



**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

AIU INSURANCE COMPANY, AMERICAN :  
HOME ASSURANCE COMPANY, :  
BIRMINGHAM FIRE INSURANCE COMPANY :  
OF PENNSYLVANIA, GRANITE STATE :  
INSURANCE COMPANY, LEXINGTON :  
INSURANCE COMPANY, and NATIONAL :  
UNION FIRE INSURANCE COMPANY OF :  
PITTSBURGH, PA, :

Plaintiffs, :

v. :

**C.A. No. 9852-VCN**

PHILIPS ELECTRONICS NORTH AMERICA :  
CORPORATION, T H AGRICULTURE & :  
NUTRITION L.L.C., and THE T H :  
AGRICULTURE & NUTRITION L.L.C. :  
ASBESTOS PERSONAL INJURY TRUST, :

Defendants. :

**MEMORANDUM OPINION**

Date Submitted: February 19, 2015  
Date Decided: June 4, 2015

Marc S. Casarino, Esquire of White and Williams LLP, Wilmington, Delaware,  
and John S. Favate, Esquire and Henry T. M. LeFevre-Snee, Esquire of Hardin  
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David J. Baldwin, Esquire, Jennifer C. Wasson, Esquire, and Andrew H. Sauder, Esquire of Potter Anderson & Corroon LLP, Wilmington, Delaware, and Kenneth H. Frenchman, Esquire, and Alana S. Klein, Esquire of Kasowitz, Benson, Torres & Friedman LLP, New York, New York, Attorneys for Defendants Philips Electronics North America Corporation and T H Agriculture & Nutrition L.L.C.

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NOBLE, Vice Chancellor

In 2009, Plaintiff insurance companies entered into a settlement agreement with Defendants T H Agriculture & Nutrition, L.L.C. (“THAN”) and Philips Electronics North America Corporation (“PENAC”) to resolve then-pending insurance coverage litigation. Because Plaintiffs’ settlement payments would be based on future disbursements by Defendant T H Agriculture & Nutrition L.L.C. Asbestos Personal Injury Trust (the “Trust,” and with THAN and PENAC, “Defendants”), Plaintiffs negotiated for a prospective right to audit those payments and distributions.

The current litigation is focused on the parties’ differing interpretations of the nature of Plaintiffs’ audit right. Plaintiffs believe that Defendants have violated their rights by barring an audit unless they consent to certain limitations. Defendants argue that because Plaintiffs’ audit right is limited, it has not been impaired.

Both sides have moved for summary judgment regarding the extent of Plaintiffs’ audit rights. Related breach of contract and tortious interference counts are also subject to various motions to dismiss or motions for summary judgment.

## I. BACKGROUND

### A. *THAN's Bankruptcy Proceeding*

On November 24, 2008, facing substantial asbestos-related liability, THAN commenced Chapter 11 bankruptcy proceedings before the United States Bankruptcy Court for the Southern District of New York (the “Bankruptcy Court”).<sup>1</sup> THAN sought to confirm a prepackaged plan of reorganization pursuant to Section 524(g) of the Bankruptcy Code.<sup>2</sup> Section 524(g) allows a debtor facing significant asbestos liabilities to channel current and future claims to a trust created specifically to assume them. After a channeling injunction is entered by a federal district court, the debtor company is relieved of its asbestos liabilities.

THAN initiated the bankruptcy case while it and its parent, PENAC, were engaged in insurance coverage litigation with some of THAN’s insurers, collectively “AIG.”<sup>3</sup> In April 2009, while the bankruptcy proceedings were pending, the parties to the coverage litigation agreed to a Settlement Agreement and Mutual Release (the “Settlement Agreement”), which the Bankruptcy Court

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<sup>1</sup> This opinion does not distinguish between the THAN entity that entered into bankruptcy and the reorganized THAN that emerged.

<sup>2</sup> 11 U.S.C. § 524(g).

<sup>3</sup> AIG includes the following insurers, which are all Plaintiffs in this action: AIU Insurance Company, American Home Assurance Company, Birmingham Fire Insurance Company of Pennsylvania, Granite State Insurance Company, Lexington Insurance Company, and National Union Fire Insurance Company of Pittsburgh, PA. Plaintiffs are referred to as AIG for the remainder of this opinion, and singular pronouns and verb forms are used for convenience.

approved on May 6, 2009.<sup>4</sup> The Settlement Agreement was “contingent upon the Bankruptcy Court confirming a Plan and entering a Confirmation Order that includes a 524(g) Channeling Injunction pursuant to such section in favor of [AIG] . . . .”<sup>5</sup>

Less than one week later, THAN filed a Notice of Filing Plan and Plan Supplement, which included a draft of the Asbestos Records Cooperation Agreement (the “Cooperation Agreement”) as an exhibit. On May 29, 2009, the Bankruptcy Court confirmed the First Amended Plan of Reorganization of THAN under Chapter 11 of the Bankruptcy Code (the “Plan”)<sup>6</sup> and certain Plan-related documents, including the Cooperation Agreement.<sup>7</sup> Subsequently, in October 2009, the Bankruptcy Court entered an order approving some non-material modifications to the Plan, and the United States District Court for the Southern

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<sup>4</sup> Compl. Ex. A (Settlement Agmt.). Bankruptcy Court Approval was required because THAN was a debtor in bankruptcy. *See* FED. R. BANKR. P. 9019; 11 U.S.C. § 105(a).

<sup>5</sup> Settlement Agmt. § 6.1.

<sup>6</sup> App. to Opening Br. in Supp. of the Trust’s Rule 12(b)(6) Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted or, in the Alternative, Mot. for Summ. J. (“Trust App.”) Volume II, Tab 6.

<sup>7</sup> Aff. of Henry T.M. LeFevre-Snee, Esq. in Supp. of Pls.’ Opp’n to PENAC and THAN’s Mot. to Dismiss and the Trust’s Mot to Dismiss or, in the Alternative, Mot. for Summ. J. and in Supp. of Pls.’ Cross-Mot. for Summ. J. (“LeFevre-Snee Aff.”) Ex. 4.

District of New York affirmed the Bankruptcy Court's confirmation of the Plan.<sup>8</sup> The Plan became effective on November 30, 2009, at which time the Trust was formed in accordance with Section 524(g) of the Bankruptcy Code.

Upon formation, the Trust entered into the Cooperation Agreement with THAN and PENAC.<sup>9</sup> According to AIG, the Cooperation Agreement is incompatible with the Settlement Agreement and the Plan because it purports to limit AIG's ability to exercise an audit right it negotiated for under the Settlement Agreement. AIG was apparently unaware of the Cooperation Agreement's terms until it sought to conduct its audit. The pending motions revolve around the proper interpretations of the Plan, the Settlement Agreement, and the Cooperation Agreement, and how those documents relate to each other.<sup>10</sup>

#### 1. The Settlement Agreement

AIG entered into the Settlement Agreement with THAN and PENAC to “resolve[] all of the insurance coverage matters at issue [between the sides] and to have th[e] Settlement Agreement operate as and constitute a complete release of THAN's and PENAC's claims for coverage for Asbestos-Related Claims and Bad

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<sup>8</sup> Hereinafter, references to the Plan refer to the Plan as modified by the Bankruptcy Court's October 2009 order. *See* Trust App. Volume II, Tab 7.A (the Plan).

<sup>9</sup> Trust App. Vol. I, Tab 5.A (Cooperation Agmt.). Again, the Cooperation Agreement was part of the confirmed Plan.

<sup>10</sup> The Bankruptcy Court approved all three documents.

Faith Claims against [AIG] . . . .”<sup>11</sup> As noted, the agreement was contingent on the Bankruptcy Court’s confirmation of the Plan and establishment of the Trust. The Settlement Agreement provided AIG with a “full and complete settlement of any and all known or unknown, past, present or future Released Claims under [AIG’s] Policies and . . . [it] absolve[ed], discharge[ed] and terminat[ed] any and all duties or responsibilities of [AIG] to THAN and PENAC with regard to the Released Claims . . . .”<sup>12</sup>

As consideration, AIG agreed to pay PENAC in installments, based on payments and distributions that the to-be-created Trust would make to asbestos claimants. The Settlement Agreement allows AIG, pursuant to Section 2.3,

to audit payments and distributions made by the Trust at [its] own expense, no more than once per year. Before conducting any audit, AIG shall agree to keep all information confidential and shall further agree not to utilize any information for anything other than to assess whether the Trust in fact made payments to the claimants as set forth in the quarterly reports.<sup>13</sup>

Section 2.4 provides that AIG cannot

challenge or question the payments or distributions of the Trust, nor shall [it] be entitled to challenge or to question [its] obligations to make payments pursuant to the terms and conditions of th[e] Settlement Agreement, or to offset, take credit against or otherwise withhold any such payments based on any claim that the Trust or its trustee(s) . . . did not properly incur expenses or did not properly

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<sup>11</sup> Settlement Agmt. 6th “Whereas” clause.

<sup>12</sup> *Id.* § 2.1.

<sup>13</sup> *Id.* § 2.3.

liquidate Claims according to the Trust's procedures, or otherwise, with two exceptions:

a. If [AIG determines] based on [its] review and/or audit that payments made by the Trust to asbestos claimants alleging malignant injuries and used as the basis for calculating the percentage share to be paid by [AIG] or rollover amounts . . . were miscalculated due to an accounting error, [AIG] may bring such accounting error to the attention of the Trustee(s) and request that the Trustee(s) review the matter and, if the Trustee(s) agree that there has been an accounting error, [AIG] will be credited the amount of any overpayment . . . . PENAC agrees to cooperate with [AIG] in obtaining any pertinent information.

b. If [AIG has] reason to believe that any of the Claims submitted to and paid by the Trust were fraudulent, i.e. were based on intentionally false information that was material to the allowance of the Claims, such that the Trust was defrauded and has a right to recover back payments made on such Claims, [AIG] may bring such evidence of such fraud to the attention of the Trustee(s) and request that the Trustee(s) review the evidence. Further, nothing in th[e] Settlement Agreement shall prevent [AIG] from bringing such evidence to the attention of the Bankruptcy Court and/or to the United States Attorney's Office for the Southern District of New York. . . . PENAC agrees to cooperate with [AIG] in obtaining any pertinent information.<sup>14</sup>

The parties dispute the nature and scope of Sections 2.3 and 2.4.<sup>15</sup>

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<sup>14</sup> *Id.* § 2.4.

<sup>15</sup> AIG also alleges that THAN and PENAC have violated Sections 8 and 16 of the Settlement Agreement. Section 8 provides: "The Parties shall cooperate to preserve the validity, finality, and enforceability of this Settlement Agreement. The Parties shall use their best efforts to resolve and/or to oppose any and all efforts or objections to challenge this Settlement Agreement under any provision of the Bankruptcy Code." Section 16 protects the Settlement Agreement from being "amended, altered or modified except by a written amendment duly executed by the original Parties or their successors or assigns."



## 2. The Plan and the Cooperation Agreement

As noted, the Cooperation Agreement was among the documents that the Bankruptcy Court confirmed along with the Plan on May 29, 2009. The Plan contains an Insurance Neutrality provision, which provides:

[N]otwithstanding anything to the contrary in the Confirmation Order, the Plan or any of the Plan Documents, nothing in the Plan, the Plan Documents, the Confirmation Order, any finding of fact and/or conclusion of law with respect to the confirmation of the Plan, or any Final Order or opinion entered on appeal from the Confirmation Order (including any other provision that purports to be preemptory or supervening) shall in any way operate to, or have the effect of, impairing: (a) any Asbestos Insurance Entity's legal, equitable or contractual rights, if any, in any respect under any Asbestos PI Insurance Contract, or with respect to Coverage Claims . . . .<sup>16</sup>

Under the Plan, AIG is an "Asbestos Insurance Entity" and the Settlement Agreement is an "Asbestos PI Insurance Contract." The Plan is binding on all three Defendants.

Coincident with the Plan's becoming effective (and the Trust's creation), THAN, PENAC, and the Trust entered into the Cooperation Agreement, which governs "the . . . Trust's access to certain documents and information and PENAC's access to certain information . . . ." <sup>17</sup> Although not a party to the Cooperation Agreement, AIG is referenced in Section 12:

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<sup>16</sup> Plan Article 10.4.

<sup>17</sup> Cooperation Agmt. 1. The Cooperation Agreement has several functions, including providing the Trust with records it needs to process and evaluate

PENAC, at its own expense and no more than twice a year, shall have the right to audit or have audited by its professionals payments and distributions made by the Asbestos PI Trust to claimants who alleged an asbestos-related cancer. In any such audit, PENAC will be permitted to select up to 200 claimants who alleged an asbestos-related cancer and will be provided with the claim form and proof of payment for each of the claims selected. The Asbestos PI Trust shall, in its sole discretion, either provide copies of the claim form and proof of payment subject to the confidentiality provision below or shall permit PENAC's insurer, the AIG Member Companies (or their designated claims auditor) ("AIG"), to perform an onsite audit of such payments at the offices of the Trust's claims processor, subject to the confidentiality provisions and restrictions below. Audit rights under this Paragraph shall be limited to the auditing of payments and distributions made by the Asbestos PI Trust for asbestos-related cancer claims only.<sup>18</sup>

AIG argues that this section, along with Sections 15 and 16 which deal with maintaining the confidentiality of information received from the Trust, operates to impair impermissibly its audit right under the Settlement Agreement. Allegedly, the Cooperation Agreement's conditions and limitations on the information and documentation which can be audited by PENAC restrain AIG's ability to obtain documents necessary for an effective audit.<sup>19</sup>

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asbestos claims and supplying information to PENAC that it needs to deal with its insurers.

<sup>18</sup> *Id.* § 12. The Trust and the Asbestos PI Trust are one and the same.

<sup>19</sup> PENAC is a party to both the Settlement Agreement and the Cooperation Agreement. However, AIG is only privy to the Settlement Agreement and the Trust is only bound by the Cooperation Agreement.

## B. *AIG Demands an Audit*

On May 7, 2013, AIG notified THAN and PENAC of its intent to audit payments made by the Trust pursuant to Section 2.3 of the Settlement Agreement. AIG requested prior Trust billings listing claimants' first names, last names, social security numbers, and payment amounts received. AIG indicated that claimant names were necessary to "examine whether trust billings comport with sections 2.4(a) and 2.4(b) of the Settlement Agreement."<sup>20</sup>

THAN and PENAC responded through counsel approximately two weeks later, explaining that they neither possessed nor were required to track the requested information. They suggested that "the heavily negotiated Settlement Agreement provides AIG with very limited audit rights under § 2.3 . . . . Section 2.4 of the Settlement Agreement does not expand AIG's audit rights whatsoever, rather §§ 2.4(a) and (b) only apply in the event that AIG uncovers an accounting error or fraud during an audit under § 2.3."<sup>21</sup> THAN and PENAC cited Section 12 of the Cooperation Agreement, which, according to them, "preserve[s] [PENAC's] ability to comply with the audit rights provided to AIG under the Settlement Agreement . . . [and] specifically addresses AIG's right to audit

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<sup>20</sup> Decl. of Kenneth H. Frenchman in Supp. of PENAC and THAN's Br. in Supp. of Their Mot. to Dismiss Counts One and Two of Pls.' Compl. Ex. C, at 1.

<sup>21</sup> *Id.* Ex. D, at 1.

payments made by the THAN Trust.”<sup>22</sup> They expressed their desire to facilitate AIG’s audit, but on the limited terms outlined in their letter.

AIG responded four months later, disagreeing with THAN and PENAC’s interpretation of the Settlement Agreement, and requesting that claim files supporting 100 specific Trust payments be made available. AIG claimed that THAN and PENAC’s letter “diminished the value of AIG’s audit rights, seemingly as cover for THAN’s asserted abrogation of those rights in . . . [the] Cooperation Agreement . . . .”<sup>23</sup> AIG described its audit rights under Section 2.3 as broad and suggested that Section 2.4 “expressly allow[s] AIG to conduct a review or audit of the payments made by the Trust to claimants alleging malignant injuries.”<sup>24</sup>

AIG contended that

The [Cooperation Agreement] has no bearing on AIG’s valuable contractual audit and review rights. AIG is not a signatory to the [Cooperation Agreement] and is therefore not bound by it. THAN agreed to AIG’s audit/review provisions in the Settlement Agreement long before it apparently unilaterally abrogated AIG’s rights in the [Cooperation Agreement]. This was in plain, material breach of the Settlement Agreement. . . . Using the [Cooperation Agreement] as a means to limit AIG’s audit rights pursuant to the Settlement Agreement is a breach of the Agreement subjecting THAN to liability to AIG.<sup>25</sup>

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<sup>22</sup> *Id.* at 1-2.

<sup>23</sup> *Id.* Ex. E, at 1.

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

THAN and PENAC responded the next day, stating that they would facilitate AIG's audit, but again insisting that the inspection comply with certain parameters. They wrote that "AIG is not entitled to the names and social security numbers of the claimants . . . ." <sup>26</sup> They also clarified that they had never suggested that AIG was bound by the Cooperation Agreement, but explained that the Cooperation Agreement was designed to allow PENAC to comply with the Settlement Agreement's audit provision by providing it access to the Trust's documents. Because the Trust is a separate legal entity, PENAC would have no right to the documents absent agreement or a court order. THAN and PENAC again took issue with AIG's characterizations of Sections 2.3 and 2.4.

After engaging in further correspondence to coordinate a mutually agreeable audit, the parties scheduled one for November 25, 2013. However, disagreements arose over the form of confidentiality agreement that AIG would be required to sign. The Trust refused to allow an audit unless AIG signed a confidentiality agreement that incorporated portions of the Cooperation Agreement. While the Trust maintained that it was bound to respect the Bankruptcy Court-approved Cooperation Agreement, AIG objected to any limit on its audit that was not contained in the Settlement Agreement. AIG claimed that the Trust's proposed confidentiality agreement went beyond confidentiality, and sought to limit the

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<sup>26</sup> *Id.* Ex. F, at 1.

information and documentation that it could review. AIG noted that it is not a party to the Cooperation Agreement, and the Plan prohibits that agreement from impairing its audit right. Because the Trust continued to insist on limiting the audit in accordance with the Cooperation Agreement, AIG cancelled on the last business day before the planned inspection. It concluded that the restrictions would preclude a useful audit.<sup>27</sup>

On March 3, 2014, AIG moved to reopen THAN's bankruptcy case in order to bring a proposed adversary complaint alleging that PENAC and THAN had breached the Settlement Agreement by not allowing it to exercise its audit right unless it agreed to conditions extraneous to the Settlement Agreement. The Bankruptcy Court denied AIG's motion, but made clear that its ruling did not touch upon the merits of the parties' dispute.<sup>28</sup>

## **II. NATURE AND STAGE OF THE PROCEEDINGS**

On July 2, 2014, AIG filed its complaint (the "Complaint") with this Court, naming THAN, PENAC, and the Trust as Defendants. AIG seeks declaratory relief regarding the nature and extent of its audit rights under the Settlement Agreement. It also charges PENAC and THAN with breach of the Settlement Agreement, the Trust with tortious interference with AIG's rights under the Settlement Agreement, and all three defendants with breach of the Plan.

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<sup>27</sup> *Id.* Ex. I.

<sup>28</sup> LeFevre-Snee Aff. Ex. 1.

The Trust moved to dismiss the claims against it for failure to state a claim or, in the alternative, for summary judgment in its favor. THAN and PENAC moved to dismiss the breach of contract claims against them. AIG subsequently filed a cross-motion for summary judgment on all of its counts. In response, THAN and PENAC cross-moved for summary judgment on the declaratory judgment count.

### III. ANALYSIS

The Court will dismiss a claim under Rule 12(b)(6) only when it appears “with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief.”<sup>29</sup> The Court views the complaint in the light most favorable to the non-moving party, drawing all reasonable inferences from the well-pled allegations in its favor.<sup>30</sup> Nonetheless, conclusory allegations unsupported by specific facts may be rejected.<sup>31</sup>

Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”<sup>32</sup> Where the Court must interpret a written agreement, summary judgment is

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<sup>29</sup> *Gantler v. Stephens*, 965 A.2d 695, 703 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008)).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 704.

<sup>32</sup> Ct. Ch. R. 56(c).

proper only if the agreement is unambiguous.<sup>33</sup> “Ambiguity does not exist simply because the parties disagree about what the [agreement] means. . . . Rather, contracts are ambiguous when the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings.”<sup>34</sup> Both parties may be denied summary judgment, despite pending cross-motions, if a genuine issue of material fact exists.<sup>35</sup>

#### *A. AIG’s Right to Audit Payments and Distributions Made by the Trust*

All parties agree that the Settlement Agreement, including its audit provision, is unambiguous; they debate the meaning of the plain language.<sup>36</sup> Defendants contend that AIG is only entitled to conduct an audit of the Trust’s payments and distributions to verify that payments were actually made, and not for any other purpose. AIG argues that although the Settlement Agreement restricts its

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<sup>33</sup> See, e.g., *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007).

<sup>34</sup> *Id.* (internal quotation marks omitted).

<sup>35</sup> *Comac P’rs, L.P. v. Ghaznavi*, 793 A.2d 372, 378 (Del. Ch. 2001). The parties have identified factual disputes and some factual matters have not been fully developed. Thus, even though there are cross-motions for summary judgment, the Court does not have the equivalent of a stipulation for decision on the merits before it. See Ct. Ch. R. 56(h).

<sup>36</sup> Under New York law, “when parties set down their agreement in a clear, complete document, their writing should . . . be enforced according to its terms.” *Waterfront Joints, Inc. v. Tarrytown Boat Club, Inc.*, 987 N.Y.S.2d 884, 884 (App. Div. 2014) (quoting *River St. Realty Corp. v. N.R. Auto, Inc.*, 942 N.Y.S.2d 163, 165 (App. Div. 2012)).



use of information obtained through an audit, there is no comparable limitation on what may constitute a proper purpose for inspection.

AIG's audit right arises exclusively under Section 2.3 of the Settlement Agreement, which contains two sentences. The first allows AIG "to audit payments and distributions made by the Trust at [its] own expense, no more than once per year." The second conditions any audit on AIG's "agree[ment] to keep all information confidential and . . . [its] agree[ment] not to utilize any information for anything other than to assess whether the Trust in fact made payments to the claimants as set forth in the quarterly reports."<sup>37</sup>

According to AIG, the first sentence grants it a broad right to audit the Trust's payments and distributions. Because the scope is not constrained, and "audit" is not defined in the agreement, AIG insists that an objective reading of Section 2.3 entitles it to conduct a commercially reasonable audit in accordance with recognized audit standards.

THAN and PENAC concede that one could reasonably read the first sentence as allowing AIG to check payments and distributions for more than simply confirming that payments were made.<sup>38</sup> In other words, one could fairly

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<sup>37</sup> Settlement Agmt. § 2.3. The Trust produces its quarterly reports to PENAC in accordance with Section 11 of the Cooperation Agreement. PENAC's invoices to AIG are based on those reports, of which AIG receives copies.

<sup>38</sup> Tr. of Oral Argument on Mots. to Dismiss, Mots. for Summ. J. and Mot. to Strike ("Oral Argument") 13 (Counsel for THAN and PENAC arguing, "to the

infer that AIG may examine whether paid claimants were entitled to money in the first place. Nonetheless, Defendants argue that Section 2.3's second sentence narrows AIG's audit right by requiring that "[b]efore conducting any audit, AIG . . . shall . . . agree not to utilize any information [obtained through its audit] for anything other than to assess whether the Trust in fact made [the stated] payments . . . ." Defendants reason that if AIG cannot use information for anything other than to verify that payments were actually made, then it would be pointless to permit it to audit for another purpose.

Despite Defendants' assertions to the contrary, Section 2.3 does not "expressly limit[] [AIG's] audit right."<sup>39</sup> Rather, it restricts how AIG may use the information it obtains. Objectively read, the first sentence gives AIG a broad right to audit the Trust's payments and distributions; the second sentence prohibits AIG from employing the information it receives for any purpose other than verifying payments. New York law, which governs interpretation of the Settlement Agreement,<sup>40</sup> instructs against "adopt[ing] an interpretation which will operate to

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extent sentence number 1 is broad and can be interpreted in different ways, sentence number 2 absolutely clarifies that"); *id.* at 74 ("Now, you can, from that first sentence alone, maybe infer, well, what does that really mean, and does that mean you get to look behind the payments and why they made the payments . . . [?] I suppose.").

<sup>39</sup> PENAC and THAN's Reply Br. in Supp. of Their Mot. to Dismiss Counts One and Two of Pls.' Compl., Cross-Mot. for Summ. J. and Mot. to Strike the Decl. of Charles H. Mullin 15 n.7.

<sup>40</sup> Settlement Agmt. § 18. This is not a disputed matter.

leave a provision of the contract without force and effect.”<sup>41</sup> If AIG were only entitled to receive limited data necessary to confirm payments, then there would be little need to constrain its use of that information solely to that purpose. An objective reading of Section 2.3 thus grants AIG the right to audit information beyond what is minimally necessary for payment verification.

Even if Defendants’ interpretation would not leave Section 2.3’s second sentence superfluous, it remains the case that the Settlement Agreement’s plain language only restricts how AIG can use information. Although one might initially question the usefulness under the circumstances of a broad right to audit payments and distributions, the Court cannot deny AIG that opportunity without rewriting the Settlement Agreement. Additionally, Section 2.4 illustrates that AIG’s audit right is not hollow. Although that section generally prohibits AIG from “challeng[ing] or question[ing] the payments or distributions of the Trust,” it contains two exceptions. Section 2.4(a) allows AIG to bring accounting errors to the attention of the Trust’s trustees if AIG “determine[s] based on [its] review and/or audit that payments made by the Trust to asbestos claimants . . . were miscalculated . . . .” Section 2.4(b) licenses AIG to bring evidence of fraud to the Trust’s attention (or the attention of the Bankruptcy Court or the U.S. Attorney’s Office) if it “ha[s] reason to believe that any of the Claims submitted to and paid

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<sup>41</sup> *Laba v. Carey*, 277 N.E.2d 641, 644 (N.Y. 1971) (internal quotation marks omitted).

by the Trust were fraudulent, i.e. were based on intentionally false information that was material to the allowance of the Claims . . . .”

Referencing those provisions, AIG insists that “[a]ny audit must . . . be sufficient to discover evidence of both miscalculation and fraud. Otherwise, Section 2.4 is superfluous.”<sup>42</sup> Section 2.4(b) purportedly entitles it “to carry out an audit capable of detecting . . . fraud . . . .”<sup>43</sup> However, Section 2.4 does not provide a positive right to audit either for accounting errors or for fraud, and Defendants’ interpretation of the Settlement Agreement would not write the section out of the contract. An audit restricted to assessing whether claimants have been paid as stated could uncover some accounting errors. Further, nothing in Section 2.4(b) requires AIG’s suspicions of fraud to arise from an audit. Indeed, AIG has alleged in this action that it “ha[s] a reasonable suspicion that fraudulent claims have been submitted to and paid by the Asbestos PI Trust.”<sup>44</sup> It has cited bases for its concerns and submitted a supporting expert report.<sup>45</sup> Apparently, AIG is already in a position to raise the issue of fraud with the Trust’s trustees if it so desires.

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<sup>42</sup> Pls.’ Br. in Opp’n to PENAC and THAN’s Mot. to Dismiss and the Trust’s Mot to Dismiss or, in the Alternative, Mot. for Summ. J. and in Supp. of Pls.’ Cross-Mot. for Summ. J. 26.

<sup>43</sup> Oral Argument 62.

<sup>44</sup> Compl. ¶ 74.

<sup>45</sup> Compl. ¶¶ 75-79; Decl. of Charles H. Mullin (“Mullin Decl.”).

Defendants maintain that the Settlement Agreement was designed such that AIG is “not supposed to” discover fraud.<sup>46</sup> “[AIG is] not allowed to challenge the trust with regard to payments. That’s the whole setup of the agreement. Because then . . . it[] [would be] death by a thousand cuts.”<sup>47</sup> Defendants also suggest that although AIG apparently already suspects fraud, its allegations lack merit and neither the trustees nor the government would take them seriously.

Although Section 2.4(b) does not necessitate a broad audit, it is difficult to understand how AIG would realistically “have reason to believe that any of the Claims submitted to and paid by the Trust . . . were based on intentionally false information that was material to the allowance of the Claims” if it never has access to the information that was material to the allowance of the claims. It is also unclear how AIG would discover “evidence of such fraud” to bring to the trustees’ attention. While Defendants’ interpretation, in theory, would not render Section 2.4 superfluous, the plain, objective reading of AIG’s audit right (described above) better fits Section 2.4 within the Settlement Agreement.

Furthermore, Defendants’ fear of “death by a thousand cuts” is largely illusory. AIG must conduct any audit at its own expense. Rejecting Defendants’ restrictions on the scope of AIG’s audit does not diminish the use restrictions contained elsewhere in the Settlement Agreement. AIG still cannot use the

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<sup>46</sup> Oral Argument 66-67.

<sup>47</sup> *Id.* at 67.

information for any purpose other than to confirm the Trust's payments, and it cannot challenge or question its obligations to make payments, except for when it discovers accounting errors or evidence of fraud.

AIG may accordingly audit the payments and distributions of the Trust at its own expense, no more than once per year. The Settlement Agreement provides AIG with a broad audit right that is not limited to only verifying that the Trust's stated payments and distributions were actually made. Although AIG's audit right is not restricted in the manner that Defendants suggest, nothing herein should be construed as directing what an audit must include to satisfy AIG's right.

*B. Material Issues of Fact Prevent Judgment on Counts I-IV*

The parties focused their arguments regarding the pending motions on the proper interpretation of the Settlement Agreement, which no party contended is ambiguous. They agreed that there is no material issue of fact that would prevent the Court from determining the plain meaning of that agreement. Accordingly, the Court has determined that AIG is entitled to judgment in its favor on its fifth count (for declaratory relief) as described *supra*, Section III.A. Nonetheless, despite both sides having moved for judgment on the other contract-related counts, there are unresolved factual questions that prevent judgment for any party.

AIG's first count charges THAN and PENAC with breach of the Settlement Agreement. Essentially, AIG contends that they breached that agreement by

(i) entering into the Cooperation Agreement with the Trust, thereby impairing their ability to facilitate AIG's audit right, and (ii) refusing to facilitate AIG's audit unless it agreed to conditions beyond those required by the Settlement Agreement. THAN and PENAC moved to dismiss this count for failure to state a claim. Their motion must be denied because AIG has stated a reasonably conceivable claim.

To succeed on a breach of contract claim under New York law, a plaintiff must establish “(1) the existence of a contract, (2) the plaintiff’s performance under the contract, (3) the defendant’s breach of the contract, and (4) resulting damages.”<sup>48</sup> Although THAN and PENAC do not dispute that AIG has performed under the Settlement Agreement (a valid contract), they argue that they have taken no action that would constitute a breach of that agreement.

However, as already established, AIG’s audit right is broader than Defendants have apparently assumed. Defendants have allegedly refused to facilitate an audit unless it complies with certain restrictions. THAN and PENAC are seemingly willing to advance AIG’s audit, but only within the confines of an interpretation of Section 2.3 that the Court has rejected. AIG never agreed to the Cooperation Agreement, and conditioning the exercise of its audit on that agreement’s restrictions would conceivably impair its negotiated-for rights. If THAN and PENAC destroyed their ability to comply with their obligations under

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<sup>48</sup> *Palmetto P’rs, L.P. v. AJW Qualified P’rs, LLC*, 921 N.Y.S.2d 260, 264 (App. Div. 2011).

the Settlement Agreement by entering into the Cooperation Agreement, then they may ultimately be liable for breach of contract.<sup>49</sup> Their current willingness to comply with the Settlement Agreement only on certain conditions may also violate AIG's rights.<sup>50</sup>

While it is reasonably conceivable that the Cooperation Agreement and the Settlement Agreement are in conflict, there are important factual issues regarding the negotiation and approval of those documents, as well as the Plan, which prevent summary judgment for either side. All three documents were approved by the Bankruptcy Court during THAN's bankruptcy proceedings. The Settlement Agreement was entered into first, in April 2009, between AIG and THAN and PENAC. However, the effectiveness of that agreement (which required and received the Bankruptcy Court's approval) was expressly "contingent upon the Bankruptcy Court confirming a Plan and entering a Confirmation Order that includes a 524(g) Channeling Injunction pursuant to such section in favor of

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<sup>49</sup> THAN and PENAC note that the Cooperation Agreement does not prevent them from serving a subpoena on the Trust if necessary to comply with their Settlement Agreement obligations. *See infra* note 50.

<sup>50</sup> THAN and PENAC argue that, at best, the allegations in the Complaint suggest that the Trust has barred an audit from proceeding unless AIG agrees to certain restrictions. Because the Trust is a separate entity, it would be improper to impute the Trust's stance to the other Defendants. Nonetheless, AIG has alleged that THAN and PENAC have relied on the Cooperation Agreement to justify their refusal to facilitate AIG's audit fully. THAN and PENAC acknowledge that they could theoretically do more (such as obtain subpoenas) to assist AIG, but argue that the Settlement Agreement (as they interpret it) does not require that effort.



[AIG] . . . .”<sup>51</sup> The Settlement Agreement granted AIG the right to audit the Trust, but the Trust was neither a contractual party nor yet in existence. An arrangement clearly needed to be reached with the to-be-created Trust that would provide a mechanism through which AIG could exercise its audit right.

In May 2009, the Bankruptcy Court first approved the Plan, along with certain Plan-related documents, including the Cooperation Agreement. The Plan did not become effective until November 30, 2009, at which point the Trust was created and the Defendants entered into the Cooperation Agreement. The Cooperation Agreement was thus approved as part of a public proceeding that was of interest to AIG. Nonetheless, AIG maintains that it was unaware of the Cooperation Agreement until it sought to exercise its audit right for the first time, approximately four years after the agreement was approved.

According to AIG, “the circumstances under which the cooperation agreement arose are very . . . pertinent” to its argument that by entering into the agreement, THAN and PENAC breached the Settlement Agreement.<sup>52</sup> AIG contends that it received no notice of the Cooperation Agreement and that there was “at least an implicit obligation of good faith arising from [the] settlement agreement on the part of [THAN] to notify [AIG] of the cooperation agreement

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<sup>51</sup> Settlement Agmt. § 6.1.

<sup>52</sup> Oral Argument 58-59.

and give [AIG] an opportunity to deal with it at the time before it was approved.”<sup>53</sup> AIG had apparently been provided with a draft cooperation agreement that was revised before it was presented to the Bankruptcy Court. The revised version was allegedly presented to that court “without notice to [AIG] and without [AIG’s] having any opportunity whatsoever to object to it, [or] to raise any issue with it at all.”<sup>54</sup> AIG suggests that the circumstances surrounding the negotiation of the Cooperation Agreement raise questions concerning THAN’s good faith.<sup>55</sup> Understanding this context is important to understanding the relationship between the Cooperation Agreement and the Settlement Agreement.<sup>56</sup>

On the other hand, THAN and PENAC attack as non-credible the suggestion that AIG was unaware of the Cooperation Agreement until 2013.<sup>57</sup> They argue that the Cooperation Agreement was fully disclosed to AIG, which was monitoring the

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<sup>53</sup> *Id.* at 61.

<sup>54</sup> *Id.* at 59-60.

<sup>55</sup> *Id.* at 59.

<sup>56</sup> On March 26, 2009, THAN and PENAC’s counsel forwarded to AIG a version of the Plan that did not include the Cooperation Agreement. LeFevre-Snee Aff. Ex. 5. Although THAN and PENAC represented that any changes to the Plan would be minimal, THAN’s May 11, 2009, Notice of Filing of Plan and Plan Supplement included the version of the Cooperation Agreement that, according to AIG, affects its audit right. Then, on May 28, 2009, THAN and PENAC sent AIG, and filed with the Bankruptcy Court, a version of the Plan and a cooperation agreement that made no reference to AIG’s audit rights. The next day, THAN and PENAC filed with the Bankruptcy Court another version of the Plan, accompanied by the Cooperation Agreement that allegedly affects AIG’s rights. The final version of the Cooperation Agreement was not served on AIG.

<sup>57</sup> Oral Argument 71.

THAN bankruptcy.<sup>58</sup> At the very least, they claim that there are factual issues relating to AIG's knowledge.<sup>59</sup> Questions of what AIG knew (or should be charged with knowing) about the contents of the Cooperation Agreement months before it, and the Plan, became effective, are relevant to understanding THAN and PENAC's intentions in entering the agreement, as well as possible defenses to the alleged breach of the Settlement Agreement. Further, it is unclear how the Bankruptcy Court's approval of the agreements affects AIG's claims. Although the Settlement Agreement is unambiguous, these unanswered questions may inform whether entry into, or reliance on, the Cooperation Agreement could be considered a breach of the Settlement Agreement.<sup>60</sup> Accordingly, neither party is now entitled to judgment on Count I.<sup>61</sup>

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<sup>58</sup> PENAC and THAN's Reply Br. in Further Supp. of Their Cross-Mot. for Summ. J. and Mot. to Strike the Decl. of Charles H. Mullin 12 n.6.

<sup>59</sup> Oral Argument 71.

<sup>60</sup> AIG has adequately pled damages, *i.e.*, loss of its bargained-for audit right.

<sup>61</sup> That the Cooperation Agreement's impact on AIG's audit right is unclear is further supported by the fact that AIG submitted an expert affidavit purporting to assess the effect of the Cooperation Agreement's limitations. Given a pending stipulated discovery stay, Defendants have not been afforded sufficient opportunity to challenge the expert submission or offer a competing opinion. Because the expert affidavit is not material to any of the Court's current analysis, PENAC and THAN's motion to strike is either moot or not yet ripe.

The Trust has noted that "AIG *has* sought to contrive an ambiguity in the Cooperation Agreement." The Trust's Combined Resp. to Pls.' Cross-Mot. for Summ. J. and Reply in Supp. of Its Rule 12(b)(6) Mot. to Dismiss for Failure to State a Claim upon Which Relief Can Be Granted or, in the Alternative, Mot. for Summ. J. 23 n.47. Similarly, THAN and PENAC have observed that AIG's

Counts II and III, which assert breaches of Article 10.4 of the Plan against all three Defendants, cannot be resolved without similar factual development. Article 10.4 provides that no Plan document, including the Cooperation Agreement, may operate to impair AIG's contractual rights under the Settlement Agreement. Whether Defendants have breached the Plan thus depends on whether the Cooperation Agreement improperly impairs AIG's audit right.<sup>62</sup>

Finally, judgment cannot be granted on Count IV, charging the Trust with tortious interference with the Settlement Agreement. AIG alleges that the Trust attempted, with no notice to AIG, to limit AIG's audit rights by entering into the Cooperation Agreement. AIG further claims that the Trust continues to interfere with the Settlement Agreement by refusing to allow AIG to exercise its audit right unless it agrees to certain restrictions.

Under New York law, tortious interference requires (i) the existence of a valid contract between the plaintiff and a third party, (ii) defendant's knowledge of that contract, (iii) defendant's intentional procurement of the third party's breach

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knowledge of the Cooperation Agreement "would be a question of fact." Oral Argument 71.

<sup>62</sup> THAN and PENAC suggest that the allegations that they have breached the Plan are duplicative of the assertions that they have breached the Settlement Agreement. Although this could be true, this is not a case where a plaintiff has advanced several completely-overlapping liability theories. Rather, there are two separate documents that THAN and PENAC are accused of breaching, and there is no reason why AIG cannot sue under both of them, at least at this stage of the proceedings.

of contract without justification, (iv) actual breach of contract, and (v) resulting damages.<sup>63</sup> AIG has adequately pled that the Trust knows of the Settlement Agreement, that THAN and PENAC have breached the Settlement Agreement, and that AIG has suffered damages by being denied the ability to exercise its audit right. The closer issue is whether the record can support the notion that the Trust intentionally procured THAN and PENAC to breach the Settlement Agreement without justification.

For the reasons discussed above, *i.e.*, the uncertainty surrounding the negotiation and approval of the Cooperation Agreement and the Plan, it is possible to infer reasonably that the Trust procured a breach of the Settlement Agreement. Again, AIG alleges that entry into the Cooperation Agreement rendered it impossible for PENAC and THAN to fulfill their obligations under the Settlement Agreement. While the Trust did not technically exist until November 2009, AIG alleges that it, “and its predecessors, representatives and constituencies had full knowledge of the Settlement Agreement, and the broad and robust audit rights that Plaintiffs have under the Settlement Agreement” before the agreement was executed or was approved by the Bankruptcy Court.<sup>64</sup> The role that the Trust’s representatives played in THAN’s bankruptcy proceeding is a contested factual issue. They were allegedly involved with the negotiations surrounding AIG’s audit

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<sup>63</sup> *Lama Hldg. Co. v. Smith Barney Inc.*, 668 N.E.2d 1370, 1375 (N.Y. 1996).

<sup>64</sup> Compl. ¶ 113.

right. AIG argues that the Trust then insisted on the Cooperation Agreement with full knowledge of AIG's Settlement Agreement-rights. While it is conceivable that the Trust induced THAN and PENAC to agree to conditions that would impair AIG's right to audit, the record cannot support summary judgment for either party.

#### **IV. CONCLUSION**

For the foregoing reasons, AIG is entitled to declaratory judgment on the scope of its audit right, as described *supra*, Section III.A. AIG may audit the payments and distributions of the Trust at its own expense, no more than once per year. While the Settlement Agreement restricts AIG's use of information obtained through an audit, the agreement does not limit the proper purposes for its investigation.

The remaining motions to dismiss and motions for summary judgment on Counts I-IV are denied.

Counsel are requested to confer and to submit an implementing form of order.