

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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VEROBLUE FARMS USA INC.,	:	
	:	
Plaintiff,	:	
	:	20 Civ. 4394 (JPC)
-v-	:	
	:	<u>OPINION AND ORDER</u>
	:	
CANACCORD GENUITY LLC,	:	
	:	
Defendant.	:	
-----X	:	

On October 9, 2020, Plaintiff VeroBlue Farms USA, Inc. (“VBF”) filed a Fourth Amended Complaint spanning 221 pages and 97 exhibits, alleging that Defendant Canaccord Genuity LLC assisted VBF’s own founders’ fraudulent acts and fiduciary breaches. Now before the Court are Canaccord’s motions to dismiss the Third and Fourth Amended Complaints under Rule 12(b)(6) of the Federal Rules of Civil Procedure, as well as Canaccord’s motions for sanctions in connection with both the Third and Fourth Amended Complaints. For the reasons that follow, the Court denies Canaccord’s motion to dismiss the Third Amended Complaint as moot, grants Canaccord’s motion to dismiss the Fourth Amended Complaint with prejudice, and denies Canaccord’s motions for sanctions.

I. Background

A. Factual Allegations

Except as otherwise noted, the following facts are taken from the Fourth Amended Complaint and from the documents attached thereto. Dkt. 335 (“FAC”); *see Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (noting that at the motion to dismiss stage, a court may consider “any written instrument attached to [the complaint] as an exhibit or any statements or

documents incorporated in it by reference” as well as any documents “integral” to the complaint, *i.e.*, “where the complaint ‘relies heavily upon [the document’s] terms and effect’” (quoting *Int’l Audiotext Network, Inc. v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995))).

VBF is an aquaculture, *i.e.*, fish farming, business, that was founded in 2014 by Leslie A. Wulf, Bruce A. Hall, James Rea, John E. “Ted” Rea, and Keith Driver (the “Founders”). FAC ¶ 1. According to the Fourth Amended Complaint, the Founders were in complete control of VBF from 2014 to 2018. *See id.* ¶ 21. From May 1, 2014 until December 14, 2015, Wulf, Hall, James Rea, and Ted Rea were the sole members of the VBF Board of Directors. *Id.* ¶ 22. After that point several “Independent Board Members” joined VBF’s Board, *see id.* ¶¶ 24-32, but “the Founders still controlled VBF,” *id.* ¶ 33. The Founders abused this control to (1) misappropriate “VBF cash and other assets” and (2) make “fraudulent misrepresentations and conceal[] . . . material facts” regarding the company’s technology and profitability. *Id.* ¶ 62. Specifically, the Founders represented that VBF’s “Opposing Flows Technology” (“OFT”) provided a superior water filtration and oxygenation water system for VBF’s fish tanks, when in fact it did not actually work. *Id.* ¶ 2. In addition, the Founders lied about their production and profitability numbers to give the false impression the business was high performing, when in fact the “application of the OFT was fatally flawed.” *Id.* ¶¶ 2, 121.

Canaccord, an investment banking company, allegedly assisted the Founders in making these fraudulent misrepresentations.¹ In February 2015, VBF hired Canaccord to raise debt for VBF’s parent company, VBF Canada. *Id.* ¶¶ 3, 47-48; *id.*, Exh. 95 (“Engagement Agreement”).²

¹ VBF does not allege that Canaccord was involved in the Founders’ misappropriations. *See* FAC ¶ 63.

² Although VBF attached the Engagement Agreement and Mutual Release, detailed below, to the Fourth Amended Complaint, VBF appears to suggest that the Court cannot consider them with respect to certain claims. *See* FAC ¶ 739 (“Neither the Engagement Letter nor the Release

Pursuant to the Engagement Agreement, Canaccord was authorized to distribute marketing materials to prospective investors, but VBF was “solely responsible for the accuracy and completeness” of those materials. Engagement Agreement at 2. Canaccord had “no obligation to verify[] the accuracy or completeness of” information prepared or supplied by VBF and was “under no circumstances” to “be liable to [VBF] for any damage arising out of the inaccuracy or incompleteness of any such information.” *Id.* at 4. In the fall of 2015, the parties orally agreed to expand the Engagement Agreement; when the National Bank of Canada, which VBF had hired to raise equity, discontinued its efforts, Canaccord agreed to raise equity for VBF in addition to debt. FAC ¶¶ 53, 762.

In accordance with the Engagement Agreement, Canaccord drafted marketing decks, which were disseminated to “those who became VBF shareholders, Independent Board Members, Independent Officers, and possibly then-current VBF shareholders not affiliated with the Founders.” *Id.* ¶¶ 59-60. These decks incorporated the Founders’ lies about the company’s technology and profitability. The Fourth Amended Complaint alleges that Canaccord knew or should have known that these representations were false. *See, e.g., id.* ¶¶ 80, 87, 118-121. In support, the Fourth Amended Complaint leans heavily on a June 15, 2015 email from Dr. Anthony Michaels, an aquaculture expert that Canaccord had contacted to investigate VBF. *See id.* ¶ 4. In

were referenced in the previous counts. They also are not central to VBF’s claims against Canaccord for aiding and abetting, knowing participation in the tort of another, conspiracy, negligent misrepresentation, fraudulent concealment, or unjust enrichment. This is not a suit for breach of either agreement, and VBF can prove Counts I through VIII without reference to, and without reliance on, either document. Therefore, VBF pleads Count IX in the alternative.”). To the extent VBF makes such an argument, it is incorrect. VBF attached both documents to the Fourth Amended Complaint, *see* FAC Exhs. 95, 96, and VBF references both documents throughout the Fourth Amended Complaint, *see* FAC ¶¶ 11, 700c, 710c, 737, 739, 740, 742, 743, 749-54, 756-63, 766, 767, 771-72. Indeed, VBF bases its rescission claim on the Mutual Release. *See id.* ¶¶ 735-68. Accordingly, the Court considers both documents in deciding Canaccord’s motion to dismiss.

that email, Dr. Michaels alerted Canaccord that, among other things, VBF’s “energy and mass flux calculations [were] almost at the theoretical limits,” that the fish that VBF farmed actually sell at half of the modeled price, and that the technology “is not new as claimed and multiple companies have gone bankrupt on similar systems.” FAC, Exh. 20A. Canaccord immediately forwarded that email to Wulf, who forwarded it to Hall, Driver, Ted Rea, and James Rea—the remainder of the VBF Board. *Id.*; FAC ¶ 200.

The Fourth Amended Complaint contends that this was a “fork in the road” in that “Canaccord could have taken the right path, . . . ceased its collaboration with the Founders[,] . . . and advised those other than the Founders who could have acted for VBF that a well-respected aquaculture expert had just thrown cold water on VBF.” FAC ¶ 5. Instead, Canaccord, motivated by its desire to earn a commission, *id.* ¶ 11, “took the wrong path,” *id.* ¶ 5, and “join[ed] the Founders in concealing VBF’s fatal flaws and making misrepresentations regarding VBF’s OFT, Metrics, and performance, instead of disclosing such critical facts to individuals who were then, or who later became, VBF shareholders, VBF non-Founder management, VBF directors who were independent of the Founders, and others who could act for VBF (besides the Founders, Canaccord’s co-conspirators),” *id.* ¶ 6.

VBF contends that it suffered \$80 million in damages as a result of this misconduct. *Id.* ¶ 12. However, VBF does not allege that Canaccord actually secured any funding during the parties’ engagement. *See id.* ¶¶ 26-29 (describing the investments VBF secured but not alleging that Canaccord secured any); Dkt. 372, Exh. A (“Demand Letter”) at 7-9;³ *see also* Dkt. 246, Exh.

³ Canaccord argues that the Court can consider the Demand Letter at this stage because the Fourth Amended Complaint extensively quotes from it and relies upon it, thereby rendering it integral to the Fourth Amended Complaint. *See* Motion to Dismiss at 5 n.3; FAC ¶ 53. VBF does not dispute the accuracy or authenticity of the Demand Letter. Accordingly, the Court agrees with Canaccord that it is appropriate to consider the Demand Letter at this stage.

1 at 108-09.⁴ In fact, Canaccord threatened to sue VBF in August 2016 for obtaining financing on its own and refusing to pay Canaccord fees it alleged it was due under the Engagement Agreement. FAC ¶¶ 53, 738; Demand Letter; FAC, Exh. 96 (“Mutual Release”) at 1.

To settle this dispute, on September 26, 2016, VBF and Canaccord entered into a Mutual Release. VBF agreed to pay Canaccord \$475,000, and VBF and Canaccord agreed to release each other from “any and all claims . . . known or unknown . . . based upon, relating to or arising out of the Engagement Agreement, the Dispute (including any efforts to resolve the Dispute), the Transaction, the engagement of Canaccord to provide services to [VBF] and its subsidiaries, and/or the services that Canaccord provided to [VBF] and its subsidiaries.” Mutual Release at 1-2; *see* FAC ¶¶ 11, 700c, 710c, 734, 738. The Fourth Amended Complaint does not allege any dealings between the parties after this point.

B. Procedural History

This is one of three actions VBF filed against Canaccord within the span of six months. *See Veroblue Farms USA, Inc. v. Wulf*, No. 19 Misc. 375 (AJN) (S.D.N.Y.) (the “Subpoena Action”); *Veroblue Farms USA, Inc. v. Wulf*, No. 3:19 Civ. 764-X (N.D. Tex.) (the “Texas

⁴ In moving to dismiss, Canaccord asserts that it did not raise any funding for VBF. Dkt. 356 (“Motion to Dismiss”) at 11 & n.8. In support, it cites a settlement letter that VBF’s attorney filed on the docket, in which VBF stated that Canaccord raised “\$0” from investors. *Id.*; Dkt. 246, Exh. 1 at 108-09. “While consideration on a motion to dismiss is typically limited to the four corners of an amended complaint, a court is not required to ‘turn a blind eye to [a plaintiff’s] previous filings.’” *Kupferstein v. TJX Cos.*, No. 15 Civ. 5881 (NG), 2017 WL 590324, at *2 (E.D.N.Y. Feb. 14, 2017) (quoting *Kupferstein v. Wakefern Food Corp.*, No. 15 Civ. 5828 (AMD), Dkt. 25 at 4 (E.D.N.Y. May 13, 2016)). Although VBF does not contest this, the Court concludes that it need not consider this letter at this stage, as the Fourth Amended Complaint, on its face, does not allege that Canaccord raised any money from investors. This omission is telling.

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