UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

GREGORY MARQUESS d/b/a SKINITEMS.COM and SKINTRIGUE, INC.,

Plaintiffs,

– against –

CARDFLEX, INC. d/b/a CLIQ, WELLS FARGO BANK, N.A., U.S. ALLIANCE GROUP, and JOHN DOES 1–10 INCLUSIVE,

Defendant.

MEMORANDUM AND ORDER

2:19-cv-04790 (ERK)

KORMAN, *J.*:

Plaintiff Gregory Marquess d/b/a Skinitems.com (Skinitems) and a separate plaintiff, Skintrigue, Inc. (Skintrigue) — a company owned and operated by Marquess — filed a complaint alleging breach of contract, breach of the implied covenant of good faith and fair dealing, unjust enrichment, and fraud against all named defendants. Defendants Wells Fargo Bank, N.A. (Wells Fargo) and U.S. Alliance Group (USAG) move to dismiss Plaintiffs' amended complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF Nos. 42, 44. Defendant CardFlex, Inc. (CardFlex) did not move to dismiss and instead filed an answer. ECF No. 5.

BACKGROUND

The following facts are accepted as true for purposes of this motion. *See Palin v. New York Times Co.*, 940 F.3d 804, 809 (2d Cir. 2019). In order to frame

the facts, brief background on card processing drawn from the plaintiffs' complaint is necessary. As relevant here, "a [credit or debit] card transaction involves four parties: (1) a cardholder, (2) an issuing bank, (3) an acquiring bank, and (4) a merchant." ECF No. 28 at 4 ¶ 20. Both the issuing and acquiring banks are members of a relevant card association like Visa or Mastercard. A cardholder receives his or her card from the issuing bank. When a cardholder makes a purchase from a merchant, that cardholder's issuing bank sends payment to the acquiring bank, which in turn forwards it on to the merchant. In order to accept card payments, a merchant must find an acquiring bank willing to provide these payment processing services. In practice, many acquiring banks contract some or all of their payment processing services out to third parties. These "Member Service Providers" (MSPs) agree to solicit merchants to sign up with an acquiring bank, process payments on the acquiring bank's behalf, and assist merchants using the acquiring bank's processing services.[1]

An example will illustrate the relationships. First and Second Street Banks are both members of the Visa card association. Adam Smith applies for and receives a Visa credit card from First Street Bank. Corner Store contracts with

[1] Companies that provide only some of these services may be referred to by different names such as Independent Sales Organizations or Card Processors. ECF No. 28 at 5 ¶ 21. Those distinctions are not relevant here, and the memorandum uses MSP as a catch-all term to avoid confusion.

Second Street Bank for Visa payment processing services. When Adam Smith buys coffee from Corner Store using his Visa, the bank that issues his card — First Street — sends payment for the coffee to Second Street. Second Street is said to be the "acquiring bank" because it receives the payment. Second Street then forwards that payment on to Corner Store, the merchant who made the sale. If Second Street chooses to contract a third-party MSP to perform its card processing services — say, Middleman, Inc. — then Middleman would receive the payment for Adam Smith's coffee from First Street and forward it on to Corner Store on Second Street's behalf. In this case, plaintiffs allege that CardFlex acted as an MSP on behalf of acquiring bank Wells Fargo to provide processing services for the Skinitems website, and USAG acted in turn as the assignee and/or agent of CardFlex. ECF No. 28 at 5 ¶ 22.

The present case involves Marquess's attempts to secure a new MSP to provide processing services for one of his skin care businesses. Marquess owned and operated Skintrigue, "an online seller of high-end, physician-exclusive dermatology products." ECF No. 28 at 5 ¶ 23. Marquess also operated the Skinitems website, which "was a discount website operating separate and apart" from Skintrigue. *Id.* at 5 ¶ 24. In June 2010, Marquess began seeking new credit card processing services for the Skinitems website. *Id.* at 5 ¶ 24. Marquess was not seeking a new MSP to provide services to his other business, Skintrigue. The

following month, Marquess's web designer connected him with David Ventura of Dynamic Merchant Payments. *Id.* at 5 ¶ 25. Ventura represented that he could obtain new card processing services for Skinitems. *Id.*

