| **Gansett One, LLC v Husch Blackwell, LLP** |
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| 2017 NY Slip Op 32461(U) |
| November 22, 2017 |
| Supreme Court, New York County |
| Docket Number: 651097/2015 |
| Judge: O. Peter Sherwood |
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**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49**
------------------------------------------ X
**GANSETT ONE, LLC, SES WEALTH ADVISORS, LLC, GW HOLDINGS, LLC, and MAST AND SON, LLC,**

**Plaintiffs,**

**- against -**

**HUSCH BLACKWELL, LLP, DIANE T. CARTER, ROBERT E. HAM, JOHN DOES 1-10, JANE DOES 1-10, and ABC CORPS. 1-10, Defendants,**

**Defendants.**
------------------------------------------ X

**DECISION AND ORDER**

**Index No. 651097/2015**
**Motion Seq. Nos. 002**

**O. PETER SHERWOOD, J.:**

In this motion sequence 002, defendants move to dismiss all claims. As discussed further below, the motion shall be granted in its entirety.

## I. BACKGROUND[1]

Defendant Husch Blackwell, LLP ("Husch") is a large Kansas-based law firm (NYSCEF Doc. No. 21 [amended complaint] ¶ 28). Diane Carter, is a Husch partner specializing in healthcare and corporate law (*id.* ¶ 29). For 11 years, Carter has represented nonparty Kamran Nezami in both personal and business matters (*id.* ¶¶ 37, 40). Through at least November 2014, Nezami owned and controlled several medical companies (*id.* ¶¶ 45, 50). In September 2013, Nezami began diverting funds from the companies for his own use, purchasing sports cars, planes, security details, and several homes (*id.* ¶¶ 99 [c]). According to the complaint, Nezami stated that, Carter "runs his life" and is the person who knows him better than anyone else (*id.* ¶¶ 39, 66). She was therefore aware of the embezzlement (*id.* ¶ 100).

Shortly after he began to embezzle funds Nezami met the plaintiff investors in November 2013 and early 2014 (*id.* ¶¶ 57-58). Thereafter, he embarked on a scheme to fraudulently obtain

[1] As this is a motion to dismiss, the facts alleged in the complaint, are taken as true. They are succinctly described in the opinion of United State District Court Judge Andrew Carter's dismissing plaintiffs' RICO claims. Accordingly, the facts described here largely repeat Judge Carter's description of the facts (*see* NYSCEF Doc. No. 32 at 1-6).

their investments in the medical companies as a further source of funds to embezzle (*id.* ¶ 6). Carter and Husch learned of Nezami's plan (*id.* ¶¶ 6-7). Nezami promised Carter an equity interest in one of his medical companies in exchange for her participation in the scheme, which she accepted (*id.* ¶¶ 21, 99 [f]). For its part, Husch weighed the fees it stood to gain from representation of Nezami in the ongoing scheme and also decided to participate (*id.* ¶ 105).

Over the course of months, Nezami exchanged interstate telephone calls and met in person with the investors at least 17 times (*id.* ¶¶ 59-60). At some or all of the meetings in which investment discussions took place, Carter accompanied Nezami (*id.* ¶¶ 29, 61). Nezami's marketing efforts with the investors were successful, and between March 14, 2014 and May 27, 2014 they purchased over $1.35 million of securities in the medical companies (*id.* ¶¶ 55-56). Through those purchases, the investors also acquired an interest in Titanium Healthcare, Inc. ("Titanium"), because it was majority owned by an LLC that itself was majority owned by one of the medical companies (*id.* ¶ 54).

Carter, along with unnamed attorneys at Husch, drafted five Purchase Agreements by which Nezami transferred a portion of his security interests in the medical companies to the investors (*id.* ¶¶ 55, 91). Those agreements represented that Nezami was transferring interests he owned in Global Molecular Labs, LLC, when he did not, in fact, own those interests (*id.* ¶¶ 97 [f]). At an unspecified date after the signing of the Purchase Agreements, however, the Global Molecular Lab interests were gifted to the investors (*id.* ¶ 151). The Purchase Agreements further contained Put Options that Carter knew Nezami never intended to honor (*id.* ¶ 93). When the investors later attempted to exercise those options, Nezami did, in fact, refuse to honor them (*id.* ¶ 94). Nezami has filed a suit in Texas state court against the investors over that dispute (*id.* ¶ 95).

At some point between February and April 2014, the medical companies discovered that Nezami had embezzled their funds (*id.* ¶¶ 100-101). Prior to at least some of the plaintiffs' decisions to invest, the medical companies sought legal advice from Carter on how to recover the money (*id.* ¶ 8). The companies then established a payment plan with Nezami, under which the embezzled funds would be treated retroactively as loans that Nezami would repay with the investors' money (*id.* ¶¶ 8, 13). On May 23, 2014, Nezami signed two Promissory Notes between himself and the companies that Carter and other Husch lawyers prepared (*id.* ¶¶ 14, 99 [c]). At unspecified dates, certain of the companies further demanded that Nezami resign from

governance over them as a result of his embezzlement and unnamed Husch lawyers drafted the resignation documents (*id.* ¶ 100). Nezami, with Carter's knowledge, falsely told the investors that he had resigned because he could not govern both the medical companies and Titanium, rather than because of the discovery of his embezzlement (*id.* ¶ 101).

Sometime before August 2014, Nezami threatened the life of a now former executive of one of the medical companies who refused to join in the conspiracy to embezzle funds (*id.* ¶ 122). An unspecified person also brought a "'trumped up' charge of wrongdoing" against the executive to remove him from his position (*id.* ¶ 123). On July 30, 2014, the executive was dismissed from his position and Carter asked him to sign a Release and Confidentiality Agreement in exchange for a sum of money (*id.*).

In addition to the legal documents that Carter and other Husch attorneys prepared in furtherance of the embezzlement scheme, plaintiffs allege Carter knowingly failed to correct Nezami when he repeatedly lied to the investors, provided them with inaccurate documents, and omitted material information in their investment discussions. Such statements, documents, or omissions include:

- inaccurate valuations of certain of the medical companies (*id.* ¶¶ 53, 72);
- financial statements of the medical companies that excluded the loans made to Nezami in order to cover up his embezzlement (*id.* ¶ 99 [c]);
- Nezami's financial statements that misrepresented his ownership in certain assets (*id.* ¶ 99 [e]);
- financial statements of the medical companies with profit projections that later failed to materialize (*id.* ¶¶ 99 [g]-[h]);
- a boast that Nezami planned to buy a football team after Titanium was listed on the New York Stock Exchange, when Titanium's management structure precluded it from ever being listed (*id.* ¶¶ 86-87);
- statements that Nezami had served in the military, when he never had (*id.* ¶ 98);
- a statement misrepresenting the number of doctors who had invested in one of the medical companies (*id.* ¶ 99 [i]); and
- and a failure to inform the investors of a million-dollar over-distribution to shareholders from one of the medical companies (*id.* ¶ 99 [j]).

Finally, the investors allege that the scheme among Nezami, Carter, and Husch is ongoing (*id.* ¶ 118). Even after the investors wired the funds indicated in the Purchase Agreement to Nezami, he continued to solicit them for more money (*id.* ¶ 72). He also sought their assistance to solicit additional funds from private equity firms and to establish business relationships with medical providers nationwide (*id.* ¶¶ 72, 82). As part of this effort, the investors accompanied Nezami on tours of office spaces in New York City in April 2014 (*id.* ¶ 102).

The original complaint was filed on April 6, 2015 and included claims for fraud, aiding and abetting fraud, negligent representation, negligent supervision, and a claim for violations of the federal civil RICO statute (NYSCEF Doc. No. 1 [original complaint]). Defendants removed to the United States District Court for the Southern District of New York on May 6, 2015 (*see* NYSCEF Doc. No. 5). After the filing of an amended complaint (NYSCEF Doc. No. 21 [amended complaint]), defendants moved to dismiss under Federal Rules of Civil Procedure rule 12 (b) (6).

On January 12, 2016, United States District Judge Andrew Carter issued a Memorandum & Order dismissing plaintiffs' RICO claim, and declining to exercise supplemental jurisdiction over plaintiffs' remaining claims (NYSCEF Doc. No. 32 ["SD NY Order"]). Judge Carter then remanded the case to this court.

Thereafter, defendants brought this motion to dismiss.

## II. ARGUMENTS

### A. *Effect of the SD NY Order on Plaintiffs' Remaining Claims*

Defendants contend first that, under law of the case doctrine, plaintiffs' claims are no longer viable in light of the findings made in the SD NY Order (defs' mem at 9-11). Defendants note that a RICO claim requires an independent, unlawful "predicate act." The predicate acts alleged in the amended complaint are mail fraud and wire fraud (*see* amended complaint ¶ 120). Defendants read the SD NY Order as finding that plaintiffs failed to plead either of these acts as a matter of law and argue that, since "a cause of action for the violation of Federal mail fraud statues is broader than a common law fraud claim," plaintiffs' common law claims must also fail (def's mem at 10, quoting *Browning Ave. Realty Corp. v Rubin*, 207 AD2d 263, 266 [1st Dept 1994]).

Plaintiffs contend that law of the case doctrine has no effect here since, under plaintiffs' reading of the SD NY Order, that court's "only legal finding was that Plaintiffs did not satisfy the

requisite requirements in asserting a RICO claim" (NYSCEF Doc. No. 41 ["pls' mem"] at 8, 8-13). Plaintiffs contend that there was "no decision on the merits," (*id.* at 8)[2] and that the preclusive effect of the SD NY Order is strictly limited to plaintiffs' RICO claim since that court declined supplemental jurisdiction and "the only issue of law decided by the court was limited to an evaluation of Plaintiffs' pleading as it pertained to the RICO statute" (*id.* at 10). Plaintiffs also dispute the conclusions defendants attribute to the SD NY Order (*id.* at 13-16).[3]

In reply, defendants urge that the predicate acts under federal law share common elements with plaintiffs' common law claims -- namely some form of fraudulent intent (NYSCEF Doc. No. 43 ["defs' reply"] at 1-3, citing *Ctr. Cadillac v Bank Leumi Trust Co.*, 808 F Supp 213, 227 [SD NY 1992] [noting that a claim for mail fraud must allege "the existence of a scheme to defraud," which requires "fraudulent or deceptive means, such as material misrepresentation or concealment"] and *Platinum Partners Value Arbitrage Fund LP v Kroll Assoc., Inc.*, 102 AD3d 483, 483 [1st Dept 2013] [finding complaint failed to state a cause of action for fraud where actions alleged did "not give rise to an inference of fraudulent intent"]). Defendants also note that the SD NY Order specifically noted that "the complaint . . . lack[s] facts to indicate a strong inference of fraudulent intent on the parts of [defendants]" (SD NY Order at 16). Defendants urge that this court should follow the decision in *Telemedia Partners Worldwide Ltd. v Hamelin Ltd.* (95 CIV. 2452 [JFK], 1996 WL 41818, at *9-11 [SD NY Feb. 2, 1996]), in which the SD NY dismissed a common law fraud claim under New York law in light of its earlier finding that the complaint "failed to plead any facts demonstrating Defendants' fraudulent intent" under plaintiff's RICO claim.

**B. *Loss Causation***

Defendants also argue that all of plaintiffs' claims fail because that plaintiffs have not sufficiently established causation (def's mem at 23-24). Defendants note that, to establish causation, a plaintiff must show two forms of causation "that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" (*Laub*

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[2] Plaintiffs simultaneously contend that "the court determined that the allegations were sufficient to show knowledge of fraud and acquiescence on the part of Defendants that would be helpful to the furtherance of the fraud" (pls' mem at 10, citing SD NY Order at 10). That portion of the order does nothing more than quote the amended complaint and state that defendants' "silence would be plausibly helpful to Nezami's RICO enterprise."

[3] In some instances, plaintiffs directly dispute conclusions it acknowledges the SD NY Order drew (*see e.g.* pls' mem at 14 ["The conclusion reached by the court is inconsistent with the Complaint"]).

*v Faessel*, 297 AD2d 28, 31 [1st Dept 2002]). Defendants contend that the complaint fails to establish loss causation in that plaintiffs fail to allege that any of the alleged misrepresentations caused plaintiffs' investments to lose value.

Plaintiffs concede that they must establish both transactional and loss causation (pl's mem at 23-24). Plaintiffs contend that they suffered the following losses as a direct result of the alleged misrepresentations:

- Damages incurred as a result of Nezami's failure to honor the Put Options
- Plaintiffs' interests in the Private Companies were diluted after they did not pay in response to a capital call. Plaintiffs say that this capital call was made necessary by "fraudulent financial representations made to Plaintiffs that . . . over-stated 2013 income by $1.0"
- As a result of "fraudulent financial information" plaintiffs were damaged to the extent that "plaintiffs' interests in the Private Companies has been substantially reduced below the valuation that was made based on the fraudulent information"
- Unspecified damages plaintiffs claim they have suffered as a result of the "investigations being done by the FBI, IRS and Homeland Security relative to Nezami"

(*id.* at 24-26).

In reply, defendants argue that the above listed damages are all attributable to Mr. Nezami's misdeeds, and not to any action defendants allegedly took (defs' reply at 18). Additionally, defendants argue that the amended complaint fails to set forth any allegations supporting the proposition that plaintiffs' investments lost any value.

**C. *Plaintiffs' Fraud Claim***

Defendants first contend that the amended complaint contains no allegations that defendants themselves made any misrepresentations, other than the Purchase Agreements (def's mem at 11-12). Although plaintiffs allege that defendants assisted or knowingly allowed certain misrepresentations Nezami made (amended complaint ¶¶ 91, 97), defendants argue that, to state a claim for fraud, plaintiffs must allege that the defendants themselves made a misrepresentation (def's mem at 12, citing *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 135 [1st Dept 2014] ["To make a prima facie claim of fraud, a complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury"]).

With respect to the Purchase Agreements, defendants argue that an attorney cannot be held liable for the representations contained in an agreement simply because that attorney drafted the

agreement knowing those representations were false (def's mem at 13, citing *Jordan Inv. Co. v Hunter Green Invs.*, 2003 US Dist LEXIS 5182, at *30-31 [SD NY Mar. 31, 2003] [applying New York law and finding defendant made no misrepresentation where the only allegation was that defendant prepared the allegedly fraudulent drafts on behalf of its clients, knowing that they would be reviewed by plaintiff's sole shareholder] and *Friedman v Hartmann*, 1994 US Dist LEXIS 3404, at *17 [SD NY Mar. 22, 1994] [noting that "an attorney does not ordinarily sign a contract he prepares for his client since the statements and undertakings laid out in the document are made by and binding upon the client rather than the attorney"]). Since plaintiffs were neither a party to the Purchase Agreements nor attested to their accuracy, defendants contend they cannot be held liable for the representations contained therein.

Even if defendants can be held liable for the representations, defendants note that the SD NY Order found that, as discussed above, the Purchase Agreements were not "false" (def's mem at 12-13). Drawing on Judge Carter's decision, defendants explain in detail exactly why the Purchase Agreements do not contain misrepresentations (*id.* at 14-17). Defendants also argue that the allegation that the Purchase Agreements falsely represented that the membership interests were unencumbered fails for lack of injury (*id.* at 16). Finally, with respect to Nezami's alleged intent not to honor the Put Options, defendants note that "an allegation of fraud based upon a statement of future intention must allege facts sufficient to show that the party, at the time the promissory representation was made, never intended to honor or act on those statements" (*id.* at 17, quoting *Pope v N.Y. Prop. Ins. Underwriting Ass'n*, 66 NY2d 857, 859 [1985]; *see also Papp v Debbane*, 16 AD3d 128, 128 [1st Dept 2005] [dismissing fraud claims on the basis that they were "premised upon representations of future intent that are non-actionable since there is no allegation that would support an inference that the representations were made with a present intention that they would not be carried out"]). Defendants contend that plaintiffs' allegations fail this standard.

Defendants also contend that plaintiffs' fraud claim fails to establish the element of scienter with the particularity required by CPLR 3016 (b) (def's mem at 13-14, citing *e.g. Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014] ["The allegation that the attorneys 'knew or should have known' of the fraud is conclusory and alleges mere constructive knowledge."]).

Finally, defendants also argue that, since much of plaintiffs' claims of fraud relate to their allegations of defendants' nondisclosure, plaintiffs are effectively seeking to bring a cause of action for fraudulent nondisclosure (*id.* at 17-18). Defendants note that, to bring such a claim,

plaintiffs must allege some affirmative duty to disclose and that, "[a]bsent a duty to speak, nondisclosure does not ordinarily constitute fraud" (*id.*, quoting *Jolly King Rest. v Hershey Chan Realty*, 214 AD2d 422, 422 [1st Dept 1995]). Here, plaintiffs cannot bring such a claim with respect to defendants' alleged omissions since plaintiffs "do not even attempt to allege" defendants owed them such a duty (*id.* at 18).

Plaintiffs contend the complaint establishes a number of misrepresentations sufficient to sustain a claim for fraud (pl's mem at 19-21). In particular, the following are alleged:

- Carter's advising and directing that Nezami's embezzlement be treated as loans and disclosed on the companies' financial statements or be revealed to plaintiffs and drafting promissory notes to Nezami pursuant to this plan.
- Drafting the security agreements
- Carter participating in meetings to solicit plaintiffs' as investors, verifying, adopting and supporting Nezami's false statements and "play[ing] an active role in the fraudulent 'dog and pony show.' "
- Carter affirmatively confirming Nezami's statements that Carter was his personal lawyer for over 10 years, that he does not finalize any business deals without consulting her, that she "runs his life" and knows him better than anyone else, which plaintiffs contend "lend[ed] credibility to the fraud."

(*id.*) Although plaintiffs do not directly address defendants' arguments regarding non-representations, plaintiffs cite broadly to "special facts" doctrine, which, in certain circumstances, creates a duty to disclose absent a fiduciary relationship (*id.* at 19, citing *CIMB Thai Bank PCL v Stanley*, 2013 NY Slip Op 32264[U], *12 [Sup Ct, NY County 2013]).

With respect to scienter, plaintiffs argue that defendants "ignore the degree to which Carter supported Nezami, assisting him in his scheme" (*id.* at 22). Plaintiffs contend they have sufficiently alleged facts supporting this element (*id.* at 22-23, citing *Weinberg v Mendelow*, 113 AD3d 485, 488 [1st Dept 2014] [finding complaint established knowledge of fraud for an aiding and abetting claim where it alleged that the defendant "knew, or certainly should have known," that the fraudsters "fraudulently induced Plaintiff's investments" and that defendant knew that certain statements it forwarded to plaintiff were false]). In support, plaintiffs draw a parallel to *Friedman v Hartmann* (1994 US Dist LEXIS 3404, at *3-4, *7 [SD NY Mar. 22, 1994, 91 Civ. 1523 (PKL)]), which found under New York law that plaintiffs adequately pled scienter where they alleged that defendant, in her capacity as lawyer, drafted a commission agreement that falsely

represented that no brokers would receive a commission other than those listed therein. The court found that the fact that the defendant drafted the agreement supported the inference that she was aware of its misrepresentations (*id.* at *7).

In reply, defendants contend that many of the fraudulent acts plaintiffs allege do not meet the particularity requirement of CPLR 3106 (b) -- namely the allegations that defendants "condoned," "encouraged," or "endorsed" Mr. Nezami's actions, "directed" Mr. Nezami, or "participated" in Mr. Nezami's alleged schemes (defs' reply at 4-5). Defendants also contend that the remaining fraudulent acts are insufficient to support any of plaintiffs' causes of action, in large part because of the findings in the SD NY Order (*id.* at 5-11).

With respect to the Purchase Agreements, defendants argue that there is no alleged injury resulting from the encumbrances, and that there is no alleged knowledge to support plaintiffs' claims as they relate to (i) investigations, liens, judgments, (ii) ownership of membership interests, or (iii) the Put Options (*id.* at 5-7). With respect to the Put Options, defendants additionally note that plaintiffs failed to address defendants' argument that the complaint failed to allege present intent not to honor.

With respect to plaintiffs' allegations that Ms. Carter described Nezami as conservative, defendants note that under New York law, a "statement of opinion . . . is not a representation of material fact and, thus, cannot support a claim of fraud" (*Mergler v Crystal Properties Assocs., Ltd.*, 179 AD2d 177, 181 [1st Dept 1992]). Defendants also note that, with respect to the alleged false financial statements, plaintiffs admit that they "do not allege that Defendants prepared those statements or actually gave them to Plaintiffs"(*id.* at 10, quoting pls' mem at 15).

With respect to scienter, defendants contend the complaint fails under CPLR 3016 (b) because plaintiffs fail to indicate how defendants came to possess knowledge of the underlying fraud (*id.* at 12). Defendants dispute plaintiffs' contention that knowledge can be inferred from circumstances surrounding the underlying fraud, and distinguish both *Friedman* (1994 US Dist LEXIS 3404) and *Weinberg* (113 AD3d 485, 488) on the basis that both cases involved circumstances that defendants argue gave rise to a stronger inference of knowledge (defs' reply at 13-15). Defendants contend that the facts of this case more closely parallels those in *Eurycleia Partners, LP v Seward & Kissel, LLP* (12 NY3d 553, 560 [2009]), where the Court of Appeals found there was no inference of knowledge on the part of defendants who merely acted as outside counsel.

Finally, in response to plaintiffs' reference to the "special facts" doctrine, defendants note that the doctrine "applies only in 'business dealings' between parties to a prospective transaction" (defs' reply at 14-15, quoting *Merkin v Berman*, 123 AD3d 523, 524 [1st Dept 2014]). Defendants thus contend that the doctrine is inapplicable, since defendants were not party to any of the transactions in question.

**D. *Plaintiffs' Claim for Aiding and Abetting Fraud***

Defendants argue that, for the same reasons given under their arguments against plaintiffs' fraud claim, plaintiffs fail to establish the element of scienter (defs' mem at 21, *see also id.* at 13-14). Defendants also note that, under New York law, allegations of providing "routine legal services" to alleged fraudsters are "insufficient to establish a claim for aiding and abetting fraud" (*id.* at 19-21, quoting *Learning Annex, L.P. v Blank Rome LLP*, 106 AD3d 663, 663 [1st Dept 2013]; *see also Natl. Westminster Bank USA v Weksel*, 124 AD2d 144, 150 [1st Dept 1987] [noting that "where the only assistance fairly alleged by plaintiff is that of the law firm's nondisclosure, the cause of action" for aiding and abetting fraud is "fatally flawed"]). Defendants contend that plaintiffs have failed to allege anything beyond such services, for which defendants may not be liable.

With respect to the element of scienter under this claim, plaintiffs note that "actual knowledge need only be pleaded generally," and that "an intent to commit fraud is to be divined from surrounding circumstances" (pl's mem at 27, quoting *Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). Plaintiffs note also that, in *Oster*, the First Department found that plaintiffs had satisfied the pleading requirements for actual knowledge of a Ponzi scheme (as opposed to constructive knowledge) where defendants had knowledge of the primary fraudsters' "criminal backgrounds, and knowledge of misrepresentations in . . . various PPMs" the defendants had prepared, which were "the admitted vehicle by which investment in the Ponzi scheme was carried out" (*id.* at 55). Plaintiffs urge that the same result is warranted in this case.

With respect to substantial assistance, plaintiffs contend that the complaint establishes that Carter was not merely providing routine legal services, but instead was a "knowing and active participant in the fraud" (pls' mem at 28-29). Plaintiffs contend defendants' participation is established by their "knowingly and actively covering up" the embezzlement, by supporting the efforts to sell interests to plaintiffs, and by drafting the Purchase Agreements (*id.* at 1-2, 28-29).

In reply, defendants note plaintiffs' admission that they "do not allege that Defendants prepared [the alleged false financial statements] or actually gave them to Plaintiffs" (defs' reply at 10, quoting pls' mem 15). Although plaintiffs contend defendants aided in the fraud relating to these statements by failing to act, despite the fact that they were aware plaintiffs were given these statements, defendants note that, under New York law, a "defendant's silence does not constitute the requisite 'substantial assistance' to sustain a claim for aiding and abetting fraud" (*Churchill Fin. Cayman, Ltd. v BNP Paribas*, 95 AD3d 614, 614 [1st Dept 2012]). Additionally, defendants argue that plaintiffs fail to allege facts establishing defendants knowledge of the alleged falsity of these statements.

**E. *Plaintiffs' Claims for Negligent Representation and Supervision***

As to the negligent representation and supervision claim, defendants again argue that plaintiffs fail to allege that defendants made any affirmative misrepresentation (defs' mem at 21). Defendants additionally note that, while plaintiffs state as part of their claim that defendants "assisted, aided, and abetted [Nezami] in making false . . . statements" (amended complaint ¶ 146), under New York law, "[t]here is no cause of action for aiding and abetting negligence or negligent misrepresentation" (*King County v IKB Deutsche Industriebank AG*, 863 F Supp 2d 288, 315 [SD NY 2012]).

Defendants also note that, in order to sustain a claim for negligent misrepresentation, there "must be a showing that there was either actual privity of contract between the parties or a relationship so close as to approach privity" (*Metral v Horn*, 213 AD2d 524, 526 [2nd Dept 1995]). Defendants further note that "courts have held that an attorney owes fiduciary duties to a party other than his client only under the rarest of circumstances" (*Lewis v Rosenfeld*, 138 F Supp 2d 466, 480 [SD NY 2001]). Defendants contend that plaintiffs fail to allege circumstances that would create such a duty (defs' mem at 22). Although plaintiffs imply defendants had a duty to them arising out of the Texas Disciplinary Rules, defendants show that the preamble to these rules specifically states that "[t]hese rules do not undertake to define standards of civil liability of lawyers for professional conduct. Violation of a rule does not give rise to a private cause of action nor does it create any presumption that a legal duty to a client has been breached" (Tex. R. Prof Conduct Preamble ¶ 15).

Finally, defendants argue that, since plaintiffs' negligent supervision claim is derivative, the dismissal of plaintiffs' other claims demands dismissal of this claim as well (defs' mem at 22, citing *Struebel v Fladd*, 75 AD3d 1164, 1166 [4th Dept 2010]).

Plaintiffs concede that they must establish some form of special relationship but note also that such a relationship may be created through a law firm's opinion letter where there is also "(1) an awareness by the [drafter] that [the letter] is to be used for a particular purpose; (2) reliance by a known party on the [letter] in furtherance of that purpose; and (3) some conduct by the [drafter] linking it to the relying party and evincing its understanding of that reliance" (*Prudential Ins. Co. v Dewey Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377, 384 [1992]). Plaintiffs note that defendants provided at least three opinion letters to plaintiffs in or about February 2014 which were drafted to address "whether physicians, in Kentucky, Louisiana, and Texas, who refer patients to a pharmacy licensed in that state, may then invest in that pharmacy" (pl's mem at 30). Plaintiffs contend these letters are sufficient to establish a special relationship since (1) the letters were drafted with the purpose of enticing investors by providing "some of the legal basis legitimizing the investments," (2) the plaintiffs relied on these letters, and (3) defendants sent these letters directly to plaintiffs (*id.* at 30-31).

In reply, defendants argue that the letters were not issued for the purpose of reliance by plaintiffs since (i) they were not addressed to plaintiffs and (ii) each stated that it "should not be relied upon by third parties," (defs' reply at 17-18). Defendants attempt to distinguish *Prudential Ins. Co.* (80 NY2d at 377) on the basis that, in that case, the defendant lawyer drafted an opinion letter addressed to the plaintiffs, expressly for their reliance and note that the court specifically found that "by addressing and sending the opinion letter directly to [the plaintiff], [the defendant] clearly engaged in conduct which evinced its awareness and understanding that [the plaintiff] would rely on the letter" (*id.* at 385).[4]

## III. DISCUSSION

On a motion to dismiss a plaintiff's claim pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see*

[4] Defendants also argue that plaintiffs may not rely on the opinion letters since they are related to new allegations not contained in the amended complaint (defs' reply at 17 n 3, citing *eBC, Inc. v Map Techs., LLC*, No. 09 Civ. 10357(CS), 2011 WL 12847702, at *3 n 3 (SD NY May 17, 2011) ("Plaintiff may not supplement the Amended Complaint and remedy its factual gaps by submitting documents, not referenced or relied upon in the Amended Complaint, that contain new facts and allegations in opposition to Defendants' Motion to Dismiss").

*Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

**A. *Impact of the SD NY Order Under Law of the Case Doctrine***

Law of the case doctrine "addresses the potentially preclusive effect of judicial determinations made in the course of a single litigation *before* final judgment" (*People v Evans*, 94 NY2d 499, 502 [2000]). Under the doctrine, "once an issue is judicially determined, it is not to be reconsidered by Judges or courts of coordinate jurisdiction in the course of the same litigation" (*Welch Foods, Inc. v Wilson*, 262 AD2d 949, 950 [4th Dept 1999]). Such a determination is "binding on the Supreme Court . . . [and] operates to foreclose re-examination of [the] question absent a showing of subsequent evidence or change of law" (*Carmona v Mathisson*, 92 AD3d 492, 492–93 [1st Dept 2012]).

Plaintiffs' narrow interpretation of law of the case doctrine as strictly limited to determinations of whether a party has asserted a particular claim lacks legal support. In fact, plaintiffs' interpretation goes against the very purpose of the doctrine, which is to avoid relitigation of *issues* already determined in the same litigation. Accordingly, any issues the SD NY Order determined in the process of examining plaintiffs' RICO claim constitutes law of the case and may not be reconsidered on this motion.

A number of the legal conclusions defendants attribute to the SD NY Order are taken out of context and have less impact on plaintiffs' remaining claims than defendants imply (*see* defs' mem at 1-2). For example, defendants state that the SD NY Order found that "Plaintiffs' 'allegations concern only Nezami himself, failing to plausibly connect Carter and Husch to their client's actions,' " (*id.* quoting SD NY Order at 19). While the quotation is accurate, the allegations to which the court referred are solely allegations relating to Nezami's embezzlement.

This conclusion does not bear on plaintiffs' remaining claims; rather, it concerns only whether the embezzlement allegations demonstrated that defendants were engaged in a pattern of racketeering relating to that embezzlement.

Much of the SD NY Order's analysis concerns elements of a RICO claim and have no bearing on plaintiffs' remaining claims, such as whether plaintiffs alleged a pattern of racketeering. Defendants are correct, however, that in reaching its ultimate conclusion regarding plaintiffs' RICO claim, the SD NY Order made a number of determinations that are relevant to plaintiffs' remaining claims.

The most significant of such determinations relate to the Purchase Agreements. Noting that, on a motion to dismiss under Federal Rules of Civil Procedure rule 12 (b) (6), a court "is not required to accept as true pleadings that are directly contradicted by other factual statements in the . . . Complaint," the court found that the Purchase Agreements had not misrepresented that (i) Nezami was sole owner of the transferred interests, (ii) that the interests were free of encumbrances, and (iii) that there were no pending investigations or suits (SD NY Order at 3 n 1, quoting *Hansen v Wwebnet, Inc.*, 1:14-CV-2263 ALC, 2015 WL 4605670, at *3 [SD NY July 31, 2015]).[5] Later, when examining the sufficiency of plaintiffs' RICO claim, the court noted that two alleged misrepresentations remained relating to the Purchase Agreements: (iv) that Carter knew Nezami didn't possess interest in one of the medical companies, and (v) that Carter knew Nezami never intended to honor the Put Options (SD NY Order at 12). With respect to the former allegation, the court found that there was no injury since, as alleged in the complaint, plaintiffs subsequently received the missing interests as gifts. With respect to the latter, the court found that, even if Carter knew that Nezami did not intend to honor the Put Options, knowledge alone was

[5] Plaintiffs had alleged these warranties were misrepresentations because Nezami had substantial tax liens and judgments against him, and was the subject of several ongoing investigations (amended complaint ¶¶ 97 [a]-[e]). The SD NY Order noted, however, that the warranties in the Purchase Agreements related only to the transferred security interests and the companies alone, and found that, even accepting plaintiffs' allegations, these warranties were not misrepresentations (SD NY Order at 3 n 1). Plaintiffs had also alleged that the warranties of sole ownership were misrepresentations on the basis that Carter had already drafted separate Security Agreements between Nezami and an outside creditor granting security interests in the medical companies (amended complaint ¶¶ 89, 92). Again, the SD NY Order found this did not contradict the warranties on the basis that plaintiffs failed to allege that the same security interests were granted to both plaintiffs and the outside creditor (SD NY Order at 3 n 1).

insufficient to show Carter conceived of or directed Nezami's decision to not honor those options (an element necessary for plaintiffs' RICO claim, but not their remaining claims).

Accordingly, with respect to the Purchase Agreements, plaintiffs may not assert claims with respect to representations (i), (ii), and (iii) since, as the SD NY Order found, these representations were not false. Plaintiff may also not assert a claim with respect to representation (iv) since, as the SD NY Order also found, plaintiffs suffered no damages from this representation. Consequentially, the only allegation with respect to the Purchase Agreements that is still valid is that Carter knew that Nezami did not intend to honor the Put Options. Other notable determinations found in the SD NY Order include:

- A determination that, under the allegations of the complaint, the only documents that could be considered "false" (i.e. financial statements by Nezami and the companies) were neither drafted by nor given to plaintiffs by defendants (SD NY Order at 12);

- A determination that, under the allegations of the complaint, the purported plan to have Nezami pay back embezzled funds was not a "cover up," but rather a repayment plan established by the medical companies (*id.* 11, citing amended complaint ¶ 8); and

- A determination that defendants' drafting of legal documents and asking a dismissed executive to sign a Release and Confidentiality Agreement were "standard actions taken by Carter and Husch in the course of representing their client" that "did not exceed their professional duties" but rather "most plausibly lead to the conclusion that Carter and Husch acted as no more than their client's attorney" (*id.* at 11 [internal quotation marks and citation omitted]);

The SD NY Order also noted that there was no allegation that Nezami defaulted on terms of loan, nor that Nezami continued to embezzle funds. Accordingly, the court noted that the amended complaint alleges that, even if Nezami embezzled funds in the past, upon discovery of his malfeasance, he was removed from a position that would allow him to continue to do so in the future, repaid the funds in full, and has refrained from doing so since (*id.* at 18-19; *see also* amended complaint, exhibits H and I [promissory notes, both to be paid in full by June 30, 2014]).

The defendants urge that, "it is easier to plead mail or wire fraud than it is to plead common-law fraud" and thus "to the extent that the District Court found wire- or mail-fraud claims inadequate as a matter of law, Plaintiffs' common-law claims, which each rest directly or indirectly on allegations of fraud, also fail" (def's mem at 10). The SD NY Order's only ruling with respect

to federal mail and wire fraud was that plaintiffs' allegations relating to interstate mails and calls had failed to satisfy the particularity requirements of FRCP 9 (b) (SD NY Order at 16-17). Accordingly, this determination had no bearing on the alleged fraudulent actions plaintiffs dispute under this motion, namely, drafting the purchase agreements, bolstering Nezami's statements at meetings, and orchestrating the purported cover-up of Nezami's embezzlement (*see* pls' mem at 20-21).

Defendants also note that the SD NY Order found that the complaint lacks facts to indicate a strong inference of fraudulent intent to defendants, because the complaint merely alleges a generalized profit motive (SD NY Order at 16). This finding, however, was made with respect to federal standards of pleading for mail and wire fraud cases (*see id.*). The Appellate Division, First Department has recently held that similar allegations were sufficient to establish intent (*see ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 131 AD3d 427, 428–29 [1st Dept 2015] [affirming finding that scienter sufficiently established where complaint alleged that defendant "had a long-term and economically rational interest in pleasing a client" and noting that "[a]s such, the complaint contains a rational basis for inferring that the alleged misrepresentations were made intentionally"]; *see also* amended complaint ¶ 105).

**B. *Failure to Allege Loss Causation for Fraudulent Acts Other than Those Relating to the Put Options***

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of the fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving the fraud (*see Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]). The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*see Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]). The elements of a claim for negligent misrepresentation are: "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the

plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]; see *Hudson Riv. Club v Consol. Edison Co. of New York, Inc.*, 275 AD2d 218, 220 [1st Dept 2000]).

For each of these causes of action, "plaintiff must establish that the alleged misrepresentations or other misconduct were the direct and proximate cause of the losses claimed" (*Laub*, 297 AD2d at 30). As both parties acknowledge, this requires plaintiff to show "both that defendant's misrepresentation induced plaintiff to engage in the transaction in question (transaction causation) and that the misrepresentations directly caused the loss about which plaintiff complains (loss causation)" (*id.*). The only type of causation in dispute here is loss causation.

Plaintiffs claim they have been damaged as a result of Nezami's failure to honor the Put Options. This adequately establishes loss causation since, if the inclusion of such an option was a misrepresentation, that misrepresentation directly caused the losses plaintiffs suffered from the failure to honor those options. Plaintiffs next claim they have been damaged by the false financial reports that made a capital call necessary and, in turn, caused the dilution of plaintiffs' interests. As the SD NY Order noted and plaintiffs concede, however, plaintiffs do not allege that defendants prepared those statements or gave them to plaintiffs. Plaintiffs fail to establish that defendants had any affirmative duty to plaintiffs (*see Merkin*, 123 AD3d at 524 [noting that "special facts" doctrine "applies only in 'business dealings' between parties to a prospective transaction"]). Accordingly, these representations are insufficient to establish fraud (*see Jolly King Rest*, 214 AD2d at 422 [1st Dept 1995] ["[a]bsent a duty to speak, nondisclosure does not ordinarily constitute fraud"). These representations (or lack thereof) are also insufficient to establish aiding and abetting fraud (*see Churchill Fin. Cayman, Ltd.*, 95 AD3d at 614 [A "defendant's silence does not constitute the requisite 'substantial assistance' to sustain a claim for aiding and abetting fraud"]), or negligent misrepresentation. Thus, even if plaintiffs could establish causation with respect to these representations, plaintiffs cannot rely on them. Similarly, while plaintiffs claim they were damaged to the extent that "plaintiffs' interests in the Private Companies has been substantially reduced below the valuation that was made based on the fraudulent information," these damages fail because they relate to the same representations for which defendants are not liable.

Plaintiffs also claim damages resulting from "investigations being done by the FBI, IRS and Homeland Security relative to Nezami." Even if plaintiffs could establish causation, claims relating to these damages must fail since, as the SD NY Order found, the Purchase Agreements contained no misrepresentations relating to investigations against Nezami. Plaintiffs allege no other source of representations relating to this issue.

Plaintiffs fail to otherwise establish loss causation arising out of plaintiffs' alleged assistance in selling the interests in the companies, Nezami's embezzlement,[6] or other alleged misrepresentations in the Purchase agreements.[7] Plaintiffs' reliance on the opinion letters must fail as well because the only "damages" plaintiffs claim relating to those letters are the fact that they induced plaintiffs to invest in the companies (*see* pls' mem at 29-30; amended complaint ¶ 148).

Plaintiffs can only establish loss causation with respect to representations relating to the Put Options. Accordingly, in all other respects plaintiffs' claims for fraud and aiding and abetting fraud fail for lack of damages.

### C. *Plaintiffs' Remaining Claims Also Fail*

As defendants correctly note, "an allegation of fraud based upon a statement of future intention must allege facts sufficient to show that the party, at the time the promissory representation was made, never intended to honor or act on those statements" (*Pope*, 66 NY2d at 859; *see also Papp*, 16 AD3d at 128). Plaintiffs do not dispute, and thus concede, that the amended complaint fails to allege any such fact evincing an intent not to honor the Put Options at the time representations relating to those options were made. Accordingly, claims that arise out of these alleged misrepresentations must fail as well.

Similarly, because plaintiffs' claim for negligent supervision necessarily depends on the existence Carter's liability (*see e.g. Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 161 [2d Dept 1997]), this claim fails as well.

[6] Additionally, as the SD NY Order and defendants explain, there is no allegation that leads to the inference that companies, let alone plaintiffs, experienced any loss as a result of the embezzlement.

[7] Moreover, as noted above, the SD NY Order already found that the Purchase Agreements did not contain actionable misrepresentations other than with respect to the Put Options.

For the foregoing reasons, defendants' motion shall be granted in its entirety.[8]

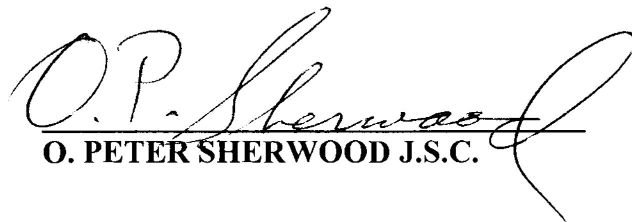
The court has considered the parties' remaining arguments and finds them to be meritless. It is hereby

ORDERED that the defendants' motion to dismiss is granted and the complaint is dismissed in its entirety; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements to defendants as taxed by the Clerk of the Court upon presentation of a proper bill of costs.

This constitutes the decision and order of the court.

**DATED: November 22, 2017** **ENTER,**



**O. PETER SHERWOOD J.S.C.**

[8] Defendants also request that this court deny leave to replead these claims (defs' mem at 25, citing *Triad Intl. Corp. v Cameron Indus.*, Inc., 122 AD3d 531, 532 [1st Dept 2014] [affirming dismissal of complaint and denying plaintiffs' request to amend where "repleading would be futile"]). Like the request to amend in defendants' cited case, plaintiffs' proposed amended complaint would also be futile with respect to the counts asserted against defendants, since none of the changes made with respect to those claims alter the above analysis (*see* NYSCEF Doc. No. 55 [Proposed Amended Complaint]).