2013 NY Slip Op 30368(U)

TONY LEECH, BRIAN INERFELD, and PROTOCOL PICTURES, INC., Plaintiffs,

v.

THE WEINSTEIN COMPANY, LLC, RAINMAKER ENTERTAINMENT INC., ESCAPE PRODUCTIONS INC., and JTM ESCAPE COMPANY LIMITED, Defendants.

Docket No. 650563/11, Mot. Seq. Nos. 006, 008.

Supreme Court, New York County.

Submitted October 15, 2012.

February 4, 2013.

Peter Schalk, Esq., Judd Burstein, Esq., Judd Burstein, P.C., 1790 Broadway, New York, NY 10019, 212-974-2400, For Plaintiffs.

Motty Shulman, Esq., Joseph Kroetsch, Esq., James Ostaszewski, Esq., Boies, Schiller & Flexner LLP, 333 Main St. Armonk, NY 10504, 914-749-8200, For Defendants.

DECISION AND ORDER

BARBARA JAFFE, Judge.

By notice of motion dated February 12, 2012, defendant JTM Escape Company Limited (JTM) moves pursuant to CPLR 3212 for an order granting it summary dismissal of the complaint against it. Plaintiffs oppose, and by notice of motion dated March 2, 2012, move pursuant to CPLR 3025 for an order granting them leave to amend their complaint. Defendants oppose. The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

On or about January 28, 2006, plaintiffs and defendant The Weinstein Company, LLC (TWC) entered into an agreement related to the production of a film entitled *Escape from Planet Earth* (film agreement) with, as pertinent here, plaintiffs receiving contingent compensation, or "back end" compensation. There is no provision granting them an interest in the film's rights or profits. The parties otherwise agreed however, that "if the picture is not greenlit (which means that TWC commits to unconditionally finance the picture) . . . then all rights revert [to plaintiffs]." In paragraph 10, the parties agreed that the film agreement

would be governed by California law. (Affidavit of Marvin Peart, dated Jan. 18, 2012 [Peart Affid.], Exh. B).

Thereafter, TWC sought financing for the film, and on April 17, 2010, with two non-parties, Escape Films TWC, LLC (Escape Films) and Weinstein Global Film Corp. (Weinstein Global), entered into a Funding and Security Agreement with JTM by which JTM agreed to provide financing for the film (security agreement). As consideration for JTM's funding obligations, TWC agreed to pay JTM 25 of the film's gross receipts and 100 percent of all foreign gross receipts. As pertinent here, the security agreement also provides that:

In order to secure the obligations of TWC that would trigger an Event of Default, TWC and Weinstein Global hereby grant JTM a continuing first priority senior security interest in all of TWC's and Weinstein Global's respective right, title and interest in all of TWC's and Weinstein Global's now owned or hereafter acquired personal property and interests in personal property relating to the film (the "Collateral"). Without in any way limiting the generality of the foregoing, the Collateral shall specifically include . . .

xiv. All proceeds of, products of, or accessions or additions to, any and all of the foregoing Collateral.

(*Id.,* Exh. A).

The security agreement references the existence of the film agreement, providing that: "JTM hereby approves payment of the contingent compensation as set forth in [the film agreement])." The security agreement also includes a provision that it is governed by and construed in accordance with California law. (*Id.*).

On June 16, 2010, JTM perfected its security interest by filing UCC Financing Statements with the Delaware Department of State. Each Statement describes the collateral as follows:

All of Debtor's right, title and interest of every kind and nature whatsoever, wherever located or situated and whether now owned, presently existing or hereafter acquired or created, in and to that certain motion picture currently entitled "Escape From Planet Earth" (by whatever title such motion picture may hereafter become known), based on the screenplay dated July 8, 2006 and written by [plaintiffs], and all other collateral more thoroughly described in Schedule A attached hereto and incorporated herein by this reference.

The debtors listed are TWC, Escape Films, and Weinstein Global. (*Id.,* Exhs. C, D, E).

The film was never completed or released. On or about March 2, 2011, plaintiffs commenced the instant action, seeking as to JTM a declaratory judgment, alleging as follows:

(1) Plaintiffs contend that their contractual rights to share in the profits from [the film] are superior to JTM's alleged security interest in the profits from the film;

(2) Upon information and belief, JTM does not recognize that Plaintiffs' contractual rights to share in the profits from [the film] are superior to JTM's alleged security interest;

(3) A justiciable controversy has therefore arisen as to whether JTM's alleged security interest is superior to Plaintiffs' contractual rights to share in the profits from [the film];

(4) Plaintiffs have no adequate remedy at law and the equities favor them; and

(5) Plaintiffs are therefore entitled to a judicial declaration that Plaintiffs' contractual rights to share in the profits from [the film] are superior to JTM's alleged security interest.

Plaintiffs also allege, as pertinent here, that pursuant to the film agreement, they are entitled to at least 20 percent of the film's adjusted gross profit. (*Id.,* Exh. F).

In its answer, JTM contends that as the security agreement references its approval of the payment of profits to plaintiffs as set forth in the film agreement, there is no inconsistency between its rights under the security agreement and plaintiffs' claimed rights under the film agreement. (*Id.,* Exh. G).

II. MOTION FOR SUMMARY JUDGMENT

A. Contentions

JTM argues that no actual dispute or justiciable controversy exists between it and plaintiffs as plaintiffs' claim that JTM does not acknowledge their contractual rights to the film is baseless given JTM's approval of the contingent compensation provision in the film agreement. They maintain that there is nothing inconsistent between the parties' asserted rights as plaintiffs claim entitlement to 20 percent of the film's adjusted gross profit and JTM is entitled to 25 percent of the film's gross receipts, equaling less than 100 percent of the profits, and thus there should be funds to pay both of them. (Mem. of Law, dated Feb. 15, 2012 [Feb. Mem.]).

Moreover, JTM argues that even if there is a justiciable controversy, it is too remote and unlikely to warrant declaratory relief, as any controversy as to whose rights are superior arises only if: (1) the film is released; (2) the film earns enough money to entitle plaintiffs to the contingent compensation; (3) TWC fails to pay plaintiffs the compensation; and (4) TWC instead pays JTM the compensation. As the film has not been completed or released, JTM maintains that it is highly likely that no actual dispute will ever arise. (*Id.*).

JTM also contends that, in any event, its perfected security interest is superior to plaintiff's claimed interest as the film agreement grants them no security interest in any of the film proceeds but entitles them to compensation only if the contingency is met. Thus, plaintiffs may not sue JTM for money allegedly owed by TWC and cannot enforce their rights against a third party such as JTM. (*Id.*).

Plaintiffs argue that their rights under the film agreement conflict with JTM's rights under the funding agreement, and that as the film will likely be released, a dispute as to the parties' respective rights will likely arise. They also contend that JTM's assertion that its rights are superior to plaintiffs' undercuts its argument that there is no justiciable controversy. In the alternative, plaintiffs assert that their proposed amendment of their complaint to add a cause of action for tortious interference renders moot JTM's arguments. (Mem. of Law, dated May 8, 2012).

According to plaintiffs, there exists additional discovery materials which may be helpful in opposing JTM's motion, such as communications between the parties, including but not limited to internal JTM and TWC communications concerning the agreements at issue, as well as depositions of JTM and TWC principals and employees. (Affirmation of Peter B. Schalk, Esq., dated May 8, 2012 [Schalk Aff.]).

B. Analysis

A cause of action for a declaratory judgment requires that an actual and justiciable controversy exists between the parties. (CPLR 3001; 43 NY Jur 2d, Declaratory Judgments § 21 [2012]). Absent a genuine dispute, such as one involving a right that is clear and not attacked or is conceded by the defendant, the court is precluded as a matter of law from issuing a declaratory judgment. (43 NY Jur 2d, Declaratory Judgments § 22). Moreover, there is no justiciable controversy premised upon the occurrence of a future event beyond the parties' control which may not occur. (*Id.* at § 28; *Cuomo v Long Is. Light Co.,* 71 NY2d 349 [1988]). "The threat of a hypothetical, contingent, or remote prejudice to a party does not represent a justiciable controversy." (*Enlarged City School Dist. of Middletown v City of Middletown,* 96 AD3d 840 [2d Dept 2012]). A dispute matures into a justiciable controversy when a party receives notice that another party is repudiating his or her rights. (*Zwarycz v Marnia Constr., Inc.,* ___ NYS2d ___, 2013 NY Slip Op 00201 [2d Dept 2013]).

