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

E 1-13-06 CD

PRESENT: RICHARD B. LOWE III Justice PART 56

BRISTOL INVESTMENT FUND, LTD

- v -

SMARTIRE SYSTEMS, INC

INDEX NO. 601442/05

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 11 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 1/6/2006

RICHARD B. LOWE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 56

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BRISTOL INVESTMENT FUND, LTD.,

Index No.: 601442/05

Plaintiff,

–against-

DECISION & ORDER

SMARTIRE SYSTEMS, INC.,

Defendant.

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RICHARD B. LOWE, III, J.:

Before the court is a motion by Plaintiff Bristol Investment Fund, Ltd., (Bristol Investment) for summary judgment pursuant to CPLR 3212, as to its first claim for specific performance under a convertible debenture and seeks 9,268,875 shares of SmarTire Systems, Inc. (SmarTire) common stock. Plaintiff also moves to dismiss each of SmarTire's counterclaims for breach of contract, securities fraud, common law fraud, breach of good faith and fair dealing, conspiracy, and prima facie tort, pursuant to CPLR 3211(a)(1) and (7). In addition, plaintiff moves, pursuant to CPLR 603, for an assessment of attorneys fees. Finally, Bristol Investment seeks to amend the complaint pursuant to CPLR 3025(b) to add a new count seeking money damages.

BACKGROUND

The following facts are taken from the Rule 19-a Statement of Material Facts submitted by Bristol Investment and Counterstatement submitted by SmarTire.

In this action, plaintiff Bristol Investment alleges that defendant SmarTire defaulted on a

Convertible Debenture, and that, based on the default and SmarTire's weak financial condition, plaintiff is entitled to a specific performance and the issuance of 9,268,875 shares of defendant's common stock to the plaintiff.

Plaintiff is an investment fund which purchased a Convertible Debenture from SmarTire, a Canadian company whose common stock is registered with the Securities and Exchange Commission (SEC), and whose shares trade in the over-the-counter market. Along with a group of other investors (the "HPC Investors"), on or about December 24, 2003, plaintiff purchased a Convertible Debenture maturing on April 1, 2006, in the principal amount of $350,000 (the Debenture), under the terms of a Securities Purchase Agreement. The Debenture required SmarTire to make payments of principal on a monthly basis in the amount of $14,583.33, in cash or stock, on the first day of each month. A key feature of the Debenture is the plaintiff's right to convert all or part of the outstanding balance into shares of SmarTire common stock at an agreed conversion price, as adjusted from time to time (the Set Price).

Defendant failed to make the payment due August 1, 2004. Plaintiff contends that SmarTire also failed to honor a notice of conversion dated August 20, 2004 in the principal amount of $25,000, then entitling plaintiff to 500,000 shares of SmarTire's common stock within five trading days. Accordingly, in September 2004, plaintiff commenced an action against SmarTire in this Court under Index No. 602874/04 to enforce its rights under the Debenture. In order to resolve that action, the parties entered into a Forbearance and Escrow Agreement.

Pursuant to the terms of the Forbearance and Escrow Agreement, SmarTire was to register shares of its common stock with the SEC on or before January 1, 2005, to the extent necessary to have registered enough stock to meet its obligations on the debentures and warrants issued to plaintiff and other investors. Section 1.3 of the Forbearance and Escrow Agreement

states that, except as specifically amended by that agreement, the prior agreements between the parties, including the Debenture, shall remain unmodified and in full force and effect. Plaintiff alleges that SmarTire breached the terms of the Forbearance and Escrow Agreement by failing to register the necessary amount of common stock by January 1, 2005.

On March 23, 2005, SmarTire entered into a financing agreement with Cornell Capital Partners, L.P., pursuant to which SmarTire sold an aggregate of $4,000,000 of its preferred stock. In conjunction with that financing, SmarTire issued preferred stock that is convertible to common stock at $0.01. Plaintiff alleges that, pursuant to the anti-dilution provisions of the Debenture, the Set Price of its outstanding Debenture was reduced to $0.01. The $0.01 Set Price was, in fact, confirmed in two e-mails sent by SmarTire's Chief Financial Officer on March 30 and 31, 2005. Accordingly, plaintiff delivered notices of conversion to SmarTire on April 11 and 18, 2005 for 1,625,000 and 7,643,875 shares of common stock, respectively, at $0.01. However, SmarTire refused to honor the conversions at that price.

Plaintiff submits that, due to SmarTire's default, Sections 3(b) and 10 of the Debenture entitle plaintiff to accelerate the full principal balance of the Convertible Debenture and to receive the "mandatory prepayment amount," along with interest and attorneys' fees. Section 4(b)(ii) also authorizes plaintiff to seek a decree of specific performance and/or injunctive relief to enforce its rights under the Debenture. Bristol Investment alleges that since SmarTire's stock opened the day trading at $0.26 a share on April 20, 2005, to date, plaintiff's monetary damages exceed $2,409,907.50, exclusive of interest and attorneys' fees.

Plaintiff commenced this action on April 21, 2005. The complaint sets forth a cause of action for a decree of specific performance directing SmarTire to deliver to plaintiff 9,268,875

shares of its stock, and a second claim for attorneys' fees incurred as a result of defendant's alleged dishonor of the notices of conversion.

In opposition to plaintiff's motion for summary judgment, SmarTire submits that plaintiff has conspired with the other HPC Investors to drive down the price of SmarTire's publicly-traded common stock in order to lower the price at which they could convert their debentures and warrants. SmarTire bases this claim on the fact that the HPC Investors, including plaintiff, were aware at the time of their investment that SmarTire needed additional funding for its operations and that such financing would likely involve the issuance of additional shares. A lower market price for SmarTire stock would necessarily be reflected in the issue price of the additional shares, which would, in turn, lower the "set price" of the HPC Investor's debentures and warrants, thus enabling the HPC Investors to obtain more stock when they converted their debentures and exercised their warrants. SmarTire claims that, beginning in early 2004, the market price of SmarTire's stock came under attack from plaintiff and the other HPC Investors who began to sell large amounts of stock, which allegedly caused the market price of SmarTire's stock to decline to below $0.10 a share.

Further, SmarTire avers that it was represented in the March 2005 transaction with Cornell Capital Partners by the law firm of Sichenzia Ross Friedman Ference LLP (the "Sichenzia law firm"), but that the Sichenzia law firm did not disclose to SmarTire that it also represented the HPC Investors. SmarTire further asserts that it understood that the anti-dilution provisions of the HPC Investors' debentures would be triggered only when Cornell Capital Partners exercised its right to convert SmarTire stock, not merely by SmarTire's entering into the transaction. The defendant blames the Sichenzia firm for not correcting this misunderstanding, and contends that the March 2005 e-mails sent to Bristol Investment and the other HPC Investors

advising that the Set Price on the HPC debentures had been adjusted to $0.01 was based on later, contrary, and incorrect advice from the Sichenzia firm. Finally, defendant submits a letter dated April 15, 2005 from plaintiff asking SmarTire to confirm to plaintiff's auditor, Rothstein, Kass & Co., that the Set Price at which the Debenture could be converted into SmarTire shares is $0.28, rather than $0.01, as plaintiff contends in this lawsuit.

This opposition to plaintiff's motion for summary judgment also provides the grounds for Defendant's counterclaims, namely, for breach of contract (first counterclaim), securities fraud (second counterclaim), common law fraud (third counterclaim), breach of covenant of good faith and fair dealing (fourth counterclaim), conspiracy (fifth counterclaim), and prima facie tort (sixth counterclaim).

DISCUSSION

Bristol Investments seeks to amend the complaint to add a claim for damages. Further, the plaintiff seeks summary judgment pursuant to CPLR 3212 as to its claim for specific performance and for the issuance of 9,268,875 shares of defendant's common stock to the plaintiff, and requests an assessment of attorneys fees in a separate trial pursuant to CPLR 603. Finally, Bristol Investment moves to dismiss all of defendant's counterclaims pursuant to CPLR 3211(a)(1) and (7).

A. Amendment of the Complaint

The plaintiff moves to amend the complaint to add a claim for money damages, asserting that it does not add to the claims asserted in the original complaint but only provides an alternative form of relief. Under CPLR 3025(b), the court will freely give leave to amend the complaint provided that the amendment provided causes no prejudice to the non-moving party

and "is not plainly lacking in merit" (*Lambert v Williams*, 218 AD2d 618, 621 [1st Dept 1995]). Because the defendant does not oppose this request, and because the amendment is not lacking in merit, plaintiff's motion to amend the complaint to add a claim for money damages is granted.

B. Summary Judgment

Bristol Investment moves for summary judgment as to its first cause of action for specific performance, arguing that the contracts to which SmarTire signed are clear and unambiguous in its terms and the breach by SmarTire of these contracts allows the plaintiff to specific performance under the agreements. The plaintiff alleges that it should receive 9,268,875 shares of defendant's common stock pursuant to the Forbearance and Escrow Agreement and the underlying Debenture. The defendant, in its opposition, argues that plaintiff is seeking what amounts to $4.4 million, exclusive of interest and penalties, where there are viable counterclaims against the plaintiff as well as triable issues of material facts, namely, that there was fraud in the inducement of the Debenture and an alleged conflict of interest due to dual representation. As well, the defendant argues that this motion for summary judgment is premature, given that discovery has just started and due to the plaintiff's motion to amend its complaint to add money damages.

To obtain summary judgment, the movant must establish its cause of action "sufficiently to warrant the court as a matter of law in directing judgment' in its favor (CPLR 3212[b]), and it must "set forth evidence that there is no factual issue" requiring an adjudication on the facts (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004]). On the other hand, to defeat a motion for summary judgment the opposing party must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]). One opposing a motion for summary judgment must produce evidentiary proof in admissible form sufficient to require a trial of material questions of

fact on which the movant rests its claim; "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to raise a question of material fact (*A.H.A. Gen. Constr. v New York City Hous. Auth.*, 92 N.Y.2d 20, 33 [1998], quoting *Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Facts are nonetheless viewed in the light most favorable to the non-moving party, and facts of the non-movant are taken as true (*Forrest*, 3 NY3d at 315).

The plaintiff moves for summary judgment as to its first cause of action, asserting that the contractual agreements entered into by SmarTire are clear and unambiguous and that the defendant breached the various contracts by failing to register its common stock and for failure to honor the notices of conversion sent by Bristol Investment. The plaintiff bases its claim on Sections 3(b) and 10 of the Debenture, which it argues entitle Bristol Investment to accelerate the full principal balance of the Convertible Debenture and to receive the "mandatory prepayment amount," along with interest and attorneys' fees. As well, the plaintiff requests specific performance and the issuance of the requested common stock, pursuant to Section 4(b)(ii) of the Debenture.

In a contract dispute, the "[i]nterpretation of an unambiguous contract provision is a function for the court" (*Teitelbaum Holdings, Ltd. v Gold*, 48 NY2d 51, 56 [1979]). Where "the language is clear, unequivocal and unambiguous, the contract is to be interpreted by its own language" (*R/S Assocs. v N.Y. Job Dev. Auth.*, 98 NY2d 29, 32 [2002], quoting *Springsteen v Samson*, 32 NY 703, 706 [1865][citing *Rodgers v Kneeland*, 10 Wend 218 (1833)]). "'[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms'" (*id.*, quoting *Reiss v Financial Performance Corp.*, 97 NY2d 195, 198 [2001][quoting *W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 (1990)]). Further,

"matters extrinsic to the agreement may not be considered when the intent of the parties can be gleaned from the face of the instrument" (*Teitelbaum Holdings, Ltd.*, 48 NY2d at 56; *see also Matter of Wallace v 600 Partners Co.*, 86 NY2d 543, 548 [1995]).

Here, neither dispute that Bristol Investment held the Debenture and acted in accordance with its terms and the terms of the related documents. Nor is there any dispute that the defendant issued securities convertible into common stock at $0.01 per share on or about March 23, 2005 to another investor. Further, there is no dispute that notices of conversion were delivered to the defendant. Finally, while there is a disagreement as to the computation of the Mandatory Prepayment Amount under the Debenture as well as the number of stocks to be issued to the plaintiff, that dispute is minor where the agreement is clear and unambiguous in its terms. Accordingly, the plaintiff has complied with the agreements and terms thereof.

In addition, Section 4(b)(ii) is explicit and unambiguous in its terms, requiring that

> [t]he Company's obligations to issue and deliver the Underlying Shares upon conversion of this Debenture in accordance with the terms hereof are *absolute and unconditional*, irrespective of any action or inaction by the Holder to enforce the same, any waiver or consent with respect to any provision hereof, the recovery of any judgment against any Person or any action to enforce the same, or any setoff, counterclaim, recoupment, limitation or termination, or any breach or alleged breach by the Holder or any other Person of any obligation to the Company or any violation or alleged violation of the law by the Holder or any other person, and irrespective of any other circumstance which might otherwise limit such obligation of the Company to the Holder in connection with the issuance of such Underlying Shares.

(*See* Wang Aff., Ex. B at 7-8 [emphasis added]). Furthermore, "the Company *may not refuse conversion based on any claim that the Holder or any one associated or affiliated with the Holder of has been engaged in any violation of law, agreement, or for any other reason, unless, an injunction . . . shall been sought and obtained*" (*id.* [emphasis added]). Here, the contract is

clear and unambiguous, and requires the Company to issue the requisite shares when there has been requisite notice provided. Nor has SmarTire sought or obtained an injunction as required under the Debenture to stop the issuance. The terms of the Debenture must be and will be enforced according to its terms.

The defendant argues that there was fraud in the inducement of regarding the financial agreement between SmarTire and Cornell Capital Partners. The defendant also argues that "there is circumstantial correlation between the decline in SmarTire share price and the trading activity of Bristol and its co-investors" which warrant a denial of summary judgment because such conduct, if proven, would support SmarTire's affirmative defenses (Def. Memo of Law at 8). The court disagrees. For one, these issues only go to SmarTire's ability to bring action against Bristol Investment, as the contract provides that "such delivery shall not operate as a waiver by the Company of any such action the Company may have against the Holder" (*see* Wang Aff., Ex. A at 8). In addition, the defendant has not brought an action to enjoin the conversion pursuant to provisions of the Debenture, and, accordingly, has not invoked a condition precedent to withholding the issuance of these shares plaintiff seeks. As such, SmarTire may not prevent judgment on this issue where it has not abided by the terms of the agreement.

More importantly, there is an "absolute and unconditional" obligation on the part of SmarTire to issue the stock when a notice of conversion is delivered to the defendant, which was further ratified by the defendant in September 2004 under the Forbearance and Escrow Agreement. Generally, a contract induced by fraud is subject to at least rescission, "rendering it unenforceable by the culpable party" (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v Wise Metals Group, LLC*, 19 AD3d 273, 275 [1st Dept 2005], citing *Sabo v Delman*, 3 NY2d 155, 161

[1957]). Furthermore, "a general merger clause contained in the parties' agreement does not operate to bar parol evidence of fraud in the inducement" (*id.*). However, where a contract states that it is "absolute and unconditional" and that the Company (here, SmarTire) "may not refuse conversion based on any claim that the Holder has been engaged in any violation of law, agreement, or for any other reason, unless, an injunction . . . shall been sought and obtained," such a clause is a bar to an action for fraud and is a waiver to any defense or claim made by a party (*see Citibank, N.A. v Plapinger*, 66 NY2d 90, 95 [1985]; *Gen. Trading Co. v A & D Food Corp.*, 292 AD2d 266, 267 [1st Dept 2002]).

Here, there is no dispute that the defendant entered into the original Debenture, a binding contractual agreement which provided an "*absolute and unconditional*" ability on the part of Bristol Investment to notify and convert its Debenture into stock "irrespective of any action . . . or violation of the law" (*see* Wang Aff., Ex. B at 7-8). Further, the defendant subsequently and willingly entered into the Forbearance and Escrow Agreement, which provided that the original Debenture Agreement would remain "unmodified and in full force and effect". Finally, the defendant failed to abide by the agreements by not seeking an injunction prior to this action. Because the contracts are plain and clear in their terms and conditions, requires the conversion of the Debentures into shares of stock, and the defendant has failed to abide by the terms to which it agreed to and reconfirmed in a subsequent writing, the contracts remain in effect. Accordingly, the defendant is liable to the plaintiff for non-issuance of the stocks where plaintiff provided notice of conversion.

The only issue that remains is the price of the stock and the number of shares to be issued. Here, there is an issue of material fact regarding the price and amount of stock that the defendant is liable to issue to Bristol Investment. While the plaintiff argues that 9,268,875

shares of stock pursuant to its two notices dated April 11 and 18, 2005, there is a substantial question of whether the Set Price is $0.01, as the plaintiff contends, or whether it is $0.28, as the defendant argues. Because these prices substantially change the amount of stock plaintiff stands to gain in this transaction, a trial as to the amount of stock to be issued is warranted.

Based on the reason set forth above, the court grants plaintiff's motion for summary judgment and, pursuant to Section 4(b)(ii) of the Debenture, orders that defendant issue shares of stock to Bristol Investment. A trial to determine the amount of stock to be issued shall be forthcoming.

C. Motion to Dismiss

In a motion to dismiss under CPLR 3211, the court's task is to determine whether the defendant's pleadings state a recognized cause of action. The motion must be denied if, "from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002][internal citations omitted]). The court must liberally construe the non-movant's counterclaims and accept as true the facts alleged in opposition to the dismissal motion (*id.*; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The court accords the non-movant the benefit of every possible inference (*id.*). Dismissal under CPLR 3211(a)(1) is warranted "only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*id.*, quoting *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

1. Uncontested Counterclaims

The plaintiff moves to dismiss each and every counterclaim asserted by the defendant for failure to state a cause of action under CPLR 3211(a)(7) and due to documentary evidence pursuant to CPLR 3211(a)(1). Here, the defendant does not contest the dismissal of

counterclaims two (securities fraud), four (breach of the covenant of good faith and fair dealing), five (conspiracy), and six (prima facie tort). Accordingly, the court grants the plaintiff's motion to dismiss counterclaims two, four, five, and six in their entirety.

2. *Breach of Contract (First Counterclaim)*

Bristol Investment moves to dismiss the defendant's first counterclaim for breach of contract, arguing that there is no breach of contract where Bristol Investment had the right under the various contracts to exercise its conversion rights. SmarTire argues that it is not asserting that Bristol Investment did not have the right to exercise its conversion rights. Instead, it avers that the plaintiff breached the various contracts by engaging in a scheme to depress the price of SmarTire stock, in turn, breaching the "in concert" clause of the Securities Purchase Agreement, as well as the other contracts entered into between the plaintiff and the defendant under the theory of breaching the covenant of good faith and fair dealing.

All contracts imply a covenant of good faith and fair dealing in the course of performance (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). This covenant embraces a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*id.*, quoting *Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995][quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 NY 79, 87 (1933)]). While the duties of good faith and fair dealing do not imply obligations "inconsistent with other terms of the contractual relationship" (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 304 [1983]), they do encompass "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 69 [1978], quoting 5 Williston, Contracts § 1293, at 3682 [rev ed 1937]). "To the extent that the express words of the contracts

failed to prohibit some acts arguably inconsistent with the nature of the relationship, [one can] invoke the implied covenant of good faith and fair dealing" (*Carvel Corp. v Noonan*, 3 NY3d 182, 195 [2004]).

Here, the defendant has made out a feasible claim for breach of contract, especially regarding that of breaching the covenant of good faith and fair dealing. SmarTire avers that the plaintiff, in conjunction with the HPC Investors, sought to bring down the stock price of SmarTire in order for to lower the price at which they could convert their debentures and warrants, violating Section 5.18 of the Securities Purchase Agreement. The defendant points to the period beginning January 2004 and ending June 2004, where stock prices began to fall and where HPC Investors sold over 10 million shares of stock, as did the plaintiff Bristol Investment. Such an allegation, if proven, would indeed give rise to a breach of contract, based upon a breach of the covenant of good faith and fair dealing.

The plaintiff asserts that this allegation is "bogus" (*see* Pl. Reply at 10). Bristol Investment argues that because the Debenture allows for the actions it has engaged in, that there was no conversion rights exercised during the time SmarTire alleges there was collusion except one, and because there was no price drop because the price was higher than when the Debentures were signed, there is no claim for breach of contract. The court disagrees. While there is no dispute that the plaintiff may sell SmarTire stock, the manner in which it sold the stock in conjunction with the HPC Investors may give rise to an inference of collusion. Further, while the defendant may have elected to honor the plaintiff's notices of conversion, as specified in the Forbearance and Escrow Agreement, the agreement was signed after the alleged time frame the defendant is asserting shows the collusion between the stock purchasers. Finally, the plaintiff seems to believe that the overall the market value was higher. However, the defendant is

alleging a time frame between January 2004 and June 2004. That the plaintiff asserts that from December 2003 to April 2005 there was an increase in per share price is irrelevant.

In addition, the plaintiff fails to note that the defendant has asserted claims of conflict of interest in the March 2005 transaction, where the SmarTire alleges that there was dual representation by the Sichenzia law firm. If that is indeed the case, then there would be a viable cause of action for breach of contract due to a breach of the covenant of good faith and fair dealing within the contract, especially, as defendant avers, there was mischief on the part of the Sichenzia law firm and the HPC Investors.

Finally, the plaintiff argues that the section of Securities Purchase Agreement the defendant asserts a violation of actually forbids the interpretation the defendant asserts. Under Section 5.18 of the Securities Purchase Agreement,

> Nothing contained herein or in any Transaction Document, and no action taken by any Purchaser pursuant thereto, shall be deemed to constitute the Purchasers as a partnership, an association, a joint venture or any other kind of entity, or create a presumption that the Purchasers are in any way acting in concert or as a group with respect to such obligations or the transactions contemplated by the Transaction Document.

(See Wang Aff., Ex. B at 27). There is nothing in this section that provides a bar as to the defendant's interpretation of the section. Here, it only notes that nothing contained in the Securities Purchase Agreement creates a *presumption* of the purchasers acting in concert. There is nothing in this section that *prohibits* the defendant from bringing a future claim of collusion.

Accordingly, the plaintiff's motion to dismiss the first counterclaim for breach of contract is denied.

3. Common Law Fraud (Third Counterclaim)

Bristol Investment also moves to dismiss SmarTire's third counterclaim for common law fraud, arguing that SmarTire has failed to produce any misstatements on which there is a basis for the defendant to claim fraud. Furthermore, the plaintiff argues that the defendant is only recasting its breach of contract counterclaim as a tort claim. Finally, the plaintiff argues that because the defendant has ratified former agreements and accepted the benefits thereof with the Forbearance and Escrow Agreement, the defendant is barred from asserting a claim for fraud. SmarTire, in response, contends that Bristol Investment's manipulation of SmarTire's stock price without disclosure represents a material omission, and, accordingly, a basis for the common law fraud claim. Further, the defendant argues that it needs more time to conduct discovery on this issue in order validate an already viable claim. Finally, SmarTire argues that this is not a recast of the breach of contract claim, since it is alleging that Bristol Investment failed to disclose its relationship with the HPC Investors and their intentions, leading to fraud in the inducement of the defendant to enter into the agreements. The court agrees with the defendant.

In order to assert a valid claim for common law fraud, the proponent must allege "representation of a material fact, falsity, knowledge, intent to deceive, reliance and damages, with the requisite particularity pursuant to CPLR 3016(b)" (*Caniglia v Chicago Tribune-New York News Syndicate*, 204 AD2d 233, 234 [1st Dept 1994]; *Bank Leumi Trust Co. v D'Evori Intl.*, 163 AD2d 26, 31-32 [1st Dept 1990]). Conclusory allegations or mere suspicion of fraud are wholly insufficient (*Bank Leumi Trust Co.*, 163 AD2d at 32, citing *Glassman v Catli*, 111 AD2d 744 [2d Dept 1985]). However, a cause of action for common law fraud "requires only that the misconduct complained of be set forth in sufficient detail to clearly inform a

[plaintiff/counterclaim-defendant] with respect to the incidents complained of and is not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be impossible to state in detail the circumstances constituting a fraud" (*Bernstein v Kelso & Co.*, 231 AD2d 314, 320 [1st Dept 1997][internal quotations omitted]). Where the facts were "peculiarly within the knowledge of the party against whom the [fraud] is being asserted" (*id.*, quoting *Jered Contr. Corp. v New York City Tr. Auth.*, 22 NY2d 187, 194 [1968]), the misconduct complained of only needs to be set forth in sufficient detail to apprise defendants of the alleged wrongs. After all, given that the allegations must be given their most favorable intendment, "it would be impossible for the plaintiff to state the circumstances in more detail because, if the allegations are true, only the [plaintiff/counterclaim-defendants] would have knowledge of the details" (*id.*, quoting *Grumman Aerospace Corp. v Rice*, 196 AD2d 572, 573 [2d Dept 1993]).

Here, the defendant has sufficiently and specifically detailed the dates of the sale of the stock by both the HPC Investors as well as by the plaintiff, and the requisite drop in the prices of the stock. Further, the defendant has sufficiently alleged that there was collusion on the part of the HPC Investors and Bristol Investment. In addition, the defendant has sufficiently alleged that there was a lack of disclosure on the part of the plaintiff, and, accordingly a material omission which was intended to deceive SmarTire. Finally, the defendant has sufficiently alleged reliance and damages. Accordingly, the defendant has made out a viable counterclaim for common law fraud.

Furthermore, it is different from the breach of contract claim in that there is the claim of failure to disclose its relationship with the HPC Investors and their intention to manipulate SmarTire's stock price as a willful act to deceive. Unlike what the plaintiff argues, this is not a

circumstance that is extraneous to or constituting elements of the contract (*Baker v Norman*, 226 AD2d 301, 304 [1st Dept 1996]). As a matter of fact, this claim is collateral to the breach of contract claim as a misrepresentation of a present fact (*see Orix Credit Alliance, Inc. v.R.E. Hable Co.*, 256 AD2d 114, 115 [1st Dept 1998]). Therefore, this does represent a breach of "a legal duty independent of the contract itself" (*Baker*, 226 AD2d at 304, quoting *Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 389 [1987]).

Finally, the plaintiff argues that the defendant ratified the previous agreements when it entered into the Forbearance and Escrow Agreement with the plaintiff and took an additional cash investment, averring thatbecause Section 1.3 of the agreement provides that "the Prior Debentures and all exhibits thereto shall remain unmodified and in full force and effect" (*see* Wang Aff., Ex. D), the defendant is foreclosed from bringing this claim of common law fraud. The court disagrees. The defendant is not seeking to repudiate the contracts to which it has entered into (*see Beutel v Beutel*, 55 NY2d 957, 958 [1982]; *McLean v Balkoski*, 125 AD2d 234, 236 [1st Dept 1986]). Moreover, there is a question of when exactly did the defendant learn about the fraud and whether there was actual acquiesce (*see Groper v Groper*, 132 AD2d 492 [1st Dept 1987]). Given that the Forbearance and Escrow Agreement was signed in September 2004, and given that the alleged conflict of interest by the Sichenzia law firm occurred in March 2005, it could be a reasonable inference that SmarTire learned of the fraud soon thereafter.

In giving all favorable inferences to the non-movant, the defendant has made a cognizable claim for common law fraud. Accordingly, the plaintiff's motion to dismiss the third counterclaim for common law fraud is denied.

D. Attorneys Fees

Finally, there is motion made by the plaintiff, pursuant to CPLR 603, for a separate trial on its cause of action for attorneys fees. Under CPLR 603, a claim may be separated and tried separately if it is made "[i]n furtherance of convenience or to avoid prejudice." The ordering of a separate trial of a claim or separate issue has been ordered where the separated issue "does not touch up on the merits of the main controversy but will, nevertheless, be dispositive of the entire action" (*Baseball Office of the Comm'r v Marsh & McLennan, Inc.*, 295 AD2d 73, 78-79 [1st Dept 2002], quoting *Morford v A. Sulka & Co.*, 79 AD2d 502, 502 [1st Dept 1980]). Here, because the court has granted the plaintiff's motion to add a claim for damages, denied the plaintiff's motion to dismiss the defendant's remaining counterclaims supra, and has ordered a trial to determine the amount of stocks to be issued to the plaintiff, it would be not be an appropriate use of judicial economy for the court to grant a separate trial for an assessment of attorneys fees where the underlying litigation is pending and does touch up on the merits of the main controversy. Accordingly, the plaintiff's motion for a separate trial and assessment of attorneys fees pursuant to CPLR 603 is denied at this time as premature and a trial as to all issues shall be held at a later date.

CONCLUSION

For the reasons stated, it is hereby

ORDERED that plaintiff's motion to amend the pleadings is granted; it is further

ORDERED that plaintiff's motion for summary judgment is granted and it is ORDERED and ADJUDGED that defendant is liable to plaintiff as to the issuance of stock in defendant

company, and a trial shall be held to determine the amount of stock to be issued by defendant to plaintiff; it is further

ORDERED that plaintiff's motion for attorneys fees is denied as premature and is deferred at this time, to be determined at trial; it is further

ORDERED that plaintiff's motion to dismiss the defendant's counterclaims are granted as to counterclaims two (securities fraud), four (breach of covenant of good faith and fair dealing), five (conspiracy), and six (prima facie tort), and are otherwise denied; it is further

ORDERED that the remaining causes of action and counterclaims are severed, as with the trial, and shall be continued; and it is further

ORDERED that plaintiff shall file an answer to defendant's first counterclaim (breach of contract) and third counterclaim (common law fraud) within ten (10) days of filing of notice of entry.

THIS SHALL CONSTITUTE THE DECISION AND ORDER OF THE COURT.

Dated: January 6, 2006

ENTER:

RICHARD B. LOWE III J.S.C.

RICHARD B. LOWE III

FILED

JAN 11 2006

COUNTY CLERK'S OFFICE

NEW YORK