SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

- X

U.S. IMMIGRATION FUND LLC, U.S. IMMIGRATION FUND-NY LLC, 701 TSQ 1000 FUNDING, LLC, and 701 TSQ 1000 FUNDING GP, LLC,

Plaintiffs,

-against- Index No. 159222/2018

DOUGLAS LITOWITZ, ESQ., XUEJUN MAKHSOUS a/k/a MA XUEJUN a/k/a ZOE MA, and REVIV-EAST LEGAL CONSULTANTS (HK) LTD. a/k/a HONG KONG ZHENDONG LEGAL SERVICES CONSULTING CO., LTD.,

Defendants.

- X

CRANE, J.

In this action, plaintiffs U.S. Immigration Fund, LLC ("USIF"), U.S. Immigration Fund-NY LLC, 701 TSQ 1000 Funding, LLC and 701 TSQ 1000 Funding GP, LLC bring this action against Douglas Litowitz, Esq. ("Litowitz"), Xuejun Makhsous, a/k/a Ma Xuejun, a/k/a Zoe Ma ("Ma") and Reviv-East Legal Consultants ("HK") Co., Ltd., a/k/a Hong Kong Zhendong Legal Services Consulting Co. Ltd. ("Consultants"). Plaintiffs assert claims for fraud, defamation, breach of contract, tortious interference with contract and prima facie tort against Litowitz, an Illinois attorney; Ma, Litowitz' Chief Investigator and an Illinois resident; and Consultants, their legal consulting business located in Hong Kong. Plaintiffs assert that defendants engaged in a fraudulent scheme to misrepresent themselves as experts in the U.S. government approved EB-5 program that affords certain accredited Chinese families green cards for themselves and their children to reside in the U.S. in return for investments from these Chinese investors in real estate development projects in the United States. Plaintiffs further allege that defendants individually, and in collusion with one another, disseminated false and defamatory statements in an attempt to

raise their own profile while disparaging plaintiffs' EB-5 real estate developments in two ongoing projects in Times Square, so as to engage the Chinese investors in an attorney-client relationship, and to induce them to withdraw their substantial investments from these EB-5 projects, in order to have them pay portions of the returned investment to defendants as contingency based legal fees.

Motion sequence nos. 001, 003, 004 and 005 are consolidated for disposition. In motion sequence no. 001, Litowitz moves for an order dismissing the complaint for lack of personal jurisdiction, striking the complaint, and for fees, costs, and sanctions.

In motion sequence no. 003, Ma moves for an order allowing her additional time to answer or respond to the complaint.

In motion sequence no. 004, Ma moves, pursuant to CPLR 8303-a and 22 NYCRR §130-1.1, for an order striking the complaint and imposing sanctions.

In motion sequence no. 005, Ma moves, pursuant to CPLR 302 (a) (3), CPLR 3211 (a) (1) and (7) and 3016 (b), for an order dismissing the amended complaint.

For the reasons set forth below, the court grants Ma's motion to extend her time to respond to the complaint, and grants the motions to dismiss for lack of personal jurisdiction, and to dismiss the amended complaint. The court denies the remaining motions.

FACTS

Plaintiff USIF, a Delaware limited liability company with a registered address in Jupiter, Florida, is an EB-5 regional center, with 25 ongoing EB-5 projects across the United States. USIF assists nearly 6,0000 EB-5 investor clients and their families from around the globe (amended complaint, ¶ 6).

Plaintiff U.S. Immigration Fund-NY, LLC ("the Regional Center") is a New York limited liability company with a registered address in Jupiter Florida. The United States Citizenship and Immigration Services ("USCIS") has approved the Regional Center under the EB-5 program to undertake EB-5 capital investment projects in the New York City area, including a project at 701 Seventh Avenue in Times Square ("the 701 Project") (*id*., ¶ 7).

Plaintiff 701 TSQ 1000 Funding, LLC ("the Company") is a Delaware limited liability company with a registered address in Jupiter, Florida, that the Regional Center sponsors. The Company's affiliation with the Regional Center allows subscribers in the Company ("Members") to rely on both direct and indirect job creation for the purposes of Members qualifying for green cards under the EB-5 Program (*id*., ¶ 8).

Plaintiff 701 TSQ 1000 Funding GP, LLC ("the Manager") is a Delaware limited liability company with a registered address in Jupiter, Florida, and manages the Company (*id*., ¶ 9).

Both Litowitz and Ma are Illinois residents (*id*., ¶¶ 10-11). Consultants is a private company registered under the laws of Hong Kong (*id*., ¶ 12).

Congress created the EB-5 program in 1990 to encourage the flow of capital into the U.S. economy and to promote employment in the United States. The EB-5 program offers foreign investors the prospect of lawful permanent residence in the United States (via a green card issuance) if they invest a minimum of $500,000 in commercial enterprise in the United States, and that investment results in the creation or maintenance of 10 full-time jobs in the U.S. for American citizens (*id*., ¶ 13).

USCIS regulations that govern the EB-5 Program require applicants to take on "at risk" – i.e., subject to the possibility of gain or loss – investments until the applicant has completed a two-year conditional residence period. The residence period lasts approximately four years from

the time of the applicant's initial EB-5 application. EB-5 loans are typically structured to come due between five and seven years (*id*., ¶ 14). Because of a growing backlog in the EB-5 visa program for Chinese residents, it can now take up to ten or more years for Chinese EB-5 applicants to obtain permanent residence (*id*., ¶ 18).

The EB-5 project at issue here is the 701 Project, where the Company was formed to make a loan ("the 701 Loan") to a third-party developer and finance a mixed-use development at 701 Broadway in Times Square. The accredited Chinese Members each invested $500,000 into the Company. The Company pooled all of the investments, and then procured the 701 Loan to the developer in the amount of $200,000,000 (*id*., ¶ 22).

In February 2018, the developer informed the Manager that it had decided to sell the 701 Project and prepay the 701 Loan (*id*., ¶ 23). To date, none of the Members have an EB-5 visa giving them the right to conditional permanent residence in the United States. As a result, the prepayment of the 701 Loan triggered a need to redeploy the repaid loan funds so the Members' capital remains "at risk" while the Members' EB-5 applications are pending. The Manager sought and received approval from a majority of the Members to permit funds to be redeployed into a very similar project located in close proximity to the 701 Project, at 1568 Broadway, otherwise known as 702 Times Square (the 702 Project) (*id*., ¶ 24).

The majority vote was brought about by the Manager circulating to the Members a consent solicitation and a proposed amended operating agreement. One method by which the solicitation was discussed among the Members was online, in a 701 Project group chat room commonly referred to as "WeChat" (*id*., ¶ 26). The WeChat chat room is a Chinese-language social media site the Chinese Members use to communicate and coordinate together (*id*., ¶ 27).

Plaintiffs allege that individuals outside of the 701 Project have used the WeChat chat room to steer certain Members, who have become disillusioned because of the backlog with the EB-5 process, to become potential clients of lawyers, and seek return of their investments (*id*.). Plaintiffs further allege that a group of Members were persuaded in such a manner to commence an action against the Regional Center, the Company, and the Manager, along with others, in the Supreme Court, New York County (*Yang Ang v U.S. Immigration Fund LLC*, index No. 156339/2018) (the *Yang* action), to seek an injunction enjoining the redeployment of the investments into the 702 Project, pending an arbitration of various claims that the redeployment was improper (*id*., ¶ 28). The *Yang* action has been settled and the claims dismissed, and the request for an arbitration has been withdrawn (*id*.).

Plaintiffs allege that Litowitz and Ma, individually and in collusion with one another, devised a scheme to portray themselves as experts in the EB-5 Program, and set about inducing the Chinese Members in the 701 Project to seek a return of their investments from plaintiffs by engaging the Members with lies and defamatory statements about plaintiffs, their affiliates and the project (*id*., ¶ 34). Plaintiffs further allege that, as part of their plan, they unveiled a sham organization in Hong Kong for purposes of the fraud by changing the name of an existing Hong Kong entity they had rights to, known as "Catrini Jewelry Co., Ltd.," and renaming it "Reviv-East Legal Service Consultants (HK) Co., Limited" (*id*., ¶ 35). Defendants then portrayed themselves on a website for the new entity as experts in the field – to help EB-5 investors to defend their rights and recover their investment funds (*id*., ¶ 36).

Plaintiffs allege that, as part of the scheme, Ma was able to infiltrate the WeChat group chat and started a campaign to spread lies and defame plaintiffs (*id*., ¶ 42). Defendants'

campaign included having the Members engage defendants with a contract entitled "Agreement to Provide Legal Services (the Agreement) (*id*., ¶ 42; *see* exhibit H).

By June of 2018, plaintiffs first started to hear from Litowitz, seeking investment withdrawals on behalf of their clients (*id*., ¶ 45).

In August of 2018, upon learning of the commencement of *Yang* action, Litowitz sought to intervene in that action, since he represented nine investors who were not parties to the case, but were separately negotiating with USIF to get released from the same fund. Rather than allowing him to intervene, Justice Saliann Scarpulla ordered the attorneys to provide Litowitz with the terms of the agreed-upon settlement that the parties had just reached. The settlement document was subject to an "attorney eyes only" confidentiality agreement (The Confidentiality Agreement) (*id*., ¶ 49; *see* exhibit J). The Confidentiality Agreement provides:

> "1. Any documents provided to Litowitz by Petitioners or Respondents will be treated as "Attorneys Eyes Only" material, which Litowitz may not disclose to any other person or party, including the Litowitz Clients, although Litowitz is permitted to discuss the substance of information contained in "Attorneys Eyes Only" material with the Litowitz Clients, subject to their written agreement not to disclose any such information to any other party or person.
>
> 2. "Any "Attorneys Eyes Only" material shall be utilized by Litowitz solely for purposes of determining whether the Litowitz Clients will join the agreed-upon settlement between Petitioners and Respondents, and for no other purposes.
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> * * *
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> 5. This Confidentiality Agreement shall be governed by and construed and enforced in accordance with the laws of the State of New York without regard to any conflict of law provisions thereof that would cause the application of the laws of any jurisdiction other than the state of New York. ***The Parties hereby irrevocably: (a) submit to the jurisdiction of any court of the State of New York or any federal court sitting in the State of New York for the purposes of any suit, action or other proceeding arising out of this Confidentiality Agreement which is brought by or against either Party***; (b) agree that all claims in respect of any suit, action or proceeding may be heard and determined in any such court; and (c) to the extent that any Party has acquired, or hereafter may acquire, any immunity from jurisdiction of any such court of from any legal process therein,

> such Party hereby waives, to the fullest extent permitted by law, such immunity. ***The Parties hereby waive, and the Parties agreed not to assert in any such suit, action or proceeding, in each case, to the fullest extent permitted by applicable law, any claim that: (i) it is not personally subject to the jurisdiction of any such court***; (ii) it is immune from any legal process (whether through service or notice, attachment prior to judgment, attachment in the aid of execution, execution or otherwise) with respect to it or its property; (iii) any such suit, action or proceeding is brought in an inconvenient forum; (iv) the venue of any such suit, action or proceeding is improper; or (v) this Confidentiality Agreement may not be enforced in or by any such court"

(*see* Confidentiality Agreement at 1-2 [emphasis added]).

Plaintiffs allege that Litowitz shared the document and its substance with Ma, who is not covered by the Agreement, and who thereafter disclosed the substance to other Chinese Members in the WeChat chat room and elsewhere. Plaintiffs contend that, as such, Litowitz breached the terms of the Confidentiality Agreement (*id*., ¶ 52).

Plaintiffs allege that, in its dealings with defendants separate and apart from the *Yang* action, USIF stood by the terms of the agreements with the Members, and upon proper documentation and proceedings, it processed the return of withdrawals to some of the Members that engaged defendants. In doing so, each Member signed documents that included a release and confidentiality agreement that was binding upon the Member and their "legal representatives" (the Withdrawal Agreement) (*id*., ¶ 55; *see* exhibit K).

The Withdrawal Agreement provides that "[t]his Agreement shall be binding upon . . . the Parties hereto, and their respective . . . legal representatives" (Withdrawal Agreement at 2). The clause entitled "Governing Law; Jurisdiction" provides:

> "This Agreement shall be interpreted, construed, enforced and administered in accordance with the laws of the State of New York. ***Each of the Parties consent to the jurisdiction of any court in New York, New York for any action arising out of matters related to this Agreement.*** Each of the Parties hereby waives the right to commence an action in accordance with this agreement in any court outside of New York County, New York"

(*see id*. [emphasis added]).

The clause entitled "Confidentiality; Non-disparagement" provides:

> "The terms and conditions of this agreement are absolutely confidential between the parties and shall not be disclosed to anyone else, except as shall be necessary to effectuate its terms. Any disclosure in violation of this section shall be deemed a material breach of this agreement. The investor further agrees that he/she will not disparage the Releasees or otherwise take any action which could reasonably be expected to adversely affect the personal or professional reputation of the Releasees"

(*see id*.).

Plaintiffs allege that Members represented by defendants breached the terms of the Withdrawal Agreement, to the detriment of plaintiff, by making statements on the WeChat group chat that disclosed terms and conditions of the agreement. They also contend members disparaged plaintiffs on the same site. Plaintiffs further allege that such members did so at the behest and with the assistance of defendants, that Ma disclosed terms and conditions of the Withdrawal Agreement and that she disparaged plaintiffs (amended complaint, ¶ 60).

The original complaint, filed on October 4, 2018, contained five causes of action – fraud, defamation, breach of the Withdrawal Agreement, tortious interference with contract, and prima facie tort. The original complaint did not contain any allegations about jurisdiction.

On October 9, 2018, Litowitz filed a motion to dismiss the complaint for lack of personal jurisdiction.

On October 24, 2018, in response to the motion to dismiss, plaintiffs amended the complaint to add a cause of action for breach of the Confidentiality Agreement, alleging that "Litowitz agreed to submit himself to this Court's jurisdiction for any action arising from the . . . Confidentiality Agreement, and that this Court may hear and determine all claims asserted in the instant action" (amended complaint, ¶ 50). Plaintiffs also allege that "Litowitz is bound by the

Withdrawal Agreements and is subject to this Court's jurisdiction as to the claims in the instant action (*id*., ¶ 58). The amended complaint contains no other allegations with respect to jurisdiction. In addition, many of the allegations are made upon information and belief.

DISCUSSION

Ma's Motion To Extend Her Time to Respond to the Complaint (Motion Sequence No. 003)

Ma's motion to extend her time to respond to the complaint is granted. The relevant inquiry on a motion to extend time to answer or otherwise respond to a complaint is whether a defendant has shown good cause for the relief sought (*see* CPLR 2004). Given the strong public policy favoring the resolution of cases on the merits, the Supreme Court has discretion to permit the filing of an answer or a response to the complaint "'where the record demonstrates that there was only a short delay in appearing or answering the complaint, that there was no willfulness on the part of the defendant, that there would be no prejudice to the plaintiff, and that a potentially meritorious defense exists'" (*Baldwin Rte. 6, LLC v Bernad Creations, Inc.*, 158 AD3d 659, 659-660 [2d Dept 2014] [citation omitted]).

Here, Ma responded to the complaint in early December, a scant two months after the complaint, and asserted that she failed to respond to the pleading as she was out of the country during the Thanksgiving holidays, and that she was not living at the address where plaintiffs served papers. Plaintiffs have not moved for a default judgment, and there is no showing of prejudice. In addition, Ma, an Illinois resident, has asserted the potentially meritorious defense of lack of personal jurisdiction.

In consideration in favor of the strong public policy in favor of resolving cases on the merits and the lack of demonstrable prejudice, and given the facts that Ma's delay in responding was not lengthy, and that she has a potentially meritorious defense (*see Cantave v 170 W. 85th St.*

Hous. Dev. Fund Corp., 164 AD3d 1157, 1157 [1st Dept 2018]; *Artcorp, Inc. v Citirich Realty Corp.*, 140 AD3d 417, 418 [1st Dept 2016]), this court grants Ma's motion to extend her time to respond to the complaint, and determine the merits of her motion to dismiss (*see e.g. Hendeles v Preferred Contractors Ins. Co. RRG, LLC*, 167 AD3d 581, 582 [2d Dept 2018] ["in light of [defendant's] brief and unintentional delay in responding to the complaint, the lack of prejudice to the plaintiff and the existence of a potentially meritorious defense . . . the Supreme Court providently exercised its discretion in granting [defendant's] cross motion pursuant to CPLR 2004 to extend its time to answer the complaint"] [internal citation omitted]).

Motions to Dismiss for Lack of Personal Jurisdiction

Both Ma and Litowitz move to dismiss the amended complaint for lack of personal jurisdiction.

Where, as here, a particular defendant is not domiciled in New York, a plaintiff must allege jurisdictional contacts that, if proven, would be sufficient to demonstrate that an exercise of personal jurisdiction would be proper under either CPRL 301 (New York's general jurisdiction statute) or CPLR 302 (New York's long-arm jurisdiction statute). On a motion to dismiss for lack of personal jurisdiction, the Court is required to accept as true all the allegations as set forth in the plaintiff's complaint and opposition papers, and accord the plaintiff the benefit of every favorable inference (*Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Lawati v Montague Morgan Slade Ltd.*, 102 AD3d 427, 428 [1st Dept 2013]). Viewing the allegations in the light most favorable to the non-moving party, the plaintiff need only make a prima facie showing that the defendant is subject to the Court's personal jurisdiction *(Weitz v Weitz*, 85 AD3d 1153, 1153 [2d Dept 2011]). As the party seeking to assert personal jurisdiction, plaintiffs bear the burden of proof on this issue (*O'Brien v Hackensack Univ. Med. Ctr.*, 305 AD2d 199, 200 [1st Dept

2003] [on a motion to dismiss for lack of personal jurisdiction, "the burden rests on plaintiff as the party asserting jurisdiction"]). Plaintiffs here fail to meet that burden,

The original complaint contains no allegations addressing the issues of jurisdiction or venue. It concedes that Litowitz and Zoe Ma are domiciled in Illinois, and does not contain any allegations placing them in New York State. The complaint does not assert that defendants have any business interests, ownership or any other connection of any kind to the state of New York.

Indeed, Litowitz, an Illinois resident, is a lawyer with little or no connection to the State of New York – he has no residence in New York, no assets in New York, no office in New York, no telephone or contact information in New York, no property in New York, no clients in New York, and has never appeared a lawyer or a party to any case in New York. Likewise, Ma, also an Illinois resident, has little or no connection to the State of New York.

Nevertheless, plaintiffs contend that there is New York jurisdiction over both Ma and Litowitz.

First, plaintiffs now assert that New York state has personal jurisdiction over Litowitz and Ma because in the *Yang* action – which has already been settled and is not at issue here – Litowitz, individually and as agent for Ma and Consultants, executed the two-page Confidentiality Agreement that has a New York forum selection clause. Plaintiffs amended the complaint to add a cause of action for breach of the Confidentiality Agreement, and to add jurisdictional allegations against Litowitz. Although neither the complaint nor the amended complaint contain any jurisdictional allegations against Ma or Consultants, in their response to the summary judgment motions plaintiffs contend that Litowitz, as agent for Ma and Consultants, consented to personal jurisdiction in the Confidentiality Agreement.

However, this court finds that the forum selection cause in the Confidentiality Agreement, that applies only to "disputes arising out of this Confidentiality Agreement," is insufficient to confer personal jurisdiction over defendants here. Under New York law, the party asserting the applicability of the forum selection clause has the burden of establishing that the forum selection clause applies (*Schmelkin v Garfield*, 85 AD3d 755, 755-756 [2d Dept 2011]). New York law only allows personal jurisdiction based on a forum selection clause where the dispute arises directly out of the contract containing the forum selection clause (*Production Resource Group v Martin Professional, A/S*, 907 F Supp2d 401, 413 [SD NY 2012] [noting that the term "arising out of" is narrow, and has been applied to cases where the gravamen of the dispute arises from rights granted in that particular contract at issue]). An action arises out of an agreement when it asserts claims for breach of the contract or seeks to enforce rights thereunder (*see e.g. Armco Inc. v North Atl. Ins. Co.*, 68 F Supp2d 330, 338-339 [SD NY 1999] [plaintiff's allegation "of a large scale scheme to defraud that included numerous pre-contract activities by defendants," was not "in connection with" or "related to" subsequently executed sale contract which contained forum selection clause]). When determining the scope of a forum selection clause, the court "examine[s] the substance of th[e] claims, shorn of their labels," and relates the substance of those claims "to the precise language of the clause" (*Phillips v Audio Active Ltd.*, 494 F3d 378, 388-390 [2d Cir 2007]).

More importantly, as is relevant here, a forum selection clause in one contract should not be applied to suits concerning an entirely separate matter (*Credit Suisse Sec. (USA) LLC v Hilliard*, 469 F Supp2d 103, 107-108 [SD NY 2007]; *see e.g. Schmelkin*, 85 AD3d at 755-756 [forum selection clause applicable to any dispute "arising from" partnership agreement held to be inapplicable to partner's action for dissolution, breach of contract and other related claims,

because such claims did not fall within the specific subject matter of the agreement]; *DeSola Group, Inc. v Coors Brewing Co.*, 199 AD2d 141, 141-142 [1st Dept 1993] [forum selection clause contained within a marketing research agreement did not govern a separate oral agreement for the provision of marketing services, which was the subject of the complaint]; *Society Anonyme Belge D'Exploitation De Le Navigation Aerienne (Sabena) v Feller*, 112 AD2d 837, 839 [1st Dept 1985] [forum selection clause inapplicable to counterclaims pertaining to loss of retirement and severance benefits as such claims "d[id] no strictly arise under" the employment agreement]; *Phillips*, 494 F3d at 392 [forum selection clause in recording contract which applied to "any legal proceedings that may arise out of [the contract]" inapplicable to copyright infringement, unjust enrichment and unfair competition claims because such claims did not "originate from the recording contract"]; *Sempra Energy Trading Corp. v Almoga Steel, Inc.*, 2001 WL 282684, *5-6 [SD NY 2001] [finding that forum selection clause in contract, which refers to "any or proceeding relating to this agreement," did not apply to separate dispute between the parties]).

Here, the Confidentiality Agreement is not related to the dispute that underlies the complaint – the alleged fraud and defamatory conduct by defendants. The Confidentiality Agreement arises under the *Yang* action, a separate lawsuit that has already been settled. It is telling that no one in the *Yang* action, including USIF, alleged a breach by Litowitz of the Confidentiality Agreement, or that such alleged breach was never raised before Justice Scarpulla.

It is clear that plaintiffs are only now alleging breach of the Confidentiality Agreement in order to assert jurisdiction over Litowitz in this action. Indeed, the original complaint did not contain a cause of action for breach of the Confidentiality Agreement, and it appears that it was added in the amended complaint, which was filed right after Litowitz moved to dismiss for lack

of personal jurisdiction, solely in an attempt to assert jurisdiction over Litowitz individually and as agent for Ma. If plaintiffs were really concerned about a breach of the Confidentiality Agreement, it should have been raised before Justice Scarpulla.

It also clear Litowitz agreed to New York jurisdiction only for disputes in connection with the Confidentiality Agreement, and not for every other dispute or claim arising between the parties. Plaintiffs cannot use a contract that was executed for one purpose only in order to trigger jurisdiction in a completely different case (*see id*.).

Accordingly, the forum selection clause in the Confidentiality Agreement does not confer personal jurisdiction over Litowitz or Ma in this action.

Plaintiffs next argue that the Withdrawal Agreement confers personal jurisdiction over Litowitz, individually, and as agent for Ma and Consultants, even though Litowitz is not a signatory to this agreement. Plaintiffs contend that because the Withdrawal Agreement provides that the terms therein "shall be binding upon . . . the Parties hereto, and their respective . . . legal representatives," the forum selection clause establishing exclusive jurisdiction in New York is binding on Litowitz as his clients' lawyer, and therefore, their "legal representative." Plaintiffs contend that Ma, as Litowitz's agent, is similarly bound by the consent to jurisdiction agreed to by Ma's and Litowitz's legal clients who executed the Withdrawal Agreement, and for whom defendants acted as their "legal representatives."

The court rejects this argument. Under New York law, the term "legal representative" does not apply to lawyers. Rather, it means a person who takes care of another person, and steps into their place when that party cannot answer for himself, due to incapacity or death:

> "[T]his Court, going back to the late 1800s, has held 'the words "legal representatives" mean ordinarily executors or administrators, and that meaning will be attributed to them in any instance unless there by facts existing which show that the words were not used in their ordinary sense, but to denote some

> other and different idea.' Even in the rare instances where the terms has been found to signify something other than 'executors or administrators,' ***the meaning has not extended to a party's attorneys***. This definition of 'legal representative' corresponds with the case law of virtually every other state and federal court that has defined the term"

(*Matter of Kese Indus. v Roslyn Torah Found.*, 15 NY3d 485, 490 [2010] [emphasis added] [citations omitted]; *see also Etterle v Excelsior Ins. Co.*, 74 AD2d 436, 441 [4th Dept 1980]).

Accordingly, the Withdrawal Agreement may not be used in order to confer personal jurisdiction over Litowitz or Ma. The court also notes that plaintiffs have not sued the Members for breach of contract, which is another indication that plaintiffs raise it here only in order to attempt to confer jurisdiction over defendants.

Finally, plaintiffs argue that, even if Litowitz are Ma are not bound by these agreements, this court has jurisdiction over these defendants pursuant to CPLR 302 (a) (3), because it has alleged a tortious act by defendants outside New York that caused injury within New York.

Long-arm jurisdiction pursuant to CPLR 302 (a) (3) is appropriate where a defendant "commits a tortious act without the state causing injury to person or property within the state." To avail itself of this clause, a plaintiff must also allege that the defendant "(i) regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from good used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce."

In opposition to the motions to dismiss, plaintiffs argue that they have sufficiently alleged jurisdiction pursuant to CPLR 302 (a) (3) because the fraud, defamation and breaches of confidentiality alleged to have been carried out by defendants harmed plaintiffs the most in New York where the 701 and 702 Projects are located, and where the impact from investor

withdrawals, the slander and the breaches of confidentiality were most critical. This argument, however, is insufficient.

For long-arm purposes, the situs of the injury is where the events giving rise to the injury occurred, not where the resultant damages occurred (*Marie v Altshuler*, 30 AD3d 271, 273 [1st Dept 2006]). "In the context of a commercial tort, where the damage is only economic, the situs of injury is where the original critical events associated with the action or dispute took place" (*CRT Investments, Ltd. v. BDO Seidman, LLP*, 85 AD3d 470, 472 [1st Dept 2011); *see also McBride v KPMG Intl.*, 135 AD3d 576, 577 [1st Dept 2016]). Thus, plaintiffs "must allege that [their] injury occurred within New York" (*Ace Decade Holdings, Ltd. v UBS AG*, 2011 NY Slip Op 32415[U], * 21 [Sup Ct, NY County 2016]).

Here, the original critical events associated with the return of investment occurred in Florida. Plaintiffs approved withdrawal requests from the Florida office, and funds were disbursed to investors living outside New York from the Florida office. The only connection to New York is that one of the plaintiffs, Regional Center, is a New York limited liability company, and the 701 and 702 Projects are located in New York. Accordingly, the underlying events took place outside of New York, which is insufficient for 302 (a) (3) purposes.

In any event, even accepting as true plaintiffs' allegations that defendants' actions caused harm in New York, mere allegations of committing a tort or injury in New York state is not enough to create personal jurisdiction unless the defendant also does business in the State or has significant ties to the State:

> "Accepting as true the plaintiff's allegations that [defendant] committed tortious acts without New York State causing injury to the plaintiff within the State, the plaintiff failed to present any evidence that [defendant] regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this State, or derived substantial revenue from interstate or international commerce"

(*Shatara v Ephraim*, 137 AD3d 1248, 1249 [2d Dept 2016] [dismissing case for lack of personal jurisdiction]; *see also Waggaman v Aruauzo*, 117 AD3d 724, 725 [2d Dept 2014]; *Muse Collections, Inc. v Carissima Bijoux, Inc.*, 86 AD3d 631, 632 [2d Dept 2011]).

Likewise, here, plaintiffs fail to present any evidence that Litowitz or Ma regularly did or solicited business, or engaged in any persistent course of conduct, or derived substantial revenue from goods used or consumed or services rendered in this State, or derived substantial revenue from interstate or international commerce.

In sum, the extremely limited contacts that Litowitz and Ma have with New York are insufficient to sustain personal jurisdiction over them. As such, their motions to dismiss the complaint are granted.

As there is no jurisdiction over defendants, this court cannot consider defendants' other motions, and they are denied as moot (*see Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014]; *Wyser-Pratte Mgt. Co., Inc. v Babcok Borsig AG*, 23 AD3d 269, 269-270 [1st Dept 2005])

Accordingly, it is

ORDERED that the motion of defendant Douglas Litowitz, Esq. for an order dismissing the amended complaint herein (motion sequence no. 001) is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant, and the remaining branches of motion sequence no. 001 are denied as moot; and it is further

ORDERED that the motion of defendant Xuejun Makhsous a/k/a Ma Xuejun a/k/a Zoe Ma for an order allowing her additional time to respond to the complaint (motion sequence no. 003) is granted; and it is further

ORDERED that the motion of defendant Xuejun Makhsous a/k/a Ma Xuejun a/k/a Zoe Ma for an order dismissing the amended complaint herein (motion sequence no. 005) is granted and the amended complaint is dismissed in its entirety as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the motion of defendant Xuejun Makhsous a/k/a Ma Xuejun a/k/a Zoe Ma for an order striking the complaint and imposing sanctions (motion sequence no. 004) is denied as moot; and it is further

ORDERED that the action is severed and continued against the remaining defendant, Reviv-East Legal Consultants (HK) Co., Ltd., a/k/a Hong Kong Zhendong Legal Services Consulting Co. Ltd.

The remaining parties are directed to appear for a preliminary conference on May 20, 2019 at 10:00 am.

Dated: _____

ENTER:

_____
J.S.C.