FIRST DIVISION
December 29, 2016

NO. 1-15-2733
2016 IL App (1st) 152733-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HUIZENGA MANAGERS FUND, LLC,	)	
Plaintiff-Appellee/Cross-Appellant,	)	Appeal from the Circuit Court of Cook County.
v.	)	
A.R. THANE RITCHIE, an individual, RITCHIE RISK –LINKED STRATEGIES, LLC, a Delaware Limited Liability Company, RITCHIE CAPITAL MANAGEMENT, LLC, a Delaware Limited Liability Company, RITCHIE CAPITAL MANAGEMENT (BERMUDA), LTD., a Bermuda Company, DOUGLAS R. ROTHSCHILD, an individual, DUNCAN GODIE-MORRISON, an individual, and PAUL WOLFE, an individual,	)	07 CH 9626 Honorable Peter Flynn, Judge Presiding.
Defendants-Appellants/Cross-Appellees.	)	

PRESIDING JUSTICE CONNORS delivered the judgment of the court.
Justices Harris and Simon concurred in the judgment.

ORDER

Held: Trial court did not abuse its discretion in allowing plaintiff to file a fourth amended complaint; the trial court properly found defendants violated certain provisions of the DSA; the trial court did not err in finding certain defendants secondarily liable; the trial court did not abuse its discretion in calculating prejudgment interest; and the trial court's finding that certain misrepresentations and omissions made prior to the first investment were not material was against the manifest weight of the evidence.

¶ 1 This appeal is from the trial court's order entered against defendants-appellants/cross-appellees A.R. Thane Ritchie, Ritchie Risk-Linked Strategies, LLC, Ritchie Partners, LLC, and Ritchie Capital Management, LLC (collectively, "Ritchie") (defendants), for violating section 7323 of the Delaware Securities Act (DSA). 6 Del. C. § 73-605 (West 2012). The trial court held defendants liable for material misrepresentations made to plaintiff-appellee/cross-appellant Huizenga Managers Fund, LLC (Huizenga) prior to Huizenga's second investment with them on October 1, 2005. The trial court denied Huizenga relief for its first investment with defendants on August 1, 2005, which Huizenga now claims on cross-appeal was in error. For the following reasons, we affirm the judgment of the circuit court on the second investment, but reverse on the first investment.

¶ 2 BACKGROUND

¶ 3 This case is complex and lengthy, as evidenced by the trial court's 53-page order. We will discuss only those facts necessary to this appeal. The defendant entities, as well as Huizenga, are hedge funds. Huizenga brought suit against defendants based on alleged violations of the DSA. Delaware substantive law was used because of the parties' choice of law provisions in the relevant governing documents. The specific counts at issue on appeal were brought under sections 7323(a)(2) and 7323(b) of the DSA. The trial was lengthy, spanning 26 days, with 21 witnesses and thousands of exhibits, as well as evidence depositions. Because neither party takes issue with the trial court's factual findings, we will provide some general background, as well as those specific factual findings.

¶ 4 Defendants wanted to enter into the life settlement market, so they reached out to Coventry First, the largest provider of life settlements. On June 7, 2005, a term sheet between Coventry and defendants was executed, which intended to give defendants an assured supply of life settlements. By June 30, 2005, a formal agreement had been signed.

¶ 5 One of the key elements of this deal was the mortality table that would be used to value and price the Coventry life settlements to be purchased by defendants. Coventry originally suggested that something called the "AVS-2" mortality table should be used. A July 12, 2005, internal Coventry memorandum notes that the AVS-2 table applies an "improvement factor" to the mortality rate each year, which is "compounded" annually for 25 years. Before signing the agreement, defendants' only modeling had been based on a different mortality table, the "LS3" mortality table, which Coventry had provided. Applying the LS3 table skewed life expectancies in Coventry's favor. The trial court noted that defendants "knew in mid-May 2005" that the medical underwriters Coventry said it was using (Fasano), considered the less aggressive "VBT" mortality tables to be "right on the money."

¶ 6 Fasano's life expectancies were calculated using the VBT tables. Accordingly, defendants had difficulty reproducing Coventry's pricing because Coventry prices used the life expectancies prepared by Coventry's medical underwriters, but not the VBT tables. Using AVS-2 tables with the underwriters' life expectancies resulted in mispricing the policy by artificially lessening the risk that the insured would live longer.

¶ 7 The trial court noted in its order that while "in hindsight the distorted results may appear deceptive, Coventry did not conceal the use of the AVS-2 tables," and that by "July 2005" defendants "were aware that Coventry was using AVS-2 tables."

¶ 8 The June 30, 2005, deal between defendants and Coventry gave Coventry a profit on each policy sold to defendants, as well as a yearly "origination and administration fee" equal to 3.75% of the outstanding junior debit, and an additional 20% "profit participation" in whatever profits defendants made.

¶ 9 Ritchie Capital then created a structure to begin its foray into life settlements. It created Ritchie Risk-Linked Strategies Trading, Ltd., which was the "master fund" for defendants' life settlement activities. Defendants also created two "feeder funds" to provide funding to the master fund. Ritchie Risk-Linked Strategies, LLC was the "onshore feeder fund," and Ritchie Risk-Linked Strategies, Ltd. was the "offshore feeder fund."

¶ 10 In June 2005, defendants described in a presentation (JX 1) to Huizenga that its risk-linked feeder funds would provide funds with which to buy life settlements from Coventry, and transfer ownership of the purchased settlements into a "special purpose entity." The JX 1 presentation contained several phrases like "speculative," "high degree of risk," "high degree of leverage," "concentrated portfolio," and "illiquid." On June 22, 2005, defendants sent Huizenga an 85-page private placement memorandum (PPM), for the onshore fund. The PPM cautioned that many "valuations" of "risk-linked instruments" are "dependent on the use of models" – "not financial models, but models designed to estimate the risk of various insured events occurring." The PPM stated that "these models are materially less certain or accurate than the typical financial models used for valuation purposes," and "involve an entire dimension of uncertainty which an option or bond pricing model does not." The PPM further stated that "material misstatements of the fair value of the Fund's Risk-Linked portfolios are possible on a level of magnitude that is typically not found in securities portfolios."

¶ 11 One of the material contracts referenced in the PPM was the Ritchie Risk-Linked Strategies, LLC Operating Agreement (Operating Agreement), as amended. Pursuant to the Operating Agreement, the Fund was a Delaware limited liability company. Section 9 of the Operating Agreement provided that the Fund is governed by Delaware law. Section 9.23 of the Operating Agreement stated that, "Any action, suit, claim or proceeding bought by any Member against the Fund or the Managing Member [Ritchie Partners, L.L.C.] or any RCM Party, by or on behalf of the Fund or any Member shall be barred" unless commenced within one year from the date the member knew or should have known of "the event which is the subject matter of such action, suit, claim or proceeding." Section 9.23(b) of the Operating Agreement provided that a member who "fails to prevail" in such a suit "shall pay the legal fees and costs incurred by the opposing party or parties." The Operating Agreement identified "Ritchie Capital Management, Ltd., a Cayman Islands company," as the Fund's "investment manager." Section 2.8(b) provides that no "RCM Party shall have any liability to *** any Member or any former Member" except for acts or omissions that are determined to "constitute fraud, bad faith, gross negligence or reckless or intentional misconduct." Section 2.8(c) of the Operating Agreement states that no RCM party shall have any liability to the Fund or a member or former member even for "a violation of Law," if the RCM party "reasonably believed such conduct to be in the interest of the Fund at the time of such conduct.

¶ 12 Huizenga invested $6 million in Ritchie Risk-Linked Strategies, LLC (the Fund) on August 1, 2005.

¶ 13 In a telephone conference that took place on September 29, 2005, Jeff Mulholland told Huizenga that the biggest risk would be if the life settlement policies could not be sold and if people lived longer than expected. However, he communicated to Huizenga that defendants were using the most conservative life expectancy assumptions because those were critically important.

¶ 14 After this phone call, Huizenga decided to invest another $4.67 million in the Fund on October 1, 2005. Also during that phone call, Mulholland had been asked to provide the model defendants were using to estimate cash flows. Mulholland agreed to do so and Huizenga received an incomplete model shortly after making its second investment. The assumptions were not visible in the model, and it could not be manipulated, so Huizenga requested the full model and not just cash flows. Huizenga never received this information.

¶ 15 In the ensuing year after Huizenga invested in the Fund, defendants pursued securitization of the life settlement portfolio. By early October 2005, days after Huizenga's second investment, Coventry was pushing to "double-size" the original deal. On May 5, 2006, the Fund received a Moody's rating of Baa, which came with a very high (42%) requirement of subordination to senior debt. By late August 2006, defendants knew that the funds were not available to meet Coventry's funding requests.

¶ 16 Between October 2005 and October 2006, defendants' regular reporting to Huizenga occurred via monthly investor letters, and then quarterly investment letters. The April 2006 and July 2006 letters included a pie chart entitled "Approximate Portfolio Allocation." The April 2006 pie chart showed "Life Settlements" at 33% of the Fund. The July 2006 pie chart showed life settlements at 40%. The trial court noted that the actual allocations differed substantially from the pie charts because defendants' inventory of policies had increased input but not output, and there was little or no outside source of the funds to buy the policies. In August 2005, defendants used the onshore feeder to fund increased Coventry demands, which meant that the life settlements share of the risk-linked "pie" rose consistently. But October 2006, the percentages for onshore exposure to life settlements were at 100%.

¶ 17 After trial, the trial court found that the disparity between the pie charts and reality was not trivial. It concluded, however, that Huizenga did not prove that the disparity in the reports during 2006 was the result of deliberate, orchestrated deception by defendants. Rather, it noted that when a crisis is happening, silence or temporizing may seem less misleading than saying the wrong thing, and that "materiality" as a disclosure trigger can be a complex balancing of probability and significance. The trial court reasoned that this could possibly explain defendants' inaccurate pie charts.

¶ 18 On June 2, 2006, Huizenga formally notified defendants that it would fully redeem its investment, effective September 30, 2006. But almost immediately thereafter, defendants advised Huizenga that the life settlement area had received a preliminary positive rating, which would have significant positive impact on the portfolio, so defendants encouraged Huizenga to stay invested in the fund and not to redeem. Huizenga canceled the redemption request.

¶ 19 While Huizenga thought that the Moody's preliminary rating from Moody's would lead to securitization right away, by late July 2006, securitization still had not occurred. Accordingly, on August 21, 2006, Huizenga sent a second withdrawal notice to defendants, effective December 21, 2006.

¶ 20 On October 26, 2006, Eliot Spitzer, the New York Attorney General, announced a suit against Coventry, focused on a small number of life settlements. Part of the requested relief was a judgment giving “the right of rescission to all Sellers who entered into Purchase Agreements with Defendant Coventry from 2001 to the present.” As the trial court noted, that potentially called into question every policy defendants held. Moody’s withdrew its rating.

¶ 21 Huizenga brought suit against defendants, alleging violations of the DSA and breach of fiduciary duties in connection with the two investments that Huizenga made to the fund. Count I was a rescission count under the section 7323(a)(2) of the DSA against defendants as offerors and/or sellers of securities, based on pre-purchase communications. Defendants contended that the DSA applied only to registered securities and since the fund sold unregistered securities to Huizenga, the DSA did not apply. Count II was a claim under section 7323(b) based on pre-purchase agreements both in and outside the PPM. The rest of the counts are not at issue in this appeal.

