SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES **PART 59**
Justice

IROQUOIS MASTER FUND LTD and KINGSBROOK OPPORTUNITIES MASTER FUND LP,

Plaintiffs,

- v -

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 No.: 651788/13

Motion Date: 03/07/14

Motion Seq. No.: 01

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 5 were read on this motion to dismiss.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No(s).	1, 2, 3,4
Answering Affidavits - Exhibits	No(s).	5
Replying Affidavits - Exhibits	No(s).	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers,

Motion sequences 001 and 002 are hereby consolidated for decision.

Defendant SingerLewak, LLP (SL), sued here as Singer Lewak LLP, moves to dismiss the complaint as against it (mot. seq. 001). Defendants PBC GP III, LLC, PBC Digital Holdings, LLC, PBC

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE: MOTION IS:** ☒ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Digital Holdings II, LLC, PBC DDH Warrants, LLC, and PBC MGPEF DDH, LLC (together, PBC) move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint as against them (mot. seq. 002).

Digital Domain Media Group, Inc. (DDMG) was a company involved with the production of feature films. Defendants John C. Textor (Textor) and Jonathan F. Teaford were inside directors of DDMG (the Inside Directors). Textor was DDMG's chairman and CEO. Defendant Deborah W. Textor is Textor's wife. Defendants John M. Nichols, Kevin C. Ambler, Jeffrey W. Lunsford, Casey L. Cummings, Kaeil Isaza Tuzman, and John W. Kluge were outside directors of DDMG (the Outside Directors). PBC had an equity stake in DDMG. SL 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.

After the IPO, on June 7, 2012 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). 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.

This action commenced 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.

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, SL claims that the complaint should be dismissed as against it either pursuant to CPLR 3211 (a) (3), "the party asserting the cause of action has not legal capacity to sue," or CPLR 3211 (a) (8), "the court has not jurisdiction of the person of the defendant."

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;" 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 14 statements in the June 7, 2012 Securities Purchase Agreement (the Purchase Agreement) claiming that they "contained misrepresentations of material fact or omitted to state a material fact."[1]

The Complaint alleges that SL particularly "furthered the wrongful conduct by providing DDMG an improper unqualified audit opinion for the fiscal year ended December 31, 2011," as well as

---

[1] No copy of the Purchase Agreement is included in any of the motion papers before the court. However, the Complaint ¶ 52 quotes the statements, all contained within paragraph 3 of the Purchase Agreement, extensively.

for 2009 and 2010. Plaintiffs claim that DDMG received qualified audit opinions from major "Big Four" accounting firms from 2005 through 2008, that questioned its ability to continue as a going concern. Plaintiffs allege that, consequently, DDMG switched to SL in 2009 in order "to receive the clean audit opinions that they desperately needed in order to secure financing for the Company." SL then produced unqualified audit opinions, although "DDMG was continuing to incur net losses, was showing negligible cash flows from operating activities, and was taking on an increasingly heavy debt burden," the same circumstances that purportedly denied them a clean audit opinion from previous accounting firms.

SL moves to dismiss the complaint, because it claims that plaintiffs lack standing to bring this action "as they are neither licensed nor registered to conduct business in New York," and they "have failed to establish personal jurisdiction over SingerLewak."

Certain characteristics of SL are undisputed:

- It is a California-based limited liability partnership.
- Its principal place of business is Los Angeles, California.
- It has six offices, all in California.
- It does not have any offices in New York State, or in any location outside of California.

- It has no employees in New York State.
- Its revenue from New York-based work was less than 1% in its last fiscal year.
- It audited DDMG for the years 2009-2011.
- It provided no services directly to either plaintiff.

SL claims that neither plaintiff is a registered entity in the State of New York. It submits the results of searches of the New York State Division of Corporations website, finding no matches for "Iroquois Master Fund Ltd." or "Iroquois Master Fund," through June 20, 2013, and no matches for "Kingsbrook Opportunities Master Fund" or Kingsbrook Opportunities Master Fund LP," through June 21, 2013. SL then contends that plaintiffs, as foreign entities, are required to register to do business in New York in order to bring suit, pursuant to Business Corporation Law (BCL) § 1312 (a), in the case of Iroquois, or Partnership Law § 121-907 (a), in the case of Kingsbrook.[2]

---

[2] BCL § 1312 (a) provides that "[a] foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state." New York's Partnership Law § 121-907 (a) has similar wording:

> A foreign limited partnership doing business in this state without having received a certificate of authority to do business in this state may not maintain any action, suit or special proceeding in any court of this state unless and until such partnership shall have received a certificate of authority in this state.

The statutory language does not require registration by a foreign corporation or limited partnership to commence an action, but only to "maintain any action."[3] It is perfectly permissible for a foreign corporation to register after commencing an action without being disqualified. Beer v Myers & Co., 159 AD2d 943, 943 (4th Dept 1990) ("compliance with Business Corporation Law § 1312 [a] . . . after commencement of an action is permissible"). Nonetheless, the court notes that as of the date that all motion papers at bar were submitted, plaintiffs had not registered in New York.

Plaintiffs argue that they have no need to register in New York at all, because they have not been "doing business in this state," as stated in the respective statutes. "In order for a foreign corporation to be 'doing business' in New York so as to require authorization before maintaining an action, the corporation must be engaged in a regular and continuous course of conduct in the State." Commodity Ocean Transp. Corp. of N.Y. v Royce, 221 AD2d 406, 407 (2d Dept 1995). This requires that "plaintiff's business activities in New York were not simply casual or occasional, but rather the activities were systematic

---

[3] "Authorization," "authority" and "registration" are used interchangeably in relevant cases. A foreign business corporation may apply for authority to do business in New York by application, pursuant to BCL § 1304; a foreign limited partnership may apply for authority to do business in New York by application, pursuant to Partnership Law § 121-902.

and regular, intrastate in character, and essential to the plaintiff's corporate business." Highfill, Inc. v Bruce & Iris, Inc., 50 AD3d 742, 744 (2d Dept 2008) (internal quotation marks omitted). Defendant has the burden of "establishing that the plaintiff's activities were not merely casual or occasional, but, rather, regular, systematic and continuous." United Arab Shipping Co. v Al-Hashim, 176 AD2d 569, 570 (1st Dept 1991); Nick v Greenfield, 299 AD2d 172, 173 (1st Dept 2002) ("Defendants have failed to demonstrate that these corporations' activities are so systematic and regular as to manifest continuity of activity in New York, and have failed to rebut the presumption that these entities are doing business where they were incorporated and not in New York").

SL states that "plaintiffs cannot claim this lawsuit arises out of an isolated transaction as plaintiffs' complaint clearly bases jurisdiction and venue on the Call Option Agreement, PIPE Offering and Securities Purchase Agreement, all of which plaintiffs allege were negotiated and/or closed in New York." SL does not, however, establish that contract negotiation is more than a mere casual or occasional business activity, but, rather, sufficiently regular, systematic and continuous to warrant the designation of doing business in this state. On the contrary, negotiating and executing contracts in New York have been held to be outside the ambit of BCL § 1312 (a). Intermar Overseas v

Argocean, 117 AD2d 492, 497 (1st Dept 1986) ("The facts that plaintiff maintains bank accounts in New York and that the default notices emanated from New York, where the agreements were negotiated and executed, are insufficient to require such authorization [pursuant to BCL § 1312 (a)]);" Fine Arts Enters. v Levy, 149 AD2d 795, 796 (3d Dept 1989) (Where "the only evidence defendant presented was that the contract was executed and performed in New York and that plaintiff has a New York address . . . [and] a New York bank account," plaintiff was found not to be doing business in New York, pursuant to BCL § 1312 [a]). Plaintiffs' standing to institute and maintain this action, as unregistered foreign entities, therefore, is not barred by the application of BCL § 1312 (a) or Partnership Law § 121-907 (a).

"Business Corporation Law § 1312's heightened 'doing business' standard is a higher hurdle than CPLR 302's . . ." AirTran N.Y., LLC v Midwest Air Group, Inc., 46 AD3d 208, 214 (1st Dept 2007).

SL argues that, regardless of plaintiffs' standing in this action, personal jurisdiction has not been extended over SL, pursuant to CPLR 302, New York's "long arm statute." CPLR 302 (a) (1) provides that personal jurisdiction may extend to a foreign enterprise that "transacts any business within the state or contracts anywhere to supply goods or services in the state;" CPLR 302 (a) (2) provides that personal jurisdiction may extend

to a foreign enterprise that "commits a tortious act within the state;" and CPLR 302 (a) (3) (ii) provides that personal jurisdiction may extend to a foreign enterprise that "commits a tortious act without the state causing injury to person or property within the state, . . . [if it] expects or should reasonably expect the act to have consequences in the state."

The Complaint charges that various defendants solicited, negotiated and executed plaintiffs' investment agreements in New York. DDMG's IPO was done on the New York Stock Exchange (NYSE) and its common stock was listed there. Defendants' alleged misconduct in misrepresenting DDMG's liquidity was intended "to artificially inflate the perceived value of DDMG common stock listed on the NYSE," and induce plaintiffs to invest in the company. Plaintiffs claim that its contracts were made within New York, defendants committed tortious acts within New York, and defendants committed tortious acts outside New York expecting, or should have been expecting, those acts to have consequences in New York.

While defendants have the burden of proving that foreign plaintiffs were doing business in New York, pursuant to BCL § 1312 (a), plaintiffs have the burden of proving that foreign defendants are reached by CPLR 302. Copp v Ramirez, 62 AD3d 23, 28 (1st Dept 2009) ("The burden rests on plaintiffs, as the parties asserting jurisdiction"). Under CPLR 302 (a) (1),

"long-arm jurisdiction over a nondomiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction." Id. Unless both prongs of this two-prong standard are met, "jurisdiction cannot be conferred under CPLR 302 (a) (1)." Johnson v Ward, 4 NY3d 516, 519 (2005). However, "one New York transaction is sufficient for personal jurisdiction . . ." , 90 D&R Global Selections, S.L. v Bodega Olegario Falcón Piñeiro AD3d 403, 404 (1st Dept 2011).

The issue is whether one or more audits conducted by SL, as a foreign accounting firm, of a foreign company is sufficient for personal jurisdiction. Plaintiffs rely upon general propositions, such as found in Kreutter v McFadden Oil Corp. (71 NY2d 460, 467 [1988]) ("one transaction in New York is sufficient to invoke jurisdiction, even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted"), or reliance on a theory of civil conspiracy, wherein SL allegedly had knowledge of the tortious acts committed in New York by other defendants (see Best Cellars, Inc. v Grape Finds at Dupont, Inc., 90 F Supp 2d 431, 446 [SD NY 2000]).

The Appellate Division, First Department, offers guidance in CRT Invs., Ltd. v BDO Seidman, LLP (85 AD3d 470 [1st Dept 2011]), under similar circumstances to the instant action.

This litigation arises out of plaintiffs' investment in the Ascot Fund, Limited, a Cayman Islands hedge fund audited by BDO Tortuga, which was a 'feeder fund' for Ascot Partners, L.P., a New York hedge fund audited by BDO Seidman. Plaintiffs asserted causes of action for fraud, aiding and abetting fraud, negligence, and gross negligence against these outside auditors for failing to disclose that the fund was ultimately managed by Bernard Madoff.

Plaintiffs failed to meet their burden of demonstrating the existence of personal jurisdiction over BDO Tortuga under New York's long arm statute. Plaintiffs failed to rebut defendant's affidavit, which established that BDO Tortuga has no presence in New York, that it performed the audit of the Ascot Fund in the Cayman Islands, pursuant to engagement letters executed in, and sent from, the Cayman Islands, and that there were only limited e-mails with anyone in New York 'affiliated in any way with Ascot Fund.' Although plaintiffs argue that BDO Tortuga relied upon the audit work that BDO Seidman had performed with respect to the existence and valuation of Ascot Partners and Ascot Fund's investments, there is no basis to conclude that BDO Tortuga should have reasonably expected to defend its actions in New York. All of the relevant parties to the cause of action (plaintiff, defendant, and audit client), and all of the work that BDO Tortuga performed were in the Cayman Islands. Nor does sending a few e-mails and engagement letters into New York alter this result.

Plaintiffs' alternative argument, that BDO Tortuga is subject to personal jurisdiction under CPLR 302 (a) (3), is also unavailing. In the context of a commercial tort, where the damage is solely economic, the situs of commercial injury is where the original critical events associated with the action or dispute took place, not where any financial loss or damages occurred. Plaintiff[s'] claim that [they were] sold the investment in New York is irrelevant, because the injury did not arise out of [their] purchase of the investment here, but, rather, out of BDO Tortuga's alleged failure to appropriately perform its audit services. Defendants' affidavit also established that BDO Tortuga did not derive 'substantial revenue' from interstate or international commerce."

Id. at 471-472 (citations omitted).

By this authority, the action as against SL shall be dismissed, pursuant to CPLR 3211 (a) (8), because the court has no personal jurisdiction over SL. Plaintiff has failed to meet the requirements of New York's long-arm statute.

Turning to PBC's motion, 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); Leon v Martinez, 84 NY2d 83, 87-88 (1994).

The Complaint states that PBC, a collection of investment vehicles, "granted Plaintiffs call options to purchase additional DDMG shares," in addition to the PIPE Offering. This was done when PBC allegedly, along with the other defendants, "knew or should have known that DDMG's liquidity crisis was more serious than had been disclosed to the public and Plaintiffs." Further, PBC allegedly concealed a $10 million loan to the Textors to fund the purchase of approximately 25% of DDMG's IPO shares. The loan bore "onerous terms," reflecting its riskiness, according to the Complaint. This transaction "was to ensure the success of the

IPO," by giving the illusion of independent investor demand. PBC's ultimate goal allegedly was to convert preferred shares, warrants and a note, owned or controlled by PBC, to more than 15 million shares of DDMG's common stock after a successful IPO.

PBC moves to be dismissed from the action, because its only connection to plaintiffs' investments in DDMG was the grant of call options, at no cost to plaintiffs. The call options set a strike price of $4.25 per share. Consequently, "Plaintiffs lost nothing; they received the options for free and chose not to invest additional money to exercise them." PBC claims that it had no part in the PIPE Offering, or any other aspect of plaintiffs' investments in DDMG. PBC states, without dispute, that it "has indeed never communicated with Plaintiffs."

PBC contends that the loan to the Textors came seven months before the PIPE Offering, and that "Textor's $10 million investment was fully disclosed." However, PBC acknowledges that the terms of its loan were not disclosed until August 29, 2012, at the earliest. Further, PBC argues that "PBC's loan to Textor could have only *helped* DDMG's liquidity at a time when neither Plaintiffs nor DDMG even contemplated the PIPE transaction or Call Options that are the actual subjects of the present action."

Additionally, PBC maintains that plaintiffs are trying

> "to blame [PBC] because it was obligated to correct those misstatements [allegedly made by other defendants] - assuming PBC knew about them - before the PIPE Transaction was consummated. Plaintiffs even

point to the $4.25 Call options strike price as evidence of PBC's participation because the amount was allegedly inflated and constituted a misstatement in itself."

Plaintiffs claim fraud and negligent misrepresentation by PBC. 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."

Plaintiffs argue that the Complaint details the necessary elements of fraud by PBC, representation of a material fact, falsity, scienter, reasonable reliance and injury. However, plaintiffs fail to establish the initial element in defining fraud. Even assuming that PBC knew of a liquidity crisis at DDMG prior to June 7, 2012, it made no representation nor omitted a representation of material fact, true or false, to plaintiffs at any time. There are no allegations of communications of any type between PBC and plaintiffs. Whatever inducement plaintiffs found sufficient to rely upon in making their investment decisions regarding DDMG, it did not come from promises, explanations, or representations provided them by PBC.

The only affirmative expression plaintiffs cite, made to several investors, not to plaintiffs alone, is the $4.25 strike price of the call options, which plaintiffs characterize as "artificially inflated and was itself an affirmative misrepresentation of DDMG's financial condition at the time." "[S]tock options constitute a promise to do something in the future -- a promise to sell stock to an individual at a set price at a time selected by the option holder during a prescribed period." Lucente v International Business Machine Corp., 146 F Supp 2d 298, 308 (SD NY 2001), revd on other grounds 310 F3d 243 (2d Cir 2002). The set price is also called the strike price, the price that the buyer of a call option has the right, but not the obligation, to pay for shares of the underlying stock, regardless of the actual selling price of the shares when the option is exercised, if it is exercised within a specified period of time. The strike price remains constant throughout the term of the option. "To make the trade profitable, the stock price should be higher than the combined price of the strike and the premium paid for the option." http://www.thestreet.com/topic/47221/strike-price.html (visited June 10, 2014). When the market price is below the strike price, "the option holder essentially is betting that the market price will rise over the strike price within the limited time period." United States v Grossman, 843 F2d 78, 81 n 1 (2d Cir 1988), cert

denied 488 US 1040 (1989). It follows that, when the market price is above the strike price, the option holder is betting that the market price will maintain or increase its difference with the strike price.

Plaintiffs' statement that the $4.25 strike price was "an affirmative misrepresentation of DDMG's financial condition at the time" is purely conclusory. A strike price, as indicated by Grossman, is part of a speculative proposition, not necessarily a value judgment on the financial condition of the company at issue. The eventual bankruptcy of DDMG makes any strike price seem inflated in retrospect, but that in itself does not allow plaintiffs to attribute actionable conduct to PBC. A strike price is, at best, an expression of opinion of future expectations, and not an element of fraud. Crossland Sav., v SOI Dev. Corp., 166 AD2d 495, 495 (2d Dept 1990) ("Representations that are mere expressions of opinion of present or future expectations are not to be considered promises when examining the issue of fraud in the inducement"). Offering plaintiffs call options at $4.25 was not an affirmative misrepresentation by PBC.

Plaintiffs contend that PBC is responsible for information that plaintiffs did not receive as to the alleged precarious financial position of DDMG. Plaintiffs do not deny their role 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"). However, plaintiffs claim that PBC had a "superior knowledge of essential facts render[ing] the transaction without disclosure inherently unfair." Dobroshi v Bank of Am., N.A., 65 AD3d 882, 884-885 (1st Dept 2009) ("defendant's superior knowledge of essential facts renders the transaction without disclosure inherently unfair").

PBC maintains that, absent a fiduciary or special relationship between the parties, there is no duty to disclose critical financial information. J.A.O. Acquisition Corp. v Stavitsky, 8 NY3d 144, 148 (2007) ("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"). PBC insists that the call option transaction, the only connection with the plaintiffs, was an arm's-length transaction, without any special relationship among them. Sebastian Holdings, Inc. v Deutsche Bank AG., 78 AD3d 446, 447 (1st Dept 2010) ("the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to

fiduciary duties"). Additionally, the call option transaction bore no cost; plaintiffs lost nothing when the call options expired valueless.

PBC also denies that DDMG's financial condition, to the degree that it was sheltered from plaintiffs, was "peculiarly within" its knowledge. see Stambovsky v Ackley, 169 AD2d 254, 259 (1st Dept 1991) ("Even an express disclaimer will not be given effect where the facts are peculiarly within the knowledge of the party invoking it"). In fact, the Complaint, in two places, claims that all or almost all defendants "knew or in the exercise of reasonable care should have known the following undisclosed material facts but deliberately or recklessly and negligently concealed them from Plaintiffs," then listing 19 specific items. Only the call option strike price might have been a subject "peculiarly within" PBC's knowledge, and it is shown above that the call option strike price was no more than an opinion. PBC cannot be held liable for misrepresentation by expression or omission based on conclusory allegations of a special relationship or peculiar knowledge.

The other causes of action as against PBC, aiding and abetting wrongful conduct, civil conspiracy, negligence, and breach of the implied covenant of good faith and fair dealing, restate the same allegations examined above, such as, "omitting to state certain true material facts necessary to correct

affirmative misrepresentations", "making affirmative misrepresentations to the Plaintiffs", "omitting to state other facts necessary to make such misstatements [of material fact] not misleading", and "making affirmative misstatements of material facts to the Plaintiffs". For all the reasons stated above, these four causes of action shall also be dismissed for failure to state a cause of action, pursuant to CPLR 3211 (a) (7).

Accordingly, it is

ORDERED that the motion to dismiss the complaint as against defendant SingerLewak, LLP, sued here as Singer Lewak LLP, is GRANTED, and the complaint as against it is hereby severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly (mot. seq. 001); and it is further

ORDERED that the motion to dismiss the complaint as against defendants PBC GP III, LLC, PBC Digital Holdings, LLC, PBC Digital Holdings II, LLC, PBC DDH Warrants, LLC, and PBC MGPEF DDH, LLC, pursuant to CPLR 3211 (a) (7), is GRANTED, and the complaint as against it is hereby severed and dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly (mot. seq. 002); and it is further

ORDERED that the action shall continue as to the remaining defendants; and it is further

ORDERED that the parties shall appear in IAS Part 59, 71 Thomas Street, Room 103, New York, New York for a preliminary conference on November 13, 2014, 9:30 AM.

This is the decision and order of the court.

Dated: October 3, 2014 **ENTER:**

DEBRA A. JAMES J.S.C.