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

PRESENT: BARBARA R. KAPNICK PART 39

Index Number : 653189/2012
MAFG ART FUND, LLC
vs
GAGOSIAN, LARRY
Sequence Number : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____
Answering Affidavits — Exhibits _____ No(s). _____
Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 1/31/14

J.S.C.
BARBARA R. KAPNICK

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 39

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MAFG ART FUND, LLC and MACANDREWS & FORBES GROUP LLC,

Plaintiffs,

-against-

LARRY GAGOSIAN and GAGOSIAN GALLERY, INC.,

Defendants.

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**DECISION/ORDER**
Index No. 653189/12
Motion Seq. No. 003

**BARBARA R. KAPNICK, J.:**

This action arises from the purchase of various sculptures and paintings by plaintiffs MAFG Art Fund, LLC (the "Art Fund") and MacAndrews & Forbes Group LLC ("MacAndrews") from defendants Larry Gagosian ("Gagosian") and Gagosian Gallery, Inc. (the "Gallery"). The Amended Complaint asserts six causes of action: for breach of contract, breach of fiduciary duty, fraud, breach of the covenant of good faith and fair dealing, unjust enrichment, and deceptive business practices under section 349 of the General Business Law ("GBL").[1]

The Gallery had commenced a separate action against plaintiffs and their principal, Ronald Perelman ("Perelman"), and Fortress Acquisitions, Inc. ("Fortress") under Index number 653181/2012, but that action was voluntarily discontinued on October 17, 2012.

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[1] The Court dismissed the sixth cause of action alleging deceptive business practices under GBL 349 on the record at the end of oral argument. (Tr. 49:9-26, June 5, 2013.)

Defendants now move to dismiss the Amended Complaint for failure to state a cause of action.[2] Defendants also move for sanctions under 22 NYCRR § 130-1.1.

*Factual Allegations*

I. The Popeye Sculpture

Plaintiffs allege that on May 12, 2010, MacAndrews and the Gallery executed a "Purchase Agreement," whereby MacAndrews agreed to a purchase price of $4 million in exchange for the rights to a black granite sculpture entitled "*Popeye*," created by world renowned artist Jeff Koons (the "MacAndrews Purchase Agreement"). (Amended Complaint, ¶ 38.) Defendants submit a copy of the MacAndrews Purchase Agreement as documentary evidence. (Dontzin Aff, Ex. 10.) The $4 million was to be paid in five installments of $800,000, with final payment due upon completion of the sculpture, which was then "estimated" to be on December 15, 2011. (MacAndrews Purchase Agreement at 1; Amended Complaint, ¶ 39.)

Under the MacAndrews Purchase Agreement, the Gallery "irrevocably and without condition or reservation of any kind,

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[2] Although not stated in their Notice of Motion, defendants also seek dismissal based upon documentary evidence. The parties all treat defendants' motion as a motion to dismiss for failure to state a cause of action and based upon documentary evidence (CPLR 3211 [a] [7] and [a] [1]), and thus the Court addresses the motion accordingly.

[sold], transfer[red] and convey[ed]" the *Popeye* sculpture to MacAndrews, including "all right to possession and all legal and equitable ownership of the Work, to have and to hold the Work unto [MacAndrews], his successors and assigns, forever." (MacAndrews Purchase Agreement at 1.) The Gallery represented that, "upon delivery . . . of the Work and after [MacAndrew's] receipt of the Purchase Price, good, valid and marketable title and exclusive and unrestricted right to possession of the Work, free of all Claims . . . will pass from [the Gallery] to [MacAndrews]." (*Id.*) The Gallery further represented that as of the "Delivery Date," the Gallery "is able, subject to Artist's reservation of rights in the work as set forth herein, to transfer the Work to [MacAndrews], free and clear of any and all rights or interests of others, claims, liens, security interests or other encumbrances held or claimed by any person and relating to the Work (collectively, 'Claims')," and that neither the Gallery nor Jeff Koons had "any knowledge of any Claims threatened or pending with respect to the Work." (*Id.* at 2.)

The Agreement defined "Delivery" of the sculpture to be deemed satisfied "only after payment of the Purchase Price [$4 million] is received in full from [MacAndrews]." (*Id.*) In addition, MacAndrews agreed that it had "no right to sell the Work or the right to receive the Work before it has been paid for in full and delivered

. . . and any such sale shall be deemed null and void." (*Id.*) The Agreement identified Jeff Koons as a third-party beneficiary. (*Id.*)

Plaintiffs claim that, in reality, the Gallery had no rights to the *Popeye* sculpture at the time the Gallery entered into the MacAndrews Purchase Agreement, as evidenced by a separate but subsequent agreement entered into between the Gallery and Sonnabend Gallery, Inc. ("Sonnabend"), dated June 1, 2010 (the "Sonnabend Purchase Agreement"), a copy of which defendants also submit as documentary evidence. (Amended Complaint, ¶ 45; Dontzin Aff, Ex. 11.) Under the Sonnabend Purchase Agreement, Sonnabend sold the Popeye sculpture to the Gallery under the same payment terms as the MacAndrews Purchase Agreement between the Gallery and MacAndrews; namely, a purchase price of $4 million to be paid in five equal payments of $800,000. The Sonnabend Purchase Agreement provided that the final $800,000 payment was due "[u]pon completion ([e]xpected to be December 2011)," and the Gallery acknowledged that "the estimated completion date for the Work is not firm and may be changed from time to time by [Sonnabend] due to delays in fabrication or other reasons." (Sonnabend Purchase Agreement at 1.) The Sonnabend Purchase Agreement further represented that "Jeff Koons, LLC" was "the sole and legal owner of the Work." (*Id.* at 2.)

The Sonnabend Purchase Agreement also provided that, "if [the Gallery] sells the Work to a third party within 2 years after the date of this Agreement for a Profit . . . , then [the Gallery] will pay Artist an amount equal to 70% of such Profit," defining "Profit" as "the amount by which the Work's price in a Secondary Sale exceeds the Purchase Price" of $4 million. (*Id.* at 2-3.) The Gallery also agreed to pay a 50% resale commission to Jeff Koons, LLC in the event that it sold the *Popeye* sculpture "to a third party and subsequently . . . resold [it] within 5 years after its original delivery to such third party." (*Id.* at 3.)

As is apparently well known in the art world, Koons' works of art appreciate immediately after delivery to the first purchaser, often by multiples of the original purchase price. (Amended Complaint, ¶ 5.)

Plaintiffs claim that Gagosian and the Gallery as Koons' exclusive dealer, were unwilling to be involved in any future resales of the *Popeye* sculpture as long as the profit-sharing provisions of the Sonnabend Purchase Agreement remained in effect. (*Id.*, ¶ 49.) Thus, the plaintiffs contend that the Sonnabend Purchase Agreement destroyed their rights under the MacAndrews Purchase Agreement, and prevented them from exchanging or reselling the sculpture for fair market value once delivered. Plaintiffs

also maintain that in June 2011, defendants informed them that the sculpture would not be completed until July 2012, approximately seven months after the estimated completion date, thereby breaching the MacAndrews Purchase Agreement. (*Id.*, ¶¶ 50, 52-53.)

II. The Exchange Transactions

Plaintiffs further claim that in April 2011, they sought to mitigate their damages resulting from defendants' breaches of the MacAndrews Purchase Agreement by entering into two transactions. In each transaction, the Art Fund acquired a work from the Gallery, or from a seller represented by the Gallery, and paid for the work with a combination of cash and a transfer or consignment to the Gallery of certain works of art, including the *Popeye* sculpture, thereby receiving a credit for the purported value of those works (the "Exchange Transactions"). (Amended Complaint, ¶ 54.) In the first Exchange Transaction identified in the Amended Complaint, the Art Fund acquired an unidentified acrylic on canvas painting for $10.5 million, which plaintiffs claim was an artificially high price for the work set by defendants (*id.*, ¶ 58), and which defendants identify in their moving papers as the Cy Twombly painting, "*Leaving Paphos Ringed With Waves* (1), 2009" ("Twombly Painting"). (Dontzin Aff, Ex. 1.) Plaintiffs assert that Perelman first viewed the Twombly Painting at the Gallery on or about April 28, 2011. (Amended Complaint, ¶ 62.) The parties' negotiations

Twombly Painting lasted for several months, until they allegedly reached an oral agreement around the end of September 2011 on a purchase price of $10.5 million, and the Gallery delivered the painting to the Art Fund on October 7, 2011. (*Id.*, ¶¶ 66-68.) Plaintiffs claim, however, that this Exchange Transaction did not close until February 2012, after the parties identified and priced the works that plaintiffs would exchange for the Twombly Painting. (*Id.*, ¶¶ 69-70.)

In exchange for the Twombly Painting, the Art Fund was to pay $250,000 in cash and also exchange four works of art, including the *Popeye* sculpture. With their moving papers, defendants submit an Invoice from the Gallery to the Art Fund identifying the other three works of art exchanged by the Art Fund as two Willem de Kooning oil paintings, "*Untitled*, 1974" and "*Untitled*, 1970," for which plaintiff received credits of $3.6 million and $2 million, respectively; and the Roy Lichtenstein painting, "*Brushstrokes in Flight*, 1983," for which the Art Fund received a credit of $2 million. (Dontzin Aff, Ex. 1.) Plaintiffs allegedly received a $4.25 million credit for the *Popeye* sculpture, minus the $1.6 million for its failure to make the last two installment payments of $800,000 each.

The Amended Complaint alleges that in the second Exchange Transaction, the Art Fund acquired an unidentified steel sculpture for $12.6 million. (Amended Complaint, ¶ 60.) In their moving papers, defendants identify this work as Richard Serra's "*Junction*, 2011" (the "Serra Sculpture"). (Dontzin Aff, Ex. 2.) In exchange for the Serra Sculpture, plaintiffs allegedly paid $4.75 million in cash and exchanged five unidentified works of art. Defendants identify these exchanged works as: Roy Lichtenstein's painted aluminum sculpture, "*Brushstroke Nude*, 1993," credited to plaintiffs in the amount of $4.5 million (the "Lichtenstein Sculpture"), which plaintiffs allegedly sent to the Gallery on consignment; Marino Marini's "*Cavaliere*, 1947" credited to plaintiffs in the amount of $2.3 million; Damien Hirst's "*Emperor Maximilian*, 2007" and "*The Premier Rose*, 2006," credited to plaintiffs in the amounts of $300,000 each; and Richard Prince's "*Eden Rock*, 2006," credited to plaintiffs in the amount of $450,000. (Dontzin Aff, Ex. 2.) While plaintiffs refer to this transaction as an "exchange transaction" (Amended Complaint, ¶¶ 60-61), defendants submit a "Sale Agreement" between the artist, Richard Serra, and the Art Fund, entered into as of January 6, 2012, memorializing the sale of the Serra Sculpture to the Art Fund (the "Serra Sale Agreement"). (Dontzin Aff, Ex. 12.)

*Analysis*

I. Breach of Contract and Breach of the Covenant of Good Faith and Fair Dealing (MacAndrews Purchase Agreement) (First Cause of Action)

Defendants seek dismissal of the first cause of action for breach of contract, arguing that the Amended Complaint fails to identify any provisions of the MacAndrews Purchase Agreement that were breached, that plaintiffs agreed to cancel this Agreement, and that plaintiffs fail to allege damages. In opposition, plaintiffs contend that the profit-sharing provisions of the Sonnabend Agreement created encumbrances that diminished the value of the *Popeye* sculpture, thereby conflicting with and breaching the terms of the MacAndrews Purchase Agreement.

The elements of a cause of action for breach of contract are "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 (1st Dept 2010). Plaintiffs must "allege the breach of [the] particular contractual provision." *Kraus v Visa Intl. Serv. Assn.*, 304 AD2d 408, 408 (1st Dept 2003).

Plaintiffs' first cause of action alleges that "[t]he Gallery breached the express and implied terms of the MacAndrews Purchase Agreement." (Amended Complaint, ¶ 87.) The provisions allegedly

breached by defendants included defendants' failure to comply with the "estimated" completion date of December 15, 2011, and the Gallery's alleged failure to convey the *Popeye* sculpture irrevocably and unconditionally, free and clear of any encumbrances, with valid and marketable title and exclusive rights to possession. (Amended Complaint, ¶¶ 39-40.)

While the Amended Complaint identifies particular provisions of the contract which defendants allegedly breached, plaintiffs fail to explain how those provisions were, in fact, breached. The MacAndrews Purchase Agreement expressly identified the sculpture's completion date as "estimated", and plaintiffs fail to allege that time was of the essence. *See Gupta v 211 St. Realty Corp.*, 16 AD3d 309, 311 (1st Dept 2005) ("mere delay in performance will not be considered as grounds for rescission unless time is of the essence"). Therefore, the change in the completion date of *Popeye* cannot constitute a breach of the MacAndrews Purchase Agreement.

Next, the profit-sharing provisions of the Sonnabend Purchase Agreement required the Gallery to pay resale commissions to Jeff Koons upon subsequent sales of *Popeye*, but this obligation was the Gallery's alone, as it related to the Gallery's potential future commissions. The Sonnabend Purchase Agreement transferred the *Popeye* sculpture to the Gallery "free and clear of any and all

rights or interests of others, claims, liens, security interests, [and] other encumbrances held or claimed by any person and relating to the Work." (Sonnabend Purchase Agreement at 2.) Plaintiffs' argument - that the profit-sharing provisions diminished the value of *Popeye* for a significant period of time following its delivery to MacAndrews, and effectively crippled plaintiffs' ability to exchange or subsequently sell *Popeye* at fair market value - presupposes that defendants would be involved in any subsequent sale of the *Popeye* sculpture, given Gagosian's role as Koons' representative and the foremost dealer in Koons' work. Plaintiffs assert that based on the course of dealings between the parties, Gagosian and the Gallery knew it was plaintiffs' right and expectation that they would be able to sell *Popeye* or exchange it for other works of art. (Amended Complaint, ¶ 44.) However, the MacAndrews Purchase Agreement contains no such obligation on defendants' part, and the Court, in the guise of contract interpretation, may not add this obligation to the parties' Agreement. *Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 152 (1st Dept 2013) ("'courts may not by construction add or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing'"), (*quoting Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). Therefore, defendants' alleged refusal to be involved in future sales of the *Popeye* sculpture as

a result of the profit-sharing provisions of the Sonnabend Purchase Agreement does not constitute an encumbrance, and is not a breach of any express or implied term of the MacAndrews Purchase Agreement. In short, plaintiffs fail to identify any conditions in the Sonnabend Purchase Agreement that constitute a breach of the MacAndrews Purchase Agreement.

Moreover, notwithstanding plaintiffs' allegation that "they had no other reasonable option but to sell or exchange *Popeye* with defendants" (Amended Complaint, ¶ 53), plaintiffs admittedly "agreed" to enter into the Exchange Transactions, although they claim that defendants intentionally and improperly suppressed the value of the exchanged works, and that the true value of the exchanged works and the cash were, together, worth much more than $10.5 million. (*Id.*, ¶ 59.) MacAndrews received a credit for the $2.4 million payments it had already made toward the *Popeye* sculpture, and plaintiffs fail to explain how their voluntary agreement to enter into the Exchange Transactions infringed upon their contract rights.

Nor does plaintiffs' claim make sense chronologically. The Amended Complaint asserts that plaintiffs entered into the Exchange Transactions in April 2011, in an "effort to mitigate their damages" caused by the Sonnabend Agreement. (*Id.*, ¶ 54.) However,

plaintiffs' claim that "at the time of the Exchange Transactions," the Sonnabend Purchase Agreement was "undisclosed" by defendants. (*Id.*, ¶ 55.) Plaintiffs concede that defendants' refusal to be involved in "subsequent sales of *Popeye*" occurred "[o]ver a year and one-half after the parties entered into the MacAndrews Purchase Agreement." (Plaintiffs' Brief in Opp at 8; Amended Complaint, ¶ 49.) Therefore, as the MacAndrews Purchase Agreement was dated May 12, 2010, defendants' alleged refusal did not occur until the end of 2011. The Amended Complaint fails to explain how plaintiffs could have known to mitigate their damages in April 2011, at a time when they had not yet discovered the very Agreement and conduct by defendants that caused the damages plaintiffs allegedly sought to mitigate. Plaintiffs also admittedly did not know about the delayed delivery date until June 2011 (Amended Complaint, ¶ 52), at which point they had already relinquished their rights to the *Popeye* sculpture, thereby undermining any allegation that plaintiffs sought to mitigate damages resulting from the delay.

Plaintiffs speculate that defendants "intentionally and improperly suppressed the value of the exchanged works" (*id.*, ¶ 59), but if anything, this allegation is a subset of plaintiffs' fraudulent inducement cause of action concerning the Exchange Transactions (discussed below). Other than conclusory allegations, plaintiffs also fail to allege any damages flowing

from the alleged breach of contract. *Fowler v American Lawyer Media*, 306 AD2d 113, 113 (1st Dept 2003) (even if other elements of breach of contract were alleged, "the complaint still fails as it lacks allegations showing any damages").

In essence, plaintiffs' breach of contract cause of action alleges that, "'with the benefit of hindsight, it appears to have [entered into] a bad bargain'" (*Schultz v 400 Coop. Corp.*, 292 AD2d 16, 20 [1st Dept 2002]), but plaintiffs fail to plead a cognizable breach of contract claim that would entitle them to damages.

Plaintiffs also argue that the profit-sharing provisions of the Sonnabend Purchase Agreement breached the implied covenant of good faith and fair dealing. Specifically, plaintiffs claim that at the time they entered into the MacAndrews Purchase Agreement, MacAndrews reasonably expected that Gagosian and the Gallery would be involved in any subsequent sale of the *Popeye* sculpture. Plaintiffs also claim that the Sonnabend Purchase Agreement permitted Sonnabend to unilaterally delay the completion date of the *Popeye* sculpture, further frustrating the parties' reasonable expectations under the MacAndrews Purchase Agreement that it would be delivered by December 15, 2011 or within a reasonable time thereafter.

As a preliminary matter, plaintiffs' claim for breach of the implied covenant of good faith and fair dealing, with respect to the MacAndrews Purchase Agreement, is subject to dismissal as "duplicative of the insufficient breach of contract claim." *Jacobs Private Equity, LLC v 450 Park LLC*, 22 AD3d 347, 347-348 (1st Dept 2005), *lv denied* 6 NY3d 703 (2006). In any event, plaintiffs fail to identify any terms of the MacAndrews Purchase Agreement that could be construed to create an expectation concerning defendants' involvement in future sales of the *Popeye* sculpture, and "no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 (1995) (*citing Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]); *see also Broder v Cablevision Sys. Corp.*, 418 F3d 187, 199 (2d Cir 2005) (implied covenant of good faith and fair dealing "does not 'add [ ] to the contract a substantive provision not included by the parties'"). Accordingly, for all of the foregoing reasons, plaintiffs' first cause of action must be dismissed.

II. Breach of Fiduciary Duty (Second Cause of Action)

Plaintiffs' cause of action for breach of fiduciary duty is based upon defendants' alleged superior knowledge of contemporary art and the value of the artwork at issue herein, the longstanding friendship between Gagosian and Perelman, Gagosian's position of

trust in advising Perelman and plaintiffs regarding art acquisitions and value, and defendants' various roles as consignee, seller, buyer, broker, bidder, and agent with respect to plaintiffs' artwork. (Amended Complaint, ¶ 90.) Plaintiffs claim that defendants breached their fiduciary duties by entering into the Sonnabend Purchase Agreement, and by incorrectly valuing the artworks that were the subject of the Exchange Transactions. (*Id.*, ¶¶ 92-93.) Defendants argue that there was no fiduciary relationship among the parties, and that plaintiffs fail to allege that defendants engaged in any misconduct that would have constituted a breach of any purported fiduciary duties.

"The elements of a cause of action . . . for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct." *Baumann v Hanover Community Bank*, 100 AD3d 814, 817 (2d Dept 2012). Two "essential elements" of a fiduciary relationship are "de facto control and dominance." *Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 21 (2008) (internal quotation marks and citation omitted). However, "'[a]llegations of superior knowledge or expertise in the art field are per se insufficient to establish the existence of a fiduciary relationship.'" *Mandarin Trading Ltd. v Wildenstein*, 17 Misc 3d 1118(A), *4-5, (Sup Ct, NY Co 2007),

[* 18]

*aff'd* 65 AD3d 448 (1st Dept 2009), *aff'd* 16 NY3d 173 (2011) (quoting *Granat v Center Art Galleries-Hawaii, Inc.*, 1993 WL 403977, *6 [SDNY 1993]).

In *Granat v Center Art Galleries-Hawaii, Inc.*, the plaintiffs alleged that over a two-year period, they purchased over $5.3 million in artwork from defendants, based upon defendants' representations that "the purchases represented a liquid investment, that they could be sold with relative ease and that the defendants, as nationally recognized art experts, would resell their purchases if requested to do so." *Id.* at *1-*2. The plaintiffs alleged that the value of the art was significantly less than what they paid for it, and that the defendants' appraisals of the art were patently false. Nonetheless, the Court dismissed the plaintiffs' cause of action for breach of fiduciary duty, holding that a fiduciary relationship could not be established based upon "[a]llegations of superior knowledge or expertise in the art field," or from "the mere fact that plaintiffs bought numerous pieces of art from the defendants over the course of two years." *Id.* at *6, *17-18.

Here, the Amended Complaint expressly states that "[p]laintiffs are art collectors and investors" with 20 years of experience making art investment decisions, having purchased and

sold "nearly 200 works" of art through defendants alone. (Amended Complaint, ¶¶ 1, 30.) Plaintiffs concede that they are not "static collectors of art. Rather, they bought, sold and exchanged pieces frequently" (*id.*, ¶ 27), with an express "art investment strategy" (*id.*, ¶ 44). In short, plaintiffs are business entities admittedly engaged in the business of art investments, they had "staffs to work out the paperwork" and were represented by counsel, and plaintiffs are owned by the renowned businessman, Ronald Perelman. (*Id.*, ¶¶ 1, 7, 27, 29.)

The Amended Complaint further alleges that plaintiffs negotiated the purchase of the Twombly Painting from April 2011 until September or October 2011, before reaching an oral agreement on its price (*id.*, ¶¶ 62, 64, 66), and the Exchange Transaction involving this Painting did not close until ten months later, in February 2012 (*id.*, ¶ 70). Although the Amended Complaint contains scant detail on the negotiations involving plaintiffs' acquisition of the Serra Sculpture in exchange for the Lichtenstein Sculpture and other works, plaintiffs allege that those negotiations began in September 2011 (*id.*, ¶ 79), and that this transaction closed "just a short time" before May 2012 (*id.*, ¶ 82), approximately eight months later.

Thus, plaintiffs' allegations make clear that they were experienced and sophisticated business investors who entered into negotiated, arm's-length transactions with defendants, which does not give rise to a fiduciary relationship. *EBC I, Inc. v Goldman Sachs & Co.*, 91 AD3d 211, 215 (1st Dept 2011) ("[n]egotiation is a 'consensual bargaining process in which the parties attempt to reach agreement on a disputed or potentially disputed matter' . . . The word implies an arm's length exchange"); *Sebastian Holdings, Inc. v Deutsche Bank AG.*, 78 AD3d 446, 447 (1st Dept 2010) (no fiduciary relationship where "parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities").

Moreover, plaintiffs' reliance on the fact that Perelman and Gagosian were friends for 20 years, "socialized together," were "business acquaintances," had "worked together" previously and invested together, to establish a fiduciary relationship is unpersuasive, as Perelman is not named as a party in this action, and, in any event, even a "longstanding relationship of fifty years" is insufficient to establish a fiduciary relationship "'where parties deal at arms length in a commercial transaction.'" *Compania Sud-Americana de Vapores, S.A. v IBJ Schroder Bank & Trust Co.*, 785 F Supp 411, 425-426 (SDNY 1992). At most, plaintiffs assert "'subjective claims of reliance on defendants' expertise,'"

which do "not give rise to a 'confidential relationship' whose 'requisite high degree of dominance and reliance' was not in existence prior to the transaction giving rise to the alleged wrong." *SNS Bank v Citibank*, 7 AD3d 352, 355-356 (1st Dept 2004).

For the foregoing reasons, the Amended Complaint fails to allege the existence of a fiduciary relationship. Accordingly, plaintiffs' second cause of action for breach of fiduciary duty is dismissed.

III. Fraud (Third Cause of Action)

Plaintiffs next allege that defendants possessed unique and superior knowledge concerning the value of the artwork included in the Exchange Transactions, and that defendants fraudulently misrepresented the value of this artwork, causing plaintiffs to overpay for the Twombly Painting and the Serra Sculpture and be undercompensated for the value of some of the exchanged works[3]. Plaintiffs also assert that defendants falsely represented that the values they ascribed to the exchanged works were their true market values (less Gagosian's customary commission) and that those values were supported by market data, including non-public market data

[3] The plaintiffs do not base their claims for fraud on any misrepresentations as to the market value of *Popeye*. (Plaintiffs' Brief in Opp at 15, n.5)

such as recent private sales and information gathered from the artists or their estates. (Amended Complaint, ¶¶ 72, 97-102.) Defendants argue that this cause of action should be dismissed, because the alleged representations about the value of artwork are not actionable, were not false or knowingly false, and because plaintiffs fail to allege justifiable reliance.

To state a cause of action for fraudulent misrepresentation, plaintiffs must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." *Mandarin Trading Ltd.*, 16 NY3d at 178 (internal quotation marks and citations omitted). In addition, CPLR 3016 (b) requires that in a fraud cause of action "the circumstances constituting the wrong shall be stated in detail." However, "neither CPLR 3016(b) nor any other rule of law requires a plaintiff to allege details of the asserted fraud that it may not know or that may be peculiarly within the defendant's knowledge at the pleading stage." *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 377 (1st Dept. 2003). "CPLR 3016(b) requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of and is not to be interpreted so strictly as

to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Id.*) (internal citations and quotations marks omitted).

As a preliminary matter, defendants argue that even assuming that defendants possessed unique and superior knowledge concerning the value of the artwork and expressed their opinion on it, such statements "constitute[] nonactionable opinion that provide[] no basis for a fraud claim." *Mandarin Trading Ltd.*, 16 NY3d at 179; (*citing Jacobs v Lewis*, 261 AD2d 127, 127-128 (1st Dept 1999) ("alleged misrepresentations amounted to no more than opinions and puffery or ultimately unfulfilled promises, and in either case were not actionable as fraud"). However, the fraud cause of action was dismissed in the *Mandarin Trading* case because defendant Wildenstein wrote a letter regarding the painting's value to an unknown individual with no mention of plaintiff Mandarin or the individual's connection to any of the parties in the case.

While generally, misrepresentations concerning value are considered matters of opinion which are not actionable, in certain circumstances they can be regarded as a representation of an existing fact, which is sufficient to support a fraud action. *See Cristallina v Christie, Manson & Woods Intl.*, 117 AD2d 284, 294-295

(1st Dept 1986); *see also Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 407 (1958). A person rendering such a representation must do so truthfully. *Cristallina, supra* at 294. Here, plaintiffs allege that Gagosian repeatedly stated that the values ascribed to the works implicated in the Exchange Transactions reflected their true market values, supported by market data which included recent sales and information gathered from customary sources, including artists' estates and his knowledge of private market sales. (Amended Complaint, ¶ 72.) However, according to plaintiffs, Gagosian's statements as to the existing facts were knowingly false. Although plaintiffs concede that these values were based in part on market data, which is not "uniquely" within defendants' knowledge, they also claim that Gagosian's assessments were supported by information gathered from private market sales, which was not peculiarly within defendants' knowledge. (Amended Complaint, ¶¶ 16, 23, 72.)

Defendants contend that the fraud claim fails to explain how defendants misrepresented the value of the artwork that was the subject of the Exchange Transactions. According to defendants, plaintiffs' explanation for defendants' overvaluation of the Twombly Painting and Serra Sculpture, and defendants' purported undervaluation of the works exchanged by plaintiffs, is based upon speculation and conclusory allegations. (*See* Amended Complaint, ¶¶

75-83, alleging that defendants sought to sell one of the Willem de Kooning paintings and the Lichtenstein Sculpture for more than the exchange values credited to plaintiffs).

As discussed *supra*, plaintiffs were credited $4.5 million for the Lichtenstein Sculpture (Amended Complaint, ¶ 61), and plaintiffs concede that they "ultimately accepted the value set by defendants of the works being traded in," based on defendants' representation that the values ascribed to the works being exchanged were "based on their true market value (less [defendants'] standard 10% commission)." (*Id.*, ¶ 32.) Thus, defendants' valuation could be false only if the Lichtenstein Sculpture were sold for more than $5 million (or $4.5 million once the 10% commission was subtracted). Defendants submit redacted copies of an Invoice showing that the Gallery sold the Lichtenstein Sculpture to Phillips de Pury & Company for $4.8 million, or $200,000 less than the value ascribed to it by defendants. (Dontzin Aff, Ex. 6.) This document suggests that defendants, in fact, overvalued the Lichtenstein Sculpture, giving plaintiffs the benefit of a higher trade-in value.

Similarly, defendants submit a redacted Invoice from the Gallery itself purporting to show that the Willem de Kooning painting, for which plaintiffs received a $3.6 million credit, was

actually sold for $3.5 million (Dontzin Aff, Ex. 5), again giving plaintiffs the benefit of a higher trade-in value than anticipated by defendants. However, these Invoices are not the type of conclusive documentary evidence upon which the Court generally relies on a pre-answer motion to dismiss pursuant to CPLR 3211(a)(1). Plaintiffs also question whether these Invoices reflect bona-fide sales to third-parties, or some other arrangement, something which they have not been able to explore at this stage of the proceeding, prior to discovery. As such, this Court finds that plaintiffs have sufficiently alleged, for purposes of this motion to dismiss, that defendants made knowingly false misrepresentations.

Defendants also argue that plaintiffs' fraud claim is legally defective because plaintiffs have not, and cannot, allege justifiable reliance.

> If the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations.

*Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.*, 17 NY3d 269, 278-279 (2011) (internal quotation marks and citations omitted).

As discussed above, plaintiffs' allegations make clear that they were experienced and sophisticated business investors who entered into negotiated, arm's-length transactions with defendants. "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arms length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it." *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 (1st Dept 2001).

Plaintiffs' argument that the existence of a fiduciary relationship among the parties justified plaintiffs' reliance upon defendants' representations is to no avail, as this Court has already determined that no fiduciary relationship existed among the parties. However, plaintiffs have alleged throughout their Amended Complaint that defendants had superior and unique knowledge concerning the art market that was not available to plaintiffs. For instance, plaintiffs allege that Gagosian has enormous power to influence, and even set, the markets for the artists he represents because of his impressive roster of artists and his access to and knowledge of the largest private art collections in the world. (Amended Complaint, ¶¶ 16, 23.) Therefore, even though the plaintiffs are sophisticated art collectors and investors, the Court cannot say, as a matter of law, that plaintiffs' alleged

reliance on defendants' representations regarding the art market and intrinsic value of particular works of art was *per se* unreasonable or unjustified. *See DDJ Mgt, LLC v Rhone Group L.L.C.*, 15 NY3d 147, 155 (2010); *Carbon Capital Mgt., LLC v American Express Co.*, 88 AD3d 933, 938 (2nd Dept. 2011); *Abu Dhabi Commercial Bank v Morgan Stanley & Co., Inc.*, 651 FSupp2d 155, 180-81 (SDNY 2009).

Accordingly, that portion of defendants' motion seeking to dismiss the third cause of action for fraud is denied.

IV. Breach of the Covenant of Good Faith and Fair Dealing (Fourth Cause of Action)

Defendants next seek dismissal of plaintiffs' fourth cause of action for breach of the covenant of good faith and fair dealing with respect to the Exchange Transactions. This claim is based upon defendants' alleged fraudulent overvaluation of the Twombly Painting, and their undervaluation of the works exchanged for the Twombly Painting and the Serra Sculpture. (Amended Complaint, ¶ 108.)

"Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive

the benefits under their agreement." *Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 (1st Dept 1996) (internal citation omitted). "The duty of good faith and fair dealing, however, is not without limits, and no obligation can be implied that 'would be inconsistent with other terms of the contractual relationship.'" *Dalton*, 87 NY2d at 389; *see also Broder v Cablevision Systems Corp.*, 418 F3d at 199 (implied covenant of good faith and fair dealing "does not 'add [ ] to the contract a substantive provision not included by the parties'").

As discussed above, the parties negotiated the prices for the Twombly Painting, the Serra Sculpture, and the exchanged works that were to be credited toward plaintiffs' purchases of these items, in what plaintiffs claim were "valid and binding contractual arrangements." (Amended Complaint, ¶ 105-106.) In essence, plaintiffs improperly seek to alter the prices and exchange credits that formed the basis of the Exchange Transactions, thereby rendering plaintiffs' claim inconsistent with pricing terms that were central to the parties' agreement. *Dalton*, 87 NY2d at 389. Accordingly, plaintiffs' fourth cause of action is dismissed.

V. Unjust Enrichment (Fifth Cause of Action)

Plaintiffs' fifth cause of action for unjust enrichment is based upon defendants' alleged improper valuation of the artwork

that comprised the Exchange Transactions, whereby defendants made millions of dollars of illicit profits at plaintiffs' expense. (Amended Complaint, ¶¶ 112-114.) Defendants argue that this cause of action should be dismissed, because the Exchange Transactions are governed by contracts, a fact which bars recovery in quasi-contract for events arising out of the same subject matter, and because an unjust enrichment claim cannot be based on a seller's statements about the value of artwork in an arms-length transaction. Plaintiffs counter that they are entitled to plead their unjust enrichment claim in the alternative, in the event that they are unable to prove the existence of a contract.

"Unjust enrichment is a quasi contract theory of recovery, and 'is an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned.'" *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 408 (1st Dept 2011), *aff'd* 19 NY3d 511 (2012). "The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter." *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 (1987).

Here, plaintiffs allege that the Exchange Transactions were governed by "valid and binding contractual arrangements" (Amended Complaint, ¶ 105), and defendants do not dispute this allegation.

(Defendants' Reply Brief at 19, n 14.) Therefore, plaintiffs' unjust enrichment cause of action is precluded by the parties' contracts governing the Exchange Transactions. Accordingly, plaintiffs' fifth cause of action for unjust enrichment is dismissed.

VI. Sanctions

Defendants also seek sanctions, arguing that plaintiffs' claims are without merit and frivolous. This portion of defendants' motion is denied, in the discretion of this Court, especially since this Court has sustained one of the causes of action.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the Amended Complaint is granted as to all the causes of action, except for the third cause of action for fraud which is severed and continued.

Defendants shall have thirty days from the date of this order to file and serve an Answer to the third cause of action. Counsel shall notify the Court when they are ready to schedule a preliminary conference.

This constitutes the decision and order of this Court.

Dated: January 31, 2014

BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.