Exhibit D

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

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

NOTICE OF APPEAL

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

PLEASE TAKE NOTICE that plaintiff Trump Marks LLC ("Plaintiff") hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Decision and Order dated February 5, 2009, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on February 6, 2009 (a copy of which is annexed hereto as Exhibit A), which denied Plaintiff's motion for leave to file a Supplemental Affirmation in response to Defendant Crescent Heights Diamond LLC's motion to dismiss.

Dated: February 24, 2009
New York, New York

MEISTER SEELIG & FEIN LLP

By: _____

Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
Attorneys for Plaintiff

DATE: 2/26/09 TIME: 2:18PM
ECBA Rec'd: M. Wood
By: Mail / Hand / Fax / Fedex / Other

TO: Morrison Cohen LLP
909 Third Avenue
New York, New York 10022
Attorneys for Defendants
Sonny Kahn, Russell W. Galbut and Bruce A. Menin

Richard D. Emery, Esq.
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attorneys for Defendant Crescent Heights Diamond, LLC

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	:	Index No. 601372/08 **PRE-ARGUMENT STATEMENT**

Pursuant to §600.17 of the Rules of the Appellate Division, First Department, the following Pre-Argument Statement is respectfully submitted by Plaintiff Trump Marks LLC ("Appellant"):

1. The title of the action and the index number of this case in the Supreme Court, New York County, are as set forth in the above caption.

2. The full names of the original parties are as stated in the above caption.

3. The names, addresses and telephone numbers of counsel for all parties are as follows:

Attorneys for Appellant:

MEISTER SEELIG & FEIN LLP
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attn: Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.

Attorneys for Defendants/Respondents
Sonny Kahn, Russell W. Galbut and Bruce A. Menin:

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Attn: Y. David Scharf, Esq.
Mary Flynn, Esq.

Attorneys for Defendant/Respondent
Crescent Heights Diamond, LLC ("Cresent"):[1]

EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attn: Richard D. Emery, Esq.

4. This is an appeal taken from the Decision and Order dated February 5, 2009, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on February 6, 2009 (the "Order"). A copy of the Order, with notice of entry is attached hereto as Exhibit A.

5. Appellant is engaged in the business of licensing various trademarks held by real estate developer and builder Donald J. Trump. This action arises out of a license agreement between Appellant, as licensor, and Crescent, as licensee (the "License Agreement"), whereby Appellant licensed to Crescent the right to name and brand as "Trump Tower" or "Trump Plaza," a luxury condominium building to be built by Respondents, on a site Crescent had assembled and acquired in Ramat Gan, Israel. Nine months after entering into the License Agreement, Crescent sold the subject site to another developer, for over $80 million, netting a profit of $36 million, without seeking to develop it into a condominium project, which efforts it had explicitly undertaken under the Licensing Agreement. Respondents effected this sale after Appellant had fulfilled its promises under the License Agreement to file and perfect a trademark application in Israel for the Trump

[1] Defendants Sonny Kahn, Russell W. Galbut, Bruce A. Menin (the "Individual Defendants"), together with defendant Crescent are collectively referred to as "Respondents."

name, and after Mr. Trump had aggressively promoted his association with the project in the worldwide media. Appellant asserts that such a staggering profit was made possible solely by virtue of the project site's association with the Trump name and Mr. Trump's promotion of the project, and, in its verified complaint, asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification against Crescent, and for unjust enrichment, violations of the fraudulent conveyance laws and legal fees against Respondents.

6. On or about June 27, 2008, Crescent moved, by order to show cause, to dismiss the Complaint, such motion having been designated as Motion Sequence No. 002.[2] In Crescent's reply papers on its motion to dismiss, Crescent for the first time, improperly submitted to the Court both brand new evidence and arguments not present in their moving papers.

7. As a result of Crescent's newly concocted arguments on reply, Plaintiff, on or about October 2, 2008, brought a motion, by order to show cause (designated as motion sequence no. 006), seeking leave to file a brief Supplemental Affirmation, which attached a certain document (the "April 10th Email") evidencing the disingenuous nature of Crescent's last minute reply-based change in position. On October 7, 2008, the Court held an oral argument on Plaintiff's motion seeking leave to file a surreply (motion sequence 006). At the October 7, 2008 oral argument on motion sequence 006, Crescent's counsel, asserted for the first time that the proffered April 10th Email attached to Plaintiff's surreply was an inadmissible settlement offer, and informed the Court that Crescent would take the Court's suggestion to waive its objection to the admission of said document under advisement.

8. In response to numerous letters delivered to the Court regarding motion sequence 006, on November 25, 2008, the parties appeared before the Court. At this appearance, the Court

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[2] On or about June 27, 2008, the Individual Defendants moved, by order to show cause, to dismiss the Complaint, such motion having been designated as Motion Sequence No. 001.

informed the parties that it would be issuing an Order of Reference referring the question of the April 10th Email's admissibility and other discovery related issues (which had by then surfaced as well) to Judicial Hearing Officer Beverly Cohen. Immediately after the November 25, 2008 appearance before Justice Cahn, and at His Honor's direction, counsel appeared before and conferred with JHO Cohen and scheduled a further conference before Her Honor on December 9, 2008.

9. Unbeknownst to any counsel at the time of the December 9, 2009 appearance before JHO Cohen (according to a later e-filing, the Order of Reference was issued on November 26, 2008, but not filed with the County Clerk until December 9, 2008), the Court had already (by then) rendered an Order of Reference stating: "[a]fter consultation with, and approval by the Administrative Judge, Hon. Beverley Cohen is appointed Referee to supervise disclosure herein. The parties are directed to contact the Referee...in connection with their discovery disputes." (emphasis supplied). Apparently, since there were discovery disputes between the parties at the time of the November 26th Order of Reference, the Court was confused and issued a "generic" Order of Reference referring out solely discovery supervision, but failing to include the need for a priority determination on the admissibility of the April 10th Email.

10. On December 9, 2008, the parties appeared before JHO Cohen, at which time all counsel jointly explained the reason for the referral — that Justice Cahn wanted JHO Cahn to determine (or hear and report on) the admissibility of the April 10th Email as a matter of law. Counsel and JHO Cohen then agreed upon a briefing schedule with respect to memoranda of law requested by JHO Cohen addressing the issue of the admissibility of the April 10th Email and whether or not said document was a "settlement document," to be excluded under CPLR 4547.

11. On December 22, 2008, prior to the parties' submissions of any briefs to JHO Cohen on the admissibility of the April 10th Email, Justice Cahn issued a decision granting the Defendants' Motions to Dismiss (motion sequence 001 and sequence 002) (the "Motion to Dismiss Decision"). Notice of Appeal of the Motion to Dismiss Decision was served on January 22, 2009. See Exhibit B attached hereto.[3]

12. On February 6, 2009, the parties were notified via e-law that Justice Fried (Justice Cahn retired as a Justice at the end of 2008) rendered a short form decision providing as follows: "[b]y Decision and Order, dated December 22, 2008, Justice Herman Cahn dismissed the Complaint in this action; accordingly, this motion (#006) is DENIED as moot."

13. Given that motion sequence 006 was denied by Justice Fried after Justice Cahn rendered the Motion to Dismiss Decision, it cannot be disputed that Justice Cahn decided the Defendants' motions to dismiss (and Plaintiff's cross-motion for summary judgment, motion sequence 001 and 002) prematurely (and therefore erroneously) and without the benefit of having reviewed the April 10th Email. Further, given that motion sequence 006 was "denied as moot," it is equally clear that Justice Fried also did not consider crucial evidence which would impact Defendants' motions to dismiss.

[3] Plaintiff also served a Notice of Appeal of a Judgment filed by Respondents, and docketed and entered by the New York County Clerk, in connection with the Motion to Dismiss Decision. See Exhibit C attached hereto.

14. Therefore, Appellant seeks reversal of the Order in that the Supreme Court below misapprehended the facts and the law of the case.

Dated: New York, New York
February 24, 2009

MEISTER SEELIG & FEIN LLP

By: _____
Stephen B. Meister
Stacey M. Ashby
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attorneys for Appellants

To:

MORRISON COHEN LLP
Attorneys for Respondents Sonny Kahn, Russell W. Galbut and Bruce A. Menin
909 Third Avenue
New York, New York 10022

EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys for Respondent Crescent Heights Diamond, LLC
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

EXHIBIT A

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No. 601372/08 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that annexed hereto is a true and correct copy of the Decision and Order of the Court, dated February 5, 2009, and duly filed and entered by the office of the Clerk, New York County, on February 6, 2009, with respect to the above-captioned matter.

Dated: New York, New York
February 20, 2009

MEISTER SEELIG & FEIN LLP

By: _____
Stacey M. Ashby
Two Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attorneys for Plaintiff

To: Richard D. Emery, Esq.
EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attorneys for Defendant Crescent Heights Diamond LLC

Y. David Scharf, Esq.
MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Attorneys for Defendants Sonny Kahn, Russell Galbut & Bruce Menin

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

PRESENT: HON. BERNARD J. FRIED Justice

PART 49

E-FILE

Tramp Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 006

MOTION CAL. NO.

Crescent Heights Diamond Ltd

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
Feb 06 2009
NEW YORK
COUNTY CLERK'S OFFICE

By Decision and Order, dated December 22, 2008, Justice Herman Cahn, dismissed the complaint in this action; accordingly, this motion (#006) is DENIED as moot.

SO ORDERED

Dated: 2/5/09

HON. BERNARD J. FRIED J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

EXHIBIT B

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

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

NOTICE OF APPEAL

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

PLEASE TAKE NOTICE that plaintiff Trump Marks LLC ("Plaintiff") hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Order of the Hon. Herman Cahn, dated December 22, 2008, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on December 23, 2008 (a copy of which is annexed hereto as Exhibit A), which granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
Attorneys for Appellants

TO: Morrison Cohen LLP
909 Third Avenue
New York, New York 10022
Attorneys for Defendants
Sonny Kahn, Russell W. Galbut and Bruce A. Menin

Richard D. Emery, Esq.
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attorneys for Defendant Crescent Heights Diamond, LLC

EXHIBIT A

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	:	Index No. 601372/08 **PRE-ARGUMENT STATEMENT**

Pursuant to §600.17 of the Rules of the Appellate Division, First Department, the following Pre-Argument Statement is respectfully submitted by Plaintiff Trump Marks LLC ("Appellant"):

1. The title of the action and the index number of this case in the Supreme Court, New York County, are as set forth in the above caption.

2. The full names of the original parties are as stated in the above caption.

3. The names, addresses and telephone numbers of counsel for all parties are as follows:

Attorneys for Appellant:

MEISTER SEELIG & FEIN LLP
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attn: Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.

Attorneys for Defendants/Respondents
Sonny Kahn, Russell W. Galbut and Bruce A. Menin:

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Attn: Y. David Scharf, Esq.
Mary Flynn, Esq.

Attorneys for Defendant/Respondent
Crescent Heights Diamond, LLC:

EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attn: Richard D. Emery, Esq.

4. This is an appeal taken from an Order of the Hon. Herman Cahn, Supreme Court of the State of New York, County of New York, dated December 22, 2008, and entered in the office of the Clerk of the County of New York on December 23, 2008, which granted the motion to dismiss by Crescent Heights Diamond LLC ("Crescent") and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin (collectively, the "Individuals Defendants").

5. Appellant is engaged in the business of licensing various trademarks held by real estate developer and builder Donald J. Trump. This action arises out of a license agreement between Appellant, as licensor, and Crescent, as licensee (the "License Agreement"), whereby Appellant licensed to Crescent the right to name and brand as "Trump Tower" or "Trump Plaza," a luxury condominium building to be built by Respondents, on a site Crescent had assembled and acquired in Ramat Gan, Israel. Nine months after entering into the License Agreement, Crescent sold the subject site to another developer, for over $80 million, netting a profit of $36 million, without seeking to develop it into a condominium project, which efforts it had explicitly undertaken under the Licensing Agreement. Respondents effected this sale after Appellant had fulfilled its promises under the License Agreement to file and perfect a trademark application in Israel for the Trump

name, and after Mr. Trump had aggressively promoted his association with the project in the worldwide media. Appellant asserts that such a staggering profit was made possible solely by virtue of the project site's association with the Trump name and Mr. Trump's promotion of the project, and, in its verified complaint, asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification against Crescent, and for unjust enrichment, violations of the fraudulent conveyance laws and legal fees against Respondents.

6. On December 22, 2008, the Supreme Court, New York County (Cahn, J.) issued an Order, entered in the office of the Clerk of the County of New York on December 23, 2008, notice of entry of which was served by Respondents on December 23, 2008. A copy of the Order and the Notice of Entry is attached hereto as Exhibit A. The Order granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

7. Appellant seeks reversal of the Order on the grounds that the Supreme Court below misapprehended the facts and the law of the case.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

Stephen B. Meister
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attorneys for Appellants

To:

MORRISON COHEN LLP
Attorneys for Respondents Sonny Kahn, Russell W. Galbut and Bruce A. Menin
909 Third Avenue
New York, New York 10022

EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys for Respondent Crescent Heights Diamond, LLC
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No.: 08/601372 (Cahn, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached true copy of the Decision and Order, dated December 22, 2008, in the above-captioned matter, was entered in the Office of the Clerk of the County of New York on December 23, 2008.

Date: December 23, 2008
New York, New York

EMERY CELLI BRINCKERHOFF & ABADY LLP

By: _____

Richard D. Emery
Andrew G. Celli, Jr.
Ilann M. Maazel
Debra Greenberger

75 Rockefeller Plaza, 20th Floor
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(212) 763-5000

Attorneys for Defendant Crescent Heights Diamond, LLC

To: Stephen B. Meister
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2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, NY 10017

Attorney for Plaintiff

Y. David Scharf
Morrison Cohen LLP
909 Third Avenue
New York, NY 10022

Attorneys for Defendants Sonny Kahn, Russell Galbut, and Bruce Menin

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

PRESENT: Cahn Justice

PART 45m

Trump Marks LLC,

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 001

MOTION CAL. NO.

Crescent Heights Diamond LLC

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . .

FILED
Dec 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/08

Hon. Cahn J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id.*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response, plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br, at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> **intends** to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be impliedly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

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

PRESENT: Cahn Justice

PART 48m

Trump Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 002

Crescent Heights Diamond

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ....

FILED
Dec 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

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Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id.*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response; plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br. at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> **intends** to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be implicdly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

EXHIBIT C

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

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

NOTICE OF APPEAL

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

PLEASE TAKE NOTICE that plaintiff Trump Marks LLC ("Plaintiff") hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Judgment dated January 8, 2009, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on January 8, 2009 (a copy of which is annexed hereto as Exhibit A), which awarded defendants Crescent Heights Diamond LLC, Sonny Kahn, Russell W. Galbut and Bruce A. Menin, an amount of $430 for costs and disbursements.

Dated: January 27, 2009
New York, New York

MEISTER SEELIG & FEIN LLP

By: _____

Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
Attorneys for Plaintiff

TO: Morrison Cohen LLP
909 Third Avenue
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Attorneys for Defendants
Sonny Kahn, Russell W. Galbut and Bruce A. Menin

Richard D. Emery, Esq.
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attorneys for Defendant Crescent Heights Diamond, LLC

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No. 601372/08 **PRE-ARGUMENT STATEMENT**

Pursuant to §600.17 of the Rules of the Appellate Division, First Department, the following Pre-Argument Statement is respectfully submitted by Plaintiff Trump Marks LLC ("Appellant"):

1. The title of the action and the index number of this case in the Supreme Court, New York County, are as set forth in the above caption.

2. The full names of the original parties are as stated in the above caption.

3. The names, addresses and telephone numbers of counsel for all parties are as follows:

Attorneys for Appellant:

MEISTER SEELIG & FEIN LLP
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attn: Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.

Attorneys for Defendants/Respondents
Sonny Kahn, Russell W. Galbut and Bruce A. Menin:

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Attn: Y. David Scharf, Esq.
Mary Flynn, Esq.
Latisha V. Thompson, Esq.

Attorneys for Defendant/Respondent
Crescent Heights Diamond, LLC:[1]

EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attn: Richard D. Emery, Esq.

4. This is an appeal taken from the Judgment dated January 8, 2009, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on January 8, 2009 (the "Judgment"). A copy of the Judgment, with notice of entry is attached hereto as Exhibit A.

5. Appellant is engaged in the business of licensing various trademarks held by real estate developer and builder Donald J. Trump. This action arises out of a license agreement between Appellant, as licensor, and Crescent, as licensee (the "License Agreement"), whereby Appellant licensed to Crescent the right to name and brand as "Trump Tower" or "Trump Plaza," a luxury condominium building to be built by Respondents, on a site Crescent had assembled and acquired in Ramat Gan, Israel. Nine months after entering into the License Agreement, Crescent sold the subject site to another developer, for over $80 million, netting a profit of $36 million, without seeking to develop it into a condominium project, which efforts it had explicitly undertaken under the Licensing Agreement. Respondents effected this sale after Appellant had fulfilled its promises under the License Agreement to file and perfect a trademark application in Israel for the Trump

[1] Defendants Sonny Kahn, Russell W. Galbut, Bruce A. Menin and Crescent Heights Diamond LLC are collectively referred to as "Respondents."

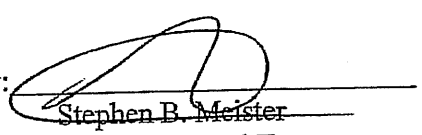
name, and after Mr. Trump had aggressively promoted his association with the project in the worldwide media. Appellant asserts that such a staggering profit was made possible solely by virtue of the project site's association with the Trump name and Mr. Trump's promotion of the project, and, in its verified complaint, asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification against Crescent, and for unjust enrichment, violations of the fraudulent conveyance laws and legal fees against Respondents.

6. On December 22, 2008, the Supreme Court, New York County (Cahn, J.) issued an Order, entered in the office of the Clerk of the County of New York on December 23, 2008, notice of entry of which was served by Respondents on December 23, 2008 (the "December 22, 2008 Order"). The December 22, 2008 Order granted the motions to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin. Notice of Appeal of the December 22, 2008 Order was served on January 22, 2009. See Exhibit B attached hereto.

7. The Judgment awarded Respondents a sum of $430 for costs and disbursements relating to the December 22, 2008 Order. Appellant seeks reversal of the Judgment in that the December 22, 2008 Order was incorrectly decided. Further, the Judgment includes fees that were not awarded by the December 22, 2008 Order.

Dated: New York, New York
January 27, 2009

MEISTER SEELIG & FEIN LLP

By: 
Stephen B. Meister
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(212) 655-3500
Attorneys for Appellants

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MORRISON COHEN LLP
Attorneys for Respondents Sonny Kahn, Russell W. Galbut and Bruce A. Menin
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EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys for Respondent Crescent Heights Diamond, LLC
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

EXHIBIT A

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No.: 08/601372 (Cahn, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached true copy of the Judgment, dated January 8, 2008, in the above-captioned matter, was entered in the Office of the Clerk of the County of New York on January 8, 2008.

Date: January 8, 2008
New York, New York

EMERY CELLI BRINCKERHOFF & ABADY LLP

By: _____

Richard D. Emery
Andrew G. Celli, Jr.
Ilann M. Maazel
Debra Greenberger

75 Rockefeller Plaza, 20th Floor
New York, New York 10019
(212) 763-5000

Attorneys for Defendant Crescent Heights Diamond, LLC

To: Stephen B. Meister
Meister Seelig & Fein LLP
2 Grand Central Tower
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Attorney for Plaintiff

Y. David Scharf
Morrison Cohen LLP
909 Third Avenue
New York, NY 10022

Attorneys for Defendants Sonny Kahn, Russell Galbut, and Bruce Menin

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

TRUMP MARKS LLC,

Plaintiff,

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

Index No.: 601372/08
(Cahn, J.)

JUDGMENT

Motions to dismiss having been granted to defendants on December 23, 2008, wherein the Court ORDERED the DISMISSAL with prejudice of Plaintiff's Complaint against all defendants and entering Judgment against Plaintiff, Trump Marks LLC, it is

ADJUDGED that defendants Crescent Heights Diamond, LLC, 2200 Biscayne Boulevard, Miami, Florida 33137; Sonny Kahn, 2200 Biscayne Boulevard, Miami, Florida 33137; Russell W. Galbut, 2200 Biscayne Boulevard, Miami, Florida 33137; and Bruce A. Menin, 40 Wall Street, 25th Floor, New York, New York 10005, have judgment against Plaintiff, Trump Marks LLC, 725 Fifth Avenue, New York, New York 10022, and shall recover such costs and disbursements as taxed by the clerk in the amount of $430, and defendants have execution thereon.

Dated: New York, New York
January 8, 2009

Clerk of the Court

FILED
JAN 08 2009
NEW YORK
COUNTY CLERK'S OFFICE

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

TRUMP MARKS LLC,

Plaintiff,

Index No.: 08/601372

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

FILED AND DOCKETED
JAN 08 2009
11:35 AM
AT N.Y., CO. CLK'S OFFICE

JUDGMENT

DOCKETED BY
ND
4

Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
212-763-5000

EXHIBIT B

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

----------X

TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

NOTICE OF APPEAL

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------X

PLEASE TAKE NOTICE that plaintiff Trump Marks LLC ("Plaintiff") hereby appeals to the Appellate Division of the Supreme Court, First Department, from the Order of the Hon. Herman Cahn, dated December 22, 2008, and entered in the above-entitled action in the office of the Clerk of the Court of New York County on December 23, 2008 (a copy of which is annexed hereto as Exhibit A), which granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

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140 East 45th Street, 19th Floor
New York, New York 10017
Attorneys for Appellants

TO: Morrison Cohen LLP
909 Third Avenue
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Sonny Kahn, Russell W. Galbut and Bruce A. Menin

Richard D. Emery, Esq.
Emery Celli Brinckerhoff & Abady LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attorneys for Defendant Crescent Heights Diamond, LLC

EXHIBIT A

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No. 601372/08 **PRE-ARGUMENT STATEMENT**

Pursuant to §600.17 of the Rules of the Appellate Division, First Department, the following Pre-Argument Statement is respectfully submitted by Plaintiff Trump Marks LLC ("Appellant"):

1. The title of the action and the index number of this case in the Supreme Court, New York County, are as set forth in the above caption.

2. The full names of the original parties are as stated in the above caption.

3. The names, addresses and telephone numbers of counsel for all parties are as follows:

Attorneys for Appellant:

MEISTER SEELIG & FEIN LLP
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attn: Stephen B. Meister, Esq.
Stacey M. Ashby, Esq.

Attorneys for Defendants/Respondents
Sonny Kahn, Russell W. Galbut and Bruce A. Menin:

MORRISON COHEN LLP
909 Third Avenue
New York, New York 10022
Attn: Y. David Scharf, Esq.
Mary Flynn, Esq.

Attorneys for Defendant/Respondent
Crescent Heights Diamond, LLC:

EMERY CELLI BRINCKERHOFF & ABADY LLP
75 Rockefeller Plaza, 20th Floor
New York, New York 10019
Attn: Richard D. Emery, Esq.

4. This is an appeal taken from an Order of the Hon. Herman Cahn, Supreme Court of the State of New York, County of New York, dated December 22, 2008, and entered in the office of the Clerk of the County of New York on December 23, 2008, which granted the motion to dismiss by Crescent Heights Diamond LLC ("Crescent") and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin (collectively, the "Individuals Defendants").

5. Appellant is engaged in the business of licensing various trademarks held by real estate developer and builder Donald J. Trump. This action arises out of a license agreement between Appellant, as licensor, and Crescent, as licensee (the "License Agreement"), whereby Appellant licensed to Crescent the right to name and brand as "Trump Tower" or "Trump Plaza," a luxury condominium building to be built by Respondents, on a site Crescent had assembled and acquired in Ramat Gan, Israel. Nine months after entering into the License Agreement, Crescent sold the subject site to another developer, for over $80 million, netting a profit of $36 million, without seeking to develop it into a condominium project, which efforts it had explicitly undertaken under the Licensing Agreement. Respondents effected this sale after Appellant had fulfilled its promises under the License Agreement to file and perfect a trademark application in Israel for the Trump

name, and after Mr. Trump had aggressively promoted his association with the project in the worldwide media. Appellant asserts that such a staggering profit was made possible solely by virtue of the project site's association with the Trump name and Mr. Trump's promotion of the project, and, in its verified complaint, asserted causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing and indemnification against Crescent, and for unjust enrichment, violations of the fraudulent conveyance laws and legal fees against Respondents.

6. On December 22, 2008, the Supreme Court, New York County (Cahn, J.) issued an Order, entered in the office of the Clerk of the County of New York on December 23, 2008, notice of entry of which was served by Respondents on December 23, 2008. A copy of the Order and the Notice of Entry is attached hereto as Exhibit A. The Order granted the motion to dismiss by Crescent Heights Diamond LLC and the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin.

7. Appellant seeks reversal of the Order on the grounds that the Supreme Court below misapprehended the facts and the law of the case.

Dated: New York, New York
January 21, 2009

MEISTER SEELIG & FEIN LLP

By: _____

Stephen B. Meister
2 Grand Central Tower
140 East 45th Street, 19th Floor
New York, New York 10017
(212) 655-3500
Attorneys for Appellants

To:

MORRISON COHEN LLP
Attorneys for Respondents Sonny Kahn, Russell W. Galbut and Bruce A. Menin
909 Third Avenue
New York, New York 10022

EMERY CELLI BRINCKERHOFF & ABADY LLP
Attorneys for Respondent Crescent Heights Diamond, LLC
75 Rockefeller Plaza, 20th Floor
New York, New York 10019

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

TRUMP MARKS LLC, Plaintiff, -against- CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC, Defendants.	Index No.: 08/601372 (Cahn, J.) **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached true copy of the Decision and Order, dated December 22, 2008, in the above-captioned matter, was entered in the Office of the Clerk of the County of New York on December 23, 2008.

Date: December 23, 2008
New York, New York

EMERY CELLI BRINCKERHOFF & ABADY LLP

By: _____

Richard D. Emery
Andrew G. Celli, Jr.
Ilann M. Maazel
Debra Greenberger

75 Rockefeller Plaza, 20th Floor
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Attorneys for Defendant Crescent Heights Diamond, LLC

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New York, NY 10017

Attorney for Plaintiff

Y. David Scharf
Morrison Cohen LLP
909 Third Avenue
New York, NY 10022

Attorneys for Defendants Sonny Kahn, Russell Galbut, and Bruce Menin

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

PRESENT: Cohin Justice

PART 45m

Team? Marks LLC,

INDEX NO. 601372/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

-v-

Crescent Heights Diamond LLC

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE . . . .

FILED
Dec 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl, ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl, ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response, plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br, at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> **intends** to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be impliedly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

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

PRESENT: Cohn Justice

PART 46m

Trump Marks LLC

INDEX NO. 601372/08

MOTION DATE

-v-

MOTION SEQ. NO. 002

Crescent Heights Diamond

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE ...

FILED
Dec 23 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/23/08

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 49

----------x

TRUMP MARKS LLC,

Plaintiff,

-against-

Index No. 601372/08

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

----------x

Herman Cahn, J.:

Motion Sequence Numbers 001 and 002 are consolidated and disposed of in accordance with the following decision and order.

Defendants Crescent Heights Diamond, LLC (Crescent), Sonny Kahn, Russell W. Galbut, and Bruce A. Menin move to dismiss the complaint against them (CPLR 3211 [a] [1] and [7]). Plaintiff Trump Marks LLC cross-moves for an order granting it summary judgment on its claims (CPLR 3211 [c] and 3212), and for an order granting it permission to amend to add two new defendants (CPLR 1024).

This action arises from a licensing agreement between plaintiff and defendant Crescent, under which plaintiff licensed to Crescent the right to use the name "Trump Tower" in connection with a condominium building Crescent intended to build in Israel. Crescent failed to build the condo and, instead, sold the land to a third party for a profit. Plaintiff brought this action for breach of contract and unjust enrichment against Crescent. It also asserts claims

against the principals of Crescent, the individual defendants, for violations of the fraudulent conveyances law.

Defendant Crescent seeks dismissal, arguing that the license agreement provides that if it did not build within two years, for any reason within its control, plaintiff's remedy was termination. It argues that, if Crescent used the licensed marks after termination of the agreement, then plaintiff would have the right to damages. Crescent contends that there is no other remedy contemplated in the agreement, and that the Court should reject plaintiff's invitation to rewrite the agreement, made between sophisticated and counseled parties, to create other remedies. Crescent urges that plaintiff was nothing more than a licensor, not a partner in the transaction to develop a building.

The individual defendants, Kahn, Galbut and Menin, urge that the complaint be dismissed against them because they are not, and have never been members of Crescent, a limited liability company, and they did not receive any distribution of the sale proceeds from the sale of the land. Therefore, they argue that they cannot be required to return a conveyance or distribution they did not receive. They also argue that the unjust enrichment claim is barred because there is a written agreement, the license agreement, covering the matter. They urge that the fraudulent conveyance claim also is insufficient because the sale was not a breach of the license agreement, plaintiff failed to plead fraud with particularity and failed to plead the necessary elements of a fraudulent conveyance claim. They further argue that the wrongful distributions claim is insufficient because Crescent's liabilities do not exceed its assets.

BACKGROUND

Plaintiff is a Delaware limited liability company, and is in the business of licensing certain United States trademarks of Donald Trump, covering real estate and related services with the designation "Trump" (Compl. ¶ 2). Defendant Crescent, a Delaware limited liability company, is engaged in the business of building and developing first-class residential condominium properties (*id.*, ¶ 5). The individual defendants, Kahn, Galbut and Menin, are allegedly members of Crescent (*id.*, ¶¶ 6-11).

On May 23, 2006, plaintiff, as licensor, entered into an agreement with defendant Crescent, as licensee, in which plaintiff licensed the Trump name for Crescent's use in connection with the development of a building on land owned or to be acquired by Crescent in Ramat Gan, Israel (Indiv Def Order to Show Cause (OtSC), Ex B). Crescent intended to develop the building as a "first-class, luxury residential condominium" with a retail component; to design, develop, and operate it in the form of condominium ownership; and to market, sell, and/or lease the units in the building, all to be performed in accordance with the "Trump Standard" (therein defined), to maximize the value of the property for the benefit of both the licensor and the licensee (*id.*, at 1). The building to be constructed on the property was going to be the tallest structure in Israel with 786,000 square feet of space. It could not be constructed as a residential and retail development without obtaining variances from the appropriate Israeli authorities (Compl. ¶¶ 14, 27).

Pursuant to the License Agreement, Crescent was licensed to use the name "Trump Tower," or "Trump Plaza," which was then referred to in the agreement as the "New Trump Mark" (*id.*; *see also* OtSC, Ex B, First amend to License Agmt, at 1). It agreed to pay plaintiff

royalties for the rights granted in the agreement (*id.*, § 5 [a], at 9). Crescent also agreed to design, develop, construct, market, sell, equip, operate, repair and maintain the property with the level of quality and luxury associated with the condominium building known as the Akirov Building in Tel Aviv, Israel, referred to as the Signature Property in the License Agreement (*id.*, § 3 [a]).

