MedPro Invs., LLC v Aridis Pharms., Inc.
2024 NY Slip Op 32359(U)
May 8, 2024
Supreme Court, New York County
Docket Number: Index No. 651074/2020
Judge: Louis L. Nock
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART 38M**

Justice

---X

MEDPRO INVESTORS, LLC, and MEDPRO INVESTORS ARIDIS, LLC, Plaintiffs,	**INDEX NO.**	651074/2020
- v -	**MOTION DATE**	01/12/2023, 01/12/2023
ARIDIS PHARMACEUTICALS, INC., Defendant.	**MOTION SEQ. NO.**	002 003

---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 002) 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 70, 72, 73, 74, 75, 76, 77, 78, and 81

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document numbers (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 79, and 80

were read on this motion for SUMMARY JUDGMENT.

LOUIS L. NOCK, J.

In motion seq. No. 002, plaintiffs MedPro Investors, LLC, and MedPro Investors Aridis, LLC (collectively, “MedPro”), move, pursuant to CPLR 3212, for summary judgment on the complaint. In motion seq. No. 003, defendant Aridis Pharmaceuticals, Inc. (“Aridis”), moves, pursuant to CPLR 3212, for summary judgment to dismiss the complaint. The motions are consolidated for disposition in accordance with the following memorandum.

Background

MedPro Investors, LLC, is a group of medical professionals engaged in the medical industry which pools their funds and invests in startup companies and technology companies within the medical industry (transcript of proceedings, NYSCEF Doc. No. 81 at 4). MedPro Investors Aridis, LLC, is a special purpose investment vehicle that was created solely for the purpose of facilitating investment by MedPro Investors, LLC, in Aridis (Tuchman EBT tr, NYSCEF Doc. No. 41 at 13-14). Aridis is a biopharmaceutical company which focuses on the discovery and development of therapies to treat life-threatening viral and bacterial respiratory infections (Aridis statement of undisputed facts, NYSCEF Doc. No. 59 ¶ 1).

On July 31, 2017, MedPro executed a Subscription Agreement to purchase $531,686.85 worth of Series A Preferred Shares of Aridis at a price of $2.95 per share, or 185,318 preferred shares of stock (subscription agreement, NYSCEF Doc. No. 45 at 11). Plaintiffs allege that the Subscription Agreement contains an anti-dilution clause which provides that, in the event defendant issues additional securities at a price lower than plaintiffs' purchase price, defendant would be required to issue additional shares that plaintiffs would have received had plaintiffs been able to purchase shares at the lower price (*id.*, § 2.10). Specifically, the agreement contains a section 2.10, titled "Priced Based Anti-Dilution Protection," that provides:

> The Company and Investor agree that, except in the case of Permitted Issuances, if the Company issues additional securities at a purchase price (the "Lower Purchase Price") less than the Purchase Price at any time that an Investor in this Offering holds any Shares, the Company shall issue to such Investor a number of additional Shares equal to the difference of (i) the number of Shares that such Investor would have received had the Purchase Price at the time of the Closing been equal to the Lower Purchase Price and (ii) the number of Shares that such Investor received in the Offering (it being understood that after a dilutive issuance, for purposes of determining whether there is an additional dilutive issuance by the Company, the Purchase Price for purposes of this Section 2.10 shall be reduced to the Lower Purchase Price).

(Subscription Agreement, NYSCEF Doc. No. 45 § 2.10.)

"Shares" are defined as "Series A Preferred Shares" (*id.* at 1). Plaintiffs contend that they executed the Subscription Agreement in reliance on the price protection clause. Defendant periodically sought and obtained funding through various sources, including as relevant here, the issuance of Series A Convertible Preferred Shares (Patzer EBT tr., NYSCEF Doc. No. 51 at 24-29).

On January 12, 2018, pursuant to a Written Consent of Series A Preferred Shareholders, plaintiffs' shares were to be converted into common shares ("Written Consent," NYSCEF Doc. No. 73). In this regard, the court notes that such a written consent is provided for in the Aridis Bylaws, which state that

> Any action required to be taken at any annual or special meeting of stockholders of the Corporation, or any action which may be taken at any annual or special meeting of such stockholders, may, if such action has been earlier approved by the Board, be taken without a meeting, without prior notice and without a vote, if a consent in writing, setting forth the action so taken, shall be signed by the holders of outstanding stock having not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted. Prompt notice of the taking of the corporate action without a meeting by less than unanimous written consent shall be given to those stockholders who have not consented in writing.

(Aridis Bylaws, NYSCEF Doc. No. 31, § 2.10.)

The conversion of plaintiffs' shares was purportedly authorized by an Amended and Restated Certificate of Designation of Preferences, Rights and Limitations of Series A Convertible Preferred Stock dated August 12, 2016 (certificate of designation, NYSCEF Doc. No. 32 [the "COD"]). According to defendant, the COD governs the automatic conversion of Preferred Shares to the company's common stock. In this regard, the COD, at section 6(b), titled "Mandatory Conversion," provides that:

> Each share of Series A Preferred Stock shall be automatically converted into fully paid and non-assessable shares of Common Stock at the Conversion Rate upon (i) the completion of a firm commitment underwritten initial public offering of the Corporation's shares of Common Stock at a price per share equal to or greater than $4.10, subject to adjustments from time to time on or after the date hereof pursuant to Section 9, or (ii) an affirmative vote of the holders of at least a majority of the outstanding shares of Series A Preferred Stock.

(COD, NYSCEF Doc. No. 32 § 6 [b].)

The parties dispute the authenticity of the written consent relied on by defendant. Plaintiffs submit what they claim to be the "legitimate" Written Consent dated January 12, 2018 (NYSCEF Doc. No. 73). They contend that defendant submitted a fabricated version of the Written Consent dated the same date as the "legitimate" Written Consent. The allegedly legitimate Written Consent provides that the conversion of preferred shares into common shares will take place "upon the closing of a firm commitment initial public offering of its shares of common stock" (*id.*). The allegedly fabricated text provides that the conversion of preferred shares to common shares will instead take place "immediately prior to the closing of a firm commitment initial public offering of its shares of common stock" (NYSCEF Doc. No. 77). The court notes that the "immediately prior to the closing" language is inconsistent with all other representations made by defendant via its Board of Directors and to the SEC. In this regard, on January 19, 2018, just one week after the "legitimate" Written Consent is dated, defendant's Board of Directors issued a resolution consenting to the conversion, which provides that the conversion will take place "upon completion of a firm commitment underwritten initial public offering" (board resolution, NYSCEF Doc. No. 75). On August 9, 2018, defendant filed a Registration Statement with the SEC which stated that the conversion would take place "upon the closing of a firm commitment underwritten initial public offering" (Notes to Consolidated Financial Statements excerpts, NYSCEF Doc. No. 76).

It is undisputed that, on or about August 14, 2018, defendant initiated an Initial Public Offering ("IPO") by which defendant issued additional shares to the public. As stipulated by the parties:

> Aridis' IPO share price at market open on August 13, 2018, was $13.02 per share.
>
> On August 3, 2018, Aridis carried out a reverse stock split wherein all shares of its common stock were split at a conversion ratio of 6.417896:1. In other words, for every 6.417896 shares of common stock issuable upon conversion of Series A Preferred Stock, Aridis Preferred Shareholders received one share of Common Stock.
>
> MedPro purchased their Series A Preferred Shares prior to the reverse split at a purchase price of $2.95 per share.
>
> Because the IPO share price was $13.02, the reverse split price equivalent of MedPro's Preferred Shares was therefore $2.02 per share (i.e., $13.02/6.417896 = $2.02).
>
> For purposes of clarity, in July 2017, MedPro purchased Series A Preferred Shares at $2.95 per share and the reverse split price equivalent of MedPro's Preferred Shares at the IPO in August 2018 was $2.02.

(Stipulation, NYSCEF Doc. No. 80, ¶¶ 1-5.)

Upon the issuance of shares in defendant's IPO, plaintiffs promptly notified defendant of their right to the issuance of additional shares. However, defendant refused to issue additional shares to plaintiffs (E-mail Exchange, NYSCEF Doc. No. 34).

Standard of Review

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). "Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [internal citations omitted]). Once a movant has met this burden, "the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring a trial" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]). "[I]t is insufficient to merely set forth averments of factual or legal conclusions" (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [internal citation omitted], *lv denied* 24 NY3d 917 [2015]). Moreover, the reviewing court should accept the opposing party's evidence as true (*Hotopp Assocs. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). Therefore, if there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Discussion[1]

Breach of Contract (First Cause of Action):

In its first cause of action for breach of contract, plaintiffs allege that defendant breached the subscription agreement by failing to issue additional shares to plaintiffs following the IPO.[2] A breach of contract claim requires proof of the existence of the contract, plaintiff's performance thereunder, defendants' failure to perform, and damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425 [1st Dept 2010]). It is axiomatic that where the parties set down the unambiguous terms of their agreement in writing, the court has no power to vary that writing (*Vermont Teddy Bear Co., Inc. v 538 Madison Realty Co.*, 1 NY3d 470, 475 [2004]). "The court construe[s] the plain and ordinary meaning of the unambiguous terms and conditions of the agreement"

---

[1] Plaintiffs initially resorted to citation to Delaware law (*see*, NYSCEF Doc. No. 35); but thereafter, informed the court that "Plaintiffs agree with Defendant that the Court's choice of law between the laws of Delaware or New York does not change the outcome here" (NYSCEF Doc. No. 78 at 2). Accordingly, this court will engage citation to New York law – the law of this forum.

[2] Plaintiffs also seek to rescind the subscription agreement; however, such a claim is not pled in the complaint and plaintiff has not sought to amend the complaint to include such a claim. Accordingly, plaintiffs' claim for rescission is denied.

(*Edelman v Chubb Indem. Ins. Co.*, 41 AD3d 327, 327 [1st Dept 2007]). The test for ambiguity is whether an agreement on its face is reasonably susceptible to more than one interpretation (*Republic Natl. Bank of N.Y. v Zimmcor U.S.A. Corp.*, 203 AD2d 107, 110 [1st Dept 1994]). Merely because plaintiffs offer a different interpretation for a clear provision does not render it ambiguous (*Bethlehem Steel Co. v Turner Constr. Co.*, 2 NY2d 456, 460 [1957]).

Here, Section 6(b) of the COD refers to and allows the automatic conversion of Series A Preferred Stock into Common Shares pursuant to "an affirmative vote of the holders of at least a majority" of the outstanding shares of Series A Preferred stock. This very language indicates that the parties did not intend that minority holders, such as plaintiffs here, have the contractual right to participate in the decision to convert the Series A Preferred Stock into Common Shares. In *Cobble Creek Consulting, Inc. v Sichenzia Ross Friedman Ference LLP* (110 AD3d 550 [1st Dept 2013]), an anti-dilution clause was included in the certificate of designation which would prevent the corporation from changing the common stock structure in a way that could affect the conversion rate of plaintiffs' Series A Preferred Stock (*id.*, at 550 ["Plaintiffs did not challenge the inclusion of language in the certificate of designation that allows changes in the value or voting rights of Preferred A shares by a majority vote of Preferred A shareholders"]). The corporation availed itself of a majority vote provision in the Certificate of Designation to change the value of Series A shares, rendering plaintiffs' stock virtually worthless without changing the common stock structure and thus achieving the same result. As in *Cobble Creek*, plaintiffs admittedly did not negotiate a minority veto provision that would have permitted them to act as a hold-out and protect their interests even upon a majority vote. Thus, the anti-dilution provision would not have altered the result (*id.*, at 551). In other words, the negotiated anti-dilution provision had limitations in its application. Plaintiffs could have negotiated for such a provision if they had wanted to, but they did not. Therefore, they have no right to protection for which they did not bargain.

The court now turns to plaintiffs' claim that defendant did not follow its own voting protocol by not giving plaintiffs the opportunity to vote on the conversion of the Series A Preferred shares. As an initial matter, the Subscription Agreement does not exist in a vacuum. It is subject to the application of the COD, a controlling document which governs how corporate actions are taken. Indeed, contrary to plaintiffs' premise, corporate action may be authorized by written consent of the shareholders under certain circumstances. Defendant's COD does not prohibit the solicitation of written consent outside of shareholders' meeting (see COD, NYSCEF Doc. No. 32, §§ 5 [Voting], 8 [Restrictions and Limitations]). To wit:

> Section 5. Voting. Each holder of Series A Preferred Stock shall be entitled to vote on all matters submitted to shareholders of the Corporation and shall be entitled to such number of votes for each share of Series A Preferred Stock owned at the record date for the determination of shareholders entitled to vote on such matter or, if no such record date is established, at the date such vote is taken or the date on which any written consent of shareholders is solicited**,** equal to the number of shares of Common Stock such shares of Series A Preferred Stock are convertible into at such time. Except as otherwise required by law, the holders of shares of Series A Preferred Stock shall vote together with the holders of Common Stock on all matters and shall not vote as a separate class.
>
> Section 8. Restrictions and Limitations. Except as expressly provided herein or as required by law, so long as any shares of Series A Preferred Stock remain outstanding, the Corporation shall not, without the vote or written consent of the holders of at least a majority of the then outstanding shares of the Series A Preferred Stock, take any action which would adversely and materially affect any of the preferences, limitations or relative rights of the Series A Preferred Stock, including, without limitation, (i) directly or indirectly, entering into, creating, incurring or assuming any new indebtedness for borrowed money or creating a new class of equity that by its terms is expressly senior in right of payment to the Corporation's obligations to the holders of the Series A Preferred Stock, (ii) incurring any liens on the Corporation's assets or (iii) repaying, repurchasing, paying cash dividends on or otherwise making distributions in respect of any shares of Common Stock or other securities.

In addition, defendant's Bylaws allow shareholders to act by written consent, in lieu of a meeting, provided that such consent was signed by "not less than the minimum number of votes that would be necessary to authorize or take such action at a meeting at which all shares entitled to vote thereon were present and voted" and that "prompt written notice of any such acts were provided to all non-consenting shareholders" (Aridis Bylaws, NYSCEF Doc. No. 31, § 2.10). The court notes that, in connection with a "Mandatory Conversion," because Section 6(b)(ii) of the COD requires an affirmative vote of the holders of at least a majority of the outstanding shares of Series A Preferred Stock, such action would require that at least a majority of the outstanding shares of Series A Preferred Stock approve same in writing. Furthermore, the court notes that this provision is not associated with any language requiring that a meeting must be held. As such, defendant circumvented the triggering of the anti-dilution when, by written consent of a majority of Series A Preferred shareholders, it propelled the change in the classification of plaintiffs' Series A Preferred shares. Thus, defendant did not violate the anti-dilution clause.

Turning to the question of which written consent is the operative version, the court finds that this question does not present any significance under the circumstances for the following reasons. Plaintiffs did not raise an issue of fact demonstrating that the outcome would be altered. Admittedly, plaintiffs did not have enough shares to veto the corporate action. Whether we consider the purported legitimate or fabricated written consent, as characterized by plaintiffs, there is no dispute that each was executed by a majority of Series A Preferred Shareholders. In the purported legitimate version, a majority of 50.8% of the holders of Series A Preferred Shares adopted the written consent (NYSCEF Doc. No. 63), whereas an even greater majority of 63.6% ratified the purported fabricated version (NYSCEF Doc. No. 77).

Next, the court addresses the discrepancy relating to the timing of the conversion highlighted by plaintiffs. On the one hand, the purported legitimate Written Consent (NYSCEF Doc. No. 63 [emphasis added]) provides that:

> [I]t is advisable and in the best interests of the Company for the Series A Preferred to automatically convert into shares of common stock pursuant to Section 6(b)(i) of the COD *upon the closing* of a firm commitment initial public offering of its shares of common stock.

On the other hand, the purported fabricated Written Consent states that such conversion shall take place "*immediately prior to the closing* of a firm IPO of its shares to common stock" (NYSCEF Doc. No. 77 [emphasis added]).

However, this distinction in timing is irrelevant because the recapitalization plan caused an immediate and automatic forfeiture of plaintiffs' interests. According to case law, an automatic conversion clause implies that plaintiffs would not retain the option of keeping their preferred shares in the event of an IPO, nor would they have the right to convert their preferred shares to common at any earlier time (*see, Bruh v Bessemer Venture Partners III, L.P.*, 464 F3d 202, 204 [2d Cir 2006]).

Furthermore, the mandatory and automatic conversion clause, as drafted, dispensed with the need for a ratification by the Board, and plaintiffs do not point to any provision of the COD requiring any further Board approval (*see, id.*, at 204, 209). Neither did plaintiffs demonstrate that the SEC Registration Statement created contractual rights attendant to the stocks or was controlling as to same (*Diamond v ShiftPixy, Inc. Eyeglasses*, 2021 WL 3085405 at *12 [SD NY July 19, 2021] [holding that the SEC filings involved in that case "do not constitute a writing signed by both parties modifying or altering the terms of the" parties' agreement and, therefore, "they cannot be read to entitle Plaintiff to anything more than that to which he was entitled under the" parties' agreement]).

Finally, plaintiffs conducted due diligence, including a review of the COD, prior to executing the Subscription Agreement (Tuchman EBT tr., NYSCEF Doc. No. 41 at 11-12; 19-22) and there is no evidence that they did not understand what they were signing or that the relevant documents were ambiguous (*EVIP Canada, Inc. v Schnader Harrison Segal & Lewis LLP*, 2021 WL 964943 at *24 [SD NY Mar. 15, 2021], *affd* 2022 WL 3904541 [2d Cir Aug. 31, 2022]).

Based on the foregoing, the court finds that defendant did not violate the protections afforded to plaintiffs in the Subscription Agreement. Accordingly, that branch of plaintiffs' motion seeking damages pursuant to its breach of contract claim is dismissed and that branch of defendant's motion seeking to dismiss plaintiffs' breach of contract claim is granted.

Breach of the Duty of Good Faith and Fair Dealing (Fifth Cause of Action):

The covenant of good faith and fair dealing is implied in every contract (*511 West 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 153 [2002]). However, as the Court of Appeals cautioned in *Rowe v Great Atlantic & Pacific Tea Co., Inc.* (46 NY2d 62, 72 [1978]), "the courts should be extremely reluctant to interpret an agreement as impliedly stating something which the parties have neglected to specifically include. As we have previously declared in a similar context, 'such lack of foresight does not create rights or obligations.'" As discussed earlier, the Certificate of Designation, the By-Laws and the Subscription Agreement apply to plaintiffs' claims. Here, Section 6(b) of the Certificate of Designation [Mandatory Conversion] permits "an affirmative vote of the holders of at least a majority of the outstanding shares of Series A Preferred Stock." Furthermore, the Bylaws allow for corporate action to be taken, pursuant to a majority written consent. The above-referenced documents governed how preferred stock would be converted and they permitted defendant to dispense with notice to the preferred shareholders.

The court notes that the parties did not place any restrictions on the procedure for obtaining the consent of the required number of shareholders. Adding the requirement that all Series A Preferred shareholders be notified prior to the written consent would add a new term to the contract. Defendant obtained the majority written consent. As a result, the court rejects plaintiffs' argument that an implied covenant fills in gaps for the procedure for corporate action without notification (*National Union Fire Ins. Co. of Pittsburgh, PA v Xerox Corp*, 25 AD3d 309, 310 [1st Dept], *appeal dismissed* 7 NY3d 886 [2006]). An implied covenant cannot be used to create an obligation inconsistent with the contract and plaintiffs' interpretation would be inconsistent with the Subscription Agreement (*id*.; *SNS Bank, NV v Citibank, N.A.*, 7 AD3d 352, 354-355 [1st Dept 2004]). Neither did MedPro establish that defendant engaged in "bad faith" in acts that ultimately had the effect of diminishing or vitiating MedPro's ability to realize a gain under the contract. Accordingly, this claim must be dismissed.

Fraud (Second Cause of Action):

The essential elements of a cause of action for fraud include a misrepresentation or material omission of fact, known to be false when made, scienter, reasonable reliance and resulting damages (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 421 [1996]; *Pramer S.C.A. v Abaplus Intl. Corp.*, 76 AD3d 89, 98 [1st Dept 2010]). Allegations of fraud are also subject to a heightened pleading requirement (CPLR 3016). General and conclusory allegations of fraud will not sustain the cause of action (*Abrahami v UPC Const. Co.*, 176 AD 2d 180 [1st Dept 1991]). Furthermore, a separate cause of action for fraud cannot stand when the only fraud alleged relates to a breach of contract (*Richbell Info. Servs. v Jupiter Partners*, 309 AD2d 288

[1st Dept 2003]; *DePinto v Ashley Scott, Inc*., 222 AD2d 288 [1st Dept 1995]). A breach of contract claim "may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation" (*DePinto, supra*, at 288).

Here, plaintiffs have not established a prima facie case of fraud. Defendant did not make any misrepresentation of a material fact known to be false "when Defendant represented to Plaintiffs that Defendant would issue additional shares to Plaintiffs if Defendant issued shares to any other person at a price lower than Plaintiffs' purchase price" (Complaint, ¶ 24; NYSCEF Doc. No. 35 at 8-9). Plaintiffs admit that they have no knowledge of any misrepresentation made to them (Tuchman EBT tr, NYSCEF Doc. No. 41 at 58). Secondly, plaintiffs' fraud claim is based on the same alleged promise as the contract claim (i.e., that defendant would abide by the Subscription Agreement and its anti-dilution clause, and that plaintiffs would be entitled to vote); the alleged fraudulent statements are not collateral or extraneous to the contract; and the alleged damages for both the fraud and breach of contract causes of action are the same, namely, compensatory damages in the amount of $276,600 corresponding to the difference in the number of shares they would have received had they been able to purchase shares at the lower price, as well as punitive damages. The Court of Appeals has long held that an allegation that a contracting party never intended to perform its obligations under a contract is actionable as a breach of contract; not as a fraud (*see, Rocanova v Equitable Life Assur. Socy*., 83 NY2d 603 [1994]; *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 62 [1st Dept 2017]).

Misrepresentation (Third Cause of Action):

A cause of action for negligent misrepresentation requires the plaintiff to demonstrate "(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" (*CMMF, LLC v JP Morgan Inv. Mgt. Inc.*, 78 AD3d 562, 565 [1st Dept 2010], quoting *J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148, *rearg denied* 8 NY3d 939 [2007]; *see also*, *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 180 [2011]). A claim for negligent misrepresentation must be "separate and apart from [a] claim for breach of contract" (*OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010] [dismissing claim for negligent misrepresentation as duplicative for being "predicated upon precisely the same purported wrongful conduct as is the claim for breach of contract"]).

Here, plaintiffs failed to demonstrate "the existence of a special or privity-like relationship imposing a duty on defendants to impart correct information" (*J.A.O. Acquisition Corp.*, *supra*). A relationship involving sophisticated parties in an arm's length business relationship does not give rise to such a "heightened duty" (*see*, *Dembeck v 220 Cent. Park S., LLC*, 33 AD3d 491, 492 [1st Dept 2006]; *see also*, *RKA Film Fin., LLC v Kavanaugh*, 171 AD3d 678, 679-680 [1st Dept 2019]; *Greentech Research LLC v Wissman*, 104 AD3d 540, 540 [1st Dept 2013]). Plaintiffs admit that MedPro is run by a group of sophisticated investors (Treitel EBT tr, NYSCEF Doc No. 53 at 46; Tuchman EBT tr, NYSCEF Doc. No. 41 at 32).

Furthermore, plaintiffs acknowledge that they have no knowledge of any misrepresentation made to them (NYSCEF Doc. No. 41 at 58). Additionally, the claim is duplicative of the claim for breach of contract because it is also based on the defendant's alleged nonperformance of the Subscription Agreement. Based on the foregoing, plaintiffs' claims asserting negligent misrepresentation and omission are dismissed.

Breach of Fiduciary Duty (Fourth Cause of Action):

To state a cause of action sounding in breach of fiduciary duty, plaintiffs must comply with the heightened pleading requirement of CPLR 3016 (b) by pleading the existence of a duty which defendant owed based on a relationship of trust and confidence, a breach of that duty by defendant, and that defendant's breach was the proximate cause of plaintiff's damages (*see*, *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). While majority shareholders owe a fiduciary duty to minority shareholders in a close corporation (*Barbour v Knecht*, 296 AD2d 218, 227 [1st Dept 2002]), fiduciary relationships are "necessarily fact-specific" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Courts have generally held that there is no fiduciary relationship between sophisticated parties involved in an arm's length transaction (*MP Cool Invs. Ltd. v Forkosh*, 142 AD3d 286, 293 [1st Dept] [holding that there was no fiduciary relationship where "The transactions at their inception were arm's length transactions between sophisticated commercial parties"], *lv denied* 28 NY3d 911 [2016]).

Here, plaintiffs admit that MedPro is run by a group of sophisticated investors (NYSCEF Doc. No. 53 [Treitel EBT] at 46; NYSCEF Doc. No. 41 [Tuchman EBT] at 32) and there is no evidence in the record that defendant provided plaintiffs with financial advice. Furthermore, even if a fiduciary relationship existed, plaintiffs did not show that defendant acted "malevolently and in bad faith" or proceeded with the conversion of shares in a manner not contemplated in the Subscription Agreement (*see*, *O'Neill v Warburg, Pincus & Co.*, 39 AD3d 281, 282 [1st Dept 2007]). Here, plaintiffs did not demonstrate that they fall within this exception (*cf.*, *Collins v Telcoa Intl. Corp.*, 283 AD2d 128, 133-134 [2d Dept 2001] [additional issuance of shares without a valid business purpose for the purpose of diluting plaintiff's percentage of ownership states a claim against majority shareholders]). In any event, the parameters of any such duty did not require defendant to explain the agreement's anti-dilution provision to plaintiffs (*Rosiny v Schmidt*, 185 AD2d 727 [1st Dept], *lv denied* 80 NY2d 762 [1992]).

Moreover, the cause of action for breach of fiduciary duty is duplicative of the breach of contract claim as it arises from the same alleged conduct, namely the alleged wrongdoing of the majority shareholders, i.e., the failure to notify plaintiffs of the vote and the breach of the anti-dilution provision (see *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 [1st Dept 2000]). Based on all the foregoing, plaintiffs' cause of action for breach of fiduciary duty is dismissed.

Accordingly, it is hereby

ORDERED that the motion by defendant Aridis Pharmaceuticals, Inc., for summary judgment (Mot. Seq. No. 003) is granted, and the motion by plaintiffs MedPro Investors, LLC, and MedPro Investors Aridis LLC for summary judgment (Mot Seq. No. 002) is denied; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendant dismissing the action, with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs.

This constitutes the decision and order of the court.

ENTER:

Louis L. Nock

5/8/2024
DATE **LOUIS L. NOCK, J.S.C.**

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