

**Adler v Molner**

2022 NY Slip Op 31228(U)

April 12, 2022

Supreme Court, New York County

Docket Number: Index No. 154462/2017

Judge: David B. Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAVID B. COHEN PART 58**

*Justice*

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**INDEX NO. 154462/2017**

MARC ADLER, ROBERT COHEN, PETER FORSSTROM,  
MICHAEL MCQUARY, and JONATHAN DAVIDOFF,

Plaintiffs,

**MOTION SEQ. NO. 017**

- v -

DAVID MOLNER, NAOMI MOLNER, JOSEPH MELI, and  
ADVANCE ENTERTAINMENT, LLC,

Defendants.

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 017) 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 536, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 608

were read on this motion to/for SUMMARY JUDGMENT.

In motion sequence number 017, plaintiffs Marc Adler (Adler), Robert Cohen (Cohen), Peter Forsstrom (Forsstrom), Michael McQuary (McQuary), and Jonathan M. Davidoff, Esq. d/b/a JMD SEPT Quality Meats Miami, LLC (Davidoff) (collectively, plaintiffs) move, pursuant to CPLR 3212, for an order granting them summary judgment on liability as against defendant David Molner (Molner) and awarding them compensatory and punitive damages under their first, second, fourth and ninth causes of action, for fraud, fraudulent inducement, fraudulent misrepresentation, and aiding and abetting the alleged fraud of defendant Joseph Meli (Meli),

respectively (see second amended complaint [SAC] [NYSCEF Doc No 489], at ¶¶ 216-50; 260-77; and 322-31).<sup>1</sup>

Molner opposes plaintiffs' motion and cross-moves, pursuant to CPLR 3126, for an order striking all or part of plaintiffs' pleadings or, in the alternative, precluding plaintiffs from relying on information disclosed by defendants and/or third parties in discovery in this matter, as a sanction for plaintiffs' violation of a confidentiality order in this action and their willful failure to disclose relevant documents in discovery.

### **Factual and Procedural Background**

This action involves an alleged scheme by defendants to defraud plaintiffs, by inducing them to participate in sham ticket resale investments in concert tours for such artists as the Grateful Dead and Adele. Defendants purportedly raised money from private investors such as plaintiffs to purchase blocks of the "most sought after [concert] tickets" for highly popular performers before they went on sale to the public, and then resold the tickets to brokers or corporate clients at a large premium (see declaration of Marc Adler, dated May 6, 2020 [Adler dec] [NYSCEF Doc No. 482], ¶¶ 6-7).<sup>2</sup> Plaintiffs allege that defendants, including Molner, operated this ticket resale business as a Ponzi scheme<sup>3</sup> (see transcript of April 28, 2021 oral

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<sup>1</sup> Defendant Advance Entertainment, LLC (Advance) "was a limited liability company created under the laws of the State of New York with its principal place of business in New York County, New York. Meli and Molner are alleged to be partners in Advance, and Molner was an investor, strategic advisor, and investor recruiter for Advance" (*id.* ¶ 10).

<sup>2</sup> As discussed below, plaintiffs submitted declarations with their initial moving papers, instead of affidavits, as required by CPLR 3212 (b). Plaintiffs sought to cure this mistake by having each plaintiff prepare and execute an affidavit in reply, before a notary public, adopting and incorporating the contents of their previously submitted declarations (see, *e.g.*, affidavit of Marc Adler, executed June 10, 2020 [Adler aff] [NYSCEF Doc No. 531]).

<sup>3</sup> "In a Ponzi scheme, the perpetrator convinces a victim to hand over money by falsely promising to invest the funds in a way that will generate a return on the victim's principal. The fraudster does not invest the money as promised, but instead finds another victim and uses that person's money to pay back the original victim, plus a phony 'return,' thus attracting new investors and avoiding scrutiny when the first victim seeks to redeem the investment. The fraudster, to avoid detection, must keep going,

argument [April 28, 2021 Tr] [NYSCEF Doc No. 608], at 7:19 – 8:7), and that Molner was fully aware of its fraudulent nature from the outset of his involvement. Molner denies these allegations and asserts that he “was misled by Mr. Meli the same way [plaintiffs] were” and that he “believed in good faith” that he committed no wrongdoing (*id.*, 46: 4-12).

Molner also cross moves for an order, pursuant to CPLR 3126, striking all or part of plaintiffs’ pleadings or, in the alternative, for such preclusive relief as this Court deems just and proper. Molner asserts that these sanctions should be imposed against plaintiffs because of their violation of the Court’s Confidentiality Order, entered March 20, 2018 (NYSCEF Doc No. 510), and their failure to abide by two Court Orders directing plaintiffs to provide outstanding discovery to Molner.

Molner asserts that the declaration of his co-defendant, Joseph Meli, dated June 6, 2019 (Meli declaration [NYSCEF Doc No. 487]), which plaintiffs submit in support of their motion, is “a false affidavit” which Meli did not read. He also notes that Meli’s criminal defense attorney expressly told Davidoff that he was not authorized to share the Meli declaration with anyone. Indeed, in an email chain annexed as exhibit A to Molner’s affidavit, sworn to May 19, 2020 (Molner aff) (NYSCEF Doc No. 507), Meli’s defense counsel, César de Castro, questioned the propriety of Davidoff’s drafting a declaration for and meeting “with a counseled individual,” without his attorney present, and stated that Meli had told him that Davidoff had “signed a document in the presence of a Bureau of Prisons witness in which [Davidoff] agreed not to disclose the declaration without his consent.”

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finding more and more victims to generate more and more cash to make payouts to an ever-growing roster of past victims.”

4F NY Prac, Com Litig in NY State Courts § 129:49 (5th ed.).

Molner also contends that plaintiffs violated the Confidentiality Order by providing documents exchanged during discovery in this action, prominently marked as “Confidential,” to the producers of a CNBC documentary television series titled “American Greed,” which were shown on the broadcast. Molner identifies those documents as the PowerPoint presentations, discussed *infra*, which Davidoff annexed as exhibits D and D2 (NYSCEF Doc Nos 492 and 493) to his Attorney Affirmation in Support (NYSCEF Doc No. 488). Molner asserts that plaintiffs intentionally committed a further violation of this Confidentiality Order by failing to file the PowerPoint presentations with the Court under seal, or with sufficient redactions, to satisfy the Confidentiality Order.

Molner further contends that plaintiffs have continually refused to provide documents responsive to his April 4, 2018 requests for production, which he sought to compel by cross motion in sequence number 015, despite this Court’s February 5, 2020 decision and order (February 5, 2020 Order), which directed plaintiffs to respond to all valid outstanding discovery requests within 45 days (see Molner aff, exhibit B [NYSCEF Doc No. 509]). Molner alleges that plaintiffs have also refused to fulfill their promise, made at a hearing before this Court more than two years ago, to provide Molner with copies of a large number of emails which plaintiffs had received from Meli “within seven days” (*id.*, exhibit K [transcript excerpts of September 11, 2019 hearing], 60:25 – 61:11 [September 11, 2019 Order] [NYSCEF Doc No. 518]).

Plaintiffs deny Molner’s contentions, arguing that they provided all discovery required by, among other things, providing documents to Molner in January and May 2018, as well as in October 2019 (see affidavit of Jonathan Marc Davidoff, sworn to June 14, 2020 [Davidoff aff] [NYSCEF Doc No. 530], ¶ 108), while Molner has failed to provide the discovery he owes (*id.* ¶ 109). However, plaintiffs do not even address Molner’s assertion that they have failed to provide

any documents to satisfy the Court's February 5, 2020 Order. With respect to the Meli emails, plaintiffs argue that Meli's counsel produced those documents to plaintiffs and Molner in May 2018, premising this conclusion, first, on an email sent by Meli's counsel, dated May 4, 2018, addressed to both plaintiffs' attorneys and Molner's, stating that the documents would be sent out by Federal Express and, second, on the fact that Plaintiffs' counsel received these documents (see Davidoff aff, ¶ 116 and exhibit 11). However, plaintiffs' receipt of this discovery does not prove that it was ever delivered, or even sent, to Molner. Meli's May 2018 production occurred almost four years ago. Plaintiffs were ordered by this Court over two years ago to provide Meli's email production to Molner (Molner aff exhibit K). Although plaintiffs' counsel assured this Court that these documents would be provided to Molner within seven days, such disclosure never occurred.

### **Legal Conclusions**

#### **Summary Judgment Standard**

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]) [internal citations omitted]. To prevail, the movants must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor (*GTF Mktg. v Colonial Aluminum Sales*, 66 NY2d 965, 967 [1985]). Once the movants have made their showing, the burden shifts to the opposing party, to submit proof in admissible form sufficient to show a question of fact exists, requiring trial (*Kosson v Algaze*, 84 NY2d 1019, 1020 [1995]).

In deciding a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmovant (*Prine v Santee*, 21 NY3d 923, 925 [2013]). Party affidavits and other proof must be examined carefully “because summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue” (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978] [citation and internal quotation marks omitted]). Still, “only the existence of a bona fide issue raised by evidentiary facts and not one based on conclusory or irrelevant allegations will suffice to defeat summary judgment” (*id.*).

“On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). “Summary judgment is a drastic remedy, to be granted only where the moving party has ‘tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact’” (*id.*, quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), “and then only if, upon the moving party's meeting of this burden, the non-moving party fails ‘to establish the existence of material issues of fact which require a trial of the action’” (*id.*, quoting *Alvarez*, 68 NY2d at 324). “The moving party's ‘[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*’” (*id.*, quoting *Alvarez*, 68 NY2d at 324 [alterations and emphasis in original]).

Where a plaintiff is the movant, “[t]here must be supporting affidavits proving the cause of action, and that clearly and completely, by affiants who speak with knowledge” (*Harry Winston, Inc. v Leggett*, 116 NYS2d 245, 247 [Sup Ct, NY County 1952], quoting *Curry v Mackenzie*, 239 NY 267, 269 [1925] [Cardozo, J.]). “Judgment should not be granted unless plaintiff has clearly made out a case [and] upon this motion the allegations of the complaint

cannot be accepted as proof of the facts therein alleged (*id.* [citations omitted]). “[S]ummary judgment . . . should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits” (*Brunetti v Musallam*, 11 AD3d 280, 280-81 [1st Dept 2004], citing, *inter alia*, *Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]).

Plaintiffs seek summary judgment against Molner on four fraud-based causes of action: common law fraud (first cause of action), fraudulent inducement (second cause of action); fraudulent misrepresentation (fourth cause of action), and Molner’s aiding and abetting of Meli’s fraud (ninth cause of action). To prevail, plaintiffs must produce evidentiary proof in admissible form sufficient to warrant granting summary judgment in their favor on one or more of these claims (*GTF Mktg.*, 66 NY2d at 967).

Since each of these causes of action are fraud-based, plaintiffs must first establish prima facie the elements of fraud. “The required elements of a common-law fraud claim are ‘a misrepresentation or a material omission of fact which was false and known to be false by [the] defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury’” (*Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578-79 [2018], quoting *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]).<sup>4</sup> “Justifiable reliance is a fundamental precept of a fraud cause of action, as is resulting injury” (*Ambac Assur. Corp.*, 31 NY3d at 579 [internal quotation marks and citations omitted]). The circumstances constituting the fraud must be stated in detail (CPLR 3016 [b]). “The issues of material misrepresentation and

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<sup>4</sup> To show scienter, or a culpable intent to deceive, “plaintiffs must establish that defendant knew, at the time they were made, that the representations were false” (*Abrahami v UPC Constr. Co.*, 224 AD2d 231, 233 [1st Dept 1996] [citations omitted]).

reasonable reliance, essential elements of a fraud claim, are not subject to summary disposition” (*Brunetti*, 11 AD3d at 281 [citations omitted]).

To sustain a cause of action for fraudulent inducement, a claimant must also show the elements of fraud, that is, a “misrepresentation or a material omission of fact which was false and known to be false by [defendant], made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*McCabe v Green*, 39 Misc 3d 270, 276 [Sup Ct NY County 2013], quoting *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]). The person asserting fraudulent inducement must also show that he is the other party to the contract, or one acting on behalf of that party (*National Union Fire Ins. Co. of Pittsburgh, Pa. v Worley*, 257 AD2d 228 [1st Dept 1999]).

Similarly, a claim for fraudulent misrepresentation must show “a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co.*, 88 NY2d at 421).

Finally, a cause of action for aiding and abetting fraud must show: “(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud” (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009] [internal quotation marks and citations omitted]).

“A plaintiff asserting a claim for fraud must furnish ‘clear and convincing evidence as to each element of the claim’” (*Fifth Ave Ctr., LLC v Dryland Properties, LLC*, 2020 NY Slip Op

30015[U], \*33 [Sup Ct, NY County 2020], quoting *Basis PAC-Rim Opportunity Fund (Master) v TCW Asset Mgmt. Co.*, 149 AD3d 146, 149 [1st Dept], *lv denied* 30 NY3d 903 [2017]). “Clear and convincing evidence is evidence that satisfies the factfinder that it is highly probable that what is claimed actually happened” (*Matter of Gail R.*, 67 AD3d 808, 811 [2d Dept 2009] [citation omitted]). “Clear and convincing evidence is a higher, more demanding standard than the preponderance standard, and it is evidence that is neither equivocal nor open to opposing presumptions” (*id.*, 67 AD3d at 811-12 [internal quotation marks and citations omitted]).

### **The Meli Declaration**

Plaintiffs focus their arguments for summary judgment largely on the Meli declaration, which cannot be considered on this motion. The Meli declaration, a 12-page document with 82 pages of exhibits, bears the caption of this action. The venue designated on its first page indicates that it was executed in the “COUNTY OF NEW YORK” but, on page 12, Meli wrote by hand “6/6/19 MDC, BK, NY” under his signature. Plaintiffs’ counsel has explained that this notation indicates that Meli signed the document at the federal Metropolitan Detention Center in Brooklyn, NY (April 28, 2021 Tr, 14:3 – 10 [NYSCEF Doc No. 608]).

New York courts do not accept declarations as supporting proof on summary judgment motions (see CPLR 3212 [b] [summary judgment motion “*shall* be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions”] [emphasis added]).

An affirmation, not sworn under oath, is accepted on a summary judgment motion in lieu of an affidavit only where it is made by “an attorney admitted to practice law in New York State, or by a physician, osteopath or dentist, authorized by law to practice in the state, who is not a

party to th[e] action,” and who subscribes and affirms that his statement is “true under the penalties of perjury” (CPLR 2106 [a]), or made by a

“person . . . physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ... day of ....., ....., under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that I am physically located outside the geographic boundaries of the United States, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)"

(CPLR 2106 [b]).

Plaintiffs assert that their failure to present the Meli declaration in the form of a duly sworn affidavit is a mere technical defect and that Molner’s effort to have it excluded from consideration on plaintiffs’ motion raises form over substance. Citing, *inter alia*, *Furtow v Jenstro Enter., Inc.* (75 AD3d 494 [2d Dept 2010]), plaintiffs argue that New York does not require any specific form of oath and that, in other cases, such as *Sirico v F.G.G. Prods., Inc.* (71 AD3d 429 [1st Dept 2010]), non-conforming affidavits have been deemed admissible for the purposes of summary judgment.

The Meli declaration (NYSCEF Doc No. 487) begins on page 1 with, “I, JOSEPH MELI, being duly sworn state that” and ends on page 12 with Meli “swear[ing] under penalty of perjury that the above facts are true to the best of my knowledge.” The document has a signature line for Meli, which he signed. Directly below his signature, Meli wrote by hand “6/4/19” and “MDC, BK, NY,” indicating the date and location of the document’s execution (that is, June 4, 2019, and Metropolitan Detention Center, Brooklyn, New York) (*id.* at 12). The Meli declaration does not

have a jurat, a notary signature or a printed line for that signature. As noted above, the venue designation on the first page, indicating the jurisdiction in which the document was to be executed, is incorrect, inasmuch as the designation states “COUNTY OF NEW YORK” while Meli wrote “MDC, BK, NY” below his signature as the place of execution.

Although this Court may disregard irregularities in form, an affidavit must satisfy certain minimum requirements which are not met here. For example, in *Sirico*, the Appellate Division found that the “plaintiffs’ affidavits [were] admissible” because “[e]ach contains the affiant’s statement that she was duly sworn and believes the affidavit’s contents to be true and correct, *and the notary’s statement that the affiant personally appeared, proved her identity, and did further acknowledge that she executed the foregoing for the purposes therein contained*” (71 AD3d at 434 [emphasis added, internal quotation marks and citations omitted]).

“There is no specific form of oath required in this State, other than that it be ‘calculated to awaken the conscience and impress the mind of the person taking it in accordance with his *[sic]* religious or ethical beliefs’” (*Collins v AA Truck Renting Corp.*, 209 AD2d 363, 363 [1st Dept 1994], quoting CPLR 2309 [b]). “Whatever the form [of oath] adopted, [however,] it must be in the presence of an officer authorized to administer it, and it must be an unequivocal and present act by which the affiant consciously takes upon himself the obligation of an oath” (*Fleigel v Blonder*, 121 Misc 2d 502, 504 [Sup Ct, Nassau County 1983], quoting *Bookman v City of New York*, 200 NY 53, 56 [1910]).

Plaintiffs’ counsel asserts that they were unable to obtain an affidavit or the like from Meli because Davidoff could not act as notary, being an interested party in this action, and because it was extremely difficult to obtain the services of a notary public for an affiant in the custody of the Federal Bureau of Prisons (see Davidoff aff [NYSCEF Doc 530] ¶ 71). While it

is true that Meli was in federal custody at that time, it is not true that his incarceration made it unduly difficult for him to execute a written statement, under oath, comparable to an affidavit and acceptable under New York State law.

The Federal Bureau of Prisons' "Program Statement" No. 1315.07, dated November 5, 1999, accessible at MDC Brooklyn's website at <https://www.bop.gov/locations/institutions/bro/>, provides guidelines for reasonable inmate "access to legal materials and counsel, and reasonable opportunity to prepare legal documents" (Program Statement, paragraph 1).<sup>5</sup> Paragraph 16 of the Program Statement, provides, in pertinent part:

**"b. Oaths.** Unsworn declarations are not legally sufficient for declarations on depositions, for oaths of office, or for oaths required to be taken before an official other than a notary public. *In addition, documents for submission to state courts and state agencies may require a sworn declaration. For such documents, it is the Bureau's policy to administer oaths prior to witnessing the signatures of persons executing these documents.*

(1) **Administering Oaths.** Title 18 U.S.C. § 4004 provides:

**'The wardens and superintendents, associate wardens and superintendents, chief clerks, and record clerks, of Federal penal or correctional institutions, may administer oaths and take acknowledgements of officers, employees, and inmates of such institutions, but shall not demand or accept any fee or compensation therefor.'**

For the purposes of this Program Statement, institution Case Managers are considered to be chief clerks.

The person giving the oath must face the oath administrator and raise his or her right hand while the administrator states:

You do solemnly, sincerely and truly swear that the various matters and things set forth in this paper which you are about to sign before me are true, and that you do this under pains and penalties of perjury. After receiving the affirmative answer, the proper stamp is affixed in the necessary places, and the paper(s) duly signed by parties in the places provided"

<sup>5</sup> This document is found at [https://www.bop.gov/locations/institutions/bro/PS1315\\_07.pdf](https://www.bop.gov/locations/institutions/bro/PS1315_07.pdf)

(*id.* Paragraph 16 [b] [1] [italics added, bolding in original]).

Had plaintiffs adhered to these guidelines and 18 USC Section 4004, the Meli declaration may have been deemed valid (see *Elias v Ridgeway*, 2021 WL 5044418, \*2 [Supreme Ct, Queens County, Sept. 20, 2021, No. 708755/21] [affidavit opposing defendant's motion to dismiss, purportedly signed by plaintiff at "MDC Brooklyn," held inadmissible because signature under plaintiff's was illegible and jurat failed to indicate whether person administering oath was authorized to do so under 18 USC § 4004]). However, the absence of a jurat executed by a New York State notary public or a prison official authorized to administer oaths under 18 USC Section 2004 renders the Meli declaration a nullity.

Plaintiffs' counsel posits that he now should be permitted to attest to the truthfulness and accuracy of Meli's statements made on the day he saw Meli sign the declaration. However, to correct the Meli declaration as he did other declarations filed with plaintiffs' moving papers, plaintiffs would have to go back to Meli with the declaration and an appropriate affidavit, have Meli read the declaration again, have a notary public administer him a proper oath, in his physical presence, and then have Meli swear to the truth of the declaration and the averments in the affidavit before the notary could validly execute the affidavit's jurat (*Bookman*, 200 NY at 56).

### **Plaintiffs' Declarations and Affidavits**

Molner takes issue with plaintiffs' causes of action sounding in fraud, arguing that plaintiffs cannot show either their reasonable reliance upon a misrepresentation or his scienter. "The issues of material misrepresentation and reasonable reliance, essential elements of a fraud claim, are not subject to summary disposition" (*Brunetti*, 11 AD3d at 281 [citations omitted]). Even if this Court were to ignore the First Department's rule in *Brunetti*, plaintiffs' other

declarations are also deficient, because they are rife with conclusory factual assertions and reiterations of allegations which plaintiffs gleaned from the Meli declaration. However, “A conclusory affidavit or an affidavit by an individual without personal knowledge of the facts does not establish the proponent’s prima facie burden” on a motion for summary judgment (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-85 [2005] [citation omitted]).

As a threshold matter, plaintiffs erred by submitting declarations, rather than properly notarized affidavits, from Adler, Cohen, Forsstrom, McQuary, and Davidoff, in their initial moving papers. Plaintiffs sought to cure these defects by having each declarant prepare an affidavit in reply, adopting and incorporating the factual allegations of their respective declarations, and executed these affidavits before notaries public in their respective home states.

The reply affidavits plaintiffs executed outside of the State of New York lack the certification required by CPLR 2309 (c). While the absence of such a certificate is considered a mere irregularity, rather than a fatal defect (*Matapos Tech. Ltd. v Compania Andina de Comercio Ltda*, 68 AD3d 672, 673 [1st Dept 2009] [“As long as the oath is duly given, authentication of the oathgiver’s [*sic*] authority can be secured later, and given nunc pro tunc effect if necessary”] [citations omitted]), it would serve no purpose for plaintiffs to secure certifications from their out-of-state oath givers for their reply affidavits now, as the factual assertions in their initial submissions are not sufficient to meet plaintiffs’ burden at summary judgment.

In his declaration, Adler identifies two transactions in which he was involved. The first was a possible Grateful Dead concert tour (Dead deal) (Adler dec ¶ 8). The second was a concert tour by Adele (Adele deal) (*id.*). With respect to the Dead deal, Adler asserts that Molner made several misrepresentations to him, and to Davidoff and Forsstrom, to induce their investment,

including Molner's false assertion that he had invested in the Dead deal himself (*id.* ¶¶ 13-20).

Adler, however, claims that he learned that Molner had not invested in the Dead deal from "review[ing] discovery in this case, including Meli's own account of the facts in his declaration" (*id.* ¶ 14).

Following their investment, Molner allegedly advised Adler that the terms of the Dead deal had been modified in various ways but assured them that the investment remained "very profitable" and advised them not to withdraw their investment (*id.* ¶¶ 22-23). Adler passed this information on to Davidoff and Forsstrom, told them that he would remain in the Dead deal, and that it was up to them whether to remain or withdraw (*id.* ¶ 24).

As time passed and they received no news, Adler claims that he, Davidoff, and Forsstrom became concerned about the progress of the Dead deal. Adler states that he contacted Molner, who responded with a group email with unspecified "general information," which allayed their concerns (*id.* ¶¶ 25-26). Adler asserts that he believed the "general information" in this email came from Meli but "later discovered" that Meli never provided any information to Molner about ticket sales and that "Molner fabricated the information that he communicated to me and the other investors" (*id.* ¶ 27). Adler does not identify the facts he "later discovered" which changed his belief, or their source, or the basis for his contention that "Molner fabricated the information" he had provided to them.

The last scheduled performance on the Dead concert tour was December 31, 2015. Adler states that Molner said that the payout on the Dead deal was to occur in early 2016 (*id.* ¶ 28), and alleges that, "[i]n late December 2015 into the first two months of 2016, Molner solicited" him and other investors to roll over their investments from the Dead deal into the upcoming Adele deal (*id.* ¶ 29). In his solicitations, Molner made representations about the large cash

commitment Advance made for premium seats at Adele's concert series, the anticipated demand for tickets, and the high investment returns the tickets were expected to garner (*id.* ¶ 30).

Initially, Adler chose not to roll over his return on the Dead deal into the Adele deal (*id.* ¶ 34). On or about February 16, 2016, Adler received his distribution from the Dead deal. Adler asserts that his return "was substantially lower than Molner had told [him] he expected" but conceded that the Dead deal was profitable, reaping Adler "an approximate 27% return on his investment" (*id.* ¶¶ 35-36).

Adler notes that, on or about February 2, 2016, he received an email from Molner (annexed to the Adler dec as exhibit B) in which Molner set forth calculations of the Dead deal returns. In that email, Molner questioned why investors had expressed fears of not receiving a payout. Adler asserts that this was deceptive because, based on allegations in the Meli declaration, Molner knew at the time that "he was stealing and misleading the investors" (*id.* ¶¶ 37-38).

Adler states that, based on the Dead deal's profitability and Molner's representations about its prospects, he agreed to invest in the Adele deal (*id.* ¶ 39). Adler maintains that, in entering the Adele deal, he relied solely on information provided to him by Molner (*id.* ¶ 42). Adler introduced Molner to plaintiffs Cohen and McQuary, and Molner provided the same information regarding the Adele deal to them, as well as to Davidoff and Forsstrom, including Molner's representation that he had also invested in the Adele deal (*id.* ¶ 43).

Adler states that he entered a funding agreement (Adler dec ex C) in connection with the Adele deal. Adler asserts that the agreement states that Advance had already purchased \$4 million worth of tickets for the Adele concert series, had the right to purchase up to \$15 million more, and "that Advance had procured insurance to protect their investment" (*id.* ¶ 44). Adler

insists that Molner created the funding agreement for Adler's investment in the Adele deal and that the information in the agreement was sourced only from "his own mind" (*id.* ¶ 45). Adler does not state the basis for either of these conclusory statements.

Adler confirmed his investment in the Adele deal on or about February 26, 2016, and told Forsstrom, Davidoff, Cohen, and McQuary about his decision and Molner's representations. At that same time, Molner told Adler that any of his friends could obtain VIP tickets to Adele's performances for their own use if they invested in the deal (*id.* ¶¶ 46, 51).

Adler asserts that Molner had represented to him and the other plaintiffs that "multiple large institutions were participating in Advance's ticket business," to encourage their investment in Advance's deals (*id.* ¶¶ 56-57). As an example, Adler points to a PowerPoint presentation addressed to prospective capital partners which Molner made and sent to Adler, Cohen, and other investors, to "bolster his alleged involvement in Advance" and his role as a "strategic advisor" (*id.* ¶ 58). Adler does not state when he received the PowerPoint presentation. Molner argues in his opposition that the PowerPoint presentation was sent to plaintiffs *after* their investments in the Adele deal, and so could not have been something which induced them, or upon which they relied, to enter that transaction. Molner's argument is supported by plaintiffs' own submissions. For example, in his declaration, Cohen describes his execution of his funding agreement for the Adele deal "on or about March 2, 2016" and his wire transfer of investment funds "shortly thereafter" (Cohen dec ¶ 8 [NYSCEF Doc No. 485]). Davidoff asserts that Molner's PowerPoint presentation, annexed as an exhibit to his affirmation (see Davidoff affirmation, sworn to May 6, 2020, ¶ 6 [NYSCEF Doc No. 488]), was an attachment to an email that was sent to Cohen on April 15, 2016, more than 6 weeks *after* he made his full investment by wire transfer.

Similarly, in his declaration, Davidoff asserts he had concerns about investing with Molner and only agreed to invest after Molner provided him with information he sought. For example, Molner told Davidoff that Advance had already purchased tickets for the Adele concert tour, even though Molner allegedly knew “no tickets had been purchased and the whole investment was a Ponzi scheme” (Davidoff declaration, dated May 6, 2020 [Davidoff dec], ¶ 15). Davidoff does not state the basis for his belief that Molner knew, at that time, that Advance had not purchased Adele tickets and that his arrangement with Meli was fraudulent.

Davidoff also asserts that Molner told him that problems with the Dead deal arose from an “illness with the talent” but that Adele was a much bigger celebrity and so would be a “profitable ‘hit’” (*id.*). Davidoff asserts these were “false representations” which were intended to induce his investment in the Adele deal. The first representation, however, was true (see <https://www.rollingstone.com/music/music-news/grateful-deads-phil-lesh-reveals-bladder-cancer-battle-193138/>). The second representation was not an assertion of past or present fact but instead combined an expression of opinion and a prediction and so cannot form the basis of a cause of action for fraud (*HGSG-NA Land Power, LLC v PSEG Power LLC*, 2016 WL 4539487, \* 4 [NY Sup Ct NY County, Aug 31, 2016] [Trial Court Order], quoting *Koagel v Ryan Homes, Inc.*, 167 AD2d 822, 823 [4th Dept 1990] [fraud cannot be premised on “opinion or predictions of something which it is hoped or expected will occur in the future” but “must relate to a past or existing fact, or something equivalent thereto”] [citations omitted]).

### **CPLR 3126 Sanctions**

“CPLR 3126 provides that if a party ‘refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed ..., the court may make such orders with regard to the failure or refusal as are just’” (*Han v New York City Tr.*

*Auth.*, 169 AD3d 435, 435 [1st Dept 2019]). “It is within the motion court's discretion to determine the nature and degree of the penalty” (*id.* citing *Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]), “and the sanction will remain undisturbed unless there has been a clear abuse of discretion” (*id.* citing *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

The statute’s “list of nonexclusive sanctions” and its grant of leave to “fashion orders ‘as are just’ . . . broadly empowers a trial court to craft a conditional order – an order that grants the motion and imposes the sanction ‘unless’ within a specific time the resisting part submits to the disclosure” (*Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 79 [2010] [citations omitted]).

Here, plaintiffs have failed to provide discovery in accordance with the Court’s September 11, 2019 and February 5, 2020 Orders. Therefore, plaintiffs are precluded from offering any documents, validly requested but not previously produced, that are encompassed in the September 11, 2019 and February 5, 2020 Orders, into evidence at trial unless plaintiffs produce those documents to Molner by May 11, 2022.

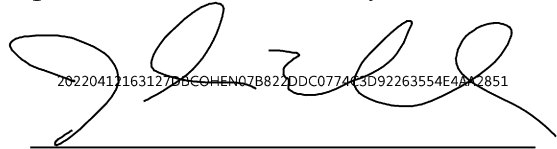
Accordingly, it is hereby:

ORDERED that plaintiffs’ motion for summary judgment against defendant David Molner on their first, second, fourth, and ninth causes of action is denied; and it is further

ORDERED that Molner’s cross motion for discovery sanctions under CPLR 3126 is granted to the extent that plaintiffs, having failed to comply with the Orders of this Court of September 11, 2019 and February 5, 2020, and having failed to present any excuse for such conduct, are precluded from offering any evidence in support of their causes of action against Molner from the documents required by the September 11, 2019 and February 5, 2020 Orders,

which plaintiffs have failed to produce, unless said documents are provided to defendant Molner on or before May 11, 2022, and the cross motion is otherwise denied; and it is further

ORDERED that, if plaintiffs produce some or all of the documents outstanding under the September 11, 2019 and February 5, 2020 Court Orders, plaintiffs' counsel is directed to e-file an affirmation of compliance as to what documents were produced on or before May 11, 2022.



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4/12/2022  
DATE

DAVID B. COHEN, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE