SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK: PART

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KEVIN GLODEK,

Plaintiff,

-against-

KADMON HOLDINGS, LLC, *et al.*,

Defendants.

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DECISION AND ORDER

Index No. 156177/2016

Mot. Seq. 003/004

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, fraud in the inducement, breach of implied covenant of good faith and fair dealing, and unjust enrichment, Kevin Glodek ("plaintiff" or "Glodek") moves for a judgment of no less than $4 million against each of Kadmon Holdings, LLC ("Kadmon LLC"), Kadmon Holdings, Inc. ("Kadmon Inc.", and together with Kadmon LLC, "Kadmon"), Steven N. Gordon ("Gordon"), and Konstantin Poukalov ("Poukalov" and together with Kadmon LLC, Kadmon Inc and Gordon, "defendants"). Defendants move to dismiss the complaint pursuant to CPLR 3211(a)(1), (5), and (7) (mot. seq. 003). Plaintiff opposes.

Alternatively, defendants move for sanctions pursuant to 22 N.Y.C.R.R. § 130-1.1(a) and disqualification pursuant to 22 N.Y.C.R.R. § 1200.0 as against Martin S. Siegel, Esq. ("Siegel") and Golenbock Eiseman Assor Bell & Peskoe LLP

("Golenbock"), who represents plaintiff in this action (mot. seq. 004). Plaintiff opposes. Motion sequence 003 and 004 have been consolidated for purposes of this decision.

Facts

The claims in this action arise out of a related claim in which John Thomas Financial ("JTF") assigned its rights, remedies, claims and causes of action related to certain agreements with Kadmon I, LLC to Glodek, a former employee of JTF, in an assignment agreement dated June 7, 2013. Amended Complaint ("Compl."), ¶10. Glodek sued Kadmon under this assignment agreement and entered into a Confidential Settlement Agreement and General Release, dated September 24, 2015 (the "Settlement Agreement"). Id. at ¶11.

During negotiations of the Settlement Agreement, Glodek agreed to accept certain securities as a portion of the settlement payment, after initially demanding an all cash deal. Id. at ¶13. Gordon represented to Glodek that Kadmon would offer Class E Units as part of the settlement. However, Gordon allegedly would not allow Glodek to review the underlying corporate documents related to the Class E securities and represented that all Class E Units were closed because they were limited to officers and employees who had provided bridge capital. Id. at ¶14.

Provided with this information, and at the alleged insistence of Gordon and Poukalov, Glodek accepted Class A Units as part of the Settlement Agreement. Glodek alleges that he was told that Class E Units would be converted into Class A Units and both would, in turn, be converted into common stock. Id. at ¶15. As part of the Settlement Agreement, Glodek accepted $1.3 million in cash payments and 300,000 Class A Units. Id. at ¶12. The Settlement Agreement was allegedly premised on a settlement amount of $4.9 million. Id. Glodek alleges that defendants represented that the 300,000 Class A Units would have a designated price of $12.00 per unit and that Gordon and Poukalov stated that Kadmon could not accept a price below the designated price. Id. at ¶17.

The Settlement Agreement contains multiple representations and warranties by Glodek regarding the Class A Units and the negotiations. Id. at ¶¶33-35. Glodek also agreed to a release in the Settlement Agreement, which releases defendants from

> Any claims…whatsoever…of any type or kind, whether known or unknown…which [Glodek] ever had, now have or hereafter shall have against [Defendants]…for, upon or by reason of any…thing whatsoever and without limitation, from the beginning of time to the date of this Settlement Agreement.
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> Settlement Agreement, §5(b).

Glodek alleges that during the time of the negotiations Kadmon purposely withheld information about an upcoming reverse split of the Class A Units, which no amount of reasonable due diligence would uncover. Id. at ¶19. Glodek contends

that Kadmon had a duty to disclose this information regarding the reverse split. Id. at ¶20. On June 10, 2016, Kadmon filed its IPO registration statement with the SEC, which disclosed the reverse split of the Class A Units, which was later revealed to be a 1 to 6.5 reverse split. Id. at ¶¶26-27. Although the Class A Units were converted to common stock, Glodek alleges that his shares lost a considerable amount of value. Id. at ¶¶30-32.

In the related motion, defendants allege that Glodek's action was brought frivolously by Siegel and Golenbock in order to interfere with Kadmon's IPO in an attempt to receive more money. Similarly, defendants seek to have this court disqualify both Siegel and Golenbock on the grounds that they are material witnesses, parties to the Settlement Agreement and potential parties in this action.

Argument

Legal Standard

On a motion to dismiss on the ground that defenses are founded upon documentary evidence, the evidence must be unambiguous, authentic, and undeniable. CPLR 3211(a)(1); Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97

N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

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 the light most favorable to plaintiffs, and 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 Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept., 1994) (internal citation omitted). This standard applies to claims brought under CPLR 3211(a)(5) as well where the release clearly and unambiguously bars the claims at issue. Tavoulareas v. Bell, 292 A.D.2d 256 (1st Dept 2002).

Whether the General Release Bars the Present Action

Defendants' motion to dismiss plaintiff's causes of action for fraudulent inducement and breach of the duty of good faith and fair dealing on the grounds that the general release bars the present action is granted. Generally, "a valid release constitutes a complete bar to an action on a claim which is the subject of the release." Centro Empresarial Cempresa S.A. v. America Movil, S.A.B. de C.C., 17 N.Y.3d 269, 276 (2011). If "the *language of a release is clear and unambiguous*, the signing of a release is a 'jural act' binding on the parties." Id. (emphasis added) (internal citations omitted). A release is "governed by principles of contract law and one that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." Sicuranza v. Phillip Howard Apts. Tenants Corp., 121 A.D.3d 966, 967 (2d Dept 2014); see also Allen v. Riese Org., Inc., 106 A.D.3d 514, 516 (1st Dept 2013) (an unambiguous release will bar a plaintiff's claim).

To determine the meaning of a contract, a court looks to the intent of the parties as expressed by the language they chose to put into their writing. Ashwood Capital, Inc. v OTG Mgt., Inc., 99 A.D.3d 1 (1st Dept 2012); Bank of Tokyo-Mitsubishi, Ltd., N.Y. Branch v Kvaerner a.s, 243 A.D.2d 1, 6 (1st Dept 1998). A clear, complete document will be enforced according to its terms. Ashwood Capital, 99 A.D.3d at 7. When the parties have a dispute over the meaning, the court first asks if the contract contains any ambiguity, which is a legal matter for the court to

decide. Id. Whether there is ambiguity "is determined by looking within the four corners of the document, not to outside sources." Kass v Kass, 91 N.Y.2d 554, 566 (1998).

The court examines the parties' obligations and intentions as manifested in the entire agreement and seeks to afford the language an interpretation that is sensible, practical, fair, and reasonable. Riverside S. Planning Corp. v CRP/Extell Riverside, L.P., 13 N.Y.3d 398, 404 (2009); Abiele Contr. v New York City School Constr. Auth., 91 N.Y.2d 1, 9-10 (1997); Brown Bros. Elec. Contr. v Beam Constr. Corp., 41 N.Y.2d 397, 400 (1977). A contract is not ambiguous if, on its face, it is definite and precise and reasonably susceptible to only one meaning. White v Continental Cas. Co., 9 N.Y.3d 264, 267 (2007); Greenfield v Philles Records, 98 N.Y.2d 562, 569 (2002). An ambiguous contract is one that, on its face, is reasonably susceptible of more than one meaning. Chimart Assoc. v Paul, 66 N.Y.2d 570, 573 (1986).

Plaintiff has not adequately alleged that the release at issue is ambiguous on its face. See Pappas v. Tzolis, 20 N.Y.3d 228 (2011) ("Plaintiffs in the plainest language announced and stipulated that they were not relying on any representations as to the very matter as to which they now claim they were defrauded" which predicated the bar to challenge the underlying fraud claim.) Here, the release states

> Any claims...whatsoever...of any type or kind, whether known or unknown...which [Glodek] ever had, now have or hereafter shall have against [Defendants]...for, upon or by reason of any...thing whatsoever and without limitation, from the beginning of time to the date of this Settlement Agreement.
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> Settlement Agreement, §5(b).

Accepting the allegations of the complaint as true and providing plaintiff the benefit of every possible favorable inference, as this court must on a motion to dismiss, plaintiff's claims are barred by the release. See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co., 5 N.Y.3d 582 (2005). Plaintiff unequivocally "accept[ed] and assume[d] the risk of some possible difference in fact from the facts now believed by them to be true." Settlement Agreement, §5(b).

Additionally, Glodek represented that he is "not relying on any representations not expressly set forth in this Settlement Agreement...[and] received no representations or warranties from the Kadmon Parties, with respect to the Settlement Securities, including...the value of the Settlement Securities." Id., §5(c). Finally, Glodek warranted that "no Party to the Settlement Agreement...has made any promise, representation or warranty, express or implied, not contained in the Settlement Agreement to induce any Party to execute this Settlement Agreement" and that he was "not relying on any promise, representation or warranty not contained in this Settlement Agreement." Id. at §16.

In other words, the release encompassed any and all negotiations up to and including the date of the Settlement Agreement. This language encompassed statements made during negotiations of the Settlement Agreement. "A release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is 'fairly and knowingly made.'" Centro, 17. N.Y.3d at 276 quoting Mangini v. McClurg, 24 N.Y.2d 556, 566-67 (1969). Here, both parties were represented by sophisticated counsel who negotiated for all claims that were either known or unknown up to at least the date of the Settlement Agreement.

Plaintiff argues that the release does not apply to claims maturing after the date of the Settlement Agreement and because the reverse stock split occurred after the Settlement Agreement, it is a tort that had not yet accrued. See Opp. Memo, p. 8; see also Kronos, Inc. v. AVX Corp., 81 N.Y.2d 90, 94 (1993) ("A tort cause of action cannot accrue until an injury is sustained. That, rather than the wrongful act of defendant or discovery of the injury by plaintiff, is the relevant date for marking accrual."). Although plaintiff alleges that the injury occurred after the execution of the Settlement Agreement, plaintiff relied upon the allegedly false statements made by defendants at the time of the negotiations of the Settlement Agreement.

Plaintiff stated in the release that it did not rely upon any statements made by defendants other than those in the Settlement Agreement. See Settlement Agreement §5(a)(i) (The release covers any claims Glodek "ever had, now h[as] or hereafter

shall have…by reason of any…thing whatsoever…from the beginning of time to the date of the Settlement Agreement."); §5(b) ("all known and unknown claims, whether arising through the date of this Settlement Agreement or hereafter."). Similarly, the First Department has held that a motion to dismiss will be granted where the release is so broad in scope so as to dispose of unripe and contingent claims, including those that did not exist when the release was executed. See Long v. O'Neill, 126 A.D.3d 404, 407-08 (1st Dept 2015). Therefore, plaintiff is precluded from now alleging that the release is inapplicable.

Next, plaintiff contends that the release is ambiguous because of the carve-out for obligations under the Settlement Agreement. The Settlement Agreement specifically states that "the Kadmon Parties' obligations under this Settlement Agreement are expressly excluded from such release." Settlement Agreement, §5(a). Plaintiff alleges that defendants evaded the $4.9 million obligation contained in section 2 of the Settlement Agreement by inducing plaintiff to accept the Class A Units that defendants knew were subject to the reverse split. See Opp. Memo, p. 10. Plaintiff claims that it only actually received $1,853,838 in cash and stock options. However, this is untrue. At the time of the execution of the Settlement Agreement, plaintiff received $4.9 million in stock value and cash thereby satisfying the carve-out for obligations under the Settlement Agreement. It wasn't until July 2016, nearly ten months after the Settlement Agreement that plaintiff itself alleges that the value

of the stock was reduced. Furthermore, plaintiff gave a representation and warranty that he understood the risks of investment in Holdings and that there is a high risk with respect to Holdings' securities. See Settlement Agreement, §5(c).

Finally, plaintiff's argument that its fraudulent inducement claim precludes the release from barring this action is without merit. In order for a claim of fraudulent inducement to preclude a release from barring an action, a party must allege allegations of fraud that were separate from the subject of the release. See Board of Managers of Fifth Avenue Condominium v. Continental Residential Holdings LLC, 2017 WL 1322329 (1st Dept Apr. 11, 2017); Pappas, 20 N.Y.3d 228, 233-34 (2012) ("While it is true that a party that releases a fraud claim may later challenge that release as fraudulently induced if it alleges a fraud separate from any contemplated by the release..."); Arfa v. Zamir, 17 N.Y.3d 737, 739 (2011) (plaintiffs "failed to allege that the release was induced by a separate fraud"); Silverstein v. Imperium Partners Grp., LLC, 126 A.D.3d 593 (1st Dept 2015) ("plaintiff may not invalidate his release of all claims against defendant...on the ground that it was procured by fraud, since the same allegations of fraud were the subject of the release."); Danann Realty v. Harris, 5 N.Y.2d 317 (1959).

Glodek has failed to adequately plead a separate fraud separate and apart from the subject of the release. Glodek's fraudulent inducement claim is predicated on the breach of an alleged duty to disclose the reverse split that defendants allegedly knew

about during its negotiations with Glodek. See Compl. ¶¶37-42. These claims were directly tied to the value of the Class A Units that Glodek received as a result of the negotiations. Id., ¶44 ("that means that the 1 to 6.5 reverse split reduced the value of the Class A Units received by Glodek by approximately 85%). In the Settlement Agreement, Glodek represented and warranted that he "received no representations or warranties from the Kadmon Parties, with respect to the [Class A Units]." Settlement Agreement, §5(c)(vi). Therefore, Glodek cannot allege a separate fraud based on the value of the Class A Units, because he specifically represented that he did not rely on any representations from the defendants' when agreeing to accept the Class A Units as part of the agreement. This forecloses Glodek's claim for fraudulent inducement.

Additionally, Glodek admits that he reviewed the LLC Agreement before agreeing to the terms of the settlement. See Oral Argument Transcript, p. 17. In discussing the rights of Class A Unit holders, the LLC Agreement states that the "units may be issued at the discretion of the Board of Managers, and for such consideration as determined by the Board of Managers." LLC Agreement, §3.1. Therefore, Glodek was aware prior to executing the Settlement Agreement that the value of the Class A Units were subject to the sole discretion of the Board of Managers, which were also a part of the representations and warranties that Glodek agreed to.

Simply put, there is nothing in plaintiff's complaint that creates any ambiguity as to the meaning of the releases contained in the Settlement Agreement. A release "should never be converted into a starting point for...litigation except under circumstances and under rules which would render any other result a grave injustice." Centro, 17 N.Y.3d at 276.

As the general release bars the entire action, plaintiff also does not have a claim for breach of the implied covenant of good faith and fair dealing. Therefore, defendants motion to dismiss plaintiff's claims for fraudulent inducement and breach of the duty of good faith and fair dealing is granted.

Plaintiff's Cause of Action for Unjust Enrichment

Defendants' motion to dismiss plaintiff's cause of action for unjust enrichment is granted. The basis of a claim for unjust enrichment is that the defendant has obtained a benefit which in "equity and good conscience" should be paid to the plaintiff. Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011) quoting Paramount Film Distrib. Corp. v. State of New York, 30 N.Y.2d 415, 421 (1972). However,

> Unjust enrichment is not a catchall cause of action to be used when others fail. It is available only in unusual situations when, though the defendant has not breached a contract nor committed a recognized tort, circumstances create an equitable obligation running from the defendant to the plaintiff. Typical cases are those in which the

> defendant, though guilty of no wrongdoing, has received money to which he or she is not entitled.

Corsello v. Verizon New York, Inc., 18 N.Y.3d 777, 791 (2012); see also Markwica v. Davis, 64 N.Y.2d 38 (1984); Kirby McInerney & Squire, LLP v. Hall Charne Burce & Olson, S.C., 15 A.D.3d 233 (2005).

An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim. See Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co., 70 N.Y.2d 382 (2005). Similarly, "a party may not recover in unjust enrichment where the parties have entered into a contract that governs the subject matter." Cox v. NAP Const. Co., Inc., 10 N.Y.2d 592, 607 (2008); see also Pappas, 20 N.Y.3d at 234; IDT Corp. v. Morgan Stanley Dean Witter & Co., 12 N.Y.3d 132, 142 (2009) (Unjust enrichment invokes an "obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.").

Plaintiff argues that "a claim for unjust enrichment is not duplicative of a breach of contract claim where the plaintiff alleges that the contracts were induced by fraud." Pramer S.C.A v. Abaplus Intl. Corp., 76 A.D.3d 89, 100 (1st Dept 2010). As discussed, *supra*, plaintiff has not adequately pled in the complaint that the contracts were induced by fraud. As there is a contract that governs the dispute at issue, defendants' motion to dismiss plaintiff's claim for unjust enrichment is granted.

Motion's for Sanctions

Defendants' and plaintiff's separate motions for sanctions to be imposed on each other pursuant to 22 NYCRR §130-1.1 are denied.

A court has the discretion to "award ... costs in the form of reimbursement for actual expenses" and/or impose financial sanctions for frivolous conduct. Ortega v. Rockefeller Ctr. N. Inc., 2014 N.Y. Misc. LEXIS 6079 at *4 (Sup. Ct. N.Y. Cnty. Oct. 3, 2014). Conduct is frivolous if:

> (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.

Id. This determination is discretionary and the court rejects both parties' invitation to impose sanctions. Additionally, defendants seek to have Siegel and Golenbock disqualified. As this court is granting defendants' motion to dismiss on the first and second causes of action, whether to disqualify Siegel and Golenbock is moot.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiff's first cause of action for fraudulent inducement is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's second cause of action for breach of the implied covenant of good faith and fair dealing is granted; and it is further

ORDERED that defendants' motion to dismiss plaintiff's third cause of action for unjust enrichment is granted; and it is further

ORDERED that defendants' motion for sanctions is denied; and it is further

ORDERED that plaintiff's motion for sanctions is denied.

Date: April 18, 2017
New York, New York

Anil C. Singh