SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49

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SOLOMON CAPITAL, LLC, SOLOMON CAPITAL 401 (K) TRUST, SOLOMON SHARBOT and SHELHAV RAFF,

Plaintiffs,

-against-

LION BIOTECHNOLOGIES, INC., formerly known as Genesis Biopharma, Inc.,

Defendant.

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DECISION AND ORDER
Index No.: 651881/2016
Motion Sequence No.: 004

O. PETER SHERWOOD, J.:

On this motion sequence number 004, plaintiffs Solomon Capital, LLC ("Solomon Capital"), Solomon Capital 401(k) Trust ("Trust"), Solomon Sharbat ("Sharbat"), and Shelhav Raff ("Raff") (collectively, the "Solomon Parties") move for an order, pursuant to CPLR 3211 (a) (7), dismissing the eleventh affirmative defense, and first through fourth counterclaims of defendant Lion Biotechnologies, Inc. ("Lion"). As this is a motion to dismiss, the facts are taken from the complaint and are assumed to be true (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]).

Plaintiffs, Israeli businessmen who worked in venture capital, allege that they were engaged by defendant Lion, a biotechnology company to help it raise capital to fund its growth and research efforts. Plaintiffs invested directly, and advanced funds to Lion. They claim that Lion agreed to pay them for the advanced funds, and to give them equity in the company. Lion counterclaims that plaintiffs made fraudulent misrepresentations that induced it to enter into the agreement. Plaintiffs' motion shall be granted.

BACKGROUND

Lion is a publicly held biotechnology company which develops immunotherapies for cancer treatment (NYSCEF Doc. No. 93, ["Doc. No. ___"], first amended counterclaims, ¶ 2). Plaintiff Sharbat is the managing member of Solomon Capital, and the sole trustee of the Trust. He maintains his residence in Israel (Doc. No. 92, complaint, ¶¶ 3-4). Plaintiff Raff is a private investor who also maintains his residence in Israel (*id.*, ¶ 5). The Solomon Parties allegedly collaborated in their dealings with Lion (Doc. No. 93, first amended counterclaims ["counterclaims"], ¶ 23).

In June 2012, plaintiffs Sharbat and Raff were introduced to Lion's chief financial officer, Michael Handelman, who told them that Lion needed to raise $30 million to fund research and development (Doc. No. 92, complaint, ¶¶ 12-13; Doc. No. 93, answer, ¶¶ 12-13). During a conference call in June 2012, between Sharbat, Anthony Cataldo (Lion's then-CEO), Handelman, and Mark Beychok (a consultant for Lion), Sharbat made the following representations:

> "(1) Sharbat had formerly run a U.S. public company and, therefore, was aware of the obligations of public companies; (2) he had previously raised 'hundreds of millions of dollars' for biotech companies such as Lion; (3) he had 'massive investors' who were prepared to invest in Lion, ([4]) the investments were a 'done deal;' ([5]) he was personally acquainted with at least one major investor who would make a sizable investment in Lion of at least $500,000; ([6]) he and his partner (i.e. Raff) would make substantial investments in Lion themselves"

(*id.*, counterclaims, ¶ 27). Thereafter, Sharbat also claimed that (7) "he could obtain financing for Lion, especially in Israel," (8) "they could obtain investments" from Sheba Medical Center, a hospital in Israel, and (9) the Solomon Parties "had obtained high-value investors for Lion in Israel" (*id.*, counterclaims, ¶¶ 22, 30, 33). Lion asserts that these statements were false (*id.*, ¶ 44).

Sharbat also did not disclose to Lion that he had been the target of investigations by FINRA. FINRA filed a complaint against him, in July 2012 for illegally inducing clients to participate in a restricted securities transaction, which resulted in a default judgment entered against him in November 2012, permanently barring him from FINRA, or associating with a FINRA member (*id.*, ¶ 31). Sharbat also failed to disclose that he had been involved in litigations over his business practices (*id.*, ¶ 32). Lion, which was then-based in California and had no contacts in New York, did not conduct a litigation search on the Solomon Parties, and did not discover this information until later (*id.*).

Unaware of these facts, Lion allowed the Solomon Parties to represent it in its efforts to obtain investors here and in Israel (*id.*, ¶ 29). At Sharbat's suggestion, Lion retained New World Merchant Partners LLC (New World) to provide investment banking services for an offering funded by the investments the Solomon Parties would find (*id.*). The offering by New World did not go forward because the Solomon Parties failed to obtain any investors (*id.*, ¶ 38). The Solomon Parties

represented to Lion that they incurred over $135,000 in expenses in connection with their efforts to obtain investors in Israel (*id.*, ¶ 34). Lion claims that plaintiffs induced Handelman to agree to offer them a promissory note in the amount of $135,000, one-half (½) of a share of Lion common stock for each dollar invested (67,500 shares), and the right to convert in the next financing of Lion on the same terms offered to the investors they brought to the company (*id.*, ¶ 36).

In April 2016, the Solomon Parties brought this action for breach of contract and unjust enrichment, seeking recovery of their expenses, and investment in Lion (Doc. No. 92, complaint). On June 3, 2016, Lion filed its original counterclaims. On January 11, 2017, the court, *inter alia*, dismissed without prejudice the counterclaims for fraud and breach of fiduciary duty with leave to replead (Doc. No. 30). Lion then filed first amended counterclaims, at issue on this motion, asserting claims for fraudulent misrepresentation, fraudulent concealment, breach of fiduciary duty, negligent misrepresentation (the first through fourth counterclaims), and breach of implied-in-fact contract (fifth counterclaim) (Doc. No. 93).

The Solomon Parties now move to dismiss the first through fourth counterclaims, and 11th affirmative defense for fraudulent inducement of contract, which seeks rescission of the parties' agreement. Plaintiffs contend that the fraud counterclaims and the fraud affirmative defense fail, because the alleged misrepresentations are puffery or involve future conduct. Moreover, scienter, justifiable reliance and loss causation or damages are not pled. Plaintiffs also urge that Lion fails to satisfy the particularity requirements of CPLR 3016 (b). They contend that the counterclaim for breach of fiduciary duty fails to plead special duty, and the negligent misrepresentation claim fails to assert the necessary special relationship.

DISCUSSION

The motion to dismiss is granted. The first through fourth counterclaims, and the 11th affirmative defense are dismissed.

I. Counterclaims Against Plaintiff Raff

The fraud, fraudulent concealment, breach of fiduciary duty, and negligent misrepresentation counterclaims are dismissed against Raff. Defendant fails to plead any specific facts against him (*see* CPLR 3016 [b]). Raff is defined under the grouping "Solomon Parties". He is not referred to individually in any of the operative paragraphs of the counterclaims. Such group pleading is

insufficient as a matter of law in a fraud action (*see Ramos v Ramirez*, 31 AD3d 294, 295 [1st Dept 2006]). Where a fraud claim is asserted against multiple defendants, it must include specific and separate allegations for each defendant (*id.*). Here, the counterclaims fail to allege that Raff made any specific, false factual misrepresentation to defendant, or even that he was present during the meetings. Nor was there any basis, other than conclusory references to conspiracy (Doc. No. 93, counterclaim, ¶ 22), to conclude that Raff could be chargeable with the other parties' claimed misrepresentations (*see Agostini v Sobol*, 304 AD2d 395, 395 [1st Dept 2003] [court dismissed conspiracy to commit fraud, under CPLR 3211, because that is "never of itself a cause of action"] [internal quotation marks and citation omitted]). Defendant fails to allege any facts to support a common scheme or plan. Similarly, there are insufficient allegations to permit an inference that Raff even participated in, or had knowledge of, the claimed fraud (*see Ramos*, 31 AD3d at 295). Thus, the counterclaims are dismissed as against Raff individually.

II. Fraud Counterclaims

The fraud and fraudulent concealment counterclaims are dismissed against the remaining plaintiffs, Solomon Capital, Trust, and Sharbat, for failure to state a claim. To assert a fraud claim, the plaintiff must allege "a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011] [internal quotation marks and citation omitted]; *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). Moreover, pursuant to CPLR 3016 (b), "where a cause of action is based in fraud, 'the circumstances constituting the wrong shall be stated in detail'" (*Mandarin Trading Ltd.*, 16 NY3d at 178, quoting CPLR 3016 [b]), "including specific dates and items" (*Cremosa Food Co., LLC v Amella*, 130 AD3d 559, 559 [2d Dept 2015]). Further,

> "[a] false representation does not, without more, give rise to a right of action, either at law or in equity, in favor of the person to whom it is addressed. To give rise, under any circumstances, to a cause of action, either in law or equity, reliance on the false representation must result in injury. . . . If the fraud causes no loss, then the plaintiff has suffered no damages"

(*Sager v Friedman*, 270 NY 472, 479-481 [1936]). The measure of damages for fraud is "the actual pecuniary loss sustained as the direct result of the wrong," sometimes referred to as the "'out-of-pocket' rule" (*Lama Holding*, 88 NY2d at 421). Under that rule, "[d]amages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained . . . . [T]here can be no recovery of profits which would have been realized in the absence of fraud" (*id.* at 421). Moreover, damages are not permitted for fraud "based on the loss of a contractual bargain, the extent, and, indeed, . . . the very existence of which is completely undeterminable and speculative" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142–143 [2017]).

Here, the counterclaims assert nine misrepresentations made by Sharbat about what he and the other Solomon Parties could or would do in the future to raise funds for Lion. The third through ninth alleged misrepresentations (in Doc No. 93, counterclaims, ¶¶ 27, 28, 30, 33) cannot form the basis of a claim for fraud, because "[o]pinions of value or future expectations," and "mere puffery" do not constitute actionable fraud (*Elghanian v Harvey*, 249 AD2d 206, 206 [1st Dept 1998]; *see also Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 135 AD3d 414, 414 [1st Dept 2016]; *Sidamonidze v Kay*, 304 AD2d 415, 416 [1st Dept 2003] [no fraud based on statements that are mere puffery, opinions of value or future expectations]; *Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000]; *DH Cattle Holdings Co. v Smith*, 195 AD2d 202, 208 [1st Dept 1994] [defendant's statements that investment was "safe," was not actionable statement of fact, but mere opinion and puffery]). The statements alleged in the counterclaims (counterclaims, ¶¶ 27, 28, 30, 33) are all representations of future conduct: specifically, plaintiffs had investors who "were prepared to invest," a major investor who "would make a sizable investment," Sharbat and Raff "would make substantial investments," Sharbat "could obtain financing," and "could obtain investments from representatives and affiliates" of a hospital in Israel. These are not actionable statements of fact. In addition, similar statements alleged are mere puffery or expectation, including that Sharbat and his colleagues had "massive investors," the investments "were a done deal" Sharbat raised "hundreds of millions of dollars" for biotech companies like defendant, and he had obtained "high-value investors" in Israel. Similarly, a broad assertion that Sharbat raised a lot of money in his career, clearly is puffery. Further, the statement that he and Raff would invest their own money

are also non-actionable opinion or future expectations (*see MMCT, LLC v JTR Coll. Point, LLC*, 122 AD3d 497, 498 [1st Dept 2014]). Moreover, these statements lack the required details to withstand challenge under CPLR 3016 (b). They were not definitive factual statements. They all are insufficient to support a fraud claim.

With respect to the first and second alleged misrepresentations, that Sharbat "had formerly run a U.S. public company," and had "previously raised 'hundreds of millions of dollars' for biotech companies" (counterclaims, ¶ 27), defendant fails to plead facts to show justifiable reliance (*see Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d 421, 422 [1st Dept 2014]). "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*Valassis Communications v Weimer*, 304 AD2d 448, 449 [1st Dept 2003] [internal quotation marks and citation omitted] [fraud claim dismissed on CPLR 3211 (a) (1) and (7) because no justifiable reliance pleaded; and plaintiff failed to verify information provided by defendant]; *see also Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009]). The plaintiff must establish that it employed its intelligence and engaged in due diligence (*see Stuart Lipsky, P.C. v Price*, 215 AD2d 102, 103 [1st Dept 1995] [plaintiff must use the "means available to ascertain the truth"]), and sophisticated business people have a heightened duty to use all means available to verify the information, and use their sophistication to conduct due diligence (*see Johnson v Proskauer Rose LLP*, 129 AD3d 59, 72 [1st Dept 2015] [referred to as sophisticated investor doctrine]; *Duane Thomas LLC v 62 Thomas Partners*, 300 AD2d 52, 52 [1st Dept 2002]; *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [1st Dept 2001]).

Lion is a sophisticated business entity. It fails to allege facts to show due diligence in ascertaining the truth of the alleged misrepresentations. It would not be particularly difficult to investigate whether Sharbat had actually run a public company, or whether he had raised investment monies for other biotech firms. Contrary to its contentions, there was no fiduciary relationship, as discussed below, to outweigh defendant's due diligence obligations (*cf. Johnson*, 129 AD3d at 72 [sophisticated investor doctrine gives way to the client's unique fiduciary reliance on law firm in fraud claim against firm]). Plaintiffs had no special duty to disclose pursuant to the special facts doctrine, since the information was not peculiarly within plaintiffs' knowledge, and was not such

that the information could not have been discovered by defendant through the exercise of ordinary diligence (*see Northern Group Inc. v Merrill Lynch, Pierce, Fenner & Smith Inc.*, 135 AD3d at 414; *see Balanced Return Fund Ltd. v Royal Bank of Can.*, 138 AD3d 542, 542-543 [1st Dept 2016]).

Similarly, with regard to Sharbat's failure to disclose the investigation and proceedings before FINRA (as the basis for the second counterclaim for fraudulent concealment), or any lawsuits involving Sharbat or Solomon Capital (counterclaims, ¶ 54), not only has defendant failed to plead a basis for a duty to disclose (*see Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006] [no duty to disclose where parties are in arms-length transaction]; *P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003] [a fraudulent concealment claim requires pleading all the elements of fraud plus that the defendant had a duty to disclose material information and failed to do so]), as discussed below in connection with the breach of fiduciary duty counterclaim, it fails to allege any facts to show it used its sophistication to determine the truth of Sharbat's assertions, which are a matter of public record. Further, both the FINRA complaint, in July 2012, and the FINRA default order, in November 2012 (Doc. No. 55), had not yet occurred when the parties entered into their agreement in June 2012 (Doc. No. 93, counterclaims, ¶ 26). Defendant does not allege that it made any inquiry regarding Sharbat's experience finding investors for public companies. Moreover, it admits that it did not conduct a litigation search of plaintiffs (*id.*, ¶ 32), or review public records (Doc. No. 59, defendant's memorandum in opposition at 18).

With regard to the element of causation, the "plaintiff must 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)" (*Laub v. Faessel*, 297 AD2d 28, 31 [1st Dept 2002]; *see also Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 151 AD3d 83, 86 [1st Dept 2017]). Loss causation "is the causal link between the alleged misconduct and the economic harm ultimately suffered by the plaintiff" (*Financial Guar. Ins. Co. v Putnam Advisory Co., LLC*, 783 F3d 395, 402 [2d Cir 2015] [internal quotation marks and citation omitted]). It is an essential element of a fraud claim and, if the plaintiff fails to plead it, the claim must be dismissed (*Ambac Assur. Corp.*, 151 AD3d at 86; *Gregor v Rossi*, 120 AD3d 447, 448 [1st Dept 2014]; *Mosaic Caribe, Ltd. v AllSettled Group, Inc.*, 117 AD3d at 422; *Greentech Research LLC v Wissman*, 104 AD3d 540 [1st Dept 2013]).

Here, defendant seeks recovery for profits it would have realized absent the fraud, specifically by alleging it "refrained from pursuing other strategies to obtain capital, thereby leading to substantial delay in the execution of it business plans and a corresponding loss of profitability" (counterclaims, ¶¶ 49, 58). This allegation fails under the "out-of-pocket rule" for fraud damages (*Lama Holding Co.*, 88 NY2d at 421). Defendant also seeks recovery for fees and "diverted resources to conduct an offering through New World," but these amounts only constitute a loss to defendant to the extent that it alleges that New World failed to obtain any investors or raise capital. Defendant, however, fails to allege how any of plaintiffs' alleged misrepresentations brought about these losses. It is too attenuated to constitute loss causation (*see Bank Hapoalim B.M. v WestLB AG*, 121 AD3d 531, 535 [1st Dept 2014]). There is no connection between the misrepresentations and the decision to retain New World. Further, to the extent that defendant points to its obligations to plaintiffs, those obligations are based on expenses plaintiffs claim they paid on defendant's behalf, and are being sought by plaintiffs under contractual or unjust enrichment theories. They do not constitute losses. Therefore, defendant's counterclaims for fraudulent misrepresentation and fraudulent concealment (the first and second counterclaims) are dismissed.

III. Breach of Fiduciary Duty

The third counterclaim for breach of fiduciary duty also fails to state a claim. "The elements of a cause of action to recover damages for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct" (*Rut v Young Adult Inst., Inc.*, 74 AD3d 776, 777 [2d Dept 2010]; *see Saul v Cahan*, 153 AD3d 947, 948–949 [2d Dept 2017]; *Stortini v Pollis*, 138 AD3d 977, 978-979 [2d Dept 2016]). Such a claim must be pleaded with particularity under CPLR 3016 (b) (*Litvinoff v Wright*, 150 AD3d 714, 715 [2d Dept 2017]).

A fiduciary relationship may be found when one has a "duty to act for or to give advice for the benefit of another upon matters within the scope of the relation " (*Oddo Asset Mgt. v Barclays Bank PLC*, 19 NY3d 584, 592-593 [2012] [internal quotation marks and citation omitted]; *see DiTolla v Doral Dental IPA of N.Y., LLC*, 100 AD3d 586, 587 [2d Dept 2012]). The relationship is based on "a higher level of trust than normally present in the marketplace between those involved in arm's length business transactions" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

"[A] conventional business relationship, without more, is insufficient to create a fiduciary relationship" (*AHA Sales, Inc. v Creative Bath Prods., Inc.*, 58 AD3d 6, 21 [2d Dept 2008]). Rather, the party pleading such a relationship must make a "showing of 'special circumstances' that could have transformed the parties' business relationship to a fiduciary one . . . , such as control by one party of the other for the good of the other" or the creation of an agency relationship (*L. Magarian & Co. v Timberland Co.*, 245 AD2d 69, 70 [1st Dept 1997]). It may exist "when one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but not in an arm's-length business transaction involving sophisticated business people" (*Guarino v North Country Mtge. Banking Corp.*, 79 AD3d 805, 807 [2d Dept 2010] [internal quotation marks and citation omitted]; *see Saul v Cahan*, 153 AD3d at 948–949). Further, the fiduciary relationship "must exist prior to the transaction complained of and not as result of it" (*Balanced Return Fund Ltd. v Royal Bank of Canada*, 138 AD3d at 542).

Here, affording the counterclaims a liberal construction, accepting the facts alleged therein to be true, and granting the defendant the benefit of every favorable inference, the answer and counterclaims fail to adequately plead the existence of a fiduciary relationship (*Saul v Cahan*, 153 AD3d at 948–949). The parties' relationship was that of an arms-length business transaction between sophisticated parties, and there is no pleading of any special circumstances. Rather, the only duty plaintiffs owed to defendant was to introduce it to investors, and even if plaintiffs' compensation would only be payable if an investment were made, that did not transform them into fiduciaries (*see Stiefvater Real Estate, Inc. v Himbaugh*, 42 AD3d 525, 526 [2d Dept 2007] [contrasting plaintiff's limited role as finder to an agent acting as a fiduciary]; *Trump v Corcoran Group*, 240 AD2d 159, 159 [1st Dept 1997]; *see also Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d 195, 207 [1st Dept 2015]). While an exclusive agency gives rise to a fiduciary duty between the principal and agent (*see Village On Canon v Bankers Trust Co.*, 920 F Supp 520, 532-533 [SD NY 1996]), defendant fails to allege facts to support that plaintiffs were its exclusive agent, rather than a mere finder. For example, defendant does not allege that plaintiffs had any authority to commit it to any proposal, or that they could negotiate on defendant's behalf, only that they could recommend certain proposals. In fact, the counterclaims specifically allege that "Sharbat told Cataldo to fly to Israel to close the deal with Sharbat's investors" (Doc. No. 93, counterclaims, ¶ 28).

At most, the parties agreed that plaintiffs were to find interested investors and direct them to defendant, for which plaintiffs would earn a finder's fee. This is not the kind of exclusive agency that would impose a fiduciary duty on plaintiffs (*see Village On Canon v Bankers Trust Co.*, 920 F Supp at 532-533). As the Court of Appeals explained in *Northeast Gen. Corp. v Wellington Adv., Inc.* (82 NY2d 158, 163-164 [1993]): "a finder is not a broker, although they perform some related functions . . . The finder is required to introduce and bring the parties together, without any obligation or power to negotiate the transaction, in order to earn the finder's fee" (*see also Matter of TBA Global, LLC v Fidus Partners, LLC*, 132 AD3d at 207 ["a finder generally does *not* owe a fiduciary duty to the principal"]; *Trump*, 240 AD2d at 159). Even a broker raising capital for a company may lack a fiduciary duty to the investment manager and investors where the broker represented them at arms-length, and lacks the authority to bind them to any deal without specific authorization from the investors (*see RNK Capital LLC v Natsource LLC*, 76 AD3d 840, 841 [1st Dept 2010]). Defendant fails to allege that any of the plaintiffs had the authority to bind defendant to any kind of transaction, and, thus, its argument that plaintiffs owed a fiduciary duty as its broker is unpersuasive. Accordingly, the third counterclaim is dismissed.

IV. Negligent Misrepresentation

The fourth counterclaim for negligent misrepresentation also is insufficient. A "claim for negligent misrepresentation requires the plaintiff to demonstrate (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" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d at 180 [internal quotation marks and citation omitted]). However, as addressed above with respect to the fiduciary duty counterclaim, the relationship pleaded by defendant is an arm's length business relationship. It does not give rise to such a "heightened duty" (*see New WTC Retail Owner LLC v Pachanga, Inc.*, 160 AD3d 584, 585 [1st Dept 2018] [no special relationship so no duty to impart correct information where arms-length transaction]; *Dembeck,* 33 AD3d at 492 ["A fiduciary relationship does not exist between parties engaged in an arm's length business transaction"]). Moreover, the "out-of-pocket" rule and the requirement for loss causation, discussed above with regard to the fraud counterclaims, applies as well to the negligent misrepresentation counterclaim, providing a further basis for dismissal (*see*

Lama Holding Co., 88 NY2d at 421; *Meyercord v Curry*, 38 AD3d 315, 316 [1st Dept 2007]). As a result, the branch of the motion to dismiss the negligent misrepresentation counterclaim is granted.

V. Affirmative Defense of Fraudulent Inducement

Plaintiffs also move to dismiss defendant's eleventh affirmative defense of fraudulent inducement. Upon such motion, the defense shall be liberally construed and defendant is entitled to all reasonable intendment of its pleading (*see UBS Sec. LLC v Angioblast Sys., Inc.*, 35 Misc 3d 1201 [A] * 9-10, 2012 NY Slip Op 50525 [U] [Sup Ct, NY County 2012]). The plaintiff bears the burden of demonstrating that the defense lacks merit as a matter of law, that it does not apply or fails to state a defense (*see Bank of Am., N.A. v 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). As discussed above with respect to the fraud counterclaims, the alleged misrepresentations are insufficient to support a fraud defense, because they are opinions of value, future expectations, or puffery. In addition, the statements could have been investigated but were not, so there is no justifiable reliance. This defense is meritless, and is dismissed.

Accordingly, it is

ORDERED that the plaintiffs' motion to dismiss is granted, and the first through the fourth counterclaims and the eleventh affirmative defense are dismissed; and it is further

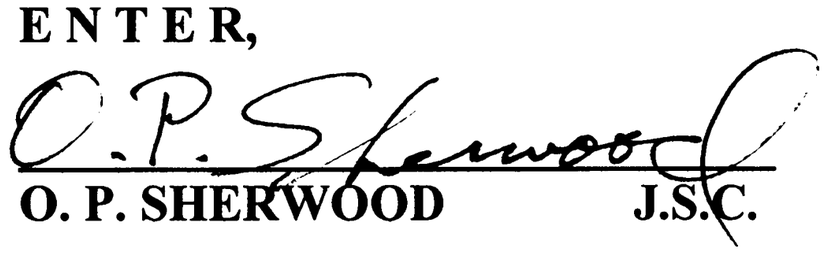
ORDERED that the plaintiffs are directed to serve a reply to the remaining counterclaim within twenty (20) days of service of a copy of this decision and order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference on Tuesday, September 11, 2018 at 9:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

Dated: August 15, 2018

E N T E R,



O. P. SHERWOOD J.S.C.