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SUPERIOR COURT OF NEW JERSEY
MORRIS COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L- 63-18

STEPHEN MAFFEI, ET AL.,

Plaintiffs,

v.

APEX FUND SERVICES (US), INC.,
ET AL.,

Defendants.

Decided: August 23, 2018

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Stephen Maffei, et. al.

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Apex Fund Services (US), Inc., Apex Fund Services, Ltd., Emerging Asset Management, Ltd., Apex Consolidation Entity, Ltd., Apex Fund Services Holdings, Ltd., and Colin Seitz

FRANK J. DEANGELIS, J.S.C.,

The current matter comes before the Court by way of motion to compel arbitration and, in the alternative, motion to dismiss. The underlying action arises out of several investors' investments in a tax lien based fund. In September 2011, Vicor began seeking investors and it was officially launched in January 2012. The plaintiffs, several investors in a fund (collectively the "Plaintiffs"), either invested directly in Vicor, (f/k/a Pantheon Tax Receivables, LP) ("Vicor"), by obtaining limited partnership interests in the Vicor, Saber Opportunity Income Fund, LP ("Saber Opportunity"), and Emerging Manager Platform, LP., Pantheon Tax Receivables Sub-Fund ("Sub-Fund"), (collectively "Funds"), or by obtaining equity interests in an offshore Sub-Fund that itself invested in Vicor.

Plaintiffs allege racketeering, fraud, and negligence. On January 10, 2018, Plaintiffs, direct and indirect investors in the Funds and the Sub-Fund, filed a Complaint against Apex Fund Services U.S. ("Apex"), Apex Fund Services Ltd. ("Apex-Bermuda"), Emerging Asset Management Ltd. ("EAM"), Saber Funds Distributors, LLC ("Saber Funds Distributors"), Apex Consolidation Entity Ltd. ("Apex Consolidation"), Apex Fund Services Holdings Ltd. ("Apex Services"), and Colin Seitz ("Seitz") (collectively, the "Defendants"[1]) alleging, violations of N.J.S.A. § § 2C:41-2(c) and (d) and 2C:41-4 (RICO); N.J.S.A. § 49:3-71(a)(2), and (5) (New Jersey Uniform Securities Law); Common Law Fraud and Fraudulent Inducement; Negligent Misrepresentation. Plaintiffs allege that

[1] Saber Funds Distributors is not a party to the present motion. Any references to "Defendants" collectively, excludes Saber Fund Distributors.

Apex Defendants advertised its role as Vicor's third-party administrator and custodian in order to induce prospective investors to invest in Vicor by falsely stating that it held and controlled the Fund's money and tax liens. In reality, Defendants allegedly permitted Falci to fully control all investments which were misappropriated to, among other things, repay defrauded investors in other funds. A prior action was filed on behalf of Vicor against Falci, his son and business partner, and various other entities they control ("Falci Action") on September 22, 2016.

Plaintiffs submit that Apex is and was at the relevant time, the U.S.-based subsidiary of Apex Fund Services Holdings, Ltd., which is registered in Bermuda, and that Vicor and Apex were parties to an Administrator, Registrar and Transfer Agent Agreement (the "Vicor Administrator Agreement") to which Plaintiffs were parties. According to Plaintiffs, Apex Fund Services (US), Inc., and Emerging Asset Management, Ltd., conspired with Falci to defraud investors. Plaintiffs also allege that Apex continues to do business in New York and is registered in New York as a foreign (New Jersey) corporation doing business in New York. Plaintiffs seek over forty million dollars from Defendants.

Defendants seek to dismiss Plaintiffs' Complaint as to the foreign defendants, Apex Bermuda, Apex Consolidation, Apex Holdings and EAM for lack of personal jurisdiction, and to dismiss the stated and remaining Defendants for failure to state a claim. Defendants also seek dismissal on the basis that the Falci Action and the within action stem from the same set of facts and series of transactional occurrences, and that the exact same allegations as to a violation of N.J.S.A. § § 2C:41-2(c) and (d) and 2C:41-4 were made by Vicor in the Falci Action as Plaintiffs herein made against the Apex Defendants. Defendants also contend that the Plaintiffs expressly provide the Funds' general partners with the authority to act for the Fund and enter into contracts with the Defendants and that all of Plaintiffs claims fall within the confines of the agreements between Defendants and the Funds. As such, Plaintiffs' claims are subject to the arbitration provision set forth in these contracts.

R. 4:6-2 provides, in relevant part, that the defendant may raise, by motion with accompanying brief, the failure of the plaintiff's pleading to state a claim upon which relief can be granted as a defense to the plaintiff's claim for relief. Such motions should be granted "in only the rarest of instances." Printing Mart v. Sharp Elect. Corp., 116 N.J. 739, 772 (1989). In approaching a motion to dismiss for failure to state a claim upon which relief can be granted, the Court's inquiry is limited to "examining the legal sufficiency of the facts alleged on the face of the complaint." Id. at 746. The court is permitted to consider additional documents, aside from the complaint, when those documents form the basis of plaintiff's claims. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 183 (2005). The Court must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim . . . ." Id. For purposes of analysis, the plaintiff is entitled to "every reasonable inference of fact . . . [and the examination] should be one that is at once painstaking and undertaken with a generous and hospitable approach." Id.

In reviewing the motion, the Court is not concerned with the "ability of plaintiffs to prove the allegations contained in the complaint." Id. The complaint need only allege sufficient facts as to give rise to a cause of action or prima facie case. Dismissal of the plaintiff's complaint is only appropriate after the complaint has been "accorded . . . [a] meticulous and indulgent examination. . . ." Printing Mart, 116 N.J. at 772. If dismissal of the plaintiff's complaint is appropriate, the dismissal "should be without prejudice to a plaintiff's filing of an amended complaint." Id. In circumstances where the plaintiff's pleading is inadequate in part, the Court has the discretion to dismiss only certain counts from the complaint. See, e.g., Jenkins v. Region Nine Housing Corp., 306 N.J. Super. 258 (App. Div. 1997).

A. Arbitration Agreement

First, Defendants argue that Plaintiffs' Complaint must be dismissed because the parties are bound by the arbitration provisions set forth in the Administrator, Registrar and Transfer Agent Agreements between Vicor and Apex US and between Saber Opportunity and Apex US. Defendants submit that these agreements apply to Plaintiffs based on the third party beneficiary, agency and estoppel theories.

Arbitration is a "creature of contract" and subject to the rules governing the construction of contracts. Id. An agreement to arbitrate "must be the product of mutual assent." NAACP of Camden Cnty East v. Foulke Mgmt Corp., 421 N.J. Super. 404, 424 (App. Div. 2011). The determination of the validity of an arbitration agreement considers "the intentions of the parties as reflected in the four corners of the written instrument," and the waiver of a part's right to litigate must "clearly and unambiguously" state an agreement to arbitrate. Id. at 425. When arbitration agreements are contained in contracts of adhesion, the courts "take particular care in assuring the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." Id.

The arbitration clauses in both Saber and Vicor agreements are identical and, in relevant part state:

> Any dispute or difference arising between the parties hereto with regard to the interpretation of this Agreement or to the rights or obligations of either party hereunder or in any manner relating to the subject matter hereof shall be referred to a single arbitrator to be appointed, and rules

> of arbitration to be agreed, by the parties or failing such appointment and agreement by the parties within thirty 30 days of a notice to so appoint and agree on such arbitrator to be appointed, in accordance with the Commercial Arbitration Rules of the American Arbitration Association and such arbitration shall be held in New York, New York.

The arbitration provision explicitly provides that it applies to differences or disputes between the parties to the agreement. It is undisputed that Plaintiffs are not parties to the Administrator, Registrar and Transfer Agent Agreement either between Vicor and Apex US or between Saber Opportunity and Apex US. Although Defendants assert that the arbitration provisions are enforceable against Plaintiffs because Plaintiffs are third party beneficiaries to both agreements, this position is contrary to the express language of the agreements. The Agreement provides: "[t]his Agreement shall not be construed to confer any benefit on any person other than the parties hereto and their respective successors and assignees. For greater certainty, no shareholder of the Fund shall, in such capacity, have any rights hereunder or be in any respect a third-party beneficiary hereof." Dagli Cert., Ex. J ¶ 15. Defendants have not cited to any basis that would require Plaintiffs' status as the beneficiaries of the Agreements to supersede the express language of the Agreements. Forcing Third-Party Defendants into arbitration where they have no contractual obligation is an affront to arbitration interests in the State. See Wasserstein v. Kovatch, 261 N.J. Super. 277, 284 (1993).

Furthermore, Defendants argue that the General Partners of Vicor and Saber Opportunities, with Plaintiffs' authorizations, were acting on behalf of Partnerships and the Plaintiffs when entering into the Agreements with Apex US. However, the General Partners signed the Administrator Agreement on behalf of Vicor, as an agent of Vicor, not as agents of the investors. Even if an agency relationship asserted by Defendants exists, such agency relationship only extends to the partner's representation of Plaintiffs' rights in their capacity as shareholders of the Fund. The contracting parties, however, explicitly agreed to leave the shareholder out of the Agreement. Dagli Cert., Ex. J ¶ 15. Therefore, the arbitration provisions are not applicable because ¶ 15 of the Agreement, excludes Plaintiffs from the scope of the Agreement.

Defendants' argument in favor of enforcement of the arbitration provisions based on equitable estoppel also fails. Equitable estoppel applies when "conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." D'Agostino v. Maldonado, 216 N.J. 168, 200 (2013) (quoting Dambro v. Union Cnty. Park Comm'n, 130 N.J. Super. 450, 457 (Law Div. 1974)). To prove equitable estoppel, there must be a "knowing and intentional misrepresentation" which results in the party seeking estoppel to rely to his or her detriment. Id. (quoting O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987). "Equitable estoppel is based on the principles of fairness and justice." Id. (citing Knorr v. Smeal, 178 N.J. 169, 180 (2003)).

Defendants assert that Plaintiffs are attempting to bypass the arbitration provision of the Agreements by filing separate suits against Falci and the Defendants in this case. Defendants submit that to permit Plaintiffs and the Funds to seek the same relief in two forums and avoid the arbitration provisions would be unjust. However, Defendants do not identify any knowing or intentional misrepresentation on behalf of Plaintiffs. Moreover, although the facts and circumstances between the present action and the Falci action overlap, at least to some extent, neither the Plaintiffs nor the Apex Defendants are parties to the Falci Action. Therefore, it is at best unclear how the filing of the Falci Action by and between different parties reasonably misled Defendants to their prejudice. Defendants have not demonstrated the applicability of equitable estoppel in this case.

B. Personal Jurisdiction

Next, Defendants assert that Plaintiffs' Complaint against Defendants Apex Consolidation, Apex Services, EAM, and Apex-Bermuda must be dismissed for lack of personal jurisdiction. Plaintiffs claim that this Court has specific jurisdiction over

Defendants Apex-Bermuda and EAM and that these entities' jurisdictional contacts should be imputed to Apex Consolidation and Apex Services under the theory of successor liability.

Specific jurisdiction is "conduct-linked" jurisdiction that arises out of or relates to a defendant's conduct within the forum state. Daimler AG v. Bauman, 571 S.Ct. 746, 751, 754 (2014) (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S.Ct. 2846, 2651, 2853 (2011)); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 n. 8 (1984)). For specific jurisdiction, the lawsuit must arise out of or relate to the defendant's contacts with the forum. Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cnty., 137 S. Ct. 1773, 1785 (2017) (internal citations omitted). "In other words, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and that is therefore subject to the State's regulation." Id. at 1776 (internal citations omitted). Specific jurisdiction "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." Id.

Here, Plaintiffs were primarily New Jersey residents who invested money in a New Jersey based entity, Vicor. Defendant EAM was an Investment Manager of the Sub-Fund and Defendant Apex-Bermuda was the Administrator and NAV Calculation Agent.

Defendants assert that EAM never entered the State of New Jersey to conduct business, never attended any meetings with Plaintiffs or Vicor in New Jersey, and never solicited any investors in New Jersey.

Plaintiffs rely on Sub-Fund Supplement and Investor Advisory Agreement ("IAA") for the basis of their allegations that EAM, together with Vidon, a limited liability company with its principal place of business in New Jersey, were responsible for initiating, approving, and/or executing all investment decisions with respect to the Sub-Fund with the goal of maximizing investor returns. EAM and Vidon invested millions of New Jersey investors' dollars into Vicor, a New Jersey-based limited partnership. Vidon received its instructions from EAM and at EAM's request was required to prepare several types of reports, including those related to the value and composition of the Sub-Fund. During the course of business, Vidon directly corresponded with Falci and other Vidon employees located in New Jersey.

Defendants dispute these allegations, noting that to demonstrate the existence of personal jurisdiction, Plaintiffs must meet their burden through sworn affidavits, certifications or testimony, and cannot merely rely on pleadings. Catalano v. Lease & Rental Mgmt. Corp., 252 N.J. Super. 545, 547 (Law Div. 1991). According to Defendants, the Sub-Fund, an off-shore Bermuda entity, not EAM and Vidon, invested in Vicor. Defendants assert that in reality, some Plaintiffs reached out to and invested in the Sub-Fund and all investors were introduced to the Sub-Fund by Vidon. Defendants further state that the Sub-Fund Supplement and Investor Advisory Agreement only set forth the responsibilities of Vidon, not EAM.

The IAA defines EAM as the "Investment Manager" and Vidon as the "Investment Advisor" appointed by EAM. Dagli Cert., Ex. I at 6. The IAA also defines Emerging Manager Platform Ltd., a Bermuda Segregated Accounts Company, as the "Company." Id. at 4. The IAA further provides that prospective investors "are urged to contact [EAM] with any questions they may have concerning any aspects of the Company or the offering of the Sub-Fund Shares." Id. at 9. In addition, the IAA informs that shareholders will receive monthly performance summaries and annual audited financial statements relating to Sub-Fund shares. Id. The IAA states, however, that Vidon will conduct due diligence and make investments. Id. at 9-10. The IAA sets out Vidon's obligations with respect to investment strategy, nature of investments, and concentration of investments with no mention of EAM's involvement or control over these decisions. See id. at 9-12. Further, the IAA provides that it is the responsibility of Vidon to advise EAM "and implement the investment strategies as described [in the IAA] with respect to the assets allocated by [EAM] to the Sub-Fund." Id. at 16.

The IAA does not provide clear guidance with respect to each entity's responsibilities. Defendants are correct that, per IAA, Vidon is responsible for making investments. Dagli Cert., Ex. I at 10. However, the "Administration Fees" subsection of the IAA also mentions that the Investment Manager *and* the Investment Advisor are responsible for any investment decisions of the Company and the Sub-Fund. Id. at 18 (emphasis added). Although, that is not the section that defines the parties' responsibilities, this language is instructive of the fact that EAM has some responsibility with respect to the investment decisions, not defined by this agreement. Further, section of the IAA titled "Investment Advisor" indicates that assets are allocated to the Sub-Fund by EAM. Id. at 16. Finally, IAA provides that investors will receive audited annual financial statements and unaudited monthly reports. The Investment Advisory Agreement provides that Vidon is responsible for carrying out reviews of the Company's portfolio, whenever it deems necessary or when EAM requires; preparing such reports as EAM may request for inclusion in annual or other reports by the Manager to the Company; and advising whether and in what manner all rights conferred by the Sub-Fund shall be exercised. Rosenbaum Cert., Ex. H § 3.2.

The Appellate Division previously considered personal jurisdiction in a case involving internet communication of alleged fraudulent misrepresentations about the financial state of a corporation offering stock disseminated in New Jersey and relied upon by the New Jersey Department of Treasury. McCormac v. Qwest Comm'ns Int'l, Inc., 387 N.J. Super. 487, 499 (App. Div. 2006). Noting that Qwest had established an investor relations division to communicate with and respond to questions from institutional investors, and that New Jersey was among Qwest's thirty-five largest institutional investors and received communications through that division, the court concluded that this New Jersey was the focal point of a harm suffered as a consequence of the alleged intentional tort the individual defendants aimed at this State. Id. at 502-05.

In Lebel v. Everglades Marina, Inc., the Court considered whether New Jersey courts had personal jurisdiction over a Florida seller with no other contacts with New Jersey who allegedly made fraudulent representations in connection with the sale of a boat to a resident in New Jersey. Lebel v. Everglades Marina, Inc., 115 N.J. 317, 320-21 (1989). The Court concluded that the seller's alleged phone calls to New Jersey and use of the postal service to solicit the contract were sufficient to satisfy the minimum contacts requirement necessary for specific jurisdiction because the buyer's allegations "support[ed] a finding that, at least for the purposes of this sale, the defendant purposely directed his activities" at the buyer in New Jersey. Lebel, 115 N.J. at 327.

At this stage in the litigation, there are many disputes of fact including those on the issue of awareness of EAM and other parties to the litigation of any falsity contained in the reports. Per the Investment Advisory Agreement, the reports prepared by Vidon were prepared at the direction of EAM and provided to EAM. Id. Further, although the full extent of EAM's responsibilities with regard to the Sub-Fund is not yet ascertained, the Investment Advisory Agreement provides that Vidon operated per the instructions of EAM. Id. at § 10.5. Therefore, Plaintiffs' reliance on IAA is sufficient to demonstrate that discovery may prove that EAM was systematically corresponding with and directing, Vidon, a New Jersey business, with regard to the management of the Sub-Fund made up of funds invested by primarily New Jersey investors. Plaintiffs also assert, based on IAA, that EAM knowingly sent, New Jersey investors, financial reports containing false information. The focal point of the injury was also New Jersey, because ten out of twelve of the Sub-Fund investor Plaintiffs are New Jersey residents. Further, per IAA, EAM "urged" prospective investors to contact it "with any questions concerning any aspect of the Company or offering of the Sub-Fund shares." Dagli Cert., Ex. I at 9. The Court finds that Plaintiffs allegations are sufficient to establish a prima facie basis for exercise of personal jurisdiction over EAM in this case.

The Court next turns to the question of specific jurisdiction over Apex-Bermuda. Apex-Bermuda's responsibilities included the maintenance of the books and records of the Sub-Fund including NAV calculations, coordination of the annual audit, preparation of shareholder account statements, and other services agreed upon by the parties. Plaintiffs assert that Apex-Bermuda prepared documents central to the fraud, including false NAV statements that were sent monthly to the Sub-Fund investors and that Apex-Bermuda communicated with Apex's New Jersey office in order to obtain NAV Calculations for the Fund. Further, based on the address on an application form given to the Sub-Fund investors, Plaintiffs assert that Apex-Bermuda carried out at least some of its custodial duties in New Jersey. However, Apex-Bermuda is a Bermuda entity, located and operated in Bermuda under the laws of Bermuda. Defendants state that Apex-Bermuda was never involved in the day to day operations of Apex US, never entered the State of New Jersey to conduct business, did not attend meetings or directly communicated with Plaintiffs or Vicor, and did not commingle funds or have common employees with Apex US.

The specific conduct of Apex-Bermuda, cited by the Plaintiffs here, relates to the management and administration of the Sub-Fund. Plaintiffs allege that Apex-Bermuda's responsibilities included "(i) maintenance of the books and records of the [Sub-Fund] including computation of the interim Net Asset Value; (ii) coordination of the annual audit; (iii) preparation of shareholder account statements; and (vi) other services as agreed upon by the parties." Dagli Cert., Ex. I at 17. Plaintiffs allege that through its preparation of NAV calculations and financial statements, Apex-Bermuda knowingly prepared documents central to the fraud, that were sent to Sub-Fund investors on a monthly basis. Giving all reasonable inferences of fact to Plaintiffs, as the Court must on a motion to dismiss, the Court finds that Plaintiffs' factual assertions are sufficient to establish a prima facie basis for exercise of personal jurisdiction over Apex-Bermuda.

The Court must now turn its attention to the inquiry of whether "fair play and substantial justice" supports an exercise of jurisdiction. The burden now shifts to Defendants to present a "compelling case that the presence of some other considerations would render jurisdiction unreasonable." Lebel, 115 N.J. at 328 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985)). Defendants did not present any special burdens beyond Defendants inconvenience of adjudicating the present action from abroad. Defendants reached into New Jersey during the course of its business and should have expected to be the subject of a potential suit in New Jersey arising out of Defendants' contacts with the forum. Moreover, New Jersey has an interest in this matter because most Plaintiffs are New Jersey residents. Thus, Defendants inconvenience in litigating this case from abroad does not rise to a compelling consideration rendering jurisdiction in New Jersey unreasonable.

C. Extraterritoriality

Defendants mention that the laws of New Jersey do not reach Bermuda entities such as the Sub-Fund, Apex Bermuda and EAM. Defendants rely on Morrison v. National Australian Bank, 561 U.S. 247 (2010), and RJR Nabisco, Inc. v. European Community, 136 S. Ct. 2090 (2016) for the proposition that the Security and Exchange Act and RICO's private right of action do not apply extraterritorially.

Generally, Congress has the authority to enforce its laws beyond territorial boundaries of the United States, but there is a presumption against extraterritoriality absent a clear indication from Congress that a statute applies extraterritorially. See Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115 (2013).

In Morrison v. Nat'l Austl. Bank Ltd., the Supreme Court noted the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255 quoting EEOC v. Arabian Am. Oil Co. (Aramco), 499 U.S. 244, 248 (1991). Finding no basis in the Exchange Act for the application of section 10(b) to foreign transactions, the Court rejected the "conduct" and "effects" tests, previously employed by the courts, and instead adopted a "transactional test". Morrison, 561 U.S. at 269. Thus, "Section 10(b) reaches the use of a manipulative or deceptive device or contrivance only in connection with the purchase or sale of a security listed on an American stock exchange, and the purchase or sale of any other security in the United States." Id. at 273.

Following the Morrison decision, in RJR Nabisco, Inc. v. European Cmty., the Supreme Court further explained its transaction test, which consist of a two-step framework. RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2101 (2016). First, the court "ask[s] whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." Id. If there is no such indication, the court proceeds to the second step. See id. at 2101; Morrison, 561 U.S. at 267 n.9. At this step, the court "determine[s] whether the case involves a domestic application of the statute." RJR Nabisco, 136 S. Ct. at 2101. To do so, it "look[s] to the statute's 'focus.'" Id. Determining the statutory focus allows the court to determine whether the case involves merely a domestic application. Id. In cases involving both conduct in the United States and conduct abroad, "[i]f the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." Id. at 2101. On the other hand, if the conduct relevant to the statute's focus occurred in a foreign country, then the case involves an extraterritorial application. Id.

Keeping this analysis in mind, it is puzzling that Defendants concluded that the holding of RJR Nabisco was that RICO’s private right of action does not apply extraterritorially. On the contrary, the Supreme Court held that certain substantive provisions of RICO applied extraterritorially. Id. 2101-06. Specifically, the statute's civil remedy, 18 U.S.C. § 1964(c), must apply extraterritorially for foreign plaintiffs suffering injury to have an actionable case. Id. at 2106. Section 1964(c) permits "[a]ny person injured in his business or property by reason of "a substantive RICO violation to sue the violator. The Supreme Court concluded that Section 1964(c) applies only to "a domestic injury to [a plaintiff's] business or property." Id. at 2106. The Supreme Court further indicated that it is the location where the injury was suffered, rather than where it was caused, that determines whether the injury is “foreign” or “domestic”. Id. The Court then concluded that because the parties to the case signed a stipulation waiving domestic damages, their remaining RICO claims based on foreign damages must be dismissed.

Such is not the case here, however. The basis for liability against the four foreign Apex Defendants at issue is their involvement with a New Jersey-based criminal Enterprise directing its fraudulent activity at Plaintiffs, domestic investors. The alleged enterprise as well as violations of the Security and Exchange Act resulted in financial injuries to New Jersey investors. Defendants have not conducted any analysis with respect to the two-step transaction test and its application to the present matter. Defendants have not even attempted to draw an analogy between the present matter and the two cases they cite to or identify the nature of the Plaintiffs' injury. Therefore, the Court has no basis for applying the presumption against extraterritoriality here.

D. Successor Liability

Defendants further argue that this Court does not have personal jurisdiction over Apex Consolidation and Apex Services. Defendants assert that there is no successor liability because there is no basis to pierce the corporate veil.[2] Additionally, Defendants assert that there is no New York entity, only Apex Services offices that are located in New York, and that there is no management and control of the Apex Fund. Plaintiffs contend

[2] At oral argument Defendants also argued that Plaintiffs did not plead either piercing the corporate veil or management theories for the purposes of personal jurisdiction. Plaintiffs' Complaint refers to Apex Services and Apex Consolidation as Apex's successors-in-interest. Compl. ¶¶ 42-43. Therefore, Plaintiffs' argument that specific jurisdiction is imputed onto Apex Consolidation and Apex Services based on the theory of successor liability is properly before the Court.

that Apex Consolidation and Apex Services are successors-in-interest to Apex because Apex was a predecessor entity to Apex Consolidation and Apex Services and thus Apex's minimum contacts are imputed on these entities.

As a preliminary matter, although similar in nature, the doctrines of piercing the corporate veil and successor liability are distinct theories pursuant to which liability could be imposed upon an individual that would not otherwise be subject to it. Similar to the doctrine of piecing the corporate veil, the purpose of the doctrine of successor liability is to prevent a corporation from escaping liability for its wrongs, simply because it has merged into another entity. See Walensky v. Jonathan Royce Intern., Inc., 264 N.J. Super. 276, 284 (App. Div. 1993). Under the theory of successor liability, a successor becomes liable for all obligations of its predecessor. Id.

Successor liability of a corporation may arise in five circumstances, when: "(1) the purchasing corporation expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction is entered into fraudulently in order to escape responsibility for such debts and liabilities"; and (5) "products liability cases where the successor corporation undertakes to manufacture essentially the same products as the predecessor." Woodrick v. Jack J. Burke Real Estate, Inc., 306 N.J. Super. 61, 72-73 (App. Div. 1997); Ramirez v. Amsted Industries, Inc., 86 N.J. 332, 340 (1981).

As to the second and third instances, which often overlap, in determining whether a particular transaction amounts to a de facto consolidation or mere continuation, courts consider four factors: "(i) continuity of management, personnel, physical location, assets, and general business operations; (ii) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (iii) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (iv) continuity of ownership/shareholders." Id. at 73. Not all of the factors need to be present; rather, the inquiry is "whether there was an intent on the part of the contracting parties to effectuate a merger or consolidation rather than a sale of assets." Id. at 74. "The more a corporation physically resembles its predecessor, the more reasonable it is to hold the successor fully responsible." Wilson v. Fare Well Corp., 140 N.J. Super. 476, 490 (Law Div. 1976).

Viewing the evidence in the light most favorable to the Plaintiffs, the Court finds that Plaintiffs have satisfied their prima facie burden of proving personal jurisdiction over Apex Consolidation and Apex Services. Apex, a domestic corporation, with its principal place of business in Red Bank, New Jersey was owned by Apex Services from October 14, 2009 to November 1, 2016. Apex Consolidation became the sole shareholder of Apex in November 2016, around the time Apex learned of the Falci Action. Apex now appears to continue doing business out of New York. It is an active foreign business corporation with its jurisdiction listed as New Jersey and an address for service of process in New York. Moreover, Apex Services' website (last updated in 2018) appears to indicate that Apex is active and continues to provide services including tax preparation and investment management. Dennis Westley, who purportedly was the Managing Director of Apex in September 2016, prior to its dissolution, is now the Managing Member in the New Jersey registration and is listed as the Managing Director of Apex, North America. Thus, post-dissolution, Apex Services operates in the same geographic territory, provides the same services, and continues to operate under the same management. The Court finds that these factual allegations warrant the imposition of successor liability for the purposes of imputing personal jurisdiction over Apex Consolidation and Apex Services.

E. Entire Controversy

Defendants argue that Plaintiffs' Complaint in the present action violates the entire controversy doctrine and Rule 4:5-1(b)(2). Plaintiffs maintain that the present action was improperly brought before this Court because Vicor, the Fund in which many of the Plaintiffs to the present action invested brought a suit against Falci seeking the return of funds that Falci unlawfully took. Defendants submit that many of the background facts in the present case are identical to the facts on which the Falci Action is predicated. Furthermore, many of the Plaintiffs herein are Limited Partners of Vicor who are seeking the same relief in both actions. Therefore, Defendants argue that Plaintiffs should not be permitted to continue the present action.

The purpose of the entire controversy doctrine is to ensure that related claims and matters arising among related parties are adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation. Kent Motor Cars, Inc. v. Reynolds and Reynolds, Co., 207 N.J. 428, 443 (2011). The doctrine is intended to prevent parties from voluntarily holding back a component of a controversy in a single proceeding, by precluding it from being raised in a subsequent proceeding. Hobart Bros. Co. v. National Union Fire Ins. Co., 354 N.J. Super. 229, 240-241 (App. Div. 2002). The rules implementing the entire controversy doctrine have changed over time. See Kent, 207 N.J. at 443-45 (reviewing the history of the entire controversy doctrine). Although the doctrine previously required the joinder of related claims and parties, today the scope of the entire controversy doctrine is limited to the preclusion of claims omitted from a first proceeding, as described in Rule 4:30A. The preclusion of a successive action against a person not a party to the first action has been abrogated except in special circumstances involving inexcusable conduct and substantial prejudice to the non-party resulting from omission from the first suit. See Comment 1 to Rule 4:30A.

Moreover, R. 4:5-1(b)(2) substitutes disclosure for mandatory joinder of non-parties. R. 4:5-1(b)(2) requires a party to certify in its first pleading as to whether the matter in controversy is the subject of any other action pending in any court, and requires the party to disclose in the certification the names of any non-party who may be joined in the action because of potential liability to any party on the basis of the same transactional facts. Based on this certification, the court determines whether to compel the non-party's joinder. The purpose of Rule 4:5-1(b)(2) is to provide notice to all parties in each action of the pendency of other actions involving the same controversy. See Comment 2.1 to R. 4:5-1. The Rule also provides:

> If a party fails to comply with its obligations under this rule, the court may impose an appropriate sanction including dismissal of a successive action against a party whose existence was not disclosed or the imposition on the noncomplying party of litigation expenses that could have been avoided by compliance with this rule. A successive action shall not, however, be dismissed for failure of compliance with this rule unless the failure of compliance was inexcusable and the right of the undisclosed party to defend the successive action has been

> substantially prejudiced by not having been identified in the prior action.

R. 4:5-1(b)(2). Courts should analyze both fairness to the parties and fairness to the system of judicial administration before dismissing claims. Hobart, 354 N.J. Super. at 244.

Vicor filed the Falci Action on September 22, 2016 against Falci, his son and business partner. Although Plaintiffs are Vicor investors, neither Plaintiffs nor the Defendants are parties to the Falci Action. Plaintiffs claim that at the time the Falci Action was filed, Plaintiffs did not know the extent of the fraud and the enterprise. At the time of the commencement of the Falci Action, Vicor was not yet in possession of the vast majority of Vidon's or Fund's bank account records, Apex's internal records or emails relating to Vicor, its own email files or the records of its outside auditor. Apex's involvement in the enterprise and the facts upon which this action was predicated, were uncovered through discovery upon the receipt of these and other documents.

Since Plaintiffs seek to pursue a cause of action against new defendants in this action, rather than to pursue new claims against the defendants from a prior litigation, the entire controversy doctrine may only preclude the Complaint if Plaintiffs engaged in inexcusable conduct and the individual Defendants would be substantially prejudiced by their omission from the first litigation. See Comment 1 to R. 4:30A. Moreover, Vicor executed a

R. 4:5-1(b)(2) certification at the outset of the first litigation and thereby certified that it was not aware of any other parties who might be potentially liable to Vicor on the basis of the facts pled. R. 4:5-1 provides that dismissal may be an appropriate remedy if Vicor was aware of the Defendants' role in the facts alleged when it executed the certification.

Defendants argue that they are prejudiced by Plaintiffs' failure to identify and include the Apex Defendants in the Falci Action because the passage of time has caused depletion in the Fund's assets affecting Defendants' right to indemnity from the Funds. Further, Plaintiffs failure to assert their claims or identify the Defendants within the Falci Action resulted in the expiration in the statute of limitation on Plaintiffs' securities claims. Defendants also state that they are prejudiced by the delay in discovery, because witness' memories fade and evidence is lost through the passage of time.

The defendants in the Falci Action defaulted and both Falci and his son filed for bankruptcy protection, staying the Falci Action. Defendants have not indicated what discovery was done in the Falci Action to date. The crux of Defendants' prejudice lies in the passage of time since the initiation of the Falci Action until the commencement of the present matter. However, Plaintiffs assert that they did not know of the claims against Defendants asserted here, contending that Plaintiffs' awareness of the existence of the Defendants and their general work and involvement with the Sub-Fund and Falci is distinct from the awareness it now has as to the Defendants' alleged roles with the enterprise including Defendants' alleged misrepresentations to Plaintiffs' and involvement in conspiracy. If the Court accepts that Plaintiffs filed the present action promptly upon becoming aware of their claims against the present Defendants, it is unclear how Defendants concerns would have been cured had Plaintiffs filed the within claims in the Falci Action at the same time that the present action was commenced.

At the motion to dismiss stage, the Court must accept Plaintiffs' allegations as true and afford Plaintiffs all reasonable inferences. Banco Popular N. Am., 184 N.J. at 183. Furthermore, Defendants have not presented any evidence of Plaintiffs knowledge of the present claims at the time of the Falci Action except general assertions that Plaintiffs should have known of the claims against Defendants when they knew the facts upon which the Falci Action is predicated. Accordingly, the entire controversy doctrine and R. 4:5-1(b) are not grounds for dismissal of Plaintiffs' Complaint.

F. Fraud and Fraudulent Inducement

Defendants submit that Plaintiffs fail to set forth any allegations in the Complaint of any material misrepresentation made by Apex Consolidation, Apex Holdings, EAM or Colin Seitz.

"In all allegations of misrepresentation, fraud, mistake, breach of trust, willful default or undue influence, particulars of the wrong, with dates and items if necessary, shall be stated insofar as practicable. Malice, intent, knowledge, and other conditions of mind of a person may be alleged generally." R. 4:5-8. To state a claim of common law fraud, the plaintiff must plead five elements: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." Banco Popular N. Am. v. Gandi, 184 N.J. 161 (2005) (citing Gennari v. Weichert Co. Realtors, 148 N.J. 582 (1997)). The "deliberate suppression or omission of a material fact that should be disclosed, is equivalent to a material misrepresentation." Strawn v. Canuso, 140 N.J. 43 (1995).

In the instant matter, Plaintiffs' Complaint sets forth the following material misrepresentations:

a) In the Sarullo Email that was shown to investors, Apex falsely stated that Falci would not be able to access Vicor's funds;

b) Apex reviewed and approved of the Investor Presentation, and was aware it would be shown to and relied upon by investors, which falsely stated that only Apex would control the movement of Vicor's funds;

c) Seitz advised Andrews, Kiernan, and Elssworth that Falci would not have access to or control over Vicor's funds, knowing that Andrews, Kiernan, and Ellsworth would rely on those statements and share that representation with potential Vicor investors who would also rely on them;

d) Apex and Apex-Bermuda prepared and disseminated to Plaintiffs materially false and misleading NAV statements on a monthly basis overstating NAVs;

e) The Apex Defendants omitted to inform investors that Apex had abandoned verifying the existence of Vicor's tax liens and tax certificates that were in its possession;

f) The Apex Defendants omitted to inform investors that Apex turned over its record-keeping and accounting duties to Falci; and

g) The Apex Defendants omitted to inform investors that Falci had access to Vicor's funds despite the fact that Apex and Seitz had made contrary representations had to investors.

Compl., ¶ 182. Plaintiffs allege that they relied on these misrepresentations, among others, such as misleading representation of assets and false NAVs and were damaged by not being able to take action to redeem their investments. These allegations are specific enough to identify misstatements, omissions and misrepresentations made to the Plaintiffs. Plaintiffs name the parties who made the misrepresentations and name at least three of the specific parties to whom the misrepresentations were directed, when they were not directed to all of the Plaintiffs, such as the NAV statements. Construing the Complaint liberally, the Court is satisfied that Plaintiffs' fraud claims are sufficiently specific and properly pled as a matter of law.

G. New Jersey Uniform Securities Law

Defendants submit that Plaintiffs fail to set forth any actions by Defendants which constitute offering, advising, or materially aiding in the sale of a security as required by N.J.S.A. 49:3-71(a)(2) and (5).

In relevant part, the New Jersey Uniform Securities Law imposes liability on any person who:

> (2) Offers, sells or purchases a security by means of any untrue statement of material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), or
> (5) Engages in the business of advising others, for compensation, either directly or through publications or writings, as to the value of securities, or as to the advisability of investing in, purchasing or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities (i) in willful violation of this act or of any rule or order promulgated pursuant to this act, or (ii) employs any device, scheme or artifice to defraud the other person or engages in any act, practice or course of business or conduct which operates or would operate as a fraud or deceit on the other person, is liable as set forth in subsection (c) of this section

N.J.S.A. § 49:3-71(a)(2) and (5).

Defendants argue that Plaintiffs fail to set forth any actions by Defendants which constitute offering, advising, or materially aiding in the sale of a security. Defendants emphasize that New Jersey Uniform Securities Law ("NJUSL") does not impose liability for "mere participation in unlawful transactions." Pinter v. Dahl, 486 U.S. 622, 650 (1988). Further, Defendants contend that Plaintiff's Complaint fails to set forth any allegations specifically against EAM, Apex Consolidation or Apex Holdings.

Relying on Zendell v. Newport Oil Corp., Plaintiffs argue that liability under NJUSL may extend to third parties "who successfully solicit the purchase, motivated at least in part by a desire to serve his or her own financial interest or those of the security's owner." Zendell v. Newport Oil Corp., 226 N.J. Super., 431, 439-40 (App. Div. 1988). In Zendell, the plaintiffs invested in unregistered limited partnerships organized to engage in gas and oil exploration. Id. at 438. The plaintiffs alleged that the attorneys were negligent by "allowing an offering of unregistered securities. . . ." in violation of NJUSL even though no fiduciary or attorney-client relationship existed between prospective purchasers and the law firm. Id. The Court cited Rosenblum v. Adler, 93 N.J. 324, 461 (1983) where the New Jersey Supreme Court held an auditor liable to "reasonably foreseeable recipients of information supplied for proper business purposes, provided that the recipient relied on the statement in pursuit of those business purposes." Relying on Rosenblum, the Zendell court reversed summary judgment for the attorneys and held that an attorney could be liable to non-clients for negligently assisting an offering of unregistered securities, and that foreseeability was an issue of fact. Id. at 438. The court in Zendell concluded that like certified public accountants or other professionals involved in commercial transactions, a lawyer's duty may run to third parties who foreseeably rely on the lawyer's opinion or other legal services. Id. at 439.

Here, Plaintiffs allege that Sub-Fund investors relied upon various statements made in the Offering Memo, Investor Presentation, and Sarullo Email, which were reviewed and approved by Apex. In addition, Seitz made false statements directly to investors to induce investments. Apex-Bermuda purported to maintain books and records and calculate NAV upon which investors foreseeably relied. EAM, as investment manager of the Sub-Fund, managed the investors' funds, for compensation. Furthermore, Plaintiffs maintain that Defendants' managerial functions for the Fund and Sub-Fund, including (1) as investment manager for the Sub-Fund, (2) maintaining the Fund's and the Sub-Fund's books and records, (3) calculating the Fund's and the Sub-Fund's NAVs (ibid.), (4) holding the Fund's assets (tax liens), and (5) maintaining control over the Fund's money, demonstrate that Defendants materially aided in the sale of securities because they supplied critical information to Plaintiffs that induced Plaintiffs to invest.

Given the liberal pleading standard in New Jersey, the Court finds that Plaintiffs set forth sufficient facts as to each Defendant demonstrating that Defendants either made statements and representations inducing Plaintiffs to invest in the Sub-Fund or managed and maintained documents in connection with the Sub-Fund for the objective purpose of investors' reliance on the documents' representations with respect to the characterizations of Plaintiffs' investments and financial health of the Fund, which could subject Defendants to liability under the New Jersey Uniform Securities Law.

H. Statute of Limitations

Defendants submit that the statute of limitations for Plaintiffs' N.J.S.A. 49:3-71(a)(2) and (5) has run. Pursuant to N.J.S.A. 49:3-71 action for deceit under Uniform Securities Law shall be brought within two years after "the contract of sale or the rendering of the investment advice, or more than two years after the time when the person aggrieved knew or should have known of the existence of a cause of action, whichever is later."

Plaintiffs assert that they did not know that they were injured at all until mid-2016 and it was not until well into 2017 that they knew their injuries were caused by the Defendants. Plaintiffs explain that Falci was removed from the Fund in 2016.

Plaintiffs assert that prior to 2016, Plaintiffs could not obtain banking and accounting records and other financial information and communications. Plaintiffs allege that contrary to Defendants' representations, Apex abdicated to Falci its responsibilities to administer the Fund's books and records, thus allowing for the fabrication of those books and records to keep the scheme going. Apex did this despite the fact that it possessed the Fund's actual assets, which were a small fraction of the fictional assets Apex represented to investors existed. The Apex Defendants fraudulently provided Vicor investors with false NAV statements, on a monthly basis, reflecting assets that Apex knew did not exist, which was integral to conducting the Enterprise's scheme.

The nature of Plaintiffs allegations is consistent with Plaintiffs' claim that the alleged fraudulent policies and practices of the Apex's back offices could not have been known to Plaintiffs until revealed through documentary discovery in the Falci Action. The injury in this case, investment losses, is of such a nature that the losses would not necessarily be indicia in and of themselves of fraud or wrongdoing. Therefore, the Court finds it plausible that only after the course of a criminal investigation and Plaintiffs' civil action against Falci, Plaintiffs learned of the full extent of the enterprise and Plaintiffs acted promptly and reasonably under these circumstances in filing the present complaint after gathering the information.

Finally, although Defendants claim prejudice with respect to availability of witnesses and evidence due to the passage of time, Defendants do not identify any specific piece of evidence or unavailability of a witness.

Nonetheless, the Court notes that its analysis is pursuant to the liberal pleading standard on a motion to dismiss. Discovery may provide more insight into the timing of Plaintiffs' awareness of the accrual of the within claims and Plaintiffs' efforts in exercising reasonable diligence. Therefore, although based on Plaintiffs' pleadings, briefs and oral argument, Plaintiffs have established a prima facie showing of compliance with the statute of limitation pursuant to the discovery rule, a Lopez hearing may be appropriate at a later date.

I. NJ-RICO

NJ RICO "makes it a crime for a person to be employed by or associated with 'an enterprise' and to engage or participate or become involved in the business of the enterprise 'through a pattern of racketeering activity'" that affects "trade or commerce." State v. Ball, 141 N.J. 142 (1995) (quoting N.J.S.A. § 2C:41-2(b), 2(c)). NJ RICO defines an "enterprise" as "any individual, sole proprietorship, partnership, corporation, business or charitable trust, association, or other legal entity, any union or group of individuals associated in fact although not a legal entity, and it includes illicit as well as licit enterprises and governmental as well as other entities." N.J.S.A. § 2C:41-1(c). It defines "racketeering activity" as "theft and all crimes defined in chapter 20 of Title 2C of the New Jersey Statutes." N.J.S.A. § 2C:41-1(a)(1)(n).

NJ RICO defines "pattern of racketeering activity" as:

> (1) Engaging in at least two incidents of racketeering conduct one of which shall have occurred after the effective date of this act and the last of which shall have occurred within 10 years (excluding any period of imprisonment) after a prior incident of racketeering activity; and
>
> (2) A showing that the incidents of racketeering activity embrace criminal conduct that has either the same or similar purposes, results, participants or victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

N.J.S.A. § 2C:41-1(d).

NJ RICO includes a civil remedies provision that permits a party to sue for restitution and damages. See N.J.S.A. § 2C:41-4. To state a claim under NJ RICO's civil remedies provision, a plaintiff must allege: (1) that the defendant committed an NJ RICO violation; and (2) that the "plaintiff's harm was proximately caused by the NJ RICO predicate acts alleged, i.e., that there was a direct relationship between plaintiff's injury and defendant's conduct." Interchange State Bank v. Veglia, 286 N.J. Super. 164 (N.J. Super. Ct. App. Div. 1995).

Plaintiffs allege that Defendants engaged in racketeering activity because they violated New Jersey Security laws. Defendants respond that Plaintiffs' post-investment claims must be pled as a shareholder derivative action and that Plaintiffs do not have standing to assert their claims directly based on post-investment conduct. Plaintiffs' fraudulent inducement claims based on allegations regarding the management of the Sub-Fund are pre-investment. Plaintiffs also allege that Defendants falsified various financial reports and misrepresented the Sub-Fund's management and finances to continue to attract additional investment and generate inflated administration fees. At oral argument, Defendants conceded that an investor who relies on misrepresentations and makes a repeat investment based on the fraudulent inducement to do so engages in pre-investment conduct. Therefore, these claims are properly pled as a direct action.

By contrast, Plaintiffs' allegations of a pattern of misrepresentations of the investors' finances including the NAV statements demonstrates post-investment conduct that was intended to keep the investment in the Sub-Fund. Defendants argue that this conduct must be pled as a derivative action. Generally, "shareholders cannot sue for injuries arising from the diminution in value of their shareholdings resulting from wrongs allegedly done to their corporations." Pepe v. General Motors Acceptance Corp., 254 N.J.Super. 662, 666 (App. Div.), certif. denied, 130

N.J. 11 (1992). In Gutman v. Howard Sav. Bank, 748 F.Supp. 254 (D.N.J. 1990), however, the court recognized that an individual plaintiff may state a common law fraud claim against a defendant whose misrepresentations caused plaintiff to hold securities which plaintiff otherwise would have sold. Plaintiffs here allege to have held their stock in reliance on misrepresentations or omissions made by Defendants.

The Court notes that in Gutman, plaintiffs alleged repeated, face-to-face contact with the defendants during which defendants made verbal and written misrepresentations. Id. at 265. Gutman expressly limited "holder" claims to situations involving such direct communication. Id. In Primavera Familienstiftung v. Askin, the court treated the fraudulent inducement and fraudulent retention claims under the same legal standard although investors testified that they had relied on written statements. Primavera Familienstiftung v. Askin, 130 F. Supp. 2d 450, 503 (S.D.N.Y. 2001) (relying on cases where "fraudulent misrepresentations induced the purchase and retention" of an investment). Importantly, in Gutman, the court's limitation of reliance on direct communications was based on, at least in part, the large class of Plaintiffs and fact issues relating to ascertaining plaintiffs' reliance on inducement. Gutman, 748 F.Supp. at 265-66. The Court finds that further discovery is necessary to ascertain the full extent of Plaintiffs' fraudulent inducement claims, the extent of communications and the full basis of Plaintiffs' reliance on Defendants' misrepresentations. Accordingly, Plaintiffs' RICO claims may proceed at this stage in the action.

J. Negligent Misrepresentation

Negligent misrepresentation requires that an "incorrect statement was negligently made and justifiably relied upon and that injury was sustained as a consequence of that reliance." Carroll v. Cellco P'ship, 313 N.J. Super. 488, 502 (App. Div. 1998). Defendants maintain that Plaintiffs' negligent misrepresentation claim fails as a matter of law because there is no duty because there is no contractual relationship between Plaintiffs and Defendants.

Defendants cite to Saltiel v. GSI Consultants, Inc., 170 N.J. 297, 315 (2002) in support of their position. There, defendant GSI Consultants, Inc. (GSI), entered into a contract with plaintiff requiring GSI to design and prepare specifications for turfgrass for two athletic fields. Saltiel, 170 N.J. at 299. Plaintiff alleged that GSI was negligent in preparing the specifications and sought to recover in tort against defendants Henry Indyk and Richard G. Caton as current and former officers of GSI. Id. at 299-300. The Court declined to allow negligence claims against two corporate officers because they owed no duty to plaintiff outside the scope of the contract between plaintiff and the defendant corporation. Even though the officers were not parties to the contract, the Court found that "the scope of the parties' obligations was defined by the contract, and the contract imposed responsibilities on defendant [corporation] only, and not on defendant [corporate officers]." Saltiel, 170 N.J. at 316. Because their duties as corporate officers were to perform the contract on behalf of the corporation, they had no separate tort duty imposed by law.

The issue before the Saltiel Court required it "to consider: (1) the proper application of the participation theory of personal liability for tortious conduct by corporate officers under New Jersey law; and (2) whether the plaintiff's claim against Indyk and Caton sounds in tort or contract." Id. at 302. The Court examined the application of the participation theory, which is employed in cases that seek to hold corporate officers personally liable for intentional torts, explaining that:

> the essence of the participation theory is that a corporate officer can be held personally liable for a tort committed by the corporation when he or she is sufficiently involved in the commission of the tort. A predicate to liability is a finding that the corporation owed a duty of care to the victim, the duty was delegated to the officer and the officer breached the duty of care by his own conduct.

Id. at 303.

Because the conduct at issue in Saltiel did not implicate an intentional tort, the Court then explored the boundaries between contract, where duties are voluntarily assumed, and tort, where duties are imposed by law, concluding that the dispute at issue was essentially a matter of contract. Id. at 315-18.

In Saltiel, although the individual officers were not parties to the contract at issue, there was a contract between plaintiffs and the defendant corporation that defined duties upon which the claims are premised. Here, on the other hand, Plaintiffs are not parties to the Administrative Agreements, thus as far as the Court can tell at this stage in the litigation, there was no contract that defined duties owed to Plaintiffs. Although Defendants argue that their duties to Plaintiffs stem from contracts, they do not identify any specific contract terms and the duty to Plaintiffs that arises out of those terms.

Plaintiffs allege that the Defendants made materially false and misleading representations to Plaintiffs related to the control of Vicor’s funds and assets and provided false and misleading NAV statements. Either knowing that information was false, or being negligent in not knowing, the Defendants furnished this false information to Plaintiffs for Plaintiffs to use in making investment decisions and in determining what their investments were worth. Plaintiffs relied on this information to their detriment, because it precluded them from learning of Falci’s embezzlement and making prudent investment decisions.

Plaintiffs submit that the Restatement (Second) of Trots establishes an independent duty to exercise reasonable care to provide accurate information. The Restatement (Second) of Torts provides:

> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.
>
> (2) … the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Unlike Saltiel, Plaintiffs here are not parties to the contracts governing any of the Defendants' obligations to Plaintiffs with regard to the supply of the information. Moreover, unlike Saltiel, where there was no recognized duty to provide design and specification other than the voluntary contractual duty between the parties, here the Restatement (Second) of Torts presents prima facie evidence of an independent duty in tort.

Therefore, the Court finds that Plaintiffs pled sufficient facts to give rise to a cause of action for negligent misrepresentation.[3]

For the reasons set forth above, Defendants' motion to compel arbitration or in alternative, to dismiss Complaint for failure to state a claim is DENIED in its entirety.

[3] Having found that Plaintiffs' presented prima facie evidence that their allegations stem from conduct outside of any contractual agreements between the parties, it follows that the economic loss doctrine also does not preclude Plaintiffs' claims.