

To Be Argued By:
Philip Allen Lacovara

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New York Supreme Court

APPELLATE DIVISION — FIRST DEPARTMENT



CENTRO EMPRESARIAL CEMPRESA S.A. and
CONECEL HOLDING LIMITED,

Plaintiffs-Respondents,

against

AMÉRICA MÓVIL, S.A.B. DE C.V., TELÉFONOS DE MÉXICO, S.A. DE C.V.,
CARLOS SLIM HELÚ, DANIEL HAJJ ABOUMRAD,
AMX ECUADOR, LLC (f/k/a Telmex Wireless LLC),
WIRELESS ECUADOR LLC (f/k/a Telmex Wireless Ecuador LLC), and
CONSORCIO ECUATORIANO DE TELECOMUNICACIONES S.A. CONECEL,

Defendants-Appellants.

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PRELIMINARY STATEMENT

Plaintiffs remind the Court to “accept the facts as alleged in the complaint as true.” Br. 11 (quoting *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994)). We could not agree more: if every fact alleged by the plaintiffs is accepted as true, the Complaint must be dismissed.

This entire case stems from one allegation: that through various means the defendants deprived the plaintiffs of a purported “right” to exchange their shares in TWE for new shares in América Móvil. Yet no contract provided any such “right”; plaintiffs were entitled only to a 20-day period of “good faith” negotiations – negotiations that might or might not have produced a deal at all, at a price that might or might not have differed from the cash “put” price stated in the contract and ultimately paid to plaintiffs. But even if plaintiffs *had* contracted for a right to an exchange, one thing is clear: according to their own allegations, plaintiffs knew from the very start that they had been “deprived” of their supposed “right” – there would be no negotiation and surely no exchange. Plaintiffs allege that they first requested a 20-day negotiation in March 2001 and that their request was repeatedly and completely rebuffed for over *two years*, forcing them to exercise the only concrete rights they did negotiate for the disposition of their TWE interests. Plaintiffs have no excuse for not filing this lawsuit years ago. They cannot reasonably claim that they were duped into releasing their claims, or that they first

discovered their rights had been violated when they read government reports in 2008. According to their own allegations, plaintiffs knew they had been deprived of a share exchange on day 21 in 2001, and they chose to do nothing about it.

Plaintiffs never come to grips with the plain meaning of their own allegations: they released the defendants from liability *knowing* that the contract had been breached and *knowing* that they were not getting complete information from the defendants. Under those circumstances, the law does not allow a party to bury its head in the sand. Plaintiffs argue that they can avoid the effects of a valid release and sidestep the statutes of limitations simply by claiming that they were “fraudulently induced” to forgo their right to sue. But no “fraud” could have concealed what plaintiffs claim they knew at the time: that they were entitled to a “share exchange” in 2001, but instead were given no choice but to sell their Units for cash. Raw allegations of fraudulent inducement cannot help the plaintiffs when their *own* allegations establish that they knew about the relevant wrongdoing yet consciously chose to settle their claims for valuable consideration rather than sue.

In the end, plaintiffs contend that every complaint alleging fraudulent inducement must go to discovery. That is not the law. The facts alleged in the Complaint preclude the conclusion that plaintiffs relied to their detriment on any false representations. The trial court’s order should be reversed, and the Complaint should be dismissed.

ARGUMENT

I. PLAINTIFFS' FRAUDULENT INDUCEMENT CLAIMS CANNOT SAVE THE COMPLAINT FROM DISMISSAL.

Plaintiffs barely deny that the sweeping releases they executed in return for tens of millions of dollars facially bar this lawsuit. Nor do they deny that most of their claims would be time-barred under ordinary circumstances. Instead, as expected, plaintiffs primarily assert that none of these barriers matter because they have alleged that their failure to sue (and decision to execute releases) was induced by the defendants' purported fraud. According to the plaintiffs, a raw allegation of fraudulent inducement is enough to defeat dismissal of a complaint on the ground that a plaintiff has consciously foregone his right to sue.

But plaintiffs' legal theory must be tested against the facts they allege. And as a matter of law, if the facts alleged in the Complaint are accepted as true, plaintiffs actually knew, or at least should have known, that they were being defrauded when they chose to release their claims. Under those circumstances, they cannot now claim they were tricked into giving up their rights.

A. If Plaintiffs' Allegations Are True, They Knew About, Or Could Have Known About, All Their Current Claims in 2001.

According to the plaintiffs, whether they reasonably relied on the defendants' purported misrepresentations when they decided not to sue is a question of fact that cannot be resolved on a motion to dismiss. See, *e.g.*, Pl. Br.

17, 19, 21, 25-26. That is not the law. The question here is whether, assuming the Complaint accurately describes the facts, the plaintiffs had sufficient notice of a potential fraud to obligate them to inquire further. If they did, then they cannot claim that they justifiably relied on the defendants' supposedly false representations when they decided to release them from liability and forgo filing a lawsuit within the statutory period. And contrary to plaintiffs' assertions, whether sufficient "storm warnings" exist to put a party on inquiry notice (and thus to impute knowledge of a potential fraud) is not a question of fact. It can be an objective inquiry, properly resolved by a court.

Plaintiffs' own authorities make this principle clear. For example, plaintiffs argue that "whether a defendant should be equitably estopped from raising the statute of limitations defense is a question of fact that should be determined upon the trial of the action." Br. 25-26. But the case they cite in support, *Putter v. North Shore University Hospital*, 7 N.Y.3d 548 (2006), *explicitly held the opposite*. In *Putter*, the Court of Appeals reversed an order that would have allowed discovery on a question of fraudulent inducement not to sue, dismissing a complaint simply on the basis of the plaintiff's own allegations. "Although the question of whether a defendant should be equitably estopped [from asserting a limitations defense] is *generally* a question of fact," the Court held, "here, given

[plaintiff's] level of awareness and subsequent inaction, equitable estoppel is inappropriate as a matter of law.” *Id.* at 553 (emphasis added).

Although questions of fraudulent inducement are *often* resolved after a certain amount of fact-finding has taken place, *Putter* makes clear that such questions need not be postponed until after discovery. It all depends on what plaintiffs seek to prove to a fact-finder. Plaintiffs note (see Br. 17 n.8) that several of the cases we cite were decided at the summary judgment stage, but they barely acknowledge, or ignore altogether, the other cited cases in which complaints were dismissed at the pleading stage (either on release or limitations grounds) despite allegations of fraudulent inducement. See, e.g., *Estate of Boyle v. Smith*, 15 A.D.3d 338, 339 (2d Dep’t 2005) (limitations), *aff’d sub nom. Quinn v. Smith*, 6 N.Y.3d 666 (2006); *New York City Sch. Constr. Auth. v. Koren-DiResta Constr. Co.*, 249 A.D.2d 205, 205-06 (1st Dep’t 1998) (release); *Augstein v. Levey*, 3 A.D.2d 595, 598 (1st Dep’t 1957) (limitations), *aff’d*, 4 N.Y.2d 791 (1958). As those decisions indicate, there is no reason to waste time and money conducting discovery or holding a trial if the best plaintiffs can hope to accomplish is to prove factual allegations that, if true, would invariably lead to a dismissal.

That is certainly the case here. Take, for example, plaintiffs’ second (and central) cause of action, for breach of Section 3.09 of the Agreement Among Members. That provision requires the parties to “negotiate in good faith (for a

period not to exceed 20 days) to exchange [TWE] Units for the equity securities” of a new entity such as América Móvil. R. 42. Put to one side plaintiffs’ implausible interpretation of this provision, which they claim (contrary to the provision’s plain language) entitled them to a share “exchange” rather than a “negotiation.” Br. 39. One way or another, plaintiffs allege that they approached the defendants in March 2001 and asked to open negotiations pursuant to this section of the contract. R. 36. According to the plaintiffs, the negotiations never took place, despite two years of repeated “demand[s].” R. 37, 39. If those allegations are taken as true, then whether the contract entitled the plaintiffs to a share exchange (as they assert) or a mere negotiation (as the language provides), it is beyond cavil that plaintiffs *actually knew* their contractual rights had been violated years before they claim they were lulled into releasing the defendants from liability for denying them those same contract rights. No purported misrepresentation, either in 2001 or 2003, could have caused plaintiffs to forget that they had a “right” to a share exchange (or at least to a negotiation) that had never happened. Indeed, plaintiffs completely ignore the 20-day limitation in the contract; they offer no explanation for why they did not think the contract had been breached as soon as the 20 days expired without a deal for a share exchange. Much less do they explain how they reasonably could have believed they would

receive a share exchange after they had been forced to “put” half, and then the balance, of their TWE Units for the contract price.

The other alleged contract breach in the Complaint was equally open and obvious. Plaintiffs assert that the defendants breached the LLC Agreement by failing to provide quarterly financial statements. R. 41. If that happened, plaintiffs *knew* they were not getting quarterly financial statements, and no supposed dissembling about the financial condition of Conecel could have led plaintiffs to believe that the contract had not been breached.

As for the fraud claims, the factual allegations contained in the plaintiffs’ complaint strongly suggest fraud. According to the plaintiffs, they asked to open negotiations for a share exchange in 2001; the defendants refused. R. 36. They asked again later the same month; their phone call was never returned. R. 37. They requested financial information about Conecel so they would be able to have an informed discussion; defendants passed the buck and ultimately never complied. R. 36, 37. Throughout the next year, the plaintiffs “demanded information” about Conecel’s finances; defendants refused to provide any, forcing the plaintiffs to rely on public filings they knew were incomplete. R. 37-38. “Deprived *** of complete and accurate financial information,” and “wary of the threat that Defendants would never negotiate in good faith,” plaintiffs sold half their shares in 2002 because they had “no practical alternative” but to do so. R. 38-39. For the

next year, plaintiffs “continued to press Defendants” to “open negotiations”; defendants refused to discuss the matter. R. 39.

Defendants deny that any of these events occurred as described, but assume that they did. Plaintiffs would have this Court believe that a finder of fact could rationally conclude, on the basis of *that* evidence, that the plaintiffs had no idea, when they decided to release the defendants from liability for “all manner of actions *** arising under or in connection with” these transactions, that there was a possibility that the defendants’ dealings with them had not been above board. Indeed, plaintiffs assert that this Court should “infer” from the complaint that back in 2001, they believed simply that these rebuffs, stonewalls, and runarounds amounted only to “rude or tough business tactic[s].” Br. 26. An “inference” of such credulity is quite a stretch, particularly when one considers that plaintiffs were sophisticated businesses represented by experienced counsel. Add to that the fact that plaintiffs have explicitly *pled* that they were “wary” the defendants would “never negotiate in good faith,” R. 38, and plaintiffs’ tortured construction of their own Complaint becomes even more implausible. But more importantly, what plaintiffs *thought* about defendants’ alleged refusal to deal or provide relevant financial information does not matter. Plaintiffs allege that they *knew* that the defendants were refusing to negotiate an exchange rate for weeks, months, and *years* after the contractual 20-day period for those negotiations had come and gone.

In any event, contrary to plaintiff's assertions, this Court need not find that the Complaint "conclusively" establishes they were aware that they were being defrauded. Rather, to dismiss the Complaint, the Court need only be satisfied that the facts plaintiffs knew were sufficiently suspicious to raise a warning flag, triggering a duty to inquire further (and certainly not to sign away their rights). As the Second Circuit has explained in an analogous context, "[a]n investor does not have to have notice of the entire fraud being perpetrated to be on inquiry notice." *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 351-52 (2d Cir. 1993). Rather, the relevant question is "whether she had constructive notice of facts sufficient to create a duty to inquire further into that matter." *Id.* See also *Estate of Boyle, supra*.

Plaintiffs certainly could have inquired further had they chosen to do so. As they note in the Complaint, they had a contractual right to complete and accurate financial information. Knowing that this material had been denied to them, there was nothing to prevent them from suing to enforce their rights. But rather than suing to get the information they knew they lacked, they released their claims.

B. A Release Is Not Invalid Just Because It Is Effective.

Plaintiffs try to avoid their release of fraud claims on the ground that they were in fact defrauded in exactly the manner contemplated by the release. New York law is clear, however, that fraudulent inducement invalidates a release only if the misrepresentations alleged to have induced the signing of the release are

separate from the misrepresentations covered by the release itself. In other words, a releasing party – particularly one who releases potentially valid claims in exchange for significant consideration – bears the risk that he will later learn that the claims he released were in fact meritorious. See *Alleghany Corp. v. Kirby*, 333 F.2d 327, 333 (2d Cir. 1964); *Bellefonte Re Ins. Co. v. Argonaut Ins. Co.*, 757 F.2d 523, 527 (2d Cir. 1985); *Eastbrook Caribe, A.V.V. v. Fresh Del Monte Produce, Inc.*, 11 A.D.3d 296, 297 (1st Dep’t 2004).

Plaintiffs nonetheless contend that the release in this case does not explicitly cover “unknown fraud,” and therefore does not release any claim that was not “within the[] contemplation” of the parties. Br. 20. That is wrong for two reasons. First, the release these plaintiffs signed by its language applies to every claim in the current lawsuit. The release covers “*all manner of actions, *** whatsoever, in law or equity, whether past, present, or future, actual or contingent, arising *** out of, based upon, attributable to or resulting from the ownership of membership interests in [TWE].*” R. 317 (emphases added). Plaintiffs quibble over the absence of the word “unknown,” but there is no meaningful difference between an “unknown” claim and a “future” claim, particularly when the operative sentence covers “*all*” actions that could possibly “aris[e] out of” the transactions at issue. See, e.g., *Ingram Corp. v. J. Ray McDermott & Co.*, 698 F.2d 1295, 1312 (5th Cir. 1983) (“When a release provides that ‘any and all claims,’ ‘past present, or future’

are to be extinguished, a court is required to enforce its provisions both as to known and unknown claims.”). Plaintiffs cannot avoid their contractual commitment by pointing to the absence of a synonym.

Second, even assuming that the release really was intended to exclude “unknown” claims not “contemplated” by the parties, there is no legitimate question that the claims in this lawsuit are in the *heartland* of claims that were contemplated at the time this release was signed. Plaintiffs released “all” claims related to or arising out of a particular set of contracts. They now bring suit claiming that those exact contracts were breached and that the defendants fraudulently deprived them of rights they had under those contracts. It is difficult to understand how plaintiffs can assert that they did not “contemplate” that the agreement they signed would bar this lawsuit.

Plaintiffs cite three cases for the proposition that a general release “will not be applied to bar claims which were unknown to the parties or not within their contemplation at the time of the execution of the release.” Br. 20. But they fundamentally misunderstand the holdings of those cases, which all stand for the unremarkable proposition that a general release cannot bar a claim that it was truly not intended, by either party, to bar. Accordingly, in *Mangini v. McClurg*, 24 N.Y.2d 556 (1969), the Court of Appeals held that a general release that settled a personal injury suit could not bar a subsequent claim brought after the plaintiff

learned that *both* parties had made a factual error about the extent of the plaintiff's injuries. Where there has been a "mutual mistake" of fact, the Court held, a defendant cannot take advantage of that mistake and hold plaintiff to a release neither party realized would cover the present claim. But there was no mutual mistake here; both parties knew that plaintiffs, in exchange for cash, were releasing any "right" to AMX shares. Likewise, in *Enock v. Nat'l Westminster Bankcorp, Inc.*, 226 A.D.2d 235 (1st Dep't 1996), plaintiffs alleged that their claim concerned an issue that was "not in dispute" at the time they signed a release with the defendants; therefore, it was unreasonable to assume that the release was intended to cover that claim.

On the other hand, the third case plaintiffs cite, *Commissioners of the State Insurance Fund v. Fortune Interior Dismantling Corp.*, 7 A.D.3d 427 (1st Dep't 2004), is exactly on point. There, the parties signed a broad release settling "any and all claims [and] demands *** which have arisen between them *** including, but not limited to, the matters raised in the Action" being settled. *Id.* at 428 (internal quotation marks omitted). This Court held that the plaintiff could not avoid the broad scope of the release because its subsequent claim related to a different insurance policy from the one at issue when the release was signed. The broad language of the release was enough to bar any suit between the contracting parties. Here, the connection between the current lawsuit and the scope of the

general release is even stronger: the release specifies the universe of claims being settled (all claims arising out of the parties' relationship as co-owners of TWE), and the current claim falls squarely within that universe.

In the end, plaintiffs' real argument is not that they did not *contemplate* in 2003 that they were releasing the tort and contract claims they now assert. What they are really saying is that they did not realize at the time they signed the release how valuable those claims were. In other words, according to the plaintiffs, if a party releases a fraud claim, consciously and for valuable consideration, he is nevertheless permitted to sue if he later learns that he was *actually* defrauded. Under plaintiffs' theory, a release would be enforceable only if the claims given up turned out to be worthless – or if every party were required, during settlement negotiations, to “come forward and confess to all his wrongful acts in connection with the subject matter of the suit.” *Alleghany Corp.*, 333 F.2d at 333. New York law is quite emphatically to the contrary, and for good reason: if the law truly required such explicit disclosures in order to insure that releases would bind their signatories, there would be no meaningful settlements. See *id.*

That is why it makes no difference that plaintiffs claim to have “discovered” the alleged fraud when they read a report from the Ecuadorian government in 2008. Defendants deny that this report indicates that they were at all untruthful with the plaintiffs, the Ecuadorian government, or anyone else. But even accepting

plaintiffs' allegations as true, the most they establish is that plaintiffs learned in 2008 that the fraud claim they settled in 2003 may have had substance. That does not mean the claim was "unknown" at the time it was released. Plaintiffs knew they hadn't exchanged their TWE units for América Móvil shares – within 20 days of their first request or at any other time – and they allegedly knew the defendants had failed to turn over requested financial documents. All plaintiffs supposedly learned in 2008 is that their suspicions of fraud were correct. But "[a] new cause of action for fraud does not accrue each time a plaintiff discovers new elements of fraud in a transaction," much less "new evidence to prove such fraud." *Sielcken-Schwarz v. Am. Factors, Ltd.*, 265 N.Y. 239, 245-46 (1934) (cited at Def. Br. 33).

C. The Complaint Does Not Allege A "Separate Fraud" In 2003.

To avoid the consequences of the release and the statutes of limitations, plaintiffs assert (Br. 22-23) that, even if they should have suspected the fraud they allege occurred in 2001, defendants "concocted a separate fraudulent scheme" in 2003. This "scheme," plaintiffs claim, was "distinct from the events in 2001 and 2002" because it was intended to induce the plaintiffs to accelerate their sale of TWE Units and to release the defendants from liability. *Id.* Even if the 2001 claims are barred, plaintiffs argue, the 2003 claims are still live, because the six-year statute of limitations has not yet run.

Plaintiffs' tactic fails, for two reasons. First, plaintiffs were no more justified in relying on the defendants' 2003 representations than they were in relying on the earlier statements. By the time the 2003 deal was put on the table, plaintiffs purportedly already knew that the original contract had been breached: there had been no share exchange, no negotiation, and no disclosure of complete financial information. If these allegations are true, plaintiffs could not justifiably rely on the defendants' supposedly additional misrepresentations in 2003. If they had reason to be concerned that they weren't getting the whole truth, the law required them to conduct additional inquiries, or at least to condition the general release they signed on the relevant representations. See *Koren-DiResta*, 249 A.D.2d at 205-06. They cannot now claim that other representations regarding their ownership of TWE shares – well within the release's terms – invalidate the release.

Second, and more basically, the “fraud” alleged in 2003 is *not* separate from the main claim. Plaintiffs allege that they were induced in 2003 to sell their remaining TWE Units to the defendants and to enter binding releases. But the damages they claim are the same as the damages asserted everywhere else in the Complaint: the allegedly current value of the América Móvil shares they claim they should have received in a share exchange, back in 2001. Try as they may to slice up the Complaint into separate pieces, plaintiffs ultimately claim one

overarching “wrong”: that they were not permitted to exchange their TWE Units for América Móvil shares at the time of the spin-off.

II. THE COMPLAINT PRESENTS ONLY ONE CLAIM, FOR BREACH OF A CONTRACTUAL OBLIGATION THAT DIDN’T EXIST.

The transactions at issue in this case may be complicated, but the ultimate allegation of wrongdoing is simple:

“Plaintiffs’ claims in this complaint arise from the fraudulent conduct of Defendants which was intended to, and did, deprive Plaintiffs from obtaining American Depository Shares in America Movil (traded on NYSE). The shares were to be obtained through an agreed exchange of shares for Units in “TWE LLC,” the limited liability company to which Plaintiffs had contributed their ownership interest in Conecel.” R-27.

As this description (from the introductory paragraph of the Complaint) makes clear, this action is ultimately a claim for breach of contract that has been improperly split into a dozen separate tort claims. And as we explained in our opening brief (at 26-31), under New York law (including many decisions by this Court), where a tort claim seeks no relief and asserts no damages that would not be recoverable under a claim for breach of contract, it is improperly duplicative and should be dismissed. *Mañas v. VMS Assocs., LLC*, 53 A.D.3d 451 (1st Dep’t 2008).

In response, plaintiffs point to two “frauds” supposedly distinct from the mere undisclosed intention not to perform contractual obligations: *First*, they

point to their allegations of promissory fraud. Slim, they argue, allegedly promised them, before signing any contracts, that the eventual deal would include a share-exchange right. Because Slim never meant to follow through on this promise, he committed fraud, apart from the breach of contract itself. Pl. Br. 32-33. *Second*, plaintiffs fall back on the so-called “separate” fraud allegedly committed in 2003, when they were purportedly “induced” to sell their remaining shares early, rather than waiting until the originally-established “put” windows. Pl. Br. 33-34. Neither of these supposed “frauds” adds anything of substance to the underlying claim for breach of contract.

To begin, the claim for promissory fraud merely alleges that Slim was “not sincere when [he] promised to perform under the contract.” *Mañas*, 53 A.D.3d at 453. The relief plaintiffs seek is the benefit of their supposed bargain. It is black-letter law that such a claim does not carry independent weight, apart from the contract claim itself. Plaintiffs are of course correct that it *is* a separate fraud to *induce* a party to enter into a contract while harboring a secret intention never to perform. But the relief for such a fraud, as we explained in our opening brief (at 28) is “damages for foregone opportunities” (*Mañas*, 53 A.D.3d at 454) – which plaintiffs quite explicitly do not allege. This is not a case in which the plaintiffs claim they were harmed by the mere act of entering into a contract that the defendants secretly planned to breach. There is no allegation, for example, that the

plaintiffs would have found another buyer for their beleaguered company had they known about Slim's true intentions, or that they otherwise would have been better off if they had never sold Conecel to the defendants. Instead, plaintiffs assert simply that Slim's statements were fraudulent because he ultimately caused the corporate defendants to breach the contract.

In any event, the premise of this argument is demonstrably incorrect. Defendants deny, of course, that Slim ever promised the plaintiffs that he would guarantee them a share exchange, but even if he did, there can be no reasonable dispute that the final contract signed by these parties *did not contain* such a provision. As we have explained elsewhere, Section 3.09 of the Agreement did not guarantee a "share exchange." It guaranteed a short period of "negotiations." If plaintiffs believed they were entitled to something more, they should have insisted that the contract so specify.¹ Instead, they signed and bound themselves to the contract their lawyers negotiated, including its merger provision: "This Agreement

¹ Plaintiffs, of course, dispute this characterization, arguing at some length that the purported agreement to exchange shares should not be "annul[ed]" because it is "indefinite" and lacks a price term. Br. 38-44. This argument attacks a straw man. We do not contend that Section 3.09 is "unenforceable" or "void" because it "fails to specify a dollar figure." Br. 41 (quoting *Cobble Hill Nursing Home, Inc. v. Henry & Warren Corp.*, 74 N.Y.2d 475, 483 (1989)). The provision certainly *did* create a binding obligation, just not the obligation plaintiffs wish it did. Section 3.09, by its terms, obligates the parties to *negotiate for 20 days*. It does not mandate that the negotiations succeed. Had the parties wished to create such an obligation, they could have; nothing prevented them from agreeing, for example, to "exchange their shares, at a price to be negotiated."

*** set[s] forth the entire agreement between the parties hereto with respect to the transactions contemplated by this Agreement.” R. 76. Any alleged prior representation about what this contract would contain was trumped by the actual language of the agreement. Plaintiffs chose to sign the contract they signed, and they now must live with the consequences.

As for the purported misrepresentations in 2003, like every other allegation in the Complaint, they are asserted to recover the benefit of plaintiffs’ supposed bargain. Plaintiffs claim that their contract entitled them to cash in their TWE units for shares of América Móvil; their supposed “fraud” damages, as they explain in their brief (at 33), are the appreciated value of those shares. But fraud damages “compensate plaintiffs *for what they lost* because of the fraud, not *** for what they might have *gained*.” *Lama Holding Co. v. Smith Barney Inc.*, 88 N.Y.2d 413, 421 (1996) (emphases added). As we noted in our opening brief, and as plaintiffs never disputed, “where [a] plaintiff is essentially seeking enforcement of the bargain, the action should proceed under a contract theory.” *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 552 (1992).

III. PLAINTIFFS HAVE ALLEGED NO DAMAGES.

Plaintiffs claim they were harmed because they were entitled to exchange their TWE Units for América Móvil shares in 2001, and the defendants allegedly prevented them from doing so. But as we pointed out in our opening brief (at 42-

43), plaintiffs could have bought América Móvil shares on the open market but chose not to. Defendants are not responsible for any harm resulting from the plaintiffs' unwillingness to risk their money.

Plaintiffs have no answer, but say only that the “burden” is on the defendants “to come forward with proof that Respondents failed to make reasonable efforts to mitigate their losses.” Br. 37. We do not believe this is an issue simply of “mitigation,” because that would assume that plaintiffs really were damaged by something the defendants did. In any event, the very premise of this lawsuit is that plaintiffs were unable to acquire shares in América Móvil at the time they say they were entitled to do so. Plaintiffs note that “[t]he Complaint contains no allegations concerning the use to which Respondents put the money they received for their TWE Units.” Br. 37. But if anything can be fairly inferred from the Complaint, it is that plaintiffs failed to purchase América Móvil shares at the time. Elementary candor to the Court would require pleading that fact, had it happened.

In our opening brief, we showed that plaintiffs got exactly what they say they were entitled to when they sold their shares for cash. Had they simply invested the cash they received in AMX stock, they would now hold more stock than they claim they would have received in a share exchange. Plaintiffs do not address this argument at all. The closest they come is to say (at 37-38) that there

was no way they could have known in 2001 that América Móvil would do so well. But that is the whole point. Plaintiffs want the benefit of an investment they never made; they want return without risk. Of course they could not have known for sure how the stock would do; that's the way investing works. If plaintiffs wanted the potential for "upside," they should have taken a risk. In any case, plaintiffs cannot avoid the premise of their suit, which is that they were supposedly "deprived" of the opportunity to own shares in América Móvil – an opportunity they claim to have desperately wanted. They simply have no good answer for why they did not buy those shares when they could have.

IV. THERE IS NO JURISDICTION OVER MOST OF THESE DEFENDANTS.

The Complaint alleges jurisdiction over "each defendant" on the basis of New York's long-arm statute and forum selection clauses designating New York as the forum for resolution of disputes. R. 30. On appeal, plaintiffs abandon their contractual argument as to the individual defendants and argue jurisdiction simply based on the "doing business" prong of the long-arm statute. Yet they also concede (as they must) that there are no allegations that either of the individual defendants ever set foot in this state (or this country) to do any "business" connected with this transaction. Their central theory appears to be that Telmex and its corporate cousins are all alter egos of Slim and Hajj, as if these were closely held family companies. See Pl. Br. 51 (Slim and Hajj "controlled the activities of

América Móvil, causing its ADSs to be listed and sold on the NYSE, and they directed the discussions concerning Respondents’ attempts to exchange their TWE Units”). When Slim and Hajj telephoned company representatives in New York (an allegation defendants dispute), plaintiffs argue, they were acting as principals, directing their personal agents to do business on their behalf.

That is, to put it mildly, an implausible suggestion. As the Complaint alleges, the corporate defendants are multinational conglomerates of which the defendants are shareholders and officers. See, e.g., R. 28 (Telmex is “the leading telecommunications company in Mexico,” whose stock is traded on the New York Stock Exchange). And plaintiffs leave largely untouched the authorities we cited (Def. Br. 50) holding that an officer is not subject to suit simply because he holds a supervisory position in a company that is. See Def. Br. 50 (citing *Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007), cert. granted, 128 S. Ct. 2931 (2008); *Kinetic Instruments, Inc. v. Lares*, 802 F. Supp. 976, 984 (S.D.N.Y. 1992); *Sargent v. Budget Rent-A-Car Corp.*, No. 94 Civ. 9215, 1996 WL 413725, at *3 (S.D.N.Y. July 24, 1996)).²

² Plaintiffs cite *Kreutter v. McFadden Oil Corp.*, 71 N.Y.2d 460 (1988), for the proposition that “corporate agents can also be principals for purposes of agency jurisdiction.” Br. 51. That is true, as far as it goes. *Kreutter* holds that a corporate officer is not categorically “shielded” from suit simply because “his dealings in the forum State were solely in a corporate capacity.” 71 N.Y.2d at 467. But the defendant in *Kreutter* was a principal owner of a privately-held corporate defendant, and the evidence showed that he was the sole “corporate agent” who

As for the corporate defendants who were not parties to the contract, the plaintiffs can point to no basis of jurisdiction other than forum-selection clauses contained in contracts that are *not* the basis for this suit (that is, the so-called Put Agreement, Master Agreement, and Purchase Agreement, none of which were alleged to have been breached). The plaintiffs claim that by consenting to forum selection clauses in contracts not at issue here, the corporate defendants have consented to all suits arising out of separate agreements to which they were not parties. To support this contention, plaintiffs cite a line of cases that hold nothing more remarkable than that a broadly-worded forum selection clause purporting to cover claims “arising out of” a contract covers not only contract claims, but also tort claims directly related to the parties’ contractual relationship. See Pl. Br. 46 (citing *Triple Z Postal Servs., Inc. v. United Parcel Serv., Inc.*, 13 Misc. 3d 1241A (Sup. Ct. N.Y. Cty. 2006); *Shalam v. KPMG LLP*, 13 Misc. 3d 1205A (Sup. Ct. N.Y. Cty. 2006), *aff’d*, 41 A.D.3d 200 (1st Dep’t 2007); *Luce v. Edelstein*, 802 F.2d 49 (2d Cir. 1986); *Envirolite Enters., Inc. v. Glastechnische Industrie Peter Lisec Gesellschaft M.B.H.*, 53 B.R. 1007, 1010 (S.D.N.Y. 1985), *aff’d*, 788 F.2d 5 (2d Cir. 1986)).

was responsible for the allegedly tortious New York act. In this case, the corporate defendants are publicly-traded multinational companies, and the New York actions of the individual defendants, as alleged, are absolutely minimal.

But the question here is not whether tort claims related to breaches of contracts signed by the non-party corporate defendants may be covered by the forum-selection clauses contained in those contracts. The question is whether a forum-selection clause purporting to cover suits that “arise out of” transactions “contemplated” by *one* contract covers suits arising out of purported breaches of a *different* contract signed by *different* parties. And as we explained in our opening brief (at 46-47), a forum selection clause can bind a non-party only when there is sufficient proof of a “close relationship” between the non-party and the signers of the operative agreement. Yet the plaintiffs explicitly disclaim that argument. See Br. 45 (“Respondents do not, as Appellants suggest, assert that any of the Appellants are subject to personal jurisdiction in New York by reason of their corporate affiliation with the parties to the Agreement Among Members.”). There is no other basis for jurisdiction here.

CONCLUSION

The trial court's Order should be reversed, the defendants' motion should be granted, and the Complaint should be dismissed.

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