SCAN

SHORT FORM ORDER

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT:
HON. IRA B. WARSHAWSKY,
Justice.

TRIAL/IAS PART 10

BIG APPLE CONSULTING USA, INC. and MJMM INVESTMENTS, LLC,

Plaintiffs,

INDEX NO.: 023104/2007
MOTION DATE: 07/18/2008
MOTION SEQUENCE: 001, 002 and 004

-against-

SOMATICS SYSTEMS, INC., SOMATICS SYSTEMS INSTITUTE, INC., MAZUMA CORP., XXR CONSULTING, CURT KRAMER, BELMONT PARTNERS, LLC, JOSEPH MEUSE, WILLIAM LUCKMAN, DAN GARBER and STEVEN ARONSTEIN,

Defendants.

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Order to show cause by the plaintiffs Big Apple Consulting, USA, Inc., and MJMM Investments, LLC, for an order, *inter alia*: (1) enjoining the defendants from issuing, disposing, selling and transferring free trading or restricted common stock of Somatic Systems, Inc., s/h/a "Somatics" Systems, Inc., bearing the stock symbol "SMAS"; (2) appointing a receiver *pendente lite* over the assets and profits of Somatics Systems, Inc.; (3) directing the defendants to account for all sums of money, profits and gains which they have made as a result of the sale disposition, transfer and/or assignment of free trading and restricted shares of Somatics common stock; (4) staying and restraining the defendants from servicing, raiding and using the publicly traded vehicle Somatics Systems, Inc. for the purpose of raising money through capital markets; (5) directing the defendants to return to MJMM Investments, Inc., all documents, files, *etc.*, which they possess regarding Somatics Systems, Inc., inasmuch as MJMM is allegedly now the *de facto* owner of that entity; and (6) requiring the defendants to account for all sums of money and gains which they have made as a result of their allegedly wrongful conduct.

Cross motion by the defendants Mazuma Corp., XXR Consulting and Curt Kramer, pursuant to CPLR 3212 for an order dismissing the eighth cause of action and the complaint.

Cross motion by the defendants Belmont Partners, LLC, Joseph Meuse and William Luckman pursuant to CPLR 3013, 3014, 3016 and 3211(a)(7) for an order dismissing the complaint insofar as asserted against them.

In early 2006, the plaintiffs Big Apple Consulting, USA, Inc. ["Big Apple"] and its wholly owned subsidiary, MJMM Investments, Inc. ["MJMM"], together agreed to, *inter alia*, finance, promote and otherwise arrange for a so-called "reverse merger," by which its client, the plaintiff Somatics Systems, Inc. ["Somatics"] – then a private company – would become a publicly held entity.

Big Apple is a Delaware Corporation and "full service financial public relations firm" which touts itself on its website as the "number one public relations and consulting firm in the Country for small cap companies (www.BigAppleconsulting.com). Co-plaintiff MJMM is a Pennsylvania limited liability company which specializes in, among other things, "assisting private small to mid-size companies who go public" through the use of a unique 'going public method'" – *i.e.*, the so-called "reverse merger" or reverse takeover (www.BigAppleconsulting.com/partners.htm).

Notably, in a "reverse" merger transaction – which avoids costly disclosure and registration obligations involved in an initial public offering – a "private company arranges to be acquired by a public company with minimal assets (*i.e.*, a shell company) and transfers the private company's assets to the new, publicly-traded owner in exchange for the shell company's equity * * *"(*S.E.C. v. Cavanagh*, 445 F.3d 105, 108, fn 4 [2nd Cir. 2006];*Clabault v. Caribbean Select, Inc.*, 805 A.2d 913, 915 [Delaware Chancery Court 2002], *affd,* 846 A2d 247 [Delaware Supreme Court 2003]).

Thereafter, "the private company's former management then runs the original company under the corporate identity of the acquiring public company" (*S.E.C. v. Cavanagh, supra see also, S.E.C. v. M & A West, Inc.*, ___F3d___ , 2008 WL 3307217 at 1 [9th Cir. 2008]; *In re Fibercore, Inc.*, ___F.Supp.2d___, 2008 WL 2778877 at 7, fn 5 [Bankruptcy Court, D. Mass.

2008]; *Southward Investments, LLC v. V-GPO, Inc.*,___ F.Supp.2d___, 2007 WL 2859702, at 1 [W.D.N.Y.2007]; *Belmont Partners, LLC v. Nehmeh,*___F.Supp2d___, 2008 WL 1858896 [W. D. Va. 2008]).

In February of 2006, Somatics, through its principal Steven Aronstein, simultaneously executed the three, operative contract documents governing the subject merger transaction, which included: (1) a Note agreement with MJMM, by which Somatics borrowed $200,000.00 from MJMM to finance purchase of the public "shell" (to be supplied by Big Apple's associate, codefendant Belmont Partners, LLC ["Belmont"]; (2) a "Pledge Agreement" with Big Apple pursuant to which Somatics agreed, *inter alia*, to surrender majority control of the publicly held vehicle in the event that it breached the terms of the Note (Jablon Aff., ¶¶ 15-16; Cmplt.,¶¶ 49-50); (3) and a "Consulting Agreement," under which Big Apple agreed to provide, among other things, funding, investor and public relations services, stock trading analysis, and other services over a 24 monthly period for the stated sum of $1.8 million – payable at Somatic's option in either stock or in cash (Aronstein Aff., ¶ 3; Jablon Aff., ¶¶ 8, 18-19; Cmplt.,¶¶ 54-55).

The Consulting Agreement also required Somatics to provide notice to Big Apple in the event Somatics stock was issued to third parties (Cmplt., ¶¶53; 77-81). Significantly, the contemporaneously executed MJMM note, precluded Somatics from, *inter alia*, engaging in third-party financing arrangements/stock sales without MJMM's prior, written consent and further conferred upon MJMM the "exclusive right of first refusal to acquire any free trading equity in [the public] vehicle * * *." (Jablon Aff., ¶ 13; Cmplt.,¶¶ 46-48).

Lastly, Somatics agreed to place a resolution into escrow providing for the issuance of stock to MMJM necessary to ensure that MJMM would acquire majority control in the event Somatics breached the terms of the Note (Jablon Aff., ¶ 15), which resolution, the plaintiffs claim, was never escrowed (Jablon Aff., ¶ 16; Cmplt.,¶ 51).

After the merger was complete, the plaintiffs allegedly learned that Somatics had issued "free trading" and restricted securities at "steep market discounts" to codefendant Mazuma Corp. ["Mazuma"], purportedly in violation of the prior written notice and "first refusal" provisions contained in the merger transaction documents (Jablon Aff., ¶ 21; Cmplt.,¶¶ 89-

104;105-113). Further, and according to the plaintiffs, the Belmont defendants, including Belmont principals William Luckman and Joseph Meuse (whom they have sued in a separate, but related action), supposedly "introduced" the Kramer defendants to Somatics and then, with knowledge of the relevant contract restrictions, tortiously induced Somatics to thereafter breach the merger agreements through the above-referenced Mazuma stock sales (Cmplt., ¶¶ 105 112; *see also, Big Apple et. al. v. Belmont Partners, LLC, et. al.*, ___Misc3d___, Index No. 23105-07; Cmplt. therein, ¶ 25 [Supreme Court, Nassau County]).

By virtue of these allegedly improper, third-party transactions, the plaintiffs claim that their own Somatic stock, which they obtained as part of the merger transaction, became diluted and significantly reduced in value (Jablon Aff., ¶ 23; Cmplt.,¶¶ 67-69).

According to Somatics, however, after the loan was made and it acquired the public "shell" from Belmont, Big Apple effectively abandoned it and affirmatively breached the merger documents by doing "virtually none of the things it promised [to do] in its consulting agreement" (Aronstein Aff., ¶ 35; Brief in Opp., 2-3). Somatics contends that the plaintiffs violated the terms of the agreements by, *inter alia*, failing to supply promised funding and support; by stonewalling its inquiries and requests for assistance; and by failing to provide vital promotion, as expressly required by the underlying agreements (Ans.,¶¶ 55-60; Aronstein Aff.,¶¶ 6-7, 39-40; 42-49; 50-58).

Moreover, by virtue of the plaintiffs' wrongful conduct, Somatics stock had already precipitously declined in value by October of 2006 (Aronstein Aff., ¶¶ 7, 39), thereby belying the plaintiffs' linchpin assertion that the third-party financing arrangements had any meaningful impact upon the value of Somatic common stock (Aronstein Aff.,¶ 61; Brief in Opp., 2-3).

In February of 2007, and based upon the transactions with the Kramer defendants, the plaintiffs delivered to Somatics, a notice of default as to the Note and Consulting Agreement (Jablon Aff., ¶ 24; Cmplt.,¶¶ 57-61).

By summons and verified complaint dated December, 2007, the plaintiffs commenced the within action, setting forth eleven, separately captioned causes of action, grounded upon breach of the Note and Consulting Agreement as to Somatics; fraud and tortious interference with

contract as to the Belmont and Kramer defendants; and breach of fiduciary duty as against Aronstein, individually.

As to Somatics, the plaintiffs allege that Somatics: (1) breached the Note by failing to repay the sums borrowed (Cmplt., ¶¶ 57-61); (2) entered into financing/stock sales agreements with the Kramer defendants in violation of stated contract provisions requiring that Somatics first obtain the plaintiffs' prior written notice and/or offer MJMM a right of first refusal; (3) and failed to escrow the majority control resolution (Cmplt., ¶¶ 64-69;77-82).

By order to show cause with temporary restraining order dated January 4, 2008, the plaintiffs brought on – pre-discovery – an expansively framed application seeking comprehensive and mandatory injunctive relief as against both Somatics and the additional defendants named in the action.

In substance, the plaintiffs' application requests that the court, *pendent lite,* collectively enjoin all named defendants, even those not in contractual privity with the plaintiffs, from issuing, selling, assigning disposing or otherwise transferring Somatics "free trading"and/or common stock, and/or further precluding them from "raiding and using the publicly traded vehicle" "for the purpose of raising money through the capital markets".

The plaintiffs also request the appointment of a temporary receiver over the assets and profits of Somatics and further relief collectively directing all defendants to account for, and pay over to the receiver, all sums of money and profits which they supposedly have made as a result of the sale and disposition of their Somatics stock.

Upon receipt and preliminary review of the plaintiffs' order to show cause, this Court granted so much of the temporary restraining order included therein as stayed the defendants from "disposing or hypothecating the common stock of Somatic Systems, Inc. * * * without prior notice to the plaintiff[s]" (Order to Cause at 3, ¶ 1). The defendants oppose the plaintiffs' application for an injunction and cross move to dismiss the complaint.

Specifically, the defendants Mazuma Corp., XXR Consulting and Curt Kramer, cross move pursuant to CPLR 3212 for an order dismissing the eighth cause of action and the complaint.

The defendants Belmont Partners, LLC, Joseph Meuse and William Luckman [the "Belmont defendants"] similarly cross move pursuant to CPLR 3211[a][7] for an order dismissing the complaint insofar as asserted against them.

Preliminarily, by executed stipulation dated May 22, 2008, the plaintiffs have agreed to dismiss the action insofar as interposed against codefendant Dan Garber. Accordingly, the matter shall be discontinued with respect to this cross movant.

Turning first, to the Kramer and Belmont cross motions (Motion Sequence No. 004), the Court agrees that these movants have demonstrated their entitlement to dismissal of the verified complaint insofar as asserted against them (CPLR 3211[a][7]; 3016[b]; 3212).

"In order to succeed on a cause of action to recover damages for tortious interference with contract, the plaintiff must establish, *inter alia*, the existence of a valid contract between it and a third party, and that the defendant intentionally procured the third party's breach of that contract without justification" (*Dome Property Management, Inc. v. Barbaria*, 47 AD3d 870 *see, Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413, 424 [1996]; *Foster v. Churchill*, 87 NY2d 744 [1996]; *R.U.M.C. Realty Corp. v. JCF Associates, LLC*, 51 AD3d 993).

Further, "a plaintiff *must* allege that the contract would not have been breached 'but for' the defendant's conduct" which is a "strict" pleading requirement (*Burrowes v. Combs*, 25 AD3d 370, 373 [emphasis added]; *68 Burns New Holding, Inc. v. Burns Street Owners Corp.*, 18 AD3d 857; *Velazquez v. Lackmann Food Services at Old Country Road,* 251 AD2d 495, 496; *Maas v. Cornell University,* 245 AD2d 728, 731; *Schuckman Realty, Inc. v. Marine Midland Bank, N.A.*, 244 AD2d 400, 401; *Washington Ave. Associates, Inc. v. Euclid Equipment, Inc.*, 229 AD2d 486, 487).

Although on a motion to dismiss pursuant to CPLR 3211[a][7], the Court must accept as true, non-conclusory averments set forth in the complaint (*Polonetsky v. Better Homes Depot*, 97 NY2d 46, 54 [2001]; *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]), nevertheless, "to avoid dismissal of a tortious interference * * * claim a plaintiff must support his claim with more than mere speculation" (*Burrowes v. Combs, supra,* at 373; *R.I. Island House, LLC v. North Town Phase II Houses, Inc.*, 51 AD3d 890; *Chestnut Hill Partners, LLC v. Van Raalte*, 45 AD3d 434;

Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc., 28 AD3d 595 *see also*, *Maas v. Cornell University*, 94 NY2d 87, 91-92 [1999]).

Additionally, and "[i]n order to hold a corporate official liable for inducing the corporation to breach its contract, it must be alleged and proved that the official's actions were taken outside the scope of employment, that the official personally profited from the acts, or that the officer committed any independently tortious acts" (*Stern v. H. Dimarzo, Inc.*, 19 Misc.3d 1144(A), 2008 WL 2369749, at 9 [Supreme Court, Westchester County 2008] *see also*, *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110). Indeed, "courts will apply 'an enhanced pleading standard' in judging the sufficiency of such claims" (*Stern v. H. Dimarzo, Inc.*, *supra,* at 9 *Joan Hansen & Co., Inc. v. Everlast World's Boxing Headquarters Corp.*, *supra,* at 110; *Rivas v. Amerimed USA, Inc.*, 34 AD3d 250, 251; *Zapin, Endlich & Lombardo, Inc. v. CBS Coverage Group, Inc.*, 26 AD3d 231 *see also, Appell v. LAG Corp.*, 41 AD3d 277, 278; *Hirsch v. Food Resources, Inc.*, 24 AD3d 293, 297).

Here, the operative factual assertions plaintiffs advance are inconclusive and vacant, since they rest upon unelaborated claims that the Belmont and Kramer defendants in some unexplained manner, induced the alleged breaches set forth in the complaint (Cmplt., ¶¶ 93-94, 99; Jablon Aff., ¶¶ 27-29)(*Burrows v. Combs, supra see generally, 68 Burns New Holding, Inc. v. Burns Street Owners Corp.*, *supra*, 18 AD3d 857; *Velazquez v. Lackmann Food Services at Old Country Road, Inc.*, *supra*, 251 AD2d 495 *cf.,Whitman Realty Group, Inc. v. Galano,* 41 AD3d 590, 593).

The plaintiffs' submissions – even as amplified by their supporting affiants – (*cf.*, *Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633, 635 [1976]), fail to identify with any measure of specificity, the particular actions supposedly taken by the Belmont and/or Kramer defendants with respect to any alleged introductions or wrongful inducements, *i.e.*, the plaintiffs do not particularize – beyond obscurely framed generalities – the underlying factual transactions supporting the claim that the breaches identified were actually causally connected to, and induced by, tortious conduct perpetrated by Belmont and Kramer (*e.g.*, *Washington Ave. Associates, Inc. v. Euclid Equipment, Inc., supra see also, Black Car and Livery Ins., Inc. v. H & W Brokerage,*

Inc., supra; Schuckman Realty, Inc. v. Marine Midland Bank, N.A., supra, 244 AD2d 400 *see also, R.I. Island House, LLC v. North Town Phase II Houses, Inc.,* 51 AD3d 890, 895-896).

As the defendants further assert, the verified complaint also omits the requisite, descriptive allegations that "but for" the defendants' purported interference, the Somatics contracts would not have been breached (*68 Burns New Holding, Inc. v. Burns Street Owners Corp., supra,* 18 AD3d 857, 858; *Burrowes v. Combs, supra*). Nor have the plaintiffs alleged facts from which it can be inferentially concluded that "but for" the defendants' conduct the plaintiffs would not have violated the notice and first refusal rights actually relied upon by the plaintiffs (*CDR Creances S.A. v. Euro-American Lodging Corp.*, 40 AD3d 421, 422).

As to the Kramer defendants, whose alleged misconduct is even more tenuously depicted, Curt Kramer, Mazuma's principal, has additionally asserted, *inter alia,* that Mazuma purchased the involved Somatics stock in the ordinary course of business after consultation with special counsel; that he had no knowledge of any of the plaintiffs' contracts with Somatic at the time; and finally, that to the extent a certain telephone call made by Big Apple's Thomas Speciale is relied upon to establish notice of the Big Apple's relationship with Somatics, that call occurred after the two sale transactions involving Mazuma were already complete (Kramer Aff., ¶¶ 6-8), a factual assertion which has neither been addressed nor disputed by the plaintiffs (*see, Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Associates v. Sterling Mets, L.P.*, 25 AD3d 314, 315).

In any event, and upon the nebulously asserted facts alleged here, the mere claim that the defendants supposedly possessed knowledge of the Somatics agreements, or that Mazuma made the subject stock purchases, does not state a claim to the effect that these defendants must, therefore, have wrongfully interfered with the plaintiffs' contracts, much less that "but for" their alleged tortious involvement, Somatics would never have breached the first refusal and written notice provisions which actually underlie the plaintiffs' claims (*see, Whitman Realty Group, Inc. v. Galano, supra,* 41 AD3d 590, 593;*Cantor Fitzgerald Associates, L.P. v. Tradition North America, Inc.*, 299 AD2d 204).

Lastly, the Court notes that the complaint interposes claims against corporate officers

Luckman, Meuse and Curt Kramer in their individual capacities, but omits non-conclusory allegations to the effect that the individuals in question have abused the privilege of doing business in the corporate form by, *inter alia*, exercising "complete domination of the corporation" so as to perpetrate a fraud or injustice against the plaintiff (*TNS Holdings, Inc. v MKI Sec. Corp.*, 92 NY2d 335, 339-340; *Morris v New York State Dept of Taxation & Fin.*, 82 NY2d 135, 140-142 [1993]; *Lofstad v. S & R Fisheries, Inc.*, 45 AD3d 739; *Bergassi v American Sur., Agency, Inc.*, 278 AD2d 413, 414 *see also, Worthy v. New York City Housing Authority*, 21 AD3d 284, 288).

While the complaint conclusorily alleges that the corporate defendants are "alter egos" of the individually named defendants (*e.g.*, Cmplt., ¶¶ 20-24; 29-30), the "mere claim that the corporation was completely dominated by the owners, or conclusory assertions that the corporation acted as their 'alter ego' without more, will not suffice to support the equitable relief of piercing the corporate veil" (*Goldman v. Chapman*, 44 AD3d 938, 939 *see*, *Morris v New York State Dept of Taxation & Fin., supra*; *Damianos Realty Group, LLC v. Fracchia*, 35 AD3d 344).

Nor are the pleaded fraud claims which have been generally interposed against "all defendants," viable as to the cross movants Kramer and Belmont.

The essential elements of a cause of action sounding in fraud are a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury (*Lama Holding Co. v. Smith Barney*, 88 NY2d 413, 421 [1999]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Shovak v. Long Island Commercial Bank*, 50 AD3d 1118; *Selinger Enterprises, Inc. v. Cassuto*, 50 AD3d 766).

In order to plead a *prima facie* cause of action for fraud, a plaintiff must allege each of these elements with particularity and support them with allegations of fact which detail with specificity, the circumstances underlying the alleged fraud (*see*, CPLR 3016 [b]; *Simmons v. Washing Equipment Technologies*, 51 AD3d 1390 *see also, Lanzi v. Brooks*, 43 NY2d 778, 780 [1977]). Bare, conclusory allegations are insufficient to sustain a cause of action for fraud (*see*,

Ramos v. Ramirez, 31 AD3d 294, 295; *New York City Health and Hospitals Corp. v. St. Barnabas Community Health Plan*, 22 AD3d 391; *Fink v. Citizens Mortg. Banking Ltd.*, 148 AD2d 578; *Glassman v. Catli*, 111 AD2d 744, 745).

At bar, the complaint sets forth – upon "information and belief" – a series of circular assertions to the effect that the "defendants" – in a collective sense – made undescribed, material misrepresentations in order to, *inter alia*, induce the plaintiffs to "continue to perform their obligations [to Somatics] and refrain from liquidating stock in the open market" (Cmplt., ¶ 130).

The foregoing cause of action, as pleaded, supplies no detail or factual context for the statements relied upon, does not specify what the material misstatements consisted of, and never meaningfully particularizes how and when the wrongful statements were actually made (*see, Brown v. Wolf Group Integrated Communications, Ltd.*, 23 AD3d 239; *Cohen v. Houseconnect Realty Corp.*, 289 AD2d 277).

Nor does the complaint attribute the unelaborated misstatements to the specific and separate defendants against whom the fraud claims have been interposed. To the contrary, it simply lumps all the defendants together in a series of generic allegations – with the result that none of the separately named defendants has been meaningfully apprised of the specific and particular misstatements which they have been accused of making ([*e.g.*, Cmplt., ¶¶ 129-133]).

Although, to be sure, CPLR 3016 is "not to be interpreted to require "unassailable proof of fraud" (*Pludeman v. Northern Leasing Systems, Inc.*, 10 NY3d 486, 492 [2008]; *Lanzi v. Brooks*, 43 NY2d 778, 780 [1977]), the allegations set forth here fall short of establishing reasonable compliance with the specificity requirements of the statute (*Greschler v. Greschler*, 51 NY2d 368, 375 [1980]; *Ladino v. Bank of America*, 52 AD3d 571; *Schulman v. Greenwich Associates, LLC*, 52 AD3d 234; *Simmons v. Washing Equipment Technologies*, 51 AD3d 1390; *Sargiss v. Magarelli*, 50 AD3d 1117; *Black Car and Livery Ins., Inc. v. H & W Brokerage, Inc., supra*, at 596; *Dumas v. Fiorito*, 13 AD3d 332). Further, and contrary to the plaintiffs' contentions, the additional factual assertions made by the plaintiffs' affiants are similarly lacking adequate specificity and detail (*see, Cohen v. Houseconnect Realty Corp., supra*, at 278)(*e.g.*, Jablon [Belmont Opp.] Aff., ¶ 13; [Kramer Opp.] Aff., ¶ 13).

Accordingly, those branches of the Belmont/Kramer cross motions which are to dismiss the fraud, the 11th, cause of action, must be granted.

"To demonstrate entitlement to a preliminary injunction under CPLR 6301, the movant must demonstrate a probability of success on the merits, the danger of irreparable harm in the absence of an injunction, and a balance of the equities in favor of granting the injunction" (*Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd.*, 53 AD3d 612 *see also*, *Nobu Next Door, LLC v. Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]; *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; *Doe v. Axelrod,* 73 NY2d 748 [1988]).

Since a preliminary injunction prevents "litigants from taking actions that they are otherwise legally entitled to take in advance of an adjudication on the merits, they should be issued cautiously and in accordance with appropriate procedural safeguards" (*Uniformed Firefighters Ass'n of Greater New York v. City of New York*, 79 NY2d 236, 241 [1992];*Coinmach Corp. v. Alley Pond Owners Corp.*, 25 AD3d 642, 643 *see*, *City of Long Beach v. Sterling American Capital, LLC*, 40 AD3d 902).

"While the existence of issues of fact alone will not justify denial of a motion for a preliminary injunction, the motion should not be granted where there are issues that 'subvert the plaintiff's likelihood of success on the merits * * * to such a degree that it cannot be said that the plaintiff established a clear right to relief'" (*Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., supra, quoting from, Milbrandt & Co. v. Griffin*, 1 AD3d 327, 328; *see, County of Westchester v. United Water New Rochelle*, 32 AD3d 979, 980; *Eklund v. Pinkey*, 31 AD3d 908; CPLR 6312[c]).

The decision to grant or deny provisional relief, which requires the court to weigh a variety of factors, is a matter ordinarily committed to the sound discretion of the court (*Nobu Next Door, LLC v. Fine Arts Housing, Inc., supra,* at 840; *Automated Waste Disposal, Inc. v. Mid-Hudson Waste, Inc.*, 50 AD3d 1072)

First, the plaintiffs' requests for, in effect, a status quo-altering, mandatory injunction compelling Somatics to immediately account for and affirmatively "turn over" all sums of money and profits as a result of the sales diverting property must denied. Such an award of such

determinative monetary relief is entirely premature at the current pleading stage of this matter (*cf., Village of Westhampton Beach v. Cayea*, 38 AD3d 760, 762; *In re Marciano v. Champion Motor Group, Inc.*, ___Misc3d___, 2007 WL 4473342 at 6-7 [Supreme Court, Nassau County 2007]). Nor will "a preliminary injunction issue where, as here, to do so would grant, in part the "ultimate relief sought" (*SHS Baisley, LLC v. Res Land, Inc.*, 18 AD3d 727, 728; *St. Paul Fire and Mar. Ins. Co. v. York Claims Serv.*, 308 AD2d 347, 348- 349; *MacIntyre v. Metropolitan Life Ins. Co.*, 221 AD2d 602 *see also, Northern Funding, LLC v. 244 Madison Realty Corp.*, 41 AD3d 182, 183; *Matos v. City of New York*, 21 AD3d 936; *Massapequa Water Dist. v. New York SMSA Ltd. Partnership*, ___Misc3d___, 2008 WL 779259 [Supreme Court, Nassau County 2008]).

Further, and in the absence of discovery, there are sharply disputed unresolved critical issues of fact with respect to the balance of the equities and likelihood of success in light plaintiffs' alleged failure to perform its own contract obligations (*Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, 42 AD3d 420, 421), the extent to which, if at all, the stock value declines can be attributed to the Somatics' conduct, and whether and how the plaintiffs were actually damaged by the disputed sales (*see generally, Advanced Digital Sec. Solutions, Inc. v. Samsung Techwin Co., Ltd., supra*). The Court notes that the complaint is vague as to the manner in which the plaintiffs have sustained compensable injury, and the plaintiffs themselves have repeatedly advised that there is "currently no market for Somatics stock" (Jablon Aff.,¶ 21).

It is also significant that the complaint demands only monetary damages in connection with the causes of action interposed, since "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm (*EdCia Corp. v. McCormack*, 44 AD3d 991, 994 *cf., Copart of Connecticut, Inc. v. Long Island Auto Realty, LLC*, supra, 42 AD3d 420, 421; *Matos v. City of New York, supra*; *Schrager v. Klein*, 267 AD2d 296, 297; *White Bay Enterprises, Ltd. v. Newsday, Inc.*, 258 AD2d 520).

The plaintiffs' unsupported conjecture that Mr. Aronstein could conceivably dispose or destroy collateral, and/or sell a controlling interest in Somatics to a third party, does not demonstrate irreparable injury (*e.g.,Secured Capital Corp. of N.Y. v. Dansker*, 263 AD2d 503,

504), or support the plaintiffs' broadly framed alternative demand for an accounting *pendente lite* – relief which has not been sought in the complaint as an independently pleaded, substantive claim.

Nor do the facts warrant an exercise of the Court's discretion with respect to the appointment of temporary receiver over "all assets and profits" Somatics.

Receivership is "a drastic and intrusive remedy" which may "only be invoked in cases where the moving party has made a clear evidentiary showing of the necessity of conserving the property and protecting the interests of that party" *(Secured Capital Corp. of N.Y. v. Dansker, supra,* 263 AD2d 503, 504 *see also, Vardaris Tech, Inc. v. Paleros Inc.*, 49 AD3d 631; *Lee v. 183 Port Richmond Ave. Realty*, 303 AD2d 379, 380; *Modern Collection Associates, Inc. v. Capital Group*, 140 AD2d 594). It follows that courts will "exercise extreme caution in appointing receivers *pendente lite* because such appointment results in the taking and withholding of possession of property from a party without an adjudication on the merits" (*see, Application of Androtsakis*, 139 AD2d 471, 472, *quoting from, Hahn v. Garay*, 54 AD2d 629, 629-630 *see also, North Fork Preserve, Inc. v. Kaplan*, 31 AD3d 403, 406; *Ronan v. Valley Stream Realty Co.*, 249 AD2d 288, 290; CPLR 6401[a]).

Here, the claims and assertions currently before the Court do not establish the necessity for the drastic receivership remedy sought, *i.e.*, the plaintiffs have not shown to the Court's satisfaction that "there is danger that the property will be * * * lost, materially injured or destroyed" going forward (CPLR 6401[a]; *Vardaris Tech, Inc. v. Paleros Inc., supra; Lee v. 183 Port Richmond Ave. Realty, supra*; *Secured Capital Corp. of N.Y. v. Dansker, supra*).

To the extent that the plaintiffs demand in unlimited fashion, the "return" of "all" documents" and "all other information" which the defendants collectively possess "regarding" Somatics, the foregoing request is materially over broad, lacking in specificity and premature at this juncture (*cf., Taji Communications, Inc. v. Bronxville Towers Apartments Corp.*, 48 AD3d 551; *Bell v. Cobble Hill Health Center, Inc.*, 22 AD3d 620; *City of New York v. M. Paul Friedberg and Associates*, 62 AD2d 407, 410).

A review of the considerable record compiled on the motions sub judice discloses no

reason for the Court to effectively accelerate or alter the normal mode of disclosure which would be available to the plaintiffs in due course as the subject action progresses. The plaintiffs' theory that MJMM is now supposedly the "de facto" owner of Somatics by virtue of the alleged breaches claimed, is a merely an unproven allegation at this early juncture of the proceedings.

Considering the totality of the circumstances presented, the plaintiffs' motion should be granted to the limited extent that the temporary restraining order granted upon submission of the original application shall be continue in full force and effect – albeit in connection the Somatics defendants only – subject to the posting of an undertaking. (*See generally, Buckley v. Ritchie Knop, Inc.*, 40 AD3d 794, 795; *Gerstner v. Katz*, 38 AD3d 835, 836). The Court is of the view that the limited relief granted above will suffice to adequately protect to the plaintiffs' interests (*cf., Kristensen v. Charleston Square, Inc.*, 273 AD2d 312).

The plaintiffs shall filed an undertaking in accord with the dictates of CPLR 6312(b), which – contrary to their contentions – "clearly and unequivocally requires the party seeking an injunction to give an undertaking'" (*Glorious Temple Church of God in Christ v. Dean Holding Corp.*, 35 AD3d 806, *quoting from*, *Hightower v. Reid*, 5 AD3d 440, 441 *see also*, *Winzelberg v. 1319 50th Realty Corp.*, 52 AD3d 700; *Griffin v. 70 Portman Road Realty, Inc.*, 47 AD3d 883; *Buckley v. Ritchie Knop, Inc.*, 40 AD3d 794,796; CPLR 6312[b]).

The Court has considered the plaintiffs' remaining contentions with respect to their application for provisional relief and concludes that they are lacking in merit.

Accordingly, it is,

ORDERED that the plaintiffs' motion for a preliminary injunction is granted to the extent that terms and provisions of the temporary restraining order previously approved by the Court shall be continued during the pendency of the subject action as to Somatics, and it is further,

ORDERED that the aforesaid relief is granted conditioned on plaintiffs posting an undertaking in the sum of $50,000 pursuant to CPLR 6312(b) within fifteen (15) days of the date of this Order, and if such undertaking is not posted, the motion is denied, and it is further,

ORDERED that the plaintiffs' order to show cause is otherwise denied, and it is further,

ORDERED that the cross motions pursuant to CPLR 3212, 3211[a] by the defendants Mazuma Corp., XXR Consulting, Curt Kramer, Belmont Partners, LLC, Joseph Meuse and William Luckman, dismissing the action insofar as asserted against them, is granted, and it is further,

ORDERED that upon consent and pursuant to the stipulation dated May 22, 2008, the action is dismissed without prejudice insofar as interposed against codefendant Dan Garber.

A Preliminary Conference (see NYCRR 202.12) shall be held on October 21, 2008, at 9:30 A.M., before the undersigned in the Supreme Court of Nassau County.

Counsel for all parties are reminded that this matter has been assigned to the Commercial Division of the Supreme Court of Nassau County and the parties are directed to follow the Rules of this Division.

Dated: September 15, 2008

J.S.C.