UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SUZANNE JACKSON,

Plaintiff,

v.

WILLIAM FISCHER, et al.,

Defendants.
_____/

No. C 11-2753 PJH

ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS

Before the court is defendants' motion for judgment on the pleadings. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court GRANTS the motion as follows.

BACKGROUND

This case was filed in June 2011 by plaintiff Suzanne Jackson ("Jackson") against numerous defendants, including William Fischer ("Fischer"). Jackson alleges that when she met Fischer in October 2006, he presented himself as a sophisticated investment advisor with connections to high-tech issuers and access to early investment opportunities. She claims that Fischer fraudulently induced her to lend money to or invest in several business entities, by misrepresenting their prospects for financial success. These entities included defendants SpeciGen, Inc. ("SpeciGen"), PeerDreams, Inc. ("PeerDreams"), Notebookz, Inc. ("Notebookz"), iLeonardo.com, Inc. ("iLeonardo"), New Moon LLC ("New Moon"), and Sazani Beach Hotel ("Sazani Beach").

The procedural background of the case is as set forth in the December 20, 2013 order re defendants' motions to dismiss the third amended complaint ("TAC") (Doc. 241). Briefly, Jackson filed the original complaint against 18 defendants, asserting claims of securities fraud under federal and state law and other common law claims. On December

5, 2011, Jackson filed the first amended complaint, against the same 18 defendants. In April 2012, Fischer filed for Chapter 7 bankruptcy protection in the District of Minnesota, claiming $12 million in liabilities, and listing Jackson as the primary creditor.

On June 15, 2012, pursuant to stipulation, Jackson filed the second amended complaint ("SAC"), asserting claims against 20 defendants. Named as defendants were Fischer; Jon Sabes ("J. Sabes"); Steven Sabes ("S. Sabes"); Marvin Siegel ("Siegel"); Brian Campion ("Campion"); Lonnie Bookbinder ("Bookbinder"); Mani Kulasooriya ("Kulasooriya"); Jorge Fernandes ("Fernandes"); Joshua Rosen ("Rosen"); Steve Waterhouse ("Waterhouse"); Jean Paul a/k/a "Buzzy" Lamere ("Lamere"); SpeciGen; PeerDreams; Notebookz; iLeonardo; New Moon; Monvia LLC ("Monvia"); CII Ltd. ("CII"); Sazani Beach; and Upper Orbit LLC ("Upper Orbit").

J. Sabes, S. Sabes, Siegel, and Campion were alleged to be officers and/or directors of SpeciGen; Bookbinder was alleged to be the CEO of SpeciGen; Lamere was alleged to be a "consultant" to SpeciGen; Kulasooriya was alleged to be a director of PeerDreams and New Moon; Fernandes was alleged to be a director of Monvia, New Moon, and PeerDreams; Rosen was alleged to be the CEO and a director of Notebookz and iLeonardo; Waterhouse was alleged to be a director of Notebookz; and CII was alleged to be the owner of Sazani Beach.

On July 17, 2012, Jackson filed an adversary proceeding in the Bankruptcy Court in Minnesota, challenging the dischargeability of Fisher's debt. Although the Bankruptcy Court discharged Fischer on July 19, 2012, the court entered judgment in the adversary proceeding on December 18, 2013, finding that the debt owed by Fischer to Jackson was non-dischargeable. This judgment was based on Fischer's agreement that he was indebted to Jackson in the amount of $8.250 million, and his admission that his debt to Jackson was non-dischargeable under 11 U.S.C. § 523(a)(2)(A) because it was obtained "by means of false pretenses, false representations and actual frauds committed against [Jackson], as she alleged in her adversary complaint."

Meanwhile, on March 15, 2013, this court issued an order granting motions to

dismiss the SAC filed by several defendants. The dismissal was with leave to amend. On April 24, 2013, plaintiff filed the TAC, against the same 20 defendants. Four groups of defendants filed motions to dismiss – J.Sabes, S.Sabes, and Siegel; Kulasooriya and Monvia; New Moon; and Fernandes. (Campion, Rosen, Notebookz, and Waterhouse filed answers in lieu of moving to dismiss.) On December 20, 2013, the court issued an order granting the motions in part and denying them in part. Among other things, the court dismissed all claims asserted against Monvia, New Moon, and Lamere, with prejudice.

Remaining in the case as defendants following the December 20, 2013 order were Fischer, J.Sabes, S.Sabes, Siegel, Campion, Bookbinder, Kulasooriya, Fernandes, Rosen, Waterhouse, Upper Orbit (default entered), SpeciGen (default entered), PeerDreams (default entered), Notebookz, iLeonardo (default entered), CII, and Sazani Beach. Of these, there has been no appearance by Bookbinder, CII, or Sazani Beach, although the court also notes that none of the causes of action alleges any facts as to those three defendants.

Remaining in the case are the following causes of action:

(1) a claim of primary liability under § 10(b) of the 1934 Securities Exchange Act and Rule 10b-5 promulgated thereunder, against Fischer, Campion, Rosen, SpeciGen, PeerDreams, Notebookz, and iLeonardo;[1]

(2) a claim of primary liability under California Corporations Code §§ 25401 and 25501, against Fischer, Campion, Rosen, SpeciGen, Peer Dreams, Notebookz, and iLeonardo;

(3) a claim of "control person" liability under § 20(a) of the 1934 Securities Exchange Act, against Fischer, J.Sabes, S.Sabes, Siegel, Campion, Kulasooriya, Fernandes, Rosen, Waterhouse, and possibly Bookbinder;

(4) a claim of "control person" liability under California Corporations Code

[1] However, as noted in the order re the motion to dismiss the SAC (and reiterated in the order re the motion to dismiss the TAC), Jackson has conceded that Fischer was the only "speaker" (at least as to J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes), and thus the only potentially viable defendant under § 10(b) and Rule 10b-5.

§ 25504, against J.Sabes, S.Sabes, Siegel, Campion, Bookbinder, Kulasooriya, Fernandes, Rosen, and Waterhouse;

(5) a claim of breach of fiduciary duty, against Fischer, Campion, Rosen, and Waterhouse;

(6) a claim under California Corporations Code §§ 25230 and 25235, against Fischer;

(7) a claim of declaratory judgment of breach of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1, et seq., against Fischer;

(8) a claim of negligent misrepresentation, against Fischer, Campion, and Rosen;

(9) a claim under California Corporations Code § 25501.5, for rescission of sales by unlicensed broker-dealer, against Fischer; and a secondary liability claim against J. Sabes, S. Sabes, Siegel, Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse;

(10) a claim of common law misrepresentation, against Fischer and possibly "all defendants" (though claim has been dismissed with prejudice as to J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes); and

(11) a claim of respondeat superior, against Fischer, and possibly against J.Sabes, S.Sabes, Siegel, Campion, Bookbinder, Kulasooriya, Fernandes, Rosen, and Waterhouse. However, respondeat superior is a theory of liability, not an independent cause of action, see Beal v. Royal Oak Bar, 2014 WL 1678015 at *5 (N.D. Cal. Apr. 28, 2014); Animal Legal Defense Fund v. HVFG LLC, 2013 WL 3242244 at *3 (N.D. Cal. June 25, 2013), and this cause of action is therefore DISMISSED.

Now before the court is the motion of defendants Siegel, J.Sabes, S.Sabes, Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse pursuant to Federal Rule of Civil Procedure 12(c) for judgment on the pleadings as to the third cause of action for violations of § 20(a) of the Securities Exchange Act, the fourth cause of action for violations of California Corporations Code § 25504, and the ninth cause of action for violations of California Corporations Code § 25501.5.

DISCUSSION

A. Legal Standard

A motion for judgment on the pleadings pursuant to Rule 12(c) "challenges the legal sufficiency of the opposing party's pleadings." William W Schwarzer et al, Federal Civil Procedure Before Trial ¶ 9:316 (2014 ed.) (emphasis in original); Fed. R. Civ. P 12(c). The legal standards governing Rules 12(c) and 12(b)(6) are "functionally identical," Dworkin v. Hustler Magazine, Inc., 867 F.2d 1188, 1192 (9th Cir. 1989), as both permit challenges directed at the legal sufficiency of the parties' allegations. See also Chavez v. United States, 683 F.3d 1102, 1108 (9th Cir. 2012). Thus, judgment on the pleadings is appropriate when the pleaded facts, accepted as true and viewed in the light most favorable to the non-moving party, entitle the moving party to a judgment as a matter of law. Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1301 (9th Cir. 1992); see also Fleming v. Pickard, 581 F.3d 922, 925 (9th Cir. 2009).

The standard articulated in Twombly and Iqbal applies equally to a motion for judgment on the pleadings, as to a motion to dismiss for failure to state a claim. Chavez, 683 F.3d at 1108-09; Cafasso, U.S. ex rel. v. General Dynamics C4 Sys., Inc., 637 F.3d 1047, 1054-55 & n.4 (9th Cir. 2011); see also Lowden v. T-Mobile USA, Inc., 378 Fed. Appx. 693, 694, 2010 WL 1841891 at *1 (9th Cir., May 10, 2010). "[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions." Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). Indeed, "a plaintiff's obligations to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. at 544, 555 (2007) (citations and quotations omitted). Rather, the allegations in the complaint "must be enough to raise a right to relief above the speculative level." Id.

In actions alleging fraud, "the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). The plaintiff must allege facts showing the "time, place, and specific content of the false representations as well as the identities of the

parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007) (citations omitted). "[A]llegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged "so that they can defend against the charge and not just deny that they have done anything wrong." Sanford v. MemberWorks, Inc., 625 F.3d 550, 558 (9th Cir. 2010) (citation and quotation omitted). In addition, the plaintiff must do more than simply allege the neutral facts necessary to identify the transaction; he must also explain why the disputed statement was untrue or misleading at the time it was made. Yourish v. California Amplifier, 191 F.3d 983, 992–93 (9th Cir. 1999).

B. Defendants' Motion

In the present motion, defendants J.Sabes, S.Sabes, Siegel, and Campion ("the SpeciGen defendants"); Kulasooriya and Fernandes ("the PeerDreams defendants"); and Rosen and Waterhouse ("the Notebookz defendants") seek judgment on the pleadings with respect to the "secondary liability" claims – the third claim for relief under § 20(a) of the Securities Exchange Act of 1934; the fourth claim for relief for violations of California Corporations Code § 25504; and the ninth claim for relief under California Corporations Code § 25501.5.

They assert that the TAC does not allege facts sufficient to support a claim of primary liability against Fischer with regard to the securities transactions involving SpeciGen, PeerDreams, or Notebookz, and thus, that there can be no viable claims of secondary liability under either federal or state law.

1. Claim under § 10(b) and Rule 10b-5 of the Securities Exchange Act

Defendants argue that the TAC fails to state a claim against Fischer under § 10(b) and Rule 10b-5 in connection with Jackson's investments in SpeciGen, PeerDreams, Notebookz, and iLeonardo.

To state a claim for securities fraud under § 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder, a plaintiff must plead a material misrepresentation or omission by the defendant; scienter; a connection with the purchase

or sale of a security; reliance; economic loss; and loss causation. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, Inc., 552 U.S. 148, 157 (2008); see also Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-42 (2005).

At the pleading stage, claims under § 10(b) and Rule 10b-5 must satisfy both Rule 9(b) and the requirements of the PSLRA. In re VeriFone Holdings, Inc. Sec. Litig., 704 F.3d 694, 701 (9th Cir. 2012). Under Rule 9(b), all elements of a securities fraud action, including loss causation, must be pled with particularity. Oregon Pub. Emps. Retirement Fund v. Apollo Grp. Inc., 774 F.3d 598, 605 (9th Cir. 2014).

In addition, the PSLRA requires that the complaint plead both falsity and scienter with particularity. See Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir. 2009). That is, the complaint must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading," and must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(1)-(2); see Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321 (2007). If the complaint does not satisfy the PSLRA's pleading requirements, the court, upon motion of the defendant, must dismiss it. 15 U.S.C. § 78u-4(b)(3)(A).

In the present motion, defendants contend that the TAC does not plead facts sufficient to state a primary violation by Fischer under either the PSLRA or Rule 9(b). They argue that the TAC does not adequately allege that Fischer made actionable false or misleading statements regarding SpeciGen, PeerDreams, or Notebookz/iLeonardo, and that the TAC does not allege particularized facts supporting a strong inference of scienter.

a. Falsity

Defendants argue that the TAC alleges no actionable false or misleading statement by Fischer, with regard to the investments in SpeciGen, PeerDreams, and Notebookz/ iLeonardo. The PSLRA requires – whether alleging that a defendant "made an untrue statement of a material fact" or alleging that a defendant "omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which

they were made, not misleading" – that the complaint "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, . . . [that it] state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1).

In short, falsity must be pled with particularity. Zucco, 552 F.3d at 990-91. In addition, a plaintiff must plead "specific facts indicating why" the statements at issue were false. Ronconi v. Larkin, 253 F.3d 423, 434 (9th Cir. 2001). "[V]ague claims about what statements were false or misleading [and] how they were false" are subject to dismissal. Metzler Inv. GmbH v. Corinthian Colls., Inc., 540 F.3d 1049, 1070 (9th Cir. 2008).

A statement or omission is misleading in the securities fraud context "if it would give a reasonable investor the 'impression of a state of affairs that differs in a material way from the one that actually exists.'" Berson v. Applied Signal Tech., Inc., 527 F.3d 982, 985 (9th Cir. 2008) (citation omitted). To be actionable, statements must have been "known to be false or misleading at that time by the people who made them." Larkin, 253 F.3d at 430. The mere fact that "[a] prediction proves to be wrong in hindsight does not render the statement untrue when made." In re VeriFone, 11 F.3d at 871.

Finally, liability under Rule 10b-5 is limited to parties who actually "make" misstatements of fact. See Janus Capital Grp., Inc. v. First Derivative Traders, 131 S.Ct. 2296, 2302 (2011) ("One 'makes' a statement by stating it."). In Janus Capital, the Supreme Court expressly rejected an attempt to rely on common law agency principles to extend primary liability to non-speakers under Rule 10b-5. See id. at 2304.

i. Investments in SpeciGen

Jackson alleges that her investments in SpeciGen were in the form of seven loans secured by promissory notes, which were "convertible" into either common or preferred stock, at SpeciGen's discretion, and which were issued on various dates from December 2006 to the summer of 2008. TAC ¶ 86. She asserts that Fischer, acting as SpeciGen's "agent," made false or misleading statements at meetings at her home and in Fischer's office in October-November 2006, and in February 2007. TAC ¶¶ 87, 89, 90. She claims

that Fischer made the following false and misleading representations:

- that SpeciGen's technology was a "proven concept," and that "publicly-traded pharmaceutical companies" (unidentified) were interested in partnering or licensing the technology – when in fact, no such companies had expressed any interest in the potential applications and products, and one of SpeciGen's "directors" (unidentified) had warned Fischer that the technology had not reached the "proof of concept" stage, TAC ¶ 87(a);
- that "Series A round" financing promoted to Jackson would be sufficient to carry the company to its "exit strategy," at which point she could recover her investment at a profit – when in fact, substantial additional capital was going to be needed beyond the Series A round financing to even get to the point of seeking FDA approval, TAC ¶ 87(b);
- that SpeciGen had an active "industrial research collaboration" with a "prominent biotech company" (unidentified) – when in fact, no such partnership existed and the (unidentified) "companies" approached as of that date had rejected such a proposal, TAC ¶ 87(c);
- that SpeciGen's technology had been "validated" by a "commercial biotech company" (unidentified) – when in fact, its only revenues had been research grants from the government, and no "validation" had been received from any source, TAC ¶ 87(d);
- that Jackson's Series A investment consisted solely of convertible promissory notes, with no disclosure that other investors had been offered common stock on a match to the convertible notes, which "diluted" Jackson's interest in the securities, TAC ¶ 87(e);
- that the Series A round was fully subscribed and that the other investors were sophisticated and had biotech startup knowledge – when in fact, the round was less than half subscribed, none of the other investors had experience investing in startups, and the one SpeciGen "director" (unidentified) who did have such experience declined to invest because he thought the company's proposed capital structure would be

unattractive to venture capital or institutional investors in future rounds, TAC ¶ 87(f);

- that SpeciGen's "exit strategy" (the point at which Jackson would presumably recoup her investment) would come within 2-3 years – when in fact, SpeciGen had no legitimate basis for such an estimate, and unless an institutional investor or biotech company invested or bought the company's technology, it would be 15-20 years before the investment was recouped (if ever), TAC ¶ 87(g);
- that SpeciGen "had all of the licenses and patents needed to commercially develop its technologies" – when in fact, the company lacked "term rights" in all of its technologies and its licenses "required ongoing royalty payments that it could not maintain at the company's present burn rate," TAC ¶ 87(h);
- that the Series A offering was "moving along well" – when in fact, "they" had difficulty selling the offering and "desperately needed Jackson to make a substantial second investment in order . . . for the company to survive," TAC ¶ 89(a);
- that Genentech had "vetted the company's technology" – when in fact, Genentech had shown no interest in partnering with SpeciGen when it had been "approached," because of the immaturity of SpeciGen's progress with its unproven technology, TAC ¶ 89(b); and
- that "they" were in advanced discussions with "a public company and an established biotech company" (unidentified) regarding advanced research partnerships – when in fact, there were no such discussion underway, and "the one later research partnership reached was poorly structured" and SpeciGen could not use the resulting data, TAC ¶ 89(c).

Jackson asserts further that in none of the discussions with Fischer in October-November 2006 and February 2007, or in "subsequent communications through Fischer as directed by defendants J.Sabes, S.Sabes, Siegel, and Campion," was she told

- that the company CEO, Bookbinder, had just resigned, complaining of mismanagement by the directors, TAC ¶ 90(a);
- that one of the board members, Dr. David Goldsteen, had resigned

from the board over concerns regarding "unlawful financing irregularities," including the sale of securities to Jackson, as well as doubts about the viability of the company's technology and its plans for developing and commercializing it, TAC ¶ 90(b);

- that SpeciGen had conducted fundraising activities in violation of the 1933 Securities Act, which had "exposed the company to litigation that could put it out of business," TAC ¶ 90(c);
- that the financial projections prepared by Campion and Siegel were short by more than 50% of what was needed to achieve the preliminary pretrial stage, TAC ¶ 90(d);
- that more than six experienced biotech and Silicon Valley investors, including Suni Paul, Mark Pincus, David Hornik, Menlo Ventures, and August Capital, had passed on SpeciGen's effort to raise money, TAC ¶ 90(e);
- that SpeciGen's cash flow was so "perilous" that it didn't even have money to meet its commitments to Bookbinder's separation agreement, and that J.Sabes and S.Sabes had refused to invest in the company, TAC ¶ 90(f), (g).

Defendants argue that the TAC fails to state a claim of primary liability against Fischer with regard to the SpeciGen investments. In general, they argue that the TAC does not specify exactly what Fischer said about SpeciGen or why the statements were false or misleading when made. In addition, they make a number of arguments about representations attributed to Fischer.

With regard to the alleged representations about SpeciGen's product development – e.g., that SpeciGen's technology was a "proven concept" that was "approaching a stage in which it could be commercialized," and that it had been "validated" by an unidentified "commercial biotech company" and "vetted" by Genentech, see TAC ¶¶ 87(a), (d), and 89(b), defendants argue that the statements are vague and unclear, in that Jackson does not explain what is meant by "proven concept," "validated," or "vetted," and does not clearly explain why the statements were false or misleading at the time they were made, or provide any objective criteria by which the truth or falsity of the statements can be ascertained.

In response, Jackson claims to be astonished that defendants do not know what "proven concept" or "proof of concept" means, as she contends it is a "major milestone in biotech." She contends that in the SpeciGen context, "proof of concept" meant that the "so-called 'protein cages' designed to deliver therapeutic drugs to specific cancer cells would have been proven to fulfill their designed function in tests on small animals." She argues that no such tests were ever undertaken, and no responsible investor would have considered investing in SpeciGen to be a good risk.

The court agrees with defendants that the allegations that Fischer falsely represented that SpeciGen's technology was a "proven concept" that had been "vetted" by Genentech, and "validated" by an unidentified "commercial biotech company," TAC ¶¶ 87(a), (b), (d), are vague and conclusory. Jackson does not explain in the TAC what the SpeciGen technology was or what she means by "proven concept;" does not provide any clue as to what form the alleged "vetting" and "validation" took; does not identify either the "publicly-traded pharmaceutical companies" that were supposedly interested in partnering or licensing the technology, or the "commercial biotech company" that had allegedly "validated" the technology; and does not point to any contemporaneous facts showing why these alleged misrepresentations were false at the time they were made. The only explanation in the TAC as to why the representations were false is that an unidentified SpeciGen "director" had allegedly warned Fischer and J.Sabes that he thought the technology had not reached the "proof of concept" stage and that as of October 2006, SpeciGen was not yet even a "promising biotech company." TAC ¶ 87(a)(2).

As for the allegation that Fischer falsely represented that the SpeciGen technology had been "validated" or "vetted" by other companies, Jackson asserts that Fischer made this representation to give her a false sense of security and low risk. She claims that in making this representation, TAC ¶ 89(h), Fischer convinced her that Genentech had made a thorough review of the SpeciGen technology and had found it to be viable. However, the TAC does not include such allegations, as it simply refers to a representation that SpeciGen's technology had been "vetted" or "validated" without any explanation or

particularized details.

With regard to the allegation that Fischer stated that SpeciGen was in "advanced discussions with a public company and an established biotech company about advanced research prospects that would develop preclinical data sufficient to complete clinical trials," TAC ¶ 89(c), defendants argue that the TAC fails to specify what Fischer actually said, whether he used the terms "advanced discussions" and "advanced research partnerships," and if so, what he meant by those terms. Defendants also assert that the allegation that the statement was false "because no such discussions were underway" does not explain why the statement was false at the time it was made.

In response, Jackson argues that the existence of a research collaboration agreement with a respected biotech company is “key” both to scientific progress and to attracting investors, and that Fisher's representation caused her to experience a “false sense of security.” She adds that at trial, her "industry expert" will testify that the existence of a research collaboration with a respected, established biotech company is key to scientific progress in product development.

Again, the court notes that Jackson is improperly seeking to introduce facts and theories that are not pled in the TAC. In addition, the allegations are insufficiently particularized, for the reasons argued by the defendants. In particular, Jackson does not specify whether the alleged statement regarding the "research collaboration" was false because SpeciGen was not discussing research partnerships with anyone, or because SpeciGen was discussing research partnerships but the discussions were only preliminary, or because the research partnerships were not likely to result in the development of preclinical data sufficient to complete clinical trials. Moreover, her speculation regarding future trial testimony of some expert has no place in an analysis of whether the TAC states a claim. Finally, she does not reconcile her claim that "no such discussions were underway" with the contradictory suggestion that some companies (including Genentech) had considered research partnerships with SpeciGen, see TAC ¶¶ 87(b), 89(b), and that SpeciGen eventually did form a research partnership with another company, TAC ¶ 89(c).

With regard to representations about SpeciGen's patent portfolio – the statement that "SpeciGen had all of the licenses and patents needed to commercially develop its technologies" (TAC ¶ 87(h) – defendants argue that Jackson fails to specify what Fischer said or why the statement was false or misleading at the time it was made. They contend that Jackson's assertion that the statement was false because SpeciGen's licenses "required ongoing royalty payments that it could not maintain at the company's present burn rate" is not an explanation as to why the statement that SpeciGen had all its licenses and patents was false, because she does not allege that Fischer told her that all such licenses and patents would be available to SpeciGen for free, or that he told her that royalty payments would be easy to make.

In response, Jackson asserts that she was misled into believing that the technology at the heart of SpeciGen's mission was in place with a long-term lock on its use. She contends that she was also misled with regard to the value of that technology (again referring to the vague term "proof of concept.") The court finds, however, that the allegations regarding SpeciGen's "technology" and its rights to "licenses and patents" are insufficiently detailed to satisfy the pleading requirements of the PSLRA.

With regard to representations about SpeciGen's fundraising prospects – such as the alleged statement that "the Series A offering was moving along well," TAC ¶ 89(a), and that it "would be sufficient to carry the company to its 'exit strategy,'" TAC ¶ 87(b), defendants assert that reasonable investors do not rely on vague statements of corporate optimism. Plaintiff's only response is that statements that the stock offering was "moving along well" confirmed earlier statements made by Fischer and led her to believe that the investments were safe and sound.

In the Ninth Circuit, "vague, generalized assertions of corporate optimism or statements of 'mere puffing' are not actionable material misrepresentations under federal securities laws" because no reasonable investor would rely on such statements. See In re Cutera Sec. Litig., 610 F.3d 1103, 1111 (9th Cir. 2010); Glen Holly Entm't, Inc. v. Tektronix, Inc., 352 F.3d 367, 379 (9th Cir. 2003). The alleged representations in TAC ¶¶ 87(b) and

89(a) appear to be little more than statements of corporate optimism regarding SpeciGen's prospects for obtaining financing for its future operations, or "mere puffery."

As for the statement that the Series A offering "would be fully sufficient to carry the company to its 'exit strategy,'" which "would come within 2-3 years," which Jackson alleges was false because the Series A offering would not raise enough money to get SpeciGen to preliminary trials, and because barring an acquisition or outside investment, it would take 12-15 years "for a return on investment," TAC ¶ 87(b), (g), defendants argue that statements regarding fundraising prospects were simply predictions, and that the fact that a prediction ends up being incorrect does not render the statement untrue when made.

In response, Jackson asserts that the representation that the Series A round of financing would be sufficient to take SpeciGen commercial was false, because SpeciGen was years and millions of dollars away from seeking FDA approval, and was material because it misrepresented SpeciGen's capital requirements and the status of its technology. She contends that the representation that the offering was being subscribed by sophisticated investors was false because no institutional investor had agreed to invest, and even SpeciGen board members had refused to invest their own money. She also asserts that the timing of an "exit strategy" is critical information to investors, and claims that telling her that her investment would be returned in a 2-3 year time frame was "the equivalent of" telling her that the company was in an advanced stage of research and product development, and that her funds would be tied up for only a few years. She contends that at trial, she will have an "industry investment expert" explain "this and other claims" to the jury.

However, Jackson does not address defendants' argument that the representations regarding SpeciGen's financing and its "exit strategy" were simply predictions that did not pan out. As pled, the alleged representations do appear to have been little more than predictions. The fact that a prediction ends up being incorrect does not render the statement untrue when made. See In re Syntex Corp. Sec. Litig., 95 F.3d 922, 929 (9th Cir. 1996). A false prediction, without more, does not constitute actionable securities

fraud. See id. at 934; In re VeriFone, 11 F.3d at 871; In re Northpoint Commc'ns Grp., Inc. Sec. Litig., 184 F.Supp. 2d 991, 1004 (N.D. Cal. 2001); In re PetSmart, Inc. Sec. Litig., 61 F.Supp. 2d 982, 992 (D. Ariz. 1999). Where an allegedly false or misleading statement is a prediction about future prospects, the plaintiff must allege with particularity facts showing that the initial prediction was clearly a falsehood at the time it was made. See In re Am. Apparel, Inc. S'holder Litig., 2013 WL 174119 at * 27 (C.D. Cal. Jan. 16, 2013); Kane v. Madge Networks, N.V., 2000 WL 33208116 at *6 (N.D. Cal. May 26, 2000).

As pled, many of the allegations regarding SpeciGen are largely classic "fraud by hindsight" allegations, not actionable under the federal securities laws. See In re Silicon Graphics, Inc. Sec. Litig., 183 F.3d 970, 988 (9th Cir. 1999) (Congress enacted the PSLRA in part to put an end to the practice of pleading "fraud by hindsight"); see also Larkin, 253 F.3d at 430 n.12. The TAC repeatedly asserts that certain predictions proved incorrect – such as that plaintiff would recover her investment within 2-3 years; that SpeciGen was on target to partner with some unspecified biotech company or companies; that SpeciGen was in a good position as far as achieving its capital requirements; and that SpeciGen would have sufficient funding to reach some unspecified level of success with some unspecified technology.

However, vague allegations that certain predictions proved incorrect is not the same as alleging with particularity facts that show the initial prediction was a falsehood. See In re Am. Apparel, Inc. S'holder Litig., 855 F.Supp. 2d 1043, 1070 (C.D. Cal. 2012); see also In re Daou Sys., Inc., 411 F.3d 1006, 1021 (9th Cir. 2005) ("Although these projections might have been overly optimistic when made, they do not rise to the level of a material misrepresentation actionable" under the securities laws.). It is true that representations concerning the status of investments at the time Jackson's investment was being solicited – e.g., that the Series A round was fully subscribed and that the other investors were "sophisticated" and had "biotech startup knowledge" – are potentially actionable, but as pled, they are too lacking in specificity to provide the basis of a Securities Act violation.

Finally, the TAC alleges no facts showing "why the difference between the earlier

and later statements is not merely the difference between two permissible judgments, but rather the result of a falsehood." See Philco Investments, Ltd. v. Martin, 2011 WL 500694 at *8 (N.D. Cal. Feb. 9, 2011); see also Larkin, 253 F.3d at 430 n.12 (fraud by hindsight is not actionable); In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1549 & n.8 (9th Cir. 1994) (claims of "fraud by hindsight" will not meet the requirements of Rule 9(b)). Overall, while Jackson disputes defendants' assertion that the allegations of falsity are inadequately pled, she does not adequately respond to the argument that the TAC does not allege specific contemporaneous facts showing that any particular alleged statement by Fischer was false at the time it was made.

The court agrees with defendants that the allegations in the TAC generally do not plead sufficient facts to establish falsity. Many of the facts alleged in TAC ¶¶ 87 and 89 are not pled with particularity. Moreover, as noted below, the more significant problem with the allegations regarding the SpeciGen investments is that the TAC does not plead facts sufficient to create a strong inference of scienter as to Fischer.

ii. Investments in PeerDreams

Jackson alleges that her investments in PeerDreams were made in the form of six convertible promissory notes she purchased between January 2007 and June 2009, four of which were allegedly converted into shares of PeerDreams common stock. TAC ¶ 103. She claims to have made the investments in reliance on oral statements by Fischer at meetings in December 2006 and January 2007. TAC ¶ 108. She asserts that Fischer made false representations about PeerDreams based on information he had obtained from Monvia, Fernandes, and Kulasooriya ("the Monvia defendants"), while acting as their "agent," in connection with the sale of convertible promissory notes and common stock. TAC ¶¶ 109-113.

In the TAC, Jackson asserts that the following statements were among the false and misleading representations made by Fischer regarding Peer Dreams:

- that Peer Dreams had a "marketing plan," prepared by Monvia, Fernandes, and Kulasooriya, that called for profitable operations within 18 months in

operations targeted to various goals, when in fact, the plan had not been developed and did not exist, TAC ¶ 110(a);

- that Kulasooriya had extensive experience with comparable entrepreneurial software investments through his previous work at Yahoo Finance, when in fact, that previous experience was in the context of a large public company with substantial internal financing, risk assessment, and marketing capabilities of no relevance to a modest startup, TAC ¶ 110(b);
- that the (unidentified) "software and website" could be up and running in 12 months, when in fact, "they" knew it would take more than 18 months to develop it and as long to come up with a real marketing plan, TAC ¶ 110(c);
- that "based on the funds raised and needed in the next year, PeerDreams would be up and running and able [to] extract substantial profit as a fund raising platform apart from charities[,]" when in fact, the funds raised and "sought to be raised" were insufficient to launch a single site profitably dedicated to any of the marketed uses, TAC ¶ 110(d);
- that "the funds raised in the first year would be sufficient to fund the development of 'white label' (private label) sites for specific institutions," when in fact, "the amount planned to be raised was insufficient to fund the development of a single white label site" (with, as plaintiff appears to be describing it, negative consequences), TAC ¶ 110(e).

Jackson asserts further that "through the spring and summer of 2007," she "was never told"

- that "the company" (unspecified) "had failed to conduct any market studies that would allow it to assess the revenues that might be realized relative to the investment needed to bring its product to market in a profitable manner," TAC ¶ 111(a);
- that "the company" (unspecified) lacked "any commitment from major nonprofit organizations to test or engage its product" and thus "had no idea of the likely market for it," TAC ¶ 111(b);

- that of "several company employees and executives, none of them had successful track records of commercializing software products in competitive markets, and lacked experience marketing web-based software products to nonprofit organizations," TAC ¶ 111(c);
- that "more than three times the raised capital was needed to enter just half the markets identified to Jackson when she made her investments" and that "the rapidly deteriorating capital position" of "the company" (unspecified) would make it impossible to raise more funds, TAC ¶ 111(d);
- that because additional funds "could not be raised," and because of the "'burn rate' of its diminished capital, no 'white label' sites could be developed to raise operating revenue," and "the company" would likely "have to close its door within a year, TAC ¶ 111(e).

Defendants argue that the allegations in the TAC are insufficient to state a claim of primary liability against Fischer with regard to the PeerDreams investments. In general, they argue that the TAC does not specify exactly what Fischer said about PeerDreams and that it makes no attempt to plead contemporaneous facts establishing that any alleged statement regarding PeerDreams was false or misleading when made. In addition, they make a number of arguments about representations attributed to Fischer.

With regard to the allegation that PeerDreams had a "marketing plan" that called for profitable operations within 18 months, TAC ¶ 110(a), defendants argue that the TAC does not specify what Fischer allegedly said about PeerDreams' marketing plan, and alleges no facts showing the statement was false or misleading when made.

In response, Jackson contends that in December 2006 and January 2007, Fischer made a presentation based on information supplied by Kulasooriya and Fernandes" which included "a claim that PeerDreams had a marketing plan that would enable it to reach operational profitability within 18 months." She asserts that she made three $50,000 investments in 2007 (in January, March, and May), and that had she been told there was no plan, she could have ended her funding.

With regard to the allegation that Kulasooriya, a founding director of PeerDreams, had extensive experience with comparable investments, TAC ¶ 110(b)(2), defendants assert that Jackson pleads no facts establishing that Kulasooriya lacked experience with comparable entrepreneurial software investments, and that she in fact concedes that Kulasooriya was experienced, but adds that his experience was not relevant to "a modest startup."

In response, Jackson asserts that Kulasooriya was presented as having been involved in “entrepreneurial risk projects” while working at Yahoo Finance, but that in fact, he was only a mid-level technical employee at Yahoo. Jackson contends that because PeerDreams was a very small company, the representations about the background of Kulasooriya were material to her investment decision. She claims that her “expert” will testify at trial that “no established venture firm or knowledgeable investor would sponsor a company with nonexistent management experience.”

Defendants assert further that the allegations that PeerDreams' software and website would be up and running within 12 months, TAC ¶ 110(c); that PeerDreams would be profitable as a fundraising platform within a year, TAC ¶ 110(d); and that PeerDreams had enough money to "fund the development of 'white label' (private label) sites for specific institutions," TAC ¶ 110(e), represent classic claims of "fraud by hindsight," which is not actionable under federal securities laws. See Silicon Graphics, 183 F.3d at 988; see also Larkin, 253 F.3d at 430 n.12.

For example, defendants point to the allegation that Fischer stated that PeerDreams' website would be operational within a year, all the while "knowing" that it would take at least 18 months to develop it and as long to come up with a real marketing plan. TAC ¶ 110(c). Defendants contend that Fischer's lack of clairvoyance does not constitute securities fraud. Similarly, they argue, the allegation that Fischer falsely predicted that the funds raised in the first year would be sufficient to fund the development of "white label" sites, whereas "the amount actually planned to be raised" was insufficient to accomplish that goal, is nothing more than an allegation that Fischer's predictions did not come to fruition.

In response, Jackson contends that the statement that PeerDreams would be profitable in 18 months and the statement that its website and products would be completed in a year were both false, and created "an illusion of a limited chronological risk window, and concealed the risk to [her] by presenting claims of imminent positive cashflow and profit." Jackson claims that there was in fact no feasible plan to produce an independent, financially viable website product in 12 months, and that in addition, without plaintiff's funds, PeerDreams would have had to shut its doors because there would have been no cash flow.

While the TAC attributes a number of allegedly false statements regarding PeerDreams to Fischer – such as the statement that there was a marketing plan (when there was in fact no marketing plan) and that Kulasooriya had a particular level of experience (when in fact he did not have that type of experience), but such statements are not adequately pled because the TAC alleges no specific contemporaneous facts showing that the statements were false at the time they were made, and her opposition does not point to any. Even more problematic, as discussed below, is the absence of any particularized facts showing that Fischer knew the statements were false at the time he made them.

While a statement of belief may be actionable if the speaker knows his opinion has no reasonable basis in fact at the time it is expressed, see Virginia Bankshares, Inc. v. Sandberg, 501 U.S. 1083, 1093-94 (1991), a false prediction, without more, does not constitute actionable securities fraud. See In re Syntex, 95 F.3d at 934. Where an allegedly false or misleading statement is a prediction about future prospects, the plaintiff must allege with particularity facts showing that the initial prediction was clearly a falsehood at the time it was made. See In re Am. Apparel, 2013 WL 174119 at * 27. Here, at most, the TAC simply alleges that Fischer represented that PeerDreams would achieve a certain level of success within a stated period, and that his prediction did not come to pass.

As pled, many of the allegations against Peer Dreams are largely classic "fraud by hindsight" allegations, not actionable under the federal securities laws. See Silicon

Graphics, 183 F.3d at 988; see also Larkin, 253 F.3d at 430 n.12. The TAC repeatedly asserts that certain predictions proved incorrect – such as that PeerDreams' software would be up and running within 12 months, and that PeerDreams would be profitable as a fundraising platform witnin a year, and that Peer Dreams had sufficient money to fund future projects. However, vague allegations that certain predictions proved incorrect is not the same as alleging with particularity facts that show the initial prediction was a falsehood. See In re Am. Apparel, 855 F.Supp. 2d at 1070; see also In re Daou Sys., 411 F.3d at 1021.

Defendants do not specifically address the alleged omissions, TAC ¶¶ 111(b)-(e) (allegations that "the company" failed to conduct marketing studies; that it "lacked any commitment from major nonprofit organizations" to test or engage its product; that the employees and executives lacked "successful track records" of commercializing and marketing software products; that more capital was needed to enter the markets identified to Jackson when she made her investments and that the "rapidly deteriorating capital position" of "the company" would make it impossible to raise more funds; and that "the company" would likely close its door within a year because funds could not be raised). Nevertheless, as discussed above with regard to the alleged misrepresentations, the TAC pleads no facts sufficient to create a strong inference of scienter as to these alleged omissions.

iii. Investments in Notebookz/iLeonardo

Jackson alleges that her investments in Notebookz/iLeonardo were made in two parts. In February 2007, she acquired a $50,000 convertible promissory note, and in April 2007, she acquired a $200,000 convertible promissory note. TAC ¶ 94(a), (b). Then "[i]n or about July, 2007," the two promissory notes were, "at the election of defendant Rosen and defendant Notebookz, converted into 507,694 shares of preferred stock." TAC ¶ 94(c).

Jackson asserts that "[t]he initial purchases" of the convertible promissory notes were made following (or at) three meetings in February and March 2007 (two at Fischer's

office and one at Jackson's home), at which Rosen and Fischer made presentations and Rosen or Fischer "mentioned the likelihood that Google would be a likely acquirer in the near to immediate future." TAC ¶¶ 94-96. She alleges that during these meetings, Fischer made the following false representations to her "to induce" her investments:

- that "the company" had raised sufficient capital to produce and market its product – when in fact, "it" had insufficient capital and "would need substantial further investment" beyond Jackson's contribution, TAC ¶ 97(a);
- that "the company" had discussed its "business, management, financial affairs" and "the details of its offering" with Jackson – when in fact, "it" had "never disclosed the company's product, management, financial affairs, competing products or even the potential market for its products" other than to falsely claim to Jackson that "they" expected Google to acquire "the company," TAC ¶ 97(b);
- that "the company" had given Jackson "the opportunity to review the company's facilities" – when in fact, she did not know where those facilities were located, or "anything about the company's staffing, equipment or product plans," TAC ¶ 97(c);
- that "the company" had given her "the opportunity to review all the terms and conditions of its securities offerings" – when in fact, "the company" had "only delivered a signature page after the February 16 meeting through defendant Fischer and did not provide any documentation relating to its offering at the time of the sale of its securities to her," TAC ¶ 97(d).

Jackson asserts further that in late June or early July 2007, Fischer provided her with an "Investor's Rights Agreement" relating to "the preferred stock she was about to receive through the conversion of her promissory notes." She claims that this agreement made "a number of representations that were false," specifically

- that "[t]he company," through Rosen, "promised to provide a balance sheet, statements of income and cash flows within 120 days of the end of each fiscal year" – a promise "that was regularly breached and that deprived plaintiff of the ability to monitor her investments and act in response to the concealed deteriorating position" of "the

company," TAC ¶ 98(a); and

- that "[t]he company," through Rosen, "promised that within 45 days of the close of the third quarter each year, that it would provide her with unaudited statements of income and cash flows, an unaudited balance sheet and a statement of stockholders' equity" – a promise "that was never kept," TAC ¶ 98(b).

Defendants argue that the allegations in the TAC are insufficient to state a claim of primary liability against Fischer with regard to the Notebookz/iLeonardo investments. In general, they argue that the TAC does not specify exactly what Fischer said about Notebookz/iLeonardo and that it makes no attempt to plead contemporaneous facts establishing that any alleged statement regarding Notebookz/iLeonardo was false or misleading when made. Defendants contend that the alleged oral statements made by Fischer are repeated in "vague and impressionistic terms," in a manner that is insufficient to allege falsity under the PSLRA.

Defendants also note that the TAC repeatedly refers to Notebookz and iLeonardo collectively as "the company," with the result that defendants are left to guess which company Fischer's alleged misrepresentations referred to (and which company the TAC is referring to). For example, with regard to the statements that Fischer and/or Rosen "expected Google to acquire the company" (TAC ¶ 97(b), and regarding the possibility that "Google would be a likely acquirer in the near to immediate future" (TAC ¶ 96), defendants argue that Jackson has left them to guess which speaker said what about which company.

In her opposition, Jackson does not specifically address the fact that TAC fails to distinguish between Notebookz and iLeonardo. Jackson asserts that “Notebookz had a product called iLeonardo that presumably was in the same tech ‘space’ as Google.” However, the TAC nowhere alleges that “Notebookz had a product called iLeonardo,” but rather alleges that iLeonardo is a corporation and that Notebookz is a corporation. This reference to Notebookz and iLeonardo collectively as "the company" is fatal to the entire claim, because the TAC clearly alleges that they are two separate companies, but the TAC does not identify which company Fischer was talking about.

Jackson also asserts that even if defendants claim to be confused, "[w]e know that Mr. Fisher is not because he has potentially incurred $250,000 of liability for himself by admitting to selling Notebookz securities to Mrs. Jackson based on 'fraud' and 'false pretenses'" (referring to the judgment in the adversary proceeding). She claims that the court cannot dismiss "these defendants" given that "their fundraiser says he sold their securities through fraud."

To the extent that Jackson is attempting to argue in her opposition that falsity is established by virtue of Fischer's concession in the adversary proceeding that he sold her $250,000 of Notebookz securities, the court finds this theory to be without merit. The TAC includes no allegations regarding the adversary proceeding judgment, and reliance on matters outside the pleadings is improper under the Rule 12(b)(6) standard. See Schneider v. Cal. Dep't of Corr., 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) (court may not take into account additional facts asserted in a memorandum opposing a motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)).

As for the allegation that either Fischer or Rosen mentioned "the likelihood that Google would be a likely acquirer" in the near to immediate future, TAC ¶ 96, Jackson argues that this statement is sufficiently specific. However, she alleges no facts showing that the statement was false at the time it was made. It is not sufficient for Jackson to argue, as she does in the opposition, that "[d]epositions of Rosen and Waterhouse would yield that information." Under the PSLRA, a plaintiff is required to allege facts sufficient to support the claim without benefit of any prior discovery. See Tellabs, 551 U.S. at 313, 321.

In somewhat of a nonsequitur, Jackson also asserts that the allegations about "capitalization" (referring to the allegation that Fischer and/or Rosen had represented that "the company" had raised sufficient capital to "produce and market its product," see TAC ¶ 97(a)) are "sufficient to allow a jury to believe that Mrs. Jackson's investments were induced through material misrepresentations." She contends that "expert testimony about the significance of capitalization, along with expert testimony about the major deficiencies in Notebookz products" will allow the jury to conclude that plaintiff was defrauded. And, she

argues, “when Mr. Fischer’s admission of fraud is added to the mix, this is a claim that is ‘plausible’ under Iqbal and should go to the jury.”

Jackson's claim in the opposition that her “expert” will testify that capitalization is a major criterion in an investment decision is misplaced in a motion for judgment on the pleadings, because she cannot look to matters outside the TAC to support the allegations. Moreover, the proffered “expert” testimony does not cure the absence of factual allegations that Fischer knew the alleged statement was false when made.

With regard to the allegations that Fischer falsely represented that "the company" had discussed with Jackson "the company's" business, management, and financial affairs; and that "the company" had given Jackson the opportunity to review "the company's" facilities and all the terms and conditions of its securities offering, TAC ¶ 97(b), (c), (d), defendants argue that Jackson cannot plausibly allege reliance (an essential element of a § 10(b) cause of action) where – as here – she already possesses sufficient information to call the alleged false representations into question.

In response, Jackson argues that "Notebookz' disregard of investors and the meaninglessness of the subscription agreement it proffers underscores the fact of the manifestly false boilerplate in its subscription documentation," and asserts that "the document made false claims about what had been shown" to Jackson," and that defendants "fail to address the fact that [she] was not given the document before she invested," but rather was given only a signature page." The court notes, however, that Jackson cannot credibly claim to have relied on an alleged misrepresentation regarding her own due diligence investigation (whether or not she was given an opportunity to tour the facilities, or review the terms and conditions of the securities offering) when "the truth" was already in her possession.

With regard to the allegation that Fischer gave Jackson an "Investor's Rights Agreement" which falsely promised that "the company" would make certain financial information available to her at the end of the fiscal year, defendants assert that this does not state a claim for securities fraud. They contend that if anything, it is an allegation of a

failure to carry out a promise, which is a contract claim.

The court is unable to locate any response to defendants' arguments regarding the Investor's Rights Agreement. In general, defendants are correct that these allegations appear to relate more to a contract claim than to a claim for securities fraud.

Jackson's response to defendants' arguments regarding the allegations about Notebookz/iLeonardo is generally rambling and unfocused. While Jackson disputes defendants' assertion that the allegations of falsity are inadequately pled, she does not adequately respond to the argument that the TAC fails to plead specific contemporaneous facts showing that any particular alleged statement by Fischer was false at the time it was made.

b. Scienter

Defendants argue that the TAC fails to allege facts raising an inference that Fischer acted with scienter. To adequately plead scienter under the PSLRA, a plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Scienter is defined as "a mental state embracing intent to deceive, manipulate, or defraud." Ernst & Ernst v. Hochfelder, 425 U.S. 185, 193 n.12 (1976). A plaintiff must allege facts showing that the defendant made false or misleading statements "either intentionally or with deliberate recklessness." Zucco, 552 F.3d at 991 (quotations omitted); see also In re NVIDIA Corp. Sec. Litig., 768 F.3d 1046, 1053 (9th Cir. 2014) (quoting In re Silicon Graphics, 183 F.3d at 977) (recklessness satisfies scienter under § 10(b) "to the extent it reflects some degree of intentional or conscious misconduct")).

Under Tellabs, the court must generally accept all factual allegations in the complaint as true. Id., 551 U.S. at 322. The court must then "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which the court may take judicial notice. Id. That is, the court "must review all the allegations holistically" when determining whether scienter has been sufficiently pled.

Matrixx Initiatives, Inc. v. Siracusano, 131 S.Ct. 1309, 1324 (2011) (quoting Tellabs, 551 U.S. at 326). The relevant inquiry is "whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." Tellabs, 551 U.S. at 323; see New Mexico State Inv. Council v. Ernst & Young LLP, 641 F.3d 1089, 1095 (9th Cir. 2011).

A strong inference of scienter "must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." Id. at 314. The inference must be that "the defendant[ ] made false or misleading statements either intentionally or with deliberate recklessness." Zucco, 552 F.3d at 991 (internal quotation marks omitted). Deliberate recklessness means that the reckless conduct "reflects some degree of intentional or conscious misconduct." South Ferry LP, No. 2 v. Killinger, 542 F.3d 776, 782 (9th Cir. 2008). "[A]n actor is [deliberately] reckless if he had reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary effort." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 390 (9th Cir. 2010) (quoting Howard v. Everex Sys., Inc., 228 F.3d 1057, 1064 (9th Cir. 2000)).

Here, defendants assert, Jackson has pled no facts showing what Fischer knew or when he knew it. For example, they argue, the TAC does not identify a single email, internal report, or other contemporaneous document suggesting that any alleged misstatement was knowingly false when made. Rather, they argue, the TAC generally alleges that all "defendants" (presumably including Fischer), were "aware" that the defendant companies needed funding to survive, see TAC ¶¶ 131(a), (c), (d); and faced significant product development challenges, see TAC ¶ 87(b), (d). Defendants contend that these generic allegations could be applied to any startup company, and note that the TAC applies the same allegations indiscriminately to "all of the '34 Act defendants," see TAC ¶¶ 130-132.

Defendants argue further that the TAC describes "routine corporate objectives" such as the desire to obtain financing and develop new products, but assert that the Ninth Circuit

has consistently rejected attempts to premise a strong inference of scienter on such allegations. See, e.g., In re Rigel Pharms, Inc. Sec. Litig., 697 F.3d 869, 884 (9th Cir. 2012). "Facts showing mere recklessness or a motive to commit fraud and opportunity to do so provide some reasonable inference of intent, but are not sufficient to establish a strong inference of deliberate recklessness." In re VeriFone, 704 F.3d at 701.

Here, however, defendants contend that the allegations in the TAC, which are not even specific to Fischer, do not "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind," as required by 15 U.S.C. § 78u-4(b)(2). They argue that none of Jackson's allegations are cogent or compelling enough to raise a strong inference of scienter, even when considered holistically.

In opposition, Jackson asserts that "scienter is present with regard to all defendants," and claims that she has pled "a mix of facts that show multiple material misrepresentations and omissions." She also contends that "[t]he documented misrepresentations and omissions describe statements of fact [that] are so inaccurate as to be either reckless or intentional." She claims that the fact that their "only discernable purpose" was to induce her to invest in the defendant companies creates a strong inference that there was a compelling financial motive." She argues that there is no innocent explanation for these misrepresentations and omissions, and that it would require "extreme mental acrobatics" to find that the alleged misrepresentations could have been made without intent.

In addition, Jackson reiterates that Fischer admitted in the Minnesota adversary proceeding that he defrauded her. She contends that under principles of issue preclusion, Fischer and the other defendants in this matter are precluded from litigating, for the second time, "the issue of Fischer's fraudulent actions." For this reason, she contends, Fischer's primary liability under § 10b-5 has been decided and "cannot be relitigated." She adds, however, that should the court determine that the TAC does not adequately state a claim against Fischer for primary liability under § 10(b) and Rule 10b-5, she should be given

leave to amend to plead additional facts obtained in discovery in the adversary proceeding.

The court finds that the TAC alleges no facts sufficient to support a strong inference of scienter as to Fischer. Rather than pleading "in great detail, facts constituting strong circumstantial evidence or deliberate reckless or conscious misconduct," In re Vantive Corp. Sec. Litig., 283 F.3d 1079, 1091 (9th Cir. 2002), the TAC's scienter allegations are lumped together, without the specification that Fischer knew anything at any particular time. In short, there are no allegations regarding what Fischer knew at the time any alleged misstatement was made, and no allegations of particularized contemporaneous facts showing that Fischer had any information – whether via internal documents, meeting notes, emails, or otherwise – that might cast doubt on any particular statement that he allegedly made at that time about any one of the defendant companies. See In re Read-Rite Corp. Sec. Litig., 335 F.3d 843, 847 (9th Cir. 2003).

The theory of fraud at the core of the TAC does not support a reasonable inference of fraud, much less one that is "strong," "cogent," and "compelling." See Tellabs, 551 U.S. at 314. At most, the TAC appears to simply describe "routine corporate objectives" such as the desire to obtain new financing and develop new products, which are insufficient to support or create a strong inference of scienter. See In re Rigel Pharms., 697 F.3d at 884 ("allegations of routine corporate objectives such as the desire to obtain good financing and expand are not, without more, sufficient to allege scienter; to hold otherwise would be to support a finding of scienter for any company that seeks to enhance its business prospects").

Jackson's argument in the opposition that Fischer's alleged misstatements were so egregious that they could only have been made with intent to defraud or deliberate recklessness is without merit, and similar arguments have been repeatedly rejected by courts in this Circuit. Allegations that defendants "must have known" or "could have known" that their statements were false or misleading when made do not satisfy the PSLRA's standard for pleading scienter. See, e.g., Zucco, 552 F.3d at 998; Metzler, 540 F.3d at 1068.

As for Jackson's repeated assertion in the opposition that the judgment in the Minnesota adversary proceeding effectively proves Fischer's liability for fraud under the PSLRA, the court cannot consider the adversary proceeding judgment in deciding whether the TAC states a claim for relief, in part because the judgment was issued after the TAC was filed and thus is not referenced in the TAC.

There are no facts alleged in the TAC showing what Fischer knew or when he knew it, and nothing contemporaneous suggesting that any alleged misstatement by Fischer was knowingly false when made. In her opposition, Jackson simply repeats the conclusory allegation that all "defendants" – presumably including Fischer but not distinguishing among defendants – were "aware" that the defendant companies needed funding to survive, TAC ¶ 131(a), (d), (d), and faced significant product development challenges, TAC ¶ 87(b), (d).

Scienter must be alleged as to each defendant separately. See Apollo Grp., 774 F.3d at 607 (citing Glazer Cap. Mgmt, LP v. Magtistri, 549 F.3d 736, 743-44 (9th Cir. 2008) (adopting a theory of "collective scienter" in certain limited circumstances));[2] see also In re NVIDIA, 768 F.3d at 1063. Here, the TAC does not allege facts showing that Fischer knew that any of the alleged false statements were false, much less that he knew they were false at the time he made them.

c. Analysis

The motion to dismiss the claims of primary liability against Fischer is GRANTED. The court finds that taken together, the allegations regarding falsity and scienter in the TAC do not state a claim of primary liability as to Fischer under § 10(b) and Rule 10b-5. Moreover, the fact that TAC includes claims and defendants that are no longer in the case makes it difficult to sort out exactly what remains. Thus, the dismissal is with leave to amend, in part to afford plaintiff the opportunity state a coherent claim and to eliminate all

[2] The Ninth Circuit "may . . . impute scienter to individual defendants in some situations" – for example, when it finds that a company's public statements are so "important and dramatically false that they would create a strong inference that at least some corporate officials knew of the falsity upon publication." Id. Here, Fischer was not a "corporate official," and thus scienter cannot be imputed to him under this theory. Moreover, the TAC does not clearly allege that any of the defendant companies made false statements to plaintiff.

claims and all defendants that have been dismissed.

In addition, Jackson argues in her opposition that "a number of important events have occurred" since the filing of the TAC (in April 2013), and that those "events" support a finding of primary liability, as does Fischer's "confession" in the December 17, 2013 stipulation for judgment in the Minnesota adversary proceeding. Jackson's repeated attempts to rely on allegations that do not appear in the TAC, while reciting assurances that the TAC's deficiencies will be remedied through discovery or evidence at trial, represents the exact approach that Congress sought to stop in enacting the PSLRA, when it included the requirement that the plaintiff plead particularized facts at the outset of the case. See Tellabs, 551 U.S. at 313, 321; see also 15 U.S.C. § 78u-4(b)(3)(b).

In this motion for judgment on the pleadings, Jackson's task in opposing defendants' motion is to establish that the TAC states a claim. Thus, Jackson cannot rely on information she did not plead or reference in the TAC – including the circumstances of Fischer's "admission" which gave rise to the judgment by the Minnesota Bankruptcy Court. Moreover, the question whether Fischer's "confession," standing alone, constitutes proof of primary liability under § 10(b) and Rule 10b-5 of the 1934 Securities Exchange Act (which have specific requirements both for pleading and proof) is not before the court.

Jackson suggests that because Fischer conceded in the Minnesota adversary proceeding that he had defrauded her, there is no longer any need to satisfy the requirements for pleading a claim for securities fraud under the PSLRA (which has very specific pleading requirements). However, while there is potentially a motion to be filed regarding the "res judicata" effect of the judgment in the adversary proceeding on the claims asserted in this action, Jackson cannot simply substitute that judgment for the requirement that she state a claim under the PSLRA.

As for Jackson's repeated assertion that "expert testimony" will show some fact or prove some theory, the court notes that the issue for resolution in the present motion is whether she has stated a claim of primary liability under the PSLRA against Fischer. Whether she can or cannot establish some fact by means of expert testimony is irrelevant,

as are her claims that "discovery will show" some fact or other.

2. Claim under §§ 25401 and 25501 of the California Corporations Code

Defendants argue that the TAC fails to allege a primary violation against Fischer under § 25401 and § 25501. Section 25401 makes it unlawful

> for any person to offer to sell a security in this state or buy or offer to buy a security in this state by means of any written or oral communication which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements made, in the light of circumstances in which they were made, not misleading.

Cal. Corp. Code § 25401. Section 25501 provides a private right of action for violations of § 25401. "Any person who violates [s]ection 25401 shall be liable to the person who purchases a security from him or sells a security to him," unless the defendant proves that the plaintiff knew the true facts or that the defendant exercised reasonable care and did not know of the untruth or omissions. Cal. Corp. Code § 25501. Because § 25501 is derivative of § 25401, see Lubin v. Sybedon Corp., 688 F.Supp. 1425, 1453 (S.D. Cal. 1988), a § 25501 claim must be dismissed if there is no viable claim under § 25401. Defendants contend that the TAC fails to state a claim against Fischer under § 25401 because there are no facts pled showing that Fischer made any material misstatement, or that Jackson purchased securities from Fischer.

The second cause of action alleging violations of §§ 25401/25501 incorporates the prior allegations by reference (including all allegations relating to the § 10(b)/Rule 10b-5 cause of action against SpeciGen, Notebookz, and PeerDreams), and asserts that "[t]he false and misleading statements and the material omissions set forth above relating to the sale of securities in SpeciGen, Notebookz, [and] PeerDreams . . . were such that, if conveyed in a truthful manner, would cause a reasonable investor to decline to invest." TAC ¶¶ 134-137. The only specific mention of Fischer is in the allegation that

> [t]he defendant companies, through the named officer and director defendants, engaged defendant Fischer to promote and sell their securities, and were specifically aware, as Mr. Fischer has testified, that he was selling their securities to Jackson. As such, Fischer was their agent and sold securities to Jackson in that capacity.

TAC ¶ 138. Defendants contend that, for the reason argued in their motion to dismiss the

§ 10(b) and Rule 10b-5 claim, the TAC fails to allege facts showing that Fischer made a material misstatement regarding any of the defendant companies.

Defendants also note that §§ 25401/25501 "impose liability only on the actual seller of the security." See Apollo Capital Fund LLC v. Roth Capital Partners, LLC, 158 Cal. App. 4th 226, 253-54 (2007). They argue that Jackson has not – and cannot – allege that she purchased securities from Fischer, as opposed to the defendant companies. In support, they cite to stock purchase agreements she entered into with SpeciGen, PeerDreams, and Notebookz, copies of which are attached to declarations filed in support of defendants' motion, and as to which defendants request the court to take judicial notice.

In opposition, Jackson contends that the TAC adequately pleads a primary violation of §§ 25401/25501. She claims that the TAC is "replete with detailed itemizations of specific overt, affirmative misrepresentations." However, she provides no further explanation apart from citing the allegations in TAC ¶¶ 87(a)-(h) (Fischer's representations about SpeciGen); TAC ¶ 95(a)-(c) (reference is not clear, as ¶ 95 does not have sub-parts and does not allege representations by Fischer or anyone); and TAC ¶¶ 97(a)-(d) (Fischer's representations about "the company," which appears to be a reference to either Notebookz or iLeonardo).

Jackson asserts further that Fischer "offer[ed] to sell" her securities in each defendant company, and that he did so through "written and oral communications" that included "untrue statements of a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading" in violation of § 25401. She also contends that under § 25501, Fischer sold securities, but then asks, "[I]f Mr. Fischer did not sell them, who did?" She asserts that, apart from some later meetings with the defendants, she made all her initial and most of her subsequent purchases through Fischer. She argues that unless the defendants can explain how she purchased the securities, if not through Fischer, then the claim that she did not purchase securities from Fischer must collapse. She adds that if defendants' position is that the defendant companies sold the securities (rather than Fischer), then she should be granted leave to

"reopen the [c]ourt's dismissal with prejudice as to them based on Fischer's agency and on discovery showing direct misrepresentations made to Mrs. Jackson."

The court finds that the TAC fails to state a claim of primary liability under §§ 25401 and 25501 as to Fischer. While the TAC does allege that Fischer made some statements that were false or misleading, it does not allege that Fischer sold plaintiff the securities. Both § 25401 and § 25501 impose liability only on the actual seller or purchaser of the security. Apollo, 158 Cal. App. 4th at 253-54. Jackson now asserts that "someone" must have sold her the securities, and if not Fischer, it must have been the defendant companies. She contends that if the defendants can argue that the defendant companies sold the securities, then she "should be granted leave to reopen the Court's dismissal with prejudice as to them based on Fischer's agency and on discovery showing direct misrepresentations made to [her]."

In the March 15, 2013 order granting the motions to dismiss the SAC, the court dismissed the § 25401 claim with leave to amend, to the extent that Jackson could allege that the moving officer and director defendants (J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes) sold securities to her. She did not correct that deficiency. In the December 20, 2013 order re the motion to dismiss the TAC, the court granted the motion of the moving parties (again, J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes) to dismiss the § 25401 claim as to the officer and director defendants, on the basis that the TAC failed to allege that any of those defendants (or any particular defendant) had made any material misstatement in connection with the sale of securities. The court noted that the only misstatements that were attributed to a particular individual were attributed to Fischer "as agent for" the various companies in which he solicited investments from plaintiff, and that in addition, the TAC did not allege that any of those defendant companies sold plaintiff any securities.

It appears that Jackson is requesting that the court allow her to seek reconsideration of the prior order re the motion to dismiss the TAC. However, the court previously granted leave to amend the claim in the order re the motion to dismiss the SAC, and cautioned

Jackson that if she did not allege that the director and officer defendants made false statements in connection with the sale of securities, a subsequent dismissal would be with prejudice. There is no basis for granting leave to seek reconsideration.

3. Claim under § 25501.5 of the California Corporations Code

Defendants argue that the TAC fails to allege a claim of primary liability against Fischer under Corporations Code § 25501.5. By its terms, § 25501.5 establishes a private right of action in favor of a person who "purchases a security from" an unlicensed broker-dealer.

> A person who purchases a security from or sells a security to a broker-dealer that is required to be licensed and has not, at the time of the sale or purchase, applied for and secured from the commissioner a certificate under Part 3 (commencing with Section 25200), that is in effect at the time of the sale or purchase authorizing that broker-dealer to act in that capacity, may bring an action for rescission of the sale or purchase or, if the plaintiff or defendant no longer owns the security, for damages.

Cal. Corp. Code § 25501.5(a)(1).

The TAC alleges that Fischer was "acting in . . . behalf" of the "individual and corporate defendants . . . to sell their securities, or the securities of the companies of which they were directors[;]" and that "[t]he individual and corporate defendants knew or should have known that Fischer was an unlicensed investment advisor, and failed to disclose that fact to Jackson[.]" TAC ¶ 189. Accordingly, "[s]aid defendants were therefore engaged in the promotion of the sale of unregistered securities through Fischer." TAC ¶ 190.

In their first argument, defendants contend that while Jackson alleges that Fischer was an unlicensed broker-dealer, she does not – and cannot – assert that she purchased securities from him. They assert that the purchase agreements attached as exhibits to their request for judicial notice confirm that she purchased convertible promissory notes and preferred stock from the defendant companies – not from Fischer. As a result, they contend, plaintiff cannot allege a claim against Fischer under § 25501.5.

In their second argument, defendants assert that the § 25501.5 claim is time-barred. As the court noted in the order dismissing the SAC, the applicable statute of limitations for claims arising under § 25501.5 is either two years from the date of discovery or five years

after the violation, see Cal. Corp. Code § 25506(b); or three years, see Civil Code § 338(a) (three-year limitation period for claims created by statute. See Jackson v. Fischer, 931 F.Supp. 2d 1049, 1066 (N.D. Cal. 2013). In opposing the motion to dismiss the SAC, plaintiff appeared to concede that the applicable limitations period was two years from the date of discovery. Id.

Section 25506 begins to run "when the plaintiff discovers the facts constituting the violation or in the exercise of reasonable diligence should have discovered them." Kramas v. Security Gas & Oil Inc., 672 F.2d 766, 770-71 (9th Cir. 1982). Plaintiff alleges in the TAC that she "became concerned" about a $1 million "trading account" with Fischer "[i]n or about summer 2008," TAC ¶ 63, and that from the summer of 2008, Fischer began presenting "claims of progress to assuage her concerns about her investments," TAC ¶ 69. Defendants assert that plaintiff's own allegations confirm that a duty to inquire arose as early as the summer of 2008 – three years before plaintiff filed the initial complaint in this action.

"Generally speaking, a cause of action accrues at 'the time when the cause of action is complete with all of its elements.'" Fox v. Ethicon Endo-Surgery, Inc., 35 Cal. 4th 797, 806 (2007) (citation and quotation omitted). Where applicable, the discovery rule postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1192 (2013) (citations and quotations omitted). The discovery rule requires a plaintiff to inquire into the existence of a cause of action when he/she has access to information that would prompt a reasonable party to do so. See Fox, 35 Cal. 4th at 807-08

In order to rely on the discovery rule for delayed accrual of a cause of action, a plaintiff must specifically plead facts showing the time and manner of discovery and the inability to have made earlier discovery despite reasonable diligence. McKelvey v. Boeing North American, Inc., 74 Cal. App. 4th 151, 160 (1999); see also Fox, 35 Cal. 4th at 808. In the order dismissing the SAC (which did not seek dismissal of the claims of primary liability asserted against Fischer), the court dismissed the § 25501.5 claim as to the moving

defendants, with leave to amend to (among other things) allege facts sufficient to show when Jackson discovered the alleged violation. Jackson, 931 F.Supp. 2d at 1067.

Here, defendants contend that plaintiff has never alleged facts showing when she discovered that Fischer was an "unlicensed broker" and why she could not have discovered the violation earlier. Defendants argue that having failed to plead facts necessary to support application of the discovery rule, plaintiff cannot now maintain a claim that is time-barred.

In opposition, plaintiff asserts that the TAC alleges that she purchased securities, TAC ¶¶ 86(a)-(e) (SpeciGen); TAC ¶¶ 94(a)-(c) (Notebookz); TAC ¶¶ 103(a)-(g) (PeerDreams); that her primary contact for the sales was Fischer, TAC ¶¶ 43, 45; that in some cases she gave her check directly to Fischer, TAC ¶ 46. Plaintiff characterizes defendants' claim that she did not purchase securities from Fischer as "an argument more suited for Alice in Wonderland." According to plaintiff, the issue is simple – if she did not purchase securities from Fischer, from whom did she purchase them?

Plaintiff adds that if she did purchase the securities from Fischer, the only remaining question is whether he was acting as a broker. She asserts that under Corporations Code § 25200, a broker-dealer is one "registered under the Securities Exchange Act of 1934, and that in turn, under the Securities Exchange Act of 1934, a "broker" is defined as "any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78a(c)(4)(A).

Jackson contends that Fischer meets this definition, and thus is subject to the terms of § 25501.5 on the plain face of the statute. She claims that he acted as a broker for the defendants, as he contacted plaintiff, made the sale, and either took her check to the issuer or directed her to the location where it should be sent. She argues that "[t]here is not a hint . . . of evidence in the pleadings, motion memoranda, depositions to date or even oral argument to suggest that any person other than Fischer 'effectuated' the sale within the meaning of [the] Exchange Act." Thus, Jackson asserts, the violation of § 25501.5 is clear, as Fischer "acted as a broker, he was unlicensed, and he sold the securities."

The court finds that the TAC fails to state a claim of primary liability under § 25501.5 against Fischer. Section 25501.5 provides that a civil action for rescission or damages under that section is available only to a person who purchases a security from (or sells a security to) an unlicensed broker-dealer. Cal. Corp. Code § 25501.5(a)(1). Section 25501.5 expressly requires privity of contract as a condition to liability, and the judicially noticeable purchase agreements reflect that plaintiff purchased the alleged securities from SpeciGen, PeerDreams, and Notebookz, not from Fischer, who did not hold title to the securities.

Were the statute of limitations issue the only problem with this cause of action, the court would grant leave to amend to allow plaintiff yet another opportunity to plead specific facts showing the time and manner of discovery and the inability to have made earlier discovery despite reasonable diligence. However, Jackson has alleged no facts showing that she purchased securities from Fischer (and she appears to concede in the opposition that she did not). Section 25501.5 does not provide for liability for a broker-dealer who acted as a placement agent for the actual seller, but did not actually sell the security to the plaintiff. Because Jackson fails to allege facts sufficient to establish a primary violation of § 25501.5 as to Fischer, the court need not consider whether § 25501.5 authorizes a private right of action against secondary actors who participate in a primary violation of § 25501.5.

CONCLUSION

It is with extreme difficulty that the court has pored through the TAC, the defendants' motion, and plaintiff's opposition, in an attempt to determine which allegations that do actually appear in the TAC are sufficient to state a claim, if any. As discussed above, because this is a motion for judgment on the pleadings, the court cannot consider facts that are not alleged in the TAC.

The court finds that the motion for judgment on the pleadings as to the claims of primary liability against Fischer under § 10(b) of the 1934 Securities Exchange Act, and Rule 10b-5 promulgated thereunder, must be GRANTED, with LEAVE TO AMEND. To

maintain a claim for control-person liability under § 20(a), a plaintiff must establish a claim of primary liability. See, e.g., Zucco, 552 F.3d at 990. Thus, because Jackson has not yet managed to state a claim of primary liability against Fischer, defendants cannot state a claim for secondary liability under § 20(a) of the Exchange Act as to Siegel, J.Sabes, S.Sabes, Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse.

Based on the lack of any allegation that Fischer sold securities to plaintiff, the court finds that the motion for judgment on the pleadings as to the claims of primary liability against Fischer under California Corporations Code §§ 25401, 25501, and 25501.5 must be GRANTED. The dismissal is WITH PREJUDICE. For that reason, the motion for judgment on the pleadings as to the claims of secondary liability under Corporations Code § 25504 against Siegel, J.Sabes, S.Sabes, Campion, Kulasooriya, Fernandes, Rosen and Waterhouse is GRANTED.

The fourth amended complaint shall be filed no later than April 24, 2015. No new parties or claims may be added without a stipulation by the parties or the agreement of the court. As stated above, all claims and parties previously dismissed must be omitted from the fourth amended complaint.

IT IS SO ORDERED.

Dated: March 13, 2015

PHYLLIS J. HAMILTON
United States District Judge