

Rodionov v Redfern
2018 NY Slip Op 30890(U)
May 10, 2018
Supreme Court, New York County
Docket Number: 651976/2016
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 3

-----X
SERGEY RODIONOV, ALEXANDER EZHKOV,

Plaintiff,

Index No. 651976/2016
Motion Seq. No. 001, 002

- v -

DECISION AND ORDER

WILLIAM REDFERN, FABIENNE DELAUNAY,
ELLEN WITTMAN, PETER VOLETSKY, NPK
EKOLOGIA LLC, DUKE VENTURE FUND LLC

Defendant.

-----X
HON. EILEEN BRANSTEN:

Defendant Peter Voletsky, Esq. brings Motion Sequence 001 to dismiss the complaint based upon CPLR §§ 3211(a)(1), 3211(a)(5), 3211(a)(7) and 3016(b).

Defendants William Donald Redfern, Fabienne Delaunay, bring Motion Sequence 002 to dismiss the complaint based upon CPLR §§ 3211(a)(3), 3211(a)(5), 3211(a)(8), 3211(a)(10) and 327(a). Defendant Ellen Wittman Grossman seeks to dismiss the complaint on grounds of CPLR §§ 3211(a)(3), 3211(a)(5), 3211(a)(7), 3211(a)(10) and 327(a).

I. Background

This is a fifty-page complaint filed by two unrelated Plaintiffs who have no connection to each other and, insofar as the Court is aware, no involvement with each other aside from independent relationships with Defendant Donald Redfern.

Plaintiff Ezhkov is a resident of Russia who alleges to be the principal member of NPK Ekologia LLC (“NPK” or “NPK Ekologia”), a New York entity. *Comp. at ¶¶ 3, 8, 17-18.*

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Plaintiff Rodionov is a resident of the Grand Duchy of Luxembourg who alleges to be the principal member of Duke Venture Fund, LLC (“Duke” or “Duke NY”), a New York entity. *See Comp at ¶¶2, 9, 30.*

The two Plaintiffs, independently, knew Defendant Donald Redfern from prior business dealings and allege that Defendant Redfern, with the assistance of other co-conspirators, fraudulently hijacked their respective businesses. *See id at ¶1.*

The court initially notes that the factual background is exceptionally confusing as it spends the first thirty-two pages examining the formation of NPK, then Duke Venture, discussing the NPK Operating Agreement, then the Duke Operating Agreement, before combining facts pertaining to both entities stating the grounds for the separate alleged frauds committed upon NPK and Duke, and which combines the damages to each LLC. *See Generally Comp.*

The Plaintiffs proceed to state ten causes of action, both individually and derivatively. Many of these causes of action are pleaded against all the Defendants, collectively, without regard to which Plaintiff experienced the harm alleged.¹

The Court’s first endeavor, in this decision, was to determine exactly what conduct resulted in harm to Ezhkov and NPK from what conduct resulted in harm to Rodionov and Duke Venture Fund. The Court then endeavored to determine which damages alleged in the complaint were suffered by NPK Ekologia and which damages were suffered by Duke Venture Fund. To

¹ The confusion caused by this becomes apparent in Motion Sequence 001, *Infra.*

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that end, this Court will first discuss the factual background of NPK Ekologia. The Court will then discuss the factual background of Duke Venture Fund.

A. NPK Ekologia LLC

From 2000 – 2015 Plaintiff Ezhkov and Defendant Redfern engaged in a business relationship. *See Comp. at ¶¶ 17, 62.* In 2005, Defendant Redfern is alleged to have orchestrated the formation of NPK Ekologia LLC naming Ezhkov the sole beneficial member of the LLC. *Id at ¶¶ 17-20.* Defendant Redfern engaged the services of Chartac Management Services Ltd, a Cyprus based company, to manage the day to day business affairs of NPK Ekologia on behalf of Ezhkov. *Id at ¶21.* Nicos Gavrielides (a/k/a Nikos Gavrielides), was the representative appointed by Chartac Management to serve as both the Trustee and Manager of NPK Ekologia in Cyprus. *Id at ¶21.* It was not until 2008, however, that Ezhkov formally signed an engagement agreement with Chartac, which placed his membership interest in trust for his benefit. *Id at ¶¶23-24.* Despite signing the agreement with Chartac Management, Ezhkov nonetheless met with Defendant Redfern on numerous occasions to further the business interests of NPK Ekologia LLC. *Id at ¶¶24, 63.*

From NPK's inception until discovery of the wrongdoing in 2015, Defendant Redfern is alleged to have masterminded a plot to convert funds from NPK Ekologia. *Id at ¶1.* To do so, Redfern caused to have executed two operating agreements. Ezhkov's copy of the operating agreement names Ezhkov, as the Member, and Defendant Voletsky, as the Manager, of NPK Ekologia LLC. *Id at ¶42.* The second copy of the Operating Agreement names a Jacqui Desmond, owner of Withean Ltd, an Irish corporation, as the Member with Nicos Gavrielides as

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the Manager. *Id at* ¶¶48, 70. Ezhkov claims not to have known about the existence of the second operating agreement until recently.

Pursuant to Ezhkov's copy of the NPK Operating Agreement dated March 15, 2005, Defendant Voletsky was to be the manager of NPK Ekologia, LLC.² *Id at* ¶42. That Operating Agreement imposes a duty of loyalty on the part of the manager to act in the best interests of the corporation. *Id at* ¶47. The Agreement further calls for ultimate Member approval of certain enumerated actions, such as the issuance of a membership interest, or the sale or transfer of the business. *Id at* ¶¶44-45. Failure to obtain member approval constitutes a breach of the Manager's contractual fiduciary duty. *Id at* ¶¶46-47.

Defendant Voletsky, however, denies signing the Operating Agreement naming him as a manager of NPK and argues that his sole role was to assist in NPK's corporate formation. *See Bergson Affirm. Ex. C*. Prior to this action, Voletsky had never met Ezhkov and argues that he formed NPK at the behest of Nicos Gavrielides. *See Bergson Affirm Ex. C*. Defendant Voletsky further argues that he resigned from any role in the corporation after its formation in 2005 and named Nicos Gavrielides as the Member/Manager on March 9, 2005.³ *See Bergson Affirm Exs. D-H*.

² Plaintiffs contend that there is a second operating agreement discussed *infra at* I(A)(i).

³ Exhibits D – H of the Bergson Affirmation contain copies of filing papers naming Nicos Gavrielides as the Initial Member, state that the LLC was organized by a Sharan Babala with Nicos Gavrielides as the initial member, as well as an application for a federal EIN. In addition, it should be noted that all papers were dated March 9, 2005, the same day as Defendant Voletsky's purported resignation. It should also be noted that the complaint alludes to an email in which Nicos Gavrielides states he cannot serve as a manager of the corporation in his individual capacity. *Comp. ¶151*.

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i. *Seizing Control of NPK*

Despite meeting with Ezhkov regularly and having a Trustee in the form of Nicos Gavrielides, Redfern is alleged to have executed a second operating agreement naming non-party Jacqui Desmond as the initial member and Nicos Gavrielides as manager of NPK Ekologia, LLC. Ezhkov alleges that Redfern would later orchestrate Jacqui Desmond's resignation as the Principal member of NPK Ekologia and name Plaintiff Ezhkov as her replacement.⁴ *See Comp. at ¶¶70-84*. Redfern, claiming to be Plaintiff Ezhkov, would later sell the Plaintiff's Membership in the LLC to a person by the name of Natalya Demidova.⁵ *Id at ¶¶88-102*. Plaintiff alleges that Membership of the LLC subsequently passed from Natalya Demidova to a person by the name of Andrey Strigin. *Id at ¶109*. At or before that time, Defendant Wittman is alleged to have been named as a Manager of NPK Ekologia LLC. *See id at ¶¶ 150* (discussing that NPK Singapore was to be created at under the same conditions as NPK Ekologia LLC, namely with Nicos Gavrielides as the member/shareholder and Defendant Ellen Wittman as the manager).

In 2013, the Redfern is alleged to have caused the formation of NPK Ekologia Pte, a Singapore Corporation. *See id at ¶148*. In order to form NPK Singapore, the Defendants provided a corporate history of NPK Ekologia LLC, the New York LLC, to the government of Singapore which lists Andrey Strigin as the Initial Member, Nicos Gavrielides as the initial director, and reflects Natalya Demidova as the owner of corporate stock from 2005 – 2008. *See id at 156-158*. After 2008, Nicos Gavrielides became the owner of NPK Singapore stock. *Id.*

⁴ This raises a factual inconsistency in Plaintiff's Complaint, that being, if Redfern orchestrated a transfer of ownership from Jacqui Desmond to Ezhkov, then under what basis did Ezhkov have authority to enter into an operating agreement with Voletsky. This is addressed in depth at Motion Sequence 001, *infra*.

⁵ Natalya Demidova is believed to be an Assistant in the Moscow office of Defendant Redfern. *Comp. ¶89*.

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Andrey Strigin is, allegedly, reflected as the sole beneficial owner of NPK Singapore and Defendant Wittman is the corporation's authorized correspondent. *See Comp. at ¶¶153-155; but see Comp. ¶150* (stating NPK Singapore was to be created with Nicos Gavrielides as the Member/Shareholder and Defendant Wittman as the Manager). Plaintiff Ezhkov was aware of the formation of NPK Singapore in 2013, however, claims to have been unaware of the information placed on the corporate formation documents. *See id at ¶149.*

On November 29, 2014, while NPK NY and NPK Singapore were under the control of Andrey Strigin, Andrey Strigin communicated with Nicos Gavrielides that Chartac Management was terminated, effective immediately, as the manager for NPK Ekologia. *Comp. ¶¶177-179.* Andrey Strigin then named a Cyprus based attorney, Nasos Panayotiou as the new Administrator of NPK Ekologia. *See id at ¶177.*

ii. *Conversion of Funds from NPK Ekologia LLC.*

Ezhkov alleges that Defendant Redfern first began to send instructions to transfer money from NPK's accounts at the Bank of Cyprus into personal accounts controlled by himself and Defendant Delaunay. *Comp. ¶¶161-169.* These instructions were sent to, and approved by, Nicos Gavrielides in his capacity a trustee for the LLC. *See id; see also Comp. ¶¶22-29.*

Defendant Redfern is also alleged to have taken money from NPK directly to finance his own business ventures. *Id at ¶¶168-169.* Nearly two million dollars (\$2,000,000) and then three million euros (€3,000,000) is alleged to have been absconded with through online banking. *Id.* Again, this was accomplished under the gaze of both Ezhkov, who claims to have actively been

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engaged in the business, and Gavrielides, who was appointed to be the trustee to manage the business' assets. *See Comp. at ¶¶22-29.*

Redfern is alleged to have fabricated bank statements up through 2015 for Plaintiff Ezhkov's files. *Id at ¶¶128-139.* Plaintiff Ezhkov alleges he discovered the fraud when attempting to change the administrator of NPK as part of a negotiated deal with the Bank of Cyprus.⁶ *Id at ¶64.* Nowhere in the Complaint, however, is Ezhkov able to explain how this ruse was accomplished for a period of 10 years when NPK was left in the care Gavrielides, as the trustee and person managing the day to day affairs of the business, and was purportedly overseen by Ezhkov, as owner. *See id at ¶¶22-29.*

In 2014, despite Defendant Redfern's having no control or authority over NPK, the Plaintiff alleges Redfern entered the Bank of Cyprus, with an unknown man, believed to be a Russian citizen, and presented this person as the new beneficial owner of NPK. *Id at ¶182.* Ezhkov further alleges Redfern and the unknown Russian man had the express purpose of looting the remaining funds from the NPK Ekologia bank accounts. *Id at ¶183.* Plaintiff Ezhkov alleges that he does not know what the current status of NPK Ekologia's finances are and is unable to obtain updates from the current trustee, Nasos Panayotiou, since his membership interest was taken away.⁷ *Id at ¶181.*

⁶ Ezhkov alleges that funds were frozen in the Cyprus bank as part of the Cypriot financial crises. *Comp. at ¶64.* The deal Ezhkov alleges to have been negotiating would have freed the assets.

⁷ It should be noted that, absent a membership interest, the Court is unable to determine what right the Plaintiff has to view the finances of NPK Ekologia under Cyprus' law.

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B. Duke Venture Fund LLC

Plaintiff Rodionov alleges that he has known Defendant Redfern since the mid-1990's when Redfern acted as his investment manager. *Comp.* ¶14. In October of 2010, Rodionov sought to protect funds located in his wholly owned Cyprus based company, Deede Trading Ltd. *See Comp.* ¶30. Rodionov alleges that he, pursuant to a purchase agreement between Deede Trading Ltd and Duke Venture Fund, bought Duke Venture Fund LLC by transferring one million dollars (\$1,000,000) into a Bank of Cyprus Account on November 8, 2010. *Id at* ¶30-33. This money was ultimately deposited in a Wachovia Bank account, the so-called "Duke Wachovia Account" located in New York.⁸ *Id at* ¶34.

After this transfer, Plaintiff Rodionov received a certificate, signed by Defendant Wittman, stating he was now the owner of 1,000 shares of the Duke Venture Fund LLC. *Id at* ¶¶35-36. Defendant Redfern is alleged to have represented that this made Plaintiff Rodionov the sole owner of Duke Venture Fund, LLC. *Id at* ¶37.

i. Seizing Control of Duke Venture Fund LLC

Rodionov alleges he was presented with an Operating Agreement naming him as the sole member of Duke Venture Fund LLC and naming Defendant Wittman as a Manager. *Comp at* ¶52-53. This operating agreement listed certain enumerated acts, such as the dissolution of the LLC, which required approval by a member of the Duke Venture Fund. *Id at* ¶¶55-56.

⁸ The Court notes an inconsistency in the Complaint. If Duke Venture Fund was bought by Deede Trading, then the purchase price should have gone to the Seller, Rodionov, however, alleges that the purchase price went into a Wachovia bank account which remained an asset of Duke Venture Fund LLC. There is no explanation for this inconsistency in the pleading.

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Defendant Wittman, as manager, is alleged to have had a duty of loyalty to the members and to the LLC. *Comp. at* ¶58.

Defendant Redfern hired Chartac Management Services, and specifically Nicos Gavrielides, to manage the affairs of Duke Venture Fund before its dissolution in 2016. *Id at* ¶¶38-39. Rodionov alleges that Defendant Redfern then engaged in a fraudulent process whereby he caused membership in the LLC to be transferred to Natalya Demidova and finally to Andrey Strigin. *Id at* ¶¶103, 105.

Defendant Redfern is also alleged to have orchestrated the creation of a Singapore affiliate of Duke Venture Fund LLC. *Id at* ¶¶141-147. This affiliate, Duke Property Pte. Ltd. (“Duke Singapore”) named “Gavrielides and a Singapore citizen, Samuel Lim Lek Kiang,” to the company’s board of directors. *Id at* ¶142. An Italian resident of Singapore, Lucia Luchetti, was named as the secretary for Duke Singapore. *Id.*

Despite knowing of the creation of Duke Singapore Rodionov alleges the company was formed without his consent and was founded upon false information pertaining to Rodionov’s place of residence. *Comp. at* ¶¶ 145-147.

ii. Conversion of Funds from Duke Venture Fund LLC.

Plaintiff Rodionov alleges that, “consistent with his use of NPK NY’s accounts at the Bank of Cyprus as his personal ATM, Redfern similarly transferred, or caused the transfer of, Duke NY’s funds to himself [and others].” *Id at* ¶ 176. Nowhere in the complaint is there some other specific as to the amount converted, the manner in which funds were converted, or how much money was placed into Duke Venture Fund Bank accounts. Plaintiff merely claims that the

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one million dollars (\$1,000,000) used in the purchase agreement and placed in the Duke Wachovia account provided the seed money for the LLC. *See e.g. Comp. ¶31.*

The Court reiterated its comment in footnote 7, which states there is an inconsistency in the Complaint. If Duke Venture Fund was bought by Deede Trading, then the purchase price should have gone to the Seller. Rodionov, however, alleges that the purchase price went into a Wachovia bank account which remained an asset of Duke Venture Fund LLC after the purchase, thus making the effective purchase price of Duke Venture Fund zero dollars. There is no explanation for this inconsistency.

iii. End of Duke Venture Fund

On November 29, 2014, non-party Andrey Strigin, purporting to be the owner of Duke NY, is alleged to have sent a notice to Nicos Gavrielides terminating Chartac Management's employ and hiring Nasos Panayotiou, a Cyprus based attorney, to manage Duke Venture Fund LLC. *Comp. at ¶178.* Ultimately, Duke Venture Fund was dissolved on April 1, 2016 without Rodionov's knowledge or consent. *Id at ¶¶39, 185.*

II. Discussion

A. *Claims Against Defendant Voletsky – Motion Sequence 001*

Defendant, Peter Voletsky, Esq. brings Motion Sequence 001 to dismiss causes of action for fraud, fraudulent inducement, breach of contract, breach of the implied covenant of good faith, breach of fiduciary duty, and unjust enrichment/breach of constructive trust pursuant to CPLR §§ 3211(a)(1), 3211(a)(5), 3211(a)(7) and 3016(b) against the Defendants.

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Both Plaintiffs state causes of action, individually and derivatively, against Defendant Voletsky for fraud (Count 1), fraudulent inducement (Count 2), and unjust enrichment/breach of constructive Trust (Count 10). Plaintiff Ezhkov, only, states additional causes of action against Defendant Voletsky for breach of contract (Count 5), breach of the implied covenant of good faith and fair dealing (Count 6), and breach of fiduciary duty (Count 8).

The Court first examines Voletsky's argument that the Plaintiffs cannot assert both direct and derivative claims before turning to the specific causes of action alleged against Voletsky.

i. Plaintiffs' Capacity to bring a suit Individually and Derivatively

Defendant Voletsky first argues the Plaintiffs are unable to bring both an individual and a derivative suit against him given that the harms occurred to the Plaintiffs' respective LLCs. *See e.g. Yudell v. Gilbert*, 99 A.D.3d 108, 113 (1st Dep't 2012) (Stating that "a plaintiff asserting a derivative claim seeks to recover for injury to the business entity [and a] plaintiff asserting a direct claim seeks redress for injury to him or herself individually"). Plaintiffs argue, however, that the nature of the harm inflicted gives rise to both direct and derivative claims. *See e.g. Fellner v. Morimoto*, 52 A.D.3d 352, 353--54 (1st Dep't 2008) (holding "where a wrongdoer has breached an obligation to a shareholder which is independent of any duty owing the corporation, the shareholder has an individual cause of action") *citing Matter of Rudey v Landmarks Preserv. Commn. of City of N.Y.*, 137 AD2d 238, 244 (1988).

It is well established that "an individual shareholder has no right to bring an action in his own name, and in his own behalf, for a wrong committed against the corporation." *Gen. Motors Acceptance Corp. v. Kalkstein*, 101 A.D.2d 102, 105--06 (1st Dep't 1984).

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In order to distinguish a derivative claim from a direct one, the court considers “(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)” *See Serino v. Lipper*, 123 A.D.3d 34, 40 (1st Dep’t 2014) *citing Yudell v. Gilbert*, 99 A.D.3d 108 (1st Dep’t 2012). If the “harm is confused with, or embedded in the corporation, then it cannot separately stand.” *See Serino*, 123 A.D.3d at 40 (1st Dep’t 2014).

In this instance, Plaintiff Ezhkov has laid a sufficient foundation to assert both direct claims and derivative claims. Ezhkov sufficiently pleaded facts which would lead one to believe a fraud was committed on Ezhkov directly by inducing him to put money into NPK bank accounts; once the money was in an NPK bank account, Ezhkov has a derivative claim where the money was removed from NPK Ekologia’s bank accounts without his, or the manager’s, consent. *See e.g. Fellner* 52 A.D.3d at 353–54. Similarly, the claims arising from breach of contract can be asserted directly by Ezhkov as he was harmed directly by the loss of control over NPK. *See e.g. id.*

Voletsky argues Plaintiffs have failed to plead that there has been a sufficient demand made upon the members of NPK Ekologia pursuant to the New York Business and Corporations Law §626(c). Where, however, the complaint pleads facts sufficient to indicate demand would have been futile, either by a showing that the majority of members were interested parties to the transaction, or that the members failed to inform themselves sufficiently about the transaction, or that the members failed to exercise their business judgment, the requirement of a demand is excused by the court. *See Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003). Taking all the facts alleged in the complaint as true, there is a sufficient basis to state that any demand made by the Plaintiffs

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upon the Members of the LLC's would have been futile. *See Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994).

There is no allegation in the complaint that Defendant Voletsky was, in any way, connected to Duke Venture Fund. Absent a factual basis which ties Voletsky to Duke Venture Fund, Plaintiff Rodionov is unable to assert either direct or derivative claims against Defendant Voletsky. *See e.g. See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 *reargument denied*, 30 N.Y.3d 1009 (2017). Alone this warrants dismissal of Rodionov's claims against Voletsky.

ii. *Plaintiffs' Claims for Fraud (Count 1) and Fraudulent Inducement (Count 2)*

Defendant Voletsky argues that the Plaintiffs' claims for fraud and fraudulent inducement fail on three grounds. The court first addresses the argument that the Complaint fails to be pleaded with sufficient particularity against the Defendants. The court then addresses the statute of limitations argument before turning to the issue as to whether these causes of action are merely duplicative of a breach of contract.

a. *CPLR 3211(a)(5) -- Statute of Limitations*

Plaintiffs' fraud claims allege that "the Individual Defendants created, or caused to be created, the NY LLC's for their own benefit" upon "representations that were materially false when made." *Comp. §§ 188, 190, 198, 200*. The Plaintiffs allege that the Individual Defendants, collectively, caused forged or fraudulent documents pertaining to both NPK Ekologia LLC and Duke Venture Fund, LLC to be created, caused fake bank statements to be sent to the Plaintiffs, opened bank accounts and used them to conduct unauthorized transfers to themselves or others,

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caused the administration of NPK Ekologia and Duke Venture Fund to be changed from Chartac Management to another company, and ultimately caused the dissolution of Duke Venture Fund. *Id at* ¶¶191, 201.

The alleged frauds against the Plaintiffs were committed from both NPK's and Duke's formation through 2015. *See Comp. ¶¶ 62*. From the time of formation onward, the Plaintiffs allege they were unaware separate operating agreements were put into effect from those actually signed by the Plaintiffs, that they received false bank statements for years, that bank accounts were opened without their knowledge, and that it was not until late 2015, after Chartac had been dismissed, that the Plaintiffs learned they could not make any changes to the way the businesses were run. *See Comp. ¶¶ 42, 52, 111-134, 180*.

The statute of limitations for fraud states that an action must be commenced either within 6 years, or within two years of the time the plaintiff discovered the fraud, or could have discovered the fraud while using reasonable diligence, whichever is greater. *See CPLR 213(8)*. The inquiry as to whether a plaintiff could, with reasonable diligence, have discovered the fraud turns on whether the plaintiff was "possessed of knowledge of facts from which the fraud could be reasonably inferred." *Sargiss v. Magarelli*, 12 N.Y.3d 527, 532 (2009) *citing Erbe v Lincoln Rochester Trust Co.*, 3 N.Y.2d 321, 326 (1957). "Where it does not conclusively appear that a plaintiff had knowledge of facts from which the fraud could reasonably be inferred, a complaint should not be dismissed on motion and the question should be left to the trier of the facts." *Id*. Here, the Plaintiff could have reasonably inferred a fraud as early as November of 2014 when Chartac was replaced as the LLC manager without the Plaintiff's consent. *See Comp. ¶67(g)*. The Plaintiffs' fraud claims, having been filed in April of 2016, are therefore timely.

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b. *Claims are Duplicative of the Breach of Contract Claim*

Plaintiffs claim that Defendant Voletsky made misrepresentations which induced the Plaintiffs to transfer money into the NY LLC accounts. *See Opp. Br. 23*. Nothing in the complaint, however, suggests that Defendant Voletsky had any role in convincing the Plaintiffs to join either NPK or Duke, merely that Voletsky organized and managed NPK. *See generally Comp.* In fact, Plaintiffs solely attribute Defendant Redfern as being the one to induce the Plaintiffs into organizing or investing in either NPK or Duke. *See Comp. ¶¶16, 199, 203*.

Here the fraud claims arise from a breach of contract and are properly dismissed as duplicative of the breach of contract claim. *See Triad Int'l Corp.*, 122 A.D.3d at 531 (1st Dep't 2014) (holding the fraud damages were, in actuality, contract damages and therefore repleading would have been futile); *see also Krantz v. Chateau Stores of Canada Ltd.*, 256 A.D.2d 186, 187 (1st Dep't 1998) (holding that in order to plead a viable cause of action for fraud arising out of a contractual relationship, the plaintiff must have alleged a breach of duty which is collateral or extraneous to the contract between the parties); *Comp. ¶¶40-50, Compare Comp. ¶¶187-196, 197-207 with Comp. ¶¶229-241*. The fraud claims are, therefore, dismissed.

c. *CPLR 3016(b) – Pleading Fraud with the Requisite Particularity*

The court now turns to Defendant Voletsky's argument that Plaintiffs' fraud claims against him are not stated with the heightened particularity required by CPLR 3016(b) requiring that the "circumstances constituting the wrong be stated in detail". *CPLR 3016(b)*. The First Department has clarified that each defendant is entitled to have the pleading "specify the tortious conduct charged against each Defendant." *Aetna Cas. & Sur. Co. v. Merchants Mut. Ins. Co.*, 84

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A.D.2d 736, 736 (1st Dep't, 1981) (holding that causes of action were pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant which failed to provide the Defendants notice as to "the material elements of each cause of action" pursuant to CPLR 3013).

While the complaint does specify a series of alleged wrongs in the claim for fraud, the pleading asserts these wrongs collectively such that Defendant Voletsky is unable to defend against the specific occurrences of fraud alleged against him. *See id.* For instance, nowhere in the complaint does it appear that Defendant Voletsky had knowledge of the Duke Venture Fund transactions, yet nonetheless the claim for fraud attempts to proclaim that Defendant Voletsky must defend against this wrong. *See Comp.* ¶188. Indeed, Plaintiff's own brief claims that Defendant Voletsky's role in NPK Ekologia LLC is a sufficient basis for the fraud claim but is utterly silent as to how Defendant Voletsky committed fraudulent actions pertaining to Duke Venture Fund. *See Opp. Br.* 22-23. Alone, this is enough to warrant dismissal of all the claims against each cause of action alleged against all the Defendants. *See Aetna Cas. & Sur. Co.*, 84 A.D.2d at 736 (1st Dep't, 1981).

iii. *Plaintiffs' claims for Breach of Contract (Count 5).*

Plaintiff Ezhkov alleges Defendant Voletsky breached the NPK Ekologia Operating Agreement by failing to seek Ezhkov's approval on certain decisions involving NPK LLC, failing to manage NPK Ekologia in good faith, and violating his fiduciary duties. *See Comp.* ¶¶ 234-236; *see also Ezhkov Affid. Ex. D.* The Court first examines whether the Plaintiff has stated a claim for breach of contract pursuant to CPLR 3211(a)(7), before discussing whether

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documentary evidence conclusively refutes the Plaintiffs' claims under CPLR 3211(a)(1). The court will then discuss the applicable statute of limitations on a breach of contract claim.

a. *CPLR 3211(a)(7) – Plaintiff's Failure to State a Claim*

The elements of a breach of contract claim include the “existence of a contract, performance, the defendant’s breach, and resulting damages.” *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep’t 2010). Defendant Voletsky first argues that the Plaintiff could not state a cause of action where no contract existed. *See Randall’s Island Aquatic Leisure LLC v. City of New York*, 92 A.D.3d 463, 463-64 (1st Dep’t 2012). In response, plaintiff Ezhkov supplied a signed Operating Agreement, dated March 15, 2005, which purportedly contains Defendant Voletsky’s signature as the initial manager. *See Ezhkov Affid. Ex. D*. Given that a contract is alleged to exist, a copy of that contract has been supplied by the Plaintiff, and the Plaintiff has sufficiently pleaded performance, breach, and damages in the form of a lost business and converted funds. *See Leon*, 84 N.Y.2d. at 87-88. The Court finds the Plaintiff has sufficiently pleaded claims for breach of contract. *Id.*

b. *CPLR 3211(a)(1) – Defense Founded Upon Documentary Evidence*

Even where the breach of contract claims are sufficiently pleaded, however, a dismissal of the claim is warranted under CPLR §3211(a)(1), if documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. *See Leon*, 84 N.Y.2d at 88.

Defendant Voletsky’s documentary evidence conclusively establishes that Ezhkov did not have the authority to enter into an Operating Agreement after the initial formation of the

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business. Defendant Voletsky states that he was contacted by someone purporting to be Nicos Gavrielides, requesting an LLC be established in New York. *Voletsky Affirm. Ex. C; but see Ezhkov Affid.* ¶¶15-16 (claiming documents containing the signature of Gavrielides are forgeries). Regardless of whether Nicos Gavrielides signed the initial letter which engaged Voletsky, the documentary evidence conclusively establishes Voletsky acted upon that representation by filing paperwork with non-party Blumberg Excelsior Corporate Services seeking to create an LLC. *See Voletsky Affirm. Ex. D.* On that filed paperwork, Defendant Voletsky named Nicos Gavrielides as the initial member of NPK Ekologia LLC. *See Voletsky Affirm Ex. D.*

Sharon Babala, of Blumberg Excelsior Corporate Services, subsequently relied upon those representations to draft and file the Articles of Organization with New York's Department of State on March 9, 2005 naming Nicos Gavrielides as the initial Member. *Voletsky Affirm. Exs. E, G.* Plaintiff's own copy of the Certificate of Organization dated May 6, 2013, names Nicos Gavrielides, *not* Ezhkov, as the initial member of the LLC. *See Ezhkov Affid. Ex. E.* It is well settled that the complaint is not entitled to favorable inferences where it contains "factual claims flatly contradicted by documentary evidence". *See Myers v. Schneiderman*, 30 N.Y.3d 1, 11 *reargument denied*, 30 N.Y.3d 1009 (2017) (finding there were no reasonable countervailing factual issues which would preclude a determination on the law).

Absent any indication that Nicos Gavrielides transferred his membership interest to Plaintiff Ezhkov in 2005, the earliest date Plaintiff Ezhkov admits he entered into an agreement with Gavrielides concerning NPK Ekologia LLC was April 21, 2008. *See Comp.* ¶¶ 81-88. Therefore, the court finds that documentary evidence supplied by both parties flatly contradicts

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the complaint. *See Myers* 30 N.Y.3d at 11. The Court finds that the Plaintiff did not have the authority to enter into the 2005 NPK Operating Agreement with Defendant Voletsky and dismissal under CPLR 3211(a)(1) is justified as the documentary evidence conclusively establishes Ezhkov had no ownership interest in NPK Ekologia from its formation through 2008. *See Leon*, 84 N.Y.2d. at 87-88. Dismissal is therefore warranted.

c. *CPLR 3211(a)(5) - Statute of Limitations*

Even had the Operating Agreement been valid, Defendant Voletsky also seeks to dismiss the breach of contract claim where the applicable statute of limitations has expired. A cause of action arising from a contractual obligation or liability shall have a six-year statute of limitations *See CPLR §213(2)*. "Except in cases of fraud where the statute expressly provides otherwise, the statutory period of limitations begins to run from the time when liability for wrong has arisen even though the injured party may be ignorant of the existence of the wrong or injury." *Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 403 (1993).

Plaintiffs argue, without any citation, that Defendant Voletsky breached contractual duties owed to the Plaintiff after April 13, 2010. *Opp. Br. p24*.

The Complaint first alleges that Voletsky breached sections 5.4 and 5.5 of the operating agreement in March of 2005, when a second operating agreement was signed between non-parties Jacqui Desmond and Nicos Gavrielides. *See Comp. ¶¶48-50, 67(a), 70-75, 79-83, 235*.

Even crediting the allegation that Ezhkov somehow had an ownership interest in NPK Ekologia prior to 2008, the claim for breach of contract during the transfer of the LLC to Jacqui Desmond remains subject to the 6-year statute of limitations provided for in CPLR §213(2). *See*

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Ely-Cruikshank Co., 81 N.Y.2d at 403 (stating the period of limitations begins to run from the time of the breach despite the ignorance of the party). Subsequent transfers of the NPK are alleged to have been effectuated by non-party Jacqui Desmond, Defendant Redfern, and Nataliya Demidova. *Comp.* ¶¶79, 88, 89, 93, 94, 102. While a breaching party is to be held liable for foreseeable consequences arising from the breach, this does not alter the fact that the date of Defendant Ezhkov's alleged breach falls outside the applicable statute of limitations. *See e.g. Ashland Mgmt. Inc. v. Janien*, 82 N.Y.2d 395, 403 (1993); *Ely-Cruikshank Co.*, 81 N.Y.2d at 403.

The Complaint next alleges that the Defendant breached his contractual fiduciary duties. *See Comp.* ¶¶234-238. This breach, again, first occurred in 2005 when Defendant Voletsky is alleged to have allowed the second Operating Agreement between non-party Jacqui Desmond and Nicos Gavrielides to seize the company from Ezhkov. *See Ezhkov Affid.* ¶¶11-16, *see also Ezhkov Affid Exs. D, E*. The Plaintiffs argue that the Defendant openly repudiated his fiduciary duties from 2005 through at least 2013. *See Ezhkov Affid.* ¶¶11-16, *see also Ezhkov Affid Exs. D, E*. The open repudiation of the Defendant's fiduciary duties, resulted in harm to the Plaintiffs with the loss of funds held by NPK Ekologia LLC. *Comp.* ¶¶240-241.

The First Department, however, has specifically held that "the open repudiation doctrine, which tolls the statute of limitations when there is an ongoing fiduciary relationship between the parties, does not apply to claims for money damages." *See Averick v. Glickenhau*s, 2017 N.Y. Slip Op. 30862(U) at *3 (April 27, 2017) *citing Mailer of Clark*, 146 A.D.3d 495, 496-497 (1st Dep't 2017); *Cusimano v. Schmurr*, 137 A.D.3d 527, 530 (1st Dep't 2016); *Stern v. Morgan Stanley Smith Barney*, 129 A.D.3d 619 (1st Dep't 2015). Given that the claims seek money

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damages and relate back to the initial breach in 2005, the Court holds the Plaintiffs' claims for breach of contract are time barred. *Id.*

iv. *Breach of the Implied Covenant of Good Faith and Fair Dealing (Count 6) and Breach of Fiduciary Duty (Count 8)*

Plaintiffs also raise claims for breach of the Implied Covenant of Good Faith and Breach of Fiduciary duty. Specifically, "Voletsky's multiple, material breaches of the implied covenant of good faith and fair dealing have deprived Ezhkov of the right to receive the benefits under the NPK Operating Agreement." *Comp.* ¶248. A claim for breach of the implied covenant of good faith is properly dismissed as duplicative of a breach of contract claim where both claims "arise from the same facts and seek the identical damages for each alleged breach." *Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110 A.D.3d 433, 433-34 (1st Dep't 2013) *citing Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010).

Given that the claims for breach of the implied covenant of good faith and fair dealing are based on the same facts, and seek the same damages as the breach of contract claim, Plaintiff's claim for breach of the implied covenant of good faith and fair dealing is properly dismissed as duplicative. *See Netologic, Inc.*, 110 A.D.3d at 433-34 (dismissing a claim for breach of the implied covenant of good faith as duplicative of a breach of contract claim).

Similarly, Plaintiffs' claims for breach of fiduciary duties also arise solely from the Operating Agreement. *See Comp.* ¶¶ 257-263. A claim for breach of fiduciary duty is properly dismissed as duplicative of a claim for breach of contract where there is no fiduciary duty independent of the contract. *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d

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171, 173 (1st Dep't, 2000) (noting that a breach of fiduciary duty claim must be separate and distinct from the underlying breach of contract claim). Given that the entirety of the Plaintiffs' claim for breach of fiduciary duty discusses fiduciary duties arising from the operating agreement and the damages are the same as the breach of contract claim, the Plaintiffs claim for breach of fiduciary duty is dismissed as duplicative of the Plaintiff's breach of contract claims.

See id.

v. *Plaintiffs' claims for Unjust Enrichment/Breach of Constructive Trust (Count 10).*⁹

To state a claim for Unjust Enrichment, the Plaintiffs needed to plead with a sufficient degree of particularity how Defendant Voletsky was enriched, at Plaintiff Ezhkov's expense, and that "it is against equity and good conscience to permit [Defendant Voletsky] to retain what is sought to be recovered." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 182 (2011). Plaintiff has failed to sufficiently plead that Defendant Voletsky obtained any benefits from the Agreement whatsoever.

Similarly, in order to grant a constructive trust, the Plaintiff must have sufficiently pleaded the existence of "(1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment." *Reinhardt v. John Family*

⁹ This Court declines to rule on the Defendant's statute of limitations argument as it pertains to unjust enrichment/constructive trust. For the reasons stated in this section, this Court holds that the present pleading fails to state the elements of the claim with sufficient particularity as to when and if Defendant Voletsky obtained a benefit within the six-year statute of limitations. *See Sirico v. F.G.G Productions*, 71 A.D.3d 429, 434 (1st Dep't 2010) (holding that there must be an act by which Defendant Voletsky was unjustly enriched within 6 years of filing the complaint); *see also* CPLR §213(1).

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Tr. of 1997, 21 Misc. 3d 1112(A) at *4 (Sup. Ct. N.Y. Cty. 2008). While the Plaintiff has sufficiently pleaded the existence of a contractual fiduciary relationship and a promise, the Plaintiff has failed to plead the elements of a transfer in reliance thereon and resulting unjust enrichment. Therefore, the Plaintiffs' Count 10 is dismissed as to Defendant Voletsky.

B. Claims against Defendants Redfern, Delaunay, and Wittman – Motion Sequence 002.

Defendants William Donald Redfern and Fabienne Delaunay bring Motion Sequence 002, to dismiss the complaint based upon CPLR §§ 3211(a)(3), 3211(a)(5), 3211(a)(8), 3211(a)(10) and 327(a). As part of motion sequence 002, Defendant Ellen Wittman Grossman also seeks to dismiss the complaint under CPLR §§ 3211(a)(3), 3211(a)(5), 3211(a)(7), 3211(a)(10) and 327(a).

Both Plaintiffs state causes of action against Defendants Redfern, Delaunay, and Wittman for fraud (Count 1), fraudulent inducement (Count 2), and unjust enrichment/breach of constructive trust (Count 10). Plaintiff Rodionov states causes of action against Defendant Wittman, specifically, for breach of contract (Count 3), breach of the implied covenant of good faith (Count 4), breach of fiduciary duty (Count 7).

Both Plaintiffs state a cause of action against Defendant Redfern, specifically, for aiding and abetting breach of fiduciary duty (Count 9).

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i. CPLR 3211(a)(8) – Lack of Personal Jurisdiction of Defendants Redfern and Delaunay.

Defendants Redfern and Delaunay move to dismiss the complaint, arguing the court does not have jurisdiction over them as there is an insufficient nexus to New York and on the grounds that they were improperly served. Defendant Redfern is alleged to live in Cyprus and Defendant Delaunay is alleged to live in France. *See Redfern Aff.* ¶¶2-7; *Delaunay Aff.* ¶¶1-10. The Defendants were purportedly served by “nail and mail” service in California. CPLR 308(4) describes nail and mail service as:

Where service under paragraphs one and two cannot be made with due diligence, by affixing the summons to the door of either *the actual place of business, dwelling place or usual place of abode within the state of the person to be served* and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person to be served at his or her actual place of business in an envelope bearing the legend “personal and confidential” and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the person to be served, such affixing and mailing to be effected within twenty days of each other; proof of such service shall be filed with the clerk of the court designated in the summons within twenty days of either such affixing or mailing, whichever is effected later; service shall be complete ten days after such filing. *CPLR §308(4) (emphasis added).*

Plaintiffs were aware that Defendants Redfern and Delaunay had multiple residences around the world. *See Ezhkov Aff.* ¶7; *see also Rodionov Aff.* ¶6. It is clear, however, that the Plaintiffs were unaware where the Defendants *actually lived* inasmuch as they attempted to effectuate service at a New York apartment, then at a home in California, before finally attempting to obtain service on the Defendants at an apartment in Russia. *See Ezhkov Aff.* ¶7; *Rodionov Aff.* ¶6; *Redfern Aff* ¶6-7; *Delaunay Aff.* ¶¶1-10; *Redfern Reply Aff.* ¶4. At a minimum, the attempts at obtaining service in New York, California, and even Russia indicate that the Plaintiffs were entirely unaware where the Defendants’ *actual dwelling place, or usual place of abode,* was. Service

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upon what is believed to be the dwelling or abode is insufficient to effectuate service in New York State. *See Feinstein v. Bergner*, 48 N.Y.2d 234, 241 (1979) (holding that subsequent knowledge of the lawsuit was nonetheless insufficient where the Defendant was never properly served); CPLR 308(4) (emphasis added).

Thus, the court holds that service upon the parties was improper, and the claims against Defendants Redfern and Delaunay are dismissed.

ii. *CPLR 3211(a)(3) – Lack of Capacity to Sue*

The concept of a lack of capacity, addresses the parties' ability to bring its claim into court and is without a concrete definition. *Cnty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994). The "legal capacity to sue, or lack thereof, often depends purely on the litigant's status, such as that of an infant, an adjudicated incompetent, a trustee, certain governmental entities or, as in this case, a business corporation." *Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 279 (1st Dep't 2006).

a. *Defendants' CPLR 3211(a)(3) motion with regard to Plaintiff Ezhkov.*

Defendants have made no argument as to why Plaintiff Ezhkov does not have capacity to assert his claims. Therefore, the court declines to determine whether Plaintiff Ezhkov had the capacity to sue.

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b. *Defendants CPLR 3211(a)(3) motion with regard to Plaintiff Rodionov.*

Defendants Redfern, Delaunay, and Wittman allege that Plaintiff Rodionov lacks standing to assert claims, given that the complaint alleges an entity by the name of Deede Trading Ltd. entered into the Purchase and Sale Agreement for Duke Venture Fund, LLC. *See e.g. Comp. ¶¶30-31.* This argument is belied by Plaintiff Rodionov's, and Defendant Redfern's, attachment of the same Certificates of Shares in Duke Venture Fund, LLC. *See Rodionov Affid. Ex. A., Redfern Affid Ex. B (September 14, 2016).* These shares granted Plaintiff Rodionov a personal interest in Duke Venture Fund LLC. This alone, establishes that Plaintiff Rodionov had an interest in the LLC on September 30, 2009. *See id.* Unlike similar cases involving corporate dissolution and the Plaintiff's capacity to bring a suit personally, here, the Plaintiff's ownership in shares of the LLC establishes his capacity to bring a suit. *See e.g. Sec. Pac. Nat. Bank*, 31 A.D.3d at 279 (noting that the despite being dissolved the corporation was nonetheless harmed and narrowly questioning the individual plaintiff's capacity to bring a suit for that harm).

Based upon Plaintiff Rodionov's ownership interest in shares of Duke Venture Fund LLC, this court finds that Plaintiff Rodionov does have the capacity to bring this lawsuit.

Capacity to sue, however, is different from a Plaintiff's standing to file a suit. *See Cmty. Bd. 7 of Borough of Manhattan v. Schaffer*, 84 N.Y.2d 148, 155 (1994) (noting that standing to sue discusses a large question of justiciability); *see also Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 279 (1st Dep't 2006). "Standing means a plaintiff has suffered an injury in fact. Only an aggrieved party has standing to bring a lawsuit. Furthermore, in order to have standing a party

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must be involved in some genuine controversy.” *See Sec. Pac. Nat. Bank v. Evans*, 31 A.D.3d 278, 283 (1st Dep’t, 2006) (Catterson, J. and Mazzerelli J.P., dissenting).

Here, the purchase agreement for the Duke Venture Fund, LLC was entered into between Duke Venture Fund and Deede Trading Ltd. *See Comp. ¶¶30-32*. Because of that transfer, Plaintiff Rodionov became the sole owner of 1000 units of Duke Venture Fund, LLC. *Comp. ¶¶35-38; see also Rodionov Aff. Ex. A*. Plaintiff Rodionov was not, however, induced in his individual capacity to enter the Purchase and Sale Agreement, but rather as a member of Deede Trading Ltd. *See Comp. ¶¶30-32*. Plaintiff Rodionov, therefore, lacks the standing to assert an individual claim of fraudulent inducement (Count 2) which rightfully should have been brought by Deede Trading, Ltd. *See Comp. ¶¶30-32*.

Plaintiff Rodionov’s claim for fraudulent inducement is therefore dismissed.

iii. *CPLR 327(a) – Forum Non Conveniens*

Defendants Redfern, Delaunay, and Wittman also move under CPLR 327(a) on the grounds that New York is an inconvenient forum to hold the action. Factors to consider when deciding a motion to dismiss on CPLR 327(a) grounds include:

“the burden on New York courts, potential hardship to the defendant, the unavailability of an alternate forum, the residence of the parties, and the location of the events giving rise to the transaction at issue in the litigation, with no one factor controlling. Other factors may include the location of potential witnesses and documents and the potential applicability of foreign law. Unless the balance is strongly in favor of the defendant, the plaintiff’s choice of forum should rarely be disturbed, even where the plaintiff is not a resident of New York.” *See Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep’t 2013).

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The decision of the Plaintiff to litigate in New York does not place a particularly substantial burden on this Court which, Plaintiff argues, is well equipped to handle complex commercial disputes involving foreign and domestic laws. *See e.g. Georgia-Pac. Corp. v. Multimark's Int'l Ltd.*, 265 A.D.2d 109, 112 (1st Dep't, 2000).

a. *Residency of the Parties*

Two of the four Defendants are not New York residents, but are instead domiciled in Cyprus. *See Redfern Aff.* ¶¶2-5; *Delaunay Aff.* ¶¶2-3. One Defendant, Fabienne Delaunay, resides in France when not at her domicile. *See Delaunay Aff.* ¶¶2-3. While it is true, that Defendants Wittman and Voletsky are domiciled in the United States, Defendant Voletsky has been dismissed from this action on other grounds and Defendant Wittman has also moved for dismissal pursuant to CPLR 327(a). Thus, the Defendants are not barred from seeking dismissal pursuant to CPLR 327(a)

b. *Availability of an Alternative Forum*

Plaintiffs argue that Cyprus is unavailable as an alternative forum merely because it does not recognize causes of action for aiding and abetting breach of fiduciary duty and breach of the implied covenant of good faith. Plaintiffs' argument, however, is a nonstarter with regard to these causes of action as they are properly dismissed in a New York forum as well.

A claim for breach of the implied covenant of good faith is properly dismissed as duplicative of a breach of contract claim where both claims "arise from the same facts and seek the identical damages for each alleged breach." *Netologic, Inc. v. Goldman Sachs Grp., Inc.*, 110

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A.D.3d 433, 433–34 (1st Dep’t 2013) citing *Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dept. 2010). Plaintiff’s cause of action for breach of the implied covenant of good faith is merely duplicative of the cause of action for breach of contract as both are based on the same facts, and seek the same damages. Compare *Comp. §§208-22 with Comp. §§221-228*.

Similarly, Plaintiffs’ claims for breach of fiduciary duty also arise solely from the Operating Agreement. See *Comp. §§ 250-256*. A claim for breach of fiduciary duty is properly dismissed as duplicative of a claim for breach of contract where there is no fiduciary duty independent of the contract. *William Kaufman Org., Ltd. v. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dep’t, 2000). Absent a breach of fiduciary duty, the Plaintiff’s claims against Defendant Redfern for “aiding and abetting a breach of fiduciary duty” cannot stand.

Given that the two causes of action were listed as one of the main reasons for denying a change of venue to Cyprus, and that those causes of action would have been dismissed in New York regardless, this Court finds that there would be no substantial prejudice to the Defendant in having the case litigated in Cyprus. It is the burden of the Plaintiffs to persuade this court that the other forum is not a proper alternative forum for purposes of determining this motion. See e.g. *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 481 (1984) (noting that even were the existence of no alternative forum a dispositive factor in determining a dismissal on forum non conveniens grounds, the burden would be on the Plaintiff to prove this given that it was the Plaintiff’s decision to litigate here in New York). Plaintiffs have failed to do so here.

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c. *Location of Events and Potential Witnesses*

The Court must take into consideration the location of the events and potential witnesses. *Elmaliach v. Bank of China Ltd.*, 110 A.D.3d 192, 208 (1st Dep't 2013). The Court takes notice that both NPK and Duke Venture Fund are both organized under the laws of New York. *See Comp.* ¶¶18, 30. The Operating Agreements for both LLCs are governed by New York law. *See id at* ¶¶41, 51. Further, money for Duke Venture Fund was transferred into New York Wachovia and Wells Fargo accounts after its formation. *Id at* ¶34. That is where the connection to New York ends.

After the initial formation of the LLCs, both were placed under the management of Nicos Gavrielides of Chartac Management, a Cyprus registered company. *See id at* ¶¶21-24, 38. Upon discovering the purported frauds, the Plaintiffs engaged in a preliminary investigation with the help of Chartac Management. *See Comp. at* ¶66, 74, 76, 78. Nicos Gavrielides, presumably operating from Chartac in Cyprus, is alleged to have been managing these corporations and in contact with Defendant Redfern throughout the relevant times. *See id at* ¶¶80-110. Nicos Gavrielides is alleged to have played a role in the fraudulent creation of Singapore Corporations for both NPK Ekologia and Duke Venture Fund. *Id at* ¶¶142, 150-153, 155.

Bank accounts were opened in Cyprus for both NPK Ekologia and Duke Venture Fund. *See id at* ¶¶26-27, 33. Through 2008 – 2015 the Plaintiffs are alleged to have met with Bank of Cyprus representatives, as well as Defendant Redfern. *See id. at* ¶63. Banking for both LLC's was regularly conducted through the Bank of Cyprus. *See id at* ¶¶ 94-95, 136, 139. The Defendants are also alleged to have made fraudulent transfers to themselves from the Bank of Cyprus Accounts. *Id at* ¶¶161-166, 172, 176.

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Finally, the Defendants are alleged to have orchestrated the transfer of management over NPK Ekologia LLC and Duke Venture Fund LLC from Chartac Management company to a person by the name of Nasos Panayotiou, a Cyprus based attorney. *See Comp. at ¶¶177.*

Dismissal of this action on *forum non conveniens* grounds is therefore appropriate given that the location of events and witnesses, the availability of an alternative forum, and the residency of the parties involved all point to Cyprus as a more convenient forum than the state of New York.

III. Decision and Order

Upon the foregoing background and analysis, it is hereby

ORDERED Defendant Voletsky's Motion to Dismiss the Complaint in its entirety (Motion Sequence 001) is GRANTED in the following manner:

- 1) Fraud (Count 1) is dismissed as duplicative of the breach of contract claim
- 2) Fraudulent inducement (Count 2) is dismissed as duplicative of the breach of contract claim.
- 3) Breach of contract (Count 5) is dismissed with prejudice pursuant to CPLR 3211(a)(1) and CPLR 3211(a)(5).
- 4) Breach of the implied covenant of good faith and fair dealing (Count 6) is dismissed as duplicative of the breach of contract claim.
- 5) Breach of fiduciary duty (Count 8) is dismissed as duplicative of the breach of contract claim.
- 6) Unjust Enrichment/Breach of Constructive Trust (Count 10) is dismissed as duplicative of the breach of contract claim.

IT IS FURTHER ORDERED that, notwithstanding other deficiencies in the Complaint warranting dismissal of the Plaintiffs' claims with and without prejudice, Defendant Redfern's,

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Delaunay's, and Wittman's Motion to Dismiss (Motion Sequence 002) is GRANTED with prejudice as New York is an inconvenient forum to litigate the Plaintiffs' claims pursuant to CPLR 327.

Dated: 5-10-2018



HON. EILEEN BRANSTEN
J.S.C.