SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

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GARY TATINTSIAN,

Plaintiff,

-against-

PRYOR CASHMAN LLP, ERIC HELLIGE, and EUDORA PARTNERS LLC,

Defendants.

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Index No: 152022/2017
ORDER AND DECISION
Motion Seq. No. 001

David B. Cohen, J.S.C.:

In this action, plaintiff Gary Tatintsian (Plaintiff) alleges that defendants Pryor Cashman LLP (Pryor Cashman), Eric Hellige (Hellige) and Eudora Partners LLC (Eudora, along with Pryor Cashman and Hellige, collectively, Defendants) participated in a scam perpetrated by Mikhail Vorotyntsev (MV) to "fleece" investors, including Plaintiff. The complaint asserts four causes of action: fraudulent inducement, aiding and abetting fraud, legal malpractice and unjust enrichment. By the instant motion (sequence number 001), Defendants move, pursuant to CPLR 3211 (a) (1) and (a) (7), for an order dismissing all causes of action with prejudice. For the reasons set forth below, the relief sought in the motion is granted in part and denied in part.

I. Background

The following facts are derived primarily from the complaint (NYSCEF #9), which are deemed to be true for purposes of Defendants' motion to dismiss. Pryor Cashman is a New York law firm, Hellige is a senior partner of Prior Cashman, and Eudora is a company in which Hellige is its member and manager (complaint, ¶¶ 7-9). In the spring of 2016, Plaintiff sought to invest in ShopLink Inc. (ShopLink), a startup software company in which MV is its chief executive

officer and sole board member (*id.*, ¶¶ 12-13). Plaintiff was led to believe that ShopLink is a legitimate operating company, but it turned out to be a vehicle through which MV and his wife defrauded investors in order to fund their lavish life style (*id.*, ¶¶ 14-15).

Prior to 2016, Pryor Cashman and Hellige had represented ShopLink and MV in a myriad of matters, including, among others, a $1.83 million convertible notes offering by ShopLink, and ShopLink and MV accrued substantial legal fees, owed and unpaid, over the years (*id.*, ¶ 19). In addition to the unpaid fees, in June 2012, Hellige caused Eudora to make a $20,000 loan to MV, and in return for this personal loan, MV granted Eudora a 5% equity interest in ShopLink and any corporate entities owned by MV, including Counter Capital LLC (Counter Capital), which owned all of the 15 million initially issued and outstanding shares of ShopLink (*id.*, ¶ 20).

In April 2016, Plaintiff executed the Subscription Agreement, pursuant to which he purchased 340,000 shares of ShopLink's common stock for $1,098,200, and concurrently therewith, he signed ShopLink's Stockholders' Agreement and other documents (collectively, Subscription Documents), including a letter agreement which granted Plaintiff an option to purchase additional ShopLink stock (*id.*, ¶ 24). The Subscription Documents were drafted by Hellige and Pryor Cashman (*id.*, ¶ 25). In August 2016, Plaintiff exercised the option and bought an additional 100,000 shares of ShopLink stock for $250,000, bringing his total investment to $1,348,200 (*id.*, ¶ 26). When Plaintiff invested in ShopLink, Defendants saw the transaction as leverage over MV and as cash flow which would enable them to obtain payment of their unpaid legal fees and loans, while Hellige could also enhance his equity interest in ShopLink and Counter Capital (*id.*, ¶ 21). Defendants even held Plaintiff's investment transaction hostage, warning MV a few days before the closing that unless a payment agreement was reached, the

investment funds would be returned to Plaintiff (*id.*, ¶ 22). In response to the threat, MV and Defendants ultimately agreed that, upon closing of the transaction, ShopLink would pay Pryor Cashman $15,000 out of the investment proceeds; MV would repay, from the same proceeds, his $30,000 personal loan owed to Hellige in return for a release by Eudora; and MV would sign a $33,000 promissory note payable to Pryor Cashman (*id.*, ¶ 23). The existence of this deal, in which Defendants were beneficiaries, was not disclosed to Plaintiff prior to his investment (*id.*)

Moreover, the Subscription Documents contained numerous misrepresentations and false statements that were unknown to Plaintiff at the time, and based upon the misrepresentations, Plaintiff invested in ShopLink believing that his investments would be used to fund ShopLink's startup business (*id.*, ¶¶ 27-35). While MV's fraud and the misrepresentations contained in the Subscription Documents were unknown to Plaintiff, Defendants knew that they were dealing with a "swindler" (i.e., MV) who was nothing but "hype," as shown in Hellige's June 2016 email to a ShopLink consultant, which indicated Hellige's knowledge about MV's "true nature and his proclivity toward deceit" (*id.*, ¶¶ 18, 36). Hellige was aware that his 5% interest in ShopLink was concealed by MV, and took affirmative steps to conceal it by drafting misrepresentations in the Subscription Documents about the ShopLink ownership and the value of its shares (*id.*, ¶ 37).

In addition, while Defendants knew that proceeds from the prior convertible notes offering had already been dissipated, because ShopLink and MV could not pay the legal bills, Defendants used Plaintiff's investments to "pay themselves" for matters unrelated to ShopLink's business activities, as well as to "buy out" Hellige/Eudora's 5% interest in ShopLink and/or Counter Capital in return for a reduction of MV's personal debt to Hellige/Eudora (*id.*, ¶¶ 38-39). Defendants were also reckless as to the veracity of the representation of ShopLink's ownership of

a certain patent application, because a Pryor Cashman attorney, Michael Campoli, stated that he had no information regarding such application, but Pryor Cashman nonetheless incorporated the misrepresentation in the Subscription Documents (*id.*, ¶ 40). Defendants drafted the Subscription Documents to further their own fraud as well as MV's fraud, and intentionally incorporated misrepresentations in the Subscription Documents with the expectation that Plaintiff would rely on the misrepresentations in order to enrich themselves (*id.*, ¶ 41).

Prior to bringing this suit against Defendants in this court, Plaintiff commenced a separate action against MV, his wife and ShopLink, in September 2016, in the federal district court for the Southern District of New York (Federal Action). In that action, Plaintiff asserted various claims, including a direct claim against MV for securities fraud, as well as derivative claims against MV for breach of fiduciary duty, corporate waste and unjust enrichment. In an opinion dated May 22, 2018, the federal court explained that because there was an "actual conflict of interest" between Plaintiff's direct and derivative claims, all of the derivative claims should be dismissed, leaving the direct claim against MV for securities fraud as the sole surviving claim in that litigation (*Tatintsian v Vorotyntsev*, 2018 WL 2324998, * 5 [SD NY 2018]).

Oral argument on Defendants' instant motion to dismiss (NYSCEF #6) was held on May 23, 2018, and at its conclusion, the court reserved decision.

II. Applicable Legal Standards

Pursuant to the instant motion, Defendants seek dismissal of all causes of action asserted in Plaintiff's complaint pursuant to CPLR 3211 (a) (1) and (a) (7). In considering a motion to dismiss pursuant to CPLR 3211 (a) (7), the court is to determine whether the plaintiff's pleadings state a cause of action. "The motion must be denied if from the pleadings' four corners, factual

allegations are discerned which taken together manifest any cause of action cognizable at law [internal quotation marks omitted]" (*Richbell Info. Servs. v Jupiter Partners,* 309 AD2d 288, 289 [1st Dept 2003], *quoting 511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY2d 144, 151-152 [2002]). The pleadings are afforded a "liberal construction," and the court accords the plaintiff "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). While factual allegations are accorded a favorable inference, bare legal conclusions and inherently incredible facts are not entitled to preferential consideration (*Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995]). Moreover, "[w]hen the moving party [seeks dismissal and] offers evidentiary material, the court is required to determine whether the proponent of the [complaint] has a cause of action, not whether [he or] she has stated one [citations omitted]" (*Asgahar v Tringali Realty, Inc.*, 18 AD3d 408, 409 [2d Dept 2005]).

Where the complaint's allegations consist of bare legal conclusions and "documentary evidence flatly contradicts the factual claims, the entitlement to the presumption of truth and the favorable inferences is rebutted" (*Scott v Bell Atlantic Corp.*, 282 AD3d 180, 183 [1st Dept 2001]). Therefore, under CPLR 3211 (a) (1), dismissal is warranted only when the documentary evidence "conclusively establishes" a defense to the claims as a matter of law or "utterly refutes" plaintiff's factual allegations (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015], *affd* 31 NY3d 100 [2018]; *Tsimerman v Janoff,* 40 AD3d 242 [1st Dept 2007]).

III. Analysis and Discussion

A. Transaction Causation and Loss Causation

In their motion to dismiss, Defendants argue that in order to state viable claims for fraudulent inducement, aiding and abetting fraud, and legal malpractice -- three of the four causes

of action asserted by Plaintiff -- the complaint must allege facts showing "proximate causation" of damages sustained by Plaintiff (Defendants' brief, NYSCEF #34, at 15). More specifically, Defendants argue that merely alleging damages would not have occurred "but for" the acts of the defendant is insufficient, because in pleading "proximate causation," the plaintiff must allege both "transaction causation" that induced him to engage in the transaction at issue, as well as "loss causation" that the alleged wrongdoing directly and foreseeably caused the loss at issue (*id.* at 16, citing, *inter alia*, *Vandashield Ltd. v Isaacson*, 146 AD3d 552, 553 [1st Dept 2017]; *Water St. Leasehold LLC v Deloitte & Touche*, LLP, 19 AD3d 183, 185 [1st Dept 2005]). According to Defendants, because Plaintiff alleges that he invested in ShopLink, and MV then looted the company and embezzled his investment, the monetary damages were proximately caused by MV's looting and misappropriating his investment and, as such, he has not alleged (and cannot allege) that the alleged misrepresentations or false statements in the Subscription Documents that were drafted by Defendants proximately caused the losses for which he seeks to redress.

In support of their argument, Defendants rely primarily on *Bloor v Carro, Spanbock, Londin, Rodman & Fass* (754 F2d 57 [2d Cir. 1985]), asserting that "[t]he facts presented here mirror those presented in *Bloor*" (Defendants' brief at 17). In *Bloor*, the trustee of a bankrupt company (IFC) asserted claims against its counsel, Carro Spanbock, for aiding and abetting IFC's securities fraud, claiming that counsel had assisted in the preparation of IFC's registration and proxy statements that omitted or misrepresented information (*Bloor*, 754 F2d at 61-62). The trustee also claimed that IFC's corporate funds had been mismanaged and looted by insiders, resulting in its bankruptcy (*id.* at 59). The Second Circuit rejected the trustee's argument that IFC's loss was proximately caused by its counsel, reasoning that "any damages sustained by IFC

. . . occurred later, after the securities transactions were completed, when the proceeds of those transactions were allegedly funneled into unwise investments or diverted to the personal use" of the corporate insiders (*id.* at 62). Applying *Bloor*, Defendants argue that because Plaintiff's loss "occurred only after he invested in ShopLink," when MV embezzled and looted his investment, any alleged misrepresentations in the Subscription Documents did not proximately cause his loss (Defendants' brief at 18). Defendants further argue that it was not "reasonably foreseeable" that the alleged misrepresentations, even assuming they had been known to Defendants to be false statements, would have resulted in MV's looting ShopLink, and accordingly, "the fraud, aiding and abetting fraud, and legal malpractice claims fail as a matter of law" (*id*).

In rebuttal, Plaintiff distinguishes the facts in *Bloor* from those in this case. Specifically, Plaintiff points to the fact that the *Bloor* court dismissed the fraud claims asserted by the trustee, who was suing on behalf of IFC but not purchasers of IFC's securities, against Carro Spanbock because its alleged conduct had assisted IFC in receiving "large amounts of money," which "necessarily undercut any claim that the harm later suffered by [IFC] was the result of Carro Spanbock's activities" (Plaintiff's opposition at 15, quoting *Bloor*, 754 F2d at 62). Importantly, Plaintiff also points to the following statement in *Bloor*: "The only harm that could have been prevented by Carro Spanbock's faithful exercise of its fiduciary duty would have been harm to the purchasers of [IFC's] securities. But they are not parties to this action" (754 F2d at 63). Thus, Plaintiff contends that because he is a purchaser of ShopLink securities and alleges harm caused by Defendants' misrepresentations, he "has established proximate causation for purposes of *Bloor*" (Plaintiff's opposition at 15).

Defendants counter, in a footnote, that the *Bloor* court statement "addresses transaction

causation and not loss causation, i.e. whether the law firm directly caused the purchasers' losses" (Defendants' reply, NYSCEF #39, at 5, n 4). However, Defendants' nuanced argument is not supported by any statement in the *Bloor* decision, nor have they pointed to a specific portion therein. Indeed, the *Bloor* court stated: "We express no opinion as to the viability of potential claims by purchasers who were harmed by the securities transactions, either under the securities laws or under the common law" (754 F2d at 63, n 6). Thus, based on *Bloor*, Plaintiff's claims should not be dismissed for failing to allege proximate causation, because the *Bloor* decision is distinguishable and its holding is inapplicable to the facts of this case, particularly where Plaintiff alleges that Defendants sought to use proceeds of his investment in ShopLink to enrich themselves at his expense, as discussed in detail below.

Apart from the foregoing, Plaintiff contends that, for purposes of "transaction causation," the complaint adequately alleges that he would not have invested in ShopLink if he had known that Defendants were fraudulently misrepresenting the true facts (Plaintiff's opposition at 13). Defendants do not challenge this contention. Plaintiff also contends that, for purposes of "loss causation," the complaint sufficiently alleges that it was "foreseeable" that he would sustain a "pecuniary loss as a result of relying on Defendants' alleged misrepresentations" (*id.*, citing *Silver Oak Capital LLC v UBS AG*, 82 AD3d 666, 667 [1st Dept 2011]; *Sterling Natl. Bank v Ernst & Young LLP*, 9 Misc3d 1129 [A], 2005 NY Slip 51850 [U] [Sup Ct, NY County 2005]).

In *Sterling*, the bank sued the auditor of the debtor company for fraud as well as aiding and abetting fraud, in connection with a "clean" audit report issued to the bank regarding the debtor's financial health, and the defendant auditor sought to dismiss the claims, arguing, *inter alia*, that the bank failed to plead fraud with particularity, that the defendant was unaware of the

debtor's fraud, and that the alleged misrepresentations in the report did not proximately cause the bank's loss. In denying the defendant's motion to dismiss, the court stated that the defendant's representations in the report gave the impression that the debtor was a bona fide business when it was a sham with little or no assets, and that had the audit fairly represented the debtor's financial condition, it would be evident that the debtor would be unable to pay the loan, and thus, it was "foreseeable that Sterling would suffer losses once it was induced by defendant's representations to transact with [the debtor]" (2005 NY Slip Op 51850 [U] at *6). The court also rejected the defendant's argument that, "as a matter of law," the fraudulent conduct of the debtor's principals constituted an "intervening cause," because the plaintiff bank alleged that the defendant knowingly gave a false "clean" audit report, and that the bank would have suffered the same loss even in absence of criminal fraud of the debtor's principals (*id.*). Here, the complaint likewise alleges, among other things, that Defendants' representations in the Subscription Documents gave Plaintiff the false impression that ShopLink was a bona fide business, that ShopLink had actual assets, that its principal (MV) committed criminal securities fraud, and that it was foreseeable that Plaintiff would sustain losses relying on the representations.

In light of the *Sterling* ruling, the First Department held, in *Silver Oak Capital,* that based on the complaint's allegation that the defendant, through its officers, "actively participated in plaintiffs' private placement transaction and in the dishonest scheme," plaintiffs "sufficiently allege loss causation since it was foreseeable that they would sustain a pecuniary loss as a result of relying on [the defendant's] alleged misrepresentations" (82 AD3d at 667, citing *Sterling*). Also, in *MBIA Ins. Corp. v Countrywide Home Loans, Inc.* (87 AD3d 287 [1st Dept 2011]), the First Department ruled that the complaint made allegations that were sufficient to show loss

causation, where "it was foreseeable that MBIA would suffer losses as a result of relying on Countrywide's alleged misrepresentations about the [investment quality] of the mortgage loans," which induced MBIA to insure the loans that subsequently defaulted (87 AD3d at 296). Importantly, the First Department also stated that "[i]t cannot be said, on this pre-answer to dismiss, that MBIA's losses were caused, as a matter of law, by the 2007 housing and credit crisis," and that "it is the job of the factfinder to determine which losses were proximately caused by misrepresentations and which were due to extrinsic forces" *(id)*. The *Sterling* court (2005 NY Slip Op 51850 [U] at *6) made a similar statement (the "basic point" with respect to a CPLR 3211 motion to dismiss is that, so long as the complaint contains sufficient allegations, "whether those allegations will be proven is something that will be decided at a later stage of the litigation," rather than at the pleading stage).

In their reply, Defendants counter that the cases relied on by Plaintiff, as noted above, "alleged facts demonstrating a direct causal link between the specific misrepresentation of the defendants and the resulting losses," but that Plaintiff failed to allege a direct link that the alleged misrepresentations in the Subscription Documents caused his loss (Defendants' reply at 7). Yet, Defendants do not challenge Plaintiff's assertion that, as a matter of law, only one party (like MV) can proximately cause damages, and Defendants also proximately caused Plaintiff damages (Plaintiff's opposition at 2). Moreover, as stated in *MBIA* and *Sterling*, on a pre-answer motion to dismiss, as is in this case, as long as the complaint contains sufficient allegations, whether such allegations can be proven will be decided at a later stage of the litigation, rather than at the pleading stage before any discovery has taken place.

Accordingly, the complaint, or at least with respect to the first three causes of action that

Defendants seek to dismiss, should not be dismissed at this juncture based upon Defendants' argument that such causes of action do not or cannot establish or prove proximate causation.

Each of the four causes of action in Plaintiff's complaint is analyzed in detail below, to determine whether it may or may not be dismissed on other basis, premised upon the substantive elements that are required to be pleaded or shown for each of them.

B. Fraudulent Inducement - Against Pryor Cashman and Hellige - Count I)

A cause of action for fraud or fraudulent inducement requires a plaintiff to plead: (1) a material misrepresentation of a fact, (2) knowledge of its falsity, (3) an intent to induce reliance, (4) justifiable reliance, and (5) damages (*Nicosia v Board of Mgrs. of Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]); *accord Laduzinski v Alvarez & Marsal Taxand LLC*, 132 AD3d 164, 167 [1st Dept 2015]).

As a threshold matter, Defendants argue that they, as counsel for ShopLink and MV, cannot be held liable in fraud or fraudulent inducement for alleged misrepresentations in the Subscription Documents because, under the law, such misrepresentations are attributable only to the client (Defendants' brief at 19, citing *Mateo v Senterfitt*, 82 AD3d 515, 517 [1st Dept 2011] [law firm not liable in fraud for misrepresentations made in transaction documents drafted for client]; *National Westminster Bank v Weksel*, 124 AD2d 144, 147 [1st Dept 1987]).

In response, Plaintiff contends that Defendants' argument "overstates the law," because the complaint alleges that Defendants had "actual knowledge of the falsity" of the statements in the Subscription Documents, and that Defendants had a personal interest in the fraud, as they committed the fraud to ensure payment of their unpaid legal fees and loans, and to enhance their equity interest in ShopLink and Counter Capital (Plaintiff's opposition at 17, citing *Swersky v*

Dreyer & Traub, 219 AD2d 321, 327-328 [1st Dept 1996]["special facts" doctrine required party with superior knowledge to disclose]). Under such a scenario, Plaintiff contends that Defendants have a "duty to disclose" its "superior knowledge of the essential facts," which rendered a transaction without disclosure "inherently unfair" (Plaintiff's opposition at 17, citations omitted).

The contention is unpersuasive, when viewed in the context of this fraud claim. First, any potential "enhancement" of Hellige/Eudora's equity interest is highly unlikely, because a sham company (i.e., ShopLink) with little or no assets and business operations (as alleged by Plaintiff) has little or no prospect to provide any enhancement of an equity interest. Also, the imputation that Defendants have "actual knowledge" of the fraud, as allegedly reflected in the June 2016 emails, appears speculative on the part of Plaintiff, as discussed below. Moreover, the "special facts" doctrine in *Swersky*, the case relied upon by Plaintiff, has been subsequently modified and/or clarified in *Merkin v Berman* (123 AD3d 523, 524 [1st Dept 2014]), which held that the doctrine would apply only in business dealings between parties to a transaction, or where a fiduciary duty existed between the parties, that would require disclosure. In this case, Defendants were not parties to the transaction that was entered into between Plaintiff and ShopLink/MV with respect to his investment, and Plaintiff does not allege, as a ShopLink investor, the existence of a fiduciary relationship with Defendants. Thus, the "special facts" doctrine is inapplicable.

Plaintiff's complaint alleges that the emails exchanged between Hellige and a ShopLink consultant in mid-June 2016 (NYSCEF #16) shown that Defendants knew that ShopLink and MV "were not what they purported to be,; that Defendants knew that they were dealing with a "swindler" (MV) who was nothing but "hype;" and that Defendants knew about MV's "true nature and his proclivity toward deceit;" but nonetheless prepared documents to give the business

"the appearance of legitimacy" to induce Plaintiff's investments in order "to protect and enhance their own financial self-interest," including using the investments "to pay themselves for matters unrelated to ShopLink's activities" (Complaint, ¶¶ 18, 36). Defendants counter that, when the email chain is analyzed in full, the emails written by Hellige "had nothing to do with the bona fides" of ShopLink or MV, but merely reflected his dispute with MV over the payment of legal fees for work performed for ShopLink and other MV ventures in the past, for which he was "attempting to get paid for services rendered" (Defendants' brief at 4).

While Defendants' intent to obtain payment of unpaid fees and loans was not facially wrongful or fraudulent, it is apparent that they intended to use the investment proceeds from the closing of Plaintiff's transaction with ShopLink to effect the payment. Indeed, Defendants admit that "at one point Hellige warns that he will cease further work and instead return [Plaintiff] investment" if MV did not agree to the payment scheme (*id*). Documentary evidence -- a letter agreement dated June 27, 2016 between MV and Hellige, a cashier's check and a promissory note by MV (NYSCEF ## 16-18) – showed Defendants' effectuation of the scheme. Although the $30,000 cashier's check was purportedly drawn from MV's own funds, as opposed to the investment proceeds (as argued by Defendants), to pay off MV's loans and the equity interest held by Eudora, the relatively small amount, when compared with Plaintiff's $1.35 million investment, is insignificant. The same is true as to the even smaller $15,000 payment for "non-ShopLink invoices" (as alleged by Plaintiff), which calls into question the "materiality" of the alleged omissions or misrepresentations, in the context of the alleged fraud perpetrated by MV and Defendants. As noted, "material misrepresentation" is one of the elements of a fraud claim.

Moreover, while the scheme enabling Defendants to get paid to "enrich" themselves at

Plaintiff's expense seemed unfair, the allegations of Defendants having actual or constructive knowledge of MV's fraud or falsity of misrepresentations -- such as allegations of recklessness relating to the patent application and ShopLink's failure to make securities law disclosures and file taxes -- were speculative on the part of Plaintiff, particularly where allegations are based "on information and belief." Such allegations do not comport with CPLR 3016 (b)'s mandate that knowledge or scienter for fraud/misrepresentation claims be pleaded with particularity (*Empire 33rd LLC v Forward Assn. Inc.*, 87 AD3d 447, 449 [1st Dept 2011] [fraud claim dismissed for lacking particularity]; *Giant Group v Arthur Andersen LLP*, 2 AD3d 189, 190 [1st Dept 2003]).

In addition, an integral element of a fraud or misrepresentation claim is plaintiff's justifiable reliance. The Subscription Documents include a document setting forth a long list of "Risk Factors," a copy of which is annexed as "Exhibit C" to the complaint (NYSCEF #4) and was provided to Plaintiff, as an "accredited investor" in ShopLink's securities. The Risk Factors include, among others: "The Company is a development stage company with no operating history and . . . investors will not have any basis on which to evaluate the Company's ability to achieve its business objectives"; "The Company has no revenues to date and cannot assure Subscribers that it will generate any revenues"; "The Shares will not be registered under any Federal or State securities laws . . ."; "The offering price for the Shares has been arbitrarily determined by the Company and bears no relationship to the [its] earnings, asset value . . ."; "The management of the Company will have broad discretion in applying the net proceeds of this Offering." The Subscription Agreement, in part, also contains similar warnings and disclaimers.

Notwithstanding the Risk Factors and their attendant warnings and disclaimers, Plaintiff argues that "contractual disclaimers of reliance do not suffice to bar fraud claims because 'a

purchaser may not be precluded from claiming reliance on misrepresentations of fact peculiar within the seller's knowledge'" (Defendants' opposition at 20, quoting *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 139 [1st Dept 2014]).

Though Plaintiff's argument is generally valid (i.e., a buyer's disclaimer of reliance cannot preclude a claim of justifiable reliance on the seller's misrepresentations or omissions), it becomes inapplicable if "(1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented or undisclosed; and (2) the alleged misrepresentations or omissions did not concern facts peculiarly within the seller's knowledge" (*id.* at 137 [citations omitted]). Here, Plaintiff argues that "the disclaimers were not specifically applicable to the misrepresentations and omissions (such as Defendants' loans to [MV] and equity ownership in ShopLink) at issue, and therefore provide Defendants with no defense" (Defendants' opposition at 21). Yet, the failure or omission to disclose the equity interest in ShopLink is immaterial because any "enhancement" of such interest is exceedingly unlikely where ShopLink is a sham (as alleged by Plaintiff), and if Defendants actually knew of the scam (as alleged by Plaintiff), why did they even seek an equity interest from MV, the scammer. As also discussed, the undisclosed loan is immaterial when compared to the amount of Plaintiff's investment, especially when viewed in the context of the overall alleged scam.

Moreover, there is legal precedent which holds that a law firm may not be held liable for drafting documents on behalf of clients that contain alleged misrepresentations, and that there is no "special duty" to disclose unless a fiduciary duty existed between the parties (*Mateo*, 82 AD3d at 517 [misrepresentations attributable to clients]; *Merkin*, 123 AD3d at 524 ["special facts" doctrine inapplicable lacking a fiduciary duty relationship]). Indeed, the *Mateo* court

observed that, in the case where a defendant law firm made "actionable misrepresentations in the transaction documents it drafted by incorporating [the client's] misrepresentations into the documents," the cause of action would be "substantial assistance by defendant to aid and abet [the client's] fraud" (*id.* at 517), but not direct fraud.

Accordingly, based upon the specific facts and circumstances of this case, the first cause of action (fraudulent inducement) should be dismissed.

C. Aiding and Abetting Fraud - Against Pryor Cashman and Hellige - Count II)

To state a claim for aiding and abetting fraud, a complaint must allege: (1) a viable claim for an underlying fraud; (2) actual knowledge of the fraud by the alleged aider and abettor; and (3) substantial assistance by the alleged aider and abetter (*Lumen at White Plains, LLC v Stern*, (135 AD3d 600, 601 [1st Dept 2016]; *Gregor v Rossi* (120 AD3d 447, 448 [1st Dept 2014]).

In support of the motion, Defendants argue that Plaintiff does not allege a viable underlying fraud claim, and his allegations of "constructive knowledge" and "recklessness," as well as his failure to sufficiently allege "substantial assistance," require dismissal of this claim (Defendants' brief at 22-24, citing various authorities of law). In rebuttal, Plaintiff contends that he has alleged an underlying fraud, that the complaint contains "numerous" allegations of Defendants' actual knowledge of fraud as well as of Defendants' "substantial assistance" to MV (Defendants' opposition at 22-24, citing various opposing authorities of law). It is apparent that the parties hold diametrically opposite positions with respect to this claim.

Importantly, despite their conflicting postures and arguments, a decision with respect to Plaintiff's underlying fraud claim against MV is still pending before the federal court in the Federal Action, and Plaintiff's counsel has conceded that if the underlying fraud claim against

MV is dismissed in the Federal Action, the instant aiding and abetting fraud claim against Defendants in this action also fails (transcript for May 23, 2018 hearing at 12-13).

Therefore, a determination of the instant claim by this court at this time is unnecessary. Indeed, the outcome of any such determination may pose a potential conflict with the federal court's decision. Accordingly, a determination of this claim is held in abeyance, pending the federal court's resolution of the underling fraud claim against MV in the Federal Action.

D. Legal Malpractice - Against Pryor Cashman and Hellige - Count III)

In order to plead a legal malpractice claim, the complaint must allege "the negligence of the attorney" and that the negligence is the "proximate cause of the loss sustained" by plaintiff (*O'Callaghan v Brunelle*, 84 AD3d 581, 582 [1st Dept 2011][internal citations and quotation marks omitted]). Further, a legal malpractice claim cannot be stated if there is no attorney-client relationship between the parties (*Waggoner v Caruso*, 68 AD3d 1, 3 [1st Dept 2009], *affd* 14 NY3d 874 [2010]).

Plaintiff acknowledges that he is not a client of and is not in privity with Defendants, but asserts that he may recover for losses arising from Defendants' legal malpractice if the complaint alleges "fraud, collusion, malicious acts or other special circumstances" (Plaintiff's opposition at 25, citing, *inter alia, Estate of Schneider v Finmann*, 15 NY3d 306, 308 [2010]). In such regard, the complaint alleges that Defendants "engaged in fraud, collusion, or malicious or tortious acts against Plaintiff," and as a result, "Defendants are liable to Plaintiff for legal malpractice" (Complaint, ¶¶ 61-62).

However, Plaintiff's allegation of "collusion" in the complaint is conclusory because he fails to identify any collusive acts between Defendants and MV, and has neither alleged nor

specifically identified any "malicious acts" on the part of Defendants. In his opposition to the motion, Plaintiff merely alleges that because "Defendants committed fraud against him to benefit themselves . . . and implicitly . . . Defendants secretly colluded with [MV] to misappropriate Plaintiff's investment for Defendants' and [MV's] own enrichment" (Defendants' opposition at 26-27), The foregoing allegations sound more like an unjust enrichment claim rather than a legal malpractice claim, because the conclusory allegation of "secret collusion" is not supported by any fact. Also, his fraud against Defendant has been dismissed, for the reasons stated above.

Accordingly, the legal malpractice claim should be dismissed (*Benzemann v Citibank, N.A.*, 149 AD3d 586, 586 [1st Dept 2017] [absence of privity, along with conclusory allegation of fraud and collusion, required dismissal of the legal malpractice claim]).

E. Unjust Enrichment - Against All Defendants - Count IV)

To adequately state a claim of unjust enrichment, the complaint must allege that the defendant was enriched at the plaintiff's expense, and that it would be "against equity and good conscience to permit [the defendant] to retain what is sought to be recovered" (*Georgia Malone & Co. v Rieder*, 19 NY3d 511, 516 [2012], citing, *inter alia*, *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]). Notably, the complaint does not have to state there is privity between the parties, but must allege or show the existence of a "connection" between the parties that is "not too attenuated" (*Georgia Malone*, 19 NY3d at 517).

In their motion, Defendants argue that Plaintiff does not allege a "relationship" or "connection" between the parties, "much less one that reasonably could have caused Plaintiff to rely upon Defendants" (Defendants' brief at 25). Defendants also argue that because they "merely served as legal counsel" to ShopLink/MV in which Plaintiff was an investor, the unjust

enrichment claim must be dismissed (*id*). Defendants further argue that Plaintiff must also show a "relationship between the parties that could have caused reliance or inducement" (*id*, citing, inter alia, *Mandarin Trading,* 16 NY3d at 182).

Defendants' arguments are unpersuasive. First, contrary to their assertion that they "merely served as legal counsel" to ShopLink/MV, the complaint alleges, and Defendants do not deny, that they made personal loans to MV and held an equity interest in ShopLink, even though Defendants subsequently agreed, pursuant to the letter agreement between Hellige and MV, dated June 27, 2018, to release any claim on the loans and equity interest and to transfer such interest back to MV, in exchange for a $30,000 bank check. Notably, the letter agreement also specified that, upon its execution, MV would cause ShopLink to pay $15,759.68 to Pryor Cashman "so that the Tatintsian transaction may close today." Therefore, it is apparent that Defendants intended to use Plaintiff's investment transaction as leverage over MV to ensure payment of its fees and loans. Indeed, as discussed, Defendants concede that Hellige would cease doing further work and return Plaintiff's investment to him, unless the payment scheme came to fruition.

Because Defendants participated in the transaction for the purpose of getting paid, the complaint states a sufficient "connection" and "relationship" that is "not too attenuated" for purpose of this claim. Indeed, whether all of part of the payment to Defendants was actually funded by proceeds of Plaintiff's investment is not critical, because the complaint adequately alleges that Defendants were "unjustly enriched by the proceeds of the Tatintisan Investment that were provided to [each of them], directly or indirectly;" the enrichment "was at the expense of Plaintiff;" and it is "against equity and good conscience" to permit Defendants to retain the proceeds of Plaintiff's investment (Complaint, ¶¶ 73-77).

Moreover, Defendants' argument that Plaintiff must also prove "reliance or inducement" is unavailing, because these elements were mentioned in *Mandarin Trading* where the plaintiff in that case argued that he relied upon the defendant's appraisal letter for a painting which plaintiff intended to later purchase at an auction even though the defendant, an art expert, never knew of the plaintiff's existence and the letter was not written for the plaintiff's benefit (16 NY3d at 176-178). Indeed, in *Mandarin Trading*, "reliance or inducement" is not among the three factors for an unjust enrichment claim (*id.* at 182, quoting, *inter alia*, *Citibank, N.A. v Walker*, 12 AD2d 480, 481 [2d Dept 2004]).

Accordingly, the motion seeking dismissal of the unjust enrichment claim is denied (*Silver Oak Capital*, 82 AD3d at 668 [allegation that placement fee paid to defendants were taken from plaintiff's investment funds was sufficient to state unjust enrichment claim]).

IV. Conclusion

For all of the foregoing reasons, it is hereby

ORDERED that defendants' motion to dismiss (motion sequence 001) is granted only to the extent of dismissing the first (fraudulent inducement) and third (legal malpractice) causes of action of the complaint; and it is further

ORDERED that defendants are directed to serve an answer to the complaint, consistent with the rulings stated herein, within 20 days after service of a copy of this order and decision with notice of entry; and it is further

ORDERED that counsel for the parties are directed to appear for a status conference in Room 574, 111 Centre Street, on FEBRUARY 20 2018, at 9:30 AM.

Dated: DECEMBER 10, 2018

ENTER:

J.S.C.

HON. DAVID B. COHEN
J.S.C.