

## NY CLS CPLR R 3015

Current through 2025 released Chapters 1-207

*New York*

*Consolidated Laws Service* >  
*Civil Practice Law And Rules (Arts. 1 — 100)* >  
*Article 30 Remedies and Pleading (§§ 3001 — 3045)*

### **R 3015. Particularity as to specific matters.**

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**(a) Conditions Precedent.** The performance or occurrence of a condition precedent in a contract need not be pleaded. A denial of performance or occurrence shall be made specifically and with particularity. In case of such denial, the party relying upon the performance or occurrence shall be required to prove on the trial only such performance or occurrence as shall have been so specified.

**(b) Corporate Status.** Where any party is a corporation, the complaint shall so state and, where known, it shall specify the state, country or government by or under whose laws the party was created.

**(c) Judgment, Decision or Determination.** A judgment, decision or other determination of a court, judicial or quasi-judicial tribunal, or of a board or officer, may be pleaded without stating matter showing jurisdiction to render it.

**(d) Signatures.** Unless specifically denied in the pleadings each signature on a negotiable instrument is admitted.

**(e) License to Do Business.** Where the plaintiff's cause of action against a consumer arises from the plaintiff's conduct of a business which is required by state or local law to be licensed by the department of consumer affairs of the city of New York, the Suffolk county department of consumer affairs, the county of Rockland, the county of Putnam, the county of Westchester, or the Nassau county department of consumer affairs, the

complaint shall allege, as part of the cause of action, that plaintiff was duly licensed at the time of services rendered and shall contain the name and number, if any, of such license and the governmental agency which issued such license. The failure of the plaintiff to comply with this subdivision will permit the defendant to move for dismissal pursuant to paragraph seven of subdivision (a) of rule thirty-two hundred eleven of this chapter.

## History

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Formerly § 3015, add, L 1962, ch 308; renumbered Rule 3015, L 1962, ch 318, § 13, eff Sept 1, 1963; L 1983, ch 817, § 1; L 1984, ch 243, § 1; L 1985, ch 26, § 1; L 1986, ch 26, § 1; L 1990, ch 654, § 1; L 1996, ch 465, § 1, eff Aug 8, 1996; L 2012, ch 458, § 1, eff Oct 3, 2012; L 2013, ch 21, § 1, eff May 2, 2013; L 2019, ch 693, § 1, effective December 20, 2019.

Annotations

## Notes

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### Editor's Notes

The 1964 amendment was proposed because UCC §§ 3-307 and 8-105(2)(a) provide that every signature on a negotiable instrument is admitted unless specifically denied in the proper pleading. However, CPLR § 3018(a) permits a party to raise by a general denial the question of the authenticity of a signature on a negotiable instrument. The amendment is deemed advisable not only for the sake of conformity with the UCC, but also as a matter of sound pleading procedure.

### Derivation Notes

Earlier statutes and rules: RCP 92, 93, 95; CCP §§ 532 (part), 533, 1775 (part), 1776, 1777; 2 RS 458 § 3; 2 RS 459 §§ 13, 14; Code Proc § 161.

### Advisory Committee Notes

Many special pleading rules similar to those in this rule and the following rule are found in the various jurisdictions. See the collection in Brown, Digest of Procedural Statutes and Court Rules 19 et seq. (1954). Further examples may be found in the procedural codes of particular courts.

**Subd. (a)** of this rule is based upon RCP 92. A statement confirming that the burden of proof remains with the plaintiff, as in New Jersey rule 4:9-2 and as indicated by RCP 92, has been considered inappropriate in this provision. The subdivision adopts the English rule implying such performance. See 12 NY Jud Council Rep 365, 368, 370 (1946). A general allegation of performance of conditions precedent is useless, adding nothing to the information a defendant gains from reading the complaint. The last sentence of the subdivision derives from the last sentence of former RCP 92.

**Subd. (b)** of this rule is based upon RCP 93(1). No change in meaning is intended.

**Subd. (c)** of this rule expands RCP 95 to include other tribunals in the manner of Federal rule 9(e).

**Subd. (d)** of this rule is based upon Federal rule 9(g).

### **Amendment Notes**

**2013.** Chapter 21, § 1 amended:

Sub (e) by deleting at fig 1 “; provided, however, that where the plaintiff does not have a license at the commencement of the action the plaintiff may, subject to the provisions of rule thirty hundred twenty-five of this article, amend the complaint with the name and number of an after-acquired license or the previously held license, as the case may be, and the name of the governmental agency which issued such license or move for leave to amend the complaint in accordance with such provisions”.

**The 2019 amendment by ch 693, § 1**, in the first sentence of (e), deleted “the Westchester county department of consumer affairs/weight-measures” following “department of consumer affairs” and added “the county of Westchester”.

## **Repeal Notes**

[1972] Subdivision (d) of rule thirty hundred fifteen of the civil practice law and rules, as repealed by Judicial Conference, related to itemization of special damages in pleading.

## **Commentary**

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### **PRACTICE INSIGHTS:**

#### **COMPARING STATUTE OF LIMITATIONS AND CONDITION PRECEDENT**

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### **INSIGHT**

Determining whether a particular time limitation is a statute of limitations or a condition precedent may be difficult, but at least three rules provide guidance. First, generally, if a cause of action is created by statute and that statute has a time limitation in it, the limitation is a condition precedent. Second, many time limitations involving governmental entities or agencies in which the entity waives its sovereign immunity, are conditions precedent. Third, if the language of the statute uses words such as “condition” or “a condition precedent,” the practitioner may rest assured that he or she has likely stumbled upon a condition precedent.

### **ANALYSIS**

#### **Conditions precedent abound in area of claims against governmental authorities.**

Conditions precedent can relate to the commencement of an action or proceeding, or a preliminary step, as in the case of a notice of claim. See Gen. Mun. Law § 50-e. They arise frequently with respect to actions or claims against a governmental entity. A condition precedent can also be provided for by statute or contract. Generally, conditions precedent must be pleaded and proved (an exception is a CPLR 3015(a) contractual conditions precedent), cannot be

waived, and tolls or extensions do not apply. The court can, in certain circumstances, extend the time to comply with a condition precedent. See, e.g., Gen. Mun. Law § 50-e(5).

**Defendant should assert statute of limitations as affirmative defense.**

A statute of limitations relates to the timing for the commencement of an action or proceeding and is provided for by statute or contract. A defendant should assert the limitations period as an affirmative defense, otherwise it can be waived. Statutes of limitations are subject to numerous tolls or extensions ( see, e.g., CPLR 205-210), but a court cannot extend the applicable limitations period ( CPLR 201).

**If statute creates cause of action and time limitation, time limitation is generally condition precedent.**

“Where a statute both ‘creates a cause of action and attaches a time limit to its commencement, the time is an ingredient of the cause’ ...; In such situations, ‘the limitation of time is so incorporated with the remedy given as to make it an integral part of it, and the condition precedent to the maintenance of the action at all.’” *Yonkers Contracting Company, Inc. v. Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375, 690 N.Y.S.2d 512, 712 N.E.2d 678 (1999). Compare *Campbell v. City of New York*, 4 N.Y.3d 200, 204, 791 N.Y.S.2d 880, 883, 825 N.E.2d 121, 124 (2005) (In holding that the 1 year 90 day provision in Gen. Mun. Law § 50-i was a statute of limitations, the Court stated that: “[n]or, in the case of actions against the City, was there a single enactment consenting to suit and incorporating a time limitation as an integral part of a waiver of sovereign immunity.”).

Nevertheless, the wrongful death statute ( see EPTL § 5-4.1) is an example of a statute that creates a cause of action (wrongful death) and contains a time limitation (2 years) that is still considered a statute of limitations. See also *Hakala v. Deutsch Bank*, 343 F.3d 111 (2d Cir. 2003) (90 day limitation on challenging arbitration award is not a condition precedent to suit but is a statute of limitation subject to CPLR 205(a)).

**Statutory language may be dead give away.**

The *Yonkers* case referred to the language of the applicable statute, McKinney's Unconsolidated Laws § 7107 (NY CLS Unconsol Ch 179, § 7), permitting actions against the Port Authority only "upon the condition that any suit, action or proceeding prosecuted or maintained under this act shall be commenced within one year." *Yonkers Contracting Company, Inc. v. Port Authority Trans-Hudson Corp.*, 93 N.Y.2d 375, 670 N.Y.S.2d 512, 712 N.E.2d 678 (1999) (emphasis added). If the statute contains such language, the practitioner may generally assume that he or she is operating under a condition precedent. Compare *Campbell v. The City of New York*, 4 N.Y.3d 200, 204, 791 N.Y.S.2d 880, 882, 825 N.E.2d 121, 123 (2005) ("Nowhere in section 50-i [of the General Municipal Law] does the term 'condition' appear").

## **PLEADING CONTRACTUAL CONDITIONS PRECEDENT**

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## **INSIGHT**

CPLR 3015(a) eliminates the requirement that a party suing to enforce a contract must allege performance of conditions precedent. Consequently, the plaintiff no longer must provide a "boilerplate", perfunctory recitation, which usually provided little or no useful information. The defending party is not expected to make the pro forma motion to dismiss for plaintiff's failure to state a cause of action. The onus is on the defendant to assert nonperformance of any condition precedent, and to do so with particularity and as an affirmative defense. If, therefore, the contract were conditioned upon the deposit of a down payment, the defendant must assert that it was not fully paid. If a construction contract requires an architect certificate of completion before final payment, the owner must plead its non-issuance. The statute does not shift the burden of proof. The enforcing party is still required to prove performance, but only of any condition precedent the nonperformance of which defendant places in issue by affirmatively raising it.

The practitioner is cautioned to plead nonperformance specifically and as an affirmative defense to avoid waiver. Obviously, if the resisting party waives a condition precedent, the enforcing party will prevail unless the condition precedent can be asserted by moving to amend for good cause shown and showing the defense has factual merit.

## **ANALYSIS**

### **Purpose of subdivision is to streamline pleading.**

CPLR 3015(a) eliminates the requirement that performance of conditions precedent in a contract must be affirmatively pleaded. Subdivision (a) eliminates the need for boilerplate, perfunctory recitation of performance of a contract, which provided little or no information. The provision also reduces reflexive demurrer practices. See *1199 Hous. Corp. v. International Fid. Ins. Co.*, 14 A.D.3d 383, 788 N.Y.S.2d 88 (1st Dep't 2005).

### **Onus to raise nonperformance is on adverse party, but asserting party still has burden of proving performance or occurrence of condition precedent.**

CPLR 3015(a) requires not only the defending party to raise nonperformance of such conditions as an affirmative defense, but also requires that it be done with particularity. To recover on the contract claim, however, the party asserting it still has the burden of proving performance or occurrence of the particularization. *CAB Assocs. v. State*, 14 A.D.3d 639, 789 N.Y.S.2d 311 (2d Dep't 2005).

### **Counsel should plead nonperformance specifically and as affirmative defense to avoid waiver.**

*Su Mei, Inc. v. Kudo* illustrates why the practitioner should plead nonperformance specifically and as an affirmative defense. In this case, the defendants agreed to purchase the assets of plaintiff's restaurant. The contract was expressly contingent upon written permission from the nonparty landlord for assignment of the lease to defendants on the same terms plaintiffs enjoyed. The defendants took possession and negotiated their own lease with the landlord on

nearly identical terms but subsequently refused to close the deal. The plaintiff sued for specific performance, and the defendants answered, asserting failure of the lease assignment, not as affirmative defense, but as evidence of fraud in two counterclaims.

The Third Department, citing CPLR 3015, held that, despite reference to the fact of the failure of this condition in their counterclaims, defendants waived the alleged condition precedent as a defense by not specifically asserting it as such with particularity in their answer. The court further found that, even had the answer contained the requisite particularity, the contract language did not clearly establish the parties' intent to make the lease assignments a condition precedent. The defendants likewise failed to obtain rescission of the contract for failure of consideration because the contract specified what the purchase price included, but did not list the leasehold interest among the items to be acquired. Apparently the same lawyers who drafted the contract prepared defendants' answer; particularity did not appear to be their strong suit. *Su Mei, Inc. v. Kudo*, 302 A.D.2d 740, 755 N.Y.S.2d 481 (3d Dep't 2003).

## **Notes to Decisions**

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**I. Under CPLR**

**1. In general**

Where complaint was sufficient on its face but affidavits submitted on motion to dismiss indicated, not quite conclusively, that purchaser might have no cause of action, and where motion was not converted to motion for summary judgment, it was properly denied. *Rovello v Orofino Realty Co.*, 40 N.Y.2d 633, 389 N.Y.S.2d 314, 357 N.E.2d 970, 1976 N.Y. LEXIS 3050 (N.Y. 1976).

Rules regarding home improvement contractors were inapplicable to a controversy which involved contracts pertaining to the installation of two separate water pump systems for softball

fields, not home improvements. *Del Carlo v Staten Is. Little League, Inc.*, 993 N.Y.S.2d 435, 45 Misc.3d 5, 2014 N.Y. Misc. LEXIS 3854 (N.Y. App. Term 2014).

## **2. Conditions precedent**

The phrase “conditions precedent” in CPLR 3015, subd [a] encompasses a condition precedent to the obligee’s performance under the contract as well as to the existence of a contract. *Allis-Chalmers Mfg. Co. v Malan Constr. Corp.*, 30 N.Y.2d 225, 331 N.Y.S.2d 636, 282 N.E.2d 600, 1972 N.Y. LEXIS 1380 (N.Y. 1972).

On motions for summary judgment in action to foreclose and sell real property, defendants were precluded from raising contention that plaintiff failed to perform conditions precedent to foreclosure where defendants did not plead such failure in their answer as required by CLS CPLR § 3015(a), since their silence as to performance of conditions precedent implied performance. *Resource Sav. Ass'n v Hoffman*, 147 A.D.2d 781, 537 N.Y.S.2d 652, 1989 N.Y. App. Div. LEXIS 1262 (N.Y. App. Div. 3d Dep't 1989).

Plaintiff was properly allowed to file amended complaint where (1) proposed amendment cured alleged defects in original pleading, (2) defendant, in claiming that plaintiff had pleaded its performance of subject agreement in merely conclusory terms, overlooked CLS CPLR § 3015(a), which provides that performance of conditions precedent in contract need not be pleaded and that burden to plead nonperformance “specifically and with particularity” is on party asserting it, and (3) plaintiff made sufficient showing of merit. *Warner Licensing Co. v Kitty Fan Koo & Fashion Franchises, Ltd.*, 281 A.D.2d 190, 721 N.Y.S.2d 235, 2001 N.Y. App. Div. LEXIS 2230 (N.Y. App. Div. 1st Dep't 2001).

Obligation to raise the issue of compliance with conditions precedent rests on the party disputing their performance or occurrence, and thus, the burden to plead “specifically and with particularity” that any condition precedent has not been fulfilled rests on the party resisting enforcement of the contract; a surety’s answer to an owner’s suit on a performance bond failed to identify any specific procedure required by the bond with which the owner failed to comply,

thus failed to meet particularity requirement, and therefore was deficient. 1199 Hous. Corp. v Int'l Fid. Ins. Co., 14 A.D.3d 383, 788 N.Y.S.2d 88, 2005 N.Y. App. Div. LEXIS 290 (N.Y. App. Div. 1st Dep't 2005).

Trial court erred in striking the State's affirmative defenses for failure to comply with the pleading requirements of N.Y. C.P.L.R. 3015(a); the defenses denied a company's compliance with a condition precedent in a contract with sufficient specificity to appraise the company of what it would have to establish at trial. CAB Assoc. v State, 14 A.D.3d 639, 789 N.Y.S.2d 311, 2005 N.Y. App. Div. LEXIS 750 (N.Y. App. Div. 2d Dep't 2005).

Leave to amend to add a counterclaim for indemnification in an action involving a construction contract was improperly denied as, instead of applying the summary judgment standard, the trial court only had to assess whether the school district had made the required evidentiary showing under N.Y. C.P.L.R. 3025(b) sufficient to support its proposed claim; the district was not required to plead or prove under N.Y. C.P.L.R. 3015(a) that it gave notice of its claim within the 21-day period prescribed in the parties' construction contract as a condition precedent but was only required to provide some evidence that a claim had been made against and that facts existed to support its claim for indemnification, which it did with evidence of the existence of the electrical subcontractor's claim for delay damages. Bast Hatfield, Inc. v Schalmont Cent. School Dist., 37 A.D.3d 987, 830 N.Y.S.2d 799, 2007 N.Y. App. Div. LEXIS 1966 (N.Y. App. Div. 3d Dep't 2007).

Homeowner's affidavit, in support of her motion to vacate the default judgment of foreclosure and sale, in which she averred that she had not been served with a default notice as required by the mortgage, was insufficient to demonstrate a potentially meritorious defense. PHH Mtge. Corp. v Muricy, 135 A.D.3d 725, 24 N.Y.S.3d 137, 2016 N.Y. App. Div. LEXIS 164 (N.Y. App. Div. 2d Dep't 2016).

Court had jurisdiction over an N.Y. Real Prop. Acts. Law art. 7 summary eviction proceeding because the plain meaning of a lease termination provision was that if there was to be a restructuring of the building, and if the landlord gave notice, the lease terminated at the end of the notice period; the landlord was not required to plead satisfaction of the payment condition of

the termination provision under CPLR 3015(a). *VNO 100 W. 33rd St. LLC v Square One of Manhattan*, 874 N.Y.S.2d 683, 22 Misc. 3d 560, 240 N.Y.L.J. 79, 2008 N.Y. Misc. LEXIS 6673 (N.Y. Civ. Ct. 2008).

### **3. —Construction**

The rule of CPLR 3015 requiring a defendant to deny the performance of any condition precedent specifically and with particularity, is not immune from the policy of New York law that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties, and where a plaintiff pleads as her sole cause of action a right of recovery as one standing in the shoes of the insured, it being alleged that the latter “duly performed all the conditions of said policy of insurance on its part”, an answer that the “insured” had failed to give notice should have been liberally construed as applicable to the cause of action brought to recover under Insurance Law § 167. *Frazier v Fidelity & Casualty Co.*, 27 A.D.2d 922, 279 N.Y.S.2d 599, 1967 N.Y. App. Div. LEXIS 4400 (N.Y. App. Div. 1st Dep't 1967).

Where a party alleges that he has performed all conditions precedent, he cannot later prove a waiver of any of such conditions. *Cohen v New York Property Ins. Underwriting Asso.*, 65 A.D.2d 71, 410 N.Y.S.2d 597, 1978 N.Y. App. Div. LEXIS 13061 (N.Y. App. Div. 1st Dep't 1978).

In action to recover on written guarantee, plaintiff's jurisdictional allegation that it was corporation organized under laws of New York or United States satisfied pleading requirements of CLS CPLR § 3015, and affirmative defense asserting that allegations were insufficient should have been dismissed. *European American Bank & Trust Co. v Boyd*, 131 A.D.2d 629, 516 N.Y.S.2d 714, 1987 N.Y. App. Div. LEXIS 48096 (N.Y. App. Div. 2d Dep't 1987).

In a suit to recover severance pay, since plaintiff specifically alleged compliance with the notice provision in his employment agreement, defendants' general denial was sufficient to raise the issue of noncompliance under N.Y. C.P.L.R. 3015(a). *DeRussy v Federated Capital Corp.*, 9 A.D.3d 274, 779 N.Y.S.2d 481, 2004 N.Y. App. Div. LEXIS 9191 (N.Y. App. Div. 1st Dep't 2004).

#### **4. —Pleading**

The defendant, in a mechanic's lien foreclosure action, was not required to deny specifically and with particularity, plaintiff's allegations of performance of certain conditions precedent in order to be entitled to prove nonperformance and a general denial was sufficient to raise the issue. *Allis-Chalmers Mfg. Co. v Malan Constr. Corp.*, 30 N.Y.2d 225, 331 N.Y.S.2d 636, 282 N.E.2d 600, 1972 N.Y. LEXIS 1380 (N.Y. 1972).

Under this section, the plaintiff has no duty to plead performance of conditions precedent, which are matters of defense. *Albemarle Theatre, Inc. v Bayberry Realty Corp.*, 27 A.D.2d 172, 277 N.Y.S.2d 505, 1967 N.Y. App. Div. LEXIS 4741 (N.Y. App. Div. 1st Dep't 1967).

The performance of conditions precedent need not be pleaded. *G. A. C. Commercial Corp. v La Pardo Bros. Excavating Contractors, Inc.*, 33 A.D.2d 777, 307 N.Y.S.2d 186, 1969 N.Y. App. Div. LEXIS 2663 (N.Y. App. Div. 2d Dep't 1969).

Performance of conditions precedent need not be pleaded. *Halperin, Somers & Goldstick v 54-55 Sixth Realty Corp.*, 50 A.D.2d 755, 376 N.Y.S.2d 162, 1975 N.Y. App. Div. LEXIS 11546 (N.Y. App. Div. 1st Dep't 1975).

Party to action is not required to plead performance of condition precedent. *Gonsenhauser v Central Trust Co.*, 51 A.D.2d 664, 378 N.Y.S.2d 536, 1976 N.Y. App. Div. LEXIS 11017 (N.Y. App. Div. 4th Dep't 1976).

If plaintiff fails to allege performance or occurrence of condition precedent contained in contract, defendant must deny compliance with condition precedent specifically and with particularity, and defendant's failure to assert specific denial constitutes waiver of that defense; thus, where plaintiff specifically alleged compliance with conditions set forth in labor and material payment bond, defendant's general denial was sufficient and obviated need for specific denial, and burden was cast on plaintiff to prove at trial that it complied with conditions of bond. *CNY Mechanical Assocs. v Fidelity & Guar. Ins. Co.*, 212 A.D.2d 989, 624 N.Y.S.2d 700, 1995 N.Y. App. Div. LEXIS 1853 (N.Y. App. Div. 4th Dep't 1995).

Purchasers waived their claim that no contract was formed between the purchasers and the seller due to the seller's failure to satisfy a condition precedent, because the purchasers never specifically pleaded the failure of a condition precedent as an affirmative defense in their answer as was required under N.Y. C.P.L.R. 3015(a); the alleged failure of the condition precedent was relied upon in the answer as evidence in support of a counterclaim alleging fraud only, and no claim was made that the condition precedent was a complete bar to the existence of a contract. *Su Mei, Inc. v Kudo*, 302 A.D.2d 740, 755 N.Y.S.2d 481, 2003 N.Y. App. Div. LEXIS 1268 (N.Y. App. Div. 3d Dep't 2003).

In a breach of contract claim arising from construction litigation between an international construction conglomerate (ICC) and project developers (PDs) regarding construction of a high-rise residential tower, the ICC was not required to plead compliance with a condition precedent, as it was incumbent on the PDs to plead the failure to comply with that condition. *Skanska USA Bldg. Inc. v Atlantic Yards B2 Owner, LLC*, 146 A.D.3d 1, 40 N.Y.S.3d 46, 2016 N.Y. App. Div. LEXIS 6834 (N.Y. App. Div. 1st Dep't 2016), *aff'd in part*, 31 N.Y.3d 1002, 98 N.E.3d 720, 74 N.Y.S.3d 805, 2018 N.Y. LEXIS 808 (N.Y. 2018).

Plaintiff sufficiently pleaded a breach of contract claim based upon defendant's alleged delays and obstruction of plaintiff's performance of the contract because plaintiff was not required to anticipate the defense that its claims were barred by the no-damage-for-delay clause of the parties' contract and plead the exceptions thereto, as plaintiff was not required to plead compliance with the two-day notice provision, which was a condition precedent in the contract. *Arnell Constr. Corp. v New York City Sch. Constr. Auth.*, 177 A.D.3d 595, 112 N.Y.S.3d 169, 2019 N.Y. App. Div. LEXIS 7884 (N.Y. App. Div. 2d Dep't 2019).

Where the defendant questions performance of a condition not specified in the complaint, he must deny it specifically under the provisions of subd (a) of this section. *Martin Fireproofing Corp. v Maryland Casualty Co.*, 45 Misc. 2d 354, 257 N.Y.S.2d 100, 1965 N.Y. Misc. LEXIS 2227 (N.Y. Sup. Ct. 1965), *aff'd*, 26 A.D.2d 910, 275 N.Y.S.2d 375, 1966 N.Y. App. Div. LEXIS 6446 (N.Y. App. Div. 4th Dep't 1966).

In a breach of contract counterclaim based on a past work agreement between a financial services company and a recycling company with respect to the provision of a broad array of financial consulting services, the failure of the recycling company to comply with a condition precedent did not bar the counterclaim because this was an affirmative defense, and under N.Y. C.P.L.R. § 3015(a), there was no requirement to plead compliance with a condition precedent. *United Res. Recovery Corp. v Ramko Venture Mgmt.*, 584 F. Supp. 2d 645, 2008 U.S. Dist. LEXIS 87437 (S.D.N.Y. 2008).

## **5. —Illustrative cases**

In action for specific performance of option agreement to purchase certain premises which were subject of lease between parties, plaintiff's motion for summary judgment will be denied, since defendant's answer denied plaintiff's faithful performance of conditions under lease with sufficient specificity and particularity, in that paragraph 14 of defendant's answer specifically denied performance of condition and paragraph 15 particularized 10 different respects in which faithful performance was lacking. *1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.*, 67 N.Y.2d 718, 499 N.Y.S.2d 936, 490 N.E.2d 855, 1986 N.Y. LEXIS 16645 (N.Y. 1986).

Where defendant bank, in suit to recover funds allegedly improperly seized from plaintiff's account, pleaded affirmative defense and counterclaim based on plaintiff's alleged agreement to indemnify bank for 50 percent of all losses sustained by it as result of mortgage loans made to certain third parties which resulted in foreclosure and sale of security, plaintiff could place in issue performance of condition of foreclosure and sale and defendant would have burden of proof of point. *Gonsenhauser v Central Trust Co.*, 51 A.D.2d 664, 378 N.Y.S.2d 536, 1976 N.Y. App. Div. LEXIS 11017 (N.Y. App. Div. 4th Dep't 1976).

In an action for a declaration that plaintiffs owed defendant nothing on a contract by which defendant was to arrange a merger of a company owned by plaintiffs with another company, the trial court properly found that defendant had breached the contract by failing to provide certain reports to plaintiff, despite defendant's claim that plaintiffs' company waived this condition,



where defendant waived this affirmative defense by failing to plead it. The trial court also acted properly in denying defendant's posttrial motion to amend its answer to assert waiver as an affirmative defense where defendant pled its performance of the condition under CPLR § 3015(a) by failing to allege otherwise in its answer, and was therefore not entitled to prove waiver of performance. *McIntosh v Niederhoffer, Cross & Zeckhauser, Inc.*, 106 A.D.2d 774, 483 N.Y.S.2d 807, 1984 N.Y. App. Div. LEXIS 21699 (N.Y. App. Div. 3d Dep't 1984), app. denied, 64 N.Y.2d 608, 488 N.Y.S.2d 1023, 477 N.E.2d 1107, 1985 N.Y. LEXIS 16242 (N.Y. 1985).

Special Term properly dismissed plaintiffs' cause of action for breach of an agreement to repurchase art objects or to exchange them where the words "when defendant is so in position to do so" imposed a condition upon both the undertaking to buy back or to exchange, and where plaintiffs' complaint failed to allege that defendants were in a position to perform. *Augsbury v Adams*, 108 A.D.2d 978, 484 N.Y.S.2d 962, 1985 N.Y. App. Div. LEXIS 43307 (N.Y. App. Div. 3d Dep't 1985).

Mortgagor waived right to assert that mortgagee's failure to perform condition precedent set forth in mortgage barred foreclosure action where (1) defense was never raised in defendant's answer or in any motion by defendant to amend her answer, and (2) defense was never raised in response to defendant's motion for summary judgment; defense could not be raised for first time on appeal. *First Northern Mortgagee Corp. v Yatrakis*, 154 A.D.2d 433, 546 N.Y.S.2d 9, 1989 N.Y. App. Div. LEXIS 12473 (N.Y. App. Div. 2d Dep't 1989).

Real estate broker was properly granted summary judgment in its action to recover commission pursuant to exclusive listing agreement on sale of property by owner, notwithstanding owner's claim that parties did not agree as to broker's entitlement to commission on sale by owner himself to certain persons, since listing agreement on its face placed no conditions on broker's right to commission on sale of property by owner, and owner failed to include in its answer denial of performance of claimed condition precedent, as required by CLS CPLR § 3015. *Blake Realty, Inc. v Gilligan*, 155 A.D.2d 816, 547 N.Y.S.2d 930, 1989 N.Y. App. Div. LEXIS 14218 (N.Y. App. Div. 3d Dep't 1989).

Summary judgment was properly granted to buyer in action to declare existence of, and obtain specific performance of, contract for sale of new collectible automobile where (1) check payable to defendant dealer in amount of \$455 bore typed notations on face: "Deposit 1976 TR6," and "agreement to purchase & deposit subject to inspection of vehicle and financing," and on reverse side bore typed notation: "Agreement to purchase and deposit subject to vehicle inspection, application of all manufacturer's and dealer warranties, and ability to obtain financing, purchase price \$13,000" which evinced binding agreement sufficient for sales statute of frauds (CLS UCC § 2-201), (2) provision that agreement was "subject to inspection and vehicle financing" constituted nothing more than condition precedent to performance, which, pursuant to CLS CPLR § 3015(a), buyer was not required to plead, (3) defendant's allegation that language was condition precedent to formation of contract itself was not supported, (4) no fact issue was raised by conclusory affidavit of defendant's president, who in any event was not party to negotiations for car, and (5) there was no evidence to support conclusion that defendant's attempts, after endorsing check, to increase purchase price constituted anything more than additional and postcontractual negotiations. *Pollack v Nemet Motors, Inc.*, 167 A.D.2d 153, 561 N.Y.S.2d 457, 1990 N.Y. App. Div. LEXIS 13377 (N.Y. App. Div. 1st Dep't 1990).

Although defendant failed to plead the defense of failure to comply with a condition precedent with sufficient specificity in plaintiff's breach of contract action, summary judgment based on that defense was not precluded because reliance thereon did not surprise or prejudice plaintiff. *Accadia Site Contr., Inc. v Erie County Water Auth.*, 115 A.D.3d 1351, 983 N.Y.S.2d 387, 2014 N.Y. App. Div. LEXIS 2162 (N.Y. App. Div. 4th Dep't 2014).

Mortgagee failed to establish its prima facie entitlement to judgment as a matter of law, as it failed to submit evidence demonstrating the mortgagor's default and that it complied with the notice of default provisions in the mortgage; Since the mortgagee failed to provide evidence of the actual mailing, or proof of a standard office mailing procedure, it failed to establish that the notice of default was sent in accordance with the terms of the mortgage. *Deutsche Bank Natl.*

Trust Co. Ams. v Banu, 205 A.D.3d 887, 169 N.Y.S.3d 318, 2022 N.Y. App. Div. LEXIS 3155 (N.Y. App. Div. 2d Dep't 2022).

The defendant insurer in an action on a standard form fire insurance policy is not entitled to summary judgment on the ground that plaintiff failed to give immediate written notice of loss as required by the policy since the defendant failed to deny satisfaction of the condition precedent “specifically and with particularity” in its answer (CPLR 3015, subd [a]); a general denial of the general allegation in the complaint that plaintiff has duly performed all the terms and conditions required by the policy is insufficient to “raise issues of fact not appearing on the face of” the complaint as required by CPLR 3018 (subd [b]) as such denial is, for pleading purposes, an affirmative defense pursuant to CPLR 3018 (subd [b]); failure to plead the defense waives it, and since the general denial effectively conceded satisfaction of the notice condition and waived any defense of noncompliance, defendant is precluded from raising a contrary contention at trial or as a ground for summary judgment. 125 Skillman Ave. Corp. v American Home Assurance Co., 103 Misc. 2d 284, 425 N.Y.S.2d 716, 1980 N.Y. Misc. LEXIS 2110 (N.Y. Civ. Ct. 1980).

## **6. Corporate status**

In mortgage foreclosure action, individual defendant is estopped from denying corporate status of defendant corporation where individual defendant accepted her title to foreclose property from corporate defendant. Kenneth Pregno Agency, Ltd. v Letterese, 112 A.D.2d 1032, 492 N.Y.S.2d 824, 1985 N.Y. App. Div. LEXIS 52238 (N.Y. App. Div. 2d Dep't 1985).

Petitioner’s failure to allege its corporate status in confirmation petition in accordance with CLS CPLR § 3015(b) was minor pleading defect that resulted in no prejudice to respondent, and thus was properly disregarded. Etkin & Co. v Play It Again Apparel, 235 A.D.2d 264, 652 N.Y.S.2d 285, 1997 N.Y. App. Div. LEXIS 288 (N.Y. App. Div. 1st Dep't 1997).

Complaint sufficiently alleged that an agreement between called for an advisor to pay \$200,000, which the advisor failed to do, despite a demand; it was unnecessary to plead performance of a

condition precedent to such payment. *Giant Group, Ltd. v Arthur Andersen LLP*, 2 A.D.3d 189, 770 N.Y.S.2d 291, 2003 N.Y. App. Div. LEXIS 13012 (N.Y. App. Div. 1st Dep't 2003).

Where attorney in action for services alleged facts of full performance of employment, it was unnecessary for him to prove that, after rendition of services, he had not breached professional relationship by not disclosing privileged information. *Shelton v Gwathmey*, 107 N.Y.S.2d 653, 201 Misc. 75, 1951 N.Y. Misc. LEXIS 2405 (N.Y. Sup. Ct. 1951).

Failure to show authenticating certificate on out-of-state affidavit and to show plaintiff's corporate status were amendable irregularities and did not reach the stature of jurisdictional defect and motion to dismiss complaint for lack of jurisdiction was properly denied. *Mercantile Nat'l Bank v Wismer*, 48 Misc. 2d 275, 264 N.Y.S.2d 850, 1965 N.Y. Misc. LEXIS 1508 (N.Y. App. Term 1965).

The defendant's application for dismissal of plaintiff's complaint for failure to plead the state of incorporation of the plaintiff was denied, although that issue might be raised by an answer or corrective motion; especially where the motion relied solely upon the fact of omission rather than any consequence resulting therefrom and did not contain an allegation of prejudice. *Dari-Delite, Inc. v Priest & Baker, Inc.*, 50 Misc. 2d 654, 271 N.Y.S.2d 355, 1966 N.Y. Misc. LEXIS 1956 (N.Y. Sup. Ct. 1966).

A complaint seeking specific performance of an option to purchase an apartment building which identified the plaintiff as "a trust company organized and existing under the laws of Puerto Rico" was an adequate pleading of corporate status pursuant to CPLR § 3015(b) so as to avoid the defendant's motion to dismiss the complaint under CPLR § 3211(a) on the ground that the plaintiff lacked capacity to sue. *Girod Trust Co. v Kingsdown Corp.*, 108 Misc. 2d 759, 438 N.Y.S.2d 894, 1981 N.Y. Misc. LEXIS 2287 (N.Y. Sup. Ct. 1981).

Failure of a contractor to plead and establish itself as a corporation with regard to his breach of contract and quantum meruit suit against a homeowner did not provide a ground for the homeowner to have the unanimous verdict in favor of the contractor for unpaid services vacated

or to obtain a new trial. However, because the contractor was unlicensed, as required by New York City, N.Y., Admin. Code §§ 20-386(2) and 20-385, he was precluded from recovering the unpaid balance of the services rendered, even on a quantum meruit basis, thus, the verdict was set aside and the complaint was dismissed. *Nemard Constr. Corp. v Deafeamkpor*, 863 N.Y.S.2d 546, 21 Misc. 3d 320, 2008 N.Y. Misc. LEXIS 5000 (N.Y. Sup. Ct. 2008).

Construction manager was not entitled to summary judgment on unpaid checks because, inter alia, a fact issue existed as to whether the construction manager fell under the definition of “contractor” for purposes of N.Y. C.P.L.R. 3015(e), which was not defeated if there was no evidence that plaintiff was unlicensed at the time the work was performed. *Capital Constr. Mgt. of N.Y., LLC v East 81st, LLC*, 900 N.Y.S.2d 825, 28 Misc. 3d 259, 2010 N.Y. Misc. LEXIS 923 (N.Y. Sup. Ct. 2010).

## **7. Signatures**

Borrower's fraud claim did not raise a material issue of fact in a foreclosure action because, inter alia, the fraud allegations in the answer were not stated with particularity to include forgery of any documents, the signature on the notes was deemed to be legitimate based upon the borrower's failure to deny in the answer that the notes contained his signature, and even if the notes had been forged, the borrower could be deemed to have adopted any unauthorized signature. *BAC Home Loans Servicing, LP v Uvino*, 155 A.D.3d 1155, 64 N.Y.S.3d 377, 2017 N.Y. App. Div. LEXIS 7751 (N.Y. App. Div. 3d Dep't 2017), overruled in part, *MTGLQ Invs., L.P. v Miciotta*, 204 A.D.3d 1119, 166 N.Y.S.3d 349, 2022 N.Y. App. Div. LEXIS 2208 (N.Y. App. Div. 3d Dep't 2022).

Signatures on negotiable instruments are deemed admitted unless specifically denied in the pleadings. *Mill Factors Corp. v Byas*, 65 Misc. 2d 904, 319 N.Y.S.2d 40, 1971 N.Y. Misc. LEXIS 1789 (N.Y. Sup. Ct. 1971).

Home improvement contractors, who admitted that they had not obtained license as required by NYC Admin Code § 20-387 at time work was done, could not amend their counterclaims in order

to plead license when one was obtained (license was obtained during consideration of motion), since CLS CPLR § 3015 requires contractor to plead license as part of its cause of action, and after-acquired license provision of that statute is applicable only where contractor was licensed at time work was done but not when claim was brought. *Zandell v Zerbe*, 139 Misc. 2d 737, 528 N.Y.S.2d 779, 1988 N.Y. Misc. LEXIS 258 (N.Y. Civ. Ct. 1988).

In breach of contract action wherein no contract was attached to complaint but plaintiff offered facsimile of copy of microfilm of original alleged contract between parties, defendant's answer, denying that it "entered" into written contract "signed by both parties," was sufficiently specific to deny genuineness of signature on contract and demand that genuineness of signature be proved. *Bell Atl. Yellow Pages v Havana Rio Enters.*, 184 Misc. 2d 863, 710 N.Y.S.2d 751, 2000 N.Y. Misc. LEXIS 246 (N.Y. Civ. Ct. 2000).

## **8. License to do business**

In action by home improvement contractor to recover balance due on contract, homeowner was entitled to summary judgment where contractor was not licensed under county code at time he performed services, notwithstanding that he was licensed at time of commencement of action, since passage of CLS CPLR § 3015(e) did not indicate intent of legislature to permit retroactive licensing to validate contracts by unlicensed contractors. *Todisco v Econopouly*, 155 A.D.2d 441, 547 N.Y.S.2d 103, 1989 N.Y. App. Div. LEXIS 14000 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 76 N.Y.2d 772, 559 N.Y.S.2d 985, 559 N.E.2d 679, 1990 N.Y. LEXIS 1295 (N.Y. 1990).

Purpose behind enactment of CLS CPLR § 3015(e) was not to weaken substantive consumer rights, but rather to shift burden from homeowner to contractor to establish that contractor was licensed and to encourage businesses to become licensed. *Todisco v Econopouly*, 155 A.D.2d 441, 547 N.Y.S.2d 103, 1989 N.Y. App. Div. LEXIS 14000 (N.Y. App. Div. 2d Dep't 1989), app. dismissed, 76 N.Y.2d 772, 559 N.Y.S.2d 985, 559 N.E.2d 679, 1990 N.Y. LEXIS 1295 (N.Y. 1990).

Court should have granted defendant's motion to dismiss complaint alleging various actions arising from certain home improvement work plaintiff performed in Westchester County at defendant's residence since complaint did not allege that plaintiff was licensed under Westchester County Administrative Code § 863.313; by performing home improvement work in Westchester County, plaintiff was "conduct[ing]" or "engag[ing]" in home improvement business there. *Cappadona v Salman*, 228 A.D.2d 632, 646 N.Y.S.2d 27, 1996 N.Y. App. Div. LEXIS 7443 (N.Y. App. Div. 2d Dep't 1996).

CLS CPLR § 3015(e) governs litigation between contractor and consumer, and did not apply to bar recovery by unlicensed plumber (subcontractor) from contractor on commercial construction project; thus, arbitration award in favor of subcontractor did not violate public policy and was properly confirmed by court. *Migdal Plumbing & Heating Corp. v Dakar Developers*, 232 A.D.2d 62, 662 N.Y.S.2d 106, 1997 N.Y. App. Div. LEXIS 8483 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 270 (N.Y. 1998).

In action to recover balance due on contract, order which granted defendant's motion for summary judgment dismissing complaint affirmed—plaintiff sued to recover balance due under contract with defendant pursuant to which he performed certain home improvements to defendant's residence; at time he performed such services, plaintiff was not licensed, but at time of commencement of this action, he was licensed; plaintiff maintains that by enacting CPLR 3015 (e), Legislature indicated its intention to permit retroactive licensing to validate contracts by unlicensed contractors—CPLR 3015 (e) pertains to particularity required for specific matters contained in pleadings and complaints and permits plaintiff who does not have license at commencement of action to amend complaint to allege existence of after-acquired license; nothing suggests that Legislature intended to overturn well-established body of law that requires license at time of performance—in order for home improvement contractor to recover damages for breach of contract under quantum meruit theory, he must possess valid license at time of performance for which he seeks compensation, and valid license at time of pleading. *Todisco v Econopouly*, 155 A.D.2d 441, 547 N.Y.S.2d 103, 1989 N.Y. App. Div. LEXIS 14000 (N.Y. App.

Div. 2d Dep't 1989), app. dismissed, 76 N.Y.2d 772, 559 N.Y.S.2d 985, 559 N.E.2d 679, 1990 N.Y. LEXIS 1295 (N.Y. 1990).

Trial court erred in denying summary judgment to home owners on a quantum meruit action by a contractor seeking to recover for work, labor, and materials used in work on the owner's home; a city ordinance in the city where the home was located required that all home improvement contractors be licensed, and the contractor was not licensed in the municipality where the home was located at the time the work was performed, so the contractor was precluded from recovery pursuant to N.Y. C.P.L.R. 3015(e). *Price v Close*, 302 A.D.2d 374, 754 N.Y.S.2d 660, 2003 N.Y. App. Div. LEXIS 780 (N.Y. App. Div. 2d Dep't 2003).

Because a home improvement contractor was not individually licensed pursuant to Nassau County, N.Y., Administrative Code § 21-11.2 at the time the contract was entered and the work was performed, the alleged contract between the parties was unenforceable. Thus, the contractor's counterclaim for breach of contract should have been dismissed. *Flax v Hommel*, 40 A.D.3d 809, 835 N.Y.S.2d 735, 2007 N.Y. App. Div. LEXIS 6173 (N.Y. App. Div. 2d Dep't 2007).

Contractor had right to maintain action for payment for services rendered where he was licensed when work was performed, although his license was suspended or revoked after work was completed, since purpose of pleading requirement of CLS CPLR § 3015(e) is to require contractors to comply with local licensing laws; legislature did not intend for contractor to lose his interest in all unpaid accounts because formerly valid license was no longer in effect when action was commenced. *Carpentry Perfectionists, Ltd. v Patterson*, 137 Misc. 2d 189, 520 N.Y.S.2d 128, 1987 N.Y. Misc. LEXIS 2668 (N.Y. Dist. Ct. 1987).

Unlicensed home improvement contractor could not sue homeowners on "stopped" checks given in payment for home improvement services, even though homeowners knew contractor was unlicensed, allowed contractor to continue, paid for services, and 10 of 16 checks cleared before payment was stopped; lack of license bars recovery in either contract or quantum meruit, and exception to statutory requirement (CLS CPLR § 3015(e)) is not created because contractor



was suing on stopped checks. *Cudahy v Cohen*, 171 Misc. 2d 469, 661 N.Y.S.2d 171, 1997 N.Y. Misc. LEXIS 23 (N.Y. Dist. Ct. 1997).

Trial court granted the alleged debtor's motion to dismiss the assignee's complaint in a case where the assignee was found to be a debt collector trying to collect a defaulted amount that the alleged debtor allegedly owed under a credit card agreement; since the assignee was not licensed as a debt collection agency, it could not state that it was so licensed in its complaint and or include relevant licensing information in its complaint, which required that the complaint be dismissed. *Centurion Capital Corp. v Druce*, 828 N.Y.S.2d 851, 14 Misc. 3d 564, 2006 N.Y. Misc. LEXIS 3924 (N.Y. Civ. Ct. 2006).

## **9. —Construction**

"Consumer," undefined in CLS CPLR § 3015(e), may reasonably be construed to apply to person, family or household. *Migdal Plumbing & Heating Corp. v Dakar Developers*, 232 A.D.2d 62, 662 N.Y.S.2d 106, 1997 N.Y. App. Div. LEXIS 8483 (N.Y. App. Div. 1st Dep't 1997), app. denied, 91 N.Y.2d 808, 669 N.Y.S.2d 261, 692 N.E.2d 130, 1998 N.Y. LEXIS 270 (N.Y. 1998).

Court properly denied plaintiffs' motion for default judgment in action to recover for damage to their home after storm sewer backed up into their basement as result of defendant city's alleged negligent failure to properly clean and maintain storm sewer, even though city failed to answer or appear in matter within 20 days (CPLR § 3012(a)), since affidavit by city's counsel and proposed answer were sufficient to suggest possibility of meritorious defense due to extreme weather conditions. *Heinrichs v City of Albany*, 239 A.D.2d 639, 656 N.Y.S.2d 569, 1997 N.Y. App. Div. LEXIS 4537 (N.Y. App. Div. 3d Dep't 1997).

CLS CPLR § 3015(e) applies only to suits against "consumers," and thus did not provide grounds for dismissal of action by supplier to collect for materials sold to construction company. *Bayonne Block Co. v Porco*, 171 Misc. 2d 684, 654 N.Y.S.2d 961, 1996 N.Y. Misc. LEXIS 562 (N.Y. Civ. Ct. 1996).

Homeowner was not entitled to summary judgment under N.Y. C.P.L.R. § 3015(e) in a breach of contract action on the basis that a business entity did not have a home improvement license under New York City, N.Y., Admin. Code § 20-387(a) as the installation of shower doors on an existing bathtub did not constitute a home improvement under New York City, N.Y., Admin. Code § 20-386(2). *Precision Mirror & Glass v Dicostanzo*, 844 N.Y.S.2d 568, 17 Misc. 3d 30, 2007 N.Y. Misc. LEXIS 6335 (N.Y. App. Term 2007).

Defendant/counterclaim plaintiff's motion to dismiss—the contractors' complaint to recover money for home improvement work performed—was denied because, while the contractors' failed to allege the required name and license, they were owned by the same person, one of them did have a license, there was no prejudice to the defendant, and forfeiting the right to be paid would be an excessive penalty under these factual circumstances where New York common law did not impose such a sanction when a contract was brought under a different name. *Best Quality Swimming Pool Serv., Inc. v Pross*, 54 Misc. 3d 919, 43 N.Y.S.3d 867, 2016 N.Y. Misc. LEXIS 4594 (N.Y. Sup. Ct. 2016).

## **10. —Illustrative cases**

After-acquired license provision of CLS CPLR § 3015(e) is only applicable where contractor was licensed at time that work was done; provision cannot be used to validate contract that was prohibited when performed. *B & F Bldg. Corp. v Liebig*, 76 N.Y.2d 689, 563 N.Y.S.2d 40, 564 N.E.2d 650, 1990 N.Y. LEXIS 3719 (N.Y. 1990), limited, *Marraccini v Ryan*, 17 N.Y.3d 83, 926 N.Y.S.2d 399, 950 N.E.2d 135, 2011 N.Y. LEXIS 1340 (N.Y. 2011).

In action commenced in 1984 for breach of contract and work performed at defendants' apartment, plaintiff contractor had burden of pleading possession of home improvement contractor license by virtue of CLS CPLR § 3015(e), applicable as of July 30, 1983; thus, court erred in denying defendants' summary judgment motion on ground that home improvement license requirement of NYC Admin Code § 20-385 was affirmative defense which should have been raised in defendants' answer pursuant to CLS CPLR § 3018. *Chosen Constr. Corp. v Syz*,

138 A.D.2d 284, 525 N.Y.S.2d 848, 1988 N.Y. App. Div. LEXIS 3068 (N.Y. App. Div. 1st Dep't 1988).

Court properly dismissed plaintiff's actions seeking to recover for work, labor, services and materials provided by plaintiff at two residential premises owned by defendants based upon court's determination that oral contract entered into between parties was void and unenforceable by reason of plaintiff's admitted failure to obtain home improvement license—plaintiff's failure to plead and possess requisite license to perform home improvement contracts barred plaintiff's recovery in either contract or quantum meruit, regardless of whether work was performed satisfactorily or whether failure to obtain license was willful; court did not abuse its discretion in denying plaintiff's cross motion seeking leave to plead after-acquired home improvement license pursuant to CPLR 3015 (e); strict compliance with licensing statute is required. *Primo Constr., Inc. v Stahl*, 161 A.D.2d 516, 555 N.Y.S.2d 785, 1990 N.Y. App. Div. LEXIS 6517 (N.Y. App. Div. 1st Dep't 1990).

Construction company stated cause of action to recover amounts due for home improvements, even though complaint did not allege that construction company was licensed as home improvement contractor and did not contain name and number of license, since (1) county code provided that requirements for complaint did not apply to home improvement contracts made prior to effective date, which was April, 1987, and (2) complaint alleged that defendants repeatedly requested improvements to their property from June, 1986 through October, 1990. *Vito M. Fosella Builders & Gen. Contractors v Silver*, 208 A.D.2d 525, 617 N.Y.S.2d 59, 1994 N.Y. App. Div. LEXIS 9355 (N.Y. App. Div. 2d Dep't 1994).

Court properly denied defendants' motion to dismiss complaint due to plaintiffs' failure to plead that they were duly licensed home improvement contractors where parties' agreement was not home improvement contract, and plaintiffs were not home improvement contractors. *Savitt v Lambrakis*, 226 A.D.2d 520, 640 N.Y.S.2d 819, 1996 N.Y. App. Div. LEXIS 4364 (N.Y. App. Div. 2d Dep't 1996).

In action to foreclose mechanics' liens, court properly dismissed complaint as against homeowners under CLS CPLR § 3015(e) where there was no allegation that plaintiffs were licensed home-improvement contractors under county administrative code. *Sorg v Marple*, 230 A.D.2d 841, 646 N.Y.S.2d 627, 1996 N.Y. App. Div. LEXIS 8581 (N.Y. App. Div. 2d Dep't 1996).

In dispute arising from parties' 1995 agreement for rehabilitation of building as to which appellant obtained deed in February 1996, motion to vacate arbitration award in favor of contractor, on ground that it violated public policy because contractor did not have home improvement license when agreement was made and work was performed, was properly denied where arbitration award did not contain any findings on issue of contractor's licensing status and, in any event, contractor alleged that appellant was neither owner of premises when agreement was entered into, nor resident when work was performed. *Kuchar v Baker*, 261 A.D.2d 402, 689 N.Y.S.2d 213, 1999 N.Y. App. Div. LEXIS 4485 (N.Y. App. Div. 2d Dep't 1999).

In action to foreclose mechanic's lien, court improperly dismissed complaint for failure to comply with CLS CPLR § 3015(e) because plaintiff did not possess county home improvement contractors license where plaintiff pleaded that he was licensed by town and proffered relevant annual licenses; although CLS Mun H R § 10(1)(ii)(a)(12)(b) provides that county may generally regulate and license occupations and businesses within county, that same provision recites that county law will not apply in areas of cities, villages, or towns in county which have their own regulations or licensing requirements. *Louis Savarese Gen. Contr. v Mychalczak*, 272 A.D.2d 300, 707 N.Y.S.2d 473, 2000 N.Y. App. Div. LEXIS 4847 (N.Y. App. Div. 2d Dep't 2000).

Where a contractor sued, inter alia, the owners of a townhouse for breaching a contract under which the contractor performed repairs on the townhouse, the trial court properly dismissed the complaint pursuant to N.Y. C.P.L.R. 3211(a)(1), (7), as the contractor was not a licensed home improvement contractor and, in light of N.Y. C.P.L.R. 3015(e), the contractor's lack of a license barred the contractor from recovering in either contract or quantum meruit. *Lee v Schweizer*, 300 A.D.2d 364, 751 N.Y.S.2d 517, 2002 N.Y. App. Div. LEXIS 11921 (N.Y. App. Div. 2d Dep't 2002).

Cooperative housing corporation was not entitled to dismissal of action by contractor to recover for breach of contract in connection with repairs to swimming pools, notwithstanding that contractor was not licensed home improvement contractor pursuant to NYC Admin Code § 20-387(a), since (1) cooperative housing corporation was not “homeowner” within meaning of statute, and (2) swimming pool was not improvement to residence or dwelling within meaning of statute since it was not appurtenant to cooperative apartment as it was accessible to nontenants who paid membership fee. *Todd Harris Co. v 601 Kappock Owners Corp.*, 149 Misc. 2d 649, 567 N.Y.S.2d 342, 1991 N.Y. Misc. LEXIS 45 (N.Y. Civ. Ct. 1991).

Landscaper which was not licensed when it removed trees on defendants’ property and when trial began, and did not obtain license until 15 days after trial began, was precluded from recovering damages for breach of contract where county law required home improvement contractors, including landscapers, to possess valid license in order to conduct business; CLS CPLR § 3015(e) does not cure, nunc pro tunc, failure to have license at time work is performed. *B & B Bros. v Vath*, 185 Misc. 2d 90, 712 N.Y.S.2d 739, 2000 N.Y. Misc. LEXIS 327 (N.Y. App. Term 2000).

Plaintiff automobile dealership was not entitled to recover balance of down payment due from purchaser of used car where sale occurred during 79-day unexcused lapse in plaintiff’s New York City Department of Consumer Affairs secondhand automobile dealer’s license, new license obtained by plaintiff could not be retroactively applied to cover time it entered into sales contract in issue, and allowing it to amend its complaint to plead new license and thereby validate sales contract during period it was unlicensed would defeat consumer protection purposes of city’s licensing scheme and CLS CPLR § 3015(e); sales contract was rescinded due to plaintiff’s unlicensed status, and defendant was directed to return car to plaintiff. *B & L Auto Group, Inc. v Zelig*, 188 Misc. 2d 851, 730 N.Y.S.2d 400, 2001 N.Y. Misc. LEXIS 292 (N.Y. Civ. Ct. 2001).

Although a contractor’s license was revoked during the pendency of the contractor’s counterclaims, the contractor possessed a valid license at the time the contractor worked on the owners’ home and at the time of pleading in satisfaction of the protective goals intended by

Westchester County, N.Y., Code § 863.313(1) and N.Y. C.P.L.R. § 3015(e); therefore, the owners' motion to dismiss the counterclaims was denied. *Kaspi v Eddie's Home Remodeling Servs., Inc.*, 815 N.Y.S.2d 442, 12 Misc. 3d 435, 235 N.Y.L.J. 113, 2006 N.Y. Misc. LEXIS 1207 (N.Y. Sup. Ct. 2006).

Complaint that a contractor filed to recover damages from a tenant and to enforce a mechanic's lien against a building owner was subject to dismissal because the contractor failed to comply with N.Y. C.P.L.R. 3015(e). The contractor had no home improvement license, as New York City, N.Y., Admin. Code § 20-387(a), required, so that the contractor was unable to and did not meet the pleading requirements, which mandated allegations that the contractor was duly licensed, that the contractor give the name and number of the license, and that the contractor give the name of the agency that issued the license. *Young's L&M Constr., Inc. v Kelley*, 822 N.Y.S.2d 409, 13 Misc. 3d 307, 2006 N.Y. Misc. LEXIS 1899 (N.Y. Sup. Ct. 2006).

## **II. Under Former Civil Practice Laws**

### **11. Conditions precedent, generally**

If there has been no performance and plaintiff intends to rely on an excuse, he must state the facts in excuse and not due performance. *Oakley v Morton*, 11 N.Y. 25, 11 N.Y. (N.Y.S.) 25, 1854 N.Y. LEXIS 45 (N.Y. 1854); *Hosley v Black*, 28 N.Y. 438, 1863 N.Y. LEXIS 87 (N.Y.), modified, *Decker v Hassel*, 26 How. Pr. 528, 1863 N.Y. Misc. LEXIS 325 (N.Y. Sup. Ct. 1863); *Garvey v Fowler*, 6 Super Ct (4 Sandf) 665.

RCP 92 was an instance illustrating the legislative authorization of pleading performance of conditions precedent in certain classes of cases in accordance with their legal effect. *Rochester R. Co. v Robinson*, 133 N.Y. 242, 30 N.E. 1008, 133 N.Y. (N.Y.S.) 242, 1892 N.Y. LEXIS 1306 (N.Y. 1892); *Breen v Henry*, 69 N.Y.S. 627, 34 Misc. 232, 1901 N.Y. Misc. LEXIS 209 (N.Y. Sup. Ct. 1901).

RCP 92 required that performance of conditions precedent be pleaded. No rule of pleading required an allegation of performance of conditions subsequent. *New York Foundation v People*, 259 N.Y. 54, 181 N.E. 12, 259 N.Y. (N.Y.S.) 54, 1932 N.Y. LEXIS 902 (N.Y. 1932).

Judgment of dismissal on pleadings for defendant held erroneous in view of plaintiff's general allegations of performance of conditions of contract. *Hipple v Melachrino*, 159 A.D. 741, 144 N.Y.S. 966, 1913 N.Y. App. Div. LEXIS 8244 (N.Y. App. Div. 1913).

Complaint held to sufficiently show compliance with conditions of contract whereby defendant agreed to purchase corporate stock from plaintiff's deceased. *Moghabghab v Sherman & Sons Co.*, 161 A.D. 135, 146 N.Y.S. 392, 1914 N.Y. App. Div. LEXIS 5325 (N.Y. App. Div. 1914).

General allegation of performance by plaintiff of conditions precedent to his right to recover on a contract without stating the facts constituting performance is authorized, but not so as to a breach of contract by defendant, and specification of various agreements on the part of defendant followed by a general allegation of a breach thereof was insufficient. *Baby Show Exhibition Co. v Crowell Pub. Co.*, 174 A.D. 368, 161 N.Y.S. 205, 1916 N.Y. App. Div. LEXIS 8206 (N.Y. App. Div. 1916).

In action on unilateral agency contract which did not require plaintiff agent to do anything, plaintiff must allege what he has done and it is not enough to simply allege due performance. *Cohn v Levine*, 185 A.D. 529, 173 N.Y.S. 289, 1918 N.Y. App. Div. LEXIS 7548 (N.Y. App. Div. 1918).

Motion for judgment on pleadings granted for failure to comply with RCP 92. *Clasen v Doherty*, 242 A.D. 502, 275 N.Y.S. 958, 1934 N.Y. App. Div. LEXIS 6107 (N.Y. App. Div. 1934).

Plaintiff must plead performance in general terms or facts constituting performance. *Funfgeld v Kogon*, 277 A.D. 785, 97 N.Y.S.2d 217, 1950 N.Y. App. Div. LEXIS 3313 (N.Y. App. Div. 1950).

Where the plaintiff has pleaded generally the performance by her of conditions precedent she may properly add an allegation of something else which she agreed to do and which she did.

Cowen v Rouss, 81 N.Y.S. 276, 40 Misc. 105, 1903 N.Y. Misc. LEXIS 103 (N.Y. Sup. Ct.), aff'd, 84 A.D. 641, 82 N.Y.S. 1098, 1903 N.Y. App. Div. LEXIS 2007 (N.Y. App. Div. 1903).

RCP 92 applied only to conditions contained in contract, and not to provisions of statute. Marriott v State, 56 N.Y.S.2d 584, 196 Misc. 454, 1945 N.Y. Misc. LEXIS 2068 (N.Y. Ct. Cl. 1945).

Analogy to former CPA § 280 disclaimed. Rathkopf v Walker, 73 N.Y.S.2d 111, 190 Misc. 168, 1947 N.Y. Misc. LEXIS 2950 (N.Y. Sup. Ct. 1947).

Action for declaratory judgment was not action on contract, though might involve contractual relations, and so RCP 92 was inapplicable. R. H. Macy & Co. v General Accident Fire & Life Assurance Corp., 4 Misc. 2d 89, 148 N.Y.S.2d 10, 1955 N.Y. Misc. LEXIS 2157 (N.Y. Sup. Ct. 1955).

RCP 92 could not demand comprehensive denials in the absence of allegations referring to some act of performance sufficient to focus attention. RCP 92 was not intended to dispense with requirements of proper pleading nor did it apply to every situation. Ruane v Smith, 5 Misc. 2d 366, 159 N.Y.S.2d 859, 1957 N.Y. Misc. LEXIS 3414 (N.Y. Sup. Ct. 1957).

RCP 92 which provided that performance or occurrence of conditions precedent in contract might be pleaded in general terms as legal conclusion, provided additional or alternative method of alleging performance and general allegation not required where specific allegation was made. Rush v Eileen Rich, Inc., 12 Misc. 2d 28, 174 N.Y.S.2d 752, 1958 N.Y. Misc. LEXIS 3475 (N.Y. Sup. Ct. 1958).

Where plaintiff pleads due performance, recovery cannot be allowed on theory of waiver of performance, even if defendant failed to deny with particularity allegation of due performance. Winter & Giordano Landscape Contracting Corp. v Colaizzo, 17 Misc. 2d 450, 191 N.Y.S.2d 565, 1959 N.Y. Misc. LEXIS 4488 (N.Y. App. Term 1959).



Statutory proceeding by welfare commissioner to seize cash surrender value of life insurance policy of insured, pursuant to warrant issued by court, was not subject to RCP 92. *Hodson v Metropolitan Life Ins. Co.*, 34 N.Y.S.2d 922, 1942 N.Y. Misc. LEXIS 1583 (N.Y. Mun. Ct. 1942).

Fact that condition precedent in contract was met must be pleaded. *Hershey v Carter*, 137 N.Y.S.2d 207, 1954 N.Y. Misc. LEXIS 3613 (N.Y. Sup. Ct. 1954).

Where contract attached to complaint provides that signatories, employees of certain corporation, will repurchase stock thereof from plaintiff and guarantee loans made by plaintiff to corporation upon giving 90 days' written notice, but that signatories who are discharged within year from date will be relieved from obligation, complaint must allege continued employment to date of notice, as such allegation is condition precedent, else complaint will be defective. *Hershey v Carter*, 137 N.Y.S.2d 207, 1954 N.Y. Misc. LEXIS 3613 (N.Y. Sup. Ct. 1954).

RCP 92 did not apply to a failure to aver notice of affirmance and lapse of ten days required by statute before an action could be begun on an undertaking on appeal. *Porter v Kingsbury*, 5 Hun 597 (N.Y.), *aff'd*, 71 N.Y. 588, 71 N.Y. (N.Y.S.) 588, 1877 N.Y. LEXIS 535 (N.Y. 1877).

## **12. —Construction**

In an action for the price of goods sold where the contract provided that the price was subject to change pending tariff revision, such change was a condition precedent, to be pleaded and proved by defendant. *Outlet Embroidery Co. v Derwent Mills*, 228 A.D. 113, 239 N.Y.S. 182, 1930 N.Y. App. Div. LEXIS 12113 (N.Y. App. Div.), *aff'd*, 254 N.Y. 179, 172 N.E. 462, 254 N.Y. (N.Y.S.) 179, 1930 N.Y. LEXIS 1023 (N.Y. 1930).

In action on a uniform bill of lading for breach of contract by delay in transit, presentation of the claim is a condition precedent to recovery, but not so as to delays in loading and unloading. *Lays Bros. & Boss, Inc. v American R. E. Co.*, 228 A.D. 746, 239 N.Y.S. 478, 1930 N.Y. App. Div. LEXIS 12805 (N.Y. App. Div. 1930).

In an action by a materialman against a contractor and surety company, fulfillment of dominant purpose of bond, i.e., security of promisee, is condition precedent and must be pleaded. *Samson Electric Co. v Buffalo Electric Co.*, 234 A.D. 521, 256 N.Y.S. 219, 1932 N.Y. App. Div. LEXIS 10478 (N.Y. App. Div. 1932).

### **13. —Necessity and sufficiency of allegations by plaintiff**

An allegation of due performance of all the conditions of a contract held to be sufficient where payments were to be made only with the assent of a third person. *Fox v Cowperthwait*, 60 A.D. 528, 69 N.Y.S. 912, 1901 N.Y. App. Div. LEXIS 737 (N.Y. App. Div. 1901).

One entitled only to share in profits of orders taken directly or indirectly by him could not recover under a complaint for an accounting alleging merely that he fully performed the contract. *Davis v Friedman*, 191 A.D. 393, 181 N.Y.S. 469, 1920 N.Y. App. Div. LEXIS 4726 (N.Y. App. Div. 1920).

Where plaintiff sues to recover on a contract a general allegation of due performance by him of conditions precedent to his right to recover, without stating the facts constituting performance, is sufficient; but where a plaintiff sues for a breach of contract by the defendant material facts must be stated and their place cannot be supplied by bare conclusions of liability for damages. *Crossways Apartments Corp. v Amante*, 213 A.D. 430, 210 N.Y.S. 346, 1925 N.Y. App. Div. LEXIS 8511 (N.Y. App. Div. 1925).

If conditions of contract referred to in complaint have been fully performed by plaintiff, the allegation of performance may be made as provided in the rule; but plaintiff cannot plead changes, alterations and modifications, and still take advantage of the rule. *Weinstein v Ruthland Realty Corp.*, 213 A.D. 828, 208 N.Y.S. 953, 1925 N.Y. App. Div. LEXIS 8834 (N.Y. App. Div. 1925).

Complaint must plead facts constituting performance by plaintiff, or statement of due performance or facts showing lawful excuse for performance. *Pletman v Goldsoll*, 264 A.D. 393, 35 N.Y.S.2d 541, 1942 N.Y. App. Div. LEXIS 4162 (N.Y. App. Div. 1942).

A mere allegation of performance where an action is brought on a contract is insufficient to support proof that performance was waived. The plaintiff is required to plead and prove the written contracts between the parties and facts showing either excuse for his nonperformance or defendant's waiver of the terms and conditions thereof. *Abinet v Mediavilla*, 5 A.D.2d 679, 169 N.Y.S.2d 231, 1957 N.Y. App. Div. LEXIS 3690 (N.Y. App. Div. 2d Dep't 1957).

A cause of action for breach of contract is insufficient if it fails to plead due performance. *All States Warehousing, Inc. v Mammoth Storage Warehouses, Inc.*, 7 A.D.2d 714, 180 N.Y.S.2d 118, 1958 N.Y. App. Div. LEXIS 3930 (N.Y. App. Div. 1st Dep't 1958).

Allegation that plaintiffs have duly performed all the conditions on their part to be performed, set out in a separate paragraph and not in terms referring to any contract, was insufficient. *Harbison v Proper*, 183 N.Y.S. 508, 112 Misc. 588, 1920 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1920).

Where plaintiff alleged payment in accordance with his construction of the contract in suit, pleading performance was surplusage. *Eldridge v Friedman*, 238 N.Y.S. 20, 135 Misc. 542, 1929 N.Y. Misc. LEXIS 984 (N.Y. Sup. Ct. 1929).

Plea of performance sufficient. *Link v O-So-White*, 240 N.Y.S. 451, 136 Misc. 747, 1930 N.Y. Misc. LEXIS 1079 (N.Y. Sup. Ct. 1930).

Where liability on note was conditional and depended upon facts outside of note, setting forth copy of note and complying with former RCP 94, without alleging performance of condition required dismissal of complaint. *Burke v Gotlieb*, 19 Misc. 2d 893, 9 Misc. 2d 893, 191 N.Y.S.2d 343, 1959 N.Y. Misc. LEXIS 3143 (N.Y. Sup. Ct. 1959).

Where, in an action for the specific performance of a contract for the sale of stock, one of buyers is not a party plaintiff or a party defendant and plaintiff has not pleaded due performance or

excuse for nonperformance, such cause is insufficient on its face and must be dismissed. *Lupo v Columbia Manicure Mfg. Co.*, 4 Misc. 2d 413, 155 N.Y.S.2d 54, 1956 N.Y. Misc. LEXIS 1643 (N.Y. Sup. Ct. 1956).

Where plaintiff alleged performance of everything it was required to perform under terms of alleged agreement, complaint was not subject to dismissal for insufficiency because it failed to allege in haec verba due performance, as required under RCP 92. *Unger v Horowitz*, 20 Misc. 2d 484, 193 N.Y.S.2d 694, 1959 N.Y. Misc. LEXIS 2826 (N.Y. Sup. Ct. 1959).

Plaintiff's allegation of full performance, except as prevented, without alleging acts of prevention or what he was to perform under the contract, which was not annexed to complaint, was conclusory and ineffective. *Blatt v Kronisch*, 26 Misc. 2d 238, 199 N.Y.S.2d 723, 1960 N.Y. Misc. LEXIS 3542 (N.Y. Sup. Ct. 1960).

Allegation of readiness and willingness is insufficient. *Molinaro v Mintz*, 70 N.Y.S.2d 518, 1947 N.Y. Misc. LEXIS 2433 (N.Y. Sup. Ct. 1947).

In absence of statement of facts sufficient to excuse plaintiff's refusal to tender performance by paying purchase price, complaint is defective, as where it is replete with conclusions rather than facts. *Harding Park Owners, Inc. v Young*, 146 N.Y.S.2d 718, 1955 N.Y. Misc. LEXIS 2976 (N.Y. Sup. Ct. 1955), *aff'd*, 2 A.D.2d 884, 156 N.Y.S.2d 1007, 1956 N.Y. App. Div. LEXIS 3873 (N.Y. App. Div. 1st Dep't 1956).

Complaint for breach of contract was dismissed for insufficiency because an allegation that plaintiff "otherwise" complied with all the provisions of the contract did not satisfy RCP 92. *Architectural Metalcrafts Corp. v Williamsburg Steel Products Co.*, 198 N.Y.S.2d 702 (N.Y. Sup. Ct. 1960).

Where plaintiff attempted specifically to allege performance, rather than to rely on RCP 92, he had to set forth facts, not conclusions. *Architectural Metalcrafts Corp. v Williamsburg Steel Products Co.*, 198 N.Y.S.2d 702 (N.Y. Sup. Ct. 1960).

Under RCP 92 in pleading the performance of a condition precedent in a contract, it was not necessary to state the facts constituting performance, but the party might state generally that he fully performed all the conditions on his part. *Case v Phoenix Bridge Co.* (1887) 55 Super Ct (23 Jones & S) 25; but see *Les Successeurs D'Arles Dufour Co. v Freedman* (1886) 53 Super Ct (21 Jones & S) 518.

#### **14. —Particular contracts**

Complaint against an indorser of a promissory note which alleged that the note had been duly presented for payment, was sufficient under RCP 92 and CPA § 241 (now Real Prop Actions & Proc Law § 653), as against a motion to dismiss under Rule 112. *Klemann v Collins*, 223 A.D. 161, 227 N.Y.S. 589, 1928 N.Y. App. Div. LEXIS 6155 (N.Y. App. Div. 1928).

Complaint in action on an insurance policy was insufficient for failure to set up a condition precedent not covered by RCP 92. *Shawmut Coal & Coke Co. v American Credit-Indemnity Co.*, 232 A.D. 29, 248 N.Y.S. 378, 1931 N.Y. App. Div. LEXIS 13720 (N.Y. App. Div. 1931).

Complaint which alleged due performance of all of provisions of insurance policy was not insufficient because it failed to allege specifically the giving of prompt notice of the accident to insurer. *Balkan Demolition Co. v Yorkshire Ins. Co.*, 10 A.D.2d 706, 198 N.Y.S.2d 99, 1960 N.Y. App. Div. LEXIS 10896 (N.Y. App. Div. 1st Dep't 1960).

Where attorney sues to recover agreed value of legal services in respect of a specified matter, and client discharged attorney before completion of services, since attorney's sole remedy is on quantum meruit, allegation of due performance of contract is not the equivalent of an allegation that the services provided for have been fully performed, and complaint is insufficient. *Handelman v Olen*, 11 A.D.2d 987, 206 N.Y.S.2d 249, 1960 N.Y. App. Div. LEXIS 7791 (N.Y. App. Div. 1st Dep't 1960), *aff'd*, 11 N.Y.2d 896, 228 N.Y.S.2d 237, 182 N.E.2d 617, 1962 N.Y. LEXIS 1209 (N.Y. 1962).

Complaint involving sale of stock in a tenant owner apartment building was insufficient for failure to comply with the provisions of RCP 92. *Burr v Hays*, 240 N.Y.S. 83, 136 Misc. 369, 1930 N.Y. Misc. LEXIS 1038 (N.Y. City Ct. 1930).

In action in municipal court on a judgment previously rendered therein, motion for judgment on pleadings granted defendant because conditions precedent were not pleaded or proved. *Heyman v Wick*, 255 N.Y.S. 356, 142 Misc. 577, 1932 N.Y. Misc. LEXIS 1353 (N.Y. Mun. Ct. 1932).

In action for specific performance of a contract for the sale of real property, allegations in the complaint that, upon due performance of the contract on the part of the defendant, plaintiff was and is ready, willing and able to perform, coupled with allegations properly pleaded showing anticipatory breach, would be sufficient to obviate the necessity of complying with this rule as to the pleading of performance of conditions precedent. *Brakarsh v Brown*, 294 N.Y.S. 848, 162 Misc. 412, 1937 N.Y. Misc. LEXIS 1614 (N.Y. Sup. Ct. 1937).

A complaint in action for money had and received need not contain an allegation of due performance of all conditions on plaintiff's part to be performed or allegation of consideration. *Castex Fire Proof Door Co. v Sheftman*, 296 N.Y.S. 682, 163 Misc. 303, 1937 N.Y. Misc. LEXIS 1322 (N.Y. City Ct. 1937).

Where record established that plaintiff had failed to comply with condition precedent in insurance contract, by failing to file required proofs and by failing to institute action within one year from accrual of cause of action, and plaintiff's papers failed to negative this breach, defendant was entitled to summary judgment. *Mason v Agricultural Ins. Co.*, 21 Misc. 2d 263, 193 N.Y.S.2d 962, 1959 N.Y. Misc. LEXIS 2683 (N.Y. App. Term 1959).

Limitation in policy defeated action where complaint failed to plead performance of condition precedent under policy requiring action to be brought within year. *Huckins v Bankers & Shippers Ins. Co.*, 59 N.Y.S.2d 755, 1946 N.Y. Misc. LEXIS 1786 (N.Y. City Ct. 1946).

Performance of stockholders' agreement, see *Peets v Manhasset Civil Engineers, Inc.*, 68 N.Y.S.2d 335, 1946 N.Y. Misc. LEXIS 3364 (N.Y. Sup. Ct. 1946).

Where plaintiff in action on note failed to plead performance of conditions precedent, defendant's motion to dismiss was granted. *Lidgerwood v Hale & Kilburn Corp.*, 47 F.2d 318, 1930 U.S. Dist. LEXIS 1643 (D.N.Y. 1930).

## **15. — —Sales**

Where buyer cancels contract or otherwise prevents full performance, an averment of "due" performance was bad. *Perry v Russell Frazer Wire Co.*, 196 A.D. 950, 188 N.Y.S. 254, 1921 N.Y. App. Div. LEXIS 6297 (N.Y. App. Div. 1921).

General averment of performance of contract to sell goods could not reasonably be taken to include the remedy provided by Pers Prop Law § 144, subd 3, and the requisite conditions to obtain relief under it. *Harbison v Propper*, 183 N.Y.S. 508, 112 Misc. 588, 1920 N.Y. Misc. LEXIS 1591 (N.Y. Sup. Ct. 1920).

Complaint alleging sale of Diesel engine at agreed price and of value of \$32,875, held not to sufficiently allege performance. *McIntosh & Seymour Corp. v Moore*, 177 N.Y.S. 581 (N.Y. Sup. Ct. 1919), *aff'd*, 191 A.D. 882, 180 N.Y.S. 944, 1920 N.Y. App. Div. LEXIS 4833 (N.Y. App. Div. 1920).

A general allegation that plaintiff "was ready, able and willing to ship said oil" does not amount to a tender of delivery. *Bisbee Linseed Co. v Paragon Paint & Varnish Corp.*, 66 F.2d 595, 1933 U.S. App. LEXIS 2729 (2d Cir. N.Y.), *cert. denied*, 290 U.S. 701, 54 S. Ct. 228, 78 L. Ed. 602, 1933 U.S. LEXIS 914 (U.S. 1933).

## **16. — —Work or services**

General allegation that plaintiff did work and duly performed all conditions of contract was sufficient to cover architect's acceptance. *Smith v Cary*, 160 A.D. 119, 145 N.Y.S. 99, 1914 N.Y. App. Div. LEXIS 4683 (N.Y. App. Div. 1914).

Allegation that plaintiff "under and pursuant to said contract" performed work and furnished materials of a certain value, and "performed all the conditions of said contract on his part," held insufficient to show right to recover a 10 per cent reserve fund withheld during performance. *Wright v Larkin*, 154 N.Y.S. 961, 91 Misc. 573, 1915 N.Y. Misc. LEXIS 1137 (N.Y. Sup. Ct. 1915).

In action for breach of contract to build house and to convey it and lot to plaintiff, allegation of due performance by plaintiff is not deemed equivalent to admission that deed was delivered and accepted in full performance of contract. *Appell v Comstock & Ludlam, Inc.*, 118 N.Y.S.2d 634, 1952 N.Y. Misc. LEXIS 2183 (N.Y. Sup. Ct. 1952).

In action for services performed, plaintiff may assert due performance of contract on her part, without stating ultimate allegations as to services performed. *Harris v Beauty Laboratory, Inc.*, 142 N.Y.S.2d 576, 1955 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. 1955).

#### **17. —Cases construing former provision that pleader might allege generally that he duly performed all conditions**

An averment that letters of administration were duly issued and granted to plaintiffs, who duly qualified was sufficient. *Cohu v Husson*, 113 N.Y. 662, 21 N.E. 703, 113 N.Y. (N.Y.S.) 662, 1889 N.Y. LEXIS 1045 (N.Y. 1889).

Cases holding the allegation insufficient where the word "duly" was omitted. *Clemens v American Fire Ins. Co.*, 70 A.D. 435, 75 N.Y.S. 484, 10 N.Y. Ann. Cas. 420, 1902 N.Y. App. Div. LEXIS 729 (N.Y. App. Div. 1902); *Hilton & Dodge Lumber Co. v Robert R. Sizer & Co.*, 137 A.D. 661, 122 N.Y.S. 306, 1910 N.Y. App. Div. LEXIS 755 (N.Y. App. Div. 1910); *Feuerstein v German Union Fire Ins. Co.*, 141 A.D. 456, 126 N.Y.S. 201, 1910 N.Y. App. Div. LEXIS 3888



(N.Y. App. Div. 1910); *Rosenthal v Rubin*, 148 A.D. 44, 132 N.Y.S. 1053, 1911 N.Y. App. Div. LEXIS 136 (N.Y. App. Div. 1911); *Marcus Contracting Co. v Weinbros Real Estate Co.*, 162 A.D. 495, 147 N.Y.S. 576, 1914 N.Y. App. Div. LEXIS 6014 (N.Y. App. Div. 1914); *Hedges v Pioneer Iron Works*, 166 A.D. 208, 151 N.Y.S. 495, 1915 N.Y. App. Div. LEXIS 6533 (N.Y. App. Div. 1915); *Zaiss v George C. Heimerdinger Co.*, 193 A.D. 671, 184 N.Y.S. 335, 1920 N.Y. App. Div. LEXIS 5625 (N.Y. App. Div. 1920); *Guarino v Fireman's Ins. Co.*, 88 N.Y.S. 1044, 44 Misc. 218, 1904 N.Y. Misc. LEXIS 288 (N.Y. App. Term 1904); *Marx v Talking Doll & Novelty Co.*, 160 N.Y.S. 861, 96 Misc. 591, 1916 N.Y. Misc. LEXIS 1193 (N.Y. Sup. Ct. 1916); *Sisskin v Workmen's Circle*, 163 N.Y.S. 535 (N.Y. App. Term), rev'd, 179 A.D. 645, 167 N.Y.S. 62, 1917 N.Y. App. Div. LEXIS 8003 (N.Y. App. Div. 1917); *King v Sperry Gyroscope Co.*, 57 N.Y.S.2d 684, 1945 N.Y. Misc. LEXIS 2323 (N.Y. Sup. Ct. 1945).

In an action to enforce a mechanic's lien for labor and materials, the allegation in the complaint that plaintiff "has duly fulfilled and performed the conditions of the said contract on his part to be performed" was a sufficient compliance with RCP 92. *Vandergriff v Bertron*, 83 A.D. 548, 82 N.Y.S. 153, 1903 N.Y. App. Div. LEXIS 1532 (N.Y. App. Div. 1903).

The allegation that plaintiff "duly performed each and every one of the terms of the agreement on her part" was a sufficient allegation of a tender of the deed, as under RCP 92 one pleading performance of a condition precedent need not state the facts constituting the performance but may state generally that he has duly performed. *Murphy v Hart*, 122 A.D. 548, 107 N.Y.S. 452, 1907 N.Y. App. Div. LEXIS 2497 (N.Y. App. Div. 1907).

That which was "duly" done was in legal parlance done according to law, and this did not relate to form merely, but includes both form and substance. *Maune v Unity Press*, 143 A.D. 94, 127 N.Y.S. 1002, 1911 N.Y. App. Div. LEXIS 765 (N.Y. App. Div. 1911).

Allegation that plaintiff "complied with all the terms and conditions of the said agreement on his part to be kept and performed thereunder," was not sufficient allegation of performance. *Ainsworth v Acheson Harden Co.*, 172 A.D. 723, 158 N.Y.S. 630, 1916 N.Y. App. Div. LEXIS 5984 (N.Y. App. Div. 1916).

In an action to recover on a contract of employment, an allegation in the complaint of due performance of the “terms and obligations” of the contract was not synonymous with a plea of due performance of all the “conditions” of the contract, so as to entitle plaintiff to the benefit of RCP 92. *Berger v Urban Motion Picture Industries, Inc.*, 206 A.D. 379, 201 N.Y.S. 489, 1923 N.Y. App. Div. LEXIS 7219 (N.Y. App. Div. 1923).

In a contract action it was necessary for plaintiff to allege due performance of the conditions of the contract in order to make out a good cause of action. *McKnight v White*, 218 A.D. 750, 218 N.Y.S. 810, 1926 N.Y. App. Div. LEXIS 6550 (N.Y. App. Div. 1926).

Strict compliance with RCP 92 was required. *Utica Trust & Deposit Co. v Sutton*, 231 A.D. 95, 246 N.Y.S. 56, 1930 N.Y. App. Div. LEXIS 7012 (N.Y. App. Div. 1930).

An allegation of the complaint of the receiver of a judgment debtor that the said judgment was “duly recovered” was sufficient. *Breen v Henry*, 69 N.Y.S. 627, 34 Misc. 232, 1901 N.Y. Misc. LEXIS 209 (N.Y. Sup. Ct. 1901).

A discharge in bankruptcy to be available must be pleaded as a defense and, either the facts showing jurisdiction in the bankruptcy court of the parties and the subject matter must also be pleaded, or there must be some allegation equivalent thereto; an allegation that a judgment was “duly rendered” was sufficient to admit proof of these facts, if the allegation is controverted. *Broadway Trust Co. v Manheim*, 95 N.Y.S. 93, 47 Misc. 415, 1905 N.Y. Misc. LEXIS 269 (N.Y. Sup. Ct. 1905).

The word “duly” means, according to the statute governing the subject, and implies the existence of every fact essential to perfect regularity of procedure. *Reynolds v Harlem Const. Co.*, 128 N.Y.S. 642, 71 Misc. 446, 1911 N.Y. Misc. LEXIS 256 (N.Y. App. Term 1911).

Allegation that answering defendant had performed his part of the contract was not sufficient allegation of “due” performance. *Weaver Hardware Co. v Solomovitz*, 163 N.Y.S. 121, 98 Misc. 413, 1917 N.Y. Misc. LEXIS 745 (N.Y. Sup. Ct. 1917).

The allegation of a complaint that the plaintiff lessor had complied with all the conditions of a lease did not follow the words of RCP 92 that he should perform all the conditions, and a motion to dismiss was sustained with leave to amend. *Rosenthal v Schaefer*, 220 N.Y.S. 330, 129 Misc. 229, 1927 N.Y. Misc. LEXIS 830 (N.Y. Sup. Ct. 1927).

Allegations that plaintiff “fulfilled all the terms and conditions of said agreement,” and that he “duly fulfilled all the terms and conditions of said agreement” were not equivalent to the allegation required by RCP 92. *Hottenroth v Shelley*, 268 N.Y.S. 667, 150 Misc. 380, 1934 N.Y. Misc. LEXIS 1043 (N.Y. Sup. Ct. 1934).

The former rule was held inapplicable where condition precedent is to be performed by third party and not by plaintiff. *Reichhold Chemicals, Inc. v Wells*, 70 N.Y.S.2d 805, 189 Misc. 188, 1947 N.Y. Misc. LEXIS 2458 (N.Y. Sup. Ct. 1947).

In action against servant and others for conspiracy with respect to breach of contract by servant, held that plaintiff could allege its performance of the contract by stating that it “duly performed all the conditions” thereof. *Rosco Trading Co. v Goldenberg*, 182 N.Y.S. 711, 1920 N.Y. Misc. LEXIS 1478 (N.Y. Sup. Ct. 1920).

An allegation that plaintiff fully and faithfully performed the contract sued on was equivalent to one that he duly performed it. *Rowland v Phalen*, 14 Super Ct (1 Bosw) 43.

## **18. —Statement of facts as to performance**

Allegation that plaintiff “duly offered to comply with each and every of the terms and conditions of the said agreement on plaintiff’s part to be kept and performed,” was insufficient in the face of specific allegations showing failure of due performance. *Weintraub v F. M. B. Realty Co.*, 196 A.D. 525, 187 N.Y.S. 904, 1921 N.Y. App. Div. LEXIS 5559 (N.Y. App. Div. 1921).

General allegation of due performance does not save complaint where plaintiff sets forth what he actually did, if that falls short of due performance. *Pease Oil Co. v Monroe County Oil Co.*, 138 N.Y.S. 177, 78 Misc. 285, 1912 N.Y. Misc. LEXIS 985 (N.Y. Sup. Ct. 1912), *aff’d*, 158 A.D.

951, 143 N.Y.S. 1134, 1913 N.Y. App. Div. LEXIS 7847 (N.Y. App. Div. 1913); *Dalzell v Fahys Watch-Case Co.*, 17 N.Y.S. 365, 60 N.Y. Super. Ct. 293, 1892 N.Y. Misc. LEXIS 308 (N.Y. Super. Ct. 1892), rev'd, 138 N.Y. 285, 33 N.E. 1071, 138 N.Y. (N.Y.S.) 285, 1893 N.Y. LEXIS 839 (N.Y. 1893); *Chatterton v Fisk*, 1 Abb NC 88; *Mills v Gould*, 1 Abb NC 93, aff'd 42 Super Ct (10 Jones & S) 119.

Where complaint alleges due performance of conditions and yet attempts to state facts constituting such performance, such attempts cannot be upheld unless all conditions to be performed have been pleaded, instead of only some of them. *Boltizar v Breitbart*, 64 N.Y.S.2d 268, 187 Misc. 685, 1946 N.Y. Misc. LEXIS 2602 (N.Y. Sup. Ct. 1946).

In action for breach of contract, where plaintiff set forth specific condition performed by him, he need not have used short form of pleading provided by RCP 92. *Sinai v Levi*, 144 N.Y.S.2d 316, 208 Misc. 650, 1955 N.Y. Misc. LEXIS 3736 (N.Y. City Ct. 1955).

Where plaintiff alleged performance of everything it was required to perform under terms of alleged agreement, complaint was not subject to dismissal for insufficiency because it failed to allege in haec verba due performance, as required under RCP 92. *Unger v Horowitz*, 20 Misc. 2d 484, 193 N.Y.S.2d 694, 1959 N.Y. Misc. LEXIS 2826 (N.Y. Sup. Ct. 1959).

## **19. —Pleading by defendant**

In an action to recover damages for failure to complete a building contract, a defense alleging that plaintiff's predecessors took the performance of the work out of defendant's hands, is a sufficient allegation of performance. *Ivy Courts Realty Co. v Morton*, 73 A.D. 335, 76 N.Y.S. 687, 1902 N.Y. App. Div. LEXIS 1564 (N.Y. App. Div. 1902).

The counterclaim to an action for accounting of a partnership that defendant is entitled to plaintiff's share thereof under a tender of its worth must contain allegations that all conditions of the agreement have been performed by the defendant. *Corr v Hoffman*, 219 A.D. 278, 219 N.Y.S. 656, 1927 N.Y. App. Div. LEXIS 10900 (N.Y. App. Div. 1927).

In an action for the price, counterclaim for damages because of nondelivery of some of the goods was stricken for want of allegation of performance on part of defendant. *Weinstein v Ken-Wel Sporting Goods Co.*, 231 A.D. 51, 246 N.Y.S. 270, 1930 N.Y. App. Div. LEXIS 6996 (N.Y. App. Div. 1930).

Failure to deny performance specifically did not warrant striking out general denial. *Strasberg v Equitable Life Assurance Soc.*, 277 A.D. 430, 100 N.Y.S.2d 593, 1950 N.Y. App. Div. LEXIS 3079 (N.Y. App. Div. 1950).

General denial of allegations of due performance was held insufficient to raise any issue. *Lourie v Mishkin*, 279 A.D. 754, 108 N.Y.S.2d 777, 1951 N.Y. App. Div. LEXIS 3661 (N.Y. App. Div. 1951).

Denial of due performance held sufficiently specific to raise issue as to services to be rendered by plaintiff in connection with such performance. *Storer v Bion Exhibits, Inc.*, 279 A.D. 1098, 112 N.Y.S.2d 801, 1952 N.Y. App. Div. LEXIS 5971 (N.Y. App. Div. 1952).

Where an action was brought on a contract, particulars might be demanded from the party having the burden of proof of the performance of the terms of the contract. RCP 92 specifically indicated that the pleading of a denial of performance did not shift the burden of proof to the defendant. *Di Mino v Old Town Corp.*, 4 Misc. 2d 962, 157 N.Y.S.2d 649, 1956 N.Y. Misc. LEXIS 1424 (N.Y. Sup. Ct. 1956).

Denial of an allegation of due performance of the terms and conditions of a contract raises no issue. *Rao v Katz*, 6 Misc. 2d 760, 161 N.Y.S.2d 504, 1957 N.Y. Misc. LEXIS 3336 (N.Y. Sup. Ct. 1957).

Defendants' naked denial that plaintiff has performed the terms and conditions of a strike settlement and "no-reprisal" agreement, without alleging specifically and with particularity the terms and conditions not performed raises no issue, and defendants are therefore precluded from making such a claim or adducing proof in support thereof. *Republic Aviation Corp. v*

Republic Lodge, etc., 10 Misc. 2d 783, 169 N.Y.S.2d 651, 1957 N.Y. Misc. LEXIS 1877 (N.Y. Sup. Ct. 1957).

Where facts constituting performance of agreement have been sufficiently set forth in opposing affidavit, their repetition in answer or other pleading itself will render it legally sufficient on motion for summary judgment. Krauss v Central Ins. Co., 40 N.Y.S.2d 736, 1943 N.Y. Misc. LEXIS 1739 (N.Y. Sup. Ct. 1943).

Denial merely of truth of each and every allegation of complaint alleging performance on plaintiff's part is insufficient. Union Free School Dist. v Gumbs, 133 N.Y.S.2d 499, 1954 N.Y. Misc. LEXIS 2241 (N.Y. Sup. Ct. 1954).

In action for breach of employment, where complaint omits allegation of due performance or its equivalent, there is nothing to show that plaintiff is entitled to share in profits claimed, and complaint was insufficient. Bender v Candee Smith & Howland Co., 136 N.Y.S.2d 425, 1954 N.Y. Misc. LEXIS 3139 (N.Y. Sup. Ct. 1954).

Denial that plaintiff has performed terms and conditions of contract without alleging specifically and with particularity terms not performed raises no issue. Koepfel v Koepfel, 138 N.Y.S.2d 366, 1954 N.Y. Misc. LEXIS 2965 (N.Y. Sup. Ct. 1954).

In action by subcontractor against contractor for contract price of trussed rafters, where complaint alleged due performance by plaintiff of all conditions of contract, general denial upon information and belief of due performance is insufficient to raise issue. Timber Structures, Inc. v Terrarube Constr. Corp., 145 N.Y.S.2d 599, 1955 N.Y. Misc. LEXIS 3810 (N.Y. Sup. Ct. 1955).

Where plaintiff alleges that he performed each and every act to be performed except as performance was excused, general denial is insufficient to raise issue, and plaintiff need prove at trial only such performance as shall have been denied specifically. Chesapeake Industries, Inc. v Selznick Releasing Organization, Inc., 148 N.Y.S.2d 736, 1956 N.Y. Misc. LEXIS 2318 (N.Y. Sup. Ct.), aff'd, 2 A.D.2d 666, 153 N.Y.S.2d 545, 1956 N.Y. App. Div. LEXIS 5062 (N.Y. App. Div. 1st Dep't 1956).

## **20. Corporate status, generally**

RCP 93 had no application where there was no complaint setting up that defendant was treasurer or officer of any corporation, and action was not brought by or against a corporation, and consequently no verified answer denying the existence of a corporation was necessary. *Tighe v Lavery*, 162 N.Y.S. 1005, 98 Misc. 245, 1917 N.Y. Misc. LEXIS 637 (N.Y. App. Term 1917).

## **21. —Foreign corporations**

An affidavit stating that defendant was a foreign corporation, and that plaintiff had actual personal knowledge of this fact from transactions with it and from conversation with officers, warranted issuance of attachment. *Stiner v Tennessee Copper Co.*, 176 A.D. 209, 161 N.Y.S. 986, 1916 N.Y. App. Div. LEXIS 8342 (N.Y. App. Div. 1916).

Statement in complaint in support of attachment that defendant was a foreign corporation was sufficient to confer jurisdiction to issue attachment under CCP § 1776. *Grassi v La Sociedad Bancaria Del Chimborazo*, 213 A.D. 629, 210 N.Y.S. 705, 1925 N.Y. App. Div. LEXIS 8561 (N.Y. App. Div. 1925).

Alleging that defendant “is a foreign corporation” is sufficient. *Fraser v Granite State Provident Ass'n*, 28 N.Y.S. 65, 8 Misc. 7, 1894 N.Y. Misc. LEXIS 366 (N.Y. Super. Ct. 1894).

In view of RCP 93 an affidavit to procure an attachment which alleged that the defendant was a foreign corporation formed a sufficient foundation. *Simons v Lehigh Mills Co.*, 104 N.Y.S. 739, 53 Misc. 368, 1907 N.Y. Misc. LEXIS 239 (N.Y. Sup. Ct. 1907).

Affidavit made by person who verified complaint stating positively that defendant was a foreign corporation and referred to itself in contracts sued upon as of Brazil, was sufficient to support attachment. *Sorensen v S. A. Companhia General Commercial De Santos*, 180 N.Y.S. 201, 1920 N.Y. Misc. LEXIS 1080 (N.Y. Sup. Ct. 1920).

## **22. —Place of incorporation**

That the plaintiff is a banking association organized under the laws of the state, with its banking house located at the city of New York, sufficiently shows that plaintiff is a domestic corporation. *Columbia Bank v Jackson*, 4 N.Y.S. 433, 1889 N.Y. Misc. LEXIS 360 (N.Y. City Ct. 1889).

A bank alleged to be organized under an act of congress must state whether it is foreign or domestic, which depends upon where it is located. *First Nat'l Bank v Doying*, 1 N.Y. St. 617 (N.Y.C.P. June 7, 1886).

That plaintiff is a joint stock partnership association organized under the laws of Pennsylvania, with power to sue in its corporate name as a corporation is sufficient. *Gorton Steamer Co. v Spofford*.

## **23. —Objections to defects in complaint**

Complaint held demurrable where it failed to show whether plaintiff was a foreign or domestic corporation. *Farmers' & Mechanics' Nat'l Bank v Rogers*, 1 N.Y.S. 757, 1888 N.Y. Misc. LEXIS 1557 (N.Y. Super. Ct. 1888); *National Temperance Soc. & Publication House v Anderson*, 2 N.Y.S. 49, 1888 N.Y. Misc. LEXIS 29 (N.Y. Super. Ct. 1888).

It was formerly held that a complaint in an action against a corporation which omits to state whether the defendant was a domestic or foreign corporation, and if the latter, the state, county, or government by or under whose laws it was created, was defective, and a demurrer thereto, on the ground that it failed to state facts sufficient to constitute a cause of action, was well taken. *Chandler v Erie Transfer Co.*, 13 N.Y.S. 573, 1890 N.Y. Misc. LEXIS 3241 (N.Y. City Ct. 1890).

Where a complaint in an action against a corporation is defective in failing to state whether it is a domestic or foreign corporation, and if the latter the sovereignty under whose law it was incorporated, the remedy is by motion. *Rothschild v Grand T. R. Co.*, 14 N.Y.S. 807, 60 Hun 582, 1891 N.Y. Misc. LEXIS 2511 (N.Y. Sup. Ct. 1891); *Harmon v Vanderbilt Hotel Co.*, 29



N.Y.S. 783, 79 Hun 392, aff'd, 143 N.Y. 665, 39 N.E. 20, 143 N.Y. (N.Y.S.) 665, 1894 N.Y. LEXIS 1059 (N.Y. 1894); *Adams v Lamson Consol. Store-Service Co.*, 13 N.Y.S. 118, 59 Hun 127, 1891 N.Y. Misc. LEXIS 989 (N.Y. Sup. Ct. 1891); or by answer, *Ernest Ochs v Frey*, 47 A.D. 390, 62 N.Y.S. 67, 1900 N.Y. App. Div. LEXIS 116 (N.Y. App. Div. 1900); *Irving Nat. Bank v Corbett*, 10 Abb NC 85; *Second Nat. Bank v Wells*, 53 How Pr 242; but see *Baker v Star P. & P. Co.* 3 Month L Bull 29; and not by demurrer under former practice. *Fraser v Granite State Provident Ass'n*, 28 N.Y.S. 65, 8 Misc. 7, 1894 N.Y. Misc. LEXIS 366 (N.Y. Super. Ct. 1894).

But a demurrer was held to lie where a complaint alleged that certain defendants were foreign corporations, but did not set forth the state, county or government by or under whose laws they were created. *Clegg v Chicago N. U.*, 3 How. Pr. (n.s.) 128.

#### **24. —Specific allegation by defendant**

Nor by a denial of the corporate existence made upon information or belief. *First Nat'l Bank v Slattery*, 4 A.D. 421, 38 N.Y.S. 859, 1896 N.Y. App. Div. LEXIS 1554 (N.Y. App. Div. 1896); *Post Publishing Co. v Bennett*, 164 A.D. 633, 149 N.Y.S. 867, 1914 N.Y. App. Div. LEXIS 7795 (N.Y. App. Div. 1914); *Joint Stock Co. v National City Bank*, 210 A.D. 665, 206 N.Y.S. 476, 1924 N.Y. App. Div. LEXIS 6816 (N.Y. App. Div. 1924), aff'd, 240 N.Y. 368, 148 N.E. 552, 240 N.Y. (N.Y.S.) 368, 1925 N.Y. LEXIS 742 (N.Y. 1925); *Taendsticksfabriks Aktiebolaget Vulcan v Myers*, 11 N.Y.S. 663, 58 Hun 161, 1890 N.Y. Misc. LEXIS 2287 (N.Y. App. Term 1890); *East River Electric Light Co. v Clark*, 18 N.Y.S. 463 (N.Y.C.P. 1892); *Snow, Church & Co. v Hall*, 44 N.Y.S. 427, 19 Misc. 655, 1897 N.Y. Misc. LEXIS 154 (N.Y. App. Term 1897).

Nor by a denial of sufficient information to form a belief. *Commercial Exch. Bank v Woodward*, 198 A.D. 769, 191 N.Y.S. 51, 1921 N.Y. App. Div. LEXIS 8176 (N.Y. App. Div. 1921); *Second Nat'l Bank v Breitung*, 203 A.D. 636, 197 N.Y.S. 375, 1922 N.Y. App. Div. LEXIS 7268 (N.Y. App. Div. 1922).

The question of corporate existence is not put in issue by a general denial. *Schmidt v Nelke Art Lithographic Co.*, 39 N.Y.S. 353, 17 Misc. 124, 1896 N.Y. Misc. LEXIS 359 (N.Y. App. Term

1896); Deutz Lithographing Co. v International Registry Co., 66 N.Y.S. 540, 32 Misc. 687, 1900 N.Y. Misc. LEXIS 819 (N.Y. App. Term 1900); Riley v Metropolitan S. R. Co., 74 N.Y.S. 873, 36 Misc. 789, 1901 N.Y. Misc. LEXIS 880 (N.Y. App. Term 1901); Kunglig Jarnvagsstyrelsen v Dexter & Carpenter, Inc., 32 F.2d 195, 1929 U.S. App. LEXIS 3743 (2d Cir. N.Y.), cert. denied, 280 U.S. 579, 50 S. Ct. 32, 74 L. Ed. 629, 1929 U.S. LEXIS 665 (U.S. 1929).

## **25. —Effect of failure to deny**

Where the answer simply avers that defendant has no knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff is a corporation the plaintiff is not required to prove its corporate character organized under the law of the state. Concordia Sav. & Aid Asso. v Read, 93 N.Y. 474, 93 N.Y. (N.Y.S.) 474, 1883 N.Y. LEXIS 305 (N.Y. 1883); New York, L. & W. R. Co. v Union Steam-Boat Co., 99 N.Y. 12, 1 N.E. 27, 99 N.Y. (N.Y.S.) 12, 1885 N.Y. LEXIS 746 (N.Y. 1885); Long Island R. Co. v Jones, 151 A.D. 407, 135 N.Y.S. 954, 1912 N.Y. App. Div. LEXIS 7757 (N.Y. App. Div. 1912); McElwee Mfg. Co. v Trowbridge, 22 N.Y.S. 674, 68 Hun 28 (1893), aff'd, 142 N.Y. 679, 37 N.E. 825, 142 N.Y. (N.Y.S.) 679, 1894 N.Y. LEXIS 900 (N.Y. 1894); Martin Cantine Co. v Warshauer, 28 N.Y.S. 139, 7 Misc. 412, 1894 N.Y. Misc. LEXIS 208 (N.Y. Sup. Ct. 1894).

An answer which merely denies that defendant is a foreign corporation without alleging that it was not a corporation does not put plaintiff to the necessity of proving defendant's corporate existence. Nickerson v Canton Marble Co., 35 A.D. 111, 54 N.Y.S. 705, 1898 N.Y. App. Div. LEXIS 2516 (N.Y. App. Div. 1898); Steele v R. M. Gilmour Mfg. Co., 77 A.D. 199, 78 N.Y.S. 1078, 1902 N.Y. App. Div. LEXIS 2833 (N.Y. App. Div. 1902); Blackburn v American News Co., 89 A.D. 82, 85 N.Y.S. 440, 1903 N.Y. App. Div. LEXIS 3684 (N.Y. App. Div. 1903); Lynett v Sea B. R. Co., 178 A.D. 112, 164 N.Y.S. 1029, 1917 N.Y. App. Div. LEXIS 5844 (N.Y. App. Div. 1917).

Where the answer contained no affirmative allegation that plaintiff was not a corporation, the plaintiff was not put to its proof of its incorporation. Atlantic Const. Co. v Kreusler, 40 A.D. 268,

57 N.Y.S. 983, 1899 N.Y. App. Div. LEXIS 1111 (N.Y. App. Div. 1899); *Erie & J. R. Co. v Brown*, 107 N.Y.S. 983, 57 Misc. 164, 1907 N.Y. Misc. LEXIS 927 (N.Y. Sup. Ct. 1907), *aff'd*, 123 A.D. 655, 107 N.Y.S. 989, 1908 N.Y. App. Div. LEXIS 144 (N.Y. App. Div. 1908).

Where defendant did not deny that it was a corporation, it was not incumbent upon plaintiff to prove the fact. *Blackburn v American News Co.*, 89 A.D. 82, 85 N.Y.S. 440, 1903 N.Y. App. Div. LEXIS 3684 (N.Y. App. Div. 1903); *De Wolf v Watterson*, 35 Hun 111 (N.Y.); *Goldsmith v Wells Co.*, 33 N.Y.S. 727, 86 Hun 489 (1895); *Schmidt v Nelke Art Lithographic Co.*, 39 N.Y.S. 353, 17 Misc. 124, 1896 N.Y. Misc. LEXIS 359 (N.Y. App. Term 1896); *Deutz Lithographing Co. v International Registry Co.*, 66 N.Y.S. 540, 32 Misc. 687, 1900 N.Y. Misc. LEXIS 819 (N.Y. App. Term 1900); *Riley v Metropolitan S. R. Co.*, 74 N.Y.S. 873, 36 Misc. 789, 1901 N.Y. Misc. LEXIS 880 (N.Y. App. Term 1901).

RCP 93 did not preclude defendant under general denial from proving actual date of incorporation of the defendant to show that contracts alleged to have been made in its name were made when it had no corporate existence. *Galdieri & Co. v Arthur Waist Co.*, 163 N.Y.S. 154, 98 Misc. 612, 1917 N.Y. Misc. LEXIS 892 (N.Y. App. Term 1917).

Since the answer does not expressly state that plaintiff is not a domestic corporation, the denial of knowledge or information with respect to that part of the complaint was bad. *J. Radley Metzger Co. v New York Times Publishing Co.*, 15 Misc. 2d 1037, 183 N.Y.S.2d 131, 1958 N.Y. Misc. LEXIS 2383 (N.Y. Sup. Ct. 1958).

Where a corporation is sued, its general appearance and answer in the action is an admission of its corporate existence, and it cannot afterwards insist that the plaintiff must affirmatively prove it to be such. *Derrenbacher v Lehigh V. R. Co.*, 21 Hun 612, 59 How. Pr. 283 (N.Y.), *rev'd*, 87 N.Y. 636, 87 N.Y. (N.Y.S.) 636, 1882 N.Y. LEXIS 59 (N.Y. 1882).

An answer denying upon information and belief that the defendant was a foreign corporation, as alleged, or had an office in New York City, but admitting that it is a common carrier of

passengers, is not such an affirmative allegation as to compel plaintiff to prove its corporate existence. *Bengston v Thingvalla S.S. Co.*, 31 Hun 96 (N.Y.).

A denial on information and belief that plaintiff was a corporation is not an affirmative allegation within RCP 93 and did not require proof by plaintiff of its corporate existence. *Taendsticksfabriks Aktiebolaget Vulcan v Myers*, 11 N.Y.S. 663, 58 Hun 161, 1890 N.Y. Misc. LEXIS 2287 (N.Y. App. Term 1890); *Lamson Consol. Store-Service Co. v Conyngham*, 32 N.Y.S. 129, 11 Misc. 428, 1895 N.Y. Misc. LEXIS 162 (N.Y.C.P. 1895).

An allegation in a complaint that the plaintiff is a corporation is admitted by failure to affirmatively deny it in the answer. .

Before the enactment of RCP 93, where the complaint alleged that the plaintiff was a corporation, duly created and existing, but did not aver that it was created under the laws of this state, and the answer denied its existence, the plaintiff must have proved its corporation. *Ansonia Brass & Copper Co. v Conner*, 13 NY Week Dig 87.

## **26. —Proceedings**

As specifically provided in RCP 93 applied to proceedings. Prior to the last amendment, it was held that this rule did not apply to condemnation proceedings. *In re Broadway & S. A. R. Co.*, 25 N.Y.S. 1080, 73 Hun 7 (1893); *Flood Abatement Com. v Merritt*, 158 N.Y.S. 289, 94 Misc. 388, 1916 N.Y. Misc. LEXIS 1086 (N.Y. Sup. Ct. 1916); but see *New York, L. & W. R. Co. v Union Steam-Boat Co.*, 99 N.Y. 12, 1 N.E. 27, 99 N.Y. (N.Y.S.) 12, 1885 N.Y. LEXIS 746 (N.Y. 1885).

## **27. Judgment, decision or determination**

The rule of pleading prescribed by RCP 95 might have been applied to the statements of facts required by CPA § 546 (Rule 3222(a) herein), and whatever was a sufficient statement of facts according to the former, to impliedly allege jurisdiction, is a sufficient statement of the fact,

according to the latter, that jurisdiction exists. *Brownell v Greenwich*, 114 N.Y. 518, 22 N.E. 24, 114 N.Y. (N.Y.S.) 518, 1889 N.Y. LEXIS 1125 (N.Y. 1889).

A complaint which alleged that upon due proceedings had, an order was duly made by the county judge directing the issuance of an execution, provided for by CPA § 684 (§§ 5205, 5209, 5230, 5239 herein), was sufficient without alleging the facts involved in the granting of the order. *Van Wie v Delaware & Hudson Co.*, 127 N.Y.S. 184, 71 Misc. 25, 1911 N.Y. Misc. LEXIS 159 (N.Y. Sup. Ct. 1911).

Allegation that order requiring employer to pay sheriff 10 per cent of wages of judgment debtor was duly made and entered was sufficient without statement of facts. *Lutkins v Lutkins*, 148 N.Y.S. 174, 85 Misc. 148, 1914 N.Y. Misc. LEXIS 782 (N.Y. Sup. Ct. 1914), *aff'd*, 170 A.D. 926, 154 N.Y.S. 1130, 1915 N.Y. App. Div. LEXIS 9403 (N.Y. App. Div. 1915).

By the enactment of RCP 95 the necessity of controverting a complaint in an action upon a domestic judgment was obviated and a general denial became sufficient to raise the question of jurisdiction of the person. A general denial of allegations of facts in a complaint in an action brought under subdivision 1 of former CPA § 484 that the plaintiff recovered judgment more than ten years prior to the commencement of this action, which judgment “was duly docketed,” raised the question of jurisdiction of the person. *Humnicki v Pitkova*, 277 N.Y.S. 417, 154 Misc. 407, 1935 N.Y. Misc. LEXIS 963 (N.Y. Sup. Ct. 1935).

Failure to give defendant notice of appointment of plaintiff as substitute committee, or of latter’s application to commence action, was no defense to an action and the plaintiff duly complied with RCP 95 in alleging that he was “duly” appointed and “duly” authorized to commence this action. *Smith v McLaughlin*, 291 N.Y.S. 618, 161 Misc. 520, 1936 N.Y. Misc. LEXIS 1509 (N.Y. Sup. Ct. 1936), *modified*, 251 A.D. 727, 295 N.Y.S. 593, 1937 N.Y. App. Div. LEXIS 7252 (N.Y. App. Div. 1937).

RCP 95 did not dispense with the necessary proof to establish the jurisdiction of a court of limited power. *Cutting v Massa*, 15 N.Y. St. 316.

Upon action brought in 1879 upon a judgment alleged to have been recovered by plaintiff's assignee in the supreme court against defendant, and that said judgment was on said 4th of May, 1860, docketed against said defendant in the office of the clerk of the county, the pleading is sufficient. *Springsteene v Gillett*, 30 Hun 260 (N.Y.).

It was necessary that the judgment or decree be duly rendered or given before some court or judicial tribunal in this state, having that authority under its laws, to bring the allegation of the issuing of letters of administration within the provisions of CCP § 532. *Secor v Pendleton*, 47 Hun 281, 13 N.Y. St. 387 (N.Y.).

Where a complaint based upon a judgment neither alleges that the judgment in question was "duly given," nor sets out the facts upon which jurisdiction to enter the same depended, it is fatally defective. *Tuttle v Robinson*, 36 N.Y.S. 346, 91 Hun 187 (1895).

It is not sufficient to say an officer had full jurisdiction over both person and subject, and that judgment was entered, *Hunt v Dutcher*, 13 How Pr 538; and a statement that the judgment was duly made is not enough unless the officer is designated. *Carter v Koezley*, 22 Super Ct (9 Bosw) 583.

Saying that the judgment or determination of the officer granting it was duly made or given, is a good pleading of an insolvent discharge. *Livingston v Oaksmith*, 13 Abb. Pr. 183.

In suing on the judgment of an inferior jurisdiction, the name and venue of the court, jurisdiction of the person, and subject or general jurisdiction in the court, must be averred. *McLaughlin v Nichols*, 13 Abb Pr 244. But a general averment of the jurisdiction of a United States circuit court is good. *Bement v Wisner*, 1 NY Code R NS 143.

## **28. —Justice court**

RCP 95 did not apply to justice's courts. *Grigg v Reed*, 56 N.Y.S. 1093, 26 Misc. 298, 1899 N.Y. Misc. LEXIS 1229 (N.Y. County Ct. 1899).

## **29. —Municipal court**

In pleading a judgment of the municipal court of the city of New York it is necessary to plead that the judgment was duly made and an alternative writ of mandamus which does not allege that a judgment was duly made is demurrable. *People ex rel. Batchelor v Bacon*, 37 A.D. 414, 55 N.Y.S. 1045, 1899 N.Y. App. Div. LEXIS 277 (N.Y. App. Div. 1899).

When the transcript of a judgment of a municipal court has been docketed in the county clerk's office, it becomes a judgment of the supreme court and the defendants who have recovered a judgment for costs may have an order requiring the plaintiff's assignors who are beneficially interested in the action to pay such costs, but the moving papers must show or state that the judgment was only given as required by this rule. *Friedman v Metropolitan S.S. Co.*, 109 A.D. 600, 96 N.Y.S. 331, 1905 N.Y. App. Div. LEXIS 3616 (N.Y. App. Div. 1905).

## **30. —City court**

An answer which did not allege facts showing that the New York city court had jurisdiction to render a judgment nor did not allege that the judgment was "duly rendered," was fatally defective. *Edgerley v Blackburn*, 140 A.D. 419, 125 N.Y.S. 353, 1910 N.Y. App. Div. LEXIS 2954 (N.Y. App. Div. 1910).

A motion to serve an amended answer by setting up a judgment which one of the defendants obtained against plaintiff's assignor, should be denied where the judgment was obtained in the city court of New York and the proposed pleading does not allege facts showing jurisdiction. *Schnitzer v Fox*, 62 N.Y.S. 1127, 31 Misc. 28, 1900 N.Y. Misc. LEXIS 250 (N.Y. City Ct. 1900).

In an action based upon judgment of city court "duly" given, an answer denying each and every allegation upon information and belief was insufficient, and court properly directed judgment for plaintiff upon the pleadings. *John Simmons Co. v Van Rees*, 149 N.Y.S. 857, 87 Misc. 284, 1914 N.Y. Misc. LEXIS 916 (N.Y. App. Term 1914).

### **31. —Surrogate's orders**

An allegation that letters testamentary were duly issued to the plaintiffs and that they had duly qualified as such on a day named, in connection with further allegations relating to the making of the will, the appointment of plaintiffs as executors and the admission of the will to probate, held sufficient to show the legal capacity of the plaintiffs to sue. *Brenner v McMahon*, 20 A.D. 3, 46 N.Y.S. 643, 1897 N.Y. App. Div. LEXIS 1669 (N.Y. App. Div. 1897).

Denial of allegation that letters of administration were “duly issued” raised an issue and enabled defendants to make an attack, but only for fraud or for collusion, and where jurisdiction of defendant was dependent upon fact of residence, burden was on plaintiff to show such fact. *Webster v M. W. Kellogg Co.*, 168 A.D. 443, 153 N.Y.S. 800, 1915 N.Y. App. Div. LEXIS 8334 (N.Y. App. Div. 1915).

That a surrogate's order was in pursuance of a certain statute, is an averment equivalent to an allegation that the order was duly made. *Kennagh v McColgan*, 4 N.Y.S. 230, 51 Hun 641, 1889 N.Y. Misc. LEXIS 259 (N.Y. Sup. Ct. 1889).

Where an action was brought pursuant to Surrogate's Ct. Act, § 115, the complaint was bad where it neither stated the fact conferring jurisdiction upon the surrogate nor alleged that the decree was duly made. *Cluff v Day*, 18 N.Y.S. 954, 60 N.Y. Super. Ct. 306 (1892).

### **32. —Arbitration award**

While under CCP § 2369 (CPA § 1455 (§ 7506 herein)) a demurrer to a complaint based upon an award of arbitrators was well taken if the arbitrators failed to take the required oath, and there was no written waiver thereof by the parties, the demurrer would be overruled, in view of CCP § 532 (the rule annotated), where the complaint alleged that the award was “duly” made in writing, and there was no affirmative showing in the complaint or the papers thereto attached that the oath was not taken, especially in view of the fact that the agreement of submission was capable



of construction as a waiver of the taking of the oath. *Cohen Iron Works Co. v Jaffe*, 198 A.D. 309, 190 N.Y.S. 476, 1921 N.Y. App. Div. LEXIS 8083 (N.Y. App. Div. 1921).

### **33. —Workmen's compensation award**

An allegation in an answer in an action for damages for negligence that an award to plaintiff under the Workmen's Compensation Act has been duly and properly made by the industrial commission covering the injuries sued for is sufficient to permit defendant to make proof of such defense if controverted by plaintiff. *Corico v Smith*, 178 A.D. 33, 164 N.Y.S. 190, 1917 N.Y. App. Div. LEXIS 5712 (N.Y. App. Div. 1917).

### **34. —Foreign judgment and decree**

In order that a transcript of a judgment rendered by a justice's court in another state may be competent evidence here, it must be duly subscribed or authenticated. *Huie v Devore*, 138 A.D. 677, 123 N.Y.S. 12, 1910 N.Y. App. Div. LEXIS 1614 (N.Y. App. Div. 1910).

An allegation that a judgment was "duly rendered" in the court of another state is a sufficient averment of the jurisdiction of the court. *Benedict v Clarke*, 139 A.D. 242, 123 N.Y.S. 964, 1910 N.Y. App. Div. LEXIS 2169 (N.Y. App. Div. 1910).

### **35. —Appointment of receiver**

Where a complaint was amended so as to allege that the plaintiff was "duly appointed receiver" it was held that this allegation was sufficient to give the plaintiff the right to show upon the trial all the facts conferring jurisdiction, so far as depended upon the regularity of his appointment. *Rockwell v Merwin*, 45 N.Y. 166, 45 N.Y. (N.Y.S.) 166, 1871 N.Y. LEXIS 119 (N.Y. 1871).

In an action brought by a receiver appointed in supplementary proceedings, a complaint alleging that on, etc., at, etc., upon an application made by K, a judgment creditor of the said R (a defendant), "in proceedings supplementary to execution, and by order of determination, then

duly made by J. J. A., county judge of, etc., the plaintiff was appointed receiver of the property of the said R,” and then setting forth the approval and filing of the bond was sufficient. *Manley v Rassiga*, 13 Hun 288 (N.Y. 1878).

### **36. —Attachment**

Where a subsequent lienor moves to vacate an attachment and the judgment he sets up was rendered in an inferior court, he must show that the judgment was duly made and that the court has jurisdiction. *Hamerschlag v Cathoscope Electrical Co.*, 16 A.D. 185, 44 N.Y.S. 668, 1897 N.Y. App. Div. LEXIS 674 (N.Y. App. Div. 1897).

An allegation that an attachment was “duly issued” was sufficient to authorize plaintiffs to give proof of all jurisdictional facts required to show that the attachment was a valid one. *Ross v Ingersoll*, 53 A.D. 86, 65 N.Y.S. 753, 1900 N.Y. App. Div. LEXIS 1876 (N.Y. App. Div. 1900).

In pleading an attachment issued by a court of foreign jurisdiction it is necessary that the statute under which it was issued be alleged, as well as the proceedings thereunder, in order that it may be seen that the law has been strictly pursued. *Sargent v Sargent Granite Co.*, 26 N.Y.S. 737, 6 Misc. 384, 1894 N.Y. Misc. LEXIS 8 (N.Y.C.P. 1894).

### **37. —False imprisonment**

A mayor sued for false imprisonment answers sufficiently by averring that he acted in good faith, under the power given by certain statutes and ordinances, giving their titles. *Willis v Havemeyer*, 12 Super Ct (5 Duer) 447.

### **38. —Filiation proceeding**

On appeal in bastardy proof is permitted of the facts conferring jurisdiction on the justices who made the order of filiation. *Tillotson v Martin*, 24 NY Week Dig 342.

## **Research References & Practice Aids**

### **Federal Aspects:**

Pleadings and motions, Rules 7 to 16 of the Federal Rules of Civil Procedure, USCS Court Rules.

Claims for relief, Rule 8(a) of the Federal Rules of Civil Procedure, USCS Court Rules.

Pleading special matters, Rule 9 of the Federal Rules of Civil Procedure, USCS Court Rules.

Fraud or mistake; conditions of mind, Rule 9(b) of the Federal Rules of Civil Procedure, USCS Court Rules.

Conditions precedent, Rule 9(c) of the Federal Rules of Civil Procedure, USCS Court Rules.

Judgment, Rule 9(e) of the Federal Rules of Civil Procedure, USCS Court Rules.

Special damages, Rule 9(g) of the Federal Rules of Civil Procedure, USCS Court Rules.

### **Jurisprudences:**

76A NY Jur 2d Mechanics Liens §§ 250., 268. .

77 NY Jur 2d Mechanics Liens §§ 276., 307. .

61A Am Jur 2d, Pleading §§ 145., 146.

5A Am Jur Legal Forms 2d, Contracts, Forms 68:24 et seq.

3 Am Jur Trials 681., Tactics and Strategy of Pleading.

### **Treatises**

#### **Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 3015, Particularity as to Specific Matters.

R 3015. Particularity as to specific matters.

2 Lansner, Reichler, New York Civil Practice: Matrimonial Actions § 34.03.

1 Cox, Arenson, Medina, New York Civil Practice: SCPA ¶302.05.

### **Matthew Bender's New York CPLR Manual:**

CPLR Manual § 2.04. Conditions precedent compared.

CPLR Manual § 12.01. (Actions Against Persons Jointly Liable) In general.

CPLR Manual § 19.08. Special rules governing pleading of specific issues.

CPLR Manual § 19.10. Responsive pleadings.

CPLR Manual § 19.12. Cross-claims.

CPLR Manual § 28.26. Powers of receiver .

### **Matthew Bender's New York Practice Guides:**

2 New York Practice Guide: Business and Commercial § 12.14.

### **Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 1.10. Preparing Summons and Complaint.

LexisNexis AnswerGuide New York Civil Litigation § 4.04. Distinguishing Conditions Precedent from Statute of Limitations.

LexisNexis AnswerGuide New York Negligence § 2.15. Preparing Appropriate Pleadings.

LexisNexis AnswerGuide New York Negligence § 2.16. Preparing Summons and Complaint.

### **Matthew Bender's New York Evidence:**

Bender's New York Evidence § 105.05. Determining Which Party Bears Burden of Proof.

**Annotations:**

Necessity and manner, in personal injury or death action, of pleading special damages in the nature of medical, nursing, and hospital expenses. 98 ALR2d 746.

**Matthew Bender's New York Checklists:**

Checklist for Preparing Initial Pleadings LexisNexis AnswerGuide New York Civil Litigation § 1.08.

**Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 3015:1 et seq.

LexisNexis Forms FORM 75-CPLR 3015:1.— Specific Denial of Performance or Occurrence of a Condition Precedent.

LexisNexis Forms FORM 75-CPLR 3015:10.— Pleading of Order Appointing Administrator.

LexisNexis Forms FORM 75-CPLR 3015:11.— Pleading Issuance of Letters to Executor.

LexisNexis Forms FORM 75-CPLR 3015:12.— Pleading of Order Appointing Committee or Guardian for Personal Needs or Property Management.

LexisNexis Forms FORM 75-CPLR 3015:13.— Specific Denial of Jurisdiction to Render Judgment, Decision or Other Determination.

LexisNexis Forms FORM 75-CPLR 3015:14.— Specific Denial of Signature on Negotiable Instrument.

LexisNexis Forms FORM 75-CPLR 3015:15.— Allegation of License to Do Business.

LexisNexis Forms FORM 75-CPLR 3015:16.— Affidavit in Support of Motion to Dismiss Unlicensed Home Improvement Contractor's Complaint to Recover Balance Due for Home Improvements.

LexisNexis Forms FORM 75-CPLR 3015:2.— Allegations of Service of Notice of Claim as Required by General Municipal Law 50 e and 50 i.

LexisNexis Forms FORM 75-CPLR 3015:3.— Allegations by Plaintiff of Waiver of Performance or Occurrence of Conditions Precedent.

LexisNexis Forms FORM 75-CPLR 3015:4.— Allegations by Plaintiff of Tender of Performance; Failure of Performance Excused by Defendant's Acts.

LexisNexis Forms FORM 75-CPLR 3015:5.— Allegation That Party Is a Corporation.

LexisNexis Forms FORM 75-CPLR 3015:6.— Allegation of Incorporation; Official Form.

LexisNexis Forms FORM 75-CPLR 3015:7.— Allegation That Party Is Not a Corporation.

LexisNexis Forms FORM 75-CPLR 3015:8.— Pleading of Judgment.

LexisNexis Forms FORM 75-CPLR 3015:9.— Pleading Order of Administrative Body.

LexisNexis Forms FORM 461-16:23.— Foreclosure Complaint (With Explanations and Alternative Provisions).

LexisNexis Forms FORM 461-21:1.— Lender's Affidavit in Support of Motion for Summary Judgment.

LexisNexis Forms FORM 461-21:3.— Notice of Motion, Plaintiff's Affidavit, Attorneys Affirmation; Basic, Answer of Subordinate Mortgagee, Denials of Knowledge Or Information Only, Strike "John Does".

LexisNexis Forms FORM 461-21:4.— Notice of Motion, Plaintiff's Affidavit, Attorney's Affirmation, Directed to Two Undated Answers, Consolidated Mortgage, Affidavit by Plaintiff's Servicing Agent, Affirmative Defense of Plaintiff's Oral Representation.

LexisNexis Forms FORM 461-21:6.— Notice of Motion, Plaintiff's Affidavit, Attorney's Affirmation, Answer of Multiple Defendants, After Publication of Summons, Vacate Publication

As Against Certain Defendants and Relieve Guardian As Against Them, Strike Deceased Defendants, Substitute Parties Found For John Does, Claimed Failure to State Cause of Action, Claimed Lack of Acceleration.

LexisNexis Forms FORM 521-11-24.— Allegation That Party Is a Corporation.

LexisNexis Forms FORM 521-11-25.— Allegation of Incorporation; Official Form 4.

LexisNexis Forms FORM 521-11-26.— Allegation That Party Is Not a Corporation.

1 Medina's Bostwick Practice Manual (Matthew Bender), Forms 14:101 et seq. (remedies and pleadings).

### **Texts:**

2 Bergman on New York Mortgage Foreclosures (Matthew Bender) §§ 16.05., 19.07., 21.05.

4 Frumer & Biskind, Bender's New York Evidence—CPLR § 10.02.

Warren's Negligence in the New York Courts § 6.01 .Serving summons.

### **Hierarchy Notes:**

NY CLS CPLR, Art. 30

## **Forms**

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### **Forms**

#### **Form 1**

#### **Answer Denying Plaintiff's Performance of Conditions**

[Title of court and cause]

Answer

Index No. \_\_\_\_\_ [if assigned]

Defendant \_\_\_\_\_, answering the complaint,

1. Denies that plaintiff has duly performed all of the conditions of said contract on his part, but on the contrary alleges: [set forth specifically and with particularity breach complained of. If the condition nonperformance of which the defendant claims, does not appear in the complaint, it may be stated thus:] that, although said contract contained the provision, \_\_\_\_\_, plaintiff did not observe the condition in this \_\_\_\_\_ [set forth breach complained of].

Wherefore, defendant demands judgment dismissing the complaint against him, etc.

\_\_\_\_\_  
Attorney for Defendant

Address \_\_\_\_\_

Telephone No. \_\_\_\_\_

[Verification if necessary]

## **Form 2**

### **Allegation of Incorporation [Official Form 4]**

Plaintiff is a corporation incorporated under the laws of the [State of New York].

## **Form 3**

### **Allegation in Complaint, in Action by or Against Domestic Corporation, as to Corporate Existence**

At all the times mentioned herein, plaintiff [or defendant] was, and now is, a domestic corporation duly organized and existing under the laws of the State of New York.

## **Form 4**

### **Allegation as to Corporate Existence of Domestic Corporation Organized Under Special Statute**



At all times mentioned herein plaintiff [or defendant] was and still is a domestic corporation duly organized and existing pursuant to Chapter \_\_\_\_\_ Laws of \_\_\_\_\_.

## **Form 5**

### **Allegations in Complaint as to Corporate Existence of Various Kinds of Corporations**

**Banks.**—At all times mentioned herein plaintiff [or defendant] was and still is a domestic corporation duly organized and existing under the Banking Law of the State of New York and duly authorized to carry on business as a bank [a savings bank, trust company, safe deposit company, industrial bank, investment company, savings and loan association or credit union].

**National Bank.**—At all times mentioned herein plaintiff [or defendant] was and still is a national banking organization duly organized and existing under the Laws of the United States and engaged in business as such in the City of \_\_\_\_\_, State of New York.

**Educational Institution.**—At all times mentioned herein plaintiff [or defendant] was and still is a domestic corporation duly organized under the Laws of the State of New York and duly chartered by the Regents of the University of the State of New York as a school [a college or university].

**Electric Light Company.**—At all times mentioned herein plaintiff [or defendant] was and still is a domestic corporation duly organized and existing under the Laws of the State of New York, engaged, among other things, in the transmission, distribution and sale of electricity for light, power and other industrial purposes.

**Fraternal Order.**—At all times mentioned herein plaintiff [or defendant], the Grand Lodge of the \_\_\_\_\_ of the City of \_\_\_\_\_ was and still is a domestic corporation duly organized and existing under the Laws of the State of New York.

Not-for-Profit Corporation.—At all times mentioned herein plaintiff [or defendant] \_\_\_\_\_ Association is a not-for-profit corporation duly organized and existing under the Not-for-Profit Corporations Law of the State of New York.

Railroad Company.—At all times mentioned herein plaintiff [or defendant] \_\_\_\_\_ Railroad Company was and still is a domestic railroad corporation duly organized and existing under and by virtue of the Laws of the State of New York.

Religious Corporation.—At all times mentioned herein plaintiff [or defendant] was and still is a religious corporation duly organized and existing under the Religious Corporations Law of the State of New York.

Trucking Corporation.—At all times mentioned herein plaintiff [or defendant] was and still is a domestic corporation duly organized and existing under the Laws of the State of New York and engaged in the business of transporting goods, wares and merchandise for hire throughout the City of \_\_\_\_\_ and between the said City of \_\_\_\_\_ and other places and had and still has its office and principal place of business at \_\_\_\_\_ Street in the City of \_\_\_\_\_, County of \_\_\_\_\_ and State of New York.

Trust Company.—At all times mentioned herein plaintiff [or defendant] \_\_\_\_\_ Trust Company was and still is a domestic corporation duly created and existing under and by virtue of the Laws of the State of New York as a banking corporation for the purpose of conducting a banking and trust company business pursuant to the Laws of the State of New York.

## **Form 6**

### **Allegations in Complaint to Show Change of Name**

Plaintiff [or defendant] is a corporation duly organized and existing under the Laws of the State of New York; plaintiff was so organized in the year 20\_\_\_\_\_ under the name of

\_\_\_\_\_, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the name of the plaintiff [or defendant] was duly changed to \_\_\_\_\_ [state present name] by proceedings brought pursuant to Section 615 of the Business Corporation Law [or Section 614 of the Not-for-Profit Corporations Law] of the State of New York.

## **Form 7**

### **Allegations in Complaint in Action by or Against Foreign Corporation**

Plaintiff [or defendant], at all the times hereinafter mentioned, was, and now is, a foreign corporation, duly organized and existing under and by virtue of the laws of the State of \_\_\_\_\_.

## **Form 8**

### **Allegations in Complaint in Action Against Foreign Corporation by Resident or Domestic Corporation**

Plaintiff is, and at all the times hereinafter mentioned was, a resident of the City of \_\_\_\_\_, County of \_\_\_\_\_, State of New York [or a domestic corporation created and existing under the laws of the State of New York].

## **Form 9**

### **Allegations in Complaint as to Nature of Business of Foreign Corporation**

Said \_\_\_\_\_ is and was at all the times hereinafter mentioned engaged, among other things, in the business of \_\_\_\_\_.

## **Form 10**

### **Allegation as to Place of Business of Corporation**

Said \_\_\_\_\_ is and at all the times hereinafter mentioned was a foreign corporation with its principal office at the City of \_\_\_\_\_ in the State of \_\_\_\_\_, and with an office for the transaction of its business in the City of \_\_\_\_\_, State of New York.

## **Form 11**

### **Allegation as to Powers of Foreign Corporation**

Said plaintiff [or defendant] is vested, by its articles of incorporation and the laws of the State of \_\_\_\_\_ [state where incorporated], with power and authority to \_\_\_\_\_ [state nature of power].

## **Form 12**

### **Allegation in Action by Foreign Corporation to Show Authority to Sue in New York**

The plaintiff is and at all times hereinafter mentioned was a foreign corporation duly organized and existing under and by virtue of the Laws of the State of \_\_\_\_\_, and duly authorized to do business in the State of New York; and prior to the times hereinafter mentioned, plaintiff duly procured from the Secretary of State of the State of New York a certificate that the plaintiff has applied for authority to do business in New York pursuant to Section 1304 of the Business Corporation Law [or Not-for-Profit Corporations Law § 1304] and such authority has not been surrendered, suspended or annulled in accordance with law.

## **Form 13**

### **Allegations in Action Against Foreign Corporation as to Nature of Business and as to Doing of Business in New York**

The defendant is, and at all times hereinafter mentioned, was a foreign corporation duly organized and existing under and by virtue of the laws and statutes of the State of \_\_\_\_\_, and duly authorized by law and by its articles of incorporation to

carry on and conduct the business, among other things, of burglary insurance, and at all the times hereinafter mentioned was engaged in carrying on such business in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of New York and was duly authorized to carry on said business in the State of New York.

## **Form 14**

### **Allegations in Complaint in Action Against Foreign Corporation by a Nonresident or Another Foreign Corporation**

[If under Business Corporation Law § 1314(b)(1) or Not-for-Profit Corporation Law § 1315(b)(1).] This action is brought to recover damages for the breach of a contract made [or to be performed] within the State of New York [or relating to property situated within the State of New York at the time of the making of the contract.]

[If under Business Corporation Law § 1314(b)(2) or Not-for-Profit Corporation Law § 1315(b)(2).] The subject matter of this action is within this state.

[If under Business Corporation Law § 1314(b)(3) or Not-for-Profit Corporation Law § 1315(b)(3).] The cause of action asserted herein arose within this state, and the object of the action is not to affect the title of real property situated outside this state.

[If under Business Corporation Law § 1314(b)(4) or Not-for-Profit Corporation Law § 1315(b)(4).] A non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the Civil Practice Law and Rules.

[If under Business Corporation Law § 1314(b)(5) or Not-for-Profit Corporation Law § 1315(b)(5).] The defendant is a foreign corporation doing [or authorized to do] business in this state.

## **Form 15**

## **Complaint in Action by Judgment Creditor Against Directors for Declaring an Unauthorized Dividend**

[Caption and introductory paragraph.]

[Allege obtaining of judgment by plaintiff against corporation, the issuance of an execution, and its return unsatisfied.]

1. At all times mentioned herein \_\_\_\_\_ Corporation was and still is a domestic corporation organized and existing under the Laws of the State of New York.

2. Said corporation was duly organized on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, with a capital stock of \_\_\_\_\_ Dollars consisting of \_\_\_\_\_ shares of common stock of the par value of \_\_\_\_\_ Dollars each and such capital stock has not been increased or decreased prior to the commencement of this action.

3. The defendants herein are owners of all of the capital stock of said corporation and from the date of its organization on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ and during all the times herein mentioned, were and still are all of the directors thereof and constituted the board of directors of said corporation.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, the defendants unlawfully adopted a resolution declaring a dividend of \_\_\_\_\_ [state amount per share] upon the \_\_\_\_\_ stock of said corporation, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ paid said dividend to the stockholders of said corporation in the aggregate amount of \_\_\_\_\_ Dollars.

5. The resolution declaring the dividend is as follows: \_\_\_\_\_ [insert resolution declaring dividend].

6. [If under Business Corporation Law § 510.] Such dividend was wholly unauthorized because it was made at a time when the said corporation was insolvent [or because the payment thereof

rendered said corporation insolvent or because the payment thereof was contrary to restrictions contained in the certificate of incorporation of said corporation].

[If under Business Corporation Law § 1314(b)(1).] This action is brought to recover damages for the breach of a contract [made within this state or to be performed within this state or relating to property situated within this state at the time of the making of the contract].

[If under Business Corporation Law § 1314(b)(2).] That the subject matter of this action is within this state.

[If under Business Corporation Law § 1314(b)(3).] That the cause of action asserted herein arose within this state and that the object of this action is not to affect the title of real property situated outside this state.

[If under Business Corporation Law § 1314(b)(4).] That a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under section 302 of the Civil Practice Law and Rules.

[If under Business Corporation Law § 1314(b)(5).] That the defendant is a foreign corporation doing [or authorized to do] business in this state.

7. The declaration and payment of said dividend were made by defendants in violation of Section 510 of the Business Corporation Law, and plaintiff was damaged thereby in the sum of \_\_\_\_\_ Dollars.

8. The declaration and payment of said dividends were unlawful, and by reason thereof the defendants, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, etc., became jointly and severally liable to said corporation and its creditors to the full amount of the loss sustained by it and its creditors, in the sum of \_\_\_\_\_ Dollars, and are now jointly and severally liable to the plaintiffs herein in the said sum, with interest thereon from the date of payment of such a dividend.

WHEREFORE, plaintiff prays for judgment against said defendants,  
\_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_, etc., jointly and severally, in the sum of \_\_\_\_\_ Dollars,  
with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## Form 16

### Complaint in Action Against Directors or Officers of Corporation Under Section 720 of the Business Corporation Law or Section 720 of the Not-for-Profit Corporation Law

[Caption and introductory paragraph.]

1. At all the times hereinafter mentioned the \_\_\_\_\_ Corporation was, and now is, a domestic corporation duly organized and existing under the Laws of the State of New York.

2. The defendant was, and at all such times, and now is, a director of said \_\_\_\_\_ Corporation.

3. The plaintiff is a judgment creditor [or as the case may be] of the \_\_\_\_\_ Corporation.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_ plaintiff duly recovered judgment against the \_\_\_\_\_ Corporation in the \_\_\_\_\_ Court for \_\_\_\_\_ County for the sum of \_\_\_\_\_ Dollars and thereafter \_\_\_\_\_ [state facts as to issuance and return of execution unsatisfied if such is the case] and said judgment remains wholly unpaid.



5. [State a cause of action against the director such as enumerated in Section 720 of the Business Corporation Law or Section 720 of the Not-for-Profit Corporation Law.]

WHEREFORE, plaintiff prays judgment that \_\_\_\_\_ [according to cause of action sued on, as authorized by such Section 720 of the Business Corporation Law or Section 720 of the Not-for-Profit Corporation Law.]

[Endorsement, address, telephone number, and verification.]

## **Form 17**

### **Complaint in Action Against Corporate Officer for Damages From False Certificate, Report or Public Notice (Business Corporation Law § 720)**

[Caption and introductory paragraph.]

1. At all the times mentioned herein \_\_\_\_\_ Corporation was, and now is, a domestic corporation duly organized and existing under the Laws of the State of New York.

2. At all times from the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_ and up to the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_, the date of the commencement of this action, defendant, \_\_\_\_\_, was an officer of said corporation, to wit, its treasurer.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and within two years before the time this action was brought, as such treasurer, defendant made and signed a report, a copy of which is hereto annexed, marked Exhibit "A" and made a part of this complaint. Said report purported to show assets and liabilities of said corporation on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and earnings and profits of said corporation during the year ending on that date.

4. Said report was false in the following respects: [here allege items of report which were false and the true facts as to each].

5. Thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said report was delivered by said corporation to the plaintiff in support of the corporation's request for a loan by the plaintiff.

6. Relying upon said report by the defendant, \_\_\_\_\_, plaintiff loaned to said corporation the sum of \_\_\_\_\_ Dollars on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to be repaid \_\_\_\_\_ months thereafter with interest at \_\_\_\_\_% per annum.

7. No part of said loan has been paid by said corporation, although payment thereof has been duly demanded. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff duly recovered a judgment in \_\_\_\_\_ Court, \_\_\_\_\_ County, against said corporation for the amount of said loan with interest and costs in the amount of \_\_\_\_\_ Dollars, and execution therefor was duly issued to the sheriff of the County of \_\_\_\_\_, where said corporation had its principal place of business, but said execution was returned wholly unsatisfied.

8. If said report by the defendant, \_\_\_\_\_, had been true, plaintiff's said loan to said corporation would have been collectible in full, but by reason of the falsity of said report, and plaintiff's reliance thereon, said loan is wholly uncollectible from said corporation and plaintiff has been damaged in the sum of \_\_\_\_\_ Dollars and the defendant is liable therefor under Section 720 of the Business Corporation Law.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## Form 18

### Petition in Nature of Mandamus to Inspect Record of Shareholders

[Title of court and matter]

Petition

Index No. \_\_\_\_\_

To the Supreme Court of the State of New York for the County of \_\_\_\_\_

The petition of \_\_\_\_\_ respectfully shows:

1. \_\_\_\_\_ a domestic corporation, was organized \_\_\_\_\_ 20\_\_\_\_\_ in the State of New York and has its office at \_\_\_\_\_ Street, City of \_\_\_\_\_ New York, County of \_\_\_\_\_
2. Petitioner is and was at all times \_\_\_\_\_ months prior to \_\_\_\_\_, 20\_\_\_\_\_ and at all times hereinafter referred to, the owner and stockholder of record of \_\_\_\_\_ (\_\_\_\_\_) shares of common stock of the said corporation.
3. The petitioner has not seen nor had an inspection of the record of shareholders or any of the books of the respondent corporation at any time since 20\_\_\_\_\_; that he is entitled as a matter of right to an inspection of the record of shareholders and further asserts that he is entitled to this inspection and to the inspection of the corporate books of account by reason of the following facts, to wit: \_\_\_\_\_.
4. Petitioner has never received any notice of a stockholders' meeting of \_\_\_\_\_, has never received any financial statements or any other official corporate information relating to the affairs or business of the corporation but was told by \_\_\_\_\_ during the course of years that business was progressing and he would receive his appropriate share.
5. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the petitioner in accordance with Section 624 of the Business Corporation Law authorized and appointed his attorneys, \_\_\_\_\_ Esqs., as his agents to inspect the record of shareholders of the respondent corporation and make extracts therefrom. Said authorization together with a demand for the inspection of the record of shareholders of the respondent corporation were delivered to the respondent corporation by registered mail at its office, \_\_\_\_\_ Street, City of \_\_\_\_\_, \_\_\_\_\_ County and State of New York

on \_\_\_\_\_, 20\_\_\_\_\_, requesting that \_\_\_\_\_, Esqs. be advised when such inspection and extract could be made. A copy of the authorization and demand is hereto annexed and marked Exhibit "A."

6. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the respondent corporation advised that the demand was being referred to their attorney and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, their attorney advised that the demand was refused.

7. The respondent corporation has declined to allow the said inspection as appears from their letters of \_\_\_\_\_, 20\_\_\_\_\_ which are attached hereto and marked Exhibits "B" and "C" respectively.

8. The inspection sought of the books of the respondent corporation is not for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation.

9. The petitioner has not at any time sold or offered for sale any list of stockholders of this corporation or of any other corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any stock list for any such purpose, and has not been connected with any stock list as above stated.

10. No previous application has been made for the relief herein sought.

WHEREFORE, the petitioner respectfully prays that the Court grant a judgment commanding \_\_\_\_\_, a domestic corporation, its secretary, assistant secretary, treasurer, assistant treasurer, president, and/or any other officer, if any, who has or ought to have the custody of the records of said corporation, to allow at an immediate date and within reasonable office hours an inspection of the record of shareholders of the respondent corporation as herein set forth; and for such other and further relief as to this Court may seem proper.

Dated, \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

[Signature, with name printed underneath]

Petitioner

[Post office address and telephone no.]

## Form 19

### Demand by Shareholder to Inspect Share Records and Minutes

To:\_\_\_\_\_ Inc.

and the officers thereof,

[Address]

PLEASE TAKE NOTICE that I am a shareholder of record of said \_\_\_\_\_ Inc., and have been such since the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_ and therefore for more than 6 months preceding the making of this demand [or, that I have been authorized in writing by the holders of at least 5 percent of all outstanding shares of said \_\_\_\_\_ Inc., as per Instrument of Authorization hereunto attached], and hereby demand the right to examine, in person or by agent or attorney, during usual business hours, the minutes of the proceedings of its shareholders and record of shareholders and to make extracts therefrom on the \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_ [not less than 5 days from making of demand], and on such other subsequent business days as may be required and convenient, for the obtaining of desired information from such records.

[Section 624 of the Business Corporation Law does not require a statement of the purpose of the examination, and such a statement can be added, or not, as deemed advisable.]

Dated at \_\_\_\_\_ this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

[Signature, Address, and Telephone No. of Demandant]

## Form 20

### Designation of Agent to Inspect Records

WE, the undersigned, being the owners and holders of record of more than 5 percent of the outstanding shares of \_\_\_\_\_ Inc., [for at least \_\_\_\_\_ months prior to date hereof], and being each the owner and holder of record of the number of shares set after our respective names, pursuant to §624 of the Business Corporation Law of New York, do hereby expressly appoint and authorize \_\_\_\_\_ of \_\_\_\_\_ our agent and attorney to inspect the minutes of the proceedings of shareholders, and the record of shareholders, of such corporation and to make extracts therefrom.

Dated \_\_\_\_\_ 20\_\_\_\_\_.

R 3015. Particularity as to specific matters.

[Signatures]

[Addresses]

[Number of Shares]

## Form 21

### Affidavit Supporting Demand for Inspection of Stock Records or Minutes

[Venue]

I, \_\_\_\_\_ being first duly sworn on oath, depose and say, to sustain my demand for inspection of the minutes of proceedings of shareholders and the record of shareholders of \_\_\_\_\_ Inc., and to establish my right to such inspection and to make extracts from such records:

1. That said inspection is not desired for a purpose which is in the interest of a business or object other than the business of such corporation.
2. That I have not within 5 years sold or offered for sale any list of shareholders of any domestic corporation or foreign corporation, or aided or abetted any person in procuring any such record of shareholders for any such purpose.

[Signature]

[Verification]

## Form 22

### Petition to Inspect Record of Shareholders

[Title of court and matter]

[Nature of paper and  
index number]

To the Supreme Court of the State of New York for the County of \_\_\_\_\_

The petition of \_\_\_\_\_ respectfully shows:

1. \_\_\_\_\_ a domestic corporation, was organized \_\_\_\_\_ 20\_\_\_\_\_ in the State of New York and has its office at \_\_\_\_\_ Street, City of \_\_\_\_\_ New York, County of \_\_\_\_\_



2. Petitioner is and was at all times \_\_\_\_\_ months prior to \_\_\_\_\_, 20\_\_\_\_\_, and at all times hereinafter referred to, the owner and stockholder of record of \_\_\_\_\_ (\_\_\_\_\_) shares of common stock of the said corporation.

3. The petitioner has not seen nor had an inspection of the record of shareholders nor any of the books of the respondent corporation at any time since 20\_\_\_\_\_; that he is entitled as a matter of right to an inspection of the record of shareholders and further asserts that he is entitled to this inspection by reason of the following facts, to wit: \_\_\_\_\_.

4. Petitioner has never received any notice of a stockholders' meeting of \_\_\_\_\_, has never received any financial statements or any other official corporate information relating to the affairs or business of the corporation but was told by \_\_\_\_\_ during the course of years that business was progressing and he would receive his appropriate share.

5. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the petitioner in accordance with §624 of the Business Corporation Law authorized and appointed his attorneys, \_\_\_\_\_, Esqs., as his agents to inspect the record of shareholders of the respondent corporation and make extracts therefrom. Said authorization together with a demand for the inspection of the record of shareholders of the respondent corporation were delivered to the respondent corporation by registered mail at its office, \_\_\_\_\_ Street, City of \_\_\_\_\_, \_\_\_\_\_ County and State of New York on \_\_\_\_\_, 20\_\_\_\_\_, requesting that \_\_\_\_\_, Esqs., be advised when such inspection and extract could be made. A copy of the authorization and demand is hereto annexed and marked Exhibit "A".

6. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the respondent corporation advised that the demand was being referred to their attorney, and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, their attorney advised that the demand was refused.

7. The respondent corporation has declined to allow the said inspection as appears from their letters of \_\_\_\_\_, 20\_\_\_\_\_, which are attached hereto and marked Exhibits "B" and "C" respectively.

8. The inspection sought of the records of the respondent corporation is not for the purpose of communicating with stockholders in the interest of a business or object other than the business of the corporation.

9. The petitioner has not at any time sold or offered for sale any list of stockholders of this corporation or of any other corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any stock list for any such purpose, and has not been connected with any stock list as above stated.

10. No previous application has been made for the relief herein sought.

WHEREFORE, the petitioner respectfully prays that the Court grant a final order commanding \_\_\_\_\_, a domestic corporation, its secretary, assistant secretary, treasurer, assistant treasurer, president, and/or any other officer, if any, who has or ought to have the custody of the records of said corporation, to allow at an immediate date and within reasonable office hours an inspection of the record of shareholders of the respondent corporation as herein set forth; and for such other and further relief as to this Court may seem proper.

Dated, \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

[Signature, with name printed underneath]

[Post office address and telephone no.]

[Verification]

## **Form 23**

### **Demand for Inspection of Voting Trust Books**

[Venue]

\_\_\_\_\_ being duly sworn, deposes and says:

1. I am a voting trust certificate holder of record of \_\_\_\_\_ whose principal office is \_\_\_\_\_ Street, \_\_\_\_\_ of \_\_\_\_\_ New York, and have been such certificate holder from the time the corporation was formed in 20\_\_\_\_\_ approximately \_\_\_\_\_ years immediately preceding the date hereof. The voting trust certificates which I hold evidence the ownership of \_\_\_\_\_ shares of the \_\_\_\_\_ stock of said corporation out of a total of \_\_\_\_\_ such shares outstanding, and were issued pursuant to a certain voting trust agreement dated as of \_\_\_\_\_, 20\_\_\_\_\_, between \_\_\_\_\_, on the one part, and \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, as voting trustees on the other part.

2. I desire an inspection of the certificate book of the voting trustees of \_\_\_\_\_ containing the names of all persons who are voting trust certificate holders of \_\_\_\_\_, showing their places of residence, the number of shares of stock represented by the certificates held by them respectively, and the time when they respectively became the owners thereof.

3. a. The request for the above-mentioned inspection is not for the purpose of communicating with anyone in the interests of a business or object other than the business of the corporation.

b. The request for the above-mentioned inspection is for the purpose of communicating and consulting with all other voting trust certificate holders of said corporation in connection with \_\_\_\_\_ [state purpose of communication, as: the termination of said voting trust agreement or, in the alternative, in connection with the removal of the incumbent voting trustees, in accordance with the provisions of said voting trust agreement].

4. I have not within \_\_\_\_\_ years or at any time sold or offered for sale any list of stockholders or certificate holders of \_\_\_\_\_ or any other corporation, or aided or abetted any person in procuring any such list for any such purpose.

5. I reside in the \_\_\_\_\_ of \_\_\_\_\_, and my post office address is \_\_\_\_\_ Street, \_\_\_\_\_ of \_\_\_\_\_, New York.

[Signature, with name printed underneath]

[Jurat]

## Form 24

### Order to Show Cause on Application of Certificate Holders for Inspection of Books of Voting Trust

[Title of court and cause]

Order to Show Cause

Index No. \_\_\_\_\_

Present: Hon. \_\_\_\_\_ Justice.

Upon the annexed petition of \_\_\_\_\_ verified \_\_\_\_\_  
20\_\_\_\_\_ and the affidavit of \_\_\_\_\_ sworn to  
\_\_\_\_\_ 20\_\_\_\_\_

Let the respondents show cause before one of the Justices of this Court, presiding at Special Term, Part \_\_\_\_\_ thereof to be held at the Courthouse, \_\_\_\_\_ Street, \_\_\_\_\_ of \_\_\_\_\_, New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon,

Why an order should not be made and entered herein permitting petitioner to inspect and make extracts from the certificate book or books or other records of the respondent containing the names of all persons who are voting trust certificate holders, showing their places of residence,

the number of shares of stock represented by the certificates held by them and each of them, and the time when such certificate holders and each of them became the owners thereof, and granting to petitioner such other and further relief as may be just.

Sufficient reason appearing therefor, Let service of a copy of this order be made by delivering a copy of such order and the papers upon which it is based, personally upon any one of the respondents, or by leaving a copy of the order and the papers upon which it is based with a person of suitable age and discretion at the office of the respondent, \_\_\_\_\_, \_\_\_\_\_ Street, \_\_\_\_\_ of \_\_\_\_\_, New York, on or before \_\_\_\_\_, 20\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at \_\_\_\_\_, New York.

[Signature, with name printed underneath]

Justice of the Supreme Court

of \_\_\_\_\_ County

## Form 25

### Demand for Inspection of Stock Book of Foreign Corporation

[Date]

\_\_\_\_\_, as Transfer Agent for common

Stock of \_\_\_\_\_ Street

\_\_\_\_\_, New York and \_\_\_\_\_

\_\_\_\_\_

Street \_\_\_\_\_, New York

By Registered Mail

Gentlemen:

PLEASE TAKE NOTICE that the undersigned, who has been a stockholder of record of \_\_\_\_\_ for a period in excess of \_\_\_\_\_ months immediately preceding this demand, does hereby demand in accordance with the provisions of § 1315 of the Business Corporation Law [or § 1316 of the Not-for-Profit Corporation Law] of the State of New York an inspection by the undersigned through her agents, \_\_\_\_\_ and \_\_\_\_\_, both of \_\_\_\_\_ Street, City of \_\_\_\_\_, New York, of the stock book of \_\_\_\_\_ and the right to make extracts therefrom.

Such inspection is not for the purpose of communicating with stockholders in the interest of a business or object other than the business of \_\_\_\_\_.

The undersigned has not within \_\_\_\_\_ years from the date of this demand sold or offered for sale any list of stockholders of \_\_\_\_\_, or any other corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any stockholders' list for any such purpose.

Each of my said agents is separately and independently vested with full power and authority to act for me and in my name for the purpose of making such inspection and such extracts. Each of my said agents is further authorized and empowered to designate one or more persons to assist him or to substitute for him in making extracts from the stock book in my behalf.

Very truly yours,

\_\_\_\_\_  
Address \_\_\_\_\_

Telephone No. \_\_\_\_\_

[Acknowledgment]

## Petition for Inspection of Stock Book of Foreign Corporation

[Caption]

To the Supreme Court of the State of New York:

The petition of \_\_\_\_\_ respectfully shows and alleges:

1. Since \_\_\_\_\_ 20\_\_\_\_\_ petitioner has been the registered holder and beneficial owner of Certificate No. \_\_\_\_\_ for \_\_\_\_\_ shares of common stock of \_\_\_\_\_ (hereinafter called "\_\_\_\_\_ Petitioner resides at \_\_\_\_\_ Street \_\_\_\_\_ New York.

2. Upon information and belief, \_\_\_\_\_ is a \_\_\_\_\_ corporation, duly licensed to transact business within this state. \_\_\_\_\_ Transfer Agent is \_\_\_\_\_, a corporation organized and existing under the Business Corporation Law of this state. \_\_\_\_\_ stock book is maintained by and is in the possession of \_\_\_\_\_.

3. By notice dated \_\_\_\_\_, 20\_\_\_\_\_, a true copy of which is annexed hereto as Exhibit A, petitioner demanded of \_\_\_\_\_, as Transfer Agent of \_\_\_\_\_, and of \_\_\_\_\_ an inspection of \_\_\_\_\_ stock book and the right to make extracts therefrom in accordance with §1315 of the Business Corporation Law [or § 1316 of the Not-for-Profit Corporation Law]. In view of petitioner's distance from \_\_\_\_\_, she designated in said notice and demand \_\_\_\_\_ and \_\_\_\_\_, both of \_\_\_\_\_ Street, City of \_\_\_\_\_, New York, as her agents to make such inspection and such extracts; and she further provided that each of said agents is separately and independently vested with full power and authority to act for her in the premises and to designate one or more persons to assist or substitute for him in making extracts from the stock book in her behalf. Said notice and demand was sent to \_\_\_\_\_ by

registered mail on \_\_\_\_\_, 20\_\_\_\_\_, and was presented to \_\_\_\_\_ on the same date by Messrs. \_\_\_\_\_ and \_\_\_\_\_, as more fully set forth in their affidavits hereto annexed.

4. By letter addressed to petitioner dated \_\_\_\_\_, 20\_\_\_\_\_, a true copy of which is annexed hereto as Exhibit B, \_\_\_\_\_, by \_\_\_\_\_, Secretary, advised that petitioner's demand for inspection of the stock book and the right to make extracts therefrom is refused. As more fully set forth in \_\_\_\_\_ affidavit, hereto annexed, \_\_\_\_\_ likewise refused petitioner's demand. \_\_\_\_\_ has thus far failed to give any reason for refusing to accord petitioner her statutory rights. Petitioner is informed that \_\_\_\_\_ has based its refusal of petitioner's demand upon the sole ground that it has been instructed not to comply therewith by \_\_\_\_\_.

5. As stated in her demand (Exhibit A), petitioner is not seeking to inspect \_\_\_\_\_ stock book for the purpose of communicating with stockholders in the interest of a business or object other than the business of \_\_\_\_\_ nor has petitioner within 5 years from the date of said demand (or ever), sold or offered for sale any list of stockholders of \_\_\_\_\_ or any other corporation of any type or kind, whether or not formed under the laws of this state, or aided or abetted any person in procuring any stockholders' list for any such purpose. Petitioner seeks to enforce her rights under § 1315 of the Business Corporation Law [or Not-for-Profit Corporation Law § 1316] in complete good faith.

6. Petitioner's sole purpose in making this application is to obtain a list of stockholders for the use of the stockholders' committee, more fully referred to in paragraph 16, infra, in soliciting proxies for the election of directors at the next annual stockholders' meeting of \_\_\_\_\_ to be held on \_\_\_\_\_, 20\_\_\_\_\_. Although petitioner has been advised by her counsel that the facts hereinabove alleged clearly entitle her to the relief sought and that the reason that she and other stockholders are



endeavoring to oust the present management of \_\_\_\_\_ is altogether immaterial, she nevertheless desires that the court be fully apprised of the facts and circumstances which have prompted this application, as hereafter set forth.

7-15. \_\_\_\_\_ [Allege details of controversies, issues, management and other circumstances, such as stockholders' derivative suits to test control, in support of which inspection is sought.] It is essential that the stockholders' committee be furnished with a list of the stockholders of \_\_\_\_\_ so as to give it the same opportunities and advantages in the solicitation of proxies as are possessed by the self-designated \_\_\_\_\_ management. As previously stated, it is solely for this purpose that petitioner seeks to enforce her statutory rights to inspect \_\_\_\_\_ stock book and to make extracts therefrom.

16. The notice of this application requests an order authorizing petitioner to inspect and make extracts through the aforementioned Messrs. \_\_\_\_\_ and \_\_\_\_\_ as her agents. Messrs. \_\_\_\_\_ and \_\_\_\_\_ are attorneys associated with the firm of \_\_\_\_\_ who are representing petitioner and the other stockholders in her group in the derivative suits aforementioned and who likewise represent petitioner on the instant application. In view of the large number of stockholders of \_\_\_\_\_, it is also requested that Messrs. \_\_\_\_\_ and \_\_\_\_\_ be permitted such stenographic or clerical assistance as may be required in making the extracts. Petitioner estimates that accurately extracting the names, addresses and holdings of some \_\_\_\_\_ stockholders would require approximately \_\_\_\_\_ weeks time of one diligent worker.

WHEREFORE, petitioner prays for an order directing \_\_\_\_\_, \_\_\_\_\_, its Secretary, and \_\_\_\_\_, its Transfer Agent, to permit the petitioner to inspect the stock book of \_\_\_\_\_ and to make extracts therefrom through \_\_\_\_\_ and/or \_\_\_\_\_, as

her agents, with the assistance of such other persons as said \_\_\_\_\_  
and/or \_\_\_\_\_ may designate, at such time and place as may be set by the  
court; and for such other and further relief as to the court may seem just and proper.

Dated: \_\_\_\_\_, N. Y.

\_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Petitioner

[Endorsement, address, and telephone number]

## Form 27

### Ordering Paragraphs of Order to Inspect Stock Books of Foreign Corporation

ORDERED, that the application of petitioner herein be and hereby is in all respects granted;  
and it is further

ORDERED, that the respondents \_\_\_\_\_ and \_\_\_\_\_  
submit the stock book of \_\_\_\_\_ for inspection by the said  
\_\_\_\_\_ petitioner; and it is further

ORDERED, that said inspection of the stock book of \_\_\_\_\_ may be made  
by \_\_\_\_\_ and/or \_\_\_\_\_ as agents for said petitioner,  
with the assistance of such other persons not exceeding three as said  
\_\_\_\_\_ and/or \_\_\_\_\_ may designate, who shall be  
allowed to take extracts from and to make photostatic and other copies of, said stock book; and  
it is further

ORDERED, that respondents herein make available the aforesaid stock book for the inspection  
herein ordered at the office of \_\_\_\_\_, \_\_\_\_\_ Street,  
\_\_\_\_\_, N. Y., at any reasonable time requested by petitioner between the

hours of \_\_\_\_\_ and \_\_\_\_\_ in the  
\_\_\_\_\_ noon, commencing on the \_\_\_\_\_ business day  
after service of copies of this order with notice of entry thereof upon the attorneys for the said  
\_\_\_\_\_ and \_\_\_\_\_, and  
that said inspection shall continue thereafter until completed; and it is further

ORDERED, that the court shall retain jurisdiction over this proceeding pending the completion  
of the inspection herein ordered and that application may be hereafter made to the undersigned  
by any of the parties hereto upon two days notice to the attorneys for the other parties hereto for  
such other and further relief as may be proper or necessary to carry out or effectuate the  
provisions of this order.

## **Form 28**

### **Allegations in Complaint in Action by Corporate Creditor Against Corporate Officers, as to Judgment and Execution**

On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff commenced an  
action in this court against said company for the recovery of the amount due for the services and  
disbursements stated herein in paragraph \_\_\_\_\_, and such proceedings  
were thereafter had; on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_,  
plaintiff, after a trial of the issues therein, duly recovered in said action a judgment against said  
company for the sum \_\_\_\_\_ dollars, damages and costs, which said judgment was  
thereafter duly docketed in the clerk's office of the County of \_\_\_\_\_, and  
on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, an execution against  
property upon the said judgment was duly issued to the sheriff of the County of  
\_\_\_\_\_, and execution was returned on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_\_, wholly unpaid and unsatisfied; and the said company  
had no real or personal property.

## **Form 29**

## Complaint in Action by Stockholder for Accounting by Directors

[Caption and introductory paragraph.]

1. \_\_\_\_\_ is a domestic corporation with a capital stock \_\_\_\_\_ dollars, divided into \_\_\_\_\_ shares of the par value of \_\_\_\_\_ dollars each, and having its principal place of business in the City of \_\_\_\_\_, County \_\_\_\_\_, in the State of New York.

2. The shares of the capital stock of said corporation are now held by the following named persons, in the number set opposite their names: \_\_\_\_\_.

3. \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, defendants, together own \_\_\_\_\_ shares of said capital stock, and have owned the shares since said corporation was organized; said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ are closely related, and the said stock owned by them has been controlled and voted at all times as a single block.

4. The directors of said corporation are said \_\_\_\_\_ and \_\_\_\_\_, together with the plaintiff and one \_\_\_\_\_, and the officers of said corporation are the following: \_\_\_\_\_.

5. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, fraudulently and unlawfully entered into a conspiracy together for the purpose of wrongfully and fraudulently depriving plaintiff and other stockholders of said corporation, other than said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, of their rights and interests as such stockholders, and to fraudulently and unlawfully exploit said corporation, and to convert its funds and assets for their own benefit.

6. In pursuance of said conspiracy said named defendants have, since said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, unlawfully and fraudulently caused and permitted large sums of money to be paid out of the funds of said corporation to said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, and have purchased property with the funds of said corporation from said defendants at fraudulently excessive prices, and have from time to time paid out large sums of money from the funds of said corporation to different ones of said defendants as salaries, in excess of the salaries to which said defendants were lawfully entitled under the by-laws and lawful resolutions of the board of directors, and are now paying to said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, out of the funds of said corporation, as pretended salaries, the sum of \_\_\_\_\_ dollars per year, and in connection with their fraudulent and unlawful practices have from time to time made fraudulent entries upon the records of meetings of stockholders and directors of said corporation and are now and have been, since the last mentioned date, continuously, arbitrarily, fraudulently, and unlawfully manipulating the affairs, moneys and properties of said corporation for their own use and benefit, and to the great injury of plaintiff and other stockholders in the premises.

7. A large number of the shares of the capital stock of said corporation were sold upon the express and implied promise contained in the by-laws of said corporation that no officer should receive more than \_\_\_\_\_ dollars per annum for his said services.

8. Notwithstanding the increase in said salaries of said officers their duties have remained the same, and the only reason for increasing the said salaries is the purpose of enabling the said officers to benefit themselves notwithstanding the rights of the other stockholders of the corporation.

9. The said officers, in pursuance of their conspiracy, have drawn from the fund of said corporation, large sums, to wit, \_\_\_\_\_ dollars, for salaries to which said officers were in no way entitled, and which they wholly refuse to return to said corporation.

10. Although large profits have been made by said corporation within the past \_\_\_\_\_ years, no dividends have been declared upon the stock of said corporation for nearly \_\_\_\_\_ years prior hereto; in the manner aforesaid, and pursuant to said conspiracy, the profits of the business of said corporation are being dissipated by said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, and appropriated to their own use.

11. The books of said corporation, especially the minute books, are in a confused and disorderly state, and do not speak the truth as to the business and profits of the business of defendant corporation; plaintiff is informed and believes, and so states the fact to be, that unless prevented by the appointment of a receiver to take possession of the books and assets of said corporation, pending final disposition of this cause, said defendants will, pursuant to said conspiracy, destroy, mutilate or alter the books of said company, and secrete its assets, and will dissipate its funds and properties, and that any demand upon defendants or any of them, or upon said corporation, would be futile and of no avail.

12. By reason of the premises said corporation cannot of its own motion and in its own name institute suit for the relief herein prayed.

13. Plaintiff is informed and believes and upon such information and belief states that said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ will, unless restrained by order of this court, enter into or attempt to enter into some contract for the disposition of the property, or some portions thereof, of the defendant corporation, or in some way secrete, transfer or encumber the real estate owned by said corporation, or some portions thereof; that the owning of said real estate is not necessary or advantageous to said corporation, and that the real estate should be disposed of for the benefit of said corporation, but any sale by said defendants will not be made in good faith and for the benefit of said corporation.

WHEREFORE plaintiff prays judgment that an accounting may be taken to ascertain the amount improperly paid to said defendants, and each of them, for salaries in excess of the amount lawfully due said defendants, and each of them, and to ascertain what other moneys

were improperly and unlawfully paid to said defendants out of the funds of said corporation; and to ascertain what property of said defendants was purchased from said defendants with the funds of such corporation, at excessive prices; that defendants \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, and each of them, may be decreed by order of this court to pay to said corporation such sums as may upon such accounting be found to be due from them to said corporation; that \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ be enjoined from in any way conveying or attempting to convey, and from transferring, selling or encumbering all or any of the property and assets of said corporation whether standing in the name of said corporation, or held by or on behalf of said defendants, or either of them, but belonging to said corporation, until the further order of this court; that the real estate owned by said corporation which it is not necessary or advantageous to said corporation to own may be decreed to be disposed of for the benefit of said corporation; and that plaintiff may have such other and further relief as may be equitable in the premises.

[Endorsement, address, telephone number, and verification.]

### **Form 30**

#### **Complaint in Action by Stockholder Against Corporation and Directors for Misconduct of Directors**

[Caption and introductory paragraph]

1. During all the times hereinafter stated, the plaintiff was a resident and inhabitant of the Village of \_\_\_\_\_, in the County of \_\_\_\_\_.

2. Heretofore, before the commencement of this action, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, there was duly organized under the laws of the State of \_\_\_\_\_ a corporation known as \_\_\_\_\_, with a capital of \_\_\_\_\_ dollars, which, together with \_\_\_\_\_ dollars surplus, was duly and fully paid into the treasury of said company, which said corporation was organized

under the banking laws of said State and had its principal place of business during all the times hereinafter stated, in the City of \_\_\_\_\_ and County of \_\_\_\_\_.

3. Upon the organization of said company the defendants \_\_\_\_\_ became directors thereof, and thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendants \_\_\_\_\_ were duly elected, and thereafter, and before the acts hereinafter set out, duly qualified as directors, and each of the individual defendants herein was during the commission of the acts and the delinquencies hereinafter specified, a director of \_\_\_\_\_ company and charged with all the duties and subject to all the liabilities attaching to such position.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff duly and lawfully became the owner, by purchase, of \_\_\_\_\_ shares of the capital stock of said company, and the plaintiff has ever since been the owner and holder of said shares of stock, with all the rights that attach to such ownership; while the individual defendants herein were such directors of said \_\_\_\_\_, and were thus charged with the duties of such position, they and each of them failed to perform the duties as such director thereof, and on the contrary each was so negligent and careless that the funds of said \_\_\_\_\_ were mismanaged and wasted and said \_\_\_\_\_ thereby suffered great loss and the value of the stock of the plaintiff was greatly reduced and the plaintiff also lost large gains in the way of dividends and returns, which he would have made had the individual defendants herein performed the duties which it was incumbent upon them to perform as such directors; all the other holders of the stock of said \_\_\_\_\_ suffered a like diminution in the value of the stock of said \_\_\_\_\_ severally held by them, and the plaintiff brings this action on behalf of himself and of all other stockholders of said corporation similarly situated, who may come in as parties plaintiff, said stockholders being many in number.



5. Before the commencement of this action, the plaintiff duly served upon the said \_\_\_\_\_ company a demand that it should bring an action against the individual defendants herein, for the purpose of recovering from the other defendants the sums lost to said company by reason of their negligence, but said company refused to bring said action, and the plaintiff, therefore, brings this action, for himself, and all other stockholders of said \_\_\_\_\_ as hereinbefore stated.

6. Among other things, as to which said defendants, other than the \_\_\_\_\_ company, were negligent, and in which they failed to perform their duty as directors, are these: they failed to attend meetings of the directors of said \_\_\_\_\_, and failed to give any attention to their duties as directors; they did not supervise the investments of said corporation, but on the contrary, allowed the officers of said \_\_\_\_\_, \_\_\_\_\_ as president, \_\_\_\_\_ as vice president, \_\_\_\_\_ as secretary and treasurer, and other officers of the corporation, to manage the affairs thereof almost exclusively, and in their individual interests, to the loss of the company, and to invest the funds of said corporation, and the money deposited with it, without control, and as they pleased, and illegally, and for their own individual profit, and in securities in which they should not have been invested, and particularly in certain stocks and bonds and obligations of \_\_\_\_\_ to the amount of about \_\_\_\_\_ dollars on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and permitted said corporation to assume large obligations in the way of guaranteeing notes of said president and \_\_\_\_\_ and others, in aid of \_\_\_\_\_ which was wholly improper and illegal; they did not establish proper rules for the management of the business of said \_\_\_\_\_, and the protection of its funds; the books of said \_\_\_\_\_ were not correctly kept, but on the contrary false and fictitious entries were made therein; money was loaned to directors of the company and used and lost in enterprises in which they were interested, in violation of law. Said directors wholly failed to perform their duty as directors, by reason of which failure the loss

aforesaid occurred, to the great damage of the stockholders of said \_\_\_\_\_, including the plaintiff.

WHEREFORE, the plaintiff demands judgment that the loss sustained by the defendant \_\_\_\_\_ company by reason of the wrongful acts and negligence of the other defendants herein, be ascertained and determined; that the defendants, other than said \_\_\_\_\_ company be directed to pay said sums severally to the defendant \_\_\_\_\_ company and that judgment therefore be entered against them in favor of said \_\_\_\_\_ company, and that the plaintiff have such other and further relief in the premises as may be just, besides costs.

[Endorsement, address, telephone number, and verification.]

### **Form 31**

#### **Complaint in Action to Compel Directors to Make Good Loss Sustained Through Sale of Corporate Assets**

[Caption and introductory paragraph]

1. At all the times mentioned herein, the defendant, \_\_\_\_\_ company, was, and now is, a domestic corporation duly organized and existing under the laws of the State of New York having its principal place of business in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of New York.

2. The plaintiff was at all times hereinafter mentioned, and now is a holder of both preferred and common stock in the defendant, \_\_\_\_\_ company, and the plaintiff is and was at such time the owner and holder of \_\_\_\_\_ shares of the common stock of said corporation and \_\_\_\_\_ shares of preferred stock.

3. The defendants, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and the plaintiff were at all times hereinafter mentioned directors in said \_\_\_\_\_ company; on or about the

\_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, a report was made to the board of directors of said company, at a meeting duly held, which in substance said that on account of the situation of the company, a sale of the assets of said company was required in the interest of said company, and a resolution was passed on said day calling a special meeting of stockholders to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, for the purpose of obtaining the consent required by Section 909 of the Business Corporation Law of the State of New York for a sale and conveyance of this property.

4. The plaintiff, as a director of said corporation, voted in favor of the resolution calling a meeting for the purpose of obtaining such consent, and thereafter executed a proxy authorizing the stock owned by him to be voted at said meeting, at which he was not personally present; the said proxy was executed in reliance upon the obligation of the directors who were in charge of the affairs of said company to act at all times in the interest of said corporation and to take such action as would best promote its interest, and after he was fully advised that the action which the stockholders would and could take at said meeting would be permissive only, and after obtaining such consent or approval as the stockholders might vote at said meeting, action on the part of the board could be required to make a sale, and after obtaining such permission as the stockholders might see fit to grant, the directors were still chargeable with the obligation to act in good faith and to use reasonable diligence to obtain the best possible price upon the sale of the assets; at said meeting of stockholders a proposition was passed by said meeting authorizing the sale of the assets at a specific price to a specific purchaser; the stock of the plaintiff, who was not personally present at the meeting, was voted in the affirmative thereon, only through the proxy given under conditions hereinbefore alleged; at said meeting of stockholders, defendants \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ used their influence to effect an immediate passage of the resolution directing such sale against the protest of another stockholder, \_\_\_\_\_, who voted in the negative upon said proposition, and in spite of the fact that an offer was presented to said meeting increasing the amount theretofore offered for the assets of the corporation, of the sum of \_\_\_\_\_ dollars; following the receipt of the

increased offer the defendant, \_\_\_\_\_, left the meeting of the stockholders and came back shortly with a report that the offer theretofore made by the prospective purchaser had been increased by the amount of \_\_\_\_\_ dollars, whereupon the stockholder, \_\_\_\_\_, and a representative of another bidder, who was then present, requested additional time to give such other bidder an opportunity to again raise his bid, and in spite of the fact that there was no evidence of the actual existence of a bona fide increase of the original bid other than the statement of the defendant, \_\_\_\_\_, that said bid had been increased in such amount, and in spite of the fact that a delay of 48 hours was requested by a responsible bidder for the purpose of submitting a larger bid, and in spite of the fact that the stockholder, \_\_\_\_\_, protested against action without giving such other bidder an opportunity to submit a further bid, the said defendants caused said resolution to be so passed at such stockholders' meeting through the vote of proxies running to the defendants, \_\_\_\_\_ and \_\_\_\_\_.

5. Upon learning of the action of said stockholders' meeting, plaintiff, as a director, immediately notified said corporation through its president, the defendant \_\_\_\_\_, that as a director he would insist that the directors of the corporation fulfill their obligation to said corporation by selling the property for a higher price if available, and if such bid were presented, or a reasonable probability that said bid could be obtained appeared, before action legally amounting to a sale had taken place; thereafter a meeting of directors was duly called to be held in the City of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, for the purpose of selling the assets of the corporation upon authority received from said stockholders' meeting and before any action was taken by said board of directors and before said meeting so called as aforesaid, a bid substantially higher than the bid upon which the property was sold accompanied by an adequate deposit therein, made by a responsible bidder, was actually in the hands of the defendant, \_\_\_\_\_, president of the defendant, \_\_\_\_\_ company; at said meeting of directors, the defendants, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ were notified that such offer had

been made and was available and that an even higher price for said property could be obtained if reasonable diligence were exercised; at the said meeting of directors, the defendants \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, constituting the majority of the entire board of directors, after being informed of the facts herein set forth, and after a motion had been made by \_\_\_\_\_, as director, that the property be sold to the highest bidder, who should submit a bid on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ in excess of the amount at which the stockholders had authorized a sale, passed a resolution of said board directing and affirming a previously unauthorized sale alleged to have been made by the president, the defendant, \_\_\_\_\_, for the sum of \_\_\_\_\_ dollars, to the bidder hereinbefore referred to; the said directors voted for said resolution knowing that a higher bid was actually in the hands of the officers of the corporation before such bid had been accepted, and knowing or having reason to believe that reasonable diligence would have resulted in obtaining a still higher bid for the assets of said corporation, and in voting for said resolution and in the various transactions leading up thereto, said directors were guilty of bad faith, malfeasance, breach of their trust as trustees of the corporation and negligence, and said corporation and its stockholders have sustained damage in large sums of money on account of such malfeasance, bad faith, breach of trust and negligence on the part of said defendant.

6. The plaintiff has no adequate remedy at law.

7. This action is brought by plaintiff, rather than by defendant, \_\_\_\_\_ company, without first making a formal demand upon said corporation to bring said action, for the reason that said corporation is in the control of defendants, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ who are liable for the acts hereinbefore set forth and demand upon said corporation to bring the action would therefore be futile.

WHEREFORE, plaintiff prays judgment of this court that the defendants,  
\_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ be  
individually charged with the loss to said corporation due to the malfeasance, bad faith, breach  
of trust and negligence herein set forth; that the amount of such loss be determined and that a  
judgment be entered directing the payment of said amount for the benefit of said  
\_\_\_\_\_ company; that provision be made for reimbursement to said  
\_\_\_\_\_ company to plaintiff for the expenses of this action, including  
counsel fees, and such other and further relief in the premises be granted as shall be just and  
equitable.

[Endorsement, address, telephone number, and verification.]

## Form 32

### Complaint in Action by Stockholder of Corporation Against Directors Who Entered into an Alleged Contract for Personal Gain

[Caption and introductory paragraph]

1. At all the times mentioned herein the defendant, \_\_\_\_\_ corporation  
was, and now is, a domestic corporation duly organized and existing under the laws of the State  
of New York.

2. At all the times mentioned herein the defendant \_\_\_\_\_ ice corporation  
was, and now is, a domestic corporation duly organized and existing under the laws of the State  
of New York.

3. The \_\_\_\_\_ ice corporation was organized on the \_\_\_\_\_ day of  
\_\_\_\_\_, 20\_\_\_\_\_, for the purpose of engaging in the independent  
manufacture and sale of ice in the City of \_\_\_\_\_, County of  
\_\_\_\_\_ and State of New York.

4. The capital of said \_\_\_\_\_ ice corporation consists of \_\_\_\_\_ shares of preferred stock of the par value of the sum of \_\_\_\_\_ dollars per share and \_\_\_\_\_ shares of common stock of the par value of the sum of \_\_\_\_\_ dollars per share.

5. The directors of said corporation are: \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_.

6. The officers of said corporation are: \_\_\_\_\_, President, \_\_\_\_\_, Vice President, \_\_\_\_\_, Treasurer, \_\_\_\_\_ Secretary.

7. Plaintiff is the owner of \_\_\_\_\_ shares of the preferred stock and \_\_\_\_\_ shares of the common stock of said corporation for which he paid the sum of \_\_\_\_\_ dollars.

8. The said corporation, after incorporation, purchased the necessary land and proceeded with the erection of a modern ice making plant which plant was ready for operation and did begin operation on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

9. The business from its very inception was successful and the business of the corporation was conducted during the years of 20\_\_\_\_\_ and 20\_\_\_\_\_ as an independent manufacturer and seller of ice in accordance with the purposes for which the said corporation was organized.

10. In the year 20\_\_\_\_\_, the operations of the corporation resulted in the gross profit of approximately the sum of \_\_\_\_\_ dollars.

11. The largest manufacturer of ice in the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York is the defendant, \_\_\_\_\_ corporation who controls and regulates the wholesale price at which

ice is generally sold in the City of \_\_\_\_\_, County of \_\_\_\_\_.

12. The said defendant, \_\_\_\_\_ corporation, has a virtual monopoly and control of the ice business in the City of \_\_\_\_\_, County of \_\_\_\_\_ and State of New York in restraint of trade.

13. In maintaining such virtual monopoly said \_\_\_\_\_ corporation from time to time has purchased the plants or the outputs of plants in the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York, and by threat or improper competition in its own territory has succeeded in keeping manufacturers in other vicinities from selling ice for retail sale in the City of \_\_\_\_\_, County of \_\_\_\_\_ and State of New York.

14. Upon the organization of said defendant, \_\_\_\_\_ ice corporation, the said defendant, \_\_\_\_\_ corporation, attempted to interfere with the business of the said defendant, \_\_\_\_\_ ice corporation, by hampering and impeding its customers in their business and by unfair and unlawful competition attempted to destroy the business of such customers of said \_\_\_\_\_ ice corporation.

15. The defendant, \_\_\_\_\_ corporation, in its plan or scheme to maintain a monopoly in the manufacture and sale of ice in the City of \_\_\_\_\_, County of \_\_\_\_\_ and State of New York, sought to compel the said \_\_\_\_\_ ice corporation to sell its output of ice to the said \_\_\_\_\_ corporation and upon the refusal of said \_\_\_\_\_ ice corporation to do so, the said \_\_\_\_\_ corporation dropped the wholesale price to \_\_\_\_\_ +42 per cake on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

16. Thereafter the defendant, \_\_\_\_\_ corporation, acting through its agents and servants induced certain directors and officers of the \_\_\_\_\_ ice



corporation to negotiate for the sale by said \_\_\_\_\_ ice corporation for certain specific quantities of ice to the said \_\_\_\_\_ corporation upon the condition that the said ice corporation shall not manufacture and sell ice to any other person or firm.

17. Although the output of ice of the said \_\_\_\_\_ ice corporation is about \_\_\_\_\_ tons per year despite the fact that in the year of 20\_\_\_\_\_, the said \_\_\_\_\_ ice corporation was compelled to purchase additional ice over and above its maximum output to supply the demands of its customers, the said \_\_\_\_\_ corporation induced certain of the directors and officers of the said \_\_\_\_\_ ice corporation to negotiate for the manufacture and sale only of \_\_\_\_\_ tons to the said \_\_\_\_\_ corporation.

18. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, a meeting of the board of directors of the \_\_\_\_\_ ice corporation was held at which meeting 12 directors were present and at which a resolution was passed by a vote of 9 to 3 consenting to an agreement for the sale of ice by the said \_\_\_\_\_ ice corporation to the said \_\_\_\_\_ corporation and no other.

19. The said \_\_\_\_\_ corporation is the owner of many ice plants in the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York which are not being operated for the reason that the said \_\_\_\_\_ corporation has made and is making sufficient ice for its needs and demands and that its desire to purchase the output of the \_\_\_\_\_ ice corporation is in keeping with its plan to control all of the ice manufactured and sold in the City of \_\_\_\_\_, County of \_\_\_\_\_ and State of New York and to regulate and control the price thereof in an unlawful restraint of trade.

20. The vote of said 9 directors in favor of the proposition to sell ice only to the said corporation and to discontinue the sale of ice to its present customers was not made in good faith nor out of regard for the best interest of the said \_\_\_\_\_ ice corporation but was made

fraudulently, in bad faith and pursuant to promises made by the defendant \_\_\_\_\_ corporation to give to the said 9 directors certain personal gifts, considerations and remunerations.

21. It is the duty of said defendants as such directors, to administer honestly, diligently and carefully the affairs of said corporation; to act fairly and honestly in connection with the corporation and its property; and in dealing with the corporation themselves to act fairly and honestly and without undue advantage being taken of this corporation and to faithfully and diligently perform all other duties devolving upon them as directors of said corporation.

22. The said 9 directors have entered or have threatened to enter into a contract or agreement with the said \_\_\_\_\_ corporation for the sale of ice exclusively to the said \_\_\_\_\_ corporation for their own individual profit and benefit absolutely disregarding the rights of other stockholders of the said \_\_\_\_\_ ice corporation and solely for the purpose of obtaining for themselves personally the benefits and advantages promised to them by the said \_\_\_\_\_ corporation through its officers and agents as a reward for voting in favor of the making of said contract.

23. The said 9 directors are not administering the affairs of the said \_\_\_\_\_ ice corporation in an honest, careful and prudent manner but on the contrary are negligently permitting and suffering its business and assets to be wasted and squandered, and loss will be occasioned to the said \_\_\_\_\_ ice corporation by such acts or threatened acts of the said 9 directors.

24. In the event such acts are committed before the trial of this action, the amount of such loss will not be capable of determination without an accounting.

25. The plaintiff has no adequate remedy at law.

26. The plaintiff and \_\_\_\_\_, who is also a director, vice-president and stockholder, objected and still do object to such contract of sale to said \_\_\_\_\_.

27. The \_\_\_\_\_ ice corporation is named as a defendant but merely nominally so inasmuch as the said 9 individual directors have assumed to act for it.

28. The plaintiff is suing herein individually and also in his capacity as a director and as the owner of preferred and common stock, on his own behalf as well as on behalf of all others similarly situated.

WHEREFORE, plaintiff prays for judgment that the defendants be enjoined and restrained from proceeding and continuing their acts and threatened acts in relation to the proposed contract with the said \_\_\_\_\_ corporation; the said defendants be enjoined and restrained from continuing the acts or threatened acts of waste herein complained of permanently; such damages sustained by the plaintiff and all others similarly situated by reason of the matters and things herein stated may be ascertained and determined and the defendants be directed to pay the damages; and the plaintiffs have such other and further relief as may be just and proper together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

### **Form 33**

#### **Complaint in Action by Stockholder Against Corporation and Directors Where the Directors Personally Received Money to Sell Corporate Property**

[Caption and introductory paragraph]

1. The plaintiff is, and at all the times hereinafter stated was, a stockholder of record of the defendant \_\_\_\_\_ corporation, and he sues on behalf of himself and all other stockholders of said defendant, who shall, in due time come in and seek relief by, and contribute to the expense of this action.

2. At all times hereinafter mentioned the defendant, \_\_\_\_\_ corporation was, and still is a domestic corporation duly organized and existing under the laws of the State

of New York and was at all times hereinafter stated engaged in the manufacture and selling of toys.

3. The defendants, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, are, and at all times hereinafter stated were, the executive officers and directors of the said \_\_\_\_\_ corporation and do, and at all times hereinafter stated did, constitute a majority of its board of directors.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant, \_\_\_\_\_ corporation, was the owner in fee of all that piece or plot of land situate, lying and being in the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York, bounded and described as follows: [set forth full legal description of fee].

5. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant \_\_\_\_\_ corporation, was erecting upon said premises, a building to be used for the manufacture of toys.

6. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant \_\_\_\_\_ corporation, entered into a written agreement, for the sale, to one, \_\_\_\_\_, of the premises as described above, the building then in the course of construction thereon, together with the contract for the purchase of machinery, the exclusive right to use the name, \_\_\_\_\_ corporation, the good will of said corporation, of its business, and of the business of the said corporation as a going concern and all other property, real or personal, tangible, or intangible, owned by the said corporation wheresoever situate for the sum of \_\_\_\_\_ dollars.

7. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and prior to the making of the contract as described above, negotiations were had between the defendant \_\_\_\_\_ corporation, and the said purchaser; the said negotiations on behalf of the defendant, \_\_\_\_\_ corporation, were conducted by the said individual

defendants who, as hereinabove stated, were at the time, the officers and directors of said corporation.

8. Said defendants, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, in violation of their duties as directors and officers of the defendant corporation, prior to the making of the contract aforesaid between said defendant, \_\_\_\_\_ corporation, and said \_\_\_\_\_, demanded that said \_\_\_\_\_ [purchaser] should pay to the said defendants personally the sum of \_\_\_\_\_ dollars in cash as a condition for the sale of premises and building thereon by said defendant, \_\_\_\_\_ corporation, to said \_\_\_\_\_ [purchaser]; and the contract of purchase and sale was made and entered into between the defendant, \_\_\_\_\_ corporation and said \_\_\_\_\_ [purchaser], only upon the promise of the said \_\_\_\_\_ [purchaser] to pay to said defendants individually the sum of \_\_\_\_\_ dollars in cash upon and after the conveyance of the title to said property.

9. Thereafter and pursuant to the contract aforesaid the premises, the building thereon, together with all of the aforementioned property, real or personal, tangible or intangible, were duly conveyed to the said \_\_\_\_\_ [purchaser] by the defendant, \_\_\_\_\_ corporation, and said defendant, \_\_\_\_\_ corporation, received the sum of \_\_\_\_\_ dollars and at the same time the defendants \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, fraudulently, unlawfully and illegally, in violation of their duties as officers and directors of said corporation, personally received from said \_\_\_\_\_ [purchaser] the sum of \_\_\_\_\_ dollars, in cash, which sum they have retained for their own use and benefit, no part of which was paid over to the defendant, \_\_\_\_\_ corporation.

10. The plaintiff demanded of the defendant, \_\_\_\_\_ corporation, through its officers and board of directors that it commence an action against the defendants for the wrongful acts committed as aforesaid, and for the relief herein sought, but the defendant, \_\_\_\_\_ Corporation refused, failed and unreasonably neglected so to do.

11. The plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff demands judgment as follows:

1. The defendants and each of them be compelled to account and pay over any funds or moneys, with interest thereon, received by them and each of them for and on account of the sale of the property herein described to \_\_\_\_\_.

2. Defendant be compelled to pay to the defendant, \_\_\_\_\_ Corporation, for the benefit of the corporation and stockholders, any damage, money and/or the value of any property which said defendants had acquired for themselves, jointly or severally, or transferred to others or lost or wasted, by the aforesaid violation of their duties and obligations.

3. Plaintiff have such other and further relief in the premises as to this court may seem just, proper and equitable, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 34**

### **Complaint in Action for Conversion by a Corporation Against an Officer of the Corporation**

[Caption and introductory paragraph]

1. [Allege character of plaintiff corporation.]

2. At all times herein mentioned the defendant was the \_\_\_\_\_ [title of office] of plaintiff Corporation and one of the directors of it.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant acting as the \_\_\_\_\_ of the plaintiff corporation received and collected from one \_\_\_\_\_ the sum \_\_\_\_\_ dollars which sum of money belonged to the plaintiff and the defendant wrongfully and unlawfully converted the money to his own use.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff duly demanded that the defendant pay the sum of \_\_\_\_\_ dollars to the plaintiff but no part of said sum has been paid to the plaintiff.

[Demand for judgment, Endorsement, address, telephone number, and verification.]

## **Form 35**

### **Complaint in Action Against Stockholder for Debt Due Employee of Corporation**

[Caption and introductory paragraph]

1. At all the times hereinafter mentioned, \_\_\_\_\_ was and still is a corporation created by and existing under the laws of the State of New York.

2. At all the times hereinafter mentioned and within two years prior to the commencement of this action the defendant herein was and still is a stockholder of said \_\_\_\_\_ company, holding stock therein to the amount \_\_\_\_\_ dollars, being \_\_\_\_\_ shares of the par value \_\_\_\_\_ dollars each.

3. Between \_\_\_\_\_, 20\_\_\_\_\_, and \_\_\_\_\_, 20\_\_\_\_\_, plaintiff performed certain work, labor and services for said company as an employee thereof, to wit \_\_\_\_\_ [state the nature of the services performed], which services were reasonably worth and for which said \_\_\_\_\_ company agreed to pay the sum of \_\_\_\_\_ dollars. Said services were performed within two years next preceding the date when said debt became due and said debt was to be paid within two years from the date it was contracted.

4. Thereafter, on \_\_\_\_\_, 20\_\_\_\_\_, and within two years after said debt became due, an action was brought in the \_\_\_\_\_ court of the State of New York, by the said plaintiff to recover the amount from said \_\_\_\_\_ company, and said plaintiff duly obtained a judgment against said company for \_\_\_\_\_ dollars, being \_\_\_\_\_ dollars, the amount of said debt, with \_\_\_\_\_ dollars interest thereon from \_\_\_\_\_, and \_\_\_\_\_ dollars, the costs of said action, which judgment was duly entered and docketed in the office of the clerk of the County of \_\_\_\_\_ on \_\_\_\_\_, 20\_\_\_\_\_.

5. Execution on said judgment against the property of said \_\_\_\_\_ company was thereafter duly issued to the sheriff of the County of \_\_\_\_\_, and has been returned by said sheriff wholly unsatisfied.

6. Thereafter and within thirty days after the return of said execution unsatisfied, this action was commenced.

7. On or about \_\_\_\_\_, 20\_\_\_\_\_, and within thirty days after the termination of the aforesaid services, plaintiff duly gave defendant notice in writing that he intended to hold the defendant liable for such debt.

WHEREFORE, the plaintiff demands judgment against the defendant for the sum of \_\_\_\_\_ dollars with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

**Form 36**

**Complaint in Action by Trustee in Bankruptcy of a Corporation for Unpaid Balance of  
Stock Subscription**



[Caption and introductory paragraph]

1. At all the times mentioned herein the \_\_\_\_\_ Corporation was, and now is, a domestic corporation duly organized and existing under the laws of the State of New York.

2. The said \_\_\_\_\_ Corporation was duly organized and created under and by virtue of the Stock Corporation Law of the State of New York and the General Corporation Law of the State of New York and duly paid all taxes and performed every other act and thing whatsoever necessary to authorize it to transact business as a corporation under the laws of the State of New York, and in all respects complied with all the provisions of said laws.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said \_\_\_\_\_ Corporation duly filed a voluntary petition in the United States District Court for the \_\_\_\_\_ District of New York, in bankruptcy, and thereupon the said \_\_\_\_\_ Corporation was by said District Court duly and regularly adjudicated a bankrupt within the purview of the acts of Congress relating to bankruptcy.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the above named plaintiff, \_\_\_\_\_, was duly appointed a trustee in bankruptcy by said District Court of the said \_\_\_\_\_ Corporation and thereupon and before the commencement of this action duly qualified as such trustee, filed his official oath and bond and was duly approved and entered upon the discharge of his duties as such trustee and is still acting as such trustee.

5. In order to pay the indebtedness of the said \_\_\_\_\_ Corporation and settle said estate, said plaintiff must collect the assets of said \_\_\_\_\_ Corporation and convert the assets of the corporation into money for that purpose, and among which assets is the stock subscription hereinafter mentioned.

6. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, an order was granted in the United States District Court for the \_\_\_\_\_ District of New

York authorizing, permitting and empowering this plaintiff to collect all outstanding assets of said bankrupt and convert the assets into money, and authorizing, permitting and empowering this plaintiff to bring this action.

7. The whole of the capital stock of said \_\_\_\_\_ Corporation had not been subscribed for at the time of filing the certificate of incorporation, and immediately after the incorporation of said \_\_\_\_\_ Corporation the directors of said corporation duly opened books of subscription to fill up the capital stock and continue to receive subscription for the capital stock of said corporation, until about the month of \_\_\_\_\_, 20\_\_\_\_\_.

8. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said defendant duly subscribed for \_\_\_\_\_ shares of the capital stock of said \_\_\_\_\_ Corporation of the par value of \$\_\_\_\_\_ per share, and thereupon made, executed and delivered to the said \_\_\_\_\_ Corporation a written subscription for said stock, of which the following is a copy: [set out the subscription].

9. At the time of the making, execution and delivery of said subscription to the capital stock by the said defendant, or immediately thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant duly paid to the said \_\_\_\_\_ Corporation the sum of \$\_\_\_\_\_ in cash, being 10% of the amount so subscribed by him as aforesaid.

10. No part of the said purchase price of the capital stock has been paid, except the sum of \$\_\_\_\_\_, and there is now due, owing and payable from the defendant for the purchase price of the capital stock the sum of \$\_\_\_\_\_, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

11. Prior to the commencement of this action the plaintiff duly demanded of the defendant the balance of the purchase price of the capital stock so subscribed for and purchased by the defendant and the defendant has neglected and refused to pay the amount, or any part thereof.

12. By reason thereof there is now due, owing and payable from said defendant to the plaintiff the sum of \$\_\_\_\_\_, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

[Demand for judgment, endorsement, address, telephone number, and verification.]

### Form 37

#### **Complaint in Action by Creditor of Dissolved Corporation to Recover on Stockholders' Liability for Unpaid Stock Subscription**

[Caption and introductory paragraph]

1. At all the times hereinafter mentioned, and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, \_\_\_\_\_ was a stock corporation duly organized and existing under and by virtue of the laws of the State of New York; its authorized capital stock was \_\_\_\_\_ dollars, of which on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, there was issued and outstanding capital stock of the par value \_\_\_\_\_ dollars. Upon such issued and outstanding capital stock, there was unpaid on said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and has ever since remained unpaid and is still unpaid the sum of at least \_\_\_\_\_ dollars.

2. Heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said corporation, by \_\_\_\_\_, Treasurer, made a certain promissory note in writing bearing the date of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, wherein and whereby for value received, the said corporation promised to pay to the order of the plaintiff the sum of \_\_\_\_\_ dollars, with interest thereon \_\_\_\_\_ months after date, at \_\_\_\_\_ [state where note was to be paid], and delivered the amount to the plaintiff, who then became and is still the owner and holder thereof.

3. Thereafter and when the promissory note by the terms thereof became due and payable, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the note was duly presented for payment at \_\_\_\_\_, where the note was payable, but the note was not paid.

4. No part of said note has been paid except the sum of \_\_\_\_\_ dollars to apply thereon; although frequently requested so to do, the \_\_\_\_\_ Corporation has neglected and refused to pay any portion of the balance thereon, leaving still due and unpaid to the plaintiff herein the sum of \_\_\_\_\_ dollars with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

5. Thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and within two years after said debt became due and payable, a final judgment was rendered, in a proceeding for its dissolution brought by a majority of the directors of said corporation in the Supreme Court of the State of New York, dissolving the corporation and forfeiting its corporate franchise, appointing a permanent receiver therefor, and permanently enjoining and restraining the creditors of the corporation from instituting or prosecuting any action against it. All the property of the corporation is insufficient in value to pay the costs and disbursements of the proceeding for its dissolution.

6. At all the times herein mentioned and up to the date of the final dissolution of the corporation, the defendant, \_\_\_\_\_, was a stockholder of the corporation and the owner and holder of \_\_\_\_\_ shares of its stock of the par value of \_\_\_\_\_ dollars, on which was and still is unpaid the sum of \_\_\_\_\_ dollars; [continue with similar allegations as to each defendant].

7. By reason of the premises, the defendants are liable to the plaintiff in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Complaint in Action by Corporation on Subscription to Stock for Amount Unpaid on Subscription**

[Caption and introductory paragraph]

1. The plaintiff is a domestic corporation duly incorporated under the laws of the State of New York.

2. The capital stock of said corporation was fixed by its certificate of incorporation at the sum of \_\_\_\_\_ dollars, divided into \_\_\_\_\_ shares of common stock of the par value \_\_\_\_\_ dollars each.

3. The defendant, \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, subscribed for and agreed to take \_\_\_\_\_ shares of said \_\_\_\_\_ stock, and to pay therefor the sum of \_\_\_\_\_ dollars payable as follows: \_\_\_\_\_, which subscription was duly accepted and agreed to by the plaintiff.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, by resolution duly adopted by the board of directors of said plaintiff, it was determined that an installment of \_\_\_\_\_ dollars per share should be paid in by the subscribers to stock, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, of which resolution a copy is hereto annexed, marked Exhibit "A", and made a part of this complaint.

5. Thereafter, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff duly notified the defendant of the said call by duly mailing to him postpaid and properly addressed to his then post office address and place of residence, a copy of said resolution and a call upon him to pay said installment within the time limited at \_\_\_\_\_.

6. The plaintiff on its part has duly performed all the conditions and requirements of said agreement of subscription on its part to be performed.

7. Defendant has paid no part of said sum of \_\_\_\_\_ dollars, and more than 60 days have elapsed since said notice was given.

[Demand for judgment, endorsement, address, telephone number, and verification.]

### Form 39

#### Complaint in Action on Stock Subscription Made Prior to Incorporation

[Title of court and cause]

Complaint

Index No. \_\_\_\_\_

[Introductory paragraph]

1. That the plaintiff now is and ever since on or about the \_\_\_\_\_ day of \_\_\_\_\_ has been a domestic corporation, organized and existing under the laws of the state of New York.

2. That prior to, and in contemplation of, the said incorporation of plaintiff the defendant, together with other persons, on or about the \_\_\_\_\_ day of \_\_\_\_\_ at the village of \_\_\_\_\_ in the county of \_\_\_\_\_, became a subscriber to the stock of the plaintiff by signing and delivering an agreement in writing, where for the purpose of organizing a company and building a railroad connecting with the \_\_\_\_\_ at \_\_\_\_\_ running east by way of \_\_\_\_\_, and \_\_\_\_\_, the said defendant did subscribe for and become a subscriber to the stock of the plaintiff and did set opposite his name the sum of \_\_\_\_\_ dollars, which he thereby agreed to pay to said company for ten shares of its capital stock, and said subscription of the defendant was immediately upon the organization of said company duly transferred to the regular books of the company of which defendant had due notice.

3. That on or about the \_\_\_\_\_ day of \_\_\_\_\_ the plaintiff having fully and duly complied with the provisions of Chapter 49 of the Consolidated Laws of the state of New York known as the Railroad Law, filed and had recorded in the office of the Secretary of State of

the state of New York a certificate of incorporation in due form and on the \_\_\_\_\_ day of \_\_\_\_\_ filed and had recorded in the office of the clerk of the county of \_\_\_\_\_, that being the county in which the office of the corporation is located, a duplicate original of such certificate.

That upon application thereafter duly made to the Public Service Commission of the state of New York, the said commission duly made a certificate and duly certified under the provisions of § 9 of the Railroad Law that the conditions of said section had been fully complied with by the plaintiff, the \_\_\_\_\_, and that public convenience and necessity require the construction of the railroad as proposed in the Articles of Incorporation of the plaintiff, which certificate was made on the \_\_\_\_\_ day of \_\_\_\_\_, and thereafter on the \_\_\_\_\_ day of \_\_\_\_\_, filed in the office of the Secretary of State of the state of New York, and that the plaintiff has in all respects fully complied with the statutes in reference to the organization and incorporation of railroad companies in the state of New York, and heretofore and during the year \_\_\_\_\_ proceeded with the work of constructing and building its railroad pursuant to its said Articles of Incorporation.

4. That the plaintiff by resolution of its directors, duly passed at a regular meeting thereof held on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ in said \_\_\_\_\_, duly required the said defendant to pay on his said subscription to the treasurer of the plaintiff, on the \_\_\_\_\_ day of \_\_\_\_\_, the sum of \_\_\_\_\_ dollars and thereafter the plaintiff by resolution duly passed by its said directors at a regular meeting held on or about the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ aforesaid, duly required the defendant to pay on his said subscription to the treasurer of the plaintiff, the sum of \_\_\_\_\_ dollars and the further sum of \_\_\_\_\_ dollars on the \_\_\_\_\_ day of \_\_\_\_\_ on his said subscription to the treasurer of the plaintiff agreeable to said subscription and the charter and bylaws of the company, and that thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_ the plaintiff by resolution of its directors duly passed at a regular meeting

held on said \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_  
aforesaid, duly required the defendant to pay on his said subscription to the treasurer of the  
plaintiff, the sum of \_\_\_\_\_ dollars agreeable to said subscription and the charter and  
bylaws of the company.

That the plaintiff has duly performed all the conditions of said subscription on its part and duly  
notified the defendant of each of said assessments and demanded that he pay the  
assessments.

That thereafter, prior to the commencement of this action, and on or about the  
\_\_\_\_\_ day of \_\_\_\_\_ the plaintiff duly offered and  
tendered to the defendant the certificate of the plaintiff for ten shares of the capital stock of the  
plaintiff of the sum of \_\_\_\_\_ dollars in value for each share on condition that he pay  
the plaintiff therefor the said sum of \_\_\_\_\_ dollars and then and there duly  
demanded that he pay the plaintiff the said sum of \_\_\_\_\_ dollars and take such  
certificate, which the defendant refused to, and then and there duly notified the defendant that  
said certificate would be left in the hands of the treasurer of the plaintiff at this place of business  
in the village of \_\_\_\_\_, where the defendant could get the certificate at any  
time on payment to said treasurer of said sum of \_\_\_\_\_ dollars. But that no part of  
said sum of \_\_\_\_\_ dollars has been paid by the defendant.

[Prayer for relief]

[Signature, with name printed underneath]

[Endorsement, telephone number,

office, and post-office address

of plaintiff's attorney]

[Verification by officer of corporation]



**Complaint in Action by Purchaser of Business of Corporation to Enforce Agreement of Stockholders Not To Compete**

[Caption and introductory paragraph]

1. On or about \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_\_ X Corp., a corporation organized under the laws of this State, and engaged in the business of \_\_\_\_\_ at \_\_\_\_\_ [where its principal office was] and in the City of \_\_\_\_\_ with the knowledge and consent and by the procurement of its officers, directors and stockholders, including the defendant \_\_\_\_\_ who was a stockholder and director and the secretary of the said company, sold and delivered to A. B., and the said A. B. purchased and took its plant, property and business, and the good will of its business in consideration of the sum of \_\_\_\_\_ dollars, then and there paid by the said A. B. to the said X Corp. for its benefit and for the benefit of and for distribution among its several stockholders, including defendant; and the said consideration so received by the X Corp. was applied to the benefit of and distributed among its stockholders, including defendant \_\_\_\_\_

2. As an inducement to the said A. B. to purchase the said plant, business, property and good will of X Corp., and in consideration of such purchase and payment by him, and as part and parcel of the same, delivery and purchase thereof, X Corp., under its corporation seal, and the defendant \_\_\_\_\_ and all the other stockholders of X Corp., under their respective hands and seals, executed and delivered an agreement with the said A. B. in the manner and form following, to wit:

"This instrument witnesseth: That A. B. has purchased the plant, business property and good will of the business of X Corp., and has paid therefor the sum of \_\_\_\_\_ dollars; that in making said transfer, and as an inducement to said A. B. to purchase said plant, business and good will and pay the sum aforesaid for the same, we each have agreed that we would not and we now do agree, each for himself, jointly and severally with him, the said A. B., his heirs and assigns forever, that we will not, during the next \_\_\_\_\_ years in the territory or the

immediate vicinity of the territory dealt in by our company or occupied by ourselves, or the agents or employees of the company, engage or in any manner be interested in either directly or indirectly for ourselves, or for others, the same, or a like kind or character of business as that heretofore conducted and now being carried on by the said company, its officers, agents, employees and assigns, and that we will not during said period of \_\_\_\_\_ years, either directly or indirectly, be guilty of any act interfering with the business, its good will, its trade or its customers, or come in competition with the same, and we will not jointly or severally either in firms or corporations or as individuals or in any other way, directly or indirectly, interfere with the said trade or business, or do any acts prejudicial to the same or any part thereof, or interference with the persons employed therein, the meaning hereof being that the said A. B. is buying and paying for the good will of this business in the largest and fullest scope of the term and that we will not, and each agrees that he will not do anything to interfere with or injure the said business, but will during the said period lend his aid and best influence to the promotion and advancement of the same.

"In witness whereof, we hereunto subscribe our names and affix our seals jointly and severally this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_."

3. The territory dealt in or operated by X Corp. and by its agents and employees included, among other places, the City of \_\_\_\_\_ and the City of \_\_\_\_\_ and the neighboring cities, villages, towns and country districts.

4. Thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the said A. B. sold, assigned, transferred and delivered to this plaintiff, the said plant, property, business and good will of X Corp., and the said agreement made by X Corp. and its stockholders, and all his right, title and interest in and under the said agreement; and this plaintiff entered upon and has ever since occupied and used the plant and property, business and good will formerly of X Corp., and has carried on the trade and business which X Corp. formerly carried on, and the said property, trade, business and good will were and are of great value. Among other property of X Corp. so sold and transferred by it to A. B., and by him

to this plaintiff, is the lease of the store number \_\_\_\_\_ street, City of \_\_\_\_\_, where the said company had previously carried on its business. This plaintiff went into possession and occupation of the said store upon the transfer and assignment aforesaid from A. B., and has ever since occupied and still occupies the same for the transaction of its business; and placed the store and its \_\_\_\_\_ business in \_\_\_\_\_ in the charge and management of the defendant \_\_\_\_\_ who had previously been employed at the same place by X Corp. as its agent and the manager of its business in the City of \_\_\_\_\_ and constituted him this plaintiff's agent, and the manager of its business there under a contract by which this plaintiff employed him and he agreed to serve this plaintiff in the capacity aforesaid by the year at a stipulated yearly salary. The said contract was renewed for the year commencing the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and he continued in this plaintiff's service until the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, when, in violation of his said agreement, he left this plaintiff's service for the furtherance of the objects hereinafter stated.

5. Y Corp. is a domestic corporation organized under the laws of the State of New York, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_. Its corporate objects, as stated in its certificate of organization, are \_\_\_\_\_. Its principal office is located in the County of \_\_\_\_\_, the incorporators and directors are the defendant \_\_\_\_\_, who is a subscriber for \_\_\_\_\_ shares of the company's stock, and its president; \_\_\_\_\_, who is a subscriber for \_\_\_\_\_ shares of the company's stock, and is its secretary and treasurer; \_\_\_\_\_, who resides at \_\_\_\_\_, and is a subscriber for \_\_\_\_\_ shares of the company's stock; \_\_\_\_\_, who resides at \_\_\_\_\_, and is a subscriber for \_\_\_\_\_ shares.

6. The incorporators of Y Corp. were induced by the defendant \_\_\_\_\_ to unite with him in organizing it for the purpose and with the intent of enabling him in conjunction with the other incorporators through the instrumentality of the corporate organization of the company, to engage or be interested in the same kind of business as that formerly conducted, and in \_\_\_\_\_, 20\_\_\_\_\_, carried on by X Corp., its officers, agents and employees, in the territory and the immediate vicinity of the territory dealt in by that company and operated in by the said \_\_\_\_\_ and other agents and employees of that company; and for the purpose and with the intent of interfering with the business sold and transferred by the X Corp. to A. B., and by him sold and transferred to this plaintiff, and thenceforth carried on by this plaintiff, as aforesaid; and of obtaining for themselves the benefit of its good will, its trade and its customers; and of competing with this plaintiff for the trade and customers; and of interfering with the persons employed therein; and of using their interests to the detriment and disadvantage of this plaintiff by taking away this plaintiff's trade and enjoying it themselves; of which intent and purpose, and of all the facts herein stated, \_\_\_\_\_, and the other defendants, had notice and knowledge. The organization of Y Corp. is a mere device to enable the defendant \_\_\_\_\_, more conveniently, with the aid and cooperation of the other defendants, to do the several things herein set forth in violation of his said agreement with A. B. and so the said defendants well knew and intended.

7. In furtherance of the purpose and intent aforesaid the defendant \_\_\_\_\_ enticed and persuaded the defendant \_\_\_\_\_ to break his said contract of employment with this plaintiff and to desert this plaintiff's service and to join with him in forming Y Corp. The defendants \_\_\_\_\_ and \_\_\_\_\_ severally and together enticed and persuaded four other employees of this plaintiff, being all but three of the employees at its said store in the City of \_\_\_\_\_, to desert its employment and enter the service of the said Y Corp. The defendant \_\_\_\_\_, directly by himself and indirectly through the agency and instrumentality and the aid, assistance and cooperation of Y Corp., and of the other defendants

above named, and the said company and the said defendants, have opened and occupied a store at No. \_\_\_\_\_, \_\_\_\_\_ street, in the City of \_\_\_\_\_, which is on the same block as this plaintiff's store, and at that store and in other places in the City of \_\_\_\_\_ carry on the business of \_\_\_\_\_; and have solicited and persuaded customers of this plaintiff to deal with Y Corp. and have bought from and sold to persons who would otherwise have dealt with this plaintiff, and with persons who prior to the \_\_\_\_\_ day of \_\_\_\_\_, were customers of and dealt with X Corp.

8. The defendant \_\_\_\_\_ and the Y Corp., and the other defendants above named, aiding, assisting, and cooperating with him, at the City of \_\_\_\_\_, and in the same territory, on and prior to the \_\_\_\_\_ day of \_\_\_\_\_, dealt in by X Corp., and operated in by the said company, and by its agents and employees, have engaged and are now engaged and interested in the same or a like kind or character of business as that on and prior to the \_\_\_\_\_ day of \_\_\_\_\_, conducted and carried on by X Corp., its officers, agents and employees. They have interfered with the business so as aforesaid sold and transferred by X Corp., its good will, its trade and its customers, and have come into competition with the business, and have interfered with the persons employed therein, to the prejudice thereof and the injury of this plaintiff, and have not lent their aid or influence to the promotion and advancement of this plaintiff's business. By the wrongful acts of the defendants \_\_\_\_\_ and the other defendants aiding, assisting and cooperating with him as herein set forth, this plaintiff has sustained damage to the amount of \_\_\_\_\_ dollars.

9. The defendants threaten and intend, and unless restrained by this court, will continue to do the various matters and things in contravention of the said agreement made the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, hereinbefore set forth, to the great and irreparable injury of this plaintiff, for which it has no adequate remedy by actions for damages,

and is without adequate remedy unless through the exercise of the equitable powers of this court.

WHEREFORE this plaintiff demands judgment that the defendant \_\_\_\_\_ specifically perform his agreement made the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, with A. B. as aforesaid; and that he, his agents, servants and employees, and the several defendants above named and each of them, their agents, employees and servants, be enjoined and restrained during the full and complete term of \_\_\_\_\_ years next ensuing from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, from engaging or in any manner being interested, directly and indirectly, for themselves or for others, in the City of \_\_\_\_\_, or in the immediate vicinity of, any territory on or prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, dealt in or operated in by X Corp. or the defendant \_\_\_\_\_, or the agents or employees of X Corp., in \_\_\_\_\_, or dealing in any manner of \_\_\_\_\_ products; and from engaging in, or any manner being interested in, as aforesaid, any other kind or character of business the same as or like that conducted and carried on by X Corp., on and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, or by its officers, agents, employees or assigns; and from soliciting or inviting other persons to buy from or sell to or otherwise deal with them, and from interfering with the business formerly conducted by X Corp., and by it sold, assigned and transferred to A. B., its good will, its trade or its customers; and from coming in competition with this plaintiff's business in the City of \_\_\_\_\_, or the territory aforesaid; and from interfering in any other way, directly or indirectly, with the said trade or business; and from doing any act prejudicial to the business or any part thereof; and from enticing from the service of this plaintiff, or otherwise interfering with, the persons employed therein; and from using their aid or influence in regard to this plaintiff's said trade or business otherwise than for the promotion and advancement of the same; and that the said defendants, their agents, servants and employees, be so enjoined and restrained during the pendency of this action; and that this plaintiff recover of the said defendants \_\_\_\_\_ dollars, and such other damages as they shall have sustained up

to the trial of this action, and have such other or further relief as it may be entitled to, and the costs of this action.

[Endorsement, address, telephone number, and verification.]

## Form 41

### **Complaint in Action Against Controlling Stockholder to Compel Payment of Judgment Against the Corporation on Debt Which He Orally Guaranteed**

[Caption and introductory paragraph]

1. Upon information and belief, \_\_\_\_\_ (hereinafter referred to as “the corporation”) is a domestic corporation duly organized in \_\_\_\_\_  
20\_\_\_\_\_ by the defendant, A, and one \_\_\_\_\_ and others for the purpose of holding and handling their real properties. The authorized capital stock of the corporation was \_\_\_\_\_ dollars. Upon the organization of the corporation, the defendant A and said \_\_\_\_\_ sold and conveyed to it certain parcels of real property, including a leasehold with an unexpired term of \_\_\_\_\_ years, hereinafter mentioned, subject to certain liens for mortgages and taxes, to be paid for by the issuance of the full capital stock of the corporation, amounting to \_\_\_\_\_ dollars, and in addition by \_\_\_\_\_ dollars in cash to defendant A out of the first profits of the company. The capital stock was represented by \_\_\_\_\_ shares of \_\_\_\_\_ dollars par value each and was issued and divided equally between defendant A and \_\_\_\_\_ in the following manner, namely, \_\_\_\_\_ shares were issued to defendant A, and one share to \_\_\_\_\_, his wife, \_\_\_\_\_ shares were issued to \_\_\_\_\_ and one share to \_\_\_\_\_, his wife. The first directors were \_\_\_\_\_; the first officers were \_\_\_\_\_.

2. Among the properties originally turned over to the corporation by defendant A and \_\_\_\_\_ was a leasehold on certain premises commonly known and referred

to herein as \_\_\_\_\_, the fee of which was owned by the plaintiffs, which leasehold defendant A and \_\_\_\_\_ had previously acquired from \_\_\_\_\_, a domestic corporation. Said leasehold was evidenced by two contemporaneous written leases given by the plaintiffs covering different parts of said premises, both running for a term of \_\_\_\_\_ years and expiring on \_\_\_\_\_. The plaintiffs held the bond of \_\_\_\_\_ in the principal sum of \_\_\_\_\_ dollars, due on \_\_\_\_\_, 20\_\_\_\_\_. As collateral security for the payment of the principal amount of said bond and interest, the plaintiffs held a mortgage given by \_\_\_\_\_ on the said leasehold.

3. In or about \_\_\_\_\_, 20\_\_\_\_\_, defendant A acquired the entire stock and interest of \_\_\_\_\_ in the corporation, and the two \_\_\_\_\_ resigned as directors and officers and the shares held by them were transferred to defendant A, who ever since then has been president and a director and has owned and held all of the stock of the corporation, except qualifying shares, which he has put in the names of his directors and all of the directors and officers, other than defendant A, have been members of his family or relatives who have acted as dummies of his appointment for his convenience and under his direction and control, without any beneficial interest in the corporation.

4. Upon information and belief, ever since A's acquisition of \_\_\_\_\_'s stock, in \_\_\_\_\_, 20\_\_\_\_\_, the corporation, notwithstanding it has held valuable rent-producing properties, has held no stockholders' or directors' meetings, has kept no minute book or books of account, has filed no annual reports as required by statute, has kept no bank account and has held no funds, and during all of said time defendant A has conducted, managed and controlled all of the corporate affairs and properties held in title by the corporation as his own personal business affairs and properties and he has collected and received to his own sole use and benefit all of the rents, income and proceeds of whatever character from said



properties and the rents and proceeds so taken and used by him have aggregated upwards of \_\_\_\_\_ dollars, including \_\_\_\_\_ dollars borrowed or realized by him upon the security of a mortgage on a part of said property which he caused to be executed. The exact amount of the rents and proceeds from said properties taken by defendant A is unknown to the plaintiffs and plaintiffs have been informed by defendant A that accounts of his receipts from said properties up to \_\_\_\_\_, 20\_\_\_\_\_, have been lost, and, upon information and belief, there is no entire or reliable record of the amount of his said receipts and he has rendered no account thereof to the corporation and at no time has the corporation received or had any of said rents, income or proceeds or any funds whatever or made any payments whatever, but all disbursements or payments on account of its obligations or on account of said properties, including carrying charges, rent on said leasehold and interest on said bond, payments in reduction of mortgages or otherwise have been made by defendant A personally out of his own funds as upon his own properties and for his own benefit.

5. Until the maturity of said bond of \_\_\_\_\_, held by the plaintiffs, defendant A and the said \_\_\_\_\_ were the persons known to the plaintiffs as the successors of \_\_\_\_\_ in ownership of the said leasehold. When the said bond matured in \_\_\_\_\_, 20\_\_\_\_\_, the plaintiffs called for the payment thereof and in response thereto defendant A applied to the plaintiffs for an extension of time for payment and he then made known to the plaintiffs that the defendant corporation, \_\_\_\_\_, had acquired and was holding title to the said leasehold and he stated and represented to the plaintiffs that he was the sole owner of the defendant corporation, that it was a close corporation confined to his own private family and that he was using the corporation to hold title to his real properties, that he was a man of large, independent means and that his personal credit stood back of the corporation and back of the said properties which it held in title, that he personally had been meeting and paying all of the corporation's obligations and that he intended to continue to meet and pay all of its obligations and to carry and protect its property as his own. Defendant A promised the plaintiffs that if they would extend the time of payment of the bond he would have the defendant corporation assume the payment of the

principal and interest and all obligations thereunder and also all obligations remaining to be met by the lessee under the two unexpired leases and that he would personally guarantee the full performance of all of said obligations by the defendant corporation. Plaintiffs had no information covering the separate property or financial condition or responsibility of the corporation, except as above stated, but accepted and relied upon A's said statement and assurances and in consideration thereof, the plaintiffs were induced by him to and did agree to extend the time of payment of the said bond for four years and to accept the defendant corporation as lessee in supplemental leases to be executed for the unexpired term and defendant A further induced the plaintiffs to grant, in consideration of his personal guarantee of the bond and leases, a special concession or remission of rental amounting to \_\_\_\_\_ dollars, for the first year, below the amount of rentals fixed and provided to be paid in the leases.

6. In consequence and pursuance of the foregoing by an agreement in writing executed and delivered on or about \_\_\_\_\_, 20\_\_\_\_\_, the plaintiffs extended the time of payment of the said bond to \_\_\_\_\_, 20\_\_\_\_\_, and defendant A caused the defendant corporation to assume therein payment of the principal and interest of said bond and all of its obligations and at the same time the plaintiffs executed and delivered supplemental leases as owners and lessors and defendant A caused the defendant corporation to execute the lease as new lessee covering the unexpired term of the original lease and continuing the same amount of rental. At the same time by A's request and insistence, the plaintiffs executed and delivered to him a separate memorandum in writing evidencing the special concession of rent, a copy of which memorandum is as follows:  
\_\_\_\_\_.

7. On \_\_\_\_\_, 20\_\_\_\_\_, default was made in the payment of taxes and installments of rent then due to be paid in the leases and no taxes or rentals accruing thereunder have been paid since that time, and on \_\_\_\_\_, 20\_\_\_\_\_, default was made in the payment of interest then due on the bond and no interest has been paid since that time.

8. On information and belief, in \_\_\_\_\_, 20\_\_\_\_\_, the assets held by the corporation consisted of the following items: \_\_\_\_\_.

9. Upon information and belief, before permitting defaults in payments due to the plaintiffs, the defendant A conceived a fraudulent design and plan to strip and loot the corporation for his own benefit of all of its assets and thereby to prevent the plaintiffs from enforcing the obligations assumed by the corporation on the bond and leases and to prevent plaintiffs from collecting any judgment against the corporation and to repudiate his oral agreement of guarantee as unenforceable by reason of its not being in writing and thus to defraud the plaintiffs out of the amount of their bond and out of the rental for the remainder of the leasehold. In pursuance of his fraudulent plan and in execution thereof, he did strip the corporation of all of its assets and caused to be conveyed to him by the corporation, by deed executed and recorded on \_\_\_\_\_, 20\_\_\_\_\_, the property described as \_\_\_\_\_. The corporation received no consideration or benefit whatever from the conveyance to A of the said real property. The plaintiffs had no knowledge of the matters set forth in this paragraph until the summer of the year 20\_\_\_\_\_.

10. In \_\_\_\_\_, 20\_\_\_\_\_, plaintiffs were obliged to, and did re-secure possession of the premises at \_\_\_\_\_ by a warrant duly issued in summary proceedings in order to protect their property and save themselves from further loss and the plaintiffs brought action in \_\_\_\_\_, 20\_\_\_\_\_, against the defendant corporation in the New York Supreme Court, \_\_\_\_\_ County, to recover the principal amount of said bond with interest. The summons and complaint were personally served upon defendant A as president of the corporation, and, upon information and belief, the said A personally retained an attorney, caused an answer verified by himself as president to be filed and caused the said action to be defended and personally directed and controlled the defense thereof. The plaintiffs duly recovered a judgment in said action which was duly entered on \_\_\_\_\_, 20\_\_\_\_\_, in the office of the clerk of the

County of \_\_\_\_\_ in favor of the plaintiffs and against the corporation for the sum of \_\_\_\_\_ dollars.

11. Thereafter and on or about \_\_\_\_\_, 20\_\_\_\_\_, execution was duly issued upon the said judgment against the real and personal property of the corporation and duly delivered to the Sheriff of \_\_\_\_\_ County where the said corporation then had and still has its chief office and the said sheriff before the commencement of this action duly returned said execution wholly unsatisfied and the said judgment remains wholly unpaid.

12. In \_\_\_\_\_, 20\_\_\_\_\_, the plaintiffs began another action against the corporation in the Supreme Court, \_\_\_\_\_ County, to recover the amount due for rent and taxes accrued and unpaid upon the leasehold prior to the summary proceedings and the summons and complaint in that action were personally served upon this defendant A as president of the corporation, and, upon information and belief, the said A retained an attorney and caused the interest of the corporation to be looked after and properly protected in the said action. The plaintiffs duly recovered judgment therein which was duly entered in the office of the clerk of the County of \_\_\_\_\_ on \_\_\_\_\_, 20\_\_\_\_\_, in favor of the plaintiffs and against the corporation for the sum of \_\_\_\_\_ dollars and the said judgment remains wholly unpaid.

13. After the default of \_\_\_\_\_, 20\_\_\_\_\_, in the payment of rent and before beginning the actions mentioned in the paragraphs 10 and 12 hereof, plaintiffs made repeated demands upon the defendant A for payment of sums accrued and unpaid under said leases and bond but he failed and refused to pay any part thereof from the corporation as hereinbefore shown and upon information and belief, the corporation has no property or means with which to pay the said judgments.

14. Upon information and belief, there are no other creditors of defendant corporation than the plaintiffs except that A claims that a balance of approximately \_\_\_\_\_ dollars remains

due him from the corporation on account of its original indebtedness to him of \_\_\_\_\_ dollars mentioned in the first paragraph of this complaint as part consideration for the property originally conveyed to it, but the plaintiffs had no knowledge of any indebtedness of the corporation to A, real or alleged, until the summer of 20\_\_\_\_\_, when they examined him as president of the corporation in proceedings supplementary to execution. Upon information and belief, the moneys and the value of properties of the corporation taken by A and wasted by him as aforesaid exceed in amount any just debts or obligations of the corporation to him but the true amount of such excess cannot be ascertained.

15. The plaintiffs have no adequate remedy at law for the relief to which they are entitled.

WHEREFORE, plaintiffs demand judgment compelling the defendant A to pay the two said judgments recovered against the corporation with interest due thereon and for such other and further relief as may be just and equitable with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 42**

### **Complaint in Action to Recover Money Advanced to Corporation Promoters**

[Caption and introductory paragraph]

#### **FOR A FIRST, SEPARATE, AND DISTINCT CAUSE OF ACTION:**

1. The plaintiff and the defendants \_\_\_\_\_ and \_\_\_\_\_ are residents of the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York.

2. On information and belief the defendant \_\_\_\_\_ Inc., is a corporation duly organized and existing under and by virtue of the laws of the State of New York and has its main and principal office and place of business in the said City of \_\_\_\_\_.

3. The plaintiff and defendants \_\_\_\_\_ and \_\_\_\_\_ at all times mentioned hereafter were the promoters and now are the chief officers and principal stockholders of the defendant \_\_\_\_\_ Inc.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, for good and valuable consideration the plaintiff and the defendants \_\_\_\_\_ and \_\_\_\_\_, entered into a contract, a copy of which is hereto annexed and marked Exhibit "A" and made a part thereof as though fully set forth at length.

5. Subsequent to the execution of the said contract, Exhibit "A," the defendant \_\_\_\_\_ Inc., duly ratified and adopted said contract.

6. By the terms of said contract it was mutually agreed that the defendant \_\_\_\_\_ Inc., should pay to the plaintiff the weekly sum of \$\_\_\_\_\_, commencing with the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and weekly thereafter until all the moneys contributed by said plaintiff to defendant \_\_\_\_\_ Inc., should have been paid in full.

7. Prior to the commencement of this action the plaintiff contributed to the defendant \_\_\_\_\_ Inc., the sum of \$\_\_\_\_\_, which the defendants agreed the defendant \_\_\_\_\_ Inc., would repay under the terms of said contract.

8. No part of said sum has been repaid to said plaintiff by said defendant \_\_\_\_\_ Inc., or by any other person or firm, although demand has been duly made therefor before the commencement of this action, all against the terms and conditions of said contract; whereby there is due and owing to the plaintiff from the defendants the sum of \$\_\_\_\_\_.

9. The plaintiff has duly performed all the terms and conditions of said contract on his part to be performed.

**FOR A SECOND, SEPARATE, AND DISTINCT CAUSE OF ACTION:**

10. The plaintiff further alleges that between the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and the date of the commencement of this action at the City of \_\_\_\_\_, County of \_\_\_\_\_, and State of New York, the defendants borrowed from the plaintiff various sums of money aggregating \$\_\_\_\_\_, which defendants promised to repay in weekly sums of \$\_\_\_\_\_, commencing with the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and weekly thereafter until all the moneys loaned by said plaintiff were repaid.

11. Thereafter and before the commencement of this action the plaintiff duly demanded payment of the amount from the defendants, but no part of said sum has been paid, and the sum of \$\_\_\_\_\_ is now due and owing from defendants to plaintiff.

[Demand for judgment, endorsement, address, telephone number, and verification.]

### **Form 43**

### **Complaint in Action by Corporation to Recover From Promoters Secret Profits From Sales to Corporation**

[Caption and introductory paragraph]

1. Prior to \_\_\_\_\_, 20\_\_\_\_\_, the defendants engaged in a scheme to promote the organization of the plaintiff corporation for the purpose of carrying on the business of \_\_\_\_\_ in the State of \_\_\_\_\_, but for the real purpose of deceiving and cheating those who might deal with said corporation, and by such deceit enriching themselves.

2. In pursuance of such scheme the defendants obtained for the purpose of purchase by said corporation the temporary control of a mining option in \_\_\_\_\_, said option conferring the right on certain terms and conditions to prospect, explore and mine for \_\_\_\_\_ ore. Said option was owned by \_\_\_\_\_ of \_\_\_\_\_, and the price demanded was \_\_\_\_\_ dollars; and the

defendants acquired the right to buy it at that price for a certain time specified in the agreement by which they acquired said option.

3. Having obtained such option and temporary control thereof the defendants proceeded to obtain subscriptions to the capital stock of a proposed corporation to buy it.

4. To induce subscriptions to the said capital stock, the defendants among other things falsely and fraudulently represented to divers persons and to all persons who became and now are stockholders in plaintiff that the price demanded by \_\_\_\_\_ [owner of the option] was \_\_\_\_\_ dollars; that it could not be bought for any less; that the defendants were themselves desirous of buying it but were financially unable to do so, but desired to form a corporation to purchase it in which they would themselves take stock to the extent of their ability and pay the same price that every one else would have to pay; that all stockholders would stand on the same level as to the sums paid; that there was no speculation in the purchase price of the option; that they were making nothing out of the promotion or purchase of said option, and desired to make nothing, not even their expenses, unless the company saw fit to reimburse them, except such legitimate profits as all stockholders would share alike, through the operation of said mines; that it would be necessary for the company to raise \_\_\_\_\_ dollars in money, of which \_\_\_\_\_ dollars was for the purchase of said option.

5. In furtherance of said fraudulent scheme the defendants drew up and by said fraudulent representations procured to be signed by divers persons a subscription paper of which a copy is hereto annexed marked "Exhibit A" and made a part of this complaint, whereby it was agreed by each subscriber with \_\_\_\_\_, named in said paper as the owner of said mining option, and with each other that they would take of and from the said \_\_\_\_\_ the number of shares of nonassessable paid-up stock in the corporation, proposed to be formed, set opposite their respective names, at \_\_\_\_\_ dollars per share; said payment to be made as soon after the company was duly incorporated, under the laws of either the state of \_\_\_\_\_ or \_\_\_\_\_,



and the said \_\_\_\_\_ should assign and transfer over to said corporation and give it a perfect title to said option, and that said capital stock was to be \_\_\_\_\_ dollars in \_\_\_\_\_ shares of \_\_\_\_\_ dollars each.

6. Said subscription was so signed by a large number of persons, and, in pursuance thereof, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendants caused the plaintiff corporation to be organized under the laws of the State of \_\_\_\_\_.

7. The defendants were the sole incorporators of plaintiff, and as such held the first meetings of stockholders and directors on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and all of them were present; defendant \_\_\_\_\_ was elected president and the defendant \_\_\_\_\_ was elected treasurer and as such they have continued to act all during the time covered by the facts herein alleged.

8. At about the time of said meeting, in further pursuance of said fraudulent scheme the defendant \_\_\_\_\_ by the advice and procurement of the other promoters and defendants, but in the joint interest of them all, subscribed for the entire stock of said corporation, to wit, \_\_\_\_\_ dollars, except one share each of \_\_\_\_\_ dollars which were taken by the defendants, \_\_\_\_\_ and \_\_\_\_\_.

9. At the same time, by the unanimous vote of defendants as sole corporators and directors, there was adopted a resolution of which a copy is hereto annexed marked "Exhibit B" and made a part of this complaint, whereby it was resolved that in accordance with the subscription of said defendant \_\_\_\_\_, the president and secretary of plaintiff issue to him or to such person or persons as he shall direct and in such numbers as he shall direct, all of said stock, except two shares, the shares being so issued as paid up in full in consideration of his making and delivering to the plaintiff an assignment of said option.

10. None of the said capital stock except \_\_\_\_\_ shares, now held by him, was ever issued to said defendant \_\_\_\_\_.

11. Although he conveyed to the company the mining option hereinbefore mentioned, neither he nor any of the defendants ever had or held any valuable interest therein above the price of \_\_\_\_\_ dollars which had to be paid to \_\_\_\_\_.

12. After said subscriptions were obtained as aforesaid, the defendants caused said option to be conveyed to said defendant \_\_\_\_\_ without consideration; then caused the plaintiff to buy it of him for substantially its entire stock; treated the agreement to take shares in the projected company as an agreement to take them of said defendant \_\_\_\_\_ and pay him for them instead of the plaintiff; and then issued the shares so fraudulently subscribed to the several persons, who by the agreement aforesaid had agreed to take them and collected from them the sum of \_\_\_\_\_ dollars, paid [name original owner of option] \_\_\_\_\_ dollars, placed \_\_\_\_\_ dollars in the treasury of the plaintiff, and fraudulently converted the remaining \_\_\_\_\_ dollars to their own use; by reason of which the said defendants are indebted to plaintiff, as for so much money had and received to its use.

[Demand for judgment, endorsement, address, telephone number, and verification.]

#### **Form 44**

### **Complaint in Action by Stockholder to Recover for, and to Restrain, Dividend Distribution Impairing Corporate Capital**

[Caption and introductory paragraph]

1. The corporate defendant, \_\_\_\_\_ Company, hereinafter referred to as "Company," is a \_\_\_\_\_ corporation, having an office in the State of \_\_\_\_\_.

2. That as will more fully appear by reference to a copy of the Certificate of Incorporation of said Company, filed herewith, marked Complainant's Exhibit A, and prayed to be taken as part hereof:

(a) Said Company was incorporated on \_\_\_\_\_, 20\_\_\_\_\_.

(b) The authorized capital stock of said corporation consisted of shares of First Preferred Stock of the par value of \$\_\_\_\_\_ each; shares of Second Preferred Stock of the par value of \$\_\_\_\_\_ each and shares of Common Stock of the par value of \$\_\_\_\_\_ each.

(c) The Company has six directors, of whom three are to be elected exclusively by the holders of the Preferred Stock, and three elected exclusively by the holders of the Common Stock.

3. The individual defendants, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ are the present directors of the Company, elected by the Preferred Stock, and \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ are the present directors of the Company elected by the holders of the Common Stock. Directors, \_\_\_\_\_ who is a complainant in this cause, and \_\_\_\_\_, are not named as defendants by reason of the fact that each of them, as directors, voted against all of the actions complained of herein which occurred during his respective tenure of office.

4. That the present officers of the Company who were elected by the directors elected by the holders of the Preferred Stock are as follows:

\_\_\_\_\_, President \_\_\_\_\_, Vice President

\_\_\_\_\_, Secretary-Treasurer

5. (a) The capital stock of said corporation originally issued and outstanding, consisted of \_\_\_\_\_ shares of First Preferred Stock and \_\_\_\_\_ shares of Common Stock; no Second Preferred having ever been issued.

(b) The present issued and outstanding stock of the Company consists of \_\_\_\_\_ shares of First Preferred Stock and \_\_\_\_\_ shares of Common Stock; the Company having purchased and retired

\_\_\_\_\_ shares of First Preferred Stock and \_\_\_\_\_  
shares of Common Stock.

6. Your Complainant, \_\_\_\_\_, is the owner of \_\_\_\_\_  
shares of the Common Stock of the Company. Said \_\_\_\_\_ first acquired  
some of said shares in \_\_\_\_\_, 20\_\_\_\_\_. Your Complainant's total  
holdings represent in excess of \_\_\_\_\_ per cent (\_\_\_\_\_% ) of the  
total of such Common Stock presently issued and outstanding.

7. The directors elected by the First Preferred Stockholders, and the officers of the Company  
who, in turn, were elected by said directors, have been in complete control of all of the affairs  
and actions of said Company at all times since its organization.

8. The said directors and officers so elected by the holders of the First Preferred Stock, have  
mismanaged the affairs of the Company, have failed to keep proper and correct accounts of the  
affairs of the Company, have knowingly issued and published materially false and misleading  
statements of the affairs of the Company, have declared and paid dividends on the First  
Preferred Stock of the Company at times when the Company was without net earnings available  
for the declaration of dividends, all as will more fully appear hereinafter in detail.

9. (a) As will more fully appear from a copy of the balance sheet of said Company issued and  
published by the Company as of \_\_\_\_\_, 20\_\_\_\_\_, filed herewith,  
marked "Complainant's Exhibit B", and prayed to be taken as part hereof, the Company carries  
on its books the following account:—

"Land, Plant and Equipment \$\_\_\_\_\_."

(b) The Audit Report of \_\_\_\_\_, Auditors for the Company for the year  
\_\_\_\_\_, discloses that there is included in said "Land, Plant and Equipment"  
account a subsidiary account entitled: "Land and Plant \$\_\_\_\_\_."

This item of \$\_\_\_\_\_ represents the cost of lands, buildings, machinery, improvements and equipment allegedly acquired by the Company prior to \_\_\_\_\_, 20\_\_\_\_\_ in an aggregate amount of \$\_\_\_\_\_, reduced by a so-called write-down in the amount of \$\_\_\_\_\_.

(c) Said "Land and Plant" account of \$\_\_\_\_\_ allegedly represents the book cost of approximately \_\_\_\_\_ different parcels of land, together with the buildings, improvements, machinery and equipment on certain of said parcels. All of said parcels of land have been sold except \_\_\_\_\_ thereof, and portions of those still owned by the Company have also been sold. All of the buildings, machinery and equipment on the parcels so sold have been abandoned, demolished or become worthless. All of the buildings, machinery and equipment included in said "Land and Plant" account which were located on the remaining portions of said \_\_\_\_\_ parcels of land, except for some minor buildings, have likewise been sold, demolished, abandoned or otherwise disposed of. There are no buildings, machinery or equipment on \_\_\_\_\_ of the \_\_\_\_\_ parcels still owned by the Company. The machinery, equipment and substantially all of the buildings now located on the remaining \_\_\_\_\_ parcels of land, except the minor building above referred to, represent replacements which are carried on specific ledger accounts, and the cost thereof is not included in said "Land and Plant" account.

(d) Although substantially all of the buildings, machinery and equipment carried in said "Land and Plant" account have been sold, demolished, abandoned or otherwise disposed of, said account has never been reduced by the cost thereof, except to the extent of said so-called "write-down".

(e) Your Complainant has no personal knowledge of the original cost of the parcels of land included in said "Land and Plant" account, or of the cost of the remaining said parcels. Your Complainant, however, shows that on or about \_\_\_\_\_, 20\_\_\_\_\_, the Company employed one, \_\_\_\_\_, accountant, to examine the books

and records of the Company and ascertain the cost of the land and improvements included in said "Land and Plant" account. The following tabulation shows a description of each of the \_\_\_\_\_ parcels still owned by the Company, the original acreage and the original cost thereof, as reported by said accountant, the remaining unsold acreage of each of said lots, as ascertained by your Complainant and the approximate pro rata remaining cost as prepared by your Complainant, upon the assumption that the cost of the unsold land be apportioned on an acreage basis.

Yard No.	Location	Orig. Acres	Orig. Cost	Remain. Acres Unsold	Approx . Pro Data Remai n. Cost
_____	_____	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	Totals	_____	\$ _____	_____	\$ _____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____

From the foregoing it appears that the remaining cost includible in said "Land and Plant" account is \$\_\_\_\_\_, increased by the depreciated cost of the small buildings mentioned in paragraph X (a) hereof, and that said "Land and Plant" account, as of \_\_\_\_\_, 20\_\_\_\_\_, is overstated in the amount of not less than \$\_\_\_\_\_.

10. (a) In addition to the corporation's failure to write off properties and other assets abandoned, demolished or otherwise disposed of, the corporation has failed to take depreciation on depreciable items included in said "Land and Plant" account, since the inception of the

Company to date, except depreciation in a minor amount on certain small buildings carried in said "Land and Plant" account and still used by the Company.

(b) The Company has also failed to establish any reserves whatsoever for the depletion of the clay deposits on its clay lands, although said clay deposits have been substantially depleted.

(c) The Company has failed to take adequate depreciation on its depreciable property not included in said "Land and Plant" account.

11. After the correct and necessary elimination from property accounts of assets no longer owned by the Company and the setting up of proper depreciation and depletion reserves, the balance sheet of the Company will disclose a deficit and an impairment of its capital.

12. Although the directors and the officers of the Company so elected and controlled by the Preferred Stockholders have, and for many years have had, full knowledge of the matters herein complained of, and although demand has been made of them by your Complainant that the same be corrected, said directors and officers have failed to correct the same. In support of said charge of knowledge on the part of said directors and officers, your Complainant shows:

(a) \_\_\_\_\_, President of the Company, in his Annual Report for the year 20\_\_\_\_\_, in referring to the Audit Report of \_\_\_\_\_, Auditors for the Company for the fiscal year ended \_\_\_\_\_, 20\_\_\_\_\_, said:  
"\_\_\_\_\_."

(b) The Audit Report of \_\_\_\_\_, Auditors for the Company for the year 20\_\_\_\_\_, shows in part:—

"The accompanying balance sheet shows a surplus of \$\_\_\_\_\_ at \_\_\_\_\_, 20\_\_\_\_\_. In considering the surplus available for dividends, however, consideration should be given to the following:

"(1) The reduction which would be required in surplus in order to reduce the property balances to proper amounts.

“(2) The appropriation of surplus which has resulted from the acquisition by the Company of its own shares of preferred and common stock.

“(3) The fact that the Company has only during the past few years made provision for possible losses, normally covered by insurance policies, resulting from destruction by fire of plant property.”

13. The Board of Directors elected by the First Preferred Stockholders have declared and ordered paid, and the Company has paid dividends on First Preferred Stock at times when the Company has no net earnings available for the payment of dividends, and when the capital of the Company was impaired.

14. The Board of Directors of the Company has authorized the purchase of Common Stock in violation of \_\_\_\_\_.

15. The directors so appointed by the First Preferred Stockholders and the officers elected by them have deliberately carried fictitious assets in the property account of the Company and have otherwise failed to keep proper books of account for the purpose of disclosing apparent “net earnings” and “earned surplus” out of which dividends on the First Preferred Stock were paid.

16. The directors of the Company so elected by the holders of First Preferred Stock by wrongfully failing to correct the accounts of the Company, and by failing to write off abandoned, demolished and obsolete property, by failing to take proper depreciation on the assets of the Company, and by failing to establish reserves for depletion of \_\_\_\_\_, caused the Company to pay excessive and unnecessary Federal Income and Excess Profits Taxes and \_\_\_\_\_ State Income Taxes.

17. At a meeting of the Board of Directors held on \_\_\_\_\_, the Directors elected by the holders of First Preferred Stock, over the objection of the directors elected by the holders of Common Stock, declared a dividend of \_\_\_\_\_ dollars per share, to be paid on account of the alleged accumulated dividends on the First Preferred Stock to Stockholders of record on \_\_\_\_\_, 20\_\_\_\_\_ payable on \_\_\_\_\_



\_\_\_\_\_, 20\_\_\_\_\_. Said dividend is allegedly payable out of “net earnings”, but your Complainant shows that the Company has no net earnings, that its capital is impaired and the payment of said divi would be in violation of \_\_\_\_\_.

18. Unless relief be granted by this Honorable Court your Complainant and other stockholders of the Company similarly situated, will suffer irreparable loss and damage, for which they have no adequate remedy at law.

WHEREFORE, Your Complainant prays:

1. That an auditor and special master be appointed to examine, review and correct the books of account and other records of the Company, to the end that the said books may properly reflect the true “net earnings”, “earned surplus” and financial condition, of the Company.

2. That said auditor and special master so to be appointed, be empowered, with the approval of this Court, to employ such accountants, attorneys, investigators and other necessary personnel in connection with this audit.

3. That this Court, by restraining order or temporary injunction, may restrain and enjoin the corporate defendant, its officers and agents from paying the dividend declared on \_\_\_\_\_, 20\_\_\_\_\_, payable \_\_\_\_\_, 20\_\_\_\_\_, until further order of this Court.

4. That pending completion of such examination of said books and records and the determination of the true financial condition of the Company, the Company, its directors and officers, be enjoined and restrained from declaring or paying, or declaring and setting aside dividends on the stock of the Company.

5. That the individual defendants be required to reimburse and indemnify the Company for all loss, cost, damage and expense which the corporation may have suffered by reason of their respective wrongful acts, including all costs and expenses incurred by the corporation, if any, in connection with this cause.

6. That the defendants, they and each of them may be enjoined and restrained from publishing false and misleading statements of the affairs of the Company.

7. That your Complainants may have such other and further relief as their cause may require, including relief not herein specifically prayed, but which may appear due upon a complete review of the affairs of the Company.

[Endorsement, address, telephone number, and verification.]

## Form 45

### Complaint Against Directors for Illegal Dividend or Distribution of Assets

[Caption; introductory paragraph]

1. This is an action brought by plaintiff, as a creditor of the \_\_\_\_\_ Company, Inc., to enforce liability of the additionally designated individual defendants, as directors of such corporation, for the benefit of plaintiff and other creditors of the corporation, pursuant to § 719 of the New York Business Corporation Law.

2. At all times hereinafter mentioned said defendant \_\_\_\_\_ Company, Inc. (hereinafter called “\_\_\_\_\_”) was and now is a domestic corporation having its office at \_\_\_\_\_ in the City of \_\_\_\_\_, \_\_\_\_\_, formed and organized under Article \_\_\_\_\_ of the \_\_\_\_\_ Corporation Law of New York.

3. On information and belief, said \_\_\_\_\_ was organized with an authorized stated capital of \$\_\_\_\_\_, divided into \_\_\_\_\_ shares of common stock of no par value and \_\_\_\_\_ shares of preferred four percent (4%) stock of par value \$\_\_\_\_\_ per share, and its stated capital was thereafter increased by amendment of its certificate of incorporation, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in the amount of \$\_\_\_\_\_ to a total aggregate of \$\_\_\_\_\_, with authority to issue an additional \_\_\_\_\_ shares of

no par common stock, all of which stock was issued and outstanding at the times hereinafter mentioned, thereby resulting in paid-in capital in the amount of \$\_\_\_\_\_.

4. On information and belief, that the net earnings of said defendant \_\_\_\_\_ for its fiscal year \_\_\_\_\_ were only \$\_\_\_\_\_, over and above its operating expenses, and the said \_\_\_\_\_ then had, at the time of the meeting of its board of directors on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, earned surplus of only \$\_\_\_\_\_, or less than enough to pay the regular four percent (4%) dividend due on its preferred stock on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, over and above its then outstanding legal debts and obligations.

5. On information and belief, that at the meeting of the board of directors of said \_\_\_\_\_ held and convened pursuant to due notice on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, each and every member of said board had, or should have had, in proper exercise of duty pursuant to § 717 of the New York Business Corporation Law, knowledge of the earnings and financial condition of the corporation, the amount of its earned surplus, and its stated capital requirements, but nevertheless said board of directors declared, and ordered to be paid, the full dividend due on its outstanding preferred shares as of \_\_\_\_\_, 20\_\_\_\_\_, and likewise declared, and ordered to be paid, a cash dividend of \$\_\_\_\_\_ on each and every outstanding share of no-par common stock to holders of record of any such shares as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

6. That said dividends as so declared and ordered to be paid at the directors' meeting of \_\_\_\_\_, 20\_\_\_\_\_, were paid to shareholders by the disbursing officers of said corporate defendant, and, on information and belief, that such payments depleted and impaired the stated capital of \_\_\_\_\_ to the extent and in the amount of \$\_\_\_\_\_.

7. That the individual defendants, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, were duly elected directors of the defendant \_\_\_\_\_ at the annual meeting of the shareholders of such corporation on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, accepted and qualified as directors, and were members of the board of directors and acting as such at the time of the directors' meeting of \_\_\_\_\_, 20\_\_\_\_\_, aforesaid.

8. That said individual defendants, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, either voted for or failed to dissent from the resolution dealt with in paragraph "5" hereof and thereby became responsible for the illegal dividend declarations and liable for the resultant capital impairment.

9. That plaintiff is a judgment creditor of the corporate defendant, \_\_\_\_\_, in the amount of \$\_\_\_\_\_, no part of which has been paid or collected, by virtue of a judgment obtained in the Supreme Court of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, a certified copy of which is hereunto attached as Exhibit A and made part hereof.

10. [Allege demand on board of directors to sue and its refusal, or] That the individual defendants, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, constitute a majority of the board of directors of defendant corporation, and it would be obviously futile to demand that they sanction the institution of an action by such corporation against themselves; hence said corporation is made a party defendant to this action for the benefit of its creditors, as well as by reason of its indebtedness as stated in paragraph "9" hereof.

WHEREFORE, plaintiff demands judgment against the individual defendants, \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_, jointly and severally, in the amount of the capital impairment caused by said illegal dividend, or such other amount as the court shall determine, in favor of said corporate defendant, with costs, for the benefit of plaintiff and other creditors of such corporation, and that said corporation be

ordered and directed to collect and enforce such judgment and distribute the proceeds and avails thereof to plaintiff and such other of its creditors as may legally establish claims against the avails.

[Endorsement, address and telephone number]

[Verification]

## **Form 46**

### **Complaint in Action for Conspiracy to Oust Director, Gain Control of Corporation, and Misuse Corporate Funds**

[Caption and introductory paragraph]

1. That \_\_\_\_\_ Co. is a domestic corporation having been duly organized on \_\_\_\_\_, 20\_\_\_\_\_, under the laws of this state; and has ever since been and now is engaged in \_\_\_\_\_.

2. That plaintiff and defendants, \_\_\_\_\_ and \_\_\_\_\_, were the incorporators of the company and at the beginning owned all of its capital stock, which was, and is, divided into \_\_\_\_\_ shares of the par value of \$\_\_\_\_\_.

3. That plaintiff worked hard from the beginning in establishing the business of the company, and enlarging and developing the business. He traveled through the whole country introducing its goods into market and use. The result of his work was to create a demand for the goods and increase the business from year to year so that the business of the company was firmly established, and increased and prospered up to \_\_\_\_\_, 20\_\_\_\_\_, when the plaintiff was deprived of all participation in the management of the company as hereinafter set forth.

4. That during all the said time the plaintiff was a director of the company, and he was secretary thereof up to 20\_\_\_\_\_, when he became treasurer of the company, which latter office

he continued to hold until \_\_\_\_\_, 20\_\_\_\_\_, and that during such connection with the management of the company he devoted his efforts honestly to advancing the property of the company. He systematized its business, and placed it in such easy working order that the work of its officers was, and is, reduced to mere supervision; and that the company did, and does, employ agents and superintendents to do its active and skillful work.

5. That up to \_\_\_\_\_, 20\_\_\_\_\_, the officers chosen by the directors of the company were a president, a secretary and a treasurer, and the salaries of the officers were \$\_\_\_\_\_ per year each, which was deemed by the directors a reasonable compensation for the duties performed. That defendant, \_\_\_\_\_, was the president, the plaintiff was treasurer, and defendant \_\_\_\_\_, secretary until in 20\_\_\_\_\_, when he sold his stock to this plaintiff and retired. The only other stockholder of the company was the defendant, \_\_\_\_\_, who retired from all work or active management in the said company in 20\_\_\_\_\_, and has never since taken and does not now take any part in the work or management of the said company except as a participant in the conversion of the funds of the company hereinafter set forth.

6. That on \_\_\_\_\_, 20\_\_\_\_\_, and for about one year prior thereto, the plaintiff and the defendants, \_\_\_\_\_ and \_\_\_\_\_, were the only stockholders in the company, all of its stock being issued, of which the defendant, \_\_\_\_\_ held \_\_\_\_\_ shares and the defendant, \_\_\_\_\_, \_\_\_\_\_ shares, and the plaintiff \_\_\_\_\_ shares.

7. That on \_\_\_\_\_, 20\_\_\_\_\_, defendant \_\_\_\_\_ placed \_\_\_\_\_ shares of his stock in the name of his son, the defendant \_\_\_\_\_, for the purpose of having him assist in the carrying out of the wrongs hereinafter mentioned. That thereupon the defendants, led by the defendant, \_\_\_\_\_, entered into a combination, agreement and conspiracy

to withhold from the plaintiff all information and knowledge concerning the company, its management, finances, books and affairs, and to prevent him from obtaining the information, or seeing the books and workings of the company, and also to appropriate the funds of the \_\_\_\_\_ company to their own use, in order to prevent the plaintiff from getting his just and lawful share thereof, and with the intent of thus appropriating to their own use the funds of the company until the plaintiff was willing to sell to them his stock, or sufficient thereof to reduce his holdings to less than one-third of all the stock of the company, at a price named by them, and of coercing him into selling his stock.

8. That thereupon, at the annual meeting of the stockholders of the company on \_\_\_\_\_, 20\_\_\_\_\_, the defendants, by the united vote of their stock, voted the plaintiff out of the board of directors of the company and elected themselves the directors of the company and, whereupon, acting as such directors, they chose the defendant, \_\_\_\_\_, president and the defendant \_\_\_\_\_, vice-president, the defendant, \_\_\_\_\_, treasurer, and appointed \_\_\_\_\_ (a nephew of the defendants \_\_\_\_\_ and \_\_\_\_\_) secretary, and then speedily and greedily, in violation of their duties as directors of the company and of this plaintiff, and conspiring together to wrong the plaintiff, and unlawfully and corruptly, and with the intent to appropriate to themselves the funds of the company and to take from this plaintiff and unto themselves his just and lawful share thereof, voted to themselves and afterwards received out of the funds excessive annual salaries as follows: \_\_\_\_\_; thus paying \$\_\_\_\_\_ per year for work which had heretofore been done for \$\_\_\_\_\_ per year, and which was a fair and just compensation thereof; to all of which the plaintiff objected.

9. That the defendants did, at the annual meeting of the stockholders of company on \_\_\_\_\_, 20\_\_\_\_\_, re-elect themselves the directors of the company, and then, in still greater speed, greed and wrongfulness, and still pursuing the conspiracy, in violation of their trust, also concerting and acting together as stockholders to

wrong the plaintiff, and for the purpose of further wrongfully appropriating to themselves and converting the funds of the company and of the plaintiff, and of taking from the plaintiff and unto themselves his just and lawful share thereof, voted to themselves, out of the funds, the following excessive salaries, to be paid in monthly installments, to-wit, \_\_\_\_\_; thus wrongfully and corruptly absorbing to themselves out of the funds of the company the total sum of \$\_\_\_\_\_ per annum.

10. That the defendants have also with the same intent and purpose since \_\_\_\_\_, 20\_\_\_\_\_, refused to allow this plaintiff to look at the books of the company, and still refuse so to do, or furnish the plaintiff with information concerning the business of the company, though he has demanded to see said books, and asked for such information, and have also refused to divide the earnings of the company among the stockholders; and the plaintiff is informed and believes and therefore alleges that the defendants have also used large amounts of the funds of the company in addition to the so-called salaries, for their own benefit and use; that they have been and are paying large sums nominally for advertising and for merchandise, but in fact excessive sums, part of which is paid back to them or to some of them and corruptly kept by them; and that they have paid money to influence legislation in the legislature of this state and paid the money out of the funds of this company; and furthermore, that the said defendants knowing the plaintiff is about to bring this action, have determined and intend to retain and pay attorneys for counsel out of the funds of the said company to defend them in the wrongs and violations of trust herein charged, though the company is not chargeable therewith.

WHEREFORE, the plaintiff prays judgment that the directors, defendants, be restrained by injunction from paying the sums as salaries to themselves, and from using the funds of the company to defend this action, or retain or pay attorneys or counsel herein, that an account be taken of their acts as trustees, and that they be charged with all moneys that they have wrongfully appropriated, and be required to account for the money ratably to the company; that they be removed from office, for costs of suit, and for such other relief as may be just.



[Endorsement, address, telephone number, and verification.]

**Form 47**

**Complaint in Action on Agreement to Pay Dividends in Connection With Creation of Corporation**

[Caption and introductory paragraph]

1. For some time prior to the making of the agreement hereafter mentioned, the plaintiff and defendants were respectively engaged in the business of transporting freight between the cities of \_\_\_\_\_ and \_\_\_\_\_, in competition with each other.

2. On or about \_\_\_\_\_, 20\_\_\_\_\_, at the city of \_\_\_\_\_, the plaintiff made and entered into a certain agreement, in writing, with said defendants, a copy of which is annexed and made part of this complaint as Exhibit "A."

3. The plaintiff thereby agreed to consolidate his said business with that of said defendants, and for that purpose to join with them in the formation of a corporation to be called the \_\_\_\_\_ Corp., with a capital of \_\_\_\_\_ dollars, one-half of which should be subscribed and paid for by the plaintiff and one-half by defendants; and plaintiff thereby agreed to transfer his business therein mentioned to the said corporation, and give defendants the management and control of said corporation and business; and the plaintiff thereby further agreed that he would not be associated in any business competing with the defendants or with said corporation, for a period of \_\_\_\_\_ years from \_\_\_\_\_, 20\_\_\_\_\_.

4. In consideration thereof and in order to induce plaintiff to enter into said agreement, the defendants, guaranteed and agreed to pay to plaintiff in each and every year of the term of \_\_\_\_\_ years succeeding said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, dividends of not less than \_\_\_\_\_ per cent upon the par value of the

stock of said corporation, amounting to the sum of \_\_\_\_\_ dollars, to be subscribed and paid for by plaintiff as aforesaid.

5. In pursuance of said agreement said corporation was duly organized under the laws of the State of \_\_\_\_\_, by the name of \_\_\_\_\_, on or about \_\_\_\_\_, 20\_\_\_\_\_, with a capital stock of \_\_\_\_\_ dollars.

6. In further pursuance of said agreement, the plaintiff subscribed, paid for, and has ever since owned and held \_\_\_\_\_ shares of the stock of said company, of the par value of \_\_\_\_\_ dollars each, amounting in all to the sum of \_\_\_\_\_ dollars; transferred his business to said corporation, and duly performed all the conditions of said agreement on his part; and the defendants have since had and exercised management of said corporation and business.

7. No dividend upon the stock of said corporation has ever been declared or paid, and the defendants have had due notice thereof.

8. The dividends or sums guaranteed and agreed to be paid by said agreement for the year from \_\_\_\_\_, 20\_\_\_\_\_, to \_\_\_\_\_, 20\_\_\_\_\_, have not been paid, nor any part thereof, although the payment thereof was duly demanded before the commencement of this action, and the defendants are, and each of them is, now justly indebted to the plaintiff therein in the sum of \_\_\_\_\_ dollars, with interest thereon from \_\_\_\_\_, 20\_\_\_\_\_.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 48**

### **Complaint in Action by Pledge or Against Pledgee of Stock for Conversion**

[Caption and introductory paragraph]

1. On information and belief, at all the times hereinafter mentioned, the defendant was and is a corporation organized under the laws of the State of \_\_\_\_\_, and its principal place of business is in the City and County of \_\_\_\_\_.

2. Plaintiff, being indebted to the defendant, on or about \_\_\_\_\_, 20\_\_\_\_\_, delivered to the defendant at the City of \_\_\_\_\_, his promissory note in the amount of \_\_\_\_\_ dollars, together with the securities therein referred to as collateral thereto, and which shares of stock therein mentioned were the property of this plaintiff. A copy of said note is hereto annexed, marked Exhibit "A," and made a part of this complaint.

3. Thereafter, and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiffs had repaid to defendant on account of said indebtedness, the sum of \_\_\_\_\_ dollars, and defendant had surrendered and delivered up to the plaintiff of said collateral \_\_\_\_\_ shares of the capital stock of \_\_\_\_\_ and retained and held the balance.

4. On or about the said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, for a good and valuable consideration the defendant agreed with this plaintiff to extend the payment of said balance until plaintiff, who was at the time in \_\_\_\_\_, should return to the City of \_\_\_\_\_, and that the defendant would retain and hold the collateral then in its hands until such time.

5. Plaintiff returned to \_\_\_\_\_ in \_\_\_\_\_, 20\_\_\_\_\_, and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, tendered to the defendant, at its principal place of business in the City of \_\_\_\_\_, the sum of \_\_\_\_\_ dollars, which said sum was the balance due and owing by plaintiff to defendant on said indebtedness on said date, and demanded back the note and the balance of the stock; and the plaintiff was not then or since such time indebted to defendant in any other sum whatever, due or to become due.

6. The defendant refused and failed to return the said note or the said collateral or any part thereof, and converted the collateral to its own use.

7. The value of said collateral so converted by defendant was at that time \_\_\_\_\_ dollars.

WHEREFORE, this plaintiff demands judgment against said defendant for the return of said note and securities, and if possession thereof cannot be had, the sum of \_\_\_\_\_ dollars, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, besides the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 49**

### **Complaint in Action by Officer of Corporation to Recover Bonus in Addition to Fixed Salary**

[Caption and introductory paragraph]

1. Upon information and belief, the defendant is, and at all the times hereinafter mentioned was, a corporation organized and existing under and by virtue of the laws of the State of New York.

2. On or about \_\_\_\_\_, 20\_\_\_\_\_, in consideration of services to be rendered to the defendant by the plaintiff as its president, the defendant promised and agreed to pay to the plaintiff, in addition to a fixed salary, a sum equal to \_\_\_\_\_ per cent of the net profits realized by it from its business during the time the plaintiff should continue to be and act as president. Said promise and agreement was partly oral and partly in writing.

3. The plaintiff continued to be and act as president of the defendant from the said \_\_\_\_\_, 20\_\_\_\_\_, to \_\_\_\_\_, 20\_\_\_\_\_, and duly performed all the conditions of the said contract on his part.

4. Upon information and belief, \_\_\_\_\_ per cent of the net profits realized by the defendant from its business during the period from \_\_\_\_\_, 20\_\_\_\_\_, to \_\_\_\_\_, 20\_\_\_\_\_, amounted to the sum of \_\_\_\_\_ dollars, no part of which has been paid to the plaintiff though demand therefor has been duly made.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 50**

### **Complaint in Action by Employee of Corporation Against Corporation Assuming Liabilities of Partnership for Breach of Contract of Employment With Partnership**

[Caption and introductory paragraph]

1. Upon information and belief, defendant, \_\_\_\_\_, is a domestic corporation organized and existing under the laws of the State of New York.

2. During the month of \_\_\_\_\_, 20\_\_\_\_\_, this plaintiff entered into a contract with a firm known as \_\_\_\_\_, whereby the said firm hired the said plaintiff to work for it as manager of the \_\_\_\_\_ department for the term and period of \_\_\_\_\_ years, beginning on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and agreed to pay him therefor the sum of \_\_\_\_\_ dollars per year, and such payments as plaintiff might draw on account thereof, not exceeding the sum of \_\_\_\_\_ dollars during one year of said term, and the plaintiff agreed with the firm of \_\_\_\_\_ so to work and serve for the said time and for the said compensation.

3. The plaintiff entered upon such services and continued therein during the existence of the said firm of \_\_\_\_\_ and the various changes which were made in said firm's membership.

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ said firm sold, assigned and transferred its business and assets to the defendant and the defendant assumed all liabilities of the firm and the performance of all of its contracts, including the contract with plaintiff.

5. Thereafter plaintiff continued in the employment of the defendant, rendering the same service and receiving the same compensation as he had formerly rendered to and received from said firm of \_\_\_\_\_, until the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, when defendant wrongfully and without cause discharged plaintiff and terminated his employment.

6. Plaintiff has duly performed all the conditions of said contract on his part, both before and since the contract was assumed by the defendant as aforesaid. By reason of the foregoing plaintiff has been damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 51**

### **Complaint in Action to Set Aside Judgment by Confession**

[Caption and introductory paragraph]

1. At all the times mentioned herein defendant was, and now is, a domestic corporation duly organized and existing under the laws of the State of New York.

2. At all the times hereinafter mentioned the defendant, \_\_\_\_\_ corporation, had its principal place of business in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of New York and at all of such times the defendants, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ were and still are the officers and directors of the defendant.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in an action in the \_\_\_\_\_ Court of \_\_\_\_\_ County, a judgment was duly rendered in favor of this plaintiff against the defendant, \_\_\_\_\_ corporation, for the sum of \_\_\_\_\_ dollars.

4. The judgment roll in said action was duly filed and the judgment was duly docketed in the office of the clerk of the County of \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

5. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, an execution was duly issued upon the judgment to the sheriff of the County of \_\_\_\_\_ wherein the defendant, \_\_\_\_\_ corporation, had and still has its principal place of business, and the execution was duly returned by the sheriff on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, wholly unsatisfied and the judgment remains unpaid.

6. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant, \_\_\_\_\_ corporation, confessed judgment in favor of the defendant \_\_\_\_\_ for the sum of \_\_\_\_\_ dollars which confession of judgment was signed and sworn to by the defendant, \_\_\_\_\_, as president of the defendant, \_\_\_\_\_ corporation.

7. An execution on the judgment by confession in favor of the defendant \_\_\_\_\_ was issued to the sheriff of the County of \_\_\_\_\_ on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and upon information and belief, the sheriff has levied upon the property of the defendant, \_\_\_\_\_ corporation, under the execution.

8. On and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and at the time the judgment was confessed in favor of the defendant, \_\_\_\_\_, as hereinbefore alleged, the defendant, \_\_\_\_\_ corporation, was and still is insolvent.

9. The judgment by confession in favor of the defendant \_\_\_\_\_ was intended to give a preference to the defendant \_\_\_\_\_, over other creditors of the defendant, \_\_\_\_\_ corporation, and at the time of the judgment by confession the defendant, \_\_\_\_\_, had notice and reasonable cause to believe that such confession of judgment would effect a preference in his favor and that the defendant, \_\_\_\_\_ corporation, was then and there insolvent.

10. The confession of judgment was in violation of the Business Corporation Law of the State of New York and by reason of such illegal confession of judgment plaintiff has been unable to collect any part of his judgment as set forth above and if such judgment had not been confessed plaintiff would have received at least \_\_\_\_\_ dollars upon his said judgment and he has suffered damages in the sum of \_\_\_\_\_ dollars by reason thereof.

WHEREFORE plaintiff demands judgment:

1. The judgment confessed by the defendant, \_\_\_\_\_ corporation, in favor of the defendant \_\_\_\_\_ be declared null and void and be cancelled of record.

2. The plaintiff have judgment against the defendants, \_\_\_\_\_ and \_\_\_\_\_, officers and directors of said corporation and each of them in the sum of \_\_\_\_\_ dollars, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

3. The plaintiff have such other and further relief as may be just and proper, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

**Form 52**

**Complaint in Action to Set Aside an Ultra Vires Agreement Made by Corporation**



[Caption and introductory paragraph]

1. At all the times mentioned herein the defendant, \_\_\_\_\_ corporation, was and still is a domestic corporation organized and existing under the laws of the State of New York.

2. Plaintiff is a stockholder of the said \_\_\_\_\_ corporation and is the owner and holder of \_\_\_\_\_ shares of the common stock thereof.

3. [Set forth powers of corporation.]

4. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant, \_\_\_\_\_ corporation, entered into an agreement with the defendant \_\_\_\_\_, and through its officers executed and delivered to the defendant \_\_\_\_\_ such agreement wherein and whereby the defendant, \_\_\_\_\_ corporation, agreed to [state portion of agreement claimed to be ultra vires]; a copy of the agreement is hereto annexed and marked Exhibit "A" and made a part of this complaint.

5. The agreement is ultra vires as to the defendant, \_\_\_\_\_ corporation and not within the powers conferred upon it by its certificate of incorporation.

6. The plaintiff has duly demanded of the officers and directors of the defendant, \_\_\_\_\_ corporation to bring an action against the defendant \_\_\_\_\_ to set aside the agreement, but the officers and directors have failed and refused to so do.

WHEREFORE plaintiff demands judgment that:

1. The said agreement be adjudged null and void and set aside.
2. The defendants be enjoined from performing the said agreement.

3. The plaintiff have such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

### **Form 53**

#### **Complaint in Action Against Underwriter of Corporate Bonds**

[Caption and introductory paragraph]

1. On or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant entered into a certain agreement, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, with the plaintiff and \_\_\_\_\_, a construction corporation organized under the laws of this State, and certain other persons or corporations who were therein designated as underwriters. Copies of said agreement (except as to the signatures of subscribers other than this defendant) are hereunto annexed, marked Schedule "A" and Schedule "B," and hereby made a part hereof.

2. Said agreements, counterparts of said Schedules "A" and "B," where under the bonds therein described to the amount \_\_\_\_\_ dollars were underwritten by underwriters who were accepted by this plaintiff, were duly delivered to plaintiff prior to the making of the loan in said agreement provided for.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and from time to time thereafter, the plaintiff loaned and advanced upon the securities and guaranties in said agreements provided for, to the said \_\_\_\_\_ construction corporation, various sums, amounting in the aggregate to the sum of \_\_\_\_\_ dollars, payable, with interest at six per centum per annum, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_. The said loan was evidenced and further secured by the several promissory notes of the said \_\_\_\_\_ construction corporation, duly made and delivered to the plaintiff at or about the respective dates on which the aforesaid sums, aggregating

\_\_\_\_\_ dollars, were respectively advanced; said notes and interest all being payable on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

4. The aforesaid loan of \_\_\_\_\_ dollars to \_\_\_\_\_ construction corporation, was \_\_\_\_\_ per cent of the amount agreed to be paid by all the underwriters under the aforesaid agreements, and there had been deposited with the plaintiff, at or prior to the times such advances were made, the contracts, assigned in blank, described in Schedule "A," and the bonds described in Schedule "B," or interim bonds representing the same, in the amount of \_\_\_\_\_ dollars par value of such bonds for each \_\_\_\_\_ dollars so advanced by plaintiff.

5. In and by said agreement Schedule "A," the defendant, in consideration of the making of the aforesaid loan by the plaintiff to said \_\_\_\_\_ construction corporation, agreed to purchase and take from said \_\_\_\_\_ its \_\_\_\_\_% \_\_\_\_\_ year mortgage bonds described in said agreements at the price of \_\_\_\_\_ per cent of their par value and accrued interest, to the amount set opposite his signature to said agreements, and guaranteed to the plaintiff the repayment of his pro rata proportion of the principal of said advances made by plaintiff to said \_\_\_\_\_, with interest thereon at the rate aforesaid.

6. The amount and par value, of said bonds set opposite the defendant's signature to said agreement, Schedule "A," and which the defendant agreed to take and pay for, was \_\_\_\_\_ dollars, and the amount of cash set opposite the defendant's signature to said agreement, Schedule "A," and which the defendant agreed to pay, was \_\_\_\_\_ dollars.

7. Pursuant to the terms of said agreement, Schedule "A," plaintiff reduced the amount of bonds which by the said agreement defendant agreed to take and pay for, from his said subscribed amount of \_\_\_\_\_ dollars, to the amount of \_\_\_\_\_ dollars, and reduced the amount of cash which said agreement specified that defendant would pay, from his said subscribed sum of \_\_\_\_\_ dollars to the sum of \_\_\_\_\_ dollars.

8. The pro rata proportion of the principal of said loan to said \_\_\_\_\_, the repayment of which was guaranteed by the defendant as aforesaid, amounts to \_\_\_\_\_ dollars of principal, upon payment of which, with interest as hereinafter set forth, defendant is entitled to receive \_\_\_\_\_ dollars par value of said bonds; but defendant has made no payments whatever on account of the bonds that he is entitled to receive under said agreements nor on account of his said guaranty.

9. The plaintiff now holds, subject to the terms and conditions of defendant's said agreements, \_\_\_\_\_ dollars, par value of the aforesaid \_\_\_\_\_ bonds, which plaintiff hereby offers to deliver to the defendant upon receiving from him full payment of defendant's said guaranty.

10. Pursuant to the terms of the aforesaid agreements, the said \_\_\_\_\_ exercised its right thereunder to renew the aforesaid loan for a period of one year at the same rate of interest, and the plaintiff thereupon extended said loan to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

11. Pursuant to the terms of the aforesaid agreements, the plaintiff from time to time detached and collected the coupons on the bonds held by it, to wit: the coupons payable \_\_\_\_\_, 20\_\_\_\_\_, and \_\_\_\_\_, 20\_\_\_\_\_, and applied all interest so collected upon the interest due or to grow due upon the said loan, interest on said loan being thereby and by other cash payments made by said \_\_\_\_\_ paid to and including the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

12. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the repayment of the said loan with the balance of interest due thereon, was duly demanded of the said \_\_\_\_\_ by this plaintiff, but neither said loan and interest nor any part thereof was then nor has since been paid by said \_\_\_\_\_.

13. By reason of the matters aforesaid, there became and is now due to plaintiff from defendant the sum of \_\_\_\_\_ dollars, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and the amount has not been paid, nor any part thereof, although duly demanded.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 54**

### **Complaint in Action Against Seller of Stock for False Representations as to the Value of the Stock**

[Caption and introductory paragraph]

1. At all times mentioned herein \_\_\_\_\_ corporation was and is a domestic corporation organized and existing under the laws of the State of New York and defendant was and is a director and officer, to wit, \_\_\_\_\_ of said corporation and fully conversant with its business and affairs.

2. Prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff was the owner of \_\_\_\_\_ shares of stock of said corporation.

3. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff informed the defendant that he desired to sell such stock if he could obtain a fair and reasonable price for it and asked defendant for information as to the financial condition of said corporation and its earnings.

4. Defendant then told plaintiff that while the balance sheet of the corporation as of the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, showed the net worth of the corporation to be \_\_\_\_\_ dollars per share, its present net worth was much less and its inventories had greatly declined in value. Defendant further stated that while the books of the corporation for the year ending \_\_\_\_\_, 20\_\_\_\_\_, showed net income after taxes to be \_\_\_\_\_ dollars per share, earnings for the current year would be much

less because the corporation's sales were steadily declining and also because of the margin or percentage of profits therein. At the same time, the defendant told plaintiff that in defendant's opinion dividends on the stock of said corporation would be discontinued before the end of the year 20\_\_\_\_\_, and that in his opinion plaintiff would be lucky if he could sell his stock for \_\_\_\_\_ dollars per share.

5. Said statements by the defendant were knowingly and willfully false in that to the knowledge of the defendant at that time, inventories of the corporation had increased in value since the date of the balance sheet mentioned above, sales of the corporation and its margin of percentage of profits thereon had been increasing during the year 20\_\_\_\_\_, and neither defendant nor other directors of said corporation had any intention of discontinuing dividends upon its stock.

6. In reliance upon defendant's false statements aforesaid, and in ignorance of the facts alleged in the preceding paragraph hereof, plaintiff asked defendant whether he would be willing to buy plaintiff's stock at \_\_\_\_\_ dollars per share, and defendant agreed to do so, saying that he considered he was taking quite a gamble in doing so. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in reliance upon said false statements of defendant, and believing them to be true, plaintiff sold his said stock to the defendant and delivered to him the certificate therefor, duly endorsed, and accepted in payment therefor the sum of \_\_\_\_\_ dollars.

7. On information and belief, the true value of said stock on said date was not less than the sum of \_\_\_\_\_ dollars per share, and defendant then knew its value to be not less than that amount and by reason of the facts hereinbefore alleged plaintiff was damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Complaint in Action for Misrepresenting Value of Stock Exchanged for Services of Plaintiff**

[Caption and introductory paragraph]

1. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant having offered to the plaintiff to assign and transfer to him \_\_\_\_\_ shares of the par value \_\_\_\_\_ dollars each, of the capital stock of the \_\_\_\_\_ company, a corporation, upon consideration that the plaintiff should render services in \_\_\_\_\_ [state briefly the nature of the services agreed to be rendered], did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said stock was of the market value \_\_\_\_\_ dollars, and that defendant had paid all charges, calls, and assessments upon said shares by said company or the directors thereof.

2. The plaintiff, relying upon said representations, then and there agreed with the defendant to render all necessary services that should be required by the defendant in said \_\_\_\_\_, to the value, at the market price for such services, of \_\_\_\_\_ dollars [or otherwise state fully the nature and the value of the services agreed to be rendered]; and thereafter proceeded to, and did render said services [state facts showing how far the contract was performed by plaintiff].

3. In truth, and as defendant then well knew, the stock was not then of the market value of \_\_\_\_\_ dollars; but, on the contrary, the company was then insolvent, and the stock worthless and not sellable in the market; and the defendant had not paid all charges, calls, and assessments laid upon said shares; but, on the contrary, a special assessment of \_\_\_\_\_ per cent on the par value of said shares had been theretofore duly imposed upon them by the directors of said company, which assessments had not been paid by defendant, but then remained [and still remains] a charge upon said shares [or otherwise state specifically the particulars in which the representations were false].

4. By reason of the premises, the plaintiff has been damaged \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

**Form 56**

**Complaint in Action by Subscribers to Stock Against Corporation for Damages From False Representations in Prospectus**

[Caption and introductory paragraph]

1. At the times hereinafter mentioned the defendant was, and still is, a foreign corporation, organized under the laws of the State of \_\_\_\_\_, having an office for the transaction of business in the City of \_\_\_\_\_. Prior to \_\_\_\_\_, 20\_\_\_\_\_, the corporate name of the defendant was \_\_\_\_\_. In or about said month of \_\_\_\_\_, the corporate name of the defendant was duly changed under the laws of the State of \_\_\_\_\_, to \_\_\_\_\_, by which name it has since carried on, and is now carrying on business in the City of \_\_\_\_\_ and elsewhere.

2. In or about the month of \_\_\_\_\_, 20\_\_\_\_\_, the defendant, through one \_\_\_\_\_, its then assistant treasurer, entered into an agreement with \_\_\_\_\_ and \_\_\_\_\_, the then owners of a certain mining lease, mining rights and machinery appurtenant to property situated at or near \_\_\_\_\_, in the State of \_\_\_\_\_, providing for the acquisition by the defendant or its nominees of the said mining lease, rights and property for the consideration of \_\_\_\_\_ dollars, payable \_\_\_\_\_ dollars in cash and the balance in deferred installments. The agreement provided that the said mining property should be operated for account of the purchasers from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

3. On or about \_\_\_\_\_, 20\_\_\_\_\_, the defendant caused to be organized, under the laws of the State of \_\_\_\_\_, a corporation known as \_\_\_\_\_, Inc., with an authorized capital stock of \_\_\_\_\_ dollars,



and on or about said date articles of association were executed by the following incorporators:

\_\_\_\_\_ [names of subscribers with number of shares subscribed].

All of the said incorporators were officers or employees of the defendant, \_\_\_\_\_ then being its president, \_\_\_\_\_ its vice-president, \_\_\_\_\_ its assistant treasurer, and \_\_\_\_\_ and \_\_\_\_\_ clerks employed in the defendant's office in \_\_\_\_\_, \_\_\_\_\_. Said articles of association state that "All of said capital stock has been in good faith subscribed and actually paid in lawful money of the United States, and is in the custody of the persons hereinafter named as the first board of directors." The articles of association so executed were thereafter filed in the office of the Secretary of State of \_\_\_\_\_, who thereupon issued to the incorporators his certificate.

4. Thereafter, and on or about \_\_\_\_\_, 20\_\_\_\_\_, the defendant caused the mining lease mentioned in contract aforesaid to be assigned to \_\_\_\_\_, Inc., as the nominee of defendant. No corporate action was taken, however, by \_\_\_\_\_, Inc., or its directors or stockholders authorizing the execution of said lease or the acquisition of the said mining property or the issue of its capital stock in payment therefor, but from and after the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said mining property was operated for account of the defendant or the said \_\_\_\_\_, Inc.

5. At the time of its formation, the Board of Directors of \_\_\_\_\_, Inc., was composed of the said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, all officers and employees of the defendant.

6. The laws of \_\_\_\_\_, under which said \_\_\_\_\_, Inc., was formed, provide that at the time of subscribing for stock every subscriber shall pay to the directors \_\_\_\_\_ per cent of the whole amount subscribed by him in money, and that no subscription shall be so taken without such payment. Said laws further provide that the articles

of incorporation of such companies shall state the amount of the capital stock of the corporation, the number of shares into which it is divided and the par value thereof, that the stock has been bona fide subscribed, and one-half thereof actually paid in lawful money of the United States, and is in the custody of the persons named as the first board of directors or managers.

7. On or about \_\_\_\_\_, 20\_\_\_\_\_, the first issue of capital stock of \_\_\_\_\_, Inc., was made as follows: \_\_\_\_\_ [specifying stock issued].

No stock was at any time issued to the incorporators except as above stated, nor was any payment made in cash by said incorporators to \_\_\_\_\_, Inc., upon their respective subscriptions.

8. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said directors, at a meeting of the board of \_\_\_\_\_, Inc., adopted a resolution directing the payment on the stock of said company of a semimonthly dividend of \_\_\_\_\_ per cent regularly on the \_\_\_\_\_ and \_\_\_\_\_ of each month. In pursuance thereof dividends at the rate of \_\_\_\_\_ per cent were paid on the stock of said company \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, 20\_\_\_\_\_.

9. On or about the month of \_\_\_\_\_, 20\_\_\_\_\_, at the City of \_\_\_\_\_ and elsewhere, the defendant issued a prospectus offering for sale to investors stock of \_\_\_\_\_, Inc., at par to the amount of \_\_\_\_\_ dollars. A copy of said prospectus is hereto annexed, and made a part hereof, marked Exhibit "A."

10. The said prospectus was brought to \_\_\_\_\_, the plaintiffs' assignor, by agents and representatives of the defendant, who solicited \_\_\_\_\_ to purchase from the defendant the stock of \_\_\_\_\_, Inc., upon the faith of the

representations contained in the said prospectus, supplemented by statements made to the said \_\_\_\_\_ by the agents and representatives of the defendant.

11. In order to induce the said \_\_\_\_\_ to purchase stock in said \_\_\_\_\_, Inc., it was represented by the defendant to the said \_\_\_\_\_ that said company was regularly and duly organized under the laws of the State of \_\_\_\_\_; that its capital stock was \_\_\_\_\_ dollars, all of which was fully paid; that the property of said company was of great value and worth more than the amount of its issued capital stock; that its mining, pumping and milling machinery were in good condition, and fully adequate for the profitable operation of the mine; that the said mine was fully developed and could be profitably operated without further expenditure for development; that the company was free from debt; that the amount of zinc ore then in sight in the shafts of the company was sufficient to keep the mill in profitable operation for at least \_\_\_\_\_; that dividends were being earned and paid at the rate of \_\_\_\_\_ per cent fortnightly; that the payment of such dividends was assured by reason of the presence of valuable ore in the shafts of the company sufficient to last for a considerable period; that the mine was being honestly and efficiently managed by the representatives of the defendant, and that by reason thereof great safety and economy of management were possible.

12. Relying upon the representations contained in the said prospectus, and the statements of the agents or representatives of the defendant, the said \_\_\_\_\_ in or about the month of \_\_\_\_\_, 20\_\_\_\_\_, at the City of \_\_\_\_\_, purchased from the defendant stock in \_\_\_\_\_, Inc., to the amount of \_\_\_\_\_ shares at par, and paid to the defendant therefor, at its office in the City of \_\_\_\_\_, the sum of \_\_\_\_\_ dollars in cash.

13. Each of the representations recited in paragraph 11 hereof was false, and known by the defendant to be false at the time of the sale of said stock to the said \_\_\_\_\_, and each of said representations was made by the defendant to said \_\_\_\_\_ for the fraudulent purpose of inducing the said

\_\_\_\_\_ to purchase stock of \_\_\_\_\_, Inc., and on information and belief, at the time of the issue by the defendant of the said prospectus and the making of the said representations to the said \_\_\_\_\_ and the sale of the said stock to him, the property of \_\_\_\_\_, Inc., was worth and was known by the defendant to be worth far less than the issued capital stock of said company; that the stock of said company was not in fact or in law fully paid, that the statement in the articles of incorporation that the amount of the capital stock had been "subscribed in good faith and actually paid in in lawful money of the United States, and is in the custody of" the directors was false, and known by the defendant to be false; that the shafts upon the property leased by said company had been stripped of all valuable ore before the transfer of said property, and defendant knew that said mine could not be profitably worked in its then condition and without large expenditure for further development; that no provision was made for working capital or for further development; that no provision was made for working capital or for the further necessary development and equipment of said property; that the mining, pumping and milling machinery were old and were known by the defendant to be in poor condition and thoroughly inadequate for the operation of said mine; that the operations of the company were conducted at a loss and were known by the defendant to be conducted at a loss from the outset; that in order to give the appearance of fictitious profit, and in order that fraudulent dividends might be paid, the defendant advanced four amounts of \_\_\_\_\_ dollars each, on four several dates, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, 20\_\_\_\_\_, which amounts were used, and were intended by the defendant to be used, to pay dividends on the stock of said company on each of said dates, and solely for the purpose of deceiving intending purchasers of said stock into the belief that said company was earning large profits, thereby enabling the defendant to sell the said stock.

14. Shortly after the said \_\_\_\_\_ purchased said stock of \_\_\_\_\_, Inc., said company ceased paying dividends, and has paid none since \_\_\_\_\_, 20\_\_\_\_\_; the representatives of the defendant have

continued down to the present time to manage its affairs without interference by the stockholders, but the said company has been conducted at a loss from the beginning; its entire output has been less than the cost of maintaining and operating the mine and said company is now in debt to a large amount; its mining operations are totally suspended; the lease of its property is liable to forfeiture; its machinery and mill are liable to attachment in proceedings instituted by its creditors, and its capital stock is now utterly worthless.

15. Said stock of \_\_\_\_\_, Inc., at the time of its sale to said \_\_\_\_\_ was and is wholly worthless, and by reason of the said fraudulent acts of the defendant, the said \_\_\_\_\_ has suffered damage in the sum of \_\_\_\_\_ dollars, payment of which was duly demanded and refused.

16. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the said \_\_\_\_\_, for a valuable consideration, transferred to the plaintiffs his certificate of stock in \_\_\_\_\_, Inc., and also assigned to the plaintiffs his claim against the defendant herein for damages growing out of the matters hereinabove set forth.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 57**

### **Complaint in Action by Subscriber to Stock Against Promoters to Recover Money Paid for Stock Where Induced by False Representations**

[Caption and introductory paragraph]

1. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, \_\_\_\_\_ was the owner in fee and in possession of the following described land: \_\_\_\_\_.

2. On said day, the above-named defendants procured from said owner an option in writing founded upon a valuable consideration to purchase said land for the sum \_\_\_\_\_ dollars, said option to be exercised within \_\_\_\_\_ months from said date.

3. Thereafter on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendants, combining together to defraud the plaintiff, falsely and fraudulently represented to the plaintiff that they could purchase the said lands for the sum of \_\_\_\_\_ dollars and for no less; that it was worth far more than that sum; and they solicited the plaintiff to subscribe the sum of \_\_\_\_\_ dollars, towards the capital stock of a corporation they were promoting and intending to organize for the purchase of said land to be platted as an addition to the \_\_\_\_\_ of \_\_\_\_\_, to which it lies adjacent.

4. Relying upon and believing said false and fraudulent representations, the plaintiff thereupon, on said day, subscribed for such stock the sum of \_\_\_\_\_ dollars payable \_\_\_\_\_.

5. Others having subscribed for stock to the amount of \_\_\_\_\_ dollars, the defendants thereupon on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, organized said corporation, and articles of incorporation were executed and filed as required by law to complete such organization; and the capital stock was fixed at the sum of \_\_\_\_\_ dollars; and the plaintiff after the organization duly paid to said corporation his said subscription, to wit, \_\_\_\_\_ dollars, and received therefor \_\_\_\_\_ shares of stock of the denomination of \_\_\_\_\_ dollars each, and so paid the amount relying upon said false and fraudulent representations made as aforesaid, and in full belief of the truth thereof, and in ignorance of the actual price of said land and the scheme aforesaid to defraud the subscribers in good faith to the said capital stock.

6. Defendants, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, were convened as a corporation and elected a board of directors, consisting of \_\_\_\_\_ members, of whom defendants were chosen as members, and were made respectively, president, secretary and treasurer of said corporation.

7. In furtherance of their scheme to defraud the plaintiff as well as other subscribers in good faith to said capital stock the defendants, as such board of directors, caused the passage of a resolution, instructing the said officers to purchase the above-described land for said corporation for the sum of \_\_\_\_\_ dollars [a larger sum which the promoters pretended was the lowest price therefor].

8. Thereupon, the defendants, as such directors, purchased the said lands, under the said option and paid therefor only the sum of \_\_\_\_\_ dollars, but falsely reported to the said corporation that they had paid therefor the sum of \_\_\_\_\_ dollars, and caused such amount to be stated as the consideration in the deed by which they caused the lands to be conveyed to the corporation.

9. Thereupon, defendants took from the said treasury the sum of \_\_\_\_\_ dollars, the difference between the actual and pretended price of the said land and converted the land to their own use, in consummation of their fraudulent scheme aforesaid; and also caused to be issued to themselves \_\_\_\_\_ shares of full paid stock in said corporation for which in fact they paid nothing.

10. By reason of said fraudulent representations and concealments, the defendants obtained and appropriated unto themselves the sum of \_\_\_\_\_ dollars of the moneys paid in by the plaintiff and other bona fide subscribers to said stock, to the plaintiff's loss and damage, the sum of \_\_\_\_\_ dollars.

11. The plaintiff did not learn of the said fraudulent transaction and that said representations were false, until the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

WHEREFORE, the plaintiff demands judgment against the defendants:

1. They be compelled to account for the moneys thus procured by them by such false representations and transactions.

2. They be adjudged to pay to the plaintiff his share thereof, to wit, the sum of \_\_\_\_\_ dollars.

3. For the costs and disbursements of this action.

4. For such other or further relief as the plaintiff may be entitled to in equity and good conscience.

[Endorsement, address, telephone number, and verification.]

## **Form 58**

### **Complaint in Action by Purchaser of Stock for Damages from False Representations as to Financial Condition, etc., of Corporation**

[Caption and introductory paragraph]

1. The defendants on or about \_\_\_\_\_, 20\_\_\_\_\_, agreed with the plaintiff to sell to plaintiff certain shares of stock in the \_\_\_\_\_ company, for the price \_\_\_\_\_ dollars.

2. The defendants, then and there, falsely and with the intention and for the purpose of inducing the plaintiff to purchase the said shares of stock, stated and represented to the plaintiff that the \_\_\_\_\_ company was a going concern with large contracts for the manufacture of \_\_\_\_\_ and other articles at great profit; said company had been operating for \_\_\_\_\_ years and was making money and said company was paying dividends on its stock; a purchase of said stock was the best investment that one could make; \_\_\_\_\_ shares of the preferred stock of said company was the last block of stock left for sale, and the company was in excellent financial condition.

3. Said representations and statements were, when made by the defendants as aforesaid, well known by them to be false and untrue.



4. The plaintiff, relying upon the said representations and statements of the defendants and believing the same to be true, then and there purchased and the defendants then and there deceitfully sold the said shares of stock to the plaintiff for the sum of \_\_\_\_\_ dollars, which said sum plaintiff then and there paid to the defendants in reliance upon said false and fraudulent representations.

5. Plaintiff received a certain certificate Number \_\_\_\_\_ for \_\_\_\_\_ shares of the preferred stock in \_\_\_\_\_ company, dated \_\_\_\_\_, and in addition thereto received a certain certificate Number \_\_\_\_\_ for \_\_\_\_\_ shares of the common stock of said company, dated \_\_\_\_\_, which was then and there delivered to the plaintiff by the defendants as a bonus for the purchase of said \_\_\_\_\_ shares of preferred stock.

6. The said representations and statements of the defendants were then and there false and untrue in that the \_\_\_\_\_ company had not been operating and making money for a period of \_\_\_\_\_ years and did not have large and profitable contracts for the manufacture of \_\_\_\_\_ and other articles and did not at that time and has not since paid dividends on its stock, and said \_\_\_\_\_ shares of stock was not the last block of stock for sale in said corporation and the said corporation was not in good financial condition, and the said shares of stock are to the plaintiff wholly worthless: To plaintiff's damage in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 59**

### **Complaint in Action by Assignee of Purchaser of Stock Based on Misrepresentations as to Dividends**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, there was organized under the laws of the State of New York a domestic corporation known as \_\_\_\_\_ corporation, with a capital stock \_\_\_\_\_ dollars, divided into \_\_\_\_\_ shares of the par value of \_\_\_\_\_ dollars per share. The defendant A was president and one of the directors of said corporation from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, until the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and defendant B was treasurer of said corporation from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, until after the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

2. At a meeting of said directors of said \_\_\_\_\_ corporation, held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at which the defendant A was present, the following resolution was adopted, said defendant A voting in favor of said resolution: \_\_\_\_\_ [resolution declaring dividend].

3. The said dividends were not made from the surplus profits arising from the business of the said \_\_\_\_\_ corporation to the knowledge of the defendants. The making of such dividends, except from the surplus profits arising from the business of the corporation, is by the provisions of Section 190.35 of the Penal Law of the State of New York declared to be a misdemeanor.

4. Notice of the declaration of said dividends was at the instance of said directors and of defendant B published on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in many of the leading newspapers of New York City, including \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_. The following is a copy of said notice as published in said newspapers: \_\_\_\_\_.

5. The statement contained in said notice that said two dividends were the regular monthly dividends Nos. 18 and 19 was false to the knowledge of defendants, in that the dividends above mentioned were the first dividends ever declared by said \_\_\_\_\_ corporation.

6. In order to realize funds with which to pay said dividends so declared on the \_\_\_\_\_ day of \_\_\_\_\_, said directors on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, issued and delivered to \_\_\_\_\_, stockbrokers of the City of \_\_\_\_\_, \_\_\_\_\_ certificates of defendant B, as treasurer of said \_\_\_\_\_ corporation, numbered from 1 to 21, inclusive, exchangeable for the stock of said corporation and aggregating \_\_\_\_\_ shares, on which said directors, with the knowledge of defendant B, gave said \_\_\_\_\_ an option at \_\_\_\_\_ cents on the dollar. Defendants authorized said \_\_\_\_\_ to state to intending purchasers of said stock that the net earnings of said \_\_\_\_\_ corporation amounted to more than one per cent per month upon its capital stock. Such statements were made accordingly by said \_\_\_\_\_ to plaintiff's assignors. Said statements were false to the knowledge of defendants and were made with the intent to deceive intending purchasers of said stock, including plaintiff's assignors, by leading them to believe that said corporation was doing a highly prosperous business when it was, in fact, doing a losing business. Thereafter and during the succeeding \_\_\_\_\_ weeks said \_\_\_\_\_ sold said stock to the public at from \_\_\_\_\_ to \_\_\_\_\_ cents on the dollar, realizing a profit of over \_\_\_\_\_ dollars, and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said \_\_\_\_\_ paid over to said \_\_\_\_\_ corporation from the proceeds of said sales the sum of \_\_\_\_\_ dollars. The advance in the price of the stock in the open market, as above alleged, was due to the fact that the public believed that said \_\_\_\_\_ corporation was doing a profitable business, and that said dividends so declared on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, were declared from the surplus profits of said corporation for the months of \_\_\_\_\_ and \_\_\_\_\_, 20\_\_\_\_\_. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said two dividends of \_\_\_\_\_ per cent each, amounting in the aggregate to the sum of \_\_\_\_\_ dollars, were knowingly paid by defendant B, as treasurer of said

\_\_\_\_\_ corporation, out of the moneys so realized from the sale of said stock, and not from the surplus profits arising from the business of said corporation.

7. At or about the time of the declaration of said dividends on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the directors of said \_\_\_\_\_ corporation, including the defendant A, and with the concurrence and cooperation of defendant B, caused a statement to be circulated among the public to the effect that said \_\_\_\_\_ corporation had been organized in the year 20\_\_\_\_\_, and that since \_\_\_\_\_, 20\_\_\_\_\_, it had paid \_\_\_\_\_ consecutive monthly cash dividends of \_\_\_\_\_ dollars each. Said statements were false to the knowledge of defendants and were made with the intent to deceive prospective purchasers of the stock of said \_\_\_\_\_ corporation, by inducing them to believe that the net earnings of said \_\_\_\_\_ corporation for the preceding \_\_\_\_\_ months had exceeded the sum of \_\_\_\_\_ dollars per month, when, in fact, it had made no such earnings.

8. The surplus of said \_\_\_\_\_ corporation was not sufficient to pay said dividends so declared on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to the knowledge of the defendants. The business of said \_\_\_\_\_ corporation gradually decreased and the value of its shares also decreased, and, finally, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, its then directors filed a petition in the Supreme Court for the county of \_\_\_\_\_, alleging that said \_\_\_\_\_ corporation was insolvent, and thereafter, and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the Supreme Court, upon said application, appointed one \_\_\_\_\_ temporary receiver of said corporation, and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said receiver duly qualified by filing his bond as such receiver.

9. During the years 20\_\_\_\_\_ and 20\_\_\_\_\_ one C purchased in the open market certificates for \_\_\_\_\_ shares of the capital stock of said

\_\_\_\_\_ corporation, at the dates and for the prices hereinafter mentioned,  
to wit: \_\_\_\_\_.

Said C received dividends on said stock to the amount of \_\_\_\_\_ dollars, which,  
deducted from said sum of \_\_\_\_\_ dollars, makes the net investment of said C the  
sum of \_\_\_\_\_ dollars.

10. Said C purchased said stock in the belief that the statements so made by said directors  
were true; said directors were honestly conducting the affairs of said \_\_\_\_\_  
corporation, and that the dividends so declared by said \_\_\_\_\_ corporation  
on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, were made and paid from  
the surplus profits arising from the business of said \_\_\_\_\_  
\_\_\_\_\_ corporation.

11. The stock of said \_\_\_\_\_ corporation,  
because of the facts aforesaid, is now worthless, and said C has been damaged by virtue of the  
premises in the sum of \_\_\_\_\_ dollars. The moneys so expended by him in the  
purchase of said stock were so expended in reliance upon the honesty of said directors and said  
B, as such treasurer in the management of the affairs of said corporation, and upon the  
statements made by the directors of the \_\_\_\_\_ corporation as aforesaid,  
and in the belief that the dividends above mentioned had been made and paid from the surplus  
profits of said \_\_\_\_\_ corporation.

12. Prior to the commencement of this action said C duly assigned and delivered to the plaintiff  
the certificates of stock of the \_\_\_\_\_ corporation so purchased by him as  
aforesaid, and duly assigned to the plaintiff all his claims, demands and rights of action against  
the defendants then vested in him by virtue of the premises.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Complaint in Action to Recover Damages From False Representations Inducing Exchange of Stock for Stock in Another Corporation**

[Caption and introductory paragraph]

1. Heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the above-named plaintiffs were the owners of \_\_\_\_\_ shares of the common capital stock of \_\_\_\_\_ company, a domestic corporation, each share being of the par value \_\_\_\_\_ dollars, the said \_\_\_\_\_ owning \_\_\_\_\_ and the said \_\_\_\_\_ owning \_\_\_\_\_ shares of said stock.

2. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant entered into an agreement with the plaintiffs, wherein and whereby, he, the said defendant promised and agreed that if the plaintiffs would assign and transfer unto the said defendant, the aforesaid \_\_\_\_\_ shares of the common stock of \_\_\_\_\_ company, the said defendant would transfer unto the plaintiffs \_\_\_\_\_ shares of the capital stock of B Company, a domestic corporation, each share being of the nominal par value of \_\_\_\_\_ dollars, and which stock of said B Company, the said defendant stated and represented to the plaintiffs, was worth \_\_\_\_\_ dollars, and which sum, he, said defendant, agreed to pay unto the plaintiffs therefor in six months after said last-mentioned date.

3. For the purpose and with the preconceived intent and design of inducing these plaintiffs to make said contract hereinbefore set forth and to transfer said \_\_\_\_\_ shares of stock in \_\_\_\_\_ company to him, said defendant further stated and represented that he would procure a bond from some reputable and responsible Guarantee and Indemnity Company, to insure the plaintiffs against any loss by reason of the making of said contract and to guarantee unto these plaintiffs, the payment by the defendant of the aforesaid sum of \_\_\_\_\_ dollars, and which bond the defendant agreed to deliver to these plaintiffs within \_\_\_\_\_ days after the delivery of aforesaid stock to him.

4. Relying upon all of said representations and believing the same to be true, the plaintiffs did assign and transfer to the defendant the aforesaid \_\_\_\_\_ shares of the capital stock of \_\_\_\_\_ company, and thereafter received from the defendant \_\_\_\_\_ shares of B Company.

5. The aforesaid statements and representations of the defendant were false and untrue, and known so to be when made by him to these plaintiffs; the stock so transferred to these plaintiffs by the defendant was not worth the sum of \_\_\_\_\_ dollars, but on the contrary was and is worth only the sum of \_\_\_\_\_ dollars.

6. The defendant failed to deliver unto these plaintiffs the indemnity bond or bond guaranteeing the faithful performance of the aforesaid contract on his part, although requested so to do, and failed and refused to pay unto the plaintiffs at the time fixed by said contract for the resale to him of said shares of stock in B Company, the said sum of \_\_\_\_\_ dollars.

7. The plaintiffs at the time stipulated in said contract, were ready, able and willing to, and did tender unto the said defendant, the aforesaid stock of B Company, and demanded the aforesaid sum of \_\_\_\_\_ dollars, but no part of said sum has ever been paid.

8. By reason of the premises, the plaintiffs have been damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 61**

### **Complaint in Action Against Directors for Fraud in Inducing Sale of Stock to Themselves**

[Caption and introductory paragraph]

1. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, \_\_\_\_\_ died leaving a will, by which this plaintiff was appointed the sole executrix thereof.

2. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said will was proved and admitted to probate by the surrogate of the county of \_\_\_\_\_ and letters testamentary thereon were thereafter, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, duly issued and granted to this plaintiff as sole executrix by the surrogate of said county; and this plaintiff thereupon duly qualified as such executrix and entered upon the duties of her said office.

3. Theretofore, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, this plaintiff was duly appointed committee of the person and estate of the said \_\_\_\_\_, who had theretofore been duly adjudged incompetent, by reason of insanity, to manage either himself or his estate.

4. As such committee of the estate of the said \_\_\_\_\_, all his personal property came into the possession of this plaintiff, amongst which were \_\_\_\_\_ shares of the capital stock of \_\_\_\_\_ company (hereinafter called the company), a foreign corporation, duly organized under the laws of the State of \_\_\_\_\_.

5. The total stock of the said company consisted of \_\_\_\_\_ shares; the defendant A, in \_\_\_\_\_, 20\_\_\_\_\_, was the owner of record of \_\_\_\_\_ of the said shares; the defendant B, at the same time, was the owner of record of \_\_\_\_\_ of the said shares; the defendant C, at the same time, was the owner of record of \_\_\_\_\_ shares of the said stock, and in addition thereto, he was then the sole acting executor of the estate of \_\_\_\_\_, the father of this plaintiff's testator, which said estate also owned \_\_\_\_\_ shares of the said capital stock; the defendants were then the sole acting directors of the company, and as such had the exclusive power to determine what, if any, dividends were to be paid on the stock of the said company; the defendants also had the sole charge, care, custody and control of all the books, papers, minutes, finances and business of such corporation from the time of the appointment of this plaintiff as committee, as aforesaid, up



to the time of the purchase hereinafter mentioned; and the plaintiff was not familiar with the business of the corporation or with its financial condition, and had only such information in reference thereto as she derived from the defendants, and she relied upon the said statements and representations made her by the defendants.

6. On information and belief, in or about the month of \_\_\_\_\_, 20\_\_\_\_\_, the defendants entered into a conspiracy to obtain the stock of the company held by the plaintiff as committee of the estate of the said \_\_\_\_\_ at a price far below its value.

7. In pursuance of such conspiracy, the defendants, as such sole acting directors of said company, on or about \_\_\_\_\_, 20\_\_\_\_\_, fraudulently and for the purpose of depressing the value of the stock of the company and of giving the plaintiff the impression and leading her to believe that the stock of the company was worth far less than it was in truth and in fact, and to induce the plaintiff to sell the stock for an inadequate consideration, fraudulently refrained from declaring a fair, just and adequate dividend on the stock of the company and did declare a dividend of only \_\_\_\_\_ per cent upon the said stock.

8. In further pursuance of the said conspiracy and for the fraudulent purpose of depressing the value of the said stock of the company and to induce this plaintiff to sell the said stock for an inadequate consideration as aforesaid, the defendants, as such sole acting directors of the company, on the same day, and without the consent of this plaintiff, increased the salary of the defendant, A, as president of the company, from the sum of \_\_\_\_\_ dollars, which he had received for years and up to that time, to the sum of \_\_\_\_\_ dollars; and they also fixed the salary of the defendant B, as treasurer of the company, at the sum of \_\_\_\_\_ dollars, when previously thereto the incumbent of the said office had received a salary of only \_\_\_\_\_ dollars; and they also raised the salary of the defendant C, from the sum of \_\_\_\_\_ dollars per year to the sum of \_\_\_\_\_ dollars per year.

9. In further pursuance of the said conspiracy, the defendants fraudulently represented to the plaintiff and to her agent that the company had suffered reverses to such an extent that it could

not pay a larger dividend than \_\_\_\_\_ per cent upon its stock and that it was doubtful whether the company would ever be in a position to pay dividends at a greater rate.

10. The defendants knew these representations to be false, and as a matter of fact the company had not suffered any large reverses, but, on the contrary, the company was then in a flourishing condition and had a large surplus, and was well able to pay a much larger dividend than the said dividend of \_\_\_\_\_ per cent directed to be paid by these defendants as sole acting directors of the said company.

11. By reason of the premises, this plaintiff, believing the said false and fraudulent representations of the defendants and relying thereon, and being ignorant of the true condition of the company and of its earning capacity, and of the true value of the stock, was induced to sell, as committee of the estate of the said \_\_\_\_\_, and thereafter did sell the \_\_\_\_\_ shares of stock of the company, which she held as committee of the estate of the said \_\_\_\_\_, to the defendant, C, for and on behalf of all three of the defendants, for the sum of \_\_\_\_\_ dollars.

12. The said price for the said stock was wholly inadequate and the said stock was then worth at least the sum of \_\_\_\_\_ dollars.

13. By reason of the premises the plaintiff was damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 62**

### **Complaint in Action by Purchaser of Stock for Breach of Agreement by Seller to Repurchase**

[Caption and introductory paragraph]

1. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, in the County of \_\_\_\_\_ and State of New York, in consideration that the plaintiff would buy and purchase of the defendant, certain securities, to wit, \_\_\_\_\_ shares of the capital stock of the \_\_\_\_\_ company, a corporation, of the par value \_\_\_\_\_ dollars each, the defendant agreed with the plaintiff to repurchase of the plaintiff, and to pay him for said shares of stock, the sum \_\_\_\_\_ dollars, together with interest thereon at \_\_\_\_\_ per cent from the last dividend paying period, at any time upon demand made by the plaintiff of the defendant, which said agreement to repurchase was by the defendant reduced to writing and signed and executed by him and delivered to the plaintiff, and is in words and figures as follows, to wit: \_\_\_\_\_.

2. Plaintiff, confiding in the said promises and undertakings of the defendant, on the day and year aforesaid, purchased from the defendant, the said shares of stock of the \_\_\_\_\_ company, a corporation, and paid to the defendant the sums of money then and there agreed to be paid by the plaintiff to defendant.

3. After the execution of the said agreement and the payment of the sums of money agreed to be paid by the plaintiff to the defendant for the said shares of stock, the plaintiff on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and at several and various other times before and after said date, duly tendered said shares of stock to the defendant and demanded that he repurchase the said shares of stock at the price of \_\_\_\_\_ dollars, with interest thereon at \_\_\_\_\_ per cent from the last dividend paying period as in and by said contract the defendant promised and agreed; that the defendant refused to do so and has ever since failed to repurchase said stock.

4. Plaintiff has duly performed all the conditions of said contract on his part.

5. By reason of the promises plaintiff has been damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

**Form 63**

**Complaint in Action to Cancel Stock Fraudulently Issued and Also Fraudulent Bond Issue**

[Caption and introductory paragraph]

1. [Allege corporate existence of the defendant corporation.]

2. The defendants \_\_\_\_\_ are respectively president, secretary and treasurer of said corporation, and were such officers at the several times hereinafter mentioned.

3. Heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff had discovered a valuable gold mine and duly located the mine at the United States land office at \_\_\_\_\_, in \_\_\_\_\_; he was without means of testing and developing said mine, and at the time stated proposed to the defendants that a corporation be formed for the purpose of testing and developing said mine under the laws of this state.

4. They accepted his proposal, and thereupon they agreed that the corporation above-named should be formed.

5. Pursuant to the said preliminary agreement on which such corporation was to be formed the defendants furnished the plaintiff \_\_\_\_\_ dollars to be used in \_\_\_\_\_. Being satisfied with such test, it was then agreed by and between the parties, by articles of agreement duly signed by all, that the individual defendants above-named should furnish the sum of \_\_\_\_\_ dollars, including said \_\_\_\_\_ dollars, as the cash working capital of the corporation to be formed; and the plaintiff was to receive for the property rights acquired by him in said \_\_\_\_\_ and the land on which it was situated, one-half of the stock to be issued.

6. Said corporation was then duly formed and stock to that amount was issued, \_\_\_\_\_ shares or \_\_\_\_\_ dollars to the plaintiff, and \_\_\_\_\_ shares or \_\_\_\_\_ dollars were issued to the other defendants, each receiving in proportion to his contribution to said fund for working capital; but certificates thereof have not been delivered to the plaintiff.

7. Said mine was developed by the use of said money and proved to be of great value.

8. After the formation of said corporation and before the adoption of any bylaws or governing rules of the corporation, the defendants, who constituted the holders of less than one-half of the capital stock of the corporation, entered into a fraudulent combination to wrong and injure the plaintiff, and for that purpose held a pretended meeting at \_\_\_\_\_ in said city, of which no notice was given to the plaintiff; at said meeting a pretended resolution was adopted increasing the capital stock from \_\_\_\_\_ to \_\_\_\_\_ dollars, but the plaintiff never consented to such increase.

9. The plaintiff then, to guard and protect his interest, offered to furnish one-half the funds necessary to carry on the business, but the defendants refused to receive it, their object being, as the plaintiff charges, to keep him out of control of the property and to crowd him out of said corporation, and deprive him of his valuable interest therein.

10. In pursuance of said purpose said defendants have without the plaintiff's knowledge or consent, and at a meeting of which no notice was given to him, caused a pretended issue of bonds to be voted and made upon said property to the amount of \_\_\_\_\_ dollars, and a mortgage to be executed, by the company, to secure the bonds, which mortgage contains provisions by which the trustee therein named can, at any time, on any default, wreck said company and sell out its properties and cut off all stockholders from any interest therein; the defendant, \_\_\_\_\_, is trustee, under said mortgage, and is, as the plaintiff is informed and believes, in collusion with said other defendants to wreck said corporation, and through a sale of said property under a pretended power in said mortgage, to deprive the plaintiff of his property and his interest in the stock of said corporation.

11. The plaintiff has duly performed his part of said agreements and all the terms and conditions thereof, and is ready and willing to do all things required of him in such performance in the future.

12. Said defendants are offering said bonds, so unlawfully issued, for sale, and are themselves intending to obtain the same and thus, as bondholders, obtain control of said property and mine and deprive the plaintiff of the same, and his valuable rights and interests as a stockholder therein.

WHEREFORE, the plaintiff demands judgment against the defendants:

- (1) Said increase of stock be adjudged to be void.
- (2) The stock to which the plaintiff is entitled be issued to him in amount as he is entitled to.
- (3) Said bonds and mortgages be adjudged to be void and delivered up to be canceled.
- (4) For such other and further relief as may be proper in the premises.

[Endorsement, address, telephone number, and verification.]

## **Form 64**

### **Complaint in Action by Stockholder Against Corporation for Transferring Certificate of Stock on Forged Signature**

[Caption and introductory paragraph]

1. [Allege incorporation of defendant.]

2. At all times mentioned herein and up to and including the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff was the registered owner of \_\_\_\_\_ shares of stock in the defendant corporation.

3. The shares were represented by stock certificate No. \_\_\_\_\_, made out in the name of the plaintiff.

4. At all times mentioned herein and up to and including the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff was the owner and was entitled to the possession of the said stock certificate and the shares represented thereby.

5. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said certificate was presented to the defendant by a person other than the plaintiff and one unknown to them. The certificate was not at that time endorsed, either in blank or as to a specified person, by the plaintiff.

6. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, when the certificate was so presented to the defendant, there was not presented to the defendant a separate document containing a written assignment of the certificate, or a power of attorney to sell, assign or transfer the certificate, or the shares represented thereby, signed by the plaintiff. Nor did the plaintiff at any time authorize, permit, consent to, or ratify any transfer assignment or assignment of the said certificate, any endorsement of his name thereon, any delivery thereof to the defendant, or any cancellation thereof.

7. The defendant without the said endorsement or without any separate document as aforesaid, and wholly without the authorization of the plaintiff, wrongfully transferred the said shares on its books to a person other than the plaintiff as the owner of the said shares, and the old certificate was thereupon cancelled and a new certificate issued to a person other than the plaintiff or his nominee.

8. Thereafter the plaintiff duly demanded of the defendant that a new certificate be issued to him in place of the old certificate which had been wrongfully cancelled, as aforesaid, and that his name be restored to the books of the company as that of the registered owner, and that all dividends since the said wrongful transfer be paid to the plaintiff, but the defendant wrongfully refused to comply with said demands or to recognize plaintiff as the owner of such shares.

9. The defendant by its acts has converted the said certificate and the shares represented thereby.

10. At all times material to this cause of action the market value of the said certificate and the shares represented thereby was the sum of \_\_\_\_\_ dollars.

WHEREFORE, plaintiff demands judgment for the value of such shares of stock, in the sum of \_\_\_\_\_ dollars, together with interest from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ and the costs and disbursements of this action; or in the alternative plaintiff demands judgment directing that defendant restore the plaintiff's name to its book as the owner of the said shares and issue to plaintiff a new certificate representing the aforesaid \_\_\_\_\_ shares, and that defendant corporation pay the plaintiff all dividends accrued on the said shares, together with the cost and disbursements of this action, and such other and further relief as may be just and proper.

[Endorsement, address, telephone number and verification.]

## **Form 65**

### **Complaint in Action to Compel a Corporation to Issue a Proportionate Share of a New Issue of Stock**

[Caption and introductory paragraph]

1. [Allege incorporation of defendant.]

2. Heretofore and prior to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the defendant corporation had a capital stock of the sum \_\_\_\_\_ dollars divided into \_\_\_\_\_ shares of common stock of the par value of the sum of \_\_\_\_\_ dollars each.

3. Plaintiff then was and for a long time prior thereto had been the owner of \_\_\_\_\_ of such shares of stock of the defendant and held the certificate of the said company as evidence of the ownership.



4. The said defendant had developed and was carrying on a large and profitable business and was earning large dividends, which were constantly increasing, thereby making the shares of its capital stock of great value, and has continued to earn such dividends since the increase of its capital stock as hereinafter alleged.

5. Pursuant to notice given according to law, the capital stock of the said defendant corporation was increased on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, from the sum of \_\_\_\_\_ dollars to the sum of \_\_\_\_\_ dollars, the said increase being represented by \_\_\_\_\_ shares of such company of the par value of \_\_\_\_\_ dollars each.

6. Plaintiff, as such stockholder, had the right to subscribe to and have issued to him at par such proportion of the said increased capital stock as the number of shares of the capital stock of the said company held by him bore to the entire number of shares of such capital stock prior to such increase, and that such proportion was and is \_\_\_\_\_ shares of such increased capital stock, and that he also had the right to subscribe to and receive at par, in preference to persons not stockholders, any shares of stock of said company not subscribed for by the stockholders thereof.

7. The plaintiff in due time and before the commencement of this action, duly offered and demanded the right to subscribe to the said \_\_\_\_\_ shares of said increased capital stock and duly tendered to the defendant at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, payment therefor.

8. In violation of plaintiff's rights, and not regarding its duty to the plaintiff, the defendant, its officers, directors and agents, refused to receive such subscription and to receive the payment therefor tendered by the plaintiff, and failed and refused to deliver said stock or any part thereof to the plaintiff, and further failed and refused to permit him to subscribe to any of said increased capital stock not subscribed for by other stockholders of the said corporation as the same existed on the said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ and on

information and belief, that a large number of such capital stock was not subscribed for by such other stockholders.

9. The business of the defendant was established in the year 20\_\_\_\_\_ and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, it had developed a large and increasing business which was and is being carried on with great profit to the stockholders, and defendant built up a large list of customers in connection with its business whose good will was and is of great and increasing value, and it was with the knowledge of and by reason of the said facts that the plaintiff originally became a stockholder of the said defendant corporation.

There are no other opportunities to invest money in similar enterprises with as great probable profit and advantage to plaintiff, and unless defendant is compelled to issue and deliver to the plaintiff the said proportion of increased capital stock to which he is entitled he will be irreparably damaged, and he has no adequate remedy at law.

WHEREFORE the plaintiff demands judgment as follows:

1. The defendant be ordered and adjudged to issue and deliver to the plaintiff a certificate for \_\_\_\_\_ shares of its capital stock upon a payment by the plaintiff of the par value or said subscription price thereof; and also so much of said capital stock as was not subscribed for by other stockholders of said company at the time of such increase, upon like payment, and to pay the plaintiff all dividends on such \_\_\_\_\_ shares that have been declared thereon;
2. In case said stock cannot be so issued, the plaintiff have judgment against the defendant for his damages.
3. Plaintiff have such other and further relief as to the court may seem just and proper together with the cost and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## **Complaint in Action to Rescind Purchase of Stock**

[Caption and introductory paragraph]

1. [Allege incorporation of defendant.]

2. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the individual defendants above named, who were then the directors of the defendant corporation, prepared for a general circulation and use, with intent that it should be distributed among the public, a certain prospectus or circular purporting to be issued by them and containing the following representations as to the defendant corporation: [insert representations claimed to be false]; a true copy of said prospectus or circular is hereto annexed, marked Exhibit "A" and made a part of this complaint.

3. A copy of said prospectus or circular was delivered to plaintiff by the defendant \_\_\_\_\_ as a director and officer of defendant corporation and with the knowledge and consent of the other individual defendants; plaintiff, at the time of receiving said prospectus and circular, was entirely ignorant of the true condition of the defendant corporation; he believed the statement contained in the said prospectus or circular and relied thereon; he was thereby induced to and did, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, purchase \_\_\_\_\_ shares of the common stock of the said defendant corporation and paid therefor the sum \_\_\_\_\_ dollars; thereafter plaintiff received from the said defendant \_\_\_\_\_ what purported to be a certificate for the said \_\_\_\_\_ shares of the common stock of the said defendant corporation, upon the value of which certificate it was represented that the said stock was fully paid and non-assessable.

4. The statements contained in the said prospectus and circular were false when they were made, and were made by the defendants with intent to deceive and defraud any person or persons who might obtain a copy of said prospectus or circular, and in particular this plaintiff.

5. In truth and in fact, the defendant corporation had not at any time, [set forth truth with regard to matters falsely represented in prospectus].

6. Plaintiff has tendered to the defendant the aforementioned certificate of stock prior to the commencement of this action and has offered and hereby offers to return the certificate to the defendant.

7. On information and belief, the said stock is worthless.

8. Plaintiff, by reason of the false and fraudulent representations made as aforesaid, has been injured and damaged in the sum of \_\_\_\_\_ dollars, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

WHEREFORE, plaintiff demands judgment that the said purchase of the said stock be rescinded and that the defendant corporation receive back from the plaintiff the certificate of stock hereinbefore mentioned and that the defendants repay to the plaintiff the sum of \_\_\_\_\_ dollars, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ and that plaintiff have judgment against the said defendants for said sum of \_\_\_\_\_ dollars, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and for such other and further relief as the court may deem just and proper, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## Form 67

### Petition for Judicial Dissolution Pursuant to Resolution of Directors

[Title of court and cause]

[Nature of paper and  
index number, if assigned]

TO SAID COURT:

The petition of \_\_\_\_\_ and \_\_\_\_\_, respectfully shows:

1. That \_\_\_\_\_, Inc., is a corporation organized and existing under the laws of the State of New York, having its office at \_\_\_\_\_, \_\_\_\_\_, New York, pursuant to certificate of incorporation duly filed in the office of the department of State on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, under Article \_\_\_\_\_ of the \_\_\_\_\_ Corporation Law of said State.

2. That the existing board of directors of said corporation presently consists, and did consist on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, when the special meeting of such board hereinafter referred to was called and held, of the following named individuals: [list all directors, with addresses].

3. That the nature of the business and objects for which such corporation was formed are and were [quote them from the certificate of incorporation, or summarize].

4. That said corporation is unable to attain its purposes and objectives because of [lack of available capital, intense competition, or as the case may be], and accordingly a special meeting of its board of directors was called, pursuant to notice duly served on each member of the board, a copy of which is hereto annexed, marked "Exhibit A," and made part hereof.

5. That such special meeting of the board was duly convened and held at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, with all members of the board then present, and at such meeting the following resolution was duly adopted by affirmative vote of more than a majority of the directors:

"WHEREAS, it appears that the affairs and business of this corporation are not prospering [and that the assets are not sufficient to discharge its liabilities] [or, that its dissolution would be beneficial to the shareholders];

NOW, THEREFORE, BE IT RESOLVED, pursuant to § 1102 of the Business Corporation Law of New York, that a petition be presented to the proper and appropriate court for its judicial dissolution."

6. Your petitioners constitute the majority of said board of directors who voted for the adoption of the above resolution, and accordingly make and file this petition in behalf of the corporation.

WHEREFORE, your petitioners pray that an order to show cause issue and that such other and further proceedings be had, looking to judicial dissolution of the corporation, as Article 11 of the Business Corporation Law requires or contemplates and to this court shall seem meet.

[Endorsement, address, telephone number, and verification.]

## Form 68

### Petition on Application for Dissolution of Insolvent Corporation

[Title of court and matter]

Petition

Index No. \_\_\_\_\_

To the Supreme Court of the State of New York:

The        petition        of        \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_, and \_\_\_\_\_ respectfully shows to this court:

That they are a majority of the directors of the \_\_\_\_\_, a corporation organized and existing under and by virtue of the Business Corporation Law of the state of New York, having its principal office and place of business located at the city of \_\_\_\_\_, county of \_\_\_\_\_ and state of New York.

That they have discovered that the stock, effects, and other property of said corporation are not sufficient to pay all just demands for which it is liable, or to offer a reasonable security to those who may deal with it, and that they deem it beneficial to the interests of the stockholders and creditors of said corporation that said corporation should be dissolved, for the reason that the corporation is insolvent, and that the officers and directors of said corporation have been unable to properly finance the company so as to carry out the purposes for which said corporation was organized.

That the dissolution of \_\_\_\_\_ Corporation is authorized under Section 1102 [or specify otherwise] of the Business Corporation Law.

That the following persons have made themselves parties to this proceeding: \_\_\_\_\_ [state appearances and attorneys].

That your petitioners are informed and believe that certain creditors of said corporation are about to bring suit against the corporation for the enforcement of collection of their claims against said corporation. No previous application has been made for an order to show cause herein.

WHEREFORE, your petitioners pray for a final order of this court dissolving said corporation and appointing a receiver of its property and assets for the protection and preservation of the assets, and restraining all persons, and especially the creditors of said corporation, from bringing any action against said corporation for the recovery of a sum of money and from taking any further proceeding whatsoever in any such action heretofore commenced and for such other, further and different relief as to the court may seem just and proper.

Dated, \_\_\_\_\_, 20\_\_\_\_\_.

[Signature, with name printed underneath]

Petitioners

\_\_\_\_\_,

Attorney for petitioners

[Office and post office address and telephone number]

[Venue]

\_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_,

being severally duly sworn, each for himself, says: That the matters of fact stated in the foregoing petition subscribed by them are just and true so far as he knows or has the means of knowing them.

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[Jurat]

**Form 69**

**Petition of Stockholder for Dissolution After Deadlock of Directors**

In the Matter of

The Application for a Dissolution of paper and

The Application for a Dissolution

\_\_\_\_\_, a corporation

[Nature of paper and  
index number, if assigned]

To the Supreme Court of the State of New York:

The petition of \_\_\_\_\_ respectfully shows:

1. \_\_\_\_\_ is a corporation organized under the Business Corporation Law of the State of New York, and has its office at \_\_\_\_\_, County of \_\_\_\_\_, State of New York.

2. Petitioner resides at \_\_\_\_\_, \_\_\_\_\_ County, New York, and is the owner of \_\_\_\_\_ shares of the \_\_\_\_\_ stock of said corporation. There are issued and outstanding a total of \_\_\_\_\_ shares of the \_\_\_\_\_ stock of said corporation, which is the stock entitled to vote at an election of directors, and petitioner is the holder of \_\_\_\_\_ shares thereof.

3. The names and residences of all the directors of said corporation are as follows:  
\_\_\_\_\_.



4. The purpose for which said corporation was organized was in brief \_\_\_\_\_ [state purpose, such as: to convert, buy, sell and deal in paper and related products].

5. The total amount of its authorized capital stock is \$\_\_\_\_\_, and the amount of its capital stock issued and outstanding is \$\_\_\_\_\_, of which \$\_\_\_\_\_ is in common stock and \$\_\_\_\_\_ in preferred stock.

6. Your petitioner is the owner of one half of the shares of stock of said corporation entitled to vote and files this petition for a voluntary dissolution on the grounds specified in Section 1104 of the Business Corporation Law.

7. Said corporation has an even number of directors who are equally divided respecting the management of its affairs.

8. Serious differences of opinion have arisen between the petitioner and \_\_\_\_\_ as directors on the one hand, and said \_\_\_\_\_ and \_\_\_\_\_ on the other, as directors, in the conduct and management of the business affairs of said corporation and its corporate affairs, with the result that the business and good will of the corporation are in immediate danger of irreparable impairment.

9. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, your petitioner as owner of fifty per cent of the entire capital stock of said corporation made a written demand upon \_\_\_\_\_, as president thereof, to call a special meeting of its stockholders for the purpose of \_\_\_\_\_ [state object, such as: amending Article \_\_\_\_\_, Section \_\_\_\_\_ of the By-laws] by providing that the Board of Directors shall consist of \_\_\_\_\_ Directors and for the further purpose of electing an additional director.

10. Pursuant to said request said \_\_\_\_\_ duly called a Special Meeting of Stockholders for the above purpose and the meeting was duly held at the office of the corporation, at \_\_\_\_\_, New York, on the \_\_\_\_\_ day of

\_\_\_\_\_, 20\_\_\_\_\_. At said meeting petitioner offered for adoption and passage the aforesaid resolution to \_\_\_\_\_ [state contents, such as: increase the Board of Directors from four to five]. Said \_\_\_\_\_ and \_\_\_\_\_ as owners of \_\_\_\_\_ of the stock entitled to vote then and there voted against the resolution and it failed of adoption.

11. Petitioner is the owner of \_\_\_\_\_ shares of the \_\_\_\_\_ stock, \_\_\_\_\_ shares of the \_\_\_\_\_ stock of said corporation; \_\_\_\_\_ [state other stock ownership].

12. \_\_\_\_\_ [allege deadlock of stockholders and directors, such as: Heretofore and during the months of \_\_\_\_\_, 20\_\_\_\_\_, petitioner as secretary of said corporation called a meeting of the stockholders thereof to be held on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ Street, \_\_\_\_\_, New York, for the purpose of discussing and resolving their differences. Before the time of said meeting said \_\_\_\_\_ and \_\_\_\_\_ informed petitioner that they would not consent to a dissolution. That thereafter during said meeting of stockholders petitioner offered to purchase all outstanding shares of preferred and common stock of the corporation then owned by said \_\_\_\_\_ and \_\_\_\_\_ for the sum of \_\_\_\_\_ Dollars in cash. Said \_\_\_\_\_ and \_\_\_\_\_ refused said offer and declined to sell their stock. Petitioner then offered to sell his holdings of preferred and common stock in the corporation to \_\_\_\_\_ and \_\_\_\_\_ for the sum of \_\_\_\_\_ Dollars in cash, which offer they refused to accept. The stock of said corporation is so divided that one half thereof, represented by two directors, is in favor of dissolving said corporation for the reasons above stated and the other one half represented by two directors, refuses to take any action]. By reason of said equal division of stock there is a deadlock in the Board of Directors, and it is impossible to select a new board of directors.

13. The reasons which induce petitioner to ask for a dissolution of the corporation are those hereinbefore specified.

14. Said corporation is at present entirely solvent and wholly able to pay all of its obligations in due course.

WHEREFORE, your petitioner prays for a final order of this court dissolving said corporation and for such other and further relief as may be proper, with the costs of this proceeding.

Dated, \_\_\_\_\_, N. Y. \_\_\_\_\_, 20\_\_\_\_\_.

\_\_\_\_\_  
Petitioner

\_\_\_\_\_  
Attorney for Petitioner

Office \_\_\_\_\_

Telephone No. \_\_\_\_\_

[Verification]

**Form 70**

**Schedule of Information Required by Court**

[Title of court and cause]

SCHEDULE A-1

MATERIALS AND SUPPLIES FURNISHED

List of Creditors

R 3015. Particularity as to specific matters.

Name

---

---

Address

---

---

Amount

---

---

---

Total

## SCHEDULE A-2

### Unfilled Contracts and Obligations

Name

\_\_\_\_\_  
\_\_\_\_\_

Address

\_\_\_\_\_  
\_\_\_\_\_

[Add necessary explanatory data, such as: A contract was entered into on \_\_\_\_\_, 20\_\_\_\_\_, by the corporation and the \_\_\_\_\_, New York, whereby the \_\_\_\_\_ agreed to repair and improve the manufacturing plant known as the \_\_\_\_\_ property, located at \_\_\_\_\_, New York and lease the premises to the corporation with an option to purchase. Pursuant to said agreement the \_\_\_\_\_ executed a lease of the premises to the corporation on \_\_\_\_\_, 20\_\_\_\_\_, and the corporation went into possession of the premises and still occupies the premises. That said two agreements are still in full force and effect and the corporation is not in default on either of them.]

## SCHEDULE A-3

### A Full and True Inventory of All Property of the Corporation

#### Cash

Cash on hand

\$ \_\_\_\_\_

Cash on deposit in \_\_\_\_\_ Bank

\$ \_\_\_\_\_

Cash on deposit in \_\_\_\_\_ Bank

\$ \_\_\_\_\_

#### Accounts Receivable

#### Goods Sold and Delivered

R 3015. Particularity as to specific matters.

Name

Address

Amount

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Total

\_\_\_\_\_

R 3015. Particularity as to specific matters.

## Machinery and Fixtures

R 3015. Particularity as to specific matters.

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Less Reserve for Depreciation

Total

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



R 3015. Particularity as to specific matters.

### Inventory of Merchandise

_____	_____
_____	_____
	Total

### SCHEDULE A-4

#### A List of All Books and Records of the Corporation

Books of Original Entry: \_\_\_\_\_

[Such as: Cash Receipt Book, Cash Disbursement Book, General Journal, Purchase Journal, Sales Book.]

Books of Final Entry: \_\_\_\_\_

[Such as; General Ledger, A/C Payable Ledger, A/C Receivable Ledger, Payroll Book, Payroll Ledger, Minute Book, Stock Book, Stock Ledger.]

### SCHEDULE A-5

Encumbrances \_\_\_\_\_

[State, if appropriate: There are no encumbrances upon the property of the corporation by judgment, mortgage, pledge or otherwise. If otherwise, state, giving particulars.]

### SCHEDULE A-6

The total amount of authorized capital stock is \_\_\_\_\_ and the amount of capital stock issued and outstanding is \_\_\_\_\_ of which \_\_\_\_\_ is in \_\_\_\_\_ stock and \_\_\_\_\_ is in \_\_\_\_\_ stock.

The following is a list of all stockholders, their addresses, the amount of stock standing in their names and the amount paid thereon:

R 3015. Particularity as to specific matters.

Stockholder

Address

Shares

Amount Paid on Shares

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[Venue]

\_\_\_\_\_, being duly sworn, says:

That he is one of the petitioners named in the foregoing petition, and that the matters of fact stated in the foregoing petition subscribed by him, and the schedules thereto annexed and therein referred to, and marked Schedule A-1 to A-6 and the various subdivisions thereof, are true, so far as the affiant knows and has the means of knowing the facts.

\_\_\_\_\_  
[Signature, with name printed underneath]

[Jurat]

## Form 71

### Complaint by Attorney General for Violation of Law in Joining a Combination in Restraint of Trade

Complaint

[Title of court and  
cause]

\_\_\_\_\_

The State of New York, by \_\_\_\_\_, its attorney general, upon leave of court duly granted, in this, its complaint, on information and belief, alleges:

1. The defendant is a domestic corporation, engaged in the business of \_\_\_\_\_, at \_\_\_\_\_ [or, in case of a corporation created by special act, allege: Defendant is a corporation created and organized under and pursuant to the act of the Legislature of New York, passed \_\_\_\_\_, 20\_\_\_\_\_, and entitled "An act to \_\_\_\_\_," and the acts amendatory thereof]; defendant's certificate of incorporation, filed on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, declares its name to be "\_\_\_\_\_  
Company," its place of business in \_\_\_\_\_, and its object \_\_\_\_\_.

2. In violation of law and in abuse of its powers, and in the exercise of privileges and franchises not conferred upon it, defendant, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in \_\_\_\_\_, together with the other subscribers thereto, entered into and became a party to and carried out the following agreement, namely: \_\_\_\_\_ [setting out agreement].

3. Thereafter, and under and pursuant to the provisions of said agreement, the capital stock of defendant was transferred to said board, "The \_\_\_\_\_ Company," and in lieu thereof certificates were issued by said board; pursuant to such agreement such of the parties thereto as were not then incorporated became corporate bodies, and their capital stock was transferred to said board and certificates issued in lieu thereof; that the greater part in number and value of said certificates is owned by members of said board; by means of said agreement, and the powers thereby conferred upon said board, said board monopolizes the manufacture and sale of \_\_\_\_\_ in the State of \_\_\_\_\_, and is enabled to control at will the production and price of said \_\_\_\_\_ in said State and in the United States; in exercise of the powers conferred by said agreement, said board controls the action of defendant and the other corporations, parties to said agreement, in the conduct of their business, and controls and regulates the production and price of \_\_\_\_\_ in the State of \_\_\_\_\_ and in the United States; that in the exercise of the said powers, said board has limited the production and increased the price of said \_\_\_\_\_ in said State and in said United States, and that said agreement constitutes a combination to do an act injurious to trade and commerce, to which combination defendant is a party.

WHEREFORE, plaintiffs demand judgment that defendant, the \_\_\_\_\_ Company, be dissolved, its charter vacated, and its corporate existence annulled; that it be enjoined from acting as a corporation, and a receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

\_\_\_\_\_

Attorney General for the plaintiff

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

**Form 72**

**Complaint by State for Forfeiture for Exercising Franchise Not Conferred by Law**

Complaint

[Title of court and  
cause] \_\_\_\_\_

The State of New York, by \_\_\_\_\_, Attorney General, for its complaint herein allege upon information and belief:

1. The defendant is a domestic corporation, organized for \_\_\_\_\_ [set forth objects of the corporation as stated in its charter or certificate of incorporation].

2. Said corporation for \_\_\_\_\_ months last past has exercised without any warrant, charter, or grant, the franchise of \_\_\_\_\_ [state franchise exercised without right, such as banking, and has issued notes, received deposits, made discounts, and transacted other banking business which it was not authorized to do] and has thus exercised franchises not conferred upon it by law.

WHEREFORE, plaintiffs demand judgment that defendant, the \_\_\_\_\_ company, be dissolved, its charter vacated, and its corporate existence annulled: that it be enjoined from acting as a corporation, and a receiver of its property be appointed, and for such other and further relief as may be appropriate, with costs.

The State of New York by

\_\_\_\_\_

Attorney General, plaintiff

[Address and telephone number]

[Verification]

**Form 73**

**Notice of Motion for Final Order of Dissolution**

Notice of motion

[Title of court and  
matter]

\_\_\_\_\_

Sirs:

TAKE NOTICE, that upon all proceedings heretofore had in the above-entitled matter and all papers therein now on file in the \_\_\_\_\_ county clerk's office, and upon the report of Honorable \_\_\_\_\_, referee, duly appointed herein, dated \_\_\_\_\_, 20\_\_\_\_\_, with a copy of which you are herewith served, a motion will be made at a Special Term of this court appointed to be held at the City and County Hall in the city of \_\_\_\_\_, New York, in and for the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, for a final order in this proceeding dissolving the \_\_\_\_\_ and appointing a permanent receiver of its property and assets, and directing the payment of the referee's fees and disbursements herein, and the expenses and disbursements incident to the publication of the order to show cause herein, and the premium upon the bond of the receiver, and for such other and further relief as to the court may seem just and equitable.

Dated \_\_\_\_\_, 20\_\_\_\_\_.

Yours, etc.

\_\_\_\_\_

Attorney for Petitioner

\_\_\_\_\_

Office and telephone number

To: \_\_\_\_\_

Attorney General for the state of New York [if proceeding under General Corporation Law] And

\_\_\_\_\_  
[Direct notice to each party to the proceeding who has appeared.]

## Form 74

### Order to Show Cause why Corporation Should Not be Dissolved

Order to show cause

[Title of court and  
cause] \_\_\_\_\_

Present: Honorable \_\_\_\_\_, Justice.

On reading and filing the petition of \_\_\_\_\_, \_\_\_\_\_,  
\_\_\_\_\_ and \_\_\_\_\_, a majority of the directors of  
\_\_\_\_\_, above named, verified \_\_\_\_\_,  
20\_\_\_\_\_, and the schedules attached to said petition, and a part thereof, from which it  
appears that the \_\_\_\_\_, is a domestic corporation located at  
\_\_\_\_\_, \_\_\_\_\_, New York, that said petitioners are a  
majority of the directors of said corporation, and have the management of its affairs, and that  
said corporation was formed for the purpose of \_\_\_\_\_ [state purpose]. The  
purposes for which said corporation was organized have been fully served, the stockholders of  
said corporation are desirous of having said corporation dissolved and of receiving their  
respective proportion from the proceeds of said sale, and it will be beneficial to the interest of  
the stockholders of said corporation that the corporation be dissolved, and the aforesaid petition  
contains all the matters specified in § 1105, of the Business Corporation Law of the state of New  
York.

[And it further appearing that a controversy has arisen among the stockholders of said  
corporation regarding the distribution of the assets of said corporation, it being claimed by a  
portion of the said stockholders that their stock is preferred, and that said preference extends to

the distribution of the assets, and it being claimed by the stockholders of said common stock that no part of said stock is, or ever has been legally \_\_\_\_\_, and that if so, the preference does not extend to the distribution of the assets, and that the entire proceeds should be distributed pro rata among all the stockholders of all the stock as \_\_\_\_\_ stockholders.]

And on further reading and filing due proof of due service of due notice of this application and of the order proposed to be obtained herein, and of a copy of said petition and schedules, on the Attorney General of the state of New York, and after hearing \_\_\_\_\_ of counsel for said petitioners,

Now on motion of said \_\_\_\_\_, attorney for said petitioners, it is

ORDERED, that all persons interested in said corporation show cause before \_\_\_\_\_, of \_\_\_\_\_, New York, a counselor of this court, who is hereby appointed a referee, at his office in \_\_\_\_\_, New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_ in the \_\_\_\_\_, or as soon thereafter as counsel can be heard why the said corporation should not be dissolved.

It is further ordered that said referee hear the allegations and proofs of the parties [and particularly as to the conflicting claims of the stockholders, as set forth in said petition], and determine the facts; and that said referee make his report in writing and file it with all convenient speed, and that said report contain a statement of the effects, credits, and other property, and of the debts and other engagements of the corporation, and of all other matters pertaining to its affairs as provided by § 1109 of the Business Corporation Law.

It is further ordered that this order be published at least once in each of the 3 weeks immediately preceding the aforesaid time for showing cause before said referee, in the \_\_\_\_\_, a daily newspaper, published at \_\_\_\_\_, in said \_\_\_\_\_, New York, and that a copy thereof be served personally upon



each of the persons specified in the schedules attached to the petition as a creditor, stockholder, or person with whom the corporation has an unfilled contract, except such a person whose address is stated to be unknown, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, or by depositing a copy in the post office in a postpaid wrapper on or before the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at \_\_\_\_\_, New York.

Enter.

[Signature, with name printed underneath]

Justice, Supreme Court

\_\_\_\_\_ County

**Form 75**

**Petition to Vacate Order Dissolving Corporation**

SUPREME COURT \_\_\_\_\_ County

R 3015. Particularity as to specific matters.

In the Matter of the Application  
of a Majority of the Board  
of Directors of \_\_\_\_\_ for  
a Judicial Dissolution of said Company.

Petition

Index No. \_\_\_\_\_

To the Supreme Court of \_\_\_\_\_ County:

The petition of \_\_\_\_\_ respectfully shows to this court: That he is a stockholder of the \_\_\_\_\_, a corporation created and existing under and by virtue of the laws of the state of New York, and is the owner and holder of \_\_\_\_\_ shares of the \_\_\_\_\_ [common] stock of said company; that said company was organized for the purpose, among other things, of \_\_\_\_\_ [state business, such as manufacturing and selling chains formed by electrically welding the chains together], and that your petitioner is \_\_\_\_\_ [the inventor of the machines used for forming such chains and doing such electric welding, and the owner of the inventions of machines for forming the chain], and prior to the transfer thereof to the said \_\_\_\_\_, as hereinafter stated, was the owner of applications for, and entitled to the issuance of, letters patent of the United States, such applications being known as Serial Nos. \_\_\_\_\_ and \_\_\_\_\_; that such inventions, applications, and rights to the issuance of letters patent were, with the exception of certain reserved rights thereunder, heretofore sold and assigned to said \_\_\_\_\_ by your petitioner, and that he received as a part of the consideration therefor the sum of \$\_\_\_\_\_ in cash, which was the only cash ever received by or paid to your petitioner from said company, or any other corporation or person on account of such sale and transfer.

Your petitioner further shows that as a part of the consideration of the transfer of said inventions and applications it was agreed that said \_\_\_\_\_ would be successfully financed and that sufficient moneys would be raised by said company to successfully carry on the business for which it was organized.

Your petitioner further shows that said company has failed to successfully carry out the agreements under which the said transfers were made and has commenced a proceeding for the dissolution of said corporation and the sale of its assets, including your petitioner's said invention; that since notice of the application for an order to show cause why said corporation

should not be dissolved, your petitioner has been endeavoring to raise sufficient moneys to protect his said inventions and has succeeded in obtaining sufficient moneys to purchase and pay for all of the preferred stock held and owned by the applicants for dissolution of said corporation, and that he is now the owner and holder of a majority of the \_\_\_\_\_ stock of the said company, and is desirous of continuing the business of the said company, to the end that his rights and interests in the said company may be conserved and protected.

Your petitioner further says that he did not join in the application for the appointment of a receiver herein, or for dissolution of the said corporation and did not vote in favor of such dissolution proceedings, at a meeting of the directors of said corporation at which such a resolution was passed.

Your petitioner therefore prays that the order of this court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the Hon. \_\_\_\_\_ presiding, at a Special Term thereof, be vacated and set aside and that all former orders and proceedings in the above matter be vacated and discontinued, and that he may be granted such other, further, or different relief as the court may be able to grant in the premises.

[Signature, with name printed underneath]

Petitioner

\_\_\_\_\_  
Attorney for Petitioner

\_\_\_\_\_  
Office and telephone number

[Verification]

**Form 76**

**Allegations in Complaint in Action Against Corporation the Result of a Merger**

On or about \_\_\_\_\_, 20\_\_\_\_\_, the said A Corporation was duly merged into B Corporation, forming a single corporation under the name of \_\_\_\_\_ Corporation, the defendant herein, pursuant to Article 9 of the Business Corporation Law.

## **Form 77**

### **Allegations in Action Against Corporation Resulting From Consolidation**

On or about \_\_\_\_\_, 20\_\_\_\_\_, said A Corporation and said B Corporation duly consolidated into a single corporation under the name of \_\_\_\_\_ Corporation, the defendant herein, pursuant to Article 9 of the Business Corporation Law.

## **Form 78**

### **Complaint in Action for Accounting Under Corporation Reorganization Agreement**

[Caption]

The plaintiff, who sues on behalf of himself and on behalf of all other persons who are depositors under the reorganization agreement, hereinafter described, who may come in and contribute to the expenses of this action, for his complaint herein, respectfully shows to the court:

1. Defendants A Company and B Company are, and at the times hereinafter mentioned were, domestic corporations, and C Company is, and at times herein mentioned was, a foreign corporation, organized and existing under the laws of the State of \_\_\_\_\_.

2. At the times herein mentioned the plaintiff was, and he still is, the owner of \_\_\_\_\_ shares of stock in the said C Company.

3. On or about \_\_\_\_\_, 20\_\_\_\_\_, the above defendants \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_, and A

Company duly signed and executed a paper styled a "Reorganization Agreement," a copy of which is hereto annexed, marked Exhibit "A."

4. On or about said date said persons who had signed said agreement as aforesaid sent copies of it to this plaintiff and to a large number of other holders of debenture bonds, notes, other obligations and certificates of shares of preferred and common stock of said C Company and to persons who held certificates of deposit of such corporate securities under a previous agreement (which said reorganization agreement was described as "Stockholders' Agreement"), and to the owners and holders of notes and other obligations and of certificates of the corporate stock of the \_\_\_\_\_ Company [and various other companies] for the purpose of procuring the signatures to and the execution of said agreement by the said persons to whom copies of it were sent.

5. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, this plaintiff duly executed said reorganization agreement and deposited with the said A Company, under the said agreement, the said \_\_\_\_\_ shares of stock in said C Company, which he then held and owned, as aforesaid. Before and after the said execution and deposit by this plaintiff, a large number of other persons, to whom said agreement had been sent, as aforesaid, executed it and deposited with the said A Company certain of the certificates of shares of stock and of the corporate securities therein described. The names of said persons and the amount and nature of the said corporate securities deposited by them, as aforesaid, are unknown to this plaintiff; but the said depositors are too numerous to be joined in this action.

6. Subsequently thereto and under color of said reorganization agreement, the said last-named individual defendants elected the defendants \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, as additional members of the reorganization committee described in said reorganization agreement, and the said \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_, thereafter aided them in all their acts hereinafter described.

7. Subsequently to the execution of the said reorganization agreement, and under color of the agreement, the said last-named individual defendants substituted the defendant B Company for the said A Company as a depositary under said reorganization agreement; and the said A Company delivered to the said B Company all the certificates of stock and other corporate securities which had been deposited with the said A Company under the said reorganization agreement.

8. After the receipt of the said certificates and of the other corporate securities, deposited as aforesaid, the said individual defendants took possession of all the property of the said C Company and of all the corporations described in the said agreement. The said property consisted, amongst other things, of a large number of letters patent of the United States, and a large number of bales of cotton.

9. Upon information and belief, by the use of said certificates and corporate securities the said individual defendants in their individual capacity have received and realized large sums of money and property of large value besides that of C Company, which should have been held and administered by them for this plaintiff and other depositors under said reorganization agreement; but said individual defendants have wasted and squandered a large amount of the said property and money, and have used for unauthorized and unlawful purposes a large portion of the balance of the property. This plaintiff is wholly ignorant of the amounts of money and of the other property so received and realized by the said defendants and of that which they so wasted and squandered, and of that so used by them for unauthorized and unlawful purposes, and is ignorant of the purposes for which said defendants have used said moneys and other property and of the manner in which it was wasted and squandered.

10. Upon information and belief, the said individual defendants and some and each of them have also pledged certain of the said certificates of the shares of stock and other corporate securities, deposited as aforesaid, with certain of the said certificates deposited as aforesaid with certain banks, trust companies and other persons, natural and corporate, to this plaintiff unknown. They have thus obtained loans of large sums of money, by the use of which, in

speculation in stocks, bonds, cotton and otherwise, the said borrowers have realized large profits which in equity belong to this plaintiff and to other depositors under said agreement. The further particulars of the matters in this paragraph described are to this plaintiff unknown.

11. The said defendants claim to have spent large sums of money for counsel fees and otherwise under color of said reorganization agreement; but upon information and belief that said expenditures were unnecessary and in excess of the real value of the services and commodities for which said payments were made, and that said defendants had no right to make the said payments or any of them.

12. Upon information and belief, the said defendants have otherwise, in a manner to the plaintiff unknown, by negligence and misfeasance, wasted and misapplied the assets of the property which they have thus acquired and have depreciated the value of the certificates of stock and other securities deposited with them as aforesaid to the great damage and loss of this plaintiff and the rest of the said depositors.

13. Upon information and belief, at the time when this plaintiff deposited the said certificates as aforesaid, the said C Company was solvent; but subsequently the said C Company became insolvent; and by collusions of said individual defendants and trust companies on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, a vice-chancellor of the State of \_\_\_\_\_ appointed the defendants, \_\_\_\_\_ and \_\_\_\_\_, receivers of the property of the said C Company.

14. Upon information and belief, that the said trust companies have assisted said individual defendants in their said unlawful acts and have shared in the profits of the unlawful acts.

15. On or about \_\_\_\_\_, 20\_\_\_\_\_, said individual defendants, under color of said reorganization agreement, issued to the depositors under the agreement another circular entitled "Plan for the Reorganization of the C Company." Upon information and belief, that each and all of the statements therein contained were false and untrue. A copy of said plan is hereto annexed, marked Exhibit "B."



16. On or about \_\_\_\_\_, 20\_\_\_\_\_, the said individual defendants issued to the plaintiff and to other depositors under the said agreement a paper entitled "Statement of Proposed Changes, Modifications or Departures from the Plan of Reorganization of the C Company," a copy of which last-named circular is hereto annexed, marked Exhibit "C." Upon information and belief, that each of the statements therein contained was false and untrue.

17. Before the commencement of this action the plaintiff duly demanded of the defendants, who acted as members of said reorganization committee, that they inform him of the amount of the obligations and expenses that had been incurred by them under said reorganization agreement and of the amount which the said committee had determined should be the plaintiff's share, and which the said committee had apportioned upon the class of capital stock deposited by the plaintiff as aforesaid; but the said defendants refused to inform this plaintiff of the amount of the obligations and expenses that had been incurred by them under the said reorganization agreement; and they refused to inform this plaintiff of the amount which the said committee had determined should be the plaintiff's share, and they refused to inform this of the amount which the said committee had determined and of that which they had apportioned of the class of capital stock deposited by the plaintiff as aforesaid. This plaintiff has no knowledge or information concerning the said matters upon which he requested information from the said defendants, as aforesaid, and without such information it was impossible for him to decide, intelligently, whether or not to dissent from the plan adopted by the said committee.

18. On or about and between the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff duly served upon the defendants, \_\_\_\_\_ and \_\_\_\_\_, a paper, a copy of which is hereto annexed, marked Exhibit "D."

19. Said defendants and each of them have failed to account for any of their acts under color of said reorganization agreement; and the defendants and each of them have failed to account for any money or for any property which they have received under color of said reorganization agreement.

20. The defendants C Company and \_\_\_\_\_ and \_\_\_\_\_, as receivers of C Company, have or may claim some interest upon said accounting; but no personal relief is prayed against said C Company, nor against the defendants \_\_\_\_\_ and \_\_\_\_\_, as receivers of C Company.

WHEREFORE, the plaintiff demands that the said defendants and each of them, except the said C Company, and the said receivers in their capacity as receivers, account to this plaintiff and to such other depositors under said reorganization agreement, as may come in and contribute to the expenses of this action, for all their acts and the acts of each of them under color of said reorganization agreement and of any modifications therein, and for all profits thus realized by them, and for all acts which they have committed by reason of the said stock certificates, which they have acquired as aforesaid; and that the plaintiff may be granted such other and further relief as may be just, with the costs of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 79**

### **Complaint by Receiver in Action on Account Stated**

[Complaint and introductory paragraph]

1. At all times hereinafter referred to, \_\_\_\_\_ was and still is a domestic corporation.

2. In a proceeding for the dissolution of said corporation in this court, the plaintiff in this action was duly appointed temporary receiver of said corporation by an order made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and thereafter by an order made and entered the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, the plaintiff was duly vested with all the powers and authority of a permanent receiver, with respect to the said

corporation, its property and assets, and plaintiff has duly qualified and entered upon the performance of his duties as such receiver.

3. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the city of \_\_\_\_\_, an account was stated between the said corporation and the defendant, and upon such statement a balance of \_\_\_\_\_ dollars was found to be due from the defendant to said corporation.

4. No part of said sum has been paid although payment thereof has been duly demanded.

[Demand for judgment, Endorsement, address, telephone number, and verification.]

## **Form 80**

### **Complaint in Action by Receiver Appointed in Corporate Reorganization Proceeding to Recover From Stockholders Proceeds of Compromise of Stockholders' Derivative Suit, Settled Without Court Approval**

[Caption]

Plaintiff above named by \_\_\_\_\_ his attorneys for his Complaint against defendants above named, alleges:

1. \_\_\_\_\_ Gas & Electric Company (hereinafter called \_\_\_\_\_ Co.) is and at all times herein mentioned was a corporation duly organized and existing under and by virtue of the laws of the State of New York.

2. On the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, \_\_\_\_\_ Co. duly filed in the office of the clerk of the United States District Court for the \_\_\_\_\_ District of New York, its petition for reorganization under Chapter X of the Bankruptcy Act, and on the same day said court duly made an order approving said petition as properly filed. On the \_\_\_\_\_ day of \_\_\_\_\_,

20\_\_\_\_\_, said court duly made another order transferring the said reorganization proceeding to the United States District Court for the \_\_\_\_\_ District of New York.

3. By an order of the United States District Court for the \_\_\_\_\_ District of New York duly made in said reorganization proceedings on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff \_\_\_\_\_ was duly appointed trustee of \_\_\_\_\_ Co., Debtor, and he thereafter duly qualified as such trustee and is now the duly qualified and acting trustee of \_\_\_\_\_ Co., Debtor, and is duly authorized to bring this action.

4. \_\_\_\_\_ Co. was at all times herein mentioned and still is a holding company owning and controlling, directly or indirectly, a large number of operating public utility companies engaged in producing and furnishing gas, electricity, water, ice and transportation to the public, and many subholding investment and miscellaneous companies.

UPON INFORMATION AND BELIEF:

5. In or about \_\_\_\_\_, 20\_\_\_\_\_, one \_\_\_\_\_ and one \_\_\_\_\_ through capital stock ownership, direct and indirect, acquired control of and exercised domination over the affairs of \_\_\_\_\_ Co. and its subsidiaries, which domination and control existed and continued during all times hereinafter mentioned. Said \_\_\_\_\_ was the Treasurer of \_\_\_\_\_ Co., from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and a Director from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_. Said \_\_\_\_\_ was a Director of \_\_\_\_\_ Co. from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and President from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

6. Defendants \_\_\_\_\_ are and at all times hereinafter were attorneys at law duly licensed and admitted to practice in the courts of the State of New York. At all times herein mentioned defendants \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ were law partners practicing under the firm name of \_\_\_\_\_ & \_\_\_\_\_.

7. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and for some time prior thereto, defendant \_\_\_\_\_ was the owner and holder of \_\_\_\_\_ shares of the \_\_\_\_\_ Dollar Dividend Series Preferred stock and \_\_\_\_\_ shares of the Class A and \_\_\_\_\_ shares of the Common stock of \_\_\_\_\_ Co.

8. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said defendant \_\_\_\_\_ as such stockholder with defendant \_\_\_\_\_ and \_\_\_\_\_, as his attorneys, commenced in the Supreme Court of the State of New York, \_\_\_\_\_ County, a certain stockholder's derivative action on behalf of \_\_\_\_\_ Co. known as \_\_\_\_\_ vs. \_\_\_\_\_ et al, in which there are included among the defendants said \_\_\_\_\_, said \_\_\_\_\_, and other persons who were or had been officers or directors of \_\_\_\_\_ Co., other persons who were relatives of said \_\_\_\_\_, certain companies in which said \_\_\_\_\_ was beneficially interested, and certain underwriting companies. \_\_\_\_\_ Co. and certain of its subsidiaries were also made parties defendant.

9. The complaint in said stockholder's derivative action in substance alleged: (Here set forth substance of complaint).

The prayer for relief asked that the defendants \_\_\_\_\_, \_\_\_\_\_ and other directors and defendant underwriting companies be required to account to \_\_\_\_\_ Co., and that the court "impress a trust in

favor of the \_\_\_\_\_, (\_\_\_\_\_ Co.) upon all secret profits and gains obtained by and of the defendant directors indirectly in the names of other persons, firms or corporations,” and that the defendants be required to pay all reasonable expenses incident to the prosecution of the action, including a reasonable counsel fee. Except said payment of expenses, no relief was sought on behalf of defendant \_\_\_\_\_, the plaintiff in said case, individually.

10. Defendant \_\_\_\_\_ was associated with defendant \_\_\_\_\_ and \_\_\_\_\_ in the preparation of the complaint and acted as counsel in the prosecution of said action.

11. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, there was a purported settlement and compromise of said stockholder’s derivative action without any approval by the court, or any application to the court for approval of the terms of such purported settlement and compromise under which said purported settlement and compromise there was paid to the defendants hereon on behalf of the persons known as defendants in said stockholder’s derivative action, and defendants herein received the sum of \_\_\_\_\_ Dollars and defendant \_\_\_\_\_ delivered to the representative of said defendants in said stockholder’s derivative action certificates representing \_\_\_\_\_ shares of the \_\_\_\_\_ Dollar Dividend Series Preferred stock and \_\_\_\_\_ shares of the Class A and \_\_\_\_\_ shares of the Common stock of \_\_\_\_\_ Co.

12. At the time of the delivery of said certificates on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, as aforesaid, the \_\_\_\_\_ shares of \_\_\_\_\_ Dollar Dividend Series Preferred stock had a market value of \$\_\_\_\_\_ per share. The said shares of Class A stock had market

value of \$\_\_\_\_\_ per share and the said shares of Common stock had a market value of \$\_\_\_\_\_ per share, making the total market value of said shares \$\_\_\_\_\_.

13. Simultaneously with the said payment of \_\_\_\_\_ Dollars, defendant \_\_\_\_\_ executed and delivered a certain instrument of release dated the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in which said defendant purported for One Dollar and in consideration of the settlement and discontinuance of the pending action entitled \_\_\_\_\_ v. \_\_\_\_\_ et al., to release and discharge the individual defendants named in said stockholder's derivative action from all claims and demands of defendant \_\_\_\_\_ which he had either in an individual or representative capacity.

14. Simultaneously with the said payment of \_\_\_\_\_ Dollars a stipulation purporting to discontinue said stockholder's derivative action was signed by defendants \_\_\_\_\_ and \_\_\_\_\_ as attorneys for the plaintiff and by the attorneys for all the defendants who had appeared in said action and was filed with the clerk for the County of \_\_\_\_\_, but no order of discontinuance was sought, made or entered thereon.

15. The moneys so received by defendants in settlement and compromise of said stockholder's derivative action amounting to \_\_\_\_\_ Dollars less the market value of said stock surrendered amounting to \_\_\_\_\_ Dollars or a net of \_\_\_\_\_ Dollars were received by defendants to the use of and in trust for \_\_\_\_\_ Co., and this plaintiff.

16. None of said defendants has accounted to \_\_\_\_\_ Co., to this plaintiff or to any predecessor of plaintiff as trustee of \_\_\_\_\_ Co., under Chapter X of the Bankruptcy Act for the amount of \_\_\_\_\_ Dollars or for any part thereof.

17. Defendants and each of them by reason of the foregoing have been unjustly enriched in the amount of \_\_\_\_\_ Dollars which amount in equity and good conscience should be paid over to the plaintiff.

WHEREFORE plaintiff demands judgment against defendants \_\_\_\_\_ and \_\_\_\_\_, individually and as copartners practicing law under the firm name of \_\_\_\_\_ and \_\_\_\_\_, and each of them in the sum of \_\_\_\_\_ Dollars with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, and for such other relief as to the court may seem just and proper, together with the costs and disbursements of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 81**

### **Complaint in Action by Judgment Creditor for Sequestration of Corporate Property, Pursuant to Section 1201 of the Business Corporation Law**

[Complaint and introductory paragraph.]

1. The defendant \_\_\_\_\_ [name the corporation] is, and has been at all times hereinafter mentioned, a corporation duly organized and existing under the laws of the State of New York, and having its principal office and place of business at \_\_\_\_\_, in the County of \_\_\_\_\_, in said state.

2. Heretofore, on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, this plaintiff commenced an action in the \_\_\_\_\_ court, County of \_\_\_\_\_, against this defendant for \_\_\_\_\_ [state nature of action], and a judgment of said court was duly rendered in said action in favor of this plaintiff against the said defendant, for the sum of \_\_\_\_\_ dollars, which said judgment was duly entered in the office of the clerk of \_\_\_\_\_ county.



3. Thereafter on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, an execution was duly issued to the sheriff of said County of \_\_\_\_\_, which said execution the said sheriff thereafter and on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, duly returned wholly unsatisfied.

4. Said judgment still remains wholly [or partly] unsatisfied and unpaid and there is now due and unpaid thereon the sum of \_\_\_\_\_ dollars, and interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

5. Upon information and belief, the defendant is wholly insolvent and is unable to pay its debts and obligations in the regular course of business as they mature.

WHEREFORE, the plaintiff demands judgment that the property of the defendant corporation be sequestered, and that the final judgment provide for a just and fair distribution of the property of the corporation, and of the proceeds thereof, among its creditors in the order and proportions prescribed by law in case of the voluntary dissolution of a corporation; that a receiver of defendant's property be appointed; and for such other and further relief as to the court may appear just and proper, together with the costs of this action.

[Endorsement, address, telephone number, and verification.]

## **Form 82**

### **Allegation Where Party is a Domestic Insurance Company**

1. At all times herein mentioned, the plaintiff [or defendant] has been and now is a domestic corporation duly authorized to engage in the business of \_\_\_\_\_ insurance in the State of New York.

## **Form 83**

### **Allegation That Plaintiff Is a Licensed Lender or Private Banker, Duly Authorized Under Banking Law**

1. At all times herein mentioned, the plaintiff was and now is a licensed lender [or private banker] carrying on business as such at \_\_\_\_\_ in this State, pursuant to authority of the Banking Law of the State of New York, and prior to all the times herein mentioned the plaintiff had duly performed all conditions required by said law for the transaction of said business.

#### **Form 84**

##### **Allegation That Plaintiff Is a Duly Authorized Banking Corporation**

1. At all times herein mentioned, the plaintiff was and now is a domestic corporation, duly organized and existing under the Banking Law of the State of New York, and duly authorized to engage in business as a bank [or savings bank, trust company, safe deposit company, etc.]

#### **Form 85**

##### **Allegations in Action by Foreign Insurance Company Authorized To Do Business in New York**

1. At all times herein mentioned the plaintiff had been and now is a corporation duly organized and existing under the laws of the State of \_\_\_\_\_, and duly authorized to engage in the business of \_\_\_\_\_ insurance in the State of New York.

#### **Form 86**

##### **Allegations Where Party Is a National Bank**

1. At all times hereinafter mentioned, plaintiff [or defendant] was and now is a national banking corporation, duly organized and existing under the laws of the United States, and engaged in the business of banking in the City of \_\_\_\_\_, State of New York.

#### **Form 87**

##### **Complaint in Action on Judgment Docketed for More Than Ten Years**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, judgment was duly rendered in favor of this plaintiff and against this defendant for the sum \_\_\_\_\_ dollars. No part thereof has been paid except the sum \_\_\_\_\_ dollars.

2. Said judgment was duly docketed on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ in the office of the Clerk of the County of \_\_\_\_\_, more than ten years prior to the commencement of this action.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 88**

### **Complaint in Action on Judgment of Court Not of Record**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in the \_\_\_\_\_ Court of \_\_\_\_\_, in the County of \_\_\_\_\_, State of New York, in an action therein in which this plaintiff was plaintiff and the defendant herein was defendant, judgment was duly rendered in favor of plaintiff and against the defendant for the sum of \_\_\_\_\_ dollars. Said judgment was duly entered and docketed on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ in the office of the clerk of \_\_\_\_\_.

2. No part of said judgment has been paid except the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 89**

### **Complaint in Action on Judgment by Confession**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff entered judgment against the above-named defendant in the Supreme Court, County of \_\_\_\_\_, in the amount \_\_\_\_\_ dollars. Said judgment was duly entered upon a confession of judgment duly executed and acknowledged by said defendant on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, which confession of judgment was duly filed in the office of the clerk of the County of \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, which was the county wherein said defendant resided at the time of executing such confession.

2. No part of said judgment has been paid except the sum of \_\_\_\_\_ dollars.

3. More than ten years have elapsed since the entry and docketing of said judgment. [or] Leave to bring this action was duly granted by this court by order entered on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 90**

### **Complaint in Action on Foreign Judgment**

[Caption and introductory paragraph]

1. On or about \_\_\_\_\_, 20\_\_\_\_\_, judgment was duly rendered in the \_\_\_\_\_ Court for the County of \_\_\_\_\_ in the State of \_\_\_\_\_, in favor of this plaintiff and against this defendant after due personal service of the summons upon this defendant, for the sum \_\_\_\_\_ dollars, no part of which has been paid.

2. Said \_\_\_\_\_ court was then and still is a court of general jurisdiction.

3. The laws of said state provide that interest upon a judgment accrues at the rate of \_\_\_\_\_ per cent a year.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 91**

### **Complaint in Action for Arrears in Alimony Under Foreign Judgment**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, plaintiff and defendant were husband and wife. On or about that date, in the \_\_\_\_\_ Court of \_\_\_\_\_, State of \_\_\_\_\_, a final judgment of divorce was rendered in favor of plaintiff and against defendant, based upon the adultery of said defendant and instituted upon personal service of process upon him in that state, where at the time he was a resident. Said judgment directed that defendant pay to plaintiff the sum \_\_\_\_\_ dollars per month on or before the first day of each month for her support and maintenance, and such judgment has never been modified.

2. Pursuant to said judgment, the following monthly installments of alimony have become due and payable by the defendant, but no part thereof has been paid: \_\_\_\_\_. Defendant is therefor indebted to plaintiff in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

## **Form 92**

### **Particular Allegation as to Assignment of Judgment**

On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, said \_\_\_\_\_, judgment creditor, in consideration of \_\_\_\_\_, duly assigned said judgment to plaintiff by written instrument, a copy of which is attached hereto and made a part of this complaint. Defendant was duly notified of such assignment. Plaintiff is now the owner and holder of such judgment.

## **Form 93**

### **Particular Allegation as to Entering and Docketing of Judgment**

The judgment roll in said action was duly filed, and the judgment was duly entered and docketed in the office of the Clerk of \_\_\_\_\_ County on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ at \_\_\_\_\_ M.

### **Form 94**

### **Particular Allegation as to Leave of Court**

That on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, at the county courthouse, in the \_\_\_\_\_ of \_\_\_\_\_, in said county of \_\_\_\_\_, upon application duly made on the plaintiff's behalf, and upon due notice to the defendant, leave was by an order of this court duly made, duly granted, and given to the plaintiff to bring this action against the defendant.

### **Form 95**

### **Complaint in Action for Conspiracy to Defeat Lien of Plaintiff's Judgment**

[Caption and introductory paragraph]

1. On or about the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, in the \_\_\_\_\_ Court, County of \_\_\_\_\_, plaintiff duly obtained judgment in an action therein against defendant \_\_\_\_\_ in the sum \_\_\_\_\_ dollars. No part of said judgment has ever been paid.

2. At the time above mentioned, said defendant was the owner of certain real property, located at \_\_\_\_\_, and bounded and described as follows: \_\_\_\_\_.

3. At the time above mentioned, said real property was encumbered only by a purchase-money mortgage in the amount of \_\_\_\_\_ dollars in favor of defendant

\_\_\_\_\_, who is the son of defendant \_\_\_\_\_. The reasonable value of said property then exceeded the face amount of said mortgage by far more than the amount of plaintiff's said judgment.

4. Shortly after the entry of plaintiff's said judgment, the aforementioned mortgagee, defendant \_\_\_\_\_, commenced an action in \_\_\_\_\_ Court, County of \_\_\_\_\_, to foreclose said mortgage, all without the knowledge of plaintiff herein. Said action was based upon an alleged default artificially contrived by and between plaintiff and defendant in said action. Plaintiff herein was named a party defendant in said foreclosure action; but, with deliberate intent, the plaintiff therein failed to serve him with process or any other papers in such action.

5. As a result of said foreclosure action, it was adjudged and decreed that plaintiff be foreclosed of any lien upon said property, and the property was ordered sold. At such foreclosure sale, the property was purchased by the defendant \_\_\_\_\_, who is the wife of the defendant \_\_\_\_\_ and mother of the defendant \_\_\_\_\_.

6. At all times herein mentioned, the defendant \_\_\_\_\_ continued to live in such property, conduct various business affairs there, and in every way to treat it as his own. All of the acts above described were a part of a conspiracy on the part of the defendants herein to defeat the lien of plaintiff's said judgment upon said real property and to impair his ability to collect such judgment.

7. By reason of the acts of said defendants as above described, plaintiff has been damaged in the sum of \_\_\_\_\_ dollars.

[Demand for judgment, endorsement, address, telephone number, and verification.]

**Form 96**

**Allegation Itemizing Special Damages**

The special damages, amounting to \_\_\_\_\_, claimed by the plaintiff herein consist of the following:

- a. Cost of repairs to [damaged property] \_\_\_\_\_.
- b. Hospital expenses, \_\_\_\_\_ Hospital \_\_\_\_\_.
- c. Loss of earnings, \_\_\_\_\_ days at \_\_\_\_\_ per day, \_\_\_\_\_.

### **Form 97**

#### **Allegation of Medical and Hospital Expenses Incurred**

That as a direct and proximate result of the negligence of defendant as aforesaid, and of said injuries, it was necessary for plaintiff to, and he did, secure medical, hospital, nursing and X-ray care and attention of the reasonable value \_\_\_\_\_ dollars, for which he has incurred an indebtedness in said sum, and by reason thereof plaintiff has been damaged in the sum \_\_\_\_\_ dollars.

### **Form 98**

#### **Allegation of Loss of Earnings**

At the time of the accident hereinabove alleged, plaintiff was regularly employed by \_\_\_\_\_ Company, at \_\_\_\_\_, as a \_\_\_\_\_, and was earning and receiving in said employment the sum of \_\_\_\_\_ dollars per week. By reason of said injuries plaintiff was prevented from attending to his said usual vocation for a period of \_\_\_\_\_ weeks, to his damage in the \_\_\_\_\_ dollars.

### **Form 99**

#### **Allegation of Cost of Repairs and Loss of Use of Automobile**



That by reason of defendant's negligence, as aforesaid, plaintiff's automobile, to-wit [describe vehicle for which loss is claimed], was damaged so that plaintiff was required to expend the sum \_\_\_\_\_ dollars in having the automobile repaired.

[if vehicle has a usable value, add the following]

That by reason of the defendant's negligence, as aforesaid, plaintiff the user of the said automobile for a period of \_\_\_\_\_ days, while the automobile was being repaired [or replaced], to the plaintiff's damage in the sum of \_\_\_\_\_ dollars.

[if another vehicle was hired temporarily, add the following]

That by reason of the defendant's negligence, as aforesaid, plaintiff was compelled to and did hire another automobile, for the purpose of continuing his occupation, for a period of \_\_\_\_\_ days, while the said plaintiff's vehicle was being repaired, and necessarily expended the sum of \_\_\_\_\_ dollars therefor.

## **Form 100**

### **Allegation of Expenses in Hiring Substitute**

That by reason of said injuries and his disability caused thereby, plaintiff was compelled to and did employ one \_\_\_\_\_ for the period of \_\_\_\_\_ weeks from said \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_, to perform plaintiff's duties as \_\_\_\_\_ [state what], and paid said \_\_\_\_\_ the sum of \_\_\_\_\_ dollars per week therefor.

## **Form 101**

### **Allegation of Medical and Hospital Expenses Incurred on Behalf of Minor Child**

That on account of the injuries and sickness caused solely and proximately by the negligent acts and misconduct of the defendant, as aforesaid, the plaintiff was compelled to and did necessarily expend the of sum \_\_\_\_\_ dollars in obtaining hospital facilities and

R 3015. Particularity as to specific matters.

employing medical and surgical assistance in endeavoring to cure \_\_\_\_\_,  
his son of the age of \_\_\_\_\_ years, of his said injuries and sickness.

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