Antipodean Domestic Partners, LP v Clovis Oncology, Inc.
2018 NY Slip Op 30809(U)
April 30, 2018
Supreme Court, New York County
Docket Number: 655908/16
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL PART 48

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ANTIPODEAN DOMESTIC PARTNERS, LP,
Plaintiff,

- against - Index No. 655908/16

CLOVIS ONCOLOGY, INC., PATRICK J. MAHAFFY, ERLE T. MAST, ANDREW ALLEN, ANNA SUSSMAN, J.P. MORGAN SECURITIES, LLC, CREDIT SUISSE SECURITIES (USA) LLC, STIFEL, NICOLAUS & COMPANY, INC., and MIZUHO SECURITIES USA INC.,
Defendants.

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MASLEY, J.:

In motion sequence number 002, defendants J.P. Morgan Securities LLC (JP Morgan), Credit Suisse Securities (USA LLC) (Credit Suisse), Stifel, Nicolaus & Company, Inc. (Stifel), and Mizuho Securities USA Inc. (Mizuho) (collectively, the Underwriter Defendants) move, pursuant to CPLR 3211 (a) (7), dismissing the Amended Complaint. In motion sequence number 003, defendant Clovis Oncology, Inc. (Clovis) and defendants Patrick J. Mahaffy, Erle T. Mast, Andrew Allen, and Anna Sussman (collectively, the Executive Defendants) move, pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint.

Motion sequence numbers 002 and 003 are consolidated for disposition.

Plaintiff Antipodean Domestic Partners, LP is a private investment fund. Defendant Clovis, headquartered in Boulder, Colorado, is a publicly traded pharmaceutical company focused on developing and marketing oncology treatments. Defendants Mahaffy, Mast, and Allen are Clovis's founders. Mahaffy serves as Clovis's CEO, Mast served as Executive Vice President and CFO, and Allen served as Chief Medical Officer. Defendant Sussman was the senior director of investor relations for

Clovis. Defendants JP Morgan, Credit Suisse, Stifel, and Mizuho were underwriters of Clovis's July 2015 secondary stock offering. It was in this offering that plaintiff purchased stock in Clovis. JP Morgan was the lead underwriter.

Plaintiff asserts that defendants made false statements about the safety and efficacy of rociletinib, a "breakthrough" lung cancer drug, enticing plaintiff and others to purchase Clovis stock at artificially inflated prices. The defendants in this action, except for Sussman, face the same claims in a class action pending in the United States District Court in Colorado.[1] A detailed and lengthy decision in that case provides an informative guide in this case (*see Medina v Clovis Oncology, Inc.*, 215 F Supp 3d 1094 [D Colo 2017]).

BACKGROUND

For the purposes of this motion, the court accepts the facts alleged in the amended complaint as true.

Before a drug trial begins, the researcher or tester must state in a protocol how the trial will be conducted and the results analyzed. Clovis agreed in the protocols for rociletinib to comply with the Response Evaluation Criteria in Solid Tumors (RECIST), a set of standard criteria for evaluating efficacy in oncology trials. RECIST sets the criteria by which an objective response rate (ORR) is measured. The ORR is the percentage of patients who experience an objectively confirmed, clinically meaningful, tumor shrinkage during treatment with the test drug. RECIST requires that patients be scanned at the beginning of and during the test period. A response occurs when a patient's tumor shrinks by 30% or more, as compared to the size of the tumor when the

[1]The class action settled on June 18, 2017. Clovis Form 8-K, June 19, 2017. The court is informed that plaintiff opted out of the settlement.

patient started the drug trial. A response is confirmed when a shrinkage of 30% or more is again observed in a subsequent scan.

Plaintiff alleges that the ORR must be calculated using only responses which have been confirmed and that Clovis improperly included unconfirmed responses in calculating the ORR for rociletinib. Plaintiff alleges that Clovis did not disclose the inclusion of unconfirmed responses and plaintiff was unaware that "Clovis based its then publicly disclosed ORR primarily on individual observations of tumor shrinkage that had *not* been confirmed by a subsequent tumor scan" (amended complaint, ¶ 5, emphasis in original). As a result, plaintiff claims, the ORR figures for rociletinib indicated that the drug was more efficient than it actually was. Also, defendants allegedly misrepresented the safety of rociletinib. Defendants allegedly stated that the drug was well-tolerated and presented false information about negative consequences caused by the drug.

During the relevant period, starting in mid-2014, Clovis generated no revenue. Its primary assets were rociletinib and two other experimental cancer drugs. Another company, AstraZeneca, was also developing a lung cancer treatment named tagrisso. Allegedly, tagrisso and rociletinib were intended to treat the same set of patients, and thus, were in direct competition. Plaintiff alleges that these patients represented a large (and untreated) market, with an estimated $3 billion in annual sales, and that defendants' misrepresentations led industry analysts to posit that Clovis was poised to capture a large portion of this market. Clovis and AstraZeneca repeatedly disclosed efficacy and safety data for their respective drugs. Clovis's data indicated that rociletinib was equal to or almost as effective as tagrisso. However, plaintiff asserts, in reality, that was not the case.

Plaintiff alleges that defendants gave out the misleading information in documents, including Clovis's Form 10-K, filed with the SEC in February 2015; in materials supporting the stock offering, including a Form S-3A Registration Statement filed with the SEC in June 2013 (registration) and a Form 424 (b) (5) Prospectus Supplement filed with the SEC in July 2015 (prospectus); conference calls with plaintiff and other investors; at medical conference presentations; in press releases; and during meetings with plaintiff's personnel.

In 2014, Clovis reported a 58% ORR for rociletinib and AstraZeneca a 56% ORR for tagrisso. On May 31, 2015, at the American Society of Clinical Oncology (ASCO) Medical Conference, Clovis made a presentation on the rociletinib trials, reporting a 60% ORR and stating that the drug was "well tolerated." AstraZeneca presented and reported an overall response rate of 73% for tagrisso based on confirmed responses (amended complaint, ¶ 65). The difference between an ORR and an overall response rate is not made clear.

Plaintiff alleges that "[i]t was highly misleading for Defendants to assert rociletinib's ***unconfirmed*** ORR of 60% (which was actually far less) was comparable to Tagrisso's ***confirmed*** ORR of 73% without telling investors that the ORR Defendants disclosed for rociletinib was based on unconfirmed results. An unconfirmed ORR is inherently inferior to a confirmed ORR" (*id.*, ¶ 119, emphasis in original).

Clovis's presentation at the 2015 ASCO conference was based on the largest rociletinib data set yet published and was supposed to preview the data that would be submitted to the FDA in the rociletinib new drug application (NDA). The 2015 ASCO data was based on patients who had tumor scans conducted before April 27, 2015. Any previously unconfirmed responses (those previously subject to only one scan)

should have been, according to the test protocols, deemed either confirmed or not confirmed by no later than June 15, 2015. Plaintiff alleges that by June 15, 2015, Clovis would have known the true ORR was far less than 60%.

On June 9, 2015, Clovis held a private meeting with the Food and Drug Administration (FDA) about the NDA for rociletinib. Unbeknownst to plaintiff at the time, Clovis reported to the FDA that the ORR was 50%. Clovis did not inform the FDA that the ORR included unconfirmed results. The prospectus and road show slides stated that the ORR was 60%. The NDA application, based on both confirmed and unconfirmed responses, was finalized on August 3, 2015.

The stock offering was on July 9, 2015. Before that time, plaintiff states that it conducted extensive due diligence on Clovis and rociletinib, reviewing Clovis's SEC filings, analyst conference call transcripts, earnings reports, conference presentations, and analyst research reports written by the Underwriter Defendants. The representations about rociletinib's efficacy and safety in treating lung cancer caused Clovis's stock to gain in value, from $38 per share on July 9, 2014 to $78 per share on the day of the stock offering. Allegedly, in reliance on defendants' false and misleading statements, plaintiff purchased 875,000 Clovis shares on the offering day.

On November 16, 2015, the truth about rociletinib was partially revealed when Clovis issued a press release indicating that it had met with the FDA the week before and that the FDA "insisted on evaluating rociletinib on the basis of confirmed responses" (amended complaint, ¶ 85). The release stated that Clovis had intended to obtain FDA approval for the drug using the unconfirmed test data, but the FDA "rejected this for the first time" at the meeting (*id.*, ¶ 173). The press release stated that the NDA that Clovis submitted to the FDA had been based on both confirmed and unconfirmed

responses, and that "'as the efficacy data have matured, the number of patients with an unconfirmed response who converted to a confirmed response was lower than expected'" (*id.*, quoting press release). The press release further stated that "'the most frequent reasons that patients' responses were not confirmed in a subsequent scan were due to progression, often due to brain metastasis, and due to subsequent scans not demonstrating tumor shrinkage greater than 30 percent'" (*id.*). The press release also stated that the confirmed ORR for patients treated with a certain dosage amount was 28% and 34% at another dosage. Plaintiff alleges that the press release caused Clovis's stock price to decline from $99 per share on November 15th to $30 per share the next day.

Until the press release came out, it is alleged that plaintiff did not know that the ORR included unconfirmed responses. Plaintiff rejects Clovis's allegation that Clovis found out for the first time in November 2015, or thereabouts, that the FDA would reject unconfirmed responses. Plaintiff alleges that Clovis's test protocols required Clovis to utilize confirmed results only in calculating the ORR. "Indeed, the test protocols not only required compliance with RECIST, but also spelled out that each response be confirmed and provided a schedule for performing confirmatory tumor scans" (*id.*, ¶ 175).

After the revelation that the ORR included unconfirmed responses, Clovis continued to publicly hold out that rociletinib was approvable by the FDA, that it could be successfully marketed, that it could capture 40% of the market, and that it could be an alternative treatment for patients who either did not respond to tagrisso or suffered adverse effects while taking tagrisso. Defendants continued to tout rociletinib's efficacy and safety. Defendants did not reveal that rociletinib's true ORR or that the drug was

"far less safe" than tagrisso, causing "very serious side effects" (amended complaint,¶ 92). Plaintiff alleges that Clovis continued to mislead investors.

On April 12, 2016, at the meeting of the FDA's Oncologic Drugs Advisory Committee (ODAC), the committee reported that, in June 2015, Clovis reported to the FDA an ORR of 50% and, about a month later, an ORR of 38%. The ODAC reported that the final ORR, calculated using confirmed data, was 23% to 32%.

Concerning adverse effects from treatment, in a May 31, 2015 press release, Clovis stated that rociletinib was well tolerated, that most adverse effects were grade 1 or 2 in severity, and that the only common grade 3 adverse effect was hyperglycemia, which was readily managed with oral medication. The stock offering documents stated that 2.5% of patients suffered grade 3 Qtc prolongation (a disturbance in the heart rhythm that is a risk factor for sudden death). The same information about adverse effects was also stated in the prospectus. At the meeting, ODAC reported that 99.5% of the patients suffered one or more adverse events, that 47% suffered a serious adverse event, and that Qtc prolongation was reported in 33% of patients, with 11% suffering grade 3 or 4 prolongation. The ODAC report stated that, if rociletinib was "eventually approved, FDA staff recommended . . . the agency's strongest warning, concerning the heart risk" (amended complaint, ¶ 95). Plaintiff alleges that defendants "had generally not mentioned Qtc prolongation when discussing rociletinib safety. When they did, Defendants revealed false numbers and downplayed any concerns about Qtc prolongation" (*id.*, ¶ 97). These revelations about adverse effects presented "a major obstacle to prescribing rociletinib over tagrisso" (*id.*, ¶ 99).

After the ODAC report came out, Clovis's stock fell from $20 per share to $15 per share. ODAC voted to delay FDA action on Clovis's NDA until Clovis could provide

the results of further testing showing evidence that rociletinib "merited FDA approval" (*id.*, ¶ 103). The transcript of ODAC's discussion before the vote shows that in the future, the FDA would judge the drug according to confirmed responses only. On May 5, 2016, Clovis withdrew its NDA for the drug.

The complaint contains 10 causes of action: first, that Clovis, Mahaffy, Mast, and the Underwriter Defendants violated Section 11 of the Securities Act of 1933 (the Act); second, that Clovis, Mahaffy, Mast and JP Morgan violated Section 12 (a) (2) of the Act; third, that Mahaffy and Mast violated Section 15 of the Act; fourth, that Clovis, Mahaffy, Mast and the Underwriter Defendants violated Section 11-15-604 (4) of the Colorado Securities Act (CSA); fifth, that all the defendants engaged in negligent misrepresentation; sixth, that Clovis and the Executive Defendants violated Sections 11-51-604 (3) and 11-51-501 (1) of the CSA; seventh, that Mahaffy and Mast violated Section 11-51-604 (5) (a) and (b) of the CSA; eighth, that the Executive Defendants violated Section 11-51-604 (5) (c) of the CSA; ninth, that Clovis and the Executive Defendants engaged in common law fraud; and tenth, that the same defendants aided and abetted fraud.

DISCUSSION

In considering a motion to dismiss, a court must accept as true the facts alleged in the complaint as well as all reasonable inferences that may be gleaned from those facts (*McGill v Parker,* 179 AD2d 98, 105 [1st Dept 1992]; *Foley v D'Agostino,* 21 AD2d 60, 65 [1st Dept 1964]). The court does not assess the merits of the complaint, but merely inquires whether, assuming the truth of the facts alleged, the complaint states the elements of a legally cognizable cause of action (*Salles v Chase Manhattan Bank*, 300 AD2d 226, 228 [1st Dept 2002]).

In support of their motion, defendants submit documentary evidence purportedly refuting plaintiff's allegation that an ORR must consist only of confirmed responses. Although defendants move pursuant to CPLR 3211 (a) (7), and not CPLR 3211 (a) (1), this evidence nevertheless will be considered (*see Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.,* 115 AD3d 128, 133 [1st Dept 2014] [holding that a court can rely on documentary evidence even when defendant moves pursuant to CPLR 3211 (a) (7)]).

Claims Under Federal Law

Plaintiff alleges that Clovis, Mahaffy, Mast, and the Underwriter Defendants violated Sections 11 and 12 (a) (2) of the Securities Act of 1933, which are codified at 15 USC § 77k (a) and 15 USC § 77l (a) (2), respectively. Under these laws, buyers of securities can bring civil claims on account of a false statement in a registration statement or prospectus. Claims made under these sections involve "roughly parallel elements" and a plaintiff who fails to plead a section 11 claim necessarily fails to plead a section 12 (a) (2) claim as well (*Lindsay v Morgan Stanley (In re Morgan Stanley Info. Fund Sec. Litig.),* 592 F3d 347, 359 [2d Cir 2010]; *In re MF Global Holdings Ltd. Secs. Litig.,* 982 F Supp 2d 277, 308 [SD NY 2013]). A claimant under section 11 must allege that a registration statement contained an untrue statement of material fact or a material omission (*MF Global,* 982 F Supp 2d at 308). A claimant under section 12 (a) (2) must allege the same in regard to a prospectus or oral communication (*id.*). Contrary to defendants' contentions, neither section requires an allegation that the defendant acted with fraudulent intent (*Fischman v Raytheon Mfg. Co.,* 188 F2d 783, 785 [2d Cir 1951]; *Nguyen v MaxPoint Interactive, Inc.,* 234 F Supp 3d 540, 544 [SD NY 2017]), or a plea of loss causation (*Youngers v Virtus Inv. Partners, Inc.,* 195 F

Supp 3d 499, 520 [SD NY 2016]; *City of Roseville Employees' Retirement Sys. v EnergySolutions, Inc.*, 814 F Supp 2d 395, 424 [SD NY 2011]). "Plaintiffs bringing claims under section 11 and 12 (a) (2) need not allege scienter, reliance, or loss causation" (*Lindsay*, 592 F3d at 359).

A misrepresentation or omission is actionable only if material, and a material statement or omission is one which would have misled a reasonable investor (*Rombach v Chang,* 355 F3d 164, 172 n 7 [2d Cir 2004]). An omission is material only if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information made available" (*Basic, Inc. v Levinson,* 485 US 224, 231–232 [1988] [citation and internal quotation marks omitted]).

Defendants advance four arguments in support of dismissing the first and second causes of action. First, defendants argue that Clovis's statements about the rociletinib's interim efficacy data were not false or misleading, as the ORR could properly consist of both confirmed and unconfirmed responses, and they did not engage in misrepresentations when they failed to divulge that rociletinib's ORR included unconfirmed responses. Specifically, defendants' memorandum of law states, "[i]n certain instances, RECIST requires 'confirmation' of responses. Confirmation is not required in Phase 1 trials, and for Phase 2 trials, confirmation need not be shown by *consecutive* scans. (Ex. H at 235-36). RECIST does not address confirmation in the context of reporting interim results" (memorandum of law at 6, emphasis in original).

However, defendants do not define the meaning of interim results or consecutive scans, instead relying on their Exhibit H, a dense and technical article published in the European Journal of Cancer (the EJC article) in October 2008, entitled *New response*

evaluation criteria in solid tumours: Revised RECIST guideline (version 1.1). Defendants refer to pages in the article without specifying the exact language that purportedly supports their viewpoint. In the Colorado case, defendants cited to the same article (*see Medina,* 215 F Supp 3d at 1113 [the article "leaves the Court staring at two pages from an exhibit hoping to find the language supporting the Clovis Defendants' argument when that language is clearly not evident simply from reading the document").

The *Medina* Court subjected the defendants' arguments and the EJC article to an exhaustive analysis and was not able to conclude that the article supported defendants' contention that RECIST allowed the ORR in the rociletinib trials to include unconfirmed responses. This court concurs.

Second, defendants argue that Clovis's statement about rociletinib's interim safety data were not false and misleading. Defendants assert that the safety data in ODAC's report came from a 60-day safety update in late September 2015, that this safety data did not exist before the July 2015 offering, and that plaintiff cannot show that defendants had such information at the time of the offering. However, plaintiff argues that the ODAC report shows that Clovis began collecting safety data in March 2012 and that the data cutoff was July 2015. Further, plaintiff alleges that the tests were unblinded, so that defendants had continual access to the rociletinib efficacy and safety data as it was collected (amended complaint, ¶ ¶ 133, 161). It is further alleged that defendants possessed nearly all of the material non-public safety data from the time that they submitted the NDA in June 2015 (*id.*, ¶ 164), and each Executive Defendant made statements to plaintiff portraying himself or herself as knowledgeable about the trial data (*id.*, ¶ 134). Thus, these allegations sufficiently state that, although

the safety data may not have existed in the form reported by ODAC, that is, as a 60-day update, the raw data did exist in some form and was available to defendants.

Defendants also assert that the prospectus and the April 2016 ODAC report did not report the same kind of adverse events. The prospectus reported treatment-related adverse effects, that is, those caused by rociletinib, while the ODAC report included all Qtc prolongation irrespective of whether it was caused by rociletinib. Thus, defendants contend plaintiff is wrong to claim that the ODAC report shows that the prospectus was misleading.

Defendants' focus on the adverse effects not caused by rociltinib to the exclusion of all other alleged misrepresentations at their peril. This argument fails to address whether the prospectus was misleading. Whether the adverse effects were related to rocilitnib or not is an issue of fact for later determination. For the purposes of this motion, plaintiff sufficiently pleads that the prospectus misled them about the drug's safety.

Alternatively, defendants argue that many of their alleged statements relate to corporate optimism and opinion and hence are not actionable. Expressions of corporate optimism do not give rise to securities violations; such statements are too general to induce reliance (*In re Vivendi, S.A. Sec. Litig.*, 838 F3d 223, 245 [2d Cir 2016]). While opinions and predictions "are not per se inactionable under the securities laws" (*In re Intl. Bus. Machs. Corp. Sec. Litig.*, 163 F3d 102, 107 [2d Cir 1998]), statements "'incapable of objective verification'" or "otherwise vague" are inactionable (*Medina*, 215 F Supp 3d at 1122, quoting *Grossman v Novell, Inc.*, 120 F3d 1112, 1119–22 [10th Cir 1997]).

To be actionable, a statement must contain, or at least suggest, "definite positive

projections" or statements of fact (*In re Symbol Tech. Class Action Litig.*, 950 F Supp 1237, 1243 [ED NY 1997]), and not merely opinion, expectation, or intention (*In re Schwartz & Meyers*, 130 BR 416, 423 [Bankr SD NY 1991]). An actionable misrepresentation exists when the speaker makes specific statements of fact that have no basis in fact, the speaker is aware of facts undermining his or her positive statements, or the speaker does not genuinely believe his or her statements (*Wang v Bear Stearns Co., LLC*, 14 F Supp 3d 537, 545 [SD NY 2016]; *Lapin v Goldman Sachs Group, Inc.*, 506 F Supp 2d 221, 239 [SD NY 2006]).

The *Medina* Court found that certain statements used to characterize rociletnib were incapable of objective verification (215 F Supp 3d at 1122). This court also finds that certain statements alleged, such as "very impressive and . . . robust" (amended complaint, ¶ 184), are too general to be actionable, as are the statements that "[W]e remain of course confident in rociletinib" (*id.*, ¶ 273) and we have "strong confidence" (*id.*, ¶ 280). Such statements would not mislead a reasonable investor. Also, not actionable are "very encouraging response rates" (*id.*, ¶ 195), "compelling and consistent activity" (*id.*, ¶ 251), "very encouraging activity" (*id.*, ¶ 210), that tagrisso and rociletinib are "really good drugs" (*id.*, ¶ ¶ 205, 248), and "continued to have strong data" (*id.*, ¶ 254).

However, like the *Medina* Court, this court finds that plaintiff has alleged other statements that are actionable. For instance, while "striking activity" alone is not actionable, the rest of the statement giving statistics on patients' responses is actionable (*id.*, ¶ 191). An assertion that the drug was tolerable (*id.*, ¶ 251) is actionable. The *Medina* Court also determined that the assertions that rociletinib was "safe" and "well- tolerated," that the side effects were "very manageable," and the

comparison of rociletinib's safety profile to tagrisso's were all actionable, because they were "objectively verifiable at least to a certain extent" (*id.*, 215 F Supp 3d at 1123). The Court determined that it was possible to assess whether the side effects were manageable or whether the drug was well-tolerated, and that a reasonable investor would certainly find such statements material (*id.*). The Court noted that plaintiff would have to show that "those metrics are objectively verifiable and that the alleged statements fell outside the verifiable meaning of the words" (*id.*). This court concurs. Also, "potent inhibitor of . . . mutations" (*id.*, ¶ 239) is actionable. Whether a drug inhibits mutations is capable of verification, and that "strong data" is not meaningless.

The *Medina* Court also held that "durable" was actionable, because plaintiff alleged that the word was a term of art with a special meaning for investors (*id.* at 1123). Here, plaintiff does not specifically allege that "durable" is a term of art. Nonetheless, this court will follow the *Medina* Court's lead in affording plaintiff an opportunity to show that "durable," as well as "efficacy," are not mere puff words for investors.

In regard to the statements deemed actionable, plaintiff sufficiently alleges that they had no basis in fact or that the speaker was aware of facts undermining his or her statements.

Finally, defendants argue that Clovis's "forward-looking" statements about rociletinib's future prospects are protected by the Private Securities Litigation Reform Act (the PSLRA). The PSLRA, which is part of both the Securities Act of 1933 and the Exchange Act of 1934, provides a safe harbor for "forward-looking" statements (15 USC § 77z–2 [Securities Act]; 15 USC § 78u–5 [e] [Exchange Act]). As the safe harbor provisions are the same in both Acts, and courts use the same standards of

construction for both (*see Linn v Allied Irish Banks, PLC,* 2004 WL 2813133, *3 n 2, 2004 US Dist LEXIS 24655, *8 n 2 [SD NY, Dec. 8, 2004, No. 02-CV-1738 (DAB), No. 02-CV-3168 (DAB)]), some of the cases cited in this discussion pertain to the Exchange Act.

A non-actionable forward-looking statement is one of projected revenues, earnings, or other financial items, plans and objectives for future operations, or future economic performance (15 USC § 77z-2 [I] [1]). Statements that encompass representations or omissions of present fact are not forward-looking, and thus, not protected by the PSLRA (*Curran v Freshpet, Inc.,* 2018 WL 394878, *4, 2018 US Dist LEXIS 5833, *10 [D NJ, Jan. 9, 2018, 16-CV-2263 (MCA)]; *Mallen v Alphatec Holdings, Inc.,* 861 F Supp 2d 1111, 1126 [SD Cal 2012], *affd sub nom Fresno County Employees' Retirement Assn. v Alphatec Holdings, Inc.,* 607 Fed Appx 694 [9th Cir 2015]). Statements concerning historical or current facts are also not forward-looking, even if couched in terms of the future (*In re Copper Mountain Sec. Litig.,* 311 F Supp 2d 857, 880 [ND Ca 2004]; *In re Complete Mgt. Sec. Litig.,* 153 F Supp 2d 314, 340 [SD NY 2001]). A "mixed present/future statement," one that is partly about the future and partly about the present, is not actionable "with respect to the part of the statement that refers to the" future (*In re Vivendi, S.A. Sec. Litig.*, 838 F3d at 246, quoting *Makor Issues & Rights, Ltd. v Tellabs, Inc.,* 513 F3d 702, 705 [7th Cir 2008]; *see also Iowa Pub. Empls.' Retirement Sys. v MF Global, Ltd.*, 620 F3d 137, 144 [2d Cir 2010]).

Under the PSLRA, the maker of a forward-looking statement, whether written or oral, is not liable for making misrepresentations upon three occasions: the forward-looking statement is identified as such and is accompanied by meaningful cautionary language; is immaterial; or the plaintiff fails to prove that the statement was made with

actual knowledge that it was false or misleading (15 USC § 77z-2 [c] [1], [2]; *Slayton v American Express Co.*, 604 F3d 758, 766 [2d Cir 2010]).

Defendants divide the statements which they contend are forward-looking and hence protected by the PSLRA into three categories: those about rociletinib's future prospects, including the likelihood of FDA approval; those about the prospects for marketing and selling the drug; and those about anticipated test results.

Defendants argue that the allegedly forward-looking statements are immunized by cautionary language in Clovis's 10-K form, which states the following: Clovis cannot give any assurance that rociletinib will receive regulatory approval which is necessary before it can be commercialized; The FDA may disagree with the design or implementation of Clovis's clinical trials or with Clovis's interpretation of trial results; Clovis may be unable to satisfy the FDA as to the drug's safety and efficacy; Clinical testing is inherently uncertain, and the results of early clinical trials may not predict later results; Significant setbacks due to lack of efficacy or safety are not uncommon in the bio-pharmaceutical industry, and the drug may cause undesirable side effects (exhibit D, at 24-27).

Meaningful cautionary language "identif[ies] important factors that could cause actual results to differ materially from those in the forward-looking statement" (15 USC § 77z-2 [c] [1] [A] [I]; *Strougo v Barclays PLC*, 105 F Supp 3d 330, 341 [SD NY 2015]; *see also Slayton*, 604 F3d at 771). A plaintiff may establish that cautionary language is not meaningful according to the safe harbor provisions of the PSLRA by showing that the language did not expressly warn of or did not directly relate to the risk that brought about the plaintiff's loss (*In re Sanofi Sec. Litig.*, 87 F Supp 3d 510, 530 [SD NY 2015], *affd sub nom Tongue v Sanofi*, 816 F3d 199 [2d Cir 2016]). The PSLRA safe harbor

does not protect statements wherein the defendants "had no basis for their optimistic statements and already knew (allegedly) that certain risks had become reality" (*Strougo,*105 F Supp 3d at 34 [citation and internal quotation marks omitted]).

Expressions of hope or expectation of future FDA approval are forward-looking, as they concern the future (*Sanofi,* 87 F Supp 3d at 535; *In re Medimmune, Inc.,* 873 F Supp 953, 964 [D Md 1995]). Such statements are not actionable, if they fall within one of the three safe harbor categories (*Sanofi,* 87 F Supp 3d at 535).

In this case, the safe harbor categories do not protect the forward looking statements about FDA approval. Plaintiff alleges these statements are material and that they were falsely made. The cautionary language does not address the risks that brought about plaintiff's loss. While FDA approval cannot be predicted, and no reasonable investor could think otherwise, in this case, plaintiff alleges facts tending to show that defendants could not have reasonably believed that FDA approval was forthcoming. Rociletinib's side effects made FDA approval of the NDA "very difficult" (amended complaint, ¶ 92). While Clovis intended to obtain FDA approval with the unconfirmed test data, this was unlikely as the FDA would expect that Clovis would comply with its own protocols (*id.*, ¶ ¶ 173, 175). The safety profile and the ORR meant that the drug did not compare favorably with tagrisso and there was no justification for the FDA to grant accelerated approval (*id.*, ¶ ¶ 228, 243). Plaintiff alleges that the industry standard was that an ORR would include only confirmed responses and defendants did not disclose that rociletinib's ORR included unconfirmed responses. Defendants did not disclose that they were taking a risk that the FDA would approve a drug where the ORR included unconfirmed responses and the drug caused serious adverse effects. The cautionary language fails to convey substantive

information about the risk that ultimately materialized, and that an investor "could have been misled into thinking that the risk that materialized and resulted in his loss did not actually exist" (*Halperin v ebanker USA Com, Inc.*, 295 F3d 352, 359 [2d Cir 2002]).

In January and February 2016, Mahaffy allegedly stated that rociletinib "compare[d] favorably with tagrisso to win market share'" (amended complaint, ¶ 91). This is not forward-looking, as it is based on then existing facts, and it is actionable, as plaintiff alleges that it is false. In February 2015, Mast stated that there was an early but encouraging 50% response rate for 19 patients with a certain kind of lung cancer and that, if this rate was reproduced in a larger patient population, that would very significantly distinguish rociletinib from competing drugs (*id.*, ¶ 196). In May 2015, Mahaffy said that rociletinib compared favorably to tagrisso based on the available data and that "'we didn't see anything that in our view had a negative impact on our feelings about the marketplace, our feelings about or ability to compete when ultimately we're out in a real marketplace'" (complaint, ¶ 204). In July 2015, Mahaffy told plaintiff that the drug had "the potential for wider application" to lung cancer, and that it and tagrisso would go to market at about the same time (*id.*, ¶ 243). In July 2015, Mahaffy said that, in regard to getting doctors to prescribe rociletinib over tagrisso, the efficacy and safety data for the drugs were about the same, and that rociletinib's potential to treat a certain class of patients would give it a meaningful advantage over tagrisso (*id.*, ¶ 234). None of these statements are forward-looking. The statements address past and present facts about the drug's efficacy, and plaintiff alleges that the statements are false, that rociletinib did not compare favorably to other drugs. The misrepresentation of present or historical facts cannot be cured by cautionary language (*P. Stolz Family Partnership v Daum,* 355 F3d 92, 96-97 [2d Cir 2004]).

In July 2015, Sussman said that tagrisso's ORR was not necessarily better than rociletinib's 60% ORR because patients treated with the latter suffered from more advanced cancer and were mainly of non-Asian descent, as compared to tagrisso's trial patients, which were mainly Asians (*id.*, ¶ 247). Sussman said that both were really good drugs for patients (*id.*, ¶ 248). These and the statements in paragraph 280 of the amended complaint, which also concerns the drug's effect on different groups, are not forward-looking statements, but allegedly false statements based on existing test results.

On November 16, 2015, Clovis revealed that the ORR was based on unconfirmed as well as confirmed responses and that the FDA was requiring the evaluation of rociletinib on the basis of confirmed responses only. Until then, plaintiff says, it believed that the ORR was based on confirmed responses only. On that date, Mahaffy said "that he believed rociletinib could still achieve a 'meaningful market share in the 40% range'" (amended complaint, ¶ 17), that Clovis had done market research and believed that even with the lower ORR, Clovis could win "'a meaningful market share in the 40% range'" (*id.*, ¶ 90), and that Clovis remained confident in the potential of rociletinib to treat a certain class of patients (*id.*, ¶ 273). These are not forward-looking statements. They concern historical or current facts about the efficacy of the drug. Plaintiff alleges that, given the facts about the drug's safety and the unconfirmed responses in the ORR, defendants knew or had to know that the drug did not have the potential to treat a certain class of patients and that they had no good reason to believe that the drug could win 40% of the market.

In January 2016, Mahaffy said that Clovis anticipated that rociletinib would be effective in combination with other cancer drugs, and that although the drug "'had a

setback. The drug is fine'" (*id.*, ¶ 17). This not forward-looking, but based on historical or current data about the effectiveness of the drug.

However, some of the statements alleged by plaintiff are protected by the PSLRA. In September 2014, Mahaffy said that Clovis was building a sales organization for the hoped for approval of rociletinib in a reasonably short period of time, and that it was an exciting time (complaint, ¶ 263). The offering documents for the July 2015 stock offering stated that Clovis "'in preparation for the potential launch . . . was in the process of establishing its US and EU commercial organizations'" (*id.*, ¶ 224). Paragraphs 256 and 278 contain similar statements about launching the product. On October 1, 2015, Sussman said that Clovis was "still on track to obtain FDA approval" and that "'we intend to be ready to launch in Q4. So really nothing has changed, other than the official dates being put in place by the FDA" (*id.*, ¶ 268).

Predictions about future product launches are forward-looking; they are plans of management for future operations (*Sanofi,* 87 F Supp 3d at 537-538). Statements that reflect the speaker's present belief regarding future events are nonetheless forward-looking, since they concern the future. Plaintiff does not allege that these statements were false. The statements in paragraphs 224, 256, 263, 268, and 278 are forward-looking and not actionable.

Defendants also argue that plaintiff's claim under section 12 (a) (2) fails because Mahaffy and Mast are not statutory sellers or solicitors and only a statutory seller can be liable under the statute. A statutory seller is one who passes title or other interest in the security to the buyer for value, or who successfully solicits the purchase of a security, motivated at least in part by a desire to serve his or her own financial interests or those of the securities' owner (*In re Morgan*, 592 F3d at 359).

As defendants contend, merely signing a registration statement or prospectus is not enough for section 12 (a) (2) liability (*Youngers,* 195 F Supp 3d at 522). Allegations that a CEO participated in preparing the allegedly false registration statement and regularly appeared before investors to tout the financial vitality of the company sufficiently stated that he was a seller under Section 12 (a) (2) (*In re Vivendi Universal, S.A. Sec. Litig.*, 381 F Supp 2d 158, 186-187 [SD NY 2003]). An allegation that the defendant stood to gain personally from the offering by virtue of their position in the company indicates financial interest (*In re OSG Sec. Litig.,* 971 F Supp 2d 387, 404 [SD NY 2013]).

Plaintiff alleges that Mast and Mahaffy not only signed but prepared and approved the prospectus supplement and the stock offering road show slides; that Mahaffy made misleading statements to investors, including plaintiff, to induce purchase of the offering shares; that Mast made misleading statements at investor conferences; that in February 2015, Mast spoke at a healthcare conference, touting the drug's efficacy; and that during a conference call in August 2015 with investors, Mahaffy and Mast made representations about the drug's success. Plaintiff further alleges that defendants were motivated by financial gain, as Clovis needed funds to continue in business, and Mahaffy and Mast were senior executives at Clovis, who stood to gain from the good of the company. Those allegations sufficiently plead that defendants actively solicited the sale of the securities and are statutory sellers.

Defendants also argue that plaintiff failed to plead control person liability under Section 15 of the Securities Act of 1933. This section imposes "control person" liability on parties in control of an entity that violates section 11 or section 12 (a) (2), unless that person did not know or had no reason to know "of the facts by reason of which the

liability of the controlled person is alleged to exist" (15 USC § 77o). Defendant argues that plaintiff fails to allege primary violations under sections 11 and 12 (a) (2) and for that reason, section 15 liability claims cannot be maintained. However, plaintiff has successfully pleaded primary violations of sections 11 and 12 (a) (2). Also, plaintiff alleges that Mast and Mahaffy are Clovis' founders and executives and that they actively participated in the stock offering and solicitation of investors. A defendant has control over a company, if he or she had the power to control the direction of management and policies, "whether through the ownership of voting securities, by contract, or otherwise" (*Maher v Durango Metals, Inc.*, 144 F3d 1302, 1305 [10th Cir 1998]). This is sufficiently alleged.

Claims Under Colorado Law

The fourth, fifth, seventh, and eighth causes of action are based on the CSA, codified at Colorado Revised Statutes (CRS) § 11-51-101 *et seq*.

Plaintiff alleges a violation of section 11-51-604 (4) against Clovis, Mahaffy, Mast, and the Underwriter Defendants and violation of sections 11-51-604 (3) and 11-51-501 (1) against Clovis and the Executive Defendants.

Section 11–51–501 proscribes fraud "in connection with the offer, sale, or purchase of any security." Section 11–51–604 provides for civil remedies for victims of such fraud.

Under section 11-51-604 (4), any person who sells a security in violation of section 11-51-501 (1) (b) is liable to the buyer. Section 11-51-501 (1) provides that it is unlawful for any person in connection with the sale or offer of any security, directly or indirectly, (a) to employ any scheme or device to defraud; (b) to make any untrue statement of a material fact or to omit to state a material fact necessary to make the

statement made not misleading; or (c) to engage in fraud or deceit.

Section 11-51-604 (3) provides that any person who recklessly, knowingly, or with an intent to defraud sells a security in violation of 11-51-501 (1) or provides investment advisory services in violation of section 11-51-501 (5) or (6) is liable to the person buying or selling such security or receiving such services.

To establish liability under section 11-51-604 (4), plaintiff must show that defendants made a misrepresentation or omission of material fact in connection with the offer or sale of securities (*F.D.I.C. v Refco Grp., Ltd.*, 989 F Supp 1052, 1071 [D Colo 1997]). Under section 11-51-604 (3), plaintiff must show that it bought a security, that the defendant violated section 11-51-501, that the defendant's conduct was in connection with the sale or purchase, that the defendant acted with the requisite scienter, and that the plaintiff relied upon the defendant's conduct to its detriment or that the defendant's conduct caused plaintiff's injury (*Agile Safety Variable Fund, L.P. v RBS Citizens, N.A.*, 793 F Supp 2d 1248, 1258 [D Colo 2011]; *Rosenthal v Dean Witter Reynolds, Inc.*, 908 P2d 1095, 1102 [Colo 1995]). Defendants assert that plaintiff can maintain none of these claims, since scienter, reliance, and loss causation are not sufficiently pleaded. Defendants assert that the heightened standard of the PSLRA applies to these claims. Plaintiff asserts that sections 11-51-604 (4) and 11-51-501 (1) (b) do not require scienter.

Even if the heightened standard of the PSLRA does apply, plaintiff's allegations would be sufficient. The *Medina* Court found that the plaintiffs' alleged facts met the PSLRA standard, and those facts are almost identical to the ones pled in this action.

Next, defendants argue that plaintiff fails to plead reliance or loss causation. Along with scienter, either reliance or loss causation is necessary for a scienter

11–51–604 (3) claim (*F.D.I.C.*, 2013 WL 49727, at *3; *Rosenthal*, 908 P2d at 1101). Plaintiff claims that defendants' representations induced it to purchase Clovis stock, and that the stock price declined when Clovis revealed that its previously disclosed ORR was based primarily on unconfirmed responses. Later, when the FDA revealed previously undisclosed safety concerns the stock price declined further. Thus, the value of plaintiff's stock went down. These allegations state "a theory of materialization of a concealed risk," meaning that the defendant's misrepresentations hid a risk, which when it subsequently materialized caused a loss for plaintiff (*Nakkhumpun v Taylor*, 782 F3d 1142, 1154 [10th Cir 2015]). To allege loss causation under this theory, a plaintiff must allege "that the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security" (*Lentell v Merrill Lynch & Co.*, 396 F3d 161, 173 [2d Cir 2005]). That is sufficiently alleged.

As for reliance, plaintiff refers to conversations with defendants and documents issued by defendants. Plaintiff alleges that it relied on the pre-November 2016 representations and that after the corrective information issued it continued to rely on the allegations that rociletinib could be successfully marketed, although not as successfully as initially stated. Defendants argue that plaintiff's trading records undercut any claim that it actually relied on the purported misstatements or omissions. On October 1, 2015, Sussman allegedly told plaintiff that rociletinib was on track to get FDA approval. On its next trade, on October 9, 2015, plaintiff sold 54,000 shares. After Clovis's alleged disclosure on November 16, 2015, plaintiff sold 250,000 shares before buying back, weeks later, more than 260,000 shares. The court cannot conclude from these facts that plaintiff did not rely on defendants' representations. An investor's "claims are no less plausible because [it] continued to purchase shares after the

release of negative information about the Company caused the price of shares to decline" (*Maverick Fund, L.D.C. v Comverse Tech., Inc.*, 801 F Supp 2d 41, 53 [ED NY 2011]).

Defendants argue that plaintiff, as a sophisticated hedge fund, should have known the risks inherent in investing in an experimental cancer drug, and that securities laws are not insurance vehicles for those who take risks in the stock market. However, plaintiff alleges that facts were misrepresented. In any case, whether plaintiff's reliance was reasonable is a factual matter (*see F.D.I.C. v Refco Group, Ltd.*, 989 F Supp 1052, 1073 [D Colo. 1997]; *see also COPIC Ins. Co. v Wells Fargo Bank, N.A.*, 767 F Supp 2d 1191, 1212 [D Colo 2011]).

Defendants also argue that plaintiff has failed to plead control person liability under the CSA. Under sections 11-51-604 (5) (a) and (b), those who control persons who violate section (1) or section (1) (b) of 11-51-501 are liable to the same extent as the controlled parties. It is alleged that Mahaffy and Mast controlled Clovis. Under section 11-51-604 (5) (c), those who provide "substantial assistance" to conduct that they know violates the CSA are similarly liable. It is alleged that the Executive Defendants aided and abetted Clovis to violate the CSA. As stated above in the discussion about Section 15 of the Securities Act of 1933, plaintiff makes a prima facie case for control person liability by alleging that Clovis violated the CSA, and that Mahaffy and Mast controlled Clovis (*Houston v Southeast Inv. N.C., Inc.*, 399 P3d 783, 790 [Colo App 2017]). Plaintiff makes a prima facie case for substantial assistance by alleging that the Executive Defendants, which includes Mast and Mahaffy, knowing that Clovis was engaging in unlawful conduct in the sale of a security, substantially assisted Clovis through the statements that they made and the documents that they prepared

(*see Touchtone Grp., LLC v Rink,* 913 F Supp 2d 1063, 1086 [D Colo 2012]).

Common Law Claims

Plaintiff's common law claims include negligent misrepresentation against all defendants, fraud against Clovis and the Executive Defendants, and aiding and abetting fraud against Clovis and the Executive Defendants.

The Executive Defendants urge the application of Colorado law to the common law claims. The Underwriter Defendants apply Colorado and New York law to the negligent misrepresentation claim, the only claim that they single out for discussion. Plaintiff asserts that the common law claims are actionable under the law of either state.

When the laws of the competing jurisdictions are in conflict with respect to a claim, the court must choose which law applies (*IBM v Liberty Mutual Ins. Co.*, 363 F3d 137, 143 [2d Cir 2004]). In New York, the elements of negligent misrepresentation are: (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) the imparting of incorrect information; and (3) the plaintiff's reasonable reliance on the information (*MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 840 [1st Dept 2011]). Colorado has adopted the formulation of the claim for negligent misrepresentation found in the Restatement (Second) of Torts § 522 (*Allen v Steele*, 252 P3d 476, 482 [Colo 2011]). "The elements of a claim of negligent misrepresentation are: (1) one in the course of his or her business, profession or employment; (2) makes a misrepresentation of a material fact, without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party

justifiably relied on the misrepresentation to his or her detriment" (*id.*). Colorado law requires business dealings but not a special relationship.

Citing *Byrum v Wells Fargo Bank, N.A.* (2015 WL 4575084, *4 n 5 [D Colo, July 30, 2015, No. 14-CV-00227 (RBJ)]), the Underwriter Defendants claim that there is no conflict, as Colorado law, in common with New York law, requires a special relationship. "A negligent misrepresentation claim grounded in the failure to disclose particular facts cannot be maintained in the absence of a special relationship between the parties" (*id.*). This statement does not support the Underwriter Defendants' argument, as it applies only to omissions. Plaintiff alleges both omissions and statements. Therefore, the laws of the two jurisdictions differ significantly. In Colorado, the tort requires a special relationship in case of non-disclosures only, while in New York there is no such distinction between non-disclosures and statements.

Since the laws of New York and Colorado are in conflict, an "interest analysis" is needed to determine which state's law should be applied to the negligent misrepresentation claim. Interest analysis is a "flexible approach intended to give controlling effect to the law of the jurisdiction, which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation" (*Cooney v Osgood Mach., Inc.*, 81 NY2d 66, 72 [1993] [internal citation and quotation marks omitted]). The framework of this analysis raises two inquiries: "(1) what are the significant contacts and in which jurisdiction are they located; and (2) whether the purpose of the law is to regulate conduct or allocate loss" (*Padula v Lilarn Props. Corp.*, 84 NY2d 519, 521 [1994]).

As to contacts, plaintiff alleges that it maintains its offices in New York City and all investment decisions on its behalf were directed in New York; its losses were

suffered in New York; and, while Clovis is headquartered in Colorado, Clovis's stock trades on the Nasdaq and Clovis executives, including Mast, Mahaffy, and Sussman, regularly traveled to New York to meet with plaintiff about its investment in Clovis and reached out by phone and email to plaintiff in New York. Plaintiff further alleges that JP Morgan, Credit Suisse, and Mizuho have their headquarters in New York City and Stifel has headquarters in Missouri and eleven offices in New York.

The negligent misrepresentation claim is a conduct-regulating rule (*HSA Residential Mtge. Servs. of Texas v Casuccio,* 350 F Supp 2d 352, 364 [ED NY 2003]). Such a claim is usually governed by the law of place where the wrong occurred, the rationale being that such place has the greatest interest in regulating conduct within its borders (*id.*). At the same time, when the claim is negligence, courts generally apply the law of the place where the plaintiff suffered the injury, even if that is not where the wrong occurred (*id.*; citing *Schultz v Boy Scouts of Am., Inc.,* 65 NY2d 189, 195 [1985]). Where defendants allegedly made their negligent misrepresentations to plaintiff is not clear. However, since plaintiff alleges that it was injured in New York, that would indicate the application of New York law. If the tortious conduct occurred in Colorado, and plaintiff was injured in New York, that would also point to New York, as the place of injury. Because of the New York contacts, including the plaintiff's domicile in New York, this state has a connection to the claim and an interest that Colorado does not have.

The next consideration is whether plaintiff has stated such a claim. The Underwriter Defendants state that plaintiff fails to plead a special relationship with them. A special relationship may exist when the defendant possesses unique or specialized expertise or in whom the injured party places such a degree of trust and confidence that reliance on that party is reasonable (*Kimmell v Schaefer,* 89 NY2d 257, 263 [1996]).

Generally, commercial parties dealing at arms length in negotiating a business transaction are not in a special relationship (*see Basis Pac–Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 124 AD3d 538, 539 [1st Dept 2015]). Nonetheless, a special relationship may exist in a commercial context, where the speaker knew that the plaintiff would put the information to a certain use and supplied it for that purpose (*Kimmell,* 89 NY2d 257 at 264). Plaintiff alleges that the Underwriter Defendants had access to trial data which plaintiff did not have and were able to evaluate the data in a way that plaintiff could not (complaint, ¶ 44). The Underwriter Defendants supplied plaintiff with information to induce it to invest in Clovis. These allegations raise the possibility of a special relationship between plaintiff and the Underwriter Defendants. Whether there actually was such a relationship is an issue of fact.

In regard to Clovis and the Executive Defendants, those defendants do not address the issue of a special relationship because they rely on Colorado law. Rather, those defendants argue that plaintiff failed to plead that defendants supplied false information and actual reliance. The court disagrees; plaintiff has sufficiently pled the requisite elements of negligent misrepresentation under New York law against Clovis and the Executive Defendants.

Regarding the other common law claims, Colorado and New York are substantially the same. In Colorado, the elements of fraud are that the defendant falsely represented a material fact knowing that it was false and intending that the plaintiff act upon it, the plaintiff did not know of the falsity, that the plaintiff relied on the representation, and thereby sustained damages (*Coors v Security Life of Denver Ins. Co.,* 112 P3d 59, 66 [Colo 2005]; *Brody v Bock,* 897 P2d 769, 775–76 [Colo 1995]). In New York, a cause of action to recover damages for fraud requires allegations of a

false representation of fact, knowledge of the falsity, intent to induce reliance, justifiable reliance, and damages (*Eurycleia Partners, LP v Seward & Kissel, LLP,* 12 NY3d 553, 559 [2009]; *Pace v Raisman & Assoc., Esqs., LLP*, 95 AD3d 1185, 1188-1189 [2d Dept 2012]). Aiding and abetting fraud consists of knowing of the fraud and giving substantial assistance to its commission and is the same in both states (*UniCredito Italiano SPA v JPMorgan Chase Bank,* 288 F Supp 2d 485, 502 [SD NY 2003]; *Rocky Mtn. Exploration, Inc. v Davis Graham & Stubbs LLP*, 2016 WL 908640, *9, 2016 Colo App LEXIS 308, *25 [Colo App, March 10, 2016, Nos. 14-CA-1483, 15-CA-0216]). Plaintiff adequately alleges facts supporting these claims.

CONCLUSION

For the foregoing reasons, it is

ORDERED that motion sequence number 002 to dismiss the complaint is denied; and it is further

ORDERED that motion sequence number 003 to dismiss the complaint is denied; and it is further

ORDERED that defendants are directed to serve their answers to the complaint within 20 days after service of a copy of this order with notice of entry.

Dated: 4/30/18

ENTER:

J.S.C.
HON. ANDREA MASLEY