US Annex I - Form of a judgment

Sample Judgment

SUPREME COURT OF THE STATE OF NEW YORK[1]
COUNTY OF NEW YORK

A.B. Plaintiff,
Against
C.D. Defendant.

Judgment
Index No. _____

The issues in this action having duly been tried before Mr. Justice Xavier C. Riccobono and a jury at Trial Term, Part XIV of this court, held at the courthouse at 60 Centre Street on March 9, 2004, and the plaintiff and defendant having appeared by their respective attorneys, Roland Garrulous and Vera Coluble, and the jury on March 9, 2004, having rendered a verdict for plaintiff against defendant for damages of $40,000, with interest thereon from October 18, 2001, and plaintiff's costs and disbursements having been duly taxed by the clerk in the sum of $_____,

Now, on motion of Roland Garulous, plaintiff's attorney, it is

ORDERED, ADJUDGED AND DECREED, that plaintiff A.B., recover of defendant C.D., the sum of $40,000, with interest thereon from October 18, 2001, amounting to $_____, making in all the sum of $_____, and that the plaintiff have execution therefor.

Judgment signed March 16, 2004

_____
Clerk

First Instance Opinion

AIU Insurance Company, et al., Plaintiffs,
v.
The Robert Plan Corporation, et al., Defendants.
The Robert Plan Corporation, et al., Counterclaim-Plaintiffs,
v.
American International Group, Inc., et al., Counterclaim-Defendants.
603159-2005

Supreme Court, New York County

Decided on September 26, 2007

For AIG Plaintiffs and

Counterclaim Defendants

[1] In New York, although it is called "supreme", the New York Supreme Court is two levels below the state's court of last resort, which is called the New York Court of Appeals. Consequently, aside from some courts of limited jurisdiction, e.g. county and village courts or family court, the Supreme Court is a first instance court of general jurisdiction (meaning that it can hear all cases except those brought against the state of New York and those for which exclusive jurisdiction has been given to the federal courts by US Congress. A Supreme Court sits in each county of the state. The opinion in this Annex is from the Supreme Court in the New York County.

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OPINION OF THE COURT

Bernard J. Fried, J.

In this action, plaintiffs are American International Group, Inc. (AIG) and certain affiliated companies (collectively, Plaintiffs), and defendants are The Robert Plan Corporation (TRP) and certain of its corporate affiliates and executive officers (collectively, Defendants). By motion dated February 7, 2007 (Motion Sequence Number 17), which was brought by way of an order to show cause, Plaintiffs seek, among other things, (a) relief to supplement their Second Amended and Supplemental Complaint by adding certain claims, as well as certain parties, including Lincoln General Insurance Company (LG), as additional defendants; and (b) a preliminary injunction enjoining TRP and LG from entering into transactions in alleged violation of the terms of the Master Agreement, dated January 1, 2002, between AIG and TRP. Thereafter, by motion dated March 6, 2007 (Motion Sequence Number 20), which was also brought by way of an order to show cause, Plaintiffs seek, among other things, (i) relief to further supplement their Second Amended and Supplemental Complaint, as set forth in the proposed Revised Third Amended and Supplemental Complaint (Revised Complaint), by adding certain claims, as well as certain parties, including Frances and William Wallach (Senior Wallachs), key shareholders of TRP and parents of Robert Wallach, TRP's chief executive officer, and the William Wallach Irrevocable Trust (Trust), as additional defendants; and (ii) a preliminary injunction enjoining TRP from paying all debts, except debts incurred in the ordinary course of business.

In response, Defendants and the Senior Wallachs, as well as LG, filed oppositions to the motions. In addition, Defendants filed a cross-motion and counterclaim, seeking to enjoin Plaintiffs' counsel from any further alleged violation of DR-7-104 (A)(1) of New York's Professional Disciplinary Rules.

A hearing was held on May 3, 2007 on both motions, and the cross-motion, which are consolidated for disposition.. At the hearing, Plaintiffs' counsel stated that Plaintiffs would withdraw certain requested relief in their motions, namely: (a) injunction against TRP from repaying LG the $20.6 million loan from LG to TRP; (b) equitable subordination of LG's claims against TRP in the event TRP files for bankruptcy; and (c) rescission or unwinding of the sale by TRP to LG of TRP's principal assets, including its renewal rights with respect to insurance policies, as more fully discussed below. Hearing Transcript of May 3, 2007 (Hearing Transcript), pages 67 - 69.

Since the commencement of this action in 2005, AIG and TRP have engaged in significant and multifarious litigation. As such, familiarity with the historical relationships between AIG and TRP is presumed and will not be repeated, except briefly:

AIG and TRP have had long-standing and varied relationships where, among other things, TRP served as the general agent of AIG, an approved servicing insurance carrier, in the underwriting, servicing and administration of assigned-risk automobile insurance policies. In 2001, AIG and TRP tried to settle disputes and obligations arising out of their varied relationships, including where AIG served as reinsurer of the insurance policies issued by TRP's wholly-owned subsidiaries, including Eagle Insurance Company (Eagle).

