the jury his theory that the complainant's in-court identification of defendant was unreliable.

Accordingly, the order of the Appellate Division should be affirmed.

WACHTLER, C.J., and SIMONS, ALEXANDER, TITONE, HANCOCK and BELLACOSA, JJ., concur.

Order affirmed.

75 N.Y.2d 496

[496]CBS INC., Appellant,

v.

ZIFF-DAVIS PUBLISHING CO. et al., Respondents.

Court of Appeals of New York.

April 3, 1990.

Buyer of consumer magazine businesses brought action against seller and guarantor of purchase agreement for breach of express warranties. The Supreme Court, New York County, Evans, J., granted defendants' motion to dismiss claims, and buyer appealed. The Supreme Court, Appellate Division, affirmed. Buyer appealed by leave granted. The Court of Appeals, Hancock, J., held that seller was not relieved from any contractual obligation under warranties as to magazines' profitability, even though buyer and its accountants, prior to closing, questioned accuracy of financial information, and buyer, when it closed, did so without believing in or relying on truth of information.

Affirmed as modified.

Bellacosa, J., filed opinion dissenting in part.

1. Sales ⇐262

Critical question in determining reliance requirement in actions for breach of express warranties is not whether buyer believed in truth of warranted information, but whether buyer believed it was purchasing seller's promise as to its truth.

2. Sales ⇐441(3)

Once express warranty is shown to have been relied on as part of contract, right to be indemnified in damages for its breach does not depend on proof that buyer thereafter believed that assurances of fact made in warranty would be fulfilled; right to indemnification depends only on establishing that warranty was breached.

3. Sales ⇐262

If buyer has purchased seller's promise as to existence of warranted facts, seller should not be relieved of responsibility because buyer, after agreeing to make purchase, forms doubts as to existence of those facts.

4. Sales ⇐277

Fact that buyer has questioned seller's ability to perform as promised should not relieve seller of his obligations under express warranties when he thereafter undertakes to render promised performance.

5. Sales ⇐262

Seller of consumer magazine businesses was not absolved from its warranty obligations as to magazines' profitability, even though buyer and its accountants, prior to closing, questioned accuracy of financial information, and buyer closed without believing in or relying on truth of information.

6. Sales ⇐179(4)

While acceptance of goods by buyer precludes rejection of goods accepted under Uniform Commercial Code, acceptance of nonconforming goods does not itself impair any other remedy for nonconformity, including damages for breach of express warranty. McKinney's Uniform Commercial Code §§ 2–607(2), 2–714.

7. Sales ⇐85(1)

Buyer of consumer magazine businesses, by closing sale, waived breach of provision of purchase agreement, which was condition to closing, but not a representation or warranty.

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[497]Douglas P. Jacobs, Anthony M. Bongiorno and David Boies, New York City, for appellant.

Leon P. Gold, Robert J. Ward and John P. Stigi, III, New York City, for respondents.

[498]**OPINION OF THE COURT**

HANCOCK, Judge.

A corporate buyer made a bid to purchase certain businesses based on financial information as to their profitability supplied by the seller. The bid was accepted and the parties entered into a binding bilateral contract for the sale which included, specifically, the seller's express warranties as to the truthfulness of the previously supplied financial information. [499]Thereafter, pursuant to the purchase agreement, the buyer conducted its own investigation which led it to believe that the warranted information was untrue. The seller dismissed as meritless the buyer's expressions of disbelief in the validity of the financial information and insisted that the sale go through as agreed. The closing took place with the mutual understanding that it would not in any way affect the previously asserted position of either party. Did the buyer's manifested lack of belief in and reliance on the truth of the warranted information prior to the closing relieve the seller of its obligations under the warranties? This is the central question presented in the breach of express warranty claim brought by CBS Inc. (CBS) against Ziff–Davis Publishing Co. (Ziff–Davis).[1] The courts below concluded that CBS's lack of reliance on the warranted information was fatal to its breach of warranty claim and, accordingly, dismissed that cause of action on motion under CPLR 3211(a)(7). We granted leave to appeal and, for reasons stated hereinafter, disagree with this conclusion and hold that the warranty claim should be reinstated.

