SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY
PRESENT: Hon. Eileen Bransten, Justice PART 3

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RAY VOLPE,

Plaintiff,

- *against* -

THE INTERPUBLIC GROUP OF COMPANIES, INC.,

Defendant.

----------X

Index No.: 652308/2012
Motion Date: 2/25/13
Motion Seq. No.: 001

The following papers, numbered 1 to 3, were read on this motion to dismiss.

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s). 1

Answering Affidavits - Exhibits No(s). 2

Replying Affidavits No(s). 3

Cross-Motion: ☐ Yes X No

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

Dated: August 2, 2013

Eileen Bransten, J.S.C.
Hon. Eileen Bransten

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

1. CHECK ONE: .....X CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: Motion Is: X GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: .....☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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RAY VOLPE,

Plaintiff,

- *against* -

THE INTERPUBLIC GROUP OF COMPANIES, INC.,

Defendant.

----------X

Index No. 652308/2012
Motion Date: 2/25/13
Motion Seq. No.: 001, 002

BRANSTEN, J.

Motion sequences 001 and 002 are consolidated for disposition herein.

In motion sequence 001, Defendant The Interpublic Group of Companies, Inc. ("IPG") moves to dismiss Plaintiff Ray Volpe's Complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). Plaintiff opposes. In motion sequence 002, Plaintiff Volpe moves to compel arbitration and stay the instant action pursuant to CPLR 7503(a) and 2201. Defendant IPG opposes and cross-moves for a stay of arbitration pursuant to CPLR 7503(b), which Plaintiff opposes. For the reasons set forth below, Plaintiff's motion to compel arbitration is denied and Defendant's cross-motion to stay arbitration is granted. Defendant's motion to dismiss is granted and the Complaint is dismissed in its entirety.

Background[1]

This case arises from a contract dispute between Volpe and IPG. Volpe alleges that IPG breached its contractual obligation to compensate Volpe for work he performed related to IPG's acquisition of Facebook stock. IPG asserts that Volpe's employment contract precludes his claims.

According to the Complaint, Volpe was a senior account executive with IPG, a "big four" global advertising and marketing company. (Cmpl. ¶¶ 1, 15). Volpe served as the CEO of two wholly-owned IPG subsidiaries. First, Volpe served as CEO of Kaleidoscope Sports and Entertainment LLC. Later, Volpe was named CEO of General Motor R*Works, a company which was dedicated to servicing the advertising needs of General Motors. (Cmpl. ¶ 14).

A. *IPG's Facebook Investment*

In 2006, Volpe brought to IPG an opportunity to invest in the stock of Facebook, Inc. ("Facebook"). (Cmpl. ¶ 19). IPG had the opportunity to invest in $2.5 million of Facebook stock, conditioned upon IPG entering into a "Strategic Alliance" with Facebook. (Affidavit of Ray Volpe ("Volpe Aff.") ¶ 6). The "Strategic Alliance" stated that IPG could buy and re-sell advertising space from Facebook, but IPG was required to

[1] All facts in this section are undisputed, unless otherwise noted.

guarantee a minimum purchase of $10 million over an eighteen-month period (the "$10 Million Guarantee"). (Volpe Aff. Ex. B).

Volpe alleges that IPG management was hostile to the investment and initially decided to decline. (Cmpl. ¶ 22). Volpe further alleges that IPG only agreed to the Facebook investment because Volpe "enlisted the assistance of an industry titan who also worked for IPG, Howard Draft." (Cmpl. ¶ 24). The Complaint avers that Volpe and Draft formed a joint venture within IPG named FB Collaborative, through which "[Volpe] and Draft agreed to split the economics of any deal with IPG regarding Facebook." (Cmpl. ¶ 25). The Complaint alleges that IPG only agreed to go forward with the Facebook investment because Volpe and Draft committed to satisfy the $10 Million Guarantee. (Cmpl. ¶ 28). Volpe repeatedly alleges that he gave his "personal" guarantee of the $10 Million Guarantee. However, elsewhere in the Complaint, Volpe alleges that the $10 Million Guarantee was not secured by his personal assets, but rather by the year-end bonus pool that would be made available to General Motor R*Works employees. (Cmpl. ¶¶ 4, 5).

The primary allegation in the complaint revolves around an alleged oral agreement between Volpe and two IPG executives, Chief Executive Officer Michael Roth and Chief Financial Officer Frank Mergenthaler. (Cmpl. ¶ 5). Volpe alleges that in a June 2006 meeting, Mergenthaler and Roth promised him the "upside, in cash, when IPG sold the

Facebook stock at a profit," in exchange for Volpe "assuming the downside risk" that IPG would not be able to satisfy the $10 Million Guarantee by re-selling advertising space purchased from Facebook ("Facebook Agreement"). (Cmpl. ¶ 26). Defendant denies such an agreement. Volpe alleges that an email from Roth, dated June 14, 2006, addressed to both Volpe and Draft, provides confirmation of the Facebook Agreement. (Volpe Aff. Ex. A ("I have approved Facebook based on your and Howard commitment on the 10million [sic] . . . .")).

IPG ultimately purchased $2.5 million of Facebook stock and entered into the Strategic Alliance with Facebook. (Cmpl. ¶ 29). The Complaint alleges that Volpe fulfilled the $10 million guarantee without the support of any "IPG operating company." (Cmpl. ¶ 37). However, Volpe also alleges that he expended "a significant percentage of [his] agency's budget to satisfy or discharge the $10 Million Revenue Commitment," and that IPG subsidiary Facebook Collaborative "ha[d] a team of six people working on the business full time." (Volpe Aff. ¶ 52, Ex. F at 1).

The Complaint alleges that IPG sold its Facebook stock for a "realized value" in excess of $380 million.

B. *Volpe's Employment Agreement*

Pertinent to this case is Volpe's written employment contract with IPG entered into on March 1, 2000 ("Employment Agreement"). (Affirmation of Hal Shaftel ("Shaftel Affirm.") Ex. B). Section 11.01 of the Employment Agreement is entitled "Agreement Entire" and states that "[t]his Agreement constitutes the entire understanding between the Corporation and Executive concerning his employment by the Corporation or any of its parents, affiliates, or subsidiaries and supersedes any and all previous agreements . . . concerning such employment and/or any compensation or bonuses. This Agreement may not be changed orally" ("Integration Clause"). (Shaftel Affirm. Ex B).

Also pertinent here are four supplemental employment agreements, the first of which was entered into in September 2004, while the remaining three were entered into after the alleged June 2006 Facebook Agreement. (Shaftel Affirm. Exs. C, D, E, F). The final supplement to the Employment Agreement, dated June 30, 2008 ("Final Employment Agreement"), incorporates all provisions of the Employment Agreement by reference, and amends Section 12 of the Employment Agreement to read as follows: "The Agreement shall be governed by and construed in accordance with the laws of the State of New York without regard to any rule or principle concerning conflicts or choice of law that might otherwise refer construction or enforcement to the substantive law of another jurisdiction." (Shaftel Affirm. Ex. F at 9).

C. *The Instant Complaint*

Plaintiff commenced this action on July 2, 2012, asserting that, *inter alia*, Defendant's failure to pay Volpe $380 million of "realized gain" obtained when IPG allegedly sold its Facebook stock gave rise to causes of action for (i) breach of contract, (ii) breach of fiduciary duty, (iii) promissory estoppel, (iv) breach of implied contract, (v) unjust enrichment, (vi) declaratory judgment, (vii) breach of the Employment Agreement, and (viii) violation of New York Labor Law Section 190. In motion sequence 001, dated August 8, 2012, Defendant seeks dismissal of the Complaint in its entirety. Plaintiff opposes motion sequence 001 and moves, in motion sequence 002, dated March 20, 2013, to compel arbitration. Defendant opposes motion sequence 002 and cross-moves to stay arbitration.

I. Plaintiff's Motion to Compel and Defendant's Motion to Stay Arbitration

In motion sequence 002, Plaintiff moves to compel arbitration on the grounds that the Facebook Deal was covered by the Employment Agreement, which contains an arbitration clause. Defendant opposes and cross-moves to stay the arbitration on the grounds that Plaintiff waived his contractual right to arbitration by filing the Complaint and invoking the jurisdiction of the courts. The Court first considers whether Plaintiff

has waived his right to arbitration under the Employment Agreement, and if so, will then consider the merits of the underlying causes of action.

A. *Choice of Law*

Before deciding the issue of waiver, this Court must decide the threshold issue of whether to apply New York or federal law. Plaintiff argues that the waiver of the right to arbitration is governed by the Federal Arbitration Act ("FAA"), which requires that an arbitrator decide the issue of waiver. Defendant argues that the Employment Agreement conclusively calls for "enforcement" with the laws of New York.

Under Court of Appeals precedent, New York law typically requires following the FAA's mandate that arbitrators decide questions of conditions precedent to arbitrate, such as waiver. *See Diamond Waterproofing Sys., Inc. v. 55 Liberty Owners Corp.*, 4 N.Y.3d 247, 252 (2005). However, parties are free to agree in their written contract that New York law, rather than the FAA, will govern the interpretation and determination of prerequisites to arbitration. *Diamond Waterproofing*, 4 N.Y.3d at 253. In order to express an intention to have the courts determine the issue of waiver, the parties to a contract must state that New York law will govern "the enforcement" of the agreement. *Diamond Waterproofing*, 4 N.Y.3d at 253.

Here, the Final Employment Agreement modified the original choice of law provision to include the requisite "enforcement" language. *See* Shaftel Affirm. Ex. F at 9 ("The Agreement shall be governed by . . . New York [law] without regard to any rule or principle . . . that might otherwise refer . . . enforcement to the substantive law of another jurisdiction."). Because the choice of law provision in the Employment Agreement requires that its enforcement be governed by New York law, this Court will apply New York's law of waiver. *Diamond Waterproofing*, 4 N.Y.3d at 253.

B. *Waiver of Arbitration Standard*

"The right to arbitrate, like any other contractual right, may be modified, waived, or abandoned." *See, e.g., Stark v. Molod Spitz DeSantis & Stark, P.C.*, 9 N.Y.3d 59, 66 (2007). In New York, a party waives its right to arbitration by manifesting "an affirmative acceptance of the judicial process." *Braun Equip. Co. Inc. v. Meli Borelli Assocs.*, 220 A.D.2d 311, 311 (1st Dep't 1995) (*quoting Jorge v. Sutton*, 134 A.D.2d 573, 573 (2d Dep't 1987), *lv. denied* 71 N.Y.2d 807 (1988)). A party will not been found to have manifested an affirmative acceptance of judicial process through, for example "the service of routine pleadings." *See Braun Equip.*, 220 A.D.2d at 311. Conversely, New York courts have found an affirmative acceptance where "the plaintiff actively

participated in [the] litigation by opposing the defendants' motion to dismiss . . . ." *See Jorge*, 134 A.D.2d at 573.

Here, the facts are akin to *Jorge*, where the court found that "plaintiff actively participated in this litigation by opposing the defendants' motion to dismiss for failure to meet the threshold requirement of physical injury" after an automobile accident. *Jorge v. Sutton*, 134 A.D.2d 573, 573 (2d Dep't 1987), *lv. denied* 71 N.Y.2d 807 (1988). Cited with approval in *Braun Equipment,* 220 A.D.2d at 331, by the First Department, *Jorge* is sufficiently similar to the facts here to require dismissal of the motion to compel. Volpe filed the Complaint, submitted opposition papers and appeared at oral argument to argue the merits of his case. To permit a party to hear judicial reactions at oral argument as to the merits of a case before deciding whether to arbitrate or proceed in court would be to countenance blatant forum shopping. Plaintiff's motion to compel arbitration is denied and Defendant's motion to stay arbitration is granted.

II. Defendant's Motion to Dismiss

The Court now considers the merits of the underlying causes of action. Defendant moves to dismiss the Complaint pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7), on the grounds that Volpe's Employment Agreement precludes his claims. Plaintiff advances several theories in opposition, each in the alternative. First, Plaintiff argues that the

Facebook Agreement was not within the scope of his employment and was not covered by the Employment Agreement. In the alternative, Plaintiff argues that the Employment Agreement was orally modified by the Facebook Agreement. In the double alternative, Plaintiff argues that IPG breached the Employment Agreement as written. In the triple alternative, Plaintiff argues that there is simply no contract governing the parties regarding the Facebook Agreement and that IPG's action are recoverable under quasi-contract theories.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted). However, on a CPLR 3211(a)(1) motion, "[i]t is

well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Employment Agreement Bars Contract Cause of Action*

Plaintiff's first cause of action, for breach of contract, alleges that Plaintiff entered into the oral Facebook Agreement, outside of the Employment Agreement, wherein Plaintiff would receive the "upside" of the Facebook stock in exchange for satisfying the $10 Million Guarantee. Defendant argues that any oral agreement is barred because the Final Employment Agreement's Integration Clause, entered into after the alleged oral Facebook Agreement, states that the Final Employment Agreement is the "entire understanding" between IPG and Volpe.

Plaintiff attempts to circumvent the Integration Clause with a number of unavailing arguments that ignore the plain language of the Employment Agreement. First, Plaintiff contends that the Employment Agreement, which cannot be changed orally, solely required that he negotiate the purchase of advertising, while the Facebook Agreement required that he negotiate the sale of advertising. Plaintiff also argues, without citing any authority, that because he had fully performed his obligations under the Facebook Agreement by the time the second supplement to the Employment Agreement was signed, the Integration Clause does not apply to the Facebook Agreement.

One of the fundamental tenets of contract interpretation is that agreements are construed according to the parties' intent, and the primary evidence of what parties to a written agreement intended is what was said in the writing. *See e.g., Slatt v. Slatt*, 64 N.Y.2d 966, 966 (1985). Accordingly, courts may not fashion a new contract for the parties under the guise of interpreting the writing. *See, e.g., Jade Realty LLC v. Citigroup Commercial Mortg. Trust 2005-EMG*, 83 A.D.2d 567, 568 (1st Dep't 2011) (*quoting Reiss v. Financial Performance Corp.*, 97 N.Y.2d 195, 199 (2001)).

Here, neither party argues that the Employment Agreement, or any subsequent supplement, is ambiguous in any way. Indeed, the plain language of Section 12.02, incorporated by reference into the Final Employment Agreement, states "[t]his Agreement constitutes the entire understanding . . . and supersedes any and all previous

agreements [between Volpe and IPG] concerning . . . any compensation or bonuses." *See* Shaftel Affirm. Exs. B, F. Any alleged oral agreement between Volpe and IPG that preceded the Final Employment Agreement was therefore superceded by its clear terms, which make no mention of the Facebook Agreement.

Plaintiff also argues that the Facebook Deal is entirely outside the scope of any Employment Agreement between Plaintiff and IPG. Plaintiff contends that the written agreement related solely to Plaintiff's work at GM R*Works because the written agreement states that Volpe will serve as CEO of the "Company," and he was "surely not made Chairman and CEO of IPG." (Pl.'s Br. 13 at n.13). However, the Section 1.01 of the Employment Agreement states that "Interpublic and Kaleidoscope are referred to herein as the 'Corporation' and . . . [e]xecutive will serve the Corporation during the term of employment." (Shaftel Affirm. Ex. B). Importantly, the pertinent section of the Employment Agreement containing the Integration Clause refers to "the entire understanding between the *Corporation* and [Volpe]. . . ." (Shaftel Affirm. Ex. B) (emphasis added). As Kaleideoscope was not a party to the Employment Agreement, the "entire understanding" that the parties reached in their contract can only have been between Volpe and IPG. *See* Shaftel Affirm. Ex. B.

Even affording every reasonable inference regarding the truth of the Facebook Agreement, Volpe's argument's are unavailing because the Final Employment

Agreement's unambiguous terms state that "any agreement" between Volpe and IPG related to "any compensation" was superseded by the Final Employment Agreement. The Complaint alleges that Plaintiff is owed $380 million in compensation for his activities related to IPG's Facebook stock. Therefore, the Facebook Agreement was superseded by the Final Employment Agreement, and the Final Employment Agreement conclusively establishes a defense as a matter of law.[2]

C. *Employment Agreement Was Not Orally Modified*

Plaintiff next argues that if the Facebook Agreement was part of his Employment Agreement, then the Employment Agreement was orally modified to permit compensation. Plaintiff argues that his performance under the Facebook Agreement is unequivocally referable to the alleged oral modification and that Defendant induced Plaintiff's significant and substantial reliance upon the oral modification. Defendant counters that Plaintiff's conduct was referable to the written contract because Employment Agreement Section 2.01 required Plaintiff to devote his "full time and

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[2] Volpe also asserts that when he signed the Final Employment Agreement, IPG's representative explicitly stated it would have no impact on the Facebook Agreement. (Cmpl. ¶ 45). However, Plaintiff does not bring a cause of action for fraudulent inducement, and "[e]vidence outside the four corners of the document as to what was really intended but unstated or misstated is generally inadmissible to add or vary the writing." *W.W.W. Assoc. v. Giancontieri*, 77 N.Y.2d 157, 162 (1990).

efforts" to the IPG subsidiary. Defendant further argues that written contacts entered into after the alleged oral agreement preclude the oral modification claim.

Plaintiff's oral-modification contention is analogous to arguments propounded by the plaintiff in *Barber v. Deutsche Bank Securities, Inc.*, 103 A.D.3d 512 (1st Dep't 2013). In *Barber*, the plaintiff alleged breach of an oral agreement, which had modified his employment contract containing an integration clause. *Barber*, 103 A.D.3d at 512-13. Plaintiff argued that his move to Hong Kong, where he had no other contacts, was unequivocally referable to the oral modification. *Barber*, 103 A.D.3d at 513. The First Department, while finding the conduct unequivocal, nevertheless dismissed plaintiff's cause of action because the alleged oral promise was superseded by a later written contract. *Barber*, 103 A.D.3d at 513.

Here, as in *Barber*, the subsequent written contract supercedes the alleged Facebook Deal. The Integration Clause found in Section 12.01 of the Final Employment Agreement, signed on June 30, 2008, post-dates the alleged June 2006 Facebook Agreement by two years. Regardless of the equivocality of Plaintiff's actions, the holding of *Barber* mandates dismissal of Plaintiff's breach of contract claim.

D. *No Breach of Employment Agreement as Written*

Plaintiff's seventh cause of action seeks damages for IPG's alleged breach of Section 6.04 of the Employment Agreement, relating to "other employee benefits." Plaintiff argues that he is entitled to $380 million as an "employment benefit" within the meaning of Section 6.04. Defendant contends that there is no link between Volpe being "eligible to participate in such other employee benefits as are available from time to time," and the Facebook Deal.

Courts must "giv[e] practical interpretation to the language employed [in contracts] and the parties' reasonable expectations." *112 W. 34th St. Assocs., LLC v. 112-1400 Trade Props. LLC*, 95 A.D.3d 529, 531 (1st Dep't 2012). Under the canon of *ejusdem generis*, a series of specifics things or concepts is used to interpret a generic one in the same series. *See 242-44 E. 77th St., LLC v. Greater N.Y. Mut. Ins. Co.*, 31 A.D.3d 100, 103-04 (1st Dep't 2006). Here, the other sections of Article XI, besides Section 6.04, all relate to relatively modest benefits, such as a general allowance of $72,000, an automobile stipend of $12,000 and a financial planning allowance of $2,500. (Shaftel Affirm. Ex. B). Using the other items in Article XI as a reference, this Court finds that the generic term "other employee benefits" was meant to refer to benefits of similar scale to the general allowance or automobile allowance. Plaintiff's contested allegation regarding the "other employee benefits" under Section 6.04 is different from the balance

of Article XI, and indeed the rest of the Employment Agreement, by such an order of magnitude, that it strains the credulity of this Court to consider. Giving practical interpretation to the language, and discerning the parties' reasonable expectations from the four corners of the contract, this Court finds that the "upside" of the Facebook Deal was not an employee benefit under Section 6.04.

In the alternative, Plaintiff seeks damages under the Employment Agreement pursuant to "established IPG policy," where an IPG subsidiary that assumes the risk of a corporate transaction is awarded with the "upside." (Cmpl. ¶¶ 5, 83-84). Plaintiff's claim regarding a breach of "IPG policy" does not withstand scrutiny. The Final Employment Agreement, which superseded all other agreements, does not delineate any policy related to compensation for assuming the risk of any corporate project and alone provides as basis for dismissal. In addition, while Plaintiff alleges that he is personally owed compensation, the Complaint alleges that in a March 28, 2007 meeting, ". . . Mr. Volpe refers to 'facebook upside' as belonging to Kaleidoscope (i.e. Mr. Volpe's Company)." (Cmpl. ¶ 30). Vague, conclusory, and contradictory allegations are insufficient to sustain a breach of contract cause of action. *See Marino v. Vunk*, 39 A.D.3d 339, 340 (1st Dep't 2007) (*citing Gordon v. Dino De Laurentiis Corp.*, 141 A.D.2d 435, 436 (1st Dep't 1988)). Plaintiff's seventh cause of action for breach of the Employment Agreement is dismissed.

E. *Precluded Implied and Quasi-Contract Claims*

Plaintiff also alleges causes of action for breach of implied-in-fact contract, unjust enrichment, and promissory estoppel. Plaintiff argues that the Facebook Agreement can be implied from Defendant's acceptance of his services relating to the $10 million guarantee and a lack of Defendant's response to Volpe's "confirmatory" emails. Plaintiff further argues that he had a reasonable expectation to be compensated for his work on the $10 million guarantee, separately from the Employment Agreement.

Plaintiff's implied-in-fact and quasi-contract claims are foreclosed by the existence of the Employment Agreement. "A contract cannot be implied in fact . . . where there is an express contract covering the subject-matter involved; or against the understanding of the parties . . . ." *A&S Welding & Boiler Repair, Inc. v. Seigal*, 93 A.D.2d 712 (1st Dep't 1983) (*quoting Miller v. Schloss*, 218 N.Y. 400 (1916)). Similarly, in *Tierney v. Capricorn Investors, L.P.*, 189 A.D.2d 629, 632 (1st Dep't 1993), the plaintiff's quasi-contract causes of action were dismissed because "it is impermissible to seek damages under a quantum meruit theory where, as here, there is an express written contract between those parties." Finally, in *Capricorn Investors III, L.P. v. Coolbrands International, Inc.*, 66 A.D.3d 409, 410 (1st Dep't 2009), the court held that the plaintiff's "promissory estoppel claim was properly dismissed because it was flatly contradicted by

the parties' written agreement which covered the same subject matter and expressly superseded all other prior agreements."

Here, as stated above, the Employment Agreement covered the "entire understanding," and thus the subject matter of any alleged agreement, between IPG and Volpe. *See* Shaftel Affirm. Ex. B. Further, as in *Capricon Investors III*, the Final Employment Agreement expressly superseded all prior agreements. 66 A.D.3d at 410 ("the parties' written agreement [] covered the same subject matter and expressly superseded all other prior agreements."). (Shaftel Affirm. Ex. F). Therefore, the implied-contract and quasi-contract claims are barred.

F. *Duplicative Declaratory Judgment*

Plaintiff's sixth cause of action seeks a declaratory judgment stating the alleged Facebook Deal is a valid contract requiring IPG to pay Volpe any profit realized on the sale of IPG's Facebook stock. As described above, the Final Employment Agreement superseded all other agreements between IPG and Volpe. An action for declaratory judgment cannot be maintained if it is derivative of other causes of action and seeks only a declaration of the same rights. *See Spitzer v. Schussel*, 48 A.D.3d 233, 234 (1st Dep't 1988) (denying motion to amend complaint to assert claim for declaratory judgment

because it was "duplicative of the [other] cause of action . . . in the original complaint"). Plaintiff's sixth cause of action is dismissed.

G. *Derivative Fiduciary Duty Claim*

Plaintiff's next cause of action alleges that Defendant breached its fiduciary duty to him by selling the Facebook shares prematurely. Under the Integration Clause, which governed the entire relationship between the parties, Volpe was acting in his capacity as an employee. Volpe's claim fails because "employment relationships do not create fiduciary relationships." *See Rather v. CBS Corp.*, 68 A.D.3d 49, 55 (1st Dep't 2009). The Employment Agreement's Integration Clause precludes any claim Plaintiff may have to the proceeds from the sale of the Facebook stock.

H. *Unavailable New York Labor Law Claim*

Plaintiff's final cause of action seeks damages for unpaid wages under New York Labor Law Section 190. Plaintiff's claim runs afoul of New York law because a party "cannot assert a statutory claim for wages under Labor Law Section 190 if he has no enforceable contractual right to those wages." *Tierney v. Capricorn Investors, L.P.*, 189 A.D.2d 629, 632 (1993) (dismissing Labor Law § 190 claim as dependent on dismissed

breach of contract claim). As stated above, Volpe has no contractual claim to unpaid wages against IPG and therefore cannot maintain a Section 190 claim.

Defendant's other arguments are rendered moot. The Court has considered Plaintiffs' other arguments and finds them unpersuasive.

(Order of the Court follows on the next page.)

Conclusion

For the reasons set forth above, it is hereby

ORDERED that plaintiff Volpe's motion to compel arbitration is denied; and it is further

ORDERED that defendant IPG's cross-motion to stay arbitration is granted and the arbitration is permanently stayed; and it is further

ORDERED that defendant IPG's motion to dismiss is granted, and the Complaint is dismissed with prejudice and with costs and disbursements to Defendant IPG as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
August 2, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.