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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Charles Edward Ramos** PART **53**

0600484/2003

RIVAS, PABLO
vs
AMERIMED USA, INC.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

SEQ 1

DISMISS ACTION

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with accompanying memorandum decision and order.

FILED
AUG 20 2004
COUNTY

Dated: 8/12/04

CHARLES E. RAMOS J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK:COMMERCIAL DIVISION
----------X
PABLO RIVAS and WALTER COHEN,

Plaintiffs,

Index No. 600484/03

- against -

AMERIMED USA, INC., MARK R. ENGELMAN, JARRETT POSNER and SAMUEL WAKSAL,

Defendants.
----------X

Charles Edward Ramos, J.S.C.:

In motion sequence 001, defendants AmeriMed USA, Inc. (AmeriMed), Mark R. Engelman, Jarrett Posner and Samuel Waksal move pursuant to CPLR 311 to dismiss the complaint against AmeriMed, pursuant to CPLR 3211 (a) (7) to dismiss the fifth, sixth and seventh causes of action and pursuant to CPLR 301 and 302 to dismiss the complaint against AmeriMed and Mr. Engelman. Plaintiffs Pablo Rivas and Walter Cohen cross-move pursuant to CPLR 306-b for an order granting an extension of time to serve the summons and complaint and pursuant to CPLR 3025 for leave to serve an amended complaint.

Background

Mr. Rivas is a citizen of Spain and resident of New York State. Mr. Cohen is a citizen of France. AmeriMed is a corporation in the business of operating a chain of hospitals in Cancun and two resort areas in Mexico, and is organized under the laws of Delaware with its administrative offices in Phoenix, Arizona. Mr. Engelman, a citizen and resident of Arizona, is the founder and significant minority shareholder of AmeriMed. Until

November 2001 he served as the company's president and, according to plaintiffs, was a member of AmeriMed's board of directors at all relevant times. Mr. Posner, a citizen and resident of New York, was a member of AmeriMed's board of directors until February 2002. Mr. Waksal, a citizen and resident of New York, was allegedly a member of AmeriMed's Board of Directors at all relevant times.

Plaintiffs allege that, in August 2001, Mr. Rivas met with Mr. Posner to discuss potential employment with AmeriMed as its senior officer. A few weeks later he visited AmeriMed's hospital facilities and received, from Mr. Engelman, financial information about the company. After further discussions with Mr. Posner, in late September 2001 an oral agreement was reached to hire Mr. Rivas as chief executive officer and Mr. Cohen as chief financial officer of AmeriMed.

Pursuant to the alleged agreement, Messrs. Rivas and Cohen were each to receive $175,000 annual salary for the first year with increases in each of the following two years, an annual bonus based on a percentage of AmeriMed's earnings, stock equal in the aggregate to 9% of the company's outstanding shares, and severance benefits. Additionally, AmeriMed was to arrange H1-B working visas for both plaintiffs.

The parties allegedly planned to reduce the agreement to writing, but in the interim, Messrs. Rivas and Cohen commenced employment with AmeriMed under the terms of the agreement. Plaintiffs began working on September 20, 2001. At its meeting

on November 28, 2001, AmeriMed's Board of Directors allegedly approved the terms of Messrs. Rivas' and Cohen's employment agreements and their compensation packages.

According to the complaint, Messrs. Rivas and Cohen worked full-time at AmeriMed for more than nine months. During that period they repeatedly urged Messrs. Posner, Waksal and the other directors to sign a written agreement, procure their H1-B visas and pay their salaries. In response, Messrs. Posner and Waksal regularly assured that the agreed terms would be honored. However, plaintiffs never received their salaries, except for a one-time payment in June 2002, of $96,000, most of which was a reimbursement for $60,000 of out-of-pocket expenses incurred on the company's benefit. On July 3, 2001 plaintiffs resigned.

Plaintiffs assert seven causes of action against defendants. The first four are asserted against AmeriMed and are for breach of contract, quantum meruit, promissory estoppel and unjust enrichment. Plaintiffs assert these causes of action based upon the contracts, or quasi contracts with AmeriMed, and seek to recover salaries and other compensations owed on the basis of said contracts.

The fifth cause of action asserts a claim of fraudulent misrepresentation against AmeriMed, Posner and Waksal. Plaintiffs allege a number of face-to-face meetings and telephone conversations with Messrs. Posner and Waksal in which both defendants represented that Messrs. Rivas and Cohen would receive their compensation and all the necessary paper work for visas

would be done by Engelman. According to plaintiffs, Messrs. Posner and Waksal knew that their representations were false or made them with reckless disregard as to whether they were true. Plaintiffs claim that they relied on these statements to their injury by commencing work and continuing to work without salaries and are entitled to recover compensatory as well as punitive damages. The sixth cause of action is for negligent representations against the same defendants based on the same statements.

The seventh cause of action, asserts tortious interference with contract against Mr. Engelman. Mr. Engelman allegedly took affirmative steps to prevent the plaintiffs from receiving the benefits of the contract because he felt threatened by their presence in the company. Plaintiffs seek damages in the amount of compensation allegedly owed them, as well as punitive damages.

Defendants move to dismiss the complaint against AmeriMed for improper service of process, and against AmeriMed and Engelman for lack of personal jurisdiction. They also move to dismiss the causes of action for fraud and negligent representation against defendants Posner, Waksal and AmeriMed, and tortious interference with contract against Engelman for failure to state a claim. Finally, defendants move to strike statements in complaint prejudicial to Mr. Waksal.

Plaintiffs cross-move for leave of court to amend the complaint, to allow additional time to serve AmeriMed and to compel the discovery on jurisdictional issues and on the merits.

Analysis

Service on AmeriMed

As a Delaware corporation, Amerimed must be served in accordance with CPLR 311. Service of the summons was made on AmeriMed by delivering it to Engelman on March 1, 2003. According to defendants, Engelman resigned from the Board of Directors as of April 11, 2002, and was not authorized in any capacity to receive service for the corporation after that date. Thus any effort to serve AmeriMed through Engelman is of no legal effect.

Plaintiffs claim to have served all three individual defendants, Engelman, Posner and Waksal, all of whom were at some time directors of AmeriMed. If any of them were still officers or directors of AmeriMed at the time of service, then, according to plaintiffs, service has also been effected on AmeriMed. Plaintiffs seek to conduct discovery to determine when the individual defendants ceased to be officers and directors of AmeriMed. In the alternative they ask this Court to extend the time for the service of process on Amerimed.

Pursuant to CPLR 311, AmeriMed was served if the complaint and summons were delivered to "an officer, director, managing or general agent []or any other agent authorized by appointment or by law to receive the service". Plaintiffs assert that Mr. Engelman was a member of the Board of Directors at the time of the service or, at least, they believed so. Where there are doubts whether a former official is authorized to accept service,

courts have allowed hearings on the matter. *Pinto v House*, 79 AD2d 361 (1st Dep't 1981).

If discovery shows that Engelman retained his connections with AmeriMed and was still authorized to receive service on its behalf, the issue arises whether one copy of the complaint and summons was sufficient to notify both him, as an individual, and the corporation. The manner in which process was delivered is decisive. If it was delivered on a corporate officer personally, in compliance both with CPLR 308 (service on a person) and CPLR 311 (service on a corporation), one copy is sufficient. *Port Chester Elec. Co. v Ronbed Corp.*, 28 AD2d 1008 (2d Dep't 1967). However when an officer was served pursuant to CPLR 308 only, by leaving documents with a competent person at his domicile or office and mailing the copy to his last known address, process is deficient as to the corporation. *Lakeside Concrete Corp. v Pine Hollow Bldg. Corp.*, 104 AD2d 551 (2d Dep't 1984), *aff'd* 65 NY2d 865 (1985).

Mr. Engelman was served personally, accordingly, if he was still an officer of the corporation at that time, service is valid for the corporation as well. However, the same is not true as to Messrs. Posner and Waksal, who were not served personally. Therefore, plaintiffs' contention that if Messrs. Posner and Waksal were authorized to receive process on the corporation's behalf, then the service on them as individuals would give notice to the corporation, is unavailing.

If discovery reveals that Engelman had ceased to be member

of the AmeriMed's Board of Directors and was not otherwise authorized to act on its behalf, but that plaintiffs did not have an opportunity to learn about it, this Court may exercise its discretion and allow the plaintiffs to serve process again. When the server of process makes a good faith effort but delivers service to an unauthorized person by mistake, courts may disregard deficiencies in process. *See Fashion Page, Ltd. v Zurich Ins. Co.*, 50 NY2d 265 (1980) (where service was made in a manner which, objectively viewed, was calculated to give the corporation fair notice, the service should be sustained). *See also Martin v Archway Inn*, 164 AD2d 843 (1st Dep't 1990).

Jurisdiction Over Defendants

Defendants argue that the court lacks jurisdiction over AmeriMed or Engelman pursuant to CPLR 301. Defendants allege that neither of them is "doing business" in New York, they do not own any property, maintain an office or mailing address in New York, nor do they have any employees or telephone numbers in New York. Also no grounds exist to establish jurisdiction pursuant to CPLR 302, since they do not transact any business in the state related to the claim within the ambit of CPLR 302(a)(1), no tortious act was committed in New York pursuant to CPLR 302(a)(2) or outside the state causing injury to a person or property within the state pursuant to 302(a)(3).

Plaintiffs argue that AmeriMed is "doing business" in New York pursuant to CPLR 301. Plaintiffs allege that AmeriMed held all of its Board of Directors' meetings in New York City, for the

convenience of board members, that individual directors or groups of directors frequently met with Messrs. Rivas and Cohen in New York; and that on at least one occasion, during 2002, representatives of AmeriMed made a presentation to a major investor in New York. Additionally, all of the face-to-face negotiations that led plaintiffs to accept employment with AmeriMed allegedly took place in New York, which confers jurisdiction pursuant to CPLR 302(a)(1). Plaintiffs also argue that the fraud and negligent misrepresentation causes of action against Messrs. Posner and Waksal on behalf of AmeriMed in New York, confer jurisdiction over the corporation pursuant CPLR 302(a)(2). Plaintiff's also assert that Mr. Engelman is subject to "doing business" jurisdiction under CPLR 301, since attended board meetings in New York. Additionally, Mr. Engelman's alleged tortious acts were committed outside the state with expected consequences in New York, conferring jurisdiction pursuant to CPLR 302(a)(3).

To establish whether New York has jurisdiction over a foreign corporation under CPLR 301, courts look at a number of factors: whether the corporation possesses property in the state, has offices, employees, a mailing address, telephone numbers, etc. AmeriMed has none of these contacts with the State. Occasional meetings held in New York do not amount to regular conduct of business. The mere periodic sending of corporate officers or employees into the State on corporate business is not enough to predicate a finding that a foreign corporate defendant

is present for jurisdictional purposes. *Holness v Maritime Overseas Corp.*, 251 AD2d 220 (1st Dep't 1998).

CPLR 302(a)(1) applies when an individual or a corporation transacts business in the state relating to the cause of action. A single transaction resulting from a purposeful act of the defendant in the State is sufficient to confer personal jurisdiction if it substantially relates to the complaint. *Kreutter v McFadden Oil*, 71 NY2d 460 (1988).

An employment contract negotiated in New York may be sufficient to confer jurisdiction on a breach of that contract. *George Reiner & Co. v Schwartz*, 41 NY2d 648 (1977). However, preliminary negotiations are not sufficient to establish jurisdiction. *C-Life Group v Generra Co.*, 235 AD2d 267 (1st Dep't 1997).

The complaint alleges that through its directors, Posner and Waksal, AmeriMed held negotiations with plaintiffs, in New York, concerning their employment with the company. According to plaintiffs, by the end of September three face-to-face meetings in New York led to an agreement on the conditions of their employment and on a compensation package. In late November, these conditions were allegedly affirmed by the Board of Directors of AmeriMed at its meeting in New York. The first four causes of action arise out of the promises which plaintiffs allegedly received from AmeriMed, whether these promises resulted in an express oral contract or led to a quasi-contractual relationship with the company.

In a motion to dismiss for lack of personal jurisdiction, the opposing side has only to demonstrate that "facts may exist" that would support jurisdiction in order to proceed with discovery. It does not need to make a prima facie case that such facts exist. *Peterson v Spartan Industries, Inc.*, 33 NY2d 463 (1974). Plaintiffs allege that employment meetings took place in New York, and seek disclosure of documents from these meetings and depositions of the participants.

Plaintiffs, however, cannot claim jurisdiction over AmeriMed pursuant to CPLR 302(a)(2) and (3). Both subsections of CPLR 302 (a) concern actions for torts. As will be discussed below, plaintiffs tort actions are not viable.

Jurisdiction may not be asserted over defendant Mark Engelman pursuant to CPLR 302 (a) (1). Mr. Engelman did not undertake any purposeful acts directed at New York in connection with plaintiffs' employment at AmeriMed. The alleged oral employment contract was entered into, or promises of compensation were made, prior to Mr. Engelman's visit to New York in November 2001. Even if plaintiffs' employment was discussed at the meeting of the Board of Directors which he attended, this discussion was to resolve the existing disagreements. See *McKee Electric Co. v Rauland-Borg Corp.*, 20 NY2d 377 (1967) (a president of the company who came to New York to smooth out difficulties between plaintiff and plaintiff's customers did not transact business related to contract).

Nor may jurisdiction be asserted over Mr. Engelman pursuant

to 302(a)(3), which establishes jurisdiction based on tortious acts committed outside the state with foreseeable injuries within the state. As will be discussed below, plaintiffs do not have a valid claim for tortious interference with contract against Mr. Engelman. Moreover, even if Mr. Engelman did tortuously interfere with plaintiffs' contract, and Mr. Rivas did live in New York part of that time, no injury occurred to plaintiffs within New York. Jurisdiction must be based upon more than the indirect financial loss resulting from the fact that the injured person resides or is domiciled in the state. *Fantis Foods, Inc. v Standard Importing Co.*, 49 NY2d 317 (1980).

Fraud

Defendants argue that the allegations which underlie the fifth cause of action for fraudulent misrepresentations, even if true, are duplicitive of plaintiffs' breach of contract claim.

Plaintiffs contend that a representation which is promissory in nature can be the basis for a claim of fraud. Plaintiffs further argue that they may state causes of action in the alternative and if there is no contract, then the fraud cause of action would stand on its own.

In considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleadings must be liberally construed. The sole criterion is whether "from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law . . . ." *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). The

facts pleaded are presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration. *Morone v Morone*, 50 NY2d 481(1980).

The elements of fraud are a material misrepresentation to the plaintiff by the defendant, known to be false, made with the intention of inducing plaintiff's reliance on it which causes plaintiff to reasonably rely on the misstatement and thereby causes plaintiff damages. *Pensee Assoc. v Quon Indus.*, 241 AD2d 354 (1st Dep't 1997). Material representation may relate not only to existing facts, but also to acts in the future. A promise made with a preconceived and undisclosed intention of not performing it constitutes a misrepresentation of material existing fact. *Sabo v Delman*, 3 NY2d 155 (1957). "A false statement of intention is sufficient to support an action for fraud." *Graubard Mollen Dannett & Horowitz v Moskovitz*, 86 NY2d 112 (1995). However, absent a present intention to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud. A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement. *Id.*

Plaintiffs claim that Posner's and Waksal's repeated promises to arrange the signing of their employment contracts and payment of compensation were false from the beginning. To

support their claim, they refer to their failure to act on their promises. Other than these conclusory allegations there is no further evidence of the defendants' state of mind at the time they gave promises. In similar cases courts required more than an inference drawn from the fact that promises were not kept. *Lanzi v Brooks*, 43 NY2d 778 (1977), *Brown v Lockwood*, 76 AD2d 721 (2d Dep't 1980). They rejected entirely conclusory statements (*Smart Egg Pictures, S. A. v New Line Cinema Corp.*, 213 AD2d 302 [1st Dep't 1995], or statements based on plaintiff's belief about defendant's intentions. *Sandra Greer Real Estate, Inc. v Johansen Organization*, 182 AD2d 468 (1st Dep't 1992).

Furthermore, fraud claims are closely related to breach of contract claims. Plaintiffs urge this Court to distinguish between fraudulent misrepresentations that Posner and Waksal made to induce them to enter into employment agreement with AmeriMed and subsequent misrepresentations on which they relied to continue employment. As to the initial representations, they clearly reiterate the alleged terms of the contract agreement. "[A] failure to perform promises of future acts is merely a breach of contract to be enforced by an action on the contract. A cause of action for fraud does not arise when the only fraud charged relates to a breach of contract." *Tesoro Petroleum Corp. v Holborn Oil Co.*, 108 AD2d 607 (1st Dep't 1985). To plead fraud distinct from contract claim, plaintiff must allege either (1) a legal duty separate and apart from the contractual duty to perform; or (2) a fraudulent representation collateral or

extraneous to the contract; or (3) special damages proximately caused by the fraudulent representation that are not recoverable under the contract measure of damages. *Coppola v Applied Elec. Corp.*, 288 AD2d 41 (1st Dep't 2001). The only duty owed by Posner and Waksal to plaintiffs was that under the alleged employment contract. Neither are representations made by the two members of AmeriMed's Board of Directors any different from what was allegedly embodied in the contact. In fact, plaintiffs are seeking precisely the same compensatory damages that they are claiming under the contract. Punitive damages pled by the plaintiffs do not qualify as special damages.

In the absence of all three conditions courts have consistently dismissed fraud claims as duplicative of contract claims. Plaintiffs assert that the dismissal occurred only when contracts were found viable. They argue that they are entitled to plead breach of contract and fraud in the alternative. However, fraud claims were dismissed as redundant even in cases where the contract claim did not stand. *Glanzer v Keilin & Bloom LLC*, 281 AD2d 371 (1st Dep't 2001), *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dep't 1994), *Arias v Women in Need, Inc.*, 274 AD2d 353 (1st Dep't 2000). If the breach of contract claim fails, plaintiffs have an opportunity to assert alternative grounds for recovery in the form of quasi-contract (promissory estoppel, quantum meruit and unjust enrichment).

In the present case plaintiffs do not allege that they were

entitled to their salaries and especially an equity interest in the firm whenever they decided to stop serving as Chief Executive Officer and Chief Financial Officer of AmeriMed. In a similar case, when plaintiffs were allegedly recruited and then induced to remain with the defendant firm by false promises of substantial compensation, the court did not find any misrepresentation collateral to the alleged breach of contract. *Glanzer v Keilin & Bloom LLC*, 281 AD2d 371 (1st Dep't 2001). The claim of fraud should be dismissed as duplicative of contractual or quasi-contractual claims.

Negligent Misrepresentation

Defendants argue that the sixth cause of action for negligent misrepresentation should be dismissed because plaintiffs failed to claim that defendants owed them a duty, based on some special relationship, to impart correct information.

Plaintiffs argue that the claim of negligent misrepresentation is based on a special relationship between Waksal and Posner as directors of AmeriMed on the one hand, and Rivas and Cohen as its chief officers on the other.

To plead negligent misrepresentation, plaintiff must demonstrate that there is a special relationship of trust or confidence, creating a duty for one party to impart correct information to another, that the information given was false, and there was reasonable reliance upon the information given. *Hudson River Club v Consolidated Edison Co.*, 275 AD2d 218 (1st Dep't

2000).

Whether there is a special relationship between plaintiffs and defendants is a close question. Generally actions for negligent misrepresentation are limited to "those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." *Kimmel v Schaefer*, 89 Ny2d 257 (1986). However, the duty is not necessarily premised on a fiduciary relationship, but may be "premised upon a relationship of 'near privity'." *Krosby v United Fin. Group*, 282 AD2d 401 (1st Dep't 2001).

However, regardless of whether a "special" relationship between plaintiffs and defendants existed, the cause of action for negligent misrepresentation is dismissed. The promises that Posner and Waksal allegedly made to plaintiffs are "nonactionable 'expression[s] of future expectation'." *Pearlman v Friedman Alpren & Green LLP*, 300 AD2d 203 (1st Dep't 2002), *citing Bower v Atlis Sys, Inc.*, 182 AD2d 951 (3d Dep't 1992) *lv denied* 80 NY2d 758(1992). Specifically, in *Bower* the court dismissed the action for negligent misrepresentation stating "we do not construe defendant's alleged assurance of employment as the impartation of false information for her guidance, but merely as an expression of future expectation (internal citations omitted)." *Id* at 953.

Tortious Interference

The elements of a tortious interference with contract claim are: the existence of a valid contract, the tortfeasor's

knowledge of the contract and intentional interference with it, the resulting breach and damages. *Hoag v Chancellor, Inc.*, 246 AD2d 224 (1st Dep't 1998). Even assuming that there existed a valid contract of employment between plaintiffs and AmeriMed, plaintiffs must demonstrate that Mr. Engelman, an officer of the corporation at the relevant time, intentionally caused the breach of this contract.

A corporate officer who is charged with inducing the breach of a contract between the corporation and a third party is immune from liability if it appears that he is acting in good faith as an officer and did not commit independent torts or predatory acts directed at another. *Murtha v Yonkers Child Care Asso.*, 45 NY2d 913 (1978). "A cause of action seeking to hold corporate officials personally responsible for the corporation's breach of contract is governed by an enhanced pleading standard." *Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 109-110 (1st Dep't 2002). Therefore, a pleading must allege that the acts complained of, whether or not beyond the scope of the defendant's corporate authority, were performed with malice and were calculated to impair the plaintiff's business for the personal profit of the defendant. *Id.*

The complaint alleges that Mr. Engelman acted as a President, and later Chairman of the Board of Directors, in refusing to sign the employment contract and insure that plaintiffs receive their compensation. The malice alleged concerns Mr. Engelman's personal interest in not having

plaintiffs in the management positions at AmeriMed. There are no facts that would corroborate this suspicion by the plaintiffs. "More than suspicion seems to us required to bring the case within the narrowly limited exception to the general rule set forth in *Murtha*, a rule that reflects a carefully considered policy judgment." *Huebener v Kenyon & Eckhardt*, Inc., 142 AD2d 185, 191-192 (1st Dep't 1988). "Failure to plead in nonconclusory language facts establishing all the elements of a wrongful and intentional interference in the contractual relationship requires dismissal of the action." *Bonanni v Straight Arrow Publishers, Inc.*, 133 AD2d 585 (1st Dep't 1987).

Punitive Damages

> "Punitive damages are available where the conduct constituting, accompanying, or associated with the breach of contract is first actionable as an independent tort for which compensatory damages are ordinarily available, and is sufficiently egregious . . . to warrant the additional imposition of exemplary damages. Thus, a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally."

Rocanova v Equitable Life Assurance Soc'y of the United States, 83 NY2d 603, 613 (1994). Plaintiffs can only recover punitive damages on their tort claims, which have been dismissed in this case. Therefore, there is no ground to allow plaintiffs to claim these damages.

Motion to Strike

The motion to strike is granted. Pursuant to CPLR 3024(b),

"a party may move to strike any scandalous or prejudicial matter unnecessary inserted in a pleading." Mr. Waksal's conduct as a former CEO of ImClone Systems is not relevant to the current action, and serves no necessary purpose.

Cross-Motion to Amend

Plaintiffs ask this Court for leave to amend their complaint. They seek to add Mr. Engelman as a defendant on the fraud and negligent misrepresentation claims (fifth and sixth causes of action). Plaintiffs seek to add causes of action for breach of an implied contract and for promissory estoppel against the individual defendants based on their alleged promises to arrange payment of compensation to Rivas and Cohen.

"While leave to amend a pleading is freely granted, this court has consistently held that, in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted. Leave to amend will be denied where the proposed pleading fails to state a cause of action (internal citations omitted)." *Megaris Furs, Inc. v Gimbel Bros., Inc.*, 172 AD2d 209 (1st Dep't 1991).

That part of the motion seeking to add Mr. Engelman as a defendant to the fraud causes of action is denied. As discussed above the fraud causes of action have been dismissed.

Plaintiffs motion to add a cause of action for implied-in-fact contract is also denied. "An implied-in fact contract would arise from a mutual agreement and an 'intent to promise, when the agreement and promise have simply not been expressed in words'

(internal citation omitted)." *Maas v Cornell Univ.*, 94 NY2d 87. In this case plaintiffs consistently allege that the promises were orally made by the individual defendants, therefore the theory of implied-in-fact contract is not applicable since the agreement was reduced to words, albeit oral.

Without pronouncing on the merits of the claim for promissory estoppel against AmeriMed (second cause of action), this Court also denies leave to add individual defendants on this claim. Messrs. Posner, Waksal and Engelman acted as officers of AmeriMed when they gave their alleged promises. These promises would bind AmeriMed but not them personally. The case cited by plaintiffs (*Richter v Zabinsky*, 257 AD 2d 397 [1st Dep't 1999]) to support their claim against individual defendants involves promises binding defendant as an individual.

Accordingly, it is

ORDERED that defendants' motion is granted in part and the fifth, sixth and seventh causes of action are dismissed; and it is further

ORDERED that plaintiffs' cross-motion to serve an amended complaint is denied; and it is further

ORDERED that discovery should proceed on the limited issues of service on Mr. Engelman and the jurisdictional issues concerning Amerimed's presence in New York; and it is further

ORDERED that the parties are to contact the Court, within 5 days of service of this order with notice of entry, to schedule a conference to schedule the above ordered discovery; and it is

further

ORDERED that a hearing on the issues of proper service and jurisdiction will be scheduled at the above conference; and it is further

ORDERED that that part of defendants' motion to dismiss on jurisdictional grounds is held in abeyance pending a hearing to be scheduled at the above conference; and it is further

ORDERED that plaintiffs' cross-motion to serve AmeriMed pursuant to CPLR 306-b is also held in abeyance pending the above hearing.

Dated:

CHARLES E. RAMOS
J.S.C.

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.