

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

SUZANNE D. JACKSON,
Plaintiff,

v.

WILLIAM FISCHER, et al.,
Defendants.

Case No. 11-cv-2753-PJH

**ORDER GRANTING MOTIONS TO
DISMISS IN PART AND DENYING
THEM IN PART**

Before the court are defendants' motions to dismiss the Fourth Amended Complaint ("4thAC"). Having read the parties' papers and carefully considered their arguments and the relevant legal authority, the court hereby GRANTS the motions in part and DENIES them in part, as follows.

BACKGROUND

Plaintiff Suzanne D. Jackson, alleges that she was defrauded by William Fischer ("Fischer") and others in connection with a series of unrelated investments in defendants SpeciGen, Inc. ("SpeciGen"); PeerDreams, Inc. ("PeerDreams"); Notebookz, Inc. ("Notebookz"); iLeonardo.com, Inc. ("iLeonardo"); New Moon Girl Media, Inc. ("New Moon"); Monvia LLC ("Monvia"); and Sazani Beach Hotel ("Sazani Beach"). She asserts that Fischer induced her to invest several million dollars in these enterprises, and that she lost all the money.

Plaintiff filed the original complaint more than four years ago, in June 2011, against ten individual defendants – Fischer; Jon Sabes ("J.Sabes"); Steven Sabes ("S.Sabes"); David Goldsteen ("Goldsteen"); Marvin Siegel ("Siegel"); Brian Campion

1 (“Campion”); Lonnie Bookbinder (“Bookbinder”); Chetan Narsude (“Narsude”); Mani
2 Kulasooriya (“Kulasooriya”); and Joshua Rosen (“Rosen”) – and against Upper Orbit LLC
3 (“Upper Orbit”); SpecGen; PeerDreams; Notebookz; iLeonardo; New Moon; Monvia; and
4 Sazani Beach. On December 5, 2011, plaintiff filed an amended complaint, against the
5 same 18 defendants.

6 On February 28, 2012, plaintiff filed a notice of dismissal as to defendant
7 Goldstein. In March 2012, plaintiff requested entry of default against SpecGen,
8 PeerDreams, and iLeonardo. Default was entered as to those three defendants on
9 March 19, 2012.

10 In April 2012, Fischer filed for Chapter 7 bankruptcy protection in the District of
11 Minnesota, asserting that he had \$12 million in liabilities, and listing plaintiff as the major
12 creditor. On April 24, 2012, Fischer and Upper Orbit filed a notice of filing of bankruptcy
13 petition, which triggered an automatic stay in this action as to Fischer.

14 On June 15, 2012, pursuant to stipulation, plaintiff filed a second amended
15 complaint (“SAC”) in the present action, against 20 defendants – Fischer; J. Sabes; S.
16 Sabes; Siegel; Campion; Bookbinder; Kulasooriya; Fernandes; Rosen; Steve
17 Waterhouse (“Waterhouse”); Jean Paul a/k/a “Buzzy” Lamere (“Lamere”); SpecGen;
18 PeerDreams; Notebookz; iLeonardo; New Moon; Monvia; CII Ltd. (“CII”); Sazani Beach;
19 and Upper Orbit.

20 J. Sabes, S.Sabes, Siegel, and Campion were allegedly officers and/or directors of
21 SpecGen; Bookbinder was allegedly the CEO of SpecGen; Kulasooriya was allegedly a
22 director of PeerDreams and New Moon; Fernandes was allegedly a director of Monvia
23 and a director of PeerDreams and New Moon; Rosen was allegedly the CEO and a
24 director of Notebookz and iLeonardo; Waterhouse was allegedly a director of Notebookz;
25 Lamere was allegedly the president of a non-party, Toppost, and a “consultant” to
26 SpecGen; and Upper Orbit was allegedly a “corporate vehicle” used by Fischer as a
27 “broker-dealer” for New Moon, non-party Toppost, SpecGen, and PeerDreams.

28 The SAC asserted 11 causes of action – (1) a claim for accounting (against all

1 defendants); (2) violation of § 10(b) of the Securities Exchange Act of 1934 ("Exchange
2 Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder (against all
3 defendants); (3) violation of California Corporations Code § 25401 and § 25501 (against
4 all defendants); (4) violation of California Corporations Code § 25504 (against all
5 defendants); (5) breach of fiduciary duty (against J. Sabes, S. Sabes, Siegel, Campion,
6 Kulasooriya, Fernandes, Waterhouse, and "the directors of the other corporate
7 defendants"); (6) violation of California Corporations Code § 25230 (against Fischer
8 only); (7) declaratory judgment of breach of Investment Advisors Act of 1940 (against
9 Fischer only); (8) negligent misrepresentation (against all individual defendants); (9)
10 violation of California Corporations Code § 25501.5 (against all defendants); (10)
11 violation of § 20(1) of the 1934 Securities Exchange Act, 15 U.S.C. § 78t (against all
12 director and officer defendants); and (11) common law misrepresentation (against all
13 defendants).

14 On July 17, 2012, plaintiff filed an adversary proceeding in the District of
15 Minnesota Bankruptcy Court, challenging the dischargeability of Fisher's debt. On July
16 19, 2012, the Bankruptcy Court issued an order discharging Fischer. The adversary
17 proceeding was eventually set for a December 9, 2013 trial.

18 Meanwhile, default was entered against Upper Orbit in this case after it failed to
19 appear by counsel (having been ordered to do so). Plaintiff filed a motion for default
20 judgment, but that motion was denied on January 2, 2013, without prejudice to refile
21 once the claims against Fischer have been resolved.

22 Campion, Rosen, and Notebookz filed an answer to the SAC. J.Sabes, S.Sabes,
23 Siegel, Kulasooriya, Monvia, New Moon, and Fernandes filed motions to dismiss the
24 SAC. On March 15, 2013, the court issued an order granting the motions. The § 10(b)
25 and Rule 10b-5 claims against J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes
26 were dismissed with prejudice, and the § 10(b) and Rule 10b-5 claims against Monvia
27 and New Moon were dismissed with leave to amend. The § 20(a) claims, and the claims
28 for breach of fiduciary duty, violation of the California Corporations Code, common law

1 fraud, negligent misrepresentation, and accounting were dismissed with leave to amend.

2 On April 25, 2013, plaintiff filed a third amended complaint ("TAC"), against the
3 same 20 defendants as in the SAC, asserting 11 causes of action – (1) a claim under
4 § 10(b) and Rule 10b-5 (against Fischer, Campion, Siegel, Rosen, Kulasooriya,
5 SpeciGen, PeerDreams, Notebookz, New Moon, and non-party Toppost); (2) a claim
6 under Corporations Code §§ 25401 and 25501 (SpeciGen, Notebookz, Ileonardo,
7 PeerDreams, New Moon, non-party Toppost, Fischer, Siegel, Campion, Rosen, and
8 Kulasooriya); (3) a claim under § 20(a) (against J. Sabes, S. Sabes, Siegel, Campion,
9 Fischer, Rosen, Waterhouse, Kulasooriya, Fernandes, non-party Nancy Gruver
10 ("Gruver"), and Lamere); (4) a claim under Corporations Code § 25504 (against J. Sabes,
11 S. Sabes, Siegel, Campion, Bookbinder, Rosen, Waterhouse, Fernandes, Kulasooriya,
12 non-party Gruver, and Lamere); (5) a claim of breach of fiduciary duty (against Fischer, J.
13 Sabes, S. Sabes, Siegel, Campion, Kulasooriya, Fernandes, Rosen, Waterhouse, and
14 "directors of the other defendant companies whose names are not currently known");
15 (6) a claim under Corporations Code §§ 25230, 25235 (against Fischer only); (7) a claim
16 for declaratory judgment of breach of Investment Advisors Act of 1940 (against Fischer
17 only); (8) a claim of negligent misrepresentation (against Fischer, J. Sabes, S. Sabes,
18 Siegel, Campion, Rosen, and Kulasooriya); (9) a claim under Corporations Code
19 § 25501.5 (against J. Sabes, S. Sabes, Siegel, Campion, Rosen, Fernandes,
20 Kulasooriya, Waterhouse, and non-party Gruver); (10) a claim of common law
21 misrepresentation (against "all defendants" or alternatively, against "Fischer and Upper
22 Orbit as agents for the other corporate, officer and director defendants"); and (11) a claim
23 of respondeat superior (against Fischer, and possibly against J. Sabes, S. Sabes, Siegel,
24 Campion, Bookbinder, Rosen, Waterhouse, Fernandes, Kulasooriya, non-party Gruver,
25 and Lamere).

26 In May 2013, Campion, Notebookz, Rosen, and Waterhouse filed answers to the
27 TAC, and New Moon, Kulasooriya, Monvia, and Fernandes filed motions to dismiss the
28 claims asserted against them in the TAC, and to strike. In June 2013, J.Sabes, S.Sabes,

1 and Siegel filed a motion to dismiss the claims asserted against them.

2 On December 18, 2013, plaintiff filed a notice of entry of stipulated judgment in the
3 adversary proceeding pending in the Bankruptcy Court in the District of Minnesota.
4 Fischer stipulated that he is indebted to plaintiff in the amount of \$8,250,000, arising from
5 investments solicited from plaintiff by Fischer on behalf of SpeciGen, Notebookz,
6 PeerDreams, CII, New Moon, Sazani Beach, and Toppost; and further stipulated that
7 such debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) (money obtained by “false
8 pretenses, a false representation, or actual fraud”).

9 On December 20, 2013, the court issued an order granting the motions to dismiss
10 in part and denying them in part. The § 10(b) and Rule 10b-5 claims, and the claims
11 under Corporations Code §§ 25401 and 25501, asserted against J.Sabes, S.Sabes,
12 Siegel, Kulasooriya, Monvia, and New Moon were dismissed with prejudice.¹ The
13 motions to dismiss the “control persons” claims under § 20 and Corporations Code
14 § 25504 and the “secondary liability” claim under Corporations Code § 25501.5, against
15 J.Sabes, S.Sabes, Siegel, Kulasooriya, and Fernandes, were denied without prejudice to
16 raising the arguments in a future motion once the stay had been lifted as to Fischer. The
17 claims of breach of fiduciary duty, negligent misrepresentation, and common law
18 misrepresentation asserted against J.Sabes, S.Sabes, Siegel, Kulasooriya, and
19 Fernandes were dismissed with prejudice. The Corporations Code § 25501.5 claim
20 asserted against J.Sabes, S.Sabes, Siegel, Kulasooriya, Fernandes, Monvia, and New
21 Moon was dismissed with prejudice, to the extent it alleged a direct claim for relief.

22 In addition, the allegations against Toppost and Gruver were ordered stricken on
23 the basis that no summons had been issued for either and neither was identified as a
24 defendant in the “Parties” section of the TAC. The court also dismissed Lamere from the
25 case for failure to serve.

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¹ The § 10(b) and Rule 10b-5 claims against J.Sabes, S.Sabes, Siegel, Kulasooriya, and
28 Fernandes had previously been dismissed with prejudice, but the claims were realleged
in the TAC (except as to Fernandes).

1 On April 3, 2014, the court held a case management conference. Following
2 extensive discussion with counsel, the court ordered that the case would proceed as
3 follows: (1) defendants would file a consolidated motion for judgment on the pleadings
4 regarding whether the TAC stated a claim for the primary liability of Fischer as to the
5 remaining claims; (2) the parties would file motions on the issue preclusive effect of the
6 bankruptcy adjudication with regard to Fischer; (3) the parties would file motions for
7 summary judgment as to the primary liability of Fischer; (4) the parties would file motions
8 for summary judgment as to the secondary liability of the other defendants.

9 Eight defendants – J.Sabes, S.Sabes, Siegel, Campion, Kulasooriya, Fernandes,
10 Rosen, and Waterhouse – subsequently moved for judgment on the pleadings as to the
11 § 20(a) and Corporations Code § 25504 “control person” claims and the Corporations
12 Code § 25501.5 “secondary liability” claim alleged in the TAC. They argued that the TAC
13 did not allege facts sufficient to state a claim of primary liability against Fischer with
14 regard to the transactions involving SpeciGen, PeerDreams, or Notebookz, and that there
15 could thus be no viable claims of “control person” or “secondary” liability under either
16 federal or state law.

17 On March 13, 2015, the court issued an order dismissing the claims of primary
18 liability against Fischer under § 10(b) and Rule 10b-5, with leave to amend. The court
19 found no claim of secondary liability could be stated against J.Sabes, S.Sabes, Siegel,
20 Campion, Kulasooriya, Fernandes, Rosen, and Waterhouse, because plaintiff had failed
21 to state a viable claim of primary liability against Fischer. The court dismissed the claims
22 against Fischer under Corporations Code § 25401, § 25501, and § 15501.5, with
23 prejudice, and dismissed the claims of secondary liability under Corporations Code
24 § 25504 against J.Sabes, S.Sabes, Siegel, Campion Kulasooriya, Fernandes, Rosen,
25 and Waterhouse.

26 The court ordered plaintiff to file a fourth amended complaint because there were
27 so many parties and claims in the TAC that had been dismissed that it was becoming
28 difficult to discern from the complaint what remained in the case. Plaintiff filed the 4thAC

on April 24, 2015.

In the "Introduction" to the 4thAC, plaintiff lists Fischer, J.Sabes, S. Sabes, Siegel, Champion, and Kulasooriya as defendants. 4thAC ¶ 1. Under "Parties," plaintiff again lists Fischer, J.Sabes, S.Sabes, Siegel, and Champion as defendants, and also lists SpeciGen, PeerDreams, Notebookz, Bookbinder, New Moon (previously dismissed), Fernandes, Monvia (previously dismissed), Waterhouse, Upper Orbit, iLeonardo, and Sazani Beach. 4thAC ¶¶ 6, 9-22.²

Plaintiff asserts eight causes of action in the 4thAC – (1) A claim under § 10(b) and Rule 10b-5 (against "all defendants," but seeking "a judgment against defendants Fischer, Champion, Siegel, Rosen, Fernandes, Waterhouse, SpeciGen, PeerDreams, and Notebookz"); (2) a claim of control person liability under § 20(a) (against J.Sabes, S.Sabes, Siegel, Champion, Rosen, Waterhouse, Kulasooriya, and Fernandes; (3) a claim of breach of fiduciary duty (against Fischer, Champion, Rosen, and Waterhouse); (4) a claim under Corporations Code §§ 25230, et seq. (against Fischer); (5) a claim of breach of the Investment Advisors Act of 1940, 15 U.S.C. §§ 80b-1, et seq. (against Fischer); (6) a claim of negligent misrepresentation (against Fischer, Champion, and Rosen); (7) a claim under Corporations Code § 25501.5 (against Fischer, for primary liability, and against J.Sabes, S.Sabes, Siegel, Champion, Rosen, Fernandes, Kulasooriya, and Waterhouse, for secondary liability; and (8) a claim of common law misrepresentation (against Fischer and Upper Orbit).

² Neither Sazani Beach nor Bookbinder have appeared. Both are listed as defendants in the "Parties" section of the 4thAC. However, plaintiff alleges no facts as to Sazani Beach, and it is not mentioned in any of the causes of action. Accordingly, the court concludes that plaintiff has abandoned any claim against Sazani Beach.

As for Bookbinder, plaintiff alleges that he was the Chief Executive Officer of SpeciGen, but alleges no other facts and does not mention him in any cause of action, apart from a conclusory assertion in the second (§ 20) cause of action that he, J.Sabes, S.Sabes, Siegel, Champion, Kulasooriya, Fernandes, Rosen, and Waterhouse were "officers and directors of their respective companies, prepared the information and materials utilized by Fischer in committing these frauds, and knew that Fischer was disseminating that false information to [plaintiff]." 4thAC ¶ 134. The court concludes from this failure to plead any facts that plaintiff has abandoned any claim against Bookbinder.

1 J.Sabes, S.Sabes, Siegel, Kulasooriya, Fernandes, Campion, Rosen, and
2 Waterhouse have now filed motions to strike; and J.Sabes, S.Sabes, Siegel, Kulasooriya,
3 Fernandes, Campion Rosen, Waterhouse, and Notebookz have filed motions to dismiss.

4 In the motions to strike, the defendants argue that certain claims asserted against
5 them in the 4thAC were previously dismissed with prejudice by the court, and they seek
6 an order striking those claims. In the motions to dismiss, each group of defendants
7 argues that the court previously dismissed the § 10(b) claim of primary liability against
8 Fischer, with leave to amend; that the 4thAC does not correct the prior deficiencies
9 identified by the court; that the § 10(b) claims should therefore be dismissed with
10 prejudice as to Fischer; and that the § 20 claims of control-person liability should be
11 dismissed because a § 20 claim can proceed only if there is a viable claim of primary
12 liability.

13 In response, plaintiff concedes that the 4thAC includes some claims that were
14 previously dismissed with prejudice, but as to the § 10(b) claim against Fischer, asserts
15 that this claim has already been "decided" by virtue of Fischer's admission in the
16 adversary proceeding that he defrauded plaintiff in connection with her investments in
17 SpeciGen, PeerDreams, and Notebookz/iLeonardo. That is, plaintiff contends that the
18 judgment in the adversary proceeding is res judicata as to any claim she has asserted
19 against Fischer for primary liability here, and that there is consequently nothing to litigate
20 as to Fischer.

21 DISCUSSION

22 A. Motions to Strike

23 1. Legal Standard

24 Federal Rule of Civil Procedure 12(f) provides that the court "may order stricken
25 from any pleading any insufficient defense or any redundant, immaterial, impertinent, or
26 scandalous matter." Fed. R. Civ. P. 12(f). The function of a 12(f) motion to strike is to
27 avoid the expenditure of time and money that must arise from litigating spurious issues
28 by dispensing with those issues prior to trial" Whittlestone, Inc. v. Handi-Craft Co.,

1 618 F.3d 970, 973 (9th Cir. 2010) (quotation and citation omitted). Motions to strike are
2 not favored and “should not be granted unless it is clear that the matter to be stricken
3 could have no possible bearing on the subject matter of the litigation.” Colaprico v. Sun
4 Microsystem, Inc., 758 F.Supp. 1335, 1339 (N.D. Cal. 1991).

5 In considering a motion to strike under Rule 12(f), the court must determine
6 whether the matter the moving party seeks to have stricken is (1) an insufficient defense;
7 (2) redundant; (3) immaterial; (4) impertinent; or (5) scandalous. Whittlestone, 618 F.3d
8 at 973-74. Matter is “immaterial” if it “has no essential or important relationship to the
9 [plaintiff’s] claim for relief,” and it is “impertinent” if it “do[es] not pertain, and [is] not
10 necessary, to the issues in question.” Id. at 974.

11 When a court considers a motion to strike, it “must view the pleading in a light
12 most favorable to the pleading party.” In re 2TheMart.com, Inc. Sec Lit., 114 F Supp. 2d
13 955, 965 (C.D. Cal. 2000). A court must deny the motion to strike if there is any doubt
14 whether the allegations in the pleadings might be relevant in the action. Id.

15 2. Defendants' Motions

16 J.Sabes, S.Sabes, and Siegel seek an order striking the claims asserted against
17 them in the first (§ 10(b)), seventh (§ 25501.5), and eighth (misrepresentation) causes of
18 action, on the basis that the court previously dismissed each of those claims with
19 prejudice as to these defendants.

20 Kulasooriya and Fernandes seek an order striking the claims asserted against
21 them in the first (§ 10(b)), seventh (§ 25501.5) and eighth (misrepresentation) causes of
22 action, on the basis that the court previously dismissed those causes of action with
23 prejudice as to these defendants.

24 Campion, Rosen, and Waterhouse seek an order striking the claims asserted
25 against them in the seventh (§ 25501.5) cause of action, on the basis that the court
26 previously dismissed the claims of primary liability against Fischer under §§ 25401,
27 25501, and 25501.5, and for that reason also effectively dismissed the claims of
28 secondary liability against these defendants in § 25501.5.

1 In her opposition, plaintiff concedes that she should not have included the first
2 (§ 10(b)) and eighth (misrepresentation) claims against J.Sabes, S.Sabes, Siegel,
3 Fernandes, and Kulasooriya, because those claims were previously dismissed with
4 prejudice. (Campion previously filed an answer but did not move to dismiss any of the
5 claims asserted against him).

6 As for the § 25501.5 claim, however, plaintiff's primary position is that the
7 judgment in the adversary proceeding is res judicata against all claims of primary liability
8 against Fischer. She focuses on the claim of primary liability under § 10(b), but asserts
9 that adversary judgment is res judicata as to any fraud-related claim against Fischer. Her
10 only mention of § 25501.5 is in a footnote where she states that she "incorporate[s] by
11 reference the arguments [in her opposition to the motion to dismiss the TAC] relating to
12 liability under Cal. Corp. Code § 25501.5," and states, "As we understand the March
13 [2015] Order, those counts remain as to all individual defendants except Mr. Fischer."
14 Based on this, it appears that plaintiff believes the § 25501.5 claim is still in the case as
15 to the director/officer defendants.

16 In reply, defendants note that the December 2013 order dismissed the § 25501.5
17 claim against the individual defendants to the extent it asserted a claim of primary liability,
18 and denied the motion to dismiss to the extent the claim was based on secondary liability,
19 dependent on plaintiff establishing a claim of primary liability against Fischer; and that the
20 March 2015 order dismissed the § 25501.5 claim of primary liability against Fischer, with
21 prejudice, and stated that the court need not consider whether any claim of secondary
22 liability was stated against the D&O defendants. Thus, they assert, the court should
23 strike the § 25501.5 claim asserted against them.

24 The motion is GRANTED as to the first and eighth causes of action, as plaintiff
25 concedes she should have deleted those allegations from the 4thAC. The motion is
26 GRANTED as to the seventh (§ 25501.5) cause of action because plaintiff cannot state a
27 claim of secondary liability against these defendants.

28 By its terms, § 25501.5 establishes a private right of action in favor of a person

1 who "purchases a security from" an unlicensed broker-dealer.

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

9 Cal. Corp. Code § 25501.5(a)(1). An issue previously raised in this case is whether it is
10 possible to state a claim of secondary liability under this statute. There is no clear
11 authority either way, but the court previously allowed the secondary liability claim to
12 remain in the case, dependent on a finding of primary liability against Fischer.

13 The TAC alleged the § 25501.5 claim against J.Sabes, S.Sabes, Siegel, Campion,
14 Rosen, Fernandes, Kulasooriya, Waterhouse, and non-party Gruver, asserting that those
15 defendants were "secondarily liable" for Fischer's sale of securities to plaintiff without
16 being a duly registered broker/dealer.

17 As explained above, Campion, Rosen, and Waterhouse filed answers to the TAC,
18 and the remaining defendants filed motions to dismiss. J.Sabes, S.Sabes, and Siegel
19 argued that the § 25501.5 claim should be dismissed because the TAC did not allege that
20 any of them participated in any transaction involving the sale of securities, or otherwise
21 acted as a broker-dealer in the State of California, and because the claim was time-
22 barred. Kulasooriya/Monvia argued that the claim must be dismissed because it was
23 time-barred, and because plaintiff alleged no facts showing that Monvia sold securities to
24 her or that she purchased Monvia securities. New Moon (Gruver's company) argued that
25 there were no facts alleged showing that plaintiff "purchased" or "sold" a security from or
26 to an unlicensed broker-dealer, and that plaintiff had alleged that she invested money in
27 Upper Orbit, which in turn purchased securities in its name from New Moon. Fernandes
28 argued that the claim must be dismissed as to him because he never sold any securities
to plaintiff (and plaintiff did not allege that he had).

The court granted the motion in part and denied it in part. The court granted the
motion to the extent the claim asserted a direct claim for relief as to the moving individual

1 defendants, because the TAC did not allege that plaintiff purchased securities from any of
2 them. As for whether the moving defendants could be secondarily liable, the court found
3 that in the absence of a viable claim of primary liability (as to Fischer), it was not possible
4 to determine whether plaintiff could proceed against the individual defendants on that
5 basis. The court also added that the TAC still did not allege facts clearly showing when
6 plaintiff discovered the alleged violation, and that the claim might be time barred (but that
7 this was probably a question of fact).

8 A number of months later, J.Sabes, S.Sabes, Siegel, Campion, Kulasooriya,
9 Fernandes, Rosen, and Waterhouse moved for judgment on the pleadings (still on the
10 TAC) as to three causes of action including the claim under § 25501.5, arguing that none
11 of the three stated a claim of primary liability against Fischer (and then added that the
12 TAC therefore did not state a claim of secondary liability against them). They argued that
13 while plaintiff alleged that Fischer was an unlicensed broker-dealer, she did not and could
14 not allege that she purchased securities from him, as the purchase agreements attached
15 as exhibits to their RJN confirmed that she purchased convertible promissory notes and
16 preferred stock from the defendant companies, not from Fischer. They also asserted that
17 the claim was time-barred.

18 The court found that the TAC failed to state a claim of primary liability against
19 Fischer, as § 25501.5 expressly requires privity of contract as a condition to liability, and
20 the judicially noticeable purchase agreements reflected that plaintiff purchased the
21 alleged securities from SpeciGen, PeerDreams, and Notebookz, not from Fischer, who
22 did not hold title to the securities.

23 The court also indicated that were the statute of limitations the only problem with
24 this cause of action, leave to amend would have been granted, but that because plaintiff
25 alleged no facts showing that she purchased securities from Fischer (and appeared to
26 concede in the opposition that she had not), she had failed to state a claim for primary
27 liability against Fischer, and thus the court need not consider whether § 25501.5
28 authorizes a claim of secondary liability against actors who "participated in" the primary

actor's violation. The court dismissed the § 25501.5 claim against Fischer with prejudice.

The gist of the March 2015 order was that there is no claim of primary liability as to Fischer, and that consequently there can be no secondary liability, even if permissible under the statute, and even if not time-barred. (Moreover, the December 2013 order clearly stated that plaintiff could proceed with a claim of secondary liability claim only to the extent she could allege a claim of primary liability against Fischer.) The court agrees with defendants that the motion to strike this claim should be granted as to all defendants.

B. Motions to Dismiss

1. Legal Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is generally limited to the contents of the complaint, although the court can also consider a document on which the complaint relies if the document is central to the claims asserted in the complaint, and no party questions the authenticity of the document. See Sanders v. Brown, 504 F.3d 903, 910 (9th Cir. 2007).

To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2)

A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Somers v. Apple, Inc., 729 F.3d 953, 959 (9th Cir. 2013). While the court is to accept as true all the factual allegations in the complaint, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009); see also In re Gilead Scis. Sec. Litig., 536 F.3d 1049, 1055 (9th Cir. 2008).

The allegations in the complaint "must be enough to raise a right to relief above the speculative level[.]" and a motion to dismiss should be granted if the complaint does not proffer enough facts to state a claim for relief that is plausible on its face. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 558-59 (2007) (citations and quotations 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." Iqbal, 556 U.S. at 678 (citation omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’" Id. at 679. Dismissal is generally without prejudice, unless it is clear the complaint cannot be saved by any amendment. Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

2. Defendants' Motions

The SpeciGen defendants (J.Sabes, S.Sabes, Siegel) make three main arguments in their motion. First, they assert that the § 20(a) claim should be dismissed because the 4thAC still fails to state a claim of primary liability against Fischer. They contend that the allegations in the 4thAC are substantially similar to those in the TAC, and that plaintiff still has not alleged any actionable misstatement by Fischer, or facts sufficient to raise a strong inference that Fischer acted with scienter. They contend that for the same reasons that the court previously dismissed this claim against Fischer, it should again dismiss the claim, but this time with prejudice.

Second, the SpeciGen defendants contend that the 4thAC does not adequately allege a primary violation against Fischer based on the stipulated judgment in the adversary proceeding. They argue that plaintiff has simply recited the fact of the stipulated judgment, and assert that such recitation does not cure the pleading deficiencies identified by the court in the TAC.

Third, the SpeciGen defendants argue that plaintiff does not (and cannot) adequately allege collateral estoppel (issue preclusion) against the SpeciGen defendants based on the stipulated judgment. They assert that collateral estoppel arises when a

1 plaintiff seeks to estop a defendant from relitigating an issue which the defendant had
2 previously litigated and lost.

3 Collateral estoppel (or issue preclusion) is appropriate only where

4 (1) there was a full and fair opportunity to litigate the identical issue in the
5 prior action; (2) the issue was actually litigated in the prior action; (3) the
6 issue was decided in a final judgment; and (4) the party against whom the
issue preclusion is asserted was a party in privity with a party to the prior
action.

7 Syverson v. International Bus. Machs. Corp., 472 F.3d 1072, 1078 (9th Cir. 2006).

8 Here, the SpecGen defendants contend, the issues are not "identical" and the
9 issues of liability of SpecGen defendants were not actually litigated in the adversary
10 proceeding or decided in a final judgment. Nor were the SpecGen defendants parties or
11 in privity with a party to the adversary proceeding. Moreover, they assert, Fischer
12 admitted that his claims were for money obtained by "false pretenses, a false
13 representation, or actual fraud" – not that he committed fraud within the meaning of the
14 1934 Securities Exchange Act.

15 Kulasooriya and Fernandes join in the arguments made by the SpecGen
16 defendants, both as to the claims under the 1934 Act, and as to the argument that the
17 judgment in the adversary proceeding is res judicata as to the claims or issues asserted
18 here.

19 Kulasooriya and Fernandes make three additional arguments in their motion.
20 First, they assert that the 4thAC does not state a claim of primary liability under § 10(b)
21 as to Fischer. They argue that the 4thAC does not allege any actionable misstatement
22 by Fischer with regard to PeerDreams or any facts showing that Fischer owed her a duty
23 to disclose; and that the 4thAC fails to allege facts supporting a strong inference that
24 Fischer acted with scienter.

25 Second, they argue that issue preclusion does not establish a primary violation by
26 Fischer, as stipulated or consent judgments are not given issue preclusive effect. See
27 Arizona v. California, 530 U.S. 392, 414 (2000) (settlement may have claim-preclusive
28 effect, but "settlements ordinarily occasion no issue preclusion (sometimes called

1 collateral estoppel) unless it is clear . . . that the parties intend their agreement to have
2 such an effect") (citing 18 Wright & Miller, Fed. Practice & Procedure § 4443 (consent
3 agreements are intended to preclude further litigation on the claim presented but not as
4 to issues presented" and consent judgments thus "ordinarily support claim preclusion but
5 not issue preclusion"). Defendants also note that the judgment signed by the bankruptcy
6 judge contains no findings of fact regarding any purported fraud, and assert that the
7 judgment cannot be used to establish a primary violation by Fischer because the "actually
8 litigated" requirement for issue preclusion has not been satisfied.

9 Third, they contend that plaintiff has not established a § 20 claim of secondary
10 liability against them, as there is no viable claim of primary liability, and in addition, the
11 4thAC does not plead facts showing that Kulasooriya and Fernandes exercised "actual
12 power or control" over the primary violator. See Howard v. Everex Sys., 228 F.3d 1057,
13 1065 (9th Cir. 2000)).

14 Campion, Rosen, Waterhouse, and Notebookz make four main arguments in
15 support of their motion to dismiss. First, they contend that the causes of action under
16 the Exchange Act are incurably defective. They assert that the 4thAC does not properly
17 allege that plaintiff relied on statements made by Rosen or Fischer relating to Notebookz/
18 iLeonardo – in particular, the alleged false statements contained in the documentation for
19 the "convertible promissory notes" that plaintiff allegedly purchased in February and April
20 2007; the alleged false statements made by Fischer and Rosen to the effect that they had
21 given plaintiff the opportunity to review all the terms and conditions of the "securities"
22 offering; and the alleged false statements in the "Investor's Rights Agreement" she claims
23 she received when Rosen converted her promissory notes to preferred stock, 4thAC
24 ¶¶ 100-101.

25 Defendants argue further that the 4thAC does not properly allege any false
26 statement by Fischer or by Campion relating to SpeciGen (and they adopt the arguments
27 made by the SpeciGen defendants in their motion), noting that plaintiff previously
28 admitted that Fischer was the only SpeciGen-related speaker). Defendants also contend

1 that the 4thAC does not properly allege any statement by Rosen or Fischer relating to
2 Notebookz/iLeonardo, and moreover, that (as the court pointed out in the March 2015
3 order) plaintiff does not distinguish between Notebookz and iLeonardo, which are alleged
4 to be separate corporate entities. They argue further that the 4thAC does not allege any
5 statement by Waterhouse, only that he was a director of Notebookz and that Fischer
6 used Notebookz materials purportedly prepared by the moving defendants. Nor, they
7 contend, does the 4thAC allege any false statement by Notebookz.

8 In addition, defendants argue that the 4thAC fails to identify any affirmative
9 statement that was made misleading by virtue of a supposed omission with regard to
10 Notebookz, Rosen, or Waterhouse. They assert that in order to prevail on a theory of
11 omission of material fact, plaintiff must allege that defendants had a duty to disclose the
12 allegedly omitted information. Here, they assert, plaintiff fails to allege any duty to
13 disclose.

14 Defendants argue further that the 4thAC does not adequately allege scienter as to
15 any of the moving defendants. They note that notwithstanding the court's prior
16 instructions as to amending the complaint, plaintiff has again failed to allege scienter as
17 to any defendant and has not pled facts showing that statements attributed to them were
18 false or that they knew they were false at the time they were made.

19 Defendants contend that the allegations that "each of the defendants" was "aware"
20 that the defendant companies needed funding to survive, and faced significant product
21 development challenges, are generic allegations that could be applied to any start-up
22 company. They assert that in essence, plaintiff has alleged only that Rosen and
23 Waterhouse were the two directors who were most involved in the company, and that
24 Campion was a founder, director, and vice-president. They argue that these allegations
25 do not provide a sufficient basis upon which to premise a strong inference of scienter
26 (particularly given that they are not directed at particular defendants, but simply refer to
27 "defendants").

28 For related reasons, defendants assert that the 4thAC does not state a claim for

1 control person liability against Campion, Rosen, or Waterhouse, as there is no adequate
2 allegation of primary liability against Fischer, and in any event, there are no facts alleged
3 that would show that Fischer had any role at all in the operation of Notebookz or
4 iLeonardo.

5 In their second main argument, defendants contend that the common law claims
6 should be dismissed. They argue that the breach of fiduciary duty claims against Rosen,
7 Waterhouse, and Campion should be dismissed because the claim was not brought as a
8 derivative action, and because it was not pled in conformance with Rule 9(b). They
9 contend that the negligent misrepresentation and common law misrepresentation claims
10 should be dismissed with prejudice, because the claims against Fischer and Upper Orbit
11 are not pled with particularity and because plaintiff has not alleged any basis for "agent"
12 liability as to the moving defendants.

13 In their third main argument, defendants assert that the § 25501.5 claim should be
14 dismissed because the court has dismissed the claim against Fischer, with prejudice, and
15 the 4thAC does not allege any basis for making the moving defendants primarily or
16 secondarily liable.

17 In the fourth main argument, defendants contend that plaintiff's attempts to "rely
18 on" the judgment in the adversary proceeding are unavailing. They incorporate by
19 reference the arguments made by J.Sabes, S.Sabes, and Siegel (that the stipulated
20 judgment cannot save defective allegations). They also assert that the "issues" were not
21 actually litigated in the Minnesota bankruptcy, and that none of the moving defendants
22 were in privity with the plaintiff in the adversary proceeding.

23 In opposition, plaintiff asserts that "the issue" of primary liability is the main issue
24 to be decided in this case, but that "the issue" of primary liability against Fischer "has
25 been settled." She claims, "It's over[,]" and there is "nothing further to litigate" between
26 herself and Fischer "on any issue and in any court," because Fischer has admitted that
27 he defrauded her in connection with the sale of securities in the defendant companies.
28 She contends that the first (§ 10(b)) cause of action against Fischer has been "settled,"

1 as have the third (breach of fiduciary duty), fourth (Cal. Investment Advisors Code), fifth
2 (IAA), sixth (negligent misrepresentation), and eighth (common law misrepresentation)
3 causes of action.

4 Plaintiff makes five main arguments. First, she contends that defendants are
5 barred from challenging the § 10(b) primary liability claims against Fischer under the
6 doctrines of collateral estoppel and res judicata. She asserts that "the issues" of material
7 misrepresentations and omissions in the sale of the SpeciGen, Notebookz, and
8 PeerDreams securities were litigated in the adversary proceeding. She claims that
9 Fisher's Chapter 7 petition was "directed exclusively at his liability exposure" in this case,
10 and that "[t]he thrust of discovery was Fischer's liability here." For that reason, she
11 argues, all the documents produced by Fischer in the adversary proceeding related to the
12 claims and issues in this case, and the sole focus of the adversary proceeding was the
13 present litigation.

14 Plaintiff contends that the judgment in the adversary proceeding is also res
15 judicata as to all primary liability claims against Fischer in this action. She claims that
16 because of res judicata, he cannot relitigate "the issue" of whether or not he defrauded
17 her in the sale of securities in the defendant companies. She argues that all three
18 elements of claim preclusion are present here, as (1) the parties (she and Fischer) are
19 identical or in privity; (2) there was a final judgment on the merits (the judgment in the
20 adversary proceeding); and (3) there is an "identity of claims" because the two suits arise
21 out of the same transactional nucleus of facts (described in adversary complaint as "a
22 series of loans and investments solicited from and sold to plaintiff through defendant
23 William Fischer").

24 As to the third element – identity of claims – plaintiff asserts that the settlement in
25 the adversary proceeding "moots the need to consider the 10(b) factors," that it is
26 irrelevant whether the elements of the two claims are the same, and that the court was
27 wrong when it stated in the March 2015 Order that plaintiff "cannot simply substitute [the
28 adversary judgment] for the requirement that she state a claim under the PSLRA."

1 She also contends that regardless of res judicata, the case between herself and Fischer
2 is over, because they settled the adversary proceeding.

3 Second, in a related argument, she asserts that the judgment in the adversary
4 proceeding creates collateral estoppel as to "the facts and issues" underlying the primary
5 claims against Fischer in this action. She argues that she and Fischer had a full and fair
6 opportunity to litigate over the 18 months of the adversary proceeding; that she and
7 Fischer are parties in both actions; and that Fischer lost in the adversary proceeding
8 when he failed to obtain a discharge of his liability exposure in this case (per the
9 adversary judgment). She does not, however, clearly identify the "facts and issues" she
10 believes were litigated and as to which collateral estoppel applies.

11 Third, plaintiff argues that even if the court declines to apply res judicata and
12 collateral estoppel, she has "proffered abundant pleadings to comply with the elements of
13 an Exchange Act 10(b) violation as to all defendants." In a detailed recitation, she
14 repeats the allegations set forth in the 4thAC as to Fischer's representations (and alleged
15 omissions) regarding SpeciGen, PeerDreams, and Notebookz in connection with the
16 § 10(b) claims. (She also asserts that the alleged misrepresentations were made by
17 Fischer "along with other officers and directors who personally met with her.")

18 Fourth, plaintiff asserts that scienter is alleged as to "all defendants." She claims
19 that it is not proper for defendants to be arguing about scienter eight months after Fischer
20 admitted in the adversary proceeding that he defrauded her, and eight months after the
21 bankruptcy court "entered a judgment against [Fischer] for fraud." She seems to be
22 suggesting that Fischer's admission in the stipulated judgment is sufficient to give rise to
23 a strong inference of scienter both as to himself and as to "all defendants."

24 Fifth, plaintiff argues that the officer/director defendants "have treated this motion
25 round as a battle over primary liability claims," and have "gambled all of their chips on
26 that issue," without addressing the issue of secondary exposure. She asserts that they
27 have thus "conceded that secondary liability can be found against them if primary liability
28 is established as to Mr. Fischer through the settlement, through res judicata or by

1 collateral estoppel.” She contends, based on her argument that Fischer’s primary liability
2 is established by operation of res judicata, the officer/director defendants are liable as
3 controlling persons under the 1934 Act and by common law respondeat superior.

4 The motions are GRANTED in part and DENIED in part.

5 1. Claims under the 1934 Exchange Act

6 The motions to dismiss the § 10(b) claims of primary liability against Fischer are
7 DENIED. As explained below, the court finds that the judgment in the adversary
8 proceeding does not have a preclusive effect on the § 10(b) claim or on any issues
9 relating to the § 10(b) claim. Nevertheless, the court finds that it is sufficient to create an
10 issue of fact as to whether plaintiff can proceed with this claim as to Fischer. Were it not
11 for the judgment in the adversary proceeding, the court would dismiss this claim against
12 Fischer with prejudice, because plaintiff has been given extensive instruction as to how to
13 amend the complaint but has repeatedly failed to comply.

14 The motion to dismiss the § 10(b) claims against defendants other than Fischer is
15 GRANTED. First, the court once again reiterates that the § 10(b) claims against J.Sabes,
16 S.Sabes, Siegel, Kulasooriya, and Fernandes have already been dismissed with
17 prejudice. As for Champion, while the 4thAC appears to be asserting that Champion made
18 false statements to plaintiff about the proposed investments in SpeciGen, plaintiff states
19 in her opposition that "the remaining claim against Champion is for secondary control
20 person liability." Moreover, plaintiff previously conceded that Fischer was the "only
21 speaker" with regard to the SpeciGen investments, so any § 10(b) claim against Champion
22 must be dismissed with prejudice (as has already occurred with the other SpeciGen
23 defendants).

24 As for Waterhouse, the 4thAC does not allege that he made any false statements
25 or that he acted with scienter. At most, he is alleged to have been involved in preparing
26 information "disseminated to investors and potential investors." 4thAC ¶ 103.
27 Accordingly, any § 10(b) claim against Waterhouse must also be dismissed with
28 prejudice.

As for Rosen, the 4thAC does not specify which defendant (Notebookz or iLeonardo) Rosen was referring to when he purportedly made statements about "the company." The court previously found the allegations in the TAC inadequate for this same reason, but plaintiff failed to correct this deficiency in the 4thAC. Moreover, the 4thAC does not state why the alleged false statements – that "the company" had sufficient capital, that "the company" was preparing a new securities offering, and that Fischer and Rosen expected Google to acquire "the company" – were false when made. In addition, as stated in the March 2015 order, the allegations regarding the "Investors Rights Agreement" are more in the nature of an asserted breach of contract, not a claim of securities fraud. Finally, and most significantly, there are no allegations sufficient to create a strong inference of scienter as to Rosen. The allegations regarding scienter refer solely to "defendants." Even though Rosen has not previously moved for dismissal of the § 10(b) claim, numerous other defendants have, and plaintiff has not corrected the deficiencies in the complaint. Thus, any § 10(b) claim against Rosen must also be dismissed with prejudice.

As for Notebookz, the court previously found in the March 2015 order that the allegations regarding Notebookz and iLeonardo were insufficient because the TAC conflated the allegations against the two, referring to them collectively as "the company," while continuing to maintain that they are two separate entities. Plaintiff failed to correct that deficiency in the 4thAC. See, e.g., TAC ¶ 94 ("Jackson's investments in Notebookz/iLeonardo were made in two parts."); TAC ¶ 97 (referring to documentation provided by "the company"); 4thAC ("Jackson's investments in Notebookz/iLeonardo were made in two parts."); 4thAC ¶ 97 (referring to documentation provided by "the company"). Apart from that, the 4thAC does not state a claim against either Notebookz or iLeonardo, as the only alleged misrepresentations are oral statements attributed to Rosen, with no statement that can be attributed to either Notebookz or iLeonardo.

The motion to dismiss the § 20(a) claims is DENIED, on the basis that secondary liability cannot be determined in the absence of a finding of primary liability. In the March

1 2015 order, the § 10(b) claim against Fischer was dismissed with leave to amend, but the
2 4thAC adds little apart from the allegations regarding the stipulated judgment in the
3 adversary proceeding. However, the question of Fischer's primary liability cannot be
4 resolved on a Rule 12(b)(6) motion to dismiss, and the court finds that further leave to
5 amend would be futile.

6 2. Claim preclusion and issue preclusion

7 The court instructed the parties at the April 2014 case management conference
8 that defendants could file a motion for judgment on the pleadings regarding whether the
9 TAC stated a claim as to Fischer's primary liability, and that the parties could
10 subsequently file motions for summary judgment as to the preclusive effect of the
11 judgment in the adversary proceeding ("the bankruptcy adjudication"), a motion for
12 summary judgment on primary liability of Fischer, and a motion for summary judgment as
13 to secondary liability of Fischer.

14 In their motions for judgment on the pleadings, defendants sought judgment as to
15 Fischer's primary liability under § 10(b), and also sought judgment as to secondary
16 liability based on lack of primary liability. In the opposition to that motion, plaintiff raised
17 numerous arguments based on facts not alleged anywhere in the TAC – principally, facts
18 relating to the adversary proceeding and the stipulated judgment. Accordingly, the court
19 granted the defendants' motion, but granted leave to amend and advised plaintiff that it
20 was not considering any of the information included in the opposition that was not based
21 on matters pled in the TAC. Plaintiff then filed the 4thAC, and defendants filed the
22 present motions to strike claims that had previously been dismissed, and to dismiss the
23 claims of primary and secondary liability.

24 Because plaintiff has opted to make the issue of res judicata the centerpiece of her
25 opposition to the present motions, the court now decides the question whether claim
26 preclusion and/or issue preclusion operates to establish Fischer's liability, rather than
27 waiting for a future motion.

28 While "res judicata" is sometimes used generically to refer to both claim preclusion

and issue preclusion, it is more correctly used to mean "claim preclusion," whereas "collateral estoppel" is used to mean "issue preclusion." The two doctrines are not the same.

In general, the preclusive effect of a federal judgment is a question of federal law. See Sullivan v. First Affiliated Sec., Inc., 813 F.2d 1368, 1376 (9th Cir. 1987). Thus, because the judgment issued in the adversary proceeding is a judgment issued by a federal court, federal law applies. See, e.g., First Pac. Bankcorp, Inc. v. Helfer, 224 F.3d 1117, 1128 (9th Cir. 2000).

Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim.

New Hampshire v. Maine, 532 U.S. 742, 748-49 (2001).

More specifically, claim preclusion ("res judicata"), which "precludes relitigation of claims that were raised or should have been raised in earlier litigation," San Remo Hotel, L.P. v. San Francisco City & Cnty., 364 F.3d 1088, 1094 (9th Cir. 2004), applies if "there is (1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties," Providence Health Plan v. McDowell, 385 F.3d 1168, 1174 (9th Cir. 2004) (citation and quotations omitted).

Issue preclusion ("collateral estoppel") "preclude[s] relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." Wolfson v. Brammer, 616 F.3d 1045, 1064 (9th Cir. 2010) (quoting United States v. Stauffer Chem. Co., 464 U.S. 165, 170-71 (1984)). Issue preclusion bars a party "from relitigating an issue if four requirements are met – (1) there was a full and fair opportunity to litigate the issue in the previous action; (2) the issue was actually litigated; (3) there was final judgment on the merits; and (4) the person against whom [issue preclusion] is asserted was a party to or in privity with a party in the previous action." Id. (citing Kendall

1 v. Visa U.S.A., Inc., 518 F.3d 1042, 1050 (9th Cir. 2008)); see also Amadeo v. Principal
2 Mut. Life Ins. Co., 290 F.3d 1152, 1159 (9th Cir. 2002).

3 At the time defendants filed the present motions, they were evidently under the
4 impression that plaintiff was planning on asserting issue preclusion, not claim preclusion.
5 However, in her opposition, plaintiff appears to be arguing that both apply.

6 With regard to claim preclusion, there is an identity of parties as to plaintiff and
7 Fischer, but not as to plaintiff and any other defendant. The court assumes for the sake
8 of argument that there was a final judgment on the merits. See Rein v. Providian Fin.
9 Corp., 270 F.3d 895, 902-03 (9th Cir. 2001) ("A judicially approved settlement agreement
10 is considered a final judgment on the merits.") That leaves the question whether the
11 same claim or cause of action was involved in both suits.

12 In evaluating this factor, the Ninth Circuit considers

13 (1) whether the rights or interests established in the prior judgment would be
14 destroyed or impaired by prosecution of the second action; (2) whether
15 substantially the same evidence is presented in the two actions; (3) whether
the two suits involve infringement of the same right; and (4) whether the two
suits arise out of the same transactional nucleus of facts.

16 Rein, 270 F.3d at 903; see also Turtle Is. Restoration Network v. United States Dep't of
17 State, 673 F.3d 914, 917-18 (9th Cir. 2012); Headwaters, Inc. v. U.S. Forest Serv., 399
18 F.3d 1047, 1052 (9th Cir. 2005). Of these, "the most important" is whether the two suits
19 arise out of the same transactional nucleus of facts. Costantini v. Trans World Airlines,
20 681 F.2d 1199-1201 (9th Cir. 1982). On the other hand, the identity of causes of action
21 "cannot be determined precisely by the mechanistic application of a simple test." Id. at
22 1202 n.7.

23 With regard to the first factor, the court finds that the rights or interests established
24 in the prior judgment in the adversary proceeding would not be destroyed or impaired by
25 prosecution of the § 10(b) claim against Fischer.

26 With regard to the second factor – whether the same evidence is presented in the
27 two actions – there is no way of knowing whether the same evidence will be presented in
28 this action as in the adversary proceeding, because this case has not yet moved beyond

1 the pleading stage and the parties have conducted no discovery in this case. Moreover,
2 the adversary proceeding was not decided on the basis of evidence, but rather based on
3 a settlement agreement. In addition, none of the other defendants in this case was
4 involved in the adversary proceeding. The Sabes brothers attempted to intervene, but
5 the bankruptcy judge found that they had no interest in the question to be resolved by the
6 court – whether Fischer's debt to Jackson was dischargeable in bankruptcy given that he
7 allegedly procured the money by fraud – and denied the motion.

8 As for the third factor – whether the two suits involve infringement of the same
9 right – while the adversary proceeding and the claims of misrepresentation in this case
10 may involve infringement of the same right, the adversary proceeding does not involve
11 infringement of the same right as the causes of action under the California Investment
12 Advisors Act and the federal Investment Advisors Act, which impose licensing and other
13 requirements on investment advisors (in addition to prohibiting investment advisors from
14 defrauding clients).

15 Moreover, a further requirement is that it must have been possible to bring "the
16 claims asserted subsequent to the judgment" in the earlier action. See Tahoe-Sierra
17 Pres. Council v. Tahoe Reg. Planning Agency, 322 F.3d 1064, 1078 (9th Cir. 2003)
18 (newly articulated claims based on same nucleus of facts may still be subject to a res
19 judicata finding if the claims could have been brought in the earlier action). Here, it is not
20 clear that either the 1934 Act claims nor the two investment advisor claims could have
21 been brought in the adversary proceeding.

22 With regard to the fourth factor – whether the two suits arise out of the same
23 transactions or nucleus of facts – the result is again not entirely clear. See International
24 Union of Operating Engineers-Emp's Constr. Indus. Pension, Welfare & Training Tr.
25 Funds v. Karr, 994 F.2d 1426, 1429 (9th Cir.1993) ("Whether two events arise from the
26 same transaction or series depends on whether they are related to the same set of facts
27 and whether they could conveniently be tried together.").

28 Plaintiff's claim against Fischer in the adversary proceeding was that the debt

1 Fischer owed her was nondischargeable under § 523(a)(2)(A). Plaintiff alleged that
2 "[b]ecause he utilized fraud and deception to obtain and lose Mrs. Jackson's funds, by
3 reason of the foregoing, defendant Fischer is liable to Mrs. Jackson for the amounts he
4 claimed she would receive by virtue of the funds entrusted to him, inclusive of interest
5 pledged, currently in excess of \$8,250,000."

6 The complaint in the adversary proceeding asserted facts similar to those alleged
7 in this action with regard to plaintiff's investments in SpeciGen, and some sketchy
8 allegations with regard to loans or investments directly in or through Upper Orbit, in
9 SpeciGen, Notebookz/iLeonardo, PeerDreams, CII/Sazani Beach Hotel, New Moon, and
10 non-parties Toppost and Rate-It-All/Double Dutch. Plaintiff alleged that she "lost all of
11 her money and never received the interest payments promised," and that she
12 subsequently engaged counsel and filed suit on multiple federal, state, and common law
13 claims against him and multiple other defendants who conspired with him in June 2011"
14 (referencing the case name and case number of the present action).

15 The judgment entered in the adversary proceeding states that "the debt
16 represented by this judgment is excepted from the defendant's discharge pursuant to 11
17 U.S.C. § 523(a)(2)(A)." The stipulation for judgment states that Fischer "admits that his
18 debt to plaintiff Suzanne D. Jackson in the amount of \$8,250,000 is non-dischargeable
19 under 11 U.S.C. § 523(a)(2)(A), because such debts were obtained by means of false
20 pretenses, false representations and actual frauds committed against [p]laintiff, as she
21 alleged in her adversary complaint."

22 The elements of a claim of "actual fraud" under 11 U.S.C. § 523(a)(2)(A), "mirror
23 the elements of common law fraud." In re Younie, 211 B.R. 367, 373-74 (9th Cir. BAP
24 1997) (citation and quotation omitted); see also In re Hai Lecong, 2015 WL 2129637 at *8
25 (9th Cir. BAP, May 6, 2015). Section 523(a)(2)(A) requires proof by a preponderance of
26 the evidence

27 (1) [that] the debtor made the representations; (2) that at the time he knew
28 they were false; (3) that he made them with the intention and purpose of
deceiving the creditor; (4) that the creditor relied on such representations;

(5) that the creditor sustained the alleged loss and damage as the proximate result of the representations having been made.

In re Younie, 211 B.R. at 373 (citation and quotation omitted). Similarly, to establish actual fraud in California, the plaintiff must show “(1) misrepresentation; (2) knowledge of the falsity of the representation; (3) intent to induce reliance; (4) justifiable reliance; and (5) damages.” In re Jogert, Inc., 950 F.2d 1498, 1504 (9th Cir. 1991) (citation and quotation omitted).

Based on this, the court finds that the adversary judgment is res judicata as to the eighth cause of action for common law fraud asserted against Fischer in the present case, and is also res judicata as to the sixth cause of action for negligent misrepresentation. On the other hand, however, while it is true (as the Ninth Circuit noted in a somewhat different context) that “the law on securities fraud is derived from common-law fraud,” and that the Rule 9(b) pleading standards thus apply to all circumstances of both securities fraud, just as it applies to all circumstances of common law fraud, see Oregon Pub. Employees Retirement Fund v. Apollo Group, Inc., 774 F.3d 598, 605 (9th Cir. 2014), it does not necessarily follow that the adversary judgment is res judicata as to the § 10(b) claims in this case.

Pleading and proof under § 10(b) are much more particularized even than pleading and proof under a common law fraud claim. Section 10(b) and Rule 10b-5 are generally treated together, and prohibit making any material misstatement or omission in connection with the purchase or sale of any security. Halliburton Co. v. Erica P. John Fund, Inc., 134 S. Ct. 2398, 2407 (2014). The elements of a private securities fraud claim based on violations of § 10(b) and Rule 10b-5 are (1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission (or transaction causation); (5) economic loss; and (6) loss causation (or proximate or legal cause). Id.; see also Nuveen Mun. High Income Opportunity Fund v. City of Alameda, 730 F.3d 1111, 1118-19 (9th Cir. 2013).

Thus, unlike a claim of common law fraud, § 10(b) and Rule 10b-5 specifically

1 require a showing that the defendant made a material misrepresentation in connection
2 with the buying or selling of a security. The fact that Fischer generally admitted to taking
3 plaintiff's money by means of fraudulent misrepresentations is not the same as admitting
4 that he induced her to purchase particular securities by means of fraudulent
5 misrepresentations. See Salameh v. Tarsadia Hotel, 726 F.3d 1124, 1132 (9th Cir. 2013)
6 ("Unlike the securities-fraud claims, the common-law fraud claims do not necessarily
7 require the sale of a security as an element of the claim.") There are numerous ways of
8 investing, which could potentially give rise to fraudulent activity, but the Exchange Act
9 applies specifically to the purchase and sales of securities. In other words, common law
10 fraud may be subsumed into securities fraud, but the reverse is not true.

11 In addition, while the complaint in the adversary proceeding refers at some length
12 to SpeciGen, it refers only in general terms to the other companies in which plaintiff
13 claims she invested. Thus, the generalized admission of fraud in the adversary
14 proceeding cannot be extended in a blanket fashion to the § 10(b)/Rule 10b-5 claim as it
15 relates to every transaction with every other defendant company in the present action.

16 Finally, liability under § 20(a) is dependent on a showing of § 10(b) primary liability
17 as to the same transactions. In other words, the Sabes brothers, Siegel, and Campion
18 can potentially be found liable under § 20(a) only as to transactions involving SpeciGen,
19 not as to all the other unrelated claims asserted in the 4thAC. Kulasooriya/Fernandes
20 can potentially be found liable under § 20 only as to transactions involving PeerDreams,
21 and the remaining individuals can potentially be found liable only as to transactions
22 involving Notebookz/iLeonardo. Since the judgment and stipulated judgment in the
23 adversary proceeding do not distinguish among the various unrelated transactions, it will
24 be necessary for plaintiff to establish Fischer's primary liability as to specific transactions
25 involving specific defendants in this case before the question of secondary liability can
26 even be considered.

27 Issue preclusion (collateral estoppel) requires a somewhat different analysis. As
28 noted above, issue preclusion applies to a question, issue, or fact when (1) there was a

1 full and fair opportunity to litigate the issue in the previous action; (2) the issue was
2 actually litigated; (3) there was final judgment on the merits; and (4) the person against
3 whom [issue preclusion] is asserted was a party to or in privity with a party in the previous
4 action.” Wolfson, 616 F.3d at 1064; see also Oyeniran v. Holder, 672 F.3d 800, 806 (9th
5 Cir. 2012). Issue preclusion serves to protect litigants from multiple lawsuits, conserve
6 judicial resources, and encourage reliance on adjudication by reducing the likelihood of
7 inconsistent decisions. Allen v. McCurry, 449 U.S. 90, 94 (1980); see generally, C. Klein,
8 et. al., Principles of Preclusion and Estoppel in Bankruptcy Cases, 79 Am. Bankr. L.J.
9 839, 852-58 (2005).

10 Here, plaintiff has not clearly identified the specific issue or issues she believes
11 should be given preclusive effect. Thus, it is impossible for the court to determine
12 whether a particular issue was at stake in both proceedings, or whether the issue was
13 necessary to decide the merits. Similarly to the claim preclusion analysis, the court
14 assumes there was a final judgment on the merits. In addition, there is identity of parties
15 as to plaintiff and Fischer, but not as to any other defendant.

16 As for whether there was a full and fair opportunity to litigate the issue, and
17 whether the issue was actually litigated, the analysis is not entirely clear-cut. Where a
18 judgment is entered by the parties' consent or stipulation prior to trial on the issues, the
19 general rule is that no issue may be said to have been fully, fairly or actually litigated for
20 purposes of collateral estoppel. See Restatement (Second) of Judgments § 27 comment
21 (e) at 257 (1982); see generally Foster v. Halco Mfg. Co., Inc., 947 F.2d 469, (Fed. Cir.
22 1991).

23 However, a form of issue preclusion has developed that is not dependent on
24 actual litigation of a matter. Under this exception, “the [issue preclusive] effect results not
25 from the rule of [§ 27] but from an agreement manifesting an intention to be bound.”
26 Foster, 947 F.2d at 480 (citing Restatement, § 27 comment (e) & note at 269); see also
27 Green v. Ancora-Citronelle Corp., 577 F.2d 1380, 1383 (9th Cir. 1978). Nevertheless,
28 this rule has not been uniformly accepted by the courts. See In re Berr, 172 B.R. 299,

1 313 (9th Cir. BAP 1994) (in determining whether the parties intended to foreclose the
2 subsequent litigation of a particular issue, stipulated judgments asserted to give rise to
3 collateral estoppel must be narrowly construed).

4 It is not appropriate for the court to speculate as to the intent of the parties here
5 based on the broad language of the stipulated judgment in the adversary proceeding, and
6 it is not possible for the court to determine at this juncture whether the parties intended to
7 qualify the application of the general rules of issue preclusion by foreclosing the
8 opportunity to challenge plaintiff's claims of securities fraud in this action.

9 Further, the California practice is instructive (even though the applicability of claim
10 and issue preclusion here is governed by federal law). The general rule in California is
11 that stipulated judgments are afforded claim preclusive effect, but not issue preclusive
12 effect. The reason is that these judgments are the product, not of litigation but of
13 negotiation. See In re Yaikian, 508 B.R. 175, 179 (Bkrtcy. S.D. Cal. 2014).

14 While stipulated judgments can preclude relitigation of specified issues if the
15 parties make that intent sufficiently clear, see id., the situation here is that the stipulated
16 judgment simply states that Fischer's debt to plaintiff was not dischargeable in
17 bankruptcy because it was obtained by "false pretenses, false representations and actual
18 frauds committed against [p]laintiff." The parties' agreement does not indicate any intent
19 to preclude future litigation of specific issues, particularly as might concern defendants
20 other than Fisher. The evident goal of the stipulated judgment was limited to excepting
21 Fischer's debt to plaintiff from discharge in bankruptcy.

22 3. Common law claims

23 The claim of breach of fiduciary duty was previously dismissed with prejudice as to
24 J.Sabes, S.Sabes, Siegel, Kulasoorya, and Fernandes. The question here is whether it
25 should also be dismissed as to Fischer, Campion, Rosen, and Waterhouse. The court
26 previously found in the March 2013 order that the gravamen of the claim as asserted in
27 the SAC was harm to the corporation, and for that reason dismissed the claim because it
28 was not brought as a derivative claim which would be subject to the demand excusal

1 rules of Delaware (the state of incorporation of the defendant corporations). The
2 dismissal was with leave to amend to clarify whether plaintiff was asserting that the
3 individual director defendants had their fiduciary duties to her or to the corporation. In the
4 December 2013 order, the court found that the TAC stated nothing other than a derivative
5 claim of harm to the corporation, and dismissed the claim with prejudice as to J.Sabes,
6 S.Sabes, Siegel, Kulasooriya, and Fernandes.

7 In the 4thAC, plaintiff again alleges (exactly as in the SAC and the TAC) that "[t]he
8 defendant directors of each of the defendant companies had a fiduciary duty to their
9 shareholders to manage the assets of their respective companies prudently, in good faith,
10 and in the interest of the shareholders," and that they "breached their duties and acted in
11 bad faith by" failing to fulfill the various duties they owed to the corporations and
12 shareholders. 4thAC ¶¶ 141-144. She also, however, has added what appears to be an
13 attempt to assert a direct (as opposed to derivative) claim for breach of fiduciary duty.
14 She alleges that defendants "breached their fiduciary duty to [plaintiff] by causing Fischer
15 to solicit her investments, knowing that the information he proffered to induce those
16 investments was, as Fischer has admitted, fraudulent and materially deceptive." 4thAC
17 ¶ 145.

18 Under Delaware law, the question whether a claim of breach of fiduciary duty can
19 be brought as a direct (as opposed to a derivative action) depends on whether the
20 plaintiff can state a claim that does not involve injury to the corporation, but rather
21 belongs personally to her. See NAF Holdings, LLC v. Ling & Fung (Trading), 118 A.3d
22 175, 179-80 & n.11 (Del. Supr. 2015) (applying analysis from Tooley v. Donaldson, Lufkin
23 & Jenrette, Inc., 845 A.2d 1031, 1033-36 (Del. 2004) (determining whether stockholder's
24 claim is derivative or direct turns on (1) who suffered the alleged harm and (2) who would
25 receive the benefit of any recovery or other remedy).

26 Here, plaintiff's claim is that "defendants" breached their fiduciary duty to plaintiff
27 by "causing" Fischer to "solicit" her investments, knowing that the information he
28 proffered to induce those investments was "fraudulent." 4thAC ¶ 145. However,

plaintiff's claim is based on a diminution in the value of her investments in the defendant companies. As such, it is a derivative claim. See NAF, 118 A.3d at 180. To the extent plaintiff is alleging "fraudulent inducement," that is a species of fraud which must be pled in accordance with Rule 9(b), which plaintiff has not done here with regard to any defendant other than Fischer.

Moreover, to the extent plaintiff is actually alleging breach of fiduciary duty, she has not alleged facts supporting the elements of the claim. To state a claim of breach of fiduciary duty, a plaintiff must allege existence of a duty based on a fiduciary relationship, breach of the fiduciary duty, and damage proximately caused by the breach. Pierce v. Lyman, 1 Cal. App. 4th 1093, 1101 (1991); see also Gutierrez v. Girardi, 194 Cal. App. 4th 925, 932 (2011). Here, apart from pleading the duties the defendants owed to the corporations, plaintiff has not alleged the existence of a duty based upon a fiduciary relationship. Plaintiff has had numerous opportunities to amend this cause of action, and based on her inability to state a claim, the court finds that the claim must be dismissed with prejudice as to Campion, Rosen, and Waterhouse.

The claim of negligent misrepresentation is also dismissed with prejudice as to Campion and Rosen, because plaintiff has failed to identify any specific false statement made by either Campion or Rosen, and has failed to allege with particularity that Fischer was acting as their "agent" in making the false statements attributed to him.

CONCLUSION

In accordance with the foregoing, the motions to strike the § 10(b) claims and the common law misrepresentation claims against J.Sabes, S.Sabes, Siegel, Kulasoorya, and Fernandes, and the Corporations Code § 25501.5 claims against J.Sabes, S.Sabes, Siegel, Kulasoorya, Fernandes, Campion, Rosen, and Waterhouse, are GRANTED. The dismissal is with prejudice.

The motions to dismiss the Exchange Act claims for primary liability are DENIED as to Fischer, and GRANTED as to any other defendant against whom the claims are asserted. The dismissal is with prejudice. The motions by to dismiss the § 20(a) claims

1 are DENIED. The motions to dismiss the claims of breach of fiduciary duty as to
2 Campion, Rosen, and Waterhouse, and the claims of negligent misrepresentation as to
3 Campion and Rosen, are GRANTED. The dismissal is with prejudice. The motions to
4 dismiss the claims of common law misrepresentation as to Fischer and Upper Orbit, and
5 the claim of negligent misrepresentation as to Fischer, are DENIED.

6 Thus far, the court has issued a 44-page order granting motions to dismiss the
7 SAC (the March 15, 2013 order); a 35-page order granting motions to dismiss TAC in
8 part and denying them in part (the December 20, 2013 order); a 40-page order granting
9 motions for judgment on pleadings (primary liability of Fischer and secondary liability
10 claims in TAC) (the March 15, 2015 order). Each of those orders provided detailed
11 rulings, and the March 15, 2013 and March 15, 2015 orders also gave instructions as to
12 how to amend any claims that were dismissed with leave to amend. Now the court has
13 issued yet another lengthy order.

14 Plaintiff has consistently failed to comply with many of the instructions for
15 amendment. Accordingly, even though the court agrees with defendants that the
16 allegations supporting the § 10(b) claim and the misrepresentation claims are pled with
17 less than the requisite particularity, the court is unwilling to endure yet another round of
18 motions to dismiss. Given Fischer's concession in the adversary proceeding that he
19 obtained money from plaintiff "by means of false pretenses, false representations and
20 actual frauds committed against [her]," the court finds that, at a minimum, the existence
21 of factual disputes precludes dismissal of the fraud-based claims asserted against
22 Fischer.

23 Remaining in the case are the § 10(b) and Rule 10b-5 claim against Fischer; the
24 § 20(a) claim against J.Sabes, S.Sabes, Siegel, Campion, Rosen, Waterhouse,
25 Kulasooriya, and Fernandes; the claim under Corporations Code §§ 25230, et seq.,
26 against Fischer; the claim of breach of the Investment Advisors Act of 1940, 15 U.S.C.
27 §§ 80b-1, et seq., against Fischer; the claim of negligent misrepresentation against
28 Fischer; and the claim of common law misrepresentation against Fischer and Upper

1 Orbit. These are the only claims that will proceed to summary judgment, and trial if
2 necessary, after the parties have had an opportunity to conduct discovery. Any motion
3 for default judgment as to SpeciGen, PeerDreams, and Upper Orbit may proceed
4 thereafter.

5 The claims against Notebookz and ILeonardo are DISMISSED with prejudice, for
6 failure to comply with the court's prior instructions as explained above. The claims
7 against Sazani Beach and Bookbinder are DISMISSED with prejudice for failure to state
8 a claim.

9 A case management conference will be held telephonically on October 8, 2015, at
10 1:30 p.m., to schedule all remaining trial dates. Plaintiff's counsel shall arrange the call to
11 chambers.

12
13 **IT IS SO ORDERED.**

14 Dated: September 21, 2015



PHYLLIS J. HAMILTON
United States District Judge