

United States District Court  
For the Northern District of California

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

-

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BIOTECHNOLOGY VALUE FUND, L.P.,  
BIOTECHNOLOGY VALUE FUND II,  
L.P., INVESTMENT 10, L.L.C., BVF  
INVESTMENTS, L.L.C.; BVF INC., and  
BVF X, LLC,

Plaintiffs,

v.

CELERA CORPORATION, QUEST  
DIAGNOSTICS INCORPORATED,  
CREDIT SUISSE SECURITIES (USA)  
LLC, KATHY ORDOÑEZ, RICHARD H.  
AYERS, JEAN-LUC BELINGARD,  
WILLIAM G. GREEN, PETER BARTON  
HUTT, GAIL M. NAUGHTON, WAYNE  
I. ROE, and BENNETT M. SHAPIRO,

Defendants.

No. C 13-03248 WHA

**ORDER GRANTING IN PART  
AND DENYING IN PART  
PLAINTIFFS' MOTION FOR  
LEAVE TO FILE SURREPLY**

Plaintiffs have submitted a motion seeking leave to file a surreply, in response to the replies in support of defendants' two motions to dismiss (Dkt. No. 82). Attached to that motion is a proposed surreply. According to plaintiffs, defendants did not consent to the filing of a surreply (*ibid.* at 10).

Nonetheless, plaintiffs argue that a surreply is warranted to address two issues from defendants' replies: (1) defendants' reported mischaracterization of the argument that plaintiffs were legally precluded from asserting Section 14(e) claims; and (2) defendant's suggestion that


1 plaintiffs had access to the discovery record from the Delaware proceedings when drafting the  
2 amended complaint.

3 To the extent stated, plaintiffs' motion is **GRANTED IN PART AND DENIED IN PART**.  
4 With respect to the second issue from above, plaintiffs declare that they did not have access to  
5 confidential discovery materials from the Delaware proceedings until November 10, when  
6 defense counsel authorized plaintiffs' access to such documents (Miami Decl. ¶¶ 13, 14).  
7 Plaintiffs then assert that defendants submitted confidential portions of documents — including  
8 two e-mails from defendant Kathy Ordoñez — in support of the replies filed on November 18,  
9 after such portions had been unavailable to plaintiffs when they drafted the amended complaint  
10 and the oppositions to defendants' motions to dismiss. Accordingly, as to the proposed  
11 surreply's discussion of these e-mails or plaintiffs' access to confidential discovery materials  
12 from the Delaware proceedings, plaintiffs' motion is **GRANTED** and the surreply is deemed filed.

13 Plaintiffs, however, may not submit a surreply as to the first issue from above,  
14 concerning their argument that they were legally precluded from asserting Section 14(e) claims.  
15 This is because as to this issue, plaintiffs' proposed surreply focuses on a new argument —  
16 equitable tolling of the statute of limitations — that was not in defendants' replies. It is true that  
17 in its motion to dismiss, defendant Credit Suisse Securities (USA) addresses equitable tolling,  
18 but neither plaintiffs' opposition to that motion nor defendants' subsequent replies discuss that  
19 issue. At best, plaintiffs' argument that they were legally precluded from bringing Section 14(e)  
20 claims took place within a discussion of tolling under *American Pipe & Construction Co. v.*  
21 *Utah*, 414 U.S. 538 (1974), and not in the context of equitable tolling (Opp. 22). Plaintiffs'  
22 motion is therefore **DENIED** as to the proposed surreply's discussion of equitable estoppel and  
23 the argument that plaintiffs were legally precluded from asserting Section 14(e) claims.

24  
25 **IT IS SO ORDERED.**

26  
27 Dated: December 6, 2013.

28   
\_\_\_\_\_  
WILLIAM ALSUP  
UNITED STATES DISTRICT JUDGE