In settling their disputes, the parties entered into various agreements, including the Master Agreement dated as of January 1, 2002. Under the Master Agreement, AIG agreed to provide underwriting capital, operating funds and credit support to TRP and its subsidiaries (collectively, TRP Group), and in return TRP agreed to assume through such subsidiaries certain AIG obligations. More specifically, AIG was to provide Eagle with a line of credit up to $150 million, in the form of Surplus Notes to be issued by Eagle and purchased by AIG. AIG also guaranteed TRP's debt (Guaranty) under a $19 million note issued by TRP to Eagle (Intercompany Note). Pursuant to the Guaranty, AIG would be subrogated to the rights of Eagle, as a creditor of TRP, when AIG paid off TRP's debt under the Intercompany Note. In turn, the Master Agreement allowed AIG to deduct, from the calculation of "Profit" generated by the TRP Group, funds AIG advanced under the Guaranty (i.e. funds paid by AIG under the Guaranty can be repaid from TRP's profits), and set forth the terms as to when and how much profit sharing TRP would be entitled, if certain conditions were met. Further, AIG funded TRP's operations pursuant to a budget established by AIG. Under the Master Agreement, AIG had significant oversight and control rights over TRP Group's business, including, among others, the rights of audit, inspection and budgeting. Also, under the Master Agreement, the TRP Group agreed to certain restrictive or negative covenants, including, among others, limitations on consolidations, mergers and asset sales (section 6.13); limitations on incurrence and repayment of debts (section 6.14); restrictions on pledges of assets and liens (section 6.15); and restriction on transactions with affiliates (section 6.16). [FN1]

In March 2004, AIG gave notice to TRP that the Master Agreement would be terminated effective December 31, 2004. Thereafter, the parties tried to restructure their relationships. When negotiations failed, they entered into a one-year Interim Agreement to govern their relationships in 2005. Under the Interim Agreement, AIG insisted on even stronger control rights and that its funding obligation was limited to fund operations that supported the parties' joint-business; however, AIG also agreed to front TRP's expenses in identifying and entering into arrangements with a new or replacement insurance servicing carrier. [FN2] The Interim Agreement expired, by its terms, on December 31, 2005. Pursuant to a Memorandum of Understanding, TRP performed certain policy administration services for AIG until March 31, 2006.

When AIG was about to end its relationships with TRP and TRP had to find a new or replacement insurance servicing carrier, TRP began negotiating with LG in mid-2005, which culminated in the execution of a Program Manager Agreement (PMA) in November that became effective on January 1, 2006. Under the PMA, TRP became LG's managing agent for the assigned risk automobile insurance business. Because of the important duties TRP had to perform for LG, the PMA required a personal guarantee from William and Robert Wallach (who own substantial interest in TRP) and a $5 million letter of credit (LC) to be posted by December 15, 2005, as well as a pledge of certain assets of TRP to secure its obligations. AIG was aware of the arrangements between TRP and LG. Indeed, by letters dated November 16 and 29, 2005, AIG informed LG that certain provisions of the PMA, including TRP's pledge of certain assets to LG, might violate the "negative pledge" covenant of the Master Agreement.

After the $5 million LC was not posted, and following a number of notices to cure that went unheeded, LG terminated the PMA by notifying TRP in a letter dated June 9, 2006, that TRP's breach of the PMA entitled LG to

assert its contractual right of ownership of the rights to solicit renewals of insurance policies issued by LG under the PMA. [FN3] Because termination of the PMA did not relieve TRP of its duty to administer the "run-off" of the policies written during the term of the PMA (for which TRP was entitled to be paid for its services), LG and TRP attempted to restructure their relationship. After substantial negotiations, the parties amended the PMA on June 14, 2006 (the Amended PMA, in which TRP acknowledged LG's ownership of the renewal rights) and executed a number of related documents, including, among others: a Credit Agreement whereby LG agreed to lend up to $20.6 million to TRP; a Security Agreement whereby TRP pledged its assets to secure its debt obligations under the Credit Agreement; a separate program manager agreement between LG and its newly-formed subsidiary RPC Insurance Agency LLC (RPCIA), whereby it was contemplated that RPCIA would take over TRP's functions until RPCIA became fully operational; and an Administrative Service Agreement whereby TRP agreed to provide services to RPCIA until the latter became licensed, and TRP was granted an option to buy from LG a 60% equity interest in RPCIA.

Despite substantial draws under the Credit Agreement, TRP continued to experience financial difficulties. TRP then requested LG to make advances against future commissions. As LG was concerned that TRP's failure to continue providing services would jeopardize LG's relations with its insureds and other third parties, LG agreed to negotiate yet another set of transactions with TRP. In December 2006, the parties executed a number of documents, including, among others: an Assignment whereby TRP would sell to LG certain assets, including renewal rights under the PMA; a Closing Memorandum whereby the parties acknowledged, among other things, that all amounts owing under the Credit Agreement plus the commission advances (aggregating over $26 million) would be applied toward the purchase price of the assets sold to LG under the Assignment, and that the Credit Agreement, the PMA and Amended PMA, would be terminated on the closing date of the transactions; and a Marketing and Option Agreement whereby TRP would be paid to produce business for LG.

The transactions, among other things, provided TRP with an additional $9 million cash and granted it an option to buy RPCIA from LG for fair market value. The transactions also permitted LG to employ former TRP employees as RPCIA employees to ensure a smooth operational transition. The parties began their operations under the new arrangements on January 5, 2007, and RPCIA is now fully administering LG's insurance business.

The Current Litigation

Litigation between Plaintiffs and Defendants has been pending since September 2005, before LG and TRP executed the PMA in November 2005. The current litigation, as encompassed by motion sequence numbers 17 and 20, involves Plaintiffs' assertion of certain causes of action against TRP, the Senior Wallachs and LG, relating to the TRP-LG transactions, as well as the TRP-Senior Wallachs transactions. Specifically, apart from the injunctive reliefs sought, as discussed above, Plaintiffs seek leave of court to further amend their complaint, as reflected in the Revised Complaint, to assert the following causes of action: 10th cause of action (breach of contract against TRP); 11th cause of action (breach of contract against TRP Group - injunctive relief); 12th cause of action (tortious interference with contract against Frances Wallach and the Trust - injunctive relief); 13th cause of action (tortious interference with contract against LG - injunctive relief); 14th cause of action (tortious interference of contract against William Wallach and Robert Wallach - money damages); 15th cause of action (fraudulent conveyance under New York Debtor and Credit Law [DCL] § 273 against TRP Group and LG - equitable relief); and 16th cause of action (fraudulent conveyance under DCL § 276 against TRP Group and LG - equitable relief). For the reasons stated herein, the various forms of requested relief are granted in part and denied in part.

