To Be Argued By:
ROBERT W. GAFFEY

New York County Clerk's Index No. 600635/02

New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

DUANE READE, a General Partnership,

Plaintiff and Counterclaim-Defendant-Respondent,

—against—

CARDINAL HEALTH, INC., CARDINAL SYRACUSE, INC., BINDLEY, WESTERN INDUSTRIES, INC., CARDINAL DISTRIBUTION and MEDICINE SHOPPE INTERNATIONAL, INC.,

Defendants and Counterclaim-Plaintiffs,

—and—

JAMES W. DALY, INC. and WHITMIRE DISTRIBUTION CORPORATION,

Defendants and Counterclaim-Plaintiffs-Appellants.

APPELLANTS' BRIEF

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Defendants and counterclaim plaintiffs, James W. Daly, Inc. and Whitmire Distribution Corporation (collectively, "Cardinal Distribution") appeal from an order of the Supreme Court, New York County (Hon. Richard B. Lowe, III, J.S.C.), entered on January 20, 2005. The order appealed from denied Cardinal Distribution's motion for leave to amend its counterclaims to assert a cause of action for breach of contract as an alternative theory of recovery to its unjust enrichment claim against respondent Duane Reade, plaintiff and counterclaim defendant.

PRELIMINARY STATEMENT

This appeal follows a decision issued from the bench on January 20, 2005, in which the lower court erroneously ruled that it lacked authority to give Cardinal Distribution leave to amend its counterclaims pursuant to CPLR 3025(b) and CPLR 3025(c). Under well-settled rules providing for liberal amendments to the pleadings, Cardinal Distribution's motion should have been granted.

Cardinal Distribution has among its current counterclaims in this action a claim for unjust enrichment arising from Duane Reade's failure to pay for nearly $9 million in pharmaceutical products. In the proceedings below, Cardinal Distribution sought leave to amend its counterclaims to assert an alternative theory of recovery, pursuant to CPLR 3025(b) and 3025(c), that Duane Reade breached a supply agreement when it failed to pay for these products. All of the facts in

support of the proposed claim have already been pleaded by Cardinal Distribution—as the predicate for the unjust enrichment claim. And those allegations have been the subject of extensive discovery in this action. The counterclaims also assert other claims for breach of the same supply agreement. In these circumstances, Duane Reade could not (and did not) show any prejudice that would have resulted from the proposed amendment.

In opposition to Cardinal Distribution's motion for leave to amend, Duane Reade relied upon this Court's narrow ruling on a prior appeal, concerning a separate claim for account stated, to argue for a blunt, unsupportable rule that "the time to amend ha[d] passed" after entry of partial summary judgment on that single claim. To make that argument, Duane Reade had to completely abandon the position it had successfully taken on the prior appeal, when it asserted, *inter alia,* that (i) the claim for account stated was "entirely irrelevant" to any claim for breach of the supply agreement, (ii) the "appeal concern[ed] an account stated claim only," and (iii) it would be "palpably false" to suggest that the two claims were in any way related. (R 283, 285, 296)

The lower court nevertheless adopted Duane Reade's unsupportable rule. It held that this Court's decision directing partial summary judgment on the account stated claim operated as res judicata to preclude Cardinal Distribution from amending its counterclaims to assert a separate, and completely different, cause of

action for breach of contract. According to the lower court, this Court's decision was an unspecified "determination on the facts" and "as a matter of law" precluded any amendment to Cardinal Distribution's counterclaims. (R 21)

That was fundamental error. This Court's prior ruling addressed only an element unique to a claim for account stated: whether the defendant agreed to the amount stated. And the Court "determin[ed]" only a single fact: that Cardinal Distribution could not establish that the parties had "agreed upon the balance of indebtedness." (R 215) This Court's decision on the prior appeal did not rule on, or even address, whether Cardinal Distribution should be permitted to assert a breach of contract claim or whether the proof would support such a claim. For that matter, the Court did not address any aspect of the parties' contract except to say that Cardinal Distribution's unjust enrichment claim should not be dismissed because "[t]here is at least a question of fact as to whether a contract governs the purchases at issue." (R 215)

The fundamental flaw in the lower court's order is that it ignored the extremely limited scope of this Court's prior order in this action. And, in any event, the doctrine of res judicata does not apply within an action. As Professor Siegel explains, "Since the doctrine of res judicata technically requires a final judgment on the merits in one action and an attempted relitigation in a second

action, *it has no application within an action.*" David D. Siegel, NEW YORK PRACTICE § 448, at 723 (3d ed. 1999) (emphasis added).

At best, law of the case determines the preclusive effect of a ruling made within an action, such as this Court's ruling directing partial summary judgment on the account stated claim. Law of the case, not res judicata, "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment." *People v. Evans*, 94 N.Y.2d 499, 502, 706 N.Y.S.2d 678, 680 (2000) (emphasis in original); *see also id.* (law of the case is "'a kind of intra-action res judicata"') (quoting Siegel, NEW YORK PRACTICE § 448, at 723). Here, of course, this Court's order on the account stated claim is clearly not "law of the case" on whether Cardinal Distribution may assert a breach of contract claim. That claim was not even mentioned in this Court's prior decision, let alone ruled upon in any way.

The lower court thus had the power to permit Cardinal Distribution to amend its counterclaims and should have exercised it. Where, as here, a party seeks to amend its pleading to assert an alternative theory of recovery based on already-pleaded facts, and the party opposing the motion cannot demonstrate any prejudice, a court abuses its discretion in denying leave to amend. The lower court's order should therefore be reversed, and Cardinal Distribution should be permitted to

amend its counterclaims to assert the proposed cause of action for breach of contract, as an alternative to its existing cause of action for unjust enrichment.

STATEMENT OF QUESTIONS PRESENTED

The issue on this appeal is whether the lower court should have granted Cardinal Distribution leave to amend its counterclaims to assert a cause of action for breach of contract, where Cardinal Distribution has already pleaded the facts in support of this alternative theory of relief and Duane Reade did not show any prejudice if the amendment were granted. That issue breaks down as follows:

A. Did this Court's order directing partial summary judgment for Duane Reade on an account stated claim strip the lower court of its power to grant Cardinal Distribution leave to amend to assert a breach of contract claim under the doctrine of res judicata, a doctrine that operates to preclude a claim only if it has been litigated in a separate, prior action and generally only after final judgment in the prior action? The lower court concluded that as a matter of law it did not have the power to grant Cardinal Distribution's motion.

B. Even if res judicata could be invoked in the circumstances described above, does this Court's order on the prior appeal operate to bar a cause of action for breach of contract, where the necessary elements of proof and evidence required to sustain an account stated claim and a breach of contract claim vary materially and, indeed, Duane Reade itself previously argued to this Court,

successfully, that "[w]hether Duane Reade breached the underlying . . . agreement . . . is entirely irrelevant" to an account stated claim. (R 283) Despite controlling precedent to the contrary, the lower court answered that res judicata barred the proposed amendment.

C. Finally, should the lower court have granted Cardinal Distribution's motion for leave to amend its counterclaims, under either CPLR 3025(b) or CPLR 3025(c), where Duane Reade made no showing of prejudice or surprise and no further discovery would be necessary if the amendment were allowed? The lower court noted that Duane Reade could not show unfair prejudice or surprise, but nonetheless held it lacked the power to grant Cardinal Distribution's motion.

STATEMENT OF THE CASE

A. The Nature of the Case

This action arises from a five-year Wholesale Supply Agreement (the "WSA") under which Cardinal Distribution agreed to sell and Duane Reade agreed to buy pharmaceutical products. Slightly more than one year into its five-year term, Duane Reade terminated the WSA and left an unpaid balance for pharmaceutical products that it had purchased from Cardinal Distribution. (R. 125-129) Specifically, Cardinal Distribution contends that Duane Reade failed to pay for over $9 million worth of products purchased under the WSA during September and October 2001. (Id.) Duane Reade admits that the WSA is a valid contract and

does not dispute that it purchased the products at issue. But Duane Reade contends that there is a dispute as to the precise amount it owes Cardinal Distribution for those products, asserting that Cardinal Distribution allegedly failed to give Duane Reade a credit of approximately $200,000 for such things as returned goods, manufacturers' credits, and promotional allowances. (R 125-133)

Duane Reade's purchase of goods from Cardinal Distribution and its failure to pay for some of those goods has been at the center of this case since the outset. (R 126, "By the fall of 2001, the parties' business relationship had deteriorated, and a dispute arose as to the amount of money that Duane Reade owed Cardinal for pharmaceutical products that Duane Reade had ordered, and had been delivered to it.") Indeed, the formation of, the parties' performance under, and Duane Reade's termination of the WSA is the factual predicate for Cardinal Distribution's counterclaims as already pleaded.[1] (R 93-124)

B. Cardinal Distribution's Counterclaims

In its counterclaims, Cardinal Distribution alleged two theories for recovering the amounts due for the products Duane Reade purchased. First, Cardinal proceeded on a claim for account stated, contending that it had rendered complete and accurate account statements for the products Duane Reade purchased

[1] Cardinal Distribution has asserted other claims for breach of the WSA, for Duane Reade's failure to pay certain termination fees and failure to meet minimum purchase requirements. (R 113-119)

between September 25, 2001 and October 16, 2001. (R 120-1) As an alternative theory of recovery, Cardinal Distribution also asserted a claim for unjust enrichment, based upon Duane Reade's receipt of the products and its failure to pay for them. (R 121) As described in more detail below, the proposed amended counterclaim at issue on this appeal, for breach of the WSA, is an alternative to this claim for unjust enrichment.

C. Cardinal Distribution's Motion for Partial Summary Judgment on the Account Stated Claim

Cardinal Distribution moved for partial summary judgment on both the account stated and unjust enrichment causes of action. In opposing the account stated prong of the motion, Duane Reade did not dispute that it had purchased the products at issue. Instead, Duane Reade contended that it had not assented to the precise amount it owed, because it had objected that various credits should have reduced the $8.86 million due by approximately $200,000. The lower court agreed that Duane Reade had not separately agreed to the account stated, and it denied Cardinal Distribution's summary judgment motion on the sole ground that there was an "issue of fact as to the amount due." (R 132) For the same reason, the Court also denied Duane Reade's cross-motion to dismiss the account stated claim, leaving both alternative theories, for account stated and unjust enrichment, intact for trial. (*Id.*)

Both parties appealed the lower court's order. On appeal, this Court held that Duane Reade's dispute about the precise amount it owed Cardinal Distribution required dismissal of the account stated claim. The Court's holding was based on the single and narrow ground that an "agreed upon . . . balance of indebtedness," a unique element of a claim for account stated, could not be shown here. (R 215) This Court cited only one piece of evidence in support of its holding: a letter dated November 7, 2003 that referred to a dispute about the amount owed for "trade payables." (R 214-215) The Court also affirmed the lower court's denial of Cardinal Distribution's motion for summary judgment on its unjust enrichment cause of action, on the ground that "[t]here is at least a question of fact as to whether a contract [the WSA] governs the purchases at issue." (*Id.*) The Court did not, however, dismiss the unjust enrichment claim, leaving for trial the issue of whether the WSA governed Duane Reade's refusal to pay for the goods Cardinal Distribution provided. (*Id.*)

D. Cardinal Distribution's Motion for Leave to Amend its Counterclaims to Assert a Breach of Contract Claim

On December 14, 2004, Cardinal Distribution moved to amend its counterclaims to assert, as an alternative to its unjust enrichment claim, a cause of action for breach of contract for Duane Reade's failure to pay for products it received from Cardinal Distribution pursuant to the WSA. Cardinal Distribution based its motion on a line of settled and controlling authority holding that a motion

for leave to amend should be granted where, as here, the proposed amended pleading asserts an alternative theory of recovery on the basis of already-pleaded facts and claims.

Cardinal Distribution also showed, on similar grounds, that Duane Reade could not demonstrate any prejudice if the amendment were permitted, because all of the facts concerning Duane Reade's purchases under the WSA were set out in Cardinal Distribution's original pleading and no further discovery would be necessary if the amendment were granted. Indeed, in the proposed amended counterclaims, Cardinal Distribution relied upon the same factual allegations of the original counterclaims, with only the minor exceptions of reciting (i) the specific payment provisions of the WSA (R 52); and (ii) the amount of third-party credits Cardinal Distribution passed along to Duane Reade after the WSA was terminated, which lowered the total amount due by $618,793.54 (R 61).

In opposing the motion, Duane Reade argued that the lower court was precluded as a matter of law from granting Cardinal Distribution leave to amend its counterclaims. Duane Reade's principal argument, and the apparent ground on which the lower court denied the motion, was that the doctrine of res judicata barred assertion of a breach of contract claim in light of this Court's order directing entry of partial summary judgment for Duane Reade on the account stated claim. In reply, Cardinal Distribution argued that res judicata did not apply because this

Court's ruling did not purport to address the merits of the entire dispute between the parties in this action, but only the narrow issue—unique to a claim for account stated—of whether Cardinal Distribution could prove a separate agreement as to the amount due.

Cardinal Distribution also argued that, in any event, res judicata was inapplicable here because the proof and elements of an account stated and breach of contract are distinct. This assertion was exactly the same position Duane Reade itself had successfully taken on the prior appeal. Duane Reade told this Court *then* that "[t]he only relevant inquiry" was "whether Duane Reade agreed to the *statement of account* sued upon." (R 283, emphasis in original).) Indeed, until it later reversed course in opposition to the motion to amend, Duane Reade said that whether it had "breached the underlying supply agreement . . . [was] *entirely irrelevant*" to whether Duane Reade was entitled to partial summary judgment on the account stated claim. (R 283, emphasis added) Duane Reade even invited Cardinal Distribution to assert a breach of contract claim in this action: "Cardinal's remedy for that contention [breach of the supply agreement] is to pursue a breach of contract claim." (*Id.*; *see also* R 285, "[T]his appeal concerns an account stated claim only . . . . If a party has a valid claim for payment, it could assert a contract claim or the myriad of other claims that could provide recovery for a debt due.")

E. The Lower Court's Order Denying Cardinal Distribution's Motion for Leave to Amend

The court held oral argument on Cardinal Distribution's motion for leave to amend on January 20, 2005. The lower court noted the "prevailing preference" for "liberal granting of the request to amend the pleadings no matter what stage" (R 14), a preference that is reflected in CPLR 3025(b) ("Leave shall be given freely upon such terms as may be just" and "at any time") and CPLR 3025(c) ("The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just . . . ."). The lower court then made clear that, because the predicate facts for the proposed breach of contract claims had already been pleaded, Duane Reade could not demonstrate any unfair surprise if the amendment were granted. Justice Lowe stated to Duane Reade's counsel: "Unless you can describe to me the prejudice that you will suffer as a result of this, I will grant the application. And don't tell me that you're being shocked on the matter. It's because the facts remain the same . . . ." (R 14)

Duane Reade avoided answering Justice Lowe's question and instead asserted that the lower court lacked the authority to permit an amendment, because, according to Duane Reade, "res judicata attache[d]" after this Court's order directing partial summary judgment for Duane Reade on the account stated claim. (R 16) Although this Court's prior decision never mentioned the WSA or whether Duane Reade breached it, the lower court then ruled, "On a motion for summary

judgment it's a determination on the facts, and so as a matter of law you cannot plead alternative theory." (R 21) This appeal followed.

STANDARD OF REVIEW

An order granting or denying leave to amend a pleading pursuant to CPLR 3025(b) or (c) is ordinarily reviewed for abuse of discretion, under the guiding principle that leave to amend must be freely allowed unless the opponent of the motion shows unfair prejudice or surprise. *See McCaskey, Davies Assoc., Inc. v. New York City Health & Hosp. Corp.*, 59 N.Y.2d 755, 757, 463 N.Y.S.2d 434 (1983). However, where, as here, the Court's basis for denying leave to amend is the purported res judicata effect of a prior judgment, this Court should review the order *de novo*. *See Peterson v. Forkey*, 50 A.D.2d 774, 775, 376 N.Y.S.2d 560, 561 (1st Dep't 1975) ("[A]pplication of the doctrine of Res judicata . . . is a question of law and does not rest in the court's discretion."); *see also Bannon v. Bannon*, 270 N.Y. 484, 490 (1936) ("The question of whether such rules [res judicata and collateral estoppel] should be applied to a particular decision is from its nature a question of law and does not rest in the discretion of the court.").

It is also reversible error to deny a motion for leave to amend where the opponent has not demonstrated that any unfair prejudice will result if the amendment were allowed. *See Fahey v. County of Ontario*, 44 N.Y.S.2d 934, 935, 408 N.Y.S.2d 314, 315 (1978) ("Since respondents cannot claim here such

prejudice or surprise, the court below abused its discretion as a matter of law in denying appellant's motion to amend."); *Equitable Life Assurance Soc'y of the United States v. Nico Constr. Co.*, 245 A.D.2d 194, 196, 666 N.Y.S.2d 602, 604 (1st Dep't 1997) ("[I]t was an abuse of discretion to deny . . . motion to conform the pleadings to the proof to allege a cause of action against [defendant] for breach of contract . . . [as defendant] cannot claim prejudice."); *see also* Siegel, NEW YORK PRACTICE § 237, at 378 ("If there is no prejudice to the other side, leave to amend must be freely given. The courts stress this time and again.").

ARGUMENT

The lower court, at Duane Reade's urging, created a non-existent exception to one of the most fundamental rules of pleading: Absent prejudice, leave to amend a pleading shall be "freely given" and may be sought at "any time," even "after judgment." CPLR 3025(b), (c). Duane Reade could not and did not demonstrate any prejudice if Cardinal Distribution were granted leave to amend its complaint to assert breach of contract as an alternative theory of relief to its already-pleaded unjust enrichment claim. Duane Reade nevertheless sought to avoid the amendment on the ground that this Court's prior decision, ordering dismissal of only the account stated claim -- on a ground unique to that claim -- operated as "res judicata" to preclude Cardinal Distribution from asserting a cause of action for breach of contract. Duane Reade was wrong, and it led the lower

court to deny Cardinal Distribution's motion on an erroneous ground. Cardinal Distribution was not attempting to re-plead the dismissed account stated claim. It was asking for leave to assert a separate and different claim for breach of contract, as an alternative to its cause of action for unjust enrichment that this Court left intact precisely because "there is at least a question of fact as to whether a contract governs the purchases at issue." (R 215)

Rulings made within an action, such as this Court's ruling on the prior appeal, are not afforded res judicata effect. And, even if they were, the doctrine would not operate to preclude Cardinal Distribution from asserting a breach of contract claim. As Duane Reade itself argued to this Court on the prior appeal, a breach of contract claim is "entirely separate" from a cause of action for account stated "with different elements and standards of proof." (R 296) Because this Court did not rule on (or even address) Cardinal Distribution's breach of contract claim, nothing in this Court's prior decision operates as a bar to Cardinal Distribution asserting the proposed claim for breach of the WSA. The motion for leave to amend should have been granted.