I

The essential facts pleaded—assumed to be true for the purpose of the dismissal motion—are these. In September 1984, Goldman Sachs & Co., acting as Ziff–Davis's investment banker and agent, solicited bids for the sale of the assets and businesses of 12 consumer magazines and 12 business publications. The offering circular, prepared by Goldman Sachs and Ziff–Davis, described Ziff–Davis's financial condition and included operating income statements for the fiscal year ending July 31, 1984 prepared by Ziff–Davis's accountant, Touche Ross & Co. Based on Ziff–Davis's representations in the offering circular, CBS, on November 9, 1984 submitted a bid limited to the purchase of the 12 consumer magazines in the amount of $362,500,000. This was the highest bid.

On November 19, 1984 CBS and Ziff–Davis entered into a binding bilateral purchase agreement for the sale of the consumer magazine businesses for the price of $362,500,000. [500]Under section 3.5 of the purchase agreement, Ziff–Davis warranted that the audited income and expense report of the businesses for the 1984 fiscal year, which had been previously provided to CBS in the offering circular, had "been prepared in accordance with generally accepted accounting principles" (GAAP) and that the report "present[ed] fairly the items set forth". Ziff–Davis agreed to furnish an interim income and expense report (Stub Report) of the businesses covering the period after the end of the 1984 fiscal year, and it warranted under section 3.6 that from July 31, 1984 until the closing, there had "not been any material adverse change in Seller's business of publishing and distrib-

1. Ziff–Davis is a privately held corporation and is a wholly owned subsidiary of defendant Ziff Corporation. Ziff Corp. is the guarantor of the purchase agreement at issue. For ease of reference, when addressing arguments raised by these defendants, I will refer to the defendants collectively as Ziff–Davis.

uting the Publications, taken as a whole". Section 6.1(a) provided that "all representations and warranties of Seller to Buyer shall be true and correct as of the time of the closing", and in section 8.1, the parties agreed that all "representations and warranties * * * shall survive the closing, notwithstanding any investigation made by or on behalf of the other party." In section 5.1 Ziff-Davis gave CBS permission to "make such investigation" of the magazine businesses being sold "as [it might] desire" and agreed to give CBS and its accountants reasonable access to the books and records pertaining thereto and to furnish such documents and information as might reasonably be requested.

Thereafter, on January 30, 1985 Ziff-Davis delivered the required Stub Report. In the interim, CBS, acting under section 5.1 of the purchase agreement, had performed its own "due diligence" examination of Ziff-Davis's financial condition. Based on this examination and on reports by its accountant, Coopers & Lybrand, CBS discovered information causing it to believe that Ziff-Davis's certified financial statements and other financial reports were not prepared according to GAAP and did not fairly depict Ziff-Davis's financial condition.

In a January 31, 1985 letter, CBS wrote Ziff-Davis that, "[b]ased on the information and analysis provided [to it, CBS was] of the view that there [were] material misrepresentations in the financial statements provided [to CBS] by Touche Ross & Co., Goldman, Sachs & Co. and Ziff-Davis". In response to this letter, Ziff-Davis advised CBS by letter dated February 4, 1985 that it "believe[d] that all conditions to the closing * * * were fulfilled", that "there [was] no merit to the position taken by CBS in its [Jan. 31, 1985] letter" and that the financial statements were properly prepared and fairly presented Ziff-Davis's financial condition. It also warned CBS that, since all conditions to closing were satisfied, closing was [501] required to be held that day, February 4, 1985, and that, if it "should fail to consummate the transactions as provided * * * Ziff-Davis intend[ed] *to pursue all of its rights and remedies as provided by law.*" (Emphasis added.)

CBS responded to Ziff-Davis's February 4, 1985 letter with its own February 4 letter, which Ziff-Davis accepted and agreed to. In its February 4 letter, CBS acknowledged that "a clear dispute" existed between the parties. It stated that it had decided to proceed with the deal because it had "spent considerable time, effort and money in complying with [its] obligations * * * and recogniz[ed] that [Ziff-Davis had] considerably more information available". Accordingly, the parties agreed "to close [that day] on a mutual understanding that the decision to close, and the closing, [would] not *constitute a waiver of any rights or defenses either of us may have*" (emphasis added) under the purchase agreement. The deal was consummated on February 4.

CBS then brought this action claiming in its third cause of action [2] that Ziff-Davis had breached the warranties made as to the magazines' profitability. Based on that breach, CBS alleged that "the price bid and the price paid by CBS were in excess of that which would have been bid and paid by CBS had Ziff-Davis not breached its representation and warranties." Supreme Court granted Ziff-Davis's motion to dismiss the breach of warranty cause of action because CBS alleged "it did not believe that the representations set forth in Paragraphs 3.5 and 3.6 of the contract of sale were true" and thus CBS did not satisfy "the law in New York [which] clearly requires that this reliance be alleged in a breach of warranty action." Supreme Court also dismissed CBS's fourth cause of action relating to an alleged breach of condition. The Appellate Division, First Department, unanimously affirmed for reasons stated by Supreme Court. There should be a modification so as to deny the dismissal motion with respect to the third cause of action for breach of warranties.

2. CBS's remaining claims, other than cause of action four (discussed *infra*, at 506, at 454 of 554 N.Y.S.2d, at 1002 of 553 N.E.2d) were also dismissed in prior orders by the lower courts. No issues have been raised as to these dismissed claims.

II

In addressing the central question whether the failure to plead reliance is fatal to CBS's claim for breach of express warranties, it is necessary to examine the exact nature of the [502]missing element of reliance which Ziff–Davis contends is essential. This critical lack of reliance, according to Ziff–Davis, relates to CBS's disbelief in the truth of the warranted financial information which resulted from its investigation *after* the signing of the agreement and *prior to* the date of closing. The reliance in question, it must be emphasized, does not relate to whether CBS relied on the submitted financial information in making its bid or relied on Ziff–Davis's express warranties as to the validity of this information when CBS committed itself to buy the businesses by signing the purchase agreement containing the warranties.

Under Ziff–Davis's theory, the reliance which is a necessary element for a claim of breach of express warranty is essentially that required for a tort action based on fraud or misrepresentation—i.e., a belief in the truth of the representations made in the express warranty and a change of position in reliance on that belief. Thus, because, prior to the closing of the contract on February 4, 1985, CBS demonstrated its lack of belief in the truth of the warranted financial information, it cannot have closed in reliance on it and its breach of warranty claim must fail. This is so, Ziff–Davis maintains, despite its unequivocal rejection of CBS's expressions of its concern that the submitted financial reports contained errors, despite its insistence that the information it had submitted complied with the warranties and that there was "no merit" to CBS's position, and despite its warnings of legal action if CBS did not go ahead with the closing. Ziff–Davis's primary source for the proposition it urges—that a change of position in reliance on the truth of the warranted information is essential for a cause of action for breach of express warranty—is language found in older New York cases such as *Crocker–Wheeler Elec. Co. v. Johns–Pratt Co.*, 29 A.D. 300, 51 N.Y.S. 793, *affd.* 164 N.Y. 593, 58 N.E. 1086.

CBS, on the other hand, maintains that the decisive question is whether it purchased the express warranties as bargained-for contractual terms that were part of the purchase agreement (*see, e.g., Ainger v. Michigan Gen. Corp.*, 476 F.Supp. 1209, 1225 [S.D.N.Y.1979], *affd.* 632 F.2d 1025 [2d Cir.1980]). It alleges that it did so and that, under these circumstances, the warranty provisions amounted to assurances of the existence of facts upon which CBS relied in committing itself to buy the consumer magazines. Ziff–Davis's assurances of these facts, CBS contends, were the equivalent of promises by Ziff–Davis to indemnify CBS if the assurances proved unfounded. Thus, as continuing promises to indemnify, the express contractual [503]warranties did not lose their operative force when, prior to the closing, CBS formed a belief that the warranted financial information was in error. Indeed, CBS claims that it is precisely because of these warranties that it proceeded with the closing, despite its misgivings.

