

IN THE, COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR. NEW CASTLE COUNTY

MADISON REALTY PARTNERS 7, LLC, a Delaware Limited Liability Company, individually and derivatively as a General Partner of ISA Partnership Liquidity Investors, MADISON AVENUE INVESTMENT PARTNERS LLC, a Delaware Limited Liability Company, INVESTMENT SERVICES OF AMERICA, LLC, a Delaware Limited Liability Company, and THE MADISON AVENUE CAPITAL GROUP II, LLC, a Delaware Limited Liability Company,

Plaintiffs,

and

C.A. No. 18094

ISA PARTNERSHIP LIQUIDITY INVESTORS, a Delaware General Partnership,

Nominal Plaintiff,

v.

AG ISA, LLC, a Delaware Limited Liability Company, and ANGELO GORDON & CO., L.P., a Delaware Limited Partnership,

Defendants.

03:00

MEMORANDUM OPINION

Date Submitted: January 12, 2001

Date Decided: April 17, 2001

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JACOBS, VICE CHANCELLOR

A general partnership had two general partners, one responsible for managing the partnership, and the other for providing the capital funding. In March 2000, the funding partner refused to provide any further capital. The managing partner claimed that that refusal was wrongful, because the partnership agreement required 120 days advance notice before funding could be terminated, and no such notice had been given. The funding partner contended that no such notice was required, because the partnership agreement entitled the funding partner to cease making capital contributions without notice once its funding reached the \$10 million level. The managing partner brought this lawsuit against the funding partner and others, asserting (inter alia) claims for breaches of contract and fiduciary duty. The funding partner and its co-defendant moved to dismiss the complaint for failure to state a claim upon which relief may be granted. This is the Opinion of the Court on that motion.

I. BACKGROUND FACTS

This factual background is taken from the well-pled allegations of the complaint. ISA Partnership Liquidity Investors (the “Partnership”) is a Delaware general partnership formed to purchase, hold, and manage limited partnership interests and similar securities (“Investment Interests”). The Partnership’s two general partners entered into a partnership agreement (the

“Partnership Agreement”), setting forth the rules governing the Partnership. Madison Realty Partners 7, LLC (“Madison”), is the primary plaintiff and the managing general partner responsible for managing the Partnership, including selecting Investment Interests for the Partnership. The primary defendant is AG ISA, LLC (“AGGP”), which is the other (non-managing) general partner. AGGP, which is a subsidiary of Angelo Gordon & Co., L.P. (“Angelo Gordon”), a Delaware limited liability company,¹ was also the exclusive provider of capital to the Partnership. Under the Partnership Agreement, AGGP was required to make such capital contributions as Madison requested. The Partnership Agreement provided, however, that AGGP could cease making capital contributions upon 120 days advance notice to Madison (the “120-Day notice provision”).

In connection with the formation of the Partnership, Madison caused the Partnership to enter into certain agreements with two affiliates, Investment Services of America, LLC (“ISA”) and The Madison Avenue Capital Group II, LLC (“MACG II”). Those affiliates are Madison’s co-plaintiffs in this lawsuit. These Agreements (the “Services Agreements”) required ISA and MACG II to furnish the Partnership with personnel,

¹ Angelo Gordon is a New York based hedge fund with approximately \$3 billion under management.

services, and infrastructure that were essential both to operate, and to acquire Investment Interests for, the Partnership. As a condition of entering into the Services Agreements, ISA and MACG II required AGGP to agree to the 120-Day notice provision described above.

In September 1997, Madison Avenue Investment Partners, LLC (“MAIP”), which is a Madison affiliate, and defendant Angelo Gordon, which holds a controlling interest in AGGP,, entered into an agreement (the “ISA Umbrella Agreement”) in which Angelo Gordon undertook to cause AGGP to fulfill its obligations under the Partnership Agreement.*

During March 2000, affiliates of the plaintiffs and the defendants met to negotiate a possible investment, unrelated to the Partnership, in a MAIP affiliate. During those negotiations, the defendants demanded that the MAIP affiliates permit them to invest on terms that were unacceptable to the MAIP affiliates, and to which the MAIP affiliates refused to accede. According to the complaint, in an effort to exert wrongful pressure on MAIP’s affiliates, Angelo Gordon responded by causing AGGP to threaten that it (AGGP) would immediately cease making capital contributions to the Partnership, despite the 120-Day notice requirement. From and after that point, AGGP

² MAIP is a Madison affiliate. Madison, MAIP, ISA, MACG II and the Partnership are referred to collectively as the “plaintiffs.” AGGP and Angelo Gordon are collectively referred to as the “defendants.”

refused to make capital contributions to the Partnership, and Angelo Gordon failed to cause AGGP to make the required capital contributions.

Although the plaintiffs claim that the 120-Day notice provision has no exceptions, the defendants assert that the Partnership Agreement permitted them to cease providing capital funding when their total contribution reached the \$10 million level, as occurred here. That latter contention gives rise to a threshold issue, which is addressed in Part III A, infra, of this Opinion.

II. THE PARTIES CONTENTIONS AND THE APPLICABLE LAW

The complaint alleges eight claims. The first four are based on AGGP's refusal to make capital contributions without first having given the 120-Day notice allegedly required by the Partnership Agreement. That conduct is claimed to have violated AGGP's contractual duties under the Partnership Agreement (Count I), AGGP's fiduciary obligations to Madison (Count II), AGGP's fiduciary obligations to the Partnership (Count III), and AGGP's contractual duties to ISA and MACG II under the Services Agreements (Count IV).

The remaining four claims are asserted against Angelo Gordon. The plaintiffs claim that by failing to cause AGGP to fulfill its funding obligations under the Partnership Agreement, and/or by causing AGGP to

cease contributing capital without giving the required 120 days notice, Angelo Gordon (1) breached the Umbrella Agreement (Count V), (2) aided and abetted. AGGP's breach of fiduciary duty to Madison (Count VI) and to the Partnership (Count VII), and (3) tortiously interfered with the Services Agreements (Count VIII).

The defendants respond that none of these Counts states an actionable claim. Defendants urge that because Counts I, III, IV, V, VII and VIII are claims on behalf of the Partnership, they are expressly foreclosed by the Partnership Agreement, which prohibits either partner from commencing a lawsuit on behalf of the Partnership without the other partner's permission. For that reason, defendants urge, those Counts must be dismissed.

Alternatively, the defendants argue that Counts I and V fail to state a cognizable claim for 'breach of contract, because neither the Partnership Agreement nor the Umbrella Agreement confers any enforceable rights upon the plaintiffs as a group. Counts II and III are also claimed to be dismissable, because they are improper attempts to seek relief based on breach of fiduciary duty theories for conduct that is specifically addressed by the Partnership Agreement and is covered by the breach of contract claims alleged in the complaint. Under Delaware law, defendants argue, fiduciary

duty claims cannot proceed where the underlying conduct is addressed by parallel breach of contract claims.

The defendants further argue that Count IV must be dismissed, because the defendants were not parties to the Services Agreements, and therefore could not have breached them. Moreover, the defendants urge, the claims against Angelo Gordon for aiding and abetting AGGP's breaches of fiduciary duty fail as a matter of law, because the complaint alleges no cognizable underlying claim for breach of fiduciary duty. Lastly, the defendants contend that the complaint fails to state a legally sufficient claim for tortious interference with contract.

* * *

Under Court of Chancery Rule 12(b)(6), a complaint must be dismissed if the facts alleged in the complaint, when taken as true and considered in a light most favorable to the plaintiff, fail to state a cognizable legal claim that would entitle the plaintiff to the relief sought.³ All eight claims alleged in the complaint are evaluated in light of that procedural standard.

In this Opinion, the issues are analyzed in the following order: first, the Court considers the threshold issue of whether a written draft of the

³ Solomon v. Pathe Communications Corp., Del. Supr., 672 A.2d 35, 38-39 (1996).

Partnership Agreement submitted by the defendants can be considered on this motion. Second, the Court addresses the question of the plaintiffs' standing to bring this action. Finally, the Court considers each of the defendants' specific arguments for dismissal.

III. ANALYSIS

A. May the Court Consider the Partnership Agreement in Deciding This Motion?

A threshold issue that must first be decided (because it could be outcome determinative) is whether a written, unsigned draft of the Partnership Agreement, submitted by the defendants but disputed by the plaintiffs, can be considered on this Rule 12(b)(6) dismissal motion. What appears to give rise to this issue is the (apparent) fact that no fully executed original or copy of the Partnership Agreement is available.

On a motion to dismiss, documents that are incorporated by reference into the complaint will normally be considered.⁴ The question is whether the alleged unsigned copy of the Partnership Agreement submitted by the defendants was "incorporated by reference." The defendants argue that it was, because the document they submitted is the only available written evidence of the Partnership Agreement. Moreover, defendants urge, it

⁴ In re Santa Fe Pacific Shareholder Litig., Del. Supr., 669 A.2d 59 (1995).

would be inequitable to allow the plaintiffs to plead the Partnership Agreement in their complaint as a basis for asserting claims against the defendants, while at the same time prohibiting the defendants from relying on the same document to challenge the legal sufficiency of those claims. The plaintiffs concede that the Partnership Agreement, as executed, is integral to their claims, but they insist that the unsigned draft submitted by the defendants does not accurately reflect the Partnership Agreement as finally executed. Because the submitted draft does not accurately memorialize the Partnership Agreement actually agreed to by Madison and AGGP, the plaintiffs argue that it cannot be deemed “incorporated by reference” into the complaint, and therefore cannot be considered on this motion to dismiss.⁵

On this issue, the plaintiffs are correct. In their complaint the plaintiffs allege certain terms of the Partnership Agreement, but they also dispute the defendants’ contention that the submitted draft constitutes the definitive Partnership Agreement. Whether the defendants’ draft constitutes the actual, definitive Partnership Agreement presents a fact dispute that cannot be resolved without an evidentiary hearing. But, we are -not yet at that stage. Because the plaintiffi claim not to be relying on the submitted

⁵ In re Santa Fe Pacific Shareholder Litig., 669 A.2d at 69-70.

draft agreement, I must assume for purposes of this motion that the plaintiffs' pled version of the Partnership Agreement is the correct one. That is because at this procedural stage the Court is required to take the pled facts as true in deciding whether a legally valid claim is stated.⁶ Accordingly, on this motion the Court will not take cognizance of the draft Partnership Agreement submitted by the defendants.⁷

B. Do the Plaintiffs Have Standing To Commence This Litigation?

The defendants next argue that the plaintiffs lack standing because the Partnership Agreement prohibits one partner from bringing a lawsuit on behalf of the Partnership without the consent of all (in this case, both) partners. Because AGGP never consented to the filing of this action, the defendants urge that Counts I, ID, IV, V, VII and VIII must be dismissed. That argument, however, rests on terms that are claimed to exist in the draft Partnership Agreement which, as previously held, can not be considered in

⁶ See Solomon, Del. Supr., 672 A.2d at 38-39.

⁷ I recognize the potential inequity in allowing the plaintiffs to rely on their alleged version of the Partnership Agreement to support their claim that the defendants breached the 120-day provision, while simultaneously disregarding what is claimed to be the only written evidence of other asserted terms of the contract upon which the defendants rely in challenging the sufficiency of that claim. As stated, however, the procedural rules that apply at the pleading stage dictate that result. If at a later stage the Court finds that the plaintiffs' position is not forthright and that the draft Partnership Agreement is, in fact, the definitive Partnership Agreement, the defendants have remedies, including the imposition of appropriate sanctions by this Court.

deciding this motion.. Because it cannot be inferred from the complaint that the “consent-of-all-partners” provision is a term of the Partnership Agreement!, the defendants’ standing argument predicated on that provision must fail at this stage.

C. Are the Non-Signatory Plaintiffs Third Party Beneficiaries of the Partnership and Umbrella Agreements?

It is undisputed that Madison, as a signatory to the Partnership Agreement, has standing to sue for a breach of that Agreement. Similarly, MAIP, as a signatory to the Umbrella Agreement, has standing to sue for a breach of the Umbrella Agreement. For that reason, Counts I and V, which allege that AGGP breached the Partnership and Umbrella Agreements, cannot be dismissed. Remaining in dispute:, however, is whether the complaint alleges facts from which it can be inferred that the non-signatory plaintiffs have standing to enforce those agreements as intended third party beneficiaries, I conclude that it does not.

The defendants argue that the non-signatory plaintiffs are not third-party beneficiaries. Rather, because they are at most incidental beneficiaries, Counts I and V fail to state cognizable breach of contract claims by the non-signatory plaintiffs. In addition, the defendants contend that because the complaint avers that some but not all of the plaintiffs were parties to the agreements, the plaintiffs as a group are not a protected class of

beneficiaries having enforceable rights under the Partnership Agreement or the Umbrella Agreement. Therefore, defendants conclude, the plaintiffs cannot claim a breach of either contract.*

The plaintiffs respond that although the non-signatory plaintiffs are not direct parties to the Agreements, they nonetheless have enforceable rights as third party beneficiaries. In addition (plaintiffs urge), Madison's claim for breach of the Partnership Agreement and MAIP's claim for breach of the Umbrella Agreement are not dismissable on this ground, since Madison and MAIP are parties to those agreements.

As a general matter, only a party to a contract has enforceable rights under, and may sue for breach of, that contract." To qualify as a third party beneficiary of a contract, (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing (obligation to

⁸ The defendants claim that both contract claims must be dismissed in their entirety because in order for a claim to be adequately pled, *all* of the plaintiffs must have a right to advance the claim. The defendants cite no case law supporting this contention, and because the plaintiffs which were signatories to the relevant documents have a clear right to assert a claim against the defendants for breach thereof, the claims will not be dismissed. For that reason, the only issue that the Court need address is whether the non-signatory plaintiffs have a legally cognizable claim to occupy third-party beneficiary status.

⁹ Insituform of N. Am., Inc. v. Chandler, Del. Ch., 534 A.2d 257, 270 (1987) (holding that non-signatories to a contract have no rights under the contract, and thus no standing to assert claims under the contract).

that person,, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.”

In this context, Illustration 3 to Comment b to § 302 of the Restatement (Second.) of Contracts is helpful in understanding the difference between an intended and an incidental beneficiary:

B promises A to pay whatever debts A may incur in a certain undertaking. A incurs in the undertaking debts to C, D and E. If the promise is . . . a promise that B will pay C, D and E, they are intended beneficiaries. . . ; if the money is to be paid to A in order that he may be provided with money to pay C, D and E, they are at most incidental beneficiaries.”

That analytical framework aids the Court's assessment of the third-party beneficiary status of the non-signatory plaintiffs under the Partnership and the Umbrella Agreements, respectively.

1. The Partnership Agreement

With respect to the contract claims based on the Partnership Agreement, I conclude that the non-signatory plaintiffs, ISA and MACG II, have not alleged facts showing that they occupied any status other than as

¹⁰ See Guardian Constr. Co. v. Tetra Tech Richardson, Inc., Del. Supr., 583 A.2d 1378, 1386-87 (1990) (“[I]n order for third-party beneficiary rights to be created, not only is it necessary that performance of the contract confer a benefit upon a third person that was intended, but the conferring of the beneficial effect on such third-party, whether it be creditor or donee, should be a material part of the contract's purpose”).

¹¹ Restatement (Second) of Contracts § 302 cmt. b, illus. 3 (1979).

incidental beneficiaries of that agreement. The complaint does not allege that those entities were intended third party beneficiaries, nor can that conclusion be inferred from the facts that are pled. The Partnership Agreement was entered into to create and establish the terms for governing the Partnership, which “was organized with the limited purpose to purchase . . . hold and otherwise manage and exercise all the rights of an owner of limited partnership interests and other similar equity or any debt securities . . .”¹² It may be the case that all the parties knew that the Partnership would rely on the capital calls as a source of payment of monies owed to ISA and MACG II under the Services Agreements. But, that fact, without more, does not make ISA and MACG II third party beneficiaries under the Partnership Agreement. At best, those entities were expected creditors of the Partnership, and as such, they would have no more standing to sue AGGP for breach of the Partnership Agreement than would the local utility company or the office supply store. Under Delaware law, expected creditors of a partnership are incidental beneficiaries, and are not entitled to sue for breach of the Partnership Agreement.¹³

¹² Complaint, at ¶ 2.

¹³ Guardian Constr. Co., 583 A.2d at 1386-87; Restatement (Second) of Contracts § 302 cmt. b, illus. 3 (1979). The claim that MAIP is an intended beneficiary of the Partnership Agreement also fails. The complaint does not allege that MAIP was specifically intended to receive a benefit that resulted from the Partnership, nor does it identify any such

2. The Umbrella Agreement

The Umbrella Agreement presents the same issue, i.e., were Madison, ISA and M.ACG II intended third party beneficiaries of Angelo Gordon's promise to cause AGGP to make capital contributions to the Partnership? I find, for the reasons previously discussed, that they were not.

The parties to the Umbrella Agreement were MAIP and Angelo Gordon. That Agreement required Angelo Gordon to cause AGGP to fulfill its obligations under the Partnership Agreement, specifically, to make the required capital contributions. Madison, as the other general partner of the Partnership, would share in the proceeds of those contributions, and ISA and MACG II would receive some of those proceeds in the form of payments under the Services Agreements. Those facts, however, do not elevate Madison, ISA and MACG II to a status other than incidental beneficiary.¹⁴ Because Madison, ISA and MACG II are not intended third party beneficiaries of the Umbrella Agreement, they have no enforceable claims for breach of that contract.

benefit. For these reasons, ISA, MACG II and MAIP are not third party beneficiaries of the Partnership Agreement.

¹⁴ See Restatement (Second) of Contracts § 302 cmt. b, illus. 3 (1979).

D. May the Plaintiffs Prosecute Breach of Fiduciary Duty Claims That Restate Their Claims For Breach of Contract?

The plaintiffs next claim that AGGP's failure to make capital contributions without giving the 120-Day notice required by the Partnership Agreement was a breach of the fiduciary obligation that AGGP owed to both Madison (Count II) and to the Partnership (Count III).

The defendants contend that these breach of fiduciary duty claims amount to improper attempts to seek a recovery under alternative theories for AGGP's alleged breach of the Partnership Agreement. Those alternative theories, defendants say, cannot coexist with the breach of contract claims. The plaintiffs respond that the two sets of claims can coexist, because the fiduciary claims in Counts II and III are independent from the breach of contract claims. The issue presented is whether the breach of fiduciary duty claims asserted in Counts II and III can be maintained independently of the breach of contract claims alleged in Counts I and V. I conclude that they cannot.

In Gale v. Bershad,¹⁵ this Court dismissed a breach of fiduciary duty claim in circumstances where the defendants' alleged wrongdoing was already addressed by a breach of contract claim. The Bershad Court held

¹⁵ Del. Ch., C.A. No. 15714, Jacobs, V.C. (Mar. 3, 1998).

that “[t]o allow a fiduciary duty claim to coexist in parallel with [a contractual] claim, would undermine the primacy of contract law over fiduciary law in matters involving . . . contractual rights and obligations.”¹⁶ In this case, the contract and fiduciary claims overlap completely since they are based on the same underlying conduct. Indeed, the complaint uses identical conduct as the basis for both legal claims.¹⁷ As this Court has held, if the dispute “relate[s] to obligations ‘expressly treated . . .’ by contract [, it] will be governed by contract principles.”¹⁸ Here, the fiduciary claims relate to obligations that are expressly treated by the Partnership Agreement and are the subject of breach of contract claims in the complaint. Accordingly, the fiduciary claims alleged in Counts II and III must be dismissed.”

¹⁶ Id.

¹⁷ Compare Complaint, at ¶ 17 (The refusal by [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement is a violation of the Partnership Agreement) with Complaint, at ¶ 20 (the refusal by [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement is a breach of the fiduciary obligations owed by [AGGP] to [Madison]).

¹⁸ Moore Bus. Forms, Inc. v. Cordant Holdings, Corp., Del. Ch., C.A. No. 13911, Jacobs, V.C., Mem. Op. at 11-12 (Nov. 2, 1995).

¹⁹ The plaintiffs’ claim against Angelo Gordon for aiding and abetting AGGP’s breaches of fiduciary duty must also be dismissed because there is no legally sufficient underlying claim for breach of fiduciary duty against AGGP. Moore Business Forms, Inc., at 12 (dismissing claim for aiding and abetting breach of fiduciary duty because “no cognizable breach of fiduciary duty is stated”).

E. Have the Plaintiffs Pled Adequate Claims For Tortious Interference?

1. Count VIII

Count VIII alleges that Angelo Gordon caused AGGP to cease making capital contributions without providing the 120-day notice in order to further Angelo Gordon's own goals and objectives. That conduct, plaintiffs claim, tortiously interfered with the Services Agreements between the Partnership and ISA and MACG. The defendants argue that those allegations do not state a legally sufficient claim for tortious interference.

To state a claim for tortious interference with contract, a plaintiff must plead facts that demonstrate the existence of: “(1) a valid contract, (2) about which defendant has knowledge, (3) an intentional act by defendant that is a significant factor in causing the breach of the [contract], (4) done without justification, and (5) which causes injury.”²⁰ The defendants argue that the plaintiffs have not pled facts sufficient to demonstrate that (a) the defendants' conduct was a significant factor in causing the Partnership to breach the Services Agreements, and that (b) the defendants ceased contributing capital without justification.

²⁰ Boyer v. Wilmington Materials, Inc., Del. Ch., C.A. No. 12549, Allen, C. (June 27, 1997).

The plaintiffs respond that they have adequately pled each and all of the elements of tortious interference. They argue specifically that the complaint can be fairly read to show that the Partnership relied on the continued capital contributions as a source from which to pay ISA and MACG II for conducting the Partnership's day-to-day operations under the Services Agreements. Because the Partnership lost its funding without the 120-day notice, it lacked sufficient time to search for an alternate funding source. As a result, the Partnership was unable to meet its payment requirements under the Services Agreements, and ISA and MACG II lost income. Those facts, the plaintiffs urge, establish that the cessation of capital contributions was a significant factor in causing that economic loss.²¹

Moreover, the plaintiffs contend that they have pled facts establishing that the defendants' actions were without justification. The plaintiffs point to paragraphs 12 and 13 of the complaint, which allege that the defendants attempted to coerce MAIP's affiliates during the negotiations, and acted in retaliation for the affiliates' refusal to grant the defendants the investment terms they demanded.

I conclude that the complaint sufficiently alleges that the defendants' termination of capital contributions was a significant factor causing the

²¹ See generally, Complaint at ¶¶ 6, 9, 10, 13, 14, 15.

Partnership to breach the Services Agreement. The complaint alleges that Angelo Gordon caused AGGP to advise Madison that it would cease making capital contributions, and that thereafter AGGP refused to make the capital contributions. The complaint further alleges that (i) AGGP was the exclusive provider of capital to the Partnership, (ii) AGGP's provision of capital and the 120-day notice provision were essential to enable the Partnership to pay for the services being rendered to it under the Services Agreements, (iii) the funding ceased, and (iv) as a result, the Partnership, ISA and MACG II lost the full benefits of the Services Agreements.

The absence of "justification" for Angelo Gordon's refusal to require AGGP to continue making the capital contributions and to respect the 120-Day notice provision is also adequately pled. The defendants' justification argument is that once AGGP had furnished \$10 million of capital to the Partnership, it was legally entitled to cease making contributions, irrespective of the 120-day notice provision. This argument, however, is predicated upon the unsigned draft Partnership Agreement which the Court has found cannot be considered on this motion. If at a later stage it is determined that that provision was applicable and gave the defendants that termination right, the tortious interference claim against Angelo Gordon will

ultimately fail. At this stage, however, the claim must be allowed to proceed.

Because the plaintiffs have pled legally sufficient tortious interference claims, the defendants' motion to dismiss those claims is denied.

2. Count IV

In Count IV, the Partnership, ISA and MACG II seek money damages for AGGP's alleged breach of the Partnership Agreement. The basis of their claim is that "[t]he failure of [AGGP] to make Capital Contributions without providing the 120-Day Notice pursuant to the Partnership Agreement has caused the Partnership to be in breach of its obligation to ISA and MACG II under the Services Agreements."²² The plaintiffs characterize this claim as one for tortious interference with contract, and argue, for the reasons previously discussed, that it should not be dismissed.

The defendants (characterize Count IV as a claim for breach of contract, and argue that (as thus characterized) the claim must fail as a matter of law for three reasons. First, the defendants contend that the complaint does not allege that AGGP or Angelo Gordon are parties to the Services Agreements; therefore, AGGP and Angelo Gordon cannot be held liable to the Partnership, ISA or MACG II for any breach of those

²² Complaint, at ¶ 26.

Agreements. Second, ISA and MACG II are not alleged to be parties to the Partnership Agreement, for which reason their claims (which in essence are claims for breach of the Partnership Agreement) must fail as a matter of law. Third, the only possible wrongdoing alleged in Count IV involves an alleged breach of the Partnership Agreement by AGGP alone, but the plaintiffs' claim on that Count is directed against all "defendants." Defendants argue that the plaintiffs cannot seek a recovery from all of the defendants where only one of them is a party to the contract allegedly breached.

I find that Count IV is fairly characterized as a claim for tortious interference with contract, essentially identical to that alleged in Count VIII. The only difference is that the Count IV claim is directed against AGGP instead of Angelo Gordon. The analysis that governs Count VIII applies equally to Count IV, for which reason the defendants' motion to dismiss Count IV will be denied.

IV. CONCLUSION

For the reasons discussed, the defendants' motion to dismiss is GRANTED as to those portions of Counts I and V that allege claims by the non-signatory plaintiffs for breach of the Partnership and Umbrella Agreements; and is also GRANTED as to the entirety of Counts II, III, VI and VII. The motion is DENIED as to the entirety of Counts IV and VIII,

and as to those portions of Counts I and V that allege claims by the signatory plaintiffs. Counsel shall submit an implementing form of order.