Date: _____

RESEARCH MEMORANDUM

FACTS

The querist has shared with us a complaint and other related documents in connection with the matter. We have perused the same and derive the following:

1. R ("**Seller Defendant**" or "**R**"), S, Chairman or Chief Executive Officer, and O, Principal, S operated a restaurant by the trade name M located at _____ and ran it until end of the month of _____. In December _____, R had hired the Plaintiffs, RP and RR to work at M.

Factual details of RP (Plaintiff):

2. On _____, R had hired Plaintiff RP, to work as a porter in the restaurant M.
3. Plaintiff RP worked for R until _____, which was the last date of his employment with R.
4. Plaintiff RP's work schedule with timings during R's employment was as follows:
   a) From the inception of his employment, through _____, Plaintiff RP worked for 7 days in a week: on Mondays, Wednesdays, Thursdays, Fridays, Saturday and Sundays from 8:00 a.m. to 4:00 p.m.; and on Tuesdays from 8:00 a.m. to 12:00 noon. Plaintiff RP worked without any break for a total of 64 hours per week.
   b) From _____ through _____, he worked for 6 days per week:
   on Tuesdays from 9:00 a.m. to 12:00 midnight; on Wednesdays and Thursdays at 9:00 a.m. to 5:00 p.m.; and on Fridays, Saturdays and Sundays from 8:00 a.m. to 5:00 p.m. Plaintiff RP worked without any break for a total of 58 hours per week.
   c) From _____ until the last date of his employment that is _____, he worked for 6 days a week: on Tuesdays and Wednesdays from 10:00 a.m. to 5:00 p.m.; on Thursdays from 10:00 a.m. to 12:00 a.m.; on Fridays from 9:00 a.m. to 5:00 p.m.; and on Saturdays and Sundays from 8:00 a.m. to 5:00 p.m. Plaintiff RP worked without any break for a total of 51 hours per

week.

1. During Plaintiff RP's employment, R paid wages at an hourly rate as follows:
   a) From the beginning of his employment that is from _____ through _____, R paid wages at $____ per hour.
   b) From _____ through _____, R paid wages at $_____ per hour.
   c) From _____ until the end of his employment, that is _____, R paid wages at $_____ per hour.
2. Throughout his employment, Plaintiff RP received wages partly in check and partly in cash from R. His wage statements reflected only the first 30 hours that Plaintiff RP worked each week because for such period, he received wage in check. However, his wage statements did not record remaining hours, including his overtime hours that Plaintiff RP worked each week because for such period he received wage in cash at a straight-time rate.

Factual details of RR (Plaintiff):

3. On _____, R hired Plaintiff RR to work as a cook in the restaurant M.
4. Plaintiff RR worked for Defendants until _____.
5. Plaintiff RR's work schedule with timings during R's employment was as follows:
   a) He worked on Mondays from 10:00 a.m. to 11:00 p.m.; on Wednesdays from 11:00 a.m. to 10:00 p.m.; on Fridays from 5:00 p.m. to 12:00 a.m.; on Saturdays from 11:00 a.m. to 12:00 a.m.; and on Sundays from 9:00 a.m. to 4:00 p.m. Plaintiff RR worked without any breaks for a total of 51 hours per week.
6. During Plaintiff RR's employment, R paid wages at an hourly rate as follows:
   a) From the beginning of his employment that is from _____ through _____, R paid wages at $_____ per hour.
   b) From _____ until the end of his employment, that is _____, R paid wages at $_____ per hour.

7. Throughout his employment, Plaintiff RR received wages from R in cash, (including his overtime hours paid at a straight-time rate). So, Plaintiff RR did not receive any form of wage statement/s.
8. On or about _____, V ("**Purchaser Defendant**" or "**V**") and the co-owners and principals of V, PL and PM, acquired the restaurant business from R and S. In _____, V changed the trade name to I.
9. RP and RR ("**Plaintiffs**"), filed a complaint against the Seller Defendant and Purchaser Defendant ("**Defendants**") on _____ contending that overtime compensation and "spread of hours" premium is due to them as employees of Purchaser Defendant and/or their predecessor that is Seller Defendant.
10. Plaintiffs alleged in the complaint that, pursuant to the Fair Labor Standards Act, as amended, 29 U.S.C. §§201 et. seq. ("**FLSA**"), they are entitled to recover from Defendants: (a) Unpaid overtime, (b) Liquidated damages and (c) Attorneys' fees and costs.
11. Plaintiffs also alleged that, pursuant to the New York Labor Law ("**NYLL"**), they are entitled to recover from Defendants: (a) Unpaid overtime, (b) Unpaid spread of hours premium, (c) Statutory penalties, (d) Liquidated damages and (5) Attorneys' fees and costs.
12. Plaintiffs retained LG to represent them in this litigation and agreed to pay LG a reasonable fee for its services.
13. On _____, the attorneys for V, G sent a letter to S, Chairman or Chief Executive Officer of R, stating that Plaintiffs were never employed by V; rather V, its co-owner and principal were wrongfully made liable to pay the Plaintiffs' alleged dues. G demanded indemnification from S and R pursuant to an Indemnification agreement dated _____. By virtue of such Agreement, S and R had agreed to indemnify V (Indemnitee) with respect to the claims of any creditor. Also, G requested S to advise whether S and R would resolve Plaintiffs' claims and indemnify V for costs of the defending the complaint.
14. In this matter, the querist has raised the following issues.

ISSUES

Issue 1

Whether a stipulation for dismissal under Rule 41(a) (1) (A) of the FRCP and stipulation for discontinuance under CPLR 3217 (a) (1) can be filed by S to dismiss/discontinue the action against the Purchaser Defendant, V?

Issue 2

Whether stipulation for dismissal/ discontinuance can be filed in case of FLSA claims?

Issue 3

What are the Affirmative defenses available to the Defendants under FLSA and Labor Law claims?

Issue 4

Whether Indemnitee, V is entitled to reimbursement of legal fees under the indemnification agreement if it is not expressly provided in the agreement?

Issue 5

Whether S, CEO and Chairman of R can be held personally liable under the indemnification agreement for signing it on behalf of R?

RULES OF LAW

Issue 1: Whether a stipulation for dismissal under Rule 41(a) (1) (A) of the FRCP and stipulation for discontinuance under CPLR 3217 (a) (1) can be filed by S to dismiss/discontinue the action against the Purchaser Defendant, V?

1. Rule 41(a)(1)(A) of the FRCP provides in pertinent part that subject to any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

   (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

2. CPLR 3217 (a) (1) provides that any party asserting a claim may discontinue it without an order by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court.

Issue 2: Whether stipulation for dismissal/ discontinuance can be filed in case of FLSA claims?

The FLSA falls within Fed. R. Civ. P. 41's 'applicable federal statute' exception, thus stipulated dismissals as per Rule 41(a)(1)(A)(ii) for settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect.

Issue 3: What are the Affirmative defenses available to the Defendants under FLSA and Labor Law claims?

The Supreme Court of the United States stated that Federal Rule 8(c), lists affirmative defenses with respect to FLSA claims.

Issue 4: Whether Indemnitee, V is entitled to reimbursement of legal fees under the indemnification agreement if it is not expressly provided in the agreement?

1. In New York, a party is not entitled to contractual indemnification for attorney's fees and costs incurred in establishing its right to indemnification.
2. In New York, attorneys' fees and disbursements may not be collected unless an award is authorized by agreement between the parties or by statute or court rule.

Issue 5: Whether S, CEO and Chairman of R can be held personally liable under the indemnification agreement for signing it on behalf of R?

1. In New York, the signer of an instrument is conclusively bound by its terms regardless of whether he actually read it, and that his mind never gave assent to the terms expressed is not material.

2. In New York, an employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended.

ANALYSES

Issue 1: Whether a stipulation for dismissal under Rule 41(a) (1) (A) of the FRCP and stipulation for discontinuance under CPLR 3217 (a) (1) can be filed by S to dismiss/discontinue the action against the Purchaser Defendant, V?

The Appellate Division, First Department, in *Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP,* 110 A.D.3d 426 (N.Y. App. Div. 1st Dep't 2013), stated that a stipulation of dismissal can be filed by a defendant.

In re *Flintlock Constr. Servs., LLC v Rubin, Fiorella & Friedman LLP,*

> In this legal malpractice action, plaintiff, general contractor (FCS) alleges that defendant law firm (RFF) negligently represented it in connection with underlying construction litigation by entering into a stipulation, without its authorization, pursuant to which it became obligated to defend and indemnify the owner (Well-come) of the subject premises in the underlying litigation without limitation. The facts of the complaint stated FCS entered in to a contract with Well-come, the owner of the building, (Well-come) for construction. Pursuant to the contract, FCS's responsibilities to defend and indemnify Well-come were limited. Defendant RFF entered into a stipulation of dismissal with prejudice with the counsel of Well-come which stated that FCS agreed to defend and indemnify Well-Come without limitations. FCS alleged that it never authorized or agreed to undertake to defend and indemnify Well-Come in the underlying litigation. It further alleged that it did not authorize, approve or agree to the stipulation of dismissal, and that it was filed and executed by RFF without FCS's approval. RFF filed a motion to dismiss the complaint on the basis of documentary evidence and for failure to state a cause of action. The Supreme Court denied defendant's motion to dismiss as to the cause of action for breach of the attorney-client relationship and attorney malpractice. Defendant appealed. On appeal, the Appellate court reversed the order of the Supreme Court and granted defendant's motion to dismiss the complaint.

The Eastern District Court in *Carson v. Team Brown Consulting, Inc.,* 2016 U.S. Dist. LEXIS 163161 (E.D.N.Y. Nov. 23, 2016) stated that Rule 41(a)(1)(A) of the FRCP provided that subject to any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

The Appellate Division, first department, in *BDO USA, LLP v Phoenix Four, Inc.*, 113 A.D.3d 507, 509 (N.Y. App. Div. 2014) stated that per CPLR 3217 (a) (1) any party asserting a claim may discontinue it without an order by serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or, if no responsive pleading is required, within twenty days after service of the pleading asserting the claim and filing the notice with proof of service with the clerk of the court.

In *Thoma v Port Auth. of N.Y. & N.J.*, 118 A.D.3d 643, 644 (N.Y. App. Div. 2014), the Appellate Court, First Department noted that plaintiff has an absolute and unconditional right to discontinue without prejudice pursuant to CPLR 3217 (a) (1).

It can be concluded from the forgoing case laws that a Plaintiff or a Defendant may enter into a stipulation of dismissal provided the stipulation is signed by all the parties impleaded in the case. With regard to stipulation to discontinue an action, a party who asserts a claim may discontinue the action by serving a notice of discontinuance to the other parties in the case before serving of a responsive pleading. As such, applying the legal principles to the case at bar, it appears that S may enter into a stipulation of dismissal provided that the stipulation is signed by the all the parties; at the same time the legal principles stated above reflect that S cannot file a stipulation to discontinue the action.

Issue 2: Whether stipulation for dismissal/ discontinuance can be filed in case of FLSA claims?

While addressing the question as to whether parties may settle FLSA claims with prejudice, without court approval or Department of Labor (DOL) supervision, under Fed. R. Civ. P. 41(a)(1)(A)(ii), the United States Court of Appeals for the Second Circuit in *Cheeks v. Freeport*

Pancake House, Inc., 796 F.3d 199 (2d Cir. 2015) stated that FLSA falls within applicable federal statute exception under Fed. R. Civ. P. 41. As such, stipulated dismissals as per Rule 41(a) (1)(A)(ii) for settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect. However, the court expressly held that, "Absent approval of the district court or the Department of Labor, parties cannot settle their Fair Labor Standards Act claims through a private stipulated dismissal with prejudice pursuant to Fed. R. Civ. P. 41(a) (1)(A)(ii)."

The Eastern District Court in *Martinez v. Ivy League Sch.*, 2016 U.S. Dist. LEXIS 83775 (E.D.N.Y. June 28, 2016), held that the reasoning in *Cheeks* applies with equal force to the dismissal of an FLSA action with prejudice pursuant to Rule 41(a)(1)(A)(i). The court also concluded that in case there is a quid pro quo for stipulation of dismissal, court approval is required.

Applying the landmark case of *Cheek* to the case at bar, it is established that S may enter into a stipulation of dismissal after seeking approval from court or Department of Labor because the case at bar involves FLSA which falls within Fed. R. Civ. P. 41 applicable federal statute exception.

Issue 3: What are the Affirmative defenses available to the Defendants under FLSA and Labor Law claims?

In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (U.S. 2010), the Supreme Court of the United States stated that Federal Rule 8(c), lists affirmative defenses.

While dealing with Affirmative defenses per Fed. R. Civ. P. 8(c), the Southern District Court in *Schwind v. EW & Assocs.*, 357 F. Supp. 2d 691, 699 (S.D.N.Y. 2005), stated that, the purpose of requiring affirmative defenses to be pleaded in the answer is to notify a party of the existence of certain issues and the main reasons for the rule stated in Fed. R. Civ. P. 8(c) is to avoid surprise to the plaintiff. The court further stated that a party's failure to plead an affirmative defense bars its invocation at later stages of the litigation and the failure to plead an affirmative defense in the answer results in the waiver of that defense and its exclusion from the case.

In *Padilla v. Sheldon Rabin, M.D., P.C.,* 176 F. Supp. 3d 290, 301 (E.D.N.Y. 2016), the Eastern District Court held that "A claim of exemption under the FLSA is an affirmative defense that, pursuant to Fed. R. Civ. P. 8(c), must be specifically pleaded or will be deemed waived." In the case, the court concluded that defendants were not barred from raising the exemption because plaintiff had notice of defendants' intentions to raise exemptions. *Id.*

The Eastern District Court in *Sampson v. MediSys Health Network, Inc.,* 2012 U.S. Dist. LEXIS 103052 (E.D.N.Y. July 24, 2012) held that, "There is no distinct equitable estoppel cause of action under New York law; rather, it is an affirmative defense."

In *Cava v. Tranquility Salon & Day Spa, Inc.,* 2014 U.S. Dist. LEXIS 21411 (E.D.N.Y. Feb. 20, 2014), the Eastern District Court denied plaintiffs' motion to strike defendants' affirmative defenses of other litigation, class action, statute of limitations and duplicative recovery.

The Eastern District Court in Perez v. De Domenico Pizza & Rest., 2016 U.S. Dist. LEXIS 72922 (E.D.N.Y. May 31, 2016) permitted defendants affirmative defenses namely : – (a) Plaintiffs were not entitled to punitive and/or liquidated damages under the Fair Labor Standards Act and the New York Labor Law as the actions and conduct of defendants were at all times taken in good faith and for legitimate and lawful business reasons and defendants never willfully or otherwise knowingly violated the Fair Labor Standards Act (FLSA) or New York Labor Law (NYLL); (b) Plaintiffs were not employees and defendants were not employers under the FLSA and NYLL and (c) Plaintiffs should be barred from pursuing their action as they had unclean hands.

Considering the above-mentioned case laws, the Defendants including S, in its answer and affirmative defenses, may incorporate affirmative defenses enumerated in Fed. R. Civ. P. 8(c).

Issue 4: Whether Indemnitee, V is entitled to reimbursement of legal fees under the indemnification agreement if it is not expressly provided in the agreement?

In *546-552 W. 146th St. LLC v. Arfa,* 99 A.D.3d 117 (N.Y. App. Div. 2012), the Appellate

Division, First Department, while affirming the denial of the motion for attorney fees, held that, "New York's general policy is that a party is not entitled to contractual indemnification for attorney's fees and costs incurred in establishing its right to indemnification."

In *Wells Fargo Bank N.A. v Webster Bus. Credit Corp.*, 113 A.D.3d 513, 514 (N.Y. App. Div. 2014), the Appellate Division, First Department affirmed the grant of the lender plaintiffs' motion for summary judgment dismissing their agent defendant's counterclaim for contractual indemnification and also affirmed the denial of the agent defendant's cross-motion for partial summary judgment seeking indemnification from the lenders for attorneys' fees.

The Appellate Division, First Department, in *Van Deventer v. CS SCF Mgt. Ltd.*, 47 A.D.3d 503 (N.Y. App. Div. 2008), affirmed the trial court's order that defendants-respondents are not required to indemnify plaintiffs for costs and expenses, including reasonable attorneys' fees, incurred in plaintiffs' prosecution of this action. The court also stated that a promise by respondents to indemnify is not unmistakably clear from the subject agreement. The court further stated that the respondents' obligation to indemnify was not broadened by the 'any and all' or 'to the fullest extent permitted by law' language in the indemnification provision.

The Court of Appeals, in *Mount Vernon City School Dist. v. Nova Cas. Co.*, 19 N.Y.3d 28, 39 (N.Y. 2012), affirmed the Appellate Court's denial of plaintiff's attorneys' fee claim and stated that under the general rule, attorneys' fees and disbursements may not be collected unless an award is authorized by agreement between the parties or by statute or court rule. The court also concluded that the claim on attorneys' fees was beyond the scope of the parties' agreement. .

Applying the afore stated legal principles to the case at bar, it can be concluded that attorney fees cannot be claimed in the absence an authorized agreement between the parties or by statute or court rule. Further, the New York's general policy provides that a party is not entitled to contractual indemnification for attorney's fees and costs incurred in establishing its right to indemnification. Therefore, the attorney of V, G cannot claim reimbursement of the attorney's fees and costs (legal

expenses) incurred by them in the case at bar.

Issue 5: Whether S, CEO and Chairman of R can be held personally liable under the indemnification agreement for signing it on behalf of R?

The Southern District Court held that, "Under both the FLSA and NYLL, personal liability may be imposed on employers for wage and hour violations." *Franco v. Jubilee First Ave. Corp.*, 2016 U.S. Dist. LEXIS 114191, 11-12 (S.D.N.Y. Aug. 25, 2016); See also *Ansoumana v. Gristede's Operating Corp.*, 255 F. Supp. 2d 184, 192 (S.D.N.Y. 2003). The Southern District Court also held that, "The definitions of employer are functionally identical under FLSA and the NYLL, and courts in this circuit use the same tests to determine employer status under both laws." *Id*.

In *Hart v. Rick's NY Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901 (S.D.N.Y. 2013), the Southern District Court noted that the New York Court of Appeals has not yet resolved whether the NYLL's standard for employer status is coextensive with the FLSA, but there is no case law to the contrary. See also *Irizarry v. Catsimatidis*, 722 F.3d 99, 101-102 (2d Cir. N.Y. 2013); *Hernandez v. La Cazuela de Mari Rest., Inc.*, 538 F. Supp. 2d 528 (E.D.N.Y. 2007).

An employer shall pay an employee for overtime at a wage rate of one and one-half times the employee's regular rate in the manner and methods provided in and subject to the exemptions of sections 7 and 13 of 29 U.S.C. 201 et seq., the Fair Labor Standards Act of 1938, as amended, provided, however that the exemptions set forth in sections 13(a) (2) and (4) shall not apply. In addition, an employer shall pay employees subject to the exemptions of section 13 of the Fair Labor Standards Act, as amended, except employees subject to sections 13(a)(2) and (4) of such Act, overtime at a wage rate of one and one-half times the basic minimum hourly rate.

The Appellate Division, First Department stated that per 12 NYCRR 142-2.2, the overtime shall be paid at one-half times the regular rate, subject to any exceptions in the federal statute. *Anderson v. Ikon Off. Solutions, Inc.*, 38 A.D.3d 317 (N.Y. App. Div. 1st Dep't 2007).

In *Bonito v Avalon Partners, Inc.*, 106 A.D.3d 625, 626 (N.Y. App. Div. 1st Dep't 2013), the Appellate Division, First Department reversed the order of the Supreme Court which dismissed the plaintiff's complaint suing Au, as an employer, for violations of the Minimum Wage Act (Labor Law § 650 et seq.) and its implementing regulations, including 12 NYCRR 142-2.2.

In re *Bonito v Avalon Partners, Inc.*

> Although there is no private right of action against corporate officers for violations of article 6 of the Labor Law. Plaintiffs filed a suit against one of the defendants, Au as an employer, not as a corporate officer. Therefore, plaintiffs are not precluded from asserting claims against Au under article 6. Plaintiffs may also assert claims against Au for violations of the Minimum Wage Act (Labor Law § 650 et seq.) and its implementing regulations, including 12 NYCRR 142-2.2. Under the Act, Au may be liable for failure to properly compensate plaintiffs if he was their employer or plaintiffs show that the corporate veil should be pierced. Here, plaintiffs allege in their complaint that, during their employment with Avalon, Au exercised control of Avalon's "day-to-day operations" and that he was their employer under New York law. They also submitted plaintiff Brian Cespedes's affidavit, wherein he stated that Au hired and fired employees, supervised and controlled employees' work schedules, determined the method and rate of pay, kept employment records, and approved any vacations. At this pre-answer juncture, and upon consideration of the economic realities of the case plaintiffs have stated a cause of action against Au, as an "employer" within the meaning of Labor Law §§ 190 (3) and 651 (6). The Appellate Court reversed the order of the Supreme Court stating that the Supreme Court should not have dismissed the complaint as against Au.

In *Wachter v. Kim*, 2011 N.Y. App. Div. LEXIS 2482 (N.Y. App. Div. 1st Dep't 2011), the Appellate Division, First Department reversed the Supreme Court's order stating that defendant is not personally liable under Labor Law.

In re *Wachter v. Kim,*

> Plaintiff former employee sued defendant, the managing member of a limited **liability** company (LLC), alleging breach of contract and seeking unpaid **wages** under Labor Law §§ 193(1) and 198. Defendant moved to dismiss the complaint for failure to state a cause of action. Defendant argued that he had no personal **liability** to plaintiff because he signed the term sheet strictly in his capacity as the managing member of DLIG. Defendant further argued that, even if he was individually liable to plaintiff, he could not have violated the Labor Law because the balance of compensation allegedly owed to plaintiff was discretionary and incentive-based, and thus did not constitute "**wages**" within the statute's definition. The Supreme Court granted defendant's motion and dismissed the complaint in its entirety. The court found that defendant is not personally liable under the term sheet as an "affiliate," because the first paragraph of the term sheet makes no references to an individual's status as an affiliate." The court stated that "[t]o read into the Term

> Sheet that the parties intended [defendant], individually, to be regarded as an affiliate … would amount to re-writing the agreement under the guise of contract interpretation." The court further found that the unpaid compensation was incentive-based and thus not covered by the Labor Law. The plaintiff appealed. However, the appellate court found that such compensation are "**wages**" that are protected by Labor Law § 193 (1) and § 198, and that the Supreme court erred in dismissing plaintiff's claim under the statute. The appellate court reversed the Supreme Court's order.

In *Chen v Yan,* 109 A.D.3d 727, 729 (N.Y. App. Div. 1st Dep't 2013), the Appellate Court, First Department reinstated the claims against Yan based on his **personal liability** to plaintiff for signing a promissory note.

In re *Chen v Yan,*

> Tony Yan, the individual defendant, the principal of defendant PA Estate LLC (the LLC), affixed his signature to a promissory note in favor of plaintiff Eugenie Chen. In November 2011, plaintiff commenced an action asserting that defendants failed to repay the loan and that they were jointly liable to her. Defendants filed an answer asserting a defense that Yan merely **signed** the note in his capacity as the manager of the LLC, and bore no **personal liability** to plaintiff. The Supreme Court upheld the defense asserting that Yan was not personally liable on the note, and sua sponte dismissed the complaint against Yan. The Supreme Court stated that Tony Yan is not personally liable for the repayment of the note as he neither signed a guaranty. Nor would an e-mail 'acknowledging' the debt constitute personal liability in this case where it is clear that the emails were in furtherance of the corporate defendant's business relating to the promissory note. The Appellate Court modified the order, on the law, to reinstate the claims against Yan.

In *Lansco Corp. v. NY Brauser Realty Corp.,* 63 A.D.3d 513 (N.Y. App. Div. 1st Dep't 2009), the Appellate Court, First Department held that, "The signer of an instrument is conclusively bound by its terms regardless of whether he actually read it, and that his mind never gave assent to the terms expressed is not material."

Applying the aforestated legal principles to the case at bar, it can be concluded that under both the FLSA and NYLL, personal liability may be imposed on employers for wage and hour violations. However, New York Court of Appeals has not yet resolved whether the NYLL's standard for employer status is coextensive with the FLSA. In certain labor law cases, the New York Appellate division, First Department has rejected arguments asserting that employer had no personal

liability because he signed the term sheet strictly in his capacity as the managing member.

CONCLUSION

From the foregoing, it can be concluded that –

1. S may enter into a stipulation of dismissal provided that the stipulation is signed by the all the parties but S cannot file a stipulation to discontinue the action.

2. S may enter into a stipulation of dismissal after seeking approval from court or Department of Labor because the case at bar involves FLSA which falls within Fed. R. Civ. P. 41 'applicable federal statute' exception.

3. The Defendants including S, in their answer and affirmative defenses, may incorporate the affirmative defenses as enumerated in Fed. R. Civ. P. 8(c).

4. Attorney fees cannot be claimed in the absence an authorized agreement between the parties or by statute or court rule. The attorney of V, G cannot claim reimbursement of the attorney's fees and costs (legal expenses) incurred by them in the case at bar in establishing its right to indemnification.

5. Under both the FLSA and NYLL, personal liability may be imposed on employers for wage and hour violations. However, New York Court of Appeals has not yet resolved whether the NYLL's standard for employer status is coextensive with the FLSA. In certain labor law cases, the New York State court has rejected arguments asserting that employer had no personal liability because he signed the term sheet strictly in his capacity as the managing member.