SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

TRIAL/IAS PART 32
NASSAU COUNTY

FAHMI ARANKI and SEAMAN & EISEMANN, INC., Individually and in their capacities as minority shareholders of Millennium Alliance Group, L.L.C.,

Plaintiffs,

- against -

GOLDMAN & ASSOCIATES, L.L.P., and RONALD GOLDMAN, Individually and in his capacity as partner in Goldman & Associates, L.L.P.,

Defendants.

Index No.: 3705/05
Motion Seq. No.:02
Motion Date: 01/05/11
XXX

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion for Summary Judgment, Affirmation, Affidavit and Exhibits and Memorandum of Law	1
Affirmation in Opposition, Memorandum of Law in Opposition and Exhibits	2
Reply Affirmation and Reply Memorandum of Law	3

Defendants move, pursuant to CPLR § 3212, for an order granting summary judgment in favor of Goldman & Associates, L.L.P. and Ronald Goldman, individually, and in his capacity as partner in Goldman Associates, L.L.P. (hereinafter referred to as "Goldman" and/or defendants) and dismissing the complaint against them. Plaintiffs oppose the motion.

On March 1, 1998, plaintiff Fahmi Aranki ("Aranki") formed Millennium Alliance Group, L.L.C., ("MAG") with James McKinnon and Robert Feuchter. MAG was a joint venture. The participants would pool their resources and clients and share their profits and

expenses. Plaintiff Aranki and his two business partners, McKinnon and Feuchter, agreed that MAG's ownership would be split in the following manner: 30% of the ownership would be split evenly between the three partners, so that each would own 10% of the company. The other 70% of MAG would be split evenly between two participating insurance agencies: plaintiff Seaman & Eisemann, Inc. ("S&E") and the McKinnon Doxie Agency. Plaintiff S&E was owned by plaintiff Aranki. McKinnon Doxie was owned by James McKinnon. The parties agreed that the two agencies would receive 55% of all income generated by the clients that each brought to MAG. The remaining 45% of the income would be given to MAG. In return, insurance agencies that joined the venture would be able to pool their resources, office space, staff and equipment in order to reduce their expenses. In or around 1998, McKinnon and Feuchter recommended that defendant Ronald Goldman be corporate counsel of MAG. Defendant Goldman was involved in the formation of the corporation, filed the necessary documents with the Department of State, and continued to be MAG's corporate counsel.

The complaint sets forth two viable courses of action against defendants. First, the complaint alleges the defendants colluded with the majority members of MAG to freeze the plaintiffs out of MAG's management and profit sharing and force them to surrender, at a reduced price, their minority membership interest in MAG. Second, the complaint alleges the defendants aided and abetted a breach of fiduciary duty by the majority members of MAG. *See Aranki v. Goldman & Associates, L.L.P.*, 34 A.D.3d 510, 825 N.Y.S.2d 97 (2d Dept. 2006).

In support of the motion for summary judgment, defendants assert that the plaintiffs were unable to identify any conduct on the part of defendant Goldman in conjunction with MAG that was fraudulent. Plaintiffs allege defendant Goldman encouraged MAG to commence a lawsuit against them which the plaintiffs believed was baseless. However, defendants assert that defendant Goldman, as counsel for MAG, owed a duty to MAG itself rather than any of its individual owners. Defendants also argue that the commencement of the lawsuit against plaintiff Aranki was not arbitrary, but rather, made in good faith based on MAG's accountant's expressed concerns about S&E's finances, as well as plaintiff Aranki's refusal to cooperate with the audit of the company. In early 2002, MAG became concerned about its cash flow, and the possibility that plaintiff Aranki and/or S&E had stolen substantial sums of money from MAG.

At his deposition, plaintiff Aranki stated that he refused to cooperate with the audit.

> "On the basis of lack of relevancy, none of their business. I felt that what Seaman & Eisemann did before Millennium was not Millennium's business and I still do." *See* Defendants' Affirmation in Support Exhibit C, Aranki's deposition transcript, at p.114:7-16.

Defendants contend that advising a corporate client about possible litigation is within the purview of a corporate attorney's responsibility.

Plaintiffs allege that MAG was not as economically viable as its partners had originally hoped. According to plaintiffs, as MAG's financial condition deteriorated, so did plaintiff Aranki's relationship with his partners. Plaintiff Aranki acknowledged that several months after MAG's formation, MAG's other owners accused him of wrongfully utilizing funds that MAG took in as insurance premiums:

> Q. Did there come a time were any of the other owners of MAG accused you of wrongfully utilizing funds that the company took in as insurance premiums?
> A. Yes.
> Q. When did these accusations first arise?
> A. I think the disagreements over that issue started later on in the first year, 1998.
> Q. So a few months after the formation of the company?
> A. Yes.
> Q. And were those accusations communicated to you verbally?
> A. Yes.
> Q. By whom?
> A. By Jim McKinnon.
> Q. What did he say to you?
> A. I don't remember the words, but it was implied references that Seaman & Eisemann was wrongfully taking money from MAG for its own purposes.

See Defendants' Affirmation in Support Exhibit C, Aranki's deposition transcript, at pp. 45:21-46:16. Plaintiff Aranki claimed, that from that point going forward, he and MAG's other owners

continued to have various disagreements regarding running the company. *See* Defendants' Affirmation in Support Exhibit C, Aranki's deposition transcript, at p. 47:5-10. Plaintiff Aranki asserts he was eventually "shut out" from MAG's management. At his deposition, plaintiff Aranki stated that MAG formed a "Board of Managers" several years after its inception. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at pp. 57:19-58:6. According to plaintiff Aranki, this Board of Managers was created because MAG's leadership "wanted more involvement by key people in the organization in knowing what's going on and inviting their input in important decisions." *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 58:9-13. Plaintiff Aranki acknowledged that major decisions relating to MAG's business were decided in the context of meetings of the Board of Managers. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 62:3-6. Although plaintiff Aranki was initially on the Board (*see* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 58:17-23), he later voluntarily resigned from it. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 61:6-11. Plaintiff Aranki explained that he quit the Board because he "was not happy with the way the board was running as far as inability to make any big decisions, and it became to [him] . . . just a forum for finger pointing and accusations and an inability to get anything resolved. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 61:18-22. Plaintiff Aranki conceded that he first started complaining about being excluded from MAG's decision making process after he resigned from the Board of Managers. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at pp. 75:19:76:4. Plaintiffs also allege that defendant Goldman, as MAG's corporate counsel, was increasingly included in management decisions. Plaintiffs alleged in their interrogatory responses that defendant Goldman was a "*de facto*"member of MAG's management. *See*

Defendants' Affirmation in Support Exhibit D at No. 17. At his deposition, plaintiff Aranki stated that the basis for these allegations was that defendant Goldman "would attend a large number of the meetings and, in fact, he on many occasions would even chair the meetings and his input and comments became major factors in what the Board decided to do. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 68:12-16. Plaintiff Aranki testified that defendant Goldman did not make any actual decisions on behalf of MAG, or even vote on issues put forth before MAG's Board of Managers. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition. at pp. 70:23-71:7, p. 108:18-20. Plaintiff Aranki acknowledged that although defendant Goldman would, on occasion, advise a course of conduct, it was left to the Board of Managers to decide on whether to follow his advice:

> Q. Would [Goldman] advise a course of conduct on occasion?
> A. Yes.
> Q. But then it was left to the members of the Board to decide whether or not to follow that?
> A. Yes.
>
> *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 71-8:13.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *See Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center,* 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985); *Fox v. Wyeth Laboratories, Inc.*, 129 A.D.2d 611, 514 N.Y.S.2d 107 (2d Dept. 1987); *Royal v. Brooklyn Union Gas Co.*, 122 A.D.2d 132, 504 N.Y.S.2d 519 (2d Dept. 1986). Defendant Goldman has demonstrated that he exercised that

degree of care, skill and diligence commonly exercised by a corporate counsel in advising the corporate client. The defendants have made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Conclusory statements are insufficient. *See Sofsky v. Rosenberg*, 163 A.D.2d 240, 559 N.Y.S.2d 873 (1st Dept. 1990), *aff'd* 76 N.Y.2d 927, 563 N.Y.S.2d 52 (1990); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980). *See also Indig v. Finkelstein*, 23 N.Y.2d 728, 296 N.Y.S.2d 370 (1968); *Werner v. Nelkin*, 206 A.D.2d 422, 614 N.Y.S.2d 66 (2d Dept. 1994); *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v. Petrides*, 80 A.D.2d 781, 437 N.Y.S.2d 1 (1st Dept. 1981), *app dism.* 53 N.Y.2d 1028, 442 N.Y.S.2d 496 (1981); *Jim-Mar Corp. v. Aquatic Construction, Ltd.*, 195 A.D.2d 868, 600 N.Y.S.2d 790 (3d Dept. 1993), *lv app den.* 82 N.Y.2d 660, 605 N.Y.S.2d 6 (1993).

In opposition to defendants' motion for summary judgment, the plaintiffs state that a claim for aiding and abetting a breach of fiduciary duty requires: (1) a breach by a fiduciary of obligations to another; (2) that the defendant knowingly induced or participated in the breach; and (3) that plaintiff suffered damage as a result of the breach. *See Kaufman v. Cohen*, 307 A.D.2d 113, 760 N.Y.S.2d 157 (1st Dept. 2003). Without any evidentiary proof, plaintiffs' counsel argues that MAG's partners, McKinnon and Feuchter, breached a fiduciary duty of loyalty that they owed to the plaintiffs. *See* Plaintiff's Memorandum of Law in Opposition at p. 14. The Court has had the opportunity to review the So Ordered Stipulation and Settlement

Agreement between MAG, including its principals McKinnon and Feuchter and S&E, including its principal the plaintiffs herein. The lawsuit out of which the global settlement was structured is based on claims and counterclaims alleging wrongdoing, including the breach of fiduciary duty of loyalty against each other by the respective principles of MAG and S&E. The settlement agreement states as follows:

> **Section 13.** Disputed claims. It is understood and agreed that this agreement is a *compromise of disputed claims, and that the payment and delivery of the aforementioned consideration is not to be construed as an admission of liability on the part of any of the parties, and each party in fact denies any wrongdoing or liability to the other.* (emphasis added)

The plaintiffs' assertion that McKinnon or Feuchter or anyone else associated with MAG breached a fiduciary duty of loyalty to the plaintiffs is not supported by the full record before this Court. Plaintiffs were represented by independent counsel of their own choosing when they voluntarily executed the stipulation acknowledging no admission of liability by any of the parties. Each party denied any wrongdoing (such as breach of fiduciary duty) toward the others. If the plaintiffs did not want to execute the stipulation acknowledging that McKinnon and Feuchter were not responsible or liable for any wrongdoing toward the plaintiffs, then plaintiff Aranki should have pursued the underlying litigation on its merits to establish as a matter of fact that there was a breach of fiduciary loyalty.

Even if the plaintiffs could demonstrate a breach of fiduciary duty by McKinnon and Feuchter, *vis-a-vis* plaintiff Aranki (which they have not done), there is no probative evidence that defendant Goldman aided the putative breach of any fiduciary duty or loyalty. Nor have the plaintiffs established any meaningful conduct on the part of the defendants that could be construed as constituting "substantial assistance" in perpetration of the putative breach of fiduciary duty. Merely restating allegations in a complaint that are not substantiated by the

record, or supported by the evidence is insufficient, whether repeated by the plaintiff in his affidavit or the plaintiffs' counsel in the Memorandum of Law. *See Allen v. Allstate Ins. Co.*, 78 A.D.3d 872, 913 N.Y.S.2d 661 (2d Dept. 2010).

Plaintiffs are required to "bare their proof" in opposing a summary judgment motion, as compared to a pre-answer motion to dismiss in which the Court is obligated to accord the plaintiffs' allegations every possible favorable inference. *See* CPLR § 3211; CPLR § 3212; *Zuckerman v. City of New York, supra; Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 729 N.Y.S.2d 425 (2001).

In further opposition to the motion for summary judgment, plaintiff Aranki asserts that, in 2002, MAG's accountant who was recommended by defendant Goldman, conducted an investigation into S&E's financial affairs. The accountant sought S&E financial documents prior to MAG's formation. The accountant did not seek similar documentation from the other insurance companies that made up MAG. The plaintiff also opines that defendant Goldman advised and encouraged the aforementioned actions against him in order to weaken plaintiff Aranki financially so that he would be inclined to sell his interest in MAG at a reduced price.

Plaintiffs' arguments in opposition are based solely on surmise, conjecture, and suspicion and insufficient to raise a triable issue of fact to defeat the defendants' motion for summary judgment. *See Rendon v. Castle Realty*, 28 A.D.3d 532, 813 N.Y.S.2d 479 (2d Dept. 2006); *Billordo v. E.P. Realty Associates*, 300 A.D.2d 523, 752 N.Y.S.2d 556 (2d Dept. 2002). It settled that, absent an acceptable excuse, a party opposing a motion for summary judgment must produce "evidentiary proof in admissible form." *See Zuckerman v. City of New York, supra. See also Grasso v. Angerami*, 79 N.Y.2d 813, 580 N.Y.S.2d 178 (1991); *Alvarez v. Prospect Hospital, supra; Pagano v. Kingsbury*, 182 A.D.2d 268, 587 N.Y.S.2d 692 (2d Dept.

1992). Plaintiffs opine that the accountant at the direction of the defendants conducted the investigation into S&E's affairs as a "fishing expedition," with the hopes of finding information that could be used to alienate the plaintiff MAG's majority member, and to further exclude plaintiff Aranki from MAG's management. Plaintiff Aranki did not feel comfortable providing the accountant with the documentation since the other agencies were not required to do the same; nor did plaintiff Aranki believe the information to be relevant. Plaintiff Aranki also contends that much of the requested documentation was over three years old and purged, on the advice of his own accountant. Plaintiff Aranki contends that defendant Goldman, in his capacity as attorney for MAG, advised MAG to cease paying commissions and profits to the plaintiffs in addition to commencing legal action against him. Plaintiffs do not submit any admissible evidence to support this allegation. Rather, the only "evidence" they submit in support of this claim is the self-serving, hearsay affidavit of plaintiff Aranki, in which he states, "In 2003, I was informed that Mr. Goldman advised MAG to cease paying S&E its commissions and profits ..." Aranki's deposition transcripts to support his allegations are also based on hearsay. *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition at pp. 72:22-73; 88:18-25. Aranki stated at his deposition that he was told by Jim Kerin that MAG was not paying him his commission "on the advice of corporate counsel . . ." *See* Defendants' Affirmation in Support Exhibit C, Aranki deposition, at p. 73:3-4. Plaintiffs' opposition does not provide any non-hearsay evidence to support this claim, such as an affidavit from Jim Kerin. Although hearsay evidence may be considered in opposition to a motion on summary judgment, it is insufficient to bar summary judgment if it is the only evidence submitted. *See Stock v. Otis Elevator Co.*, 52 A.D.3d 816, 861 N.Y.S.2d 722 (2d Dept. 2008). Even if defendant Goldman did "advise" MAG, plaintiffs have failed to demonstrate with any probative evidence that the advice was not

given in good faith. Plaintiffs have failed to provide any admissible evidence establishing any conduct on the part of the defendants that was atypical for a corporate counsel and have failed to offer any expert testimony to establish the standard practices of a corporate attorney or explain how defendant Goldman's giving of legal advice to MAG allegedly deviated from these norms. *See Natale v. Jeffrey Samel & Associates*, 308 A.D.2d 568, 764 N.Y.S.2d 883 (2d Dept. 2003). Moreover, the fact that principals of MAG, including the plaintiffs, entered into a global settlement ending the litigation between themselves demonstrates that the lawsuit was commenced in good faith and not frivolous.

Defendants' motion for summary judgment is hereby granted. All proceedings under Index No. 3705/2005 are terminated.

This constitutes the Decision and Order of this Court.

ENTER:

DENISE L. SHER, A.J.S.C.
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ENTERED
MAR 25 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE

Dated: Mineola, New York
March 22, 2010