

E-FILED on 07/09/09IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISIONVISIONQUEST CHC, LLC and GATEWAY  
COMMUNITY CHURCH,

Plaintiffs,

v.

RONALD BUCHHOLZ, CHARISE  
BUCHHOLZ, SOLOMON CAPITAL INC.,  
EQUITY ENTERPRISES INC., EQUITY  
ENTERPRISES OF NEVADA INC., RNC  
HOLDINGS LLC, RDB DEVELOPMENT  
LLC, EENI-PATRIOT COURTYARDS LLC,  
COMMUNITY REAL ESTATE LLC,  
THE DISTRICT, LLC,  
PHOENIX VALLEY DEVELOPMENT, LLC,  
EENI-PATRIOT COURTYARDS, LLC,  
EENI-DURANGO TRAILS, LLC,  
EEI-RAY RANCH, LLC, and  
EENI-PASEO VILLAGE, LLC,

Defendants.

No. C-08-3410 RMW

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS

On November 24, 2008 this court granted defendants' first motion to dismiss Gateway Community Church (also known as City Harvest Church) ("Gateway") and VisionQuest, LLC's ("VisionQuest") action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiffs filed a First Amended Complaint ("FAC") on January 15, 2009 and defendants moved again to dismiss the federal claims. The court granted the motion to dismiss on March 20, 2009, again with leave to amend. Plaintiffs filed their Second Amended Complaint on April 20, 2009, and defendants filed the instant motion to dismiss on March 15, 2009. For the reasons stated below, the court grants in part and denies in part the motion to dismiss.

### I. BACKGROUND

This action arises out of Gateway's investments into Ronald ("Buchholz") and Charise Buchholz's real-estate development projects. Buchholz approached Gateway in May/June of 2004 to solicit their investment into Buchholz' properties. SAC ¶ 27. At that meeting Gateway informed Buchholz that, because of its desire to fund expansion of its ministry with limited cash flow, the Church sought reliable returns and low risk to the principal. *Id.* ¶ 27(e). Buchholz led Gateway to believe that his real-estate project was suited to the its investment needs. *Id.* ¶ 27(f). Gateway made an initial investment of \$250,000 into EENI-Patriot Courtyards, LLC, a project that Buchholz allegedly stated would be completed, and Gateway's return on investment realized, by October/November of 2005. *Id.* ¶ 27(g). The SAC states that, after some delay, Gateway received distributions from the EENI-Patriot Courtyards investment, but it does not state how much. *Id.* ¶ 42.

In June of 2004, Buchholz solicited additional investments from Gateway Church. Gateway Church made three additional investments into the following Buchholz projects: 1) \$500,000 in EENI-Durango Trials, LLC; 2) \$500,000 in EEI Ray Ranch, LLC; and 3) \$250,000 in EENI Paseo Village Office Investments, LLC. *Id.* ¶ 30. One year later, these three loans were repaid, plus \$495,890.00 in interest. *Id.* Ex. E.

Finally, in June/July of 2005, Buchholz approached the Church a third time, and Gateway agreed to invest \$1,250,000 in RNC Holdings, LLC through VisionQuest, which was formed for the transaction. *Id.* ¶ 33, Ex. F (the promissory note on the loan). The note provides that payment is due

1 in 30 months from its date of execution. *Id.* The note has now matured but it remains unpaid. *Id.*  
2 at ¶ 49.

## 3 II. ANALYSIS

4 The SAC relies exclusively on federal-question jurisdiction, and it includes two federal  
5 claims arising out of Section 10(b) of the Securities Act of 1934. *Id.* ¶¶ 2, 159-198, 205-221. In  
6 defendants' most recent motion to dismiss, they argue that the complaint fails to state a federal  
7 claim, and that the court should decline to exercise supplemental jurisdiction over the remaining  
8 state-law claims.

### 9 A. Securities Fraud Claims

10 Section 10(b) of the 1934 Act makes it unlawful "for any person, directly or indirectly, . . .  
11 [t]o use or employ, in connection with the purchase or sale of any security . . . any manipulative or  
12 deceptive device or contrivance in contravention of such rules and regulations as the Commission  
13 may prescribe." 15 U.S.C. §§ 78j, 78j(b). Rule 10b-5, propagated under section 10(b), provides: "  
14 "It shall be unlawful for any person . . . [t]o make any untrue statement of a material fact or to omit  
15 to state a material fact necessary in order to make the statements made, in the light of the  
16 circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. The elements  
17 of a Rule 10b-5 claim are: (1) a misrepresentation or omission of a material fact; (2) scienter; (3)  
18 causation; (4) reliance; and (5) damages. *In re Daou Systems, Inc. Sec. Litig.*, 397 F.3d 704, 710  
19 (9th Cir.2005).

20 Claims brought under Rule 10b-5 must satisfy the particularity requirements of Rule 9(b),  
21 which requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or  
22 mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). And the Private Securities  
23 Litigation Reform Act ("PSLRA") requires that in securities actions based on an untrue statement of  
24 a material fact or a misleading omission<sup>1</sup> the complaint shall "specify each statement alleged to have  
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26 <sup>1</sup> 28 U.S.C. § 78u-4(b)(1) states:

27 (b) Requirements for securities fraud actions

28 (1) *Misleading statements and omissions*

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

1 been misleading, the reason or reasons why the statement is misleading, and, if an allegation  
2 regarding the statement or omission is made on information and belief, the complaint shall state with  
3 particularity all facts on which that belief is formed." 28 U.S.C. § 78u-4(b)(1).

4 For those statements forming the basis of a 10(b) violation, plaintiffs must show a mental  
5 state "embracing intent to deceive, manipulate, or defraud." *Betz*, 519 F.3d at 873. Once the  
6 individual misrepresentations are set forth, plaintiff must "state with particularity facts giving rise to  
7 a *strong inference* that the defendant acted with the required state of mind." 28 U.S.C. § 78u-4(b)(2)  
8 (emphasis added). To give rise to the required strong inference, the complaint must allege facts  
9 sufficient that an inference of the requisite scienter is "at least as likely as any plausible opposing  
10 inference." *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*, 551 U.S. 308, 127 S.Ct. 2499, 2513  
11 (2007).

12 **1. 10b-5 Claim for Investment in EENI-Patriot Courtyards, LLC**

13 Plaintiffs first 10b-5 claim (the 16th claim) arises out of the first investment of \$250,000 into  
14 EENI-Patriot Courtyards, LLC. Defendants contend that the SAC fails to state a 10b-5 claim  
15 because it does not allege with sufficient particularity the circumstances of fraud, including the  
16 falsity of the statements made and the requisite state of mind. In their opposition, plaintiffs point to  
17 five misrepresentations that they claim form an adequate basis for a claim. The court will consider  
18 the five purported misrepresentations below, but the court notes generally that, with respect to the  
19 first investment of \$250,000, the facts in the complaint appear consistent with a misjudgment as to  
20 the value of an investment rather than fraud.

21 **a. Misrepresentations Regarding Risk to Principle**

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25 (A) made an untrue statement of a material fact; or  
26 (B) omitted to state a material fact necessary in order to make the statements made, in  
27 the light of the circumstances in which they were made, not misleading;  
28 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.

1 Plaintiffs contend in their opposition that defendants misrepresented the risk of investing in  
2 EENI-Patriot Courtyards by stating that the investment was a "suitable investment and well within  
3 the Church's investment parameters and need for a timely return on investment." Opp. to Mot. to  
4 Dismiss 9 (citing SAC ¶ 27(f)). But paragraph 27(f) of the complaint states that Buchholz  
5 "acknowledged the Church's investment parameters . . . and assured the Church that although *there*  
6 *was some general risk* in investing as a member of a real estate limited liability company, there was  
7 no known or suspected impediment to EENI-Patriot Courtyards, LLC meeting its target completion  
8 date and other profit projections Defendants presented to the church board, and Defendants  
9 generally led the Church to believe that an investment in EENI-Patriot Courtyards, LLC was a  
10 suitable investment within the Church's investment parameters." *Id.* (emphasis added). Notably, the  
11 complaint does not allege that Buchholz stated that there would be no risk to the principle, as the  
12 opposition suggests. In addition, the SAC does not include an allegation that any representation  
13 regarding the investment's risk was false (plaintiffs apparently rely on the fact that the investment  
14 ultimately performed badly).

15 As for the required state of mind, the allegations offered are insufficient to raise a strong  
16 inference of the required scienter. To constitute fraud, the statements must be made with an intent to  
17 deceive. *Betz*, 519 F.3d at 873. Plaintiffs state in their opposition that two facts raise a sufficient  
18 inference of scienter: first, that plaintiffs advised the defendants that the Church's investment  
19 parameters required no risk to the principle; and second that "this was an out-of state a [sic] pooled  
20 real estate investment." Opp. to Mot. to Dismiss 9 (citing SAC Ex. L). Exhibit L to the complaint  
21 appears to be a set of photocopied pages from Solomon Capital's web site. Neither of these  
22 allegations support an inference that any defendant knew that the statements made regarding the risk  
23 of the EENI-Patriot Courtyards investment were made with an intent to deceive.

24 Finally, the allegations in paragraph 27 are made on information and belief, but the  
25 complaint does not state the facts on which plaintiffs formed their belief, which the PSLRA requires.  
26 28 U.S.C. § 78u-4(b)(1).

27 **b. Misrepresentation Regarding Purchase Price**  
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13 However, Gateway suggested at the hearing that the complaint includes sufficient facts to  
14 allege that defendants represented to Gateway, and Gateway relied on, the allegedly false land cost.  
15 Gateway stated that it could allege on information and belief that defendants made the representation  
16 on the basis that the same representation had been made to similarly-situated investors (who are now  
17 plaintiffs in another action) approximately a month after Gateway was solicited. The complaint  
18 states that the plaintiffs in this and the other action relied on the same misrepresentations. SAC ¶  
19 167. The court concludes that, based on the close proximity of the alleged solicitations and the fact  
20 that the defendants and property at issue are the same, plaintiffs can reasonably plead that they are  
21 informed and believe that the alleged misrepresentations as to the purchase price to defendants of the  
22 property were made to plaintiffs. On the basis of this misrepresentation, plaintiffs can state a 10b-5  
23 claim for the EENI-Patriot Courtyards investment.

26 Plaintiffs next contend that defendants stated, in soliciting their investment, that plaintiffs  
27 would receive a membership interest in EENI-Courtyards, LLC, but plaintiffs never received such  
28 an interest. Opp. to Mot. to Dismiss 10 (citing SAC ¶ 163, 171). The complaint does state that

1 plaintiffs were told they would be given such an interest and that it was not delivered, based on a  
2 recently found, unsigned Operating Agreements. *Id.* ¶¶ 163, 171. As for the required state of mind,  
3 plaintiffs state that the fact that EENI-Patriot Courtyards, LLC was dissolved in December of 2004  
4 demonstrates that defendants "acquired [p]laintiff's \$250,000 under the false pretense that the  
5 church's investment was in EENI-Patriot Courtyards, LLC . . . when this was not the case." Opp. to  
6 Mot. to Dismiss 11. The later dissolution of the incorporated entity is the only allegation offered in  
7 support of the PSLRA-required "strong inference" that the representation regarding membership in  
8 EENI-Patriot Courtyards, LLC was made with an intent to deceive. *Id.* The court concludes that the  
9 mere fact of a later dissolution is insufficient to raise such a strong inference. This  
10 misrepresentation therefore cannot form the basis for a 10b-5 claim.

11 **d. Misrepresentation as to Profits**

12 Plaintiffs also argue that, in soliciting investment in EENI-Patriot Courtyards, defendants  
13 projected that investors would receive timely profits of 40-60% by October-November 2005. Opp.  
14 to Mot. to Dismiss 11 (citing SAC ¶¶ 27(d), 188). Those projections apparently turned out to be  
15 incorrect. The only allegation supporting the fact that the projection was made with intent to deceive  
16 is that defendants "continued to misrepresent a year later that the project was on schedule." *Id.* A  
17 single misrepresentation a year later is not enough to raise the required strong inference of intent to  
18 deceive. It is possible, for example, that the project began on schedule and was later delayed. This  
19 misrepresentation therefore cannot form the basis for a 10b-5 claim.

20 **e. Misrepresentations as to Experience, Diligence, Permits, and Approvals**

21 Finally, plaintiffs contend that the complaint adequately states a 10b-5 claim on the basis of  
22 representations that the required permits and approvals had been obtained. Opp. to Mot. to Dismiss  
23 11-12. Plaintiffs also claim that defendants made misrepresentations regarding their experience in  
24 real estate and due diligence in investigating the value of the EENI-Patriot Courtyards project. SAC  
25 ¶¶ 186-187. The complaint does not state with any specificity what permits and approvals were  
26 claimed to have been acquired, nor which were not obtained. The allegations regarding experience  
27 are similarly vague: plaintiffs state that defendants represented that they were "experts" when their  
28 experience was, in fact, "insufficient." *Id.* ¶ 186. This is more akin to overstatement than outright

misrepresentation and does not adequately state why the representations were misleading. Additionally, the lack of permits, experience, and due diligence is alleged on information and belief, but no factual basis for that pleading is given, as required by PSLRA. *Id.* ¶¶ 187-188; 28 U.S.C. § 78u-4(b)(1).

Plaintiffs have therefore stated a securities-fraud claim in the SAC for the EENI-Patriot Courtyards investment, but only as to the alleged misrepresentation of the purchase price of the property paid by defendants. Because plaintiffs have had three opportunities to amend their complaint and have not stated a claim, the claims for securities fraud arising out of the other statements made in soliciting the EENI-Patriot Courtyards investment are dismissed with prejudice.

**2. 10b-5 Claim for Investment in RNC Holdings, LLC**

Plaintiffs second 10b-5 claim (the 18th claim) arises out of the third investment of \$1,250,000 into RNC Holdings, LLC. SAC ¶¶ 205-221. Defendants again contend that the SAC fails to state a 10b-5 claim because it does not allege with sufficient particularity the circumstances of fraud, including the falsity of the statements made and the requisite state of mind. In their opposition, plaintiffs point to seven misrepresentations that they claim form an adequate basis for this claim.

Defendants do not respond specifically in their reply to the allegations of misrepresentation regarding the RNC Holdings investment. Instead, they argue generally that the allegations are vague and insufficiently specific to support a claim. Reply ISO Mot. to Dismiss 7-8. Defendants argue that plaintiffs do not identify the specific statements or speakers, state to whom the statements were made, or allege a specific location at which the statements were made. *Id.* at 7. Defendants also contend that the complaint does not specifically explain why the statements were false nor what the true facts were. To state a claim with the required particularity, plaintiffs must allege facts reflecting "the who, what, when, where, and how with respect to the facts underlying [their] claim." *In re Silicon Graphics Inc. Securities Litig.*, 183 F.3d 970, 999 (9th Cir. 1999) (internal quotations omitted). The statements at issue for the RNC Holdings investment were apparently made over the course of two meetings, one with defendant Ronald Buchholz and a second with defendant Charise Buchholz, in Santa Clara County California in June and July of 2005. SAC ¶¶ 31-32. The



1 complaint states that the statements were made to Gateway. *Id.* The court finds that this level of  
2 specificity adequately pleads the time, place, speaker, and recipients of the alleged  
3 misrepresentations.

4 However, the allegations as to the time, place, and speaker of the alleged misrepresentations  
5 are made on information and belief. SAC at 12. Allegations of plaintiffs' factual basis for the  
6 pleading of time and place upon information and belief do not appear in the complaint. Therefore,  
7 the complaint fails to plead the 18th claim with particularity as well. A final chance to amend will  
8 be given to remedy this pleading deficiency, as well as those set forth below.

9 **a. Misrepresentation of Risk to Principle**

10 The misrepresentations as to the risk to principle are the same as those considered above for  
11 the EENI-Patriot Courtyards investment, and they similarly fail to state a claim for securities fraud.  
12 As above, the complaint does not state that defendants represented that the RNC Holdings  
13 investment was without risk.

14 **b. Misrepresentation that RNC Holdings, LLC was Fee Owner of Property**

15 Plaintiffs contend that in soliciting their investment into RNC Holdings, defendants  
16 represented that RNC Holdings, LLC was the fee owner of the real property located in Phoenix that  
17 was to be developed with plaintiffs' funds. Opp. to Mot. to Dismiss 4. The complaint does allege  
18 that defendants represented that RNC Holdings, LLC was a fee owner of the property. SAC ¶  
19 206(b). It further alleges that RNC Holdings LLC was not the fee owner of the property, that  
20 another entity, 52nd Street Investors, was the fee owner, and that the property was being acquired  
21 and developed by Phoenix Valley Development. *Id.* ¶¶ 37, 39, 206(b)-(c), 206(j). These allegations  
22 adequately state that the representations were made by defendants and that they were false. And  
23 they raise a strong inference that they were made with the requisite fraudulent intent.

24 However, the allegations in the earlier paragraphs of the complaint are made on information  
25 and belief, and therefore the complaint must state the factual basis on which they are pled. The  
26 complaint does not appear to include that factual basis. Some of the same factual allegations made  
27 earlier on information and belief appear later in specific support of the 18th claim (¶¶ 205-221) and  
28 are there made not on information and belief. The court will interpret the complaint as alleging

1 duplicate allegations (that is, those that appear both on information and belief and as plain  
2 allegations) on information and belief. The complaint presently fails to state a claim because it does  
3 not set forth the factual basis for those allegations. Plaintiffs may amend to include the required  
4 factual basis.

5 **c. Misrepresentation that Plaintiffs' Investment Would be Protected by a**  
6 **Security Interest in the Property**

7 The SAC alleges that defendants represented that plaintiffs would have a security interest in  
8 the property. SAC ¶ 33(d). It also states that RNC Holdings did not own the property and that no  
9 security interest would be provided by 52nd Street Investors or Phoenix Valley Development. SAC  
10 ¶¶ 37, 38, 206(c), 206(i)-(j). On that basis, plaintiffs contend that the court can infer that defendants  
11 knowingly misrepresented that the security interest would be provided. The court concludes that  
12 these allegations are sufficient to state a claim. But again, the complaint alleges facts on information  
13 and belief without setting forth the required factual basis for those allegations as required by  
14 PSLRA. Plaintiffs may amend to add the necessary factual support.

15 **d. Misrepresentation as to Maximum Debt on Project Capital**

16 The SAC alleges that the defendants represented that the debt on the project would not  
17 exceed \$9,003,170. SAC ¶ 206(e). The complaint states in the same paragraph that this was  
18 "unlikely or untrue." *Id.* The complaint does not state that the total debt on the project ever  
19 exceeded the stated amount. Such an allegation does not make out a particularly-pled claim for  
20 fraud.

21 **e. Misrepresentation as to Status of Previous Projects**

22 Plaintiffs next contend that defendants misrepresentations regarding the status of the projects  
23 underlying plaintiffs' previous investments form the basis for a securities-fraud claim. According to  
24 the complaint, defendants represented to plaintiffs that they had successfully completed the three  
25 real-estate development projects in which plaintiffs had previously invested: EENI-Durango Trials,  
26 LLC, EEI Ray Ranch, LLC, and EENI Paseo Village Office Investments, LLC. *Id.* at ¶¶ 206(a),  
27 206(h). Plaintiffs also allege that defendants stated that they would make an early payment to  
28 plaintiffs repaying them for their previous investments plus interest. *Id.* Plaintiffs state that

1 defendants made the statements to induce them to invest in RNC Holdings. *Id.* ¶ 206(a). But, the  
2 complaint states, the projects were not complete, and the payment to plaintiffs came from a different  
3 source. *Id.* ¶ 206(h). These allegations are not made on information and belief, so the basis for them  
4 need not be included in the complaint. The court finds that these allegations adequately make out a  
5 claim for securities fraud, including raising a strong inference of scienter. Defendants' motion to  
6 dismiss as to this claim is denied.

7 **f. Misrepresentation as to Maturation Date of First Investment**

8 Finally, plaintiffs argue that defendants' misrepresentations regarding the projected  
9 completion date of EENI-Patriot Courtyards induced them to invest in RNC Holdings, LLC. The  
10 SAC states that at the first meeting in June/July of 2005, Buchholz stated that the EENI-Patriot  
11 Courtyards project "would be completed on schedule . . . and the projected profits and return on first  
12 investment was on target." *Id.* at ¶ 31. However, the SAC states that the project was, at the time,  
13 not on schedule to begin payments in October/November 2005 as originally promised. *Id.* ¶ 137(a).  
14 These allegations adequately plead fraud and support a strong inference of scienter, but the  
15 allegation in paragraph 31 of the complaint is made on information and belief without stating the  
16 factual basis for that allegation. Plaintiffs may amend to state the factual basis as required by  
17 PSLRA.

18 **III. ORDER**

19 For the reasons stated above, the court:

- 20 1) denies defendants' motion to dismiss the 16th cause of action for securities fraud with  
21 respect to the misrepresentation of the price of the underlying property paid by  
22 defendants;
- 23 2) grants the remainder defendants' motion to dismiss the 16th cause of action for  
24 securities fraud with prejudice;
- 25 3) grants defendants' motion to dismiss the 18th cause of action for securities fraud as to  
26 the alleged misrepresentations regarding the risk to principle and the maximum debt  
27 the project would take on, also with prejudice;
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*Ronald M Whyte*  
RONALD M. WHYTE  
United States District Judge

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9  
10 **Dated:** 07/09/09

JAS  
11 **Chambers of Judge Whyte**