For Publication

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

APLUS CO., LTD, Plaintiff/Counterclaim Defendant v. **NIIZEKI INTERNATIONAL SAIPAN CO., LTD., F/K/A NIIZEKI SAIPAN CO., LTD.,** Defendant/Counterclaim Plaintiff.	**CIVIL ACTION NO. 99-0532D** **ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING DEFENDANT'S COUNTERCLAIMS**

I. INTRODUCTION

This matter came before the Court on Plaintiff's MOTION FOR SUMMARY JUDGMENT. In a hearing on December 17, 2003, the parties stipulated that all of Plaintiff's motions pending before the Court be deemed submitted without further hearings or briefings.[1] *See* ORDER VACATING THE HEARING TO CONSIDER ISSUES OF JAPANESE LAW AND OTHERS (Jan. 13, 2004). William M. Fitzgerald, Esq. appeared on behalf of Plaintiff APLUS Co. Ltd., and Vicente T. Salas, Esq., appeared on behalf of Defendant Niizeki International Saipan Co. Ltd. (hereinafter "NIS"). This matter having been fully briefed by both parties, and the Court, having considered the moving

[1] APLUS filed its MOTION FOR SUMMARY JUDGMENT concurrently with two other motions that have also been submitted to the Court for a decision: APLUS'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND ALTERNATIVELY TO ESTABLISH A PROCEDURE TO DETERMINE JAPANESE LAW, and the MOTION FOR PARTIAL SUMMARY JUDGMENT RE. THE FORUM SELECTION CLAUSE. Additionally, two other motions also remain to be decided by the Court: APLUS'S MOTION TO STRIKE, and NIS'S MOTION TO CONSOLIDATE ACTIONS FOR TRIAL.

papers, the arguments of counsel, and reviewing the record on file, now issues its decision granting Plaintiff's MOTION FOR SUMMARY JUDGMENT for the reasons that follow.

II. FACTUAL AND PROCEDURAL HISTORY

Plaintiff APLUS Co., Ltd ("APLUS") is a Japanese corporation. Defendant NIS is a CNMI corporation. The parent company of Defendant NIS is Niizeki Kensetsu Co. Ltd., a Japanese corporation (hereinafter "Niizeki Japan"). This action was commenced by Plaintiff APLUS (formerly known as "Daishinpan Co. Ltd.") in order to enforce a contract entitled "Continuing Guaranty" (hereinafter, the "Guaranty"), signed by Daishinpan Co. Ltd. and NIS, in which NIS guaranteed to Daishinpan Co. Ltd. or its successor, upon demand, the payment of all indebtedness of Niizeki Japan to Daishinpan Co. Ltd., up to (but not exceeding) the sum of two billion Japanese yen (¥2,000,000,000). *See* Ex. A to COMPLAINT. The Guaranty also provided that NIS would pay "a reasonable attorneys' fee and all other costs and expenses which may be incurred by lender in the enforcement of this Guaranty." Ex. A to COMPLAINT at 7. The Guaranty was drafted originally in English and was signed on May 29, 1989 by Masayuki Niizeki in his capacity as President of NIS.

The next day (May 30, 1989), APLUS contracted with Niizeki Japan to lend Niizeki Japan two billion yen; and later, on December 28, 1990, and then on February 26, 1993, APLUS contracted with Niizeki Japan to lend it ¥450,000,000, and ¥9,982,604, respectively. *See* Exs. B, C, D to COMPLAINT. Monies loaned by APLUS to Niizeki Japan were transferred by Niizeki Japan to NIS in order for NIS to secure and maintain various leasehold interests in real properties in Saipan. *See* COMPLAINT at 2. On or about July 23, 1997, Niizeki Japan also delivered to APLUS a "Confirmation of Obligation," that was written in Japanese and that was also signed by Masayuki Niizeki, which reaffirmed the debts owed by Niizeki Japan to APLUS under the three original loans of 1989, 1990 and 1993, which together totaled two billion one hundred ninety million five hundred

eighty nine thousand and five Japanese yen (¥2,190,589,005) as of July 1, 1997. *See* Ex. E to COMPLAINT. Furthermore, APLUS asserts that the debt owed to it by Niizeki Japan has not been repaid in whole or in part, and NIS has not contested this assertion. *See* AFFIDAVIT OF YOSHIAKI MATSUDA IN SUPPORT OF PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER filed Sept. 17, 1999; *see also, generally,* FIRST AMENDED ANSWER, DEFENSES, COUNTERCLAIM.

NIS asserts nine "affirmative defenses" in its ANSWER, including (1) the running of the applicable **statute of limitations** under Japanese law; (2) the failure of APLUS to comply with section 4534 of **CNMI Real Estate Mortgage Law**, 2 CMC §§ 4511, *et seq.*; (3) **laches**; (4) **fraud**; (5) **conspiracy**; (6) **estoppel**; (7) **unclean hands**; (8) APLUS's **breach of a later Joint Venture Agreement** (hereinafter "JVA"),[2] attached as Exhibit "A" to the COMPLAINT, that was executed on October 2, 1989, by APLUS, Niizeki Japan, and a third company called Daisue Co., Ltd.; and (9) **set-off** for breach of the JVA. ANSWER at 9-17; *see also* Ex. 1 to ANSWER. The alleged breach of the JVA by APLUS is also the basis for several of the causes of action asserted in NIS's Counterclaims against APLUS, which include (1) **breach of Contract** (the JVA); (2) **specific performance** (of the JVA); (3) **fraud** (in inducing Niizeki Japan via the "promise and representation" in the JVA to sign the Guaranty and subsequent "Confirmation of Obligation"); (4) **fraud** (in inducing NIS to sell its leasehold interest in the Kingfisher Golf Links property located in Talofofo, Saipan, to a third party, Co-You Corporation); (5) **fraud** (in inducing NIS to sell certain mortgaged properties via an American real estate company, although APLUS was silent as to the possibility of their suing NIS); and (6) **conspiracy** (to "cause [NIS's] financial demise . . . and

[2] The Court notes that, generally speaking, breach of one contract does not ordinarily constitute, in-and-of itself, an affirmative defense to breach of another contract. Nevertheless, Defendant NIS argues that the JVA was "part and parcel" to the Guaranty, and also bases several of its claims and defenses on APLUS's alleged breach of the JVA, and so the Court considers it for these purposes. *See* OPP'N at 1.

to commit each of the breaches of contract, breaches of trust, illegal acts and inequitable acts" against NIS).

In its opposition, NIS further alleges that the Guaranty was "part and parcel" to the JVA, which NIS contends APLUS breached when it failed to purchase leasehold interests in properties in Saipan that were owned by NIS, and when it failed to provide all of the "necessary funding under the joint venture." ANSWER at 7; *see also* OPP'N at 5. Although NIS was not a party to the JVA, it claims third-party beneficiary status under it, and further alleges that, because of this status, and because the Guaranty and the JVA were essentially part of the same agreement, APLUS's breach of the JVA establishes affirmative defenses to the enforcement of the obligation owed by NIS under the Guaranty.

APLUS and NIS stipulated during the hearing on December 17, 2003, that the substantive laws of the Commonwealth will apply for purposes of this Court's interpretation of the Guaranty, and they have thus waived the enforcement of that portion of the Guaranty that states "[t]his Guaranty shall be interpreted under and in accordance with the laws of the territory of Japan . . . ." Ex. A to Pl.'s COMPLAINT at 7; *see also* ORDER VACATING THE HEARING TO CONSIDER ISSUES OF JAPANESE LAW AND OTHERS. Accordingly, the terms of the Guaranty will be considered according to the laws of the Commonwealth

III. LEGAL STANDARD FOR SUMMARY JUDGMENT

Plaintiff APLUS has moved for summary judgment pursuant to Commonwealth Rule of Civil Procedure 56(b). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Com. R. Civ. P. 56(c); *see, e.g., In re Estate of Roberto*, 2002 MP 23 ¶14. "In deciding a

summary judgment motion, a court will construe the evidence and inferences drawn therefrom in favor of the non-moving party." *Santos v. Santos*, 4 N.M.I. 206, 209 (1994) (*citing Rios v. Marianas Pub. Land Corp.*, 3 N.M.I. 512, 518 (1993)).

> A moving party bears the "initial and the ultimate" burden of establishing its entitlement to summary judgment. **If a moving party is the *plaintiff*, he or she must prove that the undisputed facts establish every element of the presented claim**. **If a movant is the *defendant*, he or she has the correlative duty of showing that the undisputed facts establish every element of an asserted affirmative defense. Upon satisfying this burden, the non-moving party must establish that there exists a genuine issue of material fact.**

Id. at 210 (emphasis added, internal citations omitted). "A genuine dispute exists if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Eurotex (Saipan), Inc. v. Muna*, 4 N.M.I. 280, 284 (1995) (internal quotations and citations omitted). A non-moving party "may not rest upon the mere allegations or denials" of the moving party's pleading, but must "set forth specific facts showing that there is a genuine issue for trial." Com. R. Civ. P. 56(e); *see, e.g., Eurotex (Saipan), Inc.*, 4 N.M.I. at 284-85.

In the present case, APLUS has moved for summary judgment in two capacities: (1) as a Plaintiff and (2) as a counterclaim Defendant. Therefore, with respect to its Complaint, APLUS must prove that the undisputed facts establish every element of the claims it has presented. Because Defendant NIS has asserted affirmative defenses and counterclaims, and Plaintiff APLUS is the movant, APLUS also has the burden of proving that the undisputed facts show that NIS has failed to establish every element of NIS's asserted affirmative defenses to APLUS's claim in the Complaint, and that NIS has failed to establish every element as to each of NIS's counterclaims. Once APLUS satisfies these burdens, the burden shifts to NIS with respect to each of its affirmative defenses and counterclaims, to point out specific facts confirming that a genuine issue of material fact remains for trial.

IV. ANALYSIS

A. APLUS HAS ESTABLISHED A PRIMA FACIE CASE.

NIS admits that it signed the Guaranty, and that its parent company, Niizeki Japan, received more than two billion Japanese yen from APLUS, as evidenced by the three loans executed in 1989, 1990, and 1993, and the 1997 Confirmation of Obligation signed by Niizeki Japan, and that the loans remain unpaid. Thus, APLUS has established a *prima facie* case for recovery of two billion yen owed by NIS as a guarantor of Niizeki Japan's debts under the Guaranty. Therefore, APLUS has met its initial burden, and the Court now considers NIS's asserted defenses and counterclaims, respectively, to determine whether a genuine issue of material fact remains to be tried in this case.

B. NIS's AFFIRMATIVE DEFENSES

1. Defendant NIS's First Affirmative Defense: the Statute of Limitation

NIS argues that the Statute of Limitation period for APLUS to initiate the present action under Japanese law has expired. Because the parties have stipulated that the substantive laws of the Commonwealth apply in interpreting the terms of the Guaranty, the Court now considers whether the applicable Commonwealth statute of limitation bars APLUS's claim under the Guaranty agreement.

The Guaranty provides that "[g]uarantor [NIS] waives the benefit of any statute of limitations affecting their liability hereunder or the enforcement thereof to the extent permitted by law." Ex. A to COMPLAINT at 3. However, Commonwealth Code at 7 CMC § 2513 provides that, "[n]o agreement . . . for a period of limitation different from the period described in this chapter shall be valid." Thus, clauses such as this one are not enforceable, and the issue of whether this action was initiated within the limitations period will depend entirely upon the applicable statute of limitation.

APLUS's cause of action is for the enforcement of a guaranty, which APLUS claims NIS has failed to honor. Since this claim concerns a *breach of contract*, the Court finds that 7 CMC § 2505 applies. Accordingly, the question remaining is whether this action was "commenced within six years after the cause of action accrue[d]." 7 CMC § 2505. A cause of action for breach of contract accrues at the time of breach. *Chan v. Sunny King Man Chan*, Civ. No. 97-1039 (N.M.I. Super. Ct. April 6, 2000) (Order Denying Defendants' Motion for Summary Judgment on Intervenor's Complaint in Intervention at 8) (*citing, e.g.*, *Cochran v. Cochran*, 66 Cal. Rptr.337 (1997); *Whorton v. Dillingham*, 248 Cal. Rptr. 405 (1988)). Although neither party has specified the precise date on which NIS first refused payment to APLUS under the Guaranty, it appears from the materials submitted to the Court that the first refusal occurred in June of 1999.[3] *See* AFFIDAVIT OF YOSHIAKI MATSUDA IN SUPPORT OF PLAINTIFF'S MOTIONS FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND WRIT OF ATTACHMENT at ¶ 13. This civil action was commenced with the filing of APLUS's COMPLAINT on September 17, 1999, less than four months after the date of the breach. Therefore, this action was filed within the six-year period and it is therefore not barred by the statute of limitation. Thus the Court finds that no genuine issue of material fact remains to support this affirmative defense under Commonwealth law.

2. <u>Defendant NIS's Second Affirmative Defense: CNMI Real Estate Mortgage Law</u>

NIS's second affirmative defense is that APLUS failed to comply with the portion of the Commonwealth Real Estate Mortgage Law, 3 CMC §§ 4511, *et seq.*, contained at 2 CMC § 4534 ("Notice of Default"). ANSWER at 3. NIS contends that, under that section, APLUS was required

[3] NIS's argument with respect to the defense of laches (which is addressed at section IV(B)(3) of this Order, *infra*) seems to suggest that the date on which APLUS first became entitled to seek enforcement of the Guaranty was the final repayment or maturity date for the underlying two billion yen loan. This is incorrect. Because APLUS is seeking enforcement of the Guaranty, and because NIS's obligations derive from the Guaranty alone, APLUS's cause of action against NIS began to accrue at the time of the *Guaranty's* breach, not at the time of the loans' respective maturity dates, nor for that matter at the time that Niizeki Japan first breached its obligations under the loan agreements.

to provide thirty days written notice prior to the commencement of the present action. Title 2, section 4534 reads in relevant part: "[n]ot less than 30 days prior to the commencement of any action or proceeding seeking foreclosure of a mortgage, written notice of default shall be served as provided in 2 CMC § 4524." 2 CMC § 4534. An inspection of the prayer for relief in APLUS's COMPLAINT shows that APLUS sought only a temporary restraining order, a preliminary injunction, a constructive trust over real properties held by NIS, and a money judgment in the dollar equivalent of two billion yen. Because APLUS did not seek foreclosure of any properties in this action, no genuine issue of material fact exists to support NIS's defense under 2 CMC § 4534.

3. Defendant NIS's Third Affirmative Defense: Laches

The full extent of NIS's laches argument consists of the statement: "[p]laintiff is guilty of laches in that its own actions in delaying any action to recover under the Guaranty after May, 1994 has [sic] prejudiced and damaged defendant." ANSWER at 3. As the CNMI Supreme Court has stated,

> A defendant who asserts laches must prove two elements. First, he must show that "the plaintiff delayed filing suit for an unreasonable and inexcusable length of time from the time the plaintiff knew or reasonably should have known of its claim against the defendant," and, second, that "the delay operated to the prejudice or injury of the defendant."

Rios v. Marianas Pub. Land Corp., 3 N.M.I. 512, 524 (1993) (*quoting A. C. Aukerman Co. v. R. L. Chaides Constr. Co.*, 960 F.2d 1020, 1032 (Fed. Cir. 1992)). NIS has not alleged an unreasonable delay by APLUS in bringing this action, nor has it alleged any harm resulting from an unreasonable delay. In fact, based upon the materials submitted, and as noted above, it appears that less than four months transpired between the date of NIS's breach and the date that APLUS initiated this action. Even if NIS had alleged facts to demonstrate that it *had* been damaged by APLUS's delay, it could

hardly be said that a delay of less than four months is "unreasonable," particularly given the complexity of the case.

NIS's reference to May of 1994 suggests that APLUS's cause of action in this case began to accrue on the final repayment date of the first of the loans underlying the Guaranty. NIS's emphasis on the loans' maturity dates is misplaced, however. APLUS's cause of action is for breach of the Guaranty, and the date of the Guaranty's breach is the date that APLUS's cause of action began to accrue.

For the foregoing reasons, the equitable defense of laches has been insufficiently pled, and the Court finds that no genuine issue of material fact remains as to this defense.

4. Defendant NIS's Eighth Affirmative Defense: Breach of the JVA

NIS asserts various counterclaims and defenses relating to the alleged breach of a joint venture agreement between NIS's parent company, Niizeki Japan, and APLUS, that was executed several months subsequent to the execution of the Guaranty by APLUS and NIS. In response, APLUS argues (in part) that NIS does not have standing to rely on the terms of the JVA, because it was neither a party, nor a third-party beneficiary to that agreement. *See* Pl.'s MOTION FOR SUMMARY JUDGMENT (hereinafter "M.S.J.") at 6-7. Additionally, APLUS argues that the JVA contains a clause that requires that disputes arising under the JVA be tried exclusively in Tokyo District Court, and argues that the clause must be enforced to exclude NIS's counterclaims and defenses relating to the alleged breach of the JVA. *See generally* Pl.'s MOTION FOR PARTIAL SUMMARY JUDGMENT RE FORUM SELECTION CLAUSE. APLUS also submits various arguments in the alternative to contest the allegation that it breached the JVA, as well as each of the related claims and defenses of NIS. Before the Court can determine whether the JVA was in fact breached, and before the Court can consider whether to enforce the forum selection or choice of law provisions

contained at Article 16 of the JVA, it must address the question of whether NIS has *standing* to rely on the JVA. This Court finds as a matter of law that *NIS is not a third-party beneficiary* to the JVA, and that NIS therefore lacks standing to seek enforcement of its terms, for the reasons that follow.

In the absence of written law or local customary law to the contrary, the American Law Institute's Restatements of the Law have binding effect in the CNMI by way of 7 CMC § 3401. The RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) ("Creation of Duty to Beneficiary") provides that "[a] promise in a contract creates a duty in the promisor to any *intended* beneficiary to perform the promise, and the *intended* beneficiary may enforce the duty." RESTATEMENT (SECOND) OF CONTRACTS § 304 (1981) (emphasis added). Section 315 of the Restatement ("Effect of a Promise of Incidental Benefit") provides, in contrast: "[a]n *incidental* beneficiary acquires by virtue of the promise no right against the promisor or the promisee." RESTATEMENT (SECOND) OF CONTRACTS § 315 (1981) (emphasis added). Thus, only intended beneficiaries to contracts may assert third-party rights against the original parties. Section 302 ("Intended and Incidental Beneficiaries") explains the distinction in determining whether a beneficiary is intended or incidental:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary **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.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (1981) (emphasis added). Thus, the initial question for the Court is whether the JVA expresses an intention to recognize a right to performance in NIS. Although NIS is mentioned in the JVA, nowhere in the JVA is it stated that *NIS* is to receive a

benefit. NIS directs the Court to language contained at section 10.1(1) of the JVA, which states that, "[i]n addition, *if deemed necessary to the joint projects*, Niizeki shall sell the lands owned by Niizeki Saipan to the new company in accordance with the terms and conditions agreed to by the parties hereto, and the new company shall purchase the same." Ex. 1 to ANSWER at 5 (emphasis added); *see also* OPP'N at 2. This language does not express an intention to convey a benefit to NIS; it merely provides that *Niizeki Japan* ***may*** sell properties held by NIS, and *DND* (the joint venture company) ***may*** purchase them. The JVA says nothing about the contemplated price for those leasehold properties, and for all intents and purposes, the parties to the JVA could have intended that NIS sell the properties for no benefit at all, for the good of the joint venture. Even were the provision for the sale of leasehold properties held by NIS interpreted as conferring an interest to NIS, the JVA does not specify whether those lands will ever, in fact, *be sold* to the joint venture company, and the JVA expressly conditions their potential sale with the language, "*if deemed necessary to the joint projects*." By the plain language of this passage, whether a sale of acquired properties would be deemed "necessary" is a decision *yet to be reached* by the parties to the joint venture. At best, the interest conferred to NIS by the quoted passage was the possibility of a benefit, but mere knowledge or awareness of a potential benefit cannot, without more, demonstrate the intent to actually confer a benefit. *See Forcier v. Cardello*, 173 B.R. 973, 986 (D. R.I. 1994).

NIS argues that "the guaranty would not have been signed but for the contemplated joint venture agreement." OPP'N at 1. Even accepting this as true, this has no bearing on the fact that the JVA does not describe any benefit directed to NIS. NIS argues that the JVA and the Guaranty are part of the same agreement, and that, since NIS has standing with respect to one part of that "agreement," it should have standing to enforce the terms of the other. The facts simply do not support this conclusion. The two contracts were drafted in different languages in different places

at different times among different parties, and they create distinguishable contractual obligations. Nowhere in the JVA is the Guaranty mentioned, and although the JVA does contain general language (at Article 7) contemplating the creation of future, "ancillary contracts," the Guaranty between APLUS and NIS had been executed roughly four months *prior* to the execution of the JVA.[4] *See* Ex. 1 to ANSWER at 4. Given the lack of factual support, in order for the Court to arrive at the conclusion that NIS has standing to assert a breach of the terms of the JVA, it would need to draw a number of unsubstantiated inferences. For obvious reasons, the Court declines to do so.

NIS also argues that Masayuki Niizeki signed the JVA as "the proper representative of both Niizeki Japan and NIS Saipan." OPP'N at 3. If that were the case, NIS would have standing as a party to enforce the JVA's terms. However, NIS offers no factual or legal support for this assertion, and indeed, nothing in the JVA indicates an intention to include NIS as a party. For the foregoing reasons, this Court holds that NIS lacks standing to rely on an alleged breach of the JVA or to otherwise seek enforcement of the terms of the JVA in either its counterclaims or affirmative defenses. Therefore, this Court finds that no genuine issue of material fact remains to support NIS's asserted defense of breach of the JVA by APLUS.

5. <u>Defendant NIS's Fourth Affirmative Defense: Fraud</u>

NIS contends that "[p]laintiff is barred from obtaining any relief pleaded in its complaint because plaintiff granted the loan of two billion yens [sic] to defendant's parent company, Niizeki Japan, and the continuing guaranty of the defendant through fraud and misrepresentation." ANSWER at 3. NIS alleges that APLUS made representations to Niizeki Japan that APLUS would (1) provide the "necessary funding for the joint venture," DND; (2) purchase NIS's real estate on Saipan initially through NIS and then through the joint venture company; and (3) provide initial capitalization for

[4] This fact further complicates NIS's claim that its assent to the Guaranty was induced by the Joint Venture Agreement: based on a review of the materials submitted to the Court, at the time that the Guaranty was executed, **there was no joint venture.**

the joint venture company DND, as well as provide foreign estate mortgage loans to buyers of condominium units. ANSWER at 4-7; *see also* OPP'N at 3-5. Further, NIS alleges that APLUS committed fraud in representing to *Niizeki Japan* that the two billion yen loan to Niizeki Japan "would be repaid *by Niizeki Japan* through the proceeds of the sale of defendant's real properties to DND and additional profits it would be making through DND's Saipan projects." ANSWER at 4 (emphasis added). The ANSWER continues,

> Defendant and Niizeki Japan relied upon such representations. Because of such reliance, defendant executed the continuing guaranty. Furthermore, Niizeki Japan executed the confirmation of obligation in 1997 still relying on such promise and representation [sic].
>
> Such promise and representation [sic] were material but false. Plaintiff intended that defendant and Niizeki Japan act on such false promise and misrepresentation [sic]. Plaintiff knew or should have known that Niizeki Japan would not be able to repay the loan and that defendant would not be able to pay its guaranty if the promise and representations regarding the joint venture did not materialize.

ANSWER at 4. NIS argues that "[p]laintiff's actions were fraudulent in that, as a lender it enticed Mr. Niizeki, a business person, to enter into a joint venture which, from its inception, was one-sided and not intended to properly apportion the risks involved in such transactions." OPP'N at 7.

Although the JVA was not expressly mentioned in support of NIS's Fourth Affirmative Defense of fraud, given that the particular facts recited in this defense involve "the joint venture," the "representations" allegedly made to Niizeki Japan must have been made either in the course of executing the JVA itself, or in performing the JVA's terms.[5] As explained above, NIS lacks standing to enforce the JVA's terms, and has not provided the Court any alternative factual basis for the allegation that such representations were made. Furthermore, even were this Court to assume

[5] The Court notes that, with respect to NIS's Fourth Affirmative Defense, NIS has failed to allege any particular facts (in either its ANSWER or its OPPOSITION TO THE MOTION FOR SUMMARY JUDGMENT), in contravention of Commonwealth Rule of Civil Procedure 9, which provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated *with particularity.*" Com. R. Civ. P. 9 (emphasis added).

for the sake of argument that these claims of fraud have a factual basis that is in some manner independent of the JVA, NIS has failed to substantiate its fraud claims with particularity.

Generally speaking, when a contracting party makes a misrepresentation in the course of creating a contract, or makes a misrepresentation that induces another party to enter a contract, that misrepresentation may serve to render the contract void, or to make it voidable by the other party. Section 163 of the RESTATEMENT (SECOND) OF CONTRACTS ("When a Misrepresentation Prevents Formation of a Contract") provides that:

> If a **misrepresentation** as to the character or essential terms of a proposed contract induces conduct that appears to be a manifestation of assent by one who neither knows nor has reasonable opportunity to know of the character or essential terms of the proposed contract, his conduct is not effective as a manifestation of assent.

RESTATEMENT (SECOND) OF CONTRACTS § 163 (1981) (emphasis added). Section 164 ("When a Misrepresentation Makes a Contract Voidable") also provides that "[i]f a party's manifestation of assent [to a contract] is induced by either a fraudulent or a material **misrepresentation** by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient."[6] RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981) (emphasis added). A **misrepresentation** is defined as **"an assertion that is not in accord with the facts."** RESTATEMENT (SECOND) OF CONTRACTS § 159 (1981).

Even assuming that NIS was induced to sign the Guaranty on the basis of statements made concerning the joint venture, the statements complained of could not reasonably be considered

[6] "A misrepresentation is *material* if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." RESTATEMENT (SECOND) OF CONTRACTS § 162 (2) (1981) (emphasis added). Whether a misrepresentation is *fraudulent* depends on the subjective intent and knowledge or belief of the person making the statement. As the CNMI Supreme Court explained in *Rogolofoi v. Guerrero*, 2 N.M.I. 468 (1992),

> (1) A misrepresentation is fraudulent if the maker intends his assertion to induce a party to manifest his assent and the maker
>
> (a) knows or believes that the assertion is not in accord with the facts, or
>
> (b) does not have the confidence that he states or implies in the truth of the assertion, or
>
> (c) knows that he does not have the basis that he states or implies for the assertion.

Id. at 476-77 (*quoting* RESTATEMENT (SECOND) OF CONTRACTS § 162 (1) (1981)).

misrepresentations, because they did not constitute assertions that were not in accord with facts. In other words, at the time that the alleged statements were made, they were not false, but merely predictions as to future business activities. This is further underscored by the fact that the President of NIS acknowledged in a sworn deposition that APLUS lacked the intent to defraud NIS when it "induced" NIS to sign the Guaranty. The deposition reads:

> Q: [D]o you believe that in 1989 in May that APLUS had the intention to deceive you into believing that they would perform when in fact they had no intention? In May of 1989.
>
> A: No, at that time I don't think APLUS was thinking of that at all.

M.S.J. at 14, *quoting* Deposition of Masayuki Niizeki (Ex. I to MSJ) at 88, 8-22.

For the foregoing reasons, NIS's defense of fraud fails, and therefore, no genuine issue of material fact remains as to this defense.

6. <u>Defendant NIS's Fifth Affirmative Defense: Conspiracy</u>

NIS alleges "conspiracy" on the part of APLUS, as well as "others unknown," to commit "breaches of contract, breaches of trust, illegal acts, and inequitable acts." The difficulty encountered in considering these "affirmative defenses" is that they do not constitute affirmative defenses. An affirmative defense is a "matter asserted by [a] defendant which, assuming the complaint to be true, constitutes a defense to it." BLACK'S LAW DICTIONARY 60 (6th ed. 1990). Even if NIS's allegations of conspiracy were true, taken on their face, they would not undermine the validity of APLUS's claims. For this reason, the Court regards the claims of "conspiracy" as counterclaims rather than defenses, and considers these claims together with the identical counterclaims of conspiracy, addressed *infra* at section IV(C)(4) of this Order.

7. Defendant NIS's Sixth Affirmative Defense: Estoppel

NIS argues that APLUS is estopped from seeking payment under the Guaranty, because it induced NIS to agree to the Guaranty on the basis of false representations and promises. NIS contends that "plaintiff affirmatively sought Niizeki Japan and lured it to induce defendant to execute the guaranty upon the representation and promise that certain funds and projects would benefit defendant and defendant's parent company, Niizeki Japan, upon the formation of the joint venture company, DND . . . ." ANSWER at 6.

> The modern doctrine of equitable estoppel is a descendent of the ancient equity doctrine that "if a representation be made to another who deals upon the faith of it, the former must make the representation good if he knew or was bound to know it to be false."

Lentz v. McMahon, 777 P.2d 83, 85 (Cal. Sup. Ct. 1989) (*quoting* BIGELOW ON ESTOPPEL at p. 603(6th ed. 1913)).

> The doctrine of estoppel requires the presence of four elements: "(1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."

In re Blankenship, 3 N.M.I. 209, 214 (1992) (*quoting Lentz*, 777 P.2d at 86).

Here again, NIS has failed to state a claim in its defense. No evidence has been offered to substantiate NIS's suggestion that APLUS, at the time of the Guaranty's execution, knew something that Niizeki Japan or NIS did not with respect to the likelihood of the failure of the joint venture company, DND, and as stated above, the President of NIS confirmed that he did not believe APLUS attempted to deceive NIS when it executed the Guaranty. Again, nothing in the facts submitted by NIS demonstrates that a misrepresentation was made, and NIS is prohibited from relying upon the terms of the JVA. For these reasons, the defense of estoppel fails, and thus, no genuine issue of material fact remains to be tried with respect to this defense.

8. Defendant NIS's Seventh Affirmative Defense: Unclean Hands

NIS argues that APLUS should be barred from obtaining any of the relief requested in the COMPLAINT on the equitable basis of "unclean hands," because APLUS lured Niizeki Japan into inducing NIS to execute the Guaranty "upon the representation and promise that certain funds and projects would benefit defendant and defendant's parent company, Niizeki Japan, upon the formation of DND . . . ." OPP'N at 6. "Unclean hands" is an equitable defense, which is considered as one factor in determining whether to grant injunctive relief, on the theory that equity will not aid a person to reap the benefits of his own misconduct. *See* RESTATEMENT (SECOND) OF TORTS § 940 (1979) ("Unclean Hands"). In this case, APLUS in its COMPLAINT seeks equitable relief in the form of a constructive trust over certain leasehold interests in real property in the CNMI. *See* COMPLAINT at 1-2, 4. As stated above, in consideration of NIS's various other defenses, nothing in the facts alleged indicates inequitable conduct on the part of APLUS, no genuine issue of material fact has been raised in this regard, and the defense of "unclean hands" fails on its merits. However, as explained in the Conclusion, *infra*, the Court is denying APLUS's request for this remedy on other grounds.

9. Defendant NIS's Ninth Affirmative Defense: Set-off

The last of NIS's "affirmative defenses," "set-off," does not constitute a defense at all, but rather, a form of remedy that must itself be grounded upon a legal claim of entitlement. Therefore, with respect to NIS's Ninth Affirmative Defense, it has failed to state a claim upon which relief can be granted, and thus, it has failed to establish the existence of a genuine issue of material fact for trial.

In summary, for each of the reasons stated above, no genuine issue of material fact remains to support any of Defendant NIS's affirmative defenses, and all of Defendant NIS's affirmative defenses are therefore DENIED.

C. NIS's COUNTERCLAIMS AGAINST APLUS

1. Defendant/Counterclaimant NIS's First, Second and Third Causes of Action: Breach of Contract (Joint Venture), Specific Performance (Joint Venture), and Fraud (Joint Venture)

As addressed above, NIS lacks standing to allege a breach of the JVA, which represents the basis for NIS's first three causes of action. Additionally, NIS's second "cause of action" (specific performance) is not a cause of action, but rather, a form of equitable remedy. For these reasons, NIS's claims for Breach of the JVA, Specific Performance of the JVA, and Fraud under the JVA fail to state claims upon which relief can be granted. Thus, with respect to these counterclaims, no genuine issue of material fact remains to be tried.

2. Defendant/Counterclaimant NIS's Fourth Cause of Action: Fraud (Kingfisher Golf Links)

NIS alleges that "on or before July 31, 1991, counter defendant strongly instructed counterclaimant, through Masayuki Niizeki, that the Kingfisher Golf Links project was in conflict with, and damaging to, the projects planned by DND and must be sold." ANSWER at 14. NIS asserts that it subsequently sold the Kingfisher Golf Links leasehold property (located in Talofolo, Saipan) to CNS Corp., a CNMI corporation jointly owned by APLUS and C.I.C., a Commonwealth corporation owned by Co-You Corp. NIS also alleges that, in reliance on this suggestion, it sold the golf resort property "at a great financial loss to [NIS] and Niizeki Japan." *Id*. NIS further suggests that APLUS received a commission of 300 million yen (¥300,000,000) from Co-You Corp. for its work as an "intermediary" in this transaction. *Id.* at 15.

As in the case of the statements offered in support of NIS's fraud defense detailed above, this allegation of fraud relies upon "commitments" allegedly owed under the JVA, which NIS lacks standing to enforce. Furthermore, NIS has failed to present any facts to demonstrate that the representations by APLUS regarding the Kingfisher property constituted misrepresentations of facts, opinion, intention, or law.[7] Rather, NIS has only alleged that APLUS suggested to NIS that NIS sell the Kingfisher property because it was damaging to joint venture projects. The only allegation by NIS offered to demonstrate that this "suggestion" was fraudulent is the allegation that APLUS (as an intermediary in the transaction) profited from the sale. This allegation is itself unsubstantiated, and in any case, it is insufficient to demonstrate that a genuine issue of fact exists as to whether APLUS made misrepresentations to NIS, or that APLUS actually *intended* to defraud NIS.

Also, NIS does not deny that NIS refused to respond to a later offer from the Co-You company to *rescind* the sale of property that it now complains was fraudulently induced. *See* M.S.J. at 19. Although the sale of the Kingfisher property may have "resulted in a great financial loss," the facts demonstrate that the loss was directly attributable to the business decisions of NIS itself, rather than to fraudulent activity on the part of APLUS. Thus, with regard to the issue of causation, even were this Court to assume that NIS's reliance on APLUS's suggestion that the Kingfisher property should be sold was justified, it cannot be said that NIS's reliance was a *substantial factor* in

---

[7] The RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("Liability for Fraudulent Misrepresentation") provides:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

Section 526 further provides that a misrepresentation is fraudulent if the maker:

> (a) knows or believes that the matter is not as he represents it to be,
> (b) does not have the confidence in the accuracy of his representation that he states or implies, or
> (c) knows that he does not have the basis for his representation that he states or implies.

RESTATEMENT (SECOND) OF TORTS § 526 (1977)

determining the course of conduct that resulted in NIS's loss.[8] For the reasons stated, no genuine issue of material fact remains to support NIS's claim of fraud with respect to the sale of the Kingfisher golf property, and the claim is therefore denied.

3. Defendant/Counterclaimant's Fifth Cause of Action: Fraud (Filing of Complaint)

In its Fifth Cause of Action, NIS essentially alleges that APLUS fraudulently instructed it to sell mortgaged leasehold properties, though it intended at that time to sue NIS, and that APLUS "knew that it was not going to allow counterclaimant time to sell the mortgaged properties." How this "instruction" prejudiced NIS is unclear from the language of this counterclaim. In any event, once again, NIS has failed to state a claim for relief, because the facts alleged do not substantiate the suggestion that APLUS made *misrepresentations* to NIS. Comment b to the RESTATEMENT (SECOND) OF TORTS § 525 (1977) defines a "misrepresentation" as a written or spoken assertion, or conduct, "that amounts to an assertion not in accordance with the truth." The RESTATEMENT also provides that:

> One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, *if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.*

RESTATEMENT (SECOND) OF TORTS§ 551(1) (1977) (emphasis added).

The Court finds as a matter of law that, even if it were clear from the facts presented that APLUS intended to sue NIS at the time it "strongly instructed" NIS to sell the properties, NIS had no entitlement to know whether APLUS planned to seek enforcement of its rights under the

[8] The RESTATEMENT (SECOND) OF TORTS § 546 (1977) ("Causation in Fact") provides that:

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented, *if his reliance is a substantial factor in determining the course of conduct that results in his loss.*

(Emphasis added).

Guaranty. The possibility that a party to a contract may at some point seek its enforcement is inherent to the nature of contract, and that possibility, and the parties' implicit understanding of that possibility, was not affected by the parties' continued business dealings. For the reasons stated, NIS's fifth cause of action fails to state a claim upon which relief can be granted, and thus, the materials submitted fail to establish the existence of a genuine issue of material fact as to this claim.

4. Defendant/Counterclaimant NIS's Sixth Cause of Action: Conspiracy

NIS alleges that APLUS, as well as "others unknown," conspired to commit "breaches of contract, breaches of trust, illegal acts, and inequitable acts." NIS has failed to describe in even the most general terms what the alleged "breaches" and "illegal acts" consisted of, and therefore, the allegations of conspiracy have been insufficiently pled. Further, even if this Court were to hold that the materials submitted demonstrate the existence of genuine issues of material fact as to whether APLUS engaged in the alleged conspiracies, our Supreme Court has held that the Commonwealth of the Northern Mariana Islands does not recognize civil actions for conspiracy. *I.G.I. General Contractor & Dev., Inc. v. Pub. Sch. Sys.*, 1999 MP 12 ¶ 14. For the foregoing reasons, NIS has failed to state a claim with respect to each of its conspiracy "defenses," and thus, no genuine issue of material fact remains for trial as to those claims.

In summary, for the reasons stated above, no genuine issue of material fact remains to support any of Defendant NIS's counterclaims, and all of Defendant NIS's counterclaims are therefore DENIED.

V. CONCLUSION

For the foregoing reasons, the Court finds that undisputed facts establish that NIS is liable to APLUS under the Continuing Guaranty in the amount of two billion Japanese yen; that no genuine issue of material fact remains to support any of Defendant NIS's affirmative defenses or

counterclaims; and that, therefore, no genuine issue of material fact remains to be tried as to NIS's liability under the Continuing Guaranty. Accordingly, Plaintiff APLUS's MOTION FOR SUMMARY JUDGMENT is GRANTED; each of Defendant NIS's affirmative defenses are DENIED; and each of Defendant NIS's counterclaims are also DENIED.

The Court hereby orders that judgment is entered on APLUS's prayer for relief in its COMPLAINT as follows:

> a. for a judgment against Defendant NIS in the dollar equivalent of two billion Japanese yen, Plaintiff's request is GRANTED, and
>
> b. for a constructive trust for the benefit of Plaintiff APLUS, Plaintiff takes nothing.[9]

Because the Guaranty provides that the Guarantor (Defendant NIS) "agrees to pay a reasonable attorneys' fee and all other costs and expenses which may be incurred by Lender [Plaintiff APLUS] in the enforcement of [the] Guaranty," this Court GRANTS to Plaintiff APLUS reasonable attorneys' fees and costs that it has incurred in this action. *See* Ex. A ("Continuing Guaranty") at 7. Plaintiff APLUS is ordered to submit a schedule of its fees and costs within ten working days. Defendant will have five working days thereafter to file any objections to Plaintiff's assessment. The Court will schedule a hearing date thereafter, if appropriate.

All of the other motions filed by APLUS and NIS that are pending before the Court in this case are rendered moot by this Order. The jury trial date of June 21, 2004 is hereby vacated.

SO ORDERED this 25 th day of May 2004.

/s/
RAMONA V. MANGLONA, ASSOCIATE JUDGE

[9] APLUS requests in its prayer for relief that the Court impose a constructive trust over leasehold interests in real property held by NIS. However, APLUS does not address this remedy in its moving papers. Ordinarily, equitable relief is reserved for those cases in which the available legal remedies are insufficient to protect a party's interests, and constructive trusts are no exception to this rule. *See* Restatement of Restitution § 160 cmt. e (1937) ("Constructive Trust"). APLUS has made no statement to suggest that the legal remedies available to it are insufficient in the present case, and for this reason, this requested remedy is denied.