SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

FACIE LIBRE ASSOCIATES I, LLC and FACIE LIBRE ASSOCIATES II, LLC,	:	Index No. 651696/2011
Plaintiffs,	:	
- against -	:	
SECONDMARKET HOLDINGS, INC.,	:	
Defendant.	:	

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

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Defendant SecondMarket, Inc., s/h/a SecondMarket Holdings, Inc. ("SecondMarket") respectfully submits this reply memorandum of law in further support of its motion to dismiss the Complaint of Plaintiffs Facie Libre Associates I, LLC and Facie Libre Associates II, LLC pursuant to CPLR 3211(a)(1), (5), and (7) and 3016(b).[1]

PRELIMINARY STATEMENT

Plaintiffs either fail to apprehend or intentionally attempt to obfuscate the fact that there are three agreements here, all of which flatly contradict their claims and warrant dismissal of the Complaint. First, under the User Agreement between Plaintiffs and SecondMarket, Plaintiffs agreed to a contractual one-year statute of limitations and a limitation of liability clause for any claims arising from their use of SecondMarket's website and services. Plaintiffs do not refute the existence of these contractual provisions; rather, they disingenuously claim that SecondMarket has not established the User Agreement's "bona fides." They make this claim even though Plaintiffs (1) repeatedly admit throughout the Complaint that they "subscribed" to SecondMarket's online marketplace, (2) regularly used SecondMarket's online platform, (3) know that to set up a user account and access the online platform one must manually check a box on SecondMarket's website interface declaring, "***I have read and understand the SecondMarket User Agreement and Privacy Policy***," and (4) ignore the fact that the User Agreement itself specifically permits use of a "printed version . . . [to] be admissible in a judicial or administrative proceeding." If there were any doubt on this score, those doubts are put to rest in the accompanying Reply Affirmation of Annemarie Tierney, Esq. (SecondMarket's General Counsel). Hence, Plaintiffs are bound by the User Agreement, which bars their claims here.

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[1] Capitalized terms used but not defined herein shall have the meaning ascribed to them in SecondMarket's moving memorandum of law.

Second, under the plain language of the Stock Transfer Agreement ("STA") between Plaintiffs and Voskuil, it is Voskuil alone who bore the obligation to deliver the legal opinion in question. Despite the plain language of the STA flatly contradicting their claims, Plaintiffs nevertheless wishfully allege and repeat monotonously throughout their opposition brief that it was SecondMarket's obligation to deliver the legal opinion. However, SecondMarket was not even a party to the STA. Having made a tactical decision not to sue Voskuil, Plaintiffs cannot now engraft the STA's obligations onto SecondMarket, a stranger to the STA. Simply put, SecondMarket had no duty to deliver the legal opinion in question.

Third, under the Intermediary Agreement between Voskuil and SecondMarket, there is once again no language obligating SecondMarket to deliver the legal opinion. In fact, the Intermediary Agreement contains an express disclaimer that the legal opinion is not SecondMarket's obligation and that SecondMarket could only be liable to Voskuil for gross negligence, willful misconduct, or breaches of its representations and warranties to Voskuil, which are not implicated here. (O'Hare Aff. Ex. 4, Intermediary Agreement ¶¶ 3.2 and 4.) Moreover, there is no language whatsoever demonstrating that Plaintiffs were intended beneficiaries of the Intermediary Agreement or that Plaintiffs alone could enforce the agreement, as required for Plaintiffs to state a third party beneficiary claim under New York law. Last, even if Plaintiffs' allegations were accepted as true, and SecondMarket assisted Voskuil in his duty to deliver the legal opinion, SecondMarket would merely be an agent for a disclosed principal, and, as such, could not be liable to Plaintiffs as a matter of basic contract law.[2]

In addition to the three agreements that flatly contradict Plaintiffs' claims, there are obvious fundamental defects in each of Plaintiffs' causes of action, warranting dismissal as a matter of law. For example, despite the fact that this case clearly arises from an alleged breach

[2] Plaintiffs' opposition papers fail to address this crucial point.

of the STA by Voskuil (i.e., his purported failure to timely deliver the legal opinion), Plaintiffs manufacture an array of "tort" claims in an effort to foist Voskuil's duty upon SecondMarket. Yet, Plaintiffs cannot allege and have not alleged a legal duty owed by SecondMarket to Plaintiffs independent of the STA. This failure dooms all of their claims.

Furthermore, in an effort to explain away their failure to allege essential elements of their redundant "tort" claims for breach of fiduciary duty and negligence, Plaintiffs cavalierly claim that they may plead "in the alternative." (Pl. Br. at 17.) Of course, this misses the point. While Plaintiffs may plead alternative legal theories, they must allege substantive facts rather than bare legal conclusions underlying each element of those legal theories.

Last, Plaintiffs admit that they have obtained a refund of the transaction's purchase price from Voskuil. Plaintiffs therefore cannot have it both ways: by obtaining restitution from Voskuil, Plaintiffs have rescinded the transaction and are now barred from obtaining benefit of the bargain damages. Plaintiffs' opposition brief fails to rebut this point and thereby concedes it. This is yet another independent ground warranting dismissal.

ARGUMENT

I.

PLAINTIFFS' ENTIRE ACTION IS BARRED BY THE PARTIES' CONTRACTUAL ONE-YEAR STATUTE OF LIMITATIONS AND LIMITATION OF LIABILITY

As set forth in SecondMarket's moving brief, the User Agreement contains a one-year contractual statute of limitations stating that any causes of action "must be commenced within one (1) year after the claim or cause of action arises." (O'Hare Aff. Ex. 2, at 4.) In New York, a one-year private contractual statute of limitations is enforceable and applies to both contract and tort claims. See, e.g., Rudin v. Disanza, 202 A.D.2d 202, 203 (1st Dep't 1994)

(enforcing one-year statute of limitations); Par Fait Originals v. ADT Sec. Sys., Northeast, Inc., 184 A.D.2d 472, 472 (1st Dep't 1992) (private statute of limitations encompassed tort claims).

Plaintiffs do not dispute that their action is untimely under the User Agreement as it was brought on June 17, 2011, or more than one year after the Voskuil transaction was scheduled to close purportedly on March 26, 2010. Rather, Plaintiffs offer a variety of meritless contentions to avoid the User Agreement's statute of limitations and disclaimer provisions, each of which is addressed and dispelled below.

A. The User Agreement (Not The Intermediary Agreement) Governs The Relationship Between Plaintiffs And SecondMarket

First, Plaintiffs contend that they are not suing on the User Agreement, but rather the Intermediary Agreement between Voskuil and SecondMarket. (Pl. Br. at 11-12.) However, Plaintiffs did not even know of the terms of the Intermediary Agreement when they filed this action, so their contention is specious at best. Moreover, as discussed in SecondMarket's moving brief and in Point II, infra, a third party beneficiary claim cannot stand where the plaintiff was not an intended beneficiary of the agreement. Plaintiffs' contention is also belied by their own Complaint, which repeatedly refers to Plaintiffs establishing their relationship with SecondMarket by subscribing to its website to enjoy the benefits of SecondMarket's online marketplace and matchmaking services. (See, e.g., Compl. ¶¶ 7-9, 12, 71-73.)

Here, there can be no dispute whatsoever that the only contract entered into by Plaintiffs and SecondMarket was the User Agreement, and that the User Agreement governs their relationship. As a result, Plaintiffs are bound by the one-year contractual statute of limitations.[3]

[3] Plaintiffs' action would still fail if the Intermediary Agreement controlled, because its "Limited Liability" clause provides that SecondMarket would be liable only for "gross negligence, willful misconduct, or breach of any of Intermediary's representations and warranties," and "[i]n no event shall

B. The User Agreement Is Neither Superseded By The Intermediary Agreement Nor Against Public Policy

Second, Plaintiffs contend that the User Agreement is somehow "superseded" by the Intermediary Agreement and also somehow unenforceable as a matter of public policy. (Pl. Br. at 14, 15.) Both contentions are baseless. The User Agreement was entered into between Plaintiffs and SecondMarket, while the Intermediary Agreement was entered into between SecondMarket and Voskuil. Thus, there is no logic, much less case law support, for any argument that the Intermediary Agreement could possibly "supersede" the User Agreement.[4]

Plaintiffs attempt to gild the lily by claiming that the Intermediary Agreement's integration clause governs all parties (including Plaintiffs), "supersedes" prior understandings, and applies to "SecondMarket's rights (the $75,000 fee) and obligations (obtaining the Legal Opinion, among others) vis-a-vis the Voskuil Deal." (Pl. Br. at 14.) Of course, the Intermediary Agreement's integration clause applies only to Voskuil and SecondMarket and never states that SecondMarket had any obligation to "obtain the Legal Opinion":

> This Agreement constitutes the entire agreement and understanding of Seller [Voskuil] and Intermediary [SecondMarket] with respect to the subject matter of this Agreement, and supersedes all prior understandings and agreements, whether oral or written, between the parties hereto with respect to the subject matter hereof.

(O'Hare Aff., Ex. 4 ¶ 7.3 (emphasis added).) Plaintiffs' distortion of this language is frivolous.

Similarly, Plaintiffs' contention that the User Agreement is against public policy is specious. (Pl. Br. at 15-16.) As noted in SecondMarket's moving brief, both the statute of

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Intermediary be liable for indirect, special, incidental, consequential, or punitive damages." (O'Hare Aff., Ex. 4 ¶ 4.) In other words, because Plaintiffs cannot state a claim for grossly negligent or willful conduct and because Plaintiffs are seeking lost profits, they have no redress under the Intermediary Agreement.

[4] Plaintiffs cite Daiichi Seihan USA v. Infinity USA, Inc., 214 A.D.2d 487 (1st Dep't 1995) to support their argument, but that case involved an integration clause in a contract between plaintiff and defendant. Here, Plaintiffs are pointing to a contract (the Intermediary Agreement) to which they are not even a party. Hence, Daiichi is inapposite.

limitations and the limitation of liability in the User Agreement are enforceable under New York law. See Brintec Corp. v. Akzo N.V., 171 A.D.2d 440, 440-41 (1st Dep't 1991) ("It is well-settled that such an agreement, which modifies the statute of limitations by specifying a shorter, but reasonable period within which to commence an action, is enforceable provided it is in writing.") (citation omitted); see also Pacnet Network Ltd. v. KDDI Corp., 78 A.D.3d 478, 480 (1st Dep't 2010) (holding that contractual limitation of liability provisions are generally enforceable except for grossly negligent conduct).

Last, Plaintiffs' cases on this point are inapposite, because there are no indicia of procedural or substantive unconscionability in the User Agreement, such as "high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties" or "inflated prices, unfair termination clauses, unfair limitations on consequential damages and improper disclaimers of warranty." Universal Leasing Servs., Inc. v. Flushing Hae Kwan Rest., 169 A.D.2d 829, 831 (2d Dep't 1991) (cited in Pl. Br. at 15.) By contrast with the equipment lease in Universal Leasing, none of these factors is present here. The User Agreement is like many other common website user and license agreements, and Plaintiffs were not forced to subscribe to SecondMarket's website or accept its User Agreement. Rather, as the Complaint alleges, Plaintiffs knowingly did so to use SecondMarket's marketplace. And, as mentioned in the case law cited above, there is no substantive unconscionability either in the statute of limitations or the disclaimer of liability.[5]

[5] The User Agreement's limitation of liability reinforces the fact that SecondMarket sought to protect itself because it was merely acting as a matchmaker. In this vein, to the extent buyers and sellers sought to use SecondMarket's online marketplace, their rights in private securities transactions would be established by appropriate stock transfer agreements, not by recourse to the matchmaker/intermediary. Also, even if the limitation of liability were not enforceable – which it is – the User Agreement contains a severability clause providing that the remaining provisions should be enforced. (See O'Hare Aff., Ex. 2

C. SecondMarket Has Established The "Bona Fides" Of The User Agreement

Plaintiffs also desperately resort to questioning the authenticity of the User Agreement. (Pl. Br. at 14-15.) However, the "bona fides" of the User Agreement are established in several ways. First, as set forth in the accompanying reply affidavit of Annemarie Tierney, Esq., SecondMarket's General Counsel, Plaintiffs' representatives, including Frank Mazzola of Felix Investments, LLC, subscribed to SecondMarket's web platform by opening a user account. Upon first logging onto SecondMarket's website, each new user (including Plaintiffs here) is required to manually agree to the terms of service, specifically the User Agreement. Plaintiffs' representative signed up and manually agreed to the terms of service in 2009. Thereafter, Mazzola, in particular, logged on more than 40 times. (Tierney Reply Aff. ¶¶ 6-10.)

In other words, because of the way SecondMarket's platform works, Plaintiffs would not have been able to log in to SecondMarket's site without having initially accepted the User Agreement by opening up a window containing the User Agreement and manually checking a box on the screen declaring "***I have read and understand the SecondMarket User Agreement and Privacy Policy***." If this is not done, a user is unable to have access to the online market platform. See Id. ¶¶ 6-8, Exs. A, B.

Third, because the User Agreement appears on the screen, there is no physically signed or initialed copy. Therefore, the User Agreement itself clearly states that a "printed version of this Agreement shall be admissible in judicial or administrative proceedings." (O'Hare Aff. Ex. 2, at 4.) Hence, the Court should reject Plaintiffs' complaint that the "User Agreement is an unsigned, uninitialed form agreement attached to an affirmation of counsel."

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at 4.). Thus, at a bare minimum, the one-year statute of limitations would still be enforceable, barring Plaintiffs' case. See Brady v. Williams Capital Group, L.P., 64 A.D.3d 127, 137-38 (1st Dep't 2009) (finding fee-splitting provision unenforceable as against public policy, but noting agreement contained severability clause and upholding remainder of agreement).

(Pl. Br. at 15.) Under New York law, electronic agreements (e.g., click-through and click-wrap agreements) are enforceable, and, in this case, bar Plaintiffs' claims. See Moore v. Microsoft Corp., 293 A.D.2d 587, 587 (2d Dep't 2002) (affirming dismissal of plaintiff's claims on grounds they were barred by disclaimers set forth in click-wrap electronic agreement); Ballas v. Virgin Media, Inc., 2007 WL 4532509, at *2 (Sup. Ct. Nassau County Dec. 6, 2007) (dismissing complaint as barred by documentary evidence where terms of service were available to plaintiff "on the Virgin website and the Virgin Terms of Service Booklet"); see also Bar-Ayal v. Time Warner Cable Inc., 2006 WL 2990032, at *9-11 (S.D.N.Y. Oct.16, 2006) (enforcing software agreements that required user to click "accept" buttons on screens that displayed agreements).[6]

II.

THE THIRD PARTY BENEFICIARY CLAIM FAILS BECAUSE PLAINTIFFS ARE NOT INTENDED BENEFICIARIES OF THE INTERMEDIARY AGREEMENT

Even if Plaintiffs' claims were not barred by the contractual one-year limitations period and limitation of liability – which they are – Plaintiffs' third party beneficiary claim still fails as a matter of law. Plaintiffs simply ignore the inescapable conclusion that the Intermediary Agreement flatly contradicts Plaintiffs' allegations because it contains no provision whereby SecondMarket assumed any duty to deliver the legal opinion. (O'Hare Aff., Ex. 4.) Again, it bears emphasis that the STA (between Plaintiffs and Voskuil) required Voskuil (not SecondMarket) to provide "an opinion of counsel, in a form acceptable to the Company, that registration is not required under the Securities Act of 1933 (the 'Legal Opinion')" as one of five "Seller Deliverables" at closing. (See STA ¶ 2.1.) Nor do Plaintiffs rebut that the plain language

[6] Even if Plaintiffs failed to read the User Agreement, they are nevertheless bound by its terms. See Tsadilas v. Providian Nat'l Bank, 13 A.D.3d 190, 190 (1st Dep't 2004).

of the Intermediary Agreement disclaims any duty on SecondMarket's part to provide the legal opinion.[7] (O'Hare Aff., Ex. 4 ¶ 3.2.)

Even if there were a breach of the Intermediary Agreement – which there was not – "[t]here was no language in the agreement which clearly evinces the parties' intent to permit plaintiff to recover monetary damages from defendant ... in the event of a breach." Citytrust v. Atlas Capital Corp., 173 A.D.2d 300, 304 (1st Dep't 1991); see also Fourth Ocean Putnam Corp. v. Interstate Wrecking Co., 66 N.Y.2d 38, 45 (1985) (for a contract to confer enforceable third-party beneficiary rights, it must appear "that no one other than the third party can recover if the promisor breaches the contract"). Here, Plaintiffs are not the proper party, much less the only party, which could enforce the Intermediary Agreement. Plaintiffs again completely ignore the fact that Voskuil was SecondMarket's only counterparty to the Intermediary Agreement, and only he could enforce any rights against SecondMarket thereunder.[8]

A controlling case on point is Newmark & Co. Real Estate, Inc. v. GCJ Holdings LLC, 87 A.D.3d 454 (1st Dep't 2011). There, the plaintiff broker sought to obtain his

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[7] Plaintiffs disingenuously contend that "while the Intermediary Agreement provided SecondMarket with the possibility of opting out of obtaining the Legal Opinion, SecondMarket in fact agreed to obtain it." (Pl. Br. at 11.) This contention refers to deductions from SecondMarket's fee for the seller's costs of the legal opinion and transaction fees payable to Facebook. (O'Hare Aff., Ex. 4 ¶ 1.2.) Contrary to Plaintiffs' frivolous contention, it was Voskuil's option to use his own counsel or the firm recommended by SecondMarket in respect of the legal opinion, and it was Voskuil (not SecondMarket) who was the outside law firm's client in connection with the contemplated transaction. And, it was Voskuil's duty to deliver the legal opinion not SecondMarket's.

[8] Plaintiffs incorrectly argue that SecondMarket concedes that it was obligated to deliver the legal opinion and that the opinion was delivered late. (Pl. Br. at 18.) SecondMarket makes no such concessions, and, to the extent Plaintiffs' allegations are assumed true, they are so assumed only for purposes of this motion. Even if the documents flatly contradicting Plaintiffs' claims of duty were ignored, there was no breach of Voskuil's obligation to timely deliver the legal opinion because Plaintiffs have miscalculated the day it was due. (See Moving Br. at 7 n.7.) Hence, without either a duty or a breach of the underlying Intermediary Agreement, there cannot be a third party beneficiary claim. See Egnotovich v. Katten Muchin Zavis & Roseman LLP, 2008 WL 199757, at *6 (Sup. Ct. N.Y. County Jan. 23, 2008).

commission as a third party beneficiary of an agreement entered into by two other parties to a property transaction. Id. at 455. The First Department affirmed dismissal of the claim because "[w]hile the broker's commission clause expressly names plaintiff as the broker of record, the agreement as a whole was not intended for plaintiff's benefit." Id. (citation omitted). The First Department further noted that the broker's commission was to "be paid to plaintiff pursuant to a separate agreement." Id. Similarly here, while Plaintiffs were superficially mentioned in the Intermediary Agreement in connection with a "proposed transaction" involving a "possible" sale, the Agreement was not intended for Plaintiffs' benefit, but rather expressly stated that it "shall govern the relationship between Seller [Voskuil] and Intermediary [SecondMarket]." (O'Hare Aff., Ex. 4, preamble.) And, just as in Newmark, Plaintiffs' rights here were established "pursuant to a separate agreement," namely the STA (which Plaintiffs desperately attempt to ignore). Hence, any benefit to Plaintiffs from the Intermediary Agreement "is an incidental by-product of the agreement." 2470 Cadillac Res., Inc. v. DHL Express (USA), Inc., 84 A.D.3d 697, 698 (1st Dep't 2011) (citation omitted).

Finally, even assuming arguendo that SecondMarket assisted Voskuil in his duty to provide a legal opinion, SecondMarket would have acted only as an agent for a disclosed principal and, thus, would not be liable as a matter of law. See Brasseur v. Speranza, 21 A.D.3d 297, 299 (1st Dep't 2005) ("managing agent may not be held liable for breach of its contractual duties since it was at all times acting as agent for a disclosed principal") (citation omitted); Cruz v. NYNEX Info. Res., 263 A.D.2d 285, 291 (1st Dep't 2000) ("Donnelley was merely the agent of a disclosed principal and, thus, had no personal liability under the contract.") (citation

omitted). Plaintiffs fail to refute this authority and, hence, concede dismissal of the third party beneficiary claim.[9]

III.

THE BREACH OF FIDUCIARY DUTY, NEGLIGENCE, AND MALPRACTICE CLAIMS ARE MERELY A BREACH OF CONTRACT CLAIM AGAINST VOSKUIL MASQUERADING AS "TORT" CLAIMS AGAINST SECONDMARKET

Plaintiffs have utterly failed to rebut SecondMarket's argument that the breach of fiduciary duty, negligence, and malpractice claims fail because they are a breach of the STA disguised in tort garb.[10] See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co., 70 N.Y.2d 382, 383 (1987) ("Merely charging a breach of a 'duty of due care', employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim."). Accordingly, SecondMarket respectfully refers the Court to the arguments made in its moving memorandum of law.[11] (See Moving Br. at 13-15.)

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[9] Plaintiffs' case law is inapposite (see Pl. Br. at 12), because none of those cases involved express language limiting the agreement to its signatories. Here, by contrast, the Intermediary Agreement provides that it is "binding upon and shall inure to the benefit of [Voskuil] and [Intermediary]," and, further, that neither Voskuil nor SecondMarket could assign any of their rights "without the prior written consent of the other party to this Agreement." (O'Hare Aff., Ex. 4 ¶ 7.2.) This language excludes all but Voskuil and SecondMarket from the provisions of the Intermediary Agreement. See McMahan Sec. Co. L.P. v. Aviator Master Fund, Ltd., 57 A.D.3d 326, 327(1st Dep't 2008) ("The clear and unambiguous language of paragraph 13 of the subscription agreements explicitly excludes all but the signatories and their successors from its provisions."). Plaintiffs' reliance on Glanzer v. Shepard, 233 N.Y. 236 (1922), a 90-year-old case involving the sale of beans is also misplaced. There, the seller was not obligated to weigh and certify the beans, but rather the defendant Shepard was so obligated. Unlike the seller in Glanzer, the seller here (Voskuil) was obligated under the STA to perform the act in question (i.e., deliver the legal opinion), not the defendant here (SecondMarket). Therefore, Glanzer is of no avail to Plaintiffs.

[10] Plaintiffs do not even address SecondMarket's arguments for dismissal of their fifth claim for malpractice, and, therefore, Plaintiffs should be deemed to have abandoned that claim. Kronick v. L.P. Thebault Co., Inc., 70 A.D.3d 648, 649 (2d Dep't 2010) (holding plaintiff "abandoned that claim by failing to oppose the branch of the defendant's motion which was to dismiss it").

[11] Plaintiffs argue that they "may advance inconsistent theories." (Pl. Br. at 17.) While that may be technically true, Plaintiffs may not advance theories that are flatly contradicted by the relevant agreements and by black-letter law, as set forth in SecondMarket's motion papers.

It bears emphasis, however, that Plaintiffs have failed to rebut and therefore have conceded that they rescinded the Voskuil transaction by obtaining restitution of the purchase price from Voskuil. See Shelton v. Elite Model Mgmt., Inc., 812 N.Y.S.2d 745, 758 (Sup. Ct. N.Y. County 2005) ("By plaintiffs' failure to address this issue, the Court can only infer that plaintiffs concede it."). As a result, Plaintiffs are barred from seeking benefit-of-the-bargain or lost profit damages. See Rennie v. Pierce Cards, Ltd., 65 A.D.2d 527, 528 (1st Dep't 1978) ("plaintiff, having elected to rescind, cannot recover lost profits").

Last, Plaintiffs assert that they are owed "tort" duties because they relied on a prior course of conduct. Once again, none of their cases supports this assertion. For example, the first sentence of AG Capital Funding, Partners, L.P v. State St. Bank & Trust Co., 5 N.Y.3d 582 (2005), reveals that the decision is limited to duties owed by underwriters or issuers of securities:

> Because an underwriter or issuer of securities can, by statements and acts interpreted in light of industry custom and practice, assume a duty that may be imposed upon a secured party representative or indenture trustee, and because such allegations are adequately pleaded in a third-party complaint and supplemental documentary evidence, we reinstate causes of action for negligence . . .

Id. at 587. Plaintiffs' allegation that they executed several transactions using SecondMarket's online marketplace (see Pl. Br. at 18), does not change the fact that their rights and remedies with respect to the Voskuil transaction are contractual in nature and arise from the STA. See JPMorgan Chase Bank, N.A. v. Controladora Comercial Mexicana S.A.B. De C.V., 2010 WL 4868142, at *10-11 (Sup. Ct. N.Y. County Mar. 16, 2010) (history of transactions and rote allegations of reliance on another's expertise did not impose fiduciary duties).[12]

[12] Plaintiffs' citation to AHA Sales, Inc. v. Creative Bath Prods., Inc., 58 A.D.3d 6 (2d Dep't 2008) is misplaced as the plaintiff there was a sales representative who had an enduring relationship and "venture" with the defendant "independent of any contractual duties." Id. at 22. By contrast, the relationship

IV.

THE BREACH OF FIDUCIARY DUTY CLAIM FAILS BECAUSE THE COMPLAINT DOES NOT ALLEGE THE EXISTENCE OF A FIDUCIARY RELATIONSHIP BETWEEN PLAINTIFFS AND SECONDMARKET

Again, Plaintiffs fail to offer any substantive rebuttal to the arguments set forth in SecondMarket's moving memorandum, and, therefore, SecondMarket respectfully refers the Court to those arguments. (See Moving Br. at 16-19.) In addition, Plaintiffs have not refuted that SecondMarket never provided Plaintiffs with financial advice, never purchased securities on their behalf, and never exercised discretionary control of Plaintiffs' investment objectives. Plaintiffs' silence on this point is a tacit admission that the parties had nothing more than an arm's length relationship, which does not give rise to fiduciary obligations. See Northeast Gen. Corp. v. Wellington Adver., Inc., 82 N.Y.2d 158 (1993).[13]

V.

THE SO-CALLED "INTENTIONAL MISREPRESENTATION" CLAIM FAILS TO ALLEGE ANY OF THE ELEMENTS OF A FRAUD-BASED CLAIM

Again, for the Court's convenience, SecondMarket respectfully refers the Court to the arguments made in its moving memorandum of law, i.e., that Plaintiffs have failed to allege any of the elements of fraud: a material misrepresentation of fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff, causation, or damages. (Mov. Br. at 20-22.) What is most telling about Plaintiffs' opposition is that they cannot explain how SecondMarket owed any duty of disclosure or how its alleged silence (that the Voskuil deal had

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between Plaintiffs and SecondMarket is defined by the User Agreement, and the relationship between Plaintiffs and Voskuil (including the latter's duty to deliver the legal opinion) is defined by the STA.

[13] Again, Plaintiffs' case law concerning fiduciary duties is inapposite. For example, in Wiener v. Lazard Freres & Co., 241 A.D.2d 114, 121-22 (1st Dep't 1998) (Pl. Br. at 20 n.7), plaintiff alleged that it had provided confidential information to defendant and that defendant acted as plaintiff's agent. There are no such allegations against SecondMarket here.

not closed) caused Plaintiffs harm or how exactly Plaintiffs were damaged separately from their obvious contract claim (for breach of the STA).[14]

In this vein, the crux of the Complaint is that the Voskuil transaction failed to close, and Plaintiffs therefore did not receive Facebook stock. Once the deal failed, however, whether or not SecondMarket disclosed this fact (the deal's failure), was of no moment. In other words, Plaintiffs were allegedly damaged because the deal failed, not because they did not know it had failed. Hence, SecondMarket's alleged silence did not cause harm. Mateo v. Senterfitt, 82 A.D.3d 515, 518 (1st Dep't 2011) (holding that plaintiffs "fail sufficiently to allege that defendant's misrepresentations were the direct and proximate cause of their claimed loss").

Furthermore, as SecondMarket previously argued, Plaintiffs have failed to articulate any recoverable damages. As a matter of controlling law, Plaintiffs are simply not entitled to lost profits from the speculative value of Facebook stock: "'[T]here can be no recovery of profits which would have been realized in the absence of fraud.'" Starr Found. v. Am. Int'l Group, Inc., 76 A.D.3d 25, 27 (1st Dep't 2010) (citation omitted).

Because Plaintiffs are incapable of alleging a duty to disclose, causation, and damages, their fraud claim is frivolous. See Waggoner v. Caruso, 68 A.D.3d 1, 6 (1st Dep't 2009) ("The required detail is also lacking with respect to causation because the complaint does not set forth how defendants' conduct caused plaintiffs to lose their $10 million."); Rather v. CBS Corp., 68 A.D.3d 49, 58-59 (1st Dep't 2009) (plaintiff failed to plead pecuniary loss).

[14] Because this claim is based on a nondisclosure, Plaintiffs must allege a special relationship giving rise to a duty of disclosure, which they have failed to do. Levine v. Yokell, 245 A.D.2d 138, 139 (1st Dep't 1997) (mere nondisclosure of fact does not constitute fraud absent a confidential relationship).

VI.

THE UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW

SecondMarket again respectfully refers the Court to the arguments made in its moving memorandum that Plaintiffs have no standing to bring an unjust enrichment claim. (Mov. Br. at 24-25.) Furthermore, the cases on which Plaintiffs rely actually support SecondMarket's motion to dismiss the unjust enrichment claim. For example, in Georgia Malone & Co., Inc. v Rieder, 86 A.D.3d 406 (1st Dep't 2011), the First Department noted that "[p]rior cases from this Court and the other Departments have held that an unjust enrichment claim can only be sustained if the services were performed at the defendant's behest." Id. at 408. Here, any actions by Plaintiffs were taken at Voskuil's behest. Hence, Plaintiffs' own authority demonstrates that their unjust enrichment claim must be dismissed as a matter of law.

CONCLUSION

For all the foregoing reasons, the Complaint should be dismissed in its entirety with prejudice.

Dated: New York, New York
October 28, 2011

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