EDWARD T. LLEWELLYN, Plaintiff, v. NORTH AMERICAN TRADING, LARRY LEININGER, PAT WOJAHN, "JOHN DOE" AND "RICHARD ROE,' THE LAST TWO NAMES BEING INTENDED TO REPRESENT DEFENDANTS WHOSE TRUE NAMES ARE UNKNOWN TO PLAINTIFF, Defendants.

93 Civ. 8894 (KMW)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1998 U.S. Dist. LEXIS 2555

February 25, 1998, Decided

PRIOR HISTORY: [*1] Adopting Magistrate's Document of December 29, 1997, Reported at: 1997 U.S. Dist. LEXIS 22142.

COUNSEL: For EDWARD T. LLEWELLYN, plaintiff: David L. Ganz, Ganz Hollinger & Towe P.C., New York, NY.

For NORTH AMERICAN TRADING, LARRY LENINGER, defendants: Emile Sayegh, Yonkers, NY.

For NORTH AMERICAN TRADING, LARRY LENINGER, PAT WOJAN, "JOHN DOE", "RICHARD ROE", defendants: Russell Jim Zarkou, Keyt, Lawless et al, Phoenix, AZ.

For NORTH AMERICAN TRADING, LARRY LENINGER, PAT WOJAN, defendants: Armen R. Vartian, New York, NY.

JUDGES: Kimba M. Wood, United States District Judge.

OPINION BY: Kimba M. Wood

OPINION

ORDER

WOOD, U.S.D.J.

In a Report and Recommendation dated December 29, 1997 (the "Report"), Magistrate Judge Henry Pitman made recommendations to me with regard to defendants Larry Leininger's and North American Trading's ("NAT") and motion for summary judgment and plaintiff's motion for partial summary judgment. Magistrate Judge Pitman

recommended that Leininger's and NAT's motion for summary judgment be granted with respect to plaintiff's claims for (1) violation of the Arizona Consumer Fraud Act, (2) violation of Arizona's state RICO statute, (3) breach of fiduciary duty, (4) imposition of a constructive trust, (5) prima facie tort, (6) breach of implied warranty of merchantability, (7) violation of federal and state securities laws, and (7) violation of the federal RICO statute. Magistrate Judge Pitman recommended that Leininger's and NAT's motion for summary judgment be denied as to plaintiff's claims for (1) fraudulent inducement to contract, [*2] (2) breach of express warranty, and (3) breach of implied warranty for a particular purpose. Magistrate Judge Pitman recommended that plaintiff's motion for partial summary judgment be denied in all respects.

Both plaintiff and defendants Leininger and NAT have filed objections to portions of the Report. In addition, defendants Leininger and NAT have responded to plaintiff's objections. Pursuant to Pursuant to Federal Rule of Civil Procedure 72(b) and 28 U.S.C. § 636(b)(1)(B), I have reviewed de novo those aspects of the Report to which the parties object. After a de novo review the recommendations in the Report, consideration of the parties objections and defendants' response to plaintiff's objections, I adopt the Report in its entirety.

For the reasons stated in the Report, I grant Leininger and NAT's motion for summary judgment in part and deny it in part. Specifically, I grant Leininger's and NAT's motion for summary judgment as to plaintiff's claims for (1) violation of the Arizona Consumer Fraud Act, (2) violation of Arizona's state RICO statute, (3) breach of fiduciary duty, (4) imposition of a constructive trust, (5) prima facie tort, (6) breach of implied warranty [*3] of merchantability, (7) violation of federal and state securities laws, and (7) violation of the federal RICO statute. I deny Leininger's and NAT's motion for summary judgment as to plaintiff's claims for (1) fraudulent inducement to contract, (2) breach of express warranty, and (3) breach of implied warranty for a particular purpose.

For the reasons stated in the Report, I also deny plaintiff's motion for partial summary judgment in all respects.

SO ORDERED.

New York, New York

February 25, 1998

Kimba M. Wood

United States District Judge

EDWARD T. LLEWELLYN, Plaintiff, -against- NORTH AMERICAN TRADING; LARRY LEININGER; PAT WOJAHN; "JOHN DOE" AND "RICHARD ROE", THE LAST TWO NAMES IN QUOTATION MARKS BEING INTENDED TO REPRESENT DEFENDANTS WHOSE TRUE NAMES ARE UNKNOWN TO PLAINTIFF, Defendants.

93 Civ. 8894 (KMW)(HBP)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1997 U.S. Dist. LEXIS 22142

December 29, 1997, Decided
December 30, 1997, Filed

SUBSEQUENT HISTORY: [*1] Adopting Order of February 25, 1998, Reported at: 1998 U.S. Dist. LEXIS 2555.

COUNSEL: For EDWARD T. LLEWELLYN, plaintiff: David L. Ganz, Ganz Hollinger & Towe P.C., New York, NY.

For NORTH AMERICAN TRADING, LARRY LENINGER, defendants: Emile Sayegh, Yonkers, NY.

For NORTH AMERICAN TRADING, LARRY LENINGER, PAT WOJAN, "JOHN DOE", "RICHARD ROE", defendants: Russell Jim Zarkou, Keyt, Lawless etal, Phoenix, AZ.

For NORTH AMERICAN TRADING, LARRY LENINGER, PAT WOJAN, defendants: Armen R. Vartian, New York, NY.

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge,

TO THE HONORABLE KIMBA M. WOOD, United States District Judge:

I. Introduction

This action arises out of plaintiff's $ 90,000 purchase of rare coins from defendant North American Trading ("NAT"), an Arizona based telemarketing company, and its agents. Plaintiff contends that defendants mislead him regarding the value of the coins and alleges the following claims: (1) fraud in the inducement of the [*2] contract; (2) breach

of contract; (3) breach of fiduciary duty; (4) violations of Racketeer Influenced Corrupt Organization Act, ("RICO"), 18 U.S.C. § 1962(a)-(d); (5) prima facie tort; (6) the sale of an unregistered security in violation of the Securities Act of 1933, 15 U.S.C. § 77a et seq. and New York's Martin Act, New York General Business Law Art. 23-A, § 352 et seq.; (7) breach of express warranty; (8) breach of the implied warranties of merchantability and of fitness; (9) violation of the Arizona Consumer Fraud Act, § 44-1521 et seq.; and (10) violation of Arizona's state RICO statute, § 13-2312, et seq. Plaintiff seeks rescission of the contract, imposition of a constructive trust, consequential damages and attorney's fees.

Defendants Larry Leininger and NAT move for summary judgment; plaintiff moves for partial summary judgment. For the reasons set forth below, I respectfully recommend that defendants' motion be granted in part and denied in part and that plaintiff's motion be denied.

II. Factual Background

In April 1993, plaintiff Edward T. Llewellyn, a resident of New York, responded to an NAT advertisement and received various printed [*3] materials from the company about investing in rare coins (Plaintiff's 3(g) Statement P 4; Defendants' 3(g) Statement P 2). The following month, Llewellyn received several telephone calls from defendant Pat Wojahn, an agent of NAT, and discussed with her a possible purchase of rare coins (Plaintiff's 3(g) Statement P 6; Defendants' 3(g) Statement P 3).

On May 25, 1993, plaintiff bought a set of rare coins for $ 54,900 (Edward Llewellyn Decl. PP 6-9; Larry Leininger Aff. P 4; Defendants' 3(g) Statement PP 4, 9). He purchased a second set on June 3, 1993, for $ 35,950 (Edward Llewellyn Decl. PP 6-9; Larry Leininger Aff. P 4; Defendants' 3(g) Statement PP 4, 9). Plaintiff contends that at the time he purchased the sets, Wojahn told him that defendants would always be willing to buy back the coins at full wholesale price (Edward Llewellyn Decl. P 12).

Shortly after purchasing the coins, Llewellyn discovered that the coins were worth considerably less than the price he had paid (Edward Llewellyn Decl. PP 10-11). In July 1993, Llewellyn spoke with the defendants and requested a refund (Edward Llewellyn Decl. P 12; Defendants' 3(g) Statement P 13). The defendants repeatedly refused to buy [*4] back the coins at any price, and plaintiff subsequently commenced this action (Edward Llewellyn Decl. PP 12-16).

III. Analysis

A. Choice of Law 1

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1 Despite the fact that choice of law is central to the resolution of the summary judgment motions, neither side has addressed this issue.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Jurisdiction in this action is based on both diversity of citizenship and the presence of federal questions. Since plaintiff has asserted several common law contract and tort claims, a threshold question is which state's law should be applied to the state law claims. Federal courts must apply the choice of law rules of the forum state to determine what state law governs such state law claims. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 85 L. Ed. 1477, 61 S. Ct. 1020 (1941).

To determine what state law governs a litigant's contract claims, New York courts apply a "center of gravity" or "grouping of contacts" approach. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 84 N.Y.2d 309, 317, 642 [*5] N.E.2d 1065, 1068, 618 N.Y.S.2d 609, 612 (1994). The Court must consider the significance of the places of contracting and negotiating the contract, the place of performance of the contract, the location of the subject matter of the contract and the domicile or place of business of the parties. Lazard Freres & Co. v. Protective Life Ins. Co., 108 F.3d 1531, 1539 (2d Cir.), cert. denied, 139 L. Ed. 2d 112, 118 S. Ct. 169 (1997), citing In re Allstate Ins. Co. & Stolarz, 81 N.Y.2d 219, 227, 613 N.E.2d 936, 940, 597 N.Y.S.2d 904, 908 (1993).

Although both New York and Arizona bear a relation to the claims of this case, New York's contacts are more significant. Not only does plaintiff reside in New York, but the contract was performed in New York and the goods were delivered in New York. See generally Marsin Medical Int'l, Inc., v. Bauhinia Ltd., 948 F. Supp. 180, 191 (E.D.N.Y. 1996) (applying New York's "grouping of contacts" test and finding that the delivery of goods to New York constitutes significant activities and performance of contract). Accordingly, it is appropriate to apply New York law the contract issues in this case.

As to plaintiff's tort claims, New York [*6] applies an "interest analysis" test for choice of law issues. Lazard Freres & Co. v. Protective Life Ins. Co., supra, 108 F.3d at 1538-39 n.5, citing Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., supra, 84 N.Y.2d at 317-18, 642 N.E.2d at 1068-70, 618 N.Y.S.2d at 612-614. Pursuant to this test, the law of the jurisdiction which has the greatest interest in the litigation will be applied. Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., supra, 84 N.Y.2d at 319, 642 N.E.2d at 1069, 618 N.Y.S.2d at 614.

"In all interest analyses, 'the significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort.'. . . Where the parties are domiciled in different states, the locus of the tort will almost always be determinative in cases involving conduct-regulating laws." Krock v. Lipsay, 97 F.3d 640, 646 (2d Cir. 1996). In this case, the plaintiff is domiciled in New York while defendants are domiciled in Arizona. Thus, the locus of the tort determines what substantive law applies. Cousins v. Instrument Flyers, Inc., 44 N.Y.2d 698, 699, 376 N.E.2d 914, 915, 405 N.Y.S.2d 441, 442 (1978).

Plaintiff's tort claims are based on fraud principles. Fraud [*7] claims are ordinarily governed by the law of the place "where the injury occurred -- generally, the place where

the investor[] resided and sustained the economic impact of the loss." Smith Barney, Harris Upham & Co. v. Luckie, 85 N.Y.2d 193, 206-07, 647 N.E.2d 1308, 1316, 623 N.Y.S.2d 800, 808, cert. denied, 516 U.S. 811, 116 S. Ct. 59 (1995). See also Rosenberg v. Pillsbury Co., 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989). New York is where the plaintiff resides and sustained his alleged economic loss from the coin purchase. Accordingly, New York law will also be applied to plaintiff's state law tort claims.

Two of plaintiff's eleven claims are brought pursuant to Arizona's state statutes. 2 These claims, however, must be dismissed. As the above analysis indicates, New York substantive law applies to plaintiff's non-federal claims, thus, plaintiff cannot avail itself of Arizona state law. Accordingly, I recommend that summary judgment be granted in favor of defendants as to plaintiff's claims asserted under Arizona state law.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

2 Curiously, the complaint alleges state law claims under both New York and Arizona statutes (Comp. PP 43, 76, 84). Plaintiff articulates no argument justifying the application of both Arizona and New York law.

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[*8] B. Summary Judgment Standards

The standards applicable to a motion for summary judgment are well-settled and require only brief review.

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c); Citizens Bank of Clearwater v. Hunt, 927 F.2d 707, 710 (2d Cir. 1991). When deciding a motion for summary judgment, a court must "resolve all ambiguities and inferences . . . in the light most favorable to the party opposing the motion." United States v. One Tintoretto Painting, 691 F.2d 603, 606 (2d Cir. 1982) (citations omitted).

The moving party bears the initial burden of demonstrating that there exists no material issue of fact and that he or she is entitled to judgment as a matter of law. See Brady v. Town of Colchester, 863 F.2d 205, 210 (2d Cir. 1988). Motions for summary judgment must be denied if reasonable minds could differ as to the importance of the evidence and if "'there is any evidence in the record from [*9] any source from which a reasonable inference in the [nonmoving party's] favor may be drawn . . . .'" Brady v. Town of Colchester, 863 F.2d at 210 (quoting In re Japanese Elec. Prods. Antitrust Litigation, 723 F.2d 238, 258 (3d Cir. 1983) rev'd on other grounds sub. nom. Matsushita Elec. Indus. Co., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)).

Borgos v. A & P Brush Mfg. Co., 1997 U.S. Dist. LEXIS 5225, No. 95 Civ. 2133 (KMW), 1997 WL 193326 at *2 (S.D.N.Y. April 18, 1997).

C. Fraudulent Inducement

Both plaintiff and defendants Leininger and NAT move for summary judgment on plaintiff's first claim, fraud in the inducement of the contract. Plaintiff contends that defendants induced him to invest in rare coins by misrepresenting to him that the coins were a profitable investment that carried little risk, and by misleading him about their profit margin (Decl. of Edward Llewellyn PP 11, 17, 46-62). Specifically, plaintiff avers that during sales calls, defendants made false representations that "gold coins are going through the roof" and that "gold would triple" (Decl. of Edward Llewellyn P 11). Llewellyn further claims that he relied on defendants' representations and their [*10] oral and written assertions of expertise in the trade (Decl. of Edward Llewellyn PP 7, 11, 71 and Ex. 5).

Defendants oppose plaintiff's motion for summary judgment and move for summary judgment in their favor on the grounds that (1) they made no false representations or omissions of material fact and (2) defendants' alleged misrepresentations did not proximately cause damage to plaintiff. Specifically, defendants argue that at the time of plaintiff's purchase, the price of coins was rising and that they honestly believed that the investment would continue to increase in value (Larry Leininger Aff. PP 4-5; Ex. 1-2 annexed to Leininger Aff.). Defendants also cite plaintiff's deposition testimony in which Llewellyn admits that prior to making his purchase he was transferred to NAT's trading department and was told that there was no guarantee that his investment would increase in value because the market fluctuates (Defendants' Memorandum of Law P 7).

Under New York law, a claim for fraudulent inducement requires proof of the following five elements: (1) a representation of an existing, material fact; (2) falsity of that representation; (3) scienter; (4) deception and (5) injury. [*11] DiRose v. PK Management Corp., 691 F.2d 628, 630 (2d Cir. 1982), citing Channel Master Corp. v. Aluminium Ltd. Sales, Inc., 4 N.Y.2d 403, 151 N.E.2d 833, 176 N.Y.S.2d 259 (1958). Statements of value, such as the statements at issue here, can be actionable as fraudulent misrepresentations if "known by the author to be false or made despite the anticipation that the event will not occur." Cristallina S.A. v. Christie, Manson & Woods International, Inc., 117 A.D.2d 284, 294-95, 502 N.Y.S.2d 165, 172-73 (1st Dep't 1986).

Since the viability of plaintiff's fraud claim turns on defendants' knowledge and beliefs concerning their representations, there is a genuine issue of material fact that precludes summary judgment for plaintiff. See generally Wakefield v. Northern Telecom, Inc., 813 F.2d 535, 540 (2d Cir. 1987).

As to defendants Leininger's and NAT's argument that summary judgment should be granted on the basis of their disclaimer as to the value of the coins, such disclaimers will not preclude evidence of misrepresentations if, as here, the facts allegedly misrepresented are peculiarly within the seller's knowledge. Ward v. Hanley, 130 A.D.2d 742, 743, 516

N.Y.S.2d [*12] 40, 41 (2d Dep't 1987), citing Yurish v. Sportini, 123 A.D.2d 760, 761-62, 507 N.Y.S.2d 234, 235 (2d Dep't 1986); Hi Tor Indus. Park v. Chemical Bank, 114 A.D.2d 838, 839, 494 N.Y.S.2d 751, 752 (2d Dep't 1985); Tahini Invs. v. Bobrowsky, 99 A.D.2d 489, 490, 470 N.Y.S.2d 431, 433 (2d Dep't 1984).

Accordingly, both sides' motion for summary judgment should be denied as to plaintiff's claim for fraudulent inducement.

D. Breach of Contract

Although plaintiff moves for summary judgment on his breach of contract claim, he does not set forth the terms of his alleged contract with defendants.

The elements that give rise to a breach of contract claim are (1) a contract between the parties and (2) an act in violation of that agreement. Agency Rent A Car Sys. v. Grand Rent A Car Corp., 98 F.3d 25, 31 (2d Cir. 1996). In his moving papers, plaintiff has not attached a written contract nor has he referred to affidavits or other items in the record that set forth the terms of an oral contract. See Window Headquarters, Inc. v. MAI Basic Four, Inc., 1993 U.S. Dist. LEXIS 11245, No. 91 Civ. 1816 (MBM), 1993 WL 312899 (S.D.N.Y. Aug. 12, 1993), citing Posner v. Minnesota Min. & Mfg. Co., 713 F. Supp. [*13] 562, 563 (E.D.N.Y. 1989); Chrysler Capital Corp. v. Hilltop Egg Farms. Inc., 129 A.D.2d 927, 928, 514 N.Y.S.2d 1002, 1003 (3d Dep't 1987). Since plaintiff has not established the parties' precise contractual obligations, it is impossible to determine whether plaintiff has complied fully with all of his contractual obligations or whether Leininger and NAT have breached theirs. Thus, plaintiff's motion for summary judgment should be denied.

E. Breach of Fiduciary Duty

Defendants move for summary judgment on plaintiff's breach of fiduciary duty claim on the ground that no fiduciary relationship exists between the parties.

To prevail on a claim alleging breach of a fiduciary duty, plaintiff must prove: (1) the existence of a fiduciary relationship; (2) the nature of the relationship and when and how it arose and (3) the circumstances surrounding the breach of the relationship. Lunsford v. Farrell Shipping Lines, Inc., 1991 U.S. Dist. LEXIS 10263, No. 83 Civ. 7462 (JFK), 1991 WL 150596 (S.D.N.Y. July 26, 1991), citing NOW Prod., Inc. v. Ernest Tidyman Prod., Inc., 73 A.D.2d 168, 425 N.Y.S.2d 604 (1st Dep't 1980), aff'd, 52 N.Y.2d 907, 419 N.E.2d 346, 437 N.Y.S.2d 668 (1981).

Broadly stated, [*14] a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon another . . . . Such a relationship might be found to exist, in appropriate

circumstances, between close friends . . . or even where confidence is based on prior business dealings. . . .

Penato v. George, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, 904 (2d Dep't 1976), appeal dismissed, 42 N.Y.2d 908, 366 N.E.2d 1358, 397 N.Y.S.2d 1004 (1977).

Plaintiff contends that he trusted defendants because they told him that they were experts in the field and that they would continue to assist him with his investment after his purchase (Decl. of Edward Llewellyn PP 71, 73, 82). The mere fact that defendants may be expert marketers of rare coins and that plaintiff trusted them, does not, by itself, give rise to a fiduciary relationship.

This precise issue arose in Mechigian [*15] v. Art Capital Corp., 612 F. Supp. 1421 (S.D.N.Y. 1985). In that case, plaintiff bought a lithographic plate from defendants and discovered shortly after the sale that the plate was worth considerably less than the price he had paid. Plaintiff alleged that defendants owed him a fiduciary duty, "by virtue of their expertise and superior knowledge, their professional capacity as art dealers, . . . broker/dealers, advisors and salesmen [and] their knowledge of plaintiff's [inexperience]". Judge Duffy held that mere expertise in a matter does not create a fiduciary relationship. Mechigian v. Art Capital Corp., supra, 612 F. Supp. at 1431.

The record in this case contains no facts that distinguish it from Mechigian and that would give rise to a fiduciary relationship between plaintiff and defendants. Although plaintiff made two purchases of the rare coins, both sales are in dispute here, and cannot, therefore, constitute a demonstrated "track record" from which a fact finder might infer the confidence necessary for a fiduciary relationship based on past dealings. See generally Boley v. Pineloch Assoc., 700 F. Supp. 673, 681 (S.D.N.Y. 1988). Accordingly, Leininger's and [*16] NAT's motion for summary judgment on plaintiff's breach of fiduciary duty claim should be granted.

F. Constructive Trust

Both plaintiff and defendants Leininger and NAT move for summary judgment on plaintiff's second claim which seeks the imposition of a constructive trust.

Plaintiff contends that a constructive trust should be imposed because the amount of defendants' markups can be found fraudulent as a matter of law. In support of this argument, plaintiff cites cases involving proceedings brought by the Security Exchange Commission against brokers for various security violations (Plaintiff's Memorandum of Law at 17, citing S.E.C. v. First Jersey Sec., Inc., 101 F.3d 1450, 1469 (2d Cir. 1996), cert. denied, 118 S. Ct. 57 (1997); Charles Hughes Co. v. S.E.C., 139 F.2d 434 (2d Cir. 1943)).

Leininger and NAT move for summary judgment on the ground that no constructive trust can be imposed because no fiduciary relationship exists.

Under New York law, a constructive trust requires proof of the following elements: (1) a fiduciary relationship; (2) a promise; (3) a transfer of the subject res made in reliance on that promise; and (4) unjust enrichment. United States [*17] v. Coluccio, 51 F.3d 337, 340 (2d Cir. 1995).

Since no fiduciary relationship between plaintiff and Leininger and NAT could be sustained on the evidence in the record, Section III E, supra, the first element of a constructive trust claim cannot be proven. Accordingly, defendants' motion for summary judgment should be granted with respect to plaintiff's constructive trust claim.

G. Prima Facie Tort

Leininger and NAT next move for summary judgment on plaintiff's prima facie tort claim, arguing that plaintiff's allegation that the coins violated the Federal Trade Commission normative standards for the rare coin industry (Verified Comp. P 41), is insufficient to sustain this claim.

Plaintiff contends that there is a question of fact as to whether the coins were overpriced and argues that courts have held a claim for prima facie tort may be based on tortious conduct for overpriced goods, citing Genesco, Inc. v. T. Kakiuchi & Co., 815 F.2d 840 (2d Cir. 1987); Imtrac Indus. Inc. v. Glassexport Co., 1996 U.S. Dist. LEXIS 1022, No. 90 Civ. 6058 (LBS), 1996 WL 39294 (S.D.N.Y. Feb. 1, 1996); Kidder Peabody & Co. v. Unigestion Int'l Ltd., 903 F. Supp. 479 (S.D.N.Y. 1995).

Plaintiff's allegation [*18] that the defendants sold him coins that are in violation of FTC standards, does not support a claim for prima facie tort. Under New York law, the elements of a claim for prima facie tort are (1) intentional infliction of harm; (2) resulting in special damages; (3) without excuse or justification; (4) by an act that would otherwise be lawful. Twin Lab., Inc. v. Weider Health & Fitness, 900 F.2d 566, 571 (2d Cir. 1990), citing Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332, 451 N.E.2d 459, 467, 464 N.Y.S.2d 712, 720 (1983). Plaintiff's claim that the goods were overpriced, even if true, simply does not amount to harmful conduct performed without excuse or justification.

Where the infliction of harm is incidental to a defendant's primary business motive and not a significant part of a chosen plan of harassment, no cause of action for prima facie tort exists. . . . In other words, the sole motivation for the damaging acts must have been a malicious intention to injure the plaintiff. When there are other motives, such as profit, self-interest, or business advantage, there is no recovery under the doctrine of prima facie tort.

[*19] Marcella v. ARP Films, Inc., 778 F.2d 112, 119 (2d Cir. 1985).

Additionally, the cases cited by plaintiff, Genesco, Inc. v. T. Kakiuchi & Co., supra, 815 F.2d 840, Imtrac Indus. Inc. v. Glassexport Co., supra, 1996 U.S. Dist. LEXIS 1022, 1996 WL 39294 and Kidder Peabody & Co. v. Unigestion Int'l, Ltd., supra, 903 F. Supp.

479, address tortious interference with contractual relations and securities fraud. None of them involved a claim for prima facie tort.

Accordingly, defendants' motion for summary judgment on plaintiff's prima facie tort claim should also be granted.

H. Breach of Express Warranty

The parties have moved for summary judgment on plaintiff's claim for breach of express warranty.

Plaintiff argues that defendants' misrepresentations and gross overpricing of the coins ruled out any potential for profits within a reasonable period of time. Defendants contend that summary judgment must be granted in their favor because (1) plaintiff cannot show that the breach of the warranty was the proximate cause of his loss and (2) plaintiff cannot prove an undisclosed defect in the coins.

Plaintiff's breach of express warranty claim is governed by Section 2-313 of the New York Uniform [*20] Commercial Code ("N.Y. U.C.C.") which provides: 3

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description . . . .

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or recommendation of the goods does not create a warranty.

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3 Article 2 of the N.Y. U.C.C. applies whether the sale of the rare coins is construed as the sale of a commodity or the sale of a security. See generally Bache & Co. v. International Controls Corp., 339 F. Supp. 341, 349 (S.D.N.Y.), aff'd, 469 F.2d 696 (2d Cir. 1972). See also N.Y. U.C.C. § 2-105(2) and Official Comment (1) (The statutory definition of "goods" "is intended to cover the sale of money when money is being treated as a commodity but not to include it when money is the medium of payment.")

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

[*21] To recover on a breach of warranty claim, the buyer need only establish that a warranty exists and that a breach has occurred. Dawson Home Fashions, Inc. v. SRCO Inc., 1995 U.S. Dist. LEXIS 17022, 94 Civ. 6333 (MBM), 1995 WL 679253 at *6 (S.D.N.Y. Nov. 15, 1995), citing CBS Inc. v. Ziff-Davis Publ'g Co., 75 N.Y.2d 496, 503-04, 553 N.E.2d 997, 1001, 554 N.Y.S.2d 449, 453 (1990).

Both plaintiff's and defendants Leininger's and NAT's motion for summary judgment should be denied. Whether the oral statements at issue constitute an express warranty is a question of fact.

Affirmations made at the time of sale are warranties which are incorporated into the contract of sale. Williston on Contracts § 954 (3d ed. 1964). An express warranty arises when a seller directly affirms the quality or condition of the stock, provided that such affirmation tends to induce the buyer's purchase, and the buyer purchases relying upon it. Shippen v. Bowen, 122 U.S. 575, 581, 7 S. Ct. 1283, 1284, 30 L. Ed. 1172 (1887); Distillers Distrib. Corp. v. Sherwood Distilling Co., 180 F.2d 800, 802 (4th Cir. 1950); Williston, supra, § 954. Warranties are to be distinguished from statements of opinion, conjecture, [*22] or puffery, which do not result in the imposition of liability. Williston, supra, § 954. The test for determining whether a given statement amounts to a warranty has been articulated frequently: "did the seller assume to assert a fact of which the buyer is ignorant, or did he merely express a judgment about a thing as to which they each may have expected to have an opinion." Wedding v. Duncan, 310 Ky. 374, 220 S.W.2d 564 (1949) (quoting Mantle Lamp Co. v. Rucker, 202 Ky. 777, 261 S.W. 263, 264 (1924)); see Titus v. Poole, 145 N.Y. 414, 426, 40 N.E. 228, 231 (1895) . . . An express warranty need not be in writing; nor are technical words such as "warrant" or "warranty" necessary to create one. . . . If the facts or affirmation rely wholly or partly on parol, it is within the province of the trier of fact to determine whether a statement constitutes an opinion or a warranty.

Keenan v. D.H. Blair & Co., 838 F. Supp. 82, 90 (S.D.N.Y. 1993) (emphasis added).

Defendants' motion for summary judgment should also be denied, for under New York law, a plaintiff need not establish proximate cause in connection with a breach of warranty claim. Dawson Home Fashions, [*23] Inc. v. SRCO Inc., supra, 1995 U.S. Dist. LEXIS 17022, 94 Civ. 6333 (MBM), 1995 WL 679253 (S.D.N.Y. Nov. 15, 1995), citing CBS Inc. v. Ziff-Davis Publ'g Co., 75 N.Y.2d 496, 503-04, 553 N.E.2d 997, 1001, 554 N.Y.S.2d 449, 453 (1990).

Additionally, summary judgment cannot be granted based on Leininger's and NAT's argument that plaintiff cannot prove an "undisclosed defect in the coins." Defendants do not explain this argument nor do they cite any supporting legal authority, and, as noted above, a genuine issue of material fact exists as to what warranties, if any, were made and whether they were breached.

I. Implied Warranties

Both plaintiff and defendants Leininger and NAT move for summary judgment on plaintiff's claim for breach of the implied warranty of merchantability (N.Y. U.C.C. § 2-314) the implied warranty of fitness for a particular purpose (N.Y. U.C.C. § 2-315).

Plaintiff contends that summary judgment is appropriate because defendants breached the implied warranties of merchantability and fitness by selling him coins that were not of investment quality and that did not meet his investment goals. Specifically, plaintiff argues that defendants sold him coins that were not fit for the ordinary [*24] purpose for which they were intended, i.e., an investment purpose, nor were they fit for plaintiff's specific investment purpose.

Leininger and NAT argue that no breach has occurred because the coins are of a quality generally acceptable in the trade. To support their argument, Leininger and NAT offer an affidavit from Gregory Roberts, the President of Spectrum Numismatics International, Inc., and NAT's coin supplier (Gregory Roberts Aff. P 4). Roberts states that the coins purchased by NAT are graded by either Numismatic Guaranty Corporation of America or Professional Coin Grading Service (Gregory Roberts Aff. PP 4, 7). Roberts specifically affirms that the coins sold to Llewellyn were inspected to assure trade quality and that at the time the coins were sold to plaintiff, the coin market was rapidly rising (Gregory Roberts Aff. PP 7, 8).

Section 2-314's implied warranty of merchantability merely requires that a product be fit for the ordinary uses for which such goods are intended. Denny v. Ford Motor Co., 87 N.Y.2d 248, 258-59, 662 N.E.2d 730, 736, 639 N.Y.S.2d 250, 256 (1995). The implied warranty of merchantability provides not for a superior product but only a minimal [*25] level of quality. Denny v. Ford Motor Co., supra, 87 N.Y.2d at 259 n.4, 662 N.E.2d at 737 n.4, 639 N.Y.S.2d at 257 n.4.

Since Leininger and NAT have submitted an expert affidavit establishing that the coins are of trade quality, the burden shifts to plaintiff to produce evidence rebutting Leininger's and NAT's expert and creating a genuine issue of fact concerning the merchantability of the coins. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Urena v. Biro Mfg. Co., 114 F.3d 359, 362 (2d Cir. 1997). Plaintiff has failed to offer any evidence to rebut Leininger's and NAT's affidavit. 4 Thus, plaintiff has failed to establish that there is a genuine issue of fact concerning the merchantability of the coins. Summary judgment should, therefore, be granted for Leininger and NAT on plaintiff's claim asserting a breach of the implied warranty of merchantability.

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4 The fact that the value of the coins declined after plaintiff's purchase does not constitute a breach of the warranty of merchantability. Carlson v. General Motors Corp., 883 F.2d 287, 297-98 (4th Cir. 1989); In re General Motors Corp. Anti-Lock Brake Products

Liability Litigation, 966 F. Supp. 1525, 1532 (E.D. Mo. 1997) ("Loss of resale value is not a proper basis for a breach of warranty claim."); American Suzuki Motor Corp. v. Superior Court, 37 Cal. App. 4th 1291, 1296-98, 44 Cal. Rptr. 2d 526, 529-30 (1995).

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[*26] Plaintiff's claim for breach of the implied warranty of fitness for a particular purpose stands on a different footing. Whether an implied warranty of fitness exists depends on what, if anything, the buyer told the seller and whether the buyer relied "on the seller's skill or judgment to select or furnish suitable goods." N.Y. U.C.C. § 2-315. Thus, the inquiry concerning the implied warranty of fitness involves the fitness of the goods for a particular purpose and the particulars of the sales transaction. N.Y. U.C.C. § 2-315, Official Comment 1 ("Whether or not [the warranty of fitness for a particular purpose] arises in any individual case is basically a question of fact to be determined by the circumstances of the contracting.")

In support of their motion, Leininger and NAT argue, without any citation, that plaintiff cannot prevail on his claim for breach of warranty of fitness for a particular purpose because the coins were not defective (Defendants' Memo at 24). This argument misses the mark because nothing in Section 2-315 requires a "defect." All that is required to state a claim under the text of Section 2-315 is the (1) buyer's communication of the particular purpose [*27] to the seller, (2) reliance by the buyer on the seller to furnish appropriate goods and (3) the failure of the goods to meet the particular purpose. See Saratoga Spa & Bath Inc. v. Beeche Sys. Corp., 230 A.D.2d 326, 656 N.Y.S.2d 787 (3rd Dep't 1997). There is no requirement in the text of Section 2-315 that a breach requires a defect. Indeed, if Section 2-315 required a "defect," it would add nothing to Section 2-314's warranty of merchantability. See Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931) (warranties of merchantability and fitness for a particular use are not coextensive).

Leininger and NAT also make the argument ad horrendum that if summary judgment is not granted here, "every unsuccessful investment would be the basis for a breach of warranty action" (Defendants' Reply Memo. at 16). This is not true. Obviously, the denial of summary judgment is not a victory for plaintiff; it merely means there are factual issues to be tried. In addition, the implied warranty of fitness alleged here could have easily been disclaimed pursuant to Section 2-316. 5

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5 Leininger and NAT do not argue that they disclaimed the implied warranty of fitness for a particular purpose.

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[*28] Accordingly, in light of the issues of fact concerning the circumstances of the sale, both plaintiff's and Leininger's and NAT's motions for summary judgment on the claim

alleging breach of the implied warranty of fitness for a particular purpose should be denied. See generally Emerald Painting, Inc. v. PPG Indus., Inc., 99 A.D.2d 891, 472 N.Y.S.2d 485 (3rd Dep't 1984).

J. Securities Law Claim

Both plaintiff and defendants Leininger and NAT also move for summary judgment on plaintiff's securities law claims, disputing whether rare coins are a security under federal and state law. Plaintiff alleges that defendants have violated the Securities Act of 1933, 15 U.S.C. § 77a et seq., and New York's Martin Act, New York General Business Law, Art. 23-A, § 352 et seq., by selling an unregistered security.

In S.E.C. v. W.J. Howey, 328 U.S. 293, 298-99, 90 L. Ed. 1244, 66 S. Ct. 1100 (1946), the Supreme Court established the test for determining what constitutes a security: "An investment contract . . . means a contract, transaction or scheme whereby a person [1] invests his money [2] in a common enterprise and [3] is led to expect profits [4] solely from the [*29] efforts of the promoter or a third party." An investor must also bear a risk of loss for the instrument to constitute a security. Marine Bank v. Weaver, 455 U.S. 551, 557-58, 71 L. Ed. 2d 409, 102 S. Ct. 1220 (1982); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230, 239 (2d Cir. 1985).

Because Leininger and NAT do not dispute that plaintiff meets the first prong of the Howey test, I assume for purposes of this Report and Recommendation, that Llewellyn's coin investment satisfies that element.

As to the second prong, a party may prove a common enterprise under the horizontal commonality theory or narrow vertical commonality theory. 6 In Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F. Supp. 360, 370 (S.D.N.Y. 1992), Judge Leisure clearly and cogently explained the two theories:

> The horizontal commonality theory "require[s] plaintiff to show a pooling of the investors' interests in order to establish a common enterprise." Kaplan v. Shapiro, 655 F. Supp. 336, 339-40 (S.D.N.Y. 1987); accord Perez-Rubio v. Wyckoff, 718 F. Supp. 217, 234 ("The funds must actually be pooled.") To establish narrow vertical commonality, [*30] the investor must establish that his fortunes are interdependent with the fortunes of the investment manager. Dooner v. NMI, 725 F. Supp. 153, 158 (S.D.N.Y. 1989); Perez-Rubio, supra, 718 F. Supp. at 234 ("an investor must establish not only that his or her fortunes would rise with the promoter's fortunes, but also that their fortunes would fall together.")

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6 In Revak v. S.E.C. Realty, 18 F.3d 81, 88 (2d Cir. 1994) the Second Circuit held that the "broad vertical commonality" theory does not give rise to a common enterprise.

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Neither theory of commonality can be met in this case. Plaintiff does not offer evidence indicating that "investors' interests were pooled," as required by the horizontal commonality theory. Nor do the facts indicate that plaintiff can meet the requirements of the narrow vertical commonality theory. Although defendants' fortunes rose when plaintiff purchased the rare coins, the defendants would maintain their financial position even if plaintiff's investment decreased in [*31] value. See generally Mechigian v. Art Capital Corp., supra, 612 F. Supp. at 1427.

Plaintiff urges this Court to follow S.E.C. v. Brigadoon Scotch Distrib., Ltd., 388 F. Supp. 1288, 1291 (S.D.N.Y. 1975), which applied the broad vertical commonality theory and found rare coins to be a security. However, in light of the Second Circuit's subsequent rejection of the broad vertical commonality theory, Revak v. S.E.C. Realty, supra, 18 F.3d at 88, Brigadoon cannot control. Thus, I find that under federal law, plaintiff's purchase of coins is not a security. Accordingly, plaintiff's motion for summary judgment should be denied and Leininger's and NAT's motion for summary judgment should be granted as to plaintiff's claim under federal securities law.

Summary judgment should also be granted in favor of Leininger and NAT on plaintiff's claims under the Martin Act. A private right of action does not exist under the Martin Act. "It is well established that the Martin Act does not provide for a private right of action." Vannest v. Sage, Rutty & Co., 960 F. Supp. 651, 657 n.6 (W.D.N.Y. 1997). See also Resolution Trust Corp. v. Diamond, 18 F.3d 111, 121 (2d Cir.), vacated [*32] on other grounds, 513 U.S. 801 (1994); Pahmer v. Greenberg, 926 F. Supp. 287, 302-03 (E.D.N.Y. 1996), aff'd sub nom., Shapiro v. Cantor, 123 F.3d 717 (2d Cir. 1997); Independent Order of Foresters v. Donaldson, Lufkin & Jenrette Inc., 919 F. Supp. 149, 153-54 (S.D.N.Y. 1996); People v. First Meridian Planning Corp., 86 N.Y.2d 608, 620, 658 N.E.2d 1017, 1024, 635 N.Y.S.2d 144, 151 (1995); CPC Int'l Inc. V. McKesson Corp., 70 N.Y.2d 268, 275, 514 N.E.2d 116, 118, 519 N.Y.S.2d 804, 806 (1987).

K. RICO Claims

Finally, defendants move for summary judgment on plaintiff's RICO claims, 18 U.S.C. § 1962 (a)-(d). Specifically, defendants contend that summary judgment must be granted because (1) there is no "pattern of racketeering activity"; (2) there is no distinct enterprise and (3) defendants' alleged actions did not proximately cause plaintiff's injuries. Plaintiff opposes defendants' motion for summary judgment, arguing that triable issues of fact exist.

All subsections of 18 U.S.C. § 1962 require that plaintiff demonstrate a pattern of racketeering activity. GICC Capital Corp. v. Technology Fin. Group, 67 F.3d 463, 465 (2d Cir. 1995), cert. denied, [*33] 518 U.S. 1017, 135 L. Ed. 2d 1067, 116 S. Ct. 2547

(1996). This, in turn, requires a showing of at least two related predicate acts that amount to, or pose a threat of, continuing criminal activity. See Schlaifer Nance & Co. v. Warhol, 119 F.3d 91, 97 (2d Cir. 1997), citing H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 106 L. Ed. 2d 195, 109 S. Ct. 2893 (1989).

To meet the continuity requirement, a plaintiff must show either an "open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." GICC Capital Corp. v. Technology Fin. Group, supra, 67 F.3d at 466 (inner quotations omitted).

To determine if open-ended continuity exists, the nature of the predicate acts, or the nature of the enterprise at whose behest the predicate acts were performed, must be examined. GICC Capital Corp. v. Technology Fin. Group, supra, 67 F.3d at 466.

In cases where the act of the defendant or the enterprise were inherently unlawful, such as murder or obstruction of justice, and were [*34] in pursuit of inherently unlawful goals, such as narcotics trafficking, or embezzlement, the courts generally have concluded that the requisite threat of continuity was adequately established by the nature of the activity even though the period spanned by the racketeering acts was short.

United States v. Aulicino, 44 F.3d 1102, 1111 (2d Cir. 1995).

In this case, it is clear that the nature of defendants' conduct -- telemarketing -- is not inherently unlawful. Accordingly, other factors must be considered to determine if a requisite threat of continuity exists. GICC Capital Corp. v. Technology Fin. Group, supra, 67 F.3d at 466. One such factor is the threat that the alleged unlawful acts will continue into the future. Schlaifer Nance & Co. v. Warhol, supra, 119 F.3d at 97; Shamis v. Ambassador Factors Corp, 1997 U.S. Dist. LEXIS 12241, No. 95 Civ. 9818 (RWS), 1997 WL 473577 at *14 (S.D.N.Y. Aug. 18, 1997).

The record in this case contains no evidence that the alleged acts will be repeated in the future, and plaintiff does not argue that open-ended continuity exists as a result of any threat that defendants will continue their allegedly fraudulent activities. Thus, I find that open-ended [*35] continuity does not exist.

To determine whether closed-ended continuity exists, the following non-dispositive factors must be examined: (1) the length of time over which the alleged predicate acts took place; (2) the number of predicate acts; (3) the nature and variety of acts; (4) the number of participants; (5) the number of victims and (6) the complexity of the scheme alleged. GICC Capital Corp. v. Technology Fin. Group, supra, 67 F.3d at 466.

In this case, plaintiff claims that he was the victim of mail and wire fraud during several months in 1993. The record also contains an affidavit from Janet Medima, who claims that she was defrauded by defendants, but does not state when and where the allegedly

fraudulent communications with her took place. Llewellyn, however, states in his affidavit that Medima was defrauded in December 1994.

Although there is no minimum time period which must pass before closed-ended continuity may be found, the Second Circuit has found closed-ended continuity in only two cases, both of which alleged predicate acts occurring over a period of years. Giannacopolous v. Credit Suisse, 965 F. Supp. 549, 551 (S.D.N.Y. 1997), citing Jacobson v. Cooper, [*36] 882 F.2d 717, 720 (2d Cir. 1989) (predicate acts occurred over an eight year period) and Metromedia v. Fugazy, 983 F.2d 350, 368-69 (2d Cir. 1992) (predicate acts spanned over two years); Skylon Corp. v. Guilford Mills, Inc., 1997 U.S. Dist. LEXIS 2104, No. 93 Civ. 5581 (LAP), 1997 WL 88894 at *5 (S.D.N.Y. March 3, 1997); North American Dev., Inc. v. Shahbazi, 1996 U.S. Dist. LEXIS 7784, No. 95 Civ. 4803 (RWS), 1996 WL 306538 at *6 (S.D.N.Y. June 6, 1996).

In this case, the predicate acts spanned a year and a half, at most. Such a short period is insufficient to support a finding of closed-ended continuity.

Turning to the other non-dispositive factors, I find that the record contains a limited number of predicate acts. Plaintiff claims only a few instances of mail fraud and wire fraud occurring over a period of twelve days in 1993. It is also significant that the alleged predicate acts are not inherently unlawful but constitute garden variety fraud claims. Skylon Corp. v. Guilford Mills, Inc., supra, 1997 U.S. Dist. LEXIS 2104, 1997 WL 88894 at *6, citing United States v. Aulicino, 44 F.3d 1102, 1111 (2d Cir. 1995).

In addition, plaintiff has alleged that only a limited number of participants (four) were involved in the alleged scheme, all [*37] of whom were agents of defendant NAT, acting within the scope of their employment. However, a "plaintiff cannot succeed in alleging multiple participants merely by naming the agents of the corporation. . . . " Skylon Corp. v. Guilford Mills, Inc., supra, 1997 U.S. Dist. LEXIS 2104, 1997 WL 88894 at *6.

Finally, plaintiff's RICO claim is based on a simple fraud scheme. Courts have repeatedly held that such simple fraud schemes are insufficient to state a RICO violation. Thai Airways Int'l Ltd. v. United Aviation Leasing B.V., 842 F. Supp. 1567, 1573 (S.D.N.Y. 1994), aff'd, 59 F.3d 20 (2d Cir. 1995); Continental Realty Corp. v. J.C. Penney Co., 729 F. Supp. 1452, 1455 (S.D.N.Y. 1990).

Accordingly, the facts of this case do not give rise to closed-ended continuity.

Since plaintiff is unable to demonstrate either closed or open-ended continuity, a pattern of racketeering activity cannot be shown. Accordingly, Leininger's and NAT's motion for summary judgment should be granted as to all of plaintiff's RICO claims. 7

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7 Because the absence of a pattern of racketeering activity disposes of all of plaintiff's RICO claims, I do not reach defendants' other arguments in support of their motion for summary judgment.

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[*38] IV. Conclusion 8

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8 Plaintiff contends that he was hindered in moving for summary judgment and in opposing defendants' motion for summary judgment by my refusal to extend the briefing schedule to permit him to complete additional discovery. However, as I noted in my Opinion and Order date July 9, 1997, "the reasons [plaintiff has] proffered for extending the briefing schedule -- outstanding discovery requests -- [are] insufficient because the discovery requests in issue simply have nothing to do with the grounds asserted in [this] summary judgment motion."

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For all the foregoing reasons, I respectfully recommend that Leininger's and NAT's motion for summary judgment be granted with respect to plaintiff's claims for (1) violation of the Arizona Consumer Fraud Act; (2) violation of Arizona's state RICO statute; (3) breach of fiduciary duty; (4) imposition of a constructive trust; (5) prima facie tort; (6) breach of the implied warranty of merchantability claim; (7) violation of federal and state [*39] securities laws, and (7) violation of the federal RICO statute.

I further recommend that Leininger's and NAT's motion for summary judgment be denied as to plaintiff's claims for fraudulent inducement to contract, breach of express warranty claim and breach of the implied warranty for a particular purpose.

I further recommend that plaintiff's motion for summary judgment be denied in all respects.

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from receipt of this Report to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of the Honorable Kimba M. Wood, United States District Judge, 500 Pearl Street, Room 1610, and to the chambers of the undersigned, 40 Foley Square, Room 503, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Wood. FAILURE TO OBJECT WITHIN TEN (10) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas [*40] v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985);

IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-238 (2d Cir. 1983).

Dated: New York, New York

December 29, 1997

Respectfully submitted,

HENRY PITMAN

United States Magistrate Judge