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

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STEVEN GOLDIN, as Co-Executor of Bernice Goldin's Estate, on behalf of Bernice Goldin's IRA, and as Co-Trustee of the Paul Goldin Marital Trust B, and ROCHELLE GOLDIN, as Co-Executrix of Bernice Goldin's Estate, on behalf of Bernice Goldin's IRA, and as Co-Trustee of the Paul Goldin Marital Trust B,

Plaintiffs,

-against-

TAG VIRGIN ISLANDS, INC. (f/k/a Taurus Advisory Group, Inc.), JAMES S. TAGLIAFERRI, PATRICIA CORNELL, IEAH CORPORATION, IEAH STABLES INC., INTERNATIONAL EQUINE ACQUISITIONS HOLDINGS, INC., MICHAEL IAVARONE, and BARRY FEINER,

Defendants.

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Index No. 651021/2013
Motion Date: 4/4/2014
Motion Seq. No.: 002, 004, & 005

BRANSTEN, J.

Motion sequence numbers 002, 004, and 005 are consolidated herein for disposition.

In this action, Plaintiffs Steven Goldin and Rochelle Goldin bring claims on behalf two accounts managed by Defendant TAG Virgin Islands, Inc. ("TAG") – the Bernice Goldin IRA and the Paul Goldin Marital Trust B ("Trust") (collectively, the "accounts"). Relevant to the instant motion, Plaintiffs assert a variety of tort and contract claims related to the accounts against Defendant TAG, an investment advisory group, and its two

owners, Defendants James S. Tagliaferri and Patricia Cornell. In addition, Plaintiffs bring claims against TAG's legal counsel, Barry Feiner.[1]

In motion sequence 002, Defendant Feiner seeks dismissal of all claims asserted against him pursuant to CPLR 3016(b) and CPLR 3211(a)(5) & (a)(7). Defendants Cornell and Tagliaferri likewise move for dismissal in motion sequence 004 and 005. Plaintiffs oppose all three motions. For the reasons that follow, Feiner, Cornell, and Tagliaferri's motions to dismiss are granted.

I. Background

This action stems from investments made in brokerage accounts, managed by Defendant TAG, for which Plaintiffs are the beneficiaries or the co-trustees. Defendant TAG, formerly known as Taurus Advisory Group, is a Connecticut corporation owned by Defendants Tagliaferri and Cornell. (Compl. ¶ 17) Collectively, the Complaint refers to Defendants TAG, Tagliaferri and Cornell as the "TAG Defendants."

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[1] There are four additional Defendants in this action – IEAH Corporation, IEAH Stables Inc., International Equine Acquisitions Holdings, Inc. and Michael Iavarone (collectively, the "IEAH Defendants") .

A. *Allegations in the Instant Complaint*

From 2003 through 2008, Tagliaferri and Cornell were registered investment advisors with TAG. *Id.* ¶ 35. During that time, TAG entered into two Investment Management Agreements ("IMA") that are relevant to the instant claims. *Id.* ¶¶ 35, 39, 43. Specifically, on April 17, 2003, Bernice Golden executed an IMA with TAG on behalf of the Bernice Goldin IRA, and on January 10, 2005, Bernice Goldin, Steven Goldin, and Rochelle Golden executed an IMA with TAG as co-trustees of the Paul Goldin Marital Trust B. Both IMAs were executed by TAG, with Defendant Cornell signing "on behalf of TAG." *Id.* ¶¶ 39, 43; *see* Affidavit of James S. Tagliaferri Ex. B & C (April 17, 2003 and January 10, 2005 IMAs respectively).

The IMAs each provide that TAG was authorized "to make all investment decisions concerning the Portfolio and to make purchases, sales, and otherwise effect transaction in stocks bonds, and other securities in the Portfolio on behalf of" the accounts, as long as they were consistent with Bernice Golden's investment objectives, in the case of the April 17, 2003 IRA, or the investment objectives of the trust, in the January 10, 2005 IMA. *See* April 17, 2003 and January 10, 2005 IMAs at 1; Compl. ¶¶ 41, 45. In exchange for these services, TAG was entitled to an annual fee, as detailed in Exhibit A to the IMAs. *See* April 17, 2003 and January 10, 2005 IMAs at Ex. A.

Plaintiffs now contend that the "TAG Defendants" began "scamming" Plaintiffs in mid-2007 by liquidating their more conservative investments and transferring Plaintiffs' funds to TAG-affiliated companies through convertible note instruments. *See* Compl. ¶ 61. The notes were "mostly drafted" by Defendant Feiner. *Id.* According to Plaintiffs, these notes, while appearing legitimate, were "a fiction designed by the TAG Defendants and Feiner to defraud the Plaintiffs." *Id.* Plaintiffs contend that pursuant to the terms of the notes, TAG was the payee and TAG-affiliated companies were the makers, purportedly responsible for repaying TAG the principal due plus interest on the maturity date. However, the Complaint alleges that the notes were drafted so that Plaintiffs were not the payees, limiting their ability to recover against the makers. *Id.*

Next, Plaintiffs contend that the TAG Defendants converted these notes on or before their maturity dates to stock in the TAG-affiliated companies to which the TAG Defendants already transferred Plaintiffs' funds. *Id.* at ¶ 66. In most instances, Plaintiffs contend that the TAG Defendants converted their notes to valueless stock but listed the stock on Plaintiffs' account statements at par. *Id.*

For these transactions transferring Plaintiffs' funds to the TAG-affiliated companies, the TAG Defendants received commissions. *Id.* ¶¶ 64, 66. Plaintiffs allege that the TAG Defendants did not disclose these commissions to them. *Id.*

In addition to the commissions, Plaintiffs contend that the TAG Defendants earned management fees on positions contained in Plaintiffs' accounts. *Id.* ¶ 69. According to Plaintiffs, even though the positions were worthless, the TAG Defendants fraudulently inflated the positions' values to State Street Bank & Trust Company ("State Street"), the custodian of Plaintiffs' accounts. *Id.* Since the valuations were inflated, Plaintiffs allege that the TAG Defendants' charged Plaintiffs an equally inflated management fee. *Id.*

Plaintiffs first received notice of a problem with their accounts in February 2011, when State Street sent a letter, informing Plaintiffs that the TAG Defendants were named as defendants in a lawsuit. *Id.* ¶ 162. Shortly thereafter, in April 2011, State Street informed Plaintiffs that it had not received valuation instructions from the TAG Defendants for certain assets since November 2010. *Id.* ¶ 163. Since it had not received valuation instructions, State Street indicated that it would not longer assign a value to those assets and would state a value of zero on Plaintiffs' account statements. *Id.*

B. *Procedural History*

The instant action is the second action and fourth complaint filed by Plaintiffs arising from the same set of facts. On November 29, 2011, Plaintiffs and Bernice Goldin filed the first action – a twelve-count complaint against TAG, Tagliaferri, Cornell, Feiner, IEAH Corporation, IEAH Stables Inc., International Equine Acquisitions Holdings, Inc.

and Michael Iavarone.[2] *See Bernice Goldin, et al. v. TAG Virgin Islands, Inc.*, Index No. 653298/2011 (Sup. Ct. N.Y. Cnty.). Plaintiffs and Bernice Goldin filed a first amended complaint on April 13, 2012, asserting the same claims as the initial complaint but adding a claim for alter ego liability against Defendants Cornell and Tagliaferri. In addition, following the death of Bernice Goldin, Plaintiffs amended the caption so that they were asserting claims as co-executors of the Bernice Goldin Estate, as well as on behalf of the Bernice Goldin IRA and the Trust. Several months later, Plaintiffs and Bernice Goldin filed a motion to withdraw this first amended complaint with leave to file a second amended complaint. Since Plaintiffs failed to attach a proposed second amended complaint to their moving papers, the Court denied their motion to amend and dismissed the action without prejudice. *See* January 22, 2013 Decision and Order (Docket No. 87).

The action currently pending before the Court is *Goldin v. TAG Virgin Islands, Inc.*, Index No. 651021/2013 (Sup. Ct. N.Y. Cnty.). Instead of filing an amended complaint in the previous action, Plaintiffs commenced a new action on March 20, 2013 with the filing of a thirteen-count complaint (herein, the "Complaint"), asserting the same claims as in the first amended complaint against the same parties as before.

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[2] Defendants IEAH Corporation, IEAH Stables Inc., International Equine Acquisitions Holdings, Inc. and Michael Iavarone are collectively referred to herein as the "IEAH Defendants."

II. Discussion

Presently before the Court are motions to dismiss the instant Complaint, filed by Defendants Feiner, Cornell, and Tagliaferri. Each of these motions will be considered in turn.

A. *Motion to Dismiss Standard*

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

However, on a CPLR 3211(a)(1) motion, "[i]t is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence . . . are not presumed to be true on a motion to

dismiss for legal insufficiency." *O'Donnell, Fox & Gartner v. R-2000 Corp.*, 198 A.D.2d 154, 154 (1st Dep't 1993). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495 (1st Dep't 2006) (citing *Robinson v. Robinson*, 303 A.D.2d 234, 235 (1st Dep't 2003)). Ultimately, under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." *Leon*, 84 N.Y.2d at 88.

B. *Defendant Feiner's Motion to Dismiss* (Motion Sequence 002)

Defendant Feiner was TAG's legal counsel, and according to Plaintiffs, "mostly drafted" certain of the convertible note instruments through which Plaintiffs' funds were transferred to TAG-related companies. In addition, Plaintiffs contend that Feiner was responsible for wiring Plaintiffs' funds to the TAG-affiliated companies, including the IEAH Defendants. These allegations are all pleaded "on information and belief." *See* Compl. ¶ 81.

Based on these allegations, Plaintiffs assert four claims against Feiner – legal malpractice, aiding and abetting breach of fiduciary duty, unjust enrichment, and fraud. Feiner now seeks dismissal of each of these claims pursuant to CPLR 3211(a)(5) and

(a)(7). In addition, Feiner contends that Plaintiffs' aiding and abetting and fraud claims are not pleaded with the requisite specificity under CPLR 3016(b). Each of Feiner's arguments will be examined in turn below.

1. Legal Malpractice

a. **Statute of Limitations**

Defendant Feiner first objects to Plaintiffs' legal malpractice claim, contending that is time-barred. "In moving to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant bears the initial burden of demonstrating, prima facie, that the time within which to commence the action has expired." *City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635, 635 (2d Dep't 2014) "The burden then shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period." *Id.*

Feiner here has demonstrated that this claim was filed outside the statute of limitations. A legal malpractice action must be commenced within three years of accrual. *See* CPLR §§ 214(6), 203(a). Accrual of such a claim occurs when the malpractice is committed. *Waggoner v. Caruso*, 68 A.D.3d 1, 6 (1st Dep't 2009).

Plaintiffs' malpractice claims stem from Feiner's preparation of the convertible notes, which were allegedly used by the TAG Defendants to transfer funds from the Bernice Goldin IRA and the Trust to the TAG Affiliated Companies. *See* Compl. ¶¶ 231, 232, 235 ("The TAG Defendants hired Feiner as legal counsel to draft many of the convertible notes at issue. ... Feiner failed to disclose to Plaintiffs that the documents he drafted were drafted to preclude the Goldins from having any ability to collect against the TAG Affiliated Companies...") The Complaint alleges that Feiner prepared these convertible notes for the Bernice Goldin as late as June 2008. *See* Compl. ¶ 86. However, Plaintiffs did not file their first complaint until November 29, 2011 – more than three years after the notes were prepared and outside the statute of limitations.

Plaintiffs do not dispute that the legal malpractice cause of action accrued as late as June 2008. Instead, they contend that the statute of limitations should be tolled under the continuous representation doctrine, which provides for tolling "while representation on the same matter in which the malpractice is alleged is ongoing." *Waggoner*, 68 A.D.3d at 7. Even assuming, *arguendo*, that Feiner represented Plaintiffs in the first place when the notes were drafted, Plaintiffs provide no support for the proposition that he continued to represent them in the same matter, i.e. during the pendency of the notes through maturation. "The [continuous representation] doctrine is rooted in recognition that a client cannot be expected to jeopardize a pending case or relationship with an

attorney during the period that the attorney continues to handle the case." *Id.* Here, however, there is no allegation that Feiner continued handling the notes through maturation. Accordingly, the continuous representation doctrine does not apply under the facts as pleaded by Plaintiffs in their Complaint, and the legal malpractice claim is dismissed as untimely.

b. **Failure to State a Claim**

Even if timely brought, Plaintiffs' legal malpractice claim nonetheless would be dismissed for failure to state a cause of action. "A cause for legal malpractice cannot be stated in the absence of an attorney-client relationship." *Waggoner*, 68 A.D.3d at 5. However, Plaintiffs here fail to plead that they had such a relationship with Defendant Feiner.

As discussed above, Plaintiffs' legal malpractice claim stems from Feiner's representation of TAG in drafting the convertible notes. Since Feiner did not represent Plaintiffs and was performing services only on behalf of TAG, no attorney-client relationship has been stated. *See Federal Ins. Co. v. North American Specialty Ins. Co.*, 47 A.D.3d 52, 59 (1st Dep't 2007) ("New York courts impose a strict privity requirement to claims of legal malpractice; an attorney is not liable to a third party for negligence in performing services on behalf of his client.")

While conceding that they were not Feiner's clients, and were not in privity with him, Plaintiffs nevertheless argue that a malpractice claim may lie since "the harm caused to Plaintiffs was the result of the attorney's fraud." *See* Pl.'s Opp. Br. at 26. However, the fraud alleged by Plaintiffs is the alleged malpractice committed by Feiner. (Compl. ¶ 225.) Thus, Plaintiffs present the circular argument that a malpractice claim is stated because a near-privity relationship exists and the fraud giving rise to that near-privity relationship exists because Feiner committed malpractice. This argument does not state the "fraud, collusion, malicious acts or other special circumstances" necessary in order to maintain an attorney malpractice claim absent privity. *See AG Capital Funding Partners, L.P. v. State St. Bank & Trust Co.*, 5 N.Y.3d 582, 595 (2005).

Finally, Plaintiff's contend that even in the absence of fraud allegations, they still state a claim for attorney malpractice since Feiner was representing their interests when drafting the notes at issue. However, this theory of liability has been rejected by the First Department. In *Fortress Credit Corp. v. Dechert LLP*, 89 A.D.3d 615, 616-17 (1st Dep't 2011), the Court dismissed a legal malpractice claim, concluding that the parties had no attorney-client relationship. In *Fortress*, attorney Marc Dreier proposed to plaintiffs that they participate in short-term note program to finance real estate purchase where the borrower would be Dreier's clients and Dreier was the guarantor. Plaintiff asked Dreier and his client to get an opinion letter from independent counsel before entering into

transaction. Plaintiff later sued the independent counsel, arguing that it relied on counsel's legal opinion that certain loan documents were duly executed and that the loan was a valid and binding obligation. The First Department rejected Plaintiff's legal malpractice claim, concluding that Plaintiff had no attorney-client relationship with counsel, even though "plaintiffs were meant to benefit by defendant's actions." The Court stated that "while plaintiffs were meant to benefit by defendant[-attorney]'s actions on behalf of [client] Solow Realty, that circumstance does not give rise to a duty to plaintiffs on the part of the attorney." *Id.* at 616. The same holds true here. To hold otherwise potentially would render any transactional attorney liable for legal malpractice to all parties to a contract that he or she drafted where the contract somehow inured to the other parties' benefit.

Thus, for all the reasons stated, Plaintiffs' legal malpractice claim is dismissed.

2. Aiding and Abetting Breach of Fiduciary Duty

Defendant Feiner next moves for dismissal of Plaintiffs' aiding and abetting breach of fiduciary duty claim, which states, in relevant part, that Feiner knew that TAG owed a fiduciary duty to Plaintiffs, and that Feiner assisted TAG in breaching that duty through his drafting of the convertible notes. *See* Compl. ¶¶ 211-13. Feiner seeks dismissal on statute of limitations and 3211(a)(7) grounds.

a. **Statute of Limitations**

New York law does not provide a single statute of limitations for breach of fiduciary duty claims. Instead, "the choice of the applicable limitations period depends on the substantive remedy that the plaintiff seeks." *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 139 (2009). Where the remedy sought is purely monetary in nature, the claim is construed as alleging "injury to property," and the three-year statute of limitations enumerated in CPLR § 214(4) applies. *Id.* Conversely, where the relief sought is equitable in nature, the six-year limitations period of CPLR § 213(1) applies. *Id.*

Since Plaintiffs seek monetary relief for this claim, the statute of limitations is three years. *See* Compl. ¶ 215 ("As a result of the participation in the breach of fiduciary duty by .... Feiner ... Plaintiffs now possess illiquid and worthless stock and warrants, and notes that will never be repaid, and therefore, have no value. Accordingly, Plaintiffs have suffered damages .... and seek, among other things, compensatory damages.").

An aiding and abetting breach of fiduciary duty claim, like all tort claims, accrues when all elements necessary to state a cause of action can be truthfully alleged. *IDT Corp.*, 12 N.Y.3d at 139. "To determine timeliness, we consider whether plaintiff's complaint must, as a matter of law, be read to allege damages suffered so early as to render the claim time-barred." *Id.* In *IDT Corp.*, the complaint did not allege an exact

date of injury, but the Court of Appeals inferred that the injury must have occurred before a certain date – the date of the parties' arbitration – since the injury alleged was the breach of contract at issue in the arbitration.

Similarly here, Plaintiffs do not provide a precise date of injury in the Complaint. Instead, the injury alleged is the drafting of the convertible notes. As discussed above, Plaintiffs allege that Feiner was drafting notes on behalf of "TAG investors" as late as June 13, 2008. (Compl. ¶ 86.) Plaintiffs do not dispute that this is the latest date alleged, nor do they offer a later date in their papers. Instead, Plaintiffs contend that the injury accrued on the maturity date of the notes in 2010. However, Plaintiffs provide no support for this contention, and according to the Complaint, Plaintiffs' damages were suffered when the notes were drafted and funds were sent from Plaintiffs' accounts to the TAG affiliated entities. *See* Compl. ¶¶ 211-213.

Thus, Defendant has made a prima facie demonstration that the statute of limitations began to run in June 2008, more than three years before the first action was filed in November 2011. Plaintiffs fail to "raise an issue of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether it actually commenced the action within the applicable limitations period." *City of Yonkers v. 58A JVD Indus., Ltd.*, 115 A.D.3d 635, 635 (2d Dep't 2014). Thus, Plaintiffs' aiding and abetting breach of fiduciary duty claim is dismissed on statute of limitations grounds as to Defendant Feiner

b. **Failure to State a Claim**

Even assuming, *arguendo*, that Plaintiffs' aiding and abetting claim were not time-barred, the claim still would merit dismissal for failure to state a cause of action. A claim for aiding and abetting a breach of fiduciary duty requires: "(1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003).

As discussed, *infra,* Plaintiffs have failed to asset an underlying breach of fiduciary duty by the TAG Defendants. In the absence of a viable breach of fiduciary duty claim, no aiding and abetting claim can lie. Therefore, Plaintiffs' aiding and abetting claim merits dismissal under CPLR 3211(a)(7).

3. Unjust Enrichment

Plaintiffs ground their unjust enrichment claim as to Feiner in the allegation that Feiner should not be permitted to keep the attorneys' fees received "when the TAG Defendants transferred Plaintiffs' funds into speculative and illiquid note investments." *See* Compl. ¶ 222. This claim alleges the same facts and the same wrong as Plaintiffs' legal malpractice and aiding and abetting fiduciary duty claims. Thus, under New York law, the statute of limitations for this unjust enrichment claim is the same as for the

malpractice and aiding and abetting claims – three years. *See Maya NY, LLC v. Hagler*, 106 A.D.3d 583, 585 (1st Dep't 2013) (noting that "[u]nder New York law, there is no identified statute of limitations period within which to bring a claim for unjust enrichment" but concluding that where unjust enrichment claim based upon same facts as breach of contract claim, the statute of limitations mirrors that of the breach of contract claim). Accordingly, Plaintiffs' claim fails on statute of limitations grounds.

4. Fraud

The final claim asserted by Plaintiffs against Defendant Feiner is for fraud. Although Feiner first seeks dismissal of this claim on statute of limitations grounds,[3] the claim merits dismissal as duplicative of Plaintiffs' legal malpractice claim.

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[3] Feiner's motion to dismiss the fraud claim on statute of limitations grounds lacks merit. "A cause of action in fraud must be commenced within six years of the date of the fraudulent act, or within two years of the date the fraud was, or with reasonable diligence could have been, discovered." *Rite Aid Corp. v. Grass*, 48 A.D.3d 363, 364 (1st Dep't 2008) (citing CPLR 213(8)). Here, Plaintiff asserts that it first was put on notice of the potential wrongdoing after a February 2011 letter from State Street. *See* Compl. ¶¶ 162-64. Feiner does not dispute this date or allege that the fraud could have been discovered earlier. Thus, the fraud claim was timely when the first complaint was filed in November 2011 – less than two years after the date that fraud claim could have been discovered. After this first complaint was dismissed without prejudice by the Court on January 22, 2013, the instant complaint was filed within six months. Accordingly, the action is timely under CPLR 205(a), which states that "[i]f an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance ... the plaintiff ... may commence a new action upon the same ... series of transactions or occurrences within six months after the termination..." Here, the prior action was terminated by the Court through its dismissal order, and the new March 20, 2013 falls with the ambit of CPLR 205(a).

As pleaded, Plaintiffs' legal malpractice claim is premised on the same allegations and asserts the same damages as their fraud claim. In support of the fraud claim, Plaintiffs allege that the TAG Defendants hired Feiner as their legal counsel and that Feiner failed to disclose to Plaintiffs that he also represented them with respect to the convertible notes and the wiring of funds to the TAG-affiliated companies. *See* Compl. ¶ 225. The same allegations underlie the legal malpractice cause of action. *See* Compl. ¶¶ 231-232 ("The TAG Defendants hired Feiner as legal counsel to draft many of the convertible notes at issue. ... Feiner acted as counsel to the TAG Defendants, who were Plaintiffs' agents, and simultaneously acted as Plaintiffs' counsel in drafting the notes and with respect to the TAG Defendants' transfer of Plaintiffs' funds to IEAH and PPTI."). Further, Plaintiffs allege the same damages for both claims. *Compare* Compl. ¶ 228 ("As a result of Feiner's conduct, Plaintiffs now hold illiquid and essentially worthless investments and have accordingly suffered damages.") *with* Compl. ¶ 240 (same). Accordingly, the fraud claim is duplicative of the legal malpractice claim and must be dismissed. *See Carl v. Cohen*, 55 A.D.3d 478, 478-79 (1st Dep't 2008) ("The fraud claim was duplicative of the legal malpractice claim since it was not based on an allegation of independent, intentionally tortious conduct and failed to allege separate and distinct damages.") (internal citations omitted).

C. *Defendants Cornell and Tagliaferri's Motions to Dismiss* (Motion Sequence 004 and 005)

The remainder of Plaintiffs' claims are asserted against Defendants Cornell and Tagliaferri: (1) breach of contract; (2) alter ego; (3) breach of the implied covenant of good faith and fair dealing; (4) unjust enrichment; (5) fraud; (6) breach of fiduciary duty; (7) negligent misrepresentation; (8) fraud in the inducement; (9) constructive fraud; and, (10) aiding and abetting breach of fiduciary duty. These claims will be addressed below, after consideration of Defendants' threshold standing argument.

1. Standing

Defendants Cornell and Tagliaferri first argue that Plaintiffs fail to sufficiently allege standing to assert claims on behalf of the Bernice Goldin IRA. Plaintiffs Steven and Rochelle Goldin bring the Bernice Goldin IRA-related claims "on behalf of Bernice Goldin's IRA," as the "Co-Executor" and "Co-Executrix" of Bernice Goldin's Estate. Defendants' claim that the Complaint is deficient because it does not allege that Plaintiffs were designated as beneficiaries of the IRA or that the IRA passed into Bernice Goldin's estate at her death. In opposition, Plaintiffs produce the application for the Bernice Goldin IRA, in which Plaintiffs are named as the primary beneficiaries for the account. *See* Affirmation of Brian J. Neville Ex. J.

For the purpose of the instant motion, taking all inferences in Plaintiffs' favor, standing has been sufficiently alleged. While Defendants correctly note that the IRA application submitted by Plaintiff is not fully executed, this raises, at most, an issue of fact and does not require dismissal of all claims related to the Bernice Goldin IRA with prejudice. However, while Plaintiffs' claims are not dismissed on standing grounds, they nonetheless merit dismissal for the reasons that follow.

2. Breach of Contract and Alter Ego

Plaintiffs' breach of contract claim stems from the allegation that Cornell and Tagliaferri "invest[ed] Plaintiffs' funds according to a fraudulent scheme in which Plaintiffs' funds were transferred to various entities and individuals in the form of a convertible note." (Compl. ¶ 186.) Accordingly, Plaintiffs contend that Cornell and Tagliaferri breached the IMAs. *Id.*

Notably, however, Cornell and Tagliaferri are not parties to the IMAs. The parties to the April 17, 2003 IMA were TAG and the Bernice Goldin IRA, and the parties to the January 10, 2005 IMA were TAG and the Paul Goldin Marital Trust B. *See* Affidavit of James A. Tagliaferri Exs. B&C. Moreover, while Cornell signed both documents, she did not do so personally; instead, she signed, as Plaintiffs concede, on behalf of TAG. *Id.*; *see also* Compl. ¶ 39. Thus, neither Cornell nor Tagliaferri may be held individually

liable as a party to the IMAs. *See Newman v. Berkowitz*, 50 A.D.3d 479, 479 (1st Dep't 2008) ("This breach of contract action should have been dismissed because defendant, as an individual, was not a party to the contract."); *Riverbank Realty Co. v. Koffman*, 179 A.D.2d 542, 542-43 (1st Dep't 1992) ("The moving defendants are not parties to the exclusive brokerage agreement between plaintiff and defendant P.A. Realty Corporation, and thus plaintiff's causes of action against them for breach of contract and quantum meruit were properly dismissed.").

Plaintiffs do not dispute that Cornell and Tagliaferri cannot be held individually liable as parties to the IMAs. Plaintiffs instead contend that Cornell and Tagliaferri should be held liable as the alter egos of TAG.

Piercing the corporate veil is considered "an extraordinary measure." *Harrogate House v. Jovine*, 2 A.D.3d 108, 108 (1st Dep't 2003). To survive dismissal, such a claim requires a pleading that the corporate owners exercised complete domination and control over the corporation and that they "abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene." *Morris v. New York State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 142 (1993). "Factors to be considered in determining whether the owner has 'abused the privilege of doing business in the corporate form' include whether there was a 'failure to adhere to corporate formalities, inadequate capitalization, commingling of assets, and use

of corporate funds for personal use.'" *East Hampton Union Free School Dist. v. Sandpebble Builders, Inc.*, 66 A.D.3d 122, 127 (2d Dep't 2009), *aff'd,* 16 N.Y.3d 775 (2011).

In support of their alter ego claim, Plaintiffs offer only conclusory allegations, parroting the factors listed above. Plaintiffs plead that as the owners of TAG, Cornell and Tagliaferri "exercised complete domination and control of the operation, management and financial affairs of TAG" and "used their power over TAG to further their personal interests." (Compl. ¶¶ 243-44.) Plaintiffs likewise state that "Cornell and Tagliaferri repeatedly disregarded the required corporate formalities" and "did not adequately capitalize TAG." *Id.* ¶¶ 245-46. Such conclusory statements do not offer any factual predicate for Plaintiffs' claims. *See Barnelli & Cie SA v. Dutch Book Fund SPC, Ltd.*, 95 A.D.3d 736, 737 (1st Dep't 2012) (dismissing veil piercing claim where "the conclusory allegations in the complaint [were] insufficient"); *Albstein v. Elany Contracting Corp.*, 30 A.D.3d 210, 210 (1st Dep't 2006) (holding that piercing the corporate veil claim was properly rejected where plaintiff "alleged nothing more than that the corporation was 'undercapitalized' and functioned as defendant's 'alter ego'" and "failed to plead any facts to substantiate such conclusory claims"). Thus, Plaintiffs' breach of contract and alter ego claims are dismissed.

3. Breach of the Implied Covenant of Good Faith and Fair Dealing

Plaintiffs' breach of the implied covenant claim is premised on the same facts as their breach of contract claim. In support of their count five breach of the implied covenant claim, Plaintiffs allege that "[p]ursuant to the IMAs, Plaintiffs reasonably expected that the TAG Defendants would invest their money for Plaintiffs' benefit in accordance with Plaintiffs' stated investment objective" and that the TAG Defendants failed to do so. (Compl. ¶¶ 194, 195.) Specifically, Plaintiffs allege that the TAG Defendants reported inflated account values and charged management fees based on the inflated values. *Id.* ¶ 195. In addition, Plaintiffs contend that the TAG Defendants made personal loans using Plaintiffs' money and did not invest Plaintiffs' funds according to Plaintiffs' investment objectives. *Id.* Such allegations mirror the pleading offered in support of Plaintiffs' breach of contract claim. *See* Compl. ¶ 186 ("The TAG Defendants were not authorized to make personal loans to the TAG Defendants' associates ... The TAG Defendants also engaged in these unlawful actions in order to earn higher management fees on inflated asset values in Plaintiffs' accounts."). In addition, Plaintiffs seek the same damages for each claim. *Compare* Compl. ¶ 187 *with* ¶ 196; *see also* "Conclusion" on p. 59-60 of the Complaint.

Since Plaintiffs premise their breach of the implied covenant claim on the same facts alleged in their breach of contract claim, the implied covenant cause of action is

dismissed as duplicative. *See Amcan Holdings, Inc. v. Canadian Imperial Bank of Commerce*, 70 A.D.3d 423, 426 (1st Dep't 2010) ("The claim that defendants breached the implied covenant of good faith and fair dealing was properly dismissed as duplicative of the breach-of-contract claim, as both claims arise from the same facts and seek the identical damages for each alleged breach.").

4. Unjust Enrichment

Plaintiffs' unjust enrichment claim alleges that Cornell and Tagliaferri "benefitted from the receipt of commissions, fees and loans at Plaintiffs' expense." (Compl. ¶ 222.) Further, Plaintiffs contend that Cornell and Tagliaferri "earned undisclosed fees and charged an investment advisory fee based on [] inflated assets that are now worthless." *Id.* As alleged throughout the Complaint, the fees and commissions purportedly were earned either pursuant to the IMA or in violation of the IMA. *See, e.g., id.* ¶ 66 ("Furthermore, these additional commissions were undisclosed to the Plaintiffs and in direct contravention to the IMAs, which clearly set forth the management fee schedule, and did not allow the TAG Defendants to earn additional undisclosed commissions on Plaintiffs' accounts."); *see also id.* ¶¶ 38, 42, 46, 185-86.

"The existence of a valid and enforceable written contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the

same subject matter." *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 388 (1987). This bar applies to the instant unjust enrichment claim notwithstanding the fact that Cornell was not a signatory to the IMAs. *See Bellino Schwartz Padob Advert., Inc. v. Solaris Marketing Grp., Inc.*, 222 A.D.2d 313, 313 (1st Dep't 1995) ("The existence of an express contract between Solaris and plaintiff governing the subject matter of the plaintiff's claim also bars any quasi-contractual claims against defendant Titan, as a third-party nonsignatory to the valid and enforceable contract between those parties."); *see also Melcher v. Apollo Medical Fund Mgmt. LLC*, 105 A.D.3d 15, 28 (1st Dep't 2013) ("Melcher argues that because he has no breach of contract claim against Fradd, he can properly assert a quasi-contact claim against him. However, *Clark–Fitzpatrick* did not draw that distinction, and this Court has repeatedly rejected this argument.") Therefore, according to the facts as pleaded, the IMA governs the payment of fees and thus precludes Plaintiffs' quasi-contract unjust enrichment claim as to Cornell and Tagliaferri.

5. Fraud Claims

a. **Failure to Plead with Particularity**

Plaintiffs next assert several fraud claims, all of which suffer from the same defect – a lack of particularity. Plaintiffs bring fraud, fraudulent inducement, constructive fraud,

and negligent misrepresentation claims against Cornell and Tagliaferri premised on allegations made collectively as to the "TAG Defendants." *See, e.g.*, Compl. ¶ 170 ("The TAG Defendants misrepresented and omitted material facts by failing to inform Plaintiffs that municipal bond and security positions would be sold in their accounts and those funds would be invested in illliquid convertible notes...") (fraud); ¶ 191 ("The TAG Defendants, while acting as investment advisors ... supplied fraudulent and inadequate information to the Plaintiffs with respect to the holds in their accounts.") (negligent misrepresentation); ¶ 198 ("The TAG Defendants made material misrepresentations to Plaintiffs in order to induce them to enter into the IMAs.") (fraudulent inducement); ¶ 206 ("The TAG Defendants misrepresented and omitted material facts...") (constructive fraud). Such group pleading does not suffice to state a fraud claim.

CPLR 3016(b) requires that "[w]here a cause of action or defense is based upon misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, the circumstances constituting the wrong shall be stated in detail." Thus, a fraud claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail. *Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dep't 2006).

Here, Plaintiffs offer no such particularity, instead making the allegations to support the fraud claims against Cornell and Tagliaferri as to the "TAG Defendants" collectively. *See id.*; *see also Aetna Casualty & Surety Co. v. Merchants Mut. Ins. Co.*, 84

A.D.2d 736, 736 (1st Dep't 1981) (rejecting fraud claim where "pleaded against all defendants collectively without any specification as to the precise tortious conduct charged to a particular defendant."); *CIFG Assur. North American, Inc. v. Bank of America, N.A.*, 41 Misc.3d 1203(A) at *3 (Sup. Ct. N.Y. Cnty. 2013) ("A claim involving multiple defendants must make specific and separate allegations for each defendant."); *Excel Realty Advisors, L.P. v. SCP Capital, Inc.*, 2010 WL 5172417 (Sup. Ct. Nassau Cnty. Dec. 2, 2010) (dismissing fraud claim where "primarily based upon a series of oblique averments which, in relevant part, lump the defendants together "without any specification as to the precise" fraudulent conduct attributed to each, i.e., without identifying the discrete, fraudulent acts supposedly committed by the separately named parties.").

The court is mindful that CPLR 3016(b) must not be so strictly interpreted as to prevent an otherwise valid cause of action in situations when it is impossible to state in detail the circumstances constituting the fraud. *See Pludeman v. N. Leasing Sys., Inc.*, 10 N.Y.3d 486, 491 (2008). This is particularly so where "where concrete facts are peculiarly within the knowledge of the party charged with the fraud." *Id.* Here, however, Plaintiffs even fail to allege facts of which they themselves should have knowledge. For example, Plaintiffs contend that the "TAG Defendants made [ ] misrepresentations ... to induce Plaintiffs to continue holding accounts at TAG." (Compl.

¶ 173.) Despite the fact that these representations were made to Plaintiffs, the Complaint offers no detail as to who made the misrepresentations, what was said, or when it was said. The Complaint is replete with such non-particularized assertions. *See, e.g., id.* ¶ 191 ("The TAG Defendants, while acting as investment advisers, and for payment in the form of management fees, supplied fraudulent and inadequate information to the Plaintiffs with respect to the holdings in their accounts. Plaintiffs relied on the TAG Defendants' misinformation...").

Accordingly, Plaintiffs' claims for fraud, fraudulent inducement, constructive fraud, and negligent misrepresentation are dismissed as inadequately pleaded as to Cornell and Tagliaferri under CPLR 3016(b).

b. **Fraudulent Inducement**

While Plaintiffs' fraud claims are dismissed for the reasons set forth above, the fraudulent inducement claim merits additional attention. Even if Plaintiff's fraudulent inducement claim were adequately pleaded under CPLR 3016(b), it nonetheless would be dismissed for failure to state a claim. For a fraudulent inducement claim to be viable, "it must be demonstrated that there was a false representation, made for the purpose of inducing another to act on it, and that the party to whom the representation was made

justifiably relied on it and was damaged." *Perrotti v. Becker, Glynn, Melamed & Muffly LLP*, 82 A.D.3d 495, 498 (1st Dep't 2011).

Plaintiffs' claim here distills down to an allegation that the "TAG Defendants" entered into the IMA while lacking the intent to perform thereunder. Plaintiffs allege that the "TAG Defendants" made certain false representations prior to entering into the IMAs regarding the manner in which funds would be invested under the IMAs. (Compl. ¶ 198.) Even assuming that Cornell and Tagliaferri themselves entered into the IMAs, such allegations fail to state a fraudulent inducement claim. *See Manas v. VMS Assoc., LLC*, 53 A.D.3d 451, 453 (1st Dep't 2008) ("A fraud-based cause of action is duplicative of a breach of contract claim "when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract."). Accordingly, even if properly pleaded under CPLR 3016(b), the fraudulent inducement claim still would be dismissed as to Cornell and Tagliaferri.

6. Breach of Fiduciary Duty Claims

Plaintiffs next bring a claim for breach of fiduciary duty against Cornell and Tagliaferri and a separate claim for aiding and abetting breach of fiduciary duty against Cornell. These claims will be considered in turn.

a. **Breach of Fiduciary Duty**

The breach of fiduciary duty claim is grounded in the assertion that the "TAG Defendants" took advantage of their trusted position as investment advisors to "scam" Plaintiffs by "liquidating their more conservative investments and transferring Plaintiffs' funds to TAG Affiliated Companies under the pretense of convertible note instruments, which were never intended to be repaid to Plaintiffs." (Compl. ¶ 178.) Again, the Complaint alleges that the "TAG Defendants" received commissions and fees for these transfers, and that "[t]hese transfers were contrary to the IMAs." *Id.* ¶¶ 178-79.

As a threshold matter, this claim is pleaded collectively as to the TAG Defendants as a whole and contains no particularized allegations at to Cornell and Tagliaferri. This group pleading runs afoul of CPLR 3016(b), as Plaintiffs' allegations "are in essence claims of fraud that have not been pleaded with particularity." *Burry v. Madison Park Owner LLC*, 84 A.D.3d 699, 700 (1st Dep't 2011). Plaintiffs' breach of fiduciary duty allegations mirror the contentions offered in support of their fraud claim as to Cornell and Tagliaferri and similarly lack specificity. *Compare* Compl. ¶¶ 178-179 (breach of fiduciary duty claim) *with* Compl. ¶¶ 168, 171 ("[T]he TAG Defendants transferred Plaintiffs' funds to various entities and individuals under the guise of convertible loan instruments which were never intended to be repaid to Plaintiffs. ... [T]he TAG Defendants were also receiving commissions and fees from the entities to which

Plaintiffs' funds were transferred without Plaintiffs' knowledge.") (fraud claim). Thus, the instant claim merits dismissal as a duplicative fraud claim that is pleaded without particularity.

b. **Aiding and Abetting Breach of Fiduciary Duty**

Plaintiffs aiding and abetting claim against Cornell is premised on their breach of fiduciary duty claim against the "TAG Defendants," a group that includes Cornell. "A claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). Here, Plaintiffs' claim fails because no underlying breach has been alleged. *See supra,* Section III.C.6.a; *see also Fiala v. Met. Life Ins. Co.*, 6 A.D.3d 320, 323 (1st Dep't 2004) (dismissing aiding and abetting claim where underlying breach of fiduciary duty claim dismissed). However, even if an underlying breach were alleged, Plaintiffs' allegations distill down to the claim that Cornell aided and abetted her own breach of fiduciary duty, which renders that aiding and abetting claim duplicative of the underlying breach claim. Such a claim logically fails.

IV. Conclusion

Accordingly, it is

ORDERED that Defendant Feiner's motion to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; 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 this court bear the amended caption; and it is further

ORDERED that counsel for the movant shall serve a copy of this order with notice of entry, upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158) and the Clerk of the E-filing Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further

ORDERED that Defendant Cornell's motion to dismiss the complaint herein is granted; and it is further

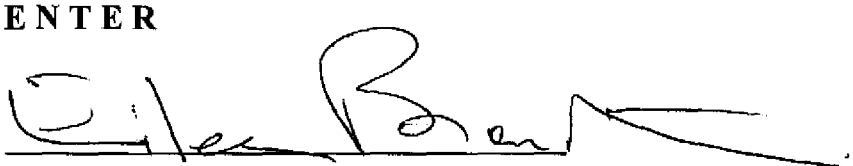
ORDERED that Defendant Tagliaferri's motion to dismiss the complaint herein is granted; and it is further

ORDERED that Plaintiffs are granted leave to serve an amended complaint as to replead the fraud, breach of fiduciary duty, negligent misrepresentation, constructive fraud, and aiding and abetting breach of fiduciary duty claims against Defendants Cornell and/or Tagliaferri (counts one, two, four, seven, and eight) within 20 days after service on Plaintiffs' attorney of a copy of this order with notice of entry; and it is further

ORDERED that, in the event that Plaintiffs fail to serve and file an amended complaint in conformity herewith within such time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation by Defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action as to Defendants Cornell and/or Tagliaferri, with prejudice, and with costs and disbursements to each defendant as taxed by the Clerk.

Dated: New York, New York
May 20, 2014

ENTER



Hon. Eileen Bransten, J.S.C.