UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BRIAN B. SAND & ZACHARY B. SAND JOINT TRUST,

Plaintiff,

v.

BIOTECHNOLOGY VALUE FUND, L.P., et al.,

Defendants.

Case No. 16-cv-01313-RS

ORDER GRANTING IN PART WITH PREJUDICE AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

I. INTRODUCTION

This is an action under section 16(b) of the Securities and Exchange Act of 1934 for disgorgement of "short-swing profits" that plaintiff Brian B. Sand & Zachary B. Sand Joint Trust alleges defendants may have realized from purchases and sales of stock of Oncothyreon, Inc., of which plaintiff is a shareholder. Defendants are Mark N. Lampert and a number of inter-related entities plaintiff contends, to one degree or another, Lampert controls. Liability in this action is predicated on, among other things, a showing that defendants, either individually as part of a group, owned beneficially more than 10 percent of Oncothyreon's outstanding common stock. Defendants move to dismiss plaintiff's claim for the second time, their first motion having been granted with leave to amend due to, among other things, plaintiff's failure to allege sufficiently 10 percent beneficial ownership on the part of any defendant. Because plaintiff has significantly repaired its complaint through amendment, defendants' motion is largely denied. It is granted with prejudice, however, with respect to certain defendants for whom plaintiff still fails to allege

adequately more than 10 percent beneficial ownership.

II. BACKGROUND

As noted, defendants in this action are Mark N. Lampert and a number of entities with which he is involved in some capacity. Lampert is the sole officer and director of defendant BVF, Inc., which, in turn, is the general partner of defendant BVF Partners, LP. The Oncothyreon stock at issue is directly owned by four of the five remaining defendants, described as hedge funds. They are (1) Biotechnology Value Fund, L.P. ("BV Fund 1"); (2) Biotechnology Value Fund II, L.P. ("BV Fund 2"); (3) Investment 10, L.L.C. ("I10"), and; (4) MSI BVF SPV, LLC ("MSI"). Defendant Magnitude Capital, LLC ("Magnitude") is also a hedge fund,[1] of which MSI is a sub-fund or "fund of a fund." BVF Partners serves as the general partner of BV Fund 1 and BV Fund 2.[2] BVF Partners is not alleged to be the general partner of either I10 or MSI. Rather, as to those two entities, BVF Partners allegedly serves as investment advisor. Magnitude is alleged to have delegated management authority of MSI to BVF Partners.

Although plaintiff refers to all defendants collectively as "the BVF entities," certain distinctions must be drawn. Accordingly, this order will hereafter refer to Lampert, BVF, Inc., and BVF Partners collectively as "the BVF defendants." The two funds for which BVF Partners serves as the general partner, BV Fund 1 and BV Fund 2, will be referred to collectively as "the BV Funds."

Defendants' first motion to dismiss was granted with leave to amend on March 3, 2017. The order granting the motion held that the BVF defendants were entitled to an exemption under

[1] The initial complaint did not name Magnitude as a defendant. Plaintiff added it in the First Amended Complaint.

[2] These three defendants, along with BVF Inc. are all incorporated in Delaware and maintain a principle place of business in California. BV Fund 1 and BV Fund 2 are incorporated as limited partnerships. MSI and Magnitude are also incorporated in Delaware, but maintain principal places of business in New York. I10 and Magnitude are incorporated in Illinois, and Magnitude maintains a principal place of business in New York. I10 apparently maintains a mailing address in Chicago, but a business address at the same San Francisco address as BVF Inc., BVF Partners, BV Fund 1, and BV Fund 2.

17 C.F.R. § 240.16a-1(a)(1) precluding them from being treated as beneficial owners of Oncothyreon stock, and that they were therefore entitled to dismissal from the action. The order likewise held the four hedge fund defendants' Oncothyreon stock holdings could not be aggregated for purposes of section 16(b) liability because plaintiff had not sufficiently alleged the hedge funds had entered into an agreement regarding Oncothyreon stock such that they could be treated as a group under SEC Rule 13d-5, 17 C.F.R. § 240.13d-5(b)(1). Without the benefit of group treatment, plaintiff could not aggregate the fund defendants' Oncothyreon stock holdings such that any defendant could be considered the beneficial owner of more than 10 percent of the stock.

