

<b>Moodform Mission v Campbell</b>
2011 NY Slip Op 31787(U)
June 29, 2011
Supreme Court, New York County
Docket Number: 603256/09
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Hoodform Mission

INDEX NO.

603256/09

MOTION DATE

- v -

MOTION SEQ. NO.

001

MOTION CAL. NO.

Naomi Campbell

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*motion(s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.*

**FILED**

JUL 01 2011

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/29/11

HON. JUDITH J. GISCHE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
MOODFORM MISSION,  
  
Plaintiff,

**-against-**

NAOMI CAMPBELL,  
  
Defendant.  
-----X

NAOMI CAMPBELL,  
  
Defendant-Counterclaim Plaintiff,

**-against-**

MOODFORM MISSION,  
  
Plaintiff-Counterclaim Defendant.  
-----X

NAOMI CAMPBELL,  
  
Defendant-Third Party Plaintiff,

**-against-**

CAROLE WHITE and PREMIER MODEL MANAGEMENT  
LTD.,  
  
Third Party Defendants.  
-----X

**DECISION/ ORDER**  
Index No.: 603256/09  
Seq. No.: 001

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**FILED**

**JUL 01 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

Third Party  
Index No.: 590315/10

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Plt's n/m [3212] w/DRB affirm, JM, CW, CO, AM affids, exhs . . .	1,2,3
Def's opp w/DFB affirm w/MWO, GB, BM, NC affids . . . . .	4,5,6,7,8
Pltfs & 3PA's reply w/CO affid, DRB affirm . . . . .	9,10
AG affid . . . . .	11
RB affid . . . . .	12

TS affid .....	13
Pltf & 3PA's reply w/CW affid .....	14

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*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an action by plaintiff, Moodform Mission ("Moodform"), for breach of contract, breach of implied covenant of good faith and fair dealing, and repudiation of contract. Defendant, Naomi Campbell ("Campbell"), interposed an answer with thirteen defenses and six counterclaims. There were also four third-party claims against third-party defendants, Carole White ("White") and Premier Model Management Ltd. ("Premier"). The first three counterclaims are against Moodform only and they sound in: violation of NYGBL §171 et. seq.; declaring a certain commission agreement unenforceable; and breach of contract. The fourth, fifth and sixth counterclaims and first three third-party claims are collectively asserted against Moodform, White and Premier, alleging fraud, conspiracy to commit fraud and unjust enrichment. The fourth third-party claim is against White and Premier only, alleging breach of fiduciary duty.

Moodform and both third party defendants (collectively "movants") are represented by the same attorney. They now collectively move to: dismiss the counterclaims, third party claims and defenses pursuant to CPLR 3211<sup>1</sup>. Movants also seek summary judgment against defendant on plaintiff's breach of contract and repudiation of contract causes of action (CPLR § 3212). Campbell opposes the

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<sup>1</sup>Although movants seek dismissal of the defenses, they are not separately addressed in their memorandum of law. The reply memorandum of law raises for the first time arguments about the defense of illegality. Since these arguments are raised belatedly, the court does not separately address in this decision whether any of the defenses should be stricken.

\* 4]  
motion<sup>2</sup>.

Issue has been joined on the complaint in chief, but not on the counterclaims or third party complaint. Summary judgment relief, therefore, may only be considered as to the complaint. CPLR § 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 (1st Dept. 2001). There can be no summary judgment until issue has been joined. CPLR § 3211 [c]; Gifts of the Orient v. Linden Country Club, 89 AD2d 508 [1st Dept. (1982)]. The counterclaims and third party complaint will, therefore, be reviewed under the legal standards available for motions to dismiss under CPLR 3211.

Motions for summary judgment and those to dismiss a pleading are determined according to different legal standards. On Moodform's motion for summary judgment, its burden is to set forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment in its favor, without the need for a trial. Only if Moodform meets this burden, must Campbell then demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for her failure so to do. CPLR § 3212; Winegrad v. NYU Medical Center, 64 N.Y.2d 851 (1985); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980).

In distinction, that part of the motion which seeks dismissal of the counterclaims and third-party claims pursuant to CPLR 3211, requires the court to give the pleadings

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<sup>2</sup>Movants collaterally raise issues in their Memorandum of law regarding whether documents should be filed under seal pursuant to a confidentiality agreement. This issue is not fairly raised by the motions before the court. Nonetheless, the parties are admonished that, regardless of whether they have an enforceable agreement regarding confidentiality, no documents may be filed under seal, without prior court approval based upon an appropriate showing of good cause in a properly made motion. Uniform Rules of the Trial Courts § 216.1, Gryphon Domestic VI, LLC v. APP International Finance Company BV, 28 A.D.2d 3d 322 (1st Dept. 2006).

\* 5]

a liberal construction and accept the facts alleged as true. The court will determine whether, affording Campbell the benefit of every possible favorable inference, the facts as alleged in the counterclaims and third-party claims, fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83 (1994). Whether Campbell can ultimately establish her allegations is not part of the calculus. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11 (2005). To the extent the motion to dismiss is based upon documentary evidence, the documents relied upon must definitively establish a basis for dismissal. Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1<sup>st</sup> dept. 1995).

The parties have each submitted extrinsic evidence in their papers. While the court may consider evidence that is otherwise legally admissible on a motion for summary judgment, the same is not true when considering the motion to dismiss. While extrinsic evidence may be freely relied upon to preserve in-artfully pleaded but potentially meritorious claims, they may not be considered to defeat a complaint, unless it is documentary evidence that definitively disposes of plaintiff's claims. Zanett Lombardier v. Ltd v Maslow, 29 AD3d 495 (1<sup>st</sup> Dept. 2006); Bronxville Knolls Inc. v. Webster Town Center Partnership, supra.

With these legal standards in mind, the court's decision follows:

#### **Facts Considered**

The record developed on this motion reveals that some facts are undisputed while others are indisputable, because they are derived from documentary evidence, such as contracts. Other facts are subject to sharp dispute between the parties.

It is undisputed that White and her brother, Chris Owen ("Owen") are principals

of Premier, a modeling agency located in London. It is further undisputed that in about 1993, Campbell's principal modeling agency was Premier (or its predecessor, Elite) and that White (a co-owner of Premier), became Campbell's "mother agent." The parties factually dispute the extent of the services White actually provided as a mother agent over the years and the extent to which White also served as Campbell's confidant and trusted business advisor.

It is undisputed, however, that sometime in 1994 or 1995, Campbell approached White about developing a line of fragrances using a Campbell branding that would take advantage of Campbell's celebrity. Movants contend that for several years after that, White, Owen and non-party Dr. Joachim Mensing ("Mensing") jointly worked toward developing a Naomi Campbell brand fragrance concept. Mensing was the principal of a company called Moodform Corp. White and Owen created, and are principles of, yet another entity known as Premier Mission. Moodform is a joint venture consisting of Moodform Corp. and Premier Mission.

The parties dispute the time when Campbell first learned that White had a beneficial financial interest in Moodform (through her ownership of Premier Mission). Campbell claims that it was not until the complaint was filed in this action. Moodform and White claim that Campbell knew about the financial arrangement no later than July 11, 2006. This dispute is important in connection with the arguments made about whether some of Campbell's claims are barred by the applicable statute of limitations (see decision, *infra*).

It is undisputed that in 1998, there was an offer from Cosmopolitan Cosmetics/Wella AG, a German fragrance and cosmetics company ("Cosmopolitan Cosmetics") to

manufacture a Campbell fragrance and cosmetics line. In furtherance thereof, in late 1998, two written contracts were executed. These documents are central to the parties' present disputes.

One agreement was made on November 26, 1998, between Moodform and Campbell (the "Moodform Agreement"). The second agreement, executed on or about December 11, 1998, is between Campbell (through her wholly owned corporation London Kilt, Inc.) and Cosmopolitan Cosmetics (the "License Agreement").

The Moodform Agreement is signed by Mensing, Owen and Naomi Campbell. White did not sign the agreement in any capacity. It provides, in relevant part, as follows:

#### 1. Consultancy

Naomi engages MoodForm Mission and MoodForm Mission agrees to act as Naomi's exclusive brand consultant and representative during the Term (as the term is defined herein) for Fragrance, cosmetics, make-up jewelry, watches, lingerie... accessories, shoes . . .and the Internet.

MoodForm Mission, having attracted serious interest from Cosmopolitan Cosmetics GmbH (Wella AG) and other companies, has introduced Naomi to Cosmpolitan Cosmetics GmbH which will be finalizing a License Agreement for a Naomi Campbell fragrance line and other cosmetics products.

In addition, Naomi engages Moodform Mission and Moodform Mission agrees to represent Naomi, non-exclusively, in all modeling bookings and television commercials via Carole White of Premier Model Management.

#### 2. Term

Twelve (12) months commencing on the date of this Letter Agreement. The term of this Agreement shall be renewed (upon the terms contained in this Agreement for an additional twelve (12) months period based on the mutual approval of the Parties

to this Agreement.

4. Consideration

**As full consideration for brand consulting services rendered by MoodForm Mission, Naomi agrees to pay MoodForm Mission**

A.) With respect to the License Agreement with Cosmopolitan Cosmetics GmbH, any successor or assign, the following percentage of payments received by Naomi, or an entity controlled by her or credited to Naomi in any way.

**i) Twenty five (25%) percent, without any limitation as to the amount and time period**

ii) The said twenty-five (25%) percent commission shall be paid to MoodForm Mission on behalf of Naomi directly by Cosmopolitan Cosmetics GmbH and Naomi hereby authorizes direct payments to MoodForm Mission to the following account . . . or such other accounts that MoodForm Mission will delegate in the future.

B.) With respect to all other agreements concerning MoodForm Mission's consultancy of Naomi under this Agreement, Naomi agrees to pay commissions to MoodForm Mission as agreed from time to time between parties. In the absence of an agreement between the parties, the commission shall be twenty-five (25%) percent of all payments received by or credited to Naomi.

C.) With respect to any deal brought to Naomi by a third party that uses the branding synergy designed and developed for Naomi by MoodForm Mission, in concept, design, color, and logo, Naomi shall pay to MoodForm Mission the commission of five (5%) percent of all payments received by or credited to Naomi.

8. This agreement is governed by the law of the state (*sic*) of New York. Any disputes hereunder shall be subject to the exclusive jurisdiction of the United States District Court for the Southern

District of New York.<sup>3</sup>

(Emphasis added)

The License Agreement gives Cosmopolitan Cosmetics the right to use Campbell trademarks, name and property in connection with the manufacture of their products and, in return, Campbell is paid monetary compensation in the form of minimum guaranties and royalties. That part of the License Agreement which is germane to the parties' controversy in this action states as follows:

14.3 LICENSOR [Campbell] shall be entitled to assign its right to collect all or a part of the royalties to a third party, but LICENSEE [Cosmopolitan Cosmetics] shall not be obliged to divide its royalty payments in more than two parts. LICENSOR directs that 25 % (twenty-five percent) of all compensation due to LICENSOR hereunder (whether MINIMUM GUARANTEE or royalties) shall be paid to the following:

Moodform Mission  
c/o Fulbright & Jaworski  
Citibank-Private Banking  
100 Wall St,  
New York, N.Y. 10043  
Acct. Title: Celebrity Service Management

The License Agreement is signed by Naomi Campbell and every page is initialed by her. The initial term was to run through December 31, 2005 with Cosmopolitan Cosmetics having the right renew for two successive terms of five years each.

It is undisputed that on June 30, 2008, the License Agreement was terminated, and that Cosmopolitan Cosmetics has not made any payments to Campbell or Moodform since that date.

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<sup>3</sup>Neither party has raised any issue about whether this case belongs in the United States District court as otherwise agreed to.

It is also undisputed that shortly thereafter, on October 8, 2008, Campbell (acting through her wholly owned corporation Omi Limited), entered into an agreement with Muelhens GmbH & Co., KG ("Muelhens"), pursuant to which Muelhens was granted the exclusive right to use Campbell's name and likeness in connection with Naomi Campbell fragrance and cosmetic products (the "Muelhens Agreement"). The parties sharply dispute whether Muelhens is a successor or assign of Cosmopolitan Cosmetics or otherwise an alter ego.

### **Discussion**

#### Moodform's Motion for Summary Judgment

The elements of a cause of action for breach of contract are: (1) formation of a contract between the parties; (2) performance by plaintiff; (3) defendant's failure to perform; and (4) resulting damage. Furja v. Furja, 166 A.D.2d 694 (2d Dept. 1990). An individual who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of the other contracting party, is conclusively presumed to know its contents and to assent to them (Metzger v. Aetna Ins. Co., 227 N.Y. 411 [1920]; Imero Fiorentino Associates, Inc. v. Green, 85 A.D.2d 419 [1<sup>st</sup> Dept 1982]).

In this case, plaintiff has established Campbell and Moodform executed the Moodform Agreement on November 26, 1998 and its terms entitled Moodform, in perpetuity, to receive 25% of any commissions that Campbell is entitled to in connection with her License Agreement with Cosmopolitan Cosmetics, or its successors or assigns. The License Agreement, however, has been terminated. Consequently, Moodforms' contract claims rest entirely on its ability to establish that Muelhens, with which, Campbell has executed a new licensing agreement, is really a

legal successor or assignee of Cosmopolitan Cosmetics. In a similar vein, Moodform argues that Muelhens is an "alter ego" of Cosmopolitan Cosmetics, which entitles it to 25% of Campbell's Compensation under the Muelhens Agreement.

