Iroquois Master Fund Ltd. v Textor
2015 NY Slip Op 30080(U)
January 9, 2015
Supreme Court, New York County
Docket Number: 651788/2013
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 59

IROQUOIS MASTER FUND LTD and KINGSBROOK OPPORTUNITIES MASTER FUND LP,

Plaintiffs,

-against-

JOHN C. TEXTOR, JONATHAN F. TEAFORD, JOHN M. NICHOLS, KEVIN C. AMBLER, JEFFREY W. LUNSFORD, CASEY L. CUMMINGS, KAEIL ISAZA TUZMAN, JOHN W. KLUGE, DEBORAH W. TEXTOR, SINGER LEWAK LLP, PBC GP III, LLC, PBC DIGITAL HOLDINGS, LLC, PBC DIGITAL HOLDINGS II, LLC, PBC DDH WARRANTS, LLC, and PBC MGPEF DDH, LLC,

Defendants.

Index Number 651788/2013

Motion Sequence Numbers 003, 004, 005 & 006

DECISION and ORDER

DEBRA A. JAMES, J.:

Motion sequences 003, 004, 005 and 006 are hereby consolidated for disposition.

Defendants John C. Textor (Textor) and Jonathan F. Teaford (Teaford) move, pursuant to CPLR 3016 (b) and 3211 (a) (1) and (7), to dismiss the complaint as against them (mot. seq. 003).

Defendant Kevin C. Ambler (Ambler) moves, pursuant to CPLR 3211 (a) (7) and (8), to dismiss the complaint as against him (mot. seq. 004).

Defendant John M. Nichols (Nichols) moves, pursuant to CPLR 3211 (a) (7) and (8), to dismiss the complaint as against him (mot. seq. 005).

Defendants Jeffrey W. Lunsford (Lunsford), Keith L. Cummings (Cummings), sued here as Casey L. Cummings, Kaleil Isaza Tuzman (Tuzman), and John Kluge, Jr. (Kluge), sued here as John W. Kluge, (together, the Outside Directors) move, pursuant to CPLR 3016 and 3211 (a) (1), (3), (7) and (8), to dismiss the complaint as against them (mot. seq. 006).

Nonparty Digital Domain Media Group, Inc. (DDMG) was a company involved with the production of feature films.

Textor and Teaford were inside directors of DDMG (the Inside Directors). Textor was DDMG's chairman and CEO. Defendant Deborah W. Textor is Textor's wife.

Nichols[1] and Ambler were DDMG outside directors, as were the designated group.

Defendants PBC GP III, LLC, PBC Digital Holdings, LLC, PBC Digital Holdings II, LLC, PBC DDH Warrants, LLC, and PBC MGPEF DDH, LLC (together, PBC) had an equity stake in DDMG.

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[1] The complaint identifies Nichols as an outside director. Nichols was DDMG's chief financial officer from February through October 2012, and served as a director from August 14, 2012 until September 10, 2012.

Defendant SingerLewak, LLP (SL), sued here as Singer Lewak LLP, was DDMG's outside auditor.

DDMG made an initial public offering (IPO) of 4,920,000 shares of common stock, at $8.50 per share, on November 21, 2011, on the New York Stock Exchange (NYSE).

After the IPO was issued, plaintiffs Iroquois Master Fund LTD (Iroquois) and Kingsbrook Opportunities Master Fund LP (Kingsbrook) purchased restricted common stock and warrants from DDMG in a private-investment-in-public-equity offering (the PIPE Offering), on June 7, 2012, under a securities purchase agreement (the Purchase Agreement). Additionally, PBC granted plaintiffs call options to purchase additional DDMG shares. Each plaintiff consequently purchased 142,858 shares of DDMG common stock, 57,143 warrants, and call options on 209,524 shares of common stock, at a cost to each of $1,000,006.

DDMG filed for bankruptcy on September 11, 2012. Both plaintiffs allegedly lost their entire investment in DDMG.

Plaintiffs commenced this action on May 17, 2013, with the complaint asserting causes of action of fraud against the Inside Directors and PBC, aiding and abetting wrongful conduct against all defendants, civil conspiracy against all defendants, negligent misrepresentation against all directors and

PBC, negligence against all defendants, and breach of the implied covenant of good faith and fair dealing against PBC.

The complaint alleges that, at the time of the PIPE Offering, "all Defendants knew or should have known that DDMG's liquidity crisis was *more serious than had been disclosed* to the public and Plaintiffs." Had the defendants "disclosed or caused the disclosure of the true liquidity crisis at DDMG on or before June 7, 2012, Plaintiffs would have known that the Company was at an immediate risk of failing and would not have participated in the PIPE Offering or entered into the Call Option Agreements." The Inside Directors, in a conference call with plaintiffs, on June 5, 2012, allegedly reassured plaintiffs with "materially false and misleading statements," to the effect that "the PIPE Offering would ensure that DDMG had sufficient cash to participate in any unanticipated opportunities in the short term"; that "DDMG expected to be cash-flow positive in the third and fourth quarters of 2012"; and that institutions expressed "significant interest" in a follow-on offering that would raise $50 to $75 million in additional equity capital.

The complaint further parses fourteen statements in the Purchase Agreement, claiming that they "contained misrepresentations of material fact or omitted to state a material fact."

The action was discontinued as against Deborah W. Textor on July 3, 2013.

The complaint as against PBC and SL was dismissed by an order of this court, dated October 3, 2014. This leaves the Inside Directors, Nichols, Ambler, and the other Outside Directors as defendants.

When presented with a motion to dismiss pursuant to CPLR 3211, "the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory." VisionChina Media Inc. v Shareholder Representative Servs., LLC, 109 AD3d 49, 55 (1st Dept 2013). Here, the Inside Directors claim that the complaint should be dismissed as against them either pursuant to CPLR 3211 (a) (1), because their "defense is founded upon documentary evidence," or CPLR 3211 (a) (7), because "the pleading fails to state a cause of action."

The Inside Directors maintain that the statements challenged in the complaint "were either nonactionable opinions, were unambiguously true, or were accompanied by hard facts about DDMG's financial condition that make any post hoc claim that they

were misleading impossible." Inside Directors memorandum of law (mot. seq. 003) at 2. Additionally, they describe plaintiffs as "two sophisticated institutional investors," with a pattern of filing lawsuits arising out of their investments.

The Inside Directors cite the Purchase Agreement's sections labeled "Buyer's Representations and Warranties," and "Representations and Warranties of the Company" as documentary evidence in their defense. The first section (paragraph 2 [d]) states:

> "Such Buyer and its advisors, if any, have been furnished with all materials relating to the business, finances and operations of the Company and materials relating to the offer and sales of the Securities that have been requested by such Buyer. Such Buyer and its advisors, if any, have been afforded the opportunity to ask questions of the Company. Neither such inquiries nor any other due diligence investigations conducted by such Buyer or its advisors, if any, or its representatives shall modify, amend or affect such Buyer's right to rely on the Company's representations and warranties contained herein. Such Buyer understands that its investment in the Securities involves a high degree of risk. Such Buyer has sought such accounting, legal, and tax advice as it has considered necessary to make an informed investment decision with respect to its acquisition of the Securities."

The second section (paragraph 3 [ss]) reads, in pertinent part:

> "The Company confirms that neither it nor any other Person acting on its behalf has provided any of the Buyers or their agents or counsel with any information

> that constitutes or could reasonably be expected to constitute material, non-public information concerning the Company or any of its Subsidiaries, other than the existence of the transactions contemplated by this Agreement and the other Transaction Documents. The Company understands and confirms that each of the buyers will rely on the foregoing representations in effecting transactions in securities of the Company. All disclosure provided to the Buyers regarding the Company and its Subsidiaries, their businesses and the transactions contemplated hereby, including the schedules to this Agreement, furnished by or on behalf of the Company or any of its Subsidiaries is true and correct and does not contain any untrue statement of a material fact or omit a material fact necessary in order to make the statements made therein, in the light of the circumstances under which they are made, not misleading."

Additionally, according to paragraph 3 (f), "[t]he Company acknowledges and agrees that each Buyer is acting solely in the capacity of an arm's length purchaser with respect to the Transaction Documents and the transactions contemplated thereby . . . ." Finally, paragraph 9 (e) asserts that the Purchase Agreement "supersede[s] all other prior oral or written agreements" among the parties, and none of its provisions may be amended or waived "other than by an instrument in writing."

In contrast to the complaint's assertions, the Inside Directors claim that a realistic picture of DDMG's financial situation was presented in its IPO prospectus and subsequent filings with the Securities and Exchange Commission (SEC). The Inside Directors identify the less than encouraging information

in the public record. Pursuing "an ambitious business plan along highly diversified lines . . . [meant that] the costs of this rapid and diversified growth were substantially outpacing the company's revenue generation." DDMG's March 31, 2012 Form 10-K, for the year ended December 31, 2011, reported almost $99 million in revenue against almost $174 million in expenses. This produced an operating loss of $75 million, more than five times greater than 2010's operating loss. The Form 10-K states: "We have a history of losses and may continue to suffer losses in the future."

This prediction was soon confirmed in the Form 10-Q, filed by DDMG with the SEC on or about May 15, 2012, about three weeks before consummating the PIPE Offering with plaintiffs. This report for the most recent quarter showed $31 million in revenue against $48 million in expenses. The operating loss of $17 million was almost two-and-a-half times greater than the operating loss in the same quarter the year before.

This pattern of losses affected DDMG's capital base. The IPO prospectus said that the company had a $28 million capital deficit, as of June 30, 2011. The Form 10-Q reported a $33 million working capital deficit, as of March 31, 2012.

In spite of the availability of this data, plaintiffs contend that "they were misled into believing that DDMG was a

viable entity with the ability to generate revenue sufficient to fund operations and generate growth." They claim that the documents cited above disclosed only "hypothetical and vague risks of an investment in DDMG," while, in truth, "DDMG's financial condition was dire and that a massive liquidity crisis was not just a hypothetical future risk but was imminent." Putting aside the actual financial data filed with the SEC, and thereby, available to any interested potential investor, plaintiffs charge that "[a]ll defendants perpetuated the false impression they had created after the IPO by continuing to conceal the truth about the Company's results and prospects."

Plaintiffs concede that "DDMG accurately disclosed its historical results, including that losses exceeded profits." Additionally, they never deny that, pursuant to the Purchase Agreement, they "have been furnished with all materials relating to the business, finances and operations of the Company and materials relating to the offer and sales of the Securities that have been requested by [them]." Yet, in spite of the hard numbers in DDMG's March 31, 2012 Form 10-K and May 15, 2102 Form 10-Q, plaintiffs maintain that, before the PIPE Offering, "all defendants continued to conceal that DDMG was encountering progressively greater financial burdens." Plaintiffs proffer such argument notwithstanding that the Purchase Agreement

paragraph 2 (d) also stated that each plaintiff "understands that its investment in the Securities involves a high degree of risk. [It] has sought such accounting, legal, and tax advice as it has considered necessary to make an informed investment decision with respect to its acquisition of the Securities."

"A CPLR 3211 dismissal may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Goldman v Metropolitan Life Ins. Co., 5 NY3d 561, 571 (2005) (internal quotation marks and citation omitted). Nowhere do plaintiffs challenge the documentary evidence as such. They do not deny their positions as sophisticated investors. Global Mins. & Metals Corp. v Holme, 35 AD3d 93, 100 (1st Dept 2006) ("New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring"). Instead, as discussed below, plaintiffs claim that they chose to invest over $1 million each based on defendants' opinions, speculation, and wishful thinking, orally expressed, in contrast to the troublesome published financial data. They even concede the accuracy of DDMG's financial reporting. Accordingly, dismissal of the complaint as against the Inside Directors, pursuant to CPLR 3211 (a) (1), is

warranted.

If the documentary evidence was not conclusive as to DDMG's financial condition, the complaint would still be dismissed as against the Inside Directors, because of its failure to state a cause of action. Claims of fraud and negligent misrepresentation are at the heart of the complaint. Fraud requires a showing of "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." Lama Holding Co. v Smith Barney, 88 NY2d 413, 421 (1996). CPLR 3016 (b) requires that, in a cause of action based upon misrepresentation or fraud, "the circumstances constituting the wrong shall be stated in detail." Communications from a defendant that "'would *envision* funding the proposed acquisition with cash on hand and borrowings,'. . . [and] proposals [that] used the word 'intend' . . . amount to no more than statements of prediction or expectation, and as such are not actionable." Naturopathic Labs. Intl, Inc. v SSL Ams., Inc., 18 AD3d 404, 404 (1st Dept 2005); Zanani v Savad, 217 AD2d 696, 697 (2d Dept 1995) ("a representation of opinion or a prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud").

Plaintiffs rely upon CPC Intl. v McKesson Corp (70 NY2d 268, 286 [1987]), where the Court of Appeals "reject[ed] the contention that the financial projections were mere opinions which could not be the basis for common-law fraud," and reversed the trial court's dismissal of the complaint as against individual corporate officers. In that case, the "crux of plaintiff's complaint is that the defendants deliberately and fraudulently prepared false projections of revenues, operating expenses and profits of [their subsidiary] and intentionally withheld other accurate projections for the purpose of selling [their subsidiary] for more than it was worth." Id. at 274. In the instant action, however, DDMG offered no false financial projections, merely an optimistic view of a bright future. Plaintiffs never claim that the actual financial data were undisclosed or falsified. As such, the alleged misrepresentations presented in the complaint essentially amount to optimistic opinions, without a basis in fact.

The complaint identifies alleged false statements of material facts at several places. Upon examination, these alleged false statements do not contain actionable factual assertions. The complaint at paragraph 4 claims that, as early as May 16, 2011, DDMG's "liquidity condition was susceptible to collapse, contrary to what was represented." It cannot be

gainsaid that susceptibility to a collapse that took place 16 months later is not a fact but pure speculation on plaintiffs' part.

At paragraph 50, the complaint alleges that the Inside Director Defendants made false statements about DDMG's liquidity, in DDMG's November 18, 2011 free writing prospectus[2] (FWP), third quarter 2011 Form 10-Q, 2011 Form 10-K, and 2012 Form 10-K where DDMG "expect[s]" or "believe[s]" that it will be able "to fund our operations and capital requirements . . . for the next 12 to 24 months;" "to meet our anticipated cash needs for at least the next 12 months;" and, to "have sufficient sources of cash to support our operations in 2012." Such are statements of opinion.

At paragraph 51, the complaint alleges that, in a telephone conference call, on June 5, 2012, the Inside Directors made "materially false and misleading statements . . . that DDMG expected to be cash-flow positive in the third and fourth quarters of 2012 [for several reasons, and] . . . that DDMG had received significant interest from institutions in a follow-on offering, which management believed would permit the Company to

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[2] A free writing prospectus "[i]s an offer to sell or a solicitation of an offer to buy SEC-registered securities that is used after the registration statement for an offering is filed." http://us.practicallaw.com/8-382-3500 (accessed December 9, 2014).

raise additional equity capital." What the Inside Directors expected and believed are not material facts. Zanani, 217 AD2d at 697.

At paragraph 52, the complaint asserts that the Purchase Agreement "included numerous representations and warrants relating to DDMG's financial well-being that also contained misrepresentations of material fact," dismissing the prospects of "material adverse change," "material adverse development in the business," insolvency, and "unreasonably small capital." The statements cited here are not couched in terms of belief, expectation, or speculation. They would withstand the test of CPLR 3211 (a) (7), while not necessarily proving to be adequately detailed under CPLR 3016 (b). However, even if these statements were taken as misrepresentations of material facts, the complaint would not stand as against the Inside Directors. The Purchase Agreement represented DDMG's obligation, not that of the individual directors. T.D. Bank, N.A. v Halcyon Jets, Inc., 99 AD3d 431, 431 (1st Dept 2012) ("It is well settled that officers or agents of a corporation are not personally liable on corporate contracts if they do not purport to bind themselves individually"). No misrepresentations of material facts may here be attributed to the Inside Directors. Therefore, plaintiffs have failed to state a cause of action for fraud against them.

While the complaint contains a cause of action for negligence, plaintiffs acknowledge that "a claim grounded in negligence does not usually arise from contracts for the sale of securities between sophisticated parties." They attempt to address this by maintaining that defendants had information to which only they had access, or that a special relationship existed between the parties, restating the basis for the cause of action for negligent misrepresentation. "A claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007); Kimmell v Schaefer, 89 NY2d 257, 264 (1996) ("In determining whether justifiable reliance exists in a particular case, a fact finder should consider [among other things] whether the person making the representation held or appeared to hold unique or special expertise; [and] whether a special relationship of trust or confidence existed between the parties").

A special relationship of trust or confidence "is grounded in a higher level of trust than normally present in the marketplace between those involved in arm's length business

transactions." EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005). Plaintiffs' claim that the Inside Directors established such a special relationship when they "solicited their investment, made misrepresentations to Plaintiffs on the telephone and sought to induce Plaintiffs to invest by providing assurances in response to Plaintiffs' questions." Such claim is only evidence of salesmanship, not of a special relationship. DiTolla v Doral Dental IPA of N. Y., LLC, 100 AD3d 586, 587 (2d Dept 2012) ("A conventional business relationship, without more, is insufficient to create a fiduciary relationship").

For the reasons stated, the Inside Directors' motion is granted, and the complaint shall be dismissed as against them.

The complaint asserts causes of action for aiding and abetting wrongful conduct, civil conspiracy, negligent misrepresentation, and negligence against Ambler, as a director of DDMG. In his motion, Ambler maintains that the court lacks personal jurisdiction over him, and that the complaint fails to state a cause of action, reasons to dismiss the complaint, pursuant to CPLR 3211 (a) (8) and (7). Since the issue of personal jurisdiction is a threshold matter, it is addressed first. Elm Mgt. Corp. v Sprung, 33 AD3d 753, 755 (2d Dept 2006) ("the Supreme Court erred in determining the plaintiff's motion

before resolving the threshold issue of jurisdiction").

Ambler claims that he is beyond the reach of New York's long-arm statute, CPLR 302 (a). "[A] defendant who is not physically present in a state must have minimum contacts with the state, thereby availing itself of the protections and benefits of the laws of that state, before the state may exercise in personam jurisdiction over it and thereby subject it to legal process." Pramer S.C.A. v Abaplus Intl. Corp., 76 AD3d 89, 95 (1st Dept 2010). Ambler, an attorney, states that he has been a member of DDMG's board since November 18, 2011. He claims that he does not conduct business in New York, does "not maintain an office, bank account, employees, telephone lines, or mailing addresses in New York," and did not during the period at issue. Further, he says that he has "never met with, spoken to, or had any dealings with Plaintiffs." He did not negotiate the Purchase Agreement, or any other agreement with plaintiffs. Finally, he denies participating in the telephone conference call of June 5, 2012, wherein plaintiffs allege that several misrepresentations regarding the PIPE Offering were made.

"[T]he burden rests on plaintiff as the party asserting jurisdiction." O'Brien v Hackensack Univ. Med. Ctr., 305 AD2d 199, 200 (1st Dept 2003). The complaint states that plaintiffs' participation in the PIPE Offering was made in New York; the

transactions associated with the PIPE Offering closed in New York; DDMG's IPO was on the NYSE; and the misrepresentations of material fact were intended to ensure the success of the IPO, and keep DDMG's stock price artificially high on the NYSE. The Purchase Agreement stipulates that it shall be governed New York State law, and subjects each party to that agreement "to the exclusive jurisdiction of the state and federal courts sitting in The City of New York, Borough of Manhattan, for the adjudication of any dispute hereunder." Additionally, each party waived "any claim that it is not personally subject to the jurisdiction of any such court."

Ambler argues that the complaint's factual allegations may serve to extend jurisdiction of the New York courts only over DDMG, not over him personally. SNS Bank v Citibank, 7 AD3d 352, 354 (1st Dept 2004) ("The fact that [the company] has submitted to the jurisdiction of the New York courts does not mean that its directors have done so"). He is named in the opening paragraph of the complaint, and once more, at paragraph 26, where he is identified as a member of the Board of Directors and its audit committee. Thereby, he allegedly "reviewed and approved DDMG's filings with the SEC during the relevant time period." He goes unmentioned in the other 153 paragraphs of the complaint. Without any factual allegations that Ambler himself conducted

business in New York, or reference to particular misdeeds which took place in New York, the complaint shall be dismissed against him, pursuant to CPLR 3211 (a) (8), on the authority of *SNS Bank*.

Were the complaint not dismissed as against Ambler, pursuant to CPLR 3211 (a) (8), it would be dismissed, pursuant to CPLR 3211 (a) (7). On a motion to dismiss for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), the pleading is afforded a liberal construction. "Although on a motion to dismiss plaintiffs' allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss." Godfrey v Spano, 13 NY3d 358, 373 (2009).

The complaint alleges misrepresentations by DDMG and the Inside Directors. The conduct of Ambler is never addressed individually, as noted above. This absence of any detail regarding Ambler's conduct obliges dismissal of the complaint as against him, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action.

The complaint asserts causes of action of aiding and abetting wrongful conduct, civil conspiracy, negligent misrepresentation, and negligence against Nichols, as a director of DDMG. In his motion, Nichols maintains that the court lacks

personal jurisdiction over him.

As noted above, Nichols was DDMG's chief financial officer from February through October 2012, and served as a director from August 14, 2012 until September 10, 2012. He says that his office was in Port St. Lucie, Florida, at DDMG's headquarters, where he "signed routine public filings with the Securities and Exchange Commission." He claims that he "do[es] not maintain an office, bank account, employees, telephone lines, or mailing addresses in New York. I do not own any property, real or personal, within the State of New York. I do not regularly engage in business within or generate revenue from New York." Further, Nichols avows that he did not communicate with plaintiffs in New York, or anywhere else; he did not meet or speak with them, or their representative, at any time. He contends that he was not a party to the Purchase Agreement, and that he was not involved with its negotiation. Also, he maintains that he did not participate in the June 5, 2012 telephone call leading up to the Purchase Agreement, and that he had no knowledge of what may have been said therein, and that therefore, New York's long arm statute, CPLR 302, would not apply to him.

Nichols's argument on personal jurisdiction parallels Ambler's. The court agrees that there is no jurisdiction over

Nichols, and will dismiss the complaint as against him, pursuant to CPLR 3211 (a) (8).

Were the complaint not dismissed as against Nichols, pursuant to CPLR 3211 (a) (8), it would be dismissed, pursuant to CPLR 3211 (a) (7). Nichols claims that plaintiffs have not set forth any facts concerning his involvement with the PIPE Offering, the basis for the complaint. Nichols's name appears four times in the 60-page complaint: in the introduction; at paragraph 25, defining his role at DDMG; at paragraph 50 (c), signing (with Textor) the March 30, 2012 Form 10-K; and, at paragraph 50 (d), signing (with Textor) the May 15, 2102 Form 10-Q. In the latter two instances, the documents are alleged to have "falsely stated" DDMG's liquidity and capital resources. The salient paragraphs in each document read almost identically: "We also believe that through our revenues from those VFX and animation contracts; through the refinancing of debt; and through co production arrangements . . . , we have sufficient sources of cash to support our operation in 2012."

Plaintiffs assert that these statements were false and misleading, and that defendants "knew or should have known" that "DDMG would most certainly experience a critical revenue shortfall . . . ; faced progressively more difficult obstacles to obtaining additional financing; and that DDMG was at a serious

risk of experiencing a massive and acute liquidity failure." However, it is beyond peradventure that Nichols cannot be held liable for having a belief that turned out to be unrealized, without factual evidence of knowing misrepresentation. Again, Naturopathic Labs. (18 AD3d at 404) separates prediction or expectation from actionable misrepresentation. Dismissal of the complaint as against Nichols is warranted, pursuant to CPLR 3211 (a) (7).

The complaint asserts causes of action of aiding and abetting wrongful conduct, civil conspiracy, negligent misrepresentation, and negligence against the Outside Directors, Lunsford, Cummings, Tuzman, and Kluge, which may be summarized as charges of fraud and negligent misrepresentation. The Outside Directors move to have the complaint dismissed as against them, pursuant to CPLR 3016, and CPLR 3211 (a) (1), (3), (7) and (8).

Referring to the contents of DDMG's November 18, 2011 FWP, third quarter 2011 Form 10-Q, 2011 Form 10-K, and 2012 Form 10-K, the complaint alleges that the Outside Directors collectively "knew or should have known that said statements relating to DDMG's liquidity were false but nevertheless said outside director defendants recklessly and negligently permitted and acquiesced in the inside director defendants making such false statements." None of the Outside Directors are mentioned by

name, and no specific conduct is cited. Such lack of detail fails to meet the requirements of CPLR 3016 (b). IndyMac Bank, F.S.B. v Vincoli, 105 AD3d 704, 707 (2d Dept 2013) (where a cause of action alleging fraud "contains only bare and conclusory allegations, without any supporting detail, it fails to satisfy the requirements of CPLR 3016 [b]"); Barclay Arms v Barclay Arms Assoc., 144 AD2d 287, 288 (1st Dept 1988), affd 74 NY2d 644 (1989) ("no cause of action for fraud is made out, nor can one be effectively answered and defended, when the subjective element is summarily alleged without supporting factual detail"); see also National Westminster Bank v Weksel, 124 AD2d 144, 149 (1st Dept 1987) ("Where liability for fraud is to be extended beyond the principal actors, to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016 [b] be strictly adhered to").

In addition, Cummings states that he is "a resident and domiciliary of the State of Florida, and have been for the entirety of my adult life." He claims that he has never been a resident of New York, never owned or leased property in New York, and never maintained an office, bank account, telephone listing or mailing address in New York. He contends that he visited New York once on behalf of DDMG, in order to effect a business

introduction for Textor, and later had "limited contact with legal counsel and other individuals in New York related to DDMG's Bankruptcy filing."

Cummings says that he "never personally communicated, whether orally or in writing, with any representative of any of the Plaintiffs"; did not market, solicit, negotiate, or advertise the PIPE Offering or PBC's options agreement to plaintiffs. He had no role in the purported June 5, 2012 telephone conference call. In fact, Cummings is named only twice in the complaint, in the introduction, and at paragraph 28, where he is identified a member of the board of directors, and chairman of its audit committee. It is alleged there that he "reviewed, approved and enabled DDMG to obtain financing from investors, including the Plaintiffs . . . [and] reviewed and approved DDMG's filings with the SEC during the relevant period."

Lunsford's affidavit reads much the same as Cummings's, except Lunsford claims to be a California resident, and that he served only on DDMG's board of directors, not its audit committee. The complaint names Lunsford in its introduction, and at paragraph 27, identifies him as a member of the Board of Directors, who merely "reviewed, approved and enabled DDMG to obtain financing from investors, including the Plaintiffs . . . [and] reviewed and approved DDMG's filings with the SEC during

the relevant period."

The complaint fails to state in detail the circumstances relevant to the Outside Directors constituting the alleged fraud or negligent misrepresentation, as required by CPLR 3016 (b). Therefore, the complaint as against the Outside Directors shall be dismissed for failing to state a cause of action, pursuant to CPLR 3211 (a) (7). It is unnecessary, therefore, to examine the balance of the Outside Directors's argument.

Accordingly, it is

ORDERED that the motions to dismiss the complaint as against defendants John C. Textor, Jonathan F. Teaford, Kevin C. Ambler, John M. Nichols, Jeffrey W. Lunsford, Keith L. Cummings, sued here as Casey L. Cummings, Kaleil Isaza Tuzman, and John Kluge, Jr., are granted, and the complaint as against them is hereby dismissed, with costs and disbursements to such defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the action is dismissed in its entirety; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 9, 2015 **ENTER:**

J.S.C.

DEBRA A. JAMES