On March 17, 2016, plaintiff filed a First Amended Complaint which attempts to bolster both plaintiff's allegations regarding agreement among the four hedge fund defendants that would expose them to "group" treatment under SEC Rule 13d-5, and plaintiff's allegations that the BVF defendants are "activist investors" not entitled to the 17 C.F.R. § 240.16a-1(a)(1) exemption. The new "activist investors" allegations include: that BVF Partners claims on its website to be "committed to working with its portfolio companies as partners in their success"; that various articles have, since 2011, described BVF Partners as an activist investor; that Lampert openly adopted an activist approach toward Oncothyreon in December 2015, which resulted in his taking a seat on the company's Board of Directors, and in the resignation of its CEO; and that in a January 2017 prospectus supplement, Oncothyreon reported "BVF, an affiliate of Mr. Lampert . . . may significantly influence our business decisions." Compl. ¶ 19-26. Defendants now move to dismiss plaintiff's First Amended Complaint, arguing it suffers from the same deficiencies as does the initial complaint.

III. LEGAL STANDARD

"A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2). "[D]etailed factual allegations" are not required, but a complaint must provide sufficient factual allegations to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)

(quoting Bell Atl. v. Twombly, 550 U.S. 544, 555, 570 (2007)) (internal quotation marks omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.

Federal Rule of Civil Procedure 12(b)(6) provides a mechanism to test the legal sufficiency of the averments in a complaint. Dismissal is appropriate when the complaint "fail[s] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). A complaint in whole or in part is subject to dismissal if it lacks a cognizable legal theory or the complaint does not include sufficient facts to support a plausible claim under a cognizable legal theory. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). When evaluating a complaint, the court must accept all its material allegations as true and construe them in the light most favorable to the non-moving party. Iqbal, 556 U.S. at 678. Legal conclusions, however, need not be accepted as true and "[t]hreadbare recitals of elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. When a plaintiff has failed to state a claim upon which relief can be granted, leave to amend should be granted unless "the complaint could not be saved by any amendment." Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002) (citation and internal quotation marks omitted).

IV. DISCUSSION

Section 16 of the Exchange Act includes two subsections: section 16(a) and section 16(b). Section 16(a) imposes reporting requirements on "[e]very person who is directly or indirectly the beneficial owner of more than 10 percent of any class of any equity security . . . which is registered pursuant to" section 12 of the Act, or who is "a director or an officer of the issuer of such security." 15 U.S.C. § 78p(a)(1). Under section 16(b), the section at issue in this action, any profit realized by "such beneficial owner, director, or officer by reason of his relationship to the issuer . . . from any purchase and sale, or any sale and purchase, of any equity security of such issuer . . . within any period of less than six months . . . shall be . . . recoverable by the issuer." 15 U.S.C. § 78p(b). For the purposes of section 16(b), "'beneficial owner' shall mean any person who is deemed a beneficial owner pursuant to section 13(d) of the Act and the rules thereunder,"

subject to certain exemptions. See Exchange Act Rule 16a-1(a)(1), 17 C.F.R. § 240.16a-1(a)(1). Exchange Act Rule 13d-3(a), in turn, defines beneficial owner as "any person who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise has or shares: (1) Voting power which includes the power to vote, or to direct the voting of, [a] security; and/or, (2) Investment power which includes the power to dispose, or to direct the disposition of, [a] security." 17 C.F.R. § 240.13d-3(a).

A. Lampert, BVF, Inc., and BVF Partners

Plaintiff alleges, and defendants do not dispute, that the BVF defendants meet the broad definition of "beneficial owner" articulated in Rule 13d-3(a) because — through BVF Partners' role as general partner of the BV Funds and investment advisor of MSI and I10 — they shared voting and dispositive power over the shares of Oncothyreon common stock owned by the four fund defendants. Plaintiff also alleges and defendants do not dispute that those holdings exceeded 10 percent of the outstanding common stock. Nevertheless, the first order of dismissal held the BVF defendants were, according to Rule 16a-1, exempt from the definition of beneficial owner for the purposes of section 16(b), and therefore subject to dismissal from this action. The relevant exemptions provide, in pertinent part:

> the following institutions or persons shall not be deemed the beneficial owner of securities of such class held for the benefit of third parties or in customer or fiduciary accounts in the ordinary course of business . . . as long as such shares are acquired by such institutions or persons without the purpose or effect of changing or influencing control of the issuer . . . (v) Any person registered as an investment adviser under Section 203 of the Investment Advisers Act of 1940 (15 U.S.C. 80b–3) or under the laws of any state; . . . [or] (vii) A parent holding company or control person, provided the aggregate amount held directly by the parent or control person, and directly and indirectly by their subsidiaries or affiliates that are not persons specified in § 240.16a-1 (a)(1)(i) through (x), does not exceed one percent of the securities of the subject class . . . .

17 C.F.R. § 240.16a-1(a)(1). In their first motion to dismiss, defendants persuasively argued BVF Partners was entitled to the "investment advisor" exemption and Lampert and BVF, Inc. were entitled to the "holding company or control person" exemption.

Now, plaintiff argues the BVF defendants cannot invoke these exemptions because they did not acquire the Oncothyreon stock at issue "without the purpose or effect of changing or influencing control of" Oncothyreon. This argument relies on new allegations in the amended complaint indicating BVF Partners and Lampert are known to have a history of activist investing, and took an activist approach with regards to Oncothyreon in December 2015, shortly after the end of the short-swing period. See supra Part II.

Defendants counter that these allegations are inadequate because none of them specifically indicate the BVF defendants had the intent to take an activist approach toward Oncothyreon during the short-swing period (from February to November 2015). Yet plaintiff need not advance such allegations to support a plausible inference such intent existed. That the BVF defendants have a history as activist investors, and ultimately took an activist posture with respect to their Oncothyreon holdings very shortly after the short-swing period ended, is sufficient to support a plausible inference the BVF defendants did not acquire the Oncothyreon stock at issue "without the purpose or effect of changing or influencing control of" Oncothyreon. 17 C.F.R. § 240.16a-1(a)(1).[3]

Defendants also emphasize BVF Partners reported its ownership of Oncothyreon stock to the SEC on a Schedule 13D filing (which indicates an intent to influence management) for the first time on December 21, 2015, and had, until that point, reported its holdings on Schedule 13G filings (which are premised on passive ownership). The contents of these self-reported (and potentially self-serving) filings, however, are not dispositive of the BVF defendants' intentions, and therefore do not negate plaintiff's plausible allegations of activist intent.

Finally, defendants argue the BVF defendants pursued an activist approach as a result of a

[3] Plaintiff does not advance activist allegations specific to BVF Inc. Because, however, BVF Inc. is the entity through which Lampert allegedly controls BVF Partners, and because plaintiff advances plausible activist allegations against Lampert and BVF Partners, it is appropriate to infer BVF Inc.'s participation in the alleged activist-purpose investing. This conclusion is reinforced by defendants' failure to raise any defenses particular to BVF Inc. predicated on the lack of activist allegations specific to it.

precipitous decline in Oncothyreon's stock price in early December 2015. In support of this argument, they offer judicially noticeable records showing that, on December 8, Oncothyreon stock closed at $18.78, and on December 9 it closed at $12.78.[4] According to the BVF defendants, the drop in Oncothyreon's stock price provides an innocuous explanation for the activist tack they took later in December 2015, and plaintiff must offer allegations tending to exclude such an explanation in order to render their allegations of earlier activist intent plausible. See In re Century Aluminum Co. Sec. Litig., 729 F.3d 1104, 1108 (9th Cir. 2013) (citations omitted) ("When faced with two possible explanations, only one of which can be true and only one of which results in liability, plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. . . . Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true . . . in order to render plaintiffs' allegations plausible . . . ."). Here, however, there are not "two possible explanations, only one of which can be true." Id. To the contrary, both possible explanations can be true; the BVF defendants could have harbored an activist intent toward Oncothyreon, but been spurred to act upon that sentiment only after the December 9 stock price decline. To the extent the BVF defendants proffer an explanation exclusive of plaintiff's explanation — that their Oncothyreon ownership took on an activist purpose only after the stock price drop — no judicially noticeable evidence supporting such an explanation has been advanced. Thus, the BVF defendants have not, at this juncture, shown their entitlement to the investment advisor and control person exemptions, and plaintiff has adequately pleaded that the BVF defendants beneficially owned, for the purposes of §16(b), more than 10 percent of the outstanding common stock of Oncothyreon during the short-swing period. As such, the BVF defendants are not entitled to dismissal.

[4] Defendants' requests for judicial notice, which are unopposed and proper under Federal Rule of Evidence 201(b), are granted.

B. The Existence of a Group

Plaintiff seeks to impose liability against all defendants on the theory that, as a group, they collectively were beneficial owners of more than 10 percent of Oncothyreon stock during the short-swing period. Section 13(d) of the Exchange Act, from which section 16(b) borrows its definition of "beneficial owner," provides that "[w]hen two or more persons act as a . . . group for the purpose of acquiring, holding, or disposing of securities of an issuer, such . . . group shall be deemed a 'person' for the purposes of this subsection." 15 U.S.C. § 78m(d)(3). Although plaintiff has adequately pleaded that the BVF defendants beneficially owned, for the purposes of section 16(b), more than 10 percent of the outstanding common stock of Oncothyreon during the short-swing period, see supra Part IV.A., plaintiff does not allege any one of the four fund defendants (or Magnitude) itself beneficially owned more than 10 percent of the outstanding common stock of Oncothyreon. Thus, plaintiff must adequately plead these defendants were members of a group that collectively owned beneficially more than 10 percent of Oncothyreon stock, or else these defendants are entitled to dismissal.

SEC Rule 13d-5, which was promulgated to implement and clarify section 13(d) of the Exchange, defines beneficial ownership by a "group" as follows:

> When two or more persons agree to act together for the purpose of acquiring, holding, voting or disposing of equity securities of an issuer, the group formed thereby shall be deemed to have acquired beneficial ownership, for purposes of sections 13(d) and (g) of the [Exchange] Act, as of the date of such agreement, of all equity securities of that issuer beneficially owned by any such persons.

17 C.F.R. § 240.13d-5(b)(1) (emphasis added). Thus, the key inquiry in determining whether a group existed such that beneficial ownership stakes can be aggregated is whether the parties "agree[d] to act together for the purpose of acquiring, holding, voting or disposing of" a company's securities. See Dreiling v. Am. Online Inc., 578 F.3d 995, 1002-03 (9th Cir. 2009). Generally, courts have concluded that whether such an agreement existed is a question of fact. See id. at 1003 (the agreement "may be formal or informal and may be proved by direct or circumstantial evidence"). Nevertheless, a plaintiff must still plead sufficient facts supporting

such an agreement, given that "threadbare recitals of the elements of the claim for relief, supported by mere conclusory statements," are not taken as true. Twombly, 550 U.S. at 555.

Plaintiff has adequately pleaded BVF Partners beneficially owned more than 10 percent of Oncothyreon stock, see supra Part IV.A.,[5] and is the general partner of defendants BV Fund 1 and BV Fund 2, which are limited partnerships. "Under Delaware law," under which BVF Partners and the BV Funds are incorporated, "a general partner of a limited partnership is an agent of the partnership for the purpose of its business, purposes or activities." *Huppe v. WPCS Int'l* Inc., 670 F.3d 214, 221 (2d Cir. 2012) (citation and internal quotation marks omitted). Accordingly, for the BV Fund defendants to have agreed to act together with BVF Partners for the purpose of acquiring, holding, voting, or disposing of Oncothyreon stock, BVF Partners need only have agreed with itself. Thus, on the basis of BVF Partners' beneficial ownership of more than 10 percent of Oncothyreon stock, the BV Fund defendants' beneficial ownership of Oncothyreon stock, and the relationship between BVF Partners and each BV Fund defendant, plaintiff has adequately pleaded the existence of a group beneficially owning more than 10 percent of Oncothyreon stock.[6] As a part of this alleged group, the BV Fund defendants can potentially be held liable under section 16(b).

This logic, of course, does not extend to I10, MSI, and Magnitude, of whom BVF Partners was not the general partner. Plaintiff can only seek to hold these defendants liable under section 16(b) upon distinct allegations of an agreement exposing them to "group" treatment. The first order of dismissal held the initial complaint did not "plead sufficient facts to support the existence of an agreement among the four [defendant] funds . . . such that they can properly be treated as a

[5] Plaintiff has also adequately pleaded Lampert and BVF Inc. beneficially owned more than 10 percent of Oncothyreon stock. See id. As such, the BVF defendants may be subject to section 16(b) liability whether or not plaintiff adequately alleges they were members of a group beneficially owning more than 10 percent of Oncothyreon stock.

[6] A different conclusion might arise with respect to a limited partnership of which BVF Partners was the general partner, but which did not have any Oncothyreon holdings or any relationship to Oncothyreon.

group for purposes of section 16(b) liability." Brian B. Sand & Zachary B. Sand Joint Trust v. Biotechnology Value Fund, L.P., No. 16-CV-01313-RS, 2017 WL 840357, at *4 (N.D. Cal. Mar. 3, 2017) (citing Greenfield v. Criterion Capital Mgmt., LLC (Criterion I), 2016 WL 4425237, at *9 (N.D. Cal. July 5, 2016)).[7] Notwithstanding allegations of the "interrelated nature and structure" of the defendants, Compl. ¶ 13, and the ability of the BVF defendants to make "all voting and investment decisions" for the defendants, id. ¶ 14, plaintiff's initial complaint advanced only conclusory, unsupported allegations that the hedge fund defendants actually entered into any agreement: "These facts demonstrate that [defendants] formed an agreement to act together at all relevant times with respect to acquisition, holding, voting and/or disposition of Oncothyreon equity securities pursuant to Section 13(d) of the Exchange Act," id. ¶ 15.

Although plaintiff's First Amended Complaint contains lengthier allegations, it fails to remedy the initial complaint's failure to advance anything more than conclusory allegations of an agreement with respect to I10, MSI, and Magnitude:

> 32. [Defendants], directly or indirectly, agreed to act together at all relevant times as a group with respect to acquiring, holding, voting and/or disposing of the Shares. This concerted action was demonstrated by, among other things, the interrelated nature and structure of [defendants]. Specifically, BVF Partners is and was at all relevant times . . . the investment adviser to [I10] and MSI. BVF Inc., in turn, is and was at all relevant times the General Partner of BVF Partners, and Lampert is and was at all relevant times the sole stockholder, officer and director of BVF, Inc. Further, MSI is and was at all relevant times a sub-fund of Magnitude, which delegated investment authority over MSI assets to BVF Partners.
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> . . .
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> 34. [Defendants] agreed to have Lampert make investment decisions on their behalf and to allocate investments among them in Lampert's discretion. . . . By investing in their respective funds or vehicles, the Clients, including BVF, BVF2, [I10], and MSI, and Magnitude as the parent fund of MSI, agreed to act together for the purpose of acquiring, holding, voting and disposing of securities as directed by BVF Partners and Lampert. Accordingly, the BVF Group formed a "group" for the purpose of 10% ownership in Oncothyreon securities as defined under SEC Rule 13d-5(b)(1), 17 C.F.R. §240.13d-5(b)(1).

[7] This portion of the order was only concerned with a potential agreement among the four fund defendants because the BVF defendants had already been dismissed. See id. at *3.

First Am. Compl. ¶ 32, 34. In their second motion to dismiss, defendants correctly argue these averments do not plausibly allege the existence of an agreement among the defendants to act together with respect to their Oncothyreon holdings. Plaintiff conclusorily alleges the existence of an agreement, but fails to plead sufficient factual content that, if taken as true, would indicate any such agreement actually existed. Because plaintiff's allegations have not materially improved, the first order of dismissal's holding that they are deficient as a matter of law endures.

Nonetheless, plaintiff's opposition brief advances a variety of legal arguments in an attempt to stave off this conclusion, most of which generally depend on the fact that Lampert and the other BVF defendants had decision-making authority with respect to the Oncothyreon holdings of all the hedge fund defendants. See, e.g., Op'n at 9 ("[A]ll of the investments at issue were bought, sold or held by investment vehicles that were organized, managed, and/or advised by BVF Partners. They acted in lockstep through BVF Partners and a single individual, Lampert, who was the sole shareholder, officer and director of BVF Inc (the general partner of BVF Partners)."). Plaintiff unsuccessfully advanced this same "hub-and-spoke" theory in opposition to defendants' first motion to dismiss. While sufficient allegations that multiple stockholders all agreed with each other to delegate authority to a single decision maker for the purpose of disposing of a stock may well be enough to plead the existence of a section 13(d) group, "shares among multiple clients of an investment advisor cannot be aggregated when the basis for doing so is . . . the mere fact that there is a shared investment advisor." Biotechnology Value Fund, L.P., 2017 WL 840357, at *4; see also Wellman v. Dickinson, 682 F.2d 355, 363 (2d Cir. 1982) (citation omitted) ("[T]he touchstone of a group within the meaning of Section 13(d) is that the members combined in furtherance of a common objective."); Goldstein v. QVT Assocs. GP LLC, No. 10 CIV.2488(HB), 2010 WL 4058157, at *5 (S.D.N.Y. Oct. 15, 2010) (citation omitted) ("A bare allegation of common control is, standing alone, insufficient to give rise to an inference of the agreement that is necessary to an existence of a Section 13(d) group."). Because of the relationship between the BVF defendants and the BV Funds, an agreement can be imputed to defendants (at least as between each BV Fund and BVF Partners). See supra Part IV.A. I10 and

MSI, however, are not owned by the BVF defendants; they are attached through an investment advisor relationship, a fact not itself sufficient to allow for group treatment. See Goldstein, 2010 WL 4058157, at *5. Plaintiff's allegations do not indicate these parties agreed "to act together" with either the BVF Defendants or the BV Funds "for the purpose of acquiring, holding, voting or disposing of equity securities." 17 C.F.R. § 240.13d-5(b)(1). The allegations only indicate these parties delegated authority of their Oncothyreon holdings to BVF Partners. In a second order of dismissal, with prejudice, the Criterion court reached an equivalent conclusion:

> [P]laintiff's theory would necessarily lead to the result that anyone who enters into an investment advisory agreement with a [registered investment advisor] would form a Rule 13(d) group with the [advisor] and any other clients of the [advisor] who purchased shares of the same company's stock. This is plainly not what is set forth in § 13(d) or Rule 13d-5.
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> Second, there are no allegations . . . Criterion Capital was part of any "agreement" between or among the Master Funds and their general partners. Allegations of parallel investment activity, are insufficient to allege an "agreement" to combine efforts in furtherance of a commonly held objective. Plaintiff alleges that Criterion entered into [investment management agreements] with each of the Master Funds, but does not allege that the Master Funds entered into agreements with each other, or that they entered into a single agreement or contractual arrangement with Criterion.

Greenfield v. Criterion Capital Mgmt., LLC (Criterion II), No. 15-cv-3583-PJH, slip op. at 13-14 (N.D. Cal. June 26, 2017).

Plaintiff would prefer that the Court follow Greenfield v. Cadian Capital Mgmt., LP, 213 F. Supp. 3d 509 (S.D.N.Y. 2016) — a decision that postdates plaintiff's opposition to defendants' first motion to dismiss — instead of the Criterion cases. Although none of these cases are binding, the reasoning in the Criterion cases is more persuasive, and its facts are more on-point. In Cadian, a single individual was alleged to be the sole managing member of both the Cadian funds' general partner and the Cadian funds' investment advisor's general partner. Here, unlike in Cadian, not all of the funds whose holdings plaintiff proposes to aggregate in a group trace their management to the same general partner. BVF Partners and the BV Funds are similar to the Cadian entities in that BVF Partners is the general partner of the BV funds; but, as previously

noted, I10 and MSI are in a different posture.[8] Moreover, the Cadian court's brief analysis of whether the plaintiff there had made sufficient group allegations failed to make the essential Rule 13d-5 inquiry of whether any agreement had been alleged. See 213 F. Supp. at 518.

Plaintiff also argues Oncothyreon's reference to defendants as "affiliates of BVF," which were added in the First Amended Complaint, support an inference of an agreement among the hedge fund defendants. It is hard to argue with Oncothyreon's characterization that defendants are all affiliates of BVF, but the legal significance of this characterization to the question of whether plaintiff has sufficiently alleged defendants entered into an agreement for the purposes of Rule 13d-5 is not apparent. Accordingly, plaintiff has not advanced sufficient allegations I10, MSI, or Magnitude comprise part of a group beneficially owning on a collective basis more than 10 percent of outstanding Oncothyreon common stock, and these defendants are entitled to dismissal.

V. CONCLUSION

As to I10, MSI, and Magnitude, defendants' motion to dismiss is granted. Plaintiff has twice failed to allege sufficiently an agreement that would allow group treatment for I10 and MSI under SEC Rule 13d-5. Because further amendment appears futile, and because Magnitude is similarly situated to MSI and I10, these defendants are dismissed with prejudice. Otherwise, for the foregoing reasons, defendants' motion to dismiss is denied.

IT IS SO ORDERED.

Dated: July 25, 2017

RICHARD SEEBORG
United States District Judge

[8] Plaintiff emphasizes I10 shares a business address with BVF Partners and the BV Funds, but does not sufficiently explain why this fact creates an inference of an agreement for the purposes of Rule 13d-5.