To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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FOX PAINE & COMPANY, LLC and SAUL A. FOX,

Plaintiffs,

-against–

EQUITY RISK PARTNERS, INC.,

Defendant.

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Index No. 52607/2014
Motion Dates: 6/8/18 & 10/12/18
SEQ #'s 26 & 27

DECISION & ORDER

WALSH, J:

Defendant Equity Risk Partners, Inc. ("Defendant" or "ERP") moves pursuant to CPLR 2212 for an order granting leave for reargument of the Court's Decision and Order dated April 6, 2018 (the "April 2018 Decision") which denied ERP's motion for summary judgment, and upon reargument granting ERP's motion for summary judgment in whole or in part. Plaintiffs Fox Paine & Company ("FPC") and Saul A. Fox ("Fox") (together "Plaintiffs") oppose the motion. Plaintiffs move for an order striking and/or dismissing Defendant's 8th, 9th, 12th, 13th, 15th, 16th and 17th Affirmative Defenses and Counterclaims (hereinafter the "new affirmative defenses and counterclaims") from ERP's Answer to the Third Amended Complaint (the "TAC"). Defendant opposes Plaintiffs' motion. These motions have been consolidated for purposes of deliberation and determination.

FACTUAL AND PROCEDURAL HISTORY

The factual and procedural history of this action, as well as the allegations of the TAC, are set forth in detail in this Court's April 2018 Decision, and they are incorporated herein by reference. Briefly, this action arises out of the disintegration of the relationship between equal partners Plaintiff Fox and W. Dexter Paine, III ("Paine") in Plaintiff FPC, a private equity management firm, a disintegration which produced multiple litigations and arbitrations.

At its essence, this action for breach of contract, breach of fiduciary duty, fraud and aiding and abetting a breach of fiduciary duty and aiding and abetting a fraud involves Plaintiffs' claims that its prior insurance broker, ERP, engaged in various acts of wrongdoing when it

decided to assist Fox's former partner Paine, Paine's new entity Paine & Partners, LLC ("P&P") (f/k/a Fox Paine Management III, LLC ["FPM III"]), the Paine Family Trust, former FPC executives who joined P & P, and Mitchell S. Presser, Esq. ("Presser"), FPC's former counsel who also joined P & P (collectively "the Paine Parties"), in obtaining the proceeds of a $10 million Private Equity Professional Policy ("PE") and General Partnership Liability ("GPL") Insurance Policy issued by Houston Casualty Company ("HCC") (the "HCC Policy") and procured by ERP on behalf of its then client FPC for the period December 31, 2006 to December 31, 2007, as well as proceeds from FPC's excess insurance policies, to fund the Paine Parties' litigation costs against Fox and FPC as well as the settlements with Plaintiffs (the HCC Policy and the excess policies are referred to herein as the "FPC Policies").

During his tenure on this case, Justice Scheinkman decided multiple motions, including a motion by Defendants to dismiss Plaintiffs' First Amended Complaint ("FAC") and a motion by Plaintiffs for leave to serve a Second Amended Complaint ("SAC"). In a Decision and Order dated November 24, 2014 (the "November 2014 Decision"), Justice Scheinkman granted the branches of ERP's motion to dismiss to the extent that he dismissed Plaintiffs' causes of action for fraud, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty against Defendants, including ERP. Thereafter, Plaintiffs moved for leave to amend their FAC so as to rectify any prior pleading deficiencies and to reassert the claims of fraud, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty against Defendants, including ERP, to add a claim for breach of contract against ERP, and to add claims against Defendants (including ERP) for conspiracy to commit fraud and aiding and abetting fraud. In his Decision and Order dated April 15, 2015 (the "April 2015 Decision"), Justice Scheinkman denied Plaintiffs' motion to amend, except to the extent of allowing Plaintiffs to amend to allege a breach of contract cause of action against ERP. Plaintiffs appealed both the November 2014 Decision and the April 2015 Decision.

Following the completion of discovery, on March 10, 2017, Plaintiffs moved to amend and supplement their SAC. In a Decision and Order dated June 1, 2017 (the "June 2017 Decision"), Justice Scheinkman granted, in part, Plaintiffs' request for leave to amend their Complaint to the extent that Plaintiffs were allowed to assert the allegations found at paragraphs 36-52, 83-107, 108-114 and 257-305 of the proposed TAC. This supplementation did not change the causes of action and was merely requested to conform the pleadings to the proof uncovered during discovery. At the time of Justice Scheinkman's June 2017 Decision, the only claim against ERP was a claim for breach of contract. However, in Decisions dated August 2017 (the "August 2017 Decisions"), the Appellate Division, Second Department, modified: (1) the November 2014 Decision by reinstating the claims for fraud, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty; and (2) the April 2015 Decision to the extent that Plaintiffs were granted leave to amend to assert claims of fraud, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and aiding and abetting fraud, but denied Plaintiffs leave to amend to add the claim for conspiracy to commit fraud. Plaintiffs subsequently filed their TAC on September 13, 2017, which included the tort causes of action which had been dismissed by Justice Scheinkman in November 2014 and reinstated by the Second Department in the

August 2017 Decision. Plaintiffs added, however, without leave of court, several paragraphs (paragraphs 208, 279 and 307) of allegations in its breach of fiduciary duty cause of action to support a claim that ERP was negligent in the procurement of the private equity professional insurance policies for FPC. On September 28, 2017, ERP filed its Answer to the TAC denying the material allegations of the TAC, asserting twenty affirmative defenses, and interposing counterclaims against Plaintiffs for: (1) indemnification; (2) negligent misrepresentation; (3) intentional misrepresentation; and (4) a declaratory judgment that Plaintiffs were not entitled to coverage under the operative policies for the Settlement Evasion Expenses. On October 18, 2017, Plaintiffs filed a reply to Defendant's counterclaims in which Plaintiffs objected to them as being untimely and a nullity given that they were filed without leave of court and after the close of discovery in the action.[1]

After the conclusion of discovery and Plaintiffs' filing of the Note of Issue, ERP moved for summary judgment and for an order striking the unauthorized allegations in Plaintiffs' TAC concerning ERP's alleged negligent procurement. This Court issued the April 2018 Decision, which denied ERP's motion for summary judgment, but granted the branch of ERP's motion striking the allegations contained in paragraphs 208, 279 and 307 of the TAC without prejudice and with leave to Plaintiffs to move to amend their TAC to assert these claims.

DEFENDANT'S MOTION SEQUENCE NO. 26

A. Defendant's Contentions in Support of Motion

In support of its motion, ERP submits: (1) an Affirmation of Marc L. Antonecchia, Esq. dated May 23, 2018, together with various exhibits ("Antonecchia Aff."); and (2) a Memorandum of Law ("Def's Mem.").

Defendant contends that this Court should grant ERP's motion to reargue and the April 2018 Decision should be revised based on the Court's erroneous rulings which were predicated on: (1) the notion that the TAC did not join new causes of action against ERP and the TAC was a mere supplementation rather than amendment rendering Defendant's new affirmative defenses and counterclaims improperly interposed without leave of court; (2) the failure to grant summary judgment based upon the broad release in the 2012 Settlement applicable to all "representatives" of the Paine Parties; (3) the conclusion that the decision in *Pulte Group, Inc. v Frank Crystal & Co.* (2012 WL 1372158 [SD NY 2012]) and the New York Insurance Department's legal opinion

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[1]Plaintiffs had also cross-moved, in response to ERP's motion for summary judgment, to dismiss ERP's Eighth, Ninth and Thirteenth Affirmative Defenses based on, *inter alia*, ERP's failure to plead release in its Answer to Plaintiffs' Revised SAC ("RSAC"). However, because Plaintiffs had not sought leave of Court pursuant to Commercial Division Rule 24 to file their cross-motion, in an Order dated October 30, 2017, Justice Scheinkman denied the cross-motion and stated that Plaintiffs' cross-motion would only be considered to the extent it provided opposition to ERP's motion.

do not reflect governing law in this case; (4) all statements, findings and rulings that reflect, incorporate, or rely upon the incompetent affidavit of Jay Pulaski (an FPC employee); and (5) the failure to grant summary judgment based on the absence of any evidence capable of raising a triable issue regarding the proximate cause of Plaintiffs' alleged Settlement Evasion Expenses.

In support of its motion, ERP relies on the transcript of a conference conducted in this action on May 2, 2018 wherein counsel argues that the Court conceded that an error had been made regarding whether the TAC was an amended complaint as opposed to a supplemented complaint. ERP contends that the TAC was more than a supplementation because the RSAC did not plead any tort causes of action against ERP and issue was not joined on the tort causes of action until ERP answered the TAC. ERP emphasizes that the operative pleading that governed previous discovery in this action was the RSAC, which only contained a single cause of action for breach of contract against ERP and it did not contain any tort causes of action against ERP. ERP argues that it should have been permitted to file affirmative defenses and counterclaims as of right in response to Plaintiffs' TAC. ERP contends that numerous statements contained in the April 2018 Decision reflect this Court's admitted misunderstanding of the procedural posture of the litigation at the time the TAC was filed. ERP further contends that the April 2018 Decision erroneously concludes that the TAC merely conformed the pleadings to evidence obtained during discovery (April 2018 Decision at 43-44). ERP contends that this Court has acknowledged its willingness to reconsider this error.

ERP contends that after Justice Scheinkman's dismissal of the FAC, Plaintiffs unilaterally and without permission interposed an SAC that included the then-dismissed tort causes of action on the rationale that those causes of action were under review by the Second Department (Def's Mem. at 3). According to ERP, following Plaintiffs' improper maneuvering, Justice Scheinkman directed Plaintiffs to file the RSAC that contained only one cause of action for breach of contract against ERP and two contract causes of action against HCC (*id.*). ERP asserts that the RSAC was not referenced in the April 2018 Decision (*id.* at 4). ERP argues that when Justice Scheinkman issued the June 2017 Decision permitting the amendment of the RSAC, ERP's original motion for summary judgment seeking dismissal of the sole contract cause of action was fully briefed and *sub judice*. According to ERP, Plaintiffs sat on their hands and did not file an amended complaint upon the issuance of the June 2017 Decision and waited until September 13, 2017 to file the TAC, which interposed four tort causes of action that had not been joined previously (through an answer by ERP) at any time in the action (*id.*).

ERP contends that this Court's finding in the April 2018 Decision that the TAC did not contain any new causes of action and was merely a supplementation of the RSAC is wrong and prejudices ERP (*id.*). Because the TAC was a completely new amended complaint, it is ERP's position that the affirmative defenses and counterclaims interposed in ERP's Answer are a "matter of right" (*id.*). According to ERP, one such prejudice resulting from this Court's error is that the Court determined that it would not consider ERP's affirmative defense of release in connection with ERP's motion for summary judgment (*id.* at 5).

ERP contends that it is entitled to full or partial summary judgment based on the release that this Court declined to consider because the broad release in the 2012 Settlement encompasses all conduct by ERP as the Paine Parties' representative (*id.* at 6). According to ERP, because the 2012 Settlement Agreement provides a general release of all "representatives" of the Paine Parties, and because it is undisputed that ERP was a representative of the Paine Parties on the date of the 2012 Agreement, Plaintiffs' claims against ERP are barred by the release (*id.* at 7).

ERP asserts that in the April 2018 Decision, this Court erred in finding that the Second Department considered and decided in its August 2017 Decision whether a terminated broker can have perpetual duties (*id.* at 8). ERP argues that the Second Department's ruling makes no mention either of termination of ERP as the Broker of Record or the law holding that a broker has no claims duty when its agency relationship with a former client ends (*id.*). ERP contends that any presumption that the Second Department actually considered the *Pulte* decision and/or the Insurance Department's industry guidance is impermissible speculation (*id.*). ERP further contends that the Second Department's discussion of a potential "special relationship" between ERP and Plaintiffs was made in the context of its assessment of whether Plaintiffs had stated a cause of action in the FAC and not in the context of a motion for summary judgment (*id.*). ERP argues that a special relationship between parties must be demonstrated by Plaintiffs before ERP can be considered to have a perpetual post-termination duty. ERP further argues that the April 2018 Decision does not cite or discuss any basis for recognition of a perpetual post-termination duty (*id.*). ERP contends that absent proof that ERP entered into an agreement to assume perpetual claims duties, ERP's claims duties ended with termination of its agency relationship with Plaintiffs (*id.* at 12).

It is ERP's further contention that this Court erred in considering the affidavit of Jay Pulaski in determining whether a material issue of fact exists to defeat summary judgment (*id.*). ERP argues that Pulaski was not competent to testify about several matters in his affidavit because he did not have personal knowledge of the purported facts, and there are no business records to support his rendition (*id.*). ERP further argues that Pulaski merely provides an after-the-fact conclusory rendition of Plaintiffs' position (*id.*). ERP contends that by Pulaski's own admission, he was not employed by FPC during the time period from December 2005 to May 2008 and would not have any personal knowledge of events during that period and there were no business records proffered to support his rendition of the facts (*id.*). ERP requests that to the extent any aspect of this Court's April 2018 Decision was dependent upon the Pulaski affidavit, those aspects of the April 2018 Decision must be revisited.

In addition, ERP argues that the Court erred in its analysis of the causation issue by finding that Plaintiffs had presented evidence creating a triable issue of fact over whether Plaintiffs' Settlement Evasion Expenses were proximately caused by ERP's tortious acts (*id.* at 13). ERP contends that Plaintiffs' alleged damages consist of Settlement Evasion Expenses incurred in opposing four motions by the Paine Parties to enforce Plaintiffs' promises that had been given in the December 2007 Settlement that extinguished and superseded the claims that

were the subject of the November 2007 litigation notice to HCC and the excess insurers (*id.* at 14). ERP claims that it is undisputed that ERP did not "proximately cause" Plaintiffs to enter into the December 2007 Settlement with the Paine Parties and, further, that ERP did not proximately cause Plaintiffs to decline to perform their obligations under that settlement (*id.*). ERP argues that all four motions to enforce the settlement were brought before HCC ever advised the Paine Parties, on or about February 23, 2010, that HCC was willing to partially reimburse them for Settlement Evasion Expenses incurred in defending against several arbitrations that Plaintiffs had initiated against the Paine Parties in May 2009. Thus, it is ERP's position that Plaintiffs failed to present evidence capable of raising a triable issue as to the proximate cause of any Settlement Evasion Expense incurred before February 23, 2010 (*id.* at 15). ERP further argues that the only so-called "material fact" raised in Plaintiffs' opposition papers involves Plaintiffs' claim that "[p]rior to HCC having changed its coverage position, the Paine Parties had not commenced any actions against Plaintiffs in connection with their alleged 'dilution' claim and only proceeded to assert the 'dilution' claims after receiving word that HCC was going to cover their legal fees and costs" and that this is not enough to raise a triable issue of fact (*id.*).

B. Plaintiffs' Contentions in Opposition to Motion

In opposition to ERP's motion, Plaintiffs submit: (1) an Affirmation of Andew P. Steinmetz, Esq. dated June 6, 2018, together with various exhibits ("Steinmetz Opp. Aff."); (2) an Affirmation of Reed Forbush, Esq. dated June 1, 2018 ("Forbush Opp. Aff."), together with various exhibits; and (3) Memorandum of Law dated June 1, 2008 ("Plfs' Opp. Mem.").

Plaintiffs contend that this Court correctly held that ERP cannot assert its untimely counterclaims and affirmative defenses because the TAC did not join, for the first time, four new tort causes of action (Plfs' Opp. Mem. at 2). Plaintiffs contend that as outlined in this action's relevant procedural history, the TAC was the result of (1) Justice Scheinkman's permission, after the close of discovery, for Plaintiffs to amend their existing background fact section and breach of contract claim against ERP to conform to the evidence produced in two years of discovery; and (2) the Second Department's "subsequent reinstatement – again after the close of discovery – of the tort claims Plaintiffs had pled against ERP in their original February 21, 2014 Complaint ... and their First Amended Complaint filed May 20, 2014 ... Plaintiffs' tort claims were extant against ERP for over *nine months* at the outset of the litigation. And not once during multiple motions to dismiss or opposition to Plaintiffs' motion to replead, or on appeal, did ERP claim that Plaintiffs' claims were barred by release, culpable conduct, or lack of coverage under the HCC Policy" (*id.* at 2).

Plaintiffs contend that after Justice Scheinkman dismissed their tort claims in November 2014, they appealed that Decision, and because they were required to file an RSAC that did not include those tort claims, "[t]o preserve Plaintiffs' appellate rights, ERP and HCC stipulated that the tort claims on appeal remained part of this case and Plaintiffs had 're-alleged dismissed causes of action [in the Second Amended Complaint] to prevent any failure to re-assert the causes of action as being construed as a waiver[.]'" (*id.* at 3, *quoting* Stipulation, NYSCEF Doc.

168). Thus, it is Plaintiffs' position that the tort claims against ERP have always been based on the same underlying acts, transactions and occurrences as the breach of contract claim against ERP in the RSAC (*id.* at 3). According to Plaintiffs, all the underlying acts were the subject of years of discovery and motion practice and at no time did ERP ever assert the arguments raised in its new affirmative defenses and counterclaims (*id.*). Plaintiffs further contend that each and every new affirmative defense and counterclaim that ERP now seeks to plead, including release, culpable conduct and the coverage-based affirmative defenses, was applicable to and could have been raised in response to the background facts and breach of contract claim in the RSAC (*id.* at 3). It is Plaintiffs' position that ERP should not be permitted to assert counterclaims for the first time ever on the eve of trial (*id.*). Plaintiffs argue that under New York law, all counterclaims are permissive and a defendant is required to admit or deny the allegations in an amended complaint and assert affirmative defenses that are waived if not raised, but a defendant is never required to assert a counterclaim in its answer (*id.* at 4, *citing* CPLR 3018, CPLR 3019 and CPLR 3011). Thus, it is Plaintiffs' contention that "while an amended complaint supercedes a prior complaint, a defendant only has to be permitted to answer (meaning admit or deny the allegations in the background facts and causes of action) and may assert affirmative defenses that have not been waived, but no law mandates the permission to file counterclaims (especially claims not relevant only to the new allegations), and CPLR 3025(d) expressly acknowledges the Court's ability to prescribe limitations in the answer" (*id.* at 5). Pointing out that ERP has never asserted a counterclaim in this action so ERP is not seeking to amend an existing counterclaim or add a new one, Plaintiff argues that "ERP cites, and Plaintiffs have found, no law to support any right by ERP to assert counterclaims for the first time in the procedural posture of this case" (*id.*). Plaintiffs further argue that even if the Court were to permit ERP to seek leave to assert counterclaims now for the first time, leave should be denied because of ERP's inexcusable and unreasonable delay, and the extraordinary prejudice to Plaintiffs given the procedural posture of this case (*id.*).

Plaintiffs assert that each and every new affirmative defense and counterclaim ERP is seeking to interpose is, on its face, purportedly based on acts, transactions and occurrences detailed at length in Plaintiffs' very first pleadings: (1) ERP's indemnification counterclaim alleges that FPC has had a duty to indemnify ERP "since this action began"; (2) ERP's two misrepresentation-based counterclaims allege that various statements which appeared in the original complaint, the FAC and the SAC are false and misleading; and (3) ERP's counterclaim for a declaratory judgment asks the Court to render a coverage determination on an insurance policy that has been at the center of this case since the beginning and HCC had made the exact coverage arguments that underlie ERP's declaratory judgment counterclaim during the early stages of this litigation (*id.* at 7). Plaintiffs assert that they would be severely prejudiced if they were forced to expend money defending against four claims for which they have had no discovery and Defendant has proffered no reasonable excuse for its failure to have asserted these counterclaims sooner (*id.*). Alternatively, Plaintiffs request that to the extent the Court were to even consider permitting ERP to seek leave to assert counterclaims now for the first time, that Plaintiffs be given the opportunity to oppose on the additional grounds that the claims are palpably insufficient or devoid of merit (*id.* at 7).

It is Plaintiffs' position that while CPLR 3025(d) authorizes the filing of an answer in response to an amended complaint, that right is not absolute. According to Plaintiffs, "a defendant has the right to file an answer admitting or denying all the allegations asserted by the plaintiff in its amended pleading under CPLR 3025(d) and 3018(a). A defendant may even have the right to assert new affirmative defenses that are uniquely responsive to the new claims (*e.g.*, if the original complaint contained only a claim at law, like breach of contract, and the amended complaint contained for the first time equitable causes of action, a defendant would be permitted to assert new previously inapplicable equitable defenses such as unclean hands, waiver and laches). But where, as here, a defendant seeks to assert new affirmative defenses for the first time after the close of discovery, on the eve of trial, that were *directly applicable to all four prior complaints*, are *not uniquely responsive to any new allegations or causes of action*, and which were not pled in a prior answer, the Court cannot authorize the pleading of affirmative defenses that were already waived as a matter of law under CPLR 3018(b), and can prohibit the filing of any other affirmative defenses on the bases of unreasonable delay, surprise, prejudice and legal insufficiency outlined *supra*"(*id.* at 8). Plaintiffs argue that "[w]hen ERP failed to assert them in its first Answer, ERP waived, as a matter of law, the affirmative defenses of culpable conduct as a basis for diminution of damages (14th and 15th); illegality (16th); fraud (15th); payment (12th and 16th); release (8th, 9th and 13th), each of which is expressly listed in CPLR 3018(b). ERP also waived its 12th (reimbursement in whole or in part), 13th (ratification and consent to ERP's conduct), 14th (unjust enrichment), 16th (damages limited or not recoverable under applicable law; reduction/offset/account for other sources); and 17th (lack of coverage under operative insurance policies) affirmative defenses because ERP was obligated to 'plead all matters which if not pleaded would be likely to take [Plaintiffs] by surprise or would raise issues of fact not appearing on the face of a prior pleading.' CPLR 3018(b) ('The application of this subdivision shall not be confined to the instances enumerated.') Each of these affirmative defenses is based on facts in ERP's possession from as early as 2007 and at the absolute latest by February 2014"(*id.* at 10).

Plaintiffs argue that the "Court correctly declined to grant summary judgment on ERP's release defense on the basis that '[i]t is undisputed that because this affirmative defense was not stated as such in ERP's Answer to the [RSAC, which was the operative answer for purposes of discovery, Plaintiffs have been foreclosed from any discovery as to such an affirmative defense'" (*id.* at 11, *quoting* April 2018 Decision at 45). Furthermore, it is Plaintiffs' position that ERP is incorrect in its argument that the Court did not consider the merits of ERP's release defense (*id.* at 11). Plaintiffs argue that the Court did scrutinize ERP's release defense and correctly found that even if it had been properly raised, it would not have justified summary judgment and ERP identifies no material misapprehensions of fact or law by the Court in this regard (*id.*). Plaintiffs point out that the Court correctly found that with regard to Defendant's conduct prior to the December 14, 2007 Broker of Record Letter (the "BOR Letter"), since Defendant was Plaintiff's representative at the time, such conduct would not fall within the Release. Second, with respect to Defendant's post-BOR conduct, Plaintiffs argue that the Court again correctly found that "'there are triable issues of fact over whether ERP was acting in its capacity as the Paine Parties' representative with regard to the alleged bad acts'" (*id.* at 12, *quoting* April 2018 Decision at 49-

50).

According to Plaintiffs, because a release may only be read to cover matters the parties intended to cover, "the term 'representatives' in the August 2012 Settlement cannot be stretched to encompass ERP – an entity that had no relevance to the subject matter of the settled claims" (*id.*). Plaintiffs argue that ERP's strained reading of the release would produce absurd results "such as Plaintiffs inability to sue anyone who provided services to or ever claimed to act on behalf of any of the Paine Parties such as their travel agents, auto insurance agencies, secretaries, nannies. There is no contextual basis to assume the parties intended to execute such a ridiculously broad release provision" (*id.* at 13). Plaintiffs further argue that they would be "unfairly prejudiced if the Court ruled on the meaning of the release language without providing Plaintiffs an opportunity to adduce evidence concerning the negotiations behind the 2012 Settlement Agreement, its drafting history, and any other evidence that might bear on the parties' intent" (*id.*).

Plaintiffs contend that the Court did not err by failing to dismiss Plaintiffs' claims as a matter of law based on the termination of Defendant in the BOR Letter. In this regard, it is Plaintiffs' position that Defendant's contention that "this Court erred in holding that the Second Department, through the reinstatement of Plaintiffs' tort claims, necessarily rejected ERP's argument," "grossly mischaracterizes the Court's decision and conspicuously ignores the Vest Affirmation while offering an unsworn assertion about ERP's appeal that is ... sanction worthy" (*id.* at 14). In this regard, Plaintiffs point out that Defendant did in fact argue before the Second Department that the BOR Letter, the decision in *Pulte, supra* and the New York Insurance Department's guidance opinion established as a matter of law that ERP owed no continuing duties to Plaintiff. Plaintiffs assert that in its two August 2017 Decisions, "the Second Department held that the trial court erred (1) in dismissing Plaintiffs' claims for breach of fiduciary duty, fraud, and aiding and abetting the Paine Parties' breaches of fiduciary duty, and (2) in failing to grant Plaintiffs leave to amend their pleading, *expressly citing Plaintiffs' supplemental cases from oral argument*" (*id.* at 15). According to Plaintiffs, "[i]n denying ERP's motion for summary judgment, this Court correctly held that the Second Department necessarily considered and rejected ERP's arguments when it reinstated Plaintiffs' tort claims without limitation" (*id.*). Plaintiffs concede that while a decision on a motion to dismiss is ordinarily not law of the case in relation to a subsequent summary judgment motion, Plaintiffs argue that "where, as here, the order 'was based on law, as opposed to facts, such disposition is law of the case'" (*id.* at 15, *quoting Matter of Gansberg v Blachman,* 2015 NY Slip Op 50060[U], 46 Misc 3d 1214[A] at *5-6 [Sup Ct, Kings County 2015]). Plaintiffs contend that the fact that the Second Department's decision does not reference *Pulte*, the BOR Letter or the Insurance Department's decision is irrelevant since "an appellate court is presumed to have considered arguments that were squarely placed before it prior to its decision" (*id.* at 16).

Regarding the effect of the BOR Letter, Plaintiffs contend that this Court correctly recognized triable issues of fact existed as to the nature of the parties' relationship since certain duties survive the termination of a principal-agent relationship even if the BOR letter terminated ERP's agency (*id.* at 16-17). Plaintiffs argue that "[o]nce a fiduciary relationship has been

established, even after the working relationship has ended, an agent or fiduciary is obligated to: (i) refrain from using confidential information of the principal gained during the agent's tenure; (ii) convey information to the principal regarding transactions undertaken during the agent's tenure, and (iii) not compete for the agent's own benefit or for a third party a transaction commenced on the principal's behalf" (*id.*).

With regard to ERP's objection to the consideration of the Pulaski Affidavit, Plaintiffs first point out that ERP fails to connect any testimony from the Pulaski Affidavit to the Court's decision on any issue. It is Plaintiffs' position that this Court "did not cite to the Pulaski Affidavit as partial support or exclusive support for *any proposition* relevant to the paragraphs ERP identified as problematic, *i.e.*, those concerning the scope of ERP's duties to Plaintiffs" and, therefore, Defendant's requested relief that the April 2018 Decision be revised to delete and amend any statement or finding that relies on the Pulaski Affidavit would have no effect at all on the Court's Decision (*id.* at 18). In addition, Plaintiffs point out that ERP never objected to the Pulaski Affidavit in their motion for summary judgment and ERP fails to argue that striking references to the Pulaski Affidavit would be sufficient to eliminate all evidence favorable to Plaintiffs concerning the scope of ERP's duties. With regard to ERP's failure to object to the Pulaski Affidavit, Plaintiffs point out that the only objection made by ERP concerning the Pulaski Affidavit was that it was "merely a recitation of the conclusory allegations in plaintiffs' complaint concerning the existence of a contract for certain 'Services'" and such a general objection is not sufficient to raise an objection as to the admissibility of the evidence based on Pulaski's lack of competence. As such, Plaintiffs argue that this Court could not have overlooked or misapprehended arguments that were never made and ERP should not be given a second bite at the summary judgment apple (*id.* at 19).

Lastly, Plaintiffs argue that the Court did not err in its causation analysis asserting that ERP cites no law that was allegedly overlooked and ERP does not claim the Court misapprehended any particular fact in the record concerning ERP's breaches and their connection to Plaintiffs' damages (*id.* at 19). Quoting from this Court's April 2018 Decision at pages 30-32 wherein the Court recited evidence supporting ERP's alleged breaches, Plaintiffs argue that the points this Court made "support ERP's liability for injuries FPC suffered before February 23, 2010, when HCC advised the Paine Parties it would reimburse them for litigation expenses. If ERP had not concealed essential information from Plaintiffs *before February 23, 2010*, Plaintiffs would have taken affirmative action preventing the wrongful payout of FPC Policy proceeds. If ERP had not acted to advance the Paine Parties' claim for reimbursement *before February 23, 2010*, the proceeds would not have ultimately been paid out and the subsequent litigation would not have been funded. The causal nexus between ERP's conduct and Plaintiffs' post-February 23, 2010 injuries is not based solely upon the mere sequence of events. Rather, in addition to the 'further ... circumstantial evidence in the form of timing,' the Court acknowledged that 'after ERP's assistance, HCC reinstated its tolling agreement with the Paine Parties, ceased any credible threats of coverage litigation against them, paid out its full policy limits, and actively assisted the Paine Parties in securing a settlement with the Excess Insurers'" (*id.* at 23, *quoting* April 2018 Decision at 31). Finally, Plaintiffs point out that the sufficiency of Plaintiffs'

evidence was not even the reason the Court denied summary judgment; rather this Court found that ERP failed to meet its prima facie burden of showing that its own actions or inactions were not a substantial factor in causing Plaintiffs' damages (*id.*).

C. Defendant's Contentions in Further Support of its Motion

In further support of its motion to reargue, Defendant submits a Reply Memorandum of Law dated June 7, 2018 ("Def's Reply").

Defendant contends that there is no triable issue regarding the fact that Plaintiffs' Settlement Evasion Expenses they voluntarily incurred from 2008 to 2013 to litigate their 2007 settlement with Paine were not proximately caused by ERP (Def's Reply at 2). According to Defendant, it is beyond dispute that HCC elected to accept coverage for the Paine Parties well after all the motions to enforce, which give rise to Plaintiffs' Settlement Evasion Expenses, had been brought (*id.* at 3). Defendant argues that Plaintiffs have failed to identify any evidence that HCC's decision "caused" litigation activity that preceded that decision (*id.*). Defendant further contends that "[a]ccording to the TAC, the [Settlement Evasion Expenses] arose as a consequence of plaintiffs' efforts to litigate four motions that the Paine Parties brought to enforce the promises that plaintiffs gave as part of the December 2007 settlement between Fox and Paine" and that the motions to enforce were brought in January 2008, August 2008, May 2009, and December 2009 (*id.* at 2). Again, relying on the TAC, Defendant points out that Plaintiffs acknowledge that the Paine Parties did not submit a demand for reimbursement to HCC until May 2009, and even then only under their own 2009 policy (*id.*). Defendant further contends that "by the time HCC informed the Paine Parties on or about February 23, 2010 that HCC 'was retracting its denial coverage' ... three of the four motions to enforce that give rise to all of plaintiffs' [Settlement Evasion Expenses] had already been litigated, and the fourth motion to enforce had already been filed" (*id.*). It is Defendant's contention that based on Plaintiffs' own allegations, "the Paine Parties had no reason to believe that any of their [Settlement Evasion Expenses] would be reimbursed by HCC until three of their four motions to enforce had been resolved, and the fourth one was already being litigated" (*id.*). Defendant further argues that it is undisputed that the Paine Parties brought each of their four motions to enforce entirely on their own and, moreover, Plaintiffs made the decision on their own to litigate the four motions (*id.*). It is Defendant's contention that given the undisputed above facts concerning the timing, Plaintiffs' argument that "'[i]f ERP had not concealed essential information from Plaintiffs *before February 23, 2010*, Plaintiffs would have taken affirmative action preventing the wrongful payout of FPC Policy proceeds' and that '[i]f ERP had not acted to advance the Paine Parties' claim for reimbursement *before February 23, 2010*, the proceeds would not have ultimately been paid out and the subsequent litigation would not have been funded'" (*id.* at 3, *quoting* Plfs' Opp. Mem. at 22 [emphasis added]) "is hopelessly unsupported, conclusory and speculative" (*id.*). Defendant argues that Plaintiffs' attempt to bootstrap its own contentions, including that ERP failed to provide claims advocacy services to Plaintiffs, as reasons that ERP caused Plaintiffs' Settlement Evasion Expenses, misses the mark since Plaintiffs fail to offer any explanation, logically or factually, of how ERP's alleged "failure to advocate" for Plaintiffs caused Plaintiffs to incur their

Settlement Evasion Expenses (*id.*). According to Defendant, Plaintiffs' rank speculation with regard to the Settlement Evasion Expenses does not present evidence capable of supporting a finding that ERP caused Plaintiffs' Settlement Evasion Expenses (*id.*). It is also Defendant's position that the Court erred when it held that ERP did not sustain its *prima facie* burden to show that ERP's actions or inactions were not a substantial factor in bringing about Plaintiffs' Settlement Evasion Expenses (*id.* at 4). Further, with regard to Plaintiffs' claim that "'[p]rior to HCC having changed its coverage position, the Paine Parties had not commenced any actions against Plaintiffs in connection with their alleged 'dilution' claim and only proceeded to assert the 'dilution' claims after receiving word that HCC was going to cover their legal fees and costs,'" Defendant contends that this fact is directly contrary to the allegations of the TAC, which provide that it was in December 2009 that the Paine Parties "'threatened to sue FPC and Fox for allegedly diluting the Former Executives' interests'" and that these allegations are a judicial admission. (*id.* at 5). Defendant further contends that even if the dilution claims occurred subsequent to HCC's change in position, there is still no triable issue of fact because it is too speculative "to suggest that the 'dilution claim' would not have been made but for HCC's change of position ... especially when the TAC alleges that the Paine Parties 'threatened' to make the claim as early as December 2009" (*id.* at 6).

Defendant reiterates its arguments concerning the insufficiency of the Pulaski Affidavit and how Plaintiffs therefore failed to proffer evidence of an oral agreement by Defendant to provide the services alleged by Plaintiffs. In further support of its absolute right to assert its affirmative defenses and counterclaims because the TAC contained four new causes of action not joined by virtue of a responsive pleading at any time during this litigation (*id.* at 8), Defendant argues that as a result of Plaintiffs' completely optional filing,[2] ERP was entitled to respond as it saw fit, which included exercising its rights under New York law (as set forth in *Mendrzycki v Cricchio* [58 AD3d 171 [2d Dept 2008]) to assert whatever it wished under CPLR 3025(d) (*id.*). It is Defendant's position that Plaintiffs' argument that ERP is duty bound in its responsive pleadings to anticipate all of Plaintiffs' future pleadings has no basis in the law (*id.*). Defendant further argues that it does not matter that the tort claims may have been based on similar transactions or occurrences as the breach of contract claim (*id.*). In response to Plaintiffs' claims of prejudice, Defendant asserts that such claims ring hollow given that Plaintiffs are on their fifth pleading and "the fact that plaintiffs elected to join new tort causes of action in New York after plaintiffs had already pled the very same causes of action in an entirely new, duplicative lawsuit in California. A plaintiff that foments overlapping and duplicative lawsuits, apparently for strategic gain, should not be heard to complain when the victimized defendant exercises its procedural rights" (*id.* at 9, n10).

In further support of its argument that the 2012 Settlement unambiguously releases

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[2]In this regard, ERP asserts that "[n]o one forced plaintiffs to expand their pleading purportedly to 'conform to evidence,' or to re-plead the tort causes of action that they had pled against ERP in the California Action, *both* after this Court issued a trial readiness order" (*id.* at 8-9).

Defendant, Defendant argues that given that the word representative is defined as "'one that represents another as agent, deputy, substitute, or delegate usually invested with the authority of a principal,'" it cannot be disputed that ERP was the Paine Parties' representative when the release was signed. It is Defendant's position that it does not matter if ERP was FPC's representative in 2007 when various wrongful acts occurred since the release identifies the released parties as including "current or former ... representatives" and the actions covered by the release encompassed acts "'from the beginning of time to the Effective Date ...'" (*id.* at 11). Defendant further contends that Plaintiffs' claim that they need discovery to ascertain the parties' intent is without merit since "[t]hey themselves negotiated the settlement with the Paine Parties. Because no one is in a better position than plaintiffs to possess evidence as to whether the term 'representative' means something other than 'representative,' evidence which plaintiffs have failed to identify to date, their request to conduct additional discovery must be disregarded" (Def's Reply at 11).

Defendant reiterates its arguments concerning the lack of any post-termination duties (fiduciary or otherwise) by Defendant based on the *Pulte* decision and the Insurance Department's advisory opinion (*i.e.*, that the appearance of impropriety by side switching is not actionable). It is Defendant's position that it was Plaintiffs' "burden to establish an agreement on ERP's part to assume a claims duty following ERP's termination in December 2007" which they failed to do (*id.* at 14). Defendant distinguishes the cases on which Plaintiffs rely regarding agents' post termination fiduciary responsibilities as involving improper transfers of the principal's confidential information and that in this case, Plaintiffs' opposition to Defendant's motion for summary judgment did not "proffer [an] explanation as to the 'confidential information' belonging to plaintiffs that serves as the predicate for any alleged post-termination breach" (*id.*). Thus, it is Defendant's position that none of the cases on which Plaintiffs rely hold that an agent has a duty to continue to serve a principal in perpetuity and instead hold that there is a duty not to utilize certain information that creates clear questions of impropriety.

Finally, Defendant asserts that Plaintiffs' contention in their opposition that the issues before the Second Department were: (1) whether ERP owed fiduciary duties to Plaintiffs; and (2) whether ERP aided and abetted the Paine Parties' breach of fiduciary duties, with the ultimate issue before the Second Department being whether these duties continued past ERP's termination, is completely incorrect since the only issue before the Second Department was whether Plaintiffs had sufficiently pled their causes of action. Furthermore, Defendant contends that since Plaintiffs had not pled when and how ERP's broker relationship ended with Plaintiffs, the Second Department did not even address this issue. Thus, it is Defendant's position that contrary to Plaintiffs' argument, the Second Department did not rule that ERP owed fiduciary duties to Plaintiffs post-termination and, therefore, this is not law of the case.

PLAINTIFFS' MOTION SEQUENCE NO. 27

A. Plaintiffs' Contentions in Support of Their Motion

In support of their motion to strike and/or dismiss the new affirmative defenses and counterclaims, Plaintiffs submit: (1) an Affirmation of Andrew P. Steinmetz, Esq. dated September 25, 2018 ("Steinmetz Aff."), together with the exhibits annexed thereto; and (2) a Memorandum of Law dated September 25, 2018 ("Plfs' Mem.").

The sole purpose of the Steinmetz Aff. is to attach: (1) the relevant procedural history for *Mendrzycki v Cricchio,* Index No. 8704/2003; and (2) a true and correct copy of a Certificate of Ownership filed on behalf of HUB International Services, Inc. ("HUB"), which was accessed and downloaded from the website of the California Secretary of State on September 24, 2018. In their memorandum of law, Plaintiffs repeat most of the same arguments made in opposition to the branch of Defendant's motion to reargue with regard to this Court's determination concerning the propriety of the new affirmative defenses and counterclaims ERP interposed for the first time in response to the TAC which will not be repeated herein. According to Plaintiffs, their tort claims against ERP were extant for nine months at the outset of this case "[a]nd not once during multiple motions to dismiss or opposition to Plaintiffs' motion to replead, or on appeal, did ERP claim that Plaintiffs' claims were barred by release, culpable conduct, or lack of coverage under the HCC Policy" (Plf's Mem. at 2). It is Plaintiffs' position that to allow these new affirmative defenses and counterclaims to be interposed at this late date on the eve of trial "would be highly prejudicial to Plaintiffs and violate the CPLR. ERP's filing violates the law of the case doctrine and ERP is estopped from pursuing its Counterclaims and New Defenses" (*id.* at 2). In further support of their argument that they would suffer undue prejudice if the Court were to grant Defendant leave to file its counterclaims on the eve of trial, Plaintiffs rely on the fact that these counterclaims would necessarily reopen discovery in this action, and that such discovery would include, "the facts surrounding any disputes or proceedings between ERP and the Paine Parties concerning any breach of duty by ERP" as it would be relevant to "ERP's understanding of its own agency relationship with Plaintiffs and/or the Paine Parties" (Plf's Mem. at 7, n4). Relying on the procedural history of *Mendrzycki v Cricchio* (58 AD3d 171 [2d Dept 2008]), Plaintiffs argue that *Mendrzycki* is distinguishable because the amendment occurred: (1) to add the crucial additional fact that the plaintiff had died; and (2) to add a new cause of action for wrongful death. According to Plaintiffs, it was based on these crucial new additions, coupled with the fact that discovery was not complete and it was well in advance of trial, that the Second Department allowed defendant to amend to assert a new statute of limitations defense (Plf's Mem. at 9, n7).

With regard to the propriety of Defendant's Fourth Counterclaim for a declaratory judgment disputing coverage under the HCC policy, as well as the new 16th and 17th affirmative defenses (damages limited or not recoverable under applicable law; reduction/offset/account for other sources; and lack of coverage under operative policies), Plaintiffs argue that this counterclaim and the affirmative defenses are barred by equitable estoppel, law of the case, and the "mend the hold" doctrine. According to Plaintiffs, ERP should be estopped from arguing

Plaintiffs are not covered under the FPC Policies because it has advanced contrary positions since at least 2007 (*id.* at 12). In support, Plaintiffs rely on the evidence submitted in opposition to ERP's motion for summary judgment showing: (1) that ERP provided HCC and the Excess Carriers with notice on behalf of Plaintiffs in November 2007 and engaged in extensive communications with them with regard to the litigation thereunder; and (2) from May 2009 onward, ERP zealously lobbied HCC and the Excess Carriers to make payments to the Paine Parties pursuant to the FPC Policies. Based on their contention that Plaintiffs had superior standing to the Paine Parties vis-a-vis the relevant insurers' coverage decisions, Plaintiffs argue "[t]he advocacy ERP undertook on the Paine Parties' behalves should equitably estop ERP from now arguing that Plaintiffs were never entitled to coverage because such advocacy was premised on the availability of coverage for entities and persons not even included in the policy and made clear from the very face of the pleadings, not acting in an insured capacity. These circumstances reasonably led Plaintiffs to rely on ERP foregoing a coverage-based defense and that Plaintiffs need not plead a standalone negligent procurement action. Where a party's conduct induces such significant and substantial reliance, that party is estopped from disputing its earlier position" (*id.* at 14).

Plaintiffs further argue that ERP's positions that it has taken throughout this litigation also estops it from arguing Plaintiffs are not covered by the HCC Policy. In this regard, Plaintiffs assert that

> ERP has consistently taken the position that: (i) its only obligation was to procure appropriate coverage for Plaintiffs; (ii) it fully satisfied its obligations to do so; (iii) Plaintiffs had and have the obligation to pursue their rights under the HCC Policy and the Excess Policies; (iv) Plaintiffs' claims against ERP should be dismissed because there is coverage left in the excess tower; and (v) Plaintiffs would be failing to mitigate their damages if they did not pursue available insurance coverage (*id.* at 15).

Plaintiffs argue that as a "result of ERP's failure to raise coverage-based arguments, and HCC's settlement of the claims against it, Plaintiffs had no reason to assert a negligent procurement claim" and Plaintiff obtained no discovery (including expert discovery) related to ERP's duty to procure and coverage positions. As such, Plaintiffs contend that ERP's choice not to argue non-coverage results "in waiver under the 'mend the hold' doctrine" and forecloses ERP from raising coverage belatedly on grounds of equitable estoppel because Plaintiffs detrimentally relied on ERP's strategic decision (*id.* at 16).

In support of their argument that ERP is foreclosed by law of the case from asserting a coverage-based defense, Plaintiffs assert that "[w]hen ERP learned that HCC would exit the case after paying Plaintiffs $7 million to settle Plaintiffs' claims, ERP attempted for the first time to argue that Plaintiffs lacked coverage under the HCC Policy by trying to join HCC's motion for summary judgment that was about to be withdrawn with prejudice ... Recognizing this belated

'Hail Mary pass' for what it was, Justice Scheinkman promptly denied ERP's joinder motion ... ERP never moved for reargument or filed a notice of appeal" (*id.* at 16). Finally, Plaintiffs argue that their motion to strike should also be granted because ERP's counsel failed to advise this Court that "ERP merged with and into HUB International Insurance Services Inc. ('HUB'), and that, effective December 31, 2017, HUB 'assume[d] all of [ERP's] obligations pursuant to California Corporations Code Section 110" which is a breach of Defendant's counsel duty of candor and justifies the granting of Plaintiff's motion to strike (*id.* at 17). Alternatively, Plaintiff requests that if this Court does not grant its motion to strike, that it be granted the opportunity to move to dismiss the claims or defenses on the merits.

B. Defendant's Contentions in Opposition of Plaintiffs' Motion

In opposition to Plaintiffs' motion, Defendant submits: (1) an Affirmation of Marc L. Antonecchia, Esq. dated October 5, 2018 ("Antonechia Opp. Aff."); and (2) a Memorandum of Law dated October 5, 2018 ("Def's Opp. Mem.").

In its memorandum, Defendant first argues that the Court should deny Plaintiffs' motion because it was filed in contravention of: (1) Commercial Division Rule 24; (2) this Court's Practice Guide to the Commercial Division; and (3) Justice Scheinkman's September 26, 2016 Standing Order in this case which was that no further motion papers could be submitted absent prior leave of court. Defendant further points out that because Plaintiffs' arguments are almost the exact same arguments they made in opposition to Defendant's motion to reargue, this motion is just a means by which Plaintiffs are seeking to impermissibly file a sur-reply (Def's Opp. Mem. at 6).

As its second argument, Defendant refers to this Court's statements at two conferences held in April and May, 2018, wherein this Court acknowledged that it was under the impression from Justice Scheinkman's June 2017 Decision that the TAC was a mere supplementation – rather than an entirely new amended complaint – and, therefore, the Court may have erred when it decided in its April 2018 Decision that Defendant impermissibly amended its Answer to assert entirely new affirmative defenses and counterclaims. Defendant then repeats all of the arguments it made in support of its motion to reargue with regard to this aspect of the Court's April 2018 Decision, which will not be repeated herein. An additional argument ERP makes is that when Justice Scheinkman issued the June 2017 Decision permitting the amendment of the RSAC, the proposed TAC referenced in the June 2017 Decision was submitted by Plaintiffs as Exhibit 1 to the Affirmation of Reed R. Forbush, Esq. dated March 10, 2017 (Dkt. 306). According to Defendant, this exhibit contained three causes of action: (1) a cause of action for breach of contract against HCC; (2) a cause of action for breach of the implied covenant of good faith and fair dealing against HCC; and (3) a breach of contract cause of action against ERP. ERP asserts that therefore, Justice Scheinkman's June 2017 Decision did not address the four new tort causes of action that were unilaterally imposed later by Plaintiffs in their TAC. Defendant asserts that until it answered the TAC on September 28, 2017, issue was never joined on any tort cause of action and it was Plaintiffs' unilateral actions and disregard of court orders which has "created all

of the confusion and prejudice for the Court and ERP" (Def's Opp. Mem. at 10). Defendant contends that because the TAC went beyond Justice Scheinkman's June 2017 Decision by interposing the revived tort claims based on the Second Department's reversal of Justice Scheinkman's dismissal of Plaintiffs' tort claims against ERP, the TAC was more than a supplementation – it was an amendment – which based on controlling Second Department precedent, entitles Defendant to raise whatever affirmative defenses and counterclaims it pleases – *i.e.,* it is not limited to the affirmative defenses it interposed in its answer to the RSAC.

Defendant argues that Plaintiffs fail to cite to any authority to support their claim that "ERP's claims or defenses have to be 'distinctly responsive' to a particular portion of the TAC, or that they have to include those that could be 'raised in response to the background facts and breach of contract claim in the RSAC'" (Def's Opp. Mem. at 13, *quoting* Plf's Mem. at 3). According to Defendant, this argument is misplaced because no one forced Plaintiffs to expand their RSAC to include four new tort causes of action and "over a hundred new allegations claiming recovery of new categories of damages. No one forced plaintiffs to belatedly file an entirely new, wholly duplicative, action in California in which new and different plaintiffs are suing ERP, thereby giving rise to ERP's right to seek indemnity from FPC as asserted in ERP's counterclaim. Plaintiffs made their election, and ERP followed by exercising its rights under New York law to defend itself against the causes of action and allegations that the new TAC, and the California complaint, now pled" (*id.* at 13). It is Defendant's position that based on the Second Department's decision in *Mendrzycki, supra* (a) "an 'amended complaint is deemed to supersede an original complaint'"; (2) "'an answer to an amended complaint served pursuant to CPLR 3025(d) is in fact an original answer to the amended complaint, and thus, affirmative defenses raised in that answer are not limited to those in the original answer'"; and (3) "'[s]ince an amended complaint supplants the original complaint, it would unduly prejudice a defendant if it were bound by an original answer when the original complaint has no legal effect'" (*id., quoting Mendrzycki*, 58 AD3d at 174-175).

In response to Plaintiffs' arguments concerning Defendant's alleged waiver of its release defenses, Defendant asserts that this Court, in its April 2018 Decision, has already determined that Defendant did waive its release defense because Defendant's boilerplate waiver defense was sufficiently broad to cover release and, therefore, because Plaintiffs have neither sought reargument of this Court's April 2018 Decision nor appealed this decision, it is law of the case.

In response to Plaintiffs' estoppel arguments, Defendant points out that where as here, ERP has the absolute right to assert these defenses and counterclaims as its response to the TAC, there is no basis for estoppel. Defendant further asserts that by arguing that ERP waived certain affirmative defenses, including release, listed in CPLR 3018(b), Plaintiffs are improperly conflating "the waiver standard of CPLR 3211(a) with respect to certain defenses, such as lack of personal jurisdiction" (*id.* at 15, n9). According to Defendant, it is Plaintiffs who have put coverage at issue and, therefore, ERP has the right to prove that Plaintiffs did not meet their burden of proof on that issue "regardless of any affirmative defense pled or not pled in ERP's Answer to the TAC" (*id.* at 16). Defendant further disputes that it failed to preserve its coverage

defense because it alleged in response to the RSAC the defenses of failure to state a claim and failure to mitigate damages – *i.e.*, "[t]he absence of coverage for FPC, or the existence of potential coverage for Paine, results in a failure to state one or more causes of action asserted in the TAC.[3] Proof of coverage for FPC establishes a mitigation of damages defense" (Def's Opp. Mem. at 16).[4] Defendant also contends that "if it is proven at trial that FPC's alleged settlement dispute expenses incurred in FPC's litigation with Paine were always reimbursable under insurance, which plaintiffs have always alleged is the case, then plaintiffs have failed to mitigate their damages by foregoing reimbursement and seeking to recover reimbursable litigation expenses from ERP" (*id.* at 19). According to Defendant, Plaintiffs "cannot complain that mitigation by seeking insurance coverage imposes an 'unreasonable' duty on them, since they themselves initiated coverage in two jurisdictions" (*id.*). With regard to Plaintiffs' "mend the hold" argument, Defendant points out that the doctrine has not been applied in a New York case in almost 50 years and in any event, given that it simply "'limits a party's defenses for breaking a contract to those based on a prelitigation explanation for nonperformance given to the other party' ... ERP's pre-litigation and post-litigation position is unchanged, *i.e.*, there was no contract for Services as defined in the complaint, and ERP did not have post-termination duties to plaintiffs" (*id.* at 19-20, n11).

It is Defendant's position that Plaintiffs have failed to demonstrate that the claims and allegations set forth in the counterclaim cause them "extraordinary prejudice" because there is no prejudice to Plaintiffs by having to defend against the legal consequences of their own allegations set forth in the TAC and the California Complaint. According to Defendant, "[t]he counterclaim alleges unambiguously that ERP is prepared to demonstrate its right to indemnity from FPC based on the facts proven in discovery to date and the content of the allegations that plaintiffs have themselves elected to make recently in the TAC and the California Complaint" (*id.* at 22). Finally, in response to Plaintiffs' request that the new affirmative defenses and counterclaim be stricken based on ERP's failure to notify Plaintiffs and the Court with regard to the merger of ERP with HUB, ERP argues that it has not engaged in any wilful or contumacious conduct that would justify such a drastic remedy. Defendant further argues that Plaintiffs have known for many months about the corporate transaction between ERP and HUB. In support, Defendant

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[3]According to Defendant, "[i]f there is no coverage for FPC, or there is potential coverage for Paine, then plaintiffs have failed to state one or more of their causes of action because plaintiffs predicate recovery, at least in part or in the alternative, on matters such as their alleged 'lost payment of insurance benefits' (TAC ¶ 243), that 'ERP and HCC conspire[d] to exclude Plaintiffs from coverage' (TAC ¶5), or that the FPC Policies 'provided coverage only for activities undertaken on behalf of and for the benefit of FPC' (TAC ¶ 201)" (Def's Opp. Mem. at 18). Thus, it is Defendant's position that its affirmative defense of failure to state a cause of action "is more than sufficient to bar a claim of waiver or estoppel with regard to any coverage issues" (*id.* at 19).

[4]In support, Defendant quotes verbatim numerous factual allegations set forth in the TAC wherein coverage is raised (Def's Opp. Mem. at 16-18).

relies on the Antonecchia Opp. Aff. wherein he affirms that on June 13, 2018, counsel for the parties appeared for a Commercial Division Rule 24 Conference and during the conference, Plaintiffs' counsel Courtney Rockett, Esq. stated that she was aware that ERP was a part of HUB based on research she had done to discover this information (Antonecchia Opp. Aff. at ¶¶ 2-3). Antonecchia further affirms that the merger was reported in the financial press and that HUB participated in the recent mediation process.

C. Plaintiffs' Contentions in Further Support of Their Motion

In further support of their motion, Plaintiffs submit: (1) an Affirmation of Courtney R. Rockett, Esq. dated October 11, 2018, together with its attached exhibit ("Rockett Reply Aff."); (2) an Affirmation of Reed D. Forbush, Esq. dated October 11, 2018, together with its attached exhibits ("Forbush Reply Aff."); and (3) a reply memorandum dated October 11, 2018 ("Plfs' Reply").

In response to Defendant's contentions concerning her knowledge of the merger between HUB and ERP, Ms. Rockett affirms that in June 2017, after Justice Scheinkman granted Plaintiffs leave to file a TAC, Plaintiffs conducted research and concluded that HUB acquired a 100% ownership stake in ERP but ERP continued to exist as a separate corporate entity and a wholly-owned subsidiary of HUB, which caused Plaintiffs to file their TAC naming only ERP as Defendant. She further states that on July 18, 2018, before the September 25, 2018 mediation, the parties jointly filed an Alternative Dispute Resolution Initiation Form (NYSCEF Doc# 918) and ERP continued to identify itself as an existing corporation and in the space on the form that requests that the parties list any corporate parents or other affiliates, ERP listed only HUB International Limited (the corporate parent of HUB) and did not list HUB. Finally, Ms. Rockett contends that it was not until September 24, 2018 that Plaintiffs discovered for the first time a Certificate of Ownership on the California Secretary of State's online database (a true and correct copy of which is attached as Exhibit A) which reflects that effective December 31, 2017, ERP merged into HUB and that its separate corporate existence ceases to exist. She affirms that ERP's counsel never made any attempt to notify Plaintiffs or the Court of this material change in ERP. The purpose of the Forbush Reply Affirmation is to attach various documents referenced in Plfs' Reply, described further herein.

In response to Defendant's contentions that their motion violates Commercial Division Rule 24, Plaintiffs argue that it is not violative because it is a dispositive motion under CPLR 3211(a), 3211(b) and 3211(e). In any event, Plaintiffs contend that they complied with this Court's Rule and Commercial Division Rule 24 because the parties attended two in-court conferences on May 2 and June 13 as well as telephone conferences on June 18, 19, 26, and 29 and that during the May 2 and June 13 conferences, Plaintiffs advised that they intended on filing a motion to strike based on the untimeliness of the new counterclaims and affirmative defenses and the Court agreed that it would be the proper procedural vehicle. Plaintiffs acknowledge that the parties agreed to hold off filing the motion as they attempted to try to resolve by stipulation the issues involved in this motion and also attempted to mediate the case. According to Plaintiffs,

they "made clear at the June 13 court conference and subsequent teleconferences that if ERP were unwilling to resolve the issues by stipulation (and it is not), and if mediation were unsuccessful (which it was), Plaintiffs intended to file this motion. The Court concurred" (Plfs' Reply at 2). It is Plaintiffs' contention that given the foregoing, Defendant's position that there has to be a seventh conference before this application may be made is solely for the purpose of harassment and delay (*id.*).

Plaintiffs repeat their arguments concerning why Defendant should not be permitted to file its counterclaims on the eve of trial and how Defendant failed to even respond to Plaintiffs' arguments that CPLR 3025(d) has nothing to do with counterclaims since counterclaims are never required in an answer and are dealt with separately in CPLR 3011 and CPLR 3019. In response to Defendant's assertion that Plaintiffs have not shown the extraordinary prejudice required, Plaintiffs argue that instead, it is ERP who needs the Court's permission to file these counterclaims on the eve of trial by showing: (1) they are not palpably insufficient; (2) there is a reasonable excuse for the delay; and (3) Plaintiffs would not be prejudiced. According to Plaintiffs, ERP provides no explanation for why it could not have filed its counterclaims earlier. Plaintiffs assert that if the Court permits Defendant to file the counterclaims, they "should be severed and stayed pending trial because they would prejudice Plaintiffs, confuse the jury, inconvenience the Court, and may be rendered moot. After trial, any surviving counterclaims can proceed with Plaintiffs exercising their rights to (1) move to dismiss on the merits; (2) take discovery; and (3) move for summary judgment" (Plfs' Reply at 5).

According to Plaintiffs, Defendant is incorrect in its assessment that *Mendrzycki* somehow abrogates CPLR 3018 (c), 3211 and 3025 as the case "guarantees a defendant an unfettered right to assert affirmative defenses on the eve of trial that were long-ago waived – something no Appellate Division could ever do" (*id.* at 6-7). Plaintiffs further contend that *Mendrzycki* did not "grant defendants a sweeping right to assert brand-new affirmative defenses in an amended pleading where they were not necessary, were waived, and where the Court otherwise has the right to limit the filing" (*id.* at 7). Plaintiffs argue that "ERP does not even attempt to dispute that every Counterclaim and New Defense was ripe, applicable and responsive to Plaintiffs' breach of contract claim; it makes no attempt to show that any of them are uniquely responsive to Plaintiffs' new factual allegations or reinstated tort claims. Thus, as a matter of law under CPLR 3018(b), ERP waived its right to assert those defenses, and nothing in the CPLR or case law supports the notion that Plaintiffs' amended pleading somehow resurrected them" (*id.* at 8). Plaintiffs contend that permitting ERP to interpose the new affirmative defenses on the eve of trial would unduly prejudice Plaintiffs since they will have to choose between going to trial without the necessary discovery or delaying the resolution of this action.

Plaintiffs dispute Defendant's contention that this Court already determined that "ERP's pleading of a 'waiver' defense in its RSAC Answer was sufficient notice to Plaintiffs of ERP's release defense" since such a holding would "be contrary to the plain language of CPLR 3018(b) and 3211(e)" since both reference the defense of release but do not reference the defense of waiver. Based on this, "[t]he CPLR drafters ... required that plaintiffs receive *specific notice* of

release when pleaded as a defense" and "neither ERP's pleading nor its litigation conduct over the past four years put Plaintiffs on notice of a release defense based on the 2012 Settlement Agreement" (*id.* at 10). Plaintiffs conclude by arguing that Defendant waived its release defense by failing to plead it in accordance with CPLR 3018 and 3211(e).

In further support of its estoppel and "mend the hold" arguments, Plaintiffs contend that Defendant failed to respond to the following arguments it made in its motion papers: (1) ERP consistently took the position that Plaintiffs (like the Paine Parties) were entitled to coverage under the HCC and Excess Policies and that they must pursue their rights to coverage to mitigate their damages and ERP did so for strategic reasons since the alternative position could subject it to liability for negligent procurement; and (2) ERP's coverage based defenses are barred by the law of the case based on Justice Scheinkman's denial to ERP of the right to join HCC's motion for summary judgment, which was based, in part, on lack of coverage (*id.* at 11). Because Defendant failed to address these arguments, Plaintiffs argue that the Court should grant Plaintiffs' motion on this basis alone. Plaintiffs further refute Defendant's contention that the TAC put coverage in issue, and in any event, since those allegations were in all of the prior three pleadings, coverage would have been an issue from the outset of this action. Plaintiffs further point out that they were willing to sign a stipulation wherein they would agree that coverage is not an issue in this case. Plaintiffs refute Defendant's position that its prior defenses of failure to state a cause of action and mitigation were sufficient to give Plaintiffs notice of Defendant's coverage-based affirmative defenses. Plaintiffs further point out that if anything, the mitigation defense put Plaintiffs on notice of the exact opposite – that Plaintiffs had coverage (*id.* at 12).

Finally, in further support of their argument that their motion should be granted based on Defendant's counsel's failure to alert this Court and opposing counsel of the change in ERP's corporate existence (*i.e.*, its nonexistence as a separate corporation due to the merger) – Plaintiffs point out that Defendant concedes that it did not apprise the Court and opposing counsel of this fact. According to Plaintiffs, such failure is not a mere oversight, it is a violation of, *inter alia*, Defendant's counsel's duty of candor, and Defendant's counsel should have disclosed this fact in order for the Court and Plaintiffs' counsel to respond in a timely fashion.

DISCUSSION

DEFENDANT'S MOTION TO REARGUE

CPLR 2221(d) provides, in relevant part, that a motion for leave to reargue: (1) shall be identified specifically as such; (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and (3) shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. Moreover, it is well settled law that a motion for reargument is "not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *Marine Natl. Bank v National City Bank*, 59 NY 67, 73 [1974]; *American Trading Co. v Fish*, 87 Misc 2d 193 [Sup Ct, NY County 1975]). .

Defendant's request for reargument is based upon five different aspects of the Court's April 2018 Decision: (1) all statements, findings and rulings that reflect, incorporate or rely upon the notion that the TAC did not join new causes of action against ERP; (2) the failure to grant summary judgment based upon the broad release in the 2012 Settlement applicable to all "representatives" of the Paine Parties; (3) the conclusion that the *Pulte* decision and the New York Insurance Department's legal opinion do not reflect governing law in this case; (4) all statements, findings and rulings that reflect, incorporate, or rely upon the incompetent Pulaski Affidavit; and (5) the failure to grant summary judgment based on the absence of any evidence capable of raising a triable issue regarding the proximate cause of Plaintiffs' alleged Settlement Evasion Expenses.

The Court turns to the first basis for Defendant's reargument, which is that the Court was in error when it ruled that the TAC was a mere supplementation (April 2018 Decision at 43-44). The Court's finding that the TAC was not an amended complaint and was only a supplemented complaint was based on a statement made by Justice Scheinkman in his June 2017 Decision granting Plaintiffs' motion to amend wherein he stated that the proposed TAC was a mere supplementation of the allegations of the SAC to incorporate facts revealed by the parties' discovery. Based on its finding that the TAC was not an amended complaint, this Court found that ERP's answer to the TAC, which added the new affirmative defenses and counterclaims, had not been filed as of right. As a result of this finding, the Court agreed with Plaintiffs that because ERP had failed to include the defense of release in its prior answer (or previously move to dismiss pursuant to CPLR 3211), ERP could not raise this defense in connection with its motion for summary judgment. With regard to the newly interposed counterclaims, the Court found that they too had been improperly interposed, but because Justice Scheinkman had previously denied the branch of Plaintiffs' opposition/cross-motion which sought to strike these counterclaims, this Court stated that it would hold a Rule 24 conference on April 18, 2018 to address Plaintiffs' right to move to strike at a future date.

Upon further review, the Court agrees with ERP that the procedural posture of the litigation supports a finding that the TAC was not merely a supplementation of the RSAC but instead was an amended complaint, which afforded Defendant the right to amend its answer and interpose its affirmative defenses (as of right) and counterclaims (permissively). In this regard, the Court was unaware that there were no tort claims in the RSAC and that joinder of issue on the tort claims occurred for the first time by Defendant's answer to the TAC at the end of September 2017. Thus, the operative pleading in this matter for purposes of discovery was the RSAC, which contained a single cause of action for breach of contract against ERP and two contract causes of action against HCC. Because the RSAC did not include any of tort causes of action, ERP was not required to submit an answer defending against such claims, which were entirely different and raised different defenses from the breach of contract claim. Since the TAC contained four new tort causes of action for fraud, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and aiding and abetting fraud, it is an amended pleading and not a

supplemental pleading and ERP was permitted to plead new affirmative defenses[5] as a matter of right (*see* CPLR 3025; *R&G Brenner Income Tax Consultants v Gilmartin,* 166 AD3d 685, 688 [2d Dept 2018] ["'When an amended complaint has been served, it supersedes the original complaint and becomes the only complaint in the case'"], *quoting St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.,* 170 AD2d 957, 958 [4th Dept 1991; *see also Marston v Westinghouse Elec. & Mfg. Co.*, 188 AD 900, 900 [2d Dept 1919] ["When a complaint is amended it takes the place of the original complaint, and the defendant has the right to answer as he shall see fit. It is not within the power of the court to require that defendant's answer to the complaint so amended shall be the same as its answer to the original complaint"]). This would include its affirmative defense of release even if Plaintiffs are correct and Defendant's waiver affirmative defense was insufficient to plead release (*Mendrzycki v Cricchio*, 58 AD3d 171 [2d Dept 2008]; *Ficorp, Ltd., supra*). While any counterclaim is permissive,[6] the Court believes that Defendant was entitled to assert the counterclaims given the procedural changes in this case discussed, *infra.* In *St. Lawrence Explosives Corp., supra,* the Fourth Department explained that because the complaint had been amended, "defendants' original answer has no effect and a new responsive pleading must be substituted for the original answer ... Defendants are not confined to answering the amended pleading ... and the amended answer may contain new allegations in their defenses and counterclaims. Furthermore, even if defendants were not entitled, as a matter of right, to amend their counterclaims, it is well established that absent prejudice or surprise, leave to amend pleadings 'shall be freely given'" (*St. Lawrence Explosives Corp., supra* 170 AD2d at 958; *see*

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[5]The Court cannot find a waiver of Defendant's right to assert the affirmative defense of release because Defendant did not move to dismiss the tort claims in its first motion to dismiss based on a claim of release. It is well settled that although the failure to interpose the affirmative release in an answer or in a motion to dismiss pursuant to CPLR 3211 results in its waiver, "it can [nevertheless] be raised in an amended answer in the absence of prejudice" (*Ficorp, Ltd. v Gourian*, 263 AD2d 392, 393 [1st Dept 1999], *lv dismissed in part, denied in part* 94 NY2d 889 [2000]; *see also DCA Advertising, Inc. v Fox Group, Inc.*, 2 AD3d 173 [1st Dept 2003] [affirmative defense of novation not waived even though not asserted in answer]). The Court finds Plaintiffs' reliance on *Boulay v Olympic Flame, Inc.* (165 AD2d 191 [3d Dept 1991]) misplaced as that case involved a waiver of a personal jurisdiction defense pursuant to CPLR 3211(e) based on a defendant's failure to assert it in its original answer or motion to dismiss. Here, Defendant is entitled to amend its answer as of right. Any prejudice to Plaintiffs in the form of lack of disclosure will be ameliorated by the reopening of discovery – either by a *vacatur* of the Note of Issue or an agreement on targeted post-Note of Issue disclosure – which will be discussed at the conference scheduled herein (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 [1st Dept 2015]).

[6]While all counterclaims are permissive, the Court sees no reason why that alters the complexion of the procedural posture of this case insofar as the TAC was an amended complaint to which Defendant was entitled to respond both with new affirmative defenses and new counterclaims (even if the counterclaims are only permissive). The Court sees no point in requiring Defendant to bring a separate action with regard to these counterclaims.

also Westinghouse Elec. Supply Co. v Pyramid Champlain Co., 193 AD2d 928 [3d Dept 1993]). "A defendant may use as a counterclaim any claim she has against the plaintiff whether related or not to the plaintiff's claim" (*Kane v Kane*, 163 AD2d 568, 571 [2d Dept 1990]). The purpose behind CPLR 3019(a)'s broad provision concerning the proper subject matters for counterclaims is to avoid multiplicity of suits and allow determination of all controversies between litigants in one action. Indeed, the only condition to the counterclaim's interposition is whether it can be conveniently and fairly determined in connection with the cause of action (*Panzer v Panzer*, 274 AD 940 [2d Dept 1948]; *David J. Hodder & Son, Inc. v Pennetto*, 32 Misc 2d 764, 767 [Sup Ct Westchester County 1961] ["[a] counterclaim is always subject to the requirement that it can be conveniently and justly determined with the plaintiff's cause of action ...."]). "The passage of time alone, without a further showing of prejudice, is insufficient to deny leave to amend a pleading" (*Eng v DiCarlo*, 79 AD2d 1018, 1018 [2d Dept 1981]). To show prejudice, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]).

Plaintiffs' reliance on cases such as *Trataros Constr., Inc. v New York City School Constr. Auth.* (46 AD3d 874 [2d Dept 2007]) is misplaced. In *Trataros*, the Appellate Division, Second Department affirmed the trial court's ruling denying defendant's motion for leave to amend its answer to assert defenses and counterclaims on the eve of trial. Here, a trial is not scheduled and while discovery has been closed, there is no reason why this Court could not either vacate the note of issue or allow some targeted post-note disclosure. This case has been unduly protracted based on the scorched-earth approach that has been taken by both sides. Plaintiffs are on their fifth pleading, There have been at least two appeals which resulted in a markedly different pleading than the RSAC which was limited to contract causes of action and which governed the pre-trial proceedings in this case. HCC settled out with Plaintiffs for $7 million in May 2017 and the action was discontinued against them in July 2017. The HCC settlement necessarily changed the nature of Defendant's defensive posture since before HCC settled, Defendant was relying on HCC to champion the defense of Plaintiffs' non-coverage. The HCC settlement is the predicate for Defendant's new Eighteenth and Nineteenth Affirmative Defenses, which could not have been raised prior to the HCC Settlement. In addition, Plaintiffs (as well as other parties related to Plaintiffs) have since sued ERP and the excess carriers in California and the Complaint in that action contains many of the same allegations as found in the TAC as well as similar causes of action (albeit related to the excess policies). Plaintiffs were likely forced to institute the California action to prevent Defendant from being successful in this action with regard to its mitigation defenses. Given these procedural differences, and given the fact that Defendant's filing of the new affirmative defenses (at a minimum) were made as of right based on Plaintiffs' filing of an amended complaint, the cases on which Plaintiffs rely are readily distinguishable and not controlling of Defendant's right to interpose its new affirmative defenses and counterclaims. Here, given the procedural machinations that have occurred in this case, the fact that Defendant's waiver affirmative defense could be read broadly to encompass release (*Brodeur v Hayes*, 305 AD2d 754 [3d Dept 2003]), the fact that Defendant would likely be afforded the opportunity to amend even if it had not amended as of right (and therefore, release was not waived (*Ficorp, Ltd., supra*), fairness dictates that Defendant be permitted to assert the

new affirmative defenses and counterclaims now *(Brodeur, supra; Atlantic Mut. Ins. Co. v Greater N.Y. Mut. Ins. Co.*, 271 AD2d 278 [3d Dept 2003]).

The Court does not agree that because Defendant bore witness to the FAC and the proposed SAC that included the tort causes of action, and because many of the factual allegations of the TAC were present in the Original Complaint, the FAC and the SAC, Defendant should have interposed these affirmative defenses and counterclaims from the outset. The Court agrees with Defendant that the change in the complaint resulting from the Second Department's August 2017 Decisions necessitated a change in its defenses that had been interposed in response to the RSAC. These technically new[7] claims as well as the California lawsuit gave rise to Defendant's counterclaims. As discussed *supra,* the Court also does not agree that Defendant waived its right to assert its release defense by failing to include it in its first motion to dismiss. In addition, as discussed *infra,* the Court does not agree with Plaintiffs' estoppel arguments concerning Defendant's affirmative defenses and counterclaims involving lack of coverage. For the most part, the affirmative defenses and counterclaims which ERP interposed in its answer to the TAC were irrelevant to the operative complaint in this action, which was limited to a breach of contract cause of action against Defendant. It was only after the Second Department's affirmative rulings on the viability of Plaintiffs' tort causes of action, four years after this action began and after the close of discovery, that Defendant had any cause to bring these issues into the case. An answer to an amended complaint is an original answer and affirmative defenses and counterclaims raised in an answer are not limited to those asserted in the original answer (*see Marston*; *St. Lawrence Explosives Corp., supra*). Thus, Plaintiff's argument that discovery is closed and Defendant has been well aware of Plaintiffs' allegations is misplaced (*see* CPLR 3025 [d] [an answer to an amended complaint is in fact an original answer to the amended complaint, and thus affirmative defenses raised in that answer are not limited to those asserted in the original answer]; *see also Mendrzycki, supra*; *Halmar Distribs., Inc. v Approved Mfg. Corp.*, 49 AD2d 841 [1st Dept 1975] [court held that an amended complaint having been served, it superseded the original complaint and became the only complaint in the case]). Accordingly, since the Court finds that the TAC was indeed an amended complaint and not merely a supplementation of the RSAC, ERP was permitted to file the new affirmative defenses and counterclaims in response to the TAC.

However, simply because Defendant was permitted to file the new affirmative defense of release as a matter of right in its answer to the TAC does not mean that this Court erred in refusing to grant summary judgment to Defendant based on Defendant's newly interposed release defense. It is undisputed that Defendant's prior answer did not explicitly include release as an affirmative defense. Therefore, the first time Plaintiffs were aware that Defendant was asserting such a defense was when Defendant filed its answer to the TAC in September 2017, which was

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[7]The Court recognizes that these claims are old in that they were extant for approximately the first nine months of the action. But these claims were ultimately dismissed and Defendant was not required to answer them until September 2017, after they were reinstated or granted leave to be asserted by the Second Department's August 2017 Decisions.

swiftly followed by Defendant's motion for summary judgment, which included release as a basis for summary judgment. The Court finds no error in its ruling that Defendant should not be permitted to move on a newly asserted defense for which Plaintiffs had no opportunity to conduct discovery and, therefore, its inclusion as a basis for summary judgment involved unfair surprise to Plaintiffs (*Franco v G. Michael Cab Corp.*, 71 AD3d 1082 [2d Dept 2010]; *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 [1st Dept 2015]; *Furlo v Cheek*, 20 AD2d 939 [3d Dept 1964]; *Krohn v Steinlauf*, 11 AD2d 695 [2d Dept 1960]). Despite its ruling that Defendant could not use release as a basis for dismissal in its summary judgment motion, the Court nevertheless addressed the defense on its merits and found that: (1) there were triable issues of fact over whether ERP was acting as the Paine Parties' representative with regard to the bad acts given Plaintiffs' position that as their broker concerning the FCP Policies, ERP could not act as the Paine Parties' representative; and (2) even if there were no questions of fact as to whether ERP was the Paine Parties' representative for the bad acts following the BOR letter, and the release unambiguously released it from the acts it performed as the Paine Parties' representative, there were other bad acts prior to the BOR Letter for which Defendant could be held liable which would not be covered by the Release. Therefore, even if the release defense had been properly raised, Defendant was not entitled to summary judgment. It is well settled that "'[i]n construing a general release it is appropriate to look to the controversy being settled and purpose for which the release was executed [,] ... [and] 'a release may not be read to cover matters that the parties did not desire or intend to dispose of'" (*Bugel v WPS Niagara Prop., Inc.*, 19 AD3d 1081 [4th Dept 2005]; *BB&S Treated Lumber Co. v Groundwater Tech., Inc.*, 256 AD2d 430 [2d Dept 1998], *lv dismissed* 93 NY2d 958 [1999]; *Humphrey & Vandervoort v C-Kitchens, Inc.*, 198 AD2d 840 [4th Dept 1993]; *Phoenix Assur. Co. of NY v C.A. Shea & Co.*, 237 AD2d 157 [1st Dept 1997]; *Senate Ins. Co. v Ezick*, 279 AD2d 746 [3d Dept 2011]). It is Plaintiffs' position that Defendant's interpretation of the Release would yield absurd results. While the Court is not revisiting its April 2018 Decision on this issue, Plaintiffs should certainly be afforded the opportunity to do some discovery concerning the execution of the 2012 Settlement so that they may argue that the release was not intended to release the Paine Parties' representatives in a dispute unrelated to the controversy settled by the 2012 Settlement.[8]

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[8]"Although the effect of a general release, in the absence of fraud or mutual mistake, cannot be limited or curtailed ... its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Cahill v Regan*, 5 NY2d 292, 299 [1959]; *see also Burnside 711 LLC v Amerada Hess Corp.*, 109 AD3d 860, 861 [2d Dept 2013]; *Desiderio v Geico Gen. Ins. Co.*, 107 AD3d 662, 663 [2d Dept 2013];*Wechsler v Diamond Sugar Co.*, 29 AD3d 681, 682 [2d Dept 2006]). There is no distinction between New York and Delaware law and the courts in Delaware hold that "if third parties, or parties that are not signatories to a release agreement, wish to avail themselves of a general release, the terms must be crystal clear and unambiguous in its inclusion of that person among the parties released" (*Alston v Alexander*, 2011 WL 5335289 at *3 [Del Super Ct 2011]).

Addressing the third prong of ERP's motion to reargue, which is that this Court erred in concluding that the *Pulte* decision and the New York Insurance Department's legal opinion do not reflect governing law in this case, the Court finds that Defendant is impermissibly seeking a second bite at the summary judgment apple and it has not established that this Court overlooked or misapprehended that there were questions of fact surrounding whether a special relationship existed between ERP and Plaintiffs such that a broker cannot side with the adversary to its former client to usurp a benefit that is subject to dispute without at least advising its prior client of its activities. Although the Court agrees with ERP that the federal court in the *Pulte* decision and the New York Insurance Department recognize that claims duties cannot "lie in wait" indefinitely following the real and/or practical end of a broker's business relationship with a client, as set forth in detail in the April 2018 Decision (pp. 52-55), this Court determined from the papers submitted that there were triable issues of fact as to whether ERP had a duty to Plaintiffs and whether there was a breach of that duty. Accordingly, this branch of ERP's motion to reargue shall be denied.

Regarding Defendant's argument that the Court erred in considering the affidavit of Jay Pulaski sworn to May 31, 2017 since he has no credible personal knowledge of what occurred prior to May 2008, the Court again believes that Defendant is impermissibly seeking a second bite at the summary judgment apple since it did not raise the competence of the Pulaski Affidavit in its reply (and its response to Plaintiffs' Rule 19 Statement) that were submitted in further support of its motion for summary judgment and it should not be permitted to raise it now in an effort to change this Court's April 2017 Decision (*see Board of Managers of Marbury Club Condo. v. Marbury Corners, LLC,* 2011 WL 1235471, at *1 [Sup Ct, Westchester County Jan. 24, 2011] [Scheinkman, J.]). But even if Defendant had raised the admissibility of Pulaski's averments in its reply, it would not change the Court's April 2018 Decision since Pulaski is competent to testify as to facts based on his review of FPC's records and, in any event, the facts the Court referenced in its April 2018 Decision where the Pulaski Affidavit was cited were also predicated on facts introduced through other witnesses and/or documents. Thus, even if the Court were to strike all references to the Pulaski Affidavit, it would not be sufficient to eliminate all evidence favorable to Plaintiffs concerning the scope of ERP's duties to them which supported this Court's finding that summary judgment was inappropriate as there were triable issues of fact.[9]

Lastly, the Court denies the branch of Defendant's motion to reargue based on its

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[9]This evidence included: (1) ERP's efforts on FPC's behalf even after the BOR Letter; (2) ERP's failure to notify Plaintiffs when the insurers requested information in January 2008 whether the insured intended to pursue such claims; (2) ERP's unilateral decision to (without authorization from a legitimate FPC representative) advise the insurers that Plaintiffs did not intend to pursue their claims; ERP's unsuccessful attempt to add FPM III to the FPC Policies; and (3) the evidence which could lead to an inference that ERP had chosen to align itself with the Paine Parties both before and after the BOR Letter and collude with them to obtain the insurance proceeds.

contention that this Court erred in deciding that there were triable issues of fact over whether Plaintiffs' Settlement Evasion Expenses in defending the motions and action brought by the Paine Parties were proximately caused by Defendant's tortious acts. In its April 2018 Decision, the Court clearly stated that Plaintiffs presented evidence that ERP colluded with the Paine Parties to conceal information that ERP was under a duty to provide to Plaintiffs in an effort to prevent Plaintiffs from learning about the Paine Parties' activities. The crux of Plaintiffs' claim is that *ERP*'s breach of contract, its fraud, its breach of fiduciary duty, and its aiding and abetting the Paine parties' breach of fiduciary duty, were substantial factors in causing Plaintiffs to incur millions of dollars defending against the Paine parties' allegedly frivolous litigation. The Court pointed to evidence supporting Plaintiffs' claims that ERP's actions were a substantial factor in the Paine Parties' success in obtaining the proceeds of the HCC Policy and some of the proceeds of the Excess Policies. Defendant's argument that the Court merely relied upon the timing of events, in other words, that one event preceded another, as legally insufficient to prove that the preceding event "caused" the succeeding event misses the point of the April 2018 Decision. The Court referenced the timing to substantiate the fact that there was further circumstantial evidence in the form of timing to support an inference that the dilution actions, which were brought within a month of HCC's reverse of its no-pay position, were brought as a result of the Paine parties' expectation that they would receive the proceeds of the HCC Policy to fund that litigation.[10] Defendant's pulling this argument out of context and analyzing it in a vacuum hardly supports its argument. Accordingly, the Court shall also deny this branch of Defendant's motion to reargue since whether or not Defendant's actions or inactions were a substantial factor in bringing about Plaintiffs' Settlement Evasion Expenses is a question for the trier of fact.

PLAINTIFFS' MOTION TO STRIKE/DISMISS

To begin with, the Court does not agree with Defendant's contention that Plaintiffs did not

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[10]The whole predicate for this branch of Defendant's motion is that given the timing (*i.e.*, that three of the four motions by the Paine Parties had been brought before the Paine Parties learned of HCC's reversal in its no pay determination), whatever ERP may have done to help change that position did not cause Plaintiffs to incur their expenses. This argument misses the mark. First, the Paine Parties began their coverage dispute with HCC in May 2009, which was at the same time the third motion was filed and before the fourth motion was filed in December 2009. The fact that the Paine Parties were pursuing reimbursement from HCC could have fueled these motions based on their expectation, given the assistance they were receiving from ERP, that they would be covered. Second, even without this expectation, based purely on timing, it is undisputed that the dilution claims were brought subsequent to HCC's change in its coverage position in February 2010. And if Plaintiffs had known that a notice of claim (or litigation) had been filed on their behalf, they may have pursued their own coverage, which also could impacted the damages Plaintiffs are alleged to have suffered in connection with the litigations with the Paine Parties. Accordingly, Defendant did not establish that its conduct could not have proximately caused Plaintiffs' Settlement Evasion Expenses.

receive permission to file this motion. In its April 2018 Decision, the Court specifically stated that at the upcoming conference that was being scheduled, the Court would address whether Plaintiffs should be granted leave to file a motion to strike the new affirmative defenses and counterclaims. This Court and counsel attempted to try to resolve the issues with regard to the new affirmative defenses and counterclaims and it was understood that if these discussions and the mediation were not successful, that Plaintiffs could make their motion. Accordingly, Commercial Division Rule 24, this Court's Practice Guide, and Justice Scheinkman's standing order with regard to receipt of court permission prior the filing of a motion were complied with.

Here, Plaintiffs are moving to strike the new affirmative defenses and counterclaims based on Defendant's failure to comply with CPLR 3025. Plaintiffs also rely extensively on CPLR 3018(b), which requires a party to plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading.[11] However, as set forth above, since the amended answer was in response to an amended complaint, it is not a nullity because it was served without leave (CPLR 3025[d]). As stated above, Defendant amended as of right to assert its new affirmative defenses and based on this Court's reopening of discovery with regard to the release affirmative defense and Defendant's coverage defenses and counterclaims, and provided Plaintiffs are afforded the right to amend their TAC to assert a negligent procurement claim, the only prejudice facing Plaintiffs is a delay in the start of the trial. In the interest of judicial economy and fairness (at least with regard to counterclaim relating to the coverage issues), Defendant had the right to file the counterclaims. CPLR 3025(b) 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 the parties. Leave shall be freely given upon such terms as may be just." "In the absence of prejudice or surprise to the opposing party, leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Mirro v City of New York*, 159 AD3d 964, 967 [2d Dept 2018]). The passage of time alone, without a further showing of prejudice, is insufficient to deny leave to amend a pleading (*Eng v DiCarlo*, 79 AD2d 1018 [2d Dept 1981]). To show prejudice, "there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has been prevented from taking some measure in support of [its] position" (*Loomis v Civeta Corrino Constr. Corp.*, 54 NY2d 18, 23 [1981]). Given that coverage was an issue in this case throughout the time HCC was a defendant, it can hardly be prejudicial to Plaintiffs to have coverage rear its ugly head again in connection with Defendant's affirmative defense and counterclaim. Of course, fairness dictates that Plaintiffs be granted the right to amend their TAC to add a claim for

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[11]In addition, Plaintiffs request that the Court strike the new affirmative defenses and counterclaims based on Defendant's willful and contumacious failure to apprise the Court of the merger of ERP into HUB. However, Defendant's counsel has provided some evidence that he understood Plaintiffs to be on notice of the change in ownership of Defendant. The Court expects the parties to have a stipulation with regard to the change in Defendant's legal existence and whether HUB needs to be joined in this action by the time of the conference scheduled herein.

negligent procurement based on ERP's new affirmative defenses and counterclaim.[12] At the conference scheduled herein, the Court hopes that the issue over Plaintiffs' right to amend to assert a claim of negligent procurement may be resolved by stipulation rather than further motion practice.

Turning to the issue of Defendant's counterclaims, as noted by the First Department:

> The distinction between affirmative defenses and counterclaims set forth in CPRL 3018(b) and 3019(1) are not merely semantic, these are substantive differences. The distinction has been succinctly explained as follows:
>
> "facts pleaded which controvert the plaintiff's claim and serve merely to defeat it as a cause of action constitute a defense, and are inconsistent with the legal idea of a counterclaim, which is a separate and distinct cause of action. On the other hand, a claim that does not defeat plaintiff's cause of action, but constitutes an independent cause of action for the defendant, should be pleaded as a counterclaim, and not as an affirmative defense" (*P.J.P. Mechanical Corp. v Commerce and Industry Ins. Co.*, 65 AD3d 195, 200 [1st Dept 2009], *quoting* 84 NY Jur 2d, Pleading § 166; *see also* CPLR 3019 [a counterclaim is a cause of action asserted by a defendant against a plaintiff]).[13]

As set forth *supra*, it is well settled that "[a] defendant may use as a counterclaim any claim she has against the plaintiff whether related or not to the plaintiff's claim" (*Kane, supa* 163 AD2d at 571). Here, the Court shall allow Defendant's counterclaims to remain in the action. However, because Defendant's counterclaims for indemnification, negligent misrepresentation and intentional misrepresentation against Plaintiffs for their acts (as well as the acts of the other plaintiffs in the California action) for bringing this action and the California action against

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[12]In its April 2018 Decision, the Court struck Plaintiffs' allegations included without leave of court to its breach of fiduciary duty claim revolving around a new-found claim of negligent procurement against Defendant (April 2018 Decision at 44). The Court, however, struck the allegations without prejudice to Plaintiffs' right to seek leave to amend to include such allegations (*id., citing American Cleaners Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD2d 792 [2d Dept 2009]).

[13]Pleadings which simply controvert the plaintiff's claims and serve to defeat a cause of action are inadequate to constitute a counterclaim, which must present a separate and distinct cause of action (see *Matter of Carvel*, 2001 WL 36402129 [Sur Ct, Westchester County 2001], *lv dismissed* 2 AD3d 870 [2d Dept 2003]; *Rappaport v Davis*, 26 Misc 2d 871 [Sup Ct, Nassau County 1960]).

Defendant may be rendered moot by a favorable verdict for Plaintiffs in this action,[14] and because while the counterclaims (for the most part) arise out of Defendant's claims that the factual allegations alleged against it are false, they do not involve the same legal issues as Plaintiffs' claims. Therefore, because the interests of judicial economy and consistency would not be served by permitting them to delay the trial and confuse the jury, the Court shall sever and stay Defendant's First, Second and Third Counterclaims pursuant to CPLR 603[15] (*Admiral Indem. Co. v Popular Plumbing & Heating Corp.*, 127 AD3d 419 [1st Dept 2015]; *County of Westchester v White Plains Ave., LLC*, 105 AD3d 690 [2d Dept 2013]; *D'Abreau v American Bankers Ins. Co. of Fla.*, 261 AD2d 501 [2d Dept 1999]). The Court is dubious as to the legal viability of these counterclaims. But even if they are legally viable as counterclaims (as opposed to simply defenses to Plaintiffs' TAC), the confusion and prejudice[16] that would result at trial if Defendant's indemnification counterclaim and its claims for negligent misrepresentation and fraud were permitted to proceed with this action, as well as the delay that would result from the discovery that would be necessary with regard to these counterclaims that Defendant had knowledge of (at least with regard to the allegations in the RSAC concerning Defendant's alleged breach of contract), are sufficient reasons for this Court to sever and stay these claims (*Blechman v I.J. Peiser's and Sons, Inc.*, 186 AD2d 50 [1st Dept 1992]; *Santos v Sure Iron Works*, 166 AD2d 571 [2d Dept 1990]; *Garcia v Gesher Realty Corp.*, 280 AD2d 440 [1st Dept 2001]; *Freeland v New York Communications Ctr. Assoc.*, 193 AD2d 511 [1st Dept 1993]).

Finally, the Court does not agree with Plaintiffs' arguments that Defendant's Fourth Counterclaim and its 16th and 17th Affirmative Defenses (the coverage-based counterclaim and affirmative defenses) are barred by the doctrines of equitable estoppel, law of the case and "mend the hold."[17] To establish equitable estoppel, a party must prove that it relied upon another's

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[14]The Court envisions that many of Defendant's contentions asserted in the counterclaims will be incorporated in the jury interrogatories as they are defenses to Plaintiffs' claims. Thus, for the most part, Defendant is contending that any breaches of duty that may have occurred (although it vehemently denies any such breaches) were caused by Plaintiffs' negligence or fraud.

[15]CPLR 603 provides "[i]n furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claim, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of others" (CPLR 603).

[16]For example, to the extent Defendant's counterclaim arises from the allegations contained in the Complaint in the California action, there would need to be a whole trial on the veracity of those allegations concerning Defendant's actions concerning the excess policies which are not at issue in this case.

[17]The Court is not prepared to find that coverage is not an issue in this case given the numerous references to Plaintiffs' right to coverage and the fact that the Paine Parties were not entitled to coverage. Furthermore, it appears that Defendant is convinced that the policies at issue would not provide coverage for Plaintiffs' Settlement Evasion Expenses thereby thwarting

actions, its reliance was justifiable, and that, in consequence of such reliance, it prejudicially changed its position (*Town of Hempstead v Incorporated Vil. of Freeport*, 15 AD3d 567 [2d Dept 2005], *lv denied* 5 NY3d 711 [2005]). While Plaintiffs make a cogent argument that Defendant's current position is contrary to the position it took from 2007 concerning both Plaintiffs and the Paine Parties' right to coverage (although at the outset ERP opined that coverage would be excluded based on the insured v insured exclusion), as well as the position it has taken throughout this litigation, and while Plaintiffs have asserted 61 affirmative defenses to Defendant's Counterclaims (including estoppel), Plaintiffs have not established this defense as a matter of law (*Besicorp Group, Inc. v Enowitz*, 235 AD2d 761, 764 [3d Dept 1997] ["Because the issues of reliance an estoppel ... are ones of fact, it was improper for the Supreme Court to grant summary judgment in favor of defendant on the issue of plaintiff's affirmative defense of equitable estoppel"]; *see also European Am. Bank v Mr. Wemonick, Ltd.*, 160 AD2d 905 [2d Dept 1990] [estoppel a question of fact]). The fact that Defendant has taken inconsistent positions during this action is inconclusive because Plaintiffs have: (1) failed to show that Defendant made judicial admissions which would preclude its new defenses or counterclaim; and (2) failed to establish a basis for judicial estoppel. The doctrine of judicial estoppel requires that: (1) the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and (2) the prior inconsistent position must have been adopted by the tribunal in some manner (*Matter of 67 Vestry Tenants Assn. v Raab,* 172 Misc 2d 214, 219 [Sup Ct, NY County 1997]; *see Kalikow 78/79 Co. v State of N.Y.*, 174 AD2d 7, 11 [1st Dept 1992], *lv dismissed* 79 NY2d 1040 [1992]). Plaintiffs have failed to satisfy either prong for judicial estoppel. And while a party is bound by prior judicial admissions (*Bogoni v Friedlander,* 197 AD2d 281 [1st Dept 1994] *lv denied* 84 NY2d 803 [1994]; *see also Kwiecinski v Chung Hwang,* 65 AD3d 1443 [3d Dept 2009]; *Imprimis Investors LLC v Insight Venture Management, Inc.*, 300 AD2d 109 [1st Dept 2002]), the Court does not find the amendment in Defendant's answer to be inherently incredible and any inconsistency with its prior pleading may be explored at trial.

The Court also sees no basis for ERP to be barred from pursuing its coverage-based defenses and counterclaim based on Justice Scheinkman's refusal to allow it to join the summary judgment motion that had been filed by HCC prior to HCC's settlement. It appears that as soon as ERP heard that HCC was settling with Plaintiffs, on April 25, 2017, ERP filed a notice of joinder advising the Court that it was joining the first argument set forth in HCC's motion for summary judgment concerning Plaintiffs' alleged non-coverage because HCC's "factual and legal arguments ... are fatal to plaintiffs' allegations of damages as to ERP" (Notice of Joinder, NYSCEF Doc. # 564). In response to ERP's Notice of Joinder, Justice Scheinkman, in a single line at the top of the Notice of Joinder, denied ERP the right to join HCC's motion because it was "[n]ot acceptable to the extent that HCC's summary judgment motion is being withdrawn" (based on the settlement) (NYSCEF Doc. # 565). In this regard, the Court agrees with ERP's

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Plaintiffs' right to damages in this case. Furthermore, the prejudice of having coverage as an issue in this case is somewhat reduced given that coverage was an issue up until the HCC settlement in May 2017 and Plaintiffs even had an expert with regard to coverage and their right to recover their Settlement Evasion Expenses.

assessment, which is that Justice Scheinkman would not allow ERP to join a motion that was being withdrawn as the result of a settlement. Justice Scheinkman was not addressing the merits of whether ERP had the right to make such arguments based on the fact that its pleading did not contain a coverage-based defense or counterclaim, Therefore, law of the case is no bar to ERP's coverage-based defenses or counterclaim.

Finally, the Court agrees with Defendant's position that the "mend the hold" doctrine has no applicability to this case since the doctrine involves limiting a breaching party's defense to a contract claim to the party's pre-litigation explanation for the breach and that here, ERP's pre- and post- litigation explanation has always been that it did not owe the duties Plaintiffs' claim.

Based on the foregoing, Plaintiffs' motion to strike shall be denied. However, the Court shall sever and stay Defendant's First, Second and Third Counterclaims until the conclusion of the trial. Counsel shall appear for a conference on January 16, 2019 at 9:30 a.m. for the purpose of resolving: (1) Plaintiffs' right to amend to assert a claim of negligent procurement; (2) the opening up of discovery limited to the issues raised as a result of the amended answer and the future Fourth Amended Complaint of Plaintiffs – *i.e.,* release, coverage and negligent procurement; and (3) whether HUB should be added or replace ERP as a defendant in this action.

CONCLUSION

The Court has read the following papers with regard to these motions:

MOTION SEQ. # 26

1) Notice of Motion; Affirmation of Marc L. Antonecchia, Esq. dated May 23, 2018, together with the exhibits annexed thereto; Memorandum of Law dated May 9. 2018;

2) Affirmation of Andew P. Steinmetz, Esq. dated June 1, 2018, together with the exhibits annexed thereto; Affirmation of Reed Forbush, Esq. dated June 1, 2018, together with the exhibits annexed thereto; and Memorandum of Law dated June 1, 2008;

3) Reply Memorandum of Law dated June 7, 2018.

MOTION SEQ. #27

1) Notice of Motion; Affirmation of Andrew P. Steinmetz, Esq. dated September 25, 2018, together with the exhibits annexed thereto; Memorandum of Law dated September 25, 2018;

2) Affirmation in Opposition of Marc L. Antonecchia, Esq. dated October 5, 2018; ERP's Memorandum of Law in Opposition to Plaintiffs' Motion to Strike and/or Dismiss ERP's Counterclaims and Defenses dated October 5, 2018;

3) Affirmation of Courtney R. Rockett, Esq. dated October 11, 2018, together with the exhibit annexed thereto; Affirmation of Reed D. Forbush, Esq. dated October 11, 2018, together with the exhibits annexed thereto;

4) Reply Memorandum of Law dated October 11, 2018; Corrected Affirmation of Courtney R. Rockett, Esq. dated October 17, 2018..

Based upon the foregoing, it is hereby

ORDERED that the motion by Equity Risk Partners, Inc. to reargue this Court's April 6, 2018 Decision is denied; and it is further

ORDERED that the motion by Plaintiffs Fox Paine & Company LLC and Saul Fox to strike and/or dismiss the 8th, 9th, 12th, 13th, 15th, 16th and 17th Affirmative Defenses and the Counterclaims from ERP's Answer to the Third Amended Complaint is denied; and it is further

ORDERED that the First, Second and Third Counterclaims of Equity Risk Partners, Inc. are hereby severed and stayed pending the conclusion of the trial in this action; and it is further

ORDERED that the parties are directed to appear before the Court on January 16, 2019 at 9:30 a.m to discuss further proceedings in this action as set forth more fully herein.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
January 7 , 2019

ENTER:

HON. GRETCHEN WALSH, J.S.C.