

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

**HON. STEPHEN A. BUCARIA**

Justice

TRIAL/IAS, PART 2  
NASSAU COUNTY

\_\_\_\_\_  
HIGH TIDES, LLC, a New York limited liability company,

Plaintiff,

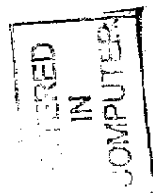
INDEX No. 024029/09

MOTION DATE: March 31, 2010  
Motion Sequence # 001, 002, 003

-against-

DON DEMICHELE, CHRISTOPHER CORTESE,  
STEVEN A. GALLOWAY, BART D. THORNE,  
JEFFREY SERKES, KENNETH KELLAWAY  
and DUNKIN BRANDS, INC.,

Defendants.



\_\_\_\_\_  
The following papers read on this motion:

- Notice of Motion..... XXX
- Affirmation/Affidavit in Opposition..... XX
- Reply Affirmation ..... XX
- Memorandum of Law..... XXXXXX
- Reply Memorandum of Law..... XXX

This motion, by defendant, Dunkin' Brands, Inc. [Seq. #001], pursuant to CPLR 3211(a)(7), for an Order, dismissing the sixth and seventh causes of action in the plaintiff, High Tides, LLC, a New York limited liability company's complaint is **granted** in part and **denied** in part; and the motion, by defendant, Don DeMichele [Seq. #002], pursuant to CPLR 3211(a)(1) and (7), for an Order, dismissing the plaintiff's complaint is **granted** in part and

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**denied** in part; and the motion, by defendants, Jeffrey Serkes and Kenneth Kellaway [Seq. #003], pursuant to CPLR 3211(a)(7) and CPLR 3016(b), for an Order, dismissing the plaintiff's complaint is **granted** in part and **denied** in part.

This action for fraud, concealment and negligent misrepresentation arises from plaintiff, High Tides, LLC's (hereinafter referred to as "High Tides") investment in a non-party entity named Kainos Partners Holding Company, LLC. (hereinafter referred to as "Kainos").

Insofar as a motion made pursuant to CPLR 3211 requires this Court to accept as true the allegations of the complaint (*Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]), the underlying facts are as follows:

Plaintiff, High Tides, LLC, is a New York limited liability company whose managing members include, non-party, Patrick LaFontaine ("LaFontaine"), a former professional hockey player for the New York Islanders, Buffalo Sabres and New York Rangers, and non-party, Jim Johnson. High Tides owns shares in Kainos, which operates Dunkin' Donuts and Dunkin' Donuts/Baskin-Robbins combo retail shops throughout Buffalo, New York, Las Vegas, Nevada and South Carolina.

Defendant, Dunkin' Brands, Inc. (hereinafter referred to as "DB"), is the "master servicer" for Dunkin' Donuts Franchised Restaurants, LLC, the company that franchises to third parties the right to develop and operate Dunkin' Donuts shops. Non-party Jon Luther ("Luther") was named by DB as its CEO in January of 2003 and its Chairman in 2006.

Luther and LaFontaine are former neighbors and friends (*Complaint*, ¶17).

Individual defendants, Don DeMichele ("DeMichele"), Christopher Cortese ("Cortese"), Steven A. Galloway ("Galloway"), Bart D. Thorne ("Thorne"), and Kenneth Kellaway ("Kellaway") are founding members as well as board members of Kainos. Specifically, DeMichele is the Chairman and Chief Executive Officer of Kainos; Cortese is the Chief Financial Officer of Kainos; Galloway was the President and Chief Operating Officer of a Kainos subsidiary that operated Dunkin' Donuts shops in Buffalo, New York on behalf of Kainos; and Thorne is the President and Chief Operating Officer of Kainos Partner South Carolina, LLC, a Kainos subsidiary that operates Dunkin' Donuts shops on behalf of Kainos in South Carolina.

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Defendant, Jeffrey Serkes (“Serkes”) is the Chief Operating Officer of Palisade Capital Investment Management, LLC, an SEC Registered Investment Advisor. In March 2007, Palisade, through its affiliate, PCEP II KPHC Holding, Inc., invested \$10,000,000.00 in Kainos. In total, it invested approximately \$14,000,000.00 in Kainos and is its largest single stakeholder. Serkes was elected to Kainos’ board of directors in March of 2007 by PCEP Holding.

Defendant Kellaway was also on Kainos’ board of directors.

Kainos was formed in November of 2006 to create a long-term business alliance with defendant DB, and was initially capitalized by its founding members for \$6,000,000.00. On or about May 2, 2005, Kainos, through its predecessor, Kainos Partners, LLC, purchased the rights to develop 40 Dunkin’ Donuts and Dunkin’ Donuts/Baskin Robbins combo retail shops in the greater Buffalo, New York area.

In August of 2005, during a golf tournament attended by LaFontaine and Luther, Luther introduced LaFontaine to defendants, DeMichele, Cortese and Thorne. At that time, in the context of discussing a possible equity investment, LaFontaine learned that Kainos was working with Luther to develop Dunkin’ Donuts shops in Buffalo and other areas. It was also suggested to LaFontaine that his status as a former Buffalo Sabres Hockey icon would assist Kainos in developing and growing the Buffalo market (*Id.* at ¶18).

In November of 2006, Kainos signed another agreement with DB to build 37 shops in Greenville and Spartanburg, South Carolina and in March 2007, it signed a third Store Development Agreement with DB to build 41 shops in Las Vegas, Nevada.

Plaintiff claims that in July of 2007, and after consulting again with Luther, LaFontaine, was induced to invest in Kainos through an initial investment of \$500,000.00 thereby becoming the owner of 500 shares. (*Id.* at ¶22). From March through December 2007, the equity holders of Kainos, including High Tides, invested an additional \$20,000,000.00 and in August of 2008, these same investors invested an additional \$5,000,000.00.

Plaintiff maintains that on September 7, 2007, Cortese delivered to LaFontaine and to High Tides a letter from DeMichele and enclosed Kainos’ Second Quarter Business Update. Subsequently, in October 2007, at a golf tournament sponsored by DB, LaFontaine was approached by Cortese about increasing High Tides’ investment in Kainos.

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In November of 2007, DB stated that Kainos was “[DB’s] Rising Star” at an Enterprise Awards dinner. In a press release issued on November 13, 2007, DB highlighted the remarks made by Luther in a toast given at the awards ceremony where, referring to Kainos and to other award recipients, Luther was quoted as saying “At this dinner we have assembled a remarkably accomplished and elite group of leaders from all around our world. In the business world, a true leader is a pathfinder. You are the best that the [DB] system has to offer” (*Id.* at ¶27).

On November 6, 2007, plaintiff High Tides, received a Confidential Investor Summary Memorandum from Cortese. Later, Cortese also delivered Kainos’ 2008 Annual Operating Plan to High Tides. Plaintiff alleges that in December of 2007, relying on these documents and relying on Luther’s representations as Chairman and CEO of DB, in December of 2007, plaintiff increased its investment in Kainos by \$1,000,000.00 acquiring 1000 additional shares.

On February 17, 2008, High Tides received from Cortese Kainos’ quarterly financial report for the three month period ending December 31, 2007.

Plaintiff claims that on June 17, 2008, Kainos announced by letter to its investors that its board had elected to pursue the rights to open up to 75 Dunkin’ Donuts restaurants in the Houston, Texas market, and that it intended to issue 5,000 new shares at the price of \$1,000 per unit to support the operations of the new subsidiary that would oversee the Houston market, for the purchase of real estate, and for the continued growth of Kainos and its subsidiaries. This second offering, if and when fully subscribed, would result in an additional \$5,000,000.00 being invested in Kainos (*Id.* at ¶33). As part of that offering, defendant Cortese offered the plaintiff the opportunity to increase its equity in Kainos by \$252,525.00, allowing High Tides to acquire an additional 252 shares (*Id.* at ¶34).

On August 24, 2008, defendant Cortese delivered to LaFontaine an e-mail that included Kainos’ Financial Statements, Kainos’ balance sheet dated December 31, 2007 and the related consolidated statements of income, changes in the members’ equity and cash flow for the fiscal year ending December 31, 2007, the unaudited consolidated balance sheets of Kainos as of March 31, 2008, and the related statements of income, cash flow and stockholders’ equity (*Id.* at ¶38). On August 24, 2008 High Tides invested an additional \$252,000 in Kainos, for a total investment of \$1,752,525.

Plaintiff alleges that on December 1, 2008, defendant Cortese advised LaFontaine

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that Kainos' board was looking for yet another round of funding to support its "incredible growth." According to Cortese, the price for any units sold in any new round of funding would be priced at \$1,250.00 per unit, given the fact that Kainos which currently had a value of \$40,000,000.00, would have a value of \$77,000,000.00 after the closing.

Two weeks after Kainos' CFO valued the company at \$77,000,000.00, Kainos was without money to continue operations.

In early February 2009, LaFontaine met Andrew Charles, a fellow investor in Kainos. Charles told LaFontaine that Kainos was in serious financial distress, that there were problems with the board, including allegations of embezzlement and fraud, and that "Palisade was coming in and taking over."

Plaintiff asserts seven causes of action as follows: (1) fraudulent inducement — against the Individual Defendants; (2) fraudulent concealment — against the Individual Defendants; (3) fraud and misrepresentation — against the Individual Defendants; (4) fraudulent concealment - negligent omission of fact — against the Individual Defendants; (5) negligent misrepresentation — against the Individual Defendants; (6) conspiracy to defraud — against all defendants; and (7) aiding and abetting fraud — against all defendants. These allegations form the basis of defendants' instant pre-answer motions to dismiss the complaint, made pursuant to CPLR 3211(a)(1) and (7).

To obtain a dismissal pursuant to CPLR 3211(a)(1), the defendant must establish that the documentary evidence which forms the basis of the defense be such that it resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim (*Leon v. Martinez*, 84 NY2d 83 [1994]; *Sheridan v. Town of Orangetown*, 21 AD3d 365 [2<sup>nd</sup> Dept. 2005]).

CPLR 3211(a)(7) permits the court to dismiss a complaint that fails to state a cause of action. The complaint must be liberally construed and the plaintiff given the benefit of every favorable inference (*Leon v. Martinez, supra*; *Aberbach v. Biomedical Tissue Serv., Ltd.*, 48 AD3d 716 [2<sup>nd</sup> Dept. 2008]). The court must also accept as true all of the facts alleged in the complaint and any factual submissions made in opposition to the motion (*511*, 98 NY2d 144 [2002]; *Sokoloff v. Harriman Estates Dev. Corp.*, 96 NY2d 409 [2001]). If the court can determine that the plaintiff is entitled to relief on any view of the facts stated, its inquiry is complete and the complaint must be declared legally sufficient (*Campaign for Fiscal Equity v. State of New York*, 86 NY2d 307, 318 [1995]; *Sokoloff v.*

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Harriman Estates Dev. Corp., *supra*). While factual allegations contained in the complaint are deemed true, bare legal conclusions and facts flatly contradicted on the record are not entitled to a presumption of truth (Lutz v. Caracappa, 35 AD3d 673, 674 [2<sup>nd</sup> Dept. 2006]; Matter of Loukoumi, Inc., 285 AD2d 595 [2<sup>nd</sup> Dept. 2001]).

For the sake of clarity, this Court will address each motion, separately and in turn.

**DB'S MOTION**

The plaintiff's complaint asserts only two causes of action as against defendant DB, the sixth cause of action for conspiracy to defraud and the seventh cause of action for aiding and abetting fraud. In support of its motion to dismiss said causes of action, defendant maintains that it had no knowledge of the fraud allegedly perpetrated by the co-defendants. DB argues that it is one of Kainos' largest creditors and, as of June 30, 2009, Kainos owed it \$4.2 million.

With respect to the plaintiff's seventh cause of action for aiding and abetting fraud, defendant, DB, argues that this cause of action cannot be sustained because of the absence of factual allegations that DB had actual knowledge of the fraudulent acts committed by the co-defendants and the failure of the complaint to set forth facts showing that DB provided substantial assistance to them. DB also submits that as it did not provide substantial assistance to the Individual Defendants, the plaintiff's seventh cause of action of aiding and abetting fraud against it must be dismissed.

A claim for aiding and abetting a fraud allows imposition of liability on those who would not be liable on the fraud claim but who had actual knowledge of the fraud and substantially assisted it (380544 Canada, Inc. v. Aspen Technology, Inc., 544 F. Supp. 2d 199 [SDNY 2008]). The general elements of a claim of aiding and abetting a common law fraud are: (1) a fraud; (2) defendant's knowledge of the fraud; and (3) defendant's knowing rendition of substantial assistance to advance the fraud (Wight v. BankAmerica Corp., 219 F.3d 79, 91 [2<sup>nd</sup> Cir. 2000]; VTech Holdings, Ltd. v. Pricewaterhouse Coopers, LLP, 348 F. Supp. 2d 255, 269 [SDNY 2004]). The plaintiff must allege facts that show that the aider and abettor had had an actual knowledge of the fraud; constructive knowledge is not sufficient (Filler v. Hanvit Bank, 339 F. Supp. 2d 553, 557 [SDNY 2004]).

Plaintiff alleges that Dunkin Donuts requires that its franchisees disclose "every detail" of their ongoing financial affairs, as well as the operation of their business. Since

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Kainos was a major franchisee, it may be inferred that Dunkin Donuts was aware of Kainos' insolvency and communicated this information to DB. Plaintiff further alleges that DB had "real time" computer access to the financial condition of Kainos. Thus, plaintiff asserts that DB is in the unique position of knowing its franchisees' "true financial condition" (*Id.* at ¶¶16, 28). Giving plaintiff the benefit of every possible favorable inference, the allegations in the complaint, coupled with the surrounding circumstances, give rise to a reasonable inference that DB aided and abetted the Individual Defendants' alleged fraudulent activities (*Eurycleia Partners, LP v. Kissel, LLP*, 12 NY3d 553, 560-561 [2009]).

A cause of action for aiding and abetting a fraud requires an allegation that in order to enable the fraud to proceed, the defendant gave affirmative assistance, concealed information, or failed to act when required to do so (*Houbigant, Inc. v. Deloitte & Touche LLP*, 303 AD2d 92, 100 [1<sup>st</sup> Dept. 2003]). "Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur. Plaintiff asserts that DB sponsored the October 2007 golf tournament at which LaFontaine was approached by Cortese about increasing his investment in Kainos. On October 24, 2007, Kainos and DB jointly announced the opening of Kainos' first Dunkin Donuts store in Las Vegas and that the store "set a new all time record in Dunkin Brands entire history". In November 2007, DB described Kainos as "Dunkin Brands Rising Star" at a dinner held at the Kennedy Library in Boston. In November 2007, DB issued a press release referring to Kainos' management as "a remarkably accomplished and elite group...the best that Dunkin Brands system has to offer". Giving plaintiff the benefit of every favorable inference, plaintiff sufficiently alleges that DB provided substantial assistance to the individual defendants in their defrauding of plaintiff. For these reasons defendant DB's motion to dismiss plaintiff's seventh cause of action as against DB is **denied**.

Plaintiff's sixth cause of action sounds in conspiracy to defraud. "New York does not recognize an independent cause of action for civil conspiracy to commit a tort" (*Roche v. Claverack Co-op Ins. Co.*, 59 AD3d 914 [3<sup>rd</sup> Dept. 2009]). "[A] mere conspiracy to commit a fraud is never of itself a cause of action" (*Brackett v. Griswold*, 112 NY 454, 467 [1889]). However, "allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander of New York, Inc. v. Fritzen*, 68 NY2d 968, 969 [1986]). Although the court has upheld plaintiff's cause of action against DB for aiding and abetting fraud, defendant DB's motion to dismiss the sixth cause of action for conspiracy to defraud is **granted**.

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**SERKES AND KELLAWAY'S MOTION**

In support of their argument for dismissing the plaintiff's complaint, defendants Serkes and Kellaway submit that plaintiff had no contact with Serkes until after the last of plaintiff's investments in Kainos and that no contact with Kellaway is alleged at all.

First Cause of Action: Fraudulent Inducement

In order to assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentations that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations (*Leno v. DePasquale*, 18 AD3d 514 [2<sup>nd</sup> Dept. 2005]). To establish a cause of action for fraud a plaintiff must allege with specificity "representations of a material existing fact, falsity, scienter, deception and injury" (*Channel Master Corp. v. Aluminum Ltd. Sales*, 4 NY2d 403, 407 [1958]).

High Tides has failed to allege that Serkes or Kellaway made any representation of a material existing fact, or any fact whatsoever, or that LaFontaine ever met with or spoke to either of them before the last of High Tides' investments in Kainos. For a representation to give rise to a fraudulent inducement claim, the representation must predate the action allegedly induced (*First Inter-County Bank v. DeFilippis*, 160 AD2d 288, 289-290 [1<sup>st</sup> Dept. 1990]). High Tides first invested in Kainos in July 2007 (*Complaint*, ¶22), but there is simply no allegation that Kellaway ever made any statement to the plaintiff and the only statement in the Complaint from Serkes was contained in an email from Serkes to LaFontaine on February 20, 2009, which was well after High Tides invested in Kainos (*Id.* at ¶50). This email could not have induced LaFontaine to invest in Kainos, and in fact, this email was the first time Serkes communicated or was at all in contact with LaFontaine.

As to Serkes and Kellaway, plaintiff has not alleged even a single representation made by either of them; rather, plaintiff asserts "that there were numerous misrepresentations that were disseminated on behalf of the entire Board, including Serkes and Kellaway (*Pl. Opp.*, p. 12). Defendants Serkes and Kellaway assert that they were non-management directors who were entitled to rely on information, including financial statements, prepared or presented to it by the officers of the corporation (Bus. Corp. Law ¶717[a]). Plaintiff cannot attribute the statements of the Board, whose members were not only directors but were also members, to Serkes and Kellaway.

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Furthermore, plaintiff has failed to show that LaFontaine relied upon any materially false statements allegedly made by Serkes or Kellaway; rather, the allegations all surround LaFontaine's reliance on Luther's and Cortese' statements in making his investment.

Therefore, and in the absence of any injury caused by Serkes or Kellaway, plaintiff's claim for fraudulent inducement is herewith **dismissed** as against them.

Third Cause of Action: Fraud and Misrepresentation

As stated above, the elements of common law fraud are "misrepresentation of a material existing fact, falsity, scienter, deception and injury" (*Channel Master Corp. v. Aluminum Limited Sales, Inc.*, supra; *Dalessio v. Kressler*, 6 AD3d 57 [2<sup>nd</sup> Dept. 2004]). Reasonable reliance is an element of a cause of action for fraud (*KNK Enterprises, Inc. v. Harriman Enterprises, Inc.*, 33 AD3d 872 [2<sup>nd</sup> Dept. 2006]); *Harris v. Camilleri*, 77 AD2d 861 [2<sup>nd</sup> Dept. 1980]). In a fraud action, the plaintiff must show a belief in the truth of the representation and a change of position in reliance on that belief (*CBS Inc. v. Ziff-Davis Pub. Co.*, 75 NY2d 496, 502 [1990]; *Lama Holding Co. v. Smith Barney*, 88 NY2d 413 [1996]).

In the absence of any allegations of a representation, or the falsity thereof, and in the absence of any allegations of reliance upon said false allegations, the plaintiff's third cause of action is dismissed as against Serkes and Kellaway.

Second and Fourth Causes of Action: Fraudulent Concealment and Negligent Omission of Fact

A party asserting a claim for fraudulent concealment must establish all of the elements of fraud and must further prove the existence of an affirmative duty to disclose (*P.T. Bank Central Asia, New York Branch v. ABN AMRO Bank, N.V.*, 301 AD2d 373 [1<sup>st</sup> Dept. 2003]; *E.B. v. Liberation Publications, Inc.*, 7 AD3d 566 [2<sup>nd</sup> Dept. 2004]). In the absence of a fiduciary relationship, an affirmative duty to disclose arises where one party's knowledge of the facts renders the transaction inherently unfair unless those facts are disclosed (*Swersky v. Dreyer & Traub*, supra). The question of whether a duty exists is a question of law to be determined by the court (*Industrial Risk Insurers v. Ernst*, 224 AD2d 389 [2<sup>nd</sup> Dept. 1996]).

Although the plaintiff alleges that the parties had a "special" relationship, the

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complaint fails to allege the existence of a confidential or a fiduciary relationship between High Tides and Serkes or Kellaway “as required for a viable cause of action sounding in fraud for any failure to disclose” (*Wirsing v. Donzi Marine, Inc.*, 30 AD3d 589 [2<sup>nd</sup> Dept. 2006]). As neither High Tides nor Serkes and/or Kellaway were under a duty to act or to give advice for the benefit of the other upon matters within the scope of the relation no fiduciary relationship existed between High Tides and/or Kellaway (*Spencer v. Green*, 42 AD3d 521, 522 [2<sup>nd</sup> Dept. 2007]). The complaint is also devoid of any factual allegations underlying the claim that the parties had a special relationship that would create a duty to disclose certain information, as is required by CPLR 3016(b), let alone the necessary detail (*Jacobs v. Haber*, 232 AD2d 372 [2<sup>nd</sup> Dept. 1996]). Therefore, the second and fourth causes of action also lack the requisite particularity.

In the fourth cause of action, plaintiff alleges that the Individual Defendants “negligently omitted” certain information (*Id.* at ¶84). However “[a]bsent a confidential or fiduciary relationship, there is no duty to disclose, and mere silence, without identifying some act of deception, does not constitute a concealment actionable as fraud” (*NYCTL 1999-1 Trust v. 573 Jackson Ave. Realty Corp.*, 55 AD3d 454 [1<sup>st</sup> Dept. 2008]).

For these reasons, plaintiff’s second and fourth causes of action as against Serkes and Kellaway are also **dismissed**.

Fifth Cause of Action: Negligent Misrepresentation

It is settled that, “[a] cause of action based on negligent misrepresentation requires proof that a defendant had a duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information was false, and that a plaintiff reasonably relied on the information” (*Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2<sup>nd</sup> Dept. 2004]; see also *Kimmell v. Schaefer*, 89 NY2d 257, 263 [1996]). “This reliance must be justifiable, as a casual response given informally does not stand on the same legal footing as a deliberate representation for purposes of determining whether an action in negligence has been established” (*Kimmell v. Schaefer, supra* at 263). Moreover, “since a vast majority of commercial transactions are comprised of such casual statements and contacts” liability for negligent misrepresentation has been imposed in the commercial context only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified (*Kimmell v. Schaefer, supra; see also, Murphy v. Kuhn*, 90 NY2d 266, 270 [1997]).

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As there was no special relationship between the plaintiff and Serkes or Kellaway, and as there is no “statement” by Serkes and/or Kellaway upon which the plaintiff can purport to rely, the fifth cause of action is also **dismissed**.

Sixth Cause of Action: Conspiracy to Defraud

As stated above, “[a] mere conspiracy to commit a tort is never of itself a cause of action” (*Alexander & Alexander, Inc. v. Fritzen*, 68 NY2d 968, 969 [1986]; *Romano v. Romano*, 2 AD3d 430, 432 [2<sup>nd</sup> Dept. 2003]). As plaintiff has failed to sufficiently plead any of the fraud claims Serkes or Kellaway, this claim is also unsubstantiated against Serkes and Kellaway.

Seventh Cause of Action: Aiding and Abetting Fraud

As stated above, the general elements of a claim of aiding and abetting a common law fraud are: (1) a fraud; (2) defendant’s knowledge of the fraud; and (3) defendant’s knowing rendition of substantial assistance to advance the fraud (*Wight v. BankAmerica Corp.*, *supra*). The plaintiff must allege facts that show that the aider and abettor had had an actual knowledge of the fraud; constructive knowledge is not sufficient (*Filler v. Hanvit Bank*, *supra*). Further, the plaintiff must allege with specificity the aider and abettor’s knowledge of the alleged fraud (*Lerner v. Fleet Bank, N.A.*, *supra*). A cause of action for aiding and abetting a fraud also requires an allegation that in order to enable the fraud to proceed, the defendant gave affirmative assistance, concealed information, or failed to act when required to do so (*Houbigant, Inc. v. Deloitte & Touche LLP*, *supra* at 100). “Substantial assistance occurs when a defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur .

Defendant Serkes is the chief operating officer of Palisade Capital Management. Through a subsidiary, Palisade is Kainos’ single largest shareholder. Defendant Kellaway is a founding member of Kainos, and both Serkes and Kellaway are members of the board. Plaintiff alleges that Serkes and Kellaway participated in Kainos’ operations and had detailed knowledge of Kainos’ financial and business affairs. Giving plaintiff the benefit of every possible favorable inference, plaintiff has sufficiently alleged actual knowledge on the part of Serkes and Kellaway of the other defendants’ fraud.

Defendants, Serkes and Kellaway’s motion to dismiss the seventh cause of action for aiding and abetting fraud is **denied**.

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**DEMICHELE'S MOTION**

In support of his motion to dismiss the complaint in its entirety, defendant, Don DeMichele argues that other than to identify him as an officer and board member of the company in which the plaintiff invested, the complaint fails to allege any representation of fact that he allegedly made to the plaintiff, that any such representation of fact was false, that DeMichele had any intent to deceive the plaintiff, that the plaintiff reasonably relied upon any misrepresentation of material fact made by DeMichele or that the plaintiff was damaged in any way from any misrepresentation made by DeMichele.

First and Third Causes of Action: Fraudulent Inducement and Fraud

In order to assert a claim for fraud in the inducement, a plaintiff must establish that the defendant made material misrepresentations that were false, the defendant knew the representations were false when made, the misrepresentations were made with intent to deceive the plaintiff, the plaintiff justifiably relied upon these representations and plaintiff was damaged as a result of relying upon these misrepresentations (*Leno v. DePasquale, supra*).

High Tides has not alleged that DeMichele made any representation of a material existing fact, let alone any misrepresentations, to the plaintiff. In fact, other than an introductory meeting at a charity event nearly two years before plaintiff made its initial investment, there is no allegation that DeMichele ever spoke to or otherwise communicated with the plaintiff at all.

To allege fraud, a plaintiff must describe, with particularity, specific misrepresentations of material existing fact made to the plaintiff by the defendant, that the alleged misrepresentations were made with the intent to mislead the plaintiff, that the plaintiff reasonably relied upon the alleged misrepresentations and that it suffered damages as a result (*Channel Master Corp. v. Aluminum Limited Sales, Inc., supra*). As there are no allegations that DeMichele made any specific representations of material facts to the plaintiff that actually mislead it into investing in Kainos, there can be no claim of fraud or fraudulent inducement against him.

Therefore, and in the absence of any injury caused by DeMichele, plaintiff's claims for fraudulent inducement, fraud and misrepresentation is herewith **dismissed** as against him.

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Second and Fourth Causes of Action: Fraudulent Concealment and Negligent Omission of Fact

Having failed to establish a claim for fraud as against defendant DeMichele, plaintiff's claim for fraudulent concealment also fails (*P.T. Bank Central Asia, New York Branch v. ABN AMRO Bank, N.V.*, 301 AD2d 373 [1<sup>st</sup> Dept. 2003]; *E.B. v. Liberation Publications, Inc.*, 7 AD3d 566 [2<sup>nd</sup> Dept. 2004]). Further, plaintiff has also failed to allege and establish the existence of a fiduciary relationship or an otherwise affirmative duty on defendant DeMichele's part to disclose to the plaintiff of any knowledge of the facts that would render its investments inherently unfair unless those facts were disclosed (*Industrial Risk Insurers v. Ernst*, 224 AD2d 389 [2<sup>nd</sup> Dept. 1996]).

For these reasons, plaintiff's second and fourth causes of action for fraudulent concealment and fraudulent concealment - negligent omission of fact are also **dismissed**.

Fifth Cause of Action: Negligent Misrepresentation

Plaintiff's failure to allege any special relationship with DeMichele, and its failure to advance any allegations of any "statements" made by DeMichele upon which it purportedly relied, compels the **dismissal** of it's fifth cause of action as well (*Fresh Direct, LLC v. Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2<sup>nd</sup> Dept. 2004]; see also, *Kimmell v. Schaefer*, 89 NY2d 257, 263 [1996]).

Sixth Cause of Action: Conspiracy to Defraud

As stated above, "[a] mere conspiracy to commit a tort is never of itself a cause of action" (*Alexander & Alexander, Inc. v. Fritzen*, 68 NY2d 968, 969 [1986]; *Romano v. Romano*, 2 AD3d 430, 432 [2<sup>nd</sup> Dept. 2003]). As plaintiff has failed to sufficiently plead any of the fraud claims against DiMichele, defendant's motion to dismiss the sixth cause of action is **granted**.

Seventh Cause of Action: Aiding and Abetting Fraud

The court reaches a contrary conclusion as to this cause of action. Plaintiff alleges that in September 2007 DeMichele signed and delivered to High Tides the "second quarter update" which indicated that Kainos was "very pleased with the results and progress [it was] making in all three markets". In August 2007, DeMichele stated that an investor's default

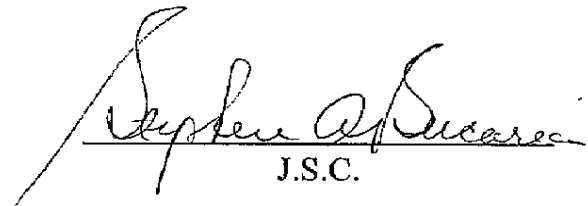
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on a \$4 million dollar loan commitment to Kainos "has not affected the company's day-to-day operations". An October 2007 Kainos press release quotes DeMichele as stating that the company achieved "record success" in the opening of its Las Vegas store and was achieving "current success" in the Buffalo market. Giving plaintiff the benefit of every possible favorable inference, plaintiff has sufficiently alleged that DeMichele had knowledge of Kainos' insolvency and, by these positive statements, provided substantial assistance to the individual defendants in perpetrating the fraud.

Defendant, DeMichele's motion to dismiss the seventh cause of action for aiding and abetting fraud is **denied**.

This shall constitute the decision and order of this Court.

Dated 11 MAY 2010

  
J.S.C.