2-4-2019

GREENLIFE ENERGY SOLUTIONS, LLC, ORDER ON MOTIONS TO DISMISS

Kelly Lee Ellerbe
Fulton County Superior Court

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

GREENLIFE ENERGY SOLUTIONS, LLC, Plaintiff, v. MCCORMACK, BARON, SALAZAR, INC., MBS-INTEGRAL UCNI, LLC, SCHOLARS LANDING MBS MEMBER, INC., VINCE BENNETT, KEVIN MCCORMACK, TONY SALAZAR, RICHARD BARON, HILLARY ZIMMERMAN, and MICHAEL DUFFY, Defendants.	CIVIL ACTION NO. 2018CV307344 Business Case Div. 3

ORDER ON MOTIONS TO DISMISS

The above styled action is before the Court on: (1) Defendants MBS-Integral UCNI, LLC and Scholars Landing MBS Member, Inc.'s Motion to Dismiss, filed on September 12, 2018; (2) Individual Defendants' Motion to Dismiss, filed on September 12, 2018; and (3) Defendant McCormack Baron Salazar, Inc.'s Motion to Dismiss, filed on September 12, 2018. Having considered the pleadings and argument of counsel at a February 1, 2019 hearing in this matter, this Court finds as follows:

SUMMARY OF PLEADINGS

According to the Complaint, Plaintiff GreenLife Energy Solutions, LLC ("GreenLife") "is a commercial development, general construction and engineering firm based out of Atlanta, Georgia that performs projects primarily in the City of Atlanta and Southeastern United States."[1]

[1] Complaint, ¶13.

Keven Patterson ("Patterson") "is the sole and managing member of GreenLife."[2]

Defendant McCormack, Baron, Salazar, Inc. ("MBS") is based out of Missouri and "is part of a broader umbrella of McCormack Baron companies [collectively the "MBS Entities"], which comprise the nation's leading for-profit developer, manager and asset manager of economically-integrated urban neighbors."[3] Plaintiff alleges "[a] key business development strategy of the MBS Entities...is to identify and select a local co-development partner in the firm's target markets."[4] Further, "[i]n markets that have significant African-American populations, African-American leadership and minority participation goals, the MBS Entities...developed a strategic model to identify successful African-American-led local firms to partner with."[5] The individually named Defendants—Vince Bennett ("Bennett"), Kevin McCormack ("McCormack"), Tony Salazar ("Salazar"), Richard Baron ("Baron"), Hillary Zimmerman ("Zimmerman") and Michael Duffy ("Duffy")—are officers and directors of MBS.[6]

MBS's Vice President of Business Development, Ronald Roberts ("Robert"), and others at MBS allegedly "had known Patterson for years and had been involved in other projects with [him] in the Southeastern United States."[7] In August of 2014, Roberts contacted GreenLife about exploring opportunities in Atlanta.[8] Plaintiff alleges "[MBS] was exploring a working relationship with GreenLife because Patterson and GreenLife fit the demographic profile within [MBS's] strategies, are familiar with the Atlanta market, have local relationships in the Atlanta market, and understand the types of opportunities that would be logical targets for [MBS] in the

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2 Id.
3 Complaint, ¶14.
4 Complaint, ¶18.
5 Complaint, ¶20.
6 Complaint, ¶53. The individually named Defendants are referred to collectively herein as the "Individual Defendants" or as the "Misrepresentation Defendants" where referred to as such in the Complaint.
7 Complaint, ¶¶ 16-17.
8 Complaint, ¶16.

Atlanta [m]arket."[9]

During the remainder of 2014 and into 2015, MBS and GreenLife allegedly met on numerous occasions "to both establish a list of potential targets and to outline potential terms of a broader relationship."[10] For example, in October of 2014, they jointly submitted a proposal on an affordable housing project in Atlanta called Renaissance at Park Place South and met with another developer to discuss the redevelopment of an apartment home project in Atlanta called Conley Village.[11] During this period, MBS also conducted a credit check and a background check "to, among other things, confirm GreenLife's and Patterson's financials."[12]

From November of 2014 through February of 2015, GreenLife and MBS engaged in numerous discussions to formalize their relationship through a written agreement.[13] During this time, Defendants McCormack, Bennett, Salazar, and Baron allegedly "became activity involved in [MBS's] negotiations with GreenLife."[14] Plaintiff alleges Patterson and Roberts also "worked closely to create a business development strategy for the Atlanta market", and Patterson "began increasing marketing efforts and informing centers of influence in the Atlanta [m]arket of the proposed co-development partnership with [MBS]."[15]

On January 21, 2015, the parties executed a Letter of Understanding ("LOU").[16] Although the LOU expressly states that it is non-binding,[17] its purpose was "to reach an

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9 Complaint, ¶21.

10 Complaint, ¶ 24.

11 Complaint, ¶¶ 25-26.

12 Complaint, ¶¶ 27, 29, 32.

13 Complaint, ¶ 32.

14 Complaint, ¶ 33.

15 Complaint, ¶¶ 34-35.

16 Complaint, ¶ 37, Ex. F (Letter of Understanding regarding Joint Venture Co-Development Opportunity). The LOU attached to the Complaint as Exhibit F is not executed and has a "DRAFT" watermark.

17 *See* LOU at p. 5 ("The purpose of this LOU is to generally describe a Joint Venture Co-Development Agreement MBS is taking under consideration. This LOU is not a commitment to invest, form a co-developer entity, nor a commitment to be bound by the terms proposed herein, and no such commitment will exist prior to the negotiation and execution of a mutually satisfactory Joint Venture Co-Development Agreement. Except with respect to confidentiality provisions herein, it is expressly understood and the parties explicitly agree that this LOU does not

understanding on the relationship, terms and conditions under which MBS and [GreenLife] agree to partner to finance, acquire, close, construct and operate proposed developments located in [sic] throughout the Atlanta (Georgia) metropolitan area."[18] That same month MBS and GreenLife "were invited to attend a January 26, 2015 meeting with the City of Atlanta about serving as the housing lead for a $30 million Choice Neighborhood[s] Implementation ("CNI") Grant for the Choice Neighborhood[s] Projects."[19]

"The sites that were to be redeveloped in connection with the Choice Neighborhood[s] Projects included: (a) affordable housing, which is being implemented as the University Commons Off-Site Multifamily; (b) single family townhomes; (c) renovation of a building called Roosevelt Hall; and (d) commercial and retail space."[20] The City of Atlanta and the Atlanta Housing Authority ("AHA") are co-applicants on the CNI Grant, a grant from the Department of Housing and Urban Development ("HUD") which typically requires the development of three distinct strategies and plans—Housing Strategy, Neighborhood Strategy, and People Strategy—with each strategy having a designated entity serving as the "lead."[21] The City of Atlanta ultimately approved, awarded and allocated funding for all of the Choice Neighborhoods Projects.[22]

GreenLife alleges Patterson, Roberts, and Bennett attended the January 26, 2015 meeting "with an understanding that they were pursuing opportunities together and would be partners on any opportunities obtained at the meeting."[23] At the conclusion of that meeting, MBS and GreenLife were allegedly invited to serve together as lead of the Housing Implementation

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create a legally binding agreement as to any of the Parties").

