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

PRESENT: Cahn Justice

PART 49m

Jonathan Kinlay

- v -

Ronald Henley

INDEX NO. 602886/04

MOTION DATE 6/12/06

MOTION SEQ. NO. 042

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
ACCOMPANYING MEMORANDUM
IN MOTION SEQUENCE . . . .

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

Dated: 3/9/07

Ira Cahn
J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 1]

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

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JONATHAN KINLAY and INVESTMENT ANALYTICS (BERMUDA) LTD.,

Plaintiffs,

-against- Index No. 602886/04

RONALD HENLEY, PAUL WILMOTT, HENLEY WILMOTT CAPITAL, LLC, HENLEY WILMOTT FUND MANAGEMENT, LLC, PRISMA CAPITAL PARTNERS, MONUMENTAL LIFE INSURANCE CO., FULCRUM INVESTMENT GROUP, LLC, and JOHN MORRIS,

Defendants,

CAISSA FUND MANAGEMENT, LLC, CAISSA CAPITAL PARTNERS, LLC, CAISSA CAPITAL MANAGEMENT LTD., CAISSA CAPITAL LP, and CAISSA CAPITAL INTERNATIONAL LTD.,

Nominal Defendants.

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Herman Cahn, J.:

Motion sequence numbers 037, 038, 039, and 042 are consolidated for disposition.

In motion sequence 037, plaintiffs move to disqualify the present counsel for nominal defendants Caissa Fund Management, LLC, Caissa Capital Partners, LLC, Caissa Capital Management Ltd., Caissa Capital LP (the Onshore Fund) and Caissa Capital International Ltd. (the Offshore Fund), (collectively, the Caissa entities) and to substitute plaintiffs' former counsel as the new counsel for the Caissa entities, 22 NYCRR

§ 1200.24 (DR 5-105).

In sequence number 038, defendant Prisma Capital Partners moves to dismiss the second amended complaint, CPLR 3211 (a) (1), 3211 (a) (7), and 3212. In sequence number 042, defendants Fulcrum Investment Group LLP and John Morris move for the same relief.

In sequence number 039, the Caissa defendants move to reargue their prior motion to dismiss plaintiffs' derivative claims, CPLR 2221.

The underlying facts and procedural history of this action are fully set forth in the court's prior decision and order dated January 4, 2006 (the January 2006 order), and will not be repeated here except as is necessary for clarification.

Briefly, this action arises out of the departure of Kinlay from the Caissa entities, a group of hedge funds and fund management partnerships formed by Kinlay and defendants Ronald Henley and Paul Wilmott beginning in 2001, and the subsequent break-up of the Caissa entities.

Plaintiff Investment Analytics (Bermuda) Ltd. is an investment research and consulting firm founded by Kinlay in 1998. Kinlay remains its sole shareholder and chief executive officer.

In the second amended complaint, plaintiffs allege that Henley and Wilmott conspired with the other defendants to destroy the Caissa entities in order to start a rival hedge fund using plaintiffs' proprietary information. The proprietary information related

primarily to the conducting of hedge fund daily trading. Henley and Wilmott are alleged to have carried out their scheme, in part, by returning the capital investment made by defendant Monumental Life Insurance Co., a limited partner, in Caissa without having received a waiver from the American Stock Exchange (AMEX) of the six-month notice period requirement set forth in AMEX Rule 300 (b).

Plaintiffs allege that defendants' actions were taken in breach of a separation agreement and release dated August 10, 2004, executed by Kinlay and the Caissa entities. The purpose of the separation agreement was to facilitate Kinlay's resignation and departure from these entities. Plaintiffs claim that Henley and Wilmott fraudulently induced Kinlay to enter into the separation agreement in order to carry out their scheme.

In addition, plaintiffs allege that Prisma, an alternative asset partnership, which directed Monumental's investments, Morris, president of Fulcrum, and Fulcrum, a hedge fund marketing firm allegedly retained by the Caissa entities to reconcile differences that had arisen among Kinlay, Henley and Wilmott, intentionally interfered with the Caissa entities' prospective and present contractual relations with Monumental and nonparty Gottex, another Caissa investor. By agreement executed in October 2003, Caissa retained Fulcrum to market Caissa's funds to prospective investors (the marketing agreement).

On these allegations, plaintiffs assert derivative claims on behalf of the Caissa entities for breach of fiduciary duty, aiding and abetting breach of fiduciary duty, tortious interference with prospective and existing contractual relations, fraud and aiding and

abetting fraud. Plaintiffs, on their own behalf, assert claims for defamation and breach of contract against the moving parties. Kinlay also asserts his individual claim against Henley and Wilmott for rescission of the separation agreement and release as fraudulently induced. Plaintiffs seek to recover more than $250,000,000, together with punitive damages.

In the January 2006 order, the court granted Monumental's motion to dismiss, and dismissed the fraud, aiding and abetting fraud and breach of fiduciary duty claims asserted against Monumental on the ground that plaintiffs had failed to plead facts sufficient to support these claims. The court also denied as moot the Caissa entities' motion to dismiss the derivative claims on the ground that plaintiffs had not asserted such claims against the Caissa entities in the second amended complaint.

Prisma, Fulcrum and John Morris each now seek dismissal of the derivative claims of fraud, aiding and abetting fraud, aiding and abetting breach of fiduciary duty and tortious interference with prospective and existing contractual relations, derivatively asserted against them by Kinlay on behalf of nominal defendants, the Caissa entities. These defendants also seek to dismiss the defamation and trade disparagement claim asserted by Kinlay in his individual capacity. In addition, Fulcrum seeks dismissal of the breach of contract claim asserted against it by Kinlay in his individual capacity.

As a threshold issue, Prisma, Fulcrum and Morris contend that Kinlay's derivative claims are fatally defective and must be dismissed on the ground that Kinlay sold his

interests in the Caissa entities in the separation agreement and, therefore, now lacks standing to assert derivative claims on their behalf.

In opposition, Kinlay contends that the separation agreement is not enforceable because it was procured by fraud and that the motions to dismiss are premature because no discovery on the issue of the enforceability of the agreement has yet occurred.

In the separation agreement, Kinlay sold his 40% interest in the Caissa entities and resigned "as a director and or member and or principal of each of the Fund Management Companies, Caissa Capital LP and Caissa Capital International, Ltd." (Separation Agr., ¶ C.1). Kinlay alleges that he executed the agreement and release in reliance on fraudulent representations by Henley and Wilmott that they intended to honor the agreement's provisions, when, in fact, they were secretly planning the establishment of rival hedge funds and the destruction of the Caissa entities. Kinlay further alleges that these improper actions eliminated the financial benefit that he would otherwise have received in consideration for entering into the agreement. In addition, Kinlay alleges that Henley and Wilmott materially breached the agreement through their subsequent actions, including the misappropriation and misuse of Kinlay's proprietary information, their failure to pay Kinlay the monies due him and their refusal to provide Kinlay with an accounting.

Caissa Capital International, Caissa Capital Partners and Caissa Fund Management are each incorporated under the laws of Delaware. Delaware law requires that, in order to bring a claim in a derivative capacity, a plaintiff must be either a partner or a member of

the entity both at the time of the alleged wrongdoing and at the time of commencing the lawsuit (see Flynn v Bachow, 1998 WL 671273 [Del Ch 1998]; 6 Del Code §§ 17-1002 [for partnerships], 18-1002 [for limited liability companies]). Therefore, Kinlay would have standing to assert derivative claims on behalf of the Caissa entities only if the separation agreement were rescinded. If the separation agreement is not rescinded, then Kinlay would not have standing to bring this, or any other, action derivatively on behalf of the Caissa entities.

Although the court directed that the parties pursue discovery on the limited issues of the enforceability of the separation agreement and standing, the parties apparently did not complete such discovery prior to making the within motions. Without such discovery, no determination on these issues can be made. Upon completion of this discovery, the parties may renew their standing arguments, if so advised.

However, assuming without deciding that Kinlay has standing to assert derivative claims on behalf of the Caissa entities, the court now turns to the other grounds asserted for dismissal of the derivative claims raised by Prisma, Fulcrum and Morris.

The Fraud and Breach of Fiduciary Duty Claims

Prisma contends that the fraud claim asserted against it and Monumental in the 6th cause of action is fatally defective on the ground that Kinlay failed to plead adequate facts in support of the claim, as the court noted in the January 2006 order granting Monumental's motion and dismissing the fraud claim asserted against Monumental.

In opposition, Kinlay contends that the factual allegations are sufficiently detailed to give Prisma adequate notice: of the claim; that a Prisma employee knew that AMEX had not waived the six-months' notice period requirement; and that more detailed factual information is possessed solely by Prisma and Prisma has refused to respond to plaintiffs' discovery requests.

In support of the fraud claim, Kinlay alleges that Francis Conroy, a Prisma employee or representative, sent a July 19, 2004 e-mail to Henley in which he intentionally falsely represented that the AMEX had waived its six-months' notice period requirement. The requirement provides that each member firm shall prohibit the withdrawal of the capital contribution of any partner on less than six months' notice, unless AMEX waives the notice requirement in writing (see AMEX rule 300 [b]).

Kinlay further alleges that Conroy knew that AMEX had not waived the requirement and was acting under instruction from William Cooke, a Prisma officer and Monumental representative. Kinlay also alleges that Prisma intended that the Caissa entities rely on the misrepresentation, they did in fact rely on the misrepresentation and their reliance was reasonable. Kinlay further alleges that, after the Caissa entities returned the capital investment prematurely and advised other investors of the early redemption, investor confidence plunged and other investors began withdrawing their investments, resulting in the collapse of the Caissa entities. Kinlay alleges that the fraud was a proximate cause of the collapse.

Kinlay bases the fraud claim on the following factual allegations: After receiving Monumental's request to redeem its capital investment, Kinlay, on behalf of Caissa, advised Monumental by letter dated June 14, 2004, that Caissa would retain the investment for six months, in accordance with AMEX rules. However, during the week of July 12, 2004, Henley and Wilmott, who together held a controlling 60% interest in Caissa, arranged for Caissa to return the capital. On July 15, 2004, Henley wrote the AMEX to confirm that it had no objection to the redemption. On July 20, 2004, Robert J. Devine, director of the National Association of Securities Dealers (NASD)-AMEX Financial Regulation Department, replied in writing that the AMEX had no objection to the early withdrawal, provided that the Securities and Exchange Commission (SEC) had no objection. Four days later, Conroy of Prisma sent the allegedly fraudulent e-mail advising Henley that the AMEX had waived the six-months notice period requirement. On July 19, 2004, Caissa's accountant provided the SEC with notice of the pending redemption and Caissa returned Monumental's investment.

On the same day, Kinlay returned to work after vacation and learned of the redemption. He contacted the AMEX to complain. The AMEX investigated the complaint and concluded that, while Caissa need not have waited six months before honoring the redemption request, it should have waited two more days, until July 21, 2004, before returning the investment, pursuant to SEC Rule 15c3-1 (e) (1). The rule requires that a broker-dealer give written notice to the SEC two business days before the

withdrawal of equity capital, if the withdrawal exceeds 30% of the broker-dealer's excess net capital, in any 30-day period.

Kinlay also complained to the NASD that Caissa had permitted Monumental to withdraw its capital investment prior to the expiration of the AMEX six-months' redemption notice period. The NASD concluded that, while the withdrawal had violated SEC Rule 15c3-1, it would take no action against Caissa because there was no evidence of harm to public customers.

To assert a viable claim of fraud, a plaintiff must plead the existence of a material misrepresentation of fact, made with knowledge of its falsity, scienter, justifiable reliance and injury (Lanzi v Brooks, 54 AD2d 1057 [3d Dept 1976], affd 43 NY2d 778 [1977]; Desideri v D.M.F.R. Group [USA] Co., 230 AD2d 503 [1st Dept 1997]). Further, "each of these essential elements must be supported by factual allegations sufficient to satisfy the requirements of CPLR 3016 (b)" (id. at 1058). It provides that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust, or undue influence, the circumstances constituting the wrong shall be stated in detail" (CPLR 3016(b)). The plaintiff's allegations must be sufficiently particularized to give adequate notice to the court and to the parties of the transactions and occurrences intended to be proved (Foley v D'Agostino, 21 AD2d 60 [1st Dept 1964], citing CPLR 3013, 3016 [b]).

Where the complaint is almost entirely grounded upon information and belief, the allegations are conclusory, and the plaintiff fails to set forth a reliable factual basis for its suspicions, the motion to dismiss will be granted (Orix Credit Alliance, Inc. v R.E. Hable Co., 256 AD2d 114 [1st Dept 1998]; Apfelberg v East 56th Plaza, Inc., 78 AD2d 606 [1st Dept 1980], appeal dismissed 54 NY2d 680 [1981]). "[A] mere recitation of the elements of fraud is insufficient to state a cause of action" (National Union Fire Ins. Co. of Pittsburgh, Pa. v Robert Christopher Assocs., 257 AD2d 1, 9 [1st Dept 1999]).

