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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

3:12-cv-170-RCJ-WGC

## ORDER

15 Currently before the Court is Defendant's Motion to Dismiss Second Amended  
16 Complaint (#37).

## BACKGROUND

In April 2012, Plaintiffs Summit Growth Management, LLC ("Summit Growth") and Summit Green Manufacturing, Inc. ("Summit Green") filed a first amended complaint against Defendant Thaddeus "Ted" Marek based on diversity jurisdiction. (Compl. (#3) at 1-2). The complaint alleged four causes of action for (1) fraud/fraudulent misrepresentation; (2) fraudulent concealment; (3) negligent misrepresentation; and (4) Nevada RICO. (*Id.* at 1).

In September 2012, this Court granted in part and denied in part Defendant's motion to dismiss. (Order (#27) at 1). The Court denied the motion to dismiss for lack of personal jurisdiction but granted the motion to dismiss for failure to state a claim with leave to amend. (*Id.* at 12). The Court found that Plaintiffs had failed to plead claims 1 and 3 with Federal Rule of Civil Procedure 9(b) specificity and had failed to sufficiently plead a special relationship between Summit Growth and Marek for claim 2. (*Id.* at 8-10).

1        In September 2012, Plaintiffs filed a second amended complaint (“SAC”) and alleged  
2 the following. (SAC (#32) at 1). Summit Growth was a Nevada limited liability company whose  
3 principal was Steven G. Mihaylo. (*Id.* at 2). Summit Green was a Nevada corporation who on  
4 May 20, 2011, became the assignee of Summit Growth in a Debtor-in-Possession, Interim  
5 Financing and Post-Confirmation Funding Agreement (“DIP Finance Agreement”) between  
6 Summit Growth and non-party Skye International, Inc. (“Skye”). (*Id.* at 2-3). Marek served as  
7 an officer and director of Skye. (*Id.* at 3). In October 2007, Marek became a director of Skye.  
8 (*Id.*). On March 26, 2008, Marek became Skye’s secretary. (*Id.*). On May 9, 2008, Marek  
9 became Skye’s Secretary/Treasurer. (*Id.*). On December 11, 2008, Marek became Skye’s  
10 Secretary/Treasurer and Chief Financial Officer. (*Id.*). On February 7, 2011, Marek became  
11 Skye’s President. (*Id.*).

12       The SAC alleged the following. Skye designed, developed, manufactured, and  
13 marketed several models of electronic tankless water heaters and was the debtor in two  
14 bankruptcy cases filed in the U.S. Bankruptcy Court for the District of Nevada. (*Id.*). Skye was  
15 the debtor in a Chapter 11 case, filed on December 16, 2009. (*Id.*). At the time of that filing,  
16 Skye had assets of approximately \$1,049,042 and liabilities of approximately \$3,171,892  
17 making Skye an insolvent corporation. (*Id.*). Skye was also the debtor in a Chapter 7 case,  
18 filed on April 28, 2011. (*Id.* at 4).

19       The SAC alleged the following. (*Id.*). Marek had made false and fraudulent statements  
20 to Mihaylo for the purpose of inducing Summit Growth to enter into and fund the DIP Finance  
21 Agreement. (*Id.*). “Marek told Mihaylo that a sale of Skye to two other tankless water heater  
22 companies Marek identified as A.O. Smith and Eemax was imminent in that it would occur  
23 within four to five months of agreeing to the DIP Finance Agreement.” (*Id.*). Specifically, at  
24 a November 15, 2009, meeting in Scottsdale, Arizona, Marek told Mihaylo that “Skye was  
25 worth \$50,000,000 and that A.O. Smith or Eemax would pay that price to purchase Skye.” (*Id.*  
26 at 5). “Marek also told Mihaylo during that meeting that in the absence of a purchase by A.O.  
27 Smith or Eemax both companies were prepared to enter into lucrative agreements with Skye  
28 for the purchase or licensing of Skye’s products.” (*Id.*). At a subsequent meeting on

