SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Index Number : 651193/2011
ONEBEACON AMERICA INSURANCE
vs
COLGATE-PALMOLIVE COMPANY
Sequence Number : 009
DISMISS

INDEX NO. _____
MOTION DATE 10/11/13
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequence 009 and motion sequence 010 are consolidated for joint disposition and decided herein.

Based on the accompanying Memorandum Decision, it is hereby

ORDERED that the motion (sequence 009) by counterclaim defendants Resolute Management, Inc. and National Indemnity Company pursuant to CPLR 3211(a)(7) and (a)(1) to dismiss Colgate-Palmolive Company's Amended Counterclaims as asserted against them is granted pursuant to CPLR 3211(a)(1) solely as follows: Count VIII and Count X as asserted against Resolute are severed and dismissed as to Resolute; Count IX as asserted against NICO is severed and dismissed against NICO; and it is further

ORDERED that the branch of OneBeacon America Insurance Company's motion (sequence 010) pursuant to CPLR 3211(a)(7) to dismiss Colgate-Palmolive Company's Amended Counterclaims for failure to state a cause of action is granted solely as to Count X as asserted against OneBeacon, and this claim as asserted against OneBeacon is severed and dismissed; and it is further

ORDERED that the branch of OneBeacon America Insurance Company's motion to strike and dismiss all allegations relating to the "Proposed Acquisition," and for a protective order pursuant to CPLR 3103 precluding all discovery on the Proposed Acquisition is denied; and it is further

ORDERED that Resolute Management, Inc., National Indemnity Company, and OneBeacon America Insurance Company shall serve their answer to the Amended Counterclaims within 30 days of entry of this decision; and it is further

ORDERED that Resolute Management, Inc. and National Indemnity Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

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

Dated: 11/1/2013

HON. CAROL EDMEAD, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

ONEBEACON AMERICA INSURANCE COMPANY,

Index No. 651193/2011

Plaintiff,

- against -

Motion Seq. ## 009 & 010

COLGATE-PALMOLIVE COMPANY and
LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

----------X

COLGATE-PALMOLIVE COMPANY,

Counterclaim Plaintiff,

- against -

ONEBEACON AMERICA INSURANCE COMPANY,
NATIONAL INDEMNITY COMPANY, and
RESOLUTE MANAGEMENT, INC.

Counterclaim Defendants.

----------X

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this insurance declaratory judgment action brought by OneBeacon America Insurance Company ("OneBeacon"), counterclaim defendants Resolute Management, Inc. ("Resolute") and National Indemnity Company ("NICO") (collectively, "NICO/Resolute") and OneBeacon move pursuant to CPLR 3211(a)(7) to dismiss Colgate-Palmolive Company's ("Colgate") Amended Counterclaims for failure to state a cause of action.[1] OneBeacon also moves to strike all allegations relating to the "Proposed Acquisition," and for a protective order pursuant to CPLR

[1] NICO/Resolute also moves pursuant to CPLR 3211(a)(1) (defense based on documentary evidence). The motion by NICO/Resolute (sequence 009) and motion by OneBeacon (sequence 010) are consolidated for joint disposition and decided herein.

3103 precluding all discovery on the Proposed Acquisition.

FACTUAL BACKGROUND

This action arises out of various personal injury lawsuits against Colgate based on alleged exposure to asbestos contained in Colgate's talc products (the "Talc Cases"), and the defense and resolution of two of those cases, *to wit*: the "Bernard & Tedrick Cases" pending in this Court (Shulman, J.), in accordance with general liability primary and excess policies OneBeacon issued to Colgate (collectively the "OneBeacon Policies").[2]

In its Complaint, OneBeacon alleges that under its primary policies issued to Colgate, it has the right to defend, investigate, and settle any bodily injury claim against Colgate, and Colgate is obligated to cooperate with OneBeacon in the conduct of such suits. Under its excess policies issued to Colgate, OneBeacon allegedly has the right to associate with Colgate in the defense of any claim likely to result in OneBeacon's liability.[3] Thus, OneBeacon retained the law firm of McGivney & Kluger ("McGivney") as Colgate's defense counsel for the Talc Cases. However, Colgate later retained Quinn Emanuel Urquhart & Sullivan, LLP ("Quinn Emanuel") as its defense counsel, and took control of the defense of the cases to the exclusion of OneBeacon. Colgate also demanded payment from OneBeacon of Colgate's counsel's expenses, which OneBeacon claims are unreasonable and unnecessary. OneBeacon claims that Colgate breached its obligations under the OneBeacon Policies by excluding it from any involvement with the defense or resolution of the Talc Cases and refusing to give OneBeacon meaningful

[2] In April 2011, Colgate sued OneBeacon and Resolute in Massachusetts (the "Massachusetts Action"). Four days later, OneBeacon filed the instant action and moved to dismiss the Massachusetts Action on the ground of *forum non conveniens*. The motion was granted and the Massachusetts Action was dismissed.

[3] It is alleged that defendant Liberty Mutual Insurance Company ("Liberty") also issued primary, umbrella and/or excess liability insurance policies to Colgate.

information regarding the defense of those claims.

In response, Colgate asserts, in its Amended Counterclaims, that OneBeacon is obligated to pay the fees of Colgate's independent defense counsel because "of conflicts of interest between OneBeacon, NICO, and Resolute on the one hand and Colgate on the other" (¶50). In 2001, OneBeacon, *via* its predecessor-in-interest, entered into an "Aggregate Loss Portfolio Reinsurance Agreement" with NICO (a reinsurance company that reinsures the asbestos and environmental risks of OneBeacon's policyholders), in which NICO reinsured (and thereby accepted), retroactively, $2.5 billion of OneBeacon's existing liabilities (and risks) for a certain sum of money (the "NICO Reinsurance Agreement") (Counterclaims, ¶¶76-77).[4] Also in 2001, OneBeacon *via* its predecessor-in-interest, entered into a "Administrative Services Agreement" with NICO, which provides for NICO to adjust, handle, settle, pay, or repudiate any claims regarding the OneBeacon Policies (the "NICO Services Agreement") (Counterclaims, ¶79). Allegedly, NICO then engaged Resolute to administer certain claims handling duties on NICO's behalf for the OneBeacon Policies (the "NICO/Resolute Agreement").

According to Colgate, in 2008, OneBeacon, *via* Resolute, began reserving its right to deny coverage for the Talc Cases on grounds, including but not limited to: the lack of an "occurrence" as defined by the OneBeacon Policies; the timing of the occurrence; and the assertion that the alleged injuries may have been "expected or intended" by Colgate. In 2010, OneBeacon issued a reservation of rights as to all present and future Talc Cases. It is alleged that

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[4] "A reinsurance contract is one by which a reinsurer agrees to indemnify a primary insurer for losses it pays to its policyholders" in exchange for consideration (*In re Liquidation of Midland Ins. Co.*, 87 AD3d 487, 929 NYS2d 116 [1st Dept 2011] *citing Matter of Midland Ins. Co.*, 79 NY2d 253, 258, 582 NYS2d 58, 590 NE2d 1186 [1992]).

in light of the Talc Cases, OneBeacon's reservations of rights create a conflict of interest whereupon any counsel appointed by "OneBeacon and/or NICO would be incentivized to defeat only those underlying claims that, if proven, would produce liability for OneBeacon and/or NICO under the OneBeacon Policies." Over the course of 2009 and early 2010, Colgate determined to defeat the Talc Cases in their entirety to deter copy-cat suits, while OneBeacon and/or NICO appeared to seek to minimize OneBeacon's/NICO's own defense costs at the expense of mounting a proper defense of the Talc Cases. Further, each time a new Talc Case was filed, Resolute, on OneBeacon's and/or NICO's behalf, engaged its own counsel, which cannot represent Colgate due to a conflict of interest based on such counsel's previous or pending representation of a client adverse to Colgate, or lack of expertise in the relevant area of law.

Colgate further asserts that in 2013, in an effort to shed its unprofitable outstanding asbestos and environmental risks, such as Colgate's policies triggered by the Talc Cases, OneBeacon's parent company, OneBeacon Insurance Company ("OBIG"), proposed to sell all of its subsidiaries' asbestos and environmental risks to a subsidiary of Armour Group Holdings Limited ("Armour") (the "Proposed Acquisition" or "Acquisition"). The Proposed Acquisition was jointly filed with the Pennsylvania Insurance Department. In the pertinent Stock Purchase Agreement, OBIG and Armour acknowledge that there may be insufficient reserves to cover all outstanding claims if the Proposed Acquisition is approved. And, according to OBIG's 2012 K-filing, of the $2.5 billion reinsurance purchased *via* the Reinsurance Agreement to cover OneBeacon's asbestos and environmental claims, only $198.3 million "is not already allocated to existing claims." Thus, OneBeacon contemplates being unable to pay the future claims of Colgate (Counterclaims, ¶¶91-93). Thus, just as NICO has no incentive to treat Colgate fairly

because it is a reinsurance company that does not sell insurance to the general public, Armour is solely concerned with maximizing profits for its investors by purchasing existing insurance risks and minimizing claims payments made under them.

Based on the above, Colgate seeks declaratory relief against OneBeacon and Resolute, and asserts claims against OneBeacon, Resolute, and/or NICO for breach of contract, tortious interference with contract, breach of the implied covenant of good faith and fair dealing, breach of duty to third-party beneficiary, and for violations of Massachusetts General Law ("MGL") 93A §11 and New York General Business Law ("NYGBL") 349.

In support of dismissal, NICO/Resolute argues that the tortious interference claims against them, and the breach of good faith and fair dealing claim against NICO, are improper counterclaims pursuant to CPLR 3019(a), because they are not also asserted against OneBeacon; such claims are required to be brought by way of a third-party complaint.

Also, Colgate's contract-based claims for declaratory judgment against Resolute, breach of contract and breach of implied covenant of good faith and fair dealing against NICO, and breach of duty to third-party beneficiary against Resolute fail as Resolute and NICO are not parties to insurance contracts. Claims for declaratory relief which seek to ascertain rights under a contract cannot be maintained against one not party to such contract. Similarly, a party (Colgate) cannot assert a breach of contract or an implied covenant claim against a defendant (NICO) with whom it does not have a contract. Further, contrary to Colgate's allegations, OneBeacon did not partially assign its rights and obligations under the OneBeacon Policies to NICO. Instead, the relevant agreements show that NICO agreed "to perform all administrative services" on OneBeacon's behalf and to act as OneBeacon's agent with respect to the Talc Cases under the

OneBeacon Policies. And, Colgate's breach of the implied duty of good faith and fair dealing claim against NICO should be dismissed as duplicative of Colgate's breach of contract claim, as both counterclaims allege that NICO was assigned and/or assumed the rights to the OneBeacon Policies, that NICO refused to acknowledge Colgate's right to appoint independent counsel, and that NICO refused to pay the independent counsel's fees. And, Colgate's claim that the NICO/Resolute Agreement is intended to confer third-party beneficiary rights on Colgate is refuted by such agreement which denies the creation of any third-party beneficiary status or rights in any other party.

NICO/Resolute also argues that Colgate's tortious interference claims against them fail since they, as agents of the party (OneBeacon) with whom Colgate has contracted are not strangers to the OneBeacon Policies. NICO and Resolute were acting as OneBeacon's agents within the scope of their authority, and they cannot tortiously interfere with OneBeacon's obligations to Colgate (if any) under the OneBeacon Policies. And, Colgate's new assertion in its Amended Counterclaims that NICO and Resolute are *not* OneBeacon's agents is belied by the relevant Agreements, which show that OneBeacon appointed NICO "to perform all administrative services" on its behalf and act as OneBeacon's agent with respect to the Talc Cases. (Art. V, 5.1) The NICO Services Agreement also provides for NICO to, *inter alia*, handle, settle, or repudiate claims, and permits NICO to provide these services through Resolute.

Further, Colgate fails to state a claim against Resolute for violation of MGL 93A because that statute does not apply as New York is the principal place of the insured risk with respect to the OneBeacon Policies, and New York law applies to disputes in connection with them. MGL 93A penalizes only unfair conduct that occurs "primarily and substantially" within

Massachusetts. However, the counterclaims identify lawsuits in other states, Colgate is located in New York, Resolute is allegedly a Delaware corporation with a principal place of business in Nebraska, OneBeacon's principal place of business is in Minnesota, and none of the cases or law firms whose bills are at issue are in Massachusetts. Thus, Massachusetts is not the "center of gravity" for this matter. Further, MGL 93A was intended to punish inequitable market behavior, and OneBeacon's claims are simply "run of the mill" breach of insurance contract claims.

It is also argued that Colgate fails to state a NYGBL 349 claim against Resolute because this private dispute as to whether Colgate may receive payment for the defense of the Talc Cases does not involve any general consumer-oriented conduct. And, there are no allegations showing that Resolute engaged in conduct tending to deceive consumers.

OneBeacon also seeks dismissal, asserting that Colgate's breach of the implied covenant of good faith and fair dealing claim against it is duplicative of Colgate's breach of contract claim. Also, Colgate's contract-based claims are not actionable under MGL where the underlying contractual dispute is governed by another state's law. The Massachusetts court previously found that New York law applies to the OneBeacon Policies. And, the counterclaim allegations against OneBeacon relate to obligations under the OneBeacon Policies, and Massachusetts law does not govern those Policies. Furthermore, the MGL 93A claim does not apply because the location of Colgate's Talc Cases establish that Massachusetts is not the "center of gravity" for this dispute. And, MGL 93A was intended to punish "truly inequitable market behavior" and Colgate's allegations show that this is a basic breach of insurance contract case. Colgate's NYGBL 349 counterclaim should likewise be dismissed as this matter concerns a private dispute over the OneBeacon Policies and does not implicate any conduct affecting the consuming public at large.

Finally, all allegations relating to the Proposed Acquisition should be stricken and dismissed, and a Protective order precluding Colgate from seeking any disclosure in this action relating to the Proposed Acquisition should issue. Since the NYGBL 349 claim is improper, this Court should not permit Colgate to pursue such claim based on the Proposed Acquisition. Also, Colgate already presented its complaints about the Proposed Acquisition to the Pennsylvania Insurance Department, and Colgate's claims as to the effects of the Proposed Acquisition are speculative given that the Acquisition has not been approved or closed. Further, the Pennsylvania Insurance Department has broad authority to evaluate and approve acquisitions of insurance companies organized under its laws, and under the doctrine of comity, this Court should not second-guess the Pennsylvania Insurance Department. In any event, any Court action is premature since the Proposed Acquisition remains pending, and any Court ruling related to the Acquisition could result in conflicting rulings with the Pennsylvania Insurance Department. The Proposed Acquisition is not only irrelevant to this instant matter, but also implicates confidentiality concerns regarding a pending transaction. Disclosure of sensitive commercial or financial information would cause material harm to the parties to the Proposed Acquisition.

In opposition, Colgate argues that there is a "sufficient link" between the counterclaims brought against OneBeacon and those brought against Resolute and NICO to constitute proper counterclaims under CPLR 3019(a), and the caselaw cited by NICO and Resolute is misinterpreted and factually distinguishable.

Colgate also argues that its tortious interference with contract claims against NICO and Resolute are properly plead. Further discovery will show whether NICO and Resolute are agents of OneBeacon. In any event, the relevant Agreements show that OneBeacon has no power to

control NICO or Resolute. Under the NICO Services Agreement, NICO has sole authority to adjust, settle or repudiate claims and enter into arrangements on OneBeacon's behalf without OneBeacon's prior consent. Prior to the effective date of the NICO Services Agreement, OneBeacon was required to obtain prior consent of NICO before settling claims over $2 million. Thus, NICO assumed the responsibilities and obligations of a primary insurance company, and was never an agent under the control of OneBeacon. NICO also controls Resolute under the NICO/Resolute Agreement, which does not mention OneBeacon, and Resolute agreed to act "in the best interests of NICO." Further, because Colgate's breach of the implied covenant of good faith and fair dealing claim is factually distinct from its breach of contract claim, the two causes of action are not duplicative and may be alleged against NICO simultaneously.

Colgate also argues that its breach of contract claim against NICO is proper, as NICO has assumed the role of primary insurance company. NICO was assigned the obligation to be fully responsible for the payment and administration of claims. By acting as the "insurer" and not a reinsurer, Colgate may bring a direct breach of contract claim against NICO.

Also, Colgate's request for declaratory judgment prohibiting Resolute from interfering with Colgate's chosen counsel involves a justiciable and legally protectable interest that is directly at issue and is properly plead. The right to independent counsel is extra-contractual in nature and does not involve an interpretation of the OneBeacon insurance policies.

Further, Colgate's claim against Resolute for breach of duty to a third-party beneficiary is properly pled, as the relevant Agreements imply that Colgate is an intended third-party beneficiary to these agreements, and in particular to the NICO/Resolute Agreement.

Additionally, Colgate alleges that Resolute made misrepresentations and engaged in

unfair conduct which occurred in Massachusetts, and as such, Colgate's claim against Resolute under MGL 93A is proper. Because Colgate's 93A claim relates to Resolute's failure to recognize Colgate's right to independent counsel, and not to the interpretation of contract terms, Colgate's 93A claim is proper regardless of which state's law applies to the OneBeacon Policies.

And, Resolute's alleged practice of unfair claims handling applies to numerous policyholders and is commercial in nature, so as to support a NYGBL 349 claim.

Colgate also opposes OneBeacon's motion, arguing that its claim for breach of the implied covenant of good faith and fair dealing is properly plead as it alleges OneBeacon's continued interference with Colgate's vigorous defense of the Talc Cases, which is conduct beyond OneBeacon's breach of the OneBeacon Policies, and is therefore distinct from Colgate's breach of contract claim, which alleges that OneBeacon breached the OneBeacon Policies by failing to pay Quinn Emanuel's reasonable fees. Also, unlike in its breach of contract claim, Colgate seeks attorneys' fees and costs in connection with this coverage action under its breach of implied covenant claims.

Also, Colgate's claim under MGL 93A against OneBeacon is proper in that Colgate's claims are tort-based, not contract-based; OneBeacon's tortious conduct, and evidence thereof, both exist in Massachusetts, and therefore Massachusetts law applies; and Colgate has properly pled the elements of an MGL 93A claim by detailing all of the methods in which OneBeacon has frustrated Colgate's attempt to vigorously defend the Talc Cases with independent counsel to which Colgate is entitled.

Further, Colgate's NYGBL claim sufficiently alleges that OneBeacon exhibited deceptive, consumer-oriented claims handling practices and patterns, and executed transactions

leading to a proposed asset sale that would leave it with insufficient reserves to pay claims by all OneBeacon policyholders in addition to Colgate. Furthermore, discovery is necessary to determine the full extent of OneBeacon's conduct.

And, there is no basis for a protective order shielding all information related to the Proposed Acquisition. Colgate (which is not OneBeacon's competitor) is willing to enter into a confidentiality agreement concerning the information in question. Discovery regarding the conduct leading up to the Acquisition, as well as the planned Acquisition itself, may support Colgate's private breach of contract and bad faith claims. Colgate has not asked this Court to make any determination regarding the Acquisition, and does not seek to circumvent the authority of the Pennsylvania Insurance Department. Thus, the doctrine of comity is irrelevant. In any event, OneBeacon should have moved under CPLR 3024 to "strike" Colgate's allegations concerning the Acquisition. And, in its opposition before the Pennsylvania Insurance Department, OneBeacon argued that policyholders such as Colgate retain their right to file suit against an insurance company even if the Acquisition was approved, and thus, cannot now attempt to preclude Colgate from pursuing its rights in this suit.

In reply, NICO/Resolute adds that the first counterclaim for declaratory relief seeks a resolution "under the OneBeacon Policies," to which Resolute is not a party. Absent a contractual duty under the OneBeacon Policies, Resolute does not have a duty to provide or pay for Colgate's defense in the Talc Cases. For the same reason, and given that NICO merely reinsured the OneBeacon Policies, the breach of contract claim based on the OneBeacon Policies, to which NICO was not a party, fails. And, there are no facts alleged, *i.e.*, communications, indicating that NICO acted as a primary insurer, or supplanted OneBeacon as insurer or acted in

any way other than an reinsurer. Further, the cases cited by Colgate granting third-party beneficiary status to third-parties involve situations where the contracts at issue did not contain express provisions negating an intent to confer third-party beneficiary rights. And, various provisions of the NICO Services Agreement establish that NICO and Resolute acted on behalf of OneBeacon, and render NICO and Resolute agents of OneBeacon as a matter of law. Thus, the tortious interference claim against NICO and Resolute fails. Colgate's pleading shows that the alleged "duty" to independent counsel at issue arises from the OneBeacon Policies and not some independent tort so as to support Colgate's MGL claim. Further, there is nothing "immoral, unethical or oppressive" about an insurer's refusal to provide coverage so as to trigger an MGL claim. And, issues regarding the handling of the Talc Cases involve a private contract dispute over insurance coverage between sophisticated, large companies, and do not involve consumer-oriented conduct to support a NYGBL claim.

Beacon also replies, adding that every alleged act Colgate cited as "unrelated" to its breach of contract claim was alleged in support of both its breach of contract and implied covenant claims. Both claims involve the alleged breach of contract and both seek recovery of "compensatory and consequential damages," and the additional assertion for attorneys' fees and costs in this action is sought also in Colgate's second count for breach of contract against OneBeacon. And, the MGL 93 claim simply restates the allegations in Colgate's breach of contract and fair dealing claims, and thus, falls under New York law and not under the MGL.

And, Colgate's speculation of the potential impact of the Proposed Acquisition cannot serve as a basis to engage in a fishing expedition into OneBeacon's business affairs. OneBeacon's alleged improper actions occurred prior to the Acquisition, and Colgate does not

allege that the Acquisition affected OneBeacon's decision or ability to pay appropriate defense expenses. Further, the alleged tortious impact is based on the alleged impact to Colgate if the Acquisition is approved, and not based on any activities leading up to the Acquisition. And, Colgate's breach of contract claim is not based on OneBeacon's alleged present or future inability to pay.

DISCUSSION

A motion to dismiss pursuant to CPLR 3211(a)(l) on the basis of a defense founded upon documentary evidence may be granted "only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 962 NYS2d 82 [1st Dept 2013] *citing Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *DKR Soundshore Oasis Holding Fund Ltd. v Merrill Lynch Intern.*, 80 AD3d 448, 914 NYS2d 145 [1st Dept 2011]). "To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence relied on by the defendant must "conclusively establish [ ] a defense to the asserted claims as a matter of law" (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]; *Scott v Bell Atlantic Corp.*, 282 AD2d 180, 726 NYS2d 60 [1st Dept 2001]).

In determining a motion to dismiss pursuant to CPLR 3211(a)(7), the Court's role is ordinarily limited to determining whether the complaint states a cause of action *(Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 741 NYS2d 9 [1st Dept 2002]). On a motion to dismiss pursuant to CPLR 3211(a)(7), the "pleading is to be liberally construed" and the court must 'accept the facts as alleged in the complaint as true, accord plaintiff[ ] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any

cognizable legal theory'" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]; *David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]).

ONEBEACON[5]

Breach of Covenant of Good Faith and Fair Dealing (Count VI)

"It is axiomatic that all contracts imply a covenant of good faith and fair dealing in the course of performance" (*Forman v Guardian Life Ins. Co. of America*, 76 AD3d 886, 908 NYS2d 27 [1st Dept 2010] *citing 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153, 746 NYS2d 131, 773 NE2d 496 [2002]). However, it is also undisputed that a claim for breach of the implied covenant of good faith and fair dealing should be dismissed as duplicative of a contract claim, where "both claims 'arise from the same facts and seek the identical damages for each alleged breach'" (*Netologic, Inc. v Goldman Sachs Group, Inc.*, 972 NYS2d 33, 2013 NY Slip Op 06320 [1st Dept 2013]; *JFK Holding Co. LLC v City of New York*, 98 AD3d 273, 948 NYS2d 63 [1st Dept 2012]).

Here, the documentary evidence fails to establish that Colgate's breach of the implied covenant of good faith and fair dealing claim against OneBeacon (Count VI) is duplicative of Colgate's breach of contract claim (Count II).

In Count II, Colgate alleges that OneBeacon has a duty under the OneBeacon Policies to defend Colgate against any underlying claims that are reasonably likely to result in liability for OneBeacon. Further, when a conflict of interest arises, the insurance company is obligated to inform its policyholder of the policyholder's right to retain independent counsel, and then pay the reasonable fees of the policyholder's independent counsel. Colgate asserts that conflicts of

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[5] OneBeacon moves solely under CPLR 3211(a)(7).

interest exist between it and OneBeacon because "OneBeacon has reserved its rights to deny coverage for the Talc Cases; OneBeacon and Colgate have divergent views on defense strategy for the Talc Cases; and the Talc Cases include certain claims that are covered under the OneBeacon Policies and other claims which may not be covered under the OneBeacon Policies." However, OneBeacon allegedly failed to inform Colgate of its right to appoint independent counsel, failed to acknowledge Colgate's right to independent counsel and Colgate's appointment of Quinn Emanuel as independent counsel, and failed to pay Quinn Emanuel's reasonable fees, all in violation of the OneBeacon Policies. And, due to OneBeacon's breach of the OneBeacon Policies, "OneBeacon is liable to Colgate for damages, including but not limited to compensatory and consequential damages, and reasonable attorneys' fees and expenses . . . ."

Count VI alleges similarly that "OneBeacon's obligations under the OneBeacon Policies include defending Colgate against claims arising against it that are potentially within the scope of coverage under the policies or, if a conflict of interest arises between OneBeacon and Colgate, informing Colgate of its right, and permitting Colgate to appoint independent defense counsel, and paying the reasonable fees of such counsel." Further, allegedly OneBeacon has refused "to provide coverage for reasonable defense costs incurred by Colgate's independent defense counsel." These allegations essentially mirror those in Count II.

However, Colgate further asserts that OneBeacon "interfered with Quinn Emanuel's administration of the Talc Cases as lead defense counsel" in numerous ways, refused to sign a confidentiality agreement to "protect privileged communications regarding the defense of the Talc Cases from possible disclosure to third parties"; and delegated all of its rights and obligations to NICO, "a third party with a direct financial incentive to minimize the payment of

Colgate's claims" (which results in a conflict with Colgate's aim to vigorously defend and defeat the underlying personal injury claims, at OneBeacon's expense). Although these allegations stem from the duty to defend, it is noted that the duty to defend, also known as "litigation insurance," provides the insured with legal representation against claims that have the potential to trigger financial liability of the insured, the costs of which are borne by the insured in the form of premiums paid (*General Motors Acceptance Corp. v Nationwide Ins. Co.*, 4 NY3d 451, 828 NE2d 959 [2005] ("the costs of defense—litigation insurance—are contemplated by, and reflected in, the premiums charged")). The covenant of good faith and fair dealing implicit in all contracts "embraces a pledge that 'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Forman v Guardian Life Ins. Co. of America, supra*). The breach of implied covenant claim "merely brings to light implicit duties to act in good faith already contained, although not necessarily specified in the contract." Inasmuch as OneBeacon is expressly obligated to provide a defense of certain claims against Colgate, an obligation for which the insured's premium is in part predicated, the additional allegations concerning OneBeacon's conduct toward Quinn Emanuel and Colgate, *i.e.*, "(i) repeatedly attempting to replace Quinn Emanuel with its own attorneys, most of whom are, by their own admission, unable to represent Colgate based on conflicts of interest or lack of experience in the relevant areas of law; (ii) refusing to communicate important information about the Talc Cases with Quinn Emanuel; (iii) refusing to promptly appoint local counsel for Quinn Emanuel despite Colgate's repeated requests, and sacrificing certain strategic advantages for Colgate by its delay" (Counterclaims, ¶173) though not expressly covered in the OneBeacon Policies, have purportedly frustrated an implicit purpose of this duty to defend. "This covenant

'is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement'" (*Gettinger Associates, L.P. v Abraham Kamber Co. LLC*, 83 AD3d 412, 413, 920 NYS2d 75 [1st Dept 2011]).

Colgate also claims that the Proposed Acquisition may result in an inability of OneBeacon to honor its obligations under the OneBeacon Policies to Colgate (*see generally*, *ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 952 NE2d 463 [2011] ("by fraudulently transferring billions of dollars of its assets to MBIA Inc. for no consideration," insurer, "violated the covenant [of good faith and fair dealing] by substantially reducing the likelihood that [it] will be able" to meet its obligations under the terms of the insurance policies")). Therefore, it cannot be said that Colgate's claim against OneBeacon for breach of the implied duty of good faith and fair dealing is duplicative of the breach of contract claim, and dismissal of this claim is unwarranted.

MGL 93A (Count IX)

MGL 93A §11 prohibits intentionally deceptive conduct in commercial dealings, and provides a private right of action to any "person who engages in the conduct of any trade or commerce" who suffers monetary losses as a result of an unfair or deceptive act or practice by another person engaged in trade or commerce. An MGL 93A claim has been held to be viable where Massachusetts has "the most significant contacts and most relevant relationship to the activities" (*Volt Systems Dev. Corp. v Raytheon Co.*, 155 AD2d 309, 547 NYS2d 280 [1st Dept 1989]). Colgate asserts that OneBeacon is domiciled in Massachusetts and OneBeacon's employees involved in this dispute work from Massachusetts; OneBeacon's decisions and

communications concerning Colgate's defense in the Talc Cases occurred in and were sent from Massachusetts, the relevant office of Resolute and its claims handlers Linda Gray MacDonald, Peter Dinunzio, and Keith Ippolit involved in this matter are located in Massachusetts. And additional discovery from Resolute will reveal the location of correspondence and meetings between OneBeacon and Resolute.

That New York law applies to the interpretation of the OneBeacon Policies and/or Colgate's breach of contract claim does not bar a claim for unfair and deceptive business practices under MGL 93A where there are claims arising from unfair and deceptive conduct "qualitatively distinct from contractual agreement" (*Bradley v Dean Witter Realty, Inc.*, 967 F Supp 19 [D. Mass 1997] ("A defendant may be liable under G.L. c. 93A for its conduct in Massachusetts even if the underlying contract is governed by the laws of another state")). Thus, it has been held that a "'mere breach of a commercial obligation,' without more, does not amount to a violation of ch. 93A" (*Lechoslaw v Bank of America, N.A.*, 575 F Supp 2d 286 [D Mass 2008]; *Samia Companies LLC v MRI Software LLC*, 898 F Supp 2d 326 [D Mass 2012] ("[a] breach of contract, standing alone, is not an unfair trade practice under c. 93A") *citing Zabin v Picciotto*, 73 Mass App Ct. 141, 169, 896 NE2d 937, 963 [2008]). "Instead, to rise to the level of a c. 93A violation, a breach must be both knowing and intended to secure 'unbargained-for benefits' to the detriment of the other party" (*Samia Companies LLC v MRI Software LLC, supra*). "Additionally, "[t]he breaching party's conduct must exceed the level of mere self-interest, rising instead to the level of commercial extortion or a similar degree of culpable conduct" (*Samia Companies LLC, supra* (emphasis added) (finding an MGL 93A was stated when defendant allegedly "abandoned its project completely while continuing to demand

payment")).

Here, Colgate's 93A cause of action sufficiently alleges unfair or deceptive conduct that is "qualitatively distinct" from OneBeacon's contractual obligations under the OneBeacon Policies.

Colgate's MGL 93A claim is premised on allegations that OneBeacon refused to acknowledge the various conflicts of interest necessitating Colgate's need for independent counsel, whose fees OneBeacon is obligated to pay, failed to cooperate with independent counsel in various respects, and that OneBeacon refuses to pay independent counsel's legal fees. More importantly, the counterclaim also asserts that OneBeacon reinsured the subject policies with NICO, unbeknownst to Colgate, and that NICO, as a reinsurer lacks any incentive to mount a vigorous defense inasmuch as so doing is not cost effective. This, according to Colgate, is at odds with Colgate's paramount interest in minimizing its liability in the Talc Cases, and at odds with its aim to deter copy-cat lawsuits from mounting across the country. Thus, although some of the allegations arise from the OneBeacon Policies, *to wit*: the duty to defend Colgate, it has been held more recently that an insurer's unreasonable delay in paying independent counsel's fees (a portion of which the insurer acknowledged was warranted) constituted a violation of MGL 93A (*Northern Sec. Ins. Co., Inc. v R.H. Realty Trust*, 78 Mass App Ct 691, 941 NE2d 688 [2011] (violation of MGL 93A found where insurer acknowledged duty to pay, offered to pay a lower hourly rate for independent counsel's legal fees after insured refused insurer's legal representation conditioned upon a reservation of rights, but "unnecessarily and unreasonably delayed payment" and refused to negotiate)).

The cases cited by OneBeacon for the proposition that breach of contract-based claims are

not actionable under MGL 93A where the contractual dispute is governed by another state's law are factually distinguishable and do not warrant a different result (*see Northeast Data Sys. v McDonnell Douglas, Computer Sys. Co.*, 986 F2d 607 [lst Cir 1993] (finding that the mere addition of "state of mind" or "bad motive" allegations to the breach of contract conduct did not "take these claims outside the scope of contractual language that says California law will govern "the rights and obligations of the parties" in respect to the "Agreement"); *Value Partners S A v Bain & Co. Inc.*, 245 F Supp 2d 269 [D Mass 2003] (where precluding a claim under GML 93A where "choice of law principles favor the application of Brazilian law"); *Worldwide Commodities Inc. v J. Amicone Ca. Inc.*, 630 NE2d 615 [Mass. App. Ct. 1994] ("the contract's choice-of-law clause bars application of" MGL 93A where the contract violations were at the core of the GML 93A claims); *Express, LLC v Club Monaco U.S., Inc.*, 2002 WL 31973223, *4 (Mass Super 2002) (where "the GML 93A claim arises out of the breach of contract claim, is premised on the breach of the implied covenant and fair dealing in contract, and is essentially a breach of contract claim "embroidered" with an allegation of bad faith . . . it is barred by the choice-of-law provision in the Sublease"); *cf. Valley Juice Ltd., Inc. v Evian Waters of France, Inc.*, 87 F3d 604 [2d Cir 1996] (rejecting the application of *Northeast Data Sys., Inc., supra*, and *Worldwide Commodities, Inc., supra*, based on subsequent Massachusetts case, *Jacobson v Mailboxes Etc. U.S.A., Inc.*, 646 NE2d 741, 746 n. 9, 419 Mass. 572, 580 n. 9 [1995], and finding that the "choice of law clause stating that agreement [as opposed to the rights of the parties] was to be governed by New York law did not bar distributor's claim against supplier under" MGL 93A)).

Therefore, dismissal of the MGL 93A claim is unwarranted.

GBL 349 (Count X)

GBL 349 prohibits "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in the state . . . ." The elements of a cause of action under GBL 349 are that: "(1) the challenged transaction was "consumer-oriented"; (2) defendant engaged in deceptive or materially misleading acts or practices; and (3) plaintiff was injured by reason of defendant's deceptive or misleading conduct" (*Denenberg v Rosen*, 71 AD3d 187, 897 NYS2d 391 [1st Dept 2010] *citing Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank, NA*, 85 NY2d 20, 25, 623 NYS2d 529, 647 NE2d 741 [1995]). To constitute "consumer-oriented" conduct, the acts or practices alleged must "have a broader impact on consumers at large" (*Berck v Principal Life Ins. Co.*, 40 Misc 3d 1207(A) [Supreme Court, New York County 2013]). In determining whether the alleged conduct is consumer-oriented, "New York courts may consider the sophistication of the parties and the amount of the transaction at issue-in other words, whether the parties need the protection' of the consumer-protection law" (*Denenberg v Rosen, supra, citing Denenberg v Rosen*, 71 AD3d at 195, 897 NYS2d 391 (finding that a transaction involving a "sophisticated, individual private pension plan" and a "sophisticated" commodities trader "was not the modest type of transaction the statute was primarily intended to reach" [internal quotation marks omitted]).

OneBeacon essentially asserts that the GBL 349 claims do not apply to Colgate, a major corporation with sophisticated insurance professionals, or to its mere insurance contract dispute with OneBeacon.

The Court finds that to the degree Colgate seeks relief premised on OneBeacons' failure to pay defense costs and OneBeacon's misconduct in the handling of the OneBeacon Policies in

connection with its duty to provide a defense to Colgate, such disputes and course of dealings are unique to Colgate. There is nothing in the record to indicate that there are any other policyholders similarly situated in this regard. As such allegations do not present the type of consumer-oriented misconduct the statute was enacted to prevent, they cannot support a GBL 349 claim (*Shou Fong Tam v Metropolitan Life Ins. Co.*, 79 AD3d 484, 913 NYS2d 183 [1st Dept 2010]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 639 NYS2d 283 [1995] (striking the GBL 349 claim based on a "private" contract dispute over policy coverage and the processing of a claim which is unique to these parties")).

It is noted that Colgate also alleges that "all" OneBeacon "policyholders" with policies providing coverage for asbestos and environmental liabilities will be affected by the Proposed Acquisition, and that OneBeacon entered into transactions designed to deplete its capital and leave it with insufficient reserves to pay claims, notwithstanding its knowledge of its potential liability on its asbestos and environmental policies (Counterclaims ¶¶ 211-212). It is alleged that this inability to pay outstanding claims necessarily affects all OneBeacon "policyholders" (Counterclaims ¶ 92). However, where the alleged deceptive practices occur between relatively sophisticated entities with equal bargaining power, such does not give rise to liability under GBL 349 (*Exxonmobil Inter–America, Inc. v Advanced Information Engineering Services, Inc.*, 328 F Supp 2d 443, 449 [SDNY 2004]). Further, large businesses are not the small-time individual consumers GBL 349 was intended to protect (*Genesco Entertainment v Koch*, 593 F Supp 743). And, "while the 'consumer-oriented' prong of the statute does not preclude the application of such statute to disputes between businesses *per se*, it does severely limit it" (*Freefall Express, Inc. v Hudson River Park Trust*, 16 Misc 3d 1135(A), 847 NYS2d 901 [Supreme Court, New

York County 2007] *citing Cruz v NYNEX Info. Resources*, 263 AD2d 285, 290 [1st Dept 2000]).

Although "the requirement that the challenged conduct be 'consumer-oriented' may be met by a showing that the practice has a broader impact on the consumer at large . . . no such impact may be inferred" from Colgate's allegations (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 709 NYS2d 74 [1st Dept 2000]) because the purported impact of the Proposed Acquisition concerns, according to Colgate, other similarly situated policy holders of potential environmental and asbestos related liability claims, and there is no indication that this class of policyholders is the type of consumer GBL 349 was intended to protect *(see Freefall Express, Inc. v Hudson River Park Trust, supra* (stating that plaintiff's "claimed losses, or any claimed losses of other heliport users, are not of the type GBL § 349 seeks to remedy and do not fall under the definition of "those who purchase goods and services for personal, family or household use"); *cf. Medical Socy. of State of N.Y. v Oxford Health Plans, Inc.*, 15 A.D.3d 206, 790 N.Y.S.2d 79 [1st Dept 2005] ("[C]onsumers" are "those who purchase goods and services for personal, family or household use")).

The caselaw cited by Colgate is factually distinguishable (*see e.g., Riordan v Nationwide Mut. Fire Ins. Co.*, 756 F Supp 732, 738 [SDNY 1990] (involving a GBL 349 claim by insureds against and insurer to recover under a misleading homeowners' policy)). Therefore, dismissal of the GBL 349 claim against OneBeacon is warranted.

Protective Order

The standard for determining whether information is discoverable in an action is whether the information is "material and necessary" (*Mahoney v Turner Const. Co.*, 61 AD3d 101, 872 NYS2d 433 [1st Dept 2009] *citing* CPLR 3101(a); *see Allen v Crowell–Collier Publ. Co.*, 21

NY2d 403, 406, 288 NYS2d 449, 235 NE2d 430 [1968] ("The words, 'material and necessary', are ... to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and prolixity")). A protective order pursuant to CPLR is discretionary and "is designed to 'prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts" (*Cynthia B. v New Rochelle Hosp. Medical Ctr.*, 60 NY2d 452, 458 NE2d 363 [1983] *citing* CPLR 3103(a)). The Court, in "exercising its discretion regarding whether and to what degree a protective order under CPLR 3103 should issue, ... must strike a balance by weighing the [ ] [parties'] conflicting interests in light of the facts of the particular case before it" (*Mahoney v Turner Const. Co., supra*).

Here, OneBeacon's request for a protective order regarding discovery concerning the Proposed Acquisition, premised on "important confidentiality concerns" and that such discovery constitutes an unwarranted fishing expedition is denied. Further, since Colgate does not seek, in this action, any ruling as to propriety of the Proposed Acquisition, there is no possibility of conflicting rulings between this Court and Pennsylvania Insurance Department, and the doctrine of comity is irrelevant. Instead, Colgate cites to the Proposed Acquisition as one of the bases of Colgate's tort claims against OneBeacon, and discovery as to impact the Proposed Acquisition has to the fulfillment of OneBeacon's payment obligations under the OneBeacon Policies is relevant to the existing claims. That the Proposed Acquisition has not been approved or closed by the Pennsylvania Insurance Department, but is still pending, is irrelevant. Again, the circumstances of the Proposed Acquisition may provide evidence tending to establish that OneBeacon breached its covenant of good faith and fair dealing. Notably, there is no indication

that an appropriate confidentiality agreement cannot be fashioned to protect any palpably irrelevant and sensitive, confidential information while simultaneously providing Colgate with the discovery to which it is entitled in this action. Therefore, the request for a protective order is unwarranted.

RESOLUTE

Declaratory Judgment (Count I)

As to Count I, Colgate seeks a declaration that Resolute is "prohibited from obstructing Quinn Emanuel's defense of the Talc Cases in any way." In support, Colgate alleges, *inter alia*, that "OneBeacon contracted with NICO, which in turn contracted with Resolute to oversee some of OneBeacon's obligations and responsibilities under the OneBeacon Policies, including the discharge and administration of OneBeacon's duty to defend and to pay defense costs. As a party to the NICO-Resolute Contract, which is intended to benefit Colgate, Resolute has a separate and stand-alone duty to treat Colgate in accordance with the promises of the OneBeacon Policies." It is alleged that OneBeacon is obligated to pay Colgate's independent counsel Quinn Emanuel's past and future reasonable defense costs in connection with the Talc Cases, and "[i]n breach of Colgate's right to independent counsel, . . . Resolute ha[s] wrongly refused to pay."

A "declaratory judgment is only appropriate where a justiciable controversy exists" (CPLR 3001 ["The supreme court may render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy . . . ."]; *Bolt Associates v Diamonds-In-The-Roth, Inc.*, 119 AD2d 524, 501 NYS2d 41 [1st Dept 1986]). "One exists where there is an actual controversy affecting the parties' rights" (*Bolt Associates, supra, citing Subcontractors Trade Assn. v Koch*, 62 NY2d 422, 477 NYS2d 120, 465 NE2d 840).

Resolute (and NICO) concede that the "relevant Agreements show that NICO agreed 'to perform all administrative services' on OneBeacon's behalf and to act as OneBeacon's agent with respect to the Talc Claims under the OneBeacon Policies" (Nico-Resolute Memorandum of Law, p. 10). Colgate alleges that "Resolute affirmatively resisted any replacement of McGivney," "instruct[ed] [Resolute's] other appointed counsel to require all vendors in the Talc Cases, including experts, to continue to report to McGivney after McGivney had advised that it could not continue to represent Colgate," and "Resolute, on OneBeacon's and/or NICO's behalf, has attempted to install its own counsel" which had conflicts of interest with Colgate. Further, "Resolute Account Manager Peter Dinunzio . . . explicitly rejected [Colgate's] May 19, 2010 invitation [to attend a meeting with Quinn Emanuel to discuss the Talc Cases going forward], stating that OneBeacon and Resolute already possessed sufficient information concerning the defense of the Talc Cases." (Counterclaims, ¶¶ 106-107, 111). Inasmuch as Colgate's request for declaratory relief is premised on Resolute's alleged interference with Colgate's defense of the Talc Cases, and Colgate seeks to prevent Resolute, as OneBeacon's purported "agent" from interfering with Quinn Emmanuel's defense of Colgate in the Talc Cases, that Resolute is not a signatory to the OneBeacon Policies is not fatal to Colgate's declaratory judgment claim.

The caselaw cited by NICO/Resolute (*i.e.*, *Fuller-Austin Insulation Co. v Fireman's Fund Ins. Co.*, No. BC116835, slip op. at 6) is factually distinguishable as to this declaratory judgment claim in light of the relief sought and the alleged actions undertaken by Resolute.

Therefore, Colgate states a claim for a declaratory judgment, and dismissal of the declaratory judgment claim against Resolute based on documentary evidence is unwarranted.

Tortious Interference with Contract (Count V)

As to the tortious interference with contract claim against Resolute, Colgate must allege "(1) the existence of a valid contract[;] (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach of that contract[;] and (4) damages" (*Meghan Beard, Inc. v Fadina*, 82 AD3d 591, 919 NYS2d 156 [1st Dept 2011] *citing Israel v Wood Dolson Co.*, 1 NY2d 116, 120, 151 NYS2d 1, 134 NE2d 97 [1956]). Here, Colgate sufficiently stated a tortious interference claim against Resolute, and dismissal under CPLR 3211(a)(7) is unwarranted.

Further, documentary evidence does not establish Resolute's defense to this claim as a matter of law. As stated in *Global Reinsurance Corporation-U.S. Branch v Equitas Ltd.*, '[A]n agent cannot be held liable for inducing his principal to breach a contract with a third person, at least where he or she is acting on behalf of his principal and within the scope of his authority" (20 Misc 3d 1115(A), 867 NYS2d 16 (Table) [Supreme Court, New York County 2008] *citing* "*Nu–Life Constr. Corp. v Board of Educ.*, 204 AD2d 106, 107 [1st Dept 1994] (. . . dismissing tortious interference claim, absent evidence that agent "was at any time acting other than as an agent of the Board, or to show that [he] committed any independent tort"; *Herald Hotel Assocs. v Ramada Franchise Sys., Inc.*, 191 AD2d 288, 595 NYS2d 28, 29 [1st Dept 1993] (upholding claims of tortious interference with contract against corporate officer who acted both in the corporation's interests and "in his own best interests"); *cf. Kartiganer Assocs., P.C. v New Windsor*, 108 AD2d 898, 899 [2d Dept 1985] (defendant was entitled to summary judgment dismissing tortious interference claim, where plaintiff had 'no proof' that his 'acts were motivated by self-interest')"). This is mainly because "only a stranger to a contract, such as a

third party, can be liable for tortious interference with a contract" (*Ashby v ALM Media, LLC* --- N.Y.S.2d ----, 2013 WL 5526288 [1st Dept 2013] *citing Koret, Inc. v Christian Dior, S.A.*, 161 AD2d 156, 554 NYS2d 867 [1st Dept 1990] *citing Greyhound Corp. v Commercial Cas. Ins. Co.*, 259 AD 317, 320-321 [1st Dept 1940]; *Manley v Pandick Press*, 72 AD2d 452, 454 [1st Dept 1980], *appeal dismissed* 49 NY2d 981 [1980]).

Under the NICO Reinsurance Agreement, Article V, NICO was appointed as the "Reinsurer to perform all administrative services with respect to the Reinsured Contracts" and "to perform such services *on behalf of the Reinsured* [OneBeacon] . . . *including, but not limited to, the direct payment of all Ultimate Net Loss and the administration of claims.*" Further, the Reinsurer agreed to "provide such services utilizing its employees or utilizing the employees of *affiliates of the Reinsured pursuant to a separate agreement between the Reinsurer and such affiliates of the Reinsured.* (Emphasis added).

Additionally, the NICO Services Agreement permits NICO to provide these services through Resolute as a "sub-agent" (Art 4.4, NICO may "employ and pay sub-agents . . . as [NICO] may in its discretion determine . . . provided that [NICO] shall be and remain responsible at all times for the acts and omissions of any such sub-agent.").

According to the Resolute-NICO Agreement, Resolute, an "affiliate" of NICO, was engaged to "perform certain administrative and special services (collectively "services") for NICO," as NICO deemed "reasonably necessary," and to make "available its facilities to NICO as NICO may determine to be reasonably necessary," including "data processing equipment, business property and communications. (Preamble; ¶1). Resolute agreed to provide NICO with the following services: "adjust claims as agent for NICO," "report to NICO with respect to the

claims adjustment transactions entered into on behalf of NICO," "collect and deposit all recoveries," and NICO agreed to reimburse Resolute for services and facilities provided by Resolute on "behalf of NICO." (¶2).

More importantly however, the Resolute-NICO Agreement makes *no* mention of OneBeacon, the OneBeacon Policies, or the Talc Cases. While Resolute and NICO assert that Resolute was "at all times acting as OneBeacon's agent and within the scope of" its authority, the relevant Agreements fail to establish that Resolute was an agent of *OneBeacon* with respect to the OneBeacon Policies, and that Resolute was *not* a stranger to such Policies for purposes of a tortious interference with contract claim. Also, discovery may yield information showing that NICO (instead of OneBeacon) controlled (or was the true principal concerning) Resolute's handling of the Talc Cases.[6] The numerous cases cited by NICO/Resolute are factually distinguishable. Therefore, dismissal of the tortious interference claim based on documentary evidence against Resolute is unwarranted, at this juncture.

Breach of Duty to Third-Party Beneficiary (Count VIII)

As to Colgate's claim against Resolute for breach of duty to third-party beneficiary, Colgate alleges that NICO and Resolute entered into the NICO/Resolute Agreement to facilitate Resolute's performance of certain obligations "under the OneBeacon Policies," and that the NICO/Resolute Agreement was intended to benefit Colgate "by ensuring that OneBeacon and

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[6] Notably, the letter by Resolute to Colgate indicating that it was acting on behalf of OneBeacon does not constitute documentary evidence as contemplated by CPLR 3211(a)(1) (*Jones v Rochdale Village, Inc.*, 96 AD3d 1014, 948 NYS2d 80 [2d Dept 2012] ("Although the parties' contracts qualify as "documentary evidence" within the intendment of CPLR 3211(a)(1), Zimmerman's remaining submissions, which included affidavits, letters, and deposition testimony, do not"); *Marin v AI Holdings (USA) Corp.*, 35 Misc 3d 1227(A), fn. 6, 953 NYS2d 550 (Table) [Supreme Court, New York County 2012 [rejecting email correspondence as CPLR 3211(a)(1) documentary evidence]).

NICO fulfill all of their obligations" to Colgate, the third-party beneficiary of such Agreement (¶¶194-196). Resolute allegedly has a duty to administer OneBeacon's obligations under the OneBeacon's Policies and failed to discharge its duty to defend or pay Colgate's defense costs in the Talc Cases and violated the obligation to treat Colgate fairly and in good faith (¶¶197-198).

Yet, paragraph 8 of the NICO/Resolute Agreement provides that "Nothing in this Agreement, expressed or implied, is intended to confer on any person other than the parties hereto, or their respective legal successors, any rights, remedies, obligations or liabilities . . . ." The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent, and "[t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 951 NYS2d 19 [1st Dept 2012] (internal citations omitted)). Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain meaning of its terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous (*id.*). Here, the clear language of the NICO/Resolute Agreement disposes of Colgate's claims of third-party beneficiary status (*id.*).

Although, as Colgate points out, caselaw holds that "the obligation to perform to the third-party plaintiff need not necessarily be expressly stated" in a contract, and "may be implied where the contracts and the surrounding circumstances indicate a clear intent on the part of the parties to obligate the promisor" (*U.S. v Ogden Technology Laboratories, Inc.*, 406 F Supp 1090 [DCNY 1973] (where contract specifically mentioned the third-party beneficiary's name)), the NICO/Resolute Agreement expressly indicates an intent *not* to confer any third-party beneficiary rights, and none of the cases cited by Colgate involved an agreement containing such language

(*see also*, *Matter of Liquidation of Union Indem. Ins. Co. of New York*, 200 AD2d 99, 611 NYS2d 506 [1st Dept 1994] (noting that although the intervening rights of the policyholders may be affected, a contract of reinsurance is one between the reinsurer and the insurer/reinsured, and *absent language in the policy indicating the reinsurer's intent to be directly liable to the insured*, the original insured cannot claim the status of a third-party beneficiary of the reinsurance contract (emphasis added)). Thus, as the NICO/Resolute Agreement itself explicitly excludes third-party beneficiary rights, and is silent as to OneBeacon and Colgate, dismissal of Colgate's breach of duty to third-party beneficiary claim, although sufficiently stated, is warranted based on documentary evidence (*Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d at 109-110 (rejecting plaintiffs' argument that they were intended third-party beneficiaries where the documentary evidence, *i.e.*, contract, stated that such contract "is solely for the benefit of the Borrower and no other Person ... shall have any rights hereunder against any Senior Lender with respect to the senior loans, the proceeds thereof or otherwise"); *cf. Turner Const. Co. v Seaboard Sur. Co.*, 85 AD2d 325, 447 NYS2d 930 [1st Dept 1982] (reinsurance agreement incorporated provision stating that "[t]his Agreement shall be deemed to comply with any law, whenever applicable, which provides that the Obligee or other beneficiary of the Bond shall have the right to maintain an action on such an agreement against the Reinsurer.")).

MGL 93A (Count IX)

Dismissal of the MGL 93A claim as asserted against Resolute is unwarranted, for the reasons set forth above.

GML 349 (Count X)

Dismissal of the GBL 349 claim against Resolute is warranted, for the reasons set forth

above.

NICO

Breach of Contract (Count III)

In Count III for breach of contract, Colgate alleges that NICO, as partial assignee of OneBeacon's rights and obligations under the OneBeacon Policies, has a duty to defend Colgate in the Talc Cases. Colgate also alleges, alternatively, that NICO assumed the rights and obligations under the OneBeacon Policies, and is thus contractually obligated to Colgate. NICO breached the OneBeacon Policies in that NICO failed to inform Colgate of Colgate's right to independent counsel arising from the various conflicts of interest, failed to acknowledge Colgate's right to independent counsel, and failed to pay Colgate's independent counsel's legal fees.

Typically, in an "'insured/insurer/reinsurer relationship,' the reinsurer does not examine risks, receive notice of loss from the original insured, or investigate claims" (*Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 948 F Supp 285, 307-08 [SDNY 1996]). Thus, where the reinsurer has no contact with the insured, "the relationship between an insurer and a reinsurer is one of indemnification only" (*id.* at 307-308). In such instance, the insured has no privity with the reinsurer, and thus, "does not have a direct right of action against a reinsurer, since the reinsurance contract is one of indemnity to the original insurer," not to the insured (*Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 948 F Supp at 307).

However, "reinsurance contracts may permit an original insured party to bring a direct action against a reinsurer" where the reinsurer agrees "to be directly liable to the original insured" (*Jurupa Valley Spectrum, LLC,* 2007 WL 1862162, *6 [SDNY 2007] *citing China*

Union Lines, Ltd. v Am. Marine Underwriters, Inc., 755 F 2d 26, 30 [2d Cir 1985]). "New York law permits the parties to a reinsurance agreement to include a so-called 'cut through' clause, which confers upon the original insured direct rights against the reinsurer" *(Jurupa Valley Spectrum, LLC, supra, citing In re Bennett Funding Corp. Sec. Litig.*, 270 BR 126, 131 [SDNY 2001], *affd* 60 Fed. Appx. 863 [2d Cir 2003]; *Mercantile & Gen. Reinsurance Co.*, 591 NYS2d at 1017 ("[P]arties may draft reinsurance contracts containing specific language so that they will operate in favor of the original insured); and *Turner Constr. Co. v Seaboard Sur. Co.*, 447 NYS2d 930, 935 [1982] ("reinsurance agreement features two provisions, one in the document and another incorporated by reference, that together vest obligee of reinsured surety bond with direct right of action against reinsurers")). Such a "cut through" provision "must be apparent on the face of an agreement" (*Jurupa Valley Spectrum, LLC, supra, citing In re Bennett*, 270 BR at 131). And, "[t]he mere fact that a reinsurer pays claims on behalf of the insurer does not necessarily alter the relationship between the reinsurer, insurer, and insured, since in such a case, 'the reinsurer is only the vehicle used by the insurer to pay the claim . . . ." (*Jurupa Valley Spectrum, LLC, supra*, fn. 9, *citing Reliance Ins. Co. v Aerodyne Eng'rs Inc.*, 612 NYS2d 87, 88 [1994]).

In the absence of any "cut through" provision, caselaw indicates that courts may "consider two factors when determining whether a reinsurance agent is directly liable to an insured: (1) whether the reinsurance agent was the ultimate, consistent reimburser of losses of the insured; and (2) whether this status was conveyed to the insured" (*World Omni Financial Corp. v Ace Capital Re, Inc.*, 2002 WL 31016669 [SDNY 2002] *citing Allstate Ins. Co.*, 948 F Supp at 307–308). Thus, in "the absence of an express cut through clause, an insured may still have a

direct cause of action against a reinsurer based on the latter's conduct, *such as when the original insured consistently deals directly with the reinsurer, bypassing the original insurer*" (*Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 948 F Supp 285, 307-08 [SDNY 1996]; *Travelers Indem. Co. v Scor Reins. Co.*, 62 F3d 74, 76 [2d Cir 1995]).

The relevant Agreements submitted by NICO/Resolute fail to establish that the relationship between the insured (Colgate), insurer (OneBeacon), and the reinsurer (NICO) was that of a typical insured/insurer/reinsurer relationship so as to preclude Colgate from asserting a direct breach of contract claim against NICO.

As stated above, and as pointed out by NICO, under Article 5.1 of the NICO Reinsurance Agreement, OneBeacon appointed NICO "to perform all administrative services with respect to" the OneBeacon Polices, "on behalf of" OneBeacon.[7]

However, NICO's administrative services further imposed upon NICO the obligation to "the direct payment of all Ultimate Net Loss," thereby leaving unresolved the issue of whether NICO was the "ultimate, consistent reimburser of losses" (or the ultimate risk-bearing entity) for the OneBeacon Policies, and whether NICO's status as such was conveyed to Colgate, the insured. Reinsurance, as explained in *Klockner Stadler Hurter Ltd v The Ins. Co. of the State of Pennsylvania, et al.* (785 F Supp 1130, 1134 [SDNY 1990]) is the "ceding by one insurance company [OneBeacon] to another [NICO] of all or a portion of its risks for a stipulated portion of the premium, in which the liability of the reinsurer [NICO] is solely to the ... ceding company, ...

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[7] See also Article 3.2 and Article 4 providing for NICO to perform numerous "Run-Off Functions" on behalf of OneBeacon "in order to give full effect to its rights and to fulfil its obligations under the Reinsurance Agreement" (*infra*, p. 37), and claims handling and claim administration services on behalf of OneBeacon (Art 6.1). The run-off functions were to be ratified and confirmed by OneBeacon, if "called upon to do so." (Art. 19.1).

[which] retains all contact with the original insured, and handles all matters prior to and subsequent to loss."[8] The documents submitted by NICO/Resolute fail to demonstrate that OneBeacon retained all contact with the insured. Moreover, the record supports Colgate's claim that as opposed to OneBeacon, NICO, *via* Resolute, handled the direct administration, investigation, and handling of the Talc Cases and communicated with Colgate. Colgate submits correspondence from Resolute indicating that "Resolute [NICO's agent] . . . is responsible *on behalf of OneBeacon* . . . for handling claims for insurance coverage under certain policies." Colgate claims that it never received any correspondence from an employee of OneBeacon regarding the Talc Cases.

NICO/Resolute's attempt to distinguish *Klockner Stadler Hurter Ltd v The Insurance Co. of the State of Pennsylvania, et al.* (780 F Supp 148 [1991]), *Allstate Ins. Co. v Administratia Asigurarilor De Stat*, 948 F Supp 285, *supra*), and *World Omni Financial Corp. v Ace Capital Re, Inc.*, *supra*), is based on factual distinctions not material to the Court's analysis of the true nature of a reinsurer's relationship with the policyholder.

As Colgate's submissions support its claim that NICO, through its conduct, maintained a relationship with Colgate sufficient to sustain direct liability, dismissal of the breach of contract claim against NICO is unwarranted.

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[8] In a subsequent decision in the same *Klockner* action (780 F Supp 148 [1991]), the Southern District of New York (Conboy, J.) addressed, *inter alia*, the issue of the whether "AIU," the claims handler for "ICSP" (the reinsurer/guarantor of a policy obtained by plaintiff/contractor Klockner Stadler Hurter Ltd ("KSH")) established an estoppel defense sufficient to defeat the direct claim brought by KSH to recover insurance reimbursement for losses. The Court stated, that based on "some" evidence that AIU "actually paid losses" under the subject policy "from its own account," and letters describing the payment of claims to the insured "apparently" under such policy, with AIU's reference to "our check," if "AIU indeed was the ultimate, consistent reimburser of losses" to the insured/contractor for the subject policy, and this status was conveyed to the insured/contractor, AIU might be considered "a risk-bearing entity" rather than a mere broker. Thus, dismissal of plaintiff's direct claim against AIU based on "lack of direct right of action," was denied.

Tortious Interference with Contract (Count IV)

Colgate alleges, as an alternative to its breach of contract claim against NICO, that if there was no assignment of the OneBeacon Policies or assumption by NICO thereof, then NICO tortiously interfered in the OneBeacon Policies between OneBeacon and Colgate. Colgate alleges that NICO was not only the claims handler for the OneBeacon Policies, but also the reinsurer of those same policies, and thus, stood to directly benefit if its claims handling actions minimized the amounts paid out under the OneBeacon Policies. By failing to properly discharge OneBeacon's duty to pay the fees of Colgate's independent defense counsel, NICO procured a breach of the OneBeacon Policies. NICO procured this breach of the OneBeacon Policies in order to minimize its own payout under the Reinsurance Agreement, despite OneBeacon's contractual obligations to Colgate to defend the Talc Cases in a manner aligned with Colgate's interests as OneBeacon's policyholder.

It is "well settled that an agent cannot be held liable for inducing [its] principal to breach a contract with a third person, at least where [it] is acting on behalf of [its] principal and within the scope of [its] authority" (*Devash LLC v German American Capital Corp.*, 104 AD3d 71, 959 NYS2d 10 [1st Dept 2013]). Unlike Resolute, NICO established that it was at all times acting as OneBeacon's agent, with OneBeacon's consent, and within the scope of its authority, and thus, the tortious interference claims against NICO cannot stand.

Under the NICO Reinsurance Agreement, Article V, provides:

ADMINISTRATION; CHANGES

> 5.1. ADMINISTRATION. Pursuant to the Administrative Services Agreement, the Reinsured and the CGU Insurers *appoint the Reinsurer [NICO] to perform all administrative services with respect to the Reinsured Contracts* until the date of

[* 38]

termination of this Agreement . . . and the Reinsurer agrees to perform such services *on behalf of the Reinsured* [OneBeacon] and such CGU Insurers at its sole expense, *including, but not limited to, the direct payment of all Ultimate Net Loss and the administration of claims*. The Reinsurer shall provide such services utilizing its employees or utilizing the employees of affiliates of the Reinsured pursuant to a separate agreement between the Reinsurer and such affiliates of the Reinsured. (Emphasis added).

More importantly, under the NICO Services Agreement, NICO, as "Administrator," was required to provide the following "functions":

4.1.1 to adjust, handle, agree, settle, pay, compromise or repudiate any claims, return premiums, reinsurance premiums or any other liability, outgoing or expense;

* * *

4.1.3 to commence, conduct, pursue, settle, appeal or compromise any legal arbitration or other proceedings wheresoever;

4.1.4 to agree to and collect premiums, claim refunds, salvages and reinsurance recoveries;

* * *

4.1.9 to use the name of the Reinsured or any CGU Insurer in connection with the exercise of any or all of the powers conferred by this Agreement;

4.1.10 to exercise any rights of subrogation or other rights of recovery;

4.1.11 to enter into discussions or negotiations with any insured or reinsured person or their representatives in connection with Business Covered;

* * *

4.1.13 to instruct lawyers, claims adjusters or other consultants or experts . . . .

The NICO Services Agreement also obligated OneBeacon to grant NICO with powers of attorney to enable NICO to perform the foregoing functions (Art. 4.3).

Also under the NICO Services Agreement, NICO agreed to provide claims handling/administrative services (Article VI), in which NICO was to "acknowledge, consider, review, investigate, deny, settle, pay or otherwise dispose of each claim that constitutes Business Covered . . . ." NICO was to "pay Claims and associated expenses *as Ultimate Net Loss under the Aggregate Reinsurance Agreement* [NICO Reinsurance Agreement] and subject to the terms of the" NICO Services Agreement. (§6.1) (emphasis added).

Colgate's claim that NICO is not an agent of OneBeacon because of OneBeacon's cede of "full" control to NICO to perform the functions above is unavailing. First, the caselaw cited by Colgate for such position either lacks any analysis or recitation of facts to guide this Court (*Ford Motor Co. v National Indemnity Co.*, No. 12-cv-839 [ED Va. 2013]), or involves contracts not materially similar to the reinsurance agreement at issue. Further, NICO cannot be said to be a "stranger" to the OneBeacon Policies NICO was engaged to administer, regardless of the level of control OneBeacon had over NICO (or lack thereof) (*Ashby v ALM Media, LLC, supra*). Therefore, as the documentary evidence establishes that NICO was not a stranger to the OneBeacon Policies allegedly breached by OneBeacon, dismissal of the tortious interference claim against NICO is warranted.

Breach of the Covenant of Good Faith and Fair Dealing (Count VII)

In Count VII, Colgate alleges that the implied covenant of good faith and fair dealing under the OneBeacon Policies was assigned to and/or assumed by NICO, and NICO breached this covenant in the same manner as OneBeacon (Counterclaims ¶¶185-190; *supra*, pp.16-17).

In light of the Court's conclusion that Colgate sufficiently stated a direct claim against NICO for breach of the OneBeacon Polices, which is not defeated by the documentary evidence submitted to the Court at this juncture, the analysis applicable to Colgate's breach of covenant claim against OneBeacon applies with equal force to NICO.

Further, as explained above, it cannot be said that Colgate's claim against NICO for breach of the implied duty of good faith and fair dealing is duplicative of the breach of contract claim. Thus, dismissal of this claim is unwarranted.

Finally, dismissal of the Counterclaims on the ground that Colgate improperly interposed

the tortious interference counterclaims under CPLR § 3019(a) is unwarranted. CPLR § 3019(a) provides:

> (a) Subject of counterclaims. A counterclaim may be any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.

Thus, a counterclaim is a claim asserted by a defendant against a plaintiff, a person whom plaintiff represents or a plaintiff and other persons alleged to be liable.

It is undisputed that the tortious interference counterclaims asserted against Resolute and NICO are not asserted against plaintiff OneBeacon. And, it has been held that where one defendant files a counterclaim against another defendant *which does not raise any question with plaintiff*, the other defendant is entitled to dismissal of the counterclaim on ground that it cannot not properly be interposed in the action (emphasis added) (*Kail v Cedric Realty Co.*, 63 NYS2d 461 [Supreme Court, New York County 1946]; *Csicsics v Hallay*, 170 Misc 364, 10 NYS2d 440 [1939] (dismissing the counterclaim interposed, reasoning that it "in no way raises any questions with the plaintiff. It involves a controversy between the defendants only. As such it is not authorized); *Linzer v Bal*, 184 Misc 2d 132, 706 NYS2d 831 [Civil Court, New York County] [2000] (dismissing counterclaim against defendant which did not include petitioner's name, and stating that even if there was a "sufficient link to petitioner," the counterclaim was improperly served)). Thus, courts have recognized circumstances warranting an exception to this rule where the counterclaim is "so closely connected with plaintiffs' cause of action that it should be litigated in this action" *(Gettinger v Glasser*, 204 AD 829, 199 NYS 41 [1st Dept 1923]).

Here, OneBeacon's declaratory judgment claim asserting, *inter alia*, that it is not

obligated to provide defense or indemnification for the portion of the Talc Cases defended, settled or tried without OneBeacon's express consent, is subject to Colgate's counterclaims for declaratory judgment, breach of contract, and breach of duty of good faith and fair dealing (which involve actions allegedly undertaken by NICO and/or Resolute). Therefore, Colgate's remaining counterclaim against Resolute for tortious interference with the OneBeacon Policies is sufficiently linked to and raises questions as to OneBeacon's liability for the costs pursued by Colgate herein. As such, dismissal of the tortious interference counterclaims based on CPLR § 3019(a) is unwarranted.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion (sequence 009) by counterclaim defendants Resolute Management, Inc. and National Indemnity Company pursuant to CPLR 3211(a)(7) and (a)(1) to dismiss Colgate-Palmolive Company's Amended Counterclaims as asserted against them is granted pursuant to CPLR 3211(a)(1) solely as follows: Count VIII and Count X as asserted against Resolute are severed and dismissed as to Resolute; Count IX as asserted against NICO is severed and dismissed against NICO; and it is further

ORDERED that the branch of OneBeacon America Insurance Company's motion (sequence 010) pursuant to CPLR 3211(a)(7) to dismiss Colgate-Palmolive Company's Amended Counterclaims for failure to state a cause of action is granted solely as to Count X as asserted against OneBeacon, and this claim as asserted against OneBeacon is severed and dismissed; and it is further

ORDERED that the branch of OneBeacon America Insurance Company's motion to

strike and dismiss all allegations relating to the "Proposed Acquisition," and for a protective order pursuant to CPLR 3103 precluding all discovery on the Proposed Acquisition is denied; and it is further

ORDERED that Resolute Management, Inc., National Indemnity Company, and OneBeacon America Insurance Company shall serve their answer to the Amended Counterclaims within 30 days of entry of this decision; and it is further

ORDERED that Resolute Management, Inc. and National Indemnity Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: November 1, 2013

Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD