

United States District Court, S.D. New York.
Thomas WALTHER, Lagonda, Ltd. and Miura Trust, Plaintiffs,
v.
MARICOPA INTERNATIONAL INVESTMENT, CORP. et al., George Liebmann, Kenneth
Tsang, and Charles Schwab & Co., Inc., Defendants.
No. 97 CIV. 4816(HB).
April 17, 1998.

OPINION and ORDER

BAER, District J.

*1 Defendants Maricopa International Investment Corp. ("Maricopa"), George Liebmann, Kenneth Tsang, and Charles Schwab & Co., Inc. ("Schwab") move separately to dismiss each of the plaintiffs eleven claims. For the reasons discussed below, the motions to dismiss are GRANTED in part and DENIED in part.

I. Background

Plaintiff Thomas Walther is a New York City art curator and collector who invested \$4 million in a hedge fund through two Bahamian offshore entities, Miura Trust ("Miura") and Lagonda Ltd. ("Lagonda"). Miura and Lagonda are also plaintiffs in this action. Walther is the donor and beneficiary of Miura. Miura owns the stock of Lagonda. Defendants George Liebmann and Kenneth Tsang were investment advisors to Walther, and allegedly persuaded him to create the Bahamian offshore entities. According to the Amended Complaint, "[a]t all relevant times, when Liebmann was advising Walther, Liebmann was doing so in his own capacity." Amended Compl. ¶ 11. During this period, Liebmann resided in New York. Amended Compl. ¶ 10.

Maricopa is a Florida corporation with its principal place of business in Naples, and engages in the business of rendering investment advice. Amended Compl. ¶ 12. Kenneth Tsang is an officer and director of Maricopa whose principle responsibility is directing the corporation's investments in the debt and equity markets. Amended Compl. ¶¶ 13-14. Schwab is a California corporation with its principal place of business in San Francisco and branches around the country including one in Naples, Florida--where it provides securities brokerage and related financial services. Amended Compl. ¶ 15.

In the summer of 1995, Walther hired Liebmann to assist him with financial issues such as banking, tax, and securities investment. According to Walther, these issues were very challenging to him, and he therefore sought Liebmann's assistance. Amended Compl. ¶ 17. On July 20, 1995 Walther and Liebmann traveled to Florida to meet with Tsang and David Mobley, the President of Maricopa. Amended Compl. ¶¶ 19-20. These meetings were arranged by Liebmann. The next day, Walther met with Tsang to discuss an investment relationship with Maricopa. He was particularly concerned about minimizing any risk to his capital. Tsang allegedly told Walther that Maricopa's system avoids risk because the "computer stops ... preclude a stock from falling," Amended Compl. ¶ 23, thus suggesting that the securities Walther bought would have stop loss orders built into the computer and if the stock fell from its purchase price or thereabouts the computer was programmed to sell the stock. Walther also asserts that he "made it clear to Tsang that [he] wanted no exceptional risks and that he was interested in preserving any principal that would be invested." Amended Compl. ¶ 25.

On December 17, 1995 Liebmann wrote to Walther with respect to the proposed fees for his advisory services, which appear to be linked to the successfulness of any investments undertaken. [FN1] Six days later, Walther met with Liebmann and Tsang on Saturday of Christmas weekend for lunch at a Japanese restaurant in New York. That conversation focused on Maricopa's track record and its service charges. Amended Compl. ¶¶ 30, 32. This is the only New York activity attributed to Tsang or Maricopa by the plaintiff.

FN1. The letter states "[s]uppose that it is a dull year in the market and that the Fund creates 25% in NEW NET PROFIT ..., even after my bonus, in this dull year, you would still be receiving a yield of 17.44%" Amended Compl. ¶ 30.

*2 Thereafter, the Lagonda and Miura entities were created as investment vehicles for Walther, who subsequently contributed \$4 million. Amended Compl. ¶¶ 34-35. Liebmann and Tsang then invested this money in a risky hedge fund, which the plaintiffs claim was unsuitable for "Walther's conservative investment goals." Amended Compl. ¶ 42. The hedge fund operated through a Schwab One International Account ("Schwab Account"), which Tsang opened in January 1996. Amended Compl. ¶ 53.

Walther contends it was April 1996 before the defendants provided him with account information. In April, he received a February Schwab Account statement ("February statement") which indicated a 6.5% loss, or \$260,000 of the principal invested. Amended Compl. ¶¶ 66-67 & Ex. 1, February Statement at pp. 1-2. The February statement also revealed that Walther's funds had been invested in put and call options, as well as a variety of what the defendants argue are speculative companies. Amended Compl., Ex. 1, February Statement at pp. 3-10. Further, the February statement indicated that the Dow Jones Industrial Average had risen by 7.2% in the first two months of the year. Amended Compl., Ex. 1, February Statement at p. 1. Thereafter, the plaintiff received Schwab Account statements from March, April and May indicating modest increases of 1.2%, 3.8% and 5.01% respectively. Amended Compl., Ex. 1, March Statement at pl ., April Statement at p. 1, May Statement at p. 1.

Accordingly, Walther asserts that he did not realize that his funds were invested in high risk securities until late September 1996, after receiving a June Schwab Account statement ("June statement") indicating a \$480,000 loss of principal. Amended Compl. ¶ 73 & Ex. 1, June Statement at p. 1. Between January 21 and November 30, 1996 Walther's \$4 million investment lost 23% of its value, or \$920,000. Amended Compl. ¶ 83.

The plaintiffs commenced this action on June 30, 1997 and amended the complaint on August 14, 1997. The Amended Complaint asserts eleven claims: (1) against all defendants, for federal securities fraud under § 10(b) of the 1934 Securities Exchange Act (the " § 10(b) claim"); (2) against Tsang, for violating the Florida Blue Sky Law; (3) against Maricopa, for violating the Florida Blue Sky Law; (4) against Schwab, for violating the Florida Blue Sky Law pursuant to an agency relationship; (5) against Schwab, for violating the Florida Blue Sky Law as an indirect participant; (6) against Schwab, sounding in negligence; (7) against Liebmann, for breach of fiduciary duty; (8) against Liebmann, for breach of contract; (9) against Tsang, for breach of contract; (10) against Maricopa, for breach of contract; and (11) against Maricopa, for negligent supervision. Amended Compl. ¶¶ 86-136. The plaintiffs contend that subject matter jurisdiction exists pursuant to 28 U.S.C. §§ 1331, 1332, and 1367.

II. Discussion

Following the kitchen sink approach to litigation, the four defendants move separately to dismiss each of the plaintiffs claims with an array of similar arguments. In the spirit of conserving judicial resources, something the parties failed to consider, I will only address the arguments that are dispositive of the motions to dismiss. With respect to the plaintiffs' § 10(b) federal securities claim, the defendants argue that the statute of limitations expired before the plaintiffs filed the complaint, that the requisite scienter requirement has not been satisfied, and that the alleged fraud is not in connection with the purchase or sale of a security. Maricopa and Tsang argue that the Court lacks personal jurisdiction under New York's long-arm statute, and therefore, contend that all state claims against them should be dismissed. Schwab argues that, as a matter of law, the plaintiffs cannot establish the requisite elements of the Florida Blue Sky Law and negligence claims. Should I decline to dismiss these claims, Schwab asserts that they should be stayed pending arbitration. Liebmann asserts that the breach of contract and fiduciary duty claims advanced against him should be dismissed for failure to state a claim upon which relief can be granted. Alternatively, Liebmann seeks dismissal pursuant to the Forum Non Conveniens doctrine. I address these arguments in turn.

A. Federal Securities Claim [FN2]

FN2. While Schwab joins in the request to dismiss the federal securities cause of action, I do not consider its motion since I later conclude that all claims brought against Schwab should be arbitrated. See *Infra* § II.C. The remaining defendants are Liebmann, Tsang and Maricopa. Personal jurisdiction over Tsang and Maricopa exists with respect to the federal securities claim since both parties are residents of Florida. See *Kidder, Peabody & Co., Inc. v. Maxus Energy Corp.*, 925 F.2d 556, 562 (2d Cir.1991) (pursuant to nationwide service of process, available where plaintiff brings a § 10(b) claim, personal jurisdiction is conferred over a defendant served anywhere within the United States).

1. Statute of Limitations

*3 Section 10(b) claims must be brought within one year after discovery of the facts which form the basis of the alleged fraud, and in no event more than three years from the date the violation occurred. See *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991). "A plaintiff in a federal securities case will be deemed to have discovered fraud for purposes of triggering the statute of limitations when a reasonable investor of ordinary intelligence would have discovered the existence of the fraud." *Dodds v. Cigna Securities, Inc.*, 12 F.3d 346, 350 (2d Cir.1993). Discovery includes actual, constructive and inquiry notice. *Id.*

Inquiry notice involves a two-pronged analysis. First, the court must determine whether the "circumstances would suggest to an investor of ordinary intelligence the probability that [he] has been defrauded" *Id.* These circumstances have been labeled "storm warnings." *Id.* If storm warnings are found to exist, the investor has a duty to inquire through the exercise of reasonable diligence, which requires the pursuit of facts which would have disclosed the fraud. See *Kosovich v. Thomas James Associates, Inc.*, 1995 WL 135582, at *4 (S.D.N.Y. Mar.29, 1995). Consequently, the second prong of the analysis is the determination of whether the investor has discharged the duty to inquire by exercising reasonable diligence. *Id.* "Where the undisputed facts set forth in the complaint establish inquiry notice and the lack of due diligence, 'resolution of

the issue on a motion to dismiss is appropriate." ' Butala v. Agashiwala, 1997 WL 79845, at *4 (S.D.N.Y. Feb.24, 1997) (citing Dodds, 12 F.3d at 352 n. 3).

The plaintiffs argue that inquiry notice did not exist until September 1996, when Walther received the June statement detailing a 10.8% decline in his investment, or \$480,000. The defendants assert that storm warnings suggesting the possibility of fraud existed in April 1996, when Walther received the February statement indicating that he had lost 6.5% of the principal invested, or \$260,000. While an interesting question, I conclude that inquiry notice did not exist when Walther received the February statement in April 1996.

The February statement is the first one that Walther received, and only reflected one month of trading. Conversely, the cases cited by the defendants all involve a greater quantum of information known to the investor, and a lengthier period of time during which the fraud could have been discovered. See *Teichner v. Painewebber Inc.*, 1997 WL 328069, at *1-2 (S.D.N.Y. Jun.13, 1997) (inquiry notice found where during 17 month period complaints were made concerning unsuitability, plaintiff reviewed multiple account statements and obtained information concerning improprieties); *Kosovich v. Thomas James Associates, Inc.*, 1995 WL 135582, at *1, *3-4 (S.D.N.Y. Mar.29, 1995) (receipt of prospectuses disclosing the nature of the investment, monthly account statements and confirmation slips during three year period led court to conclude that inquiry notice existed); *Norniella v. Kidder Peabody & Co.*, 752 F.Supp. 624, 628 (S.D.N.Y.1990) (duty of inquiry triggered where plaintiff received 169 confirmation slips and 24 monthly statements detailing activity inconsistent with the plaintiff's "investment objective"); *Appel v. Kidder, Peabody & Co.*, 628 F.Supp. 153, 157-58 (S.D.N.Y.1986) (inquiry notice found where plaintiff received 16 monthly statements suggestive of churning activity from July 1980 through November 1981).

*4 Here, the quantum of information in Walther's possession--one account statement--and the time period where the fraud allegedly occurred--thirty days of trading activity--are insufficient evidence of circumstances suggestive of fraudulent investment behavior. The defendants argue that when considering the plaintiff's conservative investment goals, the 6.5% decline in principal should have deeply troubled him. Yet, even an investor with a conservative investment strategy should expect some fluctuation in stock price, given the occasional, if not inherent, volatility of the market. Accordingly, the 6.5% decline in value did not rise to the level of a storm warning sufficient to put the plaintiff on inquiry notice.

Indeed, the next three statements received by the plaintiff, covering March through May, all indicated a modest rise in Walther's investment, reflecting increases of 1.2%, 3.8% and 5.01% respectively. Amended Compl., Ex. 1, March Statement at p. 1., April Statement at p. 1, May Statement at p. 1. Thus, any anxiety raised by the February statement was quickly assuaged by the positive news reflected in the subsequent information the plaintiff received. Consequently, inquiry notice existed no earlier than September 1996, when Walther received the June statement which detailed a 10.8% decline in his investment. Since the plaintiffs filed the complaint in June 1997, the action was brought within one year of discovery of the facts constituting the alleged fraud.

Finally, concluding that the February statement alone triggered a duty of inquiry is inconsistent with the spirit of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which is presumably designed to discourage the filing of premature securities-related lawsuits. Simply put, the receipt of one bit of bad investment news, unless earth-shattering, should not function as the equivalent of a shot fired from a starter gun that sets off a mad dash to the courthouse.

2. Scierter

Defendants also move to dismiss for the failure to adequately plead the scienter element of the plaintiffs' § 10(b) fraud claim. In deciding the 12(b)(6) motion, I must accept as true the material facts alleged in the Amended Complaint and draw all reasonable inferences in favor of the plaintiffs. See *Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir.1995). "A court may not dismiss a complaint unless the movant demonstrates beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Primavera Familienstiftung v. Askin*, 173 F.R.D. 115, 122-23 (S.D.N.Y.1997) (internal quotations and citations omitted).

In order to state a claim for securities fraud that satisfies the heightened pleading requirements of the PSLRA, a plaintiff must allege facts giving rise to a strong inference of either reckless behavior or conscious misconduct. See *Novak v. Kasaks*, 1998 WL 107033, at *5 (S.D.N.Y. Mar.10, 1998) ("join [ing] the emerging consensus in this district that either conscious recklessness or actual intent satisfy the PSLRA's scienter requirement"); *In re Baesa Securities Litig.*, 969 F.Supp. 238, 241-42 (S.D.N.Y.1997) (plaintiff must allege facts supporting strong inference of conscious or reckless behavior by the defendants in order to satisfy the reform act); see also *Norwood Venture Corp. v. Converse Incorporated*, 959 F.Supp. 205, 208 (S.D.N.Y.1997) ("under the PSLRA a plaintiff in a private securities litigation action must now plead specific facts that create a strong inference of knowing misrepresentation on the part of the defendants"). Accepting as true the material facts alleged, and drawing all reasonable inferences in favor of the plaintiffs, I conclude that facts giving rise to a strong inference of reckless behavior have been sufficiently plead.

*5 The defendants were well aware of Walther's conservative investment goals, having been told that he "wanted no exceptional risks and that he was interested in preserving any principal that would be invested." Amended Compl. ¶ 25. When the plaintiff inquired into the riskiness of the proposed investment, at a meeting arranged by Liebmann, Tsang positively reassured him-- stating that Maricopa's "system avoided risk automatically" given the "computer stops that preclude a stock from falling." Amended Compl. ¶ 23. Presumably, these representations ultimately encouraged Walther to turn over control of \$4 million to Liebmann, Tsang and Maricopa.

But there was trouble in paradise. In less than a year, Walther lost \$920,000 of the principal he invested. Indeed, within the first thirty days of trading activity the investment declined in value by \$260,000. These drastic declines give rise to a strong inference of reckless behavior, rooted in Tsang's promise of a computer system with "stops" that "avoided risk automatically." Amended Compl. ¶ 23. See *Primavera*, 173 F.R.D. at 124 (allegations that defendant misrepresented the availability of a sophisticated analytical computer model supported a strong inference of conscious misbehavior). Seemingly, one would think, a system that "avoided risk automatically" would not result in the loss of \$920,000 in less than a year-- let alone more than a quarter of a million dollars in approximately 30 days. Thus, Tsang's representations about the system's capacity to avoid risk, and by extension Maricopa's, appear to be reckless.

A strong inference of reckless behavior, if not conscious misconduct, is also supported by the allegation that Tsang failed to disclose to Walther that the "the so-called computer stops could involve losses of 30% or more in a security." Amended Compl. ¶ 26. Given Walther's explicit desire to pursue a conservative investment strategy, it is reasonable to infer that Tsang intentionally failed to reveal the true nature of the computer system's ability to prevent risk, out of fear that the plaintiff would decline to fork over the \$4 million. At the very least, the omission evidences reckless behavior.

As to Liebmann, the plaintiffs allege that he never disclosed to Walther the high risk nature of many of the stocks being traded in the account, despite being aware of the conservative goals that the plaintiff held. Amended Compl. ¶ 44. This failure is somewhat striking, when considering Liebmann's role as an "investment advisor" who allegedly had discussed with Walther the fact that the plaintiff felt "very challenged by financial issues" and knew "that this was Walther's first time in the securities market." Amended Compl. ¶¶ 11, 17, 43. Armed with this information, Liebmann should have, from the outset, explained to the plaintiff the riskiness of the investments that were being made--especially since Liebmann knew of Walther's desire to preserve principal. Amended Compl. ¶ 25.

*6 Instead, it is alleged that for several months in the Summer and Fall of 1996, Walther persistently "asked Liebmann for information regarding the securities his money was invested in" only to receive "incomplete copies" of Schwab account statements that on average arrived "45 days late." Amended Compl. ¶ 71. In September, Walther first realized that the defendants were investing his money in high risk securities. Amended Compl. ¶ 73. When he explicitly communicated that he wanted "his funds invested in safe securities" it is further alleged that "Liebmann ignored Walther's wishes." Amended Compl. ¶¶ 73-74.

Taken together, the allegations against Liebmann give rise to a strong inference of reckless, if not conscious, misbehavior. Likewise, the plaintiff has adequately plead facts from which I can strongly infer that Tsang and Maricopa behaved recklessly. Therefore, the plaintiffs have sufficiently pled scienter under § 10(b) and Rule 10b-5 as interpreted in light of the PSLRA.

3. Connectedness Requirement

Maybe because of the season, the defendants take a third swing at the plaintiffs federal securities claim--but they miss again. The defendants assert that the § 10(b) claim should be dismissed because the allegedly fraudulent misrepresentations were not made in connection with the purchase or sale of a security. However, it is well-established that an investment contract constitutes a security for purposes of the federal securities laws. See *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99, 66 S.Ct. 1100, 90 L.Ed. 1244 (1946).

Under the *Howey* test, there are three requirements for finding an investment contract: (1) the investment of money; (2) in a common enterprise; and (3) with profits to be derived solely from the efforts of others. See *Revak v. SEC Realty Corp.*, 18 F.3d 81, 87 (2d Cir.1994). There is no dispute that the first and third requirements are met. Rather, the defendants argue that the plaintiffs have failed to allege a common enterprise. A common enterprise may exist by virtue of horizontal commonality, which requires "the tying of each investor's fortunes to the fortunes of the other investors by the pooling of assets" *Id.* at 88. Here, horizontal commonality does not exist, since Walther is alleged to be the sole investor. See *Cahill v. Contemporary Perspectives, Inc.*, 1986 WL 4696, at *3 (S.D.N.Y. Apr.15, 1986) (no horizontal commonality where plaintiff the only investor in the transaction giving rise to the alleged securities violation).

In *Revak*, the Second Circuit declined to address the issue of whether strict vertical commonality satisfied the common enterprise requirement. See *Revak*, 18 F.3d at 88. Nonetheless, the courts of the Southern District have consistently held that strict vertical commonality is sufficient to establish a common enterprise for purposes of an investment contract. See, e.g., *H.G. Heine v. Colton, Hartnick, Yamin & Sheresky*, 786 F.Supp. 360, 370 (S.D.N.Y.1992); *Dooner v. NMI Limited*,

725 F.Supp. 153, 158 (S.D.N.Y.1989); *Perez-Rubio v. Wyckoff*, 718 F.Supp. 217, 234 (S.D.N.Y.1989). To establish strict vertical commonality, the fortunes of the investor must be tied to the fortunes of the promoter. See *Revak*, 18 F.3d at 88. That is, "the fortunes of plaintiff and defendant [must be] linked so that they rise and fall together." *Dooner*, 725 F.Supp. at 159.

*7 In the instant case, strict vertical commonality exists since the success of Walther's investments were directly tied to the fortunes of the defendants. According to the plaintiffs the defendants "were to be paid only if Walther's funds made substantial gains." Amended Compl. ¶ 45. Consequently, if Walther's funds appreciated in value, the defendants were financially compensated. On the other hand, if Walther's investment did not perform well, the defendants were not paid. Given the link between the successfulness of the plaintiff's investment and the financial compensation paid to the defendants, the fortunes of investor and promoter were linked so as to establish strict vertical commonality in satisfaction of the common enterprise requirement. Accordingly, the motion to dismiss the § 10(b) claim on the ground that the allegedly fraudulent misrepresentations were not made in connection with the purchase or sale of a security must fail.

B. Personal Jurisdiction

"Personal jurisdiction over a defendant in a diversity action in the United States District Court for the Southern District of New York is determined by reference to the relevant jurisdictional statutes of the State of New York." *Beekman Paper Co., Inc. v. National Paper Products*, 909 F.2d 67, 69 (2d Cir.1990) (quoting *Beacon Enters. v. Menzies*, 715 F.2d 757, 762 (2d Cir.1983)). The plaintiffs second, third, ninth, tenth, and eleventh claims against Maricopa and Tsang are all state statutory or common law causes of action. Subject matter jurisdiction over these claims is obtained pursuant to the federal diversity statute, 28 U.S.C. § 1332. Thus, personal jurisdiction must be established pursuant to the relevant jurisdictional statutes of New York. The plaintiffs argue that personal jurisdiction exists under two long-arm provisions of the Civil Practice Law and Rules ("CPLR"), § 302(a)(1) and § 302(a)(3)(ii). Conversely, Maricopa and Tsang contend that the Court lacks personal jurisdiction under these provisions, thereby requiring dismissal of the state claims.

1. Transaction of Business

Section 302(a)(1) confers jurisdiction over a non-domiciliary defendant who "in person or through an agent ... transacts any business within the state." N.Y. C.P.L.R. § 302(a)(1). The plaintiffs argue that Maricopa and Tsang, through an agency relationship with Liebmann, transacted business with Walther in New York. While Liebmann's contacts with Walther in New York are fairly extensive, they cannot be imputed to Maricopa or Tsang because no agency relationship existed. Any assertion to the contrary is belied by the plaintiffs acknowledgment that "[a]t all relevant times, when Liebmann was advising Walther, Liebmann was doing so in his own capacity." Amended Compl. ¶ 11. Indeed, the plaintiffs allege facts establishing an independent and preexisting relationship between Liebmann and Walther, based on their friendship. Amended Compl. ¶ 11.

*8 Thus, the only basis for concluding that Maricopa and Tsang transacted business in New York is a single lunch meeting that occurred in a Japanese restaurant on December 23, 1995. Walther, Liebmann, and Tsang attended this meeting. Amended Compl. ¶ 32. A single meeting in New York does not constitute the transaction of business for purposes of jurisdiction if the activities engaged in were not substantial in nature. See *Berk v. Nemetz*, 646 F.Supp. 1080, 1083-85 (S.D.N.Y.1986) (no transaction of business where the defendants visited New York on one occasion, the discussions were exploratory, and simply constituted the initial step in the solicitation process); *Gates v. Pinnacle Communications Corp.*, 623 F.Supp. 38, 41 (S.D.N.Y.) (sole visit to New York did not satisfy § 302(a)(1) where the meeting was only part of protracted negotiations); *Compare Reiner & Co. v. Schwartz*, 41 N.Y.2d 648, 653, 394 N.Y.S.2d 844, 848, 363 N.E.2d 551, 554 (1977) (defendant transacted business in New York even though only one visit occurred, since the parties executed and negotiated the contract during this visit). If less than substantial activity during a singular visit constituted the transaction of business, "every corporation whose officers or sales personnel happen to pass the time of day with a ... customer in New York runs the risk of being subjected to the personal jurisdiction of the courts." *McKee Electric Co. v. Rauland-Borg Corp.*, 20 N.Y.2d 377, 382, 283 N.Y.S.2d 34, 37, 229 N.E.2d 604, 607 (1967).

The December 1996 meeting focused on Maricopa's track record and its service charges. Amended Compl. ¶ 32. Tsang did not negotiate any specific terms of the potential investment relationship with Walther. The parties did not execute any agreement. Rather, it appears that the parties simply ate a Christmas weekend meal, and chatted generally about Maricopa. Given the absence of substantial business activity, the December 1996 meeting did not constitute the transaction of business for purposes of § 302(a)(1). See *Berk*, 646 F.Supp. at 1085; *Gates*, 623 F.Supp. at 41-42.

2. Tort Committed Outside New York, Causing Injury Inside

Alternatively, the plaintiffs argue that personal jurisdiction over Tsang and Maricopa is sustainable pursuant to CPLR § 302(a)(3)(ii). This provision allows a court to exercise personal jurisdiction over any non-domiciliary who: commits a tortious act without the state causing injury to a person or property within the state ... if he ... expects or should reasonably expect the act to have substantial consequences in the state and derives substantial revenue from interstate or international commerce. [FN3]

FN3. Even if applicable, which it is not, § 302(a)(3)(ii) would only provide a jurisdictional basis for the plaintiffs' eleventh claim, which alleges that Maricopa negligently failed to properly supervise its employees. The other claims against Maricopa and Tsang do not meet the "tortious act" requirement of this statutory provision.

Maricopa and Tsang argue, correctly, that Walther has not suffered an "injury" within the state, as the statute requires. See N.Y. C.P.L.R. § 302(a)(3)(ii). Essentially, the plaintiff contends that since he resides in New York, his \$920,000 investment loss constitutes an injury in this state because it is in New York where he will suffer the economic consequences of the hedge fund's decline in value. However, it has "long been held that the residence or domicile of the injured party within [New York] is not a sufficient predicate for jurisdiction, which must be based upon a more direct injury within the State and a closer examination of consequences within the State than the indirect financial loss resulting from the fact that the injured person resides or is domiciled [here]." *Fantis Foods, Inc. v. Standard Importing Co., Inc.*, 49 N.Y.2d 317, 326, 425 N.Y.S.2d 783, 787, 402 N.E.2d 122, 126 (1980); see also *Cooperstein v. Pan-Oceanic Marine, Inc.*, 124 A.D.2d 632, 633-34, 507 N.Y.S.2d 893, 895 (2d Dep't 1986).

*9 In *Mareno*, the plaintiff, a resident of New York, brought an action alleging that the defendants wrongfully discharged him from his job in New Jersey. See *Mareno v. Rowe*, 910 F.2d 1043, 1045 (2d Cir.1990). The plaintiff asserted that personal jurisdiction existed pursuant to § 302(a)(3), arguing that the injury occurred in New York because that is where he would "suffer the economic consequences of his firing." *Id.* at 1046. The Second Circuit rejected this argument, reasoning that the injury occurred in New Jersey, the location of the original event that caused the harm. *Id.* Similarly, the situs of the injury in this case is the Bahamas, since that is where the original event causing the harm--the loss of the \$920,000-- occurred. "Undoubtedly, the exercise of personal jurisdiction must be based on a more direct injury within [New York] and a closer expectation of consequences within the state than the type of indirect financial loss alleged by [Walther]." See *Mareno*, 910 F.2d at 1046.

To reiterate, the plaintiffs are unable to establish a basis of personal jurisdiction over defendants Maricopa and Tsang. Consequently, the defendants' motions to dismiss the second, third, ninth, tenth, and eleventh claims are granted.

C. Claims against Schwab

Defendant Schwab moves to dismiss claims four through six for the alleged failure to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). Alternatively, Schwab moves to compel arbitration. Claims four and five allege violations of the Florida Blue Sky Law. Claim six sounds in negligence.

There is no dispute that these claims, as well as claim one, are arbitrable. However, the parties disagree as to the appropriate forum. On January 21, 1998 Walther initiated an arbitration before the American Arbitration Association (the "AAA"). In response, Schwab moved to enjoin this proceeding, contending that the relevant arbitration agreement does not authorize the AAA as an arbitration forum. Following oral argument, I temporarily stayed the arbitration.

The original account agreement ("original agreement"), executed by Lagonda and Schwab in January 1996, provided for "arbitration [of] any controversy ... relating to the Schwab One Account Agreement." *Drucker Aff.*, Ex. A at 34. This agreement did not restrict the arbitration forum. However, effective July 1, 1997, Schwab amended the terms of the account agreement ("amended agreement") and limited the forums where arbitration could occur to the National Association of Securities Dealers, the New York Stock Exchange, the Pacific Stock Exchange, and the Chicago Board Options Exchange. *Drucker Aff.*, Ex. A at 13.

I conclude, nevertheless, that the amended agreement is not applicable to the dispute between Walther and Schwab. The amended agreement states that "[a]mendments won't affect rights or obligations either [party] incur[s] before the effective date of the amendment." *Drucker Aff.*, Ex. A at 32. The dispute in this litigation pertains to account activity that occurred between January 21 and November 30, 1996.

*10 Consequently, the plaintiffs had the "right" and Schwab an "obligation" to participate in arbitration before the AAA on November 30, 1996--well in advance of July 1, 1997--the effective date of the amended agreement. Further, any ambiguity as to whether "rights or obligations" includes arbitration should be construed against Schwab, the drafter. See *Westchester Resco Co., L.P. v. New England Reinsurance Corp.*, 818 F.2d 2, 3 (2d Cir.1987) ("Where an ambiguity exists in a standard-form contract supplied by one of the parties, the well-established contra proferentum principle requires that the ambiguity be construed against that party.") (citation omitted). Accordingly, I hold that the arbitration initiated by Walther before the AAA can proceed forthwith, since the plaintiff had this "right" and Schwab this "obligation" prior to July 1, 1997. Pursuant to § 3 of the Federal Arbitration Act, the proceedings against Schwab in United States District Court are hereby stayed. See *McMahan Securities Co. L.P. v. Forum Capital Markets L.P.*, 35 F.3d 82, 85 (2d Cir.1994).

D. Claims against Liebmann

Defendant Liebmann moves to dismiss the breach of fiduciary duty and contract claims against him for failure to state a claim upon which relief can be granted. See Fed.R.Civ.P. 12(b)(6). Again, in deciding the 12(b)(6) motion, I must accept

as true the material facts alleged in the Amended Complaint and draw all reasonable inferences in favor of the plaintiffs. See *Kaluczky v. City of White Plains*, 57 F.3d 202, 206 (2d Cir.1995).

1. Claim Seven--Breach of Fiduciary Duty

The plaintiffs allege that Liebmann breached his fiduciary duty in at least five ways: (1) failing to tell Walther until October 1996 that his funds would be, and had been, invested in high-risk securities; (2) failing to provide copies of the Schwab Account statements until an average of 45 days after they were available; (3) telling Walther that in a "dull year in the market people made 25% on their money; (4) ignoring Walther's instructions to invest his money in low-risk securities; and (5) demanding that Walther fill out and sign a sham "Portfolio Selection Sheet." Amended Compl. ¶ 114. The plaintiffs also allege that Liebmann, when acting as an investment advisor, facilitated the relationship between Walther and Maricopa. According to Walther, these actions damaged him in the amount of \$920,000. Amended Compl. ¶ 115. The defendant contends that this claim must be dismissed because of the plaintiffs' inability to plead and prove that the acts allegedly committed by Liebmann caused the trading losses at issue.

At the very least, the plaintiffs must show that the breach of fiduciary duty constituted a substantial factor in the harm they allegedly suffered. See *Milbank, Tweed, Hadley & McCloy v. Boon*, 13 F.3d 537, 543 (2d Cir.1994). Here, the plaintiffs have adequately plead facts meriting an inference that "but for the circumstances that the fraud concealed, the investment would not have lost its value." *In re Gas Reclamation, Inc. Securities Litig.*, 733 F.Supp. 713, 721 (S.D.N.Y.1990). Given Walther's conservative investment instincts, it seems apparent that had Liebmann promptly provided him with financial statements, adhered to his desire to invest in low-risk securities and properly informed him about the riskiness of his investment, Walther would have uncovered the true nature of the hedge fund or more likely never entered into the relationship in the first place--and if he had, he would have taken steps to halt the losses earlier. I hold, therefore, that the plaintiffs have demonstrated that Liebmann's actions are at least a substantial factor in causing the trading losses at issue. Accordingly, the motion to dismiss count seven is denied. [FN4]

FN4. The defendant also argues that this claim must be dismissed for failure to allege facts that establish deceitful intent. I disagree. When considering Walther's lack of investment savvy and his limitations in dealing with financial issues, the fiduciary breaches alleged by the plaintiff give rise to an inference of deceitful intent by Liebmann. Even if I were to conclude otherwise, "[t]he weight of authority in New York clearly holds that proof of deceitful intent is not an element of a claim for breach of fiduciary duty." *McCoy v. Goldberg*, 810 F.Supp. 539, 548 (S.D.N.Y.1993).

2. Claim Eight--Breach of Contract Claim

*11 To properly plead breach of contract, a plaintiff must allege "the terms of the contract, each element of the alleged breach, and the resultant damage to the plaintiff." *Pits, Ltd. v. American Express Bank International*, 911 F.Supp. 710, 719 (S.D.N.Y.1996). The defendant argues, however, that this claim should be dismissed for failure to adequately plead consideration. Quite to the contrary, I conclude that the plaintiffs have adequately plead facts supporting an inference that Walther agreed to confer a benefit upon Liebmann. Most notably, the Amended Complaint alleges that the parties "orally agreed that Walther would pay Liebmann \$3000 per month" for general financial assistance, which presumably includes investment advice. Amended Complaint ¶ 17. The plaintiffs also allege that "Liebmann's fee was linked to any large gains" in the investment of the \$4 million. Amended Complaint ¶ 117. Finally, the plaintiffs point to a letter that "put into writing the compensation agreement" previously discussed with Liebmann. Amended Complaint ¶ 30. Because the plaintiffs have plead the requisite elements for breach of contract, including consideration, the motion to dismiss count eight is denied. [FN5]

FN5. I also deny the defendant's motion to dismiss this action pursuant to the Forum Non Conveniens doctrine, since Walther is a New York resident, the majority of activities alleged against Liebmann occurred in New York, and the plaintiffs chose to commence this action here. See generally *Manu International, S.A. v. Avon Products, Inc.*, 641 F.2d 62, 64-68 (2d Cir.1981). Moreover, I decline the defendant's invitation to preclude the plaintiffs from pursuing punitive damages as a matter of law. For the same reasons that I determined that the plaintiffs have adequately plead deceitful intent, I am unable to conclude, at this juncture, that the requisite degree of moral turpitude for punitive damages cannot later be found by a fact-finder.

III. Conclusion

For the reasons discussed above, the motion to dismiss claim one is DENIED, since the applicable statute of limitations period did not expire before the plaintiffs commenced this action, and the plaintiffs have adequately stated a federal securities claim upon which relief can be granted. The motion to dismiss claims two, three, nine, ten and eleven is GRANTED because this Court lacks personal jurisdiction over Maricopa and Tsang in New York over state law claims. The arbitration initiated by Walther before the American Arbitration Association on January 21, 1998 may proceed forthwith, and the present proceeding against Schwab in United States District Court is hereby stayed pursuant to § 3 of the Federal Arbitration Act. Finally, Liebmann's motion to dismiss counts seven and eight is DENIED. Discovery in this action must conclude by June 30, 1998. The last date to file fully-briefed dispositive motions is August 15, 1998. A joint pretrial order is due on October 31, 1998. The case is added to the November Trailing Trial Calendar.

SO ORDERED.
S.D.N.Y., 1998.
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