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

PRESENT: BERNARD J. FRIED J.S.C. PART 60
Justice

AIU Insurance Comp.

vs

Robert Plan

seq. 011

Dismiss

INDEX NO. FBEM 603159/05

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

is 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

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

FILED
APR 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 4/10/07

HON. BERNARD J. FRIED J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

----------X

AIU INSURANCE COMPANY, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL INSURANCE COMPANY, AMERICAN INTERNATIONAL INSURANCE COMPANY OF CALIFORNIA, INC., AND NEW HAMPSHIRE INSURANCE COMPANY,

INDEX NO.: 603159/05

Plaintiff(s)

-against-

THE ROBERT PLAN CORPORATION, THE ROBERT PLAN OF NEW YORK CORPORATION, THE ROBERT PLAN OF CALIFORNIA CORPORATION, FREEDOM GENERAL AGENCY, INCORPORATED, CREATIVE INNOVATORS' ASSOCIATES LLC, ROBERT M. WALLACH AND JASPER J. JACKSON, ESQ.,

Defendant(s)

----------X

THE ROBERT PLAN CORPORATION, ET. AL,

Counterclaim-Plaintiffs,

- against-

AMERICAN INTERNATIONAL GROUP, INC. ET. AL.,

Counterclaim-Defendants

----------X

Fried, J.:

The following motions are consolidated for disposition:

(1) Motion sequence #011, in which plaintiffs/counterclaim defendants (AIU Insurance Company, et. al. [AIU]) seeks dismissal of various counterclaims;

defendants/counterclaim plaintiffs (The Robert Plan Corporation, et. al.[1] [TRP]) cross-moves, pre-answer, for summary judgment on the first counterclaim; and

(2) Motion sequence #012, in which TRP seeks dismissal of three causes of action in the Amended and Supplemental Complaint.

The causes of action and counterclaims at issue are as follows:

A. Causes of Action (Amended and Supplemental Complaint):

1. **Second cause of action**: that TRP, the individual defendants (Robert M. Wallach [Wallach] and Jasper Jackson [Jackson]) and another defendant (Creative Innovators Associates, LLC) diverted monies provided by AIU "for the express purpose of funding the actual operating expenses of the LAD (Limited Assignment Distribution) Programs to themselves and were thereby unjustly enriched.

2. **Third cause of action**: that the individual defendants, Wallach and Jackson, tortiously interfered with the agreements between AIU and TRP.

3. **Eighth cause of action**: that TRP, Wallach and Jackson, defrauded AIU by requesting funds without disclosing either that previously provided funds had been improperly diverted or that the requested funds would be used for purposes other than as approved by AIU.

[1]Individual defendants will be specified when appropriate.

B. Counterclaims (First Amended Counterclaims):

1. **First counterclaim:** AIU breached its contractual obligations by its refusal "to fund the tax liabilities of TRP" incurred during its business operations.

2. **Second counterclaim:** AIU breached its contractual obligations by refusing to pay TRP's "rent obligations" at its Bethpage, NY corporate headquarters.

3. **Fourth counterclaim:** AIU breached its contractual obligations by refusing to fund American Arbitration Association fees and expenses incurred by TRP.

4. **Fifth counterclaim:** AIU breached its contractual obligations by refusing to fund TRP's loss adjustment expenses.

5. **Seventh counterclaim:** AIU breached its contractual obligations by "appropriating" the renewal obligations, which TRP had the right to transfer and assign, to a servicing carrier of its own choosing, upon termination of the relationship with AIU.

6. **Eighth counterclaim:** AIU breached its contractual obligations by terminating TRP's claims administration rights during the period 2002 to 2005, including the "run-off" of these claims.

7. **Ninth counterclaim:** AIU breached its contractual obligations by its wrongful refusal to permit TRP from writing any further "take-out" business.

8. **Eleventh counterclaim:** AIU breached the implied covenant of good faith and fair dealing.

9. **Twelfth counterclaim:** this counterclaim alleges a claim for intentional

tort, based on all the allegations stated in the counterclaims.

MOTION SEQUENCE #011

Second, Eleventh and Ninth Counterclaims:

During oral argument on these motions, AIU withdrew its challenge to the **second counterclaim**. Thus, the motion to dismiss this **second counterclaim** is denied as moot.

Also during argument, while AIU contended that a breach of the implied covenant of good faith and fair dealing (**eleventh counterclaim**) is not a "separate claim" (tr. 14), it recognized that there was no reason, as I suggested, not to permit contract discovery to proceed, and to revisit this issue on a motion for summary judgment. (tr. 15). Therefore, the motion to dismiss the **eleventh counterclaim** is denied.

Similarly, with regard to the **ninth counterclaim**, concerning the alleged refusal of AIU to permit TRP from writing any more "take-out" business, AIU acknowledged that further discovery may not be inappropriate, with which I agree. Therefore, the motion to dismiss the **ninth counterclaim** is also denied.

First Counterclaim:

The **first counterclaim** is for the breach of AIU's asserted contractual obligation to fund TRP tax obligations, described as "various tax obligations incurred by TRP in the course of its business operations. These include $7,399,876 in tax liabilities for 2004 and unpaid estimated tax liabilities for 2005" (First Amended Counterclaims, ¶ 52). The theory of this claim, as set out in the first counterclaim, is that section 8.4(a) of the Master Agreement and paragraph 11 of the Interim Agreement "require that [AIU] provide funding for TRP's ongoing operations. These obligations include, among others, the obligation to

fund the tax liabilities of TRP" (Id., ¶ 81).

AIU seeks dismissal of this first counterclaim, on documentary evidence, arguing in its moving brief that it is not obligated to "fund TRP's own income tax liabilities", which it contends are not "actual operating expenses" required to be funded under section 8.4(a), nor were income taxes ever "set forth in the approved Budget" as further required under section 8.4. In support of the first prong of this argument AIU cites SEC's basic accounting regulation, Regulation S-X, which places operating expenses before "income tax expense", in the list of line items which appear on an income statement. According to AIU this demonstrates that "taxes on income simply are not part of operating expenses". AIU also refers to two provisions of the Interim Agreement: paragraph 11, which requires AIU to fund "RPC's operations", and paragraph 12 which "qualifies [AIU's] funding obligations" to "the 2005 budget and any Additional Liabilities...which AIG in its sole discretion determines to fund despite its lack of an obligation to do so", and AIU argues that since "the disputed income taxes were [n]ever part of any Budget", there is simply no such funding requirement. Finally, AIU points to section 6.2 of the Master Agreement which provides that "each member of the TRP Group will pay and discharge...its respective material obligations and liabilities, including tax liabilities" (AIU's M.O.L., pp. 17-20).

TRP not only opposes the motion to dismiss the **first counterclaim**, but seeks, preanswer, summary judgment on it. Citing to numerous court decisions, to the Financial Accounting Standards Board's, Statement of Financial Accounting Concepts No. 6, and to Black's Law Dictionary, TRP claims that it is undisputed that "'taxes constitute an 'operating expense'", which AIU is required to fund. This, taken together with the requirement of the

Master Agreement that TRP must prepare and file "all local, state and federal tax filings" (sections 8.2[a][2] & [3]), which, according to TRP, requires the simultaneous payment of "any amounts then due", further warrants grant of summary judgment. Nor, according to TRP, can AIU claim that it did not "know that taxes constitute 'operating expenses'", not only because, "when a company files its taxes, it also has to pay the amounts then due", but also because AIU was "the *only possible source* of such funding" (emphasis in original). Supporting this latter argument is section 8.4(a), which TRP claims requires that its "free cash on hand" be used to fund its operations, and sections 8.3 and 8.8, which it claims requires TRP's profits to be paid over to AIU "as part of the profit-sharing provisions". TRP disagrees that section 6.2 relieves AIU of an obligation to fund tax liabilities; rather, it only provides that TRP "will pay and discharge" obligations and liabilities which were to be funded under 8.4(a). Finally, TRP states that in 2004 AIU had previously funded tax liabilities without objection by AIU. (TRP's M.O.L., pp. 11- 18).

In response, AIU reiterates its position that the first counterclaim must be dismissed, i.e., "TRP's tax request is inconsistent with the operative contractual language". Alternatively, if it is not dismissed, AIU contends that "TRP's motion –filed before issue has been joined on this Counterclaim - is procedurally inappropriate and raises sufficient issues of material fact...so as to require denial of summary judgment in TRP's favor". (A.I.U.'s M.O.L. in Further Support, pp. 15-16).

Regarding the merits of these respective arguments pertaining to this counterclaim, one seeking § 3211 dismissal, the other seeking summary judgment, having considered papers submitted and the oral argument, as I stated at argument, it is evident that "there is

a factual dispute [which] ought to be left for summary judgment and discovery". (tr. 65).

It does not appear that the claim requiring AIU to fund TRP's tax revenues is insufficient as a matter of law or in light of the documentary evidence. I agree with AIU that the "key phrase is 'actual operating expenses'" (AIU's M.O.L., p. 17). While AIU's funding obligations are defined by the Master and Interim Agreements, these documents do not unequivocally demonstrate that TRP's taxes could not be cognizable under the term "actual operating expenses" referred to in section 8.4(a) or paragraph 11.

TRP has cited cases which have held that operating expenses includes taxes; however, those cases arose in different contexts. All of them arose, not in the context of the interpretation of contract language, but rather in unexceptional situations where taxes were considered operating expenses for varying purposes, e.g., whether accumulated taxes were due and owing, NLRB temporary restraining orders, receiverships, and bankruptcy proceedings (citations omitted, see T.R.P.'s M.O.L. pp. 15). Here, the issue is not whether AIU has "den[ied] its funding obligation in face of these authorities" (Id. at p. 15), but whether the agreements require such funding in the first place. This, of course, requires reference to the language of the agreements.

AIU's funding obligations, as relevant here, as stated in section 8.4(a), are to fund those expenses of TRP which are "set forth in the approved Budget for its actual operating expenses if and to the extent actually paid". Section 8.2 (f) requires TRP to submit "for approval a proposed annual budget for the TRP Group setting forth separately the proposed income and expenses for [four defined categories]". I agree with AIU that the only subsection which can arguably support this request to fund the taxes is subsection (3) which

refers to "the TRP-Parent functions identified on Schedule 8.2 (a)(3)". This reads as follows: "Tax: TRP-Parent shall prepare and file, in accordance with relevant legal and statutory obligations, all local state and federal tax filings for the entity and its consolidated subsidiaries." [2]

It is noteworthy, and material, that the claimed tax expenses - $7,399,876 for 2004 and "unpaid estimated tax liabilities for 2005" - (First Amended Counterclaims, ¶ 52), were not set forth in the approved Budgets. In reply, TRP argues AIU is obligated to fund these liabilities and that if AIU were permitted to refuse to fund the taxes just because they were not mentioned in the approved Budgets, AIU would be able to avoid funding obligations simply by refusing to include items in the Budget. This argument is strengthened by the fact that AIU funded TRP's 2004 Budget line item: "Estimated Tax Payments Due March 15, 2004"[3]. Although not specifically referred to, this seems a reference to the August 17, 2006 Affidavit of Philbert Nezamoodeen, TRP's Chief Operating Officer(¶¶ 5-12) that AIU "funded the first of these [tax] liabilities without objection", but later "refused our subsequent requests for the funding of these liabilities". Whatever merit there may be to this argument justifying the failure to include the items the Budget, the tax liabilities were not included in the budget, and there is a disputed issue of fact why not. (See Bronstein Aff.

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[2] Schedule 8.2(a)(2) similarly provides that TRP "shall prepare and file, in accordance with relevant legal and statutory obligations, all local, state and federal tax filings for each of TRP's insurance subsidiaries".

[3] This is a reference to the undisputed record that AIU funded TRP's tax liabilities in March 2004, and a "true-up" payment in June 2004. However, AIU contends that these were non-income tax liabilities, not TRP's income taxes.

9/22/05, ¶¶ 10 & 11).

I am satisfied that the cause of action for breach of contract is adequately pleaded, and that dismissal is not warranted on documentary evidence. Thus, AIU's motion to dismiss is denied. Moreover, even if I were to treat TRP's pre-answer cross-motion as one for summary judgment (see, CPLR 3211 [c]), it would be denied since there are disputed issues of material fact. Consequently, TRP's cross-motion for summary judgment is denied.

Fourth and Fifth Counterclaims:

The **fourth counterclaim** deals with the alleged refusal of AIU to fund the AAA fees; the **fifth counterclaim** deals with the alleged refusal of AIU to fund the loss adjustment expenses. AIU's argument, with respect to each of these counterclaims, is that TRP has not alleged "that it has paid these vendors out of its own funds on [AIU's] behalf". AIU points to the familiar principle that damages are an essential element of a breach of contract claim and since TRP has suffered no damages it cannot maintain these claims. It is basic that to state a claim for breach of contract, it must be alleged that (1) there was an agreement, (2) performance of the agreement by one party, (3) breach by the other party, and (4) damages. (E.g., Noise in the Attic Productions, Inc., v. Londo Records, 10 AD3d 303 [1st Dept., 2004]; see also, Commercial Litigation, vol. 4, §59:6, 59:12 [pp. 1054-5, 1066-7] Robert L. Haig et. al., 2nd ed., Thompson/West 2005). A careful reading of these counterclaims shows that there are no damages alleged; rather they allege that AIU has not honored its obligations. This fails to satisfy the fourth element of a breach of contract claim. Therefore, these two counterclaims are dismissed.

Seventh Counterclaim:

Regarding the **seventh counterclaim**, Plaintiffs contends that my December 15, 2005 decision on TRP's request for a preliminary injunction, where I construed section 11.9 of the Master Agreement - the "all (but not less than all)" provision, requires dismissal. This is so, argues AIU because this section gave TRP the right to transfer various renewal obligations to a new servicing carrier, of its choice, upon termination of the relationship with AIU, only if TRP was in the position to take "all, but not less than all" of the renewals at issue. In this regard AIU, relies upon my conclusion, following a week-long evidentiary hearing, extensive briefing, and oral argument, that "the parties intended that the transfer of AIG renewals to be all of the AIG renewals, and that this includes the take-out renewals, voluntary and involuntary. Any other reading of the agreement would impermissibly distort the plain language of the documents." AIU points to my further conclusion that "TRP has failed to meet its 'all (but not less than all)' obligation in the agreements".

AIU further argues that my December 15th findings (1) that TRP had not secured the necessary approvals for transfer of the take-out renewals in New York; (2) that it had not secured the necessary waivers in a number of states; and (3) that because a number of take-out policies had already renewed, there was no way that they could be transferred to TRP's new servicing carrier, support this motion to dismiss, since these were tantamount to a finding that TRP would be unable "to exercise its limited right to the disputed renewal policies." (AIU's M.O.L., p. 8). AIU also claims that dismissal of this counterclaim is warranted even though TRP now argues that its inability to satisfy the "(all but not less than all)" requirement was due to "interference" by AIU, referring to my December 15 finding

that "the record, including the documentary and testimonial evidence, belies TRP's claims that there was no cooperation or that AIU acted in bad faith to prevent TRP from transferring renewal business". In further support of its motion, AIU refers to the affidavit of Jasper J. Jackson, Esq., TRP's General Counsel, averring that section 11.9 "was never intended to cover take-out renewals." AIU also refers to the October 21, 2005 letter from TRP to the New York State Department of Insurance, requesting regulatory waivers for renewals, but that this did not include take-out renewals. According to AIU, notwithstanding the allegation in this counterclaim that "AIU [was] busy trying to persuade state regulators to deny TRP the approvals necessary to transfer TRP's renewal business to Lincoln General (First Amended Counterclaims, ¶ 65), the October 21st letter "forecloses any argument from TRP that it was trying to get the necessary approvals, but gave up in light of [AIU's] purported 'interference'" . (AIU's M.O.L. in Further Support, p. 8)

In opposing the motion to dismiss the seventh counterclaim, TRP refers to the rule that a decision on a preliminary injunction motion does not constitute a ruling on the merits of claims, citing for example, J.A. Preston Corp. v. Fabrication Enters., 68 NY2d 397 (1986). TRP contends that the seventh counterclaim "is premised in principal part on the contention that [AIU], while ostensibly encouraging TRP to secure the regulatory approvals needed to transfer renewals to Lincoln General [the new servicing carrier], was engaged in a behind-the-scenes campaign with state regulators to torpedo those efforts." (TRP's M.O.L. in Opposition, p. 27) Thus, it argues that this breach of contract claim is sufficient and TRP is entitled to discovery to "ultimately prove these allegations".

It seems to me that this dispute cannot be resolved on a section 3211 motion based

upon documentary evidence. Here the proffered documentary evidence primarily consists of my earlier decision on the preliminary injunction motion. While this reading of the section 11.9 I believe to have been correct, it was in the context of a preliminary injunction motion, which was not a final decision on the merits. Moreover, although the October 21st letter may provide further support, the letter itself is not unequivocal, without explanation. Finally, although the Jackson affidavit may also provide additional support for AIU, to put it in the proper context also requires explanation. Accordingly, it seems appropriate to deny the motion to dismiss the **seventh counterclaim** at this point, pending further discovery.

Eighth Counterclaim:

The **eighth counterclaim** alleging a breach of TRP's claims administration rights, was the subject of separate preliminary injunction proceedings in the Fall of 2005. At that time, at the request of AIU, I issued a temporary restraining order and ultimately granted a preliminary injunction to require that TRP continue to perform claims administration, and to permit AIU to transfer administration of claims to York. The issue, as framed by me on November 7, 2005 (Bronstein Aff. in Further Support, Ex. 8, p. 19 [tr. p.21]), was whether under "the interim agreement as well as the master agreement....[AIU] has the right to take back these claims". I concluded that "Article 2 of the MGA does not provide exclusive rights, but read together with...the provisions of the interim agreement, Paragraph 2 and Paragraph 5 and Paragraph 8", AIU was entitled to take the claims back. (id. at p.50 [tr. p. 56]) This eighth counterclaim now asserts that under paragraph 15 (b) of the MGA and Article 16 of the Interim Agreement, "TRP had the right, subject to certain limitations, to

perform claims administration work for policies during the period 2002 through 2005", and that AIU's wrongful termination of this right constituted a breach of contract.

In seeking dismissal AIU contends that this counterclaim "boils down to the assertion that [its] transfer to York of claims administration was a wrongful 'termination' of TRP's purported rights to such administration", which it argues I decided in my preliminary injunction ruling. This decision, so AIU argues, disposes of the "claim[] that under the MGA and the Interim Agreement [TRP] had the right to handle the claims arising under [AIU's] policies, including those during the run off claim", and that recasting the claim under paragraph 15 (b) of the MGA and paragraph 16 of the Interim Agreement does not change the underlying merits of" my decision. (A.I.U.'s M.O.L., p. 11-2)

TRP responds that the eighth counterclaim deals not with "whether [AIU] had the *power* (emphasis in original) to terminate TRP as its claims administrator, but whether, in exercising that power [AIU] breached the provisions of not one, but two separate contracts, both of which expressly limited [AIU's] rights to effect such a termination in all but a limited set of circumstances". (T.R.P.'s M.O.L. in Opposition, p. 28). TRP's argument is: (1) that paragraph 15 of the MGA Agreement permits termination of TRP's right to claims administration "only in the event of an 'Egregious' or 'Material' breach; and (2) that paragraph 16 of the Interim Agreement, after December 31, 2005, gives claims administration to TRP "in all but a few narrow circumstances", one of which is where "[AIU] is not then pursuing any litigation against [TRP]". (¶16 [iv]) TRP states that it is "nonsensical to argue that [AIU] can invoke its right to terminate TRP by citing to the very lawsuit in which it sought that termination". (Id. at p. 31.)

In response AIU quotes my earlier decision concerning the unambiguous language of the interim agreement, where I concluded that it does not "give [TRP] the exclusive right over these claims". (Id. at p. 19 [tr. 22]). This previous conclusion, that there was a likelihood of success on this question, was based on my reading of the very same documents at issue here. I believe this reading to be correct and now conclude that TRP is not AIU's exclusive agent for claims administration. Thus, the transfer of claims administration did not violate TRP's non-exclusive rights, or to put it another way, it was not a contractual breach for AIU to transfer the claims administration. It is also evident that the omission of the word "exclusive" does not mean "little" as TRP argues, especially in light of the use of the word "exclusive" in Articles I & II of the MGA, and its omission from Article II.

Finally, paragraph 16 of the Interim Agreement expressly provides that TRP was to perform these "runoff services" unless AIU was pursuing litigation against TRP. This provision cannot be more clear: "if and only if...(iv) [AIU] is not then pursuing any litigation against [TRP]". There is no ambiguity in this language. There is nothing to interpret in this language. There simply cannot be any doubt that it is applicable here, where AIU is pursuing litigation against TRP. Unquestionably, this documentary evidence constitutes a complete bar to TRP's claim.

For the foregoing reasons, I conclude that the **eighth cause** of action must be dismissed.

Twelfth Counterclaim:

With regard to the **twelfth counterclaim**, i.e., intentional tort, this counterclaim fails to aver all the requisite elements of an intentional tort, which are "(1) intentional infliction of harm, (2) causing special damages, (3) without excuse or justification, (4) by an act or series of acts that would otherwise be lawful" Freihofer v. Hearst Corp., 65 NY2d 135, 142 (1985). For example, there is no allegation of special damages. Thus, this counterclaim is dismissed (Cardo v. Board of Managers, Jefferson Village Condo, 29 AD3d 93 [2nd Dept., 2006]). TRP's request for leave to replead is denied; no affidavit of merit has been submitted (e.g. Zaid Theatre Corp., v. Sona Realty Co., 18 AD3d 352 [1st Dept., 2005]).

MOTION SEQUENCE #012

Second Cause of Action (Unjust Enrichment):

TRP seeks dismissal of this cause of action, arguing that since there is a breach of contract claim on the same facts, dismissal is required as a matter of law. AIU responds that this count states a cause of action: (1) that paragraph 98 of the Amended and Supplemental Complaint alleges that AIU gave TRP $250, 000 "to post an undertaking required" to obtain an injunction in the Perot arbitration , which TRP did not return to AIU and therefore TRP was unjustly enriched; (2) that TRP improperly gave escrow funds to settle the Perot arbitration, without AIU's consent, constituting "a breach of contract" (A.I.U. M.O.L., p. 5) as well as an independent wrong, i.e., using funds entrusted to it for its own benefit; and (3) that since TRP has alleged a number of breaches by Plaintiff, it should not at this time be required to make an election of remedies.

Extended discussion is unnecessary here: these claims overlap, concern the same conduct alleged in the contract claims, and duplicate each other. Moreover, TRP has not contended that the agreements are unenforceable, rather that AIU has, itself, breached various provisions. Thus, there is no merit to the argument that AIU should be permitted to pursue this as an alternative remedy since there no bona fide dispute as to the existence and applicability of the agreements. (Compare ME Corp, S.A. v. Cohen Brothers, LLC, 292 AD2d 183 [1st Dept., 2002]). The second cause of action for unjust enrichment is dismissed.

Third Cause of Action (Tortious Interference With Contract):

TRP also seeks dismissal of the tortious interference cause of action brought against Robert M. Wallach, Chief Executive Officer of the TRP Group, and Jasper Jackson, General Counsel of TRP. Recognizing that a claim of tortious interference may lie against a corporate officer, TRP points to the familiar principle that such claim is only available "where the plaintiff is able to allege, with particularity, that [the corporate officer] acted other than in a corporate capacity and/or for the purpose of securing a personal gain (as opposed to a corporate gain)." TRP further argues that the particularized pleading requirements for allegations involving a corporate officer have not been met, finding only two paragraphs in the Amended and Supplemental Complaint, that "even pay lip service to these requirements": ¶ 195 which alleges that the breaches were "induced, directed and caused by" Wallach and Jackson; and ¶ 196 which alleges that "many [of the breaches] had the sole purpose of diverting funds provided by" TRP to Wallach and Jackson "personally, or to the benefit of entities under their control or in

which they had an interest". (T.R.P. M.O.L., pp. 10-11).

Not disputing these principles, and pointing to additional provisions in the complaint, AIU contends that its pleading is sufficient, and that it is sufficiently particularized, referring to paragraphs in the complaint set forth under the heading "Monies Misappropriated Directly to TRP Executives or For Their Personal Use" (Amended and Supplemental Complt., Section A). AIU also replies that it has alleged as "one of its central themes: that Wallach and Jackson, for their own personal gain, systematically directed TRP to misappropriate funds provided by Plaintiffs [pursuant to its contracts with TRP]." (A.I.U. M.O.L in Opp., pp. 7 - 10).

"To establish a corporate officer's liability for inducing a breach of contract between the corporation and a third party, the complaint 'must allege that the officers ...acts were taken outside the scope of their employment or that they personally profited from their acts". (Hoag v. Chancellor, Inc., 246 AD2d 224, 229 [1st Dept., 1998])(internal quotations omitted). This requires a "particularized pleading that such acts were either beyond the scope of [] employment or motivated by [] desire for personal gain" (Chambers Associates LLC v. 105 Acquisition LLC, -AD3d-, 2007 WL 582839 [1st Dept., 2007]).

Upon a careful reading of the complaint, there is no doubt that the claim is that Wallach and Jackson are alleged, with particularity, with having acted in their own personal interests rather than in the corporate interest. Moreover, the fact that the complaint alleges that "many" of the alleged breaches were for the defendants' self-interests, rather than for that of the corporations, does not warrant dismissal. On this

point, Hoag instructive. In Hoag the First Department rejected an argument that a claim of tortious interference could not be brought where the corporate director or officer is alleged to have acted "with a mixed motive, that is, partially for self-interest and partially in the corporations's interest". (246 AD 2d at 229). Consequently, this cause of action is sustained.

Eighth Cause of Action (Fraud Against The TRP Group):

The claim is that the TRP Group - which according to the complaint collectively includes defendants TRP, Wallach and Jackson (Complt., ¶ 2) - requested funds and received funds from AIU pursuant to the Master and Interim Agreements, and misrepresented that the funds were being sought for approved purposes, the "supposed intended use for the requested funds", (A.I.U. M.O.L., p. 12), when they were actually diverted for unapproved purposes, including personal use or personal expenses of Wallach and Jackson. Also included in this fraud count is an allegation regarding funding for the Delaware account, which was allegedly over-funded by AIU due to an alleged misrepresentation as to the how much money was actually in the account.

TRP seeks dismissal of this fraud cause of action, arguing that is it deficient for lack of particularity and that "fraud" claim is duplicative of the breach of contract count, because it is nothing more than a claim that TRP received funds, under the contract, to which it is not entitled. This "is *precisely the basis* of [AIU's] breach of contract claim". (T.R.P. M.O.L. in Opp., p. 11)(emphasis in original).

A close reading of the complaint shows that the fraud claim duplicates the breach of contract claim. For example, under the first cause of action (Breach of Contract

Against the TRP Group - Monetary Claims), it is alleged that the TRP Group "covenanted...not to incur liabilities beyond the budget approved by Plaintiffs (Complt., ¶ 178), that "the TRP Group expended millions of dollars in fund, provided by the Plaintiffs under these agreements, for purposes other than the actual operating expenses...as loans or payments to TRP Group senior executives" (Complt., ¶ 181), that "these expenditures were made...without informing Plaintiffs of their true nature, purpose and extent [and] in contravention of representations made by the TRP Group regarding such expenditures" (Complt., ¶ 182), and that these "expenditures constitute breaches by TRP of the" Master and Interim Agreements (Complt., ¶ 183).

A fraud claim is not sustainable where the claimed fraud is integral to the breach of contract claim, i.e., "not collateral or extraneous to the contract" (e.g., Coppola v. Applied Electric Corp., 288 AD2d 41 [1st Dept., 2001]). Here that is precisely the nature of the claims. And although AIU has separated TRP's use, i.e., expenditure, of the funds which received from AIU under the agreements, from the representations which it allegedly made in order to obtain this very funds under the agreements, at essence the claim is one for breach of contract. This eighth cause of action is dismissed.

Accordingly, Motion Sequences #011 and #012 are decided as set forth in this memorandum decision.

DATED: April 10, 2007

J.S.C.

BERNARD J. FRIED
J.S.C.