Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgt. LLC
2017 NY Slip Op 31515(U)
July 17, 2017
Supreme Court, New York County
Docket Number: 653468/2015
Judge: Shirley Werner Kornreich

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

WIMBLEDON FINANCING MASTER FUND, LTD., Index No: 653468/2015

Plaintiff, **DECISION & ORDER**

-against-

WESTON CAPITAL MANAGEMENT LLC, WESTON CAPITAL ASSET MANAGEMENT LLC, PBCWESTON HOLDINGS, LLC, ALBERT HALLAC, JEFFREY HALLAC, KEITH WELLNER, JASON GALANIS, JOSEPH BIANCO, GARY HIRST, EUGENE SCHER, MARSHALL MANLEY, ARIE JAN VAN ROON, LEONARD DE WAAL, ARIE BOS, KEITH LASLOP, KIA JAM, PAUL PARMAR, ALEX WEINGARTEN, DAVID BERGSTEIN, DPRE ENTERPRISES LLC, GION FUNDING SETTLEMENTS, INC., KAMBE ASSET MANAGEMENT GROUP INC., CYRANO GROUP INC. f/k/a GRAYBOX LLC, ADVISORY IP SERVICES INC. f/k/a SWARTZ IP SERVICES, INC., ISKRA ENTERPRISES, LLC, ASIA CAPITAL MARKETS LIMITED, LLC s/h/a ASIA CAPITAL MARKETS, LTD., GENERAL HEALTH TECHNOLOGIES, LLC s/h/a GENERAL HEALTH TECHNOLOGIES, LIMITED, LLC, K JAM MEDIA, INC., GEROVA MANAGEMENT, INC. and JOHN DOE(S) 1-10,

Defendants.

----------X

SHIRLEY WERNER KORNREICH, J.:

Before the court are nine motions to dismiss filed by the defendants that have appeared in this action (Seq. 17, 18, 20, 21, 22, 23, 24, 25, and 27),[1] three motions for default judgments against some of the defendants who have not appeared (Seq. 39, 40, and 42),[2] and a motion

[1] There is a tenth motion to dismiss, filed by defendant Jeffrey Hallac (Jeffrey) (Seq. 19), that is being held in abeyance pending settlement.

[2] The reasons some of the defendants are not the subject of the instant motions do not merit extensive discussion at this time, but suffice it to say there have been service issues. A fourth default judgment motion (Seq. 41) that is opposed will be addressed at a forthcoming oral argument.

concerning service on some of the non-moving defendants (Seq. 33).[3] These motions are consolidated for disposition.

The following defendants moved to dismiss the Amended Complaint (the AC) filed by plaintiff Wimbledon Financing Master Fund, Ltd. (Wimbledon): (1) Weston Capital Asset Management LLC (WCAM) and Weston Capital Management LLC (Weston or WCM) (collectively, the Weston Parties or the Weston Defendants) [Seq. 17]; (2) Leonard de Waal and Arie Bos [Seq. 18]; (3) Alex Weingarten [Seq. 20]; (4) Jason Galanis [Seq. 21]; (5) David Bergstein, Eugene Scher, Paul Parmar, Kiarash "Kia" Jam (collectively, the Bergstein Individual Movants), DPRE Enterprises, LLC (DPRE), Gion Funding Settlements, Inc. (Gion), Kambe Asset Management Group, Inc. (Kambe), Graybox, LLC (Graybox), Advisory IP Services, Inc. (Advisory IP), Iskra Enterprises, LLC (Iskra), and K Jam Media, Inc. (KJM) (collectively, the Bergstein-Controlled Entities; and collectively with the Bergstein Individual Movants, the Bergstein Movants) [Seq. 22]; (6) Keith Wellner [Seq. 23]; (7) Joseph Bianco [Seq. 24]; (8) Albert Hallac (Hallac) [Seq. 25]; and (9) Cyrano Group, Inc. f/k/a Graybox, LLC (Cyrano) [Seq. 27]. Wimbledon filed a single omnibus opposition to these motions. *See* Dkt. 551. Wimbledon also cross-moved, on Motion 17, for partial summary judgment against WCAM on its claim for breach of fiduciary duty.

Additionally, Wimbledon filed three unopposed motions for default judgments against the following defendants, who never appeared in this action: (1) Asia Capital Markets Limited,

[3] By interim order dated May 4, 2017, the court granted the portion of Motion 33 seeking a *nunc pro tunc* extension of time to serve defendant Gerova Management, Inc. (Gerova Management). *See* Dkt. 1015. References to "Dkt." followed by a number refer to documents filed in this action on the New York State Courts Electronic Filing (NYSCEF) system.

LLC (ACM) [Seq. 39]; (2) General Health Technologies, LLC (GHT) [Seq. 40];[4] and (3) Gary Hirst [Seq. 42]. Finally, Wimbledon moved by order to show cause for a *nunc pro tunc* extension of time to serve Hirst and defendant Arie Jan van Roon, and for leave to serve van Roon via Equities Media Acquisition Corp. (Equities Media) at its address on file with the California Secretary of State [Seq. 33]. Hirst opposes and cross-moves to dismiss.

For the reasons that follow, the motions are granted in part and denied in part.

I. Factual Background & Procedural History

A. Introduction

This action involves approximately 30 defendants and has already, in the pre-answer motion to dismiss stage, resulted in more than 1,000 e-filed documents and more than 40 motions. It concerns two related fraudulent schemes for which some of the defendants are going to prison pursuant to federal prosecution. Hallac and Galanis have pleaded guilty and admitted to the fraud. Hallac directly implicated Bergstein in his allocution. Bergstein has since been indicted and arrested. Galanis, the mastermind of the Gerova scheme, has been sentenced to more than a decade in federal prison.[5] That being said, a detailed understanding of the two schemes is necessary to evaluate the causes of action in this civil case and ascertain whether all of the named defendants bear responsibility for the fraudulent schemes.

---

[4] This motion also seeks to amend the caption to reflect the proper corporate names of ACM and GHT, which is granted. The amended caption appears at the top of this decision, and appropriate ordering language to effectuate the caption change is set forth at the end of this decision.

[5] The U.S. Attorney's Office explained in a February 15, 2017 press release that "[i]n addition to the prison term, [Galanis] was sentenced to three years of supervised release, and was ordered to forfeit $37,591,681.10, as well as his interests in properties in New York and Los Angeles." *See* https://www.justice.gov/usao-sdny/pr/jason-galanis-sentenced-more-11-years-prison-securities-fraud. Hirst "was found guilty after trial of conspiracy to commit securities fraud, securities fraud, conspiracy to commit wire fraud, and wire fraud." *Id.*

The first scheme was a pump-and-dump scam involving Gerova Financial Group, Ltd. (Gerova). As explained herein, after that scheme began to unravel, Wimbledon's investment in Gerova was transferred to Arius Libra, Inc. (Arius Libra). The money then allegedly was stolen by some of the defendants through a fraudulent collateralized loan scheme. The court recently discussed these schemes in two turnover proceedings, but only in broad strokes.[6] The detailed facts discussed herein are drawn from the well-pleaded allegations in the AC (Dkt. 258), which are presumed to be true unless conclusory or utterly refuted by documentary evidence.

B. The Wimbledon Fund & Its Managers

Wimbledon is a Cayman Islands investment fund that is currently undergoing a court supervised liquidation. Prior to its liquidation, Wimbledon was managed by WCAM, a Delaware LLC controlled by Hallac, Jeffrey (Hallac's son), and Wellner. WCAM is wholly owned by WCM, another Delaware LLC. Wellner was WCAM's general counsel, chief compliance officer, and chief operating officer. Jeffrey (who, as noted earlier, is settling with Wimbledon) was WCAM's managing director. Hallac, who founded WCM and WCAM, was their CEO and principal shareholder.

For the purpose of this motion, it is sufficient to explain that, prior to the alleged schemes, Wimbledon's assets were illiquid interests in hedge funds.[7] Hence, an investor in

---

[6] As discussed herein, those proceedings, which involve the Arius Libra scheme, are: (1) *Wimbledon Financing Master Fund, Ltd. v Bergstein*, Index No. 150584/2016 (the First Petition); and (2) *Wimbledon Financing Master Fund, Ltd. v Weston Capital Mgmt. LLC*, Index No. 652771/2016 (the Second Petition). As further explained herein, both of those petitions have now been decided in Wimbledon's favor.

[7] For instance, Wimbledon was involved with the Stillwater funds, which is the subject of a separate action before this court. *See Stillwater Liquidating LLC v Partner ReIns. Co.*, 2017 WL 318658 (Sup Ct, NY County 2017), *aff'd* 2017 WL 2636425 (1st Dept Jun. 20, 2017).

Wimbledon was really investing in those hedge fund interests (the Assets). What happened next was a series of complicated events in which WCAM, which managed Wimbledon, transferred the Assets on multiple occasions in exchange for equity in other companies. According to Wimbledon, all of these transfers were fraudulent in nature because the companies in which Wimbledon was given equity were scams – one (Gerova) was a sham reinsurance company, while the other (Arius Libra) was a sham medical billing company. The end result, Wimbledon claims, was that it lost its Assets, which were pledged as collateral on a loan that defaulted because the individuals who controlled Wimbledon stole the loan proceeds.

C. Gerova

The first alleged scheme involved Gerova, a Special Purpose Acquisition Company (SPAC),[8] which was originally known as Asia Special Situation Acquisition Corp. "The two original sponsors of Gerova were [non-parties Noble Investment Fund Ltd. (Noble)] and Allius Ltd., entities owned and controlled by Defendants van Roon and Hirst, respectively." AC ¶ 67. Galanis formed Gerova in March 2007. He also allegedly owned and controlled Noble. At the time, "Galanis was the subject of an SEC bar order that prohibited him from serving as an officer or director of any public company." AC ¶ 5.[9] The SEC bar order arose from Galanis' involvement with a company called Penthouse International, Inc.,[10] and later with non-party

---

[8] An SPAC, essentially an SPV, "is a collective investment structure that allows public stock market investors to invest in private equity-type transactions. SPACs are shell or blank check companies with no operations of their own, but which offer shares to the public with the intention of using the money from the sale of the shares to acquire or merge with another company." AC ¶ 67 n.4.

[9] As the SEC noted in its complaint against Galanis, Galanis agreed to the bar order in April 2007 (a mere one month after he formed Gerova). *See* Dkt. 982 at 7.

[10] *See S.E.C. v Penthouse Int'l, Inc.*, 390 FSupp2d 344, 347 (SDNY 2005).

Fund.com, Inc. (Fund.com), which Wimbledon alleges "is likely the model for the Gerova fraud." AC ¶ 4. Fund.com was implicated in a Ponzi scheme shut down by the SEC.[11] In light of the SEC bar order, Galanis' involvement with Gerova was kept a secret by WCAM.

In January 2008, "Gerova issued stock in an IPO, raising $115 million ... [which] it was required to use ... to acquire an acceptable business by January 23, 2010. Failure to do so would result in the liquidation of the SPAC and return of the $115 million raised in the IPO to the

---

[11] Wimbledon explains:

> Galanis owned and/or controlled Fund.com, a public company that was formed in January 2008 through a reverse merger with Eastern Services Holdings, Inc., a tax advisor for Nevada casinos. Fund.com purported to be a U.S. based financial services information publishing company that focused on the fund management industry. In reality, Fund.com had little or no revenue from its inception and no operating business other than providing tax advice. Its true purpose appears to have been to acquire entities like [WCM] and [a company called] Whyte Socratic, which was owned by Bianco, for the purpose of gaining control over their assets. In late 2009, Fund.com informed the public that it had to restate its financials, which it never did. Indeed, Fund.com failed to file timely SEC disclosure reports nine out of twelve times.

AC ¶ 70. Wimbledon further explains that some of the individual defendants that allegedly conspired in this case with Galanis on the Gerova transactions also were involved with Fund.com:

> Bianco served as Chairman of Fund.com. Hlavsa was Fund.com's chief financial officer. Keith Laslop was on the board of directors. Van Roon had the power to vote the largest block of shares of Fund.com through his entity, Equities Media Acquisition Corp. ("Equities Media"). Galanis was the president, treasurer and director of Equities Media. Ymer Shahini owned more than 5% of the voting shares of Fund.com. Shahini, a Galanis family friend in Kosovo, has been indicted along with Galanis in *United States v. Jason Galanis, et al.*, 15 Crim. 643 (S.D.N.Y. 2015).

AC ¶ 71.

original SPAC investors." AC ¶ 68.[12] "Gerova was originally intended to focus on investments in Asia." AC ¶ 69.

After failing to find success in Asia, and facing the prospect of having to return the $115 million if no suitable acquisition was made by January 23, 2010, Galanis set his sights on Wimbledon:

> In late October or early November 2009, upon information and belief, Bianco and Galanis contacted Hallac and made an offer to have Fund.com "purchase a substantial ownership interest in Weston," WCAM's parent company, for approximately $9.6 million. The purported buyout payment was structured such that they [sic] would receive $4 million cash up front. Hallac, Jeffrey Hallac and Wellner received their first payment of approximately $3 million in March 2010. Upon information and belief, the Hallacs and Wellner did little or no diligence relating to Fund.com before agreeing to this transaction.
>
> At the time, the Hallacs and Wellner did not inform Wimbledon's investors or its board of directors that they were approached or had agreed to be acquired by Fund.com. They failed to do so notwithstanding the fact that, one month earlier, WCAM, Wimbledon's investment advisor, represented in writing to Wimbledon investors that, because of severe liquidity constraints, the fund was going to be liquidated in its entirety and the capital returned to investors as it became available. [At the end of 2008, WCAM had suspended investor redemptions, thereby preventing investors from accessing their capital.][13] WCAM additionally represented to investors that Wimbledon's assets were valued at approximately $114 million, and that 85% of the investors' capital, approximately $95 million, would be returned within three years.
>
> Upon information and belief, **because Fund.com had no revenue and no real operating business, it acquired Weston solely to enable Gerova to gain control over the Wimbledon assets and funds under management**. Indeed, as a quid pro quo for the Weston buyout, the Hallacs and Wellner agreed to allow Gerova to acquire Wimbledon's assets in exchange "for restricted shares of

[12] "Upon information and belief, the two principal investors in the IPO were a wealthy family in Macau and a fund based in Gibraltar. Galanis apparently negotiated to receive from the Gibraltar-based fund a fee of $600,000 and entered into a consulting agreement with the fund whereby Galanis would be entitled to up to 30% of the profits the fund derived from its investment in Gerova." AC ¶ 68 n.5.

[13] This bracketed quote is from AC ¶ 73 n.6; it is reproduced here for clarity.

> Gerova stock believed to be worth approximately $85 million" even though, at the time, Gerova had no operational business. Galanis and Bianco even sweetened the deal by secretly promising to pay WCAM millions of dollars in future fees pursuant to a new management agreement with Gerova—monies that WCAM would not otherwise have received due to its arrangement at the time with the Wimbledon investors.

AC ¶¶ 72-74 (emphasis added). After Hallac was indicted, he admitted in his plea allocution that he knew that Galanis controlled Fund.com and that Galanis was barred by the SEC from being an officer or director of a public company.

Rather than liquidate the Assets and return capital to Wimbledon's investors, the Hallacs and Wellner gave control of WCM to Galanis, who then used his effective control over Wimbledon (via WCAM) to transfer the Assets to Gerova in exchange for Gerova equity. This was done pursuant to an Asset Purchase Agreement allegedly entered into on January 6, 2010 (supposedly backdated to December 31, 2009). *See* Dkt. 354 (the APA).

"Immediately thereafter, Galanis and Manley met with a Gerova advisor – the Maxim Group, LLC [Maxim] – in New York to discuss the quickly approaching expiration of the SPAC. At that meeting, Galanis and Manley were informed that the SPAC investors were unlikely to approve the purchase of any operating entity and, accordingly, that the Gerova core asset of $115 million would have to be returned to them by January 23, 2010." AC ¶ 79. "Galanis, Bianco, Manley, van Roon and Hirst now had two significant problems to solve. First, Wimbledon's investors and board of directors had to be informed that Gerova was acquiring their assets even though this investment represented a substantial departure from what they had previously been told, and from WCAM's investment strategy for Wimbledon. Second, … arrangements [needed to be made] to buy out the SPAC investors and to rig the voting to ensure that the Gerova transaction would be approved." AC ¶ 80.

On January 11, 2010, Hallac and Wellner "made a formal written presentation to the Wimbledon investors in which they emphasized the valuable opportunity Gerova presented, and represented that the transaction would 'maximize the value' of Wimbledon's assets, and provide 'a higher likelihood of near term liquidity.'" AC ¶ 81.[14] They "also represented that 'Gerova's current core asset is $115 million cash in the bank,' but failed to disclose that almost all of these funds would be returned to SPAC investors," and stated that "Gerova had 'experienced senior management and board members,' **who would be capable of purchasing and operating a reinsurance business**." *Id.* (emphasis added). Wimbledon's investors were sold on the viability of Gerova as a reinsurance company based on Manley being touted as a "'highly experienced executive in the insurance industry,' with the abilities and background to grow the 'existing re-insurance business.'" AC ¶ 82. Galanis, Hallac, and Wellner "also falsely informed certain Wimbledon investors that their approval was not required for the Gerova transaction, even though the APA provided that the five largest investors in Wimbledon had to approve the transaction." AC ¶ 84. "They also did not inform the investors **that the APA and related agreements had already been signed**." *Id.* (emphasis added).

Wimbledon alleges that "[a]fter the meeting with Maxim, Galanis realized that he and the other insiders would be unable to secure a favorable vote from the original SPAC investors before the expiration of the SPAC. Galanis thus decided to use the Gerova core asset of $115 million to buy out the SPAC investors and not, as represented to Wimbledon, to purchase an operating reinsurance business." AC ¶ 89. "On or about January 13, 2010, Galanis enlisted the assistance of Victory Park Capital Advisors, LLC ("Victory Park"), which agreed to purchase a

[14] Defendants complain that the specific investors are not identified; they can be identified in discovery.

majority of Gerova shares from some of the original SPAC investors in exchange for the bulk of the $115 million Gerova was holding in trust. Once those shares were purchased, Victory Park voted those shares in favor of the Gerova transaction." *Id.* Wimbledon alleges "[u]pon information and belief, at the time of the vote, Galanis secretly controlled (directly and through Victory Park) approximately 7.5 million ordinary shares of Gerova." *Id.* In other words, Galanis used Gerova's money to buy out dissenters so that Galanis could control enough votes to approve the deal.

Nonetheless, "[t]he vote barely passed with only 68% of SPAC investors voting in favor of the transaction." AC ¶ 90. "Between the money paid to Victory Park, which one week later sold its shares back to Gerova for a 1% fee, and the money returned to the SPAC investors who voted against the transaction, **Gerova was left with only $2.6 million in its coffers, which was plainly insufficient to buy and operate a reinsurance business**." *Id.* (emphasis added). "This critical fact was not disclosed to Wimbledon or its investors." *Id.*

Things would continue to go downhill for Gerova because "[t]he Victory Park and related transactions left only 2.6% of the IPO shares in the market, making Gerova's public float only 300,000 shares after the vote." AC ¶ 91. Consequently, Gerova received "a notice from the NYSE Amex Exchange in late January 2010, requiring the company to demonstrate that it had, among other requirements, at least 400 shareholders who owned a minimum of 100 shares each … in order to justify Gerova's public listing." *Id.* Wimbledon alleges that "[i]n response to the Amex Exchange's notice, upon information and belief, Galanis bribed an investment advisor to have 200 of his managed accounts buy 100 shares each of Gerova. As a quid pro quo, Galanis agreed to pay the financial advisor approximately $1 million worth of restricted Gerova stock, and falsely structured this payment as 'compensation' for [a prior deal made by someone else]."

AC ¶ 92. On April 15, 2010, "Manley resigned from his positions as CEO and Chairman of the Board of Gerova." AC ¶ 93.[15] Joseph Bianco replaced him. This left Gerova "without an executive with relevant experience in reinsurance, supposedly Gerova's principal business." AC ¶ 95.[16]

The AC characterizes the real purpose of Galanis' Gerova scheme as "a massive market manipulation scheme for his own personal enrichment." AC ¶ 97. Wimbledon sets forth detailed allegations concerning a classic pump and dump scheme along with attendant bribery. *See* AC ¶¶ 97-102. The federal government became aware of Galanis' actions and indicted him and some of his co-conspirators in the Southern District of New York. They also were sued by the Securities Exchange Commission (the SEC). According to the SEC's complaint, "the scheme netted Galanis, Hirst and Galanis' family approximately $20 million in illicit profits." AC ¶ 103. As noted, Galanis pleaded guilty and will serve more than a decade in prison and forfeit over $37 million.

As things became even more dire for Galanis, he sought help from "his longtime colleague," David Bergstein, the other major alleged wrongdoer in this action.[17] "Galanis and

---

[15] "For approximately four months of employment, Manley was promised severance of $650,000 annually plus $4 million in monthly installments of $100,000." AC ¶ 93.

[16] Bianco also served on the board of Fund.com. Bianco does not explain in his motion why he felt it appropriate to take over as CEO of a company for which he had no industry experience. Of course, the knowledge that Gerova was not really a reinsurance company would obviate the need for reinsurance experience. This fact, along with his association with Fund.com, on this motion to dismiss, permits a reasonable inference that Bianco was in on the fraud.

[17] As alleged, Galanis was the mastermind of the Gerova scheme, while Bergstein was the mastermind of the Arius Libra scheme, and they were aided and abetted by the Hallacs and Wellner, as well as the other individual defendants who either served as board members (e.g., van Roon), supposed industry experts (e.g., Manley), or lawyers who helped put together the fraudulent deal documents (e.g., Weingarten).

Bergstein had worked together since at least 2000, including on a business run by Galanis called Incubator Capital, Inc., in which [Graybox] invested $5 million." AC ¶ 104. Wimbledon alleges that "Bergstein's intervention was part of the plan all along." *Id.*

Bergstein allegedly agreed "to 'lend' money to Gerova in exchange for Galanis' promise that Bergstein would ultimately be given control over the Wimbledon assets." AC ¶ 104. Wimbledon explains:

> In or about October 2010, [DPRE] allegedly loaned an aggregate sum of $2 million to the Gerova subsidiary that purportedly "owned" the Wimbledon assets, WFM Holdings LLC. In or about December 2010, Bergstein-controlled Gion allegedly advanced $4.5 million to Gerova for the purchase of assets from HM Ruby Fund, L.P. (one of Wimbledon's underlying funds), and then these assets were sold to Bergstein. Finally, [Kambe] agreed to purchase all of the membership interests in one of Gerova's other subsidiaries. As collateral for the alleged $4.5 million Gion loan, and the alleged $2 million DPRE loan, Gerova pledged Wimbledon's interest in one of Wimbledon's hedge fund assets, Aramid Entertainment Fund, Ltd. ("Aramid"),[18] which at that time was valued at $18 million. Bergstein later used the interest in Aramid to further his feud with his nemesis, David Molner, Aramid's investment manager. In 2011, Bergstein and Weingarten caused Wimbledon and Stillwater to sue Molner and Aramid for fraud and breach of fiduciary duty.

AC ¶¶ 106-109 (paragraph numbering and breaks omitted). Wimbledon then alleges that, "these loans and 'related party liens on the Gerova assets' were all 'phony,' and were designed by Bergstein and Galanis to conceal the misappropriation of Wimbledon's assets." AC ¶ 110.

Gerova was publicly exposed as a fraud in a Forbes magazine article published on January 5, 2011. The article stated that the scheme was "to pump up share prices and dump them on unsuspecting investors—many of whom are effectively required to own Gerova because of its

---

[18] As discussed in the court's August 19, 2016 decision in the First Petition (addressed herein), settlement proceeds owed to Bergstein in Aramid's bankruptcy proceedings are the source of some of the funds Wimbledon seeks to recoup. Those funds are subject to an order of attachment.

inclusion in the Russell 2000 and 3000 value indexes." *See* AC ¶ 111. Forbes identified Galanis and Fund.com as the perpetrators. *Id.* Additionally, "[o]n January 10, 2011, a similar report was published by a short seller, Dalrymple Finance LLP ("Dalrymple Report")," which stated "that Gerova had all the hallmarks of a classic fraud, detailing the lack of financial disclosure, impaired or overvalued assets, undisclosed related-party transactions, and strong ties to individuals and entities who have been in trouble with regulators in the past, including Galanis." AC ¶ 112. "Immediately following the Dalrymple Report, Gerova also received inquiries from the Wall Street Journal regarding, among other things, its failure to publish financials for over a year, the write down of the value of the Stillwater assets and the pump and dump scheme." AC ¶ 113.

"On February 20, 2011, Gerova issued a press release announcing the resignation of three of its directors—Laslop, Bos and de Waal. Hirst resigned as chairman and president and Bianco resigned as CEO. Galanis also 'agreed to terminate his employment with Gerova Advisors,' the Gerova subsidiary by which he was actually employed, subject to completion of mutually acceptable termination arrangements." AC ¶ 114. Three days later, "[o]n February 23, 2011, the NYSE halted trading of Gerova securities." AC ¶ 115. "On April 21, 2011, Gerova asked the NYSE to delist its securities, and, on May 9, 2011, Gerova deregistered its securities." AC ¶ 116.

Despite this grim situation, it is alleged that Galanis and Bergstein attempted to profit from the Gerova scheme. Their ability to abscond with liquid assets was limited by the fact that Wimbledon's Assets were, as discussed, illiquid hedge fund interests. As a result, the AC alleges they concocted a scheme using Arius Libra.

D. Arius Libra

In April 2011, the very month Gerova's securities were delisted, Wimbledon alleges:

> Galanis and Bergstein **traveled to New York** to meet Hallac, Jeffrey Hallac and Wellner to discuss the calamitous Gerova situation. Upon information and belief, during this meeting, **Bergstein offered to help Hallac "recover" Wimbledon's assets from Gerova only if Bergstein was given control over them**. As Hallac stated in the New York Plea Allocution: "Bergstein would only assist in this effort if [Wimbledon] would contribute the recovered assets to another company he created, called Arius Libra."
>
> At the time of this meeting, the Hallacs, Wellner and others at WCAM had already conducted preliminary diligence of Bergstein and knew that Bergstein was not to be trusted. Their limited research revealed "extremely negative" publicly available information about him, **including that Bergstein had been accused of fraud numerous times and regularly engaged in scorched earth litigation tactics to avoid answering for his wrongdoings**. Upon information and belief, the Hallacs and Wellner ignored this information because Bergstein offered them substantial remuneration for their cooperation

AC ¶¶ 118-119 (emphasis added).

The initial step of the Arius Libra scheme was to give Bergsten control over Gerova's board. Wimbledon explains:

> Scher became the new chief operating officer of Gerova. Scher had no experience in the insurance industry but was one of Bergstein's cadre of loyal followers who would sit on the boards of Bergstein-Controlled Entities, as needed by Bergstein. Indeed, Scher currently sits on the board of Cyrano Group, and also sat on the board of directors for Graybox. Scher also was the chief operating officer of Cascade Technologies, which also is involved in the Arius Libra schemes. Finally, Scher sits on the board of K Jam Media, a company controlled by Kia Jam (another Bergstein acolyte), and is the trustee of the Bergstein Family Trust.
>
> Bergstein also appointed three new Gerova board members, David Green, Huw Jones and Kia Jam, to replace Laslop, Bos and de Waal. Like Bergstein, Green, Jones and Jam all worked in the entertainment industry and had no apparent experience in the insurance industry prior to their appointments to the Gerova board. Jones and Bergstein worked together as producers on the movie *The Edge of Love*. Jones also was a production executive at Bergstein's Capitol Films in

> London. Jam is a longtime colleague of Bergstein's and is the co-founder of Graybox

AC ¶¶ 122-123. Thus, "[i]n April 2011, the Gerova board of directors was comprised of Scher, Hlavsa, Hirst, Jones, Jam and Mauricio Camps." AC ¶ 124.

According to Wimbledon, with Bergsten's board now in place, he laid out a three-step plan. The first step was the "Gerova Unwind", which required, *inter alia*, an "Unwind Agreement" that would (1) cause Gerova to return the Assets to Wimbledon (through WCM); (2) sell some of the Assets; (3) use the proceeds to pay the approximately $2 million in fees and loans owed to WCM; (4) give some of the Assets to Galanis as part of a settlement; and (5) ensure that all money previously given to Gerova by WCM would be retained by Gerova. *See* AC ¶ 126. The second step, the "Matrix Medical Acquisition", involved forming a new company (Newco) to acquire an entity called Matrix Medical for $5 million, funded by WCM, with Newco to be owned 35% by Matrix Medical's sellers, 54% by WCM, and 18% by the promoters (i.e., Bergstein & Co.). *See id.* The final step was to merge Newco into a public shell which had "already been identified." *See id.* Bergstein then demanded that the Hallacs and Wellner contribute $300,000 to Gerova to fund the unwind. According to Wimbledon, "some or all of the money provided [by the Hallacs and Wellner] to Bergstein came from the Wimbledon assets." AC ¶ 127.

The Unwind Agreement was allegedly executed on August 3, 2011 and backdated to July 6, 2011. *See* Dkt. 516. Simply put, the purpose of the Unwind Agreement was purportedly to "rescind ab initio" the APA. *See* AC ¶ 129. In other words, the transaction that resulted in Wimbledon's Assets being swapped for Gerova equity would be reversed. This would permit Bergstein to conduct a new swap in which the Assets would be given to Arius Libra in exchange

for a 59.5% equity stake in Arius Libra. "Per the terms of the [Unwind Agreement], Wimbledon forgave over $3 million in 'loans' previously made to Gerova insiders, and agreed to pay the following:

> (a) $500,000 to [Gerova Management] (controlled at various times by Hlavsa and Scher and, upon information and belief, used for Gerova payroll to U.S.-based employees, officers and directors); (b) $259,897 to DPRE (owned and controlled by Bergstein); (c) $1,250,000 to Galanis; (d) $700,000 to [Class C Segregated Portfolio (Class C)][19] (upon information and belief, Hallac established this fund as a feeder to SAC Capital); (e) $300,000 to Gion (owned and controlled by Bergstein); and (f) $1,800,000 to Weston/WCAM "to satisfy in full any amounts which the Gerova parties may owe to Weston.

AC ¶ 129. "These distributions, totaling approximately $4.8 million, apparently were to be made in several installments." AC ¶ 130. "Neither [the Unwind Agreement] nor the obligation to pay $4.8 million to Gerova insiders (including Weston/WCAM) was disclosed to Wimbledon's board or its investors." AC ¶ 131.

Next, Bergstein formed Arius Libra, a Delaware corporation, on July 28, 2011. "Bergstein initially was installed as Arius Libra's sole director." AC ¶ 133. The very next day, on July 29, 2011, Bergstein held the Annual Meeting of the Board of Directors of Arius Libra. **He was the only person present for the meeting.** At the meeting, he nominated Wellner as President, himself as Vice-President and Kia Jam as the Secretary of Arius Libra. He then approved his own nominations." AC ¶ 134 (emphasis added). "Bergstein, Wellner, Jam, Hallac and Jeffrey Hallac [were elected] as directors, and Bergstein [was elected] the Chairman of the board." AC ¶ 136. "The corporate documents reflect that Arius Libra had three shareholders – **Wimbledon (with 59.5% of the shares)**, WRF, which was another Weston investor (with 6.38% of the shares) and Owari Opus, a Bergstein controlled company (with 34.12% of the

[19] Class C is one of the respondents in the Second Petition.

shares)." AC ¶ 135 (emphasis added). "However, upon information and belief, Bergstein had secretly allocated half of the Owari Opus shares to Purple Box, which was controlled by Hallac, Jeffrey Hallac and Wellner. This interest was not disclosed to Wimbledon's board or its investors." *Id.*

Arius Libra, allegedly, was a sham medical billing company, just as Gerova was a sham reinsurance company. It "had no business; had no employees, offices or telephone numbers; has no registered agent in the state of Delaware; and, apart from the purported meetings of the stockholders and board of directors one day after its formation, never observed any corporate formalities." AC ¶ 137. Rather, "upon information and belief, Bergstein, Jam, Wellner, Hallac and Jeffrey Hallac created and always intended to use Arius Libra solely for the purpose of carrying out a scheme to steal assets from Wimbledon and [Weston Capital Partners Master Fund II, Ltd. (Partners II)]." *Id.*

Partners II, as discussed by the court in the related petitions, was the entity that loaned $3.6 million to Arius Libra on August 3, 2011. *See* Dkt. 122 (the Note). The Note was signed by Jam "in his capacity as Secretary for Arius Libra." AC ¶ 140. As further explained by the court in the related petitions, the Note was secured by the Assets. Hence, if the Note was defaulted upon, Arius Libra would lose the Assets and Wimbledon would lose the value of those Assets by virtue of its equity stake in Arius Libra.

"Within hours of the unwind and contribution agreements being finalized on August 3, 2011, Bergstein directed the Weston Defendants to make a total of $3.2 million in wire transfers out of the Partners II 'loan,' a direction with which the Weston Defendants promptly complied [as follows]: (a) $500,000 to Gerova Management; (b) $259,897 to DPRE; (c) $700,000 to Galanis (through [ACM]); (d) $700,000 to [Class C]; (e) $150,000 to Gion (via

Graybox); and (f) $900,000 to Weston/WCAM." AC ¶ 142. Wimbledon alleges that "nearly $1 million of the distributions were, in fact, distributions to Bergstein and/or his cronies." AC ¶ 143. It explains:

> With respect to the $500,000 wire transfer to Gerova Management, Bergstein directed that $100,000 of it be wired to Aaron A. Grunfeld's Attorney Client Trust Account. Grunfeld is one of several attorneys that Bergstein frequently uses. Bergstein directed that the remaining $400,000 go to a Gerova Management bank account in California, which account, upon information and belief, had been set up by Scher in his capacity as Gerova's chief operating officer. The DPRE distribution, upon information and belief, also went to Bergstein. Bergstein directed that this payment be wired to Henry N. Jannol's Client Trust Account. Jannol also is one of the attorneys that Bergstein frequently uses, and regularly transferred money from his Client Trust Account to accounts belonging to entities owned and controlled by Bergstein. The Gion distribution, upon information and belief, also went to Bergstein. Bergstein directed that this payment be wired to Graybox, a company he co-founded with Kia Jam and of which he is the sole managing member.

AC ¶¶ 143-145 (paragraph numbering and breaks omitted).

Wimbledon further alleges that "[b]etween August 3, 2011 and November 18, 2011, Bergstein, Jam, Wellner, [and the Hallacs] transferred more than $8 million from Partners II into the accounts of entities or individuals under their control or which served as their alter egos. These transfers included, for example:

> (a) $500,000 to Graybox. Bergstein is the sole managing member of Graybox and has admitted to using Graybox's funds to pay his own personal gambling debts. Bergstein has also used Graybox funds to pay his wife's credit card bills, transferring tens of thousands of dollars a month to the accounts of his wife and mother. The United States Trustee in an ongoing Chapter 11 bankruptcy proceeding in the Central District of California has concluded that Graybox is "a shell" that "lacked substance" and that Bergstein used it as "a conduit . . . to route funds borrowed and/or guaranteed by the [d]ebtors" to himself. Upon information and belief, Graybox has never conducted any business and provided no services to Partners II or Arius Libra in exchange for these transfers.
>
> (b) $150,000 to Iskra, another entity controlled by Bergstein that he has used to pay his personal gambling debts and fund his online stock trading account at E-

> Trade. Upon information and belief, Iskra has never conducted any business and provided no services to Partners II or Arius Libra in exchange for these transfers.
>
> (c) Approximately $2.5 million to the trust accounts of Henry N. Jannol, Esq., Aaron A. Grunfeld, Esq., and Spillane Weingarten LLP (which was owned and controlled by Defendant Weingarten). Upon information and belief, none of these attorneys or law firms ever provided any legal services to Partners II or Arius Libra, but all either currently represent or have represented Bergstein personally. In addition, Jannol is the trustee of a trust for the benefit of Bergstein's wife. Upon information and belief, money received by these attorneys was subsequently transferred to Bergstein or entities he owned or controlled, or was otherwise used for his benefit.
>
> (d) [ACM] received $700,000, but provided no services to Partners II or Arius Libra in exchange for this money. Upon information and belief, [ACM] is owned or controlled by Galanis.
>
> (e) More than $1 million to Arius Libra Directors. For example, $400,000 was transferred to [KJM] (owned and controlled by Jam), and an additional $900,000 was transferred to WCAM.
>
> (f) At least $1,800,000 divided between [GHT], an entity affiliated with Parmar, and Sage Group Consulting, Inc., upon information and belief, to satisfy a debt owed by Parmar. Arius Libra received no services in exchange for these transfers.
>
> (g) Gerova Management received $500,000, but, upon information and belief, provided no services to Partners II or Arius Libra in exchange for this money. Upon information and belief, at the time these transfers were made, Gerova Management was controlled by Scher and was being funded to pay Gerova's payroll, despite the fact that by this time Gerova was defunct.
>
> (h) $150,000 to O'Melveny & Meyers LLP to pay for legal services rendered in furtherance of Bergstein's litigation against David Molner and Aramid. Arius Libra received no services in exchange for this transfer.

AC ¶ 147.

Further transfers are addressed in the AC, which will not be discussed at this time. *See* AC ¶¶ 148-152. Nor will the court discuss the other alleged fraudulent schemes detailed in the AC (e.g., the sale of CAM Opportunity, the Swartz IP Loan, the July 6, 2011 "phony" settlement

agreement,[20] and the second backdated "phony" contribution agreement), as such detail is not necessary for the purpose of this decision. Suffice it to say that Arius Libra was falsely represented as a company that would acquire "medical billing assets" from a company called Pineboard, which was controlled by Parmar, who would be appointed CEO. *See* AC ¶ 169. Pineboard, according to Wimbledon, "also was a sham" because it was "formed by Bergstein (who appointed Jam as its first president, secretary and director) as a vehicle for repaying millions of dollars he owed Parmar for unrelated debts." *See id.*

Wimbledon's investors were first presented with some details of the Arius Libra transaction in December 2011. *See* AC ¶¶ 168-169. "Hallac, Jeffrey Hallac, Wellner, Bergstein and Parmar all worked on the slides for the investor presentation." AC ¶ 172. "Those slides **did not mention that the transaction had already been completed**." *Id.* (emphasis added). Parmar allegedly later "admitted that Arius Libra, and in particular the medical billing company transaction, were 'fraudulent solutions' by Bergstein 'to quiet disgruntled investors in [Wimbledon].'" AC ¶ 171.

Wimbledon further contends that in December 2011:

> Bergstein, Hallac, Wellner, Jam and Jeffrey Hallac also sought the approval of the Wimbledon board for the Gerova unwind transaction and the Arius Libra transactions. Upon information and belief, Hallac, Jeffrey Hallac and Wellner entered into these transactions in August 2011 without the required approval of the Wimbledon board of directors. Bergstein, Hallac, Jeffrey Hallac and Wellner sent the new backdated Settlement Agreement and the second contribution agreement to the Wimbledon board of directors for approval. They did not disclose the Unwind Agreement, pursuant to which there were $4.8 million in distributions to Bergstein and his entities, Weston, Galanis and others. They also

[20] Some of the defendants claim that by executing this agreement, they released any claims Wimbledon may have against them for their conduct with respect to Gerova and Arius Libra. As explained herein, this argument does not warrant dismissal at this time because Wimbledon has a claim that such releases were procured by fraud and are unenforceable.

> did not disclose the first contribution agreement which also identified the payments.
>
> The board asked specific questions to Wellner and Hallac concerning the transactions, and Wellner provided misleading and incomplete responses. For example, Wellner and Hallac represented to the board that Arius Libra was the only way to protect the fund's position and preserve value. Wellner also represented that Wimbledon's New York counsel had fully vetted and approved the transactions. These representations were knowingly false.
>
> Upon information and belief, the Wimbledon board was misled and they approved the transactions in January 2012 based on the phony documents and misrepresentations, and without full disclosure of all material facts concerning the transactions. Upon information and belief, the Wimbledon board would not have approved the transaction if it had been provided with all material facts.

AC ¶¶ 173-175 (paragraph numbering omitted).

"By December 2012, the Bergstein Defendants and the Weston Defendants had misappropriated far more than the amount of the original $3.6 million note." AC ¶ 153. "To cover their tracks, they drafted and executed a note in the amount of $[8] million, also signed by Kia Jam to replace the original $3.6 million note." *Id.* This new note was backdated to August 3, 2011. *Id.*; *see* Dkt. 636 (the Amended Note). The Amended Note was secured by the Assets. Wimbledon was not informed of this fact.

E. Procedural History

Arius Libra's default on the Partners II loan, which occurred on December 30, 2011, set the instant litigation in motion. As this court explained:

> On September 20, 2012, [Partners II] commenced an action in this court against Arius Libra to enforce the Loan by filing a summons and a motion for summary judgment in lieu of complaint. *See Weston Capital Partners Master Fund II, Ltd. v Arius Libra Inc.*, Index No. 653309/2012 (the 2012 Action). By order dated January 15, 2013, this court granted the motion on default and directed the entry of judgment. *See* Index No. 653309/2012, Dkt. 20. On April 4, 2013, judgment was entered against Arius Libra in the amount of $6,619,586.77 (the Judgment). *See* Index No. 653309/2012, Dkt. 24.

Wimbledon Financing Master Fund, Ltd. v Bergstein, 2016 WL 4410881, at *1-2 (Sup Ct, NY County 2016) (footnotes and citations omitted) (the August 19 Decision), *aff'd* 147 AD3d 644 (1st Dept 2017). The August 19 Decision concerns the First Petition, filed on January 22, 2016, in which Wimbledon seeks to enforce the Judgment.[21] The court addresses the merits of the First Petition in a separate, contemporaneously issued decision.

The Second Petition, filed on May 23, 2016, was decided in Wimbledon's favor by order dated December 22, 2016. The court granted judgment to Wimbledon on the claims in the Second Petition asserted against WCM and Class C. *See Wimbledon Financing Master Fund, Ltd. v The Wimbledon Fund, SPC*, 2016 WL 7440844 (Sup Ct, NY County 2016). And by order dated May 11, 2017, the court granted a default judgment against the other two respondents, Wimbledon Real Estate Financing Master Fund Ltd. and Bank of America, N.A. *See Wimbledon Financing Master Fund, Ltd. v The Wimbledon Fund, SPC*, 2017 WL 1955276 (Sup Ct, NY County 2017).

Wimbledon commenced the instant plenary action by filing a summons with notice on October 16, 2015. *See* Dkt. 1. On November 24, 2015, after some of the defendants filed demands for a complaint, but before Wimbledon actually filed a complaint, Manley moved to dismiss under CPLR 3012(b) for failure to timely file and serve a complaint. The court granted the motion on May 17, 2016 (which is when the original motions to dismiss, discussed below, were set to be argued). *See* Dkt. 276 (order) & 278 (5/16/16 Tr.). By order dated May 4, 2017, the Appellate Division reversed, holding that this court was correct to conclude that service was

[21] The August 19 Decision includes an extensive block quotation of Hallac's plea allocution (Dkt. 471), which is not reproduced here. *See id.*, 2016 WL 4410881, at *5-6. Wimbledon also submitted Galanis' allocation (Dkt. 496), as well as the allocutions of his father and brothers. *See* Dkt. 497-499.

made too late under CPLR 3012(b), but that an extension of time to serve should have been granted in the interest of justice.[22] *See Wimbledon Fin. Master Fund, Ltd. v Weston Capital Mgmt. LLC*, 150 AD3d 427 (1st Dept 2017).

Meantime, Wimbledon filed its original complaint on December 21, 2015. *See* Dkt. 73. Beginning in February 2016, defendants filed myriad motions to dismiss. By order dated April 26, 2016, the motions were denied as moot pursuant to a stipulation providing for Wimbledon to file an amended complaint. *See* Dkt. 259.

The AC was filed on April 22, 2016. *See* Dkt. 258. It contains 20 causes of action, numbered here as in the AC: (1) fraud and conspiracy to commit fraud regarding the initial Gerova transaction (i.e., the APA), asserted against WCM, WCAM, PBC-Weston Holdings, LLC, the Hallacs, Wellner, Galanis, Bianco, Hirst, Manley, van Roon, de Waal, and Laslop; (2) fraud and conspiracy to commit fraud regarding the Gerova unwind and the Arius Libra loan and looting of its proceeds, asserted against WCM, WCAM, the Hallacs, Wellner, Galanis, Bergstein, Scher, Jam, Parmar, Weingarten, and Swartz IP Services, Inc. (Swartz); (3) fraud and conspiracy to commit fraud regarding the loan from Partners II to Arius Libra, asserted against WCM, WCAM, the Hallacs, Wellner, Galanis, Bergstein, Scher, Jam, Parmar, Weingarten, DPRE, Gion, Kambe, Graybox, Swartz, Iskra, ACM, GHT, Limited, KJM, and Gerova Management; (4) aiding and abetting the fraud in the preceding causes of action, asserted against WCM, WCAM, the Hallacs, Wellner, Galanis, Bianco, Hirst, Scher, Manley, van Roon, Jam, Parmar, Weingarten, and Bergstein; (5) breach of fiduciary duty, asserted against WCM, WCAM, the Hallacs, Wellner, Galanis, Bianco, Hirst, Manley, Scher, van Roon, de Waal, Bos,

[22] Since the action had been dismissed against Manley, his motion to dismiss under CPLR 3211 (Seq. 43) was not filed until July 7, 2017, and is not yet fully briefed.

Laslop, Jam, Weingarten, and Bergstein; (6) aiding and abetting breach of fiduciary duty, asserted against all of the defendants; (7) violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 USC § 1961 *et seq.* and 18 USC § 1962(c), asserted against Galanis, Bergstein, the Hallacs, and Wellner; (8) conspiracy to commit the forgoing § 1962(c) RICO violations, pursuant to 18 USC § 1962(d), asserted against Galanis, Bergstein, the Hallacs, Wellner, Bianco, Hirst, Scher and Kia Jam; (9) conversion, asserted against the Hallacs, Wellner, Galanis, Bianco, Hirst, Scher, Bergstein, and Jam; (10) "misappropriation" (which the court assumes is a cause of action for conversion), asserted against the Hallacs, Wellner, Galanis, Bianco, Hirst, Scher, Bergstein, and Jam; (11) negligence, asserted against the Hallacs, Wellner, Galanis, Bianco, Hirst, Scher, Manley, van Roon, de Waal, Bos, Laslop, Jam, Parmar, Weingarten and Bergstein; (12) gross negligence, asserted the Hallacs, Wellner, Galanis, Bianco, Hirst, Scher, Manley, van Roon, de Waal, Bos, Laslop, Jam, Parmar, Weingarten, and Bergstein; (13) negligent misrepresentation, against Galanis, Bergstein, Bianco, the Hallacs, Wellner, and Manley; (14) legal malpractice, asserted against Weingarten; (15) violations of New York Judiciary Law § 487, asserted against Weingarten; (16) unjust enrichment, asserted against all defendants; (17) declaratory judgment, asserted against Bergstein, Wellner, Jam, and the Hallacs; (18) violations of New York Debtor and Creditor Law (DCL) §§ 276, 276-a and 278, asserted against Iskra, ACM, Gerova Management, KJM, GHT, DPRE, Graybox WCAM, and Bergstein; (19) violations of DCL §§ 273 and 278, asserted against Iskra, ACM, Gerova Management, KJM, GHT, DPRE, Graybox WCAM, and Bergstein; and (20) violations of DCL §§ 275 and 278, asserted against Iskra, ACM, Gerova Management, KJM, GHT, DPRE, Graybox, WCAM, and Bergstein.

On June 24, 2016, the instant motions to dismiss the AC were filed (with the exception of Cryano's, which was filed on July 15, 2016). Wimbledon filed an omnibus opposition on September 10, 2016,[23] in which it also cross-moved for partial summary judgment against WCAM. *See* Dkt. 551. Argument on the motions was adjourned to February 7, 2017 for reasons the court will not rehash here.[24] The court reserved on the motions after oral argument. *See* Dkt. 1013 (2/7/17 Tr.).[25]

Some of the defendants who were served, unlike those that filed the instant motions to dismiss, never responded to the AC. On January 18, 2017, Wimbledon moved for a default judgment against ACM; on January 26, 2017, Wimbledon moved for a default judgment against GHT; and on March 28, 2017, Wimbledon moved for a default judgment against Hirst. Finally, as relevant here, by order to show cause filed on December 22, 2016, but not presented to the court and entered until March 30, 2017 (*see* Dkt. 1004), Wimbledon moved for a *nunc pro tunc* extension of time to serve Hirst and van Roon, and for leave to serve van Roon via Equities Media. These three motions also are decided herein. Hirst cross-moved to dismiss on June 2,

---

[23] For reasons that are unclear, the brief was stamped as having been received on NYSCEF on September 12, 2016. This is not the first time the NYSCEF stamp (either the date or Dkt. number) on Wimbledon's filings did not align with the information in the NYSCEF line item entry, which, in this case, indicates that the brief was filed on September 10. Wimbledon is urged to reach out to the e-filing clerk to inquire about why this happened to ensure the accuracy of its filings.

[24] The court regrets granting the adjournment as it now believes defendants were simply stalling.

[25] Defendants delayed ordering the transcript for nearly three months, quibbling on how to split the cost. They surely spent more (presumably) billable hours debating the split than it would have cost to pay for the whole transcript. To the extent counsel did indeed bill their clients for this time, they are directed not to charge their clients for such time, and they are further directed to provide their clients a copy of this decision. It also should be noted that the court reserved on the outstanding motions in the First Petition after the February 7, 2017 argument, which, as mentioned earlier, are decided in a separate decision.

2017. The specific facts pertinent to these motions, including those set forth in Wimbledon's affidavits of merit, are addressed in the latter portion of this decision.

II. Motions to Dismiss

A. Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts. *Amaro v Gani Realty Corp.*, 60 AD3d 491 (1st Dept 2009); *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003), citing *McGill v Parker*, 179 AD2d 98, 105 (1st Dept 1992); *see also Cron v Hargro Fabrics, Inc.*, 91 NY2d 362, 366 (1998). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if, assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action. *Skillgames*, *id.*, citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977). Deficiencies in the complaint may be remedied by affidavits submitted by the plaintiff. *Amaro*, 60 NY3d at 491. "However, factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames*, 1 AD3d at 250, citing *Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233 (1st Dept 1994). Further, where the defendant seeks to dismiss the complaint based upon documentary evidence, the motion will succeed if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002) (citation omitted); *Leon v Martinez*, 84 NY2d 83, 88 (1994).

B. The Weston Parties' Motion & Wimbledon's Cross-Motion (Seq. 17)

The Weston Parties argue that Wimbledon's failure to comply with BCL § 1312(a) requires dismissal, and that the fraud, breach of fiduciary duty, unjust enrichment, and DCL claims asserted against them are improperly pleaded or are time barred.

Dismissal under BCL § 1312(a) is not warranted. A mere investment vehicle, such as Wimbledon, which does not conduct regular and systemic business in New York, is not subject to the registration requirements of BCL § 1312(a). *8430985 Canada Inc. v United Realty Advisors LP*, 148 AD3d 428 (1st Dept 2017); *see Highfill, Inc. v Bruce & Iris, Inc.*, 50 AD3d 742, 743 (2d Dept 2008) (emphasis added), quoting *Commodity Ocean Transp. Corp. of N.Y. v Royce*, 221 AD2d 406, 407 (2d Dept 1995); *see also Schwarz Supply Source v Redi Bag USA, LLC*, 64 AD3d 696 (2d Dept 2009). While Wimbledon's managers (i.e., the Weston Parties) conducted business in New York, Wimbledon itself did not conduct regular and systemic business within the meaning of § 1312(a).

Turning now to the merits, Wimbledon has properly pleaded a fraud claim against both WCM and WCAM. "The elements of a cause of action for fraud [are] a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages." *Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 (2009); *see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 (1st Dept 2014). Fraud claims must be pleaded with the specificity required by CPLR 3016(b). *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 (2008).

The Weston Parties, while serving as Wimbledon's fund manager, controlled Wimbledon and its Assets. Acting with the alleged knowledge of Galanis' and Bergstein's fraudulent intent

(a fact admitted by Hallac at his allocution),[26] the Weston Parties allowed the Assets to be used in both the Gerova and Arius Libra schemes. Given the extensive detail in the AC, which is more than sufficient under CPLR 3016(b), the court finds that the Weston Parties have been provided with sufficient notice of their involvement in the fraud. *See Pludeman*, 10 NY3d at 491-92.

The court rejects the Weston Parties' argument that no actual misrepresentations are alleged.[27] In the AC, the managers of WCAM (discussed below in the sections addressing their respective motions) are alleged to have explicitly lied to Wimbledon's investors about myriad material facts concerning the Gerova and Arius Libra transactions, such as the sham nature of their supposed reinsurance and medical billing businesses. The AC further explains how WCM's control over WCAM (e.g., giving control to Galanis and Bergstein, which permitted them to control WCAM and, thereby, control Wimbledon and its Assets) was essential to the schemes. WCM's involvement, thus, rises to the level of substantial assistance. *See Oster v Kirschner*, 77 AD3d 51, 56 (1st Dept 2010). At a minimum, the AC states a claim against the Weston Parties for aiding and abetting fraud. *See Chambers v Weinstein*, 135 AD3d 450 (1st Dept 2016). Simply put, had the Weston Parties rebuffed Galanis' and Bergstein's offers, the fraud would not have occurred. To the extent the Weston Parties suggest that scienter is not pleaded, a proposition the court rejects given the allocutions of Hallac and Galanis and the

---

[26] *See* Dkt. 471 at 25-29.

[27] This is somewhat of an academic point because a fraudulent omission claim is viable here given the Weston Parties fiduciary duties to Wimbledon. *See Kaufman v Cohen*, 307 AD2d 113, 119-20 (1st Dept 2003) ("a fraud cause of action may be predicated on acts of concealment where the defendant had a duty to disclose material information."). The failure to disclose Galanis' involvement is material because of his SEC bar.

conviction of Hirst, the court finds the money allegedly paid to the Weston Parties in exchange for their complicity raises a reasonable inference of their fraudulent intent.[28] While the motive to defraud cannot be inferred from an alleged incentive to earn fees [*see Jonas v Nat'l Life Ins. Co.*, 147 AD3d 610 (1st Dept 2017)], alleging an actual bribe paid to a fiduciary as a quid pro quo for fraud (especially with the specificity provided in the AC) is far more substantial than asking the court to merely infer scienter based on motive.

To be sure, while some of the other defendants proffer somewhat more plausible (albeit unconvincing) arguments about the relative tangential nature of their involvement (e.g., Bianco, who only served on Gerova's board for a few months and whose involvement is alleged to be less substantive), the detailed allegations in the AC permit a reasonable inference that the Weston Defendants knew about the fraudulent nature of the Gerova and Arius Libra schemes and participated in them. *See Aozora Bank, Ltd. v J.P. Morgan Secs. LLC*, 144 AD3d 440, 441 (1st Dept 2016) (complaint must include "sufficient facts to support the reasonable inference of fraud and scienter."). Again, that Hallac and Galanis pleaded guilty due to their involvement with Gerova reinforces this notion.

Wimbledon also alleges that the Weston Parties' conduct falls short of the fiduciary standard to which an investment manager must abide. *See Bullmore v Ernst & Young Cayman Islands*, 45 AD3d 461, 463 (1st Dept 2007) (investment advisors owe fiduciary duties to their clients). However, the Weston Parties do not dispute the seemingly obvious proposition that handing over a fund's assets to be pilfered by a criminal in exchange for a bribe is not something

---

[28] The court does not understand the Weston Parties' statute of limitations argument on the fraud, as they concede [*see* Dkt. 331 at 15] that the alleged fraud occurred within six years of this action being commenced. *See* CPLR 213(8).

an asset manager may do without breaching its fiduciary duty of loyalty to the fund. *See* Dkt. 1013 (2/7/17 Tr. at 9, 12). A claim for breach of fiduciary duty, thus, is stated.

To the extent the Weston Parties' claim the breach of fiduciary duty claim is untimely under a three-year statute of limitations, they are wrong. Where, as here, the breach of fiduciary duty claim is based on fraud, a six-year limitations period applies. *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 (2009).

That said, the court dismisses the unjust enrichment claim pleaded against the Weston Parties as duplicative. The fraud and breach of fiduciary duty claims are sufficient to ensure Wimbledon's recovery for the same conduct. To the extent Wimbledon separately seeks disgorgement of any illicit profits, such damages fall within the scope of well settled breach of fiduciary duty damages. *See Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408 (1st Dept 1990) ("where claims of self-dealing and divided loyalty are presented, a fiduciary may be required to disgorge any ill-gotten gain.").

On the other hand, the DCL claims are well pleaded for the reasons the court explained in the August 19 Decision, the December 22 Decision, and the contemporaneously issued decision on the First Petition. It should be noted, however, that Wimbledon's recovery in the First Petition effectively moots some of the DCL claims in the AC.[29]

Finally, the court denies Wimbledon's cross-motion for summary judgment against the Weston Parties since the motion is premature. The court, ordinarily, may not entertain summary judgment motions prior to issue being joined. *See 8430985 Canada*, 148 AD3d at 428, citing *Chun v N. Am. Mortg. Co.*, 285 AD2d 42, 45 (1st Dept 2001). No exceptions to this rule are

[29] Conversely, some of the claims in the First Petition, such as the claims against ACM, are mooted by the default judgment portion of this decision.

applicable here. The court has never provided the parties with the requisite notice of its intent to treat the motion as one for summary judgment under CPLR 3211(c), and declines to do so. *Four Seasons Hotels Ltd. v Vinnik*, 127 AD2d 310, 319 (1st Dept 1987) ("Notwithstanding plaintiffs' purported cross motion pursuant to CPLR 3211(c), defendants were entitled to assume, unless otherwise notified by the court, that the focus of inquiry was on the pleading of the action and not its merits, and would remain so until joinder of issue."); *see Cooney v City of N.Y. Dep't of Sanitation*, 127 AD3d 629, 630 (1st Dept 2015). Indeed, the complexity of this case and the extensive documents and depositions that will be needed to establish the parties' claims and defenses militate against summary disposition. While the same cannot be said of the DCL claims in the petitions, the fiduciary duty claims are more complex. To be sure, notwithstanding Hallac's guilty plea indicating a likelihood of success on the merits against the Weston Parties, Wimbledon must do more to ultimately prevail on the merits than merely rely on his allocution.

C. De Waal's & Bos' Motion (Seq. 18)

De Waal and Bos seek dismissal for lack of personal jurisdiction, lack of standing, failure to state a claim on the fraud, breach of fiduciary duty and unjust enrichment causes of action, and because the claims asserted against them are supposedly barred by a release.

As an initial matter, the court rejects their service objections under CPLR 3012(b) given the First Department's recent interest of justice ruling with respect to Manley. *See Wimbledon*, 150 AD3d 427. Additionally, the court rejects de Waal's claim of improper service in Luxembourg. "[O]n June 27, 2016, Wimbledon served the [AC] on de Waal by going through Luxembourg's Central Authority." Dkt. 551 at 28 n.15. This was valid service. *Mut. Benefits Offshore Fund v Zeltser*, 140 AD3d 444, 445-46 (1st Dept 2016) ("we now join our sister Departments and hold that service of process by mail 'directly to persons abroad' is authorized

by article 10 (a) of the [Hague Convention], so long as the destination state does not object to such service. ... Switzerland ... has objected to article 10(a) of the Hague Convention. Therefore, the only way to serve [parties in Switzerland] is through the 'central authority' that Switzerland has established pursuant to the Convention."); *see Water Splash, Inc. v Menon*, 137 SCt 1504, 1508 (2017).

Equally unavailing is de Waal's and Bos' contention that they are not subject to long-arm jurisdiction under CPLR 302(a). Jurisdiction over a non-domiciliary may exist "even though the defendant never enters New York [] so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." *Fischbarg v Doucet*, 9 NY3d 375, 380 (2007); *see Paterno v Laser Spine Institute*, 24 NY3d 370, 376 (2014) ("The lack of an in-state physical presence is not dispositive of the question whether a non-domiciliary is transacting business in New York."). "So long as a party avails itself of the benefits of the forum, has sufficient minimum contacts with it, and should reasonably expect to defend its actions there, due process is not offended if that party is subjected to jurisdiction even if not 'present' in that State." *Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 466 (1988) (collecting United States Supreme Court authority); *see Daimler AG v Bauman*, 134 SCt 746, 754 (2014).

At a minimum, de Waal and Bos are subject to jurisdiction as alleged participants in a conspiracy for the same reasons that Bergstein, who also principally worked outside of New York, is subject to jurisdiction. As explained by this court in the August 19 Decision, which was affirmed by the First Department, one who participates in a New York based conspiracy is subject to specific personal jurisdiction in New York for claims arising out of that conspiracy. *See Wimbledon Fin. Master Fund, Ltd. v Bergstein*, 147 AD3d 644 (1st Dept 2017), citing

Lawati v Montague Morgan Slade Ltd., 102 AD3d 427, 428 (1st Dept 2013); *see also FIA Leveraged Fund Ltd. v Grant Thornton LLP*, 150 AD3d 492 (1st Dept 2017). De Waal and Bos were directors of Gerova. As board members, they allegedly were privy to the fraud purportedly masterminded by Galanis, but did not inform the shareholders of the fraud in exchange for supposed bribes. That they are European nationals does not immunize them from jurisdiction given their alleged involvement in the conspiracy, which caused a tort to occur in New York.

That said, even without conspiracy jurisdiction, Wimbledon, at the very least, has made a sufficient start warranting jurisdictional discovery. *See Venegas v Capric Clinic*, 147 AD3d 457 (1st Dept 2017), citing *Peterson v Spartan Indus., Inc.*, 33 NY2d 463, 467 (1974). Wimbledon alleges that de Waal and Bos came to New York for a Gerova board meeting, thereby satisfying the single transaction requirement of CPLR 302(a)(1). *See Kreutter*, 71 NY2d at 467 (CPLR 302(a)(1) "is a 'single act statute' and proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted.").

While de Waal and Bos deny the allegation that they came to New York for Gerova-related business [*see* Dkt. 944], on this motion to dismiss, the allegation of their presence in New York for a Gerova board meeting must be assumed to be true. *See Chanko v Am. Broad. Cos.*, 27 NY3d 46, 56 (2016). In fact, Wimbledon has done more than merely allege de Waal's and Bos' presence in New York. It submitted an invoice from Hodgson Russ LLP, a law firm that represented Gerova, which records a disbursement for a May 12, 2010 client meal in the firm's New York office, which includes de Waal and Bos. *See* Dkt. 934 at 32 ("Client meal expense:

05/12/10 Client Luncheon Meeting@ the NYC-Broadway Office with Stephen Weiss, Albert Hallac, **Arie Bos**, ... **Leonard De Waal** ...") (emphasis added).

Turning now to the merits, the court rejects the argument that Wimbledon lacks standing to assert the fraud claim because the claim is derivative and, therefore, belongs to Gerova. *Serino v Lipper*, 123 AD3d 34, 39 (1st Dept 2014) (explaining difference between direct and derivative claims), citing *Yudell v Gilbert*, 99 AD3d 108, 114 (1st Dept 2012) (adopting Delaware's *Tooley* test), accord *Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1033 (Del 2004); *see NAF Holdings, LLC v Li & Fung (Trading) Ltd.*, 118 A3d 175, 180 (Del 2015) (an "important initial question has to be answered: does the plaintiff seek to bring a claim belonging to her personally or one belonging to the corporation itself?"). Fraudulent inducement claims based on misrepresentations made directly to investors can, in some circumstances, be pleaded as direct claims. The relevant inquiry is whether the alleged losses caused by the fraud affected plaintiff differently than the company's other investors. *See Cont'l Cas. Co. v PricewaterhouseCoopers, LLP*, 57 AD3d 411 (1st Dept 2008), *aff'd* 15 NY3d 264, 270 (2010). Here, where the Assets at issue originally belonged *only* to Wimbledon (i.e., not any other investor in Gerova), the claim is properly brought directly by Wimbledon whose injury (i.e., loss of the Assets) is unique. *See Sehoy Energy LP v Ketcham*, 2017 WL 1380619, at *11 (Del Ch 2017), citing *Big Lots Stores, Inc. v Bain Capital Fund VII, LLC*, 922 A2d 1169, 1176-77 (Del Ch 2006) ("The main dividing line between direct and derivative claims styled as 'fraudulent inducement' ... has been whether the plaintiff has alleged some injury other than that to the corporation."); *see also Freedman v Adams*, 2012 WL 1345638, at *16 n.154 (Del Ch 2012) (failure to disclose material facts to shareholders is direct claim).

Wimbledon is not suing for the diminution in value of its Gervoa or Arius Libra equity based on the way in which those companies were run (that would be a derivative claim). *Serino*, 123 AD3d at 40; *see In re Massey Energy Co. Derivative & Class Action Lit.*, 2017 WL 1739201, at *16 (Del Ch 2017). Rather, Wimbledon's claim is that it was fraudulently induced to permit its Assets to be invested in these schemes. The loss of the Assets is an injury suffered uniquely by Wimbledon, as they belonged to no one other than Wimbledon prior to the investment. The theft of the Assets was allegedly the very purpose of the fraud. This type of wrong directly and singularly harms Wimbledon.

Nonetheless, the breach of fiduciary duty claim asserted against de Waal and Bos is dismissed. Since de Waal's and Bos' only role was serving on Gerova's board, under Cayman Islands law,[30] they (unlike the Weston Defendants, who had duties to Wimbledon as its investment manager), only had fiduciary duties to the company (Gerova), not its investors, (e.g., Wimbledon). *See Davis v Scottish Re Grp., Ltd.*, 138 AD3d 230, 236 (1st Dept 2016). "The law of the Cayman Islands, which ... governs this issue, generally prohibits derivative actions." *Varga v McGraw Hill Fin., Inc.*, 147 AD3d 480 (1st Dept 2017). "The Cayman Islands modeled its laws predominantly on English common law, which prohibits shareholder derivative actions,

[30] "One of the abiding principles of the law of corporations is that the issue of corporate governance, including the threshold demand issue, is governed by the law of the state in which the corporation is chartered." *Hart v Gen. Motors Corp.*, 129 AD2d 179, 182 (1st Dept 1987); *see Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422 (1st Dept 2014). "Gerova was a Cayman Islands corporation from its incorporation in March 2007 until it reincorporated in Bermuda in September 2010." Dkt. 585 at 17. Wimbledon's "allegations against de Waal and Bos relate primarily to the period before September 2010" [*see id.*], and thus Cayman Islands law applies. That said, the parties do not contend that the applicable Cayman Islands law differs from Bermuda law, and so the court assumes this to be true for the purpose of this motion. *See TBA Global, LLC v Proscenium Events, LLC*, 114 AD3d 571, 572 (1st Dept 2014).

unless an exception to the general rule applies." *Shenwick v HM Ruby Fund, L.P.*, 106 AD3d 638, 639 (1st Dept 2013).

Wimbledon does not plead "the special circumstances necessary under Cayman Islands law to create a fiduciary duty between the Directors and plaintiff as a minority shareholder." *See Davis*, 138 AD3d at 236. "For [the 'fraud-on-the-minority'] exception to be properly pleaded, it must generally be shown that the defendants, as a result of their wrongful conduct, obtained a personal benefit at the company's expense." *Shenwick*, 106 AD3d at 639. Wimbledon may well be able to plead this exception, but it does not purport do so in the AC (nor, as noted, does it actually style its claims as derivative or purport to plead demand futility). *See* Dkt. 258 at 71-75 (breach of fiduciary duty cause of action, which does not purport to be pleaded under Cayman Islands law, let alone under the fraud-on-the-minority exception). And while Wimbledon submits an expert affidavit from a Cayman Islands attorney [*see* Dkt. 547], neither that affidavit nor Wimbledon's opposition brief provide sufficient basis to support fiduciary duty claims against de Waal and Bos. Merely averring that defendants' "interpretation of Cayman law is incorrect" and that "Wimbledon's Cayman counsel [opined], under Cayman law, [that] a shareholder owes fiduciary duties to other shareholders where there exists a special relationship between them" is insufficient because no explanation is provided as to why "a special relationship" exists in this case. *See* Dkt. 551 at 50. With respect to de Waal and Bos, who are not alleged to have stolen nearly the amounts allegedly taken by Galanis and Bergstein, more detail is required to support the personal benefit requirement.[31]

[31] De Waal and Bos, unlike many of the other defendants, are not alleged to have received funds that are the subject of the fraudulent conveyance claims.

For these reasons, the direct claim for breach of fiduciary duty against de Waal and Bos is dismissed (again, no derivative claim is pleaded). The dismissal is without prejudice to Wimbledon properly pleading the claim under controlling Cayman Islands law.

The court will not address the negligence and gross negligence causes of action asserted against de Waal and Bos because Wimbledon withdrew these claims. *See* Dkt. 551 at 57.[32]

Finally, dismissal based on the July 6, 2011 Settlement Agreement, which supposedly caused Wimbledon to release "any claims that it might have had against de Waal and Bos arising out of their service as directors of Gerova" [*see* Dkt. 415 at 30], is not tenable at this juncture. Wimbledon contends that the release was procured by fraud. Fraud is a ground for setting aside a release.[33] *See Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603, 616 (1994), citing *Mangini v McClurg*, 24 NY2d 556, 566 (1969).

D. Weingarten's Motion (Seq. 20).

Weingarten seeks dismissal of Wimbledon's claim against him for legal malpractice. The alleged malpractice concerns Weingarten's purported drafting of some of the contracts used by Bergstein in the alleged schemes and his failure to adequately protect Wimbledon's interests in the Aramid bankruptcy action.

"In order to recover damages in a legal malpractice action, a plaintiff must establish 'that the attorney 'failed to exercise the ordinary reasonable skill and knowledge commonly possessed

---

[32] These causes of action were also withdrawn as against Bianco, Galanis, and the Bergstein Movants. *See* Dkt. 551 at 57 n.42.

[33] Defendants cite no authority for the proposition that Board members can contractually immunize themselves for their own fraudulent acts. Such an agreement would almost certainly be unenforceable as violative of public policy. *See* Dkt. 551 at 70-71 (collecting cases); *see also Banc of Am. Secs. LLC v Solow Bldg. Co. II*, 47 AD3d 239, 244 (1st Dept 2007).

by a member of the legal profession' and that the attorney's breach of this duty proximately caused plaintiff to sustain actual and ascertainable damages." *Dombrowski v Bulson*, 19 NY3d 347, 350 (2012), quoting *Rudolf v Shayne, Dachs, Stanisci, Corker & Sauer*, 8 NY3d 438, 442 (2007). "An attorney's conduct or inaction is the proximate cause of a plaintiff's damages if but for the attorney's negligence the plaintiff would have succeeded on the merits of the underlying action or would not have sustained actual and ascertainable damages." *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 50 (2015) (internal citation and quotation marks omitted). Importantly, it is well settled that, absent "'special circumstances' upon which to find a 'near privity' relationship," only the attorney's client may sue the attorney for malpractice. *Leggiadro, Ltd. v Winston & Strawn, LLP*, 119 AD3d 442 (1st Dept 2014).

The parties dispute whether Weingarten personally drafted the subject contracts. On this motion to dismiss, where no definitive documentary evidence resolving this dispute was submitted, the question of whether Weingarten drafted the subject contracts must be resolved in Wimbledon's favor.[34] The court, nonetheless, dismisses the malpractice claim to the extent it relates to Weingarten's contract drafting. Redress for the claim that Weingarten harmed Wimbledon by virtue of these contracts is more properly pursued with the other well-pleaded claims asserted against Weingarten, which are addressed below. The malpractice claim is dismissed because Weingarten is not alleged to have negligently drafted the contracts, but,

[34] The emails cited by Weingarten suggest another law firm's involvement, but do not conclusively refute Wimbledon's allegation that Weingarten was involved in the drafting. This is insufficient to warrant dismissal under CPLR 3211(a)(1). *See Goshen*, 98 NY2d at 326 (documentary evidence must "utterly refute" plaintiff's allegations). Equally unavailing on this motion to dismiss is Weingarten's complaint that none of the documents submitted on this record prove that he started representing Wimbledon before April 2012. Regardless, this portion of the malpractice claim is dismissed for other reasons.

instead, aided in a fraudulent scheme. In other words, Weingarten is not accused of transactional malpractice (because the contracts effectuated the intended transactions) but of fraud. The allegation that an attorney defrauded its client may be maintained (both substantively and for statute of limitations purposes) independently of a malpractice claim. *See Johnson v Proskauer Rose LLP*, 129 AD3d 59, 69 (1st Dept 2015) (fraud claim considered independent of malpractice claim though harm arose out of accountant's failure to properly protect its client), citing *Mitschele v Schultz*, 36 AD3d 249, 254 (1st Dept 2006).

That said, Weingarten's representation of Wimbledon in the Aramid bankruptcy action may give rise to malpractice liability. Wimbledon explains:

> Weingarten's representation of Wimbledon was undertaken at the instruction of Bergstein, and his principal purpose was to aid Bergstein in his litigation war against Aramid and David Molner. Bianco admits that the Wimbledon investment in Aramid was one of the reasons Bergstein joined Galanis' conspiracy. Weingarten was representing Bergstein in various capacities in this war, and was owed millions of dollars by him. He agreed to represent Wimbledon in an attack on Aramid and Molner, **but did not protect Wimbledon's interests, instead seeking to advance Bergstein's interests**. Bergstein settled with Aramid and Molner in 2014, and during settlement discussions Weingarten purported to enter into a tolling agreement and standstill on behalf of Bergstein and Wimbledon. **Bergstein subsequently settled with the Aramid bankruptcy for $6 million, but Wimbledon received nothing**. Wimbledon's liquidators then appeared in the bankruptcy, **and the Court sustained Wimbledon's objection to any release of Wimbledon's claims in the Bergstein settlement**. Weingarten, who had been representing Wimbledon since 2012 in its dispute with Aramid, **used that litigation in part to ensure that Bergstein received a settlement, to the detriment of his client Wimbledon**. This was malpractice.

Dkt. 551 at 61 (emphasis added; citations omitted).

These allegations suffice to state a claim that Weingarten failed to zealously represent Wimbledon in the Aramid action and, as a result, Wimbledon lost out on the chance to get more money out of that litigation. And, Weingarten's representation of Bergstein, whose interests are directly adverse to Wimbledon's, would appear to be problematic. *See* Rules of Professional

Conduct, Rule 1.7(a)(1) ("a lawyer shall not represent a client if a reasonable lawyer would conclude that ... the representation will involve the lawyer in representing differing interests."). Weingarten's conclusory denials of the conflict, especially given the obvious nature of the conflict, or the lack of harm suffered by Wimbledon, do not merit dismissal. *See Fielding v Kupferman*, 65 AD3d 437, 442 (1st Dept 2009).

With respect to the remaining claims, Weingarten is correct that all of the claims asserted against him other than fraud and violation of Judiciary Law § 487 (breach of fiduciary duty, aiding and abetting fraud, negligence, gross negligence, and unjust enrichment) must be dismissed as duplicative. *See Raghavendra v Brill*, 128 AD3d 414 (1st Dept 2015), citing *Garnett v Fox, Horan & Camerini, LLP*, 82 AD3d 435, 436 (1st Dept 2011); *see also Smith v Kaplan Belsky Ross Bartell, LLP*, 126 AD3d 877, 879 (2d Dept 2015). The fraud and aiding and abetting fraud claim, however, are properly pleaded. Weingarten is alleged to have provided substantial assistance to Bergstein in the Gerova scheme by drafting the fraudulent, backdated contracts that made the unwind and transfers to Arius Libra possible. *See Oster*, 77 AD3d at 56-57; *Stanfield Offshore Leveraged Assets, Ltd. v Metro. Life Ins. Co.*, 64 AD3d 472, 476 (1st Dept 2009) ("Substantial assistance exists 'where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated.") (citation and quotation makrs omitted); *see also Johnson*, 129 AD3d at 70 ("the essences of the fraud and malpractice claims are sufficiently distinct from one another that the court properly did not invoke the duplicative claims doctrine."). The contract documents are complex. They could not have been papered in their precise and detailed manner without the aid

of counsel. It is implausible that a reasonably diligent attorney would not have understood the nature of the transactions he was papering

To be sure, "public policy demands that attorneys, in the exercise of their proper functions as such, shall not be civilly liable for their acts when performed in good faith and for the honest purpose of protecting the interests of their clients." *Art Capital Group, LLC v Neuhaus*, 70 AD3d 605, 606 (1st Dept 2010). Thus, an attorney who faithfully performs services for the client will not be subject to tort liability merely due to serving as the tortfeasor's attorney. *Id.* at 606-07. However, where, as here, it is alleged that the lawyer had an extended and integral role in aiding the fraud by knowingly drafting fraudulent contracts and was conflicted in representing his two clients, the fact that the defendant is an attorney will not immunize him. In a case with notable similarities, the First Department held that the attorney may liable for fraud. *See Oster*, 77 AD3d at 56 ("Here, [in contrasts to *Art Capital*], investments in Cobalt were from their inception objectionable because Cobalt was offered to investors who did not meet Regulation D criteria, was sold by persons not qualified to do so, **and because the company was being run by convicted felons, one of whom was banned from the securities industry** [like Galanis in this case]."") (emphasis added).

With respect to Judiciary Law § 487, the portion of such claim relating to Weingarten's contract drafting is dismissed. Neither § 487(1) ("deceit or collusion ... with intent to deceive the court or any party") nor § 487(2) ("[w]ilfully delays his client's suit with a view to his own gain; or, wilfully receives any money or allowance for or on account of any money which he has not laid out, or becomes answerable for") apply to Weingarten's transactional work. Wimbledon cites no case where similar transactional work gave rise to § 487 liability. The statute and the cited cases concern deceiving the court or the client within litigation.

However, to the extent the § 487 claim relates to Weingarten's conduct in the Aramid action, the claim remains. The Appellate Division has held that the intent element of a § 487 claim (as opposed to the negligence element of malpractice) precludes the claim from being dismissed as duplicative. *See Sabalza v Salgado*, 85 AD3d 436, 438 (1st Dept 2011); *Moormann v Perini & Hoerger*, 65 AD3d 1106, 1108 (2d Dept 2009). Weingarten's alleged loyalty to Bergstein was incompatible with his duty to zealously advocate for Wimbledon. Bergstein is alleged to have defrauded Wimbledon, aided and abetted by Weingarten. Weingarten was conflicted and should not have given up Wimbledon's claims in favor of Bergstein's. The court finds this alleged ethical violation rises to the requisite level of egregiousness necessary to state a claim under § 487. *See Savitt v Greenberg Traurig, LLP*, 126 AD3d 506, 507 (1st Dept 2015).

E. Galanis' Motion (Seq. 21)

Galanis' contention that he is not subject to personal jurisdiction in this court is rejected for the same reasons this court and Appellate Division held that the Weston Defendants and Bergstein are subject to conspiracy jurisdiction. Galanis was a central player in the Gerova scheme, which was substantially operated out of New York. He "has pleaded guilty in New York to four counts of fraud and conspiracy to commit fraud related to Gerova, and his allocution makes clear that there were meetings in furtherance of the conspiracy, including board meetings of Gerova, that took place in New York." Dkt. 551 at 27 (citation and quotation marks omitted). The admissions in Galanis' allocution preclude his claim that his involvement in the Gerova fraud cannot give rise to civil fraud liability. His motion to dismiss the fraud and aiding and abetting fraud claims are denied.

Nonetheless, for the reasons discussed earlier with respect to the other defendants, the breach of fiduciary duty and negligence claims asserted against Galanis are dismissed as

duplicative and for lack of a direct duty owed given Galanis' role as an officer of Gerova (i.e., not Wimbledon's fund manager). His defense based on the July 6, 2011 release also is rejected as premature, since it is alleged that the release was induced by fraud. To the extent Galanis contends the RICO claims are not properly pleaded against him, his terse arguments are more substantively expanded upon in his co-defendants' briefs, and, therefore, are addressed below.

F. The Bergstein Movants' Motion (Seq. 22)[35]

As an initial matter, the court rejects Bergstein's contention that the record on these motions proves that he was merely an innocent victim in the Gerova scheme and that he was duped by the real fraudsters – Galanis and Hirst. While obviously not dispositive, the U.S. Attorney for the Southern District of New York and the SEC disagree. On this motion to dismiss, the court concerns itself only with the sufficiency of the well-pleaded allegations made against Bergstein, which cannot be defeated by his self-serving version of events proffered in his moving brief (which is at odds with the evidence submitted both on this motion and in the turnover proceedings, which, it should be noted, was sufficient for this court and a California federal district court to issue attachment orders that were affirmed, respectively, by the First Department and the Ninth Circuit). Also, for the reasons previously discussed, the Bergstein Movants' jurisdictional arguments have no merit and do not warrant further attention.

As to the merits, the fraud and aiding and abetting fraud claims are properly pleaded against the Bergstein Movants.[36] Contrary to their contentions, the AC contains robust detail

---

[35] Not all of these defendants were represented by the same counsel at oral argument. However, as their motion to dismiss was made by the same counsel in a single brief, the court considers their arguments together.

[36] The court rejects the notion that Wimbledon's investors are the proper plaintiffs because Wimbledon suffered the direct injury as it, not its investors, owned the Assets. Likewise, as

regarding the nature of the alleged fraud and each defendant's involvement, putting them all on sufficient notice of the claims under CPLR 3016(b). *See Pludeman*, 10 NY3d at 491-92. While the court will not address each of the demonstrably false contentions in the Bergstein Movants' briefs, it should be noted that the most egregious is the contention that the AC "Fails to Identify a Single Misrepresentation Made to Wimbledon by the Individual and Entity Defendants." *See* Dkt. 401 at 25 (capitalization in original). Ignoring the actual alleged misrepresentations, the Bergstein Movants raise a number of strawman arguments by nitpicking at certain of the more innocuous claims, such as whether some of the lies were told to Wimbledon's investor or to their directors. Simply put, lying about the nature of an investment opportunity by representing a pump-and-dump scheme to be a bona fide reinsurance company is a material misrepresentation.

That said, Wimbledon has not stated a direct claim against Scher, Parmar, and Jam, who were officers and directors of Gerova, for breaching their fiduciary duties to Wimbledon as a shareholder. This is a classic derivative claim because it is based on harm to the company which is suffered by all shareholders. *Serino*, 123 AD3d at 40-41. The court earlier explained the problems with how this claim is pleaded under Cayman Islands law. Wimbledon may well be capable of addressing these issues, but it has not done so at this juncture. Still, given Bergstein's alleged direct control over Wimbledon through the Weston Parties, the court finds that the AC pleads a direct claim for breach of fiduciary duty against him. Moreover, Wimbledon has stated a claim for aiding and abetting breach of fiduciary duty against the other individual Bergstein Movants for substantially aiding in breaches of Bergstein's fiduciary duties. These duties arise from the relationship between the Weston Parties and Wimbledon, not between Wimbledon and

---

discussed earlier, Wimbledon can maintain the fraud claim directly and need not plead the claim derivatively on behalf of Gerova or Arius Libra.

Gerova. The former does not implicate Cayman Islands law and is not a derivative claim. Under New York law, as cited earlier, the alleged conduct states a claim for breach of fiduciary duties owed by an investment manager.

With respect to Wimbledon's RICO claim, the court first notes that, as recognized by the Bergstein Movants, the RICO claims are not duplicative "[s]ince RICO claims carry with them the threat of treble damages. *See* Dkt. 401 at 29. Yet, the Bergstein Movants contend that the AC does not actually plead a valid RICO cause of action.

"RICO is founded on the concept of racketeering activity. The statute defines 'racketeering activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates." *RJR Nabisco, Inc. v European Community*, 136 SCt 2090, 2096 (2016). Wimbledon's seventh and eighth causes of action, respectively, are asserted under 18 USC §§ 1962(c) and (d). § 1962(c) provides that it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." § 1962(d), *inter alia*, makes it illegal to conspire to violate § 1962(c). "To establish a RICO claim, a plaintiff must show: (1) a violation of [§ 1962]; (2) an injury to business or property; and (3) that the injury was caused by the violation of Section 1962." *Cruz v FXDirectDealer, LLC*, 720 F3d 115, 120 (2d Cir 2013) (internal citations and quotation marks omitted). To establish a violation of § 1962(c), ... a plaintiff must show that a person engaged in "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Id.* "To establish a violation of § 1962(d), a plaintiff must show that the defendant agreed with at least one other entity to commit a substantive RICO offense." *Crawford v Franklin Credit Mgmt. Corp.*, 758 F3d 473, 487 (2d Cir

2014). "A pattern of racketeering activity consists of, *inter alia*, at least two acts of racketeering activity; and in order to prove such a pattern, a civil RICO plaintiff also must show that the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity. The requisite continuity may be found in either an open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time." *Id.* at 487-88 (internal citations and quotation marks omitted); *see also GICC Capital Corp. v Tech. Fin. Grp., Inc.*, 67 F3d 463, 465 (2d Cir 1995).

The Bergstein Movants first contend that Wimbledon's RICO claims fail because Wimbledon does not plead a domestic injury. The United Stated Supreme Court recently held that "Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property **and does not allow recovery for foreign injuries**." *RJR Nabisco,* 136 SCt at 2111 (emphasis added). The Court, however, cautioned that "[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'" *Id.* In *RJR Nabisco*, the Court did not further elucidate the method by which a court is to distinguish between domestic and foreign injuries under § 1962(c), nor has it subsequently done so. *See id.* ("we need not concern ourselves with that question in this case [because] respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries.").

The Bergstein Movants argue: "Plaintiff is a foreign investment fund, in official liquidation in the Cayman Islands, claiming a diminution in value based on Defendants' purported misdeeds. It has not alleged the necessary domestic injury to business or property." *See* Dkt. 401 at 30. They, however, ignore the fact that Wimbledon, although incorporated in the

Cayman Islands, was managed by defendants primarily out of New York and from other locations in the United Statas, such as California and Florida. And, it is undisputed that the primary alleged tortfeasors operated in the United States. The Bergstein Movants cite no mandatory authority in their moving brief to support their contention that an investment fund with operations mainly in the United States does not suffer a domestic injury for the purposes of § 1962(c).

Moreover, federal law determines whether a RICO injury is domestic. Reliance exclusively on New York law, such as CPLR 202, is therefore misplaced. To be sure, this is clearly a developing area of federal law [*see City of Almaty, Kazakhstan v Ablyazov*, 2016 WL 7756629, at *6-7 (SDNY 2016); compare *Bascuñan v Elsaca*, 2016 WL 5475998, at *4-6 (SDNY 2016) ("the appropriate approach" is to focus on the *plaintiff* and where the alleged injury was *suffered*.") (emphasis in original), with *Tatung Co., Ltd. v Shu Tze Hsu*, 217 FSupp3d 1138, 1155 (CD Ca 2016) ("this Court declines to follow *Bascuñan*."); *see also Cevdet Aksut Ogullari Koll. Sti v Cavusoglu*, 2017 WL 1157862, at *5 (D NJ 2017) (noting split between district courts)], so defendants should ensure that, when this issue is presumably raised again on summary judgment, they focus on federal law, particularly if the federal courts have by then developed a consensus about how to evaluate the existence of a domestic RICO injury with a fund like Wimbledon. The court declines to rule on this unsettled issued without the benefit of more robust briefing. Defendants' motion to dismiss on this ground is denied.

Next, the Bergstein Movants claim that the RICO causes of action are not pleaded with sufficient particularity under CPLR 3016(b). The court rejects this argument for the same reasons it held that the fraud claim, which is based on similar facts, is pleaded with sufficient detail.

It should be noted that the Bergstein Movants do not contend that the AC lacks sufficient allegations that Gerova and Arius Libra were "enterprises" as defined by 18 USC § 1961(4). *See id.* ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."); *see also* Dkt. 551 at 40-41 (explaining Wimbledon's open-ended and closed-ended pattern allegations). Other defendants raise this issue, which is addressed further below.

The balance of the common law claims asserted against the Bergstein Movants are decided in accordance with the court's previous discussion of those claims – namely that the fiduciary duty claims against Bergstein and the aiding and abetting claims against the other Bergstein Individual Movants remain, and the negligence, gross negligence, negligent misrepresentation, and conversion claims are dismissed.

Finally, the DCL claims based on the Arius Libra transfers addressed in the turnover petitions also survive dismissal. The court previously rejected the Bergstein Movants' conclusory assertion that Arius Libra was not insolvent at the time of the transfers and, indeed, found that Wimbledon had a likelihood of success on the merits – a finding affirmed by the Appellate Division. *See Wimbledon*, 144 AD3d at 644 ("The detailed allegations in these materials amply support the court's finding that petitioner has a likelihood of success on the merits."). The new arguments raised regarding Arius Libra's supposed solvency are expressly rejected in the court's contemporaneously issued decision on the First Petition, in which Wimbledon is granted summary judgment.

The Bergstein Movants do not proffer any other basis to dismiss the DCL claims. It should be noted, however, that some of these claims are mooted by the court's rulings on the First Petition (an issue addressed further herein).

G. Wellner's Motion (Seq. 23)

Many of Wellner's arguments were raised by the other defendants and were rejected earlier by the court. They are not readdressed here, where the court focuses only on arguments uniquely applicable to him.

To begin, unlike the Bergstein Defendants, Wellner claims that Wimbledon has not pleaded a RICO enterprise or a "pattern of racketeering activity" as defined by 18 USC § 1961(5). He is wrong. As Wimbledon correctly argues in opposition, the multi-step process by which the Assets were moved around in a financial game of hot potato, until they were ultimately allegedly stolen by defendants using the cash from the Arius Libra loan, is properly pleaded as both an open-ended and closed-ended pattern.

"In [*H.J. Inc. v N.W. Bell Tel. Co.*, 492 US 229, 240-42 (1989)], the Supreme Court stated that, in order to establish a pattern of racketeering activity, a party must show that the racketeering predicate acts are not isolated or sporadic but are related, and "that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." *United States v Aulicino*, 44 F3d 1102, 1110 (2d Cir 1995). "The *H.J. Inc.* Court ... held that the pattern element did not require a plaintiff to prove that the defendant engaged in more than one scheme, stating that '[w]hat a plaintiff or prosecutor must prove is continuity of racketeering activity, or its threat, *simpliciter*.'" *Id.*

The Gerova and Arius Libra schemes amount to an open-ended pattern because there was "a threat of continuing criminal activity beyond the period during which the predicate acts [e.g., the unwind agreement] were performed." *Spool v World Child Int'l Adoption Agency*, 520 F3d 178, 185 (2d Cir 2008). The predicate acts involving Gerova (e.g., the APA and misrepresentations about its supposed reinsurance business) were continued with the Gerova

Unwind, the Arius Libra equity swap, the Partners II Loan, and the transfers of the loan proceeds to defendants. In fact, where, as here, "the enterprise's business is primarily or inherently unlawful, threat of continuing criminal activity is generally presumed." *Id.*

The schemes also are pleaded in the alterative as a closed-ended pattern. "To satisfy closed-ended continuity, the plaintiff must prove a series of related predicates extending over a substantial period of time. Although factors such as the number and variety of predicate acts and the number of participants may be germane to this showing, closed-ended continuity is primarily a temporal concept. The relevant period, moreover, is the time during which RICO predicate activity occurred, not the time during which the underlying scheme operated or the underlying dispute took place." *Id.* at 184 (internal citations and quotation marks omitted). Gerova was formed in 2007, the main events appear to have taken place between January 2008 (the IPO) and January 2012 (the last alleged fraudulent transfer). These related predicates occurred over more than two years and, therefore, may form the basis of a closed-ended pattern. *See id.* at 184; *see also GICC Capital*, 67 F3d at 467.

