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

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CITIGROUP GLOBAL MARKETS INC.,CITIGROUP GLOBAL MARKETS LIMITED, CITIGROUP GLOBAL MARKETS ASIA LIMITED, CITIGROUP GLOBAL MARKETS SINGAPORE PTE LIMITED, CITIBANK, N.A., NEW YORK BRANCH, CITIBANK, N.A., LONDON BRANCH, CITIBANK, N.A., ZURICH BRANCH, CITIBANK, N.A., GENEVA BRANCH, CITIBANK, N.A., SINGAPORE BRANCH, CITIBANK, N.A., HONG KONG BRANCH, CITIBANK, N.A., JERSEY, CHANNEL ISLANDS BRANCH, CITIBANK INTERNATIONAL PLC, CITIBANK (SWITZERLAND) AG, CITIBANK CANADA INVESTMENT FUNDS LIMITED, CITITRUST (BAHAMAS) LIMITED, and CITIBANK, N.A.

Plaintiffs,

- v -

SCIP CAPITAL MANAGEMENT, LLC and THE SILVERFERN GROUP, INC.,

Defendants.

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INDEX NO. 651031/2019

MOTION DATE N/A

MOTION SEQ. NO. (MS) 008

DECISION + ORDER ON MOTION

HON. MARGARET A. CHAN:

The following e-filed documents, listed by NYSCEF document number (Motion 008) 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 204, 205, 220, 221, 222, 223, 224, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317

were read on this motion to/for SUMMARY JUDGMENT AFTER JOINDER

This action involves dueling allegations of contract breach by the above-captioned plaintiffs (collectively, Citi) and defendants SCIP Capital Management, LLC and the Silverfern Group, Inc. (together, Silverfern) under the parties' 2012 agreement to create an equity club. Citi sues for non-payment of fees and Silverfern counterclaims for Citi's alleged failure to perform. Citi now moves for an order pursuant to CPLR 3212 granting its motion for summary judgment in favor of its breach of contract claim and to dismiss defendant Silverfern's counterclaim. Silverfern opposes the motion. Oral argument was held on June 6, 2023.

BACKGROUND

The background for this action has been stated in detail in the decision dated December 13, 2019 of the Honorable Sherwood (ret.) on MS 003 (NYSCEF # 41). In brief, the parties entered the January 12, 2012 distribution agreement to give Citi's clients the option of joining a Silverfern equity club to be "offered opportunities to co-invest in private equity or similar transactions sponsored by Silverfern" (NYSCEF # 1 – Complaint, ¶ 2; NYSCEF # 270 – the Agreement). The Agreement required Citi "to use its best efforts to offer [investment deals] to the Equity Club Investors on terms that have been approved by Silverfern" (NYSCEF # 270 § 1 [a]). "Ultimately, 39 . . . clients joined the Equity Club and invested approximately $190 million" (*id.*). The parties were to equally split Silverfern's 2% management fees collected out of the investments (*id.*, ¶ 5). Citi alleges that millions in fees are past due and owed by Silverfern (*id.*, ¶ 14).

Before Justice Sherwood in MS 003 was plaintiffs' motion to dismiss defendants six counterclaims. In support of the counterclaims raised in its amended answer (NYSCEF # 137, ¶'s 213-247), Silverfern relied upon, among other things, a letter of Citi dated April 11, 2016, sent to club members which stated that additional products Silverfern started offering to members "are not being offered pursuant to the" arrangement Citi had with Silverfern and that Citi is "not involved in such offerings, have not reviewed any documents or conducted any diligence in connection with such offerings or Silverfern's ability to offer such Additional Products in your region and no services will be provided by Citi with respect to any investments in such Additional Products by you" (NYSCEF # 166 at 1).

The counterclaim that survived dismissal was defendants' breach of contract claim (NYSCEF # 41 at 11), which Citi now moves to dismiss under CPLR 3212.

It is not disputed that Silverfern stopped paying fees in 2018; Citi contends this was notwithstanding that Citi had fully performed its obligations (NYSCEF # 118 at 10-11). Citi notes that "Silverfern had the unilateral right to renew the Agreement three times—and it did so in 2015, 2016, and 2017, never asserting any breach by Citi until Citi sought to collect unpaid fees" (NYSCEF # 118 at 12). Citi disputes that its April 11, 2016 letter breached the Agreement or that Citi otherwise failed to use the contractually required best efforts (NYSCEF # 118 at 12-17). Citi also contests Silverfern's ability to recover damages in any event (NYSCEF # 118 at 17-22).

In opposition, Silverfern posits that "[t]here is ample evidence that Citi failed to use best efforts to offer[1] Equity Club deals to clients. That evidence not only precludes summary judgment against Silverfern but forecloses summary judgment

[1] Although Silverfern's amended answer charges Citi with failing its best efforts obligation to "promote" the club, Silverfern does not carry that charge forward in the present motion (NYSCEF 137, ¶ 82). Instead, this motion turns on Citi's obligation "to use best efforts 'to offer' the deals" (NYSCEF # 317 at 2, quoting NYSCEF # 270 § 1 [a]).

on Citi's claim for unpaid fees as well" (NYSCEF # 304 at 12). Silverfern continues that whether Citi's best efforts obligation has been met presents a question of fact, including because of its submission of a report describing what industry standards apply and opining that Citi's efforts fell short (NYSCEF # 304 at 12-13, citing NYSCEF # 229 – the Strachman Report). Such standards, which Citi allegedly failed to meet, include that a placement agent "should make sure the investor is aware of the deal, ensure the investor receives all necessary information, encourage the investor to evaluate the opportunity, and follow up to ensure the investor makes a decision before the deadline" (NYSCEF # 304 at 13-14 citing NYSCEF # 229, ¶'s 60-108). Silverfern also notes the Strachman Report's opinion that Citi breached the Agreement via the April 2016 letter in that "any reasonable investor receiving this highly unusual letter would have understood that Citi was distancing itself from Silverfern and was calling into question Silverfern's competence as an investment manager" (NYSCEF # 304 at 14 quoting NYSCEF # 229, ¶ 153). In addition to the letter, Silverfern refers to the Strachman Report as identifying "more than sufficient evidence" to preclude summary judgment on its counterclaim (NYSCEF # 304 at 14 citing NYSCEF # 229, ¶'s 109-151).

As to Citi's claim for damages, Silverfern concludes that "[b]ecause Citi materially breached the Distribution Agreement in April 2016, Silverfern was not required to pay any fees that accrued after that date, whether they related to earlier deals or later ones" (NYSCEF # 304 at 15). Moreover, Silverfern contends that there are genuine disputes over its counterclaim damages (NYSCEF # 304 at 16).

In reply, Citi diminishes Silverfern's support for Citi's alleged breach as constituting nothing more than "the self-serving hearsay testimony of [Silverfern's] principals that two of the dozens of Citi bankers with clients in the Club supposedly 'disparaged' Silverfern and [ ] a handful of emails in which Citi personnel complained internally about the difficulties of working with Silverfern—none of which establishes a 'breach' of the Agreement" (NYSCEF # 317 at 2). As to the April 2016 letter, Citi argues: "Justice Sherwood already determined there was nothing wrongful or inaccurate about it" (*id.* at 2, citing NYSCEF # 41 at 11). Citi also identifies internal documents of Silverfern that "show investors had several reasons not to invest, having nothing to do with Citi" (NYSCEF # 317 at 3). Citi also points to "the notifications Silverfern sent in the same period that two of its most well-subscribed deals were severely challenged and that large additional contributions were required just to avoid 'substantial dilution' " (*id.*). Citi adds that Strachman's report cannot establish a triable issue of fact, arguing that "Strachman opines at length about 'typical' placement deals, rather than this specific arrangement. . . and, given the total absence of causation evidence, offers only speculation of the kind uniformly held insufficient to escape summary judgment" (NYSCEF # 317 at 3). Finally, Citi disputes Silverfern's damages arguments.

DISCUSSION

Standards

A party moving for summary judgment must make a prima facie showing that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "When the movant fails to make this prima facie showing, the motion must be denied, regardless of the sufficiency of the opposing papers" (*Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 481 [1st Dept 2018] [quotation marks omitted]). Once a showing has been made, the burden shifts to the party or parties opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp*, 18 NY3d 499, 503 [2012]). In the presence of a genuine issue of material fact, a motion for summary judgment must be denied (*see Grossman v Amalgamated Haus. Corp*, 298 AD2d 224, 226 [1st Dept 2002]). "Summary judgment must be denied where there is any doubt as to the existence of a triable issue or where the issue is arguable" (*Genesis*, 157 AD3d at 482 [citations and quotation marks omitted]).

"To plead breach of contract, the proponent must allege the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Second Source Funding, LLC v Yellowstone Capital, LLC*, 144 AD3d 445, 445-46 [1st Dept 2016]). "The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent. . . and [t]he best evidence of what parties to a written agreement intend is what they say in their writing" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], *affd*, 13 NY3d 398 [2009] [internal citation and quotation marks omitted]). A "best efforts clause imposes an obligation to act with good faith in light of one's own capabilities. Best efforts requires that [one] pursue all reasonable methods . . . and whether such obligation has been fulfilled will almost invariably . . . involve a question of fact" (*Maestro W. Chelsea SPE LLC v Pradera Realty Inc.*, 38 Misc 3d 522, 530 [Sup Ct, NY County 2012]).

Best Efforts Obligation

Citi's motion for summary judgment in favor of its breach of contract claim, and to dismiss Silverfern's counterclaim, is denied. Even assuming for argument's sake that Citi met its burden as the moving party of making a prima facie showing that it performed under the Agreement, Silverfern has set forth evidence sufficient to establish that there are genuine issues of material fact.

Citi agreed to use best efforts to offer Equity Club deals to clients, and Citi fails to explain why its showing as to its participation in initially launching the club

demonstrates its best efforts to offer deals in later years (NYSCEF # 118 at 11). Nor does Citi dispute that it had ongoing obligations. Rather, Citi asserts that "[a]fter the launch of the Club, Citi bankers successfully facilitated communication between Citi's clients and Silverfern and helped disseminate documentation" (NYSCEF # 317 at 4, n 4). Citi supports this assertion by citing to the material statement of facts in which it characterized its obligations as including "various administrative tasks," which description Silverfern disputes (NYSCEF # 305, ¶ 11). Even putting the dispute aside, Citi supported that portion of the statement of material facts with testimony from a Citi banker, which tends to show Citi's view of the nature of its role, not whether Citi fulfilled that role (*id.* citing to NYSCEF # 124 – Gregory Tr at 108:7-109:14 [describing Citi's facilitation role]; 211:5-12 [same]; 234:13-25 ["effort here . . . in terms of our formation efforts, and then separately our facilitation of communications during the deal phases"]). In asserting that it "successfully performed the tasks assigned to it," Citi also avers that it "provided Silverfern with anti-money-laundering certifications for each investor and managed funding of Club members' Silverfern investments through Citi accounts" supporting that claim with a reference to "NYSCEF#145, at -617" (NYSCEF # 317 at 4, n 4). Apparently referencing pages 6 to 7 of an April 23, 2013 process letter, that still only includes descriptions of Citi's role in the abstract, not identifying what Citi actually did, nor does any other portion of NYSCEF Doc. No. 145 make such showing.

Moreover, the court disagrees with Citi that there is "zero evidence" to support Silverfern's demand for damages on account of Citi having "allegedly 'failed' to perform such tasks as forwarding Silverfern's emails to clients who had already received them or reviewing diligence documents for investments on which they were not permitted to opine" (NYSCEF # 317 at 4). Rather, the court finds that Silverfern has set forth sufficient evidence to establish a genuine issue of material fact as to Citi's performance of its best efforts obligation. The Strachman Report includes quantitative analysis of, among other things, emails Citi sent to their clients about Equity Club deals (NYSCEF # 208, ¶'s 132-151). Strachman finds:

> a drastic change in the level of email activity between the three earlier deals in 2013 to 2015 . . . and the six deals in 2016 and 2017 . . . . For the earlier deals, banker email traffic to clients was moderate and reached as high as 40 emails per month for [one of the deals]. Starting in 2016, however, banker emails plummeted and rarely reached 5 emails per month. Four deals never went above even one email per month, and two deals . . . produced no emails. In my opinion, this sharp drop-off in emails to clients shows that Citi bankers drastically reduced the efforts they put into distributing Equity Club investments starting in 2016.
>
> (*Id.*, ¶ 137.)

Citi argues that Strachman's analysis is based on "massively incomplete data" in that the charts "focus on only five Citi bankers (out of the dozens who worked with Club clients) and only nine of Silverfern's 15 Club deals" (NYSCEF # 317 at 8, n 10). Citi does not dispute that the email activity declined with reference

to the data Strachman analyzed, however, or explain what the outreach efforts would have looked like based on a more complete dataset. Citi also argues that certain of the quantitative analysis is "meaningless" and "must be disregarded," but Citi fails to address the apparent decline in email outreach (*id.* [addressing call reports and Citi's participation in conference calls]).

Strachman also indicates that one Citi banker testified that he understood that the best efforts obligation applied only to the initial marketing of the club, not to later deals (NYSCEF # 208, ¶ 117 citing NYSCEF # 241 at 362:18-19, 363:16-17). A finder of fact could find meaning in this and other testimony of Citi bankers, together with the quantitative analysis Strachman presents, to question Citi's efforts, and that is all that is needed to demonstrate that there is doubt on this arguable issue (*Genesis*, 157 AD3d at 482 [citations and quotation marks omitted]).

A fact finder may find it material that "Silverfern had the unilateral right to renew the Agreement three times—and it did so in 2015, 2016, and 2017" and credit Citi's assertion that Silverfern "never assert[ed] any breach by Citi until Citi sought to collect unpaid fees," but this is insufficient to eliminate any triable issue of fact as to the level of efforts Citi was undertaking (NYSCEF # 118 at 12). Additionally, Silverfern disputes that it never raised any issue with Citi's efforts (NYSCEF # 318 at 29:11 – 30:3; *see also* NYSCEF # 234 – EBT Tr of C Holmes at 90:21 – 91:9 [testifying that Silverfern gave notice of breach at November 2, 2016 meeting with Citi]). Nor does Silverfern's acknowledgment that various earlier investment deals "were well-received" constitute a concession that Citi exercised best efforts for later deals (NYSCEF # 118 at 12, citing NYSCEF # 137, ¶ 118).

Given Silverfern's evidence identifying a triable issue of fact as to whether Citi used best efforts, Citi's reliance on *Koninklijke Ahold, N.V. v SMG-II Holdings Corp.* is unavailing (290 AD2d 375, 375-76 [1st Dept 2002] ["defendant failed to submit any evidence countering plaintiff's prima facie showing, made on its cross motion to dismiss the counterclaim, that it had used such best efforts]).

Damages

Silverfern asserts that it "suffered $32 million in lost profits from the Equity Club due to Citi's actions" and "another $328 million in lost profits from successor clubs and funds" (NYSCEF # 304 at 16). Silverfern identifies the $32 million as direct damages (*id.* at 18). As for the latter, Silverfern acknowledges that such lost profits constitute consequential damages so that it must demonstrate foreseeability and reasonable certainty as to amount (*see e.g.* NYSCEF # 318 at 44:3-13).

Citi argues that Silverfern cannot establish that Citi caused the general damages, asserting that it is speculative "that Citi's alleged conduct caused any investor not to participate in the Club" (NYSCEF # 118 at 18). Meanwhile, Citi denies that the parties reasonably contemplated liability for consequential lost profits, pointing to the remedy provisions in the Agreement, which Citi indicates provides that, if Citi were to materially breach the Agreement, Silverfern would be

relieved of its obligation to pay any unpaid balance under the Agreement—a limited, if not exclusive, remedy" (*id.* at 19-20).

"Lost profits may be either general or consequential damages, depending on whether the non-breaching party bargained for such profits and they are the direct and immediate fruits of the contract. . . . Otherwise, where the damages reflect a loss of profits on collateral business arrangements, they are only recoverable when (1) it is demonstrated with certainty that the damages have been caused by the breach, (2) the extent of the loss is capable of proof with reasonable certainty, and (3) it is established that the damages were fairly within the contemplation of the parties. . . . Lost profits from the breach of a distribution contract are subject to these principles" (*Biotronik A.G. v Conor Medsystems Ireland, Ltd.*, 22 NY3d 799, 806 [2014] [citations and quotation marks omitted]).

As for the $32 million, which the parties frame as general, and not consequential, damages (*but see Champion Labs., Inc. v Highline Aftermarket Acquisition, LLC*, 2022 WL 3586118 [Sup Ct, NY County 2022]), Citi alleges that it is entitled to summary judgment dismissing Silverfern's counterclaim to the extent of such amount because Silverfern cannot establish that Citi caused the damage. Citi argues that "[t]here is no evidence from any Club Members indicating that they would have invested in a particular Equity Club deal but for Citi's conduct" (NSYCEF # 118 at 18). Silverfern responds "there are many ways to prove causation beyond investor testimony" (NYSCEF # 304 at 16). Whatever merit, or lack thereof, may exist in this claim for lost profits, the court finds that Citi has not demonstrated a prima facie showing that it is entitled to judgment as a matter of law as to causation by noting an apparent absence of evidence coming from the club members themselves. Accordingly, the branch of Citi's motion seeking summary judgment as to the $32 million is denied.

Next, this court concludes that Silverfern is not entitled to the $328 million in consequential damages as a matter of law. As Citi argues, Section 7 of the Agreement demonstrates that the parties did not contemplate that Citi would be obligated to pay Silverfern for consequential damages in the event Citi breached. In particular, Section 7 (c) provides:

> . . . upon a [complete termination of this Agreement and the Term], all of the parties' respective rights and obligations to each other hereunder shall terminate without further liability. . . [and] with respect to any [termination] by Silverfern for Cause . . . Silverfern . . . shall cease to be required to pay, one hundred percent (100.00%) of any unpaid balance of any Placement Fees and Incentive Fees that, as of the date of such termination, has not become due and payable."
>
> (NYSCEF # 270 at 22).

Silverfern argues that the remedies provision "does not preclude consequential damages" emphasizing that it "spells out consequences where a party ***explicitly terminates*** the contract" (NYSCEF # 304 at 21, n 6 [emphasis in

original]). That is of no moment; the question is whether "the damages were fairly within the contemplation of the parties" (*Biotronik*, 22 NY3d at 806), and the above-quoted language demonstrates that the parties did not mean to allocate to Citi consequential damages (*see e.g. Kenford Co., Inc. v County of Erie*, 73 NY2d 312, 320 [1989] [rejecting application of consequential damages, including where "the provisions in the contract providing remedy for a default do not suggest or provide for such a heavy responsibility"]).

It is not the case, as Silverfern asserts, that "[t]here is ample evidence of foreseeability here" (NYSCEF # 304 at 19). That the Agreement "contains no exclusion for consequential damages" even accepting that "Citi included such provisions in numerous related documents" with third parties is unavailing (*id.*). Rather, the law is that "[i]n the absence of any provision for [consequential damages], the commonsense rule to apply is to consider what the parties would have concluded had they considered the subject" (*Kenford Co., Inc. v County of Erie*, 67 NY2d 257, 262 [1986]). Citi's dealings with third parties is not evidence that Citi and Silverfern considered the subject and determined Citi would be liable.

Silverfern's reliance on *Quadrant Structured Products Co., Ltd. v Vertin* is insufficient (23 NY3d 549, 559 [2014]). The Court of Appeals, in limiting the applicability of a no-action clause in a trust indenture to the language spelled out in the contract, noted, "with the understanding that no-action clauses are to be construed strictly and thus read narrowly," that where there is ambiguity as to the intention of the no-action clause, omission of certain terms included in other contracts implies the parties intended the omission. However, for a party to be liable for consequential damages, even intentional silence via omission is insufficient; Silverfern would have to demonstrate the parties' alleged intention that Citi would be obligated to pay for consequential damages, which it has not done as a matter of law.

Nor is the court persuaded by Silverfern's reference to *MBIA Ins. Corp. v Morgan Stanley* in apparently asserting that Citi is a highly sophisticated financial entity and therefore could foresee lost profits (NYSCEF # 304 at 20 citing 42 Misc 3d 1213(A) [Sup Ct, Westchester County 2011]). "[B]are notice of special consequences which might result from a breach of contract, unless under such circumstances as to imply that it formed the basis of the agreement, would not be sufficient" (*Kenford*, 73 NY2d at 320; *see also Bersin Properties, LLC v Nomura Credit & Capital, Inc.*, 74 Misc 3d 1209(A), 12 [Sup Ct, NY County 2022], *affd*, 213 AD3d 431 [1st Dept 2023] ["simply because . . . a breach might cause lost profits, that is not an agreement to assume liability for that loss"]). Because knowledge alone is insufficient, so is Silverfern's assertion that the Agreement mentions the possibility of successor clubs.

Silverfern cites *Karamarios v Bernstein Mgt. Corp.* (204 AD2d 139, 140 [1st Dept 1994]) to argue that "[w]hether consequential damages were foreseeable is ordinarily a question of fact." (NYSCEF # 304 at 18). This argument is unpersuasive as *Karamarios* is inapposite as *Karamarios* was decided on different facts,

measuring a different duty, and that court found a question of fact, which is not the case here (*compare Karamarios* [questioning whether a duty to maintain safe conditions on property encompassed "foreseeability of injury" from a service door presented a question of fact] *with Kenford*, 73 NY2d at 322 [denying consequential damages "as a matter of law"]).

Conclusion

In light of the foregoing, it is

ORDERED that the branch of the above-captioned plaintiffs' motion for summary judgment in favor of plaintiffs' breach of contract claim is denied; and it is further

ORDERED that the branch of the above-captioned plaintiffs' motion to dismiss defendants/counterclaim plaintiffs SCIP Capital Management, LLC and The Silverfern Group, Inc's breach of contract counterclaim is denied in the entirety; and it is further

ORDERED that counsel for the parties shall attend a settlement conference with the court at a future time, to be determined by counsel and the court (counsel may email the court's law clerk at tcaliya@nycourts.gov for scheduling); and it is further

ORDERED that counsel for defendants shall serve a copy of this decision, along with notice of entry, on all parties within ten days of entry.

07/18/2023
DATE

MARGARET CHAN, J.S.C.

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