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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

TSG8 SDB GROUP HOLDINGS, L.P.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
LEON CAPITAL GROUP LLC, CHRISTOPHER SCALES, DANIEL HARRINGTON, STUART MICHAEL SCHWARTZ, LBMC, PC, and DELOITTE & TOUCHE LLP,	)	**Case No. 24-1425-BC**
	)	
Defendants.	)	

ORDER

This matter came before the Court on April 9, 2025, at 1:30 p.m. for hearings on several motions filed by Defendants. All Defendants in this matter filed a Rule 12 Motion to Dismiss and a Motion to Stay Discovery, and Defendant Leon Capital Group LLC also filed a Rule 21 Motion, requesting that it be dropped as a party. The Court took the Rules 12 and 21 Motions under advisement and granted the Defendants' Motions to Stay Discovery on April 10, 2025.

BACKGROUND

This matter arises from a transaction involving the sale of equity in a Tennessee-based nationwide platform of specialty dental practices, Specialty Dental Brands ("SDB"), to a Delaware-based private equity firm, Plaintiff TSG8 SDB Group Holdings, LP ("TSG" or "Plaintiff"). In January 2017, SDB was founded to operate as a dental support organization based in Nashville and eventually acquire partner specialty dental practices across the country. SDB was a non-professional entity that provided critical support functions to acquired dental practices.

Before TSG invested in SDB, the company was controlled and operated by Defendant Leon Capital Group, LLC ("Leon"). As SDB's founder, Leon held approximately 44% of SDB's equity

and the remainder was held by partner dentists, investors, and members of SDB's management team.

Plaintiff entered into a Membership Interest Purchase Agreement dated July 20, 2022 with SDB Holdco, LLC, Vardiman Black Holdings, LLC, SDB Partners Salesco, LLC, VB Holdings Incentive Equity, LLC, SDB Investors Salesco, LLC, VB II, LLC, SDB Partners Holdco, LLC, LHP Dental Holdings, LLC, and LHP Dental Holdings, LLC ("MIPA"). All signatories were Delaware entities. None of the parties named herein were signatories to the agreement, other than Plaintiff.

The MIPA provided in relevant part:

9.6 Governing Law.

> This Agreement shall be governed by and construed in accordance with the internal Laws of the State of Delaware without giving effect to any choice or conflict of Law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of Delaware. Any Action arising out of or related to this Agreement or the matters contemplated hereunder shall be instituted exclusively in the courts of Delaware located in New Castle County, Delaware and of the United States of America located in the District of Delaware, and each party irrevocably submits to the exclusive jurisdiction of such courts in any such Action and waives any objection based on improper venue or forum non conveniens.

SDB did not perform as expected and, ultimately, SDB, Leon, TSG, and SDB's lenders agreed to an out-of-court restructuring in March 2024 that extinguished TSG's investments in SDB and turned the company over to a group of SDB's senior lenders.

After losing its investment in SDB, Plaintiff now alleges Leon of entering into a "brazenly fraudulent scheme" to sell a stake in the company to TSG. (Compl., ¶ 1). As part of this "scheme," TSG alleges that Leon directed three of SDB's executives, Defendants Stuart Michael Schwartz, Christopher Scales and Daniel Harrington ("SDB Executives"), to "inflate SDB's revenues and falsify its financial performance through a series of accounting manipulations," as well as to

"misrepresent[] facts about SDB's diminished ability to acquire new dental practices." *Id*. at ¶¶ 2-3.

Plaintiff brings claims against Leon and the SDB Executives, as well as LBMC and Deloitte, which audited SDB and which reports were eventually provided to Plaintiff, although Plaintiff was not the client of Deloitte or LBMC. According to the Complaint, Plaintiff is a Delaware limited partnership and investment vehicle managed for the benefit of its limited partners; Defendant Leon is a holding company headquartered in Dallas, Texas; Defendant Christopher Scales is a resident of Tennessee and served as SDB's CFO, CEO, and COO at various times throughout the relevant time period; Defendant Daniel Harrington is a resident of Tennessee and served as SDB's CFO; Defendant Stuart Michael Schwartz is a resident of Michigan and served as SDB's CEO; Defendant LBMC, PC is a Tennessee professional corporation headquartered in Nashville, Tennessee; and Defendant Deloitte & Touche LLP is a Delaware limited liability partnership headquartered in New York, New York. Specifically, Plaintiff has brought the following claims:

- Fraudulent misrepresentation against Leon and SDB Executives;
- Fraudulent misrepresentation under the MIPA against Leon;
- In the alternative, aiding and abetting fraud against Leon;
- In the alternative, negligent misrepresentation against Leon;
- Negligent misrepresentation against LBMC; and
- Negligent misrepresentation against Deloitte.

TSG does not seek rescission but seeks to recover the $349 million loss it suffered as a result of Leon's and the SDB Executives' fraud, including the initial $328 million investment as well as the additional $5 million loan and $16 million add-on equity investment.

Defendant Leon filed a Motion to Dismiss for lack of personal jurisdiction, improper venue, and failure to state a claim upon which relief can be granted. Leon contends that it was not a signatory to the MIPA and was not involved in the negotiation of the transaction.

Defendants Scales, Schwartz, and Harrington filed separate Motions to Dismiss for improper venue and failure to state a claim upon which relief can be granted.

Defendant LBMC filed a Motion to Dismiss for failure to state a claim upon which relief can be granted, arguing that the claim is time-barred under Tenn. Code Ann. § 28-3-104(c)(1) as TSG pleads that it had knowledge of facts that put it on notice of its claim against LBMC no later than September 7, 2023, but did not file this lawsuit until November 26, 2024. Likewise, Defendant Deloitte filed a similar Motion to Dismiss for failure to state a claim, primarily arguing that the claim is time-barred and, further, that TSG failed to plead that it justifiably relied on Deloitte's alleged misrepresentation.

LEGAL ANALYSIS

Motion to Dismiss for Improper Venue

Defendants Leon and the SDB Executives have moved to dismiss the Complaint pursuant to Tenn. R. Civ. P. 12.02(3) for improper venue. Defendants in Tennessee courts commonly seek to enforce a forum-selection clause by a Rule 12.02(3) motion to dismiss for improper venue. A Rule 12.02 motion to dismiss for improper venue presents a question of law. *Wolaver v. JBeez, Inc.*, No. M2024-00545-COA-R3-CV, 2024 WL 4343524, at *1 (Tenn. Ct. App. Sept. 30, 2024) (citing *Lanius v. Nashville Elec. Serv.*, 181 S.W.3d 661, 663 (Tenn. 2005)). When considering a motion for improper venue brought in accordance with Tenn. R. Civ. P. 12.02(3), the Court should construe "all allegations of fact in the complaint as true." *Cohn L. Firm v. YP Se. Advert. & Publ'g, LLC*, No. W2014-01871-COA-R3-CV, 2015 WL 3883242, at *4 (Tenn. Ct. App. June 24, 2015).

Choice of Law

The parties dispute whether Tennessee or Delaware law applies to determine whether the forum selection clause is valid and enforceable. Defendant Leon contends that Delaware law applies to determine the threshold question of the validity of the forum selection clause, while Plaintiff contends that Tennessee law applies.

When determining which state's law to apply to a particular dispute, a choice of law analysis is appropriate using the rules applicable in the forum court's state. *Williams v. Smith*, 465 S.W.3d 150, 153 (Tenn. Ct. App. 2014) (citing *Gov't Emp. Ins. Co. v. Bloodworth*, No. M2003–02986–COA–R10–CV, 2007 WL 1966022, at *26 (Tenn. Ct. App. June 29, 2007)). "Tennessee will honor a choice of law clause if the state whose law is chosen bears a reasonable relation to the transaction and absent a violation of the forum state's public policy." *Boswell v. RFD-TV the Theater, LLC*, 498 S.W.3d 550, 556 (Tenn. Ct. App. 2016) (quoting *Bourland, Heflin, Alvarez, Minor & Matthews, PLC v. Heaton*, 393 S.W.3d 671, 674 (Tenn. Ct. App. 2012); *Wright v. Rains*, 106 S.W.3d 678, 681 (Tenn. Ct. App. 2003)). And, as a general rule, the first step in the choice-of-law analysis is "whether a conflict actually exists between the relevant laws of the different jurisdictions." *Boswell v. RFD-TV the Theater, LLC*, 498 S.W.3d 550, 555 (Tenn. Ct. App. 2016).

There does appear to be a conflict between Delaware and Tennessee law as to the validity of the forum selection clause. Under Delaware law, there is a presumption that forum selection clauses are valid and such clauses "should be specifically enforced unless the resisting party clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching." *Mack v. Rev Worldwide, Inc.*, No. CV 2019-0123-MTZ, 2020 WL 7774604, at *6 (Del. Ch. Dec. 30, 2020) (quoting *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010)). Plaintiff contends that since the MIPA was obtained through fraud, the forum

selection clause is unenforceable. Delaware courts have rejected the argument that a forum selection clause is invalid if the underlying contract is likewise invalid:

> Under Delaware and federal law, a party cannot escape a valid forum selection clause . . . by arguing that the underlying contract was fraudulently induced or invalid for some reason unrelated to the forum selection . . . clause itself. Instead, the party must show that the forum selection clause itself is invalid. If the forum selection clause, standing alone, is found to be valid, the court that has jurisdiction over the dispute is to decide whether the contract is enforceable. Delaware has embraced the same approach because it sensibly prevents a party from making an end-run around an otherwise enforceable forum selection provision through an argument about the enforceability of other terms in the contract.

Id. (quoting *Carlyle Inv. Mgmt. L.L.C. v. Nat'l Indus. Grp. (Holding)*, No. CIV.A. 5527-CS, 2012 WL 4847089, at *10 (Del. Ch. Oct. 11, 2012), aff'd, 67 A.3d 373 (Del. 2013). The Delaware Supreme Court affirmed and adopted this reasoning on appeal: "[i]f the forum selection clause, standing alone, is found to be valid, the court having jurisdiction over the dispute is to decide whether the contract is enforceable or void ab initio." *Nat'l Indus. Grp. (Holding) v. Carlyle Inv. Mgmt. L.L.C.*, 67 A.3d 373, 380 (Del. 2013). Accordingly, under Delaware law, a plaintiff must point to facts clearly demonstrating that the enforcement of the forum selection clause itself, rather than the contract as a whole, is unjust or unreasonable. *Mack*, 2020 WL 7774604, at *12.

Under Tennessee law, the Court applies the factors set forth in *Dyersburg Mach. Works, Inc. v. Rentenbach Eng'g Co.*, 650 S.W.2d 378, 380 (Tenn. 1983) to determine whether a forum selection clause is enforceable. However, Plaintiff contends and points to Tennessee cases demonstrating that since the MIPA was obtained through fraud, the forum selection clause is unenforceable. In *Lamb v. MegaFlight, Inc.*, 26 S.W.3d 627, 628 (Tenn. Ct. App. 2000), the appellate court found that plaintiffs failed to present any evidence indicating that the forum selection clause itself was procured by fraud, misrepresentation, duress, or any other unconscionable means, but that there was sufficient evidence to demonstrate that the contract was

the result of MegaFlight's fraudulent inducement. *Id*. at 631. The *Lamb* court found that one of the remedies available for fraudulent inducement included rescission of the contract and that fraud in the underlying transaction renders a contract clause, such as a forum selection clause, unenforceable. *Id*. (citing *Spurling v. Kirby Parkway Chiropractic, Inc.*, No. 02A01–9609–CH–00225, 1997 WL 756684 (Tenn. Ct. App. Dec. 9, 1997)). Other cases following *Lamb* have indicated that "alleging fraud in the inducement of a contract, standing alone, may invalidate a forum selection clause because it invalidates the entire contract." *Cohn L. Firm v. YP Se. Advert. & Publ'g, LLC*, No. W2014-01871-COA-R3-CV, 2015 WL 3883242, at *8, n.8 (Tenn. Ct. App. June 24, 2015); *see also Overton v. Westgate Resorts, Ltd., L.P.*, No. E2014-00303-COAR3CV, 2015 WL 399218 (Tenn. Ct. App. Jan. 30, 2015); *Walker v. Frontier Leasing Corp.*, No. E2009-01445-COA-R3-CV, 2010 WL 1221413, at *6 (Tenn. Ct. App. Mar. 30, 2010) ("[W]e do not see the logic in holding that a misrepresentation that wrongfully induces a party to sign a contract which justifies rescinding the contract would nevertheless leave a forum selection clause in that contract enforceable.").

Thus, since there appears to be a conflict between the two jurisdictions, the Court will move forward with its choice of law analysis. The Court finds that Delaware bears a reasonable relation to the transaction because the parties to the MIPA were all Delaware entities. Thus, Delaware has a direct, relevant, and material connection to the claims alleged in the complaint. The only relation to Tennessee is that SDB was a Tennessee entity, but SDB is not a party. Plaintiff's claims all arise out of the MIPA—they allege that they were fraudulently induced into the agreement. Thus, without the agreement, there would be no claims. Further, the Court cannot find that applying the Delaware choice of law provision would violate our state's public policy. In fact, Tennessee public policy supports upholding the clause, as "[c]ontract law in Tennessee plainly reflects the public

policy allowing competent parties to strike their own bargains." *Baugh v. Novak*, 340 S.W.3d 372, 383 (Tenn. 2011) (quoting *Ellis v. Pauline S. Sprouse Residuary Trust*, 280 S.W.3d 806, 814 (Tenn. 2009)). The Court finds that the choice of law provision is valid and enforceable under Tennessee law.

Plaintiff contends that, despite the choice of law provision, choice of venue is a procedural issue that must be decided by Tennessee law. Plaintiff contends that venue deals solely with where the dispute should be heard, not substantive rights of the parties. However, the forum selection clause in the MIPA is clear and unambiguous and provides that Delaware law applies "without giving effect to any choice or conflict of Law provision or rule (whether of the State of Delaware or any other jurisdiction) that would cause the application of Laws of any jurisdiction other than those of the State of Delaware." These sophisticated parties agreed to this forum selection clause which clearly provides that Delaware law applies, regardless if it is procedural or substantive. To hold otherwise would prevent parties from being able to freely contract and negotiate any venue provision.

Non-Signatories

Plaintiff also contends that Leon and the SDB Executives cannot avail themselves of the forum selection clause in the MIPA as Tennessee courts generally do not permit non-signatories to invoke forum selection clauses for which they did not bargain. Since the Court has found the Delaware choice of law provision to be valid and enforceable, the Court will apply Delaware law.

Delaware law supports Leon and the SDB Executives' right, as non-signatories, to enforce the forum selection clause against Plaintiff. Under Delaware law, "a non-signatory has standing to invoke and enforce a forum selection clause where it is 'closely related to one of the signatories such that the non-party's enforcement of the clause is foreseeable by virtue of the relationship

between the signatory and the party sought to be bound.'" *Mack v. Rev Worldwide, Inc.*, No. CV 2019-0123-MTZ, 2020 WL 7774604, at *17, n.135 (Del. Ch. Dec. 30, 2020) (quoting *Ashall Homes Ltd. v. ROK Ent. Gp. Inc.*, 992 A.2d 1239, 1248 (Del. Ch. 2010); *BNY AIS Nominees Ltd. v. Quan*, 609 F. Supp. 2d 269, 275 (D. Conn. 2009); *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 456 (9th Cir. 2007)); *see also Lexington Servs. Ltd. v. U.S. Pat. No. 8019807 Delegate, LLC*, No. CV 2018-0157-TMR, 2018 WL 5310261, at *5 (Del. Ch. Oct. 26, 2018). A non-signatory is closely related if "(1) [the party] receives a direct benefit from the agreement; or (2) it was foreseeable that [the party] would be bound by the agreement." *Neurvana Med., LLC v. Balt USA, LLC*, 2019 WL 4464268, at *4 (Del. Ch. Sept. 18, 2019) (quoting *Weygandt v. Weco, LLC*, 2009 WL 1351808, at *4 (Del. Ch. May 14, 2009)). "[T]he foreseeability inquiry seeks to foreclose an end-run around an otherwise enforceable forum selection provision. On this basis, cases have applied the foreseeability inquiry to bind a range of transaction participants who did not sign the relevant agreement." *Id*. at *5. In *Ashall Homes Ltd. v. ROK Entertainment Group Inc.*, the Court allowed officers and directors of the entity with the forum-selection clause to invoke its benefits because they were closely involved in the creation of the entity and because they were being sued as a result of acts that directly implicated the negotiation of the agreement that led to the entity's creation. *Ashall Homes Ltd.*, 992 A.2d at 1248.

It appears likely that under Delaware law, Leon and the SDB Executives would satisfy the foreseeability test such that they would have standing to invoke the MIPA's forum selection clause although they were not signatories to that agreement. Here, as in *Ashall*, Leon and the SDB Executives are closely related to one of the signatories by virtue of Leon's involvement with SDB, the SDB Executives' positions as officers and foreseeable by virtue of their relationship to the MIPA. Defendants are also being sued because of acts they took in regards to the MIPA. Based on

the foregoing, and taking the facts alleged in the Complaint as true, it was foreseeable that the defendants would invoke the forum selection provision of the MIPA.

Section 8.2 of the MIPA

Section 8.2 of the MIPA provides in relevant part:

> 8.2 No Survival of Representations, Warranties and Covenants; Non-Party Affiliates.
>
> The representations, warranties, covenants and agreements of the parties contained in this Agreement shall not survive beyond the Closing and there shall be no liability in respect thereof, whether such liability has accrued prior to or after the Closing, on the part of any party, its Affiliates or any of their respective members, managers, officers, directors, agents or Representatives, except for (i) those covenants and agreements that by their express terms apply or are to be performed in whole or in part after the Closing and (ii) Article 9, which shall survive in accordance with their respective terms. Notwithstanding anything to the contrary in this Agreement or any Ancillary Document, nothing herein or therein shall be deemed to apply to, or limit in any way, Purchaser's rights and remedies in the case of fraud.

Plaintiff contends that Leon and the SDB Executives have no right under the MIPA to "apply" any of its provisions, including the forum selection clause, to obstruct TSG's efforts in Tennessee to recover against them for their fraudulent acts and omissions. The Court declines to find that this provision limits or negates the unequivocal and broad language of the forum selection clause. This provision appears to demonstrate that the parties may bring fraud after the closing date.

Forum Selection Clause

Under Delaware law, "[f]orum selection [ ] clauses are 'presumptively valid' and should be 'specifically' enforced unless the resisting party '[ ] clearly show[s] that enforcement would be unreasonable and unjust, or that the clause [is] invalid for such reasons as fraud and overreaching.'" *Ingres Corp. v. CA, Inc.*, 8 A.3d 1143, 1146 (Del. 2010) (citations omitted). As further explained by Delaware courts:

> Forum selection clauses are presumptively valid and have been regularly enforced. Generally, forum selection clauses should be enforced so long as enforcement

> would not place any of the parties at a substantial and unfair disadvantage or otherwise deny a litigant her day in court. Therefore, the defendant bears a heavy burden in claiming that forum selection clause is invalid. As the United States Supreme Court noted in *M/S Bremen*, "it is difficult to see why any such claim of inconvenience should be heard to render [a] forum clause unenforceable" when it is the product of "a freely negotiated private ... commercial agreement [which] contemplated the claimed inconvenience."

Cap. Grp. Companies, Inc. v. Armour, No. CIV. A. 422-N, 2004 WL 2521295, at *6 (Del. Ch. Oct. 29, 2004) (internal citations omitted). Courts should assess the reasonableness of a forum selection clause on a case-by-case basis. *Ingres*, 8 A.3d at 1146.

Delaware bears a reasonable relation to the transaction as the parties to the transaction were organized under Delaware law. Plaintiff agreed to a Delaware forum selection clause and it is a Delaware entity that is not inconvenienced by litigating its claims in Delaware. Plaintiff contends Delaware would be a substantially less convenience place for trial because two of the three SDB Executives reside in Tennessee, SDB was founded in Tennessee, and that purportedly no witnesses to the fraud reside or are headquartered in Delaware (although no affidavit or declaration to that effect was filed). However, Delaware courts have provided that Plaintiff's burden cannot be overcome by pleading "mere inconvenience" or "additional expense." Instead, "it should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court." *HealthTrio, Inc. v. Margules*, No. CIV.A. 06C-04-196, 2007 WL 544156, at *3 (Del. Super. Ct. Jan. 16, 2007) (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 18 (1972)). Plaintiff has failed to meet its burden and demonstrate that the forum selection clause is unreasonable, unjust, or otherwise invalid. Accordingly, the Court grants Defendants Leon and the SDB Executives' Motion to Dismiss.[1]

[1] Because of the Court's determination based on Tenn. R. Civ. P. 12.02(3), the Court does not reach the other arguments raised by Defendant Leon and the SDB Executives.