18 LOU at p. 1.

19 Complaint, ¶ 38.

20 Complaint, ¶ 39.

21 Complaint, ¶ 40. For example, the leader for the Housing Strategy is referred to as the Housing Implementation Entity. Id.

22 Complaint, ¶ 50.

23 Complaint, ¶ 42.

Entity.[24] GreenLife claims that "[i]mmediately after the meeting, GreenLife and [MBS] confirmed their understanding that any opportunity that arose from the meeting would be pursued jointly by [MBS] and GreenLife..."[25] Although prior to the meeting, the City and AHA had been in discussions with an Atlanta firm called The Integral Group ("Integral") to serve as the Housing Implementation Lead and MBS "was reluctant to consider serving as Housing Implementation Lead at the expense of Integral," MBS eventually agreed to have Integral "serve as a smaller participant in the Choice Neighborhood[s] Projects."[26]

However, according to GreenLife, Defendant MBS and the Individual Defendants[27] ultimately "sought to both use GreenLife to secure the Choice Neighborhood[s] Projects, and to simultaneously defraud and cheat GreenLife out of the benefits of them."[28] Specifically, GreenLife alleges that while the Individual Defendants continued to formalize [MBS's] relationship with GreenLife, on February 2, 2015 they also caused MBS to form a new affiliate—Defendant Scholars Landing MBS Member, Inc. ("Scholars Landing MBS")—to enter into a "side deal" with Integral related to the Choice Neighborhoods Projects ("Side Deal").[29] On February 3, 2015, Integral Development, LLC and Scholars Landing MBS executed an operating agreement for Defendant MBS-Integral UCNI, LLC ("MBS-Integral"), a company that "was established for the purpose of implementing the Housing Component as the Housing Implementation Entity" related to the City of Atlanta and AHA's Choice Neighborhoods grant application.[30]

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[24] Complaint, ¶ 45.
[25] Complaint, ¶ 46.
[26] Complaint, ¶¶ 47, 49.
[27] In its Complaint, GreenLife refers to these particular Defendants as the "Misrepresentation Defendants." Id. at ¶ 53. *See* note 6, *supra*.
[28] Complaint, ¶ 53.
[29] Complaint, ¶¶ 54-55, Ex. I (Scholars Landing MBS Articles of Incorporation and Missouri Certificate of Incorporation).
[30] Complaint, ¶ 55, Ex. H (Operating Agreement of MBS-Integral UCNI, LLC) at pp. 1-2.

Unaware of the Side Deal, on February 5, 2015, Patterson met with MBS and the Individual Defendants at MBS's offices in St. Louis, Missouri "to finalize the terms of what would become the Joint Development Agreement ("JDA") between [MBS] and GreenLife."[31] Nevertheless, the next day on February 6, 2015, Integral Development, LLC and MBS-Integral executed a "letter agreement" referencing the collaboration of Integral Development, LLC and Scholars Landing MBS (as members of MBS-Integral) "with respect to the redevelopment activities described in the Atlanta FYI [sic] 2014 Choice Neighborhoods Implementation Grant application."[32]

Finally, GreenLife alleges that on February 11, 2015 it was fraudulently induced to enter into the JDA with MBS, an agreement containing multiple obligations that would apply to "projects" which term GreenLife contends included the Choice Neighborhoods Projects.[33] GreenLife claims the JDA, thus, includes in its terms multiple misrepresentations insofar as MBS's obligations under its prior Side Deal with Integral "prevented it from complying with the terms of the [JDA]" as both documents purport to govern the Choice Neighborhoods Projects.[34]

GreenLife asserts MBS and the Individual Defendants then caused the City of Atlanta's invitation to serve as Housing Implementation Lead for the Choice Neighborhood Projects to be extended to MBS-Integral under the Side Deal.[35] MBS-Integral was so identified in the new CNI Grant submitted to HUD, leaving GreenLife out of the Housing Implementation Lead entity.[36] GreenLife claims it "should have been part of the ownership and control group for that entity under the parties' agreements" but instead Defendants' actions "have deprived GreenLife of

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31 Complaint, ¶ 57.
32 Complaint, ¶ 58, Ex. J (Letter dated February 6, 2015 between MBS-Integral UCNI, LLC and Integral), at p.1.
33 Complaint, ¶ 60.
34 Complaint, ¶¶ 61-62.
35 Complaint, ¶ 67.
36 Complaint, ¶ 68.

participation in the Choice Neighborhoods Projects."[37]

GreenLife further asserts it repeatedly asked MBS and the Individual Defendants to "mitigate" the harm caused to it by their actions, including requesting that they amend the MBS-Integral corporate documents such that GreenLife would be part of MBS-Integral.[38] However, GreenLife alleges "[MBS] either did not comply with GreenLife's requests or was unable to correct the harm caused to GreenLife due to the fact that [MBS] had granted certain aspects of control in MBS-Integral to Integral, rather than establishing "a single purpose limited partnership or limited liability company" with GreenLife as set forth in the JDA.[39]

On or around April 17, 2018, it was announced that the City of Atlanta and MBS had entered into a public-private partnership for the development and construction of the University Commons Off-Site Multifamily project, one of the sites which was to be redeveloped in connection with the Choice Neighborhoods Projects.[40] According to GreenLife, pursuant to the JDA, it was to participate in that project but MBS has not honored the JDA and has purported to terminate the JDA.[41] Further, MBS advised the City that it did not intend to proceed with the other awarded aspects of the Choice Neighborhoods Projects and, even though GreenLife was interested in completing them, due to the fact it was not part of MBS-Integral and because MBS terminated the JDA, "the AHA elected not to sole source the remaining Choice Neighborhoods Projects through GreenLife and instead will put those projects out to bid."[42] GreenLife contends the loss of those projects is the result of "[MBS's] submission of the HUD grant application in the name of MBS-Integral, an entity that did not include GreenLife as a partner."[43]

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37 Complaint, ¶¶ 72-73.
38 Complaint, ¶¶ 75-76.
39 Complaint, ¶ 77.
40 Complaint, ¶¶ 39, 78.
41 Complaint, ¶79.
42 Complaint, ¶¶ 80-81.
43 Complaint, ¶82.

Based on the foregoing, GreenLife asserts the following claims in this action: (1) intentional breach of the Joint Development Agreement (against MBS)[44]; (2) "fraud, deceit and suppression"[45] (against all Defendants)[46]; (3) negligent misrepresentation (against all Defendants)[47]; (4) punitive damages (against MBS and the Individual Defendants)[48]; and (5) attorney's fees and costs (against MBS and the Individual Defendants)[49].

ANALYSIS

I. Standard on a Motion to Dismiss

Defendants have moved to dismiss GreenLife's Complaint for failure to state a claim under O.C.G.A. §9-11-12(b)(6) and certain Individual Defendants have also moved to dismiss for lack of personal jurisdiction under O.C.G.A. §9-11-12(b)(2).

> [A] motion to dismiss 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. If, within the framework of the complaint, evidence may be introduced which will sustain a grant of the relief sought by the claimant, the complaint is sufficient and a motion to dismiss should be denied.

Abramyan v. State, 301 Ga. 308, 309 (2017) (citing Anderson v. Flake, 267 Ga. 498, 501 (1997)). Further, "[w]hen 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

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44 Complaint, ¶¶ 84-92.
45 Referred to collectively herein as GreenLife's "fraud" claim.
46 Complaint, ¶¶ 93-102.
47 Complaint, ¶¶ 103-110.
48 Complaint, ¶¶ 111-117.
49 Complaint, ¶¶ 118-120.

unfavorable constructions are possible." Cobb Cty. v. Jones Grp. P.L.C., 218 Ga. App. 149, 152 (1995) (citation omitted).

Under the notice pleading procedure of the Georgia Civil Practice Act, only "[a] short and plain statement of the claims" is generally required (O.C.G.A. § 9-11-8(a)(2)(A)) although fraud must be pled with particularity (O.C.G.A. §9-11-9(b)). *See also* Wright v. Waterberg Big Game Hunting Lodge Otjahewita (PTY), Ltd., 330 Ga. App. 508, 510 (2014) ("[T]he Georgia Civil Practice Act requires only notice pleading and, under the Act, pleadings are to be construed liberally and reasonably to achieve substantial justice consistent with the statutory requirement of the Act. Pleadings serve only the purpose of giving notice to the opposing party of the general nature of the contentions of the pleader, and thus general allegations are sufficient to support a plaintiff's claim for relief") (citing Racette v. Bank of Am., N.A., 318 Ga. App. 171, 180 (2012)).

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 (2007) (citing Allen v. Bergman, 201 Ga. App. 781, 783 (1991)). *See* Cleveland v. MidFirst Bank, 335 Ga. App. 465, 465 (2016) ("[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").[50]

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[50] The Court's review on a motion to dismiss for failure to state a claim under O.C.G.A. §9-11-12(b)(6) is limited to the pleadings and the attachments thereto. *See* Minnifield v. Wells Fargo Bank, N.A., 331 Ga. App. 512, 514 (2015) ("When considering a motion to dismiss for failure to state a claim, a trial court may consider exhibits attached to and incorporated into the complaint and answer") (citation omitted). However, a trial court may also consider affidavits on a motion to dismiss for lack of personal jurisdiction without converting the motion to one for summary judgment. *See* Alcatraz Media, LLC, 290 Ga. App. 882, 884 (2008); Ogden Equip. Co. v. Talmadge Farms, 232 Ga. 614 (1974).

With respect to certain Individual Defendants' O.C.G.A. §9-11-12(b)(2) defense,

> in Georgia, a defendant who files a motion to dismiss for lack of personal jurisdiction has the burden of proving lack of jurisdiction. And any disputes of fact in the written submissions supporting and opposing the motion to dismiss are resolved in favor of the party asserting the existence of personal jurisdiction.

Alcatraz Media, LLC v. Yahoo! Inc., 290 Ga. App. at 883–84 (citing Aero Toy Store v. Grieves, 279 Ga. App. 515, 524 (2006)).

II. Analysis and Conclusions of Law

A. Defendants MBS-Integral and Scholars Landing MBS's Motion to Dismiss

In this action, GreenLife asserts claims for fraud and negligent misrepresentation against MBS-Integral and Scholars Landing MBS. However, MBS-Integral and Scholars Landing MBS urge all such claims should be dismissed for two reasons. First, GreenLife does not allege any contract between GreenLife and MBS-Integral or Scholars Landing MBS. Second, neither MBS-Integral nor Scholars Landing MBS are alleged to have made any misrepresentations to GreenLife upon which to predicate such claims. The Court agrees.

i. Complaint fails to state a claim for fraud and negligent misrepresentation

"In order to prove fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff." Engelman v. Kessler, 340 Ga. App. 239, 246 (2017) (citing Sun Nurseries, Inc. v. Lake Erma, LLC, 316 Ga. App. 832, 835 (2012)). "The elements of a claim for negligent misrepresentation are: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Liberty Capital, LLC v. First Chatham Bank, 338 Ga.

App. 48, 54 (2016) (citing Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc., 267 Ga. 424, 426 (1997)). Thus, an essential element of both claims is a false representation made by the defendant to the plaintiff.

Here, GreenLife does not allege MBS-Integral or Scholars Landing MBS made any representation to GreenLife. GreenLife also fails to assert the Individual Defendants who allegedly made misrepresentations were acting on behalf of MBS-Integral or Scholars Landing MBS. Although GreenLife argues MBS-Integral and Scholars Landing MBS are "direct beneficiaries of the fraud alleged by GreenLife" and appears to argue they are "indispensable parties" because "GreenLife's requested relief will siphon money away from [them]",[51] GreenLife has alleged no basis in law or fact that would extend liability to MBS-Integral or Scholars Landing MBS, which are separate legal entities from MBS. Thus, the Complaint fails to state fraud or negligent misrepresentation claims against MBS-Integral or Scholars Landing MBS.

ii. Exculpatory Provision

MBS-Integral and Scholars Landing MBS also urge the claims asserted against them are barred under an exculpatory provision in the JDA.

"Absent a public policy interest, contracting parties are free to 'contract to waive numerous and substantial rights.'" Piedmont Arbors Condo. Ass'n, Inc. v. BPI Const. Co., 197 Ga. App. 141, 141 (1990) (citing Orkin Exterminating Co. v. Stevens, 130 Ga. App. 363, 369 (1973)). "An exculpatory clause is a contractual provision limiting or excluding remedies in either tort or contract (or both)." Ga. Contracts: Law and Litigation § 7:4 (2d ed. 2018).[52]

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[51] Plaintiff's Combined Response in Opposition to Defendants' Motions for Dismissal, p. 23.

[52] *See* 2010-1 SFG Venture LLC v. Lee Bank & Tr. Co., 332 Ga. App. 894, 897 (2015) ("Whether the clause at issue is characterized as a limitation-of-liability clause or an exculpatory clause is immaterial because Georgia case law does not appear to treat such clauses differently for purposes of review") (citation and punctuation omitted).

"Exculpatory clauses are valid and binding, and are not void as against public policy when a business relieves itself from its own negligence. However, exculpatory clauses do not relieve a party from liability for acts of gross negligence or wilful or wanton conduct." Colonial Props. Realty Ltd. P'ship v. Lowder Constr. Co., 256 Ga. App. 106, 112 (2002) (citations, footnotes, and internal punctuation omitted).

> Wanton and wilful conduct differs from negligence. Central of Ga. R. Co. v. Moore, 5 Ga. App. 562, 564 (1909). It is conduct "'such as to evidence a wilfull intention to inflict the injury, or else was so reckless or so charged with indifference to the consequences...as to justify the jury in finding a wantonness equivalent in spirit to actual intent"... There is an element of intent, actual or imputed, in 'wilful and wanton conduct' which removes such conduct from the range of conduct which may be termed negligent.

Martin v. Gaither, 219 Ga. App. 646, 652 (1995). "'Gross negligence' is defined as the absence of even slight diligence, and slight diligence is defined in [O.C.G.A. §51-1-4] as 'that degree of care which every man of common sense, however inattentive he may be, exercises under the same or similar circumstances.'"Abdel-Samed v. Dailey, 294 Ga. 758, 765 (2014).

In order to be enforceable

> [e]xculpatory clauses must be clear and unambiguous, they must be specific in what they purport to cover, and any ambiguity will be construed against the drafter of the instrument...The reason why exculpatory clauses should be explicit, prominent, clear and unambiguous, is that such an agreement amounts to a waiver of substantial rights, could be an accord and satisfaction of possible future claims, and requires a meeting of the minds on the subject matter.

Dep't of Transp. v. Arapaho Constr., Inc., 180 Ga. App. 341, 343 (1986), *aff'd*, 257 Ga. 269 (1987) (citations omitted).

Here, § 22 of the JDA ("Exculpatory Provision") provides:

> **22. No Personal Liability**. No officer, director, stockholder, member, or partner of either MBS or GreenLife, no disclosed or undisclosed principal of either MBS or GreenLife, and *no person or entity in any way affiliated*

> *with either MBS or GreenLife shall have any personal liability with respect to this Agreement*, any instrument delivered by such party in connection with this Agreement, *or the transactions contemplated hereby*, nor shall the property of any such person or entity be subject to attachment, levy, execution or other judicial process.[53]

GreenLife plainly alleges throughout its pleadings that the JDA applies to the Choice Neighborhood Projects.[54] Further, GreenLife expressly alleges that Scholars Landing MBS is "a newly-created affiliate of [MBS]" and the exhibits attached to the Complaint indicate Scholars Landing MBS and Integral Development, LLC are the members of MBS-Integral.[55] Taking GreenLife's allegations as true for purposes of this motion, MBS-Integral and Scholars Landing MBS are "affiliates" of MBS such that they are covered under the JDA's Exculpatory Provision. *See* Harkins v. CA 14th Inv'rs, Ltd., 247 Ga. App. 549, 550 (2001) ("[T]he term 'affiliate' 'signifies a condition of being united; being in close connection, allied, associated, or attached as a member or branch,' and an 'affiliate company' is defined as a '[c]ompany effectively controlled by another company'"; holding release that extended to "affiliated and related companies" unambiguously released entity that, although not expressly named in the release, was affiliated with the defendant) (citing Black's Law Dictionary 58, 1288 (6th ed.1990)); Lovelace v. Figure Salon, Inc., 179 Ga. App. 51, 52 (1986) (enforcing exculpatory clause that released the defendants "and/or any of their affiliated companies" from claims and demands arising out of the use of their services or facilities).

As to the scope of the Exculpatory Provision, the Court notes the provision explicitly and prominently is titled "**No Personal Liability**." It unambiguously provides that certain individuals and entities shall not have "any personal liability" with respect to the JDA, any instrument delivered by such party in connection with the JDA, or the transactions contemplated thereby.

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53 Complaint, ¶15, Ex. A (JDA) at § 22 (italicized emphasis added).

54 *See e.g.*, Complaint, ¶¶ 38-39, 60-67.

55 Complaint, ¶¶ 55-56, Ex. H (Operating Agreement of MBS-Integral UCNI, LLC) at p. 1.

The Exculpatory Provision is, thus, not limited to contractual claims but rather broadly encompasses and precludes "any personal liability," whether arising in contract or tort (short of willful or wanton conduct or gross negligence), related to the JDA or the transactions anticipated thereunder. *See, e.g.,* Neighborhood Assistance Corp. v. Dixon, 265 Ga. App. 255, 256 (2004) ("[A]n exculpatory clause does not need to expressly use the word "negligence" in order to bar a negligence claim"; holding provision agreeing not to hold the defendant or its agents "responsible for any losses, costs, expenses or damages that may result from [the plaintiff's] participation in, and/or [the defendant's] purchase and/or financing of [her] home" barred negligence claim); Flanigan v. Executive Office Centers, Inc., 249 Ga. App. 14, 15 (2001) (exculpatory clause in servicing agreement waiving "any claim for damages, direct or consequential, arising out of any failure to furnish any utility, service or facility, any error or omission with respect thereto, or any delay or interruption of the same" barred claims for breach of contract, negligence, tortious interference with contractual relations, and punitive damages). *Contrast* Dep't of Transp., 180 Ga. App. at 343 (termination provision allowing the Georgia Department of Transportation to terminate a contract if the contractor-plaintiff was prevented from proceeding due to a court-imposed injunction and precluding claims for losses therefrom could not be construed to bar breach of contract claim since the provision referred solely to court-imposed injunctions). Consequently, the negligent misrepresentation claim asserted against MBS-Integral or Scholars Landing MBS is precluded under the Exculpatory Provision.

Given all of the above, MBS-Integral and Scholars Landing MBS's Motion to Dismiss is hereby GRANTED.

B. Individual Defendants' Motion to Dismiss

GreenLife asserts claims against the Individual Defendants for fraud, negligent misrepresentation, punitive damages, and attorney's fees and costs. The Individual Defendants urge these claims should be dismissed because the Court lacks personal jurisdiction over Defendants Baron, Salazar and Zimmerman and because all claims for personal liability asserted against the Individual Defendants are precluded under the JDA's Exculpatory Provision.

i. Personal jurisdiction

Under Georgia's Long Arm Statute,

> [a] court of this state may exercise personal jurisdiction over any nonresident...as to a cause of action arising from any of the acts, omissions, ownership, use, or possession enumerated in this Code section, in the same manner as if he or she were a resident of this state, if in person or through an agent, he or she: (1) Transacts any business within this state...

O.C.G.A. §9-10-91(1). As noted by the Supreme Court of Georgia in Amerireach.com, LLC v. Walker, 290 Ga. 261 (2011):

> Nothing in subsection (1) [of O.C.G.A. §9-10-91] limits its application to contract cases...; nothing in subsection (1) requires the physical presence of the nonresident in Georgia or minimizes the import of a nonresident's intangible contacts with the State...Although Georgia courts have engrafted these and other requirements onto subsection (1), such requirements conflict with the literal language of the statute. To be consistent with...the well-established rules of statutory interpretation that preclude judicial construction of plain and unambiguous statutory language[], we must give the same literal construction to subsection (1) of O.C.G.A. § 9-10-91 that we give to the other subsections. Accordingly, **under that literal construction, O.C.G.A. § 9-10-91(1) grants Georgia courts the unlimited authority to exercise personal jurisdiction over any nonresident who transacts any business in this State.** Of course, because this statutory language would expand the personal jurisdiction of Georgia courts beyond that permitted by constitutional due process, we accordingly construe subsection (1) as reaching only "to the maximum extent permitted by procedural due process."

