COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT
OF THE TRIAL COURT

DAVID LARIVIERE and HAFTWARE CORPORATION, Plaintiffs, v. AARM CORPORATION, GITANJALI SWAMY, Defendants, and ZUCI REALTY, LLC, Reach and Apply Defendant.	)	C. A. NO: 2013-3194

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

SUMMARY

The plaintiffs' nine count complaint fairly presents a litigable dispute between two corporations, the plaintiff software consulting corporation and the defendant investment risk management information corporation, as to which company breached the software consultant's January 1, 2010 consulting contract (the "Consulting Agreement") and the amount of damages suffered by the non-breaching party. The complaint, however, purports to plead several other claims that must be dismissed at this preliminary stage as a matter of law for failure to state a claim.

Pursuant to Rule 12, the present motion seeks dismissal of several claims, both in contract and tort, by the individual plaintiff, David Lariviere ("Lariviere"). All claims against the individual defendant Gitanjali Swamy, the president and one of six directors of the defendant investment information company, must be dismissed.

There is not a farthing conceivably due Lariviere on any set of facts that can be proven at trial. It is undisputed that invoices (the "Invoices") submitted by the plaintiff Haftware Corporation ("Haftware") reflect all of the allegedly unpaid services for which Lariviere seeks recourse. It is also undisputed that Lariviere, as president of Haftware, himself submitted the Invoices to the defendant AARM Corporation ("AARM" or "Alternative Asset Risk Management Corporation"), and that the Invoices specified and demanded payment be made to Haftware. Lariviere therefore has no individual claim for his services in express or implied contract against either the defendant corporation or the individual defendant. That the complaint alleges no other damages other than the alleged loss from the non-payment of the Invoices is dispositive of Lariviere's other individual claims both in contract and in tort. He has no individual claim for payment for his services under the Consulting Agreement and there is no alleged harm other than non-payment of the Invoices issued pursuant to the Consulting Agreement. Even assuming *arguendo* that the Consulting Agreement were voided, it is only Haftware that has any conceivable claim in *quantum meruit*. The economic loss rule bars plaintiffs' claims in tort.

On the undisputed facts, the Wage Act treble damages claim must be dismissed. For his obvious lack of privity Lariviere has no claim to payment for his services and hence no conceivable claim under the Wage Act. Nor can Haftware Corporation have a Wage Act claim. There is no allegation that the defendants required Lariviere to provide services under a contract nominally with a straw corporation so as to evade any classification of Lariviere as an employee. There are no allegations likening AARM to an employer of bicycle messengers seeking to evade the Wage Act by requiring execution of a contract by which a common law employee, or likening either plaintiff to a franchisee, closely controlled by the franchisor, who covenants to be

bound as an independent contractor. In this case it was Lariviere and his company who insisted on a written contract which they had drafted and by which as a matter of law and under its express terms Haftware is an independent contractor. There is no allegation that it was AARM that was attempting an "end run" around the requirements of G.L. c. 149, § 148. As § 148 is dispositive, the Contract cannot be a prohibited "special contract" as defined by § 148. On the undisputed facts, the plaintiffs are estopped from denying the independent contractor characterization and status upon which they insisted.

Haftware's 93A claim fails to state a claim because its complaint presents a garden variety claim for breach of contract. AARM contends Haftware breached the January 1, 2010 contract. In the rough and tumble of the marketplace, Haftware's laments about non-payment do not constitute unfair and deceptive acts. The mere alleged breach of the covenant of good faith and fair dealing is in fact a simple breach of contract from the alleged failure to pay "for the value of past consulting services." The alleged misrepresentations were all purportedly made to, and relied upon, by Lariviere.

The claim to pierce the corporate veil to seek recovery from the individual defendant and current president of AARM, Gitanjali Swamy ("Swamy"), fails to state a claim. The claims against Swamy must be dismissed. In all events, general conclusory allegations, upon unstated information and belief, of the so-called *My Bread* factors do not even approach the pleading standard enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The reach and apply claim fails for a number of reasons, foremost among which is the fact that the court has no subject matter jurisdiction under G.L. c. 214 §3(6). Because there is no trial worthy claim against the individual defendant Swamy, there can be no valid basis to seek

any equitable remedy from any third party stakeholder. The plaintiffs' reach and apply claim therefore does not qualify under the Reach and Apply statute.

BACKGROUND[1]

AARM provides data compilation solutions to enhance investment decision-making by private equity and alternative asset investors. Affidavit of Gitanjali Swamy ("Swamy Aff.") ¶ 2. It markets its trademarked and proprietary software and investment tool products directly and through strategic partnerships to family offices, private wealth managers and institutional investors. *Id.* AARM's proprietary software and other investment tool products and new or beta concepts have been refined, developed and reduced to practice by third party contractors. *Id.*

According to the on line records of the Secretary of State for the Commonwealth, Haftware is a Massachusetts corporation whose president and sole director is David Lariviere. Haftware holds itself out as a consulting company providing software development and engineering and development of advanced technologies.

In January 2009, AARM entered into a consulting contract with Professor Stephen Edwards of Columbia University to provide software development services for its website and

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[1] Defendants include, and cite herein to, allegations of the Complaint solely for purposes of their Rule 12 motion. Without converting the defendants' motion into one for summary judgment, in deciding this motion the Court may look beyond the four corners of the Complaint and also take "into account facts set out in … documents the authenticity of which are not disputed by the parties[,] … official public records[,]… documents central to plaintiff['s] claim[,] …or documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993); *Beddall v. State St. Bank & Trust Co.,* 137 F.3d 12, 17 (1st Cir.1998) (When "a complaint's factual allegations are expressly linked to—and admittedly dependent upon—a document (the authenticity of which is not challenged), that document effectively merges into the pleadings and the trial court can review it in deciding a motion to dismiss under Rule 12(b)(6)"). See also *Marshall v. Stratus Pharmaceuticals, Inc.*, 51 Mass. App. Ct. 667, 672, 749 N.E.2d 698, 705 (2001) ("we do not think it unfair to either the plaintiff or the defendants to treat the agreement in the same manner as if it had been appended to the complaint"). The two contracts referenced in the Complaint and submitted by the defendants are properly part of the Rule 12 record. The court may also consider "matters susceptible to judicial notice," *Jorge v. Rumsfeld,* 404 F.3d 556, 559 (1st Cir. 2005), including "documents submitted [that] are part of the public record . . . without converting the motion to dismiss into a motion for summary judgment." *Santiago v. Bloise,* 741 F. Supp. 2d 357, 361 (D. Mass. 2010). See also *Schaer v. Brandeis* University, 432 Mass. 474, 477 (2000) ("matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account").

for product development. *Id.* ¶ 3. In the fall of 2009 Professor Edwards referred Haftware to AARM to complete the software development project(s) he had started. *Id.* ¶ 4.

In the fall of 2009, upon execution by Haftware Corporation of its standard form confidentiality and non-disclosure form, AARM disclosed to Haftware its confidential, contemplated new products it sought to develop. *Id.* ¶ 5; Comp. ¶ 12. Haftware agreed to take up the project, rejected Alternative Asset Risk Management Corporation's standard consulting form contract and insisted the two companies enter into a form of contract drafted by Haftware[2]. Swamy Aff. ¶ 6.

"AARM and Haftware executed a Consulting Agreement." Comp. ¶ 13. Some of the material provisions of this Consulting Agreement (Ex. B to Swamy Aff.) are that Haftware "agrees and represents" that (i) Haftware shall provide software development and machine learning services with the scope of work to be approved by Alternative Asset Risk Management Corporation or Client; (ii) Haftware "is an independent contractor, and neither [Haftware] nor [Haftware]'s staff is, or shall be deemed, [AARM]'s employees"; (iii) that Haftware "has the sole right to control and direct the means, manner, and method by which the services required ... shall be performed"; (iv) Haftware is free to work for other clients and has "the sole right to control and direct the means, manner, and method by which the services required by this Agreement shall be performed"; (v) Haftware must furnish all equipment and materials necessary for the work; (vi) Haftware will own all copyright, patent and all intellectual property rights to the Work Product created by Haftware pursuant to the Consulting Agreement with

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[2] The only materially substantive provision of the Consulting Agreement that AARM required to be inserted into Haftware's form was the provision adding to the fifth bullet point on the first page:

> "Consultant is required to submit for approval, a scoped estimate on time required prior to start of work, timesheets and any IP intent at submission of timesheets on work performed. The payment is contingent upon reasonable adherence to the approved scope of work."

Swamy Aff. ¶ 6.

AARM to have a shop right or "a non-exclusive unlimited-term worldwide license to use … the Work Product" solely for its investment information products; (vii) AARM "shall not withhold from [Haftware]'s compensation any amount that would normally be withheld from an employee's pay"; and (viii) the Consulting Agreement is subject to, but does not incorporate, AARM's standard form NDA previously executed by the two companies.

The Complaint (¶¶ 27, 31, 36, 53) alleges that four invoices were issued: on July 20, 2010 for $37,613.75; on September 17, 2010 for $62,116.25; on October 18, 2010 for $17,483.75; and on April 25, 2011 for $8,906.25.

It is undisputed that each and every invoice was issued by Haftware. Swamy Aff. ¶8. Each and every invoice was in the form of Exhibit C to the Swamy Aff. *Id.* Each Haftware invoice directed payment to Haftware. *Id.* At no time has AARM received a single invoice from David Lariviere for services rendered. *Id.*

The Complaint (¶¶ 28, 30) alleges that a total of $25,000 has been paid on invoices and that the payments were made by wire transfers in July 2010 of $20,000 and in September 2010 of $5,000. Each of these wire transfer payments was made by AARM and each was wired to an account for the benefit of "Haftware Corporation." Swamy Aff. ¶ 9. *See, e.g.,* Exh. D to Swamy Aff. In fact, AARM has made a total of twelve payments to Haftware under the Consulting Agreement totaling $47,300.00. Swamy Aff. ¶¶ 9, 10, 11. At no time has AARM made any payment for services, whether pursuant to the Consulting Agreement or otherwise, to David Lariviere. *Id.* ¶ 12.

Haftware has breached the Consulting Agreement and AARM owes Haftware Corporation nothing. Swamy Aff. ¶ 13. Indeed, when the issues are joined and the jury determines the facts it will be the plaintiffs who will be adjudged liable to AARM.

ARGUMENT

STANDARD

In order to survive a motion to dismiss, a complaint must contain factual allegations sufficient to suggest that the plaintiff is entitled to relief. M.R.C.P 12.

> While a complaint attacked by a . . . motion to dismiss does not need detailed factual allegations . . . a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions. . . . Factual allegations must be enough to raise a right to relief above the speculative level . . . [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact) . . . ." . . . . What is required at the pleading stage are factual "allegations plausibly suggesting (not merely consistent with)" an entitlement to relief.

Iannacchino v. Ford Motor Co., 451 Mass. 623, 635-36 (2008) (adopting pleading standard enunciated in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)). "Ultimately, [t]he relevant question . . . in assessing plausibility is not whether the complaint makes any particular factual allegations but, rather, whether the complaint warrant[s] dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible." *Hernandez-Cuevas v. Taylor*, __ F. 3d __, 2013 WL 3742484 (1st Cir. July 17, 2013).

WAGE ACT CLAIM (COUNTS I AND II)

In Counts I and II, Lariviere seeks a declaratory judgment and damages against both AARM and the individual defendant Swamy for violation of the Massachusetts Wage Act, G.L. c. 149 §§148B, 150. Lariviere alleges that he "provided services to AARM and to Swamy as their employee"; that "AARM and its senior managers or owners, including Swamy, violated … [the Wage Act] by misclassifying him as an independent contractor"; that "AARM and Swamy exercised direction and control over him …[and] failed to pay Lariviere approximately $89,125 in wages for employment services rendered"; that Lariviere's damages include the $89,125 and the "Employer FICA contributions" which the Consulting Agreement mandated that AARM not make; and, "[t]o the extent … Larviviere intended to waive [his] right to be compensated as an

employee through the Consulting Agreement, such contract term is unenforceable … under Massachusetts law."

At the outset, we note that as a matter of law Lariviere cannot assert any Wage Act claim for unpaid wages due prior to July 15, 2010. G. L. c. 149 §150. "Section 150 of G. L. c. 149 sets forth a limited number of defenses that an employer may raise to avoid liability thereunder." *Parow v. Howard*, 021403A, 2003 WL 23163114 (Mass. Super. Nov. 12, 2003). An action brought under this section must fail as a matter of law if, *inter alia*, it is not commenced "within 3 years of the [alleged] violation." G. L. c. 149 §150. In the present case, the Complaint was filed and dated on July 15, 2013. Pursuant to G.L. c. 149 §150, therefore, the plaintiffs cannot make a statutory claim for any allegedly unpaid wages purportedly due prior to July 15, 2010.

The purpose of the Wage Act "is to protect employees and their right to wages." *Camara v. Attorney General*, 458 Mass. 756, 760 (2011). "The Wage Act prohibits an employer from exempting itself from the timely and complete payment of wages by 'special contract ... or by *any other means.*'" *Fraelick v. Perkett PR, Inc.*, 83 Mass. App. Ct. 698, 707 (2013).

> [T]he "special contract" language in § 148 … generally prohibiting an employer from deducting, or withholding payment of, any earned wages … cannot be overcome by an employee's assent ….

Camara, 458 Mass. at 760. Assuming a true employer-employee relationship, Massachusetts law prohibits an employer from requiring or imposing a contractual relationship, nominally of principal and independent contractor, which if enforceable would enable an "end run" around the Wage Act. *Depianti v. Jan-Pro Franchising Int'l Inc.*, 465 Mass. 607, 622 (2013). *See also Machado v. System4 LLC*, 465 Mass. 508 (2013); *Crocker v. Townsend Oil Co., Inc.* 464 Mass. 1, 3-4, 11-15 (2012); *Awuah v. Coverall North America, Inc.*, 460 Mass. 484 (2011); *DiFiore v. American Airlines, Inc.*, 454 Mass. 486 (2009); *Somers v. Converged Access, Inc.* 454 Mass.

582, 588-91 (2009); *Athol Daily News v. Bd. of Rev. of Div. of Employment and Training,* 439 Mass. 171 (2003); *Boston Bicycle Couriers, Inc. v. Deputy Director of DET*, 56 Mass. App Ct. 473 (2002).

Lariviere's Wage Act claim[3] fails because based on the undisputed facts, Lariviere was never an employee of either AARM or Swamy. This is not a case of "an employer [seeking] to insulate itself from liability for misclassification by causing or creating another entity to contract with its employees." *Depianti,* 465 Mass. at 622. While there need not be a formal contract for services for an individual to have standing under the Wage Act, the Supreme Judicial Court is clear there must be in fact employee-employer privity. *Id.* at 623-24.[4]

It is undisputed that all invoices for work for which Lariviere seeks payment were issued by Haftware and required payment to Haftware and not to Lariviere. Prior to engaging counsel and filing the July 2013 complaint—almost three years after the work—Lariviere never asserted any individual entitlement to payment for Haftware's invoices. It is undisputed that AARM has never paid Lariviere for any services and that it has paid $47,300.00 to Haftware. There was no

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[3] Under G.L. c.151A, § 2, an individual is an employee unless the services "at issue are performed (a) free from control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker." *Athol Daily News v. Bd. of Rev. of Div. of Employment and Training,* 439 Mass. 171, 174-75 (2003). The employer has the burden to prove all three of these so-called "ABC" test elements. *Id.*

[4] "Assuming without in any way suggesting that Depianti was working as an employee of Jan–Pro, and not as an independent contractor, Jan–Pro's contractual arrangement with Bradley, if enforceable, would provide a means for Jan–Pro to escape its obligation, as an employer, to pay lawful wages under the wage statute, G.L. c. 149, § 148. To allow such an 'end run' around G.L. c. 149, § 148, would contravene the express purpose of the statute and would nullify the provision therein that specifically forbids this type of arrangement 'by a special contract with an employee or by any other means.' G.L. c. 149, § 148."

employment of Lariviere by AARM for purposes of the Wage Act[5] and Lariviere was not "employed by" AARM.[6]

Even assuming *arguendo* Lariviere could adduce facts at trial demonstrating him to have provided services as an employee pursuant to the Consulting Agreement and hence in the employ of AARM, his contention that the independent contractor relationship clearly established by the Consulting Agreement is unenforceable is a flawed syllogism. His predicates are: (i) the Wage Act's protections for employees lacking true bargaining power;[7] (ii) Supreme Judicial Court decisions thwarting schemes to avoid the Wage Act via overreaching contracts drafted by unscrupulous employers;[8] and (iii) the independent contractor form agreement which as president of Haftware he required AARM to sign. Resting on these three legs, Lariviere contends that despite his explicit, admitted intention to waive his right to be compensated as an employee in the Consulting Agreement which he drafted, and which mandates that the provider of consulting services be treated as an independent contractor, his waiver is unenforceable as a matter of law. Comp. ¶ 65.

In equity it would be unconscionable to allow Lariviere to assert the unenforceability of the Consulting Agreement's mandate that the service provider be treated as an independent contractor. As the sole officer, director and, upon information and belief, sole stockholder of Haftware, Lariviere had full knowledge that the corporation he owned had received the funds

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[5] G.L. c. 151A, § 1 (Definitions) "'Employment', service, including service in interstate commerce, performed for wages or under any contract, oral or written, express or implied, by an employee for his employer." Under § 148 of the Wage Act, the "president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation."

[6] In addition we note there is no privity of contract between Lariviere on the one hand and AARM or Swamy on the other. Larviere is not a party to the Consulting Agreement. Under the Consulting Agreement Lariviere was not required to perform the work; it was the "staff" of Haftware Corporation--presumably designated by its sole officer and director Lariviere—who would perform the consulting work.

[7] "No person shall by a special contract or by any means exempt himself from [the requirements of the Wage Act]." G.L. c. 149, § 148.

8 *E.g., Depianti,* 465 Mass. at 622 (the enactment of G.L. c. 149, § 148 "indicates that the Legislature was cognizant, in general, " . . . and intended to thwart such schemes."); *Camara,* 458 Mass. at 760-61 ("[a]n agreement to circumvent the Wage Act is illegal even when 'the agreement is voluntary and assented to.'").

from AARM and as the sole stockholder Lariviere clearly benefitted from those revenues. (Comp. ¶ 1 "his company"; Swamy Aff. ¶ 4). In addition to having drafted—or presented to AARM—the independent contractor mandate of the Consulting Agreement, as the sole officer and sole director of Haftware Corporation Lariviere "had the right to accept or reject the transaction." *Cf. Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 754-55 (2006), citing with approval *Uccello v. Golden Foods, Inc.*, 325 Mass. 319, 325 (1950).

Having acquiesced in the course of conduct by AARM pursuant to the terms of a contract he required and from which he derived benefit, Lariviere is estopped from contesting the independent contractor status of the service provider under the Consulting Agreement.

> It is a familiar principle of equity jurisprudence that long-continued acquiescence in a course of conduct by one interested in it, especially when the rights of others are affected thereby, will induce the court to refuse him relief upon his subsequent complaint of it.... It would be contrary to equity and good conscience to enforce such rights when a defendant has been led to suppose by the word, or action of the plaintiff that there was no objection to his operations....Having shared in its advantages, he cannot now be heard to challenge it. He had committed himself to a course inconsistent with subsequent repudiation.

Uccello v. Golden Foods, 325 Mass. 319, 325, 327-328, 330 (1950).[9]

Because there are, and can be, no allegation that AARM attempted an "end run" around the Wage Act, such an estoppel is completely consistent with both the unambiguous purposes of the Wage Act and the Supreme Judicial Court decisions on which Lariviere would inequitably seek to rely.

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[9] *Uccello* was a derivative suit brought by a minority stockholder who after being kicked out of the company sued seeking to have excessive salaries taken by the defendant stockholders returned to the corporation. The evidence was that the plaintiff and the defendants all had worked in the business and that while he worked in the business the plaintiff's.

> compensation was computed not upon the basis of what his services were reasonably worth but upon the basis of his stockholdings, what the other Stockholders were receiving and the ability of the company to pay.

325 Mass. at 326. While the compensation questioned by the derivative plaintiff was in excess of the value of the services and hence an improper constructive distribution to the controlling stockholders, having participated in and benefitted from the otherwise actionable conduct, equity would not permit the plaintiff to sue. *Id.*

In the present case, there is no allegation that AARM took any action attempting to "exempt itself" from § 148. It can hardly be liable for attempting an "end run" around § 148 if it did not draft the Consulting Agreement. In all the cases found by defendants' counsel (including all those cited to him by Lariviere's counsel) there is no indication that the unenforceable, end run "special contracts" were drafted by the defendant employer. There is no Supreme Judicial Court or Appeals Court case holding that an individual doing business as a one man corporation cannot bind himself to a contract which he proposes and which provides plainly for an independent contractor relationship. In this instance AARM does not even gain title to the intellectual product of the consultant's services for which, subject to specified, and in fact unsatisfied, conditions, it contracted to pay Haftware.

QUANTUM MERUIT (COUNT V)

The lack of privity with either AARM or Swamy also disposes of Lariviere's notion that he is entitled to be paid the fair value of his services under the theory of *quantum meruit*.

> Quantum meruit is a theory of *recovery,* not a cause of action. It is a claim independent of an assertion for damages under the contract, although both claims have as a common basis the contract itself. Recovery under this theory is derived from the principles of equity and fairness and is allowed where there is substantial performance but not full completion of the contract.

J. A. Sullivan Corp. v. Com., 397 Mass. 789, 793 (1986). For the same reasons discussed above as to the plaintiffs' Wage Act claim, it would be unconscionable to allow Lariviere to assert that he is individually entitled to the value of his services if he was not a party to the Consulting Agreement.

FRAUD (COUNT VI)

Lariviere alleges that both AARM and Swamy "knowingly and intentionally made misrepresentations that the Plaintiff [Lariviere] would be paid for the work he performed in

accordance with the terms of the contract"; "that AARM and Swamy failed to and refused to pay in full all of Lariviere's invoices"; "that Swamy made repeated false claims and representations that AARM would pay his invoices by [a specified time]"; and that Lariviere was damaged by his "reasonable reliance" on these misrepresentations.[10]

Because Lariviere does not allege any personal injury or property damage, he cannot sue either AARM or Swamy in tort. *FMR Corp. v. Boston Edison Co.*, 415 Mass. 393, 395 (1993)(economic loss rule).

On the undisputed facts, only Haftware has any claim for payment for Lariviere's services. It necessarily follows, therefore, that even assuming *arguendo* Lariviere's allegations pass Rule 12(b)(6) muster as false or misleading statements of material fact, as a matter of law Lariviere cannot have reasonably relied on such statements and/or have suffered any damages proximately caused from the defendants' statements.

SECTION 93A CLAIM (COUNT VII)

Haftware Corporation purports to have justiciable claims under G. L. c. 93A, which proscribes unfair business acts or business practices, against both AARM and Swamy for their alleged "fraudulent and deceitful acts … [by: (i)] breaching the implied covenant of good faith" in their refusal to pay Haftware for its services; (ii) their fraudulent misrepresentations to Lariviere; (iii) by "defrauding AARM board members and [AARM] investors;" and, (iv) "by failing … to pay its indebtedness to Haftware [corporation]."

These allegations simply do not "plausibly suggest … an entitlement to relief." *Iannacchino*, 451 Mass. at 636. Haftware cannot assert a 93A claim predicated on alleged fraud perpetrated on third parties. It is black letter law that a contract breach by itself will not

[10] Under the Consulting Agreement, Haftware was explicitly permitted to take on other consulting contracts while providing services to AARM. There is no allegation that Lariviere forebore other employment opportunities in reliance on these alleged assurances AARM would honor the Consulting Agreement.

constitute a 93A violation. *Whitinsville Plaza Inc. v. Kotseas*, 378 Mass. 85 (1979). A defendant's refusal to pay for services due to a legitimate dispute or because of an inability to pay does not make for a 93A claim. *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504 (1979) (dispute); *Pepsi-Cola Metropolitan Bottling Co., Inc. v. Checkers, Inc.*, 754 F. 2d 10, 18 (1st Cir. 1985) (inability to pay).

Even assuming *arguendo* that AARM committed actionable unfair and deceptive acts, the general conclusory allegation that Swamy is engaged in trade or business in Massachusetts does not pass muster under *Iannacchino*. There are no allegations that in any of her dealings with Haftware Swamy acted other than as an officer of AARM.

PIERCING CLAIM (COUNT VIII)

In Count VIII, both Haftware Corporation and Lariviere seek "to pierce the corporate veil of AARM and to hold Swamy liable for AARM's debts." Comp. ¶¶1, 15, 115-121. They allege that "[a]t all relevant times, Swamy was Chairperson and/or CEO and director of AARM [and that] Swamy exercised pervasive financial and managerial control over AARM." *Id.* ¶ 15. According to the Complaint, "[p]iercing the corporate veil is necessary to avoid a[n unstated] inequity." *Id.* ¶120.

> The doctrine of corporate disregard is an equitable tool that is only to be employed by courts "in rare situations, to ignore corporate formalities, where such disregard is necessary to provide a meaningful remedy for injuries and to avoid injustice.

Lipsitt v. Plaud, 466 Mass. 240, 253 (2013).

In order to survive a motion to dismiss an individual defendant[11] whose potential liability is predicated on a theory of piercing the corporate veil, there must be "more than mere labels and

[11] "[T]he doctrine of corporate disregard is not a cause of action but an equitable doctrine by which an act or obligation of a corporation giving rise to a cause of action may be charged to a principal of the corporation." *Id.* at 253 n. 14.

conclusions." *Id.* There must be specific factual allegations of a sufficient number of the twelve so-called corporate disregard factors[12] plausibly suggesting that the fully developed facts will "ultimately justify piercing the corporate veil and holding [Swamy] personally liable." *Id.* The factors are to be weighed and not just counted. *Id.*

In *Lipsitt,* the Supreme Judicial Court reversed a Superior Court's dismissal of an individual defendant who had allegedly controlled a corporate employer defending a common law contract claim for unpaid wages. Satisfying itself that the allegations demonstrated that application of the corporate disregard theory was necessary "to provide a meaningful remedy for injuries and to avoid injustice," the Supreme Judicial Court ruled that the specific allegations[13] of the complaint "touched on at least half of the [twelve] factors." *Id.* at 254.

By contrast, the Complaint in the present case is fatally flawed as it does not allege any specific factual component of any one of the twelve factors.[14] Even giving credence to any of the conclusory alleged factors, there can be no disregard of AARM's separate legal existence for the common law and/or 93A claims because the Complaint "does not allege any fraudulent or improper use of [AARM's] corporate form relevant to the contractual relationship at issue." *Tech Target, Inc. v. Spark Design LLC*, 746 F. Supp. 2d 353, 357 (D. Mass. 2010) (applying Massachusetts law).

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[12] "They are as follows: "(1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholders; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) use of the corporation in promoting fraud." *Id.* at 253.

[13] These included that: the dominant shareholder "Plaud intended to pay Lipsitt's back salary once [corporate] debts to Plaud were paid;" the corporation "had not filed any corporate tax returns;" and, "that any salary Lipsitt did in fact receive was paid from Plaud's personal checking account and without any withholdings." *Id.* at 253-54.

[14] The complaint alleges entirely on information and belief: "confused intermingling between AARM and Swamy's other business interests…;" "AARM has not maintained corporate formalities;" "AARM is undercapitalized in that AARM has never paid Plaintiffs for their services;" "there is active and pervasive control of a business entity by the same controlling persons;" there is "a confused intermingling of activity between the individual and the corporation with substantial disregard of the separate nature of the corporate entity, or serious ambiguity about the manner and capacity in which the corporation and the controlling person are acting." Comp. ¶¶ 115-120.

REACH AND APPLY (COUNT IX)

Haftware Corporation and Lariviere have named ZUCI Realty, LLC as a reach and apply defendant purportedly pursuant to G.L. c. 214 §3 (6), alleging that Swamy "owes the Plaintiff approximately $89,125 in principal, in addition to reasonable attorney's fees incurred in this action"; that "upon information and belief Swamy withheld or diverted income that was due to Lariviere in order to purchase" a number of commercial condominium units and that "Swamy is currently renting at least one of these office condominiums to AARM"; and, that "ZUCI [Realty LLC's] real property and other assets and receivables can be reached in equity and applied pursuant to [G.L.] c. 214 §3 (6) [to satisfy] the debt owed by Swamy to the Plaintiff [Lariviere]." Comp. ¶¶ 123-129.

Count IX must be dismissed for a host of reasons. First, because Swamy must be dismissed as a defendant as previously discussed, there is no conceivable basis to equitably attach any of her property. Second, assuming *arguendo* Swamy remains a defendant, the Court lacks subject matter jurisdiction under the statutory reach and apply statute for no less than two separate, independent reasons: Lariviere's Complaint alleges an adequate remedy at law, namely, that Swamy owns one or more real estate condominium units, *i.e,* property that may be taken on execution; and Lariviere, who is suing for damages under an alleged contract as well as for legal fees under 93A, is not suing for a debt within the meaning of the statute.

The Massachusetts reach and apply statute is subject to equitable limitations. *Tilcon Capaldi, Inc. v. Feldman*, 249 F. 3d 54, 60 (1st Cir. 2001). Since Lariviere contends that Swamy owns real estate that may be attached and taken on execution, he lacks standing to invoke the equity jurisdiction of this Court.[15]

[15] At common law, only the property of a defendant adjudged a "debtor" that cannot be seized on execution may be equitably attached by a judgment creditor. *Wax v. Monks*, 327 Mass. 1, 3 (1951).

Because the statutory reach and apply action[16]

> enlarges the equity jurisdiction of the Massachusetts courts, ... it necessarily follows that for the Massachusetts courts to have jurisdiction under it there must be compliance with the statutory requirements.

Kaufman v. Eastern Baking Co., 146 F.2d 826, 829 (1st Cir. 1945).

> The suit, pursuant to G.L. c. 214 §3(6), is a two-step proceeding wherein the plaintiff, in the first step, must show the existence of a debt owed by... the principal defendant. ...The second step involves the process of satisfying the debt out of property held by one who owes a debt to the principal defendant. ...The plaintiff must show that this property, by its nature, is incapable of attachment or of taking on execution in a legal action. ... Furthermore, the holder of this property must be joined as a party defendant in an action to reach and apply, given his interest in the issue of his indebtedness to the principal defendant and in the disposition of the property in his possession.

Massachusetts Elec. Co. v. Athol One Inc., 391 Mass. 685, 687-688 (1984).

Lariviere's damage claims for both breach of contract and 93A do not constitute a "debt" for purpose of the statutory reach and apply action because there is no allegation that Swamy expressly agreed either to pay a specific sum or to effectively indemnify Lariviere. *In re Rare Coin Galleries of America, Inc.*, 862 F.2d 896, 903-04 (1st Cir. 1980) ("remedy of a statutory bill to reach and apply is not available" in an action "contain[ing] contract, tort and statutory claims not reduced to judgment"). *See Garsoon v. American Diesel Engine Corp.*, 310 Mass. 618, 622-623 (1942) (jurisdiction lies under G.L. c. 214 §3(6) for claim for "liquidated damages" where the contract was to deliver a promissory note of a *specific* amount); *H. G. Kilbourne Co. v. Standard Stamp Affixer Co.*, 216 Mass. 118, 121 (1913).[17]

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[16] Because G.L. c. 214 §3(7) does not authorize an equitable attachment of the membership interests of limited liability companies, the reach and apply action lies, if at all, under §3(6).

[17] While the statute is to be broadly construed there can be no jurisdiction under G.L. c. 214 §3(6) for contract claims unless the action seeks to enforce a liquidated damage clause or where there is

> an agreement for the payment of money which will require some calculation or determination of extraneous facts before its exact amount can be ascertained, provided the debtor has made a distinct and binding promise to pay.

Id. at 121.

CONCLUSION

Counts I, II, V, VI, VII, VIII and IX of the plaintiffs' Complaint all fail as a matter of law and/or because they fail to state a claim upon which the Court may grant relief. Judgment of dismissal should be entered in favor of the individual defendant Gitanjaly Swamy on all counts pleaded against her because like the individual plaintiff, she was not a party to the Consulting Agreement between Haftware and AARM. Judgment should be granted to the defendants on Counts I and II, Lariviere's Wage Act claims, and Count V, Lariviere's claim in quantum meruit, because based on the undisputed facts, Lariviere was not an employee of either AARM or Swamy. Count VI, Lariviere's fraud claim, should be dismissed because only Haftware has any claim for payment for Lariviere's services. Count VII, Haftware's 93A claim, and Count VII, the plaintiffs' claim for piercing the corporate veil, should be dismissed because the plaintiffs fail to allege sufficient facts to support such claims. Count IX, the plaintiffs' reach and apply claim, should be dismissed because the Court lacks subject matter jurisdiction.

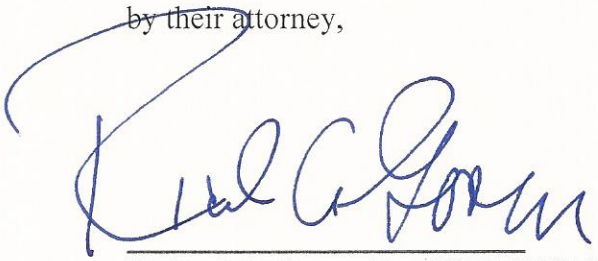
For these and the additional foregoing reasons, the defendants, AARM Corporation and Gitanjali Swamy, and the reach and apply defendant, ZUCI Realty, LLC, respectfully request that the Court grant their motions to dismiss.

Respectfully submitted,

AARM CORPORATION, and
GITANJALI SWAMY,
Defendants,

And,
ZUCI REALTY, LLC,
Reach and Apply Defendant,

by their attorney,



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