UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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WILLIAM H. MCESSY,

Plaintiff,

-v- 5:15-CV-1462 (DNH/TWD)

GREGORY W. GRAY, JR., GREGORY P. EDWARDS; ARCHIPEL CAPITAL LLC; BIM MANAGEMENT LP; BENNINGTON INVESTMENT MANAGEMENT, INC.; NIXON PEABODY, LLP, JOHN KOEPPEL ESQ.; and against all in a representative and fiduciary capacity for as acting GENERAL PARTNERS; and CONTROL MEMBERS of BENNINGTON-EVERLOOP LP; ARCHIPEL CAPITAL-AGRIVIDA LLC; ARCHIPEL CAPITAL -BLOOM ENERGY LP; ARCHIPEL CAPITAL-LATE STAGE FUND LP; ARCHIPEL CAPITAL-LINEAGEN LP; ARCHIPEL CAPITAL-SOCIAL MEDIA FUND LP, (1, 2, 3 & 4) and against each said funds Individually as Limited Partnership Enterprises and as Attorneys and Publishers of all Private Placement Memorandums in connection with each/any/or all of the above entities; and against MV LIQUIDITY FUND I, LLC; MV LIQUIDITY FUND, LLC; MICROVENTURE MARKETPLACE, INC.; and Jane Does and Mary Roes (#1-10)

Defendants.

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United States District Judge

MEMORANDUM, DECISION and ORDER

TABLE OF CONTENTS

I. INTRODUCTION 4

II. FACTUAL BACKGROUND. 5

III. LEGAL STANDARDS. 8

A. Failure to State a Claim 8

B. Pleading Securities Fraud. 9

IV. DISCUSSION 10

A. Claim 1 - Section 10(b) Claims 10

1. Nixon Defendants 11

i. Material Mistatements 12

ii. Scheme to Defraud 14

2. Bennington Defendants 14

B. Claim 2 - Section 20 Claims 15

1. Nixon Defendants 17

2. Bennington Defendants 17

C. Claim 3 - Section 12 Claims 17

D. Claim 4 - RICO Claims 18

E. Claim 5 - Fraud 19

1. Nixon Defendants 20

2. Bennington Defendants 20

F. Claim 6 - Breach of Contract 20

G. Claim 7 - Negligent Misrepresentation 21

H. Claim 8 - Breach of Fiduciary Duty 23

I. Claim 9 - Conversion 24

1. Nixon Defendants 25

2. Bennington Defendants 26

J. Claim 10 - Unjust Enrichment 26

1. Nixon Defendants 27

2. Bennington Defendants 27

3. Microventure Defendants 28

K. Claim 11 - New York General Business Law § 349. 29

L. Claims 12-15 - New York Debtor and Creditor Law §§ 273 -276 30

1. Nixon Defendants 31

2. Bennington Defendants 32

3. Microventure Defendants 32

M. Claim 16 - Constructive Trust & Accounting 33

N. Receiver's Motion to Intervene & Stay 34

IV. CONCLUSION 35

I. INTRODUCTION

Plaintiff William H. McEssy ("McEssy") commenced this action against the defendants alleging: (i) violation of § 10(b) of the Securities Exchange Act (the "Exchange Act"), 25 U.S.C. § 78j(b) ("Section 10(b)") and Securities and Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5 ("Rule 10b-5"), (iii) violation of § 20 of the Exchange Act, 25 U.S.C. § 78t ("Section 20"), (iii) violation of § 12 of the Securities Act of 1933 (the "Securities Act"), (iv) violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1962 ("RICO") and (iv) numerous state law claims including fraud, breach of contract, negligent misrepresentation, breach of fiduciary duty, conversion, unjust enrichment, violation of New York General Business Law § 349, violation of New York Debtor & Creditor Law §§ 273-276 concerning fraudulent conveyances and for a constructive trust and accounting. At the heart of his amended complaint, plaintiff alleges that defendant Gregory Gray and the other defendants engaged in ongoing fraudulent conduct designed to defraud plaintiff and that Gray operated a classic Ponzi-like scheme.

Presently under consideration are: (1) a motion to dismiss for failure to state a cause of action by defendants Nixon Peabody, LLP ("Nixon Peabody") and John Koeppel, Esq. ("Koeppel", and together with Nixon Peabody, the "Nixon Defendants"), (2) a motion to dismiss for failure to state a cause of action by defendants Gregory P. Edwards ("Edwards") and Bennington Investment Management, Inc. ("Bennington Management", and together with Edwards, the "Bennington Defendants"), (3) a motion to dismiss for failure to state a cause of action by defendants MV Liquidity Fund, LLC[1] ("MV Liquidity") and Microventure Marketplace, Inc. ("Microventure", and together with MV Liquidity, the "Microventure Defendants")[2], and (4) a motion to intervene and stay action by Lucian A. Morin, II (the "Receiver"). Plaintiff filed an amended complaint on March 1, 2016 (the "Amended Complaint")[3]. Defendants were permitted to submit supplemental briefing in light of the filing of the Amended Complaint.

The motions have been extensively briefed and oral argument was heard on March 11, 2016 in Utica, New York. Decision was reserved.

II. FACTUAL BACKGROUND

In his Amended Complaint, McEssy contends that from 2011 to 2015, defendants Gregory W. Gray, Jr. ("Gray") and Edwards raised approximately $19.6 million in investments from at least 140 individuals and investors through 11 investment limited liability companies and limited partnerships listed in the complaint (the "Archipel Entities"). See Complaint, at ¶ 35.

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[1] Plaintiff names as a defendant an entity called "MV Liquidity Fund I, LLC", which he asserts is affiliated with the MicroVenture Defendants. The MicroVenture Defendants assert that no such entity exists and believe it to be an erroneous reference to MV Liquidity.

[2] The amended complaint asserts the following claims against the Microventure Defendants: (I) Unjust Enrichment (Claim 10), (ii) fraudulent conveyance pursuant to New York Debtor & Creditor Law §§ 273 - 276 (Claims 12 - 15) and (iii) constructive trust and an accounting (Claim 16).

[3] In plaintiff's opposition to the motions to dismiss, he filed a notice of motion to amend his complaint. However, on March 1, 2016, he filed an Amended Complaint pursuant to Federal Rule of Civil Procedure 15(a)(1)(B). As such, his motion to amend is moot.

Plaintiff's complaint alleges that the individual defendants, including investment professionals and their attorneys, made material misrepresentations when marketing the investments to McEssy and during the course of the investment relationship.

McEssy alleges that he made his first investment in an Archipel Entity in or about October 2012. Id. at ¶ 54. As part of his due diligence, plaintiff states that his business manager, John Hall, noted the Nixon Defendants' involvement with the Archipel Entities, which provided comfort to plaintiff when considering whether to invest with defendant Gray. Or about April 26, 2013, plaintiff invested $1,000,000 in Archipel Capital - Social Media Fund, LP ("Social Media Fund, LP"). Id. at ¶ 61. Plaintiff alleges that on or about August 23, 2013, his business manager spoke by phone with defendant Koeppel, who assured Mr. Hall that the Nixon Defendants "would not be involved in something that was not legitimate". Id. at ¶ 63. On or about September 3, 2013, plaintiff invested an additional $200,000.00 in Social Media Fund LP. Plaintiff alleges that he received a confirmation on Nixon Peabody letterhead evidencing his investment in the fund and its use to acquire shares of Twitter. Id. at ¶ 65. However, while Social Media Fund LP raised approximately $5,240,092.49 from investors which should have been used to purchase 230,000 shares of Twitter, only 80,000 shares were actually purchased with an approximate value of $1,875,000.00. Id. at ¶¶ 67, 68. This shortfall was allegedly caused by Gray having previously misappropriated investment funds belonging to Social Media Fund LP. Id. at ¶¶ 52, 53.

As defendant Gray was significantly short in the expected return to investors of Social Media Fund LP after Twitter experienced a liquidity event, the amended complaint alleges that he began to solicit investments in the Archipel Capital - Late Stage Fund L.P. ("Late Stage Fund L.P."), telling investors he had a $5 to $10 million allocation of shares in Uber Technologies, Inc.

On or about May 20, 2014, defendants Gray and Edwards met with McEssy and his business manager at plaintiff's office. Plaintiff alleges that defendant Edwards was introduced as the "Chairman of the Board of Archipel", highlighted his successful history of business investments and bemoaned his inability to invest in the Uber deal himself. Id. at ¶¶ 75, 77. Additionally, Edwards sent a follow up email to plaintiff discussing Uber's long term value. Id. at ¶ 79.

On May 29, 2014, McEssy agreed to invest $5,000,000 in the Late Stage Fund LP and transferred such amount on or about June 10, 2014. Id. at ¶¶ 80, 84. Plaintiff alleges that in late June 2014, Gray took nearly all of plaintiff's $5,000,000 Late Stage Fund LP investment, along with $350,000 from a settlement with Everloop Inc., and transferred it to Social Media Fund, LP investors. These payments included a $2,129,366.00 cash payment to the MV Liquidity Fund, which had invested $1,268,437.50 in Social Media Fund LP and $2,449,500 that was distributed back to plaintiff, who himself had invested $1,200,000 in Social Media Fund, LP. Id. at ¶ 90. After repeated requests by plaintiff and his business manager for evidence that Gray had purchased the Uber shares, on or about August 8, 2014, Gray provided a fabricated transfer agreement to plaintiff. Id. at ¶¶ 98, 99, 100. No shares in Uber had in fact been purchased. Id. at ¶ 101.

The amended complaint further alleges that in December 2008, Gray was disciplined by the New York Stock Exchange as a result of misusing customer monies and physically threatening a customer and was barred for three years from association with NYSE member firms. See Complaint, at ¶ 4. Plaintiff alleges that the defendants failed to disclose Gray's disciplinary history in the Private Placement Memorandums ("PPMs") of Archipel Capital - Bloom Energy LP ("Bloom Energy LP") or Social Media Fund, LP. Id. at ¶ 123. McEssy alleges that Koeppel, a partner at Nixon Peabody who represented the Archipel Entities and prepared and

distributed the PPMs, was aware of Gray's disciplinary history before May 2011. Id. at ¶ 4. Further, McEssy asserts that the materials submitted to prospective investors identified Gray as "a registered investment advisor for NASD Licenses: series 6, 7, 63, 64", which was false. Id. at ¶ 124-125.

On February 27, 2015, the Security and Exchange Commission commenced an action against defendant Gray and the Archipel Entities in the Southern District of New York, enjoining further activity of the Archipel Entities and seeking damages from defendant Gray (the "SEC Action"). Neither Gregory Edwards, Bennington Investment Management, Inc., Nixon Peabody, LLP, John Koeppel Esq., MV Liquidity Fund, LLC nor Microventure Marketplace, Inc. are named as defendants in the SEC Action. Pursuant to a court order in the SEC Action, Lucien Morin (the "Receiver") was appointed the receiver to preserve the status quo with respect to the assets contained in the Archipel Entities. Gray has pled guilty to securities fraud in violation of Section 10(b) of the Exchange Act and Rule 10b-5 and is scheduled to be sentenced on September 14, 2016.

III. LEGAL STANDARDS

(A) Failure to State a Claim.

To survive a Rule 12(b)(6) motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). Although a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief," FED. R. CIV. P. 8(a)(2), more than mere conclusions are required. Indeed, "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

Dismissal is appropriate only where the plaintiff has failed to provide some basis for

the allegations that support the elements of her claims. See Twombly, 550 U.S. at 570 (requiring "only enough facts to state a claim to relief that is plausible on its face"). When considering a motion to dismiss, the pleading is to be construed liberally, all factual allegations are deemed to be true, and all reasonable inferences must be drawn in the plaintiff's favor. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152 (2d Cir. 2002).

(B) Pleading Securities Fraud.

"Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss." ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 99 (2d Cir. 2007); see also Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321-23 (2007). A complaint alleging securities fraud must meet the pleading requirements of Rule 9(b), which requires plaintiffs to "state with particularity the circumstances constituting fraud or mistake." FED. R. CIV. P. 9(b); see also ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 196 (2d Cir. 2009). "Allegations that are conclusory or unsupported by factual assertions are insufficient." ATSI, 493 F.3d at 99.

A complaint alleging securities fraud must also meet the pleading requirements of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. § 78u-4(b). Under the PSLRA, a plaintiff must "specify each statement [or omission] alleged to have been misleading [and] the reason or reasons why the statement is misleading" and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind" with respect to each act or omission. 15 U.S.C. § 78u-4. "For an inference of scienter to be strong, 'a reasonable person [must] deem [it] cogent and at least as compelling as any opposing inference one could draw from the facts alleged.'" ATSI, 493 F.3d at 99 (quoting Tellabs, 551 U.S. at 324) (alteration in original).

IV. DISCUSSION

(A) Claim 1 - Section 10(b) Claims.

McEssy asserts that the defendants violated Section 10(b) of the Exchange Act, which makes it unlawful "for any person, directly or indirectly, ... [t]o use or employ, in connection with the purchase or sale of any security ..., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). In order to properly plead a securities fraud claim under Section 10(b), a plaintiff must allege: (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentations or omissions and the purchase and sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss and (6) loss causation. See Matrix Initiative, Inc. v. Siracusano, 563 U.S. 27, 35 (2011); Carpenters Pension Trust Fund of St. Louis v. Barclays, PLC, 750 F.3d 227, 232 (2d Cir. 2014).

A plaintiff must make a threshold showing that the material misrepresentation was made by the defendant. See 17 C.F.R. § 240.10b–5 ("It shall be unlawful for any person, directly or indirectly ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary ...."); Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 2398, 2407 ("Section 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5 prohibit making any material misstatement or omission in connection with the purchase or sale of any security."). "For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not 'make' a statement in its own right." Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 180 (2011).

Lastly, to establish loss causation "a plaintiff must allege . . . that the subject of the fraudulent statement or omission was the cause of the actual loss suffered." Lentell v. Merrill Lynch & Co., Inc., 396 F.3d 161, 173 (2d Cir. 2005). Defendants argue that it was defendant Gray's illegal conduct in commingling and misappropriating fund assets, and not any alleged failure on their part, which caused plaintiff's loss.

Rule 10b-5 provides that it is unlawful for any person, directly or indirectly, to: (a) employ a device, scheme, or artifice to defraud; (b) make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstance under which they were made, not misleading; or (c) engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. See 17 C.F.R. § 240.10b-5.

(1) Nixon Defendants.

In their motion to dismiss, the Nixon Defendants contend that the amended complaint is devoid of facts that could support McEssy's claim that Nixon or Koeppel made a material misrepresentation or knowingly participated in any scheme to defraud plaintiff.

In the amended complaint, McEssy alleges that the Nixon Defendants served as the legal advisor for the private placement memoranda ("PPMs") distributed for Bloom Energy LP, Social Media Fund LP and Late Stage Fund LP and falsely stated that plaintiff's investments would be used to purchase shares in certain entities, including Twitter and Uber, failed to include defendant Gray's disciplinary history and falsely stated that Gray was a "registered investment advisor for NASD Licenses: series 6, 7, 63, 64". Further, plaintiff contends that Koeppel made a material misstatement when allegedly assured plaintiff's business manager that the Nixon Defendants would not be involved in something that was not legitimate. Additionally, plaintiff

asserts that the Nixon Defendants were responsible for receiving plaintiff's investment money from investors and on one occasion delivered a confirmation stating that an acquisition of shares of Twitter had occurred, which plaintiff asserts was false.