1 November 30, 2009, Marek told Mihaylo that “A.O. Smith and Eemax had reviewed and  
2 approved Skye’s products and that A.O. Smith or Eemax were going to buy Skye.” (*Id.*).  
3 Marek also told Mihaylo that “a sale to or licensing agreements with A.O. Smith and/or Eemax  
4 were essentially a ‘done deal’ and that both companies were ‘on the hook’ but that in order to  
5 prepare Skye for sale and conclude the sale or license agreements Skye needed \$2,000,000  
6 in short-term working capital.” (*Id.*). On December 16, 2009, Marek “assured” Mihaylo that  
7 “A.O. Smith or Eemax were prepared to purchase Skye for \$50,000,000 and in the absence  
8 of a purchase A.O. Smith and/or Eemax were prepared to enter into lucrative licensing  
9 agreements with Skye.” (*Id.*).

10 The SAC alleged the following. (*Id.* at 6). Summit Growth, acting through Mihaylo,  
11 entered into the DIP Finance Agreement with Skye based on Marek’s statements. (*Id.*).  
12 Under the DIP Finance Agreement, Summit Growth agreed to provide Skye up to \$2,000,000  
13 in debtor-in-possession financing for short-term liquidity needs pending Skye’s sale to or  
14 licensing agreements with A.O. Smith and/or Eemax. (*Id.*). The bankruptcy court approved  
15 the DIP Finance Agreement on December 23, 2009, and entered a final order in the Chapter  
16 11 case on March 2, 2010. (*Id.*). Summit Growth has funded \$1,588,910 under the DIP  
17 Finance Agreement as of the filing of the SAC. (*Id.*).

18 The SAC alleged the following. (*Id.* at 7). Marek “continued to make false statements  
19 about Skye’s imminent sale to or licensing agreements with A.O. Smith and/or Eemax, and he  
20 continued to conceal the absence of any imminent sale or licensing agreement, Skye’s true  
21 value and the amount that prospective buyers would pay to purchase Skye after the DIP  
22 Finance Agreement was signed, approved, and funded.” (*Id.*). On February 3, 2011, Marek  
23 sent Mihaylo an email which stated that, on February 1, 2011, Marek had met with Mike  
24 Parker, Division Manager of A.O. Smith in Las Vegas and that Parker had stated that “A.O.  
25 Smith could either buy Skye or do a licensing agreement with Skye.” (*Id.*). On February 6,  
26 2011, Marek emailed Mihaylo and told Mihaylo that Eemax and A.O. Smith “both would like  
27 to make a deal” with Skye. (*Id.* at 7-8). After receiving the February 6th email, Summit Growth  
28 funded an additional \$100,000 under the DIP Finance Agreement. (*Id.* at 8). On February 16,

1 2011, Mihaylo confirmed that Summit Growth had provided Skye with an additional \$100,000  
2 based on the “strength of a *pending* offer” by A.O. Smith. (*Id.*). On February 18, 2011, Marek  
3 emailed Mihaylo and stated that everything with A.O. Smith was “on track.” (*Id.*). On February  
4 28, 2011, Marek sent Mihaylo an email and represented that “there would be a deal between  
5 Skye and A.O. Smith or Eemax ‘in the next few weeks.’” (*Id.*). These statements “were false  
6 when they were made, they were known by Marek to be false at the time they were made and  
7 the true facts were concealed” because on March 7, 2011, Marek emailed Mihaylo and told  
8 him that he was “still waiting for an offer from A.O. Smith” and that he was only at the stage  
9 of “meeting Kevin the President of Eemax.” (*Id.*).

10 The SAC alleged the following. (*Id.*). Marek knew that his statements were false  
11 because on February 28, 2011, a person named Fred Huggins sent Marek an email which  
12 stated, “Hi Ted, . . . In our Saturday meeting, you spoke of the ‘great idea’ of my pursuing  
13 employment with A.O. Smith or Eemax, which could put me in a good position to encourage  
14 them to license products, or buy SKYE.” (*Id.* at 8-9). “Skye was never sold to, and it never  
15 entered into licensing agreements with A.O. Smith, Eemax or any other tankless water heater  
16 company as Marek had repeatedly promised.” (*Id.* at 9).

17 The SAC alleged five causes of action. (*Id.* at 9-14). In the first cause of action,  
18 Plaintiffs alleged fraud/fraudulent misrepresentation. (*Id.* at 9). Plaintiffs alleged that Summit  
19 Growth had entered into and funded the DIP Finance Agreement based on statements that  
20 Marek had made on or before December 16, 2009, regarding the sale of Skye to A.O. Smith  
21 or Eemax or the lucrative licensing agreements, that Skye was worth \$50,000,000, and that  
22 A.O. Smith or Eemax would pay \$50,000,000 to purchase Skye. (*Id.*). Plaintiffs alleged that  
23 Summit Growth would not have entered into and funded the DIP Finance Agreement had it  
24 known the truth of the statements. (*Id.* at 10). Plaintiffs alleged that Marek knew his  
25 statements were false when he made them because of his February 28, 2011, email which  
26 demonstrated that he concocted a plan after he had made those statements to have Huggins  
27 seek employment with A.O. Smith or Eemax to encourage either of them to buy Skye or  
28 license its products. (*Id.*). Plaintiffs alleged that Summit Growth reasonably and justifiably

1 relied on Marek's statements because "Mihaylo trusted Marek as a friend and as a business  
2 associate having served with Marek on Skye's board of directors briefly as Skye's Chairman  
3 of the Board until he resigned on or about September 14, 2009." (*Id.*).

4 In the second cause of action, Plaintiffs alleged fraudulent concealment/constructive  
5 fraud. (*Id.* at 11). Plaintiffs alleged that the DIP Finance Agreement made Summit Growth a  
6 secured creditor of an insolvent corporation to which Marek was an officer and director. (*Id.*).  
7 Marek owed Summit Growth a fiduciary duty that included a duty to disclose and to not  
8 conceal material information from Summit Growth. (*Id.*). After December 16, 2009, Marek  
9 continued to tell Mihaylo that the sale of Skye to A.O. Smith and/or Eemax was pending and  
10 imminent. (*Id.*).

11 In the third cause of action, Plaintiffs alleged breach of fiduciary duty. (*Id.* at 12).  
12 Plaintiffs alleged that Marek owed Summit Growth a fiduciary duty to act in the best interest  
13 of his creditors, to not conceal, and to provide Summit Growth with accurate and truthful  
14 information about Skye. (*Id.* at 13). After the DIP Finance Agreement had been signed,  
15 Marek never informed Summit Growth that there was no imminent sale, that Skye was not  
16 worth \$50,000,000 or that A.O. Smith and/or Eemax would not pay \$50,000,000 for Skye. (*Id.*  
17 at 13). Plaintiffs alleged that Marek had diverted or attempted to divert funds that Skye had  
18 received under the DIP Finance Agreement for his own personal use to pay third-party lenders  
19 for his personal loans. (*Id.*).

20 In the fourth cause of action, Plaintiffs alleged failure to disclose breach of fiduciary  
21 duty/constructive fraud. (*Id.* at 14). Plaintiffs alleged that Marek had a duty to disclose his  
22 breach of fiduciary duty to Summit Growth and that his failure to do so was constructive fraud.  
23 (*Id.*). In the fifth cause of action, Plaintiffs alleged negligent misrepresentation based on the  
24 statements that Marek had stated on or before December 16, 2009. (*Id.* at 14-15).

25 **LEGAL STANDARD**

26 When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, the  
27 court must accept as true all factual allegations in the complaint as well as all reasonable  
28 inferences that may be drawn from such allegations. *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1150

1 n.2 (9th Cir. 2000). Such allegations must be construed in the light most favorable to the  
2 nonmoving party. *Shwarz v. United States*, 234 F.3d 428, 435 (9th Cir. 2000). In general, the  
3 court should only look to the contents of the complaint during its review of a Rule 12(b)(6)  
4 motion to dismiss. However, the court may consider documents attached to the complaint or  
5 referred to in the complaint whose authenticity no party questions. *Id.*; see *Durning v. First*  
6 *Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987).

7 The analysis and purpose of a Rule 12(b)(6) motion to dismiss for failure to state a  
8 claim is to test the legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th  
9 Cir. 2001). The issue is not whether a plaintiff will ultimately prevail but whether the claimant  
10 is entitled to offer evidence to support the claims. *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246,  
11 249 (9th Cir. 1997) (quotations omitted). To avoid a Rule 12(b)(6) dismissal, a complaint does  
12 not need detailed factual allegations; rather, it must plead “enough facts to state a claim to  
13 relief that is plausible on its face.” *Clemens v. Daimler Chrysler Corp.*, 534 F.3d 1017, 1022  
14 (9th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955,  
15 1964, 167 L.Ed.2d 929 (2007)); *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 1949,  
16 173 L.Ed.2d 868 (2009) (stating that a “claim has facial plausibility when the plaintiff pleads  
17 factual content that allows the court to draw the reasonable inference that the defendant is  
18 liable for the misconduct alleged”). Even though a complaint does not need “detailed factual  
19 allegations” to pass muster under 12(b)(6) consideration, the factual allegations “must be  
20 enough to raise a right to relief above the speculative level . . . on the assumption that all the  
21 allegations in the complaint are true (even if doubtful in fact).” *Twombly*, 550 U.S. at 555, 127  
22 S.Ct. at 1965. “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the  
23 elements of a cause of action will not do.’” *Iqbal*, 556 U.S. at 678, 129 S.Ct. at 1949. “Nor  
24 does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual  
25 enhancements.’” *Id.* (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. at 1966).

26 Federal Rule of Civil Procedure 9(b) provides that “[i]n alleging fraud or mistake, a party  
27 must state with particularity the circumstances constituting fraud or mistake. Malice, intent,  
28 knowledge, and other conditions of a person’s mind may be alleged generally.” Fed. R.

1 Civ. P. 9(b). Under Rule 9(b), a plaintiff must be specific enough to give defendants notice of  
2 the particular misconduct so that they can defend against the charge and not just deny that  
3 they have done anything wrong. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th  
4 Cir. 2003). “Averments of fraud must be accompanied by ‘the who, what, when, where, and  
5 how’ of the misconduct charged.” *Id.* A “plaintiff must set forth *more* than the neutral facts  
6 necessary to identify the transaction. The plaintiff must set forth what is false or misleading  
7 about a statement, and why it is false.” *Id.*

## 8 DISCUSSION

9 Marek files a motion to dismiss the SAC in its entirety. (Mot. to Dismiss (#37) at 1).  
10 Marek argues that Summit Green lacks standing to assert the claims because Plaintiffs do not  
11 allege that Summit Growth assigned any of its potential claims against Marek to Summit Green  
12 and they did not explain how a company formed in May 2011 has standing to bring claims  
13 against Marek for alleged misrepresentations that occurred prior to Summit Green’s formation.  
14 (*Id.* at 12). Marek asserts that all of Summit Green’s claims should be dismissed. (*Id.*). Marek  
15 argues that Plaintiffs fail to state a fraud based claim. (*Id.*). Marek asserts that the alleged  
16 representations are speculations about future events or opinions that cannot form the basis  
17 for an actionable fraud claim. (*Id.* at 15). Marek contends that the representation that Skye  
18 was valued at \$50,000,000 is an opinion about the value of a business and that the statements  
19 that A.O. Smith and/or Eemax may pay \$50,000,000 to purchase Skye or may license  
20 products are speculations about future events that third parties may or may not agree to. (*Id.*  
21 at 15-16). Marek argues that Plaintiffs have not pled with Rule 9(b) particularity that the  
22 statements were false. (*Id.* at 17). Marek asserts that the mere fact that an event did not  
23 come to be does not demonstrate that a representation was false at the time it was made.  
24 (*Id.*). Marek argues that Plaintiffs have failed to allege any facts showing that Marek knew the  
25 representations were false at the time he made them. (*Id.*). Marek also contends that  
26 statements made over a year after the alleged misrepresentations say nothing about whether  
27 he knew his statements in 2009 were false. (*Id.* at 18). Marek asserts that Plaintiffs’ alleged  
28 reliance was neither reasonable nor justified. (*Id.* at 19). Marek argues that Plaintiffs have

1 failed to state a claim for constructive fraud/fraudulent concealment because the alleged  
2 misrepresentations took place before Plaintiffs entered into the DIP Finance Agreement, and  
3 thus, Plaintiffs were not creditors of Skye at the time of the misrepresentations. (*Id.* at 25).  
4 Marek contends that Plaintiffs fail to plead facts that state what he concealed from them. (*Id.*  
5 at 26). Marek argues that Plaintiffs fail to state a claim for negligent misrepresentation  
6 because the statements were vague, speculative, and puffery. (*Id.* at 28). Marek asserts that  
7 Plaintiffs' fiduciary based claims fail because there is no such duty between creditors and an  
8 officer/director and the claims are preempted by the Bankruptcy Code. (*Id.* at 29). Marek also  
9 argues that the bankruptcy court retained jurisdiction over Plaintiffs' claims. (*Id.*).

10 In response, Plaintiffs argue that Summit Green is a proper plaintiff in this action  
11 because it is an assignee of Summit Growth. (Opp'n to Mot. to Dismiss (#42) at 9-10).  
12 Plaintiffs argue that they have stated false representations because the alleged  
13 representations were definitive and certain and represented a current state of events set to  
14 conclude within a well-defined period of time. (*Id.* at 10-11). Plaintiffs argue that Summit  
15 Growth justifiably relied on Marek's statements because there were no red flags that triggered  
16 Mihaylo's need to further investigate. (*Id.* at 21). Plaintiffs assert that, in Nevada, an officer  
17 of an insolvent company owes a fiduciary duty to a company's creditors. (*Id.* at 22). Plaintiffs  
18 contend that they have pled concealment because the fraudulent misrepresentations can  
19 plausibly be construed as acts of active concealment. (*Id.* at 23-24). Plaintiffs argue that they  
20 state a valid claim for negligent misrepresentation because Marek's statements were factual  
21 and definitive. (*Id.* at 25). Plaintiffs assert that the bankruptcy law does not preempt their  
22 fiduciary duty claims. (*Id.* at 26). Plaintiffs also assert that the bankruptcy court's retention of  
23 post-confirmation jurisdiction in the closed Chapter 11 case does not extend to this case. (*Id.*  
24 at 28).

25 Marek filed a reply. (Reply to Mot. to Dismiss (#45)).

26 **I. Standing for Summit Green**

27 The Court declines to decide whether one of the Plaintiffs lack standing at this time.  
28 The SAC states that “[e]xcept for funding obligations, pursuant to an *Assignment Agreement*

1 dated on or about May 20, 2011, [Summit Green] is the assignee of [Summit Growth] of that  
2 [DIP Finance Agreement] between [Summit Green] and non-party Skye International, Inc.”  
3 (See SAC (#32) at 2-3). Based on this statement, it appears that Summit Growth only  
4 assigned part of the DIP Finance Agreement to Summit Green because Summit Growth  
5 retained funding obligations. As such, it appears that both Plaintiffs have an interest in the  
6 contract. The Court further notes that Article 11, Section 11.1(b) of the DIP Finance  
7 Agreement provides that “[a]ny warranty, representation, or other statement made or furnished  
8 to Lender by or on behalf of Borrower . . . proves to have been false or misleading in any  
9 material respect when made or furnished” is a default. (See DIP Finance Agreement (#37-1)  
10 at 23).

11 **II. Bankruptcy Court Jurisdiction**

12 The confirmed Chapter 11 plan of reorganization for Skye (the “Plan”) stated that the  
13 bankruptcy court would retain jurisdiction under the following circumstances: (A) to determine  
14 the allowability and payment of any claims upon any objections by the debtor or any other  
15 party in interest entitled to proceed in that manner; (B) to determine any disputes which might  
16 arise regarding the interpretation of the Plan provisions; (C) to facilitate the consummation of  
17 the Plan; (D) to adjudicate any “core proceedings” under 28 U.S.C. § 157(b) which might be  
18 pertinent to the reorganization; and (E) to enter an appropriate final decree in the  
19 reorganization case. (Plan (#37-4) at 43).

20 The Court finds that the bankruptcy court does not have jurisdiction over this case.  
21 Plaintiffs are suing Marek as an individual for alleged misrepresentations he made on behalf  
22 of Skye and are seeking damages from Marek as an individual. As such, this case does not  
23 involve the Skye or the Plan.

24 **III. First Claim: Fraud/Fraudulent Misrepresentation**

25 To state a claim for fraudulent misrepresentation in Nevada, a plaintiff must establish  
26 the following elements: (1) a false representation made by the defendant; (2) defendant’s  
27 knowledge or belief that its representation was false or that defendant has an insufficient basis  
28 of information for making the representation; (3) defendant intended to induce plaintiff to act

1 or refrain from acting upon the misrepresentation; (4) justifiable reliance upon the  
2 misrepresentation; and (5) damage resulting from such reliance. *Bulbman, Inc. v. Nevada*  
3 *Bell*, 825 P.2d 588, 592 (Nev. 1992).

4 In this case, Plaintiffs allege five misrepresentations in the SAC that occurred prior to  
5 entering into the DIP Finance Agreement:

- 6 • On November 15, 2009, Marek told Mihaylo that "Skye was worth \$50,000,000 and that  
A.O. Smith or Eemax would pay that price to purchase Skye." (SAC (#32) at 5).
- 7 • On November 15, 2009, Marek told Mihaylo that "in the absence of a purchase by A.O.  
8 Smith or Eemax both companies were prepared to enter into lucrative agreements with  
Skye for the purchase or licensing of Skye's products." (*Id.*).
- 9 • On November 30, 2009, Marek told Mihaylo that "A.O. Smith and Eemax had reviewed  
10 and approved Skye's products and that A.O. Smith or Eemax were going to buy Skye."  
(*Id.*).
- 11 • On November 30, 2009, Marek told Mihaylo that "a sale to or licensing agreements with  
12 A.O. Smith and/or Eemax were essentially a 'done deal' and that both companies were  
13 'on the hook' but that in order to prepare Skye for sale and conclude the sale or license  
agreements Skye needed \$2,000,000 in short-term working capital." (*Id.*).
- 14 • On December 16, 2009, Marek "assured" Mihaylo that "A.O. Smith or Eemax were  
15 prepared to purchase Skye for \$50,000,000 and in the absence of a purchase A.O.  
16 Smith and/or Eemax were prepared to enter into lucrative licensing agreements with  
Skye." (*Id.*).

17 The Court denies the motion to dismiss the first cause of action. The Court finds that,  
18 as pled, Marek's statements were representations and that Plaintiffs have pled sufficient facts  
19 to establish that Marek knew these representations were false at the time he made them.

20 **IV. Second Claim: Fraudulent Concealment/Constructive Fraud**

21 To succeed on a claim for fraudulent concealment in Nevada, a plaintiff must show that:  
22 (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty  
23 to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the  
24 fact with the intent to defraud plaintiff; (4) the plaintiff was unaware of the fact and would have  
25 acted differently had he known of the concealed fact; and (5) as a result of the concealment,  
26 the plaintiff sustained damages. *Nevada Power Co. v. Monsanto Co.*, 891 F. Supp. 1406,  
27 1415 (D. Nev. 1995).

28 Generally, Nevada does not recognize an action for fraud based on nondisclosure

1 unless the plaintiff demonstrates that the defendant had a duty to disclose the fact at issue.  
2 *Dow Chem. Co. v. Mahlum*, 970 P.2d 98,110 (Nev. 1998), *overruled in part on other grounds*  
3 by *GES, Inc. v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). A duty to disclose may arise when a  
4 fiduciary relationship exists between the parties or “where the parties enjoy a ‘special  
5 relationship,’ that is, where a party reasonably imparts special confidence in the defendant and  
6 the defendant would reasonably know of this confidence.” *Id.* (citing *Mackintosh v. Jack  
7 Matthews & Co.*, 855 P.2d 549, 553 (Nev. 1993)). A duty to disclose may also arise in certain  
8 transactions where the defendant alone has knowledge of material facts that are not within the  
9 fair and reasonable reach of the plaintiff. *Id.*

10 Generally, “an arms-length lender-borrower relationship is not fiduciary in nature.”  
11 *JPMorgan Chase Bank, N.A. v. KB Home*, 632 F.Supp.2d 1013, 1026 (D. Nev. 2009).  
12 However, under the insolvency exception, directors of an insolvent corporation owe a fiduciary  
13 duty to the company’s creditors. *Id.* The Nevada Supreme Court has not determined whether  
14 this exception applies in Nevada. *Id.*

15 In *JPMorgan Chase*, Judge Pro, sitting in diversity jurisdiction, found that the Nevada  
16 Supreme Court had not determined whether the insolvency exception applied in Nevada. *Id.*  
17 However, after analyzing the rationale behind the exception<sup>1</sup>, Judge Pro concluded that the  
18 Nevada Supreme Court would extend the insolvency exception to corporations and limited  
19 liability companies. *Id.* at 1026-27. This Court also finds that the Nevada Supreme Court  
20 would extend the insolvency exception to corporations and limited liability companies.

21 As such, the Court finds that Plaintiffs have stated a claim for fraudulent concealment  
22 because Plaintiffs sufficiently allege that Marek had made false representations, had a duty  
23 to disclose those material facts to Plaintiffs, and had actively concealed the truth from them.  
24 As such, the Court denies the motion to dismiss the second cause of action.

25  
26 \_\_\_\_\_  
27 <sup>1</sup> The court found that the exception gave creditors of an insolvent company firm  
28 standing to assert that directors had breached their fiduciary duties by improperly harming the  
economic value of the firm to the detriment of the creditors. *JPMorgan Chase*, 632 F.Supp.2d  
at 1026.

**V. Third & Fourth Claims: Breach of Fiduciary Duty & Failure to Disclose Breach of Fiduciary Duty/Constructive Fraud**

Here, Plaintiffs assert that directors of an insolvent company have fiduciary duties to its creditors under the so-called insolvency exception. (See Opp'n to Mot. to Dismiss (#42) at 22, 26). The Court finds that Plaintiffs state claims for breach of fiduciary duty and failure to disclose breach of fiduciary duty because this Court finds that the Nevada Supreme Court would apply the insolvency exception in Nevada. The Court denies the motion to dismiss the third and fourth causes of action.

## VI. Fifth Claim: Negligent Misrepresentation

To state a claim for negligent misrepresentation in Nevada, a plaintiff must allege: (1) a representation that is false; (2) that the representation was made in the course of the defendant's business or in any action which he has a pecuniary interest; (3) that the representation was for the guidance of others in their business transactions; (4) that the representation was justifiably relied upon; (5) such reliance resulted in pecuniary loss to the relying party; and (6) that the defendant failed to exercise reasonable care or competence in obtaining or communicating the information. *G.K. Las Vegas Ltd. P'ship v. Simon Prop. Grp., Inc.*, 460 F.Supp.2d 1246, 1262 (D. Nev. 2006). "The difference between fraud and negligent misrepresentation is that a negligent misrepresentation is made without a reasonable basis for believing its truthfulness." *Scaffidi v. United Nissan*, 425 F.Supp.2d 1159, 1170 (D. Nev. 2005).

The Court denies the motion to dismiss the claim for negligent misrepresentation because Plaintiffs have sufficiently pled false representations.

## CONCLUSION

For the foregoing reasons, IT IS ORDERED that Defendant Thaddeus "Ted" Marek's Motion to Dismiss Second Amended Complaint (#37) is DENIED.

DATED: This 22nd day of May, 2013.

  
R. James  
United States District Judge