UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JEFFREY M. CAMARDA, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Case No. 13-00871 (RJL)**
	)	
CERTIFIED FINANCIAL PLANNER BOARD OF STANDARDS, INC,	)	
	)	
Defendant.	)	

FILED
JUL - 6 2015
Clerk, U.S District & Bankruptcy Courts for the District of Columbia

MEMORANDUM OPINION

July 6, 2015 [Dkts. ## 97, 108]

Jeffrey Camarda and Kimberly Camarda ("plaintiffs") are two financial advisors who brought this suit against defendant Certified Financial Planner Board of Standards ("defendant" or "CFPB"), a non-profit organization that sets and enforces professional standards in personal financial planning. *See generally* Second Am. Compl. ("SAC") [Dkt. # 75]. Plaintiffs allege breach of contract, unfair competition, and violations of the Lanham Act, 15 U.S.C. § 1125, seeking damages as well as permanent injunctive relief. *Id.* Currently before this Court is defendant's motion for summary judgment.[1] *See* CFPB's Sealed Mot. for S.J. [Dkt. # 97]; Redacted Mot. for Sum. Judgment [Dkt.

[1] The parties have also filed approximately a dozen discovery motions, almost all of which were filed with motions to seal and accompanied by motions to file under seal the responsive pleadings, *i.e.*, the oppositions and replies. *See, e.g.*, ECF Nos. 56, 62, 64, 68, 84-1, 85, 86-1, 87, 88-2, 95, 100-1, & 103-1. I entered an order on November 26, 2014, staying all further discovery until I ruled on defendant's motion for summary judgment. *See* Sealed Order [Dkt. # 105].

108].[2] Upon consideration of the pleadings, record, and relevant law, I find that defendant is entitled to summary judgment as a matter of law on all causes of action, and therefore defendant's motion is GRANTED.

FACTUAL BACKGROUND

Defendant CFPB is a nonprofit that establishes and enforces professional standards by granting rights to certificants to use the certification marks owned by defendant. *See* Plaintiffs' Statement of Material Facts [Dkt. # 110-2] ("PSOMF") at ¶¶ 8-10. Plaintiffs Jeff Camarda and Kim Camarda have been certificants entitled to use defendant's marks for 22 years and 14 years respectively. *Id.* at ¶ 44.

The contractual relationship between CFPB and its certificants, such as plaintiffs here, permits CFPB to enforce the standards that it sets through certain disciplinary procedures. *Id.* at ¶¶ 20-21. The parties are governed by the "Terms and Conditions of Certification," in which certificants agree to comply with CFPB's standards of professional conduct, including its code of ethics and professional responsibility, rules of conduct, financial planning practice standards, and disciplinary rules and procedures. Defendant's Statement of Material Facts ("DSOMF") at ¶¶ 5, 56-59 [Dkt. # 97-2].[3] One

[2] Defendant's unredacted motion for summary judgment remains under seal. *See* Sealed Mot. for Sum. Judgment [Dkt. # 97].

[3] Because plaintiffs did not specifically oppose or dispute defendant's statement of material facts, I will treat defendant's statement as admitted unless clearly contradicted in plaintiffs' statement of material facts. *See* D.C. Local Rule 7(h)(1) ("In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion."); *Twist v. Meese*, 854 F.2d 1421, 1425 (D.C. Cir. 1988) ("[A] district court judge should not be obliged to sift through hundreds of pages of depositions, affidavits, and interrogatories in order to make [its] own analysis and determination of what may, or may not, be a genuine issue of material disputed fact.").

of the standards set by defendant, and the one at issue here, is that a certificant may describe his or her practice as "fee-only" if, and only if, all of the certificant's compensation from all of his or her client work comes exclusively from the clients in the form of fixed, flat, hourly percentage or performance-based fees. DSOMF at ¶¶ 16-18.

In February and March 2011, each of the plaintiffs received a notice of investigation that they may have violated CFPB rules and were given a chance to respond. *See* DSOMF at ¶¶ 56-59. On December 14, 2011, defendant notified each of the plaintiffs in two separate complaints that there was "probable cause" to believe grounds for discipline existed. DSOMF at ¶ 60 & Ex. 2D [Dkt. # 97-9]. Two entities associated with plaintiffs—Camarda Financial Advisors ("CFA") and Camarda Consultants, LLC ("CamCon")—were the subject of those complaints. PSOMF at ¶¶ 45-47. Plaintiffs contend that they are "two separate and distinct legally formed and organized entities under Florida law." *Id.* at ¶ 48. Defendant alleged in those December 2011 complaints that CFA had common ownership with CamCon, and, thus, CFA had inappropriately advertised itself as "fee-only" because CamCon received commissions for at least some of its services. *Id.* at ¶¶ 48-50. CFA and CamCon also had a mutual referral arrangement whereby both CFA and CamCon agreed to refer clients to each other. *See* DSOMF at ¶¶ 48-49 & Ex. 2D.

On March 1, 2012, defendant conducted an evidentiary hearing pursuant to its disciplinary procedures. DSOMF ¶ 66. At the conclusion of the hearing, the hearing panel determined that the evidence supported two of the allegations and recommended to defendant's disciplinary and ethics commission ("DEC") that a public letter of

admonition be issued. DSOMF ¶ 70. The DEC considered the report of the hearing panel and approved its findings and recommendation that plaintiffs had inappropriately described their business as "fee-only." DSOMF ¶ 72.[4] Plaintiffs appealed the DEC's decision to a five-person appeals committee, which is governed by the rules and procedures of the appeals committee, which is incorporated by reference into the standards of professional conduct. DSOMF ¶ 75. The appeals committee affirmed the DEC's decision on January 3, 2013. DSOMF ¶ 87.

STANDARD OF REVIEW

Defendant moves for summary judgment pursuant to Federal Rule of Civil Procedure 56. Summary judgment is proper where the pleadings, stipulations, affidavits, and admissions in a case show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The party seeking summary judgment may support its motion by "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

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[4] The DEC's Order resolving the complaints stated in part:

> The Commission determined that, while Respondent provided proof that CC and CFA are legally distinct entities, the testimony and the evidence at the hearing indicated that CFA and CC are functionally one organization providing clients with a wide range of investment services, some of which are commission-based. CFA and CC share clients, employees, and a Web site. Respondent also represented that CC was created solely to provide CFA clients with more "one-stop" offerings. Based on this information, the Commission determined that Respondent has made the following misrepresentations: 1) due to the mutual referral fee arrangement between CFA by CC, Respondent misrepresented that CFA is a "fee-only" investment advisor; and 2) because CFA and CC are functionally one organization providing services to clients, Respondent misrepresented CFA as "fee-only" because CC receives insurance commissions.

DSOMF at Ex. 2 pp.547-561.

affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *See Celotex Corp.*, 477 U.S. at 323. In opposing summary judgment, the "nonmoving party [must] go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (quoting Fed. R. Civ. P. 56). In determining whether a genuine issue of material fact is in dispute, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

ANALYSIS

Plaintiffs pursue three causes of action—breach of contract, common law unfair competition, and violations of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A). *See* SAC at ¶¶ 84-110. Defendant contends that under D.C. law,[5] plaintiffs' breach of contract claim fails as a matter of law because a plaintiff may not re-litigate the disciplinary proceedings of a private organization in court. Def. Mem. in Supp. of Sum. Judgment, at 16-20 ("Def.'s Mem.") [Dkt. # 97-1]. I agree.

To prevail on a breach of contract claim, plaintiffs must establish: (1) a valid contract between the parties; (2) an obligation or duty arising out of the contract; (3) a material breach of that duty; and (4) damages caused by the breach. *See Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 187 (D.C. 2009). Under principles of D.C. contract law, "courts ordinarily will not interfere with the management and internal affairs of a

[5] The parties do not dispute that D.C. law applies to plaintiffs' local law claims—breach of contract and unfair competition.

voluntary association." *Levant v. Whitley*, 755 A.2d 1036, 1043 (D.C. 2000) (quoting *Avin v. Verta*, 106 A.2d 145, 147 (D.C. 1954)); *see also NAACP v. Golding*, 342 Md. 663, 679 A.2d 554, 558 (1996) ("as a general rule, courts will not interfere in the internal affairs of a voluntary membership organization"); *see also Jolevare v. Alpha Kappa Alpha Sorority, Inc.*, 521 F. Supp. 2d 1, 9 (D.D.C. 2007) (applying *Levant*). In *Levant*, the District of Columbia Court of Appeals assumed, without deciding, "that intervention would be appropriate when an organization failed to follow its own rules." *Id.* at 1044; *see id.* at 1043-44 n. 11 (summarizing state of the law in the District of Columbia and elsewhere).

In this case, there was no breach by defendant, which followed its own rules throughout the disciplinary proceedings against plaintiffs. *See Jolevare*, 521 F. Supp. 2d at 9-10 (rejecting breach of contract claim by disciplined sorority members where "the defendant has fully complied with the policies and procedures established in its Constitution & Bylaws and the Anti–Hazing handbook."). Plaintiffs have identified no facts that demonstrate that defendant failed to follow its own procedures: plaintiffs received notice of the investigation, were afforded the opportunity to respond, received complaints setting forth the grounds for discipline, submitted documents in response, were given notice of a hearing, attended the hearing with counsel, presented arguments and witnesses, and received a written decision that they were able to appeal. In reviewing a disciplinary action by a private organization, courts do not "second-guess"

the organization's interpretation of its own rules or its evaluation of the evidence. *See Blodgett v. Univ. Club*, 930 A.2d 210, 227 (D.C. 2007).[6]

Not only do plaintiffs unsuccessfully challenge the substance of defendant's decision, but they also contend that plaintiffs were unfairly singled out for enforcement, and that this "singling out" constitutes a breach of contract because it violates the duty of good faith and fair dealing. Pls' Mem. at 33. To state a claim for breach of the implied covenant of good faith and fair dealing, a plaintiff must allege either bad faith or conduct that is arbitrary and capricious. *Wright v. Howard Univ.*, 60 A.3d 749, 754 (D.C. 2013). However, plaintiffs point to no evidence that defendant was motivated by bad faith or ill will toward them. *See Bain v. Howard Univ.*, 968 F. Supp. 2d 294, 302 (D.D.C. 2013) (rejecting claim that university's dismissal of a student had breached the duty of good faith and fair dealing because there was no evidence "from which a fact finder could conclude that there was no rational basis for the decision to dismiss [the student] or that it was motivated by bad faith or ill will unrelated to academic performance."). Additionally, there is not a "selective-enforcement" rule that governs contractual rights. *Coriatt-Gaubil v. Roche Bobois Int'l, S.A.*, 717 F. Supp. 2d 132, 139 (D. Mass. 2010) ("[T]here is no "selective enforcement" rule to govern a private party's contractual rights."); *see also Kisser v. Cisneros*, 14 F.3d 615, 619-21 (D.C. Cir. 1994) (refusing to

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[6] Plaintiffs argue that the right to use defendant's marks is akin to a license agreement subject to ordinary contract interpretation principles, but plaintiffs point to no license agreement cases where a standards-setting organization, such as defendant, was subject to a breach of contract claim for disciplining a member pursuant to the terms of a written professional code. *See* Pls' Mem. at 30-31 (collecting license agreement cases). Importantly, plaintiffs' right to use defendant's marks was never revoked—the only penalty was a public admonition.

adjudicate claim that one of several similar corporate officers was improperly singled out for debarment); *Found. for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 39 F. Supp. 2d 889, 894 (W.D. Mich. 1998) *aff'd*, 244 F.3d 521 (6th Cir. 2001) ("[C]ourts have refused to consider claims that the school denied accreditation was treated differently and more severely than other 'similarly situated' schools."); *Transp. Careers, Inc. v. Nat'l Home Study Council*, 646 F. Supp. 1474, 1485 (N.D. Ind. 1986) (comparing how other applicants were treated by defendant "would take this court beyond the proper scope of review" in part because it would amount to a determination that defendant's decision was incorrect).

Accordingly, because plaintiffs point to no procedural defect in defendant's enforcement of its own discipline rules, and because plaintiffs have adduced no evidence from which a trier of fact could conclude that defendant violated its duty of good faith and fair dealing, summary judgment will be GRANTED as to plaintiffs' breach of contract claim.

Plaintiffs' next cause of action is that defendant committed common law unfair competition. *See* SAC at ¶¶ 95-99; Pls. Mem. at 37-40. Plaintiffs have failed to satisfy their burden to survive defendant's motion for summary judgment because defendant is not a competitor of plaintiffs. Under D.C. law, the common-law tort of unfair competition "is not defined in terms of specific elements, but by the description of various acts that would constitute the tort if they resulted in damage." *Furash & Co., Inc.*

v. McClave, 130 F. Supp. 2d 48, 57 (D.D.C. 2001).[7] Defendant, as a standards-setting organization, is not a competitor of plaintiffs and thus cannot be liable for unfair competition. *See Thermal Design, Inc. v. Am. Soc'y of Heating, Refrig. & Air-Cond. Eng'rs, Inc.*, 755 F.3d 832 (7th Cir. 2014) (standards setting organization could not be liable for unfair competition when it is not a competitor of plaintiff). It is undisputed that plaintiffs are not competitors of defendant, as plaintiffs themselves allege their status as certificants of defendant's marks. *See* SAC at ¶ 19 ("The CFP Board is a private not-for-profit corporation which grants CFP® certifications and CFP® marks to individuals, such as the Camardas, who meet the CFP Board's required standards for competent and ethical personal financial planning."). Because plaintiffs are not competitors of defendants, their unfair competition claims fail as a matter of law, and summary judgment is GRANTED as to that cause of action.

Plaintiffs third, and final, cause of action is that defendant violated the Lanham Act. *See* SAC at ¶¶ 100-110. Like breach of contract and unfair competition, however, plaintiffs also fail to survive summary judgment. To prevail in a false advertising suit under section 43(a), a plaintiff must prove that the defendant's ads were false or

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[7] The D.C. Court of Appeals has defined the following as examples of torts that could constitute unfair competition: "defamation, disparagement of a competitor's goods or business methods, intimidation of customers or employees, interference with access to the business, threats of groundless suits, commercial bribery, inducing employees to sabotage, false advertising or deceptive packaging likely to mislead customers into believing goods are those of a competitor." *B & W Mgmt., Inc. v. Tasea Inv. Co.*, 451 A.2d 879, 881 n.3 (D.C. 1982). Even if plaintiffs were competitors of defendants, they have pointed to no facts or evidence that show defendant did anything unfair toward plaintiffs, because defendant was contractually authorized to enforce discipline standards against plaintiffs. *See Atlanta Nat'l League Baseball Club, Inc. v. Kuhn*, 432 F. Supp. 1213, 1226 (N.D. Ga. 1977) (rejecting tortious interference claim where the "defendant acted within the scope of his authority, and indeed, was executing his assigned duties" under the contract at issue).

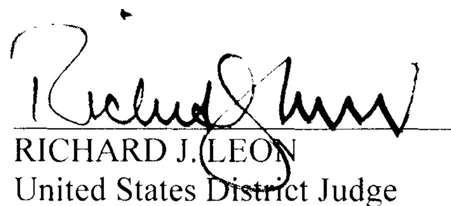
misleading, actually or likely deceptive, material in their effects on buying decisions, connected with interstate commerce, and actually or likely injurious to the plaintiff. *ALPO Petfoods, Inc. v. Ralston Purina Co.*, 913 F.2d 958, 964 (D.C. Cir. 1990); *Globalaw Ltd. v. Carmon & Carmon Law Office*, 452 F. Supp. 2d 1, 58 (D.D.C. 2006). As a preliminary matter, there is no indication that section 43(a) of the Lanham Act was intended to reach attenuated conduct such as defendant's here. Recently the United States Supreme Court clarified in a case that focused on causation requirements that, in a false advertising case, a plaintiff "ordinarily must show economic or reputational injury *flowing directly* from the deception wrought by the defendant's advertising." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1391 (2014) (emphasis added). Here, plaintiffs allege that they have been injured by defendant's "false, or at the very least, misleading" "public statements" about defendant's "fair enforcement of its rules regarding professional conduct and its adherence to the Disciplinary Rules." SAC ¶¶ 105, 106; Pls. Mem. at 41-42; PSOMF ¶ 4.[8] The allegedly false statement—that defendant fairly enforces discipline—even if assumed to be false, does not actually cause plaintiffs any direct harm. The "harm" from this statement, if false, is from defendant sanctioning plaintiffs for misrepresenting itself as "fee-only," which, as discussed above, defendant had every legal right to do under the terms of the parties' agreement. The only

[8] The record evidence supporting plaintiffs' allegation that defendant made false statements is a citation in plaintiffs' statement of material facts to defendant's web site, in which plaintiff attached a document called "Purpose, Parameters and Policies of CFP Board." *See* PSOMF ¶ 4; Dkt. # 110-3 (Exhibit 3). In this document defendant referred to its professional standards and enforcement as setting forth "a fair process for investigating matters and imposing discipline where necessary." Ex. 3 at 11.

potential harm comes from the perception that, although defendant had every legal right to sanction plaintiffs, they did so unfairly and falsely advertised their procedures as fair while doing so. This, however, is too indirect an injury to sustain liability under section 43(a). *See Lexmark,* 134 S. Ct. at 1391 (a plaintiff "must show economic or reputational injury *flowing directly* from the deception wrought by the defendant's advertising"). Put simply, section 43(a) of the Lanham Act was not meant to remedy plaintiffs, like those here, who are unhappy with the outcome of a disciplinary decision of a standards-setting organization.[9] Accordingly, defendant's motion for summary judgment as to plaintiffs' Lanham Act claim must also be GRANTED.

CONCLUSION

Thus, for all of the foregoing reasons, defendant is entitled to judgment as a matter of law and defendant's motion for summary judgment is GRANTED. A separate Order consistent with this decision accompanies this Memorandum Opinion.



RICHARD J. LEON
United States District Judge

[9] Indeed, the parties have not identified, and I have not found, any cases purporting to apply section 43(a) of the Lanham Act to the discipline procedures of a standards-setting organization. *Cf.* 5 McCarthy on Trademarks and Unfair Competition § 27:63 (4th ed.) (collecting numerous examples of false advertising, none of which resemble false statements about the discipline procedures of a standards-setting organization). I decline to extend such a novel theory of Lanham Act liability on the facts here.