Reviewing the amended complaint, it is clear that the primary actor concerning the ongoing ponzi scheme was defendant Gray. The question the Court is faced with concerning all almost all of McEssy's claims is whether plaintiff has pled sufficient specific allegations concerning the conduct of the Nixon Defendants, the Bennington Defendants and the MicroVenture Defendants. In this regard, plaintiff does not assist the Court as much of the amended complaint alleges items on a group basis simply under the banner of "defendants".

(i) *Material Misstatements*. The Second Circuit has found that "'a defendant must actually make a false or misleading statement in order to be held liable under Section 10(b). Anything short of such conduct is merely aiding and abetting, and no matter how substantial that aid may be, it is not enough to trigger liability under Section 10(b).'" Pacific Inv. Management Co. LLC v. Mayer Brown LLP, 603 F.3d 144, 153 (2d Cir. 2010) (quoting Shapiro v. Cantor, 123 F.3d 717, 720 (2d Cir. 1997). As a result, "a plaintiff's claim against a secondary actor must be based on that actor's own articulated statement, or on statements made by another that have been explicitly adopted by the secondary actor." Id. at 154 (citing Lattanzio v. Deloitte & Touche, 476 F.3d 147, 155 (2d Cir. 2007)). "An attribution requirement makes clear—to secondary actors and investors alike—that those who sign or otherwise allow a statement to be attributed to them expose themselves to liability. Those who do not are beyond the reach of Rule 10b–5's private right of action." Id. at 155. The Second Circuit has held that a law firm that drafted various securities offerings distributed for a client could not be held liable for securities fraud where the misrepresentation was not the firm's "own articulated statement" or "explicitly adopted" by the

law firm. See Pac. Inv. Mgmt. Co. LLC v. Mayer Brown LLP, 603 F.3d 144, 148 (2d Cir. 2010); see also Janus Capital Grp. v. First Derivative Traders, 131 S. Ct. 2296, 2305 (2011).

The PPMs provided to the Court note that Nixon Peabody represented both Bloom Energy LP and Social Media Fund LP in connection with those transactions but neither of those PPMs attribute any particular statements to Nixon Peabody. See Declaration of Michael Wolford, Ex. G, ECF No. 40-8, at 8, 41, 42; Ex. H, ECF No. 40-9, at 8, 43, 44. Nixon Peabody is not identified as the author of any portion of the PPMs. Nor can the mere mention of the firm's representation of such Archipel Entity be considered an "articulated statement" by Nixon Peabody adopting the entity's statements as its own. See Lattanzio, 476 F.3d at 155. Absent such attribution, plaintiffs cannot show reliance on any written statements contained in the PPMs as to Nixon Peabody or Koeppel. See id. at 154; Wright, 152 F.3d at 175.

Similarly, McEssy's allegation that Koeppel informed plaintiff's business manager that "Nixon would not be involved in something that was not legitimate" and the September 3, 2013 confirmation sent by Nixon Peabody are both insufficient to meet the requirements of Rule 9(b). In order to plead scienter adequately under the PSLRA, a plaintiff must plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2). The requisite state of mind in a section 10(b) and Rule 10b–5 action is an intent "to deceive, manipulate, or defraud." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 318 (2007). According to Tellabs, to qualify as a "strong inference", the inference of scienter must be "more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." Id. at 323.

While attributable to Koeppel, both his alleged statement and the confirmation do not show that the Nixon Defendants had the motive and opportunity to commit fraud nor do they show strong circumstantial evidence of conscious misbehavior or recklessness. As a result, the facts contained in the Amended Complaint do not adequately allege an essential element of a

Section 10(b) claim.

(ii) *Scheme to Defraud*. McEssy also alleges that the Nixon Defendants participated in a scheme to defraud in violation of Rule 10b-5(a) and (c). In the present case, plaintiff alleges that the Nixon Defendants knew, or should have known, of the material misstatements and participated or allowed Gray's fraudulent activity. However, the allegations contained in the amended complaint do not present particularized facts supporting a strong inference of the motive to commit fraud on the part of the Nixon Defendants. As a result, the Section 10(b) claim against the Nixon Defendants will be dismissed.

(*2) Bennington Defendants*.

In the amended complaint, McEssy alleges that defendant Edwards was a manager of BIM Management LP ("BIM") and chairman of the board of directors of each of Archipel Entities. Further, the complaint alleges that Edwards was a "control person" of BIM and the sole owner of Bennington Management. Edwards is also alleged to have an ownership interest in Archipel Capital LLC and BIM. Plaintiff further alleges that Edwards, as part of the May 20, 2014 meeting, was complicit in a promise to purchase approximately $5,000,000 worth of Uber shares and failed to uphold such purchase. Other than the May 20, 2014 meeting, plaintiff does not allege any actual communication, written or oral, by defendant Edwards, any actual day-to-day role for him in the Archipel Entities or any actual management tasks or responsibility.

The "group pleading doctrine" creates the presumption "that 'group-published' documents such as 'statements in prospectuses, registration statements, annual reports, [and] press releases' are attributable to 'individuals with direct involvement in the everyday business of the company,'" who either were or acted like a corporate insider. DeAngelis v. Corzine, 17 F. Supp. 3d 270, 280–82 (S.D.N.Y.2014) (quoting In re BISYS Sec. Litig., 397 F. Supp. 2d 430, 438 (S.D.N.Y. 2005)); see also Illinois State Bd. of Inv. v. Authentidate Holding Corp., 369 Fed. Appx. 260, 266 (2d Cir. 2010). The group pleading doctrine applies to collectively-authored written

documents, but does not apply to oral statements. See Camofi Master LDC v. Riptide Worldwide, Inc., 2011 WL 1197659, at *6 (S.D.N.Y. Mar. 25, 2011).

McEssy has sufficiently plead a Section 10(b) claim against Edwards and Bennington. The PPMs for Bloom Energy LP and Social Media Fund LP list Edwards as a manager of the general partner of such funds and state that he will "oversee its operations". See Wolford Dec., Ex. G, ECF No. 40-8, at 10, Ex. H, ECF No. 40-9, at 10. Further, the limited partnership agreements for such limited partnerships vested the management, operation and policy power of the partnership in the general partner. See ECF No. 40-8, at 29, ECF No. 40-9, at 27.

Plaintiff asserts that the PPMs for Social Media Fund LP and Late Stage Fund LP contain material misstatements by stating that such fund would be purchasing Twitter and Uber shares with plaintiff's funds. The amended complaint further alleges that the PPMs for Bloom Energy LP and Social Media Fund LP omit Gray's disciplinary history. Pursuant to the group pleading doctrine, such alleged misstatements and omissions may be attributable to the Bennington Defendants. Further, Edwards' participation in the May 20, 2014 meeting with plaintiff and his alleged statements concerning Archipel's investment strategy and the merits of making an investment in Uber are sufficient to qualify under the heightened pleading requirements.

The amended complaint further sufficiently pleads scienter, loss causation and reasonable reliance on the part of McEssy. As a result, the Section 10(b) claim against the Bennington Defendants is adequately plead and the motion to dismiss such claim will be denied.

(B) Claim 2 - Section 20 Claims.

In order to state a claim under Section 20(a) of the Exchange Act "a plaintiff must show: (1) a primary violation by the controlled person, (2) control of the primary violator by the defendant, and (3) that the defendant was, in some meaningful sense, a culpable participant in the controlled person's fraud." Carpenters Pension Trust Fund v. Barclays, PLC, 750 F.3d 227,

236 (2d Cir. 2014). A finding of "control" under the second prong requires a fact-intensive inquiry into the "power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise." In re IPO Secs. Litig., 241 F. Supp. 2d 281, 393 (S.D.N.Y. 2003). "Because Section 20(a) liability requires an individualized determination of the defendant control person's particular culpability, it stands to reason that an allegation of culpable participation requires particularized facts of the controlling person's conscious misbehavior or recklessness." Special Situations III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd., 33 F. Supp. 3d 401, 438 (S.D.N.Y. 2014).

"Actual control is essential to control person liability." In re Livent, Inc. Sec. Litig., 78 F. Supp. 2d 194, 221 (S.D.N.Y. 1999); see also In re Global Crossing, Ltd. Sec. Litig., 2005 WL 1875445, at *3 (S.D.N.Y. Aug. 5, 2005) ("To be liable as a control person, the defendant must actually possess, in fact, rather than in theory, the ability to direct the actions of the controlled person."). Officer or director status alone does not constitute control for the purposes of § 20(a) liability. See, Rubinstein v. Skyteller, Inc., 48 F. Supp. 2d 315, 323 (S.D.N.Y. 1999) (allegation that defendant is Treasurer and/or Chief Financial Officer of company insufficient to establish control). Similarly, "exercise of influence, without power to direct or cause the direction of management and policies through ownership of voting securities, by contract, or in any other direct way, is not sufficient to establish control for purposes of Section 20(a)." In re Alstom SA, 406 F. Supp. 2d 433, 486 (S.D.N.Y. 2005). "Minority stock ownership is not enough to establish control person liability, since minority stock ownership does not give the owner the power to direct the primary violator." Id. at 492.

(1) Nixon Defendants.

In the amended complaint, McEssy asserts that the Nixon Defendants constitute control persons since communication concerning the funds was copied to them, they drafted the PPMs and failed to stop Gray from operating a ponzi scheme. However, such allegations are

insufficient to state a claim for control person liability under Section 20(a). None of the factual allegations made by McEssy establish that Koeppel or Nixon Peabody had the power to direct Gray's management of the Archipel Entities, rather they served as legal counsel to the corporate clients. As a result, plaintiff has failed to establish the essential element of control and his Section 20(a) claim will be dismissed.

(2) Bennington Defendants.

In the amended complaint, McEssy asserts that Edwards constituted a control person as a result of his ownership interest in Archipel Capital LLC, his management position at BIM Management LP, his signatory authority of certain of the funds' bank accounts and his status as an influential business partner and mentor to defendant Gray. Edwards contends that such facts, even if accepted as true, are insufficient to find that Edwards controlled Gray's actions or was a culpable participant in the fraud.

The allegations contained in the amended complaint are insufficient to state a claim for control person liability under Section 20(a). None of the factual allegations made by McEssy establish that Edwards or Bennington had the power to direct Gray's management of the Archipel Entities. As a result, plaintiff has failed to establish the essential element of control and his Section 20(a) claim against the Bennington Defendants will be dismissed.

(C) Claim 3 - Section 12 Claims.

McEssy contends that the various defendants, including Bennington and Edwards, violated Section 12 of the Securities Act of 1933 by making material mistatements and omissions in the PPMs and other offering documents.[4] See Complaint, ECF No. 51, at ¶¶ 145 - 146.

Section 12(a)(2) of the Securities Act establishes liability for any person who "offers or sells a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact[.]" See 15 U.S.C. § 77l(a)(2).

[4] The amended complaint does not allege that either the Nixon Defendants or the Microventure Defendants violated Section 12 of the Securities Act.

However, the Second Circuit has held that a plaintiff may not maintain an action pursuant to Section 12 in connection with a private offering of securities. Yung v. Lee, 432 F.3d 142, 149 (2d Cir. 2005) ("[A] Section 12(a)(2) action cannot be maintained by a plaintiff who acquires securities through a private transaction"). The amended complaint does not allege material misrepresentations with regards to a public offering and as a result, relief under Section 12 is foreclosed. Therefore, the Bennington Defendants' motion to dismiss the Section 12 claim will be granted.

(D) Claim 4 - RICO Claims.

McEssy asserts violations of the RICO statute, 19 U.S.C. § 1962 alleging that defendants derived income from a pattern of racketeering activity. However, part of the RICO statute, 18 U.S.C. § 1964(c), prevents plaintiffs from pleading a civil RICO action upon "any conduct that would been actionable as fraud in the purchase or sale of securities . . .". See 18 U.S.C. § 1964(c) (the "RICO Amendment"). The purpose of the RICO Amendment was not merely "'to eliminate securities fraud as a predicate offense in a civil RICO action,' but also to prevent plaintiffs from 'pleading other specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud.'" Ling v. Deutsche Bank, 2005 WL 1244689, at * (S.D.N.Y. May 26, 2005) (quoting H.R. Conf. Rep. No. 104-369, at 47). "[T]he purpose of the bar was to prevent litigants from using artful pleading to boot-strap securities fraud cases into RICO cases, with their threat of treble damages." MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 274 (2d Cir. 2011). "[T]he RICO Amendment bars claims based on conduct that could be actionable under the securities laws even when the plaintiff, himself, cannot bring a cause of action under the securities laws." Id. at 275 (quoting Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, 612 F. Supp. 2d 267, 281 (S.D.N.Y. 2009)).

To determine whether a RICO claim is barred pursuant to the provisions of § 1964(c), the relevant inquiry "is whether the predicate acts of plaintiffs' RICO claim could have been the

subject of a securities fraud action brought either by plaintiffs themselves or by the SEC." In re LIBOR-Based Financial Instruments Antitrust Litig., 935 F. Supp. 2d 666, 726 (S.D.N.Y. 2013).

The amended complaint alleges a RICO violation by participating in an "ongoing scheme to defraud" and "profit from the fraudulent sale of securities". See Complaint, ECF No. 51, at ¶ 151. McEssy asserts that this included both mail fraud and wire fraud, in addition to securities fraud, as certain alleged material mistatements were made via email or by written confirmation. As the alleged mail fraud and wire fraud directly related to, and were in furtherance of, the securities fraud plaintiff alleges, the RICO amendment prevents plaintiff from alleging such actions as a predicate offense in a civil RICO action. As a result, such claims are barred under the RICO Amendment.

McEssy additionally argues that an exception to the RICO Amendment exists in cases where a defendant has been criminally convicted of securities fraud. As Gray has pled guilty to securities fraud, McEssy contends he should be able to maintain their RICO claims against the defendants. However, the criminal conviction exception is narrow and only applies to those defendants who themselves have been convicted of criminal fraud. See Kaplan v. S.A.C. Capital Advisors, L.P., 104 F. Supp. 3d 384, 388 (S.D.N.Y. 2015).

As the RICO Amendment precludes McEssy's RICO claims, such claims shall be dismissed with respect to both the Nixon Defendants and the Bennington Defendants.

(E) Claim 5 - Fraud.

Under New York law, the five elements of a fraud claim must be shown by clear and convincing evidence: (1) a material misrepresentation or omission of fact, (2) made by defendant with knowledge of its falsity, (3) and intent to defraud, (4) reasonable reliance on the part of the plaintiff; and (5) resulting damage to the plaintiff. See Crigger v. Fahnestock & Co., Inc., 443 F.3d 230, 234 (2d Cir. 2006). Each of the elements must be supported by factual allegations containing the details constituting the wrong sufficient to satisfy New York State Civil Procedure Law & Rule 3016(b)." Cohen v. Houseconnect Realty Corp., 734 N.Y.S.2d 205, 206 (App. Div.

2001). Similar to Federal Rule of Civil Procedure 9(b), New York C.P.L.R. § 3016(b) requires that "the circumstances constituting [fraud] shall be stated in detail."

(1) Nixon Defendants.

As with the Section 10(b) claims, McEssy has failed to adequately allege that the Nixon Defendants knew the representations were false with an intent to deceive. As a result, the common law fraud claim against the Nixon Defendants will be dismissed.

(2) Bennington Defendants.

As discussed previously, pursuant to the group pleading doctrine, the representations contained in the PPMs concerning the utilization of investor funds, Gray's qualifications and the omission of Gray's disciplinary history may be attributable to Edwards and Bennington given their involvement in the business of the funds and that such representations and omissions were material. Further, Edwards's statements at the May 20, 2014 meeting concerning the fund's investment strategy also constitutes a material misrepresentation. McEssy has also adequately plead the second element of a fraud claim against Edwards and Bennington. At the motion to dismiss stage, New York "requires only that the complaint include facts from which it is possible to infer defendant's knowledge of the falsity of its statements". Houbigant, Inc. v. Deloitte & Touche, 753 N.Y.S.2d 493, 501 (App. Div. 2003). Therefore, the motion to dismiss the common law fraud claim against the Bennington Defendants will be denied.

(F) Claim 6 - Breach of Contract.

McEssy sues multiple defendants, including Edwards and Bennington, for breach of contract.[5] The Bennington Defendants seek dismissal of such claim alleging that neither Edwards nor Bennington were party to a contract with McEssy.

To state a claim for breach of contract, a plaintiff must allege: (1) the parties entered into a valid agreement, (2) plaintiff performed, (3) defendant failed to perform, and (4) damages.

[5] The amended complaint does not allege a cause of action for breach of contract against either the Nixon Defendants or the Microventure Defendants.

VisionChina Media Inc. v. Shareholder Rep. Servs., LLC, 967 N.Y.S.2d 338, 347 (App. Div. 2013). Plaintiff asserts that the Bennington Defendants are in contractual privity with plaintiff as BIM Management, LP executed a letter agreement on June 12, 2014 whereby plaintiff's investment was to be used to acquire shares of Uber. However, neither Bennington, which has an ownership interest in BIM Management, LP, nor Edwards, who served as a manager of BIM, were parties to the June 12, 2014 agreement. Therefore, McEssy has failed to sufficiently plead a claim for breach of contract against the Bennington Defendants and such claim will be dismissed.

(G) Claim 7 - Negligent Misrepresentation.

McEssy alleges that the Nixon Defendants negligently misrepresented the legitimacy of Gray and the Archipel Entities and the utilization of plaintiff's investment.[6]

To state a claim for negligent misrepresentation under New York law, the plaintiff must allege that "(1) the defendant had a duty, as a result of a special relationship, to give correct information; (2) the defendant made a false representation that he or she should have known was incorrect; (3) the information supplied in the representation was known by the defendant to be desired by the plaintiff for a serious purpose; (4) the plaintiff intended to rely and act upon it; and (5) the plaintiff reasonably relied on it to his or her detriment." Hydro Investors, Inc. v. Trafalgar Power Inc., 227 F.3d 8, 20 (2d Cir. 2000); see also Eiseman v. State of New York, 70 N.Y.2d 175, 187–88 (1987). Under the "duty" element, "New York strictly limits negligent misrepresentation claims to situations involving 'actual privity of contract between the parties or a relationship so close as to approach that of privity.'" In re Time Warner Inc. Sec. Litig., 9 F.3d 259, 271 (2d Cir.1993) (quoting Ossining Union Free Sch. Dist. v. Anderson LaRocca Anderson, 73 N.Y.2d 417 (1989)); see also J.A.O. Acquisition Corp. v. Stavitsky, 8 N.Y.3d 144, 148 (2007) ("A claim for negligent misrepresentation requires the plaintiff to demonstrate ... the existence

[6] The amended complaint does not allege a cause of action for negligent misrepresentation against either the Bennington Defendants or the Microventure Defendants.

of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff.").

The Nixon Defendants allege that no relationship or contact with McEssy could remotely satisfy the New York standard. In the Second Circuit, the only cases "holding that an attorney had, or was properly alleged to have had, a relationship approaching privity with a third-party are those in which the attorney issued an 'opinion letter' to his client in connection with a transaction for the purpose of reliance by the third-party on its contents." Doehla v. Wathne Ltd., Inc., 1999 WL 566311, at * (S.D.N.Y. Aug. 3, 1999).

As the Nixon Defendants did not represent McEssy, a relationship of privity did not exist. Plaintiff points to both the August 23, 2013 phone call between Koeppel and plaintiff's business manager and the September 3, 2013 written confirmation as evidence of a special relationship between the parties. Such minimal contact is insufficient to establish a special relationship. Further, plaintiff has failed to establish that he reasonably relied on any alleged statement by Nixon or Koeppel. The August 23, 2013 statement and September 3, 2013 confirmation related to plaintiff's investment in the Social Media Fund LP, for which plaintiff has not alleged any loss. Plaintiff's reliance on representations which occurred approximately nine months before his June 2014 investment in the Late Stage Fund LP, which did not exist at the time of such representations, would not be reasonable.

Therefore, plaintiff has failed to state a claim for negligent misrepresentation under New York law against the Nixon Defendants.

(H) Claim 8 - Breach of Fiduciary Duty.

The amended complaint asserts that Edwards breach a fiduciary duty owed towards McEssy.[7]

To state a claim for a breach of fiduciary duties under New York law, a plaintiff must establish: "(1) a fiduciary duty existing between the parties; (2) the defendant's breach of that duty; and (3) damages suffered by the plaintiff which were proximately caused by the breach." Metropolitan West Asset Management, LLC v. Magnus Funding, Ltd., 2004 WL 1444868, at *8 (S.D.N.Y. June 25, 2014). While acknowledging the amorphous nature of a fiduciary relationship, New York courts have generally described it as one in which a party "reposes confidence in another and reasonably relies on the other's superior expertise or knowledge." Henneberry v. Sumitomo Corp. of Am., 532 F. Supp. 2d 523, 550 (S.D.N.Y. 2007) (citing WIT Holding Corp. v. Klein, 724 N.Y.S.2d 66, 68 (App.Div. 2001).

The New York law on breach of fiduciary duty is broad, vague, and not very helpful in determining whether any particular relationship rises to the level of "fiduciary." It is often stated that a fiduciary relationship "may exist where one party reposes confidence in another and reasonably relies on the other's superior expertise or knowledge, but an arms-length business relationship does not give rise to a fiduciary obligation." WIT Holding Corp. v. Klein, 724 N.Y.S.2d 66, 68 (2d Dept. 2001). "Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another." Penato v. George, 383 N.Y.S.2d 900, 904–5 (2d Dept.1976).

Under New York law, a fiduciary duty arises if "confidence is reposed on one side and there is resulting superiority and influence on the other." United States v. Chestman, 947 F.2d

[7] The amended complaint does not allege a cause of action for breach of fiduciary duty against the Nixon Defendants, the Microventure Defendants or Bennington.

551, 568 (2d Cir.1991); see also Daly v. Metropolitan Life Ins. Co., 782 N.Y.S.2d 530, 535 (Sup.Ct. 1992) ("[A] fiduciary duty arises, even in a commercial transaction, where one party reposed trust and confidence in another who exercises discretionary functions for the party's benefit or possesses superior expertise on which the party relied.").

Edwards argues that he did not owe a fiduciary duty to McEssy or the limited partners. However, New York courts have held that "a managing or general partner of a limited partnership is bound in a fiduciary relationship with the limited partners and the latter are, therefore, *cestuis que trustent*." Friedman v. Dalmazio, 644 N.Y.S.2d 548, 550 (App. Div. 1996). As Edwards served as a manager of the general partner of the various funds, he did owe a fiduciary duty to the limited partners of such funds. Given the alleged misstatements in the PPMs, McEssy has adequately pled that Edwards breached such duty.

(I) Claim 9 - Conversion.

"[C]onversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights." Thyroff v. Nationwide Mut. Ins. Co., 460 F.3d 400, 403–04 (2d Cir. 2006). Conversion is predicated on "(1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiffs [sic] rights." Pacific M. Intern. Corp. v. Raman Intern. Gems, Ltd., 888 F. Supp. 2d 385, 396 (S.D.N.Y.2012).

"Under New York law, [t]o state a claim for conversion, [a] plaintiff must allege that '(1) the party charged has acted without authorization, and (2) exercised dominion or a right of ownership over property belonging to another[,] (3) the rightful owner makes a demand for the property, and (4) the demand for the return is refused.'" Sabilia v. Richmond, 2011 WL 7091353, at *19 (S.D.N.Y. Oct. 26, 2011) (quoting Seanto Exps. v. United Arab Agencies, 137 F. Supp. 2d 445, 451 (S.D.N.Y.2001)). To state a conversion claim "'[w]here the property is money, [the money] must be specifically identifiable and be subject to an obligation to be returned or to be

otherwise treated in a particular manner.'" Cruz v. TD Bank, N.A., 855 F. Supp. 2d 157, 174 (S.D.N.Y. 2012) (quoting Republic of Haiti v. Duvalier, 626 N.Y.S.2d 472, 475 (1st Dep't 1995)).

When the defendant's "'original possession [of the property] is lawful, a conversion does not occur until the defendant refuses to return the property after demand or until he sooner disposes of the property.'" Schwartz v. Capital Liquidators, Inc., 984 F.2d 53, 54 (2d Cir. 1993) (quoting Johnson v. Gumer, 464 N.Y.S.2d 318, 319 (4th Dep't 1983)). While a lawful custodian of property cannot be charged with converting that property "until after a demand and refusal," Regions Bank v. Wieder & Mastroianni, P.C., 526 F. Supp. 2d 411, 414 (S.D.N.Y.2007), a "demand and refusal" will be considered futile, and thus not be required, in certain limited circumstances, including where the custodian "knows it has no right to the goods," State v. Seventh Regiment Fund, Inc., 98 N.Y.2d 249, 260 (2002). Furthermore, while a party is generally "privileged to commit acts which would otherwise be a ... conversion when [it] acts pursuant to a court order which is valid or fair on its face," Calamia v. City of New York, 879 F.2d 1025, 1031 (2d Cir.1989).

(1) Nixon Defendants.

The only money that the Nixon Defendants are alleged to have received was attorneys' fees resulting from Nixon Peabody's work on concerning the Archipel Entities. The Nixon Defendants contend that the fees were legitimately earned for its services and that there is no indication that McEssy has any legal right to the fees.

The amended complaint fails to properly plead that its has a proper possessory right to such funds, i.e. that there was a lack of consideration for such legal fee. Further, plaintiff has not plead that a proper demand has been made to the Nixon Defendants for the return of such funds and such demand was refused. Therefore, McEssy has failed to adequately pled a conversion claim against the Nixon Defendants.

(2) *Bennington Defendants*.

The amended complaint asserts that the Bennington Defendants had power over investor monies which were provided to the Archipel Entities to invest in entities like Twitter and Uber.

"Identifiable funds" include named bank accounts as long as the recovery is for a "particular and definite sum of money." ADP Investor Commc'n Servs., Inc. v. In House Attorney Servs., Inc., 390 F. Supp. 2d 212, 224 (E.D.N.Y.2005). While McEssy identifies the total investments made in various Archipel Entities, such amounts do not constitute a particularized parcel of funds as required for a conversion claim. Further, plaintiff has not alleged that a demand has been made of the Bennington Defendants for the alleged property. As the initial possession was lawful, there is no conversion in the absence of a "refusal to return the property upon demand." Salatino v. Salatino, 881 N.Y.S.2d 721, 724 (App. Div. 2009). Therefore, the amended complaint fails to adequately allege a conversion claim against the Bennington Defendants.

(J) Claim 10 - Unjust Enrichment.

The essential elements to establish an unjust enrichment claim under New York law are that (1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money. See Aaron Ferer & Sons Ltd. v. Chase Manhattan Bank, Nat'l Ass'n, 731 F.2d 112, 125 (2d Cir. 1984).

When considering an unjust enrichment claim, a court's "essential inquiry" is one of "equity and good conscience." Paramount Film Distrib. Corp. v. State, 30 N.Y.2d 415, 421 (1972). Though these are "broad considerations", the New York courts have applied them consistently in cases involving "gratuitous donee[s]" or "[i]nnocent parties." Simonds v. Simonds, 45 N.Y.2d 233 (1978). In those cases, New York courts have required proof that the innocent party received a "specific and direct benefit" from the property sought to be recovered, not an

"indirect benefit." Kaye v. Grossman, 202 F.3d 611, 616 (2d Cir. 2000). The direct-indirect distinction is consistent with a separate line of unjust enrichment cases in New York holding that a plaintiff's relationship with the defendant cannot be "too attenuated." See Sperry v. Crompton Corp., 8 N.Y.3d 204, 216 (2007) (concluding that "the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support an unjust enrichment claim").

(1) Nixon Defendants.

Similar to McEssy's conversion claim, plaintiff's unjust enrichment claim is based upon the attorney's fees Nixon Peabody allegedly earned resulting their representation of the Archipel Entities. "[T]he payment . . . of operating expenses (such as legal fees) using misappropriated funds does not confer a direct and specific benefit" sufficient to establish a claim from unjust enrichment. In re Bayou Hedge Funds Investment Litigation, 472 F. Supp. 2d 528, (S.D.N.Y. 2007). McEssy fails to allege that the monies paid to Nixon Peabody belonged to plaintiff as he does not alleged that there was a lack of consideration or that Nixon Peabody was somehow paid more than what it was owed for its legal services. Plaintiff further seems to allege that the Nixon Defendants permitted Gray to improperly divert the proceeds from plaintiff's investment. However, plaintiff does not allege that such money was ever in the control or custody of the Nixon Defendants. As a result, McEssy has failed to adequately allege a claim of unjustment enrichment against the Nixon Defendants.

(2) Bennington Defendants.

The amended complaint alleges that the Bennington Defendants were unjustly enriched as a result of the five percent (5%) management fee collected by the general partner of the various investing funds.

However, "[w]here the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded." IDT Corp. v. Morgan Stanley Dean

Witter & Co., 12 N.Y.3d 132, 142 (2009). The express terms of the limited partnership agreements of the Archipel Entities provided that a five percent (5%) management fee be paid to BIM Management LP. As McEssy's unjust enrichment claims are premised upon a management fee governed by an enforceable contract, such unjust enrichment claims are precluded. As such, the amended complaint does not sufficiently allege an unjust enrichment claim against the Bennington Defendants.

(3) Microventure Defendants.

The amended complaint also asserts that the Microventure Defendants were unjustly enriched as a result of a $2,129,366 cash payment to MV Liquidity in June 2014. McEssy alleges that this payment was made in part with the $5,000,000 he had invested in the Late Stage Fund.

An unjust enrichment claim is subject to dismissal where the pleadings "fail[ ] to indicate a relationship between the parties that could have caused reliance or inducement." Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 182 (2011). "An unjust enrichment claim, 'requires some type of direct dealing or actual, substantive relationship with a Defendant.'" Oneida Savings Bank v. Uni-Ter Mgmt. Corp., 2014 WL 4678046, at *8 (N.D.N.Y. Sept. 18, 2014) (D.J. D'Agostino) (quoting Reading Int'l, Inc. v. Oaktree Capital Mgmt., 317 F. Supp. 2d 301, 334 (S.D.N.Y.2003)).

McEssy has not alleged any conduct whatsoever on the part of Microventure Marketplace other than being the alleged parent of MV Liquidity. Further, plaintiff does not allege any contact or dealings with MV Liquidity and certainly no conduct which could cause reliance or inducement. In effect, they were both victims of others' fraud. The Microventure defendants should not be punished because it succeeded in recovering money while plaintiff did not. While plaintiff alleges that MV Liquidity received proceeds from its investment in the Archipel Entities, such allegation is too attenuated to support an unjust enrichment claim or lead to the conclusion that equity and good conscience require restitution. Moreover, Plaintiffs have not alleged that

Uni–Ter or UCSC benefitted at Plaintiffs' expense. Accordingly, the Microventure Defendants' motion to dismiss this claim will be granted.

(K) New York General Business Law § 349.

McEssy further alleges that the defendants, including the Nixon Defendants and the Bennington Defendants, violated New York General Business Law § 349, which prohibits the use of deceptive acts and practices in the conduct of business or in the furnishing of a service. See NY General Business Law § 349.

"To state a claim under § 349, a plaintiff must allege: (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." Spagnola v. Chubb Corp., 574 F.3d 64, 74 (2d Cir. 2009). To prove that an act or practice was consumer-oriented, the plaintiff "must demonstrate that the acts or practices have a broader impact on consumers at large." Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 N.Y.2d 20, 23 (1995). New York courts have generally found that securities transactions are not consumer-oriented for purposes of General Business Law 349. See DeAngelis v. Corzine, 17 F. Supp. 3d 270, 284 (S.D.N.Y. 2014) (citing In re Evergreen Mut. Funds Fee Litig., 423 F. Supp. 2d 249, 264 (S.D.N.Y.2006); Morris v. Gilbert, 649 F. Supp. 1491, 1497 (E.D.N.Y.1986). Courts have noted that "the securities markets are subject to pervasive federal regulation, and it is questionable that New York's legislature intended to give securities investors an added measure of protection beyond that provided by the securities acts." Morris, 649 F. Supp. at 1497.

The allegations contained in the amended complaint are insufficient to establish a claim under General Business Law § 349. Plaintiff invested funds in the Archipel Entities as investments, not as a purchase of traditional consumer goods. He was a qualified investor

utilizing private investment vehicles and therefore doe not have a broader impact on consumers at large. Further, the securities markets are subject to federal oversight and regulation, diminishing the need for protection under General Business Law § 349. As a result, plaintiff's claims brought pursuant to General Business Law § 349 against the Nixon Defendants and the Bennington Defendants will be dismissed.

(L) Claims 12 - 15 - New York State Debtor and Creditor Law §§ 273 - 276.

Claims 12 through 15 of the amended complaint seek avoidance and recovery of the transfers as actual or constructive fraudulent conveyances under New York State Debtor and Creditor Law ("NYDCL") §§ 273, 274, 275 and 276.

A transfer is deemed a constructively fraudulent conveyance under NYDCL §§ 273, 274 and 275, if it is made without "fair consideration," and one of the following conditions is met:

> (i) the transferor is insolvent or will be rendered insolvent by the transfer in question, DCL § 273;
> (ii) the transferor is engaged in or is about to engage in a business transaction for which its remaining property constitutes unreasonably small capital, DCL § 274; or
> (iii) the transferor believes that it will incur debt beyond its ability to pay, DCL § 275.

The Second Circuit has stated that "fair consideration" under the NYDCL has three elements: (1) the transferee must convey property in exchange for the transfer, or the transfer must discharge an antecedent debt; (2) what the transferee exchanges for the transfer must be of "fair equivalent" value to the property transferred by the debtor; and (3) the transferee must make the exchange in "good faith." See In re Sharp Intern. Corp., 403 F.3d 43, 53–54 (2d Cir. 2005) (citing HBE Leasing v. Frank, 61 F.3d 1054, 1058–59 (2d Cir. 1995)) ("fair consideration" requires not only that the exchange be for equivalent value, but also that the conveyance be made in good faith). "Under New York law, the party seeking to have the transfer set aside bears

the burden of proof on the element of fair consideration and, since it is essential to a finding of fair consideration, good faith." In re Actrade Financial Technologies Ltd., 337 B.R. 791, 802 (S.D.N.Y. Bankr. 2005). The party seeking to set aside the transfer must prove the elements of a claim for constructive fraudulent conveyance under the NYDCL by a preponderance of the evidence standard. See Lippe v. Bairnco Corp., 249 F. Supp. 2d 357, 376 n. 6 (S.D.N.Y. 2003) Under NYDCL § 272(a), "fair consideration" is given for property or an obligation: "[w]hen in exchange for such property, or obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." NYDCL § 272(a).

Section 276 of the NYDCL allows a party to avoid any "conveyance made ... with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors." NYDCL § 276. To adequately plead a claim to recover actual fraudulent transfers under the NYDCL, the complaint must state with particularity the factual circumstances constituting fraud under Rule 9(b). See Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Secs. Corp., 351 F. Supp. 2d 79, 106–07 (S.D.N.Y. 2004) (applying the pleading requirements of Rule 9(b) to actual fraud claims under the NYDCL). "Actual fraudulent intent must be proven by clear and convincing evidence, but it may be inferred from the circumstances surrounding the transaction, including the relationship among the parties and the secrecy, haste, or unusualness of the transaction." HBE Leasing Corp. v. Frank, 48 F.3d 623, 639 (2d Cir.1995).

(*1) Nixon Defendants*.

The amended complaint alleges that Nixon Peabody received a fraudulent conveyance as a result of its receipt of legal fees associated with its representation of the Archipel Entities. However, there is no allegation that there was a lack of consideration for the payment to Nixon Peabody or that it was paid more than it was owed. As the lack of consideration is an essential

element of a constructive fraudulent conveyance claim, McEssy has failed to adequately allege a cause of action pursuant to DCL §§ 273, 274 or 275.

Further, McEssy has failed to plead factual circumstances regarding payment of a legal fee to the Nixon Defendants which would evidence actual fraudulent intent concerning such transfer. As a result, plaintiff claim against the Nixon Defendants pursuant to DCL § 276 will be dismissed.

(2) Bennington Defendants.

The amended complaint fails to identify any transfers to the Bennington Defendants which it seeks to reverse pursuant to the DCL. "[A] complaint must allege that the defendant participated in the transfer at issue and that the defendant was the transferee or beneficiary of that transfer." In re Vivaro Corp., 524 B.R. 536, 559 (Bankr. S.D.N.Y. 2015). Given McEssy's failure to identify any transfer to the Bennington Defendants, the motion to dismiss concerning the DCL claims will be granted.

(3) Microventure Defendants.

The amended complaint alleges that the $2,129,366 transfer to MV Liquidity in June 2014 was a fraudulent conveyance. However, plaintiff has failed to sufficiently plead that such transfer was made without fair consideration. In August 2013, MV Liquidity made an investment of $1,268,437.50 in the Social Media Fund, which investment was used to purchase 55,000 shares of Twitter. It is not in dispute that this investment actually took place. "[T]he proper focus of a fraudulent transfer inquiry is on the transfer itself, not the overall business practices of the [transferor]." Daly v. Deptula, 286 B.R. 480, 490 (D. Conn. 2002). Therefore, even though the June 2014 payment made to MV Liquidity exceeded its initial investment, it was equivalent to the market value of the 55,000 twitter shares, the legitimate contractual obligation owed to it. As a

result, the transfer represented payment of an antecedent debt and was for fair equivalent value. Further, plaintiff has failed to allege any bad faith on the part of the Microventure Defendants concerning the June 2014 transfer. Therefore, the Microventure Defendants' motion to dismiss the DCL claims will be granted.

(M) Claim 16 - Constructive Trust & Accounting.

McEssy also seeks a constructive trust and accounting concerning any funds received by the defendants which resulted from the fraudulent acts and omissions.

A constructive trust is an equitable remedy, necessarily flexible to accomplish its purpose. See Simonds v. Simonds, 45 N.Y.2d 233, 241 (1978). Courts should consider the following elements in analyzing a constructive trust claim: New York Court of Appeals inare: "(1) a confidential or fiduciary relation, (2) a promise, (3) a transfer in reliance thereon and (4) unjust enrichment." Sharp v. Kosmalski, 40 N.Y.2d 119, 121 (1978). Such factors "are not rigid, but flexible considerations for the court to apply in determining whether a constructive trust should be imposed" Counihan v. Allstate Ins. Co., 194 F.3d 357, 362 (2d Cir. 1999). To establish an entitlement to an accounting, plaintiff must show: "(1) a fiduciary relationship, (2) entrustment of money or property, (3) no other remedy, and (4) a demand and refusal of an accounting." In re Mary XX, 822 N.Y.S. 659, 661 (App. Div. 2006).

As previously discussed, the amended complaint fails to sufficiently plead an unjust enrichment claim against either the Nixon Defendants, the Bennington Defendants or the Microventure Defendants. Similarly, plaintiff has not established that plaintiff entrusted money to any of the moving defendants or that plaintiff demanded the return of any money to him. Therefore, the claim for a constructive trust and accounting against the Nixon Defendants, the Bennington Defendants and the Microventure Defendants will be dismissed.

(N) Receiver's Motion to Intervene and Stay.

The Receiver has brought a motion to (i) intervene as a party defendant in the present action and (ii) stay the present action as against the Archipel Entities. The Receiver argues that the SEC Action involves largely overlapping issues of fact and law and overlapping relief that would benefit the same investors. Further, the Receiver argues that the burden of defending both actions will ultimately diminish the likelihood of recovery for the plaintiff if he were to prevail.

Pursuant to Federal Rule of Civil Procedure 24(a)(2), "the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action . . .". As the Receiver has been appointed to preserve the status quo and to prevent the dissipation of the property and assets of the Archipel Entities, the motion to intervene shall be granted.

The Receiver further contends that the proceedings against only the Archipel Entities should be stayed. A court's power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel and for litigants. See Kashi v. Gratsos, 790 F.2d 1050, 1057 (2d Cir. 1986).

In Nuccio v. Duce, 2015 WL 1189617 at *5 (N.D.N.Y. March 16, 2015), the Court identified five factors that should be examined in deciding whether to stay proceedings: (1) the private interests of the plaintiffs in proceeding expeditiously with the civil litigation as balanced against the prejudice to plaintiffs if delayed; (2) the private interests of and burden on the defendants; (3) the interests of the courts; (4) the interests of persons not parties to the civil litigation, and (5) the public interest. "[A] total stay of civil discovery pending the outcome of the related . . . proceedings . . . is an extraordinary remedy." In re Par Pharm. Inc. Sec. Litig., 133 F.R.D. 12, 13 (S.D.N.Y. 1990). A stay is less likely to be granted where a defendant other than

the defendant in the criminal action is the party seeking the stay. See Hicks v. City of New York, 268 F. Supp. 2d 238, 242 (E.D.N.Y. 2003).

The Court appreciates that by defending two separate but overlapping actions, the Receiver might incur additional expense and diminution of assets, which may ultimately go to investors. However, the most important factor in the analysis, the prejudice to a criminal defendant's rights, is not a factor here, because Gray has plead guilty in the criminal case against him. Further, the amended complaint alleges a scheme of fraud which is quite factual. As a result, preservation of documents and memories is of paramount importance. Permitting both the plaintiff and the remaining defendants to begin discovery, including depositions, is imperative. A stay will stifle such critical discovery and impede the efficient and expeditious progress of this case. For such reasons, the Court will deny the Receiver's motion for a stay

IV. CONCLUSION

The amended complaint fails to adequately state a cause of action against the Nixon Defendants or the Microventure Defendants. It also fails to state an adequate cause of action against the Bennington Defendants with regards to numerous of plaintiff's claims, including the Section 20(a), Section 12, RICO, breach of contract, conversion, unjust enrichment, General Business Law, Debtor & Creditor Law and constructive trust and accounting claims. Therefore, the motion to dismiss filed by the Bennington Defendants will be granted in part. For the reasons stated, the Receiver's motion to intervene will be granted and his request for a stay is denied.

Therefore, it is ORDERED that:

1. Defendants Nixon Peabody, LLP and John Koeppel, Esq.'s motion to dismiss the Amended Complaint for failure to state a cause of action is **GRANTED;**

2. Defendants Bennington Investment Management, Inc. and Gregory Edwards's motion to dismiss the Amended Complaint for failure to state a cause of action is **GRANTED** in part and **DENIED** in part;

3. Defendants MV Liquidity Fund, LLC and Microventure Marketplace, Inc.'s motion to dismiss the Amended Complaint for failure to state a cause of action is **GRANTED**;

4. The Amended Complaint against defendants Nixon Peabody, LLP and John Koeppel, Esq. is **DISMISSED**;

5. The Section 20(a) claim (Claim 2), Section 12 claim (Claim 3), RICO claim (Claim 4), breach of contract claim (Claim 6), conversion claim (Claim 9), unjust enrichment (Claim 10), General Business Law claim (Claim 11), Debtor & Creditor Law claims (Claims 12 -15) and constructive trust and accounting claim (Claim 16) in the Amended Complaint against defendants Bennington Investment Management, Inc. and Gregory Edwards are **DISMISSED**;

6. The Section 10(b) claim (Claim 1) and fraud claim (Claim 5) against defendants Bennington Investment Management, Inc. and Gregory Edwards and the breach of fiduciary duty claim (Claim 8) against defendant Gregory Edwards **REMAIN**,[8]

7. The Amended Complaint against defendants MV Liquidity Fund, LLC, MV Liquidity Fund I, LLC and Microventure Marketplace, Inc. is **DISMISSED**;

8. The Receiver's motion to intervene is **GRANTED;**

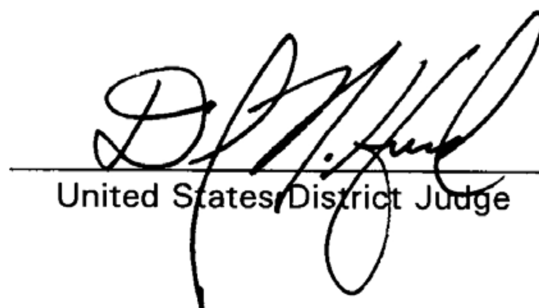
9. The Receiver may enter an answer to the amended complaint on behalf of Archipel Capital LLC, BIM Management LP, Bennington - Everloop LP, Archipel Capital - Agrivida LLC, Archipel Capital - Bloom Energy LP, Archipel Capital - Linegagen LP, Archipel Capital -

[8] Review of the docket indicates that defendant Gregory Gray has been properly served and has failed to file an answer.

Late Stage Fund LP and Archipel Capital - Social Media Fund LP (1, 2, 3, 4) on or before **September 12, 2016**; and

10. The Receiver's motion to stay is **DENIED**.

IT IS SO ORDERED.



Dated: August 11, 2016
Utica, New York