Tratado De Libre Comercio, LLC v Splitcast Tech. LLC
2018 NY Slip Op 31007(U)
May 17, 2018
Supreme Court, New York County
Docket Number: 652650/2016
Judge: Gerald Lebovits
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

---x

TRATADO DE LIBRE COMERCIO, LLC and
PEDRO CHAVEZ,

Plaintiffs,

-against-

SPLITCAST TECHNOLOGY LLC, SPLITCAST INC., SPLITCAST TECHNOLOGIA, SPA, AURUS S.A. ADMINISTRADORA GENERAL DE FONDOS, RAIMUNDO CERDA, CAMERON WENDT, HUGO NEIRA, FELIPE ARREDONDO, JOSE FLORES, JAVIER SALCEDO, IGNACIO LEON NAVARRO, and DOES 1-10, inclusive,

Defendants.

---x

Index No.: 652650/2016
DECISION/ORDER
Mot. Seq. No. 007

Gerald Lebovits, J.:

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of this motion and cross-motion:

PAPERS	NUMBERED
Defendants' Notice of Motion and Affirmation	71, 73
Defendants' Exhibits Annexed	74-88 (Exs. A-O)
Memorandum in Support	72
Plaintiffs' Answering Affirmation	99
Plaintiffs' Exhibits Annexed	100-109 (Exs. 1-10)
Plaintiffs' Notice of Cross-Motion	110
Memorandum in Opposition to Motion And in Support of Cross Motion	98
Defendants' Reply Memorandum	120
Defendants' Reply Affirmation	112, 121, 128
Defendants' Reply Exhibits Annexed	113-118 (Exs. A-F) 122-127 (Exs. A-F) 129-136 (Exs. A-H)
Plaintiffs' Reply Affirmation to Cross Motion	138, 139
Plaintiffs' Reply Memorandum to Cross Motion	137

In motion sequence No. 007, defendants Raimundo Cerda, Ignacio Leon Navarro (Leon), Hugo Neira, Felipe Arredondo, Splitcast Technology LLC (Splitcast LLC), Splitcast Inc. (Splitcast), Splitcast Tecnologia, SpA (Splitcast SpA), and Aurus S.A. Administradora General de Fondos (Aurus) move, pursuant to CPLR 3211 (a) (2), (a) (7), and (a) (8), to dismiss plaintiffs Tratado de Libre Comercio, LLC (Tratado) and Pedro Chavez's claims against Aurus, Cerda, Leon, Arredondo, and Neira for lack of subject-matter jurisdiction and failure to state a cause of action, and for lack of personal jurisdiction as to Arredondo and Neira. These defendants further move, pursuant to CPLR 7503 (a), to compel arbitration of the remainder of plaintiffs' claims, and to stay this action and any subsequent litigation on those claims. Also, the moving defendants move, pursuant to 22 NYCRR 130-1.1, for sanctions due to plaintiffs' allegedly frivolous claims.

Plaintiffs cross-move, pursuant to CPLR 3215, for a default judgment against defendants Cameron Wendt and Javier Salcedo. They further cross-move for an order, pursuant to CPLR 316, for service of the amended complaint by publication on Arredondo and Neira; an order, pursuant to CPLR 306-b and 308 (5), extending the time for service on said defendants; and a continuance, pursuant to CPLR 3211 (d), to permit the parties to engage in discovery. Moreover, plaintiffs seek a preliminary injunction against all defendants preventing the disclosure or conveyance of Splitcast SpA's technology and intellectual property. Finally, plaintiffs seek sanctions, pursuant to 22 NYCRR 130-1.1, against all defendants other than Wendt and Salcedo for alleged frivolous conduct.

Background

Splitcast SpA, a Chilean corporation, developed a video streaming application (amended complaint, ¶¶ 6, 26-29). Plaintiffs allege that defendant Wendt made a sales presentation to them regarding the software, and represented that $600,000 had been allocated to development of the software by the Production Development Corporation (CORFO), a Chilean government agency (*id.*, ¶ 26). Aurus was the leading investor in Splitcast SpA, and Cerda allegedly served as Aurus's representative (*id.*, ¶¶ 33-34). Cerda also allegedly served as chairman of the board and managing member of Splitcast SpA and Splitcast LLC, respectively (*id.*, ¶ 34). Plaintiffs allege that Neira and Arredondo confirmed Cerda's representation of both Aurus as lender and Splitcast LLC as borrower, and that Cerda had established Splitcast SpA's valuation of $2.6 million (*id.*, ¶¶ 27, 38). Plaintiffs further allege that, based on Wendt's representations about Aurus' investment in Splitcast SpA, plaintiffs decided to loan the money (*id.*, ¶ 40).

On June 6, 2012, Chavez signed an advisory agreement with Splitcast (*id.*, ¶ 41). In broad terms, the agreement provided that Chavez and nonparty Scott de Rozic would serve as "Special Advisors to the CEO . . . of Splitcast" to assist with obtaining funding for development and expansion of the video streaming application (Comar affirmation dated 10/2/17, exhibit C, Advisory Agreement dated 6/6/12 at 1-2). The agreement was made retroactive to May 18, 2012, and ran until July 24, 2012 (*id.* at 1). Chavez was to be compensated with stock in Splitcast or Splitcast SpA (*id.* at 3).

Plaintiffs allege that, due to Cerda's, Wendt's, and Neira's unwillingness to disclose details of the software and of Splitcast SpA's financials, Chavez was unable to come up with a

business plan to obtain funding within the time set forth in the Advisory Agreement (amended complaint, ¶ 44). Chavez and Splitcast then amended the Advisory Agreement, extending the term of the agreement to 30 days after funding was obtained (Comar affirmation, exhibit D, Amendment to Advisory Agreement dated 7/22/12). Plaintiffs and Aurus, along with other Chilean investors, made a $150,000 bridge loan to Splitcast SpA in order to keep it running (complaint, ¶¶ 48-49).

In October 2012, unspecified defendants formed Splitcast LLC, with Chavez, Neira, Cerda, and Arredondo serving as officers (*id.*, ¶¶ 51). Splitcast LLC also allegedly became the owner of Splitcast and Splitcast SpA, though plaintiffs do not allege how this was accomplished (*id.*). Splitcast LLC was "established using Splitcast SpA's operating agreement as an interim operating agreement for 15 days" (*id.*, ¶ 52). After the 15-day period had expired, however, plaintiffs allege that Splitcast LLC never adopted a new agreement, which allowed Cerda to exercise complete control over it, though plaintiffs do not allege how this was accomplished (*id.*, ¶53).

On December 10, 2012, Chavez and Splitcast LLC entered into a consulting agreement (Consulting Agreement), in which Chavez would be appointed to the board of Splitcast LLC, be appointed as the Interim Chief Operating Officer (COO), have the right to certain reports and information about the company, and have the right to approve certain decisions (Comar affirmation, exhibit F, Consulting Agreement dated 12/10/12).

In conjunction with the Consulting Agreement, Tratado and Splitcast LLC entered into a note purchase agreement (Note Purchase Agreement), under which Tratado loaned Splitcast LLC $200,000 in exchange for a convertible promissory note (Promissory Note) (Comar affirmation, exhibit E, Note Purchase Agreement dated 12/10/12, ¶ 2.1). Splitcast LLC and Chavez's signing of the Consulting Agreement was a condition precedent for Tratado's entering into the Note Purchase Agreement (*id.*, ¶ 3.1).

The Note Purchase Agreement also provided that Splitcast LLC would wholly own Splitcast SpA before the closing (*id.*, ¶ 6.3[b]). Further, Splitcast LLC warranted that it would apply for patents on its intellectual property, and that any notes governed by the Note Purchase Agreement would be secured by the intellectual property (*id.*, ¶ 4.1). These parties also agreed to arbitrate "any controversy or claim arising out of or relating to this agreement, or the breach thereof . . . provided however, that each party will have a right to seek injunctive relief in a court of law" (*id.*, ¶ 10.16). The Promissory Note provided that any disputes thereunder would be resolved "pursuant to the terms of the Note Purchase Agreement" (Comar affirmation, exhibit O, Promissory Note dated 12/10/12, ¶ 2). Finally, the Note Purchase Agreement included an exculpatory clause among the various lenders, under which each lender agreed that "no other [l]ender nor their respective controlling persons, officers, managing members, partners, agents, [etc.] . . . shall be liable for any action heretofore or hereafter taken or omitted to be taken by any of them in connection with the purchase and sale of the securities (Note Purchase Agreement, ¶ 10.13). The annexed list of lenders included Tratado, Aurus Tecnologia Fondo de Inversion Privado, a fund controlled by defendant Aurus, Arredondo, Leon, Neira (collectively the Lender defendants), and defendant Javier Salcedo (*id.*, Amended Schedule of Lenders).

Plaintiffs allege that the relationship among the parties then broke down in several ways. They claim that Splitcast LLC never applied for patents on the video streaming application (amended complaint, ¶ 65). Further, that Neira and Cerda took unspecified executive actions and made unspecified personnel decisions without Chavez's knowledge or consent, and denied his requests for a demonstration of the software (*id.*, ¶¶ 66-67). Also, Chavez claims he lost access to a discretionary budget set forth in the Consulting Agreement (*id.*, ¶ 69; Consulting Agreement, ¶ 2 [d] [6]). Moreover, plaintiffs claim that, during a Splitcast LLC board meeting at Aurus' headquarters in January 2013, Neira unilaterally removed a presentation by Chavez from the agenda (amended complaint, ¶¶ 67-68). Finally, plaintiffs claim that, in 2014, they learned Splitcast LLC was bankrupt, and that Neira, Cerda, and other investors had "negotiated amongst themselves without consulting plaintiffs to protect their own interests," ostensibly by dissolving Splitcast LLC and Splitcast SpA "without notifying plaintiffs or setting aside an amount to pay the liabilities owed plaintiffs prior to the distribution of corporate assets" (complaint, ¶¶ 71, 75). Tratado claims it is entitled to Splitcast LLC's intellectual property as security for the loan, and that defendants have failed to turn it over (*id.*, ¶¶ 72-73). Plaintiffs further allege that defendant Flores, and employee of an unspecified Splitcast entity, and who served as Neira's right-hand man with respect to the streaming technology, had and continues to have "knowledge and possession of the Splitcast trade secrets that constituted the intellectual property" that plaintiffs seek as security (*id.*, ¶¶ 15-16). They claim that Flores has also failed to turn that intellectual property over to them after demanding it (*id.*, ¶¶ 17-18).

Procedural History

On May 16, 2016, plaintiffs commenced this action. The complaint alleged five causes of action: conversion (first cause of action); violations of Section 10 (b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5 (second cause of action); fraud and deceit (third cause of action); breach of contract (fourth cause of action); and, money had and received (fifth cause of action).

Three months after commencing the action, plaintiffs sought an order extending the time to serve the summons and complaint, and the issuance of letters rogatory to the courts of Chile to assist in serving those defendants who reside in Chile (NYSCEF Doc No. 2, proposed ex parte order). On September 6, 2016, the court granted plaintiffs' motion and extended the time to serve the complaint to June 31, 2017 (NYSCEF Doc. No. 10, order dated 9/6/16). Chavez avers that the process of locating defendants Neira and Arredondo for service in Chile is complicated, but is ongoing with as much speed as possible (Chavez aff dated 11/24/17, ¶¶ 90-102; exhibit 10, Villalobos aff dated 5/16/17, Villalobos aff dated 6/27/17). Specifically, letters rogatory were issued for service in Chile on November 7, 2016 (*id.*, ¶ 90), and that investigations in Chile to locate Neira and Arredondo for service are ongoing, but have been frustrated by multiple addresses listed incorrectly for each defendant (*id.*, ¶¶ 97, 99-101).

On November 11, 2016, plaintiffs' process server averred that he served defendant Wendt at his place of business by leaving a copy of the papers with a person of suitable age and discretion (Reid affirmation dated 11/24/17, exhibit 9, affidavit of service). The affidavit of service does not indicate that the process server made the requisite follow-up mailing, and Wendt denies that he was ever served personally, by mail, or by substitute service as the affidavit

describes (Wendt aff dated 12/8/17, ¶¶ 1-3).

By separate motions, defendants Cerda, Leon, Splitcast, Splitcast LLC, and Splitcast SpA (NYSCEF Doc No. 11, notice of motion [seq. 002] dated 3/22/17), Aurus (NYSCEF Doc. No. 34, notice of motion [seq. 004] dated 6/30/17), Flores (NYSCEF Doc No. 48, notice of motion [seq. 005] dated 7/20/17), and Neira and Arredondo (NYSCEF Doc. No. 63, notice of motion [seq. 006] dated 8/28/17), moved to dismiss certain of plaintiff's claims, and to compel arbitration of the remaining claims. In response, on September 12, 2017, plaintiffs filed an amended complaint. The amended complaint asserts seven causes of action: conversion (first cause of action); breach of fiduciary duty (second cause of action); fraud (third cause of action); breach of contract (fourth cause of action); money had and received (fifth cause of action); constructive trust (sixth cause of action); and a permanent injunction preventing the disclosure or conveyance of Splitcast SpA's technology and intellectual property (seventh cause of action). Thereafter, defendants Aurus, Flores, Neira, and Arredondo withdrew their motions (NYSCEF Doc No. 75, letter dated 9/28/17 from Ananda to court).

While the above motions were pending, the deadline imposed by the court to serve the original complaint expired. One month later, on July 28, 2017, plaintiffs' counsel attempted to serve defendants Neira and Arredondo by electronic mail (Comar affirmation, exhibit N, email dated 7/28/17 from Reid to Neira and Arredondo). Plaintiffs subsequently filed proof of service on Arredondo alleging service on December 11, 2017 (NYSCEF Doc No. 140, proof of service dated 1/19/18). Plaintiffs did not request an extension of time to serve the complaint until the filing of the instant cross-motion on November 24, 2017, five months after the deadline had expired.

On January 11, 2018, the court granted motion sequence number 002 (NYSCEF Doc. No. 141, decision and order dated 1/11/18). Specifically, the court dismissed the claims alleged in the original complaint against Splitcast LLC and Splitcast SpA for lack of personal jurisdiction (*id.* at 3-5), dismissed the second cause of action alleging securities violations against all defendants for lack of subject matter jurisdiction (*id.* at 5), and compelled plaintiffs to arbitrate the remaining claims in the action against Splitcast, Cerda, and Leon (*id.* at 6-7). Plaintiffs appealed this decision (NYSCEF Doc. No. 149, notice of appeal dated 2/20/18).

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*id.* at 87-88). "[W]here . . . the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

Lack of Personal Jurisdiction

As an initial matter, defendants seek "all appropriate and sought relief as argued by defendants Cerda, Leon, [Splitcast LLC], [Splitcast], and [Splitcast SpA] in Motion Sequence 002" (NYSCEF Doc. No. 71, notice of motion dated 10/2/17). On motion sequence no. 002, the named defendants moved, among other things, to dismiss the case against Splitcast LLC and Splitcast SpA for lack of personal jurisdiction, which the court granted (NYSCEF Doc. No. 141, decision and order dated 1/22/18 at 3-5). Plaintiffs' appeal of that decision is pending, but it is otherwise law of the case on this point, and, moreover, nothing in the record on the instant motion suggests additional allegations that would allow the court to exercise jurisdiction. Indeed, plaintiffs do not appear to address the court's personal jurisdiction, or lack thereof, over Splitcast LLC and Splitcast SpA. Accordingly, that branch of defendants' motion to dismiss the amended complaint against Splitcast LLC and Splitcast SpA for lack of personal jurisdiction is granted.

Neira and Arredondo move, pursuant to CPLR 3211 (a) (8), to dismiss this action against them on the grounds that they were never properly or timely served. But Neira and Arredondo also seek affirmative relief from the court, in the form of an order compelling arbitration of the claims against them. When a party seeks affirmative relief from the court beyond the motion to dismiss the complaint, it thereby waives any objection to that court's jurisdiction (*see Flaks, Zaslow & Co. v Bank Computer Network Corp.*, 66 AD2d 363, 366–67 [1st Dept 1979] ["Defendant waived its previously sustained jurisdictional objection by moving for summary judgment on its second counterclaim thereby availing itself of a New York court for affirmative relief"]). Accordingly, that branch of Neira and Arredondo's motion to dismiss the complaint for lack of jurisdiction is denied. Moreover, the court's decision denying this branch of defendants' motion also renders moot those branches of plaintiffs' cross-motion related to service on these defendants.

Claims Against the Lender Defendants

The Lender defendants, as well as defendant Cerda, argue that the exculpatory clause of the Note Purchase Agreement bars plaintiffs' suit against them, as the exculpatory clause bars litigation among lenders and, among others, any controlling person of a lender. They assert that this clause applies to Leon, Neira, Arredondo, and Tratado as lenders, and to Aurus, Cerda, and Chavez as controlling persons of the Aurus fund listed as a lender, Aurus itself, and Tratado, respectively, and that all of plaintiffs' claims arise out of the transaction memorialized by the Note Purchase Agreement and related agreements incorporated into the note Purchase Agreement by reference. In opposition, plaintiffs argue that the exculpatory clause does not apply, as they have made allegations of intentional wrongful conduct. Moreover, they assert that the exculpatory clause only relates to defendants' status as lenders, and, thus, does not apply to actions taken unrelated to lending money to Splitcast LLC.

The exculpatory clause provides that no lender or related person shall be liable to any other lender for actions taken or not taken, at any time, related to the Note Purchase Agreement (note purchase agreement, ¶ 10.13). Tratado, Neira, Arredondo, and Leon are listed as lenders (*id.*, Amended Schedule of Lenders). Chavez supports defendants' argument that Cerda was the chief executive officer and managing partner of Aurus (Chavez aff, ¶ 28), that Aurus itself

"manages and controls" the Aurus fund listed as a lender, and that Cerda was a controlling person of both Aurus and the Aurus fund (*id.*, ¶ 36). Accordingly, the Lender defendants and Cerda are all covered by the exculpatory clause. Also, plaintiffs' causes of action for conversion, fraud, breach of fiduciary duty, breach of contract, money had and received, constructive trust, and a permanent injunction expressly relate to money due under, Splitcast LLC's obligations under, or representations made within the Note Purchase Agreement and related documents. Plaintiffs do not dispute this. Plaintiffs are correct, however, that allegations of "willful or grossly negligent acts" are not barred by exculpatory clauses as a matter of public policy (*Kalisch-Jarcho, Inc. v City of New York*, 58 NY2d 377, 384–85 [1983]; Restatement [Second] of Contracts § 195 [1] ["A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy"]).

Defendants' reliance on *SNS Bank v Citibank* (7 AD3d 352 [1st Dept 2004]) to the contrary is unavailing. In *SNS Bank*, the Appellate Division, First Department held that a court need not consider conclusory allegations of willful conduct or bad faith in interpreting the applicability of an exculpatory clause (*id.* at 355). Here, however, defendants have implicitly conceded that plaintiffs have stated causes of action for conversion and breach of contract, as they failed to seek dismissal of those claims. Accordingly, the exculpatory clause does not apply to bar this action, and that branch of defendants' motion to dismiss the complaint against Cerda and the Lender defendants based on the exculpatory clause is denied.

Defendant Aurus

Aurus further argues that the only claims pled against it are as an alter ego of Splitcast LLC, Splitcast SpA, and Splitcast, and the complaint fails to allege how it exercised dominion over Splitcast LLC, or how it used such dominion to harm plaintiffs. Such allegations, says Aurus, must be pleaded with particularity. In opposition, plaintiffs argue that their allegations are sufficient. They also argue that Aurus was the disclosed principal of defendant Cerda, and is, therefore, vicariously liable for Cerda's wrongdoing in relation to the various transactions at issue in this case.

Piercing the corporate veil is warranted where a party has complete dominion over a corporation and abuses the corporate form to perpetrate some fraud or wrong on the injured party (*Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). A party claiming alter ego liability, such that each corporate entity or individual is liable for the acts of the other, "bear[s] a heavy burden of showing that the corporation was dominated as to the transaction attacked and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences" (*TNS Holdings v MKI Sec. Corp.*, 92 NY2d 335, 339 [1998]). "Evidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance" (*id.*).

Here, plaintiffs' only non-conclusory allegations regarding Aurus are that it was an investor in Splitcast SpA, and that Cerda served as its representative (complaint, ¶¶ 24-25). Nowhere in the complaint, or in Chavez's affidavit offered in opposition to the motion, do plaintiffs allege specific facts showing how Aurus dominated Splitcast LLC, let alone how Aurus used that domination to defraud or otherwise injure plaintiffs. Plaintiffs' broad and conclusory

allegations to this effect are unavailing (*e.g. Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407, 407 [1st Dept 2007] ["Other than conclusory statements that . . . defendants dominated and controlled their subsidiaries, . . . plaintiffs failed to allege particularized facts to warrant piercing the corporate veil"]; *Albstein v Elany Contr. Corp.*, 30 AD3d 210, 210 [1st Dept 2006] ["Plaintiff's conclusory allegations regarding piercing the corporate veil were also properly rejected. She alleged nothing more than that the corporation was 'undercapitalized' and functioned as [defendant's] 'alter ego'"]).

Plaintiffs' claim that Aurus was Cerda's disclosed principal, making Aurus vicariously liable for Cerda's alleged wrongs, is also unavailing. To hold Aurus liable, based on respondeat superior or vicarious liability, plaintiffs "must show that [Cerda] was acting in furtherance of [Aurus's] business and within the scope of employment" (*e.g. Parlato v Equitable Life Assur. Socy. of U.S.*, 299 AD2d 108, 113–14 [1st Dept 2002] [internal quotation marks and citations omitted]). Neither the complaint nor Chavez's affidavit allege any facts suggesting that Cerda was working solely on behalf of Aurus, rather than on behalf of Splitcast LLC. Nor does the complaint allege, in non-conclusory fashion, what bad acts of Cerda's should be imputed to Aurus.

Accordingly, that branch of defendants' motion to dismiss the complaint against Aurus is granted.

Defendant Flores

Flores argues that, as an employee of Splitcast LLC, he is not liable to plaintiffs for acts undertaken as an employee. He asserts that the complaint makes only conclusory allegations against him, and that any rights plaintiffs have to the intellectual property are against Splitcast LLC, and not him. In opposition, plaintiffs argue that Flores committed acts in his own interest and adverse to Splitcast LLC, for which he may be held personally liable. Moreover, plaintiffs claim that Flores was employed by a different company when he delivered the streaming technology's source code to Splitcast LLC, and that there was a term sheet entitling Flores to shares of stock in Splitcast (Chavez aff, ¶¶ 65-69). Plaintiffs do not allege if such a transaction was ever consummated, and the alleged term sheet was not made a part of the record on this motion.

Plaintiffs have failed to allege a cause of action against Flores. Flores is not alleged to have been a member or officer of any of the entities named as defendants, nor is he a party to any of the agreements at issue. Moreover, plaintiffs do not identify any acts he took for his own benefit that were adverse to Splitcast LLC, his employer. As for plaintiffs' claims regarding Flores' possession and knowledge of Splitcast LLC's intellectual property, plaintiffs provide no case law or statute that calls for holding someone who is, at best, an employee of Splitcast LLC, liable for Splitcast LLC's failure to turn over the video streaming application and any other intellectual property. Moreover, plaintiffs' claim that Flores is currently in possession of said intellectual property is not supported by any factual allegations.

Accordingly, that branch of defendants' motion to dismiss the complaint against Flores is granted.

Breach of Fiduciary Duty (Second Cause of Action)

For their second cause of action, plaintiffs allege that defendants collectively owed them a fiduciary duty, which defendants breached by, inter alia, failing to secure Tratado's loan with the Splitcast intellectual property pursuant to the Note Purchase Agreement, failing to notify plaintiffs of certain developments regarding the operations of Splitcast SpA and Splitcast LLC, and failing to capitalize Splitcast LLC in the amount represented to Chavez before initially investing in the technology (amended complaint, ¶¶ 87-96). The moving defendants argue that Tratado and Chavez were, at best, part of an arm's length business relationship with defendants, and were not owed any fiduciary duties. Moreover, even if such duties existed, defendants claim they did not breach these duties in the manner alleged by plaintiffs. In opposition, plaintiffs argue that Chavez owned shares of Splitcast SpA pursuant to the Advisory Agreement and its amendment, and that Tratado signed a Pledge Agreement with Splitcast SpA to guarantee the loan to Splitcast LLC with the Splitcast intellectual property (Comar affirmation, exhibit H, Pledge Agreement), which created a fiduciary relationship between plaintiffs and defendants.

"A fiduciary relationship exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotation marks and citation omitted]). "[W]hile the determination of a fiduciary relationship is fact-specific, generally no such relationship exists between those involved in arm's length business transactions" (*HF Mgt. Servs. LLC v Pistone*, 34 AD3d 82, 84 [1st Dept 2006]). Plaintiffs have alleged that Tratado was, at best, a lender and creditor of Splitcast LLC, and no fiduciary duty exists between a creditor and a debtor (*SNS Bank*, 7 AD3d at 354). Contrary to plaintiffs' argument, nothing in the Pledge Agreement suggests that Splitcast SpA or Splitcast LLC, or any of the other defendants for that matter, were required to act for plaintiffs' benefit or give them advice. A secured creditor is still just a creditor. Even where courts have found that a creditor and debtor may have a fiduciary relationship, one party has affirmatively "reposed confidence in another and reasonably relied on the other's superior expertise or knowledge" (*Weiner v Lazard Freres & Co.*, 241 AD2d 114, 122 [1st Dept 1998]). No such allegations are made here.

As to Chavez's alleged ownership of shares in Splitcast SpA pursuant to the Advisory Agreement, plaintiffs fail to allege that such shares were ever held in escrow or transferred to him. Moreover, while he claims that he held those shares, the Note Purchase Agreement makes plain that Splitcast SpA was a wholly owned subsidiary of Splitcast LLC prior to the transaction closing (Note Purchase Agreement, ¶ 6.3[b]), and nothing in the Note Purchase Agreement or the other transaction documents suggests that Chavez acquired stock as part of the transaction. In the absence of a fiduciary relationship, plaintiffs cannot maintain a claim for a breach of fiduciary duty (*e.g. Kurtzman v Bergstol*, 40 AD3d 588, 590 [2d Dept 2007] ["In order to establish a breach of fiduciary duty, a plaintiff must prove the existence of a fiduciary relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct"]).

Accordingly, that branch of the moving defendants' motion to dismiss the second cause of action for breach of fiduciary duty is granted.

Fraud (Third Cause of Action)

For their third cause of action, plaintiffs assert that they have been defrauded by defendants. Specifically, they allege that defendants induced them to enter into the Note Purchase Agreement by claiming that they would patent the video streaming technology, and that the patents would serve as collateral to secure Tratado's investment in Splitcast LLC. Plaintiffs also allege that defendants misrepresented to Chavez that he would receive stock under the Advisory Agreement and its amendment, and that Splitcast was a duly organized entity at the time the Advisory Agreement was entered into by the parties. Notably, plaintiffs do not explain what those representations have to do with the Note Purchase Agreement, or how they were damaged by them.

Defendants argue that these fraud claims are essentially duplicative of plaintiffs' breach of contract claims for the same alleged bad acts. In opposition, plaintiffs argue that defendants failed to comply with their warranties to take "all corporate action" required to make Splitcast LLC's obligations under the Note Purchase Agreement enforceable, supporting a separate fraud claim. Moreover, they claim that defendants separately made numerous misrepresentations of present fact to induce plaintiffs to enter into the Note Purchase Agreement, supporting a separate fraud claim.

"General allegations that [a party] entered into a contract while lacking the intent to perform it are insufficient to support [a fraud] claim" (*New York Univ. v Cont. Ins. Co.*, 87 NY2d 308, 318 [1995]). A fraud claim is duplicative of a contract claim where it is based on the same underlying facts (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288, 305 [1st Dept 2003]), or where "it allege[s] no factual basis for recovery other than defendants' failure to keep promises; no damages [are] sought thereunder that would not be recoverable under a contract measure of damages" (*Stewart v Maitland*, 39 AD3d 319, 319 [1st Dept 2007]).

Here, plaintiffs' fraud claim is based on the same facts as portions of plaintiffs' breach of contract claim (*compare* amended complaint, ¶¶ 99-101 *with id.*, ¶¶ 107-109). To the extent that plaintiffs claim of a breach of warranties that supports a separate fraud, the cited provisions of the Note Purchase Agreement do not indicate a misrepresentation of present fact, plaintiffs do not successfully allege that defendants actually violated the cited provisions, and plaintiffs do not allege how the violations actually damaged them. Moreover, to the extent that plaintiffs allege misrepresentations by defendants, or a lack of information necessary to enter into the agreement, before entering into the Note Purchase Agreement, Tratado represented in the Note Purchase Agreement that it had "received all the information it considers necessary or appropriate for deciding whether to" loan money to Splitcast LLC, that it "had an opportunity to ask questions and receive answers . . . regarding the terms and conditions of the [loan] and the . . . financial condition of [Splitcast LLC]" (Note Purchase Agreement, ¶ 7.1). Further, the Note Purchase Agreement provides that it and the related agreements "constitute the full and entire understanding and agreement between the parties with regards to the subjects hereof and thereof" (*id.*, ¶ 10.8). In light of those representations, the fraud claim cannot survive (*Richbell Info. Servs.*, 309 AD2d at 305 ["The motion court correctly dismissed the twelfth cause of action for fraud, because . . . the representation was inconsistent with specific recitals in the stockholder

agreement, and there was a merger clause disclaiming reliance on extrinsic representations."]).

Accordingly, that branch of defendants' motion to dismiss the third cause of action for fraud is granted.

Constructive Trust (Sixth Cause of Action)

For their sixth cause of action, plaintiffs allege that defendants should be deemed to hold the Splitcast intellectual property in a constructive trust for plaintiffs. A claim for a constructive trust requires, among other elements, a fiduciary or confidential relationship between the parties, and, as set forth above in relation to plaintiffs' claim for breach of fiduciary duty, no such relationship is alleged here (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 473 [1st Dept 2010]). Moreover, in light of the court's dismissal of the third cause of action for fraud, "there [is] no predicate for plaintiff's request to impose a constructive trust, that remedy being fraud-rectifying rather than intent-enforcing" (*Stewart*, 39 AD3d 319, 319 [1st Dept 2007] [internal quotation marks and citation omitted]). Accordingly, that branch of the moving defendants' motion to dismiss the sixth cause of action for a constructive trust is granted.

Arbitration

Splitcast, Cerda, Neira, Arredondo, and Leon move, pursuant to CPLR 7503 (a), to compel arbitration of the remaining four causes of action asserted against them, and to stay this action and any other action based on these facts pending that arbitration. In its decision on motion sequence No. 002, this court held that all of plaintiffs' undismissed claims against defendants Splitcast, Cerda, and Leon were subject to arbitration based on the Note Purchase Agreement's arbitration clause, the Consulting Agreement being incorporated into the Note Purchase Agreement by reference and thus covered by that same clause, the Promissory Note explicitly referencing the arbitration clause, and the Note Purchase Agreement superseding the Advisory Agreement and its amendment (NYSCEF Doc. No. 141, decision and order dated 1/11/18 at 6-7). As with the claims under the original complaint, plaintiffs' remaining claims in the amended complaint for conversion, fraud, breach of contract, money had and received, and for a permanent injunction expressly relate to money due under, Splitcast LLC's obligations under, or representations made within the Note Purchase Agreement and related documents. Plaintiffs do not dispute this. Moreover, the reasoning set forth in the court's prior decision that compels plaintiffs to arbitrate their claims against Splitcast, Cerda, and Leon, also compels plaintiffs to arbitrate their claims against Neira and Arredondo. Plaintiffs' remaining arguments were essentially set forth in their opposition to motion sequence No. 002, and were addressed in the decision on that motion (*id.*). Thus, the court will not discuss them herein.

Accordingly, that branch of defendants' motion to compel arbitration of the remaining causes of action, and to stay this and any subsequent matter related to those claims is granted.

Plaintiffs' Cross-Motion

Plaintiffs cross-move, pursuant to CPLR 3215 for a default judgment against non-moving defendants Wendt and Salcedo. The relief sought against these non-moving defendants is not

closely related to the relief sought on the motion. Accordingly, a cross-motion against them is procedurally improper (*Rubino v 330 Madison Co., LLC*, 150 AD3d 603, 604 [1st Dept 2017]), and that branch of plaintiffs' cross-motion for a default judgment is denied.

Plaintiffs also cross-move, pursuant to CPLR 3211 (d), for a continuance of defendants' motion to permit discovery to be had. CPLR 3211 (d) provides that where it appears that "facts essential to justify opposition may exist but cannot then be stated, the court . . . may order a continuance to permit further affidavits to be obtained or disclosure to be had." The party seeking such a continuance must "specify what facts warrant further discovery [and] how they are relevant to [the] opposition to the motion to dismiss" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537 [1st Dept 2013]). Plaintiffs herein fail to satisfy either requirement, as they do not identify specific facts that may exist, or how such facts would be relevant. Moreover, the documents that underlie plaintiffs' claims are not only in possession of both parties, but are attached to the parties' moving papers. As such, it is unclear whether plaintiffs could show specific additional facts justifying a continuance to take discovery. Accordingly, that branch of plaintiffs' cross-motion for a continuance pursuant to CPLR 3211 (d) is denied.

Further, plaintiffs' cross-move, pursuant to CPLR 6301 and 6311, for a preliminary injunction enjoining any disposal, transfer, or sale of the Splitcast streaming technology by the defendants. "A movant's burden of proof on a motion for a preliminary injunction is particularly high. A preliminary injunction may be issued only where the moving party demonstrates a likelihood of success on the merits, the prospect of irreparable harm if the injunction is not granted, and a balance of equities in the moving party's favor" (*Council of City of New York v Giuliani*, 248 AD2d 1, 4 [1st Dept 1998]). Here, plaintiffs argue that they have established a likelihood of success on the merits. Assuming arguendo, however, that they have actually done so, they make only conclusory and unsupported arguments that they have shown irreparable harm in the absence of an injunction, or a balance of the equities in their favor. As plaintiffs have failed to establish two of the three factors necessary for the grant of a preliminary injunction, that branch of plaintiffs' cross-motion for a preliminary injunction is denied.

Sanctions

Finally, the parties both move and cross-move for sanctions pursuant to 22 NYCRR 130-1.1. "The court, in its discretion, may award to any party or attorney in any civil action or proceeding . . . costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct" (22 NYCRR 130-1.1). 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"

(22 NYCRR 130-1.1 [c]; *see Premier Capital v Damon Realty Corp.*, 299 AD2d 158, 158 [1st Dept 2002]). The court has discretion as to both the imposition and amount of sanctions (*Seldon v Bruno*, 204 AD2d 180, 180 [1st Dept 1994]), and such discretion should rarely be disturbed (*Matter of Metamorphosis Constr. Corp. v Glekel*, 247 AD2d 231, 231 [1st Dept 1998]).

The moving defendants seek sanctions against plaintiffs for arguing that a fiduciary relationship exists when the only relationship between them and Splitcast LLC is a creditor-debtor relationship, for attempting to sue Flores when he was only an employee of Splitcast LLC, and for violating the court's service order by serving Neira and Arredondo after the deadline to do so had passed, and purporting to do so via e-mail. The court notes that much of this allegedly sanctionable conduct by plaintiffs amounts to misapplying the law, which is not itself a sanctionable offense. To the extent that plaintiffs' conduct in attempting to serve Neira and Arredondo may have been misguided or less than ideal in terms of promptly seeking additional time to do so, such concerns are largely rectified by the court's ruling above that Neira and Arredondo have consented to the court's jurisdiction by seeking affirmative relief. At this time, the court chooses to exercise its discretion not to award sanctions against plaintiffs.

Plaintiffs' cross-motion for sanctions against defendants is meritless. Plaintiffs argue that defendants should not have made motions to dismiss the complaint, or argued that their claims are subject to arbitration, and that these arguments are insufficiently supported by attorney affirmations and unsigned or unexecuted documents. As evidenced by the court's decision granting several aspects of defendants' motion, defendants' arguments are patently not frivolous, and plaintiffs do not actually challenge the contents of the documents they claim are undated or unexecuted. The court notes that "[f]rivolous conduct shall include the making of a frivolous motion for costs or sanctions under [22 NYCRR 130-1.1]." Plaintiffs' cross-motion for sanctions is denied.

The court has examined the remaining contentions of the parties with respect to the instant motion and cross-motion, and finds them to be unavailing.

Accordingly, it is hereby,

ORDERED that the branch of the motion of defendants Splitcast Technology LLC, Splitcast Inc., Splitcast Technology, SpA, Aurus S.A. Administradora General de Fondos, Raimundo Cerda, Jose Flores, Hugo Neira, Felipe Arredondo and Ignacio Leon, to dismiss the amended complaint against Splitcast LLC and Splitcast Technology, SpA for lack of personal jurisdiction is granted, and the amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the County Clerk's Office is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the moving defendants' motion to dismiss the amended complaint against Neira and Arredondo for lack of personal jurisdiction is denied; and it is further

ORDERED that the branch of the moving defendants' motion to dismiss the amended

complaint against defendants Aurus and Flores is granted, and the amended complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs, and the County Clerk's Office is directed to enter judgment accordingly; and it is further

ORDERED that the branch of the moving defendants' motion to dismiss the amended complaint against Splitcast, Inc., Neira, Arredondo, Cerda, and Leon is granted to the extent of dismissing the second, third, and sixth causes of action against them; and it is further

ORDERED that the branch of the moving defendants' motion to compel arbitration and to stay this action against them is granted; and it is further

ORDERED that plaintiffs Tratado de Libre Comercio, LLC and Pedro Chavez shall arbitrate their claims against defendants Splitcast, Inc., Neira, Arredondo, Cerda, and Leon in accordance with Paragraph 10.16 of the Note Purchase Agreement; and it is further

ORDERED that all proceedings in this action against defendants Splitcast, Inc., Neira, Arredondo, Cerda, and Leon are hereby stayed, except for an application to vacate or modify said stay; and it is further

ORDERED that any of the arbitrating parties may make an application by order to show cause to vacate or modify this stay upon the final determination of the arbitration; and it is further

ORDERED that the parties' motion and cross-motion for sanctions are denied; and it is further

ORDERED that the remainder of plaintiffs' cross-motion is denied in all respects; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the moving defendants must serve a copy of this decision and order on the County Clerk's Office; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 345, 60 Centre Street, on August 1, 2018, at 10:00 a.m.

Dated: May 17, 2018

J.S.C.

HON. GERALD LEBOVITS
J.S.C.