

**Brown v Cerberus Capital Mgt., L.P.**

2020 NY Slip Op 31538(U)

May 14, 2020

Supreme Court, New York County

Docket Number: 655271/2017

Judge: O. Peter Sherwood

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

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**TONYA BROWN, JOHN ELSTAD, ALBERT GOEKEN,  
ELIZABETH HOMAN, and JEFFREY SAMPERE,**

**Plaintiffs,**

**-against-**

**DECISION AND ORDER  
Index No.: 655271/2017**

**Motion Seq. Nos.: 003**

**CERBERUS CAPITAL MANAGEMENT, L.P.,  
CERBERUS COVIS LLC, COVIS HOLDINGS  
GP LLC, COVIS HOLDINGS L.P., COVIS  
MANAGEMENT INVESTORS LLC,  
COVIS US HOLDINGS, LLC, COVIS  
MANAGEMENT INVESTORS US LLC,  
and COVIS PHARMACEUTICALS, INC.**

**Defendants.**

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**O. PETER SHERWOOD, J.:**

In motion sequence 003, defendants Cerberus Capital Management, L.P. (“Cerberus”), Cerberus Covis LLC (“Cerberus Covis”), Covis Holdings GP LLC (“Covis GP”), Covis Holdings L.P. (“Covis Holdings”), Covis Management Investors LLC (“MIP I”), Covis US Holdings, LLC (“US Holdco”), Covis Management Investors US LLC (“MIP II”), and Covis Pharmaceuticals, Inc. (“CPI”) (collectively, “defendants”) move for partial summary judgment based on releases. Defendants seek to dismiss plaintiffs’ claims one through eight (fraud), fourteen (civil conspiracy), and fifteen (breach of the covenant of good faith and fair dealings). Defendants assert that these causes of action are all barred by the general releases they each signed at or about the time of their termination. In opposition to the motion, plaintiffs argue the releases are either void or voidable for various reasons discussed below.

**I. BACKGROUND**

The basic facts are described in this court’s Decision and Order, dated October 30, 2018 (Doc. No. 75)<sup>1</sup> familiarity with which is assumed. The facts set forth here are drawn from that Decision and Order and the Rule 19-a statements of material facts submitted by the parties (Defendants Statement, “DSUF ¶\_\_” Doc. No. 103; Plaintiffs’ Statement “PSUF ¶\_\_” Doc. No.

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<sup>1</sup> References to “Doc. No. \_\_” are to the location of documents stored in the docket of this case in the New York State Court Electronic Filing System.

119; and Defendants' Response to Plaintiffs' Statement, "RSUF ¶\_\_" Doc. No. 191). Plaintiffs Tonya Brown ("Brown")<sup>2</sup>, John Elstad ("Elstad"), Albert Goeken ("Goeken"), Elizabeth Homan ("Homan") and Jeffrey Sampere ("Sampere"), who were terminated from CPI at various dates between June 24, 2014 and December 1, 2014 (DSUF ¶¶ 5-8), knowingly and voluntarily signed severance agreements along with the general releases and received modest severance payments of approximately four months base salary (DSUF ¶¶ 9-12) ("Severance Payments") except, they retained certain "Profit Interests".

It is undisputed that each plaintiff executed a Severance Agreement and Release of All Claims ("Release Agreements") in exchange for severance and other benefits with defendants alleging that these are broad releases wherein plaintiffs knowingly and irrevocably waive all claims against defendants. Plaintiffs maintain that the Release Agreements are void or voidable because defendants failed to disclose material information in violation of the law (PSUF ¶14). The parties dispute that Elstad and Goeken's Release Agreements provided, in consideration of the agreement's promises, both plaintiffs irrevocably waived any claims against CPI, both plaintiffs must pay defendants' attorney's fees if any suit was brought, and both plaintiffs understood the nature of the agreement (*id.* 15–18). Plaintiffs allege that the excerpts of the agreements cited by defendants are incomplete, the agreements are void due to defendants' misrepresentations, and both plaintiffs could not understand the agreements are void or voidable due to defendants' misrepresentations (PSUF ¶¶15–18).

The parties dispute that Homan and Sampere's Release Agreements provided that both plaintiffs irrevocably waived any claims against CPI and both plaintiffs understood the nature of the agreement (DSUF ¶¶19–20; PSUF ¶¶19–20). The parties dispute that the only claims exempted from Homan and Sampere's Release Agreements are those relating to certain vested Profit Interests, with plaintiffs alleging the agreements are void or voidable due to defendants' misrepresentations (*id.* ¶21). The parties dispute whether the call and valuation of plaintiffs' vested Profit Interests at issue here are governed by Section 4(a)(ii)(B) of the 2013 Award Agreements, with plaintiffs disputing that the MIP US Operating Agreement governs them (*id.* ¶22). The parties dispute whether Homan and Sampere voluntarily executed their Release Agreements with

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<sup>2</sup> Defendants did not move initially for partial summary judgment against Brown because, at the time of defendants' motion, her case had been dismissed (*see* Doc. No. 75). Now that the First Department reinstated her case (*see* Doc. No. 183), defendants are seeking partial summary judgment as to Brown as well (*see* Doc. No. 190 at n. 2).

plaintiffs alleging it was not voluntary due to defendants' misrepresentations (*id.* ¶23). (Apparently the alleged misrepresentations were made in connection with the Swap of their Original [2012] Equity for New [2013] Equity) (*id.*, ¶¶49-64). Defendants dispute this and also note that plaintiffs plead with respect to the 2013 Award Agreements, not in connection with the Release Agreements (Reply at 6, Doc. No. 190). The parties dispute that plaintiffs' causes of action one through eight, fourteen, and fifteen are based on events that occurred prior to the Release Agreements' executions, with plaintiffs alleging the Release Agreements are void or voidable (PSUF ¶¶25-34).

Plaintiffs have submitted additional Rule 19-a material facts which make clear that the misrepresentation alleged relate to the Swap in 2013 (*id.*, ¶¶49-76). Defendants deny these allegations as being immaterial (RSUF ¶¶49-76).

Plaintiffs allege that they were hired in 2012 to help build Covis, a business devised by its three Founders, Bill Collins, Jack Davis, and Ron Lickteig, and financed and controlled by Cerberus with a plan to acquire the commercial and intellectual property rights of pharmaceutical products (the "Rights"), rebrand them, and sell them (PSUF ¶¶35-36; DSUF ¶¶35-36 [Doc. No. 191]).<sup>3</sup> Plaintiffs allege that at the time of hire, plaintiffs were awarded 1.15% of the fully diluted equity on Covis Holdings (the "Original Equity") (*id.* ¶41). In 2013, Cerberus restructured the Covis companies and issued "New Equity" in exchange for the Original Equity (*id.* ¶43). In October 2013, Cerberus issued plaintiffs' 2013 Award Agreements whereby plaintiffs received New Equity, or 900,330 membership interests ("Profits Interests") in MIP II (*id.* ¶44). The MIP II Operating Agreement governed the 2013 Award Agreements and limited the number of MIP II shares to 1,700,000 (*id.* ¶45). These contracts were governed by Delaware law and required plaintiffs to bring suit in New York (*id.* ¶46). The 2013 Award Agreements distinguished plaintiffs' rights as members of the New Companies from their rights as employees, and paragraph 5 clarified that the 2013 Award Agreement had no effect on plaintiffs' employment status (*id.* ¶¶47-48). According to plaintiffs, the 2013 Award Agreements falsely implied the New Companies indirectly owned a share of the Rights but omitted a specific representation of what the New Companies owned (*id.* ¶¶49-50). The 2013 Award Agreements' acknowledgements clause required plaintiffs to affirm that they had reasonable opportunities to conduct due diligence from MIP II agents concerning the contract (*id.* ¶¶55). The 2013 Award Agreements and the equity

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<sup>3</sup> For a more detailed description of the background facts *see* the October 30, 2018 Decision and Order, at 2-4 (Doc. No. 75).

schedules were drafted by Cerberus (*id.* ¶59). Plaintiffs relied on defendants' misrepresentations and omissions (*id.* ¶72).

## II. LEGAL STANDARD

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]).

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]).

## III. ARGUMENTS

Defendants assert that almost all of plaintiffs' claims are barred by the Release Agreements (Def. Br. at 6 [Doc. No. 102]). The releases are governed by North Carolina law which is similar to New York law (*id.*). In North Carolina, releases based on consideration provide a complete defense to actions for damages (*see Talton v Mac Tools, Inc.*, 453 SE2d 563, 565 [NC Ct App 1995]). Where the terms of a contract are clear and unambiguous, the court must enforce it as

written (*see VF Jeanswear Ltd. P'ship v Molina*, 320 F Supp 2d 412, 420 [MD NC 2004]; *Chemimetals Processing, Inc. v Schrimsher*, 535 SE2d 594, 596 [NC Ct App 2000]). Defendants argue that the Release Agreements completely and unambiguously discharge nearly all claims plaintiffs have asserted (Def. Br. at 6–7; DSUF ¶¶15, 19). Defendants argue that the Release Agreements made clear that plaintiffs were discharging all claims against defendants that arose prior to their execution whether plaintiffs knew of the claim or not (Def. Br. at 7; DSUF ¶¶15, 19). Defendants argue North Carolina courts consistently uphold and enforce broad general releases such as the agreements here (*see Nelson v Montgomery*, No. 12-cv-699, 2014 WL 1571208, at \*6 [WD NC 2014]; *VF Jeanswear*, 320 F Supp 2d at 419; *Kraus v Wells Fargo Sec., LLC*, No. COA11-687, 2012 WL 123276, at \*3 [NC Ct App 2012]; *Talton*, 453 SE2d at 565). Consequently, because plaintiffs' first through eighth, fourteenth, and fifteenth causes of action existed when plaintiffs executed their respective release agreements, defendants argue they are entitled to summary judgment on those claims (Def. Br. at 8).

Plaintiffs argue that the release agreements must be understood in context (Opp. Br. at 16). Under North Carolina law, a release's meaning depends on the parties' intention at execution, the language used, the parties' then situations, and the objectives sought (*see McGladrey, Hendrickson & Pullen v Syntek Fin. Corp.*, 375 SE2d 689, 691 [NC Ct App 1989]; *Miller v Nationwide Mut. Ins. Co.*, 435 SE2d 537, 542 [NC Ct App 1993]; *Adder v Holman & Moody, Inc.*, 219 SE2d 190 [NC Ct App 1975]). The parties' intent and knowledge at execution matter because many releases contain standardized language and are given in circumstances where parties are looking no further than at the current matter in dispute (*see Johnson v Lebanese Am. Univ.*, 84 AD3d 427, 429–30 [1st Dept 2011]). Further, words of general application used in a release are not to be given their broadest interpretation but, instead, will be restricted to the matter being referred to (*see* 76 CJS Release § 50). These principles compel denying defendants' summary judgment motion plaintiffs argue.

Homan's and Sampere's Release Agreements provide that, “[i]n consideration and exchange for [their] promises in this Agreement[,]” Homan and Sampere:

[H]ereby forever discharge and release the Company, its predecessors, parent and sister companies, subsidiaries, and affiliates (including, but not limited to, Covis Management Investments US LLC, Covis Holdings, L.P., Covis Sarl, Covis US Holdings LLC, and Cerberus Capital Management, L.P.) and its respective directors, officers, stockholders, affiliates, employees, agents,

representatives, and assigns (the “Released Parties”), and each of them, from any and all claims, liabilities, actions or causes of action of any kind or character whatsoever, whether at law or in equity, whether known or unknown, whether contingent or absolute.

(a) This general release and waiver of claims includes, without limitation, claims for personal injuries, back pay, losses or damage to real or personal property, economic loss or damage of any kind, breach of contract (express or implied), defamation, breach of any covenant of good faith (express or implied), tortious interference with contract, wrongful termination, business or personal tort, misrepresentation, or any other losses or expenses of any kind (whether arising in tort, contract or by statute) arising out of your employment relationship with the Company and any other alleged acts or omissions by the Released Parties not expressly excluded herein.

(b) You acknowledge that this general release and waiver of claims applies both to known and unknown claims that may exist between you and the Released Parties. You expressly acknowledge and agree that this release and waiver of claims includes but is not limited to a release of any and all rights, claims, or causes of action arising under any employment or other agreement (whether written, oral, or implied) or under any state or federal constitution, statute, law, rule, regulation, or common-law principle of tort, contract or equity, except for the obligations of the Company under this Agreement.

(DSUF ¶ 19). Homan and Sampere’s executed Release Agreements provided:

By signing this Agreement, you hereby affirm that you have read the entire document, and that you possess sufficient education and/or experience to fully understand the extent and impact of its provisions. By signing this Agreement, you hereby affirm that you have been afforded the opportunity to consider the Agreement for a period of forty-five (45) days; that you have been provided a list of the employees selected and not selected for termination and participation in this severance program by their job title and age from the group considered (Exhibit A); and that you understand the same. By signing this Agreement, you hereby affirm that you have been advised by the Company to consult an attorney of your choice concerning the terms of this Agreement; that you have had the opportunity to obtain whatever advice you deemed appropriate; that you are fully competent to execute this Agreement; and that you do so voluntarily and without coercion, undue influence, threat, or intimidation of any type.

(DSUF ¶ 20). Elstad and Goeken signed similar agreements (*id.*, ¶ 15).

Plaintiffs argue that the Release Agreements “merely released plaintiffs’ employment claims and specifically carved out plaintiffs’ rights related to their New Equity” (Opp. Br. at 2). Defendants do not take serious issue with this. They state the Severance Payments were “payments

for accrued time off and other benefits” (Reply Br. at 2, Doc. No. 190). It does appear the Release Agreements were signed in connection with plaintiffs’ exit from their employment at CPI. The releases provide for a “general release and waiver” of a long list of claims “arising out of your employment relationship with the Company”, DSUF ¶ 19.

The dispute here relates to the “carved out rights.” Plaintiffs maintain that they gave up the Original Equity for equity in [“New Companies,” *i.e.* “New Equity”] through fraud (PSUF ¶ 43) and that the exchange was a securities transaction. Because the misrepresentations were made in connection with securities transactions, plaintiffs’ fraud claim cannot be waived under North Carolina law say plaintiffs (Opp. Br. At 20). Defendants engaged in misrepresentations in connection with the swap of plaintiffs’ Original Equity for New Equity. Defendants reply that both, the Original Equity and New Equity, were employment benefits, did not involve the purchase or sale of securities and thus, the North Carolina law plaintiffs’ cite is inapposite.

As to the defense of ratification, under New York law, plaintiffs need not tender back contract benefits as a condition of maintaining their securities claim but defendants state they do not seek dismissal of the thirteen causes of action which relate to certain Profit Interests provided for in section 4(a)(ii)(B) 2013 Award Agreement. Those Interests are expressly preserved in ¶ 2(D) the Release Agreements (PSUF ¶¶ 90 and 108).

Defendants argue that even if there is a question as to the Release Agreements’ enforceability, plaintiffs ratified them accepting the severance payments and benefits (*id.*; *Presnell v Liner*, 10 SE2d 639, 640 [NC 1940] [Holding that a release may be ratified and affirmed if a plaintiff, knowing the circumstances of the release’s execution, accepts the benefits of it, estopping them from denying its validity]). Defendants argue that it is undisputed that plaintiffs executed the Release Agreements, accepted their severance payments and other benefits, and are now litigating claims specifically discharged by those agreements (DSUF ¶¶ 23–24). Defendants argue that, despite this, plaintiffs have never attempted to repudiate the agreements by returning the money paid to them (Reply Br. at 9). Defendants argue that plaintiffs’ claims cannot stand in the face of the releases’ unambiguous language that was executed and further ratified by plaintiffs upon acceptance of their benefits (*id.*; *Arbia v Owens-Illinois, Inc.*, No. 02-cv-00111, 2004 WL 1345091, at \*2 [MD NC 2004]; *VF Jeanswear*, 320 F Supp 2d at 422; *Alphonse v Northern Telecom, Inc.*, 776 F Supp 1075, 1079 [ED NC 1991]; *Livingston v Adams Kleemeier Hagan*

*Hannah & Fouts, PLLC*, 594 SE2d 44, 49 [NC Ct App 2004]). Consequently, defendants argue they are entitled to summary judgment on these ten causes of action (Reply Br. at 9).

#### IV. DISCUSSION

The motion for summary judgment shall be granted.

The complaint alleges misrepresentations with respect to procurement of the 2013 Award Agreement, not with respect to execution of the Release Agreements a year later. Accordingly, there is no basis for plaintiffs' attack on the Release Agreements on grounds of fraud. Plaintiffs' claims for Profit Interests are not barred by the Release Agreements but the parties dispute whether the defendants made misrepresentations in connection with the swap provided for in connection with the 2013 Award Agreements which is at the heart of plaintiffs' claims.<sup>4</sup> Plaintiffs' attempt to void the 2013 Award Agreements as products of fraud is barred by the Release Agreements.

The Release Agreements state unambiguously that plaintiffs Brown, Elstad, Goeken, Homan, and Sampere each waived the right to bring any claim against CPI with an exception for claims relating to the contractual call or valuation of plaintiffs' vested Profits Interests as governed by Section 4(a)(ii)(B) of the 2013 Award Agreements. Per summary judgment requirements, defendants successfully met their burden and, consequently, the burden has shifted to the plaintiffs to demonstrate no waiver has taken place. Here, each of plaintiffs' arguments fails to meet the burden. Where plaintiffs argue that defendants failed to plead the Release Agreements in their answer, defendants correctly pointed out that, in fact, they had (*see* Reply at 3-4). Where plaintiffs asserted that the Release Agreements were ambiguous or must be understood in context, they failed to show how the contracts' language was in any way not clear. Plaintiffs also tried unsuccessfully to argue that the exemption for the 2013 Awards Agreements somehow extended beyond the narrowly drafted and unambiguous exemption. Further, plaintiffs failed to show how defendants making a different argument on a motion to dismiss (regarding the Repurchase Agreement) invalidated this argument (regarding the Release Agreements) when later made on a motion for partial summary judgment (*see id.* at 5). Finally, plaintiffs' argument that the state securities law claims were valid here was successfully rebutted by defendants' argument that those laws did not apply to these circumstances (*see id.* at 12-14). Specifically, the Blue-Sky laws on which plaintiffs rely are limited to release of securities claims in connection with the purchase, acquisition on

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<sup>4</sup> Whether the rights plaintiffs seek to recapture are as valuable as plaintiffs believe is not before the court at this point (*see* Doc. No. 129).

receipt of investment advice (*see* N. C. Gen. Stat. ¶¶49.3-71[i]). The Release Agreements were executed in connection with the receipt of severance payments for accrued time off and other benefits (*see* Reply at 13). Plaintiffs' forfeiture of their unvested Profits Interests was not the sole of a security. Moreover, the forfeiture occurred automatically upon their termination, not the execution of the Release Agreements (*id.*). As the Release Agreements are valid, defendants' motion for summary judgment must succeed.

The court has considered the remaining arguments and finds them unavailing.

Accordingly, it is hereby

**ORDERED** that the motion for partial summary judgment (Motion Sequence Number 003) of defendants is hereby GRANTED and the First through Eighth, Fourteenth and Fifteenth Causes of Action are DISMISSED; and it is further

**ORDERED** that counsel for the parties shall appear by SKYPE for Business for a status conference on Monday, June 8, 2020 at 10:00 AM. Counsel for defendants shall collect the email addresses of all counsel who should be invited and provide them in a single email addressed to Mr. Rivera, [mriviera@nycourts.gov](mailto:mriviera@nycourts.gov) not later than June 1, 2020.

This constitutes the decision and order of the court.

**DATED: May 14, 2020**

**E N T E R,**

  
**O. PETER SHERWOOD J.S.C.**