SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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ISABELLA MARTINEZ and GABRIELLA LEAL, Individually and on behalf of other persons similarly situated,

Plaintiffs,

Index No. 517921/2018

- against -

SARA BRONFMAN-IGTET,

Defendant.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT SARA BRONFMAN-IGTET'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiffs' three-count complaint (the "Complaint") alleges violations of the New York Penal Code Article 460 (Count I), New York General Business Law ("GBL") Section 349 (Count II), and California Business and Professions Code Section 17500 (Count III). Each count is frivolous. There is no private right of action under the New York Penal Code; the Complaint does not allege any of the necessary specifics to maintain a claim under the GBL or the California statute; and the California claim fails to plead the required link to California for a purported violation. On top of this, Plaintiffs' attorney, Omar Rosales, does not have a New York-based office, which is *required* under Judiciary Law Section 470 to bring an action in this Court.[1] The Court should dismiss this action *with prejudice*, pursuant to CPLR Section 3211, and award any other relief as just and proper for having to file this motion.

STATEMENT OF FACTS

Plaintiffs allege without specificity that Defendant, Ms. Bronfman-Igtet, was somehow involved in marketing the "Executive Success Program" ("ESP"), which was marketed as "a practical MBA" and "a learning institution with a faculty of qualified instructors and staff." (Compl. ¶ 29.) Each Plaintiff alleges that she learned about the ESPs from an unnamed "friend" and that each was given an unspecified "marketing pitch" somehow "developed by" Ms. Bronfman-Igtet. (*Id.* ¶¶ 19, 22.) Neither Plaintiff alleges what "marketing pitch" they received, when they received the "marketing pitch," or where they received the "marketing pitch" or spoke

[1] Mr. Rosales has been sanctioned by the United States District Court for the Western District of Texas for "bad faith" proceedings including "fabricated evidence." *Deutsch v. Henry*, 2016 WL 7165993 (W.D.Tex 2016) Those sanctions were recently affirmed by the Fifth Circuit. *Deutsch v. Phil's Icehouse Inc.*, 716 Fed. Appx. 361 (5th Cir. 2018) *cert. denied*, 2018 WL 3159328 (U.S. October 1, 2018). Mr. Morales also appears to be the subject of another disciplinary proceeding in Texas. *See* https://www.kxan.com/news/local/austin/austin-ada-attorney-omar-rosales-sued-again-by-state-bar/1151810954, annexed to the Affirmation of Rachel H. Bevans, dated November 5, 2018 ("Bevans Aff.") as Exhibit A.

to their "friends." Specifically, Plaintiffs solely allege that they were told that Keith Raniere, the programs' developer,

> was one of the world's smartest men, had a rare and unique problem-solving ability, spoke in complete sentences by age one, was an East Coast Judo Champion by age 12, and tied the State record for the 100-yard dash while in High School.

(*Id.*) In alleged reliance on these statements, Plaintiffs each purchased the $2,400 five-day intensive ESP, which took place in San Francisco, California in November 2016. (*Id.* ¶¶ 20, 23.)

Plaintiffs allege that the information they were provided about Mr. Raniere was false; and that Mr. Raniere and his associate, Nancy Salzman, "were actually con-artists who were running another illegal [] scam, and that Keith Raniere was not one of the world's smartest men." (*Id.* ¶ 32.) Instead, Plaintiffs allege that Mr. Raniere "barely graduated from Rensselaer Polytechnic University [sic] with a 2.2 GPA." (*Id.* ¶ 34.)

Plaintiffs also allege that "ESP was never accredited by any educational group and there was no end to the courses," even though there is no allegation that ESP was marketing the program otherwise. (*Id.* ¶ 32) The Complaint also alleges that "the Defendant promised an Executive Success Program, but delivered neither Executives nor Success, but instead a long running criminal enterprise to fleece and rip-off customers." (*Id.*) Plaintiffs further allege that "[t]here was no method, order, or structure to the [ESP] class," which "included such nonsense topics as 'Human Pain'" where "student-victims were posed nonsense questions and bombarded with off-the wall teachings." (*Id.* ¶¶ 39-40.) Plaintiffs do not identify any allegedly false advertising, and do not present specific allegations or facts that support the conclusory broadsides in the Complaint.

Indeed, Plaintiffs' specific factual allegations about Ms. Bronfman-Igtet are limited. Plaintiffs only allege that Ms. Bronfman-Igtet "was a founder, board member, officer, director, managing member, principal, and/or controlling shareholder of ESP, [its affiliate] NXIVM, and the associated shell companies." (*Id.* ¶ 25.) The Complaint alleges nothing about Ms. Bronfman-

Igtet's role, other than baldly claiming she "developed and distributed marketing materials" which themselves made allegedly false statements about Mr. Raniere. (*Id.* ¶ 4; *see also* ¶ 31.) Plaintiffs also allege that Ms. Bronfman-Igtet paid for celebrity appearances to events somehow connected to ESP, but make no allegation of any wrongdoing with respect to these appearances. (*Id.* ¶ 5; *see also* ¶ 31.) Plaintiffs further allege, without specifics, that Ms. Bronfman-Igtet somehow "bankrolled ESP activities with personal funds and proceeds from her various trust accounts." (*Id.* ¶ 28; *see also* ¶ 31.)

Plaintiffs filed the instant action on September 4, 2018, alleging violations of the New York Penal Code Article 460 (Count I), New York General Business Law Section 349 (Count II), and California Business and Professions Code Section 17500 (Count III). The Complaint attempts to draw a broad parallel between Ms. Bronfman-Igtet and six non-party individuals who, unlike Ms. Bronfman-Igtet, have been indicted on criminal charges in the Eastern District of New York. (*Id.* ¶¶ 8, 45.) For the reasons set forth herein, the Complaint clearly fails to state a cause of action against Ms. Bronfman-Igtet and should be dismissed, with prejudice.

ARGUMENT

On a motion to dismiss made pursuant to CPLR § 3211(a)(7), the Court will "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994); *Shebar v Metropolitan Life Ins. Co.*, 25 A.D.3d 858, 859 (2d Dep't 2006). However, "bare legal conclusions are not presumed to be true and are not accorded every favorable inference." *NCJ Cleaners, LLC v. ALM Media, Inc.*, 48 A.D.3d 766, 767 (2d Dep't 2008).

I. There Is No Private Right of Action Under NY Penal Code Article 460 (Count I)

New York Penal Law Section 460, which encompasses the New York State Organized Crime Control Act (hereinafter, "OCCA"), does not apply in this case. OCCA is specifically limited to ***criminal charges*** that can be brought under New York law, ***by the government***, when an individual is alleged to have committed the state felony offense of Enterprise Corruption. CPLR Section 1353 only permits a deputy attorney general or district attorney to bring a civil cause of action against an individual convicted of Enterprise Corruption in the form of an Article 13-B special proceeding. *See* CPLR § 1353(2); *Simpson Elec. Corp. v. Leucadia, Inc.*, 128 A.D.2d 339 (1st Dept. 1987) ("New York OCCA does not contain a provision permitting a private civil cause of action. Unlike RICO, OCCA is essentially a criminal statute with civil sanctions that can only be enforced by the District Attorney.").

New York courts have consistently and unanimously held that civil penalties under New York Penal Law Section 460 are not available by a private plaintiff. *See, e.g., CityTrust v. Mermelstein,* 1988 WL 243506 (Sup. Ct., Nassau Cty. 1988) ("[n]or does the State of New York provide a private right of action under its [OCCA] for those injured by criminal enterprise"); *see also Valle v. YMCA of Greater N.Y.,* 2006 WL 1376935 (S.D.N.Y. 2006) (denying plaintiff's request for a temporary restraining order and a special proceeding pursuant to N.Y. Penal Law Section 460 and CPLR Section 1353).

Because no private civil cause of action exists pursuant to Penal Law § 460, Count I must be dismissed.

II. Plaintiffs Fail To State a Claim For Violation of New York's GBL Section 349

To state a claim for violation of New York General Business Law Section 349, a plaintiff must allege "that the challenged act or practice was a consumer oriented act or practice that is

misleading in a material way, and caused injury to the plaintiff." *Vescon Constr., Inc. v. Gerelli Ins. Agency, Inc.*, 97 A.D.3d 658, 659 (2d Dep't 2012); *see also City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616, 621 (2009). Deceptive acts under the statute are those which are "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Lucker v. Bayide Cemetery*, 114 A.D.3d 162, 174 (1st Dep't 2013).

Here, Plaintiffs' failure to allege *any* of the circumstances or details surrounding the allegedly misleading statements is fatal to their claims. Plaintiffs have failed to allege (1) what specific alleged misstatements were made to them; (2) by whom these alleged misstatements were made; (3) when and where the alleged misstatements were made, (4) the specific medium through which they were made to all alleged class members, and (5) any connection between the alleged misstatements and Ms. Bronfman-Igtet. Moreover, the Complaint fails to allege exactly what Ms. Bronfman-Igtet ***did*** that qualifies as a deceptive act; while the Complaint makes various vague and sweeping allegations about Ms. Bronfman-Igtet's role in "developing" marketing materials, the Complaint glaringly fails to allege ***what*** Ms. Bronfman-Igtet did with ***which*** marketing materials—or, most importantly, that these marketing materials on which Ms. Ms. Bronfman-Igtet allegedly participated were deceptive and provided to the Plaintiffs. Absent these allegations, the Complaint fails to state a claim. *See Weinstein v. Natalie Weinstein Design Assocs., Inc.*, 86 A.D. 3d 641, 643 (2d Dep't 2011) (dismissing GBL Section 349 claims against individual defendants because the complaint "failed to allege any deceptive acts committed by those defendants").

Moreover, the Complaint fails to allege that Ms. Bronfman-Igtet engaged in conduct "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Lucker v. Bayide Cemetery*, 114 A.D. 3d 162, 174 (1st Dep't 2013). A reasonable consumer would not have made the decision to purchase the ESP courses solely based upon vague, improbable statements that the course director is "one of the smartest men in the world" or "had a rare and unique problem-

solving ability" or that he was speaking in full sentences by age one. Indeed, such statements are "puffery," incapable of being proven, and are not actionable. *See, e.g.*, *Serrano v. Cablevision Systems Corp.*, 863 F. Supp. 2d 157, 167-68 (E.D.N.Y. 2012) ("to the extent that Plaintiffs allege that Cablevision mislead them by falsely representing that its service provides 'High Speed Internet,' 'Faster Internet,' and 'blazing fast speed' and that 'Optimum Online's lightning-fast Internet access takes the waiting out of the Web,' these statements constitute puffery and are not actionable under § 349(a)"). Nor would a reasonable consumer have made the decision to purchase the ESP courses based upon irrelevant details such as winning a race in high school or being a young judo champion.[2]

For these reasons, Plaintiffs' GBL claims should be dismissed.

III. Plaintiffs' California False Advertising Claim (Count III) Must be Dismissed

In order to state a cause of action for a violation of California Business and Professions Code Section 17500, a plaintiff must—at a bare minimum—identify the advertisement in question. Plaintiffs have failed to do so, and their claim must be dismissed. *Moss v. Infinity Insurance Company*, 197 F. Supp. 3d 1191 (N.D. Cal. 2016) (dismissing Section 17500 claim for failure to "identify what advertisements and materials give rise to her false advertising claim.") *See also VP Racing Fuels, Inc. v. Gen. Petroleum,* 673 F. Supp. 2d 1073, 1088 (E.D. Cal. 2009) ("The underlying element of a false advertising claim is some type of advertising statement."); *Tayag v. Nat'l City Bank*, No. C 09–667SBA, 2009 WL 943897, at *2 (N.D. Cal. Apr. 7, 2009) ("[t]he content of the alleged misrepresentation is necessary to state a claim"). This bare minimum is required under basic notice pleading. *See Moss*, 197 F. Supp. 3d at 1200. Where, as here, the

[2] The Complaint alleges that other aspects of the ESP were falsely touted to the public, but the Plaintiffs do not allege that such statements were made to them. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 325 (2002) (GBL Section 349 claim requires that "the advertisement or promotional package [] result in a transaction in which the consumer was harmed").

alleged false advertising relates to purportedly fraudulent activities, the pleading standard is even higher. *Id.* (noting that the enhanced pleading requirements of Federal Rule of Civil Procedure 9(b), the equivalent of C.P.L.R. Section 3016 (b), are required when a Section 17500 claim relates to alleged fraudulent activity).

Here, Plaintiffs have alleged only that they "were told of the program by a friend." ¶19, 22. Those "friends" then allegedly gave the Plaintiffs "a marketing pitch developed by the Defendant." *Id.* The Complaint does not specify whether the "pitch" was in a written document or was delivered orally; nor does it specify the content of the "pitch." The Complaint further fails to specify when and where the "pitch" was made and under what circumstances. The Complaint also fails to explain why the Plaintiffs believe that Ms. Bronfman-Igtet "developed" the pitch or what that even means.

The complete absence of such allegations mandates dismissal. It is impossible for Ms. Bronfman-Igtet (and the Court) to determine what the real claim is or determine whether class treatment could ever be appropriate. Indeed, if putative class members heard different statements, from different people, at different times, and relied on those different specific statements for their purported injuries, class treatment would be entirely inappropriate. *See, e.g.*, *Bartis v. Harbor Tech, LLC,* 147 A.D.3d 51, 64 (2d Dep't 2016) (denying class certification where plaintiffs did not meet New York's commonality requirement); *In re 5-Hour Energy Marketing and Sales Practices Litigation*, 2017 WL 2559615 (C.D. Cal. 2017) (declining to certify a class action pursuant to Section 17500 where plaintiffs did not allege a common false advertising claim).

Plaintiffs' Section 17500 claim also fails because there is an insufficient connection to California. Section 17500 requires that plaintiffs allege that they *viewed* advertisements in California or that the advertisements were *created* in California in order to survive a motion to

dismiss. *See Warner v. Tinder Inc.*, 105 F. Supp. 3d 1083 (C.D. Cal. 2015). The *Warner* Court held that because plaintiff did "not allege that he viewed any advertisements as a consumer in California," his claim failed. *Warner* at 1096-97. The same is true here; the Complaint does not specify what advertisements were shown and where; nor does the Complaint include allegations that Plaintiffs viewed advertisements *in California* or that defendant generated false advertising *from a location in California.*[3]

Indeed, even conclusory allegations that the conduct arose from California would be insufficient. *See, e.g.*, *Gustafson v. BAC Home Loans Serv'g, LP*, 2012 WL 4761733, *6 (C.D. Cal. 2012) (concluding that the "mere possibility that certain decisions related to [defendants'] policies and practices regarding force-placed insurance may have been made in California does not, standing alone, justify application of the [statute] to Plaintiff's claims"); *Gross v. Symantec Corp.*, 2012 WL 3116158, *7 (N.D. Cal. 2012) (noting that, while plaintiff had alleged that defendant was headquartered in California, "several courts have found that this allegation is not enough to create a plausible inference that the unlawful conduct emanated from that location"); *cf. Norwest Mortgage, Inc.*, 72 Cal.App.4th at 227 ("[b]ecause Norwest Mortgage's headquarters and principal place of business, the place Category III members were injured, and the place the injury-producing conduct occurred are outside California, we conclude application of the UCL to the claims of Class III members would be arbitrary and unfair and transgress due process limitations"). Plaintiffs do not allege any conduct by Ms. Bronfman-Igtet in California and Plaintiffs' allegations

[3] Courts have consistently recognized that the Section 17500 claims are limited to application in California. *In re Toyota Motor Corp.*, 785 F. Supp. 2d 883, 918 (C.D. Cal.2011); *Churchill Village, L.L.C. v. Gen. Elec. Co.*, 169 F. Supp. 2d 1119, 1127 (N.D. Cal.2000) ("[17500] contains language that could be interpreted to limit the statute's extraterritorial application. Section 17500 prohibits false or misleading statements made 'before the public in this state' and 'from this state before the public in any state.' In the instant action, none of defendant's written or oral communications made in California was directed to consumers outside the state. Thus, only California consumers can proceed on a claim under the FA[L]"), *aff'd*, 361 F.3d 566 (9th Cir. 2004).

that ESP offered classes in California are insufficient to create the required nexus between Ms. Bronfman-Igtet and Plaintiffs in California.

For this additional reason, the 17500 claim under California law should be dismissed.

IV. The Complaint Must Also Be Dismissed Because Plaintiffs' Counsel Has Violated Judiciary Law § 470 By Failing To Maintain An In-State Office At The Time He Commenced This Action

The instant complaint was filed by Omar Rosales, Esq. of The Rosales Law Firm LLC, a firm located, as indicated on the Complaint and on the firm web site, at P.O. Box 6429, Austin, Texas 78762. *See* Complaint; *see also https://www.owrosales.com/,* annexed hereto as Bevans Aff., Ex. B. While Mr. Rosales was recently admitted to the New York bar in 2017, his city and state are listed on the New York bar directory as Austin, Texas. *See* Bar Directory Search, annexed hereto as Bevans Aff., Ex. C.

New York Judiciary Law Section 470 makes clear that an attorney who is admitted to practice in New York state and "whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." Judiciary Law Section 470. But the New York Court of Appeals has held that, "[b]y its plain terms, [Judiciary Law § 470] requires nonresident attorneys practicing in New York to maintain a physical law office here." *Schoenefeld v. State of New York*, 25 N.Y.3d 22, 26 (2015). Accordingly, a plaintiff's counsel's failure to maintain an in-state office at the time an action is commenced in New York is a violation of New York Judiciary Law Section 470. *See Webb v. Greater New York Auto Dealers Ass'n, Inc.,* 93 A.D.3d 561 (1st Dep't 2012); *see also Neal v. Energy Transport. Grp., Inc.,* 296 A.D.2d 339 (1st Dep't 2002)("[i]t has been held that Judiciary Law § 470 requires all nonresident attorneys to maintain offices in New York in order to practice law in this State").

New York courts consistently dismiss cases brought by attorneys who violate Judiciary Law Section 470 by failing to maintain an in-state office at the time the action is commenced. *See, e.g.*, *Law Office of Angela Barker, LLC v. Broxton,* 60 Misc.3d 6 (1st Dep't 2018) ("Judiciary Law § 470, which recognizes a nonresident attorney's right to practice law in New York, requires such attorney to maintain a physical office in this state for such purpose"); *see also Lichtenstein v. Emerson,* 171 Misc. 2d 933 (Sup. Ct., N.Y. Cty. 1997) ("institution based on [counsel's] license to practice here… is a nullity. Hence, for this additional reason, the complaint is dismissed").

Indeed, while Mr. Rosales does not claim to have a "virtual" office, even a "virtual" office is likely a violation of Judiciary Law Section 470. *See Stegemann v. Rensselaer County Sheriff's Off.*, 153 A.D.3d 1053, 1054 (3d Dep't 2017) (holding no statutory authority exists to waive the "prerequisite" of a physical law office); *Law Office of Angela Barker, LLC,* 60 Misc. 3d at *1 ("[t]he term 'office' as contained in section 470 implies more than just an address or an agent appointed to receive process ... [a]nd the statutory language that modifies 'office'—'for the transaction of law business'—may further narrow the scope of permissible constructions").

It is evident that Mr. Rosales has violated Judiciary Law Section 470 by failing to maintain an in-state office at the time he commenced this action. Therefore, New York law mandates that the Complaint be dismissed for this reason as well.

V. The Court May Impose Sanctions for Frivolous Litigation

Litigation conduct is frivolous and can be sanctioned under 22 NYCRR 130-1.1 if it is "completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law" or it is "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another." 22 NYCRR 130-1.1[c][1][2]; *see Stow v. Stow*, 262 A.D.2d 550 (2nd Dept. 1999); *Matter of Gordon v.*

Marrone, 202 A.D.2d 104 (2nd Dep't 1994); *Tyree Bros. Envtl. Servs. v. Ferguson Propeller*, 247 A.D.2d 376 (2nd Dep't 1998)).

This case is a textbook frivolous lawsuit. Plaintiffs' counsel is in clear violation of Judiciary Law Section 470 and *is not allowed to file a lawsuit*, the claim under NY Penal Law (Count I) *does not exist*; and the claims under the GBL and California law (Counts II and III) are woefully insufficient. Indeed, the California claim does not even *attempt* to plead the requisite connection to the state of California.

Should the Court find it appropriate, we respectfully request that Plaintiffs' counsel be ordered to pay the legal fees associated with filing this motion to dismiss.

CONCLUSION

Defendant respectfully requests that the Court grant the within motion and for such other relief as the Court may deem proper and just.

Dated: New York, New York
November 5, 2018

Respectfully,

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