

Big Boy Letters

Big Boys Don't Cry: How "Big Boy" Provisions Can Help Hedge Fund Managers Avoid Liability for Insider Trading Violations

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Various factors recently have increased the sensitivity of hedge fund managers, lawyers, compliance professionals, investors and others to insider trading concerns. Those factors include, but are not limited to: insider trading allegations against Galleon Group founder Raj Rajaratnam and others; remarks delivered by SEC Enforcement Division Director Robert Khuzami on November 23 indicating that the Division will increase its enforcement activity with respect to insider trading by hedge funds, and in particular will focus on insider trading in the derivatives context; and press reports that the SEC has sent at least three dozen subpoenas to hedge fund managers and broker-dealers during November 2009 relating to communications in connection with healthcare industry transactions closed during the past three years and certain retail industry transactions. See "For Hedge Fund Managers in a Heightened Enforcement Environment, Internal Investigations Can Help Prevent or Mitigate Criminal and Civil Charges," *The Hedge Fund Law Report*, Vol. 2, No. 47 (Nov. 25, 2009).

In light of the increased regulatory scrutiny of activity that may constitute insider trading, hedge fund lawyers, compliance professionals and others are re-examining how and where to draw the line between permissible and impermissible information, and how to police that line effectively. See "How Can Hedge Fund Managers Distinguish Between Market Color and Inside Information?," *The Hedge Fund Law Report*, Vol. 2, No. 46 (Nov. 19, 2009); "How Can Hedge Fund Managers Talk to Corporate Insiders Without Violating Applicable

Insider Trading Laws?," *The Hedge Fund Law Report*, Vol. 2, No. 43 (Oct. 29, 2009). In addition, hedge fund industry participants are refocusing on the promise and limits of tools they may employ to prevent or mitigate allegations of trading on material, nonpublic information.

One such tool is the so-called "Big Boy" provision, or disclaimer of reliance. In our November 19, 2009 issue, we published the first part of a two-party analysis of Big Boy provisions in the hedge fund context by Brian S. Fraser and Tamala E. Newbold, Partner and Staff Attorney, respectively, at Richards Kibbe & Orbe LLP. That first part discussed the duty to disclose material, nonpublic information (or refrain from trading) and the differences between the Federal securities laws and New York common law on that issue, in particular, the "superior knowledge" trigger for the duty to disclose under New York law which has no Federal counterpart. See "When Do Hedge Fund Managers Have a Duty to Disclose Material, Nonpublic Information?," *The Hedge Fund Law Report*, Vol. 2, No. 46 (Nov. 19, 2009). This second part expands on that analysis, focusing in depth on the enforceability of Big Boy provisions in securities and non-securities transactions, with a special emphasis on the enforceability of such provisions under New York law in the context of trading in bank loans. In addition, this part includes a detailed discussion of, and a comprehensive review of the caselaw relating to, specific steps that hedge fund managers can take to increase the likelihood that a court will enforce a Big Boy provision.

Enforceability of Big Boy Provisions

Securities Transactions

The antifraud provisions of the federal securities laws prohibit trading in securities, including bonds, while in possession of material, nonpublic information about the issuer, and current law requires anyone who possesses material, nonpublic information about an issuer to disclose the information or abstain from trading. See 17 C.F.R. § 240.10b5-1 (2000); *Chiarella v. United States*, 445 U.S. 222, 228 (1980).

Under the misappropriation theory of insider trading, a person who has received confidential business information from another, pursuant to a fiduciary, contractual or similar relationship of trust and confidence, has a duty to keep that information confidential. He commits fraud in connection with a securities transaction, and violates Section 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) and Rule 10b-5 promulgated thereunder, when he misappropriates confidential information for securities trading purposes, by breaching the duty owed to the source of that information. *U.S. v. O'Hagan*, 521 U.S. 642, 652 (1997).

Big Boy provisions are only disclaimers of reliance, one of the usual elements necessary to prove a claim of fraud. The SEC, however, by statute, is not required to prove reliance to prove securities fraud in an insider trading case. See 17 C.F.R. § 240.10b5-1(b) (2000). A defendant could argue, perhaps, that his use of a Big Boy letter is proof that he had no intent to defraud, but that defense has not been tested.