Enforceability Of The Restrictive Covenants

The continued enforceability, if at all, of the relevant restrictive covenants of the Master Agreement (sections 6.13 through and including 6.16) must be determined as a threshold of matter - i.e. whether such covenants survive the termination of the Master Agreement. If they do not, the requested reliefs should not be granted.

The preamble to Article 6 (Covenants of the TRP Group) of the Master Agreement provides, in relevant part, that:

Each member of the TRP Group signatory hereto hereby agrees (for itself and to cause each other member of the TRP Group) for the benefit of each of the AIG Entities that, from the Effective Date ... until the Payout Date (except that the covenants described in Sections 6.1(a), (b), 6.14, 6.15, 6.16, 6.17 and 6.20 shall continue until the Surplus

Notes are repaid in full in cash, including the payment or retention of funds as Investment Income and Profit ...).

Based on the foregoing, the restrictive covenants at issue in the instant motions remain in effect until either the Payout Date [FN4] (as to section 6.13), or until the Surplus Notes are repaid in full in cash (as to sections 6.14, 6.15 and 6.16). Defendants do not dispute that neither the Payout Date nor the full repayment of the Surplus Notes has occurred. Thus, these covenants remain in effect, unless their effectiveness is negated or superseded by other provisions of the Master Agreement.

Section 11.8 (Survival) addresses the survivability of the various provisions of the Master Agreement, and provides in relevant part, as follows:

All covenants, agreements ... in any Transaction Document ... shall be considered to have been relied upon by the AIG Entities and shall survive the purchase of the Surplus Notes [FN5] ... and shall continue in full force and effect in accordance with their terms. Article IX and Sections 7.4, 11.3, 11.4, 11.5 and 11.7 shall survive any termination of this Agreement.

Based on the foregoing, all covenants in the Master Agreement, including the restrictive covenants at issue, continue in full force and effect "in accordance with their terms." As explained above, the subject restrictive covenants continue in effect until the Payout Date or repayment of the Surplus Notes, but neither event has occurred.

Defendants argue, however, only the provisions listed in the last sentence of section 11.8 survive termination of the Master Agreement. Such argument is unpersuasive, because the last sentence simply means that those provisions survive termination, in addition to any that survive according to their own terms under the first sentence. If the last sentence were construed to supersede or otherwise trump the first sentence, it will render the first sentence (and the preamble to Article 6) meaningless, and obliterate their intended place and usefulness in the Master Agreement. A careful reading of these provisions leads to the conclusion that they have "a definite and precise meaning, unattended by danger of misconception ... and concerning which there is no reasonable basis for a difference of opinion." *Breed v Insurance Co. of North America*, 46 NY2d 351, 355 (1978).

Further, there is no merit to Defendants' argument that survival of the restrictive covenants leads to absurd results, when AIG was no longer required to fund TRP's operations after termination of the Master Agreement and/or the Interim Agreement. Termination of these agreements and cessation of AIG's funding do not mean termination of the TRP Group's obligations to repay the debts under the Surplus Notes and Intercompany Note. Moreover, even if the Surplus Notes is the sole obligation of Eagle, because each member of the TRP Group (including TRP and Eagle) covenanted in the preamble to Article 6 that those covenants bind each and every member of the Group, the restrictive covenants at issue continue to be enforceable against TRP so long as the Surplus Notes remain unpaid. [FN6] Also, any argument that the liens on assets obtained by LG under the PMA and the Security Agreement are "Permitted Liens" (as defined in the Master Agreement) is unpersuasive. Permitted Liens are, generally speaking, in the form and nature of mechanics liens, surety or appeal bonds, tax liens, etc. that are incurred in the ordinary course of business. Liens under the PMA and the Security Agreement, however, are not liens arising from TRP's ordinary course of business.

Injunctive Relief To Enjoin TRP And LG From Entering Into

Further Transactions In Violation Of The Master Agreement

Plaintiffs seek a preliminary injunction against TRP and LG to enjoin them from entering into any future transactions that may violate the restrictive covenants. Under New York law, a request for preliminary injunction may be granted only when the party seeking the relief shows: (1) a likelihood of ultimate success on the merits of the party's underlying claim; (2) an irreparable harm to the party if the relief is withheld; and (3) a balance of the equities tips in favor of the party. *Handler v 1050 Tenants Corp.*, 295 AD2d 238, 239 (1st Dept 2002); CPLR 6301.

With respect to LG, assuming the first element of the tri-partite test (likelihood of success on the merits) is met, Plaintiffs have not shown that they will suffer irreparable harm if injunctive relief is not granted. Indeed, any judgment they may obtain against LG may be satisfied by executing same against LG"s assets or be compensated in money. [FN7] *Scotto v Mei*, 219 AD2d 181, 184 (1st Dept 1996)(damages compensable in money and capable of

calculation, although with some difficulty, do not constitute irreparable harm). Moreover, the record shows that even though Plaintiffs were aware, since November 2005, of the alleged violation of the Master Agreement, they did not seek relief against LG until February 2007, after LG and TRP had consummated their heavily-negotiated and documented transactions that appeared to have been conducted at arms-length. Because Plaintiffs sat on their rights, a balance of the equities does not tip in their favor under these circumstances. Accordingly, the requested injunctive relief is denied with respect to LG.

With respect to TRP, assuming the first test (success on the merits) is satisfied, it is questionable whether the "irreparable harm" test is also satisfied. Plaintiffs allege that TRP is insolvent and money damages will be inadequate, as future judgments will likely be uncollectible. Such allegation does not generally support a claim for injunctive relief. *Petro, Inc. v Serio*, 9 Misc 3d 805, 820 (Sup Ct, NY County 2005) (allegation that party might be unable to perform due to potential insolvency is insufficient to satisfy irreparable harm test). Also, a preliminary injunction is a "drastic remedy " that is granted only when the movant has established clear legal right based on undisputed fact. *Koultukis v Phillips, 285 AD2d 433, 435 (1st Dept 2001)*. In any event, Plaintiffs have failed the "balance of the equities" test because they were dilatory in seeking relief, for the reasons discussed. Accordingly, the requested injunctive relief is denied as to TRP.

Injunctive Relief To Enjoin TRP From Paying Debts Except

Trade Debts Incurred In The Ordinary Course Of Business

TRP argues that this requested injunctive relief should be deniedbecause, as a general unsecured creditor, AIG cannot obtain an injunction against TRP, with the goal of preserving a fund for any eventual execution or satisfaction of a judgment against TRP. *Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 545 (2000)("our courts have consistently refused to grant general creditors a preliminary injunction to restrain a debtor's asset transfers that allegedly would defeat satisfaction of any anticipated judgment"). *Credit Agricole* is based, in part, on the United States Supreme Court's ruling in *Grupo Mexicano de Desarrollo S.A. v Alliance Bond Fund*, Inc. (527 US 308 [1999]). In *Grupo Mexicano*, the Supreme Court reversed the lower court's grant of injunctive relief in favor of creditors who were holders of unsecured notes issued by the debtors. The Supreme Court held that "the District Court lacked the authority to issue a preliminary injunction preventing [the debtors] from disposing of their assets pending adjudication of [the unsecured creditors'] contract claim for money damages." *527 US at 333.*

Plaintiffs argue that *Credit Agricole* is inapplicable because that case does not involve negative covenant violations. They also argue that the Supreme Court implied in *Grupo Mexicano* that the outcome of that case "might have been different" had the lower court made findings that the debtors' conduct (assignment of receivables) was unlawful, because the creditors alleged that the debtors had violated a negative pledge/assignment covenant in the debt instrument. [FN8] Plaintiffs' Reply Brief, at p. 47.

Plaintiffs' reliance on the Supreme Court dictum is not persuasive. An identical argument, relying on such dictum, was similarly made by the creditor in *RBS Asset Finance, Inc. v Bravo* (2005 WL 3008581 [ED Mich Nov 9, 2005]). Unpersuaded by the argument, the Michigan court in *RBS* stated that:

The Court is not persuaded that there is any difference, however, as both contracts [in the *RBS* and *Grupo* cases] contain a negative pledge and, with respect to the *Grupo* district court's lack of finding on whether the [debtor's] conduct was illegal, the Supreme Court did not say that such a finding would have made a difference as far as the validity of issuing an injunction .... As in *Grupo*, the injunction sought here (to prevent a sale of assets) has nothing to do with succeeding on the merits of its case (recovering a monetary judgment), but rather constitute an injunction "to protect an anticipated judgment of the court" (i.e., the award of damages for failing to make payment pursuant to the Guaranty).

Id. at *3-4.

The facts in this case and *RBS* are similar in many respects: (1) plaintiffs in both cases are unsecured creditors; (2) relying on negative covenants, RBS sought to enjoin the debtor's transfer of assets, and Plaintiffs seek to unwind the TRP-LG transactions and enjoin TRP from paying all debts except ordinary course trade debts; (3) RBS sought a money judgment against the debtor based on a guaranty, and Plaintiffs seek money judgments against Defendants

(based on alleged misappropriations) and the Intercompany Note (based on subrogation rights under the Guaranty); and (4) RBS and Plaintiffs request injunctive relief to protect potential money judgments. I find the similarity of facts compelling and the *RBS* decision persuasive.

Also, although *Credit Agricole* did not involve negative covenants (as noted by Plaintiffs), the reasons enunciated by the Court of Appeals in support of the decision are instructive. In that case, plaintiff brought an action to recover debts owed by the debtors under unsecured debentures, and sought an injunction to enjoin them from transferring or encumbering their assets. In addition to asserting a claim to recover debts, plaintiff asserted that the insolvent defendant-debtors violated their fiduciary duty, and requested an injunction to enjoin defendants from further commission of such act, which would produce injury to plaintiff. [FN9] Among other things, the Court of Appeals noted:

Although the inclusion of a money demand will not necessarily preclude an injunction if other relief, which would satisfy this provision of CPLR 6301, is also sought, *the court will refuse the injunction if convinced that a money judgment is the true object of the action and that all else is incidental*.

94 NY2d at 548 (emphasis in original), quoting, *Siegel,* NY Practice § 327 (grounds for preliminary injunction).

In the instant case, the negative covenants existed in the Master Agreement since 2002, and when Plaintiffs commenced litigation in 2005, they sought, primarily, money damages against Defendants based on their alleged misappropriations of funds.Plaintiffs did not seek the instant injunctive relief in 2005 or 2006. They waited until 2007, after TRP sold and liquified its principal asset (the renewal rights, which, due to their inherent nature, are quite illiquid) in exchange for $35 million from LG. Plaintiffs now seek, in effect, an preliminary injunction to enjoin Defendants from dissipating proceeds of the asset sale and/or misappropriating the remaining assets, so as to preserve a fund to satisfy future money judgments. This is impermissible under *Credit Agricole*, to the extent that the requested relief (purportedly to enjoin Defendants' breach of the negative covenants) "is incidental to " and "for the purposes of enforcement of the primary relief sought" i.e. money judgments. *Credit Agricole*, 94 NY2d at 550. Under these circumstances, the requested injunctive relief is not warranted.

Injunctive Relief Eleventh Cause of Action

(Breach of Contract Against the TRP Group)

In the Revised Complaint, Plaintiffs seek injunctive relief against the TRP Group for breach of the subject negative covenants of the Master Agreement. The relief sought in this cause of action seems broader than that sought above (i.e. enjoin TRP from paying all debts except ordinary course trade debts or enjoin TRP from entering into further transactions with LG).

