[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Helen E. Freedman Justice PART 39

Index Number : 603862/2005
ESBE HOLDINGS
vs
VANQUISH ACQUISITION PARTNERS
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

FILED
NOV 24 2006
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, It is ordered that ~~this~~ motion sequences 001 and 003 are consolidated for joint disposition and decided in accordance with accompanying memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: Nov 20, 2006

HED
Helen E. Freedman J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 39

- -X

ESBE HOLDINGS, INC., SHIP TRADING, S.A., SOPHLEX SHIP MANAGEMENT, INC., AMBASSADOR SERVICES, INC., TIMOTHY D. LEVENSALER, RANDALL L. MAY, JOHN M. BONNICI, and HASSAN A. JUMA,

Plaintiffs,

-against-

VANQUISH ACQUISITION PARTNERS, LLC, PHOENIX PARTNERS LLC, PHOENIX PARTNERS LP, PHOENIX ENTERPRISE HOLDINGS, INC., PHOENIX ENTERTAINMENT HOLDINGS, LLC, PHOENIX CRUISE LINES, INC., PHOENIX LEISURE HOLDINGS LLC, SOUTHEAST CRUISE HOLDINGS, LLC, JOSEPH DEL VALLE, MICHAEL H. CARSTENS, EDWARD MICHAEL GROWNEY, FOLEY & LARDNER LLP, KENNETH D. POLIN and DONNA DEL VALLE,

Defendants.

Index No. 603862/05

- -X

HELEN E. FREEDMAN, J.:

Motion sequence numbers 01 and 03 are consolidated for disposition.

In this action, various corporate and individual investors seek to recover approximately $3 million lost in commercial ventures including cruise lines and casinos. The Del Valle Defendants[1] move to dismiss the first through sixth causes of

[1] The "Del Valle Defendants" are all defendants except Foley & Lardner, LLP, Kenneth D. Polin and Donna Del Valle.

action of the First Amended Complaint[2], and all claims asserted therein against defendants Michael H. Carstens and Edward Michael Growney, for failure to state a claim, failure to plead fraud with particularity, and under the applicable statute of limitations (CPLR 3211[a][5] and [7], CPLR 3016[b]). The Foley Defendants[3] move to dismiss all claims against them for failure to state a claim and lack of particularity.

THE FIRST AMENDED COMPLAINT

The following statement of facts is a distillation of those alleged at substantially greater length in the First Amended Complaint and the supplemental affidavits of the parties. Between 1994 and 2002, plaintiffs[4] acquired shares, units or

---

[2] Plaintiffs served the First Amended Complaint on May 2, 2006, several weeks after they submitted their opposition to the motions to dismiss the original pleading and approximately a week before defendants reply papers were due. The amended pleading, is identical to the original one except for the elimination of a cause of action under the Florida Securities and Investor Protection Act and the consequent renumbering of the remaining causes of action. Except as otherwise noted, this decision refers to the claims as numbered in the First Amended Complaint, which shall be deemed the operative one.

[3] The "Foley Defendants" are Foley & Lardner LLP and Kenneth D. Polin.

[4] Plaintiffs are ESBE Holdings, Inc. ("ESBE"), Ship Trading, S.A. ("Ship Trading"), Sophlex Ship Management, Inc. ("Sophlex"), Ambassador Services, Inc. ("Ambassador"), Timothy D. Levensaler ("Levensaler"), Randall L. May ("May"), John M. Bonnici ("Bonnici") and Hassan A. Juma ("Juma").

other interests in Phoenix Partners LP ("Phoenix LP" or "LP") Phoenix Partners LLC ("Phoenix LLC"), Phoenix Tech, Inc. ("Tech"), Phoenix Cruise Lines, Inc. ("PCL"), Phoenix Hospitality Holdings ("PHH"), Moliflor, S.A. ("Moliflor"), Phoenix Enterprise Holdings, LLC ("PEH") and Southeast Cruise Holdings LLC ("SCH"). As detailed below, plaintiffs ultimately sustained combined losses of approximately $3,000,000. Plaintiffs claim that the various transactions were part of a larger "Ponzi" scheme whereby defendants oversold securities and sought to pay back earlier investors with funds secured from later ones.

Phoenix LP/Phoenix Tech Investment

Between 1994 and 1998, plaintiffs Juma, Bonnici, Ambassador and its principal May (collectively, the "LP Plaintiffs"), invested a total of approximately $1,220,000 in Phoenix LP pursuant to a written limited partnership agreement (the "Phoenix LP Agreement"). The Phoenix LP Agreement gave the investors the right to inspect LP's books and records, and required LP to provide unaudited quarterly reports and an annual information letter for tax reporting purposes. The Del Valle Individuals[5] allegedly represented that LP was a reputable banking firm engaged in acquisitions of middle market operating companies and other

[5] The "Del Valle Individuals" are defendants Joseph Del Valle, Carstens and Growney.

transactions, and that Del Valle, Carstens and Growney would run the company. They promised interest payments in the range of 30% the first year and 20% annually thereafter.

In June 1995, the Del Valle Defendants claimed that another company, Tech, was about to conclude a deal involving finger-imaging technology and acquire interests in related companies. Juma and Bonnici purchased a total of $175,000 in Tech stock. In mid-1996, the Del Valle Individuals announced a restructuring to be completed at the year's end which would give the partners an option to sell their interests in LP and other investments, including Tech. The restructuring did not occur.

In 1997, Del Valle advised Bonnici of another restructuring plan, which again proved unsuccessful. However, the Del Valle Individuals offered Bonnici and Juma the opportunity to "recapitalize" LP by purchasing two year convertible notes (the "Debt Notes") secured by stock in Worldwide Hospitality Group, Inc. ("WHG"), Club Cumayasa Resort ("CCR") and one or more cruise ships to be acquired. The Del Valle Defendants claimed that these assets would generate substantial income, and promised that Bonnici would receive a total of $795,000 in 1998-99 and Juma would receive $265,000 in those years.

In November 1997, after Del Valle told Bonnici that CCR would soon receive its initial funding and WHG had agreed to

assign LP a 5% equity interest valued at approximately $9 million, Bonnici and Juma entered into subscription agreements by which they purchased interests in LP, PCL and PHH. The agreements identified the collateral pledged as 7.5% of PHH's 60% equity interest in WHG and a 0.5% direct interest in CCR. PHH was described as the majority owner of WHG and a .25% owner of Caribe Cumayasa Resort. Bonnici and Juma were provided with a right of redemption option permitting them to resell their interests to LP after two years.

In March 1998, Del Valle told Bonnici that Tech was to be dissolved and that Bonnici's and Juma's interests were being transferred or assigned to defendant Phoenix Entertainment Holdings, LLC ("Entertainment"). However, no formal dissolution documentation was provided. In July 1998, LP advised its limited partners that a recapitalization was underway in which certain interests would be converted into shares of a new entity, Phoenix Partners, LLC ("PPLLC"). After the Debt Notes went into default in November 1999, the Del Valle Individuals repeatedly promised that repayment would be forthcoming. However, the Notes remain in default.

Phoenix Cruise Lines/Regal Cruise Lines

In May 1996, the Del Valle Defendants advised May that they had created PCL to establish a cruise business. By subscription

agreement dated September 12, 1996, May and/or Ambassador bought a 15 share, 1% interest in PCL for $34,000. In 1999, an "Acquisition Synopsis" ("Cruise Memorandum I") for Regal Cruise Lines, Inc. ("Regal"), the Del Valle Defendants advised various plaintiffs that LP was "developing a portfolio within the cruise industry." The document asserted that PCL would act as a holding company and additionally acquire and manage cruise line businesses. Specifically, it represented that LP had executed a formal acquisition agreement expressing its intention to purchase Regal for $33.5 million and that the "Phoenix Group" would contribute approximately $6.5 million. Cruise Memorandum I projected that in 2002 capitalization would be approximately $52 and income approximately $24 million. Although the synopsis identified LP, Playboy Enterprises, Inc., Ogden Entertainment, Inc. and "Senior Management" as current shareholders, it did not list May's interest. Nor was any mention made of the Del Valle Defendants' previous efforts to raise funds for cruise ventures.

The Phoenix Group allegedly lacked the funds promised to help buy Regal. In April 2002, however, Del Valle advised Bonnici that a "definitive" agreement to acquire it had been reached. Neither LP nor any other Del Valle Defendant ever acquired Regal.

Moliflor/Brentwood

In February 1999, Del Valle advised Bonnici that LP was about to purchase Moliflor, a French casino operator, and use it to acquire other gaming companies. The Del Valle Defendants claimed that Moliflor had obtained funding from a certain lender, but that an additional $35,000 was needed to pay legal fees to close the transaction. Bonnici contributed that sum in exchange for a 1% interest in Moliflor. However, LP never purchased an interest the company. Instead, Phoenix Leisure Holdings ("PLH") did but failed to obtain funding from the lender. PLH later sold its interest and Bonnici received no return on his investment.

In late 2001 or early 2002, Del Valle told Bonnici that the Del Valle Defendants were about to acquire Brentwood Media Group ("Brentwood"). Del Valle promised to provide $125,000 in convertible debentures in Entertainment, payable December 31, 2003, for an investment of $30,000. Although Brentwood was sold, no payments were made on the debentures.

Enterprise

In early 2001, the Del Valle Defendants told ESBE that they were close to acquiring Orient Cruise Lines and related businesses through "Project Phoenix." In April 2001, Del Valle sent ESBE a memorandum which represented that LP's Partnership

Committee had decided to consolidate its three primary holding companies (PLH, PHH and Entertainment) and merge Entertainment into a selected public company. The memorandum stated that the new company was expected to have a market value of $325 million upon completion of the merger. After acquiring the Cypress Corporation, the Green Bay Broadcasting Group, BMG, Orient Cruise Lines and the Noga Hilton, the company was expected to be worth at least $720 million. The memorandum did not mention the Del Valle Defendants' previous efforts to establish a cruise business through PCL. Nor did it identify the 5% interest held by Bonnici and Juma or explain how their interests related to PEH. Furthermore, the memorandum did not mention litigation over the PCL project in which Playboy sought the return of $650,000 paid for gaming and beverage rights.

ESBE bought 10 membership interests in PEH for $150,000. Thereafter, the Del Valle Defendants failed to provide financial statements required by the memorandum. In a November 2002 memorandum, the Del Valle Defendants agreed that no later than February 28, 2002, ESBE's shares in PEH would either be converted into shares of other companies or repurchased by PPLLC with 9% annual interest. In March 2003, after the conversion did not occur, ESBE made repeated unsuccessful demands for the return of its investment. In June 2003, Del Valle told ESBE that the PEH

shares would be converted into shares of SCH or another entity. That conversion did not occur either, and PCL failed to complete any cruise line transaction. However, between May 2003 and June 2004, Del Valle made various representations to ESBE regarding transactions and proposal which might result in profits from its investment or a return of its funds.

LP/PPLLC Restructuring

In June 2001, the Del Valle Defendants advised the LP Plaintiffs that the restructuring of LP had been completed. In November 2001, May converted his LP units into 250 shares of PPLLC after paying the Del Valle Defendants an additional $60,000. In 2002, the Del Valle Defendants circulated to various plaintiffs a list of alleged accomplishments of PPLLC, including its service as a financial advisor on a television station acquisition in 1998 and its financing the acquisition of interests in Moliflor and WHG by PLH and PPLLC in 1999. However, PPLLC was not incorporated until 2001. Additionally, PPLLC listed Bonnici as member of its management without permission.

Southeast Cruise Holdings

In 2001, the Del Valle Defendants announced to various plaintiffs that SCH had been created for the purpose of acquiring Regal. In March 2002 they circulated the "Project Cruise Transaction Synopsis ("Cruise Memorandum II") to sell securities

in SCH. As in Cruise Memorandum I, in the new memorandum the Del Valle Defendants represented that a Del Valle Company had entered into an agreement acquire Regal and intended to assemble a cruise business through SCH. The memorandum did not mention PCL's prior failed attempt to achieve substantially the same goal or refer to the Playboy lawsuit. It also identified the source of funding as $7 million in "secured bank debt" even though access to such financing was not assured.

The Del Valle Defendants also circulated a SCH Confidential Private Placement Memorandum ("SCH Private Placement Memorandum") offering 89,000 Class A Common Membership Units. The memorandum projected revenues of $136 million, and earnings before interest, taxes, depreciation and amortization ("EBITDA") of $48.8 million with the acquisition of three cruise vessels. The memorandum provided for a "put" option whereby unit purchasers could demand repayment of their investment plus 9% if the EBITDA did not exceed $9 million after a year of operating. The Del Valle Defendants represented that they had $9 million in secured financing, and SCH specifically warranted to plaintiff Sophlex that the company had the necessary capital for the project. Del Valle also presented a letter from defendant law firm Foley & Larder ("Foley") signed by defendant Kenneth D. Polin, representing that LP was a "sophisticated merchant banking firm"

that had sufficient financial resources to complete the Regal acquisition.

The SCH Private Placement Memorandum made no mention of the Playboy litigation. SCH never acquired Regal and plaintiffs allege it never had the funds necessary to do so. Del Valle eventually produced a list of shareholders owning 524,953 Class A units, several times the total number identified by the SCH Private Placement Memorandum.

In February 2002, Del Valle provided ESBE with a "Project Cruise Proposal" involving the acquisition of Regal, a strategic partnership between SCH and Renaissance Cruise creditors, and the merger of SCH into a new public company. Del Valle asserted that investors would have the option of selling their shares back to the company. Also that month, Del Valle advised ESBE that Norwegian Cruise Line had approached him to reactivate a project to acquire Orient Cruise Line. Del Valle claimed that "formal indications" for the required funding, including $175 million from Credit Suisse, had been obtained, and that aggregate value of ships owned by Regal, Orient and the new company should exceed $700 million. The Del Valle Defendants made similar representations to other plaintiffs regarding the acquisition of a vessel with $175 million in Credit Suisse Financing. In April 2002, Foley & Lardner circulated an allegedly executed copy of an

acquisition agreement between SCH and Regal. Del Valle further stated that SCH had entered into an agreement to merge with Oralabs Holding Corporation, and Foley & Lardner circulated a Memorandum of Understanding confirming that claim.

Foley & Lardner acted as counsel in connection with the SCH transactions. In July 2002, the firm asserted that it had been provided with evidence that SCH had a commitment to provide $15 million for the acquisition of Regal. In October 2002, Foley & Lardner announced that all outstanding issues regarding the acquisition of stock in a company called Marne Investments Limited had been resolved and that the Regal Cruise Line and Marne transaction were moving forward toward simultaneous closings. At various times, Polin was held out as a director the Del Valle Companies and participated in telephone conversations with ESBE and others concerning the various investments. The Del Valle Defendants also represented that Polin and other senior partners at Lardner and Foley had acquired interests in the Del Valle Companies.

The Del Valle Defendants ultimately sold approximately $1 million in SCH shares to various plaintiffs (the "SCH Plaintiffs"). ESBE purchased 25,000 Class A shares for $175,000 and 40,175 Class C shares for $164,000; Ship Trading bought 16,000 Class A shares for $275,000; Ambassador/May bought 10,000

Class C shares for $137,500; and Levensaler bought 18,000 Class C shares for $250,000. Some of the plaintiffs purchased Del Valle's personal shares after being directed to wire the fund directly into a bank account held by his wife, Donna Del Valle. Various of the subscription agreements promised plaintiffs or their representatives directorships or other compensated positions, which they did not receive. Some of the agreements also provided for the preparation of a comprehensive LLC Agreement for SCH, which was never provided.

In October 2003, SCH sought additional financing. PPLLC, Casinos Austria Management Company and others agreed to purchase a substantial interest in SCH to fund the acquisition of SunCruz, another cruise company. In an amended LLC agreement, Casinos Austria paid SCH $3.5 million for a 12.5% interest and a corporate directorship. Casinos Austria contemporaneously executed an agreement to serve as casino manager on certain cruise ships. The Del Valle Defendants represented to Casinos Austria that Vanquish and two other individuals (neither of them plaintiffs) were the sole members of SCH. The amended LLC agreement allocated five million common and preferred units to those parties, but none to the SCH Plaintiffs. Defendants failed to disclose this development to them. In a 2004 amendment to the LLC agreement, Casinos Austria increased its ownership in SCH to

25%. This amendment was also silent regarding the SCH Plaintiffs interests.

The PPLLC/Vanquish Restructuring

In early 2003 the Del Valle Defendants advised plaintiffs that Vanquish had succeeded to the rights of PPLLC and LP to certain ongoing acquisitions. Defendants offered partnership interests in Vanquish. Although the number of partners was to be limited to 40, Vanquish already exceeded that number in view of its succession to the rights of PPLLC and LP. Additionally, the Del Valle Defendants listed Vanquish as responsible for certain transactions which occurred before its formation and which had previously been attributed to PPLLC. Defendants also promised to provide financial information regarding Vanquish but failed to do so.

The action was commenced on October 28, 2005. The First Amended Complaint sets forth eleven causes of action, including fraud (first cause of action), fraudulent misrepresentation (second cause of action), negligent misrepresentation (third cause of action), breach of contract (fifth cause of action), conversion (sixth cause of action) and unjust enrichment (sixth cause of action). Defendants do not challenge, on this motion, the seventh through eleventh causes of action for fraudulent conveyances under the New York Debtor and Creditor Law.

DISCUSSION

For the following reasons, the motion to dismiss is granted in its entirety as to the fraud-based claims and the claims for conversion and unjust enrichment. The motion is granted in part as to the contract claims. The claims against the Foley Defendants, and Michael H. Carstens and Edward Michael Growney, are dismissed in their entirety.

Fraud/Fraudulent Misrepresentation/Negligent Misrepresentation

Defendants challenge the fraud and misrepresentation claims on a variety of grounds. Specifically, they assert that (1) most of the claims are time-barred, (2) many of the alleged misrepresentations are non-actionable statements of prediction or expectation, (3) many of the fraud claims lack particularity as to who made or relied on the alleged statements, and (4) some of the fraud claims are merely disguised contract claims. The motion to dismiss as to these claims is granted.

Statute of Limitations

The motion to dismiss the fraud claims as untimely is granted as it relates to the LP investment (and its restructuring), the Tech investment, the November 1997 Subscription Agreements, the PCL investment and the Moliflor investment. The statute of limitations for fraud is either six

years from the time of the fraud, or two years from when it could have been discovered with reasonable diligence, whichever is longer (CPLR 213[8], 203[g]; Yatter v William Morris Agency, Inc., 268 AD2d 335 [1st Dept 2000]; Ghandour v Shearson Lehman Bros. Inc., 213 AD2d 304 [1st Dept], lv denied 86 NY2d 710 [1995]; Prestandrea v Stein, 262 AD2d 621 [2d Dept 1999]). Plaintiffs allege that they made their investments in the above-named ventures between 1994 and early 1999, more than six years prior to the filing of the original complaint in October 2005.

The discovery accrual rule is inapplicable here because plaintiffs plead facts indicating that in each case they were on sufficient notice of the alleged fraud more than two years before filing suit. "An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud is a mixed question of law and fact . . . and turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred" (Ghandour, supra at 305-06)(internal citations omitted). In the investment context, a party's awareness of substantial losses or of facts that indicate the falsity of a material representation constitute constructive or inquiry notice of the fraud (see Ghandour, supra at 306 ["the IAS Court correctly concluded that the substantial losses sustained by the accounts under the circumstances herein was

sufficient to place plaintiffs on notice of the potential fraud"]; Prestandrea, supra at 622 [plaintiff on notice fraud due to receipt of documents and statements advising of losses or poor returns on investments]; Ballhaus v Morgan Guar. Trust Co. of New York, 232 AD2d 320 [1st Dept 1996][bankruptcy of company in which plaintiffs invested gave notice that defendants' alleged promises to pay corporate creditors had not been kept]; Weisl v Polaris Holding Co., 226 AD2d 286 [1st Dept 1996]["prospectuses given to plaintiff at the time of purchase or several days later clearly indicated the speculative nature of the investments and risks involved, and thereby put plaintiffs on 'inquiry notice' of their potential claims against defendants for misrepresenting the profitability and safety of the investments"]). The burden of proving that the fraud could not have been timely discovered falls upon the plaintiff (Julian v Carroll, 270 AD2d 457 [2d Dept 2000]), who may not rely on conclusory, unsubstantiated statements to avoid the bar (Lentini v Lentini, 280 AD2d 464 [1st Dept 2001]).

The record demonstrates that as to each of the investments in question, plaintiffs were placed on inquiry notice more than two years before the filing of the complaint. First, with respect to LP, plaintiffs knew they were not receiving the promised 20%-30% interest, or being provided with the promised

quarterly reports and other financial information, shortly after the last investment was made in that venture in 1998. Plaintiffs could have reasonably discovered the alleged fraud by requesting the relevant documentation (see, Fixler v Fixler, 290 AD2d 482 [2d Dept 2002]). Similarly, the complaint establishes that plaintiffs were notified of the "restructuring" of LP in 1996 and of the transfer and dissolution of their Phoenix Tech interests in 1998 but failed to inquire as to the facts underlying those events.

Regarding the 1997 Subscription Agreements, plaintiffs knew by 1999 that they had not received the promised income for that year of $265,000 (for Juma) and $795,000 (for Bonnici) and that payment had not been made on the debt notes. The agreements also gave them notice that the "put" option permitting them to redeem their interests was triggered that year. Bonnici's $35,000 investment in Moliflor was completed in early 1999; he cannot deny that a duty of inquiry arose after he failed to receive the promised equity interest and received "no return" when the lender pulled out and Phoenix Leisure was "soon thereafter" forced to sell its share of the casino. As to May/Ambassador's $34,000 investment in PCL, no explanation is offered for the failure to inquire, over the course of nine years, about the status of the original 1996 investment. Given that in the subscription

agreements plaintiffs warranted that they were "accredited investors" who recognized the "high degree of risk" and possessed "such knowledge and experience in financial and business matters that [they were] capable of fully evaluating the risks and merits" of the investments, their lack of diligence cannot be excused.

Plaintiffs nevertheless contend that they did not, and could not have discovered the fraud until after the end of 2004 when they learned from Casinos Austria that Del Valle had engaged in overselling shares. However, that allegation relates only to the claim regarding the SCH investment, which defendants are not seeking to dismiss on limitations grounds.

Failure to State a Claim/Lack of Particularity

As an alternative ground for dismissal of the fraud claims, plaintiffs assert that the complaint fails to satisfy certain threshold pleading requirements. A plaintiff claiming fraud must plead a representation of material existing fact, falsity, scienter, reliance and injury (New York Univ. v Continental Ins. Co., 87 NY2d 308 [1995]). Statements of mere "prediction or expectation" are not actionable (Naturopathic Labs Intern., Inc. v SSL Americas, Inc., 18 AD3d 404 [2005]). Nevertheless, "[a]n expression or prediction as to some future event, known by the author to be false or made despite the anticipation that the

event will not occur is deemed a statement of a material existing fact, sufficient to support a fraud action" (Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC, 19 AD3d 273 [1st Dept 2005][internal citations and quotations omitted). Furthermore, earnings projections may be actionable as fraud if they are not based upon the company's actual financial condition or are otherwise false and unreasonable (see, CPC Intern. Inc. v McKesson Corp., 70 NY2d 268 [1987]).

Contrary to defendants' contention, plaintiffs' various allegations regarding imminent cruise line acquisitions, corporate consolidations, merger agreements, existing financing and projected revenues and interest could well constitute representations of material fact (see Merrill Lynch, supra; CPC Intern, supra) rather than opinions or projections. Similarly, the failure to disclose the Playboy litigation and the alleged misrepresentations regarding the security for the Debt Notes cannot, as defendants urge, be dismissed as immaterial as a matter of law. However, defendants are correct that the remaining instances of alleged fraud that plaintiffs identify are not cognizable. The failure to disclose that Del Valle and Carstens were sanctioned, censured, and banned by NASD in 1992 is irrelevant. Even if plaintiffs were induced to invest by misrepresentations regarding defendants' competency, loss

causation could not be established because those misrepresentations do not relate to the financial condition of any of the recommended companies (see, Laub v Faessel, 297 AD2d 534 [1st Dept 2002]). The allegations regarding the past participation of PPLLC, Vanquish and the Del Valle Defendants in other transactions fail for the same reason.

Defendants are also correct that many of the fraud allegations fail to meet the particularity requirements of CPLR 3016(b), which requires that "the circumstances constituting the wrong shall be stated in detail." The statute, "[a]t a minimum, . . . requires plaintiff to identify the time, place, manner and content of the alleged misrepresentations with respect to each of the defendants" (Murphy v Sheldon, 13 Misc3d 1223 [Sup Ct NY Co 2006]); see, Eastman Kodak Co. v Roopak Enterprises, Ltd., 202 AD2d 220 [1st Dept 1994]). With respect to the investments in Phoenix Tech and PCL, the complaint alleges that defendants made representations to "certain plaintiffs" or "various plaintiffs." It is also alleged that in 2002, the "Del Valle Defendants" circulated a misleading document to "certain plaintiffs." Similar allegations with respect to the SCH investments and the restructuring of PPLLC. This practice makes it impossible to determine which plaintiffs relied on the alleged

misstatements or documents, and which defendants are liable for making them.

Finally, the purported fraud claims are better pursued as breach of contract claims. "A fraud claim is not sufficiently stated where it alleges that a defendant did not intend to perform a contract with a plaintiff when he made it" (Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 [1st Dept 1998]). Furthermore, claims for fraud which do not arise out of facts separate from, or allege damages distinct from, a contract or related cause of action should be dismissed as duplicative (see, McMahan & Co. v Bass, 250 AD2d 460 [1st Dept 1998]; Miller v Columbia Records, 70 AD2d 517 [1st Dept 1979]). The complaint alleges that defendants committed fraud by failing to fulfil promises in the Phoenix Partners LP Agreement of Limited Partnership to permit inspection of the books, provide tax information and quarterly reports; by failing to provide financial reports required by the SCH Private Placement Memorandum and to appoint plaintiffs to directorships and prepare a comprehensive LLC agreement as promised in the SCH subscription agreements. These promises are not collateral to the agreements but arise directly from their written provisions. Plaintiffs' mere desire to seek different remedies for the breaches does not change the nature of the underlying causes of action, and in any

event, rescission and the return of moneys invested are contractual remedies (see, Behren v Blumstein, 165 AD2d 657 [1st Dept 1990), appeal denied 77 NY2d 865 [1991]; Sleepy's, Inc. v Orzechowski, 7 AD3d 511 [2d Dept 2004]). Accordingly, there is no reason why plaintiffs cannot pursue their claims, including the claim that defendants oversold securities in SCH, under the existing subscription and related agreements.

Breach of Contract

The sole breach identified by plaintiffs' contract cause of action in the original complaint concerned a "put" option in the SCH Private Placement Memorandum. Defendants asserted, and plaintiffs did not dispute, that the put was never triggered under the relevant provision because the condition precedent, the acquisition of Regal, never occurred. However, in the First Amended Complaint, plaintiffs have identified additional contractual breaches. They also note that they have incorporated the preceding 260 paragraphs of allegations into the contract claim, and assert that the contract claim now encompasses all breaches of the subscription agreements and related offering and other documents -- including the failure to repay the Debt Notes, to provide financial information and reporting, to provide governing roles or positions for plaintiffs in the Del Valle companies and to convert certain ESBE shares. Defendants do not

challenge the viability of these claims, other than to reassert that their existence renders the fraud claims duplicative. Accordingly, the claim for breach of contract is dismissed only as to the breach of the "put" option described above.

Conversion/Unjust Enrichment

Plaintiffs offer no meaningful opposition to defendants' showing that the conversion and unjust enrichment claims are precluded by the respective three and six-year statute of limitations periods, neither of which is subject to a discovery exception (see, Ely-Cruikshank Co., Inc. v Bank of Montreal, 81 NY2d 399 [1993]). Although plaintiffs suggest, with respect to the conversion claim, that two of the purchases were made just under the three-year period on October 30 and 31, 2002, they do not specify which purchases they mean and those dates do not appear anywhere in the complaint.

Furthermore, a claim for conversion must allege that the plaintiff had "ownership, possession or control" of the property in question (Peters Griffin Woodward, Inc. v WCSC, Inc., 88 AD2d 883, 883 [1st Dept 1982]). Where money is the subject of a conversion action, the plaintiff must seek recovery from specifically identifiable fund, Peters, supra at 884, and allege legal ownership of it or an immediate superior right of possession (AMF Inc. v Algo Distributors, Ltd., 48 AD2d 352 [2d

Dept 1975]; see Hinkle Iron Co. v Kohn, 229 NY 179 [1920]; Independence Discount Corp. v Bressner, 47 AD2d 756 [2d Dept 1975]). A mere failure to pay pursuant to a contract does not give rise to an action for conversion, see Peters, supra; Stich v Oakdale Dental Center, P.C., 120 AD2d 794 [3d Dept 1986]). Rather, it creates an unliquidated contract right to share in the proceeds, Stich, supra at 795-96.

It is also well settled that "an action for conversion cannot be validly maintained where damages are merely being sought for breach of contract" (Yeterian v Heather Mills N.V. Inc., 183 AD2d 493 [1st Dept 1992]; Behr v Rallye Motors, Inc., 190 AD2d 706 [2d Dept 1993]; Peters, supra; Matzan v Eastman Kodak Co., 134 AD2d 863 [4th Dept 1987]). Thus, even where the elements of conversion are technically pled, the claim should be dismissed where it arises from the same facts underlying an existing cause of action for breach of contract (Interstate Adjusters v First Fidelity Bank, N.A., NJ, 251 AD2d 232 [1st Dept 1998]. Morever, a claim for unjust enrichment may not be maintained where an existing valid and enforceable written contract governs the particular subject matter (Clark-Fitzpatrick, Inc., v Long Island Railroad Co., 70 NY2d 382 [1987]).

Law Firm Defendants/Individual Defendants

The claims against Foley & Lardner LLP and Kenneth D. Polin, are dismissed. The allegations, even as supplemented by the affidavits, fail to supply the particularity necessary to support an inference that the attorneys participated in the alleged wrongdoing apart from their performance of routine legal work (see, 125 Assocs. v Cralin Trading Assocs., 196 AD2d 630 [2d Dept 1993]). The vague claims that those defendants interacted with plaintiffs "in face-to-face meetings, on the telephone and in letters and memoranda" are not sufficient to support an inference that the attorneys communicated any false or misleading information upon which plaintiffs relied.

The individual claims against defendants Carstens and Growney also fail. Neither the complaint nor the supplemental affidavits identify a false statement by either individual made to induce any investment. As to Carstens, plaintiffs rely on his 1992 NASD ban, his bare presence at certain meeting, and a statement regarding SCH's resources made years after the investments were made. Similarly, the only allegations regarding Growney is that he discussed the status of SCH and "did not discourage" a purchase. Although he is alleged to have said that "SCH was a great project," such a statement is not a misrepresentation of fact but merely non-actionable opinion (see,

Longo v Butler Equities II, L.P., 278 AD2d 97 [1st Dept 2000]) upon which the sophisticated investors could not have reasonably relied.

Accordingly, it is hereby

ORDERED, that the motions to dismiss are granted to the extent of dismissing the first, second, third, fifth and sixth causes of action of the First Amended Complaint, and it is further

ORDERED, that motion to dismiss the fourth cause of action is denied, except to the extent it pleads a breach of the put option identified above in the SCH Private Placement Memorandum, and it is further

ORDERED, that the claims against defendants Foley & Larnder, LLP, Kenneth D. Polin, Michael H. Carstens and Edward Michael Growney are hereby severed and dismissed, and it is further

ORDERED, that the Clerk shall enter judgment accordingly, and it is further

ORDERED, that the remainder of the action shall continue, and it is further

ORDERED, that the parties are directed to appear for a preliminary conference on December 19, 2006 at 9:30 a.m. in Room 208.

Dated: Nov. 20, 2006

ENTER:

J.S.C.