Pearl St. Co-Invest I, LLC v MapR (ABC) LLC
2024 NY Slip Op 31444(U)
April 12, 2024
Supreme Court, New York County
Docket Number: Index No. 654461/2020
Judge: Joel M. Cohen
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 03M

---X

PEARL STREET CO-INVEST I, LLC, ARENA INVESTORS LP,	**INDEX NO.** 654461/2020
Plaintiffs,	**MOTION DATE** 04/28/2023
- v -	**MOTION SEQ. NO.** 005
MAPR (ABC) LLC, ARMANINO LLP, ANDREW HYDE	**DECISION + ORDER ON MOTION**
Defendants.	

---X

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 005) 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 358, 362, 363, 364, 365
were read on this motion for SUMMARY JUDGMENT.

This case arises out of a general assignment for the benefit of creditors under a California statute that permits insolvent companies to liquidate without going through formal bankruptcy proceedings. Here, the insolvent company was MapR Technologies, Inc. ("MapR Technologies"), whose senior secured lender was Silicon Valley Bank ("SVB"). The liquidation went relatively smoothly, including a sale of assets to Hewlett-Packard, until an SVB loan "participant" (Plaintiff Pearl Street Co-Invest I, LLC ["Pearl Street"] and its parent company Plaintiff Arena Investors LP ["Arena"]) concluded that money was being left on the table. Specifically, Plaintiffs were rebuffed in their efforts to purchase and pursue—at their own

expense and for their own benefit—a putative breach of contract claim against Hewlett-Packard for up to $6 million that SVB and other creditors chose not to pursue. Plaintiffs sued MapR Technologies' assignee for the benefit of creditors (Defendant MapR (ABC) LLC ["MapR ABC"]) and the assignee's Member, Defendant Armanino LLP ("Armanino") and Armanino's employee, Defendant Andrew Hyde, for damages arising out of their purported lost opportunity.

This Court (Ostrager, J.) dismissed several of Plaintiffs' claims under CPLR 3211, leaving only plaintiffs' sixth cause of action against MapR ABC for breach of contract and their fifth cause of action against MapR ABC, Armanino, and Hyde for breach of fiduciary duty (NYSCEF Doc. No. 60). After completion of discovery, Defendants now move for summary judgment on those remaining claims.

For the reasons that follow, defendants' motion is **granted** and the case is dismissed.

Factual Background

On October 14, 2016, Pearl Street entered into a Master Participation Agreement ("MPA") with SVB (NYSCEF Doc. No. 130, at 1-3). According to the agreement, Pearl Street was a "Participant" in "certain secured mezzanine lending transactions" and obtained a right to purchase a participation in certain loans made by SVB (*id.*). Pearl Street obtained a "certain percent . . . of an undivided interest . . . in the Lender Loans" outlined by the agreement (*id.*). Pearl Street thereby became "the legal owner of" that interest, but the MPA provided that Pearl Street's interest "in each Participated Lender Loan from Lender to Participant . . . *shall in no way be construed as a loan by [Pearl Street] to a borrower*" (*id.* [emphasis added]). Through this agreement, Pearl Street purchased – among other things – a financial interest in a loan made by SVB to MapR Technologies (NYSCEF Doc. No. 133, at 31:4-32:13; NYSCEF Doc. No. 358 at 5). Pearl Street's participation was funded by Arena (*id.*).

On June 24, 2019, MapR Technologies executed a general assignment of its assets for the benefit of creditors to MapR ABC (NYSCEF Doc. No. 136). The assignment recitals stated that MapR Technologies was "indebted to various creditors" and "unable to pay its debts in full" (*id.*). Section 9 set forth the order of priority for distributions. In order, proceeds would be applied first to the discharge of liens and indebtedness "entitled to priority of payment" under law, then to administration of the ABC, federal taxes, monies due to employees, and state and local taxes (*id.*). The sixth distributions in order of priority would go to "other creditors," who would obtain distributions "pro rata in accordance with the terms of each creditor's indebtedness, until all such debts are paid in full" (*id.*). Finally, "any monies unclaimed by creditors 90 days after the final distribution to unsecured creditors, if any" would be re-distributed at MapR ABC's "reasonable discretion" to "all known unsecured creditors, being those creditors who cashed their respective dividend checks from the Assignment Estate" (*id.*).