As authority for its position, CBS cites, *inter alia, Ainger v. Michigan Gen. Corp. (supra)* and Judge Learned Hand's definition of warranty as "an assurance by one party to a contract of the existence of a fact upon which the other party may rely. It is intended precisely to relieve the promisee of any duty to ascertain the fact for himself; *it amounts to a promise to indemnify the promisee for any loss if the fact warranted proves untrue, for obviously the promisor cannot control what is already in the past.*" *(Metropolitan Coal Co. v. Howard,* 155 F.2d 780, 784 [2d Cir.1946] [emphasis added]; *see also, Groen v. Tri–O–Inc.*, 667 P.2d 598, 604 [Sup.Ct.Utah 1983]; *Au v. Au,* 63 Haw. 210, 263, 626 P.2d 173, 179–180 [Sup.Ct. Haw.1981]; 1 Corbin on Contracts § 14; 17A C.J.S. Contracts § 342, at 325.)

[1, 2] We believe that the analysis of the reliance requirement in actions for breach of express warranties adopted in *Ainger v. Michigan Gen. Corp. (supra)* and urged by CBS here is correct. The critical question is not whether the buyer

believed in the truth of the warranted information, as Ziff-Davis would have it, but "whether [it] believed [it] was purchasing the [seller's] promise [as to its truth]." (*Ainger v. Michigan Gen. Corp., supra,* at 1225; *see, e.g., Overstreet v. Norden Labs.,* 669 F.2d 1286, 1291 [6th Cir.1982]; *Pritchard v. Liggett & Myers Tobacco Co.,* 350 F.2d 479, 483 [3d Cir.1965], *cert. denied* 382 U.S. 987, 86 S.Ct. 549, 15 L.Ed.2d 475, *opn. amended* 370 F.2d 95 [3d Cir.1966], *cert. denied* 386 U.S. 1009, 87 S.Ct. 1350, 18 L.Ed.2d 436; *CPC Intl. v. McKesson Corp.,* 134 Misc.2d 834, 513 N.Y.S.2d 319 [Sup.Ct., N.Y. County].) This view of "reliance"—i.e., as requiring no more than reliance on the express warranty as being a part of the bargain between the parties—reflects the prevailing perception of an action for breach of express warranty as one that is no longer grounded in tort, but essentially in contract. (*See, Ainger v. Michigan Gen. Corp., supra,* at 1225; *Randy Knitwear v. American Cyanamid Co.,* 11 N.Y.2d 5, 10–11, n. 2, 226 N.Y.S.2d 363, 181 N.E.2d 399; *see,* 8 Williston, Contracts § 970, at 485–488 [3d ed.].) The express warranty is as much a part of the contract as any other term. Once the express warranty is shown to have been relied on as part of the contract, the right to be indemnified in damages for its breach does not depend on proof that the buyer thereafter believed that the assurances of fact made in the warranty would be fulfilled. The right to indemnification |504 depends only on establishing that the warranty was breached (*see, Glacier Gen. Assur. Co. v. Casualty Indem. Exch.,* 435 F.Supp. 855, 860 [D.Mont.1977] [citing *Metropolitan Coal Co. v. Howard, supra*]; 1 Corbin, Contracts § 14).

[3, 4] If, as is allegedly the case here, the buyer has purchased the seller's promise as to the existence of the warranted facts, the seller should not be relieved of responsibility because the buyer, after agreeing to make the purchase, forms doubts as to the existence of those facts (*see, Ainger v. Michigan Gen. Corp., supra,* at 1234; *see also, Metropolitan Coal Co. v. Howard, supra,* at 781; *Glacier Gen. Assur. Co. v. Casualty Indem. Exch.,* 435 F.Supp. 855, 860–861, *supra;* 8 Williston, Contracts § 973 [3d ed.]). Stated otherwise, the fact that the buyer has questioned the seller's ability to perform as promised should not relieve the seller of his obligations under the express warranties when he thereafter undertakes to render the promised performance.

The cases which Ziff-Davis cites as authority for the application of its tort-action type of reliance requirement do not support the proposition it urges. None are similar to the case at bar where the warranties sued on are bargained-for terms in a binding bilateral purchase contract. In most, the basis for the decision was a factor other than the buyer's lack of reliance such as, for example, insufficient proof of the existence of the alleged express warranty (*see, e.g., Scaringe v. Holstein,* 103 A.D.2d 880, 881, 477 N.Y.S.2d 903; *Friedman v. Medtronic,* 42 A.D.2d 185, 190, 345 N.Y.S.2d 637; *Crocker-Wheeler Elec. Co. v. Johns-Pratt Co.,* 29 A.D. 300, 51 N.Y.S. 793, 164 N.Y. 593, 58 N.E. 1086, *supra; Ellen v. Heacock,* 247 App.Div. 476, 477, 286 N.Y.S. 740) or that the warranty sued upon was expressly excluded by terms of the contract (*see, e.g., Caribbean Atl. Airlines v. Rolls-Royce Ltd.,* 39 A.D.2d 673, 331 N.Y.S.2d 921, *affd. without opn.* 31 N.Y.2d 798, 339 N.Y.S.2d 457, 291 N.E.2d 582) or that there was insufficient proof that the express warranty had been breached (*see, e.g., 200 E. End Ave. Corp. v. General Elec. Co.,* 5 A.D.2d 415, 172 N.Y.S.2d 409, *aff'd. without opn.* 6 N.Y.2d 731, 185 N.Y.S.2d 816, 158 N.E.2d 508); and some involve implied rather than express warranties (*see, e.g., Millens & Sons v. Vladich,* 28 A.D.2d 1045, 283 N.Y.S.2d 809, *affd. without opn.* 23 N.Y.2d 998, 298 N.Y.S.2d 1002, 246 N.E.2d 760).

Ziff-Davis repeatedly cites and the dissent relies upon language contained in the Appellate Division's opinion in *Crocker-Wheeler Elec. Co. v. Johns-Pratt Co. (supra)* which dealt with a claimed breach of an express warranty pertaining to the fitness of insulating material for a certain use. The court held that there was no actionable express warranty claim

|505because the seller *made no warranty with respect to use of the material.* The language which Ziff–Davis quotes as a categorical proposition that should control the case before us—i.e., "[i]t is elementary that, in order to entitle the plaintiff to maintain an action for breach of an express warranty, *it must be established that the warranty was relied on*" (emphasis added)—is contained in dictum (29 App.Div., at 302, 51 N.Y.S. 793).[3]

[5, 6] Viewed as a contract action involving the claimed breach of certain bargained-for express warranties contained in the purchase agreement, the case may be summarized this way. CBS contracted to buy the consumer magazine businesses in consideration, among other things, of the reciprocal promises made by Ziff–Davis concerning the magazines' profitability. These reciprocal promises included the express warranties that the audited reports for the year ending July 31, 1984 made by Touche Ross had been prepared according to GAAP and that the items contained therein were fairly presented, that there had been no adverse material change in the business after July 31, 1984, and that all representations and warranties would "be true and correct as of the time of the closing" and would "survive the closing, notwithstanding any investigation" by CBS.

Unquestionably, the financial information pertaining to the income and expenses of the consumer magazines was relied on by CBS in forming its opinion as to the value of the businesses and in arriving at the amount of its bid; the warranties pertaining to the validity of this financial information were express terms of the bargain and part of what CBS contracted to purchase. CBS was not merely buying identified consumer magazine businesses. It was buying businesses which it believed to be of a certain value based on information furnished by the seller which the seller warranted to be true. The determinative question is this: should Ziff–Davis be relieved from any contractual obligation under these warranties, as it contends that it should, because, prior to the closing, CBS and its accountants questioned the accuracy of the financial information and because CBS, when it closed, did so without *believing in* or *relying on* the truth of the information?

We see no reason why Ziff–Davis should be absolved from its |506warranty obligations under these circumstances. A holding that it should because CBS questioned the truth of the facts warranted would have the effect of depriving the express warranties of their only value to CBS —i.e., as continuing promises by Ziff–Davis to indemnify CBS if the facts warranted proved to be untrue (*see, Metropolitan Coal Co. v. Howard, supra,* at 784).[4] Ironically, if Ziff–Davis's position were adopted, it would have succeeded in pressing CBS to close despite CBS's misgivings and, at the same time, would have succeeded in *defeating* CBS's breach of warranties action because CBS harbored these *identical misgivings.*[5]

[7] We agree with the lower courts that CBS's fourth cause of action, for breach of section 6.1(f) of the purchase agreement,

3. We note that this dictum has been criticized (*see,* 8 Williston, Contracts § 973, at 501 [3d ed.]) and to the extent *Crocker–Wheeler* can be broadly read to require the rule of "reliance" urged by Ziff–Davis in this case it is not to be followed.

4. In this regard, analogy to the Uniform Commercial Code is "instructive". While acceptance of goods by the buyer precludes rejection of the goods accepted (*see,* UCC 2–607 [2]), the acceptance of nonconforming goods does not itself impair any other remedy for nonconformity (*see,* UCC 2–607 [2]), including damages for breach of an express warranty (*see,* UCC 2–714; *see generally,* 1 White and Summers, Uniform Commercial Code § 10–1, at 501–502 [Practitioner's 3d ed.]; *see also, Atwater & Co. v. Panama R.R. Co.,* 255 N.Y. 496, 501–502, 175 N.E. 189).

5. We make but one comment on the dissent: in its statement that our "holding discards reliance as a necessary element to maintain an action for breach of an express warranty" (dissenting opn., at 506, at 455 of 554 N.Y.S.2d, at 1003 of 553 N.E.2d) the dissent obviously misses the point of our decision. We do not hold that no reliance is required, but that the required reliance is established if, as here, the express warranties are bargained-for terms of the seller.

was properly dismissed inasmuch as section 6.1(f) was a condition to closing, not a representation or warranty, and was waived by CBS.

The order of the Appellate Division should be modified, with costs to the appellant, by denying the motion to dismiss the third cause of action for breach of warranty and the order should be otherwise affirmed.

BELLACOSA, Judge (dissenting).

The issue is whether a buyer may sue a seller, after consummating a business transaction, for breach of an express warranty on which the buyer chose not to rely. The holding discards reliance as a necessary element to maintain an action for breach of an express warranty. Predictability and reliability with respect to commercial transactions, fostered by 90 years of precedent, are thus sacrificed. I respectfully dissent and would affirm the order of the Appellate Division unanimously affirming Supreme Court's application of the sound and well-settled rule.

Plaintiff CBS contracted to purchase defendant Ziff-Davis's |507consumer magazine group pursuant to an Asset Purchase Agreement (APA). CBS specifically negotiated *the right to rely* on its own accountant's representations in assessing the validity of the financial information which had been, and would be, provided to CBS by Ziff-Davis (§ 5.1 of the APA). Given the factual and fiscal complexity of this $362,500,000 acquisition, CBS chose to rely on its own investigation. What the CBS inspectors found in the Ziff-Davis books differed significantly from the financial picture the seller had painted. CBS notified Ziff-Davis of the discrepancies by letter on January 31, 1985, four days before the closing date. Despite its protest to the contrary, it had a contractual right under section 6.1(a) of the APA to avert the closing if "all representations and warranties of Seller to Buyer" were not true on the closing date. Clearly then, CBS chose to rely on the results of its own investigation and made a business judgment to consummate the purchase rather than cancel the deal. It took the business risk of a big deal and tried by this subsequent litigation to mitigate whatever risk, if any, inured from that choice; in other words, CBS wanted to have its cake and eat it, too.

Supreme Court determined CBS did not rely on the Ziff-Davis warranties. The Appellate Division made the same determination and the nonreliance is acknowledged by the majority (majority opn., at 499, at 450 of 554 N.Y.S.2d, at 998 of 553 N.E. 2d). The reliance element is thus unnecessarily excised as a matter of law from the legal proposition governing and defining the cause of action. If I am "missing the point" (majority opn., at 506, n. 5, at 454, n. 5 of 554 N.Y.S.2d, at 1002, n. 5 of 553 N.E.2d), I believe it is because that is where the appellant's argument and the state of the law have led me.

Part of CBS's argument is that it should prevail because the closing day letter purports to reserve its rights as to the Ziff-Davis warranties and section 8.1 of the APA purports to be a kind of nonmerger survival clause. On a *sui generis* contract basis therefore, without affecting the traditional reliance element of the cause of action, this argument is enticing. Nevertheless, I conclude—and the majority apparently agrees in this respect—that the argument is not dispositive. The warranties given to CBS created a right to rely on the financial data as part of the sales agreement, not a right not to rely on them, then consummate the deal and then sue on them besides. These aspects of the agreement, therefore, merely manifested the parties' intent not to allow the closing to operate as a waiver of CBS's right to rely—a right which was surrendered *before* the closing. If this issue were dispositive, it |508would render the case and the contract entirely *sui generis* and there would be no need to address or alter the long-standing test with its reliance element. However, the court confronts and decides the broader issue, and on that we see and understand the case all too well in a fundamentally different way.

"It is elementary that, in order to entitle the plaintiff to maintain an action for

breach of an express warranty, it must be established that the warranty was relied on." (*Crocker–Wheeler Elec. Co. v. Johns–Pratt Co.*, 29 App.Div. 300, 302, 51 N.Y.S. 793, *aff'd* 164 N.Y. 593, 58 N.E. 1086.) This plain language proposition has been recognized by this court and by the Appellate Division (*see, Randy Knitwear v. American Cyanamid Co.*, 11 N.Y.2d 5, 9, 11, 15–16, 226 N.Y.S.2d 363, 181 N.E.2d 399; *see also, County Trust Co. v. Pilmer Edsel, Inc.*, 14 N.Y.2d 617, 621, 249 N.Y. S.2d 170, 198 N.E.2d 365 [Burke, J., dissenting]; *see, Butler v. Caldwell & Cook*, 122 A.D.2d 559, 560, 505 N.Y.S.2d 288, *lv. denied* 73 N.Y.2d 709, 540 N.Y.S.2d 1004, 538 N.E.2d 356, *appeal dismissed* 73 N.Y.2d 849, 537 N.Y.S.2d 483, 534 N.E.2d 321; *Scaringe v. Holstein*, 103 A.D.2d 880, 477 N.Y.S.2d 903; *Zucker v. Siegel*, 54 A.D.2d 979, 388 N.Y.S.2d 667; *Friedman v. Medtronic, Inc.*, 42 A.D.2d 185, 190, 345 N.Y.S.2d 637; *see also, Hellman v. Kirschner*, 191 N.Y.S. 202 [App.Term, Lehman, J.]). The majority declares the oft-quoted principle of *Crocker–Wheeler* "is not to be followed" (majority opn., at 505, n. 3, at 454, n. 3 of 554 N.Y.S.2d, at 1002, n. 3 of 553 N.E.2d), based in part on a dormant tort/contract categorical bifurcation drawn largely from *Ainger v. Michigan Gen. Corp.*, 476 F.Supp. 1209). Also, part of the justification for this departure from stare decisis in the field of common-law commercial transactions—where the burden for change is very high—is Professor Williston's "criticism" of *Crocker–Wheeler*. Examination of the complete section of the quoted text, however, discloses a significant qualification: "[I]t is generally and rightly held that inspection by the buyer does not excuse the seller from liability for * * * an express warranty, *if the difference between the goods and the description was not detected*" (8 Williston, Contracts § 973, at 501 [3d ed.] [nn omitted; emphasis added]). "The difference" was definitively detected here by CBS pursuant to its express contractual right to personally assess the financial data.

In exchange for the long-standing, well-regarded and well-founded rule, New York law is subordinated to a theory advanced in *Ainger v. Michigan Gen. Corp.*, 476 F.Supp., *supra*, at 1226). Among the problems of this approach, however, is that in affirming *Ainger* the Court of Appeals for the Second Circuit emphasized the limited impact of the District Court's categorical discussion of the precise issue before us. After stating that the District Court Judge's "finding of reliance [509] made a discussion of New York law unnecessary," the Second Circuit said "[b]ecause there was reliance in this case, we will not speculate how the New York courts would decide a case in which there was none." (*Ainger v. Michigan Gen. Corp.*, 632 F.2d 1025, 1026, n. 1.) The reliance on *CPC Intl. v. McKesson Corp.* 134 Misc.2d 834, 513 N.Y.S.2d 319 also seems misplaced. Again, the trial court in that case extensively discussed the reliance question. However, the appellate courts in an entirely different procedural review significantly minimized the discussion of the pertinent subject matter (*see, CPC Intl. v. McKesson Corp.*, 70 N.Y.2d 268, 285, 519 N.Y.S.2d 804, 514 N.E.2d 116 ["plaintiff, in contracting to purchase (defendant's corporation), relied solely on the warranties"], 120 A.D.2d 221, 229, 507 N.Y.S.2d 984 ["plaintiff relied solely upon the express warranties"]). Lack of reliance, therefore, was not part of the holdings in *Ainger* or *CPC*, even at their trial level citations by the majority. Yet those cases are accorded significant deference on the critical issue and they override superior longer-standing sources.

Finally, while I agree that analogy to the Uniform Commerical Code is "instructive" (majority opn., at 506, n. 4, at 454, n. 4 of 554 N.Y.S.2d, at 1002, n. 4 of 553 N.E.2d), I believe the directly on-point express warranty section, UCC 2–313, emphasizes the need to stand by our precedents and thus affirm. Official comment 3 of that section indicates that were this a transaction governed by the Uniform Commercial Code, CBS's nonreliance would take the seller's warranties out of the agreement, especially after a buyer consummates the deal with full knowledge and with open disagreement

concerning key financial data (UCC 2–313, comment 3; 1 White and Summers, Uniform Commercial Code § 9–5, at 450–451 [Practitioner's 3d ed.]).

Thus, we are presented with no binding or persuasive authorities sufficient to warrant overturning a venerable rule of the kind used especially in the commercial world to reliably order affairs in such a way as to reasonably avoid litigation (*see*, Cardozo, Selected Writings of Benjamin Nathan Cardozo, The Growth of the Law, at 236 ["In this department of activity (commercial law), the current axiology still places stability and certainty in the forefront of the virtues."]). Allowing CBS to consummate the deal, and then sue on warranted financial data it personally investigated and verified as wrong beforehand, unsettles the finality, "stability and certainty" of commercial transactions and business relationships.

[510]CBS chose—for business reasons it knows best—to complete its significant acquisition at the impressively high agreed price with its cyclopean eye wide open. That tips the scales in favor of retaining and applying the traditional rule requiring a reliance element to sue for breach of warranty.

I would affirm the order in its entirety and leave the law where it was and the parties where they put themselves.

SIMONS, ALEXANDER and TITONE, JJ., concur with HANCOCK, J.

BELLACOSA, J., dissents in part and votes to affirm in a separate opinion.

WACHTLER, C.J., and KAYE, J., taking no part.

Order modified, etc.

75 N.Y.2d 511

[511]**In the Matter of Alan KANE, Petitioner.**

Harold Freedman et al., Respondents;

Irving Tenenbaum, Appellant.

Court of Appeals of New York.

April 5, 1990.

On appeal from order of the Supreme Court, Nassau County, Kelly, J., denying motion to vacate order terminating receivership and failing to rule on motion for leave to commence action against receiver for payment of excessive commissions, the Supreme Court, Appellate Division, 132 A.D.2d 610, 517 N.Y.S.2d 771, reversed and remitted. The Supreme Court, Nassau County, Robbins, J., then entered judgment in favor of dissolving company. Receiver appealed. The Supreme Court, Appellate Division, 151 A.D.2d 672, 543 N.Y.S.2d 934, affirmed as modified. On appeal, the Court of Appeals, Bellacosa, J., held that court-appointed receiver could not, as part of overall settlement between two litigating shareholders of close corporation, privately negotiate fee without court approval in amount exceeding scheduled maximum fixed by statute.

Affirmed.

Receivers ⇐198(1)

Court-appointed receiver may not, as part of overall settlement between two litigating shareholders of close corporation, privately negotiate fee without court approval in amount exceeding scheduled maximums fixed by statute. McKinney's Business Corporation Law § 1217.

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[512]A. Thomas Levin, Mineola, for appellant.

William H. Pauley, III, Charles D. Cunningham and Lyle D. Brooks, New York City, for Harold Freedman and another, respondents.