Finally, Wellner incorrectly contends that an amendment to the RICO statute, section 107 of the Private Securities Litigation Reform Act (the PSLRA), 18 USC § 1964(c), bars Wimbledon's RICO claims because the predicate wrong is securities fraud (unless the person is criminally convicted for such fraud). *See MLSMK Inv. Co. v JP Morgan Chase & Co.*, 651 F3d 268, 273 (2d Cir 2011). While securities fraud cannot be a predicate RICO offense, and thus Wellner is correct in contending that the portions of Wimbledon's allegations that amount to securities fraud cannot be used as a RICO predicate (except acts of the defendants for which they are criminally convicted), Wellner's moving brief fails to provide *any* meaningful analysis (let alone a citation to the federal securities laws allegedly violated) that explains which portions of

the underlying allegations are securities violations. While some of the predicate RICO allegations in the AC may well give rise to federal securities violations (e.g., misrepresentations to investors), dismissal on this ground at this juncture is not warranted because the court will not on its own conduct that analysis.

In any event, the AC clearly alleges RICO predicates that do not amount to federal securities violations, such as transfers that are considered fraudulent under the DCL and myriad breaches of fiduciary duties by Wimbledon's investment advisors. Wellner does not proffer meaningful analysis of how a court should parse the allegations relating to securities fraud from the other non-securities fraud allegations for the purpose of determining the applicability of § 1964(c). In contrast, Wimbledon cites authority for the proposition that § 1964(c) does not bar RICO claims where the scheme was primarily a form of malfeasance that does not amount to securities fraud. *See* Dkt. 551 at 42, citing, e.g., *Ouwinga v Benistar 419 Plan Servs., Inc.*, 694 F3d 783, 791 (6th Cir 2012) (fraud that incidentally involves securities not barred by § 1964(c)). At this juncture, since Wimbledon alleges illegal conduct that does not exclusively amount to securities fraud, the court finds that it has alleged RICO predicates that are not barred by the PSLRA. Like the domestic RICO injury issue, defendants may revisit their PSLRA argument at the summary judgment stage with the benefit of a full discovery record and more robust briefing on the subject.

H. Bianco's Motion (Seq. 24)

Bianco is sued only for his role on Gerova's board, though it should be noted that he was also on the board of Fund.com, a fact that undermines the notion that he had nothing to do with the alleged fraud. His motion (which is shorter than the other motions and for which no reply

brief was submitted) merely raises arguments already addressed by the court.[37] To the extent Bianco argues that the claims against him are time barred under a three-year statute of limitations, he is wrong. All of the claims (except negligence and gross negligence, which were withdrawn) asserted against him (fraud, aiding and abetting fraud, breach of fiduciary duty, conversion based on fraud, unjust enrichment, and RICO) are governed by a six-year statute of limitations, which did not elapse at the time this action was commenced.

To the extent he avers that the fraud and RICO allegations are not pleaded with sufficient detail, the court, again, disagrees. He, like the other defendants, simply ignores the well pleaded allegations in the AC, such as the fact that Bianco aided Bergstein by serving on the boards of Fund.com and Gerova. To the extent discovery reveals that Bianco's role was as innocuous as he professes, he will have every opportunity to seek dismissal at the summary judgment stage. His mere denial of wrongdoing does not warrant dismissal given the fact that he served on the board of a company involved in a Ponzi scheme and a company used to effectuate a pump and dump scheme, the former of which allegedly bribed Wimbledon's fund managers as a quid pro quo for their acquiescence to the latter. A reasonable inference of scienter may be drawn from his role and the criminality of these schemes.

I. Albert Hallac's Motion (Seq. 25)

Hallac's arguments do not merit meaningful discussion. They are based on BCL § 1312, lack of personal jurisdiction, and the statute of limitations, all of which have already been considered and rejected as bases for dismissal. As with the other defendants, the negligence and

[37] It also should be noted that he does not argue that he had no fiduciary duty to Wimbledon, so the court assumes for the purposes of this motion that he did. He also does not make any arguments that some of the causes of actions are derivative in nature.

gross negligence claims were withdrawn. It should be noted that his moving brief does not argue that Wimbledon fails to meaningfully plead his role in the alleged fraud, as his involvement by virtue of his control over the Weston Defendants is set forth in extensive detail in the AC, and was essentially admitted in his allocution.

J. Cyrano's Motion (Seq. 27)

The court rejects Cyrano's motion to dismiss based on untimely service under CPLR 306-b for the same interest of justice reasons articulated by the Appellate Division in their decision reinstating the case against Manley under CPLR 3012(b).[38] Both CPLR 306-b and 3012(d) contain interest of justice exceptions. The complaint is deemed to have been timely served on Cyrano. To the extent Cyrano, an entity allegedly similar to Graybox (and allegedly its alter ego successor entity)[39] and accused of similar misconduct, contends the AC fails to state a claim against it, the court rejects the argument for the same reasons it finds the claims against Graybox to be well pleaded.[40]

III. Default Judgment & Service Motions (Seq. 33, 39, 40 & 42)

"When a defendant has failed to appear . . . the plaintiff may seek a default judgment against him." CPLR 3215(a). A party moving for a default judgment must "file proof of service

---

[38] This obviates the need for the court to address late service and complaints about Wimbledon conflating Graybox and Cyrano. *See* Dkt. 551 at 25 n.11 & 12.

[39] *See* Dkt. 551 at 25 n.12 ("Until June 16, 2016, Bergstein's Wikipedia page stated that 'he cofounded Graybox (now Cyrano Group).'"). If Cyrano is distinct from Graybox, it may seek to prove that in discovery. After all, there will be extensive financial discovery in this case.

[40] The Graybox DCL allegations are set forth more extensively in the August 19 Decision. The court grants Wimbledon judgment on them in the contemporaneously issued decision in the First Petition. The mootness implications (i.e., a claim pleaded by Wimbledon in this action having already been decided in one of the petitions), which the court has noted on multiple occasions, shall be further addressed at the conference directed below.

... and proof of the facts constituting the claim, the default and the amount due." CPLR 3215(f). A defaulting defendant "admits all traversable allegations in the complaint, including the basic allegation of liability." *Rokina Optical Co. v Camera King, Inc.*, 63 NY2d 728, 730 (1984); *see Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 (2003) ("defaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them.").

Wimbledon's counsel submitted affirmations and affidavits attesting to the fact that ACM, GHT, and Hirst were served, that these defendants did not file an answer or motion to dismiss, and an explanation of the merits of the claims against these defendants. The court finds that the well pleaded allegations in the AC, along with the evidence submitted on these motions, is a sufficient showing of merit. *See Feffer v Malpeso*, 210 AD2d 60, 61 (1st Dept 1994).

ACM is alleged to have received a $700,000 fraudulent transfer from the Arius Libra loan proceeds on August 3, 2011. ACM also is alleged to be the entity to which Galanis transferred $2.3 million in proceeds from the sale of some of the Assets in October 2010. Wimbledon "requests that a default judgment be entered against [ACM]: (i) for $700,000 on Wimbledon's fraudulent conveyance claims plus costs and interest, and (ii) for appointment of a special referee to oversee discovery as to the amount of damages Wimbledon suffered as a result of [Galanis'] use of [ACM] as his alter ego, including in connection with the transfer of $2,318,000 in October of 2010." Dkt. 810 at 3-4. The court grants the requested judgment, but any discovery shall be handled by the court, especially as it involves Galanis, a non-defaulting defendant.

GHT, a company controlled by Parmar, also received fraudulent transfers from the Arius Libra loan proceeds totaling $1.1 million. *See* Dkt. 857 (discussing transfers of $250,000 on

August 18, 2011 and $850,000 on September 19, 2011). Wimbledon is granted a default judgment in this amount against GHT.

Regarding Hirst, who was served and had actual knowledge of this action for over a year, the court grants Wimbledon's motion for a *nunc pro tunc* service extension to September 15, 2016, the date Hirst was personally served. The service was valid under CPLR 2103. *See* Dkt. 1049 at 13-15. Clearly, there is merit in the claims pleaded against Hirst who, as noted at the outset, was found guilty in his criminal trial. His motion to dismiss, therefore, is denied. *See Wimbledon*, 150 AD3d 427.

That said, while the court finds Wimbledon's affidavit of merit (Dkt. 973) sufficient for the purpose of establishing Hirst's liability for participating in the Gerova scheme, the court will not grant a default judgment against him because Wimbledon filed its default judgment motion *before* it obtained an order permitting its late service. *See Rodriguez v Rodriguez*, 103 AD3d 117, 120 (2d Dept 2012), citing *Discover Bank v Eschwege*, 71 AD3d 1413, 1414 (4th Dept 2010) ("the court erred in making the relief retroactive to the prejudice of defendant by placing defendant in default as of a date prior to the order."); *see also Khan v Hernandez*, 122 AD3d 802, 803 (2d Dept 2014) ("a court may not grant such relief retroactive to [defendant's] prejudice by placing him in default as of a date prior to the order."). It should be noted that determining the damages recoverable from Hirst requires far more than merely identifying cash that was fraudulently transferred. Hence, discovery and an inquest would be necessary before judgment could be entered. For these reasons, the court denies Wimbledon's motion for a default judgment again Hirst. Hirst shall respond to the AC within three weeks, and if he files a motion to dismiss, it will be argued along with Manley's motion after it is fully submitted.

Finally, in light of the connection between van Roon and Equities Media set forth in Wimbledon's June 16, 2017 affirmation [*see* Dkt. 1035 at 2 (van Roon signed contracts as President of Equities Media)], Wimbledon may serve van Roon via Equities Media. That said, alternative service also would be warranted here to ensure van Roon has actual knowledge of this lawsuit. To that end, Wimbledon is directed to attempt to ascertain his email address.

IV. Conclusion

The court has carefully considered all of the arguments made by defendants in their briefs. Any arguments not explicitly addressed herein were considered by the court and rejected as unavailing. Accordingly, it is

ORDERED that defendants' motions to dismiss are granted in part and denied in part to the extent set forth in this decision, and within one week of the entry of this order on NYSCEF, Wimbledon shall e-file and fax a proposed implementing order reflecting the court's rulings on such motions; and it is further

ORDERED that Wimbledon's cross-motion for partial summary judgment against WCAM is denied; and it is further

ORDERED that Wimbledon's motion for a default judgment against ACM is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amount of $700,000, plus 9% pre-judgment interest from August 3, 2011 to the date judgment is entered, and the remaining claims are hereby severed and shall continue; and it is further

ORDERED that Wimbledon's motion for a default judgment against GHT is granted, and the Clerk is directed to enter judgment in favor of said plaintiff and against said defendant in the amounts of: (1) $250,000, plus 9% pre-judgment interest from August 18, 2011 to the date

judgment is entered; and (2) $850,000, plus 9% pre-judgment interest from September 19, 2011 to the date judgment is entered; and the remaining claims are hereby severed and shall continue; and it is further

ORDERED that Wimbledon's motion for a *nunc pro tunc* extension of time to serve Hirst is granted, and Hirst is deemed to have been validly served; Wimbledon's motion for a default judgment against Hirst is denied; Hirst's cross-motion to dismiss is denied; and Hirst shall respond to the AC within three weeks of the entry of this order on NYSCEF; and it is further

ORDERED that Wimbledon's motion for a *nunc pro tunc* extension of time to serve van Roon and for leave to serve him via Equities Media is granted; and it is further

ORDERED that Wimbledon shall provide the court's relevant back offices with notice that this action shall bear the following caption:

----------X

WIMBLEDON FINANCING MASTER FUND, LTD., Index No: 653468/2015

Plaintiff,

-against-

WESTON CAPITAL MANAGEMENT LLC, WESTON CAPITAL ASSET MANAGEMENT LLC, PBCWESTON HOLDINGS, LLC, ALBERT HALLAC, JEFFREY HALLAC, KEITH WELLNER, JASON GALANIS, JOSEPH BIANCO, GARY HIRST, EUGENE SCHER, MARSHALL MANLEY, ARIE JAN VAN ROON, LEONARD DE WAAL, ARIE BOS, KEITH LASLOP, KIA JAM, PAUL PARMAR, ALEX WEINGARTEN, DAVID BERGSTEIN, DPRE ENTERPRISES LLC, GION FUNDING SETTLEMENTS, INC., KAMBE ASSET MANAGEMENT GROUP INC., CYRANO GROUP INC. f/k/a GRAYBOX LLC, ADVISORY IP SERVICES INC. f/k/a SWARTZ IP SERVICES, INC., ISKRA ENTERPRISES, LLC, ASIA CAPITAL MARKETS LIMITED, LLC s/h/a ASIA CAPITAL MARKETS, LTD., GENERAL HEALTH TECHNOLOGIES, LLC s/h/a GENERAL HEALTH TECHNOLOGIES, LIMITED, LLC, K JAM MEDIA, INC.,

GEROVA MANAGEMENT, INC. and JOHN DOE(S) 1-10,

Defendants.

----------X

And it is further

ORDERED that within one week of the entry of this order on NYSCEF, Wimbledon shall serve all defaulting defendants with a copy of this decision by overnight mail; and it is further

ORDERED that all defendants whose motions to dismiss are decided herein must file an answer to the amended complaint within three weeks of the entry of this order on NYSCEF; and it is further

ORDERED that the parties are to appear in Part 54, Supreme Court, New York County, 60 Centre Street, Room 228, New York, NY, for a status conference on August 29, 2017 at 11:30 a.m., at which time discovery shall proceed; and it is further

ORDERED that prior to the conference, counsel must discuss with their clients and each other whether mediation may result in good faith settlement negotiations or if further discovery is necessary before that will become a feasible option.

Dated: July 17, 2017

ENTER:

J.S.C.