Ahrenberg v Liotard-Vogt
2017 NY Slip Op 30667(U)
March 29, 2017
Supreme Court, New York County
Docket Number: 653687/2015
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 45
---X
STAFFAN AHRENBERG, *et al.*,

Plaintiffs,

-against-

PATRICK LIOTARD-VOGT, *et al.*,

Defendants.
---X

DECISION AND ORDER

Index No. 653687/2015

Mot. Seq. 006

HON. ANIL C. SINGH, J.:

In this action for, *inter alia*, fraud, breach of fiduciary duty, negligent misrepresentation, conversion, aiding and abetting conversion, unjust enrichment, quasi-appraisal, and rescission, Staffan Ahrenberg, *et al.* ("plaintiffs") move for a judgment of no less than $20 million in damages against ASW Capital AG ("ASW Capital"), Patrick Liotard-Vogt, Joseph Robinson, ASM Media Consult Corporation ("ASM Media") and aSmallWorld Holdings Inc. ("aSW"). Defendant ASW Capital moves for an order dismissing all of plaintiffs' counts pending against them pursuant to 3211(a)(7) and 3016(b) for failure to state a claim, 3211(a)(3) for lack of standing and 3211(a)(1) on the basis of documentary evidence. (Mot. Seq. 006). Plaintiffs oppose.

Facts

Prior to December 2012 and since May 16, 2006, aSW was the holding company of ASMALLWORLD, an invitation only online social network with 850,000 members. By December 2012, ASW Capital had acquired a 95 percent ownership stake in aSW. On December 5, 2012, ASW Capital created ASM Media and transferred all of ASW Capital's shares of aSW to ASM Media in exchange for all shares of ASM Media. Subsequently on December 13, 2012 aSW merged with and into ASM Media under a Delaware DGCL § 253 short-form merger. Following the merger, the corporate structure was such that ASW Capital was ASM Media's parent and aSW no longer existed. Because the merger occurred pursuant to DGCL § 253, all minority shareholders' shares were converted into the right to cash reimbursement and all minority shareholders were entitled to an appraisal pursuant to DGCL § 262.

Plaintiffs were minority shareholders of aSW. The merger converted minority shareholders' shares into a right to receive $0.96 per share of common stock and $1.24 per share of Preferred Series B stock. Plaintiffs did not exercise their right to an appraisal and instead brought this action in 2015. Their claims arise from the valuation of aSW's IP assets and business enterprise value for the purposes of the merger. Plaintiffs allege that the valuation of aSW was too low because Alvarez & Marsal Valuation Services LLC ("Alvarez"), the independent valuation firm that performed the valuation, was not given all relevant information. Alvarez estimated

aSW's business value to be between $3.2 million and $4.6 million. For the purposes of calculating a share price for the short-form merger, aSW was valued exactly in the middle of the estimate at $3.9 million. Yet, plaintiffs contend that in 2012 prior to the merger, ASW Capital placed a value on itself for the purposes of financing, but based on the same assets that yielded the $3.9 million valuation, of about $43 million. In their action, plaintiffs contend that they are entitled to be fully compensated for their minority shares on the basis of a consideration of all relevant financial information. At the core of plaintiffs' claims is the $43 million valuation of ASW Capital that plaintiffs allege was material information for the purposes of determining the value of aSW for the merger.

Plaintiffs' have interposed causes of action against ASW Capital for fraud (count 1), breach of fiduciary duty (count 4), negligent misrepresentation (count 7), conversion (count 5), aiding and abetting conversion (count 6), unjust enrichment (count 8), quasi-appraisal (count 11) and rescission (count 12). Defendants move to dismiss portions of counts 1, 3, 7 and 8 as it relates to aSW's sale of IP assets to ASW Capital contending that plaintiffs lack standing to pursue these claims. Defendants' seek to dismiss the remainder of plaintiffs' causes of action based upon conduct related to the short-form merger.

Analysis

Legal Standard

On a motion to dismiss based on the ground that the defenses are founded upon documentary evidence pursuant to CPLR 3211(a)(1), the evidence must be unambiguous, authentic, and undeniable. See Fountanetta v. Doe, 73 A.D.3d 78 (2d Dept 2010). "To succeed on a [CPLR 3211(a)(1)] motion ... a defendant must show that the documentary evidence upon which the motion is predicated resolves all factual issues as a matter of law and definitively disposes of the plaintiff's claim." Ozdemir v. Caithness Corp., 285 A.D.2d 961, 963 (2d Dept 2001), leave to appeal denied 97 N.Y.2d 605. Alternatively, "documentary evidence [must] utterly refute plaintiff's factual allegations, conclusively establishing a defense as a matter of law." See, Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

On a motion to dismiss pursuant to CPLR 3211(a)(3), in which a plaintiff lacks legal capacity or standing to sue, the court determines "whether the party seeking relief has a sufficiently cognizable stake in the outcome so as to cast the dispute in a form traditionally capable of judicial resolution." Matter of Graziano v County of Albany, 3 N.Y.3d 475, 479 (2004); see also Soc'y of Plastics Indus., Inc. v. County of Suffolk, 77 N.Y.2d 761, 772-73 (1991) (in determining whether a plaintiff has standing to sue, a court should look to "the existence of an injury in fact - an actual legal stake in the matter being adjudicated - which ensures that the party seeking review has some concrete interest in prosecuting the action.")

On a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), all factual allegations must be accepted as true, the complaint must be construed in the light most favorable to plaintiffs, and plaintiffs must be given the benefit of all reasonable inferences. Allianz Underwriters Ins. Co. v. Landmark Ins. Co., 13 A.D.3d 172, 174 (1st Dept 2004). The court determines only whether the facts as alleged fit within any cognizable legal theory. Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994). The court must deny a motion to dismiss, "if, from the pleading's four corners, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law." 511 West 232nd Owners Corp. v. Jennifer Realty Co., 98 N.Y.2d 144, 152 (2002).

"[N]evertheless, allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or contradicted by documentary evidence, are not entitled to such consideration." Quatrochi v. Citibank, N.A., 210 A.D.2d 53, 53 (1st Dept 1994) (internal citation omitted).

In any claim for fraud, New York law requires that "the circumstances constituting the wrong shall be stated in detail." CPLR 3016(b). Under this heightened pleading standard, a claim of fraud must be supported by factual allegations that sufficiently detail the allegedly fraudulent conduct and give rise to a reasonable inference of the alleged fraud. Pludeman v. Northern Leasing Systems,

Inc., 10 N.Y.3d 486, 492 (2008).

Whether Plaintiffs' have Standing to Bring these Claims

ASW Capital's motion to dismiss counts 1, 3, 7 and 8 under CPLR 3211(a)(3) alleging plaintiffs' lack of standing to sue related to aSW's sale of IP assets to ASW Capital is granted[1]. ASW Capital argues that plaintiffs' breach of fiduciary duty claim is derivate, not direct in nature, and that plaintiff does not have standing to individually bring these claims. See Memorandum of Law in Support, p. 8. In order to determine whether a stockholder's claim is derivate or direct, the court should consider "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)?" Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004).

In Feldman v. Cutaia, 951 A.2d 727 (Del. 2008), the court elaborated on the distinction between derivative and direct claims,

> If the corporation alone, rather than the individual stockholder, suffered the alleged harm, the corporation alone is entitled to recover, and the claim is derivative. Conversely, if the stockholder suffered harm independent of any injury to the corporation that would entitle him to an independent recovery, the cause of action is direct.

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[1] Whether shareholders have standing to sue qualifies as a substantive issue in which the law of the state of incorporation applies. See Namazee v. Premier Purch. Partners, L.P., 24 A.D.3d 196 (1st Dept 2005). As aSW was a Delaware corporation, Delaware law applies in this court's determination of standing.

Id. at 732. However, "although each question is framed in terms of exclusive alternatives (either the corporation or the Stockholders), some injuries affect both the corporation and the stockholders" and in such cases, both types of claims may be litigated. Thermopylae Capital Partners, L.P. v. Simbol, Inc., C.A. No. 10619-VCG, 2016 WL 368170, at *31 (Del. Ch., Jan. 29, 2016); see also Carsanaro v. Bloodhound Techs., Inc., 65 A.3d 618 (Del. Ch. 2013); Loral Space & Commc'ns Inc. v. Highland Crusader Offshore Ptrs., L.P., 977 A.2d 867 (Del. 2009).

Plaintiffs' argue that their claims are direct in nature because the merger immediately followed the IP asset sale and because the IP asset sale impacted their rights as minority stockholders independently of ASW Capital. Under Delaware law, "other than in instances of fraud or reorganization, a plaintiff loses standing to maintain a derivative suit where the corporation, in which the plaintiff holds stock, merges with another company." Ark. Teacher Ret. Sys. v. Caiafa, 996 A.2d 321, 322-23 (Del. 2010) ("Caiafa"). However, a stockholder maintains a post-merger suit in extremely limited circumstances such as "if the merger itself is the subject of a claim of fraud, *being perpetrated merely to deprive stockholders of the standing to bring a derivative action*." Lewis v. Ward, 852 A.2d 896, 902 (Del. 2004) (emphasis added) quoting Kramer v. Western Pac. Idus., Inc., 546 A.2d 348, 354 (Del. 1988); see also Lewis v. Anderson, 477 A.3d 1040, 1049 (Del. 1982).

Therefore, "Lewis v. Anderson [and its progeny] recognizes only two exceptions to this loss-of standing rule: (1) where the merger itself is the subject of a claim of fraud, being perpetrated merely to deprive shareholders of their standing to bring the derivative action, or (2) where the merger is essentially a reorganization that does not affect the plaintiff's relative ownership in the post-merger enterprise." Lambrecht v. O'Neal, 2 A.3d 277, 284 n. 20 (Del. 2010).

Regarding their argument that the merger immediately followed the IP asset sale, plaintiffs' rely upon In re Massey Energy Co. Derivative & Class Action Litigation, 2011 Del. Ch. LEXIS 83 (Del. Ch. May 31, 2011). In Massey, the court found that

> Delaware law recognizes a single, inseparable fraud when directors cover massive wrongdoing with an otherwise permissible merger...After allegedly intentionally engaging in fraudulent conduct that caused the stock price to plummet near bankruptcy, Countrywide directors would understandably seek an acquirer to effect a merger that would extinguish potential derivative claims...
>
> Id. at *123-24.

Fatal to plaintiffs' standing argument is the analysis that the Massey court itself engaged in on nearly identical facts as are presented here. There, the plaintiffs' argue that the decision in Caifaia modifies the standard set forth in Lewis v. Anderson such that stockholders in a merger do not ultimately lose standing to pursue derivative claims post-merger "where the complaint adequately alleged that

the board of directors' pre-merger breaches of fiduciary duty reflected misconduct so injurious to the company that it led to the subsequent merger, even in the absence of any claim that the board fraudulently negotiated or priced the merger transaction." Id. at 120-21. The Massey court rejected this proposition and found that

> The Supreme Court [in Caifaia] appears to have perceived that there was a factual basis for the fraud exception in *Lewis* to apply but that the objector had failed to invoke that exception in a fair and timely manner. To that point, the Supreme Court found that "[t]he extent of the Countrywide directors' allegedly fraudulent conduct and breach of fiduciary duties by failing loyally to oversee the company's practices in good faith would have necessitated (a) corporate rescue; and (b) individual legal protection. A merger was one of few available alternatives that met both of those objectives after the board's allegedly fraudulent schemes bankrupted a multibillion-dollar company." *Countrywide*, 996 A.2d at 323. "No one disputes," the Supreme Court goes on to say, "that Countrywide *needed* to sell itself, *and at a price significantly below its recent share price.*"
>
> Id. at 122-23 (emphasis added).

Two important and fundamental distinctions separate the case at hand from the Delaware Supreme Court's ruling in Caifaia. The first distinction is the absence of a factual basis for the fraud exception to apply. Here, plaintiffs' do not argue that either the alleged fraud was committed to deprive them of standing or that the merger was merely a reorganization. Additionally, the holding in Caifaia does not create a third category of exception to the general rule articulated in Lewis v. Anderson. In other words, the holding in Caifaia does not stand for the proposition that absent a showing of either a purposeful deprivation of standing or a reorganization, the

plaintiffs' have another bite of the apple to be able to show a single, irreparable fraud.

The second distinction is one of fact. In Caifaia, a merger was the only available alternative as a result of the board's fraudulent schemes. Countrywide needed to sell itself. Here, there are no allegations made by plaintiffs' that the merger was necessitated by some fraud that left any of the parties with no other options but to engage in a merger. The Alvarez and Marsal valuation report does not correct any of these inconsistencies.

Next, plaintiffs argue that their claims are direct rather than derivative because the IP asset sale impacted their rights independently of ASW Capital. The core of plaintiffs' argument is that aSW received less than fair value for its stock when it was conveyed to ASW Capital as part of the merger. However, even if plaintiffs were to recover under this theory, the remedy would be for ASW Capital to provide additional consideration to aSW for those assets.

Therefore, plaintiffs' claims are derivative in nature and ASW Capital's motion to dismiss plaintiffs' claims for lack of standing is granted. See Tooley, 845 A.2d 1031, 1033 ("whether a claim is derivative or direct depends upon "(1) who suffered the alleged harm (the corporation or the suing stockholders individually);

and (2) who should receive the benefit of the recovery or other remedy (the corporation or the stockholders, individually)?").

Plaintiffs' Causes of Action Related to the Merger

Plaintiffs' Cause of Action for Fraud

ASW Capital's motion to dismiss plaintiffs' first cause of action for fraud is granted. DGCL § 253 provides that a minority shareholder, in the event of a short-form merger, only has a claim to a statutory right to appraisal, unless the minority shareholder can make a demonstration of "fraud or blatant overreaching." Green v. Santa Fe Indus., Inc., 70 N.Y.2d 244, 259 (1987). To make a prima facie case for fraud that will survive a motion to dismiss, a plaintiff must allege "a misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury." Zanett Lombardier, Ltd. v. Maslow, 29 A.D.3d 495, 495 (1st Dept 2006).

In its complaint, plaintiffs' allege that ASW Capital sent a Notice of Merger in conjunction with the short-form merger that should have included "highly relevant information about ASW Capital's successful financing in Switzerland at a $43 million valuation." Compl. ¶147. However, the Merger Notice dated December 19, 2012 clearly shows that ASM Media, not ASW Capital sent plaintiff's the Notice of

Merger that contained these allegedly fraudulent misrepresentations. See Notice of Merger dated December 19, 2012.

Plaintiffs' counter that although this is true the complaint adequately alleges either a scheme to defraud or a civil conspiracy and therefore survives dismissal pursuant to a motion. To make a claim for a scheme to defraud, the complaint must demonstrate, a scheme, involving defendants, directed against the interests of plaintiffs and defendant's conduct in connection with the scheme. Shearson Lehman Bros., Inc. v. Bagley, 205 A.D.2d 467 (1st Dept 1994). In order to claim a conspiracy, the complaint must allege an agreement between two or more parties, an overt act in furtherance of the agreement, the parties' intentional participation in the furtherance of a plan or purpose and resulting damage or injury. Abacus Fed. Sav. Bank, 75 A.D.3d 472 (1st Dept 2010).

However, the lynchpin of both of these claims is that a corporation cannot conspire with its wholly owned subsidiary. "It is conceded that [the corporation] was formed for the sole purpose of taking title to the property from [a subsidiary]. To say such a relationship affords a basis for a conspiracy is much the same as saying an individual or a corporation can conspire with himself or itself. This cannot be done and a complaint so drawn is legally insufficient." Bereswill v. Yablon, 6 N.Y.2d 301, 305 (1959).

Therefore, any claims in the complaint or supporting papers that relate to a conspiracy between ASW Capital and ASM Media lacks merit, as ASM Media is the wholly owned subsidiary of ASW Capital. Similarly, ASW Capital could not have conspired with Liotard-Vogt and neither party alleges that aSW played any role in the merger. See Little v. City of New York, 487 F.Supp.2d 426, 441-42 (S.D.N.Y. 2007) ("Under the intracorporate conspiracy doctrine, the officers, agents and employees of a single corporate entity, each acting within the scope of their employment, are legally incapable of conspiring together."); In re Unocal Exploration Corp. Shareholders Litig., 793 A.2d 329, 338 (Del. Ch. 2000).

Therefore, ASW Capital's motion to dismiss is granted.

Plaintiffs' Remaining Claims for Negligent Misrepresentation, Breach of Fiduciary Duty, and Unjust Enrichment[2]

ASW Capital's motion to dismiss plaintiffs' seventh cause of action for negligent misrepresentation and fourth cause of action for breach of fiduciary duty is granted[3]. Under Delaware corporate law, a majority shareholder is the only entity that owes a duty to the minority shareholders— a duty of disclosure. In re Unocal

[2] Plaintiffs' have withdrawn their fifth and sixth causes of action for conversion and aiding and abetting conversion based upon this court's Decision and Order dated August 29, 2016.

[3] As a matter of Delaware law, since plaintiffs' cannot establish a possible claim of fraud or blatant overreaching, they have no claim "beyond their statutory right to seek an appraisal of their shares." Green v. Santa Fe Industries, Inc., 70 N.Y.2d 244 (1987); see also Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001). As this court has found that plaintiffs' have not adequately pled a cause of action for fraud the remainder of the claims are dismissed. However, even if this court were to find a cause of action for fraud, plaintiffs' claims for negligent misrepresentation, breach of fiduciary duty, quasi-appraisal, rescission and unjust enrichment would still be dismissed. See *infra*.

Exploration Corp. Shareholders Litig., 793 A.2d 329, 351-52 (Del. Ch. 2000). The subsidiary and its board members owe no such duty, "because the subsidiary directors have no role in the short form merger, . . . they have no duties to minority stockholders." See id at 338.

A claim of negligent misrepresentation requires a plaintiff to "allege 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." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 179 (2011). Further, a claim of negligent misrepresentation requires a showing of the existence of a "special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff." Id. at 180. It is undisputed by either party that at the time of the merger ASW Capital was not the majority shareholder, and therefore did not owe a fiduciary duty to plaintiffs. Therefore, ASW Capital's motion to dismiss plaintiffs' claim for negligent misrepresentation is granted.

As to the breach of fiduciary duty claim, "a fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11, 19 (2005), quoting Restatement [Second] of Torts § 874, Comment a). "Such a relationship, necessarily fact-specific, is grounded

in a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" Id. "It is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." Birnbaum v. Birnbaum, 73 N.Y.2d 461, 466 (1989). Again, as ASW Capital was not the majority shareholder, it cannot be held liable for a breach of fiduciary duty claim. Therefore, ASW Capital's motion to dismiss plaintiffs' claim for breach of fiduciary duty is granted.

Plaintiffs' Claim for Unjust Enrichment

ASW Capital's motion to dismiss plaintiffs' eighth cause of action for unjust enrichment is granted. "To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor." Nakamura v. Fujii, 253 A.D.2d 387, 390 (1st Dept 1998).

Plaintiffs' have not adequately alleged that ASW Capital received any benefit as a result of the merger. Rather, plaintiffs allege that aSW's value was received by ASM Media. Therefore, ASW Capital's motion to dismiss plaintiffs' claim for unjust enrichment is granted.

Plaintiffs' eleventh and twelfth causes of action for quasi-appraisal and rescission relief are dismissed. A claim for quasi-appraisal will not survive where all

other causes of actions are dismissed. See In re Orchard Enters., Inc., 88 A.3d 1, 42 (Del Ch 2014). As all underlying causes of action have been dismissed, the quasi-appraisal claim is also dismissed. As to the claim for rescission it is dismissed as it is not available for disclosure violations in the context of a short-form merger. See Berger v. Pubco Corp., 2008 Del Ch LEXIS 63, *15-16 (Del Ch May 30, 2008).

Plaintiff's Request for Leave to Amend the Complaint

Plaintiff's request for leave to amend the complaint is denied. Generally, "leave to amend a pleading should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit ... and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015) (internal citations omitted). Further, "[m]otions for leave to amend pleadings should be freely granted absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit...plaintiff need not establish the merit of its proposed new allegations." MBIA Ins. Corp. v. Greystone & Co. Inc., 74 A.D.3d 499, 499 (1st Dept 2010) (internal citations omitted).

In order to prevail on a claim for aiding and abetting a breach of fiduciary duty, plaintiffs must allege "(1) a breach by a fiduciary of obligations to another, (2)

that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damage as a result of the breach." Schroeder v. Pinterest Inc., 133 A.D.3d 12, 25 (1st Dept 2015) quoting Kaufman v. Cohen, 307 A.D.2d 113, 125 (1st Dept 2003). "A defendant knowingly participates in the breach of fiduciary duty when he or she provides 'substantial assistance' to the fiduciary, which occurs 'when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur.'" Schroeder, 133 A.D.3d at 25 quoting Kaufman, 307 A.D.2d at 126. "The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff." Kaufman, 307 A.D.2d at 126 (internal citations omitted).[4]

Additionally, the defendant must have known of the fiduciary duty. See People v. Coventry First LLC, 13 N.Y.3d 108, 115 (2009); see also Brasseur v. Speranza, 21 A.D.3d 297, 299 (1st Dept 2005) (actual knowledge of the duty is required, constructive knowledge is insufficient.). Finally, a plaintiff must plead this cause of action with particularity under CPLR 3016(b). See Front, Inc. v. Khalil, 103 A.D.3d 481, 483 (1st Dept 2013); Roni LLC v. Arfa, 72 A.D.3d 413 (1st Dept 2010).

[4] Substantial assistance is also a required prerequisite for successfully bringing a claim for aiding and abetting a fraud. See Stanfield Offshore Leveraged Assets, Ltd. v. Metropolitan Life Ins. Co., 64 A.D.3d 472, 490 (1st Dept 2009). As this court's determination regarding aiding and abetting a breach of fiduciary duty turns on the substantial assistance analysis, it will also be determinative of the aiding and abetting a fraud claim. See *supra*.

The crux of plaintiffs' argument is that aSW Capital substantially participated in the merger and therefore had a duty to disclose the alleged unfair $43 million valuation. See Oral Argument Transcript, pgs.25-26. However, this court has already determined that aSW Capital does not owe a fiduciary duty to plaintiffs. See *supra*. Therefore, plaintiffs' motion to amend must be dismissed for failing to allege the required element of substantial assistance in either an aiding and abetting claim for breach of fiduciary duty or fraud. See Kaufman, 307 A.D.2d at 126; Stanfield, 64 A.D.3d at 490.[5]

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss plaintiffs' causes of action for fraud, breach of fiduciary duty, negligent misrepresentation and unjust enrichment is granted as it relates to the sale of IP assets; and it is further

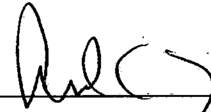
ORDERED that defendants' motion to dismiss plaintiffs' causes of action for fraud, negligent misrepresentation, breach of fiduciary duty, unjust enrichment, quasi-appraisal and rescission is granted as it relates to the short-form merger; and it is further

ORDERED that plaintiffs' motion to amend is denied.

[5] As this court has granted defendants' motions based upon lack of standing, we need not determine whether the documentary evidence refutes the factual allegations in the complaint.

Date: March 29, 2017

New York, New York



Anil C. Singh