New York State Workers' Compensation Bd. v Consolidated Risk Servs., Inc.
2013 NY Slip Op 51403(U)
Decided on August 26, 2013
Supreme Court, Albany County
Platkin, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on August 26, 2013

Supreme Court, Albany County

New York State Workers' Compensation Board, in its capacity as the governmental agency charged with administration of the Workers' Compensation Law and attendant regulations, and in its capacity as the successor in interest to The Manufacturing Industry Workers' Compensation Self-Insurance Trust a/k/a New York Manufacturing Industry Workers' Compensation Self-Insurance Trust, The Provider Agency Trust for Human Service Workers' Compensation Trust and Retail & Wholesalers Industry Workers' Compensation Trust of New York a/k/a Retail & Wholesale Industry Workers' Compensation, Plaintiff,

against

Consolidated Risk Services, Inc., CONSOLIDATED RISK SERVICES OF NEW YORK, INC., AV INTERNATIONAL, INC., AVI RISK SERVICES, LLC, DENNIS RYAN, MARTIN RAKOFF, JAMES DIEM, ANDRE DUGGINS, DAVID BRAMWELL, HICKEY-FINN & CO., INC., REGNIER CONSULTING GROUP, INC., JENNIFER BARTLETT, MARK BARTLETT, RONALD BIRDSALL, BONNIE CARPINETA, ROBERT FINCH, VINCE MINIERI, THOMAS MIRABITO, ALICE NYKAZA, GIL ROUFF, KATHLEEN SMITH, JAMIE STRILEY, JAMES GROFF, MELVIN HODIS, WILLIAM MOORADIAN and WILLIAM BONISTEEL, Defendants.

7546-11

EDITORS NOTE:

This outline, with the line numbers at which the section of the decision is found, is suppled as a service of www.InsideWorkersCompNY.com ©2013

Rupp, Baase, Pfalzgraf, Cunningham & Coppola LLC
Attorneys for Plaintiff
(Daniel E. Sarzynski and Charles D.J. Case, of counsel)
1600 Liberty Building
Buffalo, New York 14202

Hodgson Russ LLP
Attorneys for Jennifer Bartlett
(Patrick M. Tomovic and Christian J. Soller, of counsel)
Attorneys for Defendants
677 Broadway, Suite 301
Albany, New York 12207

Woods Oviatt Gilman LLP
Attorneys for Mark Bartlett
(Andrew J. Ryan, of counsel)
700 Crossroads Building
2 State Street
Rochester, New York 14614

Smith, Sovik, Kendrick & Sugnet, P.C.
Attorneys for Alice Nykaza
(Edward J. Smith, III, of counsel)
250 South Clinton Street - Suite 600
Syracuse, New York 13202-1252

Phillips Lytle LLP
Attorneys for Kathleen Smith
(Kenneth A. Manning, Kelly Mooney Lester and William H. Baaki, of counsel)
Suite 3400
One HSBC Center
Buffalo, New York 14203

Vergilis, Stenger, Roberts, Davis & Diamond, LLP
Attorneys for Consolidated risk Services, Inc., Consolidated Risk Services ofNew York, Inc.,
Consolidated Claims Services, Inc., AV International, Inc.,AVI Risk Services, LLC, Dennis Ryan,
Martin Rakoff, Andree Duggin andDavid Bramwell
(Lisa M. Cobb, of counsel)
1136 Route 9
Wappingers Falls, New York 12590

Keidel, Weldon & Cunningham, LLP
Attorneys for James Diem
(Jan A. Marcus, of counsel)

925 Westchester Avenue
White Plains, New York 10604

Maynard, O'Connor, Smith & Catalinotto, LLP
Attorneys for Hickey-Finn & Co., Inc.
(Kathleen A. Barclay, of counsel)
6 Tower Place
Albany, New York 12203

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
Attorneys for Regnier Consulting Group, Inc.
(Nancy Quinn Koba, of counsel)
3 Gannett Drive
White Plains, New York 10604

Richard M. Platkin, J.

This action is brought by the State of New York Workers' Compensation Board ("WCB") in its capacities as the governmental entity charged with the administration of the Workers' Compensation Law and as successor in interest to three group self-insured trusts: The Manufacturing Industry Workers' Compensation Self-Insurance Trust a/k/a New York Manufacturing Industry Workers' Compensation Self-Insurance Trust ("MITNY"); The Provider Agency Trust for Human Service Workers' Compensation Trust ("PATH"); and the Retail & Wholesalers Industry Workers' Compensation Trust of New York a/k/a Retail & Wholesale Industry Workers' Compensation Trust ("RITNY"). Nine separate motions to dismiss are pending, and the WCB has moved to amend its pleading. Oral argument was held on June 14, 2013. This Decision & Order follows.

BACKGROUND

Plaintiff's complaint ("Complaint") alleges that MITNY, PATH and RITNY (collectively "the Trusts") are group self-insured trusts ("GSITs") formed pursuant to Workers' Compensation Law ("WCL") § 50-a. Members of the Trusts were employers within particular trades or industries that conducted business in New York State and were required to provide workers' compensation insurance to their employees. Due to substantial accumulated deficits and the inability of the Trusts to properly manage these deficits, the WCB assumed administration of MITNY on or about March 31, 2006, PATH on or about March 1, 2006 and RITNY on or about October 15, 2008. As such, the WCB alleges it is the successor in interest to the Trusts. After assuming administration of the Trusts, the WCB commissioned forensic accounting reports that detailed the administration of Trusts from inception to termination and provided a systematic review and evaluation of the circumstances leading to their financial collapse.

Defendant Consolidated Risk Services, Inc. ("CRS"), a Pennsylvania corporation, served as group administrator and third-party administrator for the Trusts from their inception until March 2006. Copies of the contracts between the Trusts and CRS, referred to as service agreements, are

annexed to the WCB's complaint. On or about October 21, 1997, CRS allegedly registered as a foreign business corporation with New York State, assuming the fictitious name Consolidated Risk Services of New York, Inc. ("CRS-NY"). On or about February 27, 2007, CRS allegedly was merged with AV Consultants, Inc., a Pennsylvania business corporation, into AVI Risk Services ("AVI Risk"), a Pennsylvania limited liability company. AVI International, Inc. ("AVI") is alleged to be the parent of CRS and a shareholder of AVI Risk. Further, on or about January 30, 1998, Consolidated Claims Services, Inc. ("CCS"), which is alleged to be a wholly-owned subsidiary of CRS, was formed. CRS-NY, AVI Risk, AVI and CCS (collectively "the CRS Entities") are sued herein as the alleged successors, alter egos and/or agents of CRS.

Defendants Dennis Ryan, Martin Rakoff, Andree Duggin and David Bramwell (collectively "the CRS Individuals") are alleged to be owners, officers and/or key individuals involved with AVI and CRS. They allegedly exercised dominion and control over CRS and the other CRS Entities, thereby leading to inequity, fraud, and/or malfeasance.

The Complaint generally alleges that CRS, together with the CRS Entities and CRS Individuals, engaged in the following wrongful conduct: excessive discounting; improper underwriting practices; charging unreasonable manual premiums; failing to originate, follow, and/or consistently apply applicable underwriting guidelines; failing to institute reasonable and appropriate workplace safety measures; failing to set sufficient reserve levels; failing to adjust reserve levels in light of actual experience; and fraudulent and/or deceptive representations and omissions directed at the Trusts, their members and prospective members.

Included with the allegations lodged against the CRS Defendants are allegations concerning James Diem and Hickey-Finn & Co., Inc. ("Hickey-Finn"), licensed insurance brokers who are alleged to have engaged in misconduct in connection with, *inter alia*, the marketing activities of the Trusts. The claims against these insurance brokers ("Broker Defendants") will be analyzed separately from the claims against the CRS Defendants.

The Complaint further alleges that former RITNY trustees Jennifer Bartlett, Mark Bartlett, Ronald Birdsall, Bonnie Carpineta, Robert Finch, Vince Minieri, Thomas Mirabito, Alice Nykaza, Gil Rouff, Kathleen Smith, Jamie Striley, James Groff, Melvin Hodis, William Mooradian and William Bonisteel all breached fiduciary and contractual duties owed to RITNY in connection with their service.

Finally, allegations of misconduct are lodged against Regnier Consulting Group, Inc. ("Regnier"), a firm that prepared actuarial reports on an annual basis for the Trusts.

The Complaint alleges that the misconduct of each of the named defendants contributed to the Trusts' deficits, which are estimated to be in excess of $50 million. Plaintiff seeks to recover the Trusts' accumulated deficits from the defendants, together with punitive damages and attorney's fees.

LEGAL STANDARD

Under CPLR 3211 (a) (1), dismissal is warranted if documentary evidence conclusively

establishes a defense as a matter of law (*Haire v Bonelli*, 57 AD3d 1354 , 1356 [3d Dept 2008], citing *Beal Sav. Bank v Sommer*, 8 NY3d 318 , 324 [2007]; *see Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]; *Angelino v Michael Freedus, D.D.S., P.C.*, 69 AD3d 1203 [3d Dept 2010]). On such a motion, "affidavits submitted by a defendant do not constitute documentary evidence upon which a proponent of dismissal can rely" (*Crepin v Fogarty*, 59 AD3d 837 , 838 [3d Dept 2009]).

On a motion pursuant to CPLR 3211 (a) (7) to dismiss for failure to state a claim, "the Court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11 , 19 [2005]). The Court's "sole criterion is whether the pleading states a cause of action" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotations omitted]). The test is whether the plaintiff "has a cause of action, not whether he has stated one" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, the Court need not "accept as true legal conclusions or factual allegations that are either inherently incredible or flatly contradicted by documentary evidence" (*1455 Washington Ave. Assoc. v Rose & Kiernan*, 260 AD2d 770, 771 [3d Dept 1999] [internal citations omitted]). As with a motion under CPLR 3211 (a) (1), the Court must "ignore the affidavits submitted by defendants" (*Henbest & Morrisey Inc. v W. H. Ins. Agency*, 259 AD2d 829, 830 [3d Dept 1990]).

Dismissal is warranted under CPLR 3211 (a) (5) where the movant establishes that a cause of action may not be maintained due to the expiration of the statute of limitations. The movant bears the initial burden of supporting the motion with "an affidavit or other competent proof sufficient, if uncontroverted, to establish the [statute of limitations] defense as a matter of law" (*State Higher Educ. Services Corp. v Starr*, 158 AD2d 771, 771 [3d Dept 1990]; *accord Romanelli v DiSilvio*, 76 AD3d 553, 554 [2d Dept 2010]). Upon such a showing, "the burden shifts to the party opposing the motion to aver evidentiary facts" sufficient to defeat the statute of limitations defense or at least raise factual questions concerning the defense (*Hoosac Val. Farmers Exch. v AG Assets*, 168 AD2d 822, 823 [3d Dept 1990]; *see Doyon v Bascom*, 38 AD2d 645 [3d Dept 1971]). Thus, the Court must employ what is, in essence, a summary-judgment type analysis, even without converting the motion into one for summary judgment pursuant to CPLR 3211 (c) (*State Higher Educ. Services*, 158 AD2d at 772; *Suss v New York Media, Inc.*, 69 AD3d 411 , 411 [1st Dept 2010]).

Finally, under CPLR 3211 (a) (8), the burden of proving jurisdiction rests upon the party asserting it. Thus, on a motion to dismiss, the plaintiff is obliged "to come forth with definite evidentiary facts to support" the exercise of jurisdiction over the defendant (*Spectra Prods. v Indian Riv. Citrus Specialties*, 144 AD2d 832, 833 [3d Dept 1988]).

THE TRUSTEES

Defendants Jennifer Bartlett, Mark Bartlett, Ronald Birdsall, Bonnie Carpineta, Robert Finch, Vince Minieri, Thomas Mirabito, Alice Nykaza, Gil Rouff, Kathleen Smith, Jamie Striley, James Groff, Melvin Hodis, William Mooradian and William Bonisteel are alleged to be former trustees of RITNY. According to the Complaint, the RITNY Agreement and Declaration of Trust ("Trust Agreement") imposed certain duties upon the trustees, including: (a) the general management of

the Trust; (b) the holding of regular meetings, including an annual meeting to review the performance of the Trust with participating employers; (c) approval of RITNY's annual budget, and (d) review of RITNY's annual report, which is filed with the WCB.

The Complaint alleges that the former trustees ("Former Trustees") breached their fiduciary and contractual duties to RITNY. The WCB further seeks to hold the Former Trustees liable for RITNY's accumulated deficit under a theory of implied indemnification. Four of the defendant trustees, Jennifer Bartlett, Mark Bartlett, Kathleen Smith and Alice Nykaza (hereinafter "Trustees"), move separately to dismiss the Complaint.

A. Breach of Fiduciary Duty

The Complaint alleges that the Trustees breached their fiduciary duties to RITNY by, among other things: failing to exercise due care and reasonable prudence in making decisions for the trust; failing to hold regular board meetings; failing to oversee RITNY's day-to-day operations; failing to oversee RITNY's finances; failing to keep adequate records; failing to perform due diligence in the retention of CRS; failing to solicit the services of other group or program administrators; allowing CRS, its employees and/or officers, to participate in board of trustees' meetings and to maintain the minutes and records thereof; failing to keep the trust members informed through annual meetings; and failing to oversee CRS's activities.

The Court begins its analysis with the threshold issue of the timeliness of the claim. "New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Rather, the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks. Where the remedy sought is purely monetary in nature, courts construe the suit 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" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132 , 139-140 [2009]). As the WCB's complaint seeks only monetary damages, the Trustees maintain that the cause of action for breach of fiduciary duty is subject to a three-year limitations period.

In opposition, the WCB contends that the breach of fiduciary duty claim should be afforded the benefit of the six-year statute of limitations applicable to breach of contract claims because the Trustees' potential liability arose out of the initial contractual agreement, the Trust Agreement. The Court does not find this argument to be persuasive. The principal case submitted in support of this line of argument, *Baff v Redfield Blonsky & Co.* (1995 U.S. Dist. LEXIS 5400 [SDNY 1995]), cites and relies upon *Santulli v Englert, Reilly & McHugh, P.C.* (78 NY2d 700 [1992]). In *Santulli*, the Court of Appeals held that where a professional negligence claim arises out of a contractual relationship and the remedy sought is the recovery of damages to property or other pecuniary loss recoverable in a contract action, the six-year limitations period of CPLR 213 (2) applies (*see* 78 NY2d at 707). However, the mode of analysis applied in *Santulli* expressly was rejected by the State Legislature when it amended CPLR 214 (6) in 1996 to clarify that "the limitations period in non-medical malpractice claims against professionals is three years, whether the underlying theory is based in contract or tort"' (*Chase Scientific Research v NIA Group*, 96 NY2d 20 [2001], quoting CPLR 214 [6], as amended by L 1996, ch 623 ["Chapter 623"]).

Even more fundamentally, the mode of analysis relied upon by the WCB directly is refuted by *IDT*, which squarely holds that "[w]here the remedy sought is purely monetary in nature, courts construe the [breach of fiduciary duty] suit as alleging injuries to property' within the meaning of CPLR 214 (4), which has a three-year limitations period" (12 NY2d at 139-140).[FN1] In fact, the fiduciary relationship in *IDT* arose out of the parties' prior contractual relationship, which involved defendant serving as an investment banking and financial adviser to the plaintiff, but the Court of Appeals nonetheless applied a three year limitations period. Accordingly, the Court concludes that *IDT* is controlling, and the WCB's claim for breach of fiduciary duty against the Trustees is governed by a three-year statute of limitations.

The issue then becomes accrual. A claim for breach of fiduciary duty generally accrues "as soon as the claim becomes enforceable, *i.e.*, when all elements of the tort can be truthfully alleged in a complaint. As with other torts in which damage is an essential element, the claim . . . is not enforceable until damages are sustained" (*IDT*, 12 NY2d at 140-141[internal quotation marks omitted]). Thus, the statute of limitations ordinarily begins to run on the earliest date when the acts or omissions constituting the alleged breach of duty cause the plaintiff to sustain damages (*see Cator v Bauman*, 39 AD3d 1263 [4th Dept 2007]). However, "[t]he statute of limitations is tolled until the fiduciary has openly repudiated his or her obligation or the relationship has been otherwise terminated" (*People v Ben*, 55 AD3d 1306 , 1308 [4th Dept 2008]).

The Trustees argue, among other things, that any fiduciary relationship with the Trust was severed no later than October 15, 2008, when the WCB assumed administration of RITNY. On that basis, the Trustees argue that this cause of action, commenced on December 5, 2011, is untimely. The WCB responds that its cause of action accrued on June 11, 2010, when it received the forensic accounting of RITNY. In support of its contention that where damages are an essential element of a plaintiff's cause of action, the cause of action will not accrue until plaintiff has knowledge of those damages and can allege those damages in the complaint, the WCB relies upon two Appellate Division decisions of fairly recent vintage: *Inter-Community Mem. Hosp. of Newfane, Inc. v Hamilton Wharton Group, Inc.* (93 AD3d 1176 [4th Dept 2012]); and *State of NY, Workers' Compensation Bd. v A & T Healthcare, LLC* (85 AD3d 1436 [3d Dept 2011]).

In *Inter-Community*, former members of a GSIT sued to recover damages for, among other things, assessments that had been levied against them on account of the subject trust's accumulated financial deficit. In reversing the dismissal of their breach of contract claims as time-barred, the Fourth Department concluded that despite the plaintiffs' withdrawal from active participation in the trust in 2001, their joint and several liability for deficits continued under the operative trust documents. The Court further held that the statute of limitations ran anew for each alleged breach, and the record in that action did not disclose the "precise nature and timing" of the alleged breaches so as to conclusively defeat plaintiffs' contractual cause of action. Finally, the Fourth Department held that as damages are an essential component of a breach of contract claim and the plaintiffs could not allege damages for the *pro rata* deficit assessments until those assessments were actually levied against them, plaintiffs had six years from the date of the levy in which to commence suit.

A & T Healthcare, a decision of the Appellate Division. Third Department, concerned an action by the WCB to collect assessments from former GSIT members. In rejecting defendants' statute of

limitations defense, the Third Department held that the WCB's cause of action for breach of contract accrued when the former trust members refused to pay the assessments in accordance with their obligation under the operative trust agreement (83 AD3d at 1437-1438). In so doing, the Court rejected defendants' argument that the WCB's cause of action accrued when it was aware of deficits in the trust and could have levied against current and former trust members (*id.*).

The Court concludes that neither Appellate Division decision was intended to alter settled law of the Court of Appeals holding that a claim for breach of fiduciary duty accrues when damages are sustained (*IDT*, 12 NY3d at 140, citing *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). Further, both *Inter-Community* and *A & T Healthcare* clearly are distinguishable from the present action insofar as they pertained to an obligation by a present or former GSIT member to pay assessments pursuant to an indemnity agreement or other governing documents of a GSIT.[FN2] Thus, the critical inquiry is when the plaintiff "first suffered loss, as a result of [Trustees'] alleged breach[es] of fiduciary duty" (*IDT*, 12 NY3d at 130).

The Complaint alleges that RITNY was damaged when the "Trustees' failure to act in RITNY's best interests caused RITNY to become underfunded and subject to increased WCB scrutiny" (Complaint ¶ 525). This underfunding is alleged to have occurred no later than October 15, 2008, when the WCB took over the RITNY Trust. In contrast, the forensic report relied upon by the WCB merely quantified the damages sustained by the RITNY Trust and identified the potential causes.[FN3] Accordingly, the Court concludes that the Trustees' fiduciary relationship necessarily was severed no later than October 15, 2008, when the WCB assumed administration of RITNY. This conclusion is consistent with the purpose of the "open repudiation" rule, which is grounded upon the notion that "[u]ntil . . . repudiation occurred, the beneficiaries of the [trust] were entitled to assume that the administrator would perform his trust responsibilities" (*Tydings v Greenfield, Stein, & Senior, LLP*, 11 NY3d 195, 202 [2008]). Following the WCB takeover of RITNY, no one could reasonably have expected that the Trustees would continue to perform trust responsibilities.

