STATE OF MICHIGAN

COURT OF APPEALS

DAVID K. LEVY, CRAIG L. STORMER TRUST, by CRAIG L. STORMER, THOMAS R. KLEIN TRUST, by THOMAS R. KLEIN, and LARRY S. BERMAN TRUST,

Plaintiffs-Appellants,

v

ANN ARBOR MACHINE COMPANY, ANN ARBOR MACHINE COMPANY, L.L.C., WWMYS, INC., WWMYS MERGER COMPANY, INC., ANN ARBOR MC, L.L.C., ERIC BORMAN, PAUL BORMAN, and STUART BORMAN,

Defendants-Appellees,

and

ROBERT E. BETZIG, JAMES WOODS, and RANDALL BIDDIX,

Defendants.

UNPUBLISHED
December 20, 2012

No. 294548
Washtenaw Circuit Court
LC No. 07-000935-CZ

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's opinion and order granting defendants-appellees' motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiffs' claims that defendants-appellees (hereafter "defendants") violated the former Uniform Securities Act, MCL 451.501 *et seq.*[1] We affirm.

[1] The former Uniform Securities Act was repealed by 2008 PA 551, effective October 1, 2009. MCL 451.2702. Pursuant to the successor Uniform Securities Act (2002), which became

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In December 2005, David Levy and three trusts, whose trustees were associated with Levy through employment or other positions at MNP Corporation, each invested $375,000 in stock of a holding company, W.W.M.Y.S., Inc. (hereafter "WWMYS"), which was formed by defendants Eric Borman, Paul Borman, and Stuart Borman to fund and operate Ann Arbor Machine Company, L.L.C. (hereafter "Ann Arbor LLC"). The executive summary that accompanied the subscription agreements for investors to purchase units of WWMYS and Ann Arbor LLC specified that WWMYS was offering 40,000 shares of its common stock and that Ann Arbor LLC would provide up to 96,000 units of "Class B membership interests" to "a limited number of 'accredited investors' in a private offering." It also specified that the three Borman defendants were forming Ann Arbor LLC and certain related entities to acquire Ann Arbor Machine Company ("AAMC"), which was described as "a machine tool company that designs, engineers, manufactures and assembles machine tools, manufacturing solutions, and other products for automotive suppliers, automobile manufactures [sic], and other manufacturing markets." The other three individual defendants in this case, Robert Betzig, James Woods, and Randall Biddix, were identified in the executive summary as AAMC's managers.

In August 2007, Levy and the three trusts, through their respective trustees, Craig Stormer, Thomas Klein, and Larry Berman, filed this action against the three individual Bormans (Eric, Paul, and Stuart), the three AAMC managers (Betzig, Woods, and Biddix), AAMC, Ann Arbor LLC, WWMYS, and two other entities, WWMYS Merger Company, Inc., and Ann Arbor MC, L.L.C. Plaintiffs asserted claims for negligence (count I), lack of due diligence (count II), detrimental reliance (count III), misrepresentation and fraud (count IV), violations of the Uniform Securities Act (count V), and breach of fiduciary duties (count VI).

Defendants Betzig, Woods, and Biddix were dismissed pursuant to stipulated orders and are not parties to this appeal. In April 2008, the trial court granted the remaining defendants' motion for summary disposition under MCR 2.116(C)(8) with respect to each count except count V, which alleged that defendants, as issuers, officers, directors, or controlling persons, violated the Uniform Securities Act in connection with the sale of WWMYS's stock in December 2005.

Following further discovery, defendants filed a second motion for summary disposition under MCR 2.116(C)(10) with respect to plaintiffs' claims in count V and also defendants' defenses based on the doctrines of equitable estoppel and *in pari delicto*. In September 2009, the trial court granted defendants' motion, finding that there was no genuine issue of material fact regarding plaintiffs' claims that defendants violated the Uniform Securities Act. The trial court therefore found that the availability of defendants' asserted defenses was moot, but nonetheless opined that there were genuine issues of material fact regarding the defenses, thereby precluding summary disposition on that basis. On appeal, plaintiffs challenge the trial court's dismissal of their claims under the Uniform Securities Act.

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effective October 1, 2009, MCL 451.2701, "[t]he predecessor act exclusively governs all actions, prosecutions, or proceedings that are pending or may be maintained or instituted on the basis of facts or circumstances occurring before the effective date of this act." MCL 451.2703(1).

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). A motion under MCR 2.116(C)(10) is reviewed under the following standards:

> MCR 2.116(C)(10) provides for summary disposition when there is no genuine issue regarding any material fact and the moving party is entitled to judgment or partial judgment as a matter of law. A motion brought under MCR 2.116(C)(10) tests the factual support for a party's cause of action. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(4) and (5). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*[*v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003)]. A court may only consider "substantively admissible evidence actually proffered" relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). The trial court is not permitted to assess credibility, to weigh the evidence, or to determine the facts, and if material evidence conflicts, it is not appropriate to grant a motion for summary disposition under MCR 2.116(C)(10). *Skinner*, 445 Mich at 161; *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 437; 695 NW2d 84 (2005). [*Henry Ford Health Sys v Esurance Ins Co*, 288 Mich App 593, 597-598; 808 NW2d 1 (2010).]

The proper interpretation of a contract or statute present issues of law that are also reviewed de novo. *Titan Ins Co*, 491 Mich at 553.

III. UNIFORM SECURITIES ACT

The Uniform Securities Act is broadly construed to effectuate its purpose of protecting the public against fraud and deception with respect to the issuance, sale, exchange, or disposition of securities in Michigan by requiring the registration of certain securities and transactions. *People v Dempster*, 396 Mich 700, 704; 242 NW2d 381 (1976). The act is also construed "to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this act with the related federal regulation." *Michelson v Voison*, 254 Mich App 691, 695; 658 NW2d 188 (2003), quoting MCL 451.815.

Former § 101(2) of the act, MCL 451.501(2), provided that it is "unlawful for any person in connection with the offer, sale, or purchase of any security, directly or indirectly . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading." Former § 301, MCL 451.701, provided that it is unlawful to offer or sell a security

in this state unless it is registered, exempt from registration, or constitutes a federally covered security. The provision for civil liability in § 410, MCL 451.810, provided, in pertinent part,

> (a) Any person who does either of the following is liable to the person buying the security from him or her and the buyer may sue either at law or in equity to recover the consideration paid for the security, together with interest at 6% per year from the date of payment, costs, and reasonable attorney fees, less the amount of income received on the security, upon the tender of the security . . . :
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> (1) Offers or sells a security in violation of section 201(a), 301, or 405(b), or of any rule or order under section 403 which requires the affirmative approval of sales literature before it is used, or of any condition imposed under section 304(d), 305(f), 305(g), or 412(g).
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> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.
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> (b) Every person who directly or indirectly controls a seller liable under subsection (a), every partner, officer, or director of the seller, every person occupying a similar status or performing similar functions, every employee of the seller who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale are also liable jointly and severally with and to the same extent as the seller, unless the person sustains the burden of proof that he or she did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

IV. REGISTRATION VIOLATION

Plaintiffs raise an issue on appeal concerning the civil liability established by the Uniform Securities Act for a violation of registration requirements for securities pursuant to MCL 451.810(a)(1). Plaintiffs argue that the trial court failed to consider their claim that they are entitled to a remedy of rescission based on defendants' failure to perfect an exemption to the registration requirements under MCL 451.802(b)(9)(D)(1)(ii). Although the trial court did not address this claim, we shall address it because it was properly raised by plaintiffs in opposition to defendants' motion. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

When reviewing a statute, a court is required to discern and give effect to the Legislature's intent. *Echelon Homes, LLC v Carter Lumber Co*, 472 Mich 192, 196; 694 NW2d 544 (2005). "[T]o discern the Legislature's intent, statutory provisions are not to be read in isolation; rather, context matters, and thus statutory provisions are to be read as a whole."

Robinson v City of Lansing, 486 Mich 1, 15; 782 NW2d 171 (2010) (emphasis in original). Where statutory language is unambiguous, it is applied as written. *Echelon Homes, LLC*, 472 Mich App at 196.

MCL 451.802(b)(9), as a whole, requires that a transaction pursuant to an offering satisfy each of its requirements. Requirement (D) of subsection (b)(9) provides:

> *Each sale in the offering made in reliance upon this subdivision meets all of the conditions of 1 of the following*:
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> (1) The sale is to any of the following classes of persons:
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> * * *
>
> (ii) Not more than 15 persons whose principal business is the line of business to which the offering relates, and who are qualified by previous experience to evaluate the risks of the investment. The provisions of subparagraph (A) shall not apply to sales covered by subparagraph (D)(1) (i) and (ii).
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> * * *
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> (5) Sales made to a person who the seller has reasonable grounds to believe and does believe is 1 of the following:
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> * * *
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> (ii) An individual who after the purchase has an investment of $50,000.00 or more in the securities of the issuer, including installment payments to be made within 1 year after purchase by the investor; has either personal income before taxes in excess of $100,000.00 for his or her last fiscal year or latest 12-month period and is capable of bearing the economic risk, or net worth in excess of $1,000,000.00; and has the knowledge and experience in financial and business matters that he or she is capable of evaluating the merits and risks of the prospective investment or has obtained the advice of an attorney, certified public accountant, investment adviser registered under the investment advisers act of 1940, or an investment adviser registered under this act, with respect to the merits and risks of the prospective investment.
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> * * *
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> (c) In any proceeding under this act, the burden of proving an exemption or an exception from a definition is upon the person claiming it. [MCL 451.802(b)(9)(D) (emphasis added).]

It is clear from defendants' motion for summary disposition that they were relying on subsection (b)(9)(D)(5)(ii) to claim an exemption. Because MCL 451.802(b)(9)(D) plainly provides that only one listed item is required for the exemption, it is immaterial whether

defendants could satisfy subsection (b)(9)(D)(1)(ii). The relevant question is whether a genuine issue of material fact exists with respect to the applicability of subsection (b)(9)(D)(5)(ii) to the securities transactions involved in this case. Because plaintiffs do not address this necessary issue, they are not entitled to relief with respect to defendants' alleged failure to perfect to an exemption. See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987) (an appellant's failure to address an issue that necessarily must be reached precludes appellate relief).

V. UNTRUE STATEMENTS AND MISLEADING OMISSIONS

Plaintiffs raise several arguments concerning the trial court's grant of defendants' second motion for summary disposition under MCR 2.116(C)(10) with respect to their claims for civil liability under MCL 451.810(a)(2). They challenge the trial court's determination that the alleged misrepresentations were not material as a matter of law. In considering plaintiffs' arguments, we have limited our review to the deposition testimony and other documentary evidence that was presented to the trial court. Because enlargement of the record on appeal is not permitted, we decline to consider the additional materials that plaintiffs have submitted with their brief on appeal. See *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990) (enlargement of the record on appeal is not permitted); see also *Maiden*, 461 Mich at 121 (a party opposing summary disposition under MCR 2.116(C)(10) must set forth specific facts showing a genuine issue of material fact at the time the motion is heard).

For purposes of our review, we shall assume that each defendant could potentially be liable for the rescission and related relief sought by plaintiffs under MCL 410.810(a)(2) because the individual liability of each defendant is beyond the scope of the trial court's summary disposition ruling. We shall also assume that each plaintiff could predicate a claim under MCL 451.810(a)(2) on the same alleged untrue statements or misleading omissions that were made by defendants to offer or sell securities in WWMYS, notwithstanding evidence that plaintiff Levy, and to a lesser extent plaintiff Stormer, were principally involved in gathering information from defendants and conveying information regarding the potential investment, in some manner, to plaintiffs Berman and Klein.[2] With the exception of those statements that would not be actionable under MCL 451.810(a)(2) because they are promissory in nature, we conclude that plaintiffs failed to establish a genuine issue of material fact regarding whether defendants made material untrue statements or misleading omissions.

As indicated previously, civil liability under MCL 451.810(a)(2) requires that the buyer establish that a person offered or sold a security "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission[.]" A breach of contract generally falls outside the scope of securities laws. *Capital Mgt Select Fund v Bennett*, 680 F3d 214, 225-226 (CA 2, 2012).

[2] The evidence indicated that another individual, Gerald Lorenz, who was employed by MNP Corporation, was also involved in gathering information or touring AAMC's facility, but he did purchase any stock in WWMYS.

A statement may satisfy the factual element, even if it is stated in conclusory terms, such as the use of "high" or "fair" to describe the value to shareholders of a recommended merger, where "such conclusory terms in a commercial context are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading." *Virginia Bankshares, Inc v Sandberg*, 501 US 1083, 1903-1094; 111 S Ct 2749; 115 L Ed 2d 929 (1991). A statement of belief may also satisfy the factual element where the speaker did not believe the statement or had an undisclosed motive, but it must also be shown that there was something false or misleading in what was expressed or implied about the subject matter of the statement. *Id.* at 1096. The focus is on backward-looking hard information, and not forecasts, even though investors might find information regarding internal projections and forecasts to be important to the investment decision. *Glassman v Computervision Corp*, 90 F3d 617, 631 (CA 1, 1996).

"A material misstatement or omission of fact has been defined as one which a reasonable investor might have considered important to his investment decision." *Prince v Heritage Oil Co*, 109 Mich App 189, 203; 311 NW2d 741 (1981). While a jury generally decides the question of materiality, where no reasonable juror could have been swayed by the alleged misrepresentation or omission, it may be immaterial as a matter of law. *Blackmon v Nexity Fin Corp*, 953 So 2d 1180, 1192 (Ala, 2006). "Where a statement is mere "puffery," that is, "an optimistic statement so vague, broad, and non-specific that a reasonable investor would not rely on it," it is rendered immaterial as a matter of law. *In re Vivendi Universal, SA Securities Litigation*, 765 F Supp 2d 512, 572 (SD NY, 2011). But the vagueness of a statement is not the only consideration in determining whether a statement is immaterial as a matter of law. As observed in *Blackmon*, 953 So 2d at 1192:

> "Alleged misrepresentations and omissions can be immaterial as a matter of law if they: 1) are of such common knowledge that a reasonable investor can be presumed to understand them; 2) present or conceal such insignificant data that, in the total mix of information, it simply would not matter; 3) are so vague and of such obvious hyperbole that no reasonable investor would rely upon them; or 4) are accompanied by sufficient cautionary statements." [Quoting *In re AMDOCS Ltd Securities Litigation*, 390 F3d 542, 548 (CA 8, 2004).]

In this case, the trial court observed that several of plaintiffs' allegations regarding untrue statements or misleading omissions fell within a "category" of representations related to the monetary amount of backlogged or booked orders. We conclude that trial court did not err in deciding that the alleged misrepresentations regarding the backlogged or booked orders were immaterial as a matter of law. In general, a company choosing to tout a backlog is bound to do so in a manner that does not mislead investors regarding the content of the backlog. *Berson v Applied Signal Technology, Inc*, 527 F3d 982, 987 (CA 9, 2008). Viewed in a light most favorable to plaintiffs, the evidence in this case does not indicate that Eric Borman made a statement, directly or indirectly, to any plaintiff regarding the firmness of the backlogged or booked orders. Nor was there evidence that this information was included in the posting that Levy and Stormer observed during a tour of AAMC's plant before they purchased the stock.

While Levy, Stormer, and Klein testified in their depositions that they would have expected such orders to be based on contractual purchase orders, Stormer acknowledged that a

purchase order may allow for cancellations. Further, defendants presented evidence that at least one AAMC customer used a purchase order that permitted it to terminate a purchase order at any time. The evidence also included a memorandum prepared by Matrix Capital Markets Group ("Matrix Capital") for AAMC, which had been provided to Levy and disclosed that AAMC had done past work without a firm customer order. And while Levy averred in an affidavit that he and Stormer were reassured that forecasted sales were based on booked orders, the executive summary provided to potential investors contained a cautionary statement that the financial projections included with the executive summary "cannot be considered a firm representation of expected future results." A note to the forecasted financial statements cautioned that "[a]ctual results are likely to differ from the forecasted results because events and circumstances frequently do not occur as expected. Those differences may be material."

Considering the vagueness of Eric Borman's alleged representations regarding the firmness of the booked orders or backlogs, their tie to forecasted sales, and the cautionary statements provided to potential investors regarding forecasted information, a reasonable investor would not have relied on the alleged representations to purchase stock in WWMYS, to acquire AAMC. Accordingly, the trial court did not err in determining that the alleged misrepresentations regarding backlogged or booked orders were immaterial as a matter of law.

We also conclude that plaintiffs failed to establish by substantively admissibility evidence a material false statement regarding the value of the inventory that would support a claim under MCL 451.810(a)(2). And while Levy's deposition testimony indicates that he somehow obtained documents prepared for a "Powerpoint" presentation that contained the statements "All Representations Indicate Clean to a Fault" and "Gear Division is a Cash Cow" in the "company overview," the trial court did not err when it characterized these statements as classis examples of "puffing" when it decided defendants' first motion for summary disposition. Considering that the statements are obvious hyperbole and the evidence regarding the executive summary and other more detailed materials provided by defendants to potential investors to enable them to evaluate the risk of the investment, reasonable minds could not differ in concluding that no reasonable investor would be swayed by the statements to purchase stock in WWMYS

We have also considered plaintiffs' claims based on alleged untrue statements or misleading omissions regarding AAMC's competition. Although the trial court did not address this specific claim, it is properly before us to the extent that it was raised by plaintiffs in opposition to defendants' second motion for summary disposition. *Peterman*, 446 Mich at 183. Nonetheless, the evidence indicates that the written statement "Last Remaining North American Player in Its Space" was part of the same "Powerpoint" materials that contained the obvious "clean to a fault" and "cash cow" hyperbole.

While Levy also indicated in his deposition testimony that Eric Borman and his family made an oral statement to him that "they were the only domestic producer of this kind," which he concluded was inaccurate after the securities transaction was completed based on information he learned about a New Hampshire company, the evidence also included the memorandum prepared by Matrix Capital, which disclosed the foreign and business companies that AAMC considered to be competitors in 2004. That document specified that "[t]he past three years have seen a market decline in the machine tool sector, and the slowdown in the medium to high-volume

segment in particular has forced several of AAMC's direct domestic and international competitors out of business or to retrench." AAMC reportedly pursued business with a select group of customers to increase the likelihood of securing future repeat business. AAMC reported eight domestic and foreign competitors, five of which provided competition on a regular basis. None of these competitors were the company that, according to Levy's deposition, should have been viewed as a domestic competitor.

Viewed in a light most favorable to plaintiffs, it could be inferred from the evidence that Eric Borman or another family member made a false statement about AAMC being the only domestic producer of its kind before the stock transaction took place, and that the broad written statement in the "Powerpoint" materials that AAMC was the last domestic player was false. But considering the information that there were foreign competitors, and that both foreign and domestic competitors had been going out of business, the alleged false statements regarding AAMC's status as the last domestic producer are immaterial as a matter of law. While an investor might find competition information helpful, AAMC's status as a lone domestic producer does not matter unless it impacts the forecasted sales. As indicated previously, the forecasted sales in this case were tied to the backlogged or booked orders, which cautioned investors that events and circumstances frequently do not occur as expected. Viewing the evidence in a light most favorable to plaintiffs, it cannot be said that a reasonable investor, considering the total mix of information, would have been swayed by the alleged misrepresentation regarding AAMC's lone domestic status to invest in WWMYS, as part of the plan to acquire AAMC.

We also are not persuaded that the trial court erred in dismissing plaintiffs' claim based on an alleged false statement that defendants or the "Borman Group" verified all costs. According to the evidence of the December 12, 2005, email sent by Eric Borman to Lorenz, with a copy to Levy, which served as the basis for plaintiffs' argument that this statement was actionable under MCL 451.810(a)(2), Eric Borman represented that "[w]e verified all costs associated with the project" when addressing information in the memorandum prepared by Matrix Capital with respect to a "FAST" project that was abandoned and written off by AAMC before any plaintiff purchased stock in WWMYS. While Levy indicated in his deposition testimony that he concluded, rightly or wrongly, that Eric Borman's statement related to the project of acquiring AAMC, and not the "FAST" project, it is clear from the email as a whole that the statement related to the "FAST" project. Further, a reasonable investor reading the memorandum prepared by Matrix Capital would have realized that Matrix Capital relied on information supplied by AAMC, and not any independent verification, to determine the costs of the "FAST" project. Even assuming that plaintiffs, or at least Levy, could demonstrate that they were led to believe that the Borman defendants had conducted their own independent investigation to verify costs of the abandoned "FAST" project, but that no independent investigation was actually conducted, viewing the evidence in a light most favorable to plaintiffs, we conclude that plaintiffs did not establish a genuine of issue of material fact regarding whether a reasonable investor, considering the total mix of available information, would have been swayed by the alleged false "verified costs" information to purchase stock in WWMYS, for use in acquiring AAMC.

Having considered the substantively admissible evidence presented to the trial court, we also conclude that plaintiffs failed to establish a genuine issue of material fact with regard to their claims based on Eric Borman making false representations concerning whether he was

conducting due diligence of AAMC. The term "due diligence" is a term of art in the context of commercial transactions, but it is not measured by any absolute standard. *Levin v May*, 887 So2d 497, 501-502 (La App, 2004), *Huntington Nat'l Bank v Hooker*, 840 SW2d 916, 919 n 4 (Tenn App, 1991). It has been defined as "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." *Id.*, quoting Black's Law Dictionary (4th ed, 1). In the area of business acquisitions, it involves an inspection and investigation of a business entity before the buyer decides whether to consummate the acquisition. *Levin*, 887 So 2d at 501-502.

In this case, it is clear from the submitted evidence that the Borman defendants needed some form of due diligence to make their own investment decision regarding AAMC, regardless of whether they could find other investors, such as plaintiffs, to participate in the acquisition of AAMC by buying stock in WWMYS. Stormer's deposition testimony indicates that Eric Borman told him that "they were doing it and their accounting firm was doing it." Levy testified that he believed that Eric Borman told him that "they were running the due diligence process," but could not remember whether Eric Borman mentioned that an accounting firm was hired to do due diligence. While both Stormer and Levy also testified regarding their expectations for a proper due diligence analysis, the matter before us does not involve a duty imposed on any defendant to perform due diligence for the benefit of any plaintiff, but rather a claim that Eric Borman made an untrue statement of material fact regarding the performance of due diligence. The information provided to plaintiffs in the executive summary and forecasted financial statements, which were prepared by an accounting firm, would have alerted a reasonable investor that there was no claim by any defendant that an independent verification had been made of information used to prepare forecasts. It made each potential investor responsible for his or her own evaluation of risks, and urged potential investors to obtain any information from the "Holding Company," which they deemed material to the investment decision.

Viewing in a light most favorable to plaintiffs the cautionary statements and the accounting firm's disclosure that it had not verified financial information, reasonable minds could not differ in concluding that a reasonable investor would not be swayed to purchase stock by a mere statement that due diligence was being performed. Considering the total mix of available information and plaintiffs' failure to show by substantively admissible evidence that Eric Borman made misrepresentations regarding the extent of the due diligence investigation, the trial court did not err in determining that the alleged misrepresentations concerning the performance of due diligence were immaterial as a matter of law.

Plaintiffs also argue that they should have been allowed to pursue a claim under MCL 451.810(a)(2) on the ground that Eric Borman made a false written statement that Paul Borman would not receive a $300,000 consulting fee unless and until certain profitability and debt conditions were satisfied. We disagree. According to the executive summary that accompanied the subscription agreement signed by Levy, Paul Borman was to be engaged as a consultant by the operating company for an annual fee of $300,000. The evidence also indicates that Eric Borman and Levy agreed – pursuant to an exchange of emails that took place after Levy signed his investor subscription agreement, but before the completion of the transaction -- that the consulting agreement would be modified to address certain profitability and debt concerns. Eric Borman wrote on December 20, 2005, "[w]e will work out language that everyone is

comfortable with. The consulting agreement does not need to be executed before or at the closing. I have too much on my plate to add it at this time." Levy replied, "That will be fine. We can work the language out post-closing."

Future promises are generally contractual in nature. *Hi-Way Motor Co v Int'l Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976). Because the evidence establishes that Eric Borman's statements were promissory in nature, plaintiffs have not established that they were actionable under MCL 451.810(a)(2).

Plaintiffs also argue that they should have been allowed to pursue a claim under MCL 451.810(a)(2) based on a false written statement that there would be no salary increases for employees. According to the December 19, 2005, "letter of understanding" email that is the basis for plaintiffs' argument, Eric Borman wrote only that "[a]mendments will be made to the agreements to implement a concept of 'reasonable compensation' to all of AAM employee's [sic]." While the trial court disposed of this claim by finding that the alleged misrepresentation was not material in light of evidence that there were only minimal raises in 2006, rather than the promissory nature of the evidence, considering that plaintiffs did not produce evidence that the alleged "no salary increases" statement was made, we find no basis for disturbing the trial court's decision.

Lastly, considering the promissory nature of the "merger fee" payable to members of the Borman family, plaintiffs' have not established any statement regarding the "merger fee" that was actionable under MCL 451.810(a)(2).

In sum, we affirm the trial court's grant of defendants' second motion for summary disposition with respect to plaintiffs' claims under MCL 451.810(a)(2) because plaintiffs failed to establish a genuine issue of material fact regarding whether there were material untrue statements or misleading omissions. Because defendants were entitled to summary disposition on this basis, it is unnecessary to consider plaintiffs' argument concerning whether defendants could satisfy their burden under MCL 451.810(a)(2) of showing that "he or she did not know, and in the exercise of reasonable care could not have known, of the untruth or omission."

It is also unnecessary to consider plaintiffs' argument that the trial court improperly engrafted an element of reliance onto MCL 451.810(a)(2) when evaluating the claims of plaintiff's Klein and Berman. Nonetheless, we note that plaintiffs have misconstrued the trial court's decision, inasmuch as the trial court determined that a plaintiff's actual reliance on a misrepresentation is not an element of a claim for rescission under this statutory provision. Rather, the trial court determined that the individual claims of Klein and Berman failed because there was no evidence that any misrepresentations were made to them by defendants. Whether a material untrue statement or misleading omission was made in connection with the sale of a security presents a distinct question from whether the untrue statement or misleading omission is attributed to the seller and whether it was communicated, directly or indirectly, to an investor seeking a civil remedy pursuant to MCL 451.810(a)(2). See *Janus Capital Group, Inc v First Derivative Traders*, ___ US ___; 131 S Ct 2296; 180 L Ed 2d 166 (2011) (addressing a claim under 17 CFR 240.10b.5(b) [Securities and Exchange Commission Rule 10.5(b)]). Because Klein and Berman have failed to establish any actionable untrue statement or misleading omission attributable to defendants that was communicated to them, directly or indirectly, they

have not established any basis for disturbing the trial court's decision granting summary disposition.

VI. DEFENSES

Plaintiffs also argue that the trial court incorrectly applied the doctrines of *in pari delicto* and estoppel when dismissing their claims under MCL 451.810 and that, in doing so, improperly engrafted a form of reliance onto MCL 451.810. Again, plaintiffs have misconstrued the trial court's decision. The trial court determined that genuine issues of material fact existed with respect to the availability of the estoppel and *in pari delicto* defenses to Levy's claim under the antifraud provision in MCL 451.810(a)(2) and, in any event, that the availability of either defense was moot in light of its determination that defendants did not violate the Uniform Securities Act. This Court generally does not decide moot issues. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). Because we agree with the trial court's determination that the availability of the defenses to Levy's claim for rescission is moot, we decline to further address this argument on appeal.

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering