

**O'Neill v Warburg Pincus & Company**

2006 NY Slip Op 30548(U)

February 1, 2006

Supreme Court, New York County

Docket Number: 116009/2003

Judge: Herman Cahn

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

PRESENT: CAHN  
Justice

PART 49

LAWRENCE DANIEL O'NEILL  
ETAL

INDEX NO. 116009/03

MOTION DATE 11/15/05

MOTION SEQ. NO. 005

MOTION CAL. NO. \_\_\_\_\_

- v -

WABORR, PINCOS, @ Co.  
ETAL

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

**FILED**  
FEB 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE... *[Signature]*

Dated: 2/1/06 [Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 49

-----X  
LAWRENCE DANIEL O'NEILL, JAMES VALENTINE  
and MICHAEL KEANE,

Plaintiffs,

-against-

WARBURG PINCUS & COMPANY, WARBURG  
PINCUS EQUITY PARTNERS, L.P., E.M.  
WARBURG, PINCUS & CO., INC., WARBURG,  
PINCUS NETHERLANDS EQUITY PARTNERS I,  
C.V., WARBURG PINCUS NETHERLANDS EQUITY  
PARTNERS II, C.V., WARBURG, PINCUS  
NETHERLANDS EQUITY PARTNERS III, C.V.,  
ROBERTO ITALIA and ROBERT GLANVILLE,

Defendants.

-----X  
PHILIP BAILLIEU, BANCO NOMINEES  
(GUERNSEY) LTD, SIMON BREWER, CADDER  
LIMITED, BART CARNAHAN, CHAMONIX  
HOLDINGS ENTERPRISES LIMITED individually  
and as assignee of STEVE WYATT,  
GERALD CREAGH, MICHAEL CREAGH,  
PIERS LT E MONTFORT, WILLIAM EDGERLEY,  
THE REISSE FAMILY FOUNDATION, INVESTEC  
TRUST GUERNSEY LIMITED, SHARANBIR  
BRIJNATH as assignee of KENNETH KARMIN,  
THOMAS KEANE, BEATRICE M. LOWENTHAL,  
MR. & MRS. MATTHEW PATRICK, PETER REDDEN,  
THE SRILA FOUNDATION, ROBIN J. START,  
NOHA AL-TURKI and WEATONS HOLDINGS  
LIMITED,

Plaintiffs,

-against-

WARBURG PINCUS & COMPANY, WARBURG  
PINCUS EQUITY PARTNERS, L.P., E.M.  
WARBURG, PINCUS & CO., INC., WARBURG,  
PINCUS NETHERLANDS EQUITY PARTNERS I,  
C.V., WARBURG PINCUS NETHERLANDS EQUITY  
PARTNERS II, C.V., WARBURG, PINCUS

Index No.  
116009/2003  
(Mot. Seq. No. 005)

**FILED**  
FEB 06 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

Index No.  
116263/2003  
(Mot. Seq. No. 004)

NETHERLANDS EQUITY PARTNERS III, C.V.,  
ROBERTO ITALIA and ROBERT GLANVILLE,

Defendants.

-----X  
**CAHN, J.**

Defendants move in each of these actions for summary judgment dismissing plaintiffs' complaints, CPLR 3212.

### **BACKGROUND**

The underlying facts in these actions have been detailed in prior decisions and orders of this court, familiarity with which is presumed.

QoS Networks Limited (QoS or the Company) was an Irish telecommunications corporation formed on November 12, 1999, to develop a new type of global telecommunications service provider, that would use existing telecommunications infrastructure, along with new technology, to create a technologically leading-edge global data and VoIP network. Plaintiffs Lawrence Daniel O'Neill, James Valentine, and Michael Keane (the Management Investors), with non-party James Hendrickson, were the founders of QoS, and later its managers, directors, and/or officers.

On April 14, 2000, defendants Warburg, Pincus & Co., Pincus Equity Partners, L.P., Warburg, Pincus Netherlands Equity Partners I, C.V., Warburg, Pincus Netherlands Equity Partners II, C.V., Warburg, Pincus Netherlands Equity Partners III, C.V. (together, the Warburg defendants), along with the Management Investors, executed Subscription and Shareholders Agreements, pursuant to which they each agreed to purchase Units of QoS at \$2002.00 per Unit (see Eaton Affirm., Exhs. 2 and 4). Each Unit contained one Series A Preference Share, 200

shares of ordinary stock, and “Loan Stock” in the aggregate principal amount of \$1,000. Among other rights and preferences, the QoS Subscription Agreement and Articles of Association granted the holders of Series A Preference Shares (Preference shares) a “Liquidation Preference,” i.e., the right to be repaid before the holders of ordinary shares in the event of QoS’ liquidation.

Additionally, the Shareholders Agreement provided that

no resolution shall be passed to amend, alter or repeal the preferences, special rights or other powers of the Series A Preference Shares so as to affect adversely the Series A Preference Shares, without the written consent or affirmative vote of the holders of at least three quarters of the then outstanding adversely affected Series A Preference Shares to include all the Institutional Investors holding such Series A Preference Shares, given in writing or by vote at a meeting, consenting or voting (as the case may be) separately as a class. For this purpose, the authorisation or issuance of any series of preference shares with preference or priority over the Series A Preference Shares as to the right to receive either dividends or amounts distributable on liquidation, dissolution or winding up of the Company shall be deemed so to affect adversely the Series A Preference Shares.

(Eaton Affirm., Exh. 4, at § 3.12.2).

Upon investing a total of \$30 million in QoS, Warburg became QoS’s largest investor/shareholder, owning almost 61% of its Preference and ordinary shares.

QoS’ Shareholders Agreement and Articles of Association permitted Warburg to appoint two directors to the Board of Directors.

The Management Investors invested a total of approximately \$3.5 million in QoS, becoming minority shareholders.

On May 3, 2000, the plaintiffs in Baillieu executed similar, but not identical Subscription and Shareholder Agreements, pursuant to which they collectively invested approximately \$4.5 million in QoS, and also became minority shareholders.

During the following year, as the Company worked to build its global network, it ran into

various difficulties, including, inter alia, problems with certain critical equipment and adverse market conditions that affected the entire telecommunications industry. As a result, the roll out of the Company's network fell behind schedule, and QoS found itself burning through its remaining cash. The Company adopted a new budget mandating staff lay-offs in March 2001, and restructured its operations in April and May 2001. According to the report of the Company's independent auditor, prepared in late May 2001, between its inception on November 12, 1999 and December 31, 2000, the Company reported a loss of \$13.9 million on ordinary activities (see Eaton Affirm., Exh. 7: Appendix A). In addition, between December 31, 2000 and April 30, 2001, the Company's cash equivalents declined from \$21 to \$8 million (id.). The Company's independent auditors indicated that its operating losses and limited cash on hand "raised substantial doubt about [its] ability to continue as a going concern" (id., Note 3).

At a Board of Directors meeting held on April 5, 2001, defendants Roberto Italia and Robert Granville, the two directors appointed by Warburg, announced that Warburg had decided not to participate in further funding of QoS, and urged management to consider liquidating QoS immediately (Eaton Affirm., Exh. 19). The Warburg directors related the Warburg defendants' feeling that there was only a limited likelihood that the Company would be able to achieve its "proof of concept" before running out of money, and that it should consider liquidating immediately both to maximize shareholder value, and to consider of its trade creditors (id.).

The Management Investors opposed liquidation, favoring instead a further stock offering in conjunction with a financial restructuring. At the following two Board meetings, held on May 3 and May 7, 2001, the Management Investors proposed a capital restructuring (Eaton Affirm., Exhs. 5 and 6). The proposed restructuring would include, among other things, the conversion of

outstanding Preference shares and Loan Stock into ordinary shares. The Management Investors apparently felt that such a conversion was necessary in order to attract new investment, as certain potential investors had indicated that the \$54 million in outstanding Preference shares and Loan Stock would need to be dealt with before any substantive discussions with potential investors could start.

The Warburg directors indicated that the Warburg defendants would consider such a conversion only on the basis of a firm offer made by a new investor, and expressed their view that shareholders should not be asked to give up or waive rights absent such a firm proposal. It appears that Italia and Glanville declined to vote on this issue at either Board meeting.

Immediately following the May 7, 2001 meeting, the Warburg directors submitted a letter to the QoS Board, also dated May 7, 2001, reiterating their position and resigning from the Board (Eaton Affirm., Exh. 10).

On June 11, 2001, the Board produced a stock rights offering plan to sell 10,000 additional Units of QoS, with each Unit to consist of one Series B Preference Share and 1,000 ordinary shares of the Company, at a price of \$1,010.00 per unit (see Eaton Affirm., Exh. 7: Private Placement Memorandum). However, the consummation of the planned offering was expressly conditioned upon the holders of the outstanding Preference shares, ordinary shares, and Loan Stock, approving changes to the Company's capital structure, and amendments to the Articles of Association. Specifically, the proposed changes would permit the creation of the new Series B Preference Shares; provide for the conversion of the outstanding Loan Stock and Series A Preference Shares into ordinary shares, at a conversion ratio of 100 ordinary shares for each Loan Stock share and for each Preference share; and effect a one-for-ten reverse stock split of the

ordinary shares. The effect of these changes would be to eliminate the Liquidation Preference that had been granted to the current holders of Preference shares, as well as to substantially dilute Warburg's investment and interest in the Company.

Plaintiffs allege that there was strong interest in the offering and offers from other venture capitalists to provide up to \$10 million in funding for QoS under the proposed stock rights offering plan. Accordingly, QoS scheduled an extraordinary general membership (EGM) meeting for July 6, 2001, for the purpose of voting upon the resolutions regarding the financial restructuring and proposed stock rights offering. The Warburg defendants continued to object to the proposed capital restructuring absent a specific funding proposal sufficient to allow QoS to continue as a viable entity. In a letter dated July 5, 2001, they reiterated their intent to vote against the resolutions (Eaton Affirm., Exh. 8). In addition, defendants indicated in letters dated June 26 and July 9, 2001, that they would be willing to discuss the terms of a conversion with any bona fide prospective investor and agree to commit to a dilution and conversion of their Preference shares, provided that any new investor was willing to agree to commit to investing in QoS, subject to such dilution and conversion (Eaton Affirm., Exhs. 9 and 11).

Although Warburg met with at least one investor who performed some due diligence on QoS, there is no evidence that any of the potential new investors made firm commitments to invest. Nevertheless, QoS proceeded to reschedule the EGM for August 3, 2001. By letter dated August 1, 2001, the Warburg defendants again indicated their intent to vote against the resolutions, absent some mechanism that would ensure that the Warburg defendants would not be giving up their current rights without some certainty that new investment would result (Eaton Affirm., Exh. 12). Plaintiffs contend that, as a result of the failure to pass the restructuring

resolutions, QoS was unable to complete the offering and draw down the approximately \$4 million that allegedly had been committed under the plan. Upon the advice of counsel, the QoS Board suspended operations and filed for bankruptcy shortly thereafter (Zack Affirm., Exh. 7: Keane Aff., at 24).

Plaintiffs subsequently commenced the instant actions asserting causes of action against the Warburg defendants for breach of fiduciary duty and fraud. Plaintiffs' fraud claim was dismissed in a prior decision and order of this court, dated February 4, 2005 (see Eaton Affirm., Exh. 21).

In their breach of fiduciary duty claim, plaintiffs allege that the Warburg defendants, as majority shareholders of QoS, owed a fiduciary duty to the minority shareholders, and that defendants breached that duty by voting against the resolutions and proposed stock rights offering and refusing to engage in meaningful negotiations with respect thereto, thereby frustrating QoS's attempt to enable a new financier to invest in the Company. Plaintiffs contend that the Warburg defendants had no legitimate basis to oppose the proposed stock rights offering, and that their vote against the restructuring resolutions was contrary to the best interests of QoS and its minority shareholders, and caused plaintiffs to lose all, or substantially all, of the "salvageable value" of their investments.

In the Q'Neill action, the Management Investors additionally assert causes of action for breach of contract and breach of the implied covenant of good faith, in connection with certain personal loan agreements, pursuant to which each of the three Management Investors borrowed money from Warburg to purchase QoS stock. The Management Investors allege that the Warburg defendants' egregious conduct denied them the benefit of their bargain under said

agreements.

Defendants now move to dismiss the breach of fiduciary duty claims on the grounds that (1) plaintiffs lack standing to sue Warburg directly, as the Warburg defendants' alleged misconduct is claimed to have caused harm to the Company, and thus plaintiffs' claims must be brought derivatively, on behalf of QoS; and (2) defendants acted in accordance with the express rights granted them under the Subscription and Shareholders Agreements; thus, no claim for breach of fiduciary duty has been established. In any event, defendants argue that these claims must be dismissed because defendants' refusal to vote for the restructuring resolutions caused plaintiffs no injury, as the resolutions were invalid under Irish law.

Defendants move to dismiss the Management Investors' separate contract and breach of the implied covenant of good faith claims, on the ground that plaintiffs have failed to establish the essential elements of these causes of action.

## DISCUSSION

A motion for summary judgment will be granted where the movant has made "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once the movant has established entitlement to summary judgment relief, the party opposing the motion must tender evidentiary proof, sufficient to require a trial of material questions of fact, or demonstrate an acceptable excuse for not doing so (Zuckerman v City of New York, 49 NY2d 557 [1980]). "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (Id. at 562).

Defendants argue that where, as here, plaintiffs allege that defendants' misconduct caused

harm to the Company, which then resulted in the loss of the value of their equity, the action must be brought derivatively, in the name of the Company, and not as a direct action by shareholders. Plaintiffs argue that they are entitled to bring a direct action against defendants because QoS was a closely-held Irish corporation, with Warburg as its majority and controlling shareholder.

Under New York law, a shareholder lacks standing to pursue a direct cause of action to redress wrongs suffered by the corporation; rather, such claims must be asserted derivatively, for the benefit of the corporation. (Abrams v Donati, 66 NY2d 951 [1985], rearg denied 67 NY2d 758 [1986].) An exception to this rule allows direct claims to be asserted where the shareholder alleges breach of a duty owed independent of any duty owed to the corporation (id.). In determining whether a plaintiff has standing to maintain a direct shareholder action for breach of fiduciary duty, courts have recently focused on the nature of the harm alleged, who is principally harmed, and whether the harm to a shareholders' equity interests is separate and distinct from a harm to the corporation, and thus maintainable as a direct claim (see Higgins v New York Stock Exchange, Inc., 10 Misc 3d 257 (Sup Ct, NY County 2005). However, as the court noted in Higgins,

[d]espite the oftentimes problematic distinction between direct and derivative claims, ... New York courts have consistently held that diminution in the value of shares is quintessentially a derivative claim. (Paradiso & DiMenna, Inc. v DiMenna, 232 AD2d 257, 258 [1st Dept 1996].) While a decrease in share value is undoubtedly harmful to the individual shareholder, this harm is said to derive from the harm suffered principally by the corporation and only collaterally to shareholders, and thus is derivative in nature. (Paradiso & DiMenna, Inc., 232 AD2d at 258.)

(Higgins, 10 Misc 3d at 266).

Plaintiffs argue that since a derivative claim is brought for the benefit of the corporation,

in this case, a successful suit would simply turn any recovery back to QoS, and thus into the hands of the Warburg defendants, the Company's majority shareholders whose claimed misconduct gave rise to the harm. Accordingly, plaintiffs argue, that as minority shareholders, they should be granted the right to seek relief by direct action.

Although some states may allow direct suits under these circumstances, in New York, the fact that the defendants might share in the proceeds of any damage award is not a sufficient basis for allowing these causes of action to be asserted directly, rather than derivatively, even when the corporation is closely held (see Glenn v Hoteltron Systems, Inc., 74 NY2d 386 [1989]; Wolf v Rand, 258 Ad2d 401 [1<sup>st</sup> Dept 1999]; Paradiso & DiMenna, Inc. v DiMenna, 232 AD2d 257 [1<sup>st</sup> Dept 1996]).

Plaintiffs additionally argue that, pursuant to the Amended Subscription Agreement (Eaton Affirm., Exh. 3), the law of Ireland governs the disputes between the parties and that, under Irish law, minority shareholders can bring a direct action to vindicate the harm committed against them at the hands of majority shareholders.<sup>1</sup> In support of their contention, plaintiffs cite a case from the Supreme Court of Ireland, Crinde Investments v Wymes (2 ILRM 275 [1998]), in which that court notes as an exception to the general rule (that only the company is entitled to institute proceedings for damage that it has suffered), that a direct action may lie where minority shareholders complain of acts that are of a fraudulent character beyond the powers of the company, such as where the majority are endeavoring directly or indirectly to appropriate to

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<sup>1</sup>As noted by defendants in their reply brief, the Amended Subscription Agreement was never adopted by the parties, and the original Subscription Agreement provides for the application of New York law (see Eaton Affirm., Exh. 2, § 8.4). It does appear, however, that the Shareholders Agreement "and all relationships created hereby" are governed by Irish Law (id., Exh. 4, § 7.9).

themselves money, property or advantages which belong to the company, or in which other shareholders are entitled to participate.

However, even assuming that Irish law is applicable to plaintiffs' claims, and is determinative of the issue of standing, plaintiffs' particular claims alleging breach of fiduciary duty would not fall within the exception noted in Crindle. In any event, even if this court were to hold that this action could be maintained as a direct claim by shareholders, dismissal of this cause of action would still be warranted, as plaintiffs have failed to establish that the Warburg defendants breached fiduciary duties owed to plaintiffs.

Plaintiffs contend that, as majority shareholders, the Warburg defendants had a duty to act in the best interests of QoS and its minority shareholders. That by Warburg's refusing to vote in favor of the restructuring, plaintiffs were deprived of the opportunity to attract and invest new money in QoS, and thus to salvage their initial investments. In support of their contentions, plaintiffs have submitted the affidavit of an expert in corporate governance, who opines that the Warburg defendants' refusal to approve the restructuring, when other investors appeared willing to commit to invest in QoS in order to keep the company going, was a breach of its fiduciary duty to minority shareholders, as the refusal extinguished any possibility of raising new capital, and thereby caused the minority shareholders to lose any opportunity to save their investment in a potentially successful company (*Zack Affirm.*, Exh. 21: *Silver Affidavit*).

Plaintiffs further argue that, even if defendants were exercising a contractual right to vote their shares against the resolutions, as majority shareholders with a fiduciary duty to the minority, defendants were required to exercise those contract rights in good faith, so as not to destroy or injure the rights of the minority shareholders. Plaintiffs note that, even in cases where a

defendant has acted within its contractual rights, courts have held that an apparently unlimited contractual right “may not be exercised solely for personal gain in such a way as to deprive the other party of the fruits of the contract” (Richbell Information Services, Inc. v Jupiter Partners, L.P., 309 AD2d 288, 302 [1<sup>st</sup> Dept 2003]). “This limitation on an apparently unfettered contract right may be grounded either on the construction of the parties’ fiduciary obligations or on the purely contractual rule that even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party’s right to the benefit under the agreement (id. [citations omitted]). Plaintiffs contend that, in this case, the Warburg defendants’ focus on maintaining their Liquidation Preference was nothing more than a smokescreen, as defendants were aware that QoS’s liabilities exceeded its available capital, and thus that defendants would receive nothing in liquidation. Plaintiffs additionally contend that the Warburg defendants actively misled the Management Investors by feigning an interest in new investors while having already decided to liquidate QoS, and that the various letters sent by the Warburg defendants, indicting their willingness to consider other investors, was merely an effort to create a “record.”

In Richbell, the allegations of breach of fiduciary duty went far beyond claiming only that the defendant should be precluded from exercising a contractual right; rather, the First Department held that the allegations supported a claim that the defendant had exercised a contractual right “malevolently, for its own gain as part of a purposeful scheme designed to deprive the plaintiffs of the benefits of a joint venture and of the value of their pre-existing holdings” (id.). While recognizing the tension between the imposition of a good faith limitation on the exercise of a contractual right and the avoidance of using the implied covenant of good faith to create new duties that negate specific rights under a contract, the First Department held

that allegations in Richbell did “not create new duties that negate [defendant’s] explicit rights under a contract, but rather, seek imposition of an entirely proper duty to eschew this type of bad faith targeted malevolence in the guise of business dealings” (id.).

No such allegations are present here. The record shows that the Warburg defendants, in refusing to vote in favor of the restructuring (the alleged misconduct upon which plaintiffs have based their claim), were exercising their specific and expressly bargained-for rights contained in their Subscription and Shareholder agreements and the Articles of Association, in a manner clearly contemplated by all the parties to those agreements (see Sterling Fifth Assocs. v Carpentile Corp., 9 AD3d 261 [1<sup>st</sup> Dept 2004]). Although the record shows that defendants were skeptical and somewhat dismissive of plaintiffs’ efforts to secure new investment, plaintiffs have produced no evidence which might suggest that defendants voted their shares against the resolutions for an illegitimate purpose or in bad faith.

As plaintiffs acknowledge, by early May 2001, when defendants first suggested liquidation, QoS was approaching insolvency and required additional investment to keep going. At that point, according to the consolidated financial statements that were attached to the Private Placement Memorandum, the Company still reported cash equivalents of approximately \$8 million (Eaton Affirm., Exh 3), although it appears that by August 3, 2001, the date of the EGM, QoS essentially was insolvent.<sup>2</sup> Even if defendants had been aware that they would receive nothing through exercise of their Liquidation Preference, which plaintiffs have not shown, that

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<sup>2</sup>According to the affidavit of Ian Philip, an independent chartered accountant hired by QoS, as of August 3, 2001, the date of the EGM, QoS had outstanding liabilities of \$76,362,166.00 and an unrestricted cash book balance of \$2,139,712.00 (Zack Affirm., Exh. 41). To evidence his statements, Philip attaches an itemized financial schedule that apparently was prepared sometime on or after August 31, 2001, well after the EGM.

knowledge would not, by itself, render their refusal to vote in favor of the restructuring illegitimate, or suggest the kind of bad faith or malevolence at issue in Richbell. Indeed, it would appear that under such circumstances, defendants' insistence that any restructuring be contingent upon a firm offer of new investment sufficient to keep the Company going as a viable concern, was neither illegitimate nor imprudent.

The record reflects that defendants consistently expressed their unwillingness to consider a corporate restructuring, which would have deprived them of their contractual right to senior status in QoS's capital structure, absent some assurance or commitment that such a restructuring would provide sufficient new capital to keep QoS going as a viable concern. Although plaintiffs contend that Warburg's willingness to consider new investors was feigned, they have proffered no evidence that might show that the requisite assurance or commitment to invest upon the approval of such a restructuring was either available or forthcoming. Rather, the record indicates that all of the major offers of new investment were expressly contingent on factors other than just the shareholders' approval of the capital restructuring of QoS, including further due diligence post EGM (see Zack Affirm., Exhs. 16 and 18; Eaton Affirm., Exh. 29).

Accordingly, as plaintiffs have failed to establish the existence of any material issue of fact as to whether defendants' exercise of their contractual right to vote against the restructuring amounted to a bad faith targeted malevolence, in breach of a fiduciary duty owed plaintiffs, this cause of action is dismissed.

The Management Investors additional causes of action for breach of contract and breach of the implied covenant of good faith, which relate to certain loan agreements by which the Warburg defendants lent these plaintiffs money for the purchase of QoS stock, will likewise be

dismissed. The elements of a cause of action for breach of contract are the formation of a contract between plaintiff and defendant, performance by plaintiff, defendant's failure to perform, and resulting damages (Furia v Furia, 116 AD2d 694 [2d Dept 1986]). As plaintiffs have neither established that they performed their obligations under the contracts, nor identified the specific obligations breached by defendants, this cause of action must fail.

In any event, the court notes that in three prior actions commenced by the Warburg defendants against each of the Management Investors, for breach of these same agreements, this court awarded the plaintiffs therein (who are the defendants in these actions), summary judgment after necessarily finding that the Warburg defendants had fully performed their obligations under the agreements, and that each of the plaintiffs herein had breached (see Warburg, Pincus Equity Partners, L.P. v O'Neill, Index No. 124221/2002 [Sup Ct NY County July 18, 2003], affd 11 AD3d 327 [1<sup>st</sup> Dept 2004]; Warburg, Pincus Equity Partners, L.P. v Keane, Index No. 606626/2003 [Sup Ct NY County March 12, 2004] and Warburg, Pincus Equity Partners, L.P. v Valentine, Index No. 602625/2003 [Sup Ct NY County March 12, 2004], affd 22 AD3d 321 [1<sup>st</sup> Dept 2005]). This court further notes that plaintiffs' contention, that the Warburg defendants breached the implied covenant of good faith and deprived plaintiffs of the benefits of their bargain by their conduct to QoS, was found to be unavailing as a defense in those actions (see Warburg, Pincus Equity Partners, L.P. v O'Neill, 11 AD3d 327 [1<sup>st</sup> Dept 2004]).

Accordingly, it is

ORDERED that defendants' motion for summary judgment (motion sequence number 005 in O'Neill v Warburg Pincus & Co., Index No. 116009/2003 and Baillieu v Warburg Pincus & Co., Index No. 116263/2003) is granted, and the complaints are hereby dismissed with costs

and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: February 1, 2006

ENTER: *Alan Cole*  
J.S.C.

**FILED**  
FEB 06 2006  
NEW YORK  
COUNTY CLERKS OFFICE