I. RES JUDICATA WAS NOT A BASIS TO DENY CARDINAL DISTRIBUTION LEAVE TO AMEND ITS COUNTERCLAIMS

A. Res Judicata Operates to Bar Only Claims Litigated to Find Judgment in a Prior Action

Res judicata, or claim preclusion, only bars a party from re-litigating a claim that was litigated in a *prior* action and generally only after entry of final judgment in the prior action. *See Evans*, 94 N.Y.2d at 502, 706 N.Y.S.2d at 680 ("Res judicata and collateral estoppel generally deal with preclusion after judgment: res judicata precludes a party from asserting a *claim* that was litigated in a *prior action* . . . .") (first emphasis in original; second emphasis added); *Schuykill Fuel Corp. v. B. & C. Nieberg Realty Corp.*, 250 N.Y. 304, 306 (1929) (under res judicata, "[a] judgment in one action is conclusive in a later one"); *Singleton Mgt., Inc. v. Compere*, 243 A.D.2d 213, 215-16, 673 N.Y.S.2d 381, 383 (1st Dep't 1998) (same); *Jefferson Towers, Inc. v. Pub. Serv. Mut. Ins. Co.*, 195 A.D.2d 311, 313, 600 N.Y.S.2d 41, 43 (1st Dep't 1993) ("[R]es judicata prevents litigation of a matter that could have been raised and decided in a *previous suit* . . . .") (emphasis added); *see also* 28 N.Y. Jur. 2d § 237, at 299 (1997) ("[T]he doctrine of res judicata is generally concerned with the effect of an adjudication in a wholly indpendent proceeding."); RESTATEMENT (SECOND) OF JUDGMENTS § 13 (1982) ("The rules of res judicata are applicable only when a final judgment is rendered . . . ."); *id.* § 19, at 161 ("A valid and final personal judgment rendered in

favor of the defendant bars *another action* by the plaintiff on the same claim.") (emphasis added).

Res judicata cannot be invoked, as Duane Reade invoked it below, to preclude a party from asserting a cause of action on the ground that a separate cause of action in the *same* case has been dismissed on partial summary judgment. Professor Siegel aptly explains why: "Since the doctrine of res judicata technically requires a final judgment on the merits in one action and an attempted relitigation in a second, *it has no application within an action.*" Siegel, NEW YORK PRACTICE § 448, at 723 (emphasis added); *see also Brooklyn Caledonian Hosp. v. Cintron*, 147 Misc. 2d 498, 501, 557 N.Y.S.2d 842, 844 (Civil Ct. Kings Cty. 1990) (citing Professor Siegel on this point); RESTATEMENT (SECOND) OF JUDGMENTS § 13 cmt. a ("The rules of res judicata state when a judgment in one action is to be carried over to a second action and given a conclusive effect there . . . .").

The rationale for this rule is apparent. Consider, for example, if Cardinal Distribution had pleaded its cause of action for breach of the WSA in its original counterclaims. In that scenario, Duane Reade could not properly contend that this Court's decision on the prior appeal, which directed partial summary judgment for Duane Reade solely on the account stated claim for a reason unique to that claim, could have operated as res judicata to bar the breach claim. Cardinal Distribution's cause of action for breach of the WSA is an alternative theory of relief, expressly

permitted by CPLR 3014 ("Causes of action . . . may be stated alternatively . . . ."). It would not be deemed adjudicated simply because a different alternative theory of relief—the account stated claim—was dismissed on partial summary judgment. *See, e.g., SageGroupAssoc., Inc. v. Dominion Textile (USA), Inc.*, 244 A.D.2d 281, 282, 665 N.Y.S.2d 407, 407 (1997) (ordering dismissal of, *inter alia*, account stated claim on motion for summary judgment, but ruling that there was a triable issue of fact on breach of contract claim).

Nor could Duane Reade plausibly contend that the unjust enrichment claim -- which this Court expressly left intact for trial in the prior order -- is barred as res judicata in light of the outcome of the prior appeal. *See, e.g., First Frontier Pro Rodeo Circuit Finals LLC v. PRCA First Frontier Circuit*, 291 A.D.2d 645, 737 N.Y.S.2d 694 (3d Dep't 2002) (after summary judgment, breach of contract claim dismissed while unjust enrichment claim went to trial). Neither, then, can it credibly contend that the first appeal, indirectly and sub silentio, bars an unpleaded breach of contract claim.

This is because the doctrine of res judicata simply has no application within an action. If it did, a defendant would be automatically entitled to judgment on all alternative theories of relief, pled or unpled, in an action as soon as it succeeded in obtaining partial summary judgment on any *one* of those theories. Quite sensibly, res judicata does not operate in this manner. It applies only to bar a party from re-

litigating a claim that was litigated in a *prior* action and generally only after entry of final judgment on the merits of all claims in the prior action. *See Evans*, 94 N.Y.2d 499, 706 N.Y.S.2d 678; *Schuykill Fuel Corp.*, 250 N.Y. 304.

Duane Reade nonetheless convinced the lower court to misapply the doctrine of res judicata and cited inapposite case law in support of its argument. All but one of the cases that Duane Reade urged on the lower court involved a circumstance where, unlike here, a claimant sought leave to re-plead its claims after the *entire action* was dismissed on summary judgment.[2] Of course, in that circumstance, unlike this case, all claims have been resolved and there is no longer

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[2] *See Seavey v. James Kendrick Trucking, Inc.*, 4 A.D.3d 119, 770 N.Y.S.2d 865 (1st Dep't 2004) (plaintiff could not amend complaint as to defendant after complete summary relief had been granted to that particular defendant); *Jeffrey L. Rosenberg Assoc., LLC v. Kadem Capital Mgmt., Inc.*, 306 A.D.2d 155, 763 N.Y.S.2d 541 (1st Dep't 2003) (action dismissed on summary judgment, thus no complaint remained to be amended); *Shopsin v. Gray*, 184 A.D.2d 688, 587 N.Y.S.2d 180 (2d Dep't 1992); (plaintiff denied leave to amend following dismissal of entire action on summary judgment); *O'Connell v. Hill*, 179 A.D.2d 1057, 579 N.Y.S.2d 291 (4th Dep't 1992) (leave to amend previously withdrawn complaint denied after subsequent complaint arising from same transaction dismissed on summary judgment); *Reznick v. Tanen*, 162 A.D.2d 594, 556 N.Y.S.2d 777 (2d Dep't 1990) (leave to replead and frame new complaint denied following dismissal of action on summary judgment); *Feigen v. Advance Capital Mgmt. Corp*, 146 A.D.2d 556, 536 N.Y.S.2d 786 (1st Dep't 1989) (action dismissed as to Synergy defendants for failure to state a claim, plaintiffs could not now replead new theories against same defendants arising from same transaction); *Fitzpatrick v. Mister Donut of Amer., Inc.*, 84 A.D.2d 758, 443 N.Y.S.2d 766 (2d Dep't 1981) (summary judgment granted on only issue before the court prior to leave to amend); *Eidelberg v. Zellermayer*, 5 A.D.2d 658, 662-63, 174 N.Y.S.2d 300, 304 (1st Dep't 1958) (court dismissed complaint in prior action and new

any complaint left to amend. *See, e.g., Jeffrey L. Rosenberg & Assoc., LLC v. Kadem Capital Mgmt., Inc.*, 306 A.D.2d 155, 156, 763 N.Y.S.2d 541 (1st Dep't 2003) ("[T]here was no basis for a motion for its amendment; there was no complaint left before the court to amend."). The only other case cited by Duane Reade, *Buckley & Co. v. City of New York*, 121 A.D.2d 933, 505 N.Y.S.2d 140 (1st Dep't 1986), was completely inapposite. It dealt with whether a plaintiff should be granted leave to re-plead the very same cause of action that had been dismissed on summary judgment, not the assertion of an alternative theory to a surviving claim.[3]

Here, of course, Cardinal Distribution sought leave to amend its counterclaims to assert an alternative cause of action, not, as the plaintiff sought to do in *Buckley*, to re-plead the same dismissed cause of action. And the action has not yet concluded in a final judgment. It is going to trial and the trial will include

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"virtually identical" complaint barred), aff'd, 6 N.Y.2d 815, 188 N.Y.S.2d 204 (1959).

