Fox Paine & Co., LLC v Houston Cas. Co.
2018 NY Slip Op 33616(U)
April 6, 2018
Supreme Court, Westchester County
Docket Number: 52607/2014
Judge: Gretchen Walsh
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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

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

Plaintiffs,

-against–

HOUSTON CASUALTY COMPANY, PROFESSIONAL INDEMNITY AGENCY, INC.[2] and EQUITY RISK PARTNERS, INC.,

Defendants.
---X

Index No. 52607/2014
Motion Date: 1/8/18[1]
SEQ # 24

DECISION & ORDER

WALSH, J:

Defendant Equity Risk Partners, Inc. ("Defendant" or "ERP") moves pursuant to CPLR 3212 for an order granting it summary judgment dismissing the Third Amended Complaint ("TAC") of Plaintiffs Fox Paine & Company, LLC ("FPC") and Saul A. Fox ("Fox") (together "Plaintiffs"). In the alternative, Defendant requests that the Court grant it summary judgment "that plaintiffs may not take damages from ERP in the form of any expenses that plaintiffs allegedly incurred in litigating with [W. Dexter Paine, III] or because of any of [Houston Casualty Company's "HCC"] claim adjustment or coverage decisions ... [since] ERP did not proximately cause plaintiffs to litigate with Paine and incur these damages" (Def's Mem. at 4, n4). Plaintiffs oppose Defendant's motion and cross-move (Motion Seq. # 25) for an order granting them partial summary judgment and dismissal of Defendant's Eighth, Ninth and Thirteenth Affirmative Defenses asserting that Plaintiffs' claims are barred by their release of such claims on the ground that such defense has been waived. On

[1]This action was assigned to this Court pursuant to an Administrative Order dated January 8, 2018 by Hon. Michael V. Coccoma, Acting Administrative Judge, Ninth Judicial District.

[2]Following Plaintiffs settlement with HCC in May 2017, this action was voluntarily discontinued against HCC and Professional Indemnity Agency, Inc. ("PIA") pursuant to a Stipulation of Discontinuance dated July 21, 2017 and so-ordered on July 24, 2017.

October 30, 2017 (Docket # 854), the prior justice assigned to this action, Hon. Alan Scheinkman, J.S.C., denied Plaintiffs' unauthorized cross-motion and stated that the Plaintiffs' papers submitted on behalf of their cross-motion would only be considered as opposition to ERP's motion.

FACTUAL AND PROCEDURAL HISTORY

This action arises out of the disintegration of the relationship between equal partners Plaintiff Fox and W. Dexter Paine, III ("Paine") in Plaintiff FPC, a private equity management firm, a disintegration which produced multiple litigations and arbitrations. The first suit was filed in Delaware Chancery Court on August 2007 by Fox against Paine, the Paine Family Trust and Fox Paine Management III, LLC ("FPM III") and derivatively on behalf of FPC (Plf's 19-a at ¶ 55) alleging that the defendants had breached their contractual and fiduciary duties to FPC, Fund II and Fox to benefit their competing venture FPM III (herinafter "Fox v Paine Action") (id. at ¶ 56). On September 14, 2007, defendants counterclaimed against Fox claiming that he had breached his contractual and fiduciary duties to FPC by, *inter alia*, (1) hiring a new CFO for FPC without receiving joint approval from Paine; (2) firing of CEOs of portfolio companies managed by FPC (Forbush Aff., Ex. 19 at 17). When Fox and Paine first settled their disputes on December 3, 2007, Paine transferred his entire interest in FPC and Fund II to Fox and Fox transferred his entire interest in FPM III and Fund III and his residual interest in Fund I to Paine (Forbush Aff., Ex. 20). In addition, various employees of FPC, including Amy Ghisletta, FPC's Chief Financial Officer ("CFO"), were terminated from their employment with FPC effective no later than December 31, 2007 (Forbush Aff., Ex. 20 at HCC 0016776). However, the settlement spurred further litigations and arbitrations between Fox and Paine and various former employees of FPC (hereafter the "Fox Paine Litigation").[3] The Fox Paine Litigation was settled in August 2012 (Plf's 19-a at ¶ 66).

At its essence, this action for breach of contract, breach of fiduciary duty, fraud and aiding and abetting a breach of fiduciary duty and fraud involves Plaintiffs' claims that its prior insurance broker, ERP, engaged in various acts of wrongdoing when it decided to assist Fox's former partner Paine, Paine's new entity Paine & Partners, LLC ("P&P") (f/k/a Fox Paine Management III, LLC

[3]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.

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

The prior justice assigned to this action, Hon. Alan Scheinkman, J.S.C, decided multiple motions, including a motion by Defendants to dismiss Plaintiffs' First Amended Complaint and a motion by Plaintiffs for leave to serve a Second Amended Complaint. In a Decision and Order dated November 24, 2014 (the "November 2014 Decision"), Justice Scheinkman granted the branches of ERP's motion to dismiss to the extent that he dismissed Plaintiffs' causes of action for fraud, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty against Defendants, includingERP. Thereafter, Plaintiffs moved for leave to amend their First Amended Complaint so as to rectify any prior pleading deficiencies and to reassert the claims of fraud, breach of fiduciary duty and aiding and abetting a breach of fiduciary duty as against Defendants, including ERP, and to add a claim for breach of contract against ERP, and to add claims against Defendants (including ERP) for conspiracy to commit fraud and aiding and abetting fraud. In his Decision and Order dated April 15, 2015 (the "April 2015 Decision"), Justice Scheinkman denied Plaintiffs' motion to amend, except to the extent of allowing Plaintiffs to amend to allege the breach of contract claim against ERP. Plaintiffs appealed both the November 2014 Decision and the April 2015 Decision. In Decisions dated August 2017, the Appellate Division, Second Department, reversed the November 2014 Decision by reinstating the claims for fraud, breach of fiduciary duty, and aiding and abetting a breach of fiduciary duty, and reversed the April 2015 Decision granting Plaintiffs leave to amend the First Amended Complaint for the claims of fraud, breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, and aiding and abetting fraud, but denied Plaintiffs leave to amend to add the claim for conspiracy to commit fraud.

Following the completion of discovery, on March 10, 2017, Plaintiffs moved to amend and supplement their Second Amended Complaint. In a Decision and Order dated June 1, 2017, Justice Scheinkman granted, in part, Plaintiffs leave to amend their Complaint to the extent that Plaintiffs were granted leave to assert the allegations found at paragraphs 36-52, 83-107, 108-114 and 257-305 of the proposed Third Amended Complaint. This supplementation did not change the causes of action and was merely requested to conform the pleadings to the proof uncovered during discovery. Plaintiffs subsequently filed their Third Amended Complaint ("TAC") on September 13, 2017. Plaintiffs added, however, without leave of court, several paragraphs of allegations in its breach of fiduciary duty cause of action to support a claim that ERP was negligent in the procurement of the private equity professional insurance policies for FPC. On September 28, 2017, ERP filed its Answer to the TAC denying the material allegations of the TAC, asserting twenty affirmative defenses, and interposing counterclaims against Plaintiffs for: (1) indemnification; (2) negligence misrepresentation; (3) intentional misrepresentation; and (4) a declaratory judgment that Plaintiffs are not entitled to recover as damages against ERP expenses Plaintiffs allegedly Plaintiffs allegedly incurred to litigate with Paine ("Settlement Evasion Expenses") "whereas the truth is, based on the allegations found at paragraphs 121, 127 of the TAC and elsewhere that any and all claims by Paine against Plaintiffs asserted in the initial Fox Paine Litigation were resolved in, and superceded by, a

settlement agreement in December 2007, and that the only 'claims' that plaintiffs ever litigated with Paine after December 2007 were claims that plaintiffs failed and refused to perform their contractual obligations under the settlement agreement, all of which triggered no legal duty on ERP's part" (Answer to TAC at ¶426). On October 18, 2017, Plaintiffs filed a reply to Defendant's counterclaims in which Plaintiffs objected to them as being untimely and a nullity given that they were filed without leave of court and after the close of discovery in the action. [4]

THE ALLEGATIONS OF THE TAC

According to the TAC, Fox was the founder of FPC and Paine was FPC's President from 1997 through December 2007. Paine was responsible for the management of the portfolio companies in Fund I, while Fox was responsible for the management of the portfolio companies in Fund II (TAC at ¶ 28). By 2006, Fund I was "largely wound down and Paine wanted to raise a third fund [and] Fox was disinclined ... because FPC had yet to invest much of Fund II's committed capital ...." (TAC at ¶ 29). In 2006, Paine created a new non-FPC-affiliated company to manage Fund III, which was initially referred to as "Newco," then as "Fox Paine Management III" or "FPM III" and finally as "Paine & Partners, LLP" ("P & P"). Fox refused to allow Newco to be affiliated with FPC and elected not to assume a managerial role in P & P, but agreed to invest $5 million in return for a 25% carried interest in Fund III and a small equity investment in P & P. Fox permitted certain FPC executives, including Amy Ghisletta ("Ghisletta"), FPC's CFO, to render services to FPM III on a temporary basis (*id.* at ¶ 33). In February 2006, Fox and Paine entered into a management agreement to govern the operations of FPC and FPM III (the "Newco Agreement"), which provided, among other things, that "FPC employees providing services to FPM III would remain employees of FPC, and Paine and FPM III would refrain from soliciting or hiring away any FPC employees" (*id.* at ¶ 31). In addition, FPM III would hire its own CFO and dedicated accountant who would provide support services reasonably requested by FPC and FPC would give FPM III a non-exclusive, conditioned license to use certain of FPC's back office related assets (e.g., database, furniture and fixtures), but not FPC's insurance, subject to an annual fee (*id.*).

From 1997 to November 2006, Presser was an attorney at Wachtell Lipton Rosen & Katz. Fox retained Presser to act as corporate counsel for FPC and to represent Fox in non-FPC matters. In or about September 2006, Paine agreed to make Presser a partner in P & P, and Presser ceased providing services to FPC. Presser officially joined P & P in November 2006. Plaintiffs allege that beginning in or about November, 2005, Presser aided and abetted breaches of fiduciary duty to FPC by Paine and FPC's former executives (*id.* at ¶ 18). According to Plaintiffs, Presser was never a director, officer, general partner, manager, executive or employee of FPC and therefore, is not included within the meaning of the defined term "Former Executives" (*id.* at ¶ 19).

Plaintiffs allege that during 2004-2005, FPC reviewed its insurance needs and consulted with various brokers, including MacCorkle & Associates, ERP and Woodruff Sawyer, to discuss its needs

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[4] As set forth more fully herein, the Court agrees with Plaintiff's assessment and believes that if Defendant wishes to assert these untimely counterclaims, it will need to seek leave of court pursuant to a motion to amend its answer (CPLR 3025[b]).

with respect to General Partnership Liability ("GPL") coverage. Plaintiffs contend that their then CFO (Ghisletta) was charged with the responsibility of Plaintiffs' insurance needs and that because she had no prior experience with GPL or private equity-related insurance ("PE") but knew it required specialized knowledge, she knew she had to rely on the services of a full-service brokerage firm to teach her about GPL insurance coverage and to assist her in operating FPC's GPL insurance program (*id.* at ¶ 48).

Plaintiffs allege that on numerous occasions before and after December 2005, ERP offered its services to FPC as its broker of record ("BOR") for the renewal of FPC's professional equity insurance policies ("PE policies"), General Partnership Liability ("GPL Policies") which services would include: (1) recommending and procuring suitable PE policies on FPC's behalf, (2) advising FPC and its executives with regard to their rights and obligations under the PE policies, (3) reviewing and submitting claims on behalf of FPC to its respective insurers, (4) providing oversight of submitted claims, (5) aggressively promoting and protecting FPC's and its insureds' interests under the PE policies from claim submission through resolution, and (6) maintaining and providing FPC with full and complete records of all communications with respect to the PE policies and claims submitted thereunder (the "Services") (*id.* at ¶ 44). ERP held itself out to have expertise in insurance brokerage, risk management, insurance brokerage, claims handling and claims advocacy for the private equity industry (*id.* at ¶ 35). ERP represented to FPC and its other private equity clients that ERP would promote and safeguard their interests through the procurement of suitable PE policies through claim notification, claim handling and claim resolution (*id.* at ¶ 43). FPC engaged ERP in December 2005 to provide all the Services (*id.* at ¶ 50). Plaintiffs detail ERP's internal communications regarding ERP's view of FPC as ERP's most important client and how ERP received revenue from FPC in the amount of $65,000 for 2005 and that between 2005-2007, FPC paid ERP approximately $1.1 million in premiums for the PE Policies and associated brokerage services, and ERP received substantial commissions from the insurers as a direct result of FPC's acquisition of those policies (*id.* at ¶ 51, 53).

In December 2006, ERP procured a primary private equity professional policy ("PE") for FPC underwritten by HCC and administered by PIA ("HCC Policy") with a policy period running from December 30, 2006 through December 30, 2007 (which was extended to January 2, 2008) (*id.* at ¶ 55). The HCC Policy provided coverage of up to $10 million on claims for "Losses" (defined to include damages and settlements) and "Costs, Charges and Expenses" (defined to include reasonable and necessary legal fees, expenses and expert fees) incurred in connection with FPC's private equity activities (*id.*).

According to Plaintiff, under the HCC Policy, FPC is designated as the named insured on the Declarations Page and other corporate entities are listed as additional named Insured Organizations or qualify as Subsidiaries (*id.* at ¶ 59). Plaintiffs contend that P & P (formerly "Newco" and "Fox Paine Management III" and "FPM III") are not insured organizations (*id.* at ¶ 60). Plaintiffs point out that after its formation, P&P and its principals obtained their own PE Policies through ERP, including the primary layer underwritten by PIA and HCC (the "P& P Policies") (*id.* at ¶ 81). Plaintiffs further contend that the FPC Policy only covers officers and employees as additional insureds when they were acting on behalf of FPC (*id.* at ¶ 62). Accordingly, Plaintiffs assert that Paine and the former executives of FPC did not qualify as additional insureds for activities not taken on behalf of FPC (*id.*). According to Plaintiffs, ERP was aware of the terms of the Newco

Agreement, including that FPM III was an entirely separate company from, and was not an affiliate of, FPC. ERP was also aware that Fox declined to participate in the management of the new entity or to permit FPC to raise money for Fund II because Fox wanted to minimize liability for FPC in connection with the formation of FPM II and Fund III (*id.* at ¶ 61).

Further, say Plaintiffs, the HCC Policy also excludes coverage for any claim of an insured arising out of the service of the insured as a director, officer, board representative, partner, managing member or trustee of any entity other than FPC (*id.* at ¶ 62). It is Plaintiffs' contention that pursuant to this exclusion, neither Paine, nor the former executives nor Presser were additional insureds for actions taken on behalf of P&P or any other entity that was not FPC or its related entities (and for FPC and its related entities, the actions had to be taken on behalf of and to benefit FPC or its related entities) (*id.* at ¶ 63). Plaintiffs assert that because Presser was never a duly appointed or elected director, officer, general partner or manager or employee of the Insured Organization, and was only sued for actions he took adverse to FPC on behalf of the competing P&P, Presser was never even a potential additional insured under the HCC Policy (*id.* at ¶ 64). The HCC Policy also excludes coverage for litigation between insureds, but Plaintiffs contend that the exclusion is subject to an exception that affords FPC and Fox coverage for (1) claims brought by interest holders in FPC or its affiliated private equity funds or partnerships, (2) claims for Wrongful Employment Practices allegedly taken by FPC and its executives on behalf of FPC, and (3) claims brought by former "Insured Persons" after the fourth anniversary of such Persons, departure from FPC (*id.* at ¶ 70, *citing* HCC Policy at Clauses II[T], IV[1], Endorsements 14 [1], [3] and [6]).

In December 2006, ERP procured four excess PE Policies on behalf of FPC ("Excess Policies"). Two excess policies were obtained from Twin City Fire Insurance Company ("Twin Fire"), which each provided $10 million of coverage, a third excess policy was obtained from St. Paul Mercury Insurance Company ("St. Paul"), which provided for an additional $10 million in coverage, and a fourth excess policy was obtained from Liberty Mutual Company, which also provided for an additional $10 million in coverage (the "FPC Excess Policies"). Plaintiffs define the HCC Policy and the FPC Excess Policies as the "FPC Policies" (*id.* at ¶ 56). It is alleged the FPC Excess Policies incorporated the terms and conditions of the HCC Policy (*id.* at ¶ 78). It is Plaintiff's contention that ERP typically and customarily reviews for accuracy the preliminary documentation (*i.e.* "binders") that insurers send to ERP to confirm the content of the policy before the insurer finalizes it and ERP was not aware of any binder submitted by HCC or the Excess Insurers that included FPM III as an insured organization and ERP took no remedial action in response to that review to ensure that FPM III was included on the FPC policies (*id.* at ¶ 79, 80).

Plaintiffs allege that Paine and certain executives of FPC, including Ghisletta, engaged in conduct adverse to FPC's interests in 2006. Plaintiffs further allege that former executives of FPC, including Ghisletta,[5] secretly terminated their employment with FPC and assumed roles at FPM III in April and August, 2006, respectively, while continuing to hold themselves out as employees of FPC through May and December 2007, respectively (*id.* at ¶ 14-16). Specifically, the former

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[5]Plaintiffs allege that Ghisletta signed a Confidential Information and Non-Disclosure Agreement agreeing (1) to never disclose or use FPC's confidential information for her own personal benefit, (2) to not use FPC's assets to advance the interests of a competitor, (3) that she would not take or use FPC's confidential information or assets for any purpose when her employment ceased (*id.* at ¶ 14).

executives began "to countermand Fox's instructions and to abandon FPC in favor of P & P and to enrich themselves at the expense of FPC and the Fund II investors" (*id.* at ¶ 82). Plaintiffs allege that when Fox found out that Ghisletta had assumed the role of CFO of FPM III and terminated her own and most of the other executives' employment at FPC, all contrary to the terms of the Newco Agreement, Fox hired Seth Gersch to serve as FPC's CFO, but Paine and Ghisletta refused to recognize Gersch as FPC's CFO and continued to hold Ghisletta out as FPC's CFO (*id.* at ¶ 84).

On August 27, 2007, Plaintiffs commenced litigation against Paine, the Paine Family Trust and FPM III (the "Paine Defendants ") in Delaware Chancery Court ("Fox v Paine Litigation") (*id.* at ¶ 86). The Paine Defendants/Counterclaimants, the former executives, and Presser are referred to as the Paine Parties. In that complaint, Plaintiffs alleged that the Paine Defendants breached their contractual and fiduciary obligations to FPC, Fund II and Fox by raiding FPC employees, attempting to force the sale of Fund II assets, disparaging Fox, and preventing FPC's new financial personnel from obtaining information (*id.* at ¶ 87). Plaintiffs allege the complaint further made it clear that Ghisletta and other former FPC executives had terminated their employment with FPC to work exclusively for FPM III, and had engaged in acts adverse to FPC (*id.*). On September 14, 2007, the Paine Defendants countersued Fox alleging breach of contract and breach of fiduciary duties to FPC (*id.* at ¶ 88).

According to Plaintiffs, Ghisletta contacted ERP's Senior Managing Director, Tony Marcon ("Marcon") by phone on October 18, 2007 and asked him whether there would be any coverage for the lawsuit going on among FPC, Fox and Paine (*id.* at ¶ 91). Then, on October 25, 2007, ERP's Managing Director, Jeff Rubocki ("Rubocki") instructed ERP's Sulymar Bimar ("Bimar") to provide notice of the lawsuit to HCC and the Excess Insurers as Rubocki thought "it will be denied via the I vs I exclusion [sic] but it is better to be safe then [sic] sorry" (*id.* at ¶ 92).

On November 7, 2007, ERP submitted notices of the Fox-Paine Litigation on behalf of FPC and all the insureds under the FPC Policies to PIA, as claims administrator to HCC, and to the Excess Insurers (the "FPC Notice"). The FPC Notice is titled "Fox Paine & Co. Policy H 706-60545 Claims Notice" and states: "Enclosed please find notice to report a claim. It is the policy of the insured to notice any and all potential claims falling within coverage without regard to likelihood of loss, or whether all claims has [sic] the potential of exceeding the $125,000 deductible. I trust you will contact the insured directly regarding the incident as reported. Please feel free to contact me with any additional questions or concerns" (*id.* at ¶ 93). The Claims Summary Sheet attached to the FPC Notice identifies FPC as the "Insured" as identified on the Policy Declarations page, and the line provided for the claimant to indicate "If The Party Involved Is Different From Insured Name (As Given on Policy Declaration)" is blank (*id.* at ¶ 94). ERP identified Ghisletta as the FPC contact person in her capacity as FPC's CFO (*id.* at ¶ 99).

Despite having received a copy of the Complaint (and other pleadings) in the Fox v Paine Action by September 23, 2007 (*id.* at ¶ 90), which made clear that clear that (1) Ghisletta was no longer employed by or loyal to FPC, and (2) Ghisletta, Paine and the other former executives of FPC were not acting on behalf of or in the interest of FPC, ERP, PIA, HCC and the Excess Insurers never gave notice to FPC of the claim and continued to act at the direction of Ghisletta or other Paine Parties or their representatives with regard to FPC's policies and the FPC Notice (id. at ¶ 104). It is Plaintiffs' contention that had ERP, PIA, HCC or the Excess Insurers fulfilled their obligation by giving notice to Fox, Gersch or any legitimate FPC representative of the FPC Notice, FPC would have prevented the wrongful payment of the insurance proceeds to the Paine Parties.

On December 3, 2007, Fox and Paine entered into a settlement agreement to resolve the litigation and effect a complete separation of FPC and Fox from Paine and P & P, among other things ("2007 Settlement"). The 2007 Settlement provided for, among other things: (1) Paine's transfer to Fox of Paine's interest in FPC and Fund II; (2) Fox's transfer of his interest in FPM III and Fund III to Paine; (3) the termination of the Newco Agreement including the termination of the conditional license to use FPC assets; (4) the retention by Fox and FPC of "all FPC assets," which included all insurance policies and rights thereunder, including the FPC Policies; and (5) the retention by FPM III of the employees it had hired away from FPC , including the former executives and the accelerated vesting and payout of certain incentive compensation for these executives (*id.* at ¶ 106). Plaintiffs contend that Ghisletta advised Rubocki no later than December 11, 2007 of the details of the settlement (*i.e.,* that Fox and Paine were splitting up, that she was to remain as the CFO for FPM III in charge of FPM III's insurance needs and that Gersch would be the CFO for FPC in charge of FPC's insurance needs and that the separate entities and their respective funds would need new separate insurance policies for 2008, (*id.* at ¶ 107). All insurers learned of the same details and began the dual-track renewal process (*id.* at ¶ 108). According to Plaintiffs, a copy of the 2007 Settlement Agreement was provided to ERP, HCC and the Excess Insurers by no later than 2009, which was before any insurance proceeds were paid out (*id.* at ¶ 109). The 2007 Settlement made clear that Fox, Ghisletta and the former executives had no employment relationship with FPC, no remaining interest in FPC and no authority to act on behalf of FPC beyond the latest December 30, 2007, and that any rights to claim policy benefits under the FPC Policies were solely the property of Plaintiffs (*id.* at ¶ 109). Plaintiffs claim that by virtue of having received the 2007 Settlement Agreement, ERP, PIA and HCC had actual knowledge of these facts and/or were chargeable with knowledge (*id.* at ¶ 110). On January 31, 2008, ERP notified PIA, HCC and Twin City of the settlement and they closed their files assuming that no one was pursuing the FPC Notice. St. Paul closed its files in August 2008 and Liberty, having sent letter to ERP and Ghisletta in March 2008 and November 2008 inquiring on the status of the Fox-Paine Litigation and having received no response, closed its files in December 2008 (*id.*).

Plaintiffs contend that despite its actual knowledge that Gersch and not Ghisletta was FPC'a authorized representative, ERP never contacted FPC or any of its authorized representatives to inform them of the developments and communications regarding the FPC Policies; instead, ERP concealed from FPC its knowledge that ERP had submitted the FPC Notice to PIA/HCC (*id.* at ¶ 112). Plaintiffs contend that despite their actual knowledge that Gersch and not Ghisletta was FPC's authorized representative, at no time prior to closing their files did ERP or any of the insurers contact FPC or any of its authorized representatives to inquire whether FPC or any actual insureds were still seeking coverage under the FPC Policies (*id.* at ¶ 113).

Plaintiffs detail how, on December 12, 2007, the day following the call from Ghisletta on December 11, 2007, ERP met with Gersch to pitch him on keeping ERP as FPC's broker for FPC's GPL insurance for 2008 (*id.* at ¶ 116). According to Plaintiffs, around this time frame, Gersch had asked ERP if FPC and Fox had coverage under the HCC Policy for the Fox v Paine Action and ERP told Gersch that coverage would be barred under the insured versus insured exclusion. Plaintiffs point out that ERP never told Gersch that it had submitted the FPC Notice to HCC and the Excess Insurers the month before nor did it offer to submit a further notice identifying Gersch as FPC's representative (*id.* at ¶ 117). Plaintiffs also detail how ERP's Marcon in August 2007 sent an email to ERP employees to instruct them to make sure that the correct named insured on all Fox Paine Policies was FPM III (*id.* at ¶ 115). It is alleged that on December 13, 2007, Marcon told Rubocki to check with other ERP employees whether Marcon's August 2007 request to change the named

insured on the FPC policy had been implemented and Marcon was allegedly surprised to learn the named insured was not FPM III on ERP's records (*id.* at ¶ 118). On December 13, 2007, Ben Gibb forwarded Marcom's request to HCC underwriter Barry Choate ("Choate") and asked him to amend the HCC Policy to make FPM III the named insured instead of FPC. Gibb forwarded his e-mail to Marcon, who then sent it to Rubocki stating "I knew I wasn't crazy. If this wasn't done, we will look bad" (*id.* at ¶ 119). Despite these efforts on December 13 to change the named insured from FPC to FPM III, on December 14, 2007, Marcon emailed Gersch copies of the FPC Policies, including the true version of the HCC Policy with FPC as the only named insured on the Declarations Page, and failed to say to Gersch that he had made efforts with HCC to change the named insured to FPM III (*id.* at ¶ 120). Based on these allegations, Plaintiffs contend that ERP breached its contractual duties to keep FPC informed of developments and communications related to the HCC Policy by concealing its knowledge that: (1) ERP had submitted the FPC Notice to HCC and the Excess Insurers; (2) HCC and the Excess Insurers continued to communicate with the Paine Parties concerning coverage under the FPC Policies; and (3) HCC and the Excess Insurers had closed their claim files because of ERP's own failure to confirm with FPC whether FPC would seek coverage (*id.* at ¶ 114).

Following the December 2007 Settlement, FPM III and Paine filed motions to enforce the 2007 Settlement Agreement against FPC and Fox (*id.* at ¶ 121). Plaintiffs detail their arguments for why these enforcement motions were frivolous. Plaintiffs explain that it was only because of FPM III and Paine's enforcement motions that Plaintiffs were required, in May 2009, to commence arbitrations against FPC's former executives to avoid having to pay them their alleged grants based on their being void *ab initio* or if valid, that the former executives had to disgorge them because it was a benefit they received while they were breaching their fiduciary duties ("FPC's Arbitrations") (*id.* at ¶ 125). Additional motions to enforce the 2007 Settlement Agreement and a motion to enjoin the FPC Arbitration by Paine followed (*id.* at ¶ 126). Plaintiffs claim a mediation was held in March 2010, but it broke down over the Paine Parties' threats to sue over two rights offerings issued by Fund II portfolio companies (a dilution claim) (*id.* at ¶ 128). Based on the threats involving the dilution claim, the Fund II entities brought declaratory judgment actions against each of the former executives seeking a declaration that they were not entitled to post-employment participation in the Fund II investments. The purpose of these allegations is to support Plaintiffs' contention that all of Plaintiffs' actions were in defense of Paine's and FPM III's offensive litigation and, as a result, FPC was entitled to receive the advancement of its defense costs incurred in connection with each of the motions to enforce the Settlement Agreement, the allegations of which asserted the same Wrongful Acts or Interrelated Wrongful Acts constituting a Claim within the meaning of the HCC Policy and the Excess Policies (the " FPC Policies") (*id.* at ¶ 132). According to Plaintiffs, because Paine and the former executives were not acting in an insured capacity under the HCC Policy with respect to the Fox-Paine Litigation, the insured v insured exclusion did not apply to FPC's, Fox's and the Fund II entities' claims for coverage (*id.* at ¶ 135). Alternatively, Plaintiffs argue that even if it did apply, there were exceptions to the exclusion that would restore coverage to Fox and FPC, namely; (1) the exception for claims brought by interest holders in FPC or its affiliated private equity funds or partnerships; (2) the exception for claims against FPC and Fox for "Wrongful Employments Practices" allegedly taken by FPC and its executives on behalf of FPC; and (3) the exception for claims brought by former "Insured Persons" after the fourth anniversary of such persons' departure from FPC (*id.* at ¶ 135).

On May 15, 2009, Presser, on behalf of the Paine Parties, sent a letter on P & P letterhead to PIA, with a copy to ERP, demanding coverage under insurance policies obtained from HCC by

P & P ("P & P Policies") on behalf of FPC's former executives for their defense and liability costs in the FPC Arbitrations (the "2009 Notice") (*id.* at ¶ 136). PIA advised Presser that it had forwarded the 2009 Notice to counsel for PIA and HCC (Tucker Ellis & West, LLP, hereafter referred to as TEW) for review (*id.* at ¶ 137).

It is alleged that on July 7, 2009, Presser wrote to TEW (with a cc to ERP) regarding the status of coverage for P & P under the P & P Policies and regarding the status of the FPC Notice under the FPC Policy, which Presser falsely asserted was made on behalf of the Paine Parties and that only the Paine Parties were seeking the proceeds of the HCC Policy (*id.* at ¶ 138). Plaintiffs contend that the 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 2007 Settlement, the Paine Parties had no remaining interest in FPC; and (5) neither Presser nor anyone else at P & P was authorized to address the matters under FPC's PE Policies (*id.* at ¶ 139).

As to ERP, Plaintiffs claim that it knew that the Paine Parties' demand for the proceeds of the HCC Policy was improper and unlawful since, *inter alia*, it procured both the FPC's Policies and the P & P Policies (*i.e.*, ERP knew that FPM III was not an insured) and was aware of the underlying facts in the Fox-Paine Litigation, including the 2007 Settlement Agreement and subsequent motion practice to enforce the Settlement Agreement (*id.* at ¶ 140). Further, that ERP owed contractual duties to FPC and Fox to promote and protect their interests as insureds and claimants under FPC's Policies and ERP had submitted the FPC Notice on FPC's behalf (*id.*). According to Plaintiffs, in November 2009, when Twin City inquired with ERP whey Presser and ERP had sent Twin City notice of the FPC Arbitrations "under [P&P's] 2009 Policy as opposed to the 2007 Policy," Rubocki stated to Twin City "ERP's role is simply to notice [Twin City] of any events giving rise to a claim under one of [Twin City's] policies issued to its Insured for which ERP is the producer" and that "[s]ince [Twin City] was provided the original notice" of the lawsuit in 2007, Twin City was "obligated to decide" whether Twin City's insureds were covered under any Twin City policies, not only the one under which a given notice was submitted" (*id.* at ¶ 141). Plaintiffs assert that ERP breached its duties to Plaintiffs because at no time after July 7, 2009 did ERP ever advise Plaintiffs of the improper demand by the Paine Parties nor did it challenge the improper demand in its discussions with HCC or otherwise protect or advocate for FPC's, Fox's and the Fund II entities' interests as insureds and claimants under the FPC Policies (*id.* at ¶ 142). According to Plaintiffs, ERP abdicated its duties to Plaintiffs in order to promote its new partnership with the Paine Parties by wrongfully advocating and advancing the Paine Parties' improper demand for the proceeds of the FPC PE policies (*id.* at ¶143).

By letter to Presser dated September 4, 2009 and cc'd to ERP, TEW denied coverage for the Paine Parties under the HCC Policy citing, among other reasons: (1) the FPC Policy's "insured v insured" exclusion; (2) the fact that the Paine Family Trust was not an insured under the FPC Policy; and (3) the claims asserted.by the Paine Parties in the Fox-Paine Litigation and in post-settlement motions were offensive claims and not covered under the FPC Policy, which limited costs, charges and expenses to those incurred in the defense of claims (*id.* at ¶ 146-147). Tucker Ellis stated that it was providing its coverage analysis to Presser based on HCC's understanding that he was the designated representative for insurance matters not only for P&P, but also for FPC and if he was not the designated representative for FPC, he should "forward this letter to the appropriate party and advise us immediately of that party's identity" (*id.* at ¶ 146). Plaintiffs contend that this September

4, 2009 letter put ERP on notice yet again that Presser and the other Paine Parties had no authority to speak on behalf of FPC and the Paine Parties were adverse to, and inimical of FPC's and Fox's interests (*id.* at ¶ 149). It is alleged that Presser ignored TEW's request for confirmation that he was FPC's designated representative for insurance matters. Plaintiffs contend that even a cursory review of the Fox-Paine Litigation file in the possession of TEW, PIA and ERP would have revealed that neither Presser, Paine nor Ghisletta nor anyone else at P&P was the designated insurance representatives for FPC and ERP, PIA and HCC knew this fact since December 2007 at the latest (*id.* at ¶ 149).

On October 15, 2009, ERP wrote to PIA on behalf of the Paine Parties regarding a lack of responsiveness regarding the coverage for the FPC Arbitrations under the P&P Policies. In late October 2009, HCC denied the Paine Parties coverage under the P & P Policies with respect to the FPC Arbitrations (*id.* at ¶ 151-152).

Plaintiffs contend that between late October 2009 and February 2010, P & P and ERP continued to demand coverage from PIA and HCC for the Fox-Paine Litigation under the FPC Policies and the FPC Arbitrations under the P&P Policies (*id.* at ¶ 146). Plaintiffs further allege that on November 3, 2009, Jay Spievack, counsel for the Paine Parties, informed HCC in a letter which was copied to ERP, that his clients were the Paine Parties, that he did not "represent any underlying plaintiff/claimants that initiated the [Fox-Paine Litigation]" or the arbitrations, and that Presser "never was an FPC employee, and does not have any responsibility for the affairs of the Fox-Paine litigation plaintiffs, including FPC and Fox. Despite this disclaimer, Plaintiffs allege that HCC and ERP never contacted Fox or any other true representative of FPC to ascertain the status of the claim FPC made under the FPC Policies" (*id.* at ¶ 153).

On February 23, 2010, HCC advised P & P that it was retracting its denial of coverage because the matters at issue in the Fox-Paine Litigation and FPC Arbitrations constituted "Interrelated Wrongful Acts" under the HCC Policy (*id.* at ¶ 154). Plaintiffs contend that HCC continued to deny coverage for FPC and Fox, but nevertheless HCC agreed to disburse the proceeds of the HCC Policy to the Paine Parties based on ERP's FPC Notice in 2007 (*id.* at ¶ 155). According to Plaintiffs, while HCC never concluded that the Paine Parties had any lawful claim to coverage, it nevertheless agreed to pay the Paine Parties the entire $10 million in proceeds from the HCC[6] Policy for business reasons (*i.e.*, economic enticements offered by ERP and the Paine Parties) knowing that by paying out to the Paine Parties, HCC was funding litigation by FPC's disloyal former executives and their new competing entity against FPC (*id.* at ¶ 156). It is Plaintiffs' contention that HCC began making payments in June 2010 and on August 31, 2010, P&P and JCC entered into an "Interim Defense Funding Agreement" (the "IDFA") whereby HCC agreed to pay P&P under the HCC Policy "seventy (70%) of all Costs, Charges and Expenses on all invoices" arising from the Fox-Paine Litigation up to the $10 million policy limit" (*id.* at ¶ 157-158). The IDFA also contained reciprocal reservation of rights provisions, which allowed HCC to deny coverage for the Fox-Paine Litigation and seek a declaration to that effect and recoup any Costs, Charges and Expenses paid to P&P and granted P&P the right to pursue any and all claims against HCC arising from HCC's handling of the claims related to the Fox-Paine Litigation (*id.* at ¶ 159).

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[6]Plaintiffs contend that HCC paid out these funds without providing any notice to, and without requiring a general release of all claims against FPC, Fox and the Fund II entities (*id.* at ¶ 162).

To further the reservation of rights provisions, on August 31, 2010, P&P and HCC entered into a Tolling Agreement deferring any potential coverage litigation until the conclusion of the Fox-Paine Litigation and to conceal their conspiracy against Plaintiffs, HCC and P&P agreed that any future coverage litigation would be filed under seal using a John Doe v Jane Doe caption (*id.* at ¶ 160). It was further agreed that HCC would not participate in a mediation that was to occur between the Paine Parties and FPC and Fox in March 2010 to prevent Fox and FPC from learning that the Paine Parties were seeking coverage under the HCC Policy (*id.* at ¶ 161).

On March 20, 2012, Fox filed actions against certain former executives in California, Illinois and Texas (*id.* at ¶163). On May 25, 2012, FPC, Fox and the Fund II entities also commenced an action against Presser for tortious interference with contract, conspiracy, aiding and abetting tortious action, and unfair competition, based upon Presser's alleged inducement of Paine and the former executives to acquire and transfer Fund II interests in violation of the FPC partnership agreement and the 2007 Settlement Agreement (the "Presser Action") (*id.* at ¶ 164).

In August, 2012, FPC, Fox and the Fund II entities executed a settlement agreement with the Paine Parties pursuant to which the Paine Parties transferred interests to Fox valued at approximately $23 million, and resolved the Fox-Paine Litigation, the FPC Arbitration, the State Court Actions against the former FPC executives and the Presser Action (*id.* at ¶ 165). According to Plaintiffs, HCC agreed to front the balance of the $10 million to help the Paine Parties pursue coverage from the Excess Insurers in exchange for the Paine Parties' agreement to send money back to HCC if they were successful in getting money out of the Excess Policies (*id.* at ¶ 166). Plaintiffs contend that they would have never entered the 2012 Settlement Agreement if they had known about the Paine Parties' conduct with respect to the insurance coverage (*id.* at ¶ 167).

Thereafter, on or about September 12, 2012, the counsel for the Paine Parties met with counsel for the Excess Insurers and sought coverage under the FPC Policies for all costs incurred in the litigation matters and for the $23 million settlement amount. Twin City and St. Paul at first denied coverage under the Excess Policies issued to FPC for all litigation (*id.* at ¶ 169).

On June 12, 2013, Twin City and St. Paul filed actions in the Northern District of California against the Paine Parties, including FPC's former executives, FPC and others seeking a declaration of no coverage under the Excess Policies issued to FPC (*id.* at ¶ 170). Plaintiffs contend that, as a result of those actions, they learned for the first time that notwithstanding ERP's prior advice to Plaintiffs that they would not be entitled to coverage because of the insured v insured exclusion, ERP had in fact filed a claim on Plaintiffs' behalves and that ERP, PIA, HCC and the Excess Insurers: (1) had been communicating with the Paine Parties in connection with their wrongfully obtaining the proceeds of the FPC Policies: and (2) had conspired with the Paine Parties to convert that claim into one for the benefit of the Paine Parties. This was also the first time that Plaintiffs learned that HCC had analyzed claims submitted under FPC's HCC Policy and had paid out the entire proceeds of that policy to the Paine Parties (*id.* at ¶ 171). Plaintiffs assert with the exception of the initial claim notices that ERP submitted on behalf of FPC as its Broker of Record (BOR) in November 2007, none of the aforementioned correspondence from the Paine Parties had been submitted through FPC or Fox, and neither ERP, HCC, PIA, Twin City nor St. Paul had previously provided copies of such correspondence to FPC or in any way communicated with Fox, Gersch or any other authorized representative of FPC concerning the claims, duties, rights and obligations under the FPC Policies (*id.* at ¶ 172).

Plaintiffs further contend that pursuant to a settlement agreement entered into in August 2013 (which was concealed from Plaintiffs until September 9, 2016) Twin City and St. Paul wrongfully paid the Paine Parties a total of $9 million in proceeds from FPC's Excess Policies when they knew that the Paine Parties were not legally entitled to those funds (*id.* at ¶ 173). It is Plaintiffs' contention that they cannot establish jurisdiction over the Excess Insurers in New York (*id.* at ¶ 174).

B. The Pleaded Causes of Action

The First Cause of Action is for breach of contract against ERP. Plaintiffs contend that FPC accepted ERP's offer to perform the Services. According to Plaintiffs, this oral contract (including the agreed upon Services by ERP) is evidenced by sworn testimony, contemporaneous written communications, contemporaneous advertising by ERP, performance by ERP and FPC, subsequent correspondence, and the actions of ERP, FPC, HCC, the Excess Insurers and the Paine Parties. Plaintiffs contend that Fox was an intended third-party beneficiary of the contract (*id.* at ¶ 191). It is Plaintiffs' contention that ERP's duties and obligations that existed with regard to the FPC Policies were not conditioned upon FPC continuing to engage ERP as its broker (*id.* at ¶ 179). Plaintiffs claim that ERP was fully compensated in accordance with the terms of the agreement to perform all the Services in connection with the FPC Policies (*id.* at ¶ 189).

It is Plaintiffs position that in January 2007, ERP forwarded to FPC a primary binder of insurance from HCC and binders of insurance from each Excess Insurer for the 2007 calendar year and that each binder identified FPC as the sole named insured (*id.* at ¶ 185). Plaintiffs contend that Fox was a named intended third-party beneficiary of FPC's contract with ERP.

Plaintiffs contend that in partial satisfaction of its obligation to perform the Services, on November 7, 2007, ERP submitted the FPC Notice. The FPC Notice was submitted based on ERP's review of the allegations of the Complaint in the Fox v Paine Action. According to Plaintiffs, ERP learned of the counterclaims filed against Fox and FPC no later than September 23, 2007 when Rubocki received a link to the counterclaims by email from a representative of Twin City (*id.* at ¶ 194). Plaintiffs further contend that ERP also received the motions to enforce the settlement, the arbitration demands and the state court pleadings (*id.*). Plaintiffs contend that these pleadings put ERP on notice that Paine, Ghisletta and the other former executives were acting in a manner adverse to FPC, yet ERP continued to take direction from Paine, Ghisletta, and the former executives with regard to the FPC Policies and Plaintiffs' claims (*id.* at ¶ 195). Plaintiffs contend that ERP breached the parties' agreement in the following ways: (1) by failing to provide claims-advocacy services to Plaintiffs; (2) by trying to amend FPC's Policies to name Paine's competing venture as the named insured; (3) by negotiating and advocating for coverage under the FPC Policies entirely on behalf of non-insureds P&P, the Paine Family Trust, the Former Executives and Presser and/or insureds whose activities were not covered by those Policies; and (4) by failing to provide to, and actively concealing from, Plaintiffs, documents and information with respect to the FPC Policies, notices submitted, and payments made thereunder (*id.* at ¶ 205). Plaintiffs alternatively argue that if it is ultimately determined that the FPC Policies do not afford coverage, in whole or in part, for the losses Plaintiffs incurred in connection with the Fox-Paine Litigation, then ERP also breached its agreement with Plaintiffs by: (1) failing to ensure that the policy terms would not provide any basis on which individuals acting as representatives of or performing services for FPM III itself, could claim entitlement to any benefits provided by the FPC Policies; (2) failing to procure GPL insurance policies that indisputably afforded coverage for losses that Plaintiffs could incur as a result of employment-related claims made by or on behalf of FPC employees; (3) failing to procure GPL

insurance policies for Plaintiffs that indisputably afforded full coverage for defense costs that Plaintiffs could incur as a result of proceedings such as those involved in the Fox-Paine Litigation; (4) failing to inform Plaintiffs timely or adequately regarding potential problems in securing insurance coverage needed to protect against the risks of FPC's business; (5) failing to inform Plaintiffs about the availability of other policies and/or policy provisions that could provide such needed coverage; (6) failing to timely or adequately inform Plaintiffs of material terms, definitions, conditions and/or limitations in the FPC Policies, which ERP procured, that might serve to preclude or limit coverage; and (7) failing to take steps to ensure satisfaction of all policy conditions and other terms that could be invoked by JCC as a basis for its refusal to reimburse Plaintiffs for the losses incurred in connection with the Fox-Paine Litigation (*id.* at ¶ 208). As a result of ERP's breaches, Plaintiffs claim to have been damaged in an amount no less than $10 million, which is exclusive of costs and interest, as well as incidental and consequential damages to be proved at trial (which is said to include attorney's fees, costs and expenses incurred as a result of Plaintiffs' coverage dispute with HCC and damages resulting from ERP's facilitation of litigation adverse to the interests of Plaintiffs through its unlawful facilitation of the Paine Parties' receipt of proceeds under the FPC Policies (*id.* at ¶ 209).

For their Second Cause of Action for fraud against ERP, Plaintiffs allege that they entrusted ERP with control over their GPL insurance requirements and that ERP held itself out with having specialized expertise in insurance brokerage, risk management and claims handling and oversight in the private equity industry (*id.* at ¶ 212). Plaintiffs further allege that ERP represented that it would promote and safeguard Plaintiffs' interests at every stage of the insurance process from claim notification, claims handling, and claim resolution (*id.* at ¶ 213). Further, that Plaintiffs hired ERP as its agent based on their reliance on ERP's representations that it would perform the Services (*id.* at ¶ 214). Plaintiffs contend they had a special relationship of trust and confidence based on ERP's performing the consulting services from 2001-2006 and then ERP's agreement to render the Services in connection with the GPL insurance requirements. With regard to its agreement to perform the Services, Plaintiffs allege that ERP represented that it would employ on Plaintiffs' behalves a dedicated team of claims advocacy specialists to perform claims handling, claim oversight and claims advocacy for Plaintiffs (*id.* at ¶ 216). Plaintiffs allege that at all relevant times, ERP was Plaintiffs' agent and fiduciary and Plaintiffs entrusted ERP with complete control over: (1) procuring the PE Policies that satisfied Plaintiffs' requirements (including a broad insured v insured exclusion; (2) assisting Plaintiffs, HCC and PIA in administering those policies; and (3) claim notification, claim handling and claim resolution on Plaintiffs' behalf (*id.* at ¶ 217). According to Plaintiffs, ERP had a special, confidential relationship with FPC based upon: (1) the parties' longstanding contractual relationship spanning from 2001-2007; (2) Plaintiffs' reliance on ERP's expertise; (3) ERP's exclusive knowledge and control over Plaintiffs' policies, claims communications and claims resolution; and (4) the actions ERP undertook to serve as FPC's agent for purposes of transmitting formal notices of claim to HCC and PIA and its acts of claims-processing, claims advocacy and claim-resolution as evidenced by communications between HCC and PIA on the one hand, and FPC and other alleged insureds on the other (*id.* at ¶ 218).

According to Plaintiffs, even if ERP's disclosure to Ghisletta of the FPC Notice prior to December 31, 2007 constituted a disclosure to FPC prior to December 31, 2007 (which Plaintiffs do not concede), ERP's 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 Polcies 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 hand, with regard to the FPC Policies (*id.* at ¶ 222).

In addition, Plaintiffs contend that ERP withheld from Gersch information concerning ERP's attempts to change the name of the insured on the HCC Policy from FPC to FPM III (*id.* at ¶ 225). Plaintiffs contend that to cover up that ERP had submitted the FPC Notice, ERP told Gersch that the insured v insured exclusion would bar coverage thereby dissuading Gersch and any legitimate representative from FPC from seeking reimbursement from the policy proceeds and aiding Ghisletta and the Paine Parties in their pursuit fo the FPC Policies' proceeds (*id.* at ¶ 226). Plaintiffs contend that they trusted ERP not to mislead them as to the viability of a claim and that they trusted ERP to disclose to them any submission of a claim to HCC.

Plaintiffs further allege that in or about June 2010, the Paine Parties informed Marcon that HCC had made an initial payment of $70,000 in reimbursement payments to them with more to follow and to avoid Plaintiffs' learning of HCC's payment to the Paine Parties, that ERP should cease its discussions with the Excess Insurers. It is alleged that ERP complied with the Paine Parties' efforts to conceal these facts from Plaintiffs (*id.* at ¶ 228). This is reflected in an email dated June 8, 2010 from Marcon to Rubocki, ERP President Robert Zenoni and ERP CEO Michael Marcon (*id.* at ¶ 229).

It is Plaintiffs' contention that ERP had a duty to refrain from taking actions with regard to the FPC Policies and the disbursement of proceeds thereunder that harmed or defrauded Plaintiffs or benefitted others with no rightful claim to the proceeds under the policy and particularly parties who ERP knew were engaged in litigation with Plaintiffs (*id.* at ¶ 231). Plaintiffs contend that they could not have obtained the information concerning ERP's fraudulent conduct through the exercise of ordinary diligence because ERP refused to provide this information, despite Plaintiffs' demands and Gersch's diligent efforts to learn about FPC's GPL insurance program in and around December 2006, and because the information was not available to Plaintiffs in the underlying Fox-Paine Litigation (*id.* at ¶ 233) (*i.e.*, the information was not publicly available or otherwise readily available) (*id.* at ¶ 241). Plaintiffs allege that ERP engaged in the following fraudulent acts through its agreement to: (1) convert FPC's claim into a claim deemed to have been submitted on behalf of the Paine Parties; (2) cease communications with the Excess Insurers to conceal from Plaintiffs the fact that HCC had started paying the Paine Parties; (3) lobby HCC to pay the proceeds of the HCC Policy to the Paine parties even though they were not entitled to these proceeds and that such proceeds were bankrolling the litigation against Plaintiffs (ERP's client); and (4) lobby for the proceeds to be paid to the Paine Parties without requiring that the Paine Parties execute as a condition of the payment a release of all claims that they had or may have had against FPC or Fox (the only proper insureds under the FPC Policies) (*id.* at ¶ 233).

In terms of their claim that ERP engaged in acts of fraudulent concealment, Plaintiffs allege that ERP knowingly concealed and failed to disclose to Plaintiffs the following material facts: (1) the FPC Notice; (2) the communications regarding the FPC Notice among the Paine Parties, ERP, HCC and the Excess Insurers; (3) that Ghisletta was holding herself out as representing FPC with regard to the FPC Notice; (4) that Presser was holding himself out as an authorized representative of FPC for insurance matters; and (5) that the FPC Notice was misappropriated by the Paine Parties and that the Paine Parities had the proceeds of the FPC Policies (to which they were not lawfully entitled) diverted to themselves (*i.e.*, that HCC and the Excess Insurers paid out proceeds of the FPC Policies to the Paine Parties) (*id.* at ¶ 235). Plaintiffs allege that ERP had knowledge that these facts were material to Plaintiffs based on the fact that Ghisletta and others told ERP: (1) that based on the

Newco Agreement, Fox wanted to protect FPC from liability in connection with Newco/FMP III/P&P and Fund III; (2) that Plaintiffs would have taken action to prevent HCC and PIA from making improper coverage determinations and to prevent HCC from paying the proceeds of the HCC Policy to the Paine Parties; (3) that Plaintiffs would have prevented HCC from making payments of the proceeds to the Paine Parties unless the Paine Parties signed a general release in favor of Plaintiffs (*id.* at ¶ 236).

It is Plaintiffs' contention that ERP concealed and 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 ¶ 238). Accordingly to Plaintiffs they detrimentally relied on ERP's omissions and concealment based on their failure to take the affirmative acts to prevent what occurred and based on their release of the Paine Parties in the 2012 Settlement (*id.* at ¶ 239). Plaintiffs contend that they reasonably relied on ERP's material omissions because they understood that the FPC Policies expressly provided that all notices and communications regarding claims submitted were to be submitted and received by FPC – *i.e.*, that no claims, communications or coverage or payment determinations would be made without their knowledge and consent (*id.* at ¶ 240). Plaintiffs contend that as a direct and proximate result of ERP's fraud, Plaintiffs have suffered damages in an amount to be determined at trial but which include the lost insurance proceeds, the costs incurred in defending against the litigation bankrolled from the insurance proceeds (which Plaintiffs contend would not have otherwise occurred), the costs in litigating this coverage action against ERP, HCC and PIA, and its reputational damage in the insurance marketplace (*id.* at ¶ 243-245). Finally, Plaintiffs allege that ERP's fraudulent conduct was gross, wanton, willful, involved a high degree of moral culpability and/or rose to such a level of wanton dishonesty as to imply a criminal indifference to civil obligations (*id.* at ¶ 246).

For their Third Cause of Action for breach of fiduciary duty, for the most part, Plaintiffs repeat herein the allegations they made with regard to their Second Cause of Action for fraud which will not be detailed. In addition, Plaintiffs allege that based on ERP's fiduciary duty, ERP owed Plaintiffs the duties of good faith, due care, candor and loyalty (*id.* at ¶ 256). Plaintiffs also repeat their allegations concerning ERP's knowledge of the acts adverse to Plaintiffs' interests that had been taken by Paine, Ghisletta and the other former executives based on ERP's review of the pleadings in September 2007. As such, Plaintiffs allege that if Ghisletta, Paine or the other former executives requested to have the FPC Notice be deemed to have been made on behalf of the Paine Parties to the exclusion of Plaintiffs, ERP knew that Ghisletta did so in violation of her fiduciary duties to FPC and that as a result of the fiduciary obligations that Ghisletta owed to FPC, by operation of law, the claims belonged to FPC, as Ghisletta's principal, and to Plaintiffs as the sole additional insureds entitled to coverage, regardless of how it may have been presented by Ghisletta or any other employee or agent of P&P (*id.* at ¶ 262). According to Plaintiffs, while ERP was still engaged as FPC's broker, it began to conspire with Paine, Presser, Ghisletta and other former executives to convert the FPC Claim into a claim to benefit the Paine Parties (*id.* at ¶ 263). According to Plaintiffs beginning in October 2007, ERP's Marcon and Rubocki had several meetings and conversations with Ghisletta, other former executives and Presser in which Marcon and Rubocki agreed that ERP would convert the FPC Notice into a claim benefitting the Paine Parties and would advocate for the Paine Parties' recovery under the FPC Policies to the exclusion of Plaintiffs (*id.* at ¶ 264). Plaintiffs contend that ERP agreed to so conspire despite its knowledge that Ghisletta and the Paine Parties were acting adversely to Plaintiffs' interests and that FPC and its new CFO Gersch were unaware of the FPC Notice and Plaintiffs' rights under the FPC Policies (*id.* at ¶ 265).

Plaintiffs contend that despite the fact that ERP knew that the Paine Parties' demand for the proceeds of the FPC Policies was improper and unlawful and despite ERP's contractual and fiduciary duties to Plaintiffs, ERP failed to advise Plaintiffs after July 7, 2009 of the Paine Parties' improper demands nor did ERP ever challenge those improper demands with HCC or otherwise advocate and protect Plaintiffs' interests (*id.* at ¶ 269). Nor did ERP tell Plaintiffs of HCC's decision in February 2010 to disburse proceeds from the FPC Policies to the Paine Parties for their litigation expenses in matters adverse to Plaintiffs (*id.* at ¶ 272). It is Plaintiffs position that ERP and HCC actively concealed the payment information from Plaintiffs (*id.* at ¶ 274). Plaintiffs claim that as a result of ERP's failure to promote and protect Plaintiffs' interests under the FPC Policies and provide accurate and timely information to Plaintiffs regarding the Paine Parties' ongoing claims and demands under the FPC Policies and the unauthorized disbursement of the policy proceeds, ERP breached its fiduciary duties to Plaintiffs (*id.* at ¶ 275).

Plaintiffs contend that based on ERP's representations concerning its specialized expertise in risk management upon which Plaintiffs reasonably relied as well as the parties' long standing relationship which in, ERP had a duty to ensure that FPC's insurance policies had adequate coverage and if it is determined that the FPC Policies do not afford coverage in whole or in part for the losses Plaintiffs sustained in the Fox-Paine Litigation, ERP breached its duty to exercise due and reasonable care, diligence, judgment and skill in procuring the proper insurance coverage for FPC (*id.* at ¶ 275). Plaintiffs contend that as a direct and proximate result of ERP's breach of fiduciary duties, Plaintiffs have suffered damages in an amount to be determined at trial and, in the event that ERP prevails on any coverage defenses, in an amount no less than $10 million, exclusive of costs and interest, and of incidental and consequential damages to be proved at trial (*id.* at ¶ 281).

Plaintiffs' Fourth Cause of Action asserts a claim of aiding and abetting Paine's, Presser's and the former executives' breaches of fiduciary duties. In it, Plaintiffs allege that Paine as President and member of FPC, Ghisletta as FPC's CFO, the former executives as senior executives of FPC, and Presser as counsel to Fox and FPC owed Plaintiffs duties of good faith, due care, candor, loyalty and fair dealing (*id.* at ¶ 283). Plaintiffs contend that these duties included: (1) to disclose information to Plaintiffs relevant to the affairs of the agency entrusted to them; (2) to refrain from using Plaintiffs' property, assets or information for their personal benefit or to the detriment to Plaintiffs (*id.* at ¶ 283). According to Plaintiffs, they kept confidential and proprietary their insurance policies and claims submitted on their behalves (*id.* at ¶ 283). Plaintiffs repeat their prior allegations concerning the obligations that Ghisletta and the former executives had with regard to their execution of the Confidential Information and Non-Disclosure Agreements. Plaintiffs contend that even after the term of their employment or agency ended, Paine, Ghisletta, the former executives and Presser had and have continuing fiduciary obligations to Plaintiffs, including the duty not to misuse Plaintiffs' confidential information or misappropriate or usurp Plaintiffs' assets, contracts and expectancies, including the FPC Policies and their proceeds (*id.* at ¶ 285). Plaintiffs further contend that at all times ERP knew: (1) that Paine, Ghisletta, the former executives and Presser were Plaintiffs' fiduciaries; (2) that the FPC Notice was submitted on Plaintiffs' behalves and any insurance proceeds belonged to Plaintiffs; and (3) the FPC Policies required that all communications regarding the policy on behalf of the insureds be made by and received by FPC (*id.* at ¶ 286, 288, 289). Plaintiffs further contend that based on ERP's review of the 2007 Settlement Agreement in January 2008, ERP knew that Paine, Ghisletta, and the former executives had no further affiliation or authority to act on Plaintiffs' behalf (*id.* at ¶ 292). Based on the foregoing knowledge together with ERP's knowledge of P&P's Policies as it procured those policies for P&P, Plaintiffs contend that ERP knew that: (1) the Paine Parties had no authority to communicate with ERP, HCC/PIA or

the Excess Insurers regarding the FPC Policies; (2) the Paine Parties would only be entitled to coverage under the P&P Policies; and (3) if Plaintiffs had known the Paine Parties' actions, Plaintiffs would have taken affirmative action to prevent the insurance proceeds from being paid to the Paine Parties (*id.* at ¶ 296-298). Plaintiffs allege that if Ghisletta, Paine or the other former executives requested to have the FPC Notice be deemed to have been made on behalf of the Paine Parties to the exclusion of Plaintiffs, ERP knew that Ghisletta did so in violation of her fiduciary duties to FPC and that as a result of the fiduciary obligations that Ghisletta owed to FPC, by operation of law, the claims belonged to FPC, as Ghisletta's principal, and to Plaintiffs as the sole additional insureds entitled to coverage, regardless of how it may have been presented by Ghisletta (*id.* at ¶ 294). Plaintiffs allege that ERP knew that by seeking the proceeds from the FPC Policies, Paine, Presser and the Former Executives were breaching their fiduciary duties to Plaintiffs (*id.* at ¶ 299). With regard to ERP's aiding and abetting activities, Plaintiffs allege, *inter alia*, that: (1) ERP refused to engage in claims communications with Plaintiffs on the express direction of the Paine Parties; and (2) ERP did not disclose to Plaintiffs HCC's decision on or about February 23, 2010 to disburse the HCC Policy proceeds to the Paine Parties and/or the former executives for their litigation expenses. Plaintiffs contend that by failing to promote, protect and advance Plaintiffs' interests under the FPC Policies and by failing provide Plaintiffs with information while at the same time actively assisting Paine, the former executives, and Presser in their quest for the insurance proceeds, ERP actively assisted Paine, the former executives and Presser in breaching their fiduciary duties to Plaintiffs. Alternatively, Plaintiffs contend that if it is determined that the FPC Policies do not afford coverage in whole or in part, for the losses Plaintiffs incurred in connection with the Fox-Paine Litigation, then ERP provided substantial assistance to Ghisletta in her failure to procure suitable insurance that would cover Plaintiffs without subjecting Plaintiffs to the risks of coverage litigation (*id.* at ¶ 307).

Plaintiffs contend that as a result of ERP's aiding and abetting Paine's, Presser's and the former executives' breaches of fiduciary duties, Plaintiffs have suffered damages in an amount to be determined at trial but in no event less than $10 million, exclusive of costs and interest, plus the aggregate amount of commissions and fees paid by Plaintiffs to ERP during the period in which ERP was in breach of its fiduciary duties to Plaintiffs and was aiding and abetting the breaches of fiduciary duties by Paine, Presser and the former executives (*id.* at ¶ 308).

Plaintiffs' Fifth Cause of Action alleges that ERP aided and abetted the Paine Parties' fraud on FPC. The crux of this claim is predicated on Presser's correspondence on July 7, 2009 to HCC's counsel in which Plaintiffs claim Presser falsely misrepresented that the FPC Notice was submitted on behalf of the Paine Parties and that they were now seeking the proceeds of the HCC Policy (the "2009 Notice"). Plaintiffs claim that Presser knowingly made the false statement with the intention of inducing reliance on that statement by HCC's counsel TEW (*id.* at ¶ 315). According to Plaintiffs, on or about July 7, 2009, ERP knowingly provided the Paine Parties' materially false statements to HCC, which ERP (and PIA and HCC) knew were false because the FPC Notice on its face indicated it was submitted on behalf of FPC (*id.* at ¶ 316-317).

Plaintiffs next rely on TEW's response to Presser dated September 4, 2009 (which correspondence was cc'd to ERP), in which TEW predicated its response based on its understanding that Presser was the designated representative for insurance matters for Paine, P&P as well as FPC, and stated that if its understanding was not correct, Presser should forward the letter to the appropriate party and advise Tucker Ellis immediately of that party's identity (*id.* at ¶ 318). In the September 4, 2007 letter TEW proceeded to deny coverage based upon: (1) the insured v insured exclusion; (2) that Paine Family Trust was not an insured under the HCC Policy; and (3) the claims

asserted by the Paine Parties in the Fox-Paine Litigation and in post-settlement motions to enforce were offensive claims and the "costs, charges and expenses" covered under the HCC Policy were limited to those incurred in defense of the claims (*id.* at ¶ 319).

Plaintiffs point out that Presser (in his individual and representative capacity on behalf of each of the Paine Parties) intentionally failed to correct TEW's' understanding that Presser was FPC's designated representative for insurance matters (*id.* at ¶ 320).

Plaintiffs next recite ERP's letter to PIA and HCC on October 15, 2009 wherein ERP asserted that P&P was a long term client of ERP and expressed its frustration with PIA's and HCC's lack of responsiveness toward the Paine Parties with regard to their 2009 Notice and demanded that HCC and PIA rectify the situation (*id.* at ¶ 321). Plaintiffs allege that in October 2009, HCC initially denied coverage under the P&P Policies with respect to the FPC Arbitrations (*id.* at ¶ 321).

According to Plaintiffs, between October 2009 and February 2010, ERP and the Paine Parties continued to demand coverage from PIA and HCC pursuant to both the FPC Policies and the P&P Policies (*id.* at ¶ 323). Plaintiffs contend that each of the Paine Parties falsely claimed that: (1) he/she/it was an insured under the FPC Policies; and (2) the Paine Parties' claims based on the initial FPC Notice were covered under the FPC Policies (*id.* at ¶ 324).

Plaintiffs detail their reasons for why the Paine Parties' statements that he/she/it was an insured under the FPC Policies and that the Paine Parties' claims based on the initial FPC Notice were covered under the FPC Policies were false (*id.* at ¶ 325).[7] And Plaintiffs set out their reasons for why ERP knew that such statements were false but nevertheless gave substantial assistance to the Paine Parties (*id.* at ¶ 326, 328). According to Plaintiffs, the substantial assistance entailed: (1) ERP's submission of the Paine Parties' knowingly false statements to HCC and PIA; (2) ERP's telling HCC and PIA that they were liable under the HCC Policy; (3) ERP's persuading HCC to convert the claim that had been submitted on behalf of FPC and FPC's legitimate officer (Fox) into a claim submitted by the Paine Parties; (4) ERP causing the proceeds of the FPC Policies to be paid to the Paine Parties knowing that the proceeds were bankrolling the litigation against Plaintiffs (ERP's own client to whom it owed continuing fiduciary duties) and without having the Paine Parties first execute a release against all claims that they had or may have against FPC and Fox (the only proper insureds under the FPC Policies) (*id.* at ¶ 331). It is Plaintiffs' contention that the exact dates, times and contours of these wrongful acts are exclusively within ERP's and HCC's knowledge (*id.* at ¶ 332).

Plaintiffs outline why ERP knew that these facts were material to them and that if Plaintiffs had known about these fraudulent activities, they would have taken affirmative actions to prevent

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[7]Those reasons are: (1) FPC paid for the HCC Policy and was its primary beneficiary; (2) neither P&P nor the Paine Family Trust were ever insureds under the FPC Policies; (3) Paine, the former executives and Presser did not qualify as additional insureds with viable claims under the FPC Policies; (4) in the Fox-Paine Litigation, the Paine Defendants/Counterclaimants had been accused of multiple breaches of fiduciary duty and other misconduct against FPC's interests; (5) as of December 2007, neither the Paine Defendants/Counterclaimants, nor the former executives had any interest in or ongoing connection to FPC; and (6) neither Presser nor anyone else at P&P had ever been authorized to address matters under the FPC Policies (*id.* at ¶ 325).

the proceeds under the FPC policies from being paid out. Plaintiffs claim that the Paine Parties and ERP concealed and failed to disclose the foregoing 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 ¶ 335). According to Plaintiffs, ERP agreed with the Paine Parties to continue not to disclose and to conceal these misrepresentations and payment information from Plaintiffs (*id.* at ¶ 336). Plaintiffs allege that they relied to their detriment on the Paine Parties' omissions and concealment by: (1) not taking the affirmative actions they would have taken to prevent the proceeds from being paid; and (2) entering into August 2012 Settlement and releases (*id.* at ¶ 337). Plaintiffs claim that they reasonably relied on ERP's material omissions because the FPC Policies expressly provided that all notices and communications regarding claims submitted under the FPC Policies were to be submitted by and received by FPC and, therefore, they reasonably understood that no claims, communications or coverage or payment determinations would be made without their knowledge and consent (*id.* at ¶ 338).

Plaintiffs claim that they could not have discovered the concealed facts through the exercise of ordinary diligence because the information was not publicly available and otherwise not readily accessible (*id.* at ¶ 339). Plaintiffs assert that as a direct and proximate result of ERP's aiding and abetting the Paine Parties' fraud, Plaintiffs have suffered damages in an amount to be determined at trial but include: (1) the lost insurance proceeds; (2) costs in defending the litigation bankrolled by HCC and in litigating this coverage action; and (3) interest, costs and attorneys' fees. Finally, Plaintiffs allege that ERP's aiding and abetting the Paine Parties' fraud was gross, wanton, willful, involved a high degree of moral culpability and/or rose to such a level of wanton dishonesty as to imply a criminal indifference to civil obligations (*id.* at ¶ 344).

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), together with various exhibits, a Rule 19-a Statement of Undisputed Facts ("Def's Rule 19-a Stmt"), and a memorandum of law.

The essence of ERP's argument is that as of December 14, 2007, based on the BOR Letter, FPC announced to the world that ERP was terminated as FPC's insurance broker and that FPC had hired Crystal & Co. (f/k/a Frank Crystal & Co., Inc.) as its insurance BOR with regard to all matters relating to FPC's GPL insurance, including the HCC Policy at issue in this action (Def's Mem. at 2). According to Defendant, thereafter, ERP went to work for P&P with FPC's full knowledge and approval and all of ERP's broker duties were to P&P and not FPC (*id.* at 3). In addition to its argument that all of its obligations ceased to FPC as of December 14, 2007 and, therefore, there is no factual predicate to support Plaintiffs' claims, ERP also argues that all of Plaintiffs' claims are time barred since ERP ceased being FPC's broker of record more than six years prior to the commencement of the action on February 21, 2014.

In support of the dismissal of Plaintiffs' breach of contract claim against ERP, ERP argues that "[t]here is no document or testimony that proves ERP's obligation to provide specific future services. Especially not an express agreement to provide 'claims services' for life for free" (*id.* at 3). According to Defendant, while Plaintiffs allege at paragraphs 176-177 of the TAC that ERP offered

to perform various services[8] in addition to the procurement of the HCC Policy which Plaintiffs accepted, no document has been produced and no testimony has been elicited to support an agreement on ERP's part to provide such services. Defendant contends that at most, the evidence adduced supports that ERP had the capabilities to provide such services, that ERP responded to the requests by Ghisletta, and that Ghisletta "'would have never recommended to Fox or Paine that FPC hire an insurance broker that limited its services to just the procurement of insurance policies alone'" (*id.* at 6, *citing* Antonecchia Aff., Ex. 1 Ghisletta Dep. at 200:20-201:04). According to Defendant, "ERP's capabilities, responsiveness to Ghisletta's requests, and Ghisletta's undisclosed expectations, are not evidence that ERP expressly bound itself to do anything in the future for FPC" (*id.*).

With regard to its argument that the BOR Letter terminated any obligations ERP had to Plaintiffs with regard to the HCC Policy, ERP asserts that "[t]he law of agency in both California and New York holds that absent agreement to the contrary, termination of an agency relationship ends duties of the agent ... [which] included any duty relating to any insurance claim already submitted on FPC's behalf" (Def's Mem. at 11. In addition to the cited cases, ERP relies on an opinion from the New York State Insurance Department which opined that "'[t]he Insurance Law imposes no legal obligation upon brokers to continue to service claims subsequent to the termination of the relationship'" (Def's Mem. at 12, *quoting* Antonecchia Aff., Ex. 4). According to Defendant, "New York courts 'accord great deference' to agencies when 'the interpretation or application of a statute "involves specialized knowledge and understanding of the underlying operational practices or entails an evaluation of factual data within the expertise of the agency administering the statute" which includes deference to the New York State Insurance Department, *(id., quoting Matter of Albano v Board of Trustees of NYC Fire Dept*, 98 NY2d 548, 553 [2002]. Defendant asserts that "New York courts agree ... [that] '[t]he insurance agent-insured relationship is not a generally recognized professional relationship in which continuing obligations to advise might exist but, rather, is an ordinary commercial relationship which does not usually give rise to a duty to provide such ongoing guidance ....'" *(id., quoting M&E Mfg. Co. v Frank H. Reis, Inc.*, 258 AD2d 9, 11 [3d Dept 1999]).

Defendant also asserts that Plaintiffs should be equitably estopped from pursuing their claims against ERP based on the BOR Letter since by issuing the letter, FPC "stripped ERP from any authority to act on FPC 's behalf and vested those duties in FPC's new broker, Crystal going forward. ERP argues that the BOR Letter "induced ERP to undertake P&P's representation and to believe that no further action regarding FPC's GPL program was either necessary or appropriate" (Def's Mem. at 14). As such, ERP argues that it would be prejudicial for FPC to tell the world that it had assigned all duties to Crystal and then "years later complain that ERP really had an indefinite and surviving obligation to share with FPC the details of a claim that ERP's current client, P&P, pursued on its own. Neither the evidence before this Court nor the law supports this absurd view" (*id.*).

In support of the dismissal of Plaintiffs' aiding and abetting claims, ERP argues that under

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[8]Those services included, in addition to the procurement of the proper policy, advising FPC of its rights and obligations under the policy, submitting claims on behalf of FPC and overseeing and advocating on behalf of FPC with regard to such claims, and providing FPC with all records of communications with respect to the FPC policies and all claims submitted thereunder (Def's Mem. at 5-6, *quoting* TAC at ¶ 176).

New York and California law, a plaintiff must prove the existence of an underlying tort, the aider and abettor's knowledge of the tort, and the aider and abettor's substantial assistance (Def's Mem. at 14). Defendant also contends that in California, there must be proof that the aider and abettor "'knew that a tort had been, or was to be, committed and acted with the intent of facilitating the commission of that tort'" (*id., quoting Gerard v Ross*, 204 Cal App 3d 968, 983 [1988]). It is Defendant's position that because Plaintiffs settled with the alleged tortfeasors, none of the actions reached decision and Plaintiffs' release of the defendants in the lawsuits (including HCC and PIA in this action) had the effect of extinguishing the causes of action and "'there can be no aiding and abetting liability absent the commission of underlying tort'" (*id.* at 15, *quoting Nasrawi v Buck Consultants LLC*, 231 Cal App 4th 328, 344 [2014]).

In support of ERP's position that there is no evidence to support its actual (not merely constructive) knowledge of the breaches of fiduciary duty and fraud, ERP argues that even assuming that ERP had read Fox's Complaint in the Fox v Paine Action, "all it establishes is that ERP was aware of Fox's unproven allegations against his partner and other FPC executives" (*id.* at 15). Defendant further argues that Plaintiffs cannot rely on the Confidential Information and Non-Disclosure Agreement signed by the Former Executives since Plaintiffs provide no factual predicate for how Defendant knew the terms of this Confidential Agreement (*id.* at16). According to Defendant, unless Plaintiffs can show that ERP actually knew that the conduct in question was tortious, Plaintiffs cannot demonstrate actual knowledge (*id.* at 15).

Defendant argues that Plaintiffs' aider and abettor claims also fail because Plaintiffs cannot prove that Defendant rendered substantial assistance since ERP's alleged failure to notify Plaintiffs of HCC's disbursement of the $10 million to P&P was not a proximate cause of HCC's alleged wrongful payment of the insurance proceeds (*id.* at 16, emphasis added).

Finally, Defendant argues that any claim regarding ERP aiding and abetting P&P's conduct fails since "FPC *induced, encouraged, and ratified* ERP working as P&P's broker. To the extent that plaintiffs allege that ERP undertook any actions on behalf of P&P those acts were performed in the context of ERP foreseeably acting as P&P's broker and are thus not actionable" (*id.* at 16).

With regard to Defendant's statute of limitations defense, Defendant argues that because it is undisputed that the longest statute of limitations period applicable to any of Plaintiffs' claims is six years, and because it is undisputed that its broker relationship with Plaintiff terminated as of the BOR Letter on December 14, 2007, all of the causes of action are time barred because they all relate to conduct occurring before February 21, 2008, which was six years before the filing of this action on February 21, 2014 (*id.* at 7). While it is Defendant's position that New York's statute of limitations applies to Plaintiffs' claims, Defendant argues that even if California's limitations period applied, the longest period is four years and "long before February 2010, plaintiffs are charged as a matter of law with all of the requisite notice necessary to trigger the running of any applicable California limitations period" (*id.* at 8). In response to Plaintiffs' argument that equitable estoppel permits a tolling of the limitations period, Defendant argues this doctrine has no applicability because Plaintiffs cannot show that Defendant "'made an actual misrepresentation or, if a fiduciary, concealed facts it was required to disclose and that plaintiff's reliance resulted in untimely action'" and mere silence is not sufficient (*id.* at 8). Defendant further contends that "a plaintiff is never entitled to equitable estoppel when it fails to exercise due diligence" and "[t]he evidence is undisputed that FPC's insurance representative Amy Ghisletta was fully aware of everything ERP did on behalf of FPC. Since the day Fox and Paine split, plaintiffs have possessed a record of

Ghisletta's communications with ERP. (AA Ex. 1, Ghisletta 194:19-195:04 & 313:11-316:22; Exs. 2&3.) Plaintiffs merely had to review the records already in their possession to learn what ERP did or did not do for FPC prior to December 14, 2007. It is undisputed that they never did" (*id.* at 8-9). According to Defendant, under Delaware corporate law (the law applicable as it is FPC's state of incorporation), "any information Ghisletta acquires imputes to plaintiffs" (*id.* at 9). Thus, because Ghisletta was FPC's CFO until January 2008,[9] Defendant contends that Ghisletta's knowledge and ratification preclude any estoppel argument.

In addition, Defendant asserts that based on Ghisletta's knowledge, Plaintiffs cannot rely on their alternative argument that their fraud claim is not barred because of CPLR 213(8)'s two years from the discovery of the fraud statute of limitations, which Plaintiffs contend occurred in June 2013. In this regard, Defendant notes that this alternative period has the express requirement that the period begins to run "from the time plaintiffs 'could have with reasonable diligence discovered it'" (*id.* at 9, *quoting* CPLR 213[8]). Defendant argues that since Ghisletta was Plaintiffs' authorized agent through the middle of December 2007 and Plaintiffs have admitted that they did not review the "records that were already in their possession concerning ERP's activities prior to December 14, 2007, plaintiffs are charged as a matter of law with discovery" (*id.* at 10).

According to Defendant, Plaintiffs' contention that Fox's lawsuit filed in August 2007 was sufficient to put ERP on notice not to work with Ghisletta causes a problem for Plaintiff since if that lawsuit was sufficient to put ERP on notice, then it was sufficient to put Plaintiffs on notice. And if it is Plaintiffs' contention that it was insufficient to put them on notice, then it was certainly insufficient to put ERP on notice - either way, says Defendant, Plaintiffs' claims fail (*id.* at 10).

Finally, Defendant argues that Plaintiffs were chargeable with any post-termination acts done by ERP on P&P's behalf because as of December 2007, FPC knew that ERP was acting as P&P's broker and indeed, FPC, through the BOR Letter, actively induced and encouraged ERP's services on behalf of P&P (*id.* at 10).

In support of its argument that Plaintiffs' claims are barred by Plaintiffs' release found in the August 2012 Settlement, Defendant relies on Section 5(a)(i) which ERP contends released all "representatives" of the Paine Parties, which included ERP with respect to all acts or omissions prior to the August 2012 Settlement (*id.* at 17-19). It is ERP's position that it is undisputed that at the time of the Settlement in 2012, ERP was the Paine Parties' representative (*id.* at 17, *citing* TAC at ¶ 204, AA, Ex. 6, Marcon 344:11-20).

In support of the branch of its motion seeking summary judgment that Plaintiffs cannot recover their litigation expenses incurred in an effort to avoid obligations that Plaintiffs knowingly and willingly incurred in exchange for the Paine Parties' release of their original counterclaims against Plaintiffs (the "settlement evasion expenses"), ERP argues that Plaintiffs' decision to incur the settlement evasion expenses was their own without any prompting or influence by ERP and Plaintiffs have failed to explain how ERP's allegedly wrongful conduct caused them to incur these

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[9]Defendant refutes Plaintiffs' suggestion that Ghisletta was terminated earlier as a disloyal employee by asserting that Fox did not have the power to fire Ghisletta without the consent of his equal partner Paine and "[n]othing in Delaware law, which regulates FPC's governance, provides that an officer is terminated based on an allegation of disloyalty by one manager" (*id.* at 9, n13).

expenses. According to ERP, in May 2009 Paine requested benefits under Paine's own GPL policy (AA, Ex. 10) but that during its investigation, HCC related Paine's 2009 claim back to the original 2007 notice regarding the original Fox v Paine lawsuit. Further, it is ERP's position that "the evidence is undisputed that ERP did not direct or influence any of HCC's coverage or claims decisions (*id.* at 19, n18, *citing* AA, Ex. 8, Ruffee 214:06-216:07).

ERP argues that whether or not Plaintiffs can establish coverage for their settlement evasion expenses under their 2007 GPL policies is a matter between Plaintiffs and their insurers and not between Plaintiffs and ERP. It is ERP's position that: (1) if Plaintiffs are covered, then they have no damages to assert against ERP because Plaintiff concede that the remaining limits of their 2007 GPL insurance program exceed their unreimbursed settlement evasion expenses; and (2) if Plaintiffs are not covered, they have no damages to recover from ERP because it is undisputed that ERP placed the insurance that FPC (through Ghisletta) asked it to place in December 2006 (*id.* at 19). ERP asserts that settlement evasion expenses are excluded from the HCC Policy under the exclusion of duties assumed under contract. ERP further argues that the other two arbitrations, eight declaratory judgment actions, and the four additional actions were all offensive filed by Plaintiffs and thus were not Claims against Plaintiffs (*id.* at 21).

ERP's last argument in support of this branch of its motion is that even if Plaintiffs were covered and HCC made a wrongful payment to the Paine Parties, by entering into the their settlement with HCC, Plaintiffs became a party to an agreement that "'warrants that the full limit of liability under the [HCC] Policy has been exhausted by the ***payment of loss thereunder***" and "'warrants that ***no one other than one or more of the Paine Parties was paid any proceeds*** from the [HCC] Policy'" (*id.* at 21 [emphasis added], *quoting* NYSCEF Doc No. 703 ¶8 AA, Ex. 12). According to ERP, by executing the Settlement, Plaintiffs are judicially estopped from alleging that there was a wrongful payment to the Paine Parties, and as such, Plaintiffs cannot claim that ERP's alleged failure to perform proximately caused HCC to wrongfully pay the proceeds to the Paine Parties (*id.* at 22).

With regard to Defendant's last branch of its motion wherein Defendant argues that it is entitled to summary judgment dismissing paragraphs 208, 279 and 307 of the TAC, Defendant points out that in the proposed TAC attached to Plaintiff's motion to amend did not contain paragraphs similar to paragraphs 208, 279 and 307 found in the TAC concerning professional negligence that was ultimately filed after Justice Scheinkman granted Plaintiffs' motion to the limited extent of allowing Plaintiffs to amend with regard to paragraphs 36-52, 83-107, 108-114 and 257-305, but no further (*id.* at 24). Accordingly, Defendant requests that this Court deny Plaintiffs' *ultra vires* amendment by striking those paragraphs. Alternatively, Defendant argues that the claim for professional negligence should be dismissed as it is barred by the three year statute of limitations period (CPLR 214[4]).

PLAINTIFFS' CONTENTIONS IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

In opposition to Defendant's motion, Plaintiffs submit: (1) an Affirmation of Reed Forbush, Esq. (Boises Schiller & Flexner LLP) dated November 15, 2017 ("Forbush Aff."), together with various exhibits; (2) an Affidavit of Jay Pulaski, CFO of FPC, sworn to May 31, 2017 ("Pulaski Aff."); (3) an Affirmation of Jeremy C. Vest, Esq. (Boises Schiller & Flexner LLP) dated October 27, 2017 ("Vest Aff."); (4) an Affidavit of Saul A. Fox, CEO of FPC, sworn to May 31, 2017 ("Fox

Aff."); (5) Plaintiffs' Response to Defendant ERP's Rule 19-a Statement of Undisputed Material Facts; and (6) Plaintiff's Statement of Additional Undisputed Facts (Plf's Rule 19-a Stmt"); and (7) a memorandum of law.

In his affidavit, FOX states that to the best of his recollection, he would not have authorized FPC's hiring of ERP to serve as FPC 's broker of record for FPC's GPL program from 2005-2007 "if ERP did not agree to provide the services typically offered by full-service brokerage firms, including policy procurement, advisory, claims handling, claims advocacy and record maintenance services" (Fox Aff. at ¶ 3).

The purpose of the Vest Affirmation is for counsel to affirm that during the oral argument of the appeals of the Decisions and Orders issued by Justice Scheinkman on November 24, 2014 and April 15, 2014, ERP's counsel presented to the Second Department the legal authority on which ERP relies in support of this motion namely, *Pulte Group, Inc. v Frank Crystal & Co.*, 2012 WL 1372158 [SD NY 2012] and the Opinion issued by the General Counsel of the New York Insurance Department (attached as Ex. 4 to Antonecchia Aff.).

In his affidavit, Jay Pulaski avers that he has been FPC 's CFO since January 2010 and that his employment with FPC began in May 2008 (Pulaski Aff. at ¶ 2). According to Pulaski, the averments in his affidavit are based on his personal knowledge and his review of FPC business records. Without providing the factual predicate for his assertion, Pulaski avers that in December 2005, "ERP agreed to retain ERP to provide procurement, advisory, claims-handling and claims-advocacy services, for the December 2005 to December 2006 policy period" (Pulaski Aff. at ¶ 4) and FPC agreed to pay ERP the "all-inclusive fee based on the premiums due on the 2005-2006 GPL policies to be procured by ERP" (*id.* at ¶ 5). Pulaski further avers, that FPC and ERP renewed the terms of their agreement for the 2006-2007 policy period (*id.* at ¶ 6). Pulaski avers that this was the only fee FPC ever paid to ERP in exchange for ERP's agreement to (1) negotiate and obtain policy amendments; (2) advise FPC with regard to its rights and obligations under the policies; (3) draft and serve claims notices on behalf of FPC; and (4) maintain accurate files with respect to the policies and provide the documentation to FPC (the "Services") (*id.* at ¶ 8).

Pulaski asserts that the BOR Letter only appointed Crystal with respect to the renewal of Fund II (and its related entities) GPL policies (*id.* at ¶ 11) and it is his understanding that the BOR Letter was not intended to relieve ERP or any of FPC's other brokers, of their obligations with respect to the insurance such brokers had procured on FPC's behalf (*id.* at ¶ 16). Furthermore, in accordance with FPC's records, the BOR Letter was neither addressed nor issued to ERP (*id.* at ¶ 14). He avers that "[a]t no time prior to 2013 did FPC receive notice from ERP that ERP had terminated its relationship with, or its contractual or other obligations to, FPC, Fox Paine Capital Fund II or its related entities or stating that ERP would no longer provide any services on their behalves" (*id.* at ¶ 17). Pulasli avers that at no time after November 7, 2007 did ERP provide FPC with accurate copies of its files pertaining to the FPC Policies and all claims made thereunder (*id.* at ¶ 22).

Pulaski contends that at no time prior to 2013 did ERP (1) provide any FPC authorized representative with the November 2017 notices of claim; (2) advise that such claims had been submitted to the insurers on behalf of the insureds; or (3) inform FPC that the insurers were inquiring whether any insureds intended to pursue their claims for coverage after the 2007 Settlement or ask it if it wished to continue to pursue the claims (*id.* at ¶ 19). Moreover, Pulaski avers that at not time

did FPC ever authorize ERP to tell the insurance carriers that FPC and Fox did not intend to pursue claims for coverage (*id.* at ¶ 21).

In support of the application of California law to Plaintiffs' breach of contract claims, Pulaski avers that FPC's sole principal place of business has been in California and FPC's representatives were in California at the times that they negotiated, formed and performed their obligations with regard to the ERP contract (*id.* at ¶ 5).

The crux of Plaintiffs'dispute with ERP is their contention that not only did ERP fail to perform the services it was obligated to perform based on its breach of contract and breach of fiduciary duty, it "successfully advocated for payment of proceeds from *Plaintiffs'* own HCC Policy to the Paine Parties in derogation of ERP's duties to Plaintiffs, and concealed from Plaintiffs crucial claims- and policy- related information to which they were entitled" (Plf's Opp. Mem. at 13). To add insult to injury, Plaintiffs point out that the proceeds of the insurance that ERP wrongfully procured on behalf of the Paine Parties from Plaintiffs' HCC Policy were used to fund litigation against Plaintiffs (*id.* at 16).

It is Plaintiffs' position that some of the issues raised by ERP have already been determined as a matter of law in Plaintiffs' favor by the Appellate Division, Second Department, in *Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673 [2d Dept 2017]). According to Plaintiffs, the Second Department has already rejected the arguments that: (1) ERP's duties (contractual or fiduciary) terminated as of the date of the BOR Letter in December 2007 (Plf's Opp. Mem. at 13); (2) Plaintiffs' settlement agreement with the Paine Parties released any claims against ERP (*id.* at 17)[10]; (3) Plaintiffs have no cognizable damages because of the availability of Excess Insurer proceeds (*id.* at 20). Furthermore, contrary to ERP's position, Plaintiffs contend that the Second Department definitively determined that ERP had a special relationship with Plaintiffs sufficient to equitably estop it from relying on statute of limitations defense based upon ERP's omissions alone (*id.* at 11, *citing Fox Paine, supra* 153 AD3d at 676).

Plaintiffs alternatively argue that even if these issues were not definitively decided by the Second Department, Plaintiffs have proffered substantial evidentiary proof in support of their

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[10]Plaintiffs further address ERP's release argument (*i.e.*, Plaintiffs released all claims against it as the Paine Parties' representative in the 2012 Settlement) on the merits by arguing that this argument should not even be considered by this Court because ERP only raised it as a defense in its answer to the TAC and did not: (1) raise it as a defense in its Answer to Plaintiffs' Second Amended Complaint, which was the Complaint that was in place during the parties' discovery; (2) raise it as a defense in either of its two CPLR 3211 motions; or (3) move to dismiss Plaintiffs' breach of contract claims (Plf's Opp. Mem. at 18). Alternatively, Plaintiffs argue that should the Court consider ERP's release argument, it is without merit because: (1) even if ERP was a representative, "it would have been released only to the extent it owed duties to the Paine Parties or Presser as their representative, and not in any capacity in which it owed duties to Plaintiffs as Plaintiffs' representative"; and (2) "the release cannot properly be read to apply to ERP because ERP and insurance had no relevance to the subject matter of the claims settled" (*id.* at 18-19). Because the scope of a release is dependent upon the parties' intent. Plaintiffs argue that if the Court permits this defense to proceed, the Court must allow Plaintiffs discovery as to the settling parties' intent (*id.* at 19).

position that there are triable issues of fact over whether the BOR Letter can even be reasonably interpreted as terminating ERP as Plaintiffs' broker given the ambiguities present in the letter (*e.g.*, it does not refer to Fox or FPC in the "Re" clause or in the body of the letter and it uses an undefined phrase "General Partnership Liability Program") and the most reasonable interpretation is that "ERP would remain responsible for its contractual and fiduciary obligations with respect to FPC's 'present insurance program' identified by the specific existing policies in the 'Re' clause, while Crystal would be responsible for procuring and administering all GPL policies going forward" (Plf's Opp. Mem at 15).[11] According to Plaintiffs, the BOR letter did not tell ERP that FPC had extinguished ERP's ongoing duties with respect to the prior year's policies for which ERP had been paid and ERP's and HCC's post-BOR conduct confirms that they shared Plaintiffs' interpretation (*id.* at 16). Plaintiffs conclude that the scope of ERP's post-BOR Letter duties should be decided by the jury (*id.*).

With regard to ERP's contractual duties, Plaintiffs argue that FPC hired ERP to be its broker "to oversee its professional liability insurance needs, including procuring suitable GPL policies, advising FPC and its executives regarding their rights and obligations, claims handling, claims advocacy, and record maintenance" (*id.* at 4). Plaintiffs refer to the Second Department's Decision finding that they had adequately alleged a special relationship between FPC and ERP which gave rise to a fiduciary duty on behalf of ERP which was not dependent upon an actual agreement. Based on the Second Department's determination, Plaintiffs argue that ERP's position is based on a false premise that Plaintiffs must show that ERP expressly agreed to assume a duty to provide specific services beyond the obligation to place the insurance (*id.* at 1). In any event, Plaintiffs contend that they have uncovered "ample evidence of an express or implied contract creating a special relationship based on the context in which FPC hired ERP as FPC's GPL policy broker, ERP's extensive holding itself out as a private equity insurance and claims advocacy expert,[12] the actual performance by ERP of the Services, and Plaintiffs' reliance on ERP (Plf's Opp. Mem. at 2). In response to Defendant's contention that Plaintiffs' failure to renew the insurance using Defendant as their broker means that Defendant had no further obligations with regard to the HCC Policy,[13] Plaintiffs argue they have established that ERP had a contractual duty to submit and handle claims for the policies it procured and Plaintiffs paid for those services up front. As such, whether or not ERP remained on as its broker is irrelevant (Plf's Opp. Mem. at 14).

In further response to Defendant's argument that the BOR Letter terminated all duties, Plaintiffs contend that even if the Court accepts Defendant's argument, Defendant's motion must

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[11]According to Plaintiffs, the BOR letter identified the policy numbers so the insurers would know that they were to work with Crystal to renew the policies, and it was not meant to tell ERP that FPC terminated all of its ongoing duties with respect to the prior year's policies for which it had already paid ERP (Plf's Opp. Mem. at 16). It is Plaintiffs' contention that ERP's post-BOR conduct confirms that ERP shared Plaintiffs' interpretation (*id.* at 16).

[12]In support, Plaintiffs rely on the ERP's sales pitches for the business when ERP was competing with Plaintiffs' incumbent broker Woodruff-Sawyer and MacCorkle Insurance Services (Plf's Opp. Mem. at 3).

[13]Plaintiffs assert that "ERP's argument – that the performance of duties previously bought and paid for in a prior agreement are excused if the party does not renew the prior agreement for another year – is specious" (Plf's Opp. Mem. at 14, n13).

nevertheless be denied as Plaintiffs have provided proof of ERP's breaches prior to December 14, 2007 (*id.* at 13, n 9).

Plaintiffs argue that "[i]n interpreting the extent of the parties' duties pursuant to an oral contract, courts look to objective manifestations of the intent of the parties' as evidenced by their words, acts and circumstances existing when the contract was made" (*id.* at 5). In this regard, Plaintiffs rely on, *inter alia*, (1) the fact that the policy documents advised FPC that if it had any questions, it should contact ERP as producer of the policies (*id.* at 4); (2) the fact that the Policy Binders advised FPC about the claims-made nature of the policies and a warning about the need to contact ERP immediately if it became aware of a possible claim (*id.*); (3) the fact that post-procurement, ERP did advise Ghisletta and Gersch about whether there was coverage for the Fox v Paine Action (*id.* at 5 at 111); and (4) that fact that in November 2007, ERP submitted notices of claim to all insurers on behalf of FPC and its covered insureds (*id.* 140). According to Plaintiffs, ERP's offer to submit claims and its actual submission of such claims without the requirement of additional consideration is "strong evidence" of its duty to do so (*id.*). Plaintiffs fault ERP for its failures thereafter. As further evidence that the ERP had agreed to undertake the Services, Plaintiffs point out that "ERP and HCC claim their contracts with P&P were renewals of their contracts with FPC" and therefore, what ERP did for P&P after 2007 in terms of claims advocacy, record keeping and notifications is indicative of what it should have been doing for FPC (*id.* at 6). Plaintiffs alternatively argue that even if ERP did not owe Plaintiffs the special duties they contend that it did, ERP may still be liable because "every agent has a duty to provide its principal with information about the transaction or affairs entrusted to it" and "every former agent has a continuing statutory duty not to permit unauthorized persons to use, misappropriate, and take advantage of trade secret information obtained during its engagement (e.g., the Policies and the November 2007 Claims made to the insurers)" (*id.* at 14).

In opposition to Defendant's statute of limitations arguments, Plaintiffs contend that they only learned in June 2013 of Defendant's misconduct through the Excess Carrier's declaratory judgment action wherein Plaintiffs learned that "ERP failed to inform Plaintiffs that ERP: (i) submitted the 2007 Claim Notices and notice of arbitration in May 2009, and (ii) told the insurers in 2008, that 'the Fox v Paine Litigation had been dismissed'" (Plf's Opp. Mem. at 8). Plaintiffs contend that they "learned of the rest of ERP's breaches no earlier than November 2013 when ERP produced the 2007 Claims Notices and, *inter alia*, correspondence between ERP and Ghisletta" (*id.* at 8, n6). It is Plaintiffs' position that the discovery accrual rule applies not only to its fraud and fraud-based breach of fiduciary duty (as well as the aiding and abetting fraud and breach of fiduciary duty claims), but also to its breach of contract claims where "'the act which constituted the breach ... was the very act which prevented plaintiff from discovering the breach'" (*id.* at 8, *quoting Gryczman v 4550 Pico Partners., Ltd.*, 107 Cal App 4th 1, 5 [2003]).

In opposition to ERP's assertion that Plaintiffs failed to exercise reasonable diligence (which Plaintiffs claim is a question of fact for the trier of fact), Plaintiffs argue that they "had no reason to suspect that any claim or disbursement was made under the HCC Policy, and therefore could not reasonably be expected to engage in any additional diligence that would have led to an earlier discovery of facts underlying their claim" (*id.* at 9). Plaintiffs also rely on evidence they contend shows that (1) the Former Executives destroyed documents and locked Fox, Gersch and other legitimate FPC executives out of hard copy, electronic and email files (*id.*); (2) the 2007 Claims Notices are not in FPC's insurance files and are not in Ghisletta's emails (*id.*); (3) none of ERP's communications with Ghisletta, the Paine Parties or FPC's insurers after January 31, 2008 were ever

in FPC's possession (*id.*); (4) Gersch's deposition testimony that he asked ERP about coverage in the Fox v Paine Delaware action and ERP told him there would be no coverage (*id.* 99); (5) at the meeting on December 12, 2007, 9 days after the settlement in the Fox v Paine action, Gersch met with ERP's Marcon to discuss FPC's insurance program and ERP inconceivably did not discuss how the settlement would affect the program or whether ERP should send in a notice of claim (*id.* 234); (6) Gersch made reasonably diligent efforts to compile the insurance information based on his request to Marcon to send him all of FPC's insurance policies (*id.*); and (7) Section X.E of the HCC Policy wherein all insureds appointed FPC as the sole party authorized to receive and send notices (*id. 80*).

In response to ERP's position that Ghisletta's knowledge of ERP's FPC Notice should be imputed to Plaintiffs, Plaintiffs argue that the imputation doctrine has exceptions that are applicable – namely (1) "[a]n agent's knowledge will not be imputed to the principal where the agent 'is acting in a transaction in which he is personally or adversely interested or is engaged in the perpetration of an independent fraudulent transaction where the knowledge relates to such transaction and would be to his interest to conceal it'" (*id.* at 10, *quoting Lincoln Natl. Life Ins. Co. v Snyder*, 722 F Supp 2d 546, 556 [D Del 2010]); (2) "[w]hen an agent purports to act for two principals, the imputation rule does not apply 'in a situation of divided loyalties or where the agent's own interests run adverse to one of the principals'" (*id., quoting MetCap Secs. LLC v Pearl Senior Care, Inc.* 2007 WL 1498989 at *10 [Del Ch Ct 2007]). According to Plaintiffs, "[t]he evidence conclusively shows that Ghisletta was acting adverse to the interests of Fox and FPC and to advance the Paine Parties' interests in her dealings with HCC and ERP (*id.*). With regard to ERP's knowledge of Ghisletta's divided loyalties and that she was not a legitimate FPC agent, Plaintiffs contend that "ERP was clearly on notice no later than October 25, 2007, when it read the Complaint in the Fox-Paine Litigatio, that Ghisletta was no longer an authorized agent or employee of FPC (*id.*). Plaintiffs further point out that on December 11, 2007, Ghisletta told ERP the details of the 2007 Settlement (*id.* 235). Thus, according to Plaintiffs, " ERP was at all times aware Ghisletta was acting *adversely to Plaintiffs* in diverting plaintiffs' insurance benefits to the Paine Parties, and ERP was colluding with Ghisletta to get P&P's ongoing business" (*id.*).

Plaintiffs further contend that they have obtained evidence showing ERP's misrepresentations and acts of concealment that lulled Plaintiffs into inaction based on: (1) ERP telling Gersch that FPC did not have a viable insurance claim based on the insured v insured exclusion (*id.* at 11); and (2) Gersch and Ghisletta testified that Gersch did not take over FPC's insurance duties until after 12/3/07 (*id.*). According to Plaintiffs, on December 14, 2007 in response to Gersch's request for a copy of the policies, Defendant should have advised Gersch that on the day before, it had sought to replace FPC as the named insured with FPM III (*id.* at 12). Plaintiffs further contend that when it told Gersch that it thought the coverage would be precluded based on insured v insured exclusion, ERP should have advised Gersch that they had submitted the 2007 FPC Claims Notices just in case (*id., citing* Plf's 19-a at ¶ 97). Based on the foregoing, Plaintiffs argue that no claims for pre-February 21, 2008 breaches should be dismissed (*id.* at 12). It is Plaintiffs' position that Plaintiffs' knowledge of P&P's hiring of ERP as its broker in December 2007 (which Plaintiffs contend is barren of proof) has "no bearing on whether Plaintiffs also knew about the multitude of wrongful actions by ERP" (*id.* at 13).

In response to ERP's argument that Plaintiffs' claims are time-barred after the Plaintiffs' issuance of the BOR Letter because Plaintiffs "'induced ERP to work as P&P's broker," Plaintiffs submit that they have proffered evidence showing that: (1) prior to the BOR Letter ERP was already working to procure 2008 policies for FPC and FPM III based on Rubocki's conversation with Ghisletta about the terms of the December 2007 Settlement (*id.* at 12); and (2) since at least August 2007, ERP tried to convert FPC's PE Policies into ones naming FPM III as the sole insured (*id.* at 12). Finally, Plaintiffs point out that their alleged awareness of P&P's hiring of ERP in December 2007 (for which ERP provides no evidentiary support) is nevertheless irrelevant to whether Plaintiffs were aware of ERP's wrongful acts.

In response to ERP's sole argument for why Plaintiffs' aiding and abetting claims should be dismissed – namely, that Plaintiffs' release of the Paine Parties bars Plaintiffs' aiding and abetting claims – [14] Plaintiffs argue that HCC raised this same argument before the Second Department which was rejected and ERP should be sanctioned for raising it again (*id.* at 17). Alternatively, Plaintiffs argue that even if the Second Department had not already definitively decided it, it is incorrect as a matter of law (*id.* at 16-17, *citing* NY Gen Oblig Law § 15-108[a].

Plaintiffs argue that they have submitted evidence showing ERP's knowledge of the Paine Parties' breaches of fiduciary duties and fraud and its substantial assistance to the Paine Parties through not only its concealment of the submission of claims and all claims coverage communications from Plaintiffs but, also its affirmative conduct of encouraging FPC's insurers to pay the Paine Parties. It is further Plaintiffs' position that as a fiduciary and agent of FPC, ERP had a duty to speak (*id.* at 18).

Plaintiffs counter ERP's contention that Plaintiffs have not established that they have been damaged as a result of ERP's alleged breaches of contract, by pointing out that under California law, a party is entitled to damages that "might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probably result of the breach" (*id.* at 19). Plaintiffs further contend that ERP's breach was a substantial factor in: (1) preventing Plaintiffs from obtaining timely coverage of their defense costs and fees; (2) causing HCC to pay the insurance proceeds to the Paine Parties which funded their litigation against Plaintiffs; and (3) causing Plaintiffs to incur additional attorneys' fees and costs in this coverage action (*id.* at 20). Plaintiffs claim the damages were reasonably foreseeable and within the contemplation of the parties because: (1) ERP's failure to give correct coverage advice and advocate for Plaintiffs would cause the denial of the insurance proceeds to Plaintiff (*id.*).; (2) ERP gave Gersch incorrect coverage advice and concealed that the FPC Notice had been submitted to the insurers (*id.*); (3) ERP failed to notify the insurers to communicate with legitimate representatives rather than Ghisletta who ERP knew was adverse to Plaintiffs (*id.* 221); (4) when the insurers asked ERP if any insureds were seeking coverage after the December 2007 Settlement, ERP failed to ask FPC's legitimate representatives (*id.* 217); (5) ERP failed to provide claims advocacy services to Plaintiffs (*id.* 206); (6) ERP

[14] In a footnote, Plaintiffs assert that ERP does not challenge Plaintiffs' ability to prove the elements underlying the tort and any attempt by ERP in its Reply to do so should be disregarded by this Court or Plaintiffs should be given the right to submit a sur-reply (*id.* at 16, n15).

influenced HCC's coverage determination by going to HCC's Barcelona office and underwriter Barry Choate on behalf of the Paine Parties to offer HCC additional business and facilitate a meeting with P&P's principals (*id., citing* Plf's Rule 19-a at ¶ 202-205); (7) after ERP's assistance, HCC reinstated its tolling agreement with the Paine Parties, ceased any credible threats of coverage litigation against them, paid out its full policy limits, and actively assisted the Paine Parties in securing a settlement with the Excess Insurers (*id.* 206); and (8) the Paine Parties only decided to bring their alleged dilution claim against Plaintiffs after HCC changed its coverage decision (*id.*).

Addressing ERP's coverage-based arguments, Plaintiffs assert that the Court should disregard them as ERP waived any non-coverage defense by failing to assert it before this second round of summary judgment briefing. And, in any event, ERP failed to proffer any evidence in support of its "perfunctory arguments" (*id.* at 20-21). To cover their bases, Plaintiffs nevertheless address Defendant's "perfunctory arguments." Thus, in response to ERP's argument that HCC Policy Exclusion H eliminates coverage for the costs Plaintiffs incurred in defending against Paine's settlement enforcement motions, Plaintiffs assert that "Exclusion H applies only to certain types of contracts, and expressly preserves coverage for the parties' 2008-2012 litigation" (*id.* at 21). Specifically, Plaintiffs contend that Exclusion H does not apply to: (1) a contract "attaching by virtue of any waiver or release of liability" where, as was claimed by the Paine Parties, the liability "would have attached in the absence thereof"; or (2) the defense costs Plaintiffs incurred in defending against the Paine parties' employment-related claims (*id., citing* HCC Policy, Exclusion H[2] & Exclusion H[3] as amended by End. 13).

In response to ERP's contention that the litigation expenses Plaintiffs incurred in connection with the arbitrations and lawsuits brought in response to the various motions to enforce do not qualify as covered defense costs, Plaintiffs argue that as set forth in Plaintiffs' expert Gary Greenfield's report, none of Plaintiffs' proceedings were offensive actions; instead, all were brought to counter the claims asserted in Paine's motions to enforce and had a fundamental defensive purpose (*id.* at 22). In further support of Plaintiffs' claim of coverage, Plaintiffs argue that their claims fall within the Wrongful Employment Practices coverage and the insured v insured clause exclusion is no bar because of the exception to the exclusion preserving coverage for claims brought by former Insured Persons four years after their separation from FPC (*id.* at 22, n20).

According to Plaintiffs, ERP's argument that judicial estoppel bars Plaintiffs' damage claim is without merit because the HCC Settlement Agreement provides that: (1) the Settlement "is the result of a compromise, and shall never at any time for any purpose be considered as an admission or evidence of liability or responsibility on the part of the parties thereto;" and (2) Plaintiff and HCC "desire to settle and compromise all claims by the Fox Parties under the Policies ... without in any way admitting or acknowledging any fact or circumstance alleged in those matters" (*id.* at 22). It is Plaintiffs' position that judicial estoppel has no applicability since it only applies when a party assumed a factual position in a prior legal proceeding and secured a favorable judgment. Plaintiffs further point out that the statement upon which ERP relies was not made by Plaintiffs and instead states that "Houston Casualty represents and warrants" and ends with HCC's legal opinion

concerning the payment of the HCC Policy proceeds[15] (*id.* at 23). In addition, Plaintiffs assert that judicial estoppel only applies to factual assertions--not legal arguments or opinions - HCC's legal opinions cannot provide a basis to judicially estop Plaintiffs (*id.*). Finally, it is Plaintiffs' position that they have not prevailed on or benefitted from a prior contradictory assertion in any legal proceeding and this Court's dismissal of HCC from this action is not a favorable judgment, but even if it was, it benefitted HCC and not Plaintiffs (*id.* at 24).

In opposition to ERP's contention that Plaintiffs' negligent procurement allegations added to the TAC at paragraphs 208, 279 and 307 without the Court's leave should be stricken or in any event dismissed as time barred, Plaintiffs assert that at the time they moved for leave to amend on March 10, 2017, HCC had not yet filed its motion for summary judgment in which it asserted coverage based challenges and that before HCC's summary judgment motion on April 10, 2017, no Defendant had argued lack of coverage as a basis other than alleged lack of notice or approval to incur expenses – *i.e.*, neither HCC nor ERP addressed insured v insured or similar coverage arguments in their dismissal or reargument briefs (*id.* at 24). As evidence that any coverage-based argument is without merit, Plaintiffs assert that HCC paid the $10 million in proceeds to the Paine Parties and FPC's claims under the HCC Policy are as strong if not stronger than the Paine Parties. With regard to ERPs assertion that the negligent procurement claim should be dismissed, Plaintiffs point out that ERP does not assert any prejudice with regard to this claim and it does not challenge Plaintiffs' claim on the merits – it just asserts that any such claim would be barred by the statute of limitations. In opposition to this basis for dismissal, Plaintiffs argue that under New York and California law, a negligent procurement claim does not accrue until a plaintiff knows or could know through reasonable diligence that a lack of coverage has damaged it. Here, it is Plaintiffs' position that they could not have known through reasonable diligence that any insurer had made an adverse determination of coverage until Plaintiffs learned about the Excess Insurer's California coverage actions in June 2013, and Plaintiffs filed this action eight months later in February 2014 (*id.* at 25, n28). Plaintiffs further point out that ERP has always argued that its sole obligation to Plaintiffs was procurement and, therefore, if ERP is now permitted to challenge Plaintiffs' claims on the ground that Plaintiffs were not entitled to coverage, it is only fair that Plaintiffs be permitted to assert negligent procurement. Alternatively, Plaintiffs argue that if the Court decides to strike or dismiss these allegations, then ERP should be precluded from asserting coverage-based defenses both in its motion for summary judgment and at trial.

ERP'S REPLY

In further support of its motion, ERP submits: (1) a reply affirmation from ERP's counsel (Reply Affirmation of Antonecchia "ARA"), together with the attached exhibits; and (2) a reply memorandum of law ("Def's Reply").

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[15]The full paragraph provides "Houston Casualty represents and warrants that the full limit of liability under the 2006 FPC Policy has been exhausted by the payment of loss thereunder. Houston Casualty represents and warrants that no one other than one or more of the Paine Parties was paid any proceeds from the 2006 FPC Policy."

In further support of ERP's contention that it had no post-termination duties,[16] ERP reiterates its position that such duties do not exist as a matter of established law based on the *Pulte* case and the directive from the New York State Insurance Department. ERP further contends that to the extent that Plaintiffs are contending that ERP had post-termination duties based on an oral agreement to provide such services, Plaintiffs have provided no evidence to support their position and this position is not even supported in the TAC which omits a durational term to the Services ERP allegedly agreed to provide (Def's Reply at 2). In further support, ERP points out that FPC's post-termination actions undermine Plaintiffs' position since at no time after the BOR Letter did FPC ask ERP to place insurance, for ERP to provide insurance advice, or for ERP to provide claims handling and indeed in 2009, when Gersch requested information concerning FPC's 2007 policies, he went to Crystal and not ERP (*id.*).

According to ERP, they performed their duties by communicating with Ghisletta, Plaintiffs' representative, with regard to every act in the TAC. ERP further points out that it had properly told both Ghisletta and Gersch that ERP believed it was likely that the coverage would be denied and that the prediction came true (*id.*).

In further support of the branch of ERP's motion seeking to dismiss the TAC based on the statute of limitations, ERP argues that Plaintiffs' argument that the statute of limitations with regarding to its non-breach causes of action had to be tolled based on Plaintiffs' lack of knowledge of ERP's breaches and fraud despite reasonable diligence is without merit because Plaintiffs failed to submit any evidence of its own diligence sufficient to raise a triable issue of fact. In the alternative, ERP requests that if the Court determines that there are triable issues of fact, then it should convene a hearing on these issues alone (*id.* at 5 and n. 5). According to ERP, Plaintiffs' 2007 lawsuit establishes: (1) that the Complaint in the 2007 lawsuit contains the same alleged misconduct at issue in this dispute and FPC had Ghisletta's files and emails all along which contain evidence of her communications with the insurers and ERP regarding the wrongful conduct (*id.* at 6, *citing* ARA, Exs. D and F); and (2) FPC had an affirmative duty to investigate the facts and circumstances that gave rise to those claims and Plaintiffs' or their counsels' lack of diligence is their own fault (*id.* at 10).

According to ERP, "Plaintiffs cannot say that they expected ERP to help them pursue claims for coverage arising from the Fox/Paine litigation (an alleged duty that ERP, in fact, fulfilled while Ghisletta represented plaintiffs) and in the same breath say that it was reasonable for them to ignore that ERP might do the same for P&P " (*id.*). It is ERP's position that it was incumbent on Plaintiffs to act diligently by communicating with HCC (or anyone else) with regard to claims activity under FPC's policies with HCC.

In response to Plaintiffs' contention that the statute of limitations is no bar based on ERP's

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[16]In this regard, ERP points out that Plaintiffs' issue with the fact that ERP failed to inform them of the notice of arbitration in May 2009 and of ERP's alleged statement to the insurers that the Fox v Paine Litigation had been dismissed is misplaced since ERP had no duty to perform any acts on behalf of Plaintiffs (Def's Reply at 3).

sending the FPC GPL Policies to Gersch without telling Gersch that ERP had sent the FPC Notice and that ERP had tried to amend the HCC Policy to add FPM III, ERP again relies on Ghisletta's knowledge (based on ERP's informing Ghisletta)[17] that ERP sent the FPC Notice as refuting Plaintiffs' alleged ignorance (*id.* at 7, *citing* ARA, Exs. D and F). ERP further points to the fact that HCC never added FPL III to the HCC Policy and therefore ERP's attempted breach of duty is irrelevant (*id.* at 6-7).

In further support of the dismissal of the aiding and abetting claims (Fourth and Fifth Causes of Action), ERP again relies on the 2012 Settlement which states that "By signing this Agreement each of FPC, the Fox Parties and the Fund II Parties acknowledge that he/she/it will have *waived any right* he/she/it may have had *to bring a lawsuit or make a claim against any of the Former Executives* based on any acts or omissions of any of the Former Executives up to the effective Date." Based on this language, ERP argues that the Fox Parties: (1) waived any right to bring a lawsuit based on the Former Executives acts or omissions (which include fraud and breach of fiduciary duty); and (2) the Fox Parties waived any right to make a claim against any of the Former Executives based on any acts or omissions. Again ERP argues that since Fox waived the right to assert that claim, the aiding and abetting claim must fail.

ERP further contends that the evidence proffered by Plaintiffs to support ERP's purported substantial assistance is insufficient to create a triable issue of fact because: (1) ERP's alleged assistance to Ghisletta to try to change FPC's Policies to name FPM III is merely ERP "'performing routine business services for the alleged fraudster'" which does not constitute substantial assistance (*id.* at 10); and (2) ERP's assistance to Ghisletta in helping P&P, the former executives and Presser obtain the proceeds from FPC's Policies when they were not insureds and ERP's concealing the existence of all claims and claims coverage communications are not only untrue – they merely reflect inaction which is insufficient for aiding and abetting liability (*id.*).

With regard to the knowledge element, ERP contends that Plaintiffs "concede by not contesting that ERP lacked specific intent [*i.e.,* knowing of a tort and acting with the intent of facilitating the tort], as required by California law" for an aiding and abetting claim (*id.*). ERP also contends that Plaintiffs have failed to prove actual knowledge since they only rely on the fact that the 2007 Complaint was sent to ERP to support their knowledge element and they cite to no legal authority that bare allegations by one manager of an LLC gives notice of the truth of those allegations or even that the allegations are binding on FPC.

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[17]ERP refutes Plaintiffs' contention that the adverse interest exception applies allege that Ghisletta was seeking to advance her own interests – only that she was seeking to advance Paine's interest) and the exception only applies when the agent is seeking to advance her own personal financial interest (*id.* at 7). ERP also asserts that it reasonably relied on FPC's ratification of Ghisletta's actions and under New York and California law, Plaintiffs "are bound by Ghisletta's apparent authority unless they affirmatively correct that representation" (*id.* at 8). It is ERP's position that simply because it received a copy of the 2007 Complaint wherein Fox alleged breaches of fiduciary duty did not preclude ERP from reasonably relying upon Ghisletta since unproven allegations by one manager against another are not binding on the corporation (ERP Reply at 9).

ERP reiterates its argument that the 2012 Settlement's reference to representatives includes ERP and that since ERP was Paine's representative at the time, ERP must be released from all claims regarding ERP's representation of Paine. In response to Plaintiffs' argument that ERP failed to plead release in its answer to the Second Amended Complaint ("SAC") and failed to move on this ground in its prior CPLR 3211 motion, ERP argues that it had pleaded waiver in its earlier answers and ERP did not have to raise in its CPLR 3211 motion every argument it intended to raise in its summary judgment motion
(*id.*). Finally, ERP refutes that Plaintiffs need discovery to interpret the intent of an unambiguous contract.

With regard to Plaintiffs' damages consisting of the settlement evasion expenses (*i.e.*, the attorneys' fees and expenses in litigating with Paine totaling $24,462,188.45), ERP asserts it is not responsible for Plaintiffs' decision to incur settlement evasion expenses and Plaintiffs have submitted no evidence raising a triable issue of fact that ERP proximately caused Plaintiffs to litigate with Paine (*id.* at 11-12).

In response to Plaintiffs' contentions that there existed a special relationship between the parties and that the Second Department found such a special relationship to exist, ERP points out that the Second Department merely determined that Plaintiffs had adequately alleged the existence of a special relationship, but that it does not mean that the scope of ERP's duties is now a triable issue of fact. ERP points out that the TAC makes clear that the purported special relationship is based on Plaintiffs' agreement with ERP for it to render the Services (*id.* at 14, *citing* TAC at ¶ 214-216 [fraud cause of action] and ¶ 250-251 [breach of fiduciary duty cause of action]) and it is ERP's alleged breach of these duties that forms the basis for Plaintiffs' fraud and breach of fiduciary duty claims. As such, ERP argues that Plaintiffs had to proffer evidence that "ERP held itself out as a broker who agreed to provide plaintiffs with ongoing information indefinitely into the future even after its engagement as a broker ended" (*id.* at 13). According to ERP, the Second Department (which reviewed only the First Amended Complaint which did not allege a claim for breach of contract against ERP, determined that the actual relationship between the parties determines the scope of the fiduciary duty and Plaintiffs, with their TAC, had framed the actual relationship as being the same as the oral contract for Services. Based on these predicates, Defendant argues Plaintiffs' claims for fraud and breach of fiduciary duty should be dismissed as they are duplicative of the breach of contract causes of action (*id.*).

Finally, ERP reiterates its position that based on Plaintiffs' admission that they added a new cause of action for negligent procurement, which is in contravention of Justice Scheinkman's prior order, paragraphs 208, 279 and 307 of the TAC must be dismissed.

STANDARD OF REVIEW ON A MOTION FOR SUMMARY JUDGMENT

The legal standards to be applied on a motion for summary judgment are well settled.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Med. Ctr.*, 64 NY2d 851, 853 [1985];*Cendant Car Rental Group v Liberty Mutual Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]; *Martinez v 123-16 Liberty Avenue Realty Corp.*, 47 AD3d 901 [2d Dept 2008]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 [2d Dept 2000]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions (*Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also Pierson v Good Samaritan Hosp.*, 208 AD2d 513, 514 [2d Dept 1994]).

The Court's main function on a motion for summary judgment is issue finding rather than issue determination (*see Stillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The role of the Court is to determine if *bona fide* issues of fact exist, and not to resolve issues of credibility. Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (*Baker v Briarcliff School Dist.*, 205 AD2d 652, 653 [2d Dept 1994]).

FACTS DERIVED FROM RULE 19-A STATEMENTS

A. Defendant's Facts

1. Pursuant to the December 14, 2007 BOR Letter, ERP was terminated as FPC's insurance broker with regard to future policies (Defendant contends its responsibilities ceased with regard to the policies it procured on FPC's behalf but this is highly disputed and there are material questions of fact on this issue).

2. In August 2012, FPC and Fox on the one hand and the Paine Parties on the other ended the Fox-Paine Litigation through settlement.

3. Plaintiff commenced this action on February 21, 2014.

4. On July 21, 2017, Plaintiffs and HCC executed a Settlement Agreement and Mutual Release and paragraph 8 provides "Houston Casualty represents and warrants that the full limit of liability under the 2006 FPC Policy has been exhausted by the payment of loss thereunder. Houston Casualty represents and warrants that no one other than one of more of the Paine Parties was paid any proceeds from the 2006 FPC Policy."

B. Plaintiff's Facts[18]

1. It is undisputed that the HCC Policy had the insured organization as Fox Paine & Co., LLC on the HCC Policy Declarations Page (Forbush Aff., Ex. 16 at ERP 0003568). FPC's 2006-2007 policy was renewed for the period January 2, 2008-January 2, 2009 but ERP instructed HCC to change the name of the Insured Organization on the Declarations page to Paine and Partners, LLC (Forbush Aff., Ex. 89 at ERP 00002185).

2. Defendant does not dispute that after it sent the November 7, 2007 FPC Notice to HCC and the Excess Insurers, ERP did not advise Fox or FPC or anyone loyal to them that the Paine Parties had submitted claims seeking coverage under the FPC Policies, that ERP was advocating on the Paine Parties behalf, or that HCC had decided to disburse the proceeds (Plf's 19-a Stmt at 222-226, *citing* Marcon Tr. at 243-244, 377-378, 380 and Forbush Ex. 85). Defendant does not dispute that after November 7, 2007, ERP never advocated on behalf of Fox or FPC for their losses under the FPC Policies (Plf's 19-a Stmt at 221, *citing* Marcon Tr. at 243-244, 377-378, 380 and Forbush Aff., Ex. 85).

3. Twin City and St. Paul settled their coverage dispute with Paine Parties in 2013 for $9 million (Forbush Aff., Ex. 41 Twin City Dep at 258-259; Ex. 97 St. Paul Dep Tr.at 229-230)

4. Despite HCC's protestations that the Paine Parties were not covered by the HCC Policy, on February 23, 2010, HCC reversed its position and informed the Paine Parties that it would reimburse their costs (Forbush Aff., Ex. 90). As of that date, the Paine Parties had not instituted their dilution claim against Fox which did not occur until March 29, 2010 (Forbush Aff., Ex. 86). HCC began making those payments at the beginning of June 2010 ($700,000 first payment with "more to come") (Forbush Aff., Ex. 85). By time of 2012 Settlement (August 3, 2012), HCC had paid $7.1 million and promised to pay remaining amount of $2.9 (Forbush Aff. Ex. 77 at HCC 0022197, Ex. 78 at HCC 0045177). By August 2012, HCC paid its full limits but reserved its rights (Forbush Aff., Ex. 74 at HCC 0012246-47).

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[18]Unless otherwise noted, Defendant conceded the accuracy of these facts but contended the facts did not need to be evaluated by the Court for the purposes of resolving Defendant's motion for summary judgment.

I. Facts Relevant to Defendant's Contractual or Fiduciary Duties

1. ERP touted itself as a full service brokerage firm that focuses on the needs of private equity firms and their portfolios (Forbush Aff., Ex. 48; Marcon Tr. [Forbush Aff., Ex. 7] at 304) and that full service would include the handling of their claims (Marcon Tr. at 306). In response to question whether he would tell a private equity client that ERP would leverage its relationship with an insurer to make sure that the client was treated well by the insurer, Marcon stated it depended on the size of the private equity business (as a mom and pop no, but if $500,000 in commissions, yes) (*id.* at 305, 308-310).

2. In 2006, Marcon viewed Fox Paine as ERP's most important client with $65,000 in revenues in 2005 (Forbush Aff., Exs. 12, 13). ERP was given the business to procure FPC's GPL insurance policies for December 2005-2006 period and received $65,000 in commissions (*id.*, Ex. 12). The FPC GPL Policies were renewed for the 2006-2007 policy period (Pulaski Aff.).

3. Ghisletta testified that when she was assisting in the selection of an insurance broker, she would <u>not</u> have expected that she would have hired a broker for FPC whose only responsibility would have been to procure insurance (Forbush Aff., Ex. 10 Ghisletta Tr. at 200-201). Furthermore, in his affidavit submitted in support of Plaintiffs' opposition, Fox testified that he would have required a full service broker including policy procurement, claims handling, claims advocacy and record maintenance.

4. It is undisputed that ERP was FPC's BOR up until at least December 14, 2007 when the BOR letter was issued (Plf's 19-a at ¶ 153, *citing* Forbush Aff., Ex. 50, Marcon Dep., Ex. 7 at 210-211). Of course, ERP contends that it was also FPM III (Paine & Partners') broker as of that date as well, and as of the date of the 2007 Settlement, which Plaintiffs dispute.

5. The BOR Letter was intended to mean that Crystal would be FPC's broker going forward on their new policies but FPC would look to the broker that issue the policy with regard to claims made under that policy (Gersch Dep. 133, Forbush Aff,, Ex. 40). This fact is disputed by ERP.

6. There is evidence that despite the BOR Letter, ERP continued to do work for FPC. For example, on December 17, 2007, Rubocki emailed Barry Choate at HCC to confirm that HCC will extend policy to January 2, 2008 (Forbush Aff., Ex 2). HCC extended the policy (Forbush Ex. 55 at HCC 008630-31; Forbush Aff., Exs. 4 and 51). And Rubocki did the same with regard to extensions on the Excess Policies (Forbush Ex. 7).

II. Facts Relevant to ERP's actions regarding any claims under the FPC Policies

1. In an email dated October 18, 2007, Marcon told Rubocki that Ghisletta, the CFO of Fox Paine, called him that day asking if there would be any coverage in the lawsuit between Fox

and Paine and Marcon responded to her that his gut told him no because of the insured v insured exclusion but he would check and provide further input, which he asked Rubocki to do and gave him Ghisletta's contact information (Forbush Aff., Ex. 36).

2. On October 18, 2007, Rubocki responded to Ghisletta ccing Marcon and Gibb, stating that Marcon had asked him to respond to her inquiry and that the claim would be denied based on the insured v insured exclusion and he attached a copy of the exclusion for her review (Forbush Aff., Ex. 37) .

3. In response to Rubocki's email, Marcon suggests to Rubocki that since they had not seen what the suit looks like, should they ask Ghisletta for the suit (id.). Rubocki then sent a follow up email to Ghisletta on October 18, 2007 in furtherance of his prior email to her asking her to forward him a copy of the lawsuit for ERP's review stating that while he believed it would be an insured v insured situation, there may be something in the claim that could trigger coverage (Forbush Aff., Ex. 38 at ERP 00007724). On October 24, 2007, Ghisletta forwarded to Rubocki the Fox v Pain complaint (id.).

4. On October 25, 2007, Rubocki sent an email to Bimar cc'd to Marcon and another ERP employee and directing Bimar to report the above-referenced claim to HCC and other carriers (at ERP 00007723). Rubocki, in another email to Ghisletta dated October 25, 2007, reiterated that he thought the insured v insured exclusion would apply but that ERP would report it to the carrier and let them provide ERP and Ghisletta with their coverage opinion - the worst they can do is say there is no coverage (Forbush Aff., Ex. 39).

5. Gersh testified that he recalled calling someone at ERP in the Fall 2007 and asked if there would be coverage and advised that there would not be because of insured v insured exclusion (Forbush Aff., Ex. 40 at 42-43). Gersh (and Ghisletta) testified that after the December 3, 2007 settlement, Gersch took over responsibility for insurance (id. at 115; Ex. 10 at 306).

6. On November 7, 2007, Bimar forwarded notices of claim based on the Fox v Paine Action to HCC and the Excess Carriers (Forbush Aff., Exs. 29-32). ERP disputes that it initiated the FPC Notice on its own and argues that Ghisletta asked them to report it (Antonecchia Reply Aff., Ex. E).

7. On December 14, 2007, Marcon emailed Seth Gersch copies of all of the GPL policies for Fox Paine (Forbush Aff., Ex. 16). ERP admits that it never told Gersch, Fox or anyone other than Ghisletta and Rob Meyer, whom Marcon assumed would keep FPC up to date, that the 2007 FPC Notices had been sent (Plf's 19-a at ¶ 211, *citing* Marcon Dep. [Forbush Ex. 7] at 243-244; Gersch Tr. [Forbush, Ex. 40] at 177 , Pulaski Aff.) Nor were they sent to Crystal (Plf's 19-at ¶ 212, citing Strandberg Aff., Marcon Tr. At 243-244). In addition, when Marcon sent the email with the policies to Gersch, he did not inform Gersch that ERP had requested that the policies be amended to include FPM III (Plf's 19-a Stmt at ¶ 240-241).

8. By email dated December 26, 2007, HCC's counsel TEW contacted Ghisletta stating that their review of the docket in the Chancery Court action indicated that the parties had settled on December 3, 2007 and HCC was seeking confirmation whether FPC intended on pursuing coverage for that lawsuit under the FPC Policy (Forbush Aff., Ex. 33).

9. On January 8, 2008, TEW contacted ERP's Bimar who had transmitted the FPC Notice and asked whether FPC would be pursuing a claim (*id.*; see also Forbush Aff., Ex. 6). This was followed up on January 22, 2008 (Forbush, Ex. 56). Mr. Bimar evidently advised that he would confirm with the insureds that they would not be pursuing coverage and on January 31, 2008, Mr. Bimar confirmed with TEW that the insureds would not be pursuing a claim (Forbush Aff., Ex/ 33). By letter dated February 8. 2008 to Bimar, TEW confirmed that HCC would be closing its file because of the settlement and Bimar's confirmation that no one was pursuing the claim (id.; see also Forbush Aff., Ex. 5).

III. Facts from Which an Inference of ERP's Collusion with the Paine Parties May be Drawn

1. ERP knew as early as September 2007 that there was a dispute between Fox and Paine that was in litigation over the Newco arrangement. ERP knew FPC and FPM III were separate entities (*see, e.g.*, December 12, 2007 requests by ERP to Travelers/St. Paul for two separate primary 10 mm limit policies [Forbush Aff., Ex. 49]). In a phone call on December 11, 2007, Ghisletta advised Rubocki of the split based on settlement and that Funds I and III would be with FPM III and Fund II would be with FPC and Fox (Forbush Aff., Ex. 66, Plf's 19-a Stmt at ¶233).

2. Based on its knowledge of that lawsuit, it knew that FPC and Fox were contending that certain FPC employees, such as Ghisletta, had been disloyal to FPC.

3. On December 12, 2007, Marcon met with Gersch to try to get a new client (FPC) in place with new insurance (Plf's 19-a Stmt at ¶ 234, *citing* Forbbush Aff., Ex. 67, Marcon Tr. at 267).

4. On December 13, 2007, Marcon told Rubocki he was surprised that the Named Insured on the FPC Policies was not FPM III because he was sure he sent an email to ERP employees to make sure that FPM III was the named insured on all policies (Plf's 19-a Smt at ¶ 235, citing Forbush Aff., Ex. 68. This email from Marcon occurred on August 17, 2007 (*id.* at ¶ 236, *citing* Forbush Aff., Ex. 69).[19] It evidently did not happen since ERP followed up on

[19]Contrary to Plaintiffs contentions that in this August 17, 2017 email from Macron, ERP was seeking to replace FPC with a new named insured, Fox Paine Management III, there is nothing in the email to suggest that ERP was seeking to have FPC replaced – just that FPM III would be

December 13, 2007 when Rubocki requested HCC's Choate to have the current policy amended to make sure the correct named insured on all Fox Paine policies is Fox Paine Management III, LLC (*id.* at ¶ 237, *citing* Forbush Aff., Ex. 69). On Dec 17, 2007, Choate received Gersch's BOR letter and forwarded it to Marcon (Forbush Ex. 70). Rubocki, in response to Choate's email, emailed Marcon and stated : "This is not good. Why do [FPC and Gersch] think they have control over the current policy/? Marcon replied, "I know this is not [good]. But, the BofR states Fund 2 only. We need to call Amy" (Forbush Aff., Ex. 71).

5. ERP stood silent in response to HCC's counsel (TEW) letter dated September 4, 2009 requesting that it be advised immediately if Mr. Presser was not the designated representative for FPC with regard to insurance matters (Marcon Tr. [Antonecchia Aff., Ex. 6] at 380). ERP never corrected HCC that Presser was not FPC's representative.

6. During the October 2009 -November 2009 time frame, ERP was advocating on behalf of Paine Parties concerning coverage with the Excess Insurers Hartford/Twin City (Forbush Aff., Exs. 43, 64 at HC 0044070).

On October 15, 2009, ERP (Marcon) sent letter to Tara Smith (PIA) noting frustration that HCC had not responded to coverage request from May 2009 on behalf of ERP's important client Paine Partners and noting that given the large amount of premiums ERP places through PIA, this should, at a minimum, entitle that its client receive a response (Forbush Aff., Ex. 91 at ERP 2855).

Forbush Aff., Ex. 43 is an email dated November 20, 2009 from Rubocki to Reena Boltax (Hartford) cc'd to Presser, Bimar, Marcon and Robert Zenoni, which states "Paine was made aware of the arbitration demands in May 2009 and promptly gave notice of the claims to Hartford under the current policy - since Hartford was provided notice under the original notice of the Fox complaint in 2007, Hartford is obligated to decide whether its insured is covered under the 2009-2010 policy ... the 2006-2007 policy ... or all three. ERP's role is to simply notice Hartford of any events giving rise to a claim under one of Hartford's policies issued to its insured for which ERP is the producer." Also advises the Fox has offered to enter into settlement discussions, but that the insureds will not do so without Hartford's knowledge and consent and if Hartford does not want insured to engage in settlement discussions, they should let ERP know and if that is the case, ERP assumes that Hartford will agree to pay Paine's defense costs in the ongoing litigation and indemnify Paine against any judgment. In another email from Rubocki to Reena on December 3, 2009, Rubocki advises since the underlying HCC policy limits are exhausted, the policy holder was requesting Hartford/Twin City's consent with respect to cost, charges and expenses associated with the defense of the claims per the policy holder's (Presser's) 12/1 email updating on status of

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added.

arbitrations and Paine's intent to seek to enjoin the arbitrations. The email attached a copy of the confidential motion, which Rubocki advised should not be shared with third parties without Paine's prior consent.

7. In an email dated February 9, 2010 from Marcon to Tara Smith (cc'd to Jeff Rubocki and Mitchell Presser) stating that in furtherance of a voice mail Marcon had left for Smith, he is requesting that Ms. Smith get back involved with the claim ERP tendered on behalf of its client Paine & Partners (Forbush Aff., Ex. 120). On June 8, 2010, Marcon emailed Rubocki and Zenoni advising that Presser had told him that he had spoken with Paine's counsel (Spievak) that morning that HCC began making payments $700,000 and that there would be more to come and that Paine had legal bills in the amount of $8 million. Jay [Spievack] and Mitchell [Presser] told him not to do anything and do not advise any other carriers so he directed Jeff and Robert to "keep it in the file for now" (Forbush Aff., Ex. 85).

8. In May 2011, HCC advises Paine Parties that it will commence a coverage litigation against them (Forbush Aff., Ex. 60).

9. In June 2011, Marcon and Bill Monat (ERP) contact HCC's Deb McBrearty regarding a commitment to improved dialogue/communication between ERP and Paine Parties regarding the existing D&O claim they have with HCC (Forbush Aff., Ex. 61 at HCC 0019323). McBrearty explains that she is working with ERP and its client Paine & Partners on 3 potential M&A deals that may require reps and warranties insurance. This information was later reiterated to HCC's Barry Choate (lead underwriter on the HCC Policy) by ERP's Rubocki on or about June 14, 2011 and Choate suggested a conference call for all parties (Forbush Ex. 72). It is Plaintiff's contention (not conceded by Defendant) that as a result of this promise of extra business, HCC's head of claims Richard Ruffee met with P&P's Presser by teleconference in mid-June 2011 and in an in-person meeting later that month (Forbush Aff., Ex. 62 at HCC 0019365-67 and 63 at HCC 0019324-27).

10. It is Plaintiffs' contention that as a result of ERP's efforts, on June 21, 2011 HCC rescinded its notice of intention to terminate the Tolling Agreement entered into on August 31, 2010 (Forbush Aff., Ex. 73).

IV. Facts Relevant to Plaintiffs' Due diligence (Plf's 19-a Stmt at ¶ 228-231)

1. FPC's Pulaski testified that after their broker told FPC in 2007 that there would be no coverage, FPC did not pursue it any further (Pulaski Tr. [Forbush Aff., Ex. 79] at 446).

2. Pulaski testified that FPC has a frozen in time image of Ghisletta's emails that were in her Outlook that had not been deleted during the period January 2006-January 2008 (Pulaski Tr. [Forbush Aff., Ex. 79] at 384). FPC only became aware from the declaratory judgment actions initiated by the Excess Carriers that: (1) ERP mailed the FPC Claim Notices in December 2007; (2) the notice of arbitration demands in May 2009; and (3) ERP had advised

excess carriers on January 31, 2008 that the Fox v Paine Action had been dismissed (Forbush Aff., Ex. 94 at TWIN 3826). No evidence was proffered by Defendant showing that Plaintiffs knew of any of these events earlier than they claim to have known in June 2013. Instead, Defendant argues that Plaintiff should have discovered these facts sooner, either based on the imputation of such knowledge to Plaintiffs based on Ghisletta's knowledge or Plaintiffs' lack of due diligence by failing to search Ghisletta's emails.

3. Defendant does not dispute that ERP failed to provide to FPC and Crystal complete and accurate copies of the files and communications concerning the FPC Policies and claims made thereunder (Plf's 19-a at ¶219-220, citing Marcon Tr. Ex. 7 at 243-244, 377-378, 380 and Pulaski Aff.). By contrast, ERP responded fully to requests by Paine & Partners lawyers in May 2009 concerning documents and correspondence relating to policies in effect as of January 1, 2007 to present, notices of claims to insurers, the Frank Crystal and Fox separation correspondence (Forbush Aff.. Ex. 65).

4. Defendant does not dispute that after November 7, 2007, ERP did not advise Fox, Gersch or any other FPC employees (other than employees that Plaintiffs contend were no longer loyal to FPC such as Ghisletta or Meyer) that the Paine Parties had submitted claims seeking coverage under the FPC Policies, that ERP was advocating on the Paine Parties behalf, or that HCC had decided to disburse the proceeds (Plf's 19-a Stmt at 222-226, *citing* Marcon Tr. at 243-244, 377-378, 380 and Forbush Ex. 85).

5. ERP never told Fox or Gersch or anyone other than employees who had left FPC (*e.g.*, Ghisletta or Meyer) that insurers were inquiring whether insured was pursuing coverage and ERP's Bimar, in a conference call with HCC on January 31, 2018 told HCC that FPC will not be pursuing claim (Forbush Aff., Ex. 6) without having consulted with Gersch and obtaining authorization from him to say that (Plf's 19-a Stmt at ¶ 215-217, *citing* Marcon Tr. at 243-244, Pulaski Aff.) .

PLAINTIFF'S ALLEGATIONS FOUND AT PARAGRAPHS 208 279 AND 307 SHALL BE STRICKEN AND DEFENDANT'S AFFIRMATIVE DEFENSE THAT PLAINTIFFS RELEASED THEIR CLAIMS AGAINST ERP BASED ON THE AUGUST 2012 SETTLEMENT CANNOT BE USED AS A BASIS FOR THE DISMISSAL OF PLAINTIFFS' COMPLAINT

Plaintiffs have had ample opportunity to frame the allegations of their Complaint, as they are now on their fourth complaint filed in this action, having amended their Complaint once as of right, and then having moved to amend their complaint twice before Justice Scheinkman. In his most recent decision on Plaintiffs' motion for leave to amend and supplement their Complaint dated June 1, 2017 (the "June 2017 Decision") (NYSCEF Doc # 675), Justice Scheinkman was specific at to the paragraphs that could be amended (*i.e.,* paragraphs 36-52,. 83-107, 108-114. and 257-305), which did not include the allegations found at paragraphs 208, 279 and 307 of the TAC. A review

of the proposed TAC attached to Plaintiffs' motion to amend reveals that Plaintiffs' proposed amendment was really just a supplementation since Plaintiffs were seeking to conform the pleading to the facts based on evidence obtained during discovery (*i.e.*, they did not seek to add any additional causes of action). In his June 2017 Decision, Justice Scheinkman granted Plaintiffs the right to supplement their Second Amended Complaint to conform the pleadings to the proof uncovered during discovery given the lack of any prejudice since "Plaintiffs do not seek to add any new causes of action against ERP and only seek to conform their pleadings to the proof, and where there has been no contention by ERP or by Plaintiffs that any further discovery would be required, the Court is hard pressed to find that ERP will be substantially prejudiced by allowing this amendment" (June 2017 Decision at 23).

However, rather than filing a TAC that conformed with Justice Scheinkman's June 2017 Decision, which permitted only certain paragraphs to be amended, Plaintiffs took it upon themselves to further amplify the TAC that they filed by adding negligent procurement allegations to their breach of fiduciary duty claim, without first seeking leave of court. Because ERP has not had an opportunity to engage in discovery concerning this claim, and because Plaintiffs have no right to amend without leave of Court, the Court shall grant this branch of ERP's motion and shall strike the allegations found in paragraphs 208, 279 and 307 of the TAC without prejudice to Plaintiffs' right to seek leave to amend to add such negligent procurement allegations to its breach of fiduciary duty claim (*American Cleaners Inc. v American Intl. Specialty Lines Ins. Co.*, 68 AD3d 792 [2d Dept 2009]).

Defendant similarly took it upon itself to entirely revamp its prior Answer to the SAC by adding two affirmative defenses and amending a third. The law is well settled that if an amended complaint entirely replaces the prior complaint, a defendant is not confined to its prior answer and may amend as it sees fit. However, when a complaint is merely supplemented, a defendant is confined to responding to the factual supplementation (*see Martson v Westinghouse Elec. & Mfg., Co.*, 188 AD 900 [2d Dept 1919]; *Madison-Murray Assoc. v Perlbinder*, 188 AD2d 362 [1st Dept 1992]; *St. Lawrence Explosives Corp. v Law Bros. Contr. Corp.*, 170 AD2d 957 [4th Dept 1992]). Here, the TAC is more properly viewed a supplementation. Therefore, Defendant went beyond responding to the factual supplementation to Plaintiffs' original causes of action by, *inter alia*, adding release to its boilerplate Eighth Affirmative Defense, which stated in a conclusory fashion that Plaintiffs' claims were barred by the doctrines of waiver, estoppel, laches, or unclean hands. Defendant further added entirely new defenses in its Ninth[20] and Thirteenth[21] Affirmative Defenses.

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[20]The Ninth Affirmative Defense states that "Plaintiff released all of the causes of action asserted against ERP in the August 2012 settlement agreement described in the TAC" (ERP's Answer to TAC).

[21] The Thirteenth Affirmative Defense states that "Plaintiff ratified and consented to ERP's conduct with respect to the matters alleged in the TAC and/or voluntarily waived or released all claims asserted in the TAC, so that Plaintiff's claims are barred" (ERP's Answer to TAC).

Plaintiffs contend that by failing: (1) to include the defense of release in its answer to the SAC; (2) to include the release defense in its first two motions to dismiss; and (3) to move to dismiss Plaintiffs' breach of contract claim, Defendant cannot raise this defense for the first time in its motion for summary judgment. The Court agrees. Defendant's answer to Plaintiffs' supplemental complaint "should [have] been limited to a response to the new matter alleged" (*Garden State Brickface Co. v Stecker*, 130 AD2d 707 [2d Dept 1987]). It is undisputed that in its two prior motions to dismiss, ERP did not argue that the causes of action asserted against ERP should be dismissed based on Plaintiffs' release of its claims against ERP as set forth in its August 2012 Settlement with the Paine Parties. It is further undisputed that because this affirmative defense was not stated as such in ERP's Answer to the SAC, which was the operative answer for purposes of discovery, Plaintiffs have been foreclosed from any discovery as to such an affirmative defense.

The Court agrees that because Defendant did not seek leave to amend its answer pursuant to CPLR 3025(b), the new matter set forth in Defendant's answer that went beyond responding to Plaintiffs' TAC cannot be considered for the purposes of granting Defendant summary judgment[22] (*Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75 [1st Dept 2015]). Here, as in *Scholastic,* Defendant's catch-all affirmative defense that included waiver but not release did not provide sufficient notice of the defense now articulated by Defendant for the first time in its answer to Plaintiffs' TAC. In reversing the trial court's grant of summary judgment to defendant based on its defense of the statute of limitations because defendant's statute of limitations defense was contained within a catch-all list of 15 total affirmative defenses, most of which were inapplicable, the First Department held

> Plaintiff argues that defendant's defective pleading induced plaintiff to forgo targeted discovery on the statute of limitations issue, and that plaintiff's right to pursue such discovery would thus be prejudiced – and, perhaps, its claim ultimately barred — by allowing the defect to stand. We agree. Although "the burden is expressly placed upon one who attacks a pleading for deficiencies in its allegations to show that he [or she] is prejudiced" ... plaintiff has carried its burden here. If this Court simply ignores defendant's defective pleading, plaintiff will not be able to fully contest the statute of limitations defense and, as a result, its action might be precluded based on insufficient evidence. The motion court recognized this prejudice, remarking that "had Scholastic been given adequate notice that Pace would rely on the six-year limitations period, it would have had notice to seek discovery with respect to the factual basis for such affirmative defense." In this manner, defendant's defective pleading "prevented [plaintiff] from taking some measure in support of [its] case"

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[22]The Court does not agree with Plaintiffs' position that Defendant should be deemed to have waived this affirmative defense based on its failure to assert it in its answer or in its motions to dismiss. In this regard, Defendant's boilerplate affirmative defense of waiver is sufficiently broad to have encompassed release for the purposes of finding that the defense was not waived (CPLR 3211[e]).

(*Scholastic, Inc.*, 129 AD3d at 80 [citations omitted]).

Here, because Defendant failed to specifically plead (with factual allegations) the defense of release in its prior answer (or previously move to dismiss pursuant to CPLR 3211), ERP should not be permitted to raise this defense in connection with its motion for summary judgment.

In addition to its asserting this new affirmative defense, Defendant has also raised new counterclaims that were not previously alleged and for which Plaintiffs have not received any discovery. In their reply to the counterclaims, Plaintiffs asserted that they rejected them as having been untimely asserted without leave of court. For the same reasons the Court is finding Defendant's affirmative defenses were interposed improperly without leave of Court, the Court similarly finds that Defendant's counterclaims were interposed improperly. However, because Justice Scheinkman specifically denied Plaintiffs the right to cross-move to strike the affirmative defenses, the Court shall hold a Commercial Division Rule 24 conference on April 18, 2018 at 9:30 a.m. for the purposes of discussing the need for further motion practice in what has been an overly protracted action.

PLAINTIFFS' SETTLEMENTS WITH THE PAINE PARTIES AND HCC DO NOT PRECLUDE PLAINTIFFS' CLAIMS

ERP relies on the 2012 Settlement between Plaintiffs and the Paine Parties, as well as the HCC Settlement in May 2017, and argues that these settlements preclude Plaintiffs' claims as a matter of law. In support, ERP proffers three theories: (1) because none of the lawsuits filed against the alleged tortfeasors (*i.e.*, the Paine Parties) ever reached a final determination because they were settled, Plaintiffs cannot establish aiding and abetting liability because they absconded their chance to prove the existence of the underlying torts (Def's Mem. at 15); (2) Plaintiffs released ERP as the Paine Parties' representative within the meaning of the August 2012 Settlement with the Paine Parties; and (3) Plaintiffs' acknowledgment in the settlement with HCC that "the full limit of liability under the 2006 FPC Policy has been exhausted" and that "no one other than one or more of the Paine Parties was paid any proceeds from the 2006 FPC Policy" means that there is no dispute concerning the validity of HCC's payment to the Paine Parties and that coverage under the primary policy has been properly exhausted. Based on this alleged factual representation, Defendant argues that Plaintiffs are judicially estopped from asserting anything different in this action as against ERP.

The Court has already ruled that Defendant improperly added its affirmative defenses of release based on the August 2012 Settlement without seeking leave to amend and, therefore, Defendant may not invoke this defense as a basis for dismissal in its current motion for summary judgment. However, because Defendant raised the first theory in its prior motion to dismiss, Defendant has properly raised it in this motion. Furthermore, with regard to the third theory, Plaintiffs stipulated to allow this theory to be asserted in connection with Defendant's motion for summary judgment at a conference held before Justice Scheinkman on July 20, 2017. At that conference, Justice Scheinkman granted Plaintiffs' motion to discontinue the action against HCC and PIA following HCC's settlement with Plaintiffs (*see* Decision and Order dated July 20, 2017

NYSCEF Doc # 700). Accordingly, the Court shall address whether Defendant has established *prima facie* entitlement to summary judgment based on its third theory.

The Court does not agree with ERP's contention that Plaintiffs' settlement with the Paine Parties means that the torts alleged against the Paine Parties were somehow eviscerated and, as a result, Plaintiffs cannot establish aiding and abetting liability against ERP as a matter of law. Under New York's General Obligations Law (NYGOL) § 15-108(a), "[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 from liability .... unless its terms expressly so provide ...." (NYGOL § 15-108[a]; *Ginsburg Dev. Co. v Carbone,* 2010 WL 3072781 at *2 [Sup Ct, Westchester County 2010] [in stipulation of settlement, plaintiff stated it was not releasing any claims against defendants thus settlement did not discharge defendants - simply because plaintiffs settled such claims against certain former defendants does not establish that plaintiff will not prove such former defendants; breach of fiduciary duty and fraud at trial]). The same holds true under California law and Plaintiffs' release of the Paine Parties does not bar Plaintiffs' aiding and abetting claims against ERP (*American Master Lease LLC v Idanta Partners, Ltd.*, 225 Cal App 4th 1451, 1475 [2014]; Cal Code Civ Pro § 877). Indeed, there is no language in the settlement that releases any third parties from liability; instead, it states that there are no third party beneficiaries to the agreement (Settlement at ¶ 16[f]). Furthermore, in its August 2017 Decisions, the Second Department, rejected the same argument offered by HCC and found that Plaintiffs had adequately stated claims against HCC for aiding and abetting the Paine Parties' torts (*see* Plf's 19-a Response at ¶ 271-275).

In *Prime Alliance Group, Ltd. v Affiliated FM Ins. Co.*, (2018 NY Slip Op 01630 [2d Dept 2018]), plaintiffs sued their insurer Affiliated FM Insurance Co. ("Affiliated") based on its denial of plaintiffs' claim for coverage for property damage for plaintiffs' property. Plaintiffs also sued their retail insurance broker, Praxis International Corp. ("Praxis") and their wholesale insurance brokers (the "HUB defendants') based on the brokers' alleged failure to obtain the coverage requested. After plaintiffs settled their claims against Affiliated, Praxis and the HUB defendants moved pursuant to CPLR 3211(a)(7) to dismiss the complaint on the ground that plaintiffs' settlement with Affiliated precluded plaintiffs from pursuing their causes of action to recover damages for failure to procure insurance. Reversing the trial court's grant of defendants' motions to dismiss, the Appellate Division, Second Department held that "the validity of Affiliated's denial of the plaintiffs' claim for property damage remains undecided, notwithstanding that the plaintiffs settled this action with respect to Affiliated ... The complaint alleges that the denial was based on actions taken by Praxis and the HUB defendants. Should the plaintiffs prevail on their causes of action against Praxis and the HUB defendants, any damages they recover must necessarily be reduced by the amount of the settlement from Affiliated, in order to avoid a double recovery" (*id.*). The Second Department further rejected the notion that the settlement meant that plaintiffs were judicially estopped from pursuing their claims (*id.*).

With regard to Defendant's third theory – that Plaintiffs are judicially estopped from pursuing

their claims against ERP based on the HCC Settlement[23] – the Court finds that Defendant has not sustained its burden of showing *prima facie*, that the HCC Settlement precludes Plaintiffs' claims. In essence, Defendant seeks to use representations **made by HCC** in its Settlement with Plaintiffs as binding on Plaintiffs for purposes of judicial estoppel in this case – *i.e.,* ERP seeks to preclude Plaintiffs from arguing that HCC made a wrongful payment to the Paine Parties based on HCC's representation in the Settlement Agreement that "the full limit of liability under the [HCC] Policy has been exhausted by the payment of loss thereunder."

Justice Titone, before becoming an Associate Judge of the New York Court of Appeals, writing for the Appellate Division, Second Department, set forth the basis for judicial estoppel as follows:

> [T]he doctrine of estoppel against inconsistent positions precludes a party from "framing his * * * pleadings in a manner inconsistent with a position taken in a prior proceeding" ... The doctrine rests upon the principle that a litigant "should not be permitted * * * to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise" ... "The policies underlying preclusion of inconsistent positions are 'general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings" ... In short, "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position"(*Environmental Concern, Inc. v Larchwood Constr. Corp.*, 101 AD2d 591, 593 [2d Dept 1984] [Titone, J] [citations omitted]; *Kasmarski v Terranova,* 115 AD2d 640, 641 [2d Dept 1985] [same]; *accord City of New York v College Point Sports Assn., Inc.,* 61 AD3d 33 [2d Dept 2009]; *Prudential Home Mtge. Co., Inc. v Neildan Constr. Corp.,* 209 AD2d 394 [2d Dept 1994]; *Matter of Schmerer v Kahn,* 137 AD2d 758 [2d Dept 1988]).

The principle of judicial estoppel applies where two elements are shown: "[f]irst, the party against whom the estoppel is asserted must have argued an inconsistent position in a prior proceeding; and second, the prior inconsistent position must have been adopted by the court in some manner" (*Matter of 67 Vestry Tenants Assn. v Raab, as Chairperson of the NYC Landmarks Preservation*

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[23]ERP argues that even if Plaintiffs were covered under the policies and HCC made a wrongful payment to the Paine Parties, in entering into the settlement with HCC, Plaintiffs became a party to an agreement that "'warrants that the full limit of liability under the [HCC] Policy has been exhausted by the ***payment of loss thereunder***" and "'warrants that ***no one other than one or more of the Paine Parties was paid any proceeds*** from the [HCC] Policy'" (Def's Mem. at 21 [emphasis added], *quoting* NYSCEF Doc No. 703 ¶8 AA, Ex. 12). According to ERP, by executing the Settlement, Plaintiffs are judicially estopped from alleging that there was a wrongful payment to the Paine Parties and Plaintiffs cannot claim that ERP's alleged failure to perform proximately caused HCC to wrongfully pay the proceeds to the Paine Parties (*id.* at 22).

Commission, 172 Misc 2d 214, 219 [Sup Ct, NY County 1997]; *see Kalikow 78/79 Co. v State*, 174 AD2d 7, 11 [1st Dept 1992], *lv dismissed* 79 NY2d 1040 [1992]). Here, it is evident that the second element is lacking since "[a] 'settlement neither requires not implies any judicial endorsement of either party's claims or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel'" (*Bates v Long Is. R.R. Co.*, 997 F2d 1026, 1038 [2d Cir 1993], *cert denied* 510 US 992 [1993]). Furthermore, HCC's representations in the 2012 Settlement cannot be binding on Plaintiffs for purposes of judicial estoppel. By settling their differences, HCC and Plaintiffs explicitly stated in the 2012 Settlement that "as a desire to settle and compromise all claims ... without admitting or acknowledging any fact or circumstance alleged in those matters." To find that Plaintiffs should be judicially estopped from arguing that the HCC proceeds were wrongfully paid out to the Paine Parties based on Plaintiffs' compromise of their claims against HCC would turn the function of a settlement on its head and have the reverse effect on the stated goal of the courts to foster settlements (*see Prime Alliance Group, Ltd., supra*). Finally, the Court agrees with Plaintiffs that judicial estoppel has no applicability because the language of the Settlement on which Defendant relies does not involve factual assertions. Rather, it constitutes legal arguments or opinions, which are not subject to judicial estoppel.

Turning to ERP's second theory – *i.e.*, that the 2012 Settlement bars Plaintiffs' claims as ERP was the Paine Parties' representative – the Court has already determined that ERP must first seek leave to amend its answer before this defense may be raised in the context of a motion for summary judgment. But even if the defense were properly raised, and even if Defendant were correct in its interpretation of the release as applying to ERP as the Paine Parties' representative,[24] dismissal would only be appropriate for ERP's alleged bad acts during the period that ERP was acting as the Paine Parties' representative, which occurred no sooner than December 14, 2007 and probably some time in January 2008. It is well settled that "'[i]n construing a general release it is appropriate to look to the controversy being settled and purpose for which the release was executed [,] ... [and] 'a release may not be read to cover matters that the parties did not desire or intend to dispose of'" (*Bugel v WPS Niagara Prop., Inc.*, 19 AD3d 1081 [4th Dept 2005]; *BB&S Treated Lumber Co. v Groundwater Tech., Inc.*, 256 AD2d 430 [2d Dept 1998], *lv dismissed* 93 NY2d 958 [1999]; *Humphrey & Vandervoort v C-Kitchens, Inc.*, 198 AD2d 840 [4th Dept 1993]; *Phoenix Assur. Co. of NY v C.A. Shea & Co.*, 237 AD2d 157 [1st Dept 1997]; *Senate Ins. Co. v Ezick*, 279 AD2d 746 [3d Dept 2011]). Here, the language of the release explicitly limits the release to the extent that the third party was acting in the capacity as the Paine Parties' representative. Because there are aspects to Plaintiffs' claims that predate the BOR Letter at a time when there is no question that ERP was still Plaintiffs' representative, even if this defense were properly raised from a procedural standpoint, Defendant would not be able to completely prevail on such a defense as there are triable issues of fact over whether ERP was acting in its capacity as the Paine Parties' representative with regard to

[24] *See, e.g., Wells v Shearson Lehman/American Express, Inc.*, 72 NY2d 11 (1988) (release of claims against defendants, their agents, representatives and anyone else in connection with leveraged buyout of shareholder's challenged in class action unambiguously released former shareholder's financial advisors even though financial advisors were not parties to action).

the alleged bad acts (*Senate Ins. Co., supra*).[25]

THERE ARE TRIABLE ISSUES OF FACT AS TO ERP'S DUTIES BOTH PRE AND POST BOR LETTER (Plaintiffs' First Cause of Action for Breach of Contract and Plaintiffs' Third Cause of Action for Breach of Fiduciary Duty)

For Defendant to be successful on the branches of its motion seeking to dismiss Plaintiffs' claims of breach of contract and breach of fiduciary duty, Defendant must present evidence establishing *prima facie*, that there is no triable issue of fact and Plaintiffs' claims should be dismissed as a matter of law.

To begin with, the Court finds no conflict between the law of California and New York when it comes to all of Plaintiffs' claims and therefore, the Court will reference both states laws in its discussion over whether Defendant has met its *prima facie* burden to dismiss the claims.[26]

With regard to Plaintiffs' Second Cause of Action for breach of contract, the elements necessary for this claim are: (1) the existence of a contract,[27] (2) due performance of the contract by

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[25]In *Senate Ins. Co.*, the Third Department found there were triable issues of fact on whether the action was encompassed within the settlement agreement and release because defendant's status as employee of, and counsel to, the settling party ("LGI") was controverted based on evidence that defendant was plaintiff's general counsel and that he represented plaintiff in connection with the purchase of property. Therefore, the fact that defendant may have also served as general counsel to LGI did not definitely determine whether defendant was released by plaintiff's settlement with LGI, which included the release LGI's agents.

[26]"In New York ... the first question to resolve in determining whether to undertake a choice of law analysis is whether there is an actual conflict of laws" (*Fieger v Pitney Bowes Credit Corp.*, 251 F3d 386, 392 [2d Cir 2001]). "An actual conflict exists where the applicable law from each jurisdiction provides differing rules that have the potential to affect the outcome of the case significantly" (*Horton v Greenwich Hosp.*, 2014 WL 956468 at *2 n1 [SD NY 2014]). In determining the issue of which law applies, the first inquiry is whether there is an actual conflict between the laws of the two jurisdictions. When there is such a conflict, the state with the most significant relationship to the particular issue in conflict controls. Here, there is no need to undertake a conflict of laws analysis since the laws in both jurisdictions are the same.

[27] A contractual relationship with ERP is an essential to standing to maintain an action for breach of contract *(see, e.g., Plaisir v Royal Home Sales*, 81 AD3d 799 [2d Dept 2011]; *CDJ Builders Corp v Hudson Group Construction Corp.*, 67 AD3d 720 [2d Dept 2009]; *see also Citizens Defending Libraries v Marx*, 135 AD3d 582 [1st Dept 2016]; *Bond & Broadway, LLC v Funding Exchange, Inc.*, 132 AD3d 488 [1st Dept 2015], *lv denied* 28 NY3d 909 [2016]; *May v U.S. HIFU,*

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 [2010]; *JP Morgan Chase v J.H. Elec. of NY, Inc.*, 69 AD3d 802, 803 [2d Dept 2010]).

With regard to Plaintiffs' Third Cause of Action for breach of fiduciary duty, a plaintiff must show under New York and California law that there was a fiduciary relationship between the parties, 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]). 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]).

The crux of these branches of ERP's motion is that there are no triable issues of fact that: (1) there was never an agreement between ERP and Plaintiffs to perform the Services alleged in the TAC; (2) as a matter of law there is no fiduciary duty ERP owed to Plaintiffs; and (3) the BOR Letter effectively terminated its agency to Plaintiffs and thus, it owed no further duties to Plaintiffs. With regard to the defaults by ERP involving pre-BOR Letter conduct, it is Defendant's contention that these breaches are barred by the applicable statute of limitations. Alternatively, Defendant argues that it did not breach the agreement since it never agreed to provide Services alleged in the Complaint and even if it did agree to submit the claim on behalf of FPC, it fulfilled its duty by notifying Ghisletta of the FPC Notice and identifying her as the FPC representative to contact in connection with the claim set forth in the FPC Notice.

Turning to Defendant's first argument, while Defendant submitted evidence establishing *prima facie,* that there was never any agreement between ERP and Plaintiffs to provide the Services alleged in the TAC, in opposition to Defendant's prima facie showing, Plaintiffs produced evidence creating triable issues of fact over: (1) the scope of ERP's duties under its brokerage service agreement with Plaintiff; and (2) whether ERP breached its brokerage service agreement based on acts (and failures to act) occurring both before its termination on December 14, 2007 and after its termination when it was still acting on behalf of Plaintiffs with regard to the FPC. Policies In addition, as set forth *infra*, the Court is finding that there are triable issues of fact as to whether Defendant should be equitably estopped from raising the statute of limitations with regard to its breach of contract claim. Accordingly, because Plaintiffs have presented evidence that Defendant committed pre-December 14, 2007 breaches in connection with the Services it agreed to provide,

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LLC, 98 AD3d 1004 [2d Dept 2012]). Here, Plaintiffs contend and ERP does not refute, that while its agreement to perform brokerage services was with FPC , Fox, as a potential insured under the policy, is a third party beneficiary who has standing to sue for breach of contract (*see Hillside Metro Associates, LLC v JPMorgan Chase Bank, NA*, 747 F3d 44, 49 [2d Cir 2014], *cert denied* 747 F3d 44 [2015]).

Plaintiffs' breach of contract claim survives, at least for the present time, with regard to these claims.

Turning to Defendant's second and third argument, it is undisputed that the vast majority of the breaches of duty alleged against ERP are predicated on ERP's acts, and failure to act, during the time period following the BOR Letter. Thus, it is Defendant's contention that to the extent any duties existed, such duties ended with Plaintiffs' termination of ERP in its December 2007 BOR Letter. In support, Defendant relies on *Pulte Group, Inc. v Frank Crystal & Co.* (2012 WL 1372158 [SD NY 2012]) as well as an opinion from the General Counsel of the New York Insurance Department (attached as Ex. 4 to Antonecchia Aff.). Both *Pulte* and the General Counsel's opinion were brought to the attention of the Second Department during the appeals and the Second Department rejected the notion that there can be no duties on behalf of a broker, even post termination of the brokerage agreement, provided that there are facts supporting a special relationship between the insured and broker. Here, there is no language in the BOR Letter specifically terminating ERP with regard to its duties as procuring broker on the 2006-2007 FPC Policies and a fair interpretation of the BOR Letter is that Plaintiffs were terminating ERP with regard to the procurement of their future policies, but not relieving ERP of its duties to FPC in relation to the FPC Policies with regard to the claim ERP had made on FPC's behalf in the FPC notice, without advising FPC that such a claim had been made.

Here, Plaintiffs have submitted ample evidence to support their argument that there are triable issues of fact concerning Defendant's post-BOR duties and its breach of its duties in relation to FPC's claim set forth in the FPC Notice.

The New York Court of Appeals has held that ordinarily, a broker has no fiduciary duties to the insured and 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 advise was being sought and specially relied on" (*Murphy v Kuhn* (90 NY2d 266, 272 [1997]; *Curanovic v New York Cent. Mut. Fire Ins. Co.*, 307 AD2d 435, 438 [3d Dept 2003] ["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"]). Brokers who hold themselves out to be highly skilled experts doing more than simply obtaining requested coverage assume fiduciary duties (*People ex rel Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]). Furthermore, it is well settled that insurance brokers have a duty of care in processing insurance claims (*Abetta Boiler & Welding Serv., Inc. v American Intl. Specialty Lines*

Ins. Co., 76 AD3d 412, 413 [1st Dept 2010];[28] *Pulte Group, Inc. v Frank Crystal & Co.*, 2012 WL 1372158 at *1 [SD NY 2012]; *Homestead Village Assoc., L.P. v Diamond State Ins. Co.*, 818 F Supp 2d 642, 652 [ED NY 2011]). Thus a special relationship may arise where broker and the insured had a relationship 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. (*South Bay Cardiovascular Assoc. v SCS Agency, Inc.* (105 AD3d 939 [2d Dept 2013]; *AJ Contracting Co. v Trident Managers, Inc.*, 234 AD2d 195 [1st Dept 1996]).

In California, like New York, a broker ordinarily assumes only those duties 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 [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.*). 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 ....'" (*Herbert v Lankershim*, 9 Cal 2d 409, 483 [1937]).

An agent is "subject to a duty to use reasonable efforts to give [its] principal information ... relevant to affairs entrusted to [it]" (Restatement [Second] Agency § 381) and this duty survives the termination of the agency relationship. In this regard, "if an agent arranges a transaction on behalf of a principal that is ongoing at the time their agency relationship ends, it may be forseeable to the agent that the former principal will continue to rely on the agent to provide information relevant to

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[28] In *Abetta*, the Appellate Division affirmed the court's denial of a retail broker's motion for summary judgment where the insured claimed that the broker had improperly failed to inform the insured's excess carrier about an underlying personal injury and wrongful death action stating

> the evidence that as a matter of routine Abetta referred all questions regarding its insurance claims to [the retail broker] and [the retail broker] handled all Abetta's insurance needs, including referring its claims to insurers, establishes a special relationship between the two that imposed upon [the retail broker] 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*, 76 AD3d at 413).

The Second Department held that Amerisc's failure to follow up to see if wholesale broker and excess insurer actually received the notice of claim and action rendered broker liable and the court found that there was a question of fact whether "in addition to the duty to transmit all of the information in its possession concerning Abetta's claims, Amerise had a duty to monitor Abetta's pending claims to ascertain whether they had given rise to lawsuits to be reported to the insurers"

the ongoing transaction" (Restatement [Third] Agency § 8.11, cmt.c).

"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]). "It exists only when a person reposes a high level of confidence and reliance in another who thereby exercises control and dominance over him" (*People ex rel Cuomo v Coventry First LLC*, 13 NY3d at 115, *citing EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]) 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 and there is no fiduciary relationship between an insurance broker and the client (*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]).

The Court is reluctant to impose on brokers any ongoing duty, be it fiduciary or otherwise (unless it is expressly set forth in a written agreement) post termination, to advocate for coverage on a claim that had been submitted on behalf of its insured. Indeed, ERP's understanding of its post BOR duties is exemplified in the FPC Notice wherein it notified the insurers to follow up with the insured with regard to the claim. Nevertheless, in opposition to Defendant's motion, Plaintiffs have presented evidence that creates triable issues of fact as to whether ERP had duties to FPC following the BOR Letter based upon, inter alia, the superior knowledge it obtained while working on behalf of Plaintiffs and its knowledge that Plaintiffs were entirely in the dark with regard to the FPC Notice. That evidence includes: (1) ERP's advice to Plaintiffs that there would probably not be coverage under the insured v insured exception and then ERP's later knowledge that the insurers changed their position on coverage without apprising Plaintiffs of that fact; (2) ERP's knowledge of the split between Fox and Paine based on its knowledge of the allegations of the Complaint and Counterclaims in the Fox v Paine Action in late September 2007 yet its failure to provide information concerning the FPC Notice and the claim made to anyone other than Ghisletta;[29](3) the evidence of ERP's efforts on FPC's behalf even after the BOR Letter which suggests it understood[30]

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[29]Those allegations revealed that Fox (on behalf of FPC) and Paine were each accusing the other of breaches of fiduciary duty, including Fox's claim that Paine had stolen various FPC employees, including Ghisletta. The Court does not merit Defendant's contention that it could not assume the allegations of the complaint in the Fox v Paine Action as giving Fox any more authority than Paine with regard to which employees were authorized FPC representatives. Plaintiffs have submitted sufficient evidence from which a reasonable jury could infer that Defendant knew of the split, where Ghisletta's allegiances lay, and that ERP could not rely on Ghisletta to impart the knowledge bestowed on her by ERP to FPC.

[30]"'[T]he parties course of performance under the contract is considered to be the "most persuasive evidence of the agreed intention of the parties" ... "Generally speaking, the practical

that it had a post-BOR Letter contractual or other duties to FPC to assist it with regard to the FPC Policies[31]; (3) ERP's failure to insert in the FPC Notice that the insurers should contact an authorized FPC representative other than Ghisletta with regard to the FPC Notice; (4) ERP's failure to notify Plaintiffs when the insurers requested information in January 2008 whether the insured intended to pursue such claims; (5) ERP's unilateral decision to (without authorization from a legitimate FPC representative) advise the insurers that Plaintiffs did not intend to pursue their claims; (6)ERP's failure to provide FPC with the complete files of FPC's Policies and related correspondence; (7) ERP's attempt to add FPM III to the FPC Policies; and (8) the evidence which could lead to an inference that ERP had chosen to align itself with the Paine Parties both before and after the BOR Letter and collude with them to obtain the insurance proceeds. Given this evidence, the Court finds that there are triable issues of fact over whether ERP breached a duty as Plaintiffs' agent by using confidential information belonging to Plaintiffs "to compet[e], for [its] own benefit [and for the benefit of its new valued customer [P&P] a transaction originally undertaken on [its former's principal's] behalf (*ABKCO Music, Inc. v Harrisongs Music, Ltd.*, 722 F2d 988, 995 [2d Cir 1983]). Thus, there are triable issues of fact whether ERP's nondisclosure of essential facts was unfair (*Barrett v Freifeld*, 77 AD3d 600 [2d Dept 2010]).

Thus, while in the ordinary insurance broker/insured relationship, it would be unreasonable to put an affirmative obligation on a broker to continue for years into the future to handle a claim submitted on behalf of its insured post termination, here there are questions of fact surrounding whether a special relationship existed between ERP and Plaintiffs such that a broker cannot side with the adversary to its former client to usurp a benefit that is subject to dispute without at least advising its prior client of its activities.

Defendant contends it fulfilled its obligations to Plaintiff by imparting the information concerning the FPC Notice to Ghisletta, Plaintiffs' agent, and that Ghisletta's knowledge must be imputed to FPC. For the reasons that follow, the Court finds that there are triable issues of fact over whether, under Delaware law,[32] the information imparted to Ghisletta must be imputed to Plaintiffs.

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interpretation of a contract by the parties to it for any considerable period of time before it comes to be the subject of controversy is deemed of great, if not controlling influence: .... As Restatement (Second) of Contracts § 202, comment g has expressed it, "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning'"" (*Gulf Ins. Co. v Transatlantic Reinsurance Co.*, 69 AD3d 71, 85-86 [1st Dept 2009] [citations omitted]).

[31]Those actions include ERP's efforts to have the FPC Policies extended until January 2008 and Bimar's communications with the insurers on FPC's behalf concerning the FPC Notice throughout January 2008.

[32]The parties are in agreement that Delaware law governs the internal affairs of a corporation incorporated in the Delaware. Here, it is undisputed that FPC was incorporated in Delaware and that therefore, whether Ghisletta's knowledge may be imputed to FPC is governed by Delaware law.

The rationale behind imputation of an agent's knowledge to a principal is "'the presumption that an agent had discharged his duty to disclose to his principal all material facts coming to his knowledge as to the subject of his agency' .... This rationale fails when the agent has an adverse interest, which, by its very nature, he seeks to conceal from his principal" (*Lincoln Natl. Life Ins. Co. v Snyder,* 722 F Supp 2d 546, 556 [D Del 2010], *quoting KE Prop. Mgt., Inc. v 275 Madison Mgt. Corp.*, 1993 WL 285900 at *5 [Del Ch Ct 1993]). Thus, the issue becomes whether, at the time the information concerning the FPC Notice was imparted to Ghisletta as well as other information concerning the FPC Policies and the claims made thereunder, Ghisletta was acting adversely to Plaintiff's interests and, therefore, the adverse interest exception to the imputation doctrine would be applicable given Ghisletta's divided loyalties (*Lincoln Natl Life Ins. Co.*, 722 F Supp 2d at 556; *MetCap Sec., LLC v Pearl Senior Care, Inc.*, 2007 WL 1498989 [D Del 2007]; *see also FDIC v Mortgage Zone, Inc.*, 2010 WL 4000158 at * 4 [ED NY 2010] [adverse interest exception "provides that when an agent is engaged in a scheme to defraud his principal, either for his own benefit or for that of a third person, the presumption that knowledge held by the agent was disclosed to the principal fails because he cannot be presumed to have disclosed that which would expose and defeat his fraudulent purpose"]). In *Stewart v Wilmington Trust SP Serv., Inc.*, 112 A3d 271 [Del Ch Ct 2015], *affd* 126 A3d 1115 [2015]), the court noted the exceptions to the imputation doctrine, which are "[a] principal ... is not presumed to have knowledge of or be liable for the actions of an agent that abandons the principal's interests" **or** "when the corporate agent responsible for the wrongdoing was acting solely to advance his own personal financial interest, rather than that of the corporation itself" (*id.* at 303, *citing Matter of American Intl. Group, Inc. Consol. Derivative Litig.*, 976 A2d 872, 891, n50 [Del Ch Ct 2009], *affd* 11 AD3d 228 [2010] ["AIG II"]). In AIG II, the court explained that "where a fiduciary acts with third parties in order to siphon off corporate funds, that fiduciary is not just working for her own benefit, she is acting to harm the corporation. Thus, the corporation should be able to sue the third party that helped the fiduciary harm the corporation" (*AIG II*, 976 A2d at 891). In this case, as set forth more fully *infra*, Plaintiffs have presented evidence raising triable issues of fact over whether ERP was colluding with the Paine Parties (including Ghiseletta) to siphon off the proceeds of the FPC Policies to which Plaintiffs contend, the Paine Parties were not entitled. Thus, the Court does not agree with Defendant that for the exception to apply, Ghisletta must have been acting purely for her own personal interests and that FPC reaped no benefit from the FPC Notice (*see Stewart*, *supra*, 112 A3d at 303 [for the exception to apply the agent has to abandon the principal's interest or act solely to advance the agent's interest]). Thus, it would be sufficient that at the time the information concerning the FPC Notice, Ghisletta had divided loyalties and ERP was on notice of those divided loyalties through its receipt of the Complaint in the Fox-Paine litigation on September 23, 2007 (Def's Answer to TAC at ¶ 90 [NYSCEF Doc. # 719).

As set forth more fully herein, based on the evidence presented in support of, and in opposition to Defendant's motion, both of those issues involve triable questions of fact. Defendant has not presented evidence that irrefutably shows that "Plaintiffs indisputably benefitted from Ghiseletta's actions, and therefore Ghisletta's knowledge imputes to them" (Def's Reply at 8). As set forth *infra*, Plaintiffs have submitted evidence supporting how they were injured by the Paine Parties' activities and ERP's involvement. Finally, the Court rejects Defendant's contention that there is no triable issue of fact that Plaintiffs ratified Ghisletta's acts as their representative because

under New York and California law, Plaintiffs "are bound by Ghisletta's apparent authority unless they affirmatively correct that representation" (Def's Reply at 8). Again, in opposition to Defendant's arguments, Plaintiffs have submitted evidence creating a triable issue of fact over whether given that ERP was fully versed in the Fox v Paine Action and FPC's request that it be covered by the HCC Policy, ERP could properly view Ghisletta as Plaintiffs' legitimate agent.[33]

The Court does not agree with ERP's argument that because Plaintiffs induced, encouraged and ratified ERP working as P&P's broker by issuing the BOR letter, Plaintiffs knew that ERP would perform services for P&P and that those services are the very breaches and tortious conduct of which Plaintiffs now complain. Ratification requires a person's knowledge of the alleged transgressions and a failure to object to same (*see, e.g., Greenberg v Acme Folding Box Co.*, 84 Misc 2d 181, 182-183 [Sup Ct, Kings County 1975], *citing Diamond v Diamond*, 307 NY 263 [1954]; *see also Gottfried v Gottfried*, 112 NYS2d 431 [Sup Ct, NY County 1952]). Defendant has proffered no evidence to support Plaintiffs' knowledge of ERP's alleged misdeeds and their failure to object to such misdeeds. Moreover, Plaintiffs have presented evidence establishing triable issues of fact concerning their lack of knowledge and their due diligence[34] – i.e., that Plaintiffs' knowledge of Defendant's alleged bad acts was thwarted by Defendant's efforts to conceal the relevant facts from Plaintiff (*e.g.*, by advising that there was likely no coverage because of the insured v insured exclusion and by failing to advise FPC that the FPC Notice had been issued and the insurers were inquiring about whether FPC intended to pursue its noticed claims). Plaintiffs have presented sufficient circumstantial evidence creating a triable issue of fact as to whether in breach of its agency (i.e., fiduciary) duty to Plaintiffs, Defendant colluded with the Paine Parties to wrongfully divert the FPC Policies and FPC Notice to the Paine Parties.

THERE ARE TRIABLE ISSUES OF FACT OVER PLAINTIFFS' SECOND 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

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[33]This is true regardless of the fact that the allegations of the Complaint by Fox against Paine were unproven and, therefore, Fox's contentions could not be viewed as binding on FPC. Upon its becoming aware of the split between Fox and Paine in September 2007, a trier of fact could determine that ERP had a duty not to align itself with Paine.

[34] Plaintiffs proffered a basis for their reasonable reliance on ERP's material omissions because they understood that the FPC Policies expressly provided that all notices and communications regarding claims submitted were to be submitted and received by FPC – *i.e.*, that no claims, communications or coverage or payment determinations would be made without their knowledge and consent.

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]).

To establish a claim of fraudulent concealment, a plaintiff must show: (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.*,16 NY3d at 178). 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 intend 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 [2010], *quoting Kaldenbach v Mutual of Omaha Life Ins. Co.*, 178 Cal App 4th 830, 850 [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]). As the qualifying language in the quotation implies, while mere nondisclosure, standing alone, is not generally actionable, if the defendant does more than just stay silent and engages in deceptive acts, there are circumstances under which liability may be imposed. "In business [transactions], an affirmative duty to disclose material information may arise from the need to complete or clarify one party's partial or ambiguous statement .... or from a fiduciary or confidential relationship between the parties ....Such a duty may also arise .... where: (1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge" (*Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank*, 57 F3d 146, 155 [2d Cir 1995]). An active concealment is substantively the same as an affirmative misrepresentation (60 NY Jur 2d, Fraud and Deceit § 88). Active concealment implies purposeful misrepresentation, *i.e.*, the Defendant's affirmative attempt to hide something (*London v Courduff*, 141 AD2d 803 [1st Dept 1988], *lv dismissed* 73 NY2d 809 [1988]). When there has been an active fraudulent concealment, a duty to speak arises even in the absence of a confidential, fiduciary or contractual relationship (*Clement v Delaney Realty Corp.*, 83 AD3d 881 [2d Dept 2011]; *Haberman v Greenspan*, 82 Misc 2d 263 [Sup Ct, Richmond County 1975]).

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 [1996]). "Active concealment or suppression of facts by a nonfiduciary is the equivalent of a false representation (partial disclosure creates a duty to disclose)- even where no duty to disclose would otherwise exist, where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud" (*Vega v Jones, Day, Reavis & Pogue*, 121 Cal App 4th 282, 298 [2004]). The question in a nondisclosure case is whether the defendant knows of material facts, and also knows that those facts are neither known nor readily accessible to the plaintiff.

In addition, under New York law, a duty to disclose arises "when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (the "special facts doctrine")[35] (*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]).

Given the foregoing law, while Defendant has provided evidence establishing, *prima facie*, that it owed no duty to Plaintiffs and, at most, it simply failed to inform Plaintiffs of the Paine Parties' fraudulent activities. However, in opposition, Plaintiffs have presented evidence (as

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[35]California has analogous law which recognizes "that a disparity of knowledge may impose an affirmative duty of disclosure" (*Westrick v State Farm Ins.*, 127 Cal App 3d 685, 691 [1982]).

discussed herein), which includes potential affirmative misrepresentations,[36] as well as ERP's active concealment, that creates triable issues of material fact whether Defendant committed fraud against Plaintiffs (*see, e.g., Westrick, supra; MBIA Ins. Corp.v J.P. Morgan Sec., LLC,* 2014 NY Slip Op 50732[U], 43 Misc 3d 1221[A] [Sup Ct, Westchester County 2014]).

THERE ARE TRIABLE ISSUES OF FACT OVER WHETHER ERP AIDED AND ABETTED THE PAINE PARTIES' FRAUD AND THE PAINE PARTIES' BREACH OF FIDUCIARY DUTIES
(Plaintiff's Fourth and Fifth Causes of Action)

To begin with, in its moving papers, ERP does not argue that there are no triable issues of fact over whether the Paine Parties engaged in fraud and breach of fiduciary duty with regard to their obtaining all of the proceeds of the HCC Policy and some of the proceeds of the Excess Policies.[37] Thus, the sole argument raised by ERP in these branches of its motion is that there is no triable issue of material fact that its failure to alert Plaintiffs to the Paine Parties' actions cannot constitute aiding and abetting as a matter of law.

To sustain a claim of aiding and abetting a breach of fiduciary duty, a plaintiff must prove (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,* 2001 WL 59237 at * 7). "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, 1212 [2d Dept 2011] [citations omitted]; *Kaufman,* 307 AD2d at 126). It is

[36]An expression of opinion such as this may be actionable as fraud "where a confidential relationship exists ... To establish a basis of liability, it must be shown that the person making the representation had, or held himself out as having superior knowledge and recognized that the other person confided in him for guidance" (*Hutchins v Utica Mut. Ins. Co.*, 107 AD2d 871, 872 [3d Dept 1985]).

[37]The only argument concerning the sufficiency of those torts is Defendant's contention that Plaintiffs absconded their claims of fraud and breach of fiduciary duty against the Paine Parties through their release of such claims as a part of the 2012 Settlement.

well settled that "'[s]ubstantial assistance' requires an affirmative act on the defendant's party; '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,* 307 AD2d at 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'" (*Nasrawi v Buck Consultants, LLC*, 231 Cal App 4th 328, 343 [2014]; *see also American Master Lease LLC,* 225 Cal App 4th at 1475; *Casey v U.S. Bank Natl. Assn.*, 127 Cal App 4th 1138, 1144 [2005]). In California, a plaintiff must show "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). The knowledge element in *Simi Mgt Corp. v Bank of Am.*, (930 F Supp 2d 1082 [ND Cal 2013]) was satisfied as against a bank for aiding and abetting a company's CFO's breach of fiduciary duties, based on the bank's knowledge of the CFO's banking activities, including his prolific use of cashiers checks, his making Plaintiff's checks payable to cash or to the bank, and his use of Plaintiff's funds for goods and services likely unconnected to Plaintiff's business. In that case, the court denied the bank's motion for summary judgment of plaintiff's claim for aiding and abetting the CFO's breach of fiduciary duty since these facts could lead a reasonable jury to infer the bank's knowledge of the CFO's breach of fiduciary duty.

To sustain a claim of aiding and abetting a fraud, a plaintiff must establish:"'(1) the existence of a fraud; (2) a defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission" (*JP Morgan Chase Bank v Winnick*, 406 F Supp 2d 247, 252 [SD NY 2005]; *Cianci v Centaurus Fin. Inc.*, 2011 WL 1679026 at * 7 [Cal Ct App 2011] [the elements for aiding and abetting a fraud are "(1) knowledge that another's conduct constitutes a breach of duty; and (2) substantial assistance or encouragement of the other to so act']). Inaction or silence are insufficient to sustain a claim for aiding and abetting unless the defendant owes an independent duty to the plaintiff (*Jebran v LaSalle Bus. Credit, LLC,* 33 AD3d 424, 424 [1st Dept 2006]; *Sterling Natl. Bank v Ernst & Young, LLP*, 2005 NY Slip Op 51850[U], 9 Misc 3d 1129[A] [Sup Ct NY County 2005]). The aider and abettor must be alleged to have had actual knowledge of the fraud (*Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005]; *Renner v Chase Manhattan Bank, N.A.*, 85 Fed Appx 782, 784 [2d Cir 2004]). Substantial assistance is found to exist where (1) a defendant "affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed; and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 489 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]; *Cromer Fin. Ltd. v Berger*, 137 F Supp 2d 452, 470 [SD NY 2001]).

Defendant's reliance on cases standing for the proposition that (1) the mere performance of normal business activities; and (2) mere inaction, do not constitute aiding and abetting, is misplaced

(*Chambers v Weinstein*, 2014 NY Slip Op 51331[U], 44 Misc 3d 1224[A] [Sup Ct, NY County 2014], *affd* 135 AD3d 450 [1st Dept 2016]; *Fiol v Doellststedt*, 50 Cal App 4 th 1318 [Cal Ct App 1996]). Thus, even ordinary business transactions may satisfy the substantial assistance element for aiding and abetting if the alleged aider and abettor knew that those transactions were aiding the tortfeasor (*Casey*, 127 Cal App 4th at 1145).

In support of its motion, Defendant has presented *prima facie* proof that its only assistance to the Paine Parties' fraud and breaches of fiduciary duty was its failure to alert Plaintiffs that the Paine Parties were attempting to recover the proceeds from the FPC Policies. However, in opposition to Defendant's *prima facie* showing, Plaintiffs have presented evidence of ERP's active participation in the Paine Parties' fraud and breach of fiduciary duty based upon, *inter alia*, (1) the circumstantial evidence[38] of ERP's initial collusion with the Paine Parties to prevent FPC from learning that the FPC Notice had been issued to HCC and the Excess Carriers based on ERP's dealing only with Ghisletta with regard to the FPC Notice and ERP's identification of Ghisletta as the person to contact at FPC regarding the claims when ERP knew or should have known that Ghisletta was acting adversely to Plaintiffs; (2) ERP's failure to correct HCC's counsel when it requested on behalf of HCC in its correspondence in response to Presser's claim to have the Paine Parties covered by the HCC Policy that it was HCC's understanding that Presser was not only the Paine Parties' but also FPC's designated representative and if that was not the case, it should be advised immediately; (3) ERP's advocating in October 2009-November 2009 on behalf of Paine Parties (including using enticements for additional business for the insurers) with HCC, the Excess Insurers Hartford/Twin City (Forbush Aff., Exs. 43, 64 at HC 0044070; Forbush Aff., Ex. 91 at ERP 2855; Forbush Aff., Ex. 61 at HCC 0019323; Forbush Aff., Ex. 72; Forbush Aff., Ex. 62 at HCC 0019365-67 and 63 at HCC 0019324-327; Forbush Aff., Ex. 43); (4) evidence of ERP attempting to conceal the activities from FPC in accordance with the Paine Parties' directives (Forbush Aff., Exs. 43, 85).[39]

Because under New York law and California law, "'[s]ubstantial 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, 1211 [2d Dept 2011] [citations omitted]), based on the foregoing facts, there are material issues of fact

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[38]Plaintiffs submitted the following additional circumstantial evidence such as ERP's attempts to have FPM III included as an insured on the FPC Policies in August 2007, during the time that FPC and FPM III were adverse to each other and embroiled in a lawsuit (Forbush Aff., Exs. 68, 69). Later, on December 17, 2007, after HCC had forwarded ERP the BOR Letter, ERP was concerned that FPC was commandeering the FPC Policies and Marcon stated that ERP would "need to call Amy" (Forbush Aff., Ex. 71), which further supports the inference that ERP was aligned with the Paine Parties at a time that it was still clearly acting on FPC's behalf..

[39]This same evidence supports this Court's determination, infra, that there are triable issues of fact concerning whether ERP should be equitably estopped from relying on the statute of limitations.

over whether ERP substantially assisted the Paine Parties' fraud and/or breach of fiduciary duties which must be resolved by the trier of fact.

THERE ARE TRIABLE ISSUES OF FACT OVER WHETHER PLAINTIFFS' CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS

The Court turns to whether Defendant is entitled to summary judgment because Plaintiffs' claims of breach of contract, fraud, breach of fiduciary duty, and aiding and abetting the Paine Parties' fraud and breach of fiduciary duty are time barred as a matter of law.[40]

In moving to dismiss a cause of action as barred by the applicable statute of limitations, the moving defendant bears the initial burden of demonstrating, *prima facie,* that the time within which to commence the cause of action has expired; the burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*Muscat v Mid-Hudson Med. Group., P.C.*, 135 AD3d 915, 916 [2d Dept 2016]). In assessing whether ERP met its initial burden, the Court must first determine which state's (California or New York) statute of limitations applies in this case.

In this regard, New York's borrowing statute, CPLR 202 controls this Court's determination over the timeliness of Plaintiffs' claims. CPLR 202 provides:

> [a]n action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued (CPLR 202).

Under New York's borrowing statute, when a cause of action accrues outside New York and the plaintiff is a nonresident, CPLR 202 borrows the statute of limitations of the jurisdiction where the claim arose, if shorter than New York, to determine whether the action was timely filed (*Norex Petroleum Ltd. v Blavatnik*, 23 NY3d 665 [2014]). In this case, Plaintiffs are California residents and the Plaintiffs' breach of contract and tort causes of action accrued[41] in California since Plaintiffs allege purely economic losses (*id.* at 671, *citing Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529

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[40] As the Court has stricken, for the time being, Plaintiffs' claim of negligent procurement contained within its breach of fiduciary duty cause of action, the Court shall not address Defendant's argument that the claim is barred based on the three year limitations that accrued when the coverage denied *(Bonded Waterproofing Serv., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527 [2d Dept 2011]).

[41] "A cause of action accrues, for the purpose of measuring the period of limitations, 'when all the facts necessary to the cause of action have occurred so that the party would be entitled to obtain relief in court'"(*Grynberg v Giffen,* 119 AD3d 526, 527 [2d Dept 2014], *lv denied* 25 NY3d 95 [2015]).

["when the claimed injury is economic, the cause of action typically accrues 'where the plainitff resides and sustains the economic loss"]; *see also Deutsche Bank Nat. Trust Co.v Barclays Bank, PLC,* 156 AD3d 401 [1st Dept 2017]). Thus, CPLR 202 provides that a cause of action is timely if it is timely under both the statute of limitations of New York and of the jurisdiction in which the cause of action accrued (*Portfolio Recovery Assoc., LLC v King*, 14 NY3d 410 [2010]; *Antone v General Motors Corp.*, 64 NY2d 20 [1983]). Furthermore, the general rule is that "when borrowing foreign law pursuant to CPLR 202, foreign tolls and extensions must be imported, too" (*Norex Petroleum Ltd*, 23 NY3d at 676, *see also Martin v Dierck Equip. Co.*, 43 NY2d 583 [1978]; *Childs v Brandon*, 60 NY2d 927, 929 [1984]; *Portfolio Recovery Assoc., LLC, supra*; *GML, Inc.v Cinque & Cinque, P.C.*, 9 NY3d 949 [2007]).

Professor Siegel has explained the workings of the borrowing statute as follows:

> The "borrowing" takes place only when the foreign claim accrues to a nonresident, which includes a foreign corporation .... The New York period is looked to on the one hand, and, on the other, the period applicable under the laws of the place "where the cause of action accrued". The two are then compared and the shorter of the two is the one applied. If the claim has expired under either the New York or foreign period, in other words, it's barred. Note that there is not necessarily a "borrowing", therefore; the statute really dictates a comparison, with a "borrowing" of the foreign period only if it is the shorter of the two compared ....
>
> The periods that are compared are the "net" periods. That is, the New York period, with all relevant New York extensions and tolls integrated, is one prong of the comparison, and the foreign period, with the foreign tolls and extensions integrated, is the other. The New York tolls are not superimposed on the foreign period, or vice versa .... (Siegel, NY Prac. § 57 [5th ed. 2011]).

Here, New York's limitations period for breach of contract is six years (CPLR 213[2]). Therefore, California's shorter statute of limitations of two years for breach of an oral contract would appear to apply (Cal Code of Civ. Pro. § 339[1]).[42] However, California also recognizes, under certain circumstances, the statute of limitations for breach of contract may be tolled until plaintiff discovers the breach. Thus, in California, "the discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time" (*April Enter. Inc. v KTTV,* 147 Cal App 3d 805, 832 [1983]). The courts in California reason that "[u]nder such circumstances ... it is unreasonable to expect a contracting party 'to continually monitor whether the other party is performing some act inconsistent with one of the many possible terms in a contract ... especially ... when the breaching party can commit the offending act secretly, within the privacy of its own offices" (*Gryczman v 4550 Pico Partners, Ltd.*, 107 Cal App 4th 1, 5 [2003]).

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[42]It is undisputed that there is no written contract between ERP and Plaintiffs.

In *Gryczman*, the court explained that there is a common thread applicable to the discovery rule for breach of contract or tort cases : (1) "'[t]he injury or the act causing the injury, or both, have been difficult for the plaintiff to detect'"; (2) "'the defendant has been in a far superior position to comprehend the act and the injury'"; and (3) "'the defendant had reason to believe the plaintiff remained ignorant he had been wronged'" (*Gryczman*, 131 Cal App 4th at 5, *quoting April Enter., Inc.*, 147 Cal App 3d at 831). Here, as set forth herein, Plaintiffs have presented evidence in support of a trier of fact's finding that all three elements are met so as to allow a discovery rule on Plaintiffs' breach of fiduciary duty and contract claims.

By contrast, New York's six year statute of limitations for breach of contract claims accrues at the time of the breach, regardless of whether or not plaintiff is aware of the defendant's breach (*Reid v Inorporated Village of Floral Park*, 107 AD3d 777 [2d Dept 2013]). Nevertheless, under the certain circumstances, such as the ones present in this case, equitable estoppel may be invoked to toll the running of the statute of limitations.

The law will equitably toll a statute of limitations where a defendant induces a plaintiff to refrain from instituting an action, either by false statements of fact, or by active concealment of the true facts. Thus, "a defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations, or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]; *Paterra v Nationwide Mut. Fire Ins. Co.*, 38 AD3d 511 [2d Dept 2007], *quoting Garcia v Peterson*, 32 AD3d 992, 992 [2d Dept 2006]). "For the doctrine to apply, a plaintiff may not rely on the same act that forms the basis for the claim– the later fraudulent misrepresentation must be for the purpose of concealing the former tort ... The uncommon remedy of equitable estoppel 'is triggered by some conduct on the part of the defendant after the initial wrongdoing, mere silence or failure to disclose the wrongdoing is insufficient" (*Ross v Louise Wise Serv., Inc.*, 8 NY3d 478, 491 [2007]).[43] "Due diligence on the part of plaintiff in commencing the action is an essential element when plaintiff seeks the shelter of this doctrine" (*Ross*, 28 AD3d 272, 282 [1st Dept 2006], *affd* 8 NY3d 478 [2007]).[44] "A party seeking to invoke equitable estoppel bears the burden of demonstrating the following under New York law: '(1) An act constituting a concealment of facts or a false representation [which was must be distinct from the underlying claim]; (2) [a]n intention or expectation that such acts will be relied upon; (3) [a]ctual or constructive knowledge of the true facts by the wrongdoers; [and] (4) [r]eliance upon the misrepresentations which causes the innocent party to change its position to its substantial detriment'" (*Clement v Farmington Casualty Co.*, 2015 WL 6971565 at *4 [SD NY 2015], *quoting General Elec. Capital*

[43]Contrary to ERP's contention, the acts of fraudulent concealment by ERP alleged by Plaintiffs are obviously separate from the acts underlying Plaintiffs' breach of contract claim.

[44] "[T]he burden is on the plaintiff to establish that the action was brought within a reasonable time after the facts, giving rise to the estoppel have ceased to be operational. Whether in any particular instance the plaintiff will have discharged his responsibility of due diligence in this regard must necessarily depend on all the relevant circumstances" (*Simcuski*, 44 NY2d at 450).

Corp. v Armadora, S.A., 37 F3d 41, 45 [2d Cir 1994]; *Town of Hempstead v Incorporated Village of Freeport*, 15 AD3d 567 [2d Dept 2005], *lv denied* 5 NY3d 711 [2005]).[45] "[T]he question of whether a defendant should be equitably estopped is generally a question of fact" (*Richey v Hamm*, 78 AD3d 1600 [4th Dept 2010]; *see also Century Fed. Sav. and Loan Assn. v Net Realty Holding Trust*, 87 AD2d 858 [2d Dept 1982]). Similarly, whether Plaintiffs exercised the requisite due diligence in uncovering the fraud and breach of fiduciary duty is a question of fact (*Altman v Poughkeepsie Sav. Bank*, 72 AD2d 552 [2d Dept 1979]; *Matter of State Farm Mut. Auto Ins.*, 275 AD2d 989 [4th Dept 2000]).

The New York Court of Appeals has held that "'[f]raudulent representations may play a dual role. They may be the basis for an independent action for fraud. They may also, in equity, be a basis for an equitable estoppel barring the defendants from invoking the Statute of Limitations as against a cause of action for breach of fiduciary relations'" (*Simcuski*, 44 NY2d at 448). When an equitable estoppel is based on a fraudulent concealment (as opposed to a fraudulent misrepresentation lulling Plaintiffs into inaction), there must be a fiduciary duty between the parties (*Zumpano v Quinn*, 6 NY3d 666 [2006]; *Reiner v Jaeger*, 50 AD3d 761 [2d Dept 2008]; *Jordan v Ford Motor Co.*, 73 AD2d 422 [4th Dept 1980]).

With regard to Plaintiffs' claim of fraud, California has a three year statute of limitations which commences to run "'only after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud, thus putting him on notice of inquiry'" (*Vega, supra* 121 Cal App 4th at 298, *quoting Hobart v Hobart Estate Co*, 26 Cal 2d 412, 437 [1945]). "The means of knowledge are equivalent to knowledge 'only where there is a duty to inquiry, as where plaintiff is aware of facts which would make a reasonably prudent person suspicious'" (*id.*). In New York, the statute of limitations for fraud is either six years from the fraud or two years from discovery, whichever is later. In addition, a fraud cause of action "accrues ... at the time plaintiff 'possesses knowledge of the facts from which the fraud could have been discovered with reasonable diligence'" (*Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2d Dept 2015]). "[T]he statutory period does not await the leisurely discovery of the full details of the alleged scheme; knowledge will be imputed to a plaintiff claiming fraud if, with reasonable diligence, plaintiff could have discovered the fraud prior to its actual discovery" (*Rusyniak v Gensini*, 629 F Supp 2d 203 [ND NY 2009]). "'It is plaintiff's burden to establish 'facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry' ... '[W]hether the plaintiff exercised reasonable diligence is a question of fact for the

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[45]The law in California is the same. It holds that estoppel arises where (1) the plaintiff is aware of the cause of action and the identity of the wrongdoer but the wrongdoer induces the plaintiff to refrain from suing; (2) the plaintiff is unaware of the cause of action and his ignorance is due to fraudulent concealment by defendant; (3) the plaintiff is unaware of the identity of the wrongdoer and this is due to fraudulent concealment by the defendant (*Cespedes v Metropolitan Life Ins. Co.*, 2012 WL 5987445 at *4 [2012]; *Hydro-Mill Co. v Hayward Tilton and Rolapp Ins. Assocs., Inc.*, 115 Cal App 4th 1145, 1165-1166 [2004]).

court or jury to decide'" (*April Enter. Inc.*, 147 Cal App 3d at 833 [citations omitted]).

Under California law and New York law, Plaintiffs' aiding and abetting claims are governed by the same statute of limitations as the underlying tort claims (*see Coleman*, 125 AD3d at 716; *Solow v Tanger*, 258 AD2d 323 [1st Dept 1999]; *see also* CPLR 318 [8]; *Hudson v Delta Kew Holding Corp.*, 2014 NY Slip Op 50756[U], 43 Misc 3d 1223[A] at *4 [Sup Ct, Suffolk County 2014]; *American Master Lease LLC v Idanta Partners, Ltd.*, 225 Cal App 4th 1451, 1478 [2014]). Thus, with regard to Plaintiffs' claims of fraud and aiding and abetting the Paine Parties' fraud, Plaintiffs must have instituted this action within two years of the time that they possessed knowledge of the facts from which the fraud could have been discovered with reasonable diligence.

For Plaintiffs' breach of fiduciary duty claim, "New York law does not provide a single statute of limitations for causes of action alleging a breach of fiduciary duty. Rather, the choice of the applicable limitations period depends on the substantive remedy sought by the plaintiff ... "Where the remedy sought is purely monetary in nature, courts construe the action as alleging injuries to property within the meaning of CPLR 214(4), which has a three-year limitations period' .... "Where, however, the relief sought is equitable in nature, the six-year limitations period of CPLR 213[1] applies" ... In cases wherein an allegation of fraud is essential to a breach of fiduciary duty claim, courts have applied a six-year statute of limitations under CPLR 213(8) ... but the three year negligence statute applies where the fraud allegation is only incidental to the allegation of breach of fiduciary duty, and not essential to it" (*Hudson, supra* 2014 NY Slip Op 50756[U] at *4). Generally, "'a tort cause of action cannot accrue until an injury is sustained" and not at the time of defendant's wrongful act or plaintiff's discovery (*id.* at *5). In California, the statute of limitations for a breach of fiduciary duty is four years, unless the breach is predicated on actual or constructive fraud, in which case the statute of limitations is three years (*American Master Lease LLC, supra* 225 Cal App 4th at 1479).

Here, the facts underlying Plaintiffs' claims of breach of contract and breach of fiduciary duty are predicated on acts that occurred both before and after February 21, 2008. For the breaches that are alleged to have occurred after February 21, 2008, there is no statute of limitations bar for either the breach of contract or breach of fiduciary duties claims.

In addition, with regard to Plaintiffs' breach of contract and breach of fiduciary duty claims predicated on acts occurring before February 21, 2008, Plaintiffs have presented evidence creating triable issues of fact over whether the statute of limitations with regard to Defendant's alleged breaches should be tolled because Defendant should be equitably estopped to raise the statute of limitations based on its acts of concealment – *i.e.*, whether Defendant made misrepresentations or engaged in acts of active concealment that lulled Plaintiffs into inaction. Thus, Plaintiffs have proffered evidence supporting their position that: (1) ERP told Gersch that FPC likely did not have a viable insurance claim based on insured v insured exclusion thereby dissuading FPC from filing a separate claim; (2) ERP never told Gersch or a legitimate FPC representative that it had issued the

FPC Notice; (3) ERP failed to apprise Gersch about its attempt to replace[46] FPC with FPM III on the FPC Policies; and (4) based on the acts set forth in the discussion concerning the continued viability of Plaintiffs' aiding and abetting claims, such that there is sufficient evidence from which a reasonable jury could infer that ERP colluded with the Paine Parties and agreed to conceal the information concerning the Paine Parties' acts to usurp the proceeds of the FPC Policies. Plaintiffs have also presented evidence supporting their due diligence in this regard. [47] Thus, in opposition to Defendant's motion. Plaintiffs have submitted evidence creating triable issues of fact as to whether ERP should be equitably estopped from raising the statute of limitations defense with regard to Plaintiffs' contract and breach of fiduciary duty claims (*see Morando v Morando*, 41 AD3d 559 [2d Dept 2007]; *Brooker v Hunt*, 147 AD3d 591 [1st Dept 2017]).

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[46]The Court tends to agree with Defendant that no evidence has been presented that there was an attempt to replace FPC; instead, the evidence simply supports that ERP was trying to add FPM III as an insured. Nevertheless, if Plaintiffs had known in August 2007, when the parties had just begun their Fox v Paine Action, that ERP was trying to add FPM III as an insured under the FPC Policies in contravention of the parties' Newco agreement, such knowledge may have caused Plaintiffs to monitor future activities with regard to the FPC Policies, which in turn, would have potentially prevented Plaintiffs' damages.

[47]The Court does not merit Defendant's position that if the Fox v Paine Action was sufficient to put ERP on reasonable notice that it should not continue working with Ghisletta with regard to any claim to be made under the insurance policies, then similarly, the Fox v Paine Action should be viewed as putting Plaintiffs on reasonable notice that Ghiselett was working with ERP to usurp the right of Plaintiffs to benefit from the FPC Policies. The essence of this argument is that Plaintiffs were fully aware of Ghisletta's breaches of fiduciary duty based on the allegations of the Complaint in the Fox v Paine Action and "FPC had Ghisletta's files and emails all along ... [and] [e]ach contains evidence of her communications with insurers and ERP regarding the alleged wrongful conduct ... [and] FPC had an affirmative duty to investigate the facts and circumstances that gave rise to those claims. Plaintiffs' (or their counsels') lack of diligence is their own fault" (Def's Reply at 6, *citing* Exs. D and F to Antonecchia Reply Aff.). In support of this contention, ERP has presented no evidence that Plaintiffs actually had these emails. In any event, even if Defendant had presented proof that these emails were within the Outlook account that FPC had with regard to Ghisletta's emails, the Court finds that Plaintiffs have submitted evidence creating a triable issue of fact as to their diligence in ascertaining the breaches at issue (Plf's 19-a at ¶ 228-231; Forbush Aff., Ex. 79 Pulaski Tr. at 384; Forbush Aff., Ex. 94 at TWIN 3826). Thus, the Court does not agree that Plaintiffs' claims arising from post-December 2007 conduct are time barred because Plaintiffs are charged with the knowledge of any post-termination breaches or fraud (Def's Mem. at 10).

THERE ARE TRIABLE QUESTIONS OF FACT OVER WHETHER PLAINTIFFS WOULD HAVE BEEN COVERED BY THE FPC POLICIES AND WHETHER ERP'S ACTIONS OR INACTIONS WERE A SUBSTANTIAL FACTOR IN CAUSING PLAINTIFFS TO INCUR THE SETTLEMENT EVASION EXPENSES

In addition to its judicial estoppel argument concerning the HCC Settlement,[48] according to Defendant, Plaintiffs cannot recover their litigation expenses incurred in an effort to avoid their obligations under the 2007 Settlement because: (1) Plaintiffs have no proof that ERP directed or influenced HCC's decision to pay the Paine Parties proceeds of the HCC Policy; (2) if Plaintiffs are covered under the FPC Policies, then they have no damages to assert because the remaining limits on their 2007 GPL insurance program exceed their settlement evasion expense in the amount of approximately $24 million (*i.e.,* that it is the insurers and not ERP who are responsible for those expenses);[49] and (3) if Plaintiffs are not covered, they have no damages because Defendant placed the insurance it was requested to place (*i.e.,* Plaintiffs cannot blame ERP for the settlement evasion expenses if they were never covered by the insurance in the first place). It is Plaintiffs' contention that because HCC paid the entire proceeds of the HCC Policy to the Paine Parties as a result of Defendant's wrongful conduct, Plaintiffs were caused to expend approximately $25 million in litigation expenses defending the Paine Parties' litigations/arbitrations.

In essence, ERP is arguing that Plaintiffs have failed to explain how ERP's conduct caused them to incur the settlement evasion expenses.

With regard to Defendant's first argument, the Court finds that based on the evidence presented, Plaintiffs have created triable issues of fact over whether ERP provided substantial assistance by advocating on behalf of the Paine Parties (including hanging potential future business over HCC and the Excess Carriers) to have the insurers change their position and provide coverage to the Paine Parties. In addition, Plaintiffs have presented evidence that creates a triable issue of fact

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[48]This argument is that by executing the Settlement Agreement with HCC, Plaintiffs became a party to an agreement that "warrants that the full limits of liability under the [HCC] Policy has been exhausted by the payment of loss thereunder" and "warrants that no one other than one or more of the Paine Parties was paid any proceeds from the HCC Policy," Plaintiffs are judicially estopped from asserting that there was a wrongful payment to the Paine Parties.

[49]Evidently, there is pending litigation between Plaintiffs and the Excess Insurers over coverage in California. In that litigation, Plaintiffs have taken the position that "'[u]nder the terms of the HCC and the Excess Policies, FPC, Fox and the Fund II Entitles are entitled to reimbursement of costs incurred in defending the claims asserted against them by the Paine Parties in the Fox-Paine Litigation and all the related motions to enforce, arbitrations and court actions, the allegations of which constituted 'Interrelated Wrongful Acts' within the meaning of the HCC Policy and the FPC Excess Policies'" (ERP Opp. Mem. to Plf's Motion to Discontinue [NYSCEF Doc # 694] at 6, *quoting* California First Amended Complaint at ¶ 225).

over whether ERP colluded with the Paine Parties to conceal information that ERP was under a duty to provide to Plaintiffs in an effort to prevent Plaintiffs from learning about the Paine Parties' activities.

The Court first turns to Defendant's argument that under either scenario – coverage or non-coverage – Plaintiffs cannot claim the ERP is responsible for their settlement evasion expenses. The Court views Defendant's argument as overly simplistic in that it misses the crux of Plaintiffs' claim that is not dependent upon whether or not Plaintiffs' claims would have been covered under the FPC Policies. Instead, Plaintiffs are arguing that ERP's breach of contract, its fraud, its breach of fiduciary duty, and its aiding and abetting the Paine Parties' breach of fiduciary duty, constituted a substantial factor in causing Plaintiffs to have to incur millions of dollars defending against the Paine Parties' frivolous litigation. In support, Plaintiffs have presented evidence creating triable issues of fact over whether ERP's actions were a substantial factor in the Paine Parties' success in obtaining the proceeds of the HCC Policy and some of the proceeds of the Excess Policies. Plaintiffs have further provided circumstantial evidence in the form of timing to support an inference that the dilution actions, which were brought within a month of HCC's reverse of no-pay position, were brought as a result of the Paine Parties' expectation that they would receive the proceeds of the HCC Policy to fund that litigation. Since HCC and the Excess Carriers paid out on the FPC Policies as a settlement (while they were still contesting coverage), whether or not there was actual coverage is irrelevant.

Given that HCC paid the Paine Parties the proceeds of the FPC Policy even though it continued to dispute coverage, whether or not Plaintiffs or the Paine Parties were actually covered is of no moment and will not be decided in the context of the present motion since Defendant has not called upon this Court to make such a determination in the context of this motion.[50]

Here, it was Defendant's burden to show, *prima facie*, that ERP's actions or inactions were not a substantial factor in bringing about Plaintiffs' settlement evasion expenses. The Court finds that Defendant has not sustained its prima facie burden in this regard. Causation is normally a question for the trier of fact (*Johnson v Ken-Ton Union Free School Dist.*, 48 AD3d 1276, 1277 [4th Dept 2008]). Here, in opposition to Defendant's *prima facie* showing, Plaintiff has presented evidence creating a triable issue of fact over whether "[P]laintiffs' litigation expenses in defending the action[s] brought by [the Paine Parties] were proximately caused by [D]efendant's tortious acts" (*Badik v*

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[50]Even if Defendant's motion could be read as requesting that this Court resolve the issue over whether Plaintiffs were covered under the FPC Policies, the Court would find that Plaintiffs have presented evidence establishing that there exist material issues of fact whether an exception applies to the insured versus insured coverage exclusion – namely claims brought by former Insured Persons after the fourth anniversary of such Persons' departure from FPC that restores covered to Plaintiffs even if the insured versus insured exception applied. Thus, it is arguable that the Former employees were former employees of FPC by December 3, 2007 when the Fox v Paine Litigation settled. Thus, the actions that were instituted four years later would arguably provide coverage for Plaintiffs.

Murphy, 160 AD2d 1199, 208 [3d Dept 1990]).

CONCLUSION

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

1) Notice of Motion dated October 13, 2017; Affirmation of Marc L. Antonecchia, Esq. dated September 28, 2017, together with the exhibits annexed thereto;

2) Statement of Material Facts dated October 13, 2017;

3) Memorandum of Law in Support of Defendant Equity Risk Partners, Inc.'s Motion for Summary Judgment dated October 13, 2017;

4) Notice of Cross-Motion dated October 27, 2017;

5) Affirmation of Reed Forbush, Esq. in Opposition dated October 27, 2017, together with the exhibits annexed thereto;

6) Affirmation of Jeremy C. Vest, Esq. in Opposition dated October 27, 2017;

7) Affidavit of Robert Strandberg in Opposition, sworn to May 31, 2017;

8) Affidavit of Saul A. Fox in Opposition, sworn to May 31, 2017;

9) Affidavit of Jay Pulaski in Opposition, sworn to May 31, 2017;

10) Plaintiff's Memorandum of Law in Opposition to Defendant Equity Risk Partners, Inc.'s Motion to Dismiss dated October 27, 2017;

11) Plaintiffs' Rule 19-A Response and Statement of Material Facts dated November 15, 2017, together with supporting exhibits

12) Reply Affirmation of March L. Antonecchia dated November 2, 2017 together with the exhibits annexed thereto;

13) Reply Memorandum of Law in Further Support of Defendant Equity Risk Partners, Inc.'s Motion for Summary Judgment dated November 2, 2017; and

14) Equity Risk Partners Inc.'s Objections and Response to Plaintiffs' Statement of Undisputed Material Facts dated November 2, 2017.

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

ORDERED that the branch of the motion of Defendant Equity Risk Partners, Inc. for an order striking the allegations contained in paragraphs 208, 279 and 307 of the Third Amended Complaint of Plaintiffs Fox Paine Company, LLC and Saul A. Fox is granted, and said allegations are stricken without prejudice and with leave to Plaintiffs to move to amend their TAC to assert these claims, if Plaintiffs be so advised; and it is further

ORDERED that the branches of the motion of Defendant Equity Risk Partners, Inc. for an order pursuant to CPLR 3212 dismissing the Third Amended Complaint of Plaintiffs Fox Paine Company, LLC and Saul A. Fox are denied; and it is further

ORDERED that counsel for Plaintiffs and for Defendant Equity Risk Partners, Inc. shall appear for a Conference on April 18, 2018 at 9:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
April 6, 2018

ENTER:

Hon. Gretchen Walsh
Justice of the Supreme Court