

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>DAVID ANDREWS, et al.,</i>)	
)	
<i>Plaintiffs</i>)	
)	
<i>v.</i>)	<i>Docket No. 98-436-P-H</i>
)	
<i>EMERALD GREEN PENSION FUND,</i>)	
<i>et al.,</i>)	
)	
<i>Defendants</i>)	

RECOMMENDED DECISION ON CERTAIN DEFENDANTS’ MOTIONS TO DISMISS

Five of the nine defendants named in the second amended complaint have moved to dismiss this action on several grounds. Defendants Galen C. Shawver, Emerald Green Pension Fund and Commercial Mortgage & Associates, Inc. (“the Shawver defendants”) assert that the first amended complaint¹ fails to state a claim upon which relief may be granted as to Counts I-VI and XI; that venue is not proper in this district; that the court lacks personal jurisdiction over them with respect

¹ After the motions to dismiss were filed, the plaintiffs were granted leave to file a second amended complaint. Endorsement, Docket No. 28. The second amended complaint added Counts XII-XIV. Plaintiff Andrews represented that the second amended complaint would “help resolve disputes regarding the sufficiency of the original pleadings.” Plaintiff’s Motion to Amend (Second Amended Complaint) (Docket No. 28) ¶ 5. The second amended complaint consolidates the claims of three plaintiffs, who initially brought separate actions against the same defendants. Because the motions to dismiss addressed the first amended complaint, which was brought only by plaintiff Andrews, the objection to the motions to dismiss was filed only by plaintiff Andrews. All of the plaintiffs in the consolidated action are represented by the same counsel and raised the same claims. Accordingly, the court will consider the motions to dismiss as if directed to the second amended complaint and the opposition as having been filed by all plaintiffs.

to the state-law claims asserted; and that the arbitration clause of a contract compels dismissal, or, in the alternative, a stay. Defendants Emerald Green Pension Fund, Galen C. Shawver and Commercial Mortgage & Associates, Inc.'s Motion Pursuant to Rule 12 (Docket No. 17) at 1-2. Defendant Auman W. Jobe repeats all of these arguments. Defendant Auman W. Jobe's Motion Pursuant to Rule 12 (Docket No. 20) at 1-2. Defendant Michael Cassidy also repeats these arguments.² Defendants Michael Cassidy and ShuKu International's Motion Pursuant to Rule 12 (Docket No. 23) at 1-2. I recommend that the court grant the motions in part.

I. Applicable Legal Standards

The moving defendants seek dismissal pursuant to Fed. R. Civ. P. 12(b)(2), (3) and (6). A motion to dismiss for lack of personal jurisdiction raises the question whether the controversy or the defendant has sufficient contact with the forum to give the court the right to exercise judicial power over the defendant. *See, e.g., Hancock v. Delta Air Lines, Inc.*, 793 F. Supp. 366, 367 (D. Me. 1992). The burden is on the plaintiff to establish jurisdiction, *Talus Corp. v. Browne*, 775 F. Supp. 23, 25 (D. Me. 1991), but where, as here, the court rules on the Rule 12(b)(2) motion without holding an evidentiary hearing, a *prima facie* showing is sufficient, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708,

² Cassidy's *pro se* motion purports to be brought on behalf of defendant ShuKu International as well as for himself. Defendants Michael Cassidy and ShuKu International's Motion Pursuant to Rule 12 (Docket No. 23) at 1-2. ShuKu is identified in the second amended complaint as "a business entity." Consolidated Second Amended Complaint (Docket No. 37) ¶ 9. Cassidy states that ShuKu is a trust domiciled in and organized under the laws of the Turks & Caicos Islands. Affidavit of Michael Cassidy (Docket No. 24) ¶ 3. Default was entered against ShuKu on February 11, 1999, prior to the purported filing on its behalf of the motion to dismiss. Endorsement, Plaintiff's Motion for Entry of Default (Docket No. 8). Accordingly, ShuKu may not now move to dismiss the claims asserted against it. Even if that were not the case, Cassidy, who is not a member of the bar of this court, may not represent ShuKu here.

712 (1st Cir. 1996) (*prima facie* standard preferred where jurisdictional facts are undisputed); *Archibald v. Archibald*, 826 F. Supp. 26, 28 (D. Me. 1993). For the purposes of such a review, the plaintiffs may not rely on unsupported allegations in their pleadings to make the *prima facie* showing. *Boit v. Gar-Tec Prod., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). The court accepts properly supported proffers of evidence by a plaintiff as true. *Boit*, 967 F.2d at 675.

A motion to dismiss for lack of venue under Rule 12(b)(3) puts the burden on the plaintiff to demonstrate that he has met his obligation to institute his action in a permissible forum. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1352 at 264-65 (2d ed. 1990). The procedure for analysis of such a motion is the same as that for a motion under Rule 12(b)(2). *M.K.C. Equipment Co. v. M.A.I.L. Code, Inc.*, 843 F. Supp. 679, 682-83 (D. Kan. 1994).

The motions to dismiss Counts I-VI and XI invoke Fed. R. Civ. P. 12(b)(6). “When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The second amended complaint includes the following relevant factual allegations. In 1997 defendant Cassidy solicited the plaintiffs’ investment in defendant Emerald Green Pension Fund (the “Fund”). Consolidated Second Amended Complaint ¶ 14. Cassidy told the plaintiffs that the Fund

was about to conduct international trades of bonds or commercial paper that would allow investors to receive a large profit, which would be available to them on a monthly basis. *Id.* ¶¶15-16. Cassidy told the plaintiffs that investment in the Fund was secure, backed by a bank guarantee and hard assets in the form of precious gemstones; that the Fund was a qualified pension fund; and that their investments would be held in escrow until the trade occurred. *Id.* ¶ 16.

Plaintiff Andrews invested \$30,000 in the Fund on or about December 10, 1997 and another \$60,000 on February 2, 1998, as directed and arranged by Cassidy. *Id.* ¶¶ 17-18. An investment accounting form provided to Andrews stated that the investment was made pursuant to a joint venture that provided certain rights to defendant ShuKu International. *Id.* ¶ 18. Andrews invested another \$50,000 on or about May 5, 1998. *Id.* ¶ 19.

On or about December 10, 1997 plaintiff Raymond St. Laurent invested \$70,000 in the Fund, signing, at Cassidy's direction, a joint venture agreement providing that "the Cassidy group," "the Trade Group," and the "Pal Group" had certain rights to a division of earnings from the investment. *Id.* ¶ 20. On or about May 31, 1997 St. Laurent invested an additional \$187,500 in the Fund, through Cassidy. *Id.* ¶ 21. A final investment accounting form provided to St. Laurent for this investment stated that it was made pursuant to a joint venture giving certain rights to defendant ShuKu International. *Id.*

On or about December 22, 1997 plaintiff Richard Dingwell invested \$20,000 in the Fund, signing, at Cassidy's direction, a joint venture agreement providing "the Cassidy Group," "the Trade Group," and "the Palladian Group" with certain rights to a division of earnings from the investment. *Id.* ¶ 22.

Prior to December 22, 1997 the defendants were aware that an investigation of the Fund for

possible criminal wrongdoing had been begun by either the United States Attorney's Office for North Carolina or the North Carolina Attorney General's Office, or both, and that the Fund's bank accounts had been frozen by a receivership action brought by the state of North Carolina. *Id.* ¶¶ 23-24. These funds were later seized by the state in a forfeiture action. *Id.* ¶ 24. The defendants did not reveal these facts to the plaintiffs before they made their investments in the Fund. *Id.* ¶ 25. Despite demands, the defendants have failed to return the plaintiffs' investments. *Id.* ¶ 28.

The Fund was operated and designed so that early investors were paid with funds from later investors. *Id.* ¶ 29. The defendants, acting through Cassidy and Shawver, intentionally misrepresented the security of investment in the Fund and the likely return, as part of a fraudulent scheme, devised and implemented by all of the defendants acting in concert, involving the Fund. *Id.* ¶¶ 26-27. Defendants Shawver and the Fund used purported guarantees issued by the Bank of Bangkok that were not in fact authentic to attract investors and to induce the plaintiffs to leave their money in the Fund. *Id.* ¶¶ 30-31. Shawver and the Fund caused money belonging to the plaintiffs to be directed to Bromac Enterprises. *Id.* ¶ 32.

The Fund is not a bona fide pension fund. *Id.* ¶ 38. Shawver and defendant Jerry Revalee caused Fund moneys to be placed in bank accounts in their own names. *Id.* ¶ 39. Defendant Steven Brooks and Virgil Cowen also received some of money invested by the plaintiffs. *Id.* ¶ 40. At the time of each of the plaintiffs' investments, the defendants provided them with a written prospectus in the form of an investment transaction account, a joint venture agreement, and a Fund guarantee payorder. *Id.* ¶ 43. The defendants "or their agent/co-conspirators (Cassidy . . . and/or Shawver)" made certain knowing and intentionally false representations to the plaintiffs that led them to invest in the Fund. *Id.* ¶¶ 45-46. The defendants have commingled Fund moneys with other accounts and

have made personal use of Fund moneys. *Id.* ¶ 47. The United States District Court for the Middle District of North Carolina has seized \$2,031,246.91 in Fund moneys at the behest of the United States Attorney for North Carolina. *Id.* ¶ 48.

The plaintiffs did not become aware that they had been defrauded by the defendants until November 1998 when they received a copy of a complaint of forfeiture, *id.* ¶ 51, presumably the one filed in the North Carolina court.

The complaint alleges the following against all defendants: the sale or delivery of unregistered securities, in violation of 15 U.S.C. §§ 77e(a) and 77l(a)(1) (Count I); failure to provide a prospectus meeting the requirements of 15 U.S.C. § 77j with respect to the sale of a security instrument, in violation of 15 U.S.C. § 77e(b) (Count II); communication of untrue statements of material fact or omission of material facts necessary in order for the statements made not to be misleading, in violation of 15 U.S.C. § 77l(a)(2) (Count III); use of a manipulative and deceptive device or contrivance in connection with the sale of securities, in violation of 15 U.S.C. § 78j (Count V); common law fraud (Count VII); fraud as to additional investments made by Andrews (Count IX); fraud inducing Dingwell to remain an investor (Count X); fraud as to additional investments made by St. Laurent (Count XI); and violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. § 1962 (Count XV). The complaint also alleges that Shawver, Revalee, Brooks, defendant Auman Jobe and Cassidy are jointly and severally liable for any violations of 15 U.S.C. § 77 *et seq.* as controlling persons under 15 U.S.C. § 77o (Count IV) and that these defendants are jointly and severally liable for any violations of 15 U.S.C. § 78 *et seq.* as controlling persons under 15 U.S.C. § 78t (Count VI). Finally, the complaint includes allegations of breach by the Fund of contracts with each of the plaintiffs (Counts XII-XIV).

III. Discussion

A. Venue

The moving defendants contend that venue in this court is not proper for the securities claims set forth in Counts I-VI. The relevant statutory provisions are 15 U.S.C. § 77v and 15 U.S.C. § 78aa, both of which allow actions to be brought in the district where a defendant is found, is an inhabitant or conducts business. An action under the Securities Act may also be brought in the district where the offer or sale took place, if the defendant participated therein. 15 U.S.C. § 77v(a). An action under the Securities Exchange Act may also be brought in the district “wherein any act or transaction constituting the violation occurred.” 15 U.S.C. § 78aa.

With respect to Counts V and VI, the second amended complaint alleges an act or transaction that occurred in Maine and venue is proper in this court for those counts. Second Amended Complaint ¶¶ 41, 44. *See also Stern v. Gobeloff*, 332 F. Supp. 909, 911 (D.Md. 1971) (“As to venue, . . . [w]here an offer to sell securities is made by telephone by an offeror in one federal district and accepted by any offeree in another, part of the ‘act or transaction constituting the violation’ occurs in each district, and venue may be laid in either.”), and *Hilgeman v. National Ins. Co. of Am.*, 547 F.2d 298, 301 (5th Cir. 1977). Any moving defendants not specifically alleged by the second amended complaint to have been involved in the act or transaction that occurred in Maine may be sued in this district as conspirators with those who were so involved, *Securities Inv. Protection Corp. v. Vigman*, 764 F.2d 1309, 1317 (9th Cir. 1985), and a conspiracy has been adequately alleged, Second Amended Complaint ¶¶ 26-27, 44, 46.

With respect to Counts I-IV, the second amended complaint alleges an offer or sale that took place in Maine in which defendants Shawver and Cassidy participated. *Id.* ¶¶ 41, 44. Venue is

therefore properly laid in this district as to those defendants. When a common scheme of acts and transactions that violate the Securities Act is alleged, venue once established for any defendant in the forum establishes venue for all defendants under section 77v. *Abeloff v. Barth*, 119 F.R.D. 315, 323-24 (D. Mass. 1988); *Sohns v. Dahl*, 392 F. Supp. 1208, 1214 (W.D.Va. 1975).

Accordingly, the moving defendants are not entitled to dismissal of Counts I-VI on the basis of improper venue.

B. The Securities Claims (Counts I-VI)

The plaintiffs' investments here fall within the scope of the Securities Act of 1933, 15 U.S.C. § 77 *et seq.*, and the Securities Exchange Act, 15 U.S.C. § 78 *et seq.* See *International Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 558-62 (1979).

1. Statute of Limitations (Counts I-III).

Counts I-III allege violations of the Securities Act of 1933. The moving defendants contend that all of the claims asserted in these counts are barred by the statute of limitations found in 15 U.S.C. §77m, which provides:

No action shall be maintained to enforce any liability created under section 77k or 77l(a)(2) of this title unless brought within one year after the discovery of the untrue statement or omission, or after such discovery should have been made by the exercise of reasonable diligence, or, if the action is to enforce a liability created under section 77l(a)(1) of this title, unless brought within one year after the violation upon which it is based. In no event shall any such action be brought to enforce a liability created under section 77k or 77l(a)(1) of this title more than three years after the security was bona fide offered to the public, or under section 77l(a)(2) of this title more than three years after the sale.

Counts I and II of the second amended complaint invoke section 77l(a)(1) and must therefore have been brought within one year after the alleged violations upon which they are based. The initial

complaint was filed on December 16, 1998. The second amended complaint alleges investments by the defendants that occurred both more and less than one year before this date.³ Second Amended Complaint ¶¶ 17, 20, 21 (more than one year before December 16, 1998); 18, 19, 22 (less than one year before December 16, 1998). The motion must be granted as to those investments alleged to have been made before December 16, 1997.⁴

Count III invokes section 77l(a)(2). Complaints raising such claims must affirmatively plead compliance with the statute of limitations contained in section 77m, and must include a statement of the plaintiff's "due diligence" in seeking the discovery of the alleged untruths or omissions. *Shotto v. Laub*, 635 F.Supp. 835, 837 (D.Md. 1986). The defendants contend that the plaintiffs have not done so in this case. Plaintiff Andrews responds that the plaintiffs did not know until November 1998 that they had been "defrauded by the Defendants' untrue statements and omissions." Andrews' Response at [7]. This is presumably a reference to the information that appears in paragraph 51 of the second amended complaint, which provides in its entirety:

Plaintiffs did not become aware that they had been defrauded by Defendants until November, 1998, when Plaintiffs received a copy of a complaint of forfeiture exercised [sic] reasonable care in discovering the acts of Defendants which are described above.

There is no allegation in the initial complaint or the first amended complaint comparable to this

³ Plaintiff Andrews' statement that the second amended complaint "include[s] only the investments that occurred within one year [of the date of filing of the complaint]," Response and Objection of David Andrews to Defendants' 12(b)(6) Motion ("Andrews' Response") (Docket No. 30) at [8], is incorrect.

⁴ Plaintiff Andrews contends in a conclusory fashion that he may invoke the doctrine of equitable tolling with respect to this statute of limitations. Andrews' Response at [9]. However, that doctrine is not available for claims subject to 15 U.S.C. §77m. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 363 (1991).

paragraph in the second amended complaint. There are no other factual allegations in the second amended complaint relevant to this argument.⁵

Even construing the incomplete and confused paragraph 51 favorably to the plaintiffs, it is at best a conclusory allegation that specifies when the plaintiffs discovered the alleged violation but not how they were duly diligent in making this discovery. *Shotto*, 635 F. Supp. at 837-38 (allegation that plaintiffs “did not reasonably suspect the misrepresentations at issue until a date within one year of the time suit was filed” is “woefully inadequate” to demonstrate compliance with section 77l(a)(2)). Accordingly, Count III must be dismissed as to the moving defendants insofar as it is based on any investments made before December 16, 1997.

2. *No prospectus involved (Count III)*.

The defendants also argue that Count III should be dismissed because the allegations do not state a claim under 15 U.S.C. § 77l(a)(2), upon which it is based. In pertinent part, that statutory subsection imposes upon the offeror or seller of a security liability to the buyer if the offer or sale is made “by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading” The defendants contend that the allegations of the complaint do not show that any prospectus was involved. In construing the word “prospectus” in section 77l(a)(2), the Supreme Court has held that “the term ‘prospectus’ refers to a document soliciting the public to acquire securities.” *Gustafson v. Alloyd Co.*, 513 U.S. 561, 574 (1995). The statute refers to public, not private, communications. *Id.* at 575. A contract

⁵ Andrews’ memorandum of law includes further factual allegations that might well be relevant to this point, but when a motion to dismiss is pending it is the allegations present in the complaint, and those allegations alone, that the court may consider.

of sale, and its recitations, that are not held out to the public are not a prospectus for the purposes of section 771(a)(2). *Id.* at 584.

Andrews identifies “the Joint Venture Agreement, the Payorder Guarantee, and the Final Investment Accounting” as the prospectus in this case, Andrews’ Response at [9]-[10], although he does not provide copies of any of these documents or incorporate them by reference in his complaint.⁶ He also contends that unidentified “oral communications that took place prior to and at the time of the sale” are actionable under section 771. *Id.* at [10]. All of the oral communications described in the complaint were addressed to the plaintiffs. Second Amended Complaint ¶¶ 14-16, 27, 41, 45-46, 49. The identified documents were provided to the plaintiffs after they had made their investments or at the time they made those investments. *Id.* ¶¶ 18, 20-22, 41, 43. The only allegation in the second amended complaint that might be construed to support the existence of a public communication before an investment took place is found in paragraph 50: “over fifty individual investors have been solicited to invest in the EGP Fund.” This statement is simply insufficient, even construed in favor of the plaintiffs, to allege the existence of either a prospectus offered, or oral communications made, to the public, as opposed to individual documents provided, or oral communications made, to individual plaintiffs.

Accordingly, Count III must be dismissed in its entirety as to the moving defendants.

3. *The Private Securities Litigation Reform Act of 1995 (Count V).*

The defendants argue that the complaint fails to comply with the pleading requirements of

⁶ Defendant Shawver has provided the court with a copy of one of the joint venture agreements, which he believes to be identical to those signed by all of the plaintiffs. Affidavit of Galen Shawver (“Shawver Aff.”) (Docket No. 40) ¶12 & Exh. D. There is no sense in which this document can be construed to be a prospectus under *Gustafson*. See also 15 U.S.C. §§ 77b(10) & 77j.

the Private Securities Litigation Reform Act of 1995 (“PSLRA”), as found in 15 U.S.C. § 78u-4(b). These requirements apply to private actions arising under 15 U.S.C. § 78 *et seq.*, the Securities Exchange Act. Count V of the second amended complaint alleges a violation of 15 U.S.C. § 78j.⁷

The PSLRA imposes the following pleading requirements:

(1) Misleading statements and omissions

In any private action arising under this chapter in which the plaintiff alleges that the defendant —

- (A) made an untrue statement of a material fact; or
- (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;

the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

(2) Required state of mind

In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

(3) Motion to dismiss; stay of discovery

(A) Dismissal for failure to meet pleading requirements

In any private action arising under this chapter, the court shall, on

⁷ The second amended complaint does not specify either of the two subsections of 15 U.S.C. §78j, but it is apparent from the wording of the complaint, which refers only to the use of “a manipulative and deceptive device or contrivance,” Second Amended Complaint ¶¶ 67-68, that section 78j(b) provides the statutory basis for Count V.

the motion of any defendant, dismiss the complaint if the requirements of paragraphs (1) and (2) are not met.

15 U.S.C. § 78u-4(b).

In order to state a claim under 15 U.S.C. § 78j(b), a plaintiff must allege (i) that the defendants made a misrepresentation or omission of material fact, (ii) with scienter, (iii) upon which the plaintiff relied, and (iv) that caused damage to the plaintiff. *Van de Velde v. Coopers & Lybrand*, 899 F. Supp. 731, 734 (D. Mass. 1995). The required state of mind depends on the type of statement allegedly made. If the allegedly false or misleading statement is forward-looking, a plaintiff must be able to prove that the defendant had actual knowledge that the statement was false or misleading when made. 15 U.S.C. § 78u-5(c)(1)(B). A forward-looking statement is defined to include a statement containing a projection of revenue or income and a statement of future economic performance. 15 U.S.C. § 78u-5(i)(1). If a statement is not forward-looking, the courts differ as to pleading requirements. Suffice it to say that the First Circuit has determined that it will utilize its own previously-developed framework for analyzing the sufficiency of the pleadings in securities cases. *Maldonado vo Dominguez*, 137 F.3d 1, 10 n.6 (1st Cir. 1998) (First Circuit will use its own previously-developed framework for analyzing sufficiency of pleadings in securities cases).

The primary element of a claim under section 78j(b) is a showing that the defendant made materially misleading statements or omissions. *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). A false statement or omission is considered material if its disclosure would alter the total mix of facts available to an investor and “if there is a substantial likelihood that a reasonable [investor] would consider it important” to the decision to invest. *Id.* at 231-32. “Silence, absent a duty to disclose, is not misleading under” the regulation that implements section 78j(b). *Id.* at 239 n.17.

Scienter is “a mental state embracing intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976).

When the allegations of a complaint are based on information and belief, as they often are here, *e.g.*, Second Amended Complaint ¶¶ 23-24, 26, 29-30, 32, 34, 38-40, 46, the First Circuit requires that both “the source of the information and the reasons for the belief” be laid out in the complaint. *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 878 (1st Cir. 1991). Not only must the time, place and content of the alleged misrepresentations be alleged, but the complaint must also contain

factual allegations that would support a reasonable inference that adverse circumstances existed at the time [the statement or representation was made], and were known and deliberately or recklessly disregarded by defendants.

Id. While *Romani* predates the enactment of the PSLRA, it is not inconsistent with it. The intent of the PSLRA was to make the pleading requirements for private actions alleging securities violations more stringent than those imposed by Rule 9(b) for claims of fraud, not less so. *Powers v. Eichen*, 977 F. Supp. 1031, 1038 (S.D.Cal. 1997). There must be a duty to disclose the material information at issue “before the potential for any liability under the securities laws emerges.” *Gross v. Summa Four, Inc.*, 93 F.3d 987, 992 (1st Cir. 1996). The First Circuit interprets the statutory scienter requirement to be consistent with the standard it has historically applied. *Maldonado*, 137 F.3d at 9 n.5. The complaint must “set[] forth specific facts that make it reasonable to believe that defendant knew that a statement was false or misleading.” *Id.* at 9, quoting *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992). The First Circuit has specifically declined to adopt the Second Circuit’s “motive and opportunity” test for scienter in this context. *Id.* at 10 n.6.

The parties' memoranda on this issue are similarly conclusory and unhelpful. Memorandum of Points and Authorities in Support of . . . Motions Pursuant to Rule 12 ("Defendants' Memorandum") (attached to Motion to Dismiss, Docket No. 17) at 3-5; Andrews' Response at [7]. My own review of the second amended complaint leads me to the following conclusions: (i) interpreting the allegations favorably to the plaintiffs, the "manipulative or deceptive device or contrivance" allegedly used by the defendants in connection with the sale of securities consists of the misrepresentations set forth in paragraph 45; (ii) some of the alleged misrepresentations were forward-looking, *e.g.*, Second Amended Complaint ¶ 45(ii), (iv), (v), but most were not; (iii) the second amended complaint does not allege a duty to disclose any of the information allegedly withheld by the defendants, *id.* ¶ 23-25; (iv) the second amended complaint does not allege either the source of the information or the reasons for the plaintiffs' belief for its allegations made on information and belief; and (v) the second amended complaint does not allege the time or place of the alleged misrepresentations, except that it may reasonably be inferred that they were made before one or more of each plaintiff's investments. This inference is insufficient to meet the pleading requirements of the statute. *See, e.g., Sheldon v. Vermonty*, 31 F.Supp.2d 1287, 1291-93 (D.Kan. 1998); *Lirette v. Shiva Corp.*, 27 F.Supp.2d 268, 276-77 (D.Mass. 1998).

Accordingly, I conclude that the second amended complaint does not meet the pleading requirements of the PSLRA in Count V and that count must be dismissed as to the moving defendants.

4. Control person liability (Counts IV and VI).

Count IV of the second amended complaint alleges that defendants Shawver, Revalee,

Brooks, Jobe and Cassidy are jointly and severally liable for all of the alleged violations of the Securities Act alleged in Counts I-III as controlling persons under 15 U.S.C. § 77o. Count VI alleges that the same defendants are jointly and severally liable for the violations of the Securities Exchange Act alleged in Count V as controlling persons under 15 U.S.C. § 78t. The defendants, again in a minimal fashion, argue that these claims must be dismissed because the underlying counts alleging substantive violations of the respective statutes must be dismissed and that the allegations concerning control are themselves insufficient to state a claim. Defendants' Memorandum at 3 n.1. The plaintiffs do not respond to this argument.

Both 15 U.S.C. § 77o and 15 U.S.C. §78t(a) provide that a person who controls any person liable for violation of the respective Acts of which they are a part shall be jointly and severally liable for that violation. Here, because only Shawver, Jobe and Cassidy among the individual defendants named in Counts IV and VI have moved for dismissal, claims against other defendants will remain if the court adopts my recommendations concerning dismissal of Counts III and V and certain portions of Counts I and II. Claims against these defendants will remain in Counts I and II. Under these circumstances, some liability for the moving defendants as control persons may remain pursuant to the allegations of Counts IV and VI. The defendants refer to no heightened pleading requirements for claims under either section 77o or section 78t, and I am aware of none. The second amended complaint does allege that defendants Shawver and Cassidy were the agents of all of the defendants and that the defendants used the defaulted defendant, ShuKu International, to defraud them. Second Amended Complaint ¶¶ 27, 34, 41, 42, 44, 46. This pleading, although minimal, when interpreted favorably to the plaintiffs, appears to state a claim for control person liability. The moving defendants are not entitled to dismissal of Counts IV and VI.

C. The Rico Claim

Count XV of the second amended complaint, which is identical to Count XI of the first amended complaint, alleges a violation of 18 U.S.C. § 1962. The defendants seek dismissal of this count on the ground that 18 U.S.C. § 1964(c) specifically excludes securities fraud from the list of possible predicate acts required to establish a violation of 18 U.S.C. § 1962. 18 U.S.C. § 1961(5). Plaintiff Andrews does not contend that any predicate acts other than securities fraud form the basis of Count XV. Andrews' Response at [13]. He relies instead on case law decided before the 1995 amendment that added the italicized language to section 1964, as follows, became effective:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, *except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.*

18 U.S.C. § 1964(c) (emphasis added). The italicized language was added by Pub.L. 104-67, Title I, § 107, 109 Stat. 758 (1995).

The amended language of section 1964(c) is dispositive. The defendants are entitled to dismissal of Count XV.

D. Personal Jurisdiction (State Law Claims)

Counts VII and IX-XI of the second amended complaint raise claims under state law against all defendants. Count VIII raises a state-law misrepresentation claim against defendants Cassidy, Shawver and the Fund. Counts XII-XIV allege breach of contract against the Fund.⁸ The moving

⁸ Counts X, XI, XIII and XIV of the second amended complaint were not present in the first amended complaint or the original complaint, but raise claims on behalf of the plaintiffs added as
(continued...)

defendants contend that this court lacks personal jurisdiction over them with respect to these counts because they do not have minimum contacts with the State of Maine, citing 4A C. Wright & A. Miller, *Federal Practice and Procedure* §1125 (2d ed. 1987 & Supp. 1999). The defendants have not reported the treatise's position accurately, however. The authors in fact report that the question whether supplemental jurisdiction exists over state-law claims for which the minimum-contacts standard would not be met when the federal court properly exercises jurisdiction over the federal claim to which they are appended is unresolved in the courts, although all of the federal circuit courts that have considered it to date have upheld the exercise of supplemental jurisdiction under these circumstances. *Id.* 1999 Supp. at 81-82; *ESAB Group Inc. v. Centricut, Inc.*, 126 F.3d 617, 628 (4th Cir. 1997); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1057 (2d Cir. 1993); *Oetiker v. Jurid Werke, G.m.b.H.*, 556 F.2d 1, 4-5 (D.C.Cir. 1977).

I find the reasoning of these circuit courts of appeal to be persuasive. The defendants are not entitled to dismissal of the state-law claims for lack of personal jurisdiction.

E. Arbitration

In a final attempt to obtain dismissal or, in the alternative, a stay of this action, the moving defendants contend that the joint venture agreements entered into by the plaintiffs require arbitration of all the claims raised in this action. The second amended complaint alleges that plaintiff St. Laurent entered into a joint venture agreement with the Cassidy Group, the Trade Group and the Pal

⁸(...continued)

a result of the consolidation that preceded the filing of the second amended complaint. These claims are identical to claims raised by plaintiff Andrews in the earlier versions of the complaint and are raised against one or more of the moving defendants. Because the claim that this court lacks personal jurisdiction over these defendants affects each of these counts equally, the interests of judicial economy direct that my recommended decision extend to all of the state-law counts.

Group, none of which is among the moving defendants, concerning his initial investment of \$70,000, Second Amended Complaint ¶ 20; that plaintiff Dingwell signed a joint venture agreement with the Cassidy Group, the Trade Group, and the Palladian Group, which also is not a moving defendant, concerning his investment of \$20,000 on December 22, 1997, *id.* ¶ 22; and that “the Joint Venture Agreement” was provided by the defendants to the plaintiffs “[o]n or about the time of each investment,” *id.* ¶ 43. A copy of a joint venture agreement signed by plaintiff St. Laurent and the president of Palladian International, Inc. is attached as Exhibit D to the affidavit of defendant Shawver. No other joint venture agreement has been submitted to the court. Shawver believes that plaintiffs Andrews and Dingwell “signed Joint Venture Agreements with Palladian International, Inc. which are in identical form.” Shawver Aff. ¶12.

The joint venture agreement that is in the court’s file recites that it is made between Palladian International, Inc. and Raymond St. Laurent and mentions the amount of \$70,000. Joint Venture Agreement (Exh. D to Shawver Aff.) at 1. While it is appropriate for the court to consider this document, which is specifically mentioned and relied upon in the second amended complaint, *Shaw v. Digital Equip. Corp.*, 82 F.3d 1194, 1220 (1st Cir. 1996), the court may not consider Shawver’s representation concerning the existence of other similar documents without converting the motion to dismiss into a motion for summary judgment, which I decline to do. Fed. R. Civ. P. 12(b); *see Dempsey v. National Enquirer*, 702 F. Supp. 927, 932 (D. Me. 1988).

The section of the joint venture agreement invoked by the defendants is numbered XVI and provides as follows:

ALL DISPUTES ARISING: In connection with this agreement shall be settled under the rules of conciliation and Arbitration promulgated by the International Chamber of Commerce by one (1) Arbitrator appointed in

accordance with said rules. The place of Arbitration shall be DALLAS, TEXAS, USA and Arbitration shall be carried out in the English Language. Arbitration shall be binding on all parties, and any decision rendered in Arbitration may be entered as a Judgement in any Court of Competent Jurisdiction.

Joint Venture Agreement ¶ XVI, at 3. None of the moving defendants is a party to this agreement. The moving defendants do not assert that they are intended third-party beneficiaries of this contract, or that they are entitled to enforce this contract term for any other reason. Resolution of this issue is accordingly simple. The moving defendants, who are not parties to the agreement, are not entitled to enforce any of its provisions. *Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 288 (9th Cir. 1987); *see generally Moosehead Sanitary Dist. v. S. G. Phillips Corp.*, 610 F.2d 49, 52-53 (1st Cir. 1979).

Neither dismissal nor a stay is justified on the basis of the joint venture agreement submitted to the court.

IV. Conclusion

For the foregoing reasons, I recommend that the motions of defendants Shawver, Emerald Green Pension Fund, Commercial Mortgage & Associates, Inc., Jobe and Cassidy be **GRANTED** as to Counts III, V, and XV; **GRANTED** as to any claims asserted in Counts I and II that arise from investments made before December 16, 1997; and otherwise **DENIED**. If the court adopts my recommendation, all counts of the second amended complaint remain active as to defendants Steven Brooks and Jerry L. Revalee; Counts I and II, as limited, remain active as to all defendants properly served and not defaulted; and Counts IV and VII-XIV remain active as to all active defendants against whom each is asserted.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 11th day of June, 1999.

David M. Cohen