

Cypress Point Inv. Partners, LLC v Sandberg

2016 NY Slip Op 31038(U)

June 3, 2016

Supreme Court, New York County

Docket Number: 653085/2014

Judge: Jeffrey K. Oing

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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CYPRESS POINT INVESTMENT
PARTNERS, LLC -- ARTISAN INVESTORS FUND,

Plaintiff,

-against-

DAVID SANDBERG, THE RED OAK FUND, L.P.,
RED OAK PARTNERS, LLC, RED OAK CAPITAL
PARTNERS, LLC, RED OAK FUND II, LLC,
and RED OAK PARTNERS II, LLC,

Defendants.

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Index No. 653085/2014

Mtn Seq. Nos. 004 & 006

DECISION AND ORDER

JEFFREY K. OING, J.:

Mtn Seq. No. 004

Plaintiff Cypress Point Investment Partners, LLC -- Artisan Investors Fund ("plaintiff" or "Cypress") moves, pursuant to CPLR 3211(a)(1) and (7), to dismiss the defendants' counterclaim alleging the breach of a confidentiality agreement based on documentary evidence and for failure to state a cause of action.

Mtn Seq. No. 006

Defendants David Sandberg ("Sandberg"), The Red Oak Fund, L.P. (the "Fund"), Red Oak Partners, LLC (the "General Partner"), Red Oak Capital Partners, LLC (the "Management Company"), Red Oak Fund II, LLC ("RO II") and Red Oak Partners II, LLC ("defendants" or "Red Oak") move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the first amended complaint.

**Factual Allegations
Procedural History**

In the original complaint, dated October 9, 2014, Cypress alleged that on June 29, 2012 it entered into a letter agreement (the "Agreement") with Red Oak regarding investing in the Fund and certain "side-pocket" investments. The record demonstrates that there is no dispute that the Agreement, together with the Fund's March 2003 Private Placement Memorandum (the "Placement Memorandum"), the Fund's February 19, 2003 Limited Partnership Agreement (the "LP Agreement"), and the Fund's March 2003 Subscription Documents (collectively, the "Fund Documents"), define the rights and obligations of Red Oak and Cypress with respect to Cypress's investment in the Fund.

Cypress made its first investment of \$2,750,000 in the Fund on July 1, 2012, and a second investment of \$750,000 was made on October 1, 2012. On October 31, 2012, Cypress alleges it invested \$75,410 in a "side-pocket" investment known as Red Oak Title Acquisition, LLC ("ROTA") via the Fund's investment in defendant RO II in exchange for approximately 3.35% of ROTA's common equity. Thereafter, the relationship between the parties deteriorated, and in mid-2013, Cypress determined not to make any further investments in the Fund, and attempted to withdraw its investment in the Fund, while keeping its investment in the ROTA side-pocket.

In December 2013, Red Oak advised Cypress that the ROTA side pocket investment has been recontributed to the Fund. Plaintiff was redeemed from the Fund in stages that ended by January 21, 2014, when the Fund returned the remaining amount of Cypress's investment, including the amount associated with Cypress's stake in ROTA, subject to a small audit holdback, which was received on July 2, 2014.

On August 18, 2014, the Fund commenced a lawsuit against Cypress in this court contending that Cypress had agreed to make a total investment of \$5 million in the Fund and was in breach of that agreement (see The Red Oak Fund L.P. v Cypress Point Inv. Partners, LLC, Index No. 652536/2014 [the "First Action"]). On April 21, 2015, this court granted Cypress's motion to dismiss the complaint in the First Action on the ground that the plain terms of the Agreement, as amended by a November 29, 2012 email, committed Cypress only to make an initial investment of \$2,750,000 in the Fund on or before July 5, 2012, which indisputably occurred, and that Cypress had the option to make additional investments totaling \$1,250,000.

Rather than counterclaiming in the First Action, Cypress commenced this second action in October 2014 in order to redress what it termed as defendants' "swindle of Cypress and other outside limited partner investors in the Fund through a pattern of self-interested transactions, self-dealing and breaches of

fiduciary duties" (Cmplt., ¶ 1). Cypress claimed that Sandberg, who controls Red Oak, took millions of dollars in fees, personal loans and equity for himself and his insiders. He allegedly did so while seeking to avoid regulatory oversight by operating Red Oak without properly registering as an investment adviser or complying with state and/or federal securities laws. When Cypress elected to withdraw from the Fund in mid-June 2013, defendants allegedly retaliated by unilaterally writing-down Cypress's investment ownership and stealing its accumulated returns.

The original complaint asserted two causes of action -- breach of fiduciary duty and breach of the Agreement and the Fund Documents, based on the following claims: (1) that immediately after Cypress elected to withdraw from the Fund Red Oak devalued the paper value of Cypress's investment in ROTA; (2) that Red Oak failed to maintain the necessary regulatory licenses and registration required in the Agreement and Fund Documents; (3) that Red Oak used Cypress's ROTA investment as a weapon to coerce Cypress to remain invested in the Fund; (4) that Red Oak forcibly redeemed Cypress's investment in the Fund, including the amount associated with Cypress's devalued stake in ROTA; (5) that Red Oak threatened to forcibly liquidate Cypress's equity stake in ROTA, and the underlying title business; (6) that Sandberg and his insiders engaged in self-dealing; (7) that Sandberg and his

insiders prevented disclosure of the self-dealing; and (8) that Red Oak improperly contributed the ROTA side-pocket investment into the Fund. Cypress sought "to recover the full value of its investments of not less than \$1,200,000, as well as its share of the self-interested fees improperly charged by Red Oak, plus punitive damages, and attorneys' fees and costs" (Cmplt., ¶ 2).

Defendants moved to dismiss the complaint on several grounds (mtn seq. no. 002), including that most of Cypress's claims allege injury to all investors in the Fund, and thus are derivative claims that Cypress lacks standing to assert.

On April 21, 2015, this court partially granted defendants' motion to dismiss the complaint, dismissing the breach of contract claim on the ground that it was a derivative claim on behalf of all the other investors in the Fund, that Cypress had not made an appropriate demand on the general partner pursuant to 6 Del Ch § 17-1001, and that the complaint failed to allege with specificity demand futility.

Regarding the breach of fiduciary duty claim, this court allowed three specific theories to proceed as direct claims -- that defendants: (1) forcibly redeemed Cypress's investment in ROTA; (2) threatened to forcibly liquidate Cypress's equity stake in Rota; and (3) used the ROTA side-pocket investment as a weapon to force Cypress to stay invested in the Fund (see NYSCEF Doc. 50: April 21, 2015 Order at 23-25).

Finally, this court dismissed the claims against Sandberg on the ground that the complaint failed to set forth sufficient allegations to support a veil-piercing claim against him, namely that the complaint did not properly allege that corporate formalities were ignored and the corporate form was a mere fiction (Id. at 46-48).

Defendants filed their answer to the original complaint on May 11, 2015, and filed an amended answer with a counterclaim on May 28, 2015, contending that Cypress disclosed confidential information it was contractually bound not to publicly disclose by filing this lawsuit and serving certain third-party subpoenas. By stipulation of the parties, Red Oak further amended its answer on August 17, 2015 to assert two more counterclaims for breach of contract and unjust enrichment, based on its claim that Cypress was overpaid in connection with its redemption from the Fund.

Cypress filed its first amended complaint on August 20, 2015. The amended complaint now asserts both direct claims and derivative claims on behalf of the Fund in the following five causes of action: (1) breach of fiduciary duty (direct); (2) breach of fiduciary duty brought derivatively on behalf of the Fund investors against all defendants except for the Fund; (3) breach of contract (direct); (4) breach of contract brought derivatively on behalf of all the Fund against all defendants

except for the Fund; and (5) conversion of Cypress's \$75,410 investment in ROTA.

Discussion

Motion to Dismiss the Amended Complaint (Mtn Seq. No. 006)

Red Oak contends that the amended complaint is even more flawed than the original complaint. Although Cypress now purports to break down its breach of contract and breach of fiduciary claims as direct claims on behalf of Cypress (first and third causes of action) and derivatively on behalf of the Fund (second and fourth), Red Oak contends that Cypress lacks standing to assert derivative claims because it is not a member of the Fund and has not been for nearly two years. Second, Red Oak contends that most of the direct claims are really derivative claims under Delaware law. Third, Red Oak argues that all of the supposed contractual breaches are expressly contradicted by the Agreement and the Fund Documents, and that Cypress cannot do an end run around these documents by arguing that Red Oak failed to act in good faith in exercising those contractual rights. Fourth, Red Oak argues that Cypress cannot assert tort claims for matters governed by the parties' agreements and that Cypress's new conversion claim fails to state a cause of action.

Defendants again move to dismiss Sandberg as a defendant contending that the amended complaint still does not sufficiently plead alter ego or veil piercing claims against him.

Lastly, Red Oak argues that, if any claims survive dismissal Cypress's damage theory is based on speculation as to the value of the ROTA long after any alleged breach of contract or fiduciary duty that occurred in December 2013, and seeks dismissal of Cypress's damages claim to the extent that it is not determined as of the date of the alleged breach.

The Fund is a Delaware limited partnership. Thus, Delaware law dictates whether Cypress can maintain a derivative action on behalf of the Fund (Matter of Hakimian [Bear Stearns & Co., Inc.], 46 AD3d 294, 295 [1st Dept 2007]). As in most states, the law requires that the plaintiff be a limited partner as of the time of bringing the suit (Del C § 17-1002; CML V, LLC v Bax, 6 A3d 238, 245 [Del Ch 2010], affd 28 A3d 1037 [Del 2011]).

Cypress argues that it has standing as a former limited partner of the Fund, citing Anglo Am. Sec. Fund, LP v S.R. Global Intl. Fund, LP (829 A2d 143, 153 [Del Ch 2003]). The argument is unavailing. Anglo American supports, rather than makes an exception to, the legal requirement that a plaintiff in a derivative action must be a partner at the time of bringing the action (829 A2d at 149). As such, Cypress's second and fourth causes of action in the amended complaint are dismissed for lack of standing.

The first cause of action alleges that all of the defendants breached their fiduciary duty to Cypress by committing the following intentional acts:

- a. Gerrymandering the paper valuation of ROTA to deflate the investment value of Cypress's ROTA stake in retaliation for its lawful divestment from the Fund;
- b. Improperly contributing Cypress's share of the ROTA side-pocket investment into the Fund to retaliate against Cypress;
- c. Collecting an improper incentive fee (which directly and improperly enriched Sandberg) for any unrealized gains earned on Cypress's ROTA stake;
- d. Forcibly redeeming Cypress's ROTA stake despite Cypress's repeated requests to maintain its investment in ROTA; and
- e. Operating the Fund and its investments, including the ROTA investment, so as to avoid regulatory oversight.

(Am. Cmplt., ¶ 99).

This court previously dismissed Cypress's claim that Sandberg operated the Fund and other Red Oak entities without the necessary regulatory licenses and its claim that Sandberg engaged in self-dealing by the receipt of millions of dollars in improper fees, loans, commissions and/or equity in ROTA. This court ruled that these were derivative claims because they alleged harm not just to Cypress but to all of the other investors. In addition, this court also declared the following claim to be derivative in nature: that Red Oak "gerrymander[ed] the valuation of ROTA to deflate the investment value of Cypress's ROTA stake in

retaliation for its lawful divestment from the Fund" (Cmplt., ¶ 65[c][ii]).

Under Delaware law, whether Cypress's causes of action are direct or derivative turns on two questions: "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually)?" (Tooley v Donaldson, Lufkin & Jenrette, Inc., 845 A2d 1031, 1033 [Del 2004]). "If the injury is one that affects all partners proportionately to their pro rata interest in the corporation, the claim is derivative" (Anglo Am. Sec. Fund, LP v S.R. Global Intl. Fund, LP, 829 A2d at 150, citing In re Digex, Inc. Shareholders Litig., 789 A2d 1176, 1189 [Del Ch 2000]).

Cypress argues that its licensing and self-dealing claims are all direct because it has suffered a unique injury different from any injury suffered by defendants' other investors. But the only unique injury alleged is the alleged forcible devaluation and redemption of Cypress's ROTA investment, which this court already ruled stated a direct claim. Thus, if Sandberg operated the Fund without appropriate regulatory oversight or engaged in self-dealing, these actions affected all of the limited partners of the Fund not just Cypress, and Cypress admits that there were other outside limited partners (see NYSCEF Doc. 50: April 21,

2015 Order at 28). Indeed, Cypress alleges that Sandberg and his family only own approximately 58% of the Fund (Am. Cmplt., ¶ 20). The amended complaint again admits, as did the original complaint, that when Sandberg altered the methodology for valuing the ROTA investment in July 2013, allegedly in retaliation for Cypress's decision to withdraw from the Fund, this new methodology was "materially different and less favorable to Cypress and other investors than the methodology upon which Cypress relied when making its decision to invest in ROTA [emphasis added]" (Cmplt., ¶ 52; Am. Cmplt., ¶ 60).

Cypress now, however, also alleges that shortly after Cypress's ROTA investment had been improperly redeemed defendants again changed the valuation methodology used for ROTA -- this time changing it back to the methodology Sandberg had advertised in promotional materials he distributed for the ROTA investment from mid-2012. Cypress claims that Sandberg used a temporary dip in the refinancing market to change the valuation of a long-term investment so that he could forcibly redeem a disfavored investor, i.e., Cypress, at an artificially low valuation, and that after Cypress was redeemed, Sandberg changed the methodology back to more closely resemble its fair market value. Thus, Cypress alleges a harm unique to itself that was not suffered by any of the other investors who did not redeem their shares of the Fund at the time ROTA was being valued at an artificial low. In

this regard, these allegations do not support a derivative claim, but, instead, a direct claim alleging harm to Cypress alone, and, thus, this claim is not subject to dismissal for lack of standing.

In short, with the exception of the licensing and self-dealing claims asserted in paragraph 99(c) and (e) of the amended complaint, the first cause of action properly states a direct claim for breach of fiduciary duty.

The third cause of action alleges that the defendants breached various representations and provisions of the Agreement and the Fund Documents. Specifically, defendants are alleged to have breached their obligations under the Agreement and Fund Documents by the following:

Failing to exercise good faith and integrity regarding Defendants' management of Cypress's investment in the Fund and the ROTA side pocket [citing Placement Memorandum at 41]);

Failing to value Cypress's ROTA stake at a value which Defendants 'reasonably determined' [citing LP Agreement, § 9.05];

Failing to act in good faith in determining the 'fair value' of Cypress ROTA stake [citing LP Agreement, § 9.09(a)];

Failing to act in good faith in recontributing Cypress's ROTA stake back into the Fund [citing LP Agreement, § 9.09(a)];

Taking improper performance fees in connection with Cypress' ROTA stake following Defendants' recontribution of Cypress' ROTA stake into the Fund [citing LP Agreement, § 9.06(c)];

Failing to act in good faith in forcibly liquidating Cypress's stake in ROTA [citing Placement Memorandum at 41];

Failing to provide adequate notice (much less justification) for the self-serving changes in the Fund's valuation procedures and policies regarding the ROTA side-pocket investment [citing Agreement, § 11(i)]; and

Failing to obtain and maintain the necessary regulatory licenses, registrations and approvals required to perform their obligations under the Agreement [citing Agreement, § 12(a), (d)].

(Am. Cmplt., ¶ 111). For the reasons stated above, while subparagraphs (e) and (h) allege derivative claims that equally harmed the other limited partners of the Fund and the other investors in ROTA, the rest of the claims are direct claims that Cypress has standing to allege.

Defendants argue that all of Cypress's breach of fiduciary claims are duplicative of its breach of contract claims. In the Fund Documents, however, General Partner acknowledges that it is "accountable to the Partnership as a fiduciary and consequently, must exercise good faith and integrity in handling the business of the Partnership" (Placement Memorandum at 41). This type of "broad contractual undertaking incorporates and encompasses traditional fiduciary duties recognized under Delaware law," and conduct by a fiduciary may form the basis of both a contract and a breach of fiduciary duty claim (RJ Assoc., Inc. v Health Payors' Org. Ltd. Partnership, HPA, Inc., 1999 WL 550350, *9-10 [Del Ch July 16, 1999]). Likewise, while the Fund Documents

clearly give Red Oak and Sandberg the sole discretion to make business decisions regarding the Fund and related side-pockets (see e.g., LP Agreement, §§ 7.01[c], 9.09[d]), this discretion does not preclude an investor like Cypress from attempting to prove a lack of good faith and retaliatory conduct that would constitute a breach of a fiduciary's duty of good faith, loyalty and candor.

The new fifth cause of action alleges that Cypress "is the legal owner of its \$75,410 investment in ROTA (via the Fund's investment in RO II), which represents approximately 3.35% of ROTA's common equity" (Am. Cmplt., ¶ 122). Defendants are alleged to have converted plaintiff's ROTA investment by their actions in reducing the value of Cypress's investment from \$500,000 to \$220,000, and then by recontributing Cypress's equity shares in ROTA into the Fund and then liquidating Cypress's entire investment, including the amount associated with Cypress's significantly devalued stake in ROTA (Id., ¶ 124). Based on these factual allegations, Cypress sues for conversion.

In response to defendants' argument that an action in conversion will not lie to enforce a contractual claim for the payment of money, Cypress contends that an action may lie for conversion of securities. Cypress, however, never owned any equity shares of ROTA; it merely had legal ownership (via its limited partnership agreement) in the Fund, and the Fund, in

turn, owned an interest in RO II, and RO II held an interest in ROTA (see Am. Cmplt., ¶¶ 34-36, 45). Whatever Cypress's rights to an indirect interest in ROTA, they arose by virtue of the limited partnership agreement with the Fund, and investing money pursuant to that relationship. Thus, the conversion claim is dismissed for failure to allege that Cypress had "legal ownership or an immediate superior right of possession to a specific identifiable thing" that was taken by defendants (Cusak v American Defense Sys., Inc., 86 AD3d 586, 587 [2d Dept 2011]).

To properly state a veil-piercing or alter ego claim under Delaware law against Sandberg, the amended complaint "must plead facts supporting an inference that a corporation, through its alter ego, has created a sham entity designed to defraud investors and creditors" (Walnut Hous. Assoc. 2003 L.P. v MCAP Hous. LLC, 136 AD3d 403, 404 [1st Dept 2016], citing Crosse v BCBSD, Inc., 836 A2d 492 [Del 2003]). Conclusory allegations are insufficient, and as noted by the First Department:

[t]he Delaware courts apply the alter ego theory rather strictly and, in determining the sufficiency of the claim, will often consider a combination of factors including whether a company was adequately capitalized or solvent, whether corporate formalities were observed, whether the dominant shareholder siphoned company funds and whether, in general the company simply functioned as a facade for the dominant shareholder.

(Walnut Hous. Assoc. 2003 L.P. v MCAP Hous. LLC, 136 AD3d at 404, citing EBG Holdings LLC v Vredezicht's Gravenhage, 2008 WL 4057745, *12 [Del Ch, Sept. 2, 2008, CA No. 3184-VCP]).

The amended complaint still fails to properly plead a veil-piercing claim against Sandberg. While Cypress now alleges that "Sandberg observes little-to-no corporate formalities" in operating Red Oak (Am. Cmplt., ¶ 23), the only new factual allegations to support this conclusion are the claims that Sandberg had no functioning board of directors and employs only one person who is beholden to him (Id., ¶¶ 23, 78). The Fund is a limited liability partnership, and its General Partner is a limited liability company. Nothing in the Delaware Limited Partnership Act or the Delaware Limited Liability Company Act requires that such entities be managed by a board of directors (see Del C § 17-403; Del C § 18-402), and Cypress fails to allege that either the Fund or its general partner were operated in violation of the LP Agreement or the limited liability company agreement that created the General Partner. Indeed, section 3.01 of the LP Agreement provides that "[t]he business and affairs of the [Fund] shall be managed exclusively by the General Partner." There is no allegation that the Red Oak entities are mere shells without assets to satisfy a theoretical judgment, and Cypress articulates no rationale why it could not obtain a complete recovery from the corporate defendants. This court once again

dismisses Sandberg as a defendant, without prejudice to an application for leave to file an amendment after discovery has been completed.

Defendants' attempt to limit the scope of Cypress's damages at the pleading stage is fundamentally premature (Credit Suisse First Boston v Utrecht Am. Fin. Co., 30 Misc 3d 879 [Sup Ct, NY County 2010], affd 84 AD3d 579 [1st Dept 2011]). Furthermore, defendants' argument assumes any recovery to Cypress will be based on a breach of contract theory. "The measure of damages for breach of fiduciary duty is the amount of loss sustained, including lost opportunities for profit on the properties by reason of the faithless fiduciary's conduct" (105 E. Second St. Assoc. v Bobrow, 175 AD2d 746, 746-747 [1st Dept 1991]).

For these reasons, supra, defendants' motion to dismiss is granted to the extent of dismissing the second, fourth and fifth causes of action, and dismissing Sandberg as a defendant.

Motion to Dismiss Red Oak's Counterclaim for Breach of a Confidentiality Agreement (mtn seq. no. 004)

This court next addresses the motion to dismiss the defendants' counterclaim for breach of a confidentiality agreement. In connection with Cypress's investment in the Fund, the parties also signed a "Non-Circumvention Confidentiality Agreement," dated July 19, 2012 ("NDA"), pursuant to which Red Oak provided certain "Confidential Information" to Cypress in connection with the latter's evaluation of the ROTA side-pocket

investment that Red Oak made available to Cypress. The term "Confidential Information" is defined in the NDA as the identity of the potential target of the ROTA investment, i.e., KVH, and information about KVH's assets, business, affiliates, customers, operations and employees.

The counterclaim alleges that Cypress breached the NDA by filing the complaint in this action, which allegedly disclosed Confidential Information to third parties, and, thus, Cypress used the Confidential Information for purposes other than in connection with making its investment in ROTA. Defendants further allege that Cypress knowingly and gratuitously breached the NDA in bad faith as a litigation tactic to try and put pressure on Red Oak by attempting to impair its business relationships. Finally, Red Oak alleges that it:

suffered direct and consequential damages ... [which] include ... Red Oak's time and expense in responding to the breach, time and expense in attempting to restore the confidentiality of the information wrongly disclosed ... [and] lost business opportunities

(Answer, ¶ 15).

Cypress seeks dismissal of the counterclaim on three grounds. First, Cypress contends that the absolute privilege afforded statements made in judicial proceedings protects it from any breach of contract claim by Red Oak, citing such cases as Soumayah v Minnelli (19 AD3d 337 [1st Dept 2005]) and Arts4All, Ltd. v Hancock (5 AD3d 106, 108 [1st Dept 2004]). Second, it

contends none of the information Cypress disclosed is protected by the NDA because of defendants' previous public disclosures. Third, Cypress argues that Red Oak has not and cannot allege any harm caused by the disclosures.

This court need not and does not address Cypress's judicial privilege defense because Red Oak fails to state a cause of action for breach of the NDA in the first instance. The NDA specifically provides that "these restrictions ... will not apply to ... [i]nformation which is or becomes generally available to the public other than as a result of a disclosure by the Receiving party or its agents or employees." Even without this contractual provision, "only information found by a court to be confidential or proprietary may generally be protected by an action for breach of a confidentiality or nondisclosure agreement" (Kaye, 47 Causes of Action 2d, § 10 [2011]; see also Gordon v Dino De Laurentiis Corp., 141 AD2d 435, 436 [1st Dept 1988]; Sit-Up Ltd. v IAC/InterActive Corp., 2008 WL 463884, at *15 [SD NY, Feb. 20, 2008, No. 05-CV- 9292 (DLC)]).

Here, well before the complaint in this action was filed in October of 2014, Red Oak and KVH disclosed the identity of KVH and Red Oak's equity investment in that company. For example, in December 2012, Red Oak disclosed in an SEC filing that Red Oak Fund V, LLC (a related Red Oak entity) and ROTA made an offering and sale of \$10 million worth of securities "in connection with

the acquisition of a majority of the equity in KV Group Holdings, LLC." (Levine Aff., Ex. 9). In March 2013, Sandberg, the head of Red Oak, and KVH's Co-CEO's Brian Cooper and Jarret Fein, provided a copy and quotes in a Real Estate Weekly article available online regarding Red Oak's investment in KVH -- "Kensington Vanguard, an independent national title insurance and settlement agency, announced that it has secured 'significant growth capital' in a financing led by Red Oak Partners and Waterfield Group" (Id., Ex. 10).

Red Oak admits that this information, described as vanilla and generic information, was in the public domain, but contends that Cypress published in the original complaint far more detailed, non-public, confidential information. Defendants point to the following portions of the complaint: (1) citing to Red Oak's private placement materials regarding ROTA's expected return on capital and Sandberg's belief as to KVH's implied enterprise value (Cmptl. ¶ 34); (2) disclosing Sandberg's personal investment in ROTA and how it was being financed (id., ¶ 40); (3) disclosing information about the management fee structure for ROTA (id., ¶ 41); and (4) disclosing information about withdrawals from the Fund (id., ¶ 45). With the exception of Sandberg's estimate of KVH's implied enterprise value, none of this information falls under the definition of Confidential Information as it concerns ROTA and not KVH. As to plaintiff's

disclosure that Sandberg touted KVH's implied enterprise value at a particular dollar figure in his marketing materials, defendants fail to allege any facts showing how they suffered any injury or damages from the disclosure of this fact in October 2014, almost a year and a half after Red Oak's investment in KVH (see ERE LLP v Spanierman Gallery, LLC, 94 AD3d 492, 493 [1st Dept 2012]; Gordon v Dino De Laurentiis Corp., 141 AD2d at 436).

For these reasons, supra, plaintiff's motion to dismiss defendants' first counterclaim is granted, and it is dismissed.

Conclusion

For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion (mtn seq. no. 004) to dismiss defendants' first counterclaim in its Second Amended Answer With Counter-Claim dated August 17, 2015 (NYSCEF Doc. 121) is granted, and it is dismissed; and it is further

ORDERED that defendants' motion (mtn seq. no. 006) to dismiss the First Amended Complaint (NYSCEF Doc. 129) is granted to the extent of: (i) dismissing the second and fourth causes of action for lack of standing; (ii) dismissing the fifth cause of action for failure to state a cause of action; (iii) dismissing all claims against David Sandberg; and it is further

ORDERED that defendants shall serve and file a third amended answer within ten (10) days of service of a copy of this order with notice of entry; and it is further

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ORDERED that counsel shall appear in Part 48 for a preliminary conference on July 21, 2016 at 11 a.m.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/3/16



HON. JEFFREY K. OING, J.S.C.