Powers v Central Therapeutics Mgt., L.L.L.P
2018 NY Slip Op 31391(U)
January 12, 2018
Supreme Court, New York County
Docket Number: 652844/2016
Judge: Saliann Scarpulla

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SALIANN SCARPULLA **PART** 39
Justice

----------X

AVERILL POWERS,

Plaintiff,

- v -

CENTRAL THERAPEUTICS MANAGEMENT, L.L.L.P, CT THERAPEUTICS HOLDINGS L.P., CT INVESTORS GP L.L.C., CELTIC THERAPEUTICS GENERAL L.P., CELTIC THERAPEUTICS GP LTD., STEPHEN EVANS-FREKE, JOHN MAYO, PETER CORR, CELTIC PHARMACEUTICAL HOLDINGS L.P., CELTIC PHARMA MANAGEMENT L.P., CELTIC PHARMA GENERAL L.P., CELTIC PHARMA GP LTD.

Defendants.

----------X

INDEX NO. 652844/2016

MOTION DATE 2/3/2017

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 148, 149, 150, 151, 152, 153, 161, 162

were read on this application to/for Dismiss

Upon the foregoing documents, it is

Motion sequence Nos. 001, 002, and 003 are consolidated for disposition, and are disposed of in accordance with the following decision and order.

In this employment/partnership dispute, defendants Celtics Therapeutics Management, LLP d/b/a Auven Therapeutics Management LLP ("CT Investment Manager"), CT Investors GP LLC ("CT Feeder"), CT Therapeutics Holdings LP d/b/a Auven Therapeutics Holdings LP ("CT Fund"), Auven Therapeutics General L.P. f/k/a Celtic Therapeutics General LP ("CT Fund GP"), Auven Therapeutics GP Ltd. f/k/a

Celtic Therapeutics GP Ltd. ("GP of the CT Fund GP") (collectively, the "CT Corporate Defendants"), Stephen Evans-Freke ("Evans-Freke") and Peter B. Corr ("Corr") (collectively, the "CT Individual Defendants") move to dismiss the complaint of plaintiff Averill Powers ("Powers"), pursuant to CPLR 3211 (a) (1), (5), (7), and (8) (motion seq. No. 001).

Defendant John Mayo ("Mayo") separately moves to dismiss the complaint against him pursuant to CPLR 3211 (a) (1), (5), (7), and (8) (motion seq. No. 002).

Defendants Celtic Pharmaceutical Holdings, LP ("CP Fund"), Celtic Pharma Management, LP ("CP Investment Manager"), Celtic Pharma General, LP ("CP Fund GP"), and Celtic Pharma GP Ltd. (collectively, the "CP Defendants") also separately move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (5), and (7) (motion seq. No. 003).

Background

Defendant CP Fund is a biopharmaceutical private equity fund, operated as a limited partnership. Defendant CP Fund GP, a limited partnership, is the general partner of CP Fund; the initial limited partners of the CP Fund GP were defendants Evans-Freke and Mayo (the "CP Individual Defendants"). The CP Fund GP now has numerous carried interest limited partners and junior limited partners, and Powers alleges that he was a carried interest junior limited partner therein.

Defendant Celtic Pharma General Ltd. ("GP of the CP Fund GP") is the corporate general partner of the CP Fund GP, and the CP Individual Defendants were its sole shareholders. Defendant CP Investment Manager operates as the management company

for the CP Fund, providing investment and advisory services for management fees, and defendants Evans-Freke and Mayo are the comanaging general partners of CP Investment Manager.

Defendant CT Fund, a British Virgin Islands limited partnership, also is a biopharmaceutical private equity fund. CT Fund GP, a British Virgin Islands limited partnership, is its general partner, and GP of the CT Fund GP, a British Virgin Islands limited corporation, is the corporate general partner of the CT Fund GP. CT Investment Manager, a U.S. Virgin Islands limited liability limited partnership, is the investment advisor to the CT Fund, and the CT Individual Defendants, Evans-Freke and Corr, are the co-managing general partners of CT Investment Manager. CT Investment Manager is the only CT entity with employees and day-to-day operational activities.

In April 2005, Powers was offered employment as General Counsel and partner with CP Investment Manager, which offer was memorialized in two offer letters (the "CP Offer Letters"). By letter dated April 4, 2005, the CP Investment Manager confirmed its offer to Powers to "join the Celtic Pharma team with the title of Partner and General Counsel in the management entity [CP Investment Manager] of [the CP Fund]" in the New York area. The employment was "at will and not for a definite duration," and Powers was to be compensated with a base salary of $100,000, a bonus, health insurance and other benefits, and a 401K, as soon as CP Investment Manager was able to establish a retirement savings plan.

By letter dated April 5, 2005, CP Investment Manager stated that Mayo and Evans-Freke "have decided that [Powers would] receive a minimum bonus of

US$200,000, for calendar year 2005," half of which was payable on June 1, 2005, and the other half on January 1, 2006. If Powers left his employment with CP Investment Manager, or was terminated between June 2005 and January 2006, he would receive a pro rata portion of his bonus. CP Investment Manager stated that it aimed to increase Powers' combined salary and bonus "consistent with its annual compensation review in December 2005," and stated that such increases, if any, would be determined solely by Evans-Freke and Mayo.

Under the CP Offer, Powers was to share significantly in the "net carried interest payable to the [CP Fund]," receiving a "5% (five percent) allocation in the 20% (twenty percent) carried interest payable to [the CP Fund GP] after deducting any payouts to third-parties not part of the management team and Advisory Board." Powers' carried interest allocation would vest over a four-year period, with the final allocation vesting on January 1, 2009.

The April 5, 2005 offer letter also included a severance provision, pursuant to which Powers would receive an additional six months of salary and bonus if he was terminated by CP Investment Manager for any reason other than cause, and would also receive "six months of vesting effective immediately upon termination with respect to [the] allocation of carried interest" in the CP Fund GP.

Termination for "any reason without cause" was defined to include the "failure to pay [Powers] any amounts vested or due hereunder or under the [April 4, 2005] Offer Letter and such failure shall continue for 10 business days" after notice to CP Investment Manager, or "any reduction in [Powers'] salary or any reduction in [Powers'] total cash

compensation for any period that is below $275,000 per year." The CP Offer Letters were signed by both Evans-Freke and Mayo as "Managing General Partner," and by Powers.

Within two years of the inception of the CP Fund, Evans-Freke and Corr began winding it down and establishing another private equity fund, the CT Fund. In the summer of 2007, the CT Individual Defendants approached Powers about assuming responsibilities to form the new fund structure for the new CT entity, and becoming a partner in the CT Investment Manager in substantially the same role he had with the CP Fund and CP Investment Manager.

Powers alleges that the CT Individual Defendants proposed that, in addition to additional salary and bonuses, Powers would receive no smaller a percentage of carried interest than he was receiving with the CP Fund, subject to vesting terms that were no less beneficial than those offered in his carried interest limited partnership interest in the CP Fund GP.

Powers states that in November 2007 he began working for the CT Investment Manager. This position did not replace his position as General Counsel of CP Investment Manager; rather, he worked for both CP and CT Investment Managers, and his compensation from CP Investment Manager was to be supplemented by additional compensation from CT Investment Manager.

In a January 6, 2009 offer letter ("CT Offer Letter"), which was signed by both Evans-Freke and Corr, but not by Powers, the parties agreed that Powers' base compensation and bonuses from the CP Investment Manager would be supplemented by

the CT Investment Manager, such that his current salary of $370,000 per year would be supplemented to $420,000 at the time that the CT Fund reached $250MM in subscriptions. Also, Powers would be provided an additional $10,000 bonus from the CT Investment Manager at the first closing in December 2008, and that additional target bonuses and increases in base salary would be provided based on a schedule, set forth in the CT Offer Letter, linked to the CT Fund size, but with a minimum bonus expectation for 2009 of $150,000, in the event of no subscription closings by year end.

The CT Offer Letter stated that the CT Investment Manager could terminate Powers' partnership interest at any time without cause, but would continue to pay his base salary and benefits for a minimum of one year from the date of notice, and would continue to vest him in his carried interest participation for that period. The CT Offer Letter indicated that "[i]n order to accept this offer, please sign both copies, keep one for your files and return one to us." Powers did not sign and return the CT Offer Letter, but continued to work for the CT Investment Manager throughout 2009.

As General Counsel of CT Investment Manager, Powers was given a CT email address, CT business cards, and was enrolled in certain CT employee benefits, including a 401K account. As a member of the CT Investment Manager's management team, Powers participated in quarterly Board, audit and executive committee meetings; acted as corporate secretary for the meetings of the boards of the CT entities; and held himself out as a partner and General Counsel.

In February 2009, Powers made a presentation at a monthly management team meeting in Geneva, Switzerland regarding, among other things, carried interest

distributions by the CT Investment Manager in connection with the drafting of the formal written partnership agreement. In Powers' presentation summary, which was circulated after the meeting, he referred to himself as one of the five limited partners, and the summary indicated that the vesting date for his interest in the partnership "shall be October 1, 2007."

Also in 2009, the principals of CP, Evans-Freke and Mayo, and the principals of CT, Evans-Freke and Corr, began bifurcation negotiations to separate the costs and liabilities of the CP and CT Investment Managers regarding, among other things, salaries and bonuses for Powers and other junior carried interest limited partners. This bifurcation contemplated that the CP Investment Manager was to be responsible for 2/3 of Powers' salary and bonus from September 2009 through December 2009, while the CT Investment Manager was to be responsible for 1/3 of his compensation.

In late December 2009, Powers alleges that he became concerned that he might not receive any aggregate bonus compensation from either the CP or the CT Investment Managers. Because his severance payment from the CP Investment Manager was closely tied to his last bonus payment, receiving no bonus would cut off any severance to him.

On December 24, 2009, Powers emailed Evans-Freke and Mayo, informing them that he would likely need to resign from his CP position before the end of the year if the CP Investment Manager was unable to honor its bonus commitment to him, because of the impact on his severance. He also inquired about alternatives to resignation.

On December 31, 2009, Evans-Freke responded, stating that the 2009 bonuses would "be minimal at best," and that Powers would receive, at most, $25,000. Evans-

Freke indicated that the CP Investment Manager was facing a $1.9 million reduction in its management fee revenue for 2010, and was already operating at a loss during 2009, and that it "doesn't have the funds to respond to your position." Evans-Freke stated that Powers "must go ahead and do whatever you feel is appropriate for yourself."

By a separate email, also dated December 31, 2009, Evans-Freke stated that, in view of Powers informing the CP Investment Manager that he could not commit to stay with it any longer and may resign before the end of 2009, the CT Investment Manager was rescinding its January 6, 2009 offer to become a partner of CT.

On July 3, 2013, Powers requested his K-1 partnership tax form and investor information for both the CP Investment Manager and the CT Investment Manager, and Evans-Freke replied by email that Powers had no rights to either carried interest or investor information, because he was never an employee of the CT Investment Manager.

Powers filed an action in federal court in December 2015 against the CT Corporate Defendants, the CT Individual Defendants, Evans-Freke, Corr, and defendant Mayo. The federal action was later dismissed for lack of diversity jurisdiction.

Powers then commenced this action. In his amended complaint, Powers alleges that the CT and CP Corporate Defendants, Mayo, Evans-Freke, and Corr terminated his employment as general counsel, and his position as a partner of the management arms of the private equity funds, and as the carried interest junior limited partner in the corporate general partner of the equity funds, all in violation of their written employment and oral partnership agreements.

Powers asserts that he was offered employment and partnership, both orally and in writing, by Mayo, Evans-Freke, and Corr, on behalf of both the CP and the CT Investment Managers, and that he accepted and worked for the CP entities for more than four years, from 2005 through 2009, and for the CT entities for nearly two years, from mid-2007 through 2009. He asserts that he was terminated without just cause when defendants reduced his salary and/or bonus, which terminated his employment with the CP entities under his employment agreement, and that the CP Defendants failed to pay his contractual severance compensation and his full carried interest payments, as required under his employment agreement.

As to the CT Defendants, Powers claims that he also acted as general counsel of the CT Investment Manager, for additional compensation, and agreed to be one of the initial partners of this new firm, based on an oral partnership agreement. He claims that the CT Investment Manager failed to pay him amounts due, and that the CT Defendants also terminated his carried interest limited partnership interest in violation of the partnership agreements, failed to pay carried interest owed to him, and violated fiduciary duties owed to him as a limited partner.

In his amended complaint Powers asserts twelve causes of action: (1) against all the CT Corporate Defendants and the CT Individual Defendants for breach of the written and oral employment and partnership agreements; (2) against all CP Defendants and the CP Individual Defendants for breach of the written and oral employment and partnership agreements; (3) against the CP Individual Defendants and the CT Individual Defendants for breach of fiduciary duty; (4) against all defendants in quantum meruit; (5) against the

CT Corporate Defendants and the CT Individual Defendants for promissory estoppel; (6) against the CP Defendants and the CP Individual Defendants for promissory estoppel; (7) against the CT Corporate Defendants and the CT Individual Defendants for unjust enrichment; (8) against the CP Defendants and the CP Individual Defendants for unjust enrichment; (9) against all defendants for an accounting; (10) against the CT Corporate Defendants for a constructive trust; (11) against the CP Defendants for a constructive trust; and (12) a declaratory judgment.

The CT Corporate Defendants and the CT Individual Defendants now move to dismiss the amended complaint on several grounds. First, they argue that this court lacks personal jurisdiction over the non-management CT Defendants, which are the CT Fund, the CT Feeder, the CT Fund GP, and the GP of the CT Fund GP (Non-Management CT Defendants). Second, they contend that Powers' causes of action based on the allegation that he was an employee and partner of any of the CT Defendants must be dismissed because documentary evidence shows that he failed to sign the offer letter, and that the offer was later rescinded.

Next, the CT Corporate Defendants and the CT Individual Defendants argue that Powers' causes of action for breach of contract, promissory estoppel, quantum meruit, and unjust enrichment all are governed by a six-year statute of limitations, and that, to the extent that the claims are based on conduct that occurred prior to December 23, 2009, they are time-barred. Finally, they maintain that Powers fails to state a claim based on the lack of a contract, the lack of a fiduciary relationship, and the lack of reasonable reliance.

Defendant Mayo moves to dismiss the amended complaint for lack of personal jurisdiction. He also seeks dismissal based on documentary evidence and failure to state a claim.

The CP Defendants and the CP Individual Defendants move to dismiss the causes of action asserted against them because they were all brought beyond the six-year statute of limitations. They also seek dismissal for failure to state a claim, arguing that the amended complaint fails to identify wrongdoing by the various entity defendants and fails to support the request to pierce the corporate veil.

Discussion

On a motion to dismiss, the court must accept as true the facts alleged in the complaint as well as any reasonable inferences that may be gleaned from those facts (*see Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009]; *Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003]). The court may only determine, assuming the truth of the facts alleged and the inferences that may be drawn therefrom, whether the complaint states a legally cognizable claim (*Skillgames, LLC v Brody*, 1 AD3d at 250). Plaintiff may remedy any deficiencies in the complaint through the submission of affidavits (*Amaro v Gani Realty Corp.*, 60 AD3d at 492). However, factual allegations that do not state a claim, are bare legal conclusions, or are clearly contradicted by documentary evidence or inherently incredible, are not entitled to consideration (*Skillgames, LLC v Brady*, 1 AD3d at 250). Also, if the defendant seeks dismissal based on documentary evidence, the defendant must show that the documentary evidence "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a

matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

With these principles in mind, I first address personal jurisdiction and then the remainder of the bases asserted for dismissal.

Personal Jurisdiction Over Mayo

On a motion to dismiss for lack of personal jurisdiction (CPLR 3211 [a] [8]), the plaintiff bears the ultimate burden of establishing that the court has jurisdiction over each defendant (*see Marist Coll. v Brady*, 84 AD3d 1322, 1322-1323 [2d Dept 2011]). For jurisdiction over an individual defendant, the court looks to that defendant's domicile (*Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US 915, 924 [2011]; *Magdalena v Lins*, 123 AD3d 600, 601 [1st Dept 2014] [defendant not subject to general jurisdiction because he was domiciled in Uruguay]). To be entitled to jurisdictional discovery, the plaintiff must make a sufficient start to show that its position is not frivolous and warrants additional discovery (*see Marist Coll. v Brady*, 84 AD3d at 1322).

It is undisputed that Mayo is a citizen of the United Kingdom and resides in London. Mayo avers that he has never resided in New York, does not own any real property, and has no telephone numbers, bank accounts, investment accounts, or offices in New York. He further swears that he is not a member or investor in any New York partnership, joint venture, or limited liability company, and does not directly own any stock, security, instrument or commercial paper of any kind in New York. Mayo states that he has not entered into any contracts to provide or obtain goods or services in in New

York. As Mayo is not domiciled in New York, there is no basis to assert jurisdiction over him under CPLR 301.

There also is no basis for long-arm jurisdiction over Mayo under CPLR 302. Powers fails to allege any forum related contacts with New York, by which Mayo availed himself of the privilege of doing business in New York, and which are substantially related to Powers' claims. *See Rushaid v Pictet & Cie*, 28 NY3d 316, 323 [2016]; *see D&R Global Selections, S.L. v Bodega Olegario Falcon Pineiro*, 29 NY3d 292, 298 [2017].

While Powers conclusorily asserts that Mayo "conducted business related to the CP Investment Manager, and the CP Fund, as a whole, in New York City" (amended compl, ¶ 26), he fails to identify a single act taken by Mayo in New York relating to Powers' work for the CP Investment Manager, and summarily groups Mayo with other defendants in asserting that the "CP Individual Defendants" were present at meetings (*id.*, ¶ 47). These bare-boned, conclusory allegation are insufficient to demonstrate long-arm jurisdiction over Mayo, and do not qualify as a sufficient start to warrant jurisdictional discovery as to Mayo. Therefore, the complaint is dismissed against him.

Personal Jurisdiction Over the Non-Management CT Defendants

A court may exercise general jurisdiction over a foreign corporate defendant either in the forum where the corporation is incorporated or has its principal place of business, or in an "exceptional case," where the corporation's ties with the forum are so constant and pervasive "as to render [it] essentially at home in the forum State" (*Daimler AG v. Bauman*, ___U.S. ___, 134 S.Ct. 746 at 761, n 19 [internal quotation marks and citation

omitted]). New York courts have recognized that the "exceptional circumstances" constitutes a "very high bar" (*see Varga v McGraw Hill Fin. Inc.*, 2015 NY Slip Op 31453 [U], * 17 [Sup Ct, NY County 2015], *affd* 147 AD3d 480 [1st Dept 2017]). Thus, it has been held that "there is no basis for general jurisdiction pursuant to CPLR 301, [where a defendant] is not incorporated in New York and does not have its principal place of business in New York" (*Magdalena v Lins*, 123 AD3d at 601).

General jurisdiction over a corporation also has been denied even where the corporation's founder had an apartment in New York, because the founder resided and was domiciled in a foreign country (*id.*). Any exercise of jurisdiction over a foreign corporation also must comport with the due process requirement of minimum contacts between that corporation and the forum state so that the assertion of jurisdiction will not offend "traditional notions of fair play and substantial justice" (*International Shoe Co. v Washington*, 326 US 310, 316 [1945]).

Here, The Non-Management CT are all foreign limited liability corporations or limited partnerships, with foreign principal places of business. Defendant CT Feeder is a U.S. Virgin Islands limited liability company, with its principal place of business there, and has no general or limited partners or employees. The CT Fund is a British Virgin Islands limited partnership, with its principal place of business there. Its general partner, defendant CT Fund GP, also is a British Virgin Islands limited partnership, with one general partner, GP of the CT Fund GP, another British Virgin Islands limited liability corporation, and its limited partners are Corr and Evans-Freke. Powers cannot rely upon the domiciles of the founders of these entities, because Corr and Evans-Freke only

maintain non-residential apartments in New York, and both reside and are domiciled in the U.S. Virgin Islands. Powers fails even to assert that there are exceptional circumstances under *Daimler*.

The Non-Management CT Defendants are not "'engaged in such a continuous and systematic course of "doing business" here as to warrant a finding of [their] "presence" in this jurisdiction'" (*McGowan v Smith*, 52 NY2d 268, 272 [1981], quoting *Simonson v International Bank*, 14 NY2d 281 [1964]). Nor do they have contacts with this state that are "so substantial and of such a nature as to justify suit against [them] on causes of action arising from dealings entirely distinct from those activities" (*Goodyear Dunlop Tires Operations, S.A. v Brown*, 564 US at 924 [internal quotation marks and citation omitted]).

Powers attempts to establish personal jurisdiction of the Non-Management CT Defendants on an alter ego theory, that is, that these defendants were mere departments or agents of defendant CT Investment Manager, which is subject to jurisdiction here (*see Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d 426, 432 [1972]). "Where personal jurisdiction exists over a defendant, jurisdiction over his alter-ego is proper as well" (*TransAsia Commodities Ltd. v NewLead JMEG, LLC*, 45 Misc 3d 1217 [A], 2014 NY Slip Op 51612 [U], *6 [Sup Ct, NY County 2014, Ramos, J.]).

The focus on an alter ego inquiry is on the degree of control exercised by the domestic entity over the foreign entity, but the Court of Appeals has noted that it has "never held a foreign corporation present on the basis of control, unless there was in existence at least a parent-subsidiary relationship," and "[i]t is only when the two

corporations are in fact, if not in name . . . one and the same corporation, [that] there is realistically no basis for distinguishing between them for jurisdictional purposes" (*Goel v Ramachandran*, 111 AD3d 783, 787 [2d Dept 2013] [internal quotation marks and citations omitted]). "The control over [a] subsidiary's activities . . . must be so complete that the subsidiary is, in fact, merely a department of the parent" (*see Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d at 432).

Personal jurisdiction, however, may not be established by simply demonstrating common ownership, or that the foreign entity is a "holding company" (*FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d 602, 603 [1st Dept 2013]). The relevant factors for establishing jurisdiction as a mere department or agent are the veil piercing factors (*see Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 [1st Dept 2013] [veil piercing factors]; *Wilder v News Corp.*, 2015 WL 5853763, * 6-11 [SD NY 2015] [standard for veil piercing in personal jurisdiction context is a demanding one]), without the fraud prong (*GEM Advisors, Inc. v Corporacion Sidenor, S.A.*, 667 F Supp 2d 308, 319 [SD NY 2009].

To claim alter-ego liability over a defendant, the plaintiff is required to allege complete domination of the entity with respect to the transaction attacked (*see Baby Phat Holding Co., LLC v Kellwood Co.*, 123 AD3d 405, 407 [1st Dept 2014]), including that the parent and subsidiary companies lacked corporate formalities, the parent engaged in self-dealing, or commingled funds (*Hartej Corp. v Pepsico World Trading Co.*, 255 AD2d 233, 233 [1st Dept 1998]), and that the subsidiary was undercapitalized (*ABN AMRO Bank, N.V. v MBIA Inc.*, 17 NY3d 208, 229 [2011]). Conclusory allegations are

insufficient (*Board of Mgrs. of Gansevoort Condominium v 325 W. 13th, LLC*, 121 AD3d 554, 554 [1st Dept 2014]; *20 Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735 [1st Dept 2013].

ere, Powers affidavit and the amended complaint fail adequately to demonstrate a *prima facie* basis to exercise jurisdiction over the Non-Management CT Defendants on an alter ego or agency theory. First, there is no showing of a parent-subsidiary relationship. Second, even if there was such a relationship, there is an insufficient showing of control activities, or any veil piercing indicia, by the Non-Management CT Defendants over CT Investment Manager, to make CT Investment Manager a mere department of these Non-Management CT Defendants.

Powers fails to allege any specific facts showing that there was a lack of observance of corporate formalities, a lack of separate accounting of finances, any commingling of assets, or any inadequate capitalization between the CT Investment Manager and the Non-Management CT Defendants. He simply alleges that the CT Investment Manager's employees, based out of New York, advise, solicit, and invest on behalf of investors in New York, and that the investments are made directly into the defendant CT Feeder, and subsequently held in the defendant CT Fund, and that the other two Non-Management CT Defendants were general partners of those entities.

Further, Powers relies solely on his assertion that all the CT entities "operated together as a single enterprise" (amended compl, ¶ 54). This alone, however, is insufficient (*see FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d at 602-603 [jurisdiction insufficient where plaintiff only showed common ownership and that

defendant was simply a holding company]; *see also Miramax Film Corp. v Abraham*, 2003 WL 22832384, * 7 [SD NY 2003] [while standard for piercing corporate veil for personal jurisdiction purposes is less stringent than for liability purposes, plaintiff still must demonstrate a disregard for the separate corporate existence of the dominated corporation]). "[O]ut-of-state holding companies and special purpose investment vehicles are not automatically subject to this court's jurisdiction merely because money, allegedly wrongfully taken by a defendant subject to jurisdiction in New York, was transferred to the defendant's affiliates" (*Cargill Soluciones Empresariales, S.A. v WPHG Mexico Operating, L.L.C.*, 2015 NY Slip Op 30713 [U], *7 [Sup Ct, NY County April 24, 2015, Kornreich, J.]).

Powers' amended complaint and affidavit fail to allege sufficient fact to show that the control exerted by these Non-Management CT Defendants over CT Investment Manager was "so complete that the subsidiary is, in fact, merely a department of the parent" (*Delagi v Volkswagenwerk AG of Wolfsburg, Germany*, 29 NY2d at 432.

In fact, Powers seems to be arguing the reverse -- that the CT Investment Manager abused the corporate form to cause the Non-Management CT Defendants, with no New York presence, to breach their contracts with him. The documentary evidence submitted and Powers' own allegations, however, show that the only entity with which Powers had an alleged contract and offer to join as a partner was the CT Investment Manager.

Further, if Powers is asserting that CT Investment Manager is the "parent" controlling the Non-Management CT Defendants, as "subsidiaries," again he fails to show that CT Investment Manager was the dominating and controlling entity, that is, that

it abused corporate formalities, inadequately capitalized the Non-Management CT Defendants, intermingled funds between the corporations/partnerships, and used the Non-Management CT Defendants as mere shells. Under either theory, Powers fails to demonstrate a basis for personal jurisdiction, and fails to make a sufficient start to warrant jurisdictional discovery against the Non-Management CT Defendants.

Similarly, Powers fails to establish a basis for long-arm jurisdiction over the Non-Management CT Defendants under CPLR 302. The amended complaint is devoid of allegations that the Non-Management CT Defendants transacted business in this state, and that the claims have a substantial relationship with this transaction of business (*Johnson v Ward*, 4 NY3d 516, 519 [2005]).

Powers' claims all revolve around the work he performed as General Counsel and partner in the CP Investment Manager and the CT Investment Manager in New York. He fails to state a basis by which those employment relationships would render the Non-Management CT Defendants subject to long arm jurisdiction here. As discussed above, mere relatedness and common ownership in not sufficient for finding agency for jurisdictional purposes (*see FIMBank P.L.C. v Woori Fin. Holdings Co. Ltd.*, 104 AD3d at 602). Powers points to his alleged activities on behalf of these defendants, providing strategic and advisory services to "each CT entity," all of which related to his employment. These allegations relate to Powers' activities in this forum, not the Non-Management CT Defendants.

Powers also points to the negotiations he had in New York with Evans-Freke and Corr about his employment. Those negotiations were with the CT Investment Manager,

which is the party with whom Powers was employed, not the Non-Management CT Defendants. Again, these allegations fail to make a *prima facie* basis for asserting personal jurisdiction over the Non-Management CT Defendants, and fail to make a sufficient start to warrant discovery as against these defendants. Accordingly, the complaint is dismissed against the Non-Management CT Defendants.

Failure to State a Claim Against the Non-Management CT Defendants

Even if the amended complaint alleged a sufficient jurisdictional basis against the Non-Management CT Defendants, the claims against the Non-Management CT Defendants are dismissed for failure to state a claim. The amended complaint fails to allege any specific conduct by, or to assert any allegations against these Non-Management CT Defendants, but, instead, simply groups them together with the CT Investment Manager (*see Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736, 736 [1st Dept 1981] [claims pleaded against defendants collectively without specifying the precise conduct charged to a particular defendant dismissed]; *Norex Petroleum Ltd. v Blavatnik*, 48 Misc 3d 1226 [A], 2015 NY Slip Op 51280 [U] [Sup Ct, NY County 2015, Bransten, J.] [where plaintiff fails to plead each element of claim as to each defendant individually, claims dismissed]. There are only three paragraphs in the amended complaint that specifically reference the Non-Management CT Defendants., and they only contain allegations relating to jurisdiction (amended compl, ¶¶ 10-12).

The vague undifferentiated claims of wrongdoing against the Non-Management CT Defendants fail to particularly describe what role, if any, these defendants had in Powers employment with the CT Investment Manager, and his partnership therein, or in

the breach of contract, quasi contract, and fiduciary duty claims. In addition, as discussed above, Powers fails to plead a basis to establish alter ego liability to hold these Non-Management CT Defendants liable for the CT Investment Manager's alleged contracts and promises.

Claims Pled Against Individual Defendants Evans-Freke and Corr

The CP Offer Letters, and the CT Offer, if it was an effective contract, were signed by Evans-Freke and Corr in their capacities as "Managing General Partner," or as "Founder and General Partner," and not in any individual capacity. As agents for disclosed principals, these individual defendants are not personally bound unless there is "clear and explicit evidence" of their intent to "substitute or superadd" their personal liability for, or to, that of the principal, the CT and the CP Investment Managers (*Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673, 673 [1st Dept 2010]).

Powers admits in his amended complaint that the individual CT and CP Defendants were acting for the entities, that his agreements were with the CT and the CP Investment Managers, and that he was providing services to those entities (amended compl, ¶¶ 41, 44-45, 53, 55, 58, 61-62, 64, 70-71). Tellingly, the CT and CP Individual Defendants did not sign the offer letters a second time in their individual capacities (*see Matter of National Union Fire Ins. Co. of Pittsburgh, PA v Chukchansi Economic Dev. Auth.*, 104 AD3d 467, 468 [1st Dept 2013] [no "clear and explicit" evidence, including no evidence agent signed agreement a second time on its own behalf. Accordingly, the

causes of action for breach of contract and quasi contract against Evans-Freke and Corr are dismissed.

Powers' cause of action for an accounting against Evans-Freke and Corr, however, is sufficient. On an accounting cause of action, a plaintiff must establish a fiduciary relationship (*Castellotti v Free*, 138 AD3d 198, 210 [1st Dept 2016]). The CT Individual Defendants were managing general partners of the CT Investment Manager, and, as such, owed Powers a fiduciary duty as a limited partner (*see Appleton Acquisition, LLC v National Hous. Partnership*, 10 NY3d 250, 258 [2008] [general partners have fiduciary responsibilities to limited partners]; *Le Bel v Donovan*, 96 AD3d 415, 417 [1st Dept 2012] [partners owe fiduciary duties to each other]). Therefore, I deny Evans-Freke's and Corr's motion to dismiss the accounting cause of action.

Breach of Fiduciary Duty Claim Against CT and CP Investment Managers

The CT Defendants and the CP Defendants move to dismiss the third cause of action alleging breach of fiduciary duty as against them, arguing that the claim is time-barred. A claim for breach of fiduciary duty is subject to a three-year limitations period where the primary relief sought is money damages (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]). Here, Powers is seeking money damages for the CT Defendants' and the CP Defendants' failure to compensate him under the employment and partnership agreements. The equitable relief he seeks, an accounting and constructive trust, is incidental to his claim for money damages.

A breach of fiduciary duty claim accrues when damages are sustained. "To determine timeliness, [the court] consider[s] whether plaintiff's complaint must, as a

matter of law, be read to allege damages suffered so early as to render the claim time-barred" (*id.* at 140). Here, the only reasonable inference to be drawn from Powers' allegations is that he first suffered loss when the CP Defendants' and the CT Defendants' failed to pay him amounts owed to him under his written and alleged employment agreements, which occurred upon the December 31, 2009 termination notice. The claims against the CT Defendants were asserted first in the federal court action on December 23, 2015, which was beyond the three-year limitations period. As against the CP Defendants, which were not defendants in the federal complaint, were not named as defendants in the initial complaint in this court, and were not brought into this action until December 6, 2016, the breach of fiduciary duty claim is time-barred, as well. Accordingly, the third cause of action is dismissed against all defendants.

The CT Defendants' Motion to Dismiss for Failure to State a Claim and Based on Documentary Evidence

The CT Defendants move to dismiss the claims asserted against them for failure to state a claim and based on documentary evidence. Powers' first cause of action alleges breach of written and oral employment and partnership agreements. To plead a breach of contract claim, a plaintiff must establish the existence of a contract between the parties, performance by the plaintiff, breach by the defendant and damages resulting from the breach (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

"To enter into a contract, a party must clearly and unequivocally accept the offeror's terms" (*Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d 505, 507 [1st Dept 2014). If, instead of accepting the offer, the offeree conditions acceptance on new

or different terms, the offeree's response is both a rejection and a counteroffer, which extinguishes the original offer. When the original offer is extinguished, it cannot be unilaterally revived by the offeree accepting it (*Thor Props., LLC v Willspring Holdings LLC*, 118 AD3d at 507; *see also Wald v Graev*, 137 AD3d 573, 574 [1st Dept 2016]).

Here, Powers alleges that he began working to form the new fund structure for the CT Fund, as a partner and employee of the CT Investment Manager, in the summer of 2007, and that in January 2009, he memorialized his agreement with the CT Defendants on the material terms of his employment and partnership, as outlined in the CT Offer Letter. He asserts that he was making 401K contributions to CT Investment Manager's 401K plan since 2008. He was provided with a CT email address and business cards to conduct business as a CT Investment Manager employee. Powers avers that, although he did not sign the CT Offer letter, he performed the duties as both General Counsel and partner as outlined in that CT Offer Letter from before the offer letter and throughout 2009. He also presents a memo from a meeting, in Geneva, on February 9, 2009, in which he proposed provisions for inclusion in the draft partnership agreement for the CT entity.

The CT Defendants' argue that the offer letter, which contained language that "[i]n order to accept this offer, please sign both copies, keep one for your files and return one to us," indicates the parties' intent not to be bound until Powers signed it. However, the language in the CT Offer Letter was not an express and clear reservation of the right not to be bound without a writing. It is "not the equivalent of a provision that is *not* binding *until* it has been so executed" (*Kowalchuk v Stroup*, 61 AD3d 118, 125 [1st Dept

2009] [language that this "Agreement is complete and binding upon its execution by all signatories" is insufficient as an explicit reservation that the parties should not be bound until a written contract is fully executed]).

The CT Defendants submit no correspondence or other documentary evidence indicating their unequivocal intent not to be bound until Powers executed the agreement. Powers alleges, and submits proof showing that, the CT Individual Defendants and the CT Investment Manager treated Powers as the General Counsel for the CT entities, by having him draft the partnership agreement and establish the structure of the CT entities, and treated him like a partner by having him attend partnership meetings, and attend and serve as secretary at all CT board meetings.

In addition, Powers has sufficiently alleged that he and the CT Defendants partially performed the agreement, and that the essential terms of the alleged employment and partnership agreement had been agreed upon. The CT Defendants conduct, as alleged in the amended complaint, indicates that both sides understood and intended that Powers be employed as the CT Defendants' General Counsel and a partner (*see Kowalchuk v Stroup*, 61 AD3d at 125).

To the extent that Powers asserts a claim based on oral agreements for his employment, contrary to the CT Defendants' contention, the claim is not barred by the statute of frauds. An employment contract that is not for a fixed term, whether terminable at will or only for just cause, is one which, by its terms, could be performed within one year, and is not barred by the statute of frauds (*see Cron v Hargro Fabrics*, 91 NY2d 362, 366-367 [1998]; *Naughton v West Side Advisors, LLC*, 137 AD3d 562, 563

[1st Dept 2016]). Here, Powers alleges that he was employed at will, and could be terminated at any time without cause. Moreover, the CT Offer letter was signed by the CT Investment Manager, the party to be charged. Accordingly, there is no basis for the CT Defendants' statute of frauds defense.

I also decline to dismiss Powers' causes of action alleging promissory estoppel, unjust enrichment, and quantum meruit. Powers "is entitled to plead inconsistent causes of action in the alternative, [thus,] the quasi-contractual claims are not precluded by the pleading of a cause of action for breach of an oral agreement" (*Winick Realty Group LLC v Austin & Assoc.*, 51 AD3d 408, 408 [1st Dept 2008]), where the defendant denies the existence of the oral agreement (*Eastern Consol. Props., Inc. v Waterbridge Capital LLC*, 149 AD3d 444, 445 [1st Dept 2017]). Here, the CT Defendants are denying the existence of any agreement with Powers, thus Powers may pursue these alternative theories of recovery.

Powers' constructive trust claim is also sufficient. To allege a cause of action for a constructive trust, a plaintiff must allege: (1) a fiduciary or confidential relationship, (2) a promise, (3) a transfer in reliance, and (4) unjust enrichment (*see Bankers Sec. Life Ins. Socy. v Shakerdge*, 49 NY2d 939, 940 [1980]; *Kohan v Nehmadi*, 130 AD3d 429, 430 [1st Dept 2015]). Powers alleges that the CT Individual Defendants and the CT Investment Manager owed him a fiduciary duty because he was a limited partner. He claims that they promised to pay him for his carried interest upon any distributions, but, instead, they allegedly transferred his carried interest back to themselves or the partnership upon his

termination, unjustly enriching themselves. These allegations are sufficient to support a constructive trust cause of action at this early stage of the litigation.

Powers' cause of action for declaratory relief, however, is dismissed. This claim duplicates Powers' cause of action for breach of contract, and he has an adequate remedy at law (*see Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621, 622 [1st Dept 2016]).

Dismissal of Claims Against CP Defendants Based on Statute of Limitations

The CP Defendants' motion to dismiss (motion seq. No. 003) is granted only with respect to its contract and quasi contract claims based on severance and bonus payments because the claims are time-barred. To the extent that Powers' claims relate to carried interest, any carried interest payments that accrued before December 2010 also are time barred.

Powers' remaining claims against the CP Defendants are for breach of partnership and employments contracts (second cause of action), quantum meruit (fourth cause of action), promissory estoppel (sixth cause of action), unjust enrichment (eighth cause of action), accounting (ninth cause of action), constructive trust (eleventh cause of action), and for a declaratory judgment (twelfth cause of action).

A breach of contract claim must be commenced within six years of the breach (CPLR 213 [2]; *Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016]). The same six-year limitations period applies to quasi-contract claims, such as quantum meruit, promissory estoppel, and unjust enrichment, and to claims for declaratory relief that are based on the contract (CPLR 213 [2]; *see Catlin v Manilow*, 170 AD2d 357, 357 [1st Dept

1991] [quasi-contract claims subject to six-year limitations period]). A breach of contract claim accrues at the time of the breach, even if the damage does not occur until later (*Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]; *Lebedev v Blavatnik*, 144 AD3d at 28).

Powers' breach of contract claim has several components: failure to pay him severance, bonus payments, and carried interest under the employment agreement; and unlawfully expelling him from the partnership of the CP Fund GP without recognizing his rights to an accounting and to his equitable shares at dissolution. Powers does not allege that the partnership has dissolved, only that he was expelled upon termination. His alleged expulsion from the partnership, therefore, occurred on December 31, 2009. The six-year limitations period expired on his partnership breach claim on December 31, 2015. Powers did not assert claims against the CP Fund GP until he filed his amended complaint on December 6, 2016. Therefore, this breach of partnership agreement claim is untimely.

Powers' claim for breach of his employment agreement against the CP Investment Manager, based on the alleged failure to pay him his 2009 bonus, accrued on January 1, 2010, when the bonus was due (*see Wald v Graev*, 137 AD3d at 574 [the "right to sue on an obligation does not accrue until an amount is due and payable"]). As to severance payments, Powers was to receive an additional six months of salary and six months of bonus, "payable . . . as to salary not later than in the ordinary course and as to bonus not later than within six months." (Davis opp, exhibit 1 at 1). Based on Powers' termination date of December 31, 2009, the bonus payment was due June 30, 2010, and the last salary

payment as severance would have been due no later than July 2010. The six-year limitations period for this severance and bonus portion of Powers' breach claim would have run, at the latest, on July 2016. Because these claims were not brought until December 6, 2016, they are untimely.

Powers' claim that he was denied vesting of carried interest relating to his severance payment, as promised in the CP Offer Letters, also is untimely. According to the CP Offer Letters, in addition to his salary and bonus, Powers was to receive "six months of vesting effective immediately upon termination with respect to your allocation of carried interest (as described herein) based on the annualized salary and bonus and carried interest then applicable to you." Powers' claim of entitlement to vesting of carried interest, pursuant to the severance provision, accrued no later than December 31, 2009, and the limitations period expired on December 31, 2015. Powers alleges in his complaint that his 5% allocation of the 20% carried interest paid to carried interest limited partners in the CP Fund GP was already fully vested by the end of 2008, and, thus, he was not entitled to any additional vesting of carried interest (amended compl, ¶ 49). Because Powers did not bring his contract claims against the CP defendants until December 6, 2016, these claims also are untimely.

Powers' quasi-contract claims accrued "upon the occurrence of the wrongful act giving rise to a duty of restitution" (*Elliot v Qwest Communications Corp.*, 25 AD3d 897, 898 [3d Dept 2006] [internal quotation marks and citation omitted]). Powers alleges that he was promised not only a salary, but a bonus and severance pay, as well as carried interest, for work he performed; the CP Defendants realized a benefit from his work and

accepted it; and, he reasonably relied on their promise to compensate him. He alleges that, upon his termination on December 31, 2009, the CP Defendants refused to pay him such compensation. Thus, like the contract claim, the quasi-contract claims accrued between December 31, 2009 and, at the latest, July 2010, but were not brought against the CP Defendants until December 6, 2016. Therefore, these claims are time-barred.[1]

Powers' claims for an accounting and constructive trust against the CP Defendants regarding severance and bonus payments are similarly untimely. The statute of limitations for these claims are six years (CPLR 213 [1]; *Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011]). A constructive trust claim accrues when the acts occur upon which the claim is predicated, that is, the wrongful withholding (*Kohan v Nehmadi*, 130 AD3d 429, 430 [1st Dept 2015]), and an accounting claim accrues when the fiduciary openly repudiates its obligation (*id.*). Here, these acts occurred when Powers was terminated, but he did not assert these claims against the CP Defendants until December 6, 2016, more than six years after accrual.

Powers' argument, that his claims against the CP Defendants relate back to the date of the original filing against Mayo and Evans-Freke, is unpersuasive. Under CPLR 203 (c), a claim against a defendant in an amended pleading may relate back to

---

[1] Powers' quasi-contract claims for unjust enrichment, quantum meruit, and promissory estoppel also are dismissed because they are duplicative of his breach of contract claim (*Wald v Graev*, 137 AD3d at 574). Where there is a valid and enforceable contract that governs a subject, recovery in quasi-contract ordinarily is precluded for events arising out of that same subject (*Clark-Fitzpatrick, Inc. v Long Is. R. R. Co.*, 70 NY2d 382, 388 [1987]). Here, the CP Offer Letters, which defendants do not dispute as a contract, preclude his quasi-contract claims as to the same compensation and damages.

previously asserted claims against a codefendant for limitations purposes, where the defendants are "united in interest" (CPLR 203 [c]; *Buran v Coupal*, 87 NY2d 173, 177 [1995]). When applied to newly added defendants, this doctrine requires satisfaction of a three-part test:

> "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well"

(*Buran v Coupal*, 87 NY2d at 178 [internal quotation marks and citation omitted]). "Parties are united in interest when their interests in the subject matter is such that they will stand or fall together with respect to the plaintiff's claim" (*Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007] [citations omitted] [parties not united in interest where not vicariously liable for acts of each other, have different defenses, and a judgment against one would not affect the other]). Even where parties have the same shareholders, officers and comptroller, if there is no relationship that would give rise to vicarious liability, the parties are not united in interest (*Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002]).

With respect to the third element, where the plaintiff makes a strategic decision not to assert a claim against a party, "there has been no mistake and the plaintiff should not be given a second opportunity to assert that claim after the limitations period has expired" (*Buran v Coupal*, 87 NY2d at 181; *see Matter of 27th St. Block Assn. v Domitory*

Auth. of State of N.Y., 302 AD2d 155, 165 [1st Dept 2002]). Where the plaintiff's failure to join a party was not the result of a mistake as to the identity of that person or entity as the proper party, but, rather, was a mistake of law, that is not the type of mistake contemplated by the relation back doctrine (*27th St. Block Assn. v Domitory Auth. of State of N.Y.*, 302 AD2d at 165).

Contrary to Powers' argument, the claims asserted against the CP Defendants and those asserted against the CT Defendants do not arise out of the same conduct or transactions. Indeed, as the amended complaint alleges, they involved separate employment and partnership agreements, and Powers was separately but simultaneously employed by both the CP Investment Manager and the CT Investment Manager.

The claims against the CT Defendants, in both the initial complaint and the amended complaint, involve the CT Offer of employment and partnership with the CT Investment Manager, whether that offer was accepted and a contract was created, Powers' performance of that contract, and the CT Defendants' breach. The newly alleged claims in the amended complaint against the CP Defendants involve a completely different employment contract, and a partnership in a separate entity and fund. These new allegations against new defendants under a different contract do not satisfy the first prong of the relation-back analysis.

Powers also has failed to establish any unity of interest. There is no basis to find that the interest of the CP and CT Defendants in Powers' claims is such that they stand or fall together. Powers may obtain recovery against the CT Defendants based on the CT Offer or his other allegations of an oral employment agreement, the subsequent

termination, and the CT Defendants' failure to pay him pursuant to the promises in that alleged contract, without affecting the CP Defendants at all. The claims involve different proof, and a judgment with respect to one contract or partnership will not affect the other.

Powers argues that because Evans-Freke and Mayo are sued in the initial action, and they are alleged to be general partners of the CP entities, the CP entities may be held vicariously liable to satisfy the unity of interest requirement. Evans-Freke and Mayo, however, were not sued in Powers' initial complaint for their roles and actions as general partners of the CP entities. Rather, the initial complaint was focused on the CT entities, and their actions on behalf of those entities.

As to the third requirement, Powers has not shown that his failure to bring his claims against the CP Defendants was the result of a mistake of fact. He alleges that he was General Counsel to both the CP Investment Manager and the CT Investment Manager, and clearly was aware that they were separate entities and that his employment with each was governed by different contracts and partnership agreements.

Moreover, after the dismissal of the federal action, when Powers commenced this action in May 2016 against the CT Defendants, he still failed to bring his claims against the CP Defendants. Considering the foregoing, there is no basis to apply the relation-back doctrine to Powers' untimely claims as to severance and bonus against the CP Defendants, and those claims all are dismissed.

Powers' claims regarding carried interest payments against defendant CP Fund GP, however, are timely with respect to any carried interest payments that were owed to him, or accrued, from December 6, 2010 and forward. Carried interest is not paid, and a

claim seeking it does not accrue, until the general partner exercises its discretion to make a distribution. The "right to sue on an obligation does not accrue until an amount is due and payable" (*Wald v* Graev, 137 AD3d at 574). To the extent that Powers alleges a breach of CP Fund GP's obligation to pay him his share of any carried interest distributions made from December 6, 2010 and after, his claims accrued on or after that date and are timely.

The CT Defendants' Motion to Dismiss Based on Statute of Limitations

The CT Defendants also move to dismiss based on the statute of limitations. The breach of contract and quasi-contract claims against the CT Defendants are subject to a six-year limitations period, and they all accrued upon the CT Defendants' breach or repudiation of the contract and failure to pay Powers any severance and bonus payments. This occurred, at the earliest, on December 31, 2009. With respect to Powers' claim based on the carried interest, that claim accrued after the CT Investment Manager successfully disposed of the CT Fund's assets from which Powers would have been paid his share of the resulting carried interest. Powers states that he is unaware of the precise date of these disposals, but they occurred only after his December 31, 2009 termination. Contrary to the CT Defendants' contentions, Powers does not allege that the CT Investment Manager failed to vest his carry on the dates set forth in his contract. Rather, he alleges that he had an equity share (carried interest) in the CT Fund, and a right to income in the form of carried interest generated from the successful disposal of assets by the CT Fund. Powers asserted these claims against the CT Defendants in the federal court action on December 15, 2015, which action was dismissed without prejudice on

personal jurisdiction grounds on May 5, 2016. Powers then reasserted these claims in this court on May 26, 2016. Because Powers had timely asserted these claims against the CT Defendants in the federal action, and commenced this action within six months of the federal court dismissal, these claims relate back to the federal court commencement date, and are timely (CPLR 205 [a]).

Similarly, Powers' claims for an accounting and constructive trust are timely. These claims are governed by a six-year statute of limitations (CPLR 213 [1]; *Knobel v Shaw*, 90 AD3d at 496), and they accrued with the wrongful withholding (constructive trust) and the fiduciary's alleged open repudiation (accounting) (*Kohan v Nehmadi*, 130 AD3d at 430). These acts occurred, at the earliest, when Powers was terminated, and, like the contract and quasi-contract claims, the claims were asserted against the CT Defendants within the six-year limitations period.

In accordance with the foregoing, it is

ORDERED that the motion of the CT Defendants to dismiss (motion seq. No. 001) is granted to the extent of dismissing the complaint in its entirety as against defendants CT Investors GP LLC (CT Feeder), CT Therapeutics Holdings LP d/b/a Auven Therapeutics Holdings LP (CT Fund), Auven Therapeutics General LP f/k/a Celtic Therapeutics General LP (CT Fund GP), and Auven Therapeutics GP Ltd. f/k/a Celtic Therapeutics GP Ltd. (GP of the CT Fund GP), and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion of the CT Defendants' to dismiss (motion seq. No. 001) also is granted to the extent of dismissing the third (breach of fiduciary duty) and the

twelfth (declaratory judgment) causes of action against the remaining CT Corporate Defendant, Celtics Therapeutics Management, LLLP. d/b/a Auven Therapeutics Management LLLP., and it is further

ORDERED that the motion to dismiss asserted by the individual CT Defendants Stephen Evans-Freke and Peter B. Corr (motion seq. No. 001) is granted to the extent that the first (breach of contract), third (breach of fiduciary duty), fourth (quantum meruit), fifth (promissory estoppel), seventh (unjust enrichment), and twelfth (declaratory judgment) causes of action against them are dismissed; and it is further

ORDERED that the motion of defendant John Mayo to dismiss the complaint against him (motion seq. No. 002) is granted, and the complaint is dismissed in its entirety as against defendant John Mayo, and the Clerk is directed to enter judgment dismissing the action against defendant Mayo; and it is further

ORDERED that the motion of the CP Defendants (Celtic Pharmaceutical Holdings, LP [CP Fund], Celtic Pharma Management, LP [CP Investment Manager], Celtic Pharma General, LP [CP Fund GP], and Celtic Pharma GP Ltd.) to dismiss the complaint (motion seq. No. 003) is granted only to the extent that all causes of action seeking severance and bonus payments are dismissed, and the third claim for breach of fiduciary duty and twelfth claim for declaratory relief also are dismissed, as against the CP Defendants; and it is further

ORDERED that the action is severed, and the remaining claims are continued against the remaining defendants.

1/12/2018
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:	[ ]	CASE DISPOSED	[ ]	DENIED	[X]	NON-FINAL DISPOSITION	
	[ ]	GRANTED			[ ]	GRANTED IN PART	[X] OTHER
APPLICATION:	[ ]	SETTLE ORDER			[ ]	SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE