In the United States Court of Appeals for the Third Circuit

No. 13–3750

ALAN W. SCHMIDT, on behalf of himself and in a representative capacity on behalf of all others similarly situated and derivatively on behalf of Genaera Corp., appellant

v.

JOHN A. SKOLAS; LEANNE KELLY; JOHN L. ARMSTRONG, JR.; ZOLA B. HOROVITZ, Ph. D.; OSAGIE O. IMASOGIE; MITCHELL D. KAYE; ROBERT F. SHAPIRO; PAUL K. WOTTON; ROBERT DELUCCIA; DAVID LUCI; STEVE ROUHANDEH; JEFFREY DAVIS; MARK ALVINO; GENAERA LIQUIDATING TRUST; BIOTECHNOLOGY VALUE FUND, INC.; LIGAND PHARMACEUTICALS, INC.; XMARK CAPITAL PARTNERS, LLC; ARGYCE LLC; OHR PHARMACEUTICALS; JOHN L. HIGGINS; GENAERA CORP.; SCO FINANCIAL GROUP; DIPEXIUM PHARMACEUTICALS, LLC; MACROCHEM CORP.; ACCESS PHARMACEUTICALS, INC.; MARK N. LAMPERT

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, No. 12–cv–3265 (Honorable Berle M. Schiller, U.S. District Judge)

BRIEF FOR APPELLANT AND VOLUME ONE OF THE JOINT APPENDIX (Pages 1a–30a)

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I. STATEMENT OF SUBJECT–MATTER AND APPELLATE JURISDICTION

The district court possessed subject–matter jurisdiction pursuant to 28 U.S.C. §1332(a). Plaintiff Alan W. Schmidt is a citizen of Vermont. App.69a. The individual defendants are citizens of states other than Vermont, and the corporate defendants are incorporated under the laws of states other than Vermont and have their principal places of business in states other than Vermont. App.69a–74a. In addition, the amount in controversy exceeds the amount of $75,000.00, exclusive of interest and costs. App.74a.

This Court possesses appellate jurisdiction pursuant to 28 U.S.C. §1291. The district court entered its final judgment, granting various motions to dismiss under Federal Rule of Civil Procedure 12 in favor of defendants and against Schmidt, on August 12, 2013. App.13–14a. Schmidt then filed a timely motion for reconsideration on August 26, 2013. App.1674a–95a. Next, on September 10, 2013, Schmidt filed a notice of appeal from the district court's judgment. App.1a–2a. On September 25, 2013, the district court entered an order denying the motion for reconsideration. App.15a. Schmidt then timely filed an

amended notice of appeal on October 17, 2013, which included the order denying reconsideration among the items being appealed. App.7a–8a.

II. STATEMENT OF THE ISSUE ON APPEAL

1. Did the district court err as a matter of law in granting defendants' motions to dismiss on statute of limitations grounds, when in doing so the district court improperly relied on materials outside of the amended complaint, and when factual issues existed and remained unresolved concerning plaintiff's invocation of Pennsylvania's "discovery rule" to toll the accrual of plaintiff's claims until less than two years before suit was filed?

Where preserved: Schmidt preserved this argument in his briefs in opposition to defendants' motions to dismiss (App.1342a–47a) and in his motion for reconsideration of the district court's order granting defendants' motions to dismiss on statute of limitations grounds (App.1676a–95a).

III. STATEMENT OF RELATED CASES AND PROCEEDINGS

Appellant Alan W. Schmidt is not aware of any related cases or proceedings.

IV. STATEMENT OF THE CASE

Genaera was a biotechnology company that was in the business of developing certain pharmaceutical drugs and held licenses to intellectual property, patents, technology, files of technical knowledge, materials, and know–how related to the development of certain pharmaceutical drugs including the assets that are the subject of this suit. App.67a–68a.

In 2007, Genaera had two large shareholders that would later scheme and conspire to force Genaera into dissolution to allow affiliates to acquire Genaera's assets cheaply: defendant Biotechnology Fund Ventures, Inc. ("BVF") and defendants Mitchell Kaye and his investment company, XMark. App.78a–79a, 1181a–82a. Defendant Kaye and defendant Lampert, President of BVF, were friends and close acquaintances. App.78a.

XMark accumulated large amounts of Genaera's common stock in 2007, and was, by far, the largest shareholder. *Id.* In return, on September 28, 2007, defendant Kaye was elected to Genaera's Board of Directors. App.79a. By June 2009, XMark was reported as owning 26.11% of Genaera stock. *Id.*

Since at least 2007, one of Genaera's principal assets was its licensor interest in the Interlukin 9 antibody program for asthma (the "IL9 Program"), which was licensed to MedImmune, LLC, a wholly–owned subsidiary of AstraZeneca Corporation. App.79a–80a. Despite the need to monetize its assets, in or around March 2008, less than a year before Genaera began its dissolution process, Genaera management terminated negotiations to sell a portion of the company's rights to milestone and royalty payments from the IL9 Program without any notice or disclosure to the shareholders. App.81a. Such a sale would have provided Genaera with cash to fund its operations and development of its other assets. Instead, IL9 was sold to certain defendants for less than fair value. App.98a–101a.

As early as 1999, Genaera developed Pexiganan, a topical cream for the treatment of patients with diabetic foot infections. App.81a–82a.

When Genaera was developing Pexiganan, and even today, no topical antimicrobials were specifically approved for the treatment of patients with mild diabetic foot infections. App.82a. This product had, and still has, tremendous potential.

In October 2007, Pexiganan was licensed to defendant MacroChem, which later merged with defendant Access, which was controlled by defendants SCO, Rouhandeh, and Davis. App.82a–84a. Access had no interest in developing Pexiganan, and the Access controlling shareholders were intent on allowing the Pexiganan assets to stagnate, awaiting the dissolution of Genaera so the assets could be acquired cheaply by the defendants identified herein. App.85a–88a.

The Director Defendants knew that Genaera had a right under the agreement with MacroChem to demand the return of the Pexiganan assets if MacroChem would not develop the drug. App.88a. However, in breach of their fiduciary duties, the Director Defendants refused or failed to take any action to protect Genaera's interests and instead steered Genaera into dissolution to aid the self–dealing of other defendants herein. *Id.*

On June 5, 2008, MacroChem issued a press release and announced a presentation to be made by Michael Zasloff, M.D., its leading Scientific Advisor, at a professional medical symposium in San Francisco. App.86a. The June 5, 2008 press release stated, in pertinent part: "Pexiganan, currently being developed by MacroChem, has been evaluated in over 1000 diabetic patients and has already completed two Phase III clinical trials." *Id.*

In the same press release, defendant Robert DeLuccia, MacroChem's Chairman, commented "we believe the Pexiganan could fill an important unmet medical need and provide a significant commercial opportunity for our Company in an addressable market of millions of diabetic foot infections annually, which translates to a potential estimated one–half billion dollar market in just the US." *Id.*

Genaera also failed to exploit an additional package of the company's assets known as the Aminosterol Assets, even though its directors knew that there were parties interested in developing these products. App.106a. Finally, another important asset of Genaera that defendants deliberately failed to exploit, and whose value was destroyed in the dissolution, was the company's net operating loss (NOL). App.89a.

Genaera's NOL was (as of December 31, 2008) $206,349,000, which could have saved a purchasing company millions of dollars in taxes the acquiring company would otherwise be liable to pay. *Id.*

In May 2008, Genaera announced various initiatives it would take to conserve its resources so that it could continue to develop its assets. App.88a. However, shortly thereafter, the Director Defendants became aware that Genaera's two largest shareholders — XMark and BVF — wanted the company to be dissolved so the assets would come up for distress sale. App.89a. Kaye (XMark) was trying to get the rest of the Board to sell the entire company. The other directors refused because they thought they could do better by waiting for a further advance in the development of the Aminosterol Assets and for the IL9 Program to come off clinical hold, which they expected to become a reality.

In or around April 2009, Genaera's Board of Directors announced that the prospects of continuing as an ongoing business were not promising and that dissolution and liquidation would return the greatest value to stockholders as compared to other available strategic alternatives. App.90a.

The Directors sought an expedited approval of the dissolution so that they could resign and separate themselves from Genaera as quickly as possible. *Id.* By resigning, the Director Defendants sought to avoid liability for the sale of Genaera's assets for less than their fair value to interested and conflicted parties. *Id.*

On April 18, 2009, Genaera's Board of Directors unanimously approved a Plan of Dissolution to dispose of all the assets of the company. *Id.* Director Defendant Kaye did not participate in this vote, although he communicated to the rest of the Board that he would support the vote to liquidate Genaera. App.90a, 92a–93a. On April 29, 2009, the day following the announcement, the stock declined 32.7% on volume 96 times the average volume for the preceding ten days. App.94a.

On June 4, 2009, Genaera's shareholders approved the dissolution. *Id.* The very next day, June 5, 2009, after voting to dissolve and liquidate Genaera, XMark sold approximately 1,378,732, or one–third of its shares of Genaera stock at $.3095, an average price that was inflated more than 162% over the average selling price for the ten preceding trading days. App.94a–95a. The volume of XMark's transaction that day

was approximately 21 times the average volume for the preceding ten days. App.95a.

On June 12, 2009, Genaera filed Articles of Dissolution with the Delaware Secretary of State. *Id.* All the company's assets and liabilities were transferred to the Genaera Liquidating Trust (the "Liquidating Trust"). *Id.* The Board of Directors appointed Argyce LLC as Trustee of the Genaera Liquidating Trust effective upon the filing of Genaera's Certificate of Dissolution. *Id.* Defendant Skolas, the President and CEO of Argyce, had previously served as Genaera's Chief Financial Officer, Secretary and General Counsel, but had been terminated in 2007. App.95a–96a.

Defendant Skolas, as Trustee of the Liquidating Trust, participated in multiple frauds that wrongfully converted valuable assets of Genaera. App.96a. For example, Skolas sold assets for prices far below their worth, and absent any royalty provisions. *Id.* Those wrongful conversions replaced existing agreements that required royalty payments that should have accrued to the benefit of Genaera's shareholders and would have provided shareholders with substantial

cash flow if the Trustee had instead sought arrangements to continue that agreement. App.97a.

On January 11, 2010, the Trustee made its first public announcement of a solicitation for the IL9 Program assets and the Pexiganan assets. App.103a. In the announcement, the Trustee set a February 12, 2010 deadline for bids. *Id.* The Trustee knew that the announcement and bidding procedures and deadlines would favor the defendants named herein who were already intimately familiar with the Pexiganan assets and their potential. *Id.*

Outside potential bidders were at a disadvantage because critical information about the Pexiganan and IL9 assets was not public. *Id.* Thus, outside bidders had only one month from the date of the announcement to request, receive, and review sign and return the Confidential Disclosure Agreement required by the Trustee. App.104a. Then, the potential bidder would have to await receipt of the "confidential information package," review and analyze the information, do a pharmacological and regulatory compliance and valuation analysis to determine the feasibility of the assets and their potential worth, and thereafter devise a bidding strategy and submit a bid. *Id.*

On May 18, 2010, defendant Skolas executed a Purchase and Sale agreement with Defendant Ligand Pharmaceuticals, a Delaware corporation, for the IL9 Assets in their entirety. App.99a. Ligand purchased the IL9 Assets for $2.75 million, which is a fraction of the value previously given to it by Genaera's management and an unconscionably low amount of money for such a valuable program. *Id.* Ligand then sold a half interest in IL9 to BVF. *Id.*

By selling the IL9 Assets for such a low price, defendant Skolas ignored the repeated recognition by management and Directors that the fair thing to do for the benefit of all shareholders was to place the IL9 Assets in a royalty trust or a similar continuing entity that could distribute future milestone payments and royalties equitably to Genaera shareholders. *Id.*

Pexiganan was a drug whose enormous potential was recognized by the Director Defendants as well as the other defendants, specifically defendants Ligand and Lampert. App.103a. The Director Defendants knew that Genaera held a fully paid up license for Pexiganan which with extensions would not expire until late 2019 at the earliest and 2021 at the latest. *Id.*

Defendants DeLuccia and Luci are the co–founders of defendant Dipexium, which, upon information and belief, was formed to acquire the rights to Pexiganan for a pittance and free of the royalty and milestone payment obligations that were the most critical part of the MacroChem licensing agreement. App.104a. The rights acquired by Dipexium, as compared to the rights granted to MacroChem, were not limited to high concentrations of the active peptide for prescription indications but evidently also include lower concentrations that can be used with a non–prescription over the counter product for acne, which more than doubles the available market compared with the original MacroChem license. *Id.*

Dipexium acquired the rights for an insignificant purchase price and free of the original 10% royalties and milestone payment obligations. *Id.* Although the Pexiganan Asset was sold in 2010, the buyers were allowed by the conflicted Trustee to extend payment until March 2011, even though Dipexium took physical possession of the assets in April 2010. *Id.*

On July 8, 2009, only 26 days after the Liquidating Trust was established, defendant Trustee Skolas accepted a $50,000 down

payment from BBM Holdings, Inc. as part of an agreement to sell the Aminosterol Assets, another package of Genaera's assets, for a $200,000 price. App.106a. Ohr Pharmaceuticals was organized on August 4, 2009 as a successor to BBM and paid $200,000 cash for the Aminosterol Assets, including squalamine, trodsquemine, and other related compounds. App.106a–07a.

That price failed to reflect the assets' true value or the price that would have been obtained had legitimate sale been conducted. App.106a. The Trustee did not make any public announcement of bidding for the Aminosterol Assets. *Id.* Nor does it appear as if any objective appraisal of the assets was performed. *Id.* Upon information and belief, Argyce and Skolas had the opportunity to sell the Aminosterol Assets for a price higher than Ohr had agreed to pay according to a July 8, 2009 term sheet. App.107a.

But, in breach of their fiduciary duties, Argyce and Skolas bound the Trust prematurely to an agreement with Ohr with the Term Sheet as a pretext to rebuff higher offers or to take the time to market the asset properly. *Id.* Defendant Skolas deliberately encumbered himself from negotiating with another prospective buyer for more favorable terms

with almost three years remaining for effectuating a sale, and the fact that the sale was to a buyer not able or qualified to conduct any pharmaceutical development are evidence that this was a prearranged transaction. App.108a. Had Argyce and Skolas allowed higher offers to emerge, it would have raised the prices for all the other assets for sale.

The Squalamine product was at Phase 2 of FDA testing and approval process as of May 2012, with the Squalamine eye drops for wet age–related macular degeneration being guaranteed USFDA Fast Track Status. App.107a. In a May 2012 investor presentation, Ohr estimated a potential patient population of 1,750,000 US patients with 200,000 new cases annually. App.108a. As a comparison, the current market leader, Intravitreal Lucentis, is realizing worldwide revenues of $3.5 billion annually with only a 35% market share according to Ohr's estimates. *Id.* Thus, defendants Skolas and Argyce sold a similar product to Ohr for $200,000. App.106.

In 2011, Argyce publicly issued unaudited financial statements for the year ended December 31, 2010. App.108a. In those financial statements, the Trust reported without explanation or footnote or itemization that its "General and Administrative" expenses were

$687,000.00, which was nearly 25% of the $3.028 million in revenues realized by the Trust that year. *Id.* It was reported that 2011 revenues consisted of $2.75 million for the sale of the IL9 assets and the Pexiganan assets. App.108a–09a. Thus, it appears that Pexiganan was sold for approximately $252,000. App.109a.

Plaintiff Alan W. Schmidt initiated this suit in the U.S. District Court for the Eastern District of Pennsylvania on June 8, 2012. App.31a, 45a. Before any of the defendants responded to Schmidt's initial complaint initiating suit, by stipulation of the parties Schmidt filed an amended complaint in December 2012 further refining and detailing his claims. App.52a, 62a–120a.

In early February of 2013, all defendants filed motions to dismiss the amended complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. App.122a–1175a. The Rule 12(b)(6) motions raised a variety of grounds for dismissal, including the assertion that the claims pleaded were time–barred due to expiration of Pennsylvania's applicable two–year statute of limitations, *see* 42 Pa. Cons. Stat. Ann. §5524. Defendant Ohr Pharmaceuticals also

sought dismissal under Rule 12(b)(2), asserting that personal jurisdiction was lacking over Ohr in Pennsylvania. App.286a–90a.

Following briefing and oral argument, on August 12, 2013 the district court issued an order and opinion granting defendants' motions to dismiss and dismissing this suit in its entirety as to all defendants. App.13a–14a, 16a–30a. In his opinion, District Judge Berle M. Schiller explained that the sales of Genaera's assets for insufficient consideration that provided the bases for plaintiff Schmidt's claims had occurred not later than May 2010, and therefore when Schmidt initiated this lawsuit on June 8, 2012 the statute of limitations had already expired. App.27a. Judge Schiller ruled as a matter of law that the so–called discovery rule, which operates to toll the start of the limitations period under Pennsylvania law until a conscientious plaintiff either knew or should have known of the existence of his claims, did not apply to create a factual issue preventing dismissal as a matter of law. App.26a–28a. Additionally, Judge Schiller ruled that plaintiff could not establish personal jurisdiction over defendant Ohr Pharmaceuticals, and thus the district court granted Ohr's Rule 12(b)(2) dismissal motion. App.24a–26a.

Plaintiff thereafter filed a timely motion for reconsideration, placing before the district court his own affidavit and the affidavits of two other Genaera shareholders/unitholders demonstrating that they had not seen the information on Genaera's web site on which defendant relied in contending that plaintiff's claims were untimely. App.1674–95a. The district court, however, denied the motion for reconsideration without opinion or other explanation. App.15a.

Schmidt filed a timely notice of appeal from both the district court's final judgment and the district court's order denying his motion for reconsideration. App.1a–2a, 7a–8a.

V. SUMMARY OF THE ARGUMENT

Because the statute of limitations is an affirmative defense, *see* Fed. R. Civ. P. 8(c)(1), in only the rarest of cases, where the claims contained in a complaint conclusively appear to be time–barred on their face, may that defense be invoked to dismiss an action on a Rule 12(b)(6) motion for failure to state a claim on which relief can be granted. *See Robinson* v. *Johnson*, 313 F.3d 128, 135 (3d Cir. 2002). The district court thought that this was such a case, but the district court was wrong — not only

on substance, when rejecting plaintiff's proper invocation of the discovery rule, but also procedurally in relying on materials outside of plaintiff's amended complaint to hold all claims time–barred.

This case involves the loss of an investment in a company that owned several unique assets, in the nature of pharmaceutical innovations or intellectual property, that were of great value in the pharmaceutical industry. To be sure, an investor in the company such as the plaintiff here may have in fact suffered his losses when those assets were given away at fire sale prices under the guise of their supposed worthlessness.

Yet, because assets of this nature have no instantly ascertainable value on the open market, plaintiff had no way to independently confirm or determine whether the insignificant consideration obtained for these assets was fair or was part of a tortious scheme to deprive investors, such as him, of the fair value of their investments. It was not until months later, at the earliest, when the marketplace began to reflect the actual, far higher value of these assets, that the plaintiff knew or reasonably should have known of the defendants' wrongful conduct that is the subject of this lawsuit.

The facts of this case relevant to the timeliness of this lawsuit are thus analogous to a case in which a surgeon, while the patient is unconscious, carelessly leaves behind in the patient's body a piece of surgical tubing. The tort of battery is complete at the time of the surgeon's error. However, the statute of limitations on the plaintiff's claim against the surgeon does not begin to run until later, when the patient suffers inexplicable symptoms and learns or upon reasonable investigation should have learned of the surgeon's error.

The district court recognized that the fire sale of Genaera's assets about which plaintiff complains occurred only a few weeks earlier than two years before plaintiff filed suit. Because, as the district court's opinion recognizes, a two–year statute of limitations applies to plaintiff's claims under Pennsylvania law, the precise question presented here is whether the district court could properly rule as a matter of law, on a Rule 12(b)(6) motion to dismiss, that all of plaintiff's claims were time–barred because plaintiff should have recognized immediately that the assets sold were worth more than the prices obtained for them.

As explained herein, this case involves assets whose actual value to the pharmaceutical industry could not be readily ascertained in the same way that a patient whose surgeon amputates the wrong limb is instantly on notice. Accordingly, this Court should hold that the district court erred both procedurally and substantively in granting defendants' statute of limitations–based Rule 12(b)(6) motions, and this Court should reverse the district court's judgment and remand to allow this suit to go forward.

VI. ARGUMENT

A. The District Court Erred By Ruling As A Matter Of Law, At The Motion To Dismiss Stage, That Plaintiff's Claims That Defendants Tortiously Deprived Him Of The Fair Value Of His Investments Were Time–Barred

1. Standard of review

This Court exercises plenary review when it decides an appeal from the granting of a motion to dismiss under Rule 12(b)(6). *See Great W. Mining & Mineral Co.* v. *Fox Rothschild LLP*, 615 F.3d 159, 163 (3d Cir. 2010). In deciding such an appeal, this Court will set forth the facts in the light most favorable to the non–moving party below, here plaintiff

Schmidt. *See Grammer* v. *John J. Kane Reg'l Ctrs.–Glen Hazel*, 570 F.3d 520, 523 (3d Cir. 2009).

2. Whether considered as a matter of procedure or substance, the district court erred in dismissing plaintiff's claims under Rule 12(b)(6) as time–barred

a. The dismissal of plaintiff's claims was procedurally erroneous because it was based on disputed documents and information neither contained nor referenced in plaintiff's amended complaint

Unless the claims contained in a complaint initiating suit clearly appear to be time–barred on the face of the pleading, a defendant's statute of limitations defense should not be adjudicated by a federal district court until the summary judgment stage. *See Robinson*, 313 F.3d at 135.

Here, the district court's dismissal of this action as time–barred at the Rule 12(b)(6) stage was erroneous both procedurally and substantively. The ruling was erroneous procedurally because plaintiff's complaint does not confirm that the claims asserted therein are time–barred on the face of that pleading. Rather, in order to hold that plaintiff's claims were time–barred, the district court had to consider

and rely on documents and exhibits that were furnished to the district court as exhibits to defendants' motions to dismiss. App.19a–20a.

There are, to be sure, circumstances where such exhibits may properly be considered, even though furnished by a defendant, in connection with a Rule 12(b)(6) motion to dismiss. For example, if a plaintiff is suing to recover on a written contract whose existence and contents are not in dispute, and if the plaintiff fails to attach a copy of the contract to the complaint, the defendant can supply the document, and a district court would be justified in relying on the plain language of the contract to conclude that plaintiff has no valid claim. *See Mayer* v. *Belichick*, 605 F.3d 223, 230 (3d Cir. 2010) (this Court "consider[s] the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents if the complaint's claims are based on these documents").

In this case, by contrast, the key exhibits on which the district court relied in holding that plaintiff's claims were time–barred at the Rule 12(b)(6) stage were purported print–outs of internet postings that the Genaera Liquidating Trust claims to have made advising shareholders of the sale of former Genaera assets. App.19a–20a. Yet plaintiff

Schmidt claims not to have seen those internet postings at the time they supposedly were made, and Schmidt further alleges that the postings were no longer available online for his review within several months after the Trust claims they were made, calling into question whether the postings were in fact made in accordance with the defendants' representations to the district court. App.1687a–89a.

When plaintiff Schmidt knew or should have known of information that the Genaera Liquidating Trust contends was indirectly communicated to unitholders via a web site, in the face of Schmidt's denial that he either saw or was even able to access that information within months of its posting, establishes that the district court did not act properly in relying on these particular exhibits as the basis for holding that plaintiff's claims were time barred. Here, the district court relied on materials that would only properly be before that court, if at all, on a motion for summary judgment, yet the district court failed to allow plaintiff to develop the evidentiary showing that plaintiff could have developed at the summary judgment stage in support of plaintiff's invocation of the discovery rule to defeat defendants' statute of limitations defense.

In *Robinson*, this Court considered in great detail the circumstances when a district court may hold a claim to be time–barred at the Rule 12(b)(6) stage:

> Technically, the Federal Rules of Civil Procedure require that affirmative defenses be pleaded in the answer. Rule 12(b) states that "[e]very defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . ." The defenses listed in Rule 12(b) do not include limitations defenses. Thus, a limitations defense must be raised in the answer, since Rule 12(b) does not permit it to be raised by motion. However, the law of this Circuit (the so–called "Third Circuit Rule") permits a limitations defense to be raised by a motion under Rule 12(b)(6), but only if "the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations."[3] *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir.1975). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir.1978).
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> 3. The "Third Circuit Rule" dates back at least to 1948 when we recognized in *Hartmann v. Time, Inc.*, 166 F.2d 127, 139 (3d Cir.1947), that affirmative defenses are ordinarily pleaded pursuant to Fed.R.Civ.P. 8(c), but that the defense could be raised in other ways. *See also Williams v. Murdoch*, 330 F.2d 745, 749 (3d Cir.1964) (affirmative defense of res judicata may be raised by a motion to dismiss or by an answer); *Cito v. Bridgewater Twp. Police Dep't*, 892 F.2d 23, 25 (3d Cir.1989) ("When reviewing a Rule 12(b)(6) dismissal on statute of limitations grounds, we must determine whether 'the time alleged in the statement of a claim shows that the

> cause of action has not been brought within the statute of limitations.' " (citations omitted)); *Davis v. Grusemeyer*, 996 F.2d 617, 623 (3d Cir.1993) (quoting *Cito*); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1385 n.1 (3d Cir.1994) ("While the language of Fed.R.Civ.P. 8(c) indicates that a statute of limitations defense cannot be used in the context of Rule 12(b)(6) motion to dismiss, an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading."); *Rycoline Prods., Inc. v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir.1997) (affirmative defense must be apparent on the face of the complaint to be subject to a Rule 12(b)(6) motion to dismiss).

313 F.3d at 135.

As the above quotation makes clear, purely as a procedural matter, the district court erred in granting defendants' motion to dismiss plaintiff's claims as time–barred when that defense was not clear on the face of plaintiff's complaint, and when establishing that defense required the district court to rely on documents that were not attached to plaintiff's complaint, nor were they documents on which plaintiff's claims were based. Yes, plaintiff complained about the disposition of Genaera assets at fire sale prices, but when Genaera communicated the facts of those sales to unitholders was not an integral aspect of plaintiff's claims. And furthermore, whether Genaera actually communicated the relevant facts of those sales in the manner that

Genaera claimed was and remained legitimately in dispute, thereby precluding resolution of the statute of limitations defense on a Rule 12(b)(6) motion.

Because the district court committed procedural error in granting a motion to dismiss based on materials beyond plaintiff's amended complaint, the district court's order dismissing plaintiff's amended complaint should be reversed and this case remanded for further proceedings.

b. The dismissal of plaintiff's claims was substantively erroneous because it rejected at the Rule 12(b)(6) stage plaintiff's proper invocation of Pennsylvania's "discovery rule" to toll the accrual of his claims

Turning now from the issue of procedure to substance, over plaintiff's opposition, the district court agreed with the defendants that plaintiff's claims were time–barred. The district court, in so ruling, rejected the plaintiff's argument that the so–called "discovery rule" applied to toll the triggering of Pennsylvania's two–year statute of limitation, *see* 42 Pa. Cons. Stat. Ann. §5524, until plaintiff either knew or reasonably should have known that the value Genaera had obtained for its various assets was far below the actual fair market value of those assets.

Schmidt initiated this lawsuit by filing his complaint on June 8, 2012. In the district court's view, however, the two–year statute of limitations applicable to Schmidt's claims under Pennsylvania law began to run not later than in May 2010, when Genaera publicly announced how little value it had received in exchange for parting with what had previously been understood to be the company's most valuable assets.

Although the district court may be correct in concluding that the injuries about which Schmidt complains occurred when Genaera accepted wholly insufficient consideration in exchange for the valuable assets of that company that the company had agreed to transfer or license to other companies, *see Debiec* v. *Cabot Corp.*, 352 F.3d 117, 128–29 (3d Cir. 2003), what the district court improperly overlooked was that Schmidt had no reason to suspect that the consideration received was not the highest available. Indeed, it was not until sometime after June 2010 when the marketplace began to appreciate the true value of the assets that Genaera had squandered away, that Schmidt first realized, or even had reason to realize, that defendants had tortiously injured him.

As Schmidt recognized in his brief opposing the motion to dismiss his claims as time–barred, defendants were contending that the statute of limitations for the breach of fiduciary duty claims expired in May 2012, two years after Genaera's assets were sold. App.1344a. Yet a more appropriate, and broader, reading of the amended complaint demonstrates that plaintiff was not aware of any injury or the cause of the injury until sometime in 2011, when Argyce publicly issued its financial statements for fiscal year ending December 31, 2010. App.108a–09a. The shareholders could not have been aware the company's most valuable assets would be sold for pennies on the dollar based on a backroom deal between the officers and certain other defendants until that point in 2011, within two years of when this suit was filed.

Defendants reference the sale of Pexiganan as evidence the asset sales occurred by May 2010. App.879a. The Dipexium agreement for acquisition of Pexiganan was executed in April 2010, but the buyers were allowed to extend payment until early 2011. App.104a. Ninety days later (approximately June 2010), Dipexium was able to raise $10.7

million in funding, and it later raised another $1.4 million ninety days after that (approximately September 2010). App.105a.

The release of the financial statements for the year ended December 31, 2010 revealed Pexiganan was sold for a mere $252,000. App.108a–09a. Plaintiff alleges the ease with which Dipexium raised more than $12 million in financing for completing the development of Pexiganan, an asset supposedly only worth $252,000, demonstrates the Trustees and Director Defendants breached their fiduciary duties by failing to properly care for the assets. App.105a. Plaintiffs could not have discovered the true value of Pexiganan and the extent of Defendants' breach of fiduciary duty with regard to the Pexiganan asset until September 2010, when Dipexium so quickly raised funding for the product's development. The earliest date plaintiff could possibly have known would have been in July 2010, just ninety days after Dipexium's acquisition of Pexiganan when Dipexium announced they had raised the first $10.4 million.

The sale of Pexiganan for less than 10% of its value was only one transaction among several. In 2011, Argyce publicly issued unaudited financial statements for the year ended December 31, 2010 outlining

the revenues from the sale of Genaera's assets. App.108a–09a. Plaintiff reasonably could not have known the true nature of defendants' actions until the December 31, 2010 financial statements were revealed in 2011, well within two years of when this suit was initiated on June 8, 2012. Thus, even looking at these facts in a light most favorable to defendants, which is the opposite of the applicable standard, the earliest plaintiff could possibly have begun to piece together defendants' breach was within two years of when this suit was filed.

The district court's opinion seems to criticize plaintiff's amended complaint for describing defendants' tortious conduct as wrongful when it occurred (App.28a), instead of focusing on the fact that Schmidt did not appreciate the wrongfulness of the defendants' misconduct until later. To be sure, the complaint was written with the benefit of hindsight rather than in anticipation of defendants' raising a statute of limitations defense at the earliest possible stage of this case. But just because the amended complaint describes defendants' conduct giving rise to Schmidt's claims as wrongful when it occurred *does not* establish that Schmidt either knew or should have known that the conduct was wrongful when it occurred, nor does it prevent Schmidt from relying on

the discovery rule to overcome defendants' raising of a statute of limitations defense in their Rule 12(b)(6) motions. *See Moyer* v. *United Dominion Indus.*, 473 F.3d 532, 547–48 (3d Cir. 2007) (applying Pennsylvania law).

Although he is an experienced investor, plaintiff Schmidt is not someone who has either the scientific or pharmacological background to independently value on his own the sort of pharmaceutical assets originally belonging to Genaera whose valuation is at issue in this case. Moreover, the true value of those assets was not instantly ascertainable on the open market. Thus, when the trust liquidating Genaera's assets announced that the assets being liquidated were worth far less than Schmidt previously had any reason to believe, Schmidt reasonably and understandably had little alternative other than to chalk–up this particular investment as one of the more unfavorable ones that he ever had occasion to make.

What Schmidt did not then have reason to suspect or investigate, however, was that the person liquidating Genaera's assets, and the businesses acquiring those assets, were, in fact, in cahoots to sell and acquire those assets on the cheap, so as to deprive Genaera's

shareholders of the legitimate value those assets possessed and should have brought on the open market. Thus, despite the district court's erroneous conclusion to the contrary, the facts of this case are not analogous to the scenario where a patient enters the hospital to have his right leg amputated and the surgeon erroneously amputates the patient's left leg. Rather, the facts of this case are far more analogous to where a surgeon operating on an unconscious patient erroneously leaves a piece of surgical tubing inside a patient's body. To be sure, the tort of battery is complete at the time of the surgeon's error. But application of the discovery rule gives the patient the entire limitations period in which to sue, beginning from when she learned or reasonably should have learned of the surgeon's error.

In moving to dismiss the complaint on statute of limitations grounds, the defendants understandably did not focus on when the true value of the former Genaera assets began to be recognized in the marketplace, because that date was within two years from when Schmidt initiated this lawsuit. Yet, unlike defendants, who erroneously convinced the district court to dismiss this action once and for all on statute of limitations grounds at the preliminary Rule 12(b)(6) stage of

proceedings, plaintiff's appeal does not ask this Court to permanently deprive defendants of any statute of limitations defense. Rather, once all of the facts relevant to defendants' statute of limitations defense have been established in discovery, defendants will retain the ability to raise that defense at the summary judgment stage if they so choose.

If the trial court were to decide that issues of fact pertinent to the discovery rule exception to Pennsylvania's statute of limitations defense remained to be decided, then those questions would be decided by a jury at trial. *See Moyer*, 473 F.3d at 548 (noting that "[t]he issue of reasonable diligence is usually for the jury to decide"). Under Pennsylvania law, it is well–established that whether the discovery rule tolls the statute of limitations in a particular case generally presents a jury question. *Gleason* v. *Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011) ("The point at which a complaining party should be reasonably aware that he or she suffered an injury and its cause is ordinarily an issue of fact to be determined by the jury due to the fact intensive nature of the inquiry."); *Wilson* v. *El–Daief*, 964 A.2d 354, 366 (Pa. 2009); *Fine* v. *Checcio*, 870 A.2d 850, 857 (Pa. 2005).

The evidence in this case would support a jury finding for plaintiff under the discovery rule to an even greater extent than in the *Wilson* and *Fine* cases, two cases in which Pennsylvania's highest court ruled that the discovery rule applied and presented a jury question. The plaintiffs in *Fine* had the ability to discover at all relevant times that the negligent extraction of wisdom teeth was scientifically recognized as a cause of facial numbness. They simply failed to recognize that it was the cause of their facial numbness. On that record, Pennsylvania's highest court ruled that the plaintiffs' failure to recognize that one scientifically possible cause — the dental surgeons' negligence — was to blame for their facial numbness was not so objectively unreasonable that a jury should be precluded from finding that the lawsuits were timely under the discovery rule. *Fine*, 870 A.2d at 861–63.

In *Wilson*, a woman sued her wrist surgeon for having negligently lacerated the radial nerve in her wrist during a surgical procedure. 964 A.2d at 356. The surgery occurred in August 2000, but the plaintiff did not sue until October 2003. *Id.* The summary judgment record revealed that another doctor with whom the plaintiff consulted had concluded, more than two years before the plaintiff filed suit, that her pain may

have resulted from laceration of the radial nerve, a conclusion the plaintiff could have discovered simply by requesting her medical records. *Id.* at 358, 361. In addition, the plaintiff in *Wilson* testified during her deposition that she concluded in September 2001 — more than two years before she sued — that the defendant had not taken proper care of her. *Id.* at 366 & n.13.

Despite these facts, the Supreme Court of Pennsylvania in both *Fine* and *Wilson* held that the plaintiffs' invocation of the discovery rule presented a jury question. *Wilson*, 964 A.2d at 365–66 & n.12; *Fine*, 870 A.2d at 861–63. In *Wilson*, Pennsylvania's highest court "decline[d] to hold, as a matter of law, that a lay person must be charged with knowledge greater than that which was communicated to her by multiple medical professionals involved in her treatment and diagnosis." 964 A.2d at 365. In *Fine*, the Supreme Court of Pennsylvania held that the Superior Court erred when it undertook "fact–resolution and inference–drawing functions" on whether Fine knew, or should have known, that his facial numbness was as a result of the defendants' negligence, facts that the Supreme Court held "remained disputed." 870 A.2d at 861–62. In doing so, the Supreme

Court emphasized that "it is not the court's function upon summary judgment to decide issues of fact, but only to decide whether there is an issue of fact to be tried." *Id.* at 862.

Here, the need for a jury to determine whether and how to apply the discovery rule is even stronger than in *Wilson* and *Fine*. In those cases, it was at least scientifically ascertainable that the plaintiffs' injuries resulted from their surgeons' negligence. In this case, by contrast, an individual investor such as Schmidt was unable to independently ascertain, fewer than two years before he filed suit, whether the relatively insignificant consideration Genaera obtained in exchange for its assets did or did not represent fair value. Here, in accordance with the Supreme Court of Pennsylvania's rulings in *Wilson* and *Fine*, this Court should reverse the district court's Rule 12(b)(6) dismissal rejecting as a matter of law Schmidt's invocation of the discovery rule to establish the timeliness of his claims.

As this Court explained in *Knopick* v. *Connelly*, 639 F.3d 600, 611 (3d Cir. 2011), "[t]he nettlesome issue [in this case] is how to differentiate between instances when application of the discovery rule is appropriate or not." The nettlesome nature of that issue is equally apparent here,

establishing that the district court erred in resolving it as a matter of law against the plaintiff at the earliest possible juncture in this case, on a Rule 12(b)(6) motion to dismiss.

In the context of federal securities litigation, this Court recognized in *In re Merck & Co. Securities*, 543 F.3d 150, 164–65 (3d Cir. 2008), *aff'd*, 559 U.S. 633 (2010), that Congress "did not envision a statute of limitations that would open the floodgates to a rush of premature securities litigation when its primary foray into this field in recent decades has been to deter poorly pleaded allegations of securities fraud." The district court's ruling in this case, and defendants' arguments in support of upholding that ruling, would precipitate a similar untoward result.

According to defendants and the district court, Schmidt should have sued once his investment was rendered essentially valueless, without waiting to see whether the investment truly was valueless or whether defendants' wrongdoing was to blame. Requiring plaintiffs to sue before the existence of a claim can reasonably be ascertained is not a valid recipe for reducing baseless lawsuits. Rather, as this Court recognized in *Merck*, it is an invitation for more baseless lawsuits to be filed by

requiring that any such suit be asserted prematurely, before the existence of wrongdoing can be discovered.

Because this appeal arises at the Rule 12(b)(6) stage, this Court is required to accept as true the facts alleged in plaintiff's amended complaint. *See Grammer*, 570 F.3d at 523. Those facts allege that the defendants' wrongful conduct substantially injured not only the plaintiff, but also numerous other investors on whose behalf Schmidt is also seeking to bring suit. None of those other injured investors uncovered their claims against defendants any sooner than Schmidt did, or else presumably another suit similar to this one would have been filed sooner.

To summarize: This case involves claims of substantial monetary worth arising from the sale of assets whose true value could not be instantly ascertained in the marketplace at the time of their sale in exchange for grossly insufficient consideration. The amount of tolling necessary under the discovery rule to make plaintiff's claims timely is relatively insignificant — only a few weeks to less than one month. Dismissal on statute of limitations grounds at the Rule 12(b)(6) stage is limited to the rare case in which the plaintiff's claims are

unquestionably time–barred on the face of the complaint, which is not the case here.

In response to defendants' motions to dismiss, plaintiff demonstrated that he neither knew nor reasonably should have known of his claims against the defendants until fewer than two years before this suit was initiated. Accordingly, the merits of defendants' statute of limitations defense and plaintiff's invocation of the discovery rule should, as in the typical case, be resolved on a proper factual record at the summary judgment stage rather than prematurely and erroneously as happened here. *See*, *e.g.*, *Kach* v. *Hose*, 589 F.3d 626, 633–45 (3d Cir. 2009) (reviewing grant of summary judgment on statute of limitations grounds). Thus, the district court's order dismissing plaintiff's claims as time–barred should be reversed and this case remanded for further proceedings.

VII. CONCLUSION

For all of the foregoing reasons, this Court should reverse the district court's dismissal of plaintiff's claims as time–barred and should remand this case for further proceedings.

Respectfully submitted,

Dated: March 20, 2014

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CERTIFICATION OF COMPLIANCE WITH TYPE–VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type–volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 7,560 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14–point Century Schoolbook font.

Dated: March 20, 2014

/s/ *Howard J. Bashman*
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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am a member of the Bar of the United States Court of Appeals for the Third Circuit.

Dated: March 20, 2014

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CERTIFICATION OF ELECTRONIC FILING AND VIRUS CHECK

Counsel hereby certifies that the electronic copy of this Brief for Appellant is identical to the paper copies filed with the Court.

A virus check was performed on the PDF electronic file of this brief using McAfee virus scan software.

Dated: March 20, 2014

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In the United States Court of Appeals for the Third Circuit

No. 13–3750

ALAN W. SCHMIDT, on behalf of himself and in a representative capacity on behalf of all others similarly situated and derivatively on behalf of Genaera Corp., appellant

v.

JOHN A. SKOLAS; LEANNE KELLY; JOHN L. ARMSTRONG, JR.; ZOLA B. HOROVITZ, Ph. D.; OSAGIE O. IMASOGIE; MITCHELL D. KAYE; ROBERT F. SHAPIRO; PAUL K. WOTTON; ROBERT DELUCCIA; DAVID LUCI; STEVE ROUHANDEH; JEFFREY DAVIS; MARK ALVINO; GENAERA LIQUIDATING TRUST; BIOTECHNOLOGY VALUE FUND, INC.; LIGAND PHARMACEUTICALS, INC.; XMARK CAPITAL PARTNERS, LLC; ARGYCE LLC; OHR PHARMACEUTICALS; JOHN L. HIGGINS; GENAERA CORP.; SCO FINANCIAL GROUP; DIPEXIUM PHARMACEUTICALS, LLC; MACROCHEM CORP.; ACCESS PHARMACEUTICALS, INC.; MARK N. LAMPERT

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, No. 12–cv–3265 (Honorable Berle M. Schiller, U.S. District Judge)

JOINT APPENDIX
Volume One of Four
(Pages 1a–30a)

[Listing of counsel for plaintiff/appellant appears on next page]

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Alan W. Schmidt, on behalf of himself and in a representative capacity on behalf of all other similarly situated and derivatively on behalf of Genaera Corporation, Plaintiff, v. John A. Skolas, et al., Defendants	:	Civil A. No. 2:12-cv-03265-BMS

NOTICE OF APPEAL

Notice is hereby given that Plaintiff Alan W. Schmidt, on behalf of himself and (i) all other Shareholders of Defendant Genaera Corporation; (ii) all other Unit Holders of Genaera Liquidating Trust; and (iii) derivatively on behalf of Genaera, by and through his undersigned counsel, hereby appeals to the United States Court of Appeals for the Third Circuit from the Memorandum [Doc. 120] and Order [Doc. 121] granting Defendants Genaera Corporation, John L. Armstrong, Jr., Zola B. Horovitz, Ph.D., Osagie O. Imasogie, Mitchell D. Kaye, Robert F. Shapiro, Genaera Liquidating Trust, Biotechnology Value Fund, Inc., Ligand Pharmaceuticals, Incorporated, XMark Capital Partners, LLC, Argyce LLC, John A. Skolas, Mark N. Lampert, John L. Higgins, Jack Armstrong, Leanne Kelly, Paul K. Wotton, Robert DeLuccia, David Luci, Steven Rouhandeh, Jeffrey Davis, Mark Alvino, Dipexium Pharmaceuticals, MacroChem Corporation, Griffin Securities, Access Pharmaceuticals and Ohr Pharmaceuticals respective Motions to Dismiss [Docs. 63, 64, 65, 66, 68, 69, 70, 71] on grounds including lack of personal jurisdiction and statute of limitations, which was entered in this action on

the 12th day of August 2013. The above-referenced Order and Memorandum are attached as **Exhibits "A"** and **"B"**.

Respectfully submitted,

Dated: September 10, 2013

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Alan W. Schmidt, on behalf of himself and in a representative capacity on behalf of all other similarly situated and derivatively on behalf of Genaera Corporation, Plaintiff, v. John A. Skolas, et al., Defendants	:	Civil A. No. 2:12-cv-03265-BMS

CERTIFICATE OF SERVICE

I, Brian J. McCormick, Jr., hereby certify that a copy of the foregoing Plaintiff's Notice of Appeal was filed with the District Clerk via the Court's CM/ECF system, and, pursuant to Federal Rule of Appellate Procedure 3(d)(1) requiring the District Clerk serve notice of the filing upon each party's counsel of record, thereby served upon counsel listed below:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to sanctions.

Dated: September 10, 2013

/s/ BRIAN J. MCCORMICK, JR.
Brian J. McCormick, Jr.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

Alan W. Schmidt, on behalf of himself and in a representative capacity on behalf of all other similarly situated and derivatively on behalf of Genaera Corporation, Plaintiff, v. John A. Skolas, et al., Defendants.	:	Civil A. No. 2:12-cv-03265-BMS

AMENDED NOTICE OF APPEAL

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August 12, 2013. The above-referenced Order and Memorandum are attached as **Exhibits "A"** and **"B"**.

Notice is hereby given that Plaintiff Alan W. Schmidt, on behalf of himself and (i) all other Shareholders of Defendant Genaera Corporation; (ii) all other Unit Holders of Genaera Liquidating Trust; and (iii) derivatively on behalf of Genaera, by and through his undersigned counsel, hereby appeals to the United States Court of Appeals for the Third Circuit from the Order [Doc. 129] denying Plaintiff's Motion for Reconsideration [Doc. 122], which was entered in this action on September 25, 2013. The September 25, 2013 Order is attached as **Exhibit "C"**.

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I may be subject to sanctions.

Dated: October 17, 2013

/s/ BRIAN J. MCCORMICK, JR.
Brian J. McCormick, Jr.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN SCHMIDT,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JOHN A. SKOLAS, et al.,	:	**No. 12-3265**
Defendants.	:	

ORDER

AND NOW, this **12th** day of **August**, **2013**, upon consideration of Defendants Biotechnology Value Fund, Inc. and Mark Lampert's Motion to Dismiss Plaintiff's Amended Complaint, Defendants Robert DeLuccia, David Luci and Dipexium Pharmaceuticals' Motion to Dismiss, Access Defendants' Motion to Dismiss, Motion of Ohr Pharmaceutical, Inc. Joining and Supplementing Motions to Dismiss the Amended Verified Complaint, Defendants Xmark Capital Partners, LLC's and Mitchell D. Kaye's Motion to Dismiss Plaintiff Alan W. Schmidt's Amended Complaint, Director and Officer Defendants' Motion to Dismiss the Amended Complaint, Ligand Defendants' Motion to Dismiss Plaintiff's Amended Complaint, Defendants Argyce LLC's and John A. Skolas's Motion to Dismiss the Amended Complaint, Plaintiff's responses thereto, and Defendants' replies thereon, and following oral argument on July 10, 2013, and upon consideration of Plaintiff's Motion to Strike Defendants' Exhibits to the Motions to Dismiss the Amended Complaint, and Defendants' responses thereto, and for the reasons stated in the Court's Memorandum dated August 12, 2013, it is hereby **ORDERED** that:

1. BVF Defendants' motion to dismiss (Document No. 63) is **GRANTED**.

2. Dipexium Defendants' motion to dismiss (Document No. 64) is **GRANTED**.

3. Access Defendants' motion to dismiss (Document No. 65) is **GRANTED**.

4. Defendant Ohr's motion to dismiss (Document No. 66) is **GRANTED**.

5. The motion (Document No. 67) is **DENIED as moot**.

6. Xmark Defendants' motion to dismiss (Document No. 68) is **GRANTED**.

7. D&O Defendants' motion to dismiss (Document No. 69) is **GRANTED**.

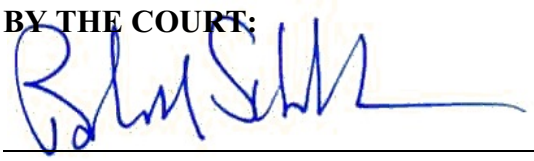
8. Ligand Defendants' motion to dismiss (Document No. 70) is **GRANTED**.

9. Trustee Defendants' motion to dismiss (Document No. 71) is **GRANTED**.

10. Plaintiff's motion to strike (Document No. 82) is **GRANTED** as to the exhibits attached to Document No. 64, and is otherwise **DENIED as moot**.

11. The Clerk of Court is directed to close this case.

BY THE COURT:



Berle M. Schiller, J.

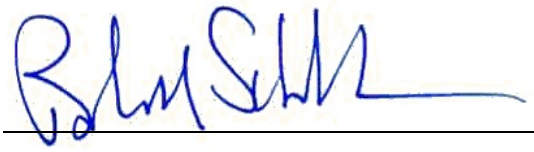
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN SCHMIDT,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JOHN A. SKOLAS, et al.,	:	**No. 12-3265**
Defendants.	:	

ORDER

AND NOW, this **24th** day of **September, 2013**, upon consideration of Plaintiff's Motion for Reconsideration and Defendants' Opposition thereto, it is hereby **ORDERED** that Plaintiff's motion (Document No. 122) is **DENIED.**

BY THE COURT:



Berle M. Schiller, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN SCHMIDT,	:	
Plaintiff,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
JOHN A. SKOLAS, et al.,	:	**No. 12-3265**
Defendants.	:	

MEMORANDUM

Schiller, J. **August 12, 2013**

Alan Schmidt, a former shareholder of Genaera Corporation ("Genaera") and a former unitholder of the Genaera Liquidating Trust ("GLT"), filed the Amended Verified Class Action and Shareholder Derivative Complaint for Damages and Rescission of Sales of Assets to Ohr and Dipexium ("Amended Complaint") against John A. Skolas, Leanne Kelly, John L. Armstrong, Jr., Zola B. Horovitz, Osagie O. Imasogie, Mitchell D. Kaye, Robert F. Shapiro, Paul K. Wotton, Robert DeLuccia, Griffin Securities,[1] David Luci, Steve Rouhandeh, Jeffrey Davis, Mark Alvino, GLT, Biotechnology Value Fund, Inc. ("BVF"), Ligand Pharmaceuticals, Inc. ("Ligand"), Xmark Capital Partners, LLC ("Xmark"), Argyce LLC ("Argyce"), Ohr Pharmaceuticals ("Ohr"), John L. Higgins, Genaera, SCO Financial Group ("SCO"), Dipexium Pharmaceuticals, LLC ("Dipexium"), MacroChem Corporation ("MacroChem"), Access Pharmaceuticals, Inc. ("Access"), and Mark N. Lampert for breach of their fiduciary duties, as well as aiding and abetting thereof, arising out of the liquidation of Genaera.

Eight groups of Defendants have moved to dismiss the Amended Complaint: (1) Trustee Argyce and Skolas ("Trustee Defendants"); (2) Directors and Officers Kelly, Armstrong, Horovitz,

[1] Plaintiff has voluntarily dismissed his claims against Griffin Securities. (ECF Document No. 79.)

Imasogie, Shapiro, and Wotton ("D&O Defendants"); (3) Xmark and Kaye ("Xmark Defendants"); (4) Dipexium, DeLuccia, and Luci ("Dipexium Defendants"); (5) BVF and Lampert ("BVF Defendants"); (6) Ligand and Higgins ("Ligand Defendants"); (7) MacroChem, Access, Rouhandeh, Davis, Alvino ("Access Defendants"); and (8) Ohr, on grounds including statute of limitations and lack of personal jurisdiction. For the reasons that follow, the Court grants Defendants' motions to dismiss.[2]

I. BACKGROUND

This action stems from the dissolution of Genaera, a biotechnology company that developed pharmaceutical drugs and held licenses to intellectual property and patents. (Am. Compl. ¶ 63.) Genaera was a Delaware corporation with its principal place of business in Pennsylvania that owned the rights to certain high value assets with "the potential to earn high returns for Genaera and its stockholders." (*Id.* ¶¶ 11, 65.) It dissolved on June 12, 2009, and its assets were transferred to GLT, a Delaware entity, which was managed by Defendant Argyce as trustee. (*Id.* ¶¶ 24, 151-52.) The allegations of the Amended Complaint pertain mostly to D&O Defendants' participation in a scheme to dissolve Genaera, and Trustee Defendants' sale of the assets in GLT for less than their value to Genaera insiders and their affiliates, at the expense of Genaera shareholders.

A. Dissolution of Genaera

In April 2009, Genaera's Board of Directors announced that the company's prospects were "not promising" and stated that dissolution and liquidation would return the greatest value to

[2] The only Defendant that has not moved to dismiss is SCO. However, for the same reasons that apply to all other Defendants, Plaintiff's claims cannot be sustained against SCO. The claims against SCO are also dismissed.

stockholders. (*Id.* ¶ 123.) On April 18, 2009, the Board unanimously approved—and recommended that shareholders vote to approve—a plan to dissolve and dispose of all the company's assets and make distributions to stockholders by establishing a liquidating trust. (*Id.* ¶ 125.) Defendant Kaye was not at this meeting. (*Id.*) The proxy statement falsely stated that no Genaera officers or directors would profit from the dissolution, and did not accurately describe how promising certain Genaera assets were, among other alleged misrepresentations. (*Id.* ¶¶ 128-29.) The proxy statement also did not explain that Defendant Argyce had already been selected as trustee, even though Defendant Skolas—one of Argyce's only employees—had been fired as Genaera's CFO in 2007. (*Id.* ¶¶ 138, 154-55.) Following the announcement of Board approval of the Plan of Dissolution, Genaera stock declined dramatically. (*Id.* ¶ 139.) At a special meeting of stockholders on June 4, 2009, the stockholders—the two largest of which were Xmark and BVF—approved the Board's recommendation to adopt the Plan of Dissolution. (*Id.* ¶¶ 124, 140-41.) Genaera filed Articles of Dissolution with the Delaware Secretary of State on June 12, 2009, and the company's assets and liabilities were transferred to GLT. (*Id.* ¶ 151.) Thereafter, each outstanding share of Genaera common stock was canceled and replaced by a unit in GLT. (*Id.* ¶¶ 159-60.) The trustee had three years to "monetiz[e]" Genaera's assets. (*Id.* ¶ 187.) GLT terminated upon its final distribution of assets on March 31, 2011. (Defs. Argyce LLC's and John A. Skolas's Mot. to Dismiss Am. Compl. [Trustee's Mot. to Dismiss] Ex. 19 [Grantor Letter Statement of Income].)

B. Post-Dissolution Sale of Assets

1. Aminosterol Assets

Genaera owned Squalamine and Trodusquemine compounds ("Aminosterol Assets"). (Am. Compl. ¶ 226.) One of these compounds was used for eye drops to treat age-related macular

degeneration. (*Id.* ¶ 229.) On July 8, 2009, the Trustee accepted a $50,000 down payment on the sale of the Aminosterol Assets for $200,000 to BBM Holdings, Inc., the predecessor to Ohr. (*Id.* ¶¶ 218, 224.) On August 12, 2009, the Trustee publicly reported that the Aminosterol Assets had been sold in May 2009. (*Id.* ¶ 220.) On August 21, 2009, Ohr filed an 8-K Form announcing its purchase of the Aminosterol Assets, with the purchase agreement attached. (Trustee's Mot. to Dismiss Ex. 7 [Aminosterol 8-K Form].) The Trustee "had the opportunity to sell the assets" for a higher price, and there was no public announcement of bidding for the assets. (Am. Compl. ¶¶ 219, 225.)

2. Pexiganan Asset

In 1999, Genaera developed Pexiganan, a topical cream for the treatment of diabetic foot infections. (*Id.* ¶ 82.) In July 2007 and again in October 2007, MacroChem licensed the right to develop Pexiganan from Genaera, with the possibility for Genaera to earn up to $35 million and ten percent royalty payments based on certain developmental milestones. (*Id.* ¶¶ 95-96.) In 2008, MacroChem "abruptly" stopped investing in the development of Pexiganan. (*Id.* ¶ 107.) In February 2009, Access acquired MacroChem and "ceased development of MacroChem's dermatology products, including Pexiganan." (*Id.* ¶¶ 112-13.) D&O Defendants knew that Genaera had a right under the licensing agreement with MacroChem to demand the return of Pexiganan if MacroChem refused to develop the drug, but they did not make any such demand. (*Id.* ¶ 114.) In December 2009, Pexiganan was returned to GLT, as announced in a March 2010 press release by GLT. (Trustee's Mot. to Dismiss Ex. 17 [GLT March 2010 Update].) According to Plaintiff, Trustee Defendants terminated the previously existing licensing agreement with MacroChem in order to allow Dipexium Defendants to obtain the rights to Pexiganan without the royalty and milestone obligations of the original licensing agreement. (Am. Compl. ¶¶ 206, 207, 210.)

After Genaera's dissolution, on January 11, 2010, the Trustee publicly solicited bids for Pexiganan, with a deadline for bids of February 12, 2010. (*Id.* ¶ 206.) Although the Amended Complaint does not allege the exact date of the transaction with Dipexium, a February 19, 2010 GLT update to unitholders announced multiple expressions of interest in Pexiganan, and a March 2010 GLT update reported negotiations for sales of the asset. (Trustee's Mot. to Dismiss Ex. 16 [GLT Feb. 19, 2010 Update]; GLT March 2010 Update.) In an update on May 21, 2010, GLT declared that "the Trust ha[d] sold substantially all of the assets of the Trust and its predecessor in interest, Genaera Corporation." (Trustee's Mot. to Dismiss Ex. 24 [GLT May 21, 2010 Update]; *see also id.* Ex. 14 [GLT July 2010 Update] (describing sale of Pexiganan under "January-May 2010" heading).) The Dipexium website announced the acquisition of Pexiganan "soon after th[e] transaction." (Am. Compl. ¶ 213.)

3. Interlukin 9 ("IL9") Asset

Since 2007, Genaera had owned a licensor interest in the IL9 antibody program for asthma, which it licensed to MedImmune, LLC ("MedImmune"). (*Id.* ¶ 72.) Genaera could have received up to $54 million in payments and royalties from MedImmune if IL9 reached certain milestones in its development. (*Id.* ¶ 77.) On May 18, 2010, Trustee Defendants sold IL9 to Ligand. (*Id.* ¶ 176.) Ligand then sold half its interest in IL9 to BVF, which had previously owned more than fifteen percent of Ligand stock. (*Id.* ¶¶ 177, 190.) This subsequent transaction was not mentioned in GLT's purchase agreement with Ligand. (*Id.* ¶ 177.) GLT sent a "Brief Update to Unitholders" dated May 21, 2010, in which it announced the sale of IL9 to Ligand for $2.75 million and revealed that Ligand conveyed half of its interest to BVF. (GLT May 21, 2010 Update.) In addition, Ligand filed an 8-K Form that also announced the details of the transaction. (Trustee's Mot. to Dismiss Ex. 22 [IL9 8-K

Form].)

C. Plaintiff's Lawsuit

Schmidt, a former investment professional and former high-ranking employee of Brown Brothers Harriman, was a stockholder of Genaera from 1998 until its dissolution on June 12, 2009, and thereafter became a unitholder of GLT by operation of law. (Am. Compl. ¶¶ 10, 60.) "[T]hroughout the years[, Schmidt] has held many conversations with Genaera officers and directors" regarding the assets at issue and their values and prospects. (*Id.* ¶ 10.) He filed this lawsuit on June 8, 2012, on behalf of himself and all other former shareholders of Genaera, on behalf of all other unitholders of GLT, and derivatively on behalf of Genaera and GLT. (*Id.* ¶¶ 47, 53, 59.) Schmidt filed the Amended Complaint on December 19, 2012, and the above-listed groups of Defendants filed motions to dismiss on February 4, 2013. The Court held oral argument on the motions to dismiss on July 10, 2013. The remaining counts are: breach of fiduciary duty against D&O Defendants, and all other Defendants for aiding and abetting thereof, on behalf of the stockholder class; breach of fiduciary duty against Trustee Defendants, and all other non-D&O Defendants for aiding and abetting thereof, on behalf of the unitholder class; corporate waste against D&O Defendants, and all other Defendants for aiding and abetting thereof, derivatively on behalf of Genaera; breach of fiduciary duty by controlling shareholder against Xmark Defendants and BVF Defendants, and all other Defendants for aiding and abetting thereof, on behalf of the stockholder class; punitive damages against all Defendants; rescission of Aminosterol Assets sale from Ohr; and rescission of Pexiganan sale from Dipexium.[3]

[3] Plaintiff has agreed to dismiss without prejudice the following claims: illegal vote selling; voiding dissolution vote; disgorgement of insider trading profits; and violations of 14(a) of the Securities Act. (Pl.'s Mem. of Law in Opp'n to Director and Officer Defs.' Mot. to

II. STANDARD OF REVIEW

A. Motion to Dismiss for Lack of Personal Jurisdiction

The plaintiff bears the burden of demonstrating facts that establish personal jurisdiction when a defendant raises a personal jurisdiction defense. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 368 (3d Cir. 2002). The plaintiff's factual allegations are taken as true and all factual disputes are drawn in the plaintiff's favor for the purpose of this analysis. *See id.* Establishing a prima facie case for the exercise of personal jurisdiction requires the plaintiff to demonstrate "with reasonable particularity sufficient contacts between the defendant and the forum state." *Mellon Bank (East) PSFS, Nat'l Ass'n v. Farino*, 960 F.2d 1217, 1223 (3d Cir. 1992). The plaintiff must offer "sworn affidavits or other competent evidence" and may not "rely on the bare pleadings alone" in its effort to withstand the defendant's motion. *Patterson v. FBI*, 893 F.2d 595, 604 (3d Cir. 1990).

If the plaintiff meets this burden, the defendant must establish the presence of other considerations that would render jurisdiction unreasonable to prevail on its motion. *Brown & Brown, Inc. v. Cola*, 745 F. Supp. 2d 588, 602 (E.D. Pa. 2010) (citing *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 150 (3d Cir. 1992)).

B. Motion to Dismiss for Failure to State a Claim

In reviewing a motion to dismiss for failure to state a claim, a district court must accept as true all well-pleaded allegations and draw all reasonable inferences in favor of the non-moving party. *See Bd. of Trs. of Bricklayers & Allied Craftsman Local 6 of N.J. Welfare Fund v. Wettlin Assocs.*, 237 F.3d 270, 272 (3d Cir. 2001). A court should accept the complaint's allegations as true, read

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Dismiss Am. Compl. at 4 n.3 [Pl.'s Resp. to D&O Defs.]; Pl.'s Mem. of Law in Opp'n to Defs. Xmark Capital Partners, LLC and Mitchell D. Kaye's Mot. to Dismiss Am. Compl. at 7 n.2.)

those allegations in the light most favorable to the plaintiff, and determine whether a reasonable reading indicates that relief may be warranted. *Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). "But a court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss." *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) (citation omitted); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"Factual allegations [in a complaint] must be enough to raise a right to relief above the speculative level . . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To survive a motion to dismiss, a complaint must include "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A plaintiff must present "enough facts to raise a reasonable expectation that discovery will reveal evidence of the necessary element[s]" of a cause of action. *Phillips v. Cnty. of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Simply reciting the elements will not suffice. *Id.*; *see also Phillips*, 515 F.3d at 231.

The Third Circuit Court of Appeals has directed district courts to conduct a two-part analysis when faced with a Rule 12(b)(6) motion. First, the legal elements and factual allegations of the claim should be separated, with the well-pleaded facts accepted as true but the legal conclusions disregarded. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). Second, the court must make a commonsense determination of whether the facts alleged in the complaint are sufficient to show a plausible claim for relief. *Id.* at 211. If the court can infer only the mere possibility of misconduct, the complaint must be dismissed because it has alleged—but has failed to show—that the pleader is entitled to relief. *Id.*

When faced with a motion to dismiss for failure to state a claim, courts may consider the allegations in the complaint, exhibits attached to the complaint, matters of public record, and documents that form the basis of a claim. *Lum v. Bank of Am.*, 361 F.3d 217, 222 n.3 (3d Cir. 2004).

III. DISCUSSION

A. Personal Jurisdiction

Defendant Ohr has moved to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2). "[A]t no point may a plaintiff rely on the bare pleadings alone in order to withstand a defendant's Rule 12(b)(2) motion to dismiss . . . ." *Time Share Vacation Club v. Atl. Resorts, Ltd.*, 735 F.2d 61, 66 n.9 (3d Cir. 1984). Yet Plaintiff has attempted to do just that. Ohr attached to its motion to dismiss the Declaration of its CEO, Irach B. Taraporewala. (Taraporewala Decl.) The Declaration states that Ohr is a Delaware corporation with headquarters in New York (and formerly in Utah) that has never had an office or employee based in Pennsylvania, nor has it sold any goods there. (*Id.* ¶¶ 3-4.) The negotiations and execution of the asset purchase agreement between Ohr and GLT, a Delaware entity, did not take place in Pennsylvania; the closing of the agreement occurred in New York, and GLT was represented by New Jersey counsel. (*Id.* ¶¶ 6-7, 9.) The asset purchase agreement is additionally governed by Delaware law and has a forum-selection that selects Delaware as the forum for any disputes. (*Id.* Ex. A [Aminosterol Assets Purchase Agreement] §§ 8.8, 8.9.)

Plaintiff, conversely, has filed no affidavits in support of his argument for personal jurisdiction. In fact, the Amended Complaint fails even to include Ohr in its list of parties and otherwise makes no jurisdictional allegations about Ohr. (Am. Compl. ¶¶ 11-41.) The Court cannot

do Plaintiff's work for him by searching for possible contacts between Ohr and Pennsylvania. Plaintiff bore this burden and failed to carry it. *See, e.g.*, *Junge v. Wheeling Island Gaming, Inc.*, Civ. A. No. 10-1033, 2010 WL 4537052, at *4 (W.D. Pa. Nov. 2, 2010); *Olympia Steel Bldgs. Sys. Corp. v. Gen. Steel Domestic Sales, LLC*, Civ. A. No. 06-1597, 2007 WL 1816281, at *4-5 (W.D. Pa. June 22, 2007) (finding no personal jurisdiction over defendant where, "[d]espite their clear burden, [plaintiffs] have not submitted any evidence, in the form of sworn affidavits or otherwise," related to personal jurisdiction).

In response to Ohr's argument, Plaintiff, without adducing additional facts supporting personal jurisdiction, seeks limited jurisdictional discovery. A plaintiff is entitled to jurisdictional discovery if he "presents factual allegations that suggest with reasonable particularity the possible existence of the requisite contacts between [the defendant] and the forum state." *Eurofins Pharma US Holdings v. BioAlliance Pharma SA*, 623 F.3d 147, 157 (3d Cir. 2010) (citation omitted). "A plaintiff may not, however, undertake a fishing expedition based only upon bare allegations, under the guise of jurisdictional discovery." *Id.* Here, there are no factual allegations—set forth with "reasonable particularity" or otherwise—to support jurisdictional discovery. Plaintiff's concession that he is "not aware of the extent of activities or contacts that Defendant Ohr has had with the Commonwealth" reveals his request for jurisdictional discovery to be nothing more than a fishing expedition. (*See* Mem. of Law in Opp'n to Def. Ohr Pharmaceutical, Inc.'s Mot. to Dismiss Am. Compl. at 18.)

Given Plaintiff's failure to provide affidavits or other competent proof of personal jurisdiction, make any basic allegations of the Court's personal jurisdiction over Ohr in his Amended Complaint, or otherwise support his request for limited jurisdictional discovery with "reasonable

particularity," the Court finds that it lacks personal jurisdiction over Ohr Pharmaceuticals. The claims against it are therefore dismissed.

B. Statute of Limitations

The parties agree that Pennsylvania's two-year statute of limitations applies to Plaintiff's claims for breach of fiduciary duty and corporate waste, and aiding and abetting thereof. *See* 42 Pa. Cons. Stat. § 5524(7); (Mem. of Law in Opp'n to Defs. Argyce LLC's and John A. Skolas' Mot. to Dismiss Am. Compl. at 8 & n.4; *e.g.*, Director and Officer Defs.' Mot. to Dismiss Am. Compl. at 21-22.). Therefore, given that Plaintiff filed this lawsuit on June 8, 2012, Plaintiff's claims cannot have accrued before June 8, 2010 in order to be timely.

To grant a motion to dismiss on statute of limitations grounds, the statute of limitations defense must be clear on the face of the complaint. *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002). Plaintiff has, in fact, conceded that he "missed the two-year period by a couple of weeks." (Oral Arg. Tr. at 22.) He therefore relies on the discovery rule to toll the running of the limitations period. (*See, e.g.*, Mem. of Law in Opp'n to Defs. Argyce LLC's and John A. Skolas' Mot. to Dismiss Am. Compl. at 8.)

A federal court applying a state statute of limitations period applies state tolling rules. *Knopick v. Connelly*, 639 F.3d 600, 606 (3d Cir. 2011) (citations omitted). The Pennsylvania discovery rule tolls the statute of limitations until the plaintiff knew, or should have known through the exercise of reasonable diligence, of the injury and its cause. *Wise v. Mortg. Lenders Network USA, Inc.*, 420 F. Supp. 2d 389, 395 (E.D. Pa. 2006). However, the discovery rule is implicated "in only the most limited of circumstances." *Goleman v. York Int'l Corp.*, Civ. A. No. 11-1328, 2011 WL 3330423, at *4 (E.D. Pa. Aug. 3, 2011). To this end, lack of knowledge is insufficient to toll the

running of the statute of limitations. *See Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983).

Rather, "the salient point giving rise to [the discovery rule's] application is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause." *Fine v. Checcio*, 870 A.2d 850, 858 (Pa. 2005). Plaintiff bears the burden of establishing this inability. *See Donovan v. Idant Labs.*, 625 F. Supp. 2d 256, 266 (E.D. Pa. 2009), *aff'd sub nom. D.D. v. Idant Labs.*, 374 F. App'x 319 (3d Cir. 2010). Yet when the Court asked Plaintiff's counsel at oral argument to explain the greater-than-two-year period after Plaintiff received notice of the transactions before he brought suit, counsel responded that "Mr. Schmidt was putting together all the facts and circumstances." (Oral Arg. Tr. at 29.) As the Court noted in response, to toll the statute of limitations on every plaintiff's mere assertion that he needed time to put together all the facts and circumstances would eviscerate the very concept of a limitations period. (*Id.* at 29-30.); *see also Ingenito v. AC & S, Inc.*, 633 A.2d 1172, 1175 (Pa. Super. Ct. 1993) ("[T]he [discovery] rule cannot be applied so loosely as to nullify the purpose for which a statute of limitations exists.").

Indeed, Plaintiff has never pointed to exactly what information ultimately brought his cause of action to his attention. He avers generally that the 2011 release of the Trustee's financial statements for fiscal year 2010 gave him the necessary information. (*See* Oral Arg. Tr. at 20 ("[T]hat was the first time that there was enough information [for] the plaintiff . . . to actually discern the nature of the injury, and where it was caused and how it came about.").) Yet by May 2010, all of the relevant transactions had occurred and been publicly announced, through a combination of updates from GLT, public SEC filings, and press releases from the acquiring companies. It is not clear what more information Plaintiff wanted. Although he implies that he was unaware of the value of the

assets sold until acquiring companies were able to develop or finance them, (*See* Am. Compl. ¶¶ 214-15), the Amended Complaint is replete with allegations of the great promise these assets showed prior to Genaera's dissolution in 2009, (*See id.* ¶¶ 79, 105, 178, 203-05). If Plaintiff cannot articulate why, in spite of his reasonable diligence, his cause of action was unknowable to him before June 2010, he has not met his burden. *See Brawner v. Educ. Mgmt. Corp.*, 513 F. App'x 148, 151 (3d Cir. 2013) (affirming grant of motion to dismiss because cause of action was not tolled where plaintiff failed to show that any new information received after the expiration of the statute of limitations "was essential to the commencement of a suit").

"Where . . . reasonable minds would not differ in finding that a party knew or should have known on the exercise of reasonable diligence of his injury and its cause, the court determines that the discovery rule does not apply as a matter of law." *Fine*, 870 A.2d at 858-59. The fact that a plaintiff "may not have been aware of the 'full extent' of the possible injury does not save his claims." *Brawner*, 513 F. App'x at 151 (quoting *Gleason v. Borough of Moosic*, 15 A.3d 479, 484 (Pa. 2011)). Plaintiff was on notice that GLT was selling Genaera's core assets, and was provided with regular updates on negotiations, transactions, and prices; all of this information was presented to him before June 8, 2010. Plaintiff's explanation that he was "putting together all the facts and circumstances" does not reflect an inability to know of his cause of action in spite of reasonable diligence. Plaintiff has not met his burden of demonstrating that the discovery rule should apply here. *See Goleman*, 2011 WL 3330423, at *4-5; *Garcia-Valentie v. McKibbin*, Civ. A. No. 06-5097, 2007 WL 2022067, at *5 (E.D. Pa. July 9, 2007).

Finally, Plaintiff also relies on the fraudulent concealment doctrine in an attempt to toll his claims. Under Pennsylvania law, the fraudulent concealment doctrine requires an "affirmative and

independent act of concealment that would divert or mislead the plaintiff from discovering the injury," which is lacking here. *See Bohus v. Beloff*, 950 F.2d 919, 925 (3d Cir. 1991). Plaintiff would be hard-pressed to point to any act of concealment here, given that every transaction to which Plaintiff objects was announced publicly by GLT, announced publicly by the purchaser, filed publicly with the SEC, or some combination of the three. Fraudulent concealment does not toll Plaintiff's claims.

C. Leave to Amend the Complaint

Plaintiff has already amended his Complaint once. "Although Federal Rule of Civil Procedure 15(a) states that leave to amend 'shall be freely given when justice so requires,' . . . leave to amend need not be granted when amending the complaint would clearly be futile." *Cowell v. Palmer Twp.*, 263 F.3d 286, 296 (3d Cir. 2001) (quoting Fed. R. Civ. P. 15(a)(2)). *Cowell* specifically notes that repleading is futile if a claim cannot overcome the statute of limitations. *Id.* Because Plaintiff cannot change the dates on which the transactions he challenges occurred, further amending his complaint would be futile.

Likewise, though Plaintiff has agreed to dismiss certain counts without prejudice, the Court dismisses them with prejudice because they, too, are barred by their statutes of limitations. *See* 15 U.S.C. § 78i(f) (setting forth three-year statute of repose for violations of Section 14(a), which allegedly occurred in proxy statement issued May 14, 2009); 42 Pa. Cons. Stat. § 5524(7) (providing two-year statute of limitations for fraud, where alleged vote selling occurred on June 4, 2009 and alleged insider trading occurred June 5, 2009). Finally, the claims for the remedies of punitive damages and rescission cannot stand now that the underlying causes of action have been dismissed.

IV. CONCLUSION

For the reasons set forth above, Defendants' motions to dismiss are granted. An Order consistent with this Memorandum will be docketed separately.

CERTIFICATE OF SERVICE

I hereby certify that all counsel listed immediately below on this Certificate of Service are Filing Users of the Third Circuit's CM/ECF system, and this document is being served electronically on them by the Notice of Docket Activity:

Michael D. Blanchard

Carolyn E. Budzinski

Donald A. Corbett

Joseph P. Dever, Jr.

Christopher M. Guth

Jordan D. Hershman

Michael L. Kichline

Brian J. McCormick, Jr.

Paul G. Nofer

Jonathan M. Proman

Joshua N. Ruby

Jake Ryan

Colleen C. Smith

Lee Squitieri

Denean K. Sturino

John S. Summers

Joseph E. Vaughan

Christopher M. Wasil

Jeffrey G. Weil

Tamar S. Wise

Richard C. Wolter

Alfred W. Zaher

Dated: March 20, 2014

/s/ *Howard J. Bashman*
Howard J. Bashman