Motion to Dismiss for Failure to State a Claim

Defendants Deloitte and LBMC have moved to dismiss the Complaint pursuant to Tenn. R. Civ. P. 12.02(6) for failure to state a claim, contending that the claims against them are time-barred. Deloitte further argues that Plaintiff failed to plead actual and justifiable reliance on its negligent misrepresentations. "The purpose of a Tenn. R. Civ. P 12.02(6) motion to dismiss is to determine whether the pleadings state a claim upon which relief can be granted. A Rule 12 motion only challenges the legal sufficiency of the complaint. It does not challenge the strength of the plaintiff's proof." *Barnes & Robinson Co. v. OneSource Facility Servs., Inc.*, 195 S.W.3d 637, 641 (Tenn. Ct. App. 2006). In reviewing a motion to dismiss, courts "must liberally construe the complaint, presuming all factual allegations to be true and giving the plaintiff the benefit of all reasonable inferences." *Id.* "Thus, a complaint should not be dismissed for failure to state a claim *unless* it appears that the plaintiff can prove no set of facts in support of his or her claim that would warrant relief." *Id.* "Making such a determination is a question of law." *Id.*

Deloitte and LBMC argue that the negligent misrepresentation claims against them are time-barred pursuant to the applicable one-year statute of limitations under Tenn. Code Ann. § 28-3-104(c)(1), which provides that "[a]ctions and suits against licensed public accountants, certified public accountants, or attorneys for malpractice shall be commenced within one (1) year after the cause of action accrued, whether the action or suit is grounded or based in contract or tort." In response, Plaintiff contends that its claims for negligent misrepresentation are covered by the three-year statute of limitations under Tenn. Code Ann. § 28-3-105. Plaintiff argues that Tenn. Code Ann. § 28-3-104 does not apply because those actions apply to malpractice claims brought by *clients* against their accountants. Further, even if the one-year statute of limitations applied, its claims would still be timely.

To determine the applicable statute of limitations, Tennessee courts "must ascertain the gravamen of each claim." *Benz–Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 149 (Tenn. 2015). "When utilizing this approach, a court must first consider the legal basis of the claim and then consider the type of injuries for which damages are sought." *Id*. at 151. The gravamen is "not dependent upon the 'designation' or 'form' litigants ascribe to an action." *Id*. at 148.

Plaintiff brings claims for negligent misrepresentation against Deloitte and LBMC which requires a showing that 1) defendant, acting in the course of his business or profession, 2) supplied false/faulty information for the guidance of others in their business transactions, and 3) defendant failed to exercise reasonable care in obtaining or communicating the information, and 4) Plaintiff justifiably relied on said information. *McNamara v. Monroe*, No. E2002-00407-COA-R3-CV, 2003 WL 192161, at *1 (Tenn. Ct. App. Jan. 29, 2003) (citing *Robinson v. Omer*, 952 S.W.2d 423 (Tenn. 1997)). The Court of Appeals further noted that a "cause of action for malpractice . . . differs from a cause of action for negligent misrepresentation, in that a cause of action for malpractice requires an employment relationship or privity, whereas an action for negligent misrepresentation does not." *Id.* at *2; *see also Bethlehem Steel Corp. v. Ernst & Whinney*, 822 S.W.2d 592, 595 (Tenn. 1991) (concluding that "Section 552 of the Restatement is the appropriate standard for actions by third parties against accountants based on negligent misrepresentation in this state").

Defendants Deloitte and LBMC contend that the gravamen of Plaintiff's claims arise out of malpractice, not negligent misrepresentation, as Plaintiff asserts that the audit opinions were false because it failed to "exercise[] reasonable care in conducting its audit and compl[y] with its obligations under professional auditing standards." (Compl., ¶ 167). Defendants rely on cases in which the courts found claims against attorneys, either clients or non-clients, sounded in

malpractice rather than misrepresentation. *See Beckwith v. LBMC, P.C.*, No. M2017-00972-COA-R3-CV, 2019 WL 1306201, at *3 (Tenn. Ct. App. Mar. 21, 2019); *Sec. Bank & Tr. Co. of Ponca City, Okl. v. Fabricating, Inc.*, 673 S.W.2d 860 (Tenn. 1983); *JRS Partners, GP v. Leech Tishman Fuscaldo & Lampl, LLC*, No. 23-5538, 2024 WL 2874575 (6th Cir. June 7, 2024); *Hanson v. Rudnick & Wolfe*, 992 F.2d 1216 (6th Cir. 1993). However, Tennessee cases have distinguished malpractice actions as those requiring an employment relationship or privity, while actions for negligent misrepresentation does not. *McNamara*, 2003 WL 192161, at *2; *Bethlehem Steel Corp.*, 822 S.W.2d at 595. In a recent case, the Court of Appeals acknowledged that "Tennessee has adopted the Restatement (Second) of Torts § 552 as the guiding principle in negligent misrepresentation actions against other professionals and business persons." *Westport Ins. Corp. v. Howard Tate Sowell Wilson Leathers & Johnson, PLCC*, No. M2023-01168-COA-R3-CV, 2024 WL 4223692, at *19 (Tenn. Ct. App. Sept. 18, 2024) (quoting *Bethlehem Steel Corp.*, 822 S.W.2d at 595). In *Bethlehem*, the Supreme Court concluded "that Section 552 of the Restatement is the appropriate standard for actions by third parties against accountants based on negligent misrepresentation in this state." *Bethlehem Steel Corp.*, 822 S.W.2d at 595. Accordingly, if Plaintiff, as a non-client, has framed its claim within the context of negligent misrepresentation rather than malpractice, it may proceed under the three-year statute of limitations.

In the Complaint, Plaintiff alleges that both firms "supplied information in the course of its profession as an accounting firm" by providing audit report(s) concerning SDB's financial statements for the years 2020 – 2023 and that the report(s) contained "materially false information because it incorporated revenue and accrual figures that had been manipulated by the SDB Executives and other SDB employees." Further, that both firms "failed to exercise reasonable care and to fulfill its professional obligations as an auditor in verifying the accuracy of the financial

information contained in its report" and that both firms should have known that the report(s) would be provided to Plaintiff to determine whether to invest in SDB. (Compl., ¶¶ 223 – 236).

At this stage, taking the facts alleged in the complaint as true, the Court declines to find that the gravamen of the complaint is a malpractice claim that should be dismissed. Plaintiff alleges that Deloitte and LBMC provided audit reports that included materially false information and that they failed to exercise reasonable care in verifying the information. Plaintiff does not assert that its injuries were caused by any violation of a purported fiduciary obligation. Further, the Court finds that Plaintiff has sufficiently pled reliance.

Conclusion

After analyzing the MIPA and Plaintiff's claims, the Court finds that it cannot exercise jurisdiction of Plaintiff's claims against Defendants Leon and the SDB Executives without dishonoring the agreement. The MIPA contains unequivocal language mandating exclusive jurisdiction in the courts of Delaware. Therefore, this matter as to those Defendants should be dismissed pursuant to Tenn. R. Civ. P. 12.02(3).

Therefore, it is ORDERED, ADJUDGED, and DECREED, that Defendants Leon and the SDB Executives' Motion to Dismiss is GRANTED pursuant to Tenn. R. Civ. P. 12.02(3), and this matter is DISMISSED as to Defendants Leon Capital Group LLC, Christopher Scales, Daniel Harrington, and Stuart Michael Schwartz.

It is FURTHER ORDERED, ADJUDGED, and DECREED, that Deloitte's and LBMC's Motions to Dismiss are hereby DENIED. Plaintiff and Deloitte and LBMC counsel are ORDERED to CONTACT the Calendar Clerk, Megan Carter, at megancarter@jisnashville.gov, within ten (10) days of this Order to schedule a Rule 16 Conference.

It is FURTHER ORDERED, ADJUDGED, and DECREED that Defendant Leon's Motion to Drop Leon, LLC as a Party is rendered MOOT.

It is so ORDERED.

s/Anne C. Martin

ANNE C. MARTIN
CHANCELLOR
BUSINESS COURT DOCKET
PILOT PROJECT

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