COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. **SUPERIOR COURT**
CIVIL ACTION
NO. 1984CV2862-BLS2

GIUL, LLC

vs.

SHENGHUO MEDICAL, LLC, D/B/A K2 MEDICAL, ET AL.

MEMORANDUM OF DECISION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT FILED BY DEFENDANTS SHENGHUO MEDICAL, LLC, MICHAEL J. ANTONOPLOS, RICHARD P. BLUMBERG, MARK FAUPEL, GUIDED THERAPEUTICS, INC., AND MARK S. PEARLSTEIN

Presently before the Court are defendants' motions for summary judgment. Specifically, defendants Shenghuo Medical, LLC, Michael J. Antonoplos, Richard P. Blumberg, Mark Faupel, and Guided Therapeutics, Inc. (collectively, "Shenghuo Defendants") move for summary judgment on Plaintiff's claims for breach of contract (Count IV), fraud (Counts I and IX), violation of Massachusetts securities law (Count II), breach of fiduciary duty (Counts III and VIII), violation of Chapter 93A (Counts V and IX), conspiracy (Count X), and reach and apply (Counts VI and VII). Defendant Mark S. Pearlstein moves for summary judgment on Plaintiff's claims for violation of Massachusetts securities law (Count II), breach of fiduciary duty (Count VIII), violation of Chapter 93A (Count V), and conspiracy (Count X). Giul opposes these motions.

Also present before the Court is the motion of Hanover Insurance Company ("Hanover") to intervene. Giul also opposes this motion.

In light of the parties' arguments and filings, and for the reasons that follow:

(a) The Shenghuo Defendants' motion for summary judgment is **ALLOWED IN PART**;

(b) Pearlstein's motion for summary judgment is **ALLOWED IN PART**; and

(c) Hanover's motion to intervene is **DENIED**.

BACKGROUND[1]

Defendant Shenghuo Medical LLC ("Shenghuo") was formed on February 23, 2015, in Pennsylvania, and on that same day, the members adopted a Limited Liability Company Agreement (the "Operating Agreement").

On June 6, 2016, Shenghuo and Guided Therapeutics, Inc. ("GTI") entered into a License Agreement. To meet its obligations under the License Agreement, Shenghuo began to seek investors in June of 2016. Ultimately, Shenghuo secured investments, each in the amount of $60,000, from investors John Imhoff and Dolores Maloof (the parties dispute whether these were investments or loans).

In June 2016, Shenghuo had two managers, Blumberg and Antonoplos. At that time, Faupel was also a non-managing member and Pearlstein was a non-managing member and served as corporate counsel to Shenghuo.

On June 9, 2016, Antonoplos sent an email to Paul Conte, the sole member of Plaintiff Giul, LLC ("Giul') and then a potential investor in Shenghuo.[2] Antonoplos had previously brought other investment opportunities to Conte. In the June 9 email, Antonoplos wrote:

> Paul, here is a deal that perhaps you can assist on, but it has a short fuse . . . check the website for Guided Therapeutics, Inc.
>
> Shenghuo Medical, LLC is a Pa entity that has negotiated . . . exclusive rights [in a GTI

[1] The following factual summary is drawn from the admissible evidence in the summary judgment record, with all reasonable inferences have been drawn in favor of Plaintiff, as the non-moving party. See Bulwer v. Mount Auburn Hosp., 473 Mass. 672, 680 (2016).

[2] Conte is also the sole member of Tax Deferred Sales, LLC, the principal of 10301 Solutions, LLC, and is also an attorney.

product] . . .

Shenghuo need[s] to come up with a total of $200K payment (loan) to GT[I] . . . we have raised $136K so we need an additional $64K by the end of July . . .

For the $64K the following will be offered:

20% interest if the loan is paid back within 90 days, another 25% if not paid thereafter and any unpaid balance not paid by December 31, 2016 will accrue 20% annual compound interest factor

Additionally, the lender will be given 100% warrant coverage on their loan and in addition they will have the ability to convert their loan into stock plus receive an interest in Shenghuo.

Obvious[ly] Paul, if there is interest there is more documented info you would need but let me say this . . . I am invested in this . . . it is a winner and the lender is so covered . . . let's discuss further.

At the bottom of the email was a disclaimer ("the Disclaimer"), which read, in part: "To the extent this information discusses the terms of a proposed contract, this email communication shall not bind either party, it being expressly understood that all contracts must be in writing, duly agreed to and signed by both parties."

In an email dated June 11, 2016, Conte wrote back and asked Antonoplos: "Does the lender get the 64k in stock too in making the loan? If so I would be more interested personally."

Eleven minutes later, Antonoplos sent an email back to Conte in which he wrote:

Paul, just to clarify, $64k lender gets, at his/her option:

(1) (a) $76,800 if repaid within 90 days or 4,413,288 shares
or
(b) $83,200 if repaid later or 4,781,060 shares

AND

(2) 100% warrant coverage whether or not the loan is converted.

(3) Shares and warrants have full anti-dilution ratchet protection.

(4) Warrants are exercisable immediately and have a 5 year term.

(5) In addition, lender has option to convert their principal investment ($64K) into shares at a conversion rate of $.017402

(6) In addition, lender will receive 10% interest in Shenghuo at $600K pre-valuation.

This [is] as good a deal [as] one could get Paul – let's chat . . .

At the bottom of this email was the same Disclaimer as was included in the June 9 email.

In a phone call shortly after June 11, Antonoplos told Conte that Imhoff and Maloof both received a loan term and an investment term for funds they provided to Shenghuo.

Conte maintains that between June 11 and 29, he spoke by phone with Antonoplos and Faupel, and discussed the proposed transaction, including the terms of a loan (the "Loan Feature") offered to Conte. During the same period, Conte also spoke with Blumberg, who confirmed the terms of the loan. The Shenghuo Defendants dispute that these conversations occurred. However, no communications from the Shenghuo Defendants contradicted the intention that Conte's investment would include a Loan Feature.

On June 29, 2016, Antonoplos sent an email to Faupel asking Faupel to send to him the draft documents that were sent to Maloof and Imhoff so that he could send them to Conte. Faupel emailed Antonoplos, writing that he had attached a document, entitled Membership Interest and Subscription Agreement, that was identical to the one he had sent to Imhoff, except that Imhoff's name was removed (hereinafter, "Model Subscription Agreement"). The Model Subscription Agreement provided that in return for $60,000, the counterparty would be repaid the $60,000 plus interest (see "Whereas" clauses 6 and 7), called the "Loan Feature," and would also receive a Membership Interest of 1,406,386 Units in Shenghuo (see "Whereas" clauses 4 and 5), called the "Ownership Feature." See Pl.'s Ex. 4, at GIUL00012.

On June 29, 2016, Antonoplos sent Conte an email which attached the Model

Subscription Agreement, which included the Loan Feature. See Shenghuo Defs. Ex. 4. In the email, Antonoplos wrote to Conte, stating that the agreement:

> is the subscription agreement we used for the two guys that both put in $69K … [who are] heavy investors in GT[I] so their interest in investing in … Shenghuo, is with a sound basis and one of them sits [on] the GT[I] board so they are both convinced that they will get their money back in 90 days – I will resend the deal and the web[site] for GT[I] – this is a great deal Paul – you will end up close to 11% interest making you the largest shareholder after the initial founders.

At the bottom of the email was the same Disclaimer as used in the earlier emails. Conte reviewed the Model Subscription Agreement following receipt.

On July 14, 2016, Conte asked that he be provided a higher percentage interest in Shenghuo for a $64,000 investment. Conte did not ask for any additional terms to be changed from the Model Subscription Agreement that he received on June 29, 2016.

On July 18, 2016, Pearlstein, at the direction of Shenghuo's Board, drafted a Subscription Agreement ("the Subscription Agreement"), which Antonoplos sent to Conte. For reasons that the parties dispute, the Subscription Agreement did not include the Loan Feature and thus differed from the Model Subscription Agreement and the agreements between Shenghuo and each of Imhoff and Maloof.[3]

The Subscription Agreement also included an integration clause which read: "This document and any document referred to herein, is the entire agreement between the parties hereto representing the foregoing and supersedes any other writing or conversation." The prior emails and conversations during June 9-29, 2016 were not referenced in the Subscription Agreement.

[3] During discovery, Pearlstein testified that he made an error by utilizing an older draft of the agreement between Shenghuo and Imhoff as the template for the Subscription Agreement that he drafted for Conte's signature. Giul disputes this, and maintains that Pearlstein admitted that, as corporate counsel, he reviewed and approved the terms of any Shenghuo investment transaction, and that Antonoplos admitted that Blumberg never want to give Conte/Giul a loan term.

Blumberg and Antonoplos were the only proposed signatories for Shenghuo and only Antonoplos actually signed the Subscription Agreement.

On the same day that he received it, July 18, 2016, Conte signed the Subscription Agreement on the same page as the integration clause. Conte did not read the Subscription Agreement before he signed it.

On July 19, 2016, Conte wired $64,000 to Shenghuo Medical, LLC. Also on that date, Conte wrote to Pearlstein, Antonoplos, Faupel, and Blumberg, asking that his yet-to-be-formed entity, Giul, be inserted as the investor in lieu of Conte individually. At the direction of Blumberg and Antonoplos, Pearlstein – who had drafted the prior Subscription Agreement – made the change and sent a revised Subscription Agreement to Conte. Pearlstein did not make any other revisions.[4]

Conte testified that he never read the execution copy of the Subscription Agreement or the revised Subscription Agreement provided to him as between Shenghuo and Giul (hereinafter collectively referred to as the "Subscription Agreement"), and relied solely on three items in deciding to invest: the June 9 and June 11 emails, and the Model Subscription Agreement.

With Conte's $64,000, Shenghuo had the full $200,0000 it needed and loaned it to GTI.

In 2016, neither Conte nor Giul claimed any irregularities with the Subscription Agreement.

On July 27, 2016, Shenghuo's board determined that as of July 1, 2016, its managing members and Faupel would receive $5,000 per month in compensation for management functions for Shenghuo. On March 17, 2017, Pearlstein and Faupel were made managers of

[4] Conte did not sign the revised Subscription Agreement, but Pearlstein produced a capitalization table for Shenghuo showing Giul, not Conte, as the owner of 10.77% of Shenghuo and none of the parties contests that Giul is the party in interest in this case. See Stagecoach Transp. v. Shuttle, Inc., 50 Mass. App. Ct. 812, 813 (2001) (enforcing unsigned contract).

Shenghuo along with Blumberg; Antonoplos resigned as a manager.

Beginning in 2017, Conte demanded repayment of the loan he contends that he (and Giul) made to Shenghuo. Communications between the parties from 2017 to 2019 grew acrimonious and reflected a disagreement as to the terms of the transaction among them. Plaintiff filed this action on September 11, 2019.

After this lawsuit was filed, Shenghuo offered to conform Giul's agreement to the same form used for those other investors. Giul declined this offer to conform the Subscription Agreement.

On January 5, 2020, Shenghuo's managers signed a resolution whereby Shenghuo converted the $200,000 loan that Shenghuo made to GTI, including the $64,000 Conte invested, into shares of GTI. As a result, Shenghuo never received any monies from GTI designated for the purpose of repayment

DISCUSSION

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." DuPont v. Commissioner of Corr., 448 Mass. 389, 397 (2007), quoting Mass. R. Civ. P. 56 (c). The moving party bears the initial burden of demonstrating that there is no triable issue and that he or she is entitled to judgment. Ng Bros. Constr., Inc. v. Cranney, 436 Mass. 638, 644 (2002), citing Pederson v. Time, Inc., 404 Mass. 14, 17 (1989); Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991).

At its core, this is a straight-forward case. The terms of a potential transaction were discussed in emails between the parties. Defendants' emails to Conte bore disclaimers that the terms discussed therein did not establish a binding agreement between the parties. Defendants

provided Conte with a draft agreement, the Model Subscription Agreement, that reflected the terms Conte wanted, including the Loan Feature. Defendants then provided Conte a formal contract, the Subscription Agreement, which included, right above the line for Conte's signature, an integration clause that made clear it trumped the prior communications. Conte, a sophisticated businessman and lawyer, did not read the contract but signed it anyway. That contract did not include one of the terms Conte desired, the Loan Feature. The parties do not dispute the terms in the Subscription Agreement are different from those they negotiated previously, they instead dispute why this is so – outright fraud and deception according to Plaintiff, oversight and error according to Defendants. Under these facts, however, the reason for the discrepancy is not a barrier to resolving certain of Plaintiff's claims in favor of Defendants.

A. Breach of Contract against the Shenghuo Defendants (Count IV).

Plaintiff's claims for breach of contract (Count IV) are meritless.

To succeed in a breach of contract claim, a plaintiff must show (1) an agreement between the plaintiff and the defendant supported by valid consideration; (2) the plaintiff was ready, willing, and able to perform; (3) the defendant's breach the agreement; and (4) the plaintiff suffered damage as a result. Singarella v. Boston, 342 Mass. 385, 387 (1961) (citations omitted).

Giul's breach of contract claim fails for three reasons. First, the contract, the Subscription Agreement, was not breached; it provided no Loan Feature, the absence of which is the core of Plaintiff's complaint. Second, even though he did not read it, Conte is bound by the terms of the Subscription Agreement, which included no Loan Feature. Miller v. Cotter, 448 Mass. 671, 680 (2007) ("a party's failure to read or understand a contract provision does not free him from its obligations."). Third, the emails that preceded the Subscription Agreement, and

which discussed the Loan Feature, did not form a binding agreement on their face and, in all events, were superseded by the integration clause contained in the binding Subscription Agreement. "The general rule is, that, in the absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not." Haufler v. Zotos, 446 Mass. 489, 501 (2006), quoting Wilkisius v. Sheehan, 258 Mass. 240, 243 (1927).[5]

B. Fraud against the Shenghuo Defendants (Counts I and IX).

Plaintiff's fraud claims also fail as a matter of law.

"To recover on their fraud claims, the plaintiff[ ] must establish that the defendants made a false representation of material fact, with knowledge of its falsity, for the purpose of inducing the plaintiff[ ] to act on this representation, that the plaintiff[ ] reasonably relied on the representation as true, and that [the plaintiff] acted upon it to [his] damage." Cumis Ins. Society, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 471-472 (2009), citing Masingill v. EMC Corp., 449 Mass. 532, 540 (2007); Danca v. Taunton Sav. Bank, 385 Mass. 1, 8 (1982).

The Shenghuo Defendants contend that the June 9 and 11 emails do not reflect representations of fact. This argument is unpersuasive at this stage, as the emails can be read to show the transaction with Conte was to be, at least in part, a loan, see Giul Opp. at 6-8, and there is a dispute as to whether Antonoplos, Blumberg, and Faupel misrepresented what they intended to offer to Conte to become an investor.[6] See McEvoy Travel Bureau, Inc. v. Norton Co., 408

[5] As noted, Pearlstein testified that he omitted the loan terms from the Subscription Agreement in error. "The mutual mistake doctrine exists to effectuate the agreement intended by the parties to a contract where the contract language fails to capture that agreement . . . but which, for some reason, was mistakenly omitted from that written contract." Caron v. Horace Mann Ins. Co., 466 Mass. 218, 223 (2013). Where there is a "full, clear, and decisive" showing of mutual mistake, Smiches v. Smiches, 423 Mass. 683, 687 (1996), the court may reform the contract to give effect to the parties' true intent. Caron, 466 Mass. at 222. However, Plaintiff has not argued mutual mistake, and expressly rejected Defendants' offer to reform the contract to correct the omission.

[6] Specifically, Plaintiff argues that Faupel and Antonoplos arranged to send the Model Subscription Agreement to him, and that all three Shenghuo Defendants discussed the loan with him between June 11 and June 29, 2016, despite knowing that Blumberg never intended to offer the loan term to Conte/Giul.

Mass. 704, 709 (1990) ("[S]tatements of present intention as to future conduct may be the basis for a fraud action if . . . the jury could [find] . . . the statements misrepresent the actual intention of the speaker and were relied upon by the recipient to his damage.").

But even assuming Giul is correct on this point, it still must show that it was reasonable for Conte to rely on the June communications and Model Subscription Agreement in light of the fact that he did not read either version of the Subscription Agreement, the one he signed and the replacement version making Giul the party in interest, which excluded the Loan Feature on its very first pages.

Under these facts, it was not. There is no evidence that Conte lacked a reasonable opportunity to review the Subscription Agreement or that the Defendants took any action that caused him to sign them and transfer the Investment Amount without doing so. Both versions of the Subscription Agreement plainly omitted the Loan Feature – which would have been clear by reading the "Whereas" clauses on the first page of either one – and both contained integration clauses. Conte thus cannot show reasonable reliance on the email communications that preceded the Subscription Agreement, or the Model Subscription Agreement, and thus has not shown a triable case of fraud. As an experienced businessman and lawyer, Conte understood that the Subscription Agreement's terms would control; indeed, right above his signature line was the integration clause that made this clear. Under the facts here, his relying on emails, which on their face disclaimed that they could be used to form a contract, and ignoring the *actual* contract, was unreasonable. "It is unreasonable as a matter of law to rely on prior oral representations that are (as a matter fact) specifically contradicted by the terms of a written contract;" the same is true regarding reliance on emails that disclaimed any binding agreement. Masingill, 449 Mass. at 542. As the Supreme Judicial Court (SJC) explained:

> This is a rule of long standing, which we most recently reaffirmed in Kuwaiti Danish [Computer Co. v. Digital Equip. Corp., 438 Mass. 459] at 467–469 [(2003)]. As we have said, "if 'the contract was fully negotiated and voluntarily signed, [then] plaintiffs may not raise as fraudulent any prior oral assertion inconsistent with a contract provision that specifically addressed the particular point at issue.'" Starr v. Fordham, 420 Mass. 178, 188 (1995), quoting Turner v. Johnson & Johnson, 809 F.2d 90, 97 (1st Cir. 1986)[.]

Id. While the SJC recognized an exceptional case, McEvoy, 408 Mass. 704, it distinguished it on the grounds that, among other things, the defendant in McEvoy induced the plaintiff to sign an agreement purporting to memorialize their longstanding oral contract by assuring the plaintiff that a disputed provision was meaningless and inoperative. Masingill, 449 Mass. at 541-542. That was an actionable fraud. The facts here are distinguishably different.

Another case cited in Masingill confirms that Conte's fraud case fails. In Kuwaiti Danish, the SJC distinguished between the rule adopted in Yorke v. Taylor, 332 Mass. 368, 374 (1955) and the Restatement of Torts § 540 (1938) that "[t]he recipient in a business transaction of a fraudulent misrepresentation of fact is justified in relying on its truth, although he might have ascertained the falsity of the representation had he made an investigation," from the rule in the Restatement (Second) of Torts § 541 (1977), which states: "The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him." Kuwaiti Danish, 438 Mass. at 467-468. The SJC recognized that while "a falsity that could only be uncovered by way of 'investigation'" would not prohibit a claim of fraud, a plaintiff could not allege fraud based on "a falsity was readily apparent or 'obvious'". Id. at 468. "[I]f a mere cursory glance would have disclosed the falsity of the representation, its falsity is regarded as obvious." Id., quoting Restatement (Second), § 540, comment a. Thus, in Kuwaiti Danish, a fraud claim could not lie where the salesperson's representation expressly stated that it was merely an invitation to offer; a cursory review would have shown that it did not reflect the terms of a final deal, and there was no evidence the salesperson attempted to conceal

the qualifying language. Id. at 468-469. As the Court noted, "[i]t should have been obvious to anyone who took the time to read the entire quotation that [the salesperson] did not have authority to make a contract." Id. at 469. Such is the case here – a cursory glance at page 1 of the 5-page Subscription Agreement would have shown that Conte was not getting the Loan Feature for which he had negotiated, and the absence of that term was obvious.

Here, there is no dispute that the emails bore the Disclaimer, that the Subscription Agreement did not include the Loan Feature but did include an integration clause, or that Conte, a lawyer and sophisticated businessman, chose to sign the Subscription Agreement without reading it and without any undue pressure from Defendants that he execute it without so doing. The terms of the contract were thus made available to Conte, but he did not confirm that they tracked the negotiation. This is not a case, in other words, where Defendants lulled Conte into signing the Subscription Agreement without reading it. That logic would track if Defendants communicated something that prevented Conte from ascertaining the true facts simply by reading the contract. See Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 446 (1975) ("[I]f the seller's representations are such as to induce the buyer not to undertake an independent examination of the pertinent facts, lulling him into placing confidence in the seller's assurances, his failure to ascertain the truth through investigation does not preclude recovery."). However, the facts here do not excuse Conte's failure to simply read the explicit and obvious terms of the contract.

Nor has Giul shown fraud by omission. "To show fraud by omission, [a] plaintiff must allege both concealment of material information and a duty requiring disclosure." Buffalo-Water 1, LLC v. Fidelity Real Est. Co., LLC, 481 Mass. 13, 25 (2018) (citation, internal quotes omitted). "A duty to disclose exists where '(i) there is a fiduciary or other similar relation of

trust and confidence, (ii) there are matters known to the speaker that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading, or (iii) the nondisclosed fact is basic to, or goes to the essence of, the transaction.'" Knapp v. Neptune Towers Assocs., 72 Mass. App. Ct. 502, 507 (2008), quoting Stolzoff v. Waste Sys. Intl., Inc., 58 Mass. App. Ct. 747, 763 (2003). Even assuming a duty to disclose existed here, the facts regarding the deal were disclosed in the Subscription Agreement; they were not concealed.

C. Violation of Massachusetts securities law against all Defendants (Count II).

Defendants argue that they are likewise entitled to summary judgment on Giul's claim for violation of Massachusetts Uniform Securities Act, G.L. c. 110A, § 410. The Court disagrees.

The purpose of G. L. c. 110A, § 410 (a) (2) "is both 'redressive' and 'preventive,'" to "compensate the buyer for a loss" but "[m]ore importantly" to "create[] a strong incentive for sellers of securities to disclose fully all material facts about the security" and by "provid[ing] a heightened deterrent against sellers who make misrepresentations by rendering tainted transactions voidable at the option of the defrauded purchaser," regardless of the actual cause of the investor's loss. The statute "provides strong protections for a buyer who received misleading information from a seller of securities" such that, "[w]hile not imposing strict liability on the seller for untrue statements or omissions, it holds the seller to the heavy burden of proof 'that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.' G.L. c. 110A, § 410 (a) (2)." Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 51-52 (2004) (citations omitted). Accordingly, to make out a case for securities fraud, Plaintiff must show that (1) Defendants offered or sold a security; (2) in Massachusetts; (3) by making an "untrue statement of a material fact" or by omitting to state a material fact; (4) Plaintiff did not know of the untruth or omission; and (5) Defendants knew, or "in the exercise of reasonable care

[would] have known," of the untruth or omission. G.L. c. 110A, § 410 (a) (2); Marram, 442 Mass. at 52. "A fact is material . . . if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to act." Sherter v. Ross Fialkow Cap. Partners, LLP, No. SUCV201001888, 2013 WL 1324818, at *8 (Mass. Super. Jan. 4, 2013), quoting Hutchison v. Deutsche Bank Sec., Inc., 647 F.3d 479, 485 (2nd Cir. 2011).

Unlike with respect to the fraud claim, Plaintiff in making a claim under G.L. c. 110A, § 410 (a) need not prove negligence or scienter on the part of Defendants, or that Plaintiff reasonably relied on the allegedly untrue statement,. Further, the sophistication of the buyer irrelevant, and the buyer is relieved from having any duty to investigate or to verify a statement's accuracy. Instead,"[t]he buyer needs only to show 'lack of knowledge of a misleading statement or omission in order to prevail.'" Marram, 442 Mass. at 53-55 (citations omitted). "[T]he existence of contradictory written statements, in an integration clause or otherwise, does not provide a defense to the charge of preinvestment materially misleading [ ] statements." Id., citing Mid–America Fed. Sav. & Loan Ass'n v. Shearson/American Express Inc., 886 F.2d 1249, 1256 (10th Cir. 1989). Thus, the facts that the Subscription Agreement contained an integration clause, its terms were obvious, and that Conte is an attorney and sophisticated businessperson, does not bar his statutory claim.

The Shenghuo Defendants argue that "Plaintiff's mistake as to the terms of its investment" does not render the June 2016 communications to Conte materially untrue and Plaintiff cannot, in good faith, state that Conte did not know the Subscription Agreement deviated from those communications, where he signed and assented to agreement. The Court disagrees. The Subscription Agreement did not contain the loan terms which were central to the prior proposals transmitted to Conte, including the Model Subscription Agreement, and Plaintiff

has raised a genuine issue of fact as to whether Defendants knowingly misled him and never intended to provide the loan. See Psychemedics Corp. v. Boston, 486 Mass. 724, 733 (2021) (factfinder determines credibility of witnesses); In re Cabletron Sys., Inc., 311 F.3d 11, 34 (1st Cir. 2002) ("In general, the materiality of a statement or omission is a question of fact that should normally be left to a jury rather than resolved by the court[.]").

Additionally, Plaintiff has raised genuine issues of fact as to the liability of each Defendant. Liability extends to a person "who directly or indirectly controls" a seller the statute, and an "agent who materially aids in" such a sale. G.L. c. 110A, § 410 (b). The Shenghuo Defendants concede that Antonoplos and Blumberg controlled the company as managers. Conte has presented evidence that Faupel and Pearlstein materially aided in the sale. Whether an agent's aid is "material" depends upon his personal contribution to the transaction, not his knowledge of the facts that make it unlawful. Sherter, 2013 WL 1324818, at *12 (citations omitted). While typing, reproducing, and delivering sales documents are insufficient alone, a defendant may be secondarily liable even without direct contact with a purchaser, or participation in a misrepresentation; "a plaintiff must show only that the defendant materially aided, or personally participated *in the sale.*" Id. (emphasis in original), citing Prince v. Brydon, 764 P.2d 1370, 1371-1372 (Or. 1988) (finding that a lawyer who prepared an offering statement for the sale of securities "materially aided" the issuer). Pearlstein drafted the Subscription Agreements that deviated from Defendants' earlier communications and transmitted the final version to Conte. Plaintiff testified that Faupel participated in the 2016 discussions of the loan terms which were excluded from the Subscription Agreement.

Thus, genuine issues of fact exist as to whether Faupel and Pearlstein are liable under G.L. c. 110A, § 410 (a) and (b).

D. Violation of Chapter 93A against all Defendants (Shenghuo Counts V and IX, Pearlstein Count V).

Defendants are not entitled to summary judgment on Plaintiff's G. L. c. 93A claim.

"To prevail on a claim under G.L. c. 93A, the plaintiff must demonstrate an unfair or deceptive act or practice by [the defendant], i.e., one that falls within at least the penumbra of some common-law, statutory, or other established concept of unfairness." Lambert v. Fleet Nat. Bank, 449 Mass. 119, 126-127 (2007) (citations, internal quotes omitted). A claim between businesspersons, under G. L. c. 93A, § 11, "requires a higher degree of misconduct for a violation than in the consumer protection context of G. L. c. 93A, § 9." H1 Lincoln, Inc. v. S. Washington St., LLC, 489 Mass. 1, 15 n. 10 (2022). "[W]hether a particular set of acts, in their factual setting, is unfair or deceptive is a question of fact. But whether conduct found to be unfair or deceptive rises to the level of a chapter 93A violation is a question of law[.]" Id. at 13-14 (citations, internal quotation marks omitted).

To the extent Giul's Chapter 93A claim is based on the fraud claims concerning the First Amendment addressed above, it is meritless. See, e.g., Macoviak v. Chase Home Mortg. Corp., 40 Mass. App. Ct. 755, 760 (1996) (plaintiff's Chapter 93A claim solely based on meritless claim for common law fraud; as a matter of law, plaintiff had no reasonable expectation of proving 93A claim). However, as discussed supra, Plaintiff has raised issues of fact as to whether Defendants violated G.L. c. 110A, § 410 (a) and, in so doing, collectively and culpably misled Conte as to the terms of the proposed investment. "Even if the actions of the defendants were merely negligent, … if the plaintiffs were injured by this alleged conduct, it would be a jury question whether the defendants had engaged in an unfair or deceptive act or practice under the statute." Loheac v. Aldeborgh, 99 Mass. App. Ct. 1122 at *3 (2021) (Rule 23.0 decision), citing Marram, 442 Mass. at 62 ("a negligent misrepresentation may be so extreme or egregious as to

constitute a violation of G. L. c. 93A, § 11"). This evidence is sufficient to defeat summary judgment as to the G. L. c. 93A claim.

E. Breach of fiduciary duty against all Defendants (Shenghuo Counts III and VIII, Pearlstein Count VIII).

Plaintiff's claims for breach of fiduciary duty fail as a matter of law.

The parties agree that Pennsylvania law applies because Shenghuo is a Pennsylvania corporation. See Harrison v. NetCentric Corp., 433 Mass. 465, 469-471 (2001) ("the State of incorporation dictates the choice of law regarding the internal affairs of a corporation."). Under Pennsylvania law, the duty of care for members *and* managers of a limited liability company in conducting "the company's activities and affairs is to refrain from engaging in gross negligence, recklessness, willful misconduct or knowing violation of law." 15 Pa. C.S. §§ 8849.1 (c), 8849.2 (c). Among other things, the duty of loyalty requires members and managers to "refrain from competing with the company" or "dealing with the company . . . on behalf of a person having an interest adverse." 15 Pa. C.S. §§ 8849.1 (b), 8849.2 (b).

Plaintiff's claims for breach of fiduciary duty do not relate to the formation of the Subscription Agreement. Instead, the gravamen of the claims is that Defendants breached a fiduciary duty to Giul by voting to convert the $200,000 Shenghuo had originally loaned to GTI into shares of GTI. Plaintiff argues that, by discharging the loan, Defendants eliminated Giul's rights to recover its $64,000 investment. As discussed, the operative contract between the parties, the Subscription Agreement, did not afford any such rights to Giul. Plaintiff further asserts that Blumberg and Faupel had a conflict of interest in that they were managers of Shenghuo while also serving as executives and officers of GTI. However, Plaintiff has failed to identify how these dual roles were adverse to Shenghuo's interests, much less harmed any existing rights of Giul.

F. Conspiracy against all Defendants (Count X).

Defendants are not entitled to summary judgment on Plaintiff's claim of civil conspiracy.

There are two types of civil conspiracy under Massachusetts law: (1) the exercise of a peculiar power of coercion; or (2) a common design or agreement between two or more persons to do a wrongful act and proof of some tortious act in furtherance of the agreement. Kurker v. Hill, 44 Mass. App. Ct. 184, 188-190 (1998). Under the latter theory, a common design to violate a statute may provide a colorable theory of civil conspiracy. See Kyte v. Philip Morris Inc., 408 Mass. 162, 168 (1990) (evaluating claim that defendant conspired to violate statutory prohibition against sale of cigarettes to minors). Here, Plaintiff has raised genuine issues of fact as to whether Defendants acted in agreement or with a common design to violate G.L. c. 110A, § 410 (a) and substitute terms into the agreement that were adverse to Giul.[7]

G. Reach and apply against the Shenghuo Defendants (Counts VI and VII).

Pursuant to G.L. c. 214, § 3 (6), a "creditor can reach and apply in payment of any 'debt' a variety of a debtor's interests that are unavailable for ordinary attachment or levy. There must be an underlying "debt" running from the defendant to the plaintiff before this remedy is available. In re Rare Coin Galleries of Am., Inc., 862 F.2d 896, 904 (1st Cir. 1988), citing H.G. Kilbourne v. Standard Stamp Affixer Co., 216 Mass. 118, 119 (1913). The definition of "debt" does not generally include the possibility of being found liable for damages in a pending lawsuit not reduced to judgment, "where neither the fact of liability nor the amount of damages can be held affirmatively to exist until a judgment [is obtained]." In re Rare Coin Galleries, 862 F.2d at

[7] Pearlstein's argument that Plaintiff must present expert testimony also fails. Plaintiff's surviving claims are that Pearlstein conspired with and/or materially aided the Shenghuo Defendants in violating the G,L. c. 110A, § 410 (a). The Court cannot conclude at this stage that expert testimony is required as a matter of law to a jury to evaluate these claims. Further, Plaintiff must show that Pearlstein substantially assisted, "with the knowledge that such assistance is contributing to a common tortious plan." Kurker, 44 Mass. App. Ct. at 189. Plaintiff's evidence as to Pearlstein's involvement in the alleged common tortious plan is sufficient to survive summary judgment.

904, quoting Kilbourne, 216 Mass. at 122. As liability and extent of damages for Plaintiff's surviving claims remain (hotly) contested, a statutory bill to reach and apply is not available at this stage of the proceedings. In re Rare Coin Galleries, 862 F.2d at 904.

H. Hanover's Motion to Intervene.

Hanover seeks to intervene under Mass. R. Civ. P. 24 (a) and (b) for the limited purpose of submitting special verdict questions to the jury to determine whether damages are covered under the insurance policy issued to Pearlstein. Hanover does not have an unconditional statutory right or an interest in the transaction at issue that would support intervention as a matter of right under Rule 24 (a). See Morra v. Casey, 960 F. Supp. 2d 335, 338 (D. Mass. 2013) (determinations of coverage under a defendant's insurance policy do not support a right to intervene). Under, Rule 24(b), the Court may permit a party to intervene where the party has a conditional statutory right to do so or where the intervening party's claim or defense shares a common question of law or fact with the main lawsuit, and the intervention will not unduly delay or prejudice the adjudication of the rights of the original parties. Mass. R. Civ. P. 24 (b) (1), (2).

Exercising its discretion, the Court denies Hanover's request to intervene. Hanover's proposed intervention is likely to delay the proceedings and significantly prejudice the parties by requiring them to present evidence and argument on issues tangential to the matters at issue. Further, posing special verdict questions without proper context creates a substantial risk of unnecessarily confusing the jurors. Coverage issues are frequently litigated in separate actions and Hanover has adequate means protect its rights in the pending declaratory judgment action.

ORDER

For the foregoing reasons:

(a) The Shenghuo Defendants' motion for summary judgment is **ALLOWED as to Counts I, III, IV, VI, VII, VIII, and IX (fraud)** and **DENIED as to Counts II, V, IX (Chapter 93A) and X**;

(b) Pearlstein's motion for summary judgment is **ALLOWED as to Count VIII and DENIED as to Counts II, V, X**; and

(c) Hanover's motion to intervene is **DENIED**.

SO ORDERED.

M. D. Ricciuti
MICHAEL D. RICCIUTI
Justice of the Superior Court

Dated: February 21, 2023