SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 3EFM

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CATALYST INVESTORS III, L.P., CATALYST INVESTORS QP III, L.P., BLUE CLOUD VENTURES II LP, IGC FUND VI, L.P.

Plaintiffs,

- v -

THE WE COMPANY, ADAM NEUMANN, ARTHUR MINSON,

Defendants.

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INDEX NO.	654377/2020
MOTION DATE	12/04/2020
MOTION SEQ. NO.	003

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 25, 26, 32, 33, 38, 39

were read on this motion to DISMISS.

In 2018, The We Company ("WeWork")[1] acquired Conductor, Inc. ("Conductor"), a search engine optimization company, in exchange for cash and WeWork stock valued at $72 per share. In this lawsuit, Plaintiffs allege that Defendants used fraudulent misrepresentations and omissions to induce them to trade their Conductor shares "for WeWork stock worth only a fraction of what Defendants promised that stock was worth," leading to "tens of millions of dollars of damage" (*see* NYSCEF Doc. No. 11 ["Compl."] at ¶ 1). Plaintiffs assert claims for Common Law Fraud and Fraudulent Inducement (First Cause of Action), Unjust Enrichment (Second Cause of Action), and Negligent Misrepresentation (Third Cause of Action).

[1] The We Company changed its name to WeWork, Inc. on October 14, 2020.

Defendants move to dismiss Plaintiffs' Complaint, asserting that this "is a classic case of buyers' remorse." They contend that Plaintiffs' claims are barred by the terms of the parties' Merger Agreement and that their allegations do not, in any event, state viable causes of action.

For the reasons set forth below, Defendants' motion to dismiss is **denied** with respect to Plaintiffs' First Cause of Action for Common Law Fraud and Fraudulent Inducement and **granted** with respect to Plaintiffs' Second and Third Causes of Action for Unjust Enrichment and Negligent Misrepresentation.

SUMMARY OF FACTUAL ALLEGATIONS[2]

Conductor was founded by Seth Besmertnik in 2006. WeWork is a shared workspace company founded by Defendant Adam Neumann in 2010. During the events that led up to this litigation, Neumann served as WeWork's CEO and Defendant Arthur Minson served as its President and CFO. Plaintiffs are investment funds that owned equity interests in Conductor prior to its merger with WeWork.

In late 2017, Neumann (who knew Besmertnik from college) identified Conductor as a potential acquisition target for WeWork because he believed Conductor to have substantial value and because he "was executing a bold play to secure technology acquisitions in anticipation of WeWork's planned IPO" (*id.* at ¶ 2). According to Plaintiffs, WeWork was "burning through cash" and "needed a scheme that would both allow WeWork to preserve its limited cash and acquire the desired assets," and thus WeWork "decided to pay for acquisitions primarily with its own artificially-inflated stock" (*id.* at ¶ 2).

[2] The factual allegations in the Complaint are accepted as true solely for purposes of this motion to dismiss.

On or around January 13, 2018, Besmertnik informed Conductor's Board and Plaintiffs that WeWork was proposing to acquire Conductor (*see id.* at ¶ 43). Plaintiffs agreed to engage in further discussions about a potential acquisition (*id.* at ¶ 44).

In connection with the proposed transaction, WeWork shared with Plaintiffs an "Investor Presentation" that purportedly contained WeWork's most recent financial information (*id.* at ¶ 46). Although the data showed that WeWork was not yet profitable on a corporate level, the presentation represented that WeWork was profitable on a per-unit level, referring to what WeWork called its "Community-Adjusted EBITDA"[3] (*id.* at ¶ 47). The Investor Presentation led Plaintiffs to believe that Community-Adjusted EBITDA was "the relevant metric" for assessing WeWork's financial condition in that it reflected "the profitability of WeWork's core offerings – like a membership of unit of office space – with temporary, growth-related expenses excluded" (*id.*).

On January 18, 2018, a few days after receiving the Investor Presentation, Plaintiffs and other Conductor shareholders participated in a due diligence call with Minson and other WeWork representatives to discuss various questions about WeWork's business. During the call, Minson and others emphasized (again) that Community-Adjusted EBITDA figures evidenced WeWork's financial health. In doing so, they represented that this key metric "was calculated to deduct WeWork's rent cost," which "was false" (*id.* at ¶¶ 51 – 52). They also represented "that WeWork was approaching profitability," which again "was false" (*id.* at ¶53). Minson further represented that WeWork's business had "never been stronger," emphasizing that

[3] EBITDA stands for earnings before interest, taxes, depreciation, and amortization.

the "[b]igger it gets, [the] stronger it gets – true economies of scale" (*id.* at ¶ 107). Again, Plaintiffs allege these representations were false.

On the same call, Minson allegedly made misrepresentations about WeWork's valuation. He stated that in 2017 certain investors had valued WeWork at $57.90 per share; that it was currently valued at $72 per share; and that by the next round of investing it would "definitely" be north of $72 per share; and that Newman believed it would be worth $100 per share in the next round of investment (*id.* at ¶ 54). According to Plaintiffs, Minson's alleged misrepresentations were "untethered from WeWork's actual financial condition and, in fact, were far in excess of the actual value of the shares at the time" (*id.*).

During and after the call, WeWork promised to provide Plaintiffs with financial statements for 2017. Because the transaction negotiations occurred in early 2018, Plaintiffs believed that the 2017 financials were not yet available. During due diligence calls, WeWork's representatives had spoken exuberantly about WeWork's growth during 2017 and made additional representations regarding the Company's increasing price per share and economies of scale. In discussions with WeWork, Plaintiffs asked pointed questions about growth, "break-even occupancy," adjusted profitability figures (like Community-Adjusted EBITDA), and economies of scale. In response, WeWork, Minson, and the other WeWork representatives gave "glowing" responses regarding WeWork's imminent profitability. Based on these representations and others—including the Investor Presentation projections, representations regarding WeWork's robust balance sheet, and other oral statements made on due diligence calls—Plaintiffs reasonably believed 2017 had been a successful year for WeWork (*id.* at ¶¶ 55-56).

Even though Plaintiffs did not receive WeWork's 2017 financials (in either audited or unaudited form), they were comfortable entering into the transaction in light of both (1) the early-2018 timing of the negotiations, and (2) WeWork's representations regarding WeWork's financial metrics, such as Community-Adjusted EBITDA and growth in 2017. Only later would Plaintiffs realize that, while WeWork's representatives were making oral and written representations that the company was profitable on a unit level, and that this growth was bringing WeWork closer to overall profitability, those representatives had been deceiving Plaintiffs about WeWork's finances. In fact, WeWork was not profitable on a per-unit level, it lost a record amount of money in 2017, and its growth was damaging, not helping, WeWork's finances (*id.* at ¶ 57).

On "February 29, 2018" [sic], Neumann held a meeting at WeWork's New York City Headquarters with various Conductor stockholders. During that meeting, Neumann "reiterated the representations contained in the Investor Presentation and emphasized [WeWork's] massive growth potential" (*id.* at ¶ 61).

On or about March 5, 2018, the parties entered into the Merger Agreement (NYSCEF Doc. No. 18), which is governed by Delaware law. Per the terms of the Merger Agreement, WeWork acquired Conductor for $113.6 million. The deal included $15.8 million in cash (paid to Conductor's management and employees) and $97.8 million in Series AP-1 Preferred Stock. Plaintiffs received consideration exclusively in the form of WeWork stock, which was valued for the purposes of the transaction at $72 per share (*see* Compl. at ¶¶ 64 – 65). WeWork also hired Besmertnik as an employee (*id.* at ¶ 68).

After the Merger, according to Plaintiffs, WeWork was "revealed to be a financial house of cards" (*id.* at p. 21). Press reports, beginning in the spring of 2018 shortly after the Merger,

suggested that WeWork experienced substantial losses in 2017. "Over the next year, as news leaked into the market, the truth eventually emerged: WeWork had suffered massive losses in 2017; it had not actually been profitable on a unit level at the time of the Transaction; it was far from achieving meaningful economies of scale (in fact, growth made WeWork's problems worse); WeWork had been suffering from dire liquidity constraints during the negotiations; it had few internal controls and disintegrating corporate governance; and it had concealed key financial truths and misrepresented others" (*id.* at ¶ 69).

In August 2019, the company filed a registration statement with the SEC revealing that it lost "$429 million on $436 million in revenue in 2016," "$890 million" on "$886 million" in 2017, "$1.6 billion on $1.8 billion in revenue" in 2018, and "$690 million on $1.5 billion in revenue" within the first "six months of 2019" (*id.* at ¶ 80). WeWork began losing support for its proposed IPO, including its lead underwriter, shortly thereafter (*id.*).

WeWork subsequently withdrew its planned IPO in September 2019, and Neumann eventually was "bought out," following accusations that WeWork had inadequate internal controls and failed to follow basic corporate governance practices.

Over the next several months, Plaintiffs learned more about WeWork's dire financial situation (*id.* at ¶ 81). A leaked letter from the SEC revealed that the SEC had warned WeWork that its Community-Adjusted EBITDA figures were misleading (*id.* at ¶ 84). Media reports described how WeWork and Neumann had strained relationships with key investors (*id.* at ¶¶ 86, 127 – 128). Stories and reports criticizing WeWork were rampant (*id.* at ¶ 81). Eventually, two former Conductor executives and an outside investor bought Conductor back from WeWork (*id.* at ¶ 89).

As a result of Defendants' alleged fraud, Plaintiffs claim that they are holding WeWork stock worth a fraction of the $72 share price on which the Merger valuation was based. Plaintiffs commenced this case, alleging three causes of action: (1) Common Law Fraud and Fraudulent Inducement; (2) Unjust Enrichment; and (3) Negligent Misrepresentation.

ANALYSIS

In assessing a motion to dismiss under CPLR 3211(a)(7), "the pleadings are necessarily afforded a liberal construction," and the Court accords Plaintiffs "the benefit of every possible favorable inference" (*Goshen v Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 [2002]). Allegations that are "bare legal conclusions," or that are inherently incredible or flatly contradicted by documentary evidence, are not sufficient to withstand a motion to dismiss (*see JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

I. Plaintiffs' Cause of Action for Common Law Fraud and Fraudulent Inducement

Defendants seek dismissal of Plaintiffs' First Cause of Action (Common Law Fraud and Fraudulent Inducement) on two independent grounds. First, they argue that the claim was waived and released in the Merger Agreement. Second, they argue that Plaintiffs fail to plead a viable fraud claim. Both arguments are unavailing.

a. Plaintiffs' Fraud Claim Was Not Waived or Released in the Merger Agreement.

Defendants' principal argument is that Section 5.13(b) of the Merger Agreement bars Plaintiffs from pursuing their claims in this case, including their fraud claim. Section 5.13(b) states, in relevant part:

> "Effective as of the Closing, each [Conductor] Stockholder hereby … (b) irrevocably and unconditionally waives, releases and forever discharges, with prejudice … any and all charges, complaints, Claims, … causes of action, … related or with respect to, in connection with, or arising out of, directly or indirectly, any …, statement or representation, …, act or omission that was in existence (or that occurred or failed to

> occur) at or prior to the Closing related to or in any way connected with, directly or indirectly, [WeWork]…"

Although that section seems to broadly preclude claims based on representations or omissions made prior to Closing, it must be read in conjunction with Section 8.9 ("Exclusive Remedy for Damages"). The latter Section provides that, "notwithstanding any provision in this Agreement to the contrary," "each Party expressly reserves and does not intend to waive any rights, remedies or claims based on ***fraud, intentional breach or willful misconduct*** of any other Party" [emphasis added]. The Section provides, in full:

> "Following the Closing, the right to be indemnified pursuant to this ARTICLE VIII ['Indemnification'] shall be the sole and exclusive remedy of the Indemnified Persons for damages with respect to the subject matter of this Agreement; provided, however, that (i) any Party shall have the right to seek equitable remedies in accordance with Section 11.5 and (ii) ***notwithstanding any provision in this Agreement to the contrary***, including but not limited to Section 4.10, this ARTICLE VIII and Section 11.5 ['Remedies; Specific Performance'], ***each Party expressly reserves and does not intend to waive any rights, remedies or claims based on fraud, intentional breach or willful misconduct of any other Party***. For clarity, this means that the survival and claim periods and liability limits set forth in this ARTICLE VIII shall control notwithstanding any statutory or common law provisions or principles to the contrary" [underscoring in original; bold italics added].

Under Delaware law, which governs here, the use of a "notwithstanding clause clearly signals the drafter's intention that the provision of the 'notwithstanding' section override conflicting provisions of any other section" (*EMSI Acquisition, Inc. v Contrarian Funds, LLC*, 2017 WL 1732369, at *10 [Del Ch Ct 2017] [internal quotations omitted]; *see also Express Scripts, Inc. v Bracket Holdings Corp.*, 2021 WL 752744 at *4-7 [Del 2021] [holding that the use of "notwithstanding" language supersedes contrary language in an agreement]; *Ev3, Inc. v Lesh*, 114 A3d 527, 537 [Del 2014] [holding that the use of a "notwithstanding" provision "render[s] ineffective any contrary provision in the merger agreement itself…"]; *AG Oncon, LLC v Ligand Pharm. Inc.*, 2019 WL 2245976 * 7 [Del Ch Ct 2019] ["[W]hen the drafters … wanted to make

one section … supersede other sections, they used the preposition 'notwithstanding' to signal that expressly"], *aff'd*, 224 A3d 963 [Del 2020]). Taking Plaintiffs' factual allegations as true, their First Cause of Action falls squarely within the scope of Section 8.9's preservation of claims based on "fraud, intentional breach, or willful misconduct."

The Court is not persuaded by Defendants' argument that Section 8.9's preservation of rights is limited to claims for indemnification. Although Section 8.9 begins by stating that indemnification is the "sole and exclusive remedy of the Indemnified Person for damages with respect to the subject matter of this Agreement," it then proceeds to limit that statement ("providing, however") by preserving "any" rights, remedies or claims based on fraud, intentional breach, and willful misconduct. It further provides that this preservation of claims applies "notwithstanding any provision in [the Merger Agreement] to the contrary, *including* ... *this Article VIII*," which is the Article of the Merger Agreement covering claims for indemnification.

Moreover, Section 8.9 is reinforced by Section 11.5(a) of the Merger Agreement, which states: "For clarity, Section 8.9 shall control exclusively on the topic of monetary remedies following the Closing." Further, the fact that Article VIII is titled "Indemnification" does not limit the scope of Section 8.9 (*see* Merger Agreement § 11.10[d] ["[The] headings contained [in the Merger Agreement] are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement"]).

The Court rejects Defendants' assertion that Plaintiffs' interpretation of Section 8.9 renders Section 5.13(b) meaningless. Indeed, the two sections are easily harmonized. Section 5.13(b) is applicable, under Plaintiffs' reading, to a wide variety of claims *other than* those "expressly reserve[d]" in Section 8.9. Indeed, as discussed *infra*, Section 5.13 remains robust

enough to warrant dismissing Plaintiffs' claims for Unjust Enrichment and Negligent Misrepresentation. In any event, "[s]pecific language in a contract controls over general language, and where specific and general provisions conflict, the specific provision ordinarily qualifies the meaning of the general one" (*DCV Holdings, Inc. v ConAgra, Inc.*, 889 A2d 954, 961 [Del 2005]). The fact that the scope of Section 5.13 is narrowed by a later and more specific provision in the Merger Agreement does not mean that the former is rendered meaningless.

Accordingly, the Court finds that Section 5.13 does not, as a matter of law, warrant dismissal of Plaintiffs' First Cause of Action for Common Law Fraud and Fraudulent Inducement.

b. Plaintiffs Have Pled Sufficient Facts to State a Claim for Common Law Fraud and Fraudulent Inducement

Under CPLR § 3016(b), claims based on alleged instances of fraud must be pled with particularized facts, though that requirement cannot be applied in a manner that would render it "impossible to state in detail the circumstances constituting a fraud" (*Bernstein v Kelso & Co., Inc.*, 231 AD2d 314, 320 [1st Dept 1997]). Here, Plaintiffs have pleaded facts with sufficient detail to maintain their Common Law Fraud and Fraudulent Inducement cause of action.

Plaintiffs sufficiently allege that Defendants made specific, objective, and ultimately false statements about WeWork's business and financial performance. They allege that Defendants misrepresented WeWork's "community-adjusted" profitability (*see* Compl. at ¶¶ 93 – 95, 101); economies of scale (*see id.* at ¶¶ 107-09); liquidity and balance sheet (*id.* at ¶¶ 113 – 114); "proven support from global shareholders" (*id.* at ¶¶ 123-25); share value (*id.* at ¶¶ 115-22); and "effective internal controls" (*id.* at ¶¶ 132-34). The Complaint cites specific documents, presentations, and conversations setting forth the alleged misrepresentations in detail. Further,

Plaintiffs sufficiently allege that Defendants withheld their 2017 financials (*id.* at ¶¶ 110-12) to hide the falsity of their representations.

Defendants' characterizations of some (though not all) of the alleged misrepresentations as either puffery – "vague statement[s] boosting the appeal of a service or product that, because of [their] vagueness and unreliability, [are] immunized from regulation" (*Clark v Davenport*, 2019 WL 3230928, at *12 [Del Ch Ct 2019]) – or "mere expressions of opinion as to probable future events" which "cannot be deemed fraud or misrepresentations" (*Consol. Fisheries Co. v Consol. Solubles Co.*, 112 A2d 30, 37 [Del 1955]) are unavailing.[4]

Even assuming (without deciding) that some of the alleged representations, viewed in isolation, are not actionable, Plaintiffs have sufficiently alleged a number of misrepresentations utilizing "terms in a commercial context that investors would reasonably understand as resting on a factual basis" (*see Local 731 I.B of T. Excavators and Pavers Pension Tr. Fund v Swanson*, 2011 WL 2444675, at *10 [D Del 2011]). Plaintiffs' specific allegations about misstatements and omission of key information from financial presentations, economies of scale, anticipated cost savings, and the like cannot summarily be dismissed as mere puffery (*see e.g.*, *Eurofins Panlabs, Inc. v Ricerca Biosciences, LLC*, 2014 WL 2457515, at *17 [Del Ch Ct 2014]).

Moreover, fraud claims based on intentional misrepresentations about the future can be actionable under Delaware law (*Clark*, 2019 WL 3230928, at *12 ["[W]hen a party makes false

[4] At oral argument, counsel for WeWork and Minson confirmed that "[t]here are a few statements that we did not move against" on grounds of puffery and the like (without conceding on other grounds for dismissal), including "the allegation that the community-adjusted EBITDA metric was misleading which is in Paragraphs 92, 93 of the complaint," "the allegation that Mr. Minson stated that the community-adjusted EBITDA metric was less rent," and "the allegation that [Minson] stated that the company was currently valued at $72 per share" (NYSCEF Doc. No. 44 ["Oral Argument Transcript"] at pp. 21:18-25 – 22:1-10).

statements with an intent to deceive, that party may be liable for fraud regardless of whether the statements expressed opinion, estimates, or projections of the future"]; *see also Phage Diagnostics, Inc. v Corvium, Inc.*, 2020 WL 1816192, at *7 [Del Super Ct 2020] [finding that forward looking statements stated a claim for fraud]; *Winner Acceptance Corp. v Return on Capital Corp.*, 2008 WL 5352063, at *7 [Del Ch Ct 2008] [stating that misstatements describing "a future event that falsely implies an existing fact" are actionable bases for fraud claims]).

c. Plaintiffs Have Pled Sufficient Facts to Allege that Defendants Neumann and Minson Actively Participated in We Work's Fraud

In Delaware, a "corporate officer can be held personally liable for the torts he commits and cannot shield himself behind a corporation when he is a participant. This includes situations where a corporate agent participates in corporate fraud" (*Bay Ctr. Apartments Owner, LLC v Emery Bay PKI, LLC*, 2009 WL 1124451, at *12 [Del Ch Ct 2009]).

Plaintiffs have alleged facts that, if true, are sufficient to state a claim that Neumann and Minson actively participated in making material misrepresentations and omissions in connection with the Merger. Although the allegations describing Minson's purported misrepresentations are more detailed, the Complaint asserts that Neumann "reiterated the representations contained in the Investor Presentation and emphasized the Company's massive growth potential" (Compl. at ¶ 61), which are set forth elsewhere in the Complaint. Those allegations suffice to put Neumann on notice of the claims asserted against him.

II. Plaintiffs' Causes of Action for Unjust Enrichment and Negligent Misrepresentation

Plaintiffs' Second and Third Causes of Action for Unjust Enrichment and Negligent Misrepresentation are dismissed. Both causes of action are squarely within the scope of claims arising "under Contract, applicable Law or otherwise" that were "irrevocably and

unconditionally waive[d], release[d], and forever discharge[d], with prejudice" in Section 5.13(b) of the Merger Agreement.

These claims accrued as of the Effective Time, and therefore are not preserved by the carve-out in Section 5.13(b)(v), which permits parties to maintain "any tort claim … which … accrued *prior to* the Effective Time…" [emphasis added]. The Merger Agreement defines "Effective Time" as the moment when Conductor was merged into WeWork — that is, at Closing (§§ 1.2[a]-[b]; 2.1[b][i]). Per Delaware law, claims sounding in tort accrue "at the time of injury" (*Kaufman v C.L. McCabe & Sons, Inc.*, 603 A2d 831, 834 [Del 1992]; *see also ISN Software Corp. v Richards, Layton & Finger, P.A.*, 226 A3d 727, 732-33 [Del 2020], *reargument denied* [Mar 20, 2020]). Here, Plaintiffs' alleged harm occurred when they received WeWork shares in consideration for the Merger of Conductor into WeWork. Therefore, Section 5.13(b)(v) does not apply to Plaintiffs' Unjust Enrichment and Negligent Misrepresentation causes of action.

Section 8.9 does not preserve Plaintiffs' claims for Unjust Enrichment and negligent misrepresentation. Unlike Plaintiffs' fraud claim, these claims do not require proof of fraud, intentional breach, or willful misconduct (*PR Acquisitions, LLC v Midland Funding LLC*, 2018 WL 2041521, at *13-14 [Del Ch Ct 2018] ["To assert a claim for unjust enrichment, a plaintiff must prove the following elements: (1) an enrichment (2) an impoverishment, (3) a relation between the enrichment and impoverishment, (4) the absence of justification, and (5) the absence of a remedy provided by law"; "[negligent misrepresentation] requires proof of all the elements of common law fraud except that plaintiff need not demonstrate that the misstatement or omission was made knowingly or recklessly"]).

Therefore, Plaintiffs' Second and Third Causes of Action for Unjust Enrichment and Negligent Misrepresentation are dismissed.

CONCLUSION

For the foregoing reasons, it is hereby

ORDERED that Defendants' motion to dismiss (Motion Sequence Number 001) is **denied** with respect to Plaintiffs' First Cause of Action for Common Law Fraud and Fraudulent Inducement, and **granted** with respect to Plaintiffs' Second Cause of Action for Unjust Enrichment and Third Cause of Action for Negligent Misrepresentation; it is further

ORDERED that Defendants file an Answer to Plaintiffs' Complaint within 21 days of the date of this Decision and Order; and it is further

ORDERED that the Parties appear for a Preliminary Conference on **June 29, 2021 at 11:30 a.m.** The parties should provide a dial-in number for the Preliminary Conference at least 24 hours in advance.

This constitutes the decision and order of the Court.

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5/26/2021
DATE

JOEL M. COHEN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE