At an IAS Term, Part Comm-1 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of July, 2011.

P R E S E N T:
HON. CAROLYN E. DEMAREST,
Justice.

- -X

LAWRENCE A. OBSTFELD and
MORNINGSIDE CONSULTING GROUP, INC.,
d/b/a MORNINGSIDE CAPITAL GROUP

Plaintiffs,

- against -

THERMO NITON ANALYZERS LLC and
THERMO FISHER SCIENTIFIC INC.

Defendants.

- -X

DECISION and ORDER
Index No.: 500152/2009

The following papers numbered 1 to 7 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	
Other Papers (Memoranda of Law)	2, 5-7

Plaintiffs/counterclaim-defendants move for an order striking the affirmative defenses and dismissing the counterclaims set forth in defendants' answer. Plaintiff Morningside Consulting Group, Inc. ("MCGI), doing business as Morningside Capital Group ("Morningside"), further moves for partial summary judgment in its favor against the defendants as to the issue of liability on the third and fourth causes of action.

BACKGROUND

Plaintiff Lawrence A. Obstfeld is an officer of plaintiff MCGI, a Delaware corporation doing business as Morningside. This contract dispute arises out of a letter, dated December 3, 2001, from Morningside to Henry "Hal" Grodzins, CEO of Niton Corporation at the time, and later amended by a second letter, dated September 6, 2002,[1] written by Obstfeld and accepted by Niton LLC,[2] whereby Niton engaged Morningside "on an exclusive basis as a financial advisor" (Ex. 2 to Obstfeld Aff.). Morningside agreed to seek "strategic relationships for Niton" which "may involve investments by or mergers/acquisitions with companies that Niton may already be doing business with. Should Niton agree to such investments or merger/acquisition, [Morningside] will receive its compensation" (Ex. 3 to Obstfeld Aff.). The Letter Agreement provided that Niton was required to compensate plaintiff Morningside, pursuant to a formula set forth therein, on a transactional basis. The December 3, 2001 letter (Ex. 2 to Obstfeld Aff.) read:

> "It is understood that [Morningside] is acting as a finder only, and shall have no authority to enter into any commitments on Niton's behalf, or to negotiate the terms of financing, or to hold any funds or securities as an escrow in connection with financing . . . It is understood that [Morningside] is not a broker/dealer, and for certain transactions will utilize its relationship with Magellan Securities, Inc. or other [*sic*] mutually agreeable broker/dealer."

[1]The two letters, dated December 3, 2001and September 6, 2002, are collectively referred to herein as the "Letter Agreement." Neither letter identifies plaintiff MCGI as a contracting party; both letters are written on Morningside's letterhead. The December 3, 2001 letter is executed by Obstfeld as the "Managing Partner" of Morningside, identified as a "Delaware Corporation." Hal Grodzins executed the letter in his capacity as the CEO and President of Niton Corporation. The September 6, 2002 letter, although written on Morningside's letterhead, is executed by Obstfeld without reference to his title and agreed to and accepted by Grodzins in his capacity as the CEO of Niton LLC.

[2]Niton Corporation and Niton LLC are collectively referred to herein as Niton. Plaintiffs allege that Niton LLC was established subsequent to the December 3, 2001 letter and that Niton Corporation and Niton LLC ultimately merged.

Plaintiffs claim that on or about March of 2003, Niton received more than $2 million through the sale of securities (the "First Round Financing").[3] As compensation for the First Round Financing, plaintiffs allege that Niton made a cash payment and distributed warrants (the "First Round Warrants") to Magellan Securities, Inc. ("Magellan"), the registered broker/dealer mentioned in the December 3, 2001 letter, and to Ameriprop., Inc., another registered broker/dealer, each of which, in turn compensated Obstfeld as a registered representative. Plaintiffs further allege that Niton also distributed the First Round Warrants to certain individuals, including Obstfeld (Complaint ¶¶ 3-5). The Letter Agreement provides that Niton pay Morningside a "success fee," comprised of a combination of cash and warrants, but plaintiffs allege that Morningside never received or realized any compensation for securities sold in the First Round Financing or for any services rendered by broker/dealers.

In a letter dated June 6, 2003, Richard Van Wert, Esq., on behalf of Niton LLC, informed plaintiffs "formally of the decision of Niton LLC not to continue to work with Morningside any more under the letter agreement dated December 3, 2001, as revised by the letter agreement dated September 6, 2002" (Ex. 4 to Obstfeld Aff.). The letter further stated:

> Niton asserts that Morningside has breached its obligations under the [Letter Agreement] . . . and Niton formally repudiates any ongoing obligations under that agreement, reserving all of its rights against Morningside for the damages caused by Morningside's actions and unfulfilled promises under the agreement. Although the two letters comprising the agreement (which letters I understand Morningside authored) are cloudy (at best) on termination, this letter will serve as formal notice from Niton of termination, to become effective at the earliest possible date, if for any reason Niton were determined not to be entitled to

[3] Plaintiffs allege that Niton sold Senior Subordinated Notes and Class A Preferred Member Interests to raise capital.

> terminate the relationship immediately based on Morningside's breach. *Id.*

In his affidavit, Obstfeld denies the Letter Agreement was properly terminated pursuant to its terms and contends that Morningside rejected and Niton subsequently rescinded the termination by permitting Morningside to contact General Electric as a potential acquirer of Niton.

Plaintiffs allege that, on or about March 29, 2005, Thermo Electron Corporation, the predecessor of Thermo Fisher Scientific Inc. ("Thermo Fisher"),[4] acquired Niton by purchasing the member interests of Niton LLC, including the interests of those possessing First Round Warrants, for more than $40 million (the "Acquisition"). Niton was subsequently renamed Thermo Niton Analyzers LLC ("Thermo Niton"), and became a subsidiary of Thermo Fisher. Plaintiffs allege that Obstfeld was not fully compensated for the First Round Warrants he owned, despite his issuing multiple demands from defendants for payment. Plaintiffs further contend that defendants have not paid Morningside any compensation relating to the Acquisition, as required by the Letter Agreement.

On June 9, 2009, plaintiffs commenced this action by filing a summons with notice. Service was effected upon the defendants on or about October 7, 2009, who then served a demand for complaint on October 27, 2009. Plaintiffs served their complaint on November 13, 2009, alleging four causes of action. The first and second causes of action, brought by Obstfeld against the defendants, are for conversion and unjust enrichment. Plaintiffs allege that, upon the purchase of member interests which effected the 2005 Acquisition of Niton by Thermo, defendants withheld payment from Obstfeld for the First Round Warrants and that Thermo

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[4] Thermo Fisher is used throughout this decision to refer both to Thermo Electron Corporation and Thermo Fisher.

Fisher, in particular, knowingly withheld such payments "to extort a release from [Morningside] concerning the Acquisition Compensation" (Complaint ¶ 11).[5] The third and fourth causes of action, brought by Morningside against defendants, are breach of contract claims for denying Morningside its contractually-owed compensation, as required under the Letter Agreement. In response, defendants moved to dismiss the action, arguing, inter alia, that a prior action was pending in Massachusetts.[6]

On April 13, 2010, this court denied defendants' motion and directed defendants to serve and file their answer, which they did on or about June 23, 2010, asserting fifteen affirmative defenses and two counterclaims. Defendants/counterclaim-plaintiffs then moved on January 25, 2011 for a default judgment against plaintiffs/counterclaim-defendants for their failure to reply to defendants' counterclaims. Plaintiffs responded with the instant motion seeking an order striking the affirmative defenses, dismissing the counterclaims and granting partial summary judgment as to liability on the third and fourth causes of action in the complaint. On April 13, 2011, after entertaining oral arguments from both sides, this court denied defendants' motion for default judgment but reserved decision on plaintiffs' motion, which is addressed herein.

DISCUSSION

Affirmative Defenses

CPLR 3211 (b) permits a party to move to dismiss a defense "on the ground that a defense is not stated or has no merit." "When moving to dismiss or strike an affirmative defense,

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[5] According to the complaint, shortly after commencement of the action, Thermo Fisher made payments for some of the First Round Warrants.

[6] The Massachusetts action, brought by Thermo Niton and Thermo Fisher in Massachusetts state court, was removed to federal court, transferred to the Eastern District of New York, and voluntarily dismissed on September 14, 2010. To the court's knowledge, no other related actions exist.

the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Galasso, Langione & Botter, LLP v Liotti*, 81 AD3d 880, 882 [2d Dept 2011] quoting *Greco v Christoffersen*, 70 AD3d 769, 771 [2d Dept 2010]). When determining a motion to dismiss an affirmative defense, "'the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference'" (*id.* quoting *Fireman's Fund Ins. Co. v Farrell,* 57 AD3d 721, 723, [2d Dept 2008]; *see also Courthouse Corporate Ctr. LLC v. Schulman,* 74 AD3d 725, 727 [2d Dept 2010]). If the court finds that "'there is any doubt as to the availability of a defense, it should not be dismissed'" (*id.* quoting *Federici v Metropolis Night Club, Inc*., 48 AD3d 741, 743 [2d Dept 2008]). CPLR 3018 (b) defines affirmative defenses as "matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading" and includes a list of potential affirmative defenses which is not intended to be exhaustive.

Plaintiffs move to strike the first affirmative defense, that the complaint fails, in whole or in part, to state a claim for which relief may be granted, contending that the failure to state a cause of action is not an affirmative defense but grounds for a CPLR 3211 (a) (7) motion to dismiss. Plaintiffs also claim, in their reply, that defendants have failed to adequately plead this affirmative defense by raising an issue of fact in support of their affirmative defense.

The Appellate Division, Second Department has held that the failure to state a cause of action can be pleaded as an affirmative defense, thus abrogating its previous decisions to the contrary (*see Butler v Catinella*, 58 AD3d 145, 150 [2d Dept 2008] (overruling *Glenesk v Guidance Realty Corp.*, 36 AD2d 852 [2d Dept 1971] and *Bentivegna v Meenan Oil Co.*, Inc., 126 AD2d 506 [2d Dept 1987], which had both previously held that the failure to state a cause of action cannot be interposed as a defense in the answer)). Moreover, in the instant action, it is premature to dismiss this defense on the merits prior to the completion of discovery. At this stage in the litigation, defendants have sufficiently raised multiple issues of fact. Because plaintiffs have failed to demonstrate that defendants' first affirmative defense is without merit, their motion to strike the defense is denied.

Plaintiffs move to strike the second affirmative defense, that "[p]laintiffs' claims are barred, in whole or in part, by the doctrines of estoppel, waiver, laches and/or unclean hands" (Ex. D to Shapiro Aff.). Plaintiffs claim this affirmative defense is a conclusion of law unsupported by fact and improper as equitable defenses should not be interposed in an action at law. In opposition, defendants claim that the action is one of both law and equity, and their equitable defenses are proper because they have interposed a counterclaim seeking the equitable remedy of rescission. In an action at law seeking monetary damages, defendants' equitable defenses are not applicable (*Greco v Christoffersen*, 70 AD3d at 771 citing *Manshion Joho Center Co., Ltd. v Manshion Joho Center, Inc.*, 24 AD3d 189, 190 [1st Dept 2005]). While defendants are not entitled to interpose equitable defenses, which were brought in defense of plaintiffs' claims for monetary damages, simply because they have interposed independent equitable counterclaims, plaintiffs have not brought only an action at law. Rather, plaintiffs have also asserted an equitable claim of unjust enrichment, thus permitting defendants to assert equitable defenses against the claim (*Melius v Breslin,* 46 AD3d 524, 527 [2d Dept 2007]). To the extent that defendants' equitable defenses apply to plaintiff's second cause of action for unjust enrichment, plaintiffs' motion to strike defendants' second affirmative defense is denied.

Plaintiffs move to strike the third and fourth affirmative defenses, claiming they are conclusions of law unsupported by fact. Defendants' third affirmative defense asserts that plaintiffs' claims are barred, in whole or in part, by documentary evidence, and defendants' fourth affirmative defense asserts that plaintiffs' claims are barred by the terms of the agreement upon which they sue. According to the affidavit of Grodzins, the June 6, 2003 letter should be viewed as documentary evidence that the defendants terminated their agreement with plaintiff. Moreover, defendants claim that they have complied with any termination provisions governing the Letter Agreement. Although it is premature at this stage in the litigation to determine whether these affirmative defenses are valid, they have been adequately pleaded by defendants, and plaintiffs have failed to demonstrate that the defenses are entirely without merit. Plaintiffs' motion to strike the third and fourth affirmative defenses is denied.

Plaintiffs move to strike the fifth affirmative defense, that no attorneys' fees are recoverable at common law or under any applicable statute or contract, claiming that documentary evidence disproves the defense. Plaintiffs contend that attorneys' fees are recoverable by the terms of the Letter Agreement, specifically by Exhibit A to the September 6, 2002 letter, which includes an indemnification provision whereby Thermo Niton promised to indemnify Morningside and its affiliates "for any legal or other expenses incurred by them . . . in connection with investigating, preparing or defending any such losses, claims, damages, or liabilities or any action in respect thereof, however, Niton shall not be liable . . . in respect of any liability . . . to have resulted primarily from [Morningside's] gross negligence or willful misconduct in the performance of its duties under this [Letter Agreement]" (Ex. 3 to Obstfeld Aff.). Defendants, however, argue that the indemnification provision is limited to Morningside's preparation of Niton's business plans and that "such losses, claims, damages, or liabilities" refer back to those "which are *asserted against* said Indemnified Party [Morningside], directly or indirectly resulting from [Morningside's] acting on behalf of Niton under the [Letter Agreement] (emphasis added)" (*id.*). Thus, defendants argue, the indemnification provision may only cover attorneys' fees and costs incurred if Morningside is a defendant as a direct result of its performance of the Letter Agreement and does not apply if Morningside is a plaintiff. Defendants have adequately pleaded their fifth affirmative defense by providing an alternate interpretation of the indemnity provision, and plaintiffs have not demonstrated that such defense is without merit. Plaintiffs' motion to strike the fifth affirmative defense is denied.

Plaintiffs move to strike the sixth affirmative defense, that plaintiffs' injuries were not caused by defendants but by persons other than the defendants, claiming it is a conclusion of law unsupported by fact. In reply, defendants have waived their sixth affirmative defense but have reserved the right to reassert it in the event that discovery reveals facts supporting such a defense. Accordingly, plaintiffs' motion to strike the sixth affirmative defense is granted, and the defense has been stricken without prejudice.

Plaintiffs also move to strike the seventh affirmative defense, that all or part of plaintiffs' claims are barred by the statute of frauds, claiming the defense has been disproved by documentary evidence. In the complaint, plaintiffs' claims arise from the Letter Agreement, comprising two written and executed letters. Defendants claim that Morningside or Obstfeld may be relying on some sort of alleged oral promise by Niton, apart from the written contractual provisions of the Letter Agreement. Plaintiffs explicitly contend that their claims arise out of the Letter Agreement and that they do not allege the existence of any oral promises. In light, however, of Obstfeld's equitable causes of action, which do not appear to derive from the Letter Agreement, it would be inappropriate to preemptively dismiss the seventh affirmative defense.

Plaintiffs move to strike the eighth affirmative defense, that any of defendants' alleged breaches are excused by plaintiffs' prior material breaches, claiming that defendants' conclusory defense is unsupported by facts. Plaintiffs claim that defendants have not alleged, in either their affirmative defenses or their counterclaims, that plaintiffs breached the Letter Agreement. Defendants, however, have cited a breach of the Letter Agreement in the June 6, 2003 letter, attached to the affidavit of Grodzins, which explicitly asserts that Morningside breached its obligations under the Letter Agreement (Ex. 3 to Grodzins Aff.).[7] The annexed letter is sufficient to find that defendants' eighth affirmative defense has some factual basis. Accordingly, plaintiffs' motion to strike this defense is denied.

Plaintiffs move to strike the ninth affirmative defense, that the Letter Agreement is "void *ab initio* and should be rescinded because at all times material, [Morningside] was acting as an unregistered broker/dealer with respect to its solicitations on behalf of Niton in violation of Section 15 (a) of the Securities and Exchange Act of 1934" (Ex. D to Shapiro Aff.). Plaintiffs claim that this affirmative defense is without merit because (1) Section 15 (a) of the Securities and Exchange Act of 1934 (the "34 Act") does not provide for the remedy of rescission and (2) the defense is barred by a three-year statute of limitations. Defendants reply that rescission is permitted under Section 29 (b) of the 34 Act, the three-year statute of limitations only applies to violations of 15 USC § 78 (o) (c) (1) and (2) of the 34 Act and not to violations of Section 15 (a) (codified as 15 USC § 78 (o) (a)) and, in the alternative, the statute of limitations applies only to

[7] This letter was also annexed as Exhibit 4 to plaintiff Obstfeld's Affidavit.

actions and not to defenses.

Section 15 (a) of the 34 Act was created to penalize those who sold securities without registering with the SEC (*see S.E.C. v Follick*, 2002 WL 31833868 at *5 [SD NY 2002]). Section 29 (b) of the 34 Act (codified as 15 USC § 78cc (b)) provides a remedy of rescission for violations of the 34 Act as follows:

> "Every contract made in violation of any provision of this chapter or any rule or regulation thereunder, and every contract . . . heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this chapter or any rule or regulation thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract . . . *Provided,* (A) That no contract shall be void by reason of this subsection because of any violation of any rule or regulation prescribed pursuant to paragraph (3) of subsection (c) of section 78o of this title, and (B) that no contract shall be deemed to be void by reason of this subsection in any action maintained in reliance upon this subsection, by any person to or for whom any broker or dealer sells, or from or for whom any broker or dealer purchases, a security in violation of any rule or regulation prescribed pursuant to paragraph (1) or (2) of subsection (c) of section 78o of this title, unless such action is brought within one year after the discovery that such sale or purchase involves such violation and within three years after such violation. "

The Appellate Division, First Department has required the defense of illegality based on the failure to register as a broker/dealer, in violation of Section 15 (a) of the 34 Act (15 USC § 78o (a) (1)), the defense asserted here, to be raised within three years after the violation or one year after its discovery, pursuant to Section 29 of the Act (15 USC § 78cc (b)) and has interpreted this time limit "'as a matter of substance, limiting the right as well as the remedy,' and not as a Statute of Limitations'" (*Carter Fin. Corp. v Atl. Med. Mgt., LLC*, 262 AD2d 178 [1st Dept 1999] quoting *Romano v Romano*, 19 NY2d 444, 448 [1967], *revd* on other grounds; *contra, Lawrence v Richman Group of Connecticut, LLC,* 407 FSupp2d 385, 389 [D Conn 2005] (noting that the *Carter* court erroneously interpreted 15 USC § 78cc (b), which only imposes a statute of limitations on violations of 15 USC § 78o (c) (1) and (2)).

In the instant action, plaintiffs seek to recover a fee, pursuant to the terms of the Letter Agreement, dated December 3, 2001 and amended September 6, 2002, based upon the Acquisition which took place in March of 2005. Defendants have sought to interpose a counterclaim for money paid under such Letter Agreement for transactions in 2003 based upon the claim that the Letter Agreement was "illegal" under Section 15 (a) of the 34 Act. Although defendants contend that the Letter Agreement was terminated on June 6, 2003, assuming the Letter Agreement was in effect in March of 2005, the *Carter* decision requires defendants to have interposed their defense and counterclaim no later than March of 2008, before the action was even commenced. As the answer containing the subject allegations was not filed until June 23, 2010, both the defense and claim are time-barred pursuant to 15 USC § 78cc (b). It is further noted, as plaintiffs argue, the Letter Agreement unequivocally states that plaintiffs are not registered broker-dealers, thus placing defendants on notice of the issue in 2001. Under 15 USC § 78cc (b), the defense and counterclaim would have to have been raised no later than December 2, 2002.

Defendants insist that the counterclaim is timely, pursuant to CPLR 203 (d), but the *Carter* court has specifically rejected the argument, finding that an untimely illegality claim could not be interposed because "CPLR 203 (d), which deals only with Statutes of Limitations and not matters of substance, is inapplicable" (*Carter* at 178). Thus, the application of CPLR 203

(d) does not save defendants since the action was not commenced until after the statutory period had passed. Defendants' remaining arguments, that the remedy of rescission applies only to actions, not defenses, and that the remedy does not apply to a violation of Section 15 (a) of the Act, were also considered in *Carter* and unequivocally rejected.[8]

This court's review of the language of 15 USC § 78cc (b) does suggest that the time limits set by the statute only apply to violations of 15 USC § 78o (c) (1) and (2) and to actions, not defenses.[9] However, this court is constrained to follow the First Department's ruling, at least until the Appellate Division, Second Department, or the Court of Appeals rules otherwise on the matter (*see Mohen v Stepanov,* 59 AD3d 502, 504 [2d Dept 2009], citing *Mountain View Coach Lines, Inc. v Storms*, 102 AD2d 663, 664 [2d Dept 1984]). Thus, in accordance with the precedent established in *Carter,* plaintiffs' motion to strike defendants' ninth affirmative defense is granted.

Plaintiffs move to strike the tenth affirmative defense, that, "[a]ny obligations owed by Thermo Niton under its agreement with Morningside ceased as of June 6, 2003." The letter dated June 6, 2003 informed Morningside "formally of the decision of Niton LLC not to continue to work with Morningside any more under the letter agreement" (Ex. 4 to Obstfeld Aff.). Plaintiffs

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[8] As for whether a private right of action exists, the Second Circuit has not addressed whether a violation of Section 15 (a) (1) warrants the remedy of rescission (*id.* at *6; *Boguslavsky v Kaplan,* 159 F3d 715, 722 fn. 6 [2d Cir 1998] (observing it had "yet to address whether an alleged violation of § 15 (a) (1) [of the 34 Act] can form the predicate for a rescission action under § 29 (b) [of the 34 Act]" but acknowledging that other circuits had recognized the remedy) (*see Cornhusker Energy Lexington, LLC v Prospect St. Ventures,* 2006 WL 2620985 at *7 [D Neb 20016]; *Regional Properties, Inc. v Fin. & Real Estate Consulting Co.*, 752 F2d 178, 182 [5th Cir 1985]; *Western Fed. Corp. v Erickson*, 739 F2d 1439, 1443-44 n. 5 [9th Cir 1984])).

[9] The *Lawrenc*e court opined that interpreting otherwise "would lead to absurd results in that an unregistered broker could simply wait to file suit on an illegal contract until after the expiration of the Section 78cc statute of limitations and thus preclude a defendant from raising the defense and effectively allow the broker to circumvent the federal registration requirements" (*Lawrence,* 407 FSupp2d at 389).

contend the defense should be stricken because it is conclusory, barred by the six-year statute of limitations, and barred by documentary evidence.

This action was commenced with the filing of a summons and notice on June 9, 2009. Although the complaint was not filed until November 13, 2009, pursuant to CPLR 203 (c), plaintiffs' claims against the defendant are considered interposed at the time the action was commenced, on June 9, 2009. CPLR 203 (d) provides:

> A defense or counterclaim is interposed when a pleading containing it is served. A defense or counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed, except that if the defense or counterclaim arose from the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed.

Plaintiffs argue that CPLR 203 (d) is inapplicable in this action because plaintiffs' claims arise from the Acquisition, which took place in March of 2005, and defendants' affirmative defense arises from the alleged termination of the Letter Agreement in June of 2003. In support of their argument, plaintiffs cite both *Haller v 360 Riverside Owners Corp.,* 273 AD2d 52, 53 [1st Dept 2000] and *SCM Corp. v Fisher Park Lane Co.,* 40 NY2d 788, 791-92 [1976] in support of their argument.

Haller v 360 Riverside Owners Corp. is inapposite to this action. In *Haller,* plaintiff attempted to revive a time-barred claim with CPLR 203 (d), but the Appellate Division ruled that, because plaintiff's claim was not interposed as either a counterclaim or a defense, CPLR 203 (d) did not apply. Here, defendants have interposed both affirmative defenses and counterclaims, raising the claim that the Agreement had been terminated. Plaintiffs' reliance upon *SCM Corp. v Fisher Park Lane Co.* is similarly unavailing. In that case, a divided Court of Appeals rejected the defendant's attempt to interpose at arbitration its request for reformation of the contract upon which plaintiff based its claims, finding that a claim relating to the enforcement of the lease and a counterclaim seeking reformation of the lease were sufficiently distinct and did not arise from the same series of transactions and occurrences for statute of limitations purposes under CPLR 203 (c) (now 203 (d)). Defendants do not, by their tenth affirmative defense, seek affirmative relief, but merely challenge the premise of plaintiffs' claim based upon the Letter Agreement. Defendants allege that the Letter Agreement was terminated by the June 6, 2003 letter. Plaintiffs allege that the termination was rejected, and the Letter Agreement was still enforceable at the time of the Acquisition. Because both plaintiffs' claims and defendants' tenth affirmative defense arise out of the enforceability of the Letter Agreement, defendants' defense is not time-barred. Plaintiffs' remaining contentions, that the tenth affirmative defense is conclusory and unsupported by documentary evidence, are belied by the June 6, 2003 letter, which defendants have annexed. Defendants have adequately pleaded that Morningside was terminated on June 6, 2003. When and whether Morningside was effectively terminated presents questions of fact requiring further discovery. Plaintiffs' motion to dismiss the tenth affirmative defense is denied.

Plaintiffs move to strike the twelfth affirmative defense, that the complaint is barred by the statute of limitations, claiming it is a conclusion of law unsupported by fact. Defendants argue that, pursuant to CPLR 213 (2), the statute of limitations for breach of contract claims is six years, thus barring plaintiffs' claims, brought June 9, 2009, as the Letter Agreement was terminated on June 6, 2003. In response, plaintiffs concede that the six-year statute of limitations applies, but contend that the Letter Agreement was not terminated in 2003 and that the breach did not occur until 2005, when Niton failed to pay Morningside its rightfully owed compensation for the Acquisition. Thus, according to plaintiffs, the action was commenced well within the six-year statute of limitations. However, as this court has previously found, whether the Letter Agreement was terminated or valid and enforceable as of 2005, when the Acquisition took place, raises an issue of fact which can not be determined at this time. Because plaintiffs have failed to demonstrate that defendants' affirmative defense lacks merit, plaintiffs' motion to strike the twelfth affirmative defense is denied.

Plaintiffs move to strike the eleventh, thirteenth, fourteenth and fifteenth affirmative defenses as previously litigated and thus barred by the doctrine of res judicata. The eleventh affirmative defense asserts that a prior action is pending in Massachusetts; the thirteenth affirmative defense asserts that the court lacks subject matter jurisdiction to hear the plaintiffs' claims because Morningside is not registered to do business in the State of New York; the fourteenth affirmative defense asserts that Morningside has not paid its applicable taxes for doing business in New York; and the fifteenth affirmative defense asserts that Morningside was not a corporation in good standing with the Delaware Secretary of State at the time the action was commenced. In their memorandum of law, defendants concede that these affirmative defenses are no longer applicable and state that they will not pursue them. Accordingly, plaintiffs' motion to strike these affirmative defenses is granted.

Counterclaims

Plaintiffs also move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the two counterclaims asserted by defendants. CPLR 3211 (a) (1) provides for dismissal where "a defense is founded upon documentary evidence" if the documentary evidence "conclusively establishes a defense to the asserted claims as a matter of law" (*see Leon v Martinez,* 84 NY2d 83, 87 [1994]) and "resolves all factual issues as a matter of law, and conclusively disposes of the [defendant's] claim" (*Fortis Fin. Serv., LLC v Fimat Futures USA, Inc.,* 290 AD2d 383, 383 [1st Dept 2002]). CPLR 3211 (a) (7), provides for dismissal if the pleading fails to state a cause of action. When determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must accept the facts alleged by the plaintiff as true and must liberally construe the complaint, according it the benefit of every possible favorable inference (*Campaign for Fiscal Equity, Inc. v State of New York,* 86 NY2d 307, 318 [1995]; *see also Sokoloff v Harriman Estates Dev. Corp.,* 96 NY2d 409, 414 [2001]). Ultimately, the role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon,* 84 NY2d 83 at 87).

In their first counterclaim, which largely mirrors defendants' ninth affirmative defense, defendants seek rescission of the Letter Agreement as an illegal contract and recovery of all money paid thereunder, based upon Morningside's violation of Section 15 (a) of the 34 Act in failing to register as a broker/dealer. The December 3, 2001 Letter Agreement explicitly states that Morningside was to act solely as a "finder" and not as a broker/dealer and would "utilize its relationship with Magellan Securities, Inc. or other mutually agreeable broker/dealer." Notwithstanding this language, defendants contend that Morningside acted as a broker/dealer by agreeing to procure for Niton "a joint venture partner, a strategic investor, an investor and/or some other business combination" (Ex. 4 to Shapiro Aff., Defendants' Counterclaims, ¶ 12). Defendants also allege that Morningside sought "investments" and "mergers/acquisitions" for Niton (*id.*, ¶ 15). The 34 Act defines "broker" as "any person engaged in the business of effecting transactions in securities for the account of others" 15 USC § 78c (a) (4) (A). "In determining whether a particular individual or entity falls within this definition, courts consider whether the individual may be 'characterized by a certain regularity of participation in securities transactions at key points in the chain of distribution'" (*S.E.C. v Martino,* 255 FSupp2d 268, 283 [SD NY 2003] quoting *S.E.C. v Hansen*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (SD NY 1984).

Plaintiffs argue that the first counterclaim is time-barred, fails to state a cause of action and that no private right of action exists under Section 29 (b) of the 1934 Act for Section 15 (a) violations. Plaintiffs also assert that the equitable defenses of estoppel and laches preclude relief because defendants benefitted from the contract, realizing more than $2 million in new capital from the First Round Financing.

Upon the authority of *Carter Fin. Corp.,* 262 AD2d 178, this court has already held that violations of Section 15 (a) of the Act (15 USC § 78o (a) (1)) must be raised within three years of the violation or one year after its discovery, pursuant to 15 USC § 78cc (b), and that the time limit is a matter of substance. Because defendants failed to assert their claim until June of 2010, defendants' first counterclaim is dismissed on the same basis that defendants' ninth affirmative defense has been stricken.

Plaintiffs' remaining arguments, that defendants fail to adequately plead a cause of action and that no private right of action exists need not be addressed. However, it bears mentioning that even if this counterclaim were not time-barred, defendants have not adequately pleaded a cause of action sufficient to withstand a CPLR 3211 (a) (7) motion to dismiss. "'To establish a violation of Section 29 (b), the plaintiffs must show that (1) the contract involved a prohibited transaction, (2) [they are] in contractual privity with the defendant[s], and (3) [they are] in the class of persons the Act was designed to protect'" (*Frati v Saltzstein*, 2011 WL 1002417 at *5 [SD NY 2011] quoting *Pompano-Windy City Partners, Ltd. v Bear Stearns & Co., Inc.*, 794 Fsupp 1265, 1288 [SD NY 1992]). Moreover, "'under § 29(b) of the Exchange Act, only unlawful contracts may be rescinded, not unlawful transactions made pursuant to lawful contracts" (*id.*).

Here, defendants have alleged that (1) the contract is unlawful and (2) they, as successor entities, are in contractual privity with plaintiff Morningside, but they have not alleged the third element of the claim, that they are in the class of persons the provision was designed to protect. The Letter Agreement states that Morningside is not registered as a broker/dealer and identifies Magellan by name as a registered broker/dealer that may be retained should the need arise. Plaintiffs submitted an email communication between Obstfeld, Grodzins and Van Wert, Niton's former counsel, which appears to be dated on or about May of 2003,[10] indicating that Magellan, as well as another registered broker/dealer, Ameriprop, were, in fact, retained and paid by Niton, but may "transfer some or all of the warrants in connection with their own compensation arrangements with their agents, and if they determine that they are able to do so while complying with applicable securities regulations" (Ex. 5 to Obstfeld Aff.). Defendants do not dispute that they were aware, even prior to the execution of the Letter Agreement, that Morningside was not a registered broker/dealer. Because Niton had full information of Morningside's status at the time it executed the Letter Agreement, it is not entitled to bring this counterclaim now, as it has failed to allege any facts to support the suggestion that the 34 Act was designed to protect it from

[10] The annexed email is undated but references a prior email sent on May 12, 2003.

Morningside's failure to register as a broker/dealer.[11]

In their second counterclaim, defendants seek a declaratory judgment determining whether (a) Thermo Niton terminated the Letter Agreement; (b) Morningside failed to register as a broker/dealer with the United States Securities and Exchange Commission and New York State and (c) plaintiffs' claims are barred by the applicable statute of limitations. Plaintiffs argue that the counterclaim should be dismissed because it is barred by a six-year statute of limitations, it is disproved by documentary evidence and it fails to state a cause of action.

In their statute of limitations argument, plaintiffs contend, and defendants do not deny, that a six-year statute of limitations applies for declaratory judgment actions (*Stein v Garfield Regency Condominium,* 65 AD3d 1126 [2d Dept 2009]) and that the counterclaim is considered interposed on June 9, 2009, when this action was commenced. Because defendants claim that the Letter Agreement was terminated on June 6, 2003 by letter, plaintiffs argue that the claim is three days late and thus barred by the statute of limitations. However, as with the tenth affirmative defense, CPLR 203 (d) allows for the interposition of the claim because it arises out of the same transactions and occurrences from which the action arises. Accordingly, defendants' second counterclaim is not time-barred.

Plaintiffs also claim that the Letter Agreement and the June 6, 2003 letter conclusively establish that the purported termination could not have occurred on June 6, 2003, because the

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[11] Defendants rely upon an SEC No-Action letter that advised that a firm, similar in practice to Morningside, would be required to register as a broker-dealer pursuant to Section 15 (b) of the 34 Act. The firm performed similar work to Morningside and also informed its clients that it was not a registered broker-dealer. The language of the SEC No-Action letter is not, however, conclusive. In particular, the letter read, "[w]e express no view with respect to other questions HallCap's [the company in question] activities may raise, including the applicability of any other provision of the federal securities laws, any state law, or any self-regulatory organization" and urged the company to consult with private counsel (Hallmark Capital Corp., SEC No-Action Letter (Feb. 26, 2007), Ex. 5 to Shapiro Aff.).

letter reads, “this letter will serve as formal notice from Niton of termination, to become effective at the earliest possible date” (Ex. 4 to Obstfeld Aff.). The December 3, 2001 letter provided for termination upon sixty days notice by either party after August 1, 2002. The September 6, 2002 amendment does not expressly modify the termination term, but reads “ Morningside is hereby granted the exclusive right to act as financial advisor for Niton for the next two rounds of institutional fundraising financing following the present round, as well as for any investment or merger/acquisition transaction or IPO” (Ex. 3 to Obstfeld Aff.). Plaintiffs argue that the Letter Agreement remained terminable at will, subject to the sixty-day notice of termination set forth in the December 3, 2001 letter, while defendants argue that the September 6, 2002 letter modified the prior termination provision by making Morningside Niton’s “exclusive financial advisor” for the next two rounds of financing, precluding Niton from terminating the Agreement prior to the completion of those rounds. The documentary evidence is not conclusive.

Plaintiffs further argue that the second counterclaim fails to state a cause of action, claiming that Niton subsequently revoked the termination by directing Morningside to contact General Electric as a potential acquirer of Niton. Defendants, however, deny that Morningside assisted Niton in any way after the termination. These allegation raise questions of fact, but do not undermine defendants’ claim for relief in a declaratory judgment. Viewing the facts in the light most favorable to the defendant (*Campaign for Fiscal Equity, Inc. v State of New York,* 86 NY2d at 318), defendants have sufficiently raised a question of fact as to whether the Letter Agreement was terminated on June 6, 2003. Accordingly, although the substance of this counterclaim is clearly redundant of several of defendants’ affirmative defenses, plaintiffs’ motion to dismiss defendants’ second counterclaim is denied.

Summary Judgment

Plaintiffs move for partial summary judgment, pursuant to CPLR 3212, as to liability on the breach of contract claims set forth in the third and fourth causes of action. The “drastic remedy of summary judgment should be granted only if there are no material issues of fact” (*Dykeman v Heht*, 52 AD3d 767, 769 [2d Dept 2008]; *see also Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). Plaintiffs’ third and fourth causes of action allege breach of the Letter Agreement. The third cause of action claims that Morningside is entitled to an acquisition fee, and the fourth cause of action claims that Morningside is owed warrants, both pursuant to the formula set forth within the Letter Agreement. Neither of these claims can be determined on the merits at this time. Multiple issues of fact have been raised which preclude this court from deciding whether a valid and enforceable contract was in existence at the time of the Acquisition or whether the Letter Agreement was terminated by the June 6, 2003, letter and whether Morningside was involved with the 2005 Acquisition at all. Accordingly, plaintiffs’ motion for partial summary judgment is denied.

CONCLUSION

Plaintiffs’ motion to strike the first, second, third, fourth, fifth, seventh, eighth, tenth and twelfth affirmative defenses and to dismiss the second counterclaim is denied. Plaintiffs’ motion to strike the ninth, eleventh, thirteenth, fourteenth and fifteenth affirmative defenses and to dismiss the first counterclaim is granted. Plaintiffs’ motion to strike the sixth affirmative defense is granted without prejudice.

Plaintiffs' motion for partial summary judgment as to liability on the third and fourth causes of action of the complaint is denied.

This constitutes the decision, order, and judgment of the court.

EN T E R,

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Carolyn E. Demarest

J. S. C.