

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LYMAN S.A. PERRY and
KATE PERRY,
Plaintiffs,

v.

MARKMAN CAPITAL MANAGEMENT, INC., and
RICHARD LONDON
Defendants.

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CIVIL ACTION
NO. 02-744

Memorandum and Order

YOHN, J.

October ____, 2002

Plaintiffs, Lyman S.A. Perry and Kate Perry, filed this action against defendants, Markman Capital Management, Inc. (“Markman Capital”) and Richard London (“London”), alleging four counts: (1) breach of contract; (2) negligence; (3) breach of fiduciary duty; and (4) violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law (“UTPCPL”). Presently before the court is defendants’ motion to dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(2) and 12(b)(6) respectively. In the alternative, defendants filed a motion to stay pending arbitration and for a transfer of venue.

For the reasons that follow, the motion to dismiss for lack of personal jurisdiction will be denied as to defendant Markman Capital and granted as to defendant London. The motion to dismiss for failure to state a claim upon which relief may be granted will be denied, as will the

motion to stay pending arbitration and the motion for transfer of venue.

BACKGROUND

I. Factual History

Plaintiffs are adult citizens of Pennsylvania. Compl. ¶ 1. Defendant Markman Capital is a Minnesota investment management firm, with its principal place of business in Minnesota. Compl. ¶ 2 and Def. Mot. at 2. Defendant London is an adult citizen of Minnesota and the chief financial officer of Markman Capital. Def. Mot. Ex. A (Affid. of Richard London).

Plaintiffs maintained three separate accounts with defendant Markman Capital. On January 9, 1998, plaintiffs executed a Private Account Services Investment Agreement (“Joint Agreement”) with defendant Markman Capital for a joint account (“Joint Account”). Compl. ¶ 6. Under the Joint Agreement, Markman Capital was to provide investment advisory services to plaintiffs for a fee. *Id.* ¶ 7. The Joint Agreement was signed by the plaintiffs and the president of defendant Markman Capital, Robert Markman. *Id.* Ex. A. Under the authority of the power of attorney that plaintiffs gave it, defendant Markman Capital held and traded the Joint Account at the brokerage firm of Charles Schwab & Co., Inc. (“Schwab”). *Id.* ¶ 8.

Plaintiffs each also executed individual private agreements (“Ms. Perry Agreement” and “Mr. Perry Agreement” respectively) with Markman Capital for investment advisory services, which were substantially identical to the Joint Agreement. *Id.* Pursuant to the Ms. Perry Agreement, Markman Capital was to provide investment advisory services for Ms. Perry’s IRA account. *Id.* ¶ 9. Markman Capital also held and traded this IRA account at Schwab, under the authority of a power of attorney. *Id.* ¶¶ 9 & 10. Pursuant to the Mr. Perry Agreement, Markman

Capital was to invest his IRA Account in its mutual funds. *Id.* at 11.

In each agreement, plaintiffs indicated the levels of risk and volatility they were willing to accept by initialing “LP” next to their choice. *Id.* at ¶ 12. The Joint Agreement shows that plaintiffs chose “low” risk. *Id.* ¶ 12 and Ex. A. Within that level of risk, they chose “moderate” volatility, defined on the face of the agreement as “potential short-term downside volatility of 10-15%, potential return over a market cycle of 13-15%”. *Id.* ¶ 12 and Ex. A.

Defendant London was the authorized representative for Markman Capital who managed plaintiffs’ accounts. *Id.* at ¶ 16. London was registered with the Pennsylvania Security Commission from December 15, 1995 through December 11, 1997. Pl. Resp. Ex. D.

From approximately February 2000 through September 2001, plaintiffs incurred losses in the three accounts totaling \$1,110,000.¹ *Id.* ¶ 17. Plaintiffs allege that these losses resulted directly from defendants’ improper managing of their accounts. *Id.* ¶ 18. Specifically, they allege that defendants invested in securities and mutual funds not suited to plaintiffs’ risk objectives. *Id.* Plaintiffs further allege that defendants “traded on margin”² without authority to do so. *Id.* In addition, plaintiffs assert that they made defendants aware of two important

¹ The following losses were attributable to each account: (1) Joint Account - \$840,000; (2) Ms. Perry Account - \$210,000; (3) Mr. Perry Account - \$60,000. Compl. ¶ 17.

² Margin trading is a type of trading subject to special regulations. It can be conducted pursuant to an actual margin account or a typical account that expressly entails the authority to trade on margin. In such trading, a customer’s trading is secured by the securities they acquire. “Customers generally use margin to leverage their investments and increase their purchasing power. At the same time, customers who trade securities on margin incur potential for higher losses.” Official website of NASD, which was created in 1938 by the Maloney Act amendments to the Securities Exchange Act of 1934 and is charged with regulating the securities industry and the Nasdaq Stock Market, *available at* <http://www.nasdr.com/2535.asp> (last modified April 7, 1999).

concerns. First, they allege that they told defendants on numerous occasions that the assets under Markman Capital's management constituted their entire life savings. *Id.* at 20. Second, Markman Capital was aware that capital needed to be preserved for plaintiffs' retirements, which explained their desire for conservative investments with low risk and moderate volatility as set forth in the agreements. *Id.* ¶ 21. Finally, plaintiffs aver that defendants never informed them of the risks involved in the type of trading that defendants conducted with plaintiffs' accounts. *Id.* ¶ 22.

II. Procedural History

Based on these allegations, plaintiffs filed this action against both defendants. In response, defendants filed a motion to dismiss for lack of personal jurisdiction and for failure to state a claim upon which relief can be granted. Specifically, defendants argue that (1) the court lacks personal jurisdiction over both defendants and (2) the breach of contract claim against defendant London and the UTPCPL claim against both defendants fail to state a claim upon which relief can be granted. In the alternative, defendants ask the court to stay the action pending arbitration based on an arbitration agreement between plaintiffs and defendants or transfer the case to the District of Minnesota as the interests of convenience and justice demand.

DISCUSSION

I find that defendant Markman Capital consented to the jurisdiction of the court, and thus exercising that jurisdiction is proper. In contrast, I find that the court lacks jurisdiction over defendant London because his contacts with Pennsylvania were wholly within his corporate capacity which triggers the protection of the corporate shield doctrine. Therefore, I will deny the

motion as to defendant Markman Capital, and grant it as to defendant London. Because I conclude that plaintiff has pled facts that can reasonably be interpreted to state a claim under the UTPCPL, I will deny defendant's motion to dismiss on this ground.³ In addition, I conclude that there was no agreement between plaintiffs and defendant Markman Capital to arbitrate disputes between them, and thus I will deny the motion to stay pending arbitration. Finally, I conclude that defendant has failed to show that convenience of the parties or justice require a transfer of venue to the district of Minnesota and, therefore, I will deny that motion.

I. Personal Jurisdiction

A. Standard of Review

Defendants have filed a motion to dismiss for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Once a defendant raises a jurisdictional defense, the burden shifts to the plaintiffs to demonstrate that the relevant jurisdictional requirements are met. *Mellon Bank (East) PSFS v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992); *Gehling v. St. George's Sch. of Med., Ltd.*, 773 F.2d 539, 542 (3d Cir. 1985). Plaintiffs must support this burden through "sworn affidavits or other competent evidence." *North Penn Gas Co. v. Corning Natural Gas Corp.*, 897 F.2d 687, 689 (3d Cir. 1990) (citations omitted). Plaintiffs meet their burden by making a prima facie showing that jurisdiction exists. *Farino*, 960 F.2d at 1223.

B. Analysis

Because "a district court sitting in diversity applies the law of the forum state in determining whether personal jurisdiction is proper," I look to the laws of Pennsylvania to

³ Having dismissed all claims against defendant London, the court addresses the remaining motions only with respect to defendant Markman Capital.

resolve this issue. *Vetrotex Certainteed Corp. v. Consolidated Fiber Glass Prod. Co.*, 75 F.3d 147, 150 (3d Cir. 1996). In Pennsylvania, jurisdiction can be established by either of two means: (A) through one of the three traditional bases for jurisdiction, namely domicile or presence in the forum, or consent, *see* 42 Pa. C.S.A. § 5301(1) (Purdon's 1981) (codifying these three traditional common law bases), or (B) through applying the alternative "minimum contacts" due process test. *See, e.g., Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001); *Vetrotex*, 75 F.3d at 150. When jurisdiction is premised on one of the aforementioned traditional bases, the due process requirements of personal jurisdiction are instantly satisfied because these bases are traditional for the very reason that they coincide with principles of constitutional due process. *See Bane v. Netlink, Inc.*, 925 F.2d 637, 641 (1991) (noting that consent is "a traditional basis for assertion of jurisdiction long upheld as constitutional" and thus forgoing a separate due process analysis).

In contrast, jurisdiction premised on the "minimum contacts" doctrine entails two steps. First, a defendant's contacts with the forum state must satisfy the forum state's "long-arm" statute which grants the court power over out-of-state defendants. *Imo Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 (3d Cir. 1998). Second, defendant's contact must be constitutionally sufficient, meaning that exercise of jurisdiction must satisfy due process in that it must comport with "fair play and substantial justice." *See, e.g., World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980); *Burger King Corp. v. Rudzewicz* 471 U.S. 462, 476 (1985)); *see also General Elec. Co. v. Deutz AG.*, 270 F.3d 144, 150 (3d Cir. 2001) (defendant's contacts with forum must be such that the defendant would "reasonably anticipate being haled into court there") (quoting *World-Wide Volkswagen*, 444 U.S. at 297)). The Pennsylvania long-arm statute permits its courts to exercise jurisdiction "to the fullest extent allowed under the Constitution of

the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.” Pa.C.S.A. 5322(b) (Purdon’s 1981); *see also Remick*, 238 F.3d at 255(stating that courts may “exercise personal jurisdiction over nonresident defendants to the constitutional limits of the due process clause fo the fourteenth amendment”). Consequently, the two-step inquiry “is collapsed into a single step,” requiring the court to determine if personal jurisdiction is consistent with the dictates of due process. *Imo*, 155 F.3d at 259 (explaining this effect under the New Jersey long-arm statute, which like Pennsylvania’s, “permits the exercise of personal jurisdiction to the fullest limits of due process”).

As its name reflects, personal jurisdiction is personal to each defendant. Accordingly, I will apply this analysis to the two defendants separately in turn.

1. Defendant Markman Capital

The court’s jurisdiction over defendant Markman Capital is proper because it expressly consented to jurisdiction by filing with the Pennsylvania Securities Commission for investment advisor registration.⁴ Pl. Resp. Ex.C at 1-2. Under 42 Pa. C.S.A. § 5301(a)(2)(ii), which, *inter alia*, codifies the three traditional bases for jurisdiction, Pennsylvania courts may exercise general

⁴ It is possible that the effect of Markman Capital’s filing the Uniform Application for Investment Advisor Registration with the Pennsylvania Security and Exchange Commission is to qualify it as a foreign corporation conducting business in Pennsylvania. If so, jurisdiction would unquestionably be proper. *See Bane*, 925 F.2d at 640 (citing the “purposeful availment” language of *Burger King*, 471 U.S. at 475.). However, as the official effect of this filing is unclear, the court does not base its decision on this reasoning.

In addition, defendant Markman Capital would almost certainly be subject to jurisdiction based on the alternative “minimum contacts” doctrine. Consent is a preferable basis, however, for the court’s finding as it is “a traditional basis for [the] assertion of jurisdiction long upheld as constitutional.” *Bane*, 925 F.2d at 641.

jurisdiction over a defendant corporation based upon “[c]onsent, to the extent authorized by the consent.” 42 Pa. C.S.A. § 5301(a)(2)(ii). On February 18, 2000, defendant Markman Capital filed an amended Uniform Application for Investment Advisor Registration with the Pennsylvania Security and Exchange Commission. Pl. Resp. Ex. C. This official filing included a provision that, by its plain language, expressed consent to the personal jurisdiction of any court sitting in Pennsylvania of competent jurisdiction and proper venue for any claims of violations of Pennsylvania law.⁵ Plaintiffs’ claims include violations of both Pennsylvania statutory and common law.⁶ In addition, the appointment of a representative to accept process, also included in this same provision, is further indication of consent. *Bane*, 925 F.2d at 641. Thus, defendant

⁵ Item 7 of this document required Markman Capital to indicate the current status of its investment advisor registration with respect to each of the United States. On this item, Markman Capital indicated that it was “registered” in Pennsylvania. The jurisdictional provision in this application states as follows:

“For the purposes of complying with the laws of this State(s) I have marked in Item 7 [Pennsylvania included], . . . I hereby . . . irrevocably appoint the administrator of each of those State(s), or such other person designated by law, and the successors in such office, my attorney in said State(s) upon whom may be served any notice, process, or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of those State(s) and I do hereby consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue within said State(s) by service of process upon said appointee with the same effect as if I were a resident in said State(s) and has lawfully been served with process in said State(s).”

⁶ Jurisdiction would also likely be proper because plaintiffs claims are “in connection with” securities’ transactions. The court’s decision, however, is based on the more general provision that follows. The court interprets “laws of those state(s)” in this provision to encompass both statutory and case law; there is no apparent reason to draw a distinction between the two, nor does either party suggest the court should.

Markman Capital expressly consented to the court's jurisdiction by filing this application.⁷

Therefore, plaintiffs have satisfied their burden of establishing a prima facie case of personal jurisdiction over defendant corporation Markman Capital.⁸

2. Defendant Richard London

Plaintiffs failed to make a prima facie showing that personal jurisdiction over defendant London is proper. Finding personal jurisdiction proper over a defendant corporation, such as Markman Capital, does not necessarily establish the same over an employee or agent of that corporation. *Calder v. Jones*, 465 U.S. 783, 790 (1984). The individual defendant's relationship with the forum must be evaluated separately.

Because no traditional basis for jurisdiction exists over defendant London,⁹ the only

⁷ The original date of defendant Markman Capital's registration in Pennsylvania is not provided by the pleadings. However, this information is not necessary to determine the jurisdictional issue because personal jurisdiction is determined by a corporation's status at the time the relevant event(s) occurred. *Bane*, 925 F.2d at 640. According to the complaint, the actions of defendants that gave rise to their claims began in February 2000 and continued through September 2001. Compl at 4. Defendant Markman Capital's application was notarized on February 18, 2000 and sent to the Pennsylvania Securities Commission on February 28, 2000. Pl. Resp. Ex. C. at 1. The application indicates that this was an amendment to a previous filing. Thus, the original filing that activated defendant's registered status occurred before February 18, 2000. Therefore, Markman Capital was registered at the time of the alleged wrongful conduct and personal jurisdiction is proper.

Furthermore, defendant Markman Capital's current status in Pennsylvania is irrelevant because the "discontinuance of the acts . . . [which confer jurisdiction over corporations] shall not affect jurisdiction with respect to any act, transaction or omission occurring during the period such status existed." 42 Pa.C.S.A. § 5301(b).

⁸ Having found that this defendant's consent establishes that jurisdiction is proper, I will refrain from engaging in the alternative minimum contacts analysis, the second possible basis for jurisdiction.

⁹ Plaintiffs assert that defendant London also consented to jurisdiction by virtue of his registration with the Pennsylvania Securities Commission. Pl. Resp. at 5. However, in contrast to defendant Markman Capital, there is insufficient competent evidence that defendant London

possible source for the court’s jurisdiction is under the “minimum contacts” doctrine. However, defendant London’s contacts with Pennsylvania, all of which were within his corporate capacity, do not support the court’s jurisdiction over him.

As explained above, under Pennsylvania law, when determining jurisdiction under the minimum contacts doctrine, the proper test is whether defendant’s contacts are constitutionally sufficient such that exercising personal jurisdiction would comport with the fairness and reasonableness principles of due process. When evaluating the constitutional sufficiency of defendant’s contacts, courts evaluate whether the “non-resident defendant has ‘purposefully directed’ his activities at a resident of the forum and the injury arises from or is related to those activities.” *General Elec.*, 270 F.3d at 150 (citing *Burger King*, 471 U.S. at 472).¹⁰ Accordingly, jurisdiction is proper if defendant London’s contacts with Pennsylvania constitute purposeful availment, and it is fair and reasonable to hale him before the court.

When an officer or employee of a corporation is a defendant, however, the “corporate shield” doctrine, must be considered in the jurisdictional analysis. This doctrine protects officers

consented to the court’s jurisdiction. Unlike the documentation regarding defendant Markman Capital, the sparse document that plaintiffs have provided with respect to defendant London’s registration with Pennsylvania does not contain any provision bearing expressly on jurisdiction. Pl. Resp. Ex. D. Furthermore, the effect of the document is unclear. Thus, there is insufficient evidence of consent. It is undisputed that defendant London was neither present nor domiciled in Pennsylvania. Consequently, none of the traditional bases for personal jurisdiction is present.

¹⁰ This type of judicial authority, specific jurisdiction, exists when the defendant has “‘purposefully directed’ his activities at residents of the forum and the litigation results from alleged injuries that ‘arise out of or relate to’ those activities.” *Burger King*, 471 U.S. at 472; *see also* 42 Pa.C.S.A. § 5322 (Purdon’s 1981) (codifying this doctrine in long-arm statute). This is distinguished from general jurisdiction which arises only from “continuous and systematic” contacts with the forum and effects jurisdiction over any claim against the defendant, regardless of its relationship to defendant’s contacts with the forum state. *Pennzoil*, 149 F.3d at 200-01; *Farino*, 960 F.2d at 1222.

and directors by limiting the extent to which their corporate actions may be used to exercise jurisdiction over them individually. *See Babich v. Karsnak*, 528 A.2d 649, 653 (Pa. Super. 1987) (explaining two different approaches to applying the corporate shield, one an absolute protection, the other subject to limited exceptions); *see also D & S Screen Fund II v. Ferrari*, 174 F. Supp.2d 343, 347 (E.D. Pa. 2001) (applying corporate shield doctrine); *TJS Brokerage & Co., Inc. v. Mahoney*, 940 F. Supp. 784, 788-89 (E.D. Pa. 1996) (same). Under the general rule of this doctrine, the actions of corporate employees and officers that are conducted within their corporate capacity do not constitute contacts with the forum that support jurisdiction over them.¹¹ *Ferrari* 174 F. Supp. 2d at 347; *Mahoney*, 940 F. Supp. at 789. This doctrine serves to prevent the untenable choice for officers to either “disassociate themselves from the corporation or defend the propriety of their conduct in a distant forum.” *PSC Prof'l Servs. Group, Inc. v. American Digital Sys., Inc.*, 555 F. Supp. 788, 793 (E.D.Pa. 1983).

Plaintiffs did not brief the issue of the corporate shield’s protection of defendant London as an officer of Markman Capital. As such, they assert no reasons that the general rule should not apply to their claims against London, which are based upon his corporate activities. Furthermore, the policy underlying the corporate shield doctrine is particularly applicable this action against him. The record evidence does not disclose anything other than that the first time

¹¹ Although plaintiffs repeatedly assert that defendant London acted both within and outside the scope of his employment, none of the allegations or supporting evidence demonstrate any conduct outside the scope of his employment with Markman Capital. “[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant’s Rule 12(b)(2) motion to dismiss for lack of in personam jurisdiction. Once the motion is made, plaintiff must respond with actual proofs, not mere allegations.” *Time Share Vacation Club v. Atlantic Resorts, LTD.*, 735 F.2d. 61, 66 (3d Cir. 1984). Consequently, the court’s analysis addresses the propriety of jurisdiction over defendant London for acts within the scope of his employment.

defendant London was introduced to plaintiffs and their account was after their contract with Markman Capital was finalized. At that point, defendant London would have been placed in this dilemma, the very dilemma that the corporate shield doctrine seeks to prevent, unless the court holds that jurisdiction is improper. Accordingly, with no reasons provided to find an exception to its protection, the corporate shield doctrine remains intact. There are no non-corporate activities for the court to consider that connect defendant London to Pennsylvania, which therefore divests the court of personal jurisdiction over him.¹²

In conclusion, plaintiffs have met their burden of proving that jurisdiction is proper over defendant Markman Capital, but have failed with respect to defendant London. Therefore, defendants' motion to dismiss for lack of personal jurisdiction is denied as to defendant Markman Capital and granted as to defendant London.

II. Failure to State a Claim Upon Which Relief Can be Granted

A. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint. *Holder v. City of Allentown*, 987 F.2d 188, 194 (3d Cir. 1993). Accordingly, the court “must accept as true all of the factual allegations in the complaint as well as the reasonable inferences

¹² Where a plaintiff brings multiple counts, a claim specific analysis is often necessary because “a conclusion that the District Court has personal jurisdiction over one of the defendants as to a particular claim . . . does not necessarily mean that it has personal jurisdiction over that same defendant as to . . . [plaintiff’s] other claims.” *Remick*, 238 F.3d at 255; *see also Gehling v. St. Georges School of Medicine, LTD.*, 773 F.2d 539, 544 (3d Cir. 1985) (finding jurisdiction lacking for contract and negligence claims but proper for misrepresentation and emotional distress claims). Where, however, the court determines that the corporate shield will remain intact for a particular defendant, and thus there are no non-corporate activities to consider, this claim-specific analysis is unnecessary.

that can be drawn from them.” *Doe v. Delie*, 257 F.3d 309, 313 (3d Cir. 2001) (citing *Moore v. Tartler*, 986 F.2d 682, 685 (3d Cir. 1993)). After so doing, the court must deny the motion unless “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *Doe*, 257 F.3d at 313 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). This does not mean, however, that the court must accept as true “unsupported conclusions and unwarranted inferences.” *Schuylkill Energy Res., Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405, 417 (3d Cir. 1997). As indicated by our court of appeals, “courts have an obligation in matters before them to view the complaint as a whole and to base rulings not upon the presence of mere words but, rather, upon the presence of a factual situation which is or is not justiciable. [They] do draw on the allegations of the complaint, but in a realistic, rather than a slavish, manner.” *City of Pittsburgh v. West Penn Power Co.*, 147 F.3d 256, 263 (3d Cir. 1998).

B. Analysis

As I have dismissed all of plaintiffs’ claims against defendant London for lack of personal jurisdiction, I will address this 12(b)(6) motion and all subsequent motions involved in this opinion only as they apply to claims against defendant Markman Capital. Defendant’s 12(b)(6) motion relates to defendant Markman Capital with respect to only one of the four claims: violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law. 73 PA. CONS. STAT. ANN § 201-1 et. seq. (West 1993); Def. Mot. at 11. Plaintiffs allege facts that, if proven, will establish a valid claim under the UTPCPL, and thus dismissal is improper.

The UTPCPL establishes a private right of action for “[a]ny person who purchases . . . services primarily for personal, family or household purposes[,] and thereby suffers any

ascertainable loss” that results from any person’s use of “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce as defined by subclauses (i) through (xxi) of clause (4) of section 2 of this act.” §§ 201-9.2(a) & 201-3.

“Trade” and “commerce” are defined to include “the sale or distribution of any services.” § 201-2(3). Clause (4) of section 2 enumerates many specific unlawful methods, then includes a catch-all prohibition against “any other fraudulent or deceptive conduct which creates a likelihood of confusion or of misunderstanding.” § 201-4(xxii).

Applying the statutory language, plaintiffs successfully state a claim for which relief can be granted. Plaintiffs purchased Markman Capital’s investment services for the primary personal purpose of increasing their retirement income. Plaintiffs aver facts that could reasonably be construed as fraudulent or deceptive conduct by defendant Markman Capital that could cause confusion or misunderstanding, including: (1) investing beyond the authority granted and in securities that contradicted plaintiffs’ goals; and (2) failing to inform them of risks involved. Compl. ¶¶ 18 & 41(b). In a claim based on analogous facts, another court in this circuit concluded that “plaintiffs appear to meet all the requirements . . . They allege that they purchased the defendant’s brokerage services for their personal portfolio and that they suffered injury because the defendant engaged in fraudulent conduct in connection with the handling of their account.” *Denison v. Kelly*, 259 F. Supp. 199, 202 (M.D. Pa. 1991). Similarly, plaintiffs here could establish a valid claim under this act, which deems dismissal on this ground improper.¹³

¹³ This is especially true in light of the “broad remedial aim of the act [and] the liberal reading it has received by the Pennsylvania Supreme Court . . .” *Advest Inc. v. Kirschner*, No. 92-6656, 1994 WL 18592, at *2 (E.D. Pa. Jan. 21, 1994).

Defendant makes only one argument in its motion to dismiss this claim. It argues that relief cannot be granted on this claim because the UTPCPL “does not apply to the purchase of securities.”¹⁴ Def. Mot. at 11. The weight of authority in this circuit has held that the UTPCPL applies to “services provided by the brokerage house,” as distinguished from “fraud relating to the securities themselves.” *Algrant v. Evergreen Valley Nurseries Ltd. P’ship.*, 126 F.3d 178, 187 (3d Cir. 1997) (citing *S. Kane & Son Profit Sharing Trust v. Marine Midland Bank*, No. 95-7058, 1996 WL 200603, at *3 (E.D. Pa. Apr. 25, 1996); *Advest, Inc. v. Kirschner*, No. 92-6656, 1994 WL 18592, at *2 (E.D. Pa. Jan. 21, 1994); *McCullough v. Shearson Lehman Bros., Inc.*, 1988 WL 23008, at *4 (W.D. Pa. Feb. 18, 1988)).

In the strikingly similar case of *Denison*, the plaintiffs alleged that the defendant brokerage house “had purchased investments inappropriate to the plaintiffs’ stated desire for long term growth and appreciation.” 759 F. Supp. at 200. Likewise, plaintiffs in this case aver in their complaint that their losses “were a direct result of Defendants’ improper handling of [their] accounts, including, but not limited to, investing in securities and mutual funds unsuitable for Plaintiffs’ risk objective.” Compl. ¶ 18. In both instances, plaintiffs allege malfeasance in a broker’s servicing of securities.¹⁵ As the Third Circuit noted in *Algrant*, this is the crucial

¹⁴ Another issue that might bear on the validity of this claim is the choice-of-law provision for Minnesota law in the contract between plaintiffs and defendant. Compl. Ex. A. Defendant, however, does not raise this issue in its motion, thus the court will refrain from addressing it.

¹⁵ For an in depth and compelling analysis of the reasoning underlying construction of the UTPCPL that results in this distinction, see the *Denison* decision. 759 F. Supp. at 202-05; see also *Advest*, No. 92-6656, 1994 WL 18592, at *2 (“Had the legislature wished to exclude securities transactions from the broad sweep of the act, it could have done so expressly, as it did for [other exclusions] but it did not”).

distinction because such claims are covered by the UTPCPL. 126 F.3d at 187. This distinction is the basis for the statute's application to plaintiffs' claim here.

Therefore, the court cannot say "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Doe*, 257 F.3d at 313 (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)). Accordingly, the motion to dismiss this claim will be denied.

III. Motion to Stay Pending Arbitration

The court refuses to grant this motion because it finds that no agreement to arbitrate existed between plaintiffs and defendant Markman Capital. In determining if a claim must be submitted to arbitration, the court must inquire "whether the parties entered into an agreement to arbitrate." *Statefarm Mutual Automobile Insur. Co. v. Coviello*, 233 F.3d 710, 717 (3d Cir. 2000). It is undisputed that there is no arbitration clause in the contract between plaintiffs and defendant. Defendant argues instead that an arbitration agreement between the parties exists by virtue of the limited power of attorney that plaintiffs executed with Schwab for the purpose of authorizing defendant Markman Capital to execute trades on plaintiffs' behalf. Compl. Ex. B. However, this fails to demonstrate an agreement to arbitrate between plaintiffs and defendant Markman Capital.

Generally, non-signatories may not enforce arbitration agreements. *Jairrett v. First Montauk Securities Corp.*, 153 F. Supp. 2d 562, 581 (2001) (citing *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1296 (3d Cir. 1996)). There are, however, limited exceptions to this rule when such an intention to create a beneficiary is "express and unequivocal." *Kaplan v. First*

Options of Chicago, Inc., 19 F.3d 503, 1512 (3d Cir. 1994). The limited power of attorney that plaintiffs executed with Schwab contains an apparently valid arbitration agreement. Yet, it is undisputed that defendant Markman Capital is not a signatory to the limited power of attorney between plaintiffs and Schwab. Compl. Ex. A. Furthermore, there is no evidence that plaintiffs intended defendant to be a beneficiary of its arbitration agreement with Schwab; in fact, there is evidence to the contrary.

Plaintiffs' Limited Power of Attorney contains an arbitration agreement stating "I agree to settle by arbitration any controversy between myself and Schwab or any of Schwab's officers, directors, employees, or agents . . ." The plain language of this agreement excludes defendant Markman Capital from its coverage. Markman Capital is not Schwab, nor is it an officer, director, employee, or agent of Schwab. Defendant concedes this with its silence on this issue.

In construing similar agreements in situations involving three-party relationships of this type (client, investment manager/broker, and brokerage firm), the majority of courts hold that absent clear intent to include the investment advisory firm as a beneficiary, arbitration agreements between the client and brokerage firm do *not* apply to disputes between the client and his/her investment manager. *See, e.g., Jairett*, 153 F. Supp. 2d at 582; *Adams & Laidlaw, Adams & Peck, Inc.*, Civ. A. No. 87-0165, 1987 WL 13388, at 2 (E.D. Pa. 1987), *aff'd* 845 F.2d 1009 (3d Cir. 1988); *Antinoph v. Laverell Reynold Sec., Inc.*, 703 F. Supp. 1185, 1191 (E.D. Pa. 1989); *see also Taylor v. Investors Assoc., Inc.*, 29 F.3d 211, 213, 216 (5th Cir. 1994); *O'Connor v. R.F. Lafferty & Co.*, 965 F.2d 893, 902 (8th Cir. 1992); *McPheeters v. McGinn, Smith, & Co., Inc.*, 953 F.2d 771, 773-74 (2d Cir. 1992); *Mowbray v. Moseley, Hallgarten, Estabrook & Weeden, Inc.*, 795 F.2d 1111, 1117 (1st Cir. 1986).

Defendant relies solely on one case to support the opposite conclusion. Def. Reply at 3-6 (discussing *Okcuoglu v. Hess, Grant & Co., Inc.*, 580 F. Supp. 749 (E.D. Pa. 1984)). A careful reading of this case, however, reveals that the court's justification for so ruling is inapplicable to this case. In *Okcuoglu*, the court based its holding in part on the fact that the broker in the position of investment manager was not only an agent of the client, but was also an agent of the clearing broker. 580 F. Supp. at 751-52; *see also Jairett*, 153 F. Supp. 2d at 583 (explaining this determinative distinction). The same cannot be said of the relationship between defendant Markman Capital and Schwab. There is no assertion on the part of defendant that it was an agent of Schwab. Furthermore, the very document that contains the arbitration agreement upon which defendant is relying in this motion expressly disclaims any association between Schwab and Markman Capital. Compl. Ex. A. Under its general terms and conditions, it states that "Investment Manager is not affiliated with or controlled or employed by Schwab." *Id.* Just in case this is unclear, it details further the extent of the disassociation by saying "Schwab will not supervise or monitor trading by Investment Manager." *Id.* If any doubt remains as to this disassociation, it repeats this same point two more times in the same section. *Id.*

Accordingly, the agreement with Schwab simply fails to evidence an intent to agree to arbitrate with Markman Capital. Because "[n]o party can be forced to arbitrate unless the party has entered into an agreement to do so," *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 511 (3d Cir. 1990), the motion to stay pending arbitration will be denied.

IV. Motion for Transfer of Venue to District of Minnesota

In addition to the aforementioned issues, defendant seeks a transfer of venue to

Minnesota. Defendant does not assert that venue is improper, but rather that venue is more appropriate in Minnesota. Def. Mot. at 16. Applying the relevant venue statute, the court finds that the circumstances do not warrant a transfer of venue.

The statutory section governing transfer of venue states that “[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” 28 U.S.C.A. § 1404(a). The decision to transfer based on 1404(a) lies within the discretion of the trial court. *Jumara v. State Farm Insur. Co.*, 55 F.3d 873, 879 (3d Cir. 1995); *Shutte v. Armco Steel Corp.*, 431 F.2d 22, 25 (3d Cir. 1970). This discretion, however, is to be exercised in light of the “black letter law that a plaintiff’s choice of proper forum is a paramount consideration in any determination of a transfer request, and that choice should not be lightly disturbed.” *Shutte* 431 F.2d at 25; *see also Elbeco Inc. v. Estrella de Plat Corp.*, 989 F. Supp. 669, 679 (E.D. Pa. 1997) (same). The defendant bears the burden of proving that convenience and justice would be served by transferring the action to another district. *In re United States*, 273 F.3d 380, 388 (3d Cir. 2001); *Shutte* 431 F.2d at 25. Importantly, [t]he purpose of transfer is not to shift the inconvenience from one party to another.” *Elbeco*, 989 F. Supp. at 679; *Superior Precast Ins. v. Safeco Insur. Co. of Amer.*, 71 F. Supp. 2d 438, 446 (E.D. Pa. 1999). “[U]nless the balance of convenience of the parties is strongly in favor of defendant, the plaintiff’s choice of forum should prevail.” *Shutte*, 431 F.2d at 25; *Superior Precast*, 71 F. Supp. 2d at 446. Accordingly, where either forum would cause one of the parties some cost and inconvenience, and defendant’s inconvenience at plaintiff’s choice of forum does not greatly outweigh the inconvenience that plaintiff would suffer upon defendant’s choice, transfer is improper. Such is the situation here, and refusing to simply shift

the inconvenience, the court will deny this motion.

Upon a motion for transfer, where there is a proper alternative venue, I must engage in the 1404(a) analysis.¹⁶ In order to assess the convenience and justice of litigation in particular forum, courts consider numerous factors reflecting both private and public interests. *Jamara*, 55 F.3d at 879 (enumerating numerous factors utilized by courts in making this determination). The court will examine this motion in light of these factors.

A. Private Interests

The private factors do not support a transfer of venue. The Third Circuit has articulated the relevant private interests as: (1) plaintiffs' forum preference as manifested in their original choice; (2) defendant's preference; (3) whether the claim arose elsewhere; (4) convenience of the parties based on their relative physical and financial situations; (5) convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the fora; and (6) the location of books and records (also limited to the extent that files could not be produced in the alternative forum). *Jumara*, 55 F.3d at 879; *Frontier Insur. Co. v. National Signal Corp.*, No. 98-4265, 1998 WL 778333 at *6 (E.D. Pa. 1998).

Clearly, plaintiffs have chosen the Eastern District of Pennsylvania, a choice that is entitled to deference. Defendant prefers the District of Minnesota. Def. Mot. at 17. Arguably the claim arose in the District of Minnesota because defendant's alleged malfeasance occurred there. On the other hand, the harm that was caused to plaintiffs was felt here in the Eastern

¹⁶ The District of Minnesota is a proper alternative because plaintiffs could have brought their action in a Minnesota court as defendant Markman Capital is subject to personal jurisdiction there on two bases: it is incorporated and has its principal place of business there. 28 U.S.C.A. 1391(c).

District of Pennsylvania. Furthermore, this action does not involve a fixed physical object or location that would make situs particularly important. *Larami Ltd. v. Yes! Entertainment Corp.*, 244 B.R. 56, 62 (3d Cir. 2000) (citing *Mountbatten Surety Co. v. Reagerharris Inc.*, No. Civ. A.99-3052, 2000 WL 39063, at *10 (E.D. Pa. Jan. 19, 2000)). Instead this claim involves a contractual relationship between a Minnesota investment management corporation and its Pennsylvania clients, where the contract was signed by each party in their respective locations and communications traveled back and forth. Although it is true that defendant would incur costs and inconvenience traveling to Pennsylvania for trial, the same would be true for plaintiffs if the case was transferred to Minnesota. Defendant has failed to show that the former would cause a substantially greater inconvenience than the latter. Defendant claims that virtually all of its employees would be expected to testify, at least briefly, which would necessitate closing the firm for the duration of the trial, as each travels to Philadelphia. Def. Mot. at 16. Although a bold statement, there is little support for this. For instance, defendant does not address the likely length of trial, which to the court appears minimal. In addition, defendant does not explain why, if each employee will only need to testify “briefly,” each cannot simply come to Philadelphia for one day or submit their testimony by deposition. *Id.* Defendant does not assert that these witnesses would be unavailable for trial in Pennsylvania. Although defendant asserts that all of its books and records are in Minnesota, it does not claim that this would make them unavailable for litigation in Pennsylvania. Presumably, documents regarding plaintiffs’ accounts are not too voluminous to preclude photocopying or other methods of transferring them to this jurisdiction.

Accordingly, the court finds that either plaintiffs or defendant would incur some additional expenses and inconvenience as a result of litigating in an out-of-state forum.

Therefore, the private interests alone do not justify a transfer to Minnesota.

B. Public Interests

The public interests also do not support transfer. According to the Third Circuit, the relevant public interests include: (1) the enforceability of the judgment; (2) practical considerations that might make the trial easy, expeditious, or inexpensive; (3) the relative administrative difficulty in the two fora resulting from court congestion; (4) the local interest in deciding local controversies at home; (5) the public policies of the two fora; and (6) the familiarity of the trial judge with the applicable state law. *Jumara*, 55 F.3d at 879-80; *Superior Precast*, 71 F. Supp. 2d at 445.

Defendant provides no evidence that judgment in this court would be unenforceable against it, nor does defendant articulate practical considerations that would favor the District of Minnesota. There is also no evidence presented to suggest that the District of Minnesota maintains a less onerous docket than the courts in this district. The pleadings are silent as to the public policies of each fora. Presumably each state has a local interest in this matter. Pennsylvania has an interest in protecting its residents and providing a forum for their disputes, and Minnesota has an interest in regulating one of its corporations. There is no evidence that the latter clearly outweighs the former. Finally, with respect to the applicable law, one of plaintiffs' claims is for violation of a Pennsylvania statute, thereby favoring this jurisdiction. The other three claims, breach of contract, negligence, and breach of fiduciary duty, are strongly founded in common law which indicates that neither venue is more appropriate. Consequently, the public interests do not strongly favor the District of Minnesota.

Therefore, as defendant has failed to meet its burden of proving that convenience and justice would be served by transfer of venue, the motion for change of venue will be denied.

CONCLUSION

Based on the foregoing reasons, I conclude that the court lacks personal jurisdiction over defendant London, but may properly exercise jurisdiction over defendant Markman Capital. Consequently, I will grant in part and deny in part defendants' motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction and will dismiss the plaintiffs' complaint without prejudice as to defendant London only. I find that plaintiff has stated a claim upon which relief may be granted against defendant Markman Capital on the count challenged by its motion. Therefore, I will deny defendant's motion to dismiss on this ground. I find that the evidence does not show that plaintiffs entered into an arbitration agreement with defendant Markman Capital, and thus I will deny the motion to stay pending arbitration. Finally, I hold that neither convenience of the parties nor the interests of justice require transferring this action to the District of Minnesota. Accordingly, Markman Capital's motion to transfer the action will be denied.

An appropriate order follows.

William H. Yohn, Jr., Judge