

In The Matter Of:
STATE OF NEW YORK v.
NOVACON

October 21, 2013

Jack L. Morelli
NYS Supreme Court - Civil Term
60 Centre Street, Room 420
New York, New York 10007
(646) 386-3441

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF NEW YORK : CIVIL TERM PART 41

2 -----X

3 STATE OF NEW YORK,
4 Plaintiff,

4 - against -

5 NOVACON ENERGY SYSTEMS, INC., STEPHEN
6 BAER AND VIVIAN MOOK BAER,
7 Defendants.

6 -----X

7 INDEX NO. 451526/11 60 Centre Street
8 New York, New York
9 October 21, 2013

9 BEFORE:

10 THE HON. LAWRENCE K. MARKS, J.S.C.

11

12 APPEARANCES:

13

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25 JACK L. MORELLI
Senior Court Reporter

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1 THE COURT CLERK: 451526 of 2011, State of New
2 York versus Novacon Energy Systems.

3 Counsel, please note your appearances for the
4 record.

5 MR. CARROLL: Good morning. Thomas Teige
6 Carroll for the State of New York. I have with me
7 Elizabeth Block and Diane Gatewood, also of our office at
8 the AG's.

9 MS. ZERNER: Good morning, Your Honor. Bridget
10 Zerner for Novacon, Steve Baer and Vivian Baer.

11 MR. GREENBAUM: Jonathan Greenbaum, Novacon,
12 Steve Baer and Vivian Baer.

13 MR. COBURN: Good morning. Barry Coburn, also
14 for the defendants.

15 THE COURT: Good morning. All right, so this is
16 on for the AG, the plaintiff's motion for summary
17 judgment. So, Mr. Carroll, you're going to argue?

18 MR. CARROLL: That's correct.

19 THE COURT: You can proceed.

20 MR. CARROLL: As the Court is aware, this is an
21 action in which the State alleges that Stephen and Vivian
22 Baer and their corporation Novacon did two things. One,
23 they engaged in repeated unregistered sale of securities
24 in a venture called Novacon. And they made material
25 fraudulent misrepresentations and omissions in connections

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1 with selling securities in that fashion.

2 In this motion we, the State, demonstrate that
3 we're entitled to summary judgment on both of these counts
4 because there are no material issues of fact for trial.
5 As to first, the unregistered sale of securities and
6 second, certain misrepresentations and omissions made in
7 connection with the sale of securities, I want to start
8 with the unregistered sales. I think that, you know, it's
9 very clear there is no issue that these -- that the issue
10 of the dealer or the agent, none of these people were
11 registered when they sold the securities. The defendants'
12 memorandum in opposition concedes that. I think that we
13 heard a little of this last time that we were here before
14 Your Honor. And that's at pages seven and eight. They
15 say, "That the Baers concede that the law required the
16 Novacon stocks to be registered." That's not quite right.
17 In fact, the law required Novacon itself and any agent
18 selling the securities to be registered, but the effect is
19 the same. Those sales were repeated. The significance of
20 that is that Executive Law 63 12 prohibits repeated fraud
21 or illegality.

22 THE COURT: What relief are you seeking with
23 regard to the first cause of action?

24 MR. CARROLL: We're seeking relief for all of
25 the problems in this case. Typically what happens --

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1 THE COURT: Just, for example, if I granted
2 summary judgment only on the first cause of action, I'm
3 not saying that's going to be my ruling, but what relief
4 would flow from that?

5 MR. CARROLL: An injunction and restitution.
6 It's our position --

7 THE COURT: What's the restitution?

8 MR. CARROLL: The restitution would be the
9 restitution of all investor amounts paid into Novacon.

10 THE COURT: Disgorgement and restitution?

11 MR. CARROLL: Yes, sir.

12 THE COURT: Is that an overly dramatic remedy
13 for arguably what is a technical violation?

14 MR. CARROLL: Taken in isolation I can see why
15 the Court would ask that question. But that question is
16 never taken in isolation. It's the practice of our office
17 typically to negotiate settlements of this kind of
18 infraction with the parties concerned. In those
19 negotiations we take into account the conduct of the
20 party, the amount of the sales that were conducted and the
21 circumstances under which those sales were conducted.
22 That's why earlier I said that you can't really take this
23 in isolation. Our view is that --

24 THE COURT: Well, look, I'm not dismissing the
25 seriousness of the failure to register. But you make far

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1 more serious allegations than simply that.

2 MR. CARROLL: We do, sir.

3 THE COURT: But you're seeking the same relief
4 again. What if this case went to trial and you prevailed
5 only on that cause of action, what would the relief be?

6 MR. CARROLL: Again, we would seek an
7 injunction. And we would try to get the restitution that
8 we think that we're entitled to on the basis of their
9 other conduct.

10 THE COURT: Right.

11 MR. CARROLL: One of the facts that accompanies
12 only this infraction, if I want to look at it that way, is
13 the sum of number of sales involved. So let's look at
14 that independently of the fraud, you know, allegations
15 that we make. Here the registry of stockholders that was
16 produced to our office by the defendants shows 224 sales,
17 224 investors, three plus million dollars worth of
18 investment funds. It's plain also from an investigation
19 of only this infraction that the agent never even
20 considered registering, as he was supposed to do, and that
21 the defendants never considered. So that kind of
22 ignorance and laxity is something that our office would
23 take into consideration and I think that a Court would
24 take into consideration. That is why an injunction would
25 certainly be warranted.

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1 They have shown that they aren't entitled to a
2 slap on the wrist. They funded all they could fund
3 unregistered. They never took the step to discover, "Oh,
4 gee, we've got to register. We've got to tell the State
5 of New York that we're doing this." That's why the
6 injunction is necessary. The length of the injunction
7 would be determined on the basis of those facts alone.

8 Again, Judge, I would urge the Court to consider
9 the totality of the circumstances here. Because we have a
10 situation not just where there is a company which made a
11 mistake, "Geez, we should have registered." That happens
12 a lot in our office and we conclude AODs and five lows,
13 life goes on and they register and start selling
14 securities. It couldn't happen here because of the
15 problems associated with Novacon. Those problems violate
16 the other provisions of the Martin Act and the Executive
17 Law which prohibit repeated fraud or illegal conduct or in
18 the case of the Martin Act, fraud.

19 So what do I mean? Again, we're here on summary
20 judgment so I have to demonstrate that there are no
21 material issues of fact as to the fraud that I'm alleging.
22 So let's talk about a threshold issue which are the tapes.
23 As the Court is aware in this case many of the
24 misrepresentations but not all, it should be recognized
25 not all of the misrepresentations were made on tapes. And

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1 the tapes were made of telephone conversations between Mr.
2 Baer, the respondent here, and his agent. In those tapes
3 Mr. Baer said a lot of false things about his company.
4 Now, before we get to those false things we have to deal
5 with the repeated argument that these tapes are a fraud.
6 Mr. Rifkin did it, the agent did it and unbeknownst to Mr.
7 Baer and they are surprised.

8 THE COURT: He's denying that that was his voice
9 on the tape?

10 MR. CARROLL: That's correct, Your Honor, he's
11 denying it. He's made a bald and conclusory assertion
12 that those tapes are fake. They say a number of other
13 things. They say that our affiant who transcribed the
14 tapes doesn't have any personal knowledge so that the
15 tapes are inauthentic. Somehow the transcripts that we
16 have are inauthentic. They say that the investors that we
17 cite to don't have personal knowledge of Mr. Baer's
18 awareness that he was being taped and that they were
19 falsified. So let's start with our affiant first of all.

20 THE COURT: With what?

21 MR. CARROLL: Our affiant, our office's affiant.
22 The person who transcribed the tapes swore that what is in
23 the transcript was on the tapes. Where do we get the
24 tapes? Nothing that can't be contested. It's a sworn
25 statement. Where do we get the tapes? Well, we got them

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1 from Ms. Rifkin, a relative of Mr. Rifkin, the man who
2 made the tapes. What happened to the tapes during the
3 time that they were in our office? Nothing. They were
4 taken, received by our office and deposited with an
5 investigator. There was an analysis was made of the
6 tapes.

7 THE COURT: I'm sorry, where did you get the
8 tapes from?

9 MR. CARROLL: From a relative of Mr. Rifkin, a
10 Patty Rifkin. Ms. Rifkin was the sister-in-law of Mr.
11 Rifkin. We have an affidavit if the Court wants to see it
12 from Ms. Gatewood, which explains to the Court what
13 happened to the tapes while they were sitting in our
14 office. If you find that necessary, I will hand it up
15 now.

16 THE COURT: That's okay.

17 MR. CARROLL: So then the question is, okay,
18 well, that's all very well, we know that the AG didn't
19 falsify the tapes, what about Ms. Rifkin or Mr. Rifkin?
20 Well, where is the evidence? Where is the material
21 dispute? Where is the dispute that has to have competent
22 evidentiary form? What have we got? We've got denials
23 from the defendant in this case made in the depositions
24 taken during this case, that's all we have.

25 THE COURT: So what fraudulent or inaccurate

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1 statements were made on the tape?

2 MR. CARROLL: Okay.

3 THE COURT: We're dealing with one tape or is it
4 multiple tapes?

5 MR. CARROLL: There are many tapes. There are
6 many tapes, Your Honor. Let's talk about --

7 THE COURT: And there is evidence that all of
8 these tapes were played to investors at one point or
9 another?

10 MR. CARROLL: There is evidence from investors
11 that they listened to the tapes and were induced to invest
12 on account of the things --

13 THE COURT: They listened to all of the tapes,
14 some of the things too?

15 MR. CARROLL: Some of the tapes.

16 THE COURT: Is there evidence that at least
17 every single investor listened to -- let me make this
18 clear. Is every one of the tapes listened to by at least
19 one investor?

20 MR. CARROLL: I'm not prepared -- I can't say
21 that. I can't say that is the case, Your Honor, I don't
22 know.

23 THE COURT: How do we know that the tapes were
24 heard by investors, that all of the tapes were heard by
25 investors? I don't mean that an investor heard all of the

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1 tapes that you had, but that all of these tapes were at
2 least heard by an investor?

3 MR. CARROLL: So, in other words, all of the
4 tapes had some hearing by someone who invested money?

5 THE COURT: Yes, but that every tape was heard
6 by an investor. Is that clear from the evidence?

7 MR. CARROLL: The short answer is, that the
8 record is unclear as to whether all of the tapes received
9 some hearing. May I speak to that?

10 THE COURT: Sure.

11 MR. CARROLL: So, I want it to be clear that the
12 Martin Act does not require the tapes to have been
13 listened to. If I may anticipate the reasoning here. The
14 Martin Act doesn't require reliance. The Martin Act
15 requires that the tapes be made but it doesn't require
16 investor reliance on those tapes in order to invest.

17 THE COURT: That's different from fraud, common
18 law fraud?

19 MR. CARROLL: It is different from common law
20 fraud in that respect. Let's talk about the --

21 THE COURT: What does it require? That's an
22 interesting point. What if Mr. Baer and Mr. Rifkin had a
23 conversation on the phone about how they were going to
24 make misrepresentations about the vitality of the company.
25 Would that make out a violation of the Martin Act?

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1 MR. CARROLL: The answer is it may be a
2 violation. I'm not sure it's one that this office would
3 pursue, Your Honor. The Martin Act --

4 THE COURT: But the fact that they recorded
5 their alleged misrepresentations in a tape, that's enough
6 even if the recording wasn't heard by an investor?

7 MR. CARROLL: No. No. I would like to confine
8 my analysis to the facts at hand with the Court's
9 permission. At least some of the tapes were heard and I'm
10 not claiming -- I don't think that this office is claiming
11 that all of the tapes were heard and therefore, all the
12 tapes were actually -- what I am saying is that only a
13 proportion of the misrepresentations made need to be
14 established beyond a doubt in this context for us to
15 establish summary judgment on a violation of the Martin
16 Act.

17 THE COURT: Well, I guess that's what I'm a
18 little confused about. Which allegations make out, which
19 relate to which causes of action? The commingling, for
20 example, which is not something that relates to the tape
21 but let's take the commingling for a second. Does the
22 commingling relate to all causes of action other than, I
23 guess, the first cause of action which is strictly the
24 failure to register? Does the commingling, is that an
25 allegation that relates to all of the -- there are what,

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1 five causes of action? Does commingling relate to causes
2 of action two through five or does it relate to only
3 certain of the causes of action? The alleged inaccurate
4 statements about Mr. Baer's educational credentials, does
5 that relate to all of the two through five causes of
6 action or only particular causes of action? I'm somewhat
7 confused about that.

8 MR. CARROLL: Well, the answer is that -- the
9 honest answer is I don't have the complaint before me, but
10 I think that I can clarify the concern. The concern is,
11 well, what does one of the these misrepresentations relate
12 to? Well, they relate to every cause of action for which
13 the law prohibits any misrepresentation under the Martin
14 Act and the Executive Law, and any tendency that falls
15 within the law by its tendency to mislead or deceive.
16 That's the federal standard that is Hornbook law in this
17 area.

18 THE COURT: So, all the alleged
19 misrepresentations go to, other than the first cause of
20 action, go to all of the causes of action including --

21 MR. CARROLL: All to the fraud component, yes.

22 THE COURT: -- including the last cause of
23 action which is common law fraud?

24 MR. CARROLL: That's correct, sir. Now, in the
25 common law fraud there is a higher burden, right? There

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1 the statement has to have been intentionally made. There
2 has to have been reliance and damages as a result of that
3 reliance. So there is a distinction.

4 THE COURT: Okay, so go ahead.

5 MR. CARROLL: So misrepresents omissions. I
6 want to talk about the misreps that were made, it's
7 central to this case and some concerns arose in these
8 papers and I want to address them.

9 The first two I want to address are the Illinois
10 Clean Coal Institute fact issue. The Court may recall
11 that we argued that there was no dispute that the ICCI as
12 it's called, had not tested or had not heard --

13 THE COURT: But there was some interaction
14 between Novacon and them.

15 MR. CARROLL: Correct. We're not prepared to
16 waste time here today saying, "Yes, this is undisputed,
17 let's set that one aside." The reason I want to set it
18 aside and the reason why I want to have set aside the
19 other 50 contracts issue is, I don't think that they are
20 important and I think that they are a distraction. The
21 other misrep that we said was an undisputed fact, there
22 are 50 contracts in Kazakhstan, Russia, China and America.
23 And on the other side has given some evidence that that's
24 disputed. I'm not prepared to stand here right now and
25 say that's not disputed.

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1 However, there are material misrepresentations
2 and omissions about the business activities of Novacon
3 which do justify summary judgment. Remember, I'm not
4 saying that those things didn't occur, I'm just not saying
5 that we get summary judgment on them.

6 THE COURT: Right.

7 MR. CARROLL: We get summary judgment for other
8 reasons. With respect to the contracts it's important to
9 remember that we don't need to show that there wasn't a
10 contract and he said that there was. We have to show a
11 misrepresentation that tends to deceive or is misleading,
12 okay? Tends to deceive or misleading is different from an
13 outright fabrication of the existence of a contract. Why
14 is that important? It's important in connection with a
15 set of circumstances which are illustrative in the way in
16 which the Novacon venture was sold to investors and that
17 is the Shand contract.

18 In our reply brief we quote from one of the
19 tapes what Mr. Baer said about the Shand contract. The
20 Shand contract was an arrangement with a power plant in, I
21 believe, Saskatchewan which was going to test the Novacon
22 process for its effectiveness in the power plant up there.
23 In one of these taped conversations with Mr. Rifkin, Mr.
24 Baer said the following about the Shand contract -- this
25 is on page nine of our reply brief.

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1 "MR. RIFKIN: Let me ask you one last question.

2 "MR. BAER: Yes.

3 "MR. RIFKIN: On a score of one to ten, ten
4 meaning absolutely I believe that we're going to get a
5 contract in Shand based on what the demonstration would
6 do, based on what you've done in the laboratory, that's a
7 ten; one means probably not. Where would you say that we
8 would rate that we're looking at a contract with Shand?

9 "MR. BAER: Oh, I would say it's definitely a
10 ten with a commitment already made. Remember, they have
11 already invested over half a million dollars themselves."

12 The remainder of the quote is in the papers for
13 the Court to review. That's the key part. What happened
14 to the Shand contract? Like so much else with Novacon it
15 did not materialize. Do they explain why? Yes, they do.
16 Do they give a lot of hard luck stories? Well, they do.
17 Where do you find that? You'll find the explanation in
18 Exhibit P to Ms. Block's affidavit at page three in an
19 update which says, "That it was Shands fault. It was
20 Shands fault, their system, their injection system was
21 faulty and messed up the process and it doesn't come
22 through."

23 That's a misleading statement, Your Honor. "Ten
24 with a commitment already made," that's a misleading
25 statement. It violates the Martin Act, it violates

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1 Executive Law 63 12.

2 THE COURT: That was on the tape?

3 MR. CARROLL: Yes, sir.

4 THE COURT: Is that a tape that was heard by at
5 least one investor?

6 MR. CARROLL: Yes, Your Honor.

7 THE COURT: What's the evidence of that?

8 MR. CARROLL: The evidence of that is, if you'll
9 give me a moment I'll be precise.

10 THE COURT: Maybe your colleague can look for
11 you while you continue.

12 MR. CARROLL: May I proceed?

13 THE COURT: Yes.

14 MR. CARROLL: Projections, let's talk about
15 projections. Projections are also in a gray area. There
16 it's a difficult area of law. And they are just guesses
17 about the future. Does that mislead, doesn't it mislead?
18 I want to make a point about these projections. The kinds
19 of projections that Mr. Baer made to investors, which is
20 that maybe isn't as clear as it should be in our papers.
21 And that is that these projections, which the other side
22 in their papers say are merely predictions and it's only
23 if we get the contract and we'll have this money;
24 investors should have realized that. All very well. But
25 those projections are projections and very likely they

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1 form the basis for a statement about the valuation of the
2 company. Mr. Baer valued his company at \$50 million.
3 Where do we see that? Let's look at the Burns' affidavit
4 which is Exhibit I to Ms. Block's affidavit. And
5 confusingly is also Exhibit I to Mr. Burns' affidavit.
6 That subject to the exhibit is a letter from Steven Baer,
7 president of Novacon to Mr. and Mrs. Burns, in which he
8 describes how they can calculate the shares that they have
9 brought. In it he says, "Take your total investment in
10 dollars, divide by \$50 million (the basis of the
11 corporation), and then multiple the resulting number by
12 1500."

13 Okay, so he's saying that the basis of the
14 corporation is \$50 million. I'll get to the question of
15 what basis means. We asked him what he meant by the basis
16 of the corporation when we deposed him. We said, "What's
17 the basis of this statement of \$50 million?" And he said,
18 "Well, it's projections." Here is what he said:

19 "MS. GATEWOOD: Where was that? How was that
20 current valuation determined, current valuation of the
21 company?

22 "THE WITNESS: I don't remember the exact
23 multiple, but I used a small fraction of what our
24 projected earnings might have been over the next five
25 years.

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1 "MS. GATEWOOD: Had the company derived any
2 earnings in 2002 to 2007?

3 "THE WITNESS: No, it did not.

4 "MS. GATEWOOD: Did the company derive any
5 earnings prior to that from 1992 to 1997?

6 "THE WITNESS: No, it did not.

7 "MS. GATEWOOD: How did this -- how did you make
8 this calculation and what was that calculation based upon?

9 "THE WITNESS: That calculation was based upon
10 projects we then had in work.

11 "MS. GATEWOOD: What projects did you then have
12 in work?

13 "THE WITNESS: I really can't tell you offhand,
14 I would have to do research."

15 When we look at what's called projects in work
16 in the business plan we see it's things like the Shand
17 contract. It's things, it's circumstances where Novacon
18 is trying to get a demonstration successfully completed in
19 a power plant so that then they can get a contract from a
20 power plant. Okay, so what are we talking about? Is it
21 all \$50 million? Does that have any basis at all in
22 reality as opposed to projections? Yeah, about
23 30 percent. How do I arrive at that 30 percent? Well, in
24 their response to our Rule 19 A statement the defense
25 cites an explanation of the money that the Baers put into

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1 Novacon prior to receiving investor funds. It's a little
2 complicated to understand, but the amount that I calculate
3 from that explanation is roughly \$13.3 million. So,
4 projections account for \$36.7 million of the current
5 valuation of the company, the current valuation of the
6 company. Seventy percent of that is blue sky, blue sky.

7 That's just false, Your Honor. That's an actual
8 misrepresentation of an existing fact and he made it more
9 than once, he made it in 2004, he made it in 2005 and
10 probably in other places.

11 THE COURT: On the tapes?

12 MR. CARROLL: No, in letters to investors. In
13 the business plan there is a set of projections, a high
14 case and a low case. You can find this at Exhibit G to
15 the Burns' affidavit. And the Burns' affidavit is in
16 turn -- I'm sorry it's Exhibit H to the Burns' affidavit
17 which is Exhibit I to the Block affidavit.

18 So, in other words, and I apologize for the
19 confusion that this is obviously engendered in these
20 proceedings. But Exhibit I to Ms. Block's affidavit
21 contains the affidavit of investor Mr. Burns. And he
22 attaches as exhibits to his statement materials, including
23 a page which you could find at Exhibit H to his affidavit
24 entitled Novacon Investor Profitability. The top of that
25 page has a low case and a high case. And in the middle of

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1 the page it reads: Current valuation, \$50 million.
2 Fifteen hundred shares, quickly that's \$3333 per share,
3 current valuation. That went to an investor. It went to
4 Mr. Burns. It went to other investors. But of the one
5 ruling I got here in this motion is that one.

6 So earlier the Court asked, "Is there any proof
7 that any investor heard this misrep about the Shand power
8 plant?" And the answer is, yes, Mr. Burns is one of the
9 those investors. And it's page three of his affidavit,
10 paragraph nine. So, okay, there we are with the core
11 business prospects of this company, its viability. What
12 is it worth? What is it going to do? Nothing. And
13 investors were misled about it.

14 Now let's talk about the other
15 misrepresentations, the other omissions. Misappropriated
16 funds, right? I don't want to spend a lot of time on
17 that. It's clear we talked about it last time that we
18 were here. It's clear that --

19 THE COURT: They are saying that, they are
20 acknowledging that they took money out but -- they may
21 have taken money out but they put a lot of their own money
22 in.

23 MR. CARROLL: That's the explanation. But it's
24 just that, it's an explanation. It's not a material
25 dispute. In fact, the undisputed fact is that they took

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1 investor money in. They spent it on a lot of stuff,
2 including personal expenses including a mortgage. We
3 talked about the pet stores and other things. And they
4 didn't tell investors that's what they were doing.

5 THE COURT: Which causes of action does that go
6 to?

7 MR. CARROLL: That goes to certainly -- I would
8 argue it goes to all of them but it certainly goes to
9 Martin Act and 63 12. In that connection I want to direct
10 the Court's attention to a case which addresses this.
11 That case is State of New York against World Interactive
12 Gaming Corporation on index 404428/98. And the cite is
13 185 Misc. 2d 852. The Court will find at page 864 and 865
14 of that opinion a holding which calls the nondisclosure of
15 commission, salaries and consulting fees a violation of
16 Executive Law 63 12 and of the Martin Act. With the
17 Court's permission I would hand up that opinion now.

18 THE COURT: You didn't cite that in your brief?

19 MR. CARROLL: No, Your Honor, we did not.

20 THE COURT: Okay, do you have a copy?

21 MR. CARROLL: I have a copy for everyone, sir.

22 May I approach?

23 THE COURT: Yes.

24 MR. CARROLL: I'll say a few more words about
25 it. No disclosure of the use of any of the funds was

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1 made. They didn't disclose that they were paying almost
2 \$300,000 to Mr. Rifkin. The agreement says simply that,
3 you know, "It's without restriction given to Novacon."
4 That's an awful lot to slip in through that under that
5 generality. We contend that that's misleading and that
6 it's misleading to a degree that rises to a violation of
7 63 12 and of the Martin Act, particularly when taken in
8 connection with all these other misreps.

9 Educational background, same thing. Okay,
10 let's talk about it for a second. He said that he had a
11 PhD from MIT. He's got a mining venture, a clean coal
12 mining which deals with highly technical subject matter.
13 Sure the investor is going to be impressed by that. Sure
14 it's material. He has a degree in accounting from NYU, so
15 much the better. It's a company, it's a business venture.
16 This man is a power god. He's ideal for the work. It's
17 not true. It's not true. They don't dispute it. He
18 thought that he was entitled to claim these distinctions.
19 He claims them in paper. He introduces himself as Dr.
20 Baer.

21 THE COURT: And those allegations go to which
22 causes of action?

23 MR. CARROLL: Same ones, Your Honor, same ones,
24 all of them.

25 THE COURT: You said the commingling goes to 63

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1 12 and the Martin Act. That's not all of the causes of
2 action.

3 MR. CARROLL: You're right, Your Honor, it's
4 not.

5 THE COURT: But you're saying that this goes to
6 all?

7 MR. CARROLL: Yes, Your Honor. I should correct
8 my misstatement. All of the indisputable misreps and
9 omissions that I've described here today meet the standard
10 of all of the claims we made. The common law fraud as
11 well, these are all.

12 THE COURT: Any single one of those allegations
13 make out a cause of action under the claims that you've
14 alleged?

15 MR. CARROLL: In isolation?

16 THE COURT: Yes.

17 MR. CARROLL: The valuation certainly. The
18 commingling certainly.

19 THE COURT: What about this one?

20 MR. CARROLL: I beg pardon?

21 THE COURT: What about the degrees?

22 MR. CARROLL: In isolation with no other
23 misrepresentation, maybe not. Maybe not, Your Honor.

24 THE COURT: Okay.

25 MR. CARROLL: So that's where we are. So let me

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1 conclude. Let me conclude now. One of the themes of the
2 defense on this motion is that there is a process which
3 works. The AG has never contested it, never attacked it
4 at all. The majority of investors want this to go
5 forward. The AG has a heavy hand and it's preventing the
6 business from proceeding. Okay, let's set that against
7 the undisputed facts that I've just talked to you about.

8 First of all, most investors want the process to
9 go forward. Irrelevant. Irrelevant. Even if it were
10 true, even if they had proved it, which they haven't and
11 which they probably will not be able to do, irrelevant to
12 this motion. We haven't contested the process. Why
13 haven't we contested the process? Because it's so plain
14 it does not work. If it had worked wouldn't there be
15 uncontested evidence that some company had picked it up?
16 This is supposed to rejuvenate the coal burning industry.

17 What do we have here? What do we have?
18 Undisputed facts that I've just told you about. We have a
19 company run by a man who falsely claims MIT PhD and an
20 accounting degree from NYU. The company has an untested
21 product. An unsuccessfully demonstrated product. It has
22 no contracts, no revenues, no projects. And in its 15
23 plus years history the company is held out to the
24 investors by its CEO as worth \$50 million. But 70 percent
25 of that value is projections based on contracts it might

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1 get.

2 THE COURT: All right, you're covering ground
3 you've already covered. I'll give you a chance to reply
4 if need be.

5 Ms. Zerner, you're arguing?

6 MS. ZERNER: Yes, Your Honor. So, I would just
7 start from where he left off and go back with these
8 alleged misrepresentations and then hit on the failure to
9 register.

10 First off, I find it interesting here that they
11 say that the investors' desire is irrelevant here. Where
12 the Martin Act is meant to protect investors and to take
13 on these actions that investors can't do themselves.
14 Whereas here, most of the investors are not contesting.
15 Novacon and many expressed that they want this project to
16 go forward because they do believe in the viability. And
17 that's key here because the viability of this technology
18 is what influenced the decision for them to invest.

19 Going through these points as the Attorney
20 General's office concedes, first on their alleged
21 misrepresentation, that Mr. Baer represented himself as a
22 doctor and that that influenced the total --

23 THE COURT: Is it doctor or PhD?

24 MS. ZERNER: Here they say specifically, Your
25 Honor, you're right, PhD from MIT. They did submit papers

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1 that referred to Mr. Baer as a doctor which they did in
2 their reply. And I think that it was unwarranted for them
3 to stick in their reply when they had every opportunity to
4 put that in their motion papers and allow us to respond.
5 Just as I will say now, this issue with the consulting fee
6 which was never disclosed was not in their papers. And I
7 don't think should be considered here since, again, we did
8 not get any opportunity to respond to that or read the
9 case law that they have now handed us this moment.

10 So on the PhD issue, not only has Mr. Baer
11 expressed that the basis for his educational background,
12 but if you look at the actual exhibits that they are
13 relying on for this misrepresentation, such as Exhibit J,
14 the Hutchinson affidavit. He goes through all the reasons
15 that he considered in investing in this and nowhere in
16 there does it say because he thought that Mr. Baer was a
17 doctor.

18 THE COURT: Well, he's conceding that that alone
19 doesn't make out a cause of action.

20 MS. ZERNER: Exactly.

21 THE COURT: But it's part of the mix.

22 MS. ZERNER: On that and as well as the
23 accounting issue. The exact same affidavit is J of
24 Hutchinson, it does not say the quoted excerpts of what
25 Mr. Baer supposedly said in his papers, does not say that

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1 he had an accounting degree to begin with. Even if it's
2 considered in the total mix it says, "That I was sent back
3 to New York to study." This is page three of Exhibit J,
4 "At New York to study accounting and finance." And Mr.
5 Baer has, again, stated, yes, he did study there and was
6 just a few credits short of the degree.

7 So as you already said it's been conceded.
8 Those standing alone are not misrepresentations because
9 also, since they want to look at the totality of the
10 circumstances, those alleged misrepresentations are not
11 misrepresentations and, in fact, are not material to the
12 decision to invest in this case.

13 Again, on the consulting fee issue, this is the
14 first that we've heard of that. I do not know, I do not
15 believe it is a necessary requirement to state every
16 consulting fee in the initial shareholder agreement. And
17 certainly those things are moving apart and they will
18 change every time and it can't be anticipated in the
19 initial shareholder agreement. But also they point to no
20 evidence that an investor asked for that information and
21 was denied it or otherwise any action was taken to hide
22 that kind of information from investors.

23 THE COURT: What about the commingling? The
24 commingling?

25 MS. ZERNER: The commingling? As cited in the

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1 shareholder agreement, that the agreement specifically
2 stated, "That the investor's understanding that the total
3 amount subscribed will be delivered to the company Novacon
4 for use by the company without restrictions." To add to
5 that, it was known that the Baers were working out of
6 their home. This was their life's work and project since
7 the '80s. They put their significant funds in this
8 project since then; openly talked about that. And they
9 were working out of their home and their address was
10 known. They had consultants, first Mr. Bryan Luftglass
11 and then Bruce Karassik, as well as Pam Matturro. It was
12 not hidden that they were putting all this and paying any
13 expenses out of that. And as is shown, they did not take
14 salaries during this entire time.

15 THE COURT: That's a rationale but is it a legal
16 excuse for what they did?

17 MS. ZERNER: Well, I think to point to the, as I
18 was about to, the case that is cited for the legal grounds
19 to say that this commingling was improper, the case of
20 People versus Royal Seaport. In that case the person who
21 they found misappropriated funds, the case said that it
22 was a broker and kind of like Rifkin, made
23 misrepresentations and taken money from people. It was
24 supposed to go to the company Royal but that broker kept
25 the money for himself, which he directly received from

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1 investors, because the company owed him money.

2 Now, certainly he was not authorized and the
3 Court specifically ruled that this was a misappropriation
4 because he had kept the money with no authorization from
5 the officers of the corporation. Here the Baers are the
6 officers. And they are managing the entire corporation
7 from their home and everything is going into one pot. Now
8 whether or not that is a proper business accounting is
9 different than what is not legal. And I don't think there
10 is case law here or the Martin Act says that it was
11 illegal to do that.

12 Certainly, as I said, it was not hidden from the
13 investors. Which is what their argument is, is that it
14 was a misrepresentation, not that commingling on its face
15 is illegal.

16 THE COURT: And then what about the projection?

17 MS. ZERNER: The financial projections on that,
18 as they went through these were all based, these were all
19 future projections. They had -- he had that money and it
20 was not just Mr. Baer's word, it was supported by the
21 viability of the technology itself. Which as we put in
22 our papers is the summary report establishing the third
23 parties who supported this as a viable technology. Not
24 only that, you had the testimony of Bryan Luftglass, he
25 formally worked for Novacon in the late '90s. He's a

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1 scientist with degrees from Colgate, as well as Masters
2 from University of California. He's been in the
3 industry --

4 THE COURT: He actually had degrees?

5 MS. ZERNER: Yes. And he said at his deposition
6 that those specific projections that the attorney general
7 has cited as misrepresentations were, in his opinion, not.
8 They were reasonable. He had dealt with that technology
9 he said back in the '90s. That they were at a commercial
10 ready state and there is nothing to show that has changed.

11 The problem that they want to brush off as
12 though it doesn't matter has been all these outside
13 factors that have prohibited them from reaching a sales
14 contract. They have memorandums of understanding and
15 protocols of intent that put the technology into a
16 demonstration at various plants. All the optimism from
17 the Baers has been because they believe in their
18 technology. And that is significant because it is viable.
19 As I said, Luftglass supports that.

20 The Attorney General's office points out in
21 their reply saying, "Luftglass wasn't shown the
22 projections so we can't really give any credit to his
23 opinion." He worked for Novacon, he saw the projections.
24 Third parties like that is discussed in the record, in the
25 interrogatories and contract, the communications with

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1 Mitsubishi and the report done from them is another third
2 party showing that these were great financial projections.
3 That's where the Baers got this information from third
4 parties.

5 I would like to note that Mr. Luftglass when he
6 said that he didn't believe that this was a
7 misrepresentation, he was sitting there, in his hand was
8 the complaint of the Attorney General's office, and he had
9 gone through it and checked off misrepresentations alleged
10 that he said, "No, that's true, that's true from what my
11 experience in the field and also dealing with Novacon."

12 In addition, you have Bruce Karassik, another
13 third party who has been a consultant in the tree and has
14 connections in Eastern Europe. He has worked for Novacon
15 since 2004. He continues to work with them presently.
16 He's certainly aware of this litigation. He sat for a
17 deposition and he believes in the viability of the
18 technology. And the technology cannot be shoved aside as
19 the Attorney General's office would like to. It is the
20 central point of this operation and the reason investors
21 invested and continue to support the company now and need
22 the money to stay with Novacon to get over these problems
23 that have been cited. Third party issues where, for
24 instance, let me speak to Shand that the attorney general
25 wants to isolate and zone in on.

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1 The Attorney General's office went through from
2 their reply memorandum Exhibit G saying that, "Look, Mr.
3 Baer is saying that he's very confident, fairly certain he
4 could get a contract with Shand. And then look later and
5 it did not happen." And they want to say that's proof
6 that that meant he was misrepresenting the -- he believed
7 that the contract was going to happen. Absolutely not.
8 He certainly believed. He believed in everything he was
9 saying and then informed investors, as in his Exhibit P,
10 he said, "This is what happened in Shand and this is why
11 it fell through. Again, outside circumstance, not the
12 viability of the technology but the problem with the
13 equipment at that particular plant." And there is no
14 evidence that they are making that up. That that wasn't
15 the problem that caused, the failed to get these
16 demonstrations to the endpoint to get a sales contract.

17 All of these goes to show that these financial
18 projections were supported by third parties by the
19 evidence in the record. And that all of their exhibits,
20 although they want to point out particular sentences,
21 their affidavits from Mr. Burns, from Mr. Hutchinson, show
22 all of these representations saying, "We believe this
23 technology. We're on the precipice of a contract."
24 Again, they didn't say that they had a sales contract,
25 they didn't misrepresent. They always were very confident

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1 and they believed in the viability of the technology. We
2 have notified them of two experts that we plan to call at
3 trial to support -- to testify about the viability of the
4 technology. They want to ignore that because they know
5 that they can't disprove that.

6 Again, they point to no evidence that these are
7 false calculations other than saying, "Look, they don't
8 have a contract. Look, the technology is everywhere,
9 somebody didn't buy it." This is Mr. Baer's and Vivian
10 Baer's, that's not up for sale. That's why it hasn't been
11 bought by somebody else. They are a small corporation
12 that continues to believe in their cause and they want to
13 put it into proper works of the plants when they have the
14 opportunity to do so.

15 Now back to these points that they have relied
16 on. As they have already conceded that they have never
17 shown in the report that each of these tapes have
18 influenced investors or even specific ones. That these
19 investors made their decision to invest based on these
20 tapes. First issue I would like to address is that Mr.
21 Baer has not denied that this is his voice on the tapes.
22 That's a mischaracterization of the testimony. He's
23 denied that he knew that every one of his conversations
24 were recorded by Rifkin. And he's denied knowing that
25 Rifkin produced them in the form that they were produced

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1 to investors. And as the affidavit in the record from the
2 previous motion to vacate, one of the investors who
3 adopted their affidavits in the record, seems like there
4 is an issue that he could say about the splicing issue.
5 But setting that aside, the tapes, they have not proven
6 that those tapes are misrepresentations made by Steve Baer
7 or Novacon and they shouldn't

8 THE COURT: And why is that?

9 MS. ZERNER: Because --

10 THE COURT: Because Baer didn't know that he was
11 being taped?

12 MS. ZERNER: No, that's not the reason. The
13 reason is just because -- setting aside whether he's
14 purportedly produced to investors. First I would like to
15 say that they should not even be considered here because
16 they haven't been authenticated, they have just said
17 offhand that there is a Ms. Rifkin who will validate their
18 custody and is ready to give an affidavit now. Which,
19 again, is not on their papers on the record and never
20 seen. But if you're going to consider them, we submit
21 they shouldn't be considered, it's not just because he
22 didn't know. But each of the specific representations
23 that they claim are fraudulent in the tapes are the things
24 we've just gone through that I have explained are not
25 fraudulent.

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1 I'm as confused here I think as you are on which
2 counts they are talking about when they make claims about
3 these misrepresentations. They say that they don't have
4 to prove reliance because that's not required in the
5 Martin Act, but yet they still want to get summary
6 judgment on the fraud count. I think that they certainly
7 have not proved here, under common law, they have not
8 proved that the Baers intentionally tried to defraud nor
9 that anyone specifically relied on them to make these
10 investments. But to talk about the other counts, the ones
11 under the violations of the Martin Act, I believe that the
12 Attorney General's office said that it doesn't matter,
13 they don't have to prove reliance under the Martin Act.
14 That's true but in order to prove in these things are part
15 of the total mix, these alleged misrepresentations on a
16 tape are part of the total mix. Certainly the investors
17 had to have known about these tapes or heard them for it
18 to be consideration in their investment.

19 So, moving on from the misrepresentations. The
20 failure to register issue, Your Honor, you brought this up
21 immediately. That it seems you questioned whether this is
22 an overly dramatic remedy in this case and we certainly
23 think so because of the evidence we have set out before
24 you in our papers. Not only was Mr. Rifkin hired
25 specifically to register, and they tried to track it down

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1 when they realized that it wasn't. It was always their
2 intent to be in accordance with the law, and unfortunately
3 they hired someone who scammed them and did not do what he
4 was supposed to do.

5 Furthermore, for disgorgement. The
6 disgorgement, if we set aside all the misrepresentations,
7 which we certainly believe they have not proven beyond
8 dispute. If you look at the disgorgement argument
9 recommended under the Martin Act, if the Court finds that
10 it's appropriate to allow them this remedy in this case,
11 we certainly don't think it's appropriate on the failure
12 to register. The disgorgement is meant to deter people.
13 And they did not ignore the law as the attorney general
14 characterized it, they specifically hired Mr. Rifkin who
15 they understood was a professional in this realm, to
16 register the securities. And the fact that they were
17 duped by him and that they secured all these investors
18 without a failure to register should not be grounds for
19 disgorgement in this because they were scammed in the same
20 way that he ultimately scammed the investors after he was
21 terminated from Novacon in 2005.

22 They have had their money frozen for years and
23 it's halted their effort not only to their dismay, but the
24 investors who have already expressed that through their
25 affidavits before this Court.

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1 THE COURT: Why don't we hear from Mr. Carroll
2 quickly, if you can.

3 MR. CARROLL: Okay. So I want to address a few
4 things. The educational qualification. The Court asked
5 whether or not standing alone that constituted violation
6 of the Martin Act. The issue I would urge the Court to
7 consider is, that that affects the total mix of the
8 information. The CEO said that he had a scientific PhD,
9 had a doctorate. There are other terms, by the way, you
10 could say that he's a doctor, certainly we don't claim
11 he's a medical doctor. He refers to himself in the
12 materials as Dr. Baer, possessor of a doctorate and that's
13 clear from our reply affidavit Exhibit S.

14 I have his curriculum vitae that was produced to
15 us in this action. The top of it says biographical
16 background, Dr. Steve H. Baer. If you look at the
17 education section you see "1964 New York University,
18 Master's in Accounting, majored in accounting, banking and
19 finance." Exhibit S to our reply, Your Honor.

20 The defense has said on the commingling, it
21 wasn't illegal to do. Illegality is not the standard.
22 The standard is the materiality to investor. Would an
23 investor have liked to know that the Baers maintained no
24 division between their personal accounts and Novacon
25 accounts? Would an investor have liked to know that a lot

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1 of proceeds that came, which an investor could have
2 reasonably assumed that would have gone to the future
3 business of the company, in fact, went to reimburse the
4 principals of the corporation? I think that they would
5 have liked to know that. It is a material omission not to
6 have told the investors that. And that material omission
7 violates the Martin Act, it violates Executive Law 63 12
8 and supports a claim of the common law fraud.

9 There was a remark to the effect that we claim
10 that nobody bought Novacon. I want to be clear that I
11 wasn't intending -- my meaning was not that the process
12 doesn't work because nobody has ever offered to buy
13 Novacon. The process, the evidence that the process
14 didn't work lies in the fact that they have never been
15 able to interest any paying customers in that process, at
16 least to the point of actually signing on the dotted line
17 and paying dollar number one.

18 The last thing I want to mention is the point
19 that disgorgement is not a remedy for nonregistration. In
20 that connection I want to refer the Court again to World
21 Interactive Gaming Corporation. Nonregistration is a
22 violation of the Martin Act. That constitutes an
23 illegality within the meaning of Executive Law 63 12, an
24 illegality if it's repeated. As I told the Court before,
25 we have 224, at least, instances of repetition. So this

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1 just isn't some kind of little mistake that they made,
2 this is wholesale unregistered investment. An illegality
3 under 63 12 may be remedied by injunction, damages and
4 restitution. Those are the only things I have to say
5 right now unless the Court has questions.

6 THE COURT: One second.

7 (Pause)

8 THE COURT: All right, I'm going to take a
9 recess. I may be able to give you a decision before the
10 lunch hour. We'll adjourn briefly.

11 MS. ZERNER: Your Honor, could I just have one
12 brief statement?

13 THE COURT: Yes.

14 MS. ZERNER: Not to rehash, just to add. As we
15 said, things were fully disclosed in the shareholder
16 agreement, the subscription agreement about how the money
17 could be used, that each one of them received without --
18 we're, again, not talking about these post-2005 Rifkin
19 termination where he went off rogue and took things that
20 he wasn't authorized to take from investors. And I want
21 to point out Nevins who invested after 2006, that wasn't
22 authorized. More importantly, Novacon never got that
23 money, Rifkin took it and ran. So trying to take back
24 that money on behalf of these complaining witnesses from
25 Novacon investors who want to keep their money in doesn't

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1 seem proper under these remedies that they seek.

2 Additionally, as they quote Mr. Burns in their
3 affidavit Exhibit I, you'll see in the attachment as well,
4 that in Exhibit E it states clearly that these are future
5 projections and based on predictions and that they can't
6 guarantee them, and the investors should look at all the
7 facts and make their determination.

8 THE COURT: Okay, so if you could stick around
9 and we'll get you word whether or not we'll have a
10 decision.

11 MR. CARROLL: Thank you, Your Honor.

12 (Luncheon recess taken)

13 A F T E R N O O N S E S S I O N

14 THE COURT CLERK: Recall of 451526 of 2011 in
15 the matter of State of New York versus Novacon.

16 Counsel, note your appearance once again for the
17 record.

18 MR. CARROLL: For the State of New York, Thomas
19 Teige Carroll, and with me is Elizabeth Block and Diane
20 Gatewood.

21 MS. ZERNER: For the defendants, Bridget Zerner.
22 Good afternoon.

23 THE COURT: Okay, I have a decision on the
24 motion I'll read for the record now.

25 In Motion Sequence Number 6 plaintiff attorney

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1 general is moving for summary judgment on its claims for
2 violation of the Martin Act for the unregistered sales of
3 securities and in violation of both of Martin Act and
4 Executive Law Section 63 subdivision 12, for
5 misrepresenting and omitting material facts concerning
6 Novacon and in the course of selling investment interests
7 in it.

8 As the Court understands this motion from the
9 papers, which differed in many ways from the presentation
10 by plaintiff at argument, plaintiff is seeking summary
11 judgment on the first two claims in its complaint but not
12 on the last three claims. Although some of the same facts
13 and allegations may ultimately be relevant to those claims
14 as well.

15 This motion is granted in part and denied in
16 part. With regard to the first cause of action for
17 failure to register the securities, summary judgment is
18 granted in plaintiff's favor. There are no questions of
19 fact with regard to this failure and no reasonable excuse
20 for which additional factual determinations later on would
21 be relevant.

22 With regard to the second cause of action for
23 fraudulent business practices under Executive Law 63 12,
24 this portion of the motion is granted with regard to the
25 false statements made by he defendants concerning Mr.

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1 Baer's education and the omissions made by defendants
2 regarding commingling. Given the nature of purported
3 business endeavors, the Court concludes that there is no
4 question of fact regarding whether this would have been
5 relevant to investors. Further, even though investors may
6 not have thought about specific educational degrees, they
7 would surely have cause for concern if told that the
8 information was specifically false. These statements are
9 clearly dishonest or misleading under the statute.

10 With regard to the commingling, that is never
11 permitted. The failure to inform investors about the lack
12 of accounting in the personal use moves the conduct from
13 that which, even if defendants are to be believed, might
14 have been permitted had the investors been explicitly told
15 about it, into the area that the attorney general is
16 clearly able to prosecute. The Court notes that this is
17 not a private person merely spending his or her own money
18 and that given or loaned to him or her in the personal
19 capacity. The individual defendants chose to incorporate
20 and took the benefits from that. Having done so they must
21 comply with the requirements of the corporation forum.
22 This is sufficient for at least partial summary judgment
23 on the second cause of action. Summary judgment is denied
24 regarding other alleged fraudulent or illegal acts even
25 under the second cause of action, such as statements

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regarding contracts or future projections.

The Court further notes that a significant portion of the contentions in the claim remain for determination, given that the Court will not now parse what the damages will be for those aspects determined today.

All right, that let me just remind you that the next conference in this case is scheduled for November 19th, 2013 at 10:30 a.m. I would also note that, you know, I would strongly urge you to make every effort at this point to try to settle the case and to make effort before the next conference.

MR. CARROLL: Thank you, Your Honor, we will.

MS. ZERNER: Thank you.

* * *

CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT.

JACK L. MORELLI, CM, CSR