Fox Paine & Co., LLC v Houston Cas. Co.
2014 NY Slip Op 33727(U)
November 24, 2014
Supreme Court, Westchester County
Docket Number: 52607/2014
Judge: Alan D. Scheinkman
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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
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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

Plaintiffs,

-against-

HOUSTON CASUALTY COMPANY, PROFESSIONAL INDEMNITY AGENCY, INC. and EQUITY RISK PARTNERS, INC.,

Defendants.

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Index No. 52607/2014
Motion Date: 8/8/14
SEQ ## 3, 4

DECISION & ORDER

Scheinkman, J:

Defendant Equity Risk Partners, Inc. ("EPA") moves pursuant to CPLR 3211(a)(7) and 3016 to dismiss the First Amended Complaint ("FAC") of Plaintiffs' Fox Paine & Company, LLC ("FPC") and Saul A. Fox ("Fox") (together "Plaintiffs") (Seq. No. 3).

Defendants Houston Casualty Company ("HCC") and Professional Indemnity Agency, Inc. ("PIA") (together "Insurer Defendants") move pursuant to CPLR 3211(a)(1), 3211(a)(7), 3211(a)(5), 3211(a)(10) and 3016 to dismiss the FAC (Seq No. 4).

Plaintiffs oppose the motions, except that they do not oppose dismissal of the Ninth Cause of Action, as to which they purport to withdraw it.

The motions have been consolidated for purposes of deliberation and determination.

THE FACTUAL AND PROCEDURAL HISTORY

This action arises out of the disintegration of a relationship between equal partners in a private equity management firm, FPC – Fox and W. Dexter Paine, III ("Paine"). Fox was FPC's founder and its CEO and Paine was its President during the period 1997 through December 2007.

[* 2]

Plaintiffs contend that Paine and certain executives of FPC, including Amy Ghisletta (FPC's CFO), began to engage in actions deleterious to FPC's interests when in 2006, they shifted their allegiances to Paine and to the new private equity management firm he formed at that time – Paine & Partners, LLC ("P&P"). This break in the relationship between Fox and Paine caused numerous litigations and arbitrations between FPC and Fox on one side, and the Paine faction on the other.

This particular action involves Fox's and FPC's claims that the Paine faction (referred to herein as the "Paine Parties"[1]), together with Fox/FPC's insurance broker/agent ERP, Fox and FPC's insurer, HCC and HCC's agent, PIA, conspired with one another and kept FPC and Fox in the dark as to the Paine faction's successful efforts to access $10 million in insurance proceeds available under Private Equity Professional Insurance Policies ("PE Polices") issued to FPC (with Fox being an additional insured under the Policies).

This Court's first encounter with the action was through the first round of motions to dismiss filed by HCC, PIA and ERP. At the conference held by this Court on May 22, 2014 to determine whether discovery should be stayed, the Court was advised that Plaintiffs had amended as of right, thereby mooting the extant motions to dismiss, but the Court was advised that Defendants wished to renew their motions. The Court set a briefing schedule and a follow-up conference for July 10, 2014 in order to decide whether discovery would be stayed pending the renewed motions to dismiss. However, prior to the July 10 conference, Defendants filed an Order to Show Cause to seal a confidential settlement agreement that was an exhibit to their motion papers. The settlement agreement was entered into in August 2012 between the two factions to resolve all of their then outstanding litigations and arbitrations. The sealing motion delayed the briefing schedule on the motions to dismiss. The motions were ultimately fully submitted on August 8, 2014 and the Court, in the interim, issued a Decision and Order on the sealing motion, which, for the most part, granted the motion and sealed the settlement agreement. All discovery has been stayed pending the outcome of these motions.

THE ALLEGATIONS OF THE FAC

The FAC is itself a tome at 109 pages (68 pages without the exhibits).

A. The Principal Allegations

The following facts are taken from the FAC, which the Court must accept as true, drawing all reasonable inferences therefrom in favor of Plaintiffs, for the purposes of its determination on these motions.

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[1]The Court adopts Plaintiffs' definition of the Paine Parties (FAC at ¶ 66) as Paine, Paine's family trust (the "Paine Family Trust") and P&P (the "Paine Defendants/Counterclaimants), the Former Executives (including Ghisletta) and FPC's former counsel, Mitchell S. Presser, Esq. for purposes of this Decision and Order.

Plaintiffs allege that Fox is the founder and Chief Executive of FPC, a successful private equity firm founded in 1996 (FAC at ¶ 18) and that in 1997, Fox hired W. Dexter Paine, III ("Paine") as President and equal partner in FPC (FAC at ¶ 19). Thereafter, FPC hired Amy Ghisletta ("Ghisletta") as CFO and certain additional executives also (with Ghisletta, the "Former Executives") (FAC at ¶¶ 20-23).

According to Plaintiffs, at all relevant times, beginning in October 2005 to 2007 (*id.* at ¶ 35), FPC engaged ERP to manage Plaintiffs' professional liability insurance needs, and ERP represented (1) that it had unique expertise in insurance brokerage, risk management and claims-handling abilities for the private equity industry (*id.* at ¶ 35); and (2) that it had a dedicated team of claims-advocacy specialists to perform claims handling, oversight and advocacy, and assured plaintiffs that it would advance and protect their interests at every stage of the insurance process, from the procurement of suitable liability policies through claim notification, handling and resolution (*id.* at ¶¶ 36-38).

It is alleged that in September 2006, ERP procured the policy at issue (the "HCC Policy" or "Policy"), which was underwritten by HCC and administered by PIA. The policy period ran from December 30, 2006 through December 30, 2007, and provided $10 million in coverage, on a claims-made basis, for "Losses" (including damages and settlements) and "Costs, Charges and Expenses" (including legal fees and expenses) incurred in connection with FPC's private equity activities.

Plaintiffs contend that under the Policy's terms, FPC was designated as the primary "Insured Organization" (FAC at ¶ 42) and was also designated to act on behalf of all insureds "with respect to the giving of all notices to the Insurer [and] the receiving of Notices from the Insurer...." (FAC at ¶ 53, *quoting* Policy, Clause X[E]). Pursuant to Clause VIII (c) and Declarations Item K, PIA was designated to receive all "Claims" from or on behalf of the insureds (FAC at ¶ 54, *citing* Policy at pp. 1, 12). A "Claim" is defined to include "any written demand for monetary damages or non-monetary relief against an Insured" and "any civil, judicial, administrative, regulatory or arbitration proceeding ... initiated against any of the Insureds ...." (FAC at ¶ 54, *citing* Policy, Clause II[B][1] and [2]). The Policy further provides that "[m]ore than one Claim involving the same Wrongful Act or Interrelated Wrongful Acts shall be deemed to constitute a single Claim and shall be deemed to have been made at ... the time at which the earliest Claim involving the same Wrongful Act or Interrelated Wrongful Acts is first made ...." (FAC at ¶¶ 56-57, *quoting* Policy at Clause V[D]).

Plaintiffs allege that in or about September 2006, ERP also procured the following excess PE Policies on FPC's behalf (the "Excess Policies"), with policy periods that likewise ran from December 30, 2006 through December 30, 2007: (I) a first layer underwritten by Twin City Fire Insurance Company ("Twin City") and providing $10 million of coverage in excess of the HCC Policy; (ii) a second-layer excess policy underwritten by St. Paul Mercury Insurance Company ("St. Paul") and providing $10 million of coverage in excess of the $20 million provided by the first two policies; and (iii) a third-layer excess policy underwritten by Twin City and providing $10 million of coverage in excess of the $30 million provided by the first three policies (Twin City and St. Paul are referred to collectively herein as the "Excess Insurers" and the HCC Policy and the Excess Policies are referred to collectively herein as the "FPC Policies") (FAC at ¶ 58).

It is alleged that the Excess Policies incorporated by reference the terms and conditions of the HCC Policy, including the provision that all notices regarding claims are to be given by, and received by, FPC (FAC at ¶ 59).

Plaintiffs allege that by 2006, FPC's initial fund (Fund I) was winding down and Fox was focused on Fund II (*id.* at ¶ 29). At that time, Paine set up a new private equity firm, P&P and a new fund (Fund III), in which Fox opted not to assume a managerial role (*id.* at ¶ 30). According to Plaintiffs, it was at this point that relations between Fox and Paine deteriorated as Paine worked to enhance his new venture at FPC's expense.

In August 2007, FPC and Fox brought suit against Paine, Paine's family trust (the "Paine Family Trust") and P&P (the "Paine Defendants/Counterclaimants) and FPC (nominally) in Delaware Chancery Court[2] alleging, among other things, that Paine had breached his contractual and fiduciary obligations to FPC and Fox to benefit his new competing venture by raiding FPC's senior executives, disparaging Fox and preventing FPC's new finance personnel from obtaining needed information (*id.* at ¶¶ 62-64) (the "Fox-Paine Litigation"). The complaint also claimed that Ghisletta and the Former Executives had terminated their employment with FPC to work exclusively for P&P and were continuing to engage in acts disloyal to FPC (*id.* at ¶ 63).

Paine interposed counterclaims against FPC and Fox alleging that Fox had breached his contractual and fiduciary duties to FPC by, *inter alia*, hiring a new CFO without Paine's consent, firing CEOs of portfolio companies managed by FPC, and financing the purchase of an airplane with a non-recourse loan from an FPC subsidiary (*id.* at ¶ 64).

In December 2007, Fox and Paine executed a settlement agreement (the "2007 Settlement Agreement") in the Fox-Paine Litigation, which provided, among other things, for: (I) Paine's immediate transfer to Fox of Paine's entire interest in FPC;[3] and (ii) P&P's retention of the employees it had hired away from FPC, including the Former Executives (*id.* at ¶ 73).

Rather than ushering in an era of peace and harmony, or at least a period of calm and quiet, the 2007 Settlement was followed by more litigations/arbitrations between FPC and Fox, on the one hand, and the Paine Parties on the other, most of which, judging by the

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[2] *Saul A. Fox, Mercury Assets, LLC, and Mercury Trust, on behalf of themselves and derivatively on behalf of Fox Paine & Company, LLC v. W. Dexter Paine, III, The Paine Family Trust, Fox Paine Management III, LLC, and, nominally, Fox Paine & Company, LLC*, Case No. 3187, Court of Chancery, Delaware (Affirmation of Aidan M. McCormack, Esq. dated June 10, 2014 ["McCormack Aff."], Ex. E).

[3] Plaintiffs highlight that ERP, in its moving papers, incorrectly states that this transfer occurred in 2012 when it knew, based on its review of the 2007 Settlement, that the transfer occurred back in December 2007 (during the HCC Policy period) (Pltfs' Opp. Mem. to ERP motion at 6).

captions, were commenced by the Fox side (*id.* at ¶¶ 78-83).[4]

Plaintiffs allege that on November 6, 2007, Ghisletta, in her capacity as FPC's CFO, submitted a claim on FPC's behalf under the FPC Policies, seeking coverage for all claims as well as litigation costs being incurred in the Fox-Paine Litigation (the "FPC Claim") (*id.* at ¶¶ 66, 246).

On November 7, 2007, ERP, as agent for FPC, forwarded the FPC Claim to PIA (*id.* at ¶ 67). In the letter, ERP stated that it trusted HCC/PIA would "contact the insured directly regarding the incident as reported" and identified Ghisletta as the contact person for FPC in her capacity as FPC's CFO (*id.* at ¶ 67). It is Plaintiffs' position that upon receipt of this claim, HCC and PIA had a duty to make a diligent inquiry into the claims and counterclaims in the Fox-Paine Litigation and the litigation that ensued thereafter, to determine whether Fox and FPC were entitled to defense and indemnity and they are chargeable with any knowledge a diligent inquiry would have revealed (*id.* at ¶ 68). Plaintiffs further contend that in connection with their review of the FPC claim, PIA, HCC and the Excess Insurers "received and reviewed the complaint filed by FPC and Fox against the Paine Defendants/Counterclaimants in the Fox-Paine Litigation, as well as the Paine Defendants/Counterclaimants' counterclaims against FPC and Fox, and all subsequent motions to enforce the settlement agreement, arbitration demands and state court pleadings" (*id.* at ¶ 69) and that those pleadings made clear that (1) Ghisletta was no longer employed by or loyal to FPC, (2) Ghisletta, Paine and the Former Executives were not acting on behalf of FPC and instead, were acting against FPC's interests, and (3) as of the execution of the December 2007 Settlement Agreement, the Paine Parties had no remaining interest in, affiliation or employment relationship with, or authority to act on behalf of, FPC (FAC at ¶¶ 70, 76).

Plaintiffs contend that, despite this knowledge, ERP, HCC, PIA and the Excess Insurers "nevertheless continued to take direction from Ghisletta with regard to the FPC

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[4]Those litigations/arbitrations were *Fox Paine & Co., LLC v. Amy Ghisletta*, No. 1100058521, JAMS Arbitration San Mateo/San Francisco and *Fox Paine & Co., LLC v Troy Thacker*, No. 13 116 Y 01220 09, American Arbitration Association (New York), *Fox Paine Capital Fund II GP, LLC v. Robert Meyer*, Case No. Civ 493186; *Fox Paine Capital Fund II GP, LLC v Troy Thacker*, Case No. Civ 493161; *Fox Paine Capital Fund II GP, LLC v Amy Ghisletta*, Case No. Civ 493163; *Fox Paine Capital Fund II GP, LLC v Kevin Schwartz*, Case No. Civ 493162; *Fox Paine Capital Fund II GP, LLC v Brian Block*, Case No. 493146; *Fox Paine Capital Fund II GP, LLC v Christopher Ruettgers*, Case No. Civ 493187; *Fox Paine Capital Fund II GP, LLC v Darius Brooks*, Case No. 493145; and *Fox Paine Capital Fund II GP, LLC v Angelos Dassios*, Case No. 493144; *Fox Paine Capital Fund II GP, LLC, et al. v Presser*, Index No. 12-006780, Supreme Court of New York, Nassau County; *Fox Paine Capital Fund II GP, LLC, et al. v Thacker*, Case No. 2012-16622/Court: 055, District Court of Harris County, Texas; *Fox Paine Capital Fund II GP, LLC, et al. v Schwartz*, Case No. 2012CH001338, Circuit Court of the Eighteenth Judicial Circuit, Chancery Division, Du Page County, Illinois; and *Fox Paine Capital Fund II GP, LLC, et al. v Meyer*, Case No. Civ 512619, Superior Court of California for the County of San Mateo.

Policies and the FPC Claim" (*id.* at ¶ 70) and never contacted FPC through Fox or any of its legitimate officers to advise FPC that Ghisletta had submitted the FPC Claim on FPC's behalf seeking coverage for any and all covered claims on behalf of all possible insureds (*id.* at ¶ 71). If FPC or Fox had been so notified, they would have taken action to prevent the wrongful payment of the HCC Policy insurance proceeds to the Paine Parties who were not entitled to coverage and had their own coverage under the P&P Policies (*id.* at ¶ 72).

According to Plaintiffs, in January 2008, ERP notified PIA and HCC of the December 2007 Settlement Agreement (and a copy of it was provided to ERP, PIA and HCC) and HCC tentatively closed their files, apparently on the assumption that no insured was pursuing the FPC Claim (*id.* at ¶¶ 75, 76). St. Paul closed its file for similar reasons in August 2008 (*id.* at ¶ 75). Rather than resolving the disputes between the parties, Plaintiffs allege (and it is conceded for the purposes of this Decision) that the December 2007 Settlement instead spurred additional litigation and arbitrations between the parties and that litigation/arbitrations are described at FAC ¶¶ 78-83). Plaintiffs allege that because Paine and the Former Executives did not qualify as insureds under the HCC Policy with respect to the Fox-Paine Litigation, the HCC Policy's insured v. insured exclusion was inapplicable to FPC's and Fox's claims for coverage (*id.* at ¶ 86).

Plaintiffs allege that Presser (FPC's former counsel), on May 15, 2009, on behalf of the Paine Parties and on P&P letterhead, wrote to PIA (with a copy to ERP), forwarding copies of FPC's and Fox's demands in the FPC Arbitrations and seeking coverage under P&P's own HCC policy (the "P&P Policy") for the Former Executives' defense and liability costs in the FPC Arbitrations (the "P&P Claim") (FAC at ¶ 88). On May 26, 2009, PIA advised Presser that it had referred the P&P Claim to counsel for PIA and HCC, Tucker Ellis & West (LLP) ("Tucker Ellis") for review (*id.* at ¶ 89). On July 7, 2009, Presser wrote to Tucker Ellis (with a copy to ERP), now asserting—allegedly falsely—that the FPC Claim submitted by FPC under FPC's HCC Policy had been submitted on behalf of the Paine Parties and demanding proceeds of both the P&P Policy and the HCC Policy (*id.* at ¶ 90). Plaintiffs claim that such demand for proceeds under the HCC Policy for the Paine Parties was wrongful because (1) P&P and the Paine Family Trust were never insureds; (2) Paine and the Former Executives were not additional insureds; (3) the acts underlying the Fox-Paine Litigation were adverse to FPC, (4) after the execution of the settlement, the Paine Parties had no remaining interest in FPC, (5) neither Presser nor anyone else at P&P was authorized to address matters under FPC's PE Policies (*id.* at ¶ 91).

Plaintiffs claim that ERP breached its contractual and fiduciary duties to Plaintiffs based on its failure to alert FPC anytime after July 7, 2009 of the improper demand by the Paine Parties (*id.* at ¶ 92-94). Plaintiffs describe additional position statements from both the Paine Parties and Tucker Ellis on behalf of PIA/HCC, including a letter from Tucker Ellis on September 4, 2009 (copied to ERP) in which Tucker Ellis stated it was providing its analysis of the FPC Claim to Presser "based on its understanding that he was the designated representative for insurance matters not only for Paine and P&P but for *FPC as well*, and that if Presser was not the designated insurance representative for FPC, he should 'forward this letter to the appropriate party and advise us immediately of that party's identity" (*id.* at ¶ 97 [emphasis in original]). It is further alleged that Presser ignored the request for confirmation that

he was FPC's designated representative (*id.* at ¶ 99).[5]

It is Plaintiffs' contention that in that September 4, 2009, HCC initially denied the Paine Parties' claim for coverage under the HCC Policy citing, among other things, the policy's insured v. insured exclusion (*id.* at ¶ 98). On October 15, 2009, ERP wrote to PIA on behalf of the Paine Parties regarding the HCC's lack of responsiveness towards the Paine Parties regarding the P&P Claim under the P&P Policies and demanding the PIA and HCC rectify the situation (*id.* at ¶ 102). In late October 2009, HCC denied the P&P Claim under the P&P Policies with respect to the FPC Arbitrations (*id.* at ¶ 103).

Plaintiffs allege that in February 2010, HCC advised P&P that it was retracting its denial of coverage for the FPC Claim, contending that the litigation matters arising out of the Fox-Paine Litigation constituted "Interrelated Wrongful Acts" under the HCC Policy (*id.* at ¶ 105). At this same time, HCC is alleged to have failed and refused to provide coverage to FPC and Fox, the only insureds with a valid claim under the HCC Policy, and instead provided coverage to the Paine Parties under the HCC Policy for the FPC Claim that had been submitted by Plaintiffs (*id.* at ¶ 106). According to Plaintiffs, in February 2010, HCC/PIA also retracted its initial denial of the P&P Claim that the Paine Parties submitted under the P&P Policies, but did not pay the claim with the proceeds from the P&P Policies and instead, because the P&P Claim was so interrelated with the FPC Claim submitted under the FPC Policies, HCC disbursed the $10 million in HCC Policy proceeds to the Paine Parties without any notice to Fox or FPC and without obtaining a general release of all claims against FPC and Fox (*id.* at ¶¶ 107-108).

Plaintiffs allege that on March 20, 2012, Fox filed actions against certain of the Former Executives for breach of contract in California, Illinois and Texas (the "State Court Actions") (*id.* at ¶ 109). On May 8, 2012, Twin City acknowledged receipt of and denied the Paine Parties' claim for coverage under the FPC Policies with respect to the State Court Actions and on May 12, 2012, St. Paul denied the Paine Parties' claims for coverage under the FPC Policies for the Fox-Paine Litigation, the FPC Arbitrations and the State Court Actions (*id.* at ¶ 111). According to Plaintiffs, on May 25, 2012, the Fox Parties sued Presser for tortious interference with contract, conspiracy and aiding abetting tortious action and unfair competition based on Presser's inducement of Paine and the Former Executives to acquire and transfer, respectively, Fund II interests in violation of the Fox Paine partnership agreements and the Settlement (the "Presser Action") (*id.* at ¶ 112). It is alleged that in August 2012, FPC and Fox and the Paine Parties entered into a settlement that put an end to the Fox-Paine Litigation, the FPC Arbitrations, the State Court Actions and the Presser Action (*id.* at ¶ 113). They claim they would have never entered into the Settlement had they known about the Paine Parties' conduct concerning the HCC Policy proceeds (*id.* at ¶ 114).[6]

Plaintiffs contend that on September 14, 2012, the Paine Parties met with counsel for Twin City and sought coverage under the FPC Policies, but were once again denied on

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[5]Plaintiffs argue that there was nothing in the HCC Policy, nothing in any of FPC's or Fox's communications with ERP, PIA or HCC and nothing in Presser's correspondence that indicated that "Presser or the Paine Parties were ever authorized to speak for FPC regarding insurance matters" (*id.* at ¶ 99).

[6]However, it does not appear that Plaintiffs have sought to void the Settlement.

[* 8]

November 19, 2012 (*id.* at ¶ 116). It is alleged that HCC's wrongful provision of coverage to the Paine Parties deprived Plaintiffs of the benefits of their own insurance and assisted the Paine Parties in litigations that were adverse to Plaintiffs and forced FPC's excess carriers to bear obligations that HCC otherwise would have borne under the P&P Policies (*id.* at ¶ 120) – *i.e.*, the motivation was that by paying the P&P Claim with proceeds of FPC's HCC Policy, HCC/PIA exhausted plaintiffs' coverage under the HCC policy and forced FPC's excess carriers to bear coverage obligations that HCC/PIA otherwise would have borne under the separate, $10 million HCC policy that they had issued to the Paine Parties (*id.* at ¶¶ 4, 260-61).

B. The Pleaded Causes of Action

The First Cause of Action is for fraud against all the Defendants based on Plaintiffs' contention, *inter alia*, that it entrusted Defendants with complete control over their insurance requirements (FAC at ¶ 123).

The crux of this claim is Plaintiffs' contention that they had confidential fiduciary -like relationships with ERP, HCC and PIA. It is asserted that Plaintiffs had a relationship of trust and confidence with HCC and PIA akin to a fiduciary relationship based on Plaintiffs' entrusting HCC and PIA with its insurance needs as set forth in the HCC Policy, and Plaintiffs' reliance on HCC's and PIA's expertise concerning the administration and performance of their duties under the HCC Policy. Plaintiffs contend under the law, HCC/PIC have the following duties as Plaintiffs' insurers:

> (1) a duty to give at least as much consideration to the interests and welfare of their insured as they give to their own interests;
> (2) a duty to act in absolute, perfect and open candor in all matters affecting the insured;
> (3) a duty to inform the insured of all rights and benefits conferred under the policy; and
> (4) upon learning of a potential claim from the insured or from any other source, a duty to make a diligent inquiry into the claim to determine whether any of its insureds are entitled to coverage to advise them accordingly (*id.* at ¶ 135 [hereinafter "Insurer's Four Duties"]).

With regard to the fraud claim as against ERP, Plaintiffs rely on their allegations concerning ERP holding itself out as having specialized expertise and its representations that it would "promote and safeguard plaintiffs' interests at every stage ... from procurement of suitable PE policies through claim notification, claim handling and claim resolution" (*id.* at ¶ 125 [emphasis added]). Plaintiffs allege that ERP was their agent and fiduciary (*id.* at ¶ 128) as Plaintiffs had a confidential relationship with ERP based on its expertise and exclusive knowledge over Plaintiffs' "policies, claims communications and claims resolutions" (*id.* at ¶ 129). Further, that ERP had access to communications concerning the FPC Policies with the insurers that Plaintiffs did not have and further had exclusive knowledge not available to FPC as to what insurance ERP had obtained for the Paine Parties through the P&P Policies (*id.* at ¶ 132). In a like regard, Plaintiffs contend that HCC and PIA had access to information that was not provided to FPC which caused them to have a "duty to disclose to FPC all communications that it had with ERP and others allegedly on behalf of FPC and/or regarding the FPC Policies" (*id.* at ¶ 137). In particular, Plaintiffs contend that "[t]o the extent that

disclosure of the claim-submission information to Ghisletta constituted a disclosure to FPC prior to December 31, 2007, failure to provide all subsequent claims communications made between ERP and the Paine Parties on the one hand, and the insurers on the other hand, with regard to the FPC Policies constituted a partial deceptive disclosure by ERP to FPC, and ERP had a duty to disclose yet failed to disclose all subsequent communications between ERP and the Paine Parties on the one hand, and the insurers on the other, with regard to the FPC Policies" (*id.* at ¶ 139). Plaintiffs further allege that HCC and PIA owed duties of good faith and fair dealing to Plaintiffs based on, *inter alia,* the known competing claims submitted.

Plaintiffs assert that Defendants "knowingly concealed and failed to disclose material facts" including: (1) the notices of claims submitted under the FPC Policies; (2) the communications regarding those claims; (3) that Ghisletta was holding herself out as representing FPC despite the fiduciary breaches that were alleged against her in the Fox-Paine Litigation – facts of which Defendants were aware; (4) that Presser held himself out as an authorized representative of FPC despite the fact that he had no such authority and Defendants knew or should have known this fact; (5) that the claim submitted by FPC was misappropriated by the Paine Parties; (6) that the Paine Parties continued to submit claims for payment under the FPC Policies despite the fact that the Paine Parties had their own polices, were not insureds and/or were no longer covered under the FPC Policies, and/or did not have insurable claims; and (7) that Defendants had agreed that HCC would make payments to the Paine Parties from FPC's HCC Policy proceeds rather than from the P&P Policies (*id.* at ¶ 148).

According to Plaintiffs, HCC and PIA were conferred a benefit (*i.e.,* the elimination of HCC's exposure under the P&P Policies and the shifting the coverage to the FPC HCC Policy) which was all to Plaintiffs' detriment (*id.* at ¶ 149). Further, that Defendants failed to disclose these material facts "knowingly and intentionally, with the knowledge that plaintiffs would rely on such omissions, and with the intent to induce plaintiffs' detrimental reliance" (*id.* at ¶ 152). Plaintiffs allege that they justifiably relied because they understood that the Policies expressly provided that all communications regarding claims would be submitted by and received by FPC – *i.e.,* that no claims, communications or payment determinations would be made without their knowledge and consent (*id.* at ¶ 154).

Plaintiffs contend that they "could not have discovered the concealed facts through the exercise of ordinary diligence, including because the information is not publicly available and was not otherwise readily available" (*id.* at ¶ 155).

Plaintiffs allege that they relied to their detriment since they would have otherwise protected their interests by preventing such a payout or requiring that the payout be conditioned on the execution of releases so that the Paine Parties could not have thereafter commenced litigations against Plaintiffs. Plaintiffs claim that as a direct result of Defendants' fraud, Plaintiffs entered into a settlement with the Paine Parties that they would not have otherwise entered into, they lost the insurance proceeds, and incurred costs in defending the ligations fostered, encouraged and bankrolled by HCC, and has suffered reputational harm in the insurance marketplace. Plaintiffs also assert that Defendants' fraud "was gross, wanton, wilful and evidenced a high degree of moral culpability and/or rose to such a level of wanton dishonesty as to imply criminal indifference to civil obligations" (*id.* at ¶ 159).

Plaintiffs' Second Cause of Action is for breach of fiduciary duty against ERP. Plaintiffs repeat all the allegations concerning the fiduciary nature of the relationship with ERP

and set forth the fact that on November 7, 2007, ERP on behalf of FPC, forwarded FPC's claim to PIA as agent and claims manager for HCC, and to the Excess Insurers. Plaintiffs claim that ERP received and reviewed all of the pleadings in the Fox-Paine Litigation and all the subsequent litigations and proceedings and that it therefore knew that Ghisletta was no longer loyal to FPC yet ERP continued to take direction from Ghisletta regarding the FPC Policies and Plaintiffs' claims. They assert that "[i]f Ghisletta thereafter purported to submit this claim solely on behalf of the Paine Parties to the exclusion of the other insureds, ERP knew that Ghisletta did so in violation of her fiduciary duties to FPC and that, as a result of the fiduciary obligation that Ghisletta owed to FPC, by operation of law the claim belonged to FPC, as Ghisletta's principal, and to Fox as the sole additional insured entitled to coverage, regardless of how it was presented by Ghisletta" (*id.* at ¶ 173). According to Plaintiffs, "[n]either P&P, nor the Paine Family Trust, nor Presser was ever an insured under the HCC Policy. Neither Paine nor any of the Former Executives was an additional insured or had a covered claim under the FPC Policies, which provided coverage only for activities undertaken on behalf of and for the benefit of FPC and which expressly excluded from their coverage claims based on any activities undertaken by Paine or the Former Executives on behalf of P&P" (*id.* at ¶ 174). Plaintiffs claim that ERP knew that the Paine Parties had no right to press a claim on their own behalf under the HCC Policies because ERP was the procuring broker for the Paine Parties under the P&P Policies so it knew the Paine Parties were covered by the P&P Policies (*id.* at ¶ 175). Plaintiffs assert that ERP knew that the Paine Parties demand for the HCC Policy proceeds was improper based on (1) its knowledge as the procuring broker for both FPC under the HCC Policy and the Paine Parties under the P&P Policy, (2) its knowledge of the facts of the underlying Fox-Paine Litigation as well as its December 2007 Settlement and the actions that followed to enforce it, and (3) the fact that "ERP owed contractual and fiduciary duties to FPC and Fox to promote and protect *their interests* as insured and claimants under the FPC's PE Policies" (*id.* at ¶ 177).

Plaintiffs contend that despite the fact that ERP knew that the Paine Parties' claims under the HCC Policy were wrongful, and despite ERP's duties to Plaintiffs, "at no time after July 7, 2009 did ERP ever advise plaintiffs of the Paine Parties' improper demands, nor did ERP ever challenge these improper demands in its discussions with HCC and PIA or otherwise protect or advocate for FPC's and Fox's interests as insureds and claimants under the FPC PE Policies." According to Plaintiffs, ERP abdicated its duties to Plaintiffs based on its decision to be loyal to its new customer P&P and its executives, which relationship is represented on ERP's website (*id.* at ¶ 179). Plaintiffs further allege that ERP never told Plaintiffs of : (1) HCC's decision on or about February 23, 2010 to disburse the entire Policy limits to the Paine Parties for their litigation expenses in matters adverse to Plaintiffs; or (2) that "HCC and PIA had conspired to treat all of the Paine Parties' subsequent claims filed under the P&P Policies as if they had been submitted under the FPC Policies" (*id.* at ¶ 181).

Plaintiffs' Third Cause of Action for Aiding and Abetting ERP's Breach of Fiduciary Duty against PIA and HCC repeats all the allegations concerning ERP's breach of fiduciary duty as set forth in the Second Cause of Action. In addition, Plaintiffs allege that HCC and PIA knew that ERP had failed to communicate the critical information concerning the Paine Parties' assertion of a claim to the HCC Policy to Plaintiffs and that HCC and PIA had knowledge (based on discussions with ERP and the Paine Parties) of ERP's wrongful conduct and that it had abdicated its contractual and fiduciary duties to Plaintiffs. According to Plaintiffs, HCC and PIA benefitted from their conspiracy with ERP to treat the claim that had been made by FPC as though it had been made by the Paine Parties and by converting claims submitted by the

Paine Parties under the P&P Policies into claims submitted under FPC's HCC Policy, because in so doing, HCC and PIA avoided having to make any payouts under this separate P&P Policy and "forced plaintiffs' Excess Carriers to bear coverage obligations that defendants would otherwise have to bear" (*id.* at ¶ 211). As damages, Plaintiffs seek the $10 million policy limits together with the commissions, fees and premiums paid to Defendants during the period in which ERP was in breach of its fiduciary duties and HCC and PIA were aiding such breach (*id.* at ¶ 212).

Plaintiffs' Fourth Cause of Action asserted against all Defendants is for Aiding and Abetting Paine's, Presser's and the Former Executives' Breaches of Fiduciary Duty. It alleges that Paine as President of FPC, Ghisletta as FPC's CFO, the former Executives and Presser as FPC's counsel, owed Plaintiffs fiduciary duties, which duties continued even after their relationships to FPC ended, which included their duty "not to misuse confidential information of FPC or to misappropriate or usurp the assets, contracts and expectancies of FPC, including the FPC Policies and the proceeds thereof" (*id.* at ¶ 215). Plaintiffs allege that Defendants were aware of the Paine Parties' status as Plaintiffs' fiduciaries (*id.* at ¶ 216). Plaintiffs claim that Defendants were also aware that on November 7, 2007, ERP as FPC's agent had forwarded the FPC Claim (made by Ghisletta on November 6, 2007 as FPC's CFO on behalf of FPC under the HCC Policy concerning the Fox-Paine Litigation) to PIA as agent and claims manager for HCC and to the Excess Insurers (*id.* at ¶¶ 217, 220). Plaintiffs assert that Defendants also knew that the Policy required that all communications regarding the Policy on behalf of the insureds be made by and received by FPC (*id.* at ¶ 219). As such, it is Plaintiffs' contention that Defendants knew that "the policy proceeds, belonged to FPC and its legitimate executives acting in their capacity on behalf of FPC" (*id.* at ¶ 218).

Plaintiffs claim that Defendants received and reviewed all of the pleadings in the Fox-Paine Litigation and all the subsequent litigations and proceedings and, therefore, they knew that Ghisletta was no longer loyal to FPC yet they continued to take direction from Ghisletta (and later Presser and other Paine Parties) regarding the FPC Policies and Plaintiffs' claims (*id.* at ¶ 222). They assert that "[i]f Ghisletta thereafter purported to submit this claim solely on behalf of the Paine Parties to the exclusion of the other insureds, ERP, HCC and PIA knew that Ghisletta did so in violation of her fiduciary duties to FPC and that, as a result of the fiduciary obligation that Ghisletta owed to FPC, by operation of law the claim belonged to FPC, as Ghisletta's principal, and to Fox as the sole additional insured entitled to coverage, regardless of how it was presented by Ghisletta" (*id.* at ¶ 225). Plaintiffs repeat their contention concerning why the Paine Parties, P&P and the Paine Family Trust were never insureds under the HCC Policy (*id.* at ¶ 226). Plaintiffs also claim that "ERP, HCC and PIA knew that the Paine Parties had no authority to address matters or communicate with defendants regarding the FPC Policies" (*id.* at ¶ 228) and Defendants knew that if Plaintiffs had been apprised that the Paine Parties had sought access to the Policy's proceeds, Plaintiffs would have taken affirmative action to prevent the wrongful payment (*id.* at ¶ 229). According to Plaintiffs, "Defendants were at all times aware that Paine, Presser and the Former Executives in demanding the proceeds of the FPC Policies, were breaching their fiduciary obligations to FPC. Nevertheless, defendants chose to be loyal not to FPC and Fox, their longtime customers, but rather to their new customers, P&P and its executives" (*id.* at ¶ 231). Further, say Plaintiffs, Defendants knew that the Policy proceeds would be used to fund the Paine Parties' ongoing litigation with Plaintiffs (*id.* at ¶ 234).

Plaintiffs contend that Defendants actively assisted the Paine Parties' breaches of fiduciary duty by: (1) failing to promote Plaintiffs' interests in the FPC Policies; (2) failing to provide information to Plaintiffs regarding the Paine Parties' claims under the FPC Policies; (3) "conspiring with the Paine Parties to divert the proceeds of the FPC Policies to these parties and to re-characterize claims submitted under the P&P Policies as claims under the FPC Policies ..." (*id.* at ¶ 232). Plaintiffs claim that HCC and PIA encouraged the breaches of fiduciary duty based on the fact that they personally profited from such breaches by "avoid[ing] having to make any payouts under the separate primary policy that they issued to P&P and also forc[ing] plaintiffs' Excess Carriers to bear coverage obligations that defendants otherwise would have had to bear" (*id.* at ¶ 236). Plaintiffs seek the same damages as sought in their Third Cause of Action.

Plaintiffs' Fifth Cause of Action is for breach of contract against HCC. In it, Plaintiffs assert that they performed all their obligations under the HCC Policy and that they were "entitled to a defense and indemnity for the claims asserted against them by the Paine Parties in the Fox-Paine Litigation" and the related litigations because the allegations contained therein constituted "Interrelated Wrongful Acts" within the meaning of the HCC Policy (*id.* at ¶ 242). Namely, they contend they were entitled to coverage under Insuring Agreement Coverage A (Wrongful Acts in connection with Private Equity Activities), Insuring Agreement Coverage C (Wrongful Acts by the Insured Organization or the Insured Persons in their respective capacities as such), and Insuring Agreement Coverage E (Wrongful Employment Practices) (*id.* at ¶ 243). Further, Plaintiffs contend that because the Paine Parties were not insureds with respect to the Fox-Paine Litigation, the insured v. insured exclusion did not apply (*id.* at ¶ 244). But even if it did apply, Plaintiffs claim that one or more exceptions to the exclusion would have rendered the exclusion inapplicable (*i.e.*, exceptions for [1] claims brought by interest holders in FPC or its affiliated private equity funds or partnerships whether or not such interest holders also qualified as insureds under the policy, and [2] claims for Wrongful Employment Practices).

With regard to Plaintiffs' performance, they allege that they submitted the claim via the November 6, 2007 letter from Ghisletta. Alternatively, they argue that if Ghisletta purported to submit the claim on behalf of the Paine Parties, "she did so in violation of her fiduciary duties to FPC with the result that, by operation of law, the FPC Claim, and any proceeds flowing therefrom, belongs to and inures to the benefit of FPC, as Ghisletta's principal" (*id.* at ¶ 248). It is Plaintiffs' contention that upon receipt of the claim from FPC's agent ERP on November 7, 2007, "HCC had a duty to make diligent inquiry into the claims and counterclaims asserted in the Fox-Paine Litigation and its ensuing satellite litigation to determine whether any insureds under the HCC policy, including FPC and Fox, were entitled to defense and indemnity. HCC is also chargeable with knowledge of any facts that such a diligent inquiry would have revealed" (*id.* at ¶ 250). Thus, Plaintiffs assert that HCC was responsible, based on its investigation of the pleadings in the litigations to know that the claim submitted was on behalf of FPC and its legitimate executives and that if Ghisletta purported to submit the claim on behalf of the Paine Parties, it was done in breach of her fiduciary obligation and by operation of law, the claim belonged to FPC and Fox as the sole additional insured regardless of how it was presented by Ghisletta. Further, Plaintiffs allege that the Paine and the Former Executives had no colorable claim to coverage since: (1) any coverage was barred by the insured v. insured exclusion; (2) neither Paine nor the Former Executives qualified as additional insureds under the HCC Policy because none of the activities or misconduct for which they were accused was carried out on behalf of and for the benefit of FPC; and (3) the Policy excluded from its coverage claims based on activities undertaken by Paine and the

Former Executives on behalf of P&P or any entity other than FPC (*id.* at ¶ 254).

It is Plaintiffs' contention that HCC breached the Policy by wrongfully denying Plaintiffs defense and indemnity under the Policy in connection with the Fox-Paine Litigation and the related proceedings. In addition, based on HCC's knowledge of the above facts (*i.e.,* that the Paine Parties had no claim under the Policy), Plaintiffs contend that HCC breached the Policy by (1) treating the Paine Parties' claims submitted under the P&P Policies as though they had been submitted under FPC's HCC Policy, and (2) by making the unauthorized payment of the Policy's proceeds to the Paine Parties (*id.* at ¶¶ 259-260).

For their Sixth Cause of Action against ERP and PIA for intentional interference with contractual relations, Plaintiffs contend that the FPC Policies are valid contracts. Plaintiffs contend that (1) as their agent and broker procuring the FPC Policies, ERP was aware of the existence and terms of the FPC Policies and that Plaintiffs "anticipated maintaining an amicable and advantageous business relationship with HCC and the Excess Insurers" (*id.* at ¶ 264); and (2) as administrator of the HCC Policy, PIA was aware of the existence and terms of the HCC Policy and that Plaintiffs "anticipated maintaining an amicable and advantageous business relationship with HCC" (*id.* at ¶ 265).

Plaintiffs also allege that based on ERP and PIA's knowledge of the pleadings in the various litigations, ERP and PIA were aware that: (1) all claims communications were to be made through FPC and that none of the Paine Parties were authorized to engage in communications concerning claims under the Policies on behalf of FPC; (2) the Paine Parties were not entitled to recover proceeds under the FPC Policies; (3) none of the P&P Claims could be deemed to have been submitted under the FPC Policies; and (4) "the conduct complained of herein was all expressly prohibited under the terms of the FPC Policies and at law" (*id.* at ¶ 268). Despite this knowledge, Plaintiffs allege that ERP and PIA "engaged in extensive communications, over a period of many years, which were expressly designed to prevent HCC from paying out the proceeds to FPC and Fox, to induce HCC's payout on the wrongful claims to the Paine Parties, and to conceal the facts of and the nature of the processing and disposition of those claims from plaintiffs" (*id.* at ¶ 269). According to Plaintiffs, PIA and ERP either intended to prevent HCC's performance or knew that prevention of HCC's performance was certain or substantially certain to occur which they did in order to promote their own business relationships with the Paine Parties (and for ERP, also its relationship with HCC) (*id.* at ¶¶ 270-271). Plaintiffs further contend that PIA and ERP engaged in the same acts of conspiracy with regard to the payments made by the Excess Insurers to the Paine Parties (*id.* at ¶ 272). It is Plaintiffs' contention that as the result of PIA's and ERP's acts, HCC and the Excess Insurers breached their insurance contracts with Plaintiffs. For this cause of action, Plaintiffs seek, *inter alia*, at a minimum the $10 million due under the Policy.

Plaintiffs assert as their Seventh Cause of Action a claim for breach of the implied covenant of good faith and fair dealing against HCC and PIA. In support of this claim, Plaintiffs contend that an insurer's obligations are akin to a fiduciary relationship and that the implied covenant of good faith and fair dealing obligates insurers to abide by the aforementioned Insurer's Four Duties. In addition, Plaintiffs assert the implied covenant "includes a duty not to favor the interests of one insured over another, and this duty is violated where an insurer pays, or its agent causes the insurer to pay, the entire proceeds under the policy to certain insureds while leaving other insureds bereft of coverage" (*id.* at ¶ 279). This duty is further violated according to Plaintiffs when the insurer's disbursement of proceeds "has the effect of

bankrolling litigation adverse to its own insured" (*id.*). Plaintiffs then repeat their prior allegations concerning HCC's and PIA's wrongful conduct, which they contend violated every one of the aforementioned implied duties and "prevented plaintiffs from receiving the proceeds and benefits of the HCC Policy" (*id.* at ¶ 280). Plaintiffs again seek as damages, *inter alia*, the $10 million they did not receive under the Policy.

Plaintiffs' Eighth Cause of Action is for Unjust Enrichment against all Defendants. In it, Plaintiffs claim that Defendants "colluded with the Paine Parties to convey a benefit on defendants to the detriment of plaintiffs" and caused themselves to be enriched with benefits at the expense of FPC under circumstances that would render it inequitable for them to keep the benefits conveyed (*id.* at ¶¶ 286-287). According to Plaintiffs, the benefits bestowed were independent from any agreement between Plaintiffs and Defendants (*id.* at ¶ 288). Further, that in equity and good conscience, it would be unfair for Defendants to retain any such benefits and Defendants should be required to disgorge any such benefits in amounts to be determined at trial (*id.* at ¶ 289).

ERP's CONTENTIONS IN SUPPORT OF ITS MOTION

In support of its motion, ERP submits an affirmation from its counsel, Marc L. Antonecchia, Esq. (Holland & Knight, LLP), the sole purpose of which is to attach the FAC, and a memorandum of law.

The essence of ERP's argument is that, as FPC's insurance broker, absent some duty imposed by contract, its duty to Plaintiffs was limited to the exercise of reasonable care, diligence, and judgment in procuring insurance on FPC's behalf and nowhere in the FAC do Plaintiffs contend that this duty was breached. Instead, Plaintiffs allege that "'commencing in or about October 2005, and continuing through 2007, FPC engaged ERP as its agent and insurance broker to manage and oversee FPC's professional liability insurance needs, including procuring PE Policies on FPC's behalf'" (ERP's Mem. at 4, *quoting* FAC at ¶ 34).

According to ERP, Plaintiffs' conclusory allegations that "'ERP held itself out as having specialized – and indeed unique – expertise in insurance brokerage, risk management and claims handling and oversight abilities for the private equity industry'" are insufficient as Plaintiffs fail to allege how ERP undertook such duties on Plaintiffs' behalf by contract or otherwise (*id.* at 5, *quoting* FAC at ¶ 35). ERP further urges that nowhere do Plaintiffs claim that "ERP (or for that matter, HCC or PIA) denied coverage of a claim by Plaintiffs, or even that Plaintiffs requested coverage under the HCC Policy" (*id.* at 2). Instead, ERP contends that the entire basis for Plaintiffs' claim is their position that ERP had an obligation to advise them as to claims made by Paine and the Paine Parties (which ERP references as the "Former Executives"). In addition to the fact that ERP did not make the payments under the Policy, ERP also relies on the assertions made by HCC concerning Plaintiffs' failure to have made a claim under the Policy, which, ERP says means Plaintiffs cannot establish a claim for breach of contract against HCC nor can they establish that they sustained any damages. ERP also joins in the arguments made by HCC/PIA that Plaintiffs cannot establish that they sustained any damages given the $30 million in excess insurance coverage that they contend is available to Plaintiffs. ERP argues that the First, Second, Fourth, Sixth, Eighth, and Ninth Causes of Action fail as a matter of law because "each is predicated on the unfounded assertion that ERP had certain fiduciary duties to Plaintiffs, and each fails to articulate any actual 'damages' incurred

by Plaintiffs" (*id.* at 5).

In support of the dismissal of Plaintiffs' claim for breach of fiduciary duty (Second Cause of Action), ERP argues because under both California and New York law, an essential element is that there is a fiduciary duty owed and because Plaintiffs have not alleged a fiduciary duty ERP owed to Plaintiffs, this claim should be dismissed. According to ERP, the existence of a fiduciary duty is a question of law for the Court and "'[o]rdinarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured'" (*id.* at 6, *quoting Jones v Grewe,* 189 Cal App 3d 950, 954 [Cal Ct App 2d Dist Div 3 1987]). ERP asserts that under California law, a broker may take on additional duties "'by an express agreement or a holding out'" (*id.*, *quoting Jones,* 189 Cal App 3d at 954).

It is ERP's contention that there are only three situations in which courts have found brokers to have an additional duty of advisement beyond this general duty:

> "(1) where the agent receives compensation for consultation apart from payment of the premiums; (2) where there was some interaction regarding a question of coverage and the insured relied on the expertise of the agent; or (3) where there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (ERP's Mem. at 7, n.2, *quoting Murphy v Kuhn*, 90 NY2d 266, 272 [1997]).

It is ERP's position that Plaintiffs have not alleged facts to fit within any exception.

ERP argues that Plaintiffs' conclusory allegations that they entrusted ERP with control over their insurance requirements, which included administering the policies and claims notification and handling, are insufficient since nowhere do Plaintiffs allege a contractual requirement or any specific communications or representations made by ERP (*id.* at 8). Further, ERP argues that Plaintiffs' assertion that there was a special relationship created as a result of Plaintiffs' "reliance on ERP's expertise, ERP's exclusive knowledge and control over plaintiffs' policies, claims communications and claims resolutions, and the fact that ERP undertook to serve as FPC's agent for purposes of transmitting formal notices of claims to HCC and PIA, and engaging in claims processing communications between HCC and PIA on the one hand, and FPC and the alleged insured on the other" are likewise insufficient because Plaintiffs fail to provide the facts supporting that a confidential relationship ensued (*id.* at 8, *quoting* FAC at ¶ 92). According to ERP, the fact that ERP "assist[ed] plaintiffs, HCC and PIA in administering those policies" does not rise to the level of a confidential or fiduciary relationship (*id.*, *quoting* FAC at ¶ 129). As such, ERP argues that Plaintiffs' contention that ERP "'had a duty to make full and fair disclosures to Plaintiffs of all material facts concerning any claims submitted with regard to the FPC Policies' and that the 'failure by ERP ... to disclose the claims submissions and communications with regard to the FPC Policies to Plaintiffs was inherently unfair'" is unsupported as a matter of law (*id.* at 8-9, *quoting* FAC ¶¶ 142-143).

ERP asserts that Plaintiffs' fraud claim fares no better because Plaintiffs do not allege any affirmative misrepresentations by ERP. According to ERP, the sum and substance of Plaintiffs' fraud claim are that "'[a]t all relevant times, ERP had a duty to disclose to FPC all

communications that ERP made on behalf of FPC with the existing and future insurers insofar as those communications and facts learned from the communications were material to FPC's insurance-related decision making and coverage prospects, and ERP's ability to obtain for FPC the policies that FPC engaged ERP to obtain on its behalf'" (*id.* at 11, *quoting* FAC at ¶ 94). Because Plaintiffs' fraud claim is limited to a claim of fraudulent concealment and because both New York and California law require a duty owed before a party may be liable for failing to disclose information to another party under a theory of fraudulent concealment, Plaintiffs' claim for fraud must be dismissed because Plaintiffs have failed to allege facts supporting a special or confidential relationship between Plaintiffs and ERP. In addition, ERP argues that the fraud claim is fatally deficient in that it lacks the specificity necessary to satisfy the particularity requirements under California and New York law.

It is ERP's position that Plaintiffs' Fourth Cause of Action for aiding and abetting the Paine Parties' breach of fiduciary duty fails because even assuming that Plaintiffs sufficiently alleged a breach of fiduciary duty by the Paine Parties, Plaintiffs have not alleged that ERP had actual knowledge (a required element of this claim) of the wrong. Thus, Plaintiffs' allegations concerning ERP's knowledge that the Paine Parties had submitted a claim that rightfully belonged to FPC and their conclusory assertion that ERP knew that the Paine Parties were breaching their fiduciary duties to FPC, simply support that ERP had knowledge of a disputed claim, not that it knew that the Paine Parties were breaching a fiduciary duty by submitting their claim (*id.* at 11, *citing* FAC at ¶¶ 164, 231, 236).

Moreover, according to ERP, allegations of omissions are insufficient to support a claim of aiding and abetting a breach of fiduciary duty unless the defendant owed a direct fiduciary duty to plaintiff. Thus, it is ERP's position that Plaintiffs' claim is deficient because "'[m]ere inaction can constitute substantial assistance only if a fiduciary duty directly to the plaintiff'" (*id.* at 14, *quoting Baron v Galasso,* 83 AD3d 626, 629 [2d Dept 2011]) and Plaintiffs have merely alleged that ERP failed to act but have not sufficiently alleged a fiduciary duty between ERP and Plaintiffs.

ERP argues that Plaintiffs' Sixth Cause of Action for intentional interference with contractual relations fails because Plaintiffs do not plead any intentional conduct by ERP that resulted in damages to Plaintiffs. ERP recites the elements necessary to state such a claim under California and New York law – *i.e.,* Plaintiffs must show: (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage (*id.* at 15).

According to ERP, Plaintiffs' allegations that "'Defendants' conduct included extensive communications, over a period of many years, which were expressly designed to induce HCC's payout on the wrongful claims to the Paine Parties, the Former Executives, and Presser'" are insufficient since "Plaintiffs fail to point to any specific act by ERP that reflects an intent to cause HCC to breach the terms of the Policy, let alone establish the nature of the underlying 'breach'" (*id.* at 16, *quoting* FAC at ¶ 264).

ERP argues that Plaintiffs' Eighth Cause of Action for unjust enrichment must be dismissed since Plaintiffs fail to allege a benefit conferred on ERP and simply allege in conclusory fashion that benefits were conveyed to Defendants to Plaintiffs' detriment without

specification of the benefit conferred or the detriment (damages) sustained. [7]

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition to ERP's motion, Plaintiffs submit an affidavit from Ann Marie Schoepf, a paralegal employed by Plaintiffs' attorneys of record (Boises Schiller & Flexner, LLP), an affirmation from Plaintiffs' counsel, Courtney R. Rockett, Esq., and a memorandum of law.

The purpose of Ms. Schoepf's affidavit is to attach documents evidencing an investigation she undertook to: (1) determine the New York contacts of W. Dexter Paine III, Mitchell Presser, Paine & Partners, HCC, PIA and ERP; (2) to show the claims ERP makes on its website both now and in 2007 concerning the efforts it would make on behalf of its clients (Affidavit of Ann Marie Schoepf in Opposition, sworn to July 18, 2014 and Exs. 1-26 thereto). According to Schoepf, her investigation revealed that: (1) W. Dexter Paine III and Susan L. Paine as Trustees of the Paine Family Trust U/D/T 10/13/94 purchased a townhouse in Manhattan at 69 East 82nd Street in June 2011 and there is no evidence that it has been subsequently sold; (2) Paine is identified as having an address of 461 Fifth Avenue, 17th Floor, New York, New York based on Paine & Partners Capital Fund IV, L.P.'s SEC Form D filed on June 30, 2014 and Paine was served at this address in connection with the motion to seal; (3) Presser was served personally in one of the many Fox-Paine Litigations at his residence located at 51 Montgomery Blvd., Atlantic Beach, New York and based on a search she performed on a Westlaw Historic Address Tracker, Presser's current address is still maintained there; (4) Presser was served with a copy of the motion to seal at the 461 Fifth Avenue, 17th Floor New York, New York address; (5) Presser is still a member of the New York Bar based on the search she performed on the New York State Court's website; (6) a search on Paine & Partners, LLC's website indicates that it maintains an office at 461 Fifth Avenue, New York, New York; (7) a search on the New York State Department of State website revealed that Paine & Partners, LLC is a Delaware limited liability company registered to do business in New York and that various P&P executives were also served at the same 461 Fifth Avenue address in connection with the motion to seal; (8) a search of the website for HCC Insurance Holdings, Inc. ("HCC Holdings") the corporate parent of HCC and PIA revealed that two "HCC-branded entities" are located at 222 Lexington Avenue, New York, New York and a third "HCC-branded entity" along with PIA maintain offices at 37 Radio Circle, Mount Kisco, New York; (9) the insurance application form posted on HCC's website states that all proposals should be submitted to HCC Global at 7 Radio Circle, Mount Kisco, New York; (10) based on a New York Department of State website search, both HCC and PIA are licensed to do business in New York; (11) ERP's website reveals that ERP has an office at 1185 Avenue of the Americas, New York, New York; and (12) ERP is registered to do business in New York under the d/b/a of ERP Insurance Brokers of New York.

Schoepf attaches screen shots from ERP's website concerning the representations as to ERP's expertise and the services it provides.

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[7]Because in their opposition papers to the motions Plaintiffs say they withdraw the Ninth Cause of Action, the Court need not address the arguments made in that regard.

The primary purposes of Plaintiffs' counsel's affirmation are to (1) annex the FAC together with the Policy at issue (Exhibit A to the FAC),[8] and (2) highlight various allegations of the FAC and various provisions of the Policy which support Plaintiffs' claims. Ms. Rockett further asserts that HCC/PIA have misled the Court by claiming that Paine transferred his interest in FPC to Fox in August 2012 when, instead, the transfer took place in December 2007 during the Policy period and HCC/PIA were immediately made aware of this fact (Affirmation in Opposition of Courtney R. Rockett, Esq. dated July 18, 2014 ["Rockett Opp. Aff."] at 5, n.4).

According to Ms. Rockett, in making any coverage determinations, "HCC, PIA and ERP in fact received and reviewed: (I) the complaint filed by FPC and Fox against Paine in the Fox-Paine Litigation and Paine's counterclaims; (ii) all ensuing claims and counterclaims between FPC and Fox, on the one hand, and the Paine Parties, on the other; and (iii) a copy of the 2007 Settlement ... These filings made clear, among other things, that: (I) Ghisletta was no longer employed by or loyal to FPC; and (ii) the Paine Parties were not acting on behalf of, and in fact were acting completely adverse to, FPC; and (iii) as of the execution of the 2007 Settlement Agreement, none of the Paine Parties had any remaining interest in, affiliation or employment relationship with, or authority to act on behalf of, FPC ... Inexplicitly, however, in the months and years that followed, ERP, HCC and PIA continued to take direction from Ghisletta, Paine, Presser and even P&P – the competing venture– itself with regard to the HCC Policy and plaintiffs' rights thereunder" (Rockett Opp. Aff. at ¶ 18, *citing* FAC at ¶¶ 69, 70, 76). Ms. Rockett makes the case for why HCC/PIA's arguments to dismiss based on failure to join indispensable parties and for *forum non conveniens* are without merit based on the information provided by Ms. Schoepf in her affirmation.

In their memorandum of law, to support of the sufficiency of their breach of fiduciary duty claim (Second Cause of Action), Plaintiffs rely on the allegations "'that ERP owed plaintiffs a fiduciary duty because it held itself out as an insurance specialist[9] who plaintiffs relied on to provide claims handling, advocacy and resolution services'" (Pltfs' Opp. Mem. at 9 *citing* FAC at ¶¶ 160-184). Plaintiffs argue "[w]hen a client 'reposes a high level of confidence' in his insurance broker, the broker is under a fiduciary duty 'to act for or to give advice for the

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[8]HCC disputes that Plaintiffs' Exhibit A to the FAC is the Policy between the parties and has attached what it contends is the HCC Policy as Exhibit A to the McCormack Affirmation.

[9]Plaintiffs point out that they alleged that "ERP assured [them] that it possessed 'specialized – and indeed unique – expertise' in procuring, handling and overseeing professional private equity insurance" (Pltfs' Opp. Mem. at 11, *quoting* FAC at ¶¶ 35, 124, 161, 186), "that it would 'promote and safeguard plaintiffs' interests at every stage of the insurance process,' including claim notification, handling and resolution (*id., quoting* FAC at ¶¶ 36-37, 125-126, 162-163, 187-188), "and that it would perform these duties with a 'dedicated team of "claims advocacy" specialists'" (*id., quoting* FAC at ¶¶ 38, 127, 164, 189). Plaintiffs also rely on the fact that on its website, ERP touts itself as more than just an insurance broker by stating that ERP "'has *redefined* the role of insurance broker in private equity from making sales to finding solutions, from *oversight to advice*,' and that it has 'the experience to stay with you beyond the close of the deal to provide ongoing analysis and creative solutions'" (*id.* at 11, n.7 *citing* Schoepf Opp. Aff. ¶ 26, Exs. 24 & 25 [emphasis in original]).

benefit of another upon matters within the scope of the relation'" (*id.* at 11, *quoting People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108, 115-116 [2009]). Plaintiffs also rely on what they contend to be well-settled law that establishes "when an insured relies on the expertise of the broker, or 'there was a course of dealing over an extended period of time' that demonstrates to a broker that its 'advice was being sought and specially relied on,' such reliance creates a 'special relationship' that imposes duties beyond merely obtaining the policy" (*id., quoting S. Bay Cardiovascular Assocs., P.C. v. SCS Agency, Inc.*, 105 AD3d 939, 941-42 [2d Dept 2013]).

In support of the sufficiency of their allegations establishing ERP's fiduciary duty, Plaintiffs rely on the allegations that:

> (1) ERP represented to plaintiffs that it would take on broad responsibilities to handle every aspect of FPC's PE Policies (FAC at ¶¶ 34-38, 123-127, 161-164, 186-189);
> (2) Plaintiffs then relied on this representation and engaged ERP to provide special services such as: (I) submitting claims; (ii) providing oversight of claims; and (iii) aggressively promoting FPC's interests (FAC at ¶¶ 37, 39, 123, 126, 128, 129, 163, 165, 188, 190, 191);
> (3) Plaintiffs did not merely engage ERP to procure an insurance policy; rather, plaintiffs put their confidence in ERP who was in a "position of superiority and control" to "promote and safeguard" plaintiffs' insurance needs (FAC at ¶¶ 125, 130, 162, 165, 187, 190). ERP encouraged this reliance, assuring Plaintiffs of its expertise in performing a broad range of claims-handling duties (FAC at ¶¶ 38, 125, 127, 162, 164, 187, 189), and knew that Plaintiffs did rely on ERP to perform such duties (FAC at ¶¶ 37, 126, 163, 188); and
> (4) the FPC Claim was submitted through ERP and ERP participated in the claim-resolution process (FAC at ¶¶ 66-70, 167-171 192-196, 246-249).

Plaintiffs contend that ERP breached its duty by wrongfully advancing/conspiring with the Paine Parties "to conceal their communications with the insurers and to convert the P&P claim under the P&P Policies to claims under the FPC Policies" causing Plaintiffs to sustain damage (Pltfs' Opp. Mem. at 9, 13 *citing* FAC at ¶¶ 34-39, 123-129, 161-166, 186-191 [allegations concerning fiduciary duty]; and FAC at ¶¶ 4, 6, 8, 39, 41, 108, 119, 121, 142-146, 148-152, 157, 158, 165, 171-184, 190-206, 212, 218-234, 237, 258, 261, 273, 279, 281 [allegations concerning damages]).

Plaintiffs dispute ERP's contention that they did not timely file a claim for coverage by pointing to the FAC's allegations that on November 6, 2007, Ghisletta, then an executive at FPC, submitted a claim to ERP on behalf of FPC under the FPC Policies, a claim which ERP reviewed and forwarded to HCC/PIA and the Excess Insurers (Pltfs' Opp. Mem. at 6, 14, *citing* FAC at ¶¶ 66, 167-169, 192-194, 217, 220, 246-249). Plaintiffs assert that because the Policy was purchased by FPC to protect FPC and certain members acting on its behalf (*id.* at 14, *citing* FAC at ¶ 33, 241-243), any claim filed by FPC (including the claim filed by Ghisletta), "was intended to confer the benefit of the proceeds upon those *acting on behalf of*

FPC" (*id.* at 14, *citing* FAC at ¶¶ 66, 167-168, 192-193, 217-218, 246-248 [emphasis in original]). Plaintiffs contend that the damages they suffered are: (1) the non-payment of at least $10 million of insurance proceeds and Plaintiffs' own coverage under the HCC Policy was exhausted (FAC at ¶¶ 4, 108, 119, 121, 157, 183, 212, 237, 261, 273, 284); (2) HCC's payment to the Paine Parties funded the adverse litigation by the Paine Parties against Plaintiffs (FAC at ¶¶ 6, 119, 146, 150, 157, 258, 261, 273, 279, 281, 284); (3) multiple claims submitted under the FPC Policies tarnished FPC's reputation and marketability in the insurance marketplace (FAC at ¶ 8, 121, 158); (4) Plaintiffs were deprived proceeds under the Excess Policies (FAC at ¶¶ 157, 183, 261, 273); and (5) the premiums Plaintiffs paid (FAC at ¶¶ 39, 41, 184, 212, 237) (Pltfs' Opp. Mem. at 14). Plaintiffs further argue that they must only allege damages and need not demonstrate them from an evidentiary standpoint (Pltfs' Opp. Mem. at 24).

In support of their claim for fraud, Plaintiffs argue that this is not simply a claim for fraudulent concealment since Plaintiffs have alleged affirmative misrepresentations by ERP "that its services go far beyond policy procurement, and that it would promote and safeguard plaintiffs' interests at every stage of the insurance process including through claim notification, claim handling and claim resolution" (Pltfs' Opp. Mem. at 15, *citing* FAC at ¶¶ 36, 38, 125, 127, 162, 164, 187, 189). To rebut ERP's contention that they have not pleaded fraud with sufficient particularity, Plaintiffs argue that they allege that "these representations to FPC were made by ERP at all relevant times and throughout the term of its engagement by FPC" (*id*). Plaintiffs also point to the various representations made on ERP's website concerning its qualifications and expertise and the services it provides.

As an attempt to relieve themselves of the usual specificity requirements for fraud (date, content, person making the fraudulent misrepresentation, person receiving the fraudulent misrepresentation), Plaintiffs argue that they have alleged that the FPC employees who had these communications with ERP are no longer at FPC and are, in fact, adverse to FPC. Moreover, Plaintiffs highlight that the FAC details how ERP initially engaged in all such claims handling and advocacy on behalf of FPC but then proceeded to switch sides after the breakup to handle the claims on behalf of the disloyal former executives and their new competing venture (Plaintiffs' Opp. Mem. at 17, *citing* FAC at ¶¶ 66-70, 88, 90, 94-102, 104, 132, 141, 147, 155).

In support of the sufficiency of Plaintiffs' claim of fraudulent concealment, Plaintiffs argue that they have pleaded it with sufficient particularity since the FAC "includes detailed allegations of the precise date, content, communicants and mode of communication for the vast majority of facts and communications concealed by ERP from plaintiffs" (*id.* at 17, *citing* FAC at ¶¶ 95-105, 148).

According to Plaintiffs, a duty to speak arises in the following situations:

> (1) when the parties have a special, confidential, or fiduciary relationship; or when one party is entrusted with complete control over the matter by the other; (2) when one party possesses superior knowledge, not readily available to the other, that is material to the party without the knowledge, or knows that the other is acting on the basis of mistaken knowledge; or (3) when one party makes a partial or incomplete statement that requires clarification (*id.* at 18).

According to Plaintiffs, a duty to speak also arises where a defendant engages in conduct involving an active concealment (*id.*) or based on the special facts doctrine. It is Plaintiffs' position that all of these legal theories for fraudulent concealment are applicable causing ERP to have a duty to disclose what it knew with regard to the Paine Parties' activities (*id.*).

Plaintiffs contend that a confidential fiduciary duty arose not only on the basis of Plaintiffs' reliance on ERP's expertise in obtaining and administering Plaintiffs' insurance needs, but also based on "ERP's exclusive knowledge and control over plaintiffs' policies, claims communications and claims resolutions, and the facts that ERP undertook to serve as FPC's agent for purposes of transmitting formal notices of claim to HCC and PIA, and engaging in claims-processing and resolution communications between HCC and PIA on the one hand, and FPC and other alleged insureds on the other" (*id.* at 19). Plaintiffs also assert that ERP had access to claims communications with regard to the FPC Claim to which FPC did not and that those "communications were material to FPC's insurance-related decision making and coverage prospects, and ERP's ability to obtain for FPC the policies that FPC engaged ERP to obtain on its behalf" (*id., citing* FAC at ¶¶ 122-132, 142-145, 161-166, 186-191). It is Plaintiffs' position that ERP's failure to disclose these communications to Plaintiffs was "inherently unfair" (*id.*). Plaintiffs assert that "ERP also had exclusive knowledge (not available to FPC) as to what insurance coverage ERP had obtained for the Paine Parties through the P&P Policies as opposed to the FPC Policies"(*id.*). Plaintiffs go so far as to assert that "ERP actively concealed its communications with the insurers and the Paine Parties, and actively concealed HCC's disbursements to the Paine Parties ... as well as the intention to induce action or inaction by plaintiffs and the exact resulting action and inaction by plaintiffs" (*id.* at 20, *citing* FAC at ¶¶ 3, 148, 150-156, 268).

Plaintiffs further rely on a partial disclosure by ERP concerning the FPC Claim. Plaintiffs claim that by partially disclosing, ERP had a duty not to omit material facts (Pltfs' Opp. Mem. at 19). According to Plaintiffs, partial disclosure occurred when "ERP communicated at length with Ghisletta in her capacity as CFO of FPC with regard to the FPC Claim prior to December 31, 2007" (*id.*, *citing* FAC at ¶139; ¶¶ at 66-70) and based on this partial disclosure, "ERP assumed a duty to disclose all subsequent communications with regard to the FPC claim" but that after Ghisletta left FPC, ERP never supplemented or clarified its initial disclosure (*id.* at 19).

In support of the sufficiency of Plaintiffs' Fourth Cause of Action for aiding and abetting a fiduciary duty, Plaintiffs rely on the FAC's allegations that "(I) Paine, Presser and the Former Executives owed plaintiffs a fiduciary duty, (ii) they breached that duty by improperly seeking insurance coverage under FPC's HCC Policy when they were not entitled to coverage, (iii) ERP provided substantial assistance to them by advancing their improper demand for coverage under the HCC Policy, and (iv) plaintiffs sustained damages as a result" (*id.* at 20, *citing* FAC at ¶¶ 213-237).

Plaintiffs counter ERP's contention that the FAC is bereft of allegations supporting ERP's "actual knowledge" of the underlying breach by relying on paragraphs 66-70, 73-77, 88-121, 214-224, 227-231, 234, 236 of the FAC. Plaintiffs argue that such allegations concerning ERP's scienter are more than sufficient given the pre-discovery stage of the action (*id.* at 20-21). Plaintiffs also clarify that the Paine Parties' breaches of fiduciary duty at issue are not the breaches underlying the acrimonious litigations/arbitrations between the parties but instead are:

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> the wrongdoers' seeking of coverage under FPC's insurance policy (an undisputed fact), for claims asserted against them by FPC for alleged harm to FPC (an undisputed fact), concealing coverage communications from FPC, and converting claims submitted under their own competing entity's (P&P's) insurance policy into claims under FPC's polices (an undisputed fact). ERP's actual knowledge of these breaches is based on its receipt and review of the FPC Policies, the FPC and P&P claims notices, pleadings that formed the basis for the coverage sought, the 2007 Settlement Agreement (which clearly states that the Paine Parties thereafter had no interest or ability to act on behalf of FPC), and actual participation in the coverage communications (*id.* at 21-22, *citing* FAC at ¶¶ 66-70, 73-77, 88-121, 214-224, 227-231, 234, 236).

As to the allegations that support ERP's knowing participation and inducement of the breach, Plaintiffs rely on the FAC at paragraphs 66, 67, 71, 74, 75, 88-121, 220, 222, 224, 231, 232, 236, which they contend show "ERP's extensive communications with HCC/PIA and the Paine Parties with regard to both coverage under the FPC Policies and shifting HCC/PIA's liability under the P&P Policy to FPC's Excess Insurers" (*id.* at 22).

In support of the sufficiency of their claim for intentional interference with contractual relations, Plaintiff contends that it has adequately pleaded this claim by alleging "Plaintiffs' valid contracts with HCC and the Excess Insurers, ERP's knowledge of those contracts, ERP's inducement of HCC and the Excess Insurers to breach those contracts by denying plaintiffs coverage and wrongfully paying out proceeds to the Paine Parties, and resulting damages" (*id.* at 22-23, *citing* Background facts re-asserted FAC at ¶¶ 33-121, 161-184, 214-237; FAC at ¶¶ 238-261, 274-284 [allegations concerning breach of contract]; FAC at ¶¶ 262-264, 266-273 [allegations concerning intentional interference]).

Plaintiffs summarize this branch of ERP's motion as being based on ERP's argument that the claim fails because Plaintiffs have not alleged (1) ERP's motive to induce HCC's breach, (2) the "actions underlying the intentional procurement" of HCC's breach, or (3) any damages Plaintiffs incurred from the "incorrect insurance payout by HCC" (*id.* at 23).

With regard to motive, Plaintiffs argue that this is no such requirement to plead motive and all Plaintiffs must allege is "'the defendant's knowledge was certain or substantially certain to occur as a result of his or her action'" (*id.* at 23, *quoting Reeves v Hanlon*, 33 Cal 4th 1140, 1148 [2004]). But even if Plaintiffs were required to plead ERP's motive, Plaintiffs contend that they have done so by alleging that "ERP interfered with the HCC Policy to 'promote and advance [its] own business relationships with the Paine Parties especially since they knew that FPC was not raising any new funds and P&P would be generating new business in the future'" (*id.* at 23, *citing* FAC at ¶¶ 94, 179-181, 204-206, 271).

Plaintiffs contend that they have satisfied the "intentional procurement" requirement by alleging that "ERP concealed from them all communications with the Paine Parties concerning the FPC Policies, conspired with the Paine Parties to convert the P&P

Claims to related claims under the FPC Policies, and actively encouraged HCC and the Excess Insurers to unlawfully pay FPC insurance proceeds to the Paine Parties when none of them was entitled to coverage" (*id.* at 24, *citing* FAC at ¶¶ 66, 67, 71, 74, 75, 88-121, 220, 222, 224, 231, 232, 236, 252, 268).

Moreover, according to Plaintiffs, ERP has failed to refute Plaintiffs' claims that ERP tortiously interfered with the Excess Insurers' performance under the Excess Policies and "[f]or that reason alone plaintiffs' Sixth Cause of Action should not be dismissed" (*id.* at 24, n.17, *citing* FAC ¶¶ 262-264, 266-273).

To support the sufficiency of their unjust enrichment claim, Plaintiffs contend that they have adequately alleged numerous benefits conferred on ERP that would be inequitable for it to retain – *i.e.*, "ERP received a portion of plaintiffs' premium payments as commissions despite the fact that it conspired with the Paine Parties to force FPC's insurers to pay out proceeds from the FPC Policies to parties entirely adverse to FPC who were not even insureds or otherwise entitled to coverage, prevented FPC from receiving proceeds on FPC's own claim, and converted P&P claims into claims under the FPC Policies" (*id.* at 24-25, *citing* FAC at ¶¶ 167-182, 192-207, 217-234, 236, 268-269, 271-272).

ERP'S REPLY

The crux of ERP's reply is that Plaintiffs' arguments are unavailing as Plaintiffs failed to plead any contractual requirement or any specific communication or representation made by ERP to Plaintiffs. It is ERP's position that under California law, unless the parties have agreed otherwise, an insurance broker's duty to his or her client begins and ends with proper procurement of insurance" (ERP's Reply at 3). ERP distinguishes the cases on which Plaintiffs rely since none of them hold that an insurance broker who contracts simply to place insurance for a client owes special fiduciary duties once the insurance is placed. Alternatively, ERP asserts that "[t]o the extent that any of the New York authorities referenced in Plaintiffs' opposition can be read as holding otherwise, they provide no support for Plaintiffs' claims, which must rise and fall on the scope of duty recognized under California law" (*id.* at 4, n.1).

ERP asserts that simply because it was capable of providing insurance services beyond procurement does not mean that it "entered into an agreement with Plaintiffs, or engaged in a long course of conduct, to provide any such services. Nowhere in the Complaint is it alleged that Plaintiffs requested, and ERP agreed, to act as Plaintiffs' fiduciary with regard to Plaintiffs' claim to HCC long after ERP's role as Plaintiffs' broker of record for purposes of placing insurance terminated" (*id.* at 6). According to ERP, simply because Plaintiffs allege that ERP engaged in claims-processing and resolution communications between HCC/PIA and FPC, such allegations are insufficient to invoke a fiduciary relationship between the ERP and Plaintiffs.

ERP again relies on the fact that Plaintiffs have failed to allege any damage proximately caused by its alleged breach since: (1) the FAC fails to allege that Fox or FPC ever

requested defense or indemnity for any claim asserted against them; and (2) Plaintiffs' admission regarding the continued existence of upwards of $30 million in excess insurance coverage renders Plaintiffs' failure to allege any request for coverage material since a breach that causes no cognizable damage is not actionable (ERP Reply at 7).

ERP refutes Plaintiffs' attempt to allege a claim being made based on FPC's CFO's submission of claim notices to ERP and ERP's forwarding of such claim notices to PIA by arguing "[a]s Paragraph 67 reveals, however, these 'claim notices' were not requests for coverage at all, but merely 'incident' reports ... [therefore] ... the Complaint does not sufficiently allege that either Plaintiff ever requested payment of any defense or settlement costs relating to any claim ever asserted against it by Paine or the Former Executives" (ERP Reply at 7).

In further support of the branch of its motion seeking to dismiss Plaintiffs' fraud claim, ERP argues that Plaintiffs have reconfigured their fraud claim from one of concealment to affirmative misrepresentation due to their acknowledgment of the fatal deficiencies to their concealment claim. According to ERP, Plaintiffs' reliance on alleged misrepresentations found on ERP's website and their reliance on *Hughes v Ester C Co.* (930 F Supp 2d 439 [ED NY 2013]) is misplaced. First, ERP argues *Hughes* is *inapposite* as it involved a consumer fraud claim concerning defendants' misrepresentations that their vitamins had qualities that they did not in fact possess. Second, on the issue of whether ERP undertook any duties to Plaintiffs beyond that of procuring insurance, "[n]one of the quotes from ERP's website recited on page 16 of the Opposition support Plaintiffs' argument that ERP did undertake such duties" (ERP Reply at 8). ERP further argues that because Plaintiffs have the knowledge necessary to allege the assurances and representations ERP made that would subject it to liability beyond that of an ordinary insurance broker, Plaintiffs' conclusory allegations are wholly insufficient (*id., citing* FAC at ¶¶ 125 and 164).[10]

In further support of the dismissal of the aiding and abetting a breach of fiduciary duty by the Paine Parties, ERP relies on *Casey v U.S. Natl. Bank Assn.* (127 Cal App 4th 1138, 1148 [Cal Ct App 4th Dist Div 3 2005]), in which the court held that such a claim "'necessarily requires a defendant to reach *a conscious decision to participate in tortious activity* for the purpose of assisting another in performing a wrongful act'" (ERP Reply at 9, *citing Casey*, 127 Cal App 4th at 1146 [emphasis added]). ERP reiterates its arguments concerning Plaintiffs' failure to allege ERP's actual knowledge. Moreover, since the only conduct alleged is that ERP engaged in continuous conversations with HCC/PIA and the Paine Parties in an effort to shift HCC/PIA's liability under the P&P Policy to FPC's Excess Insurers, ERP contends that the substantial assistance component is lacking since this conduct does not rise to the level of tortious conduct.

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[10]These allegations are "[t]hat all relevant times, ERP represented to FPC and Fox that ERP would promote and safeguard plaintiffs' interests at every stage of the insurance process, from the procurement of suitable PE Policies through claim notification, claim handling and claim resolution" and "Throughout the term of its engagement by FPC and Fox, ERP also assured plaintiffs that ERP had a dedicated team of "claim advocacy" specialists to perform claims handling, oversight and advocacy on behalf of FPC."

In further support of the dismissal of Plaintiffs' claim for intentional interference with contractual relations, ERP first relies on the fact that Plaintiffs have failed to allege a breach of the HCC Policy. In any event, ERP asserts that the predicate for Plaintiffs' claim is that ERP had a duty to advise Plaintiffs of the claim made by the Paine Parties, and since no such duty exists as a matter of law, Plaintiffs' claim for intentional interference with contractual relations fails as a matter of law (ERP Reply at 10).

In further support of the dismissal of the unjust enrichment claim, ERP argues that all of the alleged benefits conferred have nothing to do with ERP. Thus, the fact that ERP was used as a conduit for the payment of the insurance premiums is of no moment. Moreover, as admitted by Plaintiffs in their opposition, the commissions paid to ERP concerning the HCC Policy were paid by HCC – not Plaintiffs. In support of the position that it would not be inequitable and unjust to allow it to retain such commissions paid by HCC, ERP argues "there is no dispute that ERP fulfilled all of its duties as an insurance broker" (ERP Reply at 11).

HCC/PIA's CONTENTIONS IN SUPPORT OF THEIR MOTION

HCC and PIA distill this action as one based on a claim that *"the insurer owed plaintiffs a duty to deny coverage* to a different, non-party insured, and must pay damages even though the limit of liability is paid out and there is excess insurance" (HCC/PIA Mem. at 1 [emphasis in original]). HCC/PIA asserts that Plaintiffs' contention that they were the only legitimate insureds so the claim only belonged to them is misplaced since both the Policy and case law makes no distinction among insureds (*id.* at 2). According to HCC/PIA because the HCC insurance contract is a "claims-made and reported" Policy requiring that each insured both report a claim during the policy period and obtain consent before incurring any costs, Plaintiffs' claims cannot stand because it is undisputed that Plaintiffs failed to do both requirements. Moreover, it is HCC/PIA's contention that they would have violated a duty of confidentiality owed to the insured making the claim (*i.e.*, the Paine Parties) by disclosing to Plaintiffs that a claim had been made by them.

HCC/PIA set forth some of the facts alleged upon which they rely in their motion:

> HCC issued the HCC insurance contract as a first layer insurance policy with a limit of $10 million, excess of the retention. PIA is not a party to the contract and merely acted as a claims agent for HCC. Other insurers issued policies in excess of the HCC insurance contract with total limits of at least $30 million, providing at least $40 million in total. The policy no. was H706-60545 and it had a Policy Period of December 30, 2006 to January 2, 2008. Plaintiff Fox and non-party W. Dexter Paine, III ("Paine") were equal partners in the private equity fund FPC when, on August 27, 2007, Fox/FPC sued Paine and others in Delaware. What followed was acrimonious litigation from, literally, coast to coast spawning two arbitrations, eight declaratory judgment actions, and four other actions, all against Paine and certain Former Executives

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> (collectively, the "Paine Parties"). The parties eventually settled their differences in August 2012. As part of that settlement, Fox then took sole control of FPC. Now, apparently still unhappy, Fox has filed yet another action (HCC/PIA Mem. at 1-2).

HCC/PIA join in ERP's contention that Plaintiffs' FAC must be dismissed because Plaintiffs cannot demonstrate damages because, *inter alia,* they have not alleged that they have pursued and/or exhausted the $30 million in excess insurance. HCC/PIA assert that Plaintiffs' allegations concerning the damages suffered, namely that "HCC 'funded, encouraged and bankrolled' the Paine Parties' claims against Fox/FPC" (*id.* HCC/PIA Mem. at 13, *quoting* FAC at ¶¶ 150, 157) are not cognizable damages "since a Policy's purpose is to provide the insured with defined rights only and it does not 'insure the entire range of the insured's well-being'" (*id., quoting Western Polymer Tech., Inc. v Reliance Ins. Co.*, 32 Cal App 4th 14, 27 [Cal Ct App, 1st Dist, Div 3 1995]; *Feliberty v Damon,* 72 NY2d 112, 116 [1988]). Furthermore, HCC/PIA argue that even if Fox/FPC were entitled to coverage – *i.e.*, they (1) properly submitted notice of a claim, (2) obtained HCC's consent before incurring defense costs, (3) obtained HCC's consent before settling claims, and (4) showed that no exclusions applied – there is nothing left of the Policy.

In support of the dismissal of Plaintiffs' Fifth Cause of Action for breach of contract against HCC, HCC contends it is not sustainable as a matter of law since Plaintiffs have not and cannot allege that they tendered a claim for insurance during the policy period. According to HCC, the Policy is claims-made and reported policy and the failure to report a claim during the policy period bars coverage (HCC/PIA Mem. at 5) since "[t]he primary purpose of a claims-made and reported policy is to ensure that the insurer receives timely notice of claims so that the insurer knows the nature and extent of risks that it faces at the conclusion of the policy period" (*id.*). Therefore, it is HCC's position that Plaintiffs' failure to provide notice is fatal to their breach of contract claim.

HCC argues that the "single claim notice" submitted by ERP on FPC's behalf on November 7, 2007 (FAC at ¶¶ 66, 67; McCormack Aff., Ex. F) was of Fox's lawsuit against Paine as a defendant and cannot serve as notice of a claim against Fox/FPC. Alternatively, HCC argues that because it was notified of the December 3, 2007 settlement of that lawsuit (FAC at ¶ 73) in December 2007 and then sought confirmation from Ms. Ghisletta, FPC's CFO, and ERP, FPC's broker (FAC at ¶¶ 66, 74) that the claim had been withdrawn, which ERP provided to HCC/PIA on January 31, 2008 (FAC at ¶ 75), the "voluntary withdrawal of the claim terminated any possible effect of the November 7, 2007 notice" (HCC/PIA Mem. at 4-5). HCC/PIA assert that while they received a notice of claim on behalf of the Paine Parties on May 15, 2009, HCC/PIA did not receive any further tender of claim from Plaintiffs until this suit was filed.[11]

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[11]While HCC/PIA reference the July 16, 2013 letter Fox/FPC wrote to HCC (McCormack Aff., Ex. I) and HCC's response on August 29, 2013 (McCormack Aff., Ex. J), it is HCC's contention that the July 16 letter did not constitute a notice of claim.

HCC further relies on Section V of the Policy,[12] which requires that before a party may recover for defense costs, it must obtain the insurer's consent. According to HCC/PIA, because Plaintiffs fail to allege the satisfaction of this condition precedent, their claim for breach of contract fails (*id.* at 6).

As the second basis for dismissal of the breach of contract claim, HCC argues that Plaintiffs' claim is grounded on the premise that they owned the Policy and that they were the only ones with a legitimate right to submit a claim against it. HCC points out that the Policy's Coverage Clauses require it to "'pay on behalf of Insureds [or the Insured Organization] Loss' (which is defined to include defense costs) arising from insured activities (Ex. A at p. 1-2)" and the Policy provided for coverage for claims against FPC's officers and executives and nowhere does it state that "any Insured has exclusive or superior rights to the policy limits" (HCC/PIA Mem. at 6). HCC explains that it paid out on the Paine Parties' claim in response to their repeated demands under a colorable claim for coverage as insureds under the FPC Policy with respect to Fox/FPC's claims against them (FAC at ¶ 66). In this regard, HCC argues that Paine, as the President of FPC and equal partner with Fox in FPC, was an "Insured Person" under the FPC Policy (McCormack Aff., Ex. A § II.I) and the other Paine Parties, as former executives, were entitled to claim they were an "Insured Person" (McCormack Aff., Ex. A, Endorsement 3). According to HCC, it is well settled "that an insurance contract applies equally to all insureds without distinction among them" (*id.* at 6-7).

In response to Plaintiffs' contention that HCC breached the Policy and should have denied the Paine Parties' claim because it should have known the Paine Parties violated their fiduciary duties to Plaintiff, HCC argues that this would have required that it review the allegations of the pleadings in the Fox-Paine Litigation and act as judge and jury to decide which of its insureds' arguments had merit, but no place in the Policy is this required of HCC (*id.* at 7).

HCC rebuts Plaintiffs' claim that it breached the Authorization Clause[13] of the Policy (and arguably some other independent duty to Plaintiffs) by accepting a notice of claim from someone other than FPC by arguing that "the plain language of the Authorization Clause does not require that the insurer agree that it shall only accept all notices from the Named Insured. Indeed, the law is that each insured has an independent right and

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[12]As set forth in Section VI. Settlements and Defense:

A. As a condition precedent to coverage, no settlement negotiations or settlement agreements shall occur and no Costs, Charges and Expenses shall be incurred without the Insurer's consent, such consent not to be unreasonably withheld (McCormack Aff.,Ex. A).

[13]It provides: "By acceptance of this Policy, the Insureds agree that the entity identified in Item A. of the Declarations will act on their behalf with respect to giving of all notices to the Insurer, the receiving of notices from the Insurer, the payment of the premium and the receipt of any return premium" (McCormack Aff., Ex. A at p. 14).

obligation to give notice ... Nothing in this Clause requires HCC/PIA to only communicate with Fox/FPC, nor does it relieve them of their notice obligations" (*id.* at 8). According to HCC, given the conflict of interest between Fox/FPC and the Paine Parties, it would be improper for HCC/PIA to accept Fox/FPC's views on the Paine Parties' claims for coverage (*id.* at 8-9).

HCC responds to Plaintiffs' allegations that HCC breached the Policy by treating the claims submitted under the P&P Policies as though they were claims submitted under the FPC Policy by first pointing out that the Paine Parties demanded coverage under the FPC Policy (*id.* at 8, n17, *citing* McCormack Aff., Ex.H). Alternatively, HCC argues that even if the payments it made to the Paine Parties were improper, there would still be no breach because there is no provision in the FPC Policy that gives one insured the right to control or contest such a payment to another insured (*id.*).

In support of the dismissal of Plaintiffs' claims for fraudulent concealment (as Plaintiffs have not alleged any affirmative misrepresentations by HCC or PIA) and breach of the implied covenant of good faith and fair dealing, HCC/PIA argue that both are predicated on Plaintiffs' allegations that HCC/PIA had a duty to disclose the claim made by the Paine Parties against the Policy, that HCC/PIA breached that duty (FAC at ¶¶ 138-39), and that "the [HCC insurance contract] mandated that all claims communications be made only by and through FPC" (FAC at ¶¶ 3, 136, 219).

As to Plaintiffs' first basis for liability, HCC/PIA point out that it is Plaintiffs' contention that HCC had a relationship "akin to a fiduciary duty" (FAC at ¶¶ 134, 277) based on:

> "(iii) a duty to inform the insured of all rights and benefits conferred under the policy; and (iv) upon learning of a potential claim from the insured or from any source, a duty to make diligent inquiry into the claim to determine whether any of its insureds are entitled to coverage and to advise them accordingly" (*id.* at 9, *quoting* FAC at ¶¶ 135, 278).

According to HCC/PIA, this argument is without merit based on well established precedent in New York and California that insurers are not fiduciaries (*id.*). HCC/PIA contend that it is for this reason that Plaintiffs have not asserted a direct claim for breach of fiduciary duty against HCC/PIA and Plaintiffs' "attempt to assert fiduciary-like obligations without a fiduciary duty is contrary to these authorities and fails" (*id.*).

To the extent Plaintiffs are alleging that PIA should have analyzed the pleadings in the Fox/Paine litigation for coverage for a claim that Plaintiffs might present and advise Plaintiffs to present such a claim, HCC/PIA argue that such a theory of liability has been rejected under California law (*id.* at 11).

HCC/PIA analogize this case to *Medina v State Farm Fire & Cas. Co.*, (924 F2d 1063 [9th Cir 1991]) since Plaintiffs had accessible to them all of the necessary facts (*i.e.*, Plaintiffs knew the Policy existed, that there was litigation against the Paine Parties, that certain

of the Paine Parties were additional insureds and that Plaintiffs could have taken discovery of the Paine Parties' insurance in the Delaware action pursuant to Delaware Chancery Court Rule 26[b][2]).[14] Given the foregoing, HCC/PIA contend that Plaintiffs have not and cannot allege that HCC/PIA committed actionable concealment (*id.* at 11). HCC/PIA also argue that Plaintiffs cannot allege reasonable reliance on HCC/PIA because Fox/FPC were required to make their own decisions concerning the application of the Policy and seek discovery on whether the Paine Parties had insurance coverage. Finally, it is HCC/PIA's position that Plaintiffs' fraud claim fails as they have not suffered any cognizable damage.

HCC/PIA argue that Plaintiffs' claim for breach of an implied duty of good faith and fair dealing fails under New York law because such a claim is viewed to be duplicative of the breach of contract claim as both arise under the same facts and New York courts will not create implied obligations to create separate legal duties that do not exist in the contract (*id.* at 11-12). With regard to the viability of such a claim under California law, HCC/PIA assert "[w]hile California law allows a separate cause of action for breach of the implied covenant of good faith and fair dealing under certain circumstances, that is not the case here. Under California law, the implied covenant of good faith and fair dealing extends only to protection of the benefits due to an insured under the contract" (*id.* at 12). HCC/PIA further point out that Plaintiffs' claim for breach of an implied covenant of good faith and fair dealing against PIA is defective since PIA was not a party to the Policy (*id.*).

HCC/PIA's primary argument for the dismissal of the aiding and abetting the Paine Parties' breach of fiduciary duty claim (Fourth Cause of Action) is that Plaintiffs' release of the Paine Parties' breach of fiduciary duties in the underlying Fox/Paine litigation necessarily bars Plaintiffs' claims for aiding and abetting since the release negates that there ever was a breach of fiduciary duty, which is a necessary element for an aiding and abetting a breach of fiduciary duty claim. In this regard, HCC/PIA rely on the admission made by Plaintiffs' counsel at a conference before this Court on May 22, 2014 (McCormack Aff., Ex. K at 17:15-21) that Fox/FPC released all claims against the Paine Parties in the "definitive settlement agreement" that was reached in August 2012. And to the extent Plaintiffs are relying on the Paine Parties' presentation of a claim for coverage pursuant to the Policy under which they were insureds, HCC and PIA argue that Plaintiffs do not allege how such conduct could possibly constitute the predicate breach of any fiduciary owed to Fox/FPC. According to HCC/PIA, Plaintiffs' release of the Paine Parties alleged wrongful conduct bars Plaintiffs' current claim for aiding and abetting a breach of fiduciary duty with regard to any purported breaches undertaken by the Paine Parties.

As their secondary argument for dismissal with regard to the Paine Parties' alleged breaches of fiduciary duty (Fourth Cause of Action) and as their only argument for dismissal of the claim with regard to the alleged breaches of fiduciary duty by ERP (Third Cause of Action), HCC/PIA argue that Plaintiffs have failed to allege their actual knowledge of

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[14]The Delaware Chancery Rule provides "[a] party may obtain discovery of the existence and contents of any insurance agreement ... [used] to satisfy part or all of a judgment ...." (Delaware Chancery Court Rule 26[b][2]).

any breach and HCC/PIA's inducement or their substantial assistance of such breaches. According to HCC/PIA, Plaintiffs do not allege how or when HCC or PIA knew that the Paine Parties and ERP were breaching their fiduciary duties let alone any facts that would establish that HCC or PIA had actual knowledge of such a breach. With regard to HCC/PIA's inducement or substantial assistance, HCC/PIA rely on the well settled legal principle that "[m]ere inaction can constitute substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff" (HCC/PIA Mem. at 18-19). According to HCC/PIA, because all they did was to pay out on a claim (after initially contesting the claim) on behalf of additional insureds under the Policy, Plaintiffs have not alleged HCC/PIA's inducement or substantial assistance of the Paine Parties' and ERP's alleged breach of fiduciary duty.

In support of the dismissal of Plaintiffs' Sixth Cause of Action for intentional interference with contractual relations against PIA, HCC/PIA argue that the claim must fail because a necessary element is that there was a breach of the Policy and for the reasons set forth in connection with the branch of HCC/PIA's motion seeking the dismissal of the breach of contract claim against HCC, Plaintiffs have not alleged a breach. Further, with regard to PIA's intentional interference, HCC/PIA argue that Plaintiffs merely allege "in conclusory fashion that PIA's normal and typical claims handling process was somehow a conspiracy to conceal the submitted claims from Fox/FPC, wrongfully treat claims submitted under the P&P Policy as claims under the HCC insurance contract and wrongfully pay out the 'entire proceeds of the FPC Policies' to the Paine Parties" (HCC/PIA Mem. at 17, *quoting* FAC at ¶ 257, 268). It is HCC/PIA's contention that "[t]hese conclusory allegations are directly contrary to the law that there was no duty to inform, and are not supported with any allegations that PIA intentionally acted to induce HCC to breach the HCC insurance contract" (*id.*). HCC/PIA rely on what they contend is well established legal precedent in California and New York that "agents of an insurance company are immune from claims brought by insureds for actions taken while acting as an agent for the insurer under the scope of its agency" (*id.*).

HCC/PIA assert that Plaintiffs' Eighth Cause of Action for unjust enrichment fails because nowhere do Plaintiffs specify how HCC/PIA personally profited and were unjustly enriched. According to HCC/PIA, HCC's payment of $10 million to the Paine Parties is fatal to Plaintiffs' claim for unjust enrichment.

HCC/PIA's final arguments are that the action should be dismissed based on Plaintiffs' failure to join the Paine Parties as indispensable parties to this action. Namely, HCC/PIA argue

> this action should be dismissed for any one of three independent reasons: (1) Fox/FPC – repeatedly – put at issue the rights of the Paine Parties to any limits of the insurance contract and the Paine Parties' breach of duties (breaches that defendants allegedly aided and co-conspired in); (2) the absence of the Paine Parties creates the risk of inconsistent judgments concerning whether the Paine Parties had a right to any policy limits and whether they breached duties owed to Fox/FPC; and (3) it would be

> highly prejudicial and inequitable to HCC/PIA to proceed without the Paine Parties because it would result in the Paine Parties not being bound by the rulings on their rights and obligations (HCC/PIA Mem. at 20-21).

In essence, HCC/PIA urge that "[t]he Court should not, however, be determining that the Paine Parties were not covered and award the disgorgement and other damages sought without the parties at interest – the Paine Parties – present to continue their dispute on that very point" (HCC/PIA Mem. at 21). According to HCC/PIA, because this is "[a] litigation ... to determine the right to money," it "should name as a defendant the party that actually possesses the money" (*id.* at 22).

HCC/PIA further rely on the fact that proceeding without the Paine Parties may result in inconsistent judgments since "HCC paid defense costs while preserving HCC's right to seek recoupment of all amounts paid on grounds that the Paine Parties' claims were not covered under the HCC insurance contract" and the exclusive forum for that suit is in California (*id.* at 23; McCormack Aff. at ¶ 28).

With regard to the last factor, HCC/PIA argue it weighs in HCC/PIA's favor because in any recoupment action against the Paine Parties, the Paine Parties will contend that they were entitled to the Policy and that they did not breach any fiduciary duties. HCC/PIA contend that if they "are forced to litigate whether the Paine Parties were entitled to insurance limits or breached duties without the Paine Parties present in New York, HCC/PIA will surely be severely prejudiced. Who in the case will argue that the Paine Parties were entitled to the insurance? And when HCC takes a judgment from here saying that the Paine Parties were not entitled to coverage to a California court, it will have to litigate that very issue all over again and could no doubt end up with a different ruling" (HCC/PIA's Mem. at 24). HCC/PIA notes that this Court recognized this issue at the oral argument on the motion (*id., citing* Transcript of Oral Argument, McCormack, Ex. K at 17:4-12).

Finally, HCC/PIA urge for the dismissal of this action based on *forum non conveniens* pursuant to CPLR 327(a). In support, HCC/PIA rely on

> (1) HCC cannot bring the Paine Parties into this suit and Plaintiffs refuse to do so;
> (2) Fox, FPC, ERP and Paine are all California residents;
> (3) the dispute between Fox and Pain occurred in California;
> (4) the Policy was issued in California;
> (5) Amy Ghisletta (FPC's former executive) is a California resident;
> (6) HCC's coverage position letter was issued in California by a California lawyer; and
> (7) Plaintiffs contend California law applies to the case (HCC/PIA Mem. at 24-25).

PLAINTIFFS' CONTENTIONS IN OPPOSITION TO HCC/PIA'S MOTION

In their memorandum of law, Plaintiffs assert that California law applies to their breach of contract claims and New York law applies to their tort claims but nevertheless contend that the choice of law is inconsequential because "the parties agree that New York and California law are not in conflict on virtually all issues addressed on these motions" (Pltfs' Opp. Mem. at 3, n.3).

As their first argument in further support of their cause of action against HCC for breach of contract, Plaintiffs argue that the branch of the motion which seeks dismissal pursuant to CPLR 3211(a)(7) must be denied because "[t]he Fifth Cause of Action (¶¶ 238-61) alleges plaintiffs' submission of a valid and timely claim under the HCC Policy, and defendants' (I) wrongful denial of coverage, (ii) failure to engage in claim communications by and through FPC, (iii) payment to non-insureds, and (iv) resulting damages" (Pltfs' Opp. Mem. 3).

With regard to the branch of HCC/PIA's motion which seeks to dismiss the breach of contract claim pursuant to CPLR 3211(a)(1) – *i.e.*, documentary evidence which HCC/PIA contend conclusively shows that (1) Plaintiffs never tendered a claim during the Policy period, and (2) Plaintiffs allegedly withdrew their (non-tendered) claim in January 2008, purportedly "terminating" their rights under the policy – Plaintiffs argue that this branch of HCC/PIA's motion must fail because the letters and purported claim notice (as well as counsel's averments in his affidavit) do not qualify as documentary evidence. Nonetheless, Plaintiffs further address the merits of HCC/PIA's contentions and, based on the 2007 Claim Notice (McCormack Aff., Ex. F) and HCC's file closing letter (McCormack Aff., Ex. G), dispute that either document definitively establishes HCC/PIA's defense; instead, it is urged that they support Plaintiffs' claims (*id.* at 4).

Plaintiffs argue that HCC's arguments concerning the Plaintiffs' failure to timely file[15] a notice of claim are without merit under (1) the terms of the Policy which Plaintiffs claim have no formal tender requirements, and (2) California and New York law which do not require an insured to formally tender a claim or request a defense to invoke its rights and the "insurer's duty to investigate and provide coverage arises when it receives notice of a claim from any source—whether from the insured or a third party" (*id.* at 5). Thus, it is Plaintiffs' position that the notices and pleadings HCC/PIA received placed them on notice of Plaintiffs' rights under the Policy and "FPC's November 2007 notice is applicable to Fox because they were united in interest" but it did not suffice as notice for the Paine Parties since they were not united in interest with FPC.

With regard to the subsequent claims, Plaintiffs point out that they have alleged at paragraphs 66, 105, and Defendants have conceded, that HCC/PIA "received timely notice of the Fox-Paine Litigation *during* the policy period *and* that the later claims arising between the parties involved 'Interrelated Wrongful Acts' under the policy. Because these later claims are

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[15]It is also Plaintiffs' position that HCC/PIA waived any timeliness defense by not asserting it prior to their motion (Pltfs' Opp. Mem. at 6, n5).

interrelated, they relate back to the first notice *regardless* of whether HCC/PIA ever received further notice from any insureds" (*id.* at 5-6 [emphasis in original]).

Plaintiffs refute the other defenses asserted by HCC/PIA regarding Plaintiffs' alleged failure to obtain HCC's consent before incurring defense costs and HCC/PIA's claim that the Paine Parties are insureds under the Policy with equal rights to Plaintiffs. As to the former, Plaintiffs argue that HCC/PIA have presented no evidence establishing Plaintiffs' non-compliance and even if they had, it could not properly be decided on a motion to dismiss. Plaintiffs further assert that where, as here, the claim is based on wrongful denial of coverage, the "'insured [is] thereby relieved of his obligation to notify the insur[er] of the progress of the action'" and may "'incur settlement and defense costs without prejudicing his rights against the insurer'" (Pltfs' Opp. Mem. at 6, *quoting Samson v Transamerica Ins. Co.*, 30 Cal 3d 220, 238 [1981] and *Ostrowski v American Safety Indem. Co.*, 2010 WL 3924679, at *6 [ED NY 2010]).

As to the latter argument, Plaintiffs respond that neither the allegations of the FAC, nor the Policy's terms, lists the Paine Parties as insureds. Instead, under the Policy and under New York and California law, "officers and directors qualify as insureds *only when acting in their official capacities for the benefit of the insured organization*" (Pltfs' Opp. Mem. at 7 [emphasis in original]).

Plaintiffs refute any suggestion by HCC that it is somehow off the hook because it has already paid out the Policy limits by asserting that it is well settled that "an insurer must treat all insureds equally, and where an insurer pays the entire limits to one insured, leaving another bereft of coverage, the insurer *has breached its obligation to the latter insured*" (*id.* at 8 [emphasis in original]).

In support of the sufficiency of their claim that HCC/PIA breached the implied covenant of good faith and fair dealing, Plaintiffs contend that "[u]nder California law, a covenant of good faith and fair dealing is read into every insurance policy 'as a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's rights to the benefits of the agreement'" (Pltfs' Opp. Mem. at 8, *quoting Waller v Truck Ins. Exch., Inc.*, 11 Cal 4th 1, 36-37 [1995]):

> Under the implied covenant, insurers must: (i) give at least as much consideration to the interests of the insured as to its own interests ... (ii) treat all insureds equally ... ; (iii) upon learning of a claim from an insured or other source, make diligent inquiry to determine whether *any* insureds are entitled to coverage ...; and (iv) inform the insured of all coverage, rights and benefits conferred under the policy ... Where "an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer has been required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy"... The covenant is also violated where

> the insurer disburses policy proceeds to an adverse third party without obtaining a release of its insured (*id.* at 8-9, *quoting Davis v Blue Cross of N. Cal.*, 25 Cal 3d 418, 427-28 [1979] [emphasis in original]).

Plaintiffs contend that "New York ... imposes 'a contractual duty of good faith owed by an insurer to its insured' that requires, among other things, 'the exercise of abundant good faith with absolute and perfect candor in an open and honest exercise of duties'" (*id.* at 9-10, *quoting Yonkers Contr. Co., Inc. v General Star Natl. Ins. Co.*, 14 F Supp 2d 365, 373 [SD NY 1998]). Plaintiffs further refute HCC/PIA's position that the breach of the implied covenant of good faith and fair dealing is duplicative of the contract claim and they distinguish it by laying out the factual predicate for this claim as alleged in the FAC.[16] The essence of the claim being that HCC/PIA acted in bad faith by disbursing an amount equal to the Policy's limits to the Paine Parties (who did not qualify as insureds) which not only fueled the Paine Parties' litigation against Plaintiffs, but also left Plaintiffs without coverage.

With regard to Plaintiffs' ability to hold PIA liable for breach of the implied covenant of good faith and fair dealing, Plaintiffs argue that it is an affiliate of HCC with delegated claims-handling responsibilities under the Policy (Item K of Declarations page and Clauses VIII and XVI) and "[w]here, as here, the administrator is affiliated with the insured, or has been delegated claims-handling responsibility under the policy, and thus shares a financial incentive to deny or limit claims, the administrator can be held liable for bad faith and other torts" (Plfs' Opp. Mem. at 11). Plaintiffs also refute that PIA is shielded from liability based on its position as an agent citing to precedent holding that an agent is liable for its own torts (*id.*). Plaintiffs alternatively argue the FAC adequately alleges a claim against PIA since Plaintiffs allege that they engaged HCC and PIA and/or that Plaintiffs were third party beneficiaries of the HCC/PIA contractual relationship.

Plaintiffs concede that they have not asserted a claim of an affirmative misrepresentation by HCC/PIA. With regard to their fraudulent concealment claim, Plaintiffs argue the allegations are sufficient because they have alleged that HCC/PIA had an obligation to disclose that the Paine Parties had submitted a claim based on six different theories (1) "defendants had a contractual obligation to make policy disclosures to FPC—which they failed to do by communicating in secret with, and ultimately disbursing funds to, FPC's adversaries, the Paine Parties (¶¶ 53-57, Compl. Ex. A at X.E.)" (*id.* at 12); (2) "under New York and

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[16]Namely, that the FAC "alleges breach of every implied term noted above, including HCC/PIA's failure to: (i) give as much consideration to plaintiffs' interests as their own; (ii) act in absolute, perfect and open candor in all matters affecting plaintiffs' rights under the policy; (iii) inform plaintiffs of all rights and benefits conferred under the policy; and (iv) upon learning of a potential claim from any source, make diligent inquiry to determine whether any insureds were entitled to coverage and to advise them accordingly" (Pltfs' Opp. Mem. at 10).

California law, insurers have an affirmative duty to disclose all material information" (*id.*); (3) California law requires such disclosures pursuant to 10 C.C.R. § 2695.4[17]; (4) "plaintiffs reposed their trust in defendants and relied on their expertise with regard to the administration and performance of their duties under the HCC Policy, entrusting them with complete control over plaintiffs' insurance requirements (¶¶ 123, 133-134)" and this confidential relationship required that HCC/PIA provide Plaintiffs with disclosure (*id.* at 12-13); (5) "defendants were required to disclose material facts known only to them and their co-conspirators (¶¶ 136-138) under the special facts doctrine" (*id.* at 13); (6) "HCC/PIA actively concealed its communications with and disbursements to the Paine Parties (¶¶ 3, 148, 152-155), which suffices to satisfy this element even absent a duty to disclose" (*id.*).

Plaintiffs also contend they have satisfied the knowledge and scienter requirements (although HCC/PIA did not raise these elements in their moving papers) based on their "allegations (*e.g.,* ¶¶ 141-155) that defendants knowingly breached their duties to plaintiffs, by knowingly withholding claims information from plaintiffs—in favor of plaintiffs' adversaries—and by converting claims made by the Paine Parties into claims under the HCC Policy to benefit defendants ...." (*id.* at 13-14). Finally, Plaintiffs contend they have sufficiently alleged justifiable reliance (FAC at ¶¶ 150-155), and damages (FAC at ¶¶ 150-159).

With regard to Plaintiffs' Third and Fourth Causes of Action for aiding and abetting a breach of fiduciary duty, Plaintiffs refute HCC/PIA's contention that they have not adequately alleged actual knowledge by relying on various paragraphs of the FAC (FAC at ¶¶ 204-205, 210, 211, 231, 236) as well as the liberal pleading standard for actual knowledge at the pre-discovery stage. According to Plaintiffs, the FAC at paragraphs 214-237 more than adequately describes the breaches of fiduciary duties by the Paine Parties. Plaintiffs further argue that HCC/PIA's argument that HCC did not contract to be judge and jury in the disputed allegations of wrongdoing in the underlying Fox/Paine litigation misses the mark because "[r]egardless of the truth of those allegations (see ¶¶ 61-64), defendants knew that plaintiffs and the Paine Parties were adverse—and thus that the Paine Parties were misappropriating FPC's own insurance claim and policy proceeds" (Pltfs' Opp. Mem. at 15, n.14).

On the issue of the sufficiency of Plaintiffs' pleading concerning the substantial assistance element, Plaintiffs point to the allegations of the FAC alleging a conspiracy between HCC/PIA and ERP "to shift HCC/PIA's liability to the excess carriers while benefitting P&P, an important client of ERP" (*id.* at 15). Furthermore, Plaintiffs contend that given HCC/PIA's duty to "'make full disclosure of matters that should concern the insured'" (*id.* at15, n15, *quoting Transcare N.Y., Inc. v Finkelstein, Levine & Gittlesohn & Partners,* 23 AD3d 250, 251 [1st Dept 2005]), HCC/PIA's failure to disclose the breaches of fiduciary duties by the Paine Parties and

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[17]Section 2695.4(a) of California's Fair Claims Settlement Practices Regulations provides that "[e]very insurer shall disclose ... all benefits, coverage, time limits or other provisions of any insurance policy ... that may apply to the claim presented by the claimant" (10 C.C.R. § 2695.4).

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ERP also constitutes substantial assistance.

Plaintiffs refute that the Plaintiffs' release of the Paine Parties by the August 2012 Settlement has any bearing on Plaintiffs' ability to sue HCC/PIA for aiding and abetting the Paine Parties' breaches of fiduciary duty based on the express provisions of New York's General Obligations Law (NYGOL) § 15-108(a). That statute provides that "[w]hen a release or a covenant not to sue ... is given to one of two or more persons liable or claimed to be liable in tort for the same injury ... it does not discharge any of the other tortfeasors ... unless its terms expressly so provide" (NYGOL § 15-108[a]). According to Plaintiffs, HCC/PIA has not and cannot rely on any provision in the 2012 Settlement that releases the Paine Parties from liability and, indeed, the settlement states that there are "'no other third-party beneficiaries to the Agreement'" (Pltfs' Opp. Mem. at 16, *quoting* Settlement Agreement, Ex. A to the Affidavit of Saul Fox, sworn to July 12, 2014 at 32).[18]

With regard to the sufficiency of their claim for tortious interference with contractual relations asserted against PIA, Plaintiffs distinguish the case[19] on which HCC/PIA rely for the legal proposition that an agent cannot be held liable for inducing his principal's breach of contract by arguing "PIA was designated under the HCC Policy to administer claims by *insureds*; PIA was *not* appointed by HCC to administer claims submitted by unauthorized third-parties or uninsureds and its interference was independent from its role as administrator of the policy" (Pltfs' Opp. Mem. at 16]). Finally, Plaintiffs point out that in their argument, HCC/PIA have entirely ignored Plaintiffs' claim that "PIA interfered with the Excess Insurers' performance under the Excess Policies to which PIA, of course, was *not* serving as the claims administrator or in any other capacity. For that reason alone, the Sixth Cause of Action should be sustained" (Pltfs' Opp. Mem. at 15, *citing* FAC at ¶¶ 264, 268, 272, 273 [emphasis in original]).

In support of the sufficiency of their unjust enrichment claim and, in particular, the element requiring that Plaintiffs allege how HCC/PIA were unjustly enriched, Plaintiffs reference paragraphs 41 and 119 of the FAC wherein they describe how they conferred a benefit of $160,000 in premiums, "only to have HCC/PIA fraudulently disburse the policy proceeds to the Paine Parties, who were acting 'utterly adverse to the interests of HCC's own insureds—*i.e.*, plaintiffs' ... And, by converting the P&P claims under the P&P policy to ones under the HCC Policy, defendants forced FPC's Excess Carriers to bear coverage obligations that HCC/PIA

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[18]Pursuant to the October 2014 Decision, this Court sealed the Settlement Agreement, Ex. A to the Fox Affidavit.

[19]Plaintiffs distinguish the insurance adjuster-agent in *JSR Micro, Inc. v. QBE Ins. Corp.* (2009 WL 2600755 [ND Cal 2009]) who allegedly refused coverage directly to the plaintiff on behalf of the insurer, by arguing that in contrast, here, "PIA interfered with HCC's performance under the HCC Policy by fraudulently converting the Paine Parties' claims under P&P Policies into claims under the HCC Policy" (Pltfs' Opp. Mem. at 17, *citing* FAC at ¶ 268).

otherwise would have borne under the P&P policy" (Pltfs' Opp. Mem. at 17-18, *citing* FAC at ¶ 4). As to the damage sustained, Plaintiffs point out their allegations concerning how their reputation and cost structure in the insurance marketplace suffered (*id.* at 18, *citing* FAC at ¶¶ 8, 61, 121, 158).

Plaintiffs contest HCC/PIA's argument for dismissal based on failure to join necessary parties on various grounds.

First, Plaintiffs claim the argument should be rejected for HCC/PIA's failure to even identify who the Paine Parties are since HCC/PIA did not adopt Plaintiffs' definition of the Paine Parties as defined in paragraph 66 of the FAC (which includes Presser, a non-executive of FPC) and instead they loosely define the "Paine Parties" in their motion as "Paine and certain Former Executives" which could include any one or more of the nine former FPC executives sued in the Fox-Paine Litigation and the other litigations/arbitrations" (Plfs' Opp. Mem. at 18, *citing* HCC/PIA Mem. at 2 and n. 5-7).

Second, Plaintiffs point out that based on their release of the Paine Parties, they cannot sue the Paine Parties for acts or omissions occurring prior to the August 2012 Settlement Agreement.

Third, Plaintiffs argue that because the Paine Parties were joint tortfeasors with HCC/PIA, it is well settled that they are not necessary parties because "'[c]omplete relief may be accorded to the parties ... without the presence of [all tortfeasors],'" and "'a plaintiff may proceed against any or all joint tortfeasors'" (Pltfs' Opp. Mem. at 19, *quoting Smith v Pasqua*, 110 AD3d 710 [2d Dept 2013]).

Fourth, because Plaintiffs are not seeking disgorgement of the insurance proceeds from the Paine Parties, Plaintiffs argue that the Paine Parties "are not necessary parties because this action does not involve competing claims to a *common or limited fund*, and the Paine Parties simply have no 'actual, current interest in [any] property' that is at issue" (*id.* at 19-20, *quoting Swezey v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 87 AD3d 119, 126 [1st Dept 2011], *affd* 19 NY3d 543 [2012] [emphasis in original]). According to Plaintiffs, "HCC/PIA are also not *neutral stakeholders* but *primary wrongdoers*. As explained above, where an insurer wrongfully disburses the policy limits to one insured (or worse, to one who is not even an insured), the insurer must answer in damages by making a *second payment* to the aggrieved insured" (*id.* at 21 [emphasis in original]).

Fifth, Plaintiffs argue that HCC/PIA does not face any risk of inconsistent judgments since in the event HCC/PIA is required to pay money to Plaintiffs, they may later pursue a recoupment action against the Paine Parties, if they be so advised.

Lastly, Plaintiffs argue that even if the Paine Parties were viewed to be necessary, the consequence is not dismissal but their joinder by HCC/PIA (CPLR 1001[b]). In this regard, Plaintiffs contend that HCC/PIA have made no showing that the Paine Parties are beyond the

jurisdiction of the Court. As an initial matter, Plaintiffs' argue that the assertion in McCormack's affidavit that California is the exclusive jurisdiction for any action by HCC/PIA against the Paine Parties is unsupported and, in any event, irrelevant based on the court's decision in *Community Health Care Assn. of N.Y. v Mahon* (106 F Supp 2d 523 [SD NY 2000]). Plaintiffs also point out that the primary wrongdoers (*i.e.*, Paine and Presser) are New York residents. Finally, even if all of the Paine Parties were necessary and not subject to this Court's jurisdiction, any joinder may be excused upon a weighing of five factors set forth in CPLR 1001(b).

In response to HCC/PIA's argument to dismiss based on *forum non conveniens*, Plaintiffs first argue that this branch of HCC/PIA's motion should be disregarded by this Court as HCC/PIA neglected to include this as a basis for dismissal in their notice of motion and, therefore, it violates CPLR 2214(a). Next, Plaintiffs argue that HCC/PIA have not met the heavy burden required to show that the requirements for a finding of *forum non conveniens* have been met given the substantial nexus of this action with New York and the relative hardships. Plaintiffs identify as the New York connections: (1) PIA is registered and authorized to do business in New York and its principal executive office is located in Mount Kisco, New York; (2) HCC is registered and authorized to do business in New York; (3) the parent of HCC and PIA is publicly traded on the New York Stock Exchange and has one of its major office facilities located in Mount Kisco, New York; (4) ERP is registered to do business in New York; (5) the Policy has a connection to New York as all notices of claims had to be delivered to PIA's offices in Mount Kisco and service of process was to be delivered there and HCC requires applications for insurance to be delivered to Mount Kisco. On this issue of relative hardships, Plaintiffs argue that even if it were true (which has not been established) that HCC/PIA cannot sue the Paine Parties in New York, "'substantial justice' would not be served by allowing joint tortfeasors to bind their victims by way of private agreements concerning where such tortfeasors wish to apportion their relative liabilities. Such would turn New York's policy of deferring to plaintiff's choice of forum on its head. By contrast, prosecuting the action in California would significantly increase plaintiffs' actual burden and expenses; and defendants make no attempt to show that proceeding in New York would be inconvenient for any witnesses ...." (Pltfs' Opp. Mem. at 25).

HCC/PIA'S REPLY

HCC/PIA first offer the Court the alternative to convert their motion to dismiss to one for summary judgment (CPLR 3211[c]).

HCC/PIA point out that Plaintiffs have abandoned their claim that the Policy required HCC/PIA to communicate only through FPC concerning the Paine Parties' claim.

With regard to the branch of their motion seeking the dismissal of Plaintiffs' claim for breach of contract, HCC/PIA argue that the only coverage benefit is reimbursement of

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claims presented for "Loss," which includes defense and settlement payments.[20] In order to sufficiently allege that they performed under the Policy, HCC/PIA argue that Fox/FPC fail to allege that they presented such a claim. HCC/PIA point out that Plaintiffs do not dispute that they never received HCC's consent with regard to the defense costs incurred, which according to HCC/PIA is an absolute bar to coverage.

In further support of HCC/PIA's argument that the November 7, 2007 notice from Ghisletta through ERP attaching the Delaware complaint against some of the Paine Parties is insufficient to satisfy the Policy's notice requirements, HCC/PIA argue that: (1) it was not a pleading against Fox/FPC (although HCC/PIA contends that it did suffice as a claim on behalf of the Paine Parties); (2) the HCC Policy contains a notice provision, which requires, as a condition precedent to coverage, that an insured give notice in writing to HCC/PIA of any "Claim" by a third party against the insured;[21] (3) "[s]uch notice of a Claim against the insured is not a demand for reimbursement of Loss"; (4) the withdrawal of the original claim notice made it a nullity and there is no allegation that Fox/FPC ever provided any other notice of Claim prior to the institution of this lawsuit; (5) except for a conclusory allegation (FAC ¶ 256), Fox/FPC also fail to allege that HCC/PIA ever denied a claim that Fox/FPC presented for coverage.

HCC/PIA dispute Fox/FPC's assertion that under California law there is no requirement that an insured "tender a claim or request a defense to invoke its rights,"

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[20]The HCC Policy states:

> The Insurer shall pay on behalf of the Insureds Loss arising from a Claim first made during the Policy Period arising from a Wrongful Act in the performance of Private Equity Activities. (Ex. A, p. 1, I. Insuring Agreements).
>
> * * *
>
> The Insurer shall have the right to associate themselves in the defense and settlement of any Claim ... However, it shall be the duty of the Insureds, and not the duty of the Insurer, to defend Claims. (Ex. A, p. 11, VI. Settlements and Defense).
>
> "Loss" is defined to include Costs, Charges and Expenses, which mean "reasonable and necessary legal fees and expenses (including expert fees) ... incurred by the Insureds in defense of any Claim." (Ex. A, p. 3-4, II.C, K).

[21]Section VIII Notification provides that "The Insureds shall, as a condition precedent to their rights to payment under this Policy, give to the Insurer notice in writing of any Claim as soon as practicable but in no event later than 60 days after the end of the Policy Period." (Ex. A, p. 12, VIII.A). Claim is defined to mean "any written demand for monetary damages ... against an Insured ...." (Ex. A, p. 2, II.B).

by arguing that the cases cited by Fox/FPC do not support this proposition nor do they apply in this case since both involved general liability policies and the insured was seeking to invoke the insurer's duty to defend, but took the wrong steps to do so and therefore, the notice prejudice rule was implicated (HCC/PIA Reply at 4). HCC/PIA point out that the third case dealt with timely notice of claim to the primary insurer and the issue involved whether the insured had complied with the requirement to give notice to an excess insurer that the amount of a claim was likely to impact the policy (*id.* at 5). By contrast, when the policies at issue involved claims made and reported contracts which is the Policy at issue here, New York and California require a "timely reporting of a claim, consent to incurring expense, and a request for reimbursement" as necessary condition precedents to coverage (*id.*)

HCC/PIA distinguish the cases on which Plaintiffs rely for the proposition that notice furnished by one insured is deemed applicable to another because they "involve[d] occurrence-based policies with a duty to defend" and here, Fox and FPC were not united in interest in the underlying actions (HCC/PIA Reply at 5, n. 16). Instead, it is HCC/PIA's position that in New York, each insured has an independent obligation to give notice (*id.* at 5).

HCC/PIA assert that Fox/FPC do not dispute HCC/PIA's argument that a payment of benefits to the Paine Parties did not breach a contractual duty owed to Fox/FPC because the only counter they provide is that HCC/PIA's argument on this score "misses the point," because HCC's "wrongful payment to the Paine Parties does not exhaust *plaintiffs'* coverage under the HCC Policy...." and they have an independent claim for coverage.[22]

HCC/PIA reiterate the arguments made in their moving papers concerning the Paine Parties' status as insureds. HCC/PIA assert that the underlying lawsuits/arbitrations alleged that the Paine Parties committed Wrongful Acts in connection with their positions with FPC and its managed funds (FAC at ¶¶ 5-6), in addition to their positions with FPM III. Further, contrary to Fox/FPC's assertion, HCC/PIA contend there is no language in the Policy that requires a person to be "acting in their official capacities on behalf of FPC" (HCC/PIA Reply at 7). It is HCC/PIA's position that given "[t]he definition of Insured Person includes any person who 'was, is, or shall become' an employee of an Insured Organization. Both FPC and FPM III are Insured Organizations"; thus, "whether the analysis looks at FPC or FPM III as the Insured Organization, the Paine Parties are Insured Persons," which is in accordance with the allegations found in the FAC, paragraphs 19-23 (*id.*).

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[22]A review of Plaintiffs' opposition makes clear that this argument was in response to HCC/PIA's argument that even if Plaintiffs did everything right – *i.e.,* they (1) submitted a claim, (2) obtained HCC's consent prior to incurring defense costs, (3) obtained HCC's consent prior to entering into settlement, and (4) showed that no exclusions applied – Plaintiffs have no breach of contract claim because there is nothing left of the policy (HCC/PIA Mem. at 13).

HCC/PIA distinguish the cases on which Fox/FPC rely for the proposition that the Policy does not cover disputes between an insured company and a director or officer by arguing those cases involved policies that had language insuring the partners or officers/director "with respect to [duties/liabilities] as [such]" and none involved the broadly worded "Wrongful Acts"[23] contained in this Policy nor did they contain "insuring clause language that would allow coverage for internal disputes" (HCC/PIA Reply at 7 n.21).

HCC/PIA cites *Barnett v Fireman's Fund Ins. Co.* (90 Cal App 4th 500 [Cal Ct App, 4th Dist, Div 1 2001]) in which the court rejected the argument that Fox/FPC makes, which is that "when a person is an additional insured under a policy issued to an entity and the entity sues the person for conduct injurious to the entity, as a matter of law there can be no coverage under the entity's policy" (HCC/PIA Reply at 7-8). According to HCC/PIA, the court found that former executives were covered by an insured company's insurance in an action brought by the insured company against the executives for disparagement. HCC/PIA further points out that the court in *Barnett* expressly distinguished the policy in one of the cases on which Plaintiffs rely, *Milazo v Gulf Ins. Co.,* (224 Cal App 3d 1528 [Cal Ct App, 2d Dist, Div 3 1990]), as being limited to derivative liability of an insured entity whereas the policy in *Barnett* did not condition coverage for officers on the requirement that the corporation have direct liability for their misconduct.

Based on the foregoing, HCC/PIA argue that "Fox/FPC have failed to allege facts showing that HCC/PIA's reimbursement of the Paine Parties while reserving rights was wrongful conduct that breached some duty to Fox/FPC" (HCC/PIA Reply at 8).

In further support of their dismissal of the breach of the implied covenant of good faith and fair dealing claim, HCC/PIA reiterate their prior arguments concerning how the claim is duplicative of the breach of contract claim under New York law. In support of the dismissal of the breach of the implied covenant of good faith and fair dealing claim under California law, HCC/PIA argue in California, such a claim is "tethered to a right to contract benefits, and that

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[23]Wrongful acts are defined as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement, omission or act by the Insured Organization or the Insured Person in the scope of Private Equity Activities" (Policy at Endorsement No. 7), and "Private Equity Activities" broadly include virtually all types of private equity fund management. Private Equity Services are defined as "(1) services as a director, officer, board representative, partner, managing member or trustee of any current or former Portfolio Company; (2) the investment in formation, capitalization or disposition of, or rendering of management, consulting, advisory, or other services to a Portfolio Company by the Insureds; or (3) the creation, distribution, sale of securities in, or the management or administration of a private equity fund; or (4) the providing of consulting services by the Insureds to other third parties pursuant to a fee -based oral or written agreement for such activities and any activities preparatory to the activities described in this paragraph" (Policy at Endorsement No. 5).

absent coverage a plaintiff may not state a claim for breach of the implied covenant" (HCC/PIA Reply at 9). According to HCC/PIA, the theory under which Fox/FPC are asserting this claim is that "HCC/PIA ... had a duty to advise Fox/FPC that they might have coverage, and to refuse to disburse the policy proceeds to an insured who demanded reimbursement until Fox/FPC submitted a claim" but none of the cases on which Plaintiffs rely stand for this proposition (*id.*). Instead, HCC/PIA argue they involved cases in which the courts held that "an insurer may not exhaust policy limits by settling for one insured to the detriment of another" (*id.* at 9). It is HCC/PIA's position that those cases are entirely distinguishable since "they arise where both insureds have submitted a claim and the insurer has a *duty to defend* and thereby *has control over the settlement*" and here the Policy was not a general liability contract, HCC had no duty to defend, it had no control over the defense or any settlement, and Fox/FPC never submitted a competing demand for reimbursement (*id.* at 9 [emphasis in original]). HCC/PIA also argue that in *Davis v Blue Cross of N. Cal., supra*, the court did not hold that there was an obligation by the insurance company to notify its insured of coverage, rights and terms of the Policy since in that case, the court merely held that by failing to advise its insured of the right to arbitrate the insurer's denial of the claim, the insurer had waived its right to compel arbitration. Finally, HCC/PIA assert that California Code of Regulation § 2695.4 has no applicability since "[t]he regulation applies only after a claim has been presented ('the claim presented by the claimant'), and it requires only limited disclosure of policy provisions that apply to the presented claim. It does not require an insurer to advise the insured whether to present a claim in the first instance" (*id.* at 10, n. 28).

In further support of the dismissal of the breach of the implied covenant of good faith and fair dealing as against PIA, HCC/PIA assert that the cases on which Plaintiffs rely to suggest that as claims administrator for HCC, PIA had duties that were breached are entirely distinguishable (*id.* at 11).

With regard to the dismissal of Plaintiffs' claim for fraud, HCC/PIA point out that Fox/FPC have cited to no authority that HCC had a duty to advise Fox/FPC (an insured who HCC/PIA contends never submitted a claim) "that another insured has done so" (HCC/PIA Reply at 12). Relying again on a case cited in their moving brief (*Medina v State Farm Fire & Cas.*, 924 F2d 1063 [9th Cir 1992]), HCC/PIA argue that it is clear that there was no such duty and, therefore, Plaintiffs' fraud claim should be dismissed as a matter of law.

In further support of the dismissal of the aiding and abetting a breach of fiduciary duty claim, HCC/PIA repeat the arguments made in their moving papers to the effect that the release of the Paine Parties of any wrongdoing in the 2012 Settlement necessarily defeats the claim against HCC/PIA because without a breach of fiduciary duty, there can be no claim for aiding and abetting. HCC/PIA then attempt to foist the obligation on Fox/FPC (which HCC/PIA claim they failed to do) to provide a case in which a party can be held liable for aiding and abetting a breach of fiduciary duty when the underlying breach was released in a settlement.

HCC/PIA assert that the aiding and abetting the breach of fiduciary duty claim with regard to ERP's alleged breach of fiduciary duties must be dismissed because (1) it is well

settled under California law that a broker ordinarily does not owe fiduciary duties to its clients and its only duty is to use reasonable care in the procurement of insurance (HCC/PIA Reply at 13); and (2) even if Fox/FPC could plead a fiduciary relationship, Fox/FPC did not plead that HCC/PIA knew of that expanded role or that ERP had breached its fiduciary duty since all that ERP did from HCC/PIA's perspective is assist the Paine Parties in seeking a colorable claim. Finally, HCC/PIA point out that (1) ERP did not make the decision to pay out Fox Paine/FPC on the claim (*i.e.,* ERP was not responsible for the pay out); and (2) Fox/FPC do not refute HCC/PIA's authorities that aiding and abetting cannot consist of merely carrying out an ordinary business purpose, which is what HCC/PIA were doing in adjusting the Paine Parties' claims for reimbursement.

HCC/PIA's argument in further support of the dismissal of the unjust enrichment claim is that it is "absurd" given the loss HCC sustained ($9,840,000) that it can be viewed to have been unjustly enriched due to its receipt of $160,000 in premiums. HCC/PIA further assert that Fox/FPC have no standing to claim that HCC/PIA were unjustly enriched at the expense of excess insurers.

With regard to the insufficiency of the claim against PIA for tortious interference with contract, HCC/PIA again assert that PIA is immune from such a suit based on its status as HCC's agent and point out that while Fox/FPC argue that PIA was not acting in its role as agent of HCC when it adjusted the Paine Parties Claims (*citing* Pltfs' Opp. Mem. at 16-17), Fox/FPC offer no legal support for such an assertion which is directly contrary to the allegations of the FAC in which Plaintiffs allege that PIA improperly handled and paid out to the Paine Parties. In any event, HCC/PIA argue that as they have established that Plaintiffs have failed to allege a breach of contract, Plaintiffs can have no claim for tortious interference with contract.

To the extent Fox/FPC are arguing that PIA was not acting as a claims agent for the Excess Insurers, and, therefore, it can be liable for interference with their insurance contracts, HCC/PIA argue that "Fox/FPC have failed to allege facts showing that the Excess Insurers actually breached their contracts or that PIA was responsible for any disruption of them. Fox/FPC have also failed to allege any facts showing that PIA, in fact, engaged in any conduct whatsoever with respect to the Excess Insurers" (HCC/PIA Reply at 14, n. 34).

HCC/PIA repeat their same arguments that Fox/FPC have failed to allege that they have sustained any cognizable damages (*i.e.,* the funding of the Paine Parties' litigation against Fox/FPC does not represent cognizable damages and the failure to allege that they actually sustained financial loss as they have been refused coverage from the excess carriers is fatal to their claim). And as to the assertion that their insurance history has been damaged, HCC/PIA argue that even if they could prove they were entitled to the Policy limits, "a claim still would have been made and the benefits still would have been paid" (*id.* at 15, n.35).

In further support of their argument that the Paine Parties are necessary parties,

HCC/PIA simply argue that they cannot join the Paine Parties in this action (although there is no further explanation as to why this cannot occur) and that in exercising its discretion in determining whether they are necessary parties the Court should weigh fairness considerations (*i.e.*, that it is the Paine Parties who have the ability to fend off Plaintiffs' allegations that they breached their fiduciary duties to Fox/FPC, that they were entitled to coverage, and that their confidential claim information should not be revealed to Fox/FPC) (HCC/PIA Reply at 7).

STANDARD OF REVIEW ON A MOTION TO DISMISS

To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1) on the ground that a defense is founded on documentary evidence, the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim (*AG Cap. Funding Partners, L.P. v State Street Bank and Trust Co.*, 5 NY3d 582, 590-591 [2005]; *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]; *Cohen v Nassau Educators Fed. Credit Union*, 37 AD3d 751 [2d Dept 2007]; *Sheridan v Town of Orangetown*, 21 AD3d 365 [2d Dept 2005]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys – Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]; *Brunot v Joe Eisenberger & Co.*, 266 AD2d 421 [2d Dept 1999]). To qualify as "documentary," the evidence relied upon must be unambiguous and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, and contracts. Letters, affidavits, notes, and deposition transcripts are generally not documentary (*Fontanetta v Doe, supra*).

If the documentary evidence disproves an essential allegation of the complaint, dismissal is warranted even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action (*Snyder v Voris, Martini & Moore, LLC*, 52 AD3d 811 [2d Dept 2008]; *Peter F. Gaito Architecture, LLC v Simone Dev. Corp.*, 46 AD3d 530 [2d Dept 2007]).

To the extent that Plaintiffs' claims turn on a contract, the actual provisions of the contract – rather than Plaintiffs' characterization of the terms in their pleading – are controlling (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451 [1983]; *Marosu Realty Corp. v Community Preserv. Corp.*, 26 AD3d 74, 82 [1st Dept 2005]). Therefore, "[w]here a written contract ... unambiguously contradicts the allegations supporting the breach of contract, the contract itself constitutes the documentary evidence warranting the dismissal of the complaint under CPLR 3211(a)(1)" (*159 Broadway N.Y. Assoc. L.P. v Bodner*, 14 AD3d 1 [1st Dept 2004]; *see also Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005] [on a CPLR 3211(a)(1) motion to dismiss, "[t]he interpretation of an unambiguous contract is a question of law for the court, and the provisions of a contract addressing the rights of the parties will prevail over the allegations in a complaint"]).

The legal standards to be applied in evaluating a motion to dismiss pursuant to CPLR 3211(a)(7) are well-settled. In determining whether a complaint is sufficient to withstand a motion to dismiss, the sole criterion is whether the pleading states a cause of action (*Cooper v 620 Prop. Assoc.*, 242 AD2d 359 [2d Dept 1997], *citing Weiss v Cuddy & Feder*, 200 AD2d 665 [2d Dept 1994]). If from the four corners of the complaint factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, a motion to dismiss will fail (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Cooper, supra*, 242 AD2d at 360). The court's function is to "'accept ... each and every allegation forwarded by the plaintiff without expressing any opinion as to the plaintiff's ability ultimately to establish the truth of these averments before the trier of the facts'" (*id., quoting 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]). The pleading is to be liberally construed and the pleader afforded the benefit of every possible favorable inference (*511 West 232nd Owners Corp., supra)*.

Where the plaintiff submits evidentiary material, the Court is required to determine whether the proponent of the pleading has a cause of action, not whether he or she has stated one (*Leon v Martinez*, 84 NY2d 83 [1994]; *Simmons v Edelstein,* 32 AD3d 464 [2d Dept 2006]; *Hartman v Morganstern,* 28 AD3d 423 [2d Dept 2006]; *Meyer v Guinta*, 262 AD2d 463 [2d Dept 1999]).[24] Affidavits may be used to preserve inartfully pleaded, but potentially meritorious claims; however, absent conversion of the motion to a motion for summary judgment, affidavits are not to be examined in order to determine whether there is evidentiary support for the pleading (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]; *Pace v Perk*, 81 AD2d 444, 449-450 [2d Dept 1981]; *Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Affidavits may be properly considered where they conclusively establish that the plaintiff has no cause of action (*Taylor v Pulvers, Pulvers, Thompson & Kuttner, P.C.,* 1 AD3d 128 [1st Dept 2003]; *M & L Provisions, Inc. v Dominick's Italian Delights, Inc.,* 141 AD2d 616 [2d Dept 1988]; *Fields v Leeponis*, 95 AD2d 822 [2d Dept 1983]).

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[24]On the other hand, a plaintiff may rest upon the matter asserted within the four corners of the complaint and need not make an evidentiary showing by submitting affidavits in support of the complaint. A plaintiff is at liberty to stand on the pleading alone and, if the allegations are sufficient to state all of the necessary elements of a cognizable cause of action, will not be penalized for not making an evidentiary showing in support of the complaint (*Kempf v Magida*, 37 AD3d 763 [2d Dept 2007]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

[* 46]

THERE IS NO BASIS TO DISMISS BASED ON NON-JOINDER OF INDISPENSABLE PARTIES OR *FORUM NON CONVENIENS*

A. The Paine Parties are not Indispensable

The rule governing the joinder of necessary parties (otherwise known as indispensable parties) (CPLR 1001) provides

> **(a) Parties who should be joined.** Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.
>
> **(b) When joinder excused.** When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:
>
> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
>
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
>
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
>
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
>
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined.

"There are two principal purposes of requiring dismissal owing to absence of an indispensable party. First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be 'embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard'" (*Saratoga County Chamber of Commerce, Inc. v*

[* 47]

Pataki, 100 NY2d 801, 820 [2003], *cert denied* 540 US 1017 [2003]; *quoting First Natl. Bank v Shuler*, 153 NY 163, 170 [1897]).

"In making the determination whether an absentee need be joined as an indispensable party, it must be decided if the proposed party has such an interest in the litigation that the court cannot settle the controversy without necessarily considering the interests of the proposed party. It also must be determined if the court's decision in the case, in the absence of the proposed parties, will have the element of finality for the protection of those before the court" (*Joanne S. v Carey*, 115 AD2d 4, 7 [1st Dept 1986]).

Here, HCC/PIA have "failed to demonstrate that [the Paine Parties are] needed to be [made parties] if complete relief is to be accorded between the plaintiff and the defendant[s] ... [or] that [the Paine Parties] will be inequitably affected by a judgment in this action absent [their] joinder" (*Spector v Toys "R" Us, Inc.*, 12 AD3d 358, 359 [2d Dept 2004]).

The only claim that arguably implicates the Paine Parties' rights is the Ninth Cause of Action, which seeks a declaration that Paine Parties are not entitled to receive any proceeds from the Policy (FAC at ¶¶ 294[g][h]). However, Plaintiffs state that the Ninth Cause of Action has been voluntarily withdrawn (Pltfs' Opp. Mem. to HCC/PIA motion at 2, n2).[25]

Contrary to HCC/PIA's suggestion that this is a suit to determine whether Plaintiffs or the Paine Parities have the right to the $10 million in insurance proceeds and, therefore, this action cannot be decided without the presence of the Paine Parties, the $10 million in Policy proceeds that HCC paid out to the Paine Parties is not a specific fund (*i.e.*, a *res*) that is at issue in this action. In this regard, since HCC/PIA already paid out the proceeds, it is too late for it to seek to deposit the $10 million into Court as a neutral stakeholder in an interpleader action (CPLR 1006). Further, as the Paine Parties are not parties to this action, any determination that HCC breached its agreement with Plaintiffs by paying out the Policy's limits to non-insureds would not be binding on the Paine Parties. Indeed, since the Paine Parties have already gotten the money, a determination of liability and damages in Plaintiffs' favor, would not require the Paine Parties to repay it.

Moreover, as will be discussed further, even if it is assumed that the Paine Parties were insureds or additional insureds, Plaintiffs may still possess a viable breach of contract action against HCC. Stated differently, if Plaintiffs were insureds and made a timely

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[25]While Plaintiffs state in a footnote in their memorandum that they "voluntarily withdraw" the Ninth Cause of Action, thereby rendering Defendants' motion in that respect moot, the Court notes that Plaintiffs have not formally tendered a stipulation of discontinuance with respect to the subject cause of action (*see* CPLR 3217). To assure that the Ninth Cause of Action is dismissed, the Court will dismiss it.

claim but HCC elected to pay all of the proceeds over to a different set of insureds who also made a timely claim, the fact that HCC elected to pay all to one side does not prevent the other set of claimants from recovering or make the paid parties necessary to a recovery.

The Court finds the case *Federal Motorship Corp. v Johnson & Higgins* (192 Misc 401 [Sup Ct, NY County 1948], *affd* 274 AD 1034 [1st Dept 1949]) instructive. In that case, plaintiff had hired defendant to arrange for marine insurance on plaintiff's vessel with any loss to be payable to plaintiff and to Mexico. Upon the loss of the vessel, plaintiff sued defendant for the proceeds which plaintiff contended defendant failed to pay. Mexico appeared specially without intervening for the purpose of asserting its sovereign immunity and asking that the action be dismissed based on the lack of an indispensable party (itself). In denying Mexico's motion, the court held that the mere assertion by Mexico that it was entitled to part of the insurance proceeds did not convert the action into one involving specific property in which Mexico had an interest (in which case the action would have had to be dismissed). Instead, the court found that the action was "purely in personam to collect a debt (in which event Mexico has no interest in the action and is not only not an indispensable party but is not even a proper party because no judgment herein could affect Mexico or any right it may have to enforce any claim it may have against the underwriters or the defendant or anyone else" – *i.e.,* "Mexico has no interest in what debt plaintiff can establish against defendant" with no more right to be made a party to this action (*Federal Motorship Corp.,* 192 Misc at 405-406). Further, the court held that the fact that "defendant may be subjected to liability to both plaintiff and Mexico is neither a defense to defendant nor a reason for joining Mexico as a party" (*id.* at 406; *see also Community Health Care Assn. of N.Y. v Mahon*, 106 F Supp 2d 523 [SD NY 2000]).

Here, Plaintiffs are suing based on their position that Defendants are liable to them for, *inter alia*, the $10 million in insurance proceeds arising from HCC's alleged wrongful payment of the Policy limits to the Paine Parties in breach of the Policy's terms and without any notification to Plaintiffs. Plaintiffs are not seeking to recover the $10 million from the Paine Parties and Defendants' liability, if any, may be determined without the Paine Parties' presence in this action. The fact that HCC paid the Policy limits to the Paine Parties but preserved its right to seek recoupment on the grounds that the Paine Parties' claims were not covered by the Policy and allegedly agreed that any such recoupment action could only be brought in California[26] is of no consequence to Plaintiffs' right to have

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[26]The only evidence of California being the exclusive forum for a future recoupment action that HCC may initiate is HCC/PIA's counsel's say so with no elaboration as to why this is the case (*see* McCormack Aff. at. ¶ 28). During a conference on May 22, 2014, Mr. McCormack again represented that his client could only sue Paine in California again without any elaboration other than his references to the fact that California is the residence of Plaintiff, the residence of ERP and the location where some or all of this conduct is alleged to have occurred (Tr. at 9). There is no claim that any provision of the policy made California the exclusive forum for litigation between the insurer and an insured.

their dispute resolved here, precisely because Plaintiffs were not parties to the payment and to the recoupment agreement. That is a matter between HCC and the Paine Parties.

The cases on which HCC/PIA rely are distinguishable from this case since they involved the courts' finding that the actions had to be dismissed for nonjoinder of necessary parties since the missing parties had an actual stake in the litigation as, *inter alia*: (1) the beneficiary to a life insurance policy in an action brought by the insured against the insurance company based on claim that insured was fraudulently induced by the insurance agent to convert two life insurance policies into one which caused a diminished value to the policy (*Calderone v Wiemeier,* 77 AD3d 1232 [3d Dept 2010]); (2) the potential owners to property which was the subject of an action to quiet title (*Glenn Acres Tree Farm, Inc. v Town of Hartwick Historical Soc., Inc.*, 84 AD3d 1529 [3d Dept 2011]); (3) the beneficiaries of trust in an action brought against a third party for defaults injuring to the trust (*Matthies v Seymour Mfg. Co.*, 270 F2d 365 [2d Cir 1959], *cert denied* 361 US 962 [1960])[27]; and (4) the abutting property owners to a road in a declaratory judgment action seeking to have a declaration that the road was a private road that could not be widened or enlarged without the consent of the abutting property owners (*Pirrotti v Town of Greenburgh*, 2009 NY Slip Op 52309[U]; 25 Misc 3d 1226[A] [Sup Ct, Westchester County 2009]; *see also Llana v Town of Pittstown,* 245 AD2d 968 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998] [petition to annul development law under which certain property owners had obtained subdivision approval was dismissed for failure to join those property owners]).

Accordingly, the branch of HCC/PIA's motion which seeks dismissal based on the nonjoinder of the Paine Parties as indispensable parties shall be denied.

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[27]HCC/PIA have also cited to a number of cases in which the courts found that the party sought to be joined was not a necessary party. For example, in *Joanne S. v Carey* (115 AD2d 4 [1st Dept 1986]), the Appellate Division, First Department determined that city agencies were not necessary parties in an action brought by hospital patients seeking a declaration of their right to receive residential placement, supervision and care. *Spector v Toys "R" Us, Inc.* (12 AD3d 358 [2d Dept 2004]) was a consumer fraud class action alleging that Toys "R" Us had engaged in fraudulent practices concerning the credit it provided to customers when they used rewards coupons that had been issued to them based on charges they made on a credit card bearing the Toys "R" Us logo. In *Spector*, the Appellate Division, Second Department held that the bank issuing the credit cards was not an indispensable party. Likewise, in *Saratoga County Chamber of Commerce, Inc. v Pataki* (100 NY2d 801 [2003], *cert denied* 540 US 1017 [2003]), the Court of Appeals held that the counterparty to a gaming compact with the State, a Native American tribe, was not an indispensable party to an action challenging the constitutionality of that compact given the fact that they chose to be absent from action based on their sovereign immunity.

B. HCC/PIA Have Failed to Show that New York is an Inconvenient Forum

While the Court acknowledges that this branch of HCC/PIA's motion is defective in that the Notice of Motion fails to identify this ground for relief (CPLR 2214), the Court also notes that Plaintiffs have not been prejudiced by this omission in that the moving papers expressed the arguments in support of the motion and Plaintiffs responded to these arguments in their opposition. Hence, rather than deny this branch of the motion on a mere technicality and incur the delay that would follow when HCC/PIA renew their motion with a proper notice of motion, the Court opts to address this aspect of the motion on its merits.

HCC/PIA's primary argument in favor of dismissal based on *forum non conveniens* is tied to their claim that the Paine Parties are indispensable parties to this action – that in the interests of substantial justice, the action should be heard in California based on HCC's inability to sue the Paine Parties here (HCC/PIA Mem. at 24, ***citing*** CPLR 327[a]). The only other arguments in support are that Fox, FPC, ERP and Paine are all residents of California, "[t]he split between Fox and Paine precipitating the underlying actions took place in California ... [t]he HCC insurance contract was issued in California (Ex.A) .... Former Executive Amy Ghisletta is a California resident ... The HCC coverage position letter was issued in California by a California lawyer ... [and] Plaintiffs contend that California substantive law applies to this case" (*id.* at 24-25). These arguments, most of which are wholly conclusory and unsupported from an evidentiary standpoint, are nevertheless insufficient to support this Court's dismissal of the action based on *forum non conveniens*.

In a *forum non conveniens* motion, the "burden is on the defendant challenging the forum to demonstrate the relevant private or public interest factors which militate against accepting the litigation" (*Stravalle v Land Cargo, Inc.*, 39 AD3d 735 [2d Dept 2007]). "Although not every factor is necessarily articulated in every case, collectively, the courts consider and balance the following factors in determining an application for dismissal based on *forum non conveniens*: existence of an adequate alternative forum; situs of the underlying transaction; residency of the parties; the potential hardship to the defendant; location of documents; the location of a majority of the witnesses; and the burden on the New York courts" (*Silver Lane Advisors LLC v Bellatore LLC*, 2009 NY Slip Op 51514[U], 24 Misc 3d 1218[A] at *3 [Sup Ct NY County 2009]).

HCC/PIA have failed, on these papers, to show that California's connection to this case so predominates as to require the displacement of Plaintiffs' choice of venue.

The common law doctrine of *forum non conveniens* is codified in CPLR 327(a), which provides

> [w]hen the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on the motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action (CPLR 327[a]).

The doctrine rests on "justice fairness and convenience" (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-479 [1984], *cert denied* 469 US 1108 [1985]) and courts will find that actions having little or no connection to New York should be dismissed as "the taxpayers of this State should not be compelled to assume the heavy financial burden attributable to the cost of administering the litigation contemplated when their interest in the suit and the connection of its subject matter to the State of New York is so ephemeral" (*id.* at 483). As described by the Appellate Division, Second Department:

> [t]he doctrine of forum non conveniens permits a court to dismiss an action, although it has jurisdiction over the parties and the claim, when the court believes that "in the interest of substantial justice the action should be heard in another forum" (CPLR 327 [a]). The doctrine presumes that the court may exercise in personam jurisdiction over the parties, and its application requires the "balancing of many factors in light of the facts and circumstances of the particular case" .... "The burden rests upon the defendant challenging the forum to demonstrate that private or public interests militate against litigation going forward in this State" .... Among the factors which the court must weigh when deciding such a motion are the residence of the parties, the potential hardship to the proposed witnesses, the availability of an alternative forum, the situs of the underlying action, and the burden which will be imposed upon the New York courts, with no single factor controlling .... (*Sarfaty v Rainbow Helicopters, Inc.*, 221 AD2d 618, 618-619 [2d Dept 1995] [citations omitted]; *see also Islamic Republic of Iran v Pahlavi, supra*; *Smolik v Turner Constr. Co.*, 48 AD3d 452 [2d Dept 2008]; *Wentzel v Allen Mach., Inc.*, 277 AD2d 446 [2d Dept 2000]).

Turning to the first factor, the residency of the parties, Plaintiffs are California residents, HCC is a Texas corporation doing business in Westchester County, New York, PIA is a New York corporation with its principal place of business in Westchester County, New York, and ERP is a California corporation that also does business in New York. Plaintiffs have also presented evidence that non parties Presser and Paine are New York residents. As such, the Court finds the residency of the parties to be neutral with no one jurisdiction being preferable than another given that the parties are residents of multiple

states.

With regard to the potential hardship on proposed witnesses, other than its conclusory assertions that Fox, FPC, ERP and Paine are all residents of California and that former executive Amy Ghisletta is a resident of California, HCC/PIA have failed to identify any individuals who are likely to be called as witnesses in this action. Indeed, given that this Court's decision on these motions is to limit the Defendants in this action to HCC and the claims in this action to breach of contract and breach of the implied covenant of good faith and fair dealing, and given that HCC contractually consented to jurisdiction in New York and that PIA (HCC's agent charged with receiving all claims communications and the entity on which service of process was to be made) is located in Mount Kisco, New York, HCC in effect consented to venue in Westchester County (*see* Policy at XVI and FAC at ¶ 16), the Court concludes that the claim of witness hardship is unavailing.

Turning to the availability of an alternative forum, the parties do not dispute that California is a viable forum for this litigation. And while it appears that California law will apply to the claims that Court is not dismissing herein (*i.e.,* the breach of contract and breach of the implied covenant of good faith and fair dealing claims against HCC), the Court does not view the need for this Court to apply California law as a reason to dismiss the action here in favor of an alternative forum.

The Court must consider where the situs of the action is, that is, where the transaction at issue primarily took place (*Islamic Republic of Iran v Pahlavi*, *supra*, 62 NY2d at 479). Here, it is clear that while the Policy was issued in California and that California law applies to the claims that are not being dismissed, it also appears that HCC designated PIA (an entity located in Westchester County, New York) as the situs for where all claims to be made as well as where all service of process was to be made. Further, HCC and PIA contractually agreed to submit to jurisdiction in New York and, for all intents and purposes, to venue in Westchester County. Accordingly, the Court sees a connection to New York with regard to Plaintiffs' remaining claims.

Based on the foregoing, the Court shall deny this branch of Defendants' motion.

THE COURT WILL NOT CONVERT THESE DISMISSAL MOTIONS
TO MOTIONS FOR SUMMARY JUDGMENT

In response to the issues raised by Plaintiffs concerning the branch of HCC/PIA's motion which seeks dismissal pursuant to CPLR 3211(a)(1) – *i.e.,* that most of the "documents" on which HCC/PIA rely (other than the Policy itself) do not constitute documentary evidence (*e.g.,* correspondence, pleadings), HCC/PIA offer up to this Court the option of this Court's converting their motion to dismiss to a motion for summary judgment (CPLR 3211[c]).

The Court declines to exercise this authority. Before a court may convert a dismissal motion to a motion for summary judgment, the Court must give notice of its intention to do so to the parties and afford the parties the opportunity to submit additional papers (*211 West 56th St. Assoc. v Department of Housing Preservation & Dev. of City of N.Y.*, 78 AD2d 793 [1st Dept 1980]). The papers submitted on these motions are already voluminous; the Court is loathe to add to the collection. Moreover, since a significant portion of the FAC is being dismissed, the objective of using a dismissal motion to separate the wheat from the chaff has been served. The Court perceives that any motion for summary judgment would be best addressed after counsel for the surviving parties have the opportunity to obtain appropriate discovery.

Because this motion is not going to be treated as one for summary judgment, the Court has not considered the non-documentary evidence presented in connection with the branch of HCC/PIA's motion seeking dismissal pursuant to CPLR 3211(a)(1).

PLAINTIFFS' FIFTH CAUSE OF ACTION FOR BREACH OF CONTRACT AGAINST HCC

Plaintiffs argue, and Defendants have not refuted, that California law controls Plaintiffs' breach of contract claims, but because New York's and California law are identical on this issue, the Court refers to both herein. The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by plaintiff or excuse for nonperformance, (3) breach of the contract by defendant, and (4) damages resulting from the breach (*Abdelhamid v Fire Ins. Exchange,* 182 Cal App 4th 990, 999 [Cal Ct App, 3d Dist 2010]; *JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Coastal Aviation, Inc. v Commander Aircraft Co.*, 937 F Supp 1051, 1060 [SD NY 1996], *affd* 108 F3d 1369 [2d Cir 1997]).

A. HCC's Motion to Dismiss Based on CPLR 3211(a)(7)

The Court will first dispense with two overarching arguments made by HCC. The first is that because Plaintiffs have not alleged that they have exhausted their policy limits on their excess policies, Plaintiffs have not alleged damages. The second is that, by paying the Policy limits to an insured under the Policy, HCC has discharged its obligations and Plaintiffs' claim for breach of the Policy is fatally defective.

Turning to the second argument first, Plaintiffs allege that Paine, Presser and the Former Executives were not insureds or additional insureds under the Policy. A determination of whether these persons were insureds or additional insureds cannot be made on the present motion to dismiss.

An insurer cannot discharge its obligation by paying the wrong party (*Afco Credit Corp. v American Interstate Ins. Co.*, 2011 WL 1134733 [SD NY 2011]). Hence, it

cannot be determined now whether HCC paid the right or the wrong persons and HCC cannot now win dismissal.

Moreover, even if it were ultimately determined that Paine, Presser and the Former Executives were insureds or additional insureds under the Policy, because Plaintiffs allege that HCC was provided notice of the claim made by Fox and FPC under the HCC Policy (the truth of the allegation being assumed for present purposes and the sufficiency of which cannot be decided on the present motion, *see infra*), by not obtaining Fox's and FPC's consent to the payment of the Policy proceeds to the Paine Parties, HCC breached its obligations to Fox and FPC under the Policy to treat all insureds equally (*see infra*).

Accordingly, HCC's argument that it cannot be liable for breach of contract because it already exhausted the Policy limits through its $10 million payment to insureds or additional insureds under the Policy does not, as a matter of law, absolve HCC of liability for breach of contract.

Addressing HCC/PIA's argument that the FAC must be dismissed because Plaintiffs have not alleged that they have sustained damages because they have not alleged that they have exhausted the policy limits on the excess policies, the Court does not agree that the Plaintiffs had any obligation to allege as much to sustain their damages claim. Thus, Plaintiffs' allegations that they were damaged based on HCC's denial of their claim and its failure to provide them with the $10 million Policy proceeds are sufficient at the pleading stage to thwart off a motion to dismiss, and they need not allege exhaustion of the limits under the excess insurance policies (*Rock City Sound, Inc. v Bashian & Farber, LLP,* 74 AD3d 1168, 1171 [2d Dept 2010], *lv dismissed* 16 NY3d 826 [2011] [on a CPLR 3211[a][7] motion, a "plaintiff is not obligated to show ... that it actually sustained damages. It need only plead allegations from which damages attributable to the defendant's [acts] might be reasonably inferred").

The Court is far from convinced that Plaintiffs' claimed damages resulting from (1) the losses they allegedly suffered as a result of HCC's bankrolling the Paine Parties' litigations and arbitrations against Plaintiffs[28] or (2) FPC's loss of stature in the insurance marketplace, are recoverable.[29] It is enough that Plaintiffs have alleged damages and, in that regard, their claim that they should have been paid the $10 million is sufficient.

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[28]It would seem difficult to say the least that the 2012 Settlement was the product of unequal litigation funding or that the Settlement was produced solely by reason of funding disparity and, further, given that Plaintiffs seem to have ample litigation resources, that Plaintiffs had a reasonable expectation of having the funding advantage.

[29]And, of course, Plaintiffs appear to lack standing to complain of any losses sustained by the excess carriers.

As to HCC's remaining arguments concerning the insufficiency of Plaintiffs' breach of contract claim, the Court concludes that Plaintiffs have sufficiently alleged a breach of contract through their allegations concerning: (1) the existence of the HCC Policy and the provisions under which Plaintiffs should have received coverage from HCC with regard to the Fox-Paine Litigation and the related litigations and arbitrations; (2) Plaintiffs' performance through their submission of the claim during the Policy period; (3) HCC's breach based on (I) its wrongful denial of the Plaintiffs' claim,[30] (ii) its payout of the Policy limits to the Paine Parties, persons/entities that Plaintiffs claim were not insureds under the Policy;[31] (3) its payout of the Policy limits to the Paine Parties without (I) providing notice to Plaintiffs or obtaining Plaintiffs' consent, and (ii) obtaining a release from the Paine Parties of their claims as against Plaintiffs in the various actions/litigations; and (4) Plaintiffs' resulting damages.

The Court does not agree that Plaintiffs' breach of contract claim is insufficiently alleged because there is no allegation Plaintiffs sought HCC's consent[32] before

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[30]The Court does not agree that the allegations concerning HCC's denial are inadequate to survive a motion to dismiss. Thus, Plaintiffs' allegation that "HCC failed and refused to provide plaintiffs with a defense and indemnity under the HCC Policy with respect to the Fox-Paine Litigation and its related proceedings, and wrongfully denied plaintiffs coverage under the HCC Policy, thereby breaching the HCC Policy" (FAC at ¶ 106) is entirely sufficient to withstand HCC's motion to dismiss pursuant to CPLR 3211(a)(7).

[31]Because Plaintiffs' breach of contract claim is not limited to HCC's improper payout to non-insureds, the Court will not determine now whether or not the Paine Parties were or were not insureds under the HCC Policy because they were not FPC members, officers and/or executives acting on behalf and in the interests of FPC in connection with their private equity investment and management activities. In any event, because Plaintiffs have alleged that Presser was never a director, general partner, manager, executive or employee of FPC (FAC at ¶ 25), any payment by HCC to the Paine Parties based on his alleged bad acts would not have been covered as there is no basis for finding him to be an additional insured under the Policy.

[32]Section VII [Settlements and Defense] provides that "[a]s a condition precedent to coverage, no settlement negotiations or settlement agreements shall occur and no Costs, Charges and Expenses shall be incurred without the Insurer's consent, such consent not to be unreasonably withheld." Section XIII [Assistance, Cooperation, Subrogation and Recoveries] provides that "'[a]s a condition precedent to coverage, the Insureds agree to provide the Insurer with such information, assistance and cooperation as the Insurer or their counsel may reasonably request in connection with the defense, negotiation and settlement of any Claim, and the Insureds further agree that they shall not take any action which in any way increases the Insurer's exposure under this Policy."

incurring the legal fees or entering into the Settlement. First, none of the cases on which HCC/PIA rely were cases involving pre-answer dismissal motions limited to the sufficiency of the allegations of the complaint. Instead, those cases were in the very different procedural context of a motion for summary judgment and in that procedural stance, the plaintiffs/insureds were required to lay bear their proof that they had sought consent before incurring legal fees or settling the case or that such consent was unnecessary either because of the insurer's denial of the claim or some other circumstance showing that the payments made pre-notice of claim were involuntary. The Court finds HCC/PIA's arguments concerning proper tender and consent to be red herrings since Plaintiffs have alleged a tender of a claim and HCC's wrongful denial which, if proven, would excuse Plaintiffs, from a legal perspective, in seeking consent before incurring such fees and expenses. Whether or not Plaintiffs properly tendered their claim and whether or not Plaintiffs either sought HCC/PIA's consent before incurring the fees and expenses or whether Plaintiffs are excused from such a requirement based on HCC's wrongful disclaimer cannot be resolved on a CPLR 3211(a)(7) motion.

B. *HCC's Motion to Dismiss Pursuant to CPLR 3211(a)(1)*

The Court agrees that the Policy is documentary evidence and, to the extent any of Plaintiffs' claims turn on the language of the Policy, and those claims are directly refuted by the Policy's terms, such claims may be dismissed pursuant to CPLR 3211(a)(1). However, the predicate for most of HCC's motion to dismiss Plaintiffs' Fifth Cause of Action for breach of contract is based on non-documentary evidence, such as letters and pleadings, which may not be considered by a court in the context of a CPLR 3211(a)(1) motion.

"The interpretation of the meaning of an insurance policy and the scope of coverage are questions of law" (*Barnett v Fireman's Fund Ins. Co.*, 90 Cal App 4th 500, 508 [Cal Ct App 4th Dist, Div 1 2001]). Thus, courts bear the responsibility of determining the rights and obligations of the parties under insurance contracts based upon the specific language of the policies (*Empire Fire and Marine Ins. Co. v Eveready Ins. Co.*, 48 AD3d 406, 407 [2d Dept 2008]). As with contracts generally, unambiguous provisions of an insurance contract must be given their plain and ordinary meaning and the interpretation of such provisions is a question of law for the court (*Vigilant Ins. Co. v Bear Stearns Companies, Inc.*, 10 NY3d 170, 177 [2008]). In looking at the language of the policy, the policy should be construed as a whole and in a way that affords a fair meaning to all of the language employed by the parties and leaves no provision without force or effect (*Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]); *MDW Enter., Inc. v CNA Ins. Co.*, 4 AD3d 338, 341 [2d Dept 2004]).

In its motion, HCC is not asserting that Plaintiffs have no breach of contract claim because they were not insureds under the policy, although HCC is arguing that the Paine Parties were insureds/additional insureds under the Policy in order to support their claim that Plaintiffs' breach of contract fails because the $10 million in Policy proceeds were

exhausted on payments to insureds/additional insureds. However, for the reasons previously stated, even assuming this to be true, provided Plaintiffs are able to prove their performance under the Policy and HCC's wrongful denial of their claim,[33] whether or not the Paine Parties were properly paid is irrelevant to the viability of Plaintiffs' claim. Instead, HCC's arguments for why Plaintiffs' breach of contract claim should be dismissed pursuant to CPLR 3211(a)(1) are: (1) the authorization clause did not mandate that HCC only consider claims submitted by FPC and claims submitted by additional insureds had to be considered by HCC; (2) Plaintiffs did not submit a claim within the Policy period; (3) even if Plaintiffs submitted a claim, they effectively withdrew the claim through the notice of the settlement of the Fox-Paine Litigation in January 2008; and (4) Plaintiffs failed to obtain HCC's consent prior to incurring their legal fees/expenses and prior to entering into the December 2007 Settlement and therefore, they failed to satisfy a condition precedent to their right to the Policy's proceeds.

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[33]"[T]o be entitled to a defense, 'the insured must prove the existence of a potential for coverage, while the insurer must establish the absence of any such potential.' In other words, the insured need only show that the underlying claim may fall within policy coverage; the insurer must prove it cannot'" (*Barnett,* 90 Cal App 4th at 508; *see also Automobile Ins. Co. of Hartford v Cook,* 7 NY3d 131, 137 [2006] ["insurer will be called upon to proved a defense whenever the allegations of the complaint 'suggest ... a reasonable possibility of coverage'"]). "To be relieved of its duty to defend on the basis of a policy exclusion, the insurer bears the heavy burden of demonstrating that the allegations of the complaint cast the pleadings wholly within that exclusion, that the exclusion is subject to no other reasonable interpretation, and that there is no possible factual or legal basis upon which the insurer may eventually be held obligated to indemnify the insured under any policy provision" (*Bovis Lend Lease LMB, Inc. v Royal Surplus Lines Ins.* Co., 27 AD3d 84, 93 [1st Dept 2005] *see also Automobile Ins. Co. of Hartford v Cook, supra*; *Bodewes v Ulico Cas. Co.*, 336 F Supp 2d 263, 272 [WD NY 2004]). "Exclusionary clauses are strictly construed, and 'are given the interpretation most beneficial to the insured'" (*Bodewes,* 336 F Supp 2d at 272 *quoting M.H. Lipiner & Son, Inc. v Hanover Ins. Co.*, 869 F2d 685, 687 [2d Cir 1989]). The insured v. insured exclusion is commonly found in Directors and Officers insurance policies and its purpose is "to prevent collusion, 'such as suits in which a corporation sues its officers and directors in an effort to recoup the consequences of their business mistakes ... thus turning liability insurance into business-loss insurance ....'" (*id.* at 272, *quoting Level 3 Communications, Inc. v Federal Ins. Co.*, 168 F3d 956, 958 [7th Cir 1999]). "[T]he duty to defend arises whenever the allegations in a complaint against the insured fall within the scope of the risks undertaken by the insurer ... and, it is immaterial that the complaint against the insured asserts additional claims which fall outside the policy's general coverage or within its exclusionary provisions" (*id.* at 277, *quoting Town of Messena v Health Care Underwriters Mut. Ins. Co.*, 98 NY2d 435, 443-444 [2002]).

1. *The Branch of HCC's Motion Seeking to Dismiss the Breach of Contract Claim Based on HCC's Violation of the Authorization Clause Shall Be Granted*

The Court agrees that to the extent Plaintiffs' breach of contract claim is based Clause X(E) (FAC at ¶ 53), such a claim does not state a cause of action since it is entirely refuted by the language of the Policy. Thus, Clause X(E) provides:

> **E. Insured Organization Authorization Clause**
>
> By acceptance of this Policy, the Insureds agree that the entity identified in Item A. of the Declarations will act on their behalf with respect to the giving of all notices to the Insurer, the receiving of all notices from the Insurer, the payment of the premium and the receipt of any return premium (Policy at ¶ X. E).

Nowhere in this clause is there any language mandating that the Insurer only accept notices of claim from FPC. Nor has Plaintiff provided any legal basis that an insurer may only accept a claim from the named organization insured and no other. Indeed, such a position would be contrary to the legal principle "that the rights of a named insured under a policy of insurance inure to all additional insureds under that policy" (*National Auto. and Cas. Ins. Co. v California Cas. Ins. Co.*, 139 Cal App 3d 336, 341 [Cal Ct App 2d Dist, Div 4 1983]) and the meaning of the term additional insured is "an 'entity enjoying the same protection as the named insured'" (*Del Bello v General Acc. Ins. Co.,* 185 AD2d 691, 692 [4th Dept 1982]).

Accordingly, any breach of contract claim based on HCC's breach of this provision is not viable. However, it is evident from the pleadings that Plaintiffs' breach of contract claim goes beyond one claim of breach and is legally viable even if HCC was justified in accepting notices of claims from other insureds, other than FPC.

2. *The Branches of HCC's Motion Seeking to Dismiss Based on Plaintiffs' Failure to Tender a Claim During the Policy Period and Plaintiffs' Failure to Obtain HCC's Consent Prior to Their Incurring Fees or Their Execution of the Settlement Cannot be Decided at this Time*

With regard to HCC's remaining arguments supporting the dismissal of Plaintiffs' breach of contract claim, because they turn on the correspondence and pleadings annexed to HCC's moving papers, and because such evidence is not documentary, these grounds for dismissal are premature. Thus, HCC's reliance on correspondence and the

pleadings to show that – (1) Plaintiffs never tendered a claim within the Policy period[34] and even if they tendered such a claim within the Policy period, it was effectively withdrawn based on the notification that had been provided as to the settlement of the claim, and (2) Plaintiffs never obtained HCC's consent prior to incurring fees and expenses in the various litigations and prior to entering into the 2007 Settlement – is misplaced because such evidence is not considered documentary in the context of a CPLR 3211(a)(1) motion to dismiss.

With regard to HCC's position that Plaintiffs' breach of contract claim fails because based on the language of the Policy and the pleadings in the Fox-Paine Litigation, the Paine Parties were insureds or additional insureds under the Policy, the Court does not believe that simply because the Paine Parties were or were not insureds or additional insureds under the Policy absolves HCC from liability for breach of contract.[35] In this regard,

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[34]Section VIII of the Policy provides that "the Insureds shall, as a condition precedent to their rights to payments under this Policy, give the insurer notice in writing of any claim as soon as practicable but in no event later than 60 days after the end of the Policy Period."

[35]In support of the Paine Parties being insureds, HCC argues that Paine, an equal partner in FPC and President of FPC was an Insured Person under the Policy (HCC/PIA Mem. at 77, citing Policy at § II.1) and the Former Executives were also Insured Persons since they include any "natural person" who "was, is, or shall become a duly appointed or elected director, officer, general partner, manager, ... or employee of the Insured Organization" (id., citing Policy at Endorsement No. 3). Of course, in their opposition, Plaintiffs dispute this position because it is their contention that in order to fall within the meaning of an Insured Person, the member, officer, director, or manager would have had to have been acting in his/her capacity of a member, officer, director or manager of FPC and acting for the benefit of FPC, which, based on the allegations of the pleadings in the Fox-Paine Litigation, HCC cannot show. It is true that under California law, "[w]hen a person seeks coverage as an additional insured under a policy issued to a corporation as a named insured, an officer or employee of the corporation is entitled to a defense if he or she was acting in an insured capacity when allegedly engaged in the injury-producing conduct" (*Barnett, supra,* 90 Cal App 4th at 511). In *Barnett,* the Court rejected the insurer's claim that "when an individual is an additional insured under a policy issued to an entity and the entity sues the individual for conduct detrimental or injurious to the entity, as a matter of law there can be no duty to defend under the primary insured's policy" because in *Barnett*, "the complaint allege[d] Barnett and G. Mayer were seeking to further the corporate interests when they criticized MedPartners, it is possible they were engaged with respect to their duties as executive officers when they committed the alleged misconduct and therefore a potential for coverage exists" (*id.* at 513). Here, whether or not the Paine Parties were acting on behalf of FPC or an affiliated insured entity in connection with the acts alleged cannot be resolved on motion to dismiss.

Plaintiffs' claim of breach of contract does not hinge on whether or not the Paine Parties qualified as insureds or additional insureds. Rather, Plaintiffs' breach of contract argument hinges on their claim that they were insureds under the Policy (which is undisputed), that they made a valid claim for coverage (an issue which is hotly disputed but cannot be resolved on this motion to dismiss), that their claim was wrongfully denied by HCC (an issue that this Court is not being asked to resolve in the present motion to dismiss), and that HCC, in violation of its duties to an insured who had made a claim, chose to pay all of the Policy limits to the Paine Parties without obtaining Plaintiffs' consent and without obtaining a release from the Paine Parties as to their claims against Plaintiffs in the underlying litigations/arbitrations.

PLAINTIFFS' SEVENTH CAUSE OF ACTION AS AGAINST HCC AND PIA
FOR BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A breach of the implied covenant of good faith and fair dealing is a contract claim, which given Plaintiffs' contention that California law governs the contract claim (and HCC's failure to dispute the applicability to California law to the breach of contract claim) necessarily means that California law governs the breach of the implied covenant of good faith and fair dealing as well (*Luxus Aviation, LLC v Kerwin Media LLC*, 91 AD3d 569 [1st Dept 2012]; *Deloitte (Cayman) Corporate Recovery Serv., Ltd. v Sandalwood Debt Fund A, LP*, 2011 NY Slip Op 50849[U], 31 Misc 3d 1225[A] [Sup Ct, NY County 2011]; *MBIA v Royal Bank of Canada, RBC*, 2010 NY Slip Op 51490[U], 28 Misc 3d 1225[A] [Sup Ct, Westchester County 2010] [Scheinkman, J.]). Nevertheless, as this Court is doing with regard to all the other claims, the Court will refer to California and New York law in any event for the sake of completeness.

Because there must be a contract between the parties for there to be a claim for breach of the implied covenant of good faith and fair dealing, Plaintiffs' claim as against PIA, a nonparty to the Policy, necessarily fails (*Gruenberg v Aetna Ins. Co.*, 9 Cal 3d 566, 576 [1973] ["Obviously, the non-insurer defendants were not parties to the agreements for insurance; therefore, they are not, as such, subject to the implied covenant of good faith and fair dealing"]; *American-European Art Assoc., Inc. v Trend Gallery*, 227 AD2d 170 [1st Dept 1996]). Accordingly, the Court shall grant the branch of HCC/PIA's motion to the extent it seeks the dismissal of the breach of the implied covenant of good faith and fair dealing as against PIA.

"[T]he insurance contract imposes a duty of good faith and fair dealing on the insured, as well as the insurer" (*Samson, supra,* 30 Cal 3d at 240). In this regard, it is well settled that the insurer must take into account the insured and give it at least as much consideration as it does its own interest (*Merritt v Reserve Ins. Co.*, 34 Cal App 3d 858, 871-872 [Cal Ct App, 2d Dist, Div 2 1973]). Further, "an insurer violates the implied covenant when it frustrates the insured's efforts to collect benefits due under a policy" (*American Med. Intl., Inc.*, 244 F3d at 720, *citing Waller, supra,* 11 Cal 4th at 36). Thus,

"[t]he parties to the insurance contract must refrain from doing anything that will injure the right of another from receiving the benefits of the agreement ... The terms and conditions of the policy define the duties and performance to which the insured is entitled" (*Western Polymer Tech., Inc. v Reliance Ins. Co.*, 32 Cal App 4th 14, 24 [Cal Ct App, 1st Dist, Div 3 1995] [no breach of implied covenant where insurer settled within policy limits but without insured's consent given that policy allowed for insurer to settle without interference from insured]).[36]

While HCC is correct that there can be no breach of the implied covenant of good faith and fair dealing if there is no right to coverage (*American Med. Intl., Inc., supra and Waller*),[37] this Court has already determined that Plaintiffs have sufficiently alleged a claim for breach of contract against HCC.

In *Shell Oil Co. v National Union Fire Ins. Co. of Pittsburgh, Pa.* (44 Cal App 4th 1633 [Cal Ct App, 2d Dist 1996]), Shell Oil Co. contracted with S.I.P. Engineering, Inc. (SIP) for SIP to do engineering work at Shell's oil refinery. In the contract with SIP, SIP was required to provide $5 million worth of defense and indemnity to Shell for any claims for personal injury or property loss unless the claim arose from Shell's negligence. In addition, SIP agreed to maintain, *inter alia,* Comprehensive General Liability Insurance with a limit of $1,000,000 per occurrence and Shell was to be made an additional insured on these insurance policies. SIP's Comprehensive General Liability Policy from National provided that "if specifically required to be included as a named insured, this policy shall include as a named insured any person or organization to whom the named insured [*i.e.,* S.I.P] is obligated by virtue of a contract, entered into before loss, to provide insurance such as is afforded by this policy, but only to the extent required by said contract and not to exceed the

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[36]As noted by the court in *Western Polymer Tech., Inc.*, "a liability insurance policy's purpose is to provide the insured with a defense and indemnification for third party claims within the scope of coverage purchased, and not to insure the entire range of the insured's well-being" (*Western Polymer Tech., Inc.*, 32 Cal App 4th at 27). In that case, the court stated that where the policy did not require an insured's consent to a settlement, there was no precedent for finding an insurer liable for injury to an insured's reputation as a result of the settlement. However, the court noted that "the implied covenant of good faith and fair dealing protects the insured's enjoyment of the policy's benefits and purposes and avoids impairing the insured's interests under the policy" and "an insurer should not further its own interests by settling a claim within policy limits through the use of the insured's money without some form of consent by the insured" (*id.* at 26).

[37]As explained by the court in *American Med. Intl., Inc.*, "the implied covenant was 'a supplement to the express contractual covenants, to prevent a contracting party from engaging in conduct that frustrates the other party's right to the benefits to the agreement' ... Without a right to coverage ... there is no obligation the insurer may frustrate" (*American Med. Intl.*, 244 F3d at 720, *quoting Waller,* 11 Cal 4th at 36).

coverages and the limits of liability afforded by this policy" (*id.* at 1638). SIP also had excess insurers (Lexington, Pacific Employers and Granite State) that provided excess insurance over National's limit to $5 million. In January 1986, an employee of one of SIP's subcontractors suffered severe injuries on the job and in May 1986, the employee sued SIP and Shell for negligence in Washington state court (the "Washington Action"). Shell was also sued in subrogation by the subcontractor's workers' compensation carrier. SIP tendered its defense to National, which accepted and agreed to pay the lawyers SIP had retained. Shell initially retained counsel to defend the action, but after Shell obtained National's and the excess insurer's policies in September 1987, on January 21, 1988, Shell demanded coverage and defense from National and the excess carriers. National and the excess insurers declined to cover Shell.

Thereafter, on March 22, 1988, the employee's case as against SIP went to mediation and was settled. National and the excess carriers paid SIP's share of the settlement ($2 million) and Shell paid another $2 million and waived a $225,000 workers' compensation lien it had acquired in settlement with the compensation carrier. Following the settlement, Shell sued SIP for indemnity, but SIP won with the court finding that the accident had been caused by Shell's sole negligence. Following that decision, SIP, National and the excess carriers filed contribution actions against Shell, but Shell prevailed in those actions because the releases given to the employee did not preserve such claims. In this action, Shell sued National and the excess carriers in which it sought a declaratory judgment of the monies Shell expended in the Washington Action to settle the case and for the attorneys' fees and costs incurred. It also sued SIP for breach of contract if it was determined that Shell was not covered. The lower court determined that Shell was entitled to defense and indemnification in the Washington Action based on the contract with SIP and SIP's policies with National and the excess carriers. The excess carriers settled with Shell for $950,000. National went to trial and the court determined that Shell was entitled to $500,000 from National (half of the policy limit) plus prejudgment interest and the attorneys fees incurred in the Washington Action (but not the fees incurred in the declaratory judgment action).

On appeal, National argued: (1) the Washington Action did not fall within National's coverage because it involved Shell's sole negligence; (2) National fully discharged its duty to Shell when it paid its policy limits in settlement; and (3) National's duty to defend was limited to the three month period between Shell's formal tender of its defense and National's settlement payment in the Washington Action.

The appellate court agreed with the lower court's determination that Shell was covered by the National policy. Addressing National's second argument, the court agreed with the trial court that "National [was] not entitled to pick and choose between its two insureds in its payment of benefits, 'particularly where no detriment is demonstrated by

providing equal treatment to both insureds" (*Shell Oil Co.,* 44 Cal App 4th at 1645).[38] The trial court had determined that Shell received no benefit from National's payment of the $1 million on behalf of SIP because the settlement occurred simultaneously so there was nothing against which Shell could offset National's payment. The appellate court further noted that based on the implied covenant of good faith and fair dealing, "[a]n insurer owes the duty of good faith and fair dealing to each of its insureds, and cannot favor the interests of one insured over the other'" (*Shell,* 44 Cal App 4th at 1646, *quoting Lehto v Allstate Ins. Co.*, 31 Cal App 4th 60, 72 [Cal Ct App, 2d Dist, Div 5 1994], *cert denied* 516 US 820 [1995]). With regard to National's argument concerning its non-liability for pre-tender of defense expenses, the court held that Shell's pre-tender defense expenses were not barred from recovery because they were not voluntary since during that time frame, Shell was trying to find out the insurer's identity.

The court rejected National's position that once it paid out the policy limit, it could no longer be liable to Shell based on the policy's provision that National "shall not be obligated to pay any claim, judgment or award or to defend any suit or proceeding after the applicable limit of the company's liability has been exhausted by payment of judgments, settlements or awards" (*id.* at 1649) noting

> National afforded Shell none of the benefits of the policy. It left Shell holding the bag, as to both liability and defense. Although Shell had asked National to tender the policy limit, Shell had done so when demanding coverage for itself. Instead, National ignored its duties to Shell and paid its policy limit on behalf of S.I.P. only. In short, the April 9, 1988 payout marked not simply the monetary limit of National's indemnity undertaking but also the most material breach of its policy with Shell (for which most of the present judgment holds National responsible). National cannot truncate its responsibility and liability to Shell for defense by claiming it fully performed its coverage obligations by the very act of breaching them (*id.* at 1650).

The Court does not construe *Shell* and *Merritt v Reserve Ins. Co.* (34 Cal App 3d 858, 871 [1973]) as narrowly as Defendants suggest[39] – *i.e.,* that they are limited to legal

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[38]The court further rejected that any of the cases on which National relied stood for the proposition that "the payment of policy limits on behalf of one coinsured necessarily satisfies the insured's obligation to the other coinsured" (*Shell Oil Co.,* 44 Cal App 4th at 1645).

[39]The other two cases cited by HCC for the same proposition do not have any particular relevance to the matter at hand. *State Farm Mut. Auto. Ins. Co. v Crane* (217 Cal App 3d 1127 [Cal Ct App, 3d Dist 1990]) involved State Farm's offer to settle a case

proposition that an insurer may not exhaust policy limits by settling for one insured to the detriment of another – *i.e.*, they arise in the narrow circumstance "where both insureds have submitted a claim and the insurer has a *duty to defend* and thereby *has control over the settlement*" whereas here, "the Policy was not a general liability contract, HCC had no duty to defend, it had no control over the defense or any settlement, and Fox/FPC never submitted a competing demand for reimbursement" the Court (HCC Reply Mem. at 9). Rather, assuming the allegations of the FAC to be true (as the Court must on this motion), this is circumstance where HCC left Plaintiffs "holding the bag", affording them none of the benefits of the policy, in that HCC wrongfully denied Plaintiffs' claim under the policy and elected to pay all of the benefits thereof to the Paine Parties.

In *Davis v Blue Cross of N. Cal., supra*, the California Supreme Court affirmed the lower court's holding that Blue Cross had breached the implied covenant of good faith and fair dealing by failing to advise its insureds of their right to seek arbitration and, therefore, had waived its right to demand arbitration. In its affirmance, the California Supreme Court noted

> One important facet of the insurer's obligation to give the insured's interest "as much consideration ... as it does ... its own" is the duty reasonably to inform an insured of the insured's rights and obligations under the insurance policy. In particular, in situations in which an insured's lack of knowledge may potentially result in a loss of benefits or a forfeiture of rights, an insurer has been required to bring to the insured's attention relevant information so as to enable the insured to take action to secure rights afforded by the policy (*Davis,* 25 Cal 3d at 428).

New York has the same view. In *Smoral v Hanover Ins. Co.* (37 AD2d 23 [1st Dept 1971]), the insurer, Hanover, insured a car owned by Syracuse Jerome Motors. Smoral was the driver of the car and Whittaker was a passenger who was injured in a car accident. Whittaker sued Smoral, Syracuse Jerome Motors and its president, Jerome Goldberg. Based on a question over whether Smoral had purchased the car, Hanover disclaimed liability as to Smoral so Smoral notified his carrier Glens Falls Insurance Company. Glens Falls sued Hanover and it was determined that Smoral had not purchased the car and was an insured under the Hanover policy. The Hanover policy had a $50,000

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for the policy limit which limited State Farm's liability for prejudgment interest under a California statute. *Merrit v Reserve Insur. Co.*, 34 Cal App 3d 858 [Cal Ct App, 2d Dist, Div 2 1974]) involved a bad faith claim against an insurance company based on its failure to settle a claim within the policy limits – *i.e.*, while the carrier is in control of the litigation, "the carrier ... [must] consider in good faith the interests of the assured equally with its own and evaluate settlement offers within policy limits as though it alone carried the entire risk of loss" (*Merritt,* 34 Cal App 3d at 871).

limit and Hanover settled with Whittaker for the entire limit in exchange for releases on behalf of Syracuse and Goldberg, but not Smoral. Indeed, Smoral was not notified of the settlement negotiations and settled without Smoral's consent. Ultimately, Smoral and his insurer Glens Falls settled the action on behalf of Smoral for $32,500. Glens Falls and Smoral then sued Hanover to recover the $32,500. The trial court dismissed the complaint on the grounds that it viewed Glens Falls as the only party in interest and as excess carrier, it was not entitled to any notice from the primary insurer as to the progress of the action.

On appeal, the Appellate Division, First Department reversed the dismissal because the rights of Smoral were totally different from Glens Falls and Hanover owed him a duty of good faith which meant "adequate protection of the interests of the assured" and "[w]hile this duty has most frequently been considered where the interests of the company have been preferred to the detriment of the insured ... the same considerations would apply with equal force where the company preferred one of its insureds over another. It is absolutely no answer for the company to say that it paid the full amount of its policy if in so doing it fully protected one of its insureds and left the other completely exposed. While it is easy to see why Hanover acted as it did – the insured it protected was a policyholder, the one whose rights it ignored was an insured it was by law required to defend– there is no legal justification for its preferring one over the other" (*Smoral, supra,* 37 AD2d at 25). As damages, the Appellate Division expressed the view that the proper measure of damages might be the proportion of the settlement fund that should have been allotted to relieving or reducing Smoral's liability.[40]

Based on the foregoing, the Court believes that Plaintiffs have adequately stated a claim for breach of the implied covenant of good faith and fair dealing against HCC and that such a claim is not duplicative of their breach of contract claim. However, as previously noted, because PIA was not a signatory to the Policy, Plaintiffs' claim for breach of the implied covenant of good faith and fair dealing as against PIA necessarily fails and shall all be dismissed.

PLAINTIFFS' SECOND CAUSE OF ACTION AGAINST ERP FOR FRAUDULENT BREACH OF FIDUCIARY DUTY

A. The FAC Fails to Allege Facts Sufficient to Support a Fiduciary or Confidential Relationship between Plaintiffs and ERP or Between Plaintiffs and HCC

It is axiomatic that for Plaintiffs' Second Cause of Action to be legally sufficient, there must be a fiduciary relationship between ERP and Plaintiffs. So the Court

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[40]The law is well settled that an insurer's failure to communicate settlement negotiations and then failure to settle within policy limits is evidence of bad faith (*Transcare New York, Inc. v Finkelstein, Levine & Gittlesohn & Partners, supra*).

[* 66]

will first address whether the FAC alleges facts sufficient to support a fiduciary obligation owed by ERP to Plaintiffs. The Court accepts for purposes of this motion that Plaintiffs' tort claims are governed by New York law. However, because there is no distinction between New York and California law in this regard, the Court will also reference relevant California law for the sake of completeness.

Under New York law, to establish a breach of fiduciary duty, plaintiff must allege the existence of a fiduciary relationship, misconduct by the defendant and damages caused by defendant's misconduct (*Fitzpatrick House III LLC v Neighborhood Youth & Family Serv.*, 55 AD3d 664 [2d Dept 2008]; *Kurtzman v Bergstol*, 40 AD3d 588 [2d Dept 2007]). The allegations for a claim of breach of fiduciary relationship must be pleaded with requisite particularity under CPLR 3016(b) (*Parekh v Cain,* 96 AD3d 812, 816 [2d Dept 2012]; *Palmetto Partners, L.P. v AJW Qualified Partners,* LLC, 83 AD3d 804 [2d Dept 2011]). Further, it is well settled that a business relationship cannot be transformed into a fiduciary relationship by mere allegation (*Calvin Klein Trademark Trust v Wachner*, 123 F Supp 2d 731 [SD NY 2000]) and "a conventional business relationship, without more, is insufficient to create a fiduciary relationship" (*AHA Sales, Inc. v Creative Bath Prods., Inc.* 58 AD3d 6, 21 [2d Dept 2008]).

"In New York, a fiduciary relationship arises, 'where one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relations'" (*Suthers v Amgen*, 441 F Supp 2d 478, 487 [SD NY 2006], *quoting Flickinger v Harlod C. Brown & Co.*, 947 F2d 595, 599 [2d Cir 1991]). "New York courts have not hesitated to find fiduciary duty claims deficient when a plaintiff has not pled or proved facts demonstrating a fiduciary duty or 'any relationship approaching privity'" (*id., quoting Columbia Mem. Hosp. v Barley,* 16 AD3d 748, 749 [3d Dept 2005]).

Absent exceptional circumstances, there is no fiduciary duty between an insurer and its insured (*Batas v Prudential Ins. Co. of Am.*, 281 AD2d 260 [1st Dept 2001];[41]

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[41]In *Batas,* the Appellate Division, First Department, affirmed the dismissal of a claim for breach of fiduciary duty by insureds against their health insurance company because the allegations concerning a fiduciary duty revolved around plaintiffs' allegations concerning the insurer's superior knowledge of their product and promotional material on the insurer's website wherein they touted themselves as a trusted name in health insurance. The trial court found that the complaint was bereft of allegations that there was a more direct effort by the insurer to gain plaintiffs' trust and confidence through direct sales efforts. In their affirmance, the Appellate Division noted

> Plaintiffs make no showing that their relationship with defendants is unique or differs from that of a reasonable consumer and offer no reason to depart from the general rule that the relationship between the parties to a contract of insurance is strictly contractual in nature. No special relationship of trust

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Medina v State Farm Fire & Cas. Co., 924 F2d 1063 [9th Cir 1991]; *Lennane v American Zurich Ins. Co.*, 2014 WL 546061 [ED Cal 2014]). The same holds true with regard to insurance brokers and, absent exceptional and particularized circumstances based on the brokers' conduct or by express or implied contract, a broker's duty is limited to obtaining the requested coverage (*Murphy v Kuhn*, 90 NY2d 266 [1997]; *People ex rel Cuomo v Wells Fargo Ins. Serv.*, 16 NY3d 166 [2011], *affirming* 62 AD3d 404 [1st Dept 2009], *affirming* 2008 NY Slip Op 50114[U], 18 Misc 3d 1117[A] [Sup Ct, NY County 2008]; *Sawyer v Rutecki*, 92 AD3d 1237 [4th Dept 2012], *lv denied* 19 NY3d 804 [2012]; *People ex rel Cuomo v Liberty Mut. Ins. Co.*, 52 AD3d 378 [1st Dept 2008]; *Wender v Gilberg Agency, Inc.*, 304 AD2d 311 [1st Dept 2003], *lv denied* 100 NY2d 507 [2003]; *Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007]; *Consolidated Bus Tr., Inc. v Treiber Group, LLC*, 2011 WL 10782083 [Sup Ct, Kings County 2011], *affd* 97 AD3d 778 [2d Dept 2012]). "An insurance agent or broker ... may be held liable under theories of breach of contract or negligence for failing to procure insurance ... An insured must show that the agent or broker failed to discharge the duties imposed by the agreement to obtain insurance either by proof that it breached the agreement or because it failed to exercise due care in the transaction" (*Bedesse Imports, Inc. v Cook, Hall & Hyde, Inc.*, 45 AD3d 792, 793-794 [2d Dept 2007]). It is well settled that when an insurance agent "agrees with an insured to obtain [requested] insurance and fails to do so and neglects to give reasonable notice that such insurance has not been obtained, the agent becomes personally liable" – *i.e.*, the agent has a duty to use reasonable skill and care, act loyally, and give notice in the event he/she is unable to procure the promised insurance (*Riedman Agency, Inc. v Meaott Constr. Corp.*, 90 AD2d 963, 964 [4th Dept 1982], *lv dismissed* 58 NY2d 824 [1983]).

In *Murphy v Kuhn, supra*, plaintiff sued his long standing insurance agent for negligence and breach of an implied covenant of good faith and fair dealing based on his contention that "a special relationship developed from a long, continuing course of business between plaintiffs and defendant insurance agent, generating special reliance and an affirmative duty to advise with regard to appropriate or additional coverage" (*id.*). In that case, the New York Court of Appeals expressed the view that ordinarily, a broker has no fiduciary duties to the insured and an additional duty of advisement and noted that it other jurisdictions, such a duty has only been found to arise where "(1) the agent receives compensation for consultation apart from the payment of premiums ... (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent ... or (3) there was a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on" (*Murphy*, 90 NY2d at 272). In declining to decide whether a special relationship may arise between an insured and its broker, the Court noted:

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and confidence arises out of an insurance contract between the insured and the insurer; the relationship is legal rather than equitable (*Batas*, 281 AD2d at 264).

> We do, however, take note that the uniqueness of customer and ordinary insurance relationships and transactions is manifested by the "absence of obligations arising from the speaker's professional status" with regard to the procurement of additional coverage ... Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status ... Furthermore, permitting insureds to add such parties to the liability chain might well open flood gates to even more complicated and undesirable litigation (*Murphy*, 90 NY2d at 273).[42]

In *Chase Scientific Research, Inc. v NIA Group, Inc.* (96 NY2d 20 [2001]), the Court of Appeals reaffirmed the holding in *Murphy* that an insurance broker has a duty to obtain the requested coverage but "not a continuing duty to advise, guide or direct a client based on a special relationship of trust and confidence" (*id.* at 30).

In California like New York, a broker ordinarily only assumes those duties found in an agency relationship – *i.e.*, an obligation to use reasonable care, diligence and judgment in procuring insurance requested by an insured (*Jones v Grewe,* 189 Cal App 3d 950, 954 [Cal Ct App, 2d Dist, Div 3 1987]). Thus, it is only if the agent assumes additional duties by an express agreement or by a holding out that a broker may be liable for failing to obtain sufficient insurance for an insured (*id.*). Indeed, California courts have defined a fiduciary relationship as "'any relation existing between parties to a transaction wherein one of the parties is ... duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent ....'" and have explicitly found that neither an insurer[43] nor an insurance broker stands in a

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[42]The Appellate Division, Third Department has held "insurance agents are generally not liable for anything more than obtaining the requested coverage, unless there is a special relationship with the insurance customer justifying the reliance on the agent's speech ... [which occurs] in exceptional circumstances, for example where the agent receives compensation for consultation beyond the premium payments, the insured relies on expertise of the agent regarding a raised question of coverage, or there is an extended course of dealing sufficient to put objectively reasonable agents on notice that their advice was being specially relied upon" (*Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 438 [3d Dept 2003]).

[43]Thus it is black letter law in California that "'an insurer is not a fiduciary for its insured in the traditional sense and cannot be held liable for breach of fiduciary duties' ... Although 'special and heightened duties' are owed by insurers to insureds, 'the insurer-

fiduciary relationship to an insured and the duty of a broker "is no greater than the duty to use reasonable care and diligence in procuring insurance" (*Mark Tanner Constr., Inc. v HUB Intl. Ins. Serv., Inc.*, 224 Cal App 4th 574, 586 [Cal Ct App, 3d Dist 2014]; *Hydro-Mill Co. v Hayward, Tilton and Rolapp Ins. Assoc., Inc.*, 115 Cal App 4th 1145, 1156-1157 [Cal Ct App 2d Dist., Div 1 2004]; *Miniace v Pacific Maritime Assn.*, 2005 WL 2230149 at *10 [ND NY 2005]).

Further, the Court finds the cases on which Plaintiffs rely for a fiduciary relationship between a broker and the insured readily distinguishable. For example, in *People ex rel. Cuomo v Coventry First LLC* (13 NY3d 108 [2009]), New York's then attorney general brought suit against Coventry First LLC (a life settlement provider) and its various affiliates ("Coventry") on behalf of life insurance policy owners who had sold their policies to Coventry through their brokers (known as life settlement brokers). The Attorney General alleged that Coventry had engaged in bid rigging by paying substantial concealed commissions to the life settlement brokers to get them to convince their clients to accept defendants' offers of purchase rather than higher offers from rival settlement providers. The Attorney General sued Coventry based on claims of, *inter alia*, fraud, unjust enrichment and inducement of breach of fiduciary duty. On appeal, the Court of Appeals affirmed the Appellate Division's affirmance of the trial court's denial of the branch of Coventry's motion to dismiss the inducement of breach of fiduciary duty claim, finding that there were sufficient facts alleged to support a theory that the settlement brokers were in a fiduciary-type arrangement with their clients since they had held themselves out as working to obtain the highest price for their client's policies (*i.e.*, that they were highly skilled experts whose advice was specifically relied on by the clients in this relatively new and largely unregulated industry). Further, the Court found that the Complaint sufficiently alleged Coventry's knowledge of such fiduciary duties based on, *inter alia*, emails from Coventry executives annexed to the Complaint evidencing that the executives referred to the fiduciary duties of the settlement brokers.

Plaintiffs' reliance on *Migliaccio v Midland Natl. Life Ins. Co.* (2007 WL 316873 [CD Cal 2007]) is likewise unavailing as it is another case involving an insurance company's predatory acts against an unwitting sector of the public – namely, defendants training their "sales agents to lure senior citizens into their confidence by offering assistance with estate and financial planning in order to sell them improper annuities using standardized marketing materials and annuity contracts defendants supplied" (*id.* at * 11). Based on those facts, the court declined to dismiss claims for breach of fiduciary duty and aiding and abetting a breach of fiduciary duty.

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insured relationship is not a true fiduciary relationship'" (*Lennane, supra*, 2014 WL 546061 at *4, *quoting Casey v Metropolitan Life Ins. Co.*, 688 F Supp 2d 1086, 1100 [ED Cal 2010]).

Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines Ins. Co. (76 AD3d 412 [1st Dept 2010]) merely stands for the well settled principle that a broker may be held liable for negligence in failing to forward claim information to the insurer – *i.e.,* that an insurance broker owes the insured a reasonable duty of care with regard to notifying the insurer of claims. In that case, the Appellate Division, First Department found that as a "matter of routine Abetta referred all questions regarding its insurance claims to Amerisc and Amerisc handled all Abetta's insurance needs, including referring its claims to insurers, establishe[d] a special relationship between the two that imposed upon Amerisc a duty to Abetta to exercise a reasonable degree of care in notifying the appropriate primary or excess insurer of any claim reported to it by Abetta" (*Abetta Boiler & Welding Serv., Inc.,* 76 AD3d at 413).[44] This is not such a situation since Plaintiffs do not allege that ERP failed to forward a claim they had submitted to it. Instead, Plaintiffs are seeking to hold ERP responsible for not continuing to advise them as to the status of that claim, without providing any factual predicate to impose such a duty. Plaintiffs have not even alleged that ERP was still their broker after the submission of the claim in 2007.

In *South Bay Cardiovascular Assoc., P.C. v SCS Agency, Inc.* (105 AD3d 939 [2d Dept 2013]), the Appellate Division, Second Department affirmed the denial of summary judgment dismissing a complaint against an insurance broker based on the broker's failure to advise the insured that the policy limit for employee dishonesty had been reduced from $250,000 to $25,000. Thus, based on the evidence submitted, the Second Department found that there were questions of fact over a special relationship between the broker and the insured based on the relationship between the broker and the insured over an extended period of time such that the broker was on reasonable notice that its advice was being sought and therefore, breached its duty to advise.

The Court does not agree that there is any basis to impose liability on ERP for breach of fiduciary duty in failing to inform Plaintiffs that the Paine Parties were making claims as insureds under the HCC Policy.

As already discussed, the Court finds the FAC devoid of any meaningful recitation of facts that would support a special relationship between Plaintiffs and ERP. Plaintiffs allege that starting in October 2005 and continuing through 2007, FPC engaged ERP as its agent and insurance broker to manage and oversee FPC's professional liability insurance needs, including the procurement of its PE Policies (FAC at ¶ 34). Plaintiffs' allegations concerning ERP's holding itself as having expertise in handling an insured's claims, even if such allegations were sufficiently pleaded to comply with CPLR 3016 (which

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[44]Because there is no factual recitation of the allegations concerning the fiduciary relationship between the insured and the broker in *Howard v Howard* (2005 WL 4925957 [Cal Super Ct, Los Angeles County 2005]), it is not possible for the court to discern whether its denial of a motion to dismiss a claim for breach of fiduciary duty has any relevance to this action.

they are not nor do Plaintiffs have a valid excuse for failing to specifically plead with particularity),[45] there is no connection between a holding out as having expertise in handling an insured's claims with an ongoing duty to apprise an insured of all claims made against a policy.

Nowhere do Plaintiffs allege that ERP held itself out as a broker who would provide Plaintiffs with ongoing information indefinitely into the future even after its engagement ended by Plaintiffs' own allegations in 2007 (FAC at ¶ 34) concerning a Policy with a term from December 30, 2006 to December 30, 2007 (FAC at ¶ 41). Nor do Plaintiffs allege that there was an agreement between Plaintiffs and ERP to take on such future obligations. There is not even any allegation that Plaintiffs paid ERP anything. Instead, all Plaintiffs allege is that FPC paid ERP the $1.1 million in premiums for the HCC Policy and that ERP in turn paid PIA, who in turn paid HCC, and that HCC paid ERP commissions on those premiums (FAC at ¶ 39).

Moreover, Plaintiffs admit that ERP was no longer its agent/broker as of the end of 2007 so how Plaintiffs expect this Court to impose on ongoing obligation on ERP to continue to keep Plaintiffs apprised of the goings on of a Policy that expired by its terms in December 2007, years after its relationship with Plaintiffs ended, is far fetched. The FAC makes clear that Presser's push to obtain the proceeds occurred during the 2009/2010 time frame, over two years after ERP had any concluded its relationship with Plaintiffs. Even assuming *arguendo*, that Plaintiffs had sufficiently pleaded a basis to impose a fiduciary duty on ERP during the parties' relationship (which ended in 2007), that does not mean that ERP had to be aligned in perpetuity with Plaintiffs with regard to any claims under the HCC Policy. At least, Plaintiffs have not pleaded any basis for the imposition of such a continuing obligation.

In this regard, the Court finds the case *Pulte Group, Inc. v Frank Crystal & Co.* (2012 WL 1372158 [SD NY 2012]) instructive. In that case, plaintiff was in the home construction business and sued its insurance broker for negligence in its failing to: (1) procure certain excess insurance policies while it was plaintiff's broker (which relationship ended in 1999) resulting in a gap in plaintiff's primary and excess coverage; and (2) forward plaintiff's notice of exhaustion of its primary policies to the excess carrier in 2006. In granting the broker's motion to dismiss the branch of the motion seeking to dismiss the negligence claim based on the broker's failure to forward the notice to the excess carrier,

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[45]In this regard, the Court does not believe that Plaintiffs may rely on ERP's marketing efforts on its website concerning its expertise and the services it may provide as causing a fiduciary relationship to exist between Plaintiffs and ERP (*see, e.g.*, *Batas v Prudential Ins. Co. of Am., supra*). Specific representations by ERP to Plaintiffs (including the who, what, when and where such representations were made) or allegations concerning an agreement between Plaintiffs and ERP that ERP would undertake such a duty to advise Plaintiffs as to all happenings with the Policy is necessarily required to support such an unusual claim.

the court stated

> While the amended complaint repeatedly alleges in entirely conclusory terms that Crystal had a duty to forward notice of exhaustion to the excess carrier when it received it in November 2006, more than seven years after it resigned as Pulte's broker, it alleges no facts that might give rise to such a duty on the part of a former broker. Although New York recognizes a duty on behalf of a broker to exercise reasonable care in notifying the appropriate carrier of any claim reported to it by the insured where the insured and the broker have a special relationship, the Court sees no basis for concluding that Crystal had such a duty years after it resigned the account. The fact that it allegedly requested Crystal to forward the notice to the excess carrier ... created no duty on the part of Crystal to comply with the request or, contrary to Pulte's conclusory assertion ... to say that it would not do so. If Pulte relied upon it to notify the excess carrier, it did so at its own risk" (*Pulte Group, Inc.*, 2012 WL 1372158 at *1).

The court's decision in *Pacific Rim Mech. Contr., Inc. v Aon Risk Ins. Serv. West, Inc.* (203 Cal App 4th 1278 [Cal Ct App, 4th Dist, Div 1 2012]) is also relevant. In that case, the developer Bosa Development California Inc. had secured Owner Controlled Insurance (OCIP) from Legion Indemnity through defendant insurance broker Aon Risk and in October 2000, Aon provided Pacific Rim a Certificate of Liability Insurance which identified Pacific Rim as an insured. The OCIP provided $25 million in liability insurance for 10 years after the construction was completed, which also happened to be the duration of the 10 year statute of limitations for construction defects. During the construction, in April 2002, Aon informed Bosa that Legion has been placed into conservation by the Illinois Department of Insurance but neither Bosa nor Aon advised Pacific Rim of Legion's financial condition. Pacific Rim claimed that if it had been so advised, it could have suspended its work and required that Bosa obtain an alternative insurer. Pacific Rim sued Aon for, *inter alia*, fraudulent concealment in failing to notify Pacific Rim of Legion's insolvency.[46] The trial court sustained Aon's demurrer to Pacific Rim's claims holding that the duty of a broker is to use reasonable care, diligence and judgment in procuring insurance and Pacific Rim had not provided any authority "imposing on a broker to notify an insured of an insurer's post-issuance insolvency" and the court declined to impose such a duty.

On appeal, California's Court of Appeals likewise declined the request to impose such a duty "that fundamentally changes the relationship between brokers and their insureds" by noting the limited duty of a broker to use reasonable care in procuring the insurance requested by an insured which may only be expanded if "(a) the [broker]

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[46]The court noted that an order of conservation is not necessarily an adjudication that an insurer is insolvent.

misrepresents the nature, extent or scope of the coverage being offered or provided ..., (b) there is a request or inquiry by the insured for a particular type or extent of coverage ..., or (c) the [broker] assumes an additional duty by either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured" (*Pacific Rim Mech. Contr., Inc.*, 203 Cal App 4th at 1283, *quoting Fitzpatrick v Hayes*, 57 Cal App 4th 916, 927 [Cal Ct App, First Dist 1997]).

In holding that the imposition of such a duty was best left to the legislature, the court also noted the practical difficulties in imposing such a duty since "[i]n the case of occurrence-based policies, the proposed common law notification duty could last indefinitely, well after brokers (and the client) could have ceased doing business. For example, in this case the Legion policy extended 10 years after completion of the project in 2002, more than 13 years after the policy was procured in 1999. We decline to impose such a new, continuing duty retroactively against brokers. We reiterate that adoption of the rule advocated by PacRim should be done prospectively by the Legislature to avoid uncertainty as to the duties of brokers in this state" (*Pacific Rim Mech. Contr., Inc.,* 203 Cal App 4th at 1288).

Based on the foregoing, the Court concludes that the FAC fails to sufficiently allege facts that would support a basis for a fiduciary relationship (or even a confidential relationship) between Plaintiffs and HCC or between Plaintiffs and ERP. Accordingly, Plaintiffs' claim for fraudulent breach of fiduciary duty as against ERP shall be dismissed.

PLAINTIFFS' CAUSES OF ACTION
FOR AIDING AND ABETTING A BREACH OF FIDUCIARY DUTY -
THE THIRD AND FOURTH CAUSES OF ACTION

To sufficiently allege a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship; (2) breach of that relationship; (3) knowing participation and substantial assistance in the breach by a defendant who is not a fiduciary; and (4) damages proximately caused by the breach (*Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010]; *Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461 [1st Dept 2007]; *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]; *Samuel M. Feinberg Testamentary Trust v Carter*, 652 F Supp 1066, 1082 [SD NY 1987]; *Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]; *Gupta v Rubin,* 2001 WL 59237 at * 7 [SD NY 2001]). "One who aids and abets a breach of a fiduciary duty is liable for that breach as well, even if he or she had no independent fiduciary obligation to the allegedly injured party, if the alleged aider/abettor rendered 'substantial assistance' to the fiduciary in the course of effecting the alleged breaches of duty" (*Caprer v Nussbaum,* 36 AD3d 176, 193 [2d Dept 2006]). "'Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act, when required to do so, thereby enabling the breach to occur'" (*Sandford/Kissena Owners Corp. v Daral Props.*, LLC, 84 AD3d 1210 [2d Dept 2011] [citations omitted]; *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003]).

It is well settled that "'[s]ubstantial assistance' requires an affirmative act on the defendant's part; 'mere inaction' can constitute substantial assistance 'only if the defendant owes a fiduciary duty directly to the plaintiff'" (*Baron v Galasso,* 83 AD3d 626, 629 [2d Dept 2011], *quoting Kaufman v Cohen,* 307 AD2d 113, 126 [1st Dept 2003]).

The elements for aiding and abetting a breach of fiduciary duty under California law are similar: "[l]iability may ... be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person" (*Casey v U.S. Bank Natl. Assn.*, 127 Cal App 4th 1138, 1144 [Cal Ct App, 4th Dist Div 3 2005]). In California, plaintiff "must allege the defendant's actual knowledge of the specific breach of fiduciary duty for which it seeks to hold the defendant liable" (*Casey,* 127 Cal App 4th at 1152).

Because a breach of a fiduciary duty is an essential element of a claim for aiding and abetting a breach of fiduciary duty, and because this Court has already determined that the FAC fails to allege a breach of fiduciary duty by ERP, the Third Cause of Action which alleges that HCC and PIA aided and abetted ERP's breach of fiduciary duty necessarily fails and shall be dismissed.

The Court next addresses Plaintiffs' Fourth Cause of Action alleging that HCC, PIA and ERP aided and abetted the breaches of fiduciary duty by Paine, Presser and the Former Executives.

Given Plaintiffs' admission that Paine, Presser and the Former Executives were no longer affiliated with one another as of December 2007 (Pltfs' Opp. to ERP motion at 6), and since these breaches of fiduciary duty by Paine, Presser and the Former Executives are alleged to have taken place after the split,[47] the Court concludes that Plaintiffs have not adequately alleged a breach of fiduciary duty by Paine, Presser, and the Former Executives in regard to the issue of the insurance policies (*Pangia & Co., CPAs, P.C. v Diker*, 291 AD2d 539 [2d Dept 2002]). Therefore, the Fourth Cause of Action for aiding and abetting a nonexistent breach of fiduciary duty necessarily fails. But even if Plaintiffs had adequately alleged a breach of fiduciary duty, the Court would find that this

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[47]The only act that occurred before December 2007 was the allegation Plaintiffs make that on November 6, 2007, Ghisletta, then an executive at FPC, submitted a claim to ERP on behalf of FPC under the FPC Policies (FAC at ¶¶ 66, 167), 192). While Plaintiffs also allege that if she was submitting such a claim on behalf of the Paine Parties, she did so in violation of her fiduciary duties, Plaintiffs have failed to allege any aiding and abetting activities on behalf of ERP, PIA and HCC during this time frame. And in any event, Plaintiffs have failed to plead facts supporting the element of substantial assistance.

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cause of action is insufficiently pleaded because all of Plaintiffs' allegations concerning substantial assistance are related to HCC's, PIA's and ERP's failure to act (*i.e.,* failure to alert Plaintiffs that the Paine Parties were improperly seeking to access the proceeds of the HCC Policy). As the law sets out, the substantial assistance element requires an affirmative act by the aider and abettor, unless the aider and abettor owes the plaintiff a fiduciary duty. Here, this Court has already determined that neither ERP nor HCC/PIA owed Plaintiffs a fiduciary duty. As such, Plaintiffs' Third and Fourth Causes of Action for aiding and abetting breaches of fiduciary duty shall be dismissed.[48]

PLAINTIFFS' FIRST CAUSE OF ACTION FOR FRAUD

To establish a claim for fraudulent misrepresentation, a plaintiff must establish that there was an affirmative misrepresentation which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173, 178 [2011]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *MBIA Ins. Corp. v Countrywide Home Loans*, Inc., 87 AD3d 287, 293 [1st Dept 2011]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; *see also Banque Arabe et Internationale D'Investissement v Md. Natl. Bank*, 57 F3d 146, 153 [2d Cir 1995]). The complaint must make factual allegations sufficient to support each element of a cause of action for fraud (*see Kaufman v Cohen,* 307 AD2d 113 [1st Dept 2003]) and bare allegations of fraud without allegations of the details constituting the wrong are insufficient (*Gervasio v DiNapoli,* 126 AD2d 515 [2d Dept 1987]). Thus, pursuant to CPLR 3016, the plaintiff is required to set forth the time and place of the alleged misrepresentations and who made them (*see, e.g., Daly v Kochanowicz*, 2009 WL 2516932 [2d Dept 2009]; *Eastman Kodak Co. v Roopak Enter., Ltd.,* 202 AD2d 220 [1st Dept 1994]).[49]

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[48]Because the Court is dismissing the aiding and abetting breaches of fiduciary duty based on their insufficiency because there are no underlying breaches of fiduciary duty, or even if there were underlying breaches of fiduciary duty, there are no allegations supporting Defendants' substantial assistance, the Court need not address the effect, if any, of Plaintiffs' release of the Paine Parties' liability as a part of the 2012 Settlement.

[49]The Court of Appeals has made clear that "[t]he purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of ... [and] should not be so strictly interpreted 'as to prevent an otherwise valid cause of action in situations where it may be impossible to 'state in detail the circumstances constituting a fraud'" (*Pludeman, supra,* 10 NY3d at 491, *quoting Lanzi v Brooks,* 43 NY2d 778, 780 [1977], *quoting Jered Contr. Corp. v New York City Tr. Auth.,* 22 NY2d 187, 194 [1968]). Nevertheless, a plaintiff is ordinarily required to set forth the time and place of the alleged misrepresentations and who made them (*see, e.g., Daly v Kochanowicz*, 67 AD3d 78 [2d Dept 2009]; *Eastman Kodak Co. v Roopak Enter., Ltd.,* 202 AD2d 220 [1st Dept

"A fraud claim does not lie where the only fraud alleged arises from the breach of a contract ... 'A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud. Conversely, a misrepresentation of material fact that is collateral to the contract and serves as an inducement for the contract is sufficient to sustain a cause of action alleging fraud'" (*Selinger Enter., Inc. v Cassuto,* 50 AD3d 766, 768 [2d Dept 2008], *quoting WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]; *see also Hawthorne Group, LLC v RRE Ventures,* 7 AD3d 320, 322-323 [1st Dept 2004]; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *First Bank of Am. v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 [1st Dept 1999]). Allegations to the effect that at the time the defendant made the misrepresentation, it had no intention of performing are insufficient. However, the inference of fraudulent intent "may be established either by alleging facts to show that defendants had both motive and opportunity to commit fraud, or ... by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness" (*Shields v Citytrust Bancorp., Inc.*, 25 F3d 1124, 1128 [2d Cir 1994]). "Where a fraud claim arises out of the same facts as plaintiff's breach of contract claim with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract" (*Sudul v Computer Outsourcing Serv.*, 868 F Supp 59, 62 [SD NY 1994]; *Stangel v Chen*, 74 AD3d 1050, 1052 [2d Dept 2010]).

In opposition to the branch of ERP's motion seeking to dismiss Plaintiffs' fraud claim, Plaintiffs contend that they have alleged affirmative misrepresentations by ERP through the general assertion that ERP represented throughout the term of engagement with ERP "that its services go far beyond policy procurement, and that it would promote and safeguard plaintiffs' interests at every stage of the insurance process including through claim notification, claim handling and claim resolution" (Pltfs' Opp. Mem. at 15, *citing* FAC at ¶¶ 36, 38, 125, 127, 162, 164, 187, 189). The Court finds that these allegations fall short of satisfying the particularity requirements of CPLR 3016 since they fail to specify the time and place of the alleged misrepresentations and who made them. And even if these allegations were pleaded with sufficient particularity, because they state no more than ERP's alleged misrepresentations as to future expectations as to the performance it would be providing and nowhere do Plaintiffs aver that at the time such misrepresentations were made, there was no present intent to perform[50] – *i.e.,* the allegations are vague statements of hope or

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1994]).

[50] A promise with the preconceived and undisclosed intention of not performing it constitutes fraud (*Channel Master Corp. v Aluminum Ltd. Sales, Inc.,* 4 NY2d 407 [1958]; *see also Tribune Printing Co. v 263 Ninth Ave. Realty, Inc.*, 57 NY2d 1038, 1041 [1982] ["a false statement, promissory in nature, 'may be deemed the statement of a material existing fact, because it falsely represents the [declarant's] state of mind and the state of his mind is a fact'"]; *Braddock v Braddock*, 60 AD3d 84, 98 [1st Dept 2009] ["an assurance given as to a future benefit may furnish a basis for recovery on a fraud theory where the

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future expectation, which are insufficient to support a claim of fraud (*High Tides, LLC v DeMichele*, 88 AD3d 954 [2d Dept 2011]; *International Fin. Corp. v Carrera Holdings, Inc.*, 82 AD3d 641 [1st Dept 2011]; *International Oil Field Supply Serv. Corp., v Fadeyi*, 35 AD3d 372 [2d Dept 2006]; *Sidamonidze v Kay*, 304 AD2d 415 [1st Dept 2003]; *Longo v Butler Equities II, L.P.*, 278 AD2d 97 [1st Dept 2000]; *QJP Morgan Sec. Inc. v Corinthian Cap. Group, LLC*, 2010 NY Slip Op 52095[U]; 29 Misc 3d 1230[A] [Sup Ct, NY County 2010]; *Pacesetter Motors, Inc. v Nissan Motor Corp.*, 913 F Supp 174 [WD NY 1996]; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept 2009]). Accordingly, to the extent Plaintiffs are contending they have alleged a claim of fraud based on affirmative misrepresentations, such a fraud claim fails to state a cause of action.

As such, Plaintiffs' fraud claims are limited to claims of fraudulent concealment. In New York, the elements for a cause of action of fraudulent concealment are: (1) an omission of a material fact; (2) intent to defraud; (3) duty to disclose, (4) reasonable reliance on the omission, and (5) damages suffered (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The elements of fraudulent concealment are the same as the elements required for fraudulent misrepresentation with one addition – it must be shown that "the defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Central Asia v ABN Amro Bank, N.V.*, 301 AD2d 373, 373 [1st Dept 2003]). The elements are the same under California law – *i.e.*, "'(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage'" (*Levine v Blue Shield of Cal.*, 189 Cal App 4th 1117, 1126-1127 [Cal Ct App, 4th Dist, Div 1 2010], *quoting Kaldenbach v Mutual of Omaha Life Ins. Co.*, 178 Cal App 4th 830, 850 [Cal Ct App 4th Dist, Div 3 2009]).

Under New York law and California law, it is well established that "'[t]he mere nondisclosure of a material fact, unaccompanied by some deceptive act, does not constitute fraud absent a confidential or fiduciary relationship" (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1211 [2d Dept 2011], *quoting First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1138 [2d Dept 2010]; *Goodman v Kennedy*, 18 Cal 3d 335, 346-347 [1976]). In California, a duty to disclose may also arise when a defendant possesses or exerts control over material facts not readily available to the plaintiff, when a defendant actively conceals a material fact from plaintiff or when a defendant makes partial representations but suppresses material facts (*Goodman*, 18 Cal 3d at 336; *Magpi v Farmers Group, Inc.*, 48 Cal App 4th 471, 482 [Cal Ct App, 4th Dist 1996]).

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assurance constitutes a deliberate misrepresentation of present intention where the Defendant at the time of giving the assurance intends that it will not be fulfilled"]).

In New York, under the "special facts" doctrine, a duty to disclose arises "when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Pramer S.C.A. v Abaplus Intl. Corp.,* 76 AD3d 89, 99 [1st Dept 2010]; *Swersky v Dreyer and Traub,* 219 AD2d 321 [1st Dept 1996]; *Barrett v Freifeld*, 64 AD3d 736 [2d Dept 2009]). In *Jana L. v West 129th Street Realty Corp.* (22 AD3d 274 [1st Dept 2005]), the court ruled that the "special facts" doctrine is subject to qualification:

> [This] doctrine requires satisfaction of a two-prong test: that the material fact was information "peculiarly within the knowledge" of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the "'exercise of ordinary intelligence'" (*Black v. Chittenden*, 69 N.Y.2d 665, 669, 511 N.Y.S.2d 833, 503 N.E.2d 1370 [1986], *quoting Schumaker v. Mather*, 133 N.Y. 590, 596, 30 N.E. 755 [1892] ["if the other party has the means available to him of knowing ... he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation"] (*Jana L.*, 22 AD3d at 278).

Thus, "'where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge,' there is a duty to disclose that information" (*Stevenson Equip. Inc. v Chemig Constr. Corp.*, 170 AD2d 769, 771 [3d Dept 1991], *affd* 79 NY2d 989 [1992], *quoting Aaron, Ferer & Sons v Chase Manhattan Bank, Natl. Assn*, 731 F2d 112, 123 [2d Cir 1984]). A fraud claim based upon nondisclosure cannot be maintained where the facts could be discovered in public records with the use of ordinary diligence (*see., e.g, Chan v Bay Ridge Park Hill Realty Co.*, 213 AD2d 467 [2d Dept 1995]; *see also Shao v 39 College Point Corp.*, 309 AD2d 850 [2d Dept 2003]).

Here, Plaintiffs' claim of fraud based on either fraudulent concealment or the special facts doctrine is insufficiently pleaded as a matter of law because (1) there is no fiduciary duty between HCC and Plaintiffs, PIA and Plaintiffs or ERP and Plaintiffs such that their failure to alert Plaintiffs that the Paine Parties had made claims against and had gained access to the $10 million in Policy proceeds is deficient as a matter of law; and (2) Plaintiffs have not alleged facts supporting the application of the special facts doctrine since Plaintiffs could have obtained this information from the Paine Parties in the underlying litigations/arbitrations if they so desired. Indeed, Plaintiffs could have probably obtained this information from HCC, PIA and ERP if they had just asked for it or at least, there is no allegation that Plaintiffs asked and were denied.

In *Wender v Gilberg Agency, Inc.* (304 AD2d 311 [1st Dept 2003], *lv denied* 100 NY2d 507 [2003]), an insured sued his insurance agent for fraud with regard to his purchase of a disability insurance policy and his surrender of another policy. The basis for the fraud claim was one of concealment – namely, that the agent neglected to advise the

insured that his contract with the agency contained an exclusive dealing clause which prohibited him from doing business for any other carrier other than the one whose policy he recommended to plaintiff. The Appellate Division, First Department affirmed the dismissal of the fraud claim because there were no facts supporting anything other than a standard consumer-insurance agent relationship and absent a special relationship, "the agent was under no duty to disclose to plaintiff his contractual commitments, and plaintiff could not justifiably rely on any advice given by the agent guiding him to a particular policy" (*Wender,* 304 AD2d at 312; *see also Hersch v DeWitt Stern Group, Inc.*, 43 AD3d 644, 645 [1st Dept 2007] [same]).

In *Mark Tanner Constr., Inc., supra,* plaintiffs (general contractors) purchased through Diversified Risk Insurance Brokers ("Diversified") whose successor in interest was defendant HUB International Insurance Services, Inc. (HUB), a self insured workers' compensation insurance administered through Compensation Risk Managers of California, LLC (CRM) entitled Contractors Access Program of California (CAP). After CAP was terminated and placed in conservatorship and defaulted in its payment of benefits, plaintiffs sued HUB for Diversified's constructive fraud based on its fiduciary relationship to plaintiffs as plaintiffs' agent and its failure to disclose (1) its exclusive broker arrangement with CRM, (2) that CAP had incurred losses first in the amount of $28 million and then in the amount of $60 million, (2) CRM was involved in a multimillion dollar lawsuit in New York over similar self insured programs, (3) CAP's security bond was not renewed in 2008 and plaintiffs were not protected if claims exceeded reserves; and (4) at least five other self-insured insurance programs administered by CRM in California had failed. In dismissing the claim for constructive fraud, the court held that there is no fiduciary duty between an insured and its broker beyond the recognized duty to use reasonable care and diligence in the procurement of insurance at the insured's request and a broker may be liable for misrepresenting the nature, scope or extent of coverage, but that such a fiduciary duty would not extend to a "duty to ascertain the financial soundness of the insurer ... or to advise an insured of adverse changes in the insurer's financial capability" (*Mark Tanner,* 224 Cal App 4th at 588).

In *Consolidated Bus Tr., Inc. v Treiber Group, LLC* (2011 WL 10782083 [Sup Ct, Kings County 2011], *affd* 97 AD3d 778 [2d Dept 2012]), plaintiffs sued their insurance broker (Treiber Group LLC) for fraud, breach of fiduciary duty, negligence and negligent misrepresentation arising out of plaintiffs' decision to change their worker's compensation insurance from a policy issued by CNA to a group self-insured policy issued under an entity ("TIWCT"). After TIWCT was determined insolvent, plaintiffs became responsible for certain assessments totaling over two million dollars. In the complaint, plaintiffs alleged that the broker "knew or should have known that TIWCT was grossly mismanaged and in danger of insolvency, that plaintiffs relied on [their broker's] expertise and knowledge to present them with an insurance option that would not pose a substantial financial risk to plaintiffs and that [the broker] misrepresented that TIWCT was on sound financial footing" and that the broker made such misrepresentations because it received higher commissions by placing the insurance with TIWCT than with a more conventional insurer. Plaintiffs alleged that the

broker also withheld from plaintiffs the information concerning the higher commissions it made by placing the insurance with TIWCT. The Court granted the broker summary judgment on the claim for breach of fiduciary duty since there was no evidence of anything other than a usual relationship between an insurance broker and a commercial client.

In dismissing plaintiffs' claim of fraud based on the broker's failure to disclose TIWCT's financial outlook or the broker's contractual commission relationship with TIWCT, the court noted:

> "[a]bsent a confidential or fiduciary relationship, there is no duty to disclose and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud" ... To maintain an action based on a theory of fraudulent concealment, the allegedly injured party must establish a fiduciary relationship between himself and the defendant ... Where, as here, the fiduciary relationship between the parties is absent, a duty to disclose only arises under the 'special facts' doctrine, which holds that "one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" ... "The special facts doctrine requires the satisfaction of a two-pronged test: that the material fact was information peculiarly within the knowledge of [Treiber], and that the information was such that could not have been discovered by [plaintiffs] through the exercise of ordinary intelligence" .... There is no allegation that Treiber had peculiar knowledge of the facts concerning the TIWCT's financial situation, nor do plaintiffs allege that at the time it elected to join the TIWCT they were prevented from gaining access to the financial documents .... (*Consolidated Bus Tr., Inc.*, 2011 WL 10782083 at 6 [citations omitted).

Likewise, here, the FAC is devoid of allegations sufficient to satisfy the two prong requirements for the application of the special facts doctrine so as to hold HCC, PIA and ERP responsible for their failure to advise Plaintiffs of the Paine Parties' activities with regard to the $10 million in Policy proceeds. Accordingly, Plaintiffs have failed to allege a claim for fraud and the First Cause of Action shall be dismissed.

PLAINTIFFS' SIXTH CAUSE OF ACTION FOR TORTIOUS INTERFERENCE WITH CONTRACT AGAINST PIA AND ERP

To establish a cause of action for tortious interference with contract or contractual relations, plaintiff must show (1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's

intentional procurement of the third party's breach; and (4) damages to plaintiff (*Lama Holding Co. v Smith Barney, Inc.*, 88 NY2d 413, 421 [1996]; *Schuckman Realty, Inc. v Cosentino*, 294 AD2d 484, 484 [2d Dept 2002]). The elements are virtually identical under California law (*Los Angeles Jewish Home for Aging v West,* 2011 WL 5517283 at * 23 [Cal Ct App, 2d Dist, Div 5 2011]). A claim for tortious interference with contractual relations must be dismissed if it is devoid of factual basis and the allegations are vague and conclusory (*Schuckman Realty v Marine Midland Bank,* 244 AD2d 400 [2d Dept 1997]). "A plaintiff must allege that the contract would not have been breached 'but for' the defendant's conduct" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006], *lv denied* 7 NY3d 704 [2006]; *Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC,* 82 AD3d 1035, 1036 [2d Dept 2011]).

"However, since 'economic justification is a defense to an action for tortious interference with contract' (*Foster v Churchill,* 87 NY2d 744, 750 [1996]), where the defendant has an economic interest in the contract between plaintiff and the third party, to survive a dismissal motion the plaintiff must also plead facts that would support a finding of that defendant acted with malice or employed fraudulent or illegal means to induce the breach" (*Gulf Ins. Co. v Mian Contr., Inc.,* 2004 NY Slip Op 51797[U], 6 Misc 3d 1016[A] at *2 [Sup Ct, NY County 2004], *citing Foster,* 87 NY2d at 750; *South Fourth Street. Prop., Inc. v Muschel,* 1 AD3d 347 [2d Dept 2003]; *Spectacolor Inc.v Banque Nationale de Paris*, 207 AD2d 726 [1994]; *Alvord and Swift v Steward M. Muller Constr. Co.*, 46 NY2d 276 [1976]).

To the extent Plaintiffs are alleging that PIA or ERP interfered with their excess insurance policies, the Court finds that Plaintiffs' claim is insufficiently pleaded. Thus, nowhere do Plaintiffs allege facts to support a finding that the excess insurers actually breached their contracts of excess insurance with Plaintiffs. Indeed, the Court does not even find a conclusory assertion that the excess insurers breached those policies with Plaintiffs. And with regard to PIA, Plaintiffs have failed to allege any facts showing that PIA engaged in any conduct whatsoever with respect to the Excess Insurers. Finally, nowhere do Plaintiffs allege that but for ERP's and PIA's tortious interference, the excess insurers would not have breached the excess policies. Accordingly, to the extent Plaintiffs' tortious interference with contractual relations claim is based on Defendants' interference with Plaintiffs' contracts with the excess insurers, Plaintiffs' claim shall be dismissed.

Turning to Plaintiffs' claim of tortious interference by PIA and ERP with regard to the HCC Policy, the Court finds this claim legally insufficient.

With regard to the claim as against PIA, it is well settled that "an agent cannot be held liable for inducing his principal to breach a contract with a third person, at least where he or she is acting on behalf of his principal and within the scope of his authority" (*Nu-Life Constr. Corp. v Board of Educ. of City of N.Y.*, 204 AD2d 106, 107 [1st Dept 1994], *lv dismissed* 84 NY2d 850 [1994]; *Kartiganer Assoc. P.C. v Town of New Windsor,* 108 AD2d 898, 899 [2d Dept 1985], *lv dismissed* 65 NY2d 925 [1985]). "'[W]here, as here, an agent is alleged to have induced its principal to breach a contract, the agent cannot be

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found liable unless it does not act in good faith and commits independent torts or predatory acts directed at another for pecuniary gain'" (*Schmidt & Schmidt, Inc. v Town of Charlton*, 103 AD3d 1011 [3d Dept 2013], *quoting Schmidt & Schmidt, Inc. v Town of Charlton*, 68 AD3d 1314, 1316 [3d Dept 2009]). Thus, a plaintiff must allege facts supporting that the agent "'acted in bad faith and committed independent torts or predatory acts directed at another for personal pecuniary gain'" (*Bradbury v Woller Cope-Schwarz*, 20 AD3d 657, 659 [3d Dept 2005]). Here, there are no allegations that PIA maliciously interfered with Plaintiffs' rights under the HCC Policy or that it engaged in independent tort in connection with its interference of Plaintiffs' rights under the HCC Policy. Further, nowhere do Plaintiffs allege that but for PIA's interference, HCC would not have breached the Policy. Accordingly, the FAC fails to sufficiently allege a cause of action for tortious interference with contract against PIA (*Bradbury, supra; Global Reinsurance Corp.-U.S. Branch v Equitas Ltd.*, 2008 NY Slip Op 51362[U], 20 Misc 3d 1115[A] [Sup Ct, NY County 2008]; *Benatovich v Propis Agency, Inc.*, 224 AD2d 998 [4th Dept 1996]; *Youngs v Security Mut. Ins. Co.*, 3 Misc 3d 244 [Sup Ct, Seneca County 2004]). And the same is true even if California law controlled the disposition of this claim (*Gruenberg v Aetna Ins. Co.*, 9 Cal 3d 566, 576 [1973]; *JSR Micro, Inc. v QBE Ins. Corp.*, 2009 WL 2600755 [ND Cal 2009]). Thus, "[u]nder California law, an 'agent of an insurance company is generally immune from suits brought by claimants for actions taken while the agent was acting within the scope of its agency" (*JSR Micro, Inc.*, 2009 WL 2600755 at *1]).

With regard to Plaintiffs' tortious interference with contract claim as against ERP, the Court finds the allegations deficient. Here, Plaintiffs themselves have alleged that ERP had an economic interest in furthering the Paine Parties' claim to the detriment of Plaintiffs' claim. As such, Plaintiffs were required to allege that ERP acted with malice or employed fraudulent or illegal means to induce the breach. The FAC is devoid of any such allegations as against ERP. Further, Plaintiffs have not alleged that but for ERP's tortious interference, HCC would not have breached the HCC Policy. Accordingly, Plaintiffs' claim for tortious interference with contractual relations as against ERP concerning the HCC Policy are deficient and said claim shall be dismissed.[51]

Based on the foregoing, Plaintiffs' Seventh Cause of Action shall be dismissed.

PLAINTIFFS' EIGHTH CAUSE OF ACTION FOR UNJUST ENRICHMENT

The elements of a claim for unjust enrichment are that "(1) the defendant was

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[51]The Court further notes that the allegations boil down to Plaintiffs' contention that ERP assisted the Paine Parties rather than Plaintiffs in pursuing the HCC Policy claim. However, nowhere do Plaintiffs allege that ERP intentionally procured HCC's denial of Plaintiffs' claim for coverage, which the Court also views to be an essential missing element to Plaintiffs' claim.

enriched (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit [the defendant] to retain what is sought to be recovered (*Citibank, N.A. v Walker*, 12 AD3d 480, 481 [2d Dept 2004]; *Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). "'A cause of action for unjust enrichment is stated where [plaintiff has] properly asserted that a benefit was bestowed ... by [plaintiff] and that [defendant] will obtain such benefit without adequately compensating [plaintiff] therefor'" (*Sergeants Benevolent Assn. Annuity Fund v Renck*, 19 AD3d 107, 111 [1st Dept 2005] [citations omitted]; *MT Property, Inc. v Ira Weinstein and Larry Weinstein*, LLC, 50 AD3d 751 [2d Dept 2008]). The essence of unjust enrichment is that one party has received money or a benefit at the expense of another (*Wolf v National Council of Young Israel,* 264 AD2d 416 [2d Dept 1999]). "The doctrine of unjust enrichment does not require wrongful conduct by the one enriched" (*State v Park*, 204 AD2d 531, 533 [2d Dept 1994]; *Stern v H. DiMarzo, Inc.*, 2008 NY Slip Op 51163[U], 19 Misc 3d 1444[A] at *14 [Sup Ct Westchester County 2008]). Because California law applies to Plaintiffs' contract claim, Plaintiffs' claim for unjust enrichment is also governed by California law. However, it appears that California does not recognize a cause of action for unjust enrichment finding it synonymous with a claim of restitution (*Levine, supra,* 189 Cal App 4th at 1138). Even if New York law applies, the Court sees no difference and finds that Plaintiffs' claim for unjust enrichment fails to state a cause of action.

To begin with, the Court sees no basis for a claim of unjust enrichment on behalf of Fox to be maintained. Fox is not in privity with Defendants, and he cannot allege that they were enriched at his expense. Thus, any claim for unjust enrichment would belong to FPC (*Albany-Plattsburg United Corp. v Bell*, 307 AD2d 416 [3d Dept 2003], *lv dismissed in part, denied in part* 1 NY3d 620 [2004]; *Paradiso & DiMenna Inc. v DiMenna,* 232 AD2d 257 [1st Dept 1996]).

Because nowhere do Plaintiffs allege that they paid ERP or PIA for the services provided (and indeed the allegations of the FAC at paragraph 39 provide that Plaintiffs paid ERP premiums that were then paid to PIA and ultimately to HCC and that HCC paid ERP its commissions), there would be no basis to order restitution to Plaintiffs of the commissions earned by ERP or PIA. With regard to ERP and PIA, the Court finds that Plaintiffs have failed to adequately plead a benefit that they, as opposed to HCC, bestowed on ERP and PIA to Plaintiffs' detriment. Accordingly, Plaintiffs' claims for unjust enrichment fail to state a cause of action and, therefore, the Eighth Cause of Action shall be dismissed.

With regard to the claim as against HCC, it is well settled that a claim of unjust enrichment may not be maintained where there is a valid enforceable contract governing the same subject matter (*Cox v NAP Constr. Co., Inc.*, 10 NY3d 592, 607 [2008]; *Baker v Time Warner Cable, Inc.*, 83 AD3d 750 [2d Dept 2011]). Because no one disputes the validity and enforceability of the HCC Policy, Plaintiffs claims for unjust enrichment as against HCC may not be maintained and shall be dismissed.

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CONCLUSION

The Court has considered the following papers in connection with these motion:

Motion Seq. #3

1) Notice of Motion dated June 10, 2014; Affirmation of Marc L. Antonecchia, Esq. together with the exhibit annexed thereto;

2) Memorandum of Law in Support of Defendant Equity Risk Partners, Inc.'s Motion to Dismiss dated June 10, 2014;

3) Affidavit of Ann Marie Schoepf in Opposition to Defendants' Motions to Dismiss Amended Complaint, sworn to July 18, 2014 together with the exhibits annexed thereto;

4) Plaintiffs' Memorandum of Law in Opposition to Defendant Equity Risk Partners, Inc.'s Motion to Dismiss dated July 18, 2014; and

5) Reply Memorandum of Law in Further Support of Defendant Equity Risk Partners, Inc.'s Motion to Dismiss dated August 7, 2014;

Motion Seq. #4

1) Notice of Motion to Dismiss dated June 10, 2014; Affirmation of Aidan M. McCormack, Esq. in Support of Motion to Dismiss dated June 10, 2014 together with the exhibits annexed thereto;

2) Defendants Houston Casualty Company and Professional Indemnity Agency, Inc.'s Memorandum of Law in Support of their Motion to Dismiss the First Amended Complaint dated June 10, 2014;

3) Affidavit of Ann Marie Schoepf in Opposition to Defendants' Motions to Dismiss Amended Complaint, sworn to July 18, 2014, together with the exhibits annexed thereto; Affirmation of Courtney R. Rockett, Esq. in Opposition to Motion to Dismiss of Defendants Houston Casualty Company and Professional Indemnity Agency, Inc. dated July 18, 2014 together with the exhibits annexed thereto;

4) Plaintiffs' Memorandum of Law in Opposition to Motion to Dismiss of Defendants Houston Casualty Company and Professional Indemnity

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Agency, Inc. dated July 18, 2014; and

5) Defendants Houston Casualty Company and Professional Indemnity Agency, Inc.'s Reply Memorandum of Law in Further Support of Their Motion to Dismiss the First Amended Complaint dated August 7, 2014.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion of Defendant Equity Risk Partners, Inc. for an order pursuant to CPLR 3211 dismissing the First Amended Complaint of Plaintiffs Fox Paine Company, LLC and Saul A. Fox (Motion Sequence No. 3) is granted, and said First Amended Complaint is dismissed as against said Defendant; and it is further

ORDERED that the motion of Defendants Houston Casualty Company and Professional Indemnity Agency, Inc. for an order pursuant to CPLR 3211(a)(1) and 3211(a)(7) dismissing the First Amended Complaint of Fox Paine Company, LLC and Saul A. Fox (Motion Sequence No. 4) is granted in part and denied in part; and it is further

ORDERED that the motion of Defendants Houston Casualty Company and Professional Indemnity Agency, Inc. is granted to the extent that (1) the First Amended Complaint as against Defendant Professional Indemnity Agency, Inc. is dismissed, and (2) the First, Third, Fourth, Sixth, Eighth, and Ninth Causes of Action as against Defendant Houston Casualty Company are dismissed, but in all other respects, the motion is denied; and it is further

ORDERED that counsel for Plaintiffs and for Defendant Houston Casualty Company shall appear for a Preliminary Conference on December 11, 2014 at 9:30 a.m.; and it is further

ORDERED that said Preliminary Conference shall not be adjourned without the prior written consent of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
November 27, 2014

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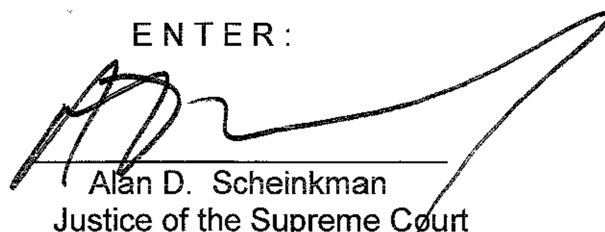

Alan D. Scheinkman
Justice of the Supreme Court