SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 43

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ARENA VANTAGE SPV, LLC, Plaintiff, - v - COVENTURE - VANTAGE CREDIT OPPORTUNITIES GP, COVENTURE - VANTAGE CREDIT OPPORTUNITIES FUND, LP, CROSSBEAM - ACQUCO EQUITY SPV LLC, CROSSBEAM VENTURE PARTNERS, VANTAGE TERM LOAN LLC, VANTAGE TERM LOAN II, LLC, VANTAGE BORROWER SPV I LLC., VANTAGE, INC., RAUNAK NIRMAL, BRIAN HARWITT, ELIZABETH OSTRANDER, ALI HAMED, WILEY ZHANG, RYAN MORGAN, MANPREET SINGH, and SAVNEET SINGH Defendants.	**INDEX NO.**	654994/2022
	MOTION DATE	03/20/2023, 10/16/2023
	MOTION SEQ. NO.	002 003 005
	DECISION + ORDER ON MOTION	

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HON. ROBERT REED:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 13, 14, 15, 16, 17, 18, 41, 46, 47, 48, 49, 54, 56, 58
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 23, 24, 25, 26, 27, 28, 29, 30, 50, 51, 52, 53, 55, 57, 59
were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 75, 76, 77, 89, 90, 94, 105, 106, 107
were read on this motion to/for LEAVE TO FILE.

Motion sequence numbers 002, 003 and 005 are consolidated for disposition.

This action arises from a series of debt and equity transactions made pursuant to an Amended and Restated Loan and Servicing Agreement (Loan Agreement). Plaintiff lender, Arena Vantage SPV, LLC, brings seven causes of action, alleging, *inter alia*, breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of the fiduciary duty. In

motion sequence numbers 002 and 003, defendants move pursuant to CPLR 3211 (a) (1) and (a) (7) to dismiss the complaint. In motion sequence number 005, plaintiff moves pursuant to CPLR 3025(b) for leave to file a second amended complaint. For the reasons herein, defendants' motions to dismiss the complaint are granted, and the complaint is dismissed. Plaintiff's motion for leave to file an amended complaint is denied.

BACKGROUND

Pursuant to an Amended and Restated Loan and Servicing Agreement (Loan Agreement) dated December 11, 2020, as amended thereafter, the parties entered into a series of debt and equity transactions. The three lenders in this arrangement, including plaintiff and defendants Vantage Term Loan LLC and Vantage Term Loan II, together advanced a total of approximately $200 million in secured debt to the borrower, Vantage Borrower SPV I LLC (Vantage Borrower), of which plaintiff contributed $20 million. The transactions are managed by the servicer and originator, defendant Vantage, Inc., and the entity designated in the agreement as the "Deal Agent," defendant CoVenture – Vantage Credit Opportunities GP, LLC (hereinafter, CoVenture). Vantage, Inc. is also the ultimate recipient of all debt and equity proceeds. Among the equity holders in Vantage, Inc. are defendant entities CoVenture – Vantage Credit Opportunities Fund, LP, and Crossbeam Venture Partners. Individually named defendants Ali Hamed, Savneet Singh, Elizabeth Ostrander, and Ryan Morgan are partners of these equity holding entities. Defendants Savneet Singh and Ryan Morgan are also on the board of directors of Vantage, Inc. and Vantage Borrower. Defendants Raunak Namal, Wiley Zhang, and Manpreet Singh are on the board of directors of Vantage, Inc. Notably, plaintiff does not articulate any specific cause of action against defendant Crossbeam – Acquco Equity SPV LLC or defendant Brian Harwitt.

The Loan Agreements were subsequently amended six times from February 5, 2021 to December 6, 2021.

Under Section 7.1, the Loan Agreement designated breaches of certain terms as "Events of Default." These included instances in which the borrower, servicer or originator failed "to perform or observe any other term, covenant or agreement contained in this Agreement or any other Transaction Document to be performed or observed by it" (Loan Agreement § 7.1 [e]). Other covenants of the Loan Agreement included, under Section 5.1 (a) (i), the borrower's duty to provide the Deal Agent and the lenders with an annual audited consolidated balance sheet of the originator and borrower, and, under Section 5.1 (a) (ii), in the event of a default, to provide the Deal Agent and the lenders with a statement describing proposed actions to address the default. Covenants of the originator and servicer included, under Section 5.3 (v) (i), a duty to provide the Deal Agent and the lenders with certain annual, quarterly, and monthly financial documents and, under Section 5.3 (v) (viii), a duty to provide the Deal Agent and lenders with any report or written information provided to the originator's or servicer's equity holders.

Under Section 9.1 (c), upon the receipt of a Notice of Event of Default, CoVenture, as Deal Agent, was required to "forward any such notice of an Event of Default, Potential Event of Default, Servicer Default, or Potential Servicer Default to all of the Lenders promptly upon receipt thereof" and "take such action with respect to such Event of Default, Potential Event of Default, Servicer Default or Potential Servicer Default as may be requested by the Required Lenders, or as the Deal Agent shall deem advisable or in the best interest of the Lenders."

Section 11.2 of the Loan Agreement provides that "[a]ny provision of this Agreement or any Note may be amended, waived, supplemented and/or otherwise modified if, but only if, such amendment, waiver, supplement and/or other modification is in writing and is signed by the

Borrower, the Servicer, the Originator, the Deal Agent and the Required Lenders," subject to certain restrictions not invoked here. Further, "in the event that an Event of Default or Servicer Default has occurred but has been waived in accordance with the terms hereof, such Event of Default or Servicer Default, as applicable, shall be deemed to have not 'occurred' for all purposes in this Agreement." The requirement of signature by the "Required Lenders" is satisfied when lenders representing in the aggregate greater than 50% of the aggregate commitments of advances to the borrower have signed a waiver or amendment.

According to plaintiff, the borrower and the servicer and originator caused Events of Default by failing to convey annual, quarterly, and monthly audited financial statements to plaintiff for the fiscal year of 2021, a detailed statement explaining the reason for the failure to provide said financial statements, and term sheets allegedly provided to the equity holders of Vantage, Inc. Following these failures, plaintiff sent a Notice of Events of Default to CoVenture's counsel on November 11, 2022. CoVenture responded on November 25, 2022, disputing that Events of Default occurred and declining to take action to induce the borrower and servicer and originator to cure their defaults.

The plaintiff also alleges that the management of Vantage, Inc. mismanaged the company's operations such that its cash-on-hand had dwindled to less than $7.9 million of unrestricted cash as of September 2022 and, upon plaintiff's information and belief, was at that time rapidly approaching zero.

Plaintiff commenced this action on December 24, 2022. In the complaint, plaintiff asserted seven causes of action: breach of contract as against CoVenture (first cause of action), breach of contract as against Vantage Borrower and Vantage, Inc. (second cause of action), breach of the implied covenant of good faith and fair dealing as against CoVenture, the

CoVenture Credit Opportunities Fund, LP, Vantage, Inc., and Vantage Borrower (third cause of action), breach of fiduciary duty as against Savneet Singh, Wiley Zhang, Raunak Nirmal, Manpreet Singh, and Ryan Morgan (fourth cause of action), breach of fiduciary duty, derivatively, as against Savneet Singh, Wiley Zhang, Raunak Nirmal, Manpreet Singh, and Ryan Morgan (fifth cause of action), aiding and abetting breach of fiduciary duty as against CoVenture, Savneet Singh, Ali Hamed, and Elizabeth Ostrander (sixth cause of action), and a declaratory judgment (seventh cause of action).

Subsequently, on January 26, 2023, CoVenture and other defendant parties, in addition to a non-party lender and non-party borrowers, executed a seventh amendment, titled Amendment No. 7, to the Loan Agreement without plaintiff's signature or consent, in which the parties acknowledged the aforementioned Events of Default and expressly waived them.

Plaintiff then filed its first amended complaint on February 17, 2023, adding allegations regarding Amendment No. 7 to its claims under the first, third, fourth, fifth, sixth, and seventh causes of action.

In motion sequence number 002, defendants CoVenture, CoVenture – Vantage Credit Opportunities Fund, LP, Brian Harwitt, Elizabeth Ostrander, and Ali Hamed move to dismiss the complaint against them pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

In motion sequence number 003, Vantage Borrower, Vantage, Inc., Crossbeam Venture Partners, Vantage Term Loan LLC, Vantage Term Loan II, LLC, and individually named defendants Raunak Nirmal, Wiley Zhang, Savneet Singh, Ryan Morgan, and Manpreet Singh, move to dismiss plaintiff's causes of action pursuant to CPLR 3211 (a) (1) and CPLR 3211 (a) (7).

In motion sequence number 005, plaintiff moves pursuant to CPLR 3025(b) for leave to file a second amended complaint, seeking to add another cause of action for a permanent injunction enjoining all parties from consummating any transaction that would cause plaintiff's interest in the loan, in whole or in part, to be converted to equity, without plaintiff's express written consent.

DISCUSSION

1. Motion to dismiss (Motion seq. nos. 002 and 003)

On a motion to dismiss, the court must afford the pleadings a liberal construction, "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Under CPLR 3211 (a) (1), dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.*). Under CPLR 3211 (a) (7), dismissal is proper when the pleadings fail to state a cause of action cognizable at law (*id.*).

As an initial matter, the court notes that the plaintiff states no claim against defendants Brian Harwitt and Crossbeam - Acquco Equity SPV LLC, and, accordingly, as an initial matter, dismisses the complaint as against these defendants.

a. Breach of Contract (against CoVenture)

In the first cause of action, plaintiff asserts that CoVenture breached Section 9.1 (c) of the Loan Agreement by refusing to take any action in the lenders' best interests relating to defaults by the borrower and servicer and originator in their obligations to provide required documents under Sections 5.1 (a) and 5.3 (v). Defendants submit documentary evidence, specifically Amendment No. 7 and the Loan Agreement, that conclusively establishes a defense to this claim

as a matter of law (*see* CPLR 3211 [a] [1]) by showing that CoVenture did not breach the agreement.

In order to prevail on a breach of contract claim, a plaintiff must allege each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's material breach of the contract; and (4) damages (*see Noise In The Attic Productions, Inc. v London Records*, 10 AD3d 303 [1st Dept 2004]).

Amendment No. 7 was signed by defendant lenders CoVenture – Vantage Credit Opportunities Fund, LP, Vantage Term Loan LLC, Vantage Term Loan II LLC, and non-party lender Variant Alternative Income Fund. Based on the facts alleged, the Amendment was executed by the Required Lenders and was therefore effective under Section 11.2 of the Loan Agreement. Indeed, plaintiff does not dispute that Amendment No. 7 was duly executed by the Required Lenders.

Furthermore, Section 11.2 permits parties to waive "[a]ny provision" of the Loan Agreement, and violations of Sections 5.1(a) and 5.3(v) do not fall under the limited exceptions set out therein. Thus, the waivers were effective, and the defaults are deemed not to have occurred at all (*see* Loan Agreement § 11.2). Accordingly, CoVenture's refusal to take action under Section 9.1(c) to address these defaults cannot be considered a breach of the Loan Agreement.

Accordingly, the first cause of action for breach of contract is dismissed.

b. Breach of Contract (against Vantage Borrower and Vantage, Inc.)

In the second cause of action, plaintiff asserts that Vantage Borrower and Vantage, Inc. breached Sections 5.1(a) and 5.3(v) of the Loan Agreement by failing to convey documents as required by those sections.

As set out above, Amendment No. 7 waives the alleged Events of Default. "A valid waiver requires no more than the voluntary and intentional abandonment of a known right" and "may arise by either an express agreement." (*Golfo v Kycia Assoc., Inc.*, 45 AD3d 531, 533 [2d Dept 2007]). Here, plaintiff voluntarily entered into the Loan Agreement, in which it agreed to Section 11.2, which permits such a waiver as occurred here. Accordingly, plaintiff may not recover under this breach of contract claim, and this cause of action is now dismissed as moot.

c. Breach of the Implied Covenant of Good Faith and Fair Dealing

In the third cause of action, plaintiff asserts that CoVenture, CoVenture Credit Opportunities Fund, LP, Vantage, Inc., and Vantage Borrower breached the implied covenant of good faith and fair dealing by permitting Vantage, Inc.'s management to waste the company's cash reserves, failing to take enforcement action with respect to the aforementioned Events of Default, and waiving both past and future Events of Default through Amendment No. 7, and in other respects changing the loan agreement to impair plaintiff's rights.

The implied covenant of good faith and fair dealing is breached "when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Com.*, 265 AD2d 513 [2d Dept 1999]). The implied covenant of good faith and fair dealing cannot contradict explicit and unambiguous terms of parties' agreement, render contract provisions ineffective, or create additional obligations not contained in the agreement (*see Bayerische Landesbank v 45 John St. LLC*, 102 AD3d 587 [1st Dept 2013]; *Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288 [1st Dept 2003]; 22A NY Jur 2d, Contracts § 423). In addition, a cause of action for breach of the implied covenant of good faith and fair dealing cannot be maintained when "[i]t is premised on

the same conduct that underlies the breach of contract cause of action and is intrinsically tied to the damages allegedly resulting from a breach of the contract" (*MBIA Ins. Corp. v Lynch*, 81 AD3d 419, 419-420 [1st Dept 2011]).

To the extent that plaintiff alleges that CoVenture, CoVenture Credit Opportunities Fund, LP, Vantage, Inc., and Vantage Borrower breached the implied covenant of good faith and fair dealing by failing to cure the Events of Default, the claim is duplicative of its breach of contract causes of action and must be dismissed (*see MBIA Ins. Corp. v Lynch*, 81 AD3d at 419-420).

As to plaintiff's assertion that CoVenture, CoVenture Credit Opportunities Fund, LP, Vantage, Inc., and Vantage Borrower breached the implied covenant by executing Amendment No. 7 without its consent and waiving both past and future Events of Default with regard to its right to receive informational documents, plaintiff appears to imply a duty not to waive provisions of the Loan Agreement relating to financial documents. Such a covenant cannot be implied, as it would contradict the express language of Section 11.2, which specifically permits "[a]ny provision" to be "waived" or otherwise modified as long as the required parties sign in writing (*see Bayerische Landesbank v 45 John St. LLC*, 102 AD3d 587).

Plaintiff also alleges that these defendants breached the implied covenant because the Amendment affects the "payout waterfall" upon a future M&A transaction involving Vantage, Inc. In support, however, plaintiff offers no explanation of how the Amendment affects the payout structure of the Loan Agreement or why such a modification would deprive it of the benefit of the bargain (*Aventine Inv. Mgmt., Inc.*, 265 AD2d 513). Such "conclusory allegations . . . are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Likewise, as to its assertion that these defendants permitted the management of Venture, Inc. to waste Venture, Inc.'s cash reserves, plaintiff alleges little other than Venture, Inc.'s "extremely cash-constrained position" with a cash reserve of "approximately $7.9 million as of September 2022." Plaintiff in no way explains how Vantage, Inc.'s mismanagement of its cash reserves, even if assumed to be true, deprives plaintiff of the benefit of the Loan Agreement. This is plainly insufficient to survive the motion (*see Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Accordingly, the plaintiff's third cause of action for breach of the implied covenant of good faith and fair dealing is dismissed.

d. Breach of the Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty

In the fourth and fifth causes of action, plaintiff asserts that defendants Savneet Singh, Wiley Zhang, Raunak Nirmal, Manpreet Singh and Ryan Morgan, as directors and officers of Vantage, Inc., breached their fiduciary duties to the company and to the company's shareholders, including plaintiff. In the sixth cause of action, plaintiff asserts that CoVenture aided and abetted the directors' and officers' breaches of their fiduciary duties to plaintiff. At the oral arguments before this court on January 18, 2024, plaintiff declined to oppose the motions to dismiss as to these causes of action, and the fourth, fifth, and sixth causes of actions are deemed to be withdrawn and accordingly dismissed.

Moreover, plaintiff fails to adequately plead these causes of action. As to the fourth cause of action for breach of the fiduciary duty, directly, plaintiff fails to allege that defendants Savneet Singh, Wiley Zhang, Raunak Nirmal, Manpreet Singh and Ryan Morgan owe a fiduciary duty to plaintiff (*see Village of Kiiryas Joel v. County of Orange,* 43 NYS3d 51 [2d Dept 2016]), as

plaintiff is merely a warrant holder and holds no shares in Vantage, Inc. As to the fifth cause of action for breach of the fiduciary duty, derivatively on behalf of Vantage, Inc., plaintiff fails to show its standing to bring a derivative claim as, again, it is merely a warrant holder in Vantage, Inc. (*see Pessin v. Chris-Craft Industries, Inc.*, 586 NYS2d 584 [1st Dept 1992] ["shareholders instituting a derivative action must demonstrate that they owned stock both when the lawsuit was brought and at the time of the transaction(s) of which they complain"], citing BCL 626 [b]). As to the sixth cause of action, as plaintiff fails to establish an underlying breach of fiduciary duty, the aiding and abetting claim must also fail (*see Yuko Ito v Suzuki*, 57 AD3d 205 [1st Dept 2008]).

e. Declaratory Judgment

In the seventh cause of action, plaintiff alleges seeks a declaration that CoVenture is conflicted in serving as Deal Agent and that plaintiff is entitled to the appointment of a new, independent Deal Agent in CoVenture's place.

Upon a motion to dismiss a cause of action for a declaratory judgment, where "the complaint fails to set forth facts showing a presently existing justiciable controversy between the parties and fails to show that the plaintiffs are entitled to any relief, it should be dismissed" (*D'Arrigo Bros. Co. v New York*, 39 AD2d 678, 679 [1st Dept 1972]; *see Tilcon NY, Inc. v Town of Poughkeepsie*, 87 AD3d 1148 [2d Dept 2011]). "[T]he courts may not issue judicial decisions that can have no immediate effect and may never resolve anything" (*Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988] [internal quotation marks omitted]).

"[A]s a general rule, the signer of a written agreement is conclusively bound by its terms unless there is a showing of fraud, duress or some other wrongful act on the part of any party to the contract" (*Bull & Bear Group v Fuller*, 170 AD2d 275, 279 [1st Dept 1991]). "The court may

not . . . make for the parties a contract which they did not make for themselves" (*Reiss v Fin. Performance Corp.*, 279 AD2d 13, 30-31 [1st Dept 2000]). Indeed, no court has the power to decide "whether [a] contract should be changed by striking out one party and substituting another" (*Hughes v Cuming*, 165 NY 91, 96 [1900]; *see Wayte v Bowker Chem. Co.*, 180 AD 568, 571 [2d Dept 1917]).

The Loan Agreement unambiguously identifies CoVenture as the Deal Agent (Loan Agreement § 1.1). Where the parties duly agreed to the arrangement, the court has no power to remove CoVenture from its role or substitute another individual in its place (*see Hughes v Cuming*, 165 NY at 96). Plaintiff has not shown "fraud, duress or some other wrongful act" such that any part of the agreement should not be enforced as written (*Bull & Bear Group v Fuller*, 170 AD2d at 279). Plaintiff cites no authority for its proposition that a conflict of interest warrants a judicial modification of an agreement among private individuals.

For this reason, although plaintiff additionally seeks a declaration that a conflict of interest exists, the claim is non-justiciable, as any such conflict of interest has no bearing on the enforceability of the Loan Agreement (*see Cuomo v Long Is. Light. Co.*, 71 NY2d at 354). The court notes that, when it entered into the Loan Agreement, plaintiff was aware of CoVenture's affiliation with the other defendant parties, which belies its claim, at this juncture, that equity demands the removal of CoVenture from its role as Deal Agent.

The seventh cause of action is accordingly dismissed.

2. *Plaintiff's Motion for Leave to File Second Amended Complaint (Motion seq. no. 005)*

In motion sequence number 005, plaintiff moves pursuant to CPLR 3025(b) for leave to file a second amended complaint. Plaintiff seeks to make the following amendments to the

complaint: (1) an additional cause of action for a permanent injunction enjoining all parties from consummating any transaction that would cause plaintiff's interest in the loan, in whole or in part, to be converted to equity, without plaintiff's express written consent; (2) additional allegations regarding an eighth amendment to the Loan Agreement; (3) additional allegations to the effect that Crossbeam Venture Partners also breached the implied covenant of good faith and fair dealing (third cause of action); and (4) additional other minor corrections, mainly implicating Crossbeam Venture Partners in the general conflicts of interest that plaintiff alleges.

Pursuant to CPLR 3025(b), "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." Although leave to submit an amended pleading "shall be freely given" (CPLR 3025 [b]), such an application will be denied where the proposed amended pleading is "palpably insufficient" or "devoid of merit" (*KIND Operations Inc. v. AUA Priv. Equity Partners, LLC*, 215 AD3d 556, 557 [1st Dept 2023]; *Leyton v. Siegel*, 212 AD3d 521, 523 [1st Dept 2023]). "Leave to amend will be denied where the proposed pleading fails to state a cause of action" (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]).

Under New York law, an injunction is a "drastic remedy" that is appropriate only where a party has established (1) the likelihood of success on the merits of the pending action; (2) irreparable injury absent such relief, and (3) a balancing of equities in favor of the relief sought. (*N.Y. Auto. Ins. Plan v. N.Y. Sch. Ins. Reciprocal*, 241 AD2d 313, 314 [1st Dept 1997]). To obtain injunctive relief, a party must show "a violation of a right presently occurring, or threatened and imminent" (*Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012]). "Where the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is nonjusticiable as wholly speculative and abstract." (*Cubas v. Martinez*,

33 AD3d 96, 103 [1st Dept 2006]). Further, "[t]he irreparable injury element is not satisfied where lost profits can be compensated with a future award of money damages" (*Ave. A Assoc. LP v Bd. of Mgrs. of the Hearth House Condominium*, 190 AD3d 473, 474 [1st Dept 2021]).

Here, plaintiff's allegations in support of the permanent injunction consist of an assertion that it learned during a May 31, 2023 conference call that "Defendants are actively pursuing a sale of the Company," and that two potential deals are being negotiated involving "equitizing the debt of all of the Lenders." Indeed, Section 11.2 of the Loan Agreement prohibits any modification that would "reduce the amount of, or waive or delay payment of, any principal, interest or fees payable" to lenders without their prior written consent. As plaintiff alleges, a conversion of plaintiff's debt to equity would reduce the amount of principal, interest or fees payable to plaintiff. Plaintiff's main basis for believing that this transaction will occur is that "Defendants refused to respond unambiguously that they understand and agree that Arena cannot be equitized without its prior consent, and that Defendants will not do so." Plaintiff admits that "Defendants responded with ambiguous statements to the effect that they will act in a manner consistent with the Loan Agreement."

Plaintiff fails to meet the threshold of showing a "a violation of a right presently occurring, or threatened and imminent" (*Lemle v Lemle*, 92 AD3d at 500). Plaintiff's allegations show no more than that an equity conversion is being considered. Further, based on plaintiff's own allegations, defendants have represented that they will not take any action inconsistent with the Loan Agreement. Thus, the harm plaintiff alleges is "contingent upon events which may not come to pass," and its claim is "nonjusticiable as wholly speculative and abstract" (*Cubas v. Martinez*, 33 AD3d at 103). In addition, plaintiff fails to show that any harm cannot "be compensated with a future award of money damages" (*Ave. A Assoc. LP*, 190 AD3d at 474).

Moreover, the new allegations plaintiff seeks to add to the complaint do nothing to address the deficiencies of the first amended complaint. The proposed new allegations regarding the now operative eighth amendment to the Loan Agreement are irrelevant to the merits of any of its causes of action. As explained above, the parties to the Loan Agreement agreed in Section 11.2 that it may be amended without the plaintiff's consent, as long as other requirements are met. Any additional allegations regarding a conflict of interest involving Crossbeam Venture Partners are also irrelevant, as plaintiff fails to allege a breach of the implied covenant of good faith and fair dealing by any of the defendants.

Accordingly, plaintiff's motion for leave to file a second amended complaint is denied.

CONCLUSION

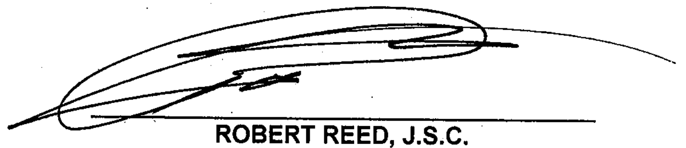
Accordingly, it is

ORDERED that defendants' motions (motion seq. no. 002 and 003) to dismiss the complaint are both granted in their entirety, and the complaint is hereby dismissed, and it is further

ORDERED that plaintiff's motion (motion seq. no. 005) for leave to amend the complaint is denied.

This constitutes the decision and order of the court.

1/25/24
DATE



ROBERT REED, J.S.C.

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