Pentagon Dollar Satellite Fund, Ltd. v Midsummer Ventures, Ltd.
2013 NY Slip Op 33617(U)
April 10, 2013
Sup Ct, NY County
Docket Number: 652835/2011
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN Justice PART 60

PENTAGON DOLLAR SATELLITE FUND, LTD.

-against-

MIDSUMMER VENTURES, LTD.

INDEX NO. 652835/2011

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... No (s). _____

Answering Affidavits — Exhibits _____ No (s). _____

Replying Affidavits _____ No (s). _____

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Defendants' motion is granted to the extent set forth in the accompanying decision/order dated April 10, 2013.

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

Dated: 4-10-13

MARCY S. FRIEDMAN, J.S.C.

1. Check one: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. Check as appropriate:.....Motion is: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 60

PRESENT: Hon. Marcy S. Friedman, JSC

PENTAGON DOLLAR SATELLITE FUND, LTD.

Plaintiff,

- against -

MIDSUMMER VENTURES, LTD., MIDSUMMER CAPITAL, LLC, and MICHEL AMSALEM,

Defendants.

Index No.: 652835/2011

DECISION/ORDER

In this action, plaintiff Pentagon Dollar Satellite Fund, Ltd. (Pentagon) seeks damages from defendants Midsummer Ventures, Ltd. (Midsummer Ventures), Midsummer Capital, LLC (Midsummer Capital), and Michel Amsalem for defendants' alleged fraud and breach of fiduciary duty in connection with the issuance of a capital call. Defendants move to dismiss Pentagon's complaint pursuant to CPLR 3211(a)(1) and (7).

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), "the pleading is to be afforded a liberal construction (see, CPLR 3026). [The court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (Leon v Martinez, 84 NY2d 83, 87-88 [1994]; see 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts." (Robinson v Robinson, 303 AD2d 234, 235 [1st Dept 2003];

see also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1st Dept 2005], lv denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." (Leon v Martinez, 84 NY2d at 88; Arnay Indus. v Brown, Raysman, Millstein, Felder & Steiner, LLP, 96 NY2d 300 [2001].)

As alleged in the complaint, Pentagon is a private investment fund. Midsummer Ventures is a feeder fund that invests in a non-party master fund. Midsummer Capital is the investment manager for Midsummer Ventures and the master fund. Defendant Amsalem is a managing member of Midsummer Capital and of the general partner of the master fund. (Complaint, ¶¶ 2-5.) In early 2007, Pentagon purchased shares of Midsummer Ventures pursuant to a Subscription Agreement dated February 7, 2007 (Subscription Agreement) and a Confidential Explanatory Memorandum dated January 1, 2007 (Confidential Memorandum)(collectively, the Agreements) in exchange for a $4 million "Capital Commitment." (Complaint, ¶¶ 7-8.) Pursuant to the Agreements, Midsummer Ventures could "draw down the unpaid balance of the Capital Commitment at such times as it identified suitable investment opportunities" during the "Investment Period." (Id., ¶ 9.) The "Investment Period" was defined as the "period beginning on the Initial Closing . . . and ending two and one-half years thereafter." (Confidential Memorandum, § 5, at 25.) As the Initial Closing occurred on March 1, 2007, the Investment Period was originally scheduled to end on September 1, 2009. (Complaint, ¶ 9.) At the Initial Closing, Pentagon funded 20% of the Capital Contribution ($800,000) and prior to August 2009, Pentagon funded an additional 20% ($800,000) in response to a second Capital Call, bringing its total contribution to $1.6 million. (Id., ¶ 8.)

In support of its breach of fiduciary duty and fraud claims, Pentagon alleges that Midsummer Capital directed Midsummer Ventures to issue a capital call in August 2009, without disclosing material information. (Id., ¶ 16.) More particularly, as of August 2009, Midsummer Ventures had made a $750,000 short term bridge loan to Amarin, a pharmaceutical company, and "became privy to material information concerning various positive developments likely to increase the value of Amarin." (Id., ¶ 15.) Defendants did not inform Pentagon about the potential investment opportunity in Amarin. (Id., ¶ 16.) Instead, they gave the information to a favored group of investors including Amsalem, his friends, family, and associates, whose investments represented only 27.3% of the total capital commitment in Midsummer Ventures. (Id., ¶ 17.)

According to the complaint, at the time Midsummer Ventures identified Amarin as a potential investment opportunity, Midsummer Ventures had sufficient capital to invest in Amarin. (Id., ¶ 14.) Moreover, prior to the August 2009 Capital Call, Pentagon had advised defendants that it would not participate in further investments. (Id., ¶ 18.) Nevertheless, two weeks before the scheduled expiration of the Investment Period, Midsummer Ventures issued the August 2009 Capital Call for an additional 20% of Pentagon's Capital Commitment. (Id., ¶ 13.) Pentagon did not fund the August 2009 Capital Call. It was met by the Amsalem group of investors who had been given the information about the Amarin investment. (Id., ¶¶ 18-19.) Midsummer Ventures solicited and received authorization from those investors who satisfied the call to extend the Investment Period to September 1, 2010. (Id., ¶ 19.)

As further alleged in the complaint, following the August 2009 Capital Call, Midsummer Capital sent an email to Pentagon, dated September 9, 2009, in which it informed Pentagon that

Midsummer Ventures would invoke the remedies for failing to satisfy a capital call set forth in section 7 of the Confidential Memorandum. (Id., ¶¶ 19-20.) Under section 7, Midsummer Ventures had "the right, in its sole discretion, to pursue any remedy available by law, including [the right] . . . to deny the defaulting Shareholder the right to participate in further investments of the Fund" or "to terminate all of the defaulting Shareholder's rights to receive profits." (Id., Ex. 2, Confidential Memorandum at 27.) The right to terminate the defaulting Shareholder's rights to receive profits was subject to the proviso that "upon dissolution of the Fund the defaulting Shareholder will be entitled to receive (without interest) an amount equal to the lesser of the amount of the Net Asset Value of the Shareholder's Shares at the time of the default or the aggregate Capital Contributions of the Shareholder to the Fund, less distributions to such Shareholder, after deduction in each case of the defaulting Shareholder's proportionate share of expenses through dissolution." (Id.)

In Pentagon's case, Midsummer Ventures gave notice, following Pentagon's failure to meet the capital call, that it would limit Pentagon's right to receive profits "to distributions from the net proceeds received from investments made by the Fund prior to July 31, 2009 (which they will receive as and when we liquidate on a pro-rata basis with participating Limited Partners) until they have received aggregate distributions (including those made prior to this capital call) equal to no more than 110.45% of their Capital Contributions." (Id., Ex. 4, Email, dated Sept. 9, 2009, from Midsummer Capital to Pentagon.) This notice further stated: "Beyond this, the non-participating investors will not be entitled to any distributions attributable to any gain from existing or future investments, and any capital gain they would otherwise have received will be allocated pro-rata among the participating Limited Partners." (Id.)

Pentagon asserts that in May 2011, Midsummer Capital "trumpeted the success from [its] investment in Amarin" – namely, that the Amarin shares, which were purchased for $0.90, were trading at $16.00 per share. (Id., ¶ 22.) Subsequently, the Amarin profits were only distributed to investors who satisfied the August 2009 Capital Call, including Amsalem, his friends, relatives, and associates. (Id., ¶¶ 21-22.) Pentagon alleges that the August 2009 Capital Call "scheme" prevented them from investing and "generated millions of dollars" for Amsalem and his friends. (Id., ¶¶ 14, 22.)

In support of its breach of contract claim, Pentagon further maintains that in October 2009, Midsummer Capital "rolled" $500,000 of a $750,000 July 2009 bridge note issued to Amarin and redeemed $250,000 in cash, and that this investment (October 2009 Amarin Investment) qualified as a "Follow-on Investment" as defined in the Confidential Memorandum. (Id., ¶¶ 27- 28.) Pentagon claims that it was entitled, under the Agreements, to proceeds from this investment, regardless of whether it defaulted on the capital call. (Id., ¶ 52.) In the alternative, Pentagon alleges that Midsummer Ventures breached the contract by improperly calculating the distributions to which it claims Pentagon will ultimately be limited as a result of its failure to meet the capital call. Specifically, it alleges such distributions are based on a percentage of the net asset value (NAV) of the fund, that Midsummer delayed in changing the methodology for calculating the NAV until after Pentagon's default, and that the new methodology would result in a higher NAV of the fund and of the shares. However, Midsummer Ventures calculated a lower NAV based on the methodology in effect as of July 31, 2009. (Id., ¶¶ 23-25.)

Breach of Fiduciary Duty Causes of Action [1]

The first cause of action is brought against Midsummer Capital for breach of fiduciary duty. The second is brought against Midsummer Ventures and Amsalem for aiding and abetting this breach. Pentagon pleads that Midsummer Capital breached a fiduciary duty to Pentagon by "wrongfully issuing" the August 2009 Capital Call, withholding material information regarding the Amarin opportunity and subsequent October 2009 Amarin Investment, withholding information that Amsalem was engaged in a scheme to enrich himself and his friends, terminating the rights of Pentagon to receive certain profits as a result of its default, changing Midsummer Ventures' methodology for calculating its net asset value, and withholding the proceeds of the October 2009 Amarin Investment. (Id., ¶ 36.) Pentagon alleges that it has suffered damages of nearly $1.8 million. (Id., ¶ 37.)

Defendants do not dispute that a duty to disclose may be based upon a fiduciary relationship. (See Swersky v Dreyer & Traub, 219 AD2d 321, 327 [1st Dept 1996], appeal withdrawn 89 NY2d 983.) Rather, in moving to dismiss the breach of fiduciary cause of action, they argue that no fiduciary duty exists and that the parties' Agreements do not require disclosure of the information that Pentagon claims was wrongfully withheld.

More particularly, defendants argue that Midsummer Capital is governed by the Investment Advisers Act of 1940 (15 USC §§ 80b-1, et seq.) (Advisers Act) and that, under the Act, it owes a fiduciary duty to the fund, not to investors in the fund. (Ds.' Memo. In Support at 13.) As alleged in the complaint, Midsummer Capital is "an SEC-registered investment adviser"

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[1]By stipulation dated November 6, 2012, the parties agreed that "New York law shall apply to all issues in this action."

(Complaint, ¶ 4) and is therefore subject to the Advisers Act. Courts interpreting the term "client" under various provisions of this Act have held that the investment adviser's client is the fund, not the investors in the fund. (Goldstein v Securities & Exch. Commn., 451 F3d 873, 881 [DC Cir 2006][registration provisions]; Securities & Exch. Commn. v Northshore Asset Mgt., 2008 US Dist Lexis 36160, *17-*18 [SD NY 2008][anti-fraud provisions].) In reaching this result, the courts have reasoned that the adviser would inevitably face conflicts of interest if the client, to which the fiduciary duty is owed, were not only the fund but each investor. (Goldstein, 451 F3d at 881.) Pentagon does not cite authority to the contrary and, indeed, does not address the applicability of the Advisers Act. Rather, it cites inapposite case law, developed in other contexts, in support of its claim that it was owed a fiduciary duty. (See Roni LLC v Arfa, 18 NY3d 846 [2011][fiduciary duty owed by promoters of limited liability companies to investors].)

Significantly, even if a fiduciary duty existed, the parties' Agreements, by their terms, do not require the disclosure to which Pentagon claims it was entitled. As noted above, the complaint acknowledges that "Midsummer Ventures could draw down the unpaid balance of the Capital Commitment at such times as it identified suitable investment opportunities." (Complaint, ¶ 9.) The Subscription Agreement, § p, expressly provides: "The Investor acknowledges and understands that in making a Capital Commitment to the Fund, the Investor is obligated to submit a portion of its Capital Commitment to the Fund at any time (subject to the terms of the Memorandum and Bye-Laws), in the Board's sole discretion." (See also Confidential Memorandum, § 7, Capital Contributions and Capital Calls, at 26.)

Pentagon does not point to any provision of the Agreements or Bye-Laws that limits the Board's discretion as to when to issue a capital call, provided that the call is made within the

Investment Period. Nor does Pentagon cite any provision that requires the investment manager to furnish information to the investors about the investment opportunities that have been identified as suitable, or to give direct advice to the investors about the investments that will be funded by the capital call.[2] The Agreements also do not afford the investors any discretion as to whether to meet the call. Pentagon's claim that Midsummer Ventures breached a fiduciary duty to it reduces to the claim that defendant should have informed it not only that it identified a suitable investment prior to the August 2009 Capital Call, but that the Amarin investment would likely be profitable. The terms of the Agreements simply provide no support for this claim.

The terms of the Agreements similarly provide no support for Pentagon's apparent contention that the August 2009 Capital Call was invalid because made just two weeks before the end of the Investment Period or at a time when the fund still had capital with which to make investments.

Nor may Pentagon maintain its breach of fiduciary duty claim under the "special facts" doctrine. While this doctrine may provide a basis for the imposition of a duty to disclose in the absence of a fiduciary relationship (see Jana L. v West 129th St. Realty Corp., 22 AD3d 274, 277 [1st Dept 2005]; Swersky, 219 AD2d at 327), it is inapplicable on the pleaded facts.

Under the special facts doctrine, "a duty to disclose arises where one party's superior

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[2]It is noted that in construing the Advisers Act, the Court of Appeals for the District of Columbia Circuit has explained that "[a]n investor in a private fund may benefit from the adviser's advice (or he may suffer from it) but he does not receive the advice directly. He invests a portion of his assets in the fund. The fund manager – the adviser – controls the disposition of the pool of capital in the fund. The adviser does not tell the investor how to spend his money; the investor made that decision when he invested in the fund." (Goldstein, 451 F3d at 879-880 [emphasis in original].)

knowledge of essential facts renders a transaction without disclosure inherently unfair." (P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V., 301 AD2d 373, 378 [1st Dept 2003] [internal quotation marks & citations omitted].) "[T]he doctrine requires satisfaction of a two-prong test: that the material fact was information 'peculiarly within [the] knowledge' of [defendant], and that the information was not such that could have been discovered by [plaintiff] through the 'exercise of ordinary intelligence.'" (Jana L, 22 AD3d at 278 [internal citations omitted].)

It was not "inherently unfair" for Midsummer Capital to withhold information about Amarin, as the Agreements did not condition the making of the capital call on any disclosures and did not afford investors any discretion not to meet the call. Moreover, Pentagon "had, at the very least, a duty to inquire. . . . It is insufficient for [Pentagon] to simply make the conclusory statement that the information . . . 'could not have been obtained [by it] through the exercise of ordinary intelligence.'" (Id. at 278.) As Pentagon does not allege that it made any inquiry regarding any potential investment after receiving notice of the August 2009 Capital Call, it cannot establish a duty to disclose based on the special facts doctrine. (Id.)

Pentagon also fails to plead facts to bring this action within the doctrine that "where one party possesses superior knowledge, not readily available to the other, and knows that the other is acting on the basis of mistaken knowledge, there is a duty to disclose that information." (Stevenson Equip. Inc. v Chemig Constr. Corp., 170 AD2d 769, 771 [3rd Dept 1991] [internal quotation marks and citation omitted], affd 79 NY2d 989 [1992].) Pentagon does not allege that defendants knew that it was acting based on mistaken information. Its bare assertion that defendants knew it would not invest without information about Amarin does not amount to such

an allegation. Nor does this assertion support a duty to disclose in the face of the parties' Agreements which provide for issuance of capital calls without disclosure of information about potential investments.

Finally, to the extent that Pentagon claims that defendants breached a fiduciary duty by concealing information about the Amarin investment as part of a scheme to enrich Amsalem and his associates at Pentagon's expense, this allegation cannot support either the fiduciary duty or fraud cause of action, as discussed below in connection with the fraud cause of action.

As the breach of fiduciary duty cause of action must be dismissed, the second cause of action for aiding and abetting such breach must also be dismissed.

Fraud Causes of Action

In its third cause of action, Pentagon alleges that Midsummer Capital committed fraud by failing to disclose material information regarding the Amarin investment to Pentagon prior to the August 2009 Capital Call, failing to disclose its intention to reinvest in Amarin, and secretly planning to enrich Amsalem at Pentagon's expense. (Complaint ¶ 43.)

To plead a claim of fraud, "the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury." (Lama Holding Co. v Smith Barney Inc., 88 NY2d 413, 421 [1996]; Perrotti v Becker, Glynn, Melamed & Muffly, 82 AD3d 495, 498 [1st Dept 2011].) To plead a claim for fraudulent concealment, the plaintiff must allege, in addition to the above elements, that "the defendant had a duty to disclose material information."

(Mandarin Trading Ltd. v Wildenstein, 16 NY3d 173, 179 [2011][citing P.T. Bank Cent. Asia, 301 AD2d at 376.)

Here, as previously discussed, defendants had no duty, under either the Agreements or the special facts doctrine, to disclose information regarding the Amarin investment. Pentagon's fraud cause of action also is not maintainable based on its assertion that defendants fraudulently concealed information about the Amarin investment as part of a scheme to enrich Amsalem and his associates. In its complaint, Pentagon alleges that Midsummer Capital knew that Pentagon would not meet the August 2009 Capital Call so long as the information about the Amarin investment was not disclosed to it, and that "[b]ut for Midsummer Capital's fraudulent failure to disclose," Pentagon would have met the call. (Complaint, ¶ 44.) At the oral argument of the motion, plaintiff characterized its fraud claim as one for "fraudulent inducement" – i.e., that Pentagon was "induced not to meet the capital call." (Oral Argument Transcript [Tr.] at 13-16.)

The complaint does not state a cause of action for fraudulent inducement. It is well settled that a party cannot be defrauded into doing what it was legally bound to do. (Senarh S.A. v Morgan, 64 AD3d 420, 421 [1st Dept 2009], citing Megaris Furs v Gimbel Bros., 172 AD2d 209, 212 [1st Dept 1991]), and that "one cannot be induced to tender a performance which is required as part of a preexisting contractual obligation." (Megaris Furs, 172 AD2d at 212.) Pentagon cites no authority for the converse proposition that a party can be defrauded into refraining from doing what it was contractually obligated to do. Continental Ins. Co. v Mercadante (222 AD 181 [1st Dept 1927]), on which Pentagon relies, is not to the contrary. There, the plaintiff stated a fraud claim based on the allegation that the plaintiff retained securities as result of the defendant's fraudulent misrepresentations. Not only did the case

involve affirmative misrepresentations, but the plaintiff's obligation to hold (or, as here, purchase) securities was not governed by a contract – two factors that distinguish the case and its progeny (see e.g. Babcock v Citigroup Inc., 2005 NY Misc Lexis 8499 [Sup Ct, NY County 2005]) from the instant action.

The court accordingly holds that Pentagon's third cause of action against Midsummer Capital for fraud must be dismissed. Its fourth cause of action against Amsalem for aiding and abetting fraud, which is based on the same allegations, must also be dismissed.

Breach of Contract Cause of Action

Pentagon's fifth and final cause of action is for breach of contract against Midsummer Ventures. Pentagon first alleges that Midsummer Ventures breached the contract by "failing to properly calculate [Pentagon's] Distribution and specifically failing to include amounts owed to [Pentagon] pursuant to the October 2009 Follow-On Investment in that calculation." (Complaint, ¶¶ 51-52.)

The Confidential Memorandum, section 5, contains the following provisions relevant to the definition of Follow-on Investment:

"Investment Period

> The Investment Manager shall invest and reinvest the assets of the Master Fund, including appreciation thereon, for a period beginning on the Initial Closing (as defined below) and ending two and one-half years thereafter (the "Investment Period"). During the Investment Period, the Investment Manager may reinvest net cash proceeds of the Master Fund generated by liquidation of underlying investments,

instead of returning those proceeds to investors.

Reinvestment

> Notwithstanding the foregoing, for a period of 1½ years following the expiration of the Investment Period, the Master Fund shall be able to liquidate existing underlying investments and either distribute the proceeds to investors in the Master Fund (including the Fund) or use the proceeds to invest in other existing underlying investments ("Follow-on Investments") in the discretion of the Investment Manager."

Pentagon claims that its October 2009 "rolling" of a portion of a bridge loan that it had made to Amarin in July 2009 constituted a Follow-on Investment within the meaning of the Confidential Memorandum. It contends that a Follow-on Investment is made where proceeds are used to invest in "other existing underlying investments." (P.'s Memo. In Opp. at 14-15.) Defendants counter that in order to qualify as a Follow-on Investment, the investment must be made after the expiration of the Investment Period. Defendants further claim that the rolling of the Amarin loan was made during the Investment Period because the investors who met the August 2009 Capital Call voted to extend the Investment Period to September 1, 2010.

To the extent that defendants contend that the Agreements are ambiguous as to the meaning of Follow-on Investment, this contention is without merit. The determination of whether a contract is ambiguous is one of law to be resolved by the court. (Matter of Wallace v

600 Partners Co., 86 NY2d 543, 548 [1995]; W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 [1990].) Moreover, the court must determine from contractual language, without regard to extrinsic evidence, whether there is any ambiguity. (Chimart Assocs. v Paul, 66 NY2d 570, 573 [1986].)

There is no ambiguity in the definition of Follow-On investment, which clearly refers to investments made after the expiration of the Investment Period. The terms of the Confidential Memorandum do not support Pentagon's argument that because the October 2009 Amarin Investment was made in part with funds contributed by Pentagon prior to July 31, 2009, it was a Follow-On Investment. Rather, the plain meaning of the Reinvestment provision is that proceeds from "existing underlying investments" (i.e., investments made prior to the end of the Investment Period, and thus including investments such as the July 2009 Amarin loan) may either be distributed to investors or invested "in other existing underlying investments." However, they are Follow-on Investments only if made in the 1½ years following the expiration of the Investment Period.

The court rejects Pentagon's further contention that the Confidential Memorandum is ambiguous as to whether the extension of the initial Investment Period would "defer the commencement of the running of the 1½ year period during which further investments in previous underlying investments, such as Amarin, would be treated as 'Follow-on Investments.'" (P.'s Supp. Memo. at 4-5.) While the Confidential Memorandum does not specifically address extensions of the Investment Period, Pentagon does not dispute that the parties' Agreements allowed for an extension of the Investment Period or that the extension at issue was valid. According the word "expiration" in the Confidential Memorandum its plain meaning, as the

Investment Period was extended it did not expire. The 1½ year period for reinvestments "following the expiration of the Investment Period" (i.e., Follow-on Investments) (emphasis supplied) therefore did not commence.

The court is also unpersuaded by Pentagon's contention that an email from Amsalem to Pentagon's principal, dated August 14, 2009, was "an admission by the defendants that an investment in Amarin which meets the criteria that are described here is going to be treated as a follow-on investment to which even a defaulting investor, if our fraud and aiding and abetting claims are rejected, is entitled to share." (Tr. at 22.) This email stated:

> "What I mean is that the investors that do not meet the call will get up to 110.45% of their capital contribution to date from the net proceeds received from investments made by the fund prior to July 31, 2009 pari-pasu with the other investors that participated in these investments, including the ones that meet the most recent capital call. There will be no new investments made with the capital of the investors that do not meet the call except for follow-on investments in companies in which the fund was invested prior to July 31, 2009. Such follow-on investments will be made pari-pasu by all investors in the fund up to July 31, 2009. They will be made out of the cash reserve that we have kept for such purpose. I hope that answers your questions."

As the court has held that the definition of Follow-on Investment in the Confidential Memorandum is not ambiguous, parole evidence is not properly considered. In any event, the statements in the email do not refer to Amarin or any particular investment, are not inconsistent with section 5, and do not modify the definition of Follow-on Investment in any respect.

Finally, the breach of contract claim is not maintainable based on defendants' alleged application of an improper methodology in calculating the net asset value of Midsummer Ventures. As discussed above (supra at 4), the Confidential Memorandum provides that the distribution of a defaulting shareholder will be based on the lesser of the NAV or the shareholder's capital contributions. Midsummer Ventures notified Pentagon that its distribution

will be based on a percentage of its capital contributions, and Pentagon makes no claim that such percentage would be lower than its proportional share of the NAV. The methodology used in calculating the NAV is therefore irrelevant.

It is accordingly hereby ORDERED that defendants' motion is granted to the extent of dismissing the complaint in its entirety.

This constitutes the decision and order of the court.

Dated: New York, New York
April 10, 2013

MARCY S. FRIEDMAN, J.S.C.

MARCY S. FRIEDMAN, J.S.C.