

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: July 1, 2010
Motion Sequence # 004, 005, 007

-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 in Opposition.....	X
Affirmation in Further Support.....	X
Reply Affirmation.....	XX
Memorandum of Law.....	XXX
Reply Memorandum of Law.....	XX

Motion by defendant Dunkin Brands Inc. for leave to reargue its motion to dismiss the complaint for failure to state a cause of action is **denied**. Motion by defendants Jeffrey Serkes and Kenneth Kellaway for leave to reargue their motion to dismiss the complaint for failure to state a cause of action is **denied**. Motion by defendant Don DeMichele for leave

to reargue his motion to dismiss the complaint for failure to state a cause of action is denied.

This is an action for securities fraud. Plaintiff High Tides, LLC is a New York limited liability company owned in part by former professional hockey player Patrick LaFontaine. Defendant Dunkin Brands, Inc. is the master servicer of Dunkin Donuts franchises. Defendants Don DeMichele, Kenneth Kellaway, Christopher Cortese, Steven Galloway, and Bart Thorne are directors of Kainos Partners Holding Company, which operated Dunkin Donuts shops in New York, Nevada, and South Carolina. Defendant Jeffrey Serkes is the chief operating officer of Palisade Capital Management, which has a \$10 million investment in Kainos.

In July 2007, after LaFontaine attended a golf tournament at which he met several Kainos directors, High Tides made an initial investment of \$500,000 in the company. Kainos operated several Dunkin Donuts shops in the Buffalo area, and it appears that LaFontaine, who had played for the Buffalo Sabres, expected to help promote the business. In November of 2007, Dunkin Brands' CEO, Jon Luther, gave Kainos an award for developing franchises and referred to it as a "rising star" at the awards dinner. High Tides then made an additional investment in Kainos allegedly in reliance upon Luther's statements. In August of 2008, High Tides invested an additional \$252,000 in Kainos, bringing its total investment to \$1,752,525. In February 2009, LaFontaine learned that Kainos was in serious financial difficulty.

The present action was commenced on November 23, 2009. The complaint asserts claims for fraudulent inducement, fraudulent concealment, fraud and misrepresentation, negligent omission, negligent misrepresentation, conspiracy to defraud, and aiding and abetting fraud. Defendants Dunkin Brands, Jeffrey Serkes, Kenneth Kellaway, and Don DeMichele moved to dismiss the complaint for failure to state a cause of action. Defendants Cortese, Galloway, and Thorne did not make a dismissal motion.

By order dated May 11, 2010, the court dismissed the fraudulent inducement claims as to defendants Serkes, Kellaway, and DeMichele. The court dismissed the fraud, fraudulent concealment, negligent misrepresentation, and negligent omission claims against defendants Serkes, Kellaway, and DeMichele. The court dismissed the conspiracy to defraud claims against defendants Dunkin Brands, Serkes, Kellaway, and DeMichele.

However, the court denied the motion to dismiss the aiding and abetting fraud claims against defendants Dunkin Brands, Serkes, Kellaway, and DeMichele. The court concluded

that plaintiff had sufficiently alleged that these defendants provided substantial assistance to defendants Cortese, Galloway, and Thorne, with knowledge of the fraud committed by those defendants.

Defendant Dunkin Brands moves for leave to reargue its motion to dismiss to the extent that the court denied dismissal of the aiding and abetting fraud claim. Dunkin Brands asserts that no facts have been alleged from which it may be inferred that it had knowledge of the fraud committed by the individual defendants. Defendants Serkes and Kellaway move for leave to reargue with respect to the aiding and abetting fraud claim. These defendants argue that no facts have been alleged from which it may be inferred that they had knowledge of the fraud or provided substantial assistance to the other defendants. Defendant DeMichele moves for leave to reargue on grounds similar to those asserted by defendants Serkes and Kellaway.

CPLR 3016(b) requires that the complaint state the circumstances constituting the fraud in detail. However, this pleading requirement should not be confused with unassailable proof of fraud (*Pludeman v Northern Leasing*, 10 NY3d 486, 492 [2008]). Thus, rule 3016(b) is met when the facts are sufficient to permit a reasonable inference of defendant's knowledge and participation in the fraudulent scheme.

Based upon their positions as directors of Kainos, a reasonable inference arises that defendants DeMichele and Kellaway had knowledge of the company's true financial condition. A similar inference of knowledge of Kainos' insolvency on the part of defendant Serkes may be drawn based upon Palisade's significant investment in the company. Finally, it may be inferred that Dunkin Brands, as the master servicer, had knowledge of the financial condition of one its major franchisees.

A reasonable inference may also be drawn that defendants Serkes, Kellaway, and DiMichele provided substantial assistance to Cortese, Galloway, and Thorne in defrauding plaintiff as to the true financial condition of Kainos. It is alleged that DeMichele attended the August 2005 golf tournament at which LaFontaine was introduced to Cortese and Thorne. It is reasonable to infer that DeMichele and Kellaway attended the subsequent tournament in October 2007, when LaFontaine was encouraged to increase his investment. Moreover, DiMichele and Kellaway as directors of Kainos, and Serkes as a principal investor, had an incentive to assist the other directors in touting the company.

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Since defendants have not shown that the court overlooked or misapprehended any matter of fact or law in deciding the prior motion, defendants' motions for leave to reargue are denied.

Dated 7 Sept. 2010

Stephen A. Sacaria
J.S.C.

ENTERED
SEP 10 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE