SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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ALEX SHANKLIN, LOUISA RASKE, MELISSA BAKER, ELENI TZIMAS, MARCELLE ALMONTE, GRECIA PALOMARES, CARINA VRETMAN, MICHELLE GRIFFIN TROTTER, individually and as class representatives,

Plaintiffs,

-against-

WILHELMINA MODELS, INC., WILHELMINA INTERNATIONAL LTD., FORD MODELS, INC., ELITE MODEL MANAGEMENT-NEW YORK LLC, CLICK MODEL MANAGEMENT, INC., MC2 d/b/a KARIN MODELS OF NEW YORK, LLC., NEXT MANAGEMENT, LLC, MAJOR MODEL MANAGEMENT INC., QUE MANAGEMENT INC., MCCANN-ERICKSON USA, INC., MCCANN-ERICKSON CORPORATION (INTERNATIONAL), L'OREAL USA, INC., P&G-CLAIROL, INC. (PROCTOR AND GAMBLE), SAATCHI AND SAATCHI NORTH AMERICA, INC., OGILVY & MATHER WORLDWIDE INC,

Defendants.

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DECISION AND ORDER
Motion Seq. Nos.: 001, 002, and 004 through 014

Index No.: 653702/2013

O. PETER SHERWOOD, J.:

This Decision and Order relates to ten motions to dismiss the complaint, two motions for protective orders and one motion to supplement the pleadings. At the request of the court, defendants designated three representative motions to dismiss (motion sequence numbers 001, 007, and 008) for oral argument. Following oral argument, the court considered the papers submitted in connection with each of the pending motions. The court having stayed all discovery pending disposition of the pending motions, the motions and portion of the motions that seek to stay discovery are denied as moot.

I. BACKGROUND

A. Raske Litigation

Raske v Next Management LLC, Index No. 653619/2012 ("*Raske* Action"), was commenced on October 16, 2012 by a single plaintiff against several modeling agency defendants ("MADs"), advertising agency defendants ("AADs"), and client defendants ("CDs"), who, for the most part, are defendants in this action[1]. The putative class action complaint sought an accounting, as well as damages for unjust enrichment, breach of fiduciary duty, fraud, and conversion. It also requested an injunction for violation of NYCRL §§ 50 and 51 as well as an order of protection prohibiting threats and intimidation of potential class members.

In a decision and order, dated September 6, 2013, and later amended on September 12, 2013 in respects that are not material here, the court dismissed the case (*see Raske v Next Mgt.*, 40 Misc 3d 1240[A], 977 NYS2d 699, 2013 NY Misc LEXIS 4061 [Sup Court, NY County 2013]). The complaint was dismissed with prejudice as against AADs, including Saatchi & Saatchi North America and non-parties to this litigation, AAD Publicis, Inc. and CD Garnier LLC. There, the court held that the AADs and CDs were unaware of the MADs' alleged lack of authority and therefore could not be held liable for a violation of NYCRL §§ 50 and 51.

B. The Wilhelmina Complaint

In this action there are eight individual plaintiffs. All are professional models and allege that they were not paid for the use/reuse of their images (Amended Class Action Complaint ("ACAC") ¶ 1). Each of the named plaintiffs alleges that, "upon information and belief, the plaintiff has not been paid in full and there are additional [unpaid] usages" (*id.* ¶¶ 26-27, 31-32, 36-37, 41-42, 45-46,

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[1]The named modeling agency defendants are: Next Management, LLC, ("Next"), Wilhelmina Models, Inc., Wilhelmina International Ltd., (together "Wilhelmina"), Ford Models Inc, ("Ford"), Elite Model Management-New York LLC ("Elite"), MC2 d/b/a Karin Models of New York, LLC ("MC2"), Major Model Management Inc. ("Major"), Que Management Inc. ("Que"), and Click Model Management, Inc. ("Click").

The named advertising agency defendants are: McCann-Erickson, USA, INC., McCann-Erickson Corporation *(INTERNATIONAL)*, (together "McCann"), Ogilvy & Mather Worldwide, Inc. ("Ogilvy"), and Saatchi & Saatchi North America, Inc. ("Saatchi").

The named client defendants are: L'Oreal USA, INC. ("L'Oreal") and P&G-Clairol, Inc. (Proctor and Gamble) ("P&G").

66-67, 71-72, 79-80, 87-88, 96-97, 100-101, 108-109, 112-113, 121-122). The ACAC alleges Breach of Contract and Unjust Enrichment against the MAD's, violation of New York Civil Rights Law §§ 50-51 against the AADs and Breach of Contract against the AAD's and CDs. Plaintiffs assert that the MAD, AAD and/or CD did not pay or in the alternative did pay, but in either case the model did not receive payment. The allegations for each plaintiff are summarized below and are assumed true for purposes of the motions to dismiss.

1. The "Wilhelmina" Class

Alex Shanklin had a contract with Wilhelmina, dated January 4, 2002 (Taylor Affirm. Ex. C, NYSCEF Doc No. 148).[2] The contract authorized Wilhelmina to "collect and receive monies on [Shanklin's] behalf" and "to approve and permit the use of [Shanklin's] name, photograph, license and voice and sign releases on [his] behalf" (*id.* ¶ 2). Wilhelmina was entitled to receive 20% of any consideration Shanklin received "as a result of agreements (*and any renewals or renegotiations thereof*, including internet [uses]) relating to [his] modeling throughout the world, which agreements are entered into during the term hereof" (emphasis added) (*id.* ¶ 4). This provision included "reuse fees, modifications, additions, options, extensions, renewals substitutions for and replacement of such engagements or contracts directly or indirectly" (*id.*).

The initial term of the contract was two years with an automatic renewal in yearly increments (*id.* ¶ 5). Shanklin duly provided termination notice on October 4, 2003 and the contract did not renew (Taylor affirmation Ex. C). Nevertheless "future usages, as that term is customarily used" would still be handled by Wilhelmina "until the termination of such usages, regardless of the sooner expiration, termination or modification of" the contract (Taylor affirmation Ex. C, ¶ 6).

Shanklin alleges that "after discovering that images captured during his stint with Wilhelmina were still being used, [he] contacted Wilhelmina" but "did not receive payments for the continued use of his image" (ACAC ¶ 25). Shanklin does not specify which images he noticed, where he noticed them, or when.

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[2]This contract was not attached to the complaint. However, in opposition to Wilhelmina's Motion to Dismiss, Shanklin includes the contract. No other Wilhelmina model has attached a contract, but plaintiffs generally allege that all models' contracts have similar terms and in any event, the contracts are in the possession of the MADs, so there can be no argument that the MADs have not been given fair notice of the terms of the alleged contracts.

Grecias Palomares alleges she had a contract with Wilhelmina until 2009 (ACAC ¶ 28). She alleges that her image was captured on March 15-16, 2006 for Proctor and Gamble and on January 7, 2007 for Saatchi and Saatchi (ACAC ¶¶ 29-30). Palomares does not allege specifically the usages for which she was not paid.

Carina Vretman alleges she had a contract with Wilhelmina through 2002 (ACAC ¶32). Vretman asserts that she was told by a former agent of Wilhelmina that Wilhelmina had retained money for her usages in its possession (ACAC ¶34). Vretman contacted Wilhelmina and was paid for those usages via check on December 6, 2012 (ACAC ¶ 35). Vretman provides no details about additional usages as to which she believes she is owed payment.

Louisa Raske (who was the named plaintiff in the *Raske Action*) alleges she had a contract with Wilhelmina from 2001-2005 (ACAC ¶ 38). Raske was booked for numerous jobs, including Schwarzkopf Hair Care and "JC Penny [sic]" (ACAC ¶ 39). Raske emailed Wilhelmina on March 8, 2011, inquiring about usages and providing an updated address to which payments should be sent (ACAC ¶ 40). Raske provides no details about the usages for which she believes she was not paid by Wilhelmina.

Michelle Griffin Trotter ("Griffin") alleges she had a contract with Wilhelmina until 2009 (ACAC ¶ 43). Griffin alleges she had numerous jobs, including Pantene, Oil of Olay, Lane Bryant, and Hanes, but provides no details about the usages for which she believes she is owed payment (ACAC ¶ 44).

2. The "Next" and "Major" Classes

Raske alleges she had a contract with Next from 1999 through 2001 (ACAC ¶¶ 47-49) and with Major until 2006 (ACAC ¶ 68). Raske modeled for L'Oreal hair boxes during her time with Next (ACAC ¶ 50). In June 2012, Raske discovered her image on a L'Oreal hair color box at a CVS in Miami, Florida (ACAC ¶ 51). Raske also became aware of foreign usages through a statement she received from McCann (ACAC ¶ 58).

Raske contacted Next, who explained that it had unsuccessfully tried to contact her in 2010 (ACAC ¶¶ 53). Next sent Raske a check for the unpaid usages (ACAC ¶¶ 53, 63). Raske then asked for an account statement (ACAC ¶ 63). Next refused, claiming that "[t]here is no statement available for you, as all your jobs have been paid" (ACAC ¶ 63). Raske alleges that Next forged her signature

on a W-4 form Next provided to McCann in order to get paid by McCann for foreign usages (ACAC ¶ 65).

Notwithstanding the fact that Raske includes information about the L'Oreal shoot in the "Next Class" section of the ACAC, she claims that a March 2011 email from Major explained to her that "the original [L'Oreal] job was done through Major" and that all additional usages on that job would come through Major (ACAC ¶ 70). Raske generally avers that she was not paid for usages associated with her work with Major (ACAC ¶¶ 71-72). It is unclear whether Raske performed separate shoots for L'Oreal with both Major and Next and whether the payment she received from Next satisfied all obligations relating to the L'Oreal shoot.

3. The "Elite" Class

Eleni Tzimas alleges she had a contract with Elite prior to 2005 (ACAC ¶¶ 73-74). On May 8, 2013, Tzimas received an email from Elite stating that Elite had "come across some funds" for her (ACAC ¶ 75). Elite sent Tzimas a document on or about July 17, 2013, informing her that Proctor and Gamble agreed to re-use her image in a "re-launch packing" that Elite invoiced Proctor and Gamble. After deducting its commission, Elite remitted the balance to Tzimas (ACAC ¶ 76). Tzimas's statements also reflect usages associated with L'Oreal and McCann for which she alleges she was not paid (ACAC ¶ 78).

Elite has not appeared in this action. As defendants note on a chart listing defenses, Elite Model Management-New York LLC is unrelated to Elite Model Management Corporation. The latter was named as a defendant in the *Raske* Action. Elite Model Management Corporation has neither been named nor served in this action.

4. The "MC2" Class

Marcelle Almonte alleges she had a contract with MC2/Karins NYC until 2009 (ACAC ¶¶ 81-82). Almonte alleges she was booked for various jobs, including Clairol, Crest, and L'Oreal (ACAC ¶ 83), but she was never paid for any of these usages (ACAC ¶¶ 85-86).

MC2 has not appeared in this action. However, the chart prepared by defendants listing defendants' defenses identifies MC2 d/b/a Karin Models of New York LLC's defenses. If MC2 filed a motion, the court has not located it among the e-filed pleadings in this case.

5. The "Click" Class

Melissa Baker alleges she had a contract with Click until 2010 (ACAC ¶ 90). Baker was booked for various jobs including Sports Illustrated, Maxim, and L'Oreal (ACAC ¶ 91). Baker was contacted by the IRS and informed that she had not reported earnings from Click for foreign usages (ACAC ¶ 92). In November 2012, Click emailed Baker stating that L'Oreal wanted to renew certain foreign usages, even though Baker claims she never received payment for any initial usages (ACAC ¶ 94).

Griffin (*see also* Wilhelmina Class, *supra*) alleges she had a contract with Click until 2010 (ACAC ¶ 98). Griffin was booked for numerous jobs including Dark and Lovely (ACAC ¶ 99), but she does not provide details about the usages for which she believes payment is owed.

6. The "Ford" Class

Tzimas (*see also* Elite Class, *supra*) alleges she had a contract with Ford from 2005 to 2013 (ACAC ¶ 103). After a motion for leave to amend the complaint was filed in *Raske*, Ford closed several of its divisions in New York and advised its models that, in order to terminate their agreements they must waive their rights to participate in the *Raske* Action (ACAC ¶ 104). Tzimas declined to sign the waiver (ACAC ¶ 105). Tzimas claims there were several usages contracted by McCann for L'Oreal and Proctor and Gamble (ACAC ¶¶ 106-107), but has not provided details about the usages for which she believes she was not paid.

Griffin (*see also* Wilhelmina Class, *supra*) alleges she had a contract with Ford until 2008 (ACAC ¶ 110). Griffin was booked for numerous jobs including Jose Cuervo (ACAC ¶ 111), but does not provide details regarding the usages for which she believes she is owed payment.

7. The "Que Management" Class

Shanklin (*see also* Wilhelmina Class, *supra*) alleges he had a contract with Que from 2006 through the present (ACAC ¶ 114). On October 31, 2006, Shanklin booked a job for Saatchi and Saatchi and was paid $7500 less commissions for the shoot and the initial usage (ACAC ¶ 115), but received no additional amounts for that shoot. Que issued a W-2 form to Shanklin indicating that it paid Shanklin $140,160 in 2008 (ACAC ¶ 116). However, in 2010 the IRS notified Shanklin that Que had reported to the IRS that Que had paid $175,200 to Shanklin in 2008 (ACAC ¶ 117). According to Shanklin, Que neither clarified the discrepancy, nor paid the him the difference (ACAC ¶ 118).

C. Procedural History

The ACAC contains four causes of action: Breach of Contract against the modeling agency defendants; Unjust Enrichment against the modeling agency defendants; violation of New York Civil Rights Law §§ 50-51 against the advertising agency defendants[3]; and Breach of Contract against the advertising agency defendants and the client defendants.

Defendants, Saatchi & Saatchi, Ogilvy & Mather, McCann-Erickson/L'Oreal, Wilhelmina Models, P&G-Clairol, Major Model Management, Next Management, Ford Models, Click Model Management and Que Management have filed motions to dismiss the complaint. Defendants Saatchi & Saatchi, and P&G-Clairol have also filed separate motions for orders of protection. As an alternative to its motion to dismiss, defendant, Ford seeks to compel arbitration. In addition, plaintiffs move, pursuant to CPLR 3025(b), for leave to supplement the pleadings to allege subsequent transactions and occurrences.

II. DISCUSSION

A. CPLR 3211 (a) (7) Standard

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the court is not called upon to determine the truth of the allegations (*see Campaign for Fiscal Equity v State*, 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [citation omitted]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Indeed, "[s]o liberal is the standard under these provisions that the test is simply whether the proponent of the pleading has a cause of action, not even whether he has stated one" (*Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998] [internal quotation marks omitted]).

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[3]At oral argument, plaintiffs conceded that these sections are inapplicable and that the Third Cause of Action must be dismissed.

While affidavits may be considered on a motion to dismiss for failure to state a cause of action, unless the motion is converted to a motion for summary judgment under CPLR 3212, the court will not consider them for the purpose of determining whether there is evidentiary support for properly pleaded claims, but, instead, will accept such submissions from a plaintiff for the limited purpose of remedying pleading defects in the complaint (*see Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]). Affidavits submitted by a defendant will almost never warrant dismissal under CPLR 3211 "*unless* they 'establish conclusively that [plaintiff] has no cause of action" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d at 636). In this posture, the lack of an affidavit by someone with knowledge of the facts will not necessarily serve as a basis for denial of a motion to dismiss.

B. CPLR 3013 Standard

CPLR 3013 requires that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."

C. Motion Sequences 001 and 008 Breach of Contract against Advertising Agency and Client Defendants

The complaint does not allege the existence of any contract between plaintiffs and either the AAD or the CD. Instead, in the Fourth Cause of Action, plaintiffs allege that the contracts between the AADs and the MADs specifically provide that any payment to the MADs is made on behalf of the models, who are the intended beneficiaries of those contracts (ACAC ¶¶ 150-152). This argument fails for two reasons. First, the models do not qualify as intended beneficiaries under New York law and second, even if the models were intended beneficiaries, the ACAC fails sufficiently to plead breach of contract by the AADs/CDs.

"In order for plaintiffs to recover as third-party beneficiaries it must appear that 'no one other than the third party can recover if the promisor breaches the contract . . . or that the language of the contract otherwise clearly evidences an intent to permit enforcement by the third party'" (*Oursler v Women's Interart Ctr., Inc.*, 170 AD2d 407 [1st Dept 1991] [quoting (*Fourth Ocean Putnam Corp.*

v. Interstate Wrecking Co., 66 NY2d 38, 45 [1985]). Here, plaintiffs are not in possession of the contracts between the MADs and the AADs. They allege that "the contracts contemplate that the models receive payment for the use of their images" (ACAC ¶ 153). Accepting this allegation as true, it falls short of the standard required. The complaint fails to allege that no one other than the models can recover for the AADs' alleged breach the contract. As such, the third-party beneficiary claim must fail.

