UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION No. 08-11148-RGS

IRVING A. BACKMAN

v.

IGOR V. SMIRNOV AND
GLOBAL QUANTECH, INC.

MEMORANDUM AND ORDER ON
DEFENDANTS' MOTION TO DISMISS COUNTS IV AND VI
OF THE AMENDED COMPLAINT

November 12, 2008

STEARNS, D. J.

This is a an action for breach of contract, misrepresentation, and violation of Mass. Gen. Laws ch. 93A, arising from agreements related to defendants' patented molecular resonance effect technology (MRET).[1] Plaintiff Irving A. Backman brings actions for breach of contract (Count I), fraud and misrepresentation (Count IV), and a violation of Mass. Gen. Laws ch. 93A (Count III) against defendants Igor V. Smirnov and Global Quantech, Inc. (collectively, defendants).[2] Defendants move to dismiss Count IV and Count VI (a prayer for injunctive relief) of the Amended Complaint. For the reasons stated, the motion will be DENIED.

To survive a motion to dismiss, a complaint must allege "a plausible entitlement to

[1]The technology is alleged to have a number of beneficial qualities, including the ability to "activate" water so as to give it miraculous qualities beneficial to human health, and to minimize the adverse health effects of exposure to electromagnetic radiation. See U.S. Patents 6,022,479 and 6,369,399.

[2]The remaining Counts set out various claims for relief styled as freestanding causes of action.

relief." Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007), disavowing Conley v. Gibson, 355 U.S. 41, 45-46 (1957). See also Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92 (1st Cir. 2007). Dismissal for failure to state a claim will be appropriate if the pleadings fail to set forth "'factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.'" Berner v. Delahanty, 129 F.3d 20, 25 (1st Cir. 1977), quoting Gooley v. Mobil Oil Corp., 851 F.2d 513, 515 (1st Cir. 1988) (internal quotation marks omitted).

Count IV is related to Smirnov's allegedly fraudulent representations concerning the health benefits of water treated with his MRET technology, the feasibility of building MRET units for commercial use, and his intention to assist Backman in obtaining scientific validation of the MRET technology. Defendants move to dismiss Count IV under Fed. R. Civ. P. 12(b)(6) on grounds that the three-year statute of limitations for a state-law fraud claim has run. See Mass. Gen. Laws ch. 260 § 2A. Defendants argue that Backman was on notice of Smirnov's alleged misrepresentations as early as February of 2004, when the parties entered into an oral agreement (the Agreement). During the initial discussions related to the Agreement, and subsequent communications with Smirnov, Backman requested, but never received, the results of clinical studies supporting Smirnov's claims. Smirnov represented to have conducted these studies from February of 2004 through October of 2005.

In the alternative, Smirnov argues that Backman should have known of the alleged fraud (at the latest) by March 9, 2004, when the parties entered into a written "non-circumvention agreement." (If true, Backman would have been required to file suit no later

than March 8, 2007). Backman, on the other hand, argues that he became aware of the fraud only on November 6, 2006, when Smirnov "suddenly and without warning began repudiating his earlier representations regarding [the validity of] MRET technology."

The court agrees with Backman's characterization of defendants' argument as based on the "[i]mplicit [assumption] that Plaintiff should have known from the very beginning of his [alleged contractual] relationship with the Defendants that he was being defrauded." Opp'n at 7. This is a somewhat queasy proposition in the law of contracts, which supposes that parties in the main enter into contracts, at least initially, with honorable intentions. It is a rudiment of hornbook law that "[e]very contract implies good faith and fair dealing between the parties to it." Warner Ins. Co. v. Comm'r of Ins., 406 Mass. 354, 362 n.9 (1990), quoting Kerrigan v. Boston, 361 Mass. 24, 33 (1972). No fact pled in the Amended Complaint would suggest that Backman was on inceptionary notice that defendants never intended to perform the Agreement in good faith. The issue of when Backman knew or should have known that he was being (allegedly) defrauded is an issue of fact that cannot be resolved as a matter of law. See Santiago Hodge v. Parke Davis & Co., 909 F.2d 628, 633 (1st Cir. 1990) ("The determination of when [litigants] had knowledge of 'both the injury and its connection with the act of defendant,' is a question of fact."); Riley v. Presnell, 409 Mass. 239, 240 (1991) ("[T]he question when a plaintiff knew or should have known of his cause of action is one of fact which in most instances will be decided by the trier of fact."). Cf. Young v. Lepone, 305 F.3d 1, 8-9 (1st Cir. 2002) (whether "storm warnings" were sufficient to place an investor on inquiry notice is a question for the factfinder; such a question may be determined as a matter of law only

when the underlying facts are either admitted or undisputed).

Defendants also move to dismiss Count IV under Fed. R. Civ. P. 12(b)(6), asserting that Backman has failed to allege each of the elements of a state-law fraud claim. To state a claim for fraud in Massachusetts, a plaintiff must allege "(1) the defendant made a false representation of material fact, (2) with knowledge of its falsity, (3) for the purpose of inducing the plaintiff to act in reliance thereon, (4) the plaintiff relied upon the representation, and (5) the plaintiff acted to his detriment." Armstrong v. Rohm & Haas Co., Inc., 349 F. Supp. 2d 71, 81 (D. Mass. 2004). See also Bishay v. Foreign Motors, Inc., 416 Mass. 1, 12 (1993); Nei v. Burley, 388 Mass. 307, 311 (1983).

Defendants assert that Backman has not alleged and will not be able to prove that Smirnov's representations regarding the health benefits of MRET technology and the ability to produce commercial-size MRET units were false, that Smirnov knew of the falsity, or that such representations were made with the intention of inducing Backman's reliance. Whether or not Backman will be able to prove his allegations as pled is not now a matter before the court. The Amended Complaint alleges that the parties entered into both the Agreement and the non-circumvention agreement with the understanding that Backman would be compensated (for an undetermined amount) for his efforts and results in marketing the MRET technology, and that Backman relied on this assurance in undertaking extensive marketing efforts on defendants' behalf. These allegations are sufficiently pled to survive a motion to dismiss.

Defendants finally move to dismiss Count IV under Fed. R. Civ. P. 9(b) for failure to plead fraud with particularity. "In all averments of fraud or mistake, the circumstances

constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "As we have stated in a recent discussion of Rule 9(b) in the securities context:

> [G]eneral averments of the defendants' knowledge of material falsity will not suffice. Consistent with Fed. R. Civ. P. 9(b), the complaint must set forth specific facts that make it reasonable to believe that defendant[s] knew that a statement was materially false or misleading. The rule requires that the particular times, dates, places or other details of the alleged fraudulent involvement of the actors be alleged.

Serabian v. Amoskeag Bank Shares, Inc., 24 F.3d 357, 361 (1st Cir. 1994) (citations and internal quotation marks omitted). This heightened pleading standard is satisfied by an averment "of the who, what, where, and when of the allegedly false or fraudulent representation." Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 29 (1st Cir. 2004).[3]

Backman's Amended Complaint recites more than simply wholly conclusory allegations; rather it states the who, what, where, and when of the alleged misrepresentations by Smirnov. Additionally, Backman sets out the specific date, November 6, 2006, on which Smirnov repudiated his earlier representations to Backman regarding the health benefits of the MRET technology. Backman also specifically references November 30, 2006, the date on which Smirnov denied making representations about the scientific validation of the technology, or statements encouraging Backman to undertake marketing efforts on his behalf. The relationship was extensive and ongoing for over two years – Rule 9(b) does not impose a duty on Backman to recount each and every

[3]Heightened pleading is required "even when the fraud relates to matters peculiarly within the knowledge of the opposing party," Romani v. Shearson Lehman Hutton, 929 F.2d 875, 878 (1st Cir. 1991), and to state law fraud claims brought in federal court. Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413, 427 (1st Cir. 2007).

representation that he now alleges was made fraudulently – he need only plead fraud with the particularity necessary to place defendants on fair notice.

Finally, defendants move to dismiss Count VI, the prayer for injunctive relief, asserting that Backman is unable to prove irreparable harm. See Ross-Simons of Warwick, Inc. v. Baccarat, Inc., 102 F.3d 12, 19 (1st Cir. 1996). It is not clear to the court that this is true. See Starlight Sugar, Inc. v. Soto, 114 F.3d 330, 332 (1st Cir. 1997) ("[T]he loss of a unique or fleeting business opportunity can constitute irreparable injury."). Nonetheless, as Count VI is set out as a prayer for relief, rather than as a separate cause of action, it will be addressed in the context of the ultimate disposition of the case, rather than prematurely on a motion to dismiss.

ORDER

For the foregoing reasons, defendants' motion to dismiss Counts IV and VI of the Amended Complaint is DENIED.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE