Guggenheim Sec., LLC v Falcon's Beyond Global, LLC
2025 NY Slip Op 31326(U)
April 11, 2025
Supreme Court, New York County
Docket Number: Index No. 651585/2024
Judge: Melissa A. Crane

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MELISSA A. CRANE** **PART** **60M**

Justice

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GUGGENHEIM SECURITIES, LLC,

Plaintiff,

- v -

FALCON'S BEYOND GLOBAL, LLC, FALCON'S BEYOND GLOBAL, INC.

Defendant.

----------X

INDEX NO. 651585/2024

MOTION DATE 08/19/2024

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 28, 29, 30, 31, 32, 33, 35, 36, 38, 39, 40, 42, 43

were read on this motion to/for DISMISSAL.

In Motion Seq. No. 002, plaintiff/counterclaim defendant Guggenheim moves to dismiss defendant/counterclaim plaintiff Falcon's counterclaims and affirmative defenses pursuant CPLR 3211 (a)(1) and (a)(7). For the following reasons, the court grants the motion in part with leave to replead. The main reason is that, the counterclaims, especially the fraud counterclaims, contain too many non-actionable allegations for plaintiffs to be able to respond.

This action concerns an agreement for financial advisory services in connection with a Special Project Acquisition Company ("SPAC") transaction. Plaintiff Guggenheim Securities ("Guggenheim") alleges that defendants Falcon's Beyond Global, LLC and Falcon's Global Inc. (collectively "Falcon") failed to pay Guggenheim its required fee pursuant to the parties' agreements. In its Amended Answer, Falcon asserts counterclaims and affirmative defenses against Guggenheim, alleging claims for fraudulent inducement, breach of contract, breach of

fiduciary duty, fraudulent misrepresentation, negligent misrepresentation, negligence, breach of the covenant of good faith and fair dealing and declaratory judgment.

FACTUAL ALLEGATIONS

In its counterclaims, Falcon alleges that in 2021, its predecessor companies, Falcon's Treehouse LLC and Katmandu Group, LLC ("the predecessor companies"), sought to combine the two entities under one uniform operating company and were looking to raise capital to aid in the growth of the new entity (Amend Answer [Doc 24] ¶¶ 44 - 45). Falcon alleges that in March 2021, the principals of the predecessor companies, Cecil Magpuri and Scott Demerau, had a series of introductory calls with two representatives of Guggenheim, an investment bank, to discuss the potential for the entity to go public through Special Purchase Acquisition Company[1] ("SPAC") (*id.* ¶ 45-47).

Falcon alleges that between March 2021 and April 2021, the parties had multiple calls with Guggenheim's Senior Managing Directors, Stephen Finkel and Ethan Sawyer, to discuss the potential venture (*id.* ¶ 48). Falcon alleges that during this time, Guggenheim was a "major player" in the SPAC market (*id.* ¶ 19). Falcon alleges that during these initial calls, Finkel and Sawyer provided a "back-of-the-envelope valuation" of the contemplated new entity and represented that Guggenheim could raise $300 million in new capital at an enterprise value of $1.6 billion via a deSPAC transaction (*id.* ¶ 49). Falcon alleges that Guggenheim represented the transaction could be completed by the end of 2022 (*id.*).

Falcon alleges that in its initial conversations with Guggenheim, Finkel represented that "Guggenheim was a 'top player' in the entertainment industry, with extensive relevant experience representing Disney in particular" (Amended Answer ¶ 53). Moreover, Falcon alleges

[1] A Special Purpose Acquisition Company ("SPAC") provides a vehicle for private companies to go public without an Initial Public Offering (IPO).

that Sawyer represented that Guggenheim recently assisted Disney in the financing of its new streaming platform and Sawyer himself spoke regularly with the CEO of Disney (*id.*). Falcon alleges that upon information and belief, these representations were false (*id.*).

Falcon also alleges that despite the initial "back-of-the-envelope valuation" Sawyer advised the predecessor companies to reduce the enterprise value of the potential business to $1.2 billion to make the future entity competitive to SPACs and attractive to investors (*id.* ¶ 33). Falcon alleges that the predecessor companies "relied on Sawyer's advice and agreed to follow it" (*id.*). Falcon further alleges that Sawyer assured the predecessor companies that a deSPAC transaction would be the best course of action and that Guggenheim was best suited to be their financial advisor (*id.* ¶ 37).

Falcon alleges that Guggenheim advised the predecessor companies "to spare no expense" in hiring "top-of-the-line professionals" in connection with the potential SPAC transaction, including "high-end attorneys, banks, and accountants." Falcon alleges that at the time, Guggenheim and Sawyer "knew that the entities were not combined and had next to no cash" (*id.* ¶ 56). Moreover, Falcon alleges that in Guggenheim's attempt to demonstrate that the fee structure was in line with industry practice, Guggenheim provided Falcon with an "Advisory Fee Analysis" (*id.* ¶ 60). Falcon alleges Guggenheim's advisory fee analysis was misleading because the comparative deals included were M&A transactions rather than SPAC transactions (*id.*).

On April 27, 2021, Guggenheim and the predecessor companies entered into an agreement for financial advisory services in connection with the subject transaction ("Original Engagement Letter" [Doc 3]). Under the agreement, the parties agreed that Guggenheim would be engaged to act:

> "...(a) as the Company's lead financial advisor in connection with any merger, sale or other business combination transaction (as more fully defined below, any "Strategic Transaction"), (b) as more fully described below in connection with any Strategic Transaction involving a special purpose acquisition company (a "SPAC" and any such transaction a "SPAC Transaction"), as placement agent and arranger or capital markets advisor in connection with any private placement of equity interests in the Company, the SPAC or the combined entity resulting from the SPAC Transaction ("NewCo") that is executed in anticipation of or in connection with consummation of the SPAC Transaction (any "SPAC Related Financing") and (c) that the Company elects to pursue in anticipation of or in lieu of a SPAC Transaction (as more fully defined below, any "Stand-Alone Financing")"

(*id.* ¶ 1 [emphasis added]).

Regarding Guggenheim's fee for its financial advisory services the agreement states:

> "4. In consideration of Guggenheim Securities' services pursuant to this Agreement, the Company agrees to pay Guggenheim Securities the following compensation (collectively, the "Transaction Fees")
>
> (a) *Strategic Transaction Fee.* A cash fee, payable upon consummation of any Strategic Transaction (the "**Strategic Transaction Fee**"), in an amount to be determined as follows:
>
> (i) In the case of any SPAC Transaction, an amount equal to 150 basis points (1.50%) of the Aggregate Consideration (as defined below) involved in the Transaction.
>
> (ii) In the case of any Strategic Transaction other than a SPAC Transaction, a percentage of the Aggregate Consideration involved in the Transaction determined in good consistent with compensation arrangements customarily agreed by leading Wall Street firms in comparable circumstances.
>
> (b) *SPAC Related Financing Fee.* A cash fee, payable upon consummation of any SPAC Related Financing (the "**SPAC Related Financing Fee**"), in an amount equal to 50% of the aggregate amount of the compensation payable by the Company, the SPAC or NewCo to all investment banking firms (including Guggenheim Securities) in respect or services rendered in connection with the SPAC Related Financing, whether as placement agent, capital markets advisor or otherwise.
>
> (c) *Stand-Alone Financing Fee.* A cash fee, payable upon consummation of any Stand-Alone Financing (the "Stand-Alone Financing Fee"), in an amount equal to 5.00% of the aggregate gross proceeds of the Stand-Alone Financing, including amounts committed but undrawn."

(*id.* ¶ 4).

The agreement further provides:

> "THE COMPANY ACKNOWLEDGES AND AGREES THAT (I) GUGGENHEIM SECURITIES WILL ACT SOLELY IN THE CAPACITIES INDICATED ABOVE IN CONNECTION WITH THE TRANSACTIONS REFERRED TO HEREIN AND (II) THIS AGREEMENT DOES NOT CONSTITUTE AN EXPRESS OR IMPLIED COMMITMENT OR UNDERTAKING ON THE PART OF GUGGENHEIM SECURITIES OR ANY OF ITS AFFILIATES AND RELATED ENTITIES TO UNDERWRITE, PROVIDE OR PLACE ALL OR ANY PART OF ANY SPAC RELATED FINANCING OR OTHER FINANCING **AND DOES NOT ENSURE OR GUARANTEE THE SUCCESSFUL ARRANGEMENT, PLACEMENT OR COMPLETION OF ANY TRANSACTION OR ANY PORTION THEREOF. ANY SUCH COMMITMENT, IF, AS AND WHEN PROVIDED, WOULD BE DOCUMENTED IN A SEPARATE WRITTEN AGREEMENT** AND REMAIN SUBJECT TO VARIOUS CONDITIONS, INCLUDING BUT NOT LIMITED TO SATISFACTORY COMPLETION OF DUE DILIGENCE, RECEIPT OF COMMITTEE APPROVAL, EXECUTION AND DELIVERY OF MUTUALLY ACCEPTABLE DEFINITIVE DOCUMENTATION AND SATISFACTION OF CONDITIONS PRECEDENT SPECIFIED THEREIN."

(*id.* ¶ 9 [emphasis added]).

> "The Company acknowledges and agrees that Guggenheim Securities will act under this Agreement as an independent contractor with obligations solely to the Company and is not being retained hereunder to advise the Company as to the underlying business or financial decision to consummate any Transaction or with respect to any related financing, derivative or other transaction. **Nothing in this Agreement or the nature of Guggenheim Securities' services will be deemed to create a fiduciary or agency relationship between Guggenheim Securities and the Company, any of the Company's direct or indirect equity holders, members, creditors or employees or any other person or entity in connection with any Transaction or otherwise.** The Company acknowledges that Guggenheim Securities is not the agent of and is not authorized to bind the Company with respect to any action or decision"

(*id.* Annex ¶ N [emphasis added]).

The agreement further provides a merger provision stating that the Original Engagement Letter embodies the entire agreement of the parties:

> "**This Agreement** (including this Annex and the Indemnification Provisions attached hereto) **embodies the entire agreement and understanding of the Company and Guggenheim Securities with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to the subject matter hereof. The provisions of this Agreement may not be waived, modified, amended or supplemented except in writing executed by the Company and Guggenheim Securities.** This Agreement will inure to the benefit of, and be binding upon, the parties hereto and their respective successors and assigns"

(*id.* Annex ¶ P) [emphasis added]).

Falcon alleges that once engaged, Guggenheim prepared a model demonstrating six years of projected financial results for the anticipated new entity (*id.* ¶ 62). Falcon contends that it only learned after the fact, that a six-year financial forecast was not in line with standard investment banking practice (*id.* ¶ 63). Falcon alleges that potential investors "repeatedly told" Falcon that they would not consider financial projections beyond 18 months to two years (*id.*). Falcon further alleges that in August 2021, Guggenheim issued a slide deck presentation "to justify" its valuation (*id.* ¶ 65). Falcon alleges this deck included misrepresentations and was prepared negligently (*id.*).

In 2022, the predecessor companies merged with a SPAC entity, FAST Acquisition Corp. II ("Fast II") (Amended Answer ¶¶ 68 – 69). Falcon alleges that in the Fall of 2022, the sponsors of FAST II questioned the validity of the projections Guggenheim generated, particularly because the sponsors were concerned about the high rate of investor redemptions (*id.* ¶ 71). Falcon alleges it then relayed these concerns to Guggenheim, who allegedly advised Falcon that "it should be sufficient" that the sponsors were working on a way to minimize these redemptions (*id.* ¶ 72). Falcon alleges that Guggenheim knew or should have known that this statement was inaccurate, as the shareholder's documents showed they were "virtually mandated to redeem" (*id.*).

Falcon alleges that later December 2022, the "market interest in SPACs had tanked" and the parties realized the deal would not close by the merger agreement deadline (*id.* ¶ 73). Falcon alleges that when it sought advice from Guggenheim about its best course of action with respect to the deal, Guggenheim advised Falcon to extend the deadline on the deal with Fast II and complete the transaction (*id.* ¶ 75). Falcon alleges that relying on Guggenheim's advice, Falcon

executed the Amended and Restated Merger Agreement with the SPAC entity to extend the deadline to complete the merger to October 18, 2023 (*id.* ¶ 77).

Falcon alleges that, when it asked Guggenheim to reduce its fee in light of the "astronomical" fees associated with the transaction, Guggenheim declined to do so. Falcon alleges that "seizing on the predecessor companies' duress, Sawyer informed [Falcon] that it would be required to sign an amendment to the Original Engagement Letter to provide Guggenheim with a flat fee (so that Guggenheim, unlike its client and everyone else on the deal, would be compensated regardless of the deal's success)" (*id.* ¶ 81). Falcon alleges that Guggenheim "put immense pressure" on Falcon to enter into the Engagement Letter Amendment by "for the first time, disclosing that, in its interpretation of the Original Engagement Letter, Guggenheim would not just be compensated for 1.5% of all outside capital raised… but would also receive 1.5% value of the Predecessor Companies' shares, that is , 98% of the entire capital of the company…" (*id.* ¶ 82).

The Engagement Letter Amendment altered Guggenheim's fee from the original percentage-based fee to a fixed fee of $11,000,000 due upon completion of the transaction (*id.* ¶ 84). Despite the language of the amendment, and the merger clauses it incorporated, Falcon alleges "prior to, at the time of, and following execution of the Engagement Letter Amendment, Sawyer made repeated promises to Falcon's Beyond that Guggenheim would renegotiate its fees just prior to deal close once the deal's financials were apparent" (*id.* ¶ 85). Falcon alleges that Sawyer, on behalf of Guggenheim, told Falcon "[i]f you guarantee us you're closing, we'll guarantee you a lower price" (*id.*).

Falcon alleges that, after the parties signed the amendment, Guggenheim "effectively ceased working on the matter," stopped providing updates to Falcon, and *supra*, stopped attempting to solicit potential investors for the deal (*id.* ¶ 88).

The SPAC transaction closed on October 5, 2023 (SAC ¶ 88). Falcon alleges that the transaction was a "total failure" because shareholders redeemed 99% of company shares (*id.*). Falcon alleges that it garnered a mere $3.7 million in outside investment as a result of the deal, and that these failures were due entirely to, or largely because of, "Guggenheim's failure to perform or its negligent execution of the transaction" (*id.*).

STANDARD

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez, supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense or the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v. Ginsburg*, 43 NY 268 [1977]).

DISCUSSION

I. Fraud Counterclaims

Falcon alleges a litany of misrepresentations prior to and during the parties' contractual relationship. Most are not actionable. Falcon appears to have asserted fraud for virtually every statement Guggenheim made. Even more confusing, Falcon has asserted two separate counts sounding in fraud (the first and sixth counterclaims) that appear to duplicate each other in large part. As a result, Falcon's fraud claims are all over the place and for the most part, fail as a matter of law. As far as the court can discern, the only fraud allegations that possibly have merit are those concerning Guggenheim urging plaintiff to "stay the course" with the ulterior motive of pocketing a large fee. However, these allegations are not plead with sufficient particularity under CPLR 3016.

i. First Counterclaim for fraudulent inducement

To maintain a cause of action for fraudulent inducement of contract, a plaintiff must allege "a material representation, known to be false, made with the intention of inducing reliance, upon which [it] actually relie[d], consequentially sustaining a detriment" (*Frank Crystal & Co. v. Dillmann*, 84 AD3d 704 [1st Dep't 2011]. Where a fraudulent inducement claim is plead in conjunction with a breach of contract action, a party must "(i) demonstrate a legal duty separate from the duty to perform under the contract; or (ii) demonstrate a fraudulent misrepresentation collateral or extraneous to the contract; or (iii) seek special damages that are caused by the misrepresentation and unrecoverable as contract damages (*State St. Glob. Advisors Tr. Co. v. Visbal*, 462 F. Supp. 3d 435 (S.D.N.Y. 2020) citing *Johnson v. Nextel Commu'ns, Inc.*, 660 F.3d 131, 143 [2d Cir. 2011]).

First, Falcon alleges that Guggenheim knowingly or with gross negligence misrepresented the projected value of the hypothetical future entity, as well as the relevant comparable companies for comparison, knowingly misrepresented that its recommended

compensation arrangements were fair, reasonable, and standard in the market and knowingly misrepresented its belief that a deSPAC transaction was in Falcon's best interest (Amended Answer ¶ 107).

Assuming all these allegations are true, the Original Engagement Letter includes a merger clause. It states that the Engagement Letter "embodies the entire agreement and understanding of [the parties] with respect to the subject matter hereof and supersedes all prior agreements and understandings relating to the subject matter hereof" (Original Engagement Letter, Annex, ¶ N). Moreover, the agreement provides an express disclaimer that Guggenheim does not "ensure or guarantee… the successful arrangement, placement or completion of any transaction or any portion thereof…" (Original Engagement Letter ¶ 9).

Thus, under the merger clause, together with the additional disclaimer, the parties agreed that Guggenheim was not ensuring or guaranteeing a successful transaction, let alone a specific financing amount. This includes Guggenheim's alleged "back-of-the-envelope valuation" and Guggenheim's alleged representations that its fee arrangement was "fair and reasonable" (*see Suber v. Churchill Owners Corp.*, 228 AD3d 414 [1st Dep't 2024]; *see also Chappo & Co. v. Ion Geophysical Corp.*, 80 AD3d 46 (1st Dep't 2011); *see also WT Holdings Incorporated v. Agronaut Group*, 5 NYS3d 731 [2015]).

Moreover, by Falcon's own admission, it was not until December 2022 that "market interest in SPACs had tanked" and "it was in the context of a then-red hot SPAC market that Guggenheim pitched its services to [Falcon]…" (Amended Answer ¶¶ 73, 42). Thus, the complaint itself contradicts the notion that, during the initial discussions in 2021, prior to signing the Original Engagement Letter, Guggenheim knew that its financial projections were inflated.

Further, Falcon's allegation that Guggenheim's valuation was knowingly false or reckless because, at the time of Guggenheim's valuation, the prospective company did not exist, had no directors or assets and, therefore, Guggenheim's valuation was "absurd," is circular. By Falcon's own admissions, the sole purpose of the conversations between Guggenheim and Falcon were to discuss the projected value of a company that did not exist yet. It is axiomatic that a hypothetical company would have no directors or assets and therefore, under this analysis, any valuation would be speculative. Thus, this allegation does not state that Guggenheim knowingly made a present misrepresentation of fact. Rather, the allegations that Guggenheim stated its belief that the prospective and hypothetical company could be worth over $1.6 billion dollars, as pled, merely reflect a prediction or expectation. This sort of statement is not actionable unless it is contradicted by "concrete, existing fact that defendant either intentionally failed to disclose or negligently failed to discover" (*100 & 130 Biscayne, LLC v. EE NWT OM, LLC*, 211 AD3d 451, 452 [1st Dep't 2022]; *see also Abselet v. Satra Realty*, LLC, 85 A.D.3d 1406, 1409 [3d Dep't 2011]).

Moreover, Falcon's allegations that Guggenheim misrepresented that the fee structure was fair and reasonable is also non-actionable. As a matter of law, parties cannot establish justifiable reliance on alleged misrepresentations if they do not make efforts to verify this information, particularly where this information is publicly available (*HSH Nordbank AG v. UBS AG*, 95 AD3d 185, 195 [1st Dep't 2012] [internal quotations omitted]). Falcon concedes that Guggenheim advised it to hire "top-of-the-line" attorneys, and there is no allegation here that Falcon was not represented by counsel nor that it could have done its own due diligence to confirm that the agreed upon fee structure was in line with market practice.

Falcon's allegations that, once the parties signed the engagement letter, Guggenheim made intentional misrepresentations concerning the financial viability of the deal, could potentially constitute fraud. However, Falcon has not plead these particular allegations with particularity. Specifically, Falcon alleges that "despite knowing that the anticipated deSPAC would be disastrous for its client, or recklessly indifferent to this reality, when asked specifically about the best course of action, Guggenheim repeatedly counseled its client to pursue a deSPAC" (*id.* ¶ 116). Falcon alleges that Guggenheim intentionally and knowingly made misrepresentations about whether Falcon should "stay the course" with the contemplated deSPAC transaction solely so that Guggenheim would not lose its now-assured fee. In other words, Falcon has alluded that Guggenheim purposefully misled it as to the propriety of continuing with the transaction, at a time when Falcon could have extracted itself, all to obtain a fee. Assuming this is true, this could amount to fraud.

However, fraud must be pled with particularity. Falcon does not allege when this misrepresentation took place, just that it occurred sometime in the fall of 2022 or after (*id.* ¶73). Nor does Falcon allege to whom Sawyer made this representation, just that it was to "Falcon." Surely, the identity of the person who Sawyer misled must be known to Falcon. What the statements were also lack detail. Finally, Falcon's allegations concerning this aspect of fraud are so muddled together with the rest of its non-actionable fraud allegations, the pleading is difficult to decipher, much less answer.

Although Guggenheim disclaimed a fiduciary duty and the success of any specific amount of financing, Falcon's allegations here concern alleged misrepresentations that were allegedly intended to induce Falcon to continue with the deal at a time it could have extracted itself, so that plaintiff could obtain its fee. This is not barred by the merger clause, and it is not

duplicative of the breach of contract claim as it is collateral to the contract. Thus, Guggenheim's claim for fraudulent inducement is dismissed with leave to replead.

ii. Sixth Cause of Action for Fraudulent Misrepresentation

As far as the court can discern, Falcon's cause of action for Fraudulent Misrepresentation largely duplicates its cause of action for fraudulent inducement. Therefore, it is dismissed.

II. Second Counterclaim for Breach of Contract

Defendant/counterclaim-plaintiff's second cause of action for breach of contract alleges that Guggenheim breached the parties Original Engagement Letter and Engagement Letter Amendment by failing to provide the contracted-for financial advisory services or failing to perform competent, professional standard projections and financial analyses of the Predecessor Companies (Amended Complaint ¶ 6). Plaintiff further alleges that Guggenheim breached the agreement by failing to perform any services to market the SPAC deal, solicit prospective stakeholders in the SPAC deal and review those stakeholder's proposals, and adequately participate in the negotiations of the SPAC deal (*id.* ¶ 113).

In order to recover from a defendant for breach of contract, a plaintiff must prove: (1) the existence of a contract between itself and that defendant; (2) performance of the plaintiff's obligations under the contract; (3) breach of the contract by that defendant; and (4) damages to the plaintiff caused by that defendant's breach (*Diesel Props S.r.l. v. Greystone Bus. Credit II LLC*, 631 F.3d 42 [2d Cir. 2011]).

The contract provides, *inter alia*, that Guggenheim agrees to "assist the company with respect to the following…review and analysis from a financial point of view of the business, financial condition and prospects of the Company and, as appropriate any Transaction

Counterparty…" (Original Engagement Letter Section 2(a)). The engagement letter further provides:

> (b) In connection with each Transaction that the Company elects to pursue:
>
> (i) Review and consideration from a financial and capital markets point of view of potential structures and terms for the Transaction;
>
> (ii) Preparation of marketing materials concerning the Company and the Transaction for presentation to prospective Transaction Counterparties;
>
> (iii) Preparation of marketing materials concerning the Company and the Transaction for presentation to prospective Transaction Counterparties;
>
> (iv) Solicitation of, and review of proposals received from, prospective Transaction Counterparties; and
>
> (v) Negotiation of the Transaction.

(*id.* Section 2 (b)).

Falcon's allegations are sufficient to maintain a claim for breach of contract against Guggenheim. Falcon has alleged that it performed its obligations under the contract and that Guggenheim breached several of its obligations under Section 2 of the contract, such as assisting in the negotiations of the SPAC transaction as well as preparing marketing materials and actively marketing the prospective company. Therefore, with respect to Falcon's breach of contract counterclaim, Guggenheim's motion to dismiss is denied.

III. Third Counterclaim for Breach of the Covenant of Good Faith and Fair Dealing

Falcon's counterclaim for breach of the covenant of good faith and fair dealing is largely duplicative of its viable breach of contract cause of action.

For some reason, Falcon also supports its good faith and fair dealing counterclaim with the contention that there was no consideration for the Engagement Letter Amendment. By its own terms the Engagement Letter Amendment modifies the parties' fee structure agreement

from a percent-based fee to a fixed amount fee payable through installments after the closing of the transaction. Falcon's assertion that the fee arrangement was not reasonable does not equate with a lack of consideration. Therefore, Falcon's counterclaim for breach of the covenant of good faith and fair dealing is dismissed as duplicative.

IV. Fourth Counterclaim for Breach of Fiduciary Duty

Falcon's breach of fiduciary duty claim fails to the extent that it is premised on Guggenheim's alleged misrepresentations before entering into the Original Engagement Letter. Even assuming the allegations are true for the purpose of this motion, Falcon alleges the basis for its fiduciary relationship is Guggenheim's role as Falcon's exclusive investment banker, which commenced with the Original Engagement Letter, not before. Therefore, Falcon's allegations that Guggenheim breached its fiduciary duty by misrepresenting the true valuation of the projected company to induce Falcon to hire Guggenheim, misrepresenting that Guggenheim's proposed fee structure was in line with market practice and inducing Falcon to agree to that proposed fee structure, cannot support a breach of fiduciary duty claim, because the allegations occurred prior to the commencement of any alleged fiduciary relationship.

The remainder of Falcon's allegations allege breaches of fiduciary duty after the parties signed the Original Engagement Letter. However, these claims fail because the agreement between the parties expressly disclaims a fiduciary duty.

Paragraph N of the Annex to the Original Engagement Letter states:

> "The Company acknowledges and agrees that Guggenheim Securities will act under this Agreement as an independent contractor with obligations solely to the Company and is not being retained hereunder to advise the Company as to the underlying business or financial decision to consummate any Transaction or with respect to any related financing, derivative or other transaction. **Nothing in this agreement or the nature of Guggenheim Securities' services will be deemed to create a fiduciary or agency relationship between Guggenheim Securities and the Company,** any of the Company's direct or indirect equity holders, members, creditors or employees or any other person or entity in connection with any Transaction or otherwise"

(Original Engagement Letter, Annex, ¶ N).

Here, the fiduciary duty disclaimer is clear and unambiguous. As Falcon's alleged breach of fiduciary duties fall under the scope of those in the agreement, and because Falcon signed an agreement clearly acknowledging that the parties did not have a fiduciary relationship, the court dismisses the claim for breach of fiduciary duty (*see La Scoula D'Italia Guglielmo Marconi v. Gates Cap. Corp.*, 187 AD3d 581 [1st Dep't 2020]; *see also Turner Constr. Co. v. Flight Ctr. Hotel, LLC*, No. 2023-04626, 2025 WL 993558 [1st Dep't 2025]).

The present matter is distinguishable from that at issue in *Samba Enters., LLC v. iMesh, Inc.*, No. 06 CIV. 7660 (DC), 2009 WL 705537 [S.D.N.Y. 2009], aff'd sub nom. *Samba Enters., Ltd. v. iMesh, Inc.*, 390 F. App'x 55 [2d Cir. 2010]). Although in *Samba* there was a provision waiving an agency relationship between the parties, the court found this waiver inconsistent with the overall purpose of the agreement and found that the defendant was nevertheless an agent of plaintiff and owed it a fiduciary duty. Here, Falcon does not explain how the waiver of fiduciary duty is inconsistent with the overall purpose of the agreement. Moreover, it is odd that Falcon relies so heavily on *EBCI v. Goldman Sachs & Co.*, 5 NY3d 11 [1st Dep't 2005]. That case is irrelevant as it did not involve an express disclaimer of fiduciary duties.

Accordingly, Falcon's counterclaim for breach of fiduciary duty is dismissed.

V. Fifth Counterclaim for Negligence

Falcon alleges that Guggenheim owed a duty of care to Falcon "to provide accurate information regarding, *inter alia*, appropriate techniques for generating financial projections for deSPAC targets; industry standard for deSPAC targets' fee arrangements; and the company's prospects for a successful deal" (Amended Answer ¶ 171). Falcon alleges that Guggenheim

breached its duty of care by "making repeated misrepresentations including, *inter alia,* that its financial projections for the company were standard in the industry and would be effective in soliciting investors" (*id.* ¶ 172). Falcon also alleges Guggenheim breached its duty of care by representing that that its proposed fee arrangement was standard in the industry and fair, that it would "backstop redemptions by procuring outside financing; that it would conduct basic diligence on the contemplated deSPAC; and that it believed that the deSPAC would be financially successfully for [Falcons]" (*id.*). Falcon also alleges Guggenheim negligently and incompetently projected a valuation of the company, used a six-year projection of the company's business, analyzed the receptiveness of the hypothetical company in the SPAC market and that the work done was not within the requisite degree of skill and care required (*id.* ¶¶ 173 – 174). Falcon contends that as a result of Guggenheim's negligence, "SPAC sponsors and investors stayed away from and abandoned [Falcons'] transaction (*id.* ¶ 177).

A breach of contract claim does not result in a separate tort claim unless there exists a legal duty independent of the contract that has been violated (*Michael Davis Constr., Inc. v. 129 Parsonage Lane, LLC*, 194 AD3d 805 [2d Dep't 2021]). Falcon's negligence allegations encompass Guggenheim's obligations under the parties' contract, not a separate duty collateral to the parties' agreement. Therefore, Falcon's negligence counterclaim is dismissed.

VI. Seventh Counterclaim for Negligent Misrepresentation

Falcon's negligent misrepresentation claim suffers from much of the same problems as the fraud claims. Namely, defendants have pled a litany of assertions that simply are not actionable. For example, defendants make the not actionable claims at ¶ 202 of its answer that: (1) Guggenheim misrepresented that its compensation arrangements were fair (a circumstance defendants could easily have verified with the slightest due diligence); (2) Guggenheim

misrepresented the projected value of a hypothetical company (non-actionable projections under the circumstances [see discussion *supra*]); (3) Guggenheim represented that it was "a leading entertainment investment bank" with ties to Disney (without more detail not actionable, defendants have alleged a mere sales pitch); (4) Guggenheim misrepresented what it actually though about the value of defendants' business (opinions are not actionable); or (5) Guggenheim misrepresented "that it would make efforts to obtain outside financing to backstop redemptions (this is merely breach of contract).

That part of the negligent misrepresentation claim asserting that, in late 2022, early 2023, Guggenheim misled Falcon that it should still move forward with the transaction, knowing that it would be a disaster, just to obtain its flat fee, may be actionable. However, this claim is lost in the morass of non-actionable allegations. Accordingly, the court dismisses the negligent misrepresentation claim with leave to replead.

VII. Declaratory Judgment

Lastly, Falcon seeks a declaratory judgment ruling that the parties' agreements are void and unenforceable because there was no mutual assent or meeting of the minds on express contractual terms. If defendant meant to plead a recission cause of action, it was unsuccessful. Accordingly, Falcon's eighth cause of action is dismissed with leave to replead.

The court has considered the parties remaining contentions and finds them unavailing.

Accordingly, it is hereby

ORDERED that plaintiff/counterclaim defendant Guggenheim's motion to dismiss is granted in part and denied in part; and it is further

ORDERED that defendant/counterclaim plaintiff's first, third, fourth, fifth, sixth, seventh, and eighth causes of action and ninth, tenth, eleventh, twelfth, and thirteenth affirmative defenses are dismissed with leave to replead; and it is further

ORDERED THAT the parties are to attend a conference with the court over Microsoft teams on April 16, 2025 at 11 am.

4/11/2025
DATE

MELISSA A. CRANE, J.S.C.

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