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Court of Appeals

STATE OF NEW YORK

KEVIN PLUDEMAN, CHRIS HANZSEK d/b/a HANZSEK AUDIO, SARA JANE HUSH, OZARK MOUNTAIN GRANITE & TILE CO. and DENNIS E. LAUCHMAN, on behalf of themselves and all others similarly situated,

Plaintiffs-Respondents,

against

NORTHERN LEASING SYSTEMS, INC., JAY COHEN, STEVE BERNADONE, RICH HAHN and SARA KRIEGER,

Defendants-Appellants.

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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THE INTEREST OF THE *AMICUS*

Representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries, the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber advocates the interests of its members in matters before the courts, Congress, and the executive branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that address issues of vital concern to the nation's business community.

The Chamber's members are frequently the targets of claims alleging that they engaged in "fraudulent" or otherwise "deceptive" business practices. Many and perhaps most of these claims are unfounded and are advanced for tactical or exploitive purposes rather than for legitimate goals. As in the instant case, these suits are often styled as putative class actions in which a lead plaintiff proposes to assert the claims of many other similarly situated individuals. Although such litigation can serve the legitimate end of discouraging deceptive business practices that harm both honest businesses and their consumers, these suits are also prone to abuses that impose substantial costs on businesses large and small, and thereby burden the nation's economy.

The particular focus of the Chamber as *amicus curiae* here is on the pleading requirements that govern the circumstances under which private plaintiffs may

seek to hold an individual corporate officer or manager liable for allegedly fraudulent conduct committed by a corporate employee. The New York courts have long held that a supervisor does not bear vicarious liability for a fraudulent act merely because that act may be imputable to the corporation. Instead, a claimant must allege and prove that the officer or manager was *personally* involved in the fraudulent act, or (at a minimum) actually knew of it and approved it, if the officer or manager is to be held personally liable for harm flowing from the employee's allegedly wrongful act.

New York's continued adherence to this venerable rule – which is a foundational aspect of the limited-liability model of corporate organization – is not directly in the balance here. But very much at stake is the scope of the rule's *practical* effectiveness in shielding officers and managers from bearing vicarious liability for the independent acts of other corporate actors.

Like the law of virtually every American jurisdiction, New York law protects against reckless and damaging assertions of fraud by demanding that such claims "shall" be stated "in detail" (*see* CPLR 3016(b)). The decision below, however, holds that a plaintiff pleading fraud against an individual corporate officer or employee may satisfy the statutory imperative simply by alleging that an individual defendant held a high-ranking corporate position at the time the alleged fraud occurred. According to the First Department, the individual's actual

involvement in the fraud may be "deduced" from the corporate title that he or she maintains. This conclusion is at odds with the plain language of CPLR 3016(b), which requires detailed pleading as to the circumstances of an alleged fraud. It cannot be reconciled with New York's longstanding presumption that liability for the culpable acts of a corporate employee runs to the corporation, not to the employees' supervisors.

More basically, the Chamber submits that the approach taken by the First Department is bad public policy. By permitting plaintiffs to state a fraud claim against a high-ranking corporate officer simply by reciting his or her job title, the First Department's rule would allow an aggressive claimant to threaten every senior officer or manager with ruinous personal liability whenever and wherever the claimant can allege that a subordinate committed a fraudulent act. Officers and managers would be required to engage in time-consuming and expensive discovery to prove the slippery negative that they did not personally participate (by means that the plaintiffs could leave unspecified) in the alleged fraud. Relentless settlement pressure would accompany such an allegation – particularly in class-action suits, which typically threaten potential liability on a scale that would be crushing for almost any individual. This practical pressure to settle any claims that can survive the First Department's indulgent pleading standard would place a target on the back of all corporate officers, with attendant costs for companies,

insurers, individual officers, and ultimately the general public. The Chamber, therefore, urges this Court to reject the rationale adopted by the First Department and to reaffirm that a plaintiff cannot state a cause of action for fraud against a corporate officer or manager merely by identifying the person's title and place in the corporation's structure.

ARGUMENT

I. NEW YORK HISTORICALLY HAS ADOPTED AND AFFIRMED FOUNDATIONAL PRINCIPLES OF LIMITED LIABILITY FOR INDIVIDUALS ASSOCIATED WITH BUSINESS ORGANIZATIONS, INCLUDING LIMITATIONS ON THE LIABILITY OF CORPORATE SUPERVISORS.

The decision below represents a dramatic departure from New York's historic role as a leader in fostering the limited-liability principles that have paved the way for the rise of the modern American economy. *See generally* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 10-17 (1932) (describing the role of the corporate form in transforming American industry). This leadership role dates back to at least to 1811, the year in which New York became the first State in the nation to adopt a general incorporation law, an innovation that permitted businesses to incorporate without having to first obtain a special charter from the Legislature. *See* Henry Hansmann, et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1394 (2006). New York again demonstrated its leadership in this area in 1822, when it became the first State to enact a limited partnership statute, thereby extending limited liability protections to the partnership form as well. *Id.* at 1396 n.227.

In modern times, too, New York has embraced the concept of screening individuals associated with business organizations from the liabilities that the organization itself may incur. While the Legislature has been creative in

authorizing new forms of business organization to match the needs of a more complex economy, the Legislature has carefully preserved the two-century-old policy of insulating owners, directors, officers, managers, and employees from the legal liabilities of the business itself. Two recent examples of this blend of modern flexibility and personal financial protection are the limited liability company (LLC) and limited liability partnership (LLP). *See* New York Limited Liability Company Law, 1994 N.Y. Laws 3240 (enacted July 26, 1994) (codified at N.Y. Ltd. Liab. Co. Law §§ 101-1403 (McKinney Supp. 2007)).

This extension of limited-liability principles to new business forms and to the professions reflects New York's continuing affirmation of the sound policy that the law should encourage investors from all walks of life to pool their resources in support of commercial enterprise by limiting the downside risks that they individually would face. As this Court explained more than 100 years ago,

> The policy of [the Limited Partnership] law was to bring into trade and commerce funds of those not inclined to engage in that business, who were disposed to furnish capital upon such limited liability, with a view to the share of profits which might be expected to result to them from its use. And the fact that the law has been in operation in this state for nearly seventy years, and has been adopted in most if not all the states of the union, indicates that it is deemed to have its advantages, and that it serves a purpose consistent with the public welfare.

Fifth Ave. Bank v. Colgate, 120 N.Y. 381, 396 (1890). *See also People v. Zinke*, 541 N.Y.S.2d 986, 991 (1st Dep't 1989) (explaining that both the corporate form

and the availability of a limited partnership serve a "capital accumulation function" by permitting "investors [to] opt for limited authority in exchange for limited liability"), *rev'd on other grounds*, 76 N.Y.2d 8 (1990).

As these comments reflect, the most obvious purpose motivating New York in undertaking its pivotal role in developing this body of modern commercial law has been to limit *investor* liability. But the State's policy of "limited liability" sweeps more broadly. New York courts have endorsed each of the fundamental principles that underlie the limited-liability model: (i) the separation of ownership and control, *see Wilson v. Israel*, 227 N.Y. 423, 428 (1920); (ii) limited investor liability, *see, e.g.*, *Zinke*, 541 N.Y.S.2d at 991; and, most critically here (iii) the recognition that a limited-liability entity is itself a legal person, *see, e.g.*, *Rapid Transit Subway Constr. Co. v. City of New York*, 259 N.Y. 472, 487 (1932), and thus is the "master" ultimately responsible for the acts undertaken by its servants within the scope of their agency. *See, e.g.*, *Capital Dimensions, Inc. v. Samuel Oberman Co.*, 478 N.Y.S.2d 950, 952 (2d Dep't 1984).

It is the third of these foundational principles that this case most directly implicates. A limited-liability organization necessarily acts through individual managers and employees. Most basically, the law of limited liability (a) imposes on the organization the imputed responsibility for unlawful acts of anyone acting on the organization's behalf, but (b) shields from *personal* financial exposure *all* of

the individuals associated with the organization, *except* the individuals who actually engaged in the wrongful conduct. Any "imputed" liability is limited to the organization itself, and not to managers solely by virtue of their role in the organizational structure.

Along with numerous other jurisdictions, therefore, New York adheres to the rule that corporate officers are not liable for the commission of a fraud "unless they personally participate[d] in the misrepresentation" or knew of it and in some direct way authorized, tolerated, or ratified it. *See* 3A WILLIAM MEADE FLETCHER, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 1143 (James Solheim & Kenneth Elkins eds., perm. ed. 1994) (citing *inter alia People v. Apple Health & Sports Clubs, Ltd.*, 80 N.Y.2d 803, 807 (1992)). In affirming dismissal of a tort claim brought against the sole shareholder and president of a nursing home for failure to state a cause of action, the Fourth Department explained:

> A corporate officer is not held liable for the negligence of the corporation merely because of his official relationship to it. It must be shown that the officer was a participant in the wrongful conduct.

Olszewski v. Waters of Orchard Park, 758 N.Y.S.2d 716, 717 (4th Dep't 2003) (quotation marks omitted).

This rule reflects the universal understanding that, in American law, it is the *corporation*, and not the corporate officers, that bears the risk that an employee of the corporation will commit a tortious act. Thus, it is the corporation, and not the

corporate supervisor of a miscreant employee, that must shoulder the resulting liability when that risk materializes. *See Meyer v. Holley*, 537 U.S. 280, 286 (2003) ("[I]n the absence of special circumstances it is the corporation, not its owner or officer, who is the principal or employer, and thus subject to vicarious liability for torts committed by its employees or agents."); *Browning-Ferris Indus., Inc. v. Ter Maat*, 195 F.3d 953, 956 (7th Cir. 1999) (Posner, J.) ("[T]here is no doctrine of superiors' liability, comparable to the doctrine of *respondeat superior* *** ."") (quotation marks omitted).

Naturally, there are exceptions. *See Connell v. Hayden*, 443 N.Y.S.2d 383, 397-98 (2d Dep't 1981) (discussing RESTATEMENT (SECOND) OF AGENCY §§ 358, 361 (1958)). But as this Court has explained, these exceptions are carefully cabined:

> In determining whether liability should be extended to reach assets beyond those belonging to the corporation, we are guided, as Judge Cardozo noted, by "general rules of agency."

Walkovszky v. Carlton, 18 N.Y.2d 414, 417 (1966) (quoting *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 95 (1926)).

Those rules of agency make clear that "[t]he doctrine of *respondeat superior* does not apply to impose vicarious liability upon supervisors." *Connell*, 443 N.Y.S.2d at 397.

The position of the corporation whose employee allegedly committed a fraudulent act is thus very different from that of the corporate officer engaged to supervise that employee. New York law presumes that the *corporation* is liable for that act (though it permits the corporation to defend by showing that the circumstances do not warrant the imposition of liability). *See Sauter v. New York Tribune, Inc.*, 305 N.Y. 442, 445 (1953). In contrast, New York law presumes that the *corporate officer* is *not* liable (although it likewise permits the plaintiff to show that the officer is liable by virtue of his personal participation in the allegedly injurious act). *See, e.g., Polonetsky v. Better Homes Depot, Inc.*, 97 N.Y.2d 46, 55 (2001). These presumptions, firmly rooted in New York's adoption and expansion of limited liability principles, should not lightly be set aside, yet that is precisely the practical impact of the pleading rule that the First Department adopted here.

II. THE INFERENCE ADOPTED BY THE COURT BELOW CANNOT BE RECONCILED WITH THE TRADITIONAL PRESUMPTION THAT A CORPORATE OFFICER IS NOT PERSONALLY LIABLE FOR THE ACTIONS OF OTHER EMPLOYEES.

The decision below is not just troubling but unsound. It poses a direct challenge to New York's longstanding presumption that a corporate officer is not liable for fraudulent acts committed by others. It departs from the long line of precedents holding that a plaintiff pleading fraud against a corporate officer must allege a specific factual basis for accusing that officer of *involvement* in the tortious conduct in order to satisfy CPLR 3016(b)'s express requirement that "the

circumstances constituting the wrong [must be pleaded] in detail." The First Department's decision instead creates a presumption that corporate officers are, as a general rule, responsible for any wrongdoing committed by any of the corporation's employees. *See Pludeman v. N. Leasing Sys., Inc.*, 837 N.Y.S.2d 10, 15 (1st Dep't 2007) (McGuire, J., dissenting) (noting that "under the majority's approach, every such officer [of the defendant corporation] could be sued."). This ruling thus contravenes both the established public policy of New York and the direct command of CPLR 3016(b). This Court should repudiate the First Department's deeply flawed approach.

This is not a close case. The First Department expressly recognized that, as to the individual defendants, the complaint alleges only that they "are the president, vice president and chief information officer, vice president of sales, and vice president of operations" of defendant Northern Leasing Systems, Inc. The complaint otherwise states no basis for finding that these individuals *actually* were involved *personally* in the allegedly fraudulent conduct of the company's sales representatives. *Id.* at 12.

Such a thin pleading is not sufficient to state a cause of action against a corporate officer even on a claim governed solely by CPLR 3013, the provision that sets forth the baseline notice pleading requirements for New York litigants. *See, e.g.*, *Olszewski*, 758 N.Y.S.2d at 717 (affirming dismissal of *negligence* claim,

because mere status as an owner and officer of a close corporation did not demonstrate "that the officer was a participant in the wrongful conduct"); *Prudential-Bache Metal Co. v. Binder*, 504 N.Y.S.2d 646, 648 (1st Dep't 1986) (dismissing *breach of contract* allegation against president and sole shareholder of defendant corporation, as well his relative, also a senior corporate officer, where neither had executed the guarantee that allegedly bound the corporation: "The mere facts that [defendants] are shareholders and/or officers of Modern Settings does not make them personally liable for the alleged breach of contract by the corporation.").

Since similar allegations cannot support complaints against corporate managers on contract claims or ordinary tort claims, the mere allegation that the individual defendant held a high-ranking position at the defendant corporation certainly cannot satisfy the *heightened* pleading requirements additionally imposed by CPLR 3016(b) on claims of fraud. It is not enough to speculate that, by virtue of the officer's structural relationship to the alleged wrongdoer, one or another officer *may* have known about the alleged misconduct. The allegation that each individual was employed in a supervisory capacity by Northern Leasing does not provide adequate factual support for the essential allegation that *each* of the individual defendants was *actually and personally involved* in culpable conduct. The mere allegation of their titles in the organization certainly does not satisfy the

CPLR's requirement that a plaintiff alleging fraud against a defendant must set out "detail[ed]" factual allegations to back up his charges against each defendant whom the plaintiff has elected to sue. *See Black v. Chittenden*, 69 N.Y.2d 665, 668 (1986) (CPLR 3016(b) requires that the misconduct complained of be set forth in "sufficient detail to clearly inform [a] defendant with respect to the incidents complained of") (internal quotation marks omitted).

New York courts – even the First Department itself – have reached precisely that conclusion in the past. *See, e.g., Ramos v. Ramirez*, 818 N.Y.S.2d 916, 917 (1st Dep't 2006); *Residential Bd. of Managers of Zeckendorf Towers v. Union Square-14th St. Assocs.*, 594 N.Y.S.2d 161, 162 (1st Dep't 1993) (fraud inadequately pled against an individual who did not sign the allegedly fraudulent certification and was not alleged to have otherwise participated in the fraud); *Binder*, 504 N.Y.S.2d at 648 (dismissing fraud claim against president and sole shareholder because complaint – which stated his corporate title and ownership interest in the firm – failed to allege that he had "personally participated in or had actual knowledge of the issuance of bad checks").

The First Department nonetheless rejected the individual defendants' argument that the complaint does not contain sufficient detail of their alleged participation, and thus merits dismissal under CPLR 3016(b). In doing so, it found that:

> according plaintiffs' complaint the most favorable inferences, one can readily deduce, given the corporate positions and titles of the individual defendants, that these individuals actually operate the day-to-day business of [defendant Northern Leasing Systems, Inc.], ***and consequently were involved in or knew about the alleged fraudulent concealment of most of the lease.***

Pludeman, 837 N.Y.S.2d at 12 (emphasis added). For several reasons, this Court should reject this inference-stacking.

First, what the First Department has offered here is not reasoned inference but conclusory speculation. Conclusory allegations of fraud do not satisfy CPLR 3016(b). *See, e.g.*, *Greschler v. Greschler*, 51 N.Y.2d 368, 375 (1980). The court simply jumped over the vast gulf between the facts actually alleged (*i.e.*, "the individual defendants are corporate officers") and the pleading of necessarily detailed facts (*i.e.*, "each of the individual defendants personally participated in the alleged fraud by engaging in the following specific acts . . ."). The Court should not countenance this approach. It eviscerates the CPLR's requirement that a plaintiff offer more than mere *ipse dixit* to support its claims of fraud.

Second, even apart from the rule of law that CPLR 3016(b) requires more detailed *facts* beyond merely plausible inferences, the First Department's inferences do not withstand analysis. While it is fair to assume that senior officers in a business – large or small – are responsible for running the day-to-day affairs of the business, it is neither fair nor realistic to assume (or infer) that each officer

personally participates in each of those day-to-day affairs or *specifically approves* them, when a subordinate engages in acts that are allegedly tortious (ordinary torts or deliberate frauds). Indeed, that misguided and unrealistic assumption lies at the heart of the First Department's approval of the adequacy of the plaintiff's pleading.

Finally, even if the Appellate Division's inference were logically tenable, it would still be out of bounds, because it directly conflicts with a presumption integral to the declared public policy of this State. As described *supra* at pp. 8-11, this State and its courts have long declined to indulge in any presumption that a corporate officer is personally liable for the legal and financial obligations of the business entity, merely because another agent of that corporation has committed a tortious or fraudulent act. *See, e.g.*, *Connell,* 443 N.Y.S.2d at 397. But this forbidden presumption is precisely what the Appellate Division found that it could so "readily deduce" from the plaintiffs' allegations that the individual defendants hold positions of responsibility at the defendant corporation. *Pludeman*, 837 N.Y.S.2d at 12.

This Court should reject this unwarranted inference and reaffirm that the law of New York instead adheres to the opposite presumption – that an officer is *not* personally liable for the actions of those beneath him or her in the corporate structure, unless the plaintiff both *pleads* and then proves that the officer actually and personally participated in the conduct that allegedly harmed the plaintiff. The

Court should insist that, in this context, CPLR 3016(b) means what it says: In order to overcome the presumption that a corporate officer is not liable for the allegedly fraudulent conduct of other employees, a plaintiff must plead factual allegations that describe "in detail" the plaintiff's basis for attributing his injuries to the personal acts of the officer.

III. THE HARMFUL EFFECTS OF A MORE PERMISSIVE PLEADING RULE WOULD BE SUBSTANTIAL.

The pleading standard adopted by the First Department does not merely contravene longstanding principles of New York law and the plain language of the CPLR. It is also ill-considered, and unless rejected by this Court, is likely to do substantial harm to New York businesses, New York workers, and New York consumers.

A pleading rule that allowed plaintiffs to state a fraud claim against corporate officers and managers simply by reciting that supervisor's job title would make it far too easy to assert that a manager is liable for allegedly fraudulent conduct (or, indeed, other torts) committed by persons elsewhere in the corporation. The resulting *carte blanche* to sue corporate officers would have pernicious effects on business entities of all sizes. Executives of large corporations could be accused of committing fraud on the basis of the "inference" that, because they oversee the day-to-day business affairs of the enterprise, they "must have known" of, or "must have participated in," a fraudulent scheme (or other tortious

activity) conducted by corporate subordinates. The First Department's rule would apparently permit such an allegation of fraud to survive a motion to dismiss. Executives therefore could be routinely compelled to engage in expensive and time-consuming discovery to disprove the speculative inference that they may have participated in an alleged fraud.

The effect on small businesses would be just as pronounced. No longer would plaintiffs need to be troubled by the separation of personal from enterprise liability when they wish to reach the personal assets of a small business owner who also holds an office in a close corporation. *See generally Sheridan Broad. Corp. v. Small*, 798 N.Y.S.2d 45, 46-47 (1st Dep't 2005) (describing veil-piercing inquiry). Instead, even if they were aware of no basis to believe that the owner was actually involved in the alleged fraud, the plaintiffs could simply ask the court to infer from his title that he must have known about the alleged misconduct or have participated in it. Under the First Department's rule, that simple averment of the owner's or manager's title would be sufficient for pleading purposes to destroy the separation between the individual and the corporation, no matter how carefully the owners and officers have observed the corporate formalities required by law.

Lowering the bar to suit in this way would also expose officers and supervisors in businesses of all sizes to relentless settlement pressures, particularly when, as here, they are named as defendants in a putative class action suit. It is

well recognized that the enormous liability risks posed by class action suits can force even the largest corporations to abandon meritorious defenses and settle, rather than risk an adverse verdict. *See, e.g.*, *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000); *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1022 (5th Cir. 1997) (Jones, J., specially concurring); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995). These pressures are greatly magnified when placed on individual defendants, only a tiny fraction of whom could ever pay the kind of damages routinely sought by plaintiffs in class-actions, including the settlements that almost invariably flow from the filing of a class action that survives the pleading stage.

Where irresistible settlement pressures lurk, frivolous strike suits too often follow, imposing considerable litigation expense and settlement costs on companies, insurers, individual officers and their families, and ultimately the public at large. *See generally Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2504 (2007) (recognizing that private securities class action suits "if not adequately contained, can be employed abusively to impose substantial costs on companies and individuals whose conduct conforms to the law").

This concern is particularly trenchant here, because the overly permissive pleading rule adopted by the First Department is not necessary to protect the legitimate interests of plaintiffs harmed by fraud. New York law already

recognizes that the corporate veil may be pierced in appropriate instances to hold an officer liable for the obligations of a corporation. *See, e.g.*, *Worthy v. New York City Housing Auth.*, 799 N.Y.S.2d 518, 521-22 (1st Dep't 2005). Accordingly, this Court need not fear that an officer who abuses the corporate form or exerts unwarranted domination over a corporation will be able to evade liability for a proven fraud.

Moreover, New York's liberal amendment rules broadly permit a plaintiff to add a party defendant if, after the original complaint has been filed, it discovers information that provides a sound basis for holding a corporate officer personally liable for participating in the alleged fraud. *See* CPLR 1003 and 3025(b); *Manhattan Real Estate Equities Group LLC v. Pine Equity NY, Inc.*, 815 N.Y.S.2d 28, 29 (1st Dep't 2006) (leave to amend to add a party defendant should be freely granted, and should be denied only where "the claim is palpably insufficient"). Plaintiffs, therefore, do not need to be able to assert premature fraud claims against individual supervisors, as the First Department apparently believed. *See Pludeman*, 837 N.Y.S.2d at 12 (finding plaintiffs' evident inability to "further state the details of the individual defendants' personal participation in, or actual knowledge of, the alleged concealment" to be "understandabl[e]" at the "prediscovery stage"). Rather, if plaintiffs later develop a substantial factual basis

for asserting a fraud claim against an individual officer, New York civil practice offers them an opportunity to call that officer to account.

Finally, if plaintiffs *do* possess some factual basis for accusing individual managers of having participated personally in fraudulent conduct, they must state those facts in the complaint. Both society and the courts would be ill-served by a contrary construction of the pleading rules that would permit plaintiffs to conceal that knowledge at the outset of a litigation. The fundamental policy of the CPLR is that defendants should receive adequate notice of the wrongful acts they are alleged to have committed. *See* CPLR 3013 (requiring a complaint to describe the "transactions, occurrences, or series of transactions or occurrences, intended to be proved"). CPLR 3016(b) raises this pleading threshold for claims such as fraud and breach of trust, which by their nature tend to cast a shadow on a defendant's reputation in the community. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (noting that the heightened pleading standard applicable to fraud claims under Fed. R. Civ. P. 9(b) serves, *inter alia,* to provide defendants "an increased measure of protection for their reputations").

A defendant who is told only that his participation in a fraudulent scheme can be inferred from his job title, and that the plaintiff will explain the rest later, will be ill-equipped to defend such a charge in a court of law, and equally unprepared to counter that accusation in the courts of public opinion. That result

would be fundamentally unfair and would be contrary to the policy embodied by the CPLR. The far better rule is to permit plaintiffs to allege fraud against an individual corporate officer only when they are prepared to provide a "detailed" factual basis for asserting that the officer personally participated in the alleged misconduct. Any lower threshold for pleading fraud against individual corporate officers would carry dire consequences for the economic environment in this State.

CONCLUSION

The provision in the First Department's order denying the motion of the individual defendants to dismiss the common-law fraud claims against them should be vacated and the case remanded with instructions to grant the motion.

Dated: New York, New York
February 1, 2008

Respectfully submitted,
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