¶ 22 After a lengthy bench trial, the trial court entered judgment in favor of Huizenga in connection with Huizenga's second investment on October 1, 2005, and awarded Huizenga $9,174,199.63 (including prejudgment interest). Defendants appeal this judgment and award. The trial court denied Huizenga relief for its $6 million investment on August 1, 2005, finding that defendants had not yet become aware of just how badly Coventry had taken advantage of them until a few weeks later. Huizenga appeals this portion of the judgment. The trial court entered its judgment and memorandum order on January 27, 2015. On February 26, 2015, defendants filed a motion to vacate judgment, and Huizenga filed a motion for prejudgment interest and Rule 304(a) certification. Pending a ruling on these pleadings, on June 15, 2015, Huizenga filed a motion for leave to file a fourth amended complaint pursuant to section 2-616(c) of the Illinois Code of Civil Procedure (Code). 735 ILCS 5/2-616(c) (West 2012). The trial court granted this motion and on July 1, 2015, Huizenga filed its fourth amended complaint for rescission and damages.

¶ 23 Defendants timely appealed.

¶ 24 I. Defendants' Appeal

¶ 25 On appeal, defendants contend that the trial court abused its discretion when it permitted Huizenga to file a fourth amended complaint, that it did not violate certain sections of the DSA, that the trial court erroneously found certain defendants secondarily liable, and that the trial court abused its discretion in awarding Huizenga prejudgment interest.

¶ 26 Fourth Amended Complaint

¶ 27 We first address defendants' contention that the trial court abused its discretion when it permitted Huizenga to file a fourth amended complaint after final judgment had been entered in this case. According to section 2-616 of the Code, which addresses amendments to pleadings:

> "(a) At any time before final judgment amendments may be allowed on just and reasonable terms, * * * changing the cause of action * * * in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought * * *.
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> * * *
>
> (c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuances that may be just." 735 ILCS 5/2-616 (West 2012).

¶ 28 This statue is to be liberally construed to allow cases to be decided on their merits rather than on technicalities. *Delzell v. Moore*, 224 Ill. App. 3d 808, 812 (1992). The four factors to consider when determining whether a pleading may be amended are the following: "(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified." *Loyola Academy v. S & S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273 (1992). A circuit court's ruling regarding an amendment to a pleading is reviewed for an abuse of discretion. *Id*. However, these factors apply only to amendments that have been proposed prior to final judgment. *Tomm's Redemption, Inc. v. Hamer,* 2014 IL App (1st) 131005, ¶ 14.

¶ 29 Here, Huizenga's motion for leave to file a fourth amended complaint, pursuant to section 2-616(c), was filed after judgment had been entered in this case. Huizenga contended in its motion that the fourth amended complaint contained additional factual details that would "conform to the trial evidence about defendants' misrepresentations and omissions of material facts." Huizenga alleged that the evidence was presented by the parties at trial and that defendants did not raise any objections to the evidence when it was presented.

¶ 30 In Count I of the fourth amended complaint, Huizenga alleged that defendants offered and sold securities to it in violation of section 7323(a)(2) of the DSA by offering and selling the securities pursuant to the PPM, which contained material misrepresentations and omitted material facts as alleged in paragraphs 65-74. Paragraph 74 of the third amended complaint stated that the PPM omitted material facts that rendered it false and misleading, including the allegations set forth in subparts (a) – (f). In the fourth amended complaint, Huizenga added facts to subpart (f) and added subparts (g) – (l). These additional allegedly omitted facts included: "the lucrative fees and profits Defendants had agreed Coventry would receive;" the fact that no one on defendants' team had any "actual experience with buying, selling, or pricing life settlements" which rendered the portion of the PPM that stated the fund's capital would be managed by in-house traders with "substantial experience in the insurance and reinsurance industry" and were "experienced in risk-linked derivatives trading, with quantitative skills specifically focused on catastrophic property and life insurance exposures" false; and that defendants were obligated to use the AVS-2 mortality tables provided by Coventry to price the policies, resulting in artificially shortened life expectancies and thus overpayment for the vast majority of the policies (which were Fasano-underwritten policies).

¶ 31 Defendants contend on appeal that the fourth amended complaint added new allegations that Huizenga did not have in its third amended complaint, such as the allegation that defendants did not disclose the substance or existence of any sale contracts with Coventry that committed and obligated defendants to invest all of the fund's assets in Coventry life settlements for the foreseeable future, and that defendants did not disclose the use of AVS-2 mortality tables to price Coventry-originated policies. Defendants contend that because the trial court held them liable for omissions that were not alleged in the third amended complaint, the judgment should be reversed.

¶ 32 Huizenga maintains that the third amended complaint pled the ultimate facts upon which it prevailed. Specifically, Huizenga contends that the third amended complaint contained extensive allegations about misleading statements regarding fund diversification and omissions rendering those statements misleading due to undisclosed Coventry obligations. Huizenga also states that the case was tried on this very theory, and that defendants examined witnesses and submitted evidence "on all of these topics, including their expert witnesses on the models, mortality tables, actuarial and mortality assumptions and life expectancies, among others." Therefore, Huizenga argues, there was no surprise to defendants and the trial court properly allowed it to amend the complaint after judgment had been entered.

¶ 33 We find that the trial court did not abuse its discretion in allowing Huizenga's section 2-616 motion to file a fourth amended complaint. The fourth amended complaint contains additional factual allegations, but contains no new counts. See *Taylor v. County of Cook*, 2011

IL App (1st) 093085, ¶ 56 (finding that circuit court did not abuse its discretion in precluding plaintiff from amending complaint to add new count because adding new cause of action would result in prejudice to defendant); *Compton v. Country Mutual Insurance Co.*, 382 Ill. App. 3d 323, 332 (2008) (a complaint cannot be amended after final judgment in order to add new claims and theories or to correct other deficiencies). We find that the additional factual allegations listed in the fourth amended complaint merely conformed the complaint to the proofs, and that the trial court's grant of Huizenga's section 2-616(c) motion was proper.

¶ 34 Delaware Securities Act

¶ 35 The fourth amended complaint alleges that defendants made material omissions in pre-purchase communications both inside and outside the PPM, in violation of section 7323(a)(2) of the DSA. Section 7323(a)(2) of the DSA states that any person who:

> “(2) Offers, sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which they are made, not misleading (the buyer or seller not knowing the untruth or omission) *** is liable to the person buying or selling the security from or to him ***.” 6 Del. C. § 73-605(a)(2) (West 2012).

¶ 36 The trial court found that the DSA "is modeled after the [Uniform Act]," and that section 7323(a)(2) "derives from Uniform Securities Act § 410(a)(2), * * * which itself is modeled on §12(2) of the Federal Securities Act of 1933." Section 410(a)(2) of the Uniform Act states:

> "(a) Any person who
>
> * * *

> (2) offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the buyer not knowing of the untruth or omission), and who does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission, is liable to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damage if he no longer owns the security."

¶ 37 Having determined that section 7323(a)(2) was modeled after section 410(a)(2), the trial court then looked at similar provisions from other states to determine what elements were required to state a claim under section 7323(a)(2) of the DSA because that question had "not yet been authoritatively addressed by the Delaware courts." Looking at other states' similar provisions led the court to conclude that section 7323(a)(2) merely requires that a plaintiff show that it was ignorant of the actual facts that it claims were withheld or misrepresented, and that the facts were material (in the sense that a reasonable person might find them important, and not in the sense that a particular plaintiff actually relied on them).

¶ 38 Defendants argued at trial, and they maintain on appeal, that section 7323 must be read together with section 7303 because although certain acts and practices are deemed unlawful by section 7303, the legal consequences of those violations are set forth in section 7323, which establishes civil penalties. Defendants maintain that reading section 7303 with section 7323 yields a cause of action akin to Federal Rule of Civil Procedure 10b-5, which requires reliance, *scienter*, and causation.

¶ 39 Section 7303 states that it is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

> "(2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; * * *." Del. C. § 72-201.

¶ 40 Several Delaware circuit court cases have stated that when a claim is brought under section 7303, that section must be read together with section 7323 to yield a claim akin to Rule 10b-5, which states:

> "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person in connection with the purchase or sale of any security." 17 CFR § 140.10b-5 (West 2012).

¶ 41 Because Rule 10b-5 is implied, federal courts have had to define its elements from the common law of fraud. See *Basic Inc. v. Levinson*, 485 U.S. 224, 230-31 (1988). One of the judicially crafted elements is that the defrauded party must prove that it relied upon the alleged misrepresentation. *Id.* at 243. The other elements are *scienter* and causation. *Id.* Accordingly, defendants' argument here is that while Huizenga brought a cause of action under only section 7323(a)(2) for misrepresentation, it must be read together with section 7303, which is modeled after Rule 10b-5, and therefore Huizenga was required to prove reliance, *scienter*, and causation. Like the trial court in this case, we are not persuaded by this argument.

¶ 42 The trial court found that the cases defendant relied on all involved claims brought under section 7303 of the DSA, not section 7323(a)(2). See *Organ v. Byron*, 435 F. Supp. 2d 388, 393 (2006) (district court noting that section 7303, when read together with section 7323, has been held by *Singer v. Magnavox Co.*, 367 A.2d 1349 (Del. Ch. 1976), *aff'd in part*, Del. Supr., 380 A. 2d 969 (1977), to create a cause of action for misrepresentation); *Singer*, 367 A.2d at 1361 (a chancery court finding that section 7303, read together with section 7323, creates a cause of action for misrepresentation); *Cooper v. Celente*, Not Reported in A.2d (1992) (an unpublished opinion citing to *Singer* for the proposition that "although subsection (a)(2) [of section 7323] does not specifically mention section 7303, the Delaware courts have read those provisions together.") The trial court noted that while there are cases that suggest that a claim brought under section 7303 must be read together with section 7323, there is no such authority suggesting that a claim brought under section 7323 must be read together with section 7303. We agree.

¶ 43 There are two Delaware cases, as outlined above, that state that section 7303 has to be read in conjunction with section 7323. The court in *Singer v. Magnavox Co.*, 367 A. 2d 1349 (Del. Ch. 1976), *aff'd in part*, 380 A.2d 969 (1977), stated, "I am of the opinion that the two statues, [sections 7323(a)(2) and 7303], must be read together when [section] 7303 is relied upon to state a cause of action * * *."). Thirty years later, the Delaware Chancery Court, relying on

Singer, found that, "Read together with § 7323, § 7303 has been held to create a case of action for misrepresentation." *Organ v. Byron*, 435 F. Supp. 2d 388 (2006). In 1992, in an unpublished opinion, a Delaware court noted in a footnote, again relying on *Singer*, that "[a]lthough subsection (a)(2) does not specifically mention Section 7303, the Delaware courts have read those provision[s] together." *Cooper v. Celente*, 1992 WL 240419, *3. However, we know that *Singer* did not stand for the proposition that those two sections must always be read together. Rather, *Singer* specifically found that section 7323 should be read together with section 7303 only when a party brings a cause of action under section 7303.

¶ 44 There are no Delaware cases that find that section 7303 must be read in conjunction with section 7323 when a party brings a cause of action under section 7323. Defendants contend that this is because a party cannot bring an action pursuant to section 7323, as it is purely a remedy provision. However, there is a federal case discussing Delaware law that states that section 7323 "provides * * * for private causes of action for rescission brought by injured investors." *Olde Discount Corp. v. Tupman*, 805 F. Supp. 1130, 1138 (D. Del. 1992). Accordingly, we agree with the trial court that there is simply no authority to find that when a party brings an action pursuant to section 7323, that it must be read together with section 7303. It follows that because there is no Delaware authority dictating that a cause of action brought under section 7323(a)(2) must be read in conjunction with section 7303, we agree with the trial court that "the Delaware Supreme Court would interpret § 7323(a)(2) consistently with the interpretations of other courts considering analogous provisions." The trial court then looked at other courts that have provisions based on the section 410 of the Uniform Act. See *Robinson, & Co., Inc. v. Bruton*, 552 A.2d 466, 475 (1989) (the penalty provision of the New Jersey Securities Act was "like

Delaware's Act, [] modeled after the Uniform Securities Act * * *" and did not require reliance, *scienter*, or causation).

¶ 45 Defendants contend, however, that section 410 of the Uniform Act only provides for seller liability, and not purchaser liability, and thus section 7323(a)(2) of the DSA, which discusses both, could not have been modeled after this provision. However, a review of other jurisdictions with similar provisions reveals that adding purchaser liability does not mean section 7323(a)(2) is therefore modeled after Rule 10b-5 instead of section 410 of the Uniform Act. For example, in *Kronenberg v. Katz*, 872 A.2d 568 (Del. Ch. 2004), a Delaware chancery court discussed section 1-501(a) of the Pennsylvania Act, which was modeled on section 410(a)(2) of the Uniform Act, and noted that not only does it provide a civil remedy against any person who “offers or sells a security in violation of section [] 410,” it also provides that any person who otherwise violates the terms of section 1-501(a) itself “shall be liable to the person purchasing the security from him.” *Kronenberg*, 872 A.2d at 597.

¶ 46 Moreover, we note that the plain language of section 7323(a)(2) does not contain a requirement that a plaintiff must prove reliance to recover. Defendants, however, ask us to look beyond the plain language of section 7323(a)(2) to read a reliance requirement into the DSA. Defendants contend that this provision should be interpreted to include the judicially imposed reliance element of the federal implied private cause of action for a violation of Rule 10b-5. This argument has failed in other jurisdictions. *Kronenberg*, 872 A.2d at 598; *Gohler v. Wood*, 919 P.2d 561, 563 (Utah 1996); *Ritch v. Robinson-Humphrey Co.*, 748 So.2d 861, 862 (Ala. 1999); *DMK Biodiesel , LLC v. McCoy*, 290 Neb. 286, 291 (2015). Section 7323(a)(2) is fundamentally different from the federal private cause of action for a violation of Rule 10b-5, and as mentioned above, because Rule 10b-5 is implied, federal courts have had to define its elements from the common law of fraud. See *Basic Inc.*, 485 U.S. at 230-31. In contrast, a cause of action under the DSA has express elements, and this court has no need to define these elements. It would be inappropriate to do so when the legislature has already done so. Accordingly, we find that section 7323(a)(2) was not modeled after Rule 10b-5, and therefore does not require reliance. See, *e.g.*, *Gohler v. Wood*, 919 P.2d 561, 563-66 (Utah 1996) (interpreting substantively the same provision of Utah's version of the Uniform Securities Act as not requiring reliance); *Ritch v. Robinson-Humphrey Co.*, 748 So. 2d 861, 862 (Ala. 1999) (holding that Alabama's version of the Uniform Act does not include a causation requirement); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 576 (1995) (reliance is not an element of section 12(2), which section 410 of the Uniform Act was modeled after)).[1]

¶ 47 Pure Omissions

¶ 48 Defendants alternatively contend that judgment in favor of Huizenga fails "under the plain language of § 7323." Defendants argue that the plain language of section 7323(a)(2) establishes that "pure omissions" are not actionable where it states that a remedy is available only if the seller omits to state a "material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." 6 Del. C. § 73-605. Defendants contend that "[i]n other words, only misleading 'half-truths' are actionable under the DSA," and therefore the trial court erred in holding defendants liable for "pure omissions." Defendants do not, however, identify what these "pure omissions" are. Rather, defendants state that Huizenga "has argued" that Mulholland's statements that he was using conservative underwriters was rendered false when defendants failed to disclose the use of the AVS-2

[1] We recognize that *Gustafson* calls into question the general applicability of section 12(2) of the Securities Act to PPMs, but decline to address this issue here as it was not raised by the parties. *Gustafson*, 513 U.S. at 596 (Ginsburg, J., dissenting) (according to the majority decision, "[c]ommunications during *** a private placement are not 'prospectuses' *** and thus are not covered by § 12(2).")

mortality table, "[b]ut the trial court did not so find," and further assert that Mulholland's statement was a non-actionable opinion rather than a statement of fact. The only authority upon which defendants rely for this argument is *Omnicare, Inc., v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318, 1327 (2015), which is a Supreme Court case discussing section 11 of the Securities Act, which governs omissions in securities registration statements. See Illinois Supreme Court Rule 341(h)(7) (eff. Jan. 1, 2016) (argument on appeal must be supported by citations to authority); *Kic v. Bianucci*, 2011 IL App (1st) 100622 ¶ 23 (failure to cite relevant authority can cause party to forfeit consideration of issue).

¶ 49 Defendants further contend that Huizenga's second investment was not sold "by means" of defendants' failure to provide certain information to Huizenga during a September 29, 2005, telephone call Mulholland had with Huizenga. Specifically, defendants contend that Huizenga failed to prove that defendants "solicited" Huizenga's second investment "by means of" an omission.

¶ 50 In *In re Access Cardiosystems, Inc.*, 776 F.3d 30 (1st Cir. 2015), the First Circuit, addressing a Massachusetts statute with the same language as section 7323(a)(2), noted that the "by means of" requirement under section 410(a)(2) has not been widely discussed. *Access Cardiosystems*, 776 F. 3d at 35. For guidance, the court turned to the "related federal legislation, and in particular to *** decisions under § 12(2) [of the Securities Act]." The Court found that several other federal courts have held that the "by means of" language in section 12(2) of the Securities Act requires "some causal connection between the misleading representation or omission and [the] plaintiff's purchase." *Sanders v. John Nuveen & Co.*, 619 F.2d 1222, 1225 (7th Cir. 1980) (recognizing it is well settled that "by means of" does not create a reliance requirement). The First Circuit found that the "requisite connection is established when the communication containing the material misrepresentation was *used* to effect the sale – and not whether it was actually successful in securing the sale that, in any event, transpired." (Emphasis in original.) *Access Cardiosystems*, 776 F. 3d at 36. The court found that this was "an objective standard, readily met." *Id*.

¶ 51 Keeping those principles in mind, we find that the trial court committed no error in looking to objective evidence of whether defendants used misrepresentations and omissions to solicit investments from Huizenga, which included: the sales agreement that gave Coventry great leverage to force defendants to buy, a mandated AVS-based pricing feature that could not be squared with "conservative" life expectancy assumptions, knowledge that "conservative life expectancy assumptions" were critically important, and a corresponding decreasing likelihood of any actual investment diversification. The trial court noted that what "Ritchie knew but did not tell Huizenga before the October 1, 2005, investment was clearly material." We agree and find that defendants used those misrepresentations to effect the sale, regardless of whether they were the reasons why the sale was made.

¶ 52 Enforcement of Certain Clauses

¶ 53 Defendants next argue that the trial court erred when it refused to enforce the standard of care and non-reliance clauses in the parties' agreements. The two provisions defendants are referring to are: (1) the non-reliance clause in the subscription agreement which stated that Huizenga "relied only on the information in the [PPM] and the other Material Contracts in determining to invest in the Fund," and (2) the standard of care in the Fund's operating agreement which provides that defendants shall have no liability to Huizenga except for actions that constitute "fraud, bad faith, gross negligence or reckless or intentional misconduct."

¶ 54 Huizenga responds that Section 9.26 of the Operating Agreement waived any securities law rights when it stated: "No Member, by becoming a party hereto, or by executing and delivering a Subscription Agreement, shall be deemed to have in any respect waived any of such Member's rights under any federal or state securities laws." Huizenga additionally points to section 7323(g) of the DSA which states that "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter * * * is void." 6 Del. C. § 73-605(g) (West 2012). We agree with Huizenga.

¶ 55 As the trial court noted, the parties provided no case law specifically addressing the question of whether a non-reliance clause provides a defense to a section 7323(a)(2) claim. So the trial court again looked at other courts interpreting analogous statutes modeled on the Uniform Act and noted that other courts have found that written contract terms, including a non-reliance clause, cannot be construed to waive a plaintiff's rights. See *Marram v. Kobrick Offshore Fund, Ltd.*, 442 Mass. 43 (2004) (the existence of an integration clause was a contract defense, and thus had no merit because the case involved the plaintiff's securities fraud claim, not a contract claim), and *Kronenberg*, 872 A. 2d at 599 (statute that contains identical language to section 7323(g) prevented an explicit non-reliance clause from acting as an absolute bar to the plaintiff's securities claims).

¶ 56 Defendants maintain, however, that the non-reliance clause and standard of care provision do not constitute impermissible waivers under section 7323(g) of the DSA, but rather simply set the standard by which Huizenga can seek to hold defendants liable for a claim under the DSA. Defendants contend that numerous federal courts have upheld non-reliance clauses under the federal securities laws. Defendants cite to several cases that upheld non-reliance clauses that limit the scope of the representations or omissions that can form the basis for a Rule

10b-5 claim. See *Vacold LLC v. Cerami*, 545 F. 3d 114, 122 (2nd Cir. 2008); *Rissman v. Rissman*, 213 F. 3d 381, 384 (7th Cir. 2000); *Jackvony v. RIHT Financial Corp.*, 873 F. 2d 411, 416 (1st Cir. 1989); *One-O-One Enterprises, Inc. v. Caruso*, 848 F. 2d 1283, 1287 (D.C. Cir. 1988). However, because this is not a 10b-5 claim, but rather a claim brought pursuant to section 7323(a)(2) of the DSA, which is modeled after the Uniform Act, and reliance is not an element, we find that relying on cases with identical language as the trial court did is appropriate, and that section 7323(g) prevents non-reliance clauses from barring securities fraud claims. Accordingly, the non-reliance clause does not bar Huizenga's claims.

¶ 57 Defendants nevertheless maintain that this holding is contrary to Illinois and Delaware law. We will address defendants' argument relating to Delaware law since the parties contracted to be bound by Delaware law, but do not see the relevance of Illinois law, and moreover find that it would be inappropriate for us to apply substantive Illinois law to this case. Defendants argue, relying on *H-M Wexford LLC v. Encorp, Inc.*, 832 A. 2d 129, 142 n. 18 (Del. Ch. 2003) and *ABRY Partners V, L.P. v. F & W Acquisition LLC*, 891 A. 2d 1032, 1057 (Del. Ch. 2006), that Delaware courts have consistently held that sophisticated parties to negotiated contracts may not reasonably rely on information that they contractually agreed would not form a basis for their decision to contract. The trial court distinguished *ABRY Partners* on the basis that the non-reliance clause was applied to a common law fraudulent inducement claim rather than a non-reliance clause in a DSA claim.

¶ 58 Both parties acknowledge that no Delaware court has addressed whether a non-reliance clause applies to a DSA claim. Accordingly, we maintain that the trial court correctly relied on *Kronenberg*, a Delaware Chancery Court case that held a Pennsylvania provision identical to section 7323(g) of the DSA prohibits explicit non-reliance clauses from barring claims under its section 7323 analog. 872 A. 2d at 597-98. Because both statutes were modeled after the Uniform Act, we find no reason to believe that the Delaware Chancery Court would decide differently when analyzing section 7323(g) of the DSA.

¶ 59 Materiality of Omissions

¶ 60 Defendants' next argument on appeal is that any omissions they made were not "material." As the trial court noted, "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic Inc.*, 485 U.S. at 240. A misrepresentation or omission is material if there is a substantial likelihood that it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id*. at 231-32. Huizenga states, and defendants do not refute, that we review the trial court's finding of materiality to see if it is against the manifest weight of the evidence. *Gerill Corp. v. Jack L. Hargrove Builders, Inc*., 128 Ill. 2d 179, 192-93 (1989) (holding that findings on elements of fraud, which includes materiality, are factual and stand unless "contrary to the manifest weight of the evidence"). Defendants nevertheless contend that Huizenga failed to present any evidence concerning what an objective, reasonable investor would find to be material to an investment in a hedge fund. We disagree.

¶ 61 The trial court found that based on the standard of a "reasonable investor," what defendants knew but did not tell Huizenga before the October 1, 2005, investment was "clearly material." This knowledge included: a sales agreement that gave Coventry great leverage to force defendants to buy, a mandated AVS-based pricing feature which could not be squared with "conservative" life expectancy assumptions, knowledge that conservative life expectancy assumptions were critically important, and a corresponding decreasing likelihood of any actual investment diversification. The trial court further noted that especially at a time when securitization was not much more than speculative, these problems would have led a reasonable investor in Huizenga's position to decline the October 1, 2005, investment. The court also pointed to two of defendants' deposition transcripts, which indicated that Mulholland was reluctant to disclose the full "model" out of a concern that it might have a negative impact on a potential equity purchaser. We find that the trial court's finding of materiality is not contrary to the manifest weight of the evidence.

¶ 62 Secondary Liability

¶ 63 Defendants next contend that the trial court erred in finding Thane Ritchie, Ritchie Partners, and Ritchie Capital secondarily liable as control persons. Specifically, defendants contend that the trial court misapplied the control person liability standard of section 7323(b) of the DSA. Section 7323(b) states:

> "Every person who directly or indirectly controls a seller or buyer liable under subsection (a), every partner, officer, or director of such a seller or buyer, every person occupying a similar status or performing similar functions, every employee of such seller or buyer who materially aids in the sale, and every broker-dealer or agent who materially aids in the sale or purchase are also liable jointly and severally with and to the same extent as the seller or buyer, unless the nonseller or nonbuyer who is so liable sustains the burden of proof that the person did not know, and in exercise of reasonable care could not have known, of the existence of the facts by reason of which liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable."

¶ 64 As the trial court noted, Delaware courts have not addressed the liability provision of section 7323(b). Accordingly, the trial court looked at how courts in other states addressed this issue and found that they have held that partners, officers, or directors are liable by virtue of their status alone, regardless of whether they controlled the seller or participated in the violation. The trial court restricted its analysis to decisions of courts applying other states' versions of section 410(b) of the Uniform Securities Act, which is the analog of section 7323(b). See, *e.g.*, *Hines v. Data Line Systems, Inc.*, 787 P. 2d 8, 17 (Wash. 1990); *Taylor v. Perdition Metals Group*, P.2d 805, 809 (Kan. 1988) (recognizing that states that have passed section 410(b) of the Uniform Act have consistently interpreted the statute to impose strict liability on partners, officers, and directors). As the trial court noted, the plain language of section 7323(b) of the DSA indicates the legislature's intent to impose liability on partners, officers, or directors regardless of their control person status or participation, unless they can sustain the burden of proof that they did not know, or that a reasonable person could not have known, "of the existence of the facts by reason of which liability is alleged to exist."

¶ 65 We are unwilling to disturb the trial court's finding that Thane Ritchie is liable under section 7323(b), as the "ultimate, and hands-on, authority regarding the Coventry project." The trial court’s factual findings, which were not contrary to the manifest weight of the evidence, show that Thane Ritchie had insisted on double-sizing the Coventry project even though there were not enough funds, that he was ultimately responsible for Mulholland's communications with potential investors, and that he was personally involved in selling the life settlements investment to Huizenga.

¶ 66 In terms of Ritchie Partners and Ritchie Capital, we first note that *section* 7302(a)(12) defines a "person" to include an entity. Ritchie Partners was the managing member of the fund, and thus had a duty of reasonable care regarding what the fund communicated to Huizenga. We agree with the trial court that defendants have not demonstrated that Ritchie Partners could not reasonably have known of the pre-purchase misrepresentations and omissions upon which Count I was based. And while Ritchie Capital was not formally tasked with overseeing communications between Huizenga and the fund, Ritchie Capital was described as a "sub-advisor" of the fund in the PPM. It made the first sales pitch to Huizenga, thus injecting itself into the sales process. Accordingly, we agree with the trial court that Ritchie Capital did not so thoroughly distance itself from the Huizenga sales process so as to absolve itself of any duty of reasonable care.

¶ 67 Prejudgment Interest

¶ 68 Defendants' final argument on appeal is that the trial court abused its discretion in awarding Huizenga prejudgment interest "in an amount ($4.5 million) that nearly equals the judgment amount awarded to Huizenga ($4.6 million)." Huizenga responds that the trial court did not have discretion in awarding prejudgment interest, as section 7323(a)(2) provides for recovery of "the consideration paid * * * [plus] interest at the legal rate from the date of [Huizenga's investment], costs, and reasonable [attorney] fees." 6 Del. C. § 73-605(a)(2) (West 2012). The Delaware legal rate is "5% over the Federal Reserve Discount rate * * * as of the time from which the interest [was] due." 6 Del. C. § 2301(a) (West 2012). The trial court decided to use the statutory calculation, which was based on the legal rate, and calculated the prejudgment interest at $4,509,657.63.

¶ 69 Rather than use the statutory rate, defendants argue that the trial court should have based its prejudgment interest award on what Huizenga could have expected to earn from an investment comparable to its investment in the fund. Defendants further argue that while Huizenga filed an affidavit from its Chief Financial Officer stating that investment returns for its other investments earned more than 10%, defendants were denied an opportunity to respond to the affidavit or take any discovery on that contention. Defendants do not cite to anything in the record indicating that they were denied an opportunity to respond to the information in the affidavit, and we can find no such challenge to the affidavit in the record.

¶ 70 Accordingly, we will not disturb the trial court's calculation of prejudgment interest rate, as it mirrored the statutory calculation.

¶ 71 II. Huizenga's Cross Appeal

¶ 72 As a final matter, Huizenga filed a cross-appeal, alleging that the trial court should have found defendants liable for Huizenga's first investment as well as its second investment. Specifically, Huizenga contends that the trial court’s factual findings establish that before Huizenga invested its first $6 million on August 1, 2005, defendants knew the same undisclosed facts that they did before Huizenga’s second investment, and failed to disclose them. Furthermore, Huizenga argues that defendants made misleading statements to Huizenga – orally and in writing – before the first investment was made. Huizenga takes issue with the trial court’s reasoning that defendants had not yet fully understood the gravity of their omissions and misleading statements until September 2005. The trial court found that by September, defendants knew that “pairing Fasano life expectancies with Coventry’s AVS-based pricing simply would not work.” However, as Huizenga notes, the trial court also found that the PPM did not disclose “the fact (which Mulholland knew by at least July 2005) that Coventry was using Fasano life expectancies with the AVS mortality tables. This would soon become a major issue, particularly when coupled with the ‘put’ feature of the Coventry June 30, 2005 deal and Coventry’s ability to force Ritchie to use the AVS2 life expectancies rather than Fasano life expectancies.”

¶ 73 Huizenga argues that defendants knew all these facts before August 1, 2005, and whether they fully understood the full impact of the undisclosed facts is not the legal standard. Rather, because they knew the underlying facts, and failed to disclose them, they are liable under the DSA. Defendants respond that the trial court only held them liable for the second investment because it was only after the first investment that defendants learned that they were overpaying for Fasano underwritten life settlements, and that Ritchie was under heavy pressure from Coventry to push to double-size the deal.

¶ 74 As discussed previously, in order to state a claim under section 7323(a)(2) of the DSA, Huizenga needs to prove that: (1) defendants made an untrue statement of material fact or omitted a material fact in selling the fund to Huizenga, and (2) that Huizenga did not know of the untruth or omission. The question for the first investment then becomes whether the facts that defendants failed to disclose to Huizenga before the first investment were "material." Also discussed previously, materiality "depends on the significance the reasonable investor would place on the withheld or misrepresented information." *Basic, Inc.*, 485 U.S. at 240. A misrepresentation or omission is material if there is a substantial likelihood that it "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Id*. at 231-32. Huizenga states, and defendants do not refute, that we review the trial court's finding of materiality to see if it is against the manifest weight of the evidence. *Gerill Corp*., 128 Ill. 2d at 192-93 (determining that findings on elements of fraud, which includes materiality, are factual and stand unless "contrary to the manifest weight of the evidence").

¶ 75 The trial court specifically found that before Huizenga's initial investment, defendants knew of, but did not disclose, the existence or terms of the June 30, 2005, Coventry deal –

“particularly the feature which arguably *** all but obligated [defendants] to buy whatever policies Coventry wanted to sell.” The trial court also found that defendants did not disclose the fact that Coventry was using Fasano life expectancies with the AVS mortality tables, which “Mulholland knew by at least July 2005”. It appears that the only distinction the trial court pointed to between the two investments was that defendants became “painfully aware” of the mismatch between Coventry’s AVS-based pricing and Fasano’s life expectancies.

¶ 76 The trial court found that these omissions were not material, and that materiality kicked in between the two investments because after the first investment, defendants “learned that pairing Fasano life expectancies with Coventry’s AVS-based pricing simply would not work,” and defendants were under heavy pressure from Coventry to “double-size” the deal.

¶ 77 We agree with Huizenga that the trial court misstated the test for materiality when discussing the first investment. The test for materiality is whether there is a substantial likelihood that the omitted facts "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." The same facts that the trial court delineated in support of its conclusion that the misrepresentations were material, were also present before the initial investment: a sales agreement which gave Coventry great leverage to force defendants to buy, a mandated AVS-based pricing feature which could not be squared with "conservative" life expectancy assumptions, knowledge that conservative life expectancy assumptions were critically important, and a corresponding decreasing likelihood of any actual investment diversification. Especially at a time when securitization was not much more than speculative, these problems would have led a reasonable investor in Huizenga's position to decline the August 1, 2005, investment. These same facts were present before the initial investment, and while defendants may not yet have been "painfully aware" of direness of these facts, it does not change the fact that there is a substantial likelihood that these facts would have been viewed by a reasonable investor as having significantly altered the "total mix" of information made available. *Levinson*, 485 U.S. at 231-32. Accordingly, we find that the trial court's finding of a lack of materiality was against the manifest weight of the evidence, and find that judgment should be entered in Huizenga's favor on the initial investment in the amount of $6 million. We remand, however, for the trial court to calculate any prejudgment interest it sees fit.

¶ 78 CONCLUSION

¶ 79 For the foregoing reasons, we affirm the judgment in part and reverse the judgment in part of the circuit court of Cook County; and remand for calculation of prejudgment interest.

¶ 80 Affirmed in part; reversed in part. Remanded for calculation of prejudgment interest.