9-12-2018

Tara Scott et al., Order on Pending Motions

Elizabeth E. Long
Fulton County Superior Court

IN THE SUPERIOR COURT OF FULTON COUNTY
BUSINESS CASE DIVISION
STATE OF GEORGIA

TARA SCOTT; BAILEY M. CARTER; and WILSON CARTER, Individually, as Trustee of THE WILSON M. CARTER 1988 TRUST, and as Next Friend of MARY WILSON CARTER,	)	Civil Action File No. 2017CV297083
Plaintiffs,	)	Bus. Case Div. 2
v.	)	
JOHN J. CARR and JOHN MATTHEW DWYER, III,	)	
Defendants.	)	

ORDER ON PENDING MOTIONS

The above styled action is before the Court on: (1) Defendant John J. Carr's Motion to Dismiss (filed Dec. 26, 2017) (Carr's "Motion to Dismiss the Original Complaint"); (2) Plaintiffs' Motion to Enforce Subpoenas to Vantage Corporation and Vantage Advisory Management, LLC (filed Feb. 15, 2018); (3) Defendant Carr's Motion to Dismiss Claims Brought by Plaintiff Wilson Carter as Trustee for the Bailey Middleton Carter 2009 Trust and the Mary Wilson Carter 2009 Trust for Lack of Standing (filed Mar. 15, 2018) (Carr's "Motion to Dismiss Certain Trusts' Claims"); (4) Defendant Carr's Amended Motion to Dismiss Plaintiffs' Complaint and First Amended Complaint (filed May 11, 2018) (Carr's "Amended Motion to Dismiss"); (5) Defendant John Matthew Dwyer, III's Motion for Judgment on the Pleadings (filed May 17, 2018); and (6) Defendant Carr's Motion to Dismiss Second Amended Complaint (filed Aug. 13, 2018) ("Motion to Dismiss the SAC"). Having considered the relevant portions of

the record with respect to each of these motions[1] as well as argument of counsel at hearings held on Jun 28, 2018 and Sept.7, 2018, the Court finds as follows:

SUMMARY OF PLEADINGS

In this action Plaintiffs allege Defendants John J. Carr ("Carr") and John Matthew Dwyer ("Dwyer") violated state and federal securities laws and committed other torts when they solicited and sold to Plaintiffs shares in Vantage Corporation and its related entities (collectively "Vantage"). Vantage is a technology and investment company that specializes in proprietary trading technology, using trading algorithms and models to process financial trading data in real time in order to exploit trading opportunities to generate investment returns.[2] Vantage Advisory Management, LLC ("VAM") is a subsidiary of Vantage, formed as the investment advisor firm for Vantage's asset management division.[3]

Plaintiffs allege that Defendants Carr and Dwyer, acting on behalf of and as agents of Vantage and/or VAM, solicited them to purchase Vantage stock. According to Plaintiffs, between January and March of 2016 and based on Defendant Carr and Dwyer's representations and solicitations: Wilson Carter and the Wilson M. Carter 1988 Trust (collectively "Carter") invested a total of $2,000,000 in Vantage; Tara Scott ("Scott") invested a total of $2,000,000; Bailey Carter ("Bailey") invested a total of $500,000; and Mary Wilson Carter ("Mary"), a minor, invested a total of $500,000.

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[1] Regarding Defendants' Motions to Dismiss and Motion for Judgment on the Pleadings, the Court has limited its review to the pleadings except with respect to the jurisdictional issue raised by Defendant Carr in his Motion to Dismiss the Second Amended Complaint due to the forum selection clause in the relevant Shareholders Agreements. *See* Part IV.B.ii, *infra*. *See also* O.C.G.A. §9-11-12(b); Campbell v. Ailion, 338 Ga. App. 382, 384 n. 2, 790 S.E.2d 68, 71 (2016) ("Documents attached to a brief in support of [a] motion to dismiss…cannot be considered in deciding the motion to dismiss") (citation and punctuation omitted); Laibe Corp. v. Gen. Pump & Well, Inc., 317 Ga. App. 827, 830–31, 733 S.E.2d 332, 335–36 (2012) ("[T]he consideration of matters outside the pleadings on a 12(b)(2) or 12(b)(3) motion to dismiss for lack of personal jurisdiction or improper venue does not convert the motion to one for summary judgment").

[2] Second Amended Complaint ("SAC"), ¶13.

[3] SAC, ¶9.

However, Plaintiffs assert that at the time they were sold the Vantage shares the stock was not a federal covered security, was not subject to an effective registration statement and was not exempt from registration. Plaintiffs also allege Defendants received direct or indirect compensation from Vantage for their role in soliciting investments but were not registered as securities salespeople or as investment advisors. Further, according to Plaintiffs, Defendants intentionally made misleading statements of material fact and omitted material facts when soliciting Plaintiffs; *e.g.*, material misstatements and omissions related to the past performance of Vantage, Plaintiffs' status as general partners, and Vantage's ownership of certain proprietary software required to operate the business, among others. These material misrepresentations and omission alleged induced Plaintiffs to purchase shares and to hold their investments in Vantage ultimately causing them to suffer damages.

Plaintiffs initially filed suit against Vantage and other related companies in the District Court of Delaware related to their investments in Vantage.[4] Plaintiffs subsequently filed this action against Carr and Dwyer alleging they are individually liable for offering for sale and selling Plaintiffs the Vantage stock in violation of state and federal law. Plaintiffs assert the following causes of action in the SAC: (1) violations of the Georgia Uniform Securities Act of 2008[5], O.C.G.A. §10-5-20, for the sale of unregistered and non-exempt securities; (2) violations of O.C.G.A. §10-5-31 for the sale of securities by individuals not properly registered; (3) violations of Section 12 of the Securities Act of 1933[6], 15 U.S.C. §77l(a)(2) alleging misrepresentations in connection with the sale of a security; (4) negligence; (5) violations of O.C.G.A. §10-5-50 *et seq*. for making untrue statements of material fact and/or omitting material

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[4] Tara Scott et al. v. Vantage Corporation et al., No. 17-448-MPT, United States District Court for the District of Delaware ("Delaware Action").

[5] Hereinafter "Georgia Securities Act".

[6] Hereinafter "the 1933 Act".

facts necessary to make statements not misleading and/or substantially participating in the making of misrepresentations of material fact, all in the context of offering for sale or selling securities; (6) common law fraud; (7) sale of securities to a minor in her individual capacity (asserted by Mary); (8) attorneys' fees; (9) punitive damages; (10) violations of the Colorado Securities Act, Colo. Rev. Stat. Ann. §§ 11-51-101 *et seq.* (asserted by Scott); and (11) breach of fiduciary duty. Plaintiffs tender their Vantage stock and seek rescission of their purchases of Vantage stock and return of any consideration paid plus interest, court costs and expenses, attorney's fees, punitive damages, and other compensatory damages.

This action was filed on Oct. 25, 2017. Following a hearing on Jun. 28, 2018 on various pending motions, the Court on Jun. 29, 2018 entered an order requiring Plaintiffs to amend their pleadings to provide a more definite statement as to the factual allegations giving rise to their claims. Plaintiffs, thus, filed their SAC on Jul. 13, 2018, Defendant Carr moved to dismiss the SAC on Aug. 13, 2018 and argument on that motion was heard on Sept. 7, 2018. The Court now considers the pending motions in light of the SAC and the current posture of the case.

I. Plaintiffs' Motion to Enforce Subpoenas to Vantage Corporation and Vantage Advisory Management, LLC

Plaintiffs moved to enforce Subpoenas for the Production of Evidence at Deposition that were served upon Vantage and Vantage Advisory Management, LLC ("VAM") on Dec. 6, 2017. However, on May 4, 2018, Vantage and VAM filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code, 11 U.S.C. §101 *et seq.*, in the United States Bankruptcy Court for the Northern District of Georgia.[7] Accordingly, this motion is STAYED pending resolution of the bankruptcy proceedings or other relief from the Bankruptcy Court.

[7] *See* In re Vantage Corporation, Case No. 18-57728, U.S. Bankruptcy Court for the Northern District of Georgia; In re Vantage Advisory Management, LLC, Case No. 18-57731, U.S. Bankruptcy Court for the Northern District of Georgia.

II. Defendant Carr's Motion to Dismiss Certain Trusts' Claims

Defendant Carr moved to dismiss the claims asserted in the original complaint by Wilson Carter as trustee of the Bailey Middleton Carter 2009 Trust and the Mary Wilson Carter 2009 Trust ("Trusts") for lack of standing because the Trusts never purchased Vantage stock. Rather, Bailey M. Carter ("Bailey") and Mary Wilson Carter ("Mary") each purchased Vantage stock in their individual capacities. However, insofar as the Court previously granted Plaintiffs' Motion to Substitute Bailey Carter and Mary Wilson Carter, Through her Next Friend Wilson Carter[,] as Plaintiffs, thereby substituting Bailey and Mary, respectively, as the real parties in interest, Defendant Carr's Motion to Dismiss Certain Trusts' Claims is DENIED as moot.

III. Defendant Carr's Motion to Dismiss the Original Complaint and Amended Motion to Dismiss and Defendant Dwyer's Motion for Judgment on the Pleadings

The Court finds the arguments raised in Defendant Carr's Motion to Dismiss the Original Complaint and Amended Motion to Dismiss have either been mooted by Plaintiffs' Second Amended Complaint and, thus, are DENIED as moot, or are addressed in Part IV, *infra*, with respect to Defendant Carr's Motion to Dismiss the SAC.

IV. Motion to Dismiss the SAC

A. Standard on a Motion to Dismiss

A motion to dismiss brought under O.C.G.A. §9-11-12(b)(6) for failure to state a claim upon which relief may be granted should not be sustained unless:

> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought...

Austin v. Clark, 294 Ga. 773, 774–75, 755 S.E.2d 796, 798–99 (2014) (citing Anderson v. Flake, 267 Ga. 498, 501(2), 480 S.E.2d 10 (1997)); Abramyan v. State, 301 Ga. 308, 309, 800 S.E.2d 366, 368 (2017), reconsideration denied (June 5, 2017). "When the sufficiency of the complaint is questioned by a motion to dismiss for failure to state a claim for which relief may be granted, the rules require that it be construed in the light most favorable to the plaintiff with all doubts resolved in his favor even though unfavorable constructions are possible." Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152, 460 S.E.2d 516, 520 (1995) (citing Time Ins. Co. v. Fulton–DeKalb Hosp. Auth., 211 Ga. App. 34, 35, 438 S.E.2d 149 (1993)).

Under the notice pleading procedure of the Georgia Civil Practice Act, only "[a] short and plain statement of the claims" is required. O.C.G.A. § 9-11-8(a)(2)(A). Nevertheless, "a complaint must give a defendant notice of the claim in terms sufficiently clear to enable him to frame a responsive pleading thereto." Patrick v. Verizon Directories Corp., 284 Ga. App. 123, 124, 643 S.E.2d 251, 252 (2007) (quoting Allen v. Bergman, 201 Ga. App. 781, 783(3)(b) (1991)). *See* Estate of Nixon v. Barber, 340 Ga. App. 103, 104, 796 S.E.2d 489, 491 (2017) ("[A] plaintiff is not required to 'plead in the complaint facts sufficient to set out each element of a cause of action so long as it puts the opposing party on reasonable notice of the issues that must be defended against") (quoting Cleveland v. MidFirst Bank, 335 Ga. App. 465, 465, 781 S.E.2d 577 (2016)).

B. Analysis

i. Whether Vantage is a necessary and indispensable party

Defendant Carr asserts Vantage is an indispensable party that cannot be joined to this action due to the previously filed suit Plaintiffs brought against it in Delaware as well as

Vantage's pending Chapter 11 bankruptcy petition. Thus, Carr urges the Court should dismiss the SAC in its entirety.

O.C.G.A. §9-11-19 governs the joinder of indispensable parties. It provides in part:

> (a) A person who is subject to service of process shall be joined as a party in the action if:
>
> (1) In his absence complete relief cannot be afforded among those who are already parties; or
>
> (2) He claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:
>
> > (A) As a practical matter impair or impede his ability to protect that interest; or
> >
> > (B) Leave any of the persons who are already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

"If a trial court concludes that a party described in O.C.G.A. § 9-11-19(a) cannot be joined as a party for venue, lack of jurisdiction, or some other reason, then the trial court 'shall determine whether in equity and good conscience the action should proceed among the parties before it or should be dismissed, the absent person being thus regarded as indispensable.'" Parsons v. Mertz, 320 Ga. App. 786, 790, 740 S.E.2d 743, 747 (2013) (quoting O.C.G.A. § 9-11-19(b)).

In making that determination, the Court must consider five factors:

> (1) To what extent a judgment rendered in the person's absence might be prejudicial to him or to those already parties;
> (2) The extent to which, by protective provisions in the judgment, by the shaping of relief, or by other measures, the prejudice can be lessened or avoided;
> (3) Whether a judgment rendered in the person's absence will be adequate;
> (4) Whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder; and
> (5) Whether and by whom prejudice might have been avoided or may, in the future, be avoided.

Id.

Here, having considered the above authorities the Court finds that, even if Vantage is a necessary party that cannot be joined in light of the Delaware Action and Vantage's pending bankruptcy proceedings, such does not warrant dismissal of this action. Importantly, the Georgia Securities Act contemplates that sellers of securities and agents that sell securities may be liable to purchasers for violations of various provisions of the act and others involved in such transactions may also be jointly and severally liable. *See generally* O.C.G.A. §10-5-58. Whereas protective measures and relief, here, may be shaped to lessen any prejudice to Vantage, if this action is dismissed in its entirety for nonjoinder, Plaintiffs will have no adequate remedy against Defendants Carr and Dwyer who it appears are not subject to the jurisdiction of Delaware courts. Defendant Carr's Motion to Dismiss the SAC on the basis of the failure to join Vantage is hereby DENIED.

ii. Choice of law and forum selection clause

Defendant Carr argues that Plaintiffs, by executing a Shareholders Agreement to purchase Vantage stock agreed that Delaware law would govern litigation arising out of the Shareholders Agreement and submitted themselves to the exclusive jurisdiction of the state and federal courts of Delaware to adjudicate such litigation. Because this action arises from the Shareholders Agreement, Carr urges it has been brought in violation of the forum selection clause and is subject to dismissal.

Although this litigation involves the Vantage stock purchased in connection with the Shareholders Agreement, Carr and Dwyer are not parties to the agreement and, thus, do not have standing to enforce its provisions. *See* GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., Inc., 245 Ga. App. 460, 463, 537 S.E.2d 677, 681 (2000) (brokers sued for securities fraud and common law fraud could not rely on stock purchase agreement's merger clause since

they were not parties to that agreement). Defendant Carr's Motion to Dismiss the SAC on this basis is therefore DENIED.

iii. Whether SAC fails to state a claim upon which relief can be granted

1. Claims of Bailey and Mary

Defendant Carr urges the claims asserted by Bailey and Mary should be dismissed as a matter of law because Plaintiffs have failed to adequately allege that Carr solicited or intentionally made any misrepresentations of material fact or omissions of material fact to Bailey or Mary. The Court agrees. As to Counts I-VI, VIII-IX, and XI of the SAC, to state a cause of action Bailey and Mary must allege some misconduct by Defendants directed at them related to their purchase of Vantage stock. However, Plaintiffs only allege that Bailey "overheard" a conversation between her father and non-party Brian Askew regarding Vantage, requested more information from her father, her father "conveyed the contents of prior communications" to her, and ultimately in February 2016 she decided to purchase Vantage stock. No factual basis is provided at all for Mary's purported decision to invest in Vantage in February 2016. Importantly, there is no allegation that Carr (or Dwyer) ever met or solicited Bailey or Mary or that he knew what information was being "conveyed" by their father to them, much less that Carr intentionally made any material misrepresentations or omission to Bailey or Mary which they could have reasonably relied on in making their investment decisions.

With respect to Count VII (sale of securities to a minor), Plaintiffs allege that at the time Mary purchased Vantage stock she was thirteen years old and, thus, considered a minor under Georgia law such that the contract is voidable. Defendant Carr urges Mary's claim for sale of securities to a minor whereby she seeks to void the Stock Subscription Agreement must be dismissed because Vantage, the other party to the agreement, is not a party to this action.

Notably, Mary here seeks to void a contract, not as a remedy available under the Georgia Securities Act, but under general contract law.

"In Georgia, a minor is generally under a disability to contract, but the contract is not ipso facto void and the option to disaffirm is personal to him." Jones v. State, 119 Ga. App. 105, 106 (1969) (citations omitted). *See* O.C.G.A. §13-3-20 ("Generally the contract of a minor is voidable"). A "void" contract "does not exist at law" but a "voidable" contract gives rise to "a right of rescission due to some defect or illegality." Georgia Receivables, Inc. v. Welch, 242 Ga. App. 146, 148, 529 S.E.2d 164, 167 (2000). However, in the absence of privity of contract, no rescission of a contract can be granted. *See* Sofet v. Roberts, 185 Ga. App. 451, 452, 364 S.E.2d 595, 597 (1987). Here, insofar as Vantage is not a party to this action, Mary has no basis under O.C.G.A. §13-3-20 to seek rescission from Defendants.[8]

Accordingly, Carr's Motion to Dismiss the SAC is hereby GRANTED as to all claims asserted by Bailey and Mary Carter.[9]

2. Heightened pleading standard under O.C.G.A. §9-11-9(b)

Defendant Carr argues the SAC is defective as a matter of law, asserting it fails to comply with the heighted pleading requirements of O.C.G.A. §9-11-9(b). That code section provides: "In all averments of fraud or mistake, the circumstance constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." However, "[a]lthough fraud must be pled with particularity under O.C.G.A. § 9-11-9(b), 'a complaint alleging fraud should not be dismissed for failure to state a claim unless it appears beyond a doubt that the pleader can prove no set of facts in support

[8] The Court makes no ruling at this time on whether rescission is a remedy available with respect to securities fraud claims asserted against agents who are not parties to the subject transaction.

[9] The remainder of this order addresses the claims asserted by Plaintiffs Carter and Scott. Thus, hereinafter all references to "Plaintiffs" refers only to those Plaintiffs.

of his claim which would entitle him to relief.'" Hedquist v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 284 Ga. App. 387, 394, 643 S.E.2d 864, 871 (2007) (quoting SRH, Inc. v. IFC Credit Corp., 275 Ga. App. 18, 19, 619 S.E.2d 744 (2005)).

The Court finds the securities fraud and common law fraud claims are pled with sufficient particularity. Plaintiffs allege specific meetings and communications during which intentional misrepresentations and omissions of fact were allegedly made to Plaintiffs Carter and Scott which were made by or are directly attributable to Defendant Carr and upon which Plaintiffs relied in purchasing and holding their Vantage stock, causing them to suffer economic losses and damages.[10] For example, Plaintiffs allege Carter misrepresented that: Vantage was raising funds for the first time and that Vantage was engaging in a fundraising round for the "General Partnership"; funds from each investor would be "segregated with specific systematic risk parameters"; Vantage had 100% ownership of all the propriety software and IP systems it used to implement its trading strategy on behalf of investors and that Vantage began developing this "custom software" in 1994; Vantage had a history of "astronomical audited returns"; and Carr had personally invested in Vantage.[11] These alleged misrepresentations are not mere opinions about future performance or puffery as suggested by Defendant Carr and their materiality cannot be determined based only on the pleadings. Further, although Carr asserts the SAC contains no allegation that he received anything from or as a result of Plaintiffs' purchases of Vantage stock, Plaintiffs allege Carr was compensated for his solicitation of investors.[12] Subject to the Court's rulings below, the Motion to Dismiss the SAC on the basis that it does not comply with Georgia's heightened pleading standard is DENIED.

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10 *See, e.g.,* SAC, ¶¶ 28-32, 42-50, 58-62, 65-67, 72-86, 112-118, 120-124.

11 SAC, ¶¶ 42, 45, 59, 65, 79, 82, 86, 104, 114, 121.

12 SAC, ¶¶ 29, 86(4), 92, 100.

3. General argument SAC should be dismissed as a shotgun pleading

The fact that each count incorporates all factual allegations of the preceding paragraphs does not perforce require dismissal as suggested by Defendant Carr. The SAC describes various meetings at which Carr and Plaintiffs were present as well as communications prepared by or in conjunction with Carr and forwarded to Carter and Scott, all allegedly for the specific purpose of soliciting Plaintiffs to purchase Vantage stock. Thus, subject to the Court's other rulings herein, the allegations in the SAC state claims for relief and are sufficient to place Defendant Carr on notice of the claims asserted against him. Defendant Carr's Motion to Dismiss the SAC on this basis is DENIED.

4. Count I: Violations of O.C.G.A. §10-5-20

Plaintiffs allege Defendant Carr violated O.C.G.A. §10-5-20 because they offered and sold the Vantage stock to them at a time when the stock was not a federal covered security and was not subject to an effective registration statement pursuant to the Georgia Security Act. O.C.G.A. §10-5-20 provides:

> It is unlawful for a person to offer or sell a security in this state unless:
> (1) The security is a federal covered security;
> (2) The security, transaction, or offer is exempted from registration under Code Sections 10-5-10 through 10-5-12; or
> (3) The security is registered under this chapter.

See also O.C.G.A. §10-5-2(9) ("'Federal covered security' means a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933, 15 U.S.C. Section 77r(b), or rules or regulations adopted pursuant to that provision."); 15 U.S.C. §77r(a)(1)(A), (b)(4)(F) (A "covered securities" includes any security exempt from federal securities registration "pursuant to…Commission rules or regulations issued under [§4(2) of the 1933 Act, 15 U.S.C. §77d(2)]").

Defendant Carr asserts Plaintiffs' claims alleging he offered and sold unregistered securities in violation of §10-5-20 fails because the stock was sold by Vantage, not Carr, and there is no factual allegation supporting a conclusion that Carr offered or sold a security a Georgia. However, Plaintiffs plainly allege Carr offered to sell and sold them Vantage stock in Georgia in violation of §10-5-20 and cite to specific meetings that took place in Georgia and communications sent to Plaintiffs in Georgia. This is sufficient to bring the transactions at issue within the purview of the Georgia Securities Act. *See generally* O.C.G.A. §10-5-79.

Carr also contends that, insofar as Plaintiffs have alleged that the Vantage stock was sold "in reliance upon the exemption from registration known as Regulation D", they have conceded that the securities were federal "covered securities" sold pursuant to federal exemption rules. Carr cites out-of-state federal district court cases for the proposition that an allegation that a security was offered or sold "pursuant" to an SEC rule or regulation is sufficient to establish the securities sold are federal "covered securities" for purposes of defeating and otherwise preempting state claims "[r]egardless of whether the private placement actually complied with the substantive requirements of [the federal rule or regulation]." Temple v. Gorman, 201 F. Supp. 2d 1238, 1244 (S.D. Fla. 2002). *See* id.; Lillard v. Stockton, 267 F. Supp. 2d 1081, 1116 (N.D. Okla. 2003); Pinnacle Commc'ns Int'l, Inc. v. Am. Family Mortg. Corp., 417 F. Supp. 2d 1073, 1087 (D. Minn. 2006). *See also* National Securities Markets Improvement Act ("NSMIA"), 15 U.S.C.A. § 77r(a)(1)(A) (preempting state regulations with respect to federal "covered securities").

However, it appears the majority view is that a state law claim for the sale of unregistered securities is preempted only if the security offering actually complies with federal exemption requirements. *See, e.g.*, Brown v. Earthboard Sports USA, Inc., 481 F.3d 901, 912 (6th Cir.

2007) ("[W]e hold that NSMIA preempts state securities registration laws with respect only to those offerings that actually qualify as 'covered securities' according to the regulations that the SEC has promulgated"); Ciuffitelli for Tr. of Ciuffitelli Revocable Tr. v. Deloitte & Touche LLP, No. 3:16-CV-580-AC, 2017 WL 2927481, at *18 (D. Or. Apr. 10, 2017), report and recommendation adopted sub nom. Ciuffitelli v. Deloitte & Touche LLP, No. 3:16-CV-00580-AC, 2017 WL 2927150 (D. Or. July 5, 2017) ("A split of authority exists regarding whether NSMIA preempts state securities laws when a security sale relies on a putative exemption, regardless of whether the security in fact qualified for the exemption... The court concludes NSMIA preemption is limited to securities that actually qualify as covered securities under federal law"); Janvey v. Willis of Colorado Inc., No. 3:13-CV-3980-N, 2014 WL 12670763, at *11 (N.D. Tex. Dec. 5, 2014), amended sub nom. Official Stanford Inv'rs Comm. v. Willis of Colorado, Inc., No. 3:13-CV-3980-N, 2015 WL 13742125 (N.D. Tex. Feb. 4, 2015) ("Based on the plain language of the NSMIA, this Court agrees with the Sixth Circuit's interpretation and holds that the 'NSMIA preempts state securities registration laws with respect only to those offerings that actually qualify as 'covered securities' according to the regulations that the SEC has promulgated'") (quoting Brown, 481 F. 3d at 912); Consol. Mgmt. Grp., LLC v. Dep't of Corps., 162 Cal. App. 4th 598, 608, 75 Cal. Rptr. 3d 795, 804 (2008) ("[W]e are persuaded by the cases that have declined to follow Temple, and we align ourselves with the authorities which have stated the obvious: a security has to actually be a 'covered security' before federal preemption applies") (citations and internal punctuation omitted); Grubka v. WebAccess Int'l, Inc., 445 F. Supp. 2d 1259, 1270 (D. Colo. 2006), amended, No. CIV 05CV02483LTBOES, 2006 WL 2527815 (D. Colo. Aug. 31, 2006) ("If Congress had intended that an offeror's representation of exemption should suffice it could have said so, but did not. Such an intent

seems unlikely, in any event; that a defendant could avoid liability under state law simply by declaiming its alleged compliance with Regulation D is an unsavory proposition and would eviscerate the statute"); Hamby v. Clearwater Consulting Concepts, LLLP, 428 F. Supp. 2d 915, 921 (E.D. Ark. 2006) ("[T]he only way to assert federal preemption is to first show that an exemption from federal registration actually applies"; holding that the mere statement in a partnership agreement stating that the sale was made pursuant to an exemption from federal registration is insufficient to establish an exemption from registration requirements). The Court is persuaded by these authorities and their progeny.

Carr also argues Plaintiffs fail to state a claim because their allegation that the securities at issue were not exempt from registration is unsupported by any specific factual allegation. However, Plaintiffs have alleged Mary was thirteen years old when she purchased Vantage stock and, thus, was not an "accredited investor" under Regulation D.[13] Further, Plaintiffs allege neither Baily nor Mary "executed an investor questionnaire in connection with their purchases of Vantage stock...nor were they asked to provide any evidence of their financial wherewithal."[14] These allegations provide some factual support for Plaintiffs' assertion that the Vantage securities were not exempt from registration requirements. Finally, although Carr urges that Plaintiffs are estopped from asserting they are not accredited investors pursuant to the Regulation D exemption given representations and warranties in the Stock Subscription Agreements to the contrary, such is not a matter which can be determined as a matter of law based solely on the pleadings and in light of the allegations contained in the SAC. The Court finds Plaintiffs have sufficiently stated a claim for violations of O.C.G.A. §10-5-20 and, thus, Defendant Carr's Motion to Dismiss the SAC is DENIED as to Count I as asserted by Carter and Scott.

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13 SAC, ¶56.

14 SAC, ¶57.

5. Count II: Violations of O.C.G.A. §10-5-31

Plaintiffs allege Defendants violated O.C.G.A. §10-5-31 because "neither Carr nor Dwyer were registered as a securities salesperson or an investment advisor with the Georgia Commissioner of Securities."[15]

O.C.G.A. §10-5-31(a) provides: "It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is exempt from registration as an agent under subsection (b) of this Code section." Under the Georgia Securities Act, "agent" is defined as: "[A]n individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or who represents an issuer in effecting or attempting to effect purchases or sales of the issuer's securities. A partner, officer, or director of a broker-dealer or issuer or an individual having a similar status or performing similar functions may be an agent if the individual performs the duties of an agent."

Defendant Carr asserts the SAC is facially defective because there is no factual allegation supporting Plaintiffs' assertion that Dwyer and Carr "represented" and therefore were "agents" of Vantage and only "speculates" that Dwyer and Carr were not exempt from registration. However, Plaintiffs have alleged that Carr at one point was a director of Vantage and that when soliciting Plaintiffs to purchase Vantage stock he was acting on Vantage's behalf, used email addresses associated with Vantage, and received commissions or other remuneration for soliciting investors.[16] The Court finds Plaintiffs Carter and Scott have sufficiently stated a claim under O.C.G.A. §10-5-31 and whether Defendants are exempt from its registration requirement cannot be determined as a matter of law from the pleadings. *See also* O.C.G.A. §10-5-52 ("In a

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15 SAC, ¶99.

16 SAC, ¶¶ 8, 28-29, 30, 34-35, 86, 100.

civil action or administrative proceeding under th[e Georgia Securities Act], a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim"). Accordingly, the Motion to Dismiss the SAC with respect to Count II as asserted by Carter and Scott is DENIED.

6. Count III: Violation of 15 U.S.C. §77l(a)(2) (Section 12(a)(2) of the 1933 Securities Act)

Plaintiffs allege that in selling Vantage stock Defendants used instrumentalities of interstate commerce to make misleading statements of material fact or omissions of material fact in violation of Section 12(a)(2) of the 1933 Securities Act, 15 U.S.C. §771l(a)(2). Defendant Carr asserts the claim is time barred under the applicable one year statute of limitations.

With respect to such claims, 15 U.S.C. §77m provides: "No action shall be maintained to enforce any liability created under section…77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or the omission, ***or after such discovery should have been made by the exercise of reasonable diligence***." (Emphasis added).

> "This statute of limitations applies an objective 'inquiry notice' analysis." Gerin v. Aegon USA, Inc., 242 Fed.Appx. 631, 632 (11th Cir. 2007). "'Inquiry notice is the term used for knowledge of facts that would lead a reasonable person to begin investigating the possibility that his legal rights had been infringed.' " Id. (quoting Theoharous v. Fong, 256 F.3d 1219, 1228 (11th Cir. 2001)).

Barron v. Lampley, No. 4:15-CV-0038-HLM, 2016 WL 5334472, at *5 (N.D. Ga. Jan. 25, 2016) (but noting a split among federal courts with respect to whether an inquiry notice standard or the discovery rule applies to the statute of limitations for § 12(a)(2) claims and that the Eleventh Circuit has not yet addressed the issue).

This action was filed on Oct. 25, 2017. According to the SAC from July through December 2016 Carr "assured Plaintiffs that Vantage was profitable in various communications"

and "claimed Vantage would soon become a billion dollar company with investments from wealthy individuals including investors in Monaco and various celebrities."[17] In reliance on these representations Plaintiffs allegedly continued to hold their Vantage investments.[18] Construing the SAC in the light most favorable to Plaintiffs with all doubts resolved in their favor even though unfavorable constructions are possible, whether Plaintiffs' claims are time barred is an issue which cannot be resolved based solely on the pleadings. Thus, Carr's Motion to Dismiss the SAC is DENIED with respect to Count III as asserted by Plaintiffs Carter and Scott.

7. Count IV: Negligence

Plaintiffs generally allege Defendants owed a duty of care to Plaintiffs as purchasers of the Vantage securities and violated that duty "based upon the acts and omissions" set forth in the SAC. Defendant Carr asserts the SAC fails to set forth factual allegations establishing the requisite elements of a negligence claim. The Court agrees.

Notably, throughout the SAC Plaintiffs consistently allege Defendants' acted willfully and with the intent to deceive and defraud them, not that they acted negligently. Further, the allegations specific to Plaintiffs' negligence claim contain only boilerplate, conclusory assertions devoid of any facts whatsoever. The Court finds Plaintiffs have failed to state a claim for negligence. Accordingly, Defendant Carr's Motion to Dismiss the SAC is GRANTED as to Count IV.

8. Counts V and VI: Securities fraud and common law fraud

In Counts V and VI Plaintiffs allege Defendants engaged in securities fraud in violation of O.C.G.A. §§ 10-5-50 *et seq.* and common law fraud by making and/or substantially participating in the making of false and misleading statements of material fact and/or omissions

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17 SAC, ¶73.
18 SAC, ¶74.

of material fact upon which Plaintiffs relied to their detriment when purchasing Vantage stock. Defendant Carr urges the SAC fails to plead fraud with sufficient particularity.

Pursuant to O.C.G.A. §10-5-50,

> [i]t is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:
> (1) To employ a device, scheme, or artifice to defraud;
> (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
> (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

As to Plaintiffs' common law fraud claim,

> [t]he elements essential to an action in tort for damages resulting from a material misrepresentation constituting fraud are: (1) that the defendant made the representations; (2) that at the time he knew they were false...; (3) that he made them with the intention and purpose of deceiving the plaintiff; (4) that the plaintiff [justifiably] relied on such representations; [and] (5) that the plaintiff sustained the alleged loss and damage as the proximate result of their having been made.

GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., Inc., 245 Ga. App. 460, 463–64, 537 S.E.2d 677, 681–82 (2000) (citation omitted) (allegations that securities broker represented to stock purchase that corporation was best company that seller had in its portfolio, that purchaser bought portfolio, and that corporation then declared bankruptcy three weeks later stated claims against broker for securities fraud, common law fraud, and negligent representation).

As held in Part IV.B.iii.2, *supra*, the Court finds Plaintiffs Carter and Scott have sufficiently pled their fraud claims against Defendant Carr. Although Carr argues that allegations regarding his having "worked with" Askew on communications sent by Askew to Plaintiffs essentially purports to assert a claim for "aiding and abetting" securities fraud, the SAC alleges more than mere aiding and abetting. Plaintiffs specifically allege that in 2016 Carr arranged for Plaintiff Carter to "receive investor guides citing 'audited returns,' 'performance summaries,'

'forecasts', and numerous email communications which contain misrepresentations and omissions."[19] They also allege that during that time period, Brian Askew, a principle of Vantage, forwarded several communications to Carter from Carr which Askew and Carr allegedly drafted together "for the purpose of distributing them [to] potential buyers", communications which Plaintiffs contend contain material misrepresentations.[20] Thus, rather than mere aiding and abetting, Plaintiffs allege Carr was directly and substantially involved in soliciting them through misrepresentations in these communications. *See* O.C.G.A. §10-5-50 (making certain fraudulent acts in connection with the offer, sale, or purchase of securities unlawful whether done "directly or indirectly").

Further, although Carr asks the Court to dismiss Plaintiffs' "holder claims" predicated on forwarded communications, "Georgia law permits holder claims where, as here, [P]laintiffs allege that misrepresentations ***were directed at them*** to their injury." Holmes v. Grubman, 286 Ga. 636, 639–40, 691 S.E.2d 196, 199 (2010) (emphasis added). This is not a situation in which private emails were forwarded to Carter and Scott without Carr's knowledge or permission. Rather, Plaintiffs allege Carr and Askew worked together to draft communications with the intent of soliciting investors. Assuming these allegations are true, as the Court is required to do when considering Carr's motion, who forwarded the email solicitations to Plaintiffs is not dispositive. Further, the allegations regarding email communications cannot be considered in isolation but rather, according to Plaintiffs, where part of an ongoing effort throughout 2016 to directly solicit Plaintiffs' investments in Vantage—efforts which include email communications, investor guides citing audited returns, performance summaries, and forecasts as well as in person meetings. Thus, the Court finds Plaintiffs Carter and Scott's holder claims are sufficiently pled.

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19 SAC, ¶43.

20 SAC, ¶¶ 44-45, 75-86.

Defendant Carr also contends the SAC fails to plead scienter with sufficient specificity. Scienter is an element of a claim brought under O.C.G.A. §10-5-50 as well as a claim for common law fraud. *See* Sims v. Nat. Prod. of Georgia, LLC, 337 Ga. App. 20, 23, 785 S.E.2d 659, 663 (2016) ("O.C.G.A. §10-5-50 requires a showing of intent to defraud") (citing Branan v. State, 285 Ga. App. 717, 720(2)(a), 647 S.E.2d 606 (2007)); Baja Properties, LLC v. Mattera, 345 Ga. App. 101, 105, 812 S.E.2d 358, 363 (2018) ("The tort of fraud has five elements: a false representation by a defendant, scienter, intention to induce the plaintiff to act or refrain from acting, justifiable reliance by plaintiff, and damage to plaintiff") (quoting Mecca Constr., Inc. v. Maestro Investments, 320 Ga. App. 34, 41 (3) (b), 739 S.E.2d 51 (2013)).

"Scienter must be pleaded with particular facts that give rise to a strong inference that the defendant acted in a severely reckless manner." GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs., Inc., 245 Ga. App. 460, 464, 537 S.E.2d 677, 682 (2000) (citing Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1281 (11th Cir.1999)).

> However, when pleading fraud, "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally," [O.C.G.A. §9-11-9(b)] not specifically. This holds true because, "[e]xcept in plain and indisputable cases, scienter in actions based on fraud is an issue of fact for jury determination." [(Citation and punctuation omitted.) Lloyd v. Kramer, 233 Ga. App. 372, 373(1), 503 S.E.2d 632 (1998).] Indeed, scienter deals with "a subjective state of mind seldom capable of direct proof." [Quill v. Newberry, 238 Ga. App. 184, 189(1)(c), 518 S.E.2d 189 (1999).]

Goldston v. Bank of Am. Corp., 259 Ga. App. 690, 697, 577 S.E.2d 864, 871 (2003).

Taking the allegations of the SAC as a whole and construing them in the light most favorable to Plaintiffs, the Court finds Plaintiffs have sufficiently pled scienter. Plaintiff repeatedly allege that Carr acting knowingly, willfully and intentionally in making false representations regarding Vantage's success, its audited returns, and Carr's own investment in

Vantage, among other allegations, in order to induce Plaintiffs to buy and hold Vantage stock. Assuming these allegations are true, they "give rise to a strong inference that [Carr] acted in a severely reckless manner." GCA Strategic Inv. Fund, Ltd., 245 Ga. App. at 464.

Additionally, Defendant Carr contends the SAC fails to adequately plead loss causation. "In the context of securities fraud, 'be it statutory or based in the common law,' proximate cause requires a showing of 'loss causation.'" Greenwald v. Odom, 314 Ga. App. 46, 60, 723 S.E.2d 305, 318 (2012) (quoting Holmes v. Grubman, 286 Ga. 636, 642, 691 S.E.2d 196, 200 (2010)). "[L]oss causation describes the link between the defendant's misconduct and the plaintiff's economic loss." Greenwald, 314 Ga. App. at 60 (quoting Robbins v. Koger Properties, 116 F.3d 1441, 1447(VI) (11th Cir. 1997)). "Significantly, the way in which a plaintiff establishes "loss causation" can differ depending on the specific circumstances of the case at hand." Greenwald, 314 Ga. App. at 60.

Here, Plaintiffs allege that Defendant Carr made false representations to induce Plaintiffs' investments and to convince them not to sell their investments, and that in reliance on his representations they purchased and held their Vantage stock, resulting in economic loss and damages. Plaintiffs' allegations are sufficient to "link" Carr's alleged misconduct with Plaintiffs' economic loss.

Finally, Defendant Carr alleges the securities fraud and common law fraud claims fail as a matter of law because "[t]he SAC fails to allege what Carr received from the supposed fraud." However, Plaintiffs have alleged Carr received commissions or other remuneration for soliciting investors.[21]

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[21] SAC, ¶¶ 29, 86(4).

Having considered the SAC and given all of the above, the Court finds Plaintiffs Carter and Scott have sufficiently stated claims for securities fraud under the Georgia Securities Act and common law fraud. The Motion to Dismiss Counts V and VI as asserted by Carter and Scott is hereby DENIED.

9. Counts VIII and IX: Attorneys' fees and punitive damages

"An award of attorney fees, costs, and punitive damages is derivative of a plaintiff's substantive claims." Racette v. Bank of Am., N.A., 318 Ga. App. 171, 181, 733 S.E.2d 457, 466 (2012) (citing DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 52(5), 668 S.E.2d 737 (2008)). Because several tort and other claims survive the instant motion, the Motion to Dismiss Counts VIII and IX is DENIED.[22]

10. Count X: Violations of the Colorado Securities Act

Defendant Carr argues Plaintiff Scott fails to state a claim for violation of the Colorado Securities Act. The Court agrees. Despite the Court's instruction to Plaintiffs to provide a more definite statement as to the factual allegations giving rise to their claims, the SAC contains largely conclusory references to the Colorado Securities Act alleging only that: Defendant Dwyer was not registered as an agent pursuant to the Colorado Securities Act[23]; Defendants offered for sale and sold Vantage stock to Plaintiffs "within the State of Georgia and in violation of...the Colorado Securities Act"[24]; Scott invested $2,000,000 in Vantage and "[a]ll of these solicitations and investments were made in the State of Georgia or the State of Colorado"[25]; and pursuant to the Colorado Securities Act, the Vantage stock is a "security", was not subject to an effective registration statement or exempt from registration, and Defendants were not properly

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22 To the extent Defendant Carr asserts that attorneys' fees and punitive damages are never available on a §12(a)(2) claim, he may raise the issue again at the summary judgment stage of this litigation.

23 SAC, ¶22.

24 SAC, ¶33.

25 SAC, ¶37.

registered as agents, securities salespersons or investment advisors[26]. With respect to Count X specifically, Plaintiff Scott only alleges that "[a]s a result of the conduct [described in the SAC], the offer and sale of securities to [her] violates the Colorado Securities Act."

Importantly, Plaintiffs conclusively assert that "solicitations and investments" were made in Georgia "or" Colorado but do provide any factual allegations in support of that assertion and do not articulate what conduct by Carr would make him liable to Scott under Colorado law or what provisions of the Colorado Securities Act were allegedly violated. Thus, Defendant Carr's Motion to Dismiss the SAC is GRANTED as to Count X.

11. Count XI: Breach of fiduciary duty

Defendant Carr alleges Plaintiffs fail to state a claim for breach of fiduciary duty because the SAC does not contain any allegations that would give rise to a fiduciary duty owed by Carr to any Plaintiff and fails to allege how any such duty was breached by Carr.

"It is well settled that a claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) damage proximately caused by the breach." Engelman v. Kessler, 340 Ga. App. 239, 246, 797 S.E.2d 160, 166 (2017), cert. denied (Aug. 14, 2017). Pursuant to O.C.G.A. §23-2-58, a fiduciary duty may exist "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence, the law requires the utmost good faith, such as the relationship between partners, principal and agent, etc." Such a relationship may be created by law, contract, or the facts of a particular case. Id.; Bedsole v. Action Outdoor Advert. JV, LLC, 325 Ga. App. 194, 201, 750 S.E.2d 445, 452 (2013). However, "[t]he mere circumstance that...people have come to repose a certain amount of trust and confidence in each other as the result of business dealings is not, in and of itself,

[26] SAC, ¶¶ 87-89.

sufficient to find the existence of a confidential relationship." Cottrell v. Smith, 299 Ga. 517, 532, 788 S.E.2d 772, 786, reconsideration denied (July 25, 2016), adopted, (Ga. Super. 2016), and cert. denied, 137 S. Ct. 648, 196 L. Ed. 2d 523 (2017) (quoting Parello v. Maio, 268 Ga. 852, 853, 494 S.E.2d 331 (1998)).

Here, Plaintiffs allege that Defendants "repeatedly represented to Plaintiffs that they were participants in a partnership and thus were partners of one another" and, from that allegation Plaintiffs summarily contend "Defendants assumed fiduciary duties to each Plaintiff."[27] Even assuming Defendants held themselves out as partners of one another, such not does give rise to a fiduciary duty owed to Plaintiffs. Moreover, the SAC makes clear Defendants were soliciting Plaintiffs to induce them to purchase shares in Vantage in an arm's length transaction. There is no allegation that Plaintiffs knew Carr prior to these solicitations or any basis upon which to find he owed Plaintiffs a fiduciary duty. Accordingly, the Motion to Dismiss the SAC is GRANTED with respect to Count XI.

V. Defendant Dwyer's Motion for Judgment on the Pleadings

The Court finds Defendant Dwyer's Motion for Judgment on the Pleadings, which seeks judgment as to Counts I through X of Plaintiffs' First Amended Complaint, has largely been mooted by the SAC, with the exception of Dwyer's arguments seeking dismissal of Counts IV (negligence), Count XI (breach of fiduciary duty), and the claims asserted by Bailey and Mary. For the reasons set forth in Part IV, *supra*, Dwyer's Motion for Judgment on the Pleadings is GRANTED as to those claims only and is otherwise DENIED as moot.

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[27] SAC, ¶137.

VI. Case Management

In light of the Court's rulings herein, counsel are directed to confer regarding case management deadlines and report back to the Court within fifteen (15) days of the entry of this order with a proposed consent Case Management Order or, if the parties cannot agree on such deadlines, each side may present a proposed Case Management Order for the Court's consideration.

SO ORDERED this 12th day of September, 2018.

ELIZABETH E. LONG, SENIOR JUDGE
Metro Atlanta Business Case Division
Fulton County Superior Court
Atlanta Judicial Circuit

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