U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
CRESCENT MACHINERY,	§	CASE NO. 02-41005-DML-11
	§	
E. L. LESTER COMPANY, INC.,	§	(JOINTLY ADMINISTERED)
	§	
Debtors	§	CHAPTER 11
	§	
	§	
	§	
THE ESTATES OF CRESCENT MACHINERY AND E. L. LESTER, INC.	§	
	§	
Plaintiffs,	§	
	§	
v.	§	
	§	Adversary Proceeding No. 03-04024
MARK ROBERSON, JEFFREY STEVENS, GERALD HADDOCK RICK KNIGHT AND CRESCENT OPERATING, INC.	§	
	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

Before the court are two motions for summary judgment in the above-styled adversary proceeding (the "Suit"), one (the "COPI Motion") filed by defendant Crescent Operating, Inc. ("COPI") and one (the "Individuals' Motion" and, with the COPI Motion, the "Motions") filed by defendants Mark Roberson ("Roberson"), Rick Knight ("Knight") and Jeffery Stevens ("Stevens" and, collectively, with Knight and Roberson, the "Individual Defendants"[1]; with COPI, the Individual Defendants may be referred to

[1] Defendant Gerald Haddock ("Haddock") has not sought summary judgment.

as "Defendants"). Both COPI and the Individual Defendants have filed briefs in support of their Motions.

Plaintiffs, the estates of Crescent Machinery Company and E.L. Lester, Inc., [2] have filed a response to each of the Motions and briefs in support thereof (collectively the Responses; for purposes of this Memorandum Opinion, the Court will not distinguish between the Reponses and briefs filed in their support). COPI and the Individual Defendants in turn, filed replies to the Responses (collectively, the "Replies"). Plaintiffs and Defendants have also designated extensive summary judgment evidence consisting principally[3] of the sworn testimony[4] of the Individual Defendants, David Six ("Six") and Particia Callaway ("Callaway")[5] (the "Summary Judgment Evidence").

The parties did not request oral argument, and the court therefore bases its conclusions on Plaintiff's [sic] Original Petition (the "Complaint"), the Motions, the Responses, the Replies and the Summary Judgment Evidence. The court's jurisdiction is exercised pursuant to 28 U.S.C. §§ 1334(a) and 157(b)(2). This Memorandum Opinion constitutes the court's findings and conclusions. Fed. R. Bankr. P. 7052.

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2 Plaintiffs, as discussed below, pursue the Suit through the agency of the Official Committee of Unsecured Creditors (the "Committee") appointed in the chapter 11 cases of Crescent Machinery Company ("CMC") and E.L. Lester, Inc. ("ELL" and, with CMC, "Crescent'). As the court is not clear based on the Summary Judgment Evidence when ELL was acquired by COPI, while both CMC and ELL (i.e., Crescent) may have suffered damages, the acquisition program discussed below is assumed to have been undertaken by CMC alone. To avoid unnecessary confusion "Plaintiffs" shall be used only to refer to Plaintiffs in the Suit.

3 Though the court has been directed to several other exhibits (e.g., COPI S.E.C. filings), the arguments of the parties and, therefore, the court's decision turn on the testimony.

4 The testimony was taken by counsel for the Committee in examinations pursuant to Fed. R. Bankr. P. 2004. The court notes that testimony given pursuant to Rule 2004 is ordinarily of limited use in adversary proceedings. As have the parties, the court will refer to the Rule 2004 examination transcripts as depositions.

5 Plaintiffs and COPI provided the court with excerpts of the various depositions. The Individual Defendants submitted complete copies of the depositions, and the court has reviewed the depositions in their entirety, focusing particularly on the excerpted portions.

I. Background

CMC originally operated under the name Moody Day, Inc. It served the Dallas, Texas area as a seller and lessor of construction equipment including tractors, back hoes, fork lifts and similar equipment. By 1997, the company's annual revenues exceeded $10,000,000.

In 1997, COPI was formed and spun off by its affiliate real estate investment trust to own and operate certain entities the trust was barred by applicable tax law from owning and operating. COPI acquired CMC (still known as Moody Day, Inc.; the name was changed some time thereafter) at about the time of COPI's creation. The transfer of CMC to COPI was part of a large transaction between the trust and CMC's prior parent.

Following its acquisition of CMC, COPI installed Stevens as CMC's sole director. Stevens was also an officer and director of COPI. Roberson had previously managed CMC, bearing the title of Vice President and General Manager.[6] Following COPI's acquisition, Roberson continued to run CMC and was given the title of President. Callaway was CMC's controller and eventually received the title of Vice President of Finance. CMC's accounting, however, was largely overseen by Knight, who was chief financial officer of COPI and was eventually given the same title at CMC.

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[6] Plaintiffs complain of Roberson's lack of formal education and his limited business experience (see. e.g., Complaint, p.4). The court notes, however, that Roberson earned the confidence of CMC's prior owners, successfully turning the company around after a history of large losses. Roberson deposition, pp. 18-9.

Haddock served as the chief executive officer of COPI from 1997 to 1999. Together with Stevens [and several other individuals] he served as a director of COPI. At various times, COPI held and managed other subsidiaries than CMC.

Soon after COPI took control of CMC, Haddock determined that CMC should commence an acquisition program. In the middle-to-late 1990's, other companies in the business of sale and leasing of large construction equipment[7] had embarked on acquisition programs, and CMC set out to become a nationwide organization through purchases of existing entities. The acquisition program was begun under the direction of Roberson supervised by Stevens and Knight. In 1999, Six was hired by CMC as a Vice President to assist in the acquisition program.

Roberson was assigned the task of identifying acquisition candidates. After determining whether a possible target might be for sale, Roberson, assisted by attorneys and accountants as well as Knight, would undertake a due diligence process. If satisfied with the prospective target, Roberson would then take it to Stevens. Sometimes Haddock was consulted in connection with an acquisition.

Stevens and Roberson typically negotiated with the seller the price of an acquisition. Although CMC paid the costs of due diligence and sometimes assumed liabilities of the acquired entity,[8] COPI underwrote each acquisition, paying through issuance of its stock,[9] an advance of cash, a promissory note or a combination of these types of

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7 United Rentals, Inc.; Nations Rent, Inc.

8 In most cases (ELL being an exception) the assets of a target were acquired. In any event, other than ELL, all acquisitions lost their separate identity prior to commencement of Crescent's chapter 11 case.

9 COPI was publicly held.

consideration. COPI also advanced funds to CMC and, later Crescent to cover operating deficits.

At some point in time,[10] Haddock told Roberson and other of CMC's managers at a meeting that COPI would provide $35,000,000 to CMC for use in connection with further acquisitions.[11] Though CMC began the process of acquiring additional companies, on the assumption funds would be available, before more acquisitions could be consummated, Roberson was advised the $35,000,000 would not be made available. Later Roberson was told (apparently by Stevens) that $10,000,000 could be advanced by COPI for acquisitions, and at least one more company was purchased thereafter.

Unfortunately, however, CMC and, later, Crescent's operations never showed a profit, and, by mid-1999, the acquisition program had come to an end and Haddock had left COPI. Thereafter, Crescent engaged in efforts to find new funding sources. By 2001, a prospective buyer and a consulting firm had taken over effective management of Crescent. Roberson was superceded as president of the company, becoming executive vice president. The general economic conditions in 2000 and 2001 grew increasingly less favorable for entities like Crescent that were suppliers to the construction industry. Finally, after the tragic events of September 11, 2001, Crescent suffered a virtual collapse of its markets.

On February 6, 2002, Crescent filed for relief under chapter 11 of the Bankruptcy Code (the "Code"). On February 21, 2002, the Committee was appointed pursuant to

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[10] It is unclear to the court precisely when this occurred, though it appears to have been in 1998.

[11] There is no writing committing to this advance of funds, and the court has not been provided with evidence that COPI intended to make an irrevocable commitment to advance the funds. Moreover, at this writing, the court does not have before it sufficient data to estimate how much COPI advanced to CMC (or Crescent) after Haddock's statement.

section 1102(a)(1) of the Code. On May 14, 2002, the court entered an order granting the Committee's unopposed motion to be authorized to investigate and pursue various claims which might be available to Crescent[12]

On December 19, 2002, Plaintiffs filed the Suit the District Court for the State of Texas in Tarrant County, Texas. On January 17, 2003, COPI filed a notice of removal (see 28 U.S.C. § 1452; Fed. R. Bankr. P. 9027) by which the Suit was removed to this court. Plaintiffs sought remand of the Suit, and this court by Memorandum Opinion and Order entered on March 19, 2003 (the "Removal Order") denied the motion to remand. The court's decision to retain the Suit was based, in part, on (1) COPI's representation that it would file a chapter 11 petition in the immediate future and (2) the consent of the Individual Defendants to this court entering final judgment in the Suit (Removal Order, pp. 7 & 8). On March 11, 2003, COPI filed in this court its petition for relief under chapter 11 of the Code.

II. **The Complaint**

In the Complaint Plaintiffs generally allege that CMC's acquisition program, undertaken at the behest of COPI, harmed CMC and ELL through the accumulation of burdensome businesses that eventually led to Crescent's chapter 11 filing. Plaintiffs assert that the Individual Defendants (and Haddock) lacked the experience or knowledge to pursue such a program, that they failed to formulate or follow a rational plan for

[12] Crescent's plan of reorganization was confirmed by the court on March 13, 2003. Pursuant to the plan, prosecution of the Suit will be assumed by a trustee for the benefit of unsecured creditors (Amended Plan, ¶ 10.1.1). In referring to "Plaintiffs", the court intends to include the trustee when substituted for the estates of CMC and ELL as plaintiff.

growing the company, that they failed to perform adequate due diligence or otherwise investigate targeted companies, that they did not integrate CMC's acquisitions into a cohesive whole or properly manage them, and that they (and COPI) did not provide "a viable financing platform to fund the acquisitions" and integration of CMC and its acquisitions (Complaint, p. 8).

Specifically, Plaintiffs state five causes of action. First, they claim the Individual Defendants breached "their fiduciary duty of loyalty and care to Crescent . . . and its creditors." Complaint, p. 14. Second, they assert that COPI and Haddock "breached their fiduciary duty of loyalty and care to Crescent . . . and its creditors." Complaint, p. 14. Third, they complain that COPI and Haddock "knowingly participated, aided and assisted or directed the breaches of fiduciary" by the Individual Defendants. Complaint, p. 15. Fourth, Plaintiffs urge that COPI and Haddock negligently misrepresented that COPI "would fund $35 million for Crescent to complete its acquisitions and to integrate the acquired companies." Complaint, p. 15. In this fourth cause of action Plaintiffs also assert that "Crescent . . . did not have proper capitalization" for the acquisition program. Complaint, p. 16. Finally, Plaintiffs claim that Defendants were grossly negligent or reckless in the management and operation of Crescent. *Id.*

III. **Discussion**

A. Summary Judgment

1. Standard for Granting Summary Judgment

Summary judgment is proper when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). *Jenkins v. Chase Home Mortg. Corp.*, 81 F.3d 592, 595 (5th Cir. 1996). It is appropriate only if

"the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," when viewed in the light most favorable to the non-moving party, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). Summary judgment is inappropriate when conflicting inferences and interpretations may be drawn from the evidence. *Askanase v. Fatjo*, 130 F.3d 657, 665 (5th Cir. 1997); *James v. Sadler*, 909 F.2d 834, 836-37 (5th Cir.1990). A dispute about a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson*, 477 U.S. at 247.

In making its determination, the court must draw all justifiable inferences in favor of the non-moving party. Id at 255. Once the moving party has initially shown "that there is an absence of evidence to support the nonmoving party's case," the non-movant must come forward, after adequate time for discovery, with significant probative evidence showing a triable issue of fact. FED. R. CIV. P. 56(e); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 118 (5th Cir. 1990). Conclusory allegations and denials, speculation, improbable inferences, unsubstantiated assertions, and legalistic argumentation are not adequate substitutes for specific facts showing that there is a genuine issue for trial. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (en banc); *SEC v. Recile*, 10 F.3d 1093, 1097 (5th Cir. 1993). To defeat a properly supported motion for summary judgment, the non-movant must present more than a mere scintilla of evidence. *See Anderson*, 477 U.S. at 251. Rather, the non-movant must

present sufficient evidence upon which a jury could reasonably find in the non-movant's favor. *Id.* at 1097.

2. Claims Inadequate as a Matter of Law

In the Responses, Plaintiffs argue that COPI and the Individual Defendants ask that the court grant judgment as to certain causes of action because Plaintiffs have failed to state a claim as a matter of law. Since the Motions seek summary judgment, Plaintiffs maintain that the court may not grant relief on the basis that the Complaint is facially deficient or fails to state a claim upon which relief may be granted (i.e., is subject to a motion to dismiss pursuant to Fed. R. Bankr. P. 7012(b) incorporating Fed. R. Civ. P. 12(b) and (c)).

Summary judgment, however, is meant to test the evidentiary sufficiency of a claim. If there is clearly inadequate *evidence* to support liability, summary judgment will be granted. A claim that cannot pass legal muster is unquestionably also deficient in terms of facts. *See Anderson*, 477 U.S. at 247. If a claim cannot survive under Rule 12, it surely is not supportable under Rule 56, for the plaintiff clearly could not show facts which would entitle it to relief. *Id.* at 247. Accordingly, the court can grant judgment as requested in the Motions and supporting papers on the basis that no valid claim is stated.

B. Need for Further Discovery

Plaintiffs also argue in the Responses that they have not had an adequate opportunity for discovery and, therefore, summary judgment should not be granted. Plaintiffs, however, have taken the sworn testimony of five persons knowledgeable about Crescent and its operations. They presumably have had (or could easily have obtained) access to Crescent's books and records. COPI is a public company, and much

information is available about it. In sum, Plaintiff has had ample opportunity to ascertain facts which would support their causes of action. Moreover, to the extent the court grants the Motions, it does so for deficiencies which probably could not be cured through further discovery.

C. The Merits

For reasons that will become apparent, the court's discussion of the Suit will not be congruent with Plaintiffs' statements of their causes of action. Rather, the court will first address the Individual Defendants' fiduciary duty of loyalty to Crescent's creditors and to Crescent. Second, the court will consider Defendants' duty of care to Crescent, including the effect of the business judgment rule and gross negligence on the part of Defendants. Finally, COPI's misrepresentation and Crescent's capitalization will be addressed. The court will reach the question of whether COPI aided or abetted the Individual Defendants in connection with discussion of the causes of action against the Individual Defendants.

1. Fiduciary Duty of Loyalty

a. Duty to Creditors.

Under Texas law,[13] officers and directors of a corporation have a duty to creditors only if the corporation is insolvent. *See generally Henry I. Siegel Company, Inc. v. Edna Holliday*, 663 S.W.2d 824, 829 (Tex. 1984); *Fagan v. LaGloria Oil and Gas Co.*, 494 S.W. 2d 624, 628 (Tex. Civ. App. – Houst. 1973). The Suit does not allege nor is there any evidence that Crescent was insolvent at the time the Individual Defendants controlled Crescent. Rather their management was supplanted a year prior to the chapter 11 filing. Indeed, it is not unreasonable to suppose that creditors of Crescent in the bankruptcy case

largely hold claims incurred many months after occurrence of the acts alleged in the Suit to be wrongful. At least no allegation of the Complaint is contrary to such a supposition. For these reasons the Motions must be GRANTED to the extent the Suit is based on a duty owed by any of Defendants to Crescent's creditors.

b. Fiduciary Duty to Crescent

Under this heading, the court will address the duty of loyalty of the Individual Defendants to Crescent. Officers and directors of a corporation owe the corporation and its shareholders a duty of loyalty which requires that they act in the interests of the corporation and its shareholders. *See Mims v. Kennedy Capital Management, Inc.* (*In re Performance Nutrition, Inc.* 239 B.R. 93, 110 (Bankr. N.D. Tex. 1999); *Fagan v. LaGloria Oil and Gas Co.*, 494 S.W. 2d 624, 628 (Tex. Civ. App. – Houst. 1973, no writ). In fulfilling the duty of loyalty, an officer or director may not act in his or her own interest. *See Gearhart Indus. v. Smith Int'l*, 741 F.2d 707 (5th Cir. 1984); *International Bankers Life Insurance Co v. Sterling Holliday and D.D. Beasley*, 368 S.W. 2d 567, 577 (Tex. 1963). This is the focus of any inquiry regarding a breach of the fiduciary duty of loyalty.

In the case at bar the Summary Judgment evidence offers no support for the contention that the Individual Defendants acted in their own interest rather than that of Crescent and its shareholder, COPI. The only hint of such conduct is the intimation (see Six deposition, pp. 46-7) that Roberson received a bonus for over-ordering inventory for the company's West Coast locations. Roberson's testimony, however, is that the bonus (a $50,000 payment) was based on successful consummation of the acquisition of Western Traction (Roberson deposition, p. 51).

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[13] The parties all have relied on Texas law, and the court will do so as well.

The testimony of Six is insufficient, in the court's view, to raise a question of fact concerning the reason for Roberson's bonus. Even if the bonus were tied to the purchase of inventory for the West Coast locations, no evidence has been presented to show that Roberson was motivated by the prospect of the bonus as opposed to the interests of CMC and COPI to buy excess inventory.

As to Plaintiffs' allegation that the Individual Defendants acted for the benefit of COPI, not Crescent, the duty of loyalty contemplates that officers and directors will serve the interest of the corporation *and* its shareholders. *Assurance Systems Corp. v. Jackson (In re Jackson)*, 141 B.R. 909, 915 (Bankr. N.D. Tex. 1992).; *Hughes v. Houston Northwest Medical Ctr., Inc.*,_680 S.W.2d 838, 843 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.). Thus, absent insolvency and a resulting duty to creditors, the Individual Defendants cannot be held to account for acting in aid of the plans and needs of COPI. Likewise, COPI cannot be liable for aiding and abetting Crescent's officers and director where there is no breach of the duty of loyalty. To the extent, therefore, that the Complaint asserts causes of action against Defendants based upon breaches of the fiduciary duty of loyalty, the Motions must be GRANTED.

2. Duty of Care

Under Texas law, officers and directors also owe to a corporation a duty of care. They must act in the best interest of the corporation, exercising "that degree of care which a person of ordinary prudence would exercise under the same or similar circumstances." *Mims v. Kennedy Capital Management Inc.*, 239 B.R. 93, 110-111 quoting *Assurance Systems Corp. v. Jackson (In re Jackson)*, 141 B.R. 909, 915 (Bankr. N.D. Tex. 1992). See also *Meyers v. Moody*, 693 F.2d 1196, 1209 (5th Cir. 1982, cert.

denied); *McCollum v. Dollar*, 213 S.W.259, 261 (Tex.Comm'n App. 1919, holding approved)(director must handle his corporate duties with such care as "an ordinarily prudent man would use under similar circumstances").

Officers and directors are insulated from liability in many instances by the business judgment rule, however. Under the business judgment rule, an officer or director is presumed to act in the interests of the corporation. *Resolution Trust Corp. v. Action*, 844 F.Supp. 307, 314 (N.D. Tex. 1994); *Gearhart*, 740 F.2d at 721. To the extent that he or she uses his or her business judgment in managing the corporation, even if guilty of negligence or poor judgment, the officer or director may not be held liable. *See Cleaver v. Cleaver*, 935 S.W.2d 491, 495-496 (Tex. App.—Tyler, 1996, no writ); *Langston v. Eagle Publishing Co.*, 719 S.W.2d 612, 616 (Tex. App.—Waco 1986, writ ref'd n.r.e.)(under business-judgment rule, conduct that is merely unwise, inexpedient, or imprudent will not sustain suit against management of corporation by shareholders); *See also Cates v. Sparkman*, 73 Tex. 619, 11 S.W. 846 (1889).

On the other hand conduct which serves one's own interest or amounts to fraud will result in forfeiture of the business judgment rule's protection. *See, e.g.*, *Gearhart*, 741 F.2d at 721. Likewise, gross negligence or recklessness in carrying out one's duties as an officer or director may result in liability to the corporation for failing to fulfill the duty of care. *See FDIC v. Harrington*, 844 F. Supp. 300, 306 (N.D. Tex. 1994); *RTC v. Norris*, 830 F. Supp. 351, 358-359 (S.D. Tex. 1993).

To the extent a third party encourages officers and directors to act in a reckless or grossly negligent fashion, that third party may also be liable for their violation of their duty of care to the corporation. *See Mims v. Kennedy Capital Management, Inc.*, 239

B.R. 93, 112; *see also, Kinzbach Tool Co., Inc. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942)(holding that third parties who knowingly aid a tortfeasor in the breach of his fiduciary duties are jointly and severally liable with the tortfeasor for such breach).

In the instant case, Plaintiffs assert a claim of gross negligence against Defendants. The Summary Judgment Evidence is sufficient such that a finder of fact might conclude that the Defendants acted in a grossly negligent fashion. Specifically, the testimony of Six supports Plaintiffs' allegation that CMC's acquisition program was not properly planned, [14] that seriously inadequate due diligence was performed in connection with at least some acquisitions,[15] that acquired companies and inventory were deceptively booked and other deceptive accounting entries were made, that impaired CMC's operations,[16] that management was at times characterized by a total lack of care[17] and that insufficient attention was paid to day-to-day management of CMC and its acquisitions.[18] The pattern suggested by these and other actions of the Individual Defendants could be enough to support the conclusion that the Individual Defendants were grossly negligent in their conduct of COPI's business.

Since a finder of fact could conclude that the Individual Defendants, with the knowledge and encouragement of COPI, conducted Crescent's affairs in a grossly

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[14] Six deposition, p. 52.

[15] *Id*, p. 58-60; 75.

[16] *Id*, p. 35-8; 42-5; 47; 85-6.

[17] *Id* p. 54-5; 58-64.

[18] *Id* p. 26.

negligent manner and so breached their duty of care, as to such allegations of breach of duty of care and COPI's aiding and abetting of same, the Motions must be DENIED.

3. The $35,000,000 Promise

The court will consider the stated cause of action based on a representation by Haddock that $35,000,000 was available to CMC. First, the court will determine whether Haddock's statement constitutes the basis for a negligent misrepresentation claim against COPI.[19] Next the court will consider whether Plaintiffs have stated a claim against COPI for inadequate capitalization of Crescent.

a. Negligent Misrepresentation

In order to prove a case of negligent misrepresentation, Plaintiffs must show (1) that COPI made a representation to CMC in the course of COPI's business; (2) that COPI's representation was false; (3) that COPI did not use reasonable care in formulating and communicating the information constituting the representation; (4) that CMC justifiably relied on it; and (5) that CMC was injured through that reliance. *See First Nat'l Bank of Durant v. Trans Terra Corp. Int'l*, 142 F.3d 802, 809 (5th Cir. 1998)(citing *Fed. Land Bank Ass'n v. Sloane*, 825 S.W. 439, 442, (Tex. 1991); *McCamish, Martin & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999).

In the case before the court, Plaintiffs have failed to demonstrate that several of these elements were met. To begin with, the alleged misrepresentation was made by *Haddock*. There is no evidence that COPI authorized the statement. Stevens testified (Stevens deposition, p. 59) he knew nothing of a representation that COPI would make

[19] The court does not here address whether Haddock individually has any liability for his statement.

$35,000,000 available to CMC. Yet Stevens was on the board of COPI as well as one of its officers. Had *COPI* determined to make a $35,000,000 investment, it would have been familiar to Stevens. There is nothing in the Summary Judgment Evidence to suggest that COPI intended or authorized Haddock to falsely represent to CMC's management that $35,000,000 was available for CMC's acquisition program.

Moreover, CMC and Roberson could not have justifiably relied on a promise of $35,000,000 when the commitment was not reduced to writing,[20] at least in a resolution of COPI's board. Similarly, an anticipated investment would be presumed by any reasonable person to be contingent on future events. Neither Haddock nor COPI, if it could be charged with the promise, could, consistent with duties to COPI and its shareholders, have intended blanket preapproval of acquisitions. In addition, as suggested by COPI, the intent to make a future advance cannot form the basis of an actionable misrepresentation. *See Cockerham v. Kerr-McGhee Chemical Corp.*, 23 F.3d 101, 104 (5th Cir. 1994); *Allied Vista, Inc.*, 987 S.W.2d 138, 141 (Tex. App.—Houston [14th Dist.] 1999, pet. denied); *See also Miksch v. Exxon Corp.*, 979 S.W.2d 700, 706 (Tex. App.—Houston [14th Dist.] 1998, pet. denied). Such an intent could actually have existed, making Haddock's statement truthful at the time it was made. That would not convert the statement into a misrepresentation when, in light of changed circumstances, it became clear that an added investment of $35,000,000 in CMC's acquisition program would be improvident.

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21 As a loan commitment, for example, it would have to be put in writing. TEX. BUS. & COM. CODE ANN. §§ 26.01, 26.02 (Vernon 1984 & Supp. 1997); *See generally Hasse and PRH Investments v. Glazner, 62* S.W.3d 795 (Tex. 2001); *Federal Land Bank Association of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

Finally, it is clear from the evidence that COPI advanced funds to CMC after Haddock's statement. Indeed, money was advanced for at least one more acquisition. Roberson Deposition, pp. 59; 123-4. That COPI elected to use greater caution and to be more discriminating in advancing capital to its subsidiary does not amount to breach of a prior promise or make Haddock's statement a negligent misrepresentation.

Based on the Summary Judgment Evidence, the court concludes that no finder of fact could conclude that COPI made a negligent representation to CMC. For the foregoing reasons, as to the claim that COPI negligently misrepresented it would advance $35,000,000 to CMC, the COPI Motion must be GRANTED.

b. Inadequate Capitalization

Although Plaintiffs failed to break out a cause of action against COPI based on undercapitalization, the Complaint does charge in connection with negligent misrepresentation that Crescent did not have "proper capitalization to integrate and operate the acquired companies." Complaint, p. 16. The owner of a company must provide the company with sufficient capital for it to conduct the business for which it is intended. *See generally Missionary Baptist I*, 712 F.2d 206, 212 (5th Cir. 1983); *Lucas v. Texas Indus., Inc.*, 695 S.W.2d 372, 375 (Tex. 1984). That a corporation is infused with substantial capital is not enough if the funds it has necessarily fall short of its needs. *Accord Harwood Tire-Arlington v. Young*, 963 S.W.2d 881 (Tex. App. – Fort Worth 1998) (determination of adequate capitalization is fact-specific and must be made on a case-by-case basis).

In the case at bar, the Summary Judgment Evidence shows that COPI advanced significant monies to CMC. It not only provided advances in cash, stock and its notes to

fund acquisitions; it underwrote CMC's operating deficits. Nonetheless, CMC also embarked on its acquisition program at the direction of COPI. If CMC was unable to digest its acquisitions in part due to inadequate capitalization, COPI might be liable. The court is unable to conclude from the Summary Judgment Evidence that a finder of fact could not find that COPI left CMC undercapitalized. Accordingly, to the extent the Complaint asserts COPI left CMC undercapitalized, the COPI Motion must be DENIED.

IV. Conclusion

To summarize, the court is not prepared to grant summary judgment with respect to the following:

1. Whether Defendants' gross negligence or recklessness in exercising management and control of Crescent resulted in a breach of the Individual Defendants' duty of care to Crescent; and
2. Whether COPI failed to capitalize Crescent adequately to conduct the business COPI intended it to.

The balance of the Individuals' Motion and the COPI Motion will be granted as more specifically set out above. The court's determinations herein shall be incorporated in the final judgment entered in the Suit.

It is so ORDERED.

SIGNED this the 5th day of June 2003.

DENNIS MICHAEL LYNN,
UNITED STATES BANKRUPTCY JUDGE