

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN DIEGO  
NORTH COUNTY**

**MINUTE ORDER**

DATE: 09/05/2012

TIME: 09:20:00 AM

DEPT: N-31

JUDICIAL OFFICER PRESIDING: Timothy M. Casserly

CLERK: Trish Dietrich

REPORTER/ERM: Not Reported

BAILIFF/COURT ATTENDANT:

CASE NO: **37-2011-00056561-CU-BC-NC** CASE INIT.DATE: 07/26/2011

CASE TITLE: **Alki Partners, LP vs. DB Hedgeworks, LLC**

CASE CATEGORY: Civil - Unlimited CASE TYPE: Breach of Contract/Warranty

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**APPEARANCES**

The Court, having taken the above-entitled matter under submission on 8/31/12 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court CONFIRMS the tentative ruling as follows:

The court issues the following ruling on the motion for judgment on the pleadings of Defendants DB Hedgeworks, LLC and Hedgeworks Fund Services Limited against the first amended complaint of Plaintiffs Alki Partners, LP, Alki Fund, Ltd., and Bullfrog Research, LLC:

Defendants' motion for judgment on the pleadings is denied. C. Civ. Proc. § 438(c)(1)(B)(ii). Defendants' request for judicial notice is denied.

The court reminds the parties to comply with CRC, Rule 3.1110(f) with all future filings.

A breach of contract requires (1) a contract, (2) the plaintiff's performance or excuse for nonperformance, (3) the defendant's breach, and (4) resulting damages to the plaintiff. Wall Street Network, Ltd. v. N. Y. Times Co. (2008) 164 Cal.App.4th 1171, 1178.

Plaintiffs allege the existence of the Agreements and that they performed under them. (FAC, ¶¶ 25, 36, 51.) Plaintiffs allege breach by Defendants through their failure to accurately calculate the NAV and timely distribute reports. The FAC includes allegations that the Hedgeworks Entities calculate the NAV and distribute reports to the Alki Entities and their investors. (FAC, ¶¶ 13, 33, 41; Ex. C, Schedule A(b)(iii), (iv), (v), (ix); Ex. D, Schedule A and A.2.) Plaintiffs state, "Instead of accurately valuing the RMDX shares, Hedgeworks stopped issuing monthly reports to Alki Partnership limited partners and to Alki Fund shareholders after January, 2008." (FAC, ¶ 22.) Plaintiffs further allege the Hedgeworks Entities breached the Agreements by failing to calculate the NAV and distribute it to the investors. (FAC, ¶¶ 27, 39-42, 53-56, 65.) They allege that Defendants' failure to timely and accurately supply NAV calculations deprived Plaintiffs of the opportunity to liquidate their holdings of RMDX stock and to attempt to stop additional stock purchases by Scott Wilfong.

Regarding the alleged failure to report the valuations, Defendants contend that Plaintiffs' statement that Wilfong participated in a "pump and dump" scheme constitutes an admission that Defendants were unable to accurately value the assets at issue. Defendants conclude that Defendants could not have breached as any failure to perform was justified or excused.

Defendants' arguments are based on the affirmative defense of impossibility. A motion for judgment on the pleadings, however, is based on the complaint. The court does not consider whether Plaintiffs have adequately responded to defenses raised. A challenge based on an affirmative defense will only be sustained if the face of the complaint discloses that the action is barred by the defense. *McKenny v. Purepac Pharm. Co.* (2008) 167 Cal. App. 4th 72, 78-79. The affirmative defense of impossibility requires that performance of a contract is made impossible. *Glendale Fed. Savings and Loan Assn. v. Marina View Heights Devel. Co., Inc.* (1977) 66 Cal. App. 3d 101, 154. Performance of a contract may be considered impossible if it becomes commercially impracticable, but would be excused only when it can be performed at excessive or unreasonable cost. The court finds no allegations by Plaintiff which show the defense of impossibility is available. Defendants rely on paragraph 21 of the FAC: "At all times herein mentioned from and after January, 2008, Hedgeworks, upon information and belief, determined anomalies with the RMDX trades were of such proportion that it was unable to accurately value the contents of the assets in the respective fund portfolios." In addition to the allegation being on information and belief, such a statement suggests it is Defendants who made the determination that calculations could not be made, and does not constitute any type of admission that Defendants were excused from performance.

Defendants further contend Defendants were contractually obligated to maintain confidentiality by not reporting to investors, including Plaintiffs, regarding Wilfong's specific investment decisions. The subject agreement includes under its confidentiality provision that, "[b]oth the Administrator and Administrative Agent further acknowledge and agree that, subject to Sections 11.b. and c., they are prohibited from releasing any information related to the Fund or the Investment Manager and that such release of this information is solely the responsibility of the Fund or the Investment Manager, except as otherwise directed by the Fund or the Investment Manager." (FAC, Ex. C.) Defendants argue such language demonstrates that Plaintiffs' allegations regarding the failure to keep investors informed are not actionable as Wilfong was the only one responsible for explaining investments to the investors.

Defendants rely on Section 11 of the 2005 agreement for their position that they had to maintain confidentiality of the information and that the information was controlled by Wilfong. The same agreement states that the preparation and distribution of net capital statements directly to the shareholders were included as monthly services provided. (FAC, Ex. C, Schedule A(b)(ix).) The agreement also allowed Defendants to communicate directly with investors to handle requests pertaining to income, expenses, taxes, or other administrative issues. (FAC, Ex. C, Schedule A(i)(i).) As the NAV would be used to evaluate income from the investment, Defendants communicating such information to investors appears to fall within the scope of communication required by the contract. The general confidentiality language does not cancel the specific terms pertaining to the communication obligations to the investors.

Giving Plaintiffs' allegations the benefit of all reasonable inferences, Plaintiffs sufficiently present claims for breach of contract. C. Civ. Proc. § 438(c)(1)(B)(ii).

The Court, having taken the above-entitled matter under submission on 8/31/12 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now

rules as follows:

The Court CONFIRMS the tentative ruling as follows:

**The court issues the following ruling on the demurrer of Cross Defendants Bullfrog Research, LLC, Alki Partners, LP, and Alki Fund LTD to the cross complaint of Cross Complainants DB Hedgeworks, LLC and Hedgeworks Fund Services Limited:**

Cross Defendants' demurrer is sustained without leave to amend as to the third cause of action. C. Civ. Proc. § 430.10(e). The demurrer is otherwise overruled. Although the subject indemnity term excludes breach of contract claims, a breach of fiduciary duty claim was originally alleged in the complaint. Equitable indemnity does not apply to this case as an express contract for indemnity exists.

**IT IS SO ORDERED:**

*Timothy M. Casserly*

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Judge Timothy M. Casserly