Having concluded that the WCB's claim for breach of fiduciary duty is subject to a three year statute of limitations that accrued no later than October 15, 2008, the claim is untimely because this action was not commenced until December 5, 2011.

B. Breach of Contract

The second cause of action against the Trustees alleges that they breached their contractual obligations under the RITNY Trust Agreement. The Trustees contend this claim is time barred and, in any event, fails to state a cause of action.

The statute of limitations for a breach of contract claim is six years (CPLR 213 [2]). Under New York law, "a breach of contract cause of action accrues at the time of the breach" (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *see* CPLR 203 [a]). The date of the breach is controlling even where damages from the breach are not sustained until later and even where the "injured party may be ignorant of the existence of the wrong or injury" (*Ely-Cruikshank*, 81 NY2d at 402-403 [internal quotation marks omitted]).

Where, as here, "a contract provides for continuing performance over a period of time, each

breach may begin the running of the statute anew such that accrual occurs continuously and plaintiffs may assert claims for damages occurring up to six years prior to filing of the suit" (*Airco Alloys Div. v Niagara Mohawk Power Corp.*, 76 AD2d 68, 80 [4th Dept 1980]). However, "so much of the causes of action asserted by [plaintiff] as accrued more than six years prior to the commencement of the instant action must be dismissed as time-barred" (*Westchester County Correction Officers Benevolent Assn., Inc. v County of Westchester*, 65 AD3d 1226 [2d Dept 2009]).

The issue then becomes whether any breaches of the RITNY Trust Agreement are alleged to have occurred within six years from the commencement of this action. As the alleged liability here arises out of the actions and omissions of the Former Trustees during their service as such, the inquiry distills into when particular trusteeships terminated.

In considering this issue, the Court rejects the WCB's repeated assertion that "affidavits are not documentary evidence sufficient to support a motion to dismiss" (Memorandum of Law in Opposition to the Motions to Dismiss Brought by Defendants Jennifer Bartlett, Mark Bartlett and Kathleen Smith, at 3-4, 28). While the WCB's statement is correct as to the branches of the motion made pursuant to CPLR 3211 (a) (1) and (7), the legal principles cited previously demonstrate that a court can consider evidentiary materials on a motion to dismiss a claim as time barred under CPLR 3211 (a) (5).

As to Jennifer Bartlett, the Complaint alleges that she served as a trustee from September 28, 2004 through March 6, 2005 (Complaint ¶ 176). Further, Ms. Bartlett submits the affidavit of Gerald W. Tracey, the founder and president of her employer, Tracey Road Equipment, Inc. ("Tracey Road"), who avers that Tracey Road ceased being a participating RITNY employer effective March 6, 2005. Attached as an exhibit to the affidavit is a confirmatory letter from CRS to Tracey Road, along with a copy of a notice of termination that was to be filed with the WCB. The date of the employer's withdrawal from RITNY is significant because Section 5.1 (C) of the Trust Agreement states that if "[a]t any time a Trustee ceases to be a representative of a Participating Employer, then such Trustee shall be deemed to have immediately resigned." Given the WCB's admission in the Complaint that Jennifer Bartlett's service as a trustee ended by March 6, 2005, the supporting proof she submits, the lack of any contrary proof adduced by the WCB on the instant motion practice and the absence of any showing that proof necessary to oppose this defense is within the exclusive possession of defendants, the Court concludes that the breach of contract claim against Jennifer Smith must be dismissed.

The same conclusion follows with respect to Alice Nykaza, who is alleged by the WCB to have served as a RITNY trustee from on or about July 1, 1998 through February 1, 2004 (Complaint ¶ 183). In addition to the allegations of plaintiff's own complaint, Nykaza submits an affidavit confirming her resignation on February 1, 2004 (*see* Nykaza Affidavit, sworn to July 24,2012, ¶9).

With respect to Kathleen Smith, the Complaint does not make any allegation as to when she ceased serving as a trustee. In her affidavit, Smith avers that "[t]o the best of [her] recollection, [she] resigned from the RITNY Board of Trustees at a meeting of the RITNY Board held in May 2004" (Affidavit of Kathleen Smith ¶ 5, sworn to June 2, 2012). Smith further avers that on August 30, 2005, she sent a letter to CRS, in its capacity as RITNY's group administrator,

advising that her employer, Wellsville Carpet, was terminating its active membership in RITNY effective September 29, 2005. The Court concludes that the proof offered by Smith is insufficient to establish her statute of limitations defense as a matter of law. Her averment regarding resignation is made "[t]o the best of [her] recollection", which suggests some uncertainty or doubt, and the annexed letter is merely a statement of intention which her employer "reserve[d] the right to rescind".

Similarly, the Complaint does not make any allegation as to when Mark Bartlett ceased serving as a trustee. In support of his motion to dismiss, Bartlett avers that his employer, Bart-Rich Enterprises, Inc. ("Bart-Rich"), ceased participation in the RITNY Trust effective June 25, 2006. In this connection, Bartlett submits a notice of termination sent by the RITNY Trust to the WCB confirming Bart-Rich's termination of Trust membership as of such date. Further, a letter from the WCB to CRS dated June 28, 2006 inquires as to how the group intends to fill the vacancy resulting from Bartlett's vacancy on the board. However, as this action was commenced on December 5, 2011,[FN4] any alleged breaches of contract on and after December 5, 2005 are actionable against Mr. Bartlett (hereinafter "Bartlett"). Therefore, dismissal of the breach of contract claim against him would be improper.

Given that Bartlett and Smith have failed to establish their statute of limitations defense as a matter of law, the Court must also consider their contention that the Complaint fails to state a valid claim for breach of contract. To establish a prima facie case that the trust agreement was breached, the WCB must demonstrate: (1) formation of a valid contract; (2) defendants' breach thereof; (3) performance of the contract by plaintiff; and (4) damages resulting from the breach (*see Clearmont Prop., LLC v Eisner*, 58 AD3d 1052, 1055 [3d Dept 2009]). Bartlett and Smith argue that they did not execute or otherwise assent to the Trust Agreement. Bartlett further contends that the Trust Agreement cannot be enforced due to a lack of consideration, since he and the other trustees were uncompensated.

The Court does not find these contentions persuasive. With regard to mutual assent, Bartlett executed a written agreement in connection with his service as trustee in which he expressly assented to accept "all duties and responsibilities [of a trustee] in accordance with the terms and conditions of the Trust Agreement . . . ." And as to Smith, the documentary evidence she submits does not conclusively negate the possibility that she signed such an agreement or that her actions manifested an objective intention to be bound by the Trust Agreement, particularly given her admission that she "agreed to serve as a Trustee of the RITNY GSIT" (Smith Aff. ¶ 4). And even if the Trustees were correct that an uncompensated trustee does not owe contractual duties to a trust, a point upon which the Court expresses considerable doubt, this case presents a situation where the trustees' service was undertaken on behalf of their employers, who were parties to a complex business relationship with the trust and also a source of compensation to their employees. Under these circumstances, the present record does not foreclose the possibility that sufficient consideration flowed to the trustees.

Based on the foregoing, the Court concludes that so much of the Bartlett and Smith's motions to dismiss the breach of contract claim must be denied with respect to alleged breaches on and after December 5, 2005.

C. Implied Indemnification

The thirteenth cause of action, which is alleged against the Former Trustees and all of the other defendants, is denominated as one seeking recovery in implied common-law indemnity. The WCB contends that through no fault of its own, it was required to assume administration of the Trusts because of the actions and inactions of the defendants (Complaint ¶ 583). The Complaint further alleges that the Trusts, through no fault of their own, incurred and paid damages in the form of liability for payment of unnecessary workers' compensation claims and increased administrative expenses as a result of the WCB takeover (*id.* ¶¶ 584-586). On the basis of these allegations, the WCB claims that the Former Trustees (and all of the other defendants) are

> obligated to indemnify the WCB, as successor in interest to [the Trusts], for all past and future expenses, fees, response costs, and direct and indirect damages, including but not limited to, amounts to be determined based upon the amount of the Trusts' total deficit attributable to the actions, inactions, and breaches of the defendants, which currently is believed to exceed $50,903,101, plus interest (*id.* ¶ 587).

The Court of Appeals has offered the following description of implied indemnification:

> Implied indemnity is a restitution concept which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other. Generally, it is available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer, but authorities have noted that the principle is not . . . limited to those who are personally free from fault' (Prosser and Keeton, Torts § 51, at 342 [5th ed]; *see also*, Restatement [Second] of Torts § 886B [2], comment k). . . . The purpose of all contribution and indemnity rules is the equitable distribution of the loss occasioned by multiple defendants. In furtherance of that purpose the courts have granted relief in a variety of cases in favor of the party who, in fairness, ought not bear the loss, allowing it to recover from the party actually at fault. They have found indemnity appropriate because of a separate duty owed the indemnitee by the indemnitor (thus the indemnitee may recover for the wrong to it), because there is a great difference in the gravity of the fault of the two tort-feasors, or because the duties owed to the injured plaintiffs and causing injury are disproportionate. (*Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990] [internal citations and quotation marks omitted]).

In other words, "[t]he underpinning of indemnity actions is the prevention of unjust enrichment. In cases where such unfairness would arise from the assumption by a third party of another's debt or obligation, a contract to reimburse or indemnify is implied by law'" (*State of New York v Stewart's Ice Cream Co.*, 64 NY2d 83, 88 [1984] [internal citation omitted]). In such a case, "the key element . . . is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor.' The duty that forms the basis for the liability arises from the principle that every one is responsible for the consequences of his own negligence, and if another person has been compelled to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him" (*Raquet v Braun*, 90 NY2d 177, 183 [1997] [internal citation omitted]).

Applying these principles, the Court rejects the WCB's contention that defendants are obligated to indemnify the WCB, as successor in interest to the Trusts (Complaint ¶ 588). In its capacity as successor in interest, the WCB stands in the shoes of the Trusts, but it acquires no greater rights than its predecessors. Insofar as the Trusts have sustained damages in the form of increased administrative expenses or the payment of unnecessary claims due to the wrongful actions and omissions of defendants, the Trusts possess claims sounding in contract or tort, which the WCB may pursue in its capacity as successor in interest. However, the Court is unpersuaded that the Trusts possess a right of indemnification against defendants that may be asserted in addition to, or in lieu of, direct claims.

Courts must look to the reality and essence of the causes of action alleged in the complaint (*Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937]), and a claim does not become one "for indemnity merely because the pleader has so denominated it" (*Bunker v Bunker*, 80 AD2d 817, 817-818 [1st Dept 1981]). The key element of a cause of action for common-law indemnification is an implied duty running from the indemnitor to the indemnitee, separate from any direct duty owed by the indemnitor to the injured party (*Raquet*, 90 NY2d at 183). But where the injured party and the indemnitee are one and the same, there is no need to imply a separate restitutionary duty, as the injured party can pursue direct claims (*see Peoples' Democratic Republic of Yemen v Goodpasture, Inc.*, 782 F2d 346, 350 [2d Cir 1986]). For this reason, a party cannot obtain the advantage of the generous statute of limitations applicable to indemnity claims by styling its direct claims as ones for indemnity (*see Bunker*, 80 AD2d at 818). And since the Trusts cannot pursue indemnification from defendants, neither can the WCB in its capacity as successor in interest.

While the complaint specifically alleges that the WCB's cause of action for implied indemnification is brought as the successor in interest to the Trusts (*see* Complaint ¶¶ 587-588), there are passing references in the complaint to the WCB suing in its governmental capacity as the State agency charged with administration of the Workers' Compensation Law ("WCL"). And as pertinent here, the cause of action for implied indemnification does refer to the WCB having been required under the WCL to assume administration of the Trust due to defendants' actions and inactions (Complaint ¶ 583) and to meet the Trust's obligations out of its administrative fund (*id.* ¶ 584). However, even if the cause of action for implied indemnification could be understood as having been brought in the WCB's governmental capacity and the issue properly were before the Court, the complaint still would fail to state a viable cause of action.

As discussed previously, implied indemnity is a common law concept intended to equitably distribute a loss occasioned by multiple defendants by implying a restitutionary duty in favor of the party who ought not to bear the loss (*Raquet*, 90 NY2d at 183; *Mas*, 75 NY2d at 690-691). In the context of this action, the Court recognizes that the WCB is responsible for paying out of its administrative fund the compensation and benefits that may be unpaid due to the insolvency of the Trust and the expenses associated with winding down the Trust (*see* WCL §§ 50 [5] [f], 51). However, this alleged "loss" purely is the product of a legislative determination of New York State regarding the continuation of benefits to injured workers. And the same statutory scheme by which the State Legislature has made the WCB the payor of last resort establishes a process for infusing the necessary funds into the agency's administrative fund through assessments on the self-insurance industry (*see id.*). In light of the nature and source of the WCB's obligation and the presence of a comprehensive statutory scheme that does not include a right of indemnification, the

Court sees no basis in law or appellate precedent for implying separate duties running from the defendants to the WCB.[FN5]

Further, allowing government agencies to pursue a claim of implied indemnification in cases like this would disregard important and longstanding rules of privity and eviscerate the principles of finality and repose embodied in statutes of limitations. Under the WCB's theory, a government agency could bring suit against the officers, directors, managers, employees and trustees of a entity, as well as the professionals and others who rendered services to the entity, under the extraordinarily generous limitations period applicable to indemnification claims in the absence of any prior professional, contractual, fiduciary or other relationship (*cf. Gray v Wallman & Kramer*, 224 AD2d 275, 275 [1st Dept 1996]; *Breen v Law Off. of Bruce A. Barket, P.C.*, 52 AD3d 635 , 636-637 [2d Dept 2008]).

Accordingly, the Court concludes that the cause of action for implied indemnity must be dismissed against the Trustees and all other moving defendants for failure to state a cause of action.

THE CRS DEFENDANTS

Defendants CRS, the CRS Entities and the CRS Individuals (collectively "the CRS Defendants") move for dismissal of the WCB's complaint pursuant to CPLR (a) (1), (5) and (7).

A.Statute of Limitations

1.The Tolling Agreement

As a threshold matter, the Court must consider the effect of a Tolling Agreement that CRS's former counsel entered into with the WCB on February 27, 2009. Pursuant to its terms, the statute of limitations for claims by the WCB against CRS and its "officers, agents and employees" was tolled during the term of the agreement. The agreement was extended several times and ultimately expired on November 30, 2011. Therefore, insofar as the Tolling Agreement is enforceable and applicable to CRS and the CRS Individuals,[FN6] it would extend the relevant limitations period by 1,007 days (about 33 months) as to the claims concerning PATH and MITNY.

In seeking to avoid the consequences of the Tolling Agreement signed on its behalf by former counsel, CRS argues that it was legally incapable of entering into said agreement. According to CRS, its corporate existence ceased in 2007 upon the merger into AVI Risk, and the power to enter into a tolling agreement thereafter was vested in its successor. In this connection, CRS cites Business Corporation Law § 906, which provides that the "surviving or consolidated corporation shall [after the merger] possess all the rights, privileges, immunities, powers and purposes of each of the constituent corporations."[FN7]

Even assuming that the 2007 merger left the attorney representing CRS in negotiations with State officials without the actual authority to bind CRS as to legal claims arising out of CRS's pre-merger activities and that said counsel otherwise lacked authority to bind his client under ordinary agency principles – assumptions that seem highly doubtful – the Court sees merit in the

WCB's invocation of the doctrine of equitable estoppel. Equitable estoppel is available where a defendant's misconduct causes a plaintiff to forbear from timely commencing an action. Here, the WCB has come forward with proof of "subsequent and specific actions by defendants [that kept the WCB] from timely bringing suit" (*Zumpano v Quinn*, 6 NY3d 666 , 674 [2006] [citation omitted]). Further, plaintiff's counsel affirms based upon his own personal knowledge that the WCB was unaware of the true state of affairs regarding CRS's corporate status until shortly before the filing of the instant complaint, and nothing in CRS's submissions conclusively demonstrates otherwise. Accordingly, the Court is satisfied that the WCB has presented sufficient facts from which it could conclude that equitable estoppel bars CRS from challenging its capacity to enter into the Tolling Agreement (*see Toste Farm Corp. v Fowler*, 235 NYLJ 32, 2006 NY Misc LEXIS 4075 [Sup Ct, NY County 2006]).

The CRS Individuals also contend that even if CRS's former counsel had authority to bind CRS to the Tolling Agreement, it could not and did not bind them. In addition to challenging counsel's authority to bind CRS's "officers, agents and employees", the CRS Individuals argue that they were not officers, agents or employees of CRS at the time of execution of the Tolling Agreement. While the Court agrees that a tolling agreement generally cannot serve to bind non-parties, the present record fails to establish that the CRS Individuals are, in fact, non-parties and that they did not otherwise assent to the Tolling Agreement.

The agreement itself recites that it is entered "by and between Consolidated Risk Services, Inc., its officers, agents and employees (hereinafter collectively CRS')", and it is signed by counsel as attorneys for this collective group. There simply is no competent proof in the record establishing that the attorney who executed the agreement lacked authority to bind the CRS Individuals under general agency principles. Indeed, the affidavits submitted by the CRS Individuals fail to provide evidentiary support for their counsel's conclusory assertions. Moreover, given the circumstances under which the Tolling Agreement was executed, it is apparent that the agreement was intended by the parties to encompass the former "officers, agents and employees" sued herein.

Based on the foregoing, the Court concludes that for purposes of the instant motion practice, the Tolling Agreement shall be given force and effect with respect to claims against CRS and the CRS Individuals concerning the PATH and MITNY Trusts.

2. Breach of Fiduciary Duty (1st Cause of Action)

As stated previously, a breach of fiduciary duty claim seeking monetary relief generally is subject to a three year limitations period. However, a six year limitations period is available where the claim for breach of fiduciary duty is grounded upon essential allegations of actual fraud (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

Upon review of the Complaint, as amplified by the WCB's submissions in opposition to the motions, a portion of the breach of fiduciary duty claim rests on allegations that the CRS Defendants fraudulently concealed or misrepresented the financial condition of the Trusts, the danger of operating deficits and issues associated with underwriting deficiencies. As to these allegations of fraudulent misrepresentations or concealment, the breach of duty claim sounds in actual fraud and is governed by a six-year statute of limitations. However, as to remaining alleged

breaches of fiduciary duty – including plaintiff's allegations of excessive discounting, inadequate underwriting, recruitment of members with poor loss experience histories, failure to retain adequate reserves, failure to collect sufficient member contributions and failure to take sufficient remedial action – the allegations of fraud are incidental and not essential. Accordingly, a three year limitations period applies to such allegations (*see Carbon Capital Mgt., LLC v American Express Co.*, 88 AD3d 933 , 939 [2d Dept 2011] ["cause of action alleging breach of fiduciary duty was partially barred by the statute of limitations"]).

For the reasons stated above, the breach of fiduciary duty cause of action against the CRS Defendants accrued no later than the date upon which the CRS ceased rendering services to the Trusts. Thus, the cause of action concerning MITNY accrued no later than March 31, 2006, no later than March 1, 2006 as to PATH and no later than March 31, 2006 as to RITNY.

Accordingly, with respect to CRS and the CRS Individuals, the portions of the breach of fiduciary duty claim subject to a three year limitations period are time barred as to PATH and RITNY, but timely as to MITNY with respect to allegations on and after March 3, 2006 (a period of less than one month). The portion of the claim grounded upon allegations of actual fraud are timely as to allegations on and after March 3, 2003 (MITNY and PATH) and December 5, 2005 (RITNY).

As to the CRS Entities, which are not subject to the Tolling Agreement, so much of the breach of fiduciary duty claim as is subject to a three year limitations period must be dismissed as untimely, and the remaining portions of the claim, grounded upon allegations of actual fraud, are timely with respect to allegations on and after December 5, 2005.

3.Contractual and Quasi-Contractual Causes of Action (2nd, 3rd and 6th Causes of Action)

The parties agree that the contractual and quasi contractual causes of action are governed by a six year limitations period. And for the reasons stated above, the breach of contract cause of action accrued no later than the dates upon which CRS ceased rendering services to the Trusts pursuant to service agreements. Accordingly, as to CRS and the CRS Individuals, the causes of action are timely with respect to allegations on and after March 3, 2003 (MITNY and PATH) and December 5, 2005 (RITNY). As to the CRS Entities, the causes of action are timely with respect to allegations on and after December 5, 2005.

4. Fraud Causes of Action (4th and 5th Causes of Action)

Claims of fraud generally are subject to a six-year statute of limitations, but maybe commenced within "two years from the time the [plaintiff] . . . discovered the fraud, or could with reasonable diligence have discovered it" (CPLR 213 [8]).

With respect to the fourth cause of action, alleging fraudulent omissions and concealment, the claims against CRS and the CRS Individuals are timely as to alleged misconduct on and after March 3, 2003 (MITNY and PATH) and December 5, 2005 (RITNY). For the CRS Entities, the cause of action is timely with respect to allegations on and after December 5, 2005.

Further, earlier allegations may be cognizable under the two-year discovery rule, but the present record fails to conclusively establish when the WCB could, with reasonable diligence, have discovered the alleged fraud. While CRS's counsel maintains that any fraud as to RITNY could have been discovered as early as 2002, when an audit identified "material deficiencies", and no later than October 15, 2008, when the WCB took over RITNY, the present factual record does not establish these assertions as a matter of law.

The same lack of clarity concerning when the WCB discovered or could reasonably have discovered the alleged fraudulent inducements precludes the dismissal of that cause of action on statute of limitations grounds. And insofar as the alleged inducements continued through CRS's administration of the Trusts, as the WCB apparently contends, the claim is timely under the six year limitations period to the same extent as the fraud cause of action.

5. Deception Causes of Action (7th and 8th Causes of Action)

Claims under GBL § 349 and 350 are governed by a three-year statute of limitations that accrues "when plaintiff has been injured by a deceptive act or practice" (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]). Here, plaintiff's claims accrued no later than the dates upon which CRS ceased administering the Trusts. Accordingly, the deception claims against PATH and RITNY are untimely as to all CRS Defendants. With regard to MITNY, the claims are timely only against CRS and the CRS Individuals, and then only for the limited period from March 3, 2006 through March 31, 2006.

6. Claims Against Certain Defendants

Martin Rakoff & David Bramwell

According to the Complaint, Rakoff and Bramwell "solicited the Trusts' members, drafted the Trusts' organizational documents, and administered the Trusts" (¶ 19). Rakoff allegedly "served as senior vice president for Marketing of CRS until his resignation from Consolidated Risk Managers, Inc. in 1999 and also is alleged, upon information and belief, to have been "a ten-percent (10%) shareholder of CRS" (*id.* ¶ 167). Bramwell allegedly "was responsible for CRS's "underwriting activities and was a ten-percent (10%) shareholder of CRS" (*id.* ¶ 168).

The WCB alleges that by virtue of their positions with CRS and/or acting as the company's agents, Rakoff and Bramwell "knew of and w[ere] involved with the fraud perpetrated by CRS" (*id.* ¶ 424). Further, the Complaint alleges that the majority owners of AVI, including Rakoff and Bramwell, exercised complete dominion and control over CRS, CRS-NY, CCS, and AVI Risk Services, leading to inequity, fraud, and/or malfeasance (*id.* ¶ 137). Additionally, Rakoff specifically is alleged to have made fraudulent misrepresentations regarding the financial risks associated with trust membership (*id.* ¶ 450).

Defendant Rakoff submits an affidavit in support of his statute of limitations defense in which he makes the following averments: (a) he was an employee of CRS from June 1991 until May 30, 1999; (b) he resigned from his employment with CRS on June 1, 1999; (c) he has had no responsibility for the day to day operations of CRS or any of its related entities since June 1, 1999;

(d) he has had no involvement with any management decisions made by or on behalf of CRS or any related entity since June 1, 1999; (e) on October 25, 2002, he transferred stock he owned in AVI to CRS, and since that date, he has not owned, either directly or indirectly, any stock in CRS or a related entity; and (f) he has not taken or received any thing of value from CRS or any CRS-related entity since October 25, 2002.

Bramwell similarly avers: (a) he never was a shareholder of AVI; (b) he did own 10 shares of CRS, but he sold them effective April 15, 1997 after his employment with CRS terminated on September 3, 1996 (a copy of the Stock Purchase Agreement is annexed to his affidavit); (c) since April 15, 1997, he has not owned any stock in the corporate defendants nor has any entity that he owns or controls owned any such stock; (d) he was not a board member or officer of any of the corporate defendants; (e) he was employed by AVI in 2000, and that employment terminated on January 31, 2002 (a Separate Agreement and Mutual Release also is attached to the affidavit); and (f) other than the foregoing, he has not had any relationship with CRS.

In opposition, the WCB first argues that its causes of action against Rakoff and Bramwell did not accrue until its receipt of the forensic accounting reports and that the Court may not consider affidavits on a CPLR 3211 (a) (5) motion, contentions that the Court rejects for the reasons stated previously, except insofar as the forensic reports may bear on the two-year discovery rule applicable to fraud claims. As the present record does not disclose when this alleged fraud should have been discovered, it would be inappropriate to dismiss any of the fraud-based claims against these defendants.

Moreover, given the self serving nature of defendants' affidavits, the prospect that they may not fully negate all potential bases of liability, the serious nature of the misconduct alleged and the fact that information germane to the statute of limitations defense may lie in the exclusive possession of the CRS Defendants, the Court will deny this branch of the motion and allow movants to preserve their timeliness objection in a responsive pleading (*see* CPLR 3211 [d]).

b. *CRS-NY*

According to the affidavit of Dennis Ryan, CRS-NY was a corporation formed in or about October 1997 as a Pennsylvania corporation to handle the New York aspects of workers' compensation GSITs for CRS. However, it never received WCB authorization to administer New York GSITs, and it never became active. It had no board of directors, no assets and took no action. As alleged in the Complaint, CRS-NY was dissolved in 2001. While these facts certainly appear to support the requested relief, the Court will deny this branch of the motion without prejudice for substantially the reasons stated immediately above.

B. Successor Liability of AVI Risk

AVI Risk claims that it is not a proper party to this action because it has not assumed the liabilities of CRS associated with the WCB's claims. In making this argument, AVI Risk submits the affidavit of Dennis Ryan, an officer of the corporation, and supporting corporate documents. Ryan explains that CRS was a wholly owned subsidiary of AVI prior to a 2007 transaction between AVI and a non-party. As a result of that transaction, CRS was merged into a newly

created entity, AVI Risk. Pursuant to the Contribution Agreement and Unit Purchase Agreement annexed to the Ryan affidavit, AVI Risk agreed to assume liability only for "ordinary course liabilities" that were "incurred on and after January 1, 2007", and no provision was made therein for the assumption of pre-2007 CRS liabilities. AVI Risk argues that the agreed upon allocation of risk between CRS and AVI Risk must be respected and given effect herein.

The Court finds this argument unconvincing. The CRS Defendants apparently concede in their motion papers that CRS formally was merged into AVI Risk. Both Pennsylvania and New York law provide that upon a merger, the surviving entity assumes the liabilities of the corporations so merged (15 Pa Cons Stat § 1929 [b]); Business Corporation Law § 906 [b] [3]). Indeed, the CRS Defendants cited the New York statute in arguing that only AVI Risk, and not CRS, had legal authority to enter into the Tolling Agreement.

In contrast, the four-part test cited and applied by AVI Risk concerns the assumption of liability in connection with an asset purchase agreement, not a merger. In such a transaction, a corporation that acquires the assets of another company generally is not liable for the torts of its predecessor, but liability will attach to the successor if: "(1) it expressly or impliedly assumed the predecessor's tort liability, (2) there was a consolidation or merger of seller and purchaser, (3) the purchasing corporation was a mere continuation of the selling corporation, or (4) the transaction is entered into fraudulently to escape such obligations" (*State Farm Fire & Cas. Co. v Main Bros. Oil Co.*, 101 AD3d 1575 , 1577 [3d Dept 2012], quoting *Schumacher v Richards Shear Co.*, 59 NY2d 239, 245 [1983]). And even if there were no statutory merger here and the transaction was deemed an asset purchase with an express disclaimer of successor liability, the present record does not affirmatively foreclose a finding of *de facto* merger (*State Farm*, 101 AD3d at 1577; *see Matter of New York City Asbestos Litig.*, 15 AD3d 254 [1st Dept 2005]).[FN8]

C. Deception Claims

The CRS Defendants contend that the Complaint fails to state a viable cause of action under GBL §§ 349 or 350. The elements of a cause of action under GBL § 349 are "first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Stutman v Chemical Bank*, 95 NY2d 24, 29 [2000] [citations omitted]). A claim under GBL § 350 has similar elements, but is directed at false advertising. As to the CRS Defendants, these claims are timely only against CRS and the CRS Individuals, only with respect to claims pertaining to the MITNY Trust and only for the period less than one month from March 3, 2006 through March 31, 2006.

The WCB alleges that the CRS Defendants (as well as Diem and Hickey-Finn) violated GBL § 349 by distributing marketing materials that falsely described CRS as skilled in the administration of workers' compensation and trust management services in order to induce the public to engage their services (¶¶ 482, 485). In an effort to meet the requirement of demonstrating consumer-oriented conduct, the WCB alleges that the Trusts' members were consumers of workers' compensation insurance services, and the deceptive representations of CRS and others induced the Trusts and its members to engage the services of CRS. The false advertising claim is similarly pled, but relies upon representations made on an Internet web site allegedly used by CRS to procure business in New York State. In seeking dismissal of these causes of action, the CRS

Defendants argue principally that the alleged deception was not directed at "consumers" within the meaning of GBL §§ 349 or 350.

"Section 349 does not grant a private remedy for every improper or illegal business practice, but only for conduct that tends to deceive consumers" (*Schlessinger v Valspar Corp.*, 2013 NY Slip Op 03870). A plaintiff "must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, for example, would not fall within the ambit of the statute" (*Oswego Laborers'Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]).

The Court agrees that the deceptive practices allegedly undertaken by defendants are not consumer oriented insofar as they were directed at the Trusts in connection with their decision to retain CRS as group administrator. These complex commercial transactions properly are viewed as "single shot" private contract disputes that are unique to the parties (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320-321 [1995]), and there is no allegation that the conduct had a broader impact on other similarly-situated group self-insured trusts (*see Oswego*, 85 NY2d at 25-26; *Med. Socy. of State of NY v Oxford Health Plans, Inc.*, 15 AD3d 206 [1st Dept 2005]).

To be sure, the CRS Defendants' alleged deceptive representations may well have had a broader impact on employers purchasing workers' compensation insurance for their employees, and these businesses might be considered "consumers" within the meaning of GBL § 349. But the WCB sues as successor in interest to the Trusts to recover the damages sustained by the Trusts as a result of the alleged deceptive acts and practices. The WCB has not alleged a viable theory as to how the Trusts were damaged as a result of the CRS Defendants' actions in soliciting employers to become members or encouraging existing members to remain as such. And while the employers who joined or stayed with the Trusts as a result of the alleged deception may well claim injury, such a claim belongs to the affected employer, not the Trusts. In that respect, the WCB's claim is entirely derivative of the Trust members (*see generally City of New York v Smokes-Spirits.Com, Inc.*, 12 NY3d 616 , 621 [2009]; *see Blue Cross & Blue Shield of N.J., Inc. v Philip Morris USA Inc.*, 3 NY3d 200 [2004]).

Likewise, the Court is mindful that the actions of CRS, as alleged in the complaint, may well have had a broader impact on the employees of Trust members, which, in turn, may have impacted consumers generally. But GBL §§ 349 and 350 are statutes directed at preventing consumer deception, and there has been no showing that any deception directed at the Trusts represents conduct that deceived consumers and, as a result, caused the claimed losses (*cf. State of New York Workers' Compensation Bd. v 26-28 Maple Ave., Inc.*, 80 AD3d 1135 , 1137 [3d Dept 2011]).

D. Fraudulent Inducement

The WCB alleges that the CRS Defendants fraudulently induced the Trusts to enter into the service agreements (Complaint ¶¶ 438-440). Certainly the WCB may pursue these allegations in its capacity as successor in interest to the Trusts.[FN9] However, the WCB also complains

that the CRS Defendants fraudulently induced employers to join the Trusts. A cause of action alleging that the members of the Trusts were fraudulently induced belongs to the

employer-members, not the Trusts or the WCB. Accordingly, so much of the fifth cause of action as is premised on the claim that employers were fraudulently induced to become Trust members must be dismissed for failure to state a cause of action.

E. Unjust Enrichment

The CRS Defendants move for dismissal of the unjust enrichment claim as duplicative of the express breach of contract claim. While there does not appear to be any dispute as to the existence of a binding and enforceable contractual arrangement between the Trusts and CRS, the remaining CRS Defendants deny the existence of such a contractual relationship, and the WCB has not alleged any other relevant contract. Under the circumstances, the cause of action seeking recovery in quasi-contract must be dismissed as against CRS, and the allegations of plaintiff's complaint appearing under the rubric of unjust enrichment shall be deemed to be part of plaintiff's claim for express breach of contract against this defendant (*Kosowsky v Willard Mtn., Inc.*, 90 AD3d 1127 [3d Dept 2011]; *see Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001]).

F. Capacity of Plaintiff to Sue

The WCB sues as successor in interest to the Trusts. As observed by the CRS Defendants, WCB regulations require the Chair of the WCB to "assume administration and final distribution of [an insolvent GSIT's] assets" (12 NYCRR 317.20). On the basis of the foregoing provision, the CRS Defendants argue that this action must be dismissed as improperly sued in the name of the Board, rather than its Chair. The Court disagrees. While the Chair is the administrative head of the agency and bears responsibility for enforcement of the Workers' Compensation Law and attendant regulations (*see* WCL § 141), the CRS Defendants cite no authority that precludes the entire Board, including the Chair, from commencing litigation in the name of the Board. In any event, even if there were merit to this contention, the remedy would merely be granting plaintiff leave to serve an amended complaint *nunc pro tunc*.

G. Remaining Contentions

The Court has considered the remaining arguments and contentions advanced by CRS Defendants – including the contentions that certain of the claims are viable against only certain of the defendants and that certain of the causes of action are duplicative, insufficiently pleaded and/or insufficiently particularized – but finds that either these issues lack merit or should be decided on a fuller and firmer record following the conclusion of discovery.

THE INSURANCE BROKERS

The Broker Defendants, James Diem and Hickey-Finn, move to dismiss the Complaint pursuant to CPLR 3211 (a) (1), (5) and (7). According to the Complaint, the Broker Defendants and the CRS Defendants "solicited the Trusts' members, drafted the Trusts' organizational documents, and administered the Trusts" (¶ 19). Diem allegedly "acted as a broker for CRS and identified members to join GSIT's formed by CRS" (*id.* ¶ 169). In particular, Diem is alleged to have "solicited Polar Plastics Corp. to establish [MITNY] and arranged for CRS to act as its

administrator" (*id.* ¶ 170). Hickey-Finn allegedly "acted as a broker and managing general agent to oversee CRS's GSIT marketing activity throughout New York State" (*id.* ¶ 171). Further, "Hickey-Finn solicited New Horizons Resources, Inc. to form PATH and arranged for CRS to act as its administrator" (*id.* ¶ 172). As agents of CRS, Diem and Hickey-Finn allegedly "knew of and were involved with the fraud perpetrated by CRS" (*id.* ¶ 424).

In an affidavit filed in support of his motion to dismiss, Diem avers that he is an insurance broker who identified employers for potential membership in MITNY and referred those potential members to CRS. He further avers that he had no involvement with PATH or RITNY, and he played no role in forming MITNY, qualifying it as a GSIT or in administering the Trust. He claims to have simply operated as an insurance broker. Diem further avers that the last employer that became a member of MITNY as a result of his personal efforts did so prior to 2000, and his involvement with MITNY and CRS effectively has been inactive since that time. Finally, he denies making any fraudulent or deceptive representations in connection with the brokerage services he allegedly provided.

Similarly, Daniel G. Hickey, Sr., the president of Hickey-Finn, submits an affidavit denying that Hickey-Finn had any ownership interest in the CRS or the CRS Entities and averring that neither Hickey-Finn nor its employees were directors, officers or employees of said entities.

Hickey further denies that there was any agreement for Hickey-Finn to oversee CRS's marketing activities, though he acknowledges that New Horizons was and remains a long-time client to which he had introduced to the concept of GSITs. As to PATH, Mr. Hickey denies that Hickey-Finn was involved in forming, organizing or administering the trust, but states that his company's responsibilities were defined in a certain Provider Agency Trust for Human Services Marketing Agreement ("Marketing Agreement") between Hickey-Finn and CRS.

Under the Marketing Agreement, Hickey-Finn was appointed "the exclusive General Agent" for a specified geographic region. As a result, Hickey-Finn received a percentage of the premium paid by every member from the region placed into PATH, whether as a result of Hickey-Finn's efforts or otherwise. Hickey-Finn later entered into a similar agreement with MITNY by agreement dated February 11, 1998. According to Hickey, CRS terminated the agreements effective January 1, 2000. A copy of the termination letter from CRS is annexed to the motion papers. Thereafter, Hickey claims that Hickey-Finn stood in the same shoes as any other insurance agent or broker placing business in the Trusts, receiving a commission upon successful referrals.

A. Breach of Fiduciary Duty

The Broker Defendants move for dismissal of the cause of action for breach of fiduciary duty, contending that the duties owed by an insurance broker or agent are not fiduciary in nature and, in any event, the claim is time barred.

In *EBC I, Inc. v Goldman Sachs & Co.* (5 NY3d 11 , 19-20 [2005]), the Court of Appeals offered the following guidance in determining the existence of a fiduciary relationship:

A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation. . . . Such a relationship, necessarily fact-specific, is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions. . . . Generally, where parties have entered into a contract, courts look to that agreement to discover the nexus of the parties' relationship and the particular contractual expression establishing the parties' interdependency. . . . If the parties do not create their own relationship of higher trust, courts should not ordinarily transport them to the higher realm of relationship and fashion the stricter duty for them. . . . However, it is fundamental that fiduciary liability is not dependent solely upon an agreement or contractual relation between the fiduciary and the beneficiary but results from the relation (*internal citations and quotation marks omitted*).

As the Broker Defendants correctly observe, an insurance broker acting as such generally does not owe fiduciary duties to purchasers of insurance or to the insurers with which the policies are placed (*see Murphy v Kuhn*, 90 NY2d 266, 270-271 [1997]). "Indeed, the word broker' suggests an intermediary – not someone with undivided loyalty to one or the other side of the transaction" (*People v Wells Fargo Ins. Servs., Inc.*, 16 NY3d 166 , 171 [2011]). Nonetheless, a broker is not exempt from the general rule that an agent owes a duty of loyalty that precludes it from, *inter alia*, giving advice in bad faith (*id.* at 170-171).

As amplified by the submissions of the WCB in opposition to the motion, the WCB alleges that Diem and Hickey-Finn, as agents of the Trust, made false representations that certain employers were good candidates for trust membership and met applicable underwriting criteria. Additionally, it is alleged that Diem played a role in establishing at least one of the Trusts and arranging for CRS to act as administrator, and Hickey-Finn served as a "managing general agent" for CRS. Together with the over-arching allegations that both insurance brokers were knowing participants in the scheme to defraud allegedly perpetrated by CRS, the present record does not conclusively establish that the Broker Defendants did not breach a duty of loyalty owed to the Trusts. In this connection, the Court notes that on a motion to dismiss under CPLR 3211 (a) (1) and (7), the affidavits submitted by Diem and Hickey-Finn cannot serve to defeat plaintiff's cause of action.

As to the statute of limitations defense, the proof put forward by the Broker Defendants establishes, *prima facie*, that the cause of action for breach of fiduciary duty is untimely even under the six year statute-of-limitations applicable to claims grounded upon allegations of essential fraud. However, the present record does not foreclose application of the two-year discovery rule applicable to fraud based claims of breach of duty (*see Sargiss v Magarelli*, 12 NY3d 527 , 532 [2009]; *Kaufman v Cohen*, 307 AD2d 113, 122-123 [1st Dept 2003]). Moreover, given the nature of the allegations and the fact that relevant proof may lie in the exclusive possession of the Broker Defendants and CRS Defendants, the Court believes that the WCB should have the opportunity for disclosure as to this defense.

B. Contractual Causes of Action

In alleging breach of contract, the WCB contends that "each of the Trusts entered into an agreement (the Service Agreements) with CRS, pursuant to which CRS agreed to perform certain specific, non-delegable services and duties on behalf of, and for the benefit of, the Trusts, in

exchange for the Trusts' payment of a fee. In the case of each of the Trusts, CRS was paid the agreed-upon fee, but failed to perform the agreed-upon services and duties, thus breaching its contract with each of the Trusts" (Complaint ¶ 265). The Complaint then goes on to detail the terms of the particular service agreements and the manner in which they were breached. No specific allegations of breach are made with respect to the Broker Defendants.

The Court concludes that the contractual causes of action must be dismissed because the Broker Defendants were not parties to the contracts on which the WCB sues, and neither the Complaint nor the materials submitted by the WCB in opposition to the motion establish a plausible basis for holding them personally responsible under CRS's contracts with the Trusts. Absent such a contractual relationship, a lawsuit for breach of contract will not lie.

In apparent recognition of this difficulty, the WCB cross-moves for leave to amend its complaint to add a claim against Hickey-Finn for breach of the exclusive marketing agreements. A motion for leave to amend a pleading should be freely granted, providing that there is no prejudice to the nonmoving party and the amendment is not plainly lacking in merit (CPLR 3025 [b]; *Smith v Haggerty*, 16 AD3d 967 , 967-968 [3d Dept 2005]). However, the WCB's claim for breach of contract is subject to a six-year limitations period; accordingly, it can sue only for breaches on and after December 5, 2005. Given the Hickey affidavit and documentary evidence annexed thereto, the Court concludes that the WCB's proposed claim is palpably lacking in merit due to the expiration of the statute of limitations. Accordingly, the cross-motion must be denied.[FN10]

Finally, given the lack of clarity concerning the existence of express contracts covering the subject matter in dispute, the WCB may pursue its claim for unjust enrichment with respect to allegations on and after December 5, 2005.

C. Fraud

The WCB's allegations that Diem and Hickey-Finn played roles in the alleged scheme to defraud, while somewhat sparse, are nonetheless sufficiently particularized and plausible to withstand a motion to dismiss. In this connection, the Court reiterates that the Diem and Hickey affidavits cannot be considered in determining whether the Complaint states a cause of action or whether such a cause of action is barred by documentary evidence. Further, as stated above, the present record does not negate the applicability of the two-year discovery rule, thereby compelling denial of the statute of limitations defense.

D. Deception Claims

The GBL claims are subject to a three year limitations period that accrued no later than the WCB's takeover of the Trusts. Accordingly, the claims are untimely and must be dismissed.

REGNIER

Defendant Regnier moves to dismiss the Complaint pursuant to CPLR 3211 (a) (1), (5) (7) and (8).

Regnier is a foreign business corporation organized under the laws of Wisconsin with a principal place of business in Stevens Point, Wisconsin (Complaint ¶ 172). According to the Complaint, CRS contracted with Regnier to perform actuarial services for RITNY (*id.* ¶ 565). The WCB contends that Regnier "consistently underestimated RITNY's reserve liabilities and expenses", "failed to apply New York State experience development factors in its actuarial analysis of RITNY's liabilities and financial condition" and "failed to provide a low/high range of estimates in its reports" (*id.* ¶¶ 553-555). The Complaint further alleges that outside review of Regnier's reports for fiscal years 2000 through 2004 found that the actuarial estimates set forth therein were unreasonable (*id.* ¶¶ 556-5587). The WCB alleges that Regnier's failure to properly estimate RITNY's reserve liabilities and expenses constituted a breach of its fiduciary duties and a breach of contract.

A. Personal Jurisdiction

To establish general jurisdiction over an unauthorized foreign corporation, CPLR 301 requires the WCB to show that Regnier "engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction" (*Laufer v Ostrow*, 55 NY2d 305, 309-310 [1982] [internal quotation marks and citations omitted]). The record does not support such a finding. Regnier's principal place of business is in the State of Wisconsin, and it does not maintain offices, employees, assets or other property within the State of New York. Further, there is no proof that Regnier advertises or solicits business with the State. Under the circumstances, it cannot be said that Regnier has the type of systemic and continuous contacts with the State that would allow for the exercise of general jurisdiction.

As to long-arm jurisdiction, CPLR 302 (a) (1) provides that "personal jurisdiction may be exercised over a foreign entity that transacts any business within the state or contracts anywhere to supply goods and services in the state if it is shown that the entity purposely interjected [itself] into New York's service economy or developed other significant contacts with New York" (*Benefits By Design Corp. v Contractor Mgt. Servs.,LLC*, 75 AD3d 826 [3d Dept 2010]). Jurisdiction under CPLR 302 (a) (1) "is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Fischbarg v Doucet*, 9 NY3d 375 , 380 [2007]). "Purposeful activities are those with which a defendant, through volitional acts, avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws" (*id.*).

In arguing against the exercise of personal jurisdiction, Regnier observes that the contract for actuarial services upon which it is sued was initiated by CRS from its offices in Pennsylvania and accepted by Regnier in its offices in Wisconsin. CRS sent the necessary data to Wisconsin, the actuarial analysis was performed in Wisconsin, and the completed reports were forwarded to CRS in Pennsylvania. On that basis, Regnier argues that the assertion of *in personum* jurisdiction by the State of New York is not authorized by CPLR 302 and, in any event, would violate principles of due process.

The Court does not find Regnier's jurisdictional objection availing. As an initial matter, Regnier's argument disregards the fact that it prepared actuarial reports on behalf of a New York GSIT comprised of New York employers providing workers' compensation insurance to New York

employees. More fundamentally, Regnier disregards the fact that the subject actuarial reports were prepared pursuant to New York regulations requiring GSITs such as RITNY to annually submit to the WCB an actuarial analysis (12 NYCRR § 317.19). In performing this work, Regnier undoubtedly was aware that its work product was to be submitted to the WCB, the State agency charged with administering New York's workers' compensation laws, rules and regulations. In fact, Regnier's report of December 31, 2004 expressly acknowledges that it was to be submitted to the WCB and that it was prepared in accordance with the State regulations.

The Court is satisfied that Regnier purposefully interjected itself into this State by preparing actuarial reports for a New York group self-insured trust in accordance with New York State regulations where the actuary knew that the reports would be filed with a New York State regulatory agency. Under these circumstances, Regnier can and should have expected to be haled in the New York courts for errors, omissions and other legal claims arising out of its reports. Accordingly, given Regnier's purposeful activities directed at New York State and the strong nexus between those activities and this action, the Court is satisfied that the exercise of personal jurisdiction is proper under constitutional and statutory law.[FN11]

B. Breach of Contract

The WCB, as the successor in interest to RITNY, alleges that Regnier breached its contractual duty to accurately estimate the Trust's future claims liabilities. While RITNY did not contract directly with Regnier, it claims the status of third-party beneficiary. This cause of action is subject to a six year limitations period that accrued upon delivery of the challenged actuarial report. Accordingly, the WCB can sue under a contractual theory for reports delivered on and after December 5, 2005.

In arguing that this cause of action is untimely, Steven J. Regnier, the principal of the defendant, submits an affidavit that references a report delivered on February 17, 2004 for the Trust's 2003 year. According to Mr. Regnier, the company "did not perform any further work for CRS regarding RITNY in 2003 or 2004" following delivery of the February 17, 2004 report (¶ 8). However, in opposition to the motion, the WCB submits reports for RITNY delivered to CRS on March 4, 2005 (for 2004) and January 10, 2006 (for 2005). In reply, Mr. Regnier acknowledges the authenticity of these reports, but claims that he was advised by counsel that those years had no relevance to this action.

As the Complaint generally refers to the actuarial reports prepared by Regnier pursuant to its contract with CRS on behalf of RITNY,[FN12] the Court finds that these subsequent reports certainly bear on Regnier's statute of limitations defense. And given that the January 10, 2006 report falls within the applicable limitations period, the cause of action for breach of contract cannot be dismissed as time barred.

C. Breach of Fiduciary Duty

As the WCB is pursuing monetary damages arising from the allegedly flawed work product delivered by Regnier and the breach of duty claim is not grounded upon allegations of actual and essential fraud, the claim is subject to a three year limitations period that accrued upon delivery of

the actuarial reports. Accordingly, a breach of duty claim is timely only with respect to reports delivered on and after December 5, 2008, a date that is subsequent to CRS's removal as administrator and the WCB's takeover of RITNY. Accordingly, the breach of fiduciary duty claim must be dismissed as time barred, and there is no need to address Regnier's alternative contention that its duties were not fiduciary in nature.

D. Motion to Dismiss Cross-Claims

Regnier also moves to dismiss the cross-claims for indemnification and contribution alleged in the answers of the former RITNY trustees.

As to the cross-claim for common law indemnification,[FN13] the WCB does not seek to hold the Former Trustees liable for any purported wrongdoing of Regnier; rather, the WCB seeks to hold them accountable for their own alleged breaches of contractual and fiduciary duties. Even accepting the truth of the WCB's allegations that the Former Trustees were presented with faulty actuarial advice from Regnier, the Former Trustees cannot be found liable to the plaintiff absent proof of their own, independent misconduct. Accordingly, as the Former Trustees' liability, if any, would necessarily arise from their own active wrongdoing rather than the imposition of vicarious liability on account of Regnier's wrongdoing, the cross-claim for implied indemnity must be dismissed.

Regnier also argues that the cross-claim for contribution must be dismissed because such a claim is not available in a breach of contract action seeking the recovery of purely economic losses. Given the dismissal of the tort claim asserted against Regnier, the contribution cross-claim also must be dismissed.

CONCLUSION

Accordingly,[FN14] it is

ORDERED that defendants' motions to dismiss plaintiff's complaint are granted in part and denied in part in accordance with the foregoing; and it is further

ORDERED that Regnier's motion to dismiss the cross-claims against it are granted, and said cross-claims are hereby dismissed; and further it is

ORDERED that plaintiff's motion to amend is granted in part to the limited extent indicated herein and denied in all other respects; and it is further

ORDERED that within thirty days from service of this Decision & Order upon defendants with notice of entry, the parties shall confer and plaintiff shall contact Chambers with several proposed dates and times for the holding of a preliminary conference; and it is further

ORDERED that prior to said preliminary conference, counsel shall consult and confer in accordance with Rule 8 of the Commercial Division; and finally it is

ORDERED that plaintiff shall promptly serve this Decision & Order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court. This Decision and Order is being transmitted to plaintiff's counsel for filing and service. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220, and counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

August 26, 2013

RICHARD M. PLATKIN

A.J.S.C.

PAPERS CONSIDERED

- Notice of Motion of Defendant Jennifer Bartlett, dated May 1, 2012
- Affirmation of Brian J. Butler, Esq., dated May 1, 2012, with attached exhibits A-E
- Affidavit of Gerald W. Tracey, sworn to April 26, 2012, with attached exhibits A-C
- Memorandum of Law in Support of Defendant Jennifer Bartlett's Motion to Dismiss, dated May 1, 2012

  Supplemental Notice of Motion of Jennifer Bartlett, dated June 15, 2012
- Supplemental Memorandum of Law, dated June 15, 2012
- Notice of Motion of Defendant Regnier Consulting Group, Inc., dated May 31, 2012
- Affidavit of Steven J. Regnier, sworn to May 30, 2012
- Affirmation of Nancy Quinn Koba, Esq., dated May 31, 2012, with attached exhibits A-D
- Defendant's Memorandum of Law, undated
- Affirmation of Daniel E. Sarzynski, Esq., dated October 18, 2012
- Plaintiff's Memorandum of Law, dated October 18, 2012
- Defendant's Reply Memorandum of Law, dated November 29, 2012
- Reply Affidavit of Steven J. Regnier, sworn to November 29, 2012
- Notice of Motion of Defendant Kathleen Smith, dated June 6, 2012
- Affidavit of Kathleen Smith, sworn to June 2, 2012, with attached exhibit A
- Affirmation of William H. Baaki, Esq,. dated June 6, 2012, with attached exhibits A-C
- Defendant's Memorandum of Law, dated June 6, 2012
- Reply Affirmation of Christian J. Soller, Esq., dated November 30, 2012, with attached exhibits A-D
- Reply Memorandum of Law, dated November 30, 2012
- Notice of Motion of Defendant Mark Bartlett, dated June 13, 2012
- Affidavit of Andrew J. Ryan, Esq,. sworn to June 13, 2012, with attached exhibits A-B
- Defendant's Memorandum of Law, dated June 14, 2012
- Affidavit of Andrew J. Ryan, Esq., sworn to November 9, 2012
- Affidavit of Mark Bartlett, sworn to June 13, 2012, with attached exhibits A-H
- Affidavit of Mark Bartlett, sworn to November 5, 2012

- Plaintiff's Memorandum of Law, dated October 18, 2012
- Affirmation of Daniel E. Sarzynski, Esq,. dated October 18, 2012
- Defendant's Reply Memorandum of Law, dated November 9, 2012
- Notice of Motion of CRS Defendants, dated June 18, 2012
- Affirmation of Lisa M. Cobb, Esq., dated June 18, 2012, with attached exhibits A-C
- Defendants' Memorandum of Law, dated June 18, 2012
- Affidavit of Dennis Ryan, sworn to June 13, 2012, with attached exhibits A-E
- Affidavit of Martin Rakoff, sworn to June 14, 2012, with attached exhibit A
- Notice of Motion of Defendant Hickey-Finn & Co., Inc., dated July 16, 2012
- Affidavit of Kathleen A. Barclay, Esq., sworn to July 16, 2012, with attached exhibits A-B
- Defendant's Memorandum of Law, dated July 16, 2012
- Affidavit of Daniel G. Hickey, Sr., sworn to July 12, 2012, with attached exhibits A-D
- Affidavit of Kathleen A. Barclay, Esq. sworn to July 16, 2012, with attached exhibits A-B
- Defendant's Reply Memorandum of Law, dated November 5, 2012, with attached exhibit A
- Plaintiff's Memorandum of Law, dated October 18, 2012
- Plaintiff's Reply Memorandum of Law, dated November 9, 2012
- Notice of Motion of Defendant Alice Nykaza, dated July 25, 2012
- Affidavit of Edward J. Smith, Esq., sworn to July 25, 2012, with attached exhibits A-B
- Defendant's Memorandum of Law, undated
- Affidavit of Alice Nykaza, sworn to July 24, 2012, with attached exhibit A
- Plaintiff's Memorandum of Law, dated November 20, 2012
- Affirmation Daniel E. Sarzynski, Esq., dated November 20, 2012
- Notice of Motion of Defendant James Diem, undated
- Defendant's Memorandum of Law, undated
  Affidavit of James Diem, sworn to September 13, 2012
- Affirmation of Jan A. Marcus, Esq., dated September 13, 2012, with attached exhibit A
- Notice of Cross-Motion of Plaintiff, dated October 19, 2012
- Affirmation of Daniel E. Sarzynski, Esq,. dated October 18, 2012, with attached exhibit A
- Plaintiff's Memorandum of Law, dated October 26, 2012, with attached exhibits
- Affirmation of Daniel E. Sarzynski, Esq., dated October 26, 2012
- Defendant's Reply Memorandum of Law, dated November 7, 2012
- Plaintiff's Memorandum of Law, dated October 18, 2012
- Affirmation of Daniel E. Sarzynski, Esq., dated October 18, 2012
- Affidavit of Michael Papa, Esq, dated October 18, 2012, with attached exhibits A-J
- Defendants' Supplemental Memorandum of Law, dated November 7, 2012
- Affidavit of David Bramwell, sworn to June 14, 2012, with attached exhibits A-C
- Notice of Motion of Defendant Regnier Consulting Group, Inc. to Dismiss Cross Claims, dated October 18, 2012
- Affirmation of Nancy Quinn Koba, Esq., dated October 18, 2012, with attached exhibits A-D
- Defendant's Memorandum of Law, undated
- Defendant's Reply Memorandum of Law, undated
- Defendants' RITNY Trustees' Memorandum of Law, dated November 21, 2012
- Affirmation of Christian J. Soller, Esq,. dated November 21, 2012, with attached exhibit A
- Plaintiff's Addendum of Certain Cases Cited
- Verified Complaint, verified April 12, 2012, with attached exhibits A-B.

Footnotes

Footnote 1: The other case relied upon by the WCB(*Lavin v Kaufman, Greenhut, Lebowitz & Forman*, 226 AD2d 107 [1st Dept 1996]) also is distinguishable as the claim for breach of fiduciary duty rested on allegations of actual fraud (*id.* at109). No such allegations are made against the Trustee Defendants here.

Footnote 2: Indeed, *A & T Healthcare* relied upon the date of the alleged breach, even where plaintiff is alleged to have known of the need for an infusion of funds prior to the date of assessment and the assessment could have been levied at such time. Here, in contrast, plaintiff seeks to disregard the date of the alleged breaches of fiduciary duty in favor of the date when it learned of the Trustees' alleged breaches.

Footnote 3: As discussed below, the forensic reports may be relevant with respect to the two-year "discovery" rule applicable to the fraud claims (*see* CPLR 213 [8]).

Footnote 4: Several of the moving defendants dispute the WCB's claim that this action was commenced on December 5, 2011. In particular, it is argued that the action was commenced on March 5, 2012, when an Amended Summons with Notice was filed with the Albany County Clerk. Insofar as these contentions were not made in the parties' written motions and raised for the first time at oral argument, they are not properly before the Court. Moreover, it appears that all of the defendants making this argument were named in the original Summons with Notice filed on December 5, 2011 and properly served with process within 120 days of the December 5, 2011 filing. Under the circumstances, any failure to serve the original Summons With Notice was not a jurisdictional defect as to these defendants, and the original Summons With Notice could be amended. Insofar as leave of court may have been required for such amendment, the Court hereby grants such leave *nunc pro tunc* (*see* CPLR 305 [c]; *see also* CPLR 3025 [a]).

Footnote 5: Insofar as Supreme Court, Niagara County has held otherwise, this Court respectfully disagrees.

Footnote 6: The WCB acknowledges that the Tolling Agreement does not directly encompass the CRS Entities, though it may have the indirect effect of increasing their liability as the alleged successors, alter egos and/or agents of CRS.

Footnote 7: As noted by the WCB, this line of argument runs counter to AVI Risk's position, discussed below, that it is not subject to successor liability as a result of the merger.

Footnote 8: In this connection, the Court notes that the affidavit of Dennis Ryan is not itself documentary evidence upon which AVI Risk may rely as to a motion under CPLR 3211 (a) (1) or (7).

Footnote 9: As stated previously, the present record does not foreclose application of the two-year discovery rule to these claims.

Footnote 10: However, the branch of the cross-motion seeking leave to amend the caption of the

Complaint to add CCC is granted. This entity was named in the body of the Amended Summons with Notice and the Complaint and has appeared herein, but it inadvertently was omitted from the caption of the Complaint. CCC is one of the moving defendants in this action, and no prejudice from the amendment has been shown.

Footnote 11: Further, the Court rejects Regnier's contention that service of the amended summons with notice upon it was improper because it never was served with the original summons with notice. The amended summons conformed in all important respects with the original summons as to Regnier (*see Spitzer v Dewar Found.*, 280 AD2d 385 [1st Dept 2001]).

Footnote 12: Contrary to Regnier's contentions, the Court does not read the Complaint as being limited to the specific years referenced in the Complaint in connection with the findings of outside reviews (¶¶ 556-558). However, the Court does agree with Regnier that the WCB's cause of action for breach of contract is framed only in terms of reports delivered by Regnier pursuant to the contract with CRS. Accordingly, the Court will not consider the WCB's reliance on reports prepared by Regnier pursuant to contract with NCA Comp. Inc., ("NCA"), the third party administrator that replaced CRS in 2006.

Footnote 13: The principles governing common law indemnification have been stated previously and will not be repeated here.

Footnote 14: The Court has considered the parties' remaining arguments and contentions but finds them unavailing or unnecessary to the disposition ordered herein.