In the License Agreement, plaintiff agreed to be subject to a covenant restricting its right to further license its name in the area. Specifically, the License Agreement stated that, "provided the Agreement was in full force and effect," until the first to occur of 42 months from the execution of the agreement, or the date on which 90% of the units are subject to binding contracts of sale, plaintiff would not license the name "Trump" for a residential condominium building within the area of Tel Aviv, Israel, and within 12 months from the date of the agreement, plaintiff would not license the "Trump" name for a "Condominium Hotel" as defined therein (*id.* at 4). Plaintiff agreed to cause Donald J. Trump to make one trip to the Tower Project for no more than one day of six working hours for the promotion of the project to the public (*id.*, § 1 [h]).

Plaintiff was permitted to terminate the agreement for "Trump Standard Defaults," such as Crescent failing, inter alia, to design, develop and maintain the property in accordance with the Trump Standard (*id.*, § 3, at 6-7), and for "non-Trump Standard Defaults" such as Crescent failing to pay money due (*id.*, § 7, at 10). Plaintiff was also permitted to terminate in "addition to any other right or remedy of Licensor" upon 10 days' written notice for reasons such as licensee's bankruptcy, fire damaging or destroying the building, the individual defendants ceasing to own and control the licensee, failure to commence construction within 24 months,

failure of the issuance of certain forms for the commencement of construction, and failure to close with regard to at least 70% of the units within 40 months (*id.*, § 8, at 10-11). The License Agreement provided that, notwithstanding its termination pursuant to any of its terms, plaintiff "shall be entitled to receive, and Licensee shall pay to Licensor all Royalties that have accrued to Licensor prior to the date of termination" (*id.*, § 8 [l], at 11).

The term of the License Agreement commenced upon its execution and "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark, and Licensor and Licensee have not agreed in writing or are not in substantive discussions for the use of a Trump Name as the name of the Tower Project" (*id.*, § 6, at 9).

The parties set forth their agreement with regard to royalties. They provided that an initial non-refundable payment of $1,000,000 was to be made to plaintiff on the date that Crescent is issued the initial construction permit for the commencement of construction. Crescent was further obligated to make royalty payments in connection with a percentage of the average aggregate sales prices per square foot, and a percentage of gross rental payments, of residential units and non-residential areas (*id.*, Ex A, at A-1).

In May 2006, plaintiff registered the licensed mark "Trump Plaza" with the Israeli Trademarks Office (Compl, ¶ 19).

In December 2006, Donald Trump, via a satellite video feed, spoke at the Israeli Business Conference, promoting and associating himself with the land and the Tower Project (*id.*, ¶ 20).

On April 30, 2007, Crescent acquired title to all of the constituent parcels constituting the land at a cost of approximately $44 million (*id.*, ¶ 17).

Crescent, however, asserts that it was unable to procure the necessary approvals to permit the construction of the Tower Property as a purely residential and retail property, as opposed to a mixed-use, residential, retail and office project, from the relevant Israeli authorities (*id.*, ¶ 25).

In or about August 1, 2007, plaintiff became aware that Crescent was negotiating to sell the land to a third party developer (*id.*, ¶ 21). On August 2, 2007, plaintiff notified Crescent that the sale of the land would result in Crescent's default under the License Agreement, causing substantial damage to plaintiff in that it would not receive royalties, its reputation would be damaged and Crescent would be unjustly enriched (*id.*, ¶ 22).

In January 2008, Crescent sold the land to Azorim Investment, Development and Construction Ltd. for approximately $80.2 million (*id.*, ¶¶ 23-24).

Plaintiff alleges that the sale was in breach of the License Agreement. It contends that section 3(a) of the License Agreement imposed an unqualified obligation on Crescent to design and construct the Tower Property. It argues that Crescent's obligations were not excused because it was unable to obtain the necessary approvals to build the Tower Property as envisaged (*id.*, ¶¶ 25-28). Plaintiff asserts that Crescent knew that it had to obtain permits, approvals, and/or variances from the authorities when it signed the License Agreement, and it failed to make bona fide efforts to obtain them (*id.*, ¶¶ 28, 31).

In the complaint, plaintiff asserts eight causes of action. The first three are against Crescent only for breach of the License Agreement; breach of the implied covenant of good faith and fair dealing by selling the land, and depriving plaintiff of the benefit of the License Agreement; and contractual indemnification for losses, attorneys' fees and disbursements in bringing this action. The remaining five causes of action are asserted against all the defendants.

The fourth is for unjust enrichment, claiming that the sale of the land resulted in a windfall profit for defendants which was realized by virtue of "the world renowned reputation of Donald J. Trump as the preeminent developer of luxury residential properties," and that defendants must make restitution to plaintiff of that windfall profit. The fifth and sixth are for fraudulent conveyances under the Debtor and Creditor Law §§ 273-276, and the seventh seeks attorneys' fees under Debtor and Creditor Law § 276-a. Finally, the eighth seeks recovery of the wrongful distribution of the net proceeds of the sale to the members of Crescent, in violation of New York Limited Liability Company Act § 508 or of section 18-607 of the Delaware Limited Liability Company Act.

In moving to dismiss, Crescent asserts that it did not construct the building, the required variances were not granted, no permit to construct the building was issued and the project never went forward to the final plans and specifications stage. Crescent argues that the License Agreement provides that if it did not build within two years for any reason within Crescent's control, plaintiff's only remedy was termination of the License Agreement and revocation of the license. With regard to royalties, Crescent asserts that it agreed to pay $1,000,000 to plaintiff if and when a construction permit were issued. It also agreed to pay additional royalties, if any, when any units in the building were sold, and provided they sold for more than a minimum price per square foot. None of these events occurred, so, Crescent argues, no royalties are due. Crescent contends that although the License Agreement could have provided for an initial, non-refundable payment upon signing, it did not. It also did not include any form of penalty or liquidated damages if the building was not built, nor did it include any clause which would provide plaintiff with a percentage of the profit if the land were resold. Crescent argues that

these provisions should not be read into the agreement, particularly where both parties are sophisticated and counseled. It urges that this was a non-exclusive licensing agreement which placed minimal restrictions on plaintiff's ability to exploit its mark worldwide.

Crescent also contends that the breach of the implied covenant claim is insufficient because it is redundant of the breach of contract claim. The indemnification claims fails because it depends upon a breach or default which Crescent asserts does not exist and because that provision refers to claims by third parties, not a breach of contract claim between Crescent and plaintiff. Crescent urges that the unjust enrichment claim fails because there is a contract that governs the subject matter of the parties' dispute. Crescent further urges that the remaining three claims for fraudulent conveyances and wrongful distribution must be dismissed because they are based on a breach of the License Agreement, and there was no breach.

In response; plaintiff cross-moves to have the motion to dismiss converted to a summary judgment motion, and for summary judgment in its favor on the first through third causes of action for breach of contract, breach of the covenant of good faith and indemnification. Plaintiff argues that there was a breach of the agreement by Crescent's failure to build. It asserts that in the first sentence of Section 3, Crescent expressly covenanted to design, build and construct the Tower Property. It urges that Crescent is inappropriately trying to use the title of the agreement, that is "License Agreement," and the caption of Section 3, "Trump Standard; Trump Standard Default: Power of Attorney," to twist the meaning of the "simple, straightforward promise to construct the Tower Property" (Opp Br. at 22). It contends that Crescent's interpretation does violence to Section 9 of the License Agreement, which gives Crescent the right to terminate only upon a substantial forced taking (by condemnation or eminent domain), or, if before 70% of the

units in the building are sold, Donald J. Trump dies, is permanently incapacitated, is no longer a principal of plaintiff, or for other specified reasons which did not occur (OtSC, Ex B, § 9, at 12).

