SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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MARCAL FINANCE SA, BELLPOND INVESTMENTS SA, FRIEDA HAMWAY, RACHELLE JEMAL, JUDITH PASKIE, GAIL MASLATON, JOAN SITT,

Plaintiff,

- v -

ISAAC SUTTON, MIDDLEGATE SECURITIES LTD., GADIEL BLUSZTEIN, KINERSIS RENEWABLES LIMITED, MIDDLEGATE HADAS ARAZIM LLC D/B/A MHA ISRAEL LLC,MIRELIS HOLDING SA AS SUCCESSOR IN INTEREST TO ATLAS CAPITAL, SA, HYPOSWISS PRIVATE BANK GENEVA, S.A. AS SUCCESSOR IN INTEREST TO ATLAS CAPITAL SA, JOHN DOES 1-10, THE ESTATE OF MAYER SUTTON, R.T. INTERAL LTD. A/K/A MIGDAL, DANSON COMPANY S.A., ALAIN KOSTENBAUM, KOSTENBAUM & ASSOCIES, LEONORA SUTTON, KINERSIS RENEWABLES USA LLC,HALMAN-ALDUBI INVESTMENT HOUSE LTD. AS SUCCESSOR INTEREST TO HADAS ARAZIM INVESTMENT HOUSE LTD.

Defendant.

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INDEX NO. 653351/2015

MOTION DATE 03/13/2020, 03/13/2020, 03/13/2020

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 010) 224, 225, 226, 227, 228, 229, 230, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 294, 295, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 232, 233, 234, 235, 236, 237, 266, 267, 268, 269, 270, 271, 272, 298

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 238, 239, 240, 241, 242, 243, 244, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 297

were read on this motion to/for DISM ACTION/INCONVENIENT FORUM.

This case involves the alleged fraud of Mayer Sutton and his facilitation of the fraudulent hiring and appointment of Alain Kostenbaum as a fiduciary, and certain entities that either Mr. Sutton's family, owned and controlled, or that were owned and controlled by his cousins' family, the Dweks, without disclosing either the Suttons' or the Dweks' interest in these entities or the relationship between these entities prior to the plaintiffs' investment, the stealing of the plaintiffs' money and the active and continuing fraudulent concealment of that theft by the defendants. Because the principals of the defendant companies are related to Mr. Sutton and may be connected to the purportedly fraudulent appointment of Mr. Kostenbaum as a fiduciary, there is *prima facie* evidence that the entities owned or controlled by the Suttons and/or the Dweks are all tainted.

The plaintiffs have plead with sufficient particularity the original fraud that permeates this action, and the continued fraudulent concealment of that fraud that explains why the plaintiffs lack information as to which of the allegedly related family entities may have their money. Under these circumstances, the defendants may not rely on either fraudulently obtained agreements with never-before-seen by the plaintiffs forum selection clauses or to otherwise whisk away these causes of action based on the current pre-discovery inability to provide additional information.

Hyposwiss' Private Bank Geneve SA (**Hyposwiss**) motion to dismiss based on lack of personal jurisdiction must be denied because both Mirelis Holding SA (**Mirelis**) and Hyopswiss, its wholly owned subsidiary, allegedly continue the business of Atlas Capital SA (**Atlas**) and because of the extent of their relationships in New York having been adequately plead to justify

jurisdictional discovery. *Prima facie* jurisdiction as to Mirelis and Hyposwiss having been established, they have a presumption to overcome given the allegations as to the substantial contacts to New York and their potential exposure as a related company to the fraud. The doctrine of *forum non convenience* also does not justify dismissal.

Thus, and for the reasons set forth below, (i) Mr. Kostenbaum and Kostenbaum & Associates' (collectively, the **Kostenbaum Defendants**) motion (Mtn. Seq. No. 10) pursuant to CPLR § 3211 (a)(1), or, in the alternative, pursuant to CPLR § 327, to dismiss the claims against them, (ii) Middlegate Securities Ltd.'s (**Middlegate**) motion (Mtn. Seq. No. 11) pursuant to CPLR §§ 3211(a)(1), (a)(5) and (a)(7), and (iii) Mirelis and Hyposwiss' motion (Mtn. Seq. No. 12) pursuant to CPLR §§ 3211(a)(1), (a)(5), (a)(7), (a)(8) or, in the alternative, pursuant to CPLR § 327, to dismiss the claims against them are all denied.

THE RELEVANT FACTS AND CIRCUMSTANCES

The Complaint (hereinafter defined) sets forth an intricate web of fraud and concealment by the defendants in this action set in motion by certain key steps, which are particularly alleged. These include the fraudulent misuse of the plaintiffs' signatures on certain documents that the plaintiffs allege that they never saw. These documents include the fraudulent appointment of their "attorney" who admits to the court that he never discussed this "appointment" with his alleged clients (NYSCEF Doc. No. 300 ¶ 35). This stunning admission both infects all of the documents executed by this attorney and corroborates the gravamen of the Complaint. Then, based on these documents, the lawyer and Mayer Sutton facilitated the stealing of the plaintiffs' money and its active concealment.

With the exception of the Kostenbaum Defendants, all of the moving defendants in this action are intimately related and are comprised of entities that are either owned or otherwise controlled directly or indirectly by the Suttons, or their cousins, the Dweks. To wit, Middlegate was founded by the Suttons, and is currently run by at least two of Mayer Sutton's sons and Isaac Sutton's brothers (notwithstanding its current claim of having no connection to Mayer and Isaac Sutton), and Mirelis and Hyposwiss, its 100% owned subsidiary (NYSCEF Doc. No. 276), just like Atlas was before them, are alleged to be owned by the Dweks (Mayer Sutton's cousins) and, significantly, the Dweks are alleged to have continued involvement in these entities' operations. Inasmuch as Mr. Kostenbaum is not actually related to the other defendants, he is alleged to be the handpicked agent through whom Mayer Sutton was able to defraud the individual plaintiffs by creating the appearance of independence, while Mr. Kostenbaum looked the other way or otherwise stayed loyal to his true principal, Mayer Sutton.

The individual plaintiffs – a 94-year-old mother and her daughters – allege claims of fraud against these defendants, their former investment advisors, lawyers, and fiduciaries, arising out of the mismanagement of the plaintiffs' investment of $11 million in certain Swiss accounts, as further discussed below.

This action was first commenced, together with a companion action captioned *Frieda Hamway et al. v Mayer Sutton et al.* (Index No. 653336/2015), in November 2015. After service on the defendants pursuant to the Hague Convention was made in April 2016, defendants Mirelis and Hyposwiss (mtn. seq. no. 002), Gadiel Blusztein (Mtn. Seq. No. 003), Isaac Sutton, MHA Israel LLC and Kinersis Renewables Limited (Mtn. Seq. No. 004), Kinersis Renewables USA LLC

(Mtn. Seq. No. 005), Middlegate Securities, Ltd. (Mtn. Seq. No. 006) and the Kostenbaum Defendants (Mtn. Seq. No. 007) moved to dismiss both actions. The plaintiffs then filed amended complaints in both actions, and the motions to dismiss were marked withdrawn without prejudice. Subsequently, both actions were then stayed upon Mayer Sutton's death on June 21, 2016 (NYSCEF Doc. Nos. 207, 218).

A motion to appoint an administrator for Mayer Sutton's Estate was granted without opposition on May 16, 2017 (NYSCEF Doc. Nos. 198, 202), and Leonora Sutton as the Administrator for the Estate of Mayer Sutton has now been substituted in Mr. Sutton's stead. On January 7, 2020, this court entered an Order lifting the stay (NYSCEF Doc. No. 219), and following a court conference on February 10, 2020, the court permitted the plaintiffs to file a consolidated amended complaint under the index number in this action and set forth a schedule for the defendants to move to dismiss thereafter (NYSCEF Doc. No. 221).

The consolidated amended complaint (the **Complaint**; NYSCEF Doc. No. 229) now alleges claims on behalf of Frieda Hamway, Rachelle Jemal, Judith Paskie, Gail Maslaton and Joan Sitt, who are the beneficial owners of Marcal Finance SA (**Marcal**) and Bellpond Investments SA (**Bellpond**; Marcal and Bellpond, together, the **Marcal Companies**). The Marcal Companies were formed to hold approximately $11 million left by Ms. Hamway's husband to Ms. Hamway and their children (Compl., ¶ 4). The individual plaintiffs all reside in an insular Syrian-Jewish community in Flatbush, Brooklyn (*id.*, ¶ 3).

Middlegate is a New York corporation and a FINRA registered broker-dealer through which Mayer and his son Isaac Sutton operated. Mayer and Isaac Sutton lived in the same Brooklyn neighborhood as the individual plaintiffs and were both prominent members of the same Syrian-Jewish community, which connection, the plaintiffs allege, "allowed the Suttons to gain the trust of the [plaintiffs] in order to obtain control" of their money "for the [Suttons'] own benefit beginning sometime in 2006" (*id.*, ¶ 6).

In June 2007, the Suttons and Middlegate allegedly formed Middlegate Hadas Arazim LLC, which also does business as MHA Israel LLC (**Middlegate Israel**), a Delaware limited liability company registered to do business in New York, and with its principal office located in Middlegate's New York office (*id.*, ¶ 8). Middlegate Israel describes itself as a private investment fund organized to make loans to an Israeli company (*id.*).

Atlas is a former Geneva, Switzerland based private wealth management firm founded by the Suttons' cousins, the Dweks (*id.*, ¶ 14). In 2013, Atlas merged with Mirelis (formerly Mirelis InvesTrust SA), another Geneva, Switzerland based financial institution, which does business in the United States and Switzerland as Mirelis Advisors SA, a foreign registered investment adviser with the SEC (*id.*, ¶ 15). The plaintiffs' claims against Mirelis and its 100% owned subsidiary, Hyposwiss, as discussed below are, in essence, premised on both its merger with Atlas and the allegations that the defendants have played a shell game with the plaintiffs $11 million through their various entities which may have, in fact, predated the merger and have actively concealed how the $11 million was invested or otherwise spread out among the Dwek and the Sutton entities or to their principals. Hyposwiss was acquired by Mirelis in 2014 and the

plaintiffs allege that Hyposwiss has used JP Morgan's New York Branch to service its New York clients. The Complaint alleges that Hyposwiss and Mirelis jointly carry on Atlas's pre-merger business activities (*id.*).

The plaintiffs allege that they had no knowledge that Atlas was owned and controlled by the Suttons' cousins, the Dweks, until well after their accounts were opened, and that from 2006 through the time their accounts were closed in 2012, they believed the Suttons, Atlas and Mr. Kostenbaum (as further discussed below) were each acting independently in their best interest to manage their money in a manner that was consistent with their agreed upon objectives, i.e., capital conservation (*id.*, ¶¶ 24, 27).

Mr. Kostenbaum is an attorney in Geneva, Switzerland and a principal of Kostenbaum & Associates, a Geneva based law firm (*id.*, ¶ 16). The Kostenbaum Defendants were allegedly fraudulently retained by the plaintiffs to be ***their*** Swiss counsel while, at the same time, upon information and belief, and unbeknownst to the plaintiffs at the time of his retainer, Mr. Kostenbaum was ***also*** the Suttons' and their related Swiss companies' counsel (*id.*, ¶¶ 16, 26). Mr. Kostenbaum claims that he previously represented one of the plaintiffs -- Ms. Hamway and her husband Albert Hamway (deceased) -- in connection with their joint accounts in Switzerland through an entity they owned called Mackay Investments and its related accounts at Banque Safra-Luxembourg (NYSCEF Doc. No. 300, ¶¶ 9-12, 14). In his Reply Affidavit, Mr. Kostenbaum states that he met "Mrs. Hamway and two of her daughters" only once in her New York home in 2003 on a trip to the United States, and that the purpose of the visit was to introduce himself to the plaintiffs since they had never met and to answer any questions they

may have had about Mackay Investments (*id.*, ¶ 14). As further discussed below, Mr. Kostenbaum is alleged, and in fact admits, to having never discussed the Marcal Trust Agreement (hereinafter defined) with the plaintiffs and, in fact, does not dispute that he did not speak with the plaintiffs about the forum selection clause in the account agreements that he never sent to the plaintiffs in connection with opening of the Marcal Companies' accounts.

In connection with the Marcal Companies, the plaintiffs allege that they never appointed Mr. Kostenbaum and/or his firm as the trustee for Bellpond and Marcal. According to the plaintiffs, Mayer Sutton asked that they provide their signatures on blank pieces of paper, which they were told was necessary to open bank accounts for them at Atlas. Their signatures however were not used for this purpose. According to the plaintiffs, the plaintiffs' signatures were then fraudulently transposed onto trust agreements that the plaintiffs never saw, purporting to appoint Mr. Kostenbaum as an officer of the Marcal Companies, which the plaintiffs never intended to do and which the plaintiffs allege they never discussed with Mr. Kostenbaum.

To wit, the undated Bellpond Investments Trust Agreement purportedly signed by Rachelle Jemal, Judith Paskie, Gail Maslaton, and Joan Sitt (the **Bellpond Trust Agreement**; NYSCEF Doc. No. 227) appoints "Kostenbaum & Associes" to "undertake in the name and on behalf of [Bellpond] all measures of direction and management, specially to draw up and sign all documents, letters and contracts and to take all steps which may be in the interest of" Bellpond (*id.*). The Bellpond Trust Agreement also contains a forum selection clause providing, which the plaintiffs allege they never saw or agreed to, for "[a]ny ligitat [sic] arising thereof will be

submitted to the regular courts of [the] Canton of Geneva" (the **Bellpond Forum Selection Clause**; *id.*).

The undated Marcal Finance SA Trust Agreement (the **Marcal Trust Agreement**) signed by Frieda Hamway "give[s] all power" to Mr. Kostenbaum to set up a corporation and "appoint[s] Mr. Alain Kostenbaum as director and officer" of Marcal (NYSCEF Doc. No. 226). It further provides that Mr. Kostenbaum "is entitled to undertake in the name and on behalf of the [] company all measures of direction and management, specially to draw up and sign all documents, letters and contracts and to take all steps which may be in the interest of the corporation" (*id.*). It contains an identical clause to the Bellpond Forum Selection Clause (the **Marcal Forum Selection Clause;** the Bellpond Forum Selection Clause, together with the Marcal Forum Selection Clause, hereinafter, collectively, the **Trust Forum Selection Clause**).

As noted above, the individual plaintiffs all attest that their signatures on these trust agreements were fraudulently obtained. To wit, Freida Hamway states in her affidavit in opposition to the instant motion:

> 7. I signed a blank piece of paper at Mayer Sutton's house, at Mayer's request. He told me our signatures were necessary to open a bank account. I trusted Mayer because I had understood he was a respected and trusted individual in our local community. I later found out, after I was told that my money had supposedly been lost in investments of which I had no knowledge, that ***my signature was attached to the trust agreement, which I had not previously seen.***
>
> 8. Had I known I was signing a trust agreement, and not simply providing my signature for purposes of opening a bank account, I would have asked additional questions. ***I would have certainly wanted to know more about Alain Kostenbaum, who I understand claims to be my trustee, including such basis information as to i) who he was, and (ii) whether he was my attorney who could explain to me the legal ramifications of the trust agreement. Assuming he***

> ***properly explained the import of the powers he now claims I gave him, I most likely would have sought the legal advice of an independent individual.***

(NYSCEF Doc. No. 251, ¶¶ 7-8 [emphasis added]).

Ms. Sitt, Ms. Maslaton, Ms. Jemal, and Ms. Paskie all make the same exact claim in their respective affidavits (NYSCEF Doc. Nos. 252-254). Mr. Kostenbaum admits that he never discussed the Marcal Trust Agreement with the plaintiffs:

> "Since this transaction involved more than $11 million, it is astonishing that the Plaintiffs now claim that they were asked to sign their names to blank pages ***but never contacted me for an explanation of why.*** The only possible explanation is that none of that ever happened."

(NYSCEF Doc. No. 300, ¶ 35).

Indeed, according to Mr. Kostenbaum, the burden was on the plaintiffs to contact him about the Marcal Trust Agreement and not on him to ensure that they understood the agreement and that they did not have questions about it. In any event, he also does not deny that he otherwise never disclosed his relationship with the Suttons and the Dweks or their companies.

The Complaint further alleges that the Suttons acted as agents for Atlas in New York and advised the plaintiffs to transfer all of the Marcal Companies' assets to accounts at Atlas without ever disclosing that Atlas was owned and controlled by their cousins, the Dweks. Indeed, according to the Complaint, the Suttons merely described Atlas as an investment advisor for private clients that would manage their money conservatively with "the primary objective being capital conservation" (Complaint, NYSCEF Doc. No. 222, ¶¶ 20, 22-23). Beginning in December 2006, the Suttons and Mr. Kostenbaum opened five investment accounts at Atlas in the Marcal Companies' names, with an aggregate balance in excess of $11 million (the **Accounts**; *id.*, ¶ 21).

The account agreements at Atlas were never signed by the plaintiffs, but by Mr. Kostenbaum pursuant to authority granted to him in the Marcal Trust Agreement and the Bellpond Trust Agreement, which the plaintiffs claim were both fraudulently obtained and which they claim they never saw. Nor were the account agreements ever provided to the plaintiffs.

The Atlas Account Opening Agreement for Marcal (the **Marcal Atlas Agreement**), dated December 19, 2006, contains Terms and Conditions, including the following provision with respect to "Governing Law and Jurisdiction:"

> All customer relations with ATLAS are subject to Swiss law. The place of execution, the forum for lawsuit for the customers domiciled abroad and ***the exclusive forum for any proceeding are headquarters of ATLAS or of the branch dealing with the customer.*** ATLAS is however entitled to take legal action at the customer's domicile or in any other court with jurisdiction.

(the **Atlas Forum Selection Clause**; NYSCEF Doc. No. 242, ¶ 12 [certified translation copy]; NYSCEF Doc. No. 240 [original French]).

The Atlas Account Opening Agreement for Bellpond (the **Bellpond Atlas Agreement;** together with the Marcal Atlas Agreement, hereinafter, collectively, the **Atlas Account Opening Agreements**), dated February 6, 2007, contains an identical Atlas Forum Selection Clause (NYSCEF Doc. 243, ¶ 12 [certified translation copy]; NYSCEF Doc. No. 241 [original French]).

The plaintiffs allege that they were not provided with copies of the Atlas Account Opening Agreements or told about the Atlas Forum Selection Clause contained therein.

Notwithstanding the plaintiffs' stated goal of "capital conservation," between December 2007 and December 2012, the balance of the Accounts went from over $11 million to just $1,050,052

(*id.*, ¶ 28) as a result of alleged "looting" by Mayer and Isaac Sutton. Although "it is unclear whether [Mr.] Kostenbaum was wholly unaware of the ongoing looting, or intentionally ignored it," a "review of the status of the Accounts at any time in the intervening six (6) years [between 2007 and 2012] – the role for which [Mr.] Kostenbaum was hired – would have shown the progressive, inexplicable dissipation of Plaintiffs' Funds" (*id.*, ¶ 55).

The Complaint alleges that the Suttons attempted to conceal their wrongdoing from the plaintiffs by operating through a "bewildering number of companies sponsored by them," including Middlegate, Middlegate Israel, Kinersis Renewable Group Limited and its Delaware affiliate, Kinersis Renewables USA (together with Kinersis Renewable Group Limited, **Kinersis**), Danson Company S.A., a Panamanian societe anonyme company, Halman-Aldubi Provident Funds Ltd. (**Halman**), a successor by merger to Hadas Arazim Investment House Ltd. (Hadas Arazim), a company that is also based in Israel, and (*id.*, ¶¶ 10-13).

The Complaint further alleges that co-defendant Gadiel Blusztein, an attorney residing and practicing in Tel Aviv, Israel, conspired with the Suttons to launder the plaintiffs' money through his personal bank account and the bank account of defendant R.T. Interall Ltd. a/k/a Migdal (**RTI**), an Israeli trust formed by Mr. Bluzstein to specifically launder the plaintiffs' money (*id.*, ¶ 9).

From 2006 to 2012, Atlas allegedly took instructions from ***Mayer Sutton*** concerning transfers of funds from the plaintiffs' Accounts, and transferred at least $8.5 million out of the Accounts at ***Mayer Sutton's direction***, which the defendants do not dispute (*id.*, ¶ 29, 31). Approximately

$3.5 million were transferred to a "third party" that Atlas has to date refused to identify (*id.*, ¶ 32). Atlas has disclosed that it also transferred approximately $5 million to Mr. Bluszstein and Kinersis (*id.*, ¶ 33). Specifically, the plaintiffs allege that of that $5 million, some $1.4 million went directly to Kinersis, and the Suttons allegedly also caused wires totaling approximately $3.5 million to go to Mr. Bluszstein's bank accounts in Israel, and that money was then purportedly laundered back to the Suttons pursuant to an arrangement whereby Mr. Bluszstein would transfer the funds to Middlegate Israel allegedly under written "credit line" agreements between him and Middlegate Israel (*id.*, ¶¶ 34-36). However, the plaintiffs allege that there were never any actual lines of credit, just the plaintiffs' funds passing through Mr. Bluszstein back to the Suttons (*id.*, ¶ 35). To justify the transfer of the $1.4 million to Kinersis, Atlas has produced a document, which the plaintiffs claim is forged, that was faxed by Middlegate, purporting to guarantee an undisclosed and defined "loan to Danson" in the amount of $2 million, which document states, "[t]hese investments will not correspond to your standard allocation of assets" (*id.*, ¶ 37; NYSCEF Doc. No. 289). Danson is allegedly controlled by the Suttons. The plaintiffs claim that their signatures on this document were forged because, among other things, it is the sister-plaintiffs' custom and practice to sign all documents in descending order of age and the forged document does not contain the signatures in the correct birth order (NYSCEF Doc. No. 261, ¶ 11; *compare* NYSCEF Doc. No. 289 with NYSCEF Doc. No. 227).

Despite repeated inquiries, Atlas still refuses to "identify certain recipients of millions of dollars of Plaintiffs' money or demonstrate the reasoning for their complete failure to invest or manage the Accounts consistent with the agreed upon objectives" (Compl., ¶ 51). In other words, millions of dollars of the plaintiffs' money are still unaccounted for (*id.*, ¶ 32), not including any

potential appreciation, including without limitation, $3.5 million wired to an unidentified recipient of the $8.5 million which was wired without authorization at Mayer Sutton's direction.

When the plaintiffs first began to inquire about their Accounts with the Suttons, the Suttons advised them that approximately 25% of their assets had been "lost" in poorly performing investments, however, to date, the Suttons have never offered any documentation of such allegedly legitimate investment losses. Later, the Suttons denied having any access to the Accounts, whereas information provided by Atlas in response to requests by the plaintiffs shows that, in fact, the Accounts were looted by the Suttons and their related entities (*id.*, ¶¶ 48-49).

Eventually, Isaac Sutton agreed to repay $6,916,400 to the individual plaintiffs directly, and to submit to arbitration as to whether an additional $750,000 was owed (as the plaintiffs contended) or if it had already been paid to them in 2013 (as the Suttons contended) (*id.*, ¶ 58). The first two payments of $2,447,758 and $850,000 were made in December of 2014 and April of 2015, respectively (*id.*). Thereafter, Isaac Sutton and the individual plaintiffs entered into a written agreement effective April 29, 2015 (the **2015 Agreement**) finalizing the terms of the agreed upon payments (*id.*, ¶ 60). The 2015 Agreement provides that a third payment of $3,618,642 would be made to the individual plaintiffs within 45 days of the effective date, and that an informal expedited arbitration would take place as to the disputed $750,000, which would be held in escrow pending the arbitration (*id.*, ¶ 61). Isaac Sutton, however, allegedly failed to comply with the terms of the 2015 Agreement, and the individual plaintiffs filed a separate JAMS arbitration against Mr. Sutton (*id.*, ¶ 62).

The Complaint now alleges seven causes of action for (i) breach of contract (ii) breach of fiduciary duty, (iii) unjust enrichment, (iv) money had and received, (v) legal malpractice/negligence (against Mr. Kostenbaum only), (vi) conversion, and (vii) accounting.

Isaac Sutton filed an Answer in this action, along with Mr. Blusztein, Kinersis and Halman-Abduli on May 29, 2020 (NYSCEF Doc. No. 247). The Estate also filed an Answer on March 13, 2020 (NYSCEF Doc. 231).

The remaining appearing defendants now move to dismiss arguing, among other things, that the action does not belong in a New York court because of the Atlas Forum Selection Clause, and because the allegedly fraudulent trust agreements which the plaintiffs were never provided for the Marcal Companies each state that:

> This trust Agreement is subject to Swiss law. Any ligitat [sic] arising thereof will be submitted to the regular courts of [the] Canton of Geneva

(NYSCEF Doc. No. 226 at 2; NYSCEF Doc. No. 227 at 2).

In addition, as noted above, Ms. Hamway attests that she is 94 years old, is not healthy enough to travel to Switzerland, does not speak or write French, and that she does not have the financial resources to try this action in Switzerland, which would include, *inter alia*, the costs of travel for herself and witnesses, lodging, and paying for interpreters (NYSCEF Doc. No. 251, ¶¶ 2-5). Ms. Hamway also submits an affidavit of Dr. Howard C. Eisenstein, her personal doctor, who attests that she has "serious health and medical issues," including seizures, and that "travel at this stage of [Ms. Hamway's] life [] could be detrimental to her health," (NYSCEF Doc. No. 262, ¶¶ 2-3).

Ms. Sitt, Ms. Maslaton, Ms. Jemal, and Ms. Paskie also attest to the fact that they would be unable to litigate this action in Switzerland (NYSCEF Doc. Nos. 252-254).

Finally, the plaintiffs also submit an affidavit of Joseph Tawil, a relative who claims to be personally acquainted with both the plaintiffs' family and the Suttons (NYSCEF Doc. No. 261, ¶ 2). Mr. Tawil attests that the individual plaintiffs are not "financially sophisticated," and that their finances were always managed by Ms. Hamway's husband, prior to his death, and that they relied on the Suttons to handle their assets after Mr. Hamway's passing (*id.*, ¶ 3). Mr. Tawil says he helped negotiate the return of some of the plaintiffs' funds to them, but states that, ultimately, Isaac failed to make the third of the agreed-upon payments back to the plaintiffs ($3,618,642 of the $6,916,400 that Isaac agreed to repay), and failed to put the $750,000 in escrow pending the outcome of arbitration, which resulted in the plaintiffs' deciding that "they had no choice but to commence this action" (*id.*, ¶ 14). Mr. Tawil goes on:

> 15. I also found the remaining defendants to be less than forthcoming as we tried to understand what happened. Mirelis [] claimed that they did not have any of the Individual Plaintiffs' money but suddenly discovered that they had at least $2,000,000 of it. ***The trustee and a defendant in this litigation, Alain Kostenbaum, claimed never to have received any bank statements as to what was going on with the account for which he was the trustee even though Mirelis's predecessor, and a defendant herein, Atlas Capital SA, claims to have been sending them monthly***.
>
> 16. An arbitrator rendered Final Award against Isaac on August 11, 2017. There is presently an action against Isaac by the Plaintiff for fraudulent conveyance for Isaac transferring his assets to a trust purportedly for the benefit of his children. I understand that this is now on the trial calendar.

(*id.*, ¶¶ 15-16 [emphasis added]).

DISCUSSION

I. The Kostenbaum Defendants' Motion to Dismiss (Mtn. Seq. No. 010) is Denied

The Kostenbaum Defendants' move to dismiss pursuant to CPLR 3211 § (a)(1) based on the Trust Forum Selection Clauses, which they argue require litigation in Switzerland or in the alternative, pursuant to CPLR § 327, *forum non conveniens*. Both of the Kostenbaum Defendants' arguments fail.

The Kostenbaum Defendants are not entitled to dismissal based on the documentary evidence pursuant to CPLR § 3211(a)(1). It is well settled that "parties to a contract may freely select a forum which will resolve any disputes over the interpretation or performance of the contract," and that "such clauses are prima facie valid and enforceable unless shown by the resisting party to be unreasonable" (*Brooke Group v JCH Syndicate 488*, 87 NY2d 530, 534 [1996]). To set aside an otherwise mandatory forum selection clause, a party must show that enforcement would be unreasonable and unjust or that the clause is invalid because of fraud or overreaching, such that a trial in the contractual forum would be so difficult and inconvenient that the challenging party would effectively be deprived of her day in court (*British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234, 234 [1st Dept 1991]).

Here, the plaintiffs have met their burden of showing that the Trust Forum Selection Clause was procured by fraud and/or overreaching by submitting sworn affidavits from the individual plaintiffs attesting to the fact that they neither signed the Marcal Trust Agreement nor the Bellpont Trust Agreement nor were they ever provided with a copy of each such agreement or otherwise informed of their contents. Put another way, there is no evidence that the parties

agreed to litigate their disputes in Switzerland. As discussed above, the plaintiffs never signed the Marcal Trust Agreement or the Bellpond Trust Agreement. They merely signed pieces of paper that were to be used for opening bank accounts. The plaintiffs allege that Mayer Sutton fraudulently transferred their signature on to these agreements. They did not appoint Mr. Kostenbaum as a fiduciary or otherwise grant him a power of attorney. Stated differently, enforcement of a forum selection clause is based on knowledge (*see British W. Indies Guar. Trust,* 172 AD2d 234, 234 [1st Dept 1991]). Here, the plaintiffs did not and could not have had knowledge of the forum selection clause because the Kostenbaum Defendants are alleged to have fraudulently obtained their signature on trust agreements from Mayer Sutton, and then pursuant to this fraudulently obtained "appointment," designated that any disputes must be brought in Genova. There was no agreement by the plaintiffs to travel across the Atlantic to litigate disputes (*Rubens v UBS AG*, 126 AD3d 421, 422 [1st Dept 2015]). Quite frankly, it is remarkable that Mr. Kostenbaum does not even allege to having discussed this purported fiduciary appointment or trust agreements with the plaintiffs as part of his "representation" of them for which he was paid, inquiring among other things, if they had reviewed these agreements and had any questions about them (NYSCEF Doc. No. 300). Although he professes to have had no hand in the fraud, had he engaged in the most basic and fundamental inquiry with his "clients" he would have learned that they never even saw the agreements (let alone signed them) upon which he now attempts to rely. Thus, the plaintiffs have sufficiently "show[n] that the parties' agreements containing the forum selection clauses are 'permeated with fraud'" so as to be unenforceable (*British W. Indies Guar. Trust,* 172 AD2d at 234)

Finally, Mr. Kostenbaum's affidavit, submitted in reply, wherein he claims, based on other bank agreements that one of the plaintiffs, Ms. Hamway, may have previously signed, that she understood that opening an account in Switzerland meant that disputes in connection with those accounts would be litigated in Switzerland is of no moment. This is not documentary evidence as to her understanding or her agreement to travel to Europe to litigate disputes with Mr. Kostenbaum. At best, this raises issues of fact as to what Mrs. Hamway may have understood based on prior unrelated agreements that cannot be properly resolved at this stage of the proceeding.

Inasmuch as Mr. Kostenbaum's reply affidavit suggests that Ms. Hamway previously appointed him as a fiduciary in connection with the Mackay Investments, this is, at best, unclear. His affidavit merely states that his partner, Ronny Levy, was appointed as agent for the Mackay Investments trust, and that after Mr. Levy's death in 1998, "the plaintiffs" had Mr. Kostenbaum "take his place as agent for Mackay Investments and its related accounts" and that Ms. Hamway also directed him by handwritten letter to name her daughters as co-owners of portions of her beneficial interest in Mackay Investments in the event of her death or incapacity (*id.*, ¶¶ 8-9; NYSCEF Doc. 302). In any event, whether Mr. Kostenbaum was previously properly appointed as an agent for Mackay Investments by Ms. Hamway has no bearing on whether Mr. Kostenbaum acted with due authority in connection with the Marcal Companies years later. Likewise, the fact that the Mackay Investment Trust Agreement ***dated June 4, 1985*** contained a Swiss forum selection clause has absolutely no bearing on whether Ms. Hamway and her daughters agreed to litigate their disputes with Mr. Kostenbaum relating to the Marcal

Companies in Switzerland more than 20 years later, or whether Ms. Hamway would even contemplate such an undertaking at that stage of her life.

The Kostenbaum Defendants are also not entitled to dismissal based on *forum non conveniencs.* The common law doctrine of *forum non conveniens* is codified in CPLR § 327. Pursuant to CPLR § 327, a court may dismiss an action if it "finds that in the interest of substantial justice the action should be heard in another forum." The resolution of a motion to dismiss on *forum non conveniens grounds* is left to the sound discretion of the trial court *(Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984]).

In deciding a motion to dismiss based on *forum non conveniens*, courts must consider the burden on New York courts, the potential hardship to a defendant, the unavailability of an alternative forum in which the plaintiff may bring suit, the residence of the parties, and whether the transaction at issue arose primarily in a foreign jurisdiction such that the forum state's interest in the dispute is diminished (*id.*). Significantly, the plaintiff's choice of forum should rarely be disturbed unless the balance is strongly in favor of the defendant and a substantial nexus between New York and the action is lacking (*Waterways, Ltd. v Barclays Bank PLC*, 174 AD2d 324, 327 [1st Dept 1991]; *Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 208 [1st Dept 2013]).

Mr. Kostenbaum is a sophisticated international lawyer who readily undertook New York clients. The apparently forged trust agreements at issue were obtained in Brooklyn, New York from the plaintiffs by Mayer Sutton. Inasmuch as Mr. Kostenbaum alleges that he would suffer a hardship from having to litigate in a New York court because his spoken English is not as good

as his written English, and many documents would need to be translated and because it would be expensive for him to travel here, the arguments ring hollow. The Commercial Division regularly adjudicates disputes involving the application of foreign law when appropriate (*see e.g., Angiolillo v Christie's, Inc.*, 64 Misc3d 500 [Sup Ct NY Cnty 2019], *affd* 185 AD3d 442 [1st Dept 2020]), and where the primary language of the litigants is not English, the court system is well equipped to provide appropriate foreign language interpreters. Mr. Kostenbaum's English competency or *ipse dixit* professed lack thereof did not interfere with his voluntary acceptance of the "representation" of the plaintiffs. Significantly, Ms. Hamway's age and health condition also do not bode in favor of dismissal based on *forum non convenience* grounds. Requiring her to travel to Geneva would effectively deprive her of her day in court. Accordingly, the Kostenbaum Defendants' motion to dismiss is denied in its entirety.

II. Middlegate's Motion to Dismiss the Complaint (Mtn. Seq. No. 011) is Denied

Middlegate argues that the court should dismiss this action pursuant to CPLR §§ 3211(a)(1), (a)(5), and (a)(7) because, it claims, it was not involved in any alleged wrongdoing by Mayer and Isaac Sutton, has no connection to the plaintiffs, and that, in any event, the claims alleged are barred in whole or in part by the statute of limitations. In support of its motion, Middlegate submits an affidavit of Albert Sutton, Mayer Sutton's son and Isaac Sutton's brother, and an owner and officer of Middlegate, which provides that, (i) "Middlegate had no involvement with plaintiffs or any of the conduct that is the basis for the plaintiffs' Complaints" (NYSCEF Doc. No. 235, ¶¶ 1-2), (ii) Isaac Sutton ***was*** an owner and employee of Middlegate prior to 2010, that he gave up his interest and resigned all positions at the end of 2009, and (iii) "Mayer Sutton is not a principal of Middlegate and has no authority to enter into any of the transactions alleged in

plaintiffs' Complaints on behalf of Middlegate" (*id.*, ¶ 3). For the reasons set forth below, the affidavit does not justify dismissal and in its most favorable read, it is at best ambiguous about Mayer Sutton's role at Middlegate, only stating that he ***is*** not a principal of Middlegate as of that date. As discussed above, Mayer Sutton died in June of 2016 (NYSCEF Doc. No. 207).

1. The Breach of Contract Claim

The well-established elements of a breach of contract claim are the existence of a contract, plaintiff's performance thereunder, breach by defendant and resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). Middlegate argues that the breach of contract claim should be dismissed because the Complaint does not allege what agreements Middlegate was a party to, who the contracting parties were, what were the terms, and how Middlegate breached. The argument fails.

The Complaint alleges that the plaintiffs entered into agreements with Middlegate pursuant to which Middlegate agreed to manage the plaintiffs' funds for the benefit of the plaintiffs and, that:

> The Suttons, who at all relevant times hereto operated through Middlegate and held themselves out to be acting as Middlegate's principals, agreed to manage and safekeep the Funds for the benefit of Plaintiffs.

(NYSCEF Doc. No. 229, ¶¶ 64-65).

The Complaint further alleges breach by Middlegate and the other defendants as follows:

a. Using Plaintiffs' Funds for their own benefit instead of Plaintiffs' Benefit

b. Failing to manage the Funds in the way agreed upon with Plaintiffs

c. Failing to ensure compliance with the requirements of written authorization and signature verification for transactions involving the Accounts

d. Failing to exercise oversight over the Accounts in the Plaintiff's [sic] best interests

(*id.*, ¶ 68).

Inasmuch as Albert Sutton's affidavit suggests that Mayer and Isaac played a limited role, if any, in Middlegate and that, therefore, their wrongdoings should not be imputed to Middlegate, according to the affidavit of Mr. Tawil, submitted by the plaintiffs, Mayer was widely known in the plaintiffs' community to be affiliated with, and a representative of, Middlegate, that Isaac was in charge of the plaintiffs' accounts at Middlegate, and both Mayer and Isaac had an office located in Middlegate's offices in New York, New York (NYSCEF Doc. No. 261, ¶¶ 5, 9). In addition, and most significantly, Middlegate, which is owned or controlled directly or indirectly by the Sutton family, cannot escape liability by claiming the plaintiffs do not allege the extent of their involvement in the misappropriation of their money and, at the same time, based on their control over other entities, fail to provide the plaintiffs with actual information as to the total amount of the money that they were entrusted with by the plaintiffs, which they have failed to do.

Construing the Complaint liberally, as the court must on a motion to dismiss, and affording the plaintiffs every possible favorable inference (*Leon v Martinez,* 84 NY2d 83, 87-88 [1994]), the Complaint sufficiently pleads a breach of contract at this current stage of litigation. Whether the plaintiffs can ultimately establish a breach of contract against Middlegate is a matter for discovery and more appropriate addressed on a motion for summary judgment (*Morris v 702 East Fifth Street HDFC*, 46 AD3d 478 [1st Dept 2007]).

2. The Breach of Fiduciary Claim

A fiduciary relationship exists between parties when one is under the duty to act or advise the other upon matters within the scope of the relation (*Northeast Gen. Corp. v Wellington Adv.,* 82 NY2d 158 [1993]; Restatement [Second] of Torts, § 874, Comment a). Generally, this is a necessarily fact-specific inquiry, and applies to a relationship grounded in a higher level of trust that normally present in the marketplace between those involved in arms' length business transactions (*EBC I, Inc. v Goldman Sachs & Co.* 5 NY3d 11 [2005]). A fiduciary relationship may also exist where one party reposes confidence in the other and reasonably relies on their superior expertise or knowledge (*WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]). Although ordinarily a broker/customer relationship would not give rise to a fiduciary obligation under New York law, a fiduciary obligation will arise where the customer delegates discretionary trading authority to the broker (*Thermal Imaging Inc. v Sandgrain Securities, Inc.*, 158 F Supp 2d 335, 344 [SD NY 2001]; *Lowenbraun v L.F. Rothschild,* 685 F Supp 336, 343 [SD NY 1988]; *see also Tradewinds Financial Corp. v Refco Secs., Inc.*, 5 AD3d 229, 230 [1st Dept 2004] [no fiduciary relationship because account non-discretionary]). Here, the plaintiffs allege that Middlegate had discretionary authority to manage their Accounts, which created a fiduciary obligation that was breached through self-dealing by Isaac and Mayer Sutton, causing the plaintiffs substantial financial harm, and that Middlegate sent a fax bearing plaintiffs' forged signatures to effect the transfer of $1.4 million from their Accounts (NYSCEF Doc. No. 229, ¶ 37). This is sufficient to state a claim for breach of fiduciary duty at the pleading stage (*Pokoik v Pokoik*, 115 AD3d 428 [1st Dept 2014]). The plaintiffs need not identify who at Middlegate sent the fax at this stage in the proceeding nor allege who is responsible for the forgery to assert their

claims, as Middlegate argues (*see Pludeman v North Leasing Sys., Inc.*, 10 NY3d 486 [2008] [recognizing some facts may be "unavailable prior to discovery" where fraudulent scheme alleged]).

3. The Conversion Claim

To state a claim for conversion, a plaintiff must show (i) legal ownership or an immediate right of possession in a specific identifiable thing and (ii) defendants' unauthorized dominion over the thing in question to the exclusion of the plaintiff (*Giardini v Settanni*, 159 AD2d3d 874 [2d Dept 2018]. Where the conversion that is alleged involves money, the plaintiff must allege a specific, identifiable fund and an obligation to return or otherwise treat the specific fund in a particular manner (*Thys v Fortis Securities LLC*, 74 AD3d 546 [1st Dept 2010]).

Here, the Complaint sufficiently alleges that Middlegate played a role in the misappropriation of the plaintiffs' money and, inasmuch the plaintiffs are required to identify "money, specifically identifiable and segregated" that can be the subject of this conversion action, the Complaint clearly identifies the plaintiffs' Accounts which were allegedly depleted by the defendants (*see Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113 [1st Dept 1990]). Most significantly, the defendants are alleged to have engaged in a shell game with the plaintiffs' money hiding the whereabouts of the plaintiffs' money that they allegedly pilfered. Having allegedly done this, including refusing to disclose, among other things, the recipient of an allegedly unauthorized at least $3.5 million transfer of the plaintiffs' $11 million, the defendants cannot then rely on the plaintiffs' lack of knowledge as to the conversion claim arguing that the

plaintiffs' cause of action fails for failure to identify which Sutton or Dwek entity has what amount of the plaintiffs' money. Accordingly, the conversion claim is not dismissed.

4. The Unjust Enrichment Claim

To state a claim for unjust enrichment, a plaintiff must allege that (i) a defendant was enriched, (ii) at plaintiff's expense, and that (iii) it is against equity and good conscience to permit defendant to retain what is sought to be recovered (*GFRE, Inc. v US Bank, N.A.*, 130 AD3d 569 [2d Dept 2015]). Middlegate argues that the court should dismiss this cause of action arguing that it never received funds or fees from the plaintiffs. In support of this claim, the Complaint alleges, *inter alia*, that Middlegate caused certain of the plaintiffs' funds to be transferred to Middlegate Israel, RTI, Hadas Arazim, and Kinesris, who were all controlled by or reported to the Suttons and/or Middlegate (NYSCEF Doc. No. 229, ¶ 84), and that Middlegate was unjustly enriched at the plaintiffs' expense as a result (*id.*, ¶¶ 84-85). As previously discussed, inasmuch the defendants are alleged to have fraudulently concealed where the entire amounts of plaintiffs' funds are and potentially what fees were charged, factual issues requiring discovery preclude dismissal at this stage of this litigation.

5. The Accounting Claim

The right to an accounting is premised upon the existence of a confidential or fiduciary relationship and a breach of the duty imposed by that relationship with respect to property in which the party seeking an accounting has an interest (*Greenberg v Wiesel*, 186 AD3d 1336 [2d Dept 2020], citing Palazzo *v Palazzo*, 121 AD2d 261 [1st Dept 1986]). Middlegate argues that this claim fails because the plaintiffs never had a fiduciary relationship with Middlegate and

because Middlegate never received any funds from the plaintiffs. The first argument fails for the reasons set forth above (*see* breach of fiduciary duty discussion, *supra*). The second argument cannot be determined at this juncture as the parties sharply dispute whether Middlegate ever received any of plaintiffs' funds. Accepting the facts alleged by the plaintiffs as true, and according them the benefit of every possible favorable inference, the Complaint contains sufficient allegations that support the plaintiffs' entitlement to an accounting in connection with Middlegate's alleged breach of its fiduciary obligations to the plaintiffs (*Greenberg, supra*).

The mere fact that plaintiffs may have another legal remedy with respect to their claims does not preclude them "from seeking equitable relief by way of an accounting predicated upon the existence of a fiduciary relationship" (*Darlagiannis v Darlagiannis*, 48 AD2d 875, 875 [2d Dept 1975]).

6. Money Had and Received Claim

A cause of action for money had and received requires (i) that a defendant received money belonging to plaintiff, (ii) benefitted from such receipt, and (iii) under principles of equity and good conscience, should not be permitted to keep said money (*Lebovits v Bassman*, 120 AD3d 1198 [2d Dept 2014]). The plaintiffs have sufficiently stated this claim for purposes of surviving a pre-discovery motion to dismiss. Inasmuch as Middlegate argues that when a contract addresses the subject of a claim for money had and received, this claim cannot lie (*Phoenix Garden Restaurant Inc. v Chu*, 245 AD2d 164, 166 [1st Dept 1997]), this is insufficient to preclude the claim as Middlegate also disputes the existence of any contract between the parties. It cannot have its cake and eat it too. The claim is sustained.

B. Statute of Limitations

Middlegate also argues that the plaintiffs' claims are barred, at least in part, by the applicable statute of limitations, which is three years for claims of breach of fiduciary duty and conversion, and six years for claims of breach of contract, unjust enrichment, accounting, and money had and received (CPLR § 213). As such, Middlegate maintains that the claims subject to the three-year time period (i.e., here, breach of fiduciary duty) must have accrued on or after October 7, 2012, and the claims subject to the six-year time period (i.e, breach of contract, unjust enrichment, and accounting) must have accrued on or after October 7, 2009. Middlegate argues that as the plaintiffs have not identified any specific misconduct by Middlegate within the applicable limitations periods, the claims should be dismissed.

As an initial matter, with respect to the claim for accounting, a claim for accounting accrues from the time of the demand and is, therefore, timely. As concerns the other remaining causes of action, because the Complaint alleges fraud and the active continued concealment of that fraud by the defendants, the claims are not time barred and discovery is needed as to Middlegate's role in the alleged looting of the plaintiffs' $11 million (*Greenberg*, *supra*; *Barasch v Estate of Sperlin*, 271 AD2d 558, 559 [2d Dept 2000]). Based on the foregoing, Middlegate's motion is denied in its entirety.

III. **Mirelis and Hyposwiss' Motion to Dismiss (Mtn. Seq. No. 012)**

Mirelis and Hyposwiss argue that the Complaint against them should be dismissed because (i) the court lacks personal jurisdiction them pursuant to CPLR §§ 301 and 302, (ii) that the claims against them are barred by the statute of limitations, (iii) that the unjust enrichment and

accounting claims are improper, (iv) that the Atlas Forum Selection Clause in the governing account agreements requires dismissal, and (v) that the action should be dismissed based on *forum non conveniens*.

1. Jurisdiction

A New York court may exercise personal jurisdiction over a non-domiciliary defendant where (i) it has long-arm jurisdiction over the defendant under CPLR § 302, and (ii) the exercise of such jurisdiction comports with due process (*Williams v Beemiller, Inc.*, 33 NY3d 523, 528 [2019]). CPLR § 302 jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction" (*Goodyear*, 564 US at 919). In other words, "the ***suit*** must aris[e] out of or relat[e] to the defendant's contacts with the ***forum***" (*Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco Cty.*, 137 S Ct 1773, 1780 [2017] [emphasis in original] [internal quotation marks and citation omitted]). New York's long-arm statute provides that, "a court may exercise personal jurisdiction over any non-domiciliary . . . who in person ***or through an agent*** . . . transacts any business within the state or contracts anywhere to supply goods or services in the state" (CPLR § 302 [a] [1] [emphasis added]). This is a "single act statute," meaning that, "proof of one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted" (*Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 [1988]).

As noted, any exercise of personal jurisdiction must also comport with due process (*D & R Global Selections, S.L.*, 29 NY3d at 299). Due process requires that a defendant must have

sufficient minimum contacts with New York such that the defendant should reasonably expect to be haled into court here (*LaMarca v Pak-Mor Mfg. Co.*, 95 NYd 210, 216 [2000], quoting *World-Wide Volkswagen Corp. v Woodson*, 444 US 286, 297 [1980]), and that requiring the non-domiciliary to defend the action in New York comports with "traditional notions of fair play and substantial justice" (*LaMarca*, 95 NY2d at 216, quoting *International Shoe Co. v Washington*, 326 US 310, 316 [1945]).

Here, the Complaint asserts that Hyposwiss and Mirelis carry on Atlas's business by alleging that, "Plaintiffs understand that both Hyposwiss and Mirelis (which are organized as a single enterprise 100% owned by Mirelis Holding SA) carry on Atlas's pre-merger business activities," that continues to be owned by the same family, directly or indirectly (NYSCEF Doc. No. 229, ¶ 15) and suggest that the two entities are not independently run (*see, e.g.,* NYSCEF Doc. No. 276). Mirelis and Hyposwiss, as successors to Atlas, have sufficient New York contacts for the court to exercise specific jurisdiction over them pursuant to CPLR § 302. As alleged in the Complaint, Atlas acted through Mayer Sutton, their cousin (i.e., Atlas's founders), as agent for Atlas to solicit the individual plaintiffs in Brooklyn, New York, and that Mayer Sutton met with the individual plaintiffs as customers in New York and persuaded them to open Accounts at Atlas in New York (NYSCEF Doc. No. 229, ¶ 14; NYSCEF Doc. No. 292, ¶ 4). The Dweks allegedly continue to own Mirelis and Hyposwiss and are alleged to be personally involved in the continued operations of these companies (*see e.g.*, NYSCEF Doc. No. 291). Thus, having purposefully availed themselves of a New York forum, they cannot now avoid New York jurisdiction. Inasmuch as this case involves the fraudulent taking of the plaintiffs' $11 million and the defendants have actively concealed the whereabouts of the plaintiffs $11 million, the

defendants cannot simply contend that jurisdiction does not exist in New York arising out of that taking. These alleged contacts are sufficient for Mirelis and Hyposwiss to anticipate the possibility of litigation in New York against its New York clients so as to comport with Due Process, and, at minimum, entitle the plaintiffs to jurisdictional discovery. Indeed, the alleged fraud and the alleged continued concealment of that fraud is *prima facie* evidence as to jurisdiction arising out of that conduct. The motion to dismiss based on lack of jurisdiction is denied.

2. The Atlas Forum Selection Clause

The defendants argue based on the Atlas Forum Selection clause, which provides that, "the exclusive forum for any proceeding [against Atlas] are headquarters of ATLAS or of the branch dealing with the customer," i.e., Geneva, Switzerland (NYSCEF Doc. Nos. 240-243, ¶ 12; *Dogmoch Intl. Corp. v Dresdner Bank AG*, 304 AD2d 396 [1st Dept 2003] [enforcing forum selection clause in bank deposit agreements designating Switzerland as exclusive forum]) that the court should dismiss the complaint. As discussed above, the argument fails because the plaintiffs were never provided with the Atlas Forum Selection clause or the Atlas Account Opening Agreements. The Atlas Account Opening Agreements were executed by Mr. Kostenbaum pursuant to his fraudulently obtained power of attorney in the Marcal Trust Agreement and Bellpond Trust Agreement, which agreements were allegedly fraudulently obtained by Mayer Sutton (*see DeSola Group, Inc. v Coors Brewing Co.*, 199 AD2d 141 [forum selection clause "unenforceable since the record is replete with allegations indicating that the entire agreement was permeated with fraud"]; *Studebaker-Worthington Leasing Corp. v New*

Concepts Realty Inc. 25 Misc3d 1 [App Term, 9th and 10th Judicial Dist. 2009]). Under these circumstances, equity does not permit the Atlas Forum Selection Clauses to be enforced.

The court has considered the remaining arguments raised by Mirelis and Hyposwiss with regard to *forum non conveniens*, statute of limitations, and failure to state a claim and finds them unpersuasive.

Accordingly, it is

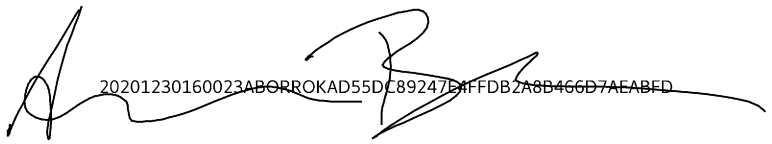
ORDERED that Alain Kostenbaum and Kostenbaum & Associates' motion to dismiss (seq. no. 010) is denied; and it is further

ORDERED that Middlegate Securities Ltd. motion to dismiss (seq. no. 011) is denied; and it is further

ORDERED that the motion to dismiss (seq. no. 012) of Mirelis Holding SA and Hyposwiss Private Bank Geneve SA is denied; and it is further

ORDERED that the defendants file an answer within 20 days of this decision and order; and it is further

ORDERED that the parties appear for a preliminary conference in Part 53 by Remote Means (MS Teams) on January 28, 2021 at 9:30 A.M.



12/30/2020
DATE

ANDREW BORROK, J.S.C.

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