

## Memorandum

October 8, 2009

“Under New York law, a party with ‘superior knowledge’ of material facts that are not readily available to its counterparty has a duty to disclose those facts.”

## Who’s a Big Boy II: Superior Knowledge and the Duty to Disclose

By Brian S. Fraser and Tamala E. Newbold

In our October 2007 memorandum titled “*Who’s A Big Boy? Non-Reliance Provisions and Claims of Insider Trading in Securities and Non-Securities Markets*,” we addressed questions regarding the enforceability of contractual disclaimers of reliance (“Big Boy provisions”), in which the parties to a transaction agree that one or both of them may have access to material non-public information to which the other party does not have access. We concluded that the usefulness of such provisions is generally limited to preventing a finding of reasonable reliance in a common-law fraud case arising from a transaction between sophisticated parties in a non-security such as bank debt, and then only when the Big Boy provision clearly describes the type and quality of the information being withheld.

In a situation involving a non-disclosure (as opposed to a misrepresentation), however, the threshold issue is whether there is a duty to disclose in the first place. So where does the duty come from? Under the “misappropriation” theory of insider trading under the federal securities laws, the duty arises from 1) a fiduciary relationship with or 2) a contractual confidentiality obligation owed to the source of the information. New York common law, however, which applies to many non-securities financial transactions, provides a different framework for determining when a party to a transaction has a duty to disclose.

In the non-securities context, the issue that gets litigated is not insider trading, but rather fraud or fraudulent concealment in a civil action for rescission or for damages. In the absence of an affirmative misstatement, liability can result from non-disclosure only if there is a duty to speak, and the general rule is *caveat emptor*. There is a line of cases, however, that holds that one party’s “superior knowledge” may trigger a duty to disclose to the party that does not have the same information.

Below, we describe the evolution and application of the “superior knowledge” exception to *caveat emptor* under New York law, and conclude that where sophisticated parties, negotiating at arms length, agree to a detailed Big Boy provision that affirms that each is entering the transaction notwithstanding that one party may have access to material nonpublic information that it will not disclose, a New York court is likely to reject a claim for fraud based on failure to disclose superior knowledge. We do so with a disclaimer of our own: the cases are heavily fact-driven, and the results are difficult to reconcile. Also, it is safe to assume that if a court concludes that there has been willful and intentional fraud, a Big Boy provision will not be much help.

## SIMILARITIES BETWEEN FEDERAL SECURITIES LAW AND NEW YORK COMMON LAW ON THE DUTY TO DISCLOSE

New York state common law and the federal securities laws both recognize that a mere disparity in information among contracting parties does not, in itself, give rise to a duty to disclose. See *Walton v. Morgan Stanley & Co., Inc.*, 623 F.2d 796, 799 n.6 (2d Cir. 1980) (noting that New York and federal law both recognize that a duty to disclose does not arise “from the fact that some investors have more information than others”); *Societe Nationale D’Exploitation Industrielle Des Tabacs Et Allumettes v. Salomon Bros. Int’l, Ltd.*, 268 A.D.2d 373, 702 N.Y.S.2d 258, 259 (1st Dep’t 2000). It is firmly established under both New York and federal law that nondisclosures are not actionable absent a duty to disclose. See *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988) (“Silence, absent a duty to disclose, is not misleading under Rule 10b-5”); *Banque Arabe et Internationale D’Investissement v. Maryland Nat’l Bank*, 57 F.3d 146, 153 (2d Cir. 1995) (claim for fraudulent concealment under New York law requires proof that the defendant had a duty to disclose material information). A duty to disclose arises under Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5 when 1) an insider trades securities on the basis of material, non-public information (see *Chiarella v. United States*, 445 U.S. 222, 228 (1980)); 2) a fiduciary or similar relationship of trust and confidence exists between the parties outside of the securities laws (see *United States v. O’Hagan*, 521 U.S. 642, 652 (1997)); or 3) the person or company at issue has previously made a statement of material fact that is false or misleading in light of undisclosed information (see 17 C.F.R. § 240.10b-5 (making it unlawful to “omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading”); *In re Time Warner Sec. Litig.*, 9 F.3d 259, 268 (2d Cir. 1993)).

New York common law also recognizes a duty to disclose (1) to make partial or ambiguous statements not misleading, and (2) where the parties have a fiduciary or confidential relationship. New York law, however, differs from federal securities law in one crucial respect: it requires disclosure where one party simply and legitimately possesses superior knowledge about a material fact regarding the transaction, and knows that the counterparty is entering the transaction with a mistaken belief regarding that fact.

## CAVEAT EMPTOR NOTWITHSTANDING, THERE IS A DUTY TO DISCLOSE UNDER NEW YORK LAW UNDER CERTAIN CIRCUMSTANCES

There can be no fraudulent concealment under New York law absent a duty to disclose.<sup>1</sup> *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 754 N.Y.S.2d 245, 250 (1st Dep’t 2003). The general rule is *caveat emptor*: “A duty to speak cannot arise simply because two parties may have been on opposite sides of a bargaining table when a deal was struck between them.” *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993) (applying New York law).

Although the question of when a duty to disclose arises is complex and highly-contested, the rule on its face is deceptively simple. A party to a business transaction has a duty to speak in only three situations: first, where the party has made a partial or ambiguous statement, and it would be misleading to omit other information to correct the misimpression; second, when the parties stand in a fiduciary or confidential relationship with each other; or third, where one party’s superior knowledge of material facts renders a transaction without disclosure “inherently unfair.” See *Jana L. v. West 129th St. Realty*, 22 A.D.3d 274, 802 N.Y.S.2d 132, 134 (1st Dep’t 2005); *Brass*, 987 F.2d at 150-52.

## PARTIAL OR AMBIGUOUS STATEMENTS

A duty to disclose can arise where necessary to correct

<sup>1</sup> The elements of fraudulent concealment under New York law are: (1) a duty to disclose material facts; (2) knowledge of material facts by a party bound to make such disclosures; (3) nondisclosure; (4) scienter; (5) reliance; and (6) damage. *P.T. Bank Central Asia v. ABN AMRO Bank N.V.*, 301 A.D.2d 373, 754 N.Y.S.2d 245, 250 (1st Dep’t 2003). The duty to disclose also can arise in negligent misrepresentation claims. Under New York law, a claim of negligent misrepresentation requires proof that the defendant had a duty, as a result of a special relationship, to give correct information. *Solutia Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 448-49 (S.D.N.Y. 2006) (citing *Kimmell v. Schaefer*, 89 N.Y.2d 257, 652 N.Y.S.2d 715, 719 (1996)).

misunderstandings when one party has made what amounts to partial or ambiguous disclosures. The general rule is that “once a party has undertaken to mention a relevant fact to the other party it cannot give only half the truth.” *Brass*, 987 F.2d at 150. For instance, to the extent such information is not readily discoverable, a company cannot disclose strong earnings without also disclosing losses that nearly wipe out its profits. See *Peerless Mills, Inc. v. AT&T*, 527 F.2d 445, 449 (2d Cir. 1975).

The partial disclosure requirement has been somewhat eroded, however, in a number of Federal court cases in which the court found, under New York law, that partial disclosures between sophisticated parties are not fraudulent where the disclosures revealed sufficient information to impose a duty on the recipient to make further inquiry. For example, in *Lazard Freres & Co. v. Protective Life Ins. Co.*, the United States Court of Appeals for the Second Circuit, applying New York law, held that where a party has been put on notice of the existence of material facts which have not been documented and that party nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, “he may truly be said to have willingly assumed the business risk that the facts may not be as represented.” *Lazard Freres & Co.*, 108 F.3d 1531, 1543 (2d Cir. 1997) (citing *Rodas v. Manitaras*, 159 A.D.2d 341, 552 N.Y.S.2d 618, 620 (1st Dep’t 1990)).

More recently, in *Century Pacific, Inc. v. Hilton Hotels, Inc.*, plaintiffs sued Hilton Hotels for fraud after the value of the Red Lion hotel franchise license plaintiffs purchased dropped significantly once Hilton divested Red Lion from its family of hotels. *Century Pacific, Inc.*, 528 F. Supp. 2d 206, 233 (S.D.N.Y. 2007). The court held, again applying New York law, that even though Century raised a triable issue of fact as to defendants’ partial or ambiguous statements regarding Hilton’s intent to retain the Red Lion name as part of its portfolio, Century could not have reasonably relied on such statements because “the contents of its customized Agreement, and its

relative sophistication as a party shows that Century should have understood exactly what legal assurances it was being given (and not given) and on what elements of the business deal it was knowingly assuming a risk.” *Id.*

## FIDUCIARY RELATIONSHIP

In New York, it is “well established that, when a fiduciary, in furtherance of its individual interests, deals with the beneficiary of the duty in a matter relating to the fiduciary relationship, the fiduciary is strictly obligated to make “full disclosure” of all material facts.” *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278, 750 N.Y.S.2d 291, 294 (1st Dep’t 2002) (citing cases). Absent such full disclosure, the transaction is voidable. For example, the court in *Blue Chip* held that a co-venturer “had no right” to keep to itself material information about its efforts to sell or lease the venture’s property, and determined that as a result, contractual disclaimers the trial court invoked as grounds for dismissing plaintiff’s action were “voidable as the fruit of the fiduciary’s breach of its obligation to make full disclosure.” *Id.* at 294-95; see also *Ajettix Inc. v. Raub*, 9 Misc.3d 908, 804 N.Y.S.2d 580, 588-89 (N.Y. Sup. 2005) (rescinding corporation’s agreement to redeem former vice-president’s stock where vice-president failed to disclose facts that affected the value of his shares); *Pebble Cove Homeowners’ Ass’n, Inc. v. Shoratlantic Development Co., Inc.*, 191 A.D.2d 544, 595 N.Y.S.2d 92, 93 (2d Dep’t 1993) (directors of homeowners’ association had duty to disclose facts which could damage the association).

However, a conventional, arms-length business relationship does not give rise to a fiduciary duty under New York law and therefore does not trigger a duty to speak. *Oursler v. Women’s Interart Center, Inc.*, 170 A.D.2d 407, 566 N.Y.S.2d 295, 297 (1st Dep’t 1991). Nor does the fact that counterparties have entered a confidentiality agreement transform a purely commercial relationship into a fiduciary one under New York law. See *Boccardi Capital Systems, Inc. v. D.E. Shaw Laminar Portfolios, L.L.C.*, No. 05 cv 6882 (GBD), 2009 WL 362118, at \*7 (S.D.N.Y. Feb. 9, 2009) (“Plaintiff’s allegations

demonstrate that the Confidentiality Agreement was executed by parties on equal footing, as part of a “purely commercial relationship,” one in which courts will not impose fiduciary obligations on either contracting party.”).

## SUPERIOR KNOWLEDGE: THE EXEMPTION THAT POTENTIALLY SWALLOWS THE GENERAL RULE

So far, so good. There should be no surprise that a misleading half-truth or a breach of a confidential relationship can potentially give rise to liability. It is the third exception to *caveat emptor*, however, that makes things interesting.

### *What is Superior Knowledge?*

The origins of the superior knowledge doctrine, which applies equally to omissions and affirmative misrepresentations of material fact, date to 1892, when the New York Court of Appeals upheld a jury verdict in favor of the plaintiff who claimed that she purchased defendant’s farm in reliance on the defendant’s false representation that the farm could house 100 cattle and 16 horses. *Schumaker v. Mather*, 88 Sickels 590, 133 N.Y. 590, 595 (1892). The defendant argued there was no fraud because the plaintiff had the means to determine for herself whether the farm could accommodate the amount of animals he claimed, but evidence showed that on several occasions the defendant thwarted plaintiffs’ attempts to do so. In addition, upon closing, plaintiff represented that she was relying solely on the defendant’s representations. The court stated the general rule that

*if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth, or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.*

*Id.* The court then held that the true facts were peculiarly within defendant’s knowledge, and that it was difficult to see “how the exercise of common prudence and the use of ordinary intelligence, or of the faculty of sight, would have enabled plaintiff to detect the falsity of Mather’s statement, and, therefore, why she was not entitled to rely absolutely upon it.” *Id.*

In its current iteration, the superior knowledge doctrine (also known as the “peculiar” knowledge doctrine) is premised on the notion that “[w]hen matters are...peculiarly within the defendant's knowledge,...plaintiff may rely without prosecuting an investigation, as he has no independent means of ascertaining the truth.” *DIMON, Inc. v. Folium, Inc.*, 48 F. Supp. 2d 359, 368 (S.D.N.Y. 1999) (citing *Lazard Freres & Co.*, 108 F.3d at 1542) (both applying New York law); see also *Strasser v. Prudential Securities, Inc.*, 218 A.D.2d 526, 527, 630 N.Y.S.2d 80, 82 (1st Dep’t 1995).

In order to establish a duty to disclose material information based on superior knowledge, the plaintiff must prove (1) that the defendant had superior knowledge; (2) that the information was not readily available the plaintiff; and (3) that the defendant knew that plaintiff was acting on the basis of mistaken knowledge. *Banque Arabe et Internationale D’Investissement v. Maryland Nat’l Bank*, 57 F.3d 146, 155 (2d Cir. 1995). Courts are very clear that a duty to disclose arises only when all three elements are present; the absence of even one element absolves the defendant of any duty to disclose based on superior knowledge.<sup>3</sup> *Congress Financial Corp. v. John Morrell & Co.*, 790 F. Supp. 459, 473 (S.D.N.Y. 1992) (“failure of any single element bars application [of the superior knowledge] doctrine” to prove New York common law fraud).

Superior knowledge is, quite simply, material information about a transaction that a counterparty does not know and cannot find out through reasonable diligence. It is material information, known and

<sup>3</sup> For example, in *Frigitemp Corp. v. Financial Dynamics Fund, Inc.*, 524 F.2d 275 (2d Cir. 1975), the Second Circuit, applying New York law, held that information about corporate holdings was not superior knowledge where the information was readily available to any potential purchaser who asked for it, so purchasers could therefore assume that the plaintiffs were not acting on the basis of mistaken knowledge. 524 F.2d at 282-83.

knowable only to one party, that renders false the counterparty's basic assumptions about the transaction. See, e.g., *Laugh Factory, Inc. v. Basciano*, 608 F. Supp. 2d 549, 559 (S.D.N.Y. 2009) (defendant knew, but plaintiff did not, that at the time he was offering plaintiff full rights to use the name Laugh Factory of NYC, he also contemplated offering the name to other investors); *Janel World Trade, Ltd. v. World Logistics Services, Inc.*, No. 08 Civ. 1327 (RJS), 2009 WL 735072, at \*10 (S.D.N.Y. Mar. 20, 2009) (plaintiff could not rightfully obtain exclusive rights to all defendant's assets because defendant had entered side deal secretly granting a portion of those assets to a third party).

A party's knowledge is not "superior" where the relevant information was either a matter of public record, was not pursued by plaintiffs, or was disclosed at least in part. See *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729, 739 (2d Cir. 1984). Nor is knowledge "superior" when a buyer has an opportunity equal to that of a seller to obtain information. *Brass*, 987 F.2d at 151; *Congress Financial Corp.*, 790 F. Supp. at 474 (finding no duty to disclose, and thus no fraudulent concealment, where plaintiff had "unrestricted" access to the books, records, facilities and personnel at issue and the means to utilize the access, but "failed to exercise diligence to discover allegedly omitted information"). In addition, courts apply a sliding scale when determining access to information, such that "the more sophisticated the buyer, the less accessible the information must be to be considered within the seller's [superior] knowledge." *Solutia Inc. v. FMC Corp.*, 456 F. Supp. 2d 429, 448 (S.D.N.Y. 2006) (citing cases).

#### **What Superior Knowledge Is Not?**

Knowledge is not "superior" where it involves knowledge of extrinsic facts such as market conditions or changes in the law. Courts assume that that kind of information, though known to only one party, could have been obtained by either party. The United States District Court for the Southern District of New York recently rejected a superior knowledge claim in *Century Pacific, Inc. v. Hilton Hotels Corp.* on grounds that Hilton's desire to sell the Red Lion hotel chain was "discernable based on public information [including the

standalone nature of Red Lion's business and the trajectory of Red Lion and other Hilton brands] equally available to a prospective franchisee in the course of reasonable diligence as to someone inside the company." *Id.* at 233.

Similarly, a plaintiff could not recover for fraud arising out of a failed real estate investment where he had not researched the local market, requested supporting documentation about a developer's other projects, or investigated the project site. See *Stuart Silver Assocs., Inc v. Baco Devel. Corp.*, 245 A.D.2d 96, 665 N.Y.S.2d 415, 418 (1st Dep't 1997).

Nor is disclosure required because one party has performed better research or due diligence than another. Again, the law presumes that a counterparty could have obtained the same information. See *Grumman Allied Indus., Inc. v. Rohr Indus., Inc.*, 748 F.2d 729,739 (2d Cir. 1984) (claim that defendant possessed superior knowledge was "without merit" where plaintiff had unrestricted access to defendant's facilities, books and records, and personnel but failed to use its access to discover the allegedly omitted information). In fact, a court recently held that "as a matter of law," one party's knowledge was not superior where the counterparty had access to the same sources of information and could have hired its own private investigators to search public records, "as defendant apparently did." See *Albion Alliance Mezzanine Fund, L.P. v. State Street Bank and Trust Co.*, 8 Misc. 3d 264, 797 N.Y.S.2d 699, 704-05 (N.Y. Sup. 2003). Another court held that a seller who hired professional drillers to test oil wells and discovered that the wells were "dry" did not have to disclose this information to purchasers, because the purchasers could have hired their own experts. See *Barcomb v. Alford*, 125 A.D.2d 907, 510 N.Y.S.2d 267, 269 (3d Dep't 1986).

#### **So When Will A Court Find Superior Knowledge Giving Rise To A Duty to Disclose?**

Then, one might ask, under what circumstances will a mere disparity in knowledge among sophisticated parties bargaining at arm's length evolve into something more, triggering disclosure obligations to a counterparty? Although the law does not require a

party that expended considerable capital and effort to diligence a transaction to disclose the fruits of that diligence, unfortunately the courts have not provided a clear roadmap of what amounts to acceptable and unacceptable nondisclosures. Below, we attempt to harness a few of the general concepts that have emerged under New York law.

Courts applying New York law generally hold that knowledge is “superior” to that of a sophisticated counterparty where (1) the subject of the transaction (whether tangible or intangible) contains a material defect or an encumbrance or other restriction on use or value that is intrinsic to the subject matter of the transaction and is known only to the seller, and the buyer could not have been expected to discover the defect; or (2) the defendant withholds facts about its own fraudulent transactions or conduct that affect the value of the subject matter.

The classic example of a case finding a duty to disclose based on superior knowledge about the inherent character or value of the subject matter is *Donovan v. Aeolian Co.*, where a piano retailer placed a five year old, partially rebuilt piano on its showroom floor alongside new pianos, but did not disclose that the piano was used when it sold the piano to plaintiff, who believed she was buying a new piano. *Donovan v. Aeolian Co.*, 270 N.Y. 267, 270-71 (1936). More recent examples include a finding that a corporation was “duty bound” to disclose restrictions on alienability of stock underlying a transaction for the sale of warrants, where the corporation knew the purchaser believed the underlying securities were freely transferable. *Brass*, 987 F.2d at 152. Similarly, the court in *OnBank & Trust Co. v. FDIC* held that the disparity between principal amount of mortgage pass-through certificates and the mortgage loan balance was peculiarly within RTC's knowledge because, as servicer of the loans, RTC knew that certain loans had been paid off but that the principal amount had not been reduced accordingly. *OnBank & Trust Co.*, 967 F. Supp. 81, 86 (W.D.N.Y. 1997) (applying New York law). Another court held that a defendant had a duty to disclose that it could not legally grant plaintiff

exclusive rights to all of its assets because it had already granted a portion of those assets to a third party. *Janel World Trade, Ltd. v. World Logistics Services, Inc.*, No. 08 Civ. 1327 (RJS), 2009 WL 735072, at \*10 (S.D.N.Y. Mar. 20, 2009). These and other cases suggest that knowledge of a latent defect in the subject of the transaction, not discoverable through the exercise of ordinary diligence, triggers a duty of disclosure.

Courts have also held that information about a defendant's own fraudulent transactions or conduct that affects the value of the subject matter of the transaction is superior knowledge that must be disclosed, the rationale being that “[b]y its nature, this information is of the type that was in defendant's possession, not at plaintiff's fingertips, and which, one can envision, defendant would have desired to keep close to the chest.” *Nomura Sec. Int'l, Inc. v. E\*Trade Sec., Inc.*, 280 F. Supp. 2d 184, 206 (S.D.N.Y. 2003) (quoting *Doehla v. Wathne, Ltd.*, No. 98 Civ. 6087, 1999 WL 566311, at \*16 (S.D.N.Y. Aug. 3, 1999)). In *Nomura*, the court held that the defendant should have disclosed to counterparties in securities lending transactions the fact that it had manipulated the market by purchasing the entire public float of a company's stock, so that the only possible lenders of the stock would be insiders who were not legally permitted to lend stock. *Id.* at 206. Finally, the court in *Minpeco, S.A. v. Conticommodity Servs., Inc.*, 552 F. Supp. 332, 337-38 (S.D.N.Y. 1982), held that a broker should have disclosed the fact that an increase in the global price of silver was the result of the broker's own efforts to monopolize the silver market.

So what is the practical, real world application of these concepts? Does the superior knowledge doctrine require the parties to disclose all of their strategies, motives, intentions or maneuverings? Clearly not. For instance, would the developer of a real estate project seeking to purchase a large block of land be required to disclose its true intention to the seller of each individual lot? Would an investor who seeks to buy a controlling block of the bank debt of a company in distress for the purpose of acquiring the equity in bankruptcy have to disclose its intentions to potential sellers of the debt?

Disclosure should not be required in such situations.

Where the non-disclosing party is not otherwise violating the law or manipulating a market, the *Nomura* and *Minpeco* decisions should not apply in most real world situations. More importantly, cases such as *Donovan*, *Janel World Trade* and *Laugh Factory* illustrate that the determining factor in superior knowledge cases is whether the non-disclosing party knows that the undisclosed information is so material to the counterparty that the counterparty has a mistaken belief about the very essence of the transaction. In the hypothetical examples above, the fact that the developer was buying up all surrounding lots in order to build and the investor was buying bank debt to obtain a controlling or blocking position does not adversely affect the inherent value of the subject matter of the transaction. While the seller has lost possible leverage over the buyer, it has not lost the benefit of its expected bargain.

## DISCLOSURE OBLIGATIONS MAY BE MODIFIED BY CONTRACT: RE-ENTER THE BIG BOY

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 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.

A prime example of this line of cases is *Chase Manhattan Bank v. New Hampshire Insurance Co.*, 193 Misc. 2d 580, 749 N.Y.S.2d 632, 647 (N.Y. Sup. 2002), in which the court rejected a claim that the superior knowledge exception barred enforcement of the parties' specific disclaimer. The insurer in *Chase Manhattan Bank* agreed to a disclaimer wherein the insurer specifically acknowledged that there might be misstatements or omissions, waived any obligation on Chase's part to speak, acknowledged that only very limited specified information had been provided by Chase, and agreed that the insurance policy could not be avoided even if Chase brokers were guilty of misstatements or omissions. *Id.* at 647. The court held that the insurers, having agreed to such a detailed disclaimer, "will not be heard to complain that Chase did not do what the insurers contractually agreed Chase did not have to do, and that Chase is responsible for what the insurers contractually agreed Chase was not responsible." *Id.*

The court in *Rodas v. Manitaras* likewise held that "where, as here, a party has been put on notice of the existence of material facts which have not been documented and he nevertheless proceeds with a transaction without securing the available documentation or inserting appropriate language in the agreement for his protection, he may truly be said to have willingly assumed the business risk that the facts may not be as represented." 159 A.D.2d 341, 552 N.Y.S.2d 618, 620 (1st Dep't 1990). There, plaintiff sought to rescind its purchase of a restaurant based on allegations that defendant falsely induced plaintiff to enter the contract by falsely representing that the weekly income of the business was \$20,000. *Id.* at 620. Plaintiff had requested permission to review defendant's business records and was denied access, but nonetheless agreed to proceed with the purchase of defendant's business. The court rejected plaintiff's argument that information about the weekly income of the business was peculiarly within defendant's knowledge, holding instead that "[i]t is apparent that they were aware that the income of the business was a material fact [for] which they had received no documentation. In entering into the contract with the

assistance of counsel and without conducting an examination of the books and records, plaintiffs clearly assumed the risk that the documentation might not support the \$20,000 weekly income that was represented to them." *Id.* See also *VO2Max, LLC v. Greenhouse Int'l, LLC*, No. 0102624/2007, 2008 WL 4461402 (Trial Order) (N.Y. Sup. Ct. Sept. 24, 2008) (rejecting peculiar knowledge argument where party who was aware it was not receiving material information did not insist on receipt of the information prior to closing, but instead entered "as is" agreement that contained no representations or warranties about alleged material information).

Federal courts applying New York law have ruled similarly. For instance, in *DynCorp v. GTE Corp.*, DynCorp alleged that GTE gave "selective" disclosures that painted an inaccurate picture of the current and future profitability of the underlying transaction, but withheld information that the deal was behind schedule and losing money. *DynCorp*, 215 F. Supp. 2d 308, 320-21 (S.D.N.Y. 2002). The court rejected DynCorp's fraud claim because DynCorp, having agreed to a disclaimer that specifically limited the amount of information it would receive from GTE, knew that "it had not received any warranty that the information was representative of the business" DynCorp intended to purchase. *DynCorp*, 215 F. Supp. 2d at 321. Further, DynCorp, as a sophisticated party to a major transaction, "could not avoid its disclaimer by complaining that it had received less than full information." *Id.* at 321-22.

In *Banque Arabe*, the Second Circuit found that the parties' participation agreement "operate[d] as a waiver absolving [defendant] of responsibility to make affirmative disclosures concerning the financial risks of the . . . Loan." *Banque Arabe*, 57 F.3d at 155; see also *Banco Espanol de Credito v. Security Pacific Nat'l Bank*, 973 F.2d 51, 56 (2d Cir. 1992) (same). And finally, the court in *Unicredito Italiano SPA v. JPMorgan Chase Bank, J.P.*, 288 F. Supp. 2d 485, 498 (S.D.N.Y. 2003), dismissed plaintiffs' fraud claims because "the contracts pursuant to which they made their Enron loan investments preclude them from establishing essential elements of those claims, namely, that the Defendant

banks had a duty to disclose information regarding or gained from their business dealings with Enron, and that any reliance by Plaintiffs on misrepresentations by the Defendants was reasonable." *Id.* See also *Century Pacific*, 528 F. Supp. 2d at 233, *infra*; *Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, N.A.*, 731 F.2d 112, 123 (2d Cir. 1984) (stating that a party's knowledge is not superior knowledge where relevant information "was disclosed, at least in part").

## CONCLUSION

Under New York law, a party with "superior knowledge" of material facts that are not readily available to its counterparty has a duty to disclose those facts. Indeed, except where sophisticated parties are involved, a disclaimer provision (or Big Boy) will not protect against the failure to disclose.

The "superior knowledge" rule, however, should not apply where a sophisticated counterparty is on notice that there are undisclosed, possibly material, facts. Where sophisticated parties, negotiating at arms length, agree to a Big Boy provision that affirms that each is entering the transaction notwithstanding that one party may have access to material nonpublic information that it will not disclose, a New York court is likely to reject the claim, especially if the Big Boy provision is specific about the type of information being withheld.



## QUESTIONS

If you have questions regarding the matters discussed in this memorandum, please call your usual contact at Richards Kibbe & Orbe LLP or one of the persons listed below.

**Brian S. Fraser**

New York, N.Y.

212.530.1820

bfraser@rkollp.com

[Click here to view additional publications on related topics.](#)

## DISCLAIMER

This memorandum may be considered advertising under applicable state laws.

This memorandum is provided by Richards Kibbe & Orbe LLP for educational and information purposes only and is not intended and should not be construed as legal advice.

© 2009 Richards Kibbe & Orbe LLP, One World Financial Center, New York, NY 10281, 212.530.1800, <http://www.rkollp.com>. All rights reserved. Quotation with attribution is permitted. If you would like to add a colleague to our mailing list or if you need to change or remove your name from our mailing list, please email [publications@rkollp.com](mailto:publications@rkollp.com).

Any advice concerning United States Federal tax issues provided in this memorandum is not intended or written to be used, and cannot be used by any taxpayer, for the purpose of (i) avoiding penalties that may be imposed on the taxpayer or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.