SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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SRS CAPITAL FUNDS, INC., USRS CAPITAL FUNDS, INC.,CAPITAL FUNDING JN, INC., JOSEPH SCHULMAN, TZILA SCHULMAN,

Plaintiffs,

- v -

ARTY BUJAN, WILLIAM LEES, CARDINAL EQUITY, LLC,

Defendants.

INDEX NO.	654888/2019
MOTION DATE	10/21/2019
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

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HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to DISMISS.

Plaintiffs allege they were lured into investing in Defendant Cardinal Equity, LLC ("Cardinal"), a "merchant cash advance" company, based on false representations made by Defendants Bujan and Lees (Cardinal's owners) as to the operation and profitability of Cardinal's business. Defendants then allegedly withheld and manipulated information about Cardinal's business and Plaintiffs' returns on their investment, overstating and obfuscating the financial results and risks. After Plaintiffs expressed concern about their investments and the information they were receiving, Defendants finally "came clean" and revealed that Plaintiffs – who were promised 45% returns on their investment – had in fact lost money on their investments. Thereafter, Plaintiffs allege, Defendants continued to withhold information about the business and have improperly retained $2 million of Plaintiffs' funds.

Based on those allegations, Plaintiffs assert a number of overlapping and interrelated claims against different groupings of defendants. As to Bujan and Cardinal, but not Lees,

Plaintiffs assert fraud in the inducement (Count One) and breach of fiduciary duty (Count Five). As to Cardinal, but not Bujan or Lees, Plaintiffs assert breach of Master Participation Agreements (MPA) and Participant Servicing Agreements (PSA) (Count Three). Finally, as to all Defendants, Plaintiffs assert fraud (Count Two), promissory estoppel (Count Four), and conversion (Count Six).

In this motion to dismiss, Defendants assert (also in overlapping fashion) that: (i) the fraud, fraudulent inducement, and conversion claims are duplicative of Plaintiffs' breach of contract claim; (ii) the fraud, fraudulent inducement, and promissory estoppel claims are precluded by the terms of the MPA; (iii) the fraud and fraudulent inducement claims are not pleaded with specificity and do not adequately allege that Defendants' representations were false; (iv) the Complaint fails to state viable claims of breach of fiduciary duty and promissory estoppel against Bujan and Cardinal; (v) the Complaint fails to state a viable claim of breach of contract against Cardinal; and (vi) the Complaint fails to adequately plead any involvement by Lees in the conduct giving rise to Plaintiffs' claims.

For the reasons that follow, Defendants' motion to dismiss is granted in part and denied in part.

Analysis

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. [The court] accept[s] the facts as alleged in the complaint as true, [and] accord[s] plaintiff[] the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994] [internal citation omitted]). However, bare legal conclusions and "factual claims which are either inherently incredible or flatly contradicted by documentary evidence" are not "accorded their most favorable intendment" (*Summit Solomon & Feldman v Lacher*, 212 AD2d

487, 487 [1st Dept 1995]). Dismissal under subsection (a) (1) is warranted where the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88).

Fraudulent Inducement (Count One)

Plaintiffs' have sufficiently pleaded a claim of fraudulent inducement against Bujan and Cardinal. The allegations of misrepresentations and reliance are sufficiently specific and detailed to meet the pleading requirements of CPLR 3016 (b).

Plaintiffs' fraudulent inducement claim is not duplicative of their claim for breach of contract. Defendants' alleged *pre*-contract misrepresentations related to objective facts about Cardinal and its business in an attempt to lure Plaintiffs into the agreement and were not merely general promises to perform under the agreement in the future (*see Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *Pate v BNY Mellon-Mezzanine III, LP*, 163 AD3d 429, 430 [1st Dept 2018]; *CC Pay Operations Ltd. v Alokush*, 2019 Slip Op. 30048(U) (Sup Ct NY County 2019]). Accordingly, that claim cannot be dismissed on grounds of duplication.

The fraudulent inducement claim is not, as Defendants suggest, precluded by the terms of the MPA. The general disclaimers in the MPA are not "sufficiently specific to the particular type of fact misrepresented or undisclosed," and they concern facts "peculiarly within the [Defendants'] knowledge" (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 137 [1st Dept 2014]; *see also Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts Inc.*, 119 AD3d 136, 143 [1st Dept 2014]; *Union Ave Estates, LLC v Garsan Realty Inc.*, 170 AD3d 498, 498 [1st Dept 2019]; *OHM NYC LLC v Times Sq. Assoc. LLC*, 170 AD3d 534, 534-535 [1st Dept 2019]). Whether due diligence by Plaintiff would or should have uncovered

the alleged fraud is a question of fact that cannot be resolved on a motion to dismiss (*Union Ave Estates*, 170 AD3d at 498-499).

The motion to dismiss Count One is denied.

Fraud (Count Two)

Plaintiffs' fraud claim against Cardinal is duplicative of their claim against Cardinal for breach of contract. As in *Laurel Hill Advisory Grp., LLC v American Stock Transfer & Tr. Co., LLC* (112 AD3d 486 [1st Dept 2013]), "the fraud alleged is based on the same facts that underlie the contract claim and is not collateral to the contract" (*id*. at 487).

However, Bujan and Lees were not parties to the contracts and are not being sued in this case for breach of contract. Thus, the fraud claim against them is not duplicative of the breach of contract claim asserted against only Cardinal (*see Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 581 [1st Dept 2015]; *Richbell Info. Services, Inc. v Jupiter Partners, L.P.*, 309 AD2d 288, 305 [1st Dept 2003]).

The allegations against Bujan are sufficiently specific and detailed to meet the pleading requirements of CPLR 3016 (b). As discussed *infra*, the allegations against Lees are not sufficient to state a claim with respect to Count Two or any other Count in the Complaint.

In sum, the motion to dismiss Count Two is granted as to Defendants Cardinal and Lees but denied as to Defendant Bujan.

Breach of Contract (Count Three)

Plaintiffs' claim that Cardinal breached sections 5.1 (by failing to meet the contractually defined Standard of Care) and 8.2 (indemnification for intentional misconduct or gross negligence) of the MPA raises questions of fact that cannot be resolved on a motion to dismiss. Cardinal does not address in its briefing Plaintiffs' allegations that Cardinal breached sections

4.2 (failure to timely provide certain information) and 4.3 (failure to deposit the full amount of funds owed to SRS into the SRS accounts) of the MPA, and thus they are not before the Court, but in any event those allegations raise factual issues as well.

However, Plaintiffs' claim that Cardinal breached the PSA is barred by a forum selection clause contained in those agreements. The PSA provide that "all actions or proceedings arising in connection with this Agreement shall be tried and litigated in" federal or state courts in New Jersey (NYSCEF Doc. No. 9 at 2). Such forum selection clauses "are prima facie valid and will not be set aside except for fraud or overreaching or if enforcement would be so unreasonable and unjust as to make a trial in the selected forum 'so gravely difficult and inconvenient that the challenging party would, for all practical purposes, be deprived of his day in court" (*Matter of Fidelity & Deposit Co. of Md. v Altman*, 209 AD2d 195, 195 [1st Dept 1994], quoting *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 117 AD2 234, 234 [1st Dept 1991]). Here, Plaintiffs were free to bring this entire action in New Jersey, where all claims could be heard together, but chose not to do so. They cannot complain that application of the forum selection clause would be "unreasonable and unjust."

Cardinal's reliance on dicta from *Shanley v Callanan Indus., Inc.* (54 NY2d 52 [1981]) for the general proposition that fragmentation of claims is inefficient and burdensome is unavailing. *Shanley* involved the severance of two related tort actions immediately prior to trial, not a forum selection clause to which sophisticated parties freely agreed.[1]

The motion to dismiss Count Three is denied.

[1] Cardinal does not assert in its papers that the forum selection clause precludes Plaintiffs' fraudulent inducement claim with respect to the PSA (as a claim "arising in connection with this Agreement"). The Court declines to reach that issue *sua sponte*.

Promissory Estoppel (Count Four)

Plaintiffs' claim for promissory estoppel "is barred by the existence of a contract" (*ID Beauty S.A.S. v Coty, Inc.*, 164 AD3d 1186, 1186 [1st Dept 2018]). They do not allege that Defendants had a duty beyond the scope of the agreements (*Zakrzewski v Luxoft USA, Inc.*, 151 AD2d 573, 574 [1st Dept 2017]). Moreover, the claim is based on the same conduct and representations upon which Plaintiffs rely in support of their claims for breach of contract and fraudulent inducement and is, therefore, duplicative.

The motion to dismiss Count Four is granted.

Breach of Fiduciary Duty (Count Five)

Plaintiffs' conclusory allegation that they had "a relationship of confidence and trust" with Cardinal and Bujan is not sufficient to state a claim for breach of fiduciary duty. The facts alleged do not create a fiduciary duty in the context of "arms' length transactions between sophisticated commercial parties" (*MP Cool Investments Ltd. v Forkosh*, 142 AD3d 286, 293 [1st Dept 2016]). The MPAs define the commercial relationship as that of buyer and seller and acknowledge that Plaintiffs were not relying on Defendants for advice.

The motion to dismiss Count Five is granted.

Conversion (Count Six)

Plaintiffs' conversion claim is duplicative of their breach of contract claim and must be dismissed (e.g. *Sebastian Holdings, Inc. v Deutsche Bank, AG*, 108 AD3d 433, 433 [1st Dept 2013]; *Kopel v Bandwidth Tech. Corp.*, 56 AD3d 320, 320 [1st Dept 2008]). Cardinal's obligation to return funds to Plaintiffs arises, if at all, under the parties' agreements. Indeed, the conversion claim is premised specifically on an alleged breach of Section 4.3 of the MPA (*see*

NYSCEF Doc. 1, ¶ 120 [Compl.]). Moreover, Plaintiffs do not allege that Defendants Bujan or Lees have retained Plaintiffs' funds for their own personal use. The funds remain with Cardinal.

The motion to dismiss Count Six is granted.

The Factual Allegations Do Not Support Any Claims Against Lees (All Counts)

Finally, in addition to the grounds for dismissal discussed above, the conclusory allegations asserted against Defendant Lees are insufficient to state any claims against him. The only specific allegations against Lees are that he provided a spreadsheet to Plaintiffs showing a "negative rate of return" from August through November 2018 (which is not alleged to be false) and that he and Bujan "came clean" and acknowledged that Plaintiffs' accounts had lost money (also not alleged to be false) (*see* NYSCEF Doc. 1, ¶¶ 52, 53). Indeed, the Complaint suggests, albeit subtly, that Lees was part of the truthful communication that the accounts had lost money but not part of the allegedly fraudulent misrepresentations prior to that time (*see e.g.* NYSCEF Doc. 1, ¶ 55 ["In truth, SRS's investment accounts were not as lucrative as Mr. Bujan asserted, and – as Mr. Bujan and Mr. Lees conceded – made zero net profit during the parties' years-long relationship, and had in fact caused millions of dollars in losses."]).

Those allegations do not suffice to plead fraud, with specificity or otherwise, against Lees (*see e.g. Eastman Kodak Co. v Roopak Enterprises, Ltd.*, 202 AD2d 220, 222 [1st Dept 1994]). Nor do the allegations include "promises" made *by Lees* that could support a claim of promissory estoppel (*see Condor Funding, LLC v 176 Broadway Owners Corp.*, 147 AD3d 409, 411 [1st Dept 2017]; *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]). Finally, there are no allegations suggesting that Lees assumed control over Plaintiffs' funds so as to give rise to a viable claim of conversion (*see Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 50 [2006]).

Plaintiffs' reliance on allegations in the Complaint against "defendants," "Cardinal," and "Cardinal employees" as a group are not sufficient to give Lees notice of the allegations against him (*see e.g. Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981] [dismissing claims where, *inter alia*, "causes of action are pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant"]; *Grika v McGraw*, 55 Misc 3d 1207(A) [Sup Ct, NY County 2016] ["'[G]roup pleading' . . . does not comply with heightened pleading requirement of CPLR 3016(b)."]; *Shareholder Representative Servs. LLC v Sandoz, Inc.*, 46 Misc3d 1228(A) (Sup Ct, NY County 2015] [noting that "group pleading" does not suffice to plead fraud with particularity]). Given that Plaintiffs had direct communications with the individual defendants, and thus know what they relied upon, this case is distinguishable from those in which the plaintiff was not in a position to know which individual made the particular misrepresentation (*see, e.g., Allenby, LLC v Credit Suisse, AG*, 134 AD3d 577, 579 [1st Dept 2015]; *Loreley Fin. (Jersey) No. 3 Ltd. v Citigroup Global Mkts Inc.*, 119 AD3d 136, 142 [1st Dept 2014] [stating that facts were "peculiarly within the knowledge" of the defendants]).

Nor is the allegation that Lees was a corporate officer of Cardinal sufficient to state a claim without specific allegations that he "participat[ed] in the commission of [the] tort" (*Doe v Bloomberg, L.P.*, 178 AD3d 44, 50 [1st Dept 2019] [citations omitted]; *see also Kopel v Bandwidth Tech Corp.*, 56 AD3d 320, 320 1st Dept 2008]; *Shimamoto v S&F Warehouses, Inc.*, 257 AD2d 334, 340 [1st Dept 1999]).

* * * *

Accordingly, it is

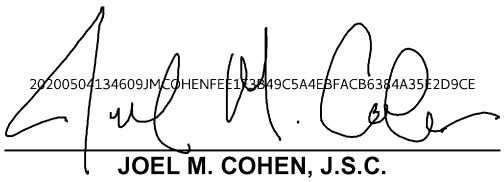
ORDERED that the branch of Defendants' motion to dismiss addressing Counts Three, Five, and Six is **granted**, and those claims are dismissed; it is further

ORDERED that the branch of Defendants' motion to dismiss addressing Count Two is **granted** with respect to Defendants Cardinal and Lees and **denied** with respect to Defendant Bujan; it is further

ORDERED that the branch of Defendant' motion to dismiss addressing Counts One and Three is **denied**; and it is further

ORDERED that Defendants Cardinal and Bujan shall answer the complaint within 20 days of the Court's entry of this order on NYSCEF.

This constitutes the decision and order of the Court.



5/4/2020
DATE

JOEL M. COHEN, J.S.C.

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