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<b>NYAHSAs Servs., Inc. Self Ins. Trust v People Care Inc.</b>
2014 NY Slip Op 51711(U)
Decided on December 5, 2014
Supreme Court, Albany County
Platkin, J.
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Decided on December 5, 2014

Supreme Court, Albany County

**NYAHSAs Services, Inc. Self Insurance Trust, Plaintiff,****against****People Care Incorporated, Defendant.****NYAHSAs Services, Inc. Self Insurance Trust, Plaintiff,****against****Recco Home Care Services, Inc., Defendant. Index No. 4134-11  
RJI No. 01-12-105990 (Action No. 2)**

4697-10

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Richard M. Platkin, J.

Plaintiff NYAHSAs Services, Inc. Self-Insurance Trust ("Trust") moves pursuant to CPLR 3211 seeking dismissal of the counterclaims alleged by defendant PeopleCare Inc. ("PeopleCare") in Action No. 1. In addition, third-party defendants Cool Insuring Agency, Inc. ("Cool Insuring"), Cool Risk Management, Inc. ("Cool Risk"), LeadingAge New York Services, Inc. f/k/a/ NYAHSAs Services, Inc. ("LeadingAge Services" or "Services") and LeadingAge New York f/k/a New York Association of Homes and Services for the

Aging ("LeadingAge") move pursuant to CPLR 3211 for dismissal of the third-party complaints filed by PeopleCare and Recco Home Care Services, Inc. ("Recco") in Actions Nos. 1 and 2 respectively.

## **BACKGROUND**

### **A. The Trust**

The Trust is a group self-insured trust ("GSIT") formed in 1995 pursuant to the Workers' Compensation Law ("WCL"). Members of the Trust were employers within the home health-care industry that conducted business in New York State and were required to provide workers' compensation insurance to their employees. Unlike many other GSITs, members of the subject Trust bear financial responsibility only for the claims of their own employees. The Trust ceased providing workers' compensation insurance as of December 31, 2011, but it continues to meet its obligations with respect to open claims.

On or about July 1, 1999, the Trust entered into two agreements with Cool Insuring and Cool Risk (collectively "Cool"). Pursuant to a Program Administrator Agreement ("PA Agreement"), Cool agreed to administer the self-insurance program by, *inter alia*: developing and conducting loss control, risk management and safety programs; coordinating claims and actuarial services; acting as the Trust's liaison to the Workers' Compensation Board ("WCB"); evaluating the suitability of prospective trust members; monitoring the Trust's financial condition; ensuring legal compliance; using its best efforts to market and promote the Trust; and acting as a broker to provide insurance services to the Trust. Under this agreement, the Trust paid Cool a fee of 10.5% of the manual premiums.

The second agreement was a Third-Party Administrator Services Agreement ("TPA Agreement"). As third-party administrator for the Trust, Cool was responsible for administering employee claims, assisting in the performance of the Trust's required regulatory obligations and [\*2] providing for medical management and banking services.

Also on July 1, 1999, Cool entered into a Marketing Agreement with LeadingAge Services, whereby the association agreed to market the Trust's self-insurance program to its membership in exchange for a fee of 1.5% of the aggregate manual premiums.

## **B. PeopleCare**

PeopleCare became a member of the Trust effective June 15, 2000 by assenting to a Self-Insurance Agreement and Declaration of Trust ("Declaration of Trust") and an Indemnity Agreement. In executing these documents, PeopleCare acknowledged its understanding of the potential benefits and liabilities of membership in the Trust, including the joint and several liability that exists pursuant to the WCL, and it agreed to be bound by the Declaration of Trust, the Indemnity Agreement and the Trust's by-laws.

Upon joining the Trust and for each year of membership thereafter, PeopleCare entered into a Contribution Agreement with the Trust setting forth the specific financial terms of its self-insurance coverage for a one-year period, including the dollar value of its payroll and the amount of the required "deposit" contribution and "basic" contribution.

[\[FN1\]](#) In addition, the Contribution Agreement established a process for periodic adjustments to reflect the employer's actual loss experience. Specifically, the Contribution Agreement provided for the calculation of a "containment contribution" using all incurred losses for PeopleCare's covered employees valued 13 months from the expiration date of the period of coverage and thereafter at annual intervals. [\[FN2\]](#) If actual losses attributable to PeopleCare's workforce exceeded its prior contributions, PeopleCare was obliged to pay the excess amount to the Trust within a specified period. Ultimately, PeopleCare terminated its membership in the Trust effective on June 15, 2008.

During PeopleCare's eight years of membership, it paid the required contributions and adjustments without dispute. However, because PeopleCare remained responsible for claims incurred during its period of coverage, the Trust continued to issue adjustments to PeopleCare after the termination of its active membership. On July 14, 2008, the Trust issued a combined adjustment of \$813,297 relative to claims accrued during PeopleCare's first seven years of Trust membership. PeopleCare objected to this assessment and

refused to pay it.

After several additional adjustments were issued to PeopleCare without payment, the Trust commenced Action No. 1 on or about July 15, 2010, seeking to recover \$2,129,235 in adjustments (plus late fees, attorney's fees and other ancillary relief) under contractual and quasi-contractual theories. On September 17, 2010, PeopleCare filed an answer to the complaint that alleged nine counterclaims. The Trust moved to dismiss the counterclaims in lieu of replying. In [\*3] November 2011, the Trust filed an amended complaint (hereinafter "Complaint") that increased its claim for damages to \$3,332,427, and PeopleCare interposed an amended answer with counterclaims ("Answer").

### **C.Recco**

Recco became a member of the Trust effective January 14, 1997. It entered into

Contribution Agreements covering annual policy periods from March 3, 1997 through March 3, 2009. Recco's last payment to the Trust was made in or about March 2009.

On March 5, 2010, the Trust issued a combined adjustment of \$595,816 relative to claims incurred during Recco's membership in the Trust. Included with the bill was a finance agreement that allowed Recco to pay this adjustment over time. On March 16, 2010, Recco submitted the executed finance agreement along with a check for \$55,286.75 as a down payment. However, Recco caused a stop-payment order to be issued on the check, and it has not since paid any of the adjustment. Another adjustment was issued on or about March 30, 2011, in the amount of \$90,574, that also remains unpaid.

The Trust commenced Action No. 2 on or about July 16, 2010. An amended complaint was filed on or about August 12, 2011.

### **D.Subsequent Proceedings**

Following unsuccessful efforts to resolve this case through mediation, PeopleCare and Recco commenced a third-party action against Cool Insuring, Cool Risk, LeadingAge Services and LeadingAge on July 26, 2013. The third-party defendants moved to dismiss these claims pursuant to CPLR 3211. At the request of the parties, a settlement conference was convened by the Court, but no agreement was reached.

Given the closely related nature of the two actions, the Court informally consolidated them for briefing, argument and disposition. Oral argument was held on August 27, 2014, supplemental briefing requested by the Court at oral argument was received on or about September 19, 2014, and this consolidated Decision & Order follows.

## ***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 I, Inc. v Goldman, Sachs & Co.](#), 5 NY3d 11, 19 [2005]). The Court's "sole criterion is whether the pleading states a cause [\*4]of action" (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotations omitted]). 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 & Morrissey 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 of New York 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 (*State of New York Higher Educ. Services*, 158 AD2d at 772; [Suss v New York Media, Inc.](#), 69 AD3d 411, 411 [1st Dept 2010]).

## ***THE TRUST***

The Court begins with the Trust's motion to dismiss PeopleCare's counterclaims in Action No. 1. The first portion of the analysis will focus on the challenges addressed to the timeliness and/or legal sufficiency of particular counterclaims. The remaining issues raised by the Trust will then be discussed in the context of the surviving counterclaims.

## **A. CAUSES OF ACTION**

### ***1. Breach of Contract***

For its sixth cause of action, PeopleCare alleges that the Trust breached its obligations under the Declaration of Trust, Indemnity Agreement and Contribution Agreements in numerous respects, including: misrepresenting the administrative fees and

the capitalization of the Trust; failing to adequately investigate Cool's qualifications; approving improper deposit contribution rates; failing to set adequate claims reserves; allowing excessive administrative expenses; offering inappropriate discounts to induce non-qualified members to join the Trust; failing to ensure that Cool provided adequate administrative services; failing to provide certain documentation; failing to ensure that the Trust complied with various regulatory requirements; understanding required claims reserves; concealing actual losses; and improperly concealing and deferring government assessments (Answer ¶¶ 126-128).

PeopleCare alleges that these breaches of contract caused it to sustain four categories of damages: (1) all amounts already paid to the Trust for contributions and adjustments; (2) all [\*5] amounts due or that may become due to the Trust in adjustments relative to the claims of its employees; (3) such other costs as may be imposed by the WCB and its current workers' compensation carrier; and (4) the fees and profits paid to Cool and the Association.

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 403-404 [internal quotation marks omitted]).

In invoking the statute of limitations, the Trust argues principally that PeopleCare's contract claim accrued upon the levying of each bill or assessment by the Trust. As a result, PeopleCare's "asserted right to recovery must be limited only to those amounts levied against and paid by [PeopleCare] to the [Trust] for a period of six years prior to [the interposition of the counterclaims]" (see CPLR 203 [d]). Thus, the Trust argues that any claims related to payments made prior to September 17, 2004, six years prior to PeopleCare's service of its original answer with counterclaims, are time barred. [\[EN3\]](#)

In opposition, PeopleCare emphasizes that the Trust's contractual duties continued

beyond the termination of its membership, and the first disputed adjustment was not issued until July 14, 2008. At oral argument, PeopleCare further sought to invoke the relation-back provisions of CPLR 203 (d), which provide that a counterclaim that was not time-barred when the claims asserted in the complaint are interposed relates back to the commencement of the action and a time-barred counterclaim may be maintained as a "set off" to plaintiff's recovery if it arises from same transactions or occurrences asserted in the complaint (*id.*). [\[EN4\]](#)

As an initial matter, the Court rejects the parties' statute of limitations analysis insofar as they read [Inter-Community Mem. Hosp. of Newfane, Inc. v Hamilton Wharton Group, Inc. \(93 AD3d 1176](#) [4th Dept 2012]) as holding that the cause of action for breach of contract accrued when PeopleCare sustained damages as a result of the levy or payment of assessments. Such a reading runs afoul of settled law holding that "a breach of contract cause of action accrues at the time of the breach . . . though no damage occurs until later" (*Ely-Cruikshank*, 81 NY2d at 402 [internal citations and quotation marks omitted]). [\[EN5\]](#) PeopleCare's cause of action for breach of [\*6] contract accrued when the Trust allegedly breached the pertinent contracts by making misrepresentations, approving improper contribution rates, allowing excessive administrative expenses, etc. (*see* Answer ¶¶ 126-128). The dates of levies and payments are relevant to accrual only to the extent that such payments themselves implicate a breach of contract.

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, 1228 [2d Dept 2009]).

Applying the foregoing principles, the Court concludes that PeopleCare's claim for breach of contract was not time-barred when the Trust commenced this action on July 15, 2010 and, therefore, it may pursue this counterclaim for breaches of contract that occurred

on and after July 15, 2004, six years prior to the commencement of Action No. 1 (*see* CPLR 213 [2], 203 [d]). However, the counterclaim is time-barred insofar as it seeks recovery of damages flowing from any breaches of contract that occurred prior to July 15, 2004.

In concluding that the contractual counterclaim is partially time barred, the Court rejects PeopleCare's invocation of the doctrine of equitable estoppel. "[A] defendant may be estopped to plead the Statute of Limitations where plaintiff was induced by fraud, misrepresentations or deception to refrain from filing a timely action" (*Simcuski v Saeli*, 44 NY2d 442, 448-49 [1978]). However, "a plaintiff may not rely on the same act that forms the basis for the claim — the later fraudulent misrepresentation must be for the purpose of concealing the former tort" (*Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]; *see also Corsello v Verizon NY, Inc.*, 18 NY3d 777, 789 [2012]). The uncommon remedy of equitable estoppel must be "triggered by some conduct on the part of the defendant after the initial wrongdoing; mere silence or failure to disclose the wrongdoing is insufficient" (*Ross*, 8 NY3d at 492 [internal quotation omitted]). As PeopleCare's invocation of equitable estoppel relies upon the same conduct that forms the basis of its counterclaims, the doctrine is not applicable in this case.

## ***2. Implied Duty of Good Faith and Fair Dealing***

The fifth counterclaim alleges that by entering into the Declaration of Trust, Indemnity Agreement and Contribution Agreements, the Trust expressly and/or implicitly agreed to deal with PeopleCare fairly and in good faith. The alleged breaches of the implied covenant are essentially the same as those underlying the counterclaim for breach of contract, and both counterclaims demand identical damages. Accordingly, this counterclaim is dismissed, and the [\*7] allegations of breach of the implied covenant shall be deemed incorporated into the sixth counterclaim for breach of contract (*Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70 AD3d 423, 426 [1st Dept 2010], *lv denied*, 15 NY3d 704; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

### ***3. Unjust Enrichment***

The second counterclaim alleges that the Trust "converted the assets of PeopleCare for its personal use in the form of excessive fees, premiums, commissions, salary and bonuses" paid to Cool and others. PeopleCare also alleges that "profits" from the Trust were diverted to the LeadingAge Services. On the basis of the foregoing allegations, PeopleCare seeks to recover the amount of its assets converted to its personal use.

In addition to arguing that the claim is partially barred by the statute of limitations, [\[EN6\]](#) the Trust also contends the counterclaim is barred by the parties' written contracts, including the Declaration of Trust, Indemnity Agreement and the annual Contribution Agreements. The Court agrees. These agreements represent binding and enforceable contracts between the Trust and PeopleCare that govern the subject matter of the instant dispute. Accordingly, the counterclaim for unjust enrichment must be dismissed (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]), and the allegations of PeopleCare's counterclaim appearing under the rubric of unjust enrichment shall be deemed to be part of its claim for express breach of contract ([State of NY Workers' Compensation Bd. v Madden](#), 119 AD3d 1022 [3d Dept 2014]).

### ***4. Breach of Fiduciary Duty***

The fourth counterclaim alleges that the Trust breached its fiduciary duties to PeopleCare. This cause of action relies upon almost identical allegations of wrongdoing as the claim for breach of contract and demands the same measures of damages. The Trust moves to dismiss the claim as, among other things, time-barred and redundant.

"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]). Further, the six-year limitations period applicable to claims of fraud is available where the claim for breach of fiduciary duty rests upon essential allegations of actual fraud (*see Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003]).

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]). Accordingly, the statute of limitations ordinarily begins to run on the earliest date upon which the alleged breach of duty causes the plaintiff to sustain damages (*see Cator v Bauman*, 39 AD3d 1263, 1264 [4th Dept 2007]; *Kaufman v Cohen*, 307 AD2d 113, 121 n3 [1st Dept 2003]).

A review of PeopleCare's pleading, as amplified by its submissions in opposition to the motions, discloses that a portion of the breach of fiduciary duty claim rests on allegations that the Trust intentionally misrepresented and/or concealed information concerning the potential liabilities associated with the workers' compensation claims of PeopleCare's employees. As these allegations sound in actual fraud, they are governed by a six-year statute of limitations. The remaining breaches of fiduciary duty alleged by PeopleCare, including claims of improper management, administration and oversight on the part of the Trust, are not premised upon essential allegations of actual fraud and, therefore, are governed by a three-year limitations period.

The issue then becomes one of accrual. The fraud-based claims of breach accrued no later than July 14, 2008, the date on which "the staggering increase in adjustments were levied by the Trust" (Memorandum of Law in Opposition to Motion to Dismiss the Complaint by Cool, at 15).<sup>[EN7]</sup> Accordingly, this branch of the claim is timely. On the other hand, it is apparent that plaintiff's alleged failure to properly operate and manage the Trust and administer claims continued throughout PeopleCare's entire period of membership and caused PeopleCare to sustain damages each and every time the Trust collected or levied a contribution, adjustment or assessment affected by these continuing

breaches of duty. By July 15, 2007, PeopleCare had been billed for deposit contributions for its entire period of membership and levied adjustments relative to the first six policy years. Accepting as true these allegations of continuing and persistent breaches of fiduciary duty by the Trust, the Court concludes that PeopleCare cannot pursue recovery for levies issued or payments made prior to the commencement of the statutory period or pursue any damages that continue to flow from any time-barred breaches.

To the extent that a small portion of the non-fraud breach-of-duty claim is timely under this analysis, the Court agrees with the Trust that these allegations are redundant of the sixth counterclaim alleging breach of contract and is subject to dismissal on that basis. These allegations "are either expressly raised in [PeopleCare's] breach of contract claim or encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith" ([Brooks v Key Trust Co. Natl. Assn.](#), 26 AD3d 628, 630 [3d Dept 2006]). Indeed, the factual allegations supporting both counterclaims are virtually the same, and the damages claimed are identical ([see Canzona v Atanasio](#), 118 AD3d 841 [2d Dept 2014]). **[EN8]**

Accordingly, PeopleCare may pursue its counterclaim for breach of fiduciary duty with [\*8] respect to its allegations of intentional misrepresentations and concealments, but the counterclaim is dismissed in all other respects.

## ***5. Negligence***

As a seventh counterclaim, PeopleCare alleges that the Trust breached a duty owed to it and the other employer-members to exercise reasonable care and skill in administering the Trust. This cause of action relies upon the same allegations of wrongdoing as the contractual and fiduciary duty counterclaims, seeks the same measure of damages, and alleges no legal duties on the part of the Trust independent of the contractual or fiduciary duties that are the subject of these separate causes of action. Under the circumstances, this counterclaim is dismissed as redundant insofar as it states a cause of action.

## ***6. Conversion***

The eighth counterclaim alleges that the Trust "converted the assets of PeopleCare for its personal use in the form of excessive fees, premiums, commissions, salary and bonuses" paid to Cool and others. PeopleCare also alleges that "profits" from the Trust were diverted to the LeadingAge Services. However, the property that is the subject of this cause of action — the contribution and adjustment payments made by PeopleCare pursuant to the contracts between the parties — belonged to the Trust upon payment by PeopleCare. Accordingly, the counterclaim must be dismissed for PeopleCare's failure to allege "legal ownership or an immediate right of possession to specifically identifiable funds and that the [Trust] exercised an unauthorized dominion over such funds to the exclusion of the [PeopleCare's rights" ([Whitman Realty Group, Inc. v Galano, 41 AD3d 590, 592 \[2d Dept 2007\]](#)). [FN9](#)]

## ***7. Fraud/Fraud in the Inducement***

PeopleCare alleges that the Trust, through its agents, made a variety of material misrepresentations of fact to induce PeopleCare to join the Trust and continue membership. These fraudulent misrepresentations and/or concealments allegedly concerned: the level of risk associated with GSIT membership, including the assertion that a "stop loss" or reinsurance would limit significant financial exposure; claims that Cool was an experienced and capable administrator that could control costs more effectively than traditional insurers; the failure to explain joint and several liability; the amount of administrative fees to be paid; the financial condition of the Trust, including understatements of claim reserves and concealment of losses and government assessments; the use of a false and inflated premium discount to induce PeopleCare to join the Trust; and false and deceptive calculations and projections of [\*9]PeopleCare's liability. PeopleCare claims to have reasonably relied upon these fraudulent acts and omissions in joining the Trust and in continuing its membership. As a result, PeopleCare allegedly sustained the same four categories of damages recited above.

"A fraud cause of action must be commenced within six years from the time the fraud

was committed or within two years from the time the fraud was discovered or could have been discovered through reasonable diligence" ([Giarratano v Silver](#), 46 AD3d 1053, 1056 [3d Dept 2007], citing CPLR 213 [8]; see *Madden*, 119 AD3d 1022 [3d Dept 2014]); [Prichard v 164 Ludlow Corp.](#), 49 AD3d 408 [1st Dept 2008] [six years from "complet[ion of] the act that the alleged fraudulent statements had induced"]; [Percoco v Lesnak](#), 24 AD3d 427, 427 [2d Dept 2005] [right to sue for rescission available upon commission of the fraud]). As the fraud claim was not entirely time-barred when Action No. 1 was commenced, PeopleCare can seek recovery for acts of fraud committed on or after July 15, 2004 under the six-year limitations period.

As so limited, PeopleCare is precluded from maintaining its cause of action for fraud with respect to the misrepresentations that allegedly induced it to join the Trust, including any claims the Trust or its agents misrepresented the availability of a "stop loss" and/or reinsurance mechanism that would limit its financial exposure, as well as any misrepresentations regarding the manner in which the Trust would be operated and managed, the failure to explain the concept of joint and several liability, the experience and qualifications of the Trust's administrator and the financial condition of the Trust. Also barred is any claim that PeopleCare was fraudulently induced to execute the Declaration of Trust, the Indemnity Agreement and the first five Contributions Agreements.. However, insofar as PeopleCare alleges that the latter three Contribution Agreements — those executed on May 26, 2005, June 14, 2006 and June 15, 2007 ("Latter Contribution Agreements") — were the product of fraudulent inducement, the claim is timely.

In addition to the six-year statutory period, CPLR 213 (8) provides that an action for fraud may be commenced within "two years from the time [PeopleCare] discovered the fraud, or could with reasonable diligence have discovered it". The test is an objective one that requires consideration of whether PeopleCare "was possessed of knowledge of facts from which the fraud could be reasonably inferred. Generally, knowledge of the fraudulent act is required and mere suspicion will not constitute a sufficient substitute" (*Sargiss v Magarelli*, 12 NY3d 527, 532 [2009] [internal quotations and citations omitted]). Given PeopleCare's acknowledgment that "the results of the fraud [became] apparent" by July 14, 2008, when "the staggering increase in adjustments were levied by the Trust", PeopleCare has failed to establish the applicability of the two-year discovery exception ([see Brooks v](#)

[AXA Advisors, LLC, 104 AD3d 1178](#), 1180 [4th Dept 2013]).

The Trust also argues that the fraud claim is insufficiently pleaded. The fact that the vast majority of the factual allegations are made "upon information and belief" does not compel dismissal of the cause of action. Allegations made upon information and belief "are to be considered true for the purposes of a motion to dismiss pursuant to CPLR 3211(a) (7)" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [2d Dept 1989] [citations omitted]). Additionally, the allegations of the complaint, taken in a light most favorable to PeopleCare, suffice to permit an inference of fraud ([see \*Pludeman v Northern Leasing Sys., Inc.\*, 10 NY3d 486](#), 492 [2008]), and the complaint is otherwise sufficient to put the Trust on notice of the basis of the fraud claim [\*10] with respect to continuing misrepresentations and concealments of the financial information pertinent to PeopleCare's continued membership in the Trust ([New York State Workers' Compensation Bd. v SGRisk, LLC, 116 AD3d 1148](#), 1152 [3d Dept 2014]; [Union State Bank v Weiss, 65 AD3d 584](#), 585 [2d Dept 2009]; *see* CPLR 3016 [b]).

The Trust further contends that the fraud claim is duplicative of the claim for breach of contract. To establish a fraud claim arising in connection with a contractual relationship, "the plaintiff must allege a breach of duty which is collateral or extraneous to the contract between the parties" (*Krantz v Chateau Stores of Canada*, 256 AD2d 186, 187 [1st Dept 1998]; *see Cole, Schotz, Meisel, Forman & Leonard, P.A. v Brown*, 109 ad3d 764 [1st Dept 2013]). In other words, the alleged fraud must be "sufficiently discrete from that underlying the breach of contract claim [in order to] state a separate cause of action" ([Kosowsky v Willard Mtn., Inc.](#), 90 AD3d 1127, 1129 [3d Dept 2011]).

PeopleCare's allegations that it fraudulently was induced to contract with the Trust are sufficiently collateral from the alleged breaches of contract as to state a separate cause of action. However, the remaining non-inducement allegations of fraud rely upon essentially the same allegations of misconduct as the breach of contract claim, encompass the same period of time and demand an identical measure of damage. Further, such alleged fraud pertains directly to the contract and its performance, rather than collateral matters. Under the circumstances, the non-inducement component of the fraud claim must be dismissed as duplicative (*see SGRisk*, 116 AD3d 1154).

Finally, while the Trust has shown that there may be aspects of the fraud claim that are defeated by the requirement of reasonable reliance, it has not established as a matter of law at this early stage of the litigation that the counterclaim is subject to dismissal on this basis.

### ***8. General Business Law §§ 349, 350***

PeopleCare alleges that the Trust and its agents made materially misleading statements in advertisements and marketing materials in an effort to induce employers such as PeopleCare to join. Further, the Trust and its agents allegedly continued to provide false and deceptive calculations and projections of its liabilities to induce its continued Trust membership and to hide and understate PeopleCare's liabilities. PeopleCare alleges that it relied upon these deceptive representations in joining the Trust and continuing its membership and, as a result, sustained the same four categories of damages described above. The Trust moves for dismissal of the claim as time-barred and for failure to state a cause of action.

Even assuming that this claim was timely interposed under the theory that defendant's counterclaim did not accrue until July 14, 2008 when PeopleCare's "unrealistic expectations" concerning future adjustments were not met (*see Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 211-212 [2001]), [\[EN10\]](#) PeopleCare has failed to state a viable cause of action under General Business Law ("GBL") §§ 349 or 350.

The elements of a cause of action under GBL § 349 are "first, that the challenged act or [\[\\*11\]](#) 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]). "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.](#), 21 NY3d 166 [2013]). A claim under GBL § 350 has similar elements, but is directed at false advertising.

The misconduct alleged by PeopleCare is not consumer-oriented within the meaning

of GBL §§ 349 or 350. PeopleCare is a large, for-profit entity with a statutory obligation to maintain insurance for its substantial workforce. As such, PeopleCare is not itself a "consumer" ([see \*Benetech, Inc. v Omni Fin. Group, Inc.\*, 116 AD3d 1190](#), 1191 [3d Dept 2014]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 73[1st Dept 2000]), and there are no allegations of an evidentiary nature demonstrating a broader impact on consumers at large ([see \*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank\*, 85 NY2d 20, 25-26 \[1995\]](#); [Mandelkow v Child & Family Servs. of Erie County](#), 49 AD3d 1316, 1318 [4th Dept 2008]; [State of NY Workers' Compensation Board v 26-28 Maple Avenue, Inc.](#) 80 AD3d 1135 [3d Dept 2011]).

The allegations of the counterclaim boil down to nothing more than a "[p]rivate contract dispute [], unique to the parties," which does "not fall within the ambit of the statute" (*Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d at 25). Indeed, as alleged in its Answer and amplified in the affidavit of its president, PeopleCare's decision to join the Trust and remain a member for eight years was the product of extensive, individualized oral communications with the Trust, Cool and others (Lewkowitz Aff. ¶¶ 8-9, 13, 14, 17, 18, 20). Based on these individualized discussions and negotiations, the Trust developed custom proposals for PeopleCare concerning complex matters of commercial insurance for each year of its membership (*id.* ¶¶ 16-19; [see \*North State Autobahn, Inc. v Progressive Ins. Group Co.\*, 102 AD3d 5](#), 12 [2d Dept 2012] ["The single shot transaction, which is tailored to meet the purchaser's wishes and requirements, does not, without more, constitute consumer-oriented conduct for the purposes of this statute"]).

Based on the foregoing, the Court concludes that the instant dispute is, in essence, one over the methods and means used to induce a commercial enterprise to purchase workers' compensation insurance for its workforce, not conduct directed at, or broadly impacting, the consuming public at large ([see \*New York Univ. v Continental Ins. Co.\*, 87 NY2d 308, 320-321 \[1995\]](#); *26-28 Maple Avenue*, 80 AD3d at 1137; *Benetech*, 116 AD3d at 1191).

Accordingly, the GBL counterclaim is dismissed.

## ***9. Injunctive Relief/Accounting***

PeopleCare's first counterclaim alleges that the methodology used to calculate the adjustments set forth in plaintiff's Complaint "is unauthorized and improper, and that the amounts sought are unreasonable, inappropriate and unauthorized." PeopleCare further alleges that the Trust has received additional funds, security, insurance, collateral and/or assets from other Trust members, insurance carriers or other sources. On the basis of these allegations, PeopleCare seeks an injunction restraining the Trust from enforcing the claimed adjustments and demands for payments and from pursuing payment and collection thereof. PeopleCare also [\*12]demands an immediate accounting.

The counterclaim fails to state a claim upon which relief can be granted. The Trust brings this collection action on the basis of alleged breaches of contract. While PeopleCare is entitled to raise defenses to this action and allege counterclaims to the extent supported by the law and the facts, it offers no plausible basis for enjoining the Trust from pursuing its legal remedies. In particular, the Court rejects PeopleCare's unsupported assertion that the contemplated injunction is merely "ancillary to [PeopleCare's] request for an accounting". Moreover, the counterclaim does not allege the necessary elements of a permanent injunction, and there has been no showing that PeopleCare lacks an adequate remedy at law. Finally, the claim for accounting is duplicative of other causes of action alleged in the complaint ([\*Calabrese Bakeries, Inc. v Rockland Bakery, Inc.\*, 102 AD3d 1033](#), 1037 [3d Dept 2013]). Accordingly, the first counterclaim is dismissed in all respects.

## **B. OTHER ARGUMENTS**

### ***1. Damages***

With respect to the remaining causes of action, the Trust argues that the monetary recovery sought by PeopleCare is limited by its legal obligation as employer to provide

workers' compensation insurance to its employees. Absent membership in a GSIT, PeopleCare

would have been required to fulfill this obligation by procuring insurance from a commercial carrier or the State Insurance Fund ("SIF"). Accordingly, the Trust maintains that PeopleCare's right of recovery must be limited to difference between what it paid to the Trust for insurance and what it would have paid otherwise (citing [County of Ulster v Highland Fire Dist.](#) (29 AD3d 1112 n 4 [3d Dept 2006] ["having received the very coverage for which the [employers] tendered premiums . . . , as well as various benefits under the plan, it would be fundamentally unfair to permit [plaintiff] to now avoid paying [its] proportionate share of the outstanding liabilities"])).

Even assuming that the ruling requested by the Trust is cognizable on a pre-answer motion to dismiss under CPLR 3211, the limitation on damages proposed by the Trust has not been conclusively established as a matter of law. While it is difficult to envision any set of facts or circumstances that would entitle PeopleCare to receive a full refund of all payments made to the Trust for the compensation of its injured workers, it does not follow the law or from the documentary evidence before the Court that PeopleCare's recovery of compensatory damages is limited in the manner proposed by the Trust.

As the Trust argues, contract damages are designed to "place the [aggrieved party] in the same position as it would have been in if the contract had not been breached" ([Xand Corp. v Reliable Sys. Alternatives Corp.](#), 63 AD3d 724, 725 [2d Dept 2009] [internal quotation omitted]). And damages in a fraud case are limited to the "actual pecuniary loss sustained as a direct result of the wrong" and serve "to compensate plaintiffs for what they lost because of the fraud, not for what they might have gained ([Continental Cas. Co. v PricewaterhouseCoopers, LLP](#), 15 NY3d 264, 271 [2010]). The present record provides no basis for concluding that these measures of damages necessarily are limited to the difference between PeopleCare's monetary [\*13] obligations to the Trust and what it otherwise would have paid for workers' compensation insurance.

## ***2. Waiver***

The Trust argues that PeopleCare has waived its right to challenge the validity of any adjustment bills issued prior to 2008 based upon its failure to timely object. The Trust cites language in the Contribution Agreements for 2000 through 2004 requiring "any part [of the adjustment] not in dispute" to be paid within thirty days of receipt and language in the Contribution Agreements for 2005 through 2007 providing that PeopleCare must notify the Trust of any "dispute concerning the [adjustment]" thirty days of receipt. The Trust submits that PeopleCare paid all requested adjustments without objection prior to July 2008, and its failure to promptly object denied the Trust to opportunity to contemporaneously review and address any concerns or objections.

Waiver is the voluntary and intentional relinquishment of a known right (*see Nassau Trust Co. v Montrose Concrete Prods. Corp.*, 56 NY2d 175, 184 [1982]). "Waiver . . . may be accomplished by express agreement or by such conduct or a failure to act as to evince an intent not to claim the purported advantage" (*Hadden v Consolidated Edison Co. of NY*, 45 NY2d 466, 469 [1978]). But a waiver "is not created by negligence, oversight, or thoughtlessness, and cannot be inferred from mere silence" (*Peck v Peck*, 232 AD2d 540, 540 [2d Dept 1996]). Rather, there must be proof that there was "a voluntary and intentional relinquishment of a known and otherwise enforceable right" (*id.*). Moreover, waiver "should not be lightly presumed and must be based on a clear manifestation of intent to relinquish a contractual protection" ([\*Team Mktg. USA Corp. v Power Pact, LLC\*, 41 AD3d 939](#), 941-942 [3d Dept 2007]).

Apart from assenting to Contribution Agreements that contemplated that members would pay the undisputed portion of bills and object to any disputed charges, the present record fails to disclose any conduct on the part of PeopleCare evincing an intent to waive any potential claims against the Trust. And the Contribution Agreements, standing alone, are insufficient to conclusively establish a waiver.

### ***3.Standing***

The Trust argues that PeopleCare lacks standing to assert any claims alleging improper administration of the Trust relative to the Cool's third-party administration and

claims administration services. According to the Trust, PeopleCare's claims regarding excessive discounting, inadequate claims administration, inadequate loss reserves, understating claim reserves and concealment of losses are all aimed squarely at Cool, not the Trust, and they allege harms and losses sustained by the Trust as a whole, not its members individually. As such, the Trust maintains that these derivative claims are barred by the demand requirement, which has not been pleaded in PeopleCare's answer.

While certain aspects of the counterclaims pleaded by PeopleCare may be derivative in nature, the claims that survive the Trust's motion to dismiss — breach of contract, fraud-based breach of fiduciary duty and fraudulent inducement — appear from the present record to be direct [\*14] claims. PeopleCare seeks to recover for breaches of contractual and fiduciary obligations owed to it by the Trust and for having been fraudulently induced to continue membership in the Trust. These claims are not rendered derivative in nature merely because the Trust's liability may have arisen from actions of Cool or others. Nor does the fact that the Trust may possess claims in its own right against Cool or others serve to divest PeopleCare of direct claims against the Trust insofar as the Trust has breached legal duties owed to PeopleCare.

### ***THIRD-PARTY COMPLAINTS***

LeadingAge, LeadingAge Services, Cool and Cool Risk move for dismissal of the claims alleged in the third-party complaints in Actions Nos. 1 and 2.

#### ***A. Indemnification and Contribution***

The first cause of action is for implied indemnity and contribution. At the outset, the claim must be dismissed insofar as it seeks contribution. The losses claimed by PeopleCare and Recco are purely economic in nature, and they arise out of their contractual relationship with the Trust. A claim for contribution under CPLR article 14 does not lie under these circumstances (*Board of Educ. of Hudson City School Dist. v Sargent, Webster, Crenshaw & Folley*, 71 NY2d 21, 27 [1987]; [see also Westbank](#)

[Contr., Inc. v Rondout Val. Cent. School Dist., 46 AD3d 1187](#), 1190 [3d Dept 2007]).

The issue then becomes whether the third-party complaints state a cause of action for implied indemnity. [\[FN11\]](#)

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, 690-691 [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]*).

Thus, to state a claim for implied indemnity, the cause of action must include allegations that the former Trust members and the third-party defendants owed a common duty to some other party that ought to be discharged by the third-party defendants, rather than the former Trust members. In *Madden*, the Third Department held that the professional advisors to a GSIT did not share a common duty within the WCB to maintain the solvency of the subject trust; the duties of the professional advisors were owed solely to the GSIT (119 AD3d at 1025). On the other hand, the trustees shared with the WCB "a common duty to the covered employees to ensure that the [GSIT] maintained adequate reserves such that its assets would cover its liabilities" (*id.*). To similar effect is [\*Murray Bresky Consultants, Ltd v New York Compensation Manager's Inc.\* \(106 AD3d 1255, 1258-1259 \[3d Dept 2013\]\)](#), in which a former trust member's claim for implied indemnity against the trustees was sustained "given their common duty to plaintiff's covered employees and to the Workers' Compensation Board to maintain adequate reserves in the trust so that it was adequately funded and its assets would cover its liabilities" (*id.*).

Applying these principles, the Court concludes that the claim for implied indemnity against LeadingAge and Services must be dismissed. According to the third-party complaint, LeadingAge and Services played a role in founding the Trust, selecting Cool as administrator and marketing the Trust to employer-members. There simply is no plausible allegation that these third-party defendants shared a duty in common with plaintiff-employers to the Workers' Compensation Board, the employees of PeopleCare or Recco, or anyone else with respect to the management or funding of the Trust.

The Court reaches a different conclusion, however, with respect to Cool in its role as third-party administrator. The third-party complaint alleges that as group administrator retained by the Trust, Cool shared a common duty with PeopleCare under the WCL and its implementing regulations and pursuant to the PA and TPA Agreements (¶¶ 28-31). These duties are alleged to include the obligations of ensuring the financial soundness of the Trust (*id.* ¶ 32). As Cool has failed to conclusively establish the absence of the common duty alleged by the third-party plaintiffs, the branch of its motion seeking dismissal of the claim for implied indemnity must be [\*15]denied. [\[FN12\]](#)

### ***B. Breach of Contract / Implied Covenant of Good Faith***

The second cause of action, alleged only against Cool, claims breaches of the contractual duties established by the Declaration of Trust, Indemnity Agreement and Contribution Agreements. The third cause of action seeks recovery against Cool based upon violations of the covenant of good faith and fair dealing implicit in the contracts. PeopleCare and Recco claim to sue as a third-party beneficiary of these contracts, and they seek to recover the same four categories of damages as sought against the Trust.

The contractual causes of action alleged in the third-party complaint must be dismissed due the absence of any contractual relationship between the former Trust members and Cool, a disclosed contractual agent for the Trust. [\[EN13\]](#) In the absence of contractual privity, there can be no claim for breach of contract (*Four Winds of Saratoga v Blue Cross & Blue Shield of Cent. NY*, 241 AD2d 906, 907 [3d Dept 1997]; see *Mark Patterson, Inc. v R.M. Stephens & Co.*, 232 AD2d 178, 179 [1st Dept 1996] [breach of contract claim "should have been dismissed, since defendant broker is not a party to the allegedly induced contract"]).

Contrary to PeopleCare and Recco's contention, these causes of action find no support in *New York State Workers' Compensation Bd. v Consolidated Risk Servs.*, 40 Misc 3d 1232 (a), (Sup. Ct., Albany County 2013). *CRS*, which involved the WCB suing as the successor to a GSIT that had a direct contractual relationship with the administrator being sued. Nor is PeopleCare and Recco's reliance on *Murray Bresky* availing, as the claim of the former GSIT member against the trustees was premised upon written contracts "between the trustees and participant employers" (106 AD3d at 1261). And in the absence of a contractual relationship, there can be no covenant of good faith and fair dealing implied, an obligation necessarily premised on the existence of a contractual relationship.

Finally, the relevant contracts do not evince an intent to allow Trust members to enforce their terms. In any event, the contract rights at issue belong to the Trust, not its members, and third-party plaintiffs lack standing to pursue derivative claims in the right and stead of the Trust.

### ***C. Breach of Fiduciary Duty***

The fourth cause of action alleges that Cool breached fiduciary duties owed to PeopleCare and Recco. The duties are said to arise through a "special relationship" whereby PeopleCare and Recco, as members of the Trust, reposed trust and confidence in Cool to properly [\*16]administer the Trust.

The Court of Appeals has described the principle underlying this cause of action as follows:

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*).

[\*\(EBC I, Inc. v Goldman Sachs & Co. \(5 NY3d 11, 19-20 \[2005\]\).\*](#)

This cause of action must be dismissed because PeopleCare and Recco have failed to plead evidentiary facts supporting the existence of a fiduciary relationship between themselves and Cool. While the Trust owed PeopleCare and Recco duties as a fiduciary and Cool may have owed fiduciary duties to the Trust, PeopleCare and Recco have not identified any duties owed to it by Cool independent of the obligations owed by Cool to the Trust. Nor is there anything in the nature of this relationship, in which Cool acted as a disclosed contractual administrator and agent of a fiduciary, that would give rise to

fiduciary duties flowing directly from Cool to the former employer-members. And nothing in *CRS* is to the contrary, as that case concerned allegations that the GSIT administrator owed fiduciary duties to the trust itself, not its member employees. [\[FN14\]](#) Accordingly, this cause of action must be dismissed.

#### ***D. Fraud / Fraudulent Inducement***

The fifth cause of action alleges fraud against Cool, and the tenth cause of action alleges fraudulent inducement against all of the third-party defendants. For the reasons that follow, these claims are dismissed as time-barred.

Under the six-year statute of limitations applicable to fraud, the claim for fraudulent inducement in Action No. 1 is time barred, as the final Contribution Agreement was executed by PeopleCare on June 15, 2007 and counter-signed by the Trust on July 24, 2007.

Further, the allegations of PeopleCare's original Answer, filed on September 17, 2010, conclusively defeat any reliance on the two-year discovery exception. The Answer includes allegations that Cool "purposely withheld information [from PeopleCare] and/or provided erroneous and/or misleading information regarding the financial condition of the [Trust], the resulting Workers Compensation adjustments, the Trust's compliance with the WCL . . . and the potential liability that would be incurred by Defendant in becoming and remaining a member of the [Trust]" (¶ 110). Additionally, the counterclaim for fraud against the Trust relies, in part, on the alleged involvement of LeadingAge and Services in the scheme to defraud. Under the circumstances, the alleged fraud committed by the third-party defendants, which pertains to the misrepresentation and omission of information material to PeopleCare's decision to join and remain a member of the Trust through June 15, 2008, could have been discovered through the exercise of reasonable diligence within two years of the filing of the original Answer.

As to Recco, it may sue under the six-year limitations period for acts of fraud on and after July 26, 2007, including any inducements made with respect to the Contribution

Agreement of February 25, 2008. Further, the present record does not clearly foreclose application of the two-year discovery rule, as Recco's first answer with counterclaims in Action No. 2 was not filed until October 5, 2011.

### ***E. Conversion***

A cause of action for conversion is governed by a three-year limitations period that accrues at the time of the alleged unauthorized exercise of dominion to the exclusion of the owner's rights. Given that PeopleCare's last payment to the Trust was made on August 8, 2007 and there are no allegations of any conversion of PeopleCare's property on or after July 26, 2010, the claim for conversion in Action No. 1 must be dismissed as untimely.

[\[FN15\]](#) The same conclusion follows with respect to Recco, which made its last payment to the Trust in March 2009.

### ***F. Unjust Enrichment***

PeopleCare and Recco allege that the third-party defendants have diverted assets contributed by Trust members to their own use and were unjustly enriched as a result. Under the applicable statute of limitations, the claim of unjust enrichment must be limited to the wrongful acts giving rise to a duty of restitution on or after July 26, 2007.

However, even if the third-party complaint alleged wrongful acts on or after such date, the counterclaim fails to state a cause of action. This equitable remedy "is available only in unusual situations when the defendant has not breached a contract nor committed a recognized tort, but circumstances create an equitable obligation running from the defendant to the plaintiff" ([Maya NY, LLC v Hagler, 106 AD3d 583](#), 585 [1st Dept 2013]). Insofar as PeopleCare and Recco claim that their own financial contributions to the Trust were improperly diverted, the [\[\\*17\]](#) claim arises out of and pertains to the contractual relationship between the former Trust members and the Trust, and there is no equitable obligation running from the third-party defendants to the former Trust members. To the extent that PeopleCare and Recco seek to vindicate the rights of the Trust generally, they

lack standing to maintain a derivative claim. Accordingly, the claim is dismissed.

### ***G. Negligent Misrepresentation / GBL §§ 349, 350***

For the reasons stated above, PeopleCare sustained injury as a result of any negligent misrepresentations or deceptive business practices no later than July 14, 2008.

Accordingly, the causes of action for negligent misrepresentation and violations of GBL §§ 349, 350 against the third-party defendants must be dismissed as time barred. Similarly, Recco sustained injury no later than March 2010, so its claims similarly are barred. In any event, for the reasons stated above, the GBL claims do not state a cause of action because the deceptive practices are not consumer-oriented in nature.

### ***H. Negligence***

The eighth cause of action alleges that Cool failed to exercise reasonable care in administering the Trust. In addition to being untimely, the duties relied upon by PeopleCare and Recco are purely contractual in nature, and New York law does not allow a cause of action for the negligent performance of contractual duties, particularly by a stranger to the contract.

### ***E. Declaratory Judgment / Alter Ego***

The twelfth cause of action seeks a declaration that Cool Insuring and Cool Risk are alter egos of one another, and the thirteenth cause of action alleges that LeadingAge and Services are alter egos of one another. These claims must be dismissed for failure to state a claim upon which relief can be granted. PeopleCare and Recco's allegations are highly conclusory, made solely upon information and belief and are unsupported by specific evidentiary facts demonstrating, if credited, that the owners of these entities caused harm to PeopleCare and Recco through an abuse of the privilege of doing business in the corporate form ([\*East Hampton Union Free School Dist. v Sandpebble Bldrs., Inc.\*, 66](#)

[AD3d 122](#), 126 [2d Dept 2009]).

## ***CONCLUSION***

Based on the foregoing, it is

**ORDERED** that the Trust's motion to dismiss in Action No. 1 is granted in part and denied in part, in accordance with the foregoing; and it is further

**ORDERED** that the motion of LeadingAge and Services for dismissal of the third-party complaint in Action No. 1 is granted; and it is further

**ORDERED** that the motion of LeadingAge and Services for dismissal of the third-party complaints in Action No. 2 is granted, with the exception of the tenth cause of action for fraudulent inducement, which is limited in accordance with the foregoing; and it is further

**ORDERED** that the motions of Cool Insuring and Cool Risk for dismissal of the third-party complaints in Actions No. 1 and Actions No. 2 are granted in part and denied in part, in accordance with the foregoing.

This constitutes the consolidated Decision & Order of the Court. Duplicate originals of this Decision & Order are being transmitted to counsel for the plaintiff for filing and service in Actions Nos. 1 and 2 respectively. All other papers are being transmitted to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR Rule 2220. Counsel is not relieved from the applicable provisions of that Rule respecting filing, entry and Notice of Entry.

Dated: Albany, New York

December 5, 2014

RICHARD M. PLATKIN

A.J.S.C.

Papers Considered:

*Action No. 1 (PeopleCare)*

Notice of Motion of Third-Party Defendant Services and the Association, dated November 22, 2013;

Affirmation of Robert J. Grande, Esq., dated November 22, 2013, with attached exhibits A-P;

Joint Memorandum of Law of Plaintiff NYASHA, and Third-Party Defendants LeadingAge and Services, dated November 22, 2013;

Notice of Motion of Plaintiff NYASHA Services, dated November 22, 2013;

Affirmation of Stuart F. Klein, Esq., dated November 22, 2013, with attached exhibits 1-10;

Affirmation of John F. Snow, Esq., sworn to November 21, 2013;

Affidavit of Jerry Lewkowitz, sworn to March 19, 2014, with attached exhibits A-C;

Memorandum of Law in Opposition to Motion to Dismiss Third-Party Complaint (Cool), dated March 21, 2014;

Memorandum of Law in Opposition to Motion to Dismiss Counterclaims, dated March 21, 2014;

Omnibus Affirmation of Linda J. Clark, dated March 21, 2014, with attached exhibits A-K;

Memorandum of Law in Opposition to Motion to Dismiss Third-Party Complaint (LeadingAge and Services), dated March 21, 2014;

Affirmation of Kevin J. O'Connor, Esq., undated, with attached exhibit A;

Reply Affirmation of Robert J. Grande, Esq., dated May 19, 2014;

Joint Reply Memorandum of Law of Plaintiff NYASHA, and Third-Party Defendants LeadingAge and Services , dated May 19, 2014;

Reply Affirmation of Stuart F. Klein, Esq., dated May 19, 2014, with attached exhibit A;

Supplemental Memorandum of Law in Opposition to Motion to Dismiss Counterclaims, dated September 19, 2014.

*[\*18] Action No. 2 (Recco)*

Notice of Motion of Third-Party Defendants LeadingAge and Services, dated November 22, 2013;

Affirmation of Kevin J. O'Connor, Esq., dated November 22, 2013, with attached exhibits A-D;

Notice of Motion of Third-Party Defendant Cool, dated November 22, 2013;

Affirmation of Robert J. Grande, Esq., dated November 22, 2013, with attached exhibits A-Q;

Affidavit of Frank Recco, sworn to March 21, 2014, with attached exhibits A-C;

Memorandum of Law in Opposition to LeadingAge Motion to Dismiss, dated March 21, 2014;

Affirmation of Linda J. Clark, Esq., dated March 21, 2014, with attached exhibits A-K;

Memorandum of Law in Opposition to Dismissal of Third-Party Complaint, dated March

21, 2014;

Affirmation of Denis Serkin, Esq., dated May 19, 2014, with attached exhibit A;

Reply Affirmation of Robert J. Grande, dated May 19, 2014, with attached exhibit A.

### Footnotes

**Footnote 1:** The "deposit contribution" reflects an estimate of the predicted incurred losses for the upcoming year. The "basic contribution", which is based upon a fixed percentage of payroll, is used to cover the expenses of administering the Trust, including excess insurance, claims administration, loss prevention and general program administration.

**Footnote 2:** The "containment contribution" also includes mandatory assessments of the Workers' Compensation Board.

**Footnote 3:** According to the Trust, this would leave in dispute payments made by PeopleCare from 2005 through 2007 and adjustment bills issued during the same period.

**Footnote 4:** The Court will exercise its discretion to consider PeopleCare's belated invocation of CPLR 203 (d), a question of law that is implicated in Action No. 2 and other related lawsuits.

**Footnote 5:** Notably, *Inter-Community* relied upon a decision of the Third Department ([\*State of NY, Workers' Compensation Bd. v A & T Healthcare, LLC\*, 85 AD3d 1436, 1437-1438 \[3d Dept 2011\]](#)), which held that a cause of action to *collect* an assessment 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). Further, the record in *Inter-Community* did "not disclose the precise nature and timing of the [alleged] breaches", and the discussion of damages relied upon by the parties appears to be dicta. Moreover, the mode of analysis employed herein was affirmed by the Third Department in both [\*State of NY Workers' Compensation Bd. v Madden\*, 119 AD3d 1022 \(3d Dept 2014\)](#) and [\*New York State Workers' Compensation Bd. v SGRisk, LLC\*, 116 AD3d 1148, 1152 \(3d Dept 2014\)](#).

**Footnote 6:** A cause of action for unjust enrichment is subject to a six-year limitations period that accrues upon the occurrence of the wrongful act giving rise to a duty of restitution (*Elliott v Qwest Communications Corp.*, 25 AD3d 897 [3d Dept 2006]). Accordingly, the cause of action is timely insofar as PeopleCare seeks to recover damages for wrongful acts committed on and after July 15, 2004 and time-barred in all other respects.

**Footnote 7:** As articulated below, the two-year discovery rule is not available to PeopleCare.

**Footnote 8:** While a similar conclusion ultimately may follow with respect to the fraud-based claims, the present record fails to conclusively establish that this branch of the counterclaim is duplicative.

**Footnote 9:** In any event, as any right possessed by PeopleCare to the funds is contractual in nature, the claim is duplicative of the sixth counterclaim for breach of contract. And insofar as PeopleCare alleges that the Trust's property was converted, it lacks standing to maintain such a derivative claim.

**Footnote 10:** 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" (*id.*).

**Footnote 11:** No claim is made for contractual indemnification.

**Footnote 12:** In this connection, the Court rejects Cool's contention that the cause of action for indemnity is merely a disguised direct claim or is subject to dismissal as duplicative of the contractual, quasi-contractual and negligence claims alleged in the third-party complaint.

**Footnote 13:** If PeopleCare did possess a breach of contract claim against Cool, it would be limited to breaches that occurred on and after July 26, 2007, six years prior to the commencement of the third-party action (CPLR 213 [2]).

**Footnote 14:** PeopleCare lacks standing to sue for breaches of any fiduciary duties owed by Cool to the Trust. Such a claim is derivative in nature.

**Footnote 15:** In any event, a claim of conversion will not lie for the reasons stated above with respect to the counterclaim against the Trust. And insofar as the claim concerns the conversion of the Trust's assets generally, the third-party plaintiffs lack standing to maintain such a derivative claim.

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