Id. at 265-66 (bold emphasis added) (citing Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank of Ames, 279 Ga. 672, 675–76 (2005)).

> Due process requires that individuals have "fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign." Burger King v. Rudzewicz, 471 U.S. 462 (1985). In evaluating whether a defendant could reasonably expect to be haled into court in a particular forum, courts examine [the] defendant's contacts with the state, focusing on whether (1) [the] defendant has done some act to avail himself of the law of the forum state; (2) the claim is related to those acts; and (3) the exercise of jurisdiction is reasonable, that is, it does not violate notions of fair play and substantial justice. Straus v. Straus, 260 Ga. 327 (1990); Smith v. Smith, 254 Ga. 450 (1985). These three elements do not constitute a due process formula, but are helpful analytical tools which ensure that a defendant is not forced to litigate in a jurisdiction solely as a result of "random," "fortuitous" or "attenuated" contacts. Burger King, supra at 475. The first two elements are used to determine whether [the] defendant has established the minimum contacts necessary for the exercise of jurisdiction. If a defendant has established minimum contacts, the court may then evaluate other factors that impact on the reasonableness of asserting jurisdiction, such as the burden on [the] defendant, the forum state's interest in adjudicating the dispute, [the] plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the states in furthering substantive social policies. Id. at 477. Beasley v. Beasley, 260 Ga. 419, 421 (1990).

Stubblefield v. Stubblefield, 296 Ga. 481, 483–84 (2015).

Importantly, although "jurisdiction over a corporate employee or officer does not automatically follow from jurisdiction over the corporation," "[n]othing in th[e] statutory language [of O.C.G.A. §9-10-91(1)] 'suggests that the Legislature intended to accord any special treatment to fiduciaries acting on behalf of a corporation or to insulate them from long-arm jurisdiction for acts performed in a corporate capacity.'" Amerireach.com, LLC v. Walker, 290 Ga. at 266 (citation omitted). Indeed, "for purposes of specific personal jurisdiction, the conduct in which the individual employees personally and actually engage as part of their employment duties does count against them in spite of the fact that they engaged in the activities as

employees of a business entity." Id. at 267 (citation omitted). Thus, "employees of a corporation that is subject to the personal jurisdiction of the courts of the forum may themselves be subject to jurisdiction if those employees were primary participants in the activities forming the basis of jurisdiction over the corporation…Personal jurisdiction over [such an employee] would extend at least as far as matters relating to the activities of the...corporation[ ] in the forum in which he was a primary participant." Id. at 267-68 (citation omitted). *See* Kipperman v. Onex Corp., 411 B.R. 805, 883–84 (N.D. Ga. 2009) (In order to exercise personal jurisdiction over a non-resident corporate officer, "there must be a determination that the corporate officer, himself, took acts, such as negotiating a contract or 'enjoying substantial financial benefit' from a contract") (citations omitted).

Here, GreenLife alleges Salazar, Baron, and Zimmerman are all non-residents and "upon information and belief are officers and directors of [MBS]."[56] According to their respective affidavits: Salazar, a California resident, is the President of West Coast Operations for MBS[57]; Baron, a Missouri resident, is the co-founder and chairman of MBS[58]; and Zimmerman, a Missouri resident, is General Counsel for MBS[59]. In asserting their personal jurisdiction defense, Salazar, Baron, and Zimmerman each aver that: to their knowledge they have never met any employee or agent of GreenLife; they have never met or communicated with Keven Patterson; and to their knowledge, they have never communicated with an employee or agent of GreenLife.[60]

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56 Complaint, ¶ 53.
57 Individual Defendants' Motion to Dismiss, Ex. 1 (Tony Salazar Aff.) at ¶¶ 3-4.
58 Individual Defendants' Motion to Dismiss, Ex. 2 (Richard D. Baron Aff.) at ¶¶ 3-4.
59 Individual Defendants' Motion to Dismiss, Ex. 3 (Hillary Zimmerman Aff.) at ¶¶ 3-4.
60 Tony Salazar Aff., ¶¶5-8; Richard D. Baron Aff., ¶¶ 5-8; Hillary Zimmerman Aff., ¶¶ 5-8.

However, GreenLife makes various allegations in the Complaint regarding these Defendants' involvement in the events giving rise to this action including, *inter alia*: while MBS was exploring a working relationship with GreenLife, Salazar and Baron made statements to the effect that GreenLife fit the demographic profile within MBS's strategies and was familiar with the Atlanta market and logical, target opportunities[61]; from November of 2014 through February of 2015 Salazar and Baron (among others) "became actively involved in [MBS's] negotiations with GreenLife"[62]; following the January 26, 2015 meeting with the City of Atlanta and AHA, these Defendants (among others) "sought to both use GreenLife to secure the Choice Neighborhood[s] Projects, and to simultaneously defraud and cheat GreenLife out of the benefits of them," causing "[MBS] to continue to formalize the relationship with GreenLife, while also secretly negotiating a side deal with Integral that conflicted with and prevented performance of the agreement that [MBS] was negotiating and eventually executed with GreenLife"[63]; these Defendants (among others) met with GreenLife's managing member, Patterson, in Missouri to finalize the terms of the JDA, which expressly contemplated the parties' collaboration on multiple real estate development projects in Atlanta, Georgia[64]; and these Defendants (among others) knew at the time that MBS entered into the JDA that it would not honor the agreement[65].

Further, GreenLife has submitted Keven Patterson's affidavit wherein he testifies to various interactions with Salazar, Baron, and Zimmerman regarding GreenLife and MBS's business dealings, including: a conference call on January 15, 2014 between Patterson, Roberts, and Baron during which they "discussed pursuing opportunities in Atlanta [sic] efforts to pursuer [sic] the Housing Lead on Choice" and Baron expressed "his excitement about the opportunities

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61 Complaint, ¶ 21.
62 Complaint, ¶ 33.
63 Complaint, ¶¶ 53-54.,
64 Complaint, ¶ 57, Ex. A (JDA) at Recital A at p. 1.
65 Complaint, ¶ 63.

and expressed an interest in meeting with [Patterson] personally within the following few weeks"[66]; during Patterson's visit to MBS's offices in Missouri he "met all the key executives at MBS including Hillary Zimmerman" and they discussed the JDA and how the agreement related to the Choice Neighborhoods Projects[67]; on June 1, 2015, Patterson participated in a conference call with Salazar and others to discuss MBS and GreenLife's debrief on the CNI in anticipation of a meeting with AHA[68]; on July 8, 2015 and July 10, 2015, Patterson participated in a conference call with Salazar and others to discuss moving forward with the CNI projects[69]; on July 15, 2015, Patterson participated in a phone conference with Baron and another Defendant regarding the Atlanta CNI "and its potential risks and challenges"[70]; on July 16, 2015, Patterson participated in an email exchange with Baron and others "regarding the Atlanta CNI, the HUD application, and what occurred during the prior 5-6 months negotiations of [a] term sheet", and that email exchange references edits Baron made or asked to be made to documents being negotiated and drafted[71]; on July 16-17, 2015, Patterson, Baron, Salazar and others participated in an email exchange "regarding the Atlanta CNI executed term sheet, the AHA commitment letter, and commitment of the NTMCS"[72].

