

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

ZHAOYIN WANG,  
Plaintiff,

v.

BETA PHARMA, INC., DON ZHANG,  
AND ZHEJIANG BETA PHARMA  
CO., LTD.,  
Defendants.

No. 3:14CV1790 (VLB)

FEBRUARY 18, 2015

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants Beta Pharma, Inc. ("Beta Pharma") and Don Zhang ("Zhang") (collectively, "Defendants") hereby file this Reply Memorandum of Law in further support of their Motion to Dismiss, and in response to arguments made by Plaintiff in his Opposition to Defendants' Motion to Dismiss (the "Opposition" or "Oppo."), filed on February 4, 2015 [D.E. # 35].

I. Plaintiff's Tort Claims Must Be Dismissed Because They Are Barred By the Economic Loss Doctrine

In the Memorandum of Law in Support of Motion to Dismiss ("Memorandum in Support" or "Supp. Memo.") Defendants explained that Plaintiff's tort claims (Counts 3-8) are barred by the economic loss doctrine ("ELD") because they are based on the same alleged conduct as Plaintiff's contract claims. Supp. Memo. at 7-13. Plaintiff now argues that the ELD does not bar these claims, including his breach of fiduciary duty claims, because they rest on affirmative misrepresentations and nondisclosures that were intended to induce him to enter the alleged "partnership agreement" (the "Agreement"). Oppo. at 5-25. However,

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the so-called affirmative misrepresentations are included in the contract claims, and thus are barred by the economic loss doctrine, and the nondisclosure allegations do not state tort causes of action.

**A. Tort Claims Based on the Alleged Affirmative Misrepresentations Are Barred by the ELD**

Any claims based on Plaintiff's "affirmative misrepresentation" allegations are barred by the ELD. These allegations, which Plaintiff pleads in support of his misrepresentation and breach of fiduciary duty claims, include: (a) Defendants paying him a stated salary; (b) Defendants giving him stock in Beta Pharma; and (c) his ownership of 1% of the stock in Zhejiang Beta Pharma Co. Ltd. ("ZJBP") and participation in the ZJBP public offering. *Oppo.* at 8, 11-12, 14, 17-18. However, these allegations are also among the promises that Plaintiff uses to plead his breach of contract claims. Complaint ("Comp."), First Count, ¶¶ 10-12; Second Count, ¶¶ 11, 14-15.

Since the alleged affirmative misrepresentations, which Plaintiff claims induced him to enter the purported Agreement, are substantially identical to the factual allegations that support Plaintiff's claims for breach of contract, the ELD bars them. See Ulbrich v. Groth, 310 Conn. 375, 405 (2013). Including conclusory (rather than fact-based) allegations that Defendants knew they would not keep these promises is a thin disguise. Plaintiff alleges no facts to suggest that Defendants had such a state of mind. Whitfield v. O'Connell, 402 Fed. Appx. 563, 566 (2d Cir. 2010) (conclusory allegations about state of mind insufficient to state cause of action). These affirmative misrepresentation allegations fail as a matter of law under the ELD.

Plaintiff's theory that he may re-plead his breach of contract allegations as alleged misrepresentations merely by adding conclusory assertions about Defendants' intentions would entirely swallow the ELD, as explained in decisions like Ulbrich v. Groth, 310 Conn. 375 (2013). Under Plaintiff's theory, every time a party makes a contractual promise that it fails to keep, it can be held liable for torts as well as breach of contract. Every plaintiff making a claim of breach of contract could plead such claims based on the other party's promises simply by asserting that the defendant knew that it would not keep its promises. Indeed, every contractual promise is a representation of the party's present intent to keep the promise and an inducement for the other party to enter the contract. Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A., 2003 WL 23018888, \*5 (S.D.N.Y. Dec. 22, 2003). The ELD bars parties from basing tort claims on that essential contractual term. Plaintiff's theory would obliterate the clear distinction between torts and breaches of contract drawn by the ELD.

Plaintiff also argues that some of the statements at issue were made before the parties entered into the Agreement. Oppo. at 9. However, he did not allege so in his Complaint. See, e.g., Comp., Count 3 ¶¶ 11-15. Thus, this attempt to avoid the ELD also fails.

**B. Plaintiff Failed to Plead Claims for Nondisclosure**

Beyond the affirmative misrepresentation allegations, which amount to re-tooled versions of Plaintiff's breach of contract claims, Plaintiff also argues that his Complaint states claims for negligent and fraudulent misrepresentation (Counts 3-4, 6-7) and for breach of fiduciary duty (Counts 5 and 8) based on

allegations that Beta Pharma and Don Zhang failed to disclose information to him. *Oppo.* at 8, 12, 14, 17, 20, 23. However, Plaintiff's Complaint fails to state a claim for any of these torts based on nondisclosure. For this reason also, the Court should dismiss Counts 3-8.

As to negligent misrepresentation, the Appellate Court of Connecticut has explained that "[I]iability for negligent misrepresentation may be placed on an individual when there has been 'a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak'." Johnnycake Mountain Assocs., 104 Conn. App. 194, 206 (2007) (quoting Duksa v. Middletown, 173 Conn. 124, 127 (1977)). "Such a duty is imposed on a party insofar as he voluntarily makes disclosure," and "[a] party who assumes to speak must make full and fair disclosure as to the matters about which he assumes to speak." Id.

Thus, Plaintiff's negligent misrepresentation claims can only survive this Motion if he pled facts creating a duty to disclose the allegedly withheld information. More specifically, Plaintiff must have pled that the parties had verbal or written communications about subject matters covering the allegedly undisclosed facts. If not, then Beta Pharma and Don Zhang had no duties to disclose such facts, and such allegedly undisclosed facts cannot support a claim of negligent misrepresentation. An analysis of the Complaint reveals that Plaintiff failed to plead that Beta Pharma and Don Zhang had duties of disclosure, or any facts suggesting that Beta Pharma and Don Zhang had duties to disclose the allegedly withheld information.

First, Plaintiff alleges that Beta Pharma withheld “material information concerning the financial condition of Beta Pharma and Zhejiang Beta Pharma.” *Oppo*. at 8; *Comp.*, Count 3, ¶ 13(a)-(b); *Comp.*, Count 6, ¶ 14(a)-(b). However, Plaintiff has pled no facts indicating that the purported agreement between himself and Beta Pharma concerned Beta Pharma’s or ZJBP’s financial condition and has not pled that the parties ever had verbal or written communications about Beta Pharma’s or ZJBP’s financial condition. The Agreement (which is attached to the Complaint) is similarly devoid of any information regarding Beta Pharma’s or ZJBP’s financial condition. Thus, Plaintiff has not pled that Beta Pharma and Zhang had duties to disclose information on this subject matter, and Plaintiff’s nondisclosure claim must fail.

The same logic applies to multiple other nondisclosure allegations, including allegations that Beta Pharma did not disclose:

- “material information concerning the transactions and relationship between BP and ZBP” (*Comp.*, Count 3, ¶ 13(c), Count 6, ¶ 14(c));
- “material information concerning transactions in which BP sold or transferred ZBP shares to others for valuable consideration” (*Comp.*, Count 3, ¶ 13(d), Count 6, ¶ 14(d));
- “BP’s knowledge that ZBP would not permit the ZBP shares transferred to plaintiff by BP to be registered in China” (*Comp.*, Count 3, ¶ 13(e), Count 6, ¶ 14(e));

- “BP’s knowledge that the ZBP board had ordered BP to repurchase ZBP shares from investors at their current fair market value” (Comp., Count 3, ¶ 13(f), Count 6, ¶ 14(f));
- “BP’s knowledge of the nature and extent of the market it made or was prepared to make for repurchase of ZBP shares so that investors could realize gain on their investments in ZBP” (Comp., Count 3, ¶ 13(g), Count 6, ¶ 14(g)); and
- “that BP had failed to provide to plaintiff material documentary information concerning BP and ZBP” (Comp., Count 3, ¶ 13(h), Count 6, ¶ 14(h)).

While Plaintiff alleges that Beta Pharma failed to honor the Agreement, Plaintiff does not plead that the parties had verbal or written communications about any such subject matters. For example, Plaintiff fails to plead that the Agreement, or related conversations, in any way concerned whether the “ZBP board had ordered BP to repurchase ZBP shares.”

Since Plaintiff pled no facts regarding the parties having verbal or written communications about such subject matters, Plaintiff has not pled that Beta Pharma or Don Zhang had duties to make such disclosures. Accordingly, Plaintiff’s nondisclosure claims fail as a matter of law.

Plaintiff also makes a nondisclosure claim based on an alleged failure to inform him that that Defendants “had failed to comply with Federal and Connecticut securities laws regulating their ability to sell unregistered securities in Connecticut, including C.G.S. Sec. 36b-4 and 36b-16.” Comp., Count 3, ¶ 13(i), Count 6, ¶ 14(i). This claim also fails because Plaintiff has not even alleged that

Beta Pharma or Zhang were aware of the alleged violations of securities laws. See Johnnycake Mountain Assocs., 104 Conn. App. at 206 (“Liability for negligent misrepresentation may be placed on an individual when there has been ‘a failure to disclose known facts and, in addition thereto, a request or an occasion or a circumstance which imposes a duty to speak.’”) (quoting Duksa, 173 Conn. at 127).

The foregoing analysis likewise bars the nondisclosure component of Plaintiff’s fraudulent misrepresentation counts. See Comp., Count 4, ¶ 13, Count 7, ¶ 14. In Duksa, 173 Conn. at 127, the Connecticut Supreme Court explained that, as with negligent misrepresentation, a fraud claim can only be based on nondisclosure if there was a duty to speak, and such a duty arises when the parties voluntarily make disclosures or have verbal or written communications about subject matters. Specifically, the Supreme Court explained that “mere nondisclosure . . . does not amount to fraud.” Id. (quoting Watertown Savings Bank v. Mattoon, 78 Conn. 388, 393 (1905)). Instead, “[t]o constitute fraud on that ground, there must be a failure to disclose known facts and, in addition thereto a request or an occasion or a circumstance which imposes a duty to speak.” Duksa, 173 Conn. at 127 (quotations and citations omitted). And “[s]uch a duty is imposed on a party insofar as he voluntarily makes disclosure. A party who assumes to speak ‘must make a full and fair disclosure as to the matters about which he assumes to speak.’” Id. (quoting Franchey v. Hannes, 152 Conn. 372, 379 (1965)). Thus, the analysis of negligent misrepresentation claims based on nondisclosure also applies to fraud claims.

Paragraph 13 of Count 4 and Paragraph 14 of the Count 7 mirror the above allegations of nondisclosure in the negligent misrepresentation counts (Counts 3 and 6). Because Connecticut courts apply the same analysis to claims of negligent misrepresentation involving nondisclosure and fraudulent misrepresentation involving nondisclosure, for the reasons already articulated, all of the nondisclosure allegations in Counts 4 and 6 fail and claims based on them must be dismissed.

Plaintiff also now argues that nondisclosures that allegedly were designed to “induce plaintiff to enter into a business relationship with Beta Pharma” form part of his breach of fiduciary duty claims (Counts 5 and 8). *Oppo.* at 20, 23. He alleges that these nondisclosures occurred before the parties entered into the Agreement. *Id.* at 21, 24. But this argument is inconsistent with the Complaint. First, in Counts 5 and 8, Plaintiff did not allege that any of the acts that allegedly breached fiduciary duties to Plaintiff were inducements. Second, Plaintiff failed to allege any fiduciary relationship between Plaintiff and either of Defendants that pre-dated the Agreement, as would be necessary to support a claim that Defendants breached fiduciary duties to him before the Agreement existed.<sup>1</sup> See *Supp. Memo.* at 14 (requirement for alleging a fiduciary relationship). Thus, he failed to allege any possible basis for a fiduciary duty based on nondisclosure.

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<sup>1</sup> Beyond the fact that the Agreement gave rise to no fiduciary relationship, it is impossible to conceive how Defendants could have had fiduciary relationships with Plaintiff before allegedly entering into the Agreement.

Because Plaintiff's tort claims all rest on these alleged nondisclosures and on alleged affirmative misrepresentations that depend on the same factual allegations as the alleged breaches of contract, all of Plaintiff's tort claims must be dismissed.

**C. Plaintiff's Request for Punitive Damages Has No Basis and Does Not Save Plaintiff's Claims from Dismissal Under the ELD**

Plaintiff also argues that the ELD does not bar his fraudulent misrepresentation and breach of fiduciary duty counts because they seek punitive damages. See, e.g., Oppo, at 16. This argument fails for two reasons.

First, "[p]unitive damages are not a cause of action." SRSNE Site Gp. v. Advanced Coatings Co., 2014 WL 671317, \*2 (D. Conn. Feb. 21, 2014). "[A] claim for punitive damages is a not a separate count inasmuch as it is a remedy." Supreme Industries, Inc. v. Town of Bloomfield, 2007 WL 901805, \*26 (Conn. Super. Ct. Mar. 8, 2007). In the absence of a statutory claim (as here), punitive damages are available only as a remedy for a claim under which the plaintiff pleads and proves a right to recover compensatory or nominal damages. Associated Inv. Co. Ltd. P'ship v. Williams Assocs. IV, 230 Conn. 148, 161 n. 16 (1994).

Since Plaintiff's tort claims fail, there is no basis for awarding punitive damages. Further, tort claims cannot be insulated from the ELD simply by requesting punitive damages. See, e.g., Wells Fargo Bank, N.A. v. Fifth Third Bank, 931 F.Supp.2d 834, 842 (S.D. Ohio 2013) ("Wells Fargo argues that its gross negligence claim is not barred by the economic loss rule because it seeks punitive damages under that claim in addition to actual damages . . . . Because

Wells Fargo has failed to establish that its breach of contract claim is accompanied by an independent tort, it may not recover punitive damages, and its gross negligence claim is barred by the economic loss rule.”). Otherwise, demands for punitive damages would eviscerate the ELD and result in duplicative contract and tort claims.

Plaintiff mis-cites Wiygul v. Thomas, 2014 WL 3397720, \*7 (Conn. Super. Ct. June 3, 2014) for the notion that a demand for punitive damages insulates a tort claim from the ELD. In Wiygul, the Court held that the ELD did not apply because the plaintiff claimed “damages to property other than the goods sold,” so the tort claims were separate from the contract claims. Id. Here, Plaintiff’s tort claims rely on the same factual allegations as his contract claims. Also, the Wiygul court linked the punitive damages to a statutory claim, which is not applicable here. Id.

Second, the Complaint pleads no facts sufficient to establish a “willful violation,” which is a prerequisite to any award of punitive damages in a common law claim. See, e.g., Markey v. Santangelo, 195 Conn. 76, 77 (1985). The demand for punitive damages must thus be stricken. Conn. Prac. Book § 10-39; Pamela B. v. Ment, 244 Conn. 296, 325 (1998).

II. Plaintiff Failed to Plead Fraud With Particularity

Plaintiff also disputes that he failed to plead his fraud claims (Counts 4 and 7) with the particularity required by Federal Rule of Civil Procedure 9(b). Oppo. at 25-30. Despite his arguments, the necessary factual allegations are simply not present in the Complaint.

First, as Defendants explained in the Memorandum in Support, Plaintiff has not alleged where and when the supposedly fraudulent statements were made. Supp. Memo. at 14. In response, Plaintiff asserts that some statements were made in writing on March 26, 2010, citing a paragraph of the Complaint that alleges promises that were made in the Agreement itself. Oppo. at 28; Comp., Count 4, ¶ 11. But by pointing to promises made in the Agreement, Plaintiff merely underscores the point that these claims are barred by the ELD. He also asserts that one could infer from the Complaint that some non-written misrepresentations were made around March 26, 2010. Oppo. at 8. But that is merely an inference, not a specific allegation of where and when the statements were made. Rule 9(b) requires specific factual allegations of time and place. Acito v. IMCERA Gp., Inc., 47 F.3d 47, 51 (2d Cir. 1995).

Second, Plaintiff's allegations of intent to defraud are mere conclusions, lacking specific factual allegations. Supp. Memo. at 14. Plaintiff argues that the Complaint alleges that Defendants made false, fraudulent statements. Oppo. at 26-30. But the Complaint merely alleges conclusorily that the statements in question were false and known to be false by Defendants. It pleads no facts (beyond Plaintiff's bare assertion) to show that Defendants knew that their statements were false. Counts 4 and 7 allege neither facts to show that Defendants had both motive and opportunity to commit fraud, nor facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness. See Eternity Global Master Fund Ltd. v. Morgan Guaranty Trust Co.

of N.Y., 375 F.3d 168, 187 (2d Cir. 2004) (allegations of such specific facts are required under Rule 9(b)). For these reasons, those counts must be dismissed.

III. Plaintiff Failed to Allege a Fiduciary Relationship

Defendants have explained that Counts 5 and 8 (for breach of fiduciary duty) fail because they do not allege a fiduciary relationship between Plaintiff and either Beta Pharma or Zhang. Supp. Memo. at 14-20. Plaintiff now argues that he has alleged four fiduciary relationships. Oppo. at 30-36. However, the Complaint does not allege a legally cognizable fiduciary relationship under any of those four headings.

First, Plaintiff asserts that Counts 5 and 8 plead that Beta Pharma and Zhang were partners with Plaintiff in “the Beta Pharma Canada venture.” Oppo. at 31-32. However, as Defendants explained in the Memorandum in Support, partner status gives rise to a fiduciary relationship only if the parties are partners in a formal partnership, i.e., a business entity organized as a partnership under Conn. Gen. Stat. § 34-300, et seq. Supp. Memo. at 14-16. Plaintiff specifically alleged that Beta Pharma Canada (“BPC”) is a closely held corporation, not a partnership. Comp., Count 8, ¶ 14(b). Because he does not allege the formation of any other formal partnership between himself and Beta Pharma or Zhang, this argument fails. Plaintiff now argues that a formal partnership need not be registered or have a written partnership agreement. Oppo. at 32. But Plaintiff’s Complaint does not allege that BPC was a formal partnership, or that any other formal partnership was created, whether by registration, written agreement, or otherwise.

Second, Plaintiff asserts that Zhang was a fellow officer, director and stockholder in BPC. Oppo. at 32-33. The Memorandum in Support explained that Plaintiff has not made the factual allegations necessary to plead a fiduciary relationship on that basis. Supp. Memo. at 18-19. It is not necessary to repeat that explanation here, except to reiterate that the Eighth Count not only fails to make the necessary factual allegations regarding Zhang's role in BPC or control over it, but fails to allege a single action that Zhang took as a director, officer or shareholder of BPC, alleging only actions that he took as an officer of Beta Pharma.

Third, Plaintiff asserts that Defendants had a "uniquely dominant position over plaintiff given their relationships to ZBP, its stock, and its forthcoming initial public offering." Oppo. at 34. However, Plaintiff alleges against each defendant only a relationship that Connecticut law specifically excludes as a possible fiduciary relationship. Plaintiff's specific factual allegation about Zhang is that he "was Vice President of ZBP and one of its directors." Id. However, Plaintiff has not alleged the "extraordinary circumstances" necessary to pierce the veil and make a breach of fiduciary duty claim against an individual officer or director of ZJBP. See Supp. Memo. at 19-20.

Plaintiff's specific factual allegation about Beta Pharma is that "it has a substantial ownership interest in ZBP." Oppo. at 34. Thus, he seeks to state a claim against Beta Pharma as a fellow shareholder in ZJBP. But a claim based on shareholder status can only be alleged against a majority shareholder. Yanow v. Teal Indus., Inc., 178 Conn. 262, 283 (1979). Plaintiff alleges that Beta Pharma had

only a 45% interest in ZJBP. Comp., First Count ¶ 7. Further, a claim based on shareholder status can only be based on an allegation, lacking here, of corporate acts that injure the value of the corporation. Cox v. Reyes-D'Arcy, 2014 WL 4413788, \*2 (Conn. Super. Ct. Aug. 13, 2014). The argument that Zhang and Beta Pharma were in a “uniquely dominant position” relative to him does not justify ignoring Connecticut case law that limits the set of relationships between a shareholder and other shareholders, officers or directors that may be defined as fiduciary relationships.<sup>2</sup>

Finally, Plaintiff argues that he has alleged that Defendants “acted as agents of plaintiff with regard to purchase of ZJBP stock and participation in its initial public offering.” Oppo. at 35. But his Complaint fails to allege any of the elements of a principal-agent relationship: “(1) a manifestation by the principal that the agent will act for him; (2) acceptance by the agent of the undertaking; and (3) an understanding between the parties that the principal will be in control of the undertaking.” LeBlanc v. New England Raceway, LLC, 116 Conn. App. 267, 274-75 (2009). Counts 5 and 8 do not allege any facts to support any of those elements. For example, at no point does Plaintiff allege that he made any manifestation that Defendants would act for him as his agent, such as an

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<sup>2</sup> This case differs from WEB Mgmt. LLC v. Arrowood Indem. Co., 2008 WL 619310 (D. Conn. Mar. 5, 2008), on which Plaintiff relies, Oppo. at 33-34, because WEB did not involve the specific rules that govern the creation of fiduciary relationships between shareholders, officers and directors of a corporation.

instruction to Defendants to act on his behalf. In the absence of an allegation of a legally cognizable fiduciary relationship, Counts 5 and 8 must be dismissed.

**DEFENDANTS BETA PHARMA, INC. AND  
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**CERTIFICATE OF SERVICE**

I hereby certify that on February 18, 2015 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/  
Michael G. Caldwell (ct 26561)