Chi v. N. Riverfront Marina & Hotel LLLP; Feng v. N. Riverfront Marina & Hotel LLLP, 2023 NCBC 47.

STATE OF NORTH CAROLINA
NEW HANOVER COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
21 CVS 4611
23 CVS 62

HE CHI; BIAN YIDE; CAO YONGJIE; CHEN MINZHI; CHENG TAO; HU KUN; LIANG JINGQUAN; LUO PENG; MA QIHONG; MA WEIGUO; SONG YING; WANG JIAN; WANG LING; WANG XUEHAI; XIE QIN; YE XIAFEN; and ZHANG YUNLONG,

Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA AND HOTEL LLLP; NRMH HOLDINGS LLC; NRMH HOTEL HOLDINGS LLC; USA INVESTCO LLC; PAC RIM VENTURE LTD.; RIVERFRONT HOLDINGS II LLC; WILMINGTON RIVERFRONT DEVELOPMENT LLC; GOLDEN MARINA LLC; CIRCLE MARINA CARWASH, INC.; CHARLES J. SCHONINGER; JOHN C. WANG; JIANGKAI WU; CHRISTOPHER ARDALAN; and GONGZHAN WU,

Defendants.

WANG FENG and ZHANG SHIXIONG,

Plaintiffs,

v.

NORTHERN RIVERFRONT MARINA AND HOTEL LLLP; NRMH HOLDINGS LLC; NRMH HOTEL HOLDINGS LLC; USA INVESTCO LLC; RIVERFRONT HOLDINGS II LLC; WILMINGTON RIVERFRONT DEVELOPMENT LLC; GOLDEN MARINA LLC; CIRCLE MARINA CARWASH, INC.; CHARLES J. SCHONINGER; JOHN C. WANG; JIANGKAI WU; and CHRISTOPHER ARDALAN,

Defendants.

ORDER AND OPINION ON MOTIONS TO DISMISS

1. THIS MATTER is before the Court on four motions to dismiss, (collectively the "Motions"). Defendants Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings LLC, USA InvestCo LLC, Riverfront Holdings II LLC, Wilmington Riverfront Development LLC, Golden Marina LLC, Circle Marina Carwash, Inc., Charles J. Schoninger, John C. Wang, and Christopher Ardalan move to dismiss the Second Amended Complaint filed by seventeen Plaintiffs (the "Chi Plaintiffs") in Civil Action no. 21 CVS 4611 (the "Chi Complaint") (ECF No. 92). Defendants also move to dismiss the virtually identical complaint filed by Plaintiffs Weng Feng and Zhang Shixiong (the "Feng Plaintiffs") in Civil Action no. 23 CVS 62 (the "Feng Complaint") (ECF No. 29).[1] Likewise, Defendant Jiangkai "Samson" Wu ("Samson Wu")[2] moves to dismiss the claims brought against him by both the Chi Plaintiffs, (ECF No. 95), and the Feng Plaintiffs, (ECF No. 31).[3]

2. The Court, having considered the Motions, the briefs supporting and opposing the Motions, and the parties' arguments at a hearing held on 21 April 2023,

[1] The only substantive difference between the Chi Second Amended Complaint and the Feng Complaint is the addition of paragraph 26 in the Feng Complaint, which identifies the Chi action as a "Companion Matter." Because the allegations in both pleadings are otherwise the same, the Court opts to cite only to the Chi Second Amended Complaint.

[2] The Court refers to Defendant Jiangkai Wu as "Samson Wu" to distinguish him from other individuals with the name Wu who are either parties or counsel in these cases.

[3] The Court previously dismissed defendants Pac Rim Venture Ltd. and Gongzhan Wu for lack of *in personam* jurisdiction. (*See* Order and Opinion, Chi ECF No. 76.)

concludes for the reasons stated below that the Motions should be GRANTED in part and DENIED in part, as provided herein.

Ledolaw, by Michelle Ledo, and DGW Kramer, LLP, by Katherine Burghardt Kramer, for Plaintiffs Ma Qihong, Luo Peng, Liang Jingquan, Hu Kun, Cheng Tao, Chen Minzhi, Cao Yongjie, Bian Yide, He Chi, Zhang Yunlong, Ye Xiafen, Xie Qin, Wang Xuehai, Wang Ling, Wang Jian, Song Ying, and Ma Weiguo, as well as for Plaintiffs Weng Feng and Zhang Shixiong.

The Law Offices of Oliver & Cheek, PLLC, by George M. Oliver, for Defendants Wilmington Riverfront Development LLC, Riverfront Holdings II LLC, USA InvestCo LLC, NRMH Hotel Holdings LLC, NRMH Holdings LLC, Northern Riverfront Marina and Hotel, LLLP, Christopher Ardalan, John C. Wang, Charles J. Schoninger, Circle Marina Carwash, Inc., and Golden Marina LLC.

The Law Offices of G. Grady Richardson, Jr., P.C., by Jennifer L. Carpenter, for Defendant Jiangkai Wu.

Earp, Judge.

I. FACTUAL BACKGROUND

3. The Court does not make findings of fact when deciding motions to dismiss pursuant to Rule 12(b)(6) but recites only those factual allegations from the Chi Complaint and the Feng Complaint that are relevant and necessary to a determination of the Motions.[4]

4. Plaintiffs He Chi, Bian Yide, Cao Yongjie, Chen Minzhi, Cheng Tao, Hu Kun, Liang Jingquan, Luo Peng, Ma Qihong, Ma Weiguo, Song Ying, Wang Jian, Wang Ling, Wang Xuehai, Xie Qin, Ye Xiafen, Zhang Yunlong, Weng Feng, and

[4] The Court's earlier Order and Opinion, ECF No. 76, contains additional fact background.

Zhang Shixiong, (collectively, "Plaintiffs"), are all citizens of the People's Republic of China. (Chi Second Am. Verified Compl., ["Chi Complaint"], ¶ 26, ECF No. 88; Verified Compl., ["Feng Compl."], ¶ 27, ECF No. 3.) Each is alleged to have invested a minimum of five hundred thousand dollars[5] to become limited partners in NRMH. (Chi Compl. ¶ 74.)

5. Northern Riverfront Marina and Hotel LLLP ("NRMH") is a North Carolina Limited Liability Limited Partnership. (Chi Compl. ¶ 2.) Wilmington Riverfront Development LLC ("Wilmington Development") is a North Carolina LLC and the general partner of NRMH. (Chi Compl. ¶ 7.)

6. Charles Schoninger ("Schoninger") is the managing member of Wilmington Development and the central figure in Plaintiffs' allegations. (Chi Compl. ¶ 10.) Plaintiffs allege that Schoninger formed NRMH to raise funds for the purpose of developing real estate located on the riverfront in downtown Wilmington, North Carolina (the "Project"). (Chi Compl. ¶ 37.) The business plan for the Project and the offering circular for the investment stated that NRMH intended to construct a marina with 204 boat slips, two restaurants, and a 136-room hotel with approximately 35,000 square feet of retail space. (Chi Compl. ¶ 34, Ex. B.)[6]

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[5] Each Plaintiff contributed additional amounts in administrative and other fees.

[6] The Chi Plaintiffs did not attach any exhibits to the Chi Second Amended Complaint and appear to have intended to incorporate the exhibits attached to their First Amended Complaint in their Second Amended Complaint. The Feng Plaintiffs also fail to attach exhibits and instead reference exhibits filed in the Chi "Companion Matter," which the Court is left to assume are the exhibits attached to the Chi First Amended Complaint. (Feng Compl. ¶ 26.) The Court observes that Plaintiffs' inexact pleading creates needless potential for confusion and strongly discourages the practice of incorporating exhibits from one civil action to another civil action.

7. Plaintiffs allege that in exchange for their investment, they were promised that the Project would meet the requirements of the USICS Employment-based Fifth Preference Visa Program (the "EB-5 program"), a government program affording foreign investors in a new commercial enterprise special dispensation with respect to permanent resident status. (Chi Compl. ¶¶ 27, 35.) They also allege that they were promised certain periodic monetary returns, including a return of the amount of their investment at the end of an investment term that was to last no longer than five years. (Chi Compl. ¶¶ 50, 70, 77.)

8. USA InvestCo, LLC ("InvestCo") is a North Carolina LLC that is alleged to have engaged in activities to promote the Project. (Chi Compl. ¶ 6.) Samson Wu, a licensed immigration broker in China, worked for a company called Pac Rim Ventures (formerly a party to this action) before taking a "directorial and/or managerial role" with InvestCo. (Chi Compl. ¶ 12.) Plaintiffs allege that "[i]n those roles, [Samson] Wu was responsible for promotion and dissemination of information about the Project in [China] to potential immigration agencies and investors and for recruiting investors." (Chi Compl. ¶ 12.) Samson Wu is also alleged to have been the Manager and Vice President of an InvestCo affiliate in China. (Chi Compl. ¶ 1.) Given his ability to speak both Mandarin and English, Samson Wu allegedly served as a "go-between" for communications between the investors and other Project representatives until at least 2021. (Chi Compl. ¶ 12.)

The Court's references to exhibits herein are to those attached to the Chi First Amended Complaint. (*See* ECF No. 26.1)

9. Schoninger is alleged to own, "partially or wholly, directly or indirectly," and to manage Defendants NRMH, Wilmington Development, InvestCo, and the three named holding companies: NRMH Holdings LLC ("NRMH Holdings 1"), Riverfront Holdings II LLC ("NRMH Holdings 2"), and NRMH Hotel Holdings LLC ("NRMH Holdings 3"). (Chi Compl. ¶ 10.)

10. Christopher Ardalan ("Ardalan") and John C. Wang ("Wang") are directors of InvestCo, along with Schoninger. (Chi Compl. ¶ 13.) In addition, Wang owns "partially or wholly, directly or indirectly, and manages" Golden Marina LLC ("Golden Marina") and Circle Marina Carwash, Inc. ("Car Wash"). (Chi Compl. ¶ 11.)

11. At various times between 1 August 2011 and 19 February 2013, each Plaintiff entered into both an Agreement of Limited Partnership and its accompanying Subscription Agreement (collectively, the "Contract") to become a Limited Partner in NRMH. (Chi Compl. ¶ 74.) Plaintiffs allege that prior to executing the Contract, some or all of them received marketing materials that were prepared and disseminated by some of the defendants. (Chi Compl. ¶¶ 39-40.) They further allege that the content of the Business Plan included in those materials changed on 30 May 2012 in response to USCIS's approval of fewer investors than was originally contemplated. (Chi Compl. ¶ 73.)

12. Plaintiffs allege that before agreeing to the Contract terms they attended seminars that were hosted by Schoninger, Ardalan, NRMH, InvestCo, and Samson Wu. (Chi Compl. ¶ 78.) They allege that both the marketing materials they received and the seminars they attended (which varied by Plaintiff) contained false

statements that were intended to, and did, induce them to execute the Contract. (Chi Compl. ¶¶ 145-46.)

13. Included in the marketing materials was an offering circular that states in relevant part:

> THESE SECURITIES ARE SUBJECT TO A HIGH DEGREE OF RISK. SEE SECTION III, "RISK FACTORS" IN SUBSCRIPTION AGREEMENT.

(Chi Compl. Ex. B, ["Offering Circular"], i.) It contains a series of securities disclosure notices, among them:

> <u>FORWARD-LOOKING STATEMENTS</u>. THIS OFFERING CIRUCILAR CONTAINS FORWARD-LOOKING STATEMENTS BASED ON THE MANAGING GENERAL PARTNER'S EXPERIENCE AND EXPECTATIONS ABOUT THE MARKETS IN WHICH THE PARTNERSHIP INVESTS. . . . SUCH FORWARD-LOOKING STATEMENTS ARE NOT GUARANTIES OF FUTURE PERFORMANCE AND ARE SUBJECT TO MANY RISKS, UNCERTAINTIES, AND ASSUMPTIONS THAT ARE DIFFICULT TO PREDICT. THEREFORE ACTUAL RETURNS COULD DIFFER MATERIALLY AND ADVERSELY FROM THOSE EXPRESSED OR IMPLIED IN ANY FORWARD-LOOKING STTAEMENTS AS A RESULT OF VARIOUS FACTORS. THE SECTION III, ENTITLED "RISK FACTORS" IN THE SUBSCRIPTION AGREEMENT. . . DISCUSSES SOME OF THE IMPORTANT RISK FACTORS THAT MAY AFFECT THE PARTNERSHIP'S RETURNS. PROSPECTIVE INVESTORS SHOULD CAREFULLY CONSIDER THOSE RISKS . . . BEFORE DECIDING WHETHER TO INVEST IN THE PARTNERSHIP. NEITHER THE MANAGING GENERAL PARTNER NOR THE PARTNERSHIP UNDERTAKES ANY OBLIGATION TO REVISE OR UPDATE ANY FORWARD-LOOKING STATEMENT FOR ANY REASON.
>
> <u>SUITABILITY</u>. THIS IS A PRIVATE OFFERING AND IS AVAILABLE ONLY TO INVESORS WHO ARE "ACCREDITED INVESTORS" AS DEFINED IN REGULATION D PROMULGATED BY THE SEC . . . . EACH INVESTOR MUST . . . HAVE SUCH KNOWLEDGE AND EXPERIENCE IN FINANCIAIL AND BUSINESS MATTERS THAT SUCH INVESTOR IS CAPABLE OF EVALUATING THE MERITS AND RISKS OF THIS INVESTMENT AND MUST BE ABLE TO BEAR THE ECONOMIC RISKS OF THIS INVESTMENT. . . . DO NOT CONSIDER INVESTING IF YOU ARE

NOT FINANCIALLY SOPHISTICATED AND CAPABLE OF EVALUATING THE MERITS AND RISKS OF THE INVESTMENT, EITHER ON YOUR OWN, OR WITH THE ASSISTANCE OF YOUR FINANCIAL ADVISOR. THESE SECURITIES ARE SPECULATIVE AND THEY INVOLVE A SUBSTANTIAL RISK, AND THEY ARE ONLY A SUITABLE INVESTMENT FOR A LIMITED PORTION OF THE RISK SEGMENT OF YOUR PORTFOLIO.

TERMS OF THE OFFERING.

* * * *

NO ONE HAS BEEN AUTHORIZED TO MAKE ANY REPRESENTATIONS ABOUT THE ISSUER OR THE SECURITIES, OTHER THAN THOSE REPRESENTATIONS MADE IN THIS OFFERING CIRCULAR. THEREFORE, DO NOT CONSIDER ANY INFORMATION THAT HAS BEEN DESCRIBED TO YOU ORALLY. PLEASE MAKE SURE THAT YOU INVEST SOLELY ON THE BASIS OF THE INFORMATION IN THIS OFFERING CIRCULAR.

THIS OFFERING CIRCULAR IS NOT LEGAL, TAX OR FINANCIAL ADVICE. PLEASE CONSULT YOUR OWN PROFESSIONAL ADVISORS AS TO THE LEGAL, TAX AND FINANCIAL IMPLICATIONS OF THIS INVESTMENT . . . .

IN MAKING AN INVESTMENT DECISION, RELY ON YOUR OWN EXAMINATION OF THE ISSUER AND THE TERMS OF THE OFFERING, INCLUDING THE MERITS AND RISKS INVOLVED. . . .

AN INVESTMENT IN THE PARTNERSHIP INVOLVES A HIGH RISK OF LOSS OF PRINCIPAL AND LACK OF LIQUIDITY, AND THEREFORE REQUIRES THE FINANCIAL ABILITY AND WILLINGNESS TO BEAR SUCH RISKS. . . . THE MANAGING GENERAL PARTNER WILL RESPOND TO ANY QUESTIONS YOU OR YOUR ADVISERS MAY HAVE CONCERNING THIS OFFERING AND WILL MAKE AVAILABLE FOR EXAMINATION BY YOU OR YOUR ADVISERS SUCH RECORDS AND FILES IN ITS POSSESSION AS MAY BE PERTINENT TO YOUR DECISION WHETHER TO INVEST IN INTERESTS.

THE TERMS AND CONDITIONS OF THIS OFFERING . . . AND THE RIGHTS AND LIABILITIES OF THE PARTNERSHIP THE MANAGING GENERAL PARTNER AND THE LIMITED PARTNERS ARE GOVERNED BY THE [PARTNERSHIP] AGREEMENT AND THE SUBSCRIPTION AGREEMENT BETWEEN EACH LIMITED PARTNER

AND THE PARTNERSHIP. . . AND THE DESCRIPTION OF ANY OF SUCH MATTERS IN THE TEXT OF THIS OFFERING CIRCULAR IS SUBJECT TO AND QUALIFIED IN ITS ENTIRETY BY REFERENCE TO [THE PARTNERSHIP AGREEMENT AND THE SUBSCRIPTION AGREEMENT].

(Offering Circular, ii-iv) (emphasis added).

14. To become a limited partner in NRMH, Plaintiffs were required to agree with the general partner, Wilmington Development, to terms stated in the Agreement of Limited Partnership of Northern Riverfront Marina and Hotel, LLLP, (the "Partnership Agreement"). The Partnership Agreement, in turn, required Plaintiffs to execute the accompanying Subscription Agreement and invest the required minimum $500,000.00 capital contribution (plus fees). (*See, e.g.*, Partnership Agreement Art. I, § 1.4 (" 'Limited Partner' shall mean each Person executing a Subscription Agreement and acquiring Units in the Partnership.") Each Plaintiff's money was placed in escrow pending approval of his or her participation in the EB-5 program. Once approved, the money was released to NRMH. (Chi Compl. Ex. F, ["Subscription Agreement"], App. I, ¶¶ 1, 3.)

15. NRMH is managed exclusively by its general partner, Wilmington Development. (Partnership Agreement Art. VII, § 7.1.) Section 7.4 of the Partnership Agreement limits the general partner's liability:

> No General Partner nor any officer appointed by the General Partner shall be liable to the Partnership or to any Partner for damages attributable to any breach of duty owned (sic) by the General Partner or officer to the Partnership or the Partners, except to the extent (i) required under the Act, (ii) such breach of duty is based upon such Person's gross negligence or willful misconduct as established by a non-appealable court order, judgment, decree or decision, or (iii) such breach of duty is based upon a knowing violation of applicable law or this Agreement.

* * * *

> The General Partner does not, in any way, guarantee the return of a Partner's Capital Contribution, the Preferred Return, or any profit from the operations of the Partnership. No General Partner shall be responsible to any Partner because of a loss of their investments or a loss in operations, unless the loss shall have been the result of gross negligence or willful misconduct[.]

(Chi Compl. Ex. E ["Partnership Agreement"] § 7.4. *See also* § 8.4: ("[N]o Limited Partner shall have any recourse against the General Partner . . . except as otherwise set forth herein.")[7]

16. The Subscription Agreement also contains representations and warranties that were required of each Plaintiff before they were permitted to invest. Among the representations each Plaintiff made were: (1) that they were able to ask questions of and receive answers from the Partnership or a person acting on its behalf concerning the terms and conditions of the Offering Circular; (2) that each Plaintiff met the criteria of Accredited Investor;[8] (3) that prior to signing the Subscription Agreement, each Plaintiff was supplied with all the information regarding the Project that s/he had requested; (4) that to the extent s/he deemed it necessary, each Plaintiff

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[7] Some of the documents in the record contain grammatical or typographical errors. The Court identifies some of those errors but does not attempt to identify all of them.

[8] "Individuals may qualify as accredited investors based on wealth and income thresholds, as well as other measures of financial sophistication."
See www.sec.gov/education/captialraising/building-blocks/accreditedinvestor (last visited 26 July 2023.)

"Accredited Investor" is defined in the Subscription Agreement as one who "has a net worth (either individually or jointly with his or her spouse) of at least $1,000,000; or . . . had an individual income, not including the income of his or her spouse (even if they are proposing to purchase an Interest with funds that are community property or as joint tenants or tenants in common), in excess of $200,000 in each of the most recent two years or joint income with his or her spouse in excess of $300,000 in each of those years and reasonably expects to achieve the same level in the current year."

had consulted with his/her own legal, tax, and financial advisers; (5) that each Plaintiff was aware that an investment in the partnership was "highly speculative" and subject to "substantial risks"; (6) that the partnership had no history of achieving revenues and that the estimated returns were uncertain and the actual results "could vary in a materially adverse manner"; (7) that each Plaintiff, in making the decision to invest, relied on his/her own independent investigation; and (8) that each Plaintiff either read and understood English or had the Subscription Agreement translated by a trusted advisor into a language that the Plaintiff understood. (Subscription Agreement § II.)

17. Section III of the Subscription Agreement is captioned "Risk Factors" and repeats multiple times many of the same warnings listed above. Notably, Plaintiffs were told that "[n]o assurances can be made that [the general partner's] forecasts will prove to be accurate, and investors are cautioned against placing excessive reliance on such forecasts in deciding whether to invest in the Partnership." (Subscription Agreement § III(B).) Subsection J highlights the Partnership Agreement's provision that "the General Partner shall not be liable to the Limited Partners for any loss or liability incurred in connection with the affairs of the Partnership, so long as such loss or liability did not result from willful misconduct or gross negligence. . . .Therefore, a Limited Partner may have a more limited right of action against the General Partner than he would have had absent these provisions in the Partnership Agreement." (Subscription Agreement § III(J).)

18. Finally, the Subscription Agreement states in Section V(I): "This Subscription Agreement constitutes the entire agreement among the parties hereto with respect to the subject matter hereof." (Subscription Agreement § V(I).)

19. The final page of Exhibit F to the Chi Complaint (incorporated by reference in the Feng Complaint) is a single page document titled, "Agreement on Investment Period." Although included with the Subscription Agreement as an exhibit to the Chi and Feng Complaints, the final page of Exhibit F is not numbered consecutively with the pages of the Subscription Agreement, nor is it in the same font.[9] (Ex. F, final page.)

20. The Agreement on Investment Period purports to reduce to writing the parties' "consensus" that the investment period for each Plaintiff's funds would begin on the date NRMH had the use of the money and run for a period of three years, with NRMH having the ability to call for two one-year extensions. (Chi Compl. ¶¶ 63, 77.) At the conclusion of the investment period (maximum five years), the agreement stated that "NRMH will repurchase the limited partnership units on a (FIFO) first in first out manor [sic]." (Ex. F, final page.)

21. Exhibit D to the Chi Complaint (incorporated by reference in the Feng Complaint) is a document titled, "Conversion of Interest in the Northern Riverfront

[9] During the hearing, counsel for Plaintiffs, referencing paragraph 63 of the Chi Complaint, clarified that the Agreement on Investment Period that was included with the Subscription Agreement in Exhibit F is "its own document" and "[her] office may have just inadvertently included" it in Exhibit F. (21 April 2023 Transcript ["Tr."] 106:23-107:10, Chi ECF No. 135.) However, during the same hearing, co-counsel for Plaintiffs referenced paragraph 74 of the Chi Complaint and argued that the Agreement on Investment Period is part of the Subscription Agreement. (Tr. 54:11-19) ("[T]hat's the way we have it alleged[.]".)

Marina and Hotel, LLLP, ("Conversion Agreement"). The document appears to be an unsigned template that is also undated, except for the typewritten year "2011." The template purports to establish a "trigger date" defined as "completion of the resort, USCIS conditions being met, Partner receipt of a [sic] Unconditional Green Card and a period of not less than 5 years from approval of I-485." On the trigger date, the document states:

> [T]he General Partner shall be responsible to acquire the interests of the Partner upon the payment of the sum of USD500,000 to be paid in U.S. dollars; In [sic] the event General Partner is unable to pay said amount at trigger date partner shall be entitled to record and take owner ship [sic] of assets (Two hotel rooms and One marina berth) as defined in the Quit Claim.

(Ex. D) (emphasis in original).

22. Each Plaintiff agreed to the terms of the Contract on a different date between 2011 and 2013. (Chi Compl. ¶ 91.) Consequently, the five-year investment term referenced in both the Agreement on Investment Period and the Conversion Agreement, if effective, would have expired on a different date for each Plaintiff. (Chi Compl. ¶ 91.) However, the latest date the term would have expired for any Plaintiff is 19 February 2018. (Chi Compl. ¶ 91.)

II. PROCEDURAL BACKGROUND

23. The Chi Plaintiffs initiated this action on 13 December 2021, asserting that their investment in NRMH had failed to provide the allegedly promised return. (ECF No. 3.) A First Amended & Verified Complaint ("Amended Complaint") was subsequently filed on 3 February 2022. (ECF No. 26.)

24. On 24 March 2022, then Defendants Pac Rim Venture Ltd. ("PRV") and Gongzhan Wu filed their motion to dismiss. (ECF No. 40.) After full briefing, the Court held a hearing on the motion on 16 May 2022. Thereafter, on 24 August 2022, the Court entered an Order and Opinion dismissing PRV and Gongzhan Wu for lack of *in personam* jurisdiction. (ECF No. 76.)[10]

25. Following service of process on Samson Wu, on 26 September 2022, the Chi Plaintiffs moved for leave to file a Second Amended Complaint in order to expand their allegations regarding Mr. Wu. (ECF No. 79.) The motion went unopposed, and the Court entered an order allowing the Chi Plaintiffs' Second Amended Complaint on 20 December 2022. (ECF No. 86.)

26. The parties have been engaged in discovery since at least 18 May 2022. (ECF No. 61.) The Court has permitted requested extensions. Pursuant to the Amended Case Management Order, the deadline for fact discovery for both the Chi and Feng Plaintiffs is now 15 January 2024. (ECF No. 131.)[11]

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[10] The Chi Plaintiffs subsequently filed an action against PRV and Gongzhan Wu in state court in New York. *He Chi et al. v. Gongzhan Wu et al.*, No. 653488/2022 (NY Supreme Ct. 2022). This Court has not been provided with a copy of the complaint in that action, but the Order and Opinion of Judge Lyle E. Frank dismissing the plaintiffs' claims on statute of limitations grounds was provided to the Court during the hearing on these Motions. The Court takes judicial notice of the fact that the action against PRV and Gongzhan Wu was dismissed, but the Court also recognizes that it is not constrained to follow the New York court's analysis of the claims that were before it with respect to PRV and Gongzhan Wu when deciding the fate of the claims pending here against the NRMH Defendants and Samson Wu.

[11] Counsel for the parties agree that discovery in this matter has been time consuming and costly. Some Plaintiffs reside in the PRC and must travel to the United States to be deposed. In addition, Plaintiffs are not fluent in the English language, requiring translation that slows the process and increases the expense.

27. Although they did not file a motion pursuant to Rule 12(b)(6) in response to the First Amended Complaint, the NRMH Defendants have exercised their right to do so in response to the Chi Complaint, as well as to the identical claims in the Feng action. Samson Wu has likewise moved to dismiss both actions pursuant to Rule 12(b)(6).

28. After full briefing, the Court held a hearing on the Motions on 21 April 2023, during which all parties participated through counsel. The Motions are now ripe for disposition.

III. LEGAL STANDARD

29. When ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the Court reviews the allegations in the light most favorable to the non-moving party. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory whether properly labeled or not." *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987).

30. The Court accepts all well-pleaded factual allegations as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). However, the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (citation omitted). It may also ignore the legal

conclusions set forth in the pleading. *McCrann v. Pinehurst, LLC*, 225 N.C. App. 368, 377 (2013).

31. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Laster v. Francis*, 199 N.C. App. 572, 577 (2009) (cleaned up); *see Moch v. A.M. Pappas & Assocs., LLC.*, 251 N.C. App. 198, 206 (2016). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted).

32. "It is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC,* 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161, 166 (2002)). This standard of review for Rule 12(b)(6) is the standard our Supreme Court "uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

IV. ANALYSIS

33. Both the Chi and Feng Complaints assert claims for fraud, negligent misrepresentation, breach of fiduciary duties, conversion, and violation of the North Carolina Securities Act, N.C.G.S. § 78A-8, against NRMH, InvestCo, Wilmington

Development, Schoninger, Ardalan, Samson Wu, and Wang (claims 1, 3, 4, 5, 6); breach of contract against NRMH, InvestCo, Wilmington Development and Schoninger (claim 2); unjust enrichment against the three holding companies, Car Wash and Golden Marina (claim 7); gross mismanagement against Schoninger (claim 8); equitable accounting against NRMH, Wilmington Development and InvestCo (claim 9);[12] and a demand to exercise their statutory inspection rights pursuant to N.C.G.S. § 59-305 and § 59-106(b) against NRMH and Schoninger (claim 10).

A. Statute of Limitations

34. While they assert multiple grounds for dismissal, the statute of limitations is central to Defendants' argument with respect to the first seven claims. Consequently, the Court addresses that argument first.

35. A statute of limitations defense may properly be asserted in a Rule 12(b)(6) motion to dismiss if it appears on the face of the complaint that such a statute bars the claim. *Futures Group v. Brosnan*, 2022 NCBC LEXIS 150, at **10-11 (N.C. Super. Ct. Dec. 7, 2022) (citing *Horton v. Carolina Medicorp*, 344 N.C. 133, 136 (1996)); *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 65 (2005).

36. Claims for fraud, negligent misrepresentation, breach of fiduciary duty, breach of contract, conversion, and unjust enrichment are all subject to a three-year statute of limitations that begins when the claims accrue. *See BDM Invs. v. Lenhill, Inc.*, 2012 NCBC LEXIS 7, at **36 (N.C. Super Ct. Jan. 18, 2012) (statute of

[12] Plaintiffs concede that the ninth cause of action, ("Equitable Accountings"), should be dismissed. (Br. Supp. Opp. Defs.' Mot. Dismiss, ECF No. 108, ["Pls.' Resp. Br."], 6 n.2)

limitations for claims of fraud and negligent misrepresentation is three years) (citing N.C.G.S. § 1-52(5)); *Loray Mill Devs., LLC v. Camden Loray Mill Phase 1, LLC*, 2023 NCBC LEXIS 21, at **31 (N.C. Super. Ct. Feb. 7, 2023) (claims for breach of fiduciary duty and breach of contract each subject to a three-year statute of limitations) (citing N.C.G.S. §§ 1-52(1), (5), (9)); *Lau v. Constable*, 2019 NCBC LEXIS 71, at *21 (N.C. Super. Ct. Sept. 24, 2019) (statute of limitations for conversion claim is three years) (citing N.C.G.S. § 1-52(4)); *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 84 (2015) (statute of limitations for unjust enrichment claim is three years) (citing N.C.G.S. § 1-52(1)).

37. A claim generally accrues, and the statute of limitations begins to run, when the right to institute and maintain suit arises. *Ocean Hill Joint Venture v. N.C. Dep't of Env't, Health & Nat. Res.*, 333 N.C. 318, 323 (1993) (cleaned up). If the discovery rule applies, however, a claim will not accrue until the plaintiff knows or should know that his rights have been violated. *Chisum v. Campagna*, 376 N.C. 680, 701 (2021) (under the discovery rule, the limitations period begins at the time the plaintiff knew or should have known of the breach of contract).

38. Several of Plaintiffs' claims in this case are subject to the discovery rule, including their claims for fraud and negligent misrepresentation. *See, e.g., Christianbury Eye Ctr., P.A. v. Medflow, Inc.*, 2015 NCBC LEXIS 64, at ** 18 (N.C. Super. Ct. June 19, 2015), *aff'd*, 370 N.C. 1 (2017) ("The statute of limitations governing a fraud claim is three years and begins to run from the time the claimant should have discovered the facts constituting the fraud."); *Barger v. McCoy Hillard*

& Parks, 346 N.C. 650, 666 (1997) (a claim for negligent misrepresentation "does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation.").

39. Likewise, the right to sue for both breach of contract and breach of fiduciary duty arises when the plaintiff knew or should have known of the alleged breach. *See, e.g.*, *Chisum*, 376 N.C. at 701 ("As soon as the injury becomes apparent to the claimant or should reasonably become apparent, the cause of action [for breach of contract] is complete and the limitation period begins to run."); *Toomer*, 171 N.C. App. at 68-69 (discovery rule applies to claims for breach of fiduciary duty); *Trail Creek Invs. LLC v. Warren Oil Holding Co.*, 2023 NCBC LEXIS 70, at **25 (N.C. Super. Ct. May 9, 2023) (in action alleging fraud, negligent misrepresentation, breach of fiduciary duty, and conspiracy, the applicable statute of limitations "does not begin to run until the plaintiff has actual or constructive notice of the defendants' wrongful acts."); s*ee also Carlisle v. Keith*, 169 N.C. App. 674, 683 (2005) (" 'Discovery' is defined as an actual discovery or the time when the fraud should have been discovered in the exercise of due diligence.").

40. Ordinarily, determining when a plaintiff discovered or should have discovered that he or she has been wronged is a question of fact to be answered by a jury. See *Forbis v. Neal*, 361 N.C. 519, 524 (2007) (noting that "a jury must decide when fraud should have been discovered in the exercise of reasonable diligence under the circumstances.") However, "[a] motion to dismiss under Rule 12(b)(6) is an

appropriate method of determining whether the statutes of limitation bar plaintiff's claims if the bar is disclosed in the complaint." *Carlisle*, 169 N.C. App. at 681.

41. A plaintiff who ignores warning signs and fails to exercise reasonable diligence does so at their peril. "Where a person is aware of facts and circumstances which, in the exercise of due care, would enable him or her to learn of or discover the fraud, the fraud is discovered for the purposes of the statute of limitations." *Jennings v. Lindsey*, 69 N.C. App. 710, 715 (1984). The Court applies these principles below to each of the claims asserted.

B. Fraud, Negligent Misrepresentation and Violation of Chapter 78A (against NRMH, InvestCo, Wilmington Development, Schoninger, Ardalan, Samson Wu and Wang)

42. Limited liability limited partners are treated like corporate shareholders with respect to their standing to bring direct claims. *Energy Investors Fund, L.P. v. Metric Constructors, Inc.,* 351 N.C. 331, 336 (2000) (citing *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660 (1997)). A partner induced by fraud to join a partnership may maintain a direct action for that fraud. *Barger*, 346 N.C. at 654 ("A special duty therefore has been found when the wrongful actions of a party induced an individual to become a shareholder) (citing *Howell v. Fisher*, 49 N.C. App. 488 (1980)).

43. Here, Plaintiffs' allegations establish that they knew or should have known of the alleged misrepresentations well before they filed their lawsuit on 13 December 2021 (Chi) and 5 January 2023 (Feng). As a result, their fraud-based

claims against InvestCo, Ardalan, Samson Wu, and Wang are barred by the statute of limitations.

44. However, the doctrine of equitable estoppel tolls the statute of limitations on the fraud-based claims asserted against Schoninger and Wilmington Development. Similarly, the statute of limitations for a securities fraud claim pursuant to Chapter 78A is extended if the defendant engages in "any fraudulent or deceitful act that . . . induces the [plaintiff] to forgo or postpone commencing an action based upon the violation." N.C.G.S. § 78A-56(f). *See Merrell v. Smith*, 2023 NCBC LEXIS 3, at **50 (N.C. Super. Ct. Jan. 11, 2023) (observing that the concealment exception in § 78A-56(f) operates to toll the statute of limitations). Accordingly, for the reasons stated below, the fraud-based claims survive this motion on statute of limitations grounds. The victory is short-lived, however, because the claims do not meet the heightened pleading requirements of Rule 9(b).

1. The Discovery Rule

45. In paragraphs 89, 144, and 180 of the Chi Complaint and the companion paragraphs of the Feng Complaint, Plaintiffs list the misrepresentations that they claim induced them to invest.[13] Notable among them are that:

a. Plaintiffs' funds would be used for the development of a marina and hotel complex, including a restaurant, (¶ 89(f));

[13] Plaintiffs also allude to misrepresentations that they allege continued during the Investment Term, including misrepresentations that they claim occurred during visits to the site, but they provide no supporting facts. (Chi Compl. ¶ 147.)

b. Construction of the Project had already begun, construction on the Hotel would begin in the first half of 2012 and take a total of 20 months to complete, while construction on the Marina would begin in January 2012 and take a total of 13 months to complete, (¶ 89(i));

c. The Project was insured against delay in completion and, therefore, was guaranteed to be completed on time, (¶ 89(o));

d. The Project itself would achieve financial stabilization within 3 to 5 years of commencement. (¶ 89(p))

e. Each Plaintiff would receive a Preferred Return of 1% *per annum* on their investment capital during the Investment Term, (¶ 89(j));

f. Plaintiffs would be entitled to a 10% share of any profits generated by the Project as part of their membership in Defendant NRMH, (¶ 89(k));

g. At the expiration of the Investment Term, Plaintiffs would enjoy the right to the return of their investment capital, (¶ 89(l)); and

h. Each Plaintiff would receive equity rights to two marina slips and a hotel room in the event NRMH was unable to repay their investment capital, (¶ 89(h)).

46. Each Plaintiff executed the Subscription Agreement and the Partnership Agreement on a different date between 1 August 2011 and 19 February

2013. (Chi Compl. ¶ 91.) However, after the two one-year extensions, expiration of the Investment Term for the last-in-time Plaintiff was February 2018. (Chi Compl. ¶¶ 102, 109, Ex. K.)

47. Plaintiffs allege that they were guaranteed that a hotel would be built by the end of 2013 or early 2014 and that the marina would be completed by March 2013. (Chi Compl. ¶¶ 59-60.) But these things did not happen. Although the marina was finally built (on a smaller scale than allegedly represented), NRMH never broke ground on a hotel. (Chi Compl. ¶¶ 94, 130-35.)

48. Plaintiffs allege that they were told that they would receive financial rewards from their investment, including a return of 1% per annum during the Investment Term and a 10% share of any profits generated. They each allege that they were promised that the entire Project would financially stabilize within five (5) years of "commencement," and that when the Investment Term expired, they would get either their investment capital back from a repurchase of their partnership interests, or they would receive the deeds to two marina slips and a hotel room. They recognize that the Investment Term for the last-in-time Plaintiff expired in February 2018, but they complain that they have not yet received any of the promised financial rewards.

49. According to Plaintiffs' own allegations, then, it was evident that something was amiss with their investments by early 2014 at the latest, when no hotel had been built and while the marina existed, it was much smaller than promised. It was equally obvious that the financial rewards were not as promised as

each year passed with no payment of a 1% return and no payment of profits. The crowning glory was when the Investment Period finally expired for the last-in-time investor in February 2018, and Plaintiffs did not receive either a return of their investment capital or deeds to the promised two marina slips and a hotel room (in the still non-existent hotel).[14]

50. Nevertheless, the Chi Plaintiffs did not commence this action until December 2021, more than three years after they should have discovered the alleged misrepresentations. The Feng Plaintiffs started their action even later. Accordingly, the Court dismisses the fraud, negligent misrepresentation and Chapter 78A claims against InvestCo, Ardalan, Samson Wu, and Wang on statute of limitations grounds.

2. Equitable Tolling

51. As for NRMH, Wilmington Development and Schoninger, however, the result is different. Plaintiffs claim that certain communications from Schoninger, "lulled [them] into non-action." (Chi Compl. ¶ 112.) They allege that in January 2020, almost two years after the Investment Term expired in February 2018, Schoninger, writing as "Managing Partner" of NRMH, sent them a letter in which he describes the Project's dire financial state. Schoninger wrote: "[I]f we tried to liquidate the project today . . . I don't think we could get much more than 10 cents on the dollar. I know that is not what we want to hear[.]" He alluded to difficulties with USCIS's approval of the Project and then requested that Plaintiffs agree to extend the time

[14] Indeed, Defendants argue that Plaintiffs should have been aware from the start that something was wrong because Plaintiffs allege that the marketing materials differed from the language of the Subscription and Partnership Agreements in multiple ways. (Tr. 15-31.)

for the anticipated return of their investment another two years, at which point he promised that NRMH would deed each of them a marina slip and begin discussions about a payment plan for the rest (the "Extension Letter"). (Chi Compl. ¶¶ 106-107, Ex. J.) The Extension Letter states in relevant part:

> We feel we are approximately two years away from where we will be [financially] stable. It is for this reason; (sic) I am asking for an extension of two years before we can legitimately start the process of refunding our investors. . . . I believe if we can get at least 2 more years that will give me enough time to sell boat slips at a high value. . . . Once this project is stabilized, I will have the opportunity to give each investor a slip valued at over $250,000 USD and then start a payment plan for the remainder. The payment plan would be as follows: Within 24 months from 2/1/2020 we would make our best efforts to deed a slip membership to each investor, and then discuss a payment plan for the remaining funds to be paid out over the next 36 months.

(Chi Compl. Ex J.)

52. Plaintiffs further allege that in February 2021, Schoninger, again writing as manager of NRMH, issued a second letter (the "Update Letter") in which Samson Wu had "direct input," although the nature of that input is not alleged. In the Update Letter, Schoninger "continued to lay blame for the extreme delays with the Project on outside forces, specifically the COVID pandemic" and "continued to represent that the Project was on track to issue title to the Marina slips and commence discussions surrounding repayment of remaining capital contributions in 2022." (Chi Compl. ¶¶ 114-115, Ex. L.)

53. The Update Letter states in relevant part:

> The pandemic created a very difficult year for businesses with the mandatory shut-downs. . . . With travel restrictions, bans, and social distancing requirements, we lost an entire season of business. . . . Even as I write this letter – the Governor has not fully opened the state. . . . We know we are not alone with these issues, but I wanted you to know what has been specifically

> impacting the projects. Needless to say, our restaurant hopes to recover from these losses and that life will get back to normal sometime this year. The same effects were also felt at the marina. . . . With such a dense population near our restaurant and marina, we imagine that once the Government allows everything to open, our businesses will make up for the losses and challenges we faced (and are continuing to face) throughout the COVID pandemic.
>
> . . . [W]e are confident that NRMH is on track towards achieving our objectives we mentioned in our letter to you in 2020. We aim to deed a slip membership to each investor at our marina and produce a payment plan to begin reimbursing our investors by end of first quarter 2022. Over the following 36 months (after Q1 2022), our goal is to reimburse each investor with their original amount of $500,000 through the sale of slips and the growth of assets.
>
> . . . During this time, we are working on other options. We have ordered a Broker's Price Opinion (BPO) letter from a realtor (expected in about 4-5 weeks) to serve as an appraisal of the property values that will include the marina, the restaurant (Marina Grill), and the future hotel site. This BPO will allow us to better understand the possibility of a sale or the ability to refinance the assets. After paying off the debt, the remaining equity would be used to settle with investors. Another option is liquidating other assets at a discount in order to reach these goals. These options may allow us to settle at an earlier date; maybe not at 100 cents on the dollar.
>
> . . . . Next year at this time, I am looking forward to bringing you the very happy news of your upcoming first scheduled payment date.
>
> (Chi Compl. Ex. L.)[15]

54. In the face of an otherwise time-barred claim, "[e]quitable estoppel may be invoked, in a proper case, to bar a defendant from relying upon the statute of

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[15] The Chi Complaint also alleges that Plaintiff Bian Yide visited the Project site in late April 2019, which was followed by a letter from Schoninger as "Member/Manager" of NRMH dated 23 May 2019. In the May 2019 letter, Schoninger "reiterated the promised return of investment capital but asked for more time in which to do so." (Chi Compl. ¶101, Ex. I.)

Other allegations regarding the communications that some Defendants had with some Plaintiffs after February 2018 are less detailed. Plaintiffs allege, for example, that in December 2020, "Defendant Wu again reached out to Defendant Ardalan and Defendant Schoninger to report that he 'communicated with NRMH Investors regarding their investment repayment.' " The content of Samson Wu's communications with the investors is not pled. (Chi Compl. ¶ 111.)

limitations." *Glynne v. Wilson Med. Ctr.*, 236 N.C. App. 42, 53 (2014). It arises "when a party has been induced by another's acts to believe that certain facts exist, and that party rightfully relies and acts on that belief to his [or her] detriment." *Id.* (cleaned up).

55. The purpose of equitable estoppel is to prevent a party "from using a statute of limitations as a sword, so as to unjustly benefit from his own conduct which induced a plaintiff to delay filing suit." *Friedland v. Gales*, 131 N.C. App. 802, 806 (1998).

56. To plead equitable estoppel, Plaintiffs must allege: "(1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts." *Robinson v. Bridgestone/Firestone N.A. Tire, LLC*, 209 N.C. App. 310, 319 (2011). In addition, Plaintiffs must show they lacked knowledge and the means of ascertaining the real facts and rightfully relied on Defendants' conduct to their detriment. *Id.*; *Johnson Neurological Clinic, Inc. v. Kirkman*, 121 N.C. App. 326, 332 (1996).

57. Facts supporting equitable estoppel must be pled with particularity and demonstrate that Defendants' representations delayed Plaintiffs from filing suit. *See Duke Univ. v. St. Paul Mercury Ins. Co.*, 95 N.C. App. 663, 673 (1989); *Rivenbark v. Moore*, 57 N.C. App. 339, 342 (1982); *see also* N.C. R. Civ. P. 8(c). Further, while "[m]ere negotiations with a possible settlement unsuccessfully accomplished is not that type of conduct designed to lull the claimant into a false

sense of security[,]" *Duke Univ. v. St. Paul*, 95 N.C. App. at 673, "[i]f the debtor makes representations which mislead the creditor, who acts upon them in good faith, to the extent that he fails to commence his action in time, estoppel may arise. The tolling of the statute may arise from the honest but entirely erroneous expression of opinion as to some significant legal fact." *Duke Univ. v. Stainback*, 320 N.C. 337, 341 (1987).

58. In this case, viewing the allegations in the light most favorable to Plaintiffs—as the Court must at this stage, equitable estoppel has been adequately pled with respect to the fraud and negligent misrepresentation claims against Schoninger and Wilmington Development. A trier of fact could find that one or both letters written by Schoninger in his role as managing member of Wilmington Development, the General Partner of NRMH, contained misrepresentations that misled Plaintiffs and resulted in the delayed filing of this action.

59. Similarly, Chapter 78A affords a plaintiff who has been duped additional time to bring a claim for securities fraud. The statute of limitations is three years after discovery of the facts constituting the violation (but in any case no later than five years after the sale or contract of sale), "except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful." N.C.G.S. § 78A-56(f).

60. Plaintiffs adequately allege that they were induced to forgo or postpone commencing their action against NRMH, Wilmington Development and Schoninger as a result of the January 2020 Extension Letter and the subsequent Update Letter. Consequently, the statute of limitations does not bar their Chapter 78A claim against these defendants.

61. As for Samson Wu, however, the Court concludes that Plaintiffs' general allegations of his involvement with the February 2021 letter and of his other communications with Plaintiffs are not pled with sufficiently particularity to forestall the running of the statute of limitations on the fraud, negligent misrepresentation and Chapter 78A claims.

3. Rule 9(b) Pleading Requirements

62. In addition to the statute of limitations, Defendants move to dismiss any of Plaintiffs' fraud-based claims that survive the statute of limitations because they do not meet the heightened pleading requirements of Rule 9(b). The Court agrees.

63. Rule 9 requires a plaintiff who pleads fraud to identify "the time, place, and content of the fraudulent representation, identity of the person making the representation and what was obtained as a result of the fraudulent act or representations.' " *Terry v. Terry*, 302 N.C. 77, 85 (1981)). *See Haigh v. Superior Ins. Mgmt. Grp.*, 2017 NCBC LEXIS 100, at * 27 (N.C. Super. Ct. Oct. 24, 2017) (applying Rule 9(b) pleading requirements to statutory claims for securities fraud); *Bucci v. Burns*, 2017 NCBC LEXIS 83, at *11 (N.C. Super. Ct. Sept. 14, 2017) (same). Claims for negligent misrepresentation must meet this same demanding standard. *See BDM*

Invs. v. Lenhil, Inc., 2012 NCBC LEXIS 7, at *56 (N.C. Super. Ct. Jan. 18, 2012) (applying Rule 9(b) to negligent misrepresentation claim).

64. To the extent the fraud claim is omission-based, Plaintiffs must plead: (1) the relationship between plaintiff and defendant giving rise to the duty to speak; (2) the event that triggered the duty to speak or the general time period over which the relationship arose and the fraud occurred; (3) the general content of the information that was withheld and the reason for its materiality; (4) the identity of those under a duty who failed to make such disclosures; (5) what the defendant gained from withholding the information; (6) why the plaintiff's reliance on the omission was reasonable and detrimental; and (7) the damages the fraud caused the plaintiff. *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at *9 (N.C. Super. Ct. June 18, 2007).

65. Both the Chi and the Feng Complaints fail to meet the particularity requirements of Rule 9. Violating a fundamental rule, Plaintiffs attempt to state claims for fraud and misrepresentation against many of the defendants jointly as a group, rather than specifying the misrepresentations made by each Defendant. For example, in paragraph 144 of the Chi Complaint Plaintiffs allege that multiple misrepresentations were made by seven different defendants without any indication of who made which statements, when, or where they were made. Further, in paragraph 91 of the same pleading, the Chi Plaintiffs allege that at seminars and in marketing materials regarding the investment Defendants made misrepresentations

and omitted information, but they do not elaborate, nor do they attribute any statement or omission to any particular defendant.

66. The Plaintiffs are also grouped together. For example, Plaintiffs allege that they received different versions of the marketing materials at different times, but they do not specify which Plaintiffs were misled by which statements in which marketing materials. (*See, e.g.*, Chi Compl. ¶¶ 73, 78, 85.)

67. Although the Chi Complaint is lengthy, the fraud counts are not the place to try to shorten it. Plaintiffs can ill-afford to plead fraud or misrepresentation in a conclusory fashion. *See, e.g., Flanders/Precisionaire Corp. v. Bank of N.Y Mellon Trust Co.,* 2015 NCBC LEXIS 36, at *30 (N.C. Super. Ct. Apr. 7, 2015) (dismissing fraud claim when Plaintiff "has failed to allege the circumstances constituting the alleged fraud with sufficient particularity—most significantly by failing to identify the specific individuals . . . as well as when and how the alleged fraud occurred."); *Julian v. Wells Fargo Bank, N.A.*, 2012 NCBC LEXIS 32, at ** 20 (N.C. Super. Ct. May 22, 2012) (complaint that does not allege the identity of an individual who made the deceptive or misleading representation does not meet the particularity requirements of Rule 9(b)); *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006) (dismissing fraud claim where plaintiff failed to identify which representative of defendant gave plaintiff false information or where and when plaintiff received it); *Stec v. Fuzion Inv. Capital, LLC*, 2012 NCBC LEXIS 24, at **38 (N.C. Super. Ct. Apr. 30, 2012) (dismissing fraud claim because plaintiff failed to identify who engaged in actionable conduct and when and where conduct occurred).

68. Accordingly, to the extent Plaintiffs' fraud-based claims (as to NRMH, Wilmington Development and Schoninger) are not dismissed on statute of limitations grounds as a result of equitable tolling, the claims are nevertheless dismissed for failure to satisfy Rule 9(b)'s heightened pleading requirements.[16]

4. Dismissal with Prejudice

69. Furthermore, since December 2021, Plaintiffs have attempted to state their claims on four separate occasions. (Chi ECF Nos. 3, 26, 88; Feng ECF No. 3.) At a hearing on then–Defendant Gongzhan Wu's Motion to Dismiss held 16 May 2022, the Court observed that North Carolina's standards for pleading fraud are very particular and addressed with the parties the heightened pleading requirements of Rule 9: "[E]ach Plaintiff needs to tell me which Defendant made a misrepresentation or statement of fraud on what date, to what effect. . . . I'm not sure as I sit here that I've got that level of specificity[.]" (16 May 2022 Tr. 31:22-32:7, Chi ECF. No. 134.)

70. Plaintiffs later filed both the Chi Complaint and the Feng Complaint that are the subject of this Motion, and in each instance, they failed to heed the Court's comments.

71. Rule 15 provides that "leave [to amend] shall be freely given when justice so requires." N.C.G.S. § 1A-1, R. 15(a). Even so, "the right to amend pursuant to Rule 15 is not unfettered." *Howard v. IOMAXIS, LLC*, 2021 NCBC LEXIS 116, at

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[16] Plaintiffs' allegations also undercut their ability to prove reasonable reliance, a necessary element of their fraud and negligent misrepresentation claims. *See, e.g., Boone Ford, Inc. v. IME Scheduler, Inc.*, 262 N.C. App. 169, 175-76, 822 S.E.2d 95 (2018) (holding that where a representation is controverted by the express terms of a contract, reliance unjustified as a matter of law).

*17 (N.C. Super. Ct. Dec. 22, 2021) (citing *Vaughan v. Mashburn*, 371 N.C. 428, 433 (2018)). Reasons to deny a motion to amend include "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies, undue prejudice and futility of the amendment." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 89 (2008) (quoting *Nationsbank of N.C., N.A. v. Baines*, 116 N.C. App. 263, 268 (1994)).

72. Over the course of more than 19 months of litigation, Plaintiffs here have repeatedly failed to cure deficiencies when pleading their fraud–based claims. The Court, in its discretion, determines that Plaintiffs have been afforded sufficient opportunities to do so. Accordingly, Plaintiffs' claims for fraud, negligent misrepresentation and violation of Chapter 78A are dismissed with prejudice. *See First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013) ("The decision to dismiss an action with or without prejudice is in the discretion of the trial court[.]").

C. Conversion (against NRMH, InvestCo, Wilmington Development, Schoninger, Ardalan, Samson Wu, and Wang)

73. Conversion is the "unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *Peed v. Burleson's, Inc.,* 244 N.C. 437, 439 (1956) (citation and quotation marks omitted).

74. A claim for conversion of partnership property is an exception to the general rule that one partner may not maintain an action against another partner. *Pugh v. Newbern*, 193 N.C. 258, 261 (1927); *Barnes v. Perry*, 2018 NCBC LEXIS 262,

at *22-24 (N.C. Super. Ct. July 30, 2018); *Gillespie v. Majestic Transp., Inc.*, 2016 NCBC LEXIS 69, at * 16-17 (N.C. Super. Ct. Sept. 9, 2016).

75. Again, however, the statute of limitations is the impediment. Conversion claims are subject to a three-year limitation period. *See, e.g., Stratton v. Royal Bank of Can.*, 211 N.C. App. 78 (2011) (citing N.C.G.S. § 1-52(4)). The claim accrues "when the unauthorized assumption and exercise of ownership occurs—not when the plaintiff discovers the conversion." *Id.* at 83 (citing *White v. Consol. Planning Inc.*, 166 N.C. App. 283, 309-11 (2004) (concluding statute of limitations runs from the date of conversion, rather than discovery)).

76. Although it is true that "[w]here there has been no wrongful taking or disposal of the goods, and the defendant has merely come rightfully into possession and then refused to surrender them, demand and refusal are necessary to the existence of the tort," *Id.* at 310–11, the rule has no application here. In this case, Plaintiffs' have alleged that they were fraudulently induced to hand over their funds to Defendants who, from the beginning, never intended to honor their alleged promises. As in *White*, the allegations are that the wrongful taking and Defendants' possession of the funds were simultaneous. Consequently, Defendants exercised unlawful dominion over the funds from the start, and no demand and refusal is necessary to start the statute of limitations. *Id.* at 311. *See In re Parker*, 2015 Bankr. LEXIS 2663, at * 50 (Bankr. E.D.N.C Aug. 10, 2015) (where claim for conversion is dependent upon claim for fraud, defendant would not have had lawful

possession, and demand and refusal was not necessary to trigger the statute of limitations clock).

77. If, alternatively, Plaintiffs contend that their investment funds were transferred lawfully at the start but were later converted when the money was not returned at the end of the Investment Period as allegedly promised, the law does not permit them to delay making a demand for return of the money and then benefit from that delay. In those circumstances, the time that the "unauthorized assumption and exercise of the right of ownership" to the money began is clear. The statute of limitations begins to run at the time of the default, and a demand and refusal is unnecessary. *Marzec v. Nye*, 203 N.C. App. 88, 96 (2010) (The statute of limitations for a conversion claim "generally begins running at the time a defendant asserts dominion over the property."); *Furman v. Timberlake,* 93 N.C. 66, 68-69 (1885) ("[I]f [defendant] is shown to have converted [money], a demand is unnecessary, and the statute begins to run from the time of the conversion.").[17]

78. Accordingly, with respect to Defendants NRMH, InvestCo, Ardalan, Samson Wu, and Wang, the Court dismisses the conversion claim (Fifth Claim for

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[17] The pleadings state that only nine of the nineteen Plaintiffs demanded the return of their investment. (Chi Complaint ¶ 108-110.) Those nine Plaintiffs sent an "Omnibus Demand" letter via email to NRMH, InvestCo and Schoninger on 16 April 2020. (Chi Compl. Ex. K.) They gave these Defendants until 15 May 2020 to return their money (Chi Compl. 110), but they allege that there was no response from these Defendants until Schoninger sent a 26 February 2021 Update Letter requesting more time, (Chi Compl. 114, Ex. L), and that their money was not returned.

However, Plaintiffs also allege that they recognized in the Omnibus Demand that the Investment Term had expired "as of 2018 and that the relevant agreements provide that at the expiration of the Investment Term, the investors' capital contribution of $500,000 was to be repaid with fiat currency or real estate equity." (Chi Compl. ¶ 109.) Thus, Plaintiffs admit that they were aware of the default "as of 2018."

Relief) on statute of limitations grounds. As for Defendants Schoninger and Wilmington Development, however, Plaintiffs have sufficiently pled that the statute should be tolled, and the conversion claim against Schoninger and Wilmington Development survives this motion.

D. Breach of Fiduciary Duty (against NRMH, InvestCo, Wilmington Development, Schoninger, Ardalan, Samson Wu, and Wang) and Gross Mismanagement (against Schoninger)

79. Plaintiffs focus their argument on the existence of a fiduciary duty, rather than on their standing to bring this direct claim. Therefore, the Court addresses their argument first, before turning to the question of standing.

80. Other than the *de jure* fiduciary duty that exists between NRMH's general partner, Wilmington Development, and its limited partners, the facts as pled do not give rise to any other fiduciary duty. Plaintiffs concede that no other *de jure* fiduciary duty exists, but they argue that the facts support a *de facto* one. (Pls.' Resp. Br. 20). The Court disagrees.

81. It is well-established that "[t]he standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Lockerman v. S. River Elec. Mbrshp. Corp.*, 250 N.C. App. 631, 636 (2016) (citation and internal quotation marks omitted).

82. Plaintiffs argue that the nature of the immigration industry in China is such that they were forced to place their trust in an immigration advisor, who in turn

relied on one or more of the NRMH Defendants to provide accurate information. (Pls.' Resp. Br. 21). Therefore, they contend, the NRMH Defendants "held all the cards related to the progress, success, and life of the EB-5 Project[,]" (Pls.' Resp. Br. 21.)

83. However, Plaintiffs, all accredited investors, were far from helpless. By signing the Subscription Agreement, they each warranted that, prior to investing, all information that they had requested had been made available to them, that they were aware that the investment was "highly speculative and subject to substantial risks," but that they were "capable of bearing the high degree of economic risk . . . including but not limited to, the possibility of the complete loss of all contributed capital." (Subscription Agreement § II(H, J).) They warranted that they had been given access to the books and records of the Partnership "necessary to verify the accuracy of any information provided." (Subscription Agreement § II(L).) They were repeatedly warned to consult their own professional advisors about the risks of investing in NRMH. (Subscription Agreement, § III) ("EACH INVESTOR. . . SHOULD CONSULT HIS OR HER OWN LEGAL, TAX AND FINANCIAL ADVISORS").

84. Moreover, language was not a barrier given that each Plaintiff warranted that he or she either understood English or had the Subscription Agreement translated by a trusted advisor into a language that the plaintiff understood. (Subscription Agreement § II(M)). In short, the Plaintiffs had cards to play. No *de facto* fiduciary duty arose on these facts. The fact that financial transactions were involved, standing alone, is not enough. *Cf. Global Promotions Group, Inc. v. Danas Inc.*, 2012 NCBC LEXIS 40, at **13 (N.C. Super Ct. June 22,

2012) (no fiduciary duty exists between a bank and its customers despite the fact that banks exercise some degree of custodial control over customer accounts); *Bradshaw v. Maiden*, 2015 NCBC LEXIS 80, at ** 34-37 (N.C. Super. Ct. Aug. 10, 2015) (no fiduciary duty found despite numerous conclusory allegations in the complaint because controlling documents attached to or referenced in the complaint did not support the assertion that defendant had domination and influence over plaintiffs); *Sec. Nat'l Bank of Greensboro v. Educators Mut. Life Ins. Co.,* 265 N.C. 86, 95 (1965) ("There was no fiduciary relationship; the relation was that of debtor and creditor."); *Branch Banking & Trust Co. v. Thompson,* 107 N.C. App. 53, 61 (1992) (The "mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship."); *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 368 (2014) (same). Accordingly, Plaintiffs' claim for breach of fiduciary duty against Defendants NRMH, InvestCo, Ardalan, Samson Wu, Wang, and Schoninger is dismissed.

85. On the other hand, under the North Carolina Uniform Limited Partnership Act, a general partner (in this instance Wilmington Development) owes limited partners fiduciary duties as a matter of law. N.C.G.S. § 59-403. *See also, Casey v. Grantham,* 239 N.C. 121, 124-25 (1954) ("It is elementary that the relationship of partners is fiduciary[.]"). The question here is whether those fiduciary duties give the limited partner standing to bring a direct claim.

86. "It is settled law in this State that one partner may not sue in his own name, and for his benefit, upon a cause of action in favor of a partnership." *Godwin v. Vinson*, 251 N.C. 326, 327 (1959). "The rule includes a cause of action against other

partners in the partnership." *Id*. "The only two exceptions to this rule are: (1) a plaintiff alleges an injury 'separate and distinct' to himself, or (2) the injuries arise out of a special duty[.]" *Energy Invs.*, 351 N.C. at 337.

87. In *Gaskin v. J.S. Procter Co.*, LLC, 196 N.C. App. 447 (2009), our Court of Appeals addressed the *Barger* exceptions that afford limited partners standing to sue general partners (and the manager of the limited partnership) for harm to the partnership. After determining that the only two exceptions to the general rule that a partner may not sue directly are the "special duty" and "distinct injury" exceptions, the court concluded that neither exception was met on the facts of that case. *Gaskin*, 196 N.C. App. at 455. The court observed that the complaint alleged that the wrongs committed put the partnership as a whole in "dire financial condition." It further recognized that allowing claims by some partners and not others, equally impacted, would create "a danger of multiple lawsuits." *Id*. In so holding, the court implicitly rejected an argument that the fiduciary duty that existed between the partners in the limited partnership—as opposed to the general partner's duty to the limited partnership itself—had been breached.

88. The same observations are true here. Plaintiffs' allegations are that Wilmington Development, acting through Schoninger, breached its fiduciary duties to the partnership as a whole. Moreover, there is no "distinct injury"[18] alleged that

[18] The *Gaskin* Court observed that "the question is not whether the limited partner plaintiff is in a less favorable position than the general partner, but whether the plaintiff is in a less favorable position when compared to all other limited partners." 196 N.C. App. at 457 (cleaned up).

would permit a direct claim by these Plaintiffs against Wilmington Development.[19] Therefore, Plaintiffs' breach of fiduciary duty claim against Wilmington Development is dismissed.

89. Relatedly, in a separate claim, Plaintiffs allege that Schoninger is guilty of "gross mismanagement" due to alleged violation of his "statutory obligations" as "manager, director, and controlling officer" of NRMH, its general partner, Wilmington Development, and InvestCo. (Chi Compl. ¶ 190.) However, Plaintiffs do not reference the statute(s) that they allege gives rise to Schoninger's obligations.

90. Instead, Plaintiffs claim that Schoninger "owns, partially or wholly, directly or indirectly, and manages each of these entities." (Chi Compl. ¶ 10.) They allege that Schoninger "has an obligation to discharge his managerial duties in good faith, with the care an ordinary prudent person in a like position would exercise in similar circumstances, and in a manner that he reasonably believes to be in their best interests." (Chi Compl. ¶ 190.)

91. A claim for gross mismanagement of an entity is quintessentially a derivative claim. *Barger*, 346 N.C. at 654 ("The only injury plaintiffs as shareholders allege is the diminution or destruction of the value of their shares as the result of defendants' negligent or fraudulent misrepresentations of TFH's financial status. This is precisely the injury suffered by the corporation itself."). But, as to Wilmington Development and InvestCo, both LLCs, there is no allegation that any Plaintiff is a

[19] Moreover, when, as here, the general partner is an LLC, North Carolina law does not, as a matter of course, extend the general partner's fiduciary duty to its manager. *Cf. Sturm v. Goss*, 90 N.C. App. 326, 330 (1988) (declining to extend fiduciary duty to director of a corporate general partner in his individual capacity.)

member of either company with standing to assert such a claim. *Kane v. Moore*, 2015 NCBC LEXIS 157, at *13 (N.C. Super. Ct. Nov. 26, 2018) ("a plaintiff purporting to bring derivative claims on behalf of a North Carolina LLC must be a member of that LLC at the time the act or omission for which the proceeding is brought occurred[.]") (internal quotations omitted).

92. As for NRMH, although the North Carolina Uniform Limited Partnership Act provides for derivative actions, *see* N.C.G.S. § 59-1001, these Plaintiffs have not pled one. Accordingly, Plaintiffs' claim for "gross mismanagement" against Schoninger is dismissed.

E. Breach of Contract (against NRMH, InvestCo, Wilmington Development, and Schoninger)

93. To state a claim for breach of contract, Plaintiffs need only allege "the existence of a valid contract and a breach of the terms therein." *Moss v. N.C. Dep't of State Treasurer, Ret. Sys. Dov.*, 282 N.C. App. 505, 509 (2022).

94. Curiously, Plaintiffs allege that they contracted with NRMH, InvestCo, Wilmington Development, and Schoninger "upon the execution of the Subscriptions." (Chi Compl. ¶ 151.) The exhibits incorporated in their pleadings reflect, however, that Plaintiffs entered into the Partnership Agreement (and the accompanying Subscription Agreement) only with Wilmington Development, the general partner of NRMH, to become limited partners of NRMH. Neither InvestCo nor Schoninger, individually, was a party to the Partnership Agreement or the Subscription Agreement and, therefore, neither of them can be liable for breach of these

agreements. Accordingly, claims for breach of contract attempted against InvestCo and against Schoninger, individually, are dismissed.[20]

95. As for Wilmington Development, Plaintiffs allege that it breached the Partnership and Subscription Agreements by: (a) "obtaining and transferring title to the Project Property . . . to entities other than NRMH; (b) failing to remit the 1% per annum Preferred Return for the duration of the Investment Term; (c) failing to provide any partial repayment of Plaintiffs' capital contribution . . . by executing the Quit Claim deeds; (d) failing to provide any return of investment capital to Plaintiffs at the expiration of the Investment Term, and (e) successfully operating the Marina for more than six (6) years without remitting the 10% *pro rata* allocation of profits to Plaintiffs, as limited partners of NRMH." (Chi Compl. ¶ 156).

96. However, with the possible exception of the first, none of the promises alleged above is included in either the Partnership Agreement or the Subscription Agreement. Plaintiffs' claim depends on whether promises made in the offering circular and other marketing materials were "incorporated by reference" in the contract but were not honored. (Chi Compl. ¶ 152)

97. The answer is no. The offering circular clearly provides that only the terms in the Partnership Agreement and Subscription Agreement control:

THE TERMS AND CONDITIONS OF THIS OFFERING . . . AND THE RIGHTS AND LIABILITIES OF THE PARTNERSHIP, THE MANAGING GENERAL PARTNER AND THE LIMITED PARTNERS ARE GOVERNED BY THE [PARTNERSHIP]

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[20] To the extent Plaintiffs attempt to allege a claim against their own partnership (NRMH) for breach of the agreements that formed it, the allegations do not state a claim. Nor do Plaintiffs allege a derivative action on behalf of NRMH. Further, Plaintiffs do not include veil-piercing allegations to consider a claim against Schoninger on that basis. *See, e.g., Consoli v. Global Supply & Logistics, Inc.,* 2014 N.C. App. 560 (2011).

AGREEMENT AND THE SUBSCRIPTION AGREEMENT BETWEEN EACH LIMITED PARTNER AND THE PARTNERSHIP. . . AND THE DESCRIPTION OF ANY OF SUCH MATTERS IN THE TEXT OF THIS OFFERING CIRCULAR IS SUBJECT TO AND QUALIFIED IN ITS ENTIRETY BY REFERENCE TO [THE PARTNERSHIP AGREEMENT AND THE SUBSCRIPTION AGREEMENT].

(Offering Circular iv, emphasis added.) In addition, the Subscription Agreement contains a merger clause specifying that the Subscription Agreement "constitutes the entire agreement among the parties hereto with respect to the subject matter hereof." (Chi Compl. Ex. F at 81, ¶ 1.) Therefore, extraneous representations in the offering circular—or in any other marketing materials Plaintiffs may have received—do not constitute contract terms.

98. In addition, Plaintiffs claim is contradicted by their own allegations. For example, Plaintiffs claim that NRMH breached the contract by "successfully operating the Marina for more than six (6) years without remitting the 10% *pro rata* allocation of profits to Plaintiffs, as limited partners of NRMH." At the same time, however, Plaintiffs allege that the marina is currently operating with "only around 80 concrete slips," (Chi. Compl. ¶ 129), when the Project was "supposed to involve the construction of a 204-slip marina[.]" (Chi Compl ¶ 34.) Moreover, the Project was to include a 136-room luxury hotel with at least two restaurants. No hotel exists[21] and only one restaurant is operating on the property. (Chi Compl. ¶¶ 34, 129, 131.) There is no allegation in the Chi or Feng Complaints even suggesting that the Project has been profitable.

[21] In fact, Plaintiffs allege that NRMH sold the real property that was to be the site of the hotel to Defendant Car Wash. (Chi Compl. ¶ 133.)

99. To the contrary, Plaintiffs allege that for tax years 2014-19, NRMH "provided K-1 forms to each investor which, with the exception of 2014, documented a consistent annual loss allocable to each investor of approximately $1,500." (Chi Compl ¶ 98.) There have been no distributions. Indeed, the Subscription Agreement's warning that "there is no assurance that there will be Distributable Cash for distribution to investors" has come to pass. (Subscription Agreement § III(F).)

100. In short, the Court finds no allegation in the lengthy Chi and Feng Complaints or their exhibits to support Plaintiffs' assertion that distributions were to be based on the success of the marina alone, or even if so, that the marina has generated a profit. Accordingly, Plaintiffs' claim for breach of contract on this basis is dismissed.

101. Notable among the other promises that Plaintiffs allege were not honored are two representations about investment returns. Plaintiffs allege that they were promised that: (1) they would receive a 1% per annum Preferred Return for the duration of the Investment Term; and (2) at the conclusion of the Investment Term (a maximum of five years) they would receive a return of their investment capital.

102. Defendants do not contest the fact that Plaintiffs have not received either a preferred return or the return of their investment capital. Rather, they respond that statements made in marketing materials are not contract terms, and

the Subscription Agreement itself, which is peppered with warnings about the risk of their investment, provides no guaranteed return or repurchase.

103. But for the odd last page that is included with the Subscription Agreement as Exhibit F to the Chi Complaint, the Court agrees that neither the Partnership Agreement nor the Subscription Agreement contains any promise of a guaranteed return at any point in time. To the contrary, the Subscription Agreement expressly outlines the risks associated with an investment in NRMH, including the "uncertainty of cash flow to meet fixed obligations" and the potential that "the Partnership may have to dispose of the Project on disadvantageous terms in order to raise needed funds." (*See* Subscription Agreement § III(C).)

104. However, Exhibit F to the Chi Complaint, which is referenced as the Subscription Agreement, includes as its final page an unsigned document captioned, "Agreement on Investment Period." The document is in a different font, does not bear the same footer, and is numbered out of sequence from the balance of the pages in the exhibit.

105. The Agreement on Investment Period defines the investment term as commencing on the day NRMH has use of the investors' funds and extending a maximum of five years. It then states: "NRMH will repurchase the limited partnership units on a (FIFO) first in first out manor (sic)." The origin and purpose of this document are mysteries that cannot be satisfied at this stage. Given Rule 12(b)(6)'s liberal standard, the Court is constrained to conclude

that Plaintiffs have alleged that the Subscription Agreement includes a promise to repurchase partnership units.

106. The applicable statute of limitations for a breach of contract claim is three years from the date it accrues. N.C.G.S. § 1-52(1). "A claim for breach of contract accrues when the plaintiff knew or should have known that the contract had been breached[.]" *Chisum*, 376 N.C. at 720; *accord Christenbury Eye Ctr., P.A.*, 370 N.C. at 5-6 ("We have long recognized that a party must initiate an action within a certain statutorily prescribed period after discovering its injury to avoid dismissal of a claim." (emphasis added)); *Black v. Littlejohn*, 312 N.C. 626, 639 (1985) ("a statute of limitations should not begin running against plaintiff until plaintiff has knowledge that a wrong has been inflicted upon him.").

107. As stated above, Plaintiffs' allegations establish that they knew or should have known when they were not reimbursed in February 2018 that Wilmington Development had breached any promise to repurchase their partnership interests that might have existed in the Subscription Agreement. However, Plaintiffs have also sufficiently alleged that, as to Wilmington Development, the statute of limitations should be equitably tolled. Accordingly, their breach of contract claim against Wilmington Development on this basis may proceed.

108. Finally, Plaintiffs allege that Wilmington Development breached the Subscription Agreement by "obtaining and transferring title to the Project Property . . . to entities other than NRMH." (Chi Compl. ¶ 156.) They contend that NRMH did not acquire title to the Project Property until "sometime in late 2014," and that in

November 2015, the title to a portion of the property (10 Harnett Street) was transferred to City Marina, which later transferred it to NRMH Holdings I. (Chi Compl. ¶¶ 123-124.)

109. Plaintiffs also allege that in July 2016, NRMH transferred another portion of the Project Property (1 Hanover Street) to NRMH Holdings 3, which sold the property to Car Wash in March 2019. (Chi Compl. ¶ 125.)[22]

110. As a consequence of these transfers, which they allege breached "Section 4" of the Subscription Agreement,[23] Plaintiffs allege that NRMH does not currently hold title to the Project Property, and therefore the value of their limited partnership interests has been "diluted." (Chi Compl. ¶ 126.)

111. Plaintiffs allege that it was not until after a group of them sent a demand letter in April 2020 that they discovered that the real property they were promised would not be sold during the pendency of the USCIS process had, in fact, been transferred to third parties. (Chi Comp. ¶¶ 117, 121.) Therefore, this claim may also proceed.

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[22] These allegations appear to contradict Plaintiffs' later allegation that the transfer(s) occurred four years prior to the time the 26 February 2021 "Update Letter" on the status of the Project was sent to investors. (Chi Comp. ¶ 121.)

[23] The reference to Section 4 is incorrect. At Section I(D)(4), the Subscription Agreement contains an agreement by NRMH not to sell the property the Plaintiffs relied upon for EB-5 visa approval until removal of their conditional permanent resident status. The Partnership Agreement also limits the authority of the Manager (Schoninger) from entering into "agreements with Affiliates of the General Partner for the sale, lease, exchange, or disposition of all or any portion of the Property" at Section 7.11(e).

112. The Subscription Agreement limits NRMH's ability to sell the property on which the investor relies "for EB-5 visa approval until removal of the [investor's] conditional permanent residence status." (Subscription Agreement § I(D)(4)).

113. Although Plaintiffs do not specifically allege when each of them successfully removed the conditions on their permanent resident status, a January 2020 letter from Schoninger to Plaintiffs, referenced as Exhibit J in the Chi Complaint, includes his congratulations to some Plaintiffs: "Regarding the USCIS, it looks like we are finally getting our early investors through the I-829 process!"[24] Given this statement in January 2020, the Court determines that Plaintiffs have alleged a breach of the Subscription Agreement with respect to any sale of the Project Property that occurred prior to removal of conditions on Plaintiffs' permanent resident status years later. This contract claim may also proceed.

F. Unjust Enrichment (against NRMH Holdings 1, NRMH Holdings 2, NRMH Holdings 3, Golden Marina, and Car Wash)

114. Plaintiffs' Seventh Claim for Relief is asserted only against NRMH Holdings 1, NRMH Holdings 2, NRMH Holdings 3, Golden Marina, and Car Wash, none of which is alleged to have been a partner in NRMH or a party to the Subscription Agreement.

115. To state a claim for unjust enrichment, Plaintiffs must allege "that [they] conferred a benefit on another party, that the other party consciously accepted

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[24] The "I-829 process" is a reference to the USCIS form investors use to petition for removal of conditions on their permanent resident status. *See* www.uscis.gov/i-829 (last visited 24 July 2023).

the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330 (2002); *see also Booe v. Shadrick*, 322 N.C. 567, 570 (1988).

116. Plaintiffs allege that they provided investment capital to NRMH that was then used by the three holding companies, Golden Marina, and Car Wash "to secure title to the Project Property in their own names at various times for their own benefit." (Chi Compl. ¶ 184.)

117. These allegations do not state a claim. Plaintiffs allege that they invested in NRMH, not in these other entities. Instead, they allege that NRMH improperly transferred assets from the partnership to the three holding companies, Golden Marina, and Car Wash. Nowhere do they allege that they agreed, at any point in time, for their money to be transferred from NRMH to these entities with the expectation that they would receive a benefit from them. Plaintiffs' allegations do not fit their legal theory.[25]

118. Accordingly, the unjust enrichment claim against NRMH Holdings 1, NRMH Holdings 2, NRMH Holdings 3, Golden Marina, and Car Wash is dismissed.

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[25] Moreover, unlike Plaintiffs' fraud, negligent misrepresentation, breach of fiduciary duty, and breach of contract claims, the three-year statute of limitations for an unjust enrichment claim is not subject to the discovery rule. *Se. Anesthesiology Consultants, PLLC v. Rose*, 2019 NCBC LEXIS 63, at *17 (N.C. Super. Ct. Oct. 10, 2019) (the discovery rule does not apply to an unjust enrichment claim); *Lau v. Constable,* 2017 NCBC LEXIS 10, at **13 (same). *But see Lockerman v. South River Elec. Mbrshp. Corp.*, 2015 NCBC LEXIS 60, at **23 (N.C. Super. Ct. June 8, 2015) (implying that the discovery rule could be implicated if the unjust enrichment claim is "predicated on fraud.").

G. Records Demand (against NRMH and Schoninger)

119. Finally, Plaintiffs claim that NRMH and Schoninger, its manager, violated their statutory rights by failing to respond to a demand made by nine of them to produce copies of certain partnership records that NRMH is required by law to maintain. (Chi Compl. ¶¶ 201-02.)

120. Exhibit K to the Chi Complaint is the 16 April 2020 written demand of nine Plaintiffs to "NRMH GP Charles schoninger" (sic) and "InvestCo Chuck Schoninger" (sic) demanding that by 25 April 2020, Schoninger produce their K-1 forms for tax year 2019, the names and contact information of the investors, and "financial statements, cash flow statements and balance sheets . . . since the date of establishment of the company." (Chi Compl. Ex. K.)

121. Plaintiffs allege that Schoninger refused to provide the requested information. (Chi Compl. ¶ 201.)

122. Section 59-106 of the North Carolina General Statutes requires a limited partnership to keep at an office in this State specific records, including but not limited to tax returns and financial statements for the most recent three years, and a current list of the full name and last known mailing address of each partner. These records are "subject to inspection and copying at the reasonable request, and at the expense, of any partner during ordinary business hours." N.C.G.S. § 59-106.

123. Section 59-305 of the North Carolina General Statutes gives limited partners the right to "[i]nspect and copy any of the partnership records required to be maintained," and to "[o]btain from the general partners from time to time upon

reasonable demand (i) true and full information regarding the state of the business and financial condition of the limited partnership, (ii) promptly after becoming available, a copy of the limited partnership's federal, State, and local income tax returns for each year, and (iii) other information regarding the affairs of the limited partnership as is just and reasonable." N.C.G.S. § 59-305.

124. The nine Plaintiffs who sent Schoninger the 16 April 2020 letter have stated a claim for violation of their right to inspect and copy records as provided by statute. Accordingly, as to those nine Plaintiffs only, the Court hereby DENIES the Motion with respect to the Tenth Claim for Relief (Demand for Inspection of Books and Records).[26]

V. CONCLUSION

125. WHEREFORE, for the foregoing reasons, Defendants' Motions are GRANTED in part and DENIED in part as follows:

a. Defendants' motions to dismiss Plaintiffs' claims for fraud, negligent misrepresentation, and violation of Chapter 78A (claims 1, 3, 6) against Defendants Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings LLC, USA InvestCo LLC, Riverfront Holdings DII LLC, Wilmington Riverfront Development LLC, Golden Marina LLC, Circle Marina Carwash, Inc., Charles J. Schoninger, John C. Wang, Christopher Ardalan, and Jiangkai "Samson" Wu in both

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[26] Section 8.3 of the Partnership Agreement also speaks to Plaintiffs' inspection rights.

the Chi Complaint and the Feng Complaint are GRANTED, and those claims are dismissed with prejudice;

b. Defendants' motions to dismiss Plaintiffs' claims for conversion in both the Chi Complaint and the Feng Complaint (claim 5) as to Defendants Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings LLC, USA InvestCo LLC, Riverfront Holdings DII LLC, Golden Marina LLC, Circle Marina Carwash, Inc., John C. Wang, Christopher Ardalan, and Jiangkai "Samson" Wu are GRANTED, and the conversion claims against these Defendants are dismissed with prejudice; but as to Charles J. Schoninger and Wilmington Riverfront Development LLC, the motions are DENIED;

c. Defendants' motions to dismiss Plaintiffs' claims for breach of fiduciary duty in both the Chi Complaint and the Feng Complaint (claim 4) as to Defendants Northern Riverfront Marina and Hotel LLLP, NRMH Holdings LLC, NRMH Hotel Holdings LLC, USA InvestCo LLC, Riverfront Holdings DII LLC, Wilmington Riverfront Development LLC, Golden Marina LLC, Circle Marina Carwash, Inc., Charles J. Schoninger, John C. Wang, Christopher Ardalan, and Jiangkai "Samson" Wu are GRANTED, and the claims are dismissed with prejudice;

d. Defendants' motions to dismiss Plaintiffs' claims for breach of contract in both the Chi Complaint and the Feng Complaint (claim 2) as to Defendants Northern Riverfront Marina and Hotel LLLP, USA InvestCo LLC, and Charles J. Schoninger are GRANTED, and the claims against these Defendants are dismissed with prejudice, but as to Wilmington Riverfront Development LLC and Plaintiffs' claim for breach with respect to the alleged transfer of Project property and the failure to repurchase Plaintiffs' partnership interests, the motions are DENIED;

e. Defendants' motions to dismiss Plaintiffs' claims for unjust enrichment in both the Chi Complaint and the Feng Complaint (claim 7) against Defendants NRMH Holdings LLC, NRMH Hotel Holdings LLC, Riverfront Holdings DII LLC, Golden Marina LLC, and Circle Marina Carwash, Inc. are GRANTED, and the claims are dismissed with prejudice;

f. Defendants' motions to dismiss Plaintiffs' claims for gross mismanagement in both the Chi Complaint and the Feng Complaint (claim 8) against Defendant Charles J. Schoninger is GRANTED, and the claims are dismissed with prejudice;

g. Defendants' motion to dismiss Plaintiffs' claim for equitable accountings in both the Chi Complaint and the Feng Complaint

(claim 9) against Defendants Northern Riverfront Marina and Hotel LLLP, Wilmington Riverfront Development LLC, and InvestCo LLC (claim 9) is GRANTED as unopposed, and the claims are dismissed with prejudice;

h. With respect to the nine plaintiffs who sent the 16 April 2020 letter,[27] Defendants' motion to dismiss Plaintiffs' Demand for Inspection in both the Chi Complaint and the Feng Complaint (claim 10) against Defendants Northern Riverfront Marina and Hotel LLLP is DENIED.

IT IS SO ORDERED, this the 27th day of July, 2023.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases

[27] The signatures on the 16 April 2020 demand are in Chinese, and the Court is unable to identify the individuals who signed the letter by name at this time. On or before 4 August 2023, Plaintiffs shall identify these nine Plaintiffs on the record.