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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1933**

DQ Wind-up, Inc. Trust for the Benefit of Shareholders  
of ACI Telecentrics, Inc., as successor to ACI Telecentrics, Inc.,  
Appellant,

vs.

Gary S. Kohler,  
Respondent,

Andrew Redleaf, et al.,  
Respondents.

**Filed May 14, 2012  
Affirmed in part, reversed in part, and remanded  
Stoneburner, Judge**

Hennepin County District Court  
File No. 27CV1027509

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Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and  
Cleary, Judge.

## UNPUBLISHED OPINION

**STONEBURNER**, Judge

The district court dismissed appellant trust's action against respondent, a former member of the board-of-directors of the trust's predecessor-in-interest, for failure to state a claim on which relief can be granted. Appellant challenges the dismissal, arguing that it pleaded sufficient facts to survive a rule 12.02 (e) dismissal. We affirm in part, reverse in part, and remand.

### FACTS

Appellant DQ Wind-up, Inc. Trust for the Benefit of Shareholders of ACI Telecentrics, Inc. (DQ Trust) is the successor-in-interest to ACI Telecentrics, Inc. (ACIT) with respect to the claims involved in this action. ACIT was a publicly traded, Minnesota-based telecommunications company founded in 1987 by Rick Diamond and Gary Cohen.

Respondent Gary S. Kohler served on ACIT's board of directors from April 15, 2003, until he resigned from the board on December 29, 2004. While Kohler was on ACIT's board, he was also, with the knowledge of the ACIT board, a partner and/or employee in a group of hedge funds, investment advisors, brokers, and other entities (under the umbrella of Whitebox Advisors) owned and/or controlled by Kohler and respondent Andrew Redleaf. Respondent Bruce Nordin is an employee of Whitebox.

In late 2004, after Cohen expressed his desire to sell his equity interest in ACIT, Kohler introduced Redleaf to Diamond and attended several meetings with Redleaf, Diamond, and Cohen to discuss Redleaf's acquisition of an equity interest in ACIT.

During these meetings, Redleaf also suggested that Whitebox replace Itasca Business Credit as ACIT's banker because Whitebox could provide a less restrictive line of credit. Kohler had personally guaranteed ACIT's existing line of credit with Itasca and was contingently liable for \$1,079,550.32. In addition, Redleaf offered to have Whitebox finance an ACIT equipment lease for Cisco routers worth \$272,598.

In November 2004, with Kohler abstaining, ACIT's board voted to approve a resolution authorizing the sale of ACIT stock to Redleaf at \$0.25 per share. The resolution was part of an anticipated three-phase agreement that included Redleaf's acquisition of equity, replacement of the line of credit, and financing of the equipment lease. The trust asserts that, because of his relationship with Redleaf, Kohler was, or should have been, familiar with Redleaf's business practices that would make Whitebox ill-suited to provide long-term financing to ACIT.

ACIT entered into an equipment lease for Cisco routers with an affiliate of Whitebox on December 29, 2004, and Kohler resigned from the ACIT board the same day. In March 2005, Whitebox and ACIT closed on a line of credit in the amount of \$3 million, replacing the Itasca line of credit. ACIT paid Whitebox \$60,000 in origination fees and Kohler obtained a release of his personal guarantee to Itasca. Also in March, Diamond finalized the terms of a mini-subscription of ACIT equity for Redleaf worth \$400,000. The terms of the mini-subscription were presented to each of ACIT's major shareholders, including Kohler.

ACIT was never out of compliance with the terms of the replacement line of credit. Nonetheless, in mid-June 2005, Whitebox refused to make additional advances

and demanded that ACIT immediately provide payment in full and notify its customers that ACIT was shutting down. As a result of Whitebox's actions, ACIT was forced to close.

In November 2010, DQ Trust sued Kohler. DQ Trust's complaint asserts that Kohler breached his fiduciary duty of care to ACIT, breached his fiduciary duty of loyalty to ACIT, and made fraudulent misrepresentations to ACIT. Kohler moved to dismiss under Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief could be granted. After oral arguments on Kohler's motion but before the district court issued its ruling, DQ Trust served an amended complaint adding Redleaf, Whitebox, and Nordin as defendants. The newly added defendants answered and moved to dismiss the amended complaint under rule 12.02(e).

The district court granted Kohler's motion to dismiss the original complaint. DQ Trust then filed a memorandum supporting the added defendants' motion to dismiss the amended complaint, stating:

In light of the Court's Order dated July 7, 2011, Plaintiff has no objection to the entry of [the] proposed order submitted by Defendants Andrew Redleaf, Bruce Nordin and Whitebox Advisors in connection with their Motion to Dismiss Plaintiff's First Amended Complaint. Accordingly, Plaintiff sees no reason to hold a hearing on Defendants' pending motion on August 24, 2011.

The district court granted the motion to dismiss the amended complaint, and judgment was entered in August 2011. In this appeal, DQ Trust challenges only the dismissal of the original complaint against Kohler.

## DECISION

### I. Standard of Review

In response to Kohler's rule 12.02(e) motion to dismiss, DQ Trust attempted to rely on an article from 2006 regarding Redleaf's business practices, but the district court excluded the article from its consideration, reasoning that it was inadmissible as hearsay evidence. The district court decided the motion solely on the pleadings. We review the denial of a motion to dismiss de novo. *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010). We consider only the factual allegations set forth in the complaint, accept those facts as true, and construe all reasonable inferences in favor of the party against whom the motion to dismiss is brought. *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008). We do not consider whether a party can prove the facts alleged; a rule 12.02(e) dismissal will not be upheld if it is possible "on any evidence which might be produced, consistent with the pleader's theory, to grant the relief demanded." *Martens v. Minn. Mining & Mfg. Co.*, 616 N.W.2d 732, 739 (Minn. 2000). But a rule 12.02(e) dismissal will be upheld "if it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr*, 788 N.W.2d at 80 (quotation omitted). A party must plead more than "labels and conclusions," and the reviewing court is not bound by legal conclusions pleaded by the party. *Id.* "[N]either opinions nor statements that are general and indefinite are representations of fact." *Martens*, 616 N.W.2d at 747 (quotation omitted).

### II. DQ Trust pleaded facts sufficient to state a claim for breach of fiduciary duty.

DQ Trust argues that the district court failed to examine the complaint as a whole or to consider all of the allegations in reaching its conclusion that DQ Trust failed to allege sufficient facts to support its breach-of-fiduciary-duty claims. A breach-of-fiduciary-duty claim is sustained on the same elements as negligence. *Padco, Inc. v. Kinny & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989), *review denied* (Minn. Nov. 15, 1989). Under Minnesota law, a complaint must allege facts showing the existence of a fiduciary duty, breach of that duty, causation, and damages. *See Foss v. Kincade*, 766 N.W.2d 317, 320 (Minn. 2009) (stating the elements of negligence).

DQ Trust's separate claims for both breach of the duty of care and the duty of loyalty are based on its allegation that Kohler recommended to the board that ACIT obtain financing from Redleaf and Whitebox without disclosing "his knowledge concerning Redleaf and Whitebox's historical business practices which were adverse to ACIT's long term interests . . . ." The district court dismissed these claims, stating that the allegation of Kohler's undisclosed knowledge "is conclusory, impermissibly vague, and void of detail."

Kohler does not dispute that, as a board member, he owed a fiduciary duty to ACIT at the time he introduced Redleaf, his partner in Whitebox, to ACIT. We must accept the allegations in the complaint that, as a partner with Redleaf in Whitebox, Kohler was familiar with Redleaf's business practices, including practices that made Redleaf and Whitebox "ill-suited to provide long-term financing to ACIT" and Redleaf's history as a lender that "made him and Whitebox unsuitable to act as replacement financiers for ACIT." We must also accept as true the allegation in the complaint that

Kohler advised ACIT's board on the financial management of ACIT and failed to disclose what he knew about Redleaf and Whitebox that would make entering into a financial relationship with them contrary to ACIT's interests. It is undisputed that Kohler resigned from ACIT's board on the same day that documents were signed implementing the first phase of a three-phase financial commitment between ACIT and Whitebox; that Kohler was released from a personal guaranty of more than \$1 million when Whitebox took over ACIT's line of credit; and that, even though ACIT was in compliance with all of its obligations to Whitebox, Whitebox refused to finance ACIT three months after assuming the line of credit, forcing ACIT to close. Although the complaint could have contained more specific information about Redleaf's and Whitebox's business practices and history as a lender, we conclude that DQ Trust's complaint is adequate to withstand the rule 12.02(e) challenge to the claim of breach of fiduciary duty. The complaint adequately asserts the existence of the duty, a breach that caused ACIT to act contrary to its interests, and damages that resulted from the abrupt termination of its business. We therefore reverse the dismissal of DQ Trust's claims for breach of the fiduciary duties of care and loyalty and remand to the district court for further proceedings.

**III. DQ Trust failed to plead fraud and misrepresentation with sufficient specificity to preclude Rule 12.02(e) dismissal.**

The district court concluded that "DQ [Trust] has not stated a 'plausible' claim of fraud because there is no allegation that Kohler misrepresented a past or present material fact." DQ Trust counters that Redleaf and Whitebox had, at the time it entered into

agreements with ACIT, a present intent not to continue financing ACIT. As the district court noted, DQ Trust's "fraud claim is not based on Kohler's intent . . . but on the intent of the third parties."

When pleading a fraud claim, "the circumstances constituting fraud . . . shall be stated with particularity." Minn. R. Civ. P. 9.02. Minnesota courts have looked to federal courts' interpretations of the federal pleading rules for guidance on the particularity requirements of rule 9.02 because the rule is virtually identical to rule 9(b) of the Federal Rules of Civil Procedure. *See DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn.1997) (stating that the federal rules are instructive on interpreting the Minnesota rules, especially when "the relevant language of the state and federal rules is identical").

The Eighth Circuit Court of Appeals has stated that the "[c]ircumstances include such matters as the time, place and contents of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." *Murr Plumbing, Inc. v. Scherer Bros. Fin. Servs. Co.*, 48 F.3d 1066, 1069 (8th Cir. 1995) (quotation omitted). "The claim must identify who, what, where, when, and how . . . [t]hus, the particularity required by [Federal] Rule 9(b) is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations." *United States ex rel. Costner v. United States*, 317 F.3d 883, 888 (8th Cir. 2003) (citation omitted).

DQ Trust argues that, even if Kohler did not have actual knowledge of Redleaf and Whitebox's present intention not to follow through with the agreements, Kohler made a negligent misrepresentation. A misrepresentation, "whether negligent or

fraudulent, constitutes fraud under Minnesota law.” *Juster Steel v. Carlson Cos.*, 366 N.W.2d 616, 618 (Minn. App. 1985). The strict pleading requirements of rule 9.02, therefore, apply to both claims for fraudulent misrepresentation and negligent misrepresentation. *Id.* at 620.

To properly plead a cause of action for fraud, the complaint must allege with specificity that (1) there was a false representation regarding a past or present fact, (2) the fact was material and susceptible of knowledge, (3) the representer knew it was false or was indifferent about whether it was true or false, (4) there was intent to induce another to act, (5) the representation was reasonably reliable, and (6) there were pecuniary damages. *Martens*, 616 N.W.2d at 747. “It is true that a misrepresentation of a present intention could amount to fraud. However, it must be made affirmatively to appear that the promisor had no intention to perform at the time the promise was made.” *Id.* (citation omitted). “[N]either opinions nor statements that are ‘general and indefinite’ are representations of fact.” *Id.*

The complaint alleges that Kohler induced ACIT to enter into the equipment lease and the agreement for the replacement line of credit with Whitebox even though Kohler knew or should have known that Redleaf and Whitebox never intended to provide long-term financing; that Whitebox intended to exercise the rights of a secured creditor and acquire control of ACIT’s assets through foreclosure; that Kohler and the other respondents had a “scheme” to obtain control of ACIT; and that, therefore, the financing arrangements were not in the best interests of ACIT.

While the complaint alleges that Kohler was in a business relationship with Redleaf at the time of the negotiations with ACIT, that he was a partner in Whitebox, that he possibly benefited from the new relationship between Whitebox and ACIT, and that he benefited from having his personal guarantee of ACIT's original line of credit released, there are no specific facts pleaded that support the allegation that Redleaf or Whitebox had no intention of performing, or had an intent to carry out a "scheme." The facts pleaded neither identify the specifics of the "scheme" nor state how Kohler knew about Redleaf's or Whitebox's intentions. Because the complaint does not state with sufficient specificity the elements of a fraud or misrepresentation claim, we conclude that the district court did not err in dismissing DQ Trust's fraud and misrepresentation claims under rule 12.02(e).

**Affirmed in part, reversed in part, and remanded.**