

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: BERNARD J. FRIED
Justice

PART 60

E-FILE

Current Medical Directions

PLAINTIFF

INDEX NO. #600941-2006

MOTION DATE _____

- v -

Salomone, Daniel

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

DEFENDANT

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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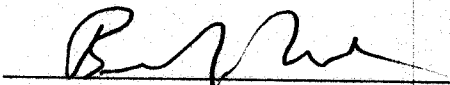
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

This motion is decided in accordance with the accompanying memorandum decision.

SO ORDERED

Dated: 2/2/2010



HON. BERNARD J. FRIED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [] REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 60

E-FILE

-----X
CURRENT MEDICAL DIRECTIONS, LLC,

Plaintiff,

Index No. 600941/06

-against-

DANIEL SALOMONE,

Motion Seq. No. 002

Defendant.

-----X
DANIEL SALOMONE,

Counterplaintiff,

-against-

CURRENT MEDICAL DIRECTIONS, LLC,
SUDLER & HENNESSEY, WPP GROUP USA, INC.,
and WPP GROUP PLC,

Counterdefendants.

-----X
APPEARANCES:

For Plaintiff/Counterdefendants

Davis & Gilbert, LLP
1740 Broadway
New York, New York 10019
Bruce M. Ginsberg, Esq.

For Defendant/Counterplaintiff

Lebowitz Law Office, LLC
275 Madison Avenue
New York, New York 10016
Marc A. Lebowitz, Esq.
Keith M. Getz, Esq.

FRIED, J.:

Plaintiff Current Medical Directions, LLC (CMD) is a medical education company that specializes in marketing health-related information to healthcare professionals. Defendant Daniel Salomone (Salomone) is the president and majority shareholder of CMD Holding Corporation (CMD Holding) which, in turn, owned 100% of the capital stock of Current Medical Directions Inc. (CMDI). On or about December 14, 2004, CMD, then

known as CMD Sudler Acquisition Company (Acquisition) - a special entity formed by and affiliated with the other counterdefendants Sudler & Hennessey (S&H), WPP Group USA, Inc. and WPP Group PLC (collectively, WPP)¹ - entered into an Asset Purchase Agreement (the APA) with CMDI, CMD Holding, Salomone and certain of his CMDI partners. Pursuant to the APA, Acquisition purchased substantially all of CMDI's assets, effective as of January 1, 2005. Promptly after the transactions, Acquisition, which then held the assets of CMDI, changed its name to CMD. In connection with the transactions contemplated by the APA, Acquisition also entered into employment agreements with Salomone and his CMDI partners. Pursuant to his own agreement with Acquisition/CMD (the Employment Agreement), Salomone became the President and Chief Executive Officer of CMD, and was to report directly to S&H.

By letter dated March 17, 2006, WPP told Salomone that his employment was terminated the same day (the Termination Letter).² On that date, WPP also commenced the instant action against Salomone alleging, among other things, causes of action sounding in fraudulent inducement and breach of contract.³ In his answer to the amended complaint,

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WPP Group PLC is the ultimate corporate parent of S&H, WPP Group USA, Inc. and CMD.

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For the purpose herein and unless otherwise specified, the nominal plaintiff CMD and other plaintiff-counterdefendants will be referred to hereinafter, collectively, as WPP.

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The original complaint contained additional causes of action. Based on the rulings of this court (Justice Freedman) on Salomone's prior motion to dismiss, plaintiff served an amended complaint that contains only two causes of action: fraudulent inducement and breach of contract.

Salomone asserts eighteen affirmative defenses and eight counterclaims, including, among others, breach of the Employment Agreement (first counterclaim) and breach of the APA (second counterclaim). After the conclusion of discovery, Salomone moves, pursuant to CPLR 3212, for an order (i) granting him summary judgment with respect to his first and second counterclaims; and (ii) dismissing plaintiff's fraudulent inducement cause of action.

In response, plaintiff-counterdefendants cross-move for (i) partial summary judgment dismissing defendant's first and second counterclaims; (ii) if the second counterclaim is not dismissed, an order deeming that certain accounting and review procedures conducted by WPP's accountants, Deloitte & Touche LLP (Deloitte), satisfied the APA and/or the Employment Agreement for purposes of terminating Salomone's employment; and (iii) an order, pursuant to CPLR 3212 (g), granting plaintiff's motion in limine that the attorney-client privilege does not apply to certain categories of e-mails exchanged between Salomone and his attorney Steven Gersh. For the reasons stated herein, the various forms of relief requested in defendant-counterplaintiff's motion, as well as in plaintiff-counterdefendants' cross motion, are granted in part and denied in part.

After months of negotiations, on or about December 14, 2004, Salomone and his CMDI partners (Steven Abramson, Diane Plateis, Carmen Amor-Rios and Jodi Dennis) entered into the APA with Acquisition, whereby Salomone and his partners agreed to sell substantially all of CMDI's assets for a payment of \$18 million by WPP at closing, and additional future contingent payments up to \$47 million (the Future Contingent Payments), for an aggregate purchase price not to exceed \$65 million. Salomone was appointed as the "Representative" by his CDMI business partners.

In connection with the APA transactions, all CDMI partners, including Salomone, entered into employment agreements with Acquisition. Salomone was able to negotiate his Employment Agreement with provisions that he could not be terminated without cause, including termination provisions based on specified financial benchmarks. In particular, paragraph 6 (e) of his Employment Agreement states, in relevant part, that WPP “shall have the right to terminate the Executive’s employment” if “the Purchaser’s OPAT (as defined in the Purchase Agreement) for any calendar year, commencing with the calendar year ending December 31, 2005, is less than seventy-five percent (75%) of the average annual OPAT for the three immediately preceding years.” Section 2.1.2 (vi) of the APA defines “OPAT” (Operating Profit After Taxes) as follows: the “consolidated income (loss) of the Purchaser or the Company ... after all provision for federal, state and local income taxes for such year ... as the same are reflected in the Annual Determination (as finally determined) for such calendar year” In turn, Section 2.1.3 of the APA defines “Annual Determination” as follows:

For each of the calendar year during the period of January 1, 2004 through December 31, 2008 (the “Earn-Out Period”), the Purchaser shall cause the Accountants to prepare a report containing a consolidated audited balance sheet [and a related consolidated audited statement of income] of the Purchaser and AAME⁴ as of the last day of such calendar year ... together with a statement of the Accountants based on such report and stating that such year-end financial statements were prepared in accordance with this Agreement and setting forth the calendar year under examination the calculation of OPAT ... and all other adjustments required to be made to such audited year-end financial statements in order to make the calculations required under this Section 2.1 (the “Annual Determination”).

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AAME is the acronym for Academic Alliances in Medical Education, Inc., a wholly-owned subsidiary of CDMI, which, in turn, is wholly-owned by CDM Holding.

APA, § 2.1.3 (ii). Section 2.1 of the APA pertains to the calculation of the purchase price for the CDMI assets, including any Future Contingent Payments, and the OPAT calculation is subject to fifteen adjustments, as set forth in Section 2.1.2 (vi) (a) - (o). Further, Section 2.1.3 (iii) of the APA sets forth the procedures for resolving OPAT Annual Determination disputes, which, in essence, requires the parties to submit their disputes to an "Independent Auditor" for "final determination."

On March 17, 2006, pursuant to the Termination Letter, WPP terminated Salomone, purportedly based on Section 6 (e) of his Employment Agreement. On the same day, WPP commenced this action against Salomone, alleging, among other things, claims of fraudulent inducement and breach of contract. With respect to the fraudulent inducement claim, WPP alleges that during contract negotiations, Salomone induced WPP into signing the APA by making material misrepresentations of present facts, including that Diane Plateis (a CDMI partner and shareholder) was a qualified and suitable successor to Salomone to head the business, and that he had a reasonable basis for projecting \$17 million of revenue for year 2005. Amended Complaint, ¶ 25. WPP also alleges that Salomone knew of the falsity of the misrepresentations, and that WPP justifiably relied on them to its detriment, thus sustaining damages. *Id.*, ¶¶ 26-29. With respect to the breach of contract claim, WPP alleges that various written representations were made in the APA, including Sections 3.41, 3.42, 3.10 and 3.12 therein, where Salomone, in his individual capacity, falsely represented CDMI's assets and liabilities, including its financial condition, budget and profit projection. *Id.*, ¶¶ 15-21.

Generally denying the allegations of the amended complaint, Salomone asserts in his answer various counterclaims against WPP, including breach of the Employment Agreement

and breach of the APA. Alleging that his employment was wrongfully terminated, Salomone argues in his first counterclaim that WPP failed to follow the termination procedures in the Employment Agreement and the APA, including its alleged failure to provide him with the OPAT calculations for 2005. As a result of the alleged breach, Salomone asserts that he was wrongfully removed as the President and CEO of CMD, which eliminated his chance of receiving any Future Contingent Payments. Answer and Counterclaims to Amended Complaint, ¶¶ 52-58. With respect to the second counterclaim, Salomone asserts that WPP breached the APA by not following the accounting procedures, including the calculation of 2005 OPAT and other financial numbers, as well as not allowing “the provision for resolution of a final number to operate as drafted in the APA.” *Id.*, ¶¶ 65-66. Although conceding that the Termination Letter did not include a calculation of the 2005 OPAT, WPP avers that “Salomone as CEO was aware of the company’s 2005 financial performance and was aware that in no event did 2005 OPAT equal or exceed 75% of the average of the preceding three years’ OPAT.” Reply to Counterclaims, at 7-8. The dispute was heard by this court (Justice Freedman) in May 2007. In connection with the court conference, the parties prepared and submitted an order dated May 1, 2007 (the May 2007 Order) which stated in part:

Plaintiff shall provide audited 2004 and 2005 Annual Determination per the Asset Purchase Agreement or a statement from their auditors why compliance is not possible and why the reports previously provided are as good. If audited reports are provided the parties shall follow the procedures in the APA regarding objections and resolution by an Independent Auditor.

