22NW Fund, L.P. v Lifecore Biomedical, Inc.
2026 NY Slip Op 31784(U)
April 16, 2026
Supreme Court, New York County
Docket Number: Index No. 659802/2024
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **61M**

Justice

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22NW FUND, L.P.,

Plaintiff,

- v -

LIFECORE BIOMEDICAL, INC.,JAMES G. HALL, JOHN MORBERG, KATRINA L. HOUDE, JEFFREY L. EDWARDS, JOSHUA E. SCHECHTER, CRAIG BARBAROSH, and RAYMOND DIRADORRIAN,

Defendants.

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INDEX NO. 659802/2024

MOTION DATE 11-5-25

MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 98, 102, 106, 115

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 99, 103, 107, 116

were read on this motion to/for DISMISS.

I. INTRODUCTION

In this action, inter alia, to recover damages for breach of contract and fraud, defendant Lifecore Biomedical, Inc. (Lifecore) moves, pre-answer, to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (1) and (7) (Mot Seq No 003). Defendants James G. Hall, John Morberg, Katrina L. Houde, Jeffrey L. Edwards, Joshua Schechter, Craig Barbarosh, and Raymond Diradorrian (collectively, the Individual Defendants) move to dismiss the complaint insofar as asserted against them pursuant to CPLR 3211 (a) (1), (7), and (8) (Mot Seq No 004). Plaintiff opposes both motions, which are hereby consolidated for disposition.

II. BACKGROUND

Lifecore is a Delaware corporation that develops and manufactures sterile injectable drug products. It maintains its principal place of business in Minnesota. 22NW Fund L.P. (plaintiff) is a Seattle-based hedge fund with its principal place of business in Washington state.

On January 9, 2023, plaintiff purchased 15,000 shares of Lifecore series A preferred stock, which were convertible into shares of Lifecore common stock, for $15 million pursuant to a securities purchase agreement (the SPA). Plaintiff alleges that defendants breached several of the representations made by Lifecore in the SPA regarding, among other things, Lifecore's liquidity, its compliance with certain covenants governing its existing credit agreements, and the value of its existing project portfolio. The crux of plaintiff's allegations is that defendants deliberately made these false and misleading representations so as to induce plaintiff to purchase the shares of stock at an inflated price and/or because plaintiff would not otherwise have purchased the stock.

Plaintiff commenced this action against Lifecore and the Individual Defendants who are/were corporate officers or directors of Lifecore during the negotiation and execution of the SPA. In the complaint, plaintiff asserts seven causes of action. The first, second, and third causes of action are for breach of contract against Lifecore. Under the fourth cause of action, plaintiff seeks to recover damages from Lifecore for fraud based on alleged violations of the Minnesota Securities Act, Minn. Stat. § 80A.76 (b). Under the fifth cause of action, plaintiff alleges that the Individual Defendants are jointly and severally liable with Lifecore under Minn. Stat. § 80A.76 (g) (1) and (2). In the sixth cause of action plaintiff seeks damages for negligent misrepresentation against Lifecore, defendant John Morberg, the former Chief Financial Officer of Lifecore, and defendant James Hall, the former Chief Executive Officer of Lifecore (together,

the Officer Defendants). Under the seventh cause of action plaintiff seeks damages for common law fraud against Lifecore and the Officer Defendants. The eighth cause of action alleges a claim for aiding and abetting fraud against that the remaining Individual Defendants, Katrina L. Houde, Jeffrey L. Edwards, Joshua E. Schechter, Craig Barbarosh, and Raymond Diradoorian (collectively, the Director Defendants).

Lifecore now moves to dismiss the complaint insofar as asserted against it based on documentary evidence and for failing to state a cause of action. The Individual Defendants move to dismiss the complaint insofar as asserted against them on the same grounds and for lack of personal jurisdiction.

III. DISCUSSION

(A) Lifecore's Motion

On a motion to dismiss under CPLR 3211 (a) (7) for failure to state a cause of action, the facts as alleged in the complaint are deemed to be true, the complaint is afforded a liberal construction, and the plaintiff is accorded the benefit of every favorable inference (*see Taxi Tours Inc. v Go N.Y. Tours, Inc*., 41 NY3d 991, 993 [2024]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration. Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery" (*Connaughton v Chipotle Mexican Grill, Inc*., 29 NY3d 137, 141-142 [2017] [internal quotation marks and citations omitted]). "[W]hether [the nonmoving party] can ultimately establish its allegations is not part of the calculus" (*Taxi Tours Inc. v. Go N.Y. Tours, Inc*., 41 NY3d at 993 [internal quotation marks and citations omitted])

Dismissal is warranted under CPLR 3211 (a) (1) "only if the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Eccles v Shamrock Capital Advisors, LLC*, 42 NY3d 321, 342 [2024] [internal quotation marks and citation omitted]).

(i) First Cause of Action – Breach of the SPA, Paragraph 3

"The elements of a breach of contract claim are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach, and (4) resulting damages" (*Alloy Advisory, LLC v 503 W. 33rd St. Assoc., Inc*., 195 AD3d 436, 436 [1st Dept 2021]). Lifecore argues that the first cause of action fails to adequately plead the elements of breach and damages.

In the first cause of action, plaintiff alleges that Lifecore breached paragraphs 3 (l) and 3 (m) of the SPA. Turning first to paragraph 3 (l), it provides, in part:

> "SEC Documents; Financial Statements; No Undisclosed Liabilities. During the two (2) years prior to the date hereof, the Company has timely filed all the SEC Documents required to be filed by it with the SEC pursuant to the 1934 Act. As of their respective filing dates . . . none of the SEC Documents, at the time they were filed with the SEC (or, if amended prior to the date hereof, the date of the filing of such amendment, with respect to the disclosures that are amended), contained any untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary in order to make the statements therein, in light of the circumstances under which they were made, not misleading. As of their respective filing dates, the financial statements of the Company included in the SEC Documents . . . fairly present in all material respects the financial position of the Company and its Subsidiaries as of the dates thereof and the results of its operations and cash flows for the periods then ended."

The complaint sets forth that Lifecore breached the representations included in this section because the financial statements for the periods ending August 30, 2020, November 29, 2020, February 28, 2021, August 29, 2021, November 28, 2021, February 27, 2022, August 28, 2022, and November 27, 2022, as filed with the SEC, contained material errors involving the calculation of capitalized interest, valuation of inventories, and certain adjustments related to previously divested businesses. In addition, the complaint alleges that a report filed with the

SEC on September 13, 2022 contained false statements regarding whether Lifecore's existing cash and lines of credit would be sufficient to finance its operational and capital requirements for at least the next 12 months. This is sufficient to allege that Lifecore breached paragraph 3 (l) of the SPA. The court notes that "[t]here is no requirement of heightened particularity in a contract claim" (*Vandashield Ltd v Isaacson*, 146 AD3d 552, 554 [1st Dept 2017]).

As to the element of damages, "[i]t is well settled that in breach of contract actions the nonbreaching party may recover general damages which are the natural and probable consequence of the breach" (*Bi-Economy Mkt., Inc. v Harleysville Ins. Co. of N.Y.,* 10 NY3d 187, 192 [2008] [internal quotation marks and citation omitted]). Damages that do not flow directly from the breach are also recoverable so long as they are foreseeable at the time the contract was made (*see id.*). Here, the complaint alleges that on March 16, 2023, after plaintiff entered into the SPA, Lifecore made certain public disclosures about Lifecore's financial projections contradicting the representations made by Lifecore in paragraph 3 (l). These disclosures included substantial and ongoing doubts about Lifecore's ability to continue, that it would not have sufficient liquidity to meet its obligations over the next 12 months, and that its projections would violate several financial credit agreement covenants over the next 12 months. Plaintiff alleges that these public disclosures caused a significant drop in the price of Lifecore common stock, thereby adversely impacting the value of the Series A Preferred Stock it purchased, which was convertible to common stock. Plaintiff alleges that it is, therefore, entitled to "an amount to be proved at trial but at a minimum consisting of an amount calculated based on the number of additional common shares into which Plaintiff's investment in Lifecore Series A Preferred Shares would be converted at a conversion price based on the market price of

Lifecore's common stock following its March 16, 2023 disclosures and the highest intermediate price for Lifecore's common shares before trial" (Complaint at ¶ 143).

Lifecore asserts that the foregoing allegations do not adequately satisfy the element of damages because the complaint fails to explain how the conversion price is calculated under the SPA and because plaintiff fails to explain why the price of common stock on March 16, 2023, after the price dropped precipitously, would serve as a reasonable basis for a remedy for the alleged breach. Assuming the truth of the complaint's allegations, however, it may be inferred from them that plaintiff incurred some damages arising from Lifecore's alleged breach of the representations included in paragraph 3 (l). Plaintiff is alleging that it negotiated and agreed to a price based upon misrepresentations relevant to the stock's value and that it is, thus, entitled to the difference between the price it paid for the stock and the actual value of the stock. Whether that value is accurately reflected, as plaintiff alleges, by the value of Lifecore's common stock immediately after the March 16, 2023 public disclosures need not be determined on this motion. It is not plaintiff's burden at this stage of the litigation to prove the amount of damages it is entitled to. The allegations need only be sufficient to state a cause of action for breach of contract.

Turning next to paragraph 3 (m), it provides, in part, as follows:

> "Absence of Certain Changes. Since May 29, 2022, except for the execution and performance of this Agreement and the discussions, negotiations and transactions related thereto, the business of the Company and its Subsidiaries has been carried on and conducted in all material respects in the ordinary course of business and there has not been any Material Adverse Effect or any event, change or occurrence that would, individually or in the aggregate, reasonably be expected to have a Material Adverse Effect. Neither the Company nor any of its Subsidiaries has taken any steps to seek protection pursuant to any law or statute relating to bankruptcy insolvency, reorganization, receivership, liquidation or winding up nor does the Company or any Subsidiary have any knowledge or reason to believe that any of its respective creditors intend to initiate involuntary bankruptcy proceedings or any actual knowledge of any fact that would reasonably lead a creditor to do so"

The complaint alleges Lifecore violated section 3 (m) because Lifecore was, in fact, suffering material adverse effects from September 2022 to December 2022 through its violations of multiple credit agreement covenants and payment of default interest rates, and that such events individually or in the aggregate were, or would reasonably be expected to be, "materially adverse" to Lifecore's business operations and/or financial condition. In addition, the complaint alleges that Lifecore had also taken steps towards filing for bankruptcy. These allegations are sufficient to satisfy the element of breach and, as already discussed, the complaint pleads facts from which damages attributable to Lifecore's conduct may be inferred.

Lifecore argues that the breach of contract claim based on a violation of section 3 (m) should be dismissed because plaintiff was aware of the covenant breaches before it entered into the SPA as evidenced by the allegations in the complaint itself that during discussions on November 28, 2022, the Officer Defendants advised plaintiff that Lifecore was having problems maintaining compliance with its debt covenants and facing a liquidity shortfall (Complaint at ¶¶ 48-49, 52-53). However, the complaint further alleges that the statements made by the Officer Defendants during the November 28, 2022 discussions were misleading for a variety of reasons, including mischaracterization of the debt covenant compliance issues as "potential" and "temporary," even though this was not the case (Complaint at ¶¶ 165-166).

Lifecore also maintains that the allegation in the complaint that it took steps towards bankruptcy protection is not sufficiently supported inasmuch the complaint merely alleges in this regard that an attorney specializing in restructuring attended one board meeting. The complaint, however, further alleges that Lifecore had, in fact, retained bankruptcy counsel in December 2022, was actively considering filing for bankruptcy protection, and that a bankruptcy attorney attended Lifecore's board meetings on more than one occasion. Lifecore submits no

documentary evidence utterly refuting these allegations. Nor does Lifecore argue that these additional allegations do not amount to it having taken "steps to seek [bankruptcy] protection." Whether plaintiff can ultimately prove these allegations is not part of the calculus in determining this motion.

Thus, contrary to Lifecore's contention, affording the allegations in the complaint their most favorable intendment, the first cause of action sufficiently states a claim for breach of contract.

(ii) Second Cause of Action – Breach of the SPA, Paragraph 4

Under the second cause of action, plaintiff alleges that Lifecore breached paragraph 4 (o) of the SPA. The complaint asserts that this section requires Lifecore to file a definitive proxy statement for a stockholder meeting in order to approve the issuance of common stock sufficient to allow conversion of Series A Preferred Shares by March 10, 2023. It further alleges that as of the date of the complaint, no such proxy statement had been filed and no such stockholder meeting had been held. The complaint also asserts that there is no adequate remedy at law for such a breach and, therefore, plaintiff is entitled to specific performance.

In arguing for dismissal of this cause of action, plaintiff asserts that it is now moot because "Lifecore publicly filed the proxy statement envisioned by Section 4 (o) on February 20, 2025, and the requisite stockholder meeting is scheduled to take place on April 10, 2025" (NYSCEF Doc. No. 40 at 22). Plaintiff submits no opposition to this branch of Lifecore's motion. It is, therefore, granted and the second cause of action is dismissed (*see Martin Assoc., Inc. v Illinois Natl. Ins. Co*., 188 AD3d 572, 573 [1st Dept 2020] [motion court properly dismissed breach of fiduciary claim under CPLR 3211 where plaintiff "did not oppose dismissal of the breach of fiduciary duty claim in opposition to (defendant's) motion to dismiss, and thus

had abandoned this claim"]; *Saidin v Negron*, 136 AD3d 458, 459 [1st Dept 2016], *lv dism* 28 NY3d 1069 [2016], *rearg denied* 28 NY3d 1168 [2017],*cert denied* 583 US 842 [2017], *reh'g denied* 583 US 1086 [2018]. "Plaintiff abandoned his claim against the individual police officer by failing to oppose that part of the motion to dismiss the claim as against him"]).

(iii) Third Cause of Action – Breach of Registration of Rights

Under the third cause of action, plaintiff alleges that Lifecore breached section 2 (g) of a Registration of Rights Agreement, also dated January 9, 2023. In its notice of motion, Lifecore indicates that it is seeking dismissal of the complaint in its entirety. However, in support of its motion, Lifecore makes no argument directed at the third cause of action and explicitly states that it is not seeking dismissal of the third cause of action (NYSCEF Doc. No. 40 at 22 ["Lifecore respectfully requests that the Court dismiss with prejudice all causes of action against Lifecore except for the Third Cause of Action for breach of contract"]; NYSCEF Doc. No. 115 at 14 [same]). As such, dismissal of the third cause of action is not warranted.

(iv) Fourth Cause of Action – Securities Fraud under the Minnesota Securities Act
Sixth Cause of Action – Negligent Misrepresentation
Seventh Cause of Action – Common Law Fraud

Under the fourth cause of action, plaintiff seeks to recover damages from Lifecore for fraud based on alleged violations of the Minnesota Securities Act, Minn. Stat. § 80A.76 (b) which imposes civil liability for conduct prohibited under Minn. Stat. § 80A.68 (2). Section 80A.68 (2) makes it unlawful for a person, in connection with the offer, sale, or purchase of a security, "to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make a statement made . . . not misleading." "The elements of a securities fraud claim under § 80A.68 are 'essentially the same' as a federal securities fraud claim under [SEC] Rule 10b-5 [17 C.F.R. § 240.10b-5]. Both statutes require a misrepresentation with

scienter in connection with a transaction in a security on which the plaintiff justifiably relied to his detriment [and the claim] must be stated with particularity" (*Trooien v Mansour,* 2008 WL 2202720 at *4, 2008 US Dist LEXIS 41307 at *7; [D Minn 2008][internal quotation marks and citations omitted]).

The seventh cause of action is for common law fraud. "The elements of a cause of action for fraud require a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016 (b)" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009] [internal citations omitted]).

The sixth cause of action seeks to recover damages for negligent misrepresentation. To state a cause of action for negligent misrepresentation, the complaint must allege "(1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" *(Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011] [quotation marks and citation omitted]).

Lifecore argues that all three causes of action should be dismissed under CPLR 3211 (a) (1) because they are barred by paragraphs 2 (g) and 2 (m) of the SPA (the disclaimer), which state the following:

> "(g) Information. *Such Buyer and its advisors, if any, have been furnished with or have had full access to all materials relating to the business, finances and operations of the Company and materials relating to the offer and sale of the Securities that have been requested by such Buyer.* Such Buyer and its advisors, if any, have been afforded the opportunity to ask questions of the Company or its representatives, it being understood that neither such inquiries nor any other due diligence investigations conducted by such Buyer or its advisors, if any, or its representatives shall modify, amend or affect such Buyer's right to rely on the Company's representations and warranties contained herein. Such Buyer understands that its investment in the Securities involves a high degree of risk. Such Buyer has sought such accounting, legal and tax advice as it has considered

> necessary to make an informed investment decision with respect to its acquisition of the Securities.
> . . .
> (m) No Other Company Representations or Warranties. *Such Buyer acknowledges and agrees that neither the Company nor any of its Subsidiaries makes or has made any representations or warranties with respect to the transactions contemplated hereby other than those specifically set forth in Section 3*. In connection with the due diligence investigation of the Company by such Buyer and its representatives, such Buyer and its representatives have received and may continue to receive from the Company and its representatives certain estimates, projections, forecasts and other forward-looking information, as well as certain business plan information containing such information, regarding the Company and its Subsidiaries and their respective businesses and operations. Such Buyer hereby acknowledges that there are uncertainties inherent in attempting to make such estimates, projections, forecasts and other forward-looking statements, as well as in such business plans, with which such Buyer is familiar, *that such Buyer is making its own evaluation of the adequacy and accuracy of all estimates, projections, forecasts and other forward-looking information, as well as such business plans, so furnished to such Buyer (including the reasonableness of the assumptions underlying such estimates, projections, forecasts, forward-looking information or business plans), and that except for the representations and warranties made by the Company in Section 3 and in any certificate or other Transaction Document delivered by the Company in connection with this Agreement, such Buyer will have no claim against the Company or any of its Subsidiaries, or any of their respective representatives, with respect thereto*"

(emphasis added).

As an initial matter, the disclaimer does not bar plaintiff from bringing a claim that arises from an alleged breach of the representations made by Lifecore in section 3 of the SPA and the alleged misrepresentations in this regard do not involve promises of future performance, but misrepresentations of then present facts (*see Tahari v Narkis*, 239 AD3d 470 [1st Dept 2025]; *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439-440 [1st Dept 2015]; *First Bank of Ams. v Motor Car Funding*, 257 AD2d 287, 291-292 [1st Dept 1999]). However, the fraud-based claims insofar as premised upon such misrepresentations are duplicative because in those claim the plaintiff seeks the very same damages as the first cause of action for breach of section 3 of the SPA (*see MBIA Ins. Corp. v Credit Suisse Sec. (USA) LLC*, 165 AD3d 108, 114 [1st Dept 2018] ["It has long been the rule that parties may not assert fraud claims seeking damages that are duplicative of

those recoverable on a cause of action for breach of contract"], and cases cited therein). Further, "[a] claim for negligent misrepresentation is not separate from a breach of contract claim where the plaintiff fails to allege a breach of any duty independent from contractual obligations" (*Board of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507 [1st Dept 2021]). Therefore, the negligent misrepresentation claim is also duplicative to the extent it is based upon the same allegations as those asserted in support of plaintiff's claim for breach of paragraph 3 of the SPA.

To the extent the claims are based on statements external to paragraph 3 of the SPA, they fall within the scope of the disclaimer. Pursuant to the disclaimer, plaintiff specifically acknowledged that neither Lifecore nor any of its subsidiaries "made any representations or warranties with respect to the transactions contemplated hereby other than those specifically set forth in Section 3" and explicitly agreed that it will have "no claim" against Lifecore or its "representatives," "except for the representations and warranties made by [Lifecore] in Section 3 and in any certificate or other Transaction Document delivered by the Company in connection with" the SPA. This language is broad enough to encompass plaintiff's fraud-based and negligent misrepresentation claims (*Avnet, Inc. v Deloitte Consulting LLP*, 187 AD3d 430, 431 [1st Dept 2020]; *Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.,* 115 AD3d 128, 137 [1st Dept 2014]; *Natoli v NYC Partnership Hous. Dev. Fund Co., Inc.,* 103 AD3d 611, 613 [2d Dept 2013]; *Mountain Cr. Acquisition LLC v Intrawest U.S. Holdings, Inc*., 96 AD3d 633, 634 [1st Dept 2012]). Further, Lifecore specifically represented that it made its own evaluation of the adequacy and accuracy of all estimates, projections, and business plans furnished to it by Lifecore (*Chase Manhattan Bank v New Hampshire Ins. Co.*, 304 AD2d 423, 424 [1st Dept 2003], *lv denied* 100 NY2d 509 [2003] ["fraud claims cannot be brought by a contracting party

who specifically disclaimed reliance on extracontractual representations and indicated that it would make its own investigation of the risks involved"]).

Plaintiff argues that the disclaimer, nevertheless, does not preclude it from relying on such representations because the "special facts" doctrine applies. Under the "special facts" doctrine, a contractual disclaimer will not be held to bar a fraud claim where the facts alleged to have been withheld or misrepresented were peculiarly within the defendant's knowledge (*see TIAA Global Invs., LLC v One Astoria Sq. LLC,* 127 AD3d 75, 87 [1st Dept 2015]; *Basis Yield Alpha Fund (Master)*, 115 AD3d at 137). The doctrine requires satisfaction of a two-part test -- the facts must have been "peculiarly within the knowledge" of the defendant and could not have been discovered by the plaintiff through the "exercise of ordinary intelligence" (*Jana L. v West 129th St. Realty Corp.*, 22 AD3d 274, 278 [1st Dept 2005][quotation marks and citations omitted]; *see LMM Capital Partners, LLC v Mill Point Capital, LLC,* 224 AD3d 504, 508 [1st Dept 2024]). To satisfy the second element, the plaintiff must do more than "simply make the conclusory statement that the information of an incident giving rise to liability could not have been obtained [by it] through the exercise of ordinary intelligence" (*Jana*, 22 AD3d at 278 [internal quotation marks omitted]; *see also New York City Waterfront Dev. Fund II, LLC v Pier A Battery Park Assoc., LLC*, 206 AD3d 565, 567 [1st Dept 2022]["Plaintiff's reliance on the 'special facts' doctrine is unavailing because, even though the complaint adequately alleges defendants' superior knowledge of the facts, the allegations that plaintiff could not have discovered the information through the exercise of ordinary intelligence are conclusory"]).

Here, in arguing that the doctrine applies, plaintiff contends that Lifecore had superior knowledge of (1) its defaults under its financial covenants, (2) the value of its development pipeline, and (3) its financial condition. Plaintiff clams that such information, which ultimately

proved to be misleading or incomplete, was not readily available to plaintiff. However, this is the same allegedly misleading or incomplete information that forms the basis of plaintiff's claim for breach of contract under paragraph 3 of the SPA. For reasons already stated such claims are duplicative. Moreover, even assuming some of the alleged misrepresented or incomplete information is extraneous to paragraph 3 of the SPA, the allegation that such information was not available to plaintiff with the exercise of reasonable diligence is entirely conclusory (*see id*.).

Thus, the fourth, sixth and seventh causes of action are dismissed insofar as asserted against Lifecore on the ground that they are either duplicative of the first cause of action for breach of paragraph 3 of the SPA or barred by the disclaimer in the SPA. In light of this determination, the court need not consider Lifecore's remaining arguments for dismissal of those causes of action.

(B) The Individual Defendant's Motion

Under the fifth cause of action, plaintiff alleges that the Individual Defendants are jointly and severally liable with Lifecore under Minn. Stat. § 80A.76 (g) (1) and (2) for Lifecore's liability under Minn. Stat. § 80A.68 (2).[1] The sixth cause of action seeks damages for negligent misrepresentation against Lifecore (already addressed) and the Officer Defendants. Under the seventh cause of action, plaintiff seeks to recover damages for common law fraud against Lifecore (already addressed) and the Officer Defendants. Under the eighth cause of action, plaintiff seeks damages for aiding and abetting fraud against the Director Defendants.

[1] Minn. Stat. § 80A.76 (g) (1) provides that "a person that directly or indirectly controls a person liable under subsections (b) through (f) [is jointly and severally liable], unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist." Minn. Stat. § 80A.76 (g) (2) provides that "an individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f), including an individual having a similar status or performing similar functions [is jointly and severally liable], unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could have known, of the existence of conduct by reason of which the liability is alleged to exist."

The Individual Defendants argue that such claims are barred by the disclaimer. Plaintiff counters that the disclaimer does not apply to bar such claims against the Individual Defendants because they are not parties to the SPA. The language of the disclaimer, however, states that other than the representations and warranties made by Lifecore "in Section 3 and in any certificate or other Transaction Document delivered by [Lifecore] in connection with" the SPA, plaintiff "will have *no claim* against the Company or any of its Subsidiaries*, or any of their respective representatives*" (emphasis added), thereby including the Individual Defendants (*cf. Wittenberg v Robinov*, 9 NY2d 261 [1961][reversing dismissal of claims against defendant because he was not a party to the contract and the express language of the disclaimer did not "inure to his benefit"]). As such, any claims, insofar as they are premised upon representations extraneous to section 3 of the SPA, are barred by the disclaimer.

Nonetheless, as already discussed, the disclaimer does not bar plaintiff from bringing a claim that arises from an alleged breach of the representations made by Lifecore in section 3 of the SPA or other transaction documents delivered by Lifecore in connection with the SPA. Since the breach of contract claims are not asserted against the Individual Defendants, any fraud-based claims based upon such representations are not duplicative.

The question then becomes whether plaintiff has adequately pleaded the elements of such claims. With respect to the Minnesota Securities Act claim, since the claim against Lifecore is dismissed, the claim under Minn. Stat. § 80A.76 (g) (1) and (2) for joint liability is not viable (*see Tisdell v ValAdCo*, 2002 WL 31368336, 2002 Minn. App. LEXIS 1207 [Minn Ct App 2002] ["the lack of a colorable claim for fraud negates any claim for joint and several liability on the part of any respondent in this appeal"]).

As to the claim for common law fraud, it is first noted that "a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*American Express Travel Related Servs. Co. v North Atl. Resources*., 261 AD2d 310, 311 [1st Dept 1999]; *see Fletcher v Dakota, Inc*., 99 AD3d 43, 49 [1st Dept 2012]). Nevertheless, the allegations in this regard are insufficient. The complaint alleges the following with respect to misrepresentations arising under section 3 of the SPA. It alleges that Lifecore breached section 3 (l) because its financial statements for the periods ending August 30, 2020, November 29, 2020, February 28, 2021, August 29, 2021, November 28, 2021, February 27, 2022, August 28, 2022, and November 27, 2022, as filed with the SEC contained untrue statements or omissions, and a report filed with the SEC on September 13, 2022 contained false statements regarding whether Lifecore's existing cash and lines of credit would be sufficient to finance its operational and capital requirements for at least the next 12 months. It further alleges that in violation of section 3 (m) of the SPA, Lifecore represented that its business had been operating in ordinary course since May 29, 2022 with no material adverse effects, and that it had not taken any steps to seek bankruptcy protection. With regard to such representations, however, the elements of fraud are not sufficiently stated. Indeed, it is not clear from the allegations who in particular made the purported misrepresentations. Nor does plaintiff allege that the particular person who made the misrepresentations knew of their falsity. Since a claim for negligent misrepresentation must also be plead with the particularity required by CPLR 3016(b) (*see Ferro Fabricators, Inc. v 1807-1811 Park Ave. Dev. Corp.,* 127 AD3d 479, 479 [1st Dept 2015]), the allegations supporting this cause of action insofar as it involves misrepresentations arising under section 3 of the SPA are also insufficient.

Lastly, as to the cause of action for aiding and abetting fraud, "[a] plaintiff alleging an aiding-and-abetting fraud claim must allege the existence of the underlying fraud, actual knowledge, and substantial assistance" (*see Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]). The complaint fails to include factual allegations to support such a claim against the Director Defendants. Even assuming the existence of an underlying fraud, the complaint is bereft of allegations of actual knowledge and substantial assistance as to the Director Defendants.

Thus, the complaint is dismissed insofar as asserted against the Individual Defendants. Because the court has dismissed all claims against the Individual Defendants on other grounds, their personal jurisdiction arguments are academic (*see FPG Maiden Lane, LLC v Bank Leumi USA*, 226 AD3d 406, 408 [1st Dept 2024]).

IV. CONCLUSION

Accordingly, upon the foregoing papers, it is

ORDERED that defendant Lifecore Biomedical, Inc.'s motion is granted to the extent that the second, fourth, sixth, and seventh causes of action in the complaint are dismissed insofar as asserted against it, and the motion is otherwise denied (Mot Seq No 003); and it is further

ORDERED that the motion by defendants James G. Hall, John Morberg, Katrina L. Houde, Jeffrey L. Edwards, Joshua Schechter, Craig Barbarosh, and Raymond Diradorrian to dismiss the complaint insofar as asserted against them is granted in its entirety (Mot Seq No 004); and it is further

ORDERED that defendant Lifecore Biomedical, Inc. shall file an answer to the remaining causes of action in the complaint within thirty (30) days of the date of this order; and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/16/2026
DATE

NANCY M. BANNON, 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