SUPREME COURT OF NEW YORK
NEW YORK COUNTY

PURSUIT CREDIT SPECIAL OPPORTUNITY FUND, L.P.,	:	
Plaintiff,	:	Index No. 651070/2022
- against -	:	
KRUNCHCASH, LLC, KC PCRD FUND, LLC, JEFFREY HACKMAN, and SEAN MCGHIE PLC	:	**MOTION SEQ. 002**
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN RESPONSE TO DEFENDANTS' MOTION TO DISMISS THE VERIFIED AMENDED COMPLAINT

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Statute

Pursuit Credit Special Opportunity Fund, L.P.'s ("Pursuit") submits this Memorandum of Law in Opposition to Defendants' KrunchCash LLC ("KrunchCash"), KC PCRD Fund, LLC ("KC PCRD"), Jeffrey Hackman ("Hackman") (collectively the "KrunchCash Parties"), and Sean McGhie PLC's ("McGhie") Motion to Dismiss the Verified Amended Complaint.

PRELIMINARY STATEMENT

Countless lawsuits trail Jeff Hackman's business endeavors, accusing him of fiduciary misconduct and using threats to evade accountability. (Bea Aff. ¶4.)[1] This is not just a case about an investment gone bad. This is a case about brazen self-dealing that was exposed when Hackman's gambit collapsed, and the swirl of litigation surrounding him revealed that Pursuit had been defrauded. There is every indication that Hackman is running a full-blown investment fraud: using Pursuit's monies to pay off other investors, multiple sets of books, double-pledging collateral, intimidation of investors, and *zero* reporting to the IRS, SEC, or state regulators. By *this* action, Pursuit seeks to hold Hackman and the other Defendants accountable for fraud and the willful mismanagement of more than $10 million Pursuit invested through KC PCRD and KrunchCash, including the apparent misappropriation of millions of dollars of Pursuit's capital. Hackman and those who do his bidding do not hesitate, even before this Court, to misrepresent facts to achieve their ends, counting on the sheer volume of falsehoods he has proliferated to obscure the truth about what he was really up to and where Pursuit's money went.

Defendants' assertion that the Verified Amended Complaint ("VAC") (Doc. 14) fails to state a cause of action must be rejected. The VAC alleges, in detail, the scale of Defendants' misconduct and documents their wildly inconsistent posturing in response to

[1] "Bea Aff." refers to the Affirmation of Renee Bea, filed concurrently herewith.

Pursuit's demands for accountability. The KrunchCash Parties try to have it both ways: denying contracts when they do not serve their interests and asserting those same agreements to avoid Pursuit's claims.

More specifically, the parties' dealings confirm that the KrunchCash Parties understood that they, and Pursuit's investments, were governed by the Amended IFA and the Purchase Agreement. (¶28-32.)[2] But as the deals collapsed, and Hackman could no longer conceal his fiduciary misconduct, he began posturing, disclaiming any liability, and taking inconsistent positions regarding the application of the Amended IFA to later Advances and recoveries from the Default Actions. (¶49-52.) As a result of Defendants' disingenuous posturing, Pursuit asserts claims for breach of contract, breach of fiduciary duty, constructive fraud, and seeks an accounting directed to the KrunchCash Parties' gross fiduciary mismanagement of the investments they were entrusted to manage, misleading accounting, commingling of Pursuit's funds, and disloyal self-dealing—conduct that *Defendants assert* is beyond the reach of the agreements. To recover misappropriated funds, Pursuit pleads claims for unjust enrichment and voidable transfer based on KrunchCash, Hackman, and McGhie's surreptitious and unearned payments to themselves from funds invested by, or owed to, Pursuit.

And *finally,* Pursuit alleges in detail a series of fraudulent misrepresentations and omissions of fact regarding the under-performance of prior Advances, employed to solicit millions from Pursuit after the Amended IFA was executed. The fraud continued well into 2019, with Hackman misrepresenting or concealing the performance of the investments, the ballooning cost of the Default Actions, the recovery of proceeds, and the status of other investors' pro-rata

[2] Capitalized terms not otherwise defined have the meaning ascribed to them in the VAC (Doc. 14) and "¶" references are to Paragraphs therein.

contributions to induce Pursuit to fund his and KrunchCash's litigation expenses associated with efforts to recover Pursuit's investment. (¶220.) These revelations give rise to Pursuit's well-plead causes of action for fraud and Florida Blue Sky violations. And none of these causes of action are foreclosed by, or waived by, the existing agreements. In the face of this robust pleading, the VAC must be sustained.

STATEMENT OF FACTS

Pursuit refers the Court to its pleading for a detailed and comprehensive recitation of the facts, which can only be summarized at the highest level in this memorandum. (*See* VAC.)

A. PURSUIT LEARNS DEFENDANTS LIED AND MISMANAGED THE INVESTMENTS

Pursuit invested more than $10 million into KrunchCash and KC PCRD, two specialty finance entities owned and managed by Hackman. (¶1-3.) Under various agreements, Pursuit is entitled to participate in proceeds generated by "Advances," *i.e.,* law firm loans and factoring agreements made by KrunchCash to third-parties. (¶1-2.) By early 2019, undisclosed to Pursuit, two of the largest investments Pursuit funded, the "Maryland" and "Pharma" Advances, became impaired. (¶3.)

Hackman hid the defaults from Pursuit until, unable to conceal the failing investments any longer, Hackman finally revealed to Pursuit in July 2019 that the Maryland and Pharma Advances were in default, wiping out nearly all of Pursuit's $10 million in capital, and that the KrunchCash Parties were embroiled in litigation with the Maryland law firm. (¶42-44.) Then in January 2020, Pharma sued KrunchCash and Hackman. (¶45-47.) A saga of litigation ensued among KrunchCash and Hackman and the Advance recipients in Florida and Maryland (the "Default Actions").

Shortly thereafter, Hackman began making extortionate demands that Pursuit fund the Default Actions. (¶49-55.) Hackman threatened that if Pursuit did not rewrite the existing economic arrangement to pay Hackman extra-contractual compensation and subsidize KrunchCash's overhead, he would abandon collection efforts. (*Id.*) Defendants strategically exploited information asymmetry in their favor by providing false information concerning the expenses Pursuit was being asked to fund (¶50), misrepresenting the status of the Advances and Default Actions (¶45), and misrepresenting the capital contributions made by KrunchCash and a third-party investor. (¶59-61.) Defendants refused transparency into Pursuit's investment or the Default Actions. (¶64-71.)

As Pursuit's questions mounted, and with Defendants' finances gridlocked from disputes concerning other questionable business endeavors (¶73-76), Pursuit uncovered a web of fraud on the part of Hackman—and the truth of the events that led to the seemingly sudden loss of more than $10 million. (¶7-8, 73-83.) Pursuit learned that, as losses mounted, KrunchCash and Hackman misappropriated several hundred thousand dollars in realizations from Pursuit's other investments, unrelated to the Pharma or Maryland Advance (¶73, 75), and misappropriated part of a $700,000 collection from the Pharma Advance, concealing it and later concocting nonsensical explanations to justify the theft. (¶76-78.) Pivotally, in Spring 2021, Pursuit learned that Defendants *had collected but failed to disclose or disburse $2.5 million from the Maryland Advance*. (¶82.)

Pursuit also learned that Hackman manipulated the accounting by failing to disclose revenue and invoices to obscure Defendants' unauthorized and improper use of proceeds owed to Pursuit, and that KrunchCash had been using Pursuit's funds to subsidize KrunchCash's operations (and other investors') obligations. (¶84.) Pursuit's demands for transparency have

been met with threats and a refusal to acknowledge Defendants' obligations to Pursuit. (¶87-90.) Recently, Hackman collected several hundred thousand dollars from assets belonging to Pursuit (the "Connecticut Advances") but refuses to pay them over to Pursuit. (¶35, 75, 180-181, 202.)

Upon discovering Hackman's theft of $2.5 million, Pursuit sued. (¶96.) Since then, Pursuit has made stunning discoveries regarding the KrunchCash Parties' fraudulent conduct, including the concealment of early Advance impairments, false or misleading accounting used to solicit additional capital from Pursuit, and Hackman's collection of millions in unearned fees on the basis of *false profits* presented to Pursuit. (¶41-47, 231, 251.)

B. THE PARTIES' AGREEMENTS

From 2015 through mid-2018, Pursuit's investments with KrunchCash were made under two agreements: the Original IFA dated April 2015 (Ex.1) and a separate September 2017 Purchase Agreement (as amended). (Ex. 3; ¶21.) Both governed Pursuit's funding of specific Advances and distributions pursuant to a waterfall. (¶24.)

In April 2018, Defendants asked Pursuit to enter into a new agreement, the Amended IFA, inserting a dedicated entity, KC PCRD, designed to partition investor funds as a managed account through which Pursuit's investments would flow. (Ex. 2; ¶27-28.) The Amended IFA superseded the Original IFA. (*See* ¶28.) Substantively it did not disturb the economic waterfall for proceeds. (Ex. 2 at § 2, 6.)

The Amended IFA binds both KC PCRD and KrunchCash: KC PCRD is the 'managed account,' and KrunchCash is obligated to marshal "KrunchCash's right, title and interest in any and all future proceeds received from any Advances provided by KrunchCash with any [Pursuit] funding under the [Original IFA]." (*Id.* § 2). KrunchCash also assumed obligations under the Amended IFA, usurping KC PCRD's roles thereunder. (¶31-34, 161-165.)

Defendants' argument that Pursuit "waived" claims for conduct Pursuit alleges in this action is misleading and false. While, consistent with the Amended IFA's supplanting the Original IFA, the waiver language had no application to post-April 2018 acts (nor any claims *whatsoever* against KC PCRD, Hackman, or McGhie, or arising under the separate Purchase Agreement)—which is what is alleged in this action.

C. DEFENDANTS' INCONSISTENT APPLICATION OF THE AGREEMENTS

Pursuit pleads both contract and tort claims because of ambiguity in the Parties' agreements, and because Defendants have taken irreconcilable positions throughout the dispute regarding Defendants' obligations and Pursuit's rights under the agreements.

The Amended IFA is not comprehensive and was varied by performance. For instance, although the Amended IFA provides that "the Company [KC PCRD]" would enter into and service the Advances (Ex. 2, § 3 *and* 4), in fact, KrunchCash—not KC PCRD—assumed obligations to Pursuit as the contractual party to Advances, Hackman directed Pursuit to deposit funds with KrunchCash, not KC PCRD, and Hackman and KrunchCash managed the investments, including the Default Actions. (¶163-164.) Additionally, while the Amended IFA only explicitly addresses the Maryland Advances and Pursuit's then-existing capital balance based on amounts reinvested from prior investments (*see* Ex. 2, § 1 ("*Existing* Advances")), it did not expressly address new capital or the several million dollars the KrunchCash Parties solicited, and Pursuit invested, after the Amended IFA was executed. (¶34.) Nevertheless, the parties' contemporaneous understanding and course of performance demonstrates that each of the later Advances were invested on the same terms set forth in the Amended IFA, with KrunchCash assuming the role as custodian and administrator of the investments, and Hackman serving as the investment advisor and servicer. (¶35-36, 106, 200.)

Additionally, the Amended IFA does not explicitly address potential litigation with the borrowers concerning the Advances, *e.g.,* the Default Actions, and Defendants have taken inconsistent positions in this regard. (Ex. 2; ¶108.) At times, Defendants asserted that the Amended IFA applies (¶56), and treated capital and revenues from Default Actions just as they would funds invested or received from Advances in the ordinary course. (¶76-78) Indeed, Defendants have brandished the Amended IFA in this action, suggesting that agreement provides cover for Defendants' malfeasance. (Mem. 5 (Pursuit has "no authority, power or discretion to manage or participate in the business affairs of KC PCRD").)

Elsewhere, as Defendants became entrenched, Defendants asserted the inverse: that Pursuit's agreements "expired" in April 2020 (though Defendants asserted the Amended IFA required Pursuit to fund for more than year afterward) (¶110); that Pursuit is entitled to proceeds from *Advances*, but not from the *Default Actions* (*id.*); that—*because* the agreements supposedly do not apply—Hackman is entitled to extra-contractual compensation (¶60, 63); and that settlements from the Default Actions would be distributed in an undisclosed "to be determined" manner. (¶60, 110.) Moreover, the KrunchCash Parties have asserted that their use of the KrunchCash entity as a vehicle for investment (instead of KC PCRD, as required under the Amended IFA) shields them absolutely from liability. (¶79, 107.)

Pursuit sought to clarify the KrunchCash Parties' inconsistent application of the agreements following the defaults. (¶114.) Defendants, however, refused to do so, negotiated in bad faith, and attempted to exploit perceived ambiguities to extort Pursuit to provide additional funding, under threat to the Default Actions, to intercept Pursuit's funds, and to refuse transparency on how those funds are used or how distributions will be made. (¶115-116.) Because Defendants have taken inconsistent positions, *i.e.,* claiming that the Amended IFA

applies when beneficial, but disclaiming it when not, and because Pursuit now realizes that the investment structure was a scheme used to defraud, Pursuit pleads contract claims under the Amended IFA and Purchase Agreement, and tort and quasi-contract theories—particularly as against Hackman and KrunchCash, whose responsibilities are not fully addressed by the Amended IFA—to recover misappropriated and mismanaged funds. (¶117.)

ARGUMENT

On "a motion to dismiss pursuant to CPLR §3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005). The Court's task is to "determine only whether the facts as alleged fit within any cognizable legal theory." *Cortlandt St. Recovery Corp. v. Bonderman*, 31 N.Y.3d 30, 47 (2018) (citing *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994)). Unless a material fact is conclusively disproved, and no dispute exists regarding it, dismissal is improper. *Leon*, 84 NY2d at 88. Pleading in the alternative is expressly permitted under New York law. CPLR §3014. While documentary evidence may be considered on a motion to dismiss, the documents proffered on this motion do not satisfy Defendants' burden to "utterly refute[] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002) (citing *Leon*).

I. DEFENDANTS CANNOT "UTTERLY REFUTE" PURSUIT'S CONTRACT CLAIMS

As a threshold matter, the Amended IFA and the Purchase Agreement require the application of Florida law. (Ex. 2, §12(f); Ex. 3, §6(e).)

A. KrunchCash is Bound By The Amended IFA

KrunchCash argues it cannot be liable under the Amended IFA because its obligations thereunder were limited. (Mem. 11.) KrunchCash is a signatory to the Amended IFA and, in addition to its express obligations it is alleged to have breached thereunder (¶181-182), KrunchCash also assumed KC PCRD's obligations under that agreement and manifested an intent to be bound by the Amended IFA (¶177). *ConSeal Int'l Inc. v. Neogen Corp.*, 2020 WL 4736203, at *3 (S.D. Fla. Aug. 14, 2020) (contract binds a nonsignatory who assumed performance obligations or manifests an intent to be bound); *Integrated Health Servs. of Green Briar, Inc. v. Lopez-Silvero*, 827 So. 2d 338, 339 (Fla. Dist. Ct. App. 2002); *accord MBIA Ins. Corp. v. Royal Bank of Canada*, 706 F. Supp. 2d 380, 397 (S.D.N.Y. 2009) (citing New York cases).

The Amended IFA requires KrunchCash to "transfer the remaining proceeds that [Pursuit] previously provided to KrunchCash under the Existing Agreement [i.e. the 2015 Original IFA]" to the KC PCRD bank account (Ex. 2, § 1) *and* to "assign[] to [KC PCRD] all of KrunchCash's right, title and interest in and to any and all *future proceeds* received from any Advances provided by KrunchCash with any Investor funding under the [Original IFA]." (*Id.,* § 2 (emphasis added).) KrunchCash breach that obligation by refusing to assign proceeds from the Maryland Advances (and other Advances) to KC PCRD, and has asserted, in refusing to pay

Pursuit funds it is owed, that it *retained* the "right, title and interest" to any proceeds from that Advance. (¶162-163, 178.)

KrunchCash also assumed obligations under the Amended IFA by, *inter alia,* causing KrunchCash—rather than KC PCRD—to "enter into funding agreements with the funding recipients to provide Advances with the Investor Funding" (Ex. 2, § 3; ¶178); collecting and remitting payments from Advance recipients through *KrunchCash's* bank accounts (*id.* § 4; ¶179); directing Pursuit to deposit funds in KrunchCash's bank account (¶30, 178); and it was KrunchCash's account "from which" Advances were funded. (Ex. 2, § 5; ¶175-177.)[3] Critically, KrunchCash directed Pharma and Maryland to repay Advances to its own bank account, thus assuming the role of "servicing," "collecting," and "remitting" the amount repaid by the funding recipient—responsibilities which *should have* been fulfilled by *KC PCRD* pursuant to Section 4 of the Amended IFA. (Ex. 2, § 4, 6; ¶181.) Having assumed these roles, assumption and equitable estoppel prevent KrunchCash from reaping the benefits of the Amended IFA and then repudiating it when advantageous to KrunchCash. *Interim Healthcare, Inc. v. Interim Healthcare of Se. Louisiana, Inc.*, 2020 WL 3078531, at *12 (S.D. Fla. June 10, 2020) (citing cases).

B. Pursuit Did Not Waive Claims Asserted In This Action

Defendants' attempt to invoke a limited, backward-looking release in the Amended IFA to dismiss all claims against KrunchCash "and derivatively, Hackman," is *non sequitur,* and misleading. (Mem. 11, 14.) A release, like any other contract, should be construed by its terms. *In re Managed Care*, 756 F.3d 1222, 1237 (11th Cir. 2014). "[T]he relevant inquiry

[3] KrunchCash asserts that "KrunchCash, and KrunchCash alone, is the first-priority secured creditor of the defendants in the Default Actions." (Mem. 13.) If that is so, it is only because KrunchCash unilaterally assumed KC PCRD's roles under the Amended IFA, and therefore must assign those rights to Pursuit. (¶161-162.)

for determining whether a claim is released is [] whether the acts giving rise to the complaint … occurred after the date of the [release]." *Id.*

The plain meaning of the Amended IFA's release language is backward looking and applies narrowly to a specific prior agreement—the Original IFA—not the Amended IFA. (Ex. 2, § 9(b).) The language Defendants assert states that Pursuit "waives and releases KrunchCash from any and all claims arising out of or attributable to any acts of KrunchCash taken *under the Existing Agreement.*" (*Id.* (emphasis supplied).) "Existing Agreement" means "Investor Funding Agreement dated April 15, 2015," *i.e.* the *Original* IFA. (*Id*. at Preamble.) Thus, this language does not operate to waive Pursuit's claims arising under the Amended IFA (or *any* against KC PCRD or Hackman). (*See id.*) To conclude otherwise would do violence to other provisions of the Amended IFA, such as KrunchCash's *future* obligation to "assign … future proceeds received from Advances provided by KrunchCash." (*Id.* § 2.) Pursuit did not prospectively waive the Amended IFA's obligations before they even arose. Such a construction would render the Amended IFA meaningless. Likewise, the release language does not waive any of Pursuit's other causes of action, all of which arise from the separate Purchase Agreement, or from breaches or acts that occurred after the Amended IFA's effective date of April 10, 2018. (*See* ¶191-195, 258.) *In re Managed Care*, 756 F.3d at 1237.

The Court should also reject Defendants' misleading citation to the purported "record," *i.e.,* transcripts in a narrow Article 75 proceeding, which are neither dispositive nor probative here. *Remco Maintenance, LLC v. CC Mgt. & Consulting, Inc.*, 85 A.D.3d 477, 479-480 (1st Dep't 2011); D-Ex. 2 at 21:21-22 (determination is as to arbitrability, not merits). Defendants misrepresent the Court's prior analysis, which applied to the Original IFA (D-Ex. 2 at 12-14), an agreement not asserted in this action. Contrary to Defendants' representation, the

Court's "initial reaction" was that Pursuit "may have some claims against Krunchcash arising out of the amended agreement [*i.e.* the Amended IFA]," because "there is as least some obligation imposed upon Krunchcash in the amended agreement." (D-Ex. 2 at 27:21-28:03.) The purported waiver has no relevance to Pursuit's actual claims under the Amended IFA and Purchase Agreement, and for torts committed after those agreements were executed. *See In re Managed Care*, 756 F.3d at 1237.

C. The Amended IFA Does Not Absolve KrunchCash's and KC PCRD's Malfeasance

KrunchCash and KC PCRD's argument that they are absolved of any obligation to pay proceeds to Pursuit because the Amended IFA purportedly expired on April 10, 2020 belies the Amended IFA.[4] (Mem. 12-13.) The Amended IFA expressly addresses post-termination rights, providing that "[t]he expiration or termination of this Agreement will not affect any rights or liabilities of any party accrued prior to such expiration or Termination Date and will not affect any such antecedent rights," and that after termination,[5] "proceeds received from Advances provided with the Investor Funding…will continue to be allocated and disbursed in accordance with Section 6." (Ex. 2, § 8(c)(i), (iii).) The Amended IFA also provides that provisions that "by their nature are intended to survive [] expiration or termination" "will survive the termination." (*Id.* § 12(l).) Neither KC PCRD nor KrunchCash adhered to the Amended IFA

[4] This position is incompatible with the KrunchCash Parties' position that the Amended IFA requires Pursuit to fund the Default Actions and permits KC PCRD's conduct after April 2020. (¶110.)

[5] KC PCRD's assertion that "no outstanding proceeds had been collected therefore nothing was owed" (Mem. 12) is disputed, and to the extent KC PCRD failed to collect proceeds to repay Pursuit, it is a result of Defendants' diversion of cash from the commingled KrunchCash account—separately a breach. (*e.g.* ¶75, 82-83, 187-188, 193.)

waterfall, segregated funds, or properly managed the Advances, and Pursuit pleads breach of the Amended IFA based on this conduct. (¶82.)

Likewise, Defendants argue risk disclosures in the Amended IFA preclude damages. (Mem. 12-13.) Cautionary language does not shield a defendant from liability for claims arising separate and apart from the then-offered asset.[6] *Crowell v. Morgan, Stanley, Dean Witter Services Co., Inc.*, 87 F.Supp.2d 1287, 1291 (S.D. Fla. 2000) (denying dismissal where plaintiff "does not base his claim upon the prospectus at all," but rather "fraudulent [] scheme and sales tactics."); *People v. Merkin*, 26 Misc.3d 1237(A)*5 (Sup. Ct. N.Y. Cty. Feb. 8, 2010) ("cautionary language warn[ing] investors that 'bad things may come'" did not bar fraud claims because "[g]eneralized disclosure regarding unspecified risks"); *Hong Leong Finance Ltd. v. Morgan Stanley*, 44 Misc.3d 1231(A) (Sup. Ct. N.Y. Cty. 2014). Plaintiff is not complaining that the Advances were risky. On the contrary, the gravamen of the action is that Defendants acted willfully and maliciously *after* Pursuit executed the Amended IFA, falsifying accounting and misrepresenting investment performance to solicit further investment, refusing to pay Pursuit amounts owed, and jeopardizing Pursuit's investment. (¶220, 237.) This malicious behavior is not the "high degree of risk" in the nature of the assets covered by the disclaimer language. *Crowell*, 87 F.Supp.2d at 1291. The Amended IFA does not bar Pursuit's claims against KrunchCash.

D. Pursuit Alleges a Separate Agreement Regarding Right to Proceeds

It is KrunchCash's duplicity that gives rise to the second cause of action, plead in the alternative, which is expressly allowed under New York law. CPLR §3014. Pursuit's position

[6] Defendants apparently invoke the "bespeaks caution" doctrine—which has no application here to claims based on the performance, rather than the entering-into of the relationship. *Merkin*, 26 Misc.3d 1237 *5.

is, and has been, that the Amended IFA governs proceeds from the Advances and Default Actions. (¶ 104-111, 117-118.) And it has been Defendants' position too, when it suits their needs. (¶68, 186.) Defendants' shifting positions, however, necessitate this claim to address funds solicited from Pursuit for the Default Actions that Defendants assert is not governed by the contracts. (¶184-190.)

E. Pursuit's Seeks Declaratory Judgment Regarding Future Proceeds

Citing no authority, the KrunchCash Parties assert Pursuit's tenth cause of action seeking declaratory relief is not ripe. (Mem. 18.) The fact that there is a real dispute involving a substantial legal interest for which a declaration of rights will have a practical effect with respect to prospective obligations is self-evident in KrunchCash's inconsistent challenges to Pursuit's asserted rights. (*See, e.g.,* ¶104, 110, 117-118.) *Chanos v. MADAC, LLC*, 74 A.D.3d 1007, 1008 (2d Dep't 2010). KrunchCash argues that Pursuit was obligated to fund the Default Actions, but that only KrunchCash, and not Pursuit, is entitled to share in any future recovery from the Default Actions. (¶180-182.) Defendants inconsistently assert no contract governs the parties' rights to such recoveries, but that the Amended IFA gives KrunchCash an unfettered right to those recoveries. (¶110, 238.) While the breach of contract claims relate to proceeds Defendants already misappropriated, the tenth cause of action seeks the *prospective* relief of a declaration of *future* rights in the event of any *additional* recovery. (¶242-247.)

F. One Self-Serving Email Does Not Utterly Refute KrunchCash's Breach

KrunchCash cites one, self-serving email, authored by Hackman, to challenge Pursuit's claim for breach of the Purchase Agreement. (Mem. 13.) This is not documentary evidence because it does not "utterly refute" Pursuit's allegation that KrunchCash has failed to pay proceeds owed to Pursuit. *Englese v. Sladkus*, 59 Misc. 3d 1218(A) *3 (Sup. Ct. N.Y. Cty. 2018) (citing *Goshen*, 98 NY2d at 326). On its face, the proffered email shows only a request,

and not an agreement. (*See* Defs-Ex. 4 ("Company respectfully requests that Investor waive…").) Pursuit's VAC disputes Defendants' assertion that Pursuit agreed to anything—raising issues of fact not properly resolved on a motion to dismiss. (¶73-74, 193-194.) *Englese,* 59 Misc. 3d 1218(A) at *4. Additionally, other documents (*e.g.* Exs. 4, 5) and even KrunchCash's own assertions (¶238; Mem. 13) contradict the absurd argument that Pursuit, who comes before this Court *because* it has not been paid what it is due, has waived its right to payment under the Purchase Agreement.

II. CLAIMS ARISING FROM FIDUCIARY DUTIES OWED TO PURSUIT

A. New York and Florida Law on Fiduciary Duties

The VAC pleads causes of action for breach of fiduciary duty (fourth) and constructive fraud (fifth), both of which arise from a fiduciary relationship. KrunchCash and Hackman argue the breach of fiduciary duty cause of action is duplicative of breach of contract. (Mem. 14-15.) Pursuit's tort-based claims are necessary and proper—under New York or Florida law—because both defendants elsewhere disclaim the Amended IFA, and because the KrunchCash Entities are investment managers.

In New York and Florida, conduct arising to a breach of fiduciary duty may proceed notwithstanding a contract where it is "nonetheless independent of such contract." *Bullmore v. Ernst & Young Cayman Isl.*, 45 A.D.3d 461, 463 (1st Dep't 2007) (citation omitted) ("allegations of fraud and breach of fiduciary duty/duty of care are not duplicative of the contract claim against Beacon Hill"); *PNC Bank v. Colonial Bank, N.A.*, 2008 WL 4790122, at *1, 4 (M.D. Fla. 2008) ("Florida courts have routinely recognized parallel breach of fiduciary duty and breach of contract claims.").

Likewise, both Florida and New York recognize coexistent contractual and fiduciary duties. Under New York law, "[a] legal duty independent of contractual obligations

may be imposed by law as incident to the parties' relationship. Professionals … may be subject to tort liability for failure to exercise reasonable care, irrespective of their contractual duties." *Assured Guar. (UK) Ltd. v. J.P. Morgan Inv. Management Inc.*, 80 A.D.3d 293, 306 (1st Dep't 2010) (beneficiary of investment management agreement could bring claims tort against management company where "defendant had discretionary authority to manage [] investment accounts"). In "these instances, it is policy, not the parties' contract, that gives rise to a duty of care." *Bullmore*, 45 A.D.3d at 461 (citation omitted). Respecting Florida's hostility towards rogue investment management, Florida is even *more harsh* in imposing fiduciary duties: under Florida law, a fiduciary relationship can be created by an express agreement or implied based on the facts and circumstances. *Craig v. Kropp*, 2017 WL 2506386, at *4 (M.D. Fla. June 9, 2017).

In both jurisdictions, an "*investment advisor*" and/or one who controls investment funds is bound by fiduciary obligations. *Assured Guar.*, 80 A.D.3d at 306 (citing *Bullmore,* 45 A.D.3d at 463); *Rushing v. Wells Fargo Bank, N.A.*, 752 F.Supp. 2d 1254, 1264 (M.D. Fla. 2010) (finding fiduciary claim not duplicative where bank "held itself out to be a knowledgeable, qualified, and experienced investment advisor …"); *In re Allianz Global Investors U.S. LLC Alpha Series Litigation*, 2021 WL 4481215, *19 (S.D.N.Y. 2021) (upholding fiduciary duty claim where defendant controlled "the manner in which the Funds would be invested" and "the risk management practices Defendant represented it would employ.").

Although Pursuit's claims suffice under either law, a potential conflict arises because "the laws in question [] provide different substantive rules in each jurisdiction that are 'relevant' to the issue at hand and have a 'significant possible effect on the outcome of the trial.'" *Elmaliach v. Bank of China Ltd.,* 110 A.D.3d 192, 200 (1st Dep't 2013). Under New York's interest analysis, Florida law applies because Florida has the most significant contacts:

the tort concerns conduct-regulating rules and occurred in Florida; the funds were misappropriated and misused through bank accounts in Florida; and the false accounting was prepared in Florida, by two Florida-based defendants. (¶100.) *See Elmaliach,* 110 A.D.3d at 202.

B. Pursuit Alleges a Distinct Duty Giving Rise to Breach of Fiduciary Duty and Constructive Fraud

Pursuit's breach of fiduciary duty and constructive fraud claims allege a fiduciary relationship arising from an investment management relationship and misconduct beyond the scope of the Amended IFA. *Maxted v. Sato Global Solutions, Inc.*, 2018 WL 3109628, at *6 (S.D. Fla. 2018) (denying dismissal and outlining Florida law's "independent tort" doctrine).

The crux of Pursuit's fiduciary duty claim is that KrunchCash and Hackman, acted as investment advisors, custodians of more than $10 million of Pursuit's assets, and managers of the Default Actions, and abused their position of superior knowledge and trust in a self-dealing fashion. (¶199-200.) KrunchCash's role as an investment fund entrusted to manage Pursuit's assets, and Hackman's direct control over the bank accounts and the accounting, gives rise to fiduciary duties. (*Id.*) *Assured Guar.*, 80 A.D.3d at 306; *Bullmore*, 45 A.D.3d at 463; *In re Allianz Global Investors*, 2021 WL 4481215, *19; *Rushing*, 752 F.Supp. 2d at 1264; *Mahdavieh v. Suntrust Mortg., Inc.*, 2014 WL 1365425, at *4.

KrunchCash blocked Pursuit from protecting its secured interest, made threats to extract extra-contractual payments, manipulated reporting, commingled and redirected funds,[7] and acted in a self-interested manner vis-a-vis the Default Actions (*see* ¶123-127, 202)—all

[7] KrunchCash and KC PCRD purport to provide evidence that Pursuit's funds were not commingled (*see* D-Ex. 3), but the amounts Pursuit funded is not disputed, which is all this exhibit shows. What it does not address is the timing or amounts outgoing to, or incoming from, Advance recipients, or how those funds were subsequently distributed by KrunchCash. Defendants have refused to provide any transparency to those records. (¶64-71, 227.)

classic self-dealing and improprieties that support fiduciary duty claims against an investment manager. *Rushing*, 752 F.Supp.2d at 1264; *Seoul Broadcasting System Intern, Inc. v. Ladies Prof. Golf Ass'n*, 2010 WL 2035137, *6 (M.D. Fla. 2010); *Bullmore*, 45 A.D.3d at 463 ("investment managers [] had an independent fiduciary obligation … to ensure that they did not engage in fraudulent or unsound investment practices"). Indeed a fiduciary duty claim *must* proceed in light of KrunchCash's duplicitous assertion that the Amended IFA does not control.

Similarly, Pursuit's constructive fraud claim under Florida law is grounded in the KrunchCash Parties' superior position of knowledge with respect to the investments. Constructive fraud "occurs when a duty under a confidential or fiduciary relationship has been abused or where an unconscionable advantage has been taken," and "may be based on a misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party." *Levy v. Levy*, 862 So. 2d 48, 53 (Fla. Dist. Ct. App. 2003) (citing *Beers v. Beers*, 724 So.2d 109 (Fla. 5th DCA 1998)). Constructive fraud is related to breach of fiduciary, and Florida recognizes that both may proceed concurrently. *Rogers v. Mitzi*, 584 So. 2d 1092, 1093 (Fla. Dist. Ct. App. 1991) (collecting cases).

Pursuit alleges that each of the KrunchCash Parties were in a superior position of knowledge with respect to agreements with Advance recipients, the bank accounts, Advance collateral and performance, and the Default Actions, and that Pursuit relied on their representations concerning the investments and the Default Actions in agreeing to provide funding, including millions of dollars funded *after* the Amended IFA. (¶207, 212.) KrunchCash assumed (and co-opted) KC PCRD's fiduciary role as custodian, servicer, and manager of the investment capital, inserted itself as the counterparty on Advances, and asserts that it had sole

control over these functions. (¶208-216.) Hackman used KC PCRD as a mere instrumentality to attempt to shield his and KrunchCash's fraudulent conduct and self-dealing from Pursuit and caused KC PCRD to take no action to fulfill its obligations to Pursuit. (*Id*.) The VAC details the myriad ways that KrunchCash and Hackman took unconscionable advantage of their fiduciary roles to mislead Pursuit and conceal the failure of the investments, misappropriate proceeds owed to Pursuit, and personally benefit from their abuse of trust to Pursuit's detriment. (*Id*.)

Hackman is also personally liable. Firmly in control of the entities, Advances, and Default Actions, he breached his fiduciary duty by wielding authority and threatening to scuttle the litigations to extract *personal* compensation, prop *his* interest in the investments, and benefit *his* personal entanglement with the Maryland and Pharma borrowers. (¶148, 202.) It merits emphasis that *Hackman is a named party* in the Default Actions and in that capacity personally extracted Pursuit's capital for *his* defense (¶220), and central to this dispute is Hackman's personal compensation and investment in the Advances. (¶202, 231.) Under Florida law, if a corporate officer or director commits a tort, whether or not it is also by or for the corporation, he is liable to injured third persons, irrespective of liability that attaches to the corporation. *Caladan Aviation, LLC v. Santos*, 2019 WL 13062113, at *2 (S.D. Fla. 2019) (citing *First Fin. USA v. Steinget*, 760 So.2d 996, 997-998 (Fla. 4th DCA 2000)). "[W]here the plaintiff alleges claims against a corporate director for torts that he individually committed, the plaintiff does not need to pierce the corporate veil." *Caladan Aviation, LLC*, 2019 WL 13062113, *2 (citing *BB In Tech Co. v. JAF, LLC*, 242 F.R.D. 632, 639 (S.D. Fla. 2007)).

C. The Amended IFA Does Not Preclude Pursuit's Tort Claims

The KrunchCash Parties' argument that the Amended IFA precludes these claims also fails for the reasons explained *supra* at Points I.B and II.C.[8] If anything, KrunchCash's and Hackman's claim that the Amended IFA affords them solitary right to control *highlights* their superior influence and asymmetric access to information—the cornerstone of a fiduciary duty. *Mahdavieh*, 2014 WL 1365425, at *4. In any event, "[t]o the extent that contract provisions might stand as a defense to [fiduciary] claims, those defenses are preserved for litigation and or resolution on summary judgment." *PNC Bank*, 2008 WL 4790122, at *4. Accordingly, Pursuit's fourth and fifth causes of action must proceed.

D. Pursuit Has An Absolute Right To Demand An Accounting

As explained *supra* Point II.B, Pursuit adequately alleges a fiduciary relationship, and KrunchCash and Hackman breached fiduciary duties owed to Pursuit. Thus, Pursuit is entitled to an equitable accounting—not a self-serving "account" prepared by Hackman. *Grgurev v. Licul*, 203 A.D.3d 624, 625 (1st Dep't 2022) ("whenever there is a fiduciary relationship between the parties . . . there is an absolute right to an accounting notwithstanding the existence of an adequate remedy at law."); *Craig,*, 2017 WL 2506386, at *7 ("a party may seek an equitable accounting for breach of fiduciary duty"). Accordingly, Pursuit's seventh cause of action stands.

[8] This argument is inconsistent with Defendants' position that Pursuit's right to proceeds under the Amended IFA extends to "Advances" but not the "Default Actions." (¶199.) Accepting, *arguendo,* Defendants' position that conduct relating to the Default Actions is extra-contractual, it serves as another basis to conclude that a fiduciary duty claim is proper. *Seoul Broadcasting System Intern, Inc.*, 2010 WL 2035137, at *6 (fiduciary claim "does not concern a contractual obligation"); *Maxted*, 2018 WL 3109628, at *6.

III. PURSUIT'S FRAUD AND BLUE SKY CLAIMS ARE WELL PLEAD

The KrunchCash Parties argue that Pursuit's causes of action for fraud (sixth) and securities fraud (ninth) are duplicative of, or precluded by, the Amended IFA. (Mem. 16-18.) These arguments mischaracterize the VAC, which details misrepresentations and omissions made *after* the Amended IFA was executed to induce Pursuit to invest millions of dollars in *additional* money for Advances and the Default Actions. (¶217-222.)

New York recognizes that, "[o]ne who makes a misrepresentation of a present intention for the purpose of inducing another to act or refrain from action in reliance thereon may be liable in tort for damages, or for rescission of the contract." *Channel Master Corp. v. Aluminum Ltd. Sales, Inc.*, 4 N.Y.2d 403, 407 (1958); *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Worley*, 257 A.D.2d 228, 233 (1st Dep't 1999) ("The elements of fraudulent inducement are: a false representation of a material fact and with scienter; reliance thereon by defendant to its detriment."). With respect to Pursuit's Blue Sky claim, Florida prohibits the use of "any device, scheme, or artifice to defraud," or deceit "[i]n connection with the rendering of any investment advice or in connection with the offer, sale, or purchase of any investment or security…" Fla. Stat. § 517.301.

The Amended IFA's merger clause does not preclude Pursuit's fraud or Blue Sky claims because Pursuit's allegations arise from conduct *after* the Amended IFA was signed.[9]

[9] Even if the allegations related to prior conduct, the Amended IFA's merger clause would not preclude a claim for fraud in the inducement. *See CBS Outdoor Inc. v. Union Telecard Alliance, LLC*, 2009 WL 2429459 (N.Y. Sup. Ct. July 31, 2009) ("it is well settled that a general merger clause is ineffective to defeat a claim of fraud in inducing the agreement."); *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. Dist. Ct. App. 2001) (merger clause does not affect representations that fraudulently induced a person to enter into the agreement).

Pursuit alleges that Hackman solicited millions of dollars from Pursuit based on misleading spreadsheets that falsely reported that Advances were performing when in fact they were materially impaired. (¶219; Ex. 6.) With respect to the Default Actions, Pursuit alleges Defendants concealed millions in recoveries, and misled Pursuit regarding the purported contributions of co-investors to induce Pursuit to fund the Default Actions. (¶202, 213.) KC PCRD was complicit in concealing millions in recoveries, issuing false and misleading financial statements to obfuscate asset performance and investor capital balances, and interfering with Pursuit's attempt to investigate facts with a third-party investor. (¶160-169.) These allegations are neither duplicative of Pursuit's breach of contract claim, nor precluded by the Amended IFA. Therefore, Pursuit's sixth cause of action asserts actionable conduct that falls outside the scope of the Amended IFA.

Likewise, KrunchCash's and Hackman's reliance on a disclaimer in the Amended IFA, which states that "*this Agreement* will not constitute an offer to sell or a solicitation of an offer to buy any securities *in the Company*," is flawed. (Ex. 2, § 9(f).) This disclaimer cannot bar Blue Sky claims because: (1) this clause is limited to "Existing Advances" made with Pursuit's then-remaining $2.8 million of "Investor Funding," such that any solicitation or offer made *after* the Amended IFA was executed would necessarily fall outside the scope of that agreement; and, (2) Pursuit's participation rights in the new Advances and Default Actions are not securities "in the Company, [i.e. KC PCRD]," but rather participation rights to proceeds which were peddled by *Hackman* and purchased *from KrunchCash*. (*See* ¶35 n.7.) Hackman and KrunchCash solicited millions of dollars in additional funds to invest in additional Advances (¶218-219), and the Default Actions (¶221), based on false and misleading representations regarding investment performance, the use of funds and proceeds, and legal expenditures, to induce Pursuit to invest. (¶220.) Moreover, KrunchCash and Hackman, who are alleged to have made affirmative

misrepresentations to conceal the true nature and performance of the investments, and who acted as investment managers of Pursuit's investments, cannot assert the Amended IFA as a defense because they deny the it is binding upon them. (¶185.) Thus, the disclaimer language has no relevance here and, at least, its application cannot be resolved on a motion to dismiss.

IV. UNJUST ENRICHMENT

To plead unjust enrichment, Pursuit must allege it conferred a benefit on Defendants, and that each benefitted at Pursuit's expense. *Nakamura v. Fujii*, 253 A.D.2d 387, 390 (1st Dep't 1998). "[W]here, as here, a bona fide dispute exists as to the existence of the contract, the plaintiff may proceed on both breach of contract and quasi-contract theories." *Id.* KrunchCash, Hackman, and McGhie all take the position that the Amended IFA is not binding upon them, and that there is no written agreement concerning the use of Pursuit's funds for the Default Actions. (¶230.) Pursuit alleges that Hackman applied Pursuit's funds to satisfy pre-existing debts to McGhie, that KrunchCash and Hackman paid themselves millions of dollars in fees based on false profits, and Hackman used Pursuit's capital to fund his personal defense. (¶219-220.) Pursuit's eighth cause of action for unjust enrichment should proceed.

V. VOIDABLE TRANSFER

Hackman and McGhie's assertion that Pursuit's cause of action asserting voidable transactions is not plead with sufficient specificity (Mem. 18) ignores the VAC's detailed of defendants' self-dealing, and the very nature of a fraudulent conveyance claim. A claim to set aside a conveyance is governed by the law in which the debtor is located when the transfer is made or obligation incurred. N.Y. D.C.L. § 279(b). Pursuit alleges that McGhie (a Colorado resident) and Hackman and KrunchCash (both located in Florida), received monies from the bank accounts that represented funds owing or belonging to Pursuit. (*See* ¶232-234.) Accordingly, Colorado and Florida law apply.

Florida, Colorado, and New York recognize that a conveyance is fraudulent to a creditor, and may be set aside, where it was made with an intent to hinder, delay or defraud creditors (¶252), or where a transfer is made to an insider, or made for less than fair consideration at a time when the debtor, here KrunchCash and KC PCRD, were facing debts beyond their ability to pay. (¶255.) Colo. Rev. Stat. § 38-8-105; Fla. Stat. § 726.105, 726.106; N.Y. D.C.L. § 273, 274.

There can be no doubt that Pursuit meets the pleading requirements under any of these state's laws. *Drywave Techs. USA, Inc. v. Message Int'l, Ltd.*, 2018 WL 1522608, at *6 (D. Colo. Mar. 28, 2018) (heightened pleading does not apply to fraudulent conveyance claims); *Perlman v. Five Corners Invs. I*, 2010 WL 962953, at *4 (S.D. Fla. Mar. 15, 2010) (same); *JDI Display Am., Inc. v. Jaco Elecs., Inc.*, 188 A.D.3d 844, 845 (2d Dep't 2020) (heightened pleading only applies to "actual intent to hinder, delay, or defraud," and not the other bases to set aside a conveyance).

The allegations of the VAC plainly meet the lenient notice pleading standard, and also satisfy heightened pleading because Pursuit alleges multiple badges of fraud from which actual intent may be inferred. *In re Level 8 Apparel, LLC*, 2021 WL 279620, at *5 (Bankr. S.D.N.Y. Jan. 26, 2021) (badges of fraud accepted to plead fraudulent intent). Specifically, Pursuit alleges that two insiders (Hackman and McGhie) obtained money owed or belonging to Pursuit, in a self-dealing fashion, to extinguish Hackman's personal, antecedent debt to McGhie, and to pay Hackman unearned compensation based on falsified profits, and that at the time of the transfers KrunchCash and KC PCRD were facing insolvency based on the material impairment of the Advances and the litigation each faced. (¶147, 249-258.) Accordingly, this cause of action is sufficiently plead.

CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

New York, New York
Dated: July 29, 2022

SLARSKEY LLC

By:_____

Renee Bea
Evan Fried
420 Lexington Avenue, Suite 2525
New York, NY 10022
(212) 658-0661
Counsel for Pursuit Credit Special Opportunity Fund, L.P.

CERTIFICATION

I hereby certify pursuant to Rule 17 of the Commercial Division that the word count for the foregoing memorandum of law is 6,794 words, exclusive of caption, table of contents, table of authorities, and signature block, as prepared by Google Documents.

Renee Bea