Moreover, assuming that the models were found to be third-party beneficiaries of the contracts between the MADs and the AADs, plaintiffs have failed to allege all the elements necessary to support a breach of contract claim. The elements of a breach of contract claim are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Plaintiffs allege the existence of a contract. However, although they allege that they (as third-party beneficiaries) performed *their* obligations, they do not allege that the AADs failed to perform their obligations. The also do not specifically allege that the AADs breached the contracts. In fact, the word "breach" does not appear in ¶¶ 150-156 of the ACAC. Instead, plaintiffs seem to assume that the fact that they have not received payment necessarily implies that the AADs breached their contracts with the MADs. Plaintiffs claim that each models' allegation that "upon information and belief the plaintiff has not been paid in full and there are additional usages, domestic and foreign, unpaid by" the AAD/CD is sufficient. However, this conclusory allegation, unsupported by any reference to a single contract that was not paid by the AAD/CDs, is insufficient to state a claim for a breach of contract. The fourth cause of action must be dismissed.[4]

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[4]At oral argument, counsel for plaintiffs argued that the MADs/AADs may be liable to the models for violation of Article 11 of the General Business Law §171(8)(a) that includes "models" in the definition of "Artists". Plaintiffs argue that, the MADs/AADs are "Employer Agencies" under §171(2)(b), must be licensed pursuant to §172 and are subject to various other requirements of Article 11. These allegations do not appear in the ACAC and cannot be the bases for denial of the motions to dismiss. In any event, § 189, vests enforcement authority in the State Commissioner of Labor and the New York City Commissioner of Consumer Affairs. Therefore, even if these violations were pled, a private right of action is not contemplated in Article 11 of the General Business Law.

D. Motion Sequence 007 (Wilhelmina): Breach of Contract/Unjust Enrichment Claims Against Modeling Agency Defendants

1. Standing

In *Raske*, the Court noted that "[it is well settled that '[the procedural device of a class action may not be used to bootstrap a plaintiff into standing which is otherwise lacking" (*Raske*, 2013 NY Slip Op 51514[U], at *7, [quoting *Murray v Empire Ins. Co.*, 175 AD2d 639, 694-695 [1st Dept 1991]]). In this complaint, individual plaintiffs who assert claims against specific defendants have been added. These allegations provide the needed standing as against each named MAD. However, the court must still analyze the allegations against each defendant to determine whether the ACAC states a claim for breach of contract against that particular MAD.

2. Existence of Contacts/Sufficiency of Allegations

The ACAC does not contain the terms of the alleged contracts and does not attach them. However, plaintiffs attached the contract between Alex Shanklin and Wilhelmina Models as an exhibit to the affirmation of their attorney, Skip Taylor, in support of Plaintiffs' Consolidated Response to the AADs' Motions to Dismiss (Taylor Affirmation Ex. C).[5] Plaintiffs allege, and the court assumes for the purpose of this motion, that all of the contracts between the models and the AADs are the same in all material respects. Because plaintiffs are entitled to submit affidavits to cure defects in their pleadings, defendants' argument regarding the failure to attach contracts or describe the material terms must fail. Furthermore, the ACAC clearly alleges which contract term was breached: the AADs' obligation to pay the models for usages. Contrary to defendants' arguments, the ACAC also sufficiently alleges that the models performed under the contracts by providing their images. Defendants complain that this falls short of alleging that the models *fully* performed under the contracts. Even accepting this strained argument, it would only be grounds for dismissing without prejudice with leave to replead.

3. Unjust Enrichment Claims

In *Raske*, the court held that plaintiffs unjust enrichment claims are foreclosed as a matter of law by the existence of written contracts governing the subject matter of the case (*see Raske* 2013

[5]Other MADs, such as Que, have included the relevant contract as exhibits to their opposition paper or in the *Raske* Action.

NY Misc LEXIS 4061*27). In this case, plaintiffs argue that unjust enrichment is an appropriate cause of action because the Shanklin contract has been revoked (and other contracts have been terminated). This argument ignores the fact that the Shanklin/Wilhelmina contract plainly provides that "future usages, as that term is customarily used" would still be handled by Wilhelmina "until the termination of such usages, regardless of the sooner expiration, termination or modification of" the contract. Plaintiffs seize on the language of ¶ 2 of the contract providing that the "power of attorney is irrevocable during the term of the agreement." According to plaintiffs, "[a] fortiori, power of attorney and the right to collect models' funds terminate and are revoked with the expiration/termination of the contract/management period" (Pl's Consolidated Response, at 4).

This interpretation disregards the very next clause in ¶ 2, which continues, "and, with respect to any matter for which you are entitled to compensation, thereafter." When read in conjunction with ¶ 6 of the contract, which explicitly contemplates that "future usages, as that term is customarily used" would still be handled by Wilhelmina "until the termination of such usages, *regardless of the sooner expiration, termination or modification of*" the contract, plaintiffs interpretation is untenable. Thus, it appears that under Shanklin's contract, Wilhelmina retained the right to license future usages of Shanklin's image that were captured during the term of the contract. Therefore any failure to pay Shanklin for re-usages would constitute a breach of contract, precluding an unjust enrichment cause of action. That said, the Second Cause of Action for unjust Enrichment cannot be dismissed at this time because the claim is pleaded in the alternative in the event the court finds there is no contract between the parties (*see* ACAC, ¶ 136).

4. Breach of Contract Claim

CPLR 3013 requires a plaintiff to "give notice of the transactions complained of and the conduct resulting in the alleged breach" (*Seven Seventeen Corp. v JP Morgan Chase & Co.*, 32 AD3d 802, 802 [1st Dept 2006]). To state a claim for a breach of contract based on nonpayment, a pleading must "set forth each . . . claim, including but not limited to, the facts underlying each claim, the . . . contract provision on which each claim is based . . . and the amount sought on each claim" (*Automobile Coverage, Inc. v American International Group, Inc.*, 42 AD3d 405, 406 [1st Dept 2007]).

5. The "Wilhelmina" Class

Alex Shanklin, Grecias Palomares, Louis Raske, and Michelle Griffin Trotter each allege that they have not been paid for unspecified usages of their image that was captured during the time he/she was under contract with Wilhelmina. Each model provides information about the time frame of their contracts with Wilhelmina. The models allege that they discovered or suspect re-usages after they were no longer being paid by Wilhelmina. Carina Vretman claims that she was told about unpaid usages by a former agent of Wilhelmina and that she was paid after she contacted the agency. However, because she was paid, these usages do not provide grounds for an actionable claim. Vretman also alleges additional unpaid usages. The information, provided by a former Wilhelmina agent to Vretman raises an inference that monies were withheld sufficient to withstand a motion to dismiss.

The specific details of the extent of any licensing of Shanklin's images are within the exclusive control of the AADs. The models were not informed of these re-usages or paid for them. At a minimum, the models are entitled to limited disclosure about re-usages that were negotiated on their behalf. At this pre-certification stage, the disclosure may not be used to discover additional models who are owed payment by Wilhelmina. The disclosure will be limited to re-usages agreed to within the six years preceding commencement of this action. The purpose of such discovery is simply to uncover whether the named plaintiffs have causes of action against Wilhelmina. Wilhelmina's motion to dismiss is denied.

E. Other AADs

1. The "Next" and "Major" Classes

Louisa Raske alleges she had contracts with Next and Major. Unlike the Wilhelmina class, Raske has particularized information about alleged usages for which she was not paid. However, like Vretman, Raske specifically admits that Next sent her payment for the usage when it was brought to their attention. As with Wilhelmina, this raises the inference of withheld payments, knowledge of which are in the exclusive control of the defendants. This entitles Raske to disclosure regarding her usages.

2. The "Elite" and "MC2" Classes

Eleni Tzimas and Marcelle Almonte allege contracts with Elite and MC2 respectively. Neither Elite nor MC2 has appeared. Both Tzimas and Almonte sufficiently allege the specific usage for which they were not paid. The case shall continue as against Elite and MC2.

3. The "Click" Class

Melissa Baker alleges she had a contract with Click. Baker's allegation that she was contacted by the IRS and informed that she had not reported earnings from Click for foreign usages is sufficient to put Click on notice of the usages about which Baker complains. Furthermore, Click's November 2012 email to Baker stating that L'Oreal wanted to renew certain foreign usages alerted Baker to the specific usages for which she now claims she is owed payment. The Click motion to dismiss must be denied.

Michelle Griffin Trotter, on the other hand does not provide details about the usages for which she believes she is owed payment. Her allegations do not sufficiently state a claim against Click.

4. The "Ford" Class

Elina Tzimas and Michelle Griffin Trotter allege they had contracts with Ford. Tzimas's allegation that Ford tried to get her to sign a waiver does not give notice of her breach of contract claim. Neither Tzimas nor Griffin provide any details about the usages for which each believes she has not been paid. Unlike the other classes, Tzimas and Griffin provide no additional information that raise an inference of withheld payments. For that reason, Ford's motion to dismiss shall be granted.

5. The "Que Management" Class

Like Baker, Shanklin, who alleges he had a contract with Que, claims that a disparity exists between his W-2 (reflecting what he was paid) and what the agency reported to the Internal Revenue Service.

Que argues that Shanklin failed to comply with a condition precedent to bringing suit, specifically notice to Que of a breach of contract with a sixty day period to cure. However, because Shanklin alleges that knowledge surrounding the re-usages are within Que's knowledge and control, he cannot be expected to give specific notice for the same reason CPLR 3013 does not require the other plaintiffs to plead the specific transactions for which they are not paid.

Que further argues that the complaint should be dismissed based on documentary evidence that plainly contradicts the underpayment allegations (*see* CPLR 3211 [a] [1]). In support of this assertion, Que relies on the affidavit of its Director Jeffrey Kolsrud and accompanying exhibits. Que acknowledges that it initially issued an incorrect 1099-MISC form (not a W-2 form) for tax year 2008. According to Que, the form reflected the amount Shanklin was actually paid, not the amount Shanklin earned prior to the subtraction of Que's 20% commission. Que subsequently issued a corrected 1099-MISC reflecting Shanklin's gross earnings, which coincided with what was reported to the IRS (Kolsrud aff, Ex. D).

Courts regularly dismiss complaints pursuant to CPLR 3211(a)(l) where the documentary evidence resolves all factual issues as a matter of law and conclusively disposes of a plaintiff's claim (*see West 64th St.. LLC v Axis US. Ins.*, 63 AD3d 471 [1st Dept 2009]. Furthermore, "the court is not required to accept factual allegations that are flatly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

Plaintiffs argue that "[t]he Kolsrud affidavit is false, misleading, incorrect, omits usages and evidences a billing scheme to hide usages from models . . . ." Plaintiffs further claim that Shanklin never saw the corrected 1099-MISC prior to the time the Kolsrud affidavit was filed on June 30, 2014. However, whether or not Shanklin actually received the form, plaintiff's opposition fails to rebut Que's showing that Shanklin was never in fact owed the $35,400 difference between the amount shown on the initial form and the amount reflected on the corrected form or undercut Que's explanation for the mistake. Que's motion shall be granted.

F. Plaintiffs' Motion to Supplement the Pleadings

In response Que's motion to dismiss, plaintiffs filed a motion to supplement the pleadings pursuant to CPLR 3025(b) (motion sequence no. 014). CPLR 3025 provides that:

> A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

Plaintiff proposes to include six exhibits, annexed to an affirmation of plaintiff's counsel (and ratified in reply by the affidavit of Shanklin). The affirmation alleges that Shanklin had been booked for a shoot in connection with non-party Target's Merona Brand underwear in 2009 (Taylor affirmation ¶ 5). The usage expired in 2011 (*id.* ¶ 6). Shanklin discovered his image was still being used in March 2012, whereupon he contacted Que, who in turn contacted Target. Target eventually agreed to pay for the usage and extended the usage until June 11, 2012 (*id.*).

This allegation does not support Shanklin's claim against Que. In fact, it confirms that Que did *not* withhold monies received on Shanklin's behalf. It is not alleged that Que withheld any funds payable to Shanklin. Rather, when Que became aware of the unauthorized usage, it advocated on Shanklin's behalf, obtained payment and promptly upon receipt of payment, disbursed the sums owed him.

On May 29, 2014, Shanklin notified Que that over Memorial Day weekend 2014, he again discovered Merona underwear that allegedly contained his image in Target stores (*id.* ¶ 9). Que contacted Target who claimed that the usages were not a "reuse" because Target was simply selling product that was not sold during the usage period *(id.)*.

Target is not a party to this action. The proposed supplemental allegations do not bolster Shanklin's complaint against Que. Instead, the additional allegations support an inference that Que did not withhold payments owed to Shanklin. The ACAC shall be dismissed as against Que.

In conclusion, the claims against the AADs and CDs (motion sequence numbers 002, 005, 006 and 008) shall be DISMISSED.[6] The motions of MADs, Wilhermina, Next, Major and Click (motion sequence numbers 001, 009, 010 and 012) to dismiss are DENIED. The motions of MADs Ford and Que (motion sequence numbers 011 and 013) are GRANTED. Plaintiffs' motion to supplement the pleadings as to Que (motion sequence number 014) is DENIED. It is hereby

ORDERED that the motions to dismiss of advertising agency defendants and client defendants, SAATCHI AND SAATCHI NORTH AMERICA, INC., (motion sequence number 002), OGILVY & MATHER WORLDWIDE INC., (motion sequence number 005),

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[6]Because the Third (Civil Rights Law) and Fourth (Breach of Contract) Cause of Action are asserted against AAD and CD only, these causes of action must be dismissed in their entirety.

MCCANN-ERICKSON USA, INC., MCCANN-ERICKSON CORPORATION (INTERNATIONAL) and L'OREAL USA, INC., (motion sequence number 006) and P&G-CLAIROL, INC. (PROCTOR AND GAMBLE) (motion sequence number 008) are GRANTED and the complaint is dismissed as to the said defendants; and it is further

ORDERED that the motions to dismiss of modeling agency defendants, WILHELMINA MODELS, INC., WILHELMINA INTERNATIONAL LTD., (motion sequence number 001), NEXT MANAGEMENT, LLC (motion sequence number 010), MAJOR MODEL MANAGEMENT INC., (motion sequence number 009) and CLICK MODEL MANAGEMENT, INC., (motion sequence number 012) are DENIED; and it is further

ORDERED that the motions to dismiss of modeling agency defendants, FORD MODELS, INC., (motion sequence number 011) and QUE MANAGEMENT INC., (motion sequence number 013) are GRANTED and it is further

ORDERED that the motions for orders of protection of SAATCHI AND SAATCHI NORTH AMERICA, INC., (motion sequence number 002) and P&G-CLAIROL, INC. (PROCTOR AND GAMBLE) (motion sequence number 004) are DENIED as moot; and it is further

ORDERED that the motion of plaintiffs to supplement the pleadings (motion sequence number 014) is DENIED; and it is further

ORDERED that the action is severed and continued against the defendants not dismissed from the case; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the following amended caption:

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ALEX SHANKLIN, LOUISA RASKE, MELISSA BAKER, ELENI TZIMAS, MARCELLE ALMONTE, GRECIA PALOMARES, CARINA VRETMAN, MICHELLE GRIFFIN TROTTER, individually and as class representatives,

Plaintiffs,

Index No.: 653702/2013

-against-

WILHELMINA MODELS, INC., WILHELMINA INTERNATIONAL LTD., ELITE MODEL MANAGEMENT-NEW YORK LLC, CLICK MODEL MANAGEMENT, INC., MC2 d/b/a KARIN MODELS OF NEW YORK, LLC., NEXT MANAGEMENT, LLC, MAJOR MODEL MANAGEMENT INC.,

Defendants.

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and it is further

ORDERED that the counsel for SAATCHI AND SAATCHI NORTH AMERICA, INC., shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Commercial Division Support Office (Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that counsel for the remaining parties shall appear before Justice Charles Ramos, Part 53, Courtroom 238 on September 10, 2014 at 10:00 AM to discuss possible mediation of the dispute; and it is further

ORDERED that the remaining defendants shall answer the Amended Class Action Complaint by September 22, 2014; and it is further

ORDERED that all counsel for the remaining parties shall appear for a preliminary conference on Tuesday, September 30, 2014 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York; and it is further

ORDERED that the Part 49 Clerk shall provide a copy of this Decision and Order to Justice Ramos and that the deadline for service and filing of answers and/or the date of the preliminary conference as set forth herein, may be adjusted as Justice Ramos deems appropriate.

This constitutes the decision and order of the court.

DATED: August 11, 2014

E N T E R,

O. PETER SHERWOOD
J.S.C.