SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: EILEEN BRANSTEN *Justice* **PART** 3

SHAREHOLDER REPRESENTATIVE

INDEX NO. 653506/2013

MOTION DATE 02/06/2015

-V-

SANDOZ INC.

MOTION SEQ. NO. 008

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause - Affidavits - Exhibits	No(s)	1
Answering Affidavits - Exhibits	No(s)	2
Replying Affidavits	No(s)	3
Cross Motion		No

Upon the foregoing papers, it is ordered that this motion is

decided in accordance with the accompanying memorandum decision.

46 Misc. 3d 1228(A)
9 NYS 3d 595 (Table)
Decided March 16, 2015
Unreported disposition

DATED: 3/13/2015

EILEEN BRANSTEN , J.S.C.

1. CHECK ONE : ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE : MOTION IS : ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE : ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART THREE

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SHAREHOLDER REPRESENTATIVE SERVICES LLC, suing on its own behalf and in its capacity as Stockholders' Representative,

Plaintiff,

-against-

Index No. 653506/2013
Motion Date: 2/5/2015
Motion Seq. No. 008, 009 010 & 011

SANDOZ INC., SANDOZ AG, SANDOZ INTERNATIONAL GmbH, JEFF GEORGE and CHRISTINA ACKERMANN,

Defendants.

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BRANSTEN, J.

Motion sequence numbers 008, 009, 010, and 011 are consolidated for disposition herein.

Plaintiff Shareholder Representative Services LLC ("SRS") brings this action on its own behalf, as well as on behalf of the former shareholders of Oriel Therapeutics, Inc. ("Oriel"), following Oriel's merger with Defendant Sandoz Inc. SRS now asserts claims against Defendant Sandoz Inc., as well as Defendants Sandoz AG, Sandoz International GmbH, Jeff George and Christina Ackermann, for breach of contract, fraud, negligent misrepresentation and violation of state securities fraud statutes. All Defendants seek dismissal of SRS' Complaint. For the reasons that follow, the motions to dismiss filed by Sandoz AG, Sandoz International GmbH, Jeff George and Christina Ackermann are granted in their entirety, while Sandoz, Inc.'s motion is granted in part and denied in part.

I. Background[1]

The instant dispute arises from the sale of Oriel, a generic pharmaceutical company, to Defendant Sandoz Inc. in June 2010. At the time of the merger, Oriel was developing generic alternatives to patented drugs for asthma and other pulmonary diseases. Sandoz Inc.'s purchase price included payment in cash up-front, as well as additional cash consideration upon the subsequent attainment of certain milestones ("Milestone Events") set forth in the Merger Agreement. The Milestone Events turned in large part on the development of a particular drug in the Oriel pipeline (the "Product"), which is not yet publicly available.[2]

A. *Merger Negotiations and the Merger Agreement*

The merger process began on December 11, 2009, when Defendant Sandoz AG, a multinational pharmaceutical company, sent Oriel and its advisor, non-party Lazard Freres & Co. ("Lazard"), a "preliminary, non-binding" offer letter for the purchase of Oriel. *See* Compl. Ex. G. In support of its offer, the letter stated that Sandoz AG "recently invested over €50 million to develop a state of the art ... Manufacturing and

[1] All facts cited in this section are drawn from the Complaint unless otherwise noted.

[2] The Court granted the parties' motion to redact the name of this particular drug, as well as technical information about it, since the drug is still in development. *See* Decision and Order for Motion Sequence 002, dated January 23, 2014.

Development Center in Rudolstadt, Germany." *Id.*; *see also* Sandoz AG Moving Br. at 4. This offer letter was signed by Defendants Jeff George and Christina Ackermann, the Chief Executive Officer and General Counsel of Sandoz AG respectively, and was sent to Oriel's offices in North Carolina and to Lazard's offices in California. *Id.*

SRS alleges that the parties' negotiation of the Merger Agreement was predicated in part upon this representation in the offer letter that Sandoz owned a "state of the art" manufacturing facility in Germany. Before entering into the Merger Agreement, SRS alleges that an Oriel representative attempted to inspect the facility, named Aeropharm, as part of the due diligence performed for Oriel's selling shareholders; however, Sandoz purportedly denied the representative access, claiming that a competing drug was being developed on the site and citing confidentiality concerns.

Nevertheless, on April 18, 2010, Oriel and SRS entered into the Merger Agreement. Notably, the Merger Agreement provided that Sandoz Inc. "shall use Diligent Efforts to achieve the Milestone Events." (Compl. Ex. A at § 1.7(f).) "Diligent Efforts" is defined in the Agreement as:

> [T]hat level of effort and resources consistent with such efforts and resources as would normally be exerted or employed by a similarly-situated generic pharmaceutical company for a product of similar market potential and at a similar stage in development or product life as [the Product]. Such level of efforts and resources may take into account, by way of example, issues of safety and efficacy, ... the competitiveness of the marketplace, ... and other relevant factors ...

(Compl. Ex. A at § 1.7(a)(vii).)

The Merger Agreement contemplated completion of the first Milestone Event by a date certain. *See* Compl. Ex. A at § 1.7(b)(1). SRS contends that Sandoz did not meet this deadline and unilaterally decided not to use "Diligent Efforts" to do so. The Complaint alleges that Defendants failed to take necessary steps toward the manufacture of the Product until after the deadline had passed. Moreover, Plaintiff alleges that Aeropharm was not "state of the art" and that Defendants used this representation to create the false impression that Aeropharm was operational and capable of testing and manufacturing the Product immediately after closing.

B. *Federal Action and the Assignment of Claims to SRS*

In August 2012, SRS filed suit in the Southern District of New York, asserting claims on behalf of the former shareholders of Oriel. The federal complaint alleged the same claims against the same defendants as this action.

Sandoz Inc. sought dismissal of the federal complaint on standing grounds, challenging SRS' ability to sue on behalf of the former shareholders. *See Shareholder Representative Servs. LLC v. Sandoz Inc.*, 2013 WL 4015901, at *5 (S.D.N.Y. Aug. 7, 2013) (submitted as Exhibit 2 to the Affirmation of Angela R. Vicari). Following this motion, SRS obtained assignments from some, but not all, of the former shareholders for some, but not all, of their claims. *Id.* In addition, SRS entered into a Remittance Agreement with the assigning shareholders, under which SRS agreed to remit "all sums,

proceeds, money and other consideration obtained by [SRS] in connection with the enforcement and collection of the [assigned claims]." (Compl. Ex. E.) SRS then filed an amended complaint, this time both on its own behalf and on behalf of the former shareholders. *Id.*

While SRS attempted to cure its standing defect through the assignments, the federal court nonetheless granted Sandoz Inc.'s motion to dismiss without prejudice on standing grounds. The court noted that SRS' post-filing receipt of claim assignments from certain former shareholders did not cure any standing defects that existed at the time that SRS filed suit. Thus, the court focused on whether SRS had standing to sue when it filed the original complaint and determined that, at that time, SRS had not "personally suffered an injury-in-fact." Further, neither the complaint nor the amended complaint "identifies a concrete and particularized injury that SRS has suffered as a result of the defendant's actions." *Id.* at *8. Accordingly, the amended complaint was dismissed without prejudice.

C. *The Instant Action*

Instead of re-filing its action before the federal court, SRS elected to commence an action in this Court, on its own behalf and in its capacity as "Stockholders' Representative." In its complaint, SRS asserts nine claims: (1) breach of the Merger Agreement against Sandoz Inc.; (2) breach of the implied covenant of good faith and fair

dealing against Sandoz Inc.; (3) common law fraud against all Defendants; (4) a violation of North Carolina Securities Act § 78A-56 against Sandoz AG, Sandoz International GmbH, George, and Ackermann; (5) a violation of North Carolina Securities Act § 78A-56 against Sandoz Inc.; (6) a violation of California Corporate Securities Law § 25501 against Sandoz AG, Sandoz International GmbH, George, and Ackermann; (7) negligent misrepresentation against Sandoz Inc.; (8) equitable fraud against Sandoz Inc.; and, (9) unjust enrichment against Sandoz Inc.

Defendants now seek dismissal of this complaint in its entirety.

II. Discussion

Defendants' dismissal arguments are many and run the gamut from assertions of champerty and release to failure to assert a claim. These challenges will be addressed in turn.

A. *Champerty*

Defendants first contend that this action should be dismissed in its entirety, since all of SRS' claims hinge on the assignment of claims to SRS from the former shareholders and the assignment runs afoul of New York's champerty statute, N.Y. Jud. Law § 489. Without the assignment, Defendants contend that SRS lacks standing.

The champerty statute states that no entity shall "buy or take an assignment of ... any claim or demand, with the intent and for the purpose of bringing an action of proceeding thereon." N.Y. Jud. Law § 489. As the wording of the statute makes clear, the focus of the champerty inquiry centers on intent. The champerty statute does not prohibit assignments for which the purpose is the collection of a legitimate claim. Instead, "[w]hat the statute prohibits, as the Appellate Division stated over a century ago, is the purchase of claims with the 'intent and for the purpose of bringing an action' that [the purchaser] may involve parties in costs and annoyance, where such claims would not be prosecuted if not stirred up . . . in [an] effort to secure costs." *Trust for the Certificate Holders of Merrill Lynch Mortg. Investors, Inc. v. Love Funding Corp.*, 13 N.Y.3d 190, 201 (2009).

Defendants contend that the Assignment of Claim Agreement and the Remittance Agreement executed by the former shareholders and SRS reveal SRS' intention to bring this litigation as a proxy in exchange for a fee. For example, Defendants note that the Assignment of Claim Agreement states that each assignment is to SRS "for the purposes of collection." *See* Compl. Ex. D at 1. Further, the Remittance Agreement states that all sums collected by SRS "shall be promptly remitted to" the former shareholders. *See* Compl. Ex. E at 1. Thus, according to Defendants, the former shareholders will be the only beneficiaries of any collection that SRS performs, and that in exchange for its efforts

as a proxy, and for other services, SRS will be paid a fee of $185,000. *See* Compl. Ex. B at 4.

While Defendants accurately quote the language of the various agreements cited, a factual issue remains regarding the "intent and purpose" of the assignee, SRS, which precludes dismissal at this juncture. "The relevant inquiry is whether [the assignee] bought the instruments as a bona-fide investment (which would properly include the ability to enforce rights through litigation) or if the purchase was merely pretext for conducting litigation by proxy in exchange for a fee. The latter is classic champerty." *See Justinian Capital SPC v. WestLB AG*, 37 Misc.3d 518, 526 (Sup. Ct. N.Y. Cnty. 2012). This issue cannot be resolved on a motion to dismiss.

B. *Release*

Sandoz AG next argues that SRS cannot pursue its non-contract claims against Defendants, since the former shareholders released these claims when they executed the Merger Agreement. Delaware courts recognize the validity of general releases.[3] *See, e.g., Alvarez v. Castellon*, 55 A.3d 352, 354 (Del. 2012). Such a release "is intended to

[3] The parties' briefs each cite to Delaware law with regard to this release argument; therefore, in the absence of a dispute, the Court will apply Delaware law. Sandoz AG alternates between Delaware and New York law in its briefing on this point, without engaging in any choice of law analysis. This briefing tactic is strongly discouraged by the Court, as it is incumbent upon the parties to argue that a particular law governs, not simply to offer alternatives.

cover everything – what the parties presently have in mind, as well as what they do not have in mind." *Seven Invs., LLC v. AD Capital, LLC*, 32 A.3d 391, 397 (Del. Ch. 2011).

The general release here is found in the Letter of Transmittal, which is integrated through the Merger Agreement. *See* Compl. Ex. A at § 8.5 (integration clause). The Letter of Transmittal states, in pertinent part, that the former shareholders: "forever release[], acquit[], and discharge[] the Parent [Sandoz Inc.]... and each of [its] respective current and former directors ... affiliates, predecessors, and assigns ... from any and all rights, actions, claims ... that arise out of or are related directly or indirectly to the undersigned ownership of the Securities, in law or in equity, known and unknown ... except for the undersigned's right to receive the applicable Merger Consideration..." *See* Compl. Ex. B at 4.

On its face, this broad release encompasses the fraud, negligent misrepresentation, and state securities law claims in the Complaint. SRS, however, attacks the validity of the release, arguing that it was fraudulently induced to enter into the Merger Agreement by Defendants' representations regarding the readiness of the Aeropharm facility.

In support, SRS cites to *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage*, 744 A.2d 457 (Del. 1999) for the proposition that a release procured by fraud does not bar a claim that the release itself was fraudulently induced. While SRS is correct that the *E.I. DuPont* invalidated a general release on fraud grounds, that case is

grounded in very different facts than the instant matter, rendering *E.I. DuPont* distinguishable and inapplicable.

In *E.I. DuPont*, the general release at issue was part of a settlement agreement between DuPont and a nursery, resolving a products liability litigation concerning a fungicide named Benlate. After the parties signed the settlement agreement, the nursery filed a second lawsuit, this time alleging that DuPont fraudulently induced it to enter into the settlement agreement. Specifically, DuPont was alleged to have withheld from discovery "vital scientific data" that it was obligated to produce to the nursery in the first action. The Delaware Chancery Court determined that this fraudulent inducement claim was viable notwithstanding the sweeping general release in the settlement agreement since the conduct alleged "subsists separate from, and necessarily occurred after, any conduct that DuPont may have engaged in with respect to its manufacture or distribution of Benlate," i.e., the subject matter of the settlement agreement. Thus, the torts were deemed "different sequentially and conceptually," rendering the sweeping general release inapplicable to the fraud claim in the second suit.

Here, the conduct underlying SRS' fraudulent inducement claim relates to the same subject matter of the Letter of Transmittal – the Merger Agreement governing the Oriel-Sandoz Inc. transaction. There is no conceptual or sequential difference between the conduct alleged and the subject of the release. Thus, even under *E.I. DuPont*, the general release in the Letter of Transmittal is valid, notwithstanding SRS' fraud claim.

Further, it appears that the release itself contemplates the waiver of such a fraudulent inducement claim:

> The undersigned acknowledges and covenants that ... (iii) the Releasing Parties expressly waive all Claims, including but not limited to, those claims that the undersigned may not know of, which if known, may have materially affected the decision to provide such release, and the undersigned expressly waives rights that provide to the contrary, except for the undersigned's rights to receive the applicable Merger Consideration, Option Consideration or Warrant Consideration.

(Compl. Ex. B at 5.) The purported misrepresentations about Aeropharm's readiness appear to fall within the scope of this release.

Accordingly, Defendants' motions to dismiss the common law fraud, equitable fraud, negligent misrepresentation, breach of the covenant of good faith and fair dealing, unjust enrichment, and state securities law claims are granted in light of the release.

C. *Failure to State a Claim – Fraud Claims*

Even if not barred by the release, Plaintiff's fraud claims nonetheless would merit dismissal pursuant to CPLR 3211(a)(7).

On a motion to dismiss a complaint for failure to state a cause of action, all factual allegations must be accepted as truthful, the complaint must be construed in a light most favorable to the plaintiffs and the plaintiffs must be given the benefit of all reasonable inferences. *Allianz Underwriters Ins. Co. v. Landmark Ins. Co.*, 13 A.D.3d 172, 174 (1st

Dep't 2004). "We . . . determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez,* 84 N.Y.2d 83, 87-88 (1994). This Court must deny a motion to dismiss, "if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." *511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 152 (2002) (internal quotation marks and citations omitted).

1. Fraud

To plead a claim for fraud under New York law, SRS must allege: a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages. *Eurycleia Partners, LP v. Seward & Kissel, LLP,* 12 N.Y.3d 553, 558 (2009). A claim rooted in fraud must be pleaded with the requisite particularity under CPLR 3016(b). *Id.* The pleading requirements of CPLR 3016(b) are a matter of procedure, governed by the law of the forum. *See Westdeutsche Landesbank Girozentrale v. Learsy,* 284 A.D.2d 251, 252 (1st Dep't 2001).

As to the substantive validity of the pleading, neither Plaintiff nor Defendants offer a choice of law analysis. Instead, the parties cite New York law and then Delaware law in the alternative.[4] To raise a choice of law issue, the burden is on the party asserting

[4] Again, as noted above, this briefing tactic is strongly discouraged by the Court.

the conflict, if any, to assert that a conflict actually exists. *See, e.g., Portanova v. Trump Taj Mahal Assoc.*, 270 A.D.2d 757, 759–60, 704 N.Y.S.2d 380 (3d Dep't 2000) ("[P]laintiffs have failed to establish the existence of any conflict between the legal principles herein and the applicable law of New Jersey ... As a consequence, we need not engage in any choice of law analysis."). However, the parties do not argue that New York law is in conflict with Delaware law. Accordingly, the parties have not raised a choice of law issue, and the Court will apply New York law as the law of the forum. *See SNS Bank, N.V. v. Citibank, N.A.*, 7 A.D.3d 352, 354, 777 N.Y.S.2d 62 (1st Dep't 2004) ("The first step in any choice-of-law analysis is to determine if there is actually a conflict between the laws of the competing jurisdictions. If there is none, then the law of the forum state where the action is being tried should apply.").

a. Material Misrepresentation

Turning to the first element of fraud, Plaintiff points to two purported misrepresentations in the Complaint – that Aeropharm was a "state of the art" facility and that Aeropharm was able to receive the equipment necessary to begin production of the Product immediately. The first statement originally was made in the offer letter and then in-person by a representative of Sandoz AG to Oriel's "Principal Shareholders,"[5] while

[5] Notably, Plaintiffs' briefing does not identify these "Principal Shareholders," aside from providing the names of two individuals by way of example. *See* Pl.'s Opp. Br. at 17 ("During

the second was a "false impression" created by Defendants' "state of the art" representation. Neither statement suffices to state a material misrepresentation.

Defendants' purported misrepresentation that the Aeropharm facility was "state of the art" is a nonactionable statement of opinion, which cannot provide the basis for a fraud claim. *See Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC*, 832 F. Supp. 2d 194, 209 (E.D.N.Y. 2010) (applying New York law and deeming statement that Defendant's program was "state of the art" to be "expression[] of opinion, rather than of fact" that "cannot form the basis of a fraud claim."); *see also Longo v. Butler Equities II, L.P.*, 278 A.D.2d 97, 97 (1st Dep't 2000) ("Plaintiff's allegations of fraud are deficient first because the alleged misrepresentations that the target company was seriously undervalued and could be profitably broken up, and that partnership investors would be "in and out" in not more than one year, can only be understood as nonactionable expressions of opinion, mere puffing.").

Next, Plaintiff does not plead in its Complaint that any individual actually stated that Aeropharm was able to receive the equipment necessary to begin production of the Product immediately. Neither the offer letter nor the near-identical oral statement alleged to have been made during merger negotiations by Daniel Salvadori contains the statement

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negotiations in New York, Daniel Salvadori of Sandoz AG orally represented to Oriel's Principal Shareholders – including Eric Aguiar and Jim Neidel – that Aeropharm was 'state of the art'....").

that Aeropharm was "ready to receive equipment necessary" for the manufacture of the drug.

Instead, Plaintiff contends that Defendants' failure to disclose Aeropharm's readiness was a fraudulent omission. However, an omission is only actionable as fraud where there is something akin to a fiduciary duty between the parties. *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 179 (2011) ("with respect to a claim of fraudulent omission, the complaint fails to allege that Wildenstein owed a fiduciary duty to Mandarin"); *see P.T. Bank Cent. Asia, N.Y. Branch v ABN AMRO Bank N.V.*, 301 A.D.2d 373, 376 (1st Dep't 2003) ("A cause of action for fraudulent concealment requires, in addition to the four foregoing elements [of fraudulent misrepresentation], an allegation that the defendant had a duty to disclose material information and that it failed to do so"). No such relationship is alleged here. Instead, the Complaint alleges facts consistent with an arm's length business relationship between the former shareholders and Defendants. *See Dembeck v. 220 Central Park South, LLC*, 33 A.D.3d 491, 492 (1st Dep't 2006) ("A fiduciary relationship does not exist between parties engaged in an arm's length business transaction.").

Nonetheless, Plaintiff asserts that Defendants had a duty to disclose the operational status of Aeropharm under New York's "special facts" doctrine. *See Jana L. v. W. 129th St. Realty Corp.*, 22 AD3d 274, 277 (1st Dep't 2005) ("It is well established

that, absent a fiduciary relationship between the parties, a duty to disclose arises only under the special facts doctrine."). The "special facts" doctrine requires "satisfaction of a two-prong test: "that the material fact was information peculiarly within [the] knowledge of [the defendant], and that the information was not such that could have been discovered by [the plaintiff] through the exercise of ordinary intelligence." *Jana L.*, 22 A.D.3d at 278 (internal citations omitted). The *Jana L.* Court further noted that "[if] the other party has the means available to him of knowing . . . he must make use of those means, or he will not be heard to complain that he was induced to enter into the transaction by misrepresentations." 22 A.D.3d at 278 (internal citations omitted).

Even assuming for the sake of argument that the readiness of Aeropharm was peculiarly within Defendants' knowledge, the status of the plant could have been discovered through the use of ordinary intelligence. Plaintiff alleges that the former shareholders were told that they could not inspect the plant during the due diligence process due to the production of another drug at the time. However, Plaintiff does not allege that the former shareholders asked any questions to assess the readiness of the plant or that it requested another inspection after it purportedly was denied access. Therefore, Plaintiff has not alleged that the former shareholders made use of the means available to them to discover Aeropharm's readiness.

Accordingly, Plaintiff's fraud claim merits dismissal for failure to plead a misrepresentation.

b. Scienter

Next, to satisfy the scienter element of its fraud claim, SRS alleges that the purported misrepresentations cited above were "false when made" and that "Sandoz AG and its agents intended to induce the former shareholders to enter into the Merger Agreement based upon their misrepresentations and omissions." (Compl. ¶¶ 117, 120.) While Plaintiff makes this broad statement, SRS does not plead any facts from which to infer that Defendants knew at the time that the statements were false or made with the intent to deceive. *See Zanett Lombardier, Ltd. v. Maslow*, 29 A.D.3d 495, 495-96 (1st Dep't 2006) ("The conclusory statement of intent did not adequately plead sufficient details of scienter.")

Moreover, SRS' allegations are made collectively as to all Defendants. Under CPLR 3016(b), a fraud claim must be pleaded with particularity, and the circumstances constituting the alleged wrong must be stated in detail. *Ramos v. Ramirez*, 31 A.D.3d 294, 295 (1st Dep't 2006). SRS' group pleading falls far short of this mark. *See also Aetna Casualty & Surety Co. v. Merchants Mut. Ins. Co.*, 84 A.D.2d 736, 736 (1st Dep't 1981) (rejecting fraud claim where "pleaded against all defendants collectively without

any specification as to the precise tortious conduct charged to a particular defendant."); *CIFG Assur. North Am., Inc. v. Bank of Am., N.A.*, 41 Misc.3d 1203(A) at *3 (Sup. Ct. N.Y. Cnty. 2013) ("A claim involving multiple defendants must make specific and separate allegations for each defendant."); *Excel Realty Advisors, L.P. v. SCP Capital, Inc.*, 2010 WL 5172417 (Sup. Ct. Nassau Cnty. Dec. 2, 2010) (dismissing fraud claim where "primarily based upon a series of oblique averments which, in relevant part, lump the defendants together 'without any specification as to the precise' fraudulent conduct attributed to each, i.e., without identifying the discrete, fraudulent acts supposedly committed by the separately named parties.") Therefore, SRS' fraud claim also fails on this basis.

c. Reliance

Likewise, SRS fails to plead reliance with the requisite particularity. The Complaint does not allege that the offer letter was sent to the former shareholders, nor does it assert that the alleged oral misrepresentations were made to any of the former shareholders, aside from the two "Principal Shareholders" identified.[6] As a result, SRS has not pleaded facts sufficient to set forth reliance on these alleged misrepresentations

[6] The Complaint does not state whether these "Principal Shareholders" assigned the claims raised in this action to SRS under the Assignment of Claim Agreement.

by the former shareholders, as the shareholders not present for the alleged oral misrepresentations and not in receipt of the offer letter cannot be alleged to have relied on representations they never received. *See Modell's N.Y. v. Noodle Kidoodle*, 242 A.D.2d 248, 250 (1st Dep't 1997) (dismissing fraud claim for lack of particularity where "plaintiff failed to allege any reliance on its part in the complaint and has offered no evidence indicating that there was, in fact, such reliance.").

2. Negligent Misrepresentation and Equitable Fraud

In addition to common law fraud, SRS asserts negligent misrepresentation and equitable fraud claims based on Sandoz Inc.'s allegedly false representations with respect to the readiness of Aeropharm and its ability to achieve the Milestone Events. As pleaded, SRS' negligent misrepresentation and equitable fraud claims hinge upon the allegation that Defendant Sandoz Inc. owed the former shareholders a "heightened duty." *See* Compl. ¶¶ 145-46 ("Sandoz Inc. agreed to use Diligent Efforts to accomplish the Milestone Events after the transaction closed. Accordingly, Sandoz Inc. obligated itself to a heightened duty beyond good faith to achieve the Milestone Events."); *id.* ¶ 158 ("Sandoz owed the Former Shareholders a heightened duty based upon its agreement to use Diligent Efforts to achieve the Milestone Events after the transaction closed."). It is well settled that "[a] claim for negligent misrepresentation requires the plaintiff to

demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information." *Mandarin Trading Ltd. v. Wildenstein*, 16 N.Y.3d 173, 180 (2011).[7] However, as addressed above with respect to the special facts doctrine, the relationship pleaded by SRS is an arm's length business relationship, which does not give rise to such a "heightened duty." *See Dembeck v. 220 Central Park South, LLC*, 33 A.D.3d 491, 492 (1st Dep't 2006) ("A fiduciary relationship does not exist between parties engaged in an arm's length business transaction.") As a result, Sandoz Inc.'s motion to dismiss these claims is granted.

3. North Carolina and California Securities Law Claims

Plaintiff's final fraud claims are brought under the securities laws of North Carolina and California. These claims stem from the mailing of the offer letter and Merger Agreement drafts to Oriel in North Carolina, as well as the sending of the offer letter to Oriel's investment banker in California. Both the North Carolina Securities Act § 78A-56(b) claims and the California Corporate Securities Law § 25501 claim require

[7] SRS asserts without support that Delaware law governs these claims, notwithstanding the fact that SRS cited to New York law in support of its common law fraud claim. As stated above, since SRS has made no choice of law argument in support of applying Delaware law, the Court will apply the law of the forum, New York, to this claim.

the pleading of an untrue statement of material fact or omission. *See Sullivan v. Mebane Packaging Group, Inc.*, 158 N.C. App. 19, 34 (N.C. 2003) ("Under G.S. § 78A-56(b), a defendant may be civilly liable where (1) the plaintiff can show the defendant (a) made an untrue statement of a material fact, or (b) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the [plaintiff] not knowing of the untruth or omission), and (2) the defendant cannot show that he did not know, or in the exercise of reasonable care could not have known, of the untruth or omission."); *Arei II Cases*, 216 Cal. App. 4th 1004, 1013 (Cal. Ct. App. 2013) (stating that California Corporate Securities Law § 25501 claim requires the pleading of an untrue statement of material fact or omission in connection with the offer or sale of a security); *Fed. Home Loan Bank of San Francisco v. Countrywide Fin. Corp.*, 214 Cal. App. 4th 1520, 1531 n.7 (Cal. Ct. App. 2013). Just as SRS argued with its common law fraud claim in count three, SRS again asserts that it has pleaded the requisite elements of fraud with specificity. However, the defects in its fraud claim under New York law likewise doom its North Carolina and California claims, as SRS has failed to plead a fraudulent misstatement.

D. *Failure to State a Claim – Breach of the Merger Agreement*

Defendant Sandoz Inc. does not contend that Plaintiff's claim for breach of the Merger Agreement falls within the scope of the release; therefore, this Court next must determine whether the claim survives Sandoz Inc.'s CPLR 3211(a)(7) arguments.

SRS's breach of contract claim centers on the allegation that Sandoz Inc. failed to use "Diligent Efforts" to achieve the Milestone Events. In assessing the viability of this claim, the Court will apply Delaware law, as the Merger Agreement contains a Delaware choice of law provision. *See* Compl. Ex. A at § 8.6.

"In order to survive a motion to dismiss for failure to state a breach of contract claim, the plaintiff must demonstrate: first, the existence of the contract, whether express or implied; second, the breach of an obligation imposed by that contract; and third, the resultant damage to the plaintiff." *VLIV Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

SRS has met this burden. In the Complaint, SRS alleges that Sandoz Inc. breached the Merger Agreement by failing to use "Diligent Efforts" to achieve the Milestone Events set forth therein. As a result of this breach, SRS contends that it did not receive the payments associated with the achievement of each Milestone Event and thus was damaged. While Sandoz Inc. argues that it had the "discretion" to determine how to reach the Milestone Events – or whether to reach them at all – such a reading is contrary

to the language of the "Diligent Efforts" provision in the Merger Agreement. *See* Merger Agreement § 1.7(f). The "Diligent Efforts" provision states that Sandoz Inc. "shall use Diligent Efforts to achieve the Milestone Events." *Id.* Sandoz Inc. maintained the discretion to "determine when and whether to commence commercial launch or sale" of the drug at issue; however, there is no language in this provision to support Sandoz Inc.'s reading that this discretion vitatied its obligation to use "Diligent Efforts" to meet the Milestone Events generally. Therefore, Sandoz Inc.'s motion to dismiss the breach of contract claim is denied.

E. *Failure to State a Claim – Breach of the Implied Covenant of Good Faith and Fair Dealing and Unjust Enrichment*

Finally, Defendant Sandoz Inc. seeks dismissal of SRS' quasi-contract claims. These claims assert that Sandoz Inc. breached its contractual obligations under the Merger Agreement. *See* Compl. ¶ 112 ("Sandoz has breached its duty of good faith and fair dealing with respect to its contractual obligations under the Merger Agreement causing SRS and the Former Shareholders to be damaged..."); ¶ 161 (premising unjust enrichment claim on "the failure of Sandoz to achieve the Milestone Events" set forth in the Merger Agreement).

These quasi-contract causes of action each fail because the express terms of the Merger Agreement control the claims. *Kuroda*, 971 A.2d at 888 (deeming that implied

covenant claim "must fail because the express terms of the contract will control such a claim."); *id.* at 891 ("[I]f the contract is the measure of [Plaintiff's] right, there can be no recovery under an unjust enrichment theory independent of it. ... Thus, when the complaint alleges an express, enforceable contract that controls the parties' relationship ... a claim for unjust enrichment will be dismissed."). The Merger Agreement embodies Sandoz's Inc.'s obligation to use "Diligent Efforts" to achieve the Milestone Events. Since SRS' quasi-contract claims stem from Sandoz Inc.'s alleged failure to satisfy this contractual obligation, these claims must be dismissed.

III. Conclusion

For the foregoing reasons, the Court grants Defendants Sandoz AG, Sandoz International GmbH, George, and Ackermann's motions to dismiss in their entirety and grants in part and denies in part Defendant Sandoz Inc.'s motion. The remaining dismissal arguments raised by Defendants are denied as moot.

Accordingly, it is

ORDERED that the motions to dismiss filed by Defendants Sandoz AG, Sandoz International GmbH, George, and Ackermann are granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to each defendant

as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the motion to dismiss filed by Defendant Sandoz Inc. is granted as to Counts Two, Three, Five, Seven, Eight, and Nine and is otherwise denied; and it is further

ORDERED that the action is severed and continued against Defendant Sandoz Inc. as to Count One; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B), the Clerk of the Trial Support Office (Room 158), and the Clerk of the E-file Support Office (Room 119), who are directed to mark the Court's records to reflect the amended caption; and it is further

ORDERED that counsel for Plaintiff and Defendant Sandoz Inc. are directed to appear for a preliminary conference in Room 442, 60 Centre Street, on March 31, 2015.

Dated: New York, New York
March 13, 2015

ENTER

Hon. Eileen Bransten, J.S.C.