In support of the requested relief, Plaintiffs allege, among other things, that: "[i]f successful in this action, Plaintiffs will also become judgment creditors of the TRP Group" and "[t]hrough the above breaches of the in-force covenants ... the TRP Group has compromised Plaintiffs' position as a creditor and diminished Plaintiffs' ability to collect monies owed to them by the TRP Group." Revised Complaint, ¶ 287 and ¶ 288.

Based on the foregoing, it is clear that Plaintiffs' primary objective in seeking the injunctive relief is to protect potential money judgments against the TRP Group with respect to the monies allegedly owed to Plaintiffs, and the injunction to prevent violation of the negative covenants is merely incidental. For the reasons stated above, I deny the relief sought.

Injunctive Relief - Tortious Interference With Contract

Against LG (Thirteenth Cause of Action) and Against

Frances Wallach and The Trust (Twelfth Cause of Action)

In New York, the elements of a tortious interference with contract claim are: (1) existence of a valid contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional

procurement of a breach of the contract without economic justification; and (4) resulting damages. Lama Holding Co. v Smith Barney Inc., *88 NY2d 413, 424 (1996);* American Preferred Prescriptions, Inc. v Health Management, Inc., *252 AD2d 414, 417 (1st Dept 1998).*

With respect to the claim against LG, the first and second elements of the claim are met. As to the third element, LG argues that it did not intentionally procure TRP's breach of the Master Agreement, and that LG had sufficient economic justification when entering into the various transactions with TRP, including the PMA in November 2005. Plaintiffs contend that LG is not entitled to the economic justification defense when LG was aware (and was warned of its possible violation) of the negative covenants, but chose to ignore them. Plaintiffs also contend that, under the recent Court of Appeals' decision in ***White Plains Coat &*** *Apron, Co. v Cintas Corp.* (8 NY3d 422 [2007]), a defendant who has a generalized economic interest in soliciting business for profit (such as LG), but does not have a prior economic relation with the breaching party (such as TRP), cannot assert the economic justification defense. In response, LG argues that AIG was aware of LG's ongoing negotiations with TRP, as AIG itself was about to terminate its relations with TRP, and AIG encouraged TRP to seek out a new insurance servicing carrier. LG also produced several documents, all generated in October 2005, to show that it already made economic and legal commitments with TRP, before finalizing the PMA with TRP in November 2005. Whether LG had "prior" and "sufficient" economic relations with TRP to support a economic justification defense is a disputed issue that cannot be resolved at this time.

As to the last element (resulting damages), Plaintiffs, by their counsel, acknowledged that they are not "at the moment specifically monetarily damaged. That's, by the way, why we've moved for injunctive relief." Hearing Transcript, page 18. They also argue that caselaw supports a grant of injunctive relief to enjoin tortious interference conduct, without the need for a movant to establish actual damages. Plaintiffs cited several cases for such proposition of law, including, *Telerate Systems, Inc. v Caro* (689 F Supp 221 [SD NY 1999]), and *American Para Professional Systems, Inc. v Labone, Inc.* (175 F Supp 2d 450 [ED NY 2001]). However, in *Telerate*, the court found that if the defendant's conduct was not enjoined, "there will certainly be a degradation in the performance of the Telerate system [and the] effect of this degradation ... satisfies the irreparable harm prong of the [injunction] test." 689 F Supp at 233. And in *American Para*, while denying plaintiff's request for injunctive relief due to its failure to establish personal jurisdiction over the defendant, the court also denied defendant's motion to dismiss because the complaint alleged sufficient facts (plaintiff's loss of revenue and customers) to survive a dismissal motion. 175 F Supp 2d 457-458.

In the instant case, Plaintiffs have agreed to withdraw their request to unwind the TRP-LG transactions, which means that they do not and cannot seek injunctive relief with respect to past transactions. It is also unclear, and Plaintiffs have not alleged, whether TRP and LG are currently doing business, as it appears that since January 2007, RPCIA has taken over TRP's role and has been fully administering LG's business. In such regard, prospective injunctive relief does not appear necessary. In any event, it is axiomatic that a party is not entitled to injunctive relief, "unless the right is plain from the undisputed facts." *Family Affair Haircutters v Detling*, 110 AD2d 745, 747 (2nd Dept 1985). As discussed, it is disputed by the parties whether LG had sufficient prior economic relations with TRP - a factual issue - to support LG's economic interest defense to a tortious interference of contract claim. This, coupled with Plaintiffs' failure to establish actual damages, warrants a denial of the requested injunctive relief as a matter of law. [FN10]

With respect to the proposed tortious interference of contract claim against Frances Wallach and the Trust, Defendants argue that it was the Trust, not Frances Wallach, that lent money to TRP, and the book entry was an error. Defendants also argue that Plaintiffs cannot prove that Frances Wallach or the Trust "intentionally procured" the breach of the restrictive covenant, and that Frances Wallach has the economic justification defense because, as a shareholder of TRP, she had a financial interest in its success. In effect, Defendants seek a pre-answer or summary dismissal of this claim.

These arguments are unpersuasive, particularly in the context of Plaintiffs' request for leave to amend the complaint, which would generally be granted, unless it causes prejudice to the non-moving party or unless the proposed cause of action is "palpably insufficient." *Valdes v Marbrose Realty, Inc.*, 289 AD2d 28, 29 (1st Dept 2001); *Roberts v Alexander's, Inc.*, 224 AD2d 677, 678 (2d Dept 1996). The Revised Complaint alleges that Frances Wallach (or the Trust) was aware of the Master Agreement and negative covenants, but knowingly lent money to the TRP Group in violation of the covenants, which caused damages to Plaintiffs by increasing the Group's debt and

diminished their claim against the Group. *Id.* ¶ ¶ 304-310. I am satisfied that this claim has been adequately pleaded. Whether Mrs. Wallach has an economic interest defense, or whether the loans were made by the Trust and not Mrs. Wallach, involves disputed issues of fact that cannot be determined now. Such issues do not, however, render the proposed claim "palpably insufficient." Thus, I grant Plaintiffs' request for leave to amend the complaint as to this claim.

