Parsifal Partners B, LP v Zugel
2018 NY Slip Op 31413(U)
July 2, 2018
Supreme Court, New York County
Docket Number: 651174/17
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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PARSIFAL PARTNERS B, LP,

Plaintiff,

Index No. 651174/17

-against-

CHRISTIAN ZUGEL, MICHAEL SZYMANSKI, R. BRUCE CAMERON, ZAIS GROUP HOLDINGS, INC., and BERKSHIRE CAPITAL SECURITIES LLC,

Defendants.

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Masley, J.:

In motion sequence number 001, defendants Christian Zugel, Michael Szymanski, and ZAIS Group Holdings, Inc. (ZGH) move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the complaint. In motion sequence number 002, defendants R. Bruce Cameron and Berkshire Capital Securities LLC (Berkshire) move, pursuant to CPLR 3211 (a) (1), (3), and (7), to dismiss the complaint.

Motion sequence numbers 001 and 002 are consolidated for disposition.

Background

The following factual allegations are set forth in the complaint, and for the purposes of this motion are accepted as true.

Zugel is the Chairman, Chief Investment Officer, and a director of ZGH. Szymanski is the President, Chief Executive Officer, and a director of ZGH. Cameron is the former Chairman, Chief Executive Officer and director of HF2 Financial Management Inc. (HF2), a former director of ZGH, and Executive Chairman and Chief Executive Officer of Berkshire.

HF2, now known as ZGH[1], was formed in 2012 as a special purpose acquisition company (SPAC) to acquire control of one or more businesses in the financial sector. Richard Foote was HF2's original Chief Executive Office and Chief Executive Officer of Berkshire. Berkshire served as HF2's financial advisor and was responsible for performing due diligence for HF2.

On November 30, 2012, plaintiff Parsifal Partners B, LP and HF2 entered into an agreement whereby plaintiff agreed to purchase a certain number of "Sponsors' Shares" of Class A common stock at $10.00 per share (the Sponsor Agreement). Plaintiff was also given a certain number of "Founders' Shares," for which it agreed to pay $0.0001 per share, as consideration for being a Sponsor and contributing to the pool of cash from which redemptions by future stockholders could be paid. Under the Sponsor Agreement, plaintiff purchased 294,350 Founders' Shares and 110,649 Sponsors' Shares.[2]

On March 21, 2013, HF2's Registration Statement for its initial public offering (IPO) was declared effective. Under the terms of the Registration Statement, HF2 had 18 months to execute a letter of intent, agreement in principle, or definitive agreement for an initial business combination. Investors who purchased stock in connection with

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[1] After the March 17, 2015 closing of the business combination transaction between HF2 and ZAIS Group Parent, LLC, discussed herein, HF2 became ZGH. This decision will refer to the special purpose acquisition company as HF2 when discussing events prior to March 17, 2015 and ZGH thereafter.

[2] Ultimately, plaintiff purchased a total of 125,000 Sponsor Shares.

the IPO could redeem their shares at $10.50 per share prior to the business combination, retain their shares, or retain some portion of their shares and redeem the rest. The IPO closed on March 27, 2013, generating net proceeds of approximately $186 million.

On April 25, 2014, Foote passed away and Cameron assumed the role of HF2's Chief Executive Officer. In July 2014, HF2 agreed on a term sheet with Tennenbaum Capital Partners (Tennenbaum). Throughout July 2014, Cameron had discussions with the management of other potential acquisition targets. By July 18, 2014, Cameron had narrowed the targets to Tennenbaum, Tocqueville Asset Management, and ZAIS Group, LLC (ZAIS). Cameron recommended ZAIS to HF2's Board of Directors and they approved.

On September 16, 2014, HF2 entered into a definitive agreement with ZAIS to acquire a majority equity interest in ZAIS Group Parent, LLC (ZAIS Parent), the sole member of ZAIS (the Investment Agreement). At the time of this agreement, ZAIS represented that its assets under management (AUM) as of June 30, 2014, were approximately $5 billion. Entering into the Investment Agreement effectively extended the amount of time to March 21, 2015 for a business combination to be consummated under the Registration Statement. The Agreement also provided that as a condition of closing, HF2 was required to have $100 million in cash after giving effect to redemptions and expense payments.

By October 2014, ZAIS had received a demand from one of its largest institutional

investors seeking that $600 million be returned to the investor. On October 28, 2014, nonparty Kenneth Rilander, plaintiff's managing partner, and principals of other Sponsors, attended a meeting at ZAIS's offices, where Zugel allegedly assured all in attendance that ZAIS's business was highly profitable and growing and that ZAIS's AUM was approximately $5 billion. Zugel did not disclose the demand made by the investor, which would bring ZAIS's AUM to approximately $4.1 billion. These alleged misrepresentations were repeated in a press release attached to HF2's January 8, 2015 8-K, which stated that ZAIS's AUM was approximately $4.7 billion as of September 30, 2014, not disclosing that ZAIS's AUM had been reduced to $4.1 billion as of December 31, 2014.

On January 8, 2015, Cameron informed plaintiff that he was working with EarlyBirdCapital, Inc. and Sandler O'Neill & Partners, L.P. (Sandler) as HF2's financial advisors. Specifically, Cameron informed plaintiff that "'[t]hough we haven't seen any material volume in the stock, Sandler continues to express strong confidence they will bring significant investors (at least $100m) into the company in the coming weeks'" (complaint, ¶ 47). However, later that month, Cameron told plaintiff that Sandler had informed him that there was virtually no interest from investors on the secondary market. Plaintiff alleges that Cameron and Berkshire made no efforts to determine why investor interest in the secondary market was virtually nonexistent. Plaintiff further alleges that Berkshire and Cameron failed to perform due diligence sufficient to reveal the decrease in ZAIS's AUM, and had they learned of the $600 million decrease, they could have

renegotiated the agreement with ZAIS, re-engaged with the other targets, Tennenbaum and Tocqueville Asset Management, or focused on finding another acquisition target. This failure was allegedly a result of Cameron and Berkshire's own interests.

On January 29, 2015, HF2 filed a proxy statement which stated that "ZAIS's revenue is derived principally from two sources: (1) management fee income, based on the size of ZAIS's funds and (2) incentive income, based on the performance of ZAIS's funds. Thus, revenues vary directly with increases or decreases in the aggregate size and the investment performance of ZAIS's funds" (complaint, ¶ 56). The proxy statement stated that a significant portion of ZAIS's AUM was derived from a small number of clients and that a loss of clients or a client's withdrawal of all or a portion of its AUM could have a material adverse effect on ZAIS's operations and financial condition. The proxy statement listed ZAIS's AUM as $4.7 billion as of September 30, 2014. On February 3, 2015, HF2 filed a Schedule 14A, which also listed ZAIS's AUM as $4.7 billion as of September 30, 2014, but did not disclose that as of December 31, 2014, ZAIS's AUM was reduced to $4.1 billion. The 10-K also filed that month listed ZAIS's AUM as $4.7 billion. The 10-K did not mention the decrease in ZAIS's AUM and did not disclose that ZAIS's business had been negatively affected as a result.

Knowing that HF2 would not have the $100 million in cash at the closing due to lack of investor interest, defendants approached Neil Ramsey, principal of NAR Special Global LLC, a sponsor, about making a substantial investment. On February 10, 2015, Ramsey committed to invest $60 million from his other company dQuant Special

Opportunities Fund, LP (dQuant). In exchange for this investment, defendants committed to paying Ramsey an "incentive fee" of $3.4 million and reallocating all but 500,000 Founders' Shares originally sold to the Sponsors to dQuant.

On March 4, 2015, HF2 filed an 8-K, which listed ZAIS's AUM as $4.1 billion "attributable to redemptions by one institutional investor" (complaint, ¶ 69). "The 8-K further disclosed that, on March 4, 2015, HF2 and ZAIS had entered into an agreement amending the amount of cash required to be in HF2's trust account as a condition to the closing of the business combination from $100 million to $65 million" (*id.* at ¶ 70). The 8-K also disclosed the agreement entered into between ZAIS Parent, dQuant, and Ramsey. In connection with this agreement, the vast majority of plaintiff's Founder Shares were stripped and reallocated to dQuant, as well as Zugel, Zugel's ex-wife, two trusts controlled by Zugel, and a number of individuals and entities who did not invest any additional money. Plaintiff's Founder Shares were reduced from 293,869 to 14,466.