Here, plaintiffs seek a declaration that their rights to profits from the film are superior to those of JTM's even though the film has not yet been developed and no profits have been earned. Consequently, the issue of who has superior rights to those profits depends on future events that may never occur, especially since plaintiffs and defendants have ceased working together on the film and plaintiffs' right to compensation is, in any event, contingent on various factors, such as the amount of profits earned, TWC's failure to pay them their alleged share of the profits, and TWC's payment of the profits to JTM.

Similarly, in *Estate of Brown v Pullman Group,* the Appellate Division, First Department, held that a lender's claim for a declaration that a proposed financing transaction between a performer and third party, if consummated, would have breached the agreement the lender had with the performer, did not present a justiciable controversy as the financing transaction did not go forward and was abandoned. (60 AD3d 481 [1st Dept 2009], *lv denied* 13 NY3d 789; *see eg ABN Amro Bank, N.V. v MBIA Inc.,* 81 AD3d 237 [1st Dept 2011], *affd on other grounds* 17 NY3d 208 [plaintiffs sought judgment declaring that if other parties defaulted in

future on plaintiffs' insured securities, they could look to defendants to satisfy their insurance claims; in essence, plaintiffs sought advisory opinion premised on future events not in defendants' control and thus speculative and not the proper subject of declaratory judgment claim]; *Bolt Assocs. v Diamonds-In-The-Roth, Inc.,* 119 AD2d 524 [1st Dept 1986] [plaintiffs sought judgment to determine whether revenues received from tenants would be subject to certain classification once premises were converted to cooperative; as conversion had not yet occurred and may never occur, conversion itself and potential revenues were hypothetical and there was no justiciable controversy]; *see also Sutton Madison, Inc. v 27 E. 65*th *St. Owners Corp.,* 68 AD3d 512 [1st Dept 2009] [claim for declaratory judgment dismissed as moot as relief sought would become effective only upon occurrence of future event that may not occur]; *Town of Coeymans v City of Albany,* 237 AD2d 856 [3d Dept 1997], *lv denied* 90 NY2d 803 [claim seeking declaration as to validity of local laws related to construction of landfill dismissed as premature as there was high degree of uncertainty whether construction would ever occur]; *Charney v N. Jersey Trading Corp.,* 172 AD2d 390 [1st Dept 1991] [there was no justiciable controversy where shareholder sought to settle dispute over ownership of shares when ownership was not yet in dispute]; *see also Uhlfelder v Weinshall,* 47 AD3d 169 [1st Dept 2007] [declaratory relief premature as application for new license may not be granted, and even if granted, applicant would not necessarily be subject to specific requirement at issue]).

Absent any specifics as to the discovery sought relating to their claim, there is no basis for denying JTM's motion pursuant to CPLR 3212(f). (*See Nascimento v Bridgehampton Constr. Corp.,* 86 AD3d 189 [1st Dept 2011] [defendant failed to set forth basis for claim that further discovery would lead to additional relevant evidence]). And, that JTM addressed, in the alternative, the merit of plaintiffs' claim does not constitute an admission that it is justiciable.

III. MOTION TO AMEND AS TO JTM

A. Contentions

Plaintiffs seek leave to amend their complaint to add a claim against JTM for tortious interference with contract against JTM based on the facts set forth in their cause of action for a declaratory judgment in addition to their allegation that the film agreement is an enforceable contract between TWC and them and thus, JTM tortiously interfered with it, thereby causing them to suffer damages. (Affirmation of Peter B. Schalk, Esq., dated Mar. 2, 2012 [Schalk Mar. Aff.], Exh. A). They assert that JTM was aware of the film agreement before it entered into the funding agreement with TWC, and thus knew that under its terms, if TWC did not unconditionally finance the film, the rights in the film would revert to plaintiffs. As JTM nevertheless decided to finance TWC in exchange for receiving a secured interest in the film's profits, it thereby caused TWC to breach the film agreement by entering into the finding agreement and rendering their reversionary rights secondary to JTM's secured interest in the film. (Mem. of Law, dated Mar. 2, 2012 [March Mem.]).

According to defendants, there is nothing in the film agreement that prohibits TWC from borrowing money to fund the film, as its obligation to "unconditionally finance" does not limit it in terms of how the film would be financed. They observe that there is no allegation or evidence that JTM induced or intentionally procured TWC's alleged breach, that JTM's mere awareness of the film agreement is insufficient, and that it is undisputed that TWC approached JTM to provide financing, not the other way around. (Mem. of Law, dated May 8, 2012 [May Mem.]).

In reply, plaintiffs contend that the phrase "unconditionally finance" is ambiguous and that extrinsic evidence may be used to discern its meaning, and that they need not show that JTM intentionally induced TWC's breach but only that its agreement with TWC breached TWC's agreement with plaintiffs. (Reply Mem., dated May 23, 2012 [Reply Mem.]).

B. Analysis

Pursuant to CPLR 3025(b), a party may amend its pleading at any time by leave of the court, which is "freely given upon such terms as may be just including the granting of costs and continuances." (*Murray v City of New York,* 43 NY2d 400, 404-405 [1977], *rearg dismissed* 45 NY2d 966 [1978]; *Lanpont v Savvas Cab Corp., Inc.,* 244 AD2d 208, 209 [1st Dept 1997]). The factors the court must consider in exercising its discretion are whether the proposed amendment would "surprise or prejudice" the opposing party (*Murray,* 43 NY2d at 405; *Lanpont,* 244 AD2d at 209, 211; *Norwood v City of New York,* 203 AD2d 147, 148 [1st Dept 1994], *lv dismissed* 84 NY2d 849), and whether such amendment is meritorious (*Thomas Crimmins Contracting Co., Inc. v City of New York,* 74 NY2d 166, 170 [1989] ["Where a proposed defense plainly lacks merit, however, amendment of a pleading would serve no purpose but needlessly to complicate discovery and trial, and the motion to amend is therefore properly denied."]; *Ancrum v St. Barnabas Hosp.,* 301 AD2d 474, 475 [1st Dept 2003] [same]).

The elements of a cause of action for tortious interference of contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of that contract, (3) the defendant's intentional procurement of the third party's breach of that contract, and (4) damages. (*Chung v Wang,* 79 AD3d 693, 694 [2d Dept 2010]).

Although the first two elements of the claim have been met here, whether TWC breached the film agreement and whether JTM intentionally caused it to do so are in issue.

The term "unconditionally finance" is not defined in the film agreement, and the parties offer competing plausible interpretations of its meaning. Consequently, the term is ambiguous. (*See County of Suffolk v Long Is. Power Auth.,* 100 AD3d 944 [2d Dept 2012] [where contract language is susceptible to more than one reasonable interpretation, it is considered ambiguous]; *see also TIG Premier Ins. Co. v Hartford Acc. & Indem. Co.,* 35 F Supp 2d 348 [SD NY 1999] [pursuant to California law, even if contract appears unambiguous on its face,

ambiguity may be exposed by extrinsic evidence which reveals more than one possible meaning to which language of contract is reasonably susceptible]).

As the term is ambiguous, it may not be resolved here whether TWC breached the film agreement by obtaining financing from JTM. (*See eg Wachter v Kim,* 82 AD3d 658 [1st Dept 2011] [as term in contract was ambiguous, court erred in dismissing breach of contract cause of action]; *Telerep, LLC v U.S. Intern. Media, LLC,* 74 AD3d 401 [1st Dept 2010] [as contracts were ambiguous, claim for tortious interference of contract should not have been dismissed absent development of full factual record]).

However, a claim of tortious interference with a contract also requires a showing that the third-party's interference was improper and/or intentional. (NY Prac, Torts § 3:15 [2012]). Here, plaintiffs allege only that JTM's agreement with TWC to fund the film, in and of itself, caused TWC to breach the film agreement, not that JTM acted improperly or intentionally to procure TWC's breach of the Agreement. (See Restatement [Torts] § 766[n] ["One does not induce another to commit a breach of contract with a third person under the rule stated in this Section when he merely enters into an agreement with the other with knowledge that the other cannot perform both it and his contract with the third person"]).

In a case factually similar to this one, in *AJW Partners, LLC v Admiralty Holding Co.,* the Appellate Division, First Department, held that the plaintiffs failed to state a claim for tortious interference with contract against defendant Admiral Holding Company based on allegations that the Company knew of plaintiffs' security agreements with another defendant but nevertheless entered into a license agreement with the other defendant, despite knowing that the license agreement would constitute a breach of the security agreements between the plaintiffs and the Company. (93 AD3d 486 [1st Dept 2012]; *see also Weiss v Lowenberg,* 95 AD3d 405 [1st Dept 2012] [complaint did not allege that defendant intentionally procured breach of contract]; *Susan D. Fine Enter., LLC v Steele,* 61 AD3d 518 [1st Dept 2009] [same]; *Beecher v Feldstein,* 8 AD3d 597 [2d Dept 2004] [to impose liability for tortious interference, defendant must induce or intentionally procure breach and not merely have knowledge of contract's existence]).

Moreover, an essential element of a tortious interference claim is that the breach of contract would not have occurred but for the defendant's activities (*Cantor Fitzgerald Assocs., L.P. v Tradition N. Am., Inc.,* 299 AD2d 204 [1st Dept 2002], *lv denied* 99 NY2d 508 [2003]), and as it is undisputed here that TWC sought financing from the film from other sources and that it approached JTM, not vice versa, there is no evidence that TWC's alleged breach would not have occurred but for JTM's actions. (*See* NY Prac, Contracts § 21:48 [2012] [if defendant's acts did not procure and were merely incidental to breach, tortious interference claim fails]; *Ferrandino & Son, Inc. v Wheaton Builders, Inc., LLC,* 82 AD3d 1035 [2d Dept 2011] [plaintiff must specifically allege that contract would not have been breached but for the third party's conduct; claim dismissed as plaintiff merely asserted in conclusory manner that party's actions caused other party to breach contract and failed to allege that but for third party's actions, contract would not have been breached]; *Cantor Fitzgerald Assocs., L.P.,* 299 AD2d at 204 [while three of plaintiff's employees breached employment contracts

and went to work for defendant and defendant knew of contracts, evidence showed that employees were determined to breach contracts and leave plaintiff's employ and actively sought new employment before defendant's involvement]).

For all of these reasons, plaintiffs have failed to establish that their proposed claim against JTM for tortious interference with contract is meritorious. (*Fidelity and Deposit Co. of Maryland v Levine, Levine & Meyrowitz, CPAs, P.C.,* 66 AD3d 514 [1st Dept 2006] [leave to amend is properly denied where proposed amendment lacks merit and is legally insufficient]).

IV. MOTION TO AMEND AS TO OTHER DEFENDANTS

A. Breach of the production services agreement (PSA) and of the implied covenant of good faith and fair dealing related to the PSA

Plaintiffs assert that as part of the discovery exchange in this matter, defendants provided a copy of a Production Services Agreement (PSA) between TWC and Escape Productions, which is a wholly-owned subsidiary of Rainmaker Entertainment, Inc. (Rainmaker), and that the agreement provides them with third-party beneficiary rights to a portion of the money payable by TWC to Rainmaker. They thus seek to amend their complaint to add claims for breach of the PSA and breach of the implied covenant of good faith and fair dealing relating to the PSA against TWC and Rainmaker. (March Mem.).

In the proposed amended complaint, plaintiffs allege that they are third-party beneficiaries of the PSA and that TWC and Escape Productions actions breached their obligations to them under it (breach of contract claim), and that the actions of TWC, Escape Productions, and Rainmaker destroyed, frustrated, and injured their right to receive benefits under the PSA and that they have been damaged in an amount to be determined at trial (breach of the covenant of good faith and fair dealing claim). As to both claims, plaintiffs seek to pierce Rainmaker's corporate veil. (Schalk Mar. Aff., Exh. A).

Defendants maintain that plaintiffs' new allegations are impermissibly vague as they fail to identify any details regarding the contractual duties that were allegedly breached, that plaintiffs are not third-party beneficiaries of the PSA absent any grant therein of rights other than those set forth in the film agreement, and that plaintiffs' claims in seeking to pierce Rainmaker's corporate veil are conclusory and meritless. They observe that TWC was entitled to enter into the film agreement with plaintiffs to produce the film and to enter into the PSA with Escape Productions to provide the animation for the film, and that simply because plaintiffs were hired to produce the film does not mean that they are third-party beneficiaries of any other agreement related to the film. (May Mem.).

