

**Visionchina Media Inc. v Shareholder
Representative Servs., LLC**

2011 NY Slip Op 33689(U)

October 12, 2011

Sup Ct, NY County

Docket Number: 652390/10

Judge: Charles E. Ramos

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[* 1]

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

PRESENT: CE Ramos
Justice

PART 53

Shareholder Representative Services, et al.
- v -
Neuroline Medic, Inc, et al.

INDEX NO. 650526/11
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...

Answering Affidavits – Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE 001

in the related action 652390/10

Dated: 10/22/11

Charles E. Ramos
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

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

PRESENT: [Signature]
Justice

PART 53

Index Number : 652390/2010
VISIONCHINA MEDIA INC.
vs.
SHAREHOLDER REPRESENTATIVE
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

This motion is for/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

is decided in accordance with
accompanying memorandum decision and order.

Dated: 10/12/11

[Signature]

CHARLES E. RAMOS ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----x
VISIONCHINA MEDIA INC. and VISION BEST
LIMITED,

Index No. 652390/10

Plaintiff,

-against-

SHAREHOLDER REPRESENTATIVE SERVICES, LLC,
GOBI PARTNERS, INC., GOBI FUND, INC.,
GOBI FUND II, L.P., OAK INVESTMENT PARTNERS
XII, L.P., SIERRA VENTURES IX, L.P., NIFSMBC-
V2006S1 INVESTMENT LIMITED PARTNERSHIP,
NIFSMBC-V2006S3 INVESTMENT LIMITED
PARTNERSHIP, THOMAS GAI TEI TSAO, and
JOHN DOES 1-10,

Defendants.

-----x

Charles Edward Ramos, J.S.C.:

In motion sequence 01 in the action entitled *Visionchina Media Inc. et al v Shareholder Representative Services, LLC* (652390/10) (Visionchina Action), defendants (together, the Sellers¹) move to dismiss the complaint of plaintiffs Visionchina Media Inc. and Vision Best Limited (together, the Buyers or Visionchina) in its entirety pursuant to CPLR 3211 (a) (1), and (7).

In motion sequence 02, the Sellers also move to dismiss the complaint on the basis of CPLR 3016 (b).

¹ In the Visionchina Action, the Sellers are all named defendants: Shareholder Representative Services, LLC; Gobi Partners, Inc., Gobi Fund, Inc., Gobi Fund II, L.P.; Oak Investment Partners XII, L.P.; Sierra Ventures IX, LP; and Thomas Gai Tei Tsao. Defendants NIFSMBC-V20006S1 Investment Limited Partnership and NIFSMBC-V2006S3 Investment Partnership have not appeared in this action.

In the related action entitled *Shareholder Representative Services, LLC, et al v Visionchina Media Inc., et al* (650526/11) (Shareholder Representative Action), the Sellers, plaintiffs in the Visionchina Action), move in motion sequence 01 for an order of attachment of Visionchina's assets pursuant to CPLR 6201 (1).

In motion sequence 02 in the Shareholder Representative Action, certain of the Sellers (Oak Investment Partners XII, Limited Partnership, Gobi Partners, Inc., Gobi Fund, Inc., and Gobi Fund II, L.P. [together, the DMG Shareholders]), join in the motion for an attachment, and separately move for a preliminary injunction enjoining Visionchina from: (1) violating Visionchina's covenant contained in certain shareholder agreements to remove the restrictive legend on Visionchina stock (the Initial Shares); (2) withholding any other consents or authorizations required to convert the Initial Shares to American Depository Shares; and (3) otherwise preventing the Initial Shares from becoming freely tradable.

In motion sequence 04 in the Shareholder Representative Action, the Sellers move to dismiss Visionchina's counterclaims pursuant to CPLR 3211 (a) (1), (5), (7).

The motions in both actions are consolidated for disposition.

Background²

This action arises out an alleged scheme by the Sellers to fraudulently induce Visionchina to acquire by merger (Merger) Digital Media Group Company Limited (DMG) through false statements repeated throughout the period of due diligence and negotiation of the Merger. The Sellers assert that Visionchina, a sophisticated company, is asserting baseless claims for fraud in an attempt to avoid making the required payments under the Merger Agreement, while simultaneously retaining the DMG's assets and business.

Visionchina purports to be one of China's largest out-of-home digital mobile television advertising networks. It uses digital mobile technology to deliver advertising content to displays on public transportation systems across China.

DMG operates a digital media advertising network, and sells advertisements featured on a network of television screens displayed on public transportation in cities across China and Hong Kong. Prior to the Merger, the DMG Shareholders, comprised largely of Cayman venture capitalists, owned approximately three-quarters of DMG's shares. Thomas Gai Tei Tsao, an individually-named defendant in the Visionchina Action, is a founding partner

² The facts set forth in this section are from the parties' pleadings and affidavits, except where noted.

of Gobi Partners, Inc. and also served as the CEO of DMG immediately prior to the Merger.

In the summers of 2008 and 2009, the DMG Shareholders approached Visionchina concerning their desire to sell DMG. They purportedly represented that DMG's financial condition had been significantly improving. DMG rejected Visionchina's initial offer of purchase for \$120 million, which Tsao indicated was too low in light of DMG's improving condition.

On September 26, 2009, the parties signed a letter of intent (LOI), which set forth the principal terms and conditions of the proposed acquisition by Visionchina of all of DMG's assets and market share for the increased price of \$160 million, to be paid partly in cash and partly in common shares of NASDAQ-traded DMG stock. The closing of the Merger was subject to customary due diligence, which was to last 21 days.

The LOI included a provision requiring that either party pay a penalty of \$5 million if it "materially changes the terms on which an Acquisition would occur." The LOI included an exception to this provision due to a material change or withdrawal from the agreement coming "as a result of due diligence findings that would have a material adverse effect on the operation and financial condition" of DMG.

On October 4, 2009, Visionchina began its due diligence. The following day, representatives from Visionchina met with Tsao

and DMG's CFO, Terrence Tong, at the DMG Shareholders' offices in Shanghai. At that meeting, Tsao and Tong discussed DMG's management accounts for the first eight months of 2009 (Management Accounts). DMG's September 2009 financials were not included in the Management Accounts. Tsao and Tong purportedly told Visionchina that DMG's results for the third full quarter of 2009 would show a total revenue of between RMB 54 million and RMB 60 million. They also allegedly indicated that DMG's revenue for September 2009 was much higher than it had been, and would definitely lead DMG's revenue to meet or exceed its costs and expenses for the month of September, which would also continue into the fourth quarter.

According to Visionchina, these representations were material in its decision to acquire DMG at the price of \$160 million. In reliance upon these representations, Visionchina entered into an agreement for the Merger, dated October 15, 2009, followed by an amended and restatement agreement, dated November 16, 2009 (Merger Agreement), the date on which the transaction closed (Closing Date).

The Merger Agreement had an effective time (Effective Time) of January 2, 2010, and expressly provided that either party could terminate the agreement prior to the Effective Time under certain conditions, and even by mutual written consent without penalty (Merger Agreement, § 6.1 [a]).

Between the Closing Date and Effective Time, DMG was to "use commercially reasonable efforts to cooperate with" Ernst & Young in order to permit it to review the [2009] [M]anagement [A]ccounts" (Merger Agreement, § 4.14).

The payment schedule was as follows: (1) \$100,000,000 to be paid at the time of closing, consisting of \$40,000,000 in cash, and 8,476,013 of ordinary shares of Visionchina; (2) \$30,000,000 on the first anniversary of the Closing Date (November 16, 2010), consisting of \$20,000,000 in cash and \$10,000,000 in either cash or ordinary shares of Visionchina at the DMG Shareholders' option; (3) and an equal installment on the second anniversary of the Closing Date.

The Merger Agreement also contains an indemnity clause which requires the DMG Shareholders to indemnify Visionchina for damages and defined losses arising out of or relating to any inaccuracies or breach of the Sellers' express representations and warranties, subject to the delivery of a "claim notice" (Claim Notice) by November 16, 2010 (Merger Agreement, §§ 7.2 [a]; 7.5 [a]). This indemnification procedure was to be Visionchina's "exclusive post-closing remedy" (Merger Agreement, § 7.8).

The Merger Agreement also provided for the creation of an indemnity fund, in which Visionchina deposited \$10 million of the initial consideration (Merger Agreement, § 1.9 [c]). Visionchina

was obligated to release the initial consideration from the fund on the first anniversary of the Closing Date, less any amounts noticed for indemnification (*Id.*, 7.4 [b]).

On December 24, 2009, after the Closing Date but before the Effective Date, DMG sent Visionchina, as required by the Merger Agreement, the unaudited interim condensed consolidated financial statements for the Management Accounts (covering January 1, 2009 through August 31, 2009), which had been prepared by Ernst & Young (EY Report). According to Visionchina, the EY Report revealed for the first time that DMG's total revenue for the first eight months of 2009 were much lower and net loss greater than that represented by the Sellers. This information purportedly undermined the Sellers' representations that DMG would begin turning a profit for the last four months of 2009 and in 2010, and made clear that DMG was actually on a downward, rather than upward, trend. Nonetheless, Visionchina did not attempt to terminate the agreement prior to the Effective Time, nor did it raise its concerns as to DMG's financial outlook subsequent to this revelation for another year.

On November 16, 2010, the eve of the first anniversary of the Closing Date, Visionchina delivered a Claim Notice to the Sellers seeking to preserve claims for indemnification pursuant to Section 7.2 (a) of the Merger Agreement (Exhibit D, annexed to the Morton Aff.). The Claim Notice stated the basis for the

indemnification claim was the overstatement of revenue and accounts receivables in the Management Accounts, a portion of which was reversed and written off in the EY Report. It also stated that this constituted a breach of section 2.6 (a), which required that the Management Accounts be prepared in accordance with GAAP (Exhibit D, annexed to the Morton Aff.). In response, the Sellers served an objection notice.

In December 2010, Visionchina commenced the Visionchina Action, and asserts causes of action for fraud and conspiracy to defraud against the DMG Shareholders, breaches of contract and unjust enrichment against all defendants. Visionchina seeks restitution in the amount of \$100,000,000, and a declaration that it is not obligated to make any further payments under the Merger Agreement.

In February 2011, the Sellers commenced the Shareholder Representative Action against Visionchina seeking to enforce the Merger Agreement and for damages for Visionchina's failure to make requirement payments thereunder. The Sellers assert causes of action for breach of contract and anticipatory breach, and breach of the covenant of good faith and fair dealing. Visionchina asserts as counterclaims in the Shareholder Representative Action the identical claims it asserts in the Visionchina Action in addition to a counterclaim for breach of

contract arising out of the Sellers' alleged destruction of electronically stored material on DMG's servers.

I. Visionchina Action: Motion to Dismiss by the Sellers

In the Visionchina Action, the Sellers move to dismiss the first and fourth causes of action for fraud and declaratory judgment on the ground that they are precluded by the Merger Agreement. They also assert that the cause of action for breach of contract is defective because Visionchina failed to properly notice the breach pursuant to the agreement's indemnification provisions.

In opposition, Visionchina asserts that the Merger Agreement's one-year deadline for providing notice of indemnification claims is not a barrier to its adequately pled fraud cause of action because it does not arise from any of the indemnified matters listed in the Merger Agreement, but rather is based on extra-contractual representations made by the Sellers during due diligence. To this point, Visionchina asserts that it sufficiently alleges a pre-contractual pattern of intentional misrepresentations by the DMG Shareholders with respect to DMG's expected and historical financial returns that are independent from the representations and warranties contained in the Merger Agreement. In any event, Visionchina asserts that the fraud cause of action is preserved by the Claim Notice dated November 16, 2010.

The Merger Agreement contains specific indemnification procedures, which afforded Visionchina one year from the first anniversary of the Closing Date in which to assert an objection or claim relating to defined "Losses."³ This indemnification procedure was the "exclusive post-closing remedy" for raising any claims or objections for Losses "arising out of or resulting from this Agreement and the transactions contemplated hereby," including inaccuracies or fraud contained in the representations and warranties (Merger Agreement, §§ 7.2 [a], 7.3 [b], 7.5 [a]; 7.8).

Where sophisticated parties establish contractual indemnification procedures under which they agree to limit their liability exclusively to certain remedies, disputes that fall within those provisions must be resolved in the manner specified (see e.g. *Matter of Westmoreland Coal Co. v Entech Inc.*, 100 NY2d 352 [2003]; *Lincoln Snacks Holding Co. v Brynwood Partners III L.P.*, 8 Misc 3d 1023[A] [Sup Ct, NY County 2005]).

Considering the Merger Agreement "as a harmonious and integrated whole," the indemnification provisions contained therein afford a "complete, comprehensive remedy," indeed it is

³ Losses is defined as "all amounts, payments, losses, damages, claims, demands, actions or causes of action, Taxes liabilities, costs and expenses ... arising out of, resulting from or relating to ... any inaccuracy in or breach of any of the representations and warranties ... contained in this [Merger Agreement]" (Merger Agreement, § 7.2 [a]).

the "exclusive post-closing remedy," for any and all claims that relate to the representations and warranties (see *Matter of Westmoreland Coal Co.*, 100 NY2d 352). Considering Visionchina's allegations of fraud which largely relate to DMG's financial statements and specifically, the 2009 Management Accounts, and the representations and warranties contained in the agreement, it is evident that Visionchina's fraud cause of action falls squarely within the Merger Agreement's indemnification provisions.

For instance, Visionchina alleges that the DMG Shareholders misrepresented:

(a) that DMG was reaching profitability, "earning a monthly profit in September 2009, and on target to reach sustainable profitability by the fourth quarter of 2009;

(b) DMG's business had improved since the projections contain in the 2008 Management Presentation and, because of these improvements, the company's performance in 2009 and succeeding periods than previously projected;

(c) DMG's net losses for the first eight months of 2009 [covered in the Management Accounts] totaled only RMB 50.1 million; and

(d) DMG had earned revenue of RMB 29 million in July and August 2009 combined and expected to earn revenue for the third quarter of 2009 totally between RMB 54 million and RMB 60 million" (Complaint, § 60).

As to the 2009 financials,⁴ the Sellers represented in the Merger Agreement that the unaudited consolidated balance sheet as of August 31 and the Management Accounts (covering January 1, 2009 through August 31, 2009):

"[I]n all material respects (x) have been properly extracted from the accounting records, (y) were prepared in a manner consistent with prior unaudited interim financial statements and (z) were prepared in accordance with GAAP, subject to normal recurring year-end adjustments and the absence of notes, which will not be material in amount of significance in the aggregate" ... [T]he books of account and financial records ... are true and correct in all material respects and have been prepared and are maintained in accordance with sound accounting practice" (Merger Agreement, § 2.6 [a]).

Because the allegations of fraud fall within the indemnification provisions, it must be resolved in accordance with the manner specified in the agreement and noticed by the first anniversary of the Closing Date (Merger Agreement, § 7.1). Insofar as Visionchina's Claim Notice⁵ concededly did not include

⁴ The Sellers also represented that the Audited Financial Statements of 2006-2008 "have been prepared in all material respects in accordance with GAAP and (...) fairly presented in all material respects the financial condition, the results of operations ... and cash flow" (Merger Agreement, § 2.6 [a]).

⁵ The Claim Notice reserves a claim for breach of section 2.6 (a) of the Merger Agreement arising out of: (1) \$441,540 in losses resulting from the Sellers' alleged material overstatement in the accounts receivable record in the Management Accounts; (2) \$2,344,093 in losses resulting from the Sellers alleged undisclosed overstatement in revenues and accounts receivables recorded in the Management Accounts, which amount was reversed and written off in the EY Report; and for the alleged breach of section 2.6 (a) of the Merger Agreement which states that the Management Accounts were prepared in accordance with GAAP (Claim

any allegations of fraud, the cause of action was not timely preserved and thus, cannot now be raised.

Notwithstanding the clear application of the indemnification provisions to the fraud cause of action, Visionchina fails to allege a misrepresentation that is collateral to the representations and warranties contained in the Merger Agreement. To sustain a cause of action for fraudulently inducing a party to contract, the plaintiff must allege a representation that is collateral to the contract, not simply a breach of a contractual warranty, and damages that are not recoverable in an action for breach of contract (*RGH Liquidating Trust v Deloitte & Touche LLP*, 47 AD3d 516, 517 [1st Dept], lv dismissed 11 NY3d 804 [2008]).

The allegations of fraud clearly relate to the purported overstatement of the Management Accounts and DMG's financial condition in 2009, which are the subject of a portion of the representations and warranties contained within the agreement (Merger Agreement, § 2.6). To this extent, the fraud cause of action is in essence a breach of contract cause of action.

The fraud claim is also defective for failure to allege the elements of both fraudulent intent (other than in conclusory fashion), and reasonable reliance. "New York law imposes an affirmative duty on sophisticated investors to protect themselves

Notice, Exhibit D, annexed to the Morton Aff.).

from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring" (*Global Minerals and Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006]). "When the party to whom a misrepresentation is made has hints of its falsity, a heightened degree of diligence is required of it" (*Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 279 [2011]).

Visionchina's inability to establish the element of reasonable reliance, essential to a cause of action for fraud, is evident from the fact that, not only is it a sophisticated business entity, but it was provided with financial information relevant to the Merger (the EY Report), whereupon it purportedly discovered the falsity of the Sellers' oral representations regarding the overstated Management Accounts and 2009 financial condition. The revelation of the Sellers' falsity occurred prior to the Effective Time of the Merger (Complaint, ¶ 48).

The Effective Time is the date on which the Merger became effective (January 2, 2010) (Merger Agreement, §1.4). After Closing but prior to the Effective Time, Visionchina could have required the Sellers to confirm the financial information, and even have taken steps to terminate the agreement without penalty due to the discovery that certain representations and warranties were "untrue or inaccurate" (see Merger Agreement, § 6.2).

Nonetheless, Visionchina took no action to verify the true nature of DMG's financial condition, and elected to proceed with the Merger, whereupon it took possession of DMG's assets and waited an entire year before asserting that the oral representations regarding the Management Accounts and DMG's 2009 financial condition were false by the commencement of this action.

"As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification available to it" (*Valassis Communications v Weimer*, 304 AD2d 448, 448-49 [1st Dept 2003], *lv denied* 2 NY3d 794 [2004]; see also *Centro Empresarial Cempresa S.A.*, 17 NY3d at 278-79).

Finally, the Merger Agreement contains an integration clause which states:

"This Agreement and the Ancillary Documents (...) constitute the entire agreement and supercede all prior agreements and undertakings (...), both written and oral among the parties, or any of them, with respect to the subject matter hereof and thereof" (Merger Agreement, § 8.6).

In light of this integration clause prohibiting Visionchina's reliance on pre-contractual oral promises upon which its claim is based,⁶ in addition to its inability to

⁶ A plaintiff cannot detrimentally rely on representations which are outside the agreement's terms where there is an

establish reasonable reliance, its failure to allege representations collateral to the Merger Agreement, and otherwise to assert an actionable fraud, it is plain that Visionchina is unable to maintain a viable cause of action for fraud.

Correspondingly, Visionchina is not entitled to the declaration that it seeks to the effect that the Sellers are not entitled to further payments under the Merger Agreement as a result of their fraud. Accordingly, the Sellers' motion to dismiss the first and fourth causes of action is granted.

Visionchina also asserts a cause of action for breach of contract arising out of inaccuracies of several contractual representations and warranties, which it contends was sufficiently preserved under the indemnification provisions of the agreement by its Claim Notice. The Sellers argue that the content of the Claim Notice fails to comply with the requirements of the Merger Agreement, and on this basis, should be dismissed.

The Sellers fail to persuade that the Claim Notice does not adhere to the content requirements of section 7.5 (a) of the Merger Agreement. It appears from the face of the Claim Notice that Visionchina properly preserved its indemnification claim by timely sending the requisite notice. Because the documentary evidence does not conclusively establish the Sellers' defense as

integration clause that specifically states that it constitutes the entire agreement of the parties (*Valassis Communications*, 304 AD2d at 448-49).

a matter of law (see *Correa v Orient-Express Hotels, Inc.*, 84 AD3d 651 [1st Dept 2011]), the breach of contract cause of action remains viable.

Nonetheless, the cause of action for unjust enrichment fails in light of a valid and enforceable agreement governing the same subject matter (*Ellington v Sony/ATV Music Publishing LLC*, 85 AD3d 438, 438 [1st Dept 2011]).

II. Shareholder Representative Action

A. Motion for an Order of Attachment by the Sellers

The Sellers and the DMG Shareholders move for an order of attachment under CPLR 6201 (1) in aid of security on the ground that Visionchina is a foreign corporation not authorized to do business in New York.

In order to obtain the provisional remedy of attachment, a plaintiff must show that it has a cause of action, is likely to succeed on the merits, that one or more grounds for attachment provided for in CPLR 6201 exist, and that the amount demanded by the defendant exceeds all counterclaims known to the plaintiff (CPLR 6212 [a]).

Under CPLR 6201 (1), a court may order an attachment where the defendant is a non-domiciliary residing without the state, or is a foreign corporation not qualified to do business in the state.

Further, where, as here, the plaintiff seeks to levy upon defendant's property in order to conserve it for eventual execution rather than to obtain jurisdiction over a nonresident, the plaintiff must demonstrate that there is an identifiable risk that the defendant will not be able to satisfy a judgment, including by past or present conduct of the defendant (*Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d 303, 310-13 [2010]; *ITC Entertainment, Ltd. v Nelson Film Partners*, 714 F 2d 217, 220-221 [2d Cir 1983]; McKinney's Cons Laws of NY, Book 7B, CPLR C6201:2).

Visionchina, who admittedly is subject to the jurisdiction of this Court, is a foreign corporation not authorized to do business in this state, thereby satisfying the first requirement of CPLR 6201 (1). Moreover, the amount demanded in the complaint, money damages of at least \$30 million for non-payment of the first deferred payment due under the Merger Agreement and for Visionchina's failure to release the indemnification escrow account, exceeds the amount of known counterclaims.

The indemnification provisions of the Merger Agreement explicitly state that the maximum aggregate liability for any "Losses" arising out of a breach of the representations and warranties is "limited to an amount equal to the Indemnity Escrow

Account”⁷ (Merger Agreement, § 7.3 [b]). In the Shareholder Representative Action, Visionchina’s counterclaims are nearly identical to the claims it asserts in the Visionchina Action with the exception of an additional counterclaim for breach of contract stemming from the Sellers’ alleged destruction of electronic information stored on DMG’s servers. Of those claims, only the claim for breach of contract arising out of alleged inaccuracies in the representations and warranties remain viable, and any potential recovery is limited by the agreement.

Additionally, the Sellers have demonstrated that it is more likely than not that it will succeed on the merits of its claims (see *In re Amaranth Natural Gas Commodities Litig.*, 711 F Supp 2d 301, 306 [SD NY 2010]). Drawing all legitimate inferences in their favor,⁸ the Sellers make a showing that the Merger Agreement is a binding and valid contract pursuant to which Visionchina acquired DMG, which Visionchina breached by failing to pay the first and subsequent payments due thereunder.

As to whether Visionchina’s financial position and conduct pose a significant risk of enforcement of a future judgment, New

⁷ The Indemnity Escrow Amount is defined as \$4 million of the Initial Cash Consideration and 847,601 shares of the Initial Share Consideration (Merger Agreement, § 1.9 [c]).

⁸ When assessing whether the likelihood of success on the merits exists on a motion to confirm attachment, the court must give the plaintiff the benefit of every favorable inference (*In re Amaranth Natural Gas Commodities Litig.*, 711 F Supp 2d 301).

York courts have "long recognized that provisions for attachment against nonresidents are based on the assumption that 'there is much more propriety in requiring a debtor, whose domicile is without the state, to give security for the debt, than one whose domicile is within ... [T]he courts focus ... on whether there is a likelihood that the defendant will have adequate assets within the state to respond to a judgment against him'" (*ITC Entertainment, Ltd.*, 714 F2d at 220).

The Court is persuaded that, because China does not have a treaty with the U.S. providing for the reciprocal recognition and enforcement of judgments, an eventual ruling in the Sellers' favor may be prove to be worthless in the absence of a prejudgment order of attachment. To this point, the Sellers excerpt portions of Visionchina's own SEC filings wherein it acknowledges that parties "may experience difficulties ... enforcing foreign judgments or bringing original actions in China," and also notes that "substantially all of [Visionchina's] assets are located in China" (Sellers' Memo. in Supp., 20-21).

As recently stated by the Court of Appeals, "a court with personal jurisdiction over a nondomiciliary [or a foreign corporation not authorized to do business in this state] has jurisdiction over that individual's tangible or intangible property, even if the situs of the property is outside New York" (*Hotel 71 Mezz Lender LLC*, 14 NY3d at 312). Because personal

jurisdiction exists over Visionchina, this Court clearly has the authority to order attachment of its property (see *Id.*).

For all these reasons, the Sellers have satisfied both the statutory requirements and established the need for an attachment. In its discretion, the Court concludes that attachment is appropriate (see *Capital Ventures Intl. v Republic of Argentina*, 443 F 3d 214, 222 [2d Cir 2006] [the provisional remedy of attachment is a discretionary one]).

B. Motion for a Preliminary Injunction by the DMG Shareholders

The DMG Shareholders separately move for a preliminary injunction and seeking to enjoin Visionchina from violating its covenant in certain shareholders agreements to remove the restrictive legend on the Visionchina stock owned by the DMG Shareholders, withholding other consents or authorizations required to convert the shares to American Depositary Shares, and otherwise preventing the shares from becoming freely tradeable. They argue that preliminary injunctive relief is necessary to restore the status quo as it existed prior to Visionchina's breach by requiring it to perform under the Merger Agreement.

To obtain a preliminary injunction under CPLR 6301, a party must demonstrate a likelihood of success on the merits, danger of irreparable harm in the absence of an injunction, and a balance of equities in its favor (*CC Vending, Inc. v Berkeley Educ.*

Services of New York, Inc., 74 AD3d 559, 560 [1st Dept 2010], lv denied 16 NY3d 705 [2011]).

As for the requisite element of demonstrating imminent irreparable harm, the "possibility that adequate compensatory or other collective relief will be available at a later date ... weighs heavily against a claim of irreparable harm" (*Jayaraj v Scappini*, 66 F 3d 36, 39-40 [2d Cir 1995]; see also *Credit Index L.L.C. v Riskwise Intl. L.L.C.*, 282 AD2d 246, 246 [1st Dept 2011]; *Dinner Club Corp. v Hamlet on Olde Oyster Bay Homeowners Assoc.*, 21 AD3d 777, 778 [1st Dept 2005]).

Notwithstanding the showing of a likelihood of success on the merits, the DMG Shareholders fail to demonstrate that the alleged injury cannot be fully redressed by monetary damages, as any losses resulting from a decrease in value of the Initial Shares caused by the restrictions are both capable of calculation and compensable. Moreover, the appropriate provisional remedy to prevent a defendant from taking action to make a money judgment uncollectible is a pre-judgment attachment (*Siegel*, NY Prac § 327 [3d]). Thus, the motion for a preliminary injunction is denied.

C. Motion to Dismiss by the Sellers

The Sellers also move to dismiss the Buyers' counterclaims. To the extent that Visionchina's counterclaims are identical to the claims asserted against the Sellers in the Visionchina

Action, the Court's reasoning with respect to partial dismissal is applicable.

Visionchina also asserts a new counterclaim for breach of contract based upon allegations that the Sellers deliberately destroyed electronically stored information in DMG's systems in breach of the Merger Agreement. According to Visionchina, this information constitutes assets of DMG that was to vest at the Effective Time.

However, Visionchina did not preserve this claim in that it failed to provide the requisite Claim Notice to the Sellers by the first anniversary of the Closing Date in accordance with the indemnification provisions of the Merger Agreement (Merger Agreement, §§ 7.2), and the allegations of breach fall squarely within those provisions (*see Matter of Westmoreland Coal Co.*, 100 NY2d 352). Therefore, the motion to dismiss is also granted as to this counterclaim.

Accordingly, it is hereby

ORDERED that motion sequence 01 in the action entitled *Visionchina Media Inc. et al v Shareholder Representative Services, LLC* (652390/10) is granted in part as to the first, third and fourth claims which are severed and dismissed, and denied as to the second claim; and it is further

ORDERED that motion sequence 02 in the action entitled *Visionchina Media Inc. et al v Shareholder Representative Services, LLC* (652390/10) is moot; it is further

ORDERED that defendants in the action entitled *Visionchina Media Inc. et al v Shareholder Representative Services, LLC* (652390/10) are directed to serve an answer to the complaint within 10 days after service of a copy of this order with notice of entry; it is further

ORDERED that motion sequence 01 in the action entitled *Shareholder Representative Services, LLC, et al v Visionchina Media Inc., et al* (650526/11) for an order of attachment is granted, and the amount secured by this order of attachment, inclusive of interest, costs and Sheriff's fees and expenses, shall be no less than \$30,000,000 it is further

ORDERED that the plaintiffs' undertaking in the action entitled *Shareholder Representative Services, LLC, et al v Visionchina Media Inc., et al* (650526/11) is fixed in the sum of \$500,000, conditioned that the plaintiffs, if it is determined that they were not entitled to an attachment, will pay to the defendants all damages and costs which may be sustained by reason of this attachment; it is further

ORDERED that motion sequence 02 in the action entitled *Shareholder Representative Services, LLC, et al v Visionchina*

Media Inc., et al (650526/11) for a preliminary injunction is denied; it is further

ORDERED that motion sequence 04 to dismiss counterclaims in the action entitled *Shareholder Representative Services, LLC, et al v Visionchina Media Inc., et al* (650526/11) is granted, in part, and denied, in part, as to the second counterclaim; it is further

ORDERED that plaintiffs in the action entitled *Shareholder Representative Services, LLC, et al v Visionchina Media Inc., et al* (650526/11) are directed to serve a reply to the answer within 10 days after service of a copy of this order with notice of entry; it is further

ORDERED that the parties in both actions are directed to contact the Part Clerk for the purpose of scheduling a Preliminary Conference.

Date: October 12, 2011

ENTER:

CHARLES E. RAMOS
J.S.C.