SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN BRANSTEN

PRESENT: J.S.C. **PART** 3
Justice

Index Number : 651614/2012
IROQUOIS MASTER FUND LTD.
vs.
HYPERDYNAMICS CORPORATION
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 651614/2012
MOTION DATE 12/11/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3 **, were read on this motion to/for** dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits **No(s).** 1
Answering Affidavits — Exhibits **No(s).** 2
Replying Affidavits **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: June 19, 2013

EILEEN BRANSTEN J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

----------X

IROQUOIS MASTER FUND LTD., HUDSON BAY MASTER FUND LTD., CRANSHIRE CAPITAL MASTER FUND, LTD., KINGSBROOK OPPORTUNITIES MASTER FUND LP, and FREESTONE ADVANTAGE PARTNERS II, LP,

Plaintiffs,

-against-

HYPERDYNAMICS CORPORATION, RAY LEONARD, ROBERT A. SOLBERG, HERMAN J. COHEN, LORD DAVID OWEN, FRED S. ZEIDMAN, and WILLIAM O. STRANGE,

Defendants.

----------X

Index No. 651614/2012
Motion Date: 12/11/2012
Motion Seq. No.: 001

BRANSTEN, J.

This matter comes before the Court on Defendants' motion to dismiss. Defendant Hyperdynamics Corporation ("Hyperdynamics") and the individually-named Defendants Ray Leonard, Robert A. Solberg, Herman J. Cohen, Lord David Owen, Fred S. Zeidman, and William O. Strange (collectively the "Individual Defendants") seek dismissal of Plaintiff's First Amended Complaint in its entirety pursuant to CPLR 3211(a)(1), (a)(7), and (a)(8), as well as CPLR 3016(b) and § 3013. Plaintiffs oppose. For the reasons that follow, Defendants' motion is granted in part and denied in part.

I. Background[1]

The instant litigation stems from Plaintiffs' $30 million investment in Defendant Hyperdynamics, an oil and gas exploration company. (Compl. ¶ 1.) Plaintiffs made their investment pursuant to a Securities Purchase Agreement ("SPA") executed by Plaintiffs and Hyperdynamics dated January 30, 2012. *Id.* ¶ 36.

As described by Plaintiffs in the Complaint, Hyperdynamics "needed to raise money" in January 2012 due to delays and cost overruns stemming from the Company's drilling of its first exploratory oil well, known as Sabu-1. *Id.* ¶ 2. Hyperdynamics then approached Plaintiffs through its placement agent to seek additional capital. *Id.* ¶ 28.

Plaintiffs engaged in negotiations with Hyperdynamics and ultimately entered into the SPA. Plaintiff now points to two "critical representations" made by Hyperdynamics in the SPA. First, Hyperdynamics represented and warranted that "[s]ince the date of the latest audited financial statements included within the SEC reports . . . there has been no event, occurrence or development that has had or could reasonably be expected to result in a Material Adverse Effect . . ." *Id.* ¶ 37; *see also* Affidavit of Joshua Silverman in Opposition to Defendants' Motion to Dismiss ("Silverman Aff.") § 3.1(g). Second, Plaintiff notes that Hyperdynamics represented that it had disclosed everything necessary

---

[1] The facts as described in this section are drawn from the First Amended Complaint ("Complaint" or "Compl.") unless otherwise noted.

to make its public disclosures "not misleading." (Silverman Aff. § 3.1(n).) In addition, Plaintiff contends that, separate and apart from these contractual assurances, Hyperdynamic's CFO represented that the Company did not anticipate making any public announcements for at least thirty days after the parties closed on the SPA. (Compl. ¶ 35.)

While Hyperdynamics made these representations, Plaintiffs contend that Defendants nonetheless failed to disclose that Hyperdynamics was on the verge of hitting its target drilling depth at the closing date of the SPA. *Id.* ¶ 42. Further, Plaintiffs maintain that Defendants "had reason to believe" at the time of closing that the Sabu-1 well did not contain commercial grade oil but did not disclose as much to Plaintiffs. *Id.* ¶ 43. According to Plaintiffs, both items of information "could reasonably be expected to result in a Material Adverse Effect" on Hyperdynamics. *Id.* ¶ 63. Thus, since Hyperdynamics failed to disclose the progress of its drilling and the contents of the Sabu-1 well prior to closing on the SPA, Plaintiffs contend that Hyperdynamics breached Section 3.1(g) of the SPA, the "material and adverse effect" representation. *Id.* ¶ 64.

In their First Amended Complaint, Plaintiffs assert a breach of contract claim against Hyperdynamics and negligent misrepresentation against all Defendants – i.e., Hyperdynamics and the Individual Defendants. Defendants' motion to dismiss is now before the Court.

II. Discussion

Defendants seek dismissal of the First Amended Complaint on several grounds. First, the Individual Directors seek dismissal pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction. Next, all Defendants seeks dismissal of the claims in the Complaint for failure to state a cause of action pursuant to CPLR 3211(a)(1) and (a)(7). Finally, Defendants argue that the negligence misrepresentation claim must be dismissed given Plaintiffs' purported failure to plead negligent misrepresentation with the requisite particularity under CPLR 3106(b) and § 3103.

A. *Individual Directors' Motion to Dismiss for Lack of Personal Jurisdiction*

The Individual Defendants seek dismissal of the Complaint, arguing that Plaintiff's allegations do not establish personal jurisdiction over them.

CPLR 3211(a)(8) governs a motion to dismiss for lack of personal jurisdiction. A party opposing a CPLR 3211(a)(8) motion to dismiss "need only demonstrate that facts may exist whereby to defeat the motion. It need not be demonstrated that they do exist." *Peterson v. Spartan Indus.*, 33 N.Y. 2d 463, 466 (1974) (quotations omitted); CPLR 3211(d). Further, the Court must view the jurisdictional allegations in a light most favorable to Plaintiffs, the parties seeking to establish jurisdiction. *See Ed Moore Adv. Agency, Inc. v. I.H.R., Inc.*, 114 A.D.2d 484, 486 (2d Dep't 1985).

At issue on this motion is the forum-selection clause found at Section 5.9 of the SPA. Plaintiff maintains that the forum-selection clause is binding as to the Individual Defendants and, in fact, requires that the instant action be brought in a New York court. While the Individual Defendants concede that SPA contains a forum-selection clause, they nonetheless contend that it does not subject them to personal jurisdiction since they are not parties to the SPA and did not participate significantly in its negotiation.

Section 5.9 of the SPA provides that:

> Each party agrees that all legal proceedings concerning the interpretations, enforcement and defense of the transactions contemplated by this Agreement and any other Transaction Documents (whether brought against a party hereto or its respective affiliates, **directors**, officers, shareholders, employees or agents) shall be commenced exclusively in the state and federal courts sitting in the City of New York. Each party hereby irrevocably submits 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 . . . and hereby irrevocably waives, and agrees not to assert in any suit, action or proceeding, any claim that it is not personally subject to the jurisdiction of such court . . .

Silverman Aff. Ex. B at § 5.9 (emphasis added).

The Individual Defendants contend that this provision subjects only Hyperdynamics to jurisdiction in New York and waives only Hyperdynamics' personal jurisdiction claim. The Individual Defendants base this argument on the fact that they were not parties to the SPA.

However, forum selection clauses bind non-signatories if they are "sufficiently close in their relation" to the signatory or the dispute. *Indosuez International Finance, B.V. v. National Reserve Bank*, 304 A.D. 2d 429, 431 (1st Dep't 2003), *citing International Private Satellite Partners, L.P. v. Lucky Cat*, 975 F. Supp. 483, 486 (W.D.N.Y. 1997) ("it is well established that a range of transaction participants, parties and non-parties, should benefit from and be subject to forum selection clauses. An entity that is not a party to a contract containing a forum selection clause may therefore be bound by the clause if the entity is closely related to the dispute such that it becomes foreseeable that it will be bound") (citations and quotations omitted). A "non-signatory defendant must be [so] closely related to the dispute such that it becomes foreseeable that it will be bound" by a forum selection clause. *Universal Grading Service v. eBay,* 2009 US Dist. LEXIS 49841, at *58-59, 2009 WL 2029796, at *16 (E.D.N.Y. June 9, 2009); *see also Tate & Lyle Ingredients Am., Inc. v. Whitefox Tech. USA, Inc.*, 98 A.D.3d 401, 402-03 (1st Dep't 2012).

Here, Plaintiffs argue that Defendant Ray Leonard is "closely related" to the dispute because he negotiated and signed the SPA. As a Director and as Hyperdynamics' President and CEO, Plaintiff maintains that Leonard was "closely related" to the SPA, such that it was foreseeable that he would be subject to litigation in New York. Taking Plaintiffs' assertion as true, as this Court must on the motion to dismiss, the Court

concludes that Plaintiff has asserted a sufficiently close relationship for Leonard and that the forum selection clause applies to him. *See Infinity Consulting Grp., LLC v. Am. Cybersystems, Inc.*, 2010 WL 2267470, at *2 (E.D.N.Y. May 30, 2010) (finding non-party foreign CEO bound by contractual forum selection clause where CEO executed the agreement at issue in the claims asserted).

Further, the remaining Individual Defendants are subject to personal jurisdiction under Section 5.9. Plaintiffs asserts that the Individual Defendants, as Directors, reviewed and approved the terms of the SPA. In support, Plaintiffs cite to Exhibit 5.1 to Hyperdynamics Form 8-K filing. Exhibit 5.1 is an opinion letter from Hyperdynamics' outside counsel to Hyperdynamics' Board of Directors, recommending that the Directors approve the SPA. (Silverman Aff. Ex. D.) Further, the language of Section 5.9 and its explicit reference to commencing actions regarding the SPA against Directors in New York made it foreseeable that the Individual Defendants would be required to litigate in New York. *Nanopierce Tech., Inc. v. Southridge Capital Mgmt. LLC*, 2003 WL 22882137, at *5–6 (S.D.N.Y. Dec. 4, 2003) (enforcing a forum selection clause against a non-signatory corporate officer who was held to be closely related to the corporation).

Accordingly, since the Individual Defendants are bound by Section 5.9, their additional arguments regarding personal jurisdiction under CPLR 301 and 302(a) are

waived. Therefore, the Individual Defendants' motion to dismiss for lack of personal jurisdiction is denied.

B. *Defendants' Motion to Dismiss for Failure to State a Claim*

Defendants seek dismissal of all counts of the First Amended Complaint: negligent misrepresentation, asserted against all Defendants; and breach of contract, asserted only against Hyperdynamics. Defendants bring this motion under CPLR 3211(a)(1) and (a)(7).

1. Negligent Misrepresentation

To state a claim for negligent misrepresentation under New York law, Plaintiffs must plead: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to Plaintiffs; (2) that the information was incorrect; and (3) reasonable reliance on the information. *MatlinPatterson ATA Holdings LLC v. Fed. Express Corp.*, 87 A.D.3d 836, 840 (1st Dep't 2011).

The weakness of Plaintiff's negligent misrepresentation count lies in the first element of the claim. Because Plaintiff fails to plead a "special relationship," the Defendants' motion to dismiss is granted.

"An arm's length business relationship, as existed here, is not generally considered to be the sort of confidential or fiduciary relationship that would support a cause of action for negligent misrepresentation." *Greentech Research LLC v. Wissman*, 104 A.D.3d 540, 540 (1st Dep't 2013); *see also MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 87 A.D.3d 286, 296-97 (1st Dep't 2011). While Plaintiffs do not dispute that this transaction was at arm's length, they maintain that the "significant experience in geology and/or oil exploration" held by three of the Individual Defendants transforms this arm's length business relationship into one in which fiduciary duties may be imposed. However, the purported experience of these three Individual Defendants does not, in and of itself, give rise to a special relationship and a heightened duty to disclose. *See Sebastian Holdings, Inc. v. Deutsche Bank AG*, 78 A.D.3d 446, 447 (1st Dep't 2010) ("Plaintiff's alleged reliance on defendant's superior knowledge and expertise in connection with its foreign exchange trading account ignores the reality that the parties engaged in arm's-length transactions pursuant to contracts between sophisticated business entities that do not give rise to fiduciary duties.")

To add heft to their claim, Plaintiffs analogize to *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996), in which the Court of Appeals sustained a negligent misrepresentation claim, finding a "special relationship" established between commercial parties. However, review of *Kimmell* highlights the inadequacy of Plaintiffs' pleading. In *Kimmell*, the

Chairman and Chief Financial Officer of a corporation – CESI – solicited an investment in CESI directly from plaintiff-investors and made numerous representations directly to the investors through several in-person meetings. In finding a "special relationship," the Court of Appeals noted that "Defendant's efforts sought to induce plaintiffs to invest in the project." *Id.* at 264. The Court also emphasized that the defendant-CFO "met with each plaintiff," "personally represented that the [] project would generate some income," and "informed [plaintiff] that he could provide 'hot comfort' should plaintiff entertain any reservations about investing." *Id.* at 265.

Plaintiff makes no such pleading in its First Amended Complaint. Although Plaintiff is by no means required to allege all of the facts cited by the Court in *Kimmell* to have a viable negligent misrepresentation claim, here Plaintiff pleads no facts to demonstrate a "special relationship" with Defendants. In fact, Plaintiff pleads no facts at all as to the Individual Defendants in its Complaint. There is a reference to the Board of Directors, *see* Compl. ¶ 47, and to "Defendants" collectively, but no mention of facts as to the Individual Defendants.

Accordingly, Defendants' motion to dismiss the negligent misrepresentation claim in the First Amended Complaint is granted without prejudice.

2. Breach of Contract

Hyperdynamics next seeks dismissal of the breach of contract claim asserted against it. As discussed above, Plaintiff's claim asserts that Hyperdynamics breached the "material adverse effect" clause of the SOA by failing to disclose that: (1) Hyperdynamics was on the verge of hitting the well's target depth and (2) the well did not contain commercial grade oil. In the instant motion, Hyperdynamics contends that Plaintiff's allegations are insufficient to state a breach of contract claim, asserting that "there is no evidence to support" Plaintiff's allegations that these disclosures were "material." (Def.'s Moving Br. at 20.)

The elements of a breach of contract claim include the existence of a contract, Plaintiff's performance thereunder, Defendant's breach thereof, and resulting damages. *Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dep't 2010). Here, Plaintiff has pleaded each of these elements. Plaintiff has pleaded the existence of the SPA, its performance, a breach of Section 5.9 of the SPA, and damages. This pleading is sufficient to state a breach claim.

Hyperdynamic's argument that "there is no evidence to support" Plaintiff's claim is better left for summary judgment. To survive a motion to dismiss, Plaintiff simply needs to plead facts, not present evidence.

Moreover, to the extent that Plaintiffs submitted documentary evidence to buttress their claims, this evidence – a February 20, 2012 email from Defendant Leonard – does not contradict the pleading, as Hyperdynamics alleges. *See* Silverman Aff. Ex. C. Instead, in this email, Leonard states that the well hit a certain depth on February 4, 2012 and that "we thought there was a good chance of an oil discovery." *Id.* The thrust of Plaintiffs' claim is that Hyperdynamics said one thing to Plaintiffs while possessing information to the contrary. Taking all inferences in favor of Plaintiffs, as the Court must on this motion, that Defendant Leonard said in an email that he thought there would be "an oil discovery" does not bar Plaintiffs' claim based on the premise that Hyperdynamics was in possession of contrary facts.

Accordingly, Hyperdynamic's motion to dismiss is denied.

(*Order follows on next page.*)

III. Conclusion

Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted as to the negligent misrepresentation claim (Count Two) of the First Amended Complaint without prejudice and is otherwise denied; and it is further

ORDERED that Defendant Hyperdynamics is directed to serve an answer to the First Amended Complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on August 6, 2013, at 10 AM.

Dated: New York, New York
June 19, 2013

ENTER:

Hon. Eileen Bransten, J.S.C.