SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

----------X

CITIGROUP GLOBAL MARKETS INC., CITIGROUP GLOBAL MARKETS LIMITED; CITIGROUP GLOBAL MARKETS ASIA LIMITED, CITIGROUP GLOBAL MARKETS SINGAPORE PTE LIMITED, CITIBANK, N.A., NEW YORK BRANCH, CITIBANK, N.A., LONDON BRANCH, CITIBANK, N.A., ZURICH BRANCH, CITIBANK, N.A., GENEVA BRANCH, CITIBANK, N.A., SINGAPORE BRANCH, CITIBANK, N.A., HONG KONG BRANCH, CITIBANK, N.A., JERSEY, CHANNEL ISLANDS BRANCH, CITIBANK INTERNATIONAL PLC, CITIBANK (SWITZERLAND) AG, CITIBANK CANADA INVESTMENT FUNDS LIMITED, CITITRUST (BAHAMAS) LIMITED, AND CITIBANK, N.A.,

Plaintiffs,

-against-

SCIP CAPITAL MANAGEMENT, LLC AND THE SILVERFERN GROUP, INC.,

Defendants.

----------X

DECISION AND ORDER
Index No.: 651031/2019

Motion Sequence No.: 003

O. PETER SHERWOOD, J.:

On this motion, plaintiffs seek to dismiss the six counterclaims alleged by defendants. The facts which are accepted as true, are taken from the pleadings.

I. BACKGROUND

In the complaint, plaintiffs Citibank Gobal and its affiliates ("Citi") allege defendants SCIP Capital Management, LLC and The Silverfern Group, Inc. ("Silverfern") breached a January 12, 2012 Distribution Agreement (the "Agreement") between the parties Complaint, ¶1). Citi entered into the agreement to give Citi Private Bank ("CPB") clients the option of joining a Silverfern "Equity Club" where members would have an opportunity to co-invest in private equity arrangements sponsored by Silverfern (*Id.* ¶3). This arrangement gave Silverfern access to CPB's broad global client base and an association with Citi's brand (*Id.* ¶4). The Agreement also provided Silverfern: (i) a quarterly "Management Fee" equal to 2% per annum of the Equity Club investor's investments with Silverfern, which Silverfern would then split with Citi by paying a quarterly

"Placement Fee"; and (ii) 20% "carried interest" charges on all distributions on investments after the return of the investor's capital contributions, with Silverfern in turn paying an "Incentive Fee" of 25% of the carried interest (*Id.* ¶¶5–6).

The Equity Club offering period, when CPB clients had the opportunity to join the Club and make non-binding investment commitments, extended through September 30, 2013 (*Id.* ¶35). During that period, Citi devoted resources to help Silverfern identify CPB clients who would be good candidates for the Equity Club, introduce clients to the Club, arrange meetings between clients and Silverfern, and leverage Citi's reputation to support the Club (*Id.* ¶36). As a result of these efforts, thirty-nine CPB clients joined the Equity Club, making soft commitments of between $5 and $50 million (*Id.* ¶37). The original investment period was to run three years from May 30, 2012 and the Agreement granted Silverfern a unilateral right to make three one-year extensions which Silverfern exercised in 2015, 2016, and 2017 (*Id.* ¶¶38–39). During the investment period, CPB clients invested in fifteen Silverfern investments, representing $190 million in total commitments which resulted in fees paid to Silverfern, including the 2% annual Management Fee (*Id.* ¶¶40–41).

Beginning in 2016, Silverfern often paid Citi its contractually required Placement Fees late in contravention of the Agreement, Section 3(a) (*Id.* ¶¶7–14, 43). For much of 2017, Citi repeatedly reached out to Silverfern to request payment and would receive no response or assurances of payment within the week that never materialized (*Id.* ¶¶44–55). When Silverfern did finally pay, it failed to pay the full amount due (*Id.* ¶¶56, 60). This process was repeated through 2018 (*Id.* ¶¶59–64). After several meetings between the parties in late 2018, Silverfern communicated to Citi that it did not intend to pay any past due fees and would not pay any fees moving forward (*Id.* ¶¶65–67). Consequently, plaintiffs brought suit alleging one claim for breach of contract.

In response, defendants assert six counterclaims: (i) breach of contract, (ii) breach of implied covenant of good faith and fair dealing, (iii) negligent misrepresentation, (iv) fraud, (v) interference with prospective business relations and prospective economic advantage, and (vi) unjust enrichment (Amended Answer ¶¶214–247 [Doc. No. 28]). As to the breach of contract claim, Silverfern alleges the Agreement was valid and binding between January 12, 2012 and May 30, 2018 and that Silverfern performed its obligations under the Agreement (*Id.* ¶214). Silverfern alleges that Citi breached the Agreement when it sent a 2016 Letter (the "Letter") to Club members and failed to meet its various obligations, resulting in harm to Silverfern (*Id.* ¶215). Silverfern also

alleges that under the Agreement Section 6(b), it is entitled to have Citi "indemnify, defend and hold [Silverfern] free and harmless" from all losses, claims, demands, liabilities, and reasonable expenses incurred by Citi's breach (*Id.* ¶217). To the breach of implied covenant claim, Silverfern alleges that it met its obligations under the Agreement but that Citi failed to act fairly and with good faith when it communicated to Club members that it was no longer supporting Silverfern (*Id.* ¶¶218–221). Silverfern alleges that Citi knew and intended to deprive Silverfern of the Agreement's benefits (*Id.* ¶222). To the negligent misrepresentation claim, Silverfern alleges that by entering the Agreement, Citi, assumed a special relationship with Silverfern wherein Citi was obligated to provide correct information to Silverfern and not omit material information (*Id.* ¶¶224–226). Silverfern alleges that Citi misleadingly communicated to Club members that it no longer supported Silverfern's products and proceeded to omit the fact of this letter to Silverfern to defendants' detriment (*Id.* ¶¶227–230). To the fraud claim, Silverfern alleges that the Letter's contents and Citi's failure to deny or misrepresent the Letter to Silverfern constituted a material omission of fact upon which Silverfern detrimentally relied (*Id.* ¶¶231–237). To the interference claim, Silverfern alleges that the Letter and Citi's continued business with Silverfern harmed Silverfern's professional relationships (*Id.* ¶¶238–243). Finally, to the unjust enrichment claim, Silverfern alleges that Citi was unjustly enriched by Silverfern's payment of fees following the 2016 Letter because the Letter was a breach of the Agreement, and allowing Citi to retain such payments would be inequitable (*Id.* ¶¶244–247).

II. ARGUMENTS

A. Plaintiffs' Memorandum in Support

Plaintiffs assert that defendants' breach of contract counterclaim fails to plead the elements necessary to mandate dismissal (Pl. Br. at 13 [Doc. No. 33]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]; *Chappo & Co. v Ion Geophsical Corp.*, 83 AD3d 499, 500 [1st Dept 2011]). The centerpiece of Silverfern's counterclaims is a letter, dated April 11, 2016 which Citi sent to clients confused about the proliferation of Silverfern investment products that defendant offered outside of the Equity Club (*Id.*; Dewey Aff., Ex. D [Doc. No. 38] [Hereinafter "Letter"]). Plaintiffs argue that nothing in the Agreement precludes Citi from communicating with its clients to correct a misunderstanding fostered by Silverfern's conduct (Pl. Br. at 13). Plaintiffs argue defendants' breach of contract counterclaim is meritless for five reasons: (i) the Letter's contents are not false, (ii) the Letter's content does not say Citi would stop supporting the Equity

Club, (iii) Citi had no obligation to clear the letter with Silverfern beforehand, (iv) the Letter in no way invoked Citi's "best efforts" obligation, and (v) Silverfern's assertion that the Letter misled Equity Club members to believe the Club was ending is speculative (*Id.* at 13–17).

To the first point, plaintiffs argue that the Letter merely clarifies Citi's relationship as to the additional products Silverfern was offering outside of the Equity Club, and clearly stated that the Club's investment period was extended to May 2016 and that Silverfern had the option to extend the relationship for two more years (*Id.* at 14; Letter at 1). To the second point, plaintiffs dispute Silverfern's characterization that the Letter stated reasons why Citi would no longer support Silverfern when, in fact, it does not state such things and such mischaracterizations have previously led to claim dismissal (*Id.* at 14–15; *Attallah v Milbank, Tweed, Hadley & McCloy, LLP*, 168 AD3d 1026, 1028 [2d Dept 2019]). Regarding the third point, plaintiffs argue that Silverfern's assertion that sending the Letter without Silverfern's approval was a breach of the Agreement Section 1(c), is incorrect. That provision only requires "Partnership Documents or other information related to Investment Partnership" to be approved by Silverfern. The Letter does not meet that description (Pl. Br. at 15; Dewey Aff., Ex. C, Agmt § 1 (c) [Hereinafter, "Agmt"]). As to the fourth point, plaintiffs maintain that Silverfern's assertion that the Letter is inconsistent with Citi's obligation to use "best efforts" to promote the partnership with Silverfern and caused fewer Equity Club Investor commitments, is flawed because Citi's "best efforts" obligation only appears once in the Agreement with regard to offering Class B Interests to the Club which Citi did (Pl. Br. at 16; Amended Answer ¶¶117–122; *Benihana of Tokyo, LLC v Angelo, Gordon & Co., L.P.*, 259 F Supp 3d 16, 34–35 [SDNY 2017]; *Ixe Banco, S.A. v MBNA Am. Bank, N.A.*, No. 07 Civ. 0432, 2008 WL 650403, at *10 [SDNY 2008]). To the fifth point, plaintiffs argue that the Letter explicitly states that the Equity Club period was extended to May 2016 and may be extended twice more, and that Equity Club Investors continued to invest in every Silverfern investment available through the Club (Pl. Br. at 17; Amended Answer ¶173). Consequently, the breach of contract counterclaim should be dismissed.

Plaintiffs next argue that the breach of implied covenant claim should fail because (i) as stated above, the Letter did no more than clarify the status of Silverfern's non-Equity Club investments, and (ii) the claim is duplicative of the breach of contract claim because it arises from the same facts (Pl. Br. at 18; *Amcan Holdings, Inc. v Canadian Imperial Bank of Commerce*, 70

AD3d 423, 426 [1st Dept 2010]; *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]).

As to defendants' negligent misrepresentation claim Plaintiffs assert it should fail for four reasons: (i) Silverfern cannot establish that a special or privity-like relationship between the parties exists outside the Agreement, (ii) Silverfern cannot establish that Citi omitted or misrepresented any material information, much less to Silverfern, (iii) there was no misrepresentation upon which Silverfern could have relied, and (iv) the counterclaim is duplicative of the breach of contract claim because it is based on the same facts as the breach of contract counterclaim (Pl. Br. at 18–21). To the first point, plaintiffs argue that they did not enter a special relationship with Silverfern by entering into the Agreement to exercise "best efforts" as the best efforts clause only relates to one provision of the contract and the law has made clear that such clauses do not give rise to a special relationship between parties (*Alexsam, Inc. v MasterCard Int'l Inc.*, No. 15-CV-2799, 2017 WL 9482100, at *6 [EDNY 2017]; *Cal Distrib., Inc. v Cadbury Schweppes Americas Beverages, Inc.*, No. 06 Civ. 0496, 2007 WL 54534, at *2–3, *8 [SDNY 2007]). Regarding the second point, plaintiffs argue that this counterclaim fails entirely because, as the Letter shows and contrary to Silverfern's allegations, Citi did not tell clients that it was no longer supporting Silverfern and its investments which means that Citi did not misrepresent or omit any material fact (Pl. Br. at 20; *Hudson River Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). As to the third point, plaintiffs argue that because there was no misrepresentation by Citi to Silverfern, Silverfern cannot allege reliance (*Id.* at 220; *Gen. Elec. Capital Corp. v US Tr. Co. of New York*, 238 AD2d 144, 145 [1st Dept 1997]). To the fourth point, the negligent misrepresentation counterclaim must be dismissed as it is based on the same facts that the breach of contract counterclaim is based upon (*OP Sols, Inc. v Crowell & Moring, LLP*, 72 AD3d 622 [1st Dept 2010]; *Emigrant Bank v UBS Real Estate Sec., Inc.*, 49 AD3d 382, 384–85 [1st Dept 2008]).

Regarding the fraud counterclaim plaintiffs argue it must fail because (i) as argued above, Citi did not make any misrepresentation to its clients or to Silverfern, much less one with scienter (*Raytheon Co. v AES Red Oak, LLC*, 37 AD3d 364, 365 [1st Dept 2007]), (ii) as argued above, there was no misrepresentation so, consequently, there can be no allegation that Silverfern was induced to rely on it, (iii) causation between Citi's "misrepresentation" and Silverfern's "reliance" has not been pleaded with particularity (*Greentech Research LLC v Wissman*, 104 AD3d 540 [1st

Dept 2013]; *Laub v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]), and (iv) it is duplicative of the breach of contract counterclaim because it is based upon the same facts (*Linea Nuova, S.A. v Slowchowsky*, 62 AD3d 473 [1st Dept 2009; *RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 [1st Dept 2008]; *Raske v Next Mgmt., LLC*, 2013 WL 5033149, at *9; *Reuben H. Donnelley Corp. v Mark I Mktg. Corp.*, 893 F Supp 285, 290 [SDNY 1995]; *Bridgestone/Firestone, Inc. v Recovery Credit Servs., Inc.*, 98 F3d 13, 20 [2d Cir 1996]; *Atlantis Info. Tech., GmbH v CA, Inc.*, 485 F Supp 2d 224, 233 [EDNY 2007]) (Pl. Br. at 21–23).

Plaintiffs next argue that defendants' interference with prospective business relations and economic advantage counterclaim must fail because: (i) the factual allegations regarding the Letter are disproved by the Letter itself (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]), and (ii) even if the Letter stated what Silverfern alleges, Silverfern has not adequately alleged that Citi acted with the sole purpose of harming Silverfern or used means constituting a crime or independent tort (*Amaranth LLC v JP Morgan Chase*, 71 AD3d 40, 47 [1st Dept 2009]; *Wolberg v IAI N. Am., Inc.*, 161 AD3d 468, 469 [1st Dept 2018]) (Pl. Br. at 23–24).

Finally, plaintiffs argue that defendants' unjust enrichment counterclaim must fail because: (i) Silverfern fails to allege that Citi obtained a benefit which in equity should be paid to plaintiff (*Corsello v Verizon NY, Inc.*, 18 NY3d 777, 790 [2012]), and (ii) no valid counterclaim exists where the parties' dispute is governed by contract (*Goldstein v CIBC World Mkts. Corp.*, 6 AD3d 295, 296 [1st Dept 2004]; *Raske*, 2013 WL 5033149, at *9) (Pl. Br. at 25).

B. Defendants' Memorandum in Opposition

Defendants maintain that plaintiffs fail to challenge Silverfern's multiple allegations of other breaches of Citi's contractual allegations (Def. Br. at 11 [Doc. No. 39]) e.g. the allegations that Citi: (i) ceased attending Silverfern's deal presentations to Club members (Amended Answer ¶176), (ii) ceased asking questions about new investments Silverfern was presenting to Club members (*Id.*), (iii) ceased cooperating with Silverfern (*Id.* ¶87), (iv) abandoned the Club leading to a decline in Club member participation in 2016 (*Id.* ¶¶173–174), and (v) caused a notable declination in real dollar terms and Club member participation overall (*Id.*¶¶118, 120–125, 173). Defendants argue that these unchallenged allegations adequately plead breach of contract distinct from the Letter because: (i) Citi's abandonment of the Club through its cessation of duties is sufficient to allege a breach of contract for Citi to "use its best efforts to offer Class B Interest to the Equity Club Investors" (Agmt §1(c)), (ii) it is impossible to determine the scope of a "best

efforts" contractual obligation at the motion to dismiss stage (*Burke v Steinmann*, 2004 WL 1117891, at *7 [SDNY 2004]; *Maestro W. Chelsea SPE LLC v Pradera Realty Inc.*, 38 Misc3d 522, 530 [Sup Ct 2012]), and (iii) the allegations also plead a breach of Citi's obligation to perform specific services such as "assisting Silverfern" in placing Class B Interests with Club members (Agmt. § 1(c)(vi)).

Defendants add that Silverfern's allegations concerning 2016 Letter also sufficiently state a claim for breach of contract because (i) the Letter was false in multiple respects, (ii) the Letter breached Citi's best efforts obligations, and (iii) Citi breached its pre-clearance obligation under the Agreement (Def. Br. at 13). To the first point, defendants argue that the Letter warned Club members that the additional products Silverfern was offering were unrelated to the Silverfern Contract despite the products being, in fact, the same investments being offered to Equity Club members (Def. Br. at 13–14; Amended Answer ¶¶167–170). Further, after receiving the Letter, several Club members believed that Citi was no longer supporting Silverfern and the Club which resulted in a drop of Club member participation (Amended Answer ¶¶155, 156, 173, 174, 203). Defendants further argue that if Silverfern had not adequately alleged that the Letter was false and misleading, Citi's argument would at most raise an ambiguity which the court cannot decide on a motion to dismiss based on CPLR 3211(a)(1) (Def. Br. at 15; *Attalah v Milbank, tweed, Hadley & McCloy, LLP*, 168 AD3d 1026, 1028 [2d Dept 2019]).

Regarding the second point, Silverfern states that Citi's narrow interpretation of the best efforts clause is unreasonably and, at best, only raises an ambiguity as to the scope of the clause (Def. Br. at 16; *Greenwich Capital Fin. Prod., Inc. v Negrin*, 74 AD3d 413, 415 [1st Dept 2010]; *LDIR LLC v DB Structured Prod., Inc.*, 172 AD3d 1, 5 [1st Dept 2019]). Defendants further state that Citi's argument, that it met its best efforts obligations because Club members continued to invest in Silverfern investments through the Equity Club, is implausible because Silverfern's allegations plead that member investment dropped in 2016 (Amended Answer ¶¶87. 175–176). With respect to the third point, defendants assert that Citi breached its pre-clearance obligation because the Letter is directly about Equity Club investments and such communication was required to be pre-approved by Silverfern under the Agreement (Def. Br. at 17).

Defendants next argue that they have stated a claim for breach of the implied covenant of good faith and fair dealing because the claim rests of facts beyond those alleged in the breach of contract claim and therefore, the claim is not duplicative (*Id.*; Amended Answer ¶221; *Ret. Bd. Of*

Policemen's Annuity & Ben. Fund of City of Chicago v Bank of New York Mellon, 2014 WL 3858469, at *3–4 [SDNY 2014]; *JJM Sunrise Auto. V Volkswagen Grp. of Am.*, 46 Misc3d 755, 777 [NY Sup 2014]); *25 Bay Terrace Assocs v Pub. Serv. Mut. Ins. Co.*, 144 AD3d 665, 667–68 [2d Dept 2016]). Defendants further argue that at the motion to dismiss stage, it is entitled to arguments in the alternative, particularly where the meaning of a contract is in doubt (*Citi Mgmt. Grp. v Highbridge House Ogden, LLC*, 45 AD3d 487 [1st Dept 2007]; *Hard Rock Café Int'l, (USA) Inc. v Hard Rock Hotel Holdings, LLC*, 808 F Supp 2d 552, 567–68 [SDNY 2011]); *Demetre v HMS Holdings Corp.*, 127 AD3d 493, 494 [1st Dept 2015).

Defendants next argue that they have successfully stated a claim for negligent misrepresentation because (i) Silverfern alleges multiple instances of reliance upon Citi's misleading statements (Amended Answer ¶¶112, 128–131, 172, 176–177, 195, 228), and (ii) Silverfern has alleged a special relationship with a closer degree of trust than an ordinary relationship between the parties (*Fleet Bank v Pine Kroll Corp.*, 290 AD2d 792, 795 [3d Dept 2002]). This relationship was established when the parties conducted due diligence on each other in preparation for signing the Agreement because "Citi would not let anyone access its wealthiest investors unless convinced they were in a 'safe pair of hands'" and because Silverfern relied on Citi to provide accurate information solely within Citi's knowledge (Amended Answer ¶¶88, 97–99, 110, 112, 128–129, 170, 193). Defendants further argue that it has alleged that Citi made misrepresentations upon which Silverfern relied, including: (i) whether disparaging statements and communications were made, (ii) why Club member participation dropped in 2016, (iii) whether Silverfern should commit more resources to the Club, (iv) whether Silverfern should extend the Agreement, and (v) whether Citi was willing to enter into a successor Club (*Id.* ¶¶126–133, 158; Def. Br. at 20; *Nyahsa Servs. Inc. v Recco Home Care Servs., Inc.*, 141 AD3d 792, 798 [2d Dept 2016]).

Defendants next argue that they have successfully stated a claim for fraud because (i) Silverfern alleged that the 2016 Letter contained facially false statements which Club members understood to mean that Citi no longer support the Club, on allegation which the court must accept as true (Amended Answer ¶¶156, 159), (ii) the counterclaims do contain allegations of transaction and loss (*Id.* ¶¶178–212), and (iii) Silverfern's claim is not duplicative because Citi's misrepresentations during the contract are separate from its failure to perform under it (*Id.* ¶¶85–

90, 125–137, 147–152, 231–237; *First Bank of American v Motor Car Funding, Inc.*, 257 AD2d 287, 292 [1st Dept 1999]).

As to the claim for interference with prospective business relations and economic advantage, the claim is sufficiently stated because (i) Silverfern has alleged in detail that Citi caused Club members to believe Citi no longer supported the Equity Club, (ii) Silverfern has alleged that Citi's conduct constitutes two independent torts: negligent misrepresentation and fraud (*Moulton Paving LLC v Town of Poughkeepsie*, 950 NYS2d 762, 766 [2012]), and (iii) Silverfern has adequately alleged each element of the tortious interference claims (Amended Answer ¶¶193–197, 201–205, 243).

Next, Silverfern argues that it has successfully pleaded unjust enrichment because Citi cannot both argue that the dispute is governed by the contract and dispute the application of the Agreement Section 7(c)(ii)(B) (Def. Br. at 23; Pl. Br. at 25). Consequently, defendants argue that they are allowed to plead this claim in the alternative (*First Class Concrete Corp. v Rosenblum*, 167 AD3d 989, 990 [2d Dept 2018]).

Finally, defendants request leave to amend their counterclaims should the motion to dismiss be granted (Def. Br. at 23).

C. Plainitffs' Reply

Although Citi replied to each counterclaim, the court will describe only two of them.

In addition to reiterating that Silverfern failed to adequately plead that Citi breached the Agreement (Pl. Reply at [Doc. No. 40]), plaintiffs assert that: (i) Silverfern extended the Agreement an additional two times after the alleged breach and did not provide the required written notice of breach or terminate the Agreement (Agmt. § 7(b); *Kamco Supply Corp. v On the Right Track, LLC*, 149 AD3d 275, 283–284 [2d Dept 2017]), (ii) Silverfern's factual basis for this counterclaim is defective as the Letter contains no falsehoods and Silverfern fails to identify any respect in which the Letter violates the Agreement, (iii) Silverfern's argument that Club members thought the Letter meant Citi was no longer supporting the Club is baseless as the Letter explicitly states that the Investment Period for the Club remained open and that Citi could answer questions about the Club (Letter at 1–2; *150 Broadway NY Assocs, LP v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]), (iv) Silverfern's best efforts argument misstates the Agreement and the law because there are no allegations that Citi failed to offer Silverfern's Club investments and court's typically reject efforts to expand best efforts obligations into open-ended "partnerships" (*Benihana of Tokyo, LLC*

v Angelo, Gordon & Co., LP, 259 F Supp 3d 16, 34–35 [SDNY 2017]; *Wurtsbaugh v Banc of Am. Sec. LLC*, 2006 WL 1683416, at *5 [SDNY 2006]), (v) even if there had been a generalized best efforts obligation, Silvefern does not allege a factual basis for a breach of this provision (*Scott-Macon Sec., Inc. v Zoltek Cos.*, 2005 WL 1138476, at *16–17 [SDNY 2005]; *Hasbro, Inc. v Child's Play Int'l Corp.*, 1991 WL 156282, at *6 [SDNY 1991]), and (vi) while some courts have held that best efforts disputes could not be resolved on a motion to dismiss, Silverfern has failed to plead facts to establish a breach of the Agreement and courts have routinely dismissed similarly deficient claims (*Benihana*, 259 F Supp 3d at 34–35; *Wurtsbaugh*, 2006 WL 1683416, at *5). Consequently, defendants argue that they have successfully stated a counterclaim for breach of contract.

Regarding the fraud counterclaim, Citi maintains that: (i) Silverfern's allegations need not be taken as facially true because they are "flatly contradicted" by the Letter (Pl. Br. at 12–13), (ii) Silverfern has not alleged causation as simply listing alleged harms that have no connection to the Letter does not amount to a proper causation allegation (*Greentech Research LLC v Wissman*, 104 AD3d 540 [1st Dept 2013]; *Loreley Fin. (Jersey) No. 4 Ltd. v UBS Ltd.*, 978 NYS2d 615, 620–21 [NY Cnty 2013]; *Fin. Guar. Ins. Co. v Putnam Advisory Co.*, 2013 WL 5230818, at *2, *3 [SDNY 2013]), (iii) this claim is duplicative of the breach of contract counterclaim because an allegation that Citi committed fraud by failing to disclose its allege breach is insufficient (Amended Answer ¶232; *MBW Advert. Network, Inc. v Century Bus. Credit Corp.*, 173 AD2d 306 [1st Dept 1991]; *Reuben H. Donnelley Corp. v Mark I Mktg. Corp.*, 893 F Supp 285. 290 [SDNY 1995]), and (iv) Silverfern concedes it did not plead scienter as defendants' only reply to this argument is a footnote stating "Silverfern has suffered significant harm" (Def. Br. at 22 n.10; Pl. Reply at 12–13; *SSR II, LLC v John Hancock Life Ins. Co. (USA)*, 2012 WL 4513354, at *5–6 [NY Cnty 2012]).

III. DISCUSSION

To sustain a breach of contract cause of action, plaintiff must show: (1) an agreement; (2) plaintiff's performance; (3) defendant's breach of that agreement; and (4) damages (*see Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent . . . and '[t]he best evidence of what parties to a written agreement intend is what they say in their writing' . . . . Thus, a written agreement that is clear and unambiguous on its face must be enforced according to the plain terms, and extrinsic evidence of the parties' intent may be considered only if the agreement is ambiguous

[internal citations omitted]" (*Riverside South Planning Corp. v CRP/Extell Riverside LP*, 60 AD3d 61, 66 [1st Dept 2008], *affd* 13 NY3d 398 [2009]). Whether a contract is ambiguous presents a question of law for resolution by the courts (*id.* at 67). Courts should adopt an interpretation of a contract which gives meaning to every provision of the contract, with no provision left without force and effect (*see RM 14 FK Corp. v Bank One Trust Co., N.A.*, 37 AD3d 272 [1st Dept 2007]).

At this, the pleading stage of the case, the court is not called upon to determine the truth of the allegations in Silverfern's counterclaims for breach of contract. Instead, the court must take the allegations of the counterclaim as true and provide Silverfern with every possible inference. (*see Leon v Martinez,* 84 NY 2d 83, 87-88 [1994]). The court's role is limited to determining whether the pleading states a cause of action not whether there is evidentiary support to establish a meritorious cause of action (*see Raske v Next Mgt., LLC,* 2013 WL 5033149 * 5 [NY Cnty September 12, 2013]). Measured by these forgiving standards, the breach of contract cause of action survives. Although nothing in the Letter shows falsity, a lack of best efforts or breach of any pre-clearance obligation, Silverfern has sufficiently pleaded breaches including breaches arising from the Letter, to survive a motion to dismiss.

The same cannot be said for the counterclaim of breach of the covenant of good faith and fair dealing. It is well settled that within every contract is an implied covenant of good faith and fair dealings (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]; *Dalton v Educ. Testing Serv.*, 87 NY2d 384, 389 [1995]). The implied covenant "embraces a pledge that neither party shall do anything that will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*511 W. 232nd Owners Corp.*, 98 NY2d at 153 [internal quotation marks omitted]; *see also 6243 Jericho Realty Corp. v AutoZone, Inc.*, 71 AD3d 983, 984 [2d Dept 2010]; *Moran v Erk*, 11 NY3d 452, 457 [2008]). A breach of the covenant is a breach of the contract itself (*see Boscoral Operating, LLC v Nautica Apparel, Inc.*, 298 AD2d 330, 331 [1st Dept 2002]). The covenant of good faith and fair dealing is breached when a party acts in a manner that, although not expressly forbidden by the contractual provision, would deprive the other party of the benefits of the agreement (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Sorenson v Bridge Capital Corp.*, 52 AD3d 265, 267 [1st Dept 2008]).

The covenant encompasses any promises that a reasonable person in the position of the promisee would be justified in understanding were included (*see 511 W. 232nd Owners Corp.*, 98 NY2d at 153; *Ochal v Tel. Tech. Corp.*, 26 AD3d 575, 576 [3d Dept 2006]). However, the

obligations imposed by an implied covenant of good faith and fair dealing are limited to obligations in aid and furtherance of the explicit terms of the parties' agreement (*see Trump on Ocean, LLC v State*, 79 AD3d 1325, 1326 [3d Dept 2010]). The covenant cannot be construed so broadly as to nullify the express terms of a contract, or to create independent contractual rights (*see Phoenix Capital Invs. LLC v Ellington Mgt. Group, L.L.C.*, 51 AD3d 549, 550 [1st Dept 2008]; *767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, [1st Dept 2004]; *SNS Bank, N.V. v Citibank, N.A.*, 7 AD3d 352, 355 [1st Dept 2004]; *Fesseha v TD Waterhouse Inv. Servs., Inc.*, 305 AD2d 268, [1st Dept 2003]). To establish a breach of the implied covenant, the Plaintiff must allege facts that tend to show that the Defendants sought to prevent performance of the contract or to withhold its benefits from the plaintiff (*see Aventine Inv. Mgmt., Inc. v Can. Imperial Bank of Communications Inc.*, 265 AD2d 513, 514 [2d Dept 1999]).

Here, defendants have failed to allege facts showing that plaintiffs breach an implied covenant which, according to Silverfern, is based on facts alleged in "Counterclaim ¶ 221" (Def. Br. at 18). This claim is wholly duplicative of the breach of contract claim with no further or different facts alleged to support it.

The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; *see Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]). This claim must be dismissed because it fails to allege facts showing that a special or privity-like relationship existed between the parties which imposed a duty on the defendant to impart correct information. Further, defendants have failed to allege facts that support a claim that plaintiffs provided incorrect information to defendants upon which they relied to their detriment.

"To state a cause of action for *fraud*, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). Similar to the negligent misrepresentation claim, defendants' fraud counterclaim must be dismissed because they have failed to allege that plaintiffs made a misrepresentation of

material fact to defendants which was relied on to their detriment. Silverfern alleges in conclusory fashion that Citi "told Club members they were 'not allowed to make investments in Silverfern anymore'" (Def. Br. at 21) and asserts these allegations must be accepted as true (*id.*). However allegations of fraud must be stated "in detail" CPLR 3016 (b). Moreover this allegation is directly contradicted by the Letter where Citi customers participating in the Equity Club were advised that the "Silverfern Contract" was in effect, that the "Investment Period" could be extended "in Silverfern's discretion," that the "Additional Products" being offered by Silverfern were unrelated to the Silverfern Contract and that Citi was "not involved in such offerings, have not reviewed any documents or conducted any diligence in connection with such offerings" (Doc. No. 38). Nowhere in the Letter does Citi state that the customer is "not allowed to make investments in Silverfern anymore." The fraud counterclaim shall be dismissed.

Interference with a business relationship, where there is no contract, is actionable if unlawful means are used, or (under the theory of prima facie tort), if lawful means are used to inflict intentional harm, resulting in damage, without either excuse or justification (*Sommer v Kaufman*, 59 AD2d 843, 843-44 [1st Dept 1977]). Wrongful means includes physical violence, threats, fraud, misrepresentation, civil suits and criminal prosecutions, and extreme and unfair economic pressure (72 N.Y. Jur. 2d Interference § 42). Simple persuasion is insufficient (*id.*). Here, defendants have failed to allege facts to show that plaintiffs employed wrongful means to interfere with one of defendants' prospective or current business relationships. There are no statements in the Letter that would cause the reader to believe Citi no longer supported the Equity Club. The Letter, dated April 11, 2016, states it was "extended to May 30, 2016 . . . [and] is subject to two additional one-year extensions in SIlverfern's discretion" (Doc. 38). Moreover no independent tort is alleged and in any event, the torts alleged (which are not independent torts) must be dismissed.

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned'" (*Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 [1st Dept 2011], *affd.* 19 NY3d 511 [2012], quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). In order to plead a claim for unjust enrichment, the plaintiff must allege "that the other party was enriched, at plaintiff's expense, and that 'it is against equity and good conscience to permit [the other party] to retain what is sought to be recovered'" (*Georgia Malone & Co.*, 86

AD3d at 408, quoting *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Defendants have failed to state an unjust enrichment counterclaim because they have not alleged facts showing that plaintiffs were enriched at the defendants' expense. Instead, defendants would have the court reinterpret the Agreement to provide that if Silverfern loses its breach of contract claim and as a result cannot escape its obligation thereunder by invocation of Clause 7 (c)(11)(B) the Agreement, Silverfern can still avoid its contractual obligation by resort to an unjust enrichment claim (Def. Br. at 23). The argument itself demonstrates such claim is duplicative of the breach of contract claim and must be dismissed.

In accordance with the above discussion, the counterclaim for breach of contract (Counterclaim 1, Doc. No. 28, ¶¶ 213-217) survives. The remaining counterclaims for breach of the covenant of good faith and fair dealing (Counterclaim 2), negligent misrepresentation (Counterclaim 3), fraud (Counterclaim 4), interference with prospective business relations (Counterclaim 5) and unjust enrichment (Counterclaim 6), all fail.

Silverfern requests that "[i]f the Court concludes any counterclaim should be dismissed [it be given] leave to amend" (Def. Br. at 23). Silverfern's "unelaborated" request for leave to amend is denied (*see The Moore Charitable Fdn. v PJT Partners, Inc.*, ___AD 3d ___, 2019 WL 6481920 [1st Dept December 3, 2019]).

It is hereby

ORDERED that the motion to dismiss of plaintiffs (motion sequence number 003) is GRANTED to the extent that the second through sixth counterclaims are hereby DISMISSED and DENIED as to the first counterclaim.

This constitutes the decision and order of the court.

DATED: December 13, 2019

ENTER,

O. PETER SHERWOOD J.S.C.