Fosshage v Mitta Water Holdings, LLC
2020 NY Slip Op 30296(U)
February 4, 2020
Supreme Court, New York County
Docket Number: 652881/2018
Judge: Joel M. Cohen

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

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DR. JAMES FOSSHAGE and MARK FOSSHAGE, derivatively and on behalf of WORLD WATER WORKS HOLDINGS, INC.,

Plaintiffs,

- against -

MITTA WATER HOLDINGS, LLC, THINK WWW HOLDINGS, LLC, TURA WATER HOLDINGS, LLC, DAVID A. CARPENTER, ESQ., MAYER BROWN LLP, DAVID BOILLOT, ESQ., SAMUEL C. WILSON, ESQ., REITLER, KAILAS, & ROSENBLATT LLC, and WORLD WATER WORKS HOLDINGS, INC. as a nominal defendant,

Defendants.

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INDEX NO. 652881/2018

MOTION DATE N/A, N/A

MOTION SEQ. NO. 001 003

DECISION + ORDER ON MOTION

HON. JOEL M. COHEN:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 63, 71, 72, 77
were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 38, 39, 40, 41, 42, 43, 44, 45, 46, 65, 70, 74, 78, 81
were read on this motion to DISMISS.

This is a shareholder derivative action in which plaintiffs Dr. James Fosshage and Mark Fosshage seek to rescind two stock purchase agreements on behalf of World Water Works Holdings, Inc. (WWWH), a Delaware corporation. Plaintiffs allege that investors in WWWH, aided by their attorneys, failed to disclose the identities of their investors' owners when they purchased Series B-2 and Series C preferred stock in WWWH.

In motion sequence number 001, defendants Mitta Water Holdings, LLC (MWH), Think WWW Holdings, LLC (Think), Tura Water Holdings, LLC (Tura), and Samuel C. Wilson

(Wilson) (collectively, the Stockholder defendants) move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the complaint based upon documentary evidence, on statute of limitations grounds, and for failure to state a cause of action.

In motion sequence number 003, defendants David A. Carpenter (Carpenter) and Mayer Brown LLP (together, Mayer Brown) also move, pursuant to CPLR 3211 (a) (1), (5), and (7), to dismiss the complaint based upon documentary evidence, as time-barred, and for failure to state a cause of action.

For the reasons set forth below, both motions to dismiss are granted, and the complaint is dismissed.

BACKGROUND

WWWH is a closely-held corporation organized under the laws of the State of Delaware (NY St Cts Elec Filing [NYSCEF] Doc No. 2, complaint, ¶ 22). WWWH designs and manufactures products used to treat wastewater and develops other wastewater solutions (*id.*, ¶ 57). WWWH has issued Series A, Series B, Series B-1, Series B-2, and Series C preferred stock (NYSCEF Doc No. 3). Mark Fosshage was a shareholder, the chief executive officer of WWWH, and a director of WWWH during the Series B-2 and Series C investments (NYSCEF Doc No. 2, complaint, ¶¶ 13, 59). Mark Fosshage's father, Dr. James Fosshage, was also a shareholder and a director of WWWH during the relevant period (*id.*, ¶ 58). Until the Series B-2 investment, plaintiffs held majority voting rights and exercised control over WWWH (*id.*, ¶ 33).

MWH, Think, and Tura are limited liability companies that own shares in WWWH (*id.*, ¶¶ 49-51).

On December 22, 2011, WWWH and Think entered into the Series B-2 stock purchase agreement, whereby Think purchased Series B-2 preferred stock in WWWH (*id.*, ¶¶ 50, 111).

As an express condition of the Series B-2 stock purchase agreement, and pursuant to a voting agreement executed concurrently, MWH's owner, Prashant Mitta (Mitta), and Think's owner, Ravi Reddy (Reddy), were designated as members of WWWH's board of directors (*id.*, ¶¶ 72, 73, 85; NYSCEF Doc No. 3).

On November 30, 2012, WWWH, Tura, MWH, and Mark Fosshage executed the Series C stock purchase agreement, pursuant to which MWH and Tura each purchased shares of Series C preferred stock (NYSCEF Doc No. 2, complaint, ¶ 51). As an express condition of the Series C stock purchase agreement, Tura's designee, Ravishankar Tumuluri (Tumuluri), was given a seat on WWWH's board of directors (*id.*; NYSCEF Doc No. 3).

Plaintiffs bring this action "seeking the sole remedy of rescission of the Preferred Stockholder Series B-2 Purchase Agreement and the Preferred Stockholder Series C Purchase Agreement" (NYSCEF Doc No. 2, complaint, ¶ 11). According to plaintiffs, the Shareholder defendants and their attorneys participated in a fraudulent scheme to "tak[e] over [WWWH's] Board of Directors majority and control the Company's business" (*id.*, ¶¶ 25, 75). Plaintiffs allege that defendants fraudulently concealed Mitta's and Reddy's investments in each other's companies and in Tura (*id.*, ¶ 171). Specifically, plaintiffs allege that, when the Series B-2 stock purchase agreement was entered into, Mitta was an investor in Think, but failed to disclose this fact to WWWH (*id.*, ¶ 31). Plaintiffs further allege that Reddy similarly failed to disclose his investment in MWH (*id.*, ¶ 30). In addition, plaintiffs claim that, during the Series C transaction, Mitta and Reddy failed to disclose their investments in Tura (*id.*, ¶ 34). According to plaintiffs, had WWWH known of these financial interests, it would not have entered into the Series B-2 stock purchase agreement or the Series C stock purchase agreement (*id.*, ¶¶ 33, 97). Plaintiffs

assert that the first time that they learned of Reddy's investment in MWH was during a JAMS arbitration on March 13, 2018 (*id.*, ¶ 67).

According to the complaint, Reddy retained Mayer Brown to represent him and/or his entities in the Series B-1, B-2, and C stock purchase transactions (*id.*, ¶ 53). Carpenter, an attorney employed by Mayer Brown, represented MWH and Think and their respective board designees Mitta and Reddy in the Series B-1, B-2, and C transactions (*id.*, ¶ 52). After the Series C transaction, Carpenter also represented Tura and its board designee, Tumuluri (*id.*). The complaint alleges that Mayer Brown aided and abetted the fraud "by failing to disclose the related party interests of their members or entities . . . ." (*id.*, ¶ 25). According to plaintiffs, Mayer Brown drafted a Voting Agreement, an Investor's Rights Agreement, a Right of First Refusal and Co-Sale Agreement, and an Indemnification Agreement (*id.*, ¶ 72). Plaintiffs seek reimbursement of the $20,000 in legal fees paid to Mayer Brown as a remedy for Carpenter's aiding and abetting the fraud (*id.*, ¶ 195).

Wilson represented Tura in connection with the Series C stock purchase (*id.*, ¶ 8). The complaint alleges that Wilson aided and abetted the fraud by failing to disclose the members or interests of MWH, Think, and Tura (*id.*, ¶ 25). Plaintiffs seek reimbursement of the $15,000 in legal fees paid to Wilson (*id.*, ¶ 45, 192).

The complaint asserts seven causes of action.[1] In the first cause of action, asserted against Think, plaintiffs seek rescission of the Series B-2 stock purchase agreement and a declaratory judgment declaring the agreement null and void (*id.*, ¶¶ 201-204). In the second and

[1] The sixth cause of action is asserted solely against defendants David Boillot and Reitler, Kailas & Rosenblatt, LLC (NYSCEF Doc No. 2, complaint, ¶¶ 221-230). By stipulation of discontinuance dated July 18, 2019, plaintiffs discontinued the action against David Boillot and Reitler, Kailas, & Rosenblatt, LLC (NYSCEF Doc No. 66).

third causes of action, asserted against Tura and MWH, plaintiffs seek rescission of the Series C stock purchase agreement and a declaration that the agreement is null and void (*id.*, ¶¶ 205-208, 209-212). In the fourth cause of action, asserted against the Stockholder defendants and Mayer Brown, plaintiffs seek rescission based upon fraudulent misrepresentations and aiding and abetting fraud (*id.*, ¶¶ 213-216). In the fifth cause of action, asserted against the Stockholder defendants and Mayer Brown, plaintiffs seek rescission for constructive fraud (*id.*, ¶¶ 217-220). In the seventh cause of action, asserted against MWH, Think, and Tura, plaintiffs seek rescission based upon Mitta's and Reddy's breaches of fiduciary duty (*id.*, ¶¶ 231-240). Additionally, plaintiffs request attorneys' fees and costs pursuant to BCL § 626 (c) (*id.*, wherefore clause).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Do Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim"

(*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 192 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]).

> "'On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff'"

(*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]). "To meet its burden, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotation marks and citation omitted]). "If the defendant meets that burden, then the burden shifts to the plaintiff 'to aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely'" (*Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844 [2d Dept 2014], quoting *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]).

Even affording plaintiffs the benefit of every favorable inference, the court finds that this is not a proper derivative action and that plaintiffs' claims also fail to state a cause of action.

I. Stockholder Defendants' Motion to Dismiss (Motion Sequence Number 001)

A. Whether Plaintiffs' Claims Relating to the Series B-2 Stock Purchase Are Time-Barred

The Stockholder defendants contend that plaintiffs' claims related to the Series B-2 transaction are time-barred. As support for their argument, the Stockholder defendants point out that the Series B-2 stock purchase agreement was executed on December 22, 2011.

Plaintiffs counter that their claims are timely. Plaintiffs argue that the complaint alleges that the Series B-2 stock purchase agreement was finalized in November 2012, and that they did not discover the fraud until March 2018.

"New York law provides that a claim for constructive fraud is governed by the six-year limitation set out in CPLR 213 (1), and that such a claim arises at the time the fraud or conveyance occurs" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 530 [1st Dept 1999] [citation omitted]). "[T]he two-year discovery provision [of CPLR 213(8)] . . . does not apply to constructive fraud" (*Berman v Holland & Knight, LLP*, 156 AD3d 429, 429 [1st Dept 2017] [internal quotation marks and citation omitted]).

Although the Stockholder defendants argue that plaintiffs' claims concerning the Series B-2 stock purchase are untimely, they have failed to establish prima facie that plaintiffs' constructive fraud claims are time-barred. Indeed, the complaint alleges that the final amendment to the Series B-2 stock purchase agreement was finalized on November 27, 2012 (NYSCEF Doc No. 2, complaint, ¶ 31). Plaintiffs brought this action on June 8, 2018 (*id.*), less than six years from this date (*see Brown v Tonawanda Hous.*, 123 AD2d 493, 494 [4th Dept 1986] [cause of action alleging constructive fraud occurred when contract was executed]).

Fraudulent misrepresentation claims must be brought within six years from the fraud or two years from discovery, whichever is longer (*see Norddeutsche Landesbank Girozentrale v Tilton*, 149 AD3d 152, 158-159 [1st Dept 2017]). "[A]iding and abetting fraud claims are subject to the greater of a six-year statute of limitations period or two years from when the alleged fraudulent activity was discovered or could have been discovered with reasonable diligence" (*Belair Care Center, Inc. v Cool Insuring Agency, Inc.*, 168 AD3d 1162, 1166 [3d Dept 2019], citing CPLR 213 [8]).

> "Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him"

(*CIFG Assur. N. Am., Inc. v Credit Suisse Sec. [USA] LLC*, 128 AD3d 607, 608 [1st Dept 2015], *lv denied* 27 NY3d 906 [2016] [internal quotation marks and citation omitted]).

"Whether or not a plaintiff should have discovered an alleged fraud is an objective test" (*Vilsack v Meyer*, 96 AD3d 827, 828 [2d Dept 2012]). Thus, "plaintiffs will be held to have discovered the fraud when it is established that they were possessed of knowledge of facts from which [the fraud] could be reasonably inferred" (*Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 326 [1957]).

Here, the Stockholder defendants have also failed to establish that the aiding and abetting fraud claims are time-barred. Specifically, the Stockholder defendants have not shown prima facie that the alleged fraud could have been discovered with reasonable diligence, including through publicly-available information. Plaintiffs allege that they learned about the alleged fraud in March 2018 (NYSCEF Doc No. 2, complaint, ¶¶ 21, 67). Therefore, the branch of the Stockholder defendants' motion seeking dismissal of the complaint based upon statute of limitations grounds is denied.

B. Whether Plaintiffs' Claims Should Be Dismissed Based Upon Emails

The Stockholder defendants argue that the complaint should be dismissed based upon unambiguous email evidence. According to the Stockholder defendants, Mark Fosshage not only knew that Mitta and Reddy were associated with the Stockholder defendants, but also actively solicited investments from Mitta and Reddy.

To support their argument, the Stockholder defendants submit an email dated September 23, 2012 from Mark Fosshage to Mitta, which states:

> "Mark,
> I have mentioned this guy to you several times before. He invested approximately $600k already into WWW alongside Ravi and me through Think WWW Holdings. He is a high net worth individual who was the former head of New York Life Investments ($30 B in management). He is currently on the board of Fidelity . . . not sure but he is approximately worth $70M and well connected. He is your dad's age and has amazing sense for things. An awesome guy in general.
> Regards,
> Prashant"

(NYSCEF Doc No. 25).

In addition, the Stockholder defendants rely on an email exchange dated November 30, 2012, in which Reddy wrote to Mark Fosshage:

> "Prashant has appealed to me, to get you guys out of this 'jam', as the 'last hope'. I have agreed to accommodate and support and today, am funding the Tura entity (Ravishankar). This new exposure is above and beyond our original plan as well as the recent additional funding and frankly, out of my comfort level. . . . Building and operating businesses is hard and I want to see you guys, successful, in the long run. I believe in WWW and the entire team to make this happen and I am here for you in good times and bad"

(NYSCEF Doc No. 26). That same day, Mark Fosshage responded:

> "Thank you very very very much for your continued support and guidance. WWW has underperformed on sales this year. I am very sorry about that and working hard to get that turned around. The constant concern about raising money has certainly not helped… Thank you again for your tremendous support"

(*id.*).

Plaintiffs argue, in response, that these emails are not dispositive, given that Reddy and Mitta did not disclose their interests in the transactions.

"Emails can suffice as documentary evidence for purposes of CPLR 3211 (a) (1) . . ." (*Calpo-Rivera v Siroka*, 144 AD3d 568, 568 [1st Dept 2016]; *accord Kolchins v Evolution Mkts., Inc.*, 128 AD3d 47, 59 [1st Dept 2015], *aff'd* 31 NY3d 100 [2018] ["there is no blanket rule by which email is to excluded from consideration as documentary evidence under the statute"]). Nevertheless, the court finds that the emails relied upon by the Shareholder defendants do not

"resolve all factual issues as a matter of law" (*Fortis Fin. Servs.*, 290 AD2d at 383). The complaint alleges that "[u]nbeknownst to the plaintiffs, Prashant Mitta or MWH, also invested in Think" (NYSCEF Doc No. 2, complaint, ¶ 31). The complaint further alleges that Mitta and Reddy secretly invested in Tura in connection with the Series C stock purchase (*id.*, ¶ 91). Contrary to the Stockholder defendants' contention, the September 23, 2012 email does not indicate that MWH invested in Think. Even if the November 30, 2012 email shows that Reddy invested in Tura, it does not appear to refer to Mitta's investment in Tura.

In sum, the documentary evidence does not "utterly refute[] plaintiff's factual allegations," and does not "conclusively establish[] a defense as a matter of law." *Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 888 [2013], quoting Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 [2002]. Accordingly, the branch of the Stockholder defendants' motion seeking dismissal of plaintiffs' claims concerning the Series B-2 transaction based upon documentary evidence is denied.

C. Whether Plaintiffs' Claims Are Derivative

The Stockholder defendants next argue that this is not a proper derivative action. Specifically, the Stockholder defendants maintain that plaintiffs fail to allege that WWWH suffered any harm. According to the Stockholder defendants, plaintiffs' allegation that WWWH was injured by a change in control of the board does not constitute an injury to WWWH. In addition, the Stockholder defendants assert that, rather than benefiting from the remedy sought, WWWH would suffer debilitating harm from plaintiffs' rescission scheme.

Plaintiffs contend, in response, that the complaint sufficiently alleges that WWWH was injured by the fraud. Plaintiffs assert that "the fraud to the Company is an injury to the Company" (NYSCEF Doc No. 71 at 17).

Pursuant to the internal affairs doctrine, Delaware law governs the claims asserted in the name of WWWH against its shareholders, *i.e.*, the Shareholder defendants (*see Culligan Soft Water Co. v Clayton Dubilier & Rice LLC*, 118 AD3d 422, 422 [1st Dept 2014]).[2]

In order to determine whether a stockholder's claim is derivative or direct under Delaware law, the court considers (1) "[w]ho suffered the alleged harm – the corporation or the suing stockholder individually"; and (2) "who would receive the benefit of the recovery or other remedy" (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1035 [Del 2004]). "If the corporation alone, rather than the individual stockholder, suffered the alleged harm, the corporation alone is entitled to recover, and the claim in question is derivative" (*Feldman v Cutaia*, 951 A2d 727, 732 [Del 2008]). "Conversely, if the stockholder suffered harm independent of any injury to the corporation that would entitle him to an individualized recovery, the cause of action is direct" (*id.*).

Generally, a claim alleging mismanagement, corporate overpayment or a breach of fiduciary duty by managers is derivative (*see Tooley*, 845 A2d at 1038; *Gentile v Rossette*, 906 A2d 91, 99 [Del 2006] ["[C]laims of corporate overpayment are treated as causing harm solely to the corporation and, thus, are regarded as derivative"]; *In re Saba Software, Inc. Stockholder Litig.*, 2017 WL 1201108, *17, 2017 Del Ch LEXIS 52, *47 [Del Ch 2017] ["Claims of corporate mismanagement are classically derivative claims because, if proven, they represent 'direct wrong to the corporation that is indirectly experienced by all shareholders'"] [internal quotation marks and citation omitted]).

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[2] Even if the court applied New York law, the result would be the same because New York has adopted Delaware's test for determining whether a claim is direct or derivative (*see Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014]; *Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012]).

On the other hand, "[a] stockholder who is directly injured . . . does retain the right to bring an individual action for injuries affecting his or her legal rights as a stockholder" (*Tooley*, 845 A2d at 1036). "Voting power dilution may constitute a direct claim, because it can directly harm the shareholders without affecting the corporation, and any remedy for the harm suffered under those circumstances would benefit the shareholders" (*Oliver v Boston Univ.*, 2006 WL 1064169, *17, 2006 Del Ch LEXIS 75, *76 [Del Ch 2006], *rearg denied* 2006 WL 3742598, 2006 Del Ch LEXIS 210 [Del Ch 2006]).

Applying these principles, the complaint fails to allege that WWWH suffered the alleged harm. To the contrary, the complaint alleges that the injury consists of "a concealed change in control of the governance of WWWH" (NYSCEF Doc No. 2, complaint, ¶¶ 71, 82). Furthermore, the complaint alleges that the Stockholder defendants "gained full board control which allowed them to methodically displace Dr. James Fosshage and Mark Fosshage from virtually any involvement in WWWH" (*id.*, ¶ 34). Thus, the alleged harm is direct because it is specific to plaintiffs and no other shareholders (*see Vaughan v Standard Gen. L.P.*, 154 AD3d 581, 582 [1st Dept 2017] (applying Delaware law) ("Because the alleged injury—a lost opportunity to realize a premium on the share price—affects all shareholders, not only plaintiff and the putative class, these claims are derivative, rather than direct").

While the complaint alleges that the Stockholder defendants have "creat[ed] substantial debt for the Company mostly to aid their investments in India"; that the "interested transactions benefited their India Operation to the detriment of Plaintiff WWWH"; and that, in 2016, Mitta and Reddy "attempt[ed] to not pay money due by Defendants Board Designees' entities to WWWH, to burden WWWH with the India Operation debt, to push WWWH resources to the India Operation, and to gain additional technology from WWWH beyond what was licensed"

(NYSCEF Doc No. 2, complaint, ¶¶ 47, 162, 185), the complaint does not seek damages as a result of this alleged waste or mismanagement. Rather, the sole remedy sought by plaintiffs is rescission of the Series B-2 and Series C stock purchase agreements based upon the concealment of the identity of the investors' owners (*id.*, ¶ 11), which is a remedy that arguably would require the company to return the infusion of capital effected by the purchase agreements. Plaintiffs argue that Mitta and Reddy, in their capacity of directors, violated their fiduciary duties owed to WWWH. Nevertheless, even assuming the *company* (rather than the individual shareholders) suffered harm as a result of such alleged violations, the directors (the individuals, Mitta and Reddy) are not defendants in this action. Therefore, the complaint must be dismissed.

D. Whether the Complaint Fails to State A Cause of Action

In any event, even if plaintiffs had standing, the complaint still fails to state a cause of action.[3]

1. <u>Fraud and Breach of Fiduciary Duty Claims Against MWH, Think, and Tura</u>

Under Delaware law,

> "[t]o prevail on a claim of common law fraud, the plaintiff must plead facts supporting an inference that: (1) the defendant falsely represented or omitted facts that the defendant had a duty to disclose; (2) the defendant knew or believed that the representation was false or made the representation with a reckless indifference to the truth; (3) the defendant intended to induce the plaintiff to act or refrain from acting; (4) the plaintiff acted in justifiable reliance on the representation; and (5) the plaintiff was injured by its reliance"

[3] The court has not considered plaintiffs' letter dated November 12, 2019 (NYSCEF Doc No. 79). Commercial Division Rule 18 provides that "[a]bsent express permission in advance, sur-reply papers, including correspondence, addressing the merits of a motion are not permitted" (Rules of the Commercial Division of the Supreme Court (Uniform Rules for Trial Cts [22 NYCRR] § 202.70 [g] [rule 18]). The court did not give plaintiffs permission to address the merits of the motions.

(*DCV Holdings, Inc. v ConAgra, Inc.*, 889 A2d 954, 958 [Del 2005]). Moreover, "the circumstances constituting the fraud must be pled with particularity" (*Hauspie v Stonington Partners, Inc.*, 945 A2d 584, 586-587 [Del 2008]).

"Constructive fraud [or equitable fraud] is simply a term applied to a great variety of transactions, having little resemblance either in form or nature, which equity regards as wrongful, to which it attributes the same or similar effects as those which follow from actual fraud...." (*In re Wayport, Inc. Litig.*, 76 A3d 296, 327 [Del Ch 2013] [internal quotation marks and citation omitted]). "The principal factor distinguishing constructive fraud from actual fraud is the existence of a special relationship between the plaintiff and the defendant, such as where the defendant is a fiduciary for the plaintiff" (*id.*).

The complaint alleges that the Shareholder defendants "engaged in a fraudulent scheme to conceal the identity of the investors . . . ." (NYSCEF Doc No. 2, complaint, ¶¶ 214, 215). However, the complaint fails to allege that MWH, Think and Tura owed a fiduciary duty to WWWH or had a confidential relationship with WWWH prior to entering into the stock purchase agreements (*see Northpointe Holdings, Inc. v Nationwide Emerging Managers, LLC*, 2010 WL 3707677, *8, 2010 Del Super LEXIS 395, *20 [Del Superior, Sept. 14, 2010]).

Moreover, the complaint fails to state a cause of action for breach of fiduciary duty against the Shareholder defendants. To state a cause of action for breach of fiduciary duty under Delaware law, a plaintiff must allege: (1) the existence of a fiduciary relationship; and (2) the fiduciary's breach of that duty (*Heller v Kiernan*, 2002 WL 385545, *3, 2002 Del Ch LEXIS 17, *9 [Del Ch, Feb. 27, 2002], *affd* 806 A2d 164 [Del 2002]).

> "[A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status. For a dominating relationship to exist in the absence

> of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporate conduct"

(*Citron v Fairchild Camera and Instr. Corp.*, 569 A2d 53, 70 [Del 1989] [citations omitted]).

Although plaintiffs argue that "allegations of fiduciary violations against [nonparties] Mitta and Reddy are plead with sufficient particularity," plaintiffs concede that "[t]here are no fiduciary violations against the Stockholder Defendants because they did not owe a fiduciary duty to the Company" (NYSCEF Doc No. 71 at 16). Therefore, the complaint fails to state causes of action for fraud or breaches of fiduciary duty against MWH, Think, and Tura.

2. Fraud and Aiding and Abetting Fraud Claims Against Wilson

The Stockholder defendants argue that the fourth and fifth causes of action for fraudulent misrepresentation and constructive fraud asserted against Wilson should be dismissed because he did not have a duty to disclose information to WWWH. In addition, the Stockholder defendants argue that, since there was no underlying fraud, the aiding and abetting fraud claim necessarily fails. Finally, the Stockholder defendants maintain that Wilson was not a party to the stock purchase agreements. Therefore, according to the Stockholder defendants, plaintiffs' rescission claim cannot be maintained against him.

New York law governs the claims against Wilson (*see Culligan*, 118 AD3d at 422). In order to state a cause of action for fraudulent misrepresentation, "a plaintiff must allege 'a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury'" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011], quoting *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]). "A cause of action for fraudulent concealment requires, in addition to the four foregoing elements, an allegation that the defendant had a duty to disclose material

information and that it failed to do so" (*P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 AD2d 373, 376 [1st Dept 2003]). "The elements of constructive fraud are the same as those for actual fraud, except that the element of scienter is replaced by a fiduciary or confidential relationship between the parties" (*Klembczyk v DiNardo*, 265 AD2d 934, 935 [4th Dept 1999]). Moreover, CPLR 3016 (b) requires that "the circumstances constituting the wrong shall be stated in detail." Stated otherwise, the plaintiff must "'set forth specific and detailed factual allegations that the defendant personally participated in, or had actual knowledge of any alleged fraud'" (*Friedman v Anderson*, 23 AD3d 163, 166 [1st Dept 2005], quoting *Handel v Bruder*, 209 AD2d 282, 282-283 [1st Dept 1994]).

In this case, the complaint alleges that Wilson aided and abetted the fraud "by failing to disclose the related party interests of [the] members or entities in the Stock Purchaser Defendants that purchased stock in WWWH" and "conceal[ed] the true investors' identity from [WWWH]" (NYSCEF Doc No. 2, complaint, ¶¶ 25, 34). However, the complaint fails to allege that Wilson had a fiduciary relationship or confidential relationship with WWWH. "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). Indeed, the complaint alleges that Wilson represented Tura and Tumuluri in connection with the Series C transaction (NYSCEF Doc No. 2, complaint, ¶¶ 8, 54). The allegations that Wilson had a duty to disclose the interested party transactions (*id.*, ¶¶ 34, 82) are bare legal conclusions and, therefore, are not presumed to be true and accorded the benefit of every favorable inference. Accordingly, the complaint fails to state a cause of action for fraud against Wilson.

To state a cause of action "for aiding and abetting fraud, the complaint must allege: '(1) the existence of an underlying fraud; (2) knowledge of this fraud on the part of the aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the fraud'" (*Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472, 476 [1st Dept 2009], quoting *UniCredito Italiano SPA v JPMorgan Chase Bank*, 288 F Supp 2d 485, 502 [SD NY 2003]). "Aiding and abetting fraud must be pleaded with the specificity sufficient to satisfy CPLR 3016 (b)" (*High Tides, LLC v DeMichele*, 88 AD3d 954, 960 [2d Dept 2011]). This is particularly so with respect to aiding and abetting fraud claims; "[w]here liability for fraud is to be extended... to those who, although not participants in the fraudulent scheme, are said to have aided in and encouraged its commission, it is especially important that the command of CPLR 3016(b) be strictly adhered to" (*National Westminster Bank v Weksel*, 124 AD2d 144, 149 [1st Dept 1987], *lv denied* 70 NY2d 604 [1987]).

"Substantial assistance exists where (1) a defendant affirmatively assists, helps conceal, or by virtue of failing to act when required to do so enables the fraud to proceed, and (2) the actions of the aider/abettor proximately caused the harm on which the primary liability is predicated" (*Stanfield Offshore Leveraged Assets, Ltd.*, 64 AD3d at 476 [internal quotation marks and citation omitted]).

In *Eurycleia Partners, LP v Seward & Kissel, LLP* (12 NY3d 553, 556-557 [2009]), the plaintiffs brought an aiding and abetting claim against a law firm based on its drafting of offering memoranda that failed to reveal allegedly fraudulent actions. The Court of Appeals held that "[i]n the absence of a fiduciary relationship, we perceive no legal duty obligating [the law firm] to make affirmative disclosures to plaintiffs under the circumstances of this case" (*id.* at 562).

In *National Westminster Bank*, *supra*, a lender brought an action against, among others, the borrower's attorneys for fraud in connection with portraying the borrower as creditworthy (*National Westminster Bank*, 124 AD2d at 144). The First Department held that the borrower's attorneys did not provide substantial assistance to the borrower in the commission of the fraud, noting that:

> "Here, there was no independent duty to act on the part of defendant law firm. Manifestly, there was no fiduciary relationship between the law firm and the bank. Nor was the firm under any ethical obligation to disclose what knowledge it might have had concerning its client's alleged impending fraud"

(*id.* at 148; *see also Gansett One, LLC v Husch Blackwell, LLP*, 168 AD3d 579, 579 [1st Dept 2019]).

Here, the complaint fails to state a cause of action for aiding and abetting fraud against Wilson. First, the complaint fails to plead any underlying fraud (*see Nabatkhorian v Nabatkhorian*, 127 AD3d 1043, 1044 [2d Dept 2015] ["a cause of action for aiding and abetting fraud cannot lie without the underlying fraud having been sufficiently pleaded"]). Second, to the extent that the complaint alleges that Wilson failed to disclose the identity of the investors (NYSCEF Doc No. 2, complaint, ¶¶ 25, 34), Wilson's silence does not constitute substantial assistance (*see King v George Schonberg & Co.*, 233 AD2d 242, 243 [1st Dept 1996] ["in the absence of a confidential or fiduciary relationship between plaintiff and her brother's attorneys giving rise to a duty of disclosure, the silence of the attorneys did not amount to the substantial assistance that is a required element of aider or abettor liability"]; *National Westminster Bank*, 124 AD2d at 148). Even though the complaint alleges that Wilson drafted documents (NYSCEF Doc No. 2, complaint, ¶ 103), plaintiffs fail to allege anything more than "routine legal services," which is insufficient to support an aiding and abetting fraud claim against an attorney (*Learning*

Annex, L.P. v Blank Rome LLP, 106 AD3d 663, 663 [1st Dept 2013], *lv denied* 106 AD3d 859 [2013]).

3. Rescission Claims

Because the fraud, breach of fiduciary duty, and aiding and abetting fraud claims fail, the rescission claim fails as well (*see e.g. Gall v Summit, Rovins & Feldesman*, 222 AD2d 225, 226 [1st Dept 1995], *lv dismissed* 88 NY2d 919 [1996] ["The insufficient pleading of [fraud and breach of fiduciary duty] causes of action necessarily dooms the rescission cause of action as well since, in this instance, it is predicated upon the viable assertion of at least one of those claims"]).

4. Leave to Replead

The court denies plaintiffs' request for leave to replead the complaint. Plaintiffs have failed to submit a proposed amended complaint (*see FCRC Modular, LLC v Skanska Modular LLC*, 159 AD3d 413, 416 [1st Dept 2018] ["Leave to replead was also properly denied, as appellants failed to set forth any proposed amendments that would cure the present deficiencies"]; *Parker Waichman LLP v Squier, Knapp & Dunn Communications, Inc.*, 138 AD3d 570, 571 [1st Dept 2016] ["court properly denied plaintiff's request for leave to replead, as plaintiff failed to submit a proposed amended pleading accompanied by an affidavit of merit"]; *Abbott v Herzfeld & Rubin*, 202 AD2d 351, 352 [1st Dept 1994], *lv dismissed in part, denied in part* 83 NY2d 995 [1994] ["Leave to replead was properly denied, plaintiffs not having provided proposed new pleadings supported by evidence as on a motion for summary judgment"]).

In view of the above, the court need not reach the Stockholder defendants' remaining contentions.

Accordingly, the Stockholder defendants' motion to dismiss is granted.

II. Mayer Brown's Motion to Dismiss (Motion Sequence Number 003)

Mayer Brown contends that the fourth and fifth causes of action should be dismissed, because it did not have a duty to disclose facts to WWWH. Mayer Brown further argues that plaintiffs have failed to allege Mayer Brown's awareness of, or reliance on, the information that it concealed from WWWH. According to Mayer Brown, plaintiffs have failed to allege that its non-disclosure proximately caused WWWH's injury. In addition, Mayer Brown maintains that it cannot be sued for rescission because it was not a party to the stock purchase agreements.

The court first turns to the fraudulent misrepresentation and constructive fraud claims against Mayer Brown. The complaint alleges that Mayer Brown concealed the true identity of the investors from plaintiffs (NYSCEF Doc No. 2, complaint, ¶¶ 25, 32, 34, 67, 171, 214, 215, 218, 219). Nevertheless, the complaint fails to allege that Mayer Brown owed a fiduciary duty to WWWH or that it had some other confidential relationship with WWWH (*see Mandarin Trading Ltd.*, 16 NY3d at 179; *Gansett One, LLC*, 168 AD3d at 579). Specifically, the complaint alleges that "Mayer Brown LLP was retained by the purchaser of the B-1 and B-2 Series and the undisclosed investors in the C Series and later represented the C Series purchaser" (NYSCEF Doc No. 2, complaint, ¶ 5). Although the complaint alleges that "Mayer Brown, LLP had the duty to disclose the interested party transactions and failed to do so" (*id.*, ¶¶ 34, 75, 82, 90), this is a bare legal conclusion without any supporting factual allegations (*see Mamoon*, 135 AD3d at 668).

Moreover, the aiding and abetting fraud claim against Mayer Brown is similarly deficient. The complaint fails to allege an underlying fraud. In addition, given that plaintiffs have failed to plead a fiduciary relationship between Mayer Brown and WWWH, Mayer Brown's silence does not amount to substantial assistance (*see King*, 233 AD2d at 243). To the

extent that the complaint alleges that "Defendant Mayer Brown, representing Defendant MWH and its members, Mitta and Reddy, intentionally created a new entity for the specific purpose to obtain WWWH Series B-2 Preferred Stock to pursue a fraudulent scheme of obtaining the majority of WWWH Board through investments that concealed MWH's members[] true identity" and drafted "a Voting Agreement, an Investor's Rights Agreement, a Right of First Refusal and Co-Sale Agreement and Indemnification Agreements" (NYSCEF Doc No. 2, complaint, ¶¶ 72, 75), the complaint fails to plead facts indicating that Mayer Brown did anything more than provide routine legal services (*see Learning Annex, L.P.*, 106 AD3d at 663).

Since the fraud and aiding and abetting fraud claims fail, the rescission claim must also be dismissed as a necessary consequence (*see Gall*, 222 AD2d at 225).

Plaintiffs' request for leave to replead their causes of action against Mayer Brown is denied. Plaintiffs have failed to submit a proposed amended complaint or submit evidentiary proof to support their request (*see Parker Waichman LLP*, 138 AD3d at 571).

Therefore, Mayer Brown's motion to dismiss must be granted.

In light of the above, the court need not reach Mayer Brown's additional arguments advanced in support of dismissal of the complaint.

CONCLUSION

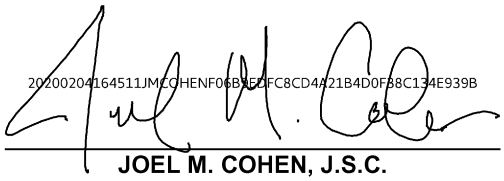
Accordingly, it is

ORDERED that the motion (sequence number 001) of defendants Mitta Water Holdings, LLC, Think WWW Holdings, LLC, Tura Water Holdings, LLC, and Samuel C. Wilson to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the

Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion (sequence number 003) of defendants David A. Carpenter and Mayer Brown, LLP to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants.

This constitutes the Decision and Order of the Court.



2/4/2020
DATE

JOEL M. COHEN, J.S.C.

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