

CMI II, LLC v Interactive Brand Dev., Inc.

2007 NY Slip Op 31113(U)

May 2, 2007

Supreme Court, New York County

Docket Number: 0600589/2005

Judge: Bernard J. Fried

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

CMI- II LLC

PART _____

vs
Interactive Brand Dev.

Seq. 003
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

600589/6005

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

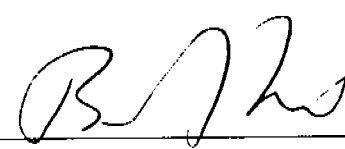
FILED

This motion is decided in accordance with the accompanying memorandum decision. MAY 17 2007

SO ORDERED

NEW YORK
COUNTY CLERK'S OFFICE

Dated: ~~5/17/07~~ 5/21/07


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

Check one: FINAL DISPOSITION ¹ NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

70249

-----X
CMI II, LLC, on its own behalf and as Collateral Agent
under a Security Agreement dated as of September 29,
2004,

Plaintiff,

-against-

Index No. 600589/05

INTERACTIVE BRAND DEVELOPMENT, INC., f/k/a
CARE CONCEPTS I, INC., MEDIA BILLING
COMPANY, LLC, INTERNET BILLING COMPANY,
LLC, ELLIOT BRUCE WEINER, as Trustee of the H.
ROBERT WEINER TRUST OF 1983, STANLEY B.
WEINER, as Trustee of the BLANCHE WEINER TRUST
of 1982, GERALD HORST, EDWARD ARNOLD,
SHALVA MORRIS, STEVEN NOEL, GREG
MUDWILDER, HAL COOK, ANTON PARISI, JAMES
SANCHEZ, ROBERT HENDERSON, DAN SELZNICK,
GULALAI MAYAR, CHRIS WOODRUFF, GEORGE
MORRIS, and IIG CAPITAL LLC,

Defendants.

FILED
MAY 07 2007
NEW YORK
COUNTY CLERKS OFFICE

-----X
APPEARANCES:

For Plaintiff:

For Defendants:

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425 Park Avenue
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(Michael A. Lynn)

FRIED, J.:

In this action, plaintiff CMI II, LLC (CMI II) seeks damages for breach of contract and conversion, as well as an accounting and foreclosure on certain collateral. On

September 26, 2006, I issued a decision in which I granted CMI II's motion for partial summary judgment as to liability on the sixth through ninth and fourteenth causes of action, granted summary judgment on the tenth cause of action for foreclosure, dismissed all of the affirmative defenses asserted by defendants Interactive Brand Development, Inc., f/ka Care Concepts I, Inc. (IBD), Media Billing Company, LLC (Media Billing) and Internet Billing Company, LLC (iBill), and dismissed the first, second, fourth and fifth affirmative defenses asserted by defendant IIG Capital LLC (IIG). I denied summary judgment on the first through fifth causes of action. With respect to the sixth through ninth and fourteenth causes of action, I referred the issues of damages, attorneys' fees and costs to a Special Referee to hear and report.

Motion Sequence Nos. 003, 004 and 005 are consolidated for disposition.

In Motion Sequence No. 003, CMI II moves for an order: (1) pursuant to CPLR 3211 (a) (5), (6) and (7), dismissing all of the affirmative defenses and counterclaims contained in the amended answer to the second amended complaint filed by defendants IBD, Media Billing and iBill (collectively, the IBD defendants); (2) pursuant to CPLR 3211 (a) (5), (6) and (7), striking the amended answer; and (3) pursuant to 22 NYCRR 130-1.1, sanctioning the IBD defendants, and directing them and their counsel to pay the costs and legal expenses incurred by CMI II in connection with its efforts to procure the withdrawal and dismissal of the amended answer, including the fees and expenses associated with the bringing of this motion. Defendant IIG cross-moves for an order confirming that among the issues to be decided by the Special Referee pursuant to my referral is the "amount secured by IIG's senior security interest."

In Motion Sequence No. 004, the IBD defendants move for an order, pursuant to CPLR 2214 and 2221: (1) granting their motion to reargue or, in the alternative, motion to renew; (2) rescinding my September 26, 2006 decision; (3) denying CMI II's motion for summary judgment; and (4) in the alternative, postponing the decision on the motion until oral depositions of CMI II have been taken, and discovery has been substantially completed.

In Motion Sequence No. 005, CMI II moves, pursuant to CPLR 4403, for an order confirming the November 28, 2006 report and recommendation of Special Referee Howard G. Leventhal, and directing that partial summary judgment be entered in favor of CMI II and against IBD in the amount of \$6,156,878.82, plus pre-judgment statutory interest at 9% per annum from June 30, 2005, and against defendants Media Billing and iBill in the amount of \$6,734,856.13, plus pre-judgment statutory interest at 9% per annum from June 30, 2005. The IBD defendants cross-move, pursuant to CPLR 2214 and 2215, for an order: (1) granting their cross motion to reject, in part, the Special Referee's report and recommendation; (2) denying CMI II attorneys' fees in this action or, alternatively, reducing any attorneys' fees award by \$207,264.00; and (3) awarding prejudgment interest on the judgment exclusive of attorneys' fees only from February 15, 2006.

For the reasons set forth below, CMI II's motion to dismiss the affirmative defenses and counterclaims contained in the amended answer to the second amended complaint is granted, and both IIG's cross motion, and CMI II's motion for sanctions are denied. The IBD defendants' motion for reargument or renewal is denied. CMI II's motion to confirm the Special Referee's report is granted, and the IBD defendants' cross motion to reject the report is denied.

CMI II's Motion to Dismiss the IBD Defendants' Affirmative Defenses and Counterclaims in the Second Amended Answer (Motion Sequence No. 003)

IBD and its affiliates previously raised millions of dollars, by selling 10% convertible preferred stock of IBD (the Series F Stock) to CMI II's predecessor, and others. CMI II's predecessor paid IBD \$3.25 million, plus certain stock, in exchange for 52,500 shares of the Series F Stock, pursuant to a number of written agreements (collectively, the Operative Documents).

CMI II moved for summary judgment on numerous causes of action in the second amended complaint. On September 26, 2006, I issued a decision and order (the Decision) granting summary judgment in favor of CMI II, and dismissing each affirmative defense asserted by the IBD defendants in their then-extant answer to the second amended complaint (the Prior Answer). In the Decision, I found that the IBD defendants breached the Operative Documents in numerous material respects, including failing to make required semi-annual dividend payments to CMI II, failing to uphold the guarantee of IBD's payment and performance obligations, and failing to honor CMI II's redemption demands, all of which entitled CMI II to compensatory damages, and the right to foreclose on its security interest in certain collateral.

On September 14, 2006, prior to the issuance of the Decision, the IBD defendants requested that CMI II consent to the filing of an amended answer, along with affirmative defenses and counterclaims. The admissions and denials of the proposed amended answer (see Aff. of David Parker, Exh C) were essentially word-for-word identical to those contained in the Prior Answer (id., Exh B). The affirmative defenses asserted were

also identical. The only substantive change was the inclusion of counterclaims for fraud, economic duress, promissory estoppel and breach of contract, which defendants' counsel asserted were merely "derivative of IBD's previously asserted-defenses" (*id.*, Exh I).

On September 19, 2006, while its summary judgment motion was still pending, CMI II consented to the proposed amendment, "reserv[ing] all rights," and stating that "our consent is not to be taken as an acknowledgment of the validity of any of the claims asserted or that they state a cause of action" (*id.*, Exh L). On September 21, 2006, defendants' attorneys submitted to the court the fully-executed stipulation concerning the amendment.

On September 28, 2006, at 9:08 a.m., all counsel electronically received a copy of the Decision. Later that day, at 12:01 p.m., with full knowledge that the Decision dismissed their defenses, the IBD defendants filed their amended answer, restating the same affirmative defenses which had just been rejected in the Decision, and asserting counterclaims based on those same stricken affirmative defenses.

The IBD defendants' affirmative defenses contained in the amended answer (Amended Answer, at 13-14) are word-for-word identical to those previously asserted in the Prior Answer (Prior Answer, at 14-15), and explicitly rejected and dismissed in the Decision (Decision, at 16-17). The IBD defendants' newly asserted counterclaims (Amended Answer, at 25-28) are also substantively identical to the IBD defendants' previously asserted affirmative defenses (Prior Answer, at 13-14), which are set forth in detail, almost identically, in their opposition to the motion for summary judgment (Def. Mem. Law [Parker Aff., Exh D]). Accordingly, the IBD defendants' affirmative defenses and counterclaims

are barred by the Decision, and the doctrine of the law of the case.

The IBD defendants explicated their affirmative defenses in their opposition to CMI II's motion for summary judgment. A comparison of the IBD defendants' new counterclaims with their prior defenses, as explained in their opposition to summary judgment motion, reveals that the newly asserted counterclaims are nothing more than restatements of their old, rejected affirmative defenses.

For example, with respect to the new counterclaim for fraud, the IBD defendants allege in the amended answer that "CMI falsely represented to IBD and deposited escrow monies reflecting that it would make an investment in IBD of \$6.5 million," but that "[t]his representation was false, as CMI intended to and in fact only did invest \$3.25 million" (Amended Answer, ¶¶ 32-33). Similarly, in their opposition to the summary judgment motion, the IBD defendants assert that their affirmative defense of fraud arises "from CMI's false representations that it would invest \$6.5 million in IBD so that IBD could consummate a transaction to acquire a 48.3% equity interest in Penthouse Media Group, Inc. ("PMG")," but that "[o]n the day that the CMI investment and the PMG transaction were supposed to fund, CMI abruptly informed IBD that it was no longer willing to invest \$6.5 million and that, instead, it would invest \$3.25 million or nothing at all" (Def. Mem. Law, at 2-3).

With respect to their new counterclaim for economic duress, the IBD defendants allege that "CMI coerced IBD to accept its investment of \$3.25 million by telling IBD that if it did not accept it, CMI would completely back out of the deal," and "CMI knew that IBD had no choice but to accept these changed terms because IBD only had a narrow window of opportunity to participate in the PMG equity transaction" (Amended Answer, ¶¶

38, 39). Likewise, in their opposition to the summary judgment motion, the IBD defendants make the same allegation with respect to the economic duress defense: “CMI coerced IBD to accept its investment of \$3.25 million by telling IBD that if it did not accept it CMI would completely back out of deal,” and “CMI knew that IBD had no choice but to accept these changed terms because IBD had only a limited window of opportunity to participate in the PMG equity transaction” (Def. Mem. Law, at 20-21).

In their new promissory estoppel counterclaim, the IBD defendants allege that “CMI made a clear and unambiguous promise to invest \$6.5 million in IBD so that IBD could purchase a 48.3% equity interest in PMG,” and that “[i]t was reasonable and foreseeable for IBD to rely on CMI’s promise, and IBD did so rely, because the \$6.5 million had been deposited in escrow” (Amended Answer, ¶¶ 42-43). In their opposition to the summary judgment motion, the IBD defendants make the exact same allegation with respect to their old promissory estoppel defense: “CMI made a clear and unambiguous promise to invest \$6.5 million in IBD so that IBD could purchase a 48.3% equity interest in PMG,” and that “it was reasonable and foreseeable for IBD to rely on CMI’s promise, and IBD did so rely, because the \$6.5 million had been deposited in escrow” (Def. Mem. of Law, at 21-22).

In their new counterclaim for breach of contract, the IBD defendants allege that “CMI breached the implied covenant of good faith and fair dealing in its investment agreements with IBD by intentionally frustrating IBD’s performance through its scheme of transmitting numerous purported default and redemption notices and by the filing of this lawsuit” (Amended Answer, ¶ 46). With respect to their old breach of contract defense, the IBD defendants make almost the exact same allegation: “CMI’s various breach of contract

claims are precluded because of CMI's antecedent breaches of the implied covenant of good faith and fair dealing and intentional frustration of IBD's performance resulting from its scheme to pressure IBD to redeem its stock," which scheme "consisted of transmitting bogus 'default' notices and commencing this lawsuit without a good faith basis" (Def. Mem. Law, at 23-24).

Thus, the IBD defendants' counterclaims alleging fraud, economic duress, and promissory estoppel -- all relating to CMI II's alleged pre-closing representation concerning the amount of its intended share purchase -- contain the same allegations previously asserted by the IBD defendants as affirmative defenses. All of these contentions have been rejected by this court by reason of the integration clause in the Operative Documents -- "IBD is precluded from claiming that it relied on plaintiff's oral representations that it would invest \$6.5 million in IBD" (Decision, at 8-9, 16-17).

The IBD defendants' breach of contract counterclaim is based upon the allegation that "CMI breached the implied covenant of good faith and fair dealing in its investment agreements with IBD by intentionally frustrating IBD's performance through its scheme of transmitting numerous purported default and redemption notices and by the filing of this lawsuit on February 15, 2004" (Amended Answer, ¶ 46). This contention, identical to the defense previously asserted by the IBD defendants, was also rejected by the Decision, in which I ruled that CMI II "has clearly established a breach of contract by IBD," "had the absolute right to demand a 'mandatory redemption' of its 52,500 shares of Series F Stock," and "validly exercised its right to demand redemption" (Decision, at 7, 11).

The doctrine of the “law of the case” is a “rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (Martin v City of Cohoes, 37 NY2d 162, 165 [1975]; see also Brownrigg v New York City Hous. Auth., 29 AD3d 721 [2d Dept 2006]). Thus, “[o]nce a point is decided within a case, the doctrine of law of the case makes it binding not only on the parties, but on the court as well” (Dukett v Wilson, 31 AD3d 865, 865 [3d Dept 2006] [quotation marks and citation omitted]; see also Thompson v Cooper, 24 AD3d 203 [1st Dept 2005]; Hass & Gottlieb v Sook Hi Lee, 11 AD3d 230 [1st Dept 2004]; Gee Tai Chong Realty Corp. v GA Insurance Co. of N.Y., 283 AD2d 295 [1st Dept 2001]). Therefore, an award of summary judgment “establishes the law of the case as to the issues essential to that determination” (Dukett v Wilson, 31 AD3d at 865 [quotation marks and citation omitted]).

My holding that the IBD defendants cannot reasonably rely upon any alleged pre-contract oral representations relating to the amount of the share purchase, and the rejection of the IBD defendants’ express and implied breach of contract arguments relating to CMI II’s transmittal of default and redemption notices and the filing of this lawsuit, constitute the law of the case, and are binding on defendants (see Tolksdorf v Tolksdorf, 106 AD2d 633, 633 [2d Dept 1984] [dismissing defenses on grounds that “(v)irtually the same defenses were (previously) raised ... and were specifically rejected as lacking in merit,” so that “the determinations then made became the ‘law of the case’ so as to preclude relitigation”]; Rosso v Beer Garden, Inc., 12 AD3d 152 [1st Dept 2004] [holding that previous order granting partial summary judgment and dismissing claim constitutes law of

the case, and requires dismissal of claim]; Barcov Holding Corp. v Bexin Realty Corp., 16 AD3d 282 [1st Dept 2005] [prohibiting defendant from asserting defense already stricken by the court]).

In opposition to the motion, the IBD defendants contend that because there is a distinction between counterclaims and affirmative defenses, their counterclaims are, in reality, different from their affirmative defenses. To the contrary, it is beyond cavil that the newly asserted counterclaims are identical to their stricken affirmative defenses, since the IBD defendants merely “cut and pasted” the defenses from their summary judgment opposition, and then converted them into counterclaims. If the affirmative defenses were deficient as a matter of law, then the counterclaims, which are predicated upon the same allegations, are also deficient as a matter of law (see e.g. CFSC Capital Corp. XXVII v W.J. Bachman Mech. Sheet Metal Co., Inc., 247 AD2d 502, 505 [2nd Dept 1998] [holding that because counterclaims were deficient, affirmative defenses “based on the same allegations” must be dismissed]).

The IBD defendants also assert that that their pending motion for reargument and renewal stays the operation of the law of the case doctrine. However, the IBD defendants fail to offer any case law in support of this assertion. Although defendants cite to Parker v McMahon (53 AD2d 1034 [4th Dept 1976]), that case stands only for the proposition that a jurisdictionally valid order, constituting the law of the case, may be “undone” only by appellate reversal, or by successful application for reargument and renewal. The IBD defendants’ mere filing of their motion for reargument and renewal does not stay the law of the case doctrine.

Accordingly, because the IBD defendants' amended answer merely restates their prior, dismissed affirmative defenses, and asserts counterclaims based solely on those affirmative defenses, the newly filed amended pleading, including the affirmative defenses and counterclaims, must be stricken in its entirety based on the Decision, and the doctrine of law of the case.

However, CMI II's request for sanctions is denied. CMI II has not demonstrated that the IBD defendants' arguments completely lack merit, and, as such, the imposition of costs and fees is not appropriate (see Grossman v Pendant Realty Corp., 221 AD2d 240 [1st Dept 1995], lv dismissed 88 NY2d 919 [1996]; North American Van Lines, Inc. v American Intl. Companies, 11 Misc 3d 1076(A) [Sup Ct, NY County 2006]).

IIG's cross motion for an order confirming that one of the issues to be decided by the Special Referee is the "amount secured by IIG's senior security interest," which is the subject of the tenth cause of action, is denied as moot, as the hearing before the Special Referee has already taken place. Moreover, in the Decision, I granted summary judgment in favor of CMI II and against defendants IBD, Media Billing and iBill with respect to the sixth, seventh, eighth, ninth, tenth and fourteenth causes of action (see Decision, at 21). I referred to the Special Referee the issue of CMI II's damages, not IIG's damages, against the IBD defendants with respect to only the sixth, seventh, eighth, ninth and fourteenth causes of action -- not the tenth cause of action relating to CMI II's right to foreclosure. Thus, the amount of IIG's "security interest" has nothing to do with the hearing held by the Special Referee concerning CMI II's damages against the IBD defendants. Indeed, the Special Referee specifically held that the issue of the amount of IIG's lien was not a subject of the

order of reference. Thus, IIG's cross motion is denied.

The IBD Defendants' Motion for Reargument/Renewal (Motion Sequence No. 004)

The IBD defendants move for both reargument and renewal. In support of their motion for reargument, the IBD defendants contend that there are several errors of law and fact embodied in the Decision that justify granting of a motion to reargue. The IBD defendants contend that I erred by: (1) treating their contention that they had no obligation to pay dividends to CMI II as unsupported by case law; (2) holding that CMI II exercised a valid "exchange option" for an additional 20,000 shares of Series of F Stock; (3) erroneously concluding that the parol evidence rule bars the IBD defendants from presenting affirmative defenses based on fraud/economic duress and promissory estoppel; (4) erroneously striking all of the IBD defendants' affirmative defenses by incorrectly concluding that each defense was based on the contention that CMI II falsely represented to the IBD defendants the amount of its initial investment, to their detriment; and (5) holding that CMI II's motion for summary judgment was not premature in light of the limited discovery that had been conducted, and in my reasoning that further discovery would be unavailing.

A motion for reargument is addressed to the sound discretion of the trial court, and may be granted upon a showing that the court overlooked or misapprehended the facts or law, or misapplied any controlling principle of law (see CPLR 2221 [d] [2]; McGill v Goldman, 261 AD2d 593 [2d Dept 1999]; Opton Handler Gottlieb Feiler Landau & Hirsch v Patel, 203 AD2d 72 [1st Dept 1994]). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided (see William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 [1st Dept], lv dismissed in part, denied

in part 80 NY2d 1005 [1992]; Bliss v Jaffin, 176 AD2d 106 [1st Dept 1991]; Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

The IBD defendants' motion for reargument is denied. The IBD defendants' moving papers do not identify anything that I overlooked or misapprehended that justifies granting leave to reargue. Rather, plaintiffs' papers merely restate the same arguments that I already rejected in the Decision.

Thus, in support of their motion for reargument, the IBD defendants once again argue, as they did in their original opposition papers, that they had no obligation to pay dividends to CMI II, and that CMI II's exchange of certain stock for additional IBD preferred stock was completely invalid. In addition, the IBD defendants seek to relitigate baseless affirmative defenses, and their vague and unsubstantiated expression of need for additional discovery. Thus, the IBD defendants merely repeat and rehash the same arguments that were originally presented and rejected on the prior motion, which is insufficient to grant a motion for reargument (see Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971 [1st Dept 1984]; Foley v Roche, 68 AD2d 558, supra). In any event, the IBD defendants fail to demonstrate that I overlooked or misapplied any controlling principle of law in granting the dismissal motions (see CPLR 2221 [d] [2]; Spinale v 10 West 66th Street Corp., 193 AD2d 431 [1st Dept 1993] [denying motion for leave to reargue since there was no showing that the court overlooked or misapprehended relevant facts or controlling law in prior decision]; see also Daluisc v Sottile, 15 AD3d 609 [2d Dept 2005]; Armstead v Morgan Guar. Trust Co. of New York, 13 AD3d 294 [1st Dept 2004]).

The IBD defendants also move for leave to renew. A motion for renewal “shall be based upon new facts not offered on the prior motion that would change the prior determination” (CPLR 2221 [e] [2]; see also Brooklyn Welding Corp. v Chin, 236 AD2d 392, 392 [2d Dept 1997]). Renewal is properly denied where the motion is “based upon evidence that was available at the time of the original motion” (Atkins v Malota, 1 AD3d 294, 294 [1st Dept 2003], lv dismissed 3 NY3d 701 [2004]), or where “such evidence would not have altered the result” (In re Will of Forray, 234 AD2d 16, 16 [1st Dept 1996], lv dismissed in part, denied in part 90 NY2d 876 [1997]; see also Cerro v Washington County Bd. of Supervisors, 270 AD2d 679 [3d Dept], appeal dismissed 95 NY2d 887 [2000]).

The IBD defendants contend that their motion for leave to renew must be granted because I overlooked their response to CMI II’s Rule 19-A Statement of Genuine Issues of Material Fact to Be Tried (the IBD defendants’ Rule 19-A Statement). The IBD defendants filed their Rule 19-A Statement on August 17, 2006. However, the IBD defendants’ Rule 19-A Statement was inadvertently not brought to my attention, likely because it was filed under seal. Thus, in the Decision, I stated that:

Defendants apparently do not contest the facts set forth in plaintiff’s Rule 19-A Statement, as they have failed to submit either a response, or their own Rule 19-A Statement. Thus, for purposes of this motion, the facts set forth in plaintiff’s Rule 19-A Statement are deemed to be true.

Decision, at 2, n 2.

The IBD defendants’ motion for renewal must be denied because their Rule 19-A Statement does not constitute new evidence and, in any event, would not change the outcome of the motion for summary judgment, as the Decision was predicated on the

undisputed language of the underlying agreements. Indeed, the IBD defendants' Rule 19-A Statement contains mostly conclusions of law, and is essentially identical to the IBD defendants' other submissions in response to the summary judgment, all of which I reviewed and addressed in the Decision.

First, the Rule 19-A Statement contains almost no facts, and certainly no new facts. Moreover, in their Rule 19-A Statement, the IBD defendants do not dispute CMI II's recitation of the facts, but rather, just the legal import of such facts. Throughout their Rule 19-A Statement (Parker Aff., Exh B), the IBD defendants primarily assert unsupported defenses and legal conclusions, not factual allegations:

- [S]uch agreement was procured by means of economic duress (see Responses 1, 2, 4, 6-9, 14, 18, 20-21, 23-27, 28-34, 36-63, 65-66, and 73-75).
- CMI II had materially breached the agreements between the parties [and] IBD's obligation under any such agreements were discharged as a result of CMI II's antecedent breaches and repudiation of the agreements (see Responses 1, 4, 6-9, 11, 45, 48 and 50-55).
- IBD also raises meritorious affirmative defenses to the enforcement of any of CMI II's alleged rights under the Subscription Agreement including promissory estoppel, breach of contract/interference, and the doctrine of unclean hands (see Responses 1-2, 6-9, 11-12, 16-18, 20-24, 26-30, 32-36, 38-42, 44-48, 50-56, 59-61 and 65-66).

Thus, there is no dispute about what happened in this case, only as to the legal liabilities arising from those events.

Importantly, the IBD's defendants' memorandum of law in opposition to CMI II's motion for partial summary judgment (the Prior Memorandum of Law) contained each defense, argument, conclusion and factual allegation asserted by the IBD defendants in their Rule 19-A Statement. The following chart identifies the principal contentions and defenses advanced by the IBD defendants in their Rule 19-A Statement, and shows that the Rule 19-A Statement contains no information not considered by me in the Decision:

Contention: The parties' agreements were procured by economic duress.

<u>Asserted in the IBD defendants' Prior Memorandum of Law</u>	<u>Refuted in CMI II's Memorandum of Law</u>	<u>Addressed in the Decision</u>
Pages 2, 20-21	Page 18 (moving papers) Pages 9-10 (reply papers)	Pages 8-9, 16-17, 21

Contention: CMI II breached the investment agreements and interfered with the IBD defendants' performance of their contractual duties.

<u>Asserted in the IBD defendants' Prior Memorandum of Law</u>	<u>Refuted in CMI II's Memorandum of Law</u>	<u>Addressed in the Decision</u>
Pages 2, 4, 22-24	Pages 10-12, 16-19 (moving papers) Pages 1, 4, 11-13 (reply papers)	Pages 7-9, 16-17, 21

Contention: CMI II's claims are barred by the doctrines of promissory estoppel and unclean hands.

<u>Asserted in the IBD defendants' Prior Memorandum of Law</u>	<u>Refuted in CMI II's Memorandum of Law</u>	<u>Addressed in the Decision</u>
Pages 2, 21-22, 24-25	Pages 4-8, 10	Pages 7-9, 16-17, 21

(moving papers)

Pages 14-15, 17

(reply papers)

Accordingly, because the IBD defendants' Rule 19-A Statement does not constitute "new" evidence which, had it been presented earlier, would have changed the outcome of the Decision, their motion for renewal is denied (see Galgano v Galgano, 287 AD2d 687 [2d Dept 2001] [renewal denied where renewal evidence was insufficient to warrant any change in underlying determination]; Lau v Lungen, 264 AD2d 912 [3d Dept 1999], lv dismissed 95 NY2d 825 [2000] [renewal denied where renewal evidence "immaterial" to outcome of action]).

In any event, the Decision was squarely predicated on the written agreements executed by the parties, and not the absence of the IBD defendants' Rule 19-A Statement. Having considered the IBD defendants' opposing affidavits and memoranda, I rejected the IBD defendants' defenses, and concluded that the IBD defendants breached their obligations to CMI II:

Pursuant to the unambiguous terms of both the Subscription Agreement and the Series F Certificate, IBD was required to pay dividends to plaintiff The plain terms of Section 9 (b) (i) of the Series F Certificate provide that the holders of the Series F Stock are entitled to require 'mandatory redemption' of their Series F Stock if IBD 'fails to pay when due any dividend in accordance herewith.' ... IBD does not dispute that it failed to pay dividends due to plaintiff [and] does not contend that any of the documents at issue are ambiguous. Thus, in light of the unambiguous agreements between plaintiff and IBD, and defendants' failure to make the dividend payments or honor plaintiff's redemption demand pursuant to those agreements, plaintiff has clearly established a breach of contract by IBD.

Decision, at 7

The IBD defendants readily admit in their Rule 19-A Statement that they do not dispute the text of the parties' agreements (see Responses 6-7, 43-44, 49, 57, 60, and 74-75), and acknowledge that they did not pay CMI II the dividends at issue, or otherwise honor CMI II's redemption demands (see Responses 6-10, 46, 50). In fact, the IBD defendants nowhere dispute, in their Rule 19-A Statement or prior memorandum of law, that the parties' agreements imposed certain payment and redemption obligations upon the IBD defendants, and that the IBD defendants failed to make those payments, and redeem CMI II's stock. Thus, the IBD' defendants's claim in their reargument motion that I solely relied on CMI II's representations fails in light of my reliance on the unambiguous terms of the investment agreements, and the IBD defendants' failure to submit affidavits meaningfully disputing the material facts.

Accordingly, both the motions for reargument and for renewal are denied. The IBD defendants' alternative motion, for an order postponing the decision on the motion until oral depositions of CMI II have been taken, and discovery has been substantially completed, is also denied.

CMI II's Motion to Confirm the Special Referee's Report (Motion Sequence No. 005)

In the Decision, I awarded summary judgment to CMI II in connection with numerous claims, including the sixth cause of action (IBD's failure to pay dividends and honor redemption demands); the seventh cause of action (IBD's failure to honor redemption demands following breach of the September 23, 2004 Guaranty [the Guaranty]); the eighth cause of action (breach of the Guaranty by Media Billing and iBill); the ninth cause of action

(Media Billing's and iBill's failure to pay CMI II's attorneys' fees and expenses pursuant to the Guaranty); and the fourteenth cause of action (Media Billing's and iBill's failure to pay CMI II's costs and expenses, including attorneys' fees, pursuant to the Security Agreement dated September 29, 2004 [the Security Agreement]) (Decision, at 21). I then referred the amount of CMI II's damages relating to certain of its causes of action to a Special Referee in order to hear and report:

ORDERED that the issues of the amount of damages to which plaintiff is entitled (sixth, seventh and eighth causes of action), the amount of plaintiff's attorney's fees (ninth cause of action), and the amount of costs and expenses incurred by plaintiff in seeking to protect and enforce its rights as both a secured party and Security Agreement Collateral Agent, including, without limitation, the reasonable fees and disbursements of counsel in this action (fourteenth cause of action), is referred to a Special Referee to hear and report with recommendations

Decision, at 21.

The damages hearing was conducted on November 28, 2006 before Special Referee Howard G. Leventhal, and lasted approximately 4 ½ hours (Transcript of Hearing [Aff. of Marc R. Rosen, Exh E]). CMI II presented two witnesses, Alex Mazier and David Parker. Mr. Mazier is the senior analyst for CMI II's position in IBD, and was heavily involved in the underlying transaction and the negotiation of the parties' agreements. Mr. Parker, the chair of the litigation department at Kleinberg, Kaplan, Wolff & Cohen, P.C. (Kleinberg Kaplan), is lead counsel for CMI II in this action, and has knowledge of the work performed on CMI II's behalf, and the attorneys' fees incurred. CMI II also submitted documentary evidence at the hearing, including the Subscription Agreement, the Guaranty,

the Certificate of Designation, the Security Agreement (collectively, the Operative Documents), and Kleinberg Kaplan's detailed time records and invoices.

The IBD defendants did not call any of their own witnesses, and submitted into evidence only a copy of CMI II's second amended complaint.

Following the hearing, Special Referee Leventhal issued his report and recommendation and stated in part:

I found Mr. Mazier's testimony to be credible as to the manner in which he calculated plaintiff's damages.

* * *

[T]he amount of unpaid ["and accruing"] dividends should be \$906,878.82 ... and I agree with Mr. Mazier that the ... redemption price should be \$5,250,000 plus the \$906,878.82 for a total of \$6,156,878.80 on the 6th and 7th causes of action, as well as to the 8th cause of action for breach of guarant[y].

* * *

With respect to attorneys' fees, the agreements clearly call for that and plaintiff is entitled to what is found by Justice Fried. ... I note that this was a complicated matter and required skill and expertise for the resolution. Plaintiff's lawyers ... are well regarded in this respect and I find that the hourly rates billed by the lawyers at the firm were fair and reasonable for this type of complicated litigation in the Commercial Division of Supreme Court, New York County. I find the amount of time and labor expended was reasonable under the circumstances, particularly in view of the litigiousness of defense counsel, as well as their use of all possible defenses on behalf of their clients. [P]laintiff should not suffer because of the ingenuity of defense counsel, particularly where plaintiff is entitled to be compensated therefore. As far as the amount involved, this [total damages award] is over \$6 million. The attorneys' fees sought are less than 10% thereof. Plaintiff's counsel succeeded in getting partial summary judgment on most of the causes of action after litigating most strenuously. I find that

the fair and reasonable value of attorneys' fees sought by plaintiff's counsel under the guarant[y] and security agreement in the sum of \$577,977.31 to be fair and reasonable.

* * *

[P]laintiff is entitled to recover prejudgment interest from ... June 30th, 2005 at the statutory rate of nine percent per annum.

It is my report and recommendation that the Court grant a judgment in favor of plaintiff as to defendants in accordance with this decision, report and recommendation.

Hearing Transcript, at 109, 111-112.

It is well-established that the report of a Special Referee should be confirmed whenever the findings contained therein are supported by the record (In re Musano, 302 AD2d 302 [1st Dept 2003]; Nager v Panadis, 238 AD2d 135 [1st Dept 1997]), and the referee has clearly defined the issues and resolved matters of credibility (Kaplan v Einy, 209 AD2d 248 [1st Dept 1994]). Since the Special Referee is deemed to have "the same power and authority as a justice presiding at a regular special term of the supreme court" (Judiciary Law § 117), courts have consistently refused to disturb reports and recommendations made by Special Referees (see e.g. Dunnan v Dunnan, 293 AD2d 345, 345 [1st Dept 2002] ["no basis exists to disturb the Special Referee's findings"]; Halpern v Halpern, 264 AD2d 630, 630 [1st Dept 1999] [the referee's report "should not be disturbed"]).

I have carefully reviewed the record before Special Referee Leventhal, and I find that the Referee's report and recommendation will not be disturbed, as it is substantiated by the record.

CMI II's damages are straightforward. These damages are predicated upon the IBD defendants' failure to pay dividends and honor their redemption obligations, their breach of the Guaranty, and their refusal to pay CMI II its contractual attorneys' fees and expenses. As set forth below, CMI II's damages are supported by the undisputed record.

For example, the amount of unpaid and accruing dividends owed to CMI II are calculated by reference to unambiguous provisions in Section 1 (A) (a) (i) of the Subscription Agreement and Section 4 of the Certificate of Designation, which expressly require the IBD defendants to pay semi-annual dividends to CMI II as set forth therein. At the hearing, Mr. Mazier calculated, based upon a 360-day year as the agreement provided, that since the IBD defendants failed to make the last six contractually required dividend payments, CMI II was owed \$921,462.12 in unpaid and accruing dividends based upon the Subscription Agreement and Certificate of Designation (Hearing Transcript, at 22-28). After considering the evidence presented, Special Referee Leventhal concluded that the 360-day year provision was "not fair," and ruled that, based upon a 365-day year, the amount of unpaid and accruing dividends owed to CMI II equals \$906,878.82 (*id.* at 28).

The Certificate of Designation states that CMI II is entitled to receive from IBD the "per share redemption price" upon the occurrence and continuation of certain mandatory redemption events, including IBD's failure to pay any dividend when due (Certificate of Designation, §§ 9 [a], [b]). The Certificate of Designation provides that the "per share redemption price" shall equal \$100 per share of Series F Stock owned by CMI II, plus all unpaid and accrued dividends, plus any other amounts owed by IBD to CMI II (*id.*, ¶ 9 [a]). I previously determined that CMI II owns 52,500 share of Series F Stock (Decision,

at 4). Mr. Mazier testified that IBD failed to make almost every required dividend payment, and that the mandatory per share redemption price, based upon his calculations and the Certificate of Designation, equals at least \$6,156,878.82 (Hearing Transcript, at 23-25; 29-30; 32-33).

The Guaranty requires Media Billing and iBill, jointly and severally, to “guarantee[] the full payment and performance, when due, of all of [IBD’s] obligations” (Guaranty, at 1). Mr. Mazier testified that Media Billing and iBill have not paid CMI II any monies representing the unpaid and accruing dividends or the “per share redemption price,” or any portion thereof, under the Guaranty (*id.* at 29-30, 33). Based upon this evidence, Special Referee Leventhal properly found that Media Billing and iBill owe CMI II the sum of \$6,156,878.82, pursuant to the Guaranty (*id.* at 109).

At the hearing, Mr. Parker testified as to the reasonableness of CMI II’s legal expenses, which totaled \$577,977.31 between January 2005 and November 22, 2006, and submitted Kleinberg Kaplan’s detailed time records and invoices sent to CMI II (Exh E, at 57-89). Mr. Parker testified that the firm’s work in this case related to CMI II’s efforts to enforce its rights as a secured party and as Security Agreement Collateral Agent under the Guaranty and Security Agreement (*id.*, at 60-62, 63, 88-89). Mr. Parker explained that “defendants have tried everything imaginable to [throw] sand in the gears, obfuscate issues, confusc matters, and drag things out,” and that “given the amount of effort it has taken to get us to this point, now with summary judgment having been granted and despite the motions for reconsideration ... as necessitated by tenacity of th[ese] defendant[s], the fees are extremely reasonable” (*id.*, at 67-68). At the hearing, Mr. Parker testified that Kleinberg

Kaplan was successful in this litigation and that “we litigated hard and when we saw a strategic opportunity to shorten the case because of the many breaches ... we were able to ... get summary judgment,” notwithstanding that “defendants here thr[ew] up as many defenses as they possibly could and then more so” (*id.* at 68-69).

Special Referee Leventhal concluded that this case has been a “complicated matter” and “required skill and expertise for the resolution,” that “the hourly rates billed by lawyers at the firm were fair and reasonable for this type of complicated litigation,” that “the amount of time and labor expended was reasonable under the circumstances, particularly in view of the litigiousness of defense counsel, as well as their use of all possible defenses on behalf of their clients,” and that “the fair and reasonable value of attorneys’ fees sought by plaintiff’s counsel under the guarant[y] and security agreement in the sum of \$577,977.31 [is] fair and reasonable” (Exh E, at 111-112).

Special Referee Leventhal received and reviewed all of CMI II’s evidence, assessed CMI II’s witnesses’ testimony, and made detailed factual findings supported by the record. According to Special Referee Leventhal, Mr. Mazier was “credible” and “truthful” (Exh E, at 108). The IBD defendants did not present any witnesses, and did not dispute CMI II’s evidence. It is undisputed that the IBD defendants missed almost every dividend payment, did not pay the “per share redemption price,” breached the Guaranty, and failed to pay CMI II’s legal expenses, and that the Operative Documents unambiguously set forth the formula for calculating CMI II’s damages. Thus, the record clearly supports Special Referee Leventhal’s findings as to damages, and the report and recommendation must be confirmed.

In their cross motion in response to the motion to confirm, the IBD defendants challenge only the attorneys' fee award in the amount of \$577,977.31, and not the balance of the award. In challenging the award, the IBD defendants do not claim that the fees were not reasonable. Rather, they contend that they did not have an adequate opportunity to review the billing records in advance of the hearing, and that CMI II is not entitled to reimbursement of its legal expenses prior to a certain date.

The IBD defendants failed to seek any discovery in preparation for the damages hearing. Between September 26, 2006, the date of the Decision, and November 26, 2006, two days prior to the scheduled damages hearing, the IBD defendants never requested any documents from CMI II concerning the damages proceeding, or CMI II's attorneys' fees (Parker Reply Aff., ¶ 3). Rather, they waited until November 27, 2007, the day before the damages hearing, to request CMI II's attorneys' fees records. That same day, CMI II delivered the requested documents to counsel for the IBD defendants (*id.*, ¶ 4).

On November 10, 2006, shortly before the damages hearing, the IBD defendants moved for a stay of the hearing. On November 17, 2006, I denied that request. In the stay motion, the IBD defendants did not claim that they were missing or needed any discovery from CMI II, including attorneys' fees records.

On November 28, 2006, the morning of the damages hearing, the Honorable Jacqueline Silberman, presiding in the Special Referees' Part, denied the IBD defendants' request to adjourn the damages hearing and/or to exclude CMI II's attorneys' fees records.

It is thus clear that the IBD defendants had a reasonable and sufficient opportunity to request the billing records prior to the hearing, but did not do so.

Accordingly, Special Referee Leventhal ruled that the IBD defendants waived their right to complain – both in failing to request the documents after the matter was referred for a damages hearing, and by failing to include the issue in their request for a stay:

[A]n application had been made to Justice Fried for an adjournment a week ago, which he denied and the judge did not refer the issue of an adjournment to myself. Moreover, it has been 60 days almost to the day since Justice Fried's order and defendants made no attempt to obtain appropriate discovery needed for the hearing. Therefore, I find that constitutes a waiver.

Hearing Transcript, at 107. This finding is clearly supported by the record, and must be sustained.

The IBD defendants also contend that CMI II should not be awarded its contractual attorneys' fees for work performed prior to June 30, 2005, the date when IBD failed to make a dividend payment to CMI II. The IBD defendants argue that the claims decided in favor of CMI II in the Decision all rely upon the determination that IBD first breached the investment agreements by failing to pay dividends on June 30, 2005, but that I did not find that there had been any breaches prior to June 30, 2005. Thus, the IBD defendants contend, it is improper for CMI II to recover fees for legal work done prior to June 30, 2005, which necessarily are related to claims that are still pending, and not to the claims that were resolved by the Decision. This contention is rejected, and it is refuted by both the express language of the reference, as well as the parties' underlying agreements.

In the Decision, I referred to Special Referee Leventhal "the amount of plaintiff's attorneys' fees ... and the amount of costs and expenses incurred by plaintiff *in seeking to protect and enforce its rights as both a secured party and Security Agreement*

Collateral Agent, including, without limitation, the reasonable fees and disbursements of counsel in this action” (Decision, at 21 [emphasis added]). Thus, contrary to the IBD defendants’ argument, I did not limit CMI II’s recovery of attorneys’ fees to those incurred following June 30, 2005, but rather, I held that all fees “in this action” were recoverable. Accordingly, Special Referee Levcnthal granted CMI II all of its requested attorneys’ fees in this action, which is completely consistent with my award of all legal fees “in this action.”

The awarded legal expenses also all relate to CMI II’s effort in “seeking to protect and enforce its rights as both a secured party and Security Agreement Collateral Agent.” There is no provision in the Decision or the parties’ agreements restricting CMI II’s attorneys’ fees to those incurred in connection with only fully adjudicated claims. In the underlying agreements, the parties agreed that the IBD defendants, not CMI II, would bear the burden of paying CMI II’s legal expenses in the event that it was compelled to enforce the agreements, and protect its rights. If the parties wished to limit attorneys’ fees to decided claims only, they would have done so.

Finally, the IBD defendants contend that prejudgment interest should not apply to the attorneys’ fee award, and that interest on the total damages award should be calculated only from February 15, 2006.

CMI II’s entitlement to indemnification for its attorneys’ fees is based upon specific contractual provisions in the parties’ agreements. The IBD defendants’ failure to pay CMI II’s attorneys’ fees therefore constitutes a contractual breach, and thus, it is proper to award prejudgment interest on the attorneys’ fee award.

Additionally, Special Referee Leventhal was authorized to award prejudgment interest on the total damages award from June 30, 2005, which represents the date of the IBD defendants' failure to pay the dividends to CMI II. In fact, CPLR 5001 (b) provides that interest shall be computed from "the earliest ascertainable date the cause of action existed." Thus, Special Referee Leventhal properly calculated prejudgment interest from June 30, 2005.¹

In sum, Special Referee Leventhal's findings are completely supported by the record. A referee's report should be confirmed in its totality where, as here, the reviewing court finds nothing in the record contrary to the findings in the referee's report (Scarab Equities Corp. v 684 Owners Corp., 170 AD2d 409 [1st Dept 1991]; Namer v 152-54-56 West 15th Street Realty Corp., 108 AD2d 705 [1st Dept 1985]; see also Visco v Marion, 268 AD2d 303 [1st Dept 2000]; Kardanis v Velis, 90 AD2d 727 [1st Dept 1982]).

Pursuant to the report and recommendation, IBD owes CMI II the amount of \$6,156,878.82, plus interest, based upon the sixth and seventh causes of action, and Media Billing and iBill owe CMI II the amount of \$6,734,856.13, plus interest, based upon the eighth, ninth and fourteenth causes of action. Accordingly, partial summary judgment is entered in favor of CMI II and against the IBD defendants in the foregoing amounts.

Accordingly, it is

¹ It must also be noted that the IBD defendants had ample opportunity at the damages hearing to argue their theories concerning prejudgment interest, but failed to do so.

ORDERED that plaintiff's motion to dismiss the affirmative defenses and counterclaims contained in the amended answer to the second amended complaint, and to strike the amended answer (Motion Sequence No. 003) is granted; and it is further

ORDERED that plaintiff's motion for sanctions (Motion Sequence No. 003) is denied; and it is further

ORDERED that defendant IIG Capital LLC's cross motion for an order confirming that among one of the issues to be decided by the Special Referee is the "amount secured by IIG's senior security interest" (Motion Sequence No. 003) is denied; and it is further

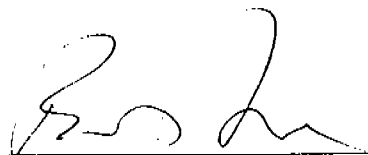
ORDERED that the motion of defendants Interactive Brand Development, Inc., f/ka Care Concepts I, Inc., Media Billing Company, LLC and Internet Billing Company, LLC for leave to reargue and/or renew, or, in the alternative, postponing decision on the summary judgment motion pending discovery (Motion Sequence No. 004) is denied; and it is further

ORDERED that plaintiff's motion for an order confirming the November 28, 2006 report of Special Referee Howard G. Leventhal (Motion Sequence No. 005) is granted, and partial summary judgment is entered in favor of plaintiff, and against Interactive Brand Development, Inc., f/ka Care Concepts I, Inc. in the amount of \$6,156,878.82, plus pre-judgment statutory interest at 9% per annum from June 30, 2005, and against defendants Media Billing Company, LLC and Internet Billing Company, LLC in the amount of \$6,734,856.13, plus pre-judgment statutory interest at 9% per annum from June 30, 2005; and it is further

ORDERED that the remainder of the action shall continue.

Dated: 3/2/07

ENTER:



J.S.C.

BERNARD J. FRIED
J.S.C.