On June 26, 2019, MapR ABC issued a Sale Memorandum indicating its intention to sell virtually all assets under assignment to a single buyer (NYSCEF Doc. No. 131). MapR Technologies engaged Armanino to assist in the wind down process (NYSCEF Doc. No. 134). At that time, Hyde held the title of Consulting Chief Financial Officer ("CFO") at Armanino (NYSCEF Doc. No. 143, at 14:25-15:6).

On July 24, 2019, MapR Technologies issued a Notice of Assignment for the Benefit of Creditors and Deadline for Submitting Claims (NYSCEF Doc. No. 141). The Notice referenced the June 24, 2019 general assignment to MapR ABC, and stated that "all entities asserting any claim against Assignor must submit proof of claim and proper supporting documentation no later than January 17, 2020 (the 'Bar Date')" (*id.*). The Notice further provided that "[a]ny claimant who fails to timely submit a claim, postmarked on or before the Bar Date … shall be barred from

sharing in any distribution from the net liquidation proceeds, if applicable, and shall not receive any payment from Assignee" (*id.*).

On August 3, 2019, Hewlett-Packard purchased the assets that were assigned to MapR ABC pursuant to an Asset Purchase Agreement ("APA") (NYSCEF Doc. No. 147). Under the APA, Hewlett-Packard would pay a lump-sum at closing, withholding $6 million of the purchase price, defined as the "Holdback Consideration" (*id.* at 3). The APA provided that the Holdback Consideration ("HC") would be payable by Hewlett-Packard upon satisfaction of the "Holdback Condition," defined as the occurrence of:

> "(i) 90% or more of the employees set forth on Exhibit 4.2(a)(i) either accept offers of employment with Buyer or one of its affiliates within ninety (90) days following the Closing Date or continue to be paid by Buyer or one of its affiliates as of the ninetieth (90th) day following the Closing Date (the "***Employee Condition***"), and (ii) the total amount of Renewed [Annual Contract Value ("ACV")] Revenue is 90% more of Expected ACV Revenue as of the ninetieth (90th) day following the Closing Date."

(*Id.*) The APA required Hewlett-Packard to "use commercially reasonable efforts to solicit and negotiate the employment offers and enter into the customer renewals contemplated by the Holdback Condition" (*id.* at 4).

On November 7, 2019, Hewlett-Packard asserted that the Holdback Condition was not met, based on its own calculations (NYSCEF Doc. No. 151). On February 27, 2020, Hyde and representatives of Arena exchanged email correspondence about pursuing a claim for the amount of the Holdback Consideration (NYSCEF Doc. No. 154).

On March 6, 2020, MapR ABC, through counsel, sent a demand letter to Hewlett-Packard asserting that Hewlett-Packard's calculations were incorrect, and that the Holdback Condition had been met (NYSCEF Doc. No. 155). The letter indicated a payment due date of

March 16, 2020 (*id.*). Hewlett-Packard responded on March 16, 2020, reasserting its conclusions and stating it would not pay (NYSCEF Doc. No. 156). Arena reached out to other members of the syndicate, including SVB, who said they were not interested in pursuing the HC claim at that time (NYSCEF Doc. Nos. 161, 162).

Arena again indicated to MapR ABC that it wished to pursue the HC claim. Hyde wrote back that MapR ABC would not make an assignment of that right without consideration (NYSCEF Doc. No. 330). Hyde's letter stated that MapR ABC "[did] not see Arena as a direct creditor of the Assignor and Arena did not file a claim in the Estate, as required under California law for parties to seek benefit from the liquidation" (*id.*). It is undisputed that neither Pearl Street nor Arena submitted a claim prior to the Bar Date set forth in the Notice of Assignment (NYSCEF Doc. No. 141). Plaintiffs dispute only that they were required to submit claims "separate from the claim submitted by SVB" (NYSCEF Doc. No. 358 at 15).

