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

**PRESENT:** **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

***Justice***

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**INDEX NO.** 656825/2019

WPP GROUP USA, INC.,

**MOTION SEQ. NO.** 003, 004

Plaintiff,

- v -

RB/TDM INVESTORS, LLC,FALCON STRATEGIC PARTNERS IV, LP, GREG MURTAGH, ROGER BERDUSCO, TOM BAUMLIN, PARTNERRE IRELAND INSURANCE DAC, F/K/A PARTNERRE IRELAND INSURANCE LIMITED,

**DECISION + ORDER ON MOTIONS**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 53, 61

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 39, 40, 41, 42, 43, 44, 45, 46, 54, 60

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ORDERED that the motions to dismiss by defendants RB/TDM Investors, LLC, Falcon Strategic Partners IV, LP, Greg Murtagh, Roger Berdusco, and Tom Baumlin (collectively, the Seller Defendants) and defendant PartnerRe Ireland Insurance DAC (PartnerRe) are DENIED.

In this action, which concerns plaintiff's acquisition of a company (the Company) from the Seller Defendants, plaintiff seeks to enforce warranty breaches against the Seller Defendants related to their good-faith financial projections for the Company as of the Closing and to hold PartnerRe liable under a policy it issued insuring such breaches up to $40 million. On these motions to dismiss, the complaint's allegations that the projections were not made in good faith must be assumed true. Defendants urge that the projections were made as of a date before closing and that they were in good faith as of then. They maintain, based on the language of the Unit Purchase Agreement (UPA), that good faith at the time of Closing is irrelevant; thus, they cannot be held liable for failing to disclose the Company's deteriorating financial condition between execution of the contract and the Closing. The Seller Defendants also argue that "WPP's fraud claim should be dismissed because it is derivative and duplicative of its breach-of-contract claims" (Dkt. 16 at 12) and because the Company's CEO should have been sued. PartnerRe asserts that the action

against it must be dismissed based on two policy exclusions precluding coverage. Dismissal is denied.

The UPA

The representations and warranties are contained in the UPA, which is dated October 12, 2016, and governs the sale of the Company that closed on November 17, 2016 (Dkt. 19). Two of the warranties are in Section 5, which begins: "**Except as otherwise indicated on the Schedules**, each member of the Company Group makes the representations and warranties set forth in this ARTICLE 5 as of the date of this Agreement **and as of the Closing**" (*id.* at 48 [bold added]). Section 5.5(C) provides: "Schedule 5.5(C) sets forth the budget for the Company Group and the most recent profit projections for the 2016 calendar year. The Company Group does not warrant that the 2016 budget or profit projections set forth on Schedule 5.5(C) will prove to be accurate; provided, however, that **the Company Group does represent that the 2016 budget and profit projections were made in good faith and consistent with past practice**" (*id.* at 50-51). Similarly, section 5.23(A) warrants that "the estimated revenue for each retail partner and all retail partners (in the aggregate) for such calendar year" on Schedule 5.23(A) was "made in good faith and consistent with past practice" (*id.* at 71).

Schedule 5.5(C) contains actual data from January through August 2016 and monthly-performance forecasts for the rest of the year (Dkt. 43). Nowhere does this schedule unequivocally indicate that projections for the remainder of 2016 were only intended to be made as of August 2016, October 2016 or any other date. Thus, it is reasonable per the preamble to Section 5, that if unchanged, the Seller Defendants warranted the continued good faith of the 2016 annual projections in section 5.5(C) as of the November 17, 2016 Closing. That the schedule contains a footer, perhaps indicating that the document was generated on October 10, 2016, is not an unambiguous indication that the projections were only intended to have been made in good faith as of that date. If the Seller Defendants so intended, it is not unreasonable to assume that they would have explicitly said so to avoid any doubt instead of stamping a date on the bottom of page and assuming everyone understood its meaning. The ordinary footer surely is not unequivocal documentary evidence establishing such intent and does not "utterly refute" plaintiff's claim (*see Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]). Likewise, Schedule 5.23(A), which lists revenue from clients through August 2016 and estimates revenue for the rest of that year, also contains no indication that the Seller Defendants did not intend to warrant that such estimates were good-faith projections as of the date of closing (Dkt. 44). The schedules are ambiguous and the limited extrinsic evidence proffered does not warrant dismissal at the pleading stage. "Instead, the matter should proceed to discovery as to the parties' intent" (*LDIR, LLC v DB Structured Prods., Inc.*, 172 AD3d 1, 6 [1st Dept 2019]).

Plaintiff also states a claim for breach of section 7.5(B), which obligates the Seller Defendants to "promptly disclose ... any material variances from the representations and

warranties contained in [Section 5]" and to "promptly deliver ... an update to the Schedules specifying such change" (Dkt. 19 at 80-81). Plaintiff alleges that the Company's internal projections on the date of closing were significantly worse than those provided in the Schedules. Whether certain information provided to plaintiff in late October negates the failure to provide the Company's actual projections from mid-November is, at best, a question of fact. Liability for this breach is also grounded in sections 8.2(F)(2) and 11(A)(2) (*see id.* at 83-84, 98).

Plaintiff also sufficiently pleads breach of section 11.2(c), which obligates the Seller Defendants to indemnify plaintiff against losses caused "Actual Fraud committed by any Seller, Core Management Team member or any member of the Company Group ... in respect of any of the representations and warranties set forth in ARTICLE 5" (*id.* at 100). This claim is not duplicative because it is not a fraud claim. It asserts breach of contract. In any event, under controlling authority, a separate fraud claim may be pleaded based on knowingly false warranty breaches (*see MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 294 [1st Dept 2011]). While it is possible that the claim might only give rise to duplicative damages, the measure of damages is not at issue on this motion and is better assessed on summary judgment (*MBIA Ins. Corp. v Credit Suisse Secs. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018]; *see Ambac Assurance Corp. v Countrywide Home Loans Inc.*, 179 AD3d 518, 520 [1st Dept 2020]).

The claim for breach of section 11.2(C) will not be dismissed at this time for failure to name Sherry Smith, the Company's CEO, as a defendant (*see* Dkt. 19 at 100 [covenanting that plaintiff will "seek indemnification from each Core Management Team member who committed the Actual Fraud"]). Plaintiff avers that it "included as defendants each Seller and Core Management Teammember who [it] currently believes in good faith it can prove committed Actual Fraud" (Dkt. 53 at 49). Defendants suggest that if Actual Fraud was committed, Smith would necessarily be culpable given her role. Plaintiff cannot be forced to lodge allegations it professes cannot be made in good faith. Ultimately, it runs the risk that, if it is proven that Smith committed Actual Fraud, it may be in breach and may not be able to recover unless she is named as a defendant. Dismissal now though is certainly premature. Perhaps defendants may even implead her to hold her jointly and severally liable.

Insurance Policy Exclusions

PartnerRe, which issued a policy covering, among other things, Section 5 breaches with a $40 million limit (Dkt. 45 [the Policy] at 3), argues that two of the Policy's exclusions preclude coverage. It first relies on Exclusion III.A, which excludes the "portion" -- that is, not necessarily all -- of the Loss "arising out of any (a) Breach of which any Deal Team Member had Actual Knowledge prior to the Inception Date or (b) Interim Breach" (*id.* at 9). Discovery is required to determine whether this exclusion applies and, if so, how much of the Loss is excluded. Whether any of the defined Deal Team Members had Actual Knowledge is a question of fact. Discovery is also required to determine whether there

was an Interim Breach, which requires Actual Knowledge of a breach occurring between execution and closing (*see id.* at 7-8). While it is possible, based on plaintiff's allegations, that the Seller Defendants will be held liable based on their Actual Knowledge of a Section 5 breach, uncertainty over the interplay between the good faith element and the separately defined Actual Knowledge requirement makes dismissal premature. PartnerRe asks the court to infer Actual Knowledge based on the complaint's allegations. But on a motion to dismiss, the court must "accord plaintiff the benefit of every possible inference" (*Kolchins v Evolution Markets, Inc.*, 31 NY3d 100, 105-06 [2018]).

PartnerRe also moves to dismiss based on Exclusion III.B, which excludes the portion of the Loss "arising out of the specific indemnities set forth in Sections 11.2(A)(2) and (3) of the [UPA]" (*id.* at 9). This exclusion does not apply to Section 11.2(A)(1), which covers the subject breaches of representations in Section 5 (*see* Dkt. 19 at 98). It is unclear whether Sections 11.2(A)(2) and (3) can be read as overlapping with Sections 11.2(A)(1) and, if so, coverage might not be precluded as PartnerRe's interpretation seemingly renders coverage for section 5 breaches illusory. It would be incompatible with the scope of Insured Matters (*see id.* at 3). Ambiguities in exclusions must be strictly construed and are ordinarily resolved in favor of the insured (*see Cragg v Allstate Indem. Corp.*, 17 NY3d 118, 122 [2011]). Dismissal based on Exclusion III.B is therefore denied.

Defendants' other arguments are unavailing.

Accordingly, it is ORDERED that a telephonic preliminary conference will be held on February 10, 2021 at 1:00 p.m. (the parties shall circulate a dial-in number 30 minutes in advance), and the parties shall e-file and email the court (mrand@nycourts.gov) their joint letter at least one week before the conference.

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**1/15/2021**
**DATE**

**JENNIFER G. SCHECTER, J.S.C.**

**CHECK ONE:** [ ] **CASE DISPOSED** [X] **NON-FINAL DISPOSITION**
[ ] **GRANTED** [X] **DENIED** [ ] **GRANTED IN PART** [ ] **OTHER**