In furtherance of the May 2007 Order, WPP instructed its accountants/auditors, Deloitte, to prepare drafts of the 2004 and 2005 audit work,

copies of which were produced to Salomone in October 2007. WPP then requested Salomone, as he was the CEO of CMDI/CMD in 2004 and 2005, to sign a management representation letter regarding Deloitte's audit. Due to Salomone's refusal to sign any representation letter, WPP asserts that Deloitte did not issue an audit opinion and an Annual Determination report. Because of the impasse, the parties again returned to this court (Justice Freedman) for a status conference in February 2008. The court conference order dated March 7, 2008 (the March 2008 Order) provided, in relevant part, that: if the court determines that a representation letter is necessary for Deloitte's report to comply with the APA, and if the report is appropriate in form, and if Deloitte has a valid reason to require Salomone to sign a representation letter but he still refuses to sign, then Salomone could no longer argue the fact that the Deloitte report is not an audit makes such report invalid. The March 2008 Order also directed WPP to arrange for Deloitte to provide deposition testimony.

After the conclusion of discovery, Salomone moves for summary judgment on his first and second counterclaims, as well as for dismissal of WPP's fraudulent inducement claim. In response, WPP cross moves for, inter alia, partial summary judgment to dismiss Salomone's two counterclaims.

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary support in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the above guidance, the courts uniformly scrutinize motions for summary judgment, as well as the facts and circumstances of each case, to determine whether relief may be granted. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) (in considering a motion for summary judgment, “evidence should be analyzed in the light most favorable to the party opposing the motion”). Conclusory allegations unsupported by competent evidence, however, are insufficient to defeat a summary judgment motion. *Alvarez*, 68 NY2d at 324-25. Also, summary judgment is generally granted in favor of the movant if there are no material and triable issues of fact. *Francis v Basic Metal, Inc.*, 144 AD2d 634 (2nd Dept 1988).

The First Counterclaim - Breach of the Employment Agreement

Salomone’s first counterclaim alleges that WPP breached the Employment Agreement by failing to comply with the termination procedures, namely: failing to include in the Termination Letter a calculation of OPAT for the year 2005, and that OPAT should be computed or completed pursuant to an Annual Determination. As noted above, the Termination Letter stated that Salomone was terminated in

accordance with Section 6 (e) of the Employment Agreement, because the company's 2005 OPAT was allegedly less than 75% of the average annual OPAT for the three preceding years.

WPP contends that for purposes of terminating Salomone, OPAT is not required to be computed or completed pursuant to an Annual Determination, and that to require WPP to do so would render other termination provisions of the Employment Agreement meaningless. Thus, WPP argues for the application of *Beal Savings Bank v Sommer* (8 NY3d 318, 324 [2007])(a contract should be interpreted so as not to render any provisions meaningless). More specifically, WPP contends that, besides permitting termination where the 2005 OPAT is less than 75% of the average OPAT for the three prior years (the 75% Test), the Employment Agreement permits termination from any time after June 30, 2006 through December 31, 2009, if (x) there is no reasonable expectation that CMD will generate a future Purchase Price payment pursuant to the APA (the Expectation Test); or (y) CMD's aggregate OPAT for the then preceding four consecutive calendar quarters is less than \$2,400,000 (the Quarterly Test). APA, § 6 (e)(x),(y).

In WPP's view, because "Annual Determination" of OPAT by definition is meant only for the entire calendar year, and because there is no such thing as a quarterly or rolling quarterly Annual Determination, WPP would never be able to terminate Salomone based on the Quarterly Test except after the fourth quarter of any calendar year, which would render termination based on this provision meaningless for three out of four quarters in each year. WPP also takes the view that, because the

Expectation Test permits termination at any time during a calendar year without any reference to an Annual Determination, and because OPAT can be calculated to date or be projected for the future without an Annual Determination, any requirement for WPP to complete an Annual Determination when termination is based on the Expectation Test would abrogate WPP's right to exercise this provision. Hence, WPP takes the position that the Employment Agreement should not be interpreted to require "Annual Determinations" of OPAT before terminating Salomone's employment.

WPP's arguments are not persuasive. First, it should be noted that the Expectation Test and the Quarterly Test, in clauses (x) and (y) of Section 6 (e) of the Employment Agreement, would apply only if Salomone was terminated after June 30, 2006. However, Salomone was terminated on March 17, 2006 (the Termination Date), and the Termination Letter stated that his termination was based on the 75% Test.⁵ Hence, any argument that Annual Determination of OPAT should not be required for the 75% Test, because other termination provisions (clauses [x] and [y]) of the Employment Agreement do not require the same, is of no moment or is irrelevant. Secondly, it is undisputed that, as of the Termination Date, Deloitte had

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WPP argues that, in exercising the 75% Test, the 2002 OPAT value it used was derived from the financial data reported by CDMI during due diligence, the 2003 OPAT was stipulated in the APA, and the 2004 OPAT was based on the numbers provided by Salomone's CFO, with some adjustments. WPP further argues that Salomone used the 2002 through 2005 OPATs prepared by his CFO in filing his tax returns, which allegedly showed there was no reasonable expectation that any tax would be due as to the Future Contingent Payments because of declining business performance. These arguments are unavailing, for the reasons explained below.

not performed any audit work with respect to the OPATs for 2005 and 2004. Indeed, David Evans (Evans) of Deloitte has testified that Deloitte did not commence work on the 2005 OPAT until November 2006, which was eight months after the Termination Date. Lebowitz Affirmation, ¶ 16; Exhibit O, Evans Deposition, at 75-76. Also, WPP has conceded that prior to commencing this action in March 2006, it “had not engaged Deloitte to do any procedures regarding calendar year 2005 performance because there was no possibility that the 2005 component of the contingent Earnout had become due in light of the fact that [CMD’s] business was shrinking, not growing, as reported by [Salomone] and his CFO.” WPP’s Opposition Brief, at 22.

The law in New York for failure to follow employment termination procedures is clear. In particular, when an employer terminates an employee, whether the termination is “for cause” or “without cause,” the employee will prevail in a breach of contract claim if the termination does not comply with the termination procedures set forth in the contract. *Scudder v Jack Hall Plumbing & Heating*, 302 AD2d 848 (3d Dept 2003); *Hanson v Capital Dist. Sports*, 218 AD2d 909 (3d Dept 1995).

In the instant case, it cannot be disputed that, as of the Termination Date, WPP did not provide Salomone with the 2005 OPAT (audited or otherwise). However, the Termination Letter stated that Salomone’s termination was pursuant to the 75% Test, which requires WPP to provide a comparison of the 2005 OPAT

with the average OPAT from prior years,⁶ which WPP failed to do. Therefore, WPP breached the Employment Agreement by failing to comply with the termination procedures, and Salomone is entitled to partial summary judgment on the issue of liability with respect to his first counterclaim.⁷ Consequently, WPP's cross motion for dismissal of the first counterclaim should be denied.

The Second Counterclaim - Breach of the APA

Salomone's second counterclaim alleges that WPP breached the APA by not complying with the accounting and review procedures therein, including the failure to provide the OPAT calculations, and the failure to complete the OPAT numbers via the independent auditor process.⁸ WPP counters, inter alia, that based on the principles of waiver and/or estoppel, Salomone should be precluded from taking the position that WPP has failed to provide the 2004 and 2005 OPATs pursuant to Annual Determinations. Specifically, WPP argues that, because Salomone and his

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The 75% Test requires a comparison of the 2005 OPAT with the average OPAT for 2002, 2003 and 2004. As for the 2002 OPAT, the parties dispute whether an Annual Determination for that year is feasible or necessary. This issue need not be resolved, because the parties have stipulated in the May 2007 Order that WPP would only be required to provide audited 2004 and 2005 Annual Determinations as per the APA, or a statement from WPP's auditors why compliance is not possible.

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Based on the record, it is not possible to determine the amount of damages, if any, arising from such breach. Indeed, Salomone has the burden of proving his damage claim, which he alleges is in an amount not less than \$27,000,000.

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This counterclaim also alleges that WPP did not allow Salomone to manage CMD's business, and that WPP forced him to report to S&H's CFO, instead of its CEO. Such allegations, in effect, are related or incidental to his Employment Agreement.

CFO (Steven Underwood), his corporate transactional attorney (Steven T. Gersh) and his broker (a lawyer who brokered CMDI's asset sale to WPP and could earn additional commissions if the OPAT calculations require the Future Contingent Payments), all received and reviewed the 2004 OPAT draft report that was prepared by Deloitte in early 2006 pursuant to certain "Agreed Upon Procedures"⁹ without objections that it was not compliant with the Annual Determination requirement of the APA, Salomone had waived the right to demand that the 2004 OPAT report, as well as the subsequently drafted 2005 OPAT report, be completed pursuant to Annual Determinations.

Waiver is an "intentional abandonment or relinquishment of a known right" and "[n]egligence, oversight or thoughtlessness does not create it." *Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407, 410 (1st Dept 2007), citing *Alsens Am. Portland Cement Works v Degnon Contr. Co.*, 222 NY 34, 37 (1917). The record in this case does not reflect that Salomone intentionally relinquished or abandoned his rights to require audited financial reports. Also, his litigation counsel, in a letter

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The "Agreed Upon Procedures" are accounting and review procedures agreed to, and adopted by, WPP and Deloitte in connection with Deloitte's review of the unaudited OPATs and other financial numbers (such as Future Contingent Payments and working capital) prepared by CFO Underwood. These numbers were provided to WPP and Deloitte for review. Deloitte then prepared reports as to whether, based on its view, adjustments to these numbers were required. WPP's Opposition Brief, at 18. These Procedures were formally memorialized by David Evans in a file memorandum, dated November 13, 2006, which documented the considerations and concerns of independence undertaken by Deloitte, as WPP's auditors, in connection with its review of the books and records of CMDI/CMD. Ginsburg Affirmation, Exhibit 37. Notably, the Agreed Upon Procedures reports do not include or require a formal audit opinion by Deloitte.

dated April 4, 2006, reserved his rights to require financial reports as per the APA. Lebowitz Affirmation, Exhibit J. Thereafter, by letter dated March 14, 2007, counsel asserted that the Agreed Upon Procedure reports did not meet the requirements of the APA. Ginsburg Affirmation, Exhibit 45. Thus, the waiver argument is unavailing.

However, in light of his subsequent conduct (as fully described below), Salomone should be equitably estopped from asserting that the follow-up financial reports prepared by Deloitte are invalid. More specifically, after Salomone's counsel asserted that the Agreed Upon Procedures reports were not audits, the parties procured the May 2007 Order, which required WPP to provide audited 2004 and 2005 reports or, alternatively, a statement from WPP's auditors as to why compliance is not possible or why the previously prepared reports are as good. In the spirit of complying with the May 2007 Order, and relying on a promise that Salomone would sign a "reasonable" management representation letter in connection with the audits,¹⁰ WPP instructed Deloitte to commence work on the 2004 and 2005 audits. A draft of the 2004 and 2005 financial statements, along with a draft representation letter, were sent to Salomone in October 2007. Ginsburg Affirmation, Exhibit 49. Through counsel's letter dated December 12, 2007, however, Salomone refused to sign the draft representation letter, asserting that no such representations would be necessary for Deloitte to complete its work. *Id.*, Exhibit 50. The parties' dispute was generally

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Salomone's litigation counsel, in a letter dated July 23, 2007, wrote that "Mr. Salomone will sign a reasonable rep letter ... in connection with the Court ordered audit." Ginsburg Affirmation, Exhibit 48.

resolved by the March 2008 Order, which provided: (i) if a representation letter is necessary for Deloitte's report to comply with the APA, (ii) if the report is "appropriate in form," (iii) if there is a valid reason to require Salomone to sign the representation letter, and (iv) if Salomone still refuses to sign the letter, then he could "no longer make the argument that the fact Deloitte's report is not an audit makes the report invalid." *Id.*, Exhibit 51.

The record reflects that Salomone was the CEO of CDMI/CDM in 2004 and 2005. Also, Salomone and his CFO Underwood were responsible for preparing the company's books and records during the relevant years. Moreover, it is alleged by WPP, and not disputed by Salomone, that he and CFO Underwood were involved in providing explanations and documentation in connection with Deloitte's fieldwork that underpinned the 2004 Agreed Upon Procedures report. Also, the guidelines governing accounting professionals, excerpts of which are stated in the Deloitte letter dated January 28, 2008 (the Deloitte Letter, signed by Evans, is annexed to David Evan's Affidavit dated February 13, 2009),¹¹ afford Deloitte valid reasons to require Salomone, as CEO, to sign a representation letter in connection with the audited financial statements, especially where, as here, it is Salomone who insists upon the

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In addition to the guidelines noted in the Deloitte Letter, the expert report authored by Gary Goldman, a Grant Thornton partner retained by WPP's counsel, stated, in relevant part, that AICPA AU 333 guidelines require an independent auditor to "obtain written representations from management as a part of an audit of financial statements" In this regard, the Deloitte Letter concluded that "our final position is that a representation from Mr. Salomone is an essential step in us reaching a conclusion that the consolidated financial information is presented fairly in all material respects."

audited financials, and WPP incurred expenses in performing same.¹²

Yet, Salomone argues that his refusal to sign any representation letter did not affect Deloitte's ability to issue a disclaimer of opinion to enable completion of the Annual Determination. The fact that Deloitte has not signed an audit opinion is of no moment. Indeed, an illustrative form of a disclaimer of opinion was attached as Appendix C to the Deloitte Letter. Signing a disclaimer opinion simply means that the auditor has performed the audit engagement, but expresses no opinion as to the financial information contained in the audit report, due to management's refusal or failure to provide written representations confirming its responsibility to prepare and present accurate and complete accounting records of the audited company. Here, Salomone does not allege that Deloitte has not performed the audit.

Indeed, it is undisputed that copies of the draft audited financials, together with the draft audit opinion and other relevant documents, were delivered to Salomone and his counsel, and no objections (at least as to their form) had been raised with respect to such drafts. Thus, I find that the draft reports and opinion letter are "appropriate in form," as such phrase is used in the March 2008 Order. Because there are valid reasons why Salomone should sign a representation letter, and because he has refused to sign any letter and failed to articulate a justifiable reason, he can

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WPP also alleges that a reason for Salomone's refusal to sign a customary representation letter is that he is trying to prevent the 2004 audit numbers from being finalized, because under the APA, Salomone would owe WPP working capital shortfall payments based on such numbers. WPP Opposition Brief, at 21. Salomone remains silent as to such allegation.

“no longer make the argument that the fact Deloitte’s report is not an audit [supported by an audit opinion] makes the report invalid.”

Accordingly, Salomone’s motion seeking summary judgment on his second counterclaim (breach of the APA) is denied, and WPP’s cross motion for a court finding that the absence of an audit opinion does not render Deloitte’s followup audit reports for 2004 and 2005 incomplete is granted. If Salomone disputes the substance of the report, he must follow the procedures in the APA and the May 2007 Order to resolve same via the independent auditor process.

WPP’s First Cause of Action - Fraudulent Inducement

Salomone seeks dismissal of WPP’s fraudulent inducement cause of action, which consists of two major components: (1) Salomone allegedly misrepresented that he had a reasonable basis for projecting \$17 million of company revenue in 2005 (the Revenue Projection Claim); and (2) Salomone allegedly misrepresented that Diane Plateis (Plateis) would be a qualified and suitable successor to head the company if Salomone were unable to fulfill his CEO duties (the Heir Apparent Claim). In sum, Salomone argues for dismissal of the Revenue Projection Claim because it is duplicative of WPP’s second cause of action, namely: a breach of the representations made in the APA, including representations regarding the company’s financial condition, budget and profit projections. Salomone seeks dismissal of the Heir Apparent Claim, arguing that WPP did not rely on the alleged misrepresentation, and any reliance would be unjustifiable

1. The Revenue Projection Claim

It is settled law that a fraudulent inducement claim cannot be maintained unless the fraud is extraneous and collateral to the contract. *International Plaza Assoc., L.P. v Lacher*, 63 AD3d 527, 527 (1st Dept 2009)(fraud claim dismissed because it was a mere restatement of the breach of contract claim); *34-35th Corp. v 1-10 Indus. Assoc., LLC*, 2 AD3d 711, 712 (2d Dept 2003)(same).

In the instant case, the Revenue Projection Claim is substantially similar to, if not duplicative of, WPP's breach of contract claim, wherein WPP alleges that Salomone (and his partners) made representations in the APA as to the company's budget and profit projections. More specifically, Section 3.4.2 of the APA states, in relevant part, that "the Company and the Representors do represent that the 2004 and 2005 budget and profit projections were made in good faith and on a reasonable basis." WPP argues, however, that the Revenue Projection Claim relates to the fact that WPP was fraudulently induced by Salomone to enter into the APA, and thus is collateral to the contract, because it involved a duty distinct from performance of the contract. WPP relies on *First Bank of the Americas v Motor Car Funding, Inc.* (257 AD2d 287 [1st Dept 1999]) for support of its argument.

Notably, in *First Bank*, the court stated that "a cause of action for fraud may be maintained where a plaintiff pleads a breach of duty separate from, or in addition to, a breach of the contract." *Id.* at 291. WPP, however, has not alleged or identified what legal duty is owed to it by Salomone, other than the duty owed under the APA. *First Bank* also stated that "[u]nlike a misrepresentation of future intent to perform,

a misrepresentation of present facts is collateral to the contract ... and therefore involves a separate breach of duty.” *Id.* at 292. However, WPP has not alleged or identified the “present facts” that were misrepresented. Indeed, WPP merely alleges that the Revenue Projection Claim pertains to Salomone’s “representations prior to closing that he had a reasonable basis for projecting \$17 million in client revenues for CDMI during 2005 [which] were then known by him to be false.” Amended Complaint, ¶ 14. By its nature, a projection of future revenues does not involve “present facts.” Hence, WPP’s reliance on *First Bank* is misplaced.

Moreover, “there are no damages that would not be recoverable under the contract measure of damages, and therefore, the fraud cause of action is simply redundant.” *34-35th Corp. v 1-10 Industry Assoc.*, 2AD3d at 712. *Accord Orix Credit Alliance v Hable Co.*, 256 AD2d 114, 115 (1st Dept 1998)(fraud claim dismissed because “no damages were alleged that would not be recoverable in an action for breach of contract”). Here, WPP has not alleged or argued otherwise.¹³ Accordingly, the Revenue Projection Claim is dismissed as a matter of law.

2. The Heir Apparent Claim

It is undisputed by the parties that the Heir Apparent Claim is extraneous or

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WPP attempts to supplement this claim or the Amended Complaint by alleging that Salomone made other misrepresentations regarding the “health of the company.” WPP’s Opposition Brief, at 34. These alleged misrepresentations include, inter alia, that the company’s weak client relation with Pfizer was only temporary, and that the company has a strong management team. *Id.* at 34-36. However, WPP fails to address why certain of the misrepresentations would not be covered by its breach of contract claim (e.g. APA, section 3.16 addresses “client relations”).

collateral to the APA, because it contains no provisions that address this issue. However, even if the Heir Apparent Claim is not duplicative of the breach of contract claim, it must satisfy these elements: (1) a misrepresentation of a material fact; (2) which was false and known to be false by the defendant; (3) made for the purpose of inducing the other party to rely upon it; and (4) justifiable reliance by the other party. *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 (1996).

Salomone does not expressly deny the allegation that he misrepresented Plateis' qualifications and that she would be his Heir Apparent, particularly where there is no rebuttal to the testimony of Roel Smits, an executive of WPP who headed its acquisition team, that he specifically remembered Salomone making such representation. WPP Opposition Brief, at 28 and references therein. Salomone also does not expressly deny or address the allegation that the misrepresentation was known to him to be false, and that he made it to induce WPP's reliance. Amended Complaint, ¶¶ 5-9; Defendant's Brief, at 22-26. Instead, he argues that either WPP did not rely on the misrepresentation, or that any reliance would be unreasonable. *Id.* Specifically, he argues, among other things: (1) the due diligence report prepared by KPMG did not address succession issues; (2) Plateis was merely one of the three persons identified in the acquisition team's due diligence review memorandum as a possible successor; (3) Jed Beitler, S&H's CEO, in an internal e-mail indicated that Plateis could not be a proper successor; (4) Ellen Goldman, S&H's CFO, in an internal e-mail indicated that she was not entirely sure whether Salomone misrepresented or lied about Plateis, but in her earlier affidavit she stated that

Salomone had "admitted" to her that he had lied about Plateis; and (5) WPP is a sophisticated investor-acquirer and, as such, cannot claim justifiable reliance on a misrepresentation when it could have discovered the truth with due diligence.

These arguments, as a matter of law, do not require summary dismissal of the Heir Apparent Claim. First, there is uncontroverted testimony by Smits and others that KPMG was retained primarily to perform financial due diligence (as opposed to personnel or succession due diligence), and KPMG's due diligence report (a copy was attached as Exhibit S to the Lebowitz Affirmation) does not indicate otherwise. Second, there is credible testimony explaining that the three persons (including Plateis) identified as possible successors was in the context of "long term successors," versus the separate issue of a "short term successor" (i.e., what if Salomone was "hit by a bus tomorrow" scenario). WPP Opposition Brief, at 29-31 and references therein. Third, the Jed Beitler e-mail was written in June 2005, after the acquisition was closed in January 2005. His e-mail noted that Plateis could not win new business, even though Salomone had thought that she could be a rainmaker. Beitler also testified that prior to the closing, he had reached out to third parties in the industry to vet Plateis and received nothing but positive feedback, and that it was only post-acquisition that he received negative feedback about her. WPP Opposition Brief, at 31-32 and references therein. Fourth, relying on an excerpted e-mail (a copy is attached as Exhibit X to the Lebowitz Affirmation), Salomone attempts to impugn the integrity and credibility of Ellen Goldman. The complete trail of this e-mail (a copy is attached as Exhibit 23 to the Ginsberg Affirmation) seems to tell a different

story. In particular, in an earlier part of the e-mail trail, Goldman noted that she had asked Salomone as to how Plateis could have gone from his “heir apparent” to being fired by him, and that WPP “would have preferred if he had gotten rid of his dirty laundry prior to the closing date, but that didn’t happen. This whole thing is a nightmare.” Exhibit 23, at 2.¹⁴ In her testimony, Goldman also explained that her focus in this e-mail trail was to keep the business on its track, rather than inciting panic. WPP Opposition Brief, at 33 and references therein. In that context, Salomone’s selective use of the record tends to raise issues about his own integrity and credibility.

Further, Salomone has misplaced his reliance on *Global Minerals and Metals Corp. v Holme* (35 AD3d 93 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]), for the proposition of law that WPP cannot claim justifiable reliance, because WPP is a sophisticated investor and could have discovered the misrepresentation via due diligence. The holding and rationale in *Global Minerals* is based on the fact that “Global did not show that it reasonably relied on a known false representation because it was on notice of many of the acts alleged in the complaints at the time Global [entered into the subject transaction].” *Id.* at 97. In this case, there is no allegation or evidence that WPP knew or was on notice of sufficient facts with respect to the heir apparent misrepresentation prior to the closing; indeed, the record appears to reflect otherwise. Thus, *Global Minerals* is distinguishable. *See Littman*

¹⁴

The e-mail was dated July 13, 2005, and was written prior to the commencement of this action in March 2006.

v Magee, 54 AD3d 14 (1st Dept 2008) (distinguishing *Global Minerals* because there was no evidence that plaintiff was aware of sufficient information to create a duty to investigate further into defendant's misrepresentation).¹⁵

Accordingly, Salomone's motion for summary dismissal of the Heir Apparent Claim is denied. *Littman*, 54 AD3d at 17 ("at this juncture, it was erroneous to conclude as a matter of law that plaintiff could not establish the requisite justifiable reliance to set aside [its claim]").

The Motion In Limine

Pursuant to CPLR 3212 (g), WPP moves in limine for a ruling that the attorney-client privilege does not apply to certain e-mails between Salomone and attorney Steven Gersh. Notably, Salomone does not object to WPP's use of those e-mails that were exchanged between him and Gersh post-acquisition (i.e., after January 1, 2005), because there is clear authority that such e-mails are not privileged and that he, as a WPP employee using its e-mail system, had no reasonable expectation of privacy in such communications. *Scott v Beth Israel Med. Ctr. Inc.*,

¹⁵

The case of *DDJ Mgmt, LLC v. Rhone Group LLC* (60 AD3d 421 [1st Dept 2009]) is also distinguishable. In that case, plaintiff never conducted any due diligence as to defendant's financial statements, even though its books and records should have been reviewed by plaintiff prior to extending a loan to defendant. Similarly, *Ventur Group, LLC v. Finnerty*, 68 AD3d 638 [1st Dept (2009)], 2009 NY Slip Op 09544 [Dec. 22, 2009] is distinguishable. In *Ventur*, even though an employee was listed by the defendants as their "key employee," the principal of the defendants misrepresented that such employee was merely an old man irrelevant to the operation of defendants' business. In light of this discrepancy, *Ventur* should have undertaken a thorough investigation into the employee's role in the business, but it failed to do so. The record in this case, however does not have sufficient facts to put CMD on notice of any discrepancy.

17 Misc 3d 934 (Sup Ct, NY County 2007) (private e-mails transmitted in violation of employer's e-mail policy are not protected by attorney-client privilege). However, Salomone objects to WPP's intended use of the pre-acquisition e-mails, and argues for a non-waiver of the attorney-client privilege.

Generally, disclosure of an otherwise privileged communication results in waiver of the privilege unless the party seeking the privilege proves the following: "(1) it intended to maintain confidentiality and took reasonable steps to prevent its disclosure; (2) it promptly sought to remedy the situation after learning of the disclosure; and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted." *AFA Protective Systems, Inc. v City of New York*, 13 AD3d 564, 565 (2d Dept 2004) (citations omitted).

The subject e-mails between Salomone and Gersh pre-acquisition resided in the company's computer servers, which, along with other assets, were sold to WPP in the acquisition. Subsequently, these e-mails, together with other communications and documents, were produced by WPP to Salomone in response to his request for document production. The record shows that Salomone made no effort to delete the e-mails from the servers prior to or after the acquisition, nor did he diligently and carefully review the documents that were produced to him. In fact, he did not assert any privilege (or seek a protective order) with respect to these e-mails until WPP made this motion in limine. In sum, he did not take reasonable steps to prevent their disclosure.

Yet, he argues that these e-mails should be protected because this is the first

time WPP has referred to them, and he is now seeking to remedy the situation after learning of their inadvertent disclosure. This argument has no merit. WPP points out that, during a deposition on November 27, 2007, when its counsel sought to preserve privilege with respect to certain documents that were inadvertently produced to Salomone and asked for their return, Salomone's counsel suggested a "prisoner exchange." Ginsberg Reply Affirmation, Exhibit C (excerpt of Roel Smits deposition, at 187). The suggestion was neither followed up by letter nor an application for a protective order. Thus, Salomone's tardy request should not be approved. Also, these e-mails appear to support WPP's claims in certain respects, and any preclusion of their use may cause WPP undue prejudice. Therefore, WPP's motion in limine is granted.

Accordingly, for all of the foregoing reasons, it is

ORDERED that so much of Daniel Salomone's motion as seeks summary judgment on his first counterclaim (breach of the Employment Agreement) is granted on the issue of liability only; and it is further

ORDERED that so much of Daniel Salomone's motion as seeks summary judgment on his second counterclaim (breach of the Asset Purchase Agreement) is denied; and it is further

ORDERED that so much of Daniel Salomone's motion as seeks summary judgment dismissing plaintiff's first cause of action (fraudulent inducement) is granted with respect the Revenue Projection Claim only, and is otherwise denied; and it is further

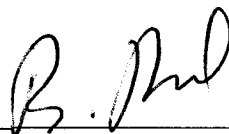
ORDERED that so much of plaintiff's cross motion as seeks a determination that the absence of an audit opinion by Deloitte & Touche LLC does not render Deloitte's follow-up audit reports for 2004 and 2005 incomplete or invalid is granted; and it is further

ORDERED that plaintiff's cross motion in limine for a ruling that the attorney-client privilege has been waived with respect to certain e-mails between Daniel Salomone and his attorney Steve Gersh is granted; and it is further

ORDERED that the remainder of this action shall continue.

Dated: 2/2/2010

ENTER:



J.S.C.

HON. BERNARD J. FRIED