Plaintiff also contends that Crescent's interpretation conflicts with Section 7 (b) regarding termination by Crescent following a default by plaintiff after notice and opportunity to cure. Further, plaintiff argues that Section 4, which compels Crescent to deliver plans and specifications to plaintiff, gives plaintiff the right to issue deficiency notices indicating its objections and gives both parties the right to terminate, supports its interpretation that Crescent could not terminate for whatever reason. It counters that Section 8 (h), upon which Crescent relies, is inapplicable, because it deals with construction delays, not a sale to a third party, and it would require plaintiff to wait two years to terminate its 3 ½ year negative covenant. Finally, Section 6, according to plaintiff, which specifies the term of the agreement, does not specify a sale of the property as the end of the term and, therefore, it cannot be relied upon by Crescent. Plaintiff urges that under its interpretation of the License Agreement, Crescent has breached as a matter of law and it is entitled to summary judgment of liability on its claims.

With respect to its implied covenant claim, plaintiff asserts that a promise to build should be implied and it is entitled to take discovery thereon. Plaintiff contends that its unjust enrichment claim cannot be dismissed unless its contract claim is granted. Plaintiff also contends that its indemnification claim should not be dismissed because Section 11 of the License Agreement covers action arising out of Crescent's "acts or omissions in breach or default of this Agreement" (*id.*, § 11, at 12).

The individual defendants seek dismissal of the claims against them on the ground that they are not, and never were, members of Crescent, and they did not receive any distribution of

the sales proceeds. They submit documentary evidence supporting this assertion (CPLR 3211 [a] [1]). They also seek dismissal of the fraudulent conveyance claims on the additional ground that plaintiff fails to plead fraud with particularity. They further argue that the claims are insufficient because they simply parrot the language in the statute and fail to contain any supporting facts. With respect to the wrongful distribution claim, again, they argue that they were not members of Crescent and that they did not receive any of the proceeds of the sale of the land.

Plaintiff cross-moves, in response to the individual defendants' motion, seeking permission to amend the complaint to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants (CPLR 1024), based on their identification by the individual defendants as the actual members of Crescent. It claims that it is not required to elect its remedies and may pursue its claim for unjust enrichment at the same time as its claim for breach of contract. It also argues that the documentary evidence does not establish that the individual defendants did not receive proceeds from the sale of the land, only that they were not members of Crescent.

DISCUSSION

The motions to dismiss by defendant Crescent and the individual defendants are granted, and the complaint is dismissed. Plaintiff's cross motion for summary judgment against Crescent on the first three causes of action is denied, and its cross motion to amend is also denied as moot.

Although on a motion to dismiss, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction, and "the facts as alleged in the complaint [are presumed] as true" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633 [1976]), "factual claims . . . flatly contradicted by documentary evidence are not entitled to such

consideration" (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991] [citations omitted], *appeal denied* 80 NY2d 788 [1992]; *see Quatrochi v Citibank, N.A.*, 210 AD2d 53, 53 [1st Dept 1994]). Moreover, a complaint should be dismissed if the facts alleged do not fit within any cognizable legal theory (*see e.g. 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 [1979]; *Callaghan v Goldsweig*, 7 AD3d 361, 362 [1st Dept 2004]). A motion pursuant to CPLR 3211 (a) (1) will be granted if the movant presents documentary evidence that "definitively dispose[s] of the claim" (*Demas v 325 West End Ave. Corp.*, 127 AD2d 476, 477 [1st Dept 1987]), or conclusively establishes a defense to the asserted claims as a matter of law (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). Here, even giving the complaint such a liberal construction, the Court, nevertheless, concludes that the License Agreement was not a promise by Crescent to build, it did not provide plaintiff with any remedy other than termination, and there was no breach of its provisions warranting dismissal of the breach of contract claim, as well as the other claims, many of which depend upon such a breach for their allegations.

The linchpin of this action is the first claim for breach of contract. In it, plaintiff asserts that the License Agreement obligated Crescent to design and build the Tower Property, market the condominium units for sale and pay plaintiff royalties, and that Crescent breached these obligations. This claim must be dismissed based on the clear and unambiguous language of the License Agreement and its purpose. Construction of an unambiguous contract is a matter of law appropriate for disposition by the Court (*see W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990]). In interpreting a contract, the Court must first look within the four corners of the document, and enforce it without recourse to parol evidence (*ABS Partnership v AirTran*

Airways, Inc., 1 AD3d 24, 29 [1st Dept 2003]). The parties' agreement should be read as a whole to determine its purpose and intent (*W.W.W. Assocs. v Giancontieri*, 77 NY2d at 162). It also should be construed as to give meaning and effect to all of its provisions (*id.*; *see American Express Bank Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1st Dept 1990], *appeal denied* 77 NY2d 807 [1991]). A contract does not become ambiguous just because the parties argue different interpretations (*see Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]). It should be construed and enforced according to its terms, particularly when it is drafted by "sophisticated and counseled business persons" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001]; *see also Cornhusker Farms, Inc. v Hunts Point Co-op. Mkt., Inc.*, 2 AD3d 201, 204 [1st Dept 2003]). The Court must interpret the contract, giving effect to the parties' expressed intentions and adopting an interpretation which gives effect to all of its provisions (*ABS Partnership v AirTran Airways, Inc.*, 1 AD3d at 28; *see also PNC Capital Recovery v Mechanical Parking Sys., Inc.*, 283 AD2d 268 [1st Dept], *lv dismissed* 96 NY2d 937 [2001], *appeal dismissed* 98 NY2d 763 [2002]).

The License Agreement is clear and unambiguous, and may be interpreted as a matter of law. First, as its title indicates, the agreement is a license agreement in which plaintiff agreed to allow Crescent to use the Trump Mark for a condominium building Crescent intended to build in Israel, and Crescent agreed to pay royalties for the use of the name (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d 204, 206 [1st Dept 2007], *lv dismissed* 10 NY3d 800 [2008] [court may look at headings in a contract to help interpret]). It did not obligate Crescent to build and market the condominium; it was simply a license arrangement (*see Long Island R. R. Co. v Northville Indus. Corp.*, 41 NY2d 455, 461-62 [1977] [license agreement was not an obligation

to construct and operate a pipeline]). The contract provisions support this interpretation. In the third "Whereas" clause, Crescent states, in relevant part, that it

> intends to (i) develop a building . . . on certain land . . . owned or to be acquired by [Crescent] in Ramat Gan, Israel . . . which upon completion of construction will include a first-class, luxury residential condominium component, . . . and, a retail component . . . ; (ii) design, develop, construct and operate the Tower Property . . . in the form of condominium ownership; and (iii) market, sell and/or lease the units

(OtSC, Ex B, at 1 [emphasis added]). Crescent agreed that it would perform these activities in accordance with the "Trump Standard," as that is defined in the agreement (*id.*). Contrary to plaintiff's contention, there is no language in this "Whereas" clause, or anywhere else in the agreement, in which Crescent promised to build, construct and operate the condominium. Instead, it just indicated that Crescent intended to do so and that, if it did, it would pay plaintiff royalties for the use of its name.

Section 3(a), relied upon by plaintiff, also does not constitute a promise by Crescent to build. That provision is entitled "Trump Standard; Trump Standard Default; Power of Attorney." This title itself indicates that it was addressing the quality of the building – that it was to be built according to the "Trump Standard" (*see Superb Gen. Contr. Co. v City of New York*, 39 AD3d at 206 [it is appropriate to look at headings in interpreting the parties' agreement]; *Beltrone Constr. Co. v State of New York*, 189 AD2d 963, 966 [3d Dept], *lv denied* 81 NY2d 709 [1993] [look at headings in interpreting agreement]).

Section 3, subsections a and b, provide that if the building is built, Crescent agrees to design and develop the property with the level of quality and luxury associated with a building known as the Akirov Building in Tel Aviv, Israel, referred to as the "Signature Property," and

maintain it with the standards followed by the Signature Property, then referred to as the "Trump Standard." Subsection c provides that plaintiff would be the sole judge of whether Crescent was maintaining the Trump Standard. Subsection d provides that plaintiff would at all times have access to, and the right to inspect the property. Subsection e indicates that Crescent would sign a Power of Attorney so that plaintiff could register the agreement with the Israeli governmental authority. Thus, all of section 3, read together, addresses the purpose of that section, to ensure quality control, that is, to make sure that if the property is to bear the Trump Mark, Crescent would maintain a certain level of quality and luxury commensurate with that of the Signature Property. Contrary to plaintiff's contention, none of these provisions constitute a promise by Crescent to build. As Crescent aptly argues, both plaintiff and Crescent were sophisticated and well-counseled business entities and if they had intended to create a promise by Crescent to build, they could have easily drafted such a provision. They did not, and the Court will not imply such a promise.

This interpretation makes sense when considering that, at the time that the contract was entered into, Crescent did not own all the property that was needed to build the project (*see* Compl, ¶17). In fact, Crescent did not acquire title to all of the constituent parcels constituting the land for the project until almost a year after the License Agreement was executed (*id.*). Moreover, as pled in the complaint, Crescent needed to obtain a zoning variance to be able to build the property as it intended – residential and some retail, and without office space (*id.*, ¶ 26).

Section 8, which provides for plaintiff's right to terminate the agreement, further supports the conclusion that this was a license agreement, not a promise to build. Specifically, in section

8(h) plaintiff is granted the right to terminate the agreement and the rights licensed thereunder, upon 10 days' written notice, if

> (h) The construction of the Building fails to commence within twenty-four (24) months from the date of this Agreement, unless such delay shall result from any strikes, lockouts or labor disputes, . . . or other events similar to the foregoing beyond the reasonable control of [Crescent] (collectively, "Unavoidable Delays") in which event such twenty-four (24) month period shall be deemed extended one (1) day for each day of Unavoidable Delay . . .

(OtSC, Ex B, § 8[h], at 11). Thus, if the construction does not begin within two years because of avoidable delays, that is, delays within Crescent's control, plaintiff could terminate the License Agreement and any rights licensed under it. The parties thus provided a remedy to plaintiff if Crescent failed to begin construction of the building – termination and revocation of the license. The other subsections of Section 8 provide additional situations under which plaintiff could terminate the license, such as Crescent's bankruptcy, insolvency, the building is destroyed by fire, the property is taken by condemnation or eminent domain and closings for at least 70% of the units have not taken place within 40 months (*id.*, at 10-11). Finally, in subsection l, the parties provided that, notwithstanding the termination of the agreement, plaintiff would still be entitled to royalties that accrued prior to the termination (*id.*, § 8[l]). Section 8 clearly provides, therefore, that in the event of plaintiff's termination of the agreement, for example, for failure to begin construction based on avoidable delay by Crescent, plaintiff's remedies were termination and royalties that accrued prior to such termination. It does not provide, as plaintiff seeks here, damages for windfall profits if the land were sold and the construction permit was never issued. Again, if the parties, who were sophisticated business entities, sought to include a liquidated damages provision, or a provision that failure to begin construction would be a breach or default

under the agreement, they could have so provided, but they did not. The Court will not write a new agreement for the parties under the guise of contract interpretation.

Section 14, entitled "Representations and Warranties: Covenants," sets forth the representations of both parties. In subsection b, referring to Crescent's representations, Crescent makes representations about its corporate standing and its ability to enter into the agreement. There is, however, no covenant that Crescent was covenanting or promising to build, or promising to use good faith efforts to build.

Section 9, relied upon by plaintiff, does not conflict with this interpretation. Section 9, entitled "Licensee's Termination," provides Crescent with a reciprocal right to termination. It states that, "[n]otwithstanding anything to the contrary herein, including but not limited to Paragraph 7 (b)," regarding plaintiff's default and time to cure, Crescent has the absolute right to terminate if the building is taken in condemnation or eminent domain, or if before 70% of the units are sold, Donald Trump dies, goes into bankruptcy, is no longer a principal of plaintiff, or is convicted of a felony (*id.*, § 9, at 11-12). Like Section 8, it limits Crescent to the right to terminate as its remedy. The provision cannot be construed as a promise to build, or an agreement that Crescent could not terminate based on its own failure or inability to construct the building. It further supports the reading that the parties had a reciprocal right to terminate, and that the only damages which naturally flowed from breach and which were contemplated were royalties to plaintiff if they had accrued prior to termination (*see Kenford Co. v County of Erie*, 73 NY2d 312, 319-22 [1989][unusual or extraordinary damages limited to those in parties' contemplation]).

Plaintiff's argument that under Crescent's interpretation, the restrictive covenant in

Section 1 of the License Agreement requires plaintiff to continue not to use the New Trump Mark in the relevant area for 3 ½ years, even after the land was sold, fails to take into account all of the language in that section. In subsection g of Section 1, the first clause provides that "provided that . . . this Agreement is in full force and effect," then plaintiff is required to abide by the restrictive covenant (*id.*, § 1[g], at 4). It is apparent that when the land was sold to a third party, the License Agreement was no longer in full force and effect and, therefore, plaintiff was not still subject to the restrictive covenant therein.

Section 7 (b) fails to provide support for plaintiff's reading of the agreement. It simply provides that if plaintiff is in default in any of its material obligations, and the default is not cured within 30 days after notice, then Crescent may terminate the agreement. It has nothing to do with any promise to build, or the situation where there is no building and construction has not commenced. Similarly, Section 4, like Section 3, is all about meeting the Trump Standard by submitting plans and specifications. It does not include a promise or covenant by Crescent to build. Section 6 simply provides that the term of the agreement "shall end on the first to occur of: (i) the expiration or earlier termination of this Agreement, as provided herein or (ii) the day upon which the Tower Property shall no longer be known by the New Trump Mark" (*id.*, § 6, at 9). This, like the other sections relied upon by plaintiff, cannot be construed to convert this agreement from purely a license agreement into a promise by Crescent to build the building.

In *Long Island R.R. Co. v Northville Indus. Corp.* (41 NY2d 455), the Court of Appeals considered and rejected a similar argument that a license agreement, regarding the installation and use of an oil pipeline along plaintiff's right of way, obligated the defendant to construct the oil pipeline. In the parties' agreement, which was characterized in the agreement as a license

agreement, the plaintiff railroad granted the defendant the right and privilege to construct, install, use, operate and maintain a pipeline along the plaintiff's right of way. The defendant agreed to pay the railroad $10,000 in advance, during which the defendant would procure the necessary consents, permits or other authority and construct the pipeline and, after construction or a three-year period had passed, then defendant would pay a certain fee based on the size of piping or the output, with a guaranteed minimum of $20,000 per year. The agreement provided for cancellation rights by the defendant within the first three years and, by the railroad, if defendant did not complete at least half of the pipeline during that three-year period. The Court held that the express terms of the agreement did not obligate the defendant to construct and operate a pipeline along the railroad's right of way. "The agreement was purely and simply a license arrangement" (*id.* at 461). It found that to construe the various portions of the agreement in such a way as "to place an obligation on Northville to exercise the privilege granted to it, as urged by the railroad, would be contrary to the obvious intention of the parties as expressed therein" (*id.*). The Court further rejected the railroad's argument, similar to plaintiff's argument in the instant case, that even in the absence of an express contractual requirement to build the pipeline, defendant should be impliedly obligated to construct, operate and maintain a pipeline (*id.*). It found that the agreement "manifests that had such an obligation been intended, it would have been expressed" (*id.* at 462).

Similarly, here, the agreement was purely a license agreement, as its name implies. The agreement states that Crescent "intends to build," and never indicates that it promised to build. It makes sense that there was no promise to build since Crescent did not yet own the parcels of land, or have the approvals required to build the condominium it was intending to build. To

construe the provisions plaintiff relies upon to obligate Crescent to build would be contrary to the intention of the parties as expressed in the License Agreement (*see id.*). Moreover, plaintiff's argument that even if there was not an express requirement in the agreement to build, Crescent should be impliedly obligated to construct the building is rejected. As in the *Northville* case, this agreement manifests that had such an obligation been intended, it would have been expressed in the License Agreement.

Therefore, the License Agreement does not obligate Crescent to build, and plaintiff cannot assert the failure to build as a breach of the agreement. Accordingly, there is no breach of contract, warranting dismissal of the first cause of action.

The second cause of action, for breach of the implied duty of good faith and fair dealing also is dismissed. Plaintiff alleges that Crescent breached such duty by selling the land without having built the building, thereby frustrating the purpose of the License Agreement, depriving plaintiff of the benefit of the bargain and reaping a windfall profit (Compl, ¶¶ 42-43). It is well-established that a claim for breach of the covenant of good faith and fair dealing cannot survive if it only substitutes for a failed breach of contract claim (*see Phoenix Capital Investments LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008] [breach of implied duty of good faith claim is invalid substitute for nonviable breach of contract calim]; *TeeVee Toons, Inc. v Prudential Sec. Credit Corp., L.L.C.*, 8 AD3d 134, 134 [1st Dept 2004] [affirming dismissal of claim for breach of covenant of good faith, because it was redundant of breach of contract claim]; *Triton Partners LLC v Prudential Sec. Inc.*, 301 AD2d 411, 411 [1st Dept 2003] [affirming dismissal of breach of the implied covenant claim where it was "merely a substitute for a nonviable breach of contract claim"]). Plaintiff, here, has failed to allege a breach of the License

Agreement, or any damages flowing from such a breach. Therefore, its implied duty of good faith claim based on the same allegations must be dismissed (*see Empire State Bldg. Assocs. v Trump*, 247 AD2d 214, 214 [1st Dept], *lv dismissed in part, denied in part* 92 NY2d 885 [1998] ["The causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing were properly dismissed on the grounds that the former fails to adequately allege any breach of contract, and the latter merely duplicates the former"]; *accord Engelhard Corp. v Research Corp.*, 268 AD2d 358, 359 [1st Dept 2000] [breach of implied covenant claim dismissed as redundant of breach of contract claim]; *Business Networks of New York, Inc. v Complete Network Solutions Inc.*, 265 AD2d 194, 195 [1st Dept 1999] [same]).

In addition, "[a] cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is 'intrinsically tied to the damages allegedly resulting from a breach of the contract'" (*Hawthorne Group, LLC v RRE Ventures*, 7 AD3d 320, 323 [1st Dept 2004], quoting *Canstar v J.A. Jones Constr. Co.*, 212 AD2d 452, 453 [1st Dept 1995]). Here, that intrinsic tie is apparent on the face of the complaint, where it seeks the identical damages sought in the breach of contract claim of not less than $45 million. Accordingly, plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

The third cause of action, a contractual indemnification claim, is dismissed. This claim is based on Section 11 of the License Agreement, which provides that Crescent agreed to indemnify, defend, and hold harmless plaintiff, from and against any and all causes of action "arising in whole or in part, directly or indirectly, out of (i) Licensee's . . . acts or omissions in breach or default of this Agreement" (OtSC, Ex B, § 11, at 12). As determined above, there was

no breach of this agreement by Crescent's failure to build on the Tower Property. Therefore, there is no basis on which to seek indemnification. The Court also notes that this indemnification provision was not "unmistakably clear," or "exclusively or unequivocally referable to claims between the parties themselves" (*see Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 492[1989]).

The fourth cause of action for unjust enrichment, asserted against Crescent and the individual defendants is dismissed. It is well-settled that where there is a valid and binding contract governing the subject matter of the parties' dispute, recovery for unjust enrichment for events arising out of the same subject matter is precluded (*see Apfel v Prudential-Bache Secs.*, 81 NY2d 470, 478-79 [1993]; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 388 [1987]; *Vitale v Steinberg*, 307 AD2d 107, 111 [1st Dept 2003] [the agreement governs the subject of the dispute, and also bars the claims against the individual defendants even though they were not signatories to that agreement]; *Surge Licensing, Inc. v Copyright Promotions Ltd.*, 258 AD2d 257, 258 [1st Dept 1999]). Here, the License Agreement governs the subject matter of the dispute over whether Crescent was obligated to build the condominium.

The fifth, sixth, and seventh causes of action, asserted against all the defendants and seeking recovery for fraudulent conveyances (constructive and actual fraud) and attorneys' fees under Debtor and Creditor Law §§ 273-276 and 276-a, all are dismissed. These claims assert that the distribution of the net proceeds of Crescent's sale of the Tower Property to the individual defendants was a conveyance to avoid Crescent's debt to plaintiff. These claims, however, are based on plaintiff's assertion that it is a creditor of Crescent because of Crescent's breach of the License Agreement. As determined above, there was no breach of that agreement by Crescent's

sale of the land, and there is no basis for indemnification under that agreement as well. Therefore, plaintiff cannot establish itself as a creditor of Crescent, and the fraudulent conveyance claims fail (*see Salovaara v Eckert*, 6 Misc 3d 1005[A], 2005 NY Slip Op 50010 [U] *9 [Sup Ct, NY County 2005, Lowe, J.], *affd as mod on other grounds* 32 AD3d 708 [1st Dept 2006]). The Court also notes that the individual defendants have submitted documentary evidence demonstrating that they were not members of Crescent, and that they did not receive the sale proceeds, providing an additional basis for dismissal of these claims against them.

Finally, the eighth cause of action for wrongful distribution is also dismissed, because it is based on the allegations that there was a breach of the License Agreement by the sale of the property and that the distribution of those proceeds was wrongful. Again, as determined above, there was no obligation by Crescent to build, and its sale of the property did not breach the License Agreement. Thus, there is no basis for a wrongful distribution claim.

The Court has considered the plaintiffs's remaining arguments, and considers them to be without merit.

In light of the above, plaintiff's cross motion for summary judgment in its favor on the first three causes of action is denied. In addition, its cross motion to amend to add Crescent Heights Diamond Holdings, LLC and CH International Holdings, LLC as defendants in this action on the ground that they are members of defendant Crescent and, as such, are liable on the fraudulent conveyance and wrongful distribution claims, is denied. As stated above, there is no basis for those causes of action because plaintiff has failed to plead a breach of the License Agreement and has not shown that it is a creditor of Crescent.

Accordingly, it is

ORDERED that the motion to dismiss by defendant Crescent Heights Diamond, LLC is granted, and the complaint as against defendant Crescent Heights Diamond LLC is dismissed with costs and disbursements to defendant Crescent as taxed by the Clerk of the Court; and it is further

ORDERED that the motion to dismiss by defendants Sonny Kahn, Russell W. Galbut, and Bruce A. Menin is granted, and the complaint is dismissed as against these defendants with costs and disbursements to these individual defendants Kahn, Galbut, and Menin as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the plaintiff's cross motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's cross motion to amend is denied.

Dated: December 22, 2008

ENTER:

J.S.C.

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

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TRUMP MARKS LLC,

Plaintiff,

Index No.: 601372/08

-against-

CRESCENT HEIGHTS DIAMOND, LLC, SONNY KAHN, an individual, RUSSELL W. GALBUT, an individual, BRUCE A. MENIN, an individual, each said individual being a member of Crescent Heights Diamond, LLC, and THOSE UNKNOWN INDIVIDUALS AND/OR UNKNOWN ENTITIES CONSTITUTING THE REMAINING MEMBERS OF CRESCENT HEIGHTS DIAMOND, LLC,

Defendants.

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NOTICE OF APPEAL

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(212) 655-3500

To

Service of a copy of the within is hereby admitted.

Dated: .....

Attorney(s) for .....