Marquess filled out an application for a new MSP sent to him by Ventura. ECF No. 28 at 6 ¶ 27. At Ventura's request, Marquess provided certain information to send to Wells Fargo, the prospective acquiring bank. *Id.* at 6 ¶ 28. In August 2010, Ventura told Marquess that the MSP did not want to approve his application because it could not conduct an on-site inspection of his offices. *Id.* at 7 ¶ 30. Ventura said that he could find another processor that would approve Skinitems while retaining Wells Fargo as the acquiring bank. *Id.* Marquess then received an email from Cardflex asking him to finish a merchant application. *Id.* at 7–8 ¶ 32. Ventura assured Marquess that "CardFlex is one of the top-rated and most respected merchant processors in the U.S." *Id.* at 8 ¶ 36. On August 14, 2010, Ventura emailed Marquess a one-page document, which Marquess signed and returned because Ventura informed him that Wells Fargo needed it. *Id.* at 8 ¶ 38. That document was the final page of the Program Guide attached to plaintiffs' complaint, the full copy of which was not included in the email Ventura sent to Marquess on August 14. *Id.*

Three days later, Marquess received an email from CardFlex informing him that his application was being processed. ECF No. 28 at 9 ¶ 39. Attached to that

email were two documents that Marquess was unable to open. *Id.* Marquess would later discover that these documents were a copy of his completed merchant application to CardFlex and the full Program Guide. *Id.* at 9 ¶ 40. The completed merchant application contained an incorrect address and phone number for Skinitems. *Id.* at 9 ¶ 42. This was significant because consumers may attempt a chargeback if they do not recognize a merchant's information when it appears on their credit card statements. Marquess alleges that (1) Ventura copied all of his information from the first MSP application to the Cardflex application, (2) forged his signature on the latter document, and (3) acted as an agent for one or more of the defendants in so doing. *Id.* at 9–10 ¶ 43–46.

On August 23, the Skinitems website began processing online transactions. ECF No. 28 at 14 ¶ 70. The next day, Marquess received an email from CardFlex confirming that his card processing account had been set up. *Id.* at 15 ¶ 71. Months later, on January 31, 2011, Marquess learned from a customer that incorrect contact information was being provided by CardFlex to Skinitems customers. *Id.* at 15 ¶ 72. Marquess contacted Ventura, CardFlex, and Wells Fargo to request the information be updated in order to avoid chargeback attempts. *Id.* He would continue to contact these parties throughout 2011 and into 2012, but the information was never updated. *Id.* at 14–15 ¶ 74.

On February 11, 2011, Marquess received an email from an employee of USAG informing him that USAG would be creating a reserve account for Skinitems and would begin withholding ten percent of its monthly gross sales. ECF No. 28 at 17 ¶ 77. This was the first time that Marquess learned of USAG's association with CardFlex. *Id.* Marquess refused to sign an authorization to create the reserve account. *Id.* Nevertheless, over the next 21 months a total of $33,562.12 was withheld from Skinitems and placed into the reserve account. *Id.* at 17 ¶ 79.

On February 14, 2011, Marquess received an email from an employee of CardFlex informing him that Skinitems' account was being flagged for risk because of multiple negative Address Verification Systems transactions. ECF No. 28 at 17 ¶ 80. "A [n]egative AVS transaction occurs when the person attempting to purchase merchandise using a credit or debit card enters incorrect information in the billing fields for an address or zip code, either mistakenly or deliberately." *Id.* . Marquess responded that it was the responsibility of the processor, not the merchant, to identify and stop negative AVS transactions from settling. *Id.* at 18 ¶ 81. The same day, USAG confirmed that it had received Marquess's request to correct the contact information being provided to Skinitems customers, but again failed to take any action to make corrections. *Id.* at 18 ¶ 82. Over the following months, Marquess made several attempts to correct the contact information issue

by reaching out to CardFlex, USAG, and Ventura, as well as by traveling from Texas to Florida to investigate the incorrect address in person. *Id.* at 18–20 ¶¶ 83–92.

On February 1, 2012, an employee of USAG emailed Marquess to tell him that Wells Fargo had noted an increase in chargeback activity and requested an explanation. ECF No. 28 at 21 ¶ 93. Marquess replied that the chargebacks were being caused by the incorrect contact information being provided to Skinitems customers. *Id.* The following month, 100% of the proceeds from Skinitems' sales began to be withheld. *Id.* at 21 ¶ 94. Marquess contacted USAG, which subsequently released the funds. *Id.* at 21 ¶ 95. Withholding resumed in November 2012, and a total of $12,186.82 was withheld between November 1 and termination of the account several weeks later. *Id.* at 21 ¶ 98–99.

On November 26, 2012, USAG mailed Marquess a letter titled "Notice of Account Termination," informing him that the Skinitems payment processing account would be terminated effective that date. ECF No. 28 at 22 ¶ 101. The letter also informed Marquess that USAG was assessing a termination fee of $2,419.78. *Id.* Both the Skinitems and Skintrigue websites were immediately unable to process credit or debit card transactions. *Id.* at 22 ¶ 102. The Skintrigue website stopped processing transactions even though it was operated independently from the Skinitems website, had not switched MSPs, and was linked to a different

bank account. *Id.* at 22 ¶ 102. On the same date, a total of $123,941.43 was seized from bank accounts belonging to Marquess and Skintrigue and the termination fee of $2,419.78 was debited from the Skinitems merchant account. *Id.* at 23 ¶¶ 103–05. The Amended Complaint states that CardFlex debited the termination fee, but does not state which defendant seized funds. *See id.*

The following day, Marquess received a letter from the MSP providing processing services to Skintrigue informing him that the account was being terminated because Skintrigue had been placed on the Terminated Merchant File / Member Alert to Control High Risk, or TMF/MATCH, list. ECF No. 28 at 24 ¶ 107. "The TMF/MATCH lists are essentially 'blacklists' that prevent merchants with high-risk accounts . . . from opening a merchant account with an MSP." *Id.* at 24 ¶ 108. Marquess later learned that he was placed on the TMF/MATCH list by "CardFlex at the request of Wells Fargo." *Id.* at 25 ¶ 109. The next month, American Express also terminated processing services for both Skinitems and Skintrigue. *Id.* at 26 ¶ 114. In January 2013, the dermatology products in plaintiffs' inventories began to expire, causing a loss of $528.430.18, or approximately $600,000 in estimated lost profits. *Id.* at 26 ¶¶ 115–16.

Marquess then attempted to secure the return of the $169,496.32 still being held in reserve. ECF No. 28 at 27 ¶¶ 118–21. In June 2013, CardFlex informed Marquess that it was assessing an early termination fee of $145,111.09 and

consequently would only return $20,385.23 of the funds. *Id.* at 28 ¶ 122. Marquess attempted to meet with USAG, CardFlex, and Wells Fargo to resolve the issue, including by travelling in person to offices in California. *Id.* at 28 ¶¶ 123–25. CardFlex told Marquess he had incurred an early termination fee of $165,111.09 and offered him a "50/50 settlement" of $82,555.54, which Marquess refused. *Id.* at 28–29 ¶ 126. On July 2, 2013, an employee of CardFlex told Marquess that it would assess an early termination fee of only $250 "per the instructions of Ventura," and that the balance of the reserve fund would be returned to Skinitems within 24 hours. *Id.* at 29 ¶ 127. To date, Marquess has not been refunded any amounts from the reserve account or any other source. *Id.* at 29 ¶ 128. Marquess sued defendants in New York State Supreme Court, and the action was removed pursuant to 28 U.S.C. §§ 1441 and 1446. ECF No. 1. Wells Fargo and USAG now move separately for dismissal.

STANDARD OF REVIEW

In deciding a motion to dismiss under Rule 12(b)(6), a court must "construe[] the complaint liberally, accept[ ] all factual allegations in the complaint as true, and draw[ ] all reasonable inferences in the plaintiff's favor." *Elias v. Rolling Stone LLC*, 872 F.3d 97, 104 (2d Cir. 2017) (quoting *Chase Grp. All. LLC v. City of N.Y. Dep't of Fin.*, 620 F.3d 146, 150 (2d Cir. 2010)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to

relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition to the facts alleged in the Amended Complaint, the court may also consider documents that plaintiffs have incorporated by reference. *Chamberlain v. City of White Plains*, 960 F.3d 100, 105 (2d Cir. 2020).

DISCUSSION

I. Fraud

Plaintiffs advance two theories to support their fraud claim: (1) Ventura made fraudulent representations and omissions while acting as an agent for defendants, and (2) defendants entered into the contract with a concealed intent not to perform. To make out a fraud claim under New York law, a plaintiff must allege "a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury." *Kaufman v. Cohen*, 307 A.D.2d 113, 119 (1st Dep't 2003). In place of a misrepresentation, a plaintiff may allege "acts of concealment where the defendant had a duty to disclose material information." *Id.* at 119–20. "[A] fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as redundant of the contract claim." *Cronos Grp. Ltd. v. XComIP, LLC*, 156 A.D.3d 54, 62–63 (1st Dep't 2017) (internal quotations and alterations

omitted). In order to maintain a fraud claim in this posture, a plaintiff must either (1) demonstrate a legal duty separate from the duty to perform under the contract, (2) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract, or (3) seek special damages caused by the representation and unrecoverable as contract damages, *Bridgestone/Firestone, Inc. v. Recovery Credit Servs., Inc.*, 98 F.3d 13, 20 (2d Cir. 1996).

Fraud claims are subject to the heightened pleading requirements of Federal Rule of Civil Procedure 9(b). The rule requires that the pleading party must "state with particularity the circumstances constituting fraud or mistake," while allowing that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. P. 9(b). To satisfy this standard, the complaint must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Lerner v. Fleet Bank*, 459 F.3d 273, 290 (2d Cir. 2006) (quotation omitted).

a. *Intent Not to Perform*

Plaintiffs argue that the fraud and contract claims are not redundant because defendants "had no intention of ever performing the agreement," but instead intended to use it "as a subterfuge for conducting their wrongful scheme." ECF No. 42-4 at 19. Plaintiffs maintain that these allegations are enough to sustain a

fraud claim at the motion to dismiss stage because the concealed intent not to perform was a misrepresentation when made that is collateral to the contract. *Id.*

Plaintiffs point to *Deerfield Commc'ns Corp. v. Chesebrough-Ponds, Inc.*, 68 N.Y.2d 954 (1986), which held that "a promise made with a preconceived and undisclosed intention of not performing it[] constitutes a misrepresentation" that may be collateral to a contract. *Id.* at 956. More recent cases construing *Deerfield* have held that "where the promised performance is an obligation of the promisor under an enforceable contract between the parties, and the only damages sought are those recoverable for a breach of contract, allegations of such an 'insincere promise' are redundant of a claim for breach of the parties' contract and, therefore, do not state a cause of action for fraud." *Cronos*, 156 A.D.3d at 67 (quoting *Castellotti v. Free*, 138 A.D.3d 198, 211 (1st Dep't 2016)); *see also Papa's-June Music, Inc. v. McLean*, 921 F. Supp. 1154, 1160–61 (S.D.N.Y. 1996) (collecting cases); *Wilshire Westwood Plaza LLC v. UBS Real Estate Secs. Inc*, 94 A.D.3d 514, 516 (1st Dep't 2012). This rule "guards against the erosion of the distinction" between contract and fraud claims. *Cronos*, 156 A.D.3d at 68.

Applying this reasoning, plaintiffs' claim fails because they do not allege an insincere promise by defendants that is independent of defendants' obligations under the agreement, and therefore collateral to the contract. Unlike the insincere promise in *Deerfield*, which was made orally to induce the promisee's assent to the

contract and was not included in its written terms, 68 N.Y.2d at 956, plaintiffs here allege only that defendants never intended to perform their obligations under the terms of the contract itself. ECF No. 42-4 at 19; *see also DynCorp v. GTE Corp.*, 215 F. Supp. 2d 308, 325 (S.D.N.Y. 2002) (explaining that *Deerfield* "involved parol representations concerning geographic restrictions limiting product resales that were not contained in the contract, but which were not negatived by the contract; hence, the parol representations were held 'collateral or extrinsic' to the contract, and were thus enforceable"). Plaintiffs' fraud claim is wholly grounded on promised performances that are "obligation[s] of the promisor[s] under an enforceable contract between the parties" and is therefore redundant of their contract claim. *Cronos*, 156 A.D.3d at 67.

b. *Special Damages*

Plaintiffs also assert that their fraud claim should stand because they seek special damages in the form of lost profits, which defendants argue are barred by the contract's limitation-of-liability provision. ECF No. 42-4 at 18–19; ECF No. 28-1 at 20 ¶ 19.3. A fraud claim may be sustained where a plaintiff "seek[s] special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Bridgestone/Firestone*, 98 F.3d at 20. But here, plaintiffs seek identical damages for both their contract and fraud claims. ECF No. 28 at 32

¶ 140, 36–37 ¶ 164.[2] Plaintiffs fail to explain how damages they contend are recoverable "under the contract measure of damages," *Papa's-June Music*, 921 F. Supp. at 1161, could be considered "special damages" supporting a claim for fraud under New York law. *See Druyan v. Jagger*, 508 F. Supp. 2d 228, 239 (S.D.N.Y. 2007) (rejecting a similar argument because "[t]he only damages that plaintiff can recover as a matter of law are not 'special' damages: they are precisely the damages contemplated by her contract").

Plaintiffs rely on *Am. List Corp. v. U.S. News & World Report*, 75 N.Y.2d 38, 41 (1989) for the proposition that "lost profits are special damages" under New York law. ECF No. 42-4 at 18. But that case reached precisely the opposite conclusion about the damages there claimed by the plaintiffs, and the language upon which the present plaintiffs rely describes a position the court rejected. *See Am. List Corp*, 75 N.Y.2d at 42, 44 (rejecting "at the outset defendant's contention that the courts below improperly awarded plaintiff 'lost future profits' which are special damages" and concluding that "plaintiff has sufficiently demonstrated that

[2] The fact that plaintiffs included a demand for punitive damages does not change the outcome. *Cf. Fort Howard Paper Co. v. William D. Witter, Inc.*, 787 F.2d 784, 793 (2d Cir. 1986) ("[w]ithout a finding that [plaintiff] could not recover punitive damages as a matter of law, [the district judge] erroneously construed the fraud claims as identical to those in contract"). Here, plaintiffs sought punitive damages as part of both their contract and fraud claims, so the presence of that demand does not "distinguish[] the fraud claims from those [sounding] in contract." *Id.*

the moneys it seeks . . . are general damages flowing as a natural and probable consequence of the breach [of contract]").

Plaintiffs have provided no authority establishing that they can support a fraud claim by recasting contract damages as special damages in anticipation of an affirmative defense to recovery. Indeed, the existence of a contractual bar to the damages now portrayed as "special" precludes this type of creative pleading. *See DynCorp*, 215 F. Supp. 2d at 327 (noting that "DynCorp's allegation of [special] damage is not legally sufficient" because the contract specified that no party would be liable "for any consequential, special, or punitive damages, including loss of future revenue or income, or loss of business reputation" as the result of a breach). I do not reach that ground for dismissal because plaintiffs have failed to specify any special damages distinct from those they seek under the contract itself. Plaintiffs have failed to plausibly plead facts satisfying any of the *Bridgestone/Firestone* factors, and their fraud claims addressed directly to defendants are dismissed as redundant of the contract claims.

c. *Ventura's Representations and Omissions*

Finally, plaintiffs contend that Ventura, acting as agent for one or more of the defendants, made collateral misrepresentations and omissions of material fact. ECF No. 28 at 34–35. Plaintiffs allege that Ventura (1) falsely represented that the first MSP to which Marquess applied was not willing to perform an on-site

inspection required for approval of his application, (2) falsely represented that CardFlex was a "top-rated" processor, and (3) failed to disclose that CardFlex caters to high-risk merchants, was the subject of a Federal Trade Commission investigation, and was involved in multiple lawsuits with merchants. *Id.*

Plaintiffs have failed to adequately allege facts supporting the inference that Ventura acted as agent for defendants with respect to these representations and omissions. Under New York common law, an agency relationship "results from a manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and the consent by the other to act." *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 175 (2d Cir. 2012) (internal quotation omitted). Agency authority may be either actual, where it arises from a direct manifestation of consent by the principal to the agent, or apparent, where the conduct of the principal reasonably causes a third person believe that the principal has consented to the agency's performance of an act. *Meisel v. Grunberg*, 651 F. Supp. 2d 98, 110 (S.D.N.Y. 2009).

It is unclear which theory plaintiffs believe applies in this case. Plaintiffs alleged the bald legal conclusion that "Ventura acted as an agent for one or more of the Defendants." ECF No. 28 at 10 ¶ 46. But "[t]he unsupported statement that [Ventura] acted as an agent on behalf of [defendants] is insufficient to allege an agency relationship." *Meisel*, 651 F. Supp. 2d at 121. The complaint contains no

factual allegations indicating that Wells Fargo or another defendant ever granted Ventura actual or apparent authority to act as its agent. Nor does the complaint contain factual allegations that Ventura acted at the direction, or under the control, of Wells Fargo or another defendant, from which such a grant of authority might be plausibly inferred. Plaintiffs also allege that "each Defendant was the agent of the other and, with respect to Defendant's actions and omissions, were acting within the course and scope of such agency and/or by contract or operation of law." ECF No. 28 at 2 ¶ 11. But "[b]road allegations that several defendants participated in a scheme, or conclusory assertions that one defendant controlled another, or that some defendants are guilty because of their association with others . . . do not satisfy Rule 9(b)." *Kolbeck v. LIT Am., Inc.*, 923 F. Supp. 557, 569 (S.D.N.Y. 1996).

Plaintiffs argue that "[t]o the extent 'direction and control' is an issue, it is a question of fact that would not serve as the basis for dismissing Plaintiffs' fraud claims." ECF No. 42-4 at 16 n.9. That might be true if plaintiffs had made any factual allegation that Ventura was subject to the direction or control of any defendant, but they did not do so. *Cf. Elbit Sys., Ltd. v. Credit Suisse Grp.*, 917 F. Supp. 2d 217, 225 (S.D.N.Y. 2013) (allegations that, *inter alia*, one party established a binding code of conduct for, and "exercised managerial authority" over, another party were sufficient to plausibly allege agency); *Cumis Ins. Soc., Inc*

v. Peters, 983 F. Supp. 787, 796 (N.D. Ill. 1997) (allegations of an agreement under which an agent would collect debts on behalf of the principal and account to him for monies collected were sufficient to allege the existence of an agency relationship). Whether an agency relationship exists is generally "a mixed question of law and fact," but that does not excuse plaintiffs from carrying their burden to plead facts from which one could plausibly infer the existence of such a relationship. *In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 79 (2d Cir. 2019).

Plaintiffs argue that their allegation that Ventura may have received compensation for introducing Marquess to CardFlex was sufficient to allege an agency relationship. ECF No. 42-4 at 15–16. This argument fails for at least two reasons. First, the Amended Complaint states only that "[t]o the extent Ventura received compensation . . . that compensation was paid by one or more of the Defendants" because "Marquess did not compensate Ventura." ECF No. 28 at 9 ¶ 45. This language fails to allege even that Ventura was actually compensated by defendants, much less specify which of the defendants paid any such compensation.

Second, even if plaintiffs had directly alleged that one or more defendants compensated Ventura, the fact that one party compensated another would not be enough to plausibly allege the existence of an agency relationship without some

other indicia of consent to act or direction and control. Indeed, compensation is not even a required feature of an agency relationship. *See* Restatement (Second) of Agency § 441 cmt. a ("Unless the circumstances create a restitutional duty, a principal has no duty to pay compensation to an agent for services rendered in the absence of a promise to pay for them").

In a related argument, plaintiffs attempt to analogize the situation to the agency relationships involved in insurance transactions. Under New York law, an "insurance agent" is the agent of an insurance company, while an "insurance broker" is the agent of an individual insured, and compensation generally flows from principal to agent. N.Y. Ins. Law. § 2101(a), (c). Insurance agents solicit sales on behalf of insurance companies, while brokers are engaged by individuals or corporations seeking policies from insurance companies.

If anything, this comparison works against plaintiffs. The factual allegations in the complaint indicate that Marquess sought out Ventura's assistance to find him a better processing deal by looking at options offered by various companies, which would make Ventura analogous to an insurance broker, not an insurance agent. ECF No. 28 at 5–6 ¶¶ 24–26. The fact that plaintiffs did not compensate Ventura and do not know the source of any possible compensation does not change that the complaint alleges that they, and not the defendants, originally engaged Ventura's help in this matter.

II. Other Causes of Action Asserted by Marquess

Wells Fargo seeks dismissal of Marquess's claims for unjust enrichment and breach of the covenant of good faith and fair dealing as redundant of its contract claim and, with respect to the unjust enrichment claim, as time-barred. In addition, Wells Fargo seek dismissal of Marquess's contract claim to the extent it seeks damages beyond what they contend is allowed under the limitation of liability provision of the contract. As Wells Fargo notes, the factual predicates for the claims defendants seek to dismiss are integrally related to Marquess's contract claim and arise out of the same facts. Wells Fargo does not contest the sufficiency of the basic contract claim at this stage, and instead seeks only partial dismissal of that claim based on the relief sought.

Partial dismissal of a contract claim on the basis of a limitation of liability provision may sometimes be appropriate on a Rule 12(b)(6) motion. New York courts have granted analogous motions for partial dismissal pursuant to CPLR 3211 "to the extent [a contract claim] seeks damages above the amount allowed under the contractual limitation of liability clause." *Electron Trading, LLC v. Morgan Stanley & Co.*, 157 A.D.3d 579, 579 (1st Dep't 2017). That approach results from the combination of CPLR 3211(a)(1), which permits a motion for dismissal on the ground that "a defense is founded upon documentary evidence," and New York law holding that "[c]onstruction of an unambiguous contract is a

matter of law, and the intention of the parties may be gathered from the four corners of the instrument and should be enforced according to its terms." *Beal Savs. Bank v. Sommer*, 8 N.Y.3d 318, 324 (2007). Federal courts have granted relief similar to that available under CPLR 3211 on both Rule 12(b)(6) motions to dismiss and Rule 12(c) motions for judgment on the pleadings. *See, e.g.*, *Nirvana Int'l, Inc. v. ADT Sec. Servs.*, 525 F. App'x 12 (2d Cir. 2013); *Media Glow Dig., LLC v. Panasonic Corp.*, 2018 WL 2175550, at *1 (S.D.N.Y. May 11, 2018); *Constellation Brands, Inc. v. Keste, LLC*, 2014 WL 6065776, at *4 (W.D.N.Y. Nov. 13, 2014); *Pacs Indus. v. Cutler-Hammer, Inc.*, 103 F. Supp.2d 570, 573 (E.D.N.Y. 2000). Conversely, other judges have held that "damages are not an element of a cause of action" and therefore cannot be challenged by a Rule 12(b)(6) motion that only "tests the legal sufficiency of allegations . . . not the request for relief." *Alevsky v. GC Servs. Ltd. P'ship*, 2014 WL 1711682, at *1 (E.D.N.Y. Apr. 30, 2014) (Gleeson, J.); *see also Bontkowski v. Smith*, 305 F.3d 757, 762 (7th Cir. 2002) (Posner, J.) ("[T]he demand [for damages] is not itself a part of the plaintiff's claim . . . and so failure to specify relief to which the plaintiff was entitled would not warrant dismissal under Rule 12(b)(6).").

It is not necessary to decide which approach is most appropriate here. Because the contract claim will have to be tried in any event, it would "make[] little sense to grant a motion to dismiss as to one or more of [the other claims], as it

may prove necessary to hold yet another trial in the event that it is determined on appeal that the motion to dismiss was improperly granted." *Thibodeaux v. Travco Ins.*, 2014 WL 354656, at *2 (E.D.N.Y. Jan. 31, 2014). As Judge Clark observed, "fragmentary disposal of what is essentially one matter is unfortunate not merely for the waste of time and expense caused the parties and the courts, but because of the mischance of differing dispositions of what is essentially a single controlling issue." *Audi Vision Inc. v. RCA Mfg.*, 136 F.2d 621, 625 (2d Cir. 1943).

III. Causes of Action Asserted by Skintrigue

Wells Fargo separately seeks dismissal of all claims brought by separate plaintiff Skintrigue, including the breach of contract claim. As discussed above, Skintrigue is an entity owned and operated by Marquess separately from the Skinitems website. Plaintiffs have failed to adequately allege that Skintrigue was a party to the contract or show that it was otherwise entitled to sue upon it. In New York, "[a] non-party may sue for breach of contract only if it is an intended, and not a mere incidental, beneficiary" of the contract, and "the parties' intent to benefit the third party [is] apparent from the face of the contract." *LaSalle Nat'l Bank v. Ernst & Young LLP*, 285 A.D.2d 101, 108 (1st Dep't 2001).

Plaintiffs allege, upon information and belief, that "Skintrigue was an unauthorized guarantor" of the other plaintiffs and was therefore a "party/guarantor" under the contract. ECF No. 28 at 30 ¶ 134; ECF No. 42-4 at 24.

Skintrigue's name appears nowhere in the contract documents submitted by plaintiffs. *See* ECF No. 42-2. In addition, the contract expressly provides that "[n]othing in this Agreement is intended to confer upon any person or entity other than the parties any rights or remedies, and the parties do not intend for any third parties to be third-party beneficiaries of this Agreement." ECF No. 28-1 at 25 ¶ 31.8. Plaintiffs cannot now circumvent the clear language of the contract by attempting to confer the status of "party/guarantor" upon Skintrigue because "there is a question concerning how Defendants had authority [to] seize funds" from its bank account. ECF No. 42-4 at 24. Skintrigue's failure to establish its right to sue upon the contract is necessarily fatal to its cause of action for breach of the covenant because "[w]ithout an underlying binding contract[] there can be no breach of the implied covenant of good faith and fair dealing." *Kilgore v. Ocwen Loan Serv., LLC*, 89 F. Supp. 3d 526, 534 (E.D.N.Y. 2015). The motion to dismiss Skintrigue's other causes of action is denied because those claims are integrally related to the surviving causes of action asserted by Marquess.

IV. Causes of Action Asserted Against U.S. Alliance Group

In its separate motion, USAG — the alleged agent or assignee of CardFlex — seeks dismissal of all claims against it on the ground that plaintiffs failed to plausibly allege facts establishing its relationship with CardFlex. ECF No. 44-1 at 6. USAG says that the "fatal deficiency" in plaintiffs' allegations is "that they are

literally nothing more than conclusory allegations that are completely unsupported by any factual allegations whatsoever, such as the source of the information upon which the allegations are based, or the reasons for Plaintiffs' belief upon which the allegations are based." *Id.* at 9.

The *Twombly*/*Iqbal* standard requires that a complaint "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (internal quotation omitted). That standard demands "factual amplification where needed to render a claim plausible," *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir. 2010), but it does not follow that plaintiffs here were required to plead the sources of its information or explain "the reasons for Plaintiffs' belief upon which the allegations are based." ECF No. 44-1 at 9. *Arista* itself confronted allegations made "upon information and belief" and found them sufficient. 604 F.3d at 120–21.

Plaintiffs alleged, upon information and belief, that "at some point subsequent to when CardFlex began rendering merchant processing services to Plaintiffs, USAG became CardFlex's assignee and/or agent with respect to the rendering of those services." ECF No. 28 at 16 ¶ 76. They then provided "factual amplification" for that allegation by alleging, *inter alia*, that USAG emailed plaintiffs to inform them that a reserve account would be set up pursuant to the terms of the contract, confirmed receipt of plaintiffs' requests to update merchant

information provided to customers, and finally sent them a letter terminating payment processing services and assessing an early termination fee. *Arista*, 604 F.3d at 120; ECF No. 28 at 17–22 ¶¶ 77, 82, 101. The combination of these allegations was more than enough to "make[] the inference of [USAG's] culpability plausible." *Arista*, 604 F.3d at 120.

USAG appears to argue that *Arista*'s allowance of allegations made upon information and belief must be cabined to contexts where "the facts are peculiarly within the possession and control of the defendant." ECF No. 44-3 at 6. As noted above, *Arista* also says that this style of pleading may be appropriate "where the belief is based on factual information that makes the inference of culpability plausible." *Arista*, 604 F.3d at 120. That is simply a restatement of *Iqbal*'s requirement that plaintiff plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 556 U.S. at 678. Here, the factual information provided by plaintiffs easily makes plausible the inference that USAG was an agent and/or assignee of CardFlex under its agreement with plaintiffs, and could therefore be liable for the misconduct alleged.

Finally, USAG faults plaintiffs for filing a "shotgun" complaint that fails to sufficiently specify which claims and factual allegations are aimed at which defendants. ECF No. 44-1 at 10. It is true that parts of the complaint are

frustratingly vague about exactly which defendant is alleged to have committed which actions. In many cases, this inartful pleading appears to be the result of plaintiffs' inability, using the information currently available to them, to precisely assign responsibility for every action given the shifting constellation of parties involved in processing their transactions.

Regardless of the reason, none of the potential confusion arising from the pleadings is so serious that it merits dismissing the affected claims wholesale. This is not a case where "a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Weiland v. Palm Beach Cty. Sheriff*, 792 F.3d 1313, 1324 (11th Cir. 2015). Indeed, USAG never made a motion for a more definite statement, which is available in cases where a pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

CONCLUSION

The motions to dismiss are granted in part and denied in part. The cause of action for fraud is dismissed for failure to state a claim. Skintrigue's causes of action for breach of contract and the covenant of good faith and fair dealing are dismissed for failure to state a claim. Plaintiffs' causes of action for negligence, conversion, and making materially false and misleading statements in violation of

N.Y. Gen. Bus. Law § 349(h) — which they conceded are time-barred, ECF No. 44-2 at 5 n.1 — are dismissed with prejudice. Plaintiffs are granted leave to replead within 30 days of the date of this order.

SO ORDERED.

Brooklyn, New York
February 2, 2021

Edward R. Korman
Edward R. Korman
United States District Judge