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)

REPLY BRIEF FOR APPELLANT

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I. INTRODUCTION

Plaintiff/appellant Alan W. Schmidt's opening brief, consisting of 7,560 words, focused entirely on the statute of limitations issue, because that was the ground on which the district court based its dismissal of this case against all remaining defendants/appellees.

The defendants/appellees, by contrast, have filed a total of six Briefs for Appellees containing in excess of 44,000 words. Although all six briefs ask this Court to affirm the district court's statute of limitations–based dismissal, only three of those briefs discuss the limitations issue in any detail. Yet all six briefs raise a number of other arguments that, according to defendants/appellees, present alternate, independent grounds for affirming the district court's dismissal of this case.

By means of this Reply Brief, which is limited by rule to no more than 7,000 words, plaintiff/appellant must reply not only to defendants' statute of limitations arguments but also to the supposed alternate grounds for dismissal, which neither the Brief for Appellant nor the district court's opinion addressed. Although plaintiff had a fair opportunity to respond to these supposed grounds for dismissal before the district court, limited now to a 7,000 word appellate reply brief, plaintiff cannot respond as comprehensively as plaintiff would desire to all of the defendants' supposed alternate grounds for affirmance.

As the defendants' appellate briefs recognize, the district court did not address on the merits any of the supposed alternate grounds for affirmance. Although this Court has the ability to address in the first instance alternate grounds for dismissal that the district court did not address, plaintiff respectfully suggests in the context of this appeal that the better approach would be, once this Court reverses on the statute of limitations issue, to remand to the district court for whatever further consideration the district court wished to give to the alternate grounds for dismissal.

If, following such a remand, the district court were to deny defendants' requests for dismissal on those other grounds, then no appealable order would exist, and this case would proceed on the merits. But if the district court were to dismiss this case on an alternate ground, then this Court would be able to consider plaintiff's appeal from that dismissal in the context of adequate briefing, which regrettably is not possible in the current posture of this case.

This Reply Brief begins by establishing that none of the appellees' arguments in favor of affirmance on the statute of limitations issue has merit. Then, this Reply Brief concludes by demonstrating both that the supposed alternate grounds for affirmance lack merit and, at a minimum, should not be considered in the first instance in the context of this appeal.

II. ARGUMENT IN REPLY

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. Introduction

The central question presented in this appeal is whether the state law claims contained in plaintiff's 59–page amended complaint are clearly time–barred on the face of that pleading. *See Robinson* v. *Johnson*, 313 F.3d 128, 135 (3d Cir. 2002). The fact that this appeal has produced a Joint Appendix containing more than 1,700 pages of relevant filings, including nine motions to dismiss that themselves alone account for more than 1,050 pages of the Joint Appendix, demonstrates that the defendants have placed before the district court in support of their motions to dismiss a wide variety of other documents — neither expressly incorporated into plaintiff's amended complaint nor from which plaintiff's claims arise — in order to establish that plaintiff's claims supposedly are time–barred.

Because defendants' statute of limitations arguments rely to such a great extent on documents beyond plaintiff's pleading, and because plaintiff's proper invocation of the discovery rule to toll the accrual of the statute of limitations itself presents issues of fact beyond the pleadings, reversal of the district court's dismissal is necessary so that the statute of limitations issue can be addressed on a proper record at the summary judgment stage of this case.

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

As in many appeals that this Court reviews, the parties have presented this Court with two quite different views of what the case involves. In order to obtain, and now in an effort to sustain, the dismissal of plaintiff's claims on statute of limitations grounds, the defendants have characterized this case as one in which the plaintiff believed that Genaera's various assets were valuable, and therefore when those assets were sold for relatively insignificant consideration plaintiff was or should have been on notice of his claims.

By contrast, as explained in the Brief for Appellant, plaintiff was more than willing to accept as valid the insignificant consideration that Genaera received for its assets until he discovered that the transactions were not legitimate arm's length sales but rather represented an effort to secretly deprive Genaera's shareholders and unit holders of the true value of those assets, in order to unfairly benefit the insiders and others who purchased 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 were previously understood to be the company's most valuable assets.

As plaintiff explained in his opening Brief for Appellant, 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.

In this case, defendants contended 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, broader reading of the amended complaint demonstrates that plaintiff was not aware of any injury or the cause of any injury until sometime in 2011, when Argyce publicly issued its financial statements for the 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 $1.07

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

The release of 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 nearly $2.5 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. Plaintiff 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 it had raised the first $1.07 million. Under the discovery rule, Pennsylvania law provides the plaintiff a full two–year period to file suit after the plaintiff knows, or reasonably should have known, of the existence of his claims.

The sale of Pexiganan for a small fraction 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, the earliest plaintiff could possibly have begun to piece together defendants' breach was within two years of when this suit was filed.

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.

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 of when Schmidt initiated this lawsuit. However, the plaintiff is the master of his own complaint, and therefore the plaintiff's representation of what this case is actually about, rather than defendants' efforts to incorrectly characterize his claims to facilitate their statute of limitations defense, is what matters.

The defendants' Briefs for Appellees take great liberties with their characterization of documents that plaintiff's amended complaint supposedly incorporates. The amended complaint may make reference to events that are reflected in certain SEC filings, but the amended complaint never expressly incorporates any of those filings. But even if the district court may properly consider SEC filings in support of a motion to dismiss on statute of limitations grounds, here the district court's reliance on SEC filings does not validate its dismissal.

Rather, the district court's dismissal ignores plaintiff's actual theories of recovery in favor of defendants' mischaracterization of those theories, which assumes that plaintiff should have known of his claim immediately when insufficient consideration was recovered in exchange for Genaera's former assets. Moreover, the district court relied heavily on internet postings that go far beyond SEC filings in finding plaintiff's claims time–barred. App. 19a–20a. There is nothing in this Court's jurisprudence that legitimizes reliance on that sort of extraneous evidence at the motion to dismiss stage. Defendants quote cases holding that a district court may rely on "any items of record," but attaching documents or other exhibits to a motion to dismiss makes whatever is attached "an item of record." Surely this Court's jurisprudence does not hold or even suggest that anything that a defendant attaches to a motion to dismiss on statute of limitations grounds is proper for a district court's consideration. Moreover, just because a plaintiff is willing to concede the authenticity of certain defendants' web postings does not mean that plaintiff had access to that information or that those postings actually disclosed the wrongdoing that is at issue in this lawsuit.

Defendants' reliance on such a great volume of exhibits beyond plaintiff's pleading in support of their motions to dismiss seriously calls into question the sincerity of defendants' repeated assertion that somehow plaintiff's claims are time–barred on the face of the complaint. Yet defendants have no choice but to contend that plaintiff's claims are time–barred on the face of the complaint, despite having introduced all that extraneous "evidence" to establish the supposed time bar, in order to simultaneously maintain that plaintiff also had to plead facts establishing applicability of the discovery rule in the amended complaint.

Once again, defendants' arguments miss the mark, this time for three reasons. First, as explained above and in the opening Brief for Appellant, plaintiff's claims are not clearly time–barred on the face of the amended complaint. Rather, the district court in granting its Rule

12(b)(6) dismissal on statute of limitations grounds found it necessary to rely on materials outside plaintiff's complaint. App. 19a–20a.

Second, as explained in the Brief for Appellant at pages 28–32 (and summarized above in this Reply Brief at pages 5–9), the facts necessary to plaintiff's invocation of the discovery rule are contained in the complaint. Accordingly, if this were a case in which it was necessary to plead facts pertinent to the discovery rule to avoid a statute of limitations–based dismissal, plaintiff has done so here.

Finally, it is simply inequitable for defendants to be able to introduce an endless stream of extraneous evidence in support of their statute of limitations argument while depriving plaintiff of the same opportunity, simply because this case remains at the Rule 12(b)(6) motion to dismiss stage. Plaintiff has shared with his counsel evidence that is not attached to the amended complaint that establishes even more persuasively than plaintiff has been able to argue here and in the trial court the applicability of the discovery rule to this case, but that evidence is not before this Court, nor could it have been properly placed before the district court, at this stage of the litigation. It is for this reason that the discovery rule normally either presents a jury question or, at a minimum, an issue to be considered initially at summary judgment. It simply is not equitable for defendants to bring forth so much extraneous evidence in an effort to establish that plaintiff's claims are time–barred without allowing plaintiff the reciprocal ability, likewise based on outside evidence, to establish the reasonableness and applicability of the discovery rule to defeat defendants' invocation of their statute of limitations defense.

For these reasons, and for the reasons explained in the opening Brief for Appellant, this Court should reverse the district court's dismissal of this case on statute of limitations grounds and remand for further proceedings.

B. This Court Either Should Remand To Allow The District Court To Address In The First Instance Defendants' Supposed Alternate Grounds For Dismissal Or Reject Those Grounds On The Merits

1. The district court should be permitted, in the first instance, to address and decide defendants' supposed alternate grounds for dismissal

As noted above, the extent to which the defendants have relied in their appellate briefing on alternate grounds for affirmance reveals a recognition that the district court's dismissal of this case on statute of limitations grounds is in serious jeopardy.

Although this Court has discretion to address alternate grounds for affirmance on a proper record, here this Court should decline to do so for the following reasons. First, as the Briefs for Appellees acknowledge, the district court has not addressed in the first instance any of the alternate grounds for dismissal that the defendants urge on appeal.

Second, although the defendants in their six Briefs for Appellees have been able to devote more than 20,000 words toward briefing the supposed alternate grounds for affirmance, plaintiff has only a small fraction of that amount to address those same grounds. Plaintiff had no obligation to address anything in his opening brief other than the basis on which the district court actually dismissed this case. Although the rules permit defendants, through the use of multiple briefs, substantial additional words in which to pursue the supposed alternate grounds for affirmance, those issues cannot be fully and fairly presented for this

Court's consideration due to the vastly more restrictive word–count that plaintiff faces in the context of this single Reply Brief.*

Third, this Court is under no obligation to decide, in the first instance, arguments for dismissal of a complaint that the district court has not yet decided. In *In re Lord Abbett Mutual Funds Fee Litig.*, 553 F.3d 248 (3d Cir. 2009), this Court explained:

> We decline defendants' request to affirm the dismissal of this case on alternative grounds * * *. These alternate grounds, along with a number of other possible bases for dismissal, were all briefed before the District Court in a separate motion to dismiss, which was pending when the District Court dismissed the case on [other] grounds. The alternate grounds for dismissal would be better decided by the District Court in the first instance.

Id. at 257–58 (footnote omitted); *see also Tretter* v. *Pa. Dep't of Corrections*, 2014 WL 903490, at *3 (3d Cir. 2014) (non–precedential)

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* The briefs in opposition that plaintiff filed in the district court in response to defendants' various motions to dismiss appear in the Joint Appendix at pages 1178a–404a. In those briefs in opposition, plaintiff responded comprehensively to all of the grounds for dismissal that defendants had raised in the district court. App. 1178a–404a. To the extent that the word count constraints applicable to this Reply Brief have caused plaintiff to oppose defendants alternative arguments in a more abbreviated and less comprehensive manner herein, plaintiff neither intends to waive nor voluntarily relinquish any of the arguments in opposition to the supposed alternate grounds for dismissal that plaintiff set forth in his trial court briefing.

("Although the parties have included arguments for and against dismissal in their appellate briefs, we decline to address these issues and will, instead, leave it to the District Court in the first instance to address the merits of any such unresolved issues on remand.") (citing *Berda* v. *CBS Inc.*, 881 F.2d 20, 28 (3d Cir.1989)).

Fourth and finally, sound prudential reasons exist for this Court to defer the additional grounds for dismissal to the district court in the first instance. To begin with, if the district court denies all of the alternate grounds for dismissal, no appealable order will result, and this case will proceed forward on the merits in the district court. By deferring these issues to the district court, this Court may never need to address them. Moreover, if any of these alternate grounds for affirmance were clear–cut, presumably the district court would have already addressed and decided them.

For all of these reasons, this Court should decline to address in the first instance the numerous supposed alternate grounds for affirmance that defendants have raised on appeal. Instead, after this Court reverses the dismissal of this case on statute of limitations grounds, this

Court should remand the case so that the district court can address those matters in the first instance.

2. If this Court chooses to address on the merits the numerous supposed alternate grounds for dismissal that defendants have raised, they should all be rejected

a. The business judgment rule does not protect the director defendants from liability

Under Delaware law, the business judgment rule is a rebuttable presumption that does not apply in the face of evidence that board members acted disloyally to enhance the selfish interests of themselves and/or fellow directors and did not act in good faith or in the best interests of the company and its shareholders.

The business judgment rule is premised on a presumption that the directors have severally met their duties of loyalty and that the directors have collectively, as a board, met their duty of care. *See Cede & Co.* v. *Technicolor, Inc.*, 634 A.2d 345, 368 (Del. 1993). "A breach of either the duty of loyalty or the duty of care rebuts the presumption that the directors acted in the best interests of the shareholders, and requires the directors to prove the transaction was entirely fair." *Id.* at 371.

Because plaintiff's allegations are sufficient to rebut the business judgment rule, here the burden shifts to the defendant directors to prove the entire fairness of the transaction to the shareholder plaintiff. *Id.* at 361. "Under the entire fairness standard of judicial review, the defendant directors must establish to the court's satisfaction that the transaction was the product of both fair dealing and fair price." *Id.* (citations omitted). In addition, "in the review of a transaction involving a sale of a company, the directors have the burden of establishing that the price offered was the highest value reasonably available under the circumstances." *Id.* (citations omitted).

For these reasons, this Court cannot decide at the Rule 12(b)(6) stage that the business judgment rule protects any defendant from liability under the claims alleged in the amended complaint.

b. The amended complaint adequately alleges claims for breach of fiduciary duty

Plaintiff has sufficiently stated a claim against the Director and Officer defendants for multiple breaches of fiduciary duties under Delaware law. In exercising their powers, "directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders." *Cede & Co.*, 634 A.2d at 360.

The amended complaint sets forth sufficient allegations of plaintiff's duty of care claims. Specifically:

> • Defendants were not adequately informed about the benefits of other, more lucrative alternatives to liquidation such as a royalty trust. (App.98a).
>
> • Defendants failed to actively seek and pursue additional bids for the assets. (App.100a, 101a, 103a–04a, 106a).
>
> • Defendants failed to give other interested bidders adequate time to research company assets and liabilities to prepare a bid. (App.100a, 101a, 103a–04a, 106a).
>
> • Defendants provided misleading proxy information to the shareholders to make the liquidating trust scenario appear to be the exclusive option for Genaera. (App.89a, 91a–92a).
>
> • Defendants failed to properly maintain and develop the corporate assets. (App.81a, 88a–89a, 105a, 107a).

With regard to plaintiff's breach of fiduciary duty claims, the amended complaint alleges that defendants failed in their fiduciary roles when:

> • the dissolution agreement was not preceded by a prudent search for alternatives (App.98a);
>
> • they agreed to sell the assets in a rushed and uninformed manner, resulting in the company's receiving grossly

inadequate consideration for the assets (App. 100a, 105a–06a);

- they failed to seek offers from other likely purchasers (App.101a, 103a–04a, 106a);

- they appointed defendant Skolas as the Trustee to sell the company assets with disregard for his troubled business past (App.96a); and

- they failed to acquire adequate information regarding the sale of the assets, including the side benefits to defendants Mitchell Kaye and BVF. (App.93a, 102a).

As a result, the board's actions are not protected by the business judgment rule at the motion to dismiss stage; rather, the board's actions must be examined under the entire fairness standard.

With regard to defendants Argyce and Skolas, plaintiff has pled sufficient allegations to demonstrate that these two defendants breached their fiduciary duties of care and loyalty.

Here, these defendants had a duty to protect the interests of the Trust and all the unitholders, and not just the select few. *Cede & Co.*, 634 A.2d at 360 ("directors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders"). Moreover, these defendants had an obligation to be loyal to the corporation. "Essentially, the duty of loyalty mandates that the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder and not shared by the stockholders generally." *Id.* at 361. These defendants' actions were in direct contradiction of this duty. (App.98a). Specifically, plaintiff has alleged that:

