

# Private Offerings in New York: How an “Integration Clause” bars an Investor from Relying on the Offerors’ Representations

Anyone in business should be careful to note whether their contracts contain “integration clauses.” A so called integration clause makes the contract “king” in terms of the promises and representations of a party to a transaction. In other words, if there is an integration clause in a contract that says “X”, even if one party may have orally maintained “Y” throughout the dealings with the other party, the other party will likely be cut off from using the oral representation of “Y” against the other party, because the contract states “X”. Nowhere is this more true than in the private investment context.

One New York case in particular demonstrated how an integration clause can foreclose an investor claim against the company in which he invested in. In *Basel v. Traders Commercial Capital, LLC*, 50775U Slip op. (N.Y.Sup.Ct. 2006), a 2006 ruling from the New York Supreme Court in New York County, the Court upheld the integration clause contained in the Operating Agreement and Subscription Agreement, which both referenced a Private Placement Memorandum purporting to contain the pertinent and definitive information regarding the subject investment proposition (“PPM”)(all three together, the “Contract”), barring the Plaintiff from relying on Defendants’ alleged representations outside of the Contract..

## Anatomy of the Agreements:

In *Basel*, plaintiff Basel (“Plaintiff”) acquired membership in defendant Traders Commercial Capital, LLC (“Defendant” or “TCC”), an LLC that funds private day-traders. *Slip op.* at \*1. Plaintiff acquired membership in TCC pursuant to TCC’s Operating Agreement, the PPM, and Plaintiff’s Subscription Agreement. *Slip op.* at \*1.

### (i)Subscription Agreement:

Within the Subscription Agreement, Plaintiff acknowledged that he did not rely on any representations regarding the transaction made by any person except as contained in the PPM and Operating Agreement. *Slip op.* at \*2. Plaintiff also represented that he was furnished and carefully read the information in the PPM and Operating Agreement, and the information contained therein was the only information upon which he relied. *Slip op.* at \*2. The Subscription Agreement contained an integration clause, providing *inter alia* that it constitutes the entire agreement among the parties, and any other representations will not change, interpret, or restrict the provisions of the Subscription Agreement. Furthermore, Plaintiff represented that he understood that withdrawals from his capital account with TCC were subject to significant restrictions under the Operating Agreement. *Slip op.* at \*3.

### (ii) Operating Agreement:

Plaintiff represented that he had relied solely upon independent investigations made by Plaintiff and took into account risk factors related to membership in the Company. *Slip op.* at \*2. The Operating Agreement contained a similar integration clause as described above. *Slip op.* at \*2. The Operating Agreement

limited the investor's ability to withdraw from the capital account to 8.4% of his original contribution, at most. *Slip op.* at \*2. The limitation was to apply for a period of three years, further restricted to only instances in which the investor provided 30-days written notice. *Slip op.* at \*3. After June 2007, according to the provision, the investor was entitled to withdraw his entire membership amount ("Complete Withdrawal"). *Slip op.* at \*3. However, Complete Withdrawals were covered in another section of the Operating Agreement, restricting Complete Withdrawals to the first nine Class A members only. *Slip op.* at 3.

Plaintiff purchased his membership in June 2002. 11 interests had already been purchased prior to December 31, 2001, according to the PPM. *Slip op.* at \*3. Thus, Plaintiff did not qualify for a Complete Withdrawal.

### Causes of Action:

Plaintiff's claim all stemmed from the allegation that TCC manager Fred Miller and TCC represented to Plaintiff that he was one of the first nine investors, and, thus, making him eligible for Complete Withdrawal. *Slip op.* at \*3. Plaintiff alleged that TCC's failure to refund his initial investment constituted fraud, breach of contract, and conversion/co-mingling. The Court dismissed all of the claims by relying on the integration clauses contained in the Subscription Agreement and the Operating Agreement. *Slip op.* at \*4. Given the clauses, the Court held, Plaintiff was precluded from alleging that he relied on representations by TCC or Miller with respect to Complete Withdrawal of his investment. *Slip op.* at \*4.

### Conclusion:

For whatever purposes you are entering into a contract, make sure to note whether it contains an integration clause. Regardless of whether the other party makes oral or written representations to you outside of the contract, you may be barred from relying on those representations.

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