In reply, plaintiffs argue that the PSA evinces an intent to benefit them, and that their allegations are sufficient to pierce the corporate veil. (Reply Mem.).

Here, plaintiffs fail to specify what duties were owed it under the PSA, how the PSA was breached, and how they have been damaged. (*See Marino v Vunk,* 39 AD3d 339 [1st Dept 2007] [vague and conclusory allegations insufficient to sustain breach of contract cause of action]; *Is. Surgical Supply Co. v Allstate Ins. Co.,* 32 AD3d 824 [2d Dept 2006] [complaint properly dismissed as allegations were vague, conclusory and indefinite as to alleged breaches of contracts]; *Krouner v Travis,* 290 AD2d 917 [3d Dept 2002] [motion to amend to add breach of contract claim properly denied as plaintiff offered only conclusory allegations to support claims and demonstrate their merits]). They also fail to allege, other than conclusorily, that the PSA was intended to benefit them. (*Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173 [2011] [plaintiff must establish existence of valid and binding contract between other parties, that contract was intended for its benefit, and that benefit to it is sufficiently immediate to indicate that contracting parties assumed duty to compensate plaintiff if benefit lost]; *Levine v Harriton & Furrer, LLP,* 92 AD3d 1176 [3d Dept 2012] [no contract in retainer agreement indicating that it was intended to furnish defendant with any benefit other than legal fees that might incidentally be gained and nothing supported assumption of duty to compensate it if fees were not gained]; *IMS Engineers-Architects, P.C. v State,* 51 AD3d 1355 [3d Dept 2008], *lv denied* 11 NY3d 706 [claimant failed to identify any provision in contracts that contains language evincing intent to benefit it beyond its status as incidental beneficiary]; *Regatta Condominium Assn. v Vil. of Mamaroneck,* 303 AD2d 739 [2d Dept 2003] [plaintiff pleaded no facts or circumstances that would support finding that it was more than mere incidental beneficiary of contract]; *LaSalle Nat. Bank v Ernst & Young LLP,* 285 AD2d 101 [1st Dept 2001] [non-party to contract must be intended, and not merely incidental, beneficiary and parties' intent to benefit it must be apparent from face of contract]).

Plaintiffs' allegations are also insufficient to state a claim to pierce Rainmaker's corporate veil absent any substantial claim that Rainmaker used its domination over Escape Productions to commit a fraud or wrong against plaintiffs, resulting in their injury, especially in light of plaintiffs' failure to allege sufficiently how the PSA was breached. (*See E. Hampton Union Free School Dist. v Sandpebble Builders, Inc.,* 16 NY3d 775 [2011] [motion to amend correctly denied as plaintiff failed to allege any facts indicating that corporate owner engaged in acts amounting to abuse or perversion of corporate form]; *Cobalt Partners, LP v GSC Cap. Corp.,* 97 AD3d 35 [1st Dept 2012] [in order to pierce corporate veil, party must show that company's owner exercised compete domination of company in respect to transaction at issue and that such domination was used to commit fraud or wrong against plaintiff that resulted in plaintiff's injury]; *Albstein v Elany Contr. Corp.,* 30 AD3d 210 [1st Dept 2006], *lv denied* 7 NY3d 712 [plaintiff did not allege sufficiently that corporate form was used to commit fraud against her]).

Plaintiffs have thus failed to establish that these proposed claims are meritorious.

B. Removal of declaratory judgment claim related to $500,000 payment

Plaintiffs also seek to withdraw their prayer for a declaratory judgment related to a $500,000 payment made to it by TWC, in light of TWC's apparent decision not to seek to recoup that payment in this action. (March Mem.). This aspect of the motion is not opposed.

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that JTM Escape Company Limited's motion for summary judgment is granted, and the complaint is dismissed as against said defendant with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly; it is further

ORDERED, that plaintiffs' motion for leave to amend the complaint is granted except as to their proposed claim for tortious interference with contract against JTM Escape Company Limited and claims against defendants for breach of contract and breach of the covenant of good faith and fair dealing related to the Production Services Agreement; and it is further

ORDERED, that plaintiffs are directed, within 30 days of the date of this order, to file and serve an amended complaint in accordance with this decision.