> • Defendant Skolas replaced an existing license with MedImmune that could have had royalty provisions and substantial value to Genaera shareholders with a substitute agreement of sale that actually provided economic benefits to a major Genaera shareholder to the great harm of the other shareholders. (App.97a).
>
> • Defendant Skolas participated in concealing the involvement of BVF in the IL9 transaction, in essence transferring a huge benefit on BVF, Genaera's second largest shareholder, to the detriment of the other shareholders. (App.102a).
>
> • Defendant Skolas sold the IL9 Asset to Ligand "for a price that was insignificant relative to the value of the asset." (*Id.*).
>
> • Defendant Skolas instituted a bidding procedure for the Pexiganan and IL9 asset that unfairly favored certain bidders over others, eliminating the possibility of higher bids for the company's assets. (App.103a–04a).
>
> • Defendant Skolas sold the Pexiganan Asset free of the royalty milestone payment obligations owed to Genaera and the unitholders. (App.105a).
>
> • Defendant Skolas sold the Aminosterol Asset only 26 days after the liquidating trust was established without any

public announcement of bidding of any objective appraisal of the asset undertaken. (App.106a). Indeed, the Trustee failed to make any effort to the market the Aminosterol Asset. (*Id.*).

• Defendants had the opportunity to sell the Aminosterol Assets for a price higher than paid but could not take advantage of that opportunity because the liquidating trust was prematurely tied into the agreement with Ohr. (App.107a–08a).

From these specific facts, it is reasonable to infer that defendants conducted the affairs of the Genaera Liquidating Trust in a manner inconsistent with the duties imposed upon them. Failing to have assets valued, foregoing independent evaluations of assets, rigging the bidding process to eliminate other potential bidders, and expediting sales of assets without considering all offers exhibit behaviors that constitute breaches of the duty of care and loyalty.

c. The amended complaint adequately alleges claims for corporate waste

Plaintiff has sufficiently pleaded a claim for corporate waste. Corporate waste is "an exchange of corporate assets for consideration so disproportionately small as to lie beyond the range at which any reasonable person might be willing to trade." *In re Nat'l Auto Credit,* *Inc. Shareholders Litig.*, 2003 WL 139768, *13 (Del. Ch. Jan. 10, 2003) (internal quotations omitted); *Telxon Corp.* v. *Bogomolny*, 792 A.2d 964, 976 (Del. Ch. 2001).

Here, plaintiff's amended complaint alleges that defendants sold all the company assets for far less than they were worth, even considering the dissolution context. (App.68a). Prior to its dissolution, Genaera's assets consisted mainly of: (a) its licensor interest in the Interlukin 9 antibody program for the asthma (the "IL9 Program"); (b) a license requiring royalties and milestone payments for Pexiganan, a topical cream for the treatment of patients with mild diabetic foot infections; (c) the MSI 1436 program for obesity and diabetes; and (d) several squalamine antiangiogenic and other aminosterol compounds (the "Aminosterol Assets"). (App.67a–68a). "These were all valuable assets in which Genaera had invested large sums of money in their development over the previous decade." *Id.*

The amended complaint alleges that the Director and Officer defendants gave away the company assets although they were well aware of the true worth of these assets. In fact, one of the buyers of the assets acknowledged that the company had "stolen" the asset from the liquidating trust. (App.108a). The defendants' conduct rises to the level of extraordinary circumstances that warrant a finding of corporate waste.

d. Plaintiff's amended complaint satisfies the heightened pleading requirements of Fed. R. Civ. P. 9(b), to the extent that rule is applicable

The defendants who argue that the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) apply to plaintiff's claims of fiduciary duty are incorrect, because not all fiduciary duty claims sound in fraud, and in particular plaintiff's fiduciary duty claims do not constitute claims of fraud.

In applying Rule 9(b)'s pleading requirement, this Court has explained that courts must be sensitive to the fact that its application prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud. *See Craftmatic Secs. Litig.* v. *Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989). Rule 9(b) is relaxed in circumstances, as here, where the facts relating to the fraud are peculiarly within the perpetrators' knowledge. *Id.* at 645; *see also Corley* v. *Rosewood Care Center, Inc.*, 142 F.3d 1041, 1050–51 (7th Cir. 1998);

Michaels Bldg. Co. v. *Ameritrust Co., N.A.*, 848 F.2d 674, 680 (6th Cir. 1988).

Because plaintiff's amended complaint adequately puts the defendants on notice of plaintiff's claims, the amended complaint satisfies Rule 9(b)'s heightened pleading standards, to the extent that they apply.

e. Plaintiff's amended complaint permissibly subjects Skolas to personal liability

Defendant Skolas asserts that he is not subject to personal liability because the Trust Agreement contains a provision preventing personal liability. However, the contractual provision does not act as a complete bar to Skolas' personal liability.

Rather, the Agreement allows personal liability upon a showing of gross negligence, fraud, or willful misconduct knowingly and intentionally committed in bad faith by the Trustee. Plaintiff has alleged conduct encompassing personal liability on the part of Skolas. Moreover, a contractual provision supposedly barring liability is an affirmative defense and not properly decided on a motion to dismiss.

Accordingly, plaintiff's claims against Skolas cannot properly be dismissed at this stage of the litigation.

f. The amended complaint adequately alleges claims for aiding and abetting liability against defendants

Under Delaware law, a third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party "knowingly participates" in the breach. To survive a motion to dismiss, a claim for aiding and abetting requires the following elements: (1) the existence of a fiduciary relationship, (2) a breach of the fiduciary's duty, (3) a knowing participation in that breach, and (4) damages to the plaintiff resulted from the concerted action of the fiduciary and the non–fiduciary. *See Carsanaro* v. *Bloodhound Technologies, Inc.*, 65 A.3d 618, 643 (Del. Ch. 2013) (citing *In re Santa Fe Pac. Corp. S'holder Litig.*, 669 A.2d 59, 72 (Del.1995)).

Here, plaintiff has adequately pleaded facts necessary to substantiate a claim for the Director and Officer defendants' breach of fiduciary duty including the existence of a fiduciary relationship, a breach of that duty, and damages proximately caused by the breach. A reasonable inference can be made that defendant Skolas knowingly participated in the Directors' and Officers' breach. The Directors and Officers would not have been able to effectuate the fire sale of Genaera's assets without the willing participation of Skolas, the Trustee. Skolas' knowing participation was necessary for the Directors' and Officers' breach to have succeeded. It is clear from the facts alleged in the amended complaint that defendant Skolas and the Directors and Officers knowingly acted in concert at the expense of shareholders.

Similarly, plaintiff has adequately stated a claim against BVF and Lampert for aiding and abetting the Director and Officer defendants' and defendants Skolas and Argyce's breach of fiduciary duty and corporate waste. Under Delaware law, a third party may be liable for aiding and abetting a breach of a corporate fiduciary's duty to the stockholders if the third party "knowingly participates" in the breach.

Plaintiff alleges sufficient facts to create an inference that the BVF defendants knowingly participated in the remaining defendants' breaches of fiduciary duty and corporate waste. A claim of knowing participation need not be plead with particularity, so long as the complaint contains some factual allegations from which knowing participation can be inferred. *See Jackson Nat. Life Ins. Co.* v. *Kennedy*, 741 A.2d 377, 391–92 (Del. Ch. 1999).

The Director and Officer defendants, along with the BVF defendants and the Kaye defendants, orchestrated Genaera's dissolution so its core assets could be acquired at drastically reduced prices by predetermined buyers, which included Genaera's largest shareholders. Defendant Lampert was president of Defendant BVF and a close acquaintance of defendant Kaye, the CEO of defendant XMark and a Genaera Director. (App.78a, 94a). Collectively, XMark and BVF were the largest shareholders of Genaera. (App.90a). Plaintiff alleges Genaera's Board of Directors knew BVF and XMark wanted Genaera to be dissolved so the core assets would come up for distress sale. (App.89a).

Genaera's Directors sought expedited approval of dissolution so they could resign and separate themselves from Genaera as quickly as possible to avoid liability for the sale of Genaera's assets for less than fair value. (App.90a). Plaintiff alleges the Kaye defendants and the BVF defendants coordinated their efforts to steer Genaera into dissolution so its core assets could be acquired cheaply. (App.92a). The proxy prepared by the Director defendants falsely stated none of the Genaera officers or directors would profit from the dissolution. (*Id.*).

The Director and Officer defendants could not transfer Genaera's core assets at distress prices as their fiduciary duty would have obligated them to maximize value. Instead, the Director defendants created a situation where Genaera was dissolved without establishing a royalty trust or any other structure so the predetermined trustee could freely execute sales of assets for far below their worth. (App.96a–97a). Without BVF's knowing participation as Genaera insiders in the Director and Officers' breach of fiduciary duty resulting in Genaera's dissolution, they would not have been able to effectuate post–dissolution acquisition of Genaera's assets at prices dramatically less than fair value.

BVF also had a significant interest in defendant Ligand. Defendant Skolas, the Trustee of Genaera's liquidating trust, favored insiders Ligand and BVF as bidders for the IL9 program. (App.98a). As an insider, BVF could not purchase Genaera's assets directly without conflict of interest so the asset was sold to Ligand and then Ligand subsequently sold half its interest to BVF. (App.99a–100a). BVF owned more than 15% of Ligand common stock prior to Genaera's dissolution. Within two weeks, BVF cut back on its Ligand position to just less than 10% to evade status as a Ligand insider. (App.101a).

The Ligand–BVF "partnership" then acquired the IL9 asset, and BVF provided roughly half the purchase price. (App.102a). Plaintiff alleges defendants Skolas, Ligand, and BVF acted together to secure the IL9 asset for less than 5% of its actual worth. (App.100a). Defendant Skolas provided public valuations of the IL9 asset that had no reasonable basis as a fraction of its earlier value. (App.98a). Defendant Skolas and Ligand participated in the concealment of BVF's involvement. (App.99a, 102a).

Plaintiff further alleges defendant Kaye provided defendant Lampert with advice and information appropriated from Genaera to facilitate this fraudulent transaction. (App.100a, 102a). Plaintiff alleges defendant Skolas and defendant Lampert conspired to transfer the IL9 asset from Genaera's unit holders to BVF, Genaera's second largest stockholder. (App.102a).

Plaintiff has provided sufficient facts to create an inference that defendants BVF and Ligand knowingly conspired with the Director and

Officer defendants and defendant Skolas, as well as the Kaye defendants, to dissolve Genaera, downplay the value of Genaera's assets, and then used information improperly obtained by Director Kaye about the true value of the IL9 asset to facilitate a prearranged sale for a dramatically lower price.

Additionally, these defendants' conduct amounts to more than an arm's length transaction with the Trustee. Plaintiff alleges defendants Skolas and Argyce enriched themselves through excessive fees and expenses charged to the Trust. (App.108a–09a). Defendants BVF and Ligand clearly benefited from the conspiracy by obtaining the IL9 asset for pennies on the dollar. Plaintiff has alleged enough facts to create a strong inference that fiduciaries and defendants BVF and Ligand conspired to mutually benefit from the sale at the expense of other Genaera unit holders. *See Jackson Nat. Life Ins. Co.*, 741 A.2d at 393 (finding activities alleged in the complaint were more than arm's–length transactions when accompanied by details that payments made incident to negotiation were inducements to breach a duty). For the foregoing reasons, plaintiff's claims that defendants BVF and Ligand aided and abetted a breach of fiduciary duty should not be dismissed.

Similarly, with regard to the Dipexium and Access defendants, plaintiff has alleged enough facts to show that these defendants knowingly participated in the officers' and directors' breaches of fiduciary duty because the sale and purchase of the Pexiganan asset amounted to far more than an arm's length negotiation.

Defendant Dipexium was founded by defendant David P. Luci and defendant Robert J. DeLuccia. (App.73a). Before founding Dipexium, defendant Luci was a member of the Access board and President, Chief Business Officer, and board member of MacroChem. (*Id.*). Defendant DeLuccia also was President and CEO of MacroChem. (App.74a).

In October 2007, MacroChem executed options to acquire exclusive worldwide rights for drug uses of Pexiganan. The terms included payments to Genaera of certain clinical and regulatory milestones through approval, sales–based milestones of up to $35 million, and 10% royalty payments on net sales. MacroChem was to assume all clinical development, manufacturing and regulatory activities for Pexiganan. (App.84a). If Pexiganan had been developed, Genaera was poised to reap huge monetary benefits under its agreement with MacroChem. (App.85a). MacroChem began to issue favorable Pexiganan–related press releases but then abruptly reversed course and stopped developing the Pexiganan asset for the next year and a half. (App.85a–87a).

During this time, Access acquired Somanta Pharmaceuticals in January of 2008, of which defendant Kaye/XMark, a Genaera director, owned 46.5%. (App.82a). In July 2008, Access then announced it was acquiring MacroChem and ceased development of Pexiganan. (App.87a–88a). Genaera had a right under the agreement with MacroChem to demand return of the Pexiganan asset if MacroChem would not develop the drug. The Director defendants, including defendant Kaye, who was heavily invested in Access, did not take any action to protect Genaera's interests. (App.82a, 88a). Instead, the Director defendants steered Genaera into dissolution.

Genaera was dissolved in April 2009 (App.90a, 93a), and the Trust was established with no structure for the benefit of shareholders (App.97a). Defendant Trustee Skolas terminated the Pexiganan licensing agreement between Access and MacroChem in October 2009 (App.90a–91a), returning the Pexiganan asset so insiders could acquire those same Pexiganan rights from the Trust on behalf of their new company (App.103a–04a). The Trustee opened bidding for Pexiganan on January 11, 2010, with a close date of February 12, 2010. (*Id.*). The bidding process was thus highly unfavorable to outside potential bidders. (*Id.*).

Also, in January 2010, defendants DeLuccia and Luci co–founded Dipexium, a company created solely to acquire the rights to Pexiganan. (App.104a). Defendant Skolas worked with insiders Kaye, DeLuccia, and Luci to get them a better deal in violation of his fiduciary duties. (*Id.*). Within the one–month bidding period, Dipexium was founded, reviewed and analyzed the confidential information package, performed a pharmacological and regulatory compliance and valuation analysis, and then devised a bidding strategy to purchase the asset. (App.103a–04a).

Dipexium purchased the Pexiganan asset for a small purchase price and free of the original royalty and milestone payment obligations to Genaera. (App.104a). The new rights acquired by Dipexium more than doubled the market value compared to the original license. (*Id.*). The Access/MacroChem Directors acted in bad faith with the Genaera Directors and Officers by failing to surrender the Pexiganan license until 2010, after the Access/MacroChem Directors could create Dipexium and were prepared to acquire it. (App.105a). Access cooperated with defendant Trustee Skolas so they could replace MacroChem's license with one free of royalty and milestone payment obligations and obligations to Genaera stockholders. (App.105a–06a).

The Dipexium defendants aided and abetted the Genaera Directors' and Officers', as well as Trustee Skolas', breaches of fiduciary duty. *See Gilbert* v. *El Paso Co.*, 490 A.2d 1050, 1058 (Del. Ch. 1984) (finding that although an offeror may attempt to obtain the lowest possible price through arm's–length negotiations with the target's board, it may not knowingly participate in the target board's breach of fiduciary duty by extracting terms which require the opposite party to prefer its interests at the expense of its shareholders), *aff'd*, 575 A.2d 1131 (Del. 1990).

Plaintiff has pled sufficient facts to create a strong inference that defendant Kaye, who was both a Genaera and Access insider, could not have effectuated the return and sale of Pexiganan without defendants Luci and DeLuccia's knowing participation.

Defendants DeLuccia and Luci can be held personally liable for aiding and abetting this clear and intentional breach of fiduciary duty.

The corporate veil may be pierced "in the interest of justice, when such matters as fraud, contravention of law or contract, public wrong, or where equitable considerations among members of the corporation require it, are involved." *See Pauley Petroleum, Inc.* v. *Continental Oil Co.*, 239 A.2d 629, 633 (Del. 1968).

Plaintiff's amended complaint has created an inference that Dipexium simply functioned as a façade for the Access Directors and dominant shareholders to obtain Pexiganan unjustly at the expense of Genaera shareholders. Accepting as true all facts alleged in plaintiff's amended complaint and all reasonable inferences that can be drawn therefrom, these defendants' motions to dismiss should be denied.

Finally, the arguments of the Dipexium and Access defendants that the claims against them have been contractually waived by Genaera or are subject to mandatory arbitration is dependent on documents outside of plaintiff's amended complaint, and thus those arguments are not properly advanced in the context of a Rule 12(b)(6) motion.

III. 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,

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Dated: June 23, 2014

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Dated: June 23, 2014

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