While Patterson's averments clearly conflict with those of Salazar, Baron, and Zimmerman, such disputes of fact must be resolved in GreenLife's favor as the party asserting the existence of personal jurisdiction. Alcatraz Media, LLC, 290 Ga. App. at 883–84; Aero Toy Store, 279 Ga. App. at 524. As described in the Complaint and Patterson's affidavit, Salazar, Baron, and Zimmerman appear to have engaged in the foregoing contacts in their capacities as

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66 Plaintiff's Combined Response in Opposition to Defendants' Motions for Dismissal, Ex. B (Keven Patterson Aff.) at ¶ 15.

67 Keven Patterson Aff., ¶ 22.

68 Keven Patterson Aff., ¶ 27.

69 Keven Patterson Aff., ¶¶ 28-29.

70 Keven Patterson Aff., ¶ 30.

71 Keven Patterson Aff., ¶ 31.

72 Keven Patterson Aff., ¶ 33. The term "NTMCS" does not appear to be defined in the pleadings.

officers and employees and on behalf of MBS. Moreover, although Defendants describe the contacts as passive—with Salazar, Baron, and/or Zimmerman simply being copied on emails or merely being on a conference call with numerous others—the telephone conversations as described by Patterson and the emails indicate ongoing and direct communications and negotiations with these Defendants (and others) regarding GreenLife and MBS's business dealings. When considered in conjunction with GreenLife's allegations and claims as well as the executed JDA, which expressly contemplated the companies' collaboration on multiple real estate development projects in the Atlanta area, the Court does not find the contacts described are merely "random," "fortuitous," or "attenuated." Rather, they indicate fiduciaries acting on behalf of a corporation to transact business in Georgia. Amerireach.com, LLC v. Walker, 290 Ga. at 266. The Court finds it may properly exercise personal jurisdiction over Defendants Salazar, Baron, and Zimmerman under O.C.G.A. §9-10-91(1) and that such exercise of the Court's jurisdiction over these Defendants satisfies constitutional due process.

ii. Exculpatory Provision

As referenced above, the JDA's Exculpatory Provision states that "[n]o officer, director, stockholder, member, or partner of either MBS or GreenLife, [and] no disclosed or undisclosed principal of either MBS or GreenLife...shall have any personal liability with respect to this Agreement...or the transactions contemplated hereby..."[73] For the same reasons summarized in Part II(A)(ii), *supra*, the Court finds the Exculpatory Provision bars the negligent misrepresentation claim asserted against the Individual Defendants. Accordingly, that claim is hereby DISMISSED.

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[73] JDA, § 22.

However, having considered the pleadings and insofar as GreenLife alleges the Individual Defendants engaged in intentional misconduct and that their "omissions and misleading of GreenLife were willful and done with the intent of depriving GreenLife of contemplated benefits under the [JDA] and the parties' prior understandings,"[74] the Court finds GreenLife has stated a claim of fraud against the Individual Defendants that is not precluded under the Exculpatory Provision. Further, insofar as the fraud claim survives the instant motion, GreenLife's derivative claims for punitive damages and attorney's fees and costs survive as well. *See* Racette, 318 Ga. App. at 181 ("An award of attorney fees, costs, and punitive damages is derivative of a plaintiff's substantive claims") (citing DaimlerChrysler Motors Co. v. Clemente, 294 Ga. App. 38, 52 (2008)). Thus, the Individual Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART as set forth above.

C. MBS's Motion to Dismiss[75]

MBS has moved to dismiss all claims asserted against it for failure to state a claim. The Court addresses each claim in turn.

i. Breach of contract

"The elements for a breach of contract claim in Georgia are the (1) breach and the (2) resultant damages (3) to the party who has the right to complain about the contract being broken." SAWS at Seven Hills, LLC v. Forestar Realty, Inc., 342 Ga. App. 780, 784 (2017) (citing Dewrell Sacks, LLP v. Chicago Title Ins. Co., 324 Ga. App. 219, 223 (2013)).

Here, GreenLife alleges MBS breached the JDA by "failing to include GreenLife in the MBS-Integral entity that would become the Housing Implementation Lead" which "deprived

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74 *See, e.g.*, Complaint, ¶¶ 88, 89.

75 In their respective Motions to Dismiss, MBS-Integral and Scholars Landing MBS and the Individual Defendants adopt in full the arguments made in MBS's Motion to Dismiss. Thus, the Court's rulings regarding MBS's motion also apply to the other Defendants.

[GreenLife] of an ownership interest, participation in, and control of the entity that would become the Housing Implementation Lead on the Choice Neighborhood[s] Projects" and ultimately deprived it of the opportunity to participate in those projects.[76]

As to the scope of the JDA and the projects contemplated thereunder, the agreement provides in part:

> A. **MBS and GreenLife desire to collaborate on multiple real estate development projects in the Metropolitan Statistical Area of Atlanta, but not on an exclusive basis**. The real estate projects will consist of: (i) affordable and workforce tax credit multifamily residential housing projects, (ii) non tax credit residential housing projects; [sic] (iii) general commercial and retail developments with and without secured parking, (iv), [sic] and other types of projects (individually a "Project", and collectively the "Projects").
>
> B. The parties hereto are entering into this Agreement in order to document the agreement between the parties to various terms and conditions regarding the development of the Projects, in an effort to, among other things, coordinate joint development of the Projects, minimize potential conflicts, delays and performance risks, agree on cost-sharing procedures, protect the Parties against delays and additional costs that arise from a Party's failure to carry out its obligations and/or fund its portion of the Projects.
>
> C. **The Parties further contemplate that for each Project to be developed in accordance with the terms of this Agreement, the Parties will enter into a Project Specific Owner's Agreement (each, an "Owner's Agreement") to further set forth the Project specific terms and conditions of the collaborative development of such Project by the Parties**. The Parties acknowledge that each Owner's Agreement will include provisions which shall supplement the provisions [sic] this Agreement and further agree that the terms and conditions of the Owner's Agreements shall be interpreted in a manner consistent with the terms and conditions of this Agreement, provided that to the extent the terms of each Owner's Agreement is inconsistent with this Agreement, the term of each Owner's Agreement shall control with respect to such inconsistency.[77]

The JDA goes on to outline various terms that will govern the parties' rights and obligations with respect to the development of projects including, *inter alia*: the coordination,

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76 Complaint, ¶¶ 86-89.

77 JDA, Recitals ¶¶ A-C at p. 1 (bold emphasis added).

performance, and funding of pre-development work; a structure for the ownership of projects depending on whether it is a "tax credit project" or a "non-tax credit project"; the selection of project architects, contractors and other consultants; the parties' development responsibilities; and the split of project developer fees. The JDA also has a "No Modification" provision that states: "This Agreement represents all of the agreements between the Parties with respect to the subject matter hereof as of the date of this Agreement, and no alteration or modification shall be binding unless in writing and signed by both Parties."

MBS asserts the breach of contract claim is subject to dismissal because the JDA does not require that it make GreenLife a Housing Implementation Lead on the Choice Neighborhoods Projects and it expressly states that the parties' agreement is not "exclusive." Further, the JDA does not identify any particular project and instead contemplates that for "each Project to be developed in accordance with the terms of the [JDA]" the parties would execute a "Project Specific Owner's Agreement." Insofar as the parties did not ever agree to a Project Specific Owner's Agreement with respect to the Choice Neighborhoods Projects, MBS asserts any alleged failure to involve GreenLife in the Choice Neighborhoods Projects cannot constitute a breach of the JDA.

Nevertheless, GreenLife's pleadings include the affidavit of Roberts, a former MBS employee directly involved in the negotiations between GreenLife and MBS regarding the JDA and their dealings concerning the Choice Neighborhoods Projects. Roberts avers the parties executed the JDA and jointly pursued the Choice Neighborhoods Projects with an understanding that they would collaborate together on those opportunities.[78] Moreover, with its Complaint GreenLife submitted a term sheet dated July 27, 2015 that is executed by "MBS" and "Integral" which relates to the "Choice Neighborhood activities" and "their collective role as Housing

[78] Amendment to Complaint, Ex. P (Ronald Roberts Aff.) at ¶¶ 24-30.

Implementation Entity" and expressly provides that the "Roles" of MBS as described therein "will be carried out by a Joint Venture of McCormack Baron and GreenLife."[79]

Thus, whether the parties held themselves out as a joint venture with respect to the Choice Neighborhoods Projects or came to an agreement with respect to same such as to fall within the JDA cannot be determined from the pleadings. Construing the pleadings in the light most favorable to GreenLife and resolving all doubts in its favor, the Court cannot say that the pleadings disclose with certainty that GreenLife would not be entitled to relief under any state of provable facts or that GreenLife could not possibly introduce evidence within the framework of the Complaint sufficient to warrant relief for breach of contract. *See* Cobb Cty., 218 Ga. App. at 152; Abramyan, 301 Ga. at 309; Anderson, 267 Ga. at 501. Thus, MBS's Motion to Dismiss is DENIED with respect to the breach of contract claim.

ii. Fraud

As noted above, in order to state a claim for fraud, the plaintiff must establish five elements: (1) a false representation by a defendant, (2) scienter, (3) intention to induce the plaintiff to act or refrain from acting, (4) justifiable reliance by plaintiff, and (5) damage to plaintiff. Engelman, 340 Ga. App. at 246; Sun Nurseries, Inc., 316 Ga. App. at 835.

GreenLife alleges MBS intentionally made false representations before and after execution of the JDA that it would honor the JDA and that the parties would pursue the Choice Neighborhoods Projects together. GreenLife alleges these false representations caused GreenLife to enter the JDA and assist Defendants in securing the Choice Neighborhoods Projects although MBS ultimately secured those projects for MBS-Integral and MBS's affiliate, Scholars Landing MBS. GreenLife further alleges that, as a result of Defendants' false representations, it forewent opportunities to pursue the Choice Neighborhoods Projects with other potential partners and it

[79] Complaint, Ex. L (MBS/Integral Term Sheet dated July 27, 2015) at p. 3.

ultimately was not able to participate in those projects at all. The Court finds GreenLife has stated a claim for fraud.

MBS urges the economic loss rule bars GreenLife's tort claims.

> The "economic loss rule" generally provides that a contracting party who suffers purely economic losses must seek his remedy in contract and not in tort. Under the economic loss rule, a plaintiff can recover in tort only those economic losses resulting from injury to his person or damage to his property.

General Elec. Co. v. Lowe's Home Centers, Inc., 279 Ga. 77, 78 (2005) (citations and footnotes omitted). Nevertheless,

> [t]wo exceptions exist to this general rule: (1) the accident exception, which allows a plaintiff to recover in tort when there is a sudden and calamitous event that not only causes damage to the product but poses an unreasonable risk of injury to persons and other property, [Vulcan Materials Co. v. Driltech, 251 Ga. 383, 388 (1983)]; and (2) the misrepresentation exception, which was defined by our Supreme Court as follows: "[O]ne who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. This liability is limited to a foreseeable person or limited class of persons for whom the information was intended, either directly or indirectly." Robert & Co. Assoc. v. Rhodes–Haverty Partnership, 250 Ga. 680, 681–682 (1983). In setting forth the second exception our Supreme Court "'approved the Restatement of Torts 2d, § 552 (1977) which sets forth essentially the same five elements to recover as are required for fraud.'" American Legion v. Foote & Davies, Inc., 193 Ga. App. 225, 228 (1989) (quoting Guernsey Petroleum Corp. v. Data Gen. Corp., 183 Ga. App. 790, 795 (1987)).

Advanced Drainage Sys., Inc. v. Lowman, 210 Ga. App. 731, 734 (1993). *See* Home Depot U.S.A., Inc. v. Wabash Nat. Corp., 314 Ga. App. 360, 366 (2012) (noting fraud and misrepresentations clams fell under misrepresentation exception to the economic loss rule).

In light of the false representations allegedly made by Defendants prior to and following the negotiation and execution of the JDA and with respect to the parties' joint pursuit of the

Choice Neighborhoods Projects, the Court finds this action falls within the misrepresentation exception such that GreenLife's tort claims are not barred by the economic loss rule.

MBS also asserts no basis exists to impute or attribute false statements allegedly made by the "Misrepresentation Defendant" to MBS. However, O.C.G.A. §51-2-2 provides: "Every person shall be liable for torts committed by...his servant by his command or in the prosecution and within the scope of his business, whether the same are committed by negligence or voluntarily." *See* King v. Citizens Bank of DeKalb, 88 Ga. App. 40, 45 (1953) ("[I]n order to hold the defendant corporation liable for the act of its officer, such tort must have been committed during the prosecution of the business of the corporation as a part thereof or by authority of the corporation or be ratified by it or assented to"). *See also* O.C.G.A. §51-2-1(a) ("For the negligence of one person to be properly imputable to another, the one to whom it is imputed **must stand in such a relation or privity to the negligent person as to create the relation of principal and agent**") (emphasis added); O.C.G.A. §51-2-4 ("An employer generally is not responsible for torts committed by his employee when the employee exercises **an independent business and in it is not subject to the immediate direction and control of the employer**") (emphasis added).

Here, GreenLife alleges the Individual Defendants "upon information belief are officers and directors of [MBS]."[80] The pleadings plainly indicate the actions taken by the Individual Defendants were taken in their capacities as officers and directors of MBS and in the scope of their employment. Construing the pleadings in the light most favorable to GreenLife, GreenLife has sufficiently alleged a basis to attribute the allegedly false representations made by the Individual Defendants to MBS.

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[80] Complaint, ¶53.

MBS also alleges GreenLife's fraudulent inducement claim fails as a matter of law because GreenLife must make an election of remedies and it has affirmed the JDA and never rescinded it.

> Where one is induced to enter into a contract by fraud, the defrauded party has an election either to affirm the contract and sue for damage resulting from the fraud or rescind the contract...One can pursue any number of inconsistent remedies prior to [the] formulation and entry of judgment...Thus, [a plaintiff] [i]s not required to elect [its] remedy prior to the submission of [its] case to the jury but would have to do so if inconsistent verdicts had been rendered.

Tankersley v. Barker, 286 Ga. App. 788, 790–91 (2007) (citing Long v. Marion, 182 Ga. App. 361, 366 (1987)). *See* Black & White Const. Co. v. Bolden Contractors, Inc., 187 Ga. App. 805, 808 (1988). Thus, GreenLife's assertion of a breach of contract claim and a fraud claim simultaneously does not require dismissal of the fraud claim as a matter of law at this juncture.

Additionally, MBS argues the fraudulent inducement claim fails because the "No Modification" provision in the JDA is a merger clause which acts as a disclaimer of all representations made prior to its execution. However, insofar as GreenLife alleges Defendants made misrepresentations in the JDA itself and following its execution, the "No Modification" provision does not bar GreenLife's fraud claim as a matter of law. *See* Authentic Architectural Millworks, Inc. v. SCM Grp. USA, Inc., 262 Ga. App. 826, 828 (2003) (fraud and negligent misrepresentation claims based on representations made in contract not barred by alleged merger clause).

MBS also asserts the fraud claim fails because the alleged false representations upon which it is premised are future promises which cannot support fraud.

> [T]he general rule is that actionable fraud cannot be predicated upon promises to perform some act in the future....An exception to the general rule exists where a promise as to future events is made with a present

> intent not to perform or where the promisor knows that the future event will not take place.

Jonas v. Jonas, 280 Ga. App. 155, 159–60 (2006). *Accord* JTH Tax, Inc. v. Flowers, 302 Ga. App. 719, 725 (2010).

Here, GreenLife plainly asserts MBS negotiated the JDA with an understanding the parties would pursue the Choice Neighborhood Projects as partners while knowing it would not pursue those projects with GreenLife as its partner. GreenLife alleges MBS had engaged in the Side Deal with Integral and formed MBS-Integral to serve as the Housing Implementation Entity for the CNI Grant housing component. Insofar as GreenLife alleges MBS made promises and representations with respect to future events with no present intent to perform them or knowing that such performance would not occur,[81] GreenLife's fraud claim falls under the exception to the general rule that actionable fraud cannot be based on promises as to future events.

Finally, MBS asserts the fraud claim has not been pled with sufficient particularity as required under O.C.G.A. §9-11-9(b). That code section provides in relevant part: "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." *See* Diversified Holding Corp. v. Clayton McLendon, Inc., 120 Ga. App. 455, 456 (1969) ("[T]he circumstances constituting the fraud must be stated with particularity. At the very least the pleader should designate the occasions on which affirmative misstatements were made and by whom and in what way they were acted upon"). "However, the proper remedy for seeking more particularity is by motion for a more definite statement at the pleading stage or by the rules of discovery thereafter." Pampattiwar v. Hinson, 326 Ga. App. 163, 170 n.3 (2014) (citing Odom v. Hughes, 293 Ga. 447, 455 n. 6 (2013)).

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[81] Complaint, ¶¶ 54, 94-95.

MBS has not moved for a more definite statement. Further, GreenLife amended the Complaint to include the affidavit of Ronald Roberts and submitted Keven Patterson's affidavit. Both of these affidavits provide additional specificity with respect to GreenLife's claims. For these reasons, the Court finds GreenLife has sufficiently stated its fraud claim and further development of same is best left for discovery. Given the foregoing, MBS's Motion to Dismiss GreenLife's fraud claim is DENIED.

iii. Negligent misrepresentation

"The elements of a claim for negligent misrepresentation are: (1) the defendant's negligent supply of false information to foreseeable persons, known or unknown; (2) such persons' reasonable reliance upon that false information; and (3) economic injury proximately resulting from such reliance." Liberty Capital, LLC, 338 Ga. App. at 54; Hardaway Co., 267 Ga. at 426.

MBS alleges the Complaint does not identify what information MBS supplied to GreenLife or how MBS did so negligently. However, as noted above, in the Complaint GreenLife alleges MBS and the Individual Defendants used GreenLife to secure the Choice Neighborhood Projects and entered the JDA with the understanding the parties would jointly pursue those projects while at the same time negotiating the Side Deal with Integral.[82] GreenLife asserts "[t]he very deal that [it] brought to [MBS], and that would be covered by the [JDA] between GreenLife and [MBS], was the same deal that the Misrepresentation Defendants [i.e. the Individual Defendants] moved over to Integral under the Secret Side Deal."[83]

With respect to the negligent misrepresentation claim, GreenLife incorporates its prior allegations and further alleges that at the time MBS and the Individual Defendants made false

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82 Complaint, ¶¶ 53-56.

83 Complaint, ¶ 59.

representations to GreenLife they knew or should have known the misrepresentations were false and that their actions would prevent MBS from performing its obligations under the JDA. GreenLife asserts it relied on the misrepresentations by entering into the JDA, assisting MBS in securing the Choice Neighborhoods Projects, and forgoing opportunities to pursue those projects with other potential partners. Further, GreenLife alleges it suffered damages as a result of its reliance on the Defendants' misrepresentations, including not being able to participate in the Choice Neighborhoods Projects. Although MBS asserts GreenLife has failed to identify any out of pocket damages it suffered to support its negligent misrepresentation claim, such does not mandate the dismissal of the claim at the pleading stage. The Court finds GreenLife has stated a claim for negligent misrepresentation and MBS is adequately on notice of same. *See* Wright , 330 Ga. App. at 510 ("[G]eneral allegations are sufficient to support a plaintiff's claim for relief"). Thus, MBS's Motion to Dismiss GreenLife's negligent misrepresentation claim is hereby DENIED.

iv. Punitive damages and attorney's fees and costs

In light of the Court's rulings above and insofar as tort claims remain for adjudication, GreenLife's claims for punitive damages and attorney's fees and costs also survive the instant motion. *See* Racette , 318 Ga. App. at 181; DaimlerChrysler Motors Co., 294 Ga. App. at 52.

CONCLUSION

Given all of the above, the Court rules as follows: Defendants MBS-Integral and Scholars Landing MBS's Motion to Dismiss is hereby GRANTED and those Defendants are dismissed from this action; the Individual Defendants' Motion to Dismiss is GRANTED IN PART and DENIED IN PART as set forth above; and Defendant MBS's Motion to Dismiss is hereby DENIED.

SO ORDERED this 4th day of February, 2019.

HONORABLE KELLY LEE ELLERBE
Superior Court of Fulton County
Business Case Division
Atlanta Judicial Circuit

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