

KELLEY DRYE & WARREN LLP

A LIMITED LIABILITY PARTNERSHIP

101 PARK AVENUE

NEW YORK, NEW YORK 10178

(212) 808-7800

WASHINGTON, DC

CHICAGO, IL

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MUMBAI, INDIA

FACSIMILE

(212) 808-7897

www.kelleydrye.com

DIRECT LINE: (212) 808-7718

EMAIL: jcallagy@kelleydrye.com

July 29, 2011

BY HAND

Hon. Robert E. Gerber, U.S.B.J.
United States Bankruptcy Court
for the Southern District of New York
One Bowling Green
New York, NY 10004

Re: Official Committee of Unsecured Creditors of Motors Liquidation
Company v. JPMorgan Chase Bank, N.A., et al. Adv. Pro. No. 09-00504

Dear Judge Gerber:

On behalf of JPMorgan Chase Bank, N.A. ("JPMCB"), we write to submit to the Court, as additional supplemental authority in further support of JPMCB's motion for summary judgment currently pending before the Court in this adversary proceeding, a recent decision rendered in the Supreme Court of the State of New York, New York County. *See AEG Liquidation Trust v. Toobro N.Y. LLC*, 32 Misc.3d 1202, 2011 WL 2535035 (N.Y. Sup. 2011) (attached hereto as Exhibit A).

In *AEG Liquidation*, a liquidation trust for American Equities Group Inc. ("AEG") sought a declaration that AEG had a perfected, first-priority security interest in the assets of Ahava Dairy and related entities ("AD") based on the filing of UCC-1 financing statements by AEG in 1996 in connection with a factoring agreement between AEG and AD. 2011 WL 2535035 at *1-2. After the filing of those UCC-1 financing statements, UCC-3 termination statements were filed purporting to terminate AEG's security interests. *Id.* at *2. The termination statements indicated that AD was the filer. *Id.* On defendants' motion to dismiss AEG's complaint, Justice Kornreich found that under UCC §§ 9-510 and 9-509, the UCC-3 termination statements were not "effective" because AEG did not authorize those filings. *Id.* at *9.

The Honorable Robert E. Gerber
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In her decision, Justice Kornreich addressed *Roswell Capital Partners LLC v. Alternative Construction Technologies*, 2010 U.S. Dist. LEXIS 90695 (S.D.N.Y. Sept. 1, 2010) (“*Roswell*”), the first court, to our knowledge, to do so. As this Court may recall, *Roswell* is one of the decisions the Committee heavily relied upon in support of its motion for partial summary judgment. Justice Kornreich correctly noted that the cases cited by *Roswell* in support of its decision were “out of state cases citing and interpreting earlier versions of Article 9.” 2011 WL 2535035 at *9, n.1. Justice Kornreich also disagreed with *Roswell’s* statement that the UCC places the burden of monitoring for potentially erroneous UCC-3 filings on existing creditors rather than potential creditors. Quoting from the comments to UCC § 9-502, Justice Kornreich noted that the filed financing statement “indicates merely that a person *may have a security interest* in the collateral indicated. ***Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.***” *Id.* (emphasis in original). Justice Kornreich disagreed with *Roswell’s* attempt to distinguish this comment by stating it only applied to financing statements and not UCC-3 termination statements. The Court correctly found that the UCC comment applies to both the financing statement and a termination statement related thereto.

Respectfully submitted,



John M. Callagy

Attachments

cc: Eric B. Fisher, Esq. (via e-mail and First Class U.S. Mail w/attachments)

EXHIBIT A

Slip Copy, 32 Misc.3d 1202(A), 2011 WL 2535035 (N.Y.Sup.), 2011 N.Y. Slip Op. 51156(U)
(Table, Text in WESTLAW), Unreported Disposition
(Cite as: 2011 WL 2535035 (N.Y.Sup.))

NOTE: THIS OPINION WILL NOT APPEAR IN A PRINTED VOLUME. THE DISPOSITION WILL APPEAR IN A REPORTER TABLE.

Supreme Court, New York County, New York.
 The **AEG LIQUIDATION TRUST** on behalf of
 American Equities Group, Inc., Plaintiff,

v.

TOOBRO N.Y. LLC, Toobro DAG LLC, FJB, LLC, Ahava Food Corp. d/b/a North Country Cheese Corp., Lewis County Dairy Corp., St. Lawrence Food Corp., Schwartz & Sons Quality Distributors, Inc., Ahava of California d/b/a Best Value Kosher Food and d/b/a Ahava National Food Distributor and d/b/a North Country Manufacturing, RTB Specialty Food, LLC, Yomo Quality Food LLC d/b/a Best Value Kosher Food, MSBRO, LLC, and Ahava Dairy Products Corp., Defendants.

No. 650680/10.

June 24, 2011.

Shaya M. Berger Esq. of Dickstein Shapiro LLP, for plaintiff.

Steve A. Weg Esq. of Goldberg & Rimberg PLLC, for Defendants, Toobro N.Y. LLC, Toobro Dag LLC, Ahava Food Corp., Lewis County Dairy Corp, Schwartz & Sons Quality Distributors, and MSBRO LLC.

Allan J. Rotlewicz Esq. of Rumberger Kirk & Caldwell P.A., for Defendants, Ahava of California, RTB Specialty Food, LLC, and Yomo Quality Food, LLC.

SHIRLEY WERNER KORNREICH, J.

*1 This action arises from a November 6, 1996 "Master Purchase & Sales Agreement" (the Factoring Agreement) between American Equities Group Inc. (AEG) and defendant Ahava Dairy Products Corp. (Ahava Dairy). Defendant Lewis County Dairy Corp. (Lewis) guaranteed all of Ahava Dairy's obligations to AEG under the Factoring Agreement. To secure payment of these obligations, Ahava Dairy and Lewis each granted AEG first priority security interests in all of their respective assets. Plaintiff, The AEG Liquidation Trust (the Liquidator), is a trust established

by AEG as debtor in a bankruptcy proceeding in the United States Bankruptcy Court for the Southern District of New York, pursuant to a plan of liquidation which was confirmed by the Bankruptcy Court on October 20, 2008.

In this action, the Liquidator seeks, *inter alia*, a declaratory judgment that it maintains uninterrupted first priority security interests in the assets of Ahava Dairy and Lewis despite a series of transfers, voluntary and involuntary, to other holders (the Fourth Cause of Action). The Liquidator also seeks to hold liable the alleged transferees of these assets on successor liability and *de facto* merger grounds for certain obligations allegedly incurred by Ahava Dairy, Lewis and other related entities either through contract or as a result of litigation (the First, Second and Third Causes of Action). Further, the Liquidator seeks to hold liable, for the same obligations, certain entities allegedly related to Ahava Dairy and/or the asset transferees under an *alter ego* theory of liability (the Fifth and Sixth Causes of Action). Lastly, the Liquidator seeks to hold all defendants liable, jointly and severally, for the same obligations (the Seventh Cause of Action).

Defendants Toobro N.Y. LLC (Toobro NY), Toobro DAG LLC (Toobro DAG), FJB, LLC (FJB), Ahava Food Corp. (Ahava Food), Lewis, St. Lawrence Food Corp. (St.Lawrence), Schwartz & Sons Quality Distributors (Schwartz), and MSBRO, LLC (MSBRO) move to dismiss the complaint in its entirety. The Liquidator opposes the motion.

I. Background

The following facts are drawn from the complaint unless otherwise stated. They are presented in chronological order unless otherwise necessary to provide context.

Ahava Dairy and Lewis are manufacturers, producers and/or distributors of kosher dairy products. Compl. ¶ 22. Moshe Banayan (M.Banayan) was the sole owner of Ahava Dairy and Lewis for many years. Compl. ¶ 25. On November 6, 1996, AEG and Ahava Dairy entered into the Factoring Agreement, whereby Ahava Dairy agreed to sell and AEG agreed to buy Ahava Dairy's accounts receivables. Compl. ¶

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26. Pursuant to the Factoring Agreement, AEG was entitled to charge Ahava Dairy's account for any of the purchased receivables that were not collected within ninety days of the invoice date, as well as certain additional fees. Compl. ¶¶ 28–29. AEG also was entitled to payment on demand of such charges, with interest accruing at eighteen percent *per annum*. Compl. ¶ 29.

*2 For AEG's protection, Banayan and Lewis personally guaranteed Ahava Dairy's obligations under the Factoring Agreement. Compl. ¶ 27. Further, Ahava Dairy and Lewis each granted AEG first priority security interests in all of their respective assets to secure payment of their obligations. Compl. ¶ 30. AEG perfected the security interests by filing UCC–1 financing statements on November 13, 1996. Compl. ¶ 31. AEG has never allowed its financing statements to lapse. Compl. ¶ 32.

On November 21, 2000, AEG commenced a Chapter 11 bankruptcy proceeding by filing a petition in the United States Bankruptcy Court for the Southern District of New York (the SDNY Bankruptcy Court). *See Weg Aff.*, Exh. F. As of December 31, 2000, AEG was owed \$8,081,819.30 for charges to Ahava Dairy's account under the Factoring Agreement. Compl. ¶ 33. AEG demanded payment from Ahava Dairy and the guarantors, M. Banayan and Lewis, but no payments were made. *Id.*

As a result, on April 17, 2001, AEG commenced an adversary proceeding against Ahava Dairy, Lewis, and M. Banayan in the SDNY Bankruptcy Court. Compl. ¶ 35. AEG later amended the complaint to include Ahava Food as a defendant, allegedly, upon learning that Ahava Food had become the owner of all of Ahava Dairy's assets, including real property, equipment, trademarks and other intellectual property. Compl. ¶¶ 36–37. According to the complaint: (1) M. Banayan owned and controlled both Ahava Dairy and Ahava Food; (2) Ahava Food was under the same management and ownership structure as Ahava Dairy; and (3) Ahava Food sold the same products as Ahava Dairy to the same customers. Compl. ¶¶ 25, 36.

On September 27, 2001, AEG's case against M. Banayan, Ahava Dairy, Ahava Food and Lewis (the SDNY Defendants) was transferred to the United States District Court for the Southern District of New

York (the SDNY Court). Compl. ¶ 38.

On February 7, 2002, an “unknown party,” without authorization and without the knowledge of AEG, filed UCC–3 termination statements purporting to terminate AEG's security interests in substantially all of the assets of Ahava Dairy and Lewis. Compl. ¶ 47. The termination statements indicated that Ahava Dairy and Lewis were the filers. Compl. ¶ 47. In addition, plaintiff alleges that “[a]s early as 2000, Banayan began creating various corporate entities and instigating sham transfers of property and assets in order to escape the financial obligations of Ahava Dairy [] and Lewis [].” Compl. ¶ 59. More specifically, according to the complaint, “[i]n 2000 during the time period that Ahava Dairy became indebted to AEG for over \$8 million, M.[] Banayan and his brother Aaron Banayan [A. Banayan] formed Ahava of California, LLC [Ahava of California].” Compl. ¶ 60. Then, M. Banayan allegedly transferred his shares in Ahava of California to A. Banayan, no longer maintaining an interest in that entity. Compl. ¶ 63.

Further, “in 2003, whilst in the midst of active litigation with AEG ..., [] Banayan formed St. Lawrence [].” Compl. ¶ 61. According to the complaint, St. Lawrence was an alter ego of the three original Ahava entities—Ahava Dairy, Ahava Food, and Lewis—having the same ownership and management structure as these entities and marketing the same products to the same customers. *Id.* Plaintiff alleges that, through the course of the years, St. Lawrence received assets of the three original Ahava entities—Ahava Dairy, Ahava Food, and Lewis. *Id.*

*3 Finally, “in 2007, M.[] Banayan purported to transfer the business operations of Ahava Dairy [], Lewis [], Ahava Food [], and St. Lawrence [] to Ahava of California.” Compl. ¶ 64. The complaint asserts that through a series of leases and other agreements, “the right to all revenue producing property, including equipment and intellectual property, was [also] transferred to Ahava of California.” *Id.* Moreover, in 2007, plaintiff alleges “[M.] Banayan created yet another new entity, Schwartz [] as an additional alter ego of the original Ahava entities.” Compl. ¶ 67. According to the complaint, Schwartz “has the same ownership and management structure as the original Ahava entities, markets the same products as the original Ahava entities to the same

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customers, and at various times received assets of the three original Ahava entities [Ahava Dairy, Lewis and Ahava Food].” *Id.*

In between these alleged asset transfers—specifically in 2005, after Ahava Dairy and Lewis filed the UCC-3 termination statements—Signature Bank became a creditor of the SDNY Defendants and other related entities and “filed UCC financing statements to document liens supporting Signature Bank’s claims” against them. Compl. ¶ 52. On July 28, 2006—upon discovery of the unauthorized filing of termination statements—AEG filed UCC Correction Statements pursuant to UCC § 9-518, in which AEG stated that the termination statements were unauthorized. Compl. ¶ 50; *see also* Weg Aff., Exh. G. On December 27, 2007, Signature Bank filed a CPLR 3213 motion for summary judgment in lieu of complaint in the Supreme Court, New York County, against Ahava Food, Lewis, St. Lawrence, M. Banayan, Ana Banayan (M. Banayan’s wife), and Schwartz. *See* Weg Aff., Exh. J.

On February 7, 2008, AEG and the SDNY Defendants entered into a “Stipulation and Agreement of Settlement” (the Settlement Agreement). Under the Settlement Agreement, “the Settling Parties ... release the Released Claims.” *See* Weg Aff., Exh. G, Part III, G. The “Settling Parties” are defined as AEG and the SDNY Defendants. “Released Claims” are defined as:

any and all claims, demands, debts, liabilities, losses, rights, and causes of action of any nature and description whatsoever (including, but not limited to, any claims for damages, interest, attorneys’ fees, expert or consulting fees, and any other costs or expenses, or liability whatsoever), whether known or unknown, whether suspected or unsuspected, whether concealed or hidden, whether based on federal, state, local, statutory or common law, or any other law, rule regulation, whether fixed or contingent, accrued, liquidated or unliquidated, at law or in equity, material or immaterial, **by or against the Settling Parties** ..., based upon, arising out of, or related to the [Factoring] Agreement, the Banayan Guaranty, and the Lewis ... Guaranty, but with respect to the defendants, shall be limited to the Judgment Amount and **this release does not include any person or entity other than the Settling Parties. Nothing set forth herein,**

including this release, shall affect AEG’s right or ability to enforce any judgment to be entered herein. [emphasis supplied]

*4 *See* Weg Aff., Exh. G, Part II, L.

The Settlement Agreement provides that “[j]udgment shall be entered ... against Ahava Dairy [], Lewis [], and ... [M.] Banayan in the amount of \$3,500,000, upon the signing of [the Settlement Agreement]. *See* Weg Aff., Exh. G, Part III, D. Also, upon the signing of the Settlement Agreement, “[j]udgment shall be entered against Ahava Food [] ... in the amount of \$325,000.” *See* Weg Aff., Exh. G, Part III, E. In addition, under the Settlement Agreement, Ahava Dairy, Ahava Food, Lewis and M. Banayan were obligated to remit to AEG ten “Cash Settlement Payments” of \$25,000 each for a total of \$250,000. *See* Weg Aff., Exh. G, Part II, I, Part III, A. The first such payment was due on March 13, 2008, and all subsequent payments were due every thirty days for nine consecutive months. *Id.* If the Cash Settlement Payments were not received in full on the due date, AEG “shall give Defendants twenty (20) days written notice to cure.” *See* Weg Aff., Exh. G, Part III, C. If the deficiency was not cured within 20 days, “AEG may immediately and without further notice enter judgment in this court against Ahava Food for \$3.5 million.” *See* Weg Aff., Exh. G, Part III, F.

On March 10, 2008, the SDNY Court, having reviewed the Settlement Agreement, entered judgment: (1) against Ahava Dairy, Lewis, and M. Banayan for \$3,500,00 jointly and severally; (2) against Ahava Food for \$325,000; and (3) against all SDNY Defendants, jointly and severally, for \$250,000 to be paid in ten equal monthly installments, starting on March 13, 2008. Compl. ¶ 40; *see also* Weg Aff., Ex. H, I. The Court also dismissed, on the merits and “with prejudice,” all claims and counterclaims in the action. *Id.* Without affecting the finality of the judgment, the Court retained continuing jurisdiction over all parties for the purposes of construing, enforcing, and administering the Settlement Agreement. *Id.* As of the date of filing of the instant complaint, the SDNY Defendants have only paid two Cash Settlement Payments to AEG, totaling \$50,000.

On March 11, 2008, the New York Supreme Court granted Signature Bank’s motion for summary

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judgment in lieu of complaint against Ahava Food, Lewis, St. Lawrence, M. Banayan, Ana Banayan, and Schwartz. *See* Weg Aff., Exh. J. The Court directed entry of judgment against these defendants in the amount of \$9,338,103.90 and entry of judgment against Ana Banayan in the amount of \$1,781,621.53. *Id.* Judgment for these amounts, plus costs and disbursements, was entered on March 14, 2008. *Id.*

On June 18, 2008, Signature Bank sent a “Notice of Secured Party Sale” (Notice of Sale) to a list of entities pursuant to UCC 9–613. *See* Weg Aff., Exh. K. The Notice of Sale indicated that “the collateral described below on Schedule A ... will be sold at a sale ... held to enforce the rights of Lender as Secured Party Seller in the Collateral.” *Id.* The Notice of Sale further stated that the “Collateral is the subject of a certain Security Agreement dated as of August 5, 2005, by and among Ahava Food [], St. Lawrence [], Lewis [], and Schwartz [] (collectively the Debtor) and the Lender.” *Id.*

*5 Schedule A indicated that “Collateral” meant:

all personal property and fixtures of each Debtor in which the Debtor has an interest, in each case whether now or hereafter existing or now owned or hereafter acquired and whether subject to the Uniform Commercial Code including all goods, money, instruments, accounts, farm products, inventory, equipment, documents, chattel paper, securities and general intangibles and all interest, dividends and other distributions thereon paid and payable in cash or in property; and all replacements and substitutions for, and all accessions and additions to, and all products and Proceeds of, all the foregoing. [emphasis supplied]

Id. The sale was to be held on July 9, 2008, at 10:00 a.m. at the offices of Signature Bank’s counsel, Herrick Feinstein LLP (Herrick). *Id.*

On June 25, 2008, AEG’s counsel, Dickstein Shapiro LLP (Dickstein), sent a letter to Herrick advising it that AEG was a secured creditor of Ahava Dairy and Lewis pursuant to a 1996 security agreement and UCC –1 financing statements filed on November 13, 1996. *See* Weg Aff., Exh. L. Dickstein’s letter further advised that AEG is a judgment creditor of Ahava Dairy, Lewis and related entities pursuant to a judgment dated March 10, 2008. *Id.* Finally,

Dickstein’s letter advised Herrick that AEG claimed priority over the purported lien of Signature Bank and that any action taken by Herrick, Signature Bank, or its agents that “would infringe upon or purport to affect, negate or modify AEG’s interest in the subject collateral would constitute a breach of the automatic stay of Section 362 of the Bankruptcy Code.” *Id.*

On July 1, 2008, Signature Bank moved, by order to show cause, in the SDNY Bankruptcy Court, for relief from the Section 362 automatic stay. *See* Weg Aff., Exh. E. By order dated July 8, 2008 (the Bankruptcy Court Order), the SDNY Bankruptcy Court granted Signature Bank relief from the automatic stay “to the limited extent” that Signature may conduct the secured party sale of assets of Lewis, with the proviso that “all liens of Signature and AEG shall attach to the proceeds of the Sale (subject to prior security interests, if any, of any third party), and the proceeds of the Sale shall be held in escrow pending further adjudication of this Court with respect to competing claims of priority as to the proceeds of the Sale.” *Id.*

“On July 9, 2008, Signature Bank purportedly conducted a secured party sale of the assets of the Ahava Judgment Debtors [Ahava Dairy, Ahava Food and Lewis] and other related entities.” Compl. ¶ 81. “SB AHLCSLSS LLC [Sub–SB], an entity wholly owned by Signature Bank, was the successful bidder at the purported sale.” Compl. ¶ 82. According to the complaint “[t]he sale was expressly made as is’ and with all liens and encumbrances remaining attached to the assets.” Compl. ¶ 84.

On February 17, 2009, Signature Bank and Sub–SB entered into an “Asset Sale Agreement” with Toobro NY, whereby Sub–SB sold to Toobro N.Y. “(i) all the personal property of the Ahava Judgment Debtors, St. Lawrence [] and Schwartz [], and (ii) all the equity interests in the Ahava Judgment Debtors, St. Lawrence and Schwartz.” Compl. ¶ 87; *see also* Weg Aff. Ex. M. Section 1.1 of the Asset Sale Agreement provides in pertinent part that “[t]he Purchased Assets are being sold ... subject to all claims and encumbrances of [among others] ... American Equities Group Liquidation Trust [the Liquidator] [and] American Equities Group, Inc. [AEG].” *Id.*

*6 “On February 18, 2009, AEG and Toobro N.Y. executed a Claims Purchase Agreement in

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which AEG agreed to sell and Toobro N.Y. agreed to purchase AEG's claims and liens against the Ahava entities, Banayan, and other related entities." Compl. ¶ 101. Pursuant to the Claims Purchase Agreement, "Toobro N.Y. [] was required to pay a non-refundable initial payment of \$100,000 upon execution and an additional \$750,000 by March 16, 2009." Compl. ¶ 102. If Toobro N.Y. failed to pay the \$750,000 by March 16, 2009, the agreement would be *void ab initio*. *Id.*

On February 23, 2009, the United States Bankruptcy Court for the Northern District of New York, where M. Banayan had a pending Chapter 7 bankruptcy case, approved the sale by the bankruptcy trustee to Signature Bank of all of M. Banayan's shares of stock in Ahava Food, Lewis, St. Lawrence, and Schwartz. Compl. ¶ 86.

Toobro N.Y. failed to pay AEG \$750,000 by March 16, 2009, as required by the Claims Purchase Agreement. Compl. ¶ 103. On March 24, 2009, in exchange for another non-refundable \$100,000 payment from Toobro NY, AEG agreed not to declare the Claims Purchase Agreement void *ab initio* until April 2, 2009. Compl. ¶ 104. Toobro N.Y. failed to pay the remaining balance on April 2, 2009. Compl. ¶ 105.

On April 22, 2009, the SDNY Court—based on the Settlement Agreement between the Ahava Judgment Debtors and AEG and having determined that AEG did not receive the Cash Settlement Payments contemplated by the Settlement Agreement on the dates due—issued a final judgment for AEG and against Ahava Food in the amount of \$3,500,000. Compl. ¶ 44; *see also* Weg Aff. Ex. N.

This action followed. AEG's Liquidator seeks to recover from all defendants, jointly and severally, payments owed under the following obligations: (1) the requirement to pay under the Factoring Agreement; (2) the promise to pay \$250,000 in connection with the Settlement Agreement; (3) the \$3.5 million judgment entered by the SDNY Court against M. Banayan, Ahava Dairy and Lewis; (4) the \$325,000 judgment entered on March 10, 2008 and the \$3.5 million judgment entered on April 22, 2009 by the SDNY Court against Ahava Food; and (5) the obligations under Toobro's Claims Purchase Agreement. Compl. ¶ 107. (Seventh Cause of Action).

Recovery is premised under different theories of liability for different groups of defendants. Specifically, recovery against Ahava Dairy and Lewis is premised on the breach of the Factoring Agreement and/or Guaranty, breach of the Settlement Agreement, and the \$3.5 million judgment entered against them by the SDNY Court on March 10, 2008. Recovery against Ahava Food is also premised on the judgments entered by the SDNY Court—the original \$325,000 judgment entered on March 10, 2008 and the \$3.5 million entered on April 22, 2009. (Fifth Cause of Action).

Liability for Schwartz, St. Lawrence, Ahava of California, RTB Specialty Food LLC (RTB), and Yomo Quality Food (Yomo) is premised on the allegation that these entities are *alter egos* of Ahava Dairy, Ahava Food, and Lewis because they have overlapping ownership, officers, directors and personnel with these entities and are completely dominated by M. Banayan and/or his brother A. Banayan. Compl. ¶¶ 154–155. Further, according to the complaint, these entities were used by M. Banayan and A. Banayan to commit fraud against AEG. (Fifth Cause of Action).

*7 Toobro NY's liability allegedly consists in it being the *successor* of one or more of the Ahava entities listed above. The successor liability, in turn, is premised on: (1) an *express* assumption of liability under the "Asset Sale Agreement" with Sub-SB; and (2) an *implied* assumption of liability by agreeing to purchase the assets of Ahava Food, Lewis, and Schwartz from Sub-SB. Compl. ¶¶ 112–13, 118. (First and Second Causes of Action). Toobro NY's liability is further premised on an alleged *de facto* merger between this company and the Ahava entities resulting from Toobro NY's purchase of both their stock and assets. Compl. ¶¶ 127–130. (Third Cause of Action).

Liability for Toobro DAG and FJB is premised on the allegation that they are *alter egos* of Toobro N.Y. because, allegedly, the three companies operate as a single business with no regard for their corporate separateness and they have overlapping ownership, officers, directors, and personnel. Compl. ¶¶ 163, 167. Further, according to the complaint, all three companies are dominated by Mendy Bistritzky and Steve Bistritzky (the Bistritzkys), who allegedly used

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these companies to commit fraud against AEG. Compl. ¶ 168. (Sixth Cause of Action).

Finally, the Liquidator seeks a declaratory judgment that it maintains uninterrupted first priority security interests in Ahava Dairy's and Lewis' assets despite a series of transfers, voluntary and involuntary, to other holders (Fourth Cause of Action).

II. Discussion

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true and accord plaintiff the benefit of every possible favorable inference. Morone v. Morone, 50 N.Y.2d 481, 484 (1980); Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 (1976). “[T]he court [however] is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” Robinson v. Robinson, 303 A.D.2d 234, 235 (1st Dept 2003).

A. AEG's Security Interests in Ahava Dairy's and Lewis' Assets (Fourth Cause of Action)

Defendants move to dismiss Liquidator's cause of action for declaratory judgment that AEG maintains uninterrupted security interests in Ahava Dairy's and Lewis' assets. The argument is fourfold.

First, defendants argue that the purported security interests were “eliminated” by the Bankruptcy Court Order of July 8, 2008. That Order provided that “all liens of Signature [Bank] and AEG shall attach to the proceeds of the Sale ... and the proceeds of the Sale shall be held in escrow pending further adjudication of this court with respect to competing claims of priority as to the proceeds of the Sale.” See Defendants' MOL, at 7–10; see also Weg Aff., Exh. E. From this language, defendants infer that since AEG's security interests attached to proceeds of the sale, the security interests no longer attached to the underlying collateral sold.

*8 This inference is mistaken as a matter of law. Section 9–315 of the Uniform Commercial Code (UCC) provides that “a security interest ... continues in collateral notwithstanding sale ... or other disposition thereof. and a security interest attaches to any identifiable proceeds of collateral.” [emphasis supplied] See UCC § 9–315(a)(1)–(2). Exceptions to this rule exist where the secured party authorized the sale

free of the security interests or the buyer purchased the goods in the ordinary course of business. See UCC §§ 9–315(a)(1), 2–403(2); Broyhill Furniture Indus., Inc. v. Hudson Furniture Gallerires, LLC, 2008 N.Y. Slip Op 30636U, *15 (S Ct, N.Y. County, 2008), affd 61 AD3d 554 (1st Dept 2009). Neither exception applies here. Consequently, defendants cannot infer that the security interests did not continue in the collateral. The Bankruptcy Court Order merely reflected the statutory requirement that upon sale of the collateral, the security interests also attach to the proceeds. See UCC § 9–315(a)(2). It does not address the status of the security interests in the underlying collateral and could not eliminate the statutory protection of Section 9–315.

Defendants next argue that AEG's security interests in the assets of Ahava Dairy and Lewis were “discharged” as a result of the July 9, 2008 secured party sale of these assets by Signature Bank. This argument is also unavailing. Section 9–617 of the UCC provides that “a secured party's disposition of collateral after default ... discharges any subordinate security interest or other subordinate lien.” [emphasis supplied] See UCC § 9–617(a)(3). Defendants fail to show that AEG's security interests in Ahava Dairy's and/or Lewis' assets were subordinate to those of Signature Bank.

To explain, UCC 9–317(a)(1) provides that “a security interest ... is subordinate to the rights of: (1) a person entitled to priority under Section 9–322....” Section 9–322(a)(1) provides that “priority among conflicting security interests ... in the same collateral is determined according to the following rules: (1) Conflicting perfected security interests ... **rank according to priority in time of filing or perfection**” [emphasis supplied]. AEG perfected the security interests by filing UCC–1 financing statements on November 13, 1996. Compl. ¶ 31. Signature Bank perfected its security interests by filing UCC–1 financing statements in 2005. Compl. ¶ 52. Hence, defendants fail to show that AEG's security interests are subordinate to those of Signature Bank under UCC § 9–317. See UCC §§ 9–317(a)(1), 9–322(a)(1). *A fortiori*, they fail to show that Signature Bank's disposition of these assets through the secured party sale of July 9, 2008 discharged AEG's security interests in the collateral. See UCC § 9–617(a)(3).

The filing of the UCC–3 termination statements

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on February 7, 2002 does not change this result. Section 9-513(d) of the UCC provides that “[e]xcept as otherwise provided in Section 9-510, upon the filing of a termination statement with the filing office, the financing statement to which the termination statement relates ceases to be effective.” Section 9-510(a), however, provides that “[a] filed record is effective only to the extent that it was filed by a person that may file it under Section 9-509.” Under Section 9-509(d)(1) & (2),

*9 A person may file an amendment other than an amendment that adds collateral covered by a financing statement or an amendment that adds a debtor to the financing statement only if:

(1) the *secured party of record authorizes the filing*; or

(2) the amendment is a termination statement for a financing statement as to which *the secured party of record has failed to file or send a termination statement as required by section 9-513(a) or (c)*, the debtor authorizes the filing, and the termination statement indicates that the debtor authorized it to be filed. [emphasis supplied]

Neither condition for “effectiveness” of the termination statements is met here.

AEG as the secured party did not authorize the filing of the termination statements. *See UCC § 9-509(d)(1)*. Nor did AEG fail to file or send a termination statement under UCC § 9-509(d)(2) because Sections 9-513(a) and (c) do not apply in this case. Section 9-513(a) does not apply because that section applies to consumer goods. The underlying collateral here was not consumer goods. Section 9-513(c), in turn, requires that

20 days after a secured party receives an authenticated demand from a debtor, the secured party shall cause the secured party of record for a financing statement to send to the debtor a termination statement for the financing statement or file the termination statement *if*: (1) ... *there is no obligation secured by the collateral covered by the financing statement*“ [emphasis supplied]

UCC § 9-513(c) does not apply because one of

its conditions was not satisfied. More specifically, there was an “obligation secured by the collateral” in February 7, 2002, since AEG was still owed \$8,081,819.30 for charges to Ahava Dairy's account under the Factoring Agreement. That obligation was secured by the relevant collateral in this case. In sum, the termination statements filed on February 7, 2002 were ineffective under Section 9-510 and, thus, the financing statements to which they related did not cease to be effective under Section 9-513. *See UCC §§ 9-510(a), 9-513(d)*.^{FN1}

^{FN1}. Defendants do not articulate an alternative analysis on the effect of the termination statements filed in this case. The court's research identified only one New York case applying a contrary analysis to the one adopted here. In *Roswell Capital Partners LLC v. Alternative Construction Technologies*, the SDNY Court, applying the Florida version of the UCC, reasoned as follows: “even if the termination statement was not authorized by [the secured party] it nevertheless extinguished any perfected security interest [that party] had in the Collateral. Following this termination, Plaintiffs perfected their security interest in the Collateral by filing UCC-1 financing statements with the Florida Secretary of State.... This gave Plaintiffs a perfected security interest in the Collateral senior to whatever security interest [the prior secured creditor] may have still had at that point.” *See* 2010 LEXIS 90695 *25 (SDNY 2010).

The cases cited by the SDNY court in support of this analysis trace back to out-of-state cases citing and interpreting earlier versions of Article 9. *See Id.* at *22-23. With respect to policy, the SDNY court stated that “[t]he UCC ... places the burden of monitoring for potentially erroneous UCC-3 filings on existing creditors, who are aware of the true state of affairs as to their security interests, rather than potential creditors who will not be in a position to know whether a termination statement was authorized or not.” The termination statement form promoted by the UCC does not support this policy analysis. *See UCC § 9-521(b)*. Under ru-

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bric 9, the form requires that the filer identify either the secured party authorizing the termination statement, or if the termination is unauthorized, the name of the debtor authorizing the termination. As an example, in this case, the debtors, Ahava Dairy and Lewis were named as the filers.

Further, the analysis runs against the “notice filing” system adopted by the UCC. See UCC § 9–502, cmt. 2. Under this system, “[w]hat is required to be filed is not, as under pre-UCC chattel mortgage and conditional sales acts, the security agreement itself, but only a simple record providing a limited amount of information (financing statement)... The notice itself indicates merely that a person *may have a security interest* in the collateral indicated. *Further inquiry from the parties concerned will be necessary to disclose the complete state of affairs.* Section 9–210 provides a statutory procedure under which the secured party, at the debtor's request, may be required to make disclosure.” [emphasis supplied] *Id.*

In *Roswell Capital*, the SDNY court considered but distinguished the “notice filing” comment of UCC § 9–502 stating that it “refer[s] only to financing statements,’ and not to termination statements.” See 2010 LEXIS 90695 *24, n. 14. This distinction is inconsistent with the definitions of “financing statement” and “termination statement” under Article 9. See UCC §§ 9–102(39), (79). “Financing statement’ means a record or records composed of an initial financing statement *and any filed record relating to the initial financing statement.*” [emphasis supplied] UCC § 9–102(39). “Termination statement’ means an amendment of a financing statement which:(A) identifies, by its file number, *the initial financing statement to which it relates;* and (B) indicates either that it is a termination statement or that the identified financing statement is no longer effective.” [emphasis supplied] UCC § 9–102(79). Since a

termination statement is a record “relating to the initial financing statement,” it is part of a “financing statement” as this term is defined by the UCC. See UCC § 9–102(39). Consequently, the “notice filing” comment of UCC § 9–502 applies to termination statements. For these reasons, the court declines to follow the SDNY Court's analysis in *Roswell Capital*.

Lastly, defendants argue that by entering into the Settlement Agreement with Ahava Dairy, Ahava Food, Lewis and M. Banayan on February 7, 2008, “AEG expressly waived its right to enforce its liens against the Ahava Entities.” See Defendants MOL, at 13. The court disagrees. The claims released by the Settlement Agreement are those “by and against the Settling Parties.” See Weg Aff., Exh. G, Part II, L. A security interest, by contrast, is not a claim against a person but an interest *in property*. See UCC § 1–201(37) (“Security interest’ means an interest in personal property or fixtures which *secures* payment or performance of an obligation.”). The language of the release provision of the Settlement Agreement does not expressly address “interests in property.”

The scheme of the UCC, taken together with the wording of the Settlement Agreement, demonstrate the importance of separately and explicitly addressing “interests in property.” The Settlement Agreement provides that “[j]udgment shall be entered ... against Ahava Dairy [], Lewis [], and ... [M.] Banayan in the amount of \$3,500,000, upon the signing of [the Settlement Agreement] .” See Weg Aff., Exh. G, Part III, D. UCC § 9–601(e)(1) & (2), which addresses the enforcement of a security interest upon default, provides:

*10 [i]f a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment *relates back* to the earliest of: (1) the date of perfection of the security interest ... in the collateral; (2) the date of filing a financing statement covering the collateral [emphasis supplied] If the Settlement Agreement “eliminated” AEG's security interests—as defendants contend—it would prevent any execution lien based upon the judgment from “relating back” to the date of perfection/filing of the security interests—November 13, 1996. This result, in turn, would affect AEG's

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ability to enforce the judgment by making its post-2008 execution liens subordinate to the security interests of Signature Bank, which were perfected in 2005. See UCC § 9-317(a)(2). This contingency is expressly foreclosed by the language of the Settlement Agreement which provides that “[n]othing set forth herein [in the Settlement Agreement], including this release, shall affect AEG’s right or ability to enforce any judgment to be entered herein.” [emphasis supplied] See Weg Aff., Exh. G, Part III, D.

The court also notes that the parties’ conduct after the execution of the Settlement Agreement is incongruous with an intent to eliminate AEG’s security interests in the collateral. AEG never sent a termination statement to the debtors. See UCC § 9-513(c). In fact, the debtors never sent an “authenticated demand” for a termination statement to AEG. *Id.* Most importantly, no termination statement was ever filed by the debtor, with or without authorization from AEG, after the execution of the Settlement Agreement so as to render AEG’s financing statements ineffective. See UCC § 9-513(d).

Moreover, defendants’ interpretation undermines any business purpose behind AEG entering into the Settlement Agreement. Madison Avenue Leasehold, LLC v. Madison Bentley Associates, LLC, 30 AD3d 1, 6 (1st Dept 2006) (A consideration in interpreting commercial contract is business purpose to be served by contract.). According to defendants’ interpretation, through the Settlement Agreement, AEG gave up an \$8,081,819.30 *secured* claim against the defendants in exchange for an approximately \$4 million *unsecured* one. “Before it is found that the parties intended to make so one-sided a contract as claimed by the defendant, such intention should appear with sufficient certainty to require such a finding.” Wigand v. Bachmann-Bechtel Brewing Co., 222 N.Y. 272, 278 (1918). As discussed above, such certainty cannot be obtained from the language of the Settlement Agreement. In sum, defendants’ motion to dismiss the Fourth Cause of Action is denied.

B. Necessary Party (Fourth Cause of Action)

Defendants also move to dismiss the complaint for failure to name a necessary party. CPLR 1001 defines necessary parties as those “who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who

might be inequitably affected by a judgment in the action.” See CPLR § 1001(a). Where the declaratory judgment affects a party’s interest in property that party must have an opportunity to be heard. See Phillips v. Stony Point, 104 A.D.2d 1033 (2d Dept 1984) (Court acted improperly in rendering declaratory judgment concerning 50-foot-wide easement located on owner’s property when owner did not have opportunity to be heard.). “When a person who should be joined ... has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned.” See CPLR § 1001(b).

*11 As discussed above, the Fourth Cause of Action for declaratory judgment depends in part on determining whether AEG’s security interests are subordinate to those of Signature Bank, a determination which would affect the status of Signature Bank’s interest in the underlying collateral. Signature Bank, therefore, is a necessary party. See Phillips, 104 A.D.2d at 1033. Pursuant to CPLR 1001, the court joins Signature Bank, whose principal office is located in New York County, as a necessary party to this action, and the caption is amended to include Signature Bank as a co-defendant, subject to proper service of a supplemental summons and an amended complaint on Signature Bank.

C. Successor Liability (First, Second & Third Causes of Action)

“[T]he general principle [is] that an acquiring corporation does not become responsible ... for the pre-existing liabilities of the acquired corporation.” Fitzgerald v. Fahnestock & Co., 286 A.D.2d 573, 574 (1st Dept 2001). There are four exceptions to this general rule: (1) the corporation “expressly or impliedly assumed the predecessor’s ... liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations.” Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 245 (1983).

As discussed above, pursuant to the February 17, 2009 Asset Sale Agreement, Toobro N.Y. purchased from Sub-SB: “all the personal property of the Ahava Judgment Debtors, St. Lawrence [] and Schwartz [].” See Compl. ¶ 87; see also Weg Aff. Ex. M. Section 1.1 of the Asset Sale Agreement provided in pertinent part that “[t]he Purchased Assets

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are being sold ... subject to all claims and encumbrances of [among others] ... *American Equities Group Liquidation Trust* [the Liquidator] [and] *American Equities Group, Inc.* [AEG].” [emphasis supplied] *Id.*

Defendants argue that there was no express assumption of liability by N.Y. Toobro because “any interest or liens that AEG had in the Ahava Entities were wiped out” by Signature Bank’s secured party sale. *See* Defendants’ MOL, at 17. This argument fails because, as discussed above, pursuant to UCC 9–617, AEG’s security interests were discharged by the secured party sale only if they were subordinate to the security interests of Signature Bank. Defendants fail to show that this was so. *See* Part A of this decision.

Defendants next contend that any AEG claims, encumbrances and/or liens in the Ahava Entities and their assets were limited to the proceeds of the sale under the Bankruptcy Court Order of July 8, 2008. This interpretation of the Bankruptcy Court Order also is mistaken for the reasons stated in Part A of this decision. The Bankruptcy Court Order merely recognized the creation of a security interest in the proceeds after the sale—a result that obtains by operation of law. *See* UCC § 9–315(a)(2). This result does not in any way limit AEG’s other rights against the underlying collateral. Defendants’ motion to dismiss the First Cause of Action for express assumption of liability is, therefore, denied.

*12 Defendants’ motion to dismiss the Second and Third Causes of Action, respectively, for implied assumption of liability and *de facto* merger, too, is denied. To determine the presence of *de facto* merger, “New York courts look to whether there is: (1) continuity of ownership; (2) cessation of ordinary business operations and the dissolution of the selling corporation as soon as possible after the transaction; (3) the buyer’s assumption of the liabilities ordinarily necessary for the uninterrupted continuation of the seller’s business; and (4) continuity of management, personnel, physical location, assets and general business operation.” [citations omitted] *Van Nocker v. A.W. Chesteron, Co.*, 15 AD3d 254, 789 N.Y.S.2d 484 (1st Dept 2005). Where one corporation purchases “all of the outstanding stock of [another corporation] and then t[akes] by assignment its only assets ... the Court could find either that [purchaser]

impliedly assumed [the target corporation’s] obligations or that the transactions between the two corporations amounted to a merger.” *Hoche Productions, SA v. Jayark Films Corp.*, 256 FSupp. 291, 295–96 (SDNY 1966).

Here, the Liquidator alleges that Toobro N.Y. purchased from Sub–SB: “(i) all the personal property of the Ahava Judgment Debtors, St. Lawrence [] and Schwartz [], and (ii) all the equity interests in the Ahava Judgment Debtors, St. Lawrence and Schwartz.” Compl. ¶ 87. The Liquidator further alleges that “M. Banayan, A. Banayan, and Ahava of California still control, at least in part, the management and operations of the Ahava entities’ businesses acquired by Toobro NY.” Compl. ¶ 92. Finally, the Liquidator alleges that “[s]ince purchasing the businesses of the Ahava entities, Toobro N.Y. has sold [for the most part] the same products under the same name to the same customers as the Ahava entities.” Compl. ¶ 93. The trier of fact, therefore, can find that Toobro N.Y. “impliedly assumed [the] obligations [of the target Ahava entities] or that the transactions between the ... corporations amounted to a [de facto] merger.” *See Van Nocker*, 15 AD3d at 789; *Hoche Productions, SA*, 256 FSupp. at 295–96.

D. Alter Ego Liability (Fifth & Sixth Causes of Action)

Sufficient facts are alleged to sustain causes of action for *alter ego* liability in this case. “In order to pierce the corporate veil, a plaintiff must show that the dominant corporation exercised complete domination and control with respect to the transaction attacked, and that such domination was used to commit a fraud or wrong causing injury to the plaintiff.” (*Fantazia Intl. Corp. v. CPL Furs NY, Inc.*, 67 AD3d 511, 512 [1st Dept 2009]).

Factors to be considered include the disregard of corporate formalities; inadequate capitalization; intermingling of funds; overlap in ownership, officers, directors and personnel; common office space or telephone numbers; the degree of discretion demonstrated by the allegedly dominated corporation; whether dealings between the entities are at arm’s length; whether the corporations are treated as independent profit centers; and the payment or guaranty of the corporation’s debts by the dominating entity *Id.*

*13 Defendants move to dismiss the Fifth and

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Sixth Causes of Action for *alter ego* liability on the grounds that: (1) the allegations supporting these causes of action are conclusory; and (2) they rely exclusively on the assumption that the assets of the allegedly primary obligors are insufficient to assure the Liquidator recovery. *See* Defendants' MOL at 24–25.

Liability for Schwartz, St. Lawrence, Ahava of California, RTB, and Yomo is premised on the allegation that these entities are *alter egos* of Ahava Dairy, Ahava Food, and Lewis. (Fifth Cause of Action). The complaint alleges that these companies have overlapping ownership, officers, directors and personnel with Ahava Dairy, Ahava Food, and Lewis and are completely dominated by M. Banayan and/or his brother A. Banayan. Compl. ¶¶ 154–155. Further, according to the complaint, these entities were used by M. Banayan and A. Banayan to commit fraud against AEG. More specifically, they were used as vehicles for instigating sham transfers of property and assets in order to escape the financial obligations of Ahava Dairy [] and Lewis [].” Compl. ¶¶ 59–64. These facts are sufficient to sustain the Fifth Cause of Action for *alter ego* liability against Schwartz, St. Lawrence, Ahava of California, RTB, and Yomo.

Liability for Toobro DAG and FJB is premised on the allegation that they are *alter egos* of Toobro NY. (Sixth Cause of Action). According to the complaint, Toobro NY, Toobro DAG and FJB operate as a single business with no regard for their corporate separateness and they have overlapping ownership, officers, directors, and personnel. Compl. ¶¶ 163, 167. Also alleged is that all three companies are dominated by the Bistrizkys, who allegedly used these companies to commit fraud against AEG. Compl. ¶ 168. The complaint asserts that the Bistrizkys “(i) refused to pay the judgments and Settlement Payments due and owing to AEG, and (ii) concealed the assets of the Toobro entities by commingling them with their own so as to avoid the collection of the judgements and Settlement Payments due and owing to AEG.” Compl. ¶ 168. These facts are sufficient to sustain a cause of action for *alter ego* liability against Toobro DAG and FJB.

D. *Res Judicata*

In the end, defendants move to limit the Liquidator's damages to the two SDNY Court judgments dated March 10, 2008 and April 22, 2009. They ar-

gue that Liquidator's claim for \$8,081,819.30 for charges to Ahava Dairy's account under the Factoring Agreement is barred by the doctrine of *res judicata*. *See* CPLR 3211(a)(5) (“[a] cause of action may not be maintained because of ... collateral estoppel, ... release, *res judicata* ...”).

Where a final judgment predicated on settlement agreements and approved by the court “expressly dismisses, with prejudice, all class claims of the plaintiffs therein,” any new action based on the same claims is barred by the doctrine of *res judicata*. *See* Bethea v. Scopetta, 275 A.D.2d 651 (1st Dept 2000). AEG's claim for \$8,081,819.30 for charges to Ahava Dairy's account under the Factoring Agreement was litigated in AEG's 2001 action commenced in the SDNY Bankruptcy Court, later transferred to the SDNY Court. On March 10, 2008, the SDNY Court, having reviewed the Settlement Agreement, entered judgment: (1) against Ahava Dairy, Lewis, and Banayan for \$3,500,00 jointly and severally; (2) against Ahava Food for \$325,000; and (3) against all SDNY defendants, jointly and severally, for \$250,000 to be paid in ten equal monthly installments, starting on March 13, 2008. Compl. ¶ 40; *see also* Weg Aff., Ex. H, I. The Court dismissed all claims and counterclaims in the action on the merits and with prejudice. *Id.* On April 22, 2009, the SDNY Court—based on the Settlement Agreement between the Ahava Judgment Debtors and AEG, having determined that AEG did not receive the Cash Settlement Payments contemplated by the Settlement Agreement on the dates due—issued a final judgment for AEG and against Ahava Food in the amount of \$3,500,000. Compl. ¶ 44; *see also* Weg Aff. Ex. N. The two decisions bar recovery of the \$8,081,819.30 for charges under the Factoring Agreement *See* Bethea, 275 A.D.2d at 651. Accordingly it is

***14 ORDERED** that defendants' motion to dismiss is granted only to the extent that the Liquidator's \$8,081,819.30 claim for charges under the Factoring Agreement is barred by the doctrine of *res judicata*; and the motion to dismiss is otherwise denied; and it is further

ORDERED that Signature Bank is joined as a party defendant to this action; the summons and complaint in this action are amended by the addition of the name of Signature Bank as party defendant; the plaintiff is permitted to amend the complaint to allege

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any claim that it may have against Signature Bank; a supplemental summons shall be issued, directed to defendant Signature Bank; the supplemental summons, specifying the amended complaint, shall be filed with the Clerk of the Court, and the supplemental summons and a copy of the amended complaint, together with a copy of this order with notice of entry, shall be served upon defendant Signature Bank, within 10 days from the date of the filing and entry of this order; unless service is made upon Signature Bank as above ordered and a copy of the proof of service served upon attorneys for defendants who appeared in this action and filed with the Clerk of the Court within 20 days from the date of the filing and entry of this order, this action shall be dismissed without prejudice and without further notice to plaintiff; the plaintiff is directed to serve upon defendant Signature Bank a copy of all papers on this motion.

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