

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MELVIN L. SCHWEITZER
Justice

PART 45

FUND.COM INC.

INDEX NO. 650321/12

-v-

MOTION DATE

ADVISORSHARES INVESTMENTS, LLC et al

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is by defendants' to dismiss

plaintiff's first cause of action for breach of contract is DENIED; and defendants' motion to dismiss plaintiff's second through third causes of action are GRANTED.

all for the reasons stated in the attached Decision and Order.

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

Dated: November 27, 2012

Melvin L. Schweitzer (Signature)

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

-----X		
FUND.COM INC.	:	
	:	
Plaintiff,	:	Index No. 650321/12
	:	
-against-	:	DECISION AND ORDER
	:	
ADVISORSHARES INVESTMENTS, LLC, et al.	:	Sequence No.: 001
	:	
Defendants.	:	
-----X		

**MELVIN L. SCHWEITZER, J.:**

**Preliminary Statement**

Plaintiff Fund.com LLC (Fund) brings this action against defendants AdvisorShares Investments, LLC (ASI), Noah Hamman (Hamman), Wilson Lane Group, LLC (Wilson Lane), and David Nichols Jr. (Nichols), alleging, variously among the defendants: breach of contract; breach of covenant of good faith, fair dealing and cooperation; intentional interference with contractual relations; conversion; breach of fiduciary duties; aiding and abetting breach of fiduciary duties; unjust enrichment; constructive trust; and accounting. ASI, Hamman, Wilson Lane, and Nichols (defendants) move to dismiss the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, and pursuant to CPLR 3211(a)(1) on the ground that defendants' defenses are founded upon documentary evidence.

**Standard of Review**

On a motion to dismiss for failure to state a claim, the court accepts all factual allegations pleaded in plaintiff's complaint as true, and gives plaintiff the benefit of every favorable inference. CPLR 3211(a)(7); *Sheila C. v Povich*, 11 AD3d 120 (1st Dept. 2004). The court must determine whether "from the [complaint's] four corners[,] 'factual allegations are discerned

which taken together manifest any cause of action cognizable at law.” *Gorelik v Mount Sinai Hosp. Ctr.*, 19 AD3d 319, 319 (1st Dept. 2005) (quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)). Vague and conclusory allegations, however, are not sufficient to sustain a cause of action. *Fowler v American Lawyer Media, Inc.*, 306 AD2d 113 (1st Dept. 2003).

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic and undeniable. CPRL 3211(a)(1); *Fontanetta v Doe*, 73 AD3d 78 (2d Dept. 2010). “To succeed on a [CPRL 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff’s claim.” *Ozdemir v Caithness Corp.*, 285 AD2d 961, 963 (3d Dept. 2001), *leave to appeal denied* 97 NY2d 605. Alternatively, “documentary evidence [must] utterly refute plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 (2002).

### **Background**

The following facts are taken from plaintiff’s complaint. ASI is a Delaware limited liability company (LLC) with its principal place of business in Bethesda, Maryland, that offers actively managed exchange traded funds (ETFs) in partnership with independent investment advisors acting as sub-advisors to the ETFs. Fund, a Delaware corporation, is one of the two members of ASI and its sole seed investor. Wilson Lane, a Delaware LLC, is the other member. Noah Hamman is the CEO and one of the directors of ASI, as well as the sole member and 100% owner of Wilson Lane. David Nichols is another director of ASI.

In 2008, ASI’s business was little more than an idea. In order to implement this idea, ASI needed to obtain an Exemptive Order from the SEC, a complex and expensive process, that

ultimately took over 18 months to complete. At the time, however, ASI had little to no working capital. That summer, Hamman was introduced to Fund as a potential source of seed capital and a business partner in ASI.

After a series of negotiations, the parties entered into two agreements. On October 31, 2008, Fund, ASI, Hamman, and Wilson Lane entered into the "Purchase and Contribution Agreement" (PCA). At the same time, Wilson Lane and Fund entered into the "Amended and Restated Limited Liability Company Agreement" (LLC Agreement). Under the terms of the PCA, Fund promised to contribute up to \$4 million to ASI in consideration for 6 million Units of ASI, representing 60% of the outstanding membership interests of ASI. At closing, Fund was required to contribute an initial \$275,000, while the remaining \$3.725 million was scheduled to be contributed by Fund in predetermined portions over time when, and if, ASI reached certain "milestones." At issue here, Section 1.2(e) of the PCA provided:

Upon the Company's total assets under management reaching US\$150,000,000 ("Milestone B"), within 30 days following delivery by the Company to Fund.com of a statement from the Company's independent auditor verifying the achievement of Milestone B, Fund.com shall effect payment to the Company of \$725,000 by check or wire transfer or any combination thereof.

PCA, Compl., Ex. A, § 1.2. In the event Fund was unable to pay, the LLC Agreement provided:

In the event Fund.com is in default under the Purchase and Contribution Agreement with respect to a Contribution Obligation pursuant to Section 1.2(d), (e) (f) or (g) of the Purchase and Contribution Agreement ("Contribution Default"), then, if the Contribution Default is in connection with: . . . Milestone B, then 4,087,500 . . . Units held by Fund.com shall be forfeited by Fund.com and cancelled by the Company, Fund.com's percentage interest in the Company shall be proportionally reduced . . . .

LLC Agreement, Compl. Ex. B, § 5.07(a). Section 5.07(c) of the LLC Agreement further provided that:

Upon a forfeiture of Units held by Fund.com pursuant to Section 5.07(a), the Class A Directors of the Company shall automatically be removed from the Board

of Directors and the provisions of Section 7.04 shall be amended such that Fund.com will forfeit its right to designate the Class A Directors.

*Id.* § 5.07(c).

On December 22, 2010, Hamman, sent a letter to Fund's then-CEO Gregory

Webster (Webster), stating:

In connection with that certain Purchase and Contribution Agreement (the "Purchase Agreement"), dated as of October 31, 2008, between AdvisorShares Investments, LLC (the "Company") and Fund.com Inc. ("Fund.com"), I am hereby notifying you that as of 22nd day of December 2010, the Company's total assets under management exceed US\$150,000,000 as verified on the statement attached hereto from the Company's independent auditor. As such, pursuant to Section 1.2(e) of the Purchase Agreement, within 30 days following this written notice Fund.com is required to effect payment to the Company in the amount of \$725,000.

Compl. Ex. D ("12/22/10 Letter"). However, Hamman did not attach a statement from ASI's independent auditor. Instead, Hamman attached an excel file, entitled "AdvisorShares ETF Update Daily Values for Dissemination 12-22-10.xls." The file contained a spreadsheet from BNY Mellon Asset Servicing with the heading "The Bank of New York Mellon ETF Update Daily Values for Dissemination," and dated December 22, 2010. It is uncontested that this file is not a statement from an independent auditor.

Contrary to the complaint, Defendants maintain that all parties, including Fund, treated January 21, 2011, as the deadline for Fund to make payment. Defendants have supplied several e-mails in which the parties seem to treat the 12/22/10 Letter as triggering the 30-day period, and that the deadline for payment was January 21, 2011. Moreover, Fund wired ASI \$220,000 on January 21, 2011. *See* Pl.'s Mem. 16 ("Defendants admit that Fund paid ASI \$220,000 on January 21, 2011").

On January 25, 2011, Hamman sent a letter (“1/25/11 Letter”) to Fund, stating that as of January 22, 2011, Fund failed to pay its \$725,000 obligation in connection with Milestone B, and that accordingly ASI had canceled 4,087,500 of Fund’s 6 million Units, and removed Fund’s representative from the board. Attached to this letter, however, was another letter from ASI’s independent auditor, dated January 25, 2011, which stated: “We have verified by examination of the Funds’ records maintained by BNY Mellon that the Funds comprising AdvisorShares Trust had net assets of \$150,536,754 on December 22, 2010.” Compl. Ex. C.

On January 26, 2011, ASI received a second wire of \$511,147.10 for the remainder of the obligation.<sup>1</sup> However, ASI refused to accept payment, and on January 31, 2011, ASI returned the money to Fund.

Fund filed suit against ASI, Hamman, Wilson Lane, and Nichols, alleging various claims against each of them, seeking an order enjoining ASI and Hamman to accept Fund’s payment of \$725,000 in satisfaction of Fund’s obligation under Section 1.2(e) of the PCA and restore Fund to its ownership position.

Essentially, Fund claims that Hamman intended to cut Fund out of the business, but that the 12/22/10 Letter did not contain the independent auditor statement as required in the PCA. Fund further points out that immediately after it received the 1/25/11 letter that included the independent auditor statement, it fulfilled its obligation by wiring the remainder owed, which was received by ASI on January 26, 2011.

### **Discussion**

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<sup>1</sup> This also included a different payment not at issue here in the amount of \$6,147.10

Fund's first cause of action alleges breach of contract against ASI and Noah Hamman. To allege the essential elements of a breach of contract claim, plaintiff's complaint must plead the existence of a contract between the parties; plaintiff's performance under the contract; defendant's breach of the contract; and plaintiff's resulting damages. *JPMorgan Chase v J.H. Elec. of New York, Inc.*, 69 AD3d 802 (2d Dept 2010).

Fund's complaint asserts that it made payment within thirty days after receiving an independent auditor statement as required under the PCA and Hamman and ASI breached the contract by refusing to accept payment and forcibly returning \$725,000 to Fund on January 31, 2011. The complaint pleads sufficient facts so as to allege a breach of contract claim.

Defendants move to dismiss this cause of action, claiming that Fund waived any objection to the 12/22/10 Letter. Defendants argue (and provide e-mails tending to prove) that Fund never had a problem with the 12/22/10 Letter and acknowledged its obligation to pay by January 21, 2011, and even attempted to do so, but that it simply could not pay because it did not have the money. Defendants further argue that the independent auditor statement required under the PCA was a trivial notice requirement and that it was never disputed that ASI reached \$150 million AUM on December 22, 2010. Defendants characterize this lawsuit as an after-the-fact-concoction to avoid the consequences of Fund's inability to pay in time. These positions are not dispositive at this stage. They neither address the sufficiency of the plaintiff's first claim, nor do they provide a complete defense based on documentary evidence. CPLR 3211(a)(7); CPLR 3211 (a)(1).

As a preliminary matter, it is worth noting that Defendants' arguments are strongly undermined by the fact that ASI provided this so-called "trivial" statement from an independent auditor in its 1/25/11 Letter, and section 7.10 of the PCA specifically states that any terms of the

agreement may be waived “*only* with the written consent of the Company and Fund.com.” PCA, Compl., Ex. A, § 7.10. (emphasis added). Most importantly, however, Defendants come nowhere close to showing “that a material fact as claimed by the pleader to be one is not a fact at all” and it certainly cannot be said “that no significant dispute exists regarding it.” *Guggenheimer*, 43 NY2d at 275. Accordingly, defendant’s motion to dismiss the first cause of action is denied.

*Breach of Covenant of Good Faith, Fair Dealing, and Cooperation*

Plaintiff’s second cause of action alleges ASI and Noah Hamman breached a covenant of good faith and fair dealing by preventing Fund from performing its Contribution Obligation and falsely and artificially forcing Fund into Contribution Default. This claim is duplicative of the breach of contract claim because it arises from the same facts. *See MBIA Ind. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 297 (1st Dept 2011) (dismissing good faith and fair dealing claim as duplicative of contract claim because it arose from the same facts) (citing *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 (2009)). Accordingly, plaintiff’s second cause of action is dismissed.

Plaintiff’s third cause of action alleges that Hamman intentionally interfered with the PCA by preventing ASI from accepting delivery of Fund’s payment and thus preventing Fund from performing its obligation. This claim fails for two reasons: (1) it is duplicative of the breach of contract claim since it arises from the same facts, *See Logan*, 63 AD3d 440; and (2) Hamman is a party to the PCA (Compl. ¶ 94), and “asserting that a defendant tortiously interfered with its own contract quite clearly does not state a legally sufficient cause of action.” *Ahead Realy LLC v India House, Inc.*, 92 AD3d 424, 425 (1st Dept 2012) (quoting *Manley v Pandick Press, Inc.*, 72 AD2d 452, 454 (1980)). Accordingly, plaintiff’s third cause of action is dismissed.

Plaintiff's fourth cause of action is against Hamman for conversion. Plaintiff alleges that Hamman exercised unlawful dominion over Fund's Units of ASI when he caused ASI to remove Fund's appointed director and cancel 4,087,500 Units of ASI owned by Fund. This claim merely restates plaintiff's breach of contract claim using tort law terminology and is therefore duplicative. *See IBM Credit Fin. Corp. v Mazda Motor Mfg. (USA) Corp.*, 152 AD2d 451, 453 (1st Dept 1989) ("where an action clearly sounds in contract, the mere invocation of the terminology of tort will not serve to transform the matter into something it is not"). Accordingly, plaintiff's fourth cause of action is dismissed.

Plaintiff's fifth and sixth causes of action allege the same facts but claim that Hamman breached his fiduciary duties. "A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 (1st Dept 2000). Accordingly, plaintiff's fifth and sixth causes of action are dismissed.

Plaintiff's seventh and eighth causes of action allege that Nichols breached his fiduciary duties. Essentially, plaintiff asserts Nichols' breached his fiduciary duty by allowing Hamman to act in an unfettered manner with respect to his actions described above. The complaint, in this respect, is conclusory and not particular. The court finds the claims duplicative of the breach of contract claim and, in any event, insufficient in its conclusory nature. Plaintiff's seventh and eighth causes of action are dismissed.

Plaintiff's ninth and tenth causes of action allege that Nichols aided and abetted Hamman's breach of fiduciary duties. These claims are also dismissed as duplicative of the breach of contract claim.

Plaintiff's eleventh cause of action alleges unjust enrichment against Hamman and Wilson Lane. It is well settled law that "[t]he existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 (1987). The PCA and the LLC govern this dispute. Accordingly, plaintiff's eleventh cause of action is dismissed.

Plaintiff's twelfth cause of action alleges constructive trust against Hamman and Wilson Lane. "The elements necessary for the imposition of a constructive trust are a confidential or fiduciary relationship, a promise, a transfer in reliance thereon, and unjust enrichment." *Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 (1st Dept 2010). This is but a quasi-contractual claim attempting to occupy a field fully occupied by a well pleaded contractual claim. It is dismissed.

Plaintiff's thirteenth cause of action is against Hamman and Nichols for accounting. This cause of action is dismissed for the reasons set forth with respect to the twelfth cause of action.

Accordingly, it is

ORDERED that defendants' motion to dismiss plaintiff's first cause of action is denied; and it is further

ORDERED that defendants' motion to dismiss plaintiff's second through thirteenth causes of action is granted.

Dated: November 27, 2012

ENTER:

J.S.C.

MELVIN L. SCHWEITZER  
J.S.C.