[3] *Buckley* also did not distinguish between the doctrines of res judicata and law of the case. *See* 121 A.D.2d at 935, 505 N.Y.S.2d at 143; *see generally* Siegel, NEW YORK PRACTICE § 443, at 715 (res judicata "is the parent [in a family of doctrines that includes collateral estoppel and law of the case] and in popular usage it often lends its name to the others, a handy title to describe the whole clan"). The Court of Appeals has since made clear, however, that law of the case—not res judicata—determines the preclusive effect of a ruling made *within* an action. *See Evans*, 94 N.Y.2d at 502, 706 N.Y.S.2d at 680. *Buckley* also properly rested its holding on the alternative ground that a plaintiff must demonstrate it has proof of a cause of action in opposition to a motion for summary judgment, not after it is granted. *See* 121 A.D.2d at 935, 505 N.Y.S.2d at 143.

the unjust enrichment claim as well as other claims for breach of the WSA. In this posture, this Court's ruling on the account stated cause of action does not operate as "res judicata" to preclude Cardinal Distribution from asserting an alternative cause of action for breach of contract. The lower court erred in ruling to the contrary.

B. Even Assuming Res Judicata Is Appropriately Applied Within an Action, It Does Not Bar the Breach of Contract Claim

Even assuming, for the sake of argument, that res judicata could be invoked to preclude a party from asserting an alternative theory of relief to surviving claims in the same case, the doctrine would not apply here to preclude Cardinal Distribution from asserting a breach of contract claim.

1. The Proof on the Breach of Contract and Account Stated Claims Varies Materially

Res judicata is properly applied to bar a subsequent cause of action only "when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." *Schuykill Fuel Corp.*, 250 N.Y. at 306-07. As this Court has made clear, a judgment in a prior action will not bar a second action, "even if both actions arise from an identical course of dealing, if the necessary elements of proof and evidence required to sustain recovery vary materially." *Jefferson Towers*, 195 A.D.2d at 313, 600 N.Y.S.2d at 42; *see also Lukowsky v. Shalit*, 110 A.D.2d 563,

566, 487 N.Y.S.2d 781, 784 (1st Dep't 1985) ("[E]ven when two successive actions arise from an identical course of dealing, the second may not be barred [under res judicata] if the requisite elements of proof and evidence necessary to sustain recovery vary materially."); *Brown v. Milando*, 267 A.D.2d 412, 413, 700 N.Y.S.2d 856, 857 (2d Dep't 1999) (res judicata "does not extend to all causes of action arising out of a course of dealing between parties and those in privity with them"); *Finkelstein v. Ilan*, 239 A.D.2d 545, 658 N.Y.S.2d 78 (2d Dep't 1997) (action for default under mortgage "reduction agreement" not barred by dismissal of prior action to set aside same "reduction note" as induced by fraud, because there was insufficient identity between the two transactions); *Coliseum Towers Assoc. v. County of Nassau*, 217 A.D.2d 387, 637 N.Y.S.2d 972 (2d Dep't 1996) ("a second action may not be barred, even if both actions arise from an identical course of dealing if the . . . elements of proof and evidence required to sustain recovery vary materially") (citation omitted).

Under this settled authority, this Court's prior decision granting partial summary judgment for Duane Reade on the account stated claim would not bar the proposed breach of contract claim, even assuming res judicata were applicable. On the prior appeal, this Court did not rule upon any aspect of the parties' relationship other than to determine whether Duane Reade separately assented to the amount stated in the account. Thus, the *only* "right" or "interest" established by this

Court's decision on the prior appeal was that Duane Reade could not be held liable for an independently agreed balance on the account stated claim, because there is a "dispute about the account." (R 215)

A judgment for Cardinal Distribution on its proposed cause of action for breach of the WSA would not in any way destroy or impair that judgment for Duane Reade on the account stated claim. Cardinal Distribution's breach of contract claim does not turn on whether Duane Reade agreed to the amount stated in the invoices. It requires proof of the parties' performance pursuant to the WSA. For this reason, "the necessary elements of proof and evidence required to sustain recovery vary materially." *Jefferson Towers*, 195 A.D.2d at 313, 600 N.Y.S.2d at 42. Res judicata therefore cannot bar the proposed breach of contract cause of action, even assuming it applied here.

2. Duane Reade Is Estopped From Arguing That the Breach of Contract and Account Stated Claims Are Identical

Duane Reade is also judicially estopped from arguing that res judicata applied to bar the proposed breach of contract cause of action. On the prior appeal to this Court, Duane Reade forcefully contended that the account stated claim concerned a transaction wholly separate and apart from the WSA. (R 283) And in its decision, which addressed only whether the parties disputed the balance due, this Court adopted Duane Reade's view. The Court addressed the account stated claim as an isolated transaction, without reference or regard to the WSA. (R 214-

215) Having successfully argued on the prior appeal that the account stated claim was based on a completely separate transaction, Duane Reade should have been estopped below from reversing course and arguing that the proposed breach of contract claim was based on the same underlying "transaction" as the account stated claim.

The doctrine of judicial estoppel "precludes a party who assumed a certain position in a prior proceeding and who secured a judgment in his or her favor from assuming a contrary position in another action simply because his or her interests have changed." *Ford Motor Credit Co. v. Colonial Funding Corp.*, 215 A.D.2d 435, 436, 626 N.Y.S.2d 527, 529 (2d Dep't 1995); *accord All Terrain Props., Inc. v. Hoy*, 265 A.D.2d 87, 93, 705 N.Y.S.2d 350, 355 (1st Dep't 2000); *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). "The doctrine rests upon the principle that a litigant 'should not be permitted . . . to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise'." *Envtl. Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593, 476 N.Y.S.2d 175, 177 (2d Dep't 1984) (internal quotation omitted).

