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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 3

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RICHBELL INFORMATION SERVICES, INC., THE RICHBELL GROUP LIMITED, and DAVID M.A. ELIAS,

Plaintiffs,

- against-

JUPITER PARTNERS L.P., GANYMEDE L.P., EUROPA L.P., JOHN A. SPRAGUE, TERRY J. BLUMER, RIT CAPITAL PARTNERS PLC, ATLANTIC AND GENERAL INVESTMENT TRUST LIMITED, H-G HOLDINGS, INC., ERNEST SAUNDERS, and THE HARPUR GROUP LIMITED,

Defendants.

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Index No. 605979/97

Decision and Order

KARLA MOSKOWITZ, J.:

Motion sequence numbers 011, 012, 013 and 014 are consolidated for disposition.

All defendants move to dismiss the Verified Amended Complaint (the "Complaint") pursuant to CPLR 3211(a)(2),(3),(5) and (7). Defendants H-G Holdings, Inc. ("H-G"), The Harpur Group Limited ("Harpur"), RIT Capital Partners PLC ("RIT") and Atlantic and General Investment Trust ("AGIT") alternatively move to dismiss for lack of jurisdiction pursuant to CPLR 3211(a)(8)(motion sequence nos. 011 and 012).

Plaintiffs move to lift the automatic stay of disclosure (motion sequence no. 013) and to vacate the orders of this court entered October 27, 2000 and March 6, 2001 that imposed sanctions upon plaintiffs and their counsel (motion sequence no. 014).

FACTS

The court accepts the following facts in the Complaint and agreements, correspondence, documents attached to or incorporated by reference and other submitted materials as true for the purposes of the motion to dismiss, except where the documentary record flatly contradicts the allegations in the complaint.

I. Parties

Plaintiff David M.A. Elias ("Elias"), a citizen of the United Kingdom, founded defendant Harpur, a limited liability company under the laws of England and Wales, in the 1980's and, by 1994, had built it into a company worth 167 million dollars. Harpur's primary business was the operation and processing of corporate fuel cards that company fleets utilized. Elias and plaintiff The Richbell Group Limited ("plaintiff RGL") (a holding company with limited liability under the laws of England and Wales) owned and controlled Harpur through the Northington Group Limited[1], ("Northington") until Harpur became part of defendant H-G Holdings, Inc. Plaintiff RGL also indirectly owns and controls plaintiff Richbell Information Services, Inc. ("plaintiff RIS"), a Delaware holding company.

Defendant Jupiter Partners L.P. ("Jupiter"), a Delaware limited partnership, is an investment firm.

Defendants Ganymede L.P. ("Ganymede") and Europa L.P. ("Europa") are Delaware limited partnerships; Europa is a general partner of Ganymede, which in turn, is a general partner of Jupiter.

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[1] Northington is an Elias-controlled entity that subsequently became Richbell Strategic Holdings Limited ("Richbell Strategic").

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Defendants John A. Sprague ("Sprague") and Terry J. Blumer ("Blumer") are general partners of Europa and principals of Jupiter.

Defendant RIT is an investment trust company organized under the laws of England and Wales. RIT holds an indirect interest in Harpur. In the spring of 1994, Elias approached defendant RIT to find a United States financial partner to help acquire Gelco Payments Systems, Inc. ("Gelco"). Gelco is an American company in the business of expense and payment processing and management information services. Elias sought to combine Gelco with Harpur. RIT recommended Jupiter as a potential investor. Defendant H-G Holdings, Inc. ("H-G") is a Delaware Corporation formed as the holding company for the combined companies of Harpur and Gelco.

Defendant Atlantic and General Investment Trust Limited ("AGIT") is a company organized under the laws of England and Wales. AGIT is a wholly-owned subsidiary of RIT.

Defendant Ernest Saunders ("Saunders") is chairman of H-G's executive committee. From December 1993 until July 1996, Saunders was an officer of, and paid consultant for, plaintiff RGL.

II. Background

In June 1994, Elias, representing RGL, and Sprague and Blumer, representing Jupiter, commenced negotiations that ultimately culminated in the formation of defendant H-G, a Delaware corporation that became the holding company for Harpur and Gelco. On June 16, 1994, Elias sent an outline of his idea for the transaction to Jupiter, noting that time was "very tight" because the deadline to bid for Gelco was July 8, 1994 and because of competition from American companies. (Compl. ¶¶ 3-9, 41.) On June

28, 1994, Elias sent Sprague at Jupiter another letter, noting that it would be a good idea for he and Sprague to talk on the phone about the valuation and proposed structure of the deal before July eighth. Elias noted that, although they would have some flexibility over the terms after July eighth, because the Gelco offer would likely be conditional and the legal documentation would take some time, Jupiter and RGL would be under pressure to disclose their source of financing shortly after submitting the bid. (Compl. ¶ 45.)

Elias met with Sprague and Blumer, Jupiter's principals, in New York on July 5 and 6, 1994. During these meetings, Elias provided Jupiter with a written summary of a proposal for the transaction. (Compl. ¶¶ 47-58.) Jupiter assented in principle to the basic terms of the summary and promised to send Elias a term sheet memorializing the agreement. (Compl. ¶ 59.) However, the term sheet that Jupiter sent on July eighth differed in three critical respects from Elias' proposal. In the term sheet, Jupiter insisted on: (1) special veto rights for Jupiter; (2) restrictions on the sale of ordinary stock; and (3) elimination of a commitment to a bank financing that Elias needed to keep his companies liquid. (Compl. ¶ 63.) Because the bid deadline had arrived and he had no other financing options, Elias accepted the new terms and submitted a bid for Gelco on behalf of one of his companies so as not to lose this valuable business opportunity. (Compl. ¶ 64.)

From July 14 to 15, 1994, Jupiter, with Elias, conducted due diligence of Harpur in New York. (Compl. ¶ 68.) On July 20 and 21, Elias met with Jupiter to discuss the transaction further. At that time, Jupiter proposed a new share structure whereby Jupiter would

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receive Class B shares that would be protected against under performance, and Elias' designee would receive Class A shares that would be rewarded for over performance (the "A/B share structure"). (Compl. ¶ 70.) Elias realized that this arrangement could create a "discontinuity of interest" between the A and B shareholders and therefore worried that Jupiter might exploit its veto powers for its own benefit. Nevertheless, he agreed to the A/B share structure to "save the deal." (Compl. ¶¶ 71, 73)

Jupiter sent Elias a second term sheet on July 22, 1994. The cover letter stated that

> Our willingness to complete the transactions contemplated by this letter is subject to the execution of definitive agreements between us and between Newco and Gelco, on terms satisfactory to us, and also to completion of accounting due diligence with respect to Harpur and Gelco by our accountants, Deloitte & Touche, which we expect to be completed by July 27. Except for the numbered paragraphs above [relating to pre-merger notifications and similar matters], which are intended to be binding, this letter is not and is not intended to be a legally binding agreement. Neither of us shall be liable to the other except as provided in such definitive agreements.

(Compl. Ex. 7.) On August 5, 1994, Jupiter sent a further revised term sheet to Elias on behalf of RGL with a cover letter containing disclaimers similar to the July 22nd term sheet. The August 1994 term sheet gave Jupiter additional protection against under performance. Elias considered this term sheet as so different from the original term sheet that it effectively constituted a different transaction. (Compl. ¶ 80-83.) Although Elias believed that this term sheet created a "lack of commonality" between Jupiter and his own interests, Elias agreed to the terms, relying upon assurances

that Jupiter would not use its veto rights "in an unfair or exploitive way to extort financial concessions." (Compl. ¶ 83.)

When the parties met in early October 1994, Elias reiterated his concern about the lack of commonality of interest between the parties. Specifically, he voiced his concern that Jupiter might become resentful of his higher rate of return if the new company over performed and might exercise its veto power to block a realization event such as an initial public offering ("IPO"). (Compl. ¶ 85.) Sprague allegedly assured him that Jupiter would never use its veto rights in that manner. (Compl. ¶ 86-87.)

In August 1994, Jupiter and RGL formed the holding company, H-G, to effect the combination of Harpur and Gelco. (Compl. ¶ 84.) RGL and RIT contributed their indirect equity interests in Harpur and Jupiter contributed eighty-five million dollars to H-G. (Compl. ¶ 62, 63 and Ex. 6.) On October 13, 1994, Elias and RGL caused Northington to execute the "Stockholders Agreement of H-G Holdings, Inc." (the "Stockholders Agreement"). (Compl. ¶ 93 and Ex. 10.) The purpose of the Stockholders Agreement was to define the parties' rights in H-G. (Compl. Ex. 10.) In addition to Northington, the signatories to the Stockholders Agreement were Jupiter, H-G, and Richbell Holdings Limited ("Richbell Holdings"). (Id.) In May 1995, plaintiff RIS and defendant RIT became parties to the Stockholders Agreement, with RIS receiving Richbell Strategic's stock and H-G and RIT receiving Richbell Holdings' H-G shares. (Id.) Neither Elias nor plaintiff RGL, however, became parties to the Stockholders Agreement.

The Stockholders Agreement incorporated the A/B share structure from the August 1994 term sheet. (Compl. ¶ 104.) Jupiter

held approximately 36% of the equity in H-G; Northington held 33%, and RIT held 26%. (Compl. ¶ 106.) The Stockholders Agreement provides for the appointment of seven directors: three by plaintiff RIS, two by Jupiter, one by RIT and one by a plurality of the shareholders. (Compl. ¶ 97.) Additionally, section 3.2 of the Stockholders Agreement requires Jupiter's consent before an Initial Public Offering ("IPO") of H-G's common stock could take place, when that offering would involve the issuance of primary common stock exceeding five percent of H-G's outstanding common stock:

> Certain Restrictions on the Company. Neither the Company nor any of its Subsidiaries shall (nor shall the Stockholders, to the extent they shall have the power to cause such acts), without the written approval of the Majority Holder [Jupiter] . . . cumulatively issue additional Common Stock representing more than five percent of the total number of shares of Common Stock outstanding at the Closing Date, as adjusted for stock splits, stock combinations and stock dividends.

Section 6.2 of the Stockholders Agreement gives Jupiter the right to exercise voting control over plaintiff RIS' shares and plaintiff RIS' Board seats if H-G's EBITDA (earnings before interest, taxes, depreciation and amortization) growth rate falls below certain contractually-set targets. That section provides:

> Special Majority Holder Control Provision. Following the completion of the Final Figures Report for every fiscal year of the Company beginning with the fiscal year ending December 31, 1996, if the Company has not achieved a Cumulative Annual EBITDA Growth Rate greater than the Applicable Cumulative Annual EBITDA Growth Rate . . . for that year (the "Growth Test"), the Majority Holder [Jupiter] shall have the right but not the obligation thereafter to (i) exercise voting control over all shares of Common Stock beneficially owned by the parties hereto and (ii) appoint up to such number of directors on the Board of Directors as shall equal the total number of

such directors.

(Compl. Ex. 10). Finally, the Stockholders Agreement contains both an integration clause and a clause requiring any amendments to be in writing and signed by all parties to the agreement. Section 10.7 provides:

> Entire Agreement. This Agreement contains the entire agreement and understanding between the parties hereto with respect to matters covered hereby and supersedes all prior agreements and understandings, written or oral, among the parties with respect to the subject matter hereof.

Section 10.3 provides:

> Amendments. No amendment to this Agreement shall be effective unless it shall be in writing and signed by all parties hereto.

(Id.) Contemporaneous with the execution of the Stockholders Agreement, Richbell Strategic issued a note to Harpur for 8.9 million pounds (the "Northington Note"), representing an intercompany debt that was outstanding at the time of H-G's formation. (Compl. ¶¶ 90-92.) The Northington Note calls for Richbell Strategic to repay Harpur in annual installments on the last business day of July (commencing in 1996) and to pay interest quarterly. (Compl. ¶ 91 and Ex. 9.) The Northington Note provides for immediate repayment of the outstanding principal in the event of any defaults, including a default "in making payment of any principal moneys or interest due on this Note." (Compl. Ex. 9.) The Stockholders Agreement provides that, upon a default in the Northington Note, Jupiter may exercise voting control over plaintiff RIS' shares of H-G and appoint six of the seven directors to the Board. (Compl. Ex. 10)

Toward the end of 1995, Elias sought to raise thirty million dollars to satisfy debts RGL owed to its investors and creditors. To gain liquidity, Elias needed an IPO for H-G or other realization of plaintiff RIS' interest in H-G. Additionally, Elias could not borrow from a third party without placing a value on plaintiff RIS' interest in H-G. (Compl. ¶ 161.) This, in turn, meant undoing the A/B share structure. Consequently, over the next several months, Elias, Jupiter and RIT negotiated plaintiff RIS' and Jupiter's percentages of equity holdings in H-G in the event of an IPO. Plaintiffs allege that the parties reached an agreement in April 1996 (the "April 1996 Agreement"). (Compl. ¶ 268.) According to the April 1996 Agreement, the parties supposedly would undo the A/B share structure and carry out an IPO within six to nine months. In exchange for the promise of an IPO, plaintiff RIS agreed to decrease its interest in H-G to approximately 28% and permit Jupiter to increase its interest to approximately 41%. (Compl. ¶ 261.) The parties allegedly memorialized the terms of the April 1996 Agreement in a written but unsigned memorandum of understanding dated April 18, 1996 (the "MOU"). (Compl. ¶ 260, 268 268; see also Ex. C to Def. Mem. in Support of Mot. To Dismiss attached as Ex. A. to Affidavit of Howard Goldstein ("Goldstein Aff."), sworn to April 2, 2001.) Further, RIT separately agreed (the "RIT 1996 Agreement")to loan plaintiff RIS $30 million, to support the IPO and otherwise use RIT's best efforts to ensure that Jupiter complied with the terms of the April 1996 Agreement. (Compl. ¶ 271.)

On April 22, 1996, defendant AGIT (a wholly-owned subsidiary of RIT) loaned thirty million dollars to plaintiff RIS and

plaintiff RIS issued a note for thirty million dollars to AGIT (the "AGIT Note"). (Compl. ¶ 272.) The AGIT Note specifies a repayment date of December 31, 1997 for the entire sum of the note. (Id.) The note provides that, if plaintiff RIS fails to pay either the principal or any interest by the repayment date, the interest rate would rise from 25% per year to 28% until plaintiff RIS pays the amount due. (Id.) A charge on plaintiff RIS' shares in H-G secures the AGIT Note. (Id.) The terms of the AGIT Note do not refer to the MOU, the April 1996 Agreement or the 1996 RIT Agreement. An IPO of H-G was not a prerequisite for repayment of or a condition of default under the Note.

No IPO or other realization of the value of the shares of H-G occurred. On January 31, 1997, Jupiter and RIT entered into an agreement (the "January 1997 Agreement"), in which Jupiter agreed, on an AGIT Note default, to purchase a portion of the AGIT Note in exchange for the rights to control any foreclosure on and sale of plaintiff RIS' shares, to vote plaintiff RIS' shares and to designate the individual who would be RIT's nominee as a director of H-G. (Compl. ¶¶ 345-355, Exs. 52, 53.)

On April 4 and 9, 1997, Jupiter notified plaintiffs Elias and RGL under section 5.1 of the Stockholders Agreement that Jupiter would exercise voting control over plaintiff RIS' shares in H-G and exercise plaintiff RIS' right of appointment of directors to the H-G Board because of Richbell Strategic's default under the Northington Note. (Compl. ¶ 423.) On April 29, 1997, defendant Harpur presented a winding-up petition in the United Kingdom against Richbell Strategic for amounts due under the Northington Note. (Compl. ¶ 428.) On July 24, 1997, an English court ruled

that, at least as of June 30, 1997, Richbell Strategic had "not paid a substantial debt which [had] fallen due" as a consequence of a default under the Northington Note. (Goldstein Aff. Ex. F of Ex. A).

On May 12, 1997, AGIT declared a default on the AGIT Note. (Compl. ¶ 430-431.) On May 13, 1998, AGIT presented a winding-up petition in the United Kingdom against plaintiff RIS for amounts due under the AGIT Note. (Compl. ¶ 444.)

III. Procedural History

Plaintiffs commenced this action in November 1997 and filed the Complaint in its present form on September 2, 1998. The Complaint contains thirty-three causes of action sounding in breach of contract, breach of the implied covenant of good faith and fair dealing, breach of fiduciary duty, corporate waste, fraud, negligent misrepresentation and other torts. The essence of the Complaint is that defendants conspired to misappropriate plaintiffs' valuable interest in H-G by exploiting plaintiffs' liquidity problems. Specifically, the Complaint asserts that defendants deliberately blocked an IPO of H-G to coerce plaintiffs to agree to reduce their interest in the company and to accept a thirty million dollar loan and then continued blocking the IPO to force a foreclosure of plaintiffs' shares so defendant could purchase them at an artificially low price.

Defendants moved to dismiss the Complaint in December 1998, both on the merits of the Complaint and on the ground of champerty pursuant to New York Judiciary Law § 489.[2] By order entered August

[2] Because plaintiffs were unable to finance this lawsuit themselves, on April 24, 1998, a committee of individuals who had invested in Richbell Group companies solicited funds for the litigation from the shareholders

6, 1999, the court (Cozier, J.S.C.), dismissed the Complaint on the champerty ground only, with leave to replead any claims that did not violate the champerty statute.[3] Plaintiffs appealed and filed a second amended complaint. By order entered April 10, 2000, Justice Cozier dismissed that complaint with leave to replead, finding it substantially similar to the earlier-dismissed pleading insofar as it included many of the same factual allegations that the court had determined to be champertous. Plaintiffs also appealed that order and filed a third amended complaint. Finding that the new pleading violated the court's prior order, by order entered October 27, 2000, Justice Cozier directed a briefing on whether the court should impose sanctions on plaintiffs as a condition of reinstating the non-champertous portions of the complaint.

By order dated March 6, 2001, Justice Cozier found that plaintiffs' filing of repeated pleadings containing similar champertous allegations merited sanctions under NYCRR § 130-1.1(c). Justice Cozier imposed a fine of $2,500 for plaintiffs' counsel to pay to the Lawyers' Fund for Client Protection and directed plaintiffs to pay defendants' fees and expenses incurred in connection with the motion to dismiss the third amended complaint. Two weeks later, the Appellate Division, First Department, reversed

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and creditors of Richbell Information Holdings, Inc and Verulam Group Limited, another Richbell Group company (the "funding investors"). The funding investors eventually paid for the litigation through a company called "Richbell 1998 Ltd." ("Richbell 1998"). On June 15, 1998, Richbell 1998 acquired plaintiffs' litigation rights. By agreement, any money or other assets plaintiffs recover in this action would first be used to pay creditors. Plaintiffs would then pay the remainder into a trust for the benefit of Richbell 1998. The funding investors would then receive a percentage of the trust funds.

[3] Justice Cozier found that "the sole or primary purpose of the creation of Richbell 1998 and the assignment of the claims thereto was to pursue this action" in violation of Judiciary Law s 489.

Justice Cozier's original August 1999 finding of champerty and reinstated the 1998 Complaint. See Richbell Info. Services, Inc. et al. v. Jupiter Partners L.P., 2001 N.Y. slip op. 02605 (1st Dep't March 20, 2001). Defendants then brought these motions, renewing their prior motions to dismiss the pleading on the merits; and plaintiffs moved to vacate the various sanctions orders and for discovery.

THE MOTIONS TO DISMISS

Defendants' motions to dismiss the Complaint on the merits are granted. For the following reasons, plaintiffs' claims are barred, inter alia, as inconsistent with the terms of the express and comprehensive written agreements plaintiffs executed to memorialize their commercial undertakings. In view of this court's determination, the motion to lift the automatic stay of disclosure is moot. For the same reason, the motions of defendants Harpur, and AGIT to dismiss on alternative jurisdictional grounds are moot, as are the motions of RIT, H-G, Harpur and AGIT to dismiss on the grounds of forum non conveniens and in the interests of comity, although the court does address these arguments infra.

1. Claims Relating to the Stockholders Agreement/Northington Note (Third, Fourth, Fifth, Thirteenth, Fourteenth, Twenty-Third and Thirty Second Causes of Action

In the fifth cause of action, plaintiffs RIS, RGL and Elias allege that Jupiter fraudulently induced them into entering the Stockholders Agreement and the Northington Note. Specifically, plaintiffs claim that Jupiter falsely represented that it would act fairly and in good faith in exercising its veto rights under the Stockholders Agreement and only employ those rights defensively. Moreover, plaintiffs allege that Jupiter and RIT fraudulently

represented that the amounts due under the Northington Note could be paid out of an H-G realization event.

A party generally cannot avoid the terms of a written agreement on the grounds of fraud simply by asserting that "the writing did not express his own understanding of the oral agreement reached during negotiations," (Chimart Assocs. v Paul, 66 NY2d 570, 571; Marine Midland Bank, N.A. v Embassy East, Inc., 160 AD2d 420, 422). Indeed, where there is a significant conflict between an express provision in a written contract and a prior alleged oral representation, the conflict renders reliance upon the oral representation unreasonable as a matter of law (Coutts Bank (Switzerland) Ltd. v Anatian, 261 AD2d 307); Societe Nationale D'Expolitation Industreille Des Tabacs et Allumettes v Salomon Bros. Intern. Ltd., 249 AD2d 232; Bango v Naughton, 184 AD2d 961). A party cannot rely on oral representations where, through a merger or integration clause, it has "in the plainest language announced and stipulated that it is not relying on any representations" as to the matters it claims as fraud. (Danann Realty Corp. v Harris, 5 NY2d 317, 320; see, Citibank v Plapinger, 66 NY2d 90). And, "[e]ven if an integration clause is general, a fraud claim will not stand where the clause was included in a multi-million dollar transaction that was executed following negotiations between sophisticated business people and a fraud defense is inconsistent with other specific recitals in the contract" (Emergent Capital Mgmt. LLC v Stonepath Group, 165 F Supp2d 615, 622; see, Cohan v Sicular, 214 AD2d 637).

Section 3.2 of the Stockholders Agreement contains no restrictions upon Jupiter's veto rights. It simply provides that

"[n]either the Company [H-G] nor any of its Subsidiaries shall" effect certain transactions, including an IPO of more the 5% of the company's stock, "without the written approval of the Majority Holder [Jupiter]." Additionally, section 10.7 of the Agreement provides that "[t]his Agreement contains the entire agreement and understanding between the parties hereto with respect to matters covered hereby and supersedes all prior agreements and understandings, written or oral, among the parties with respect to the subject matter hereof." Accordingly, plaintiffs' claim of fraud regarding the scope and proper exercise of defendants' veto rights with respect to an IPO is inconsistent with the express clause defining those rights and plaintiffs' own agreement that they were not relying upon any contrary, extrinsic representations. Moreover, plaintiffs were not entitled to rely upon any representations regarding an IPO because such an event was a contingent future occurrence outside the control of the parties (see, Worldcom, Inc. v PrepayUSA Telecom Corp., 12/4/98 NYLJ 30 [Sup Ct NY Co], aff'd sub nom Worldcom, Inc. v Segway Mktg. Ltd., 262 AD2d 14).

Identical considerations bar plaintiffs' claim of fraudulent inducement with respect to the Northington Note. The Note calls for payment on a series of dates certain, rather than making payment conditional upon receipt of additional funds. Thus, plaintiffs cannot rely on the alleged oral promises that repayment would be contingent upon a realization from their investment (see, Glenfed Fin. Corp. v Aeronautics and Astronautics Servs., 181 AD2d 575, lv denied 80 NY2d 893; Mnfrs. Hanover Trust Co. v Restivo, 169 AD2d 413, lv dismissed 77 NY2d 989).

The third cause of action, for breach of contract, asserts a breach of the implied obligation of good faith and fair dealing. This theory fails because "[t]he covenant of good faith and fair dealing cannot be used to add a new term to a contract, especially to a commercial contract between two sophisticated commercial parties represented by counsel" (D&L Holdings, LLC v RCG Goldman Co., LLC., ___ AD2d ___, 2001 WL 1558124). Nor may the covenant be applied in a manner inconsistent with the express terms of the contract (Sabetay v Sterling Drug, 69 NY2d 329; Mark Patterson, Inc. v Bowie, 237 AD2d 184; Marine Midland Bank, N.A. v Yoruk, 242 AD2d 932), or be invoked to penalize a party for exercising its rights under an agreement (see, M/A-Com Sec. Corp. v Galesi, 904 F2d 124 [2d Cir]; Hartford Fire Ins. Co. v Federated Dept Stores, Inc., 723 F Supp 976). All of the alleged breaches of the covenant relate to either defendants' exercise of their contractually guaranteed right to veto an IPO under section 3.2 of the Stockholders Agreement or their control rights upon default under section 5.1.

The fourth cause of action asserts a breach of section 3.1 of the Stockholders Agreement, alleging that Jupiter and RIT "fail[ed] to restore Elias to the H-G board when he was duly nominated by RIS," and that Jupiter breached section 5.1 by "falsely claiming a default under the Northington Note as a pretext to seize voting control of plaintiff RIS' shares and block Elias's reappointment to the Board." However, the record, including the complaint, conclusively establishes that, no later than July 30, 1997, Richbell Strategic was in default on the Northington Note. In April 1997, Harpur petitioned an English court to wind up Richbell

Strategic on the ground of the default and, in July 1997, the court ruled that Richbell Strategic had failed to make the interest payment due on June 30, 1997. Pursuant to section 5.1 of the Stockholders Agreement, Jupiter then had the right to vote plaintiff RIS' H-G shares and take plaintiff RIS' seats on the Board. Although the plaintiffs allege that Elias' removal from the Board was premature in that it occurred in February 1997, and that he thus should have been allowed to serve from that time until July 30, 1997, plaintiffs have not pled any damages flowing from Elias' premature removal. Plaintiffs have not identified any action the board would have resolved differently had Elias served. They have not even identified any matter H-G shareholders voted upon during that period. Accordingly, the fourth cause of action is dismissed (see, Ryan Ready Mixed Concrete Corp. v Coons, 25 AD2d 530).

The thirteenth and fourteenth causes of action allege tortious interference with the Stockholders Agreement and the Northington Note. A claim for tortious interference with an existing contract must plead (1) a valid contract between plaintiff and a third party (2) defendants' knowledge of the contract, (3) defendants' wrongful, intentional procurement to breach or render performance impossible, and (4) damages (see, Lama Holding Co. v Smith Barney, 88 NY2d 413; Kronos, Inc. v AVX Corp., 81 NY2d 90; Israel v Wood Dolson Co., 1 NY2d 116). Because the court has dismissed the underlying contract claims, the claims for tortious interference upon which they are predicated must fail as well.

Likewise, the twenty-second and twenty-third causes of action, for unjust enrichment and conversion, are dismissed because they merely restate the facts underpinning the failed contract claims

(see, Interstate Adjusters, Inc. v First Fidelity Bank, N.A., New Jersey, 251 AD2d 232; (Yeterian v Heather Mills N.V. Inc., 183 AD2d 493; Julien J. Studley, Inc. v N.Y. News, 70 NY2d 628; Clark-Fitzpatrick, Inc. v Long Is. R.R., 70 NY2d 382).

2. Breach of Fiduciary Duty (First and Second Causes of Action)

In the first cause of action, plaintiffs allege that Jupiter breached its fiduciary duties to plaintiffs RGL and RIS when it unreasonably refused to approve an IPO, used that refusal to extract financial concessions and delayed any realization of value until Jupiter wiped out plaintiffs' interest. RIT allegedly joined in Jupiter's conduct, by supporting the delay of the IPO (or other realization) to prevent plaintiffs from repaying the thirty million dollar AGIT Loan and by agreeing to share in the proceeds from a foreclosure of plaintiffs' H-G shares. Additionally, plaintiffs allege that Jupiter and RIT breached their fiduciary duties when they: (1) exploited plaintiffs' need for liquidity by forcing plaintiffs to accept the 1995 capital distribution as a dividend rather than as a return of capital; (2) failed to compensate plaintiffs for certain corporate transactions; and (3) prevented plaintiffs from borrowing from others. Plaintiffs assert that defendants' fiduciary duties arose out of: (1) Jupiter, RIT and RGL's status as co-venturers in a joint venture; and (2) Jupiter, RIT and RIS' status as shareholders in a closely-held corporation. The second cause of action alleges that all of the defendants aided and abetted the various breaches of fiduciary duty.

Ordinarily, "[a] conventional business relationship does not create a fiduciary relationship in the absence of additional factors" (RKB Enters., Inc. v Ernst & Young, 182 AD2d 971; Feigen v

Advance Capital Mgmt. Corp., 150 AD2d 281, appeal dismissed 74 NY2d 874; Oursler v Women's Interart Ctr., 170 AD2d 407). After lengthy, contentious, arm's-length negotiations, the parties here fixed their respective rights and obligations in the Stockholders Agreement. None of the various theories plaintiffs proffer can convert that contractual relationship into a fiduciary one.

The pleadings do not establish the existence of a joint venture among the parties. In determining whether a joint venture exists, the factors the court considers are the intent of the parties, the degree of joint control and management of the undertaking, the sharing of profits and losses, and whether there was a combination of property, skill or knowledge (see, Mendelson v Feinman, 143 AD2d 76, 77). "The ultimate inquiry is whether the parties have so joined their property, interests, skills and risks that for the purpose of the particular adventure their respective contributions have become as one and the commingled property and interests of the parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their joint benefit" (Matter of Steinbeck v Gerosa, 4 NY2d 302, 317 (internal quotations and citations omitted), appeal dismissed 358 US 39).

Mere allegations that the parties have combined their resources in a business entity are insufficient (Mendelson, supra at 78). Likewise, claims that they have agreed to act together to achieve some stated economic objective are insufficient, as "[s]uch agreement, by itself, creates no more than a contractual obligation, otherwise every stockholders' agreement would give rise to a joint venture" (Gerosa, supra at 317-318). Additionally,

"[a]n agreement to distribute the proceeds of an enterprise on a percentage basis, or the sharing of gross returns, does not in and of itself establish a joint venture" (Gold Mechanical Contractors v Lloyds Bank PLC, 197 AD2d 384; see, DeVito v Pokoik, 150 AD2d 331).

Although plaintiffs argue there was a joint venture by the time of the Gelco bid in July 1994, the pleadings demonstrate that only preliminary, non-binding negotiations had occurred up to that point. Likewise, nothing in the discussions thereafter that led up to the execution of the Stockholders Agreement in October 1994 suggests an intent to form a joint venture. To the contrary, plaintiffs allege highly adversarial negotiations culminating in a corporation the parties structured specifically to protect the stockholders from each other.

The terms of the Stockholders Agreement also do not establish a joint venture. At most, the terms establish an agreement to share the proceeds of the business on a percentage basis. Rather than providing that the parties would share losses, the Agreement provided Jupiter with special protection in the event of under performance. Further, plaintiffs concede that the A/B share structure resulted in the lack of a commonality of interest among the parties, rather than a fiduciary relationship. Moreover, because the Stockholders Agreement does not reflect that the parties reserved any rights for the alleged joint venture to exercise independently, it is clear that the parties intended to relegate their rights to corporate shareholders and carry the business out exclusively through the corporate form. (see, Heisman v Awnair Corp. of Amer., 3 NY2d 444; Interset Group, Inc. v

Rosenzweig, 225 AD2d 402; Sagamore Corp. v Diamond Energy W. Corp., 806 F2d 373).

Nor did a fiduciary duty arise out of the parties' status as shareholders. Although a fiduciary relationship may arise in a closed corporation where the shareholders function as de facto partners (see, Fender v Prescott, 101 AD2d 418, aff'd 64 NY2d 1079), the stockholders are nevertheless bound to the terms of the agreement they have made. "[T]here is no reason why an appeal to general fiduciary law should be used . . . as a pretext for evading . . . contractual obligations" Ingle v Glamore Motor Sales, 73 NY2d 183, 190), quoting Coleman v Taub, 638 F2d 628, 636). Moreover, fiduciary duties do not arise where, as here, the shareholders lack a close working relationship (Rosiny v Schmidt, 185 AD2d 727, leave denied, 80 NY2d 762).

Finally, even if there were some sort of fiduciary relationship among plaintiffs and Jupiter and RIT, plaintiffs have not pled conduct that would constitute a breach. Rather, they complain that defendants failed to exercise, or refrained from exercising, their contractual rights in a manner that would accommodate plaintiffs' financial difficulties. Thus, the first cause of action is dismissed. Because plaintiffs predicate the second cause of action for aiding and abetting upon the failed claim for breach of fiduciary duties, this cause of action is also dismissed.

3. Breach of Fiduciary Duty (Twenty-Fifth Cause of Action)

In the twenty-fifth cause of action plaintiff RIS alleges that the failure of defendants, in particular Sprague, Blumer and

Saunders, to "get the best sales price for H-G" amounts to a breach of fiduciary duty. However, the obligation of corporate directors to maximize the sales price generally arises only where the company is engaged in an active bidding process and the breakup of the company is inevitable (see, Revlon Inc. v McAndrews & Forbes Holdings, Inc., 506 A2d 173; Paramount Comms. Inc. v QVC Network, Inc., 637 A2d 34). Because the pleadings demonstrate that H-G's board never committed to an IPO or sale, the duty plaintiffs urge does not apply (see, Ivanhoe Partners v Newmont Min. Corp., 535 A2d 1334). Plaintiffs' allegations, that the company had taken "steps" toward a sale by retaining investment bankers, are insufficient, as these "steps" do not establish an active bidding process or inevitable sale. Thus, the cause of action is insufficient and dismissed.

4. Claims Relating to the "April 1996 Agreement" (Sixth, Eleventh and Fifteenth Causes of Action)

In the sixth cause of action, plaintiffs allege that defendants breached the April 1996 Agreement. Plaintiffs concede that that Agreement was not a written one, but rather an oral one, in part, evidenced by the April 18, 1996 MOU. Jupiter allegedly promised to support, rather than veto, an IPO or floatation within six to nine months, to loan plaintiff RIS $30 million and abide by the other terms of the MOU.

The claim is dismissed. Even accepting that the defendants orally agreed to the terms of the MOU, those terms at best constitute no more than an "agreement to agree" (see, Martin, Delicatessen, Inc. v Schumacher, 52 NY2d 105. A "mere agreement to agree, in which a material term is left for future negotiations, is

unenforceable" (Id. at 109).

The MOU, referring to issues agreed to only "in principle," leaves a series of material terms unresolved, including the terms of the IPO, Elias' future role in management, his post-IPO shareholdings and the continued existence of the Shareholders Agreement. And, even assuming that the parties' alleged agreement to the MOU became binding without the need for future discussions, the terms themselves are too indefinite for enforcement. The MOU refers to a "common intention to achieve an IPO" with no specific commitment to go forward or details of the transaction; an "active role" for Elias, without specifying his duties; and "significant shareholding" for Elias, without any quantification of the degree.

Additionally, the April 1996 Agreement is "devoid of any of the formalities of contract" (Allied Sheet Metal Works, Inc. v Kerby Saunders, Inc., 206 AD2d 166, 170; see, D.K. Cable Ventures v Bell Atl. Inv., 232 AD2d 294, leave dismissed, 89 NY2d 981). In contrast to the lengthy Stockholders Agreement and the Northington Note, the MOU is a single page document lacking any recitals, words of agreement, signatures or other indicia of a contract. "A contract of this magnitude is one that the courts would ordinarily expect the parties to embody in a formal writing" (see, Allied, supra, 206 AD2d at 170). Moreover, apart from the lack of signatures, the complaint does not plead, in a non-conclusory fashion, facts from which one may reasonably infer oral assent to the MOU (see, Schwartz v Soc. Of NY Hosp., 199 AD2d 129).

The eleventh cause of action seeks enforcement of the April 1996 Agreement under a theory of promissory estoppel. However, a claim for promissory estoppel requires reliance upon "clear and

unambiguous promises" (Chatterjee Fund Management, L.P. v Dimensional Media Assoc., 260 AD2d 159, 159). As noted above, the terms of the alleged April 1996 Agreement are vague and indefinite. Therefore, they cannot form the basis for a promissory estoppel claim.

The fifteenth cause of action, for tortious interference with the April 1996 Agreement, is also dismissed because, as noted above, a claim for tortious inference cannot survive absent a viable contract claim.

5. Breach of the RIT 1996 Agreement (Eighth and Sixteenth Causes of Action)

The eighth cause of action alleges that RIT promised to use its best efforts to ensure that Jupiter would uphold its obligations under the April 1996 Agreement. The sixteenth cause of action alleges that Jupiter and other defendants interfered with that Agreement. Because, as noted above, there was no valid April 1996 Agreement, the claims are dismissed.

6. Intentional Interference with Business Relations (Twentieth Through Twenty-Second Causes of Action)

The twentieth and twenty-first causes of action allege tortious interference with unspecified existing and prospective business relationships with unnamed, third-party financial institutions, investors and creditors. A claim for tortious interference with prospective relationships requires, among other things, a showing of the use of wrongful means, such as physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, or some degree of economic pressure, or that defendant acted with malice, i.e. for the sole purpose of harming the plaintiff (see, NBT Bancorp v Fleet/Norstar Fin. Group, 87 NY2d

614); Guard-Life Corp v S. Parker Hardware Mnfr. Corp., 50 NY2d 183; Snyder v Sony Music Entertainment Inc., 252 AD2d 294). Plaintiff must further allege that, but for the defendant's acts, a third party would have entered into or extended a contractual relationship with plaintiff (see, Amer. Preferred Prescription, Inc. v Health Mgmt. Inc., 252 AD2d 414; M.J. & K Co. v Matthew Bender & Co., 220 AD2d 488, and plaintiff must identify a specific prospective relationship with which defendant interfered (Best Payphones, Inc. v Empire State Assoc., 272 AD2d 139; Business Networks of NY v Complete Network Solutions, 265 AD2d 194).

In opposition to the motion, plaintiffs assert that, in 1997 and 1998, defendants interfered with Elias' relationships with Lloyd's Bank and Henry Ausbacker by engaging in various communications with them. However, plaintiffs still do not point to a specific contract or opportunity that defendants' conduct defeated. Further, plaintiffs do not allege that the communications were defamatory or otherwise explain how they constituted wrongful means. Nor do plaintiffs assert that the sole motivation behind the communications was a desire to harm plaintiffs. Accordingly, the twentieth and twenty-first causes of action are dismissed.

The twenty-second cause of action, alleging interference with plaintiffs' attempts to obtain a loan from Jack Dellal, is also dismissed. Specifically, plaintiffs allege that defendants wrongfully refused to provide a written commitment to an IPO or to unwind or replace the A/B share structure. However, a mere refusal to affirmatively assist another in obtaining financing does not constitute intentional interference with that financing. Further,

plaintiffs' categorization of the refusal as "wrongful" rests entirely on the incorrect proposition that defendants owed fiduciary duties to plaintiffs.

7. (Fraudulent Inducement of the AGIT Note (Twelfth Cause of Action)

In the twelfth cause of action, plaintiffs assert that defendants fraudulently induced plaintiffs into signing the AGIT Note and pledging plaintiff RIS' shares as security for the loan. Plaintiffs rely, again, upon the same representations about the imminence of the IPO and other matters that underlie plaintiffs' dismissed claim for breach of the April 1996 Agreement. A fraud claim that merely restates a breach of contract claim cannot proceed (PSI Intern., Inc. v Ottimo, 272 AD2d 279). Further, as noted above, plaintiffs cannot assert that they reasonably relied on the representations because the representations meaningfully conflict with the terms of the Stockholders Agreement, as well as the AGIT Note, that provided for repayment on a date certain and without respect to the occurrence of an IPO.

8. Wrongful Enforcement of the AGIT Note (Seventh, Ninth and Seventeenth Causes of Action)

The seventh cause of action asserts a claim for fraud, collusion, bad faith and failure to proceed in a commercially reasonable manner with respect to the enforcement of the AGIT Note. Plaintiffs contend that the January 1997 Agreement was a "bid-rigging" arrangement whereby RIT, AGIT and Jupiter colluded to cause plaintiff RIS to default on the AGIT Note in order to purchase plaintiff RIS' shares in H-G at a depressed price.

The claim is dismissed. First, the allegation that defendants

caused the default relies, again, merely on plaintiffs' failed allegation of defendants' failure to approve an IPO and upon defendants' fraudulent inducement of the AGIT note.

Second, the allegations of "bid rigging" and collusion rest upon a mischaracterization of the January 1997 Agreement. That agreement gives Jupiter the right to determine the amount at which RIT could attempt to purchase plaintiff RIS' H-G shares, but provides that the agreement is "subject to applicable bankruptcy, insolvency and other similar laws affecting the enforcement of creditors' rights generally, general equitable principles and the discretion of the courts in granting equitable remedies." (Compl. Ex. 53 § 7.2(b).) Further, the agreement does not set the price for plaintiff RIS' shares. That price is still subject to the outcome of the foreclosure sale.

Finally, because there has been no foreclosure sale, the claim is premature. AGIT has taken title to plaintiff RIS' shares pursuant to the Note and has presented a winding-up petition in the United Kingdom. Apparently, the propriety of the liquidation is still before the High Court in that jurisdiction. But no sale has occurred. Nor is one imminent. That the foreclosure sale may depress the price for the stock is too speculative to adjudicate.

The ninth cause of action, that plaintiffs should not have to repay the AGIT Note because AGIT and RIT breached the obligation of good faith and fair dealing, is foreclosed for the same reasons that the seventh cause of action for, inter alia, failure to proceed in a commercially reasonable manner with respect to the enforcement of the AGIT Note, was foreclosed. The seventeenth cause of action alleges that Jupiter and other defendants

intentionally interfered with, or procured the breach of, the AGIT Note. Once again, the claims are dismissed because they are based on conduct related to the mere failure to support an IPO or provide financing, or acts performed in accordance with the parties' contractual rights.

9. Negligent Misrepresentation (Thirty-Third Cause of Action)

The thirty-third cause of action against RIT for negligent misrepresentation is dismissed. The misrepresentation relates to the ineffective April 1996 MOU Agreement and relies upon the incorrect premise that RIT had fiduciary duties under the Stockholders Agreement, the alleged RIT 1996 Agreement and the purported H-G joint venture.

10. Breach of Fiduciary Duty (Twenty-Fourth and Thirtieth Causes of Action)

The twenty-fourth and thirtieth causes of action are derivative claims on behalf of H-G against Jupiter, RIT and others for corporate waste, self-dealing and misuse of corporate assets.

Because H-G is a Delaware Corporation, Delaware law applies. Pursuant to the applicable Delaware Court of Chancery Rule 23.1, a plaintiff bringing a derivative suit must "allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and the reasons for the plaintiff's failure to obtain the action or for not making the effort." To establish the futility of demand, the plaintiff must raise a reasonable doubt that: (1) the directors are disinterested and independent; or (2) the transaction was the product of a valid exercise of business judgment (see,

Brehm v Eisner, 746 A2d 244).[1] In determining whether plaintiff has complied with the statute, "only well-pleaded allegations of fact must be accepted as true; conclusionary allegations of fact or law not supported by allegations of specific fact may not be taken as true" (Grobow v Perot, 539 A2d 180, 187 [Del], overruled on other grounds, Brehm v. Eisner, 746 A.2d 244 [Del]).

The complaint does not allege plaintiffs' efforts as to the board or even the composition of the H-G board at the time the lawsuit was filed. Nor does the complaint make particularized allegations of the Board's disinterest or lack of independence of the majority of the directors responsible for the challenged actions. Accordingly, these claims are dismissed.

11. Claims Relating to the Saunders' Consulting Agreements (Eighteenth, Nineteenth, Twenty-Eighth and Twenty-Ninth Causes of Action)

The twenty-ninth cause of action alleges that defendant Ernest Saunders "had contracts to provide services to plaintiffs RGL and Elias" that he breached. The twenty-eighth cause of action alleges that Saunders breached his fiduciary duties to RGL and Elias and that all the other defendants aided and abetted him. The eighteenth and nineteenth causes of action allege that various defendants intentionally interfered and procured the breaches of Saunders' contracts with RGL and Elias.

The claims are dismissed. First, in an action for breach of contract, the complaint must, inter alia, set forth the terms of

[1] Although circumstances where defendants' acts of waste were so egregious so that they could not be the product of sound business judgment may excuse plaintiff from the demand requirement, this exception only applies where "a majority of the directors making the decision have been replaced" (Rales v Blasband, 634 A2d 927, 934; see also Wilson v Tully, 243 AD2d 229).

the agreement, (either by express reference or by attaching a copy of the contract) and the special damages plaintiff sustained (see, Chrysler Capital Corp. v Hilltop Egg Farms, Inc., 129 AD2d 927; Griffin Bros. v Yatto, 68 AD2d 1009; Lupinski v Village of Ilion, 59 AD2d 1050). Where there is no contractual obligation between two parties or when the essential elements of the contract are not specified, there can be no breach of contract claim (see, Fleissler v Bayroff, 266 AD2d 34; Sud v Sud, 211 AD2d 423). This rule applies to contracts for personal services (Caniglia v Chicago Tribune-New York News Syndicate, 204 AD2d 233). The complaint does not set forth any particulars of Saunders' contracts with RGL or Elias and, the contracts plaintiffs' have proffered in opposition to this motion, are not with RGL or Elias. The claims for breach of fiduciary duty and interference with contract are also dismissed because the claims are premised upon the alleged contractual relationship between Saunders and the plaintiffs.

12. Breach of Contract, Unjust Enrichment and Quantum Meruit (Thirty-First Cause of Action)

The thirty-first cause of action seeks recovery for management services Elias and RGL allegedly performed for H-G and Harpur. The complaint fails to set forth, inter alia, the agreed rate of compensation and is thus too indefinite for enforcement in contract (see, Caniglia, supra). The record also negates the existence of an express contract, pleading that Elias agreed to forgo compensation for his services in anticipation of realizing returns through an IPO. Moreover, in connection with the winding up proceedings Harpur commenced under the Northington Note, non-party Richbell Strategic, not Elias or RGL, asserted entitlement to

compensation for management services Richbell Strategic allegedly rendered between October 1994 and December 1996, and plaintiffs have not asserted any basis for their standing to pursue monies allegedly owed to that entity.

13. Accounting, Inspection of H-G's Books and Records and Declaratory Relief (Tenth, Twenty-Sixth and Twenty-Seventh Causes of Action)

Plaintiffs have abandoned their claims for an accounting under the Northington Note (tenth cause of action) and an inspection of H-G 's books and records (twenty-seventh cause of action). The twenty-sixth cause of action is also dismissed as moot, insofar as it merely seeks a declaration of the parties' rights, adjudicated above, under the various agreements.

AGIT'S AND HARPUR'S MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Even if the court were not to dismiss the amended complaint in its entirety, it would dismiss the amended complaint as to AGIT and Harpur because it lacks personal jurisdiction over these defendants.[2] Plaintiffs base their claims against AGIT entirely on AGIT's conduct in enforcing the 30 million dollar AGIT note. This note was made in England and AGIT's allegedly wrongful conduct in enforcing that note took place exclusively in England. Consequently, this court has no jurisdiction over AGIT.

[2] AGIT and Harpur, along with H-G and RIT, argue alternatively that this case should be dismissed on the grounds of forum non conveniens and in the interests of comity. However, under Business Corporations Law § 1314(b) where a foreign corporation sues another foreign corporation, a New York forum is presumptively convenient where, *inter alia*, "the defendant would be subject to jurisdiction under CPLR 302." Thus, if there were jurisdiction over AGIT and Harpur under CPLR 302, their forum non conveniens argument would be unavailing. Likewise, because defendants concede personal jurisdiction with respect to H-G and RIT, they cannot argue that this forum is not convenient. In addition, because the cases before the British courts involve different issues from this case, there is no need to dismiss in the interests of comity.

Nor does the January 1997 Agreement, containing New York choice of law and choice of forum provisions, confer jurisdiction over AGIT. Just because AGIT chose to submit to New York for the limited purpose of resolving disputes arising from the January 1997 Agreement with RIT and Jupiter, does not require AGIT to submit to New York for the much broader dispute that plaintiffs assert in this case. Moreover, plaintiffs are neither parties nor third-party beneficiaries to the January 1997 Agreement and therefore cannot enforce its provisions.

Further, the acts of RIT in New York do not confer jurisdiction over AGIT. AGIT and RIT are separate companies. They have separate bank accounts. With one exception, AGIT and RIT have separate directors. (Budge Aff. ¶ 8.) Other than noting that AGIT and RIT are located at the same London address, plaintiffs have failed to contradict AGIT's affidavit evidence demonstrating that it is an independent corporation from RIT.

Finally, plaintiffs try to base jurisdiction over AGIT on various visits to New York that Paul Griffiths, who at times represented AGIT in England, made on behalf of RIT. However, the mere presence of a company's representative in a forum does not confer jurisdiction when that representative is not conducting the business of that company. (Lawford v. New York Life Ins. Co., 739 F. Supp. 906.)

For similar reasons there is no personal jurisdiction over defendant Harpur. Plaintiffs conclusorily assert that Harpur is the "agent, instrumentality and alter ego of Jupiter, RIT and other defendants." (Plaintiffs' Opp. Mem. at pg. 116.) However, the amended complaint is devoid of any specific fact, such as identity

of board members, to support plaintiffs' assertion that Harpur is one of these companies' alter ego. Nor have plaintiffs connected Harpur to tortious conduct in New York. Thus, plaintiffs have failed to establish a *prima facie* case conferring jurisdiction over Harpur in New York.

Plaintiffs also assert that this court has "conspiracy jurisdiction" over Harpur and AGIT, because the acts of these two companies, even if outside New York, were in furtherance of a conspiracy with New York-based defendants. (Plaintiffs' Opp. Mem. at pg. 117.) However, because this court has dismissed the seventh cause of action for, inter alia, fraud and conspiracy, this argument is moot.

Accordingly, in the alternative, the court grants the motion of defendants Harpur and AGIT to dismiss the amended complaint against them on the grounds of lack of personal jurisdiction.

THE MOTION TO VACATE PRIOR ORDERS CONCERNING SANCTIONS

Plaintiffs' motion to vacate the orders of October 27, 2000 and March 2001 imposing sanctions upon plaintiffs and their counsel is granted. These prior orders were based, in part, upon the court's finding that plaintiffs' third amended complaint contained factual allegations the court had previously found champertous. However, the Appellate Division's order of March 20, 2001 reversed the original order upon which the court had made the finding of champerty. Further, at oral argument prior to directing sanctions, Justice Cozier noted that he did not find plaintiffs' conduct to be contumacious or constitute willful disobedience, but rather that it was frivolous only in the "entire context of the litigation." Viewing the record as a whole and, in particular, the Appellate

Division's reversal of the court's finding of champerty, this court finds that the orders imposing sanctions should be vacated. In view of this determination, plaintiffs' counsel is entitled to restitution of the $2,500 paid to the Lawyers' Fund for Client Protection (see, CPLR 5015[d]).

Accordingly, it is

ORDERED that the motion to dismiss is granted, and the Verified Amended Complaint is dismissed, with costs and disbursements to defendants as taxed by the Clerk of the Court, and it is further

ORDERED, that the motion to lift the automatic stay of discovery is denied as moot, and it is further

ORDERED, that the motion to vacate the prior orders concerning sanctions is granted, and it is further

ORDERED, that the Lawyers' Fund for Client Protection is directed to reimburse plaintiffs' counsel the sum of $2,500.

The foregoing is the Order and Judgment of the court and the Clerk is directed to enter judgment accordingly.

Dated: 3/6/02

ENTER:

J.S.C.

KARLA MOSKOWITZ