

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

RONALD FRIEDMAN, as trustee for the SportCo
Creditors' Liquidation Trust,

Plaintiff,

v.

WELLSPRING CAPITAL MANAGEMENT,
LLC, WELLSPRING CAPITAL PARTNERS IV,
L.P., WCM GENPAR IV, L.P., WCM GENPAR
IV GP, LLC, ALEXANDER E CARLES,
BRADLEY JOHNSON, F. HEWITT GRANT,
CHARLES E. WALKER, JR., TODD BOEHLY,
BERNARD ZIOMEK, and ANDREW KUPCHIK,

Defendants.

Adversary No. 19-80071-dd

**DEFENDANT BRADLEY JOHNSON'S REPLY MEMORANDUM OF LAW
IN SUPPORT OF HIS MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

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Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure and Rule 7012(b)(6) of the Federal Rules of Bankruptcy Procedure, Defendant Bradley Johnson respectfully submits this reply memorandum in further support of his motion to dismiss the Amended Complaint.¹

INTRODUCTION

Plaintiff's negligent misrepresentation claim against Mr. Johnson is an impermissible attempt to cobble together a tort claim from standard commercial negotiations involving the potential outcomes of a transaction. Plaintiff admits that his claim "hinges on certain documented email communications." Opp. at 45. Because those communications contain forward-looking statements of opinion, and expressly rebut Plaintiff's conclusory allegations regarding Mr. Johnson's representations, Plaintiff's claim against Mr. Johnson fails for at least three separate and independent reasons.

First, contrary to Plaintiff's analysis, opinions regarding future events, like those Mr. Johnson is alleged to have provided to Prospect, do not constitute a proper basis for a negligent misrepresentation claim. In attempting to save its claim, Plaintiff relies on *Kimmell v. Schaefer*, [224 A.D. 2d 217](#) (N.Y. App. Div. 1996), an inapposite case that has been expressly limited to its circumstances. Even if Mr. Johnson had predicted with certainty the Inventory Value, Resale Profit, Sales Volume Capture, and Facility Synergies, which the documents show he did not, Plaintiff would not have a negligent misrepresentation claim on that basis because he fails to adequately plead that any of the opinions were false when made.

Second, Mr. Johnson actually made no such certain predictions. Mr. Johnson's opening memorandum ("Memorandum") established that the email communications relied on by Plaintiff

¹ Unless otherwise defined herein, Mr. Johnson's reply memorandum incorporates the terms and definitions set out in his opening memorandum. Plaintiffs' Omnibus Response to Defendants Motion to Dismiss the First Amended Complaint, filed March 26, 2020, is referred to as "Opposition" or "Opp."

expressly warned Prospect that the statements were “draft” analyses addressing various potential “scenarios” of sales and revenue that SportCo might capture if it purchased AcuSport’s assets. The documents speak loudly for themselves, and Plaintiff does not attempt to address, much less rebut, that the challenged statements themselves belie his claim.

Finally, Plaintiff also fails to dispute, and therefore concedes, Mr. Johnson’s additional arguments that (a) he did not owe a relevant duty to Prospect arising out of the “zone of insolvency” and (b) Prospect was a sophisticated counterparty that could not have reasonably relied on any opinions provided by Mr. Johnson. In his Opposition, Plaintiff makes a new argument that Mr. Johnson owed Prospect a special duty arising out of his “pecuniary interest” in remaining employed and “expertise” as a CEO of a sporting goods company. But it is well established that “ordinary business transactions” like the negotiations between SportCo and Prospect do not give rise to the type of special relationship necessary to support a negligent misrepresentation claim. The tort of negligent misrepresentation requires a special duty beyond a standard contractual or commercial relationship. Plaintiff cannot allege such a duty existed between Mr. Johnson and Prospect, or that Prospect, a sophisticated investor in the middle market, had a reasonable basis to rely on any forward-looking opinions of value and synergy as guarantees or “facts.” Plaintiff’s claim should be dismissed.

ARGUMENT

Plaintiff asserts that there is no difference between the New York and South Carolina law of negligent misrepresentation and admits that, to plead a negligent misrepresentation claim on behalf of Prospect under either state’s laws, the Amended Complaint must state sufficient facts to plausibly allege that (i) Mr. Johnson made statements that were false “at the time they were made,” (ii) Mr. Johnson owed Prospect a special duty of care, (iii) Prospect reasonably relied on the challenged representations, and (iv) Prospect was damaged as a result. Opp. at 12, 39, 43

(emphasis added).² Mere legal conclusions, inferences, and speculation cannot suffice to survive a motion to dismiss (Mem. at 8), and where documented communications rebut Plaintiff's allegations, his claim should be dismissed.³

It also is well-settled that a party “who fails to address an issue” in a responsive brief “has conceded the issue.”⁴ Plaintiff's Opposition does not address, and therefore concedes, Mr. Johnson's arguments that (i) Plaintiff's allegations of falsity are directly rebutted by the actual text of the emails Plaintiff admits it relies on to plead its claim, (ii) Mr. Johnson did not owe Prospect any special duty of care as a result of SportCo's alleged insolvency, and (iii) Prospect's status as a sophisticated counterparty means that it had no right to rely on statements by Mr. Johnson.

I. MR. JOHNSON'S ALLEGED MISREPRESENTATIONS WERE INACTIONABLE OPINIONS REGARDING FUTURE EVENTS

The Amended Complaint admits that the Inventory Value, Resale Profit, Sales Volume Capture, and Facility Synergies representations allegedly were made by Defendants between

² Further, because Plaintiff's negligent misrepresentation claim “sounds in fraud” (Mem. at 10-13), Rule 9(b) of the Federal Rules of Civil Procedure additionally requires the Amended Complaint to “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). This includes alleging the “who, what, when, where and how of the alleged fraud.” *U.S. ex rel. Ahumada v. NISH*, 756 F.3d 268, 280 (4th Cir. 2014). The case law relied on by Plaintiff to argue Rule 9(b) does not apply (Opp. at 43-44) is inapposite and does not undermine the general practice in this and other circuits that Rule 9(b) applies to negligent misrepresentation claims sounding in fraud. Mem. at 10-13 & n.14. Here, Plaintiff expressly has claimed that Mr. Johnson made “reckless” misrepresentations (i.e., acted with more than mere negligence). Am. Compl. ¶ 45. Plaintiff does not dispute that his claim “sounds in fraud.”

³ See *Murphy v. Capella Educ. Co.*, 589 F. App'x 646, 655 (4th Cir. 2014) (dismissing complaint where “the supporting allegations [were] actually belied by the attached exhibits”); *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002) (explaining that at motion to dismiss stage, courts need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit.” (internal quotation marks omitted)); *Haberland v. Bulkeley*, 896 F. Supp. 2d 410, 419-20 (E.D.N.C. 2012) (explaining court may consider documents attached as exhibits or incorporated into complaint by reference and “need not accept as true a plaintiff's factual allegations to the extent they contradict such documents”).

⁴ See, e.g., *Kinetic Concepts, Inc. v. ConvaTec Inc.*, 2010 WL 1667285, at *7-8 (M.D.N.C. Apr. 23, 2010) (holding defendants conceded issue when they “did not say anything in reply or reaction to Plaintiffs' argument”); see also *Brand v. N.C. Dep't of Crime Control and Pub. Safety*, 352 F.Supp.2d 606, 618 (M.D.N.C. 2004) (finding argument conceded where it was not addressed “[i]n Plaintiff's brief in response to Defendants' motion.”).

March and April 2018 and addressed what might happen after—and if—the AcuSport Purchase closed months later. Mem. at 14-20; Am. Compl. ¶¶ 55–56, 58–59, 63. As such, the challenged statements are inactionable forward-looking statements of opinion.⁵ They are not adequately alleged to have been false “when made,” and they cannot support a claim for negligent misrepresentation.

Plaintiff’s only rebuttal to that necessary result is a bald, conclusory statement that the allegations in the Amended Complaint “relate to presently existing *facts*.” (Opp. at 41-42.) That statement is incorrect and is belied by the actual email communications at issue.⁶

First, Plaintiff impermissibly relies on two after-the-fact allegations to suggest that Mr. Johnson’s statements were false at the time they were made: (1) that the “AcuSport distribution center the Borrowers purchased contained only \$139,000 worth of inventory” and (2) “the fact that [SportCo] filed for bankruptcy less than a year after the AcuSport purchase.” Opp. at 43. Events that take place after statements are made, however, cannot turn opinions into false statements of fact. These allegations “are paradigmatic ‘fraud by hindsight’ and cannot survive a motion to dismiss.”⁷

⁵ See e.g., *Sotheby’s Fin. Servs., Inc. v. Baran*, [107 Fed. App’x 235, 238](#) (2d Cir. 2004) (representation that good would “sell for over one million dollars” was opinion of value and not actionable); cf. *In re Marine Energy Sys. Corp.*, [362 B.R. 247, 261](#) (Bankr. D.S.C. 2006) (“[M]isrepresentation of future profits, a type of opinion and prediction of future events, generally cannot constitute fraud.”).

⁶ See *Murphy*, [589 F. App’x at 655](#) (dismissing complaint where “the supporting allegations [were] actually belied by the attached exhibits”); *Philips v. Pitt Cty. Mem. Hosp.*, [572 F.3d 176, 180](#) (4th Cir. 2009) (explaining that on 12(b)(6) motion, the Court need not accept plaintiff’s legal conclusions, inferences, or arguments). See also, *infra* Section II.

⁷ *Landesbank Baden-Wuerttemberg v. Goldman, Sachs & Co.*, [821 F. Supp. 2d 616, 623](#) (S.D.N.Y. 2011) (dismissing claim that defendant had “knowingly misrepresented that it had performed [adequate] due diligence” where “[a]ll that [plaintiff could] muster against TCW [was] that it should have uncovered the substantial number of nonconforming loans originated by Countrywide, New Century, and Fremont, given the subsequent revelations about toxic mortgages”); see also *Hydro Inv’rs, Inc. v. Trafalgar Power Inc.*, [227 F.3d 8, 12, 20–21](#) (2d Cir. 2000) (overly optimistic predictions not actionable because they later proved “financial disasters”); *Xerion Partners, I LLC v. Resurgence Asset Mgmt., LLC*, [474 F. Supp. 2d 505, 518](#) (S.D.N.Y. 2007) (dismissing fraud claim based on post-closing events as improper “‘fraud by hindsight’ pleading” which could not show statements were “false when made”).

Second, Plaintiff attempts to manufacture a claim of “reckless” due diligence out of the fact that predictions did not materialize. “[R]etrospective critique[s]” of a defendant’s due diligence made with the benefit of hindsight, however, do not show “defendants’ statements ‘were false when made.’”⁸ Recklessness in the context of misrepresentation and fraud requires even more than pleading a defendant was wrong; it requires factual allegations of conduct “which is highly unreasonable and which represents an extreme departure from the standards of ordinary care.” *See Fresh Meadow Food Servs., LLC v. RB 175 Corp.*, [549 Fed. Appx. 34, 35](#) (2nd Cir. 2014) (internal quotation marks omitted). Allegations that a defendant “should have anticipated future events” do not suffice; instead, a complaint must contain “specific allegations of defendants’ knowledge of facts or access to information contradicting [the alleged misstatements].” *See Fadem v. Ford Motor Co.*, [2003 WL 22227961](#), at *4 (S.D.N.Y. Sept 25, 2003) (internal quotation marks omitted).⁹

Finally, in desperation, Plaintiff asserts that even if Mr. Johnson’s statements were

⁸ *In re Bank of Am. Corp. Sec., Derivative and ERISA Litig.*, [2012 WL 1353523](#), at *5-7 (S.D.N.Y. Apr. 12, 2012) (dismissing securities fraud claim and explaining “Complaint [did] not plausibly allege a false and misleading statement by any defendant” where plaintiff premised allegations of lack of due diligence on post-closing litigation and regulatory investigations); *see also Local No. 38 Intern–Broth. of Elec. Workers Pension Fund v. Am. Exp. Co.*, [724 F.Supp.2d 447, 463](#) (S.D.N.Y. 2010) (rejecting argument that defendants recklessly failed to check information they had duty to monitor and explaining, “[t]o the extent Plaintiff relies on the fact that the loss reserves proved inadequate, such allegations must be rejected as “a classic example of fraud by hindsight” (internal quotations omitted)).

⁹ Plaintiff asks for a chance to prove this element through discovery, arguing that requiring him to plead such facts at this stage would impose an improper “level of prescience,” *Opp.* at 43, but that request is unfounded. Plaintiff must allege a plausible case to avoid dismissal under Rule 12(b)(6), *see CitiSculpt, LLC v. Advanced Commercial Credit Int’l (ACI) Ltd.*, [2017 WL 660833](#), at *2 (D.S.C. Feb. 17, 2017) (“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face. . . . The negligent misrepresentation claim is dismissed for failure to state a plausible claim for relief.’”), and the fact that predictions did not materialize is insufficient as a matter of law. Plaintiff’s disavowal of “prescience” is even more incredible in light of the circumstances of the current complaint. Plaintiff already holds SportCo’s documents and is uniquely situated to know what information was known or available to SportCo’s officers and directors, including Mr. Johnson, at the time of the negotiations between SportCo and Prospect regarding the AcuSport Purchase. The bankruptcy plan directed the Debtors, including SportCo, to “turnover their books, records, and all other materials—including, but not limited to, privileged books, records and other materials—to the Liquidation Trust” and the Trustee. [ECF No. 56-2](#), Debtors’ Chapter 11 Plan at 59.

forward-looking statements of opinion, they are still actionable. Opp. at 42-43. Plaintiff's reliance on the New York cases of *Kimmell v. Schaefer*, 224 A.D. 2d 217 (N.Y. App. Div. 1996) and *West Side Federal Savings & Loan Association of N.Y.C. v. Hirschfield*, 101 A.D. 2d 380 (N.Y. App. Div. 1984) (Opp. at 42-43), however, is misplaced. Those cases are inapposite and, indeed, Plaintiff cites *Kimmell* for exactly the proposition that the U.S. Court of Appeals for the Second Circuit has subsequently rejected.

As explained by the Second Circuit in *Hydro Investors*, *Kimmell* did not alter the well-established New York law that opinions or “representations about future events . . . cannot support a claim for negligent misrepresentation.” 227 F.3d at 21 & n.1.¹⁰ The predictions in *Kimmell* “were not only wrong and deceptive but contained glaring omissions” of known and existing facts that rendered the predictions impossible to achieve at the time they were made. *Kimmell*, 224 A.D. 2d at 217. In particular, a “defendant had failed to disclose that the California Public Utility Commission had already approved electric and natural gas rate reductions, as well as sweeping rate design alterations, which changes were completely destructive of the financial viability of [the proposed project]” and rendered cash flows that had been calculated on the basis of prior rates factually misleading when made. *Id.*; see also *Kimmell v. Schaefer*, 89 N.Y.2d 257 (1996) (same). The Second Circuit expressly contrasted those representations with ones—like those at issue in this action—concerning possible outcomes dependent on future events, and held the latter are plainly inactionable. *Hydro Inv'rs*, 227 F.3d at 21 n.1 (“The projections at issue in *Kimmell* dealt with energy cogeneration plants already in

¹⁰ As the Second Circuit has explained, that reading of *Kimmell* is an exception that runs “contrary to the great weight of authority” that predictions or “representations about future events . . . cannot support a claim for negligent misrepresentation.” See *Hydro Inv'rs, Inc.*, 227 F.3d at 21 & n.1; see also *Maverick Fund, L.D.C. v. Comverse Tech., Inc.*, 801 F. Supp. 2d 41, 64 (E.D.N.Y, 2011) (same).

existence, in contrast to our case, where the plants had not yet been built at the time of the alleged misrepresentation.”).

Similarly, *Hirschfield* addressed representations of current facts by the defendant that a new garage “had 500 parking spaces” when it actually contained space for only 402 cars. *See Hirschfield*, [101 A.D. 2d at 382](#). The space in the garage was a fact at the time the statement was made. That is not at all the same thing as forward-looking statements of opinion about the value, sales, or inventory that might be captured from a competitor as a result of a proposed future acquisition.¹¹

In sum, predictions that turn out to have been overly optimistic are not actionable as negligent misrepresentations, even if later proved to be “financial disasters.” *Hydro Inv’rs, Inc.*, [227 F.3d at 12, 20–21](#); *see also Koontz v. Thomas*, [333 S.C. 702, 707, 713](#) (S.C. Ct. App. 1999) (rejecting negligent misrepresentation claim where plaintiff alleged construction costs “exceed[ed] [the predicted] amount by 100%”); Mem. at 10-11, 21 & nn. 22-23. To be actionable, a misrepresentation must relate to a current fact and “must be false when made.” *Sauner v. Pub. Serv. Auth. of S.C.*, [354 S.C. 397, 408](#) (S.C. 2003) (internal citations omitted); *Hydro Inv’rs, Inc.*, [227 F.3d at 20-21](#) (“Under New York law . . . the alleged misrepresentation

¹¹ *King Cty., Wash. v. IKB Deutsche Industriebank AG*, which Plaintiff also cites, is similarly distinguishable, as the statements at issue in that case involved the use of “stale and inaccurate” information and “outdated” models to generate credit ratings that were thus false and inaccurate when made. [863 F. Supp 2d 288, 296](#) (S.D.N.Y. 2012). Plaintiff’s reliance on *Private Mortg. Inv. Servs., Inc. v. Hotel & Club Assocs., Inc.*, [296 F.3d 308](#) (4th Cir. 2002) is likewise misplaced, as that court limited its holding to opinions offered by a professional appraiser who failed to exercise due care in ascertaining the accuracy of existing facts and expressly did not alter “the general rule that in order to be actionable as a negligent misrepresentation, the misrepresentation must relate to a present or preexisting fact that is false when made.” *Id.* at 315 & n.4. Further, *Probulk Carriers Ltd. v. Peraco Chartering USA LLC*, [2012 WL 3095319](#) (S.D.N.Y. July 20, 2012)—which Plaintiff relies on—also is instructive. In *Probulk Carriers*, the Court found the complaint plausibly alleged defendant’s statements “were false at the time they were made” based on certain specific, factual allegations providing “indicia of falsity,” including specific allegations that defendant knew information that directly contradicted its representations to plaintiff. *Id.* at *10-11 (observing that complaint “explained [that] the statements were fraudulent . . . because [defendant] allegedly represented one thing to [plaintiff] regarding Korea Line’s past actions or present intentions when it knew that Korea Line had done or intended to do no such thing”).

must be factual in nature and not promissory or relating to future events that might never come to fruition). There are no such allegations here and Plaintiff's claim should be dismissed.

II. MR. JOHNSON DID NOT MAKE THE STATEMENTS AS CHARACTERIZED BY PLAINTIFF

Apart from the fact that a forward-looking opinion is by its nature inactionable, the “documented communications” upon which Plaintiff's claim “hinges” (Opp. at 45) establish that Mr. Johnson expressed possibilities of predicted outcomes, not promises of profit, inventory, or synergies.

Inventory Value and Resale Profit—Plaintiff's Opposition does not dispute that the Amended Complaint identifies only one specific statement made by Mr. Johnson purportedly about the “value of AcuSport inventory”: his March 2, 2018 email to Mr. Carratu and others at Prospect. Mem. at 16-17; Am. Compl. ¶ 55. Contrary to Plaintiff's characterization, however, that email contains no representation at all about the dollar value of AcuSport's inventory, let alone that SportCo or its subsidiaries “would acquire \$14 million worth of AcuSport inventory” or realize “a \$7 million profit” from the resale of AcuSport inventory. Opp. at 43; Am. Compl. ¶ 48. Instead, Mr. Johnson's email merely (i) describes difficulties SportCo was facing in getting inventory due to under-deliveries by vendors and increased credit pressures, and (ii) stresses the importance of getting inventory—of any amount—to strengthen the company's borrowing base. Mem. at 16-17; Adams Decl. Ex. C.

Plaintiff's Opposition also does not dispute that specific communications incorporated into the Amended Complaint alerted Prospect to the fact that there was no guarantee of any particular inventory purchase from AcuSport. Mem. at 17. For instance, the Amended Complaint relies on an email from Mr. Johnson to Prospect sent on April 11, 2018—several weeks *before* Prospect's decision to forbear exercising its rights under the Loan Agreements

(Am. Compl. ¶ 62)—which attached an executed letter of intent with AcuSport that did not contain any guarantee that SportCo or any of its subsidiaries would acquire a specific amount or volume of inventory from AcuSport. Mem. at 17; Adams Decl. Ex. D. The Amended Complaint likewise relies on an April 17, 2018, email allegedly sent by a subordinate of Mr. Johnson, which provided Prospect with a deck summarizing the proposed AcuSport Purchase and underscored that the deck’s “base case” “assume[d] no acquisition of assets.” Mem. at 17-18; Adams Decl. Ex. E. Plaintiff’s Opposition provides no explanation for how, in light of these emails, Prospect could have been misled by Mr. Johnson in the manner it describes. Opp. at 42-43.

Sales Volume Capture—Plaintiffs’ Opposition also does not dispute that the Amended Complaint identifies only two statements by or attributed to Mr. Johnson concerning the percentage of sales volumes SportCo might acquire (the emails dated April 11 and April 17, 2018 (Am. Compl. ¶¶ 58–59)). It is plain that in neither email, nor in any attachment thereto, does Mr. Johnson make any statement that—as Plaintiff contends—the AcuSport Purchase “would result in . . . [SportCo] capturing 20% to 30% of AcuSport sales.” Am. Compl. ¶ 48. Instead, both of these emails refer to theoretical “cases” and “scenarios” as to how the potential AcuSport Purchase might play, from a “base case” analysis that “*assume[d] no acquisition of assets*” at all to “*scenarios where [SportCo] acquire[d] the assets and recover[ed] 20% and 30% of AcuSport’s historical sales.*” Mem. at 19; Adams Decl. Exs. D–E (emphasis added). Plaintiff’s characterization of the documents as representing that “Debtors would capture 20% to 30% of AcuSport sales” (Opp. at 42-43), is thus directly contradicted by the actual emails that Plaintiff purportedly relies on and should be disregarded by the Court.

Facility Synergies—Plaintiff also does not dispute that the Amended Complaint identifies only one specific statement made by Mr. Johnson about the “supposed synergies and

savings” from the future purchase of AcuSport: his March 16, 2018, email to Prospect. Mem. at 20; Am. Compl. ¶ 56. But, contrary to Plaintiff’s assertion that Mr. Johnson “tout[ed]” “promised synergies gains” (Opp. at 10, 43), his March 16 email and the attached worksheet instead expressly warned that the assessment was a “draft” and the projected synergies were “SUBJECT TO CHANGE.” Adams Decl. Ex. F at 1, 3. Again, Plaintiff’s Opposition does not even address this email, much less explain how, in light of the express warning in this email and its attachment, Prospect was misled by Mr. Johnson.

Because Plaintiff’s characterizations of the Inventory Value, Resale Profit, Sales Volume Capture, and Facility Synergies representations are rebutted by the very emails Plaintiff relies on to state his claim (Opp. at 45), Plaintiff’s negligent misrepresentation claim fails and should be dismissed. *See Murphy*, [589 F. App’x at 655](#) (dismissing complaint where plaintiff failed “to describe accurately the contents of the false representations” and where plaintiff’s description was contradicted by “a close examination of” the underlying document); *see also Sheth v. New York Life, Ins. Co.*, [273 A.D.2d 72, 73](#) (N.Y. App. Div. 2000) (granting motion to dismiss where the representations purportedly relied on by plaintiffs were “contradicted by the written agreement between the parties”).

III. PROSPECT WAS NOT OWED A SPECIAL DUTY AND COULD NOT “REASONABLY RELY” ON PROJECTIONS.

Regardless of the actionability of the challenged statements, Plaintiff concedes, as he must, that his claim for negligent misrepresentation against Mr. Johnson should be dismissed unless Mr. Johnson owed Plaintiff a special duty of care. Opp. at 39. Although Plaintiff originally alleged that the required duty arose out of an insolvency analysis, he has now entirely abandoned that theory in favor of a new one. In his Opposition, Plaintiff asserts that Mr. Johnson owed Prospect a duty because he had a pecuniary interest in making the alleged

misstatements and possessed expertise or special knowledge. Opp. at 39-41. Plaintiff's first theory has been waived by his failure to respond. *See Kinetic Concepts, Inc.*, [2010 WL 1667285](#), at *7-8. Because his new theory likewise fails, Plaintiff's claim should be dismissed even apart from the fact that he does not allege any actionable misrepresentations.

First, the Amended Complaint does not allege that Mr. Johnson actually possessed any unique expertise or special knowledge regarding *AcuSport* or the proposed acquisition. Mem. at 26 n.27. Tellingly, none of the statements cited in Plaintiff's Opposition as allegedly touting special knowledge were made by Mr. Johnson. Opp. at 40-41. Likewise, the Amended Complaint does not actually allege that Mr. Johnson had a pecuniary interest in making any alleged misrepresentation. *See* Mem. at 10 n.13. Plaintiff's sole observation that, in negotiating for SportCo, Mr. Johnson sought a benefit for SportCo (Opp. at 41), would be true in any commercial negotiation and cannot suffice to create a "special duty." *See Sanitoy, Inc. v. Shapiro*, [705 F.Supp. 152, 155](#) (S.D.N.Y. 1989) (explaining if seller's "representation that the buyer can rely on his expertise and the buyer's reliance were enough to create the necessary special relationship, the exception would swallow the rule."); *Accusystems, Inc. v. Honeywell Info. Sys., Inc.*, [580 F. Supp. 474, 481](#) (S.D.N.Y. 1984) (finding no special relationship between plaintiff and defendant after months of negotiations and assurances by defendant's salesmen as to quality of goods). Plaintiff's assertions in his Opposition about Mr. Johnson's special knowledge and pecuniary interest are thus impermissible attempts to amend the current complaint and should not be allowed. *See Guess v. Dean*, [2008 WL 4816989](#), at *1 (D.S.C. Nov. 3, 2008) (dismissing complaint and observing it is "well-settled that a complaint cannot be amended by plaintiff's briefs in opposition to a motion to dismiss.").

Second, any amendment to plead such a theory of duty would be futile because the law in both New York and South Carolina is clear that “ordinary business transactions” do not give rise to the type of special relationship necessary to support a negligent misrepresentation claim.¹²

Prospect holds itself out as a highly sophisticated investment company with expertise in refinancings and acquisitions, among other complex financial areas. Mem. at 3. As a sophisticated commercial party, its remedies are either breach of contract or, when appropriate, fraud. By comparison, negligent misrepresentation requires more than contractual privity and allegations of recklessness or mistake; otherwise, a plaintiff could “transmogrify [every] contract claim into one for tort.” See *PPI Enters. (U.S.), Inc. v. Del Monte Foods Co.*, [2003 WL 22118977](#), at * 26 (S.D.N.Y. Sept. 11, 2003) (dismissing negligent misrepresentation claim premised on a duty to disclose information arising from the parties’ contractual relationship).¹³

A “special relationship” arising out of expertise in the negligent misrepresentation context is generally confined to those “[p]rofessionals, such as lawyers and engineers, [who] by virtue of their training and expertise, may have special relationships of confidence and trust with their clients.” *Murphy v. Kuhn*, [90 N.Y.2d 266, 270](#) (1997); see also *Jerrold A Watson & Sons, L.L.C. v C.H. Robinson Co.*, [2017 WL 11317861](#), at *6 (D.S.C. Sept. 28, 2017) (“South Carolina courts have permitted negligence actions to proceed against engineers and

¹² See Mem. at 25-26; see also *St. Paul Fire and Marine Ins. Co. v. Heath Fielding Ins. Broking Ltd.*, [976 F. Supp. 198, 205](#) (S.D.N.Y. 1996) (negligent misrepresentation requires “more intimate associations than ordinary business transactions.”); *Lenco Diagnostic Labs., Inc. v. McKinley Sci., Inc.*, [2018 WL 7932085](#), at *4-5 (E.D.N.Y. Aug. 15, 2018) (“[T]he fact that one party is sought for a technical or specialized service does not itself render the relationship between those two parties special.”); *Midland Mortg. Corp. v. Wells Fargo Bank, N.A.*, [926 F. Supp. 2d 780, 787-88, 792-93](#) (D.S.C. 2013) (rejecting negligent misrepresentation claim and explaining that “[w]here there is no confidential or fiduciary relationship and an arm’s length transaction between mature, educated people is involved, there is no right to rely”).

¹³ Likewise, courts applying South Carolina law have explained that, “[i]n most instances, a negligence action will not lie when the parties are in privity of contract.” *Jerrold A Watson & Sons*, [2017 WL 11317861](#), at *6 (dismissing negligent misrepresentation claim where “there [was] no evidence of a special relationship between [plaintiff and defendant] independent of the Agreement”).

lawyers based on their professional duties to plaintiffs.”). By comparison, a defendant’s mere “superior knowledge of the particulars of [its] own business practice”—as Plaintiff alleges here (Am. Compl. ¶ 50; Opp. at 40)—“is insufficient to show a special relationship.” *Brandr Grp. v. Port Auth. of N.Y. and N.J.*, [2020 WL 1489802](#), at *5 (S.D.N.Y. Mar. 26, 2020) (internal quotation marks omitted); *Batas v. Prudential Ins. Co. of Am.*, [281 A.D.2d 260, 264](#) (N.Y. App. Div. 2001) (holding that “defendants’ superior knowledge of their products,” without more, created no special relationship). A defendant’s mere “general knowledge of an industry” is likewise insufficient. *Kraatz v. USAA Cas. Ins. Co.*, [2017 WL 876187](#), at *8 (W.D.N.Y. Mar. 6, 2017) (dismissing negligent misrepresentation claim); *see also Kamboj v. Bajoj*, [2013 WL 12363611](#), at *3 (E.D.N.Y. Aug. 28 2013) (dismissing omissions claim and finding licensed CPA’s superior knowledge was insufficient to create a special relationship absent allegations of a fiduciary “agreement or deep relationship of trust” between the parties).

To the extent that Plaintiff relies on *Kimmell v. Schaefer*, [89 N.Y.2d 257, 263](#) (1996), to plead that defendants, including Mr. Johnson, owed Prospect a duty of care merely because they were soliciting financial assistance (Opp. at 39), Plaintiff is wrong. “*Kimmell* . . . does nothing to undermine the basic requirement of a ‘special relationship’ for a negligent misrepresentation tort action.” *Dallas Aerospace, Inc. v. CIS Air Corp.*, [352 F.3d 775, 788–89](#) (2d Cir. 2003).¹⁴ “Since *Kimmell*, New York courts and federal courts applying New York law have continued to follow the general rule of non-actionability for negligent misstatements made in the context of arms-length business transactions.” *M & T Bank Corp. v. LaSalle Bank Nat. Ass’n*, [852 F. Supp. 2d 324, 336–38](#) (W.D.N.Y. 2012) (collecting cases). This includes where a defendant ostensibly

¹⁴ As the court in *Dallas* explained, reading *Kimmell* to “enunciate[] a new standard, exacting liability whenever the relationship between the parties is ‘such that in morals and good conscience the one has the right to rely upon the other for information’”—precisely as Plaintiff urges—“[i]s a misreading of the case.” *Dallas Aerospace, Inc.*, [352 F.3d at 788](#).

makes misstatements as part of soliciting investments or financial assistance from another. *Id.* (finding no special relationship existed between note holder and note issuers and broker-dealer and dismissing negligent misrepresentation claim based on statements in offering documents); *see also SNS Bank, N.V. v. Citibank, N.A.*, [7 A.D.3d 352, 354](#), [777 N.Y.S.2d 62](#) (N.Y. App. Div. 2004) (finding issuer of notes did not owe fiduciary duty to plaintiff because their relationship as debtor and note-holding creditor was purely contractual).

Finally, Plaintiff does not even attempt to rebut, and therefore has conceded, Mr. Johnson's argument that Prospect has not adequately pled the element of reasonable reliance. *See* Mem. at 28-29. Specifically, Prospect had an obligation to conduct its own analysis and due diligence, particularly in light of (i) its admitted expertise in transactions like the AcuSport Purchase (*see* Mem. at 3), (ii) the actual and complete text of the communications Plaintiff admits he relies on (Mem. at 28), and (iii) the extensive rights granted to Prospect under the 2012 Loan Agreement, including the right to appoint an observer to the Ellet and SportCo boards, the right to access and audit the Borrower's financial information, and the right to inspect and audit the Borrowers' books and records (*see* 2012 Loan Agreement §§ 9.1; [ECF No. 91 at 8](#)). Prospect's purported reliance solely on the forward-looking statements of opinion of a counterparty was unreasonable as a matter of law and cannot give rise to tortious liability by Mr. Johnson.¹⁵

¹⁵ *See Hydro Inv'rs, Inc.*, [227 F.3d at 21](#) (plaintiff could not show reasonable reliance where it "possessed adequate knowledge" and "should have known not to rely" on alleged misrepresentations); *Landesbank Baden-Wurtemberg v. Goldman, Sachs & Co.*, [821 F. Supp. 2d 616, 624](#) (S.D.N.Y. 2011) ("[A]s a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it, such as reviewing the files of the other parties." (internal quotation marks omitted)); *Terra Secs. ASA Konkursbo v. Citigroup, Inc.*, [820 F. Supp. 2d 541, 545, 548](#) (S.D.N.Y. 2011) (granting motion to dismiss under Rule 12(b)(6) where plaintiff failed to plead reasonable reliance in light of "heightened duty placed on sophisticated investors" to conduct independent analysis); *accord Geo Plastics v. Beacon Dev. Co.*, [2010 WL 11561194](#), at *5 (D.S.C. June 10, 2010) (holding that reliance was not reasonable where transaction was arm's length, parties were all sophisticated, and plaintiff failed to conduct independent investigation).

CONCLUSION

For the reasons set forth above and in Mr. Johnson's opening Memorandum, Defendant Bradley Johnson respectfully requests that the Court enter an order dismissing Plaintiff's Third Cause of Action against him, with prejudice.

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Respectfully submitted,

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