SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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CHIPOTLE MEXICAN GRILL, INC., CHIPOTLE MEXICAN GRILL OF COLOARDO, LLC and CHIPOTLE SERVICES, LLC

Index No. 700712/2016

Plaintiff,

-against-

RLI INSURANCE COMPANY and THE KOCH-GLACKEN AGENCY a/k/a GLACKEN GROUP, INC., PIECE MANAGEMENT INC., SIMON PROPERTY GROUP, INC., THE RETAIL PROPERTY TRUST, and AFMAT WAZADALLY,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

SULLIVAN & KLEIN, LLP
Attorneys for Defendant AFI ASSOCIATES, INC. d/b/a THE KOCH-GLACKEN AGENCY sued herein Incorrectly as THE KOCH-GLACKEN AGENCY a/k/a GLACKEN GROUP, INC.
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File No.: 003-704

Of Counsel:
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PRELIMINARY STATEMENT

Defendant, AFI ASSOCIATES, INC. d/b/a THE KOCH-GLACKEN AGENCY sued herein incorrectly as THE KOCH-GLACKEN AGENCY a/k/a GLACKEN GROUP, INC., ("Koch-Glacken") by its attorneys, Sullivan & Klein, LLP, submit this memorandum of law in support of the instant motion for an Order:

(a) Pursuant to CPLR 3211(a)(7) and 3212 of the Civil Practice Law and Rules, dismissing the First, Third and Fourth Causes of Action of the Verified Complaint as against Koch-Glacken because Plaintiff has failed to state a cause of action upon which relief may be granted and Koch-Glacken is entitled to judgment as a matter of law;

(b) Pursuant to CPLR 3211(a)(7) of the Civil Practice Law and Rules, dismissing the Fifth and Sixth Causes of Action of the Complaint as against Koch-Glacken with prejudice because Plaintiff has failed to state a cause of action upon which relief may be granted;

The instant motion must be granted for the following reasons:

First, to the extent that the First, Third and Fourth Causes of Action set forth in the Verified Complaint seek a declaratory judgment against Koch-Glacken, they each must be dismissed on the ground that the causes of action fail to state a cause of action because the equitable remedy of a declaratory judgment is not available when, as here, a remedy at law exists.

Second, the First, Third and Fourth Causes of Action against Koch-Glacken must be dismissed because, under New York law, in order for an insurance broker such as Koch-Glacken to be liable to a putative additional insured on a policy of insurance there must exist privity.

Here, CHIPOTLE MEXICAN GRILL, INC., CHIPOTLE MEXICAN GRILL OF COLOARDO, LLC and CHIPOTLE SERVICES, LLC (collectively "Chipotle") has neither alleged nor can prove the existence of privity between it and Koch-Glacken.

Third, the Fourth Cause of Action against Koch-Glacken must be dismissed because Koch-Glacken is not a party to the RLI INSURANCE COMPANY ("RLI") policy and a non-party cannot be liable for breach of obligations under a contract of insurance to which it is not a party.

Fourth, the Fourth Cause of Action against Koch-Glacken must be dismissed because Chipotle has failed to plead and cannot prove that any act by Koch-Glacken was the proximate cause of any damage suffered by Chipotle.

Fifth, the Fifth and Sixth Cause of Action asserted against Koch-Glacken for unjust enrichment, must be dismissed because Chipotle's unjust enrichment claims are duplicative of its prior causes of action.

STATEMENT OF FACTS

The instant action is an action by Chipotle for coverage under a policy of insurance. It is alleged in Chipotle's Verified Complaint (the "Verified Complaint") that RLI and Koch-Glacken must defend and indemnify Chipotle in a personal injury action *Wazadally v. Chipotle Mexican Grill, Inc. et al.*, Index No. 1064/15 (the "*Wazadally* Action") pending in the Supreme Court, County of Queens.

The First and Third Causes of Action seek a determination of rights under to the RLI Policy and seek an order declaring that Koch-Glacken and RLI must indemnify Chipotle in the *Wazadally* Action. *See* Verified Complaint, annexed to Affirmation of Robert M. Sullivan (the "Sullivan Affm."), as Exhibit "A", at pg. 9, para. 66; pg. 12, para. 89.

The Fourth Cause of Action asserts a claim of action entitled "Declaratory Judgment" against Koch-Glacken and RLI for breach of their obligation to defend and indemnify in the *Wazadally* Action but, contrary to the relief generally sought in a declaratory judgment action, seeks damages for Chipotle including past defense costs. *Id.*, at pg. 13 para. 99.

The Fifth and Sixth Causes of Action assert claims of unjust enrichment against Koch-Glacken and RLI for being unjustly enriched by the amount Chipotle paid to defend itself in the *Wazadally* Action. *Id.* at pg. 13, para. 103. Chipotle seeks restitution in the amount Koch-Glacken and RLI were unjustly enriched at Chipotle's expense. *Id.* at pg. 13, para. 104.

Koch-Glacken plead, in its Verified Answer, affirmative defenses of failure to state a legally sufficient claim upon which relief may be granted, failure to allege sufficient facts which would give rise to a claim, lack of privity between Koch-Glacken and Chipotle, lack of proximate cause of Koch-Glacken's action to the damages of Chipotle, and a claim for declaratory judgment is barred when Plaintiff has an adequate remedy at law. *See* Verified Answer, annexed to Sullivan Affm., as Exhibit "B" at pg. 19-20 paras. 117-19; pg. 20 para. 122; pg. 21 para. 124.

As noted above, the current action is predicated upon the *Wazadally* Action. *See* Verified Complaint, annexed hereto Sullivan Affm., as Exhibit "F". The instant action is to obtain coverage under a comprehensive liability policy (CGL) (the "Policy") issued by RLI to PIECE MANAGEMENT INC. ("Piece Management") or alternatively against Koch-Glacken for failing to obtain a policy naming Chipotle as an additional insured under the Policy. *See* Sullivan Affm., Exhibit "A", pg. 5, para. 36. Koch-Glacken is the insurance broker for Piece Management. *See* Koch Affidavit, annexed hereto Sullivan Affm., as Exhibit "H". Koch-Glacken placed the

Policy through a wholesale insurance broker CRC/Crump. *See id.*; *see also* Sullivan Affm., Exhibit "G".

The Policy states that additional insureds under that policy are "[o]wners where required by written contract, signed prior to loss." Sullivan Affm, Exhibit "G". Chipotle alleges that "[p]ursuant to the terms of contractual agreement and course of dealing between Chipotle and Piece Management, Inc., Piece Management Inc., agreed to procure and maintain insurance coverage on behalf of Chipotle, and said policy was to name Chipotle as an insured and/or additional insured under said policy." *See* Sullivan Affm., Exhibit "A", pg. 4, para. 20. Chipotle further alleges that "Piece Management Inc. agreed in a contract or agreement that Chipotle be added as an additional insured on its policy." *Id.*, at pg. 8, para. 57.

Koch-Glacken issued a Certificate of Insurance (the "Certificate") for the RLI policy, which named Chipotle a "Certificate Holder" and an "additional insured". *Id.* at pg. 6 paras. 37-38; *See also* the Certificate annexed hereto Sullivan Affm., as Exhibit "I". Piece Management provided Chipotle with the Certificate. Sullivan Affm., Exhibit "A", pg. 5, para. 27. The Certificate states, at the top of the Certificate:

> "This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder."

Sullivan Affm., Exhibit "I".

Chipotle sent a letter to Piece Management and RLI asking Piece Management to hold harmless and indemnify Chipotle because Chipotle was an additional insured under the Policy. *See* CMG DJ 000081-000082, annexed to Sullivan Affm., as Exhibit "J". RLI responded to Chipotle denying Chipotle's request for defense and indemnity "[s]ince you [Chipotle] have not

provided RLI with a contract between Piece Management and any of the parties for whom you are seeking coverage, no one qualifies as an additional insured under the above referenced Additional Insured Endorsement." *See* CMG DJ 000095-000098, annexed to Sullivan Affm., as Exhibit "K". Chipotle has not only failed to allege the existence of a written contract requiring that Piece obtain a policy of insurance naming Chipotle as an additional insured or it has heretofore failed to produce such a written contract naming Chipotle an additional insured under the Policy.

ARGUMENT

Point I

THE LEGAL STANDARD

A. Motion to Dismiss

As a threshold matter, the First, Third, Fourth, Fifth, and Sixth Causes of Action against Koch-Glacken must be dismissed pursuant to CPLR 3211(a)(7) because the Complaint fails to state any cognizable causes of action against Koch-Glacken. A Complaint must be dismissed if it fails to state a cause of action. *See* CPLR 3211(a)(7). When a Court determines a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), it must determine whether the allegations set forth a proper cause of action. If the facts do not fit into a cognizable legal theory, the motion to dismiss should be granted. *See* Leon v. Martinez, 84 N.Y.2d 83, 614 N.Y.S.2d 972 (1994); Integrated Constr. Servs., Inc. v. Scottsdale Ins. Co., 82 A.D.3d 1160, 920 N.Y.S.2d 166 (2d Dept. 2011); Thomas v. Thomas, 70 A.D.3d 588, 896 N.Y.S.2d 30 (1st Dept. 2010).

In determining whether a plaintiff's complaint states a cause of action, courts look "within the four corners of the complaint [to determine whether] any cognizable cause of action

has been stated." Scott v. Bell Atlantic Corp, 282 A.D.2d 180, 183, 726 N.Y.S.2d 60, 63 (1st Dept. 2001) (citations omitted); *see also* Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 372 N.E.2d (1977). If a Complaint fails to allege facts giving rise to a cognizable cause of action, the Complaint must be dismissed. Accordingly, Chipotle's First, Third, Fourth, Fifth and Sixth Causes of Action against Koch-Glacken set forth in the Verified Complaint must be dismissed on the grounds that Chipotle has failed to state a cause of action.

B. Summary Judgment

Summary judgment is appropriate where there is no genuine issue of material fact and the Court determines as a matter of law that no reasonable jury could find in favor of the non-moving party. Zuckerman v. City of New York, 49 N.Y.2d 557, 561, 427 N.Y.S.2d 595, 597, 404 N.E.2d 718, 720 (1980). When the moving party meets its initial burden on a motion for summary judgment by alerting the Court to the absence of evidence supporting the non-moving party's case, the burden then shifts to the non-moving party to show that a triable issue exists. Zuckerman, 49 N.Y.2d at 561, 427 N.Y.S.2d at 597-98, 404 N.E.2d at 720; Zambrana v. City of New York, 94 N.Y.2d 887, 888, 727 N.E.2d 573 (2000).

As detailed below, the evidence demonstrates that not only does the Verified Complaint fail to state a cause of action against Koch-Glacken, but Chipotle cannot prove a claim against Koch-Glacken. The First, Third and Fourth Causes of Action must be dismissed because no evidence exists to establish a claim and Koch-Glacken is entitled to judgment as a matter of law.

POINT II

THE FIRST, THIRD AND FOURTH CAUSES OF ACTION MUST BE DISMISSED BECAUSE IF CHIPOTLE HAS ANY RECOVERY, IT IS A REMEDY AT LAW

In its First, Third and Fourth Causes of Action in the Complaint, to the extent comprehensible, Chipotle seeks a declaratory judgment against Koch-Glacken and co-defendant RLI requesting that the Court obligate Koch-Glacken and RLI "to indemnify Chipotle with respect to the *Wazadally* Action." Sullivan Affm., Exhibit "A", pg. 9 para. 66; pg. 12 para. 89.

The First, Third and Fourth Causes of Action are legally deficient because they seek the equitable relief of a declaratory judgment against Koch-Glacken. However, if any remedy exists for Chipotle, it is a remedy at law through an action for damages against Koch-Glacken, not an action for declaratory judgment.

The remedy of a declaratory judgment is appropriate to decide the scope and extent of insurance coverage. Abate v. All-City Insurance Co., 214 A.D.2d, 627, 625 N.Y.S.2d 587 (2d Dept. 1995); Reliance Insurance Co. of New York v. Garsart Building Corp., 122 A.D.2d 128, 505 N.Y.S.2d 160 (2d Dept. 1986).

The Appellate Division, Second Department, in Reliance, *supra*, stated, "New York courts ... have permitted a party who, although not privy to the insurance contract nevertheless stand to benefit from the insurance policy to bring a declaratory judgment action to determine whether the insurer owed a defense and/or coverage under the policy." 122 A.D.2d at 131, 505 N.Y.S.2d at 162.

It is well settled under New York law that "[a] cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action..." BGW Dev. Corp. v. Mount Kisco Lodge No. 1552 of Benev. &

Protective Order of Elks of the United States of Am., Inc., 247 A.D.2d 565, 568, 669 N.Y.S.2d 56, 59 (2d Dept., 1998); Alizio v. Feldman, 82 A.D.3d 804, 805, 918 N.Y.S.2d 218, 220 (2d Dept., 2011); Wells Fargo Bank, Nat. Ass'n v. GSRE II, Ltd., 92 A.D.3d 535, 536, 939 N.Y.S.2d 348, 349 (1st Dept., 2012) (claim for declaratory relief properly dismissed where complaint alleged breach of contract claim); Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50, 54, 529 N.Y.S.2d 279, 281 (1st Dept., 1988) ("The motion court did not abuse its discretion in dismissing the third and fourth causes of action for declaratory judgments. A cause of action for a declaratory judgment is unnecessary and inappropriate when the plaintiff has an adequate, alternative remedy in another form of action, such as breach of contract.").

While declaratory relief may be available the insurer of the Policy, Koch-Glacken is not an insurer. Koch-Glacken is an insurance broker and acted as Piece Management's insurance broker. *See* Sullivan Affm., Exhibit "H". Koch-Glacken is not a party to the Policy and has no obligation under the Policy defend and indemnify Chipotle. If any remedy exists for Chipotle, it would only be a remedy at law through an action for damages against Koch-Glacken under a negligence or breach of contract theory, not an action for declaratory judgment as pleaded here.

Since Koch-Glacken is not an insurer where liability, if any, to Chipotle is determined under the terms of a policy of insurance, to the extent that the First, Third, and Fourth Causes of Action in the Verified Complaint seek the equitable relief of a declaratory judgment they fail to set forth a cause of action and must be dismissed.

POINT III

THE FIRST, THIRD AND FOURTH CAUSES OF ACTION TO THE EXTENT THEY SEEK DAMAGES FROM KOCH-GLACKEN MUST BE DISMISSED AS AGAINST KOCH-GLACKEN BECAUSE THERE WAS NO PRIVTY OF CONTRACT

Chipotle's First, Third and Fourth Causes of Action against Koch-Glacken are not causes of action cognizable under New York law. In addition, based on the evidence Koch-Glacken is entitled to judgement as a matter of law.

Koch-Glacken is an insurance broker, and acted as the insurance broker for Piece Management in placing the Policy. *See* Sullivan Affm., Exhibit "H". Koch-Glacken placed the Policy through CRC/Crump, a wholesale insurance broker and not directly with RLI. *See id.*; *see also* Sullivan Affm., Exhibit "G".

It is a well-established law in the State of New York that in order for an insurance broker or agent to be held liable for negligence in the procurement of an insurance policy to a putative additional insured, privity must exist between the claimant and the broker. American Ref-Fuel Co. of Hempstead v. Resource Recycling, Inc., 248 A.D.2d 420, 671 N.Y.S.2d 93 (2d Dept. 1998); Saraco Glass Corp., v. Yeled V'Yalda Childhood Center, Inc., 11 Misc.3d 1071(A), 816 N.Y.S.2d 700 (Sup. Ct., Kings Co., 2006); Dezer Properties II, LLC v. Kaye Ins. Assoc., 38 A.D.3d 213, 831 N.Y.S.2d 146 (1st Dept., 2007); Greater New York Mutual Ins. Co. v. White Knight Restoration, Ltd., 7 A.D.3d 292, 776 N.Y.S.2d 257 (1st Dept., 2004); Federal Insurance Company v. Spectrum Ins. Brokerage Services, Inc., 304 A.D.2d 316, 758 N.Y.S.2d 21 (1st Dept., 2003); Benjamin Shapiro Realty Co., LLC v. Kemper Nat. Ins. Cas., 303 A.D.2d 245, 756 N.Y.S.2d 45 (1st Dept., 2003) *mot. lv. app. den.* 100 N.Y.2d, 573, 764 N.Y.S.2d 382, 796 N.E.2d 473 (2003); Glynn v. United House of Prayer for All People, et al., 292 A.D.2d 319, 741 N.Y.S.2d 499 (1st Dept. 2002); Manson Construction Corp. v. Illinois Union Ins. Co., 276

A.D.2d 294, 714 N.Y.S.2d 207 (1st Dept., 2000); St. George v. W.J. Barney Corp., 270 A.D.2d 171, 706 N.Y.S.2d 24 (1st Dept., 2000).

In Greater New York, *supra*, a property owner and a contractor, both purportedly required by contract to be named as additional insureds on a sub-contractor's policy of insurance, sued the sub-contractor's broker for producing certificates naming them as additional insured, when, in fact, they were not additional insureds.

In dismissing the case against the broker, the Appellate Division held:

> "...summary judgment was properly granted to the sub-contractor's insurance broker...dismissing the claims for breach of contract and negligence, since the broker was under no duty to the property owner and contractor..." (citing Feld Ins. Co. v. Spectrum Ins. Brokerage Servs., *supra*) 7 A.D.3d at 293, 776 N.Y.S.2d at 258

Similarly, in the Benjamin Shapiro case, *supra*, the Court dismissed an action by a landlord against its tenant's insurance broker for failure to obtain coverage adding the landlord as an additional insured on the tenant's policy.

The Appellate Division stated:

> "...Plaintiff and (broker) had no contractual relationship i.e. one approaching that of privity, requisite to the imposition of liability..." 303 A.D.2d at 245-246, 756 N.Y.S.2d at 45

In United House of Prayer, *supra*, a property owner sued the broker of a contractor who allegedly failed to name the property owner as an additional insured on the contractor's policy.

In dismissing the action, the Appellate Division held:

> "...(broker) having had no contractual relationship with (plaintiff), and not having been in privity with it, was under no duty to (plaintiff) that might serve as a predicate for plaintiff's claim..." 292 A.D.2d at 322, 741 N.Y.S.2d at 503.

In American Ref-Fuel, *supra*, a recycling plant owner and a contractor, both purportedly required by contract to be named as additional insureds on a sub-contractor's policy of insurance, sued the sub-contractor's broker for failure to procure the insurance requested by the sub-contractor. 248 A.D.2d at 422-23, 671 N.Y.S.2d at 95-96. The Second Department held the plaintiff could not bring an action against the broker for failure to procure insurance because the broker owed no duty to the additional insured. *Id.* at 424.

Koch-Glacken acted at all times as an insurance broker for Piece Management. *See* Sullivan Affm., Exhibit "H". Chipotle failed to allege nor can provide any evidence that Chipotle and Koch-Glacken had a contractual relationship or a relationship approaching privity that would sustain a direct claim for damages by Chipotle against Koch-Glacken.

As Chipotle has neither pleaded nor can prove a relationship approaching privity existed between Koch-Glacken and Chipotle, to the extent that the First, Third and Fourth Causes of Action set forth in the Complaint must be dismissed.

POINT IV

THE FOURTH CAUSES OF ACTION MUST BE DISMISSED AS AGAINST KOCH-GLACKEN BECAUSE KOCK-GLACKEN IS NOT A PARTY TO THE POLICY

The Fourth Cause of Action claims Koch-Glacken breached its duty to defend and indemnify Chipotle in the *Wazadally* Action. The Fourth Cause of Action must be dismissed because Koch-Glacken is not a party to the Policy or a contract with Chipotle.

The Verified Complaint alleges RLI afforded Piece Management the Policy. Sullivan Affm., Exhibit "A", pg. 5, para "36". Chipotle alleges Piece Management "agreed in a contract or agreement that Chipotle be added as an additional insured on its policy." *Id.* at pg. 8, para. 57.

Koch-Glacken was Piece Management's insurance broker. Koch-Glacken placed the Policy through CRC/Crump, a wholesale insurance broker. *See* Sullivan Affm., Exhibit "H". In fact, CRC/Crump is listed on the Policy as the producer. S*ee* Sullivan Affm., Exhibit "G".

The Declarations page of the policy lists Piece Management as the insured under the Policy and RLI as the insurance company, which agreed in return for premiums to provide the insurance listed in the Policy. Sullivan Affm., Exhibit "G". Koch-Glacken is not listed as a party on the Policy. *See id.*

Piece Management provided Koch-Glacken with a list of certificates to be issued and Koch-Glacken issued the certificates. *See* Sullivan Affm. Exhibit "H". Chipotle alleges that Koch-Glacken issued the Certificate. *See* Sullivan Affm., Exhibit "A", pg 6, para. 37; *see also* Sullivan Affm., Exhibit "I". In addition, Chipotle alleges Piece Management provide the Certificate to Chipotle. *See id.*, at pg. 5, para. 27. The Certificate contains a disclaimer stating "[t]his certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder." Sullivan Affm., Exhibit "I".

"A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone that such a contract exists." Tribeca Broadway Assoc. V. Mount Vernon Fire Ins. Co., 5 A.D.3d 198, 200, 774 N.Y.S.2d 11, 13 (1st Dept. 2004); *see also* Penske Truck Leasing Co., L.P. v. Home Ins. Co., 251 A.D.2d 478, 479, 647 N.Y.S.2d 400, 401 (2d Dept. 1998); St. George v. W.J. Barney Corp., 270 A.D.2d 171, 172, 706 N.Y.S.2d 24, 25 (1st Dept. 2000).

"It goes without saying that a contract cannot bind a nonparty." EEOC v. Waffle House, Inc., 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002). A non-party to a contract is not liable for a breach of the obligations of the contract. *See* Black Car and Livery Ins., Inc. v H & W Brokerage, Inc., 28 A.D.3d 595, 595, 813 N.Y.S.2d 751, 752 (2d Dept 2006); *see also* Randall's Island Aquatic Leisure, LLC v. City of New York, 92 A.D.3d 463, 463, 938 N.Y.S.2d 62, 63 (2d Dept. 2012).

The Certificate does not create a contract between Koch-Glacken and Chipotle. *See* Tribeca Broadway Assoc., 5 A.D.3d at 200, 774 N.Y.S.2d at 13; *see also* Penske, 251 A.D.2d at 479, 647 N.Y.S.2d at 401; St. George, 270 A.D.2d at 172, 706 N.Y.S.2d at 25. Chipotle has neither alleged nor produce any evidence of a contract between Chipotle and Koch-Glacken that created a duty or obligation for Koch-Glacken to defend and indemnify Chipotle in the *Wazadally* Action. Therefore, Koch-Glacken is a non-party to the Policy and is not liable for any breach of the obligations under the Policy. *See* Black Car and Livery Ins., Inc., 28 A.D.3d at 595, 813 N.Y.S.2d at 752; *see also* Randall's Island Aquatic Leisure, 92 A.D.3d at 463, 938 N.Y.S.2d at 63.

Since Chipotle has neither alleged nor produced evidence that Koch-Glacken is a party to the RLI policy, the Fourth Cause of Action of the Verified Complaint must be dismissed, to the extent it seeks damages from Koch-Glacken, because Koch-Glacken is not a party to the Policy.

POINT V

THERE EXISTS NO CASUAL NEXUS BETWEEN KOCH-GLACKEN'S ALLEGED CONDUCT AND CHIPOTLE'S LOSS

The Fourth Cause of Action in the Complaint must be dismissed because no action by Koch-Glacken caused Chipotle to fail enter into a contract with Piece Management affording Chipotle additional insured status under the Policy.

Koch-Glacken, the insurance broker for Piece Management, placed the Policy with RLI through a wholesale broker. *See* Sullivan Affm., Exhibit "H". The Policy contains an additional insured endorsement that provides that the "who is an insured" section of the policy "... is amended to include as an additional insured the person(s) or organizations(s) shown in the Schedule...." Sullivan Affm., Exhibit "G". The so-called "schedule" states "Name of Additional Insured Person(s) or Organization(s) – Owners when required by written contract, signed prior to a loss...." *Id.* The endorsement further provides "Location and Description of Completed Operations – Locations when required by written contract...." *Id.* Koch-Glacken, solely, issued the Certificate. *See* Sullivan Affm., Exhibit "I"; *see also* Sullivan Affm., Exhibit "A", at pg. 6, para. 37.

RLI denied Chipotle's tender for defense and indemnity in the underlying *Wazadally* Action. *See* Sullivan Affm., Exhibit "J". In the disclaimer letter to Chipotle, RLI states,

> "[s]ince you have not provided RLI with a contract between Piece Management and any of the parties for whom you are seeking coverage, no one qualifies as an additional insured under the above reference Additional Insured Endorsement. Therefore, there is no coverage for Chipotle or Simon for this claim." (emphasis supplied)

Sullivan Affm., Exhibit "K".

The failures of an insurance broker must be the proximate cause of the plaintiff's injury in order for the plaintiff to recover against the insurance broker for damages. *See* Weissberg v. Royal Ins. Co., 240 A.D.2d 733, 704, 659 N.Y.S.2d 505, 507 (2d Dept., 1997); Resource Fin., Inc. v. National Cas. Co., 219 A.D.2d 627, 628, 631 N.Y.S.2d 411, 412 (2d Dept. 1995), 219 A.D.2d 627, 628, 631 N.Y.S.2d 411, 412 (2nd Dept., 1995). "It is axiomatic that liability for negligence will not attach absent proof that the negligence was the proximate cause of the harm sued upon." Resource Fin., 219 A.D.2d at 628, 631 N.Y.S.2d at 412 (citations omitted); *see also*

Woodbury Transp., Inc. v. Associated Brokerage Ctr., Inc., 289 A.D.2d 401, 734 N.Y.S.2d 898 (2d Dept. 2001); Weissberg, 240 A.D.2d at 734, 659 N.Y.S.2d at 507.

RLI denied coverage to Chipotle because Chipotle failed to provide a contract that named Chipotle an additional insured under the Policy, not because of any conduct on the part of Koch-Glacken. Chipotle's failure to enter into the contract with Piece Management is the proximate cause of RLI's denial of Chipotle's request to defend and indemnity it in the *Wazadally* Action. Chipotle fails to allege nor prove any action by Koch-Glacken that is a proximate cause of Chipotle not entering into an agreement with Piece Management naming Chipotle an additional insured under the Policy. Put simply, had Chipotle entered into a written contract with Piece as required by the Policy, there would have been coverage.

Because Chipotle neither alleged nor provided evidence of any action by Koch-Glacken that resulted in Chipotle not entering into a contract with Piece Management, the Fourth Cause of Action against Koch-Glacken must be dismissed.

POINT VI

THE FIFTH AND SIX CAUSES OF ACTION MUST BE DISMISSED AS AGAINST KOCH-GLACKEN BECAUSE THERE WAS NO UNJUST ENRICHMENT

The Fifth and Sixth Causes of Action in the Complaint assert a claim of unjust enrichment against Koch-Glacken. Chipotle seeks restitution for its defense costs in the *Wazadally* Action. Chipotle's claim against Koch-Glacken for unjust enrichment is not a cause of action cognizable under New York law.

The basis of an unjust enrichment claim occurs when a defendant obtains a benefit intended for the plaintiff. *See* Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 790, 967 N.E.2d 1177, 1185 (2012). However, unjust enrichment is not a catchall cause of action and is available only in unique situations when a defendant did not breach a contract or commit a tort.

See id. In Corsello, the Court of Appeals held "[a]n unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim." *Id.*; *see also* Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382, 388-89, 521 N.Y.S.2d 653, 656 (1987); Samiento v. World Yacht Inc., 10 N.Y.3d 70, 81, 854 N.E.2d 83, 89 (2008); Town of Wallkill v. Rosenstein, 40 A.D.3d 972, 974, 837 N.Y.S.2d 212, 215 (2d Dept. 2007).

Chipotle alleges that Koch-Glacken failure to defend and indemnify Chipotle in the *Wazadally* Action unjustly enriched Koch-Glacken. However, Chipotle alleges in its Fourth Cause of Action that Koch-Glacken breached its obligation to defend and indemnify Chipotle. Chipotle's claims for unjust enrichment are duplicative and fail to differ from its claim against Koch-Glacken for breach of its obligation to defend and indemnify Chipotle. *See* Corsello v. Verizon New York, Inc., 18 N.Y.3d at 791; *see also* Weisblum v. Prophas Labs, Inc., 88 F. Supp.3d 283, 297 (S.D.N.Y. 2015) (dismissing plaintiff's unjust enrichment claim because the plaintiff failed to show that the unjust enrichment claim differed from plaintiff's contract and tort claims).

As Chipotle has plead an unjust enrichment claim that is duplicative of a breach of contract or tort claim, the Complaint fails to state a cognizable cause of action against Koch-Glacken and the Fifth and Sixth Causes of Action set forth in the Complaint must be dismissed.

CONCLUSION

It is respectfully submitted that the instant motion must be granted for the following reasons:

First, to the extent that the First, Third and Fourth Causes of Action set forth in the Verified Complaint seek a declaratory judgment against Koch-Glacken, they each must be dismissed on the ground that the causes of action fail to state a cause of action because the

equitable remedy of a declaratory judgment is not available when, as here, a remedy at law exists.

Second, the First, Third and Fourth Causes of Action against Koch-Glacken must be dismissed because, under New York law, in order for an insurance broker such as Koch-Glacken to be liable to a putative additional insured on a policy of insurance there must exist privity. Here, Chipotle has neither alleged nor can prove the existence of privity between it and Koch-Glacken.

Third, the Fourth Cause of Action against Koch-Glacken must be dismissed because Koch-Glacken is not a party to the Policy and a non-party cannot be liable for breach of obligations under a contract of insurance to which it is not a party.

Fourth, the Fourth Cause of Action against Koch-Glacken must be dismissed because Chipotle has failed to plead and cannot prove that any act by Koch-Glacken was the proximate cause of any damage suffered by Chipotle.

Fifth, the Fifth and Sixth Cause of Action asserted against Koch-Glacken for unjust enrichment, must be dismissed because Chipotle's unjust enrichment claims are duplicative of its prior causes of action.

It is respectfully requested that this Court enter an Order dismissing the First, Third, Fourth, Fifth and Sixth Causes of Action asserted against Koch-Glacken and direct the Clerk of the Court to enter judgment accordingly.

Dated: New York, New York
May 3, 2016

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AGENCY a/k/a GLACKEN GROUP, INC.

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