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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. RICHARD B. LOWE, III PART 56

Index Number : 117041/2005
DIGITAL BROADCAST
VS.
LADENBURG THALMANN
SEQUENCE NUMBER : 012
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9/24/08
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
DEC 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/10/08

HON. RICHARD B. LOWE, III
J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 56

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DIGITAL BROADCAST CORPORATION,

Plaintiff,

-against- Index No. 117041/05

LADENBURG, THALMANN & CO., INC.,
SILVERMAN, COLLURA & CHERNIS, P.C.,
JONATHAN INTRATER and MARTIN LICHT,

Defendants.

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Hon. Richard B. Lowe, III

Plaintiff Digital Broadcast Corp. (DBC) brings this action against defendants Ladenburg, Thalmann & Co., Inc. (Ladenburg), Silverman, Collura & Chernis, P.C., Jonathan Intrater (Intrater) and Martin Licht for fraud, breach of fiduciary duty, breach of contract, breach of the implied covenant of good faith, and aiding and abetting fraud in connection with Ladenburg's efforts to raise $20 million in investment capital for DBC through a private placement of stock.

Motion Sequence Nos. 012 and 013 are consolidated for disposition. In Motion Sequence No. 012, DBC moves, pursuant to CPLR 3212, for partial summary judgment on its third cause of action for breach of contract, and summary judgment dismissing the fourth affirmative defense and counterclaim of defendants Ladenburg and Intrater. In Motion Sequence No. 013, Ladenburg and Intrater move, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

BACKGROUND

DBC was founded in 1995 with the intent to offer "digital wireless television" services in competition with cable television. DBC was the owner of valuable licenses for the

transmission of digital wireless broadband services, as well as a joint venture partner owning exclusive and valuable proprietary technology for the transmission of such services. Gary Nerlinger was the president, CEO and chairman of DBC. Non-party Air Cable of Roanoke LLC d/b/a Air Cable America (Air Cable) was an operator and provider of digital wireless broadband services in the Roanoke, Virginia market. DBC was the owner of 90% of Air Cable's stock. In the early part of 2000, DBC, an unproven "start up" company, undertook to raise capital to finance the intended expansion of the operations of Air Cable. In March of 2000, DBC developed a business plan to market its unique product and services to mid-sized markets, and had acquired FCC licensing rights to transmit digital wireless broadband services in those markets. As part of the business plan, DBC created financial projections for Air Cable. In its forecasts, DBC speculated that Air Cable would have 2,600 subscribers by September of 2000, and 40,000 subscribers by April of 2003.

Throughout the early part of 2000, DBC solicited investments from private investors, and sought the services of attorneys, investment bankers and other professionals who could assist DBC in raising capital. By April of 2000, DBC had raised over $10 million from private investors, and was seeking an additional $20 million of investment capital.

In May of 2000, DBC retained attorney Martin Licht (Licht), then of the firm of defendant Silverman Collura & Chernis, P.C., to represent it in connection with its efforts to raise capital in a private offering and a potential future IPO. Licht introduced Nerlinger to four investment banking firms, one of which was Ladenburg. In June of 2000, Ladenburg agreed to try to find investors for DBC.

On June 22, 2000, DBC and Ladenburg entered into a one-year agreement

pursuant to which Ladenburg undertook to act as placement agent for the private placement of approximately $20 million in "equity, convertible debt or preferred securities" of DBC (the Agreement [Aff. of Stephen Heiser, Exh B-12, at LT002229]). DBC paid Ladenburg a retainer of $50,000. Ladenburg did not agree to purchase the securities itself, and did not guarantee that the offering would be successful. The Agreement provided Ladenburg a financial incentive to complete the offering (id.).

The Agreement obligated DBC to disclose to Ladenburg any efforts to raise capital that DBC made on its own during the term of the contract (*id.*, ¶ IV). The Agreement also contained an indemnification provision, under which Ladenburg cannot be held liable to DBC unless Ladenburg has acted in a "wilful" or "gross[ly] negligen[t]" fashion (*id.*, ¶ III and Appendix A).

In addition, the Agreement contained an implicit "best efforts" clause, which required Ladenburg to use its best efforts to offer DBC's securities on a private placement basis to qualified investors (*see id.*, ¶ I). The Agreement permitted either party to terminate, with or without cause, upon written notice after 180 days (*id.*, ¶ VII). The Agreement further provided that it could not be terminated or changed, nor could any of its provisions be waived, except in a writing signed by both parties (*id.*, ¶ VIII).

In early August of 2000, DBC and Ladenburg began reviewing drafts of the Confidential Offering Memorandum (the Memorandum). Ladenburg used DBC's March 2000 business plan, as well as other DBC and Air Cable documents, as the starting point for the Memorandum. The historical financial statements included with the Offering Memorandum were created by DBC. Those financial statements reflect that DBC was a "development stage"

company, and that in its five-year existence, DBC had never earned a single dollar of revenue. In fact, the financials showed that DBC had losses of over $4.5 million (*see* Heiser Aff., Exh B-3).

The first draft of the Memorandum was distributed on August 2, 2000 to DBC and its counsel. The draft made clear that potential investors in the transaction "MUST BE INSTITUTIONAL ACCREDITED INVESTORS" (*see* Heiser Aff., Exh B-31). It also made clear that the underlying business and financial information was provided by DBC (*see id.*).

A second draft of the Confidential Offering Memorandum was distributed in mid-August 2000. This draft again made clear that the offering would be limited to "INSTITUTIONAL ACCREDITED INVESTORS" (*see* Heiser Aff., Exh B-32). The draft also reflected that the roles of Mr. Nerlinger and other key members were now in question. A few days prior to August 15, 2000, Ladenburg or Licht discovered that Nerlinger had been convicted of mail fraud in 1988, and had been sent to prison. The underlying conduct involved investment-related fraud. As a result of this revelation, Nerlinger stepped down as CEO (*see id.*).

By late September 2000, the Memorandum was completed. That document again made clear that any potential investors "MUST BE INSTITUTIONAL ACCREDITED INVESTORS" (*see* Heiser Aff., Exh B-3). The document also provided that "forecasted financial statements and assumptions" in the Memorandum were "prepared by Digital Broadcast Corporation" (*id.* at LT004995). In the Memorandum, DBC stated that it "launched its first digital wireless television operating system in Roanoke, Virginia" in May of 2000 – just one month before signing its contract with Ladenburg (*id.* at LT004942, LT004969). The company claimed to have only 140 subscribers as of September 18, 2000 (*id.* at LT004942, LT004965).

Finally, the Memorandum stated that because the forecasts and financial statements contained therein were contingent upon raising "[s]ubstantial additional capital," DBC intended to raise another $140 to $170 million over the five-year period following the Ladenburg offering (*id.* at LT004989, LT 004997).

Ladenburg contends that it engaged in extensive efforts to market the offering. Following an extensive search for appropriate investors, Ladenburg created a list of over one hundred potential institutional investors. Ladenburg personnel then initiated contact with these potential investors. Next, from approximately September 26 to December 8, 2000, Ladenburg sent copies of the Memorandum to at least 36 institutional investors that had expressed interest in the offering, including Goldman Sachs, Merrill Lynch and others. Ladenburg contends that, as the end of 2000 drew near, however, it became increasingly clear that investors were not interested. By December 2000, virtually no potential investors had decided to invest.

While the Ladenburg offering was ongoing, the State of Virginia commenced an investigation based on its belief that DBC had illegally sold securities in Virginia. In August and September of 2000, DBC asserted the Fifth Amendment, and refused to provide any information. None of these proceedings was disclosed to Ladenburg. A hearing examiner later ruled on December 19, 2000 that DBC had wrongly withheld the information, and also illegally sold securities as late as September 9, 2000. The State of Virginia ultimately issued an order finding that DBC had violated the state's securities laws by selling unregistered securities, and that its refusal to produce records had been unjustified. DBC did not disclose this order to Ladenburg.

Ladenburg contends that, by the end of December 2000, when it learned of DBC's violation of Virginia's securities laws, it concluded that DBC had breached the

Agreement. By this time, DBC had also concluded that its relationship with Ladenburg was over. Neither party ever issued a written notice of termination of the Agreement.

In December 2002, DBC closed its office, and in that entire year, had no revenues. The same was true in 2003 and 2004. In late 2004, Nerlinger decided to try to "resurrect" the company, and created a business plan in order to do so. In that document, DBC projected that the company would have tens of thousands of subscribers by 2005, and nearly one million by 2007. By early 2005, however, DBC had, at most, 100 subscribers.

In December 2005, DBC filed this lawsuit. Although it has materially changed its allegations over the course of the case, the following allegations have remained constant:

- Before and after DBC signed its contract with Ladenburg, Licht and employees of Ladenburg told DBC that investors were "lined up" and the financing was a "done deal";
- This was part of a plan to sabotage DBC because Ladenburg supposedly had significant ties to cable companies;
- As a result, Ladenburg intentionally failed to market DBC's offering at all;
- In reliance on these statements, DBC stopped raising its own funds and made significant increased expenditures to expand their subscriber base.

DBC's remaining claims are the following: (1) a claim for breach of contract, on the theory that Ladenburg failed to use its "best efforts" to market the offering because it marketed the offering only to institutional investors, and never marketed it to any qualified individual investors; (2) a claim of fraud, based on the allegations that DBC was told that the offering was a "done deal," and that investors were "lined up"; and (3) a claim of breach of fiduciary duty based upon the same allegations as the fraud claim. On February 6, 2008, this

court rejected DBC's effort to re-assert a claim based upon Ladenburg's supposed conflicts of interest and the cable company conspiracy.

DISCUSSION

A. DBC's Motion for Summary Judgment on the Breach of Contract Cause of Action, and Defendants' Motion for Summary Judgment Dismissing the Complaint

1. Breach of Contract (Third Cause of Action)

Both DBC and defendants move for summary judgment on DBC's breach of contract claim. DBC does not contend that Ladenburg breached any explicit term of the Agreement. Rather, DBC claims that Ladenburg breached its implied obligation to use its "best efforts," because it declined to market DBC to individual investors after institutional investors decided not to invest in its offering. Notably, DBC does not assert – much less identify any evidence showing – that it ever asked Ladenburg to pursue individual investors. In any event, because the Agreement contains no objective criteria against which to measure the "best efforts" obligation, DBC's claim for breach of contract fails as a matter of law.

While it is true that "[t]he requirement to employ reasonable efforts or 'best efforts', as it is generally expressed, ... is deemed to be implicit in every agreement," it is also true that "to be enforceable, there must be objective criteria against which a party's efforts can be measured, whether the requirement is deemed to be implicit" (*Timberline Dev. LLC v Kronman*, 263 AD2d 175, 178 [1st Dept 2000]). The absence of such objective criteria in the Agreement renders the implied "best efforts" term unenforceable, and is fatal to DBC's claim (*see StoreRunner Network, Inc. v CBS Corp.*, 8 AD3d 127, 128 [1st Dept 2004] [affirming grant of summary judgment to defendant, and noting that "the provision of the contract upon which plaintiff relies did not set forth objective criteria against which defendants' efforts could be

measured"]). The breach of contract cause of action must be dismissed for this reason alone.

Moreover, even if the Agreement had contained a best efforts clause, defendants would still be entitled to summary judgment:

> However, even a best efforts clause permits parties a degree of discretion in the selection of a plan of action and allows them to rely on their good faith business judgment as to the 'best way' to achieve the desired result. ... Accordingly, to prevail upon its contention that a party has failed to use its best efforts, the [plaintiff] must show that the nature and extent of the opposing party's efforts did not reflect good faith business judgments. While a best efforts clause requires good faith activity in light of the party's own capabilities and expertise, once such activity is demonstrated, it is clearly erroneous for a court to speculate as to what other steps the party should have taken

(*In re Chateaugay Corp.*, 186 BR 561, 594-595 [Bankr SD NY 1995], *affd, appeal dismissed* 198 BR 848 [SD NY 1996], *affd* 108 F3d 1369 [2d Cir 1997] [internal citations omitted]). Here, there is no dispute that Ladenburg actually marketed the offering, and did so based upon the strategies and themes that DBC had developed on its own. DBC's core complaint is that Ladenburg focused its efforts only on institutional investors. This, however, is precisely the type of business judgment which Ladenburg is authorized to make even under an explicit best efforts clause (*see id.*).

Although DBC now claims that it never knew that Ladenburg was marketing only to institutional investors, given the undisputed evidence showing that DBC and its attorneys assisted in drafting the Memorandum which limited the offering to "INSTITUTIONAL ACCREDITED INVESTORS," DBC's after-the-fact denial is insufficient to defeat summary judgment (*see Coleman v Norton*, 289 AD2d 130, 130 [1st Dept 2001] [summary judgment appropriate where allegations were "substantially contradicted by ... documentary evidence"]).

DBC also relies on *McKinley Allsopp, Inc. v Jethborne Intl. Inc.* (1990 US Dist LEXIS [SD NY 1990]) in support of its argument that defendants breached the implicit "best efforts" clause. That case, however, is completely inapposite, as, unlike here, the contract at issue included explicit "best efforts" clauses.

Thus, DBC cannot establish a breach of an implied best efforts obligation as a matter of law.

Moreover, Ladenburg is entitled to summary judgment because its conduct – even if it could be deemed a breach of an implied obligation – was not willful or grossly negligent. The Agreement provides that Ladenburg shall have no "liability" ... to [DBC] ... except for any such liability for losses, claims, damages, liabilities or expenses incurred by [DBC] that is found ... to have resulted from [Ladenburg's] gross negligence or willful misconduct" (Agreement, ¶ III and Appendix A). DBC has presented no evidence to meet this standard, which requires conduct approaching intentional fraud (*see Colnaghi, U.S.A, Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821, 823-824 [1993] ["Used in this context, 'gross negligence' ... is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing"]). Courts have not hesitated to grant summary judgment on the basis of such clauses (*see Obremski v Image Bank, Inc.*, 30 AD3d 1141 [1st Dept 2006]; *Gluck v JPMorgan Chase Bank*, 12 AD3d 305 [1st Dept 2004]).

Next, DBC seeks summary judgment on its breach of contract claim on the ground that defendants violated the statute of frauds, General Obligations Law (GOL) § 15-301 (2), by terminating the Agreement without a writing. Defendants agree that no written termination notice of the Agreement was sent by either party. However, there is no independent

cause of action to enforce section 15-301 (2). No such right is granted expressly by the statute. Instead, section 15-301 (2) simply goes to the enforceability of certain contractual provisions.

Moreover, DBC has not offered evidence of any damages caused by the allegedly improper termination of the agreement. DBC's entire argument is that Ladenburg should have tried to market the securities to individual investors after dozens of institutional investors had rejected the offering. DBC offers no evidence that Ladenburg's decision not to do so was in any way related to its supposed decision to terminate the contract orally rather than in writing. Because DBC has failed to demonstrate that it suffered any contract damages due to the alleged technical violation of GOL § 15-301 (2), its breach of contract claim must be dismissed (*see Marbax Assocs. Ltd. Partnership v Resources Property Improvement Corp.*, 196 AD2d 727 [1st Dept], *lv denied* 82 NY2d 662 [1993]; *National Cleaning Contractors v Uris 380 Madison Corp.*, 84 AD2d 718 [1st Dept 1981]).

Notably, DBC also fails to offer any evidence that it would have behaved differently if Ladenburg had sent it a written termination notice. To the contrary, the evidence reveals that DBC itself believed that its relationship with Ladenburg was over by December 2000, the same period when Ladenburg ceased its efforts to market DBC's securities to investors (*see* Nerlinger Dep., at 36-37 [Heiser Aff., Exh A-4] ["around Christmas of 2000," Nerlinger concluded that DBC's "relationship with Ladenburg (was) over"]; *see also* Aff. of Georgia Baransky, DBC's corporate accountant, ¶ 6 [Heiser Aff., Exh B-48]). Accordingly, there is no evidence of any effort on DBC's part to encourage Ladenburg to continue to pursue the offering after December 2000. Indeed, before the term of the Agreement had ended, DBC informed its investors that it had begun to seek out placement agents other than Ladenburg to raise

institutional funds (Dep. of Stephen McCormick, 65-68 [Heiser Opp Aff., Exh D-5]). Therefore, DBC cannot now claim that it was harmed by Ladenburg's failure to send it a written notice of what DBC had already concluded was true (*see Lexington 360 Assocs. v First Union Natl. Bank of N.C.*, 234 AD2d 187, 191-192 [1st Dept 1996] ["In any event, plaintiff has failed to demonstrate that it was damaged as a result of defendant's alleged failure to use its best efforts to notify it of the contemplated sale to Toledo. Absent a showing of specific damages resulting from defendant's failure to exercise its best efforts to notify plaintiff of the sale to Toledo, plaintiff cannot recover"]).

Furthermore, the parties can terminate an agreement by their conduct and without a writing, even if the agreement has a clause requiring termination to be in writing. "[A]part from statute, a contract once made can be unmade, and a contractual prohibition against oral modification may itself be waived" (*Rose v Spa Realty Assocs.*, 42 NY2d 338, 343 [1977]; *see also Greenberg v Frey*, 190 AD2d 546 [1st Dept 1993] [noting exceptions to GOL § 15-301]; *Congress Factors v Malden Mills Inc.*, 332 F Supp 1384 [D NJ 1971] [applying New York law and holding that oral agreement to terminate contract estops party from invoking GOL § 15-301]). The undisputed evidence demonstrates that DBC itself treated the relationship as terminated by the end of December 2000. In light of these facts, DBC is estopped from relying on section 15-301 (2) to contest the alleged termination of the Agreement.

Finally, even if DBC could demonstrate that it had a viable claim for breach of contract, it could not demonstrate that it suffered any damages as a result of the breach. DBC contends that it would have been worth $3 billion today if the Ladenburg offering had been successful, and that it incurred lost profits of $150 million. However, DBC is not entitled to lost

profits as a matter of law. As a new business in an entertainment-related industry, and without any record of performance, DBC cannot meet the strict standards that govern claims for lost profits.

With respect to its claim for lost profits for the alleged breach of contract, DBC faces the initial hurdle of demonstrating "that the particular damages were fairly within the contemplation of the parties to the contract at the time it was made" (*Kenford Co. v County of Erie*, 67 NY2d 257, 261 [1986]). For example, in *Awards.com, LLC v Kinko's, Inc.* (42 AD3d 178 [1st Dept 2007]), although the agreement failed to reflect that the parties contemplated lost profits as a potential basis for damages in the event of a breach, the plaintiff nevertheless contended that defendant Kinko's was liable for its lost profits when plaintiff's plan to sell personalized items in Kinko's stores failed. The court flatly rejected the claim:

> It would be highly speculative and unreasonable to infer an intent to assume the risk of lost profits in what was to be a start-up venture ... . There is nothing to suggest that, in those circumstances, Kinko's would have entered into an agreement to undertake responsibility for lost profits, a liability with unlimited potential. Plaintiffs' claim for $276 million in alleged lost profits, based on sheer speculation, demonstrates the unreasonableness of such an inference

(*id.* at 184; *accord Jambetta Music, Inc. v Nugent*, 2008 WL 412618, 2008 NY Slip Op 30363[U] [Sup Ct, NY County 2008]; *see also Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325 [1st Dept 1997] [reversing denial of summary judgment on claim of lost profits]; *Great Earth Intl. Franchising Corp. v Milks Dev.*, 311 F Supp 2d 419 [SD NY 2004] [rejecting lost profits claim where there was no evidence it was in contemplation of parties]).

Likewise, here, the Agreement contains no mention of consequential damages.

Moreover, there is no evidence in the record that liability for lost profits was discussed during the contract negotiations.

In addition, even if DBC could have shown that lost profits had been contemplated, New York has a "relatively demanding standard for an award of lost profits" (*Kidder, Peabody & Co., Inc. v IAG Intl. Acceptance Group N.V.*, 28 F Supp 2d 126, 131 [SD NY 1998], *affd* 205 F3d 1323 [2d Cir 1999]). To receive lost profits damages:

> First, it must be demonstrated with certainty that such damages have been caused by the breach and, second, the alleged loss must be capable of proof with reasonable certainty. In other words, the damages may not be merely speculative, possible or imaginary, but must be reasonably certain and directly traceable to the breach, not remote or the result of other intervening causes

(*Kenford Co. v County of Erie*, 67 NY2d at 261 [affirming vacation of award of lost profits as damages for failure to construct stadium]; *accord O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [1st Dept 2007] [affirming summary judgment dismissing claim for lost profits]). Furthermore, "when a new business venture is involved, 'a stricter standard is imposed for the obvious reason that there does not exist a reasonable basis of experience upon which to estimate lost profits with the requisite degree of reasonable certainty [citation omitted]'" (*Zink v Mark Goodson Productions, Inc.*, 261 AD2d 105, 106 [1st Dept], *lv dismissed* 94 NY2d 858 [1999]). Finally, "New York has long recognized the inherent uncertainties of predicting profits in the entertainment field in general" *(Kenford Co. v County of Erie*, 67 NY2d at 263).

In light of these rules, "[m]ost of the leading cases which have decided on claims of future lost profits have ruled that they are not recoverable" (*Great Earth Intl. Franchising Corp. v Milks Dev.*, 311 F Supp 2d at 432 [granting summary judgment against claim for lost profits]). For example, in *O'Neill v Warburg, Pincus & Co.* (2006 WL 6085610, 2006 NY Slip

Op 30410[U] [Sup Ct, NY County 2006], *affd* 39 AD3d 281 [1st Dept 2007]), plaintiffs had founded a telecommunications company based on a new form of VoIP (Voice over Internet Protocol) technology. They had a falling out with an investor, and sued for lost profits, presenting an expert report that the company would have been worth over $100 million had it been able to pursue its business plan. In granting defendants' motion for summary judgment on the claim for lost profits, the court pointed to many facts, including that: (1) plaintiffs' claim was "based upon projections of future profitability"; (2) at the time of the alleged breach, the company "was still at a developmental stage and had yet to achieve profitability"; and (3) "the offers of funding, upon which [the Company] was depending, were not unconditional commitments" (*id.*).

Likewise, here, when DBC entered into the Agreement with Ladenburg, it had been in existence for five years but was still, by its own admission, a "development stage" company (*see* Memorandum, at LT005012-LT005018). A "development stage" company is one which does not generate revenue (Dep. of Richard Stern, at 58-59 [Heiser Aff., Exh A-8]). As of April 30, 2000, DBC had never earned a single dollar of revenue, and indeed, had generated losses of over $8 million (*see* Memorandum at LT004987 ["THE COMPANY HAS INCURRED LOSSES AND EXPECTS TO CONTINUE TO INCUR LOSSES IN THE FORESEEABLE FUTURE"]; Stern Dep., at 142-143). DBC had, at most, 140 subscribers as of September of 2000, and by its own estimate required four to six percent market penetration to merely break even (*see id.* at LT 004942, LT004964-65, LT004987 ["The Company's ability to generate profits and positive cash flow will depend in large part on obtaining enough subscribers"]; Nerlinger Dep., at 765-766). Moreover, it has never generated a consistent stream of revenue,

much less earned a single dollar in profit. Thus, DBC, a start-up in the entertainment-related field that has never earned a single dollar over a span of 13 years, cannot prove that it lost any profits as a result of Ladenburg's inability to find investors for it in the year 2000.

Accordingly, DBC's breach of contract cause of action must be dismissed.

2. **Fraud (First Cause of Action)**

DBC's fraud claim is premised upon its allegation that, both before and after the Agreement with Ladenburg was signed, Intrater told DBC that investors were "lined up," and that the offering was a "done deal." DBC claims that it relied upon these statements, and that it was therefore harmed in two ways: (1) it ceased its own efforts to raise money; and (2) it made substantial expenditures that depleted its cash reserves and caused it to incur obligations to Sun Trust Bank. Neither of these claims can be substantiated as a matter of law.

The undisputed evidence reveals that DBC did raise capital on its own after the Agreement was signed. Specifically, during the term of the Agreement, DBC was raising money from Web Design, Joseph Dillon, Stephen McCormick, Randy Brown and others (*see* McCormick Dep., at 56, 59, 70-72, 79-82, 95-97, 115 123-124 [Heiser Aff., Exh A-13]; Baransky Dep., at 387-390, 465-466, 487-489 [Heiser Aff., Exh A-6]; *see also* Heiser Aff., Exhs B-51 to B-57, B-78 to B82). Indeed, Nerlinger now states that he was not prevented by Ladenburg from raising money outside of the Ladenburg offering, and that Ladenburg knew DBC was raising some money on its own (*see* Nerlinger Aff., ¶ 7; Nerlinger Dep., at 1062-1073, 1082-1083). In light of this evidence, DBC could never prove that it ceased raising capital in reliance on any statements made by defendants.

DBC also cannot recover for the supposed increased expenditures made in late

2000, because those expenditures were made by Air Cable, rather than DBC. The undisputed evidence demonstrates that the alleged depletion of cash reserves and the debt incurred to Sun Trust Bank were incurred by Air Cable (*see* Baransky Dep., at 234-235; Nerlinger Dep., at 212; Heiser Aff., Exhs B-84 to B-86). It is undisputed that, in 2000, DBC owned only 65% to 75% of Air Cable, and was one of hundreds of investors in Air Cable (*see* Memorandum at LT004965, LT00507, LT005021; Listing of the Partners' Allocation Percentage in Air Cable [Heiser Aff., Exh B-86]). It is also undisputed that Air Cable is a separate legal entity, and is not a party to this lawsuit. In light of these undisputed facts, DBC is unable as a matter of law to pursue claims for alleged damages to Air Cable (*see Matter of Waldbaum, Inc. v Finance Adm'r. of City of N.Y.*, 74 NY2d 128 [1989] [reversing decision below, and dismissing on ground that parent corporation lacked standing to challenge tax assessment of property owned by wholly-owned subsidiary]; *Matter of Saint Gobain v Assessor of Town of Wheatfield*, 17 AD3d 1112 [4th Dept 2005] [affirming dismissal for lack of standing of challenge by parent to tax assessment of wholly-owned subsidiary]; *Alexander & Alexander of N.Y., Inc. v Fritzen*, 114 AD2d 814, 815 [1st Dept 1985], *affd* 68 NY2d 968 [1986] [dismissing suit by parent for injury to subsidiary for lack of standing, and stating that "one corporation will generally not have legal standing to exercise the rights of other associated corporations"]; *see also Schenley Distillers Corp. v United States*, 326 US 432, 437 [1946] [affirming dismissal of suit by parent corporation that sought to enforce the rights of its subsidiary, and stating that the corporate form "will not be disregarded where those in control have deliberately adopted the corporate form in order to secure its advantages"]).

In response to the motion, although DBC acknowledges that all of the

"expenditures made" were "technically" by Air Cable, an entity that is "legally distinct" from DBC (Pl Opp Br., at 20), it nonetheless argues that it is entitled to pursue a claim on behalf of Air Cable. In support of this argument, DBC cites dictum from a single decision, *Lumbermens Mut. Cas. Co. v Commonwealth of Pa.* (18 Misc 3d 1122[A], 2008 NY Slip Op. 50161[U] [Sup Ct, NY County 2008]) for the proposition that a parent company has standing to sue on behalf of a wholly-owned subsidiary. DBC fails to note, however, that the decision was reversed (*see Lumbermens Mut. Cas. Co. v Commonwealth of Pa.*, 52 AD3d 212 [1st Dept 2008]), and that, in any event, the proper subsidiary had previously been added as a plaintiff, an event which "moot[ed] any argument that plaintiffs lack standing" (18 Misc 3d at * 4). Here, in contrast, Air Cable is not a plaintiff, and is not a "wholly-owned" subsidiary of DBC, but instead is owned by hundreds of investors in addition to DBC. Thus, *Lumbermens* does not apply here.

Accordingly, DBC's first cause of action for fraud is dismissed.

3. Breach of Fiduciary Duty (Second Cause of Action)

In its breach of fiduciary duty cause of action, DBC alleges that Ladenburg and Intrater had fiduciary duties to DBC, and that those fiduciary duties were breached when they failed to disclose material conflicts of interest which compromised their obligations to DBC. DBC has previously asserted that its breach of fiduciary duty claim is grounded in its fraud claim, and is therefore entitled to a six-year statute of limitations (*see Digital Broadcast Corp. v Ladenburg, Thalman Co.*, Index No.117041/05, slip op at 4 [Sup Ct, NY County March 28, 2007]). Because the breach of fiduciary duty claim merely restates DBC's fraud claim, it must be dismissed for the same reasons as the fraud claim is being dismissed.

4. DBC's Claim for Punitive Damages

DBC seeks punitive damages with respect to its claims for fraud and breach of fiduciary duty. However, it is well-settled that with respect to tort claims deriving from a contractual relationship, punitive damages are not available unless the alleged misconduct is both outrageous to the point of criminality, and is a part of a pattern aimed at the public generally (*see New York University v Continental Ins. Co.*, 87 NY2d 308 [1995]; *see e.g. Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007] [punitive damages unavailable for fraud claim, given lack of evidence of malicious or vindictive intent]). DBC has not alleged any such conduct, and, as such, its claim for punitive damages must be dismissed.

B. DBC's Motion for Summary Judgment Dismissing Ladenburg's Fourth Affirmative Defense and Counterclaim

In its fourth affirmative defense, Ladenburg contends that DBC's claim for breach of contract is barred because DBC breached the Agreement by independently raising investment money for itself following entry into the Agreement, but failed to disclose that activity to Ladenburg. According to Ladenburg, this conduct breached paragraph VI of the Agreement, entitled "Coordination of Efforts," which required DBC to notify Ladenburg promptly of any discussions with potential purchasers of its securities, as well as paragraph II, entitled "Compensation for Services," which obligated DBC to pay Ladenburg a six percent commission for consummated investments in DBC made during the term of the Agreement.

DBC seeks partial summary judgment dismissing Ladenburg's counterclaim for unpaid commissions on DBC's undisclosed sales of its securities during the contractual period. In support of its motion for summary judgment, Ladenburg primarily repeats its argument, made in a prior motion, that these sales were not covered by the Agreement, despite the plain language of the Agreement, and DBC's own previous admissions that the Agreement did apply to such

sales. Indeed, this argument was squarely rejected by this court in its April 21, 2008 decision and order. These arguments are no more persuasive now than they were earlier.

First, DBC's own motion confirms that summary judgment cannot be granted in its favor. DBC expressly acknowledges that the particular aspects of the Agreement on which it relies are ambiguous, and proceeds to introduce extrinsic evidence which, it contends, supports its interpretation (Pl Br., at 13-17). In particular, DBC relies upon the testimony of Robert Kropp, a former Ladenburg employee who had, by his own admission, absolutely no personal knowledge of, or involvement in, the DBC transaction (*see* Kropp Aff., ¶ 2 ["I did not work on the proposed private placement for (DBC)"] [Heiser Opp Aff., Exh D-9]; Kropp Tr., at 229-230 [Heiser Opp Aff., Exh D-10]). In addition, DBC cites to Kropp's testimony that the exclusivity clause in the Agreement is "definitely unclear" (Pl Br., at 15).

Where, as here, "'the language of a contract is ambiguous, its construction presents a question of fact which may not be resolved by the court on a motion for summary judgment'" (*NFL Enters. LLC v Comcast Cable Communications, LLC*, 51 AD3d 52, 61 [1st Dept 2008] [citation omitted]; *accord Pozament Corp. v Aes Westover, LLC*, 27 AD3d 1000 [3d Dept 2006]).

Second, DBC completely ignores all of the evidence that contradicts its interpretation, including its own admissions – made before it began to defend Ladenburg's counterclaim – that it had entered into an "exclusive" relationship with Ladenburg (Nerlinger's Transcript of 8/19/02 DBC Update Conference Call, at GB002537-GB002538 [Heiser Aff., Exh B-68] ["(W)e signed up with Ladenburg on an exclusive agreement"]; Plaintiff's Memorandum in Opposition to Ladenburg's Motion to Dismiss, at 13 ["(T)he June 2000 letter agreement

provided that Ladenburg would be the sole and exclusive investment bank hired to raise the capital (and) provides that DBC should notify Ladenburg of all parallel discussions with potential investors"]).

Because DBC itself contends that the Agreement is ambiguous, and because DBC's own admissions indicate that it is compelled to pay commissions on undisclosed financing, DBC's motion for summary judgment on the fourth counterclaim must be denied.

The court has considered the remaining claims, and finds them to be without merit.

Accordingly, it is

ORDERED plaintiff's motion for partial summary judgment on its third cause of action for breach of contract and summary judgment dismissing the fourth affirmative defense and counterclaim of defendants Ladenburg Thalmann & Co., Inc. and Jonathan Intrater (Motion Sequence No. 012) is denied; and it is further

ORDERED that the motion of defendants Ladenburg Thalmann & Co., Inc. and Jonathan Intrater for summary judgment dismissing the complaint as against them (Motion Sequence No. 013) is granted, and the complaint is dismissed against these defendants with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the remainder of action shall continue.

Dated: December 11, 2008

ENTER:

J.S.C.

HON. RICHARD B. LOWE III