On the other hand, private litigants must prove, by a “preponderance of the evidence,” that they relied on their counterparty’s representations or omissions. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2513 (2007)

(plaintiff alleging fraud in § 10(b)/10b-5 action must prove her case by a preponderance of the evidence; the burden of proof in a common law fraud case is the stricter “clear and convincing evidence” standard. *Weinberger v. Kendrick*, 698 F.2d 61, 78 (2d Cir. 1982)). Do Big Boy letters provide any better protection in private securities fraud cases?

Section 29(a) of the Exchange Act forbids waivers of compliance with obligations imposed by the federal securities laws. See 15 U.S.C. § 78cc (2005). A case can be made that a Big Boy letter is an impermissible and unenforceable waiver under § 29(a). See *AES Corp. v. Dow Chemical Co.*, 325 F.3d 174, 182 (3d Cir. 2003) (holding that to permit parties’ disclaimer of reliance to bar relief under § 10(b) and Rule 10b-5 “would be fundamentally inconsistent with Section 29(a)”; *Rogen v. Ilikon Corp.*, 361 F.2d 260, 268 (1st Cir. 1966) (“Were we to hold that the existence of [a disclaimer of reliance] provision constituted the basis (or a substantial part of the basis) for finding non-reliance as a matter of law, we would have gone far toward eviscerating Section 29(a)”; *but cf. Harsco Corp. v. Segui*, 91 F.3d 337, 343 (2d Cir. 1996) (disclaimer of reliance merely “weaken[ed]” plaintiff’s case and therefore was not an impermissible waiver of compliance with the Exchange Act). Courts, however, generally agree that disclaimers of reliance may be at least relevant in evaluating the reasonableness of any reliance in a private securities action for violations of § 10(b)/Rule 10b-5. See, e.g., *AES Corp.*, 325 F.3d at 181 (holding that while non-reliance clause could not itself bar relief on Rule 10b-5 claim, fact that parties’ agreement contained a disclaimer of reliance was “among the circumstances to be considered in determining the reasonableness of any reliance”); *Harsco Corp.*, 91 F.3d at 343 (sophisticated corporate plaintiff that agreed to non-reliance provision in purchase agreement was precluded from establishing the reasonable reliance necessary to prove

its securities fraud claim). In assessing the reasonableness of a plaintiff's reliance, courts consider "the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them." *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 195 (2d Cir. 2003).

Non-Securities Transactions: Trading in Bank Loans Under New York Law

It has been the general rule in New York since at least 1959 that a disclaimer, no matter how specific, will not operate where one party has superior knowledge not readily available to the other. *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 184 N.Y.S.2d 603-04 (1959). However, both New York state courts and federal courts applying New York law have made an exception to that general rule and have held that, among sophisticated parties, disclosure obligations may be modified by contract. The guiding principle here is that courts are loathe to rewrite detailed, bargained for contractual provisions that allocate risks between sophisticated parties. *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 322 (S.D.N.Y. 2002) (citing *Grumman Allied Indus.*, 748 F.2d at 735). These cases hold that a where the sophisticated plaintiff has contractually agreed to absolve a counterparty of the duty to disclose material information, the plaintiff may not then claim fraud based on the counterparty's failure to disclose material information. To determine whether a Big Boy provision will be effective, one of the considerations is the type of non-public information that the non disclosing party possesses.

The secondary market for both par and distressed bank loans is probably the largest financial market that is

overwhelmingly governed by New York law, and thus a useful example for the application of New York law on Big Boy provisions.

There are two types of confidential information that bank loan investors can typically acquire: Syndicate Confidential Information and Borrower Confidential Information. Syndicate Confidential Information is "material information provided by or on behalf of a borrower (or its affiliates) which is non-public except that it is deliberately made available by or on behalf of such borrower to all of the members and potential members of a particular lending syndicate." Section 2(a)(i), Confidential Information Supplement to the LSTA Code of Conduct (May 1998). Syndicate Confidential Information is not confidential between syndicate members, is readily available to brokers and can be disclosed to potential buyers of the debt with an appropriate confidentiality agreement. *Id.* Bank loans generally are freely traded (among syndicate members and prospective members, not the public) on the basis of Syndicate Confidential Information, and the possessors of Syndicate Confidential Information typically do not owe any fiduciary duty to the borrower or other creditors. *See id.*; Section III(A)(1), LSTA Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants (Dec. 2006).

Borrower Confidential Information, on the other hand, is material information relating to a borrower that is non-public and is either obtained from the borrower or from another person that the market participant has reason to believe is subject to a duty not to disclose, and that has not been made available to all members or potential members of the syndicate. Section 2(a)(ii), Confidential Information

Supplement to the LSTA Code of Conduct. Investors often acquire Borrower Confidential Information through their participation on creditors' committees or as an advisor to the borrower. Borrower Confidential Information typically cannot be shared without breaching a confidentiality agreement with, or a fiduciary duty to, the borrower, or violating a court order of confidentiality. *See* Section III(A) (2), LSTA Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants (Dec. 2006).

Trading in the debt of a borrower while in possession of Borrower Confidential Information presents a number of issues that are not present when trading while in possession of Syndicate Confidential Information. A party who trades in the bank loans of a borrower while in possession of Borrower Confidential Information, which it does not disclose to the counterparty, may be susceptible to allegations of breaches of fiduciary duty to the bankruptcy estate and other creditors as well as claims for fraud. *See, e.g., In re Papercraft Corp.*, 211 B.R. 813, 825-26 (W.D. Pa. 1997).

The most common method of dealing with the problem of creditors who wish to continue trading the debt while at the same time serving on a committee is the creation of internal information walls that separate the traders from the recipients in the firm of Borrower Confidential Information. *See* Sections V(A)-V(C), LSTA Statement of Principles for the Communication and Use of Confidential Information by Loan Market Participants (Dec. 2006); Order Approving Specified Information Blocking Procedures and Permitting Trading in Securities of the Debtors Upon Establishment of a Screening Wall, *In re Fibermark, Inc.*, No. 04-10463, Docket No. 684 (Bankr. D. Vt. Oct. 19, 2004); Robert C. Pozen and

Judy Mencher, "Chinese Walls for Creditors' Committees," 48 *BUS. LAW.* 747, 756-57 (Feb. 1993).

If an information wall is not feasible, because the firm that wishes to trade is too small or there are other internal structural impediments to a wall, can a Big Boy letter provide protection? In such cases, a Big Boy letter may still protect against causes of action for fraud, but it will not help defend against allegations of breach of fiduciary duty, because the reliance or non-reliance of the counterparty to the trade is immaterial to claims of self-interest and unjust enrichment brought by other constituents of the borrower. *See, e.g., Granite Partners, L.P. v. Bear, Stears & Co., Inc.*, 17 F. Supp. 2d 275, 306, 311 (S.D.N.Y. 1998) (setting forth the elements of breach of fiduciary duty and unjust enrichment).

How Hedge Fund Managers Can Improve the Chances that a Court Will Enforce a Big Boy Provision

In this next section, we discuss some practical steps hedge fund managers can take that will increase the chances that a court applying New York common law will enforce a Big Boy provision and dismiss a lawsuit for fraudulent omission or rescission.

First, while a Big Boy letter may successfully prevent a plaintiff from arguing that it relied on the non-disclosure, it can present other issues. Most importantly, it may affect the transaction itself, as the prospective counterparty may be reluctant to agree to the transaction without full disclosure or may seek to insert a provision that would permit the parties to "unwind" the transaction if certain events occur. The presence of a Big Boy letter may also affect downstream marketability of the debt, as any subsequent purchasers may

be unwilling to purchase debt that is already subject to a Big Boy provision.

Second, assuming all attendant concerns have been assessed and the parties agree to execute a Big Boy provision, the drafters of such provisions need to consider the following issues. Courts have enforced disclaimers of reliance where the disclaimer:

1. is the product of negotiation among sophisticated parties;
2. specifically describes the type and quality of the information being withheld in terms that are tailored to the specific transaction at hand,
3. requires the parties to acknowledge that each party has voluntarily entered the transaction notwithstanding the nondisclosure of material, non-public information;
4. requires each party to perform its own due diligence and to disclaim any reliance on the other.

In addition, the Big Boy letter should contain a merger clause that clearly sets forth the parameters of the entire agreement between the parties, and the representations upon which the parties may rely.

Finally, the possession of material, non-public information and the need for a Big Boy provision should be disclosed to the counterparty at the earliest opportunity. Because trades in the secondary market for bank loans are considered “done” as of a verbal agreement on quantity and price, the disclosure should be made at the time of the verbal trade, and the written confirmation should provide that a Big Boy provision will be included in final documentation.

The Big Boy Provision Must Be the Product of Negotiation Between Sophisticated Entities

Parties to distressed bank loan trades in the secondary market should be, and almost always are, financially sophisticated and all relevant documents between the parties should clearly reflect their sophistication. Sophisticated parties are presumed to have equal bargaining power and can negotiate terms or insist on greater disclosure. When a contract is between two sophisticated parties, courts recognize that reliance is unreasonable not merely on expressly disclaimed representations, but also on representations that a knowledgeable party should have insisted on including in the agreement but that were not included. For instance, in *UniCredito Italiano SPA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485 (S.D.N.Y. 2003), plaintiffs, sophisticated Italian and Polish financial institutions, alleged that JP Morgan Chase (Chase) and Citigroup defrauded them in connection with the formation of and payment under certain Enron-related syndicated credit facilities for which Citigroup and Chase served as co-administrative agents. The agreements precluded plaintiffs from claiming that they relied on any alleged representations by Chase or Citigroup. The court dismissed fraud and negligent misrepresentation claims against Chase and Citigroup on grounds that

[h]aving failed to bargain for the right to rely on the banks as monitors of Enron’s compliance with its disclosure, financial condition and other covenants, or for the right to benefit from any knowledge gained by the Defendant banks or their affiliates in connection with their own business dealings with Enron and its affiliates, Plaintiffs cannot, as a matter of law, be held reasonably to have relied on any misrepresentations or omissions by the Defendants concerning those matters.

Id. at 499; *see also Emergent Capital Inv. Mgmt., LLC v. Stonepath Group, Inc.*, 165 F. Supp. 2d 615, 622 (S.D.N.Y. 2001) (dismissing fraud claim on grounds that “fraud claim will not stand where the clause was included in a multi-million dollar transaction that was executed following negotiations between sophisticated business people and a fraud defense is inconsistent with other specific recitals in the contract”).

Likewise, in *Lazard Freres & Co. v. Protective Life Ins. Co.*, 108 F.3d 1531 (2d Cir. 1997), negotiations for a time-sensitive sale of bank debt between two large, sophisticated bank debt traders required Protective to make an oral commitment to purchase the bank debt before it had a chance to review a key report on the debtor’s financial condition. Protective subsequently alleged that Lazard’s representative made false representations regarding the report. The court held that even though matters may have been peculiarly within Lazard’s knowledge, Protective, as a “substantial and sophisticated player in the bank debt market,” was under a duty to protect itself from Lazard’s alleged misrepresentation regarding the underlying purchase of bank debt, and could easily have protected itself by insisting, as a condition to closing, on an examination of documents pertaining to the transaction or by negotiating contractual provisions to protect parties’ interests. *Id.* at 1543. Protective’s failure to protect itself rendered reliance on the misrepresentation “unreasonable as a matter of law.” *Id.*

The Big Boy Provision Must Specifically Describe the Information Withheld

Cases in the Second Circuit hold that a party who specifically disclaims reliance upon a particular representation in a contract cannot, in a subsequent action for fraud, claim it

was fraudulently induced to enter into the contract by the very representation it has disclaimed reliance upon. *Banque Arabe*, 57 F.3d at 155. To be effective, the Big Boy letter or provision should be specific enough that the counterparty clearly is on notice as to what may not be reasonably relied on, yet not so specific as to disclose the substance of the confidential information. The letter must avoid boilerplate generalities and specifically reference the representations and warranties on which each party is entitled to rely, if any. *See Harsco Corp.*, 91 F.3d at 346 (“the exhaustive nature of the [Agreement’s] representations adds to the specificity of [the Agreement’s] disclaimer of other representations.”).

Where a party to a distressed bank loan transaction possesses Borrower Confidential Information, it would be advisable to disclose the type of information withheld, e.g., business plans, earnings projections or financial statements, as well as the party’s relationships with the issuer, e.g., committee member, adviser, member of the Board of Directors.

For example, the plaintiff in *DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308 (S.D.N.Y. 2002), purchased a telecommunications company from Contel, a wholly owned subsidiary of GTE. GTE in turn agreed not to compete with the business, and also agreed to guarantee its subsidiary’s performance of certain obligations. The parties’ purchase agreement specifically provided that GTE made no express or implied representations or warranties with respect to the business being sold, or to its probable success or profitability, or to any other information provided to plaintiff. In addition, plaintiff agreed that GTE would not be subject to any liability or indemnification obligation resulting from the distribution to plaintiff of the offering memorandum or any other information or documents. The court held that

the parties' particularized disclaimers made it impossible for plaintiff to prove reasonable reliance. *DynCorp*, 214 F. Supp. 2d at 320-21. See also *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 321-23 (1959) (finding that where a party specifically disclaims reliance on a particular representation, the party is precluded from claiming fraudulent inducement to enter into the contract based on that very representation, and that a contrary result would allow the plaintiff to "deliberately misrepresent[]" its purported nonreliance in the contract).

In contrast, in *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, Merrill provided certain Evaluation Material to Allegheny in connection with the contemplated sale of Merrill's energy commodity trading business. After Allegheny acquired the business from Merrill, Allegheny discovered that Merrill knew that a principal in the business had been suspected of engaging in considerable fraudulent activity, and that the business' financial performance was based in part on sham trades with Enron. 382 F. Supp. 2d at 415. The court held that the parties' disclaimer did not track the substance of the alleged misrepresentations because the disclaimer did not state that Merrill Lynch disclaimed any prior representations about the Enron transactions or the principal's qualifications. *Id.* at 417.

*The Disclaiming Party Should Acknowledge
that it has Agreed to Complete the
Transaction Notwithstanding the Nondisclosure
of Material, Non-Public Information*

Big Boy letters also must require the disclaiming party to acknowledge that its counterparty may have Borrower Confidential Information that it cannot disclose, but that the disclaiming party has voluntarily entered the transaction

notwithstanding the nondisclosure. The LSTA Distressed Standard Terms suggest the following standard Big Boy provision:

5(n): Buyer acknowledges that (i) Seller currently may have, and later may come into possession of, information with respect to the Transferred Rights, the Assumed Obligations, Borrower, Obligors or any of their respective Affiliates that is not known to the Buyer and that many be material to a decision to sell the Transferred Rights and to retain the Assumed Obligations ("Buyer Excluded Information"), (ii) Buyer has determined to purchase the Transferred Rights and to retain the Assumed Obligations notwithstanding its lack of knowledge of Buyer Excluded Information and (iii) Seller shall have no liability to Buyer or any Buyer Indemnitee, and Buyer waives and releases any claims that it might have against Seller or any Seller indemnitee. . . .

(Section 4(o) of the LSTA Distressed Standard Terms and Conditions contains a nearly identical provision for the Seller.)

The Second Circuit has noted that a party who has been put on notice of the existence of material facts which have not been documented and nevertheless proceeds with the transaction without negotiating language into the agreement for his protection, "will not be heard to complain that he has been defrauded." *Lazard Freres & Co.*, 108 F.3d at 1543. Similarly, the courts in *McCormick v. Fund American Cos., Inc.*, 26 F.3d 869 (9th Cir. 1994) and *Jensen v. Kimble*, 1 F.3d 1073 (10th Cir. 1993), dismissed securities fraud charges by parties who were put on notice that their counterparties

would not disclose certain information. Defendants in McCormick and Jensen explicitly informed plaintiffs that they would not disclose certain material information, and the plaintiffs entered the transactions notwithstanding the nondisclosures. The *Jensen* court held that there could be no fraud because the plaintiff “knew what he didn’t know” when he entered the transaction. 1 F.3d at 1078.

Like all other aspects of the disclaimer, the acknowledgment of non-reliance must be specifically tailored to the agreement. For instance, the agreement in *Harsco Corp. v. Segui* provided that Harsco acknowledged that the sellers of a business were not warranting “projections, estimates or budgets . . . of future revenues, expenses or expenditures, future results of operations . . . or any other information or documents made available” to Harsco. *Harsco Corp.*, 91 F.3d at 342. Harsco also acknowledged that it could only rely on those representations specifically set forth in the agreement. *Id.* Harsco purchased the business and subsequently filed suit, alleging that defendants misrepresented the status of the construction of several plants in Asia and Europe, the financial prospects of the business’ operations, and the business’ intellectual property rights. The Second Circuit affirmed dismissal of Harsco’s claims, holding that many of the misrepresentations complained of were “exactly what [the agreement] disclaim[ed].” *Id.* at 345. The Second Circuit also held that to the extent Harsco claimed misrepresentations about plants other than those specifically referenced in the agreement, “Harsco should be treated as if it meant what it said when it agreed” to specifically disclaim reliance on representations not in the agreement. *Id.* at 345-46. See also *Danann Realty Corp. v. Harris*, 5 N.Y.2d 317, 320-21 (1959) (dismissing fraud claims by purchaser of lease, based on seller’s alleged false representations as to

the building’s operating expenses and profitability, where plaintiff specifically acknowledged in the agreement that seller had not made and did not make any representations as to, among other things, “the physical condition . . . expenses, [or] operation” of the premises).

*The Big Boy Provision Must Require
Each Party to Perform Its Own Due Diligence
on the Underlying Transaction*

Parties to a Big Boy letter also should include language affirming that each party is responsible for its own due diligence, and that neither is entitled to rely on the other. For example, sections 5.1(f) and 5.1(f) of the LSTA Standard Terms and Conditions, provide that the buyer:

has adequate information concerning the business and financial condition of the Borrower and Obligors . . . to make an informed decision regarding the purchase . . . has independently and without reliance upon Seller, and based on such information as Buyer has deemed appropriate, made its own analysis and decision to enter into this Agreement . . . acknowledges that Seller has not given Buyer any investment advice, credit information or opinion on whether the purchase of the Transferred Rights or the assumption of the Assumed Obligations is prudent[; and] . . . has not relied and will not rely on Seller to furnish or make available any documents or other information regarding the credit, affairs, financial condition or business of Borrower or any Obligor, or any other matter concerning Borrower or Obligor.

Such language may forestall any subsequent invocation of the “peculiar knowledge” doctrine, which provides that express

disclaimers of reliance will not be given effect because the facts are peculiarly within the knowledge of the defendant, and plaintiff had no independent means of ascertaining the truth. *Banque Arabe*, 57 F.3d at 155.

In the past, some courts have enforced disclaimers of reliance over the plaintiffs' protests that facts concerning the transaction were peculiarly within the defendants' knowledge, where the disclaimers placed the burden on the buyer to perform its own due diligence. See *UniCredito Italiano*, 288 F. Supp. 2d at 500-01 (where plaintiffs specifically agreed they would make their own credit decisions and would not rely on defendants in deciding whether to enter Enron credit facilities, court refused to apply the peculiar knowledge exception to defeat the parties' contractual allocations of risks away from the defendants). *But see Merrill Lynch v. Allegheny Energy*, 382 F. Supp. 2d at 415 (notwithstanding the general disclaimer of reliance, the language in the parties' agreement placed a disclosure burden on Merrill, rather than a diligence burden on Allegheny, and information about the sham trades and about Merrill's suspicions about the principal's conduct was peculiarly within Merrill's knowledge).

The Big Boy Provision Should Contain a Merger Clause

Finally, to underscore the specific disclaimers and acknowledgments contained therein, a Big Boy letter also should contain a merger clause. See *Emergent Capital Investment Mgmt, LLC v. Stonepath Group, Inc.*, 195 F. Supp. 2d 551, 562 (S.D.N.Y. 2002), vacated in part on unrelated grounds, 343 F.3d 189 (2d Cir. 2003) ("when the contract states that the defendant makes no representations other than those contained in another more exhaustive clause of the contract, a fraud claim may be precluded"). The

merger clause should indicate that the Big Boy letter and any other pertinent transaction documents constitute the entire agreement between the parties, supersede any prior agreements and understandings, written or oral, between the parties with respect to the subject matter of the agreement, and contain the only representations or warranties on which the parties are entitled to rely. See, e.g., *Harsco Corp.*, 91 F.3d at 345 ("no other representations" clause in merger agreement precluded claims alleging misrepresentations about Russian plant facility during due diligence process, where parties' agreement did not contain any representations about the Russian plant); *Consolidated Edison, Inc. v. Northeast Util.*, 249 F. Supp. 2d 387, 401 (S.D.N.Y. 2003), *rev'd in part on unrelated grounds*, 426 F.3d 524 (2d Cir. 2005) (plaintiffs could not prove reasonable reliance on oral statements made in the course of due diligence where the parties' agreement contained specific disclaimer, combined with integration clause which provided that Merger Agreement and Confidentiality Agreement were the entire agreement between the parties and superseded all prior written and oral understandings).

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