According to a March 9, 2015 press release, HF2 held a special meeting of stockholders, who approved the business combination. Zugel, Szymanski, Cameron, Paul Guenther, and James Zinn were elected to be the ZGH's directors. The press release stated that HF2 anticipated that the consummation of the business combination would occur on March 17, 2015, which it did, and that upon the closing, HF2 would deliver approximately $78 million to ZAIS Parent. On March 25, 2015, plaintiff, along with other holders of a majority-in-interest of Sponsors' Shares, sent a letter to ZGH requesting that it file a Registration Statement on Form S-3 with respect to the Founders'

Shares and Sponsors' Shares, as it was required to do under the Registration Rights Agreement. This request was denied on the ground that filing on a Form S-3 would require ZGH to make an "adverse disclosure," as defined in the Registration Rights Agreement. A Registration Form was not filed until January 2016.

On May 11, 2015, plaintiff and Guenther agreed over the phone that plaintiff would sell its shares in ZGH to Guenther for $10 a share. On May 13, 2015, Guenther informed plaintiff that he was not longer interested in buying plaintiff's shares. While ZGH's stock price was $10 a share in March 2015, by January 2016, it was $5.78. On December 16, 2016, it hit a low of $1.32. As of February 2017, the stock was $2.39 a share. Since the closing of the business combination, ZGH has not used the $78 million in cash delivered at the closing. Plaintiff alleges that ZGH's poor performance was due in large part to the reduction of ZAIS's AUM. Plaintiff further alleges that defendants have continued to reward themselves. Specifically, plaintiff alleges that "Zugel and Szymanski intended to manipulate the company's stock price downward, purchase shares at a reduced price, and then take the company private" (complaint, ¶ 105).

On March 6, 2017, plaintiff filed this action alleging fraudulent concealment (against Zugel and Syzmanski), breaches of fiduciary duties (against Cameron and Berkshire), breach of contract (against ZGH), tortious interference with prospective business relations (against Zugel and Syzmanski), and unjust enrichment (against Zugel and Syzmanski). Defendants Zugel, Syzmanski, ZGH move to dismiss the first, fourth, fifth, and sixth causes of action. Defendants Cameron and Berkshire move to

dismiss the second and third causes of action.

Analysis

On a motion to dismiss under CPLR 3211, "the pleading is afforded a liberal construction. . . . [and the Court] accepts the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Dismissal pursuant to CPLR 3211 (a) (1) is appropriate where "the documentary proof disproves an essential allegation of the complaint, . . . even if the allegations, standing alone, could withstand a motion to dismiss for failure to state a cause of action." (*Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 58 [1st Dept 2015].)

Choice of Law

Zugel, Szymanski, and ZGH (collectively, the ZGH Defendants) assert that New York law applies to plaintiff's claims for fraudulent concealment, tortious interference, and breach of contract (Counts I, IV, and V, respectively), and Delaware law applies to the question of whether plaintiff's claim for unjust enrichment (Count VI) is direct or derivative in nature. Plaintiff, for the purposes of this motion agrees, with these assertions. Thus, the court will apply New York to Counts I, IV, and V, and Delaware law in determining whether plaintiff's unjust enrichment claim is direct or derivative.

Defendants Cameron and Berkshire (collectively, the Berkshire Defendants) assert that Delaware law applies to plaintiff's breach of fiduciary duty claims (Counts II and III) and the question of whether such claims are direct or derivative in nature.

Again, plaintiff, for the purposes of this motion agrees, with these assertions. Thus, the court will apply Delaware law to these claims.

The ZGH Defendant's motion to dismiss Counts I, IV, V, and VI

"Holder Claims"

Relying on *Starr Found. v American Intl. Group, Inc.* (76 AD3d 25 [1st Dept 2010]), the ZGH Defendants assert that, as a matter of law, plaintiff's claims for fraudulent concealment, tortious interference, and breach of contract fail, because each allege the same harm - that the ZGH Defendants' conduct caused plaintiff to retain its ZGH stock - and because plaintiff continues to hold the stock at issue, it has suffered no cognizable damages.

In *Starr*, the plaintiff alleged that it suspended the sale of, and instead held on to, its AIG stock based on its reliance on misrepresentations made by defendants. Plaintiff Starr sought to recover the value that it might have realized if it sold the stock. The Appellate Division, First Department, affirming the lower court's dismissal of the complaint, held that Starr's "holder" claims "violate[d] the 'out-of-pocket' rule governing damages recoverable for fraud" (*Starr*, 76 AD3d at 27). The First Department determined that a "holder claim seeking damages based on the value that would have been realized in a hypothetical sale" is too speculative (*id.* at 29). Specifically stating,

> "[T]he degree of speculation in determining damages is essentially quadrupled, in that the factfinder must determine (1) whether the claimant would have engaged in a transaction at all if there had been accurate disclosure of the relevant information, (2) the time frame within which the hypothetical transaction or series of transactions would have occurred, (3) the quantity of the security the claimant would have sold, and (4) the effect

truthful disclosure [*30] would have had on the price of the security within the relevant time frame. These cumulative layers of uncertainty amount to a difference in the quality, not just the quantity, of speculation, and take the claim out of the realm of cognizable damages"

(*id.* at 29-30).

It is well settled in New York, that "if the fraud causes no loss, then the plaintiff has suffered no damages" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017] [internal quotation marks and citation omitted]). Under the out-of-pocket rule, "damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained ... . There can be no recovery of profits which would have been realized in the absence of fraud" (*id.* [internal quotation marks and citations omitted]).

Here, plaintiff alleges that Zugel and Szymanski's fraudulently misrepresented and concealed ZAIS's actual AUM and its true financial condition and outlook, which caused plaintiff "to lose the vast majority of its Founders' Shares and to forego other available business opportunities and instead maintain its investment in a company whose stock price was virtually guaranteed to - and did - fall" (complaint, ¶ 118). This allegation extends beyond damages for what it might have received had it sold its Founders' Shares, and thus, is not impermissibly speculative. Taken as true, this allegation sufficiently alleges that plaintiff has suffered actual damages

The ZGH Defendants also assert that *Starr's* applicability should extend beyond plaintiff's fraud claim and apply to its claims for tortious interference with prospective business relations and breach of contract. It is true that in tort, there is no enforceable

right until there is actual loss (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]), and, thus, plaintiff's claim for tortious interference requires actual damages. However, plaintiff has sufficiently alleged actual damages. Plaintiff alleges that Guenther agreed to purchase plaintiff's shares for $10 a share, but the ZGH Defendants interfered with this prospective business relationship, causing plaintiff to lose the sale.

As to the breach of contract claim, "[n]ominal damages are always available in breach of contract actions" (*Kronos, Inc. v AVX Corp.*, 81 NY2d at 95), and therefore, plaintiff need not plead actual loss. Thus, the court will not extend *Starr's* applicability to plaintiff's breach of contract claim.

Count I - Fraudulent Concealment

> "To state a legally cognizable claim of fraudulent misrepresentation, the complaint must allege that the defendant made a material misrepresentation of fact; that the misrepresentation was made intentionally in order to defraud or mislead the plaintiff; that the plaintiff reasonably relied on the misrepresentation; and that the plaintiff suffered damage as a result of its reliance on the defendant's misrepresentation. A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material information and that it failed to do so."

(*P.T. Bank Cent. Asia v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003] [citations omitted]). As this cause of action is based on fraud, the alleged misconduct must "be set forth in sufficient detail" (CPLR 3016 [b]).

The ZGH Defendants argue that plaintiff cannot plead justifiable reliance or causation because ZAIS's AUM and true financial condition and outlook were, in fact, disclosed to plaintiff prior to both the approval of the business combination and the

alleged stripping of plaintiff's Founders' Shares. Specifically, plaintiff pleads that, on March 4, 2015, HF2 filed an 8-K, which, for the first time, disclosed that ZAIS's AUM, as of December 31, 2014, was approximately $4.1 billion, $600 million less than the previously reported $4.7 billion. On March 9, 2015, the business combination was approved by plaintiff and the other shareholders, and on March 17, 2015, plaintiff executed the Founder Shares Allocation Agreement (Kratenstein Aff., exhibit D) and the business combination closed, 13 days after ZAIS's financial condition was revealed.

"As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's 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 Investors Fund, Inc. v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]) [citations omitted]). Here, plaintiff, admittedly, had the means of discovering that ZAIS's AUM was reduced to $4.1 billion prior to (1) voting on the business combination, (2) the closing of the business combination, and (3) agreeing to reduce its number of Founders' Shares. Accordingly, plaintiff cannot claim to have justifiably relied on any alleged misrepresentation of ZAIS's "true financial condition" because the information was available in a public securities filing prior to the alleged detrimental events listed above.

Further, a party cannot claim reasonable reliance when the fraud could have been discovered with reasonable due diligence. Plaintiff alleges that when HF2 filed an 8-K, a Proxy Statement, a Schedule 14 and a 10-K in 2015, the documentation it

provided only revealed ZAIS's AUM as of September 30, 2014. Plaintiff should have, at the very least, inquired as to ZAIS's current AUM, and not relied on months-old financial information (*see Graham Packaging Co., L.P. v Owens-Illinois, Inc.*, 67 AD3d 465, 465 [1st Dept 2009] [finding that, even if defendants could not have learned of certain information by the exercise of reasonable diligence, as sophisticated entities represented by counsel, defendants should have at least inquired about such information]). Such information would have been available from defendants had plaintiff requested it. Instead, plaintiff chose to rely on defendants' representation that ZAIS's AUM was $4.7 billion as of September 30, 2014, which it appears to be accurate, as according to the complaint, it was on October 1, 2014 that ZAIS had received the demand to return $600 million to one of its investors, lowering ZAIS's AUM.

Plaintiff fails to allege that it exercised due diligence when it came to learning of ZAIS's financial condition. Thus, the claim for fraudulent concealment is dismissed.

Count IV - Breach of Contract

For the reasons stated above, the ZGH Defendants' motion to dismiss the breach of contract claim on the ground that plaintiff fails to plead damages is denied.

Count V - Tortious Interference with Prospective Business Relations

To state a claim for tortious interference with prospective business relations plaintiff must allege that "(1) the plaintiff had business relations with a third party; (2) the defendant interfered with those business relations; (3) the defendant acted for the sole purpose of harming the plaintiff or by using wrongful (or unlawful) means, and (4) there

was resulting injury to the business relationship (*Thome v Alexander & Louisa Calder Foundation*, 70 AD3d 88, 108 [1st Dept 2009] [citations omitted], *lv denied* 15 NY3d 703 [2010]). Specifically, plaintiff must allege "that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, or that such conduct was wrongful or improper independent of the interference allegedly caused thereby" (*Jacobs v Continuum Health Partners, Inc.*, 7 AD3d 312, 313 [1st Dept 2004] [citation omitted]).

The ZGH Defendants argue that plaintiff's sole allegation that Zugel and Szymanski told Guenther not to purchase plaintiff's shares does not satisfy the requirement that plaintiff allege that the conduct was undertaken for the sole purpose to harm plaintiff or that the conduct was independently wrongful. In response, plaintiff asks the court for leave to either proceed on the theory of tortious interference with contract in addition to the tortious interference with prospective business relations claim or amend the complaint to formally add a claim for tortious interference with contract.

In support of its claim for interference with prospective business relations, plaintiff asserts that it has satisfied the requirement by alleging that Zugel and Szymanski knew that interfering with the purchase would harm plaintiff and protect Guenther as the stock price declined and that Zugel and Szymanski interfered to ensure that Guenther, in return for being protected, would allow for defendants to loot and waste the company's assets. These allegations do not constitute crimes or independent torts (*see Carvel Corp. v Noonan*, 3 NY3d 182, 190-191 [2004]). They are also unsupported and

conclusory in so far as they allege that Guenther would allow defendants to loot and waste the company in exchange for "protecting" him. Furthermore, it cannot be argued that the ZGH Defendants' alleged interference was undertaken for the sole purpose of harming plaintiff, as plaintiff alleges that the interference was undertaken to "protect" Guenther. Thus, this claim is dismissed.

Further, a claim for tortious interference with contract also fails. Plaintiff alleges that it had an oral agreement with Guenther whereby he agreed to purchase the plaintiff's shares for $10 per share. "[T]he case law is clear that agreements that are terminable at will are classified as only prospective contractual relations, and thus, cannot support a claim for tortious interference with existing contracts" (*Snyder v Sony Music Entertainment, Inc.*, 252 AD2d 294, 299 [1st Dept 1999] [internal quotation marks and citations omitted]). "[T]here can be no breach of a contract, a necessary element for tortuous interference with contract, when the contract may be terminated at will" (*Discover Group v Lexmark Inter.*, 333 F Supp 2d 78, 83-84 [EDNY 2004]).

Count VI - Unjust Enrichment

The ZGH Defendants argue that plaintiff's claim for unjust enrichment is derivative and not direct. It is agreed that Delaware law governs this issue.

Under Delaware law, the proper analysis to distinguish between direct and derivative claims is "based solely on the following questions: Who suffered the alleged harm--the corporation or the suing stockholder individually--and who would receive the benefit of the recovery or other remedy" (*Tooley v Donaldson, Lufkin, & Jenrette, Inc.*,

845 A.2d 1031, 1035 [Del 2004]). However, "The Tooley test is not necessarily a binary inquiry, as certain corporate wrongs are said to harm stockholders directly and derivatively. Essential to asserting a direct claim are allegations of 'some individualized harm not suffered by all of the stockholders at large'" (*Lee v Pincus*, 2014 WL 6066108, *6 [Del Ch 2014]).

Here, plaintiff asserts that it suffered a harm that was not suffered by all of ZAIS's shareholders, because ZAIS had three different subsets of investors, pre-IPO investors, such as plaintiff, who were given Founders' Shares and were prohibited from selling them in the secondary market or redeeming their shares prior to closing, IPO investors who did not have Founders' Shares, but were free to sell their other shares in the secondary market or redeem them, and post-IPO investors. The court agrees. Plaintiff is permitted to bring its claim for unjust enrichment as a direct claim.

The ZGH Defendants also argue that the unjust enrichment claim is duplicative of the fraud claim. Plaintiff's claim is, admittedly, predicated on the allegation that from "at least October 1, 2014 until, at the earliest, March 4, 2015, Zugel and Szymanski intentionally concealed ZAIS's actual assets under management and true financial condition and outlook for the purpose of ensuring the consummation of the business combination and their own enrichment" (complaint, ¶ 148).

"An unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*Corsello v Verizon N.Y., Inc.*, 18 NY3d 777, 790 [2012] [citation omitted]). Plaintiff alleges that the Zugel and Szymanski have

committed wrongs by concealing ZAIS's actual assets, ensuring the consummation of the business combination, which Zugel and Szymanski greatly benefitted from. These are the same allegations of plaintiff's fraudulent concealment claim. "[A] claim for unjust enrichment cannot lie where the complaint also alleges either fraud or breach of contract based on the same underlying facts" (*Madison 92nd Street Associates, LLC v Courtyard Management Corp.*, 2016 N.Y. Slip Op. 32287[U], *23 [Sup Ct, NY County 2016] [citations omitted]). Further, the fact that the claim for fraudulent concealment is dismissed does not sustain the unjust enrichment claim (*see Corsello*, 18 NY3d at 791 [holding that "[t]o the extent that these claims succeed, the unjust enrichment claim is duplicative; if plaintiffs' other claims are defective, an unjust enrichment claim cannot remedy the defects"]). This claim is dismissed.

Defendants Cameron and Berkshire's Motion to Dismiss Counts II and III

Counts II and III allege breaches of fiduciary duty. As discussed above, the parties agree that Delaware law applies to these claims. Also, for the reasons discussed above, these claim may be brought as direct claims, as opposed to derivative, under Delaware law.

Count II - Breach of Fiduciary Duty Against Cameron

In the complaint, plaintiff alleges that, as the CEO and a director of HF2, Cameron owed plaintiff fiduciary duties. Specifically, plaintiff alleges that Cameron had a duty to perform due diligence to determine ZAIS's actual AUM and that, as of January 2015, Cameron had, or should have had, reason to believe that the AUM was less than

$4.7 billion. Plaintiff alleges that Cameron was not motivated to perform any due diligence because he did not want to jeopardize the business combination as he expected to serve as a director of ZGH and engage Berkshire as ZGH's investment banker after the closing of the business combination. Plaintiff alleges that this created a conflict of interest and that Cameron's failure to conduct due diligence was a violation of his duties of care and loyalty.

Here, plaintiff is not challenging a decision by HF2's board or a decision made by Cameron in his role as a director of HF2. Rather, plaintiff seeks to hold Cameron accountable for his alleged breaches based on his failure to conduct due diligence, or if he did have knowledge of the alleged fraud involving the concealment of ZAIS's AUM, his silence. The alleged failure to act happened after HF2's board approved the business combination transaction and entered into the Investment Agreement with ZAIS. Because plaintiff is not challenging a "business decision," the court agrees with plaintiff that the business judgment rule is not applicable here.

Officers and directors of Delaware corporations have identical fiduciary duties (*In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 745 [Del Ch 2005]).; *see also Guth v Loft, Inc.*, 5 A.2d 503, 510 [Del. 1939]; *Cede & Co. v Technicolor, Inc.*, 634 A.2d 345, 361 [Del. 1993]). Under Delaware law, the fiduciary duties owed are the duties of due care and loyalty" (*id.*). "[T]he requirement to act in good faith is a subsidiary element, i.e., a condition, of the fundamental duty of loyalty" (*Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A2d 362, 370 [Del 2006]). "Like directors, officers breach

the duty of loyalty if they 'act[] in bad faith for a purpose other than advancing the best interests of the corporation'" (*Frederick Hsu Living Trust v ODN Holding Corp.*, 2017 Del. Ch. LEXIS 67, *98 [Del Ch 2017], *quoting Hampshire Grp. Ltd. v. Kuttner*, 2010 WL 2739995, *12, 2010 Del. Ch. LEXIS 144 [Del Ch 2010]). The duty of loyalty requires acting in a manner in which "the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally" (*Cede & Co. v. Technicolor*, 634 A.2d 345, 361 [Del 1993] [citations omitted]).

"[A] a duty of loyalty claim may be premised on willful disregard of red flags, whereas a duty of care claim may be premised on gross negligence in failing to heed red flags where the certificate of incorporation exculpates the directors from ordinary negligence" (*AP Services, LLP v Lobell*, 2015 NY Slip Op 31115[U], *8 [Sup Ct, NY County 2015] [applying Delaware law]).

The allegations of the complaint do not support a reasonable inference that Cameron acted in bad faith. However, they do support a reasonable inference of gross negligence, supporting a claim for breach of the duty of care. Plaintiff alleges that (1) in January 2015, Cameron was told by Sandler that there was virtually no interest from investors in the outside market; (2) by February 2015, it appeared that the majority of shares purchased through the IPO would be redeemed; (3) in February 2015, the most recent statement of ZAIS' AUM was as of September 30, 2014; and Zugel and Szymanski were refusing to share detailed projections with potential investors.

While Cameron argues that he is protected by the exculpatory clause in HF2's certificate of incorporation, this clause, authorized under Section 102 (b) (7) of the Delaware General Corporate Law, only protects Cameron in his role as a director of HF2. Exculpatory clauses do not protect those acting in their capacity as officer (*Chen v Howard-Anderson*, 87 A3d 648, 687 [Del Ch 2014]). Thus, plaintiff sufficiently pleads a claim for breach of fiduciary duty based on breach of due care.

Count II - Breach of Fiduciary Duty Against Berkshire

Plaintiff alleges that "Berkshire served as HF2's financial advisor and was responsible for performing due diligence in connection with the SPAC" (complaint, ¶ 20).[3] However, this conclusory allegation is refuted by the Administrative Services Agreement between HF2 and Berkshire, by which Berkshire agreed to provide HF2 with office space and administrative services such as informational technology, secretarial, and bookkeeping services. Further, even if Berkshire did act as HF2's financial advisor, it has no connection to the shareholders other than as an agent of the board and no fiduciary duty to the shareholders (*see In re Shoe-Town, Inc. Stockholders Litigation*, 1990 WL 13475, *7 [Del Ch 1990] [dismissing breach of fiduciary duty claim against corporation's financial advisor on the grounds that there was no duty]). This claim is dismissed.

Accordingly, it is

[3] Plaintiff's allegations in regard to the breach of this duty by Berkshire are identical to those alleged as to Cameron.

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ORDERED that defendants Christian Zugel, Michael Szymanski, and ZAIS Group Holdings, Inc.'s motion to dismiss the complaint is granted, in part, and the first (fraudulent concealment), fifth (tortious interference with prospective business relations), and sixth (unjust enrichment) causes of action of the complaint are dismissed and the complaint is dismissed in its entirety against Christian Zugel and Michael Szymanski, with costs and disbursements to said defendants as taxed by Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of Christian Zugel and Michael Szymanski; and it is further

ORDERED that defendants R. Bruce Cameron and Berkshire Capital Securities LLC's motion to dismiss the complaint is granted, in part, and the third (breach of Berkshire's fiduciary duties) cause of action of the complaint is dismissed and the complaint is dismissed in its entirety against Berkshire Capital Securities LLC, with costs and disbursements to said defendant as taxed by Clerk of the Court and the Clerk is directed to enter judgment accordingly in favor of Berkshire Capital Securities LLC; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that moving counsel shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the

General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at www.nycourts.gov/supctmanh); and it is further

ORDERED that the remaining defendants ZAIS Group Holdings, Inc. and R. Bruce Cameron are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are direct to appear for a preliminary conference on July 12, 2018 at 2:30 PM.

Dated: July 2, 2018

ENTER:

J.S.C.

HON. ANDREA MASLEY