With respect to the request for injunctive relief against Frances Wallach and the Trust, it appears that there is a likelihood of success on the tortious interference claim, and that Plaintiffs may suffer irreparable harm (increase in TRP's debt liability and dilution of Plaintiffs' claim against TRP) if Mrs. Wallach and the Trust are not enjoined from continue lending money to TRP. The balance of equities also favors Plaintiffs in that they did not learn of these loans until relevant information were produced by Defendants in February 2007 (thus no laches), and there is little or no harm to Mrs. Wallach and the Trust in stopping them from further lending to TRP. Hence, Plaintiff's request for injunctive relief against Frances Wallach and the Trust for tortious interference with contract is granted.

Fourteenth Cause of Action (Tortious Interference

With Contract Against William Wallach

and Robert Wallach - Monetary Damages)

Defendants do not oppose Plaintiffs' request for leave to amend the complaint to add this claim against Robert Wallach, but oppose the request to the extent the claim is sought to be asserted against William Wallach, the father of Robert Wallach.

The Revised Complaint alleges that William Wallach caused TRP to advance him money (in the form of loans) during the term of the Master Agreement, in violation of the restrictive covenants. Defendants argue that the alleged " loans" were the result of TRP's transfer in 2003 of two life insurance policies to Mr. Wallach, which in the past were maintained for its and Mr. Wallach's benefits, and the cash surrender value of the policies were recorded on TRP's books as "loans." Defendants also argue that after the transfer, TRP discontinued paying premiums on these policies, as Mr. Wallach has been paying for them himself. Thus, Defendants contend that Plaintiffs have no sustainable tortious interference claim against William Wallach.

Defendants' arguments are unavailing in the context of Plaintiffs' request for leave to add the proposed claim, as explained above. Based on the allegations of the Revised Complaint, I am satisfied that it adequately pleads a palpable claim: (1) William Wallach, as a principal shareholder of TRP and the father of Robert Wallach (TRP's CEO), is aware of the restrictive covenants; (2) he caused TRP to loan him money in violation of the covenants; and (3) the prohibited loans reduced TRP's assets, which diminished its ability to repay Plaintiffs.

Because TRP's books show that William Wallach's loan account balance increased during the term of the Master Agreement, it leads to an inference that TRP might have lent him money in violation of the covenants. At this stage of these proceedings (pre-answer and pre-discovery), it is inappropriate to deny Plaintiffs' request to add this claim, based solely on Defendants' undocumented and untested assertions. Accordingly, I grant Plaintiffs' request for leave to further amend the complaint to add a tortious interference with contract claim against William Wallach.

Tenth Cause of Action (Breach of Contract Against TRP)

The Revised Complaint alleges that the Intercompany Note and the Guaranty are valid and enforceable contracts, and pursuant to the Guaranty, Plaintiffs funded approximately $22 million (principal and interest) owed by TRP to Eagle under the Intercompany Note. Because Plaintiffs have subrogation rights under the Guaranty with respect to funds advanced to pay the Intercompany Note, and TRP has not repaid Plaintiffs the debt under the Intercompany Note, Plaintiffs assert a breach of contract claim against TRP. Revised Complaint, ¶ ¶ 270-274.

Defendants argue that the Intercompany Note has been fully repaid. Nezamoodeen Affidavit, ¶ ¶ 4-11. [FN11] Specifically, they argue that, based upon the profiting-sharing provisions of the Master Agreement, Plaintiffs have been repaying themselves for all credit support payments made to the TRP Group, including credit payments made

by Plaintiffs under the Intercompany Note, out of the gross income of the TRP Group. Defendants further argue that, based upon their reading of the so-called Profit Model and Profit Certification, "AIG has quite obviously credited itself for the entire $22 million payable under the Intercompany Note." Nezamoodeen Affidavit, ¶ 10.

In response, Plaintiffs argue that, in real terms they are "significantly worse off today than they would have been had TRP not breached the Inter-Company Note," for the reasons stated in their reply brief and the Riley Affidavit. [FN12] Plaintiffs' Reply Brief, pages 14-19. Specifically, Plaintiffs argue, among other things, that the calculation of a positive " Profit" number does not necessarily mean that TRP was entitled to any profit-sharing, based on the methodology for determining profit-allocation under the Master Agreement. Relying on the Riley Affidavit, Plaintiffs contend that had TRP in fact paid the Intercompany Note (i.e. no breach of contract), they would have been able to recover $45.9 million (versus $26.4 million) in terms of Profit calculations for the calendar years 2002 to 2004 of the Master Agreement, and Plaintiffs contend this made them worse off if TRP had paid them back directly on the Intercompany Note. [FN13] Plaintiffs' Reply Brief, pages 18-19.

It is apparent that the parties have different interpretations of, among other things, the provisions of the Master Agreement governing the calculation of profit-sharing and allocable profit, and they dispute whether Plaintiffs have fully repaid themselves from the Profits of TRP's business with respect to the debt under the Intercompany Note. Inasmuch as Plaintiffs seek leave to add this breach of contract claim, and I believe the Revised Complaint adequately pleaded such claim, it does not seem warranted to deny the requested relief at this time, before discovery is undertaken to substantiate or refute the parties' respective assertions. Accordingly, I grant Plaintiffs' request to amend the complaint to add the breach of contract claim.

Fifteenth Cause of Action (Fraudulent Conveyance Claim

Under DCL § 273 Against The TRP Group and Lincoln General)

In the Revised Complaint, Plaintiffs allege that TRP and LG violated § 273 of the Debtor and Creditor Law in that TRP conveyed the renewal rights to LG " for less than a full and fair consideration to the extent that [LG] paid the Purchase Price by forgiving debt obligations that, as both TRP and [LG] knew, TRP was contractually prohibited from incurring." *Id.* at ¶ 317.

DCL § 273 provides that "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." Because § 273 permits the assertion of a fraudulent conveyance claim without regard to actual intent, it is usually referred to as a constructive (as opposed to actual) fraud claim. In turn, DCL § 272 provides:

Fair consideration is given for property, or obligation,

a. When in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied, or

b. When such property or obligation is received in good faith to secure a present advance or antecedent debt in amount not disproportionately small as compared with the value of the property, or obligation obtained.

Thus, based on § 272, it is a defense to a constructive fraudulent conveyance claim under § 273 if the property conveyed or obligation incurred is supported by "fair consideration," which includes satisfaction of an antecedent debt for "fair equivalent" value or in an amount "not disproportionately small."

Based on a fair and careful reading of the Revised Complaint, Plaintiffs appear to argue that fair consideration was not received by TRP in the sale of its asset (the renewal rights) because about $26 million (or three-quarters of the purchase price paid by LG) [FN14] was for the forgiveness of a debt incurred by TRP in violation of the Master Agreement. Plaintiffs have not cited caselaw to support their assertion that the satisfaction or forgiveness of an antecedent debt in exchange for a conveyance of assets cannot constitute fair consideration, when the debt was incurred in violation of another agreement. Inexplicably, the only case that Plaintiffs mentioned in their reply brief on this issue, *In re Sharp International Corp.* (403 F3d 43 [2d Cir 2005]), appears to significantly undercut their

position.

In *Sharp*, the Second Circuit noted that the "only case found by us or the parties in which an {allegedly) antecedent debt paid to an *outsider* was found lacking in consideration is one in which the debtor affirmatively swore that the transaction was intended to evade his creditors." *Id.* at 54 (emphasis in original). Here, the antecedent debt was "repaid" to LG, which undisputedly is an outsider, but TRP never said that the LG transactions were intended to evade creditors. Plaintiffs also consider it significant that "TRP and LG do not contest that TRP was insolvent as of the [sic] December 2006." Plaintiffs' Reply Brief, page 30. However, the Second Circuit opined that it did not matter that a preferred creditor (such as LG) "knows that the debtor is insolvent, " because "conveyance which satisfies an antecedent debt made while the debtor is insolvent is neither fraudulent nor otherwise improper, even if its effect is to prefer one creditor over another." *Id.* at 55. Based on the foregoing and other reasons, the Second Circuit affirmed the lower court's dismissal of the fraudulent conveyance claim.

Moreover, the courts have held that the burden of proving insolvency and lack of fair consideration is upon the party challenging the conveyance. *CIT Group Commercial Services, Inc. v 160-09 Jamaica Avenue Limited Partnership*, 25 AD3d 301, 306 (1st Dept 2006); *American Investment Bank, N.A. v Marine Midland Bank*, 191 AD2d 690, 692 (2nd Dept 1993). Yet, Plaintiffs argue, in effect, that LG and TRP should introduce evidence of fair consideration. In the Revised Complaint, the only allegation of lack of fair consideration is based on the fact that the antecedent debt was incurred in violation of the negative covenants. For the reasons stated above, this is "palpably insufficient" to support the request for leave to amend the complaint to add this proposed cause of action against LG and TRP.

Sixteenth Cause of Action (Fraudulent Conveyance Claim

Under DCL § 276 Against The TRP Group and Lincoln General)

Plaintiffs also allege that TRP and LG violated § 276 of the DCL, which provides that a "conveyance made or obligation incurred with the actual intent ... to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Caselaw indicates that where "actual intent to defraud creditors is proven, the conveyance will be set aside regardless of the adequacy of consideration given." *Sharp*, 403 F3d at 56 (citations omitted); *Wall Street Assocs. v Brodsky*, 257 AD2d 526, 529 (1st Dept 1999).

The Revised Complaint alleges that "[o]n information and belief, TRP and [LG] entered into these transactions with actual intent to hinder, delay and/or defraud Plaintiffs, first by making [LG] a secured creditor with priority over Plaintiffs, and then by transferring TRP's assets to [LG] in exchange for forgiveness of those prohibited debt obligations." *Id.*, ¶ 327. Defendants argue that this fraud claim is not sustainable because CPLR 3016 (b) requires that the circumstances constituting the fraud must be stated with particularly, and the Revised Complaint fails to do so. Also, it is axiomatic that the burden of proving "actual intent" is on the party seeking to set aside the conveyance. *Sharp*, 403 F3d at 56 (citations omitted).

However, because direct evidence of fraudulent intent is often elusive, courts generally consider "badges of fraud" as indicia that accompany fraudulent transfers that give rise to "an inference of intent." *Dempster v Overview Equities, Inc.*, 4 AD3d 495, 498 (2nd Dept 2004); *Wall Street Assocs.*, 257 AD2d at 529. The "badges of fraud" may include: a close relationship between the parties to the transaction; a questionable transfer not in the usual course of business; inadequate consideration for the transfer; transferor's knowledge of the creditor's claim and the ability to pay it; and retention of control of the property by the transferor after the transfer. *Dempster*, at 498 (citations omitted); *Wall Street Assocs.*, at 529 (citations omitted).

In the instant case, (1) it is undisputed that TRP and LG are unrelated to each other and they negotiated the subject transactions at arms-length; (2) although the transactions were not in the ordinary course of TRP's business, AIG was aware of their negotiations, as AIG itself was about to end its relation with TRP, and encouraged TRP to search for a new or replacement insurance carrier; (3) TRP disputes that AIG is a creditor, as TRP believes that it is no longer indebted under the Intercompany Note and the Surplus Notes are the sole obligation of Eagle; and (4) under the TRP-LG transactions, TRP does not retain control of property transferred. Because the transactions do not implicate "badges of fraud" and Plaintiffs have not alleged facts tending to show otherwise, the "actual fraud" claim

under § 276 is not sustainable under applicable law. Accordingly, their request for leave to add this claim to the complaint is denied.

Defendants' Counterclaim Against Plaintiffs' Counsel

In their cross motion, Defendants allege that counsel for the Plaintiffs sent a letter to TRP's board of directors on March 23, 2007, and threatened the directors that they would be subject to legal proceedings if they undertook actions that might be deemed a breach of their fiduciary duty to TRP's creditors. Defendants argue that counsel's action violated the Professional Disciplinary Rules, namely DR 7-104 (A) (1), which prohibits an attorney from communicating with someone who is represented by counsel. Specifically, the Rule provides that during the course of the representation of a client, a lawyer cannot communicate with a party "that the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so. " Defendants seek a preliminary injunction to enjoin Plaintiffs' counsel from communications with TRP's directors.

Plaintiffs' counsel does not deny sending the letter to the directors, but contends that TRP's counsel never indicated that it also represents the directors in their personal capacity, and that the letter was copied to TRP's counsel. However, the prohibited communications under DR 7-104 extend to any direct communication by adversary counsel with the directors of a defendant corporation. *Niesig v Team I*, 76 NY2d 363 (1990). Hence, the cross motion to enjoin Plaintiffs' counsel from communicating with TRP's board of directors is granted.

Accordingly, in respect of Plaintiffs' Motion Sequence Numbers 17 and 20, as well as Defendants' cross motion, it is

ORDERED that the following preliminary injunctive relief requested by Plaintiffs are denied: (1) relief to enjoin TRP and LG from entering into further transactions in violation of the Master Agreement; (2) relief to enjoin TRP from paying all debts except for trade debts incurred in the ordinary course of business; (3) relief to enjoin the TRP Group from breach of contract (Eleventh Cause of Action); and (4) relief to enjoin LG from tortious interference with contract (Thirteenth Cause of Action); and it is further

ORDERED that the following preliminary injunctive relief requested by Plaintiffs is granted: relief to enjoin Frances Wallach and the Trust from tortious interference with contract (Twelfth Cause of Action); and it is further

ORDERED that the following preliminary injunctive relief requested by Plaintiffs are deemed moot: (1) relief to enjoin TRP from repaying LG the $20.6 million loan from LG to TRP; (2) relief to equitably subordinate LG's claims against TRP in the event TRP files for bankruptcy; and (3) relief to unwind or rescind the sale to LG of TRP's principle assets, including the renewal rights; and it is further

ORDERED that the following causes of action sought to be added to Plaintiffs' complaint, as reflected in the proposed Revised Complaint, are denied: (1) Thirteenth Cause of Action - tortious interference of contract claim against LG; (2) Fifteenth Cause of Action - fraudulent conveyance claim under DCL § 273 against LG and TRP; and (3) Sixteenth Cause of Action - fraudulent conveyance claim under DCL § 276 against LG and TRP; it is further

ORDERED that the following causes of action sought to be added to the complaint, as reflected in the proposed Revised Complaint, are granted: (1) Tenth Cause of Action - breach of contract claim against TRP; (2) Twelfth Cause of Action - tortious interference with contract claim against Frances Wallach and the Trust; and (3) Fourteenth Cause of Action - tortious interference with contract claim against William Wallach and Robert Wallach; and the Revised Complaint is deemed served on Defendants, who are hereby directed to file an answer or other responsive pleadings within 20 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that Defendants' cross motion for injunctive relief to enjoin Plaintiffs' counsel from further communicating with TRP's board of directors is granted.

Dated: _____

ENTER:

_____

J.S.C.

FOOTNOTES

FN1. As explained below, Plaintiffs allege in their complaint that Defendants have breached these restrictive covenants, and that LG and the Wallachs have tortiously interfered with TRP's performance of the Master Agreement, including these covenants.

FN2. As discussed below, LG became the new servicing carrier.

FN3. Under the PMA, the renewal rights would belong to LG if the PMA was terminated by LG due to TRP defaults, including a failure in posting the required LC.

FN4. The Payout Date is generally defined to mean the date on which the amount of profit calculated under the Master Agreement equals the face amount of the Surplus Notes plus interest.

FN5. As noted above, under the Purchase Agreement, AIG and/or its affiliates agreed to purchase the Surplus Notes issued by Eagle, up to an amount of $150 million.

FN6. Issues regarding whether the debt under the Intercompany Note is still outstanding will be discussed below.

FN7. In fact, Plaintffs counsel acknowledged at the hearing held on May 3, 2007 that "[t]here may be bases on which we don't have a claim [for injunctive relief] against Lincoln General ... ." Hearing Transcript, at p. 96.

FN8. The Supreme Court, in footnote 2 of the decision, noted the lower court's lack of findings, and that if the debtors "had no right under the note instrument to take the actions that were enjoined, that would presumably be a defense to the action on the injunction bond." 527 US at 315, fn. 2. This is dictum.

FN9. It is noteworthy that Plaintiffs here also asserted a breach of fiduciary duty claim against the TRP Group (Seventh Cause of Action) and sought injunctive relief.

FN10. It is unclear whether Plaintiffs only seek injunctive relief against LG, but not leave to amend the complaint to assert the tortious interference claim. Assuming they also seek leave to amend, such request is denied without prejudice, because they have conceded that they cannot currently show damages.

FN11. Philbert Nezamoodeen is TRP's Chief Operating Officer.

FN12. Mark Riley is a certified public accountant who acted as an interim Controller for the business conducted by Plaintiffs and TRP pursuant to the Master Agreement.

FN13. "Put simply, because TRP's breach has forced Plaintiffs to include in Outflow' for the Master Agreement years amounts advanced under the [Intercompany] Note during those years, Plaintiffs have received less in profits from the Business than they otherwise would have." Plaintiffs' Reply Brief, at page 17-18, quoting Riley Affidavit, paragraph 14.

FN14. Plaintiffs contend that the purchase price was about $33 million, but LG argues that it paid about $35 million in total.