In dismissing the fraud claim in the January 2006 order, the court noted Kinlay's failure to allege that Prisma's Conroy knew that the e-mail contained false information. The AMEX e-mail sent four days prior to the Conroy e-mail demonstrates the AMEX's confirmation that it had no objection to waiving the notice period, if the SEC did not object. In addition, Kinlay does not allege that Conroy knew that Caissa's accountant had delayed notifying the SEC until July 19, 2004. Therefore, an analysis of Kinlay's allegations shows that the Conroy e-mail was apparently not an intentional misrepresentation. For these reasons, Kinlay has not shown, much less proven, the element of scienter against Prisma.

Similarly, Kinlay has failed to allege adequate facts to support the element of reliance. To show reliance, a plaintiff must demonstrate that he was induced to "act or refrain from acting" to his detriment as the result of the alleged misrepresentation or omission (Megaris Furs, Inc. v Gimbel Bros., Inc., 172 AD2d 209, 212 [1st Dept 1991]).

The plaintiff must also show that the reliance was reasonable or justified (Stuart Silver Assocs. v Baco Dev. Corp., 245 AD2d 96 [1st Dept 1997]; Prosser & Keeton, Law of Torts § 108, at 749 [5th ed.]). The fraud claim is defective because Kinlay has failed to allege that Henley and Wilmott, as Caissa officers, relied upon the Conroy e-mail in arranging for the return of Monumental's capital investment. Instead, Kinlay's own allegations and the undisputed facts make it clear that Henley and Wilmott had agreed to return the Monumental investment prior to receipt of the e-mail and that the e-mail caused them, at most, to return the investment two days earlier than if the e-mail had not contained the alleged misrepresentation.

The fraud claim is also fatally defective because Kinlay has failed to allege facts that would support a finding that the alleged misrepresentation by Conroy was the direct and proximate cause of the losses claimed (see Laub v Faessel, 297 AD2d 28, 30 [1st Dept 2002]). Kinlay does not allege that the Conroy e-mail was necessary for Caissa's return of Monumental's investment, nor has he adequately alleged that it was the catalyst for the redemption. Instead, he has alleged that Henley, Wilmott and Caissa had arranged for the redemption prior to the e-mail. There is no dispute that, had they known that Caissa's accountant had not advised the SEC of the pending redemption until July 19, 2004, they could simply have delayed returning the funds until July 21, 2004 instead. Thus, it has not been shown that the e-mail caused the damages allegedly suffered by Caissa, inasmuch as the capital could simply have been returned two days later.

For these reasons, that branch of Prisma's motion to dismiss the fraud claim is granted and the claim asserted against Prisma is dismissed.

Next, Prisma contends that the aiding and abetting fraud claim asserted against it and Monumental in the seventh cause of action is fatally defective for the same reasons that the court in the January 2006 order dismissed the branch of the claim asserted against Monumental. Prisma also contends that the claim is defective because Kinlay has failed to allege that the Conroy e-mail was a necessary part of the alleged scheme to return Monumental's capital to Caissa's detriment, or to assert facts in support of his allegation that the Conroy e-mail provided substantial assistance to the alleged wrongful conduct. Instead, Kinlay alleges that Henley, Wilmott and Caissa arranged to return Monumental's capital several days before Conroy sent the e-mail.

To assert a legally cognizable claim of aiding and abetting fraud, a plaintiff must plead facts demonstrating that the proposed aider had knowledge of the fraudulent nature of the representations and rendered substantial assistance to the principal actor (Kaufman v Cohen, 307 AD2d 113 [1st Dept 2003]; National Westminster Bank USA v Weksel, 124 AD2d 144 [1st Dept], lv denied 70 NY2d 604 [1987]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur" (id. at 126, citing Kolbeck v LIT America, Inc., 939 F Supp 240 [SDNY 1996], affd 152 F3d 918 [2d Cir 1998]; King v George Schonberg & Co., 233 AD2d 242 [1st Dept 1996]). "Where liability for fraud is to be

extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016 (b) be strictly adhered to" (National Westminster Bank, 124 AD2d at 149).

Kinlay cannot demonstrate the element of causation because, by his own allegations, it is apparent that Prisma did not provide any actual assistance to Henley and Wilmott in their alleged breaches of fiduciary duty or fraud. By Kinlay's own allegations, Prisma's Conroy, either acting independently or under direction from his employers, sent the e-mail to Henley on July 19, 2004, after Henley and Wilmott had decided to return Monumental's investment. Kinlay does not allege that Caissa needed any representation from Prisma before returning the investment.

In addition, Prisma's benefit, if any, from Henley's and Wilmott's alleged misconduct is not sufficient to establish aiding and abetting liability. Receiving a benefit from another's wrongful conduct establishes, at most, constructive knowledge, which "is an insufficient basis for aider and abettor liability" (Kaufman, 307 AD2d at 126).

For these reasons, that branch of Prisma's motion to dismiss the aiding and abetting fraud claim asserted against Prisma is granted, and the claim is dismissed.

The aiding and abetting fraud claim asserted against Fulcrum and Morris in the 11th cause of action is similarly fatally defective on its face. In this claim, Kinlay primarily alleges that Fulcrum and Morris aided and abetted Henley and Wilmott in their

alleged fraudulent inducement of Kinlay to enter into the separation agreement and release while planning to destroy the Caissa entities. Kinlay alleges that Henley and Wilmott's fraud consisted of failing to divulge to Kinlay prior to, and during, negotiation of the separation agreement and release that they were establishing a rival hedge fund. However, Kinlay has failed to allege the manner in which Fulcrum and Morris aided and abetted the alleged fraudulent omission.

To the extent that the claim is based on allegations that Fulcrum and Morris aided and abetted the fraud allegedly committed by Prisma with the Conroy e-mail, the claim is also fatally defective. As discussed above, the fraud claim asserted against Prisma is not legally cognizable, primarily because Kinlay has failed to allege adequate facts in support of the element of reliance. Where no primary fraud exists, a claim of aiding and abetting that conduct or omission is fatally defective and must be dismissed (see National Westminster Bank USA,124 AD2d 144).

For these reasons, the branch of the motion to dismiss the aiding and abetting fraud claim asserted against Fulcrum and Morris is granted and the claim is dismissed.

The Fiduciary Duty Claims

In the aiding and abetting a breach of fiduciary duty claim asserted against Prisma in the fifth cause of action, Kinlay alleges that Prisma aided Monumental, as a Caissa limited partner, in its alleged breach of fiduciary duty owed to Caissa, a Delaware limited liability company.

In the January 2006 order, the court dismissed the breach of fiduciary duty claim asserted against Monumental on the ground that, pursuant to Delaware law, Monumental, as a limited partner without management control, does not owe such duty and, therefore, cannot be held liable for breach of the duty (see Bond Purchase, L.L.C. v Patriot Tax Credit Props., L.P., 746 A2d 842 [Del Ch 1999] [Under Delaware law, a limited partner does not owe a fiduciary duty to the partnership or its partners, unless the partnership agreement vests the limited partner with the power to manage or control the partnership]; Caissa Capital LP Partnership Agr. § 3.01 [a]; K2 [Caissa] Capital Mgt., LLC, Operating Agr. § 5.1). Inasmuch as Monumental did not owe such duty, Prisma could not have aided and abetted a breach of such duty.

Therefore, that branch of the motion to dismiss the aiding and abetting of fiduciary duty claim asserted against Prisma is granted and the claim is dismissed.

In the 12th cause of action, Kinlay alleges that Fulcrum and Morris aided and abetted Henley and Wilmott in breaching the fiduciary duties they owed to Kinlay and the Caissa entities by knowingly facilitating the establishment of rival funds and the destruction of the Caissa Onshore and Offshore Funds.

However, there is no dispute that Fulcrum and Morris are in the business of establishing hedge funds and were retained by Henley and Wilmott to perform that service. Further, nothing in the 2003 marketing agreement between the Caissa entities

and Fulcrum prohibits Fulcrum and Morris from establishing such funds. Instead, the agreement provides that "[t]he parties to this Agreement recognize and agree that each is operating as an independent contractor and not as an agent of the other. This Agreement shall not constitute a partnership or joint venture" (Caissa/Fulcrum Marketing Agr., § 10, Miscellaneous, Relationship of the Parties). In addition, the court notes in passing that there is no dispute that Kinlay himself set up a rival fund, the Proteum Fund, while in partnership with Henley and Wilmott. For these reasons, the claim that Fulcrum or Morris participated in a breach of fiduciary duty by assisting in the creation of the rival funds is fatally defective on its face, and is dismissed.

The Tortious Interference Claims

In the "tortious interference with existing contractual relations" claims asserted in the 4th cause of action, plaintiffs allege that Prisma, without economic justification and acting out of malice, intentionally induced the breach, or termination, of various agreements: by various investors of their agreements with the Caissa entities; by Henley and Wilmott of the separation agreement with Kinlay; and by the Caissa entities of the licensing agreement with Investment Analytics regarding the use of that company's forecasting models.

Prisma seeks dismissal of the claim on grounds that both Monumental and it had a legal right to redeem their capital investment and that plaintiffs have failed to allege that

the redemption caused any specific investor to actually breach an agreement with any of the Caissa entities.

The elements of a viable claim for tortious interference with contract are: "the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom" (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 424 [1996]; Israel v Wood Dolson Co., 1 NY2d 116 [1956]). "[T]he interference must be intentional, not merely negligent or incidental to some other, lawful, purpose" (Alvord & Swift v Stewart M. Muller Constr. Co., 46 NY2d 276, 281 [1978]). "[E]conomic interest is a defense to an action for tortious interference with contract unless there is a showing of malice or illegality" (Foster v Churchill, 87 NY2d 744, 750 [1996]).

Kinlay acknowledged Monumental's right to redeem in his June 14, 2004, reply to Monumental's redemption request. In the January 2006 order, the court concluded that Monumental had a legal right to redeem its capital under the limited partnership agreement. Further, Prisma/Monumental had an economic justification for doing so.

Moreover, plaintiffs have failed to allege any factual basis for their allegation that Prisma tortiously interfered with a licensing agreement between the Caissa entities and Investment Analytics, and the separation agreement executed by Kinlay, Henley and Wilmott.

In addition, plaintiffs' pertinent factual allegations in the second amended complaint make no mention of Prisma, nor do plaintiffs allege any factual basis for their conclusory allegation that Prisma acted illegally or with malice.

For these reasons, that branch of Prisma's motion to dismiss the tortious interference claim asserted against it is granted and the claim is dismissed.

Fulcrum and Morris also seek to dismiss plaintiff's claims for tortious interference with contractual relations and prospective contractual relations asserted against them in the 9th and 10th causes of action. They contend that Kinlay failed to identify any specific existing contracts or prospective contractual relations that were breached, allegedly as the result of their conduct.

In these claims, plaintiffs allege that Fulcrum and Morris, without economic justification and acting out of malice, intentionally induced the breach or termination by: investors, including Prisma/Monumental and Gottex, of agreements with the Caissa entities; Henley and Wilmott of the Kinlay separation agreement; and the Caissa entities of the Investment Analytics licensing agreement. Plaintiffs also allege that Fulcrum and Morris were aware that various investors were considering entering into contractual or business relationships with the Caissa entities and with Kinlay and caused the potential investors to refrain from entering into such relationships.

With regard to investor agreements, Monumental had a right to redeem its capital investment, as held above. With respect to the Gottex agreement or prospective

agreement, plaintiffs have failed to adequately identify such agreement. Other than those two agreements, they have wholly failed to identify any investor contract that was breached (see Business Networks of New York, Inc. v Complete Network Solutions Inc., 265 AD2d 194 [1st Dept 1999]). In addition, they have failed to allege any facts regarding the nature of the breach of existing contracts or specifying any conduct by Fulcrum or Morris that resulted in the breach of the identified existing contracts or the failure of a prospective contractual or business relationship.

With regard to the separation agreement, plaintiffs allege that Henley and Wilmott breached that agreement by misappropriating and misusing proprietary information, failing to pay monies due to Kinlay and failing to provide Kinlay with an accounting. However, they do not allege any facts that suggest that Fulcrum or Morris intentionally procured the alleged breach.

With regard to the licensing agreement with Investment Analytics, plaintiffs have similarly failed to allege adequate facts in support of their bare legal conclusions.

For these reasons, the 9th and 10th causes of action are fatally defective. Therefore, the branches of the motion by Fulcrum and Morris to dismiss these claims are granted and the claims are dismissed.

The Defamation and Trade Disparagement Claims

Prisma, Fulcrum and Morris contend that the defamation and trade disparagement claims asserted against them in the 14th cause of action are fatally defective because

plaintiffs have failed to attribute any defamatory statement to a particular defendant, or to specify the time, place or manner of publication of such statement.

The elements of a claim of defamation are "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se" (Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999], citing Restatement [Second] of Torts, § 558). Further, in the complaint, the plaintiff must also allege "the particular words complained of" (CPLR 3016 [a]) and "the time, place and manner of publication" (Khan v Reade, 7 AD3d 311, 312 [1st Dept 2004]). "The reason for the requirement of specific pleading in defamation cases is to give adequate notice to the defendant as to the occurrence constituting the wrong and to discourage the institution of vexatious actions" (Pappalardo v Westchester Rockland Newspapers, 101 AD2d 830, 830 [2d Dept 1984], affd 64 NY2d 862 [1985]).

Although, in the second amended complaint, plaintiffs allege in general terms that all defendants made various false, defamatory and disparaging statements about his business reputation and the services provided by both plaintiffs, they have failed to attribute any specific statement to a particular defendant. They have also wholly failed to set forth any particular words allegedly uttered and the time, manner and place of publication.

In addition, in the branch of the claim for trade disparagement, plaintiffs have wholly failed to allege that Kinlay or Investment Analytics suffered any specific damages. A plaintiff alleging a claim for trade disparagement must allege special damages with specificity (Kirby v Wildenstein, 784 F Supp 1112 [SDNY 1992]; see Lynch v McQueen, 309 AD2d 790 [2d Dept 2003] [prima facie tort claim requires pleading of special damages]). Here, plaintiffs allege merely that they have "sustained injury damages as a result of these false, defamatory and disparaging statements" (Second Am Compl ¶ 243).

Further, Fulcrum and Morris contend that all claims alleged against Morris individually must be dismissed because plaintiffs do not allege that Morris acted in any capacity other than as principal of Fulcrum. A claim against an individual based on alleged actions taken solely in his corporate capacity is fatally defective, unless the plaintiff alleges that the individual had committed an independent tortious act outside the scope of his corporate employment (Adzick v AGS Computers, Inc., 160 AD2d 530 [1st Dept 1990]). This branch of the motion is granted without opposition by plaintiffs and plaintiffs' claims asserted against Morris are dismissed.

The Breach of Contract Claim

Fulcrum next seeks to dismiss the 13th cause of action for breach of the October 1, 2003, marketing agreement asserted by Kinlay as a third-party beneficiary against Fulcrum, on the grounds that Kinlay lacks standing because he is neither a party to, nor a third-party beneficiary of, the marketing agreement.

"A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost'" (State of California Pub. Employees' Ret. Sys. v Shearman & Sterling, 95 NY2d 427, 434-435 [2000], quoting Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314, 336 [1983]). The marketing agreement between the Caissa entities and Fulcrum provides in relevant part that "[t]he parties to this Agreement recognize and agree that each is operating as an independent contractor and not as an agent of the other" (Caissa/Fulcrum Marketing Agr., § 10, Miscellaneous, Relationship of the Parties). The agreement also provides that "[t]his Agreement shall be binding upon and inure to the benefit of the parties hereto, their successors and permitted assigns. No other person shall have any right or obligation under this agreement" (Caissa/Fulcrum Marketing Agr., § 10, Miscellaneous, Successors).

Fulcrum also contends that the claim as asserted by Kinlay in his derivative capacity is fatally defective on grounds that Kinlay lacks standing (see discussion above) and because he has failed to identify both the confidential information Fulcrum allegedly disclosed and the damages resulting from the breach.

To establish a right to recover for breach of contract, a party must allege the existence of a contract, performance of the contract by the injured party, breach by

another party and damages as a result of the breach (Rexnard Holdings, Inc. v Bidermann, 21 F3d 522 [2d Cir 1994]; Noise in Attic Prods., Inc. v London Records, 10 AD3d 303 [1st Dept 2004]). When the alleged breach involves the impermissible disclosure of confidential information, the plaintiff must identify the confidential information that defendant allegedly disclosed and the damages that resulted from that disclosure (Gordon v Dino De Laurentiis Corp., 141 AD2d 435 [1st Dept 1988]). Vague and conclusory allegations, including a failure to identify the confidential information and failure to demonstrate how the alleged breach of a confidentiality agreement caused plaintiffs injury, are insufficient to sustain a claim of breach of contract (id.).

Here, Kinlay simply alleges in a conclusory fashion that Fulcrum disclosed "to others various confidential and trade secret information acquired from the Caissa Entities and Kinlay while performing services under the October 1, 2003 marketing agreement" (Second Am Compl ¶¶ 235-36 [emphasis added]) and that the Caissa entities sustained damages as a result. Kinlay does not identify the information allegedly disclosed, nor does he allege the specific damages sustained.

For these reasons, that branch of Fulcrum's motion to dismiss the 13th cause of action in its entirety is granted without opposition and the claim is dismissed.

Attorney Disqualification

Plaintiffs seek to disqualify Jared Stamell, Esq., John Crow, Esq. and the law firm of Stamell & Schager, LLP, as counsel for the Caissa entities on grounds that their

representation of Henley and Wilmott has placed them in direct conflict with the Caissa entities' best interests.

In opposition, the Caissa entities contend that disqualification should be denied for the same reasons that the court denied plaintiffs' previous motion to disqualify counsel. In the decision and order dated March 21, 2005, the court denied plaintiffs' motion to disqualify the Caissa entities' counsel on grounds that, assuming counsel had represented Kinlay during negotiations culminating in the separation agreement and release, Kinlay, as a partner of Henley and Wilmott, had no reasonable expectation of privacy regarding any information that he may have disclosed to counsel during the course of the representation.

The pending motion to disqualify is denied. Plaintiffs have failed to demonstrate any viable reason to deny the Caissa entities their right be represented by their chosen counsel; counsel who has represented them since before commencement of this lawsuit (see S&S Hotel Ventures Ltd. Partnership v 777 S.H. Corp., 69 NY2d 437 [1987]).

This motion is yet another in the dispute between Kinlay, on the one side, and Henley and Wilmott, on the other, for control over the Caissa entities. The Caissa entities, apparently on instruction from Caissa principals Henley and Wilmott, have asserted counterclaims for breach of fiduciary duty against Kinlay. While Kinlay asserts a cause of action to rescind the separation agreement pursuant to which he sold his Caissa interests, no decision regarding the enforceability of that agreement may be made at this

stage of the litigation, inasmuch as little discovery regarding Kinlay's allegations of fraudulent inducement has yet occurred, as discussed above. Therefore, at this juncture, to substitute plaintiffs' counsel for the Caissa entities' counsel would be to create a serious conflict of interest.

Reargument

The Caissa entities seek to reargue that branch of their prior motion to dismiss plaintiffs' derivative claims, contending that the court misapprehended the relief sought and that they had requested that the court dismiss the derivative claims plaintiffs had asserted against the other defendants in the Caissa entities' name.

In opposition, plaintiffs contend that the motion should be denied on grounds that it is untimely, that the Caissa entities never requested such relief and that, in any event, Kinlay has the right to bring derivative claims on the Caissa entities' behalf.

By interim bench order issued on February 22, 2006, the court granted the Caissa entities' request for permission to move to reargue, in the interests of judicial economy and fairness.

In the January 2006 order denying the Caissa entities' motion to dismiss, the court noted that the Caissa entities seek to dismiss the derivative claims asserted in the second amended complaint on grounds that Kinlay lacks standing to bring derivative claims on their behalf and that Kinlay cannot seek to rescind the separation agreement until he tenders the $372,500 that he received from the Caissa entities under the agreement. The

court then denied the motion to dismiss, on the ground that all claims originally asserted against the Caissa entities were omitted from the second amended complaint.

As noted above, the court is well aware of the struggle for control over the Caissa entities between Kinlay, as plaintiff and counterclaim defendant, and Henley and Wilmott, as defendants and counterclaim plaintiffs, in this action. As discussed above, inasmuch as little discovery has occurred regarding Kinlay's claim to rescind the separation agreement and release as fraudulently induced, no decision may be rendered regarding Kinlay's standing to assert derivative claims on behalf of the Caissa defendants.

Accordingly, it is

ORDERED that motion sequence number 037 is denied in its entirety; and it is further

ORDERED that motion sequence number 038 is granted and the 4th, 5th, 6th, 7th and 14th causes of action asserted against defendant Prisma Capital Partners in the second amended complaint are dismissed; and it is further

ORDERED that motion sequence number 039 is granted to the limited extent that the court grants reargument, and upon reargument, adheres to its prior decision; and it is further

ORDERED that motion sequence number 042 is granted and the 9th, 10th, 11th, 12th, 13th and 14th causes of action asserted against defendants Fulcrum Investment Group LLC and John Morris are dismissed.

This constitutes the decision and order of the court.

Dated: March 9, 2007

ENTER:

J.S.C.