That is precisely what Duane Reade did here.[4] It characterized the account stated claim one way on the prior appeal, and then, after it succeeded in securing

[4] In the Supreme Court, Duane Reade curiously argued that Cardinal Distribution should be judicially estopped from arguing that this Court did not already adjudicate Cardinal Distribution's claim for breach of the WSA. This

judgment on that claim, Duane Reade repudiated its characterization in its opposition to Cardinal Distribution's motion for leave to amend. In this Court, Duane Reade argued successfully that the prior appeal concerned *solely* the account stated claim and nothing more: "[T]he only relevant inquiry here is whether Duane Reade agreed to the *statement of account* sued upon." (R 283, emphasis in original).) According to Duane Reade, "whether [it] breached the underlying supply agreement . . . [was] *entirely irrelevant*" to the claim for account stated. (R 283) Indeed, on the prior appeal, Duane Reade urged in no uncertain terms that Cardinal Distribution *must* pursue a separate claim for breach of contract to recover for Duane Reade's alleged breach of the WSA: "Cardinal's remedy for that contention [breach of the supply agreement] is to pursue a breach of contract claim," which is exactly what Cardinal Distribution seeks to do now. (R 283)

Indeed, Duane Reade felt so strongly about this issue that it made a motion to strike Cardinal Distribution's arguments that mentioned the WSA. Duane Reade argued in strident terms in its motion that "[b]reach of contract and account stated claims are separate legal theories of recovery that require distinct allegations

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claim is, of course, as-yet unpleaded, so this Court could not have adjudicated it. In any event, judicial estoppel cannot apply on the basis of arguments Cardinal Distribution made on the prior appeal, because it *lost* that appeal. See *Ford Motor Credit Co.*, 215 A.D.2d at 436, 626 N.Y.S.2d at 529 (judicial estoppel applies only to "a party ... who secured a judgment in his or her favor").

and proof in order to obtain recovery." (R 250) In the same vein, Duane Read asserted:

- the two claims are "entirely separate causes of action with different elements and standards of proof" and it would be "palpably false" to suggest that they are in any way related (R 296);
- it is "absurd on its face" to argue that "the two causes of action are really one and the same" (R 294); and
- "[a]n account stated is an agreement, independent of the underlying agreement, regarding the amount due on past transactions." (R 296-297, quoting *G.W. White & Son v. Gosier*, 219 A.D.2d 866, 866-67, 632 N.Y.S.2d 910, 911 (4th Dep't 1995)).

Duane Reade thus made its position quite clear before this Court: claims for account stated and breach of contract require "distinct proof" and are "entirely separate" causes of action. As noted above, this Court has held expressly that, under a nearly identical formulation, res judicata does not apply. *See, e.g., Jefferson Towers, Inc. v. Public Service Mutual Ins. Co.*, 195 A.D.2d 311, 313, 600 N.Y.S. 2d 41, 42 (lst Dep't. 1993) ("[A] second action may not be barred even if both actions arise from an identical course of dealing, *if the necessary elements of proof and evidence required to sustain recovery vary materially.*") (emphasis added).

Duane Reade of course prevailed on the prior appeal. This Court agreed with Duane Reade that the only issue on appeal was whether it "agreed upon the balance of indebtedness," which had nothing to do with the terms of the WSA or

the parties' performance under it. This Court held that the mere existence of this dispute, not whether there was any merit to it, required judgment as a matter of law for Duane Reade on the account stated claim. (R 214-215) An "assent to the balance" is not, however, an element of Cardinal Distribution's proposed breach of contract claim.

Duane Reade was thus barred by the doctrine of judicial estoppel from arguing to the lower court that this Court's decision on the prior appeal effectively adjudicated both the as-yet unpleaded claim for breach of contract *and* the account stated claim. Having previously taken the position in this Court that breach of contract claim is entirely distinct from an account stated claim, Duane Reade should not have been permitted to take back its arguments and argue exactly the opposite in opposition to the motion to amend, *i.e.*, that the two causes of action are, for purposes of applying the doctrine of res judicata, actually one and the same. For this reason, as well, res judicata did not bar Cardinal Distribution from asserting its proposed cause of action for breach of the WSA.

C. Law of the Case Does Not Bar the Breach of Contract Claim

The lower court's fundamental error here, however, was that res judicata should never have been invoked at all. At best, the lower court should have looked to law of the case, the proper doctrine to apply to determine the preclusive effect of

rulings *within* an action.[5] As the Court of Appeals has explained, law of the case—not res judicata—addresses the preclusive effect, if any, of judicial rulings made within an action and prior to final judgment:

> As distinguished from issue preclusion [collateral estoppel] and claim preclusion [res judicata] . . ., *law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation before final judgment.* Res judicata and collateral estoppel generally deal with preclusion after judgment . . . . Accordingly, law of the case has been aptly characterized as "a kind of intra-action res judicata."

Evans, 94 N.Y.2d at 501, 706 N.Y.S.2d at 680-81 (emphasis added; quoting Siegel, NEW YORK PRACTICE § 448, at 723).[6]

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[5] In the Supreme Court, Duane Reade also made the odd argument that collateral estoppel operated to preclude Cardinal Distribution's proposed amendment. Collateral estoppel, or issue preclusion, is similar to res judicata in that both doctrines apply only in a later action after entry of final judgment in an earlier action. Collateral estoppel also requires, moreover, that the issue to be precluded in the later action be *identical* to the issue already adjudicated in the earlier action. *See Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 208, 746 N.Y.S.2d 141, 145 (1st Dep't 2002) ("Of course, application of these doctrines [law of the case and collateral estoppel] necessarily requires an *identity of issues* between the earlier determination and the matter sub judice."). Collateral estoppel therefore does not apply here, because this Court's prior decision did not rule upon, let alone address, whether Cardinal Distribution could assert the proposed cause of action for breach of the WSA.

[6] *See also Engel v. Eichler*, 300 A.D.2d 622, 623, 753 N.Y.S.2d 109, 110 (2d Dep't 2002) ("The doctrine of law of the case addresses the preclusive effect of judicial determinations made in the course of a litigation before final judgment is entered."); *Fioranelli v. News Bldg. Corp.*, 102 Misc. 2d 825, 827, 424 N.Y.S.2d 677, 679 (Sup. Ct. Queens Cty. 1980) ("The 'Law of the Case' doctrine is a kind of intra-action res judicata. Within the framework of a single action it

The narrow doctrine of law of the case does not bar Cardinal Distribution from amending its counterclaims to assert a cause of action for breach of the WSA. Law of the case bars a party from re-litigating only an issue that is *identical* to an issue already determined in the action. *See Brown v. Sears Roebuck & Co.*, 297 A.D.2d 205, 746 N.Y.S.2d 141 (1st Dep't 2002) ("Of course, application of these doctrines [law of the case and collateral estoppel] necessarily requires an *identity of issues* between the earlier determination and the matter sub judice.") (emphasis added); *see also M.G. Sales, Inc. v. Chem. Bank*, 137 A.D.2d 433, 434, 524 N.Y.S.2d 447, 448 (1st Dep't 1988) ("[O]nce an issue is judicially determined, it is law of the case and is not to be reconsidered in the course of the same litigation."); *Martin v. City of Cohoes*, 37 N.Y.2d 162, 164, 371 N.Y.S.2d 687, 689 (1975) ("The doctrine of 'law of the case' is a rule of practice, an articulation of sound

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prevents relitigation of a point already adjudicated in it."); *Brooklyn Caledonian Hosp.*, 147 Misc. 2d at 501, 557 N.Y.S.2d at 844 ("Since the doctrine of res judicata technically requires a final judgment on the merits in one action and an attempted relitigation in the second, it has no application within an action. The doctrine of the 'law of the case' was devised to close that gap. It applies to various stages of the same litigation and not to different litigations."); 28 N.Y. Jur. 2d § 237, at 299 ("The doctrine of the law of the case applies to various stages of the same litigation, and not to two different litigations . . . ."); 1 Carmody-Wait 2d § 2:259, at (19__)("As distinguished from issue preclusion and claim preclusion, ... law of the case addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation, but before final judgment. . . . In contrast, res judicata . . . generally deal[s] with preclusion after judgment . . . .").

policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned.").

In the prior appeal, this Court never addressed whether Cardinal Distribution should be permitted to assert a cause of action for breach of contract against Duane Reade. As this Court's decision made clear, the sole issues the Court decided were that (i) "the record demonstrates, as a matter of law, that there was a 'dispute about the account,'" and thus "no claim for an account stated survives" (R 214-215) ; and (ii) "[t]here is at least a question of fact as to whether a contract governs the purchases at issue." (Id.) Neither of these rulings addressed whether Cardinal Distribution should be permitted to plead, or could prove, the essential elements of the proposed claim for breach of contract: a valid contract between Cardinal Distribution and Duane Reade, breach by Duane Reade due to Duane Reade's failure to pay, and damages to Cardinal Distribution. *See, e.g., Convenient Med. Care P.C. v. Med. Business Assocs. Inc.*, 291 A.D.2d 617, 618, 737 N.Y.S.2d 403, 405 (3d Dep't 2002). And, of course, on a cause of action for breach of contract it is no bar to recovery that Duane Reade disputes the amount it owes Cardinal Distribution.[7] *See id.* (counterclaimant entitled to summary judgment of liability on breach of contract claim by "tender of the written contract and its

[7] Indeed, almost by definition, any defendant in a breach of contract action disputes the amount that the plaintiff claims the defendant owes.

uncontroverted assertion that plaintiff failed to pay amounts due thereunder," but not on account stated claim "due to the differing amounts claimed due in the record"); *see also Sisters of Charity Hosp. v. Riley*, 231 A.D.2d 272, 661 N.Y.S.2d 352 (4th Dep't 1997) (same). The only pertinent issues on this claim are whether Duane Reade received the products at issue pursuant to the WSA and whether it paid Cardinal Distribution for them as the WSA required.

Accordingly, this Court's decision on the prior appeal could not be deemed "law of the case" on whether Cardinal Distribution may assert the proposed cause of action for breach of the WSA. *See, e.g., Bd. of Managers of the Europa Condo. v. Orenstein*, 1 A.D.3d 206, 207, 768 N.Y.S.2d 1, 2 (1st Dep't 2003) ("The law of the case doctrine is inapplicable to Orenstein's contentions with respect to his first and second counterclaims since he never moved for judgment on these claims."); *Gray v. Sandoz Pharm., Division of Sandoz, Inc.*, 123 A.D.2d 829, 507 N.Y.S.2d 444 (2d Dep't 1986) ("[T]he law of the case doctrine is not applicable at bar since the prior order did not finally determine the merits of the third-party claim for contribution.") The lower court therefore erred in holding that Cardinal Distribution was barred from asserting this claim.

II. CARDINAL DISTRIBUTION SHOULD BE GIVEN LEAVE TO AMEND ITS COUNTERCLAIMS

Shorn of the erroneous "res judicata" rationale Duane Reade urged upon the lower court, it is evident—for the reasons noted by the lower court itself—that Cardinal Distribution's motion should have been granted.

The CPLR liberally allows for amendments to the pleadings. CPLR 3025(b) provides that a party may amend its pleading "*at any time* by leave of court" and that "[l]eave of court shall be freely given upon such terms as may be just." (emphasis added). Indeed, under CPLR 3025(c), a court may permit amendments to pleadings even "*after* judgment to conform to the evidence, upon such terms as may be just." (emphasis added). As the lower court recognized, these rules reflect "the prevailing preference . . . for granting [a] request to amend the pleadings no matter what the stage." (R 14) *See also Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23, 444 N.Y.S.2d 571, 572 (1981) ("One of the obvious goals of the CPLR was to liberalize the practice relating to pleadings . . . . Thus, in the absence of prejudice to the defendant, a motion to amend . . . should generally be granted.").

The lower court also properly recognized that Duane Reade could not demonstrate any unfair prejudice if the amendment were granted, saying to Duane Reade's counsel: "Unless you can describe to me the prejudice that you will suffer as a result of this, I will grant this application. And don't tell me that you're being

shocked on the matter. It's because the facts remain the same . . . ." (R 14) For precisely the reasons articulated by the lower court, Cardinal Distribution's motion should have been granted.

"[I]t is well established that leave to amend a pleading shall be freely given absent prejudice or surprise resulting from the delay." *Tishman Constr. Corp. v. City of New York*, 280 A.D.2d 374, 377, 720 N.Y.S.2d 487, 491 (1st Dep't 2001) (citations omitted); *Ebasco Constructors, Inc. v. Aetna Ins. Co.*, 260 A.D.2d 287, 291, 692 N.Y.S.2d 295, 298-99 (1st Dep't 1999) (same). The level of prejudice the opposing party must show is very high. "There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add." *A.J. Pegno Constr. Corp. v. City of New York*, 95 A.D.2d 655, 656, 463 N.Y.S.2d 214, 215 (1st Dep't 1983). The courts have repeatedly emphasized that "[m]ere lateness is not a barrier to [an] amendment," either. *See, e.g., Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959, 471 N.Y.S.2d 55, 56 (1983). "It must be lateness coupled with significant prejudice to the other side." *Id.*; *see also* Siegel, NEW YORK PRACTICE § 237, at 380 ("As a rule, mere lateness is not a barrier to the amendment, but lateness coupled with significant prejudice is.").

Duane Reade showed no such prejudice in accordance with these well-established principles, nor could it. The proposed amendment does not set forth any new allegations of fact and would not require any further discovery. *See* Siegel, NEW YORK PRACTICE § 237, at 378-79 ("If the theory alone is changed, but the facts remain as originally pleaded, a problem should not often be met because there is little the other party would now have to do by way of new preparation.").

Cardinal Distribution seeks only to add an alternative theory of recovery to the already-pleaded unjust enrichment claim, on the basis of facts that are already pleaded and have been the subject of extensive discovery. The courts have routinely held that no prejudice can be shown in these circumstances. *See Brewster v. Baltimore & Ohio R.R. Co.*, 185 A.D.2d 653, 653,585 N.Y.S.2d 647, 648 (4th Dep't 1992); *Carco Inc. v. Beltrone Constr. Co.*, 183 A.D.2d 984, 985, 583 N.Y.S.2d 602, 604 (3d Dep't 1992) (amendment to assert breach of contract claim allowed because "the amended complaint does not prejudice or unfairly surprise Beltrone. The amended complaint only changes the theory of liability without adding any new facts to those pleaded in the original complaint"); *Foresite Prop., Inc. v. Halsdorf*, 172 A.D.2d 929, 930, 568 N.Y.S.2d 209, 210 (3d Dep't 1991) (proposed amended complaint asserting new theory of liability was based upon essentially the same factual allegations. "Accordingly, it appears that there was no unfair surprise and, therefore, little prejudice could have accrued to F.J.E.

by allowance of the amendment."); *Young v. Robertshaw Controls Co.*, 104 A.D.2d 84, 88-89, 481 N.Y.S.2d 891, 895 (3d Dep't 1984) (post-note of issue amendment to assert alternative theory allowed where "defendant does not aver that it has experienced any real prejudice as a consequence"); *Rife v. Union Coll.*, 30 A.D.2d 504, 505, 294 N.Y.S.2d 460, 462 (3d Dep't 1968) (allowing amendment where amended complaint did not propose to add "any new unknown or unalleged facts in the amended complaint, but at most has merely set forth an additional theory of the law based upon the facts formerly alleged").

Duane Reade's sole argument on prejudice—which it did not support with any affidavit—was that it would not have chosen to litigate the account stated claim prior to trial if Cardinal Distribution had also asserted a breach of contract claim (presumably because Duane Reade recognizes that there is no basis for dismissing the breach of contract claim prior to trial). But, of course, Duane Reade cannot unilaterally determine which claims are the subject of pre-trial motions and which are not. Cardinal Distribution would have moved for partial summary judgment on its account stated claim and litigated an adverse determination on that motion through an appeal even if the breach of contract claim had been pleaded from the outset of this case.

There is not, accordingly, any conceivable prejudice to Duane Reade in allowing the amendment. For the very reasons noted by the lower court, Cardinal

Distribution should therefore be permitted to amend its counterclaims to assert the breach of contract cause of action. *See, e.g.*, *Loomis*, 54 N.Y.2d at 24, 444 N.Y.S.2d at 573 (amendment allowed where "defendant has failed utterly to indicate that any significant prejudice eventuated"); *A.J. Pegno Constr. Corp*, 95 A.D.2d at 656, 463 N.Y.S.2d at 215 (1st Dep't 1983) (amendment allowed where "[n]o such showing [of prejudice] appears in plaintiff's papers opposing the motion to amend"); *Trusthouse Forte Mgmt., Inc. v. Garden City Hotel, Inc.*, 106 A.D.2d 271, 272, 483 N.Y.S.2d 216, 217 (1st Dep't 1984) ("The amendment sets out that additional theory of recovery, but is based on the same set of facts as originally pleaded. No prejudice to appellants is claimed or demonstrated."); *see also Leslie v. Hymes*, 60 A.D.2d 564, 564, 400 N.Y.S.2d 350, 351 (1st Dep't 1977) ("The burden is upon the party opposing the motion to show prejudice.").

Indeed, it would work a profound injustice in this case to prohibit Cardinal Distribution from making the proposed amendment. *See* CPLR 3025(b) (leave to amend shall be given "upon such terms as may be just"). If a breach of contract claim cannot be put to the jury as an alternative theory of recovery, Duane Reade will argue, as it has before, that Cardinal Distribution's unjust enrichment claim cannot be sustained to the extent that the WSA governed Duane Reade's purchases in September and October 2001. Duane Reade would thus seek to avoid paying Cardinal Distribution for nearly $9 million of pharmaceutical products that

Cardinal Distribution provided to Duane Reade on the absurd grounds that (i) Duane Reade bought the goods pursuant to a contract, and therefore, (ii) Duane Reade should not have to pay for them.

For Duane Reade to escape liability in this manner would run counter to the very purpose of New York's liberal policy favoring pleading amendments: to direct the efforts of the courts to the adjudication of substantive rights and diminish the importance of technical construction of the pleadings. *See* CPLR 3025, Practice Commentaries 3025:15 (David D. Siegel) ("[T]he purpose of the CPLR is to diminish the importance of pleadings and to direct effort instead to the substantive rights involved . . . ."); *see also Dittmar Explosives, Inc. v. A.E. Ottaviano, Inc.*, 20 N.Y.2d 498, 502, 285 N.Y.S.2d 55, 58 (1967) ("[T]he CPLR provides that an action shall not fail solely because it is not brought in the proper form or under the precise pleading.")

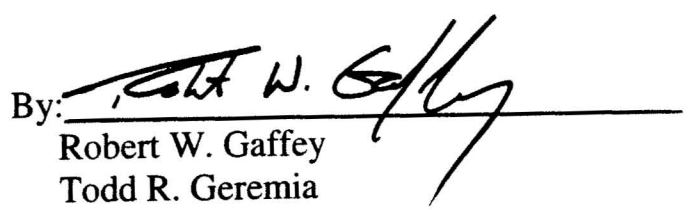
CONCLUSION

The lower court's order denying Cardinal Distribution's motion for leave to amend its counterclaims should be reversed, and Cardinal Distribution should be permitted to amend its counterclaims as proposed in its motion.

Dated: New York, New York
March 1, 2005

Respectfully submitted,

JONES DAY

By: 

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PRINTING SPECIFICATIONS STATEMENT

This brief was prepared on a computer using Microsoft Word 97 SR-2. The text of the brief, including the headnotes and the footnotes, is in 14-point Times New Roman font. The brief contains 10,793 words, as calculated by the word processing system used to prepare it, inclusive of footnotes and point headings and exclusive of the table of contents and table of authorities.