SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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EV SCARSDALE CORP. and JONATHAN LERNER, Index No.: 651169/2011

Plaintiffs, **DECISION & ORDER**

-against-

ENGEL & VOELKERS NORTH EAST LLC, ENGEL & VOELKERS N.Y. LLC as successor in interest to ENGEL & VOELKERS NORTH EAST LLC, ENGEL & VOELKERS U.S. HOLDINGS, INC., ENGEL & VOELKERS US HOLDING GMBH, ENGEL & VOELKERS AG, ENGEL & VOELKERS RESIDNETIAL GMBH, ENGEL & VOELKERS IT, MICHAEL AUDET, WAV GROUP, INC., RALPH LENIHAN, and SVEN ODIA,

Defendants.

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JAMES IAN PROPERTIES CORP., GARY LEVEILLEE, and GORDON DWAN, Index No.: 651611/2011

Plaintiffs,

-against-

ENGEL & VOELKERS NORTH EAST LLC, ENGEL & VOELKERS N.Y. LLC as successor in interest to ENGEL & VOELKERS U.S. HOLDINGS, INC, ENGEL & VOELKERS U.S. HOLDINGS, INC., ENGEL & VOELKERS US HOLDING GMBH, ENGEL & VOELKERS AG, ENGEL & VOELKERS RESIDNETIAL GMBH, ENGEL & VOELKERS IT, MICHAEL AUDET, WAV GROUP, INC., RAUERT PETERS, and SVEN ODIA,

Defendants.

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RIVERSIDE HOMES REALTY INC. and LING HO, Index No.: 651608/2011

Plaintiffs,

-against-

ENGEL & VOELKERS NORTH EAST LLC, ENGEL & VOELKERS N.Y. LLC as successor in interest to ENGEL & VOELKERS NORTH EAST LLC, ENGEL & VOELKERS U.S. HOLDINGS, INC., ENGEL & VOELKERS US HOLDING GMBH, ENGEL &

VOELKERS AG, ENGEL & VOELKERS RESIDNETIAL GMBH, ENGEL & VOELKERS IT, WAV GROUP, INC., RAUERT PETERS, MICHAEL AUDET, RALPH LENIHAN, and SVEN ODIA,

Defendants.

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SHIRLEY WERNER KORNREICH, J.:

In the three above-captioned cases, joined for the purposes of discovery, the parties move for partial summary judgment. These motions[1] are consolidated for disposition. For the reasons that follow, defendants' motions are granted in part and denied in part, and plaintiffs' motions are denied.

I. Background

The court assumes familiarity with its June 5, 2015 decision on defendants' motions to dismiss plaintiffs' second amended complaints, which extensively sets forth the allegations in this case and the relevant legal issues. *See* Dkt. 192 (*EV Scarsdale Corp. v Engel & Voelkers N.E. LLC*, 48 Misc3d 1019 (Sup Ct, NY County 2015)) (the 2015 Decision).[2] *See also* Dkt. 216

[1] Motion sequence numbers 008 and 009 in Index No. 651169/2011 (the EV Scarsdale Action), and motion sequence numbers 004 and 005 in both Index No. 651611/2011 (the James Ian Action) and Index No. 651608/2011 (the Riverside Action). Since the motions are virtually identical (the parties filed omnibus briefs), all citations to "Dkt. __" refer to the NYSCEF docket in the EV Scarsdale Action.

[2] "(1) the claims under the GBL asserted by plaintiffs James Ian Properties Corp., Gary Leveillee, and Gordon Dwan [were] dismissed; (2) the causes of action for breach of the licenses agreements [were] dismissed against all defendants except Engel & Voelkers North East LLC and Engel & Voelkers N.Y. LLC; (3) the causes of action for breach of IT agreements [were] dismissed against all defendants except Engel & Voelkers IT-Services GmbH; (4) the veil piercing claims [were] dismissed; and (5) the common law fraudulent inducement claims [were] dismissed as duplicative of the claims asserted under GBL § 687 and RIGL § 19-28.1-17." Capitalized terms not defined herein have the same meaning as in the 2015 Decision.

(parties' joint statement of undisputed material facts).[3] Simply put, these cases concern claims by "Engel & Voelkers" real estate agency franchisees. The franchisees complain of being improperly induced to open property shops, and allege they received deficient support from the company after doing so. The inducement claims sound in alleged violations of applicable franchise law statutes,[4] while the failure of support sounds in alleged breaches of the parties' contracts. The bulk of the instant motions concerns the statutory claims. The applicable contracts are discussed at length in the 2015 Decision. With one exception, the contracts are not discussed herein because the parties agree that plaintiffs' claims that such contracts were breached implicate material factual disputes that will be adjudicated at trial.

With respect to the statutory claims, all of the plaintiffs allege two core claims: (1) the failure of defendants to provide them with a written franchise disclosure document (FDD) prior to their first personal meeting (the Late Disclosure Claims);[5] and (2) defendants' fraudulent inducement of plaintiffs' investments based on material misrepresentations about the financial

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[3] Much of the underlying, extensive factual record is not material to this decision because the two major dispositive issues on which defendants are granted summary judgment (materiality and loss causation) turn on several straightforward, undisputed facts (e.g., the timing of the disclosures and plaintiffs' failure to submit a rebuttal causation report). To the extent the court relies on record evidence that was not before the court on the prior motions, it is addressed where relevant herein.

[4] The New York Plaintiffs' claims are governed by the NYSFA, GBL §§ 680-695, while the James Ian Plaintiffs' claims are governed by the RFIA, RIGL § 19-28.1, *et seq.* *See* 2015 Decision at 10, 20; *see generally A.J. Temple Marble & Tile, Inc. v Union Carbide Marble Care, Inc.*, 87 NY2d 574, 578-80 (1996); *Governara v 7-Eleven, Inc.*, 2014 WL 4476534, at *2 (SDNY 2014). Based on the parties' briefs and the court's independent research, it is clear that the applicable New York and Rhode Island statutes are quite similar and that there is no applicable, dispositive difference between New York and Rhode Island Law. *See* 2015 Decision at 22 (noting one non-dispositive difference concerning enforceability of non-reliance disclaimer).

[5] The Late Disclosure Claims are governed by GBL § 683 and RIGL § 19-28.1-8(a). *See* 2015 Decision at 11, 20.

prospects of their property shops (the Misrepresentation Claims).[6] The principal relief sought by plaintiffs for these statutory violations is rescission – a refund of their investment and out-of-pocket expenses incurred in setting up the property shops.

Discovery is now complete, and a Note of Issue has been filed in all three actions. The parties filed their respective summary judgment motions on February 9, 2017, and the court reserved on the motions after oral argument. *See* Dkt. 325 (9/7/17 Tr.). Defendants' motions seek summary judgment, *inter alia*, on: (1) the Late Disclosure Claims, due to the immaterially of the late FDD disclosure and the lack of proximately caused damages; (2) the Misrepresentation Claims, due to plaintiffs' failure to rebut defendants' prima facie showing of the absence of loss causation; (3) the enforceability of the contracts' limitation of liability clauses; (4) plaintiffs' punitive, exemplary, and consequential damages demands; and (5) defendants' counterclaims for breach of contract for the amounts plaintiffs allegedly owe under the subject contracts. For the reasons set forth below, defendants are granted summary judgment on the first three issues and partial summary judgment on the fourth issue. Summary judgment is denied on the fifth issue.

Given the materiality and loss causation bases for dismissal of plaintiffs' statutory claims, the court need not address the other issues raised by the parties' motions concerning the statutory claims (e.g., which non-contracting defendants are subject to liability for the alleged statutory violations). As for plaintiffs' motions, they seek summary judgment on: (1) there purportedly being no question of fact that all of the plaintiffs were given their FDDs after their first personal meeting; (2) the Misrepresentation Claims; and (3) their available statutory remedies. The court

[6] The Misrepresentation Claims are governed by GBL § 687 and RIGL § 19-28.1-17. *See* 2015 Decision at 14-15, 20-21.

need not address plaintiffs' request for summary judgment on these issues due to the court's dismissal of plaintiffs' statutory claims on materiality and loss causation grounds.

II. Legal Standard

Summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 (1986). The burden is upon the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 NY2d 1062, 1063 (1993). If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidence sufficient to establish the existence of material issues of fact. *Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562. The papers submitted in support of and in opposition to a summary judgment motion are examined in the light most favorable to the party opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman,* 49 NY2d at 562. After examining all of the documents submitted in connection with a summary judgment motion, the court must deny the motion if there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

III. Discussion

A. The Late Disclosure Claims

While most (if not all)[7] of the plaintiffs received their FDDs after their first personal meeting with defendants, it is undisputed that ***they all received their FDDs prior to signing their License Agreements***. Plaintiffs do not cite a single case, nor is the court aware of any, where a franchisee was awarded damages where the FDD was provided after the first personal meeting but prior to the execution of the license agreement.

Indeed, none of the plaintiffs claim that they did not have sufficient time to review the FDDs before deciding to invest. The conclusive evidence utterly refutes such a notion. Lerner (1) signed FDD receipts on February 26, 2008 and May 27, 2008, but did not sign the Scarsdale License Agreement until June 3, 2008; and (2) signed another FDD receipt on October 31, 2008, but did not sign the Southampton License Agreement until November 26, 2008. "In addition, Lerner read the FDD ***and provided it to his lawyer to read***, and he negotiated the terms of the Scarsdale License Agreement." Dkt. 221 at 13 (emphasis added). Likewise, HO signed FDD receipts on August 12, 2008 and March 17, 2009; she signed the Riverside License Agreement on March 21, 2009. "***Ho gave the FDD to her counsel*** prior to December 15, 2008" and "***her counsel*** sent a letter to [Audet] on that date with his comments to the draft [Riverside] License Agreement, referencing the FDD." *Id.* at 14 (emphasis added).

Defendants aver that even if they met with Lerner and Ho prior to giving them FDDs, Lerner and Ho, along with their counsel, had ample time to review the FDDs and negotiate the

[7] The court assumes, *arguendo*, that a late disclosure violation occurred with all of the plaintiffs since that fact would not alter the court's conclusion.

License Agreements before deciding to invest.[8] They further correctly observe that every court to have considered an analogous fact pattern at the summary judgment stage (as opposed to the motion to dismiss stage, the posture of the 2015 Decision) has held that defendants' late provision of the FDD was a technical, statutory violation that could not have been material to plaintiff's investment decision and could not have caused any damages. *See* 2015 Decision at 13, quoting *A Love of Food I, LLC v Maoz Vegetarian USA, Inc.*, 70 FSupp3d 376, 412 (DDC 2014) (*Maoz*); *see also Burgers Bar Five Towns, LLC v Burger Holdings Corp.*, 71 AD3d 939, 941 (2d Dept 2010) ("even if the defendants violated the Franchise Sales Act by failing to register an offering prospectus, the plaintiff must still prove that it sustained damages as a result of the violation.").[9] Consequently, if the plaintiffs' property shops failed, they did so for other

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[8] *See* Dkt. 221 at 14 ("Lerner was in possession of the [FDD] for more than [4] months prior to his execution of the Scarsdale License Agreement and, thereafter, was in possession of a revised [FDD] for approximately one month prior to his execution of the Southampton License Agreement. Likewise, Ho was in possession of the [FDD] at least three months prior to her execution of the [Riverside] License Agreement (we know this because her attorney commented on the FDD in writing three months before she signed the License Agreement).").

[9] The *Maoz* court's compelling reasoning, which is set forth in the 2015 Decision, bears repeating given the factual similarities to this case:

> [T]his Court also concludes that [plaintiff] is not entitled to monetary damages as a result of [defendant's] failure to disclose the offering prospectus at the first possible meeting of the parties. **The causation requirement is even harder to fulfill in this context than it was with the other technical violations [of the franchise laws at issue], for it is undisputed that [defendant] provided a copy of the offering prospectus at some point prior to the execution of the franchise agreement [], so at most there was a slight delay in providing [plaintiff] with the requisite information (i.e., a nominal violation), and no reasonable jury could find that [plaintiff's] significant business losses were the result of untimely disclosure, as the NYFSA requires.** In fact, Plaintiff's claims in this case have nothing whatsoever to do with the timing of [defendant's] disclosure of the 2007 Offering Prospectus, **as might have been the case if there was any evidence that the [plaintiff] had insufficient time to review the prospectus prior to purchasing the franchise**. Instead, and quite to the contrary, the gravamen of [plaintiff's] claims homes in on the content of the

reasons. *See Coraud LLC v Kidville Franchise Co.*, 121 FSupp3d 387, 396 (SDNY 2015) (Rakoff, J.) ("Assuming, arguendo, that Coraud properly asserts a claim under Section 683, it must still prove that Kidville's alleged noncompliance with Section 683 caused Coraud's damages."), accord *Dunkin' Donuts, Inc. v HWT Assocs., Inc.*, 181 AD2d 711, 713 (2d Dept 1992).

Similarly, the record evidence concerning the James Ian Plaintiffs does not demonstrate materiality or causation. Leveillee signed an FDD receipt on October 11, 2007, but did not execute the James Ian License Agreement until November 13, 2007. There is no question of fact that the information in the FDD was not material to the principals of JIP, Leveillee and Dwan, because ***both admitted they did not read the FDD***. Hence, they cannot credibly contend that any information in the FDD would have influenced their decision to invest. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 (1st Dept 2005) ("To state a cause of action for fraudulent inducement, it is sufficient that the claim alleges a material representation, known to be false, made with the intention of inducing reliance, **upon which the victim actually relies**, consequentially sustaining a detriment.") (emphasis added);

> Offering Prospectus; [plaintiff] asserts, in particular, that [plaintiff] had so studied and accepted the information in the 2007 Offering Prospectus that they relied to their detriment on what [defendant] had stated therein when [plaintiff] undertook to purchase a franchise. It is clear beyond cavil that [plaintiff] cannot have it both ways: it cannot maintain that it relied heavily on the offering prospectus, on the one hand, and suggest, on the other, that the disclosure of that same document was so tardy that [plaintiff] did not have time to review it, causing compensable damages. Because there is no evidence connecting the untimely disclosure to [plaintiff's] business losses, and especially in light of [plaintiff's] explicit argument that it relied on the content of the Offering Prospectus, this Court finds as a matter of law that Plaintiff will be unable to prove causation. Thus, despite the technical NYFSA violation, [plaintiff] is not entitled to damages.

Maoz, 70 FSupp3d at 412 (emphasis added; citations omitted).

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see also MBIA Ins. Corp. v J.P. Morgan Secs. LLC, 2016 WL 4141573, at *1 (Sup Ct, Westchester County 2016) (fraudulent inducement claim based on misrepresentations in spreadsheets dismissed where plaintiff did not actually review spreadsheets prior to investing), accord *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 (2011) (fraudulent inducement claims require plaintiff's reliance on defendant's misrepresentation). There is no evidence that suggests the James Ian Plaintiffs would have read the FDD had it been disclosed to them prior to their first personal meeting with defendants.

To be sure, the court still does not rule out the conceptual possibly that a plaintiff that is induced not to read the FDDs might recover damages. As the court explained:

> [T]he argument that one cannot possibly suffer a legally compensable loss when an FDD is provided between the first meeting and the signing of the contract may be at odds with the full scope of legislative concerns as expressed in § 683(8). § 683(8) mandates that the FDD be provided, not only before the final decision to open a franchise, but also before the franchisor can unleash its sales pitch on the prospective franchisee. From the wording that the FDD was to be provided at "the earlier of" the events listed, it appears that the legislature believed that advance written disclosures can prospectively mitigate the persuasive influence of in-person solicitation. Once the sales presentations begin, along with the attendant dose of puffery and overly optimistic projections, subsequent written disclosure may have less of an influence on the decision-making process of a prospective franchisee. That the legislature saw fit to expressly require pre-meeting disclosure, raises, **at least for the purposes of this motion to dismiss**, a reasonable inference that a compensable injury may be sustained if pre-meeting disclosure does not occur.

2015 Decision at 13-14 (emphasis added); *see Coraud LLC v Kidville Franchise Co.*, 109 FSupp3d 615, 622 (SDNY 2015) (Rakoff, J.) (noting "the reality that, in the franchise context, written contractual provisions are not as likely to be scrutinized by less sophisticated people, whose judgment may be compromised in the face of aggressive salesmanship."), quoting 2015 Decision at 19.

Here, however, plaintiffs had ample time to review the FDDs. Indeed, some of the plaintiffs consulted counsel and negotiated the terms of the contract. Others had no interest in reviewing the FDD at all. Thus, there simply is no non-speculative basis for the finder of fact to conclude that the first personal meeting preceding the delivery of the FDDs had any effect on plaintiffs' decision-making process. By contrast, simply assuming, without evidence (which is lacking here), that a late FDD disclosure always causes damages by affecting the plaintiff's decision-making process is at odds with cited caselaw, such as *Moaz*. Plaintiffs were afforded the opportunity to obtain and proffer such evidence, which is why their Late Disclosure Claims survived the motions to dismiss. *See* 2015 Decision at 14 ("ascertaining the existence and magnitude of the injury suffered by not having pre-meeting disclosure is a fact-specific inquiry that cannot be resolved on this motion to dismiss."). They did not do so.

There is nothing in the record that would permit a reasonable finder of fact to conclude that defendants' late disclosure violations had any effect on plaintiffs' investment decisions or their losses. Ergo, as in *Maoz*, the court finds that no reasonable finder of fact could conclude that there is causal connection between between plaintiffs' Late Disclosure Claims and the failure of their property shops. Summary judgment is granted to defendants on these claims, which are dismissed.

B. The Misrepresentation Claims

As the court explained in the 2015 Decision (*see id.* at 15), the elements of plaintiffs' statutory fraud claims mirror those of the classic common law standard.[10] *See Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009) ("The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to

[10] That is why, as noted earlier, plaintiffs' common law fraud claims were dismissed as duplicative.

induce reliance, justifiable reliance by the plaintiff and damages."). Critically, as the First Department recently reiterated, loss causation – proof that plaintiff's loss was caused by defendant's fraudulent misrepresentation – is an "essential," indispensable element of a fraud claim. *See Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 86 (1st Dept 2017) ("Loss causation **is the fundamental core of the common-law concept of proximate cause**.") (emphasis added), quoting *Laub v Faessel*, 297 AD2d 28, 31 (1st Dept 2002) ("the misrepresentation directly caused the loss about which plaintiff complains"); *see also Ambac*, 151 AD3d at 86 ("This Court has repeatedly reaffirmed this principle.") (collecting cases). It is not to be confused with the separate element of transaction causation (i.e., "but-for" causation), which merely requires proof that but for the misrepresentation, "the plaintiff would not have entered into the [] transaction." *Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co.*, 149 AD3d 146, 149 (1st Dept 2017).

In this case, as is evident both from plaintiffs' briefs and from their positions articulated at oral argument,[11] plaintiffs merely submitted evidence of transaction causation – that is, but for defendants' alleged misrepresentations regarding the financial prospects of the property shops, the plaintiffs would never have invested. The court assumes, for the purposes of the instant motions, that this is true. Nonetheless, plaintiffs' fraud claim still would fail absent proof that the alleged misrepresentations were the cause of plaintiffs' loss. That is the case.

Basis PAC-Rim is squarely on point, both in terms of setting the requisite loss causation standard in the context of a real estate related investment going south during the 2008 financial crisis, as well as setting the standard a plaintiff must meet to rebut the sort of prima facie loss

[11] *See* Dkt. 325 (9/7/17 Tr. at 41-43) (plaintiffs' counsel disagreeing with notion that loss causation must be proven in addition to transaction causation).

causation showing that defendants have made here.[12] Regarding the former, the First Department explained:

> Loss causation is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff. To establish loss causation a plaintiff must prove that the subject of the fraudulent statement or omission was the cause of the actual loss suffered. Moreover, **when the plaintiff's loss coincides with a marketwide phenomenon causing comparable losses to other investors [i.e., the 2008 financial crisis], the prospect that the plaintiff's loss was caused by the fraud decreases, and a plaintiff's claim fails when it has not ... proven ... that its loss was caused by the alleged misstatements as opposed to intervening events**. Indeed, when an investor suffers an investment loss due to a market crash [ ] of such dramatic proportions that [the] losses would have occurred at the same time and to the same extent regardless of the alleged fraud, loss causation is lacking.

Basis PAC-Rim, 149 AD3d at 149 (emphasis added; citations and quotation marks omitted). Here, as in *Basis PAC-Rim*, plaintiffs' real estate investment failed at the same time the financial crisis caused virtually all real estate investments to fail.[13]

Litigation emanating from the fallout of the financial crisis has been pervasive and still has no end in sight. That said, a predicable implication of such litigation is that precedent has developed concerning the question of if and how a real estate investor must disentangle the causes of his own losses as being a product of the defendant's alleged fraud from the overall market events that caused everyone's real estate investments to fail. Taking a page from the well-settled federal caselaw concerning securities fraud during a period where the overall market experienced a downturn, the First Department in *Basis PAC-Rim*, as it did in *Laub*, effectively

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[12] *Basis PAC-Rim* was issued on March 2, 2017, after the parties' moving briefs were filed, but prior to the remainder of the briefing. Defendants devote substantial attention to *Basis PAC-Rim* in their opposition brief, yet in reply, plaintiffs do not cite the case, let alone attempt to grapple with its clearly controlling holdings.

[13] It is well known that the financial crisis adversely affected virtually all investors with "long" exposure to the real estate market (i.e., not the few who predicted the crash and shorted the market) – everyone from the ordinary homeowners to those that took market exposure by way of complex derivatives, such as synthetic collateralized debt obligations.

adopted that federal standard, and held that it is *plaintiff's* burden to demonstrate loss causation. *See Basis PAC-Rim*, 149 AD3d at 149, citing *Lentell v Merrill Lynch & Co.*, 396 F3d 161, 173-74 (2d Cir 2005), citing *First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 772 (2d Cir 1994), and citing *Loreley Fin. (Jersey) No. 3 Ltd. v Wells Fargo Secs., LLC*, 797 F3d 160, 186 (2d Cir 2015).[14] Specifically, the First Department held that where, as here, a defendant moves for summary judgment and comes forward with expert evidence that the plaintiff's losses would have been caused by the market downturn regardless of the defendant's malfeasance, the burden then shifts to plaintiff to raise a material question of fact about whether plaintiff's loss can indeed be traced to defendant's fraudulent actions independently of such adverse market forces. *See Basis PAC-Rim*, 149 AD3d at 148-49 ("Once TCW made a prima facie showing that Basis's loss was not due to any fraudulent statements or omissions by TCW, the burden then shifted to Basis to raise an issue of fact. Basis did not meet its burden and TCW's summary judgment motion should have been granted.").

Simply put, the plaintiff must parse out the cause of its losses from macroeconomic events. As noted by the First Department in *Basis PAC-Rim*, the plaintiffs were unable to do so:

> Here, TCW has proffered evidence that Dutch Hill would have collapsed regardless of the assets selected by TCW due to the housing market crash—a marketwide phenomenon causing comparable losses to other investors. **TCW submitted an expert affidavit in which the expert opined that even if TCW had selected assets that complied with the Dutch Hill model and comported with TCW's representations to Basis, Basis would still have suffered a loss due to an external and intervening cause—namely, the housing market crash.** The expert conducted a common form of regression analysis to "analyze the effect that macroeconomic factors had on pools of collateral consistent with Dutch Hill II's core asset portfolio ... in order to create a benchmark against which to

[14] While courts have noted the First Department's somewhat inconsistent positions on the standard for procuring a loss causation dismissal at the motion to dismiss stage [*see Loreley*, 797 F3d at 182 n.14], after *Basis PAC-Rim*, there can be no doubt that loss causation is an issue well suited for resolution on a motion for summary judgment, especially if, as explained herein, the expert evidence is entirely one-sided.

> compare the performance of the loan pools analyzing the collateral in Dutch Hill II." The TCW expert found that "any CDO backed by pools of loans consistent with Dutch Hill II's core asset portfolio would have suffered losses as a consequence of the general market downturn ..." Ultimately, the expert concluded that Basis's "economic losses were caused by unforeseeable macroeconomic events ..."
>
> In response, Basis failed to raise an issue of fact. Despite having pleaded in its amended complaint that TCW allowed Dutch Hill to contain "toxic securities" that "performed significantly worse than a benchmark portfolio comprised of similar mortgage-backed bonds," **Basis failed to produce any evidence that under the circumstances here involving the collapse of the RMBS market, it was TCW's misrepresentations, rather than market forces, that caused the investment losses**. Instead, Basis's expert, in response, provided a general overview of the role of various players involved in CDO transactions as well as his opinion and interpretation of internal TCW emails discussing the investment vehicle at issue and the health of the market. However, Basis's expert failed to address or even discuss Basis's argument that no suitable collateral then existed and that TCW lied about its existence, and that this misrepresentation caused Basis to lose their entire investment. Basis's expert did not analyze the quality or performance of the assets purchased by TCW. Basis's expert's conclusory assessment of the economic damages suffered by Basis addressed only transaction causation, stating that "[i]n the absence of [ ] fraudulent inducement and concealment, [p]laintiffs aver that Basis would not have invested [$27,000,000 plus] ... and would therefore not have suffered this total loss." This was insufficient to raise an issue of fact as to loss causation.

Basis PAC-Rim, 149 AD3d at 150-51 (emphasis added; citations and quotation marks omitted). To be sure, the First Department made clear that "[w]e do not mean to suggest that all cases in which a plaintiff alleges fraud will be unable to survive summary judgment in the event of a market collapse", but that "Basis's complete failure to meet its burden on the issue of loss causation [] compels our decision." *Id.* at 151.

If the *Basis PAC-Rim* plaintiffs' loss causation rebuttal attempts were a "complete failure," then the attempt made by the plaintiffs in this case can only be described as utterly nonexistent. Here, in response to defendants proffering an expert report that explains why plaintiffs' property shops likely failed by virtue of the financial crisis, plaintiffs proffered even

less than the plaintiffs in *Basis PAC-Rim* (who, as noted above, at least submitted a rebuttal expert report that purported to raise a question of fact about the true cause of their losses). *See* Dkt. 274 (Expert Report of Jonathan J. Miller) at 1-8 (analyzing effect of financial crisis on residential real estate markets covered by plaintiffs' property shops). While Mr. Miller caveated his conclusion by stating that "I don't know if the drop in sales volume across these markets was the sole cause of the decline," he opined, based on his experience with the historical effects of real market downturns on the real estate brokerage industry, that "it is certainly reasonable to assume that it was a large part of their problem." *See id.* at 3.[15] Under *Basis PAC-Rim*, that is enough to make out a prima facie case and shift the burden to plaintiffs to at least proffer *some* evidence of how much (if any) of their losses were caused by defendants, as opposed to the market downturn. Plaintiffs have not done so. Not only did they fail to submit *any* fact or expert evidence on this issue, they do not even proffer a conclusory theory as to how much of their losses were caused independently of the market downturn. *See* Dkt. 211 at 17 ("Plaintiffs have utterly failed to proffer any evidence of causation or damages and Defendants' unrebutted expert has opined that, to the extent Plaintiffs have sustained business losses, those losses were caused by the 2008-2011 financial crisis. That evidence, combined with the undisputed fact that each of the New York Plaintiffs actually received an FDD well prior to execution of their respective License Agreements and had their attorneys review and negotiate their terms, renders it impossible for them to establish damages causation."). Hence, were this case to proceed to trial, the finder of fact would lack any evidence on which to base a conclusion regarding the amount

[15] While the court has noted plaintiffs' failure to submit an expert to rebut Mr. Miller's analysis, it also should be noted that plaintiffs' briefs do not advocate the position that Mr. Miller's analysis is flawed or that he is unqualified to render his expert opinions. On the contrary, he clearly appears qualified, and his opinions about the relationship between real estate downturns and adverse effects on real estate brokerages are persuasive.

of plaintiffs' losses that, in hindsight, were *not* inevitable due to the financial crisis. Hence, no reasonable finder of fact could conclude that plaintiffs proved the element of loss causation.

In reaching this conclusion, the court cannot ignore the fact that, in *Basis PAC-Rim*, the First Department granted summary judgment to defendant on loss causation because (1) defendant met its prima facie case; and (2) the analysis in plaintiffs' rebuttal expert report was analytically insufficient. It follows, therefore, that a defendant is entitled to summary judgment if, after making out its prima facie case, the plaintiff does not submit *any* rebuttal expert report. That is the case here. Plaintiffs' failure to submit a rebuttal expert report on loss causation utterly dooms their fraud claims.

This conclusion is consistent with the well settled rule that a party opposing summary judgment has the obligation to lay bare its proof to ensure there is a genuine question of fact that requires a trial to resolve. *Genger v Genger*, 123 AD3d 445, 447 (1st Dept 2014); *see Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 (2016) ("a party may not create a feigned issue of fact to defeat summary judgment."). Plaintiffs' failure to come forward with any evidence of how much of their losses are attributable to the market downturn and how much are attributable to their alleged reliance on defendants' misrepresentations requires the court to conclude that plaintiffs have no such evidence.[16]

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[16] It is too late for plaintiffs to do so. Leaving aside the question of whether their submission of an expert report in connection with the instant motions would have been proper given defendants' prior demand under CPLR 3101(d) and the court's June 29, 2016 order (Dkt. 206) that required all experts to be disclosed by August 10, 2016 and affirmative reports to be served by September 15, 2016, rebutting a prima facie case on a summary motion requires more than a mere conclusory statement that an expert might be retained at trial. *See* Dkt. 211 at 21 ("No such expert was identified by Plaintiffs, and no report by [any] damages expert was served pursuant to the court-ordered expert witness disclosure schedule. In fact, Plaintiffs did not serve any expert report concerning damages. Instead, they served the expert report of [a] … purported franchise expert, who sets forth his opinion concerning the purpose of franchise statutes and the reasonableness of Plaintiffs' reliance upon the alleged misrepresentations made by EV-NE. **The**

In sum, since plaintiffs failed to proffer any expert evidence to raise a question of fact (or even a reasonable inference) that their losses can be disentangled from the market forces behind the financial crisis, no reasonable finder of fact could rule in their favor on loss causation. "Simply stated, the sole evidence concerning causation – the Miller Report – eliminates the possibility that Plaintiffs can establish that the alleged statutory violation[s] caused any damages suffered by Plaintiffs." Dkt. 211 at 32. Summary judgment is granted to defendants, and plaintiffs' statutory fraud claims are dismissed.

C. Limitation of Liability Clause

One of plaintiffs' breach of contract claims is defendants' alleged failure to provide "a functional website." *See* Dkt. 221 at 38. The parties agree that the material facts pertinent to the merits of this claim are in dispute. Defendants, however, seek dismissal of (or to at least limit their liability on) this claim based on their contention that "the parties' [IT Agreements] contain an extensive disclaimer of warranty and waiver of remedies arising from Plaintiffs' license and use of the E&V Software (which is included on the 'englevoelkers.com' website and the 'E&V GO Suite of Productivity Tools,' which included email and website tools)." *See id.*

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report contains no data or analyses of Plaintiffs' alleged damages (other than, in one sentence, to repeat the conclusory total damage amounts set forth in Plaintiffs' Interrogatory Responses)") (emphasis added). There is no authority this court is aware of that permits a plaintiff to avoid scrutiny of its expert evidence after a defendant has made a prima facie case merely by asserting that it will be able to rebut defendant's expert at trial. At best, this is an "expression of hope" that is insufficient to defeat summary judgment. *See Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 (2016), quoting *Zuckerman,* 49 NY2d at 562. Indeed, if a plaintiff could avoid summary judgment in this manner, there would never be an incentive for a plaintiff to submit expert evidence in opposition to a summary judgment motion if doing so subjected it to a possibly adverse ruling, since omitting such evidence from the record would automatically result in a trial. That would be utterly inconsistent with the well-established summary judgment burden shifting standard. *See Genger*, 123 AD3d at 447 ("When Arie established his prima facie entitlement to judgment, it was incumbent upon Sagi to 'assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.'") (citation omitted).

Section 7 of the IT Agreements sets forth the scope of the license granted to plaintiffs and the scope of defendants' warranty of its technology, including the website. *See* Dkt. 254 at 8. Critically, section 7.3 provides:

> Except as expressly provided above, the E&V Software or Licensed Materials **are provided "AS IS" and without warranty of any kind**, either express or implied by operation of law or otherwise, including, but not limited to, **any implied warranties of merchantability or fitness for a particular purpose** and warranties against interference or infringement, subject to Section 10 of this Agreement. [EV-IT] does not warrant or represent that the operation of the E&V Software will be uninterrupted or error free or that any defects in the E&V Software or Licensed Materials will be or can be corrected.

Dkt. 254 at 8-9 (bold added for emphasis; capitalization in original). Moreover, section 7.4 disclaims defendants' liability for:

> **any lost profits, revenues, business opportunities or business advantages whatsoever, nor for any special, consequential, indirect or incidental losses, damages or expenses** directly or indirectly relating to E&V Software or Licensed Materials, caused through Licensee's use or misuse of the E&V Software or Licensed Materials, this Software License, **any obligation under or subject matter of this Agreement, whether such claim is based upon breach of contract**, breach of warranty, negligence, strict liability in tort or any other theory of relief, or whether or not IT-Services is informed in advance of the possibility of such damages.

Id. at 9 (emphasis added). Additionally, section 7.6 provides that EV-IT's "total aggregate liability hereunder shall be limited to an amount which shall not exceed the amount paid by Licensee to [EV-IT] under this Agreement." *Id.*

Defendants are entitled to partial summary judgment on this claim to the extent plaintiffs seek damages from EV-IT in excess of those permitted under section 7.6 – that is, damages in excess of the amount plaintiffs paid under the IT Agreements. "As a general rule, parties are free to enter into contracts that absolve a party from its own negligence [(*see Melodee Lane Lingerie Co. v American Dist. Tel. Co.*, 18 NY2d 57, 69 (1966)] **or that limit liability to a nominal**

sum." *Abacus Fed. Sav. Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675, 682-83 (2012) (emphasis added). This sort of contractual limitation of liability is ordinarily enforceable absent gross negligence and "where it does not offend public policy." *Banc of Am. Secs. LLC v Solow Bldg. Co. II*, 47 AD3d 239, 244 (1st Dept 2007); *see* Dkt. 221 at 39-40 (collecting cases);[17] *see also Meyer v Alex Lyon & Son Sales Managers & Auctioneers, Inc.*, 67 AD3d 547, 548 (1st Dept 2009) ("as is" warranty enforceable), accord *Roberts v Weight Watchers Int'l, Inc.*, 2017 WL 4994471, at *2 (2d Cir Nov. 2, 2017) (plaintiff "failed to state a claim for breach of contract because he 'got what he bargained for: the ability to access, use [the website] on an 'AS IS' basis.'") (citation omitted). That is the case here, where there is no evidence of gross negligence in the record and where there are no apparent public policy concerns.[18] *See Abacus*, 18 NY3d at 683.

Nonetheless, in seeking complete dismissal of this claim, plaintiffs correctly contend [*see* Dkt. 303 at 36-37] that defendants misconstrue the nature of plaintiffs' technology allegations – which are not proffered merely to assert a claim against EV-IT for breach of warranty, but also

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[17] In *Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377 (1983), the Court of Appeals held that:

> an exculpatory clause is unenforceable when, in contravention of acceptable notions of morality, the misconduct for which it would grant immunity smacks of intentional wrongdoing. This can be explicit, as when it is fraudulent, malicious or prompted by the sinister intention of one acting in bad faith. Or, when, as in gross negligence, it betokens a reckless indifference to the rights of others, it may be implicit

Id. at 385. It should be noted that, as discussed herein, plaintiffs do not allege any fraud in defendants' performance of the contracts, and while they do claim fraud in the inducement, such fraud claims have been dismissed.

[18] Defendants' suggestion that the lack of negotiation over the contracts is legally relevant to *Solow*'s public policy prong is unsupported by any controlling authority. In any event, the record clearly evidences plaintiffs' ability to review and negotiate the contracts with the aid of counsel.

for express breach of EV-NE's obligation under section 1.6 of the License Agreements "to use commercially reasonable efforts to support the Licensee - as far as possible and as set out in this Agreement." *See* Dkt. 251 at 6. In other words, while the "AS-IS" warranty disclaimer in section 7.3 precludes holding EV-IT liable for the mere fact that the website may have had problems, plaintiffs plausibly contend that EV-NE's failure to help remedy the technology problems is not in keeping with its duty to take commercially reasonable efforts to support plaintiffs due to the adverse effects such problems allegedly had on their property shops (the truth and extent of which are indisputably questions of fact for trial). Defendants do not respond to this point in their reply brief and thus concede this is a triable issue. *See* Dkt. 323 at 24-27.

D. Punitive, Exemplary, & Consequential Damages

Section 27.3[19] of the License Agreements expressly disclaims these categories of damages. *See* Dkt. 251 at 34. Such a contractual disclaimer is ordinarily enforceable. *See Obremski v Image Bank, Inc.*, 30 AD3d 1141 (1st Dept 2006), citing *Uribe v Merchants Bank of N.Y.*, 91 NY2d 336, 341 (1998). Nothing alleged by plaintiffs, let alone evidenced by the record, suggests defendants committed gross negligence, which could vitiate the enforceability of section 27.3. *See Morgan Stanley Mort. Loan Trust 2006-13ARX v Morgan Stanley Mort. Capital Holdings LLC*, 143 AD3d 1, 8 (1st Dept 2016). The only allegations that come close are the claims of fraudulent inducement, which have nothing to do with defendants' performance under the contracts and, in any event, are dismissed for the reasons set forth earlier. Regardless, punitive damages are unavailable since defendants' wrongdoing was not aimed at the public [*see Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 613 (1994) ("a private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by

[19] Defendants erroneously refer to this section as 37.3.

which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.")], nor does anything in the parties' agreements suggest an intention to permit plaintiffs to recover more than compensatory damages, such as exemplary or consequential damages. *See Bi-Econ. Mkt., Inc. v Harleysville Ins. Co. of N.Y.*, 10 NY3d 187, 192-93 (2008), citing *Kenford Co. v Cty. of Erie*, 73 NY2d 312, 319 (1989). As discussed, the contracts evidence a clear intent to restrict plaintiffs to recovering compensatory damages.

E. Defendants' Breach of Contract Counterclaims

Summary judgment on defendants' counterclaims is denied. It is axiomatic that a party's own performance under a contract is a necessary predicate to its maintenance of a claim for breach of that contract. *See Nevco Contracting Inc. v R.P. Brennan Gen. Contractors & Builders, Inc.*, 139 AD3d 515 (1st Dept 2016); *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Defendants concede that there are triable questions of fact regarding their alleged contractual breaches. Thus, it is premature to grant judgment to defendants on their counterclaims. Accordingly, it is

ORDERED that defendants' motions for summary judgment are granted only to the extent that (1) plaintiffs' Late Disclosure Claims under GBL § 683 and RIGL § 19-28.1-8(a) are dismissed with prejudice; (2) plaintiffs' Misrepresentation Claims under GBL § 687 and RIGL § 19-28.1-17 are dismissed with prejudice; (3) EV-IT's liability is capped at the amount it was paid by plaintiffs; and (4) plaintiffs are limited to seeking compensatory damages on their remaining breach of contract claims, and their demands for punitive, exemplary, and consequential damages are hereby stricken; and it is further

ORDERED that defendants' motions are otherwise denied; and it is further

ORDERED that plaintiffs' motions for summary judgment are denied; and it is further

ORDERED that the parties shall contact the court within three weeks of the entry of this order on NYSCEF regarding plaintiffs' intention to take an interlocutory appeal of this decision.

Dated: November 16, 2017

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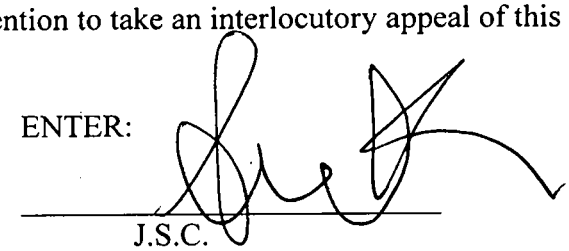

J.S.C.

SHIRLEY WERNER KORNREICH
J.S.C.