On May 14, 2020, Arena wrote to MapR ABC's counsel, Cooley LLP, to express interest in pursuing the HC claim independently given that "SVB indicated they are pencils down on pursuing anything further" (NYSCEF Doc. No. 163). The parties exchanged emails and engaged in phone calls to discuss the possibility of selling the HC claim to Arena (*id.*). On June 10, 2020, Jake Sussman at Arena forwarded correspondence from SVB, in which SVB stated it did not intend to pursue the HC claim (NYSCEF Doc. No. 162).

Arena followed up with Armanino again on June 17, 2020, taking a more aggressive tone, asserting that Armanino had been "evasive[]" about a deal and asserting that MapR ABC owed fiduciary duties to Arena (NYSCEF Doc. No. 163). Although the communication stated that "Arena does not believe that Armanino has breached a duty to Arena by ceasing to pursue the Holdback Consideration from" Hewlett-Packard at that time, it noted that "it is now clear that

neither SVB nor any other member of the original creditor syndicate wishes to take further action to recover the Holdback Consideration," but that "[a]t its sole effort and expense, Arena does wish to move forward with a claim against" Hewlett-Packard and requested that MapR ABC execute a "limited assignment of rights from [MapR ABC] to Arena" "without further delay" (*id.*).

On July 9, 2020, MapR ABC invited Hewlett-Packard to negotiate a settlement of the HC claim (NYSCEF Doc. No. 185). No settlement agreement was reached.

On July 23, 2020, Arena and MapR ABC executed an agreement (the "Marketing Agreement," NYSCEF Doc. No. 169), with respect to the right to pursue the HC claim ("HCR"). MapR ABC's obligations under the Marketing Agreement were specific: First, after receiving a $12,500 payment from Arena, MapR ABC was "to inquire whether any of the creditors of MapR Technologies other than Arena wishes to pay more than [Arena's] Proposed Purchase Price [i.e., $140.00] for the acquisition of the [HCR] under the APA with" Hewlett-Packard (the Marketing Period). Second, "[i]f no other creditor of MapR Technologies wishes to purchase the [HCR] from [MapR ABC] for more than the Proposed Purchase Price, then [MapR ABC] shall have fifteen (15) additional days to prepare (or have its counsel prepare) a written agreement assigning the HCR from [Map ABC] to Arena" (the Assignment Period). Finally, the Agreement provided for a brief period by which MapR ABC would transfer materials to Arena (the "Transfer Period") (*id.*).

Under the Marketing Agreement, drafted initially by Arena as an Assignment Agreement and edited by both parties (*see* NYSCEF Doc. Nos. 167; 168), Arena "agree[d] to indemnify, defend, and hold harmless [MapR ABC] from and against any loss, cost, or damage of any kind (including reasonable outside attorneys' fees) to the extent arising out of breach of this

Agreement, and/or negligence or willful conduct" (NYSCEF Doc. No. 169). The Agreement contained a merger clause and provided it "shall exclusively be governed by and construed in accordance with the laws of the State of New York" (*id.*).

On July 28, 2020, MapR ABC received a call from Hewlett-Packard indicating potential willingness to entertain settlement negotiations relating to the HC (NYSCEF Doc. No. 185). It discussed this conversation with SVB and Triple Point Capital, another creditor of MapR ABC (NYSCEF Doc. Nos. 172, 332). On August 3, 2020, SVB and Armanino engaged in discussions to move forward with Hewlett-Packard's "offer" (NYSCEF Doc. No. 334).

On August 5, 2020, MapR ABC sent a letter to MapR Technologies' creditors referencing its efforts to satisfy the holdback conditions; Hewlett-Packard's position that the conditions have not been satisfied; and the "desire" by a "prospective party-in-interest" (i.e., Arena) to purchase the HCR for $140.00 (NYSCEF Doc. No. 173). The letter noted that Hewlett-Packard "recently indicated that it is willing to consider a proposal to settle the [HC claim]," and opined that "[w]hile there is no certainty that a settlement will be reached at all, the Assignee believes that if a settlement were reached the settlement amount could exceed $100,000" (*id.*). Consistent with the terms of the Marketing Agreement, the letter stated that "the Assignee is soliciting offers to purchase the [HCR] for more than $140.00 from any existing creditor of MapR Technologies, Inc. wishing to make an offer," and requested indications of interest "no later than the close of business on Monday, August 10, 2020" (*id.*).

In parallel with the marketing effort, Arena and MapR ABC/Armanino exchanged a number of contentious emails concerning possible settlement discussions between MapR ABC and Hewlett-Packard, with Arena demanding that Defendants cease all such communications (NYSCEF Doc. No. 185). MapR ABC's counsel stated that MapR ABC had a "fiduciary duty to

creditors as a whole," and that it only heard from Hewlett-Packard on limited occasions, at which time Hewlett-Packard suggested it may be open to settling for a sum less than one million dollars, which discussions took place after the Marketing Agreement was executed (*id.*).

On August 6, 2020, SVB offered to purchase the HCR for "$500.00 in cash plus 100% of any recovery [it] receives in connection with the [HCR]" after deducting expenses (NYSCEF Doc. No. 174). Thus, unlike Arena's offer to purchase the HCR outright (and retain all proceeds), SVB proposed to pursue the HCR claim and share 100% of the proceeds with MapR ABC for the benefit of the creditors. SVB added that "[n]othing contained in this letter is intended to be, and shall not be construed as, a consent by [SVB] to the sale of the Holdback Consideration Right to any other party, or a waiver or release of [SVB's] rights in and to the Holdback Consideration Right" (*id.*) On August 10, 2020, another MapR Technologies creditor offered to purchase the HCR for "$500.00 in cash plus 10% of any recovery" after deducting expenses (NYSCEF Doc. No. 176), a similar approach to SVB but retaining a higher percentage of the recovery. Both bids arrived within the Marketing Period.

On August 10, 2020, MapR ABC notified Arena of its efforts to market the HCR and that

> [t]he Assignee has now received offers from creditors of MapR Technologies[,] each of which is for significantly more than [Arena's] Proposed Purchase Price. The offers confirm that [since] creditors of MapR Technologies wish to pay more for the Holdback Consideration right than the Proposed Purchase Price, the Assignee's obligations under the Agreement have now been completed, and the Assignee will proceed accordingly

(NYSCEF Doc. No. 177.)

On August 14, 2020, counsel for SVB and Arena wrote in a joint email to MapR ABC's counsel conveying

> SVB's and Arena's understanding that [MapR ABC] has agreed that it will not sell the [HCR] to any party without the future written consent of the secured lenders, and that there is presently no sale planned for the [HCR]. Please confirm that our understanding is correct. Subject to receipt of such confirmation from the assignee, Arena and [SVB] have agreed that any agreements, offers, or indications of interest made by Arena or [SVB] in connection with the potential purchase of the Holdback Consideration are now void. After Arena and SVB confer, either or both (jointly or individually) may make an offer or indication of interest.

(NYSCEF Doc. No. 178.)

On September 2, 2020, Arena responded to MapR ABC's August 10 letter. After noting that MapR ABC had notified all of the creditors "*other than Arena*" of settlement discussions with Hewlett-Packard, Arena purported to raise its "bid" to purchase the HCR to $40,000.00 (NYSCEF Doc. No. 179).

On September 10, 2020, Armanino sent an email to SVB enclosing Arena's revised bid plus the August 10 proposal made by another creditor for $500.00 plus 10% of the recovery, and asked whether SVB would "approve of the Assignee selling the Holdback Consideration claim pursuant to the terms of either, or both, offers" (NYSCEF Doc. No. 180).

On September 11, 2020, Arena wrote to MapR ABC complaining that it had not been told of the $500 plus 10% bid from another creditor, which it had learned from "another source," and contending that the other bid was inferior to Arena's $40,000 offer (NYSCEF Doc. No. 181).[1] Nevertheless, Arena provided a new "bid" of $40,000 plus 10% of any recovery net of attorneys' fees (*id.*). The letter allowed three days "to accept Arena's bid" or they would file a

[1] Arena was apparently under the impression that its $40,000 bid had been deemed financially inferior to the other creditor's $500 offer. In fact, as noted above, MapR ABC had deemed Arena's *original $140.00* offer to be financially inferior (NYSCEF Doc. No. 177).

lawsuit (*id.*). The same day, SVB indicated it did not consent to selling the HCR to any party (NYSCEF Doc. No. 182).

On September 15, 2020, plaintiffs commenced this litigation (NYSCEF Doc. Nos. 1, 2). The Complaint asserted eight causes of action against all defendants for (1) gross negligence; (2) fraudulent misrepresentation; (3) fraudulent concealment; (4) fraudulent inducement; (5) breach of fiduciary duty; (6) breach of contract; (7) breach of contract/anticipatory breach; (8) breach of the covenant of good faith and fair dealing (NYSCEF Doc. No. 2).

On October 29, 2021, this Court (Ostrager, J.) dismissed plaintiffs' first, second, third, fourth, seventh, and eighth causes of action, and dismissed the sixth cause of action as against Hyde and Armanino (NYSCEF Doc. No. 60). The fifth (breach of fiduciary duty) and sixth (breach of the Marketing Agreement as against MapR ABC) causes of action were sustained (*id.*). Specifically, the Court allowed the fifth cause of action for breach of fiduciary duty to proceed to determine "whether defendants voluntarily assumed a position of trust and confidence creating a fiduciary duty under California law" (*id.*).

Discussion

A motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party" (CPLR 3212 [b]). The moving party must make a prima facie showing that they are entitled to a judgment as a matter of law (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]). "If the moving party fails to meet this initial burden, summary judgment must be denied 'regardless of the sufficiency of the opposing papers'" (*id.* [citing *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]]). However, if the moving party makes this showing, the burden shifts to the opposing party "to produce

evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]).

A. Breach of the Marketing Agreement

"To plead a cause of action for breach of contract, a plaintiff usually must allege that: (1) a contract exists; (2) plaintiff performed in accordance with the contract; (3) defendant breached its contractual obligations; and (4) defendant's breach resulted in damages (*34-06 73, LLC v Seneca Ins. Co.*, 39 NY3d 44, 52 [2022] [citations omitted]). "[A] contract is to be construed in accordance with the parties' intent, which is generally discerned from the four corners of the document itself. Consequently, 'a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms'" (*MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009] [quoting *Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]]).

As an initial matter, Plaintiff Pearl Street lacks standing to sue MapR ABC for breach of the Marketing Agreement, to which only Arena and MapR ABC were signatories. "A non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary" (*LaSalle Nat'l Bank v Ernst & Young LLP*, 285 AD2d 101, 108 [1st Dept 2001] [citing *Alicea v City of New York*, 145 AD2d 315, 317 [1988]]). Here, there is no evidence that Pearl Street was a party, assignee, or an intended beneficiary of the Marketing Agreement. Accordingly, summary judgment is granted insofar as plaintiff Pearl Street asserts the claim on its own behalf.

In any event, Plaintiffs' breach of contract claim (whether asserted by Arena, Pearl Street, or both) fails on the merits. The Marketing Agreement required that MapR ABC (1) market the

HCR to other creditors and (2) sell the HCR to Arena "if no other creditor of MapR Technologies wishe[d] to purchase" the HCR "for more than" Arena's Proposed Purchase Price of $140.00 (NYSCEF Doc. No. 16). The summary judgment record demonstrates that MapR ABC marketed the HCR opportunity to all creditors, as required by the agreement, and received two responses during the Marketing Period from entities that asserted a wish to purchase the HCR for more than the $140.00 offered by Arena (NYSCEF Doc. Nos. 174 [SVB offering $500 plus 100% of any HCR recovery after deducting expenses]); 176 [another creditor offering $500 plus 10% of any HCR recovery after deducting expenses]). Upon the failure of the condition precedent of Section 2(b) – a creditor objectively manifested a "wish" to purchase the HCR – there was no requirement under the terms of the Marketing Agreement to prepare a written agreement of the HCR assignment to Arena or to proceed further.

The Marketing Agreement did not establish a bidding process by which Arena had the right to bid again on the HCR. Nor did the Agreement provide for an additional bidding process if one or more creditors did not follow through on their expressed indications of interest. Nor did the Agreement prohibit MapR ABC and its members from continuing to explore resolution of the HC claim with Hewlett-Packard for the benefit of all creditors. It is not the Court's role to revise the parties' agreement or create new contractual obligations "under the guise of interpreting the writing" (*Jade Realty LLC v Citigroup Commercial Mortgage Tr. 2005-EMG*, 83 AD3d 567, 568 [1st Dept 2011] [quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001]]).

The bottom line is that Arena's bid to acquire the HCR outright for minimal consideration was easily exceeded by indications of interest from two creditors. Under the clear and unambiguous language of the instrument, plaintiffs cannot establish that MapR ABC

breached the Marketing Agreement. Therefore, summary judgment is granted dismissing the breach of contract claim.[2]

B. Breach of Fiduciary Duty

Under California law, "[w]hether a fiduciary duty exists is generally a question of law[,]" and "[w]hether defendant breached that duty towards the plaintiff is a question of fact" (*Marzec v Cal. Pub. Emps. Retirement Sys.*, 236 Cal App 4th 889, 915 [Cal Ct App 2d Dist 2015] [emphasis and citations omitted]).

Defendants do not dispute that MapR ABC owed fiduciary duties to MapR Technologies' creditors, for whose benefit the assignment was expressly created. They argue instead that Plaintiffs Pearl Street and Arena cannot, as a matter of law, be considered creditors of MapR Technologies and that Defendants did not otherwise voluntarily assume a fiduciary obligation to Plaintiffs. The Court agrees.

First, Pearl Street and Arena were not creditors to which MapR ABC owed a fiduciary duty as a matter of law. A creditor "is one in whose favor an obligation exists, by reason of which he is, or may become, entitled to the payment of money" (Cal Civ Code, § 3430). Relatedly, "[a] debtor . . . is one who, by reason of an existing obligation, is or may become

[2] Furthermore, Plaintiffs' claims for damages are impermissibly speculative. "Loss of future profits as damages . . . must be capable of proof with reasonable certainty. . . . [T]he damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes" (*Kenford Co., Inc. v Erie County*, 67 NY2d 257, 261 [1986]; *Wathne Imports, Ltd. v PRL USA, Inc.*, 101 AD3d 83, 88 [1st Dept 2012]). Here, the claim of lost future profits "require[s] the [C]ourt to accept too many speculative assumptions" (*Wathne Imports*, 101 AD3d at 88). Arena's claim presupposes that, if it had obtained the HCR, it would have succeeded either in litigation with Hewlett-Packard or it would have been able to extract a settlement of an undetermined amount. Arena's heavy reliance on an advocacy letter sent by MapR ABC's counsel to Hewlett-Packard during negotiations does not remedy the defect in Plaintiffs' claim.

liable to pay money to another, whether such liability is certain or contingent" (Cal Civ Code, § 3429). Here, Pearl Street had no relationship, contractual or otherwise, with the borrower MapR Technologies. Pearl Street's only contractual relationship was with SVB, and that contract stated explicitly that Pearl Street's participation in SVB's loan portfolio "shall in no way be construed as a loan by Participant to a borrower" (NYSCEF Doc. No. 130, at 1-3). Pearl Street's "participation" in SVB's loan portfolio is thus distinguishable from a syndicated loan in which each syndicate member signs on to a common loan agreement with the borrower (*Audax Credit Opportunities Offshore Ltd. v TMK Hawk Parent, Corp.*, 72 Misc 3d 1218(A) [Sup Ct 2021]). That explains, among other things, why Pearl Street did not (and presumably could not) file a claim with MapR ABC as a "creditor" in its own right and instead had to rely upon SVB (*i.e.*, the actual creditor) to do so (*see* NYSCEF Doc. No. 358, Plaintiffs' Counterstatement of Facts at 15 ["Disputed to the extent it suggests that Arena and Pearl Street were required to submit claims separate from the claim submitted by SVB"]). Arena's interest is even more remote than Pearl Street's, as it did not hold *any* interest SVB's loans, and was simply Pearl Street's funding source.[3]

Second, the summary judgment record refutes any suggestion that Defendants voluntarily assumed a fiduciary duty to Pearl Street independent of the "assignment for benefit of creditors"

---

[3] None of the cases Plaintiffs cite dealt with the type of loan participation agreement to which Pearl Street was a party (*see In re Mercury Eng'g, Inc.*, 68 F Supp 376, 382 [SD Cal 1946] [concluding in dicta that state law would allow the State of California to make a tax claim as a creditor against a bankrupt estate]; *Boyd v. Commissioner*, 1945 WL 7331 [US Tax Ct 1945] [noting each member of a loan syndicate issued independent promissory notes]). Plaintiffs cite no persuasive authority to suggest that an assignee for the benefit of creditors under California law undertakes an independent fiduciary duty to all the many potential entities that happen to have directly or indirectly *invested* in the loan portfolios of creditors from which the debtor had obtained loans. Such a potentially vast expansion of fiduciary duties under a statutory regime is not to be lightly presumed, and there is no basis for doing so here.

statutory regime. In some circumstances, an independent fiduciary relationship can be voluntarily undertaken when "confidence is reposed by one person in the integrity of another, and . . . the party in whom the confidence is reposed, . . . voluntarily accepts or assumes to accept the confidence" (*Barbara A. v John G.*, 145 Cal App 3d 369, 382 [Cal App 1st Dist 1983]). The "essential elements" of a confidential relationship that give rise to a fiduciary relationship are: "(1) The vulnerability of one party to the other which (2) results in the empowerment of the stronger party by the weaker which (3) empowerment has been solicited or accepted by the stronger party and (4) prevents the weaker party from effectively protecting itself" (*Persson v Smart Inventions, Inc.*, 125 Cal App 4th 1141, 1161 [Cal App 2d Dist 2005]).

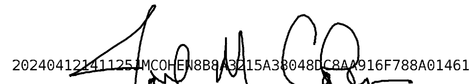
Here, there is no evidence that Defendants had any dealings with Pearl Street. Rather, defendants MapR ABC, Armanino, and Hyde all dealt directly with Arena, which had voluntarily inserted itself into the winding-down process. And as to Arena, the relationship was purely arm's length and contractual, which is insufficient to establish a fiduciary duty (*see Zumbrun v Univ. of S. Cal.*, 25 Cal App 3d 1, 15 [Cal Ct App 2d Dist 1972] [noting "[a] bare allegation that defendants assumed a fiduciary relationship" is insufficient to overcome a "normal relationship" between contracting parties]). Giving Plaintiffs the benefit of all favorable inferences, the evidence simply does not support a finding that Arena – represented by formidable counsel and aggressively pursuing its position every step of the way – was a weak or vulnerable party in its dealings with Defendants.

As a result, because there is no evidence to support the existence of fiduciary duties flowing from Defendants to Plaintiffs, summary judgment is granted dismissing Plaintiffs' claim for breach of fiduciary duty. Accordingly, it is

ORDERED that defendants' motion for summary judgment is **granted** and Plaintiff's complaint is dismissed with prejudice; and it is further

ORDERED that the parties upload a copy of the transcript of the November 28, 2023 oral argument to NYSCEF upon receipt.

This constitutes the Decision and Order of the Court. The Clerk is directed to enter judgment in favor of Defendants, with taxable costs, upon submission by Defendants of a form of judgment and bill of costs in acceptable form.



4/12/2024			JOEL M. COHEN, J.S.C.
DATE			

CHECK ONE:	X	CASE DISPOSED			☐ NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐ SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐ FIDUCIARY APPOINTMENT	☐ REFERENCE