The terms successor or assign are not defined in the Moodform Agreement. The language used in the Moodform agreement, however, clearly refers to a successor or assignee of Cosmopolitan Cosmetics. Arguments by Campbell to the contrary, in order to render the Moodform Agreement ambiguous, are rejected. Movant argues that the words successors and/or assigns have particular, unambiguous legal meanings, and that, as a result, it is entitled to summary judgment. Campbell claims that the legal meaning of successor or assign is more limited in the context of "entities." Each party primarily relies upon broad definitions of these terms as found in Black's Law Dictionary. Thus, movant argues that a "successor" is "one that succeeds or follows: one who takes the place that another has left and sustains the like part or character." VKK Corp. v. National Football League, 244 F3d 114, 130 (2<sup>nd</sup> Cir. 2001)(citing Black's Law Dictionary, 7<sup>th</sup> ed.). Campbell argues that in the context of entities, Black's Law Dictionary defines a successor as "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." Black's Law Dictionary, 8<sup>th</sup> Ed. (2004). The proffered definitions are not inconsistent, nor do they definitively resolve the parties' disputes before this court. See Wein & Malkin v. Hemsley-Spear, Inc., 6 NY3d 471, 482 fn 12 (2006)(citing Black's Law Dictionary [7<sup>th</sup> ed.] the court stated: "A successor in interest is '[o]ne who follows another in ownership or control of property' and 'retains the same rights as the original owner, with no change in substance'...An assignee is '[o]ne to whom property

rights or powers are transferred by another' and '[c]ourts recognize the protean nature of the term and are therefore forced to look to the intent of the assignor and assignee')

The dispute in this case is not really about the legal definition of successor or assign and/or what the parties meant by these terms in the Moodform Agreement. The issue is whether the facts presented by plaintiff on this motion support a *prima facie* conclusion that Cosmopolitan Cosmetics and Muelhens have such a legal relationship. The court holds that the facts presented on this motion do not lead to such a conclusion, as a matter of law, and consequently, summary judgment is not appropriate.

Succession and/or assignment is a relationship often established by the documents and/or contracts executed by the interested parties which demonstrate their intent. See: Hutton Developers v. 346-364 Washington Ave. Corp., 17 AD3d 977 (3<sup>rd</sup> dept. 2005); Gerel Corp. v. Prime Eastside Holdings, LLC, 12 AD3d 86 (1<sup>st</sup> dept. 2004); KIOP Forest Ave., L.P. v. Southern Smokehouse of Staten Island, 28 Misc3d 1214(A)(NY Civ. Ct. 2010). Here, there are no such documents provided. The Muelhens contract is redacted and the portions provided to the court do not outline a relationship of succession or assignment. There are no separate agreements creating succession and/or assignment.

The absence of documents directly evidencing the relationship is not surprising, given Moodform's argument that the Muelhens contract was a deliberate attempt by Campbell to avoid her obligations to it under the License Agreement. Moodform's argument is really that, despite what Campbell holds the Muelhens contract out to be,

Muelhens and Cosmopolitan Cosmetics are, in fact, alter egos of one another. The “alter ego” argument is not really an alternative argument advanced by Moodform, but part and parcel of its contention as to why Muelhens should be considered a successor to or assignee of Cosmopolitan Cosmetics. In this regard, Campbell's arguments that concepts of alter ego have no place here because this case is not about piercing a corporate veil, is an unduly restrictive interpretation of the application of the doctrine, which in this case is relied upon to ferret out whether Campbell impermissibly thwarted her obligations under the Moodform Agreement. Campbell's argument is rejected.

Proof of an alter ego relationship requires evidence that one entity exercises managerial and financial control over the other, such that the entities lack a separate legal identity. Cappella v. Suresky at Hatfield Lane, LLC, (2<sup>nd</sup> dept. 2008), Thompson v. Cooper, 23 AD3d 203 (1<sup>st</sup> dept. 2005). The issue of alter ego is generally one of fact that is particularly unsuited for summary judgment. Klein v. CAVI Acquisition, Inc., 57 AD3d 376 (1<sup>st</sup> dept. 2008); Mason v. Dupont Direct Financial Holdings, Inc., 302 AD2d 260 (1<sup>st</sup> dept. 2003).

In making this motion, Moodform relies primarily on observations made by outsiders to the corporate entities involved (eg, Mensing and Owen); the fact that the license agreements with Cosmopolitan Cosmetics and Muelhens concern similar subject matter and have similar structure; that the entities share office and laboratory space and have similar and/or some of the same employees; and that they both have the same parent company and possibly share common directors. While these facts are relevant to the issue of alter ego, they do not establish the relationship as a matter

of law and without the need for a trial. Truglio v. HHM Realty Corp., 25 Misc3d 138 (A) (NY Sup Ct. AT 2009).

In any event, Campbell has raised issues of fact, about the true nature of the legal relationship between Cosmopolitan Cosmetics and Muelhens, including a letter in which Procter and Gamble (formerly Cosmopolitan Cosmetics), through its counsel, discusses the corporate history and confirms that Muelhens is distinct legal entity.

In addition, to the extent Campbell's claims of fraud are still viable (see decision, *infra*), they constitute full and fair defenses to the contractual claims raised by Moodform and would warrant the denial of summary judgment.

Accordingly, movants' motion for summary judgment is denied.

#### Motion to Dismiss

##### [1] Ratification

Movants make a broad argument that "any" defense or claim to the enforcement of the Moodform Agreement is waived, as a matter of law, because the agreement was ratified by the fact that Campbell paid the commissions for a period of 10 years. Their legal discussion of this issue, however, is limited the defenses and claims based on fraud.

Waiver is a voluntary relinquishment of a known right. DLJ Mortg. Capital Corp., Inc. v Fairmont Funding, Ltd., 81 AD3d 563 (1<sup>st</sup> dept. 2011). In the case of fraud, there can be no ratification if no payments were made after the fraud was discovered.

Banque Arabe Et Internationale D'Investissement v. Maryland National Bank, 850 F. Supp 1199 (SDNY 1994). Campbell has alleged that she did not know about the fraud

until this complaint was filed. For reasons stated later in this decision, the issue of when the fraud was discovered cannot be determined on this motion.

Consequently the court cannot conclude on this motion that, as a matter of law, Campbell ratified any fraud.

[2] Violation of NY GBL

Campbell alleges in its first counterclaim that the License Agreement is void because it violates NY GBL Article 11. Briefly stated and as applicable to the parties' arguments, GBL Article 11 requires any theatrical employment agency to be licensed. GBL § 171(8). Relying on Moodform's allegations that it procured the License Agreement for Campbell to act as a "spokesmodel and product endorser," Campbell argues that Moodform should have been licensed (Counterclaim ¶¶67). At the outset, the court rejects Moodform's argument that New York law does not apply, because the parties expressly agreed in paragraph 8 of the Moodform Agreement that New York law applies. Frankel v. Citicorp Ins. Services, Inc., 80 AD3d 280 (2<sup>nd</sup> dept. 2010).

Even applying New York law, the counterclaim fails because Moodform is not a theatrical employment agency and the License Agreement does not concern theatrical engagements obtained for Campbell. GBL §171(9). Any promotional events that Campbell may have been required to attend under the License Agreement were incidental to her licensing her trademark, name and products. GBL §171(8).

To the extent Campbell argues that Moodform obligated itself under the Moodform Agreement to represent Campbell "in all modeling bookings and television commercials," that provision is separate from the branding consulting obligations relative to Cosmopolitan Cosmetics and expired no later than November 25, 2000, 24

months after the Moodform Agreement was signed. Claims under that contract provision are clearly time barred.

Accordingly, the first counterclaim against Moodform is dismissed.

### [3] Declaratory Judgment

Declaratory relief is unavailable where a party has an adequate, alternative remedy, such as breach of contract. Niagra Falls Water Bd. v. City of Niagra Falls, 64 AD3d 1142 (4<sup>th</sup> dept. 2009). The primary purpose of declaratory judgments is to adjudicate the parties' right before a wrong actually occurs, in the hope that later litigation will be unnecessary. Klostermann v. Cuomo, 61 NY2d 525 (1984).

Campbell claims that a declaratory action is necessary to : [1] declare that Moodform is not entitled to any share of Campbell's earnings under the Muelhens contract; [2] to declare that the Moodform Agreement is void and unenforceable; and [3] to declare that Moodform must disgorge any payments it received under the Moodform Agreement.

These "declarations," however, are not independent of the legal claims in connection with the other causes of actions asserted in this action and they may not stand as an independent cause of action. A "declaration" for the disgorgement of payments is really a damage claim, that results from establishing that the Moodform Agreement is void and unenforceable. The Moodform Agreement can only be declared unenforceable if there is some legal basis for doing so. The legal arguments that Campbell depends upon to declare the Moodform Agreement void and unenforceable are fraud and violation of GBL article 11. As previously stated in this decision, the claims raised under GBL are not viable. The fraud claims stand independently and

there is no need for a separate cause of action.

Finally, there is no need for the court to make any declaration about the Muelhens contract. The issue about whether Moodform may collect commissions paid to Campbell under the Muelhens contract will necessarily be decided and bind the parties in connection with Moodform's contract claims in this action.

The cause of action for declaratory judgment is, therefore, severed and dismissed.

#### [4] Breach of contract

Movants argue that the third counterclaim for breach of contract should be dismissed because it is time barred and otherwise fails to state a cause of action. Campbell addresses these issues in a footnote in its Memorandum in Opposition. (P.36 fn 19). Campbell concedes that its claims for branding services are time barred. It argues, however, that the confidentiality provisions of both agreements is enforceable. The third counterclaim alleged by Campbell only concerns brand consulting services. And as previously stated in this decision, the issues about confidentiality have no place in this motion (see decision, *supra*). The entire counterclaim, as alleged, is time barred.

Accordingly, the third counterclaim is severed and dismissed.

#### [5] Fraud

Campbell particularizes three aspects of fraud (see Campbell Memorandum of Law in Opposition p. 47). First she claims that she did not know of Moodform's excessive rate of compensation and/or that she was unaware that the compensation directly reduced what was otherwise due to her under the License Agreement. Second,

Campbell claims, that at the time she signed the Moodform Agreement and License Agreement, White had expressly told her that her attorney had approved the deal. Third, she claims, that at the time she signed the Moodform Agreement and the License Agreement, she was unaware that White was personally financially benefitting from the compensation paid to Moodform.

Movants seek to dismiss the fraud claims arguing that they are time barred, all material facts were disclosed to Campbell, she did not rely on any failure to disclose and she has no damages. Finally, they claim that the allegations are flatly contradicted by documentary evidence.

The elements for fraud and fraudulent inducement are substantially the same. They require the plaintiff to establish: [1] a misrepresentation of material fact; [2] known by the defendant to be false; [3] intended to be relied upon when made; [4] justifiable reliance; and [5] resulting injury. Ventur Group, LLC v. Finnerty, 68 AD3d 638 (1<sup>st</sup> dept. 2009). Fraudulent inducement, however, also requires a showing that the misrepresentation was made of a present fact, not future intent, which was the inducement for entering into the contract. Sandra Greer Real Estate, Inc. v. Johnansen Organization, 182 AD2d 468 (1<sup>st</sup> dept. 1992); Newmark & Co. Real Estate, Inc. v. Gallo Vitucci Klar Pinter & Cogan, LLP, 2010 WL 4682652 (NY Co. 2010)(nor). To the extent the inducement is based upon the concealment of facts, the plaintiffs must also prove a confidential or fiduciary relationship as a predicate for the duty to disclose. 900 Unlimited, Inc., v. MCI Telecommunications Corp., 215 AD2d 227 (1<sup>st</sup> dept. 1995).

The statute of limitations for fraud is six years from the fraud or two years from

when the fraud was, or with the exercise of reasonable diligence, could have been discovered. CPLR §213(8); Rite Aid Corp. v. Grass, 48 3d 363 (1<sup>st</sup> dept. 2008).

To the extent that Campbell's claim is based upon her claim that she did not know or understand the extent of compensation that would be provided to Moodform, the claim must be dismissed. The Moodform Agreement expressly states the rate of compensations as 25% of Campell's earnings on account of the fragrance line. The License Agreement expressly states that Campbell authorizes the 25% compensation to Moodform to be paid from her share of compensation due under the agreement and that it will be paid directly to Moodform. AFG Industires Inc. v. Empire Glass Co., Inc., 226 AD2d 487 (2<sup>nd</sup> dept. 1996). Campbell's claim that she did not read the contracts and/or that she was young when the contracts were made and/or that she relied on others to read contracts for her, is not sufficient to support a claim of fraud on this basis. See: Continental Stock Transfer & Trust Co. v. Sher-Del Transfer & Trust, 298 AD2d 336 (1<sup>st</sup> dept. 2002).

Movants claim that the remaining fraud claims are time barred.<sup>4</sup> Since the frauds allegedly occurred at or about the time the Moodform Agreement and the License Agreement were signed, the actions have not been brought within the six year statute of limitations. The remaining fraud claims can only be considered timely if brought within two years of either actual discovery or discovery upon reasonable diligence.

Movants argue that the parties met on July 11, 2006 to discuss their differences

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<sup>4</sup>Movants also claim that the fraud claims concerning the amount of Moodform's compensation is time barred. Since the claim plainly lacks merit, and is being dismissed on that basis, the court does not reach the issue of whether the statute of limitations otherwise bars such claim.

and from at least that time, Campbell and her manager, Bruno Michel, actually knew about White's financial interest in Moodform. There seems to be no dispute that on July 11, 2006 there was a meeting between Michel Bruno, identified as Campbell's manager; Carole White, identified as Campbell's mother agent; Gideon Benaim, identified as Campbell's lawyer; and Nicola Easton, identified as Carole White's personal agent. A transcript and a copy of the actual recorded conversation from that day is provided to the court. Nobody disputes the authenticity of what was said. The subject matter of the conversation appears to have been the Moodform and License Agreements.

Campbell herself was not at the meeting. Movants' claims arise from the fact that her manager and her attorney were there. The tenor of the conversation and the language used by the parties speaking is confusing and ambiguous. The court is unable to conclude from reviewing the conversation, without more, that Campbell either knew or could reasonably have known at that time that White had a personal financial interest in Moodform. While there are pronoun references by Campbell's representatives that could be construed as recognizing that White herself receives commissions, there are also affirmative statements by White that she has done a lot of work for Campbell for nothing. In addition, much of the conversation is about how to end the Moodform Agreement, so that Campbell would not have to pay the "German." Carole White appears to agree with this, notwithstanding that she receives financial benefit under such agreement. White's actions further call into question whether Campbell and/or her agents knew, or should have known, at that time about White's

personal financial position in the Moodform Agreement.

The July 11, 2006 conversation does not conclusively resolve the statute of limitations issue, one way or the other.<sup>5</sup> Other documents provided, while they indicate that Campbell knew that Moodform received commissions, they do not reveal that White had a personal financial interest in the transaction. Whether in or about 2006 Campbell had inquiry notice of the fraud, remains a factually disputed issue for trial.

Likewise, there is no information from which the court can conclude one way or the other when Campbell knew or should have known that White had falsely represented to her that her attorneys approved the agreement. The issue of the statute of limitations on this claim also remains for trial.

Movants alternatively argue that the claims for fraudulent concealment do not lie because White was not a fiduciary for Campbell. She claims that, as a matter of law, the relationship between modeling agent and model is not a fiduciary relationship. See: Wilhelmina Artist Management, LLC v. Knowles, 8 Misc3d 1012(A)(Sup. Ct. NY co. 2005). At bar, however, Campbell raises facts that, if true, describe a relationship that is much stronger and closer than that of simply a model and agent. A fiduciary relationship arises between two persons when one of them is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relationship.

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<sup>5</sup>It is the July 11, 2006 conversation that movants insist provides a basis for the court (but not for them) to refer this matter to the District Attorney for perjury. Campbell denies that any perjury was committed and claims that the issue was raised to incite bad publicity for her. The confusing nature of the July 11, 2006 conversation does not provide a basis for the court to draw any conclusion, one way or the other, about whether any of the affidavits submitted on this motion are perjurious. The court, therefore, declines to make such a referral at this time, without prejudice to movants taking whatever actions they believe are appropriate.

Pergament v. Raoch, 41 AD3d 569 (2<sup>nd</sup> dept. 2007). The existence of a relationship is not solely dependant upon an agreement or contractual relationship, but results from the relation itself. Ongoing conduct between the parties may give rise to a fiduciary relation that will be recognized by the courts. Sergeants Benev. Assn. Annuity Fund v. Renck, 19 AD3d 107 (1<sup>st</sup> dept. 2005). Campbell has raised sufficient facts that, if true, would permit a finder of fact to conclude that White stood in a fiduciary relationship with Campbell.

Closely related are Campbell's allegations that White misrepresented that Campbell's attorneys had approved the agreements. Campbell has claimed facts constituting a confidential relationship between her and White, such that White interfaced with Campbell's attorneys on her behalf. The fact that Campbell could have contacted her own attorney's directly is not a sufficient basis to dismiss this case as a matter of law.

Movants also claim that Campbell's causes of action for fraud lack legal merit because she cannot prove damages. Campbell alleges that she paid an excessive compensation to Moodform as a result of the frauds. In this regard, the court, as it must, accepts Campbell's allegations as true. Movants' extrinsic proof, in the form of an affidavit about the propriety of the Moodform Commissions, is not the kind of documentary evidence that can defeat a validly pleaded claim. Crepin v. Fogarty, 59 AD3d 837 (3<sup>rd</sup> dept. 2009).

#### [5] Conspiracy to Defraud

Conspiracy to commit fraud is never an independent tort. Allegations of

conspiracy are permitted, however, to connect the actions of separate defendants with an otherwise actionable tort. Cash v. Titan Financial Services, 58 AD3d 785 (2<sup>nd</sup> dept. 2009). Since Campbell's fourth counterclaim and first third-party claim for fraud is asserted against all the same parties as her separately pleaded fifth counterclaim and second third party claim for "conspiracy to defraud", the fifth counterclaim and second third-party claim must be dismissed as a duplication of the underlying fraud claim.

Accordingly, the claim for conspiracy to defraud is severed and dismissed.

#### [6] Unjust Enrichment

Movants claim that the cause of action for unjust enrichment fails as a matter of law because the parties' relationship is governed by a written contract. They also claim that it is barred by the applicable three year statute of limitations.

No argument is raised about whether the three years statute of limitations claimed by movants, is the correct one. See: CPLR 213(1), Sirico v. FGG Productions, Inc., 71 AD3d 429 (1<sup>st</sup> dept 2010)(applying a six year statute of limitations). The parties' argument on this issue really concerns when the claim accrued and Campbell's collateral argument that the wrong was ongoing. In general, a claim for unjust enrichment accrues upon the commission of the wrongful act creating a duty of restitution. Congregation Yetev Lev D'Satmar v. 26 Adar N.B. Corp., 192 AD2d 501, 503 (3<sup>rd</sup> dept. 1993). Where there are ongoing wrongs and the harm cannot be traced back solely to the first day the wrong was committed, the continuous injuries create separate causes of action while the limitations period begins to run as to each upon its commission. Covington v. Walker, 3 NY3d 287 (2004); Bloomington, Inc. v. New

York City Transit Authority, 52 AD3d 120 (1<sup>st</sup> dept. 2008). Consequently, to the extent Campbell's claim is related to monies obtained by Moodform and its beneficial owners during the applicable statute of limitations, such claim is timely.

Movants further argue that the claim otherwise fails to state a cause of action. They claim that the action is barred by the existence of a written contract that governs the parties' relationship. They also argue that since the compensation they receive was from Cosmopolitan Cosmetics, a third party, Campbell has no right to assert a claim for unjust enrichment.

A properly pleaded cause of action for unjust enrichment must show that: [1] the other party was enriched; [2] at that party's expense; and [3] that it is against equity and good conscience to permit the other party to retain what is sought to be recovered. Manderin Trading, Ltd. v. Wilenstein, 16 NY3d 173 (2011), Sperry v. Crompton Court, 8 NY3d 204 (2007). Unjust enrichment is a quasi-contract theory that applies only in the absence of an express agreement. Heller v. Kurz, 228 AD2d 283 (1<sup>st</sup> dept. 1996). At the pleading stage, however, alternate theories of contract and quasi-contract are permissible. Segal v. Cooper, 49 AD3d 467 (1<sup>st</sup> dept. 2008). At bar, there are claims that, if proven, would vitiate the underlying agreements.

Movants' argument, that payments in question came from Cosmopolitan Cosmetics and not Campbell, does not provide a basis for dismissing a claim of unjust enrichment. The Moodform Agreement and the License Agreement make it clear that the monies paid by Cosmopolitan Cosmetics to Moodform were a portion of compensation that was otherwise due to Campbell's company, but assigned by her/it to

Moodform. Thus, the payments were at her expense.

Accordingly, at this stage of the litigation, unjust enrichment remains as a viable cause of action.

#### [7] Breach of Fiduciary Duty

Movants argue the breach of fiduciary duty claim should be dismissed because neither White nor Premier are in a fiduciary relationship with Campbell.<sup>6</sup> They also argue that the claim is barred by the applicable statute of limitations.

In the context of Campbell's claim for fraudulent concealment, the court has already found that there are sufficient allegations of a confidential, fiduciary relationship sufficient to withstand a motion to dismiss. As to the statute of limitations argument, where, as here, the breach of fiduciary claim is grounded in fraud, the alternative statute of limitations applicable to fraud applies to the breach of fiduciary claims as well. Kaufman v. Cohen, 307 AD2d 113 (1<sup>st</sup> dept. 2003). For the same reasons that some of Campbell's fraud claims remain (see decision, *infra*), so does her claim for breach of fiduciary duty.

Accordingly, the motion to dismiss the motion for breach of fiduciary is denied.

#### **CONCLUSION**

in accordance with this decision is it hereby:

ORDERED that the motion for summary judgment is denied in all respects; and it is further

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<sup>6</sup>In their arguments, the parties do not distinguish between White and Premier and, as a consequence, neither does the court.

ORDERED that the motion to dismiss is granted as to the first counterclaim, second counterclaim and third counterclaim, and these causes of action are severed and dismissed; and it is further

ORDERED that the morion to dismiss is granted to the extent that the fifth counterclaim/ second third party claim is severed and dismissed; and it is further

ORDERED that, except as otherwise expressly set forth herein, the motion to dismiss is denied and the remaining counterclaims/third party claims shall continue; and it is further

ORDERED that movants shall have 30 days it interpose a reply and answer the remaining counterclaims and third party complaint; and it is further

ORDERED that this matter is set down for a preliminary conference on **September 8, 2011 at 9:30 a.m.** No further notices will be sent; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the court and is hereby expressly denied; and it is further;

ORDERED that this shall constitute the decision and order of the Court.

Dated: New York, New York  
June 29, 2011

So Ordered:

**FILED**

  
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HON. JUDITH J. GISCHE, J.S.C.

**JUL 01 2011**

NEW YORK  
COUNTY CLERK'S OFFICE