Blink v Johnson
2015 NY Slip Op 32975(U)
August 21, 2015
Supreme Court, Westchester County
Docket Number: 51201/2014
Judge: Alan D. Scheinkman
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
COMMERCIAL DIVISION

Present: HON. ALAN D. SCHEINKMAN,
Justice.

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ROBERT BLINK and JASON GOLDKLANG,

Plaintiffs,

-against-

RICHARD JOHNSON, M.D., HUDSON COMMUNICATIONS, LLC, 5 MEDICAL MARKETING LLC, HUDSON GLOBAL GROUP, LLC, INFINITY GLOBAL EVENTS, LLC, and HEALTHONE GROUP, LLC,

Defendants.

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Index No. 51201/2014

Motion Seq. # 2
Motion Date: May 8, 2015

DECISION & ORDER

Scheinkman, J:

Defendants, Richard Johnson, M.D. ("Johnson"), Hudson Communications, LLC ("Hudson Communications"), 5 Medical Marketing LLC ("5 Medical"), Hudson Global Group, LLC ("Hudson Global"), Infinity Global Events, LLC ("Infinity") and Healthone Group, LLC ("Healthone") (collectively "Hudson Group" or "Defendants") move, pursuant to CPLR 3212, for summary judgment dismissing the Amended Complaint of Plaintiffs Robert Blink ("Blink") and Jason Goldklang ("Goldklang") ("Plaintiffs"). Plaintiffs oppose Defendants' motion.

FACTUAL AND PROCEDURAL HISTORY

This action was initiated by Plaintiffs' filing of a Verified Complaint on January 27, 2014. The Court was asked to intervene in connection with Defendants' motion to dismiss.

On April 24, 2014, the Court held a conference to determine whether discovery should proceed pending the motion to dismiss and decided that discovery should proceed since the Court perceived that it was unlikely that the motion would dispose entirely of the case. The Court asked Plaintiffs if they wanted to amend the Complaint and was advised that Plaintiffs wished to avail themselves of that opportunity.

On May 5, 2014, Plaintiffs filed their Amended Verified Complaint.

The Court held a Preliminary Conference on May 8, 2014 and issued a

Preliminary Conference Order which required that all discovery be completed by November 13, 2014 and that a Trial Readiness Conference would be held on November 14, 2014.

On June 13, 2014, Defendants filed their Verified Answer and Counterclaims denying the material allegations of the Amended Complaint, asserting various affirmative defenses and interposing counterclaims on behalf of Johnson and HMC America, LLC. On July 3, 2014, Plaintiffs filed their Answer to Defendants' Counterclaims in which they denied the material allegations and asserted various affirmative defenses.

Due to various discovery disputes, the discovery cut-off date and the Trial Readiness Conference date were adjourned to January 16, 2015. On January 16, 2015 the Court issued the Trial Readiness Order and directed that Plaintiffs file their Note of Issue. The Note of Issue was filed and this motion ensued.

THE AMENDED VERIFIED COMPLAINT'S ALLEGATIONS
AND DEFENDANTS' COUNTERCLAIMS

Based on the allegations of the Amended Verified Complaint, Blink held a 45.75% interest in Hudson Group as a Common Member. Goldklang was also a Common Member of Hudson Group holding a 6.5% interest and Johnson and an entity in which he held a controlling interest (MidAtlantic Partners II, LP) were Preferred Members in Hudson Group, each holding a 24% interest (Amended Complaint at ¶¶ 1-3). Hudson Group provided strategic marketing, scientific communications, interactive educational services, and post-marketing research for the pharmaceutical and healthcare industries (*id.* at ¶ 11).

Plaintiffs allege that on August 30, 2012, Hudson Group, Blink, Johnson, MidAtlantic and Goldklang entered into an Asset Purchase Agreement with HG Group, LLC ("HG Group"), a subsidiary of Interpublic Group ("IPG") for the sale of a majority of Hudson Group's assets for a purchase price of $35,795,037.00. Plaintiffs describe the allocation of the purchase price among the various Sellers (Blink [$9,664,031], Goldklang [$1,371,669], MidAtlantic [$11,618,198] and Johnson [$10,114,667]) and the remaining balance ($3,026,472) was paid to Hudson Global (*id.* at ¶ 15). Plaintiffs claim that Sellers were also entitled to an Earnout from HG Group based on HG Group's profitability, which was based on the 2012 balance sheet of Hudson Group, as well as Plaintiffs' future employment efforts at HG Group (*id.* at ¶ 16).

Plaintiffs allege that throughout their association with Hudson Group, they had no access to Hudson Group's financial information and data, which was exclusively controlled by Johnson (*id.* at ¶ 17). They further claim that Johnson did not provide them with access to data regarding Hudson Group's distributions, capital accounts, company expenses or working capital despite repeated requests to review this information (*id.* at ¶ 17). According to Plaintiffs, on the eve of the closing, Johnson required (based on a threat that he would walk away from the transaction) that Plaintiffs execute the Members Agreement and Release Agreement, which are attached to the Complaint as Exhibits A and B (*id.* at ¶ 18). It is alleged that Johnson required that they do so because he knew that there would be financial liabilities to HG Group to which Plaintiffs and not Johnson would be responsible (*id.* at ¶ 19).

Based on the terms of the Members Agreement, Blink and Goldklang were required to repay certain loans reflected on the books that Plaintiffs contend were placed there by Johnson shortly before the transfer. These loan repayments totaled $2,449,173 (hereinafter the "Loan Repayments") (*id.* at ¶¶ 21-22). Blink was also required to pay Johnson $103,777, which reflected amounts due pursuant to a Promissory Note dated March 9, 1999 (the "Promissory Note Payment") (*id.* at ¶ 21). Blink contends that shortly after he made the Promissory Note Payment, he determined that he had already paid that amount and despite Blink's having provided Johnson with proof of the prior payment, Johnson refused to refund Blink the amount of this overpayment (*id.* at ¶ 23).

Plaintiffs contend that "[d]espite Defendants having received and benefitted from the collective payment from Plaintiffs in the sum of $2,449,173.00, Defendants have failed to re-distribute to Plaintiffs their pro-rata share of such distributions in violation of Articles 7 and 15 of the Hudson Group Operating Agreement" (*id.* at ¶ 24). In a similar vein, Plaintiffs contend that sometime after the Asset Sale, $50,000 in bonus monies were returned to Hudson Group by former employees Patricia Buckley and Mary McNamee (hereinafter the "Bonus Refund") and Defendants have failed to re-distribute those monies to Plaintiffs *pro rata* in violation of Articles 7 and 15 of the Operating Agreement (*id.* at ¶ 25).

With regard to Plaintiffs' further liabilities following the Asset Sale, Plaintiffs explain that under the Members Agreement and Release, they were the ones who remained liable for the increase in working capital to HG Group as defined in the APA for a period of 180 days following the closing (*id.* at ¶ 26). Plaintiffs contend that it was Johnson who determined the working capital figure and that it was Johnson who required that they be liable for it (*id.* at ¶ 26). Plaintiffs assert that to satisfy any shortfall in working capital for which they would be liable, they had to escrow 5% of the proceeds they received for a period of 180 days (*id.*).[1] Within 180 days of the closing, HG Group sent notice of a shortfall in working capital and that a payment was required to satisfy the deficiency for which Plaintiffs were responsible pursuant to Section 6(d) of the Members Agreement (*id.* at ¶ 27). It is Plaintiffs' contention that Johnson was aware that the working capital figure projected to HG Group was inaccurate and that there would be a future deficiency. The inaccuracy resulted from Johnson having taken out large quantities of cash from the business immediately prior to the closing and his "misrepresenting the accounts receivable data to project that cash had instead remained with the company" which "altered the actual financial forecast of the Hudson Group and what it would take to maintain all of the liabilities going forward" (*id.* at ¶ 28). Plaintiffs contend that Johnson waited until the eve of closing to fraudulently induce Plaintiffs into executing the Release knowing that he would continue to operate Hudson Group with Plaintiffs' funds in violation of the APA. Plaintiffs assert that they detrimentally relied on Johnson in executing the Release (*id.* at ¶ 29).

With regard to Plaintiffs' claims for breach of the Operating Agreement, Plaintiffs allege that Johnson has failed to wind down Hudson Group and has failed to relinquish final distribution payments owed to Plaintiff pursuant to Articles 7 and 15. According to Plaintiffs,

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[1]As will be discussed further, Plaintiffs' contention ignores the fact that the escrow provision recites that it was intended to provide funding for designated expenses. While a potential working capital shortfall was one such expense, it was not the only designated expense.

Hudson Group received more than $2,500,000 and Defendants have unlawfully retained the entire amount of these funds (*id.* at ¶ 32). Plaintiffs contend that Johnson wrote a check for the sum of $132,314 to HG Group in violation of the APA and the check is attached as Exhibit C (*id.* at ¶ 27). According to Plaintiffs, Johnson, as Managing Member of Hudson Group, delayed and then manipulated the K-1's prepared post-closing causing Plaintiffs' capital accounts to increase despite the fact that they did not receive any additional distributions from Hudson Group pursuant to Article 15 of the Operating Agreement. By contrast, Plaintiffs assert that Johnson manipulated Hudson Group's books by taking repayments of loans in the form of distributions, purchasing gifts and making unlawful corporate expenditures to reduce his capital account (*id.* at ¶ 35). Plaintiffs also allege that Johnson wrongfully put the employees of his private dental practice on Hudson Group's payroll and had Hudson Group provide them with medical benefits and 401K savings (*id.* at ¶ 36).

Based on the foregoing allegations, Plaintiffs present a series of causes of action.

Plaintiffs allege a First Cause of Action for fraudulent inducement against all Defendants – *i.e.,* that Johnson misrepresented that there would not be a working capital shortfall of Hudson Group thereby fraudulently inducing them to sign the Release and that but for such misrepresentations, Plaintiffs would have never signed the Release. Plaintiffs seek to have the Release set aside based on Johnson's fraud and that they be returned the working capital monies that were escrowed (*id.* at ¶ 47).

For their breach of the Operating Agreement cause of action, Plaintiffs allege that pursuant to Article 7 of the Operating Agreement, Defendants are required to make income allocations to Plaintiffs reflecting the financial benefit Hudson Group received from the Loan Repayment and the Bonus Refund but no such distributions have been made to Plaintiffs to date (*id.* at ¶ 52). In addition, Plaintiffs contend that despite the increase in their capital accounts, Plaintiffs have not received back up documentation to support the figures set forth in the K-1's and they have not received any distribution required by Article 15 of the Operating Agreement (*id.* at ¶ 53).

Plaintiff Blink brings a cause of action against Johnson for breach of the Members Agreement based on Blink's having paid Johnson back twice on the $103,770 Promissory Note (*id.* at ¶ 62). And based on Johnson's fraudulent inducement, Plaintiffs seek a return from Johnson of the escrow payments made by Plaintiffs and for which Johnson has retained for his own benefit (*id.* at ¶ 63).

Plaintiffs assert a Fourth Cause of Action for breach of fiduciary duty against Johnson based on his status as managing member of Hudson Group and his alleged wrongful acts of, *inter alia*, misrepresenting the financial picture of Hudson Group in order to foist responsibility of a deficiency in working capital on Plaintiffs, instructing Defendants to continue to retain monies due and owing Plaintiffs, and his use of Hudson Group's payroll for non-Hudson group employees.

As noted above, in response to Plaintiffs' Amended Verified Complaint, Defendants, Counterclaim Plaintiffs Johnson and HMC America, LLC, asserted the following counterclaims:

(1) a counterclaim for breach of the Members Agreement and the Release Agreement in which Counterclaim Plaintiffs seek $1,066,267 based on Blink and Goldklang's (a) failing to pay the outstanding working capital deficiency along with "incremental expenses over and above the amount of escrow funds" totaling $1,051,267.00; (b) failing to fulfill their obligations to handle various employment matters including the rollover of a 401K plan for former employees of Hudson to IPG costing Johnson $15,000.00; (c) failing to fulfill their agreement to indemnify Johnson from various events, including an employee dispute seeking $35,000.00 (Counterclaims at ¶¶ 46-54);

(2) a counterclaim for breach of the Members Agreement and the Release Agreement in which Counterclaim Plaintiffs claim that Blink and Goldklang failed to protect the integrity of the APA with regard to the contemplated earnout payments by "artificially draining the company's profits by, among other things, paying themselves and other employees improper bonuses and raises so as to not share any potential earnout under the APA"; Counterclaim Plaintiffs seek $5.5 million in damages with regard to this claim ($2,750,000 earnout for 2014 and $2,750,000 earnout for 2016) (Counterclaims at ¶¶ 55-63);

(3) a counterclaim for breach of the Operating Agreement based on Blink's and Goldklang's failing to honor the conditions of sale, including the continued employment and performance targets and non-compete causing Counterclaim Plaintiffs to sustain damages totaling $5.5 million;

(4) a counterclaim for unjust enrichment in the event the Court were to set aside the Release based on the Counterclaim Defendants having been unjustly enriched by their receipt of approximately $1,901,320 in interest savings that Johnson agreed to forego as well as the Aggregate Johnson Investment in the amount of $3,478,746.00 Johnson agreed to forego as a result of the negotiations over the Members Agreement and Release; and

(5) a counterclaim for breach of contract based on Goldklang's failure to pay Johnson the $10,000 he had agreed to pay for Johnson's assignment of Goldklang's life insurance policy.

THE UNDISPUTED FACTS

Based on the Rule 19-a Statement submitted by Defendants and Plaintiffs' Response to that Rule 19-a Statement, the following are the undisputed facts pertinent to the resolution of Defendants' motion.

This action arises out of the sale of by Plaintiffs and Johnson of their interests in Hudson Group Communications ("Hudson" or the "Company"), a medical communications company. Hudson is a Delaware Limited Liability Company (LLC) formed in October 2004 and headquartered in Tarrytown, New York (Defs' 19-a Stmt. and Plfs' Res. at ¶ 1). Johnson was responsible for contributing the required capital to start Hudson and assumed all of the Company's debts and liabilities, using his personal credit line (*id.* at ¶ 3). Blink and Goldklang became employees of Hudson as President and Vice President, respectively (*id.* at ¶ 4). As President of Hudson, Blink was responsible for running the day-to-day operations, including sales and business development and the Company's revenue and profits forecasts using backlog reports of purchase orders already signed, and pipeline reports of proposals that had been sent to clients but had not been signed (*id.* at ¶¶ 10, 11). As Executive Vice President, Goldklang oversaw operations of the business, including pricing, production, and putting together client proposals (*id.* at ¶ 14).

The Company was governed by an Operating Agreement, which set forth the right and obligations of all members of the LLC (*id.* at ¶ 6). Pursuant to the Agreement, Johnson was a Preferred Member and the only Managing Member of Hudson from 2004 until the 2012 sale of the Company (*id.* at ¶ 7). Johnson was given the authority to "manage the Company fully, without the necessity or participation of the Members, a Board of Directors or any other authority" (*id.* at ¶ 8, *quoting* Operating Agreement at 2). With his authority, Johnson hired Alex Glembocki ("Glembocki") in 2007 as the Company's accounting manager and later promoted him to Finance Director (*id.* at ¶ 15).

In 2008, Johnson discovered that Blink had made over $1 million in personal charges on Hudson's credit card. Additionally, Johnson agreed to loan Blink to pay for Blink's divorce settlement. Blink's personal charges and personal loan were put into a "loan account" to be dealt with upon a future sale of the Company (*id.* at ¶¶ 21, 24, 25). The total amount in the loan account was approximately $1,900,000.00 and it is undisputed that the loans were paid back (*id.* at ¶ 27).

In May 2010, Blink became a Common Member of Hudson (*id.* at ¶ 28) and the Operating Agreement was amended to add Blink as a member (*id.* at ¶ 29). Blink's responsibilities did not change (*id.* at ¶ 31). In July 2011, at a time when the potential sale of Hudson was being contemplated, Goldklang also became a Common Member and the Operating Agreement was again amended (*id.* at ¶¶ 33, 34).

The Operating Agreement addressed how the proceeds would be distributed if Hudson were sold and at the top was the "Aggregate Johnson Investment" ("AJI"), which entitled Johnson to a return of his investment upon sale of the Company (*id.* at ¶¶ 34-37). The Agreement also provided that funds allocated or paid to Members would be "reduced and offset" by any debts a member may owe the Company (*id.* at ¶ 39).

In 2010, all the members of the Company agreed that they wished to sell the Company (*id.* at ¶ 47). In preparation for a sale, audits of the Company's 2009, 2010, and 2011 financials were conducted so that this information could be shared with prospective buyers (*id.* at ¶ 49). The audit process revealed that Goldklang used his Company credit card for personal expenses prior to becoming a member (*id.* at ¶ 50). These charges, in addition to

monies lent to Goldklang from Johnson for a house purchase, were put into a loan account in anticipation of a possible sale and would appear as a loan on the Company's books and records in the audit letters. Goldklang's loan account totaled approximately $519,000.00 when the Company was sold in 2012 (*id.* at ¶¶ 50-51).

In 2011, Hudson engaged a broker to assist them in selling the Company. Johnson and Plaintiffs agreed to hire Doug Donohue ("Donohue") to be the broker (*id.* at ¶ 48). Blink and Goldklang were part of the "management deal team", along with Johnson and Glembocki, and worked with Donohue on the process of selling the Company (*id.* at ¶ 52). As part of the process, an "Information Memorandum", also referred to as "The Book", containing financial information and forecasts was sent out to potential buyers including Interpublic Group ("IPG"), and Plaintiffs were privy to the financial information being sent to Excel Partners (representing Hudson) ("Excel") for the Information Memorandum (*id.* at ¶¶ 10, 11). In connection with this process, Plaintiffs and Johnson provided financial information to IPG, such as revenue by client and projections (*id.* at ¶ 80).

After reviewing the Information Memorandum, IPG provided a term sheet to Hudson (*id.* at ¶ 57). IPG's final proposal consisted of a one-time upfront payment to Hudson of approximately $35 million at closing, an interim earn-out payment in 2014, and a final earn-out payment in 2015 (collectively the "Earnout Payments") (*id.* at ¶ 58). The Earnout Payments were not guaranteed payments. Rather, they were contingent on the new Hudson business meeting performance targets (*id.*). Both Blink and Goldklang were given the opportunity to comment on the purchase proposals made by IPG and agreed to accept the final proposal (*id.* at ¶ 60). At this time Blink and Goldklang reviewed the performance targets necessary to achieve the Earnout Payments and discussed them directly with Donahue and IPG (*id.* at ¶ 62). It was also agreed that Blink and Goldklang would become employees to manage the Hudson business on behalf of IPG (*id.* at ¶ 62). Johnson agreed to act as a consultant for 6 months post-closing.

To move forward with the IPG proposal, certain due diligence information about Hudson was requested by IPG (*id.* at ¶ 64). To this end, information was gathered throughout the lengthy process of continuous requests by IPG for updated financials, forecasts, and backlog and pipeline reports (*id.* at ¶ 65). All of the due diligence materials were uploaded to a virtual "data room". Those given access, including Plaintiffs, could view all the documents uploaded and made available to IPG (*id.* at ¶ 67). Cash flow statements, income statements, balance sheets, profit and loss statements, financial reviews and other financial information were uploaded to give a financial picture of the Company (*id.* at ¶ 68).

Throughout the due diligence period, Blink and Goldklang were actively involved in communications regarding revenue forecasts and performance targets with IPG (*id.* at ¶ 66). Blink and Goldklang also met with Glembocki (*id.* at ¶ 73)

IPG (represented by Paul Curley, Esq.) drafted the Asset Purchase Agreement ("APA") and Plaintiffs had direct communications with Adam Chodos, Esq., Hudson's attorney who negotiated the APA (*id.* at ¶¶ 82-83). One of the negotiated items in the deal between Excel and IPG was working capital (*id.* at ¶¶ 85, 91, 92).

It is disputed between the parties how working capital was determined. Defendants contend that it was determined right off the company's balance sheet by the working capital calculation: Cash + Accounts Receivables – Accounts Payable (Credit Cards) (Defs' Rule 19-a Stmt. at ¶ 87). While Plaintiffs agree that working capital is arrived at by the assets seen on the books, including accounts receivable and accounts payable, they contend that Hudson also employed a percent of completion sales recognition method, which relied on management discretion (Plfs' Res. at ¶ 87). All of the relevant financials were uploaded to the data room, which Blink and Goldklang had full access to. However, Plaintiffs dispute that up to date balance sheets showing the amount of cash in the Company were in the data room (Plfs' Res. at ¶ 99). IPG (and Plaintiffs contend Donohue, Glembocki and Johnson) eventually determined that the working capital amount of $2.2 million would be left in the business at closing as well as an additional $200,000 cash deposit, and Blink and Goldklang were informed of this (*id.* at ¶¶ 108-110). The amount was also memorialized in the APA and the APA included a provision that within 90 days of closing, IPG would provide a working capital Statement in accordance with IPG's accounting methodologies and that Sellers (jointly and severally) would be required to pay any shortfall in working capital (*id.* at ¶ 111). In addition to the APA, Plaintiffs had to sign employment agreements and Plaintiffs had their own counsel, Paul Ritter, Esq. (Kramer Levin) to represent them in those negotiations (*id.* at ¶ 112).

As the IPG deal was nearing closing, Blink, Goldklang, and Johnson had yet to come to an agreement among members about the allocation of the sales proceeds and other member issues; the relationship among Plaintiffs and Johnson had become contentious. Donohue began to put pressure on the members to come to an agreement to avoid the members' disputes impacting on the IPG deal. In June 2012, the parties began to negotiate through their representatives --Ritter (on behalf of Blink and Goldklang) and Chodos (on behalf of Johnson) (*id.* at ¶ 115). The negotiations continued and the agreements needed to resolve how the proceeds would be allocated among Johnson and Plaintiffs were still being negotiated up to the day of closing. It was only on the day of the closing with IPG that Plaintiffs were presented with the Members Agreement and the Release Agreement. Those agreements were negotiated and finalized on the day of the closing, August 30, 2012 (*id.* at ¶¶ 119, 125). It is Johnson's contention that in exchange for executing the release, Johnson agreed to various demands by Plaintiffs including that substantial interest due on the outstanding loans to Plaintiffs be forgiven (*id.* at ¶ 115)

The Members Agreement set forth the allocation of the initial payment from IPG with $10,065,668.00 allocated to Blink and $1,427,305.00 to Goldklang. However, the full amount of the allocations was not wired to Blink and Goldklang. Instead, approximately $401,000 was withheld in an escrow from Blink and $55,000 was withheld in an escrow from Goldklang. Those proceeds were to be held in escrow for a period of 180 days per the Members Agreement (*id.* at ¶¶ 127, 131, Members Agreement at ¶1). The Members Agreement also provided that 75% of any future Earnout Payments would be allocated to Blink and Goldklang and the remaining 25% would be allocated to Johnson (*id.* at ¶ 128, Members Agreement at ¶ 4). The Members Agreement further set forth the final amount of loans to be repaid by Blink and Goldklang (*id.* at ¶ 129, Members Agreement at ¶¶ 2-3). The Members Agreement included a clause that provided that the terms of the Members Agreement would control in the event of an inconsistency with the provisions of other documents, including the Third Amended and Restated Operating Agreement (*id.* at ¶ 132, Members Agreement at ¶ 7).

The Release Agreement contained a broad mutual release whereby each party agreed to release the other from "'all actions, causes of action, suites, debts, dues, sums of money, accounts, controversies ... of any nature, whatsoever, in law, admiralty or equity ... which any or all of the Common Releasors ever had, now has or hereafter can, shall or may have ... for, upon or by reason of any matter, cause of thing whatsoever from the beginning of the world to the date of this Agreement'" (*id.* at ¶ 135, *citing* Release at ¶1). Blink and Goldklang agreed that they would be responsible for any post-closing obligations regarding increase in working capital and that 5% of Blink's and Goldklang's allocations would be put into escrow to cover this responsibility, among others (*id.* at ¶ 137**).** The Release contains a merger clause as well as a provision whereby the parties represented that they had (1) investigated all facts that they deemed necessary, (2) discussed the Release with their counsel, and (3) that no promises or inducements were relied on in executing the Release other than those contained in the Release (*id.* at ¶ 140).

Approximately 90 days after closing, Glembocki provided IPG with an updated financial report of Hudson so IPG could conduct a final working capital calculation (*id.* at ¶ 145). On November 28, 2012, IPG informed the parties that there was a working capital shortfall of $703,000.00 as a result of customer credits given to Hudson clients after the sale, affecting the accounts receivable portion of the working capital calculation (*id.* at ¶ 146). It is undisputed that IPG has never indicated that the shortfall in working capital was the result of any fraudulent information provided or any wrongdoing by Johnson nor has IPG contended that any of the financial information provided contained any misrepresentations (*id.* at ¶¶ 155-156).

<u>DEFENDANTS' CONTENTIONS IN SUPPORT OF THEIR MOTION</u>

In support of their motion, Defendants submit an affirmation from their counsel, Antonette Ruocco, Esq., together with their supporting exhibits, a Rule 19-a Statement and a memorandum of law.

The essence of Defendants' argument in support of the dismissal of Plaintiffs' fraudulent inducement claim is that it fails as a matter of law because (1) contrary to the Amended Complaint's allegations, the shortfall arose from two post closing credits (over which Johnson had no control) to customers, which credits that were not foreseeable by anyone, including Johnson, pre-closing; and (2) Plaintiffs were sophisticated businessmen who were represented by counsel and privy to all of the financial information so they could not have justifiably relied on anything conveyed to them by Johnson.

Defendants argue that Plaintiffs cannot show a misrepresentation by Johnson since

> (a) Dr. Johnson did not make a representation regarding working capital; rather the working capital number was based on a specific formula with the numbers obtained directly from the Company's balance sheets; (b) all pre-closing representations made regarding working capital pre-closing, whether by Dr. Johnson or anyone

> else, were true and accurate when made; (c) the shortfall arose from a second calculation done well after the closing and resulted from two post-closing client credits that no one, especially Dr. Johnson, could have predicted pre-closing when the working capital figure was calculated; and (d) there has been no claim by anyone at IPG that any of the financial information provided to IPG was fraudulent (Defs' Mem. at 14).

Defendants further contend that Plaintiffs cannot show justifiable reliance because where the alleged misrepresentations relate to facts that are not exclusively within the Defendants' knowledge, the claim is insufficient for failing to show why Plaintiffs could not have ascertained the true facts through the exercise of ordinary diligence. Here, because Plaintiffs are sophisticated businessmen represented by counsel with full access to all of the financial information, they cannot establish justifiable reliance.

Moreover, it is Defendants' contention that the fraud claim fails because a misrepresentation must emanate from a present fact, not future predictions or expectations. Therefore, even if Plaintiffs' characterization of Johnson's misrepresentation that there would not be a working capital shortfall were accurate, it is at best a prediction of a future event, which is not actionable (*id.* at 16).

Defendants rely on two Court of Appeals' cases which they contend involved similar fact patterns to the present action wherein the Court of Appeals held that a release was a complete bar to any claim of fraud, even where the parties had at one time stood in a fiduciary relationship to one another (*id.* at 16-17, *citing Centro Empresarial Cempresa S.A. v America Movil S.A.B de C.V.*, 17 NY3d 269 [2011]; *Pappas v Tzolis*, 20 NY3d 228 [2012]). Further, Defendants point out that "'[i]t is well established that, where an agreement contains a clear disclaimer of reliance on oral representations, a party is precluded from making subsequent assertions of fraudulent inducement based on oral representations'" (*id.* at 18, *quoting Capstone Enter.of Port Chester, Inc. v County of Westchester*, 262 AD2d 343, 344 [2d Dept 1999]). According to Defendants, the Release contained not only a general merger clause but also a specific disclaimer in which Plaintiffs stated that they had investigated the facts they deemed necessary and there had been no promises or representations made or relied upon in executing the Release except as to those specified in the Release.

It is Defendants' position that Plaintiffs are trying to reap all the benefits of the APA and the Members Agreement while, at the same time, they are trying to avoid the disadvantageous provisions found in the Release. However, because the agreements were executed simultaneously, they must be read and interpreted together.

With regard to the remaining causes of action, Defendants first argue that if the Court agrees that the Release bars any claim for fraudulent inducement, then the Release operates to bar Plaintiffs' other causes of action (*id.* at 20).

Alternatively, Defendants argue that Plaintiffs' claim for breach of the Operating Agreement fails because:

> First, the Operating Agreement does not provide that Plaintiffs' personal loan/debt repayments be allocated back to them. Indeed, Article XII refers to allocations of "income" with no mention of allocations based on a member's repayments of his or her debts (Ruocco Aff., Ex. F ¶ 7.1(a)(ii)). Second, as set forth above and in the accompanying [Rule 19-a Statement], several other provisions of the Operating Agreement wholly contradict Plaintiffs' contention, making clear that any monies owed by Plaintiffs would be ***offset*** from any monies they could be entitled to under the Operating Agreement. Specifically, Article XV, which deals with distributions to members upon a sale, provides that any pro-rata distributions to members would be ***reduced and offset by any debts*** of the members may have to the Company (Ruocco Aff., Ex. F ¶ 15.2(xi)). The Operating Agreement further provides that "whenever the Company is to pay any sum to any member, any amounts the member owes the company *may be deducted from that sum before payment*" (Ruocco Aff., Ex. F ¶ 17.8). Third, the total allocations to be distributed to the Plaintiffs were set forth in the Members Agreement (as were the amounts of the loans to be paid back by Plaintiffs) and the Members Agreement does not provide for any additional allocations to the Plaintiff other than those provided thereunder stating that 'the terms and provisions of all other documents, including but not limited to ... the Operating Agreement ... to the extent inconsistent ... this Agreement shall control." (Ruocco Aff., Ex. I ¶ 7; see also, St., ¶ 133). (*id.* at 22 [emphasis in original]).

Defendants argue that Plaintiffs' claim for breach of the Membership Agreement fails because the amount set forth as being owed by Blink in the Membership Agreement was heavily negotiated with Blink's counsel before he signed it and, in exchange, he received the benefit of forgiveness on significant interest due. As such, Blink's "'after the fact' contention that he mistakenly overpaid his outstanding loan does not create a breach of contract ... [since] the law is settled that 'conscious ignorance' or 'negligence' in verifying the amounts that could have easily been ascertained cannot be used as an excuse to undo a valid contract ... This is especially true where, as here, Plaintiff signed off on yearly audit letters without ever objecting to the amounts due" (*id.* at 24).

Defendants assert that Plaintiffs' breach of fiduciary duty claim fails for the same reasons that their fraudulent inducement claim fails. Namely, "where, as here, the parties are sophisticated businessmen represented by counsel and negotiating a complex transaction which will terminate their relationship, it is unreasonable to 'rely [on] representations without making additional inquiry to determine their accuracy'" (*id.* at 25, *quoting Centro, supra* at 279).

PLAINTIFFS' CONTENTIONS IN OPPOSITION

In opposition, Plaintiffs submit an affirmation from their counsel, Michele L. Ross, Esq., together with Plaintiffs' exhibits consisting of various documents as well as excerpts from deposition transcripts, Plaintiffs' Response to Defendants' Rule 19-a Statement, a report from Plaintiffs' expert, Edward Heben, CPA/ABV/CFF, CVA, AEP, and a memorandum of law.

Heben devotes much of his report[2] to explaining why, based on the manner in which Johnson spent Company monies on his personal expenses and unrelated business expenses, as much as $1 million or more was improperly classified and there were unreported expenses that should have been charged to his capital account (Report at 4-13).[3] Another aspect to the report involves Plaintiffs' belief that they paid taxes on profits that they never received in cash (*see* Report at 19 ["Blink and Goldklang received $3.5 million in cash over a 3-year period while their tax liability was based upon $7.6 million"]). The last aspect of the report addresses the issue of working capital. The upshot of Heben's analysis is that he believes the working capital number was overstated for a number of reasons. First, for the three months leading up to the sale, the Company had never met the working capital figure of $2.2 million that occurred in August (*i.e.,* in May it was $1.5 million, in June it was $1.9 million and in July it was $1.0 million). Second, given Johnson's proclivity to spend money for personal uses in violation of the Operating Agreement and to hide financial information given the disparity between what was reported to the IRS versus what the Company's books showed, "it is not a leap to consider the possibility that the working capital, at least on the margins, could have been creatively overstated" (Report at 25). Heben further describes Johnson as reckless prior to the sale given that he withdrew $1,556,136 from the Company at a time that it was critical for the Company to meet the $2.2 million target (Report at 26).

In their memorandum of law, Plaintiffs argue that Johnson was wholly responsible for negotiating the working capital figure to the exclusion of Plaintiffs and he negotiated a figure with IPG that "left no allowance for the possibility of uncollectible accounts receivable and no cash reserve maintained to offset that possibility" and that he was well

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[2]The report is purportedly authenticated by an affidavit from Heben in which he recites that his firm was retained to render forensic advice, that he submits the report in opposition, that a true and correct copy is annexed, and that he attests to the truth of the foregoing statements. This language falls considerably short of an attestation under oath to the truth of the contents of the report. Nevertheless, the Court will assume, for purposes of this Decision and Order, that the report has been properly authenticated, particularly since Defendants do not raise the point in their reply papers.

[3]The issue appears to boil down to whether it was proper for Johnson to have run through his draw account non-Hudson expenses so that they were treated as distributions and not expenses. According to Defendants' accountant, "any funds that go through a 'draw' are treated as if distributed to the member, reduces that member's capital account, and is not a company expense and does not impact the company's financials" (Affidavit of Adam Chodos, Esq. in Further Support of Defendants' Motion for Summary Judgment sworn to May 7, 2015 at ¶ 17).

aware that the pre-closing working capital calculation would result in a shortfall (Plfs' Opp. Mem. at 2, *citing* Plfs' Opp. Stmt. at ¶¶ 141, 142; Heben Aff., p. 22). It is Plaintiffs' position that they did not have an opportunity to evaluate the working capital calculation and, indeed, that they were prohibited from doing so (Plfs' Opp. Mem. at 11, n16). Further, they claim that Johnson compelled Plaintiffs to enter into the Release and the Members Agreement requiring that Plaintiffs escrow certain monies in the event there was a working capital shortfall and that at the time Johnson required that the funds be escrowed, he knew that he was never going to release those funds back to Plaintiffs or allow those monies to be used for any such shortfall.[4] According to Plaintiffs, "Defendants now claim that there was never an escrow, but a 'set-aside' and the 'set-aside' was fully used for 'ongoing expense and deal costs' which, to date, remain entirely unsubstantiated" (*id.* at 2-3). Plaintiffs also point out that the Company received more than $3 million from the Asset sale to pay for deal costs post-closing, as well as the repayment of approximately $2.4 million in loans from Plaintiffs and Defendants have failed to provide any information has to how these monies were allocated (*id.* at 3, n.6).

In support of their claim for fraudulent inducement, Plaintiffs argue that the misrepresentation regarding the working capital figure is actually that Johnson concealed from Plaintiffs that the amount left[5] was insufficient to sustain the Company going forward by failing to provide them with an updated balance sheet or current "cash snapshot" and instead deceived them into relying on the formula he negotiated and underestimated (*id.* at 5). In support, Plaintiffs rely on their expert's report wherein Herben opines that for three months prior to the sale, the Company had never met working capital and that Johnson knew that he had given the barest minimum of additional cash necessary to satisfy IPG after he had previously been bleeding the company of its cash reserves for personal and other non-Company related expenses at egregious rates,[6] and that there was a possibility that accounts receivable would remain uncollected and a shortfall would arise (Plfs' Opp. Mem. at 6).

Instead, say Plaintiffs, the working capital number had a cash component to it that was critical to whether the figure would be sufficient or deficient. Therefore, it is Plaintiffs' position that the misrepresentation arises from the fact that Johnson never provided Plaintiffs with an updated balance sheet or a cash snapshot and "instead deceived Plaintiffs into relying on the formula he negotiated and knowingly underestimated" (*id.* at 5). Further, that Johnson knew about "the Company's cash position and the fact that the amount left by him in the Company at the time of the sale would be insufficient to sustain the Company going forward"

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[4]In this regard, Plaintiffs contend that they did not have the opportunity to vet the Release and Members Agreement as it pertained to working capital and the escrow (Pltfs' Opp. Mem. at 11, n.16).

[5]According to Plaintiffs, Johnson was wholly responsible for determining what cash would remain in the Company's operating accounts to sustain the working capital post-closing (*id.* at 5, *citing* Plfs' Opp. Stmt.at ¶¶ 16, 85, 94; Heben Aff., 22 ¶ 4).

[6]According to Plaintiffs' expert, those improper expenditures were for mortgage payments, real estate tax payments, and unsubstantiated payments to Nora Johnson (Plfs' Opp. Aff. at 6, n9).

(*id., citing* Heben Aff., p22, ¶ 4).

Plaintiffs refute Defendants' argument that Johnson cannot be held liable for a misrepresentation since the shortfall arose from two post-closing credits by asserting that the credits occurred pre-closing and that "it was Johnson himself who authorized them and failed to account for them when doing his cash and accounts receivable analysis" (*id.* at 7).

To refute Defendants' contention that there can be no reasonable reliance because Plaintiffs had access to all the financial information concerning the working capital calculation, Plaintiffs contend that reasonable reliance is rarely resolvable on a motion for summary judgment. Furthermore, Plaintiffs assert that there is a factual dispute because Plaintiffs were excluded from the substantive discussions and given no access to the Company's cash position (*id.* at 8). In addition, Plaintiffs claim that they relied to their detriment on Johnson's representations that the monies they escrowed would be available to satisfy the shortfall in working capital (*id.*).

In response to Defendants' contention that the working capital shortfall is a prediction of a future event and therefore, not a misrepresentation of a present fact, Plaintiffs assert that because Johnson was aware that the working capital figure was not sustainable, Defendants had an intent to deceive Plaintiffs by escrowing funds that they knew would never be paid back (*id.* at 9).

Plaintiffs also dispute that the disclaimer language in the Release bars their claim for fraudulent inducement because (1) the disclaimer language at issue is not specific enough to bar a claim for fraudulent inducement; and (2) "the fraudulent inducement at issue relates to Dr. Johnson's fraudulent conduct ***separate and apart*** from that which is contemplated by the Release Agreement, namely Dr. Johnson's mandate of an escrow that he unlawfully consumed in breach of the Release and Members Agreement" (Plfs' Opp. Mem. at 11 [emphasis in original]).

According to Plaintiffs, they are not trying to unwind this deal. Plaintiffs then argue, somewhat confusingly and seemingly contrary to some of their other arguments as well as the Amended Complaint's allegations, that they are not trying to unwind the deal and they do not deny their responsibility for the working capital shortfall - rather, it is Plaintiffs' position that "neither the Release Agreement nor the Members Agreement contractually obligate Plaintiffs to maintain payment for the working capital ***twice*** as Dr. Johnson would now see fit" (Plfs' Opp. Mem. at 12 [emphasis in original]).

With regard to their remaining claims, Plaintiffs dispute that the Release is an absolute bar to those claims because Plaintiffs are seeking to rescind the Release based on their claim of fraudulent inducement.

Addressing the merits of these remaining claims, Plaintiffs first argue that there are triable issues of fact concerning their claims that Defendants breached the Operating Agreement based on evidence showing that Johnson has: (a) improperly used the Company's monies post-closing and has failed to properly re-distribute the monies the Company received post-closing (*i.e.,* Plaintiffs refute that there is anything in the Operating Agreement that

precludes Plaintiff from receiving distributions as a result of the loan repayments); and (b) failed to comply with the reporting criteria required for the capital accounts and has caused Plaintiffs to have to pay a disproportionate amount of taxes. Further, that the Members Agreement and Release Agreement only addressed how the proceeds from the APA would be distributed – it did not qualify or limit Plaintiffs' entitlement to monies upon the sale of the Company pursuant to Article 15.2(xi) (*id.* at 14).

In further support of Blink's claim for breach of the Members Agreement based on his paying back the $103,177 note twice, according to Plaintiffs, there are triable questions over whether the overpayment was ever accounted for in the audit letters as Defendants maintain and over whether it was a heavily negotiated item given that the agreements were presented on the last day of the closing without time to review. In any event, Plaintiff claims it would be unjust for Johnson to retain both payments and it is what forms the basis for Plaintiffs' breach of contract claim (*id.*).

In further support of their claim for breach of fiduciary duty, Plaintiffs argue that the facts of this case are distinguishable from the cases on which Defendants rely – *i.e.*, *Pappas* and *Centro* – because Johnson, as the Preferred member, was responsible for all decisions, and the parties were not parting ways and were to remain partners for a three year earn out post-closing. In any event, even if this were a typical arms-length transaction, they were unable to conduct any due diligence on the issue of working capital.

DEFENDANTS' REPLY

In further support of their motion, Defendants submit an affidavit from Adam Chodos, Esq., the attorney who represented the Company in the 2012 sale to IPG and who represented Johnson in his negotiations with Plaintiffs' attorney Paul Ritter, Esq. over the Members Agreement and Release, an affirmation from Defendants' Counsel, Antonette Ruocco, Esq. and its supporting exhibits, and a reply memorandum of law.

Chodos' asserts, in essence, that the agreements between the parties were heavily negotiated and Plaintiffs were not forced into signing anything. Chodos submits various emails between Plaintiffs' counsel, Ritter and Chodos evidencing the negotiations between counsel over the Release and Members Agreement (Affidavit of Adam Chodos, Esq. in Further Support of Defendants' Motion for Summary Judgment, sworn to May 7, 2015 ["Chodos Aff."] at ¶ 14 and Ex. A thereto). He also refutes Plaintiffs' suggestion that there was pressure being brought to bear by IPG to close the transaction on the date that it closed (Chodos Aff. at ¶ 15 and Ex. B thereto).

With regard to Plaintiffs' expert report, Chodos claims that all of the expenses listed by Heben as questionable are all legitimate (*e.g.,* Nora Johnson performed legal services for Hudson) (Chodos Aff. at ¶¶ 19-21).

With regard to the only aspect to Heben's report relevant to Plaintiffs' claim of fraud – *i.e.,* that Johnson manipulated the working capital number – Chodos points out that all the statements made by Heben regarding this issue are entirely speculative. Further the fact

that the working capital number was reached with only a few dollars to spare is irrelevant since it is "a pre-negotiated number to give a purchaser comfort that there is enough cash to operate the business without additional cash infusions ...." and if IPG had wanted a larger number, it could have required it.

In support of the fact that Johnson did not know that there would be a shortfall in working capital and that the client credits occurred post closing, Chodos, avers that when he inquired as to the reason for the shortfall to Goldklang, in December 2012 he received an email from Goldklang that stated that the shortfall occurred as a result of client credits that had been given in the fall (Chodos Aff. at ¶ 23, and Ex. E).

To show that Johnson did not have any ability post-closing to authorize the credits, Chodos attaches Johnson's Consulting Agreement with IPG that Chodos negotiated on Johnson's behalf. According to Chodos, the Consulting Agreement lasted 6 months and its purpose was so that IPG would have Johnson available to it to answer questions. Explicit within the agreement was that Johnson would not have an active role in managing or directing any part of the business operations and that he was not authorized to act on behalf of the Company (*id.* at ¶ 24, Consulting Agreement at ¶ 2.2). Chodos also references an IPG press release that advises that the Company was to be led by Plaintiffs (*id.* at ¶ 24 and Ex. F). Finally, in response to Plaintiffs' assertions that Defendants have taken the escrow funds that were to be used for the working capital shortfall, Chodos avers that "no one is denying that the monies already paid by Plaintiffs, totaling $450,000.00 are to be deducted from the balance owed by Plaintiffs" (*id.* at ¶ 26). Further, that contrary to Plaintiffs' assertions, Chodos himself provided the support for the additional expenses by giving Plaintiffs the various invoices involving "additional accounting statement, [Chodos'] legal statements, the lease assignment invoice, and state licensing receipts" (*id.* at ¶ 26).

In their reply memorandum, Defendants debunk Plaintiffs' contention that they were not provided the financial information necessary to know that the working capital figure was undervalued and that it was predestined to have a shortfall (Defs' Reply at 5-8 and the evidence cited therein). Defendants argue that Plaintiffs' unsupported and conclusory statements are insufficient to avoid summary judgment (Defs' Reply at 5) and "there is no issue of fact as to whether Plaintiffs received the financial information they now deny receiving in contradiction of testimony and numerous e-mails produced in this case" (Defs' Reply at 6, n.7). Defendants also refute Plaintiffs contention that (1) the credits occurred pre-closing by citing to, *inter alia,* the above cited email from Goldklang to Chodos as well as Blink's own testimony (Blink Tr. at 500 and 502) in which he acknowledged that the accounts receivable at issue in the shortfall were cancelled after August 30, 2015 (*id.* at 8-9); and (2) that it was Donohue, the Investment Banker, who negotiated the sale with IPG is the one who negotiated the working capital figure with IPG – not Johnson (*id.* at 6).

Defendants argue that Plaintiffs' expert report, which is entirely speculative and conclusory, is insufficient to create a triable issue of fact (*id.* at 12). Defendants further point out that most of the report has nothing to do with the main issue in this case which is whether or not Plaintiffs' claim of fraudulent inducement is sustainable. And the only part of the report that deals with the issue of working capital "concludes that it was IPG that determined the working capital and that it was satisfied – which is consistent with Defendants' position" (*id.* at

12). The remainder of Defendants reply involves a rehash of Defendants' prior legal argument over why summary judgment is appropriate in this case and will not be reiterated herein. Defendants distinguish the cases on which Plaintiffs rely, including Plaintiffs' argument that *Sterling Natl. Bank and Trust Co. of N.Y. v Giannetti* (53 AD2d 533 [1st Dept 1976]) holds that a waiver of fraud claims violates New York public policy (Defs' Reply at 14, n.18).

THE SUMMARY JUDGMENT STANDARD

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact.[7] Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 643-644 [1985]; *St. Luke's-Roosevelt Hosp. v American Tr. Ins. Co.*, 274 AD2d 511 [2d Dept 2000]; *Greenberg v Manlon Realty, Inc.*, 43 AD2d 968 [2d Dept 1974]). Once the moving party has made *a prima facie* showing of entitlement of summary judgment, the burden of production shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Tillem v Cablevision Sys. Corp.*, 38 AD3d 878 [2d Dept 2007]).

The court's main function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson*, 8 NY2d 8 [1960]; *Sillman v Twentieth Century Fox Film Corp.*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (*Baker v Briarcliff School Dist.*, 205 AD2d 652, 661-662 [2d Dept 1994]).

The threshold inquiry in a motion for summary judgment involving a contract dispute is whether the contract is free from ambiguity such that its provisions may be enforced without resort to extrinsic evidence. The interpretation of an unambiguous contract is a question of law for the court (*Kass v Kass,* 91 NY2d 554, 566 [1998]; *W.W.W. Assoc., Inc. v Giancontieri,* 77 NY2d 157 [1990]; *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [2004], *lv denied* 4 NY3d 707 [2005]; *1550 Fifth Avenue Bay Shore, LLC v 1550 Fifth Avenue, LLC*, 297 AD2d 781, 783 [2002], *lv denied* 99 NY2d 505 [2003]). Contract terms are ambiguous if they are "'capable of more than one meaning when viewed objectively by a reasonably intelligent

[7]There is no requirement that proof be submitted in the form of an affidavit, as opposed to other acceptable forms, such as deposition testimony (*Muniz v Bacchus*, 282 AD2d 387 [1st Dept 2001]).

person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business'" (*Sayers v Rochester Tel. Corp. Supplemental Mgt. Pension Plan*, 7 F3d 1091, 1095 [2d Cir 1993], *quoting Walk-In Med. Ctr., Inc. v Breuer Cap. Corp.*, 818 F2d 260 [2d Cir 1987]; *see also Computer Assoc. Intl. Inc. v U.S. Balloon Mfg. Co.*, 10 AD3d 699, 699 [2d Dept 2004] ["[a] contract is unambiguous if the language it uses has a 'definite and precise meaning, unattended by danger of misconception in the purpose of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion'"]). A court's task is "to determine whether such clauses are ambiguous when 'read in the context of the entire agreement' ... By examining the entire contract, [the Court] safeguard[s] against adopting an interpretation that would render any individual provision superfluous ... Parties to a contract may not create an ambiguity merely by urging conflicting interpretations of their agreement'" (*Sayers*, 7 F3d at 1095 [citations omitted]).

The Court of Appeals has emphasized that "'when parties set down their agreement in a clear, complete document, their writing should ... be enforced according to its terms'" (*Vermont Teddy Bear Co. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004], *quoting W.W.W. Assoc., Inc. v Giancontieri*, 77 NY2d 157 [1990]). "In interpreting a contract, the intent of the parties governs ... A contract should be construed so as to give full meaning and effect to all of its provisions ... Where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law and the case is ripe for summary judgment ... On the other hand, if it is necessary to refer to extrinsic facts, which may be in conflict, to determine the intent of the parties, there is a question of fact and summary judgment should be denied" (*American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275, 277 [1990], *lv denied* 77 NY2d 807 [1991]). "Where consideration of a contract as a whole resolves an ambiguity created by one clause, there is no occasion to consider extrinsic evidence of the parties' intent" (*Hudson-Port Ewen Assoc., L.P. v Kuo*, 78 NY2d 944, 945 [1991]).

"[T]he aim is a practical interpretation of the expressions of the parties to the end that there be a 'realization of [their] reasonable expectations'" (*Brown Bros. Elec. Contr., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 400 [1977]; *see also South Road Assoc., LLC v International Business Machines Corp.*, 2 AD3d 829, 833 [2003], *affd* 4 NY3d 272 [2005] ["[t]he language of a contract must be interpreted 'to reach a practical interpretation of the expressions of the parties so that their reasonable expectations will be realized'"]). Thus, "[t]he rules of construction of contracts require [the court] to adopt an interpretation which gives meaning to every provision of a contract or, in the negative, no provision of a contract should be left without force and effect" (*Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 [1956]; *see also Columbus Park Corp. v Department of Hous. Preserv. & Dev. of City of New York*, 80 NY2d 19, 31 [1992]; *Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.*, 63 NY2d 396, 403 [1984]; *Singh v Atakhanian*, 31 AD3d 425, 427 [2d Dept 2006] ["A contract should not be interpreted in such a way as would leave one of its provisions substantially without force or effect"]).

Where there is an inconsistency between a specific provision and a general provision of a contract, the specific provision controls (*Aguirre v City of New York*, 214 AD2d 692, 693 [2d Dept 1995]). Likewise "a contract which confers certain rights or benefits in one clause will not be construed in other provisions completely to undermine those rights or

benefits" (*Ronnen v Ajax Elec. Motor Corp.*, 88 NY2d 582, 590 [1996]).

PLAINTIFFS' FIRST CAUSE OF ACTION
CLAIM FOR FRAUDULENT INDUCEMENT MUST BE DISMISSED

The crux of Plaintiffs' claim for fraudulent inducement, presented in their First Cause of Action[8], is that Johnson misrepresented to Plaintiffs that the $2.2 million working capital figure was adequate and that there would not be a working capital shortfall and that but for this misrepresentation, Plaintiffs would not have entered into the Release. Alternatively, Plaintiffs argue that they were fraudulently induced to enter into the Release based on Johnson's representation to them that he would use the monies Plaintiffs agreed to be escrowed for the purpose of paying off any shortfall in working capital when at the time he was making such representation, he knew he was never going to allow them to use those escrowed funds for that purpose.

For both fraudulent misrepresentation and fraudulent concealment, the fraud must be established by clear and convincing evidence (*Orbit Holding Corp. v Anthony Hotel Corp.*, 121 AD2d 311, 314 [1st Dept 1986]; PJI 3:20; *accord*, *Colavito v N.Y. Organ Donor Network, Inc.*, 438 F3d 214, 222 [2d Cir 2006]; *Banque Arabe et Internationale D'Investissement v Md. Natl. Bank,* 57 F3d 146, 153 [2d Cir 1995]).

To establish a claim for fraudulent misrepresentation, a plaintiff must establish that there was an affirmative misrepresentation 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 NY3d 173, 178 [2011]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 421 [1996]; *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011]; *Orlando v Kukielka*, 40 AD3d 829, 831 [2d Dept 2007]; *see also Banque Arabe et Internationale D'Investissement, supra,* 57 F3d at 153). It is well settled that vague statements of future expectation of performance are insufficient to support a claim of fraud (*High Tides, LLC v DeMichele*, 88 AD3d 954 [2d Dept 2011]; *International Fin. Corp. v Carrera Holdings, Inc.*, 82 AD3d 641 [1st Dept 2011]; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 758 [2d Dept 2009]; *International Oil Field Supply Serv. Corp. v Fadeyi,* 35 AD3d 372 [2d Dept 2006]; *Sidamonidze v Kay,* 304 AD2d 415 [1st Dept 2003]; *Longo v Butler Equities II, L.P.*, 278 AD2d 97 [1st Dept 2000]; *JP Morgan Sec. Inc. v Corinthian Cap. Group, LLC,* 2010 NY Slip Op 52095[U]; 29 Misc 3d 1230[A] [Sup Ct, NY County 2010]; *Pacesetter Motors, Inc. v Nissan Motor Corp.*, 913 F Supp 174 [WD NY 1996]).

The elements for a cause of action of fraudulent concealment are: (1) an omission of a material fact; (2) intent to defraud; (3) duty to disclose, (4) reasonable reliance on the omission, and (5) damages suffered (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]). The elements of fraudulent concealment are the same as the elements required for fraudulent misrepresentation with one addition – it must be shown that "the

[8]Plaintiffs' style their causes of actions "Claims for Relief" which is the federal, not the state, parlance. The Court will use the state terminology.

defendant had a duty to disclose material information and that it failed to do so" (*P.T. Bank Central Asia v ABN Amro Bank, N.V.*, 301 AD2d 373, 373 [1st Dept 2003]).

It is well established that "'[t]he mere nondisclosure of a material fact, unaccompanied by some deceptive act, does not constitute fraud absent a confidential or fiduciary relationship" (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 1211 [2d Dept 2011], *quoting First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1138 [2d Dept 2010]). The only other instance where an affirmative duty to disclose arises is "when one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair" (*Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 99 [1st Dept 2010]; *Swersky v Dreyer and Traub*, 219 AD2d 321 [1st Dept 1996]). This special facts doctrine arises "where: (1) one party has superior knowledge of certain information; (2) that information is not readily available to the other party; and (3) the first party knows that the second party is acting on the basis of mistaken knowledge" (*Banque Arabe et Internationale D'Investissement v Maryland Natl. Bank*, 57 F3d 146, 155 [2d Cir 1995]).

In *Jana L. v West 129th Street Realty Corp.* (22 AD3d 274 [1st Dept 2005]), the court ruled that the "special facts" doctrine is subject to qualification:

> [This] doctrine requires satisfaction of a two-prong test: that the material fact was information "peculiarly within the knowledge" of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the "'exercise of ordinary intelligence'" (*Black v. Chittenden*, 69 N.Y.2d 665, 669, 511 N.Y.S.2d 833, 503 N.E.2d 1370 [1986], *quoting Schumaker v. Mather*, 133 N.Y. 590, 596, 30 N.E. 755 [1892] ["if the other party has the means available to him of knowing ... he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentation"] (*Jana L.*, 22 AD3d at 278).

Plaintiffs' claim for fraudulent inducement fails as a matter of law.

First, Plaintiffs released their claim of fraud by signing the Members Agreement and Release on the day of the closing of the APA. "Generally, the rule is that separate contracts relating to the same subject matter and executed simultaneously by the same parties may be construed as one agreement ... The rule is applied even though in one of the contracts it is stated that there are not other contracts between the parties ... or such contract does not refer in terms to the other" and this issue boils down to "whether the parties assented to all of the promises as a whole, so that there would have been no bargain if any promise or set of promises had been stricken" (*Williams v Mobil Oil Corp.*, 83 AD2d 434, 439-440 [2d Dept 1981]; *Durst v Abrash*, 22 AD2d 39 [1st Dept 1964] *affd* 17 NY2d 445 [1965]; *Commander Oil Corp. v Advance Food Serv. Equip.*, 991 F2d 49 [2d Cir 1993]).In addition, when one agreement incorporates another agreement by reference, the provisions of the contracts must be construed together (*Ferrari v Iona College*, 95 AD3d 576 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]; *Chiacchia v National Westminster Bank USA*, 124 AD2d 626 [2d Dept 1986]). Furthermore, it is well settled that a release that is executed simultaneously with

an agreement must be construed in connection with the agreement (*Television Credit Corp. v International Television Corp.*, 279 AD 561 [1st Dept 1951]).

Here, because the Members Agreement and Release would not have been entered into but for the APA, and because the APA would not have occurred unless the parties executed the Members Agreement and the Release, the Court views the parties' intent was that the various documents were part of the overall APA transaction and must be construed in that context. Indeed, the documents were all part and parcel of closely inter-related transactions and executed contemporaneously, if not virtually simultaneously. The parties were simultaneously agreeing to sell their business and upon a division of the proceeds of that sale. The interrelationship and interdependence of the documents are borne out by the terms thereof.

In its preamble, the Members Agreement specifically references that the companies constituting Hudson Group (which included Defendants herein) and HG Group were entering into the APA in which HG Group was acquiring the businesses of Hudson Group. The Members Agreement then allocates how much of the proceeds of the transaction would be going to Blink and Goldklang and how much would remain in escrow. It further addressed the requirement that Blink and Goldklang repay certain loans and referencing the fact that the loan interest had been reduced and was reflected in the payoff amounts. They agreed that Blink and Goldklang would be entitled to 75% of the Interim Payment defined in the APA. Finally, the Members Agreement states that (1) to the extent the Members Agreement conflicted with the Third Amended and Restated Operating Agreement, the Members Agreement would control; (2) it set forth the entire understanding between the parties concerning the matters covered by the Agreement, and (3) no provision could be amended modified or waived unless it was by a writing signed by all Parties.

The Release acknowledges that the parties to the Release (Johnson, MidAtlantic, Johnson and Goldklang) are members of Hudson Group and that Hudson Group was selling its assets pursuant to the APA. It states that the funds were going to be allocated in accordance with the separate but contemporaneously executed Members Agreement (Release at ¶ 2). In the Release the parties

> represent and warrant that each has investigated the facts it or he has deemed necessary to execute this Agreement; that each has had the opportunity to review and discuss this Agreement with their counsel; and that no payments, promises, representations, or inducement for the execution of this Agreement have been made or in any way relied on in executing this Agreement, except solely as described in this Agreement (Release at ¶ 14).

They further agreed that the Release constituted "the entire, integrated agreement between the Parties regarding the subject matter hereof and supercedes any and all prior and contemporaneous agreements, representations and understandings of the Parties, whether written or oral" (Release at ¶ 9). At various points, the Release references the parties' obligations under the APA with regard to (1) the Common Unit Holders obligations to honor all representations and warranties set forth in the APA and their obligation to indemnify the Releasees and hold them harmless from all claims arising from those representations and

warranties (*id.* at ¶ 5), and (2) based on their continuing operations of the Company following the closing, the Common Unit Holders' obligation to protect the integrity of the APA (*id.* at ¶ 6).

The language of the Release makes clear that Plaintiffs were releasing Johnson (and the companies in which he held an interest and his successors in interest), from all, *inter alia*, actions, causes of action, debts, claims, demands, liabilities, obligations, contracts, and remedies of any nature whatsoever the Plaintiffs had, would have, or may have against Defendants "for, upon or by reason of any matter, cause or thing whatsoever from the beginning of the world to the date of this Agreement" (Release at ¶ 1). Johnson made a reciprocal release to Plaintiffs (and the companies in which they held an interest as well as their successors in interest).

As noted by the New York Court of Appeals, a release "is a jural act of high significance without which the settlement of disputes would be rendered all but impossible" (*Mangini v McClurg*, 24 NY2d 556, 563 [1969]). "A release will not be treated lightly, and will be set aside by a court only for duress, illegality, fraud, or mutual mistake" (*Shklovskiy v Khan*, 273 AD2d 371, 372 [2d Dept 2000]; *see also Lee v Boro Realty, LLC,* 39 AD3d 715, 716 [2d Dept 2007]). As noted by the Appellate Division, Second Department:

> [a] release is a contract, and its construction is governed by contract law ... Where a release is unambiguous, the intent of the parties must be ascertained from the plain language of the agreement ... However, "'if from the recitals therein or otherwise, it appears that the release is to be limited to only particular claims, demands or obligations, the instrument will be operative as to those matters alone'" (*Perritano v. Town of Mamaroneck*, 126 A.D.2d 623, 624, 511 N.Y.S.2d 60, quoting 49 N.Y. Jur., Release and Discharge, § 33, at 405). Indeed, "[t]he meaning and coverage of a general release necessarily depends upon the controversy being settled and upon the purpose for which the release was given. A release may not be read to cover matters which the parties did not intend to cover" (*Kaminsky v Gamache*, 298 AD2d 361, 361-362 [2d Dept 2002], *quoting Gale v Citicorp*, 278 AD2d 197, 197 [2d Dept 2000]; *accord Kaprall v WE: Women's Entertainment, LLC,* 74 AD3d 1151 [2d Dept 2010]).

In addition to these authorities, the Court of Appeals' decision, *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. De C.V.* (17 NY3d 269 [2011]) is controlling.

In *Centro*, Plaintiffs Centro Empresarial Cempresa S.A. ("Centro") and Conecel Holding Limited ("CHL") claimed that they owned substantial shares in defendants Consorico Ecuatoriano de Telecomunicaciones S.A. Conecel ("Conecel"). They approached other defendants who owned Telmex Wireless LLC ("Telmex") about Telmex investing in Conecel. In a Master Agreement executed in March 2000, Telmex obtained a 60% interest in Conecel while Plaintiffs, through their new entity Telmex Wireless Ecuador LLC ("TWE"), retained a minority interest in Conecel. In *Centro*, like here, plaintiffs alleged that defendants falsely

represented in various financial records that Conecel was not doing well so that they could extract a low purchase price for Conecel from plaintiffs. In *Centro*, like here, in connection with the defendants' purchase of plaintiffs' shares in Conecel, the parties executed a broad release. Defendants moved to dismiss, arguing plaintiffs' claims were barred by the release.

In affirming the Appellate Division's reversal of the trial court's denial of defendants' motion to dismiss, the Court of Appeals recited the law of release as follows:

> Generally, "a release constitutes a complete bar to an action on a claim which is the subject of the release" ... A plaintiff seeking to invalidate a release due to fraudulent inducement must "establish the basic elements of fraud ... [and] a **release may encompass unknown claims, including unknown fraud claims, if the parties so intend and the agreement is "fairly and knowingly made"** ... [A] party that releases a fraud claim may later challenge that release as fraudulently induced only if it can identify a separate fraud from the subject of the release ... Were this not the case, no party could ever settle a fraud claim with any finality (*Centro*, 17 NY3d at 276 [citations omitted] [emphasis added]).

In *Centro*, the Court of Appeals agreed that the fraud at issue – defendants' misrepresentation of the value of plaintiffs' ownership interest – fell "squarely within the scope of the release: plaintiffs allege that defendants supplied them with false financial information regarding the value of Conecel and TWE, and that, based on this false information, plaintiffs sold their interests in TWE and released defendants from claims in connection with that sale" (*id.* at 277). Therefore, the Court held that plaintiffs had not alleged, as required, that the release was induced by a separate fraud.

The fact that the parties stood in a fiduciary relationship to one another since Telmax was a majority shareholder in a closely held corporation did not effect the result since the Court found that the "fiduciary relationship [was] no longer one of unquestioning trust– so long as the principal understands that the fiduciary is acting in its own interest and the release is knowingly entered into" (*id.* at 278). In this regard, since the parties were sophisticated entities negotiating the termination of their relationship, the Court held that they negotiated the Release with their eyes wide open and could not invalidate the "release by claiming ignorance of the depth of their fiduciary misconduct" (*id.*) – *i.e.,* at that point in their relationship, "the principal cannot blindly trust the fiduciary's assertions" (*id.* at 279).

As another basis for dismissal, the Court of Appeals held that plaintiffs had failed to allege justifiable reliance given the well settled principle that "'if the facts represented are not matters peculiarly within the party's knowledge, and the other party has the means available to him of knowing by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, he must make use of those means, or he will not be heard to complain that he was induced to enter in to the transaction by misrepresentations'" (*Centro,* 17 NY3d at 278-279, *quoting DDJ Mgmt., LLC v Rhone Group L.L.C.,* 15 NY3d 147, 154 [2010]). The Court viewed that the complaint alleged:

> plaintiffs knew that the defendants had not supplied them with the financial information necessary to properly value the TWE units, and that they were entitled to that information. Yet they chose to cash out their interests and release defendants from fraud claims without demanding either access to the information or assurances as to its accuracy in the form of representations and warranties. In short, this is an instance where plaintiffs have been so lax in protecting themselves that they cannot fairly ask for the law's protection (*id.* at 279, *quoting DDJ Mgmt.*, 17 NY3d at 279).

The facts in this case are virtually indistinguishable from *Centro*. The parties were at odds with each other and were in heavy negotiations to terminate their association. Plaintiffs were integrally involved in the APA, even to the extent of assembling financial information necessary to be provided to IPG. As part of the parties' negotiations, they entered into a broad mutual release that followed in all respects the language of the release found in *Centro* to bar the plaintiffs' claim for fraudulent inducement. Here, the fraud claimed — *i.e.,* that the working capital amount would be sufficient – was part and parcel of the entire transaction and was not a fraud separate from the parties' agreement. Accordingly, the Release bars Plaintiffs' claim for fraudulent inducement (*Centro; see also Pappas v Tzolis,* 20 NY3d 228 [2012]; *Global Minerals and Metals Corp. v Holme*, 35 AD3d 93 [1st Dept 2006]).[9]

Even if the fraud were separate from the parties' agreement, Plaintiffs cannot show justifiable reliance because they had access to the information necessary to make their own informed determination as to whether or not the working capital figure set forth in the APA would be sufficient (*see, e.g.*, Blink Tr. at 200-201 [he chose not to go into data room]) (*HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 [1st Dept 2011]; *Global Minerals and Metals Corp., supra*). Regardless of whether or not up to date financial information, including the critical cash information, was available in the data room and whether or not Blink and Goldklang accessed the information are irrelevant because Plaintiffs have provided no evidence that if they had requested to see such up to date information, their request would have been denied. Therefore, any reliance on the working capital figure was unreasonable and it is appropriate to decide this on a motion for summary judgment (*Global Minerals and Metal, supra*).

Additionally, Plaintiffs expressly disclaimed that they were relying on any promises not contained within the parties' agreement. Namely, the parties "represent[ed] and warrant[ed] that each has investigated the facts it or he has deemed necessary to execute this Agreement; that each has had the opportunity to review and discuss this Agreement with their counsel; and that no payments, promises, representations, or inducement for the execution of this Agreement have been made or in any way relied on in executing this Agreement, except

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[9]The cases upon which Plaintiffs rely where the courts declined to grant summary judgment dismissing fraudulent inducement claims are distinguishable since none of them involved a release being executed in connection with the deal at issue (*see, e.g., Brunetti v Musallam*, 11 AD3d 280 [1st Dept 2004]; *Sokolow, Dunaud, Mercadier & Carreras LLP*, 299 AD2d 64 [1st Dept 2002]; *Texaco, Inc. v Synergy Group, Inc.*, 171 AD2d 788 [2d Dept 1991]).

solely as described in this Agreement" (Release at ¶ 14). Not only does such a specific disclaimer bar any ability to bring a claim of fraudulent inducement, a "specific disclaimer destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon these contrary oral misrepresentations" (*Weiss v Shapolsky,* 161 AD2d 707 [2d Dept 1990], *lv dismissed* 76 NY2d 889 [1990], *quoting Danann Realty Corp. v Harris,* 5 NY2d 317, 320-321 [1959]; *Capstone Enter. of Port Chester, Inc. v County of Westchester*, 262 AD2d 343 [2d Dept 1999]; *see also Nancy Neale Enter., Inc. v Eventful Enter., Inc.*, 238 AD2d 322 [2d Dept 1997]). Thus, it also eviscerates any ability for Plaintiffs to contend that they could not have investigated the issue of working capital prior to the execution of the Release and the Members Agreement – *i.e.,* Plaintiffs cannot contend that they justifiably relied on any statement from Johnson that the working capital figure would be adequate (*HSH Nordbank AG v UBS AG*, 95 AD3d 185 [1st Dept 2012]; *MBIA Ins. Corp. v Merrill Lynch*, 81 AD3d 419 [1st Dept 2011]; *Capital Z Fin. Serv. Fund II, L.P. v Health Net, Inc.*, 43 AD3d 100 [1st Dept 2007]; *Chase Manhattan Bank v New Hampshire Ins. Co.*, 304 AD2d 423 [1st Dept 2003], *lv denied* 100 NY2s 509 [2003]; *O&M Gourmet Foods, Inc. v Marino's 184 Foods, Inc.,* 225 AD2d 340 [1st Dept 1996]).

Additionally, if the fraud is viewed as the misrepresentation as to the sufficiency in the future of the working capital number, it is merely a statement of prediction which is not actionable fraud (*Chase Invs., Ltd. v Kent*, 256 AD2d 298, 299 [2d Dept 1998] ["[a] prediction of something which is hoped or expected to occur in the future will not sustain an action for fraud"]; *see also Biagio Rest., Inc. v C.E. Props., Inc.*, 127 AD3d 1006 [2d Dept 2015]; *Current Med. Directions, LLC v Salomone*, 2010 NY Slip Op 50315[U], 26 Misc 3d 1229[A] [Sup Ct, NY County 2010]). If the fraud is viewed as the statement that the escrowed monies would be used to pay off the working capital shortfall but when Johnson made that representation, he had no intention of applying the escrowed funds for that purpose, that claim would fail as well since it is simply a breach of contract claim. "A fraud claim does not lie where the only fraud alleged arises from the breach of a contract ... 'A present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud. Conversely, a misrepresentation of material fact that is collateral to the contract and serves as an inducement for the contract is sufficient to sustain a cause of action alleging fraud'" (*Selinger Enter., Inc. v Cassuto,* 50 AD3d 766, 768 [2d Dept 2008], *quoting WIT Holding Corp. v Klein*, 282 AD2d 527 [2d Dept 2001]; *see also Hawthorne Group, LLC v RRE Ventures,* 7 AD3d 320, 322-323 [1st Dept 2004]; *Deerfield Communications Corp. v Chesebrough-Ponds, Inc.*, 68 NY2d 954, 956 [1986]; *First Bank of Am. v Motor Car Funding, Inc.*, 257 AD2d 287, 291-292 [1st Dept 1999]). "Where a fraud claim arises out of the same facts as plaintiff's breach of contract claim with the addition only of an allegation that defendant never intended to perform the precise promises spelled out in the contract between the parties, the fraud claim is redundant and plaintiff's sole remedy is for breach of contract" (*Sudul v Computer Outsourcing Serv.*, 868 F Supp 59, 62 [SD NY 1994]; *Stangel v Chen*, 74 AD3d 1050, 1052 [2d Dept 2010]). Here, the same allegations Plaintiffs assert in their breach of contract claim constitute the basis for their fraud claim, with the addition only of a conclusory allegation that Defendant Johnson never intended to honor the parties' agreement concerning the escrowing for funds in the event of a working capital shortfall. The claimed misrepresentation is not collateral to the contract but is embodied in the contract itself. Because this alternative theory of fraud is simply an alleged misrepresentation of an intention to perform under the contract, it is a breach of contract claim cloaked in fraud allegations. Further, Plaintiffs have provided no evidence that at the time Johnson made those

representations he did not intend to keep his promise.

The fraudulent inducement claim fails because Defendants established *prima facie,* that because the working capital shortfall occurred as a result of customer credits occurring after the closing of the APA, Johnson could not have known there would be a working capital shortfall at the time he was alleged to have made the misrepresentation. In opposition to this *prima facie* showing, all Plaintiffs offer is speculative opinion by Heben:

> In summary, a high percentage of working capital is determined by the level of sales a company faces. A good percentage of working capital is subject to management judgement [sic] and behavior. Keep in mind that HG met its target with 2% to spare and one has to ask whether the manipulation of working capital could have made a difference in this case.
>
> We do not know what Mr. Johnson did or didn't do with the working capital reporting, we simply know that it was possible. Given his proclivity to spend money at the expense of his partners in spite of the operating agreement admonition, and essentially hide financial information (as starkly shown in the different reporting made to the IRS versus what the company books showed), it is not a leap of faith to consider the possibility that the working capital, at least on the margins, could have been creatively overstated (Report at 25 [footnote omitted]).

This opinion is based on pure conjecture and does not provide facts creating a triable issue of fact over whether Johnson had any control over the working capital shortfall that ultimately resulted (*Rivers v Birnbaum,* 102 AD3d 26 [2d Dept 2012]).

THE THIRD CAUSE OF ACTION SHALL BE DISMISSED EXCEPT AS TO PLAINTIFFS' CLAIM FOR FAILURE TO REFUND THE ESCROW

The Third Cause of Action is self-described as asserting a breach of the Members Agreement. All but 1 of the 6 substantive allegations contained therein concern a claim that Johnson was paid twice for a March 9, 1999 promissory note. Specifically, Plaintiffs allege that Blink paid the note "[i]n or around August 30, 2012" and thereafter discovered that "an oversight had been made and the $103,770 had in fact been paid to Defendant Johnson previously on May 11, 1999" (Amended Complaint at ¶¶ 58-60). Blink therefore seeks the return of $103,770.00 (*id.* at ¶ 62).

The elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by plaintiff, (3) breach of the contract by defendant, and (4) damages resulting from the breach (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010]; *Coastal Aviation, Inc. v Commander Aircraft Co.*, 937 F Supp 1051, 1060 [SD NY 1996], *affd* 108 F3d 1369 [2d Cir 1997]).

The Members Agreement specifically provides that within 2 days of Blink's

receipt of his share of the IPG proceeds, he is to pay Johnson $103,177 in full payment of a loan from Johnson (¶2).[10]

Since it has not been definitively shown that the $103,770 at issue was paid prior to the execution of the release, which occurred on August 30, 2012, it cannot be determined whether this claim is barred by the release. That said, however, Blink has utterly failed to set forth a claim for breach of contract. The Members Agreement provides that Blink was to pay $103,177 to Johnson in repayment of a loan. To the extent that Blink is asserting that he made a mistake in agreeing to repay the loan as part of the Members Agreement, he has not presented a cause of action to reform the Members Agreement, for which he would need to establish that the mistake was mutual (*see, e.g., Asset Management & Capital Co. v Nugent*, 85 AD3d 947 [2d Dept 2011]). In any event, there is no claim for breach of the Members Agreement on account of the alleged duplicate payment.[11]

That leaves 1 paragraph left in the Third Cause of Action which alleges, in its entirety:

> 63. Moreover, pursuant to the Members Agreement, Defendant Johnson has retained for his own benefit the Escrow Payments which had been set aside by Plaintiffs. As these Escrow Payments were made at the fraudulent inducement of Defendant Johnson, Plaintiffs are entitled to the refund of their respective Escrow Payments.

It is undisputed that the Members Agreement provided that $401,637 of Blink's share of the IPG payment be "held in escrow for 180 days" and that $55,636 of Goldklang's share be held in escrow for a like period of time. It is undisputed that, as addressed in the release, the escrow was for the purpose of securing certain post-closing obligations of Blink and Goldklang, including any increase in working capital (Statement of Material Facts, ¶137). The release agreement provides that, in order to "ensure funding for above potential expenses", Blink and Goldklang agree to have 5% of their shares of the proceeds held in escrow. While the agreement does not specify the length of the escrow, it does specify what are the "above potential expenses" – (a) a guarantee by Blink and Goldklang of the collection of business receivables; (b) an indemnity by Plaintiffs from their commission of certain acts of

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[10] This payment was in addition to two other loan repayments: $1,929,753 to Hudson Medical Communications, LLC and $601,230 to Hudson Global Group, LLC.

[11] Blink suggests, in a footnote in Plaintiffs' Response to Defendants' Rule 19-a Statement (p 5 n2) that Johnson has failed to discharge a lien that he placed on Blink's personal residence and that this violates the Members Agreement and other agreements. However, Blink does not present in the present Complaint a breach of contract regarding failure to release a lien. He does not claim damages for the non-release of the lien and does not seek to have the lien discharged. A copy of lien is not provided. Moreover, according to the Complaint, Blink resides in Fort Lee, New Jersey, thus, it would appear that any application regarding the lien would be governed by New Jersey law and, possibly, might have to be presented in the courts in New Jersey.

intentional wrongdoing; (c) payment of a bonus to two individuals by Blink; (d) a shortfall in working capital; and (e) client reimbursements.

Plaintiffs now contend that they "understood" that the escrow was only to cover a shortfall in working capital and that they were not "aware" that the escrowed money would be used for "any additional expenses" (Plfs' Response tp Defs' Rule 19-A Statement, ¶¶138). They also contend that, under the Members Agreement, the escrow was to last only 180 days (*id.,* ¶131).

While Plaintiffs are correct that, under the Members' Agreement, the escrow was for 180 days, the Members Agreement did not specify what was happen at the end of the 180 day period, though it would be reasonable to construe that provision as requiring a return of any monies not needed to fulfill a working capital shortfall. However, the Members Agreement must be read together with the release agreement which provided that the escrow was to provide "funding" for four categories of expenses, beyond a working capital shortfall. A reasonable construction of this provision is that the escrow funds could be tapped to cover the designated expenses and that any remaining funds would be paid over to Plaintiffs within a reasonable time after all of the designated expenses were resolved.

In moving for summary judgment, Defendants have failed to present evidence that would establish *prima facie* that the escrow funds were consumed and that they were consumed solely and only for the designated purposes. Defendants do present evidence, and it is undisputed, that IPG, on November 28, 2012, notified the parties that there was a $703,000 shortfall in working capital. While this amount would consume the escrow, there is no claim that anything was paid over IPG on account of its notice. Rather, Defendants contend that, to date, IPG has not made a further demand and it is unclear whether they intend to collect the amount demanded.

Plaintiffs' opposition cites to Johnson's testimony that the money in escrow was used up, that many of the expenses exceeded the escrow, and that the additional expenses were caused by Plaintiffs' lack of performance of their obligations. However, the cited testimony does not address whether the expenses referred to were designated expenses under the Release Agreement.

Plaintiffs cite Johnson's testimony that the Company's closing proceeds were allocated for closing costs, separate and apart from the escrow, and suggest that this somehow contradicts his testimony about the use of the escrow. They also cite to evidence that the Company paid over $1.5 million in expenses, including for expenses for non-Company items, though Plaintiffs do not cite any evidence that these expenses were paid out of escrow funds.

While Plaintiffs' opposition is deficient in terms of providing affirmative support for Plaintiffs's claims, the fact remains that Defendants have failed to show *prima facie* that the escrow funds were used solely and only for designated expenses and, therefore, the Court cannot grant them summary judgment on this aspect of the Complaint, notwithstanding Plaintiffs' failure to present meaningful affirmative evidence *(see, e.g., Weingrad v New York University Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Derieux v Apollo New York City Ambulette,*

Inc., ___ AD3d ___ 2015 WL 4744497 []2d Dept 2015]).[12]

According, the Third Cause of Action shall be dismissed, except insofar as it asserts a claim for breach of contract for failure to refund the escrowed funds.

THE SECOND CAUSE OF ACTION SHALL BE DISMISSED IN PART AND SHALL BE SUSTAINED IN PART

Plaintiffs' Second Cause of Action alleges Defendants' breaches of the Operating Agreement.

First, Plaintiffs allege that Article 7 obligates Defendants to make income allocations to Plaintiffs reflecting the financial benefit received by Hudson Group as a result of both the loan repayments by Plaintiffs and the Bonus Refunds owed to Plaintiffs (Blink, $23,500; Goldklang, $3,250). Plaintiffs assert that no such allocation has been made and, as a result, they have sustained damages.

Section 7.1 of the Operating Agreement provides for the allocation of income among the members. In response to Defendants' motion for summary judgment and articulation that Plaintiffs have failed to identify what aspect of Section 7.1 was allegedly violated by Defendants, Plaintiffs have utterly failed to provide any specification of what, if any, provision of Section 7.1 Defendants are claimed to have violated. Indeed, Plaintiffs have failed to show any basis for treating their loan repayments or the Bonus Refunds as "income" in the first place.

Plaintiffs also assert that they have not received distributions they claim they are entitled to pursuant to Article 15 of the Operating Agreement and that Johnson continued to write checks as recently as March 2014.[13] Article XV of the Operating Agreement applies to dissolution and winding up. Since it is undisputed that the Company sold its assets, such sale triggered dissolution pursuant to Section 15.1.

In support of their motion for summary judgment, Defendants acknowledge that Johnson continued to write checks as late as March 2014 but assert that this occurred due to the fault of Plaintiffs and/or IPG to properly inform Hudson to wire payments to new IPG bank accounts. Thus, some payments, according to Plaintiffs, inadvertently went to Defendants'

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[12]Plaintiffs' allegation that they are entitled to a return of the escrow money because they were fraudulently induced to make the payments in escrow does not state a cause of action for breach of contract and, in event, is flawed for the same reasons as stated in connection with the First Cause of Action. Hence, dismissal of this aspect of the Second Cause of Action is appropriate.

[13]Plaintiffs further assert that they have not received written documentation to verify figures produced in K-1 statements. However, they have not identified a basis for their entitlement to such documents, or even whether they requested such documents and were refused them.

dormant accounts, which Johnson had to rectify by writing checks to IPG. Plaintiffs, in response, argue that Johnson held on to the $132,000 at issue for more than 8 months and wrote checks for a variety of non-Hudson expenses. These contentions raise triable issues of fact.

Accordingly, the branch of Defendants' motion seeking the dismissal of the breach of Operating Agreement shall be denied insofar as the Second Cause of Action asserts breaches of Article 15 but shall otherwise be granted.

PLAINTIFFS' FOURTH CAUSE OF ACTION FOR
BREACH OF FIDUCIARY DUTY SHALL BE DISMISSED

The elements of a cause of action for a breach of fiduciary are (a) a breach by a fiduciary of obligations to another; (b) that the defendant knowingly induced or participated in the breach; and (c) that the plaintiff suffered damages as a result of the breach (*Kurtzman v Bergstol,* 40 AD3d 588, 590 [2d Dept 2007]; *Gupta v Rubin*, 2001 WL 59237 at * 7 [SD NY 2001]).

The vast majority of this claim revolves around Johnson's alleged breaches of fiduciary duty that pre-date the entry into the Release on August 30, 2012. Therefore, for all the reasons that Plaintiffs' claim for fraudulent inducement fails based on the Release, Plaintiffs' claims for breach of fiduciary duty against Johnson that pre-date the Release are likewise barred.

The only other allegation that post-dates the Release is the allegation that Johnson has wrongfully directed Defendants post-sale to continue the retention of monies due and owing to Plaintiffs. This claim is entirely duplicative of Plaintiffs' breach of the Operating Agreement claim. It is well settled that "'[a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand" (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173 [1st Dept 2000]; *Fesseha v TD Waterhouse Inv. Servs, Inc.*, 305 AD2d 268, 269 [1st Dept 2003]; *RNK Capital LLC v Natsource*, 76 AD3d 840 [1st Dept 2010], *lv denied* 16 NY3d 709 [2011]).

Accordingly, the branch of Defendants' motion seeking the dismissal of the Fourth Cause of Action shall be granted.

CONCLUSION

The Court has considered the following papers in connection with the motion:

1) Notice of Motion dated March 20, 2015; Affirmation of Antonette Ruocco in Support of Defendants' Motion for Summary Judgment dated March 20, 2015, together with the exhibits annexed thereto;

2) Defendants' Statement of Undisputed Facts Pursuant to Commercial Division Rule 19-a dated March 20, 2015;

[* 31]

3) Memorandum of Law in Support of Defendants' Motion for Summary Judgment dated March 20, 2015;

4) Affirmation of Michele L. Ross, Esq. in Opposition to Defendants' Motion for Summary Judgment dated April 16, 2015, together with the exhibits annexed thereto;

5) Plaintiffs' Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment dated April 16, 2015;

6) Affidavit of Edward D. Heben, CPA, P.C., sworn to April 14, 2015 and Expert Report of Edward D. Heben, CPA, P.C. dated April 3, 2015;

7) Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment dated April 16, 2015;

8) Affirmation of Antonette Ruocco in Further Support of Defendants' Motion for Summary Judgment dated May 7, 2015 together with the exhibits annexed thereto;

9) Affidavit of Adam Chodos, Esq. in Further Support of Defendants' Motion for Summary Judgment dated May 7, 2015, together with the exhibits annexed thereto; and

10) Reply Memorandum of Law in Further Support of Defendants' Motiono for Summary Judgment Pursuant to CPLR 3212 dated May 7, 2015.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion for summary judgment by Defendants Richard Johnson, M.D., Hudson Communications, LLC, 5 Medical Marketing LLC, Hudson Global Group, LLC, Infinity Global Events, LLC and Healthone Group, LLC as against Plaintiffs Robert Blink and Jason Goldklang is granted in part and denied in part; and it is further

ORDERED that the branch of said motion seeking summary judgment with respect to said Plaintiffs' First Cause of Action is granted and said First Cause of Action shall be, and is hereby, dismissed; and it is further

ORDERED that the branch of said motion seeking summary judgment with respect to said Plaintiffs' Second Cause of Action is granted, except as to such portion of such Cause of Action as alleges breaches of Article 15 of the Hudson Group Operating Agreement; and all other portions of such Cause of Action shall be, and hereby are, dismissed

ORDERED the branch of said motion as seeks summary judgment with respect

to said Plaintiffs' Third Cause of Action is granted, except as to such portion of such Cause of Action as alleges breach of contract for failure to refund certain monies paid into escrow, and all other portions of such Cause of Action shall be, and hereby are, dismissed; and it is further

ORDERED that the branch of said motion as seeks summary judgment with respect to the Fourth Causes of Action is granted and said Fourth Cause of Action shall be, and hereby is, dismissed; and it is further

ORDERED that the parties shall appear for a conference on September 18, 2015 at 9:30 a.m, the purpose of which shall be to schedule a trial date in this action; and it is further

ORDERED that the above-reference conference shall not be adjourned without the prior written consent of this Court.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
August 21 , 2015

ENTER:

Alan D. Scheinkman
Justice of the Supreme Court

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