SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. O. PETER SHERWOOD PART IAS MOTION 49EFM

Justice

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SOLOMON CAPITAL, LLC, SOLOMON CAPITAL 401(K) TRUST, SOLOMON SHARBAT and SHELHAV RAFF,

Plaintiffs,

-against-

LION BIOTECHNOLOGIES, INC., formerly known as Genesis Biopharma, Inc.,

Defendant.

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INDEX No.: 651881/2016

MOT. DATE: 1/24/2020

MOT. SEQ. No.: 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114
were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Defendant Lion Biotechnologies, Inc. ("Lion") moves for partial summary judgment against plaintiffs Solomon Capital, LLC ("SCLLC"), Solomon Sharbat ("Sharbat"), and Shelhav Raff ("Raff") pursuant to CPLR § 3212 determining that: (i) plaintiffs' damages claim must be limited to stock value at the time of the breach, and (ii) such damages do not exceed $50,000 (Def. Br. at 1–2 [NYSCEF Doc. No. 94]).

I. BACKGROUND

Plaintiffs are two individuals, Sharbat and Raff, and two entities, Solomon LLC and Solomon Capital 401(k) Trust (the "Trust"), of which Sharbat is the principal (*id.* at 2; Glazer Aff., Ex. 1 ¶¶ 1–4 [NYSCEF Doc. No. 78] [hereinafter "Compl."]). Defendant Lion is a publicly traded biotechnology company focused on cancer treatment (Compl. ¶¶ 6, 9). Plaintiffs allege they have invested $223,908 in Lion in three different instances:

- From June 2012 to November 2012, plaintiffs paid $136,058 in "business expenses" associated with fundraising efforts in Israel (the "Israel Expenses") (*id.* ¶¶ 29–38, 51)

- On August 22, 2012, Sharbat SCLLC and/or the Trust invested $30,000 in Lion and, on November 29, 2012, invested an additional $15,000, for a total of $45,000 invested (the "Sharbat Parties Investment Claim") (*id.* ¶ 46).
- In November 2012, Raff paid $35,000 to the advisory banking firm New World Merchants Partners, LLC and invested an additional $7,850 for a total of $42,850 (the "Raff Investment Claim") (*id.* ¶¶ 17, 21, 22).

In return for these investments, plaintiffs allege they were promised: (i) a promissory note in Lion in the amount of the investments, (ii) one-half a common share of each dollar invested (the "Share Award"), and (iii) the right to convert the note into shares on the same terms offered to other investors in the company's next financing (*id.* ¶¶ 21, 40, 47). Based on the foregoing, plaintiffs allege they should have received the following Share Award:

- Israel Expenses: 67,500 shares on November 13, 2012 (*id.* ¶¶39–40, 54)
- Sharbat Parties Investment Claim: 15,000 shares on August 22, 2012 and 7,500 shares on November 29, 2012 (*id.* ¶¶ 58–60)
- Raff Investment Claim: 21,425 shares on November 13, 2012 (*id.* ¶¶ 21, 24).

Defendant's motion here seeks to limit the damages plaintiffs may recover for the Share Award portion of their damages claim (Def. Br. at 3 [NSYCEF Doc. No. 94]).

II. ARGUMENTS

A. Defendant's Memorandum in Support

Defendant argues that it is entitled to partial summary judgment limiting plaintiffs' damages to the value of the share award at the time of the alleged breach (Def. Br. at 10). Plaintiffs claim $2,451,350 in damages based on the fair market value of 111,425 shares of Lion as of August 7, 2019. However defendant argues that under New York law, damages are to be measured as of the date of the alleged breach (s*ee Simon v Electrospace Corp.*, 28 NY2d 136, 145 [1971]; *see e.g. Emposimato v CICF Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2011]; *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 197 [2d Cir. 2003]; *Lucente v Int'l Bus. Machines Corp.*, 310 F3d 243, 262 [2d Cir. 2002]). Further, plaintiffs' damages claim fails to account for the September 2013 100 to 1 reverse split, resulting in a claim for 100 times more shares than were promised (Def. Br. at 11).

Defendant argues that the shares at issue here are worth no more than $50,000 (*id.*). The value of stock can be determined by a report of general circulation and by expert testimony (*see* CPLR § 4533; *see e.g. Kovens v Paul*, 2009 WL 562280, *5 [SD NY 2009]). Defendant submits both stock price data from Bloomberg and the expert report of Dr. Marietta-Westberg, a member of the Investor Advisory Committee of the Securities and Exchange Commission who previously served as the SEC's Acting Director/Chief Economist (Marietta-Westberg Aff., Ex. 1 at ¶¶ 4–6 [NYSCEF Doc. No. 92]) in support of the limitation of damages claimed. Dr. Marietta-Westberg considered data from Bloomberg to determine the highest trade price for the shares on the dates when plaintiffs allege they should have received the awards and, on dates where no trades occurred, utilized the highest quoted asking price (*id.* ¶¶ 30, 36, 42, 46). He could have used the stock's average price rather than its high price but did not because the shares at issue would have borne a restrictive legend limiting their sale (s*ee Boyce v Soundview Technology Group, Inc.*, 466 F3d 376, 385 [2d Cir. 2006]; *see e.g. Kovens v Paul*, No. 04 Civ 2238(TPG), 2009 WL 562280, at *5 [SD NY 2009] ["The general rule is that the market price of a security should be discounted to reflect the decrease in value, if any, due to a restriction on its transferability"]). Defendant's proof shows that the maximum value of the Share Award damages is approximately $47,420, calculated as:

1. First Cause of Action – Israel Expenses Claim: $27,000 – 67,500 shares valued at 40 cents per share as of November 13, 2012 (Compl. ¶¶ 39, 54; Marietta-Westberg Aff., Ex. 1 ¶¶ 42)
2. Second Cause of Action – Sharbat Investment Claim: $11,850 – 15,000 shares valued at 60 cents per share as of August 22, 2012, plus 7,500 shares valued at 38 cents per share on November 29, 2019 (Compl. ¶¶58–60; Marietta-Westberg Aff., Ex. 1 ¶¶ 49, 52)
3. Third Cause of Action – Raff Investment Claim: $8,750 – 21,425 shares valued at 40 cents per share on November 13, 2012 (Compl. ¶¶ 64–67; Marietta-Westberg Aff., Ex. 1 ¶ 44).

B. Plaintiffs' Memorandum in Opposition

In opposition, plaintiffs argue that defendant is not entitled to partial summary judgment because there is a question of fact as to when defendant breached its agreement (Pl. Br. at 4

[NYSCEF Doc. No. 97]). While defendant argues the three dates of breach were August 22, 2012, November 13, 2012, and November 29, 2012, plaintiffs dispute these dates, arguing that they "at most . . . represent" when plaintiffs' investments were made in defendant for the same terms offered in the Term Sheet (Pl. Br. at 4). Plaintiffs argue that summary judgment should be denied as material factual issues exist concerning the appropriate date and fairness for the evaluation of stock appreciation (*Morano v Oral Research Laboratories, Inc.*, 191 AD2d 258, 259 [1st Dept 1993]). Plaintiffs argue, between 2012 and 2014, plaintiff Sharbat was repeatedly assured that the shares and promissory notes would be provided in various communications with defendant (Pl. Br. at 5; Sack Aff., Exs. J–N [NYSCEF Doc. Nos. 108–112]). Plaintiffs argue the first time they were informed that defendant would not honor the deal was in February 2014 and, consequently, it is "possible the date of breach is" then (Pl. Br. at 6). Plaintiffs argue that a contract is not breached until the time set for performance has expired and that, here, there was no contractually set date on when the shares and promissory notes would be tendered (*id.*; *Cole v Macklowe*, 64 AD3d 480 [1st Dept 2009]; *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 265 [1st Dept 1995]). Consequently, plaintiffs argue there is a clear factual question as to when the breaches occurred and summary judgment should be denied.

Plaintiffs argue, because defendant argues plaintiffs' damages are a factual inquiry, the valuation of stock prices should be determined by a jury (Pl. Br. at 7; *Credit Suisse First Boston v Utrecht-America Finance Co.*, 84 AD3d 579, 580 [1st Dept 2011]; *Boyce v Soundview Tech. Group, Inc.*, 464 F3d 376, 387 [2d Cir. 2006]; *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 196 [2d Cir. 2003]; *see also In re Seagroatt Floral Co.*, 78 NY2d 439, 443 [1991] [referring the matter to a Referee, for extensive proceedings including testimony from expert witnesses for both sides to ascertain the fair value of the stock]).

Plaintiffs next argue that they have accounted for the 100 to 1 reverse split based on the May 22, 2013 capital raise in their damages evaluation (Pl. Br. at 7). Plaintiffs argue that in 2012 Lion sought to raise capital pursuant to a Term Sheet dated May 2, 2012 which offered investors a convertible note: (i) bearing 12% interest per annum, (ii) convertible into Lion's next capital raise at the same terms and conditions offered to the future investors, and (iii) one half a share of Lion common stock for each dollar funded by investors (*id.*; Sack Aff., Ex. G [NYSCEF Doc. No. 105]). Lion's next Capital Raise occurred on May 22, 2013, selling common stock at $1.00 per share, with a Term Sheet offering investors: (i) one half share of Lion stock for each dollar of

principal invested and (ii) 100 shares of common stock for each dollar of principal and interest invested if they converted common stock based on the terms of the next Capital Raise (Pl. Br. at 7. In the summer of 2012, the parties entered a Note and Common Stock Subscription Agreement in connection with the subscription by the Purchasers for Second Promissory Notes and shares of common stock in Lion (Sack Aff., Ex. H [NYSCEF Doc. No. 106]). Pursuant to this agreement, the Purchasers agreed to lend Lion up to $1,500,000 and Lion agreed to sell the Purchasers up to $1,500,000 of secured notes as well as issuing one half share of common stock for every dollar funded under the secured notes (Pl. Br. at 8). The Subscription Agreement also provided that if, while the secured notes are outstanding, Lion consummates any equity or debt financing with more favorable terms than those in the secured notes, the remaining outstanding portion of the credit facility would be adjusted to have terms and conditions similar to the new financing (*id.*). Because Lion raised capital for sale of common stock in the company on May 22, 2013 with common stock at $1.00 a share and 100 shares of common stock for each dollar of principal, plaintiffs were included in this capital raise based on the investments they made in Lion in 2012. Consequently, plaintiffs argue that they have already accounted for the reverse split as, had Lion complied with the terms of the agreement and plaintiffs were able to convert in the May 22, 2013 financing, plaintiffs would have been due millions of total shares but for the reverse split in September 2013 (*id.* at 8–9).

III. DISCUSSION

The standards for summary judgment are well settled. Summary judgment is a drastic remedy which will be granted only when the party seeking summary judgment has established that there are no triable issues of fact (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 329 [1986]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395 [1957]). To prevail, the party seeking summary judgment must make a prima facie showing of entitlement to judgment as a matter of law tendering evidentiary proof in admissible form, which may include deposition transcripts and other proof annexed to an attorney's affirmation (*see Alvarez v Prospect Hosp., supra*; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Absent a sufficient showing, the court should deny the motion without regard to the strength of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

Once the initial showing has been made, the burden shifts to the party opposing the motion for summary judgment to rebut the prima facie showing by producing evidentiary proof in admissible form sufficient to require a trial of material issues of fact (*see Kaufman v Silver*, 90 NY2d 204, 208 [1997]). Although the court must carefully scrutinize the motion papers in a light most favorable to the party opposing the motion and must give that party the benefit of every favorable inference (*see Negri v Stop & Shop*, 65 NY2d 625 [1985]) and summary judgment should be denied where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, v Ceppos*, 46 NY2d 223, 231 [1978]), bald, conclusory assertions or speculation and "[a] shadowy semblance of an issue" are insufficient to defeat a summary judgment motion (*S.J. Capalin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]; *see Zuckerman v City of New York, supra; Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255, 259 [1970]).

Lastly, "[a] motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Ruiz v Griffin*, 71 AD3d 1112 [2d Dept 2010], quoting *Scott v Long Is. Power Auth.*, 294 AD2d 348 [2d Dept 2002]).

In non-matrimonial actions, "summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just" (CPLR § 3212 [e]). Where a plaintiff's maximum damages are limited by law, partial summary judgment declaring the maximum damages available is appropriate (*Saboundjian v Bank Audi*, 157 AD2d 278, 283–85 [1st Dept 1990]).

Defendant's summary judgment motion shall be granted as to the Share Award. Damages for breach of contract is typically calculated as of the date of the breach, not when plaintiffs were first notified of noncompliance as plaintiffs suggest (*see Cole v Macklowe*, 64 AD3d 480 [1st Dept 2009]; *Rachmani Corp. v 9 E. 96th St. Apt. Corp.*, 211 AD2d 262, 266 [1st Dept 1995]). Lion's shares must be valued at the time of the alleged breaches as damages for breach of an agreement to deliver stock are measured "at the time and place of the breach" (*Simon*, 28 NY2d at 145 [1971]; *Emposimato v CICF Acquisition Corp.*, 89 AD3d 418, 421 [1st Dept 2011]; *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 197 [2d Cir 2003]; *Lucente v Int'l Bus. Machines Corp.*, 310 F3d 243, 262 [2d Cir 2002]).

Defendant has proffered expert testimony to determine the value of the shares that plaintiffs would have been entitled to at the time performance was required. That evidence has not been disputed. Plaintiffs' suggestion that the value of the Share Award should be determined by a jury is unsupported by both plaintiffs' brief and its citations. Plaintiffs' argument that it had accounted for the 100 to 1 reverse stock split based on Lion's May 22, 2013 Capital Raise is unconvincing as plaintiffs had not previously alleged or argued a valuation of damages based on conversion of the promissory notes into equity in their discovery responses and plaintiffs cannot now defeat an otherwise proper motion for summary judgment by asserting a brand new theory of liability (*see People of the State of New York v Grasso*, 53 AD3d 180, 212–13 [1st Dept 2008]; *Mathew v Mishra*, 41 AD3d 1230, 1231 [4th Dept 2007]).

There are no material issue of fact to dispute that: (i) plaintiffs invested approximately $225,000 investment in Lion ($136,058 in business expenses; $45,000 for investments in Lion by Sharbat, SCLLC, and/or the Trust; $42,850 by Raff); (ii) plaintiffs were promised, in exchange for their investments a promissory note in Lion in the amount invested, one-half common share for each dollar invested, and the right to convert the note into shares on the same terms offered to other investors in the company's next financing; (iii) plaintiffs should have received 15,000 shares on August 22, 2012, 88,925 shares on November 13, 2012, and 7,500 shares on November 29, 2012; and (iv) Lion's shares were worth 60 cents per share on August 22, 2012, 40 cents per share on November 13, 2012, and 38 cents per share on November 29, 2012 (Def. Reply at 3–4 [NYSCEF Doc. No. 114]).

According to plaintiffs' verified response to Lion's 10th Interrogatory, their contract claims seek (i) the debt purportedly owing on the promissory notes attributable to the amounts they claim to have invested (plus 12% interest in the case of the Sharbat Parties Investment Claim and the Raff Investment Claim), and (ii) the value of the Share Award (*id.* at 4).

Defendant has shown through expert testimony which has not been contested by admissible evidence that the shares are worth less than $50,000. The expert report of Dr. Marietta-Westberg shows the value of the stock when it would have been awarded to plaintiffs.

Although plaintiffs claim that there is still a question of fact for the jury as to when the breaches occurred and the value of the stock, plaintiffs do not dispute the dates the shares should have been issued or the expert's estimate of the value of the stock. As to the dates of the breaches, plaintiff's verified complaint repeatedly alleges that the shares "should have been issued contemporaneously with" plaintiffs' investments into Lion (Def. Reply at 7; Compl. at ¶¶ 27, 42, 49, 56, 62).

There is no assailing the general notion that the value of damages can be "a factual inquiry" as it is here. Nor can it be disputed that the issue may be resolved on summary judgment where there are no disputed facts as here. A party may obtain partial summary judgment to limit a damages claim which is unsupported by evidence and Defendant has done so here. (*see Saboundjian v Bank Audi*, 157 AD2d 278, 282–85 [1st Dept 1990]; *Raff v Rochester Gas & Elec. Corp.*, 137 Misc2d 887, 891 [Sup Ct. Monroe County 1987]; *Credit Suisse First Boston v Utrecht-America Finance Co.*, 84 AD3d 579, 580 [1st Dept 2011]; *Boyce v Soundview Tech. Group, Inc.*, 464 F3d 376, 385 [2d Cir 2006]; *Oscar Gruss & Son, Inc. v Hollander*, 337 F3d 186, 196 [2d Cir 2003]).

Plaintiffs' speculative claim that they might have converted their promissory notes into "millions of total shares" in the May 22, 2013 Financing fails for several reasons. First, this motion is directed to the Share Award damages claim, not the promissory note damages claim (Compl. ¶¶ 21, 40, 47). Second, plaintiffs' claim that they should be awarded the value of shares they would have gotten by converting debt into equity was not mentioned in plaintiffs' discovery response to defendant request for detailed damage computations (*see Mathew v Mishra*, 41 AD3d 1230, 1231 [4th Dept 2007] ["a plaintiff cannot defeat an otherwise proper motion for summary judgment by asserting a new theory of liability . . . for the first time in opposition to the motion"]; *see also Gagen v Kipany Prods., Ltd.*, 27 AD3d 1042 [3d Dept 2006]). Third, plaintiffs' claim in their interrogatory response that they are entitled to receive the value of the promissory notes as if they accrued interest through the time of plaintiffs' discovery responses for a total of $330,000, representing the sum of their investments at a 12% interest rate, and to now obtain the value of the stock they would have obtained if they had converted the debt into equity is impermissible double dipping. Finally, converting debt into shares in 2013 would not have increased the value of plaintiffs' claims beyond the debt owned as reflected in the promissory notes as confirmed by the conclusion of defendant's expert that the shares would

have been worth no more than the amount plaintiffs would have paid (*id.* at 11–12; *see Kovens*, 2009 WL 562280, at *7).

Consequently, defendant's motion for summary judgment is granted and plaintiffs' damages as to the Share Award are limited to $47,420. Accordingly, it is hereby

ORDERED that the motion of defendant for partial summary judgement is **GRANTED**; and it is further

Adjudged that the damaged plaintiffs may recover based on the Share Award claim is no more than $47,420.00; and it is further

ORDERED that counsel for the parties shall appear at a status conference on Tuesday, June 30, 2020 at 10:30 AM at Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

5/12/2020
DATE

O. P. Sherwood
O. PETER SHERWOOD, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
	X	GRANTED	DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE