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

PRESENT: HON. EILEEN BRANSTEN PART 3

Index Number : 651615/2010
MOFFATT, ANDREW P.
vs
JP MORGAN CHASE BANK
Sequence Number : 001
DISMISS ACTION

INDEX NO. 651615/10
MOTION DATE 8/11/11
MOTION SEQ. NO. 001
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 ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 1-9-12

HON. EILEEN BRANSTEN J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART THREE

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ANDREW P. MOFFATT, individually and derivatively on behalf of DISPATCH TRANSPORTATION CORP.,

Plaintiffs,

Index No.: 651615/2010
Motion Date: 8/11/11
Motion Seq. No.: 001

-against-

JP MORGAN CHASE BANK,

Defendant.

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PRESENT: EILEEN BRANSTEN, J.:

Defendant JPMorgan Chase Bank, N.A.[1] ("Chase" or "Defendant"), moves, pursuant to CPLR 3211(a)(1), (3), (5) and (7), to dismiss the complaint of Andrew P. Moffatt ("Moffatt"). Moffatt brings this suit individually and derivatively on behalf of Dispatch Transportation Corp. ("DTC", and, with Moffat, "Plaintiffs"). Plaintiffs oppose the motion.

FACTUAL BACKGROUND

On or about September 28, 2010, Plaintiffs commenced this action. Affirmation of Andrea Likwornik Weiss in Support of Defendant's Motion to Dismiss the Complaint ("Weiss Affirm."), Ex. A ("Complaint").

DTC is a delivery firm in New York City. Plaintiff Moffatt is a fifty percent shareholder in DTC. *Id.*, ¶ 4. Non-party Jud H. Gittelman ("Gittelman") is the other fifty percent shareholder. *Id.*, ¶ 5. Gittelman was responsible for the financial affairs of DTC. *Id.*, ¶ 12. Moffatt managed the operation of the business. *Id.*, ¶ 12.

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[1] Sued herein as "JP Morgan Chase Bank."

In 1987, DTC established two bank accounts, numbered 010-026991 and 010-028315, at Chemical Bank, a predecessor to Chase. Complaint, ¶ 13. Plaintiffs argue that they have had a banking relationship with Chemical Bank, and then Chase, since 1987. Complaint, ¶ 26.

When DTC opened its two Chemical Bank, now Chase, accounts, the accounts required the signature of both Gittelman and Moffatt. *Id.*, ¶ 13; *see also* Complaint, Ex. E. Moffatt believed that from the inception of DTC to February or March 2009, each check from DTC's Chase bank accounts required both his and Gittelman's signature. Complaint, ¶ 18.

Sometime in 1998, new signature cards were executed for both Chase accounts. Complaint, ¶¶ 37, 39. The new signature cards for each account, 010-026991 and 010-028315, reduced the number of signatories on checks issued from the accounts from two to one. *Id.*, ¶¶ 37, 39.

In early 1997, Gittelman approached Defendant Chase for a line of credit. *Id.*, ¶ 20. A loan for $100,000 was issued on May 7, 1997. *Id.* An additional $25,000 was requested on or about November 24, 1997. *Id.*, ¶ 21. The business credit line was extended to $115,000 on or about October 17, 2001. *Id.*, ¶ 23.

Plaintiffs allege that these loan applications contained false information regarding DTC. In particular, Plaintiffs point to the loan applications listing Gittelman as the 100%

owner of DTC. Complaint, ¶ 22. Plaintiffs allege that Chase should have verified this information against its DTC file, and that Chase either knew or should have known that Gittelman was not the 100% owner of DTC. *Id.*, ¶¶ 27, 32.

Sometime in October or November of 2008, Gittelman abandoned his position at DTC. *Id.*, ¶ 15. Upon Gittelman's departure, Moffatt discovered "a bag of checks, statements and handwritten ledgers...." *Id.*, ¶ 16. Plaintiff asserts that these documents reflected a diversion of an estimated $750,000 each year from DTC. *Id.*

Upon learning of the alleged diversion of funds, Moffatt reported the situation to a Chase employees Christopher R. Mania and Anthony Campagna. *Id.*, ¶ 17.

Moffatt alleges, based on records provided by Chase, that from 2002 on Gittelman withdrew approximately $15,002,403.28 using checks for the Chase accounts that containing only Gittelman's signature. *Id.*, ¶ 43.

Other Proceedings

On or about June 30, 2009, Chase filed an action against DTC and nonparty Gittelman in Nassau County (*JP Morgan Chase Bank v. DTC, et al.* Index No. 13867/2009). Complaint, ¶ 8. Chase sought recover of DTC's debt obligations incurred with respect to the business loans issued to DTC. *Id.* On or about March 12, 2010, Gittelman impleaded Moffatt.

On or about August 4, 2009, the Neiman Marcus Group commenced an action against Jud Gittelman and DTC in U.S. district court, Southern District of New York (No. 09-Civ-

6861)("Neiman Marcus Action"). *Id.*, ¶ 10. The Neiman Marcus Group alleged that DTC and Gittelman fraudulently overbilled for DTC's services. *Id.* On or about January 8, 2010, Gittelman filed a third party complaint against Moffatt. *Id.* Moffatt filed a fourth party action against Jud Gittelman's wife, Ann Gittelman; Jud Gittelman's father and DTC officer, Sol Gittelman; DTC's accountant, Philip London and DTC's accounting firm, London & Co. *Id.*

The instant complaint in this action contains seven counts alleged by Moffatt individually and derivatively on behalf of DTC against Chase: 1) breach of contract; 2) breach of implied covenant of good faith and fair dealing; 3) breach of fiduciary duty; 4) breach of duty to supervise employees; 5) fraud, fraudulent misrepresentation and deceit; 6) gross negligence; and 7) negligence. Complaint, pp. 13-22.

STANDARD OF LAW

Motion to Dismiss

Under CPLR 3211, the court takes the facts alleged in the complaint as true and accords the non-movant the benefit of every possible favorable inference. *AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 691 (2005). Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence. *Id.*, citing *Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 635-36 (1976). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners

factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail." *Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275 (1977); *Yan Ping Xu v. New York City Dep't of Health*, 77 A.D.3d 40, 43 (1st Dep't 2010).

ANALYSIS

I. *Moffat's Standing to Assert Claims in his Individual Capacity*

Moffatt asserts each claim in his individual capacity and derivatively on behalf of DTC. Complaint, p. 1. Defendant moves to dismiss all claims asserted by Moffatt in his individual capacity.

Defendant argues that Moffatt sues only for alleged injuries to a corporation and that he thus lacks standing to sue in his individual capacity. Defendant contends that Moffatt is seeking damages as a corporate shareholder and that a corporate shareholder does not have standing to sue in his individual capacity for injuries to the corporation. Defendant's Memorandum of Law in Support of its Motion to Dismiss the Complaint ("Def. Mem."), p. 10. According to Defendant, the complaint only alleges damages as a result of diversion of DTC's assets and Moffatt has not alleged a separate and distinct injury to himself. *Id.*, p. 11.

Plaintiffs argue in opposition that, in addition to corporate losses, Moffatt suffered individual injury which permits a personal right of action. Plaintiffs' Memorandum of Law

in Opposition to Defendant's Motion to Dismiss the Complaint ("Pl. Mem."), pp. 11-12. Plaintiffs suggest that a "personal right of action" exists where "there is a violation of a duty owing to the shareholder, having its origin in circumstances independent of and extrinsic to the corporate entity." *Id.*, p. 12. Moffatt alleges that as a result of Defendant's actions, he lost the equity he built in the corporation and $1.5M in retained earnings that were set aside for Moffatt. *Id.*, p. 11. Further, Plaintiffs argue that striking Moffatt's individual claims at this early state without discovery would be "inappropriate." *Id.*, p. 12.

In further support of its motion to dismiss, Defendant argues that Plaintiffs' allegations are based on corporate looting, which only amounts to a wrong against a corporation. Reply Memorandum of Law in Further Support of its Motion to Dismiss the Complaint ("Reply Mem."), p. 8. Defendant contends that a complaint which contains "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment" amounts to a claim raised by a shareholder in a derivative action and not in any individual capacity. Chase argues the only contractual relationship exists with its customer, DTC.

It is well settled law that a shareholder claiming corporate waste or mismanagement of assets may sue derivatively. *Abrams v. Donati*, 66 N.Y.2d 951, 953 (1985). The Court of Appeals has held that, "[f]or a wrong against a corporation a shareholder has no individual

cause of action, though he losses the value of his investment or incurs personal liability in an effort to maintain the solvency of the corporation." *Id.* Thus, "allegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more" reflect a wrong to the corporation and not to the shareholder individually. *Id.*

Further, in a similar case involving a closely held corporation with two shareholders each owning 50% of the corporation, the Court of Appeals held that "the fruits of a diverted corporate opportunity are properly a corporate asset." *Glenn, et al. v. Hoteltron Systems, Inc., et al.*, 74 N.Y.2d 386, 393 (1989) (finding no exception necessary where an errant shareholder may share proportionately in the restitution to a corporation generated by a successful derivative action). The Court found that "the innocent shareholder, was injured only to the extent that he was entitled to share in those profits" based on the non-shareholders diversion of corporate assets for his own profit. *Id.* at 392; *see also Quatrochi, et al. v. Citibank, N.A., et al.*, 210 A.D.2d 53, 53 (1st Dep't 1994)(dismissing complaint pursuant to CPLR 3211 (a)(7) based on corporate shareholder's lack of standing to sue in his own name for injuries to the corporation).

In this matter, Plaintiffs have not alleged that Defendant breached a duty to Moffatt that has origins in circumstances independent of and extrinsic to the corporate entity. The complaint only contains allegations that Defendant breached duties to DTC. Plaintiffs allege

that due to Defendant's actions and inactions, non-party Gittelman was able to improperly transfer and expend money from DTC accounts with a single signature. Complaint, ¶¶ 50, 56, 62, 68, 75, 81, 87 ("Plaintiffs Moffatt and DTC are entitled to recover the amount of funds that were improperly transferred and expended as a result of the single signature of Jud Gittelman on checks in amounts well in excess of $15 million dollars."). Although Moffatt states that he "lost equity in the corporation" and that "$1.5M retained earnings were set aside" for his benefit, he has not provided any basis for this statement except for a general citation to his "Amended Answer, Affirmative Defenses, and Counterclaims" in the Neiman Marcus action. *See* Pl. Mem., p. 11. These damages would only be a result of Defendant Chase's relationship to DTC and would not be a result of any Chase duty independent and extrinsic to DTC. Moreover, the only two theories of liability asserted against Chase are: 1) Chase failed to observe its procedures and signature card requirements by reducing the number of signatories from two to one and 2) Chase permitted nonparty Gittelman to abscond with DTC funds by permitting loans to be issued to Gittelman. Neither of these theories present circumstances "independent of and extrinsic to the corporate entity."

Additionally, while Moffatt argues that striking Moffatt's individual claims would be "inappropriate" without discovery, there is no discovery which would alter the allegations in this complaint to permit recovery in an individual capacity from this Defendant. For these

reasons, Defendant's motion to dismiss all of the claims as asserted by Plaintiff Moffatt in his individual capacity must be granted.

II. *Statute of Limitations*

Defendant next argues that all of Plaintiffs' claims are time-barred. Def. Mem., p. 7. Defendant argues that all plaintiffs' claims are based in whole or in part on Chase's role in the execution of new signature cards in 1998. *Id.*, p. 8. Defendant contends on this basis that the statute of limitations on Plaintiffs' claims began in 1998, when the new signature cards were put into effect.

Defendant contends that Plaintiff's claims are all governed and barred by applicable six and three year statutes of limitations. *Id.*, p. 7.

Plaintiffs argue in opposition that the claims are not time barred. Plaintiffs contend that the causes of action accrued only in late 2008, once Moffatt first became aware of Defendant's acts. Pl. Mem., p. 7. Plaintiffs argue claims accrued when Moffatt discovered the checks with the single signature in late 2008. *Id.* Plaintiff argues that "as such, the fraud and concealment first perpetrated with the revised signature cards that eliminated the dual signature requirement for the DTC accounts continued and was ongoing through 2008 and such the statue of limitation would not start to run until June 2008 at the latest." *Id.*, p. 11. Plaintiff argues that because the causes of action accrue where Plaintiff discovered the fraud,

Plaintiffs have properly filed this action within the applicable two year statute of limitations. *Id.*

Additionally, Plaintiffs appear to argue under an equitable estoppel theory that the statute of limitations is tolled based on Defendant's conduct. Pl. Mem., p. 7. Plaintiffs argue that Defendant is estopped from pleading an affirmative defense of the statute of limitations where plaintiff was induced by fraud, misrepresentations, or deception to refrain from a timely action. *Id.* Plaintiff argues that Chase: 1) knew or should have known that Gittelman presented false information in his application for a business loan (specifically, that Gittelman was a 100% owner of DTC); 2) failed to notify Moffatt that he was no longer a required signatory on the DTC bank accounts; and 3) intended to mislead Moffatt into believing that he remained a signatory on the accounts. *Id.*, p. 8.

Defendant argues that fraud discovery rule and the equitable estoppel doctrine are not applicable. Defendant argues that the fraud discovery rule only applies to fraud claims. Reply Brief, p. 7. Defendants argued that plaintiffs were on notice of any alleged fraud when the new signature cards were executed in 1998, and that DTC knew that the dual signature requirement was eliminated in 1998 as Plaintiff admits that Gittelman signed the signature cards. *Id.*, p. 6.[2] Defendant further argues that even facts existed that permitted the the

[2] Defendant argues that Moffatt admits to signing a portion of the signature card. In opposition, Moffatt contends that one of the two signatures purportedly signed by him is not his

tolling of the statute of limitations to apply, the complaint and documents show that Plaintiffs had sufficient information available to them to require them to investigate whether there was basis for a cause of action as early as 1998. *Id.*, pp. 5-6. Defendant argues that Plainitff has not alleged any facts indicating that Chase made any false representations or engaged in any fraudulent conduct after the signing of the new signature cards in 1998. *Id.*, p. 5.

Defendant also contends that the equitable estoppel doctrine applies only when defendant has engaged in affirmative conduct or made affirmative misrepresentations to conceal from plaintiffs facts essential to make out the cause of action. Reply Mem., p. 3. This limitation on the equitable estoppel doctrine "also applies to fraud actions, because otherwise, the mere assertion of an underlying fraudulent act would always trigger the equitable estoppel...." *Id.*, p. 4.

Accrual of Plaintiff's Claims

The applicable statute of limitations for the seven claims in the complaint are not in dispute. Count one, a breach of contract claim has a statute of limitations of six years. CPLR § 213(2). Count two, a breach of implied duty of good faith and fair dealing claim has a statute of limitations of six years. CPLR § 213(2) ("an action upon a contractual obligation or liability, express or implied."); *see also Pressley v. Ne. Conf. Of Seventh-Day Adventists,* 2006 WL 2482435, *4 (E.D.N.Y. August 25, 2006) (under New York law, the statute of

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signature.

limitations for breach of duty of good faith and fair dealing is six years). Count three, a breach of fiduciary duty which seeks money damages has a statute of limitations of three years. *Kaufman v. Cohen,* 307 A.D.2d 113, 118 (1st Dep't 2003) (stating a breach of fiduciary claim seeking money damages has a statute of limitations of three years). Count four, a breach of duty to supervise has a statute of limitations of three years. *Siagha v. Salant-Jerome, Inc.*, 249 A.D.2d 11, 11 (1st Dep't 1998). Count five, a fraud claim, has a statute of limitations of six years from the date the action accrued or two years from the time the plaintiff discovered the fraud or could have discovered the fraud with reasonable diligence. CPLR § 213(8). Count six, a gross negligence claim, and count seven, a negligence claim, both have a statute of limitations of three years. CPLR § 214(4); *see also Kent v. 534 E. 11th St.*, 80 A.D.3d 106, 112 (1st Dep't 2010) (stating that the statute of limitations for negligence is three years).

Plaintiff's claims are based on two main theories.

First, Plaintiffs argue that Chase allegedly permitted Gittelman to change the policy on the two accounts to permit checks with single signatures as opposed to two signatures to draw from the account. Plaintiffs list certain procedures that Chase alleged failed to abide by and caused Plaintiffs damages. Plaintiffs contend that this permitted Gittelman to issue checks with only his signature for over $15 million dollars.

Second, Plaintiffs argue that Chase processed bank loans in DTC's name for

Gittelman's benefit. Plaintiff contends that the loan applications contained improper information about DTC which Chase knew or should have known was false.

Plaintiff's claims based upon the change in signature policy to DTC's two Chase bank accounts accrued when the new signature cards were signed and the signature policy on the Chase accounts therefore changed. The signature cards appended to the complaint are dated 1998 and the parties do not dispute that the cards were processed on or about that time.

Plaintiffs' theory regarding DTC's bank loans accrued when Chase processed the various bank loans. The first loan occurred in 1997 and was amended at the latest in 2001.

Thus, the claims regarding the signature requirement on the bank accounts accrued in 1998 and the claims regarding the bank loans would at the latest start to accrue in 2001.[3]

Tolling of Plaintiff's Claims

The parties dispute whether any doctrines apply to toll the application of the statute of limitations. In particular, Plaintiffs appear to raise the discovery rule and the equitable estoppel doctrine. The discovery accrual rule applies to fraud claims and fraud-based breach of fiduciary duty claims. *Kaufman v. Cohen*, 307 A.D.2d at 122. Further, the equitable estoppel doctrine reflects the theory that "a defendant/wrongdoer cannot take affirmative

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[3] Defendant has withdrawn its *res judicata* argument pertaining to the bank loans and the Nassau County action. Plaintiff has assured Defendant that counts four, six, and seven were not predicated on loans.. Def. Reply Brief, n.1.

steps to prevent a plaintiff from bringing a claim and then assert the statute of limitations as a defense." *Zumpano v. Quinn*, 6 N.Y.3d 666,674 (2006). For this doctrine it is fundamental in the application of the doctrine that plaintiffs "establish that subsequent and specific actions by defendants somehow kept them from timely brining suit." *Id.*

In this matter, the discovery accrual rule applies to count three (breach of fiduciary duty) and count five (fraud) of Plaintiffs' complaint. Viewing all allegations in the complaint as true and according the non-movant the benefit of every favorable inference, this court finds that the application of the discovery accrual rule to count three and count five places the accrual of the cause of action to 2008, when Moffatt acknowledges that he discovered checks issued with only Gittelman's signature and additional statements which prompted his inquiry to Chase regarding DTC's bank accounts.

Plaintiffs also argue that the equitable estoppel doctrine applies to their causes of action. However, Plaintiffs have not alleged any affirmative steps made by Defendant Chase that prevented Plaintiffs from bringing their claims. The complaint only alleges that Moffatt, despite being a 50% shareholder, had no knowledge of Chase's alleged conduct because Moffat's co-owner of DTC handled DTC finances and that Chase processed checks with both Gittelman's and Moffatt's signature and with only Gittelman's signature. These actions do not show affirmative actions by Chase preventing Plaintiffs from bringing their claims or becoming aware of the accrual of any potential claims, but, instead, may show steps taken

by Gittelman to shield his own conduct. Thus, this court finds that the equitable estoppel doctrine is not applicable to DTC's breach of contract claim (count one), breach of implied covenant of good faith and fair dealing (count two), breach of duty to supervise (count four), gross negligence (count six) and negligence claim (count seven). Plaintiffs filed their complaint on or about September 28, 2010. The basis for these respective claims is Chase's 1998 signature policy change. Thus, these claims were filed 12 years from the date those cause of actions accrued and the claims are thus barred by the statute of limitations. For these reasons, Moffatt's claims derivatively on behalf of DTC for breach of contract claim (count one), breach of implied covenant of good faith and fair dealing (count two), breach of duty to supervise (count four), gross negligence (count six) and negligence claim (count seven) are dismissed.

III. *Failure to State a Cause of action*

Plaintiffs' claims for breach of fiduciary duty (count three) and fraud (count five) remain. Defendant argues that these claims (as with all others) must be dismissed for failing to state a cause of action. Def. Mem., pp. 16-23.

1. Breach of fiduciary duty (Count three)

Defendant argues that Plaintiffs' have failed to state a cause of action for a breach of fiduciary duty. Def. Mem., pp. 19-20. Chase argues that the relationship between a bank and

its depositor is a debtor and creditor relationship, and that a bank does not owe a fiduciary duty to its depositer. *Id.*, p. 19.

In opposition, Plaintiffs argue that Defendant fails to apply the factual inquiry to whether the parties' relationship reflects a fiduciary duty. Pl. Mem., pp. 18-19. Plaintiffs argues that Plaintiffs relied upon "the integrity and fidelity of Defendant when it came to filling out signature cards for accounts that were to require two signatures." Pl. Mem., p. 19.

To plead a breach of fiduciary duty, a plaintiff must allege: 1) defendant owed a fiduciary duty; 2) the defendant committed misconduct; and 3) the plaintiff suffered damages caused by that misconduct. *Burry, et al. v. Madison Park Owner LLC*, 84 A.D.3d 699, 699-700 (1st Dep't 2011). "A fiduciary relationship arises between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 561 (2009) quoting *EBC I v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). This relationship is grounded on a "higher trust" than normally present in the marketplace between those involved in arm's length business transactions. *HF Mgmt. Servs., LLC v. Pistone*, 34 A.D.3d 82, 85 (1st Dep't 2006). Further, the relationship between bank and customer, without more, is not a fiduciary relationship. *Call v. Ellenville Nat'l Bank*, 5 A.D.3d 521, 523 (2 nd Dep't 2004); *see also Marine Midland Bank, N.A. v. Hallman's Budget Rent-A-Car*, 204 A.D.2d 1007, 1008 (4th Dep't 1994).

CPLR 3016(b) requires that "where a cause of action is based upon . . .[a] breach of trust . . . the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). However, this rule does not require a plaintiff to have perfect knowledge of the facts underlying its claim at the initial stage of a litigation, when little if any disclosure may have occurred. *Foley v. D'Agostino,* 21 A.D.2d 60, 64 (1st Dep't 1964). The directive of CPLR 3016(b) constitutes "no more than a directive that the 'transactions and occurrences' constituting the 'wrong' shall be pleaded in sufficient 'detail' to give adequate notice thereof." *Id.*

DTC has not sufficiently alleged a fiduciary relationship between it and Chase, a breach of that relationship and damages which arose from that breach. DTC's relationship with Chase was one of a bank and its corporate customer. A banking relationship, without more, does not create a fiduciary relationship. Further, the complaint does not contain any additional facts which would suggest that a fiduciary relationship was created. For this reason, DTC's breach of fiduciary duty (count three) is dismissed.

2. *Fraud Claim (Count five)*

Defendant also moves to dismiss DTC's claim for fraud (count five). First, Defendant argues that the fraud claim duplicates the breach of contract claim. Def. Mem., p. 20. Additionally, Defendant argues that Plaintiff has not sufficiently pled the elements of a claim for fraud. *Id.* In particular, Defendant argues that a fraud claim requires "material

misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, and damages." *Id.* Defendant argues that the signature cards attached to the complaint demonstrate that DTC was advised of the change in the signature policy. *Id.*, p. 21.

In opposition, Plaintiffs argue that Defendant has ignored the pleadings. Pl. Mem., p. 20. Plaintiffs argue that the signature cards do not demonstrate that DTC knew about the change in signature policy. *Id.*

A fraud claim must allege "misrepresentation of a material fact existing fact, falsity, scienter, deception, and injury." *Chemical Bank* v. *Ettinger, et al.*, 196 A.D.2d 711, 715 (1st Dep't 1993). Further, the elements of a fraud claim are "material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v. Seward & Kissel, LLP*, 12 N.Y.3d 553, 559 (2009). Moreover, CPLR 3016(b) requires that "where a cause of action is based upon . . .fraud . . . the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Viewing all facts alleged in the complaint as true, and according the benefit of every possible favorable inference to the non-movant, this court finds that Plaintiff has not sufficiently pled a fraud claim. Plaintiffs have not pled a material misrepresentation of fact made by Chase and, additionally, have not alleged that Chase had "an intent" to induce reliance. For this reason, DTC's fraud claim must also be dismissed.

ORDER

Accordingly, it is

ORDERED that Defendant's motion to dismiss Plaintiffs' complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to Defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of Defendants JPMorgan Chase Bank.

This constitutes the order and decision of the court.

Dated: New York, New York
January 9, 2012

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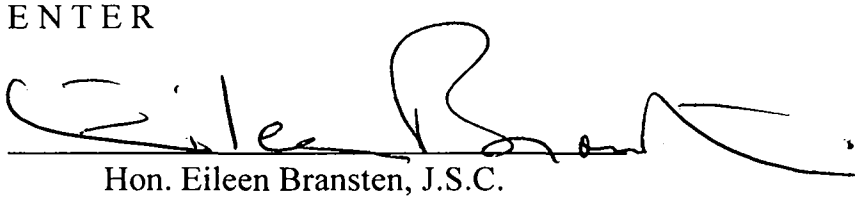

Hon. Eileen Bransten, J.S.C.