

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

SEAPORT LOAN PRODUCTS, LLC and ALDWYCH  
CAPITAL PARTNERS, LLC,

Plaintiffs,

- against -

LOWER BRULE COMMUNITY DEVELOPMENT  
ENTERPRISE LLC,

Defendant.

Index No.: 651492/12

Hon. Eileen Bransten, J.S.C.

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**PLAINTIFF ADLWYCH CAPITAL PARTNERS, LLC'S MEMORANDUM OF LAW IN  
OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

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## INTRODUCTION

This memorandum of law is submitted on behalf of plaintiff Aldwych Capital Partners, LLC (hereinafter “ACP”) in opposition to the motion (“Motion”) of defendant Lower Brule Community Development Enterprise, LLC (hereinafter “Lower Brule” or “Defendant”) to dismiss the claims of ACP and Seaport Loan Products, LLC (“Seaport,” together with ACP, the “Plaintiffs”).

Plaintiffs’ claims allege, in substance, that Defendant breached the trade confirmation dated January 20, 2012 between Seaport and Defendant (the “Trade Confirmation”), and that Defendant was unjustly enriched by its conduct. ACP claims, independently of Seaport, that it was a third-party beneficiary of the Trade Confirmation and that it is also entitled to damages by reason of Defendant’s breach. Plaintiffs’ claims seek money damages for breach of contract and unjust enrichment.

By this memorandum of law, ACP solely addresses Defendant’s argument that ACP’s third-party beneficiary claim fails as a matter of law. As to all other arguments made by Defendant in its motion, ACP joins in and incorporates all arguments made by Seaport in its separately filed Opposition to Defendant’s motion.

## SUMMARY OF ARGUMENT

Defendant argues in its pre-Answer motion to dismiss that ACP’s third-party claims should be dismissed pursuant to CPLR 3211(a)(7) based on the following two grounds: (1) that due to the derivate nature of ACP’s third-party beneficiary claims, ACP’s claims cannot stand because Seaport’s claims fail; and (2) ACP’s third party beneficiary claim fails to allege that Defendant intended to bestow a benefit to ACP. A review of the allegations in the Complaint

demonstrate that ACP properly alleged its status as a third-party beneficiary and that it is entitled to damages for Defendant's breach.

## ARGUMENT

### **PLAINTIFF'S PRE-ANSWER MOTION TO DISMISS ALDWYCH'S THIRD PARTY BENEFICIARY CLAIMS FAILS TO MEET THE APPLICABLE STANDARD UNDER NEW YORK LAW AND, THEREFORE, MUST BE DENIED**

#### **A. The Standard**

A court's task in deciding a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action "is to determine whether plaintiffs' pleadings state a cause of action. The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 West 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144 (2002) (internal quotations omitted). In furtherance of this task, the court must "liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." *Id.*, citing *Leon v. Martinez*, 84 NY2d 83, 87 (1994); *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 (2001). *See also, Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 (1977) ("[T]he sole criterion [on a motion pursuant to CPLR 3211(a)(7)] is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.").

#### **B. Aldwych's Claims as a Third-Party Beneficiary Contain Allegations Sufficient to Defeat a Motion to Dismiss.**

Defendant argues in its Memorandum of Law that "[t]here is no claim that LBCDE intended to bestow a benefit to ACP . . . [and] Plaintiff's own allegations therefore do not support a third party beneficiary claim for breach of contract." (Defendant's Memorandum of

Law, p. 35). As discussed below, Defendant's argument is contradicted by the allegations in the Complaint.

Under New York law, a party seeking to enforce a third party beneficiary claim "must establish that a valid and binding contract exists between other parties, that the contract was intended for his or her benefit, and that the benefit was direct rather than incidental." *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 368, 807 N.Y.S.2d 353, 358 (1st Dep't 2006). A party is an intended (rather than incidental) beneficiary of a contract if "recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary . . . or (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *LaSalle Nat'l Bank v. Ernst & Young, L.L.P.*, 285 A.D.2d 101, 108, 729 N.Y.S.2d 671, 676 (1st Dep't 2001) (quoting Restatement [Second] of Contracts § 302). Where the obligation to render a performance to the third-party beneficiary is not expressly stated in the contract at issue, the court may look to surrounding circumstances to determine whether the contracting parties intended to benefit the third party. *Belgrave Owners, Inc. v. OR Holding Corp.*, 233 A.D.2d 352, 650 N.Y.S.2d 249 (2d Dep't 1996).

ACP makes various allegations in the Complaint, which, when accepted as true, state a valid third-party beneficiary claim. ACP and Seaport both allege in the Complaint that the Trade Confirmation was a valid and binding contract between Seaport and Defendant. Moreover, ACP's allegations in the Complaint demonstrate that ACP was an **intended** third-party beneficiary of the sale of the loan, because ACP alleged that it was at all times known and agreed upon by the parties that ACP would share in the proceeds from the ultimate sale of the loan to


Farm Credit. ACP directly alleges in the Complaint that “ACP was disclosed to Defendant as a direct beneficiary of any transaction involving the agreement between Defendant and Seaport, and ACP worked directly with Defendant to sell the Loan.” (Complaint ¶ 10.) In addition, ACP alleges that Defendant and ACP collaborated and communicated to finalize the sale of the loan throughout the relevant period. (Complaint ¶¶ 12, 18-19.) Thus, the circumstances surrounding the formation and performance of the Trade Confirmation indicate that the ACP was an intended third party beneficiary.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiff’s motion to dismiss ACP’s third party beneficiary claims should be denied in its entirety.

Dated: New York, New York.  
May 8, 2013

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