

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

BASSO SECURITIES LTD.,	:	
Plaintiff,	:	
	:	
-vs-	:	Civil No. 3:01cv575 (PCD)
	:	
INTERSTATE BAKERIES	:	
CORPORATION & RALSTON PURINA	:	
COMPANY,	:	
Defendants.	:	

RULINGS ON DEFENDANTS' MOTIONS TO DISMISS

Defendants, Interstate Bakeries Corp. (“IBC”) and Ralston Purina Co. (“Ralston”), move to dismiss the complaint of plaintiff, Basso Securities Ltd., pursuant to FED. R. CIV. P. 9(b), FED. R. CIV. P. 12(b)(6) and the Private Securities Litigation Reform Act of 1995, Pub. L. 104-67, § 21D(b)(2), 109 Stat. 747, codified at 15 U.S.C. § 78u-4(b)(2) (1994 ed., Supp. V). For the reasons set forth herein, the motions to dismiss are granted.

I. JURISDICTION

Jurisdiction is asserted under section 27 of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b), 78t(a), and 28 U.S.C. §§ 1331, 1367.

II. BACKGROUND

The relevant facts are as follows.¹ On July 22, 1995, IBC and Ralston entered into an

¹ Although a motion to dismiss typically is limited to allegations within the complaint, documents relied on by plaintiff may be included without converting the motion into one for summary judgment. *Rothman v. Gregor*, 220 F.3d 81, 88 (2d Cir. 2000). A complaint, for purposes of motion to dismiss, thus includes written instruments attached as exhibits, statements or documents incorporated by reference, public disclosure documents filed with the SEC as required by law, and

agreement (“Shareholder Agreement”) precluding further acquisitions of IBC stock by Ralston and setting forth a schedule for divestiture of IBC stock ownership by Ralston. On July 29, 1997, Ralston issued 7% exchangeable notes designated Stock Appreciation Income Linked Securities (“SAILS”). By the terms of the SAILS, the notes were to be exchanged by Ralston for up to 15,498,000 shares of IBC common stock, depending on the average closing price of the stock over the twenty trading days ending on July 31, 2000. Also by their terms, Ralston was not required to disclose whether the exchange would be for stock or cash until four business days before the mandatory conversion date of August 1, 2000. SAILS were traded on the New York Stock Exchange.

On March 30, 2000, Ralston and IBC amended the Shareholder Agreement (“First Shareholder Amendment”). Under the First Shareholder Amendment, the timetable by which Ralston would divest its IBC ownership was modified. The amendment provided that “if it has not sold the IBC Equity owned by Ralston and its Affiliates prior to August 15, 2000 it shall cause the principal amount of each Stock Appreciation Income Linked Securities (“SAILS”) related to its 7% Exchangeable Notes Due August 1, 2000 to be mandatorily exchanged into shares of IBC Stock and not into cash or other consideration.” On March 31, 2000, IBC announced the First Shareholder Amendment in a company press release. The press release summarized the terms of the First Shareholder Amendment, including a divestiture schedule by Ralston and IBC’s right of first offer on Ralston’s sale of IBC stock. The release also indicated that Ralston “has also agreed to use IBC common stock to satisfy its SAILS obligation,” and that Charles A. Sullivan, IBC’s Chairman and Chief Executive Officer, was “pleased

documents either possessed or known of and relied upon in filing the complaint. *Id.*

the matter is resolved.”

On April 10, 2000, IBC filed a Form 10-Q with the Securities and Exchange Commission (“SEC”) disclosing the First Shareholder Amendment as a subsequent event. On April 14, 2000, Ralston included the First Shareholder Amendment as an attachment to a Form 10-Q filed with the SEC. On May 12, 2000, it included the First Shareholder Amendment with a Form 8-K filed with the SEC.

Plaintiff contemplated an investment scheme by which it would trade in SAILS and IBC stock, profiting from the interest on the SAILS and covering IBC stock obligations with the stock provided when the SAILS were redeemed. A risk to this scheme was that Ralston could, at its option, redeem the SAILS for cash rather than stock, causing plaintiff to purchase IBC shares to cover its obligations. Prior to embarking on its venture, plaintiff telephoned Ralston on July 7, July 10 and July 21, 2000, to demand further assurances that Ralston intended to exchange IBC common stock for the SAILS. Plaintiff explained that a last-minute announcement by Ralston that SAILS were to be redeemed for cash would cause plaintiff substantial losses. An unidentified person at Ralston assured plaintiff that the SAILS would be redeemed for IBC stock, and, with that assurance, plaintiff pursued its strategy.

On July 24, 2000, Ralston and IBC further amended the Shareholder Agreement (“Second Shareholder Amendment”). The Second Shareholder Amendment eliminated the provision requiring that Ralston redeem the SAILS for stock and deleted the schedule by which Ralston would divest its ownership in IBC. The amendment added a provision requiring that Ralston sell to IBC 15,498,000 shares of IBC common stock in accordance with a Share Purchase Agreement executed at the same time. Ralston agreed in this Share Purchase Agreement to another timetable for reducing its ownership

interest in IBC. The Share Purchase Agreement also set the price per share for any shares redeemed by Ralston as the average price over the previous twenty trading days prior to July 31, 2000.

On July 24, 2000, Ralston and IBC disclