IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 279

Suit No 862 of 2021

Between

Asia-Euro Capital SPV I LLP

… *Plaintiff*

And

(1) Regulus Advisors Pte Ltd
(formerly known as Al Masah
Capital (Asia) Pte Ltd)
(2) Amit Bagri
(3) Don Lim Jung Chiat

… *Defendants*

JUDGMENT

[Evidence — Adverse inferences]
[Tort — Conspiracy — Unlawful means conspiracy]
[Tort — Misrepresentation — Fraud and deceit]
[Tort — Misrepresentation — Negligent misrepresentation]
[Tort — Misrepresentation — Whether plaintiff can sue on representation made prior to its incorporation]

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Asia-Euro Capital SPV I LLP
v
Regulus Advisors Pte Ltd and others

[2024] SGHC 279

General Division of the High Court — Suit No 862 of 2021
Mohamed Faizal JC
24–27 June, 19 August 2024

30 October 2024 Judgment reserved.

Mohamed Faizal JC:

Introduction

1 In the world of publicly-traded securities, informed decision making by investors is facilitated by transparency in operations, robust accounting standards, disclosure requirements for price-sensitive information and objective data-reporting. However, these are not typical features of investments in the *private* market. Privately-traded securities often entail higher potential returns than those being traded in the public markets, but are accompanied by, *inter alia*, a much higher level of risk, less complete financial disclosures, less robust regulatory protections and, generally, a higher level of illiquidity. For that reason, in the domestic context, such investments are generally only available to accredited investors, *ie*, investors who are deemed to possess the necessary expertise, financial resources and know-how to navigate the murkiness of such

waters, and who have an outsized appetite for risks with one eye to reaping the relatively handsomer financial rewards.

2 This case is, in some ways, a microcosm of that dynamic and serves as a timely and necessary caution of the risks that often accompany private investments. Here, an aggrieved investor of a private investment gone wrong raises numerous issues as to how the financial product had been marketed to him (and to related entities) after he had allegedly suffered hundreds of thousands of dollars in losses. An investment that was supposed to reap him numerous multiples of his initial financial investment ended up seemingly stripping him of the invested monies almost in its entirety. When the initially rosy expectations of a hugely profitable investment are not met, and where representations had been made about the pristine prospects of that investment, where should the losses lie?

Facts

The parties

3 The plaintiff, Asia-Euro Capital SPV I LLP, is a limited liability partnership incorporated in Singapore that has its principal business in financial investments.[1] Mr Adrian Choo Pei Ang ("Mr Choo") is the managing partner and a director of the plaintiff.[2] At all relevant times, Mr Choo was a Chartered Financial Analyst ("CFA"), and a Chartered Alternative Investment Analyst ("CAIA").[3]

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1 Mr Adrian Choo Pei Ang's affidavit of evidence-in-chief dated 16 February 2024 ("Mr Choo's AEIC") at para 6 (Bundle of affidavits of evidence-in-chief ("BAEIC") volume ("vol") 1 at p 4).

2 Mr Choo's AEIC at paras 1 and 30 (BAEIC vol 1 at pp 3 and 11).

3 Mr Choo's AEIC at para 5 (BAEIC vol 1 at p 3).

4 Mr Lim Jing Xiang ("Mr Lim JX") is also a partner and director in the plaintiff.[4] He is a cousin of Mr Choo.[5] At all relevant times, Mr Lim was a chartered accountant accredited by the Institute of Singapore Chartered Accountants.[6]

5 The 1st defendant is Regulus Advisors Pte Ltd ("RAPL"), formerly known as Al Masah Capital (Asia) Pte Ltd ("AMCA"). The 1st defendant changed its name from AMCA to RAPL on 16 August 2016.[7] It is a company incorporated in Singapore and a registered fund management company regulated by the Monetary Authority of Singapore ("MAS"). Its principal business is to promote equity funds or investments to investors.[8]

6 The 1st defendant supported its parent company, Regulus Capital Limited ("RCL") and a related company, Al Masah Capital Limited ("AMCL"), in providing services to a number of private equity companies (the "PE companies"), including the AVIVO Group ("AVIVO") and Al Najah Education Limited ("ANEL"). AVIVO and ANEL were both incorporated in the Cayman Islands and in the business of providing healthcare services and educational services respectively in the United Arab Emirates ("UAE").[9] The PE companies

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4 Mr Lim Jing Xiang's AEIC dated 16 February 2024 ("Mr Lim JX's AEIC") at paras 1 and 11 (BAEIC vol 2 at pp 3 and 6).

5 Transcript dated 25 June 2024 ("25 June Transcript") at p 112 lines 7–11.

6 Mr Lim JX's AEIC at para 5 (BAEIC vol 2 at p 4).

7 Mr Amit Bagri's AEIC dated 16 February 2024 ("Mr Bagri's AEIC") at para 5 (BAEIC vol 2 at p 258).

8 Mr Choo's AEIC at para 7 (BAEIC vol 1 at p 4); and 1st and 2nd defendants' closing submissions dated 22 July 2024 ("12DCS") at para 12.

9 Mr Mohd Farid bin Mohd Rosli's AEIC dated 16 February 2024 ("Mr Rosli's AEIC") at para 11 (BAEIC vol 3 at p 5); Mr Rosli's AEIC at p 43 (BAEIC vol 3 at p 45); and Mr Don Lim Jung Chiat's AEIC dated 16 February 2024 ("Mr Don Lim's AEIC") at para 7 (BAEIC vol 6 at p 84).

engaged RCL as an investment manager to advise on and assist with their investment activities, and engaged AMCL to act as their placement agent to assist with the promotion of investments into them.[10] The 1st defendant's role was to support RCL's and AMCL's operations in Southeast Asia.[11]

7 Additionally, the 1st defendant dealt with parties who also wished to act as a distributor, or "referral partner", that refers others to invest in the PE companies. A "referral partner" does so by entering into a referral agreement with AMCL, under which it could earn a referral fee for introducing investments into the PE companies.[12]

8 The 2nd defendant, Mr Amit Bagri, was employed by the 1st defendant from about 16 September 2014 to 19 April 2018. He held the title of "Sales Director" when the 1st defendant was known as AMCA, and subsequently "Director, Investor Relations" after the 1st defendant changed its name to RAPL.[13] Although the 2nd defendant's job title incorporated the term "director", he was not, in fact, a board director of the 1st defendant.[14] Instead, according to the 2nd defendant, his role in the 1st defendant was sales-focused, *ie*, to introduce clients to opportunities to invest in private equity. Specifically, he promoted the purchase of shares in the PE companies.[15]

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10 Mr Rosli's AEIC at para 12 (BAEIC vol 3 at pp 5–6).

11 Mr Rosli's AEIC at para 15 (BAEIC vol 3 at p 7).

12 Mr Bagri's AEIC at para 12 (BAEIC vol 2 at p 259).

13 Mr Bagri's AEIC at paras 4–8 (BAEIC vol 2 at p 258).

14 Mr Bagri's AEIC at para 7 (BAEIC vol 2 at p 258).

15 Mr Bagri's AEIC at para 9 (BAEIC vol 2 at pp 258–259).

9 The 3rd defendant, Mr Don Lim Jung Chiat, held numerous (and sometimes concurrent) leadership positions in various entities (which include the entities as set out above at [5]–[6]):

(a) He was a board director of the 1st defendant from 3 May 2013 to 10 October 2016, and served as its chief executive officer ("CEO") from 19 April 2016 to 10 October 2016. By 10 October 2016, the 3rd defendant had stepped down from both the board and the position of CEO of the 1st defendant.[16]

(b) He was appointed a board director of AVIVO sometime in November 2014, a position he resigned from on 1 November 2016.[17]

(c) On or about 26 July 2016, he was formally employed by RCL and assigned the title of "Executive Director" though he was not, in fact, a board director of RCL. For the purposes of this role, he relocated to Dubai and was also tasked with managing ANEL.[18] He continued in this role within RCL until sometime in April 2021.[19]

10 It would be apparent that by virtue of the roles he occupied as set out in (a) and (b) of the preceding paragraph, from November 2014 till 10 October 2016, the 3rd defendant was concurrently a board director of the 1st defendant and also AVIVO.

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16 Mr Don Lim's AEIC at paras 15–18 (BAEIC vol 6 at pp 86–87).

17 Mr Don Lim's AEIC at paras 19–20 (BAEIC vol 6 at p 87).

18 Mr Don Lim's AEIC at paras 23–25 (BAEIC vol 6 at pp 88–89); and Transcript dated 27 June 2024 ("27 June Transcript") at p 71 line 20 to p 72 line 1.

19 Mr Don Lim's AEIC at para 25 (BAEIC vol 6 at p 89).

11 After the 3rd defendant stepped down as CEO of the 1st defendant, Mr Mohd Farid bin Mohd Rosli ("Mr Farid Rosli") was appointed the CEO of the 1st defendant from 24 October 2016 to 29 July 2020.[20] Prior to holding this position, Mr Farid Rosli was employed by RCL from 2013 to 2016 as a "director", though, much like the 3rd defendant, he did not in fact serve on the board of RCL. In that capacity, Mr Farid Rosli advised AVIVO on potential and actual acquisitions and investments, and AVIVO's own financial performance.[21]

Background to the dispute

The plaintiff's subscription to US$550,000 worth of shares in AVIVO

12 On 7 October 2016, Mr Choo and the 2nd defendant met for the first time. At the meeting, the 2nd defendant introduced the 1st defendant's business and the PE companies to Mr Choo.[22]

13 Consequent to this meeting, on 10 October 2016, the 2nd defendant sent an email to Mr Choo which contained three slide decks: (a) an overview of the 1st defendant's business dated October 2016 (the "RAPL Corporate Presentation"); (b) an overview of AVIVO's business dated August 2016 (the "AVIVO Teaser"); and (c) an overview of ANEL's business dated July 2016 (the "ANEL Teaser").[23] Sometime in October 2016, the 2nd defendant also provided two further slide decks, both dated September 2016, to Mr Choo. These were the "AVIVO Investor Presentation" and the "AVIVO Investor

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20 Mr Rosli's AEIC at para 7 (BAEIC vol 3 at p 4).

21 Mr Rosli's AEIC at paras 5 and 13 (BAEIC vol 3 at pp 4 and 6).

22 Mr Choo's AEIC at paras 11–12 (BAEIC vol 1 at p 5).

23 Agreed bundle of documents ("ABOD") vol 3 at p 320; and Transcript dated 24 June 2024 ("24 June Transcript") at p 70 line 24 to p 71 line 8.

Presentation (Financial Section)" slide decks.[24] These two slide decks form the "Offering Document" as defined in the share subscription form that is eventually signed by Mr Choo on behalf of the plaintiff.[25]

14 Mr Choo also requested access to AVIVO's online data room to do due diligence.[26] Mr Choo, Mr Lim JX, and two other investors (Ms Ruth Guo Qingru ("Ms Guo") and Mr Brian Ng ("Mr Ng"), whose relationships with Mr Choo will be explained later at [19]), were all given accounts on the "Investor Login" platform to access AVIVO's online data room.[27] At the time, Mr Choo was allegedly in discussions with five Chinese investors regarding potential investments in AVIVO. This group of Chinese investors included Ms Guo and Mr Ng.[28] By way of the online data room, Mr Choo had access to the AVIVO Teaser, AVIVO Investor Presentation and AVIVO Investor Presentation (Financial Section) slide decks, AVIVO's audited financial statements, a fact book on AVIVO's recent years' financial performance and AVIVO's memorandum and articles of association.[29]

15 On 27 October 2016, Mr Choo signed a referral agreement with AMCL (the "Referral Agreement"). Of significance in the Referral Agreement is the

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24 Mr Bagri's AEIC at paras 29 and 32 (BAEIC vol 2 at pp 263–264); 24 June Transcript at p 75 lines 6–18.

25 ABOD vol 1 at p 137; Mr Don Lim's AEIC at para 30 (BAEIC vol 6 at pp 90–91); and 24 June Transcript at p 177 lines 1–7.

26 24 June Transcript at p 74 lines 2–7.

27 Mr Bagri's AEIC at paras 26–27 (BAEIC vol 2 at pp 262–263).

28 24 June Transcript at p 45 lines 13–20; and 24 June Transcript at p 41 line 24 to p 42 line 6.

29 Mr Farid Rosli's AEIC at paras 13–14 (BAEIC vol 3 at p 6); and 24 June Transcript at p 74 line 24 to p 75 line 25.

fact that Mr Choo would be entitled to a referral fee of up to 2% of the capital raised for investments into AVIVO.[30]

16 On 10 November 2016, Mr Choo incorporated the plaintiff as a special purpose vehicle for the purpose of investing in AVIVO.[31] The use of a special purpose vehicle of this nature would also allow for Mr Choo to receive referral fees based on the quantum of the plaintiff's entire investment into AVIVO, even if some of the investment money came, in substance, from himself (see below at [22]). On 29 November 2016, the plaintiff was converted to a limited liability partnership and its purpose was stated to be "to conduct commercial due diligence and invest in property as well as private companies",[32] whereby "private companies" would, in practical terms, be a reference only to AVIVO. This is because, based on the partnership agreement for the plaintiff, the plaintiff would "restrict itself" to investing only in AVIVO.[33] The partnership agreement was signed by Mr Choo and Mr Lim JX, *ie*, the two partners and directors of the plaintiff (see above at [3]–[4]).

17 On 30 November 2016, as part of their due diligence efforts,[34] Mr Choo and Mr Lim JX flew to Dubai to observe and view the assets of AVIVO (the "Site Visit").[35] On that day, Mr Farid Rosli guided Mr Choo and Mr Lim JX to tour the offices and physical assets of AVIVO, which included hospitals and dental clinics. On the subsequent day (*ie*, 1 December 2016), Mr Choo met with and posed questions regarding AVIVO's business to various personnel in

30 Mr Bagri's AEIC at para 12 (BAEIC vol 2 at p 259); and ABOD vol 1 at p 80.

31 Mr Choo's AEIC at para 30 (BAEIC vol 1 at p 11).

32 Mr Choo's AEIC at para 33 (BAEIC vol 1 at p 11); and ABOD vol 1 at p 85.

33 ABOD vol 1 at p 92.

34 24 June Transcript at p 45 line 24 to p 46 line 7.

35 Mr Choo's AEIC at para 34 (BAEIC vol 1 at p 12).

AVIVO, including Mr Amit Agrawal ("Mr Agrawal"), who was the chief financial officer of AVIVO.[36] After the Site Visit, Mr Choo also sent in, by way of an email to Mr Agrawal, further questions to be addressed by AVIVO.[37]

18 On 8 December 2016, Mr Choo signed a subscription form (the "Subscription Form") on the plaintiff's behalf, subscribing to US$550,000 worth of shares in AVIVO (the "Subscribed Capital"). Each share was issued at US$2.80.[38] As such, the plaintiff had purchased 196,428.57 shares in AVIVO (the "AVIVO Shares").[39] The material clauses in the Subscription Form in relation to any fees payable (in particular, the clause regarding the placement fee to be paid to distributors or placement agents) are as follows:[40]

> 1.1 [The plaintiff] acknowledge[s] that [RCL] has been appointed the manager of AVIVO and will receive an annual management fee from AVIVO equal to 2% of the Subscribed Capital of AVIVO.
>
> 1.2 [The plaintiff] acknowledge[s] that, where services are provided by distributors or placement agents in connection with the subscription for Shares evidenced hereby, *AVIVO shall pay to such distributors or placement agents a placement fee which shall reflect prevailing market rates and which are subject to negotiations and amendment from time to time*.
>
> 1.3 [The plaintiff] agree[s] to pay [RCL] an incentive fee … equal to 20% of the Returns Generated on [its] investment in AVIVO (such return calculation to take into account all dividends/distributions received by [the plaintiff] during the tenure of the investment in AVIVO) …
>
> [emphasis added]

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36 Mr Choo's AEIC at para 34 (BAEIC vol 1 at p 12); 24 June Transcript at p 158 lines 13–23; and Mr Rosli's AEIC at para 22 (BAEIC vol 3 at p 9).

37 Mr Rosli's AEIC at para 22 (BAEIC vol 3 at p 9); and ABOD vol 3 p 420.

38 Mr Choo's AEIC at para 35 (BAEIC vol 1 at pp 12–13).

39 Mr Choo's AEIC at para 36 (BAEIC vol 1 at p 13).

40 Mr Choo's AEIC at p 151 (BAEIC vol 1 at p 153).

19 The plaintiff paid US$550,000 in accordance with the Subscription Form on around 15 December 2016.[41] The US$550,000 apparently comprised moneys from the following individuals:[42]

(a) US$220,000 was directly contributed by Mr Choo.

(b) US$100,000 was loaned by Ms Guo to Mr Choo personally, pursuant to a loan agreement between Ms Guo and Mr Choo dated 5 December 2016. According to the loan agreement, an "Initial Sales Charge" of 2% of the subscription value would be charged by the plaintiff to Ms Guo to "cover the costs of set-up of the partnership, sourcing of the shares, structuring the investment, legal fees and commercial due diligence".[43]

(c) US$120,000 was loaned by Mr Ng to Mr Choo personally. The loan agreement between Mr Ng and Mr Choo was apparently oral, but it was apparently materially similar to the one between Ms Guo and Mr Choo.[44]

(d) US$110,000 was contributed by Mr Lim JX.

20 The AVIVO Shares were purchased through a secondary sale, *ie*, the AVIVO Shares were purchased from an existing shareholder. This is contrasted with a primary sale of shares, where investors invest in the PE companies

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41 Mr Bagri's AEIC at para 112 (BAEIC vol 2 at p 283).

42 Mr Choo's AEIC at para 36 (BAEIC vol 1 at p 13); and 25 June Transcript at p 9 lines 11–13.

43 ABOD vol 1 at pp 145–146; and 24 June Transcript at p 55 lines 9–19.

44 24 June Transcript at p 55 line 20 to p 56 line 3.

directly in return for newly-issued shares.[45] Initially, as of around 12 December 2016, the arrangement was supposed to be that the AVIVO shares were to be transferred from one Aly Ahmed Raafat to the plaintiff. A share transfer form dated 12 December 2016 was signed by the plaintiff but was not counter-signed by Mr Aly Ahmed Rafaat.[46] On 5 January 2017, a new share transfer form (the "Share Transfer Form") was provided *via* email by the 2nd defendant to the plaintiff, which indicated that the AVIVO Shares were to be transferred to the plaintiff from African Partners Limited ("African Partners") instead. The Share Transfer Form was signed by both the plaintiff and African Partners.[47] It would be useful to note, for reasons that will be discussed later, that African Partners had acquired the AVIVO Shares at between US$1.00 to US$1.50 per share,[48] while the plaintiff acquired the AVIVO shares from African Partners in a secondary sale at US$2.80 per share.

21 The plaintiff's share certificate, stating its ownership of the AVIVO Shares, was issued by AVIVO on 10 January 2017,[49] and was duly received by the plaintiff on 23 January 2017.[50]

22 Sometime in February 2017, Mr Choo received US$9,821 in referral fees, which amounted to approximately 1.8% of the US$550,000 invested in AVIVO.[51] At the time of the investment, neither Ms Guo nor Mr Ng were

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45 Mr Bagri's AEIC at para 11 (BAEIC vol 2 at p 259).

46 ABOD vol 1 at p 147.

47 ABOD vol 1 at p 148.

48 Mr Choo's AEIC at para 52 (BAEIC vol 1 at p 18).

49 ABOD vol 1 at p 422.

50 Mr Choo's AEIC at para 38 (BAEIC vol 1 at p 14).

51 Mr Bagri's AEIC at para 125 (BAEIC vol 2 at p 285); and 27 June Transcript at p 135 lines 3–19.

informed of the fact that Mr Choo would be receiving referral fees for procuring their investment in AVIVO through the plaintiff.[52]

The alleged representations

23 Between Mr Choo's and the 2nd defendant's first meeting on 7 October 2016, and the signing of the Subscription Form on 8 December 2016, the plaintiff alleges that certain representations were made by the 2nd defendant to Mr Choo. Mr Choo claimed that these representations induced him to take the necessary steps that culminated in the US$550,000 investment by the plaintiff in AVIVO.[53] I will deal with each of these purported representations in turn.

(1) The 20 October Oral Representations

24 On 20 October 2016, Mr Choo met the 2nd defendant at the 1st defendant's office to discuss potential investments in AVIVO. During such a meeting, the plaintiff alleges that the 2nd defendant made the following oral representations to Mr Choo (the "20 October Oral Representations"):[54]

> … "AVIVO is going to have no issues maintaining its historical dividend of 9%. [AVIVO] is expected to grow approximately 20% a year and generate ample cashflow to pay dividends. 2016, based on business and market performance in the 10 months to date, is another strong financial year".
>
> … "AVIVO's shares were 64% undervalued and after Initial Public Offering ("IPO"), which AVIVO was intending to do in 2017, they are expected to fetch at least 3 times the price that it is issued at to new investors now".
>
> … "[The 1st defendant] and its parent company [RCL] are in excellent standing with the MAS and the Dubai Financial

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52 25 June Transcript at p 103 lines 7–13.

53 Plaintiff's closing submissions dated 22 July 2024 ("PCS") at para 2.

54 Mr Choo's AEIC at para 17 (BAEIC vol 1 at p 7).

> Services Authority. Regulus has a strong track record as a MAS regulated fund manager and a private equity player in both Middle East and Southeast Asia. AVIVO, Regulus's Healthcare portfolio company, has a strong financial performance for the past few years, with 9% dividends being paid out consistently. It is going to IPO next year."

Mr Choo then conveyed the alleged representations above made by the 2nd defendant to Mr Lim JX.[55]

25 According to Mr Choo, the 20 October Oral Representations further comprise the following statements made by the 2nd defendant:

(a) When Mr Choo asked the 2nd defendant if any management or board members of the 1st defendant were selling their shares before AVIVO's planned IPO, the 2nd defendant replied that there would be no such share disposal to demonstrate the management's confidence and commitment to the IPO. Moreover, there would even be a lock-down period for the shares owned by the management and/or board of AVIVO.[56]

(b) The 1st defendant's fees were "transparent and reflected as a 20% interest on profits and an additional 2% annual management fee".[57]

(c) The "primary purpose" of the 3rd defendant's directorship in AVIVO was to "actively improve the business and financial performance" of AVIVO for the benefit of investors and shareholders.

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55 Mr Choo's AEIC at para 21 (BAEIC vol 1 at p 8).

56 Mr Choo's AEIC at para 18 (BAEIC vol 1 at pp 7–8).

57 Mr Choo's AEIC at para 19 (BAEIC vol 1 at p 8).

In fact, the 3rd defendant was placed in AVIVO to protect the interests of investors in AVIVO.[58]

(d) The 3rd defendant was concurrently the CEO of the 1st defendant, had outstanding credentials and could protect the investments in AVIVO.[59]

(2) The 27 October Email, 28 October Phone Call and 29 October Email

26 As outlined earlier (see above at [20]), the plaintiff obtained the AVIVO Shares through a secondary sale. Prior to the plaintiff's investment, on 27 October 2016, Mr Choo emailed the 2nd defendant with two questions regarding the dividend payouts from investing in AVIVO:[60]

> 1. The secondary stakes we will buy will get dividends at which price – original entry price or acquisition price? Or rather what is expected dividend payout amount per share?
>
> 2. The stakes we buy in Nov – will it get full year 2016 dividend in Dec, semi-annual or pro-rated by holding period?

27 In essence, Mr Choo was clarifying: (a) whether the dividends, if any were to be received by the plaintiff, would be calculated according to the price at which the plaintiff would acquire the shares from the original owner of the shares (the "Acquisition Price") or at the price at which the original owner of the shares initially acquired them (the "Original Entry Price"); and (b) if the plaintiff were to acquire the AVIVO Shares in November 2016, whether the dividends received would be for the full year of 2016, paid on a semi-annual basis, or pro-rated based on the holding period of the said shares.[61]

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58 Mr Choo's AEIC at paras 20(a)–20(b) (BAEIC vol 1 at p 8).

59 Mr Choo's AEIC at paras 20(a) and 20(c) (BAEIC vol 1 at p 8).

60 ABOD vol 3 at p 347.

61 Mr Choo's AEIC at para 22 (BAEIC vol 1 at p 9).

28 On the same day, the 2nd defendant responded as follows to Mr Choo's questions, and included a table in his email (the "27 October Email" and "Breakdown Table"):[62]

> Allow me [to] share the dividend calculations for your perusal.
>
> Will speak with you on the same tomorrow morning.
>
> …

Investor	Amount Invested	Date of Investment	Price Invested	Number of Shares	Div. Decl. 31-12	Dividend Rcd.
A	1,000,000	1-Jan	1.50	666,667	9%	90,000
B	500,000	1-Apr	1.65	303,030	9%	33,750
C	1,000,000	1-Jul	1.80	555,556	9%	45,000

29 On 28 October 2016, there was a phone call between Mr Choo and the 2nd defendant (the "28 October Phone Call"). The contents of the phone call are disputed. Mr Choo claims that, in that phone call, the 2nd defendant conveyed that the dividends to be paid to the plaintiff would be based on the Acquisition Price, and that AVIVO "had the ability and intended to continue to maintain a high dividend payout of approximately 9% annually".[63] A day after the phone call, on 29 October 2016, Mr Choo sent an email to the 2nd defendant (the "29 October Email"), which stated as follows:[64]

> Thanks Amit. So it is a flat 9% on amount invested pro-rated by holding period. Should dividends on the secondary investments accrue to us on the same basis ie pro-rated on the holding period since the original investor bought it?

There appears to be no recorded response from the 2nd defendant to the 29 October email.

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62 ABOD vol 3 at pp 347–349.

63 Mr Choo's AEIC at para 25 (BAEIC vol 1 at p 10).

64 ABOD vol 3 at p 350.

(3) The 16 November Phone Call

30 In November 2016, Mr Choo did a search on the 1st defendant, and discovered that it was formerly under the "Al Masah Capital" brand (see above at [5]). According to Mr Choo, he had a phone call with the 2nd defendant on 16 November 2016 (the "16 November Phone Call"), in which he questioned the 2nd defendant as to why the 1st defendant changed its name. The 2nd defendant allegedly responded that the re-naming of the 1st defendant from AMCA to RAPL was "merely a rebranding exercise".[65]

(4) The 28 November Email

31 On 23 November 2016, Mr Choo compiled a list of questions which he wanted addressed by the management and auditors of AVIVO, and sent them to the 2nd defendant. In particular, Mr Choo asked the following question:[66]

> … Dividend for 2014 is 5.4m/0.8m in 2014 and 12.4m/12.6m in 2015 for controlling/non-controlling interests. *Understand from previous discussion there is no set dividend policy. However, can you share key factors driving dividend distribution level?*
>
> In particular, dividend paid to non-controlling interests in 2015 had a substantial increase both in absolute terms and in proportionate terms to non-controlling interests – why did this occur? Does increase in dividends to non-controlling interests affect ability to pay dividends to controlling interests?
>
> [emphasis added]

32 On 28 November 2016, the 2nd defendant responded to Mr Choo's questions *via* email (the "28 November Email"). In response to the question

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65 Mr Choo's AEIC at para 26 (BAEIC vol 1 at p 10).

66 ABOD vol 3 at p 377.

reproduced in the preceding paragraph, the 2nd defendant conveyed *verbatim* to Mr Choo *via* email the following answer provided by Mr Agrawal:[67]

> Dividend in case of minority partner/non-controlling interests depends on several factors viz. share of profit of the minority partner, profit and cash position of the underlying asset, frequency of dividend distribution, etc. Sharp increase in dividends for minority/non-controlling interest in 2015 vis-à-vis 2014 is primarily due to addition of Tijan; During 2015, the minority shareholder distribution stood as follows [Tijan - USD 11.2M (2 years dividend distribution) & balance attributable to Conceive]
>
> *In case of [AVIVO], the pay-out was 9% pro-rata based on the funds contributed by the shareholders.*
>
> Further, dividend pay-out in case of non-controlling interest is from the cash available in the respective Company and will not affect the dividend pay-out to the controlling interest. The more the distribution at the underlying assets, the more is the share of [AVIVO].
>
> [emphasis added]

(5) The 2 December Phone Call

33 On 2 December 2016, during another alleged phone call between the 2nd defendant and Mr Choo, the 2nd defendant allegedly represented that "[AVIVO's] financial projections are conservation [*sic*] and can comfortably sustain the 9% dividend pay out [*sic*]" (the "2 December Phone Call").[68]

The events following the plaintiff's subscription of the AVIVO shares

34 After the plaintiff subscribed to the AVIVO Shares in December 2016, nothing of significance (at least for the purposes of the proceedings before me) happened for about eight months. However, as I will explain below, things quickly unravelled from August 2017 onwards.

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67 ABOD vol 3 at pp 409–411.

68 Mr Choo's AEIC at para 29 (BAEOC vol 1 at p 11).

(1) The dividend payout was at 7%

35 On 21 August 2017, Mr Choo received an email from AVIVO's investor relations department (which I shall refer to as AVIVO as well for ease of reference, since there was no dispute that AVIVO's investor relations department accurately communicated AVIVO's intentions) that the "distribution for [the plaintiff's] investment in [AVIVO] for the financial year 2016 has been decided at *7%*" [emphasis added] and that the "date for the distribution [of dividends] will be communicated … in due course".[69] According to Mr Choo, this came as a "complete surprise" to him given the 2nd defendant's repeated representations to him that the dividend payout would be at 9%.[70] Nonetheless, on 14 September 2017, Mr Choo merely replied to the above email by requesting for "an update on the distribution date" for the dividends.[71]

(2) The dividends were calculated based on the Original Entry Price

36 On 5 November 2017, AVIVO sent out another email stating that distribution of the dividends will be in "tranches" due to "the existing cash position of the company and some of the immediate priority payments like debt servicing", and that the first tranche will be processed within ten days of the email.[72] On 22 and 27 November 2017, Mr Choo sent further emails to AVIVO and the 2nd defendant, seeking an update on the release of dividend payments.[73] On 30 November 2017, the 2nd defendant responded to Mr Choo over email after receiving updates from Mr Agrawal, and "highlight[ed]" that the dividends

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69 ABOD vol 4 at p 21.

70 Mr Choo's AEIC at para 43 (BAEIC vol 1 at p 15).

71 ABOD vol 4 at p 20.

72 ABOD vol 4 at p 24.

73 Mr Choo's AEIC at para 48 (BAEIC vol 1 at pp 16–17); ABOD vol 4 at pp 27–30.

will be calculated based on the Original Entry Price instead of the Acquisition Price:[74]

> [Referring to] your confirmation on the dividend payout, I have sent a mail out to AVIVO Team and heard back that they would be processing the dividend for 17 days.
>
> Just to highlight, and given that yours was a secondary purchase, the dividend will be based on acquisition price of the seller [*ie,* the Original Entry Price] and not your acquisition price [*ie*, the Acquisition Price].

37 On 5 December 2017, Mr Choo responded to the abovementioned email from the 2nd defendant, seeking "documentary proof" that the "acquisition price of the seller [*ie*, the Original Entry Price] was US$1 per share".[75] AVIVO finally responded to Mr Choo on 12 December 2017 with: (a) African Partners' share issuance statement, which revealed that its shares in AVIVO were originally acquired at either US$1.00 or US$1.50 (172,434 shares were acquired at US$1.00 and 723,035 shares at US$1.50); and (b) a table showing that the dividend payments to the plaintiff would be calculated on the basis of the Original Entry Price of US$1.00 (for 172,434 of the 196,428.57 shares acquired by the plaintiff) and US$1.50 (for the remaining 23,994.57 shares) accordingly. The total amount of dividends to be paid to Mr Choo for the financial year of 2016 would therefore amount to US$680.[76] On 13 December 2017, Mr Choo sent an email to AVIVO and the 2nd defendant, expressing, amongst other things, his dissatisfaction that the dividends were calculated on the basis of "the lowest cost shares ($1) first" and his desire for an explanation from AVIVO and

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74 Mr Choo's AEIC at para 49 (BAEIC vol 1 at p 17); ABOD vol 4 at p 47.

75 ABOD vol 4 at p 46.

76 Mr Choo's AEIC at paras 51–53 (BAEIC vol 1 at pp 17–18); and ABOD vol 4 at pp 43–45.

the 2nd defendant.[77] On 7 January 2018, AVIVO responded, in relation to that query:[78]

> … the calculation of distribution amount has been made on the amount invested by the primary investor in the Company and not on the amount invested by the investor in secondary market. The distribution amount has always been calculated on this basis for all the investors.

38 On 10 January 2018, Mr Choo sent the following response to AVIVO's email reproduced in the preceding paragraph:[79]

> *I accept that the dividend is based on the investment amount invested in the primary market.* My point from the email dated 12 Dec 2017 is that that African Partners bought 723k primary shares at $1.50 per share and only 172k primary shares at $1 per share. So my dividend should not be based on $1 per share, but at the weighted average of the primary share price.
>
> [emphasis added]

39 Of the total dividends payable to the plaintiff for the financial year of 2016 (*ie*, US$680), AVIVO only distributed US$170 to the plaintiff in its first tranche of dividend payments to investors. This was only 25% of the dividends payable for the financial year ending in 2016. According to Mr Choo, the plaintiff has not received any further dividend payouts to date.[80]

(3) The original owner of the AVIVO Shares was Mr Shailesh Dash

40 On 27 February 2017, AVIVO held an extraordinary general meeting ("EGM"). According to Mr Choo, he did not attend the EGM but requested for a copy of the meeting's minutes and received them sometime in the second half

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77 Mr Choo's AEIC at para 55 (BAEIC vol 1 at p 19); and ABOD vol 4 at p 43.

78 ABOD vol 4 at p 42.

79 ABOD vol 4 at p 41.

80 Mr Choo's AEIC at paras 53 and 61 (BAEIC vol 1 at p 18 and 20).

of 2017 (the "EGM Minutes").[81] Upon receiving a copy of the EGM minutes, Mr Choo noticed that the signature on the EGM Minutes of Mr Shailesh Dash, the CEO and founder of RCL and a board director of the 1st defendant,[82] was identical to the signature on the Share Transfer Form signed on behalf of African Partners. Mr Choo claimed that, at that juncture, he came to the realisation that the plaintiff had essentially acquired the AVIVO Shares from Mr Shailesh Dash.[83] According to the plaintiff, this was contrary to the 2nd defendant's representation that there would be no share disposal by the management and/or board of the 1st defendant and/or AVIVO ahead of the intended IPO of AVIVO (see above at [25(a)]).[84]

41 On 15 January 2018, Mr Choo also received an update over email from AVIVO stating that the IPO was put on hold as the "market scenario was no longer conducive".[85]

(4) Joint letter sent to members of the management of AVIVO and the 1st defendant

42 On 21 February 2018, Mr Choo sent an email to various members of the senior management of the 1st defendant and AVIVO. The email was sent on behalf of himself and 13 other investors in AVIVO. In the email, Mr Choo and the other investors sought a "constructive dialogue" for the "Management of

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81 Mr Choo's AEIC at paras 39–40 (BAEIC vol 1 at p 14); and 24 June Transcript at p 170 lines 19–25.

82 Mr Bagri's AEIC at para 118 (BAEIC vol 2 at p 284); Mr Choo's AEIC at para 14(a) (BAEIC vol 1 at p 6); and ABOD vol 3 at p 103.

83 Mr Choo's AEIC at paras 40–41 (BAEIC vol 1 at p 14).

84 Statement of Claim (Amendment No. 1) dated 6 February 2023 ("SOC") at para 9(d) (Set down bundle ("SDB") at pp 61–62).

85 Slide deck of AVIVO's frequently asked questions dated December 2017 (BAEIC vol 1 at p 212); and Mr Choo's AEIC at para 64 (BAEIC vol 1 at p 21).

[AVIVO] … to address [their] concerns and grievances".[86] A letter was also attached to the email.[87] It comprised questions posed by this group of investors to AVIVO.[88]

43 AVIVO responded on 7 March 2018 to some of the questions posed by the investors.[89] Subsequently, a meeting was held on 16 August 2018 between several investors including the plaintiff (represented by Mr Choo), and, amongst others, Mr Farid Rosli, and Dr Dilshaad Ali who was the CEO of AVIVO at that time.[90]

44 Between 2019 and 2021, it appears that the plaintiff did not take any further action regarding the AVIVO Shares, although Mr Choo alleged that "several other investors in AVIVO had repeatedly chased AVIVO's Investor Relations for financial updates but to no avail".[91]

(5) The DFSA investigations and decision notice against the 3rd defendant

45 On 30 July 2021, Mr Choo allegedly came across a news article dated 4 November 2020 titled "Al Masah Capital to be liquidated following series of fines by Dubai regulator".[92] In that article, it was revealed that in September 2019, the Dubai Financial Services Authority ("DFSA") had fined AMCL in the sum of US$3m, and had also fined Al Masah Capital Management

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86 ABOD vol 4 at p 53.

87 Mr Choo's AEIC at para 66 (BAEIC vol 1 at p 22).

88 ABOD vol 4 at pp 117–122.

89 Mr Choo's AEIC at para 67 (BAEIC vol 1 at p 22); and ABOD vol 4 at pp 123–127.

90 Mr Choo's AEIC at para 68 (BAEIC vol 1 at p 22); and ABOD vol 4 at pp 61, 62 and 67.

91 Mr Choo's AEIC at para 69 (BAEIC vol 1 at p 22).

92 Mr Choo's AEIC at para 71 (BAEIC vol 1 at p 23).

Limited ("AMCML", a Dubai-based subsidiary of AMCL[93]), in the sum of US$1.5m, for not informing investors in ANEL of a placement fee equating to 10% of all funds raised by such investors. The DFSA also banned certain individuals, including Mr Shailesh Dash and the 3rd defendant, from "performing any function in connection with the provision of financial services in or from the DIFC [*ie*, the Dubai International Financial Centre]", and fined them US$225,000 and US$150,000 respectively.[94]

46 In DFSA's decision notice against the 3rd defendant dated 25 September 2019 (the "Decision Notice"), such action was taken against the 3rd defendant for his involvement and knowing concern in the contraventions of DFSA-administered laws or rules by AMCL and AMCML by: (a) making misleading or deceptive statements as to fees in certain documents; and (b) failing to take reasonable steps to ensure that the information contained in those documents was clear, fair and not misleading. This decision was in relation to the failure to disclose a placement fee, amounting to 10% of the invested capital, that was paid to AMCL for investments into ANEL.[95] It was also revealed that investigations against AMCL and the 3rd defendant commenced in April 2016 (and thus prior to the plaintiff's subscription of the AVIVO Shares).[96] The plaintiff thus alleges that the defendants failed to disclose the DFSA investigations against the 3rd defendant. The presence of such investigations against AMCL and the 3rd defendant also went against the 2nd defendant's

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93 Mr Bagri's AEIC at para 31 (BAEIC vol 2 at p 263).

94 ABOD vol 4 at p 516.

95 Decision notice dated 25 September 2019 at paras 4, 5 and 8 (ABOD vol 4 at p 210); and Mr Don Lim's AEIC at para 47 (BAEIC vol 6 at p 100).

96 DIFC Financial Markets Tribunal grounds of decision dated 16 January 2020 at para 19 (ABOD vol 4 at p 360); DIFC Financial Markets Tribunal grounds of decision dated 27 October 2020 at para 5 (ABOD vol 4 at p 394); and Mr Choo's AEIC at para 75 (BAEIC vol 1 at p 25).

alleged representation that the 1st defendant was in "excellent standing" with the MAS and the DFSA (see above at [24]).[97]

47 According to the plaintiff, an "unusually high" placement fee of 10% of the invested capital was also collected by the 1st defendant from the investments into AVIVO, and such a placement fee was similarly concealed from the plaintiff.[98] This was also contrary to the 2nd defendant's alleged representation that the 1st defendant's fees were transparent (see above at [25(b)]).[99]

48 Mr Choo claimed that on the same day that he came across the news article regarding DFSA's decision, he conducted a profile search on the 3rd defendant with the Accounting and Corporate Regulatory Authority ("ACRA"), and found out that the 3rd defendant had ceased to be a director of the 1st defendant on 10 October 2016.[100] This was the very same day that the 2nd defendant circulated materials such as slide decks in relation to the 1st defendant and AVIVO to Mr Choo (see above at [13]). According to the plaintiff, these slides thus wrongly represented that the 3rd defendant remained the CEO and a board director of the 1st defendant.[101]

49 On 20 October 2021, the present suit was commenced by the plaintiff against the defendants.[102]

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97 SOC at para 9(a)(ii) (SDB at p 57).

98 SOC at para 27 (SDB at p 72).

99 SOC at para 9(a)(iv) (SDB at p 57).

100 Mr Choo's AEIC at para 80 (BAEIC vol 1 at p 26).

101 SOC at para 49(a)(vii) (SDB at p 94).

102 Writ of summons dated 20 October 2021; Mr Choo's AEIC at para 81 (BAEIC vol 1 at p 26).

The parties' cases

The plaintiff's case

50 The "genesis of the [plaintiff's] claim" lies in the series of alleged misrepresentations made by the 2nd defendant in his capacity as a "director" of the 1st defendant to Mr Choo, which were relied on by Mr Choo (and thus the plaintiff) to acquire shares in, and refer other investors to, AVIVO.[103] In gist, the following misrepresentations were allegedly made by the 2nd defendant to Mr Choo (the "Alleged Representations"):

(a) The expected dividend yield of the AVIVO Shares would be at 9% (the "9% Dividend Representation"), when it was 7% in reality.

(b) The dividend payouts to investors in AVIVO were to be calculated based on the Acquisition Price (*ie*, at US$2.80 per share) instead of the Original Entry Price (*ie*, at US$1.00 to US$1.50 per share) (the "Calculation Representation"). However, as it turned out, the dividends were calculated based on the much lower Original Entry Price.

(c) There would be no share disposal, and even a pre-IPO lockdown period, for the shares owned by board members and/or management of the 1st defendant and AVIVO, to demonstrate their confidence in and commitment to the IPO (the "No Share Disposal Representation") and relatedly, that there would be an upcoming IPO planned for AVIVO (the "Intended IPO Representation"). As noted earlier, there was a share disposal by the management of AVIVO as the AVIVO Shares were procured from the CEO of AVIVO, and the IPO planned for AVIVO was eventually put on hold.

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103 The plaintiff's closing submissions dated 22 July 2024 ("PCS") at para 2.

(d) That the 1st defendant's fees would be transparent and reflected as only a 20% interest on profits and an additional 2% annual management fee (of the invested capital) (the "Transparent Fees Representation"). On top of the disclosed fees, the plaintiff alleges that the 1st defendant collected a placement fee of 10% of the invested capital which the plaintiff was not aware of.

(e) That the 3rd defendant was a "key figure" with "outstanding credentials", whose concurrent appointment in the boards of AVIVO and the 1st defendant was intended to safeguard the interests of investors in AVIVO (the "Concurrent Role Representation"), but the 3rd defendant had stepped down from both boards prior to the plaintiff's investment in AVIVO. At the same time, the plaintiff also claims that the 1st and/or 2nd defendant failed to disclose the 3rd defendant's conflict of interest by way of his concurrent appointments in the boards of AVIVO and the 1st defendant, a contention which is squarely at odds with the intent of the representation found in the preceding sentence. I will address this inconsistency within their claim at a later juncture.

(f) The active concealment of the DFSA investigations against the 3rd defendant and the 3rd defendant's resignation. I pause to note that the plaintiff is not relying on the contents of, or outcome in, the Decision Notice *per se*. Rather, the plaintiff is relying on it to demonstrate that such investigations were live against the 3rd defendant and should have been disclosed.[104] The existence of such investigations against the 3rd defendant was also contrary to the representation that the 1st defendant

[104] 24 June Transcript at p 23 line 23 to p 24 line 22.

was in "good standing" with the MAS and the DFSA (the "Good Standing Representation").

51 The plaintiff seeks US$550,000 in joint damages from the defendants, with interest at 5.33% per annum from the date it paid the aforesaid sum to AVIVO to acquire the AVIVO shares.[105] The plaintiff does so on the basis of the following claims:

(a) claims against the 1st and 2nd defendants for fraudulent and/or negligent misrepresentation under common law;[106]

(b) alternatively, claims against the 1st and 2nd defendants for damages for negligent misrepresentation under ss 2(1) and 2(2) of the Misrepresentation Act 1967 (2020 Rev Ed) ("Misrepresentation Act");[107] and

(c) against all three defendants for unlawful means conspiracy.[108]

52 Initially, there appeared to be a standalone claim against the 1st and 2nd defendants for an alleged breach of duty of care,[109] but this was later crafted as part of the claim for negligent misrepresentation.[110] According to the plaintiff, it was expressly and/or impliedly agreed that the 1st and 2nd defendant would advise the plaintiff, and that they would exercise reasonable care and skill

105 PCS at para 104.

106 SOC at paras 2(a)–2(b) (SDB at pp 50 –51).

107 SOC at paras 2(a)–2(b) (SDB at pp 50 –51).

108 SOC at para 2(d) (SDB at p 51).

109 SOC at para 2(c) (SDB at p 51).

110 SOC at part V (SDB at p 81).

throughout the period of investment.[111] Alternatively, by agreeing to provide financial advice to Mr Choo, the 1st and 2nd defendants had voluntarily assumed responsibility to the plaintiff to exercise reasonable care and skill in rending the financial advice. By virtue of the 1st and 2nd defendants' profession, skill, expertise, knowledge, experience and/or their special position, it is reasonable to expect that the plaintiff would rely on them to give reliable advice.[112]

53 In relation to the claim against all three defendants for unlawful means conspiracy, the plaintiff avers that there was a combination or agreement between the three defendants for the 1st and 2nd defendants to make the Alleged Representations, including concealing the fact that the 3rd defendant was facing DFSA investigations at the time of the plaintiff's investment.[113] However, in the plaintiff's opening statement and closing submissions, its position on this shifted slightly. The plaintiff now contends that there was a combination or agreement between the defendants to *specifically* conceal the 3rd defendant's resignation (and the DFSA investigations against him), by way of the 1st and 2nd defendant making the Concurrent Role Representation to Mr Choo.[114] The plaintiff relied on the Concurrent Role Representation, and consequently suffered loss (in the sum of the US$550,000 invested in AVIVO).[115]

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111 SOC at para 9B (SDB at pp 53–54).

112 SOC at para 9C (SDB at pp 54–55).

113 SOC at para 48 (SDB at p 88).

114 Plaintiff's Opening statement dated 19 June 2024 ("Pf Opening statement") at paras 45–46; and PCS at paras 103(a)–103(c).

115 PCS at para 103(d).

54 For completeness, the plaintiff is not claiming that the 3rd defendant in particular made any misrepresentation to the plaintiff, nor is the plaintiff claiming that the 3rd defendant breached any duty of care.[116]

The 1st and 2nd defendants' case

55 The 1st and 2nd defendants' primary case is that none of the misrepresentations alleged by the plaintiff were, in fact, made.[117] Their secondary case is that even if the alleged representations were made, they were statements of opinion or promises as to future conduct, which are not actionable to begin with.[118] Moreover, the plaintiff did not rely on any alleged misrepresentation in acquiring the shares. Instead, it relied on its own judgment in doing so.[119] There is also no evidence of any fraudulent intent or negligence on the part of the 1st and 2nd defendants.[120]

56 The 1st and 2nd defendants also contend that there was no duty of care owed to the plaintiff. There was no contractual duty of care as there was never any contractual agreement for them to provide investment advice to the plaintiff. In this regard, there is no evidence that any consideration was provided for such that an enforceable contractual duty of care could have arisen.[121] There also could not have been any tortious duty of care owed to the plaintiff since "the

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116 25 June Transcript at p 78 line 25 to p 79 line 13.

117 1st and 2nd defendants' opening statement dated 19 June 2024 ("12D Opening statement") at para 3(d); and 24 June Transcript at p 94 lines 18–23.

118 12D Opening statement at para 3(c).

119 12D Opening statement at para 3(e); and 1st and 2nd defendants' Defence (Amendment No. 1) dated 25 April 2023 ("12D Defence") at para 21 (SDB at pp 130–131).

120 12D Opening statement at paras 3(f)–3(g).

121 12D Opening statement at paras 3(a) and 26; and 12D Defence at para 18C(a) (SDB at p 118).

law does not recognise a positive tortious duty of care" to give advice.[122] Furthermore, at the time the alleged representations were made, the plaintiff was not even incorporated yet (see above at [16]). As such, the 1st and 2nd defendants could not have assumed responsibility for an entity that did not even exist at that time.[123] In any event, any alleged duty of care would have been negated by the express disclaimers within the RAPL Corporate Presentation, AVIVO Teaser, and the Offering Document.[124]

57 In addition, the 1st and 2nd defendants highlight that the plaintiff was set up as a special purpose vehicle to "conduct commercial due diligence and invest" in AVIVO, and that Mr Choo even earned an "Initial Sales Charge" of 2% of the invested capital for providing various services, including commercial due diligence on AVIVO, to Ms Guo and Mr Ng. As such, it was Mr Choo who was the "agent for [the] investors" through the plaintiff.[125] This only reinforces the 1st and 2nd defendants' contention that they had no duty to advise Mr Choo (or the plaintiff) and that the plaintiff ultimately exercised its own independent judgment to make the investment.[126]

58 Furthermore, the plaintiff has not established its alleged loss. Crucially, it has failed to provide any evidence whatsoever of the current value of the AVIVO Shares.[127]

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122 12D Opening statement at para 3(b); and 12D Defence at para 18C(a) (SDB at p 118).

123 12D Opening statement at para 27; and 12D Defence at para 18C(b)(i) (SDB at p 118).

124 12D Opening statement at para 3(b); 12D Defence at paras 18C(b)–18C(c) (SDB at pp 118–119); and 12DCS at para 51.

125 12DCS at paras 38–39 and 41–42.

126 12DCS at para 43; and 12D Defence at para 26A (SDB at p 136).

127 12D Opening statement at para 3(i).

59 Finally, the plaintiff's claim in unlawful means conspiracy also fails as there were no unlawful acts (since the misrepresentation claims are not made out), no evidence of an agreement or combination between the defendants to carry out the alleged unlawful acts, and no specific intention to injure the plaintiff.[128]

The 3rd defendant's case

60 The 3rd defendant makes no admission to whether there were unlawful acts underlying the alleged unlawful means conspiracy that have taken place, but also does not submit on them since the Alleged Representations were, on the plaintiff's case, committed by the 1st and/or 2nd defendant.[129]

61 The 3rd defendant's case is essentially that there was no agreement or combination between the three defendants:

(a) The 3rd defendant was not involved in the representations made to the plaintiff by the 2nd defendant in relation to the investment in the AVIVO Shares. He never corresponded with the plaintiff regarding its decision to invest in AVIVO and was not consulted on the written materials shared with the plaintiff by the 2nd defendant.[130] The fact that the 3rd defendant was carbon-copied in certain emails is insufficient to show any agreement of a shared objective between the defendants.[131]

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128 12D Opening statement at paras 3(h), 59 and 62.

129 3rd defendant's Defence (Amendment No. 1) dated 25 April 2023 ("3D Defence") at para 11 (SDB at p 153); 3rd defendant's closing submissions dated 22 July 2024 ("3DCS") at para 7.

130 3D Defence at para 30E (SDB at pp 164–168); and 3DCS at paras 16–17 and 24.

131 3DCS at para 27.

(b) The 3rd defendant's resignation on or around the time the plaintiff invested in AVIVO is a mere coincidence.[132]

(c) The 1st and 2nd defendants were not aware of the DFSA investigations against the 3rd defendant at the time of the plaintiff's investment in AVIVO. In any event, it would not have been possible to disclose such DFSA investigations at the time due to the need to ensure compliance with regulatory directions by the DFSA to keep such investigations confidential.[133]

62 There is also no evidence that the 3rd defendant (or any of the other defendants) intended to specifically injure the plaintiff,[134] nor any evidence adduced by the plaintiff to prove its loss.[135] As such, a claim for unlawful means conspiracy is not made out.

Misrepresentation

The applicable law

63 I first address the plaintiff's claims of misrepresentation against the 1st and 2nd defendants. The elements of the tort of fraudulent misrepresentation have been summarised in *IM Skaugen SE and another v MAN Diesel & Turbo SE and another* [2018] SGHC 123 ("*IM Skaugen SE*") at [121] (citing the Court of Appeal's decision in *Panatron Pte Ltd and another v Lee Cheow Lee and another* [2001] 2 SLR(R) 435 ("*Panatron*") at [14]) as follows:

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132 3DCS at para 23.

133 3DCS at paras 37–38.

134 3D Defence at para 30C (SDB at pp 161–163); and 3DCS at paras 43–44.

135 3DCS at para 50.

(a) there must be a representation of fact made by words or conduct;

(b) the representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff (*ie*, there must be inducement);

(c) it must be proved that the plaintiff had acted upon the false statement (*ie*, there must be reliance);

(d) it must be proved that the plaintiff suffered damage by so doing; and

(e) the representation must be made with knowledge that it is false; it must be wilfully false, or at least made in the absence of any genuine belief that it is true.

64 Given the serious implications of fraud, a relatively high standard of proof is required for the court to be satisfied that fraudulent misrepresentation is established. As such, "cogent evidence" is necessary (*Fuji Xerox Singapore Pte Ltd v Mazzy Creations Pte Ltd and others* [2021] SGHC 193 ("*Fuji Xerox*") at [50], citing the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [159]–[161]).

65 The elements of the tort of negligent misrepresentation were also outlined in *IM Skaugen SE* at [121], referring to the Court of Appeal decisions of *Fong Maun Yee and another v Yoong Weng Ho Robert* [1997] 1 SLR(R) 751 at [52] and *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 at [21]):

(a) the defendant must have made a false representation of fact;

(b) the representation induced actual reliance;

(c) the defendant must owe a duty of care;

(d) there must be a breach of that duty of care; and

(e) the breach must have caused damage to the plaintiff.

66 I also note that for a statement to constitute an actionable misrepresentation, it must be a statement of a present fact. This would exclude statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law (*Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 ("*Deutsche Bank AG (HC)*") at [93]). Moreover, it is trite law that "mere silence, however morally wrong, will not support an action of deceit" (the House of Lords decision of *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211). There can be no misrepresentation by omission, although active concealment of a particular state of affairs may amount to misrepresentation. In the latter case, active concealment may be found where there is evidence that the representator deliberately and dishonestly concealed the truth from the representee with the intention to mislead (*Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*") at [65]).

67 Alternatively, where the party on the receiving end of a non-fraudulent misrepresentation (*ie*, a negligent or innocent misrepresentation) had entered into a contract after relying on that representation, he may bring a statutory claim for damages pursuant to s 2 of the Misrepresentation Act, which I reproduce for ease of reference:

> **Damages for misrepresentation**
>
> **2.**—(1) Where a person has entered into a contract after a misrepresentation has been made to him by another party

> thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable to damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation was not made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true.
>
> (2) Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, and he would be entitled, by reason of the misrepresentation, to rescind the contract, then, if it is claimed, in any proceedings arising out of the contract, that the contract ought to be or has been rescinded, the court or arbitrator may declare the contract subsisting and award damages in lieu of rescission, if of opinion that it would be equitable to do so, having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were upheld, as well as to the loss that rescission would cause to the other party.
>
> (3) Damages may be awarded against a person under subsection (2) whether or not he is liable to damages under subsection (1), but where he is so liable any award under subsection (2) shall be taken into account in assessing his liability under subsection (1).

68 In essence, s 2 of the Misrepresentation Act provides two grounds of additional relief for non-fraudulent misrepresentation where such a misrepresentation induced the representee to enter into a contract. Section 2(1) provides a statutory cause of action for negligent misrepresentation without any need to establish a duty of care in tort (*CDX and another v CDZ and another* [2021] 5 SLR 405 ("*CDX*") at [41]) and the burden is on the defendant/representor to prove "that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true" (*RBC Properties Pte Ltd v Defu Furniture Pte Ltd* [2015] 1 SLR 997 ("*RBC Properties*") at [66]). As set out in in *RBC Properties* (at [64]), s 2(1) of the Misrepresentation Act was intended "to provide a legal avenue for the recovery of damages at common law [for non-fraudulent misrepresentation, at a time] where none had existed before, apart from a claim for fraudulent

misrepresentation or deceit" [emphasis in original omitted]. Put another way, at that time, apart from a claim for fraudulent misrepresentation or deceit, damages were not recoverable for all other types of misrepresentation; recission of the contract was the only remedy available to the claimant/representee (*RBC Properties* at [64]). In a similar vein, s 2(2) of the Misrepresentation Act also furnishes the claimant/representee with the additional option of claiming damages in lieu of rescission for negligent or innocent misrepresentation (*CDX* at [41], citing *RBC Properties* at [67], and see also, in this connection, the Court of Appeal's observations in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [104]).

69 Nevertheless, claims pursued under s 2 of the Misrepresentation Act will still require the pleaded misrepresentation to be *actionable*. The Court of Appeal explained that s 2(1) of the Misrepresentation Act (which provides for damages for non-fraudulent misrepresentations) "only alters the law as to the reliefs to be granted for a non-fraudulent misrepresentation *but not as to what constitutes an actionable misrepresentation*" [emphasis added] (*Tan Chin Seng and others v Raffles Town Club Pte Ltd* [2003] 3 SLR(R) 307 ("*Raffles Town Club*") at [23]), and this observation would equally apply to s 2(2) of the Misrepresentation Act, which provides for damages in lieu of recission for non-fraudulent representations (*Fuji Xerox* at [118]).

Issues to be determined

70 Based on the applicable legal principles, it is clear that the first, and perhaps most crucial, hurdle for the plaintiff to overcome is proving that the Alleged Representations were in fact made in the manner pleaded. If I arrive at the view that the Alleged Representations were not made in the manner asserted by the plaintiff, or, in the alternative, if they were so made, that these were

nothing more than statements in the form of opinion or are otherwise unactionable, then it would follow that the case would necessarily fail, whatever my views may be on the other issues that have arisen in this matter.

71 With the preceding paragraph in mind, these are the issues that arise in the present case:

(a) whether the Alleged Representations were made;

(b) whether the Alleged Representations are actionable misrepresentations; and

(c) whether the 1st and 2nd defendants owe a duty of care to the plaintiff.

The Alleged Representations were not made

72 Having considered the documentary and oral evidence adduced before me, I find that, on the balance of probabilities, the Alleged Representations were not made by the 2nd defendant in the manner suggested by the plaintiff.

73 As a preliminary observation, I do not propose to address the 16 November Phone Call and 2 December Phone Call in the ensuing analysis. The alleged representations made by the 2nd defendant to Mr Choo over the 2 December Phone Call largely replicates that made in prior alleged oral representations relating to the 9% Dividend Representation, such as the 20 October Phone Call and 28 October Phone Call (see above at [24], [29] and [33]). Additionally, the plaintiff makes no reference to the 2 December Phone Call in both its closing submissions and submissions in reply. Similarly, in relation to the 16 November Phone Call, this was not brought up at all during the course of the proceedings before me or in the parties' submissions.

There was no independent corroboration of the Alleged Representations

74 First, as the defendants have taken pains to highlight, the representations alleged by the plaintiff cannot be independently corroborated.[136] Conspicuously, notwithstanding the claim of the centrality of these representations to procuring the AVIVO Shares, almost no reference to most of these alleged representations featured in any of Mr Choo's many written correspondences with the defendants and/or AVIVO. Moreover, the content of the emails exchanged between Mr Choo and the defendants appear to largely support the conclusion that no such oral representations were actually made. I highlight three examples, touching on the most material of the suggested representations made to Mr Choo.

(1) The 9% Dividend Representation and the Calculation Representation

75 As is clear above, a significant part of the plaintiff's case revolves around the purported oral representation by the 2nd defendant from as early as 20 October 2016, that "AVIVO is going to have no issues maintaining its historical dividend of 9%", and that "AVIVO had the ability and intended to continue to maintain a high dividend payout of approximately 9% annually" (see above at [24] and [29] respectively). Based on the wording of these oral representations as alleged by the plaintiff, at first blush, the plaintiff's position appeared to be that the 2nd defendant essentially represented that a dividend yield of 9% was virtually guaranteed. Moreover, in the plaintiff's statement of claim, the representations were particularised as such: "[t]he dividends paid out to investors … would be based on the [Acquisition Price], with an *expected yield of 9%* per annum" [emphasis added].[137]

136 12D Opening statement at para 3(d).

137 SOC at para 9(b)(i) (SDB at p 58).

76 Despite the apparent centrality of the 9% Dividend Representation to the plaintiff's decision to invest in AVIVO, Mr Choo did not express any form of surprise or protest (or even inquired with the 2nd defendant) when AVIVO announced that the dividend yield was, in fact, at a lower rate of 7%. After such announcement, Mr Choo simply went on to seek an update on the dividend distribution date from AVIVO (see above at [35]).[138] In my mind, this suggested that there was no actual understanding on the part of Mr Choo that a 9% yield would be a given, which in turn reveals that the representations by the 2nd defendant, if any were made at all, were tentative and not couched to suggest any certainty in outcome.

77 I note that the plaintiff relies on the 29 October Email as corroborative evidence that the 9% Dividend Representation was indeed made during the 28 October Phone Call. To recapitulate, in the 29 October Email, Mr Choo stated: "Thanks Amit [*ie*, the 2nd defendant] … *So it is a flat 9% on amount invested* pro-rated by holding period" [emphasis added] (see above at [29]). According to the plaintiff, if the 2nd defendant did not make the 9% Dividend Representation to Mr Choo, it is "inexplicable that [Mr Choo] would nevertheless [go] on to record his understanding that the dividend payout would be pro-rated specifically at the rate of 9% of the amount invested".[139] However, the point remains that, if the 9% Dividend Representation was indeed made, and such a representation was central to the plaintiff's decision to invest in AVIVO, it is inexplicable that Mr Choo raised no complaint at all to either the 2nd defendant or AVIVO when the level of dividend payment (at 7%) was announced by AVIVO.

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138 Email dated 14 September 2017 (ABOD vol 4 at p 20).

139 PCS at paras 22–23.

78 In fact, the subsequent email correspondence between Mr Choo and the 2nd defendant suggests that Mr Choo himself *knew that there was no iron-clad dividend policy*. In his email to the 2nd defendant dated 23 November 2016 (see above at [31]) (the "23 November Email"), just shy of a month after the 9% Dividend Representation was purportedly made, Mr Choo stated that he "understand[s] from previous discussion [that] there *is no set dividend policy* … [h]owever, *can [the 2nd defendant] share key factors driving dividend distribution level?*" [emphasis added]. When Mr Choo was cross-examined on the 23 November Email, he clarified that that he was never seeking a guarantee, and that the 2nd defendant likewise "did not guarantee" the 9% dividend yield, and merely represented that AVIVO was "likely to maintain 9[%] or even better".[140] As such, it appeared that the plaintiff's position, more precisely, appeared to be that the 1st and/or 2nd defendant misrepresented *the likelihood* of the dividend yield being maintained at 9%,[141] rather than *a guarantee* of the dividend yield being maintained at that level. I pause at this juncture to note that this makes the 9% Dividend Representation even more likely to be unactionable. I address this at a later juncture (see below at [140]).

79 In a similar vein, with respect to the Calculation Representation allegedly made during the 28 October Phone Call, Mr Choo's response was also conspicuously muted despite his apparent "complete surprise" when the 2nd defendant "highlight[ed]" that the dividends were calculated based on the Original Entry Price instead of the Acquisition Price (see above at [35]).[142] In fact, Mr Choo appeared entirely non-plussed about that revelation, instead focusing on finding out what the exact quantum of the Original Entry Price of

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140 24 June Transcript at p 142 lines 6–10.

141 24 June Transcript at p 138 lines 9–19.

142 Mr Choo's AEIC at para 50 (BAEIC vol 1 at p 17).

the shares was. Once more, if there was indeed any express representation in the manner suggested by Mr Choo, it would have been surprising for him to not immediately come back to highlight that the 2nd defendant's response was squarely inconsistent with the explicit assurances given previously. At the very least, one would have imagined that he would have checked in with the 2nd defendant on the apparent divergence in calculation methodology for dividends from what was represented to him. This was especially so given that the difference could not, by any measure, be seen as *de minimis*: based on Mr Choo's understanding, the dividends would have been calculated based on the Acquisition Price (of US$2.80), which is, even on a conservative estimate, more than double that of the Original Entry Price that the dividends payments were eventually based on (between US$1.00 and US$1.50, with most of the dividend payments being based on US$1.00 as most of the shares in question were originally purchased by African Partners at US$1.00) (see above at [37]). The plaintiff's position, that the Calculation Representation was indeed made, becomes even more inexplicable in light of Mr Choo's email dated 10 January 2018 (see above at [38]), where, after AVIVO clarified that the calculation of such dividends would be based on the Original Entry Price, Mr Choo responded unambiguously that he "*accept[ed] that the dividend is based on the investment amount invested in the primary market*" [emphasis added].

80 When questioned at trial about his muted response, Mr Choo explained that he was "trying to salvage what [he could] at this point" despite realising that the 2nd defendant had misrepresented to him.[143] He was "picking [his] battles" and "focusing on what [he could] get [from] AVIVO", particularly since he did not want to "burn bridges with them because [he was] still hoping

143 24 June Transcript at p 180 lines 3–9.

to get [the] IPO".[144] Such an explanation by Mr Choo made no logical sense on two levels.

81 First, as pointed out by the 1st and 2nd defendants, Mr Choo was already pursuing a complaint in relation to the manner the dividends were calculated, albeit on a different basis.[145] Mr Choo raised his complaint to AVIVO and the 2nd defendant *via* email regarding the fact that the dividends were calculated on the basis of "the lowest cost shares first ($1)" (*ie*, US$1.00 per share) (see above at [37]) rather than a weighted average of the two prices (*ie*, US$1.00 and US$1.50 per share) at which the shares were initially purchased. In other words, Mr Choo's pursued his complaint that a different method should have been used to calculate the dividends based on the *Original Entry Price*. It therefore did not make sense that Mr Choo did not pursue a separate (and ostensibly much more significant) facet of the very same complaint, namely that the dividends should have been calculated at the much higher *Acquisition Price* (*ie*, US$2.80 per share) instead.

82 Second, it is unclear why Mr Choo's complaint regarding the dividends, if raised, would have any impact at all on pending IPO plans.[146] When Mr Choo was questioned regarding his similar failure to raise any complaint after finding out that the original owner of the AVIVO Shares was Mr Shailesh Dash (*ie*, in relation to the No Share Disposal Representation), Mr Choo again made reference to the IPO, explaining that he "[did] not want to raise this" as it may "jeopardise the IPO".[147] However, when pressed further as to why exactly

144 24 June Transcript at p 183 lines 2–17.

145 12DCS at para 75(j).

146 12DCS at para 75(k).

147 24 June Transcript at p 171 line 22 to p 172 line 5.

raising a concern, by way of an *internal email*, would jeopardise AVIVO's IPO, Mr Choo simply stated that he wanted to "play it safe".[148] In my view, this is clearly a non-response, and there is no persuasive reason provided by Mr Choo as to why any internal complaint by an investor would, as Mr Choo avers, jeopardise IPO plans.

83 The plaintiff also points to the 27 October Email and the attached Breakdown Table sent by the 2nd defendant as purported evidence that the Calculation Representation (and also the 9% Dividend Representation) was made. To recapitulate, Mr Choo emailed the 2nd defendant on 27 October 2016 seeking clarification on: (a) whether the dividends, if any were to be received by the plaintiff, would be calculated based on the Acquisition Price or the Original Entry Price; and (b) if the plaintiff were to acquire the AVIVO shares in November 2016, whether the dividends received would be for the full year of 2016 or pro-rated by the holding period of the said shares. It is undisputed that the 2nd defendant replied to the plaintiff in the 27 October Email and attached the Breakdown Table (see above at [28]), which I reproduce here for ease of reference:

> Allow me share the dividend calculations for your perusal.
>
> Will speak with you on the same tomorrow morning.
>
> …

Investor	Amount Invested	Date of Investment	Price Invested	Number of Shares	Div. Decl. 31-12	Dividend Rcd.
A	1,000,000	1-Jan	1.50	666,667	9%	90,000
B	500,000	1-Apr	1.65	303,030	9%	33,750
C	1,000,000	1-Jul	1.80	555,556	9%	45,000

84 The plaintiff submits that the 27 October Email in the context of Mr Choo's queries, without any qualification by the 2nd defendant, clearly

[148] 24 June Transcript at p 172 lines 7–22.

represented that the dividends would be calculated based on the price at which the said investor acquired the shares and the expected dividend yield will be at 9%.[149]

85 According to the 2nd defendant, the Breakdown Table was "illustrative"[150] and was meant to show how the dividends worked under various scenarios, *assuming* a 9% dividend was declared.[151] Moreover, the 2nd defendant clarified that, by way of the 27 October Email, he had only intended to respond to Mr Choo's second question (*ie*, if the plaintiff were to acquire the AVIVO Shares in November 2016, whether the dividends received would be for the full year of 2016 or pro-rated by the holding period of the said shares).[152] The 2nd defendant accepted that he omitted to qualify in that email that the Breakdown Table was only in relation to primary investments.[153] However, he ultimately clarified with Mr Choo during the 28 October Phone Call that the dividend payments were to be based on the Original Entry Price,[154] and the 9% dividend yield as illustrated in the Breakdown Table was merely an assumption.[155] Finally, the 2nd defendant also submitted that the words "Amount Invested" in the second column of the Breakdown Table can only sensibly mean the amount paid by the original shareholder. This is because there is no commercial reason why AVIVO would pay out dividends based on the

149 PCS at para 8.

150 Transcript dated 26 June 2024 ("26 June Transcript") at p 83 line 23.

151 Mr Bagri's AEIC at para 71 (BAEIC vol 2 at p 273).

152 26 June Transcript at p 106 line 22 to p 107 line 16.

153 26 June Transcript at p 183 line 20 to p 184 line 12.

154 26 June Transcript at p 85 lines 15–24.

155 26 June Transcript at p 82 lines 6–16.

price of its shares in a secondary sale, since that amount paid would go to the seller of the shares instead of AVIVO.[156]

86 I agree with the 2nd defendant's account in this regard. Here, in assessing whether the alleged representation was in fact made, the particular words used must be read in their context and, in particular, it is necessary to have regard to the purpose for which the document came into existence, why the statements contained in it were made and by whom they were intended to be read (*Anna Wee* at [36], citing *Jaffray v Society of Lloyd's* [2002] EWCA Civ 1101 at [52]). Significantly, the 27 October Email does not assert any fact apart from merely setting out what 9% dividends might look like given a variety of purchase prices. It does not make any specific reference to whether the purchase prices found in the table was a reference to the Acquisition Price or the Original Entry Price. I also note the 2nd defendant's evidence that he had clarified that dividends were payable by reference to Original Entry Price rather than the Acquisition Price, and that the 9% dividend yield was merely an assumption in the 28 October Phone Call, though the contents of the phone call are evidently disputed and I make no finding on the same.

87 As such, on the balance of probabilities, I find that the 9% Dividend Representation and Calculation Representation were not made to Mr Choo, based on the evidence so far comprising: (a) Mr Choo's muted responses to the announcement of the dividend yield at 7% and the information that the dividends were calculated on the basis of the Original Entry Price; (b) the lack of a satisfactory explanation for Mr Choo's failure to raise any complaint; and (c) the contents of the 27 October Email and Breakdown Table, which are not as dispositive as depicted by Mr Choo.

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156 12DCS at para 74(b).

88 I would, as an aside, note that I found it somewhat odd that Mr Choo, an experienced investor, would have expected the company to issue dividends based on a percentage of the purchase price from the secondary market given that this had nothing to do with the infusion of actual equity in the company. In cross-examination, when confronted with the absurdity of a company calculating dividends by reference to the price of a secondary sale, Mr Choo attempted to defend the sensibility of such a basis of calculation by stating that there are "different class[es]" of shares.[157] However, as counsel for the 1st and 2nd defendants, Mr Vikram Nair, rightly pointed out to him, this was no response at all since in a situation where there are indeed different classes of shares, the different classes are still defined by discrete contributions made *to the company*, as opposed to a third party seller of the shares.[158] I agree entirely with Mr Nair on that front.

(2) The No Share Disposal Representation

89 Once more, in relation to the No Share Disposal Representation, there is no suggestion that the plaintiff raised his concerns with the defendants when he purportedly found out that the shares that he was sold were indirectly owned Mr Shailesh Dash (*ie*, the CEO of RCL and a board director of the 1st defendant at the time) (see above at [40]). Despite finding out this "major issue" sometime in the middle of 2017,[159] the plaintiff did not raise this concern to any of the defendants. Indeed, it conveniently did not feature as an issue at all (in the correspondence produced before me, at least) until it appeared in the cause papers for this case. As I noted earlier, Mr Choo's explanation that he did not raise any complaint for fear of jeopardising the IPO simply did not sit well with

157 24 June Transcript at p 135 lines 6–10.

158 24 June Transcript at p 135 lines 11–19.

159 24 June Transcript at p 171 lines 9–12.

reason (see above at [80] and [82]). All in all, this appeared to suggest that, much like many of the rest of the purported misrepresentations, it simply never happened.

(3) The Concurrent Role Representation

90 In a similar vein, there is no independent evidence corroborating the Concurrent Role Representation (*ie*, the alleged representation that the 3rd defendant's concurrent directorship in both AVIVO and the 1st defendant allegedly allowed him to safeguard the interests of shareholders). In fact, on a balance of probabilities, the documents before me reveal that the plaintiff (or, more precisely, Mr Choo) knew full well about the change in management by March 2017 at the latest, and not, as Mr Choo claims, that he only found out in 2021 about the 3rd defendant's resignation (see above at [48]).[160] Apart from the 2nd defendant's evidence suggesting that he did inform Mr Choo about this change in leadership,[161] such a finding can also be inferred from the following facts:

(a) On 12 March 2017 (which is a few months after the plaintiff's investment in AVIVO), Mr Choo specifically emailed the 3rd defendant regarding an investment in *ANEL* in particular, a portfolio that was only under the 3rd defendant's charge as a consequence of him stepping down as CEO of the 1st defendant (see above at [9(c)]):[162]

> Dear Don,
>
> I have an important Chinese investor visiting Singapore last week of March. *He is interested in investing in Al Najah with around USD 1 million to start, and would like*

[160] 12DCS at para 121.

[161] 26 June Transcript at p 27 lines 20–24.

[162] ABOD vol 3 at p 487.

> *to take this opportunity to meet you*. Are you around from 27th to 31st March? Please let me have a few time slots and I would lock things down. Thank you.
>
> [emphasis added]

The plaintiff contends that the email reveals that the 3rd defendant was nonetheless still using his email address affiliated to the 1st defendant,[163] and also that the 2nd defendant must have made the Concurrent Role Representation such that Mr Choo would have "conceived the idea of specifically approaching" the 3rd defendant and not any other member in the 1st defendant.[164] I disagree with the plaintiff's reasoning. It was not the 3rd defendant's email address that was of significance, but the contents of such an email that were. The email suggests that Mr Choo knew that the 3rd defendant had shifted portfolios within the wider group (*ie*, from AVIVO to ANEL), or at the very least, that Mr Choo knew that the 3rd defendant was the appropriate person to contact regarding investments in *ANEL*.

(b) At the same time, on around 16 March 2017, Mr Choo emailed Mr Farid Rosli about *AVIVO*, regarding IPO-related matters and a query regarding dividends.[165]

91 The documents before me therefore strongly hinted to Mr Choo being fully aware of the leadership change in the 1st defendant (namely that Mr Farid Rosli had stepped up as the CEO of the 1st defendant after the 3rd defendant resigned). While this falls short of a specific finding that the 3rd defendant's stepping down was made known to Mr Choo *before* the plaintiff entered into

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163 25 June Transcript at p 18 lines 12–25.

164 PCS at para 51.

165 ABOD vol 3 at p 490.

the subscription agreement, it nonetheless put paid to the plaintiff's contention that Mr Choo only became conscious of such a leadership change in 2021. Given the above circumstances, in my view, he very clearly knew about it much earlier, at the very latest by March 2017.

92 Moreover, the evidence showed that the plaintiff and/or Mr Choo were sufficiently blasé about the existence of the 3rd defendant on the board of AVIVO. In February 2018, when the joint letter from various investors (including the plaintiff) was sent by Mr Choo to various parties (including the 3rd defendant) seeking a discussion with AVIVO's senior management (see above at [42]), the letter specifically requested for a "face-to-face meeting with Mr Shailesh Dash, Mr Amitava Ghosal [*ie*, one of the partners in the 1st defendant] and Mr Amit Agrawal" and the purpose of such a meeting was "for senior management to take [the investors] through the written responses and to avail themselves for questions".[166] Significantly, the 3rd defendant was not someone requested by the investors to attend such a meeting. This proves one of two things: either, and I believe this to be the more likely case, Mr Choo knew full well by that time that the 3rd defendant was not part of the management team of AVIVO, or, alternatively, at the very least, the plaintiff did not in fact view the 3rd defendant as an influential figure in the manner it now asserts. Either way, the plaintiff's assertion, that it believed that the 3rd defendant was of significant influence on the board of AVIVO and/or the 1st defendant, is inconsistent with the contents of such joint letter. It bears noting as well that in that very same letter, the investors had described previous meetings which some of them had with the 3rd defendant (and Mr Farid Rosli) as being "woefully inadequate", as the 3rd defendant "professed that [he was] not privy to many of the key management decisions [they were] concerned

166 ABOD vol 4 at p 117.

about".[167] This must mean that there was a conscious decision not to include the 3rd defendant in the requested meeting with the senior management.

93 I would also add that the suggestion that the 2nd defendant would excessively tout the 3rd defendant as being a key "individual with outstanding credentials"[168] that was able to protect the plaintiff's investment in AVIVO suffers from another logical defect. As I will discuss in detail at a later juncture, the plaintiff's claim in unlawful means conspiracy essentially stands on the factual foundation that the 1st and 2nd defendants (acting in concert with the 3rd defendant) conspired to hide from him the fact that the 3rd defendant, amongst others, had been facing investigations by the DFSA and the fact that the 3rd defendant stepped down from the boards of AVIVO and the 1st defendant at around the same time (see above at [9] and [46]).[169] The implication is that the defendants all knew this fact and sought to actively hide it, knowing full well that disclosure of it would likely mean that the plaintiff would not have invested in AVIVO. This is where the argument breaks apart. One would have imagined that if the parties were indeed engaged in such a conspiracy as the plaintiff suggests, then the more intuitive thing for the 2nd defendant to do would be to downplay the 3rd defendant's role, rather than accentuate it or play it up, given the real possibility that the fact of the 3rd defendant's resignation and the findings of the DFSA would very likely come out in public in due course.

94 In my mind, it is especially unlikely for the 2nd defendant to tout the 3rd defendant's role and credentials in such a manner while concealing the 3rd

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167 ABOD vol 4 at p 117.

168 Mr Choo's AEIC at para 20(c) (BAEIC vol 1 at p 8).

169 Pf Opening statement at paras 45–46; and PCS at paras 103(a)–103(c).

defendant's resignation, when a simple check on the ACRA register would have revealed to the plaintiff (and Mr Choo) that the 3rd defendant was no longer on the board of the 1st defendant, and unravel the defendants' purported lie. In the premises, it appears more likely than not that the 2nd defendant was simply unaware of the existence of the DFSA investigations, or of the 3rd defendant's intended departure from the 1st defendant at the time of the presentation (or at the very least, saw it as such a non-event that it simply never came up). I note further that, conveniently, there is no suggestion that the plaintiff ever once asked a question about the 3rd defendant during his checks over email, or during the Site Visit, or asked to speak to the 3rd defendant or get more details about him, before he signed the agreement – all of which suggests once more that the significance of the 3rd defendant to the investment represents a convenient fact which Mr Choo is raising after the event.

95 I make one final observation on this point. According to the plaintiff, the Concurrent Role Representation was made orally by the 2nd defendant, but also "with references to the [RAPL Corporate Presentation] at the point when [such a presentation deck] was no longer accurate".[170] In so far as the plaintiff contends that the slide deck and/or marketing materials were themselves misleading, this must also be rejected. It was not as if the 3rd defendant was a public individual well-renowned for having a Midas touch such that his name would immediately be of especial importance to any prospective investor. Indeed, it was quite inexplicable that anyone would specifically hone in on such an innocuous part of the marketing materials and particularly place reliance on that part of the marketing deck. In any event, having perused the marketing materials adduced in evidence, I find it hard to believe that the focus in the mind of Mr Choo would have been the 3rd defendant, or indeed, that the 3rd defendant was at all a

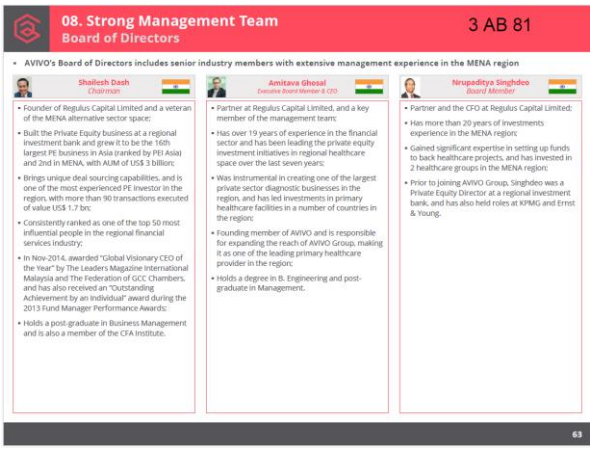
[170] Plaintiff's reply submissions dated 22 July 2024 ("PRS") at para 27.

weighty factor in the plaintiff's decision to invest in AVIVO. The information on the 3rd defendant merely comprises of one-third of one slide in the AVIVO Investor's Presentation,[171] and few small boxes scattered throughout the RAPL Corporate Presentation.[172]

96 The AVIVO Investor Presentation had set out the organisational structure of AVIVO and included a short introduction for every member of its board of directors, with the 3rd defendant's information comprising *one column* in a single slide (the information relating to the 3rd defendant is marked with a yellow box for ease of reference):

171 ABOD vol 3 at p 82.

172 ABOD vol 3 at pp 103, 104 and 116.



08. Strong Management Team
Board of Directors

3 AB 81

- AVIVO's Board of Directors includes senior industry members with extensive management experience in the MENA region

Shailesh Dash
Chairman

- Founder of Regulus Capital Limited and a veteran of the MENA alternative sector space;
- Built the Private Equity business at a regional investment bank and grew it to be the 16th largest PE business in Asia (ranked by PEI Asia) and 2nd in MENA, with AUM of US$ 3 billion;
- Brings unique deal sourcing capabilities, and is one of the most experienced PE investor in the region, with more than 90 transactions executed of value US$ 1.7 bn;
- Consistently ranked as one of the top 50 most influential people in the regional financial services industry;
- In Nov-2014, awarded "Global Visionary CEO of the Year" by The Leaders Magazine International Malaysia and The Federation of GCC Chambers, and has also received an "Outstanding Achievement by an Individual" award during the 2013 Fund Manager Performance Awards;
- Holds a post-graduate in Business Management and is also a member of the CFA Institute.

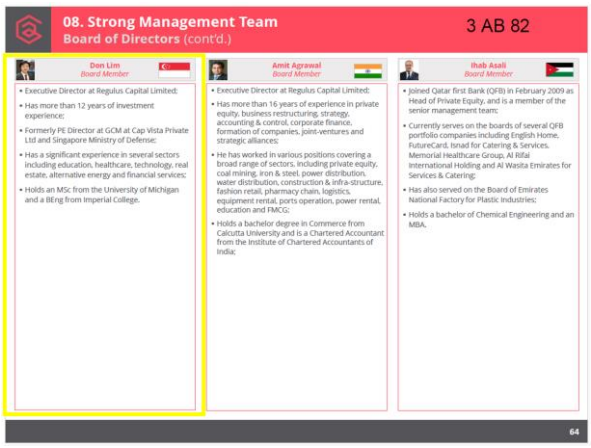
Amitava Ghosal
Executive Board Member & CFO

- Partner at Regulus Capital Limited, and a key member of the management team;
- Has over 19 years of experience in the financial sector and has been leading the private equity investment initiatives in regional healthcare space over the last seven years;
- Was instrumental in creating one of the largest private sector diagnostic businesses in the region, and has led investments in primary healthcare facilities in a number of countries in the region;
- Founding member of AVIVO and is responsible for expanding the reach of AVIVO Group, making it as one of the leading primary healthcare provider in the region;
- Holds a degree in B. Engineering and post-graduate in Management.

Nrupaditya Singhdeo
Board Member

- Partner and the CFO at Regulus Capital Limited;
- Has more than 20 years of investments experience in the MENA region;
- Gained significant expertise in setting up funds to back healthcare projects, and has invested in 2 healthcare groups in the MENA region;
- Prior to joining AVIVO Group, Singhdeo was a Private Equity Director at a regional investment bank, and has also held roles at KPMG and Ernst & Young.

63



08. Strong Management Team
Board of Directors (cont'd.)

3 AB 82

Don Lim
Board Member

- Executive Director at Regulus Capital Limited;
- Has more than 12 years of investment experience;
- Formerly PE Director at GCM at Cap Vista Private Ltd and Singapore Ministry of Defense;
- Has a significant experience in several sectors including education, healthcare, technology, real estate, alternative energy and financial services;
- Holds an MSc from the University of Michigan and a BEng from Imperial College.

Amit Agrawal
Board Member

- Executive Director at Regulus Capital Limited;
- Has more than 16 years of experience in private equity, business restructuring, strategy, accounting & control, corporate finance, formation of companies, joint-ventures and strategic alliances;
- He has worked in various positions covering a broad range of sectors, including private equity, coal mining, iron & steel, power distribution, water distribution, construction & infra-structure, fashion retail, pharmacy chain, logistics, equipment rental, ports operation, power rental, education and FMCG;
- Holds a bachelor degree in Commerce from Calcutta University and is a Chartered Accountant from the Institute of Chartered Accountants of India;

Ihab Asali
Board Member

- Joined Qatar first Bank (QFB) in February 2009 as Head of Private Equity, and is a member of the senior management team;
- Currently serves on the boards of several QFB portfolio companies including English Home, FutureCard, Isnad for Catering & Services, Memorial Healthcare Group, Al Rifai International Holding and Al Wasita Emirates for Services & Catering;
- Has also served on the Board of Emirates National Factory for Plastic Industries;
- Holds a bachelor of Chemical Engineering and an MBA.

64

08. Strong Management Team
Board of Directors (cont'd.)

3 AB 83

Dr. Khaled Elnaggar
Board Member

- Has 25 years of conventional and Islamic banking experience across Europe and the Middle East;
- Has occupied senior positions at several top tier international and regional institutions such as Deutsche Bank, LGT, NSGB and FIBE;
- Completed his B.Sc. of Commerce, in Cairo, and has received his Diploma of Islamic banking and Economics from Cyprus; an MBA from the US; and a PhD from Germany, focusing on 'Managing risk in Islamic Banks';
- Was also a founding member of the Islamic Bank of Cyprus in 1982.

Tarik Abdul Hafith Salim Al Aujaili
Board Member

- Currently serves as Non-Executive Independent Chairman of the Board and a Member of the Company's Audit and Investment Committee at Bank Dhofar SAOG;
- Also a Chairman at Dhofar Beverages and Foodstuff Company and Director of Oman Chromite Company;
- Held various positions in the Government of Oman as Deputy Governor of Dhofar Administrative and Financial Affairs in 1987 and a member of the Advisory Council 1986-1987 and an advisor to the Ministry of Education and Youth in 1990;
- Holds a Higher Diploma in Public Administration from the College South Devon in Torquay .

Eyad Abu Huwaij
Board Member

- Has more than 15 years of regional investment experience spanning across healthcare, education, retail and other industrial sectors;
- Served on the board of leading companies and organizations in the MENA region;
- Formerly Private Equity Director at Regulus Capital Limited, GCM, and has worked at KPMG and Grant Thornton;
- Holds an EMBA from Cass Business School of City University London.

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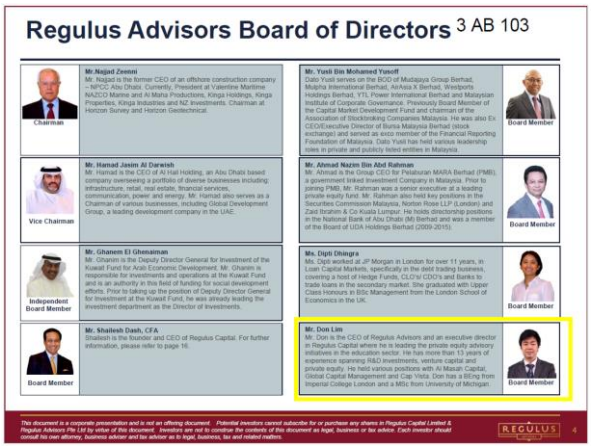
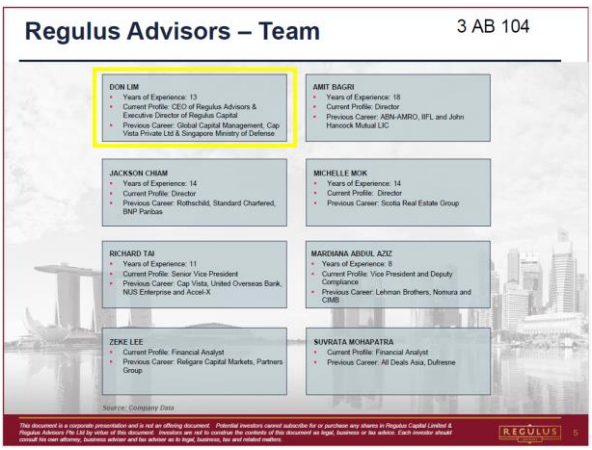
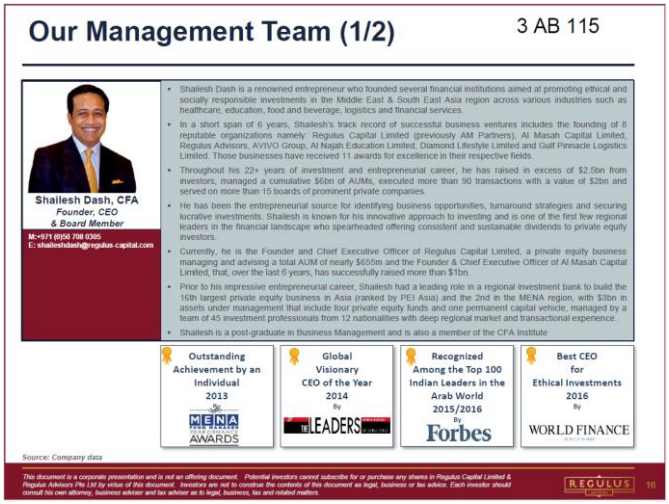
97 In the RAPL Corporate Presentation, any information in relation to the 3rd defendant was confined to small boxes, where he was clearly portrayed as *one of many* faces:





98 In fact, on any objective reading of the marketing materials, if anyone could be said to have any significant prominence in the marketing slides, it was, as counsel for the 3rd defendant pointed out, Mr Shailesh Dash, the founder and CEO of RCL, and board director of the 1st defendant, who had his profile splashed much more significantly across the marketing materials in question:[173]



99 Indeed, in yet another Freudian slip, Mr Choo noted that the 3rd defendant was Mr Shailesh Dash's "right-hand man".[174] It therefore necessarily follows that the 3rd defendant would be, even on the plaintiff's own logic, only the less important of the "two most important men"[175] in the presentation, and that any stance that the 3rd defendant took would have, in any event, been subsidiary to the wishes and directions of Mr Shailesh Dash.

100 These circumstances collectively only further betrayed the fact that this was an allegation that was engineered *ex post facto* in order to fashion a claim.

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173 ABOD vol 3 at pp 81, 103, and 114-116.

174 24 June Transcript at p 100 line 9.

175 24 June Transcript at p 100 lines 10–11.

There is, in my view, some evidence strongly suggestive of this. As I noted earlier, in an email dated 31 July 2021 disclosed by the plaintiff, Mr Choo told a fellow investor, Mr Ng, that he was thinking about "how to leverage [on the DFSA decision] to claim for damages".[176] It was also not lost on me that the first time at which the plaintiff even bothered to undertake a check on the 3rd defendant's status was only after these disputes had already arisen (see above at [48]). It seems to me, more likely than not, that the 3rd defendant was never a factor at all in the plaintiff's decision to invest in AVIVO, and the coincidence of the Decision Notice emerged at a time when the plaintiff was considering its legal options. The Decision Notice then provided a gilt-edged opportunity to include the 3rd defendant into the mix. In the circumstances, it appears clear that all of the representations attributed to the 2nd defendant by the plaintiff and/or Mr Choo were engineered *ex post facto* in order to fashion the present claim. I am accordingly inclined to take the view that the representations contended by the claimant regarding the 3rd defendant were simply never made in the manner suggested.

The plaintiff withheld internal correspondence

101 A further point that infects the plaintiff's entire claim needs to be made. In the present case, the defendants disclosed voluminous internal correspondences pertaining to the plaintiff's investment, comprising not only the 2nd defendant's email correspondence with Mr Choo, but also the 2nd defendant's internal email correspondence with AVIVO and other personnel in the 1st defendant, such as Mr Farid Rosli.[177] Reading those correspondences in totality, the overriding sense one had was that, from the perspective of the

176 ABOD vol 4 at p 110.

177 See the index to ABOD vol 3 and vol 4.

defendants, the plaintiff's investment was a plain-vanilla commercial investment from an investor. Absent from the many pages of documents produced by the defendants collectively was even the slightest hint of any sinister plot to misrepresent or otherwise exaggerate, fabricate or manufacture non-existent claims on financial prospects or personnel details, or to advance any misrepresentation or mislead Mr Choo or the plaintiff in any way. While of course not dispositive, the totality of such internal correspondences only fortified my view that there were simply no cancerous attempts to mislead Mr Choo and/or the plaintiff in the manner contended by the plaintiff.

102 In comparison, almost *none* of the internal correspondences between Mr Choo, Mr Lim JX and/or the other Chinese investors Mr Choo allegedly was in discussions with were disclosed. Counsel for the 1st and 2nd defendants, Mr Vikram Nair, provided to the court their letter dated 30 August 2023 requesting the disclosure of correspondence between Mr Choo and the various investors over a five year period.[178] The response from counsel for the plaintiff was that there was essentially nothing that could be disclosed, as "most of the internal communications between … Mr Choo and Mr Lim [JX] were mainly conducted via phone calls and face-to-face conversations in an informal setting".[179] Similarly, between Mr Choo and/or Mr Lim JX on the one hand, and Ms Guo, Mr Ng and/or any of the other Chinese investors on the other, there were essentially no internal correspondences available as they communicated over phone calls and face to face conversations that were not documented by Mr

178 Letter from Rajah and Tann LLP dated 30 August 2023 (Exhibit D1-1) at paras 1 and 6 in particular.

179 Letter from Fervent Law Chambers dated 13 September 2023 (Exhibit D1-2) at para 2(a).

Choo.[180] On the stand, Mr Choo confirmed that such a position remained accurate.[181]

103 The contention that *all* the communications pertaining to the plaintiff's investments in AVIVO were done orally was patently unbelievable and need only be stated to be rejected. When investors circle the wagon to debate an investment's potential and viability, especially the one at hand, which was in a relatively unknown private equity company in another jurisdiction, it is almost a given that there would be a whole inbox's worth of emails and phone messages debating the many pros and cons of such an investment. Despite this, Mr Choo maintained there were simply *no* such correspondence for him to disclose as all of "the discussions were oral".[182] This obvious falsehood quickly unravelled at trial.

104 First, Mr Choo inadvertently revealed on the stand that there were indeed documented internal communications. For instance, Mr Choo stated that he had "passed on … information [relating to his due diligence and the questions asked of AVIVO]" to Ms Guo,[183] and that he did "share the documents, especially the key information … that was given by AVIVO, and then [Ms Guo and him would] get on calls to discuss [their] views and findings".[184] When Mr Choo was pressed further as to *how* exactly he shared such documents, Mr Choo accepted that he had forwarded information provided by the defendants (over

180 Letter from Fervent Law Chambers dated 13 September 2023 (Exhibit D1-2) at para 2(d).

181 24 June Transcript at p 48 lines 6–10.

182 24 June Transcript at p 116 line 1.

183 24 June Transcript at p 45 lines 5–9.

184 24 June Transcript at p 46 lines 11–15.

email) to investors.[185] To take an example, as counsel for the plaintiff also confirmed, even though the loan agreement between Ms Guo and Mr Choo was disclosed, the underlying email or outward communication to Ms Guo that contained such a loan agreement was not disclosed.[186] When Mr Choo was confronted about the fact that he had not disclosed these emails, he pivoted and explained that it was because the Chinese investors wanted to keep their identities confidential, and were blind carbon-copied ("BCC") into these emails. As such, Mr Choo could allegedly no longer find these emails.[187] While counsel for the 1st and 2nd defendant did not pursue this point, it was clearly an explanation that, in my mind, did not at all accord with sense. The fact that the Chinese investors were BCC-ed in an email thread would have no bearing on Mr Choo's own record of the email thread from his end.

105 Later, when it was put to Mr Choo that he failed to disclose any of the outward communication to the Chinese investors containing information and/or materials relating to the investment, Mr Choo's narrative shifted yet again and he claimed that he actually forwarded such information *via* WeChat, a messaging platform, to the Chinese investors but he "could not find that written records any more on WeChat" as these communications were from "too far back [in time]".[188] This proves that Mr Choo's earlier suggestion, both pre-trial and in court, that his discussions with the other investors were only oral, was a lie.

106 Indeed, during the course of the trial, more disturbing developments ensued, showing quite clearly that the plaintiff was seeking to shield internal

185 24 June Transcript at p 48 lines 11–16.

186 24 June Transcript at p 107 lines 8–16.

187 24 June Transcript at p 49 lines 3–9.

188 24 June Transcript at p 126 lines 17–21 and p 127 lines 4–7.

communications from the court. In the course of the cross-examination of Mr Choo by counsel for the 1st and 2nd defendants, during which he was asked serious questions in relation to his suggestion that no written communications existed, Mr Lim JX (who was sitting in court) provided a document to counsel for the plaintiff, Mr Clarence Lun, during a break in court proceedings. This document was subsequently disclosed by Mr Lun to the Court (and rightly so). Such document showed the existence of at least one email correspondence between Mr Choo and Mr Lim JX on the matter, in which they discussed what questions to ask of AVIVO as part of the due diligence exercise.[189] Mr Choo then pivoted, yet again, from his previous assertion that there was no record of any internal correspondence, by claiming that he "missed out [on] this email."[190] What both Mr Choo and Mr Lim JX seemed to ignore was the fact that the contents of that specific email, in which the parties were conversing on what questions to ask AVIVO as part of their due diligence process, are very strongly suggestive of the investors using email as the principal modality (or at least, one of the principal modalities) for communicating with each other, and necessarily suggests a trove of emails back and forth between the investors discussing the viability of an investment in AVIVO, and documenting their thought process when the investment went south much later. As highlighted by the 1st and 2nd defendants, this suggestion was further reinforced by another disclosed email dated 31 July 2021 between Mr Choo and Mr Ng, where Mr Choo shared that "Al Masah … [has] been found guilty by the [DFSA] of misrepresenting/concealing placement fees made from AVIVO to Al Masah".[191]

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189 Email thread between Mr Lim JX and Mr Choo dated 23 November 2016 (Exhibit C-1).

190 24 June Transcript at p 113 lines 2–9.

191 ABOD vol 4 at p 110.

107 In fact, it became painfully apparent during the hearing that such messages (and emails) do in fact exist but are intentionally being withheld from disclosure. As the hearing progressed, in what appeared to be a Freudian slip, Mr Lim JX made a passing remark on the stand that he never logged in to AVIVO's online data room, and that the documents he had reviewed were "forwarded" by Mr Choo, who would "do so by email".[192] The fact that they were indeed communicating *via* email was an otherwise obvious and unexceptional fact, save that given Mr Choo's absolutist position that they did not discuss anything over email, this would mean that they were intentionally failing to disclose relevant emails to the court. Realising then that he had let the cat out of the bag, in that Mr Choo and Mr Lim JX were actively communicating with each other by email about the investment, Mr Lim JX then suggested that he "[could not] remember" how he received the documents from Mr Choo, and that perhaps, it could be "by email or it could be printed out".[193] I had no reason to believe that Mr Choo and Mr Lim JX were communicating in an old-school manner where Mr Choo would only print and physically pass documents to Mr Lim JX, rather than the more intuitively obvious choice of forwarding them over email, for some unknown reason. Indeed, the point I made earlier (see above at [106]) of there being a discussion *via* email between Mr Choo and Mr Lim JX makes it obvious that they were in fact corresponding repeatedly by email.

108 The plaintiff's failure to disclose the internal correspondences (whether *via* WeChat and/or email) justifies my drawing of an adverse inference that such correspondences, if disclosed, would be unfavourable to the plaintiff's case. Illustration (*g*) of s 116 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act") provides as follows:

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192 25 June Transcript at p 137 lines 22–25 and p 138 lines 16–18.

193 25 June Transcript at p 139 lines 1–2.

> **Court may presume existence of certain fact**
>
> **116.** The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume –
>
> …
>
> (*g*) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it…

109 As observed by the Appellate Division of the High Court in *Chan Pik Sun v Wan Hoe Keet (alias Wen Haojie) and others and another appeal* [2024] 1 SLR 893 ("*Chan Pik Sun*") (at [115]) (citing the Court of Appeal's decision in *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha Natrajan*") at [19]), illus (*g*) of s 116 of the Evidence Act allows the court to draw an adverse inference as to any fact flowing from the nature of the evidence that would likely have emerged if evidence that could and should have been produced by a party is not so produced; it was "plain common sense" that a party's failure to produce evidence which would elucidate a matter is that the party fears the evidence would be unfavourable to it. The relevant principles governing the drawing of such an adverse inference are as follows (*Chan Pik Sun* at [116], citing *Sudha Natrajan* at [20] and *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 at [43]):

> (a) In certain circumstances, *the court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue* in the matter before it.
>
> (b) *If the court is willing to draw such inferences, these may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*

> (c) There must, however, have been some evidence, even if weak, which was adduced by the party seeking to draw the inference, on the issue in question, before the court would be entitled to draw the desired inference: in other words, there must be a case to answer on that issue which is then strengthened by the drawing of the inference.
>
> (d) If the reason for the witness's absence or silence can be explained to the satisfaction of the court, then no adverse inference may be drawn. If, on the other hand, a reasonable and credible explanation is given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or annulled.
>
> [emphasis added]

110 With these principles in mind, I find that the internal correspondences (namely, the various emails and messages) between Mr Choo and the other investors in the present case, if disclosed, would serve to show that the Alleged Representations never actually occurred. This must be so, because if indeed the Alleged Representations were even half as significant as has been suggested by the plaintiff, there would have been a plethora of references to these representations in such communications amongst the investors, and, if so, the plaintiff would undoubtedly have insisted on having these before the court. Similarly, an absence of any reference to these representations in such communications would very strongly suggest that the entire narrative about the centrality of such representations (and/or the fact that they were made) to the investment decision is a fabrication. It would follow that such caginess on the part of Mr Choo about the release of such documents necessarily conferred credibility on the 1st and 2nd defendants' narrative, and fatally detracted from the plaintiff's case. This conclusion would also be in line with the obvious point that it is difficult to believe that Mr Choo, a sophisticated financial investor with many years of experience in the finance industry and as an investment analyst,[194] would elect to coordinate an investment (which was perceived at the time to be

[194] 24 June Transcript at p 40 lines 3–14.

entirely legitimate) across multiple jurisdictions in a manner that seemed designed to intentionally avoid allowing for an internal paper trail.

111 Before moving on from the matter of internal correspondence, I further note that the communications that were disclosed by the defendants collectively, which included the emails within the 1st defendant, and between the 2nd defendant and AVIVO, suggests that the 2nd defendant had been doing his best to try and answer all of Mr Choo's many questions in the lead-up to the agreement and had dealt with those queries in a *bona fide* manner. Indeed, the documents suggest that even after the plaintiff's investment in AVIVO, the 2nd defendant never attempted to disengage, and instead tried to be as facilitative as possible to assist the plaintiff, and even sided with the plaintiff (in an internal discussion within the 1st defendant) in one of the plaintiff's disputes with AVIVO regarding dividend distribution for the financial year of 2016.[195]

112 It may be useful for me to set out the facts of the dividend dispute briefly to contextualise the point. At one point, there appeared to be an error in the computation of dividends such that AVIVO assumed that the plaintiff was not entitled to any dividends for the financial year of 2016. The 2nd defendant believed this to be incorrect and actively sought to obtain an explanation from various parties internally before he finally obtained a clarification from Mr Agrawal that the plaintiff was indeed entitled to such dividends.[196] Such a communication was internal and not something that even Mr Choo would have been aware of until it was disclosed for the purposes of these proceedings. The picture painted by the entirety of the internal correspondences therefore was not one remotely suggestive of any cancerous conspiracy. Indeed, on the contrary,

195 ABOD vol 4 at pp 31, 35–38.

196 ABOD vol 4 at pp 31, 34–38.

the documents showed that the 2nd defendant was, internally, being as even-handed as he reasonably could to the plaintiff and Mr Choo, including taking their side in internal discussions where he felt that to do so would be the more principled stance to take.

Mr Choo's verbatim reproduction of the 20 October Oral Representations

113 Third, as the 1st and 2nd defendants also point out in their submissions,[197] Mr Choo provided an essentially verbatim account of what was supposedly represented to him orally by the 2nd defendant (see above at [24]), down to the precise wording of what had been said on 20 October 2016. Mr Choo apparently recalls the conversations with the 2nd defendant with vivid detail despite never having reduced any of the discussions into writing, for example, by way of contemporaneous notes or minutes.[198] It is hard to understand how any individual would be able to recall such specifics, in *verbatim* no less, of what was said to him in a couple of short conversations many years after, especially since there would have been nothing at the time to suggest that the specifics of such a conversation would be tested in court many years later. Common sense would tell us that anyone asserting an ability to recall, entirely from memory, exact sentences from an unexceptional meeting or two some years back is likely either fabricating the details of that conversation or, if innocuous, unwittingly placing reliance on selective and entirely unreliable memories. To be fair to the plaintiff, it may be that Mr Choo felt compelled to take this position because, as a matter of law, he felt that there would be an outsized significance to the precise words used for these proceedings. However, the fact that Mr Choo failed to caveat or otherwise

197 12DCS at para 100(a).

198 25 June Transcript at p 101 line 7 to p 102 line 23.

qualify any of the contents of the conversation he reproduced in verbatim necessarily meant that I had to view the account with some circumspection.

114 On the contrary, the 2nd defendant's account of the meetings between himself and Mr Choo was of a much more tentative nature. He readily conceded that he had to bridge memory gaps (and was simply unable to recall innocuous features of the discussion), and that he made assumptions about what was said given the long passage of time between the meetings and the present,[199] even with the assistance of the contemporaneous logs he kept of their conversations (which were admittedly skimpy).[200] This was a much more plausible account. On balance, there was basis to conclude that the 2nd defendant's accounts of the conversations were more reflective of what had transpired.

Blatant lies and inaccuracies within the plaintiff's claim

115 Next, I observed that the plaintiff's case had a certain fluidity to it which largely detracts from the credibility of its entire claim. Indeed, there were *complete lies and inaccuracies* in its pleadings.

(1) The plaintiff's claim that it was unaware of the 3rd defendant's conflict of interest is mutually exclusive with the Concurrent Role Representation

116 As part of its statement of claim, the plaintiff contended that the 1st and 2nd defendants failed to disclose the 3rd defendant's conflict of interest by virtue of his concurrent appointments in the 1st defendant and AVIVO (see above at [10]), and that the plaintiff would not have invested in AVIVO if Mr

199 See, for example, Mr Bagri's AEIC at paras 32 and 34 (BAEIC vol 2 at p 264).

200 ABOD vol 4 at p 204.

Choo's attention had been sufficiently drawn to this conflict of interest at the outset. In the Statement of Claim, it was particularly alleged as follows:[201]

> … *At all material times, the 1st and/or 2nd Defendant failed to sufficiently draw the Plaintiff's attention to or highlight to the Plaintiff that the 3rd Defendant stood in a position of conflict as a director and/or de facto director of the 1st Defendant and also a director of AVIVO*, and therefore would stand to personally benefit from the Plaintiff entering into the Share Subscription Agreement. In the alternative, the 3rd Defendant placed himself in a position of conflict that was non-waivable as the 3rd Defendant is unable to advance and protect both the interest of the Plaintiff and that of AVIVO.
>
> …
>
> The 1st and/or 2nd Defendant, in failing to sufficiently draw the Plaintiff's attention to or highlight the 3rd Defendant's position of conflict, allowed the Plaintiff to have an incomplete and/or inaccurate understanding of AVIVO's management. In this regard, *the Plaintiff avers that it would not have entered into the Share Subscription Agreement for the purchase of the [AVIVO Shares] had it known that the 3rd Defendant is unable to advance and protect both the interests of the Plaintiff and that of AVIVO.*
>
> [emphasis added]

117 At the same time, the plaintiff also contends that the 2nd defendant represented that the "3rd [d]efendant was a key person, and his concurrent appointments as a board member of AVIVO and executive director of [RAPL] were intended to, amongst other things, safeguard the interests of investors in AVIVO",[202] which suggested that the plaintiff was in fact aware of the 3rd defendant's concurrent directorship in the 1st defendant and AVIVO.

118 As counsel for the 3rd defendant, Mr See Chern Yang, pointed out, the two narratives peddled by the plaintiff are necessarily mutually exclusive.[203] Mr

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201 SOC at paras 31 and 34 (SDB at pp 75–78).

202 SOC at para 9(bb) (SDB at pp 59–60).

203 25 June Transcript at p 39 lines 10–23.

Choo's account was that he was interested in investing, at least in part, *precisely* because of the existence of the potential conflict as it meant that the 3rd defendant would have "the influence to manage the company on behalf of the investors".[204] If so, it therefore cannot be that he was concurrently unaware of such a conflict (or that it was otherwise hidden). One or the other must be a lie. When confronted with such an irreconcilable duality, Mr Choo conceded that the 3rd defendant's conflict of interest (by virtue of his concurrent directorship) was disclosed, and that Mr Choo was aware of it.[205] This necessarily meant that the entire portion claiming otherwise in the statement of claim was founded on indisputably false premises. When I queried counsel for the plaintiff in relation to their attempt to run factually irreconcilable claims, counsel conceded that they were still crystallising their case at the time and had considered that it was possible to run both claims simultaneously, though they ultimately chose to pursue one claim over the other (*ie*, the plaintiff eventually decided to pursue the claim that the Concurrent Role Representation was made, over the claim that the 3rd defendant's concurrent appointment to the board of AVIVO and the 1st defendant was not disclosed).[206] With respect, such a response is a non-starter – what was being presented were not competing legal arguments, but competing facts. One is certainly entitled to run alternate legal cases (assuming the facts so allow it), but the plaintiff cannot be asking the court to accept that it is allowed, as part of its pleadings, to assert two entirely competing realities of the facts *that were represented to it and that it relied upon* in making the investment that it did. Such a blunderbuss approach to its pleadings raised obvious question marks about the *bona fide* of the entire case, as it indisputably shows that the plaintiff was more than willing to cast entirely spurious aspersions to make its case.

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204 25 June Transcript at p 39 lines 1–6.

205 25 June Transcript at p 40 lines 16–20.

206 Minute sheet dated 19 August 2024 at p 32.

(2) There is no 10% placement fee

119 I point out another example. The plaintiff also avers that, contrary to the 2nd defendant's alleged representation that the 1st defendant's fees were "transparent and reflected as a 20% interest on profits and an additional 2% annual management fee",[207] there was an additional placement fee amounting to 10% of investments into AVIVO that was collected by the 1st defendant.[208] According to Mr Choo, the plaintiff would not have invested in AVIVO if the "substantial" 10% placement fee was disclosed.[209] I pause to note that the alleged active concealment of such placement fee is also relied on by the plaintiff as evidence of an unlawful means conspiracy between all three defendants, which I shall address at a later point. To be clear, Mr Choo accepts he was aware of the existence of placement fees, but his ire was allegedly caused by the fact that the placement fees were at a substantially high 10%.[210] This argument was, with respect, predicated upon an entirely false factual foundation. The 2nd defendant testified that the placement fee in the present case was not 10% of the invested capital, but calculated by way of "10 basis points", of which half (*ie*, 5 basis points) would then be paid to Mr Choo as referral fees.[211] A placement fee calculated by way of "10 basis points" essentially equated to 10 cents per share invested, which works out to a much lower placement fee of 3.6% of the invested capital, of which half of such placement fee comprised Mr Choo's referral fees (see above at [22]).[212] This was corroborated by an internal email dated 13 December 2016 between the 2nd

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207 SOC at paras 9(a)(iv) and 27 (SDB at pp 57 and 72).

208 SOC at para 26 (SDB at p 71).

209 24 June Transcript at p 174 lines 12–19.

210 24 June Transcript at p 174 lines 12–19.

211 26 June Transcript at p 234 line 19 to p 235 line 1.

212 27 June Transcript at p 135 lines 7–16.

defendant and one Mr Saikat Kumar from AMCML, where the latter approved the secondary sale of shares to the plaintiff and stated "Approved 10 bps [*ie*, 10 basis points]",[213] and another email dated 19 December 2016 by the 2nd defendant to other parties in AMCML stating that the "commission of 5 bps on this transaction has been paid to our referral partner Adrian Choo".[214] Counsel for the plaintiff also confirmed that "5 bps" of the amount invested in the AVIVO Shares corresponded, at least numerically, to the amount received in referral fees (of US$9,821) by Mr Choo.[215]

120 This not only puts paid to the assertion that there was any active concealment or otherwise failure to disclose an exorbitant placement fee, but the divergence between what was pleaded and what in fact happened proves that the plaintiff's primary motivation for filing the suit was, in all likelihood, to leverage on the Decision Notice against the 3rd defendant. The plaintiff understood from the Decision Notice that there was a 10% placement fee concealed from investors,[216] and crafted the statement of claim in a manner that purported to display a *modus operandi* of fraudulent conduct. This is also the obvious take-away from the single email (between Mr Choo and Mr Ng) disclosed by the plaintiff, in which Mr Choo brought the news article concerning the Decision Notice to Mr Ng's attention and made clear, in his own words, that he intended to see "how [he could] leverage on [the DFSA decision] to claim for damages":[217]

> …

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213 ABOD vol 3 at p 434.

214 ABOD vol 3 at p 444.

215 27 June Transcript at p 135 lines 3–16.

216 Pf Opening statement at para 46.

217 ABOD vol 4 at p 110.

> Subject: Legal case against AVIVO
>
> …
>
> Some bad news on the AVIVO front. Al Masah, the private equity manager of Avivo, have been found guilty by the Dubai Financial Authority of misrepresenting/concealing placement fees made from Avivo to Al Massh [*sic*]. See attached and links below.
>
> *I have been discussing with other investors and litigation lawyers how to leverage on this to claim for damages from Al Masah*. In particular, wanted to see if we can bring a case against Don Lim (head of Singapore office and one of 3 defendants fined by Dubai) and Regulus Singapore (who is the successor of Al Masah and sold us the Avivo shares) for misrepresentation and breach of their duties in managing Avivo.
>
> [emphasis added]

121 I would only further add that there is a certain irony to Mr Choo taking issue with the alleged lack of transparency surrounding the placement fee collected by the 1st defendant for investments into AVIVO, when Mr Choo himself received a cut of the invested capital in AVIVO by way of referral fees and did not disclose the same to the other investors (*ie*, Ms Guo and Mr Ng) at the time (see above at [22]). As outlined earlier, Mr Choo received a referral fee for the plaintiff's investment (that comprised money pooled from other investors) in AVIVO, which he did not disclose to the other investors at the time of the investment, and Mr Choo appeared to have been aware that his referral fee would invariably come from the placement fee (and thus, necessarily from the investment capital).[218]

122 Connected to the above point, and as a quick aside, I note that Mr Choo appeared himself to be in a potential fiduciary relationship *vis-à-vis* the plaintiff in so far as he had referred the investment to the plaintiff, earned such a referral

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218 24 June Transcript at p 175 lines 4–25.

fee in the process, and also charged his fellow investors a 2% initial sales charge that he claimed to also comprise of compensation for his own "commercial due diligence" on the propriety of the investment. Given those circumstances, there is an argument to be made that, much as he asserts of the 1st and 2nd defendants, Mr Choo himself appeared to have potentially owed some specific duties to make sufficient enquiries in relation to the prospects of the investment in AVIVO in order to safeguard the other investors' interests. I highlight this not to suggest that he breached any such duties (the issue is not strictly before me, so this court would be in no position to make any specific finding on this point). I only do so to make the point that this reality, in itself, did further suggest that Mr Choo's version of events – that he was misled into corralling a group of investors into investing by virtue of misrepresentations made to him, and that this was not just a plain vanilla investment gone wrong (whether as a result of lack of due diligence on his part or otherwise), thereby deflecting all blame on his end to the defendants – ought to be viewed with considerable wariness and circumspection.

No reason or apparent motive on the 2nd defendant's part to make the Alleged Representations

123 I also observed there was simply no need for the 2nd defendant to make the Alleged Representations. Implicit in the plaintiff's claim is the idea that the 2nd defendant was selling a dud, an investment that he knew full well was going to fail given all the on-goings behind the scenes, since well-resourced, well-led and well-managed companies sell themselves without any need to advance misrepresentations. This did not appear to be so, and there was no basis to believe that the 2nd defendant had anything but full confidence in AVIVO, given that he himself, and his family, had invested money in AVIVO. The 2nd defendant invested US$150,000 in AVIVO in 2015, and his family invested a

further sum of US$600,000.[219] He was therefore seemingly bullish about its prospects, to the extent that his family's collective investment in AVIVO was apparently even more significant that the entirety of the plaintiff's already sizeable investment. If so, why would he bother to be involved in a conspiracy to hide material information that he knew meant that AVIVO was set-up to fail, only to then continue maintaining his own long-term investments in that same set-up? Why would the 2nd defendant not seek to get rid of the shares at that time, whether to Mr Choo, the plaintiff, or some other investor? This was something that the 2nd defendant could of course do quite easily given that the issue price of the 2nd defendant's shares was relatively low (US$1.65), which was much lower than the entry price of the plaintiff's shares (at US$2.80), and the 2nd defendant could therefore easily sell his shares to the plaintiff at a much lower price than the plaintiff's Acquisition Price (and at a significant profit too, at that).

124 That said, I did not give the point alluded to in the previous paragraph much weight in the final analysis. This was not a matter that was extensively explored by the parties. It was also not an especially forceful point since, in theory, there may have been many reasons for the 2nd defendant and his family to maintain the investments.

No weight attributed to Mr Lim JX's account

125 One further observation has to be made. On the matter of corroboration of Mr Choo's account, I did not give the evidence of Mr Lim JX any weight. For one, Mr Lim JX clearly had a vested interest in supporting Mr Choo's version of events as he would gain from any positive outcome in this case. For

[219] 26 June Transcript at p 239 line 14 to p 240 line 11.

another, Mr Lim JX parroted Mr Choo's account to an almost entirely unbelievable extent, and conveniently did so without reliance on any documentary evidence whatsoever. Mr Choo's verbatim reproduction of the 2nd defendant's alleged representations to him on 20 October 2016 (see above at [24]) was identically reproduced in Mr Lim JX's affidavit.[220] This was despite Mr Lim JX's concession that he had never met the 2nd defendant personally, and had no personal knowledge of what was said by the 2nd defendant to Mr Choo.[221]

126 Not only is Mr Lim JX's evidence, in effect, inadmissible hearsay, but if one accepts Mr Lim JX's evidence, it essentially means that he recalls each misrepresentation being expressly communicated to him (through Mr Choo), even those which would have been innocuous at the time of the investment.[222] The weight Mr Lim JX places on every purported misrepresentation is the same as the weight placed on them by Mr Choo. When two affidavits parrot identical points to such an incredible degree, they portray two mirrors facing each other in that they reflect repetition rather than any independent truth. I would again highlight, in stark contrast, the evidence of Mr Farid Rosli, the 2nd defendant, and to a lesser extent, the 3rd defendant (given his much more divorced role in the matter), which broadly echo similar points, but encompass quite understandable differences. These largely immaterial differences only serve to add credibility to their story. Much like witnesses describing a crime scene looking at the matter at different angles, such variations suggest a *bona fide*, if nonetheless imperfect, attempt to proffer a truthful and honest account.

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220 25 June Transcript at p 120 lines 12–22.

221 25 June Transcript at p 165 lines 3–11.

222 12DCS at para 100.

127 Furthermore, if it is true that Mr Lim JX's parameters for investment all conveniently happened to be the very same parameters that Mr Choo thought to be of significance (which themselves curiously are all the Alleged Representations), then, as I observed earlier, it is perplexing that there would be no email or any messages at the time of the investment suggestive of these factors being critical for the decision-making. All of this is above and beyond the fact that it is clear that Mr Lim JX, like Mr Choo, was suppressing documentary evidence in his possession, which in all likelihood suggests that he had documentation that would likely largely detract from his own testimony (see above at [101]–[111]).

128 In sum, of the two broad narratives before me, it was plain that the much more persuasive narrative was that of the defendants. The plaintiff's case was not only doubtful and fatally undermined by its own selective disclosure of documents, but it was also punctuated by irreconcilable inconsistencies and illogical assertions. On the balance of probabilities, I preferred the 2nd defendant's version over that of the plaintiff's version, and therefore find that no such representations (at least in the manner as alleged by the plaintiff) were made.

There was no reliance on the Alleged Representations

129 In any event, even assuming *arguendo* that the Alleged Representations were made in the manner suggested by the plaintiff, I find that Mr Choo or the plaintiff did not place any reliance on them. For the element of "reliance" in a misrepresentation claim to be made out, it must be shown that the misrepresentation played a real and substantial part in the plaintiff's mind as an inducement, though it is not required that the misrepresentation was the sole inducing cause (*Panatron* at [21]–[23]). It is difficult to comprehend how the

Alleged Representations would have induced the plaintiff and/or Mr Choo to invest in AVIVO, given that any remotely savvy investor would have viewed them as nothing more than preliminary discussions to be followed up by way of written confirmation or proper due diligence.

130 Indeed, Mr Choo was very much the savvy investor. As Mr Choo acknowledged during cross-examination, he had ten years of experience working in finance and as an investment analyst[223] and possessed detailed and well-rounded qualifications to analyse both conventional and alternative investments,[224] and he runs a company in the UK that offers similar investment analyses for clients.[225] Mr Choo had a sufficiently intimate understanding of investment opportunities in other countries, the nous to enter into an agreement for a private equity transaction, and even structured the plaintiff's investment by way of a third-party corporate vehicle in order to extract even more value from the transaction in the form of a referral fee. Simply put, this was an individual who was a sophisticated investor and one who would have known that sound investments would be grounded in diligent research rather than partial overly optimistic projections of future performance delivered as part of a marketing pitch. In fact, Mr Choo conceded as much during his cross-examination, that the "main job [of the 2nd defendant] was to promote investments", and therefore to pitch the investment in as glowing terms as possible and that any company promoter, the 2nd defendant in this case, has an (entirely legitimate) incentive to be optimistic about their business.[226]

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223 24 June Transcript at p 40 lines 3–14.

224 24 June Transcript at p 34 line 23 to p 35 line 22.

225 24 June Transcript at p 36 line 19 to p 37 line 18.

226 24 June Transcript at p 70 lines 2–4; and 24 June Transcript at p 93 lines 12–23.

131 It was not lost on me that, despite Mr Choo's extensive background in investing and finance, and the fact the Alleged Representations were apparently central to the plaintiff's investment decision, Mr Choo never sought written confirmation of the Alleged Representations at any point, even during his due diligence process. To state an example, if Mr Choo indeed harboured the unmistakeable impression from the discussions with the 2nd defendant that it was a given that the company would enter into an IPO within a few years or that dividends would be virtually guaranteed at 9%, the most obvious way to obtain some assurance would be during the Site Visit, when meeting with the AVIVO senior management on 30 November and 1 December 2016, and to corroborate the Alleged Representations by way of a careful scrutiny of the company's financial accounts. The fact that these matters conveniently never came up in the due diligence process, and/or were simply not followed up on, indicates that it is likely that the Alleged Representations were never made, or are more likely than not *ex post facto* grouses that were never particularly material considerations in investing in the company. I note that Mr Choo, by virtue of the 29 October Email (see above at [29]), appeared to have *attempted* to obtain the 2nd defendant's confirmation over email by stating that there was a "flat 9% on the amount invested pro-rated by holding period". However, there was no recorded response by the 2nd defendant.

132 To be clear, I am not suggesting, as the 1st and 2nd defendants have, that the mere fact that Mr Choo conducted due diligence in AVIVO necessarily meant that that the plaintiff "relied on its own judgment and due diligence" rather than the Alleged Representations in investing in AVIVO (on the assumption that such representations were made). Actual reliance must be distinguished from reasonable reliance. It is an established principle that "representees are not obliged to test the accuracy of the representations made to them, and it does not matter if they had the opportunity to discover the truth as

long as they did not actually discover it" (*Broadley Construction Pte Ltd v Alacran Design Pte Ltd* [2018] 2 SLR 110 ("*Broadley*") at [36], citing *Peekay Intermark Ltd v Australia and New Zealand Banking Group Ltd* [2006] 2 Lloyd's Rep 511 at [40]). Indeed, as held by the Court of Appeal in *Jurong Town Corp v Wishing Star Ltd* [2005] 3 SLR 283 (at [114]):

> A person who has made a false representation cannot escape its consequences just because the innocent party has made his own inquiry or due diligence, unless the innocent party has come to learn of the misrepresentation before entering into the contract or does not rely on the misrepresentation when entering into the contract. This is all the more so when the representation is made fraudulently. We would add that it matters not whether the inquiry or due diligence is conducted by the innocent party or his agents or both. The principle is the same.

133 In that sense, the mere fact that Mr Choo undertook a due diligence exercise was not sufficient, by itself, to displace the requirement of reliance. My point is simply that, despite Mr Choo's vast experience in the finance industry and the apparent centrality of the Alleged Representations to the plaintiff's investment, the fact that Mr Choo never sought written confirmation of the Alleged Representations and these issues never came up as the primary issues he was concerned about in his due diligence process, suggested that the representations were not in fact material to the plaintiff's investment, assuming they were in fact made.

The Alleged Representations are not actionable

134 It is, strictly speaking, not necessary for me to decide if the Alleged Representations constitute actionable misrepresentations, since I have found that they did not occur (at least in the manner suggested by the plaintiff). Be that as it may, if I had to decide on this issue, I would make the following findings:

(a) The 9% Dividend Representation, No Share Disposal Representation, Intended IPO Representation and the Concurrent Role Representation are all clearly statements of future fact, which are not actionable.

(b) Only the Calculation Representation and Good Standing Representation, if made in the manner pleaded by the plaintiff, are likely to be statements of present fact. However, it is uncertain if the latter representation was truly a *false* statement at the time it was made.

(c) The 1st and 2nd defendants' silence, in relation to the resignation of the 3rd defendant or the fact that there were DFSA investigations against the 3rd defendant, did not amount to a misrepresentation.

135 I make no mention of the Transparent Fees Representation since, as per my findings earlier, there is plainly no placement fee (that amounted to 10% of the investment capital) that was imposed on the plaintiff in the present case.

136 To recapitulate, only false statements of present (or past) fact are actionable, which is distinct from any statements as to future intention, predictions, statements of opinion or belief, sales puffs, exaggerations and statements of law (*Deutsche Bank AG (HC)* at [93]). Chao Hick Tin J (as he then was), in *Bestland Development Pte Ltd v Thasin Development Pte Lt*d [1991] SGHC 27, helpfully outlined the law in this regard:

> The first question to determine is, are the alleged statements representations? To constitute a representation, a statement must relate to a matter of fact. It must be a matter of present or past fact … A distinction ought to be drawn between a representation of an existing fact and a promise to do something in the future. Furthermore, mere praise by a man of his own goods or undertaking is a matter of puffing and pushing and does not amount to representation.

137 Following the principles laid out in the preceding paragraph, it is clear that a significant majority of the representations alluded to were, even taking them at their highest, not actionable to begin with:

(a) The 9% Dividend Representation is, in essence, a promise as to future conduct. In *Zuraimi bin Mohamed Dahlan and another v Zulkarnine B Hafiz and another* [2020] SGHC 219 (at [51]), the court found that the statement that the plaintiffs would receive dividends on their investment was unactionable since such a statement pertained to a future event, *ie*, that the statement was effectively that the plaintiffs may, *in the future*, receive dividends after investing in the company. In a similar vein, the representation that the plaintiff here would receive dividends at a certain level (of 9%) *in the future* after their investment, is also a statement of future fact.

(b) The Intended IPO Representation, that AVIVO is "going to IPO next year" is a promise as to future conduct.

(c) Any statement to the effect that there would be no share disposal by the management and/or board of the 1st defendant and AVIVO (up until any planned IPO) is a promise as to future conduct.

(d) The Concurrent Role Representation is a statement of present fact *only* to the extent that the 3rd defendant was concurrently holding positions in both the 1st defendant and AVIVO. The statement that, by virtue of his concurrent appointments, the 3rd defendant would thus be able to safeguard the plaintiff's investment is clearly one that pertained to a future event since the investment had not happened at the time the representation was made.

138 The Calculation Representation and the Good Standing Representation, if made in the manner pleaded by the plaintiff, are statements of present fact:

(a) The Calculation Representation, that the dividends to be paid for shares purchased in the secondary market would be calculated on the basis of the Original Entry Price, even on the 2nd defendant's own evidence, was in relation to a dividend policy that persisted at the time the Alleged Representations were made.[227] Put simply, the Calculation Representation was a representation of the current state of affairs.

(b) The Good Standing Representation, *ie*, the representation that the 1st defendant was in "good standing" with the MAS and the DFSA, was plausibly a statement of present fact. However, I note that such a statement may not have been false at the time it was made, since at the time such a representation was made on 20 October 2016, the 3rd defendant was facing investigations by the DFSA but there was no outcome to such investigations yet. In any event, parties did not submit extensively on the correct interpretation of "good standing", and the burden ultimately falls on the plaintiff to prove the falsity of the statement.

139 As emphasised in *Zuraimi* (at [52]), for claims involving such future promises or statements of intention, there is a crucial distinction between actionable misrepresentations and a future promise, and "in the context of commercial contracts, a claim relating to the latter (a future promise of commercial returns) would fall more properly into the realm of contractual terms and the enforcement of the same … [which] could manifest in a claim in, for example, breach of contract (and not misrepresentation)". In doing so, the

[227] 26 June Transcript at p 85 lines 18–24.

court relied on the findings of the Court of Appeal in *Raffles Town Club* (at [21], citing Andrew Phang Boon Leong, *Cheshire, Fifoot and Furmston's Law of Contract (Second Singapore and Malaysian Edition)* (1998) at pp 444–445):

> … A representation … relates to some existing fact or some past event. It implies a *factum*, not a *faciendum*, and since it contains no element of futurity it must be distinguished from a statement of intention. ***An affirmation of the truth of a fact is different from a promise to do something in futuro, and produces different legal consequences.***
>
> [emphasis in italics in original, emphasis in bold added]

140 With respect to the 9% Dividend Representation, by virtue of the plaintiff's position that the 2nd defendant did not guarantee that there would be a 9% dividend yield but only represented that such a yield was a *likelihood* (albeit a high one at that) (see above at [78]), it is arguable that such a representation was not even false to begin with. The plaintiff has not adduced any evidence that to show that the 2nd defendant had no reasonable grounds to make the representation that a 9% dividend yield was highly likely. Indeed, Mr Choo also accepted on the stand that it was not the plaintiff's pleaded case that "the forecast in the [presentation decks prepared by AVIVO] was wrong".[228] I note that, in his affidavit, Mr Choo insinuated that the 2nd defendant knew that the dividend yield could not be maintained at the level of 9%, because the investment capital would have been drained by the placement fee of 10% (of such capital) on top of the 2% management fee that the 1st defendant collected from AVIVO.[229] However, as outlined earlier, there is simply no such placement fee at the level asserted by the plaintiff (see above at [119]).

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228 24 June Transcript at p 82 lines 13–16.

229 Mr Choo's AEIC at para 77 (BAEIC vol 1 at p 25).

141 The plaintiff points out that statements of future intention may sometimes be re-characterised as representations of fact that: (a) the representor had an honest belief in the statement; (b) the representor had reasonable grounds to make the statement; or (c) the representor had the present intention to carry out the matters expressed in the statement (*Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 ("*Deutsche Bank AG (CA)*") at [83], citing *FoodCo UK LLP (t/a Muffin Break) v Henry Boot Developments Limited* [2010] EWHC 358 (Ch) at [198]). In *Chen Qiming v Huttons Asia Pte Ltd and others* [2024] SGHC 103 at [123], citing *Raffles Town Club* at [12]–[13] and [16]–[17], this court also held that "implicit in a representation of one's intentions or beliefs is an underlying representation *of fact*, namely that the maker (a) genuinely holds the relevant intention or belief; and (b) has objectively reasonable grounds for holding the relevant intention or belief" [emphasis in original]. As observed in *Goldrich Venture Pte Ltd and another v Halcyon Offshore Pte Ltd* [2015] 3 SLR 990 ("*Goldrich Venture*") at [107], the distinction between an actionable statement and a non-actionable one can be "slippery", as it may be easy to re-cast statements of opinion or promises as to future conduct as representations as to the representor's state of mind or to interpret them as containing collateral representations of fact.

142 The plaintiff's sole submission on this point is that the 9% Dividend Representation is still actionable, as the "2nd defendant cannot be said to have an honest belief and/or have reasonable grounds to make the [9% Dividend Representation]"[230]. In this regard, the plaintiff submits that: (a) the 2nd defendant removed the last column of the Breakdown Table; (b) the 2nd defendant failed to qualify that the 27 October Email and the Breakdown Table

230 PCS at para 46.

were only "illustrative"[231]; and (c) the 2nd defendant was negligent by merely passing on AVIVO's (more specifically, Mr Agrawal's) verbatim answers to the plaintiff's queries without ascertaining their accuracy (see above at [32]).[232]

143 In my view, none of these arguments are meritorious. Long before the plaintiff and Mr Choo came into the picture in 2016, the Breakdown Table was initially prepared by the 2nd defendant on 13 March 2015 and approved by the 3rd defendant on the same day.[233] At that time, the Breakdown Table featured an additional rightmost column that indicated "Div. Per Share", highlighted in grey below for ease of reference (the "missing column"):

Investor	Amount Invested	Date of Investment	Price Invested	Number of Shares	Div. Decl. 31-12	Dividend Rcd.	Div. Per Share
A	1,000,000	1-Jan	1.50	666,667	9%	90,000	0.135
B	500,000	1-Apr	1.65	303,030	9%	33,750	0.111
C	1,000,000	1-Jul	1.80	555,556	9%	45,000	0.081

144 This version of the table that was approved in 2015 was different from the Breakdown Table forwarded to the plaintiff on 27 October 2016, which did not feature the missing column. The 2nd defendant explained that the missing column was simply a "mathematical" calculation.[234] On the face of it, the missing column plainly comprises values that are obtained by taking the amount of dividends received (the values in the "Dividend Rcd" column) and dividing that by the number of shares specified (the values in the "Number of Shares" column). There is therefore no basis to the plaintiff's claim that the omission of the missing column revealed any negligence on the part of the 2nd defendant.

231 PCS at paras 15, 20 and 26; 26 June Transcript at p 83 line 23.

232 PCS at paras 37–38.

233 ABOD vol 3 at pp 314–315.

234 26 June Transcript at p 217 lines 7–24.

145 Moreover, as I outlined earlier, I did not find that the 9% Dividend Representation was even made or that the Breakdown Table was misleading (see above at [87]). There is also no basis to suggest that the contents of the 28 November Email (which comprised the 2nd defendant's verbatim reproduction of Mr Agrawal's answers to the plaintiff) were wrong, such that the 2nd defendant was negligent in communicating AVIVO's answers to the plaintiff. The statement that in the "case of [AVIVO], the pay-out was 9% pro-rata based on the funds contributed by the shareholders" was not false at the time, since AVIVO did historically declare dividends at 9% of the invested capital.[235] It bears repeating that it is *not* the plaintiff's pleaded case that "the forecast in the [presentation decks prepared by AVIVO] was wrong".[236]

146 For completeness, I should clarify that I do not discount the possibility that quite a bit of puffery and marketing talk by the 2nd defendant may have taken place during the course of the discussions in marketing AVIVO. I have little doubt that he talked up the prospects of an investment in AVIVO. While the reality of trying to piece together a couple of off-hand conversations many years ago is that one can only get an approximation of what might have happened, given that this was, in essence, a marketing talk, there is every chance that the 2nd defendant would have talked up the merits of investing in AVIVO, whether or not he had a genuine belief in AVIVO, and whether or not he did so by way of accentuating or highlighting only the more positive aspects of the investment, while not dwelling excessively on the negatives. Nonetheless, while there may be certain circumstances where puffery may operate as a real and substantial inducement, such as where there exists between the parties a

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235 Mr Bagri's AEIC at paras 41–42 (BAEIC vol 2 at pp 266–267); ABOD vol 3 at pp 98, 117 and 398.

236 24 June Transcript at p 82 lines 13–16.

significant disparity in knowledge or gulf in business acumen or sophistication (*Kong Chee Chui and others v Soh Ghee Hong* [2014] SGHC 8 at [4]), this was clearly not the case here. In view of Mr Choo's extensive background in investment and finance, he would have and did in fact recognise that the 2nd defendant's role was to optimistically promote such investments (see above at [130]). Either way, there is no reason for me to conclude that any misstatement or optimistic assessment of the company's prospects would be actionable.

147 Finally, in my mind, the 1st and 2nd defendants' silence as to the 3rd defendant's resignation and the pending DFSA investigations against him do not amount to a misrepresentation. Silence is rarely considered sufficient to amount to a representation as it is a form of passive conduct that is "inherently lacking the definitive quality of an active statement" (*Broadley* at [28]) but may amount to a representation in circumstances such as where the representor is under a positive duty to disclose the facts on which he remains silent. Such a duty may arise out of the relationship between parties and/or the circumstances in which the silence is maintained, and is to be assessed by reference to how a reasonable person would view the silence in the circumstances (*Broadley* at [28], citing *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [61]).

148 In view of the circumstances that the silence was maintained, I find that the 1st and 2nd defendants' silence did not amount to any actionable misrepresentation. It is undisputed that during the 3rd defendant's employment with the 1st defendant and AVIVO, he never spoke with, met, or had any discussions with Mr Choo and/or the plaintiff regarding the decision to invest in AVIVO.[237] Moreover, as I found earlier, there is no suggestion that the

[237] Mr Don Lim's AEIC at para 38 (BAEIC vol 6 at p 94); and 3DCS at para 23.2.

plaintiff ever once asked a question about the 3rd defendant during his checks over email, or during the Site Visit, and there was also no reason for the plaintiff to have honed in on precisely the 3rd defendant in the marketing materials. In the circumstances, I did not find that there is any indication, as the plaintiff asserts, that the 3rd defendant was key to its decision to invest in AVIVO, such that the 1st and 2nd defendant's silence as to the 3rd defendant's resignation and/or the fact that he was facing investigations amounted to active concealment. Notably, it is the 2nd defendant's unchallenged evidence that he was unaware of the DFSA investigations against the 3rd defendant at the time.[238] This aligns with the 3rd defendant's account that he was told by the DFSA to keep the investigations confidential.[239] As I will explain later, there is also no free-standing duty for the defendants to disclose the fact that the 3rd defendant was facing investigations by the DFSA.

The 1st and 2nd defendants owed a tortious duty of care to the plaintiff

149 As outlined earlier, in order to establish the common law claim of negligent misrepresentation, the plaintiff has to show that it was owed a duty of care by the 1st and 2nd defendants. In this regard, the plaintiff submits that:

> (a) By virtue of an alleged oral agreement, the 1st and 2nd defendants owed a contractual duty of care, whether expressly or impliedly, to advise the plaintiff and to exercise reasonable care and skill throughout.[240]

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238 Mr Bagri's AEIC at para 142 (BAEIC vol 2 at p); and 12DCS at para 81.

239 27 June Transcript at p 129 lines 2–9.

240 SOC at para 9B (SDB at pp 53–54).

(b) Alternatively, the 1st and 2nd defendants owed the plaintiff a duty of care in common law in "like terms" to the express or implied contractual duty to advise and take exercise reasonable care and skill throughout.[241]

(c) The relevant disclaimers did not negate the duty of care owed to the plaintiff.

150 In response, the 1st and 2nd defendants argue that:

(a) There is no evidence that any oral agreement existed between the 1st and/or 2nd defendants on the one hand, and the plaintiff on the other. Any such agreement did not contain sufficiently certain terms and there was no consideration provided for the agreement.[242]

(b) In any event, there is no duty of care owed to the plaintiff in tort as there was no voluntary assumption of responsibility by the 1st and 2nd defendant. Any alleged duty of care is negated by the disclaimers in the various documents provided to the plaintiff. Mr Choo himself was soliciting third parties to purchase shares in AVIVO and the plaintiff was set up as an investment vehicle to conduct commercial due diligence on AVIVO on behalf of the investors. In any event, even assuming that the 1st and 2nd defendant assumed any responsibility, such a responsibility was in respect of Mr Choo instead of the plaintiff, which was not even incorporated at the time the alleged representations were made.

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241 SOC at para 9C (SDB at pp 54–55).

242 12DCS at para 45.

No contractual duty is owed to the plaintiff

151 As outlined by the Court of Appeal in *Go Dante Yap v Bank Austria Creditanstalt AG* [2011] 4 SLR 559 ("*Go Dante Yap*") (at [19]), contractual duties find their genesis in the express or implied agreement of the contracting parties, and they may therefore be as narrow or specific as the parties desire, and thus, there is nothing wrong with the concept of an express or implied "contractual duty to advise". I note that the absence of an express or implied contractual duty to *advise* the plaintiff did not necessarily mean that the 1st and/or 2nd defendants did not owe a contractual duty of *skill and care* to the plaintiff (*Go Dante Yap* at [24]), and in contracts under which "a skilled or professional person agrees to render certain services to his client in return for a specified or reasonable fee, there is at common law an implied term in law that he will exercise reasonable skill and care in rendering those services" (*Go Dante Yap* at [24], citing the House of Lords decision of *Lister v Romford Ice and Cold Storage Co Ltd* [1957] AC 555 at 572−573). Nonetheless, any implied duty "must be viewed in light of the express terms as set out in the contractual documents", and, as such, "[w]here the parties have entered into an agreement, especially one which contained numerous detailed express terms, the court must be careful not to imply a term which contradicts the express terms"; it is ultimately "not the function of the court to rewrite the terms of the bargain" (*Telemedia Pacific Group Ltd v Credit Agricole (Suisse) SA (Yeh Mao-Yuan, third party)* [2015] 1 SLR 338 at [206]).

152 The plaintiff contends that when Mr Choo and the 2nd defendant first met on 7 October 2016, Mr Choo allegedly instructed the 1st and 2nd defendants that the plaintiff was "looking for an investment that would ideally provide attractive dividends over the holding period and the potential to achieve capital gains", and there was an express and/or implied agreement between Mr Choo

and the 1st and 2nd defendants that:[243] (a) "the 1st and 2nd [d]efendants would advise the [p]laintiff as to the most suitable investment for the [p]laintiff on the basis that the [p]laintiff was looking for attractive dividends over the holding period, the potential to achieve capital gains, a high quality and reputable fund manager to look after and manage the investment, and where appropriate to protect the risk associated with the investment"; and (b) "the 1st and 2nd [d]efendants would exercise reasonable care and skill throughout".

153 Despite pleading the above in its statement of claim, the plaintiff makes no further submissions on this point. In the circumstances, I find that, much like the rest of the Alleged Representations, there is no corroboration of the plaintiff's account, by way of any written documentation or internal correspondence, that there was such an express (oral) agreement between the plaintiff and the 1st and 2nd defendants. Indeed, there is no evidence of any contract between the plaintiff and the 1st and 2nd defendants, for me to even begin to consider whether an express or implied contractual duty to advise or take reasonable care existed.

Duty to exercise reasonable care owed to the plaintiff

154 As the Court of Appeal held in *Go Dante Yap* (at [19]), it is not, strictly speaking, correct to speak of a broad "tortious duty to advise" without more and, in particular, without reference to any related contractual obligation. Nonetheless, the 1st and 2nd defendants may potentially still owe the plaintiff a tortious duty to take reasonable care by way of their conduct and representations to the plaintiff, including in the giving of advice (*Go Dante Yap* at [19]–[20] and [39]). A duty of care will arise in tort (for cases arising out of negligence in

243 SOC at paras 9A–9B (SDB at pp 53–54).

the context of pure economic loss such as the present) if: (a) it is factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm; (b) there is sufficient legal proximity between the parties; and (c) policy considerations do not militate against the imposition of a duty of care (*Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*") at [73], [77] and [83]).

155 As further observed by the Court of Appeal, the threshold requirement of factual foreseeability "will almost always be satisfied" (*Deutsche Bank AG (CA)* at [29], citing *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR(R) 853 at [55]). In the present case, it is factually foreseeable that any negligence on the 2nd defendant's part may cause harm to the plaintiff. It is not inconceivable that, by way of the 2nd defendant's conduct and representations to Mr Choo, the plaintiff may rely on the 2nd defendant's representations in relation to its investment in AVIVO. As I will explain, there is also sufficient legal proximity between the parties. Proximity may reflect "an assumption by one party of a responsibility to take care to avoid or prevent injury, loss or damage to the person or property of another or reliance by one party upon such care being taken by the other in circumstances where the other party knew or ought to have known of that reliance" (*Spandeck* at [78], endorsing the Australian High Court in *Sutherland Shire Council v Heyman* (1985) 60 ALR 1 at 55–56). Nonetheless, an "express disclaimer of responsibility" may prevent a tortious duty of care from arising, by negating the proximity sought to be established by the concept of an "assumption of responsibility" (*Go Dante Yap* at [38], relying on the seminal decision by the House of Lords in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 503). This then raises the question of whether, and to what extent, the various disclaimers negate such a tortious duty of care.

156 Given my findings earlier that the Alleged Representations were not made in the manner pleaded, there is, strictly speaking, no need to discuss the implications of the disclaimer and agreement in this case. However, if I am wrong in finding that the representations were not made, with respect to at least the Calculation Representation which I found to be most likely an actionable misrepresentation, I would have concluded that the disclaimers would not have immunised the 1st and 2nd defendants from liability. The result is that there appears to be a duty to exercise reasonable care owed to the plaintiff.

(1) The disclaimers do not negate any duty of care owed to the plaintiffs

157 There are four main sources of disclaimers in the present case. First, there are the disclaimers in the RAPL Corporate Presentation that, in gist, provide that the 1st defendant cannot be held liable as a result of one's use of the RAPL Corporate Presentation and the information therein:[244]

> [The 1st defendant] does not warrant the truth, accuracy, adequacy, completeness or reasonableness of the information and materials contained in or accessed through this document and expressly disclaims liability for any errors in, or omissions from, such information and materials. No warranty of any kind, implied, express or statutory (including but not limited to, warranties of title, merchantability, satisfactory quality, non-infringement of third-party intellectual property rights, fitness for a particular purpose and freedom from computer virus and other malicious code), is given in conjunction with such information and materials, or this document in general.
>
> The views expressed are opinions of [the 1st defendant] and are subject to change based on market and other conditions. These views are not intended to be a forecast of future events, a guarantee of future results. Nothing in this document constitutes accounting, legal, regulatory, tax or other advice.
>
> In no event shall [the 1st defendant] be liable to you or any other party for any damages, losses, expenses, or costs whatsoever (including without limitation, any direct, indirect, special, incidental or consequential damages, loss of profits or loss of

244 ABOD vol 3 at p 101.

> opportunity) arising in connection with your use of this document, regardless of the form of action and even if [the 1st defendant] had been advised as to the possibility of such damages.
>
> Past results do not guarantee future performance. [The 1st defendant] accepts no liability for any loss arising from the use of material presented in this presentation. Any portion of the presentation may not be reprinted, sold or redistributed without prior written consent.
>
> …
>
> Investors are not to construe the contents of this document as legal, business or tax advice. Each investor should consult his own attorney, business adviser and tax adviser as to legal, business, tax and related matters.

158 Second, in the AVIVO Teaser, AVIVO and RCL disclaimed any responsibility resulting from the use of such a document and the information relied on within:[245]

> This document is intended for discussion purposes only and is provided without warranty of any kind and reliance on any information presented is at your own risk. AVIVO, [RCL] and its contributors hereby disclaim all warranties and conditions with regard to this information, and any and all sections of the document.
>
> …
>
> In no event shall AVIVO or [RCL] be liable for any direct, indirect, or consequential damages arising out of or in any way connected with the use of this document, whether based on contract, tort, negligence, strict liability or otherwise. You are hereby expressly advised that there are specific risks associated with the holding of shares in the Company, including, but not limited to (i) Liquidity (ii) Leveraging (iii) Counterparty Default (iv) Credit Risk (v) Legal and Regulatory, and (vi) general economic environment risks more details of which can be found in Section 2 of this document. Investors are not to construe the contents of this document as legal, business or tax advice. Each investor should consult his own attorney, business adviser and tax adviser as to risk, legal, business, tax and related matters. The purchase of the shares in AVIVO should be considered only by eligible and qualified persons (including "Professional

245 ABOD vol 3 at p 98.

> Clients") who fully understand the risks associated with such an investment and can bear the financial risks of their investment being illiquid for an indefinite period or a total loss.

159 Third, there are disclaimers within the Offering Document (*ie*, the AVIVO Investor Presentation and the AVIVO Investor Presentation (Financial Section)), which comprise, amongst others, disclaimers that AVIVO and RCL shall not be liable for any damage connected with the use of such document:[246]

> … The document is intended for discussion purposes only and is provided without warranty of any kind and reliance on any information is at [the prospective investor's] own risk. …
>
> In no event shall AVIVO or the Manager [*ie,* RCL] be liable for any direct, indirect, or consequential damages arising out of or in any way connected with the use of this document, whether based on contract, tort, negligence, strict liability or otherwise. … Investors are not to construe the contents of this document as legal, business or tax advice.
>
> …
>
> An investment in the shares of [AVIVO] is subject to a high degree of risk and is suitable only for [p]rofessional and sophisticated investors that fully understand the risks and are prepared to bear such risks for an indefinite period of time and are able to withstand a total loss of their investment.
>
> … Prospective investors should … read the Legal Disclaimer that is at the front of the Offering Document/Investor presentation. It is also recommended that investors always seek independent advice prior to making any investment decisions.
>
> …
>
> [RCL] is the appointed Manager of [AVIVO]. [RCL] also owns shares in the platform. Directors of the Company are appointed by the Manager. Managers and Directors may have a conflict of interest between acting in the best interests of the shareholders, and duties to the appointed Manager.
>
> …
>
> The documents and materials provided by [AVIVO] … contain certain forward-looking statements that involve risks and

246 ABOD vol 3 at p 22, 24 and 26–27.

> uncertainties. … [AVIVO's] actual results could differ materially from those discussed in these statements. …
>
> …
>
> There is also no guarantee that [AVIVO] will be able to execute its exit plan within the expected time horizon, or that markets at the time of planned exit will allow for a favourable terms or realization of projected return.

160 None of these disclaimers would immunise the 1st and 2nd defendants from liability. As the plaintiff correctly points out, its claim does not arise from the purported use or reliance on specifically the RAPL Corporate Presentation, the AVIVO Teaser and/or the Offering Document. Rather, its claim is based on the Alleged Representations made orally by the 2nd defendant. With respect to the Concurrent Role Representation, although the plaintiff claims that this was made "with references to the [RAPL Corporate Presentation] at the point when [such a presentation deck] was no longer accurate", the crux of this claim was that such a representation was made orally by the 2nd defendant.[247] In my view, it is plain that the RAPL Corporate Presentation, AVIVO Teaser and the Offering Document merely restrict liability for misrepresentation in relation to the reliance of any information provided *within these materials*. While the 1st and 2nd defendants contend that "the disclaimers were … intended to and did apply to all subsequent communications between Mr Choo and [the 2nd defendant] on AVIVO",[248] there is no such notice to that effect in the marketing materials provided.

161 Finally, I turn to the fourth set of disclaimers. These may have negated any legal proximity between the 1st and 2nd defendants and the plaintiff, had these disclaimers been reasonable. In the Subscription Form that Mr Choo

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247 PRS at para 27.

248 12DCS at paras 52–53.

signed on behalf of the plaintiff (and which formed the basis of an agreement between the plaintiff *and AVIVO*, not the 1st and 2nd defendants), cl 2.13 provides that the plaintiff, in purchasing the AVIVO shares, agreed that it was "not relying on any information or representation other than such as may be contained in the [AVIVO] Articles, the Offering Document and this Subscription Form":[249]

> [Clause 2.13] I/We agree that the issue of allotment [of the AVIVO Shares] is subject to the provisions of the [memorandum and articles of association of AVIVO], the Offering Document and the provisions of this Subscription Form (including all schedules and attachments hereto), and that my/our subscription for [the AVIVO Shares] will be governed and construed in accordance with Cayman Islands law. *I/We confirm that, by subscribing for [the AVIVO Shares], I/we are not relying on any information or representation other than such as may be contained in the Articles, the Offering Document and this Subscription Form (including all schedules and attachments hereto).*
>
> [emphasis added]

162 In order to interpret the clause cited in the preceding paragraph, I begin with the Court of Appeal's decision in *Singapore Telecommunications Ltd v Starhub Cable Vision Ltd* [2006] 2 SLR(R) 195 (at [52]) which stated the applicable principles for interpreting exclusion or exemption clauses:

> The focus on the purpose of the contract and the circumstances in which it was made is particularly apt where exemption clauses are concerned. The general rule should be applied that if a party otherwise liable is to exclude or limit his liability or to rely on an exemption, he must do so in clear words; any ambiguity or lack of clarity must be resolved against that party: per Lord Hobhouse in *Homburg Houtimport BV v Agrosin Private Ltd* [2004] 1 AC 715 at [144]. The principle that exemption clauses must be construed strictly entails, as this court held in *Hong Realty Pte Ltd v Chua Keng Mong* [1994] 2 SLR(R) 90 ("*Hong Realty*") at [19], that the application of such clauses must be restricted to the *particular circumstances* the parties had in mind at the time they entered into the contract.

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249 ABOD vol 1 at p 140.

[emphasis in original]

163 In my mind, cl 2.13 of the Subscription Form was clearly intended to be a non-reliance clause which sought to exclude liability for misrepresentation: the plaintiff, by signing the Subscription Form and acquiring the AVIVO Shares, agreed that it was not relying on any other pre-contractual representation other than the materials specified. It would thus also be apparent that I disagreed with the plaintiff's characterisation of cl 2.13 as an "entire agreement clause", which is a clause that stipulates that no representations or promises except those expressly stated in the agreement between parties can have contractual effect (*RBC Properties* at [113]).[250]

164 In *First Tower Trustees Ltd and another v CDS (Superstores International) Ltd* [2019] 1 WLR 637 ("*First Tower Trustees*") (at [47]), the English Court of Appeal held that parties could, by way of "contractual estoppel", bind themselves by contract to a fictional state of affairs in which no representation has been made, or, if made, has not been relied on (at [47]). I respectfully agree with the position taken by this court in earlier decisions that the doctrine of contractual estoppel indeed operates in the domestic context (see, in this regard, the analyses in *Tradewaves Ltd and others v Standard Chartered Bank and another suit* [2017] SGHC 93 at [129]–[141], and *Phoa Eugene (personal representative of the estate of Evelyn Phoa (alias Lauw Evelyn Siew Chiang), deceased and personal representative of the estate of William Phoa, deceased) v Oey Liang Ho (alias Henry Kasenda) (sole executor of the estate of Wirio Kasenda (alias Oey Giok Tjeng), deceased) and others* [2024] 4 SLR 1493 at [177]–[178]).

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250 PRS at para 11.

165 Notably, the established position at law is that a principal cannot exclude his own liability for *fraudulent* misrepresentation (*First Tower Trustees* at [74], cited in *H8 Holdings Pte Ltd v RIC Dormitory (SG) Pte Ltd and others and another suit* [2024] SGHC 177 ("*H8 Holdings*") at [105]). Indeed, if an exclusion clause is to be construed wide enough so as to include fraudulent conduct, such a construction would render the clause ineffective in common law and pursuant to s 3 of the Misrepresentation Act (*H8 Holdings* at [105], citing with approval John Cartwright, *Misrepresentation, Mistake and Non-Disclosure* (Sweet & Maxwell, 6th Ed, 2022) at para 9-13). The English Court of Appeal held in *First Tower Trustees* (at [60]–[61]) that the essential question of whether the clause in question is to be understood as one that excluded or restricted liability in respect of the representations made, intended to be acted on, and in fact acted on, is one of substance and not form. As such, if the clause is one that substantively excludes or restricts liability for misrepresentation, it would be subject to s 3 of the Misrepresentation Act 1967 (c 7) (UK) (the "Misrepresentation Act (UK)"), in order to give effect to its evident policy in preventing contracting parties from escaping from liability for misrepresentation unless it is reasonable for them to do so (*First Tower Trustees* at [51]). Section 3 of the Misrepresentation Act (UK) is largely *in pari materia* with s 3 of the Misrepresentation Act in the domestic context. The latter provides as follows:

> **Avoidance of provision excluding liability for misrepresentation**
>
> 3. If a contract contains a term which would exclude or restrict —
>
> (*a*) any liability to which a party to a contract may be subject by reason of any misrepresentation made by him before the contract was made; or
>
> (*b*) any remedy available to another party to the contract by reason of such a misrepresentation,

> that term shall be of no effect except in so far as it satisfies the requirement of reasonableness as stated in section 11(1) of the Unfair Contract Terms Act 1977, and it is for those claiming that the term satisfies that requirement to show that it does.

166 For completeness, I note that the plaintiff referred, in their written submissions, to s 2(2) of the UCTA instead of s 3 of the Misrepresentation act. The former provision similarly states that parties cannot exclude or restrict their liability for negligence except in so far as that term or notice satisfies the requirement of "reasonableness". Section 3 of the Misrepresentation Act merely applies the same principle to contractual terms which exclude or restrict liability for misrepresentation in particular (see, in this regard, the English Court of Appeal's decision in *Taberna Europe CDO II plc v Selskabet AF1 (formerly Roskilde Bank A/S)* [2017] 2 WLR 803 at [18]).

167 As evident from the provision reproduced in paragraph [165] above, any term seeking to exclude liability for misrepresentation shall only have effect if it satisfies the requirement of "reasonableness" under s 11(1) of the Unfair Contract Terms Act 1977 (2020 Rev Ed) ("UCTA"), which I also reproduce for ease of reference:

> **"Reasonableness" test**
>
> 11.—(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part and section 3 of the Misrepresentation Act 1967 is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

168 It will be for the contracting party seeking to rely on such a clause to establish that it was reasonable (*First Tower Trustees* at [67]). As the plaintiff rightly points out, any such clause that purports to exclude liability ought to be in clear and express terms, and there is, accordingly, no basis for the 1st and 2nd

defendants to rely on such a clause in the present case.[251] The 1st and 2nd defendants' sole submission in this regard is that such a disclaimer was reasonable, as the AVIVO Teaser and Offering Document made reference to the 1st defendant as the "sub-manager of AVIVO", and thus, the protection afforded by the disclaimers and terms thereunder must be understood and intended to extend to the 1st defendant and its employees.[252] In my view, the 1st and 2nd defendants' position on this point is untenable. Where a principal seeks to exclude its liability for its agent's misrepresentation, this must be expressed "in clear and unmistakable terms" on the clause seeking to exclude such liability (see, in this regard, the House of Lords' decision in *HIH Casualty and General Insurance Ltd and others v Chase Manhattan Bank and others (conjoined appeals)* [2003] 1 All ER (Comm) 349 at [16]). In a similar vein, if cl 2.13 purported to restrict liability on the part of another entity (since the Subscription Form was strictly between the plaintiff and AVIVO), such entity being the 1st defendant and also its employees, this must be clearly expressed. It does not accord to logic, by the mere fact that the 1st defendant was mentioned as the "sub-manager of AVIVO" in the AVIVO Teaser and the Offering Document, that the scope of the non-reliance clause also extended to the 1st defendant and its employees.

(2) The mere fact that the plaintiff was not incorporated at the time the representations were made does not bar the claim

169 Finally, I would give short shrift to the 1st and 2nd defendants' argument that the plaintiff was barred from asserting that there was a duty of care owed to it, merely because it was not incorporated at the time the Alleged

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251 PRS at para 14.

252 1st and 2nd defendants' reply submissions dated 5 August 2024 ("12DRS") at para 42.

Representations were made.[253] As Steven Chong J (as he then was) found in *Goldrich Venture* (at [43]), if a representation is made to a party 'A', in the contemplation that the representation will be of continuing effect and be acted on by a third party 'B', then that representation will be of continuing effect and will, when made known to B through A, become a direct representation to B. If B subsequently relies on such a representation which proves to be false and suffers a loss, B has a cause of action against the representor and it does not matter that B, being a company, had yet to be incorporated at the time the representation was made. In *Goldrich Venture* (at [44]), Chong J observed that such a conclusion was not an entirely a novel point of law, as it involved two established legal principles: (a) that a pre-contractual representation is of continuing effect until it is corrected (*Yokogawa Engineering Asia Pte Ltd v Transtel Engineering Pte Ltd* [2009] 2 SLR(R) 532 at [12]); and (b) the principle that a representation made to a third party for intended transmission to the plaintiff can be actionable (*Thode Gerd Walter v Mintwell Industry Pte Ltd* [2009] SGHC 44 at [32]).

170 In arriving at his decision, one of the cases Chong J relied on was that of the Supreme Court of the United Kingdom ("UKSC") in *Cramaso LLP v Ogilvie-Grant and others* [2014] AC 1093 ("*Cramaso*"). The UKSC held, in that case, that a duty of care did arise on the facts, and such a duty arose when the representation was first made to the appellant's agent (which was at a time prior to the incorporation of the appellant in that case) and such a duty of care persisted even after the appellant had been formed (at [28] and [30]):

> … the representor can equally be taken to be, by his conduct, implicitly repeating the representation previously made, and can therefore owe a duty in respect of the accuracy of the representation towards the agent's principal.

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253 12DCS at para 50.

> …
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> In the present case, the change in the identity of the prospective contracting party did not affect the continuing nature of the representation, or the defendants' continuing responsibility for its accuracy … the representation made in the critical e-mail remained operative in the mind of [the agent of the appellant] after he began to act in the capacity of an agent of [the appellant], up until the time when the lease was executed on behalf of [the appellant]. [The appellant] was thus induced to enter into the contract by that representation.

171 The outcome in *Cramaso* is also reflective of the principle that although a claimant must show that the defendant owed a duty, and that such duty was owed to it, the defendant need not know the identity of the claimant – it is sufficient if the defendant knows him as a "member of an ascertainable class" (*Caparo v Dickman* [1990] 2 AC 605 at 638). Additionally, it is possible, in appropriate circumstances, for a duty of care to be owed to a class of persons, some of whom might not (at the time of the purported misrepresentation) be in existence yet (*Cramaso* at [3]).

172 As such, the fact that the plaintiff had not been incorporated at the time the Alleged Representations were made was not, by itself, "an insuperable obstacle" to the plaintiff's claim, provided that the alleged representations were intended to be of a continuing character and to be relied on by the plaintiff after its incorporation (*Goldrich Venture* at [47]). On the present facts, the 2nd defendant was plainly aware, from at least 22 November 2016,[254] prior to the investment in AVIVO, that Mr Choo intended to incorporate the plaintiff as a special purpose vehicle for the purposes of such an investment. Any representation made to Mr Choo would therefore, through Mr Choo, be a direct representation to the plaintiff, and any duty to take reasonable care can be owed to the plaintiff who had not been incorporated at the time.

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254 ABOD vol 3 at p 376.

173 Be that as it may, these issues do not impact my decision and are set out purely to ensure that the court's views on these areas are made known, as nothing turns on these matters given my findings above.

Unlawful means conspiracy

Applicable law

174 It is undisputed between parties that the requirements to establish a claim for unlawful means conspiracy is as set out by the Court of Appeal in *EFT Holdings, Inc and another v Marinteknik Shipbuilders (S) Pte Ltd and another* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]:

(a) there was a combination of two or more persons to do certain acts;

(b) the alleged conspirators had the intention to cause damage or injury to the plaintiff by those acts;

(c) the acts were unlawful;

(d) the acts were performed in furtherance of the agreement; and

(e) the plaintiff suffered loss as a result of the conspiracy.

There were no unlawful acts

175 Given my findings above, it is plain that the claim brought under unlawful means conspiracy is similarly entirely unsustainable and ought to be dismissed. In order to make a claim of unlawful conspiracy out, it would first be necessary for me to find that there were, in fact, misrepresentations made to the plaintiff. Any claim for unlawful means conspiracy can only be sustained if the acts were unlawful to begin with, and "unlawful means" comprises "civil wrongs which are actionable by the claimant" (*Singapore Rifle Association v*

Singapore Shooting Association and others [2019] SGHC 13 at [67], citing *EFT Holdings* at [91]). Since there are, in my view, no such misrepresentations advanced by the 1st and/or 2nd defendant as alleged by the plaintiff, the case for an unlawful means conspiracy must necessarily fail.[255]

176 Nonetheless, as parties also submitted at length as to whether there is any evidence of a combination or agreement between the three defendants, I will also address these points for completeness. In my view, there are a few aspects to the case involving the 3rd defendant that makes the case against him even weaker than any case against the 1st and 2nd defendants.

There was no combination of the defendants to do certain acts

177 I note that any agreement between the conspirators need not have been an express agreement and can be inferred from the circumstances and acts of the alleged conspirators, though the parties must be (a) sufficiently aware of the surrounding circumstances and (b) share the object for it to properly be said that they were acting in concert (*EFT Holdings* at [113]). A conspirator need not know all the details of the plot so long as he is aware of the common objective and what his role in bringing it about involves (*The "Dolphina"* [2012] 1 SLR 992 at [282]).

178 First, it would appear from the evidence before me that there is simply no factual basis to provide a cancerous slant to the 3rd defendant's role in this case. He was, even on the highest plausible case on the part of the plaintiff, nothing more than a passive party who was not involved in any meaningful way in the lead-up to the plaintiff's investment in AVIVO. It is undisputed that during the 3rd defendant's employment with the 1st defendant and AVIVO, he

255 12DCS at para 109; and 3DCS at paras 6–7.

never spoke with, met, or discussed with Mr Choo and/or the plaintiff regarding the decision to invest in AVIVO.[256] A central tenet of the factual allegations advanced by the plaintiff *vis-à-vis* the third defendant are the dual-fold claims that the 3rd defendant was somehow involved in the creation of the presentation slides provided to Mr Choo in October 2016, and that he had deliberately concealed his roles in the 1st defendant and AVIVO from the plaintiff.[257] This was an allegation crafted out of whole cloth. Indeed, in the entire trial, not a single iota of evidence suggestive of this was adduced.

179 Instead, in trying to somehow bring the 3rd defendant into the picture, entirely fallacious potshots were taken at him. It is claimed, for example, that the 3rd defendant somehow had a duty to respond to email correspondences that he was otherwise not involved in after he stepped down as CEO of the 1st defendant and indicated in no uncertain terms that he had stepped down as CEO and/or from the board of AVIVO, each time he was copied into any possible investor-related email after he resigned from the 1st defendant,[258] and failing to do so conferred a "cloak of legitimacy" on the perception that he remained CEO of the 1st defendant.[259] This is a standard that is neither realistic, nor indeed, even achievable in real life. It ignores the fact that the 3rd defendant continued to be part of the broader Regulus Group of companies at the time, and so did the only obvious thing one would do in the circumstances when he was copied on an email that did not involve him personally: he ignored them. As the 3rd defendant put it, "I cannot control people putting me onto [the carbon copy] of emails. What I can control would be me replying to the emails that matter to

256 Mr Don Lim's AEIC at para 38 (BAEIC vol 6 at p 94); and 3DCS at para 23.2.

257 SOC at para 49(a)(vii) (SDB at pp 94–97).

258 PCS at paras 93 and 95.

259 26 June Transcript at p 38 line 24 to p 39 line 2.

me".[260] Contrary to the suggestions made by the plaintiff, the 3rd defendant could not be faulted for taking what was plainly the most commonsensical stance upon receiving such emails.

180 At trial, in order to cast him in a bad light, the plaintiff even took to suggesting that the defendants (whether individually or collectively) should have consistently updated their presentation slides and re-sent them to investors they had previously marketed investments to, in case any of them had relied on the information contained on past slide decks.[261] As I impressed to counsel for the plaintiff,[262] any suggestion that the 3rd defendant had some overriding duty to all possible investors to keep updating them about his status is an absurd standard that is bound to be breached in an overwhelming number of innocuous circumstances since it incorporates into directors' duties a duty to be personally involved in all marketing aspects of any business. For rather obvious reasons, this is not a standard I was willing to contemplate ascribing to directors of companies. For what it is worth, as I have noted earlier, the internal documents provided by the 3rd defendant only further buttress the fact that he was never materially involved in the matter of the plaintiff's eventual investment in AVIVO. In the circumstances, I find that the 3rd defendant likely had no meaningful involvement in the events in the lead-up to the signing of the Subscription Form.

181 In a further attempt to adduce evidence of the 3rd defendant's purported involvement in the conspiracy, the plaintiff also submitted that that the 3rd defendant was involved in preparing the Breakdown Table that was shared to

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260 27 June Transcript at p 88 lines 17–19.

261 26 June Transcript at p 193 lines 15–17.

262 26 June Transcript at p 193 line 18 to p 195 line 2.

Mr Choo, and that the 3rd defendant had responded to Mr Choo's emails in March 2017.[263] Neither of these get the plaintiff very far. In relation to the former submission, Mr Choo accepted that the Breakdown Table that was shared with him in 2016 by the 2nd defendant differed from the one that the 3rd defendant approved in 2015.[264] In relation to the latter point, as I had found above, these emails that the 3rd defendant responded to related to investments in ANEL, and not AVIVO (see above at [90]).

182 Seeing the evidence in the round therefore, there was no evidence to suggest that the 3rd defendant should have been brought into these proceedings to begin with. It should be self-evident that the factual foundation to support any allegation of conspiracy against the plaintiff would be missing. One can therefore only come to the conclusion that the plaintiff brought the 3rd defendant into its claim not because there was any case to speak of, but to effectively use him as collateral because of the adverse finding against him by the DFSA investigations in 2021. I will now turn to address the significance of this.

183 I did not place much weight on the Decision Notice by the DFSA, which indicated that the 3rd defendant was fined for a variety of offences in relation to the placement fees for investments in ANEL. To be fair to the plaintiff, they are not suggesting that the findings of the DFSA are themselves of significant weight, as much as the non-disclosure of such live investigations involving the 3rd defendant is indicative of a conspiracy amongst all of the defendants to deceive the plaintiff and other investors, by intentionally omitting such information during the discussions.

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263 PCS at paras 88 and 91.

264 25 June Transcript at p 26 lines 19–23.

184 In the plaintiff's closing submissions, it was alleged for the first time that the 1st defendant was a Capital Markets Services ("CMS") license holder that was bound to report to the MAS certain types of misconduct that was committed by "any of their representatives who has ceased to be a representative of the CMS license holder or exempt financial institution before the misconduct was discovered, or before disciplinary action has been decided upon or taken", which allegedly included the DFSA's investigations against the 3rd defendant at the time.[265] The plaintiff highlighted this to support their allegation that the 3rd defendant's re-assignment to RCL was strategic and done with the aim of preventing the diminishing of investors' confidence. This argument is rejected. First, the fact that the 1st defendant was allegedly a CMS license holder was never pleaded, nor put to any of the defendants' witnesses. In fact, as the 1st and 2nd defendants point out, it was not disputed till this juncture that the 1st defendant was a registered fund management company, which was distinct from a CMS license holder.[266] Secondly, contrary to the plaintiff's assertion, the 3rd defendant did not concede that the fact he was facing investigations by the DFSA was one of the factors leading to his re-assignment within the Regulus Group, and he instead explained that such re-assignment was ultimately a decision made by the board of RCL.[267] Finally, even if one of the reasons for the 3rd defendant's move from the 1st defendant and/or AVIVO to RCL was partly as a result of the DFSA investigations against him, I fail to see how this is indicative of any conspiracy between the defendants to specifically injure the plaintiff. In a similar vein, the mere fact that the date the 3rd defendant officially resigned from the 1st defendant (*ie*, 10 October 2016) coincided with the day that certain slide decks were circulated to the plaintiff was not revealing of any

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265 PCS at para 85.

266 12DRS at para 47.

267 27 June Transcript at p 79 lines 3–8.

conspiracy. Indeed, the 3rd defendant's handover in preparation for his resignation was already put in motion since July 2016,[268] well before the 2nd defendant had even met Mr Choo for the first time.

185 In any event, on the facts and based on the 3rd defendant's evidence, it would not have been possible to disclose the investigations anyhow since the regulators had made it clear to him that such investigations, given their infancy, had to be kept confidential, save for the purposes of seeking legal advice. The only individuals within the 1st defendant who knew about such investigations would have been those being investigated and their in-house legal counsel.[269] There could not therefore have been a conspiracy with the 2nd defendant to suppress this information from the plaintiff and Mr Choo, given that the 2nd defendant himself appeared to be in the dark about such investigations at the time.[270]

186 I would parenthetically add that a free-standing duty to disclose every conceivable facet of possibly negatively-perceived news to potential investors would be an unrealistic and impossible standard. Even taking the plaintiff's case at its absolute highest and assuming that the representations in relation to the 3rd defendant were in fact made, and further assuming that the 1st and 2nd defendants were aware of such information relating to the DFSA investigations of the 3rd defendant, I did not think this would be ordinarily disclosable in these circumstances. To take a simple example: if the 3rd defendant was in the midst of challenging negotiations to renew his contract at AVIVO, failing which there would be a not-inconsiderable possibility that he may leave the company –

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268 3DCS at para 23.1.

269 27 June Transcript at p 129 lines 2–12.

270 Mr Bagri's AEIC at para 142 (BAEIC vol 2 at p 289); and 12DCS at para 81.

would this need to be disclosed? How about if the 3rd defendant just found out that he was suffering from a critical illness that may potentially require him to step down in a year or two? Must this then be disclosed? The problem with the plaintiff's case on this front is that it seeks to impose an impossible standard of disclosure that shifts all burdens of disclosure to a company seeking investments, which essentially negates the need for any due diligence. It is clear that this is an intolerable burden that turns the conventional wisdom on its head – it is well known that investing in private companies inherently carries additional risks, as they are not subject to the much more stringent regulatory requirements regarding disclosure and transparency and would, in general, have much less obligations of disclosure. This information asymmetry of course heightens the importance of conducting comprehensive due diligence, which is precisely why Mr Choo conducted the Site Visit in Dubai, perused AVIVO's accounts and spoke to the AVIVO management when he was there. By the plaintiff's account, instead, what is needed is an overbearing duty of full and frank disclosure, which ostensibly makes private companies the subject of as onerous, if not more onerous, duties than publicly-listed companies. To be sure, if indeed the defendants did collude and decide actively to hide the fact of the present investigations, then a much stronger case can be made that such disclosure was clearly to be had. However, as can be seen above, there is simply no basis for me to make such a finding.

187 In this regard, the 1st and 2nd defendants referred me to the case of *Madhavan Peter v Public Prosecutor and other appeals* [2012] 4 SLR 613 ("*Madhavan*"), which offers some guidance on this point. In that case, the appellants were directors of a listed company on the main board of the Singapore Exchange ("SGX") at the material time. They were convicted of, *inter alia*, charges under s 331(1), read with s 203(2) and punishable under s 204(1) of the Securities and Futures Act (Cap 289, 2002 Rev Ed) for

consenting to their company's reckless failure to inform SGX of the fact that the company's CEO was being questioned by the Corrupt Practices Investigation Bureau in relation to certain transactions, had been released on bail and had had his passport impounded (the "Information"), which was likely to materially affect the price or value of the company's securities and was thus required to be disclosed under rule 703(1)(*b*) of the Singapore Exchange Trading Limited Listing Manual (the "Listing Rules"). The court there, in considering whether the company was indeed aware that non-disclosure of the Information would likely have a material effect on the price or value of the company's securities, made the following observations (at [114]):

> The likelihood of information materially affecting the price or value of a company's securities requires a prediction of how investors would react to the information if they were to know of it. Of course, some kinds of information are so damaging to the financial condition of a company or its future prospects that, as a matter of common sense, it is bound to materially affect the price of the company's securities (*eg*, information that a company has lost its only valuable franchise or has lost the bulk of its capital). *The likely market impact of other kinds of information may, however, be less clear (eg, the impact of information that a company's CEO or COO is under criminal investigation, as the business of the company may not be totally reliant on its CEO or COO). Experience and the actual market impact of similar information in the past may be of assistance in evaluating the probable outcome of disclosing the information in question.* Securities analysts and other experts in studying the reaction of investors to certain kinds of favourable or unfavourable news about a company's securities or the stock market as a whole may also be of assistance. *The correctness of the forecast or prediction is often validated or disproved, as the case may be, by actual market impact evidence, which is highly relevant.*
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> [emphasis added]

188 In light of the above observations, the court found that the factual circumstances revealed that the company did not know or was unsure if it had to disclose the Information as it did not know the likely effect of the Information on the company's share price (*Madhavan* at [115]). Further, it was not

unreasonable for the company to have continued taking the risk of non-disclosure as it was, at that time, seeking legal advice on how to proceed with its knowledge of the Information (*Madhavan* at [116]).

189 Albeit the above findings are made in a different context (in relation to a criminal offence for a listed company's failure to disclose certain information), its observations are apposite for our present purposes. A *listed* company which is subject to the Listing Rules is required to disclose information that is likely to materially affect the market price of the company's shares. Even then, it is uncertain if the fact that a key officer like a CEO or a director of a company is under investigation must necessarily be disclosed because the likely market impact of such information, without relevant expert or actual market evidence, is admittedly *unclear*. This line of argument for the disclosure of such information becomes even more tenuous for an *unlisted* company like the present case, who is not subject to the same rules of disclosure as a listed company. Moreover, given the objectively peripheral role that the 3rd defendant played in the investments in AVIVO, it is difficult to see how the fact that there were live investigations against him would have any impact on market price such that any duty to disclose would arise in the circumstances. Indeed, there is also no evidence adduced by the plaintiff that such information did or would affect the market conditions at the time. Finally, as I observed earlier, it remains the 3rd defendant's unchallenged evidence that the DFSA had advised him to keep the investigations confidential at that time, and thus the 1st and 2nd defendant remained unaware of the same.

190 In sum, I decline to find that there is any free standing *prima facie* duty for private companies to disclose to investors that one of their directors is facing live investigations, and such a duty would, nevertheless, not have arisen on the present facts.

Damages

191 Given that I did not find for the plaintiff, it follows that the issue of quantification of damages simply does not arise. That said, I should highlight my reservations on how the plaintiff sought to prove its damages. The plaintiff adduced no evidence whatsoever of any residual value of AVIVO given that it is liquidation,[271] and instead urged me to compensate them for the full sum invested without much further elaboration. This was despite the fact that the plaintiff would have received money from its investment, such as the dividend payment and the referral fees paid to Mr Choo.

192 I would hasten to add that this was not one of those cases where valuation of the loss is impossible by virtue of a complete asymmetry of information on the part of the plaintiffs, or where valuation is impossible as AVIVO had been, for example, engaged in fraudulent conduct rendering its actual financial state impossible to discern. Indeed, the plaintiff itself takes the position that evidence exists to show that the liquidators have intimated that "the distribution to shareholders is expected to be zero",[272] and yet, for some inexplicable reason, did not put such documentary evidence before the Court. All it would take, if this were true, was to at least simply show some records proving that liabilities exceed assets, which could potentially mean, in these specific circumstances, that in all likelihood, shareholders' value would be almost entirely wiped out and their shares, by extension, would be worthless. This was not done, raising serious questions about whether the alleged losses were inflated. Nonetheless, I say no more about this, since the issue of quantifying damages does not arise on the present facts.

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271 24 June Transcript at p 196 lines 14–25.

272 24 June Transcript at p 196 at lines 19–20.

Conclusion

193 This was a case of an investment gone wrong. When an investment sours, it is natural for aggrieved investors to seek explanations. On that front, it is often easy to blame the individual advising the merits of the investment, or making the marketing pitch, or the company that was invested in. This entirely fathomable and very human reaction stems from a myriad and complex mix of emotions that often come up when such high-risk, high-potential investments fail, ranging from frustration, to anger, and betrayal. It is especially easy to outsource and attribute the blame (often times, innocuously) to third party individuals and entities who have shown themselves to be no angels (as the DFSA decision clearly shows), and have, in similar settings, engaged in undeniably suspect behaviour when seeking investments.

194 As understandable as this instinct is, it very much overlooks the reality that in many of these cases, the failures in fact stem primarily from an interplay of two overlapping crucial factors very much outside the control of these entities and individuals: luck and risk. That was, in my view, clearly the case here. Whatever the merits of the initial investment in the company, and whatever the factors that motivated the plaintiff and Mr Choo to invest in the company, for the reasons I have set out above, it was plainly not the result of the misrepresentations made by the 1st or 2nd defendant or any conspiracy between them and the 3rd defendant, as suggested by the plaintiff. Consequently, I dismiss the suit in its entirety.

195 If costs are not otherwise agreed, the parties are to file submissions on costs, limited to no more than ten pages each, within two weeks of the issuance

of this judgment. Should any party wish to request an oral hearing on costs, this should be indicated in such submissions.

Mohamed Faizal
Judicial Commissioner

Clarence Lun Yaodong and Tan Ming Yew Clarence (Fervent Chambers LLC) for the plaintiff;
Vikram Nair, Cheong Tian Ci Torsten and Jodi Siah Be Koen (Rajah & Tann Singapore LLP) for the first and second defendants;
See Chern Yang and Joshua Quek Wen Chieh (Drew & Napier LLC) for the third defendant.