[* 1]

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

OPEN ACCESS INC. and TOPSPIN PARTNERS, L.P.,

Plaintiffs,

INDEX No. 006291/09

MOTION DATE: Oct. 30, 2009
Motion Sequence # 002

-against-

LIGHT TOWER FIBER LONG ISLAND LLC, formerly Keyspan Communications Corporation,

Defendant.

The following papers read on this motion:

Notice of Motion..... X
Affidavit in Opposition..... X
Reply Affirmation X
Memorandum of Law..... XX
Reply Memorandum of Law..... X
Sur-Reply Memorandum of Law..... X
Defendants Response..... X

The defendant moves pursuant to CPLR 3211[a][1] and [7] for dismissal of the complaint.

Plaintiff, Open Access Inc., [hereinafter Open Access] is in the fiber optics business and "provides, among other things, data communications transport and services primarily

utilizing direct fiber optic routes to its customers" (*see* Amended Verified Complaint at ¶¶1,4). Plaintiff, Topspin, is in the business of providing venture capital and financing and has provided same to Open Access in connection with the development of its fiber optics business. Defendant, Light Tower Fiber Long Island LLC. (hereinafter Light Tower), which was formerly Keyspan Communications Corporation (hereinafter KC), is the owner and operator of "an optical fiber transmission system on Long Island, New York and surrounding areas" (hereinafter the KC System), and is the principal supplier of fiber optic routes to Open Access. The KC system is defined as "the combination of all optical fiber network infrastructure (including, but not limited to, optical fiber cable, conduit, innerduct, attachments, termination cabinets and panels, patches, splices, enclosures, network operating centers, multiplexing equipment, protocol conversion equipment and other electronic equipment) owned and operated by KC". (see section 1.23 of the Second Restated and Amended Fiber Optics Cable Co-Construction and Exchange Agreement).

The within action involves three agreements executed by and between Open Access and KC, the first of which is dated May 16, 2001 and is entitled the "FIBER OPTICS CABLE CO-CONSTRUCTION AND EXCHANGE AGREEMENT", the second of which is dated December 6, 2001 entitled the "Restated and Amended FIBER OPTICS CABLE CO-CONSTRUCTION AND EXCHANGE AGREEMENT", and the third of which is dated June 26, 2007 and in entitled the "Second Restated and Amended FIBER OPTICS CABLE CO-CONSTRUCTION AND EXCHANGE AGREEMENT" (hereinafter the Agreements).

Plaintiff's Complaint

As a general proposition, Open Access posits that the defendant has engaged in an overarching course of conduct comprised of separate but related actions, the common goal of each was to influence and ultimately jeopardize Open Access' status as a viable business concern. Open Access asserts that the defendant has expressed an interest in purchasing the company, and so as to gain a more favorable advantage in the market place, has deliberately undertaken this alleged course of conduct for the purpose of reducing the market value of Open Access so as to acquire the company at a reduced price.

As a result of the defendant's alleged wrongdoing, the plaintiff commenced the underlying action on or about April 1, 2009 and thereafter amended the original complaint which presently includes ten causes of action against the defendant. The defendant's instant application thereafter ensued seeking dismissal of the complaint in its entirety pursuant to CPLR 3211 (a)(1) and CPLR 3211 (a)(7).

When entertaining an application interposed pursuant to CPLR 3211 (a)(7), the pleading is to be liberally construed and the Court must accept as true the facts therein alleged and must accord the plaintiff with every favorable inference which may be extrapolated therefrom (*Leon v Martinez*, 84 NY2d 83, 1994). An application made pursuant to this section of law, must be denied when "if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law'" (***511 W. 232nd Owners Corp. v Jennifer Realty Co.***, 98 NY2d 144, 2002, quoting ***Guggenheimer v Ginzburg***, 43 NY2d 268, 1977).

With respect to an application interposed pursuant to CPLR 3211[a][1], dismissal of a complaint thereunder is appropriate "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (***Leon v Martinez***, 84 NY2d 83, 1994, ***supra***, at **88; *Yew Prospect, LLC v Szulman***, 305 AD2d 588, 2nd Dept., 2003; ***Sta-Bright Services, Inc. v Sutton***, 17 AD3d 570, 2nd Dept., 2005).

Defendants' Motion to Dismiss

In the matter *sub judice*, of the ten causes of action contained in the Amended Verified Complaint, the First, Second, Seventh, Eighth and Ninth of which each seek various forms of declaratory relief.

CPLR §3001 provides, in relevant part, that "the supreme court may render a declaratory judgement having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." Within the particular context of a motion which seeks dismissal of an action for a declaratory judgment, the complaint is to be liberally construed "and deemed to allege whatever can be reasonably implied from its factual statements" (***Hallock v State***, 39 AD2d 172, 3d Dept., 1972). In addressing an application to dismiss the complaint in a declaratory judgment action, "the determinative question is not whether the plaintiff is entitled to a declaration in his favor, but whether the court's jurisdiction to render a declaratory judgement has been properly invoked" (***Hallock v State***, 39 AD2d 172, 3d Dept., 1972, ***supra***; ***Nasa Auto Supplies, Inc. v 319 Main Street Corp.***, 133 AD2d 265, 2nd Dept., 1987; ***Staver Company v Skrobisch***, 144 AD2d 449, 2nd Dept., 1988).

So as to withstand a motion to dismiss for lack of sufficiency, "the complaint in an

action for a declaratory judgment must contain factual allegations showing the existence of a real controversy concerning jural relations, and a sufficient basis for the invocation of the court's discretionary power to pronounce judgment declaring the rights and legal relations of the parties" (***American News Co., Inc. v Avon Publishing Co.***, 283 AD 1041, 1st Dept., 1954; CPLR §3001). If the Court determines that it may properly entertain the action but ultimately decides the merits of the declaratory action against a plaintiff, "the proper course is not to dismiss the complaint but to issue a declaration in favor of the defendants" (***Maurizzio v Lumbermens Mutual Casualty Co.***, 73 NY2d 951, 1989; ***Lanza v Wagner***, 11 NY2d 317, 1962).

The plaintiffs' First cause of action seeks a judgment from this Court "declaring that KC is required under the Second Amended Agreement in all events, to provide fiber strand connectivity to Open Access through the KC system to the designated Open Access node" (*see* Amended Verified Complaint at ¶¶51-54).

In support of this application, counsel for the defendants argues that "Light Tower fully acknowledges and has always acknowledged, that it has a duty to provide connectivity to Open Access' customers pursuant to the Second Amended Agreement, which provides that Light Tower 'shall, in any event, provide Fiber Strand connectivity to Open Accces through the KC system to the designated Open Access Node'" (*see* Defendant's Memorandum of Law in Support of Motion to Dismiss at p.19, Defendant's Reply Memorandum of Law at pp. 14,15, and Defendant's Response to Plaintiffs' Memorandum of Law at p. 4).

Thus, as there is no controversy existing between the respective parties with respect to this matter, this Court does not have subject matter jurisdiction to render a declaratory judgment and the First cause of action hereby **dismissed** (***Nasa Auto Supplies, Inc. v 319 Main Street Corp.***, 133 AD2d 265, 2nd Dept., 1987, ***supra***).

The plaintiffs' second cause of action seeks a declaratory judgment that "KC is not entitled to share in the revenue received by Open Access from the sale of Ethernet if the transport is by an through the 'Open Access System' and a declaration of what routes are part of such "Open Access System'" (*see* Amended Verified Complaint at ¶¶55-60). Here, the plaintiffs allege that the defendant has improperly "taken the position that certain fiber optic routes are part of the KC system" and have improperly demanded revenue sharing payments in connection thereto, when, in fact, such routes are part of the Open Access system and thus exempt from revenue sharing.

Counsel for the defendant argues that the express terms contained in Second Amended Agreement clearly provide that the defendant is entitled to receive revenue sharing payments from Open Access, for Ethernet Transport, defined as "the ability to physically deliver or the act of physically delivering bits of data between two points". (see Second Amended Agreement at section 1.40), which involves the use of the KC system. Specifically, counsel relies upon §6.1 of the Second Amended Agreement, which provides the following:

> "In exchange for KC's performance of the obligations set forth in this Agreement, and for access to KC's infrastructure and facilities as provided for herein, Open Access shall pay to KC, on a monthly basis and within thirty (30) days after receiving revenue from a customer, fifty percent (50%) of Open Access' Gross Receipts for the sale of Ethernet Transport."

Counsel further relies upon section 1.19 of the Second Amended Agreement, wherein the term "Gross Receipts" is defined as "Gross Sales billed and actually received from a customer for the sale of services" and the term "Gross Sales" is in turn defined as "all sales revenues generated by use of the KC system pursuant to this Agreement".

In opposition, counsel for Open Access argues that the plaintiffs have sufficiently plead a cause of action for a declaratory judgment and the application should be denied; and relies upon different language, which is also contained in section 1.19 of the Second Amended Agreement, which expressly provides "Services of any kind that are provided by OA [Open Access] to its customers that do not use the KC System for Transport are not included in Gross Sales or Gross Receipts and are not subject to revenue sharing." (*see* Plaintiffs' Memorandum of Law in Opposition to Defendants Motion to Dismiss at pp. 6-10). Counsel stresses that there a genuine controversy which exists between the parties herein given their reliance upon separate sections of the Second Amended Agreement warranting denial of the defendant's motion.

A review of the disparate positions espoused by the respective parties herein quite plainly reveals a controversy, and according this Court's jurisdiction is properly invoked (CPLR§3001; (***Nasa Auto Supplies, Inc. v 319 Main Street Corp.***, ***supra***; ***American New Co. v Avon Publishing Co.***, 283 AD 1041, 2nd Dept., 1954; ***Metropolitan Package Store Association, Inc. v Koch***, 89 AD2d 317, 2nd Dept., 1982). However, upon a careful review of the above-cited provisions the Court finds that the plaintiff is not entitled to a declaratory judgment as is herein requested.

Here, as noted above, the plaintiffs seek a declaratory judgment that "KC is not entitled to share in the revenue received by Open Access from the sale of Ethernet if the transport is by an through the 'Open Access System' and a declaration of what routes are part of such "Open Access System.'" (*see* Amended Verified Complaint at ¶¶55-60). However, whether data transport is through the Open Access System is not the determinative factor as to whether the revenue sharing obligation is triggered. Rather, pursuant to the express terms of the Second Amended Agreement, the obligation of Open Access to share revenue with the defendant is triggered by Open Access' "use of the KC system."

In the instant matter, counsel for the plaintiffs concedes that data transported "can and does" travel over both the Open Access System and the KC system. Thus, for this Court to declare that data which travels over the Open Access System is exempt from revenue sharing would be to render a declaration which does not reflect the express terms of sections 1.19 and 6.1 of the Second Amended Agreement.

Therefore, given the controversy that exists between the parties herein with respect to the interpretation of the Agreements, this Court's jurisdiction is properly invoked and accordingly declares that, pursuant to the terms of 1.19 and 6.1 of the Second Amended Agreement, KC is entitled to revenue sharing payments for Open Access' use of the KC system.

Plaintiff, Open Access, alleges that the defendant has served upon it a notice to conduct an audit, which improperly sought confidential customer and pricing information to which it is not entitled. Accordingly, the plaintiffs' seventh cause of action seeks a judgment from this Court "declaring that KC's right to audit Open Access' records is limited to what is prescribed in Section 5.6 of the Agreement." (*id.* at ¶99).

Section 5.6 of the Second Amended Agreement, to which the plaintiff refers, provides in relevant part, "KC . . . shall have the right to audit the books, and records, including customer invoices or other documents of Open Access directly related to KC's remuneration pursuant to this Agreement" (*see* Johnson Affirmation in Support at Exh.1). Further, section 5.3 of the Second Amended Agreement provides, in relevant part, "in instances where Open Access provides Transport and Value-Added Services to customers, Open Access' invoices to such customers shall clearly delineate between the charges for Transport and Value-Added Services." (*id.*).

In support of the within application seeking dismissal of the complaint, defense

counsel argues, and this Court agrees, that were Open Access permitted to withhold customer and pricing information, such would directly impede the defendant's right to determine whether it had been correctly remunerated for Open Access' use of the KC system (*see* Defendants Memorandum of Law in Support of Motion to Dismiss at pp. 20-22). The fact that section 5.3, as cited hereinabove, particularly distinguishes between Transport services, in respect to which the defendant has a right to receive revenue sharing payments under the Second Amended Agreement, and Value-Added services, to which the defendant does not possess such a right, indicates the intent of the parties to insure that KC was able to properly determine if it had been properly compensated under the revenue sharing provisions as are contained in sections 1.19 and 6.1 of the Second Amended Agreement.

Once again, given the controversy as exists between the parties as to the interpretation of the audit provisions contained in the Second Amended Agreement, this Court hereby retains jurisdiction over the matters herein raised and hereby declares that the defendant is entitled to audit Open Access' records in accordance with the provisions as embodied in Article 5 of the Second Amended Agreement (***Lanza v Wagner***, 11 NY2d 317, 1962, ***supra***).

The plaintiffs' eighth cause of action seeks a declaratory judgment stating that "Open Access has the right to perform, or have its designee perform, any and all work on the Open Access System including splicing, rearrangements and any other modifications or additions, and that KC shall provide and shall not deny access to perform such work." (*see* Amended Verified Complaint at ¶¶101-107). Open Access alleges that the defendants, in direct contravention of §2.5 (G) of the Second Amended Agreement, improperly insist that it "must perform *all* splices for *all* fibers installed under the Agreement (even those that are not part of the KC system), and will charge Open Access a price in excess of what it costs Open Access to perform" [*sic*]. (*id.* at ¶103).

In moving for dismissal of the eighth cause of action, counsel for the defendant contends that §2.5 (G), upon which Open Access relies, expressly prohibits the plaintiff from performing work on fiber strands within cables, which are part of the KC system.

Section 2.5(G) provides, ***inter alia***, "all work on the KC system including splicing rearrangements and any other modifications or additions shall be preformed solely by KC or its designee. . ." In the instant matter, as adduced for the record, the fiber optic strands allocated to Open Access are situated within cables, which were constructed by KC. Pursuant to §1.23 of the Second Amended Agreement, such cables are part of the "KC

system."

Therefore, while a controversy exists between the parties as to the proper interpretation of §2.5 (G), the allegations as contained in the Amended Verified Complaint and the plain terms of §2.5 (G), do not support the plaintiffs' Eighth cause of action.

Accordingly, the Court hereby declares that the plaintiff is not entitled to conduct any work on fiber optic strands which are located in cables within the KC system ***(Maurizzio v Lumbermans Mutual Casualty Co.***, 73 NY2d 951, 1989, ***supra***).

Plaintiffs' ninth cause seeks a judgment from this Court that the release, as is contained in section 2.9 of the Second Amended Agreement, is null and void as same was procured by the defendant via fraud, wrongful concealment and various breaches of the Agreements.

Section 2.9 states "Upon the Effective Date, the parties each agree to irrevocably and unconditionally waive, release and discharge the other party from any and all claims relating the Route Costs for all Fiber Optic Routes constructed pursuant to the Original Agreement of the First Amended Agreement" (*see* Johnson Affirmation in Support at Exh. 1).

Counsel for the plaintiff contends that, pursuant to the "special facts" doctrine, the defendant, who was in exclusive possession of certain facts with respect to the fiber optic routes it constructed, was under a duty to disclose same. Particularly, counsel argues that, prior to the execution of the release, KC was in "sole and exclusive possession of all information regarding the fiber optic routes that it constructed and the fibers it converted for itself by using plaintiffs' money" (*see* Amended Verified Complaint at ¶111). Notwithstanding said obligation to disclose such information, counsel asserts that the defendant wrongfully concealed said information from Open Access and that such concealment on the part of the defendant warrants a declaration from this Court that the subject release is null and void. Counsel additionally posits that "there was no opportunity for Open Access to conduct any due diligence on these matters" and was rather "required to rely on KC".

In the absence of a fiduciary relationship, a duty upon one party to disclose certain facts to the other is triggered under the "special facts" doctrine where " 'one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair'"

(***Swersky v Dreyer & Traub***, 219 Ad2d 321, 1st Dept., 1996; quoting ***Chiarella v United States***, 445 US 222, 1980). In order for the doctrine to be applied to a particular circumstance, the following two elements must be satisfied: the material facts alleged to have been withheld are within the exclusive knowledge of the party charged with non-disclosure and the information could not have been discovered through the "exercise of ordinary intelligence" (***Black v Chittenden***, 69 NY2d 665, 1986 (citations omitted); ***Jana v West 129th Street Realty Corp.***, 22AD3d 274, 1st Dept., 2005).

Here, while Open Access claims that it was not afforded any opportunity to conduct any due diligence, such an explanation for failing to do so is insufficient for the invocation of the doctrine. Open Access is a sophisticated business entity, and given such status, is held to a heightened standard to employ whatever means are available to it to determine the veracity or lack thereof as to the information upon which they rely and to undertake "due diligence" in such endeavor (*see, generally,* ***Big Apple Consulting USA v Belmont Partners, LLC***, 20 Misc 3d 1144, NY Sup 2008). In the instant matter, Open Access has failed to demonstrate that it employed due diligence and cannot claim justifiable reliance upon the defendant's alleged incomplete disclosure (*id.*; *see also* ***McGuire Children, LLC v Huntress***, *24 Misc 3d 1202,* NY Sup 2009).

With respect to this cause of action there is a controversy between the parties upon which this Court can exercise jurisdiction (***Maurizzio v Lumbermans Mutual Casualty Co.***, 73 NY2d 951, 1989, ***supra***). However, based upon the foregoing, this Court finds that the plaintiff is not entitled to a declaration as is requested herein, and hereby declares that the release, as is contained in 2.9 of the Second Amended Agreement, is hereby valid and enforceable as against Open Access.

Plaintiff has interposed a third cause of action for specific performance alleging that under the Agreements, the defendant is obligated but has failed "to provide Open Access with detailed descriptions of the fiber optic routes (including but not limited to mappings of the routes, termination point and connection points)." (*see* Amended Verified Complaint at ¶¶61-65). As a result, the plaintiff commenced the within action for Specific Performance and "for an order directing KC to specifically perform it's obligations" under the Agreements (*id.*).

In moving for dismissal of the third cause of action, counsel for the defendant contends that *all* of the plaintiffs' contract based claims, including that for breach of contract

and specific performance, must be dismissed for failing to provide the defendant with proper pre-action notice and an opportunity to cure any alleged defaults as is required by the Second Amended Agreement. Counsel contends that, while the plaintiff has annexed various notices to the opposing papers which pre-dated the commencement of the within action, none of the purported notices "clearly state that Light Tower has defaulted under the Second Amended Agreement or afford it an opportunity to cure the default within the contractually provided cure period" (*see* Defendant's Reply Memorandum of Law at pp.4,5). Counsel further avers that the alleged notices were not sent in compliance with section 29.1 of the Second Amended Agreement (*id.*).

Counsel for the plaintiff argues that various pre-action notices were sent to the defendant "well before the case started" and annexes to the opposing affidavit various communications which counsel asserts were "more than sufficient to put defendant on notice" that it was violating the Agreements (*see* Plaintiff's Memorandum of Law in Opposition at pp. 2,3). Of the pre-action notices sent to the defendant, same appear to include various emails dated December 9 and 11, 2008, January 29 and 30, 2009 and February 5, 12 and 20, 2009. All of these emails were authored by Steven Winnick, Esq., counsel to both the named plaintiffs herein. Additionally, the record indicates that on March 31, 2009, Mr. Winnick directed a letter to Ms. Leslie Brown, Esq., who serves as General Counsel to Light Tower.

Section 24.1 of the Second Amended Agreement provides, in pertinent part, that "Neither party shall be in default under this Agreement, or in breach of any provision hereof unless and until the non-defaulting party gives the defaulting party written notice of such breach and the defaulting party fails to cure the same with 30 days after receipt of such notice." Said sections goes onto provide that "Upon the failure by the defaulting party to timely cure any such breach after notice thereof from the non-defaulting party, the non-defaulting party shall have the right to (i) terminate this Agreement without penalty or (ii) take such action as it may determine, in its sole reasonable discretion, and at the defaulting party's reasonable cost, to be necessary to cure the breach (*see* Johnson Affirmation in Support at Exh. 1). Further, section 29.1 of the Second Amended Agreement provides that "Any written notice under this Agreement shall be deemed properly given if sent by registered or certified mail, postage prepaid, or by recognized overnight delivery service or by facsimile" (*id.*). With respect to notices of default sent to the defendant, said section requires that same are to be sent to the attention of "Jason Cohen, Vice President" (*id.*).

In the instant matter, the within action was commenced on April 2, 2009. Thus,

according to Section 24.1, it was incumbent upon the plaintiffs to provide the defendant with notice of its alleged defaults and with time in which to remedy same prior to taking "any such action as it may determine", which in this instance was the commencement of the underlying action. Here, with respect to the emails sent to the defendant, quite clearly none of them were sent in accordance with the mailing provisions embodied in section 29. 1, and with respect to the letter dated March 31, 2009, same was not directed to Mr. Cohen, as is plainly required by the terms this section of the Second Amended Agreement. Thus, as the plaintiffs have failed to plead and demonstrate that they have complied with the terms of the notice requirements quite clearly contained in Second Amended Agreement, the plaintiffs' causes of action, predicated upon contract claims, are premature and cannot be presently maintained (***J.T.M Group Inc. v Fleischman***, 2001 WL 1665333, NY App Term, 9th & 10th Jud Dists; ***Day Op of North Nassau Inc. v Viola***, 16 Misc 3d 1122). Accordingly, the plaintiffs' third cause of action is hereby **dismissed** (CPLR §3211[a][1]).

The plaintiffs' fourth cause of action sounds in breach of contract and is predicated upon the defendant's alleged breach of the Second Amended Agreement by improperly demanding and subsequently receiving certain revenue sharing payments and inflated costs attendant to the construction of the fiber optic routes. With particular regard to revenue sharing, the plaintiff contends that "Open Access overpaid KC in excess of $299,574.44".

In support of the within application seeking dismissal of the complaint, counsel for the defendant relies upon the above referenced section 6.1 as contained in the Second Amended Agreement. As noted above, counsel posits that said section expressly provides that the defendant is entitled to receive payment as to revenue sharing for Ethernet Transport which involves use of the KC System.

In opposing the within application, counsel for Open Access contends that while the defendant is "entitled to share in revenue received by Open Access from the sale of Ethernet Transport through certain fiber optic routes", section 1.19 of the Second Amended Agreement demonstrates that if such Transport is "exclusively through the Open Access System" KC is not entitled to any revenue sharing payments (*see* Plaintiffs' Memorandum of Law in Opposition at p.6; *see also* Plaintiff's Sur-Reply Memorandum of Law at p. 3).

As to the construction costs, as articulated in the Verified Amended Complaint, Open Access alleges that between December 2001 and June 2007, it paid to KC the sum of $8,000,000 to construct fiber optic routes, the funding for which was provided to Open Access by Topspin. Counsel for the defendant contends that all such claims must be

dismissed in accordance with the above referenced release as is contained in section 2.9 of the Second Amended Agreement.

In opposing the defendant's application, counsel contends that the plaintiffs did not waive any and all claims relating to construction costs as the routes were not constructed in accordance with the Original or First Amended Agreement, but were rather improperly constructed by KC for its own benefit and with money belonging to the plaintiffs.

In consideration of this Court's determination, as stated hereinabove, that the plaintiffs' contract claims cannot be presently maintained, the within cause of action sounding in breach of contract is **dismissed** (CPLR §3211[a][1]). However, putting aside the issue as to prior notice, the Court notes that with particular respect to the claims for construction costs, same would have been dismissed in any event, given this Court's decision declaring the validity of the release.

The fifth cause of action sounds in conversion in that Open Access alleges that, as to those fiber optic routes constructed, it paid "substantially all" or "materially more" than the total costs attendant to the fiber optic routes which were constructed and that "KC billed Open Access for amounts in excess of what was actually due under the Agreement for the purpose of converting the plaintiffs' monies, the labor paid for by the plaintiffs' monies for its own benefit, and to build and improperly convert fiber strands." (*see* Amended Verified Complaint at ¶¶37,38,43).

In consideration of this Court's prior determination that the subject release as in contained in 2.9 of the Second Amended Agreement is valid, this Court hereby **grants** the defendant's application and the instant action alleging conversion with respect to costs attendant to the fiber optic routes is hereby **dismissed** (CPLR §3211[a][1]).

The sixth cause of action sounds in fraud in that the plaintiffs allege that KC engaged in a series of direct communications with Topspin, during which KC knowingly made false representations to induce Topspin to invest in Open Access, which in turn would pay KC to construct the routes. The plaintiffs allege that based upon such false representations, upon which Topspin reasonably relied, it contributed $20,000,000 to Open Access so that Open Access could in turn pay KC for the fiber optic routes it constructed.

Open Access additionally alleges that KC did not ultimately construct these fiber optic routes "in contravention of the Agreement and/or KC's representations", but rather employed

sub-contractors to accomplish the project and thereafter charged Open Access inflated costs in connection thereto (Amended Verified Complaint, ¶ 28). The plaintiffs allege that the conduct undertaken by the defendant was "willful, wanton and outrageous and warrants the imposition of punitive damages" (*id.* at ¶85).

At issue herein are the following statements alleged to have been made by representatives of KC to members of Topspin:

> 1. KC has its own construction crews that were expert at fiber route construction and could do so at the lowest possible cost
>
> 2. KC itself would be responsible for and actually perform the work necessary in order to assure the lowest possible cost and highest quality and workmanship
>
> 3. KC would appropriately document and account for its expenditures
>
> 4. Based upon KC's costs, investment by Topspin in fiber optic routes would yield excellent returns
>
> 5. If Topspin would commit in advance to KC to funding a substantial number of fiber optic routes by investing in Open Access, KC would be able to be even more economically efficient in its construction business and benefit both Open Access and Topspin.
>
> 6. KC could perform the construction tasks more economically than if Open Access performed the tasks itself or hired others to do it.

A cause of action sounding in fraud is comprised of the following elements: [1] the defendant made a representation as to a material fact; [2] such representation was false; [3] the defendant intended to deceive the plaintiff; [4] the plaintiff believed and justifiably relied upon the statement and was thus induced to partake in a certain course of action; and [5] the plaintiff suffered injury as a result of such reliance (***Young v Williams***, 47 AD3d 1084, 3d Dept., 2008). As a general proposition, "representations of opinion or predications of some thing which is hoped or expected will occur in the future will not sustain an action in fraud" (***Chase Manhattan Bank , N.A. v Perla***, 65 AD2d 207, 4th Dept., 1978). Further, "mere expressions of opinion of present or future expectations are not to be considered promises

when examining the issue of fraud in the inducement" (***Crossland Savings, F.S.B. v SOI Development Corp.***, 166 AD2d 495, 2nd Dept., 1990; ***A. Bella Food Corp. v Luigi's Italian Deli, Inc.***, 243 AD2d 592, 2nd Dept., 1997; ***Goldman v Strough Real Estate, Inc.***, 2 AD3d 677, 2nd Dept., 2003).

A careful review of the statements purportedly made by representatives of KC to Topspin reveals that same deal with future events, as well as the potential of future business developments which are insufficient to sustain an action for fraud (*id.; see also* ***Fitch v TMF Systems Inc.***, 272 AD2d 775, 3d Dept., 2000; 60A NY Jur 2d, Fraud and Deceit §40). Moreover, plaintiffs' alleged reliance that KC would construct the fiber optic routes without resort to the use of subcontractors is not justified when the use thereof was expressly contemplated by the parties as is evidenced by section 4.4 of the Second Amended Agreement (***Goldman v Strough Real Estate, Inc.***, 2 AD3d 677, 2nd Dept., 2003, ***supra***).

Accordingly, the Sixth cause of action sounding in fraud is hereby **dismissed** and the plaintiffs' claim for punitive damages is hereby **stricken** given the instant dismissal of the substantive claim to which it was attached (***Randi A. J. v Long Island Surgi-Center***, 46 AD3d 74, 2nd Dept., 2007; CPLR §3211[a][7]).

The plaintiffs' Tenth cause of action sounds in breach of the implied covenant of good faith and fair dealing. A review of the complaint reveals that the plaintiffs allege "by engaging in the conduct described herein, KC has breached the implied covenant of good faith and fair dealing"(*id.* at ¶122). As such action is clearly duplicative of the breach of contract action, same is accordingly **dismissed** (***Engelhard v Corp. v Research Corp.***, 268 AD2d 358, 1st Dept., 2000; ***Jacobs Private Equity, LLC v 450 Park LLC***, 22 AD3d 347, 1st Dept., 2005).

All applications not specifically addressed herein are **denied**.

This constitutes the decision and order of the Court.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

Dated DEC 15 2009

XXX J.S.C.

ENTERED

DEC 24 2009

COUNTY CLERK'S OFFICE