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

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TAURUS PETROLEUM LTD., In Liquidation,

Plaintiff,

-against-

GLOBAL EMERGING MARKETS NORTH AMERICA, INC., GEM GLOBAL YIELD FUND, LTD., CHRISTOPHER BROWN, and CHEIKH FAYE,

Defendants.

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DECISION AND ORDER
Index No.: 654640/2017

Mot. Seq. Nos.: 001-003

O. PETER SHERWOOD, J.:

I. FACTS

Motion Sequence Numbers 001, 002 and 003 are consolidated for disposition. As Motion Sequence Numbers 001 and 002 are motions to dismiss, the facts are taken from the complaint (NYSCEF Doc. No. 2) (*see Monroe v Monroe*, 50 NY2d 481, 484 [1980]). Motion Sequence Number 003 is a motion for summary judgment on default.

Plaintiff Taurus Petroleum Ltd. (Taurus) is a Swiss oil trading company. Taurus is currently in voluntary liquidation, and has leave of the liquidator to bring this action (Complaint at 3). Defendant Global Emerging Markets North America, Inc. (GEM) is an investment group specializing in emerging markets. Defendant GEM Global Yield Fund, Ltd. (GYF) is an investment company subsidiary of GEM. It is incorporated in the Cayman Islands. Christopher Brown (Brown) is founder and Director of GEM and Director of GYF. Cheikh Faye (Faye) is Managing Director of GEM.

In July 2011, Faye, as Managing Director of GEM, reached out to Taurus about a possible loan (*id.* at 6). While Taurus declined to participate, Taurus principals negotiated with GEM on behalf of Ursa, an entity with which Taurus frequently collaborated (*id.*). Ursa eventually agreed to make the loan.[1] The loan agreement provided that GEM would create a special purpose vehicle,

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[1] The underlying project was a South African entity, Main Street 778 (Pty), Ltd (Main Street), which developed a manganese mine in South Africa. Main Street was owned by two South African entities (the South African Partners) and CMang, a Hong Kong based company owned by David Chen. Between May 2010 and June 2011, CMang paid over $8.5 million to the South African Partners (*id.* at 4). In May 2011, GEM prepared a term sheet

GRI. GYF would assign the proceeds from its 20% stake in CMang to GRI. Ursa would then loan GRI $5 million and be repaid the principal along with interest at LIBOR plus 3%, and a premium payment (*id.* at 6). Faye (acting for GEM and GYF) represented that Ursa's loan would be used by CMang to make its down payment in the proposed Main Street Deal (*id.* at 7). On October 19, 2011, GYF assigned the proceeds from its interest in CMang to GRI pursuant to an agreement. Brown signed that agreement on behalf of GYF. Faye sent Taurus's principals an e-mail from Brown stating that GYF's shares in CMang would be held in trust. These representations convinced Taurus's principals to agree to the loan on Ursa's behalf (*id.* at 7-8). Ursa then entered into the loan agreement with GRI and transferred $5 million to GRI's account (*id.* at 9).

GRI was supposed to transfer the borrowed $5 million to the South African Partners, but Faye instructed the bank to transfer the funds to Daniyal, "a clearinghouse entity" (*id.* at 9). To convince the bank that the transfer was legitimate, Faye gave the bank a forged management services agreement which stated the transfer to Daniyal was consistent with the purpose of the Ursa loan (*id.* at 9-10). It was not. Plaintiff alleges the $5 million was never transferred from Daniyal to the South African Partners (*id.* at 11). Instead, CMang used money borrowed from an unrelated third party to make the initial payment (*id.* at 13). CMang made a second installment payment of $20 million in January 2013 (*id.* at 11).

In late 2014, Ursa wanted to exit the loan to GRI (*id.* at 10). Taurus agreed to take Ursa's place in the loan agreement. Taurus believed GRI had used the proceeds of the $5 million loan properly. Taurus was also unaware that GYF had directed GRI to assign most of the proceeds from CMang back to GYF and other entities, despite the fact that the CMang shares were supposed to be held in trust. Taurus signed a loan agreement with GRI on December 12, 2014, for $5,586,500, to cover Ursa's principal and interest (*id.* at 11). On December 15, Taurus transferred the loan amount to Daniyal, which transferred the money to Ursa.

On April 1, 2016, Faye told Taurus that Eramet was not going to exercise its option to purchase 100% of CMang's shares for $118 million (*id.* at 12). Instead, Eramet attempted to negotiate a deal with the South African Partners which would cut out CMang (*id.*). In the face of

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outlining a possible deal (the Main Street Deal) among CMang, GYF and French mining company Eramet, S.A. (Eramet). The proposal called for GYF to purchase a 51% stake in CMang, and CMang to obtain a 49.9% stake in Main Street. In exchange for certain payments, Eramet would receive an option to purchase 100% of CMang (Complaint at 4-5). Portions of the proposal were executed. Others were not.

Taurus's concern, Faye reassured Taurus that another company would replace Eramet, and there would be sufficient funds to repay the Taurus loan (*id.*). To further reassure Taurus, Faye showed Taurus a forged bank document showing that Ursa's $5 million had been transferred from Daniyal to Main Street (*id.* at 13). In December 2016, Taurus discovered from Main Street and the South African Partners that there had been a fraud, the Ursa funds had been diverted, and that GRI had transferred 50% of its CMang proceeds to GYF, and then to other entities, reducing GRI's ability to repay the loan (*id.* at 14).

Plaintiff asserts claims against all defendants for fraud and aiding and abetting fraud. Brown and Faye move to dismiss the claims against them. Plaintiff moves for default against defendants GEM and GYF, as they have not answered or otherwise responded.

II. ARGUMENTS

A. Brown's Motion to Dismiss (001)

1. Brown's Arguments in Support of Dismissal

First, Brown argues that a claim that he misrepresented GRI's intention to use the loan proceeds in accordance with the terms of the Ursa and Taurus loan agreements is properly brought as a breach of contract claim against GRI, and does not qualify as a cause of action for fraud against him. Both of the representations which are the basis for Taurus's claim, that the Ursa loan proceeds would be used to make CMang's "first installment" payment as stated in the "purpose" clause of the contracts, and that GYF would assign the proceeds from its interest in CMang to GRI so GRI could repay the loan, were terms of the Taurus loan agreement, as alleged in the complaint (001 Memo at 7, citing Complaint, ¶¶ 24, 48). "Although an agent for a disclosed principal may be held liable to a third party where the agent has committed fraud . . . a cause of action to recover damages for fraud will not arise when the only fraud charged relates to a breach of contract" (*Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009] quoting *Mastropieri v Solmar Const. Co., Inc.*, 159 AD2d 698, 700 [2d Dept 1990]). To survive a motion to dismiss, the alleged misrepresentation must be collateral to the contract and the damages not recoverable in an action for breach (001 Memo at 8). Further, the alleged misrepresentations must have caused the damage (*id.*). Here, the damages sought are the same as those that would be sought in a breach of contract action, and the claims here should fail (*id.* at 9). Additionally, a claim that a party entered into a contract while lacking intent to perform, or misrepresenting its ability to perform, fails as a fraud

claim (*id. CBS v Ziff-Davis* 75 NY2d 496, 503). As far as plaintiff claims defendants misrepresented that GYF would hold the CMang shares in trust, that was a function of the Option Agreement, which gave Eramet the option to purchase 100% of CMang, which option Eramet declined to exercise. Accordingly, a breach of the Option Agreement could not cause Taurus damages (*id.* at 10 n. 4).

Brown argues the fraud claim must also fail because Taurus has not alleged it was damaged, since it does not allege GRI defaulted on the loan (*id.* at 12). Nor does Taurus name any other damages it suffered from its reliance on misrepresentations. As GRI is not alleged to have defaulted, any damages are speculative (*id.* at 12). If GRI has defaulted, or does in the future, Taurus's claim is properly against that entity (*id.* at 14). Even if GRI does or did default, the damage to Taurus would be caused by Eramet's decision not to exercise its option (*id.*). Taurus's proceeds were supposed to come from Eramet. When Eramet decided not to exercise its option, there were no proceeds, making any damage to Taurus disconnected from the fate of the $5 million loaned by Ursa (*id.* at 15). As far as Taurus claims the Ursa loan was not used as it was supposed to be used, Taurus does not allege it suffered any injury as a consequence (*id.* at 14).

Nor can Taurus show justifiable reliance, as it, a sophisticated investor, failed to perform due diligence or negotiate a contract which would have bound defendants to their representations (*id.*). Taurus could have reached out to the South African Partners or to other participants in the project and verified the use of the proceeds of the Ursa loan (*id.* at 15-16). Its failure to make reasonable efforts to verify this information is fatal to its claim (*id.* at 16). Taurus also included no relevant representations or warranties in its agreements to condition the loans on the validity of the statements (*id.* at 17).

Additionally, the complaint fails to state the allegations comprising fraud by Brown with the required specificity (*id.*). Brown is not alleged to have made any direct communication to Ursa or Taurus (*id.*). The complaint contains only vague allegations of "numerous specific occasions between October 2011 and December 2016, GEM and GYF – through their Directors Brown and Faye - - misrepresented to Taurus" (Complaint, ¶ 62).

The aiding and abetting fraud claim should also be dismissed because, as discussed above, plaintiff failed to properly allege an underlying fraud, and also failed to allege Brown's actual knowledge and substantial assistance (001 Memo at 22). The facts pled by Taurus do not lead to

an inference Brown was aware of the alleged fraud (*id.* at 22-23). The vague allegations are insufficient (*id.* at 23). Nor does Taurus allege any acts by Brown in furtherance of the alleged fraud. All of the acts Brown is alleged to have committed are in compliance with the parties' agreements (*id.* at 24). If any allegations are made which support the elements of aiding and abetting fraud, they are not made with the required specificity (*id.* at 24-25).

2. Taurus's Opposition

As far as Brown moves to dismiss based on documentary evidence, Taurus argues that Brown presents his affidavit as the documentary evidence, which is inappropriate, and the motion must fail (001 Opp at 6-7). Nor do any of the statements in the affidavit definitively establish a defense (*id.* at 7-9).

A fraud claim may be inappropriate where there is a contract, but a claim for fraud in the inducement may be brought if there is a duty apart from those in the agreement (*id.* at 10-11). Taurus argues that the defendants engaged in fraud to convince Taurus to enter into a contract with GRI, which defendants promised would have sufficient assets (*id.* at 11). Taurus does not allege it was damaged by any failure of GRI to repay the loan or use the loan proceeds in the agreed-upon manner (*id.* at 12). Taurus claims it was injured by the misrepresentations regarding how the loan proceeds would be/were applied and how GRI would be able to repay the loan (*id.*). Taurus argues that defendants' misrepresentations made in 2011 were not about future events, as GRI had already misused the Ursa loan funds (*id.*). Those representations, therefore, also constitute a then-existing intent not to perform (*id.*). Also, when they encouraged Taurus's participation in the loan, the defendants assumed a duty, separate from the contract with GRI, to avoid causing injury (*id.*). The fact that Taurus could be made whole through a breach of contract action against GRI does not prohibit it seeking a remedy from defendants here (*id.* at 13).

Taurus argues it has properly pleaded the elements of fraud, including damages (*id.* at 14). Plaintiff is not seeking expectation damages or lost profits. It is only looking to recover the amount it is out of pocket (*id.* at 14). As far as Brown argues that GFI has not yet defaulted on the contract, and therefore Taurus is not yet damaged, Taurus has alleged GFI had, and has, no intention of performing. Taurus claims to be damaged from the moment it entered into the contract (*id.* at 15). Additionally, while Brown argues that Taurus's injury comes from Eramet's failure to exercise its option, Taurus argues it was damaged by entering into the agreement in the first place, so whether

the damage springs from the failure of the option or GFI's failure to pay back the loan, defendants are responsible for inducing Taurus to enter into a contract to which it otherwise would not have agreed (*id.* at 16).

While Brown argues there was no reasonable reliance, Taurus contends the inquiry is not appropriate for a motion to dismiss, as it is fact-intensive (*id.* at 17). Taurus points to allegations it reviewed documents supporting the misrepresentations. As Taurus received written assurances the shares were held in trust, the loan proceeds would be used for the first payment on the Main Street deal, and so forth, it was justified in relying on them rather than making an independent inquiry, and the claims should survive the motion to dismiss (*id.* at 18). Taurus did not have to perform an independent investigation (*id.* at 19). Nor was the fraud discoverable then (*id.*).

As to allegations of Brown's conduct, Taurus alleges Brown signed an agreement assigning GYF's proceeds to GFI in October 2011, which allowed the Ursa loan to be made (*id.* at 21). Taurus interprets Brown's action as a representation that GRI will have means to repay the loan (*id.*). Taurus contends that the fact that GYF subsequently reassigned the proceeds could be interpreted as evidence the initial assignment was not bona fide (*id.* at 22). Taurus also claims Brown, through his employee Faye, sent an e-mail to Taurus's principals that GYF's CMang shares were being held in trust, which could be interpreted as a further representation of GRI's means of repaying the loan from Taurus, which again was not borne out (*id.*). Taurus claims to be relying on the Brown representations made in 2011, which had been reaffirmed (*id.* at 23).

Taurus also argues that the aiding and abetting claim should stand because it has stated "many detailed, factual allegations allowing a reasonable inference of both actual knowledge and substantial assistance" (*id.* at 24). An affirmative statement of actual knowledge is not needed at this stage, and his knowledge may be inferred from his status with the defendant entities, and his participation in the fraudulent events (*id.* at 25). Brown's statements about the Ursa loan agreement were essential to its success, and to Taurus's participation, so constituted substantial assistance (*id.*).

3. Brown Reply

Brown reiterates that the fraud claim must fail due to the contract, unless the alleged misrepresentation is extraneous to the contract and relates to a separate duty, and damages must be alleged separately (001 Reply at 2). He contends Taurus has failed to meet this burden. The

First Department has recently reiterated this rule (*id.* at 4, citing *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 68 [1st Dept 2017]). How the loan proceeds would be used was a term of the contract, and is therefore not collateral to the contract, so cannot support a fraud claim (001 Reply at 5). Nor is it presented in the contract as a warranty (*id.*). As far as defendants made misrepresentations that GRI would be able to repay the Ursa and Taurus loans, those statements cannot support a claim for fraudulent inducement because they are "an expression of hope and future intent," and so not actionable (*id.* at 7, citing *Syncora Guarantee Inc. v Alinda Capital Partners LLC*, 2013 N.Y. Slip Op. 31489[U] [Sup Ct, New York County 2013]). Nor was there any promise that GRI would not be judgment proof or that there would be any security for the loan. This was an inherently risky investment (001 Reply at 7). Repayment would come from the sale of CMang shares to Eramet, and as there was no sale, there are no proceeds, and no payment to Taurus (*id.* at 7-8).

Taurus has also failed to show proper damages. It has not pleaded damages flowed from the alleged fraud (*id.* at 8). Taurus acknowledges the option payments made by GRI, totaling $15 million, are lost if Eramet declines to purchase CMang (*id.*). Further, since defendants made the first option payment, even if the money loaned by Ursa was not used, a diversion of that money did not cause damages (*id.*). The damages came from Eramet's failure to complete the purchase of CMang (*id.* at 8-9). As there were no proceeds from the sale, Taurus's allegations about the alleged reduction of GRI's portion of the proceeds from 20% to 10%, as the amount received in either case is zero. While Taurus claims it was damaged as soon as it loaned out the money, it admits it was damaged by GRI's default (001 Reply at 9, citing 001 Opp at 15).

Further, a defendant in a fraud case is not liable for all possible losses, but only for those losses actually suffered (*id.* at 10). Therefore, a lender must first exhaust all of its bargained-for remedies, which Taurus has not done (*id.*, citing *First Nationwide Bank v Gelt Funding Corp.*, 27 F3d 763, 768 [2d Cir 1994]). Nor is there proximate cause, as the time gap between the alleged fraud (in 2011) and Taurus's injury (in 2014) is too great (001 Reply at 10).

Brown also contends there was a lack of reasonable reliance on alleged statements by Brown, as Taurus is a sophisticated entity and could have protected itself (*id.* at 11). Taurus has the burden to show it took reasonable steps to protect itself, and has not done so, failing to perform due diligence or obtain representations and warranties in the Taurus Loan Agreement (*id.*). As far

as Taurus claims to have been told the CMang shares were being held in some kind of trust, no details or specifics are alleged (*id.* at 13). No due diligence was performed (*id.*). Taurus's complaint states that the shares were to be held in trust, "per the option agreement" (*id.*, quoting Complaint, ¶ 32). The Option Agreement gave Eramet the right to purchase the CMang shares, so the trust would have been for the benefit of Eramet, not Taurus, and there was no further information about the terms of the trust, making it unreasonable for Taurus to rely on this representation (001 Reply at 13).

The aiding and abetting claim should fail because Taurus has failed to plead fraud. Even had Taurus properly pleaded fraud, the aiding and abetting claim should still fail against Brown because he is not liable merely by virtue of being a corporate officer (*id.* at 14). The Complaint does not allege Brown was involved in the day to day operations of GRI or GYF, or participated in any of the relevant events personally (*id.*).

4. Faye's Motion to Dismiss (002)

1. Faye's Motion

Faye moves to dismiss the claims asserted against him based on (1) documentary evidence; (2) failure to state a claim; (3) lack of jurisdiction; (4) failure to name a necessary party; (5) forum non conveniens; and (6) an arbitration requirement. Faye also seeks sanctions pursuant to 22 NYCR section 130-1.1. According to Faye, the allegations raised here make out, at most, a breach of contract dispute to be arbitrated in London (*id.* at 5). This was no fraud, and the transaction was not a loan. It was a highly speculative investment, which failed. Ursa, and later Taurus, would have made money if GRI had made three payments ($5 million, $20 million, and $65 million, respectively). GRI made the first payment, Eramet made the second payment. The third payment (which was supposed to be made by Eramet) was not made. Therefore, the transaction failed and Taurus's investment was lost (*id.* at 5-6). If this transaction were a loan, rather than an investment, Taurus would be entitled to recover in a breach of contract action, and should have made demand for the return of the money.

a. Lack of Jurisdiction

First, Faye argues this court lacks jurisdiction over him. Faye lives in Johannesburg, South Africa (002 Memo at 3). He does no business in New York, controls no entity here, owns no property here. The fact that he used an email address from the domain gemny.com (with "NY" in

the domain) does not provide sufficient connection to New York (*id.* at 8). Taurus does not assert that any of the relevant representations were made here (*id.* at 3). Nor are there allegations that Faye has contacts with New York or engaged in purposeful activities here related to the transaction at issue (*id.* at 9).

b. Forum Non Conveniens

The claims against Faye should also be dismissed based upon forum non conveniens, as this matter has no substantial nexus with New York (*id.* at 9, citing *FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d 602, 603 [1st Dept 2013]). The only connection between New York and the events alleged by Taurus in this case are the residences of Brown and GEM (002 Memo at 10). The transaction was not negotiated or consummated in New York, and has no impact on New York. Ursa is a Hong Kong entity, Taurus is Swiss, GRI is domiciled in the Cayman Islands. The mining deal involved South African, French, and Hong Kong entities. The transaction is governed by English and Welsh law, and requires arbitration in London (*id.*). Most of the witnesses are from outside New York (*id.*).

c. Improper Service of Process

Faye also argues he was not properly served (*id.* at 11). CPLR 313 allows a person (who is subject to the jurisdiction of the court) to be served outside the state "by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the [location] in which service is made or by any duly qualified attorney . . . or equivalent." Service in South Africa was performed by Brennan Eugenio Honsbein, a South African "candidate attorney" (002 Memo at 11). Only a sheriff of the court may serve papers in South Africa, and Honsbein does not qualify for the "duly qualified attorney" exception in CPLR 313. The affidavit of service is also deficient, as it does not contain the language required by CPLR 2016(b) (002 Memo at 12).

d. The Fraud Claims

Faye contends this complaint fails to state a cause of action against him, for a variety of reasons. One is the failure to allege justifiable reliance (*id.* at 13-14). Taurus and Ursa are both controlled by Mr. Ben Pollner, a very sophisticated fossil fuel and mineral trader (*id.* at 14). The complaint does not allege due diligence performed by Taurus (*id.*). Faye also contends the

complaint fails to allege scienter and damages. While the complaint alleges Faye used forged documents (Complaint, ¶¶ 39, 57, 59), it does not allege Faye knew or should have known the documents were forged. Nor are there allegations Faye stood to profit from the fraud (002 Memo at 15). The complaint also fails to allege damages, adopting Brown's arguments on that issue, as well as generally regarding the absence of a valid fraud claim, discussed above (*id.* at 16).

e. Other Grounds

Faye also argues Taurus has failed to join two indispensable parties, GRI and Daniyal. GRI is the contracting party, and may have relevant claims against Taurus under the contract (*id.* at 17, citing CPLR § 1001[a]). Daniyal is the entity which is alleged to have received the money from GRI, and it may still have the funds (002 Memo at 18, citing Complaint, ¶4).

The underlying contract contains a broad arbitration clause, requiring "[a]ny dispute arising out of or in connection with this Agreement . . . shall be decided by arbitration . . . under the Rules of Arbitration of the International Chamber of Commerce [and] the seat of the arbitration shall be London" (Contract, ¶ 15.2). This arbitration clause should be enforced and this action dismissed in favor of a London arbitration.

Faye asks the case against him be dismissed and sanctions be issued for frivolous conduct.

2. Taurus's Opposition

As far as Faye moves pursuant to CPLE 3211(a)(1), based on documentary evidence, Faye fails to bring proper documentary evidence, attempting to use a news article about one of Taurus's principals, unauthenticated letters, an unsigned, unauthenticated copy of the loan agreement (to which Faye was not a party), and three factual affidavits (one of which is unsigned and inadmissible) (002 Memo at 9-10).

a. Lack of Jurisdiction

This court has personal jurisdiction over Faye (002 Opp at 11). He was a managing director of GEM during the relevant period, received mail at GEM's New York office, had a Manhattan phone number, and used the gemny.com e-mail address. His online presence makes clear he conducts business in New York, and was in New York doing business at the time the funds were diverted (*id.* at 11-12). As a non-resident working remotely for a New York company, Faye is

doing business in New York (*id.* at 12, citing *George Reiner & Co., Inc. v Schwartz*, 41 NY2d 648, 653 [1977] ["defendant's coming into New York purposefully seeking employment, his interview and his entering into an agreement with a New York employer which contemplated and resulted in a continuing relationship between them, certainly are of the nature and quality to be deemed sufficient to render him liable to suit here"]). Further, an in-state transaction can be sufficient, and the telephone calls and e-mails, to which Faye admits, qualify to establish jurisdiction (002 Opp at 13). While Faye has argued GYF is a Cayman Islands entity, GYF filed a lawsuit in the Southern District of New York in which it stated its principal place of business was in Manhattan (*id.* at 6). Taurus also claims Faye lacks credibility, and his affidavit should be considered a nullity (*id.* at 14). Taurus is, at least, entitled to jurisdictional discovery (*id.*).

b. Forum non conveniens

Taurus points out that this action has many connections to New York. Brown and GEM are based in New York, and took actions to defraud Taurus from New York (*id.* at 15). Faye had a New York mailing address and phone number and conducted business from New York at a key time, creating an inference that he was in New York when he acted to defraud Taurus (*id.*). Taurus expects many of the relevant documents will be in New York, at GEM's New York office (*id.* at 16). Faye has worked in New York before, and, as NY is a major transportation hub, and as parties and non-party witnesses are all over the world, and as there will be some travel involved, wherever the trial is held, New York is a good place (*id.* at 16). Taurus also argues the choice of law provision in the loan agreement is irrelevant, as that is a "sham contract" with "no relevance to this action" (*id.* at 16-17). Nor does Faye suggest a forum which would be less burdensome (*id.* at 17).

c. The Fraud Claims

Taurus states a cause of action for fraud and for aiding and abetting fraud (*id.* at 18). Taurus refers to the arguments made opposing Brown's motion to dismiss in Motion Sequence Number 001. Taurus also notes that the loan agreement is irrelevant, including the question of whether the loan is in default, because Taurus alleges there was never any intention to repay the loan, and its proceeds had been effectively stolen years before it was executed (*id.* at 18). While Faye argues Taurus did not perform due diligence, Faye does not show the actions not taken by Taurus would have resulted in discovery of the fraud (*id.* at 19). While Faye argues Taurus has not alleged Faye's

knowledge of the alleged fraud, Taurus contends Fays' use of forged documents allows the inference of his knowledge of the forgeries, and also that Faye also made many misrepresentations, which support the fraud claim (*id.*). Finally, regarding the inducement claim, Taurus has alleged damages, which is sufficient, regardless of whether Faye profited personally (*id.* at 19).

d. Other Claims

Taurus disagrees that additional parties are necessary. Here, complete relief can be obtained without GRI or Daniyal, and those entities will not be inequitably affected by a judgment here (*id.* at 19). To the extent Taurus has tort claims against GRI and Daniyal, it can choose to seek its remedy solely from the defendants (*id.* at 20). If Faye wants those entities to be part of this action, he can implead them, but he has not shown GRI and Daniyal to have a claim against Taurus.

Nor is there an agreement to arbitrate this action. Taurus points out that Faye has provided an unsigned copy of the Taurus loan agreement, which provides for arbitration between Taurus and GRI. Faye is not a party to that agreement (*id.* at 7). While a non-signatory may be entitled to enforce an arbitration provision if the agreement expressly provides for it, this agreement does not (*id.* at 22). Nor do other equitable exceptions apply (*id.*).

Regarding service, Taurus has provided the papers to Faye formally and informally six times, and Faye clearly has received the notice (*id.* at 7). "[T]echnical, non -prejudicial defect[s,]" such as service by an apprentice attorney rather than a qualified attorney, does not make service ineffective, if the defect is merely technical (*id.* at 23, quoting *Ruffin v Lion Corp.*, 15 NY3d 578, 582 [2010]). The issue is whether the service is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Ruffin*, 15 NY3d at 582, quoting *Raschel v Rish*, 69 NY2d 694, 696 [1986] and *Mullane v Central Hanover Bank & Trust Co.,* 339 US 306, 314 [1950]). Taurus contends that the distinction between a trainee attorney and a qualified attorney is minimal, and unlikely to cause a difference in the likelihood that the notice will reach a defendant (002 Opp at 24). As Faye identifies no prejudice, the defect should be disregarded as merely technical under CPLR 2001, and the case should continue. As far as Faye objects to the lack of certain language in the affidavit of service, that language, specified in CPLR 2106(b), is required only in affirmations. The document filed here is a notarized affidavit (*id.*).

Finally, the request for sanctions pursuant to 22 NYCRR section 130-1.1 should be denied, as Taurus brought these claims with a good faith basis (002 Opp at 25, citing *Wecker v D'Ambrosio*, 6 AD3d 452, 453 [2d Dept 2004]). Should the motion to dismiss be granted, plaintiff seeks leave to replead.

3. Faye's Reply

Plaintiff has the burden of showing jurisdiction over Faye, and has failed (002 Reply at 3). The signature block used in Faye's e-mail is not enough to establish jurisdiction (especially since there is a distinction between the entities GEM (a defendant here) and Global Emerging Markets Group (GEM Group, the entity named in Faye's signature block), nor is the "puffery" of stating connections to New York on the internet (*id.* at 4). There is no evidence Faye received relevant mail or calls at the New York address and phone number in the e-mail signature block (*id.* at 7). Further, the exhibits only show Faye flew to NY on October 31, 2011, and returned to Geneva in early January 2012 (*id.* at 10). The exhibits do not explain whether or why he stayed in New York for two months, or what he was doing during that period (*id.* at 4-5). Nor has Taurus established a connection between the transaction and New York (*id.* at 10). Plaintiff is Swiss, the 2014 transaction was with GRI (British Virgin Islands), and the "loan" was to repay Ursa, a Hong Kong entity (*id.* at 11). There is no New York connection. Even if GRI is a GEM special purpose vehicle, that does not create jurisdiction over Faye. Finally, allegations about Faye's actions in New York in 2011 cannot establish jurisdiction for claims in this action, because this action is based on an alleged fraud against Taurus, and Taurus had not yet entered into its agreement at that time. Any injury caused by Kaye's actions in New York would have accrued to Ursa, not Taurus (*id.* at 12).

The fraud claim still fails because the allegations regarding justifiable reliance and scienter are merely conclusory (*id.* at 12). Faye reiterates his arguments about the lack of allegations regarding Taurus's due diligence, making its reliance on defendants' alleged statements unreasonable, and Taurus's failure to seek guarantees or warranties in the agreement (*id.* at 13). Plaintiff fails to properly allege scienter, because all of Faye's alleged conduct is consistent with the deal as Faye describes it, an investment rather than a loan (*id.* at 14). The only action alleged which suggests fraud was the forwarding of forged documents in 2011, without allegations Faye knew the documents were forged, and the actions in 2011 cannot support the alleged fraud in 2014.

Faye continues to argue that this dispute should be arbitrated in London, pursuant to the agreement, with the question of whether the agreement was a sham an issue before the arbitrator (*id.* at 15). While there is a question as to whether Faye would be entitled to enforce the arbitration provision under NY law, the laws of England and Wales should be used to interpret the agreement, and so the issue should be presented to the arbitrator there (*id.*).

C. Taurus's Motion for Default Judgment against GEM and GYF (Motion Sequence Number 003)

Taurus moves for default judgment against the entity defendants, GEM and GYF. Taurus asks for a judgment of $5,586,500, plus 9% statutory interest from December 15, 2014, and costs. Both GEM and GYF have attorneys who have entered appearances. GEM is represented by the same attorneys who represent Brown, but GEM has not moved to dismiss or answered the complaint (although GEM received an extension of time to respond to the complaint by stipulation of the parties). Counsel for GYF filed a notice of appearance on February 22, 2018, along with a letter asking the court to allow GYF to bring a belated motion to dismiss (NYSCEF Doc. No. 70). GYF contends the court lacks in personam jurisdiction and the motion for a default judgment lacks merit, because it is not supported by an affidavit from a person with knowledge, does not provide a ground for jurisdiction, and does not assert facts to support claims against GYF. Taurus opposes the request (NYSCEF Doc. No. 71), contending GYF has not provided a reason for its failure to participate. Taurus asks the court to grant the default, after which GYF may move for relief from the order pursuant to CPLR 5015, which allows "court which rendered a judgment or order may relieve a party from it upon such terms as may be just."

Taurus alleges service upon the entities and the entities' failure to file an answer or motion (003 Schrager Aff, NYSCEF Doc. No. 34, at 2). Taurus also provides the affidavit of Martin Schenker, who has been employed by Taurus as a consultant since 1994, which states he was personally involved in the events underlying this suit (Schenker Aff, NYSCEF Doc. No 38, at 1). He states that the allegations in the complaint are true either to his knowledge, or (if they are stated upon information and belief) he believes them to be true (*id.* at 2).

III. DISCUSSION

A. Brown's Motion (001)

1. Standard for a Motion to Dismiss for Failure to State a Claim

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

2. Fraud/Fraudulent Inducement Claim

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], lv. denied 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]). However, this is really a claim for fraudulent inducement (*see* Complaint, paragraphs 1, 67). "In a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted]; *see also J.M. Bldrs. & Assoc., Inc. v Lindner*, 67 AD3d 738, 741 [2d Dept 2007] ["[a] present intent to deceive must be alleged and a mere misrepresentation of an intention to perform under the contract is insufficient to allege fraud"]). Representations of opinion, even as to matters of fact, are not representations and are not actionable unless guaranteed (*see Lanzi v Brooks*, 54 AD2d

1057 [1976], *affd* 43 NY2d 778 [1977]; *Mun. Metallic Bed Mfg. Corp. v Dobbs*, 253 NY 313 [1930]).

For the representations of material fact, Taurus alleges Brown caused Faye to tell Taurus's principals in 2011 (when they were acting for Ursa) that GYF's CMang shares would be held in trust, and that Brown signed an agreement assigning GYF's CMang proceeds to GRI, which create a reasonable inference that passing the assignment agreement along to Taurus was intended to indicate GRI would be able to repay the Ursa loan (Complaint, paragraphs 31-33). Taurus does not allege any false representations of material facts made by Brown in 2014, but contends it relied on the 2011 statements and on the 2014 loan contract, in which "it insisted on contractual assurances that . . . the loan proceeds would be used for the first installment on the Main Street deal, and . . . the CMang shares would continue to be held in trust (001 Opp at 18). Neither Brown nor Taurus provides a copy of the 2014 loan agreement, and Taurus does not allege Brown's involvement with that agreement or that Brown made any specific relevant statements after 2011.

As far as Taurus relies on alleged bargained-for contractual "assurances" in the 2014 loan agreement that "the loan proceeds would be used for the first installment on the Main Street deal, and . . . the CMang shares would continue to be held in trust" (001 Opp at 18), these are, on their face, not the required "then-present facts," but promises to perform.

As far as Taurus claims to have relied on Brown's 2011 statements, Taurus's reliance was unjustified. Those statements were three years old when Taurus negotiated the contract and had been made to another entity. Additionally, "[i]t is well established that if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015] quoting *Schumaker v Mather*, 133 NY 590, 596 [1892]). Taurus is a sophisticated entity, but does not allege it performed any due diligence before entering the 2014 loan agreement. While Taurus points out that when "a plaintiff has taken reasonable steps to protect itself against deception, it should not be denied recovery merely because hindsight suggests that it might have been possible to detect the fraud when it occurred. In particular, where a plaintiff has gone to the trouble to insist on a written

representation that certain facts are true, it will often be justified in accepting that representation rather than making its own inquiry" (*DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). However, in *DDJ Mgt*, the plaintiff had bargained for representations and warranties that the (misleading) financial statements were accurate, which was sufficient to survive the motion to dismiss (*id.* at 153). Taurus required neither representations or warranties in the contract, but only claims to have received the "assurances" of future conduct, as described above.

3. Aiding and Abetting Fraud

The elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]. The elements for the underlying fraud are: (a) a misrepresentation or a material omission of fact which was false and known to be false, (b) made for the purpose of inducing the other party to rely upon it, (c) justifiable reliance of the other party on the misrepresentation or material omission, and (d) injury (*Mandarin Trading Ltd. v Wildenstein,* 16 NY3d 173 [2011]; *Ross v Louise Wise Services, Inc.*, 8 NY3d 478 [2007]; *Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413 [1996]; *Tanzman v La Pietra*, 8 AD3d 706 [3rd Dept 2004]).

Taurus alleges Brown aided and abetted Faye's fraud, that Brown's "active and repeated participation," referring to Brown's signing of the assignment agreement and the e-mail stating the CMang shares were held in trust in 2011, and his position as director of both GEM and GYF allows the inference of his knowledge of Faye's (his employee's) actions, and that his 2011 representations substantially assisted in the fraud (001 Opp at 24-25). Brown claims that, even if there was a fraud, Taurus has not alleged the knowledge required to plead aiding and abetting (001 Reply at 14). While Brown argues Taurus failed to allege Brown was actively involved in the day to day activities of the companies (*id.* citing *Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 55 [2001]), the allegations are sufficient to allow a jury to find Brown was aware of Faye's fraud. If Taurus had pleaded a proper underlying fraud, this aiding and abetting claim might survive against Brown.

B. Faye's Motion (Motion Sequence Number 002)

1. Documentary Evidence

To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence submitted that forms the basis of a defense must resolve all factual issues and definitively dispose of the plaintiff's claims (*see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.,* 98 NY2d 144, 152 [2002]; *Blonder & Co., Inc. v Citibank, N.A.,* 28 AD3d 180, 182 [1st Dept 2006]). A motion to dismiss pursuant to CPLR § 3211 (a) (1) "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*McCully v. Jersey Partners, Inc.,* 60 AD3d 562, 562 [1st Dept. 2009]). The facts as alleged in the complaint are regarded as true, and the plaintiff is afforded the benefit of every favorable inference (*see Leon v Martinez,* 84 NY2d 83, 87-88 [1994]). Allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration (*see e.g. Nisari v Ramjohn,* 85 AD3d 987, 989 [2nd Dept 2011]).

CPLR § 3211 (a) (1) does not explicitly define "documentary evidence." As used in this statutory provision, "'documentary evidence' is a 'fuzzy term', and what is documentary evidence for one purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1,* 73 AD3d 78, 84 [2nd Dept 2010]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*id.* at 86, citing Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3211:10, at 21-22). Typically that means "judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are 'essentially undeniable,' " (*id.* at 84-85). Here, the presented documentary evidence is an unsigned, unauthenticated draft of the 2014 loan agreement between Taurus and non-party GEM Resources International, Inc (NYSCEF Doc No. 25). While Faye cites to N*aturopathic Labs. Intern., Inc. v SSL Americas, Inc.* (18 AD3d 404 [1st Dept 2005]), for the premise that an unsigned agreement may constitute documentary evidence, no information is provided in that case to clarify what made that unsigned document reliable.

Faye also attaches news articles, affidavits, and letters, none of which are undisputed or conclusively establish a defense. Accordingly, the portion of the motion to dismiss based on documentary evidence fails.

2. Jurisdiction

CPLR 3211 [a] [8] provides that "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the court has not jurisdiction of the person of the defendant." When presented with a motion under CPLR 3211 [a] [8], "the party seeking to assert personal jurisdiction, the plaintiff[,] bears the ultimate burden of proof on this issue" (*Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). The party opposing a motion to dismiss need not state all the facts necessary to establish jurisdiction. If evidence of the facts establishing jurisdiction are in the exclusive control of the moving party, CPLR 3211 [d] only a requires a "sufficient start," demonstrating that such facts "may exist" (*see HBK Master Fund L.P. v Troika Dialog USA, Inc.*, 85 AD3d 665 [1st Dept 2011], citing *Peterson v Spartan Industries, Inc.*, 33 NY2d 463, 467 [1974]).

Taurus alleges specific, rather than general jurisdiction, over Faye. CPLR 302(a) sets forth four different scenarios in which the New York courts can exercise specific or long arm jurisdiction over non-domiciliary defendants (*see* CPLR 302[a][1]-[a][4]). Taurus asserts jurisdiction as Faye is a non-domiciliary who "transacts any business within the state or contracts anywhere to supply goods or services in the state" which is related to the claim (*id.* at [a][1]). The parties dispute whether Faye conducted business in New York. Taurus alleges Faye had a NY phone number and mailing address, has held himself out as a New York businessman, and was doing business from New York when the Ursa loan funds were diverted. While these allegations are disputed, jurisdictional discovery is appropriate, if this action is to continue against Faye.

3. Improper Service

The parties do not dispute that service on Faye in South Africa was improper. Taurus, however, contends the error (service by a trainee attorney, rather than an accredited attorney) is merely technical and non-prejudicial, so should be disregarded. CPLR section 2001 provides: "[a]t any stage of an action, . . . the court may permit a mistake, omission, defect or irregularity . . . to be corrected, upon such terms as may be just, or, if a substantial right of a party is not

prejudiced, the mistake, omission, defect or irregularity shall be disregarded". The error appears de minimis, and will be ignored. Service is deemed sufficient.

4. Failure to State a Cause of Action

Faye argues Taurus has failed to state a cause of action and failed to make the fraud allegations with the specificity required by CPLR 3016(b). As discussed above, "[i]n a fraudulent inducement claim, the alleged misrepresentation should be one of then-present fact, which would be extraneous to the contract and involve a duty separate from or in addition to that imposed by the contract . . . and not merely a misrepresented intent to perform" (*Hawthorne Group v RRE Ventures*, 7 AD3d 320, 323-24 [1st Dept 2004] [citations omitted].

Taurus makes several allegations of statements made by Faye in 2011, but, as discussed above, it is inherently unreasonable for an entity to rely on three-year-old representations made to another entity without doing any due diligence to confirm the accuracy of the representations. Taurus also alleges Faye made misrepresentations in 2016, but those were after Taurus entered into the 2014 loan agreement, which it claims to be the source of the injury Taurus suffered (Complaint, paragraphs 57-58). The only false representation alleged to have been made by Faye around the time of the December 12, 2014, signing of the Taurus loan agreement is that "Faye represented to Taurus in December 2014 that GRI had the same means to repay Taurus's loan as it had Ursa's loan in 2011" (Complaint, paragraph 46). No specifics of that communication are alleged, including how it was made, to whom, and whether it was before or after the signing of the Taurus loan agreement. This is not sufficient detail to satisfy the heightened particularity requirement of CPLR 3016(b). Accordingly, this claim against Faye shall be dismissed.

As to the aiding and abetting fraud claim, the elements of a claim for aiding and abetting fraud are: (1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this fraud (*Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Insurance Co.*, 64 AD3d 472 [1st Dept 2009]. Taurus has alleged Faye's involvement in the misuse of the original Ursa loan proceeds and a level of involvement which might, giving Taurus the benefit of every inference, support Faye's knowledge and substantial assistance, if Taurus had properly pleaded an underlying fraud.

5. Failure to Name a Necessary Party

CPLR 3211(a)(10) provides that a party may move to dismiss a case if "the court should not proceed in the absence of a person who should be a party." CPLR 1001(a) provides: "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." If the party's consent is required to obtain jurisdiction, as it may be here, "the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

> 1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;
> 2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;
> 3. whether and by whom prejudice might have been avoided or may in the future be avoided;
> 4. the feasibility of a protective provision by order of the court or in the judgment; and
> 5. whether an effective judgment may be rendered in the absence of the person who is not joined"

(CPLR 1001[b]).

Faye argues that GEM Resources International, Inc. (GRI), the borrower, and Daniyal, the entity alleged to have received the money from GRI, are necessary parties. GRI's rights under the contract, and the parties' performance under the loan agreement, are at issue here. Further, Daniyal may still hold the funds, or may know what happened to them. Taurus contends that these are not necessary parties, as Taurus may obtain complete relief against Faye as against all the joint tortfeasors. If Faye wishes, he may implead GRI and Daniyal. Taurus also argues that there is no chance of inconsistent judgments if this case is allowed to proceed without GRI. Taurus is incorrect. While it claims that existence of an injury may be established by the fact that it was induced to enter into the 2014 loan agreement, discerning its damages will require an inquiry into the results of entering into the contract, which will require evaluating Taurus's and GRI's rights and performance under that agreement.

Accordingly, this court must consider whether to allow the action to proceed without GRI. If this action is dismissed for the nonjoinder, Taurus may seek relief in other proceedings. It may pursue contractual remedies, including the arbitration, against GRI, and then pursue the claims it raises here (properly pleaded) once GRI's rights have been established there. Without being heard here, GRI could be significantly prejudiced, as there would be a decision on the parties' rights under the contract without GRI's participation. This prejudice is avoidable. Further, it does not appear any protective order would preserve GRI's rights, even though this court could make an effective judgment without GRI. Accordingly, the portion of the motion seeking to dismiss the case for failure to join a necessary party (GRI) is granted.

C. Taurus's Motion for Default

Taurus moves for summary judgment on default against GEM and GYF. As discussed above, GRI is a necessary party to this litigation, and so this case shall be dismissed to allow the GRI/Taurus arbitration to proceed and determine what Taurus's damages would be, if any, in this action.

Regarding this motion, Taurus's motion papers consist of an affirmation alleging service and the entities' failure to respond in a timely manner, and an affirmation from Martin Schenker, an employee or contractor of Taurus (the document is not clear) stating that the facts in the complaint are true. Schenker is outside the jurisdiction of the United States (making it permissible to file an affirmation instead of an affidavit, pursuant to CPLR 2106). Taurus provides no memorandum of law. Counsel have appeared for both GEM and GYF, although only counsel for GYF has made any argument on behalf of its client, including a claim of lack of in personam jurisdiction.

Taurus does not point to any additional alleged fraudulent statements to support a claim of fraud against the entities. Accordingly, this claim fails for the same reasons as the fraud claims above. As Taurus has failed to properly allege a claim for an underlying fraud, Taurus's claim for aiding and abetting fraud should also fail.

For the reasons discussed above, the motions to dismiss shall be granted and the motion for default judgment denied, both on the ground of a failure to allege facts in support of the underlying fraud claims and for failure to join GRI, the borrower, as an indispensable party.

The motion to dismiss based on failure to state a claim is be granted because Taurus has failed to allege reasonable reliance on misrepresentations by the defendants. Virtually all of the material misrepresentations alleged occurred in 2011, in relation to the original Ursa loan, long before Taurus became a party to the arrangement. Moreover, the representations were not made to Taurus, but instead to Taurus employees acting for Ursa. The 2014 statements cited by Taurus were statements purportedly made by Faye. The alleged bargained-for contractual "assurances" in the 2014 loan agreement that "the loan proceeds would be used for the first installment on the Main Street deal, and . . . the CMang shares would continue to be held in trust" (001 Opp at 18) are, on their face, not the required "then-present facts," but instead promises to perform. Taurus does not allege that any representations and warranties were made in the loan agreement, and no signed copy of the loan agreement has been provided. The purported Faye misrepresentation in 2014 was that "Faye represented to Taurus in December 2014 that GRI had the same means to repay Taurus's loan as it had Ursa's loan in 2011" (Complaint, paragraph 46). No specifics of that communication are alleged, including how it was made, to whom, and whether it was before or after the signing of the Taurus loan agreement. This is insufficient detail to satisfy the heightened pleading requirements of CPLR 3016(b). Taurus alleges Faye made some additional misrepresentations in 2016, but these occurred after signing of the 2014 loan agreement. No additional misrepresentations are alleged. Additionally, Taurus does not allege it performed any due diligence whatsoever before making the $5.8 million loan.

Accordingly, it is hereby

ORDERED that the motion to dismiss the complaint as against Christopher Brown (motion sequence number 001) is GRANTED and the complaint is dismissed as to him; and it is further

ORDERED that the motion to dismiss the complaint as against Cheikh Faye (motion sequence number 002) is GRANTED and the complaint is dismissed as to him; and it is further

ORDERED that the motion for a default judgment against Global Emerging Markets North America, Inc. and GEM Global Yield Fund, Ltd. (motion sequence number 003) is DENIED and the complaint as to said entities is dismissed for the reasons discussed above; and it is further

ORDERED that the complaint having been dismissed in its entirety, the Clerk of the Court is directed to enter judgment against Plaintiff Taurus Petroleum, Ltd and in favor of defendants Global Emerging Markets North America, Inc., GEM Global Yield Fund, Ltd., Christopher Brown, and Cheikh Faye, together with costs and disbursement in amounts calculated by the Clerk upon submission of proper bills of costs.

This constitutes the decision and order of the court.

DATED: June 18, 2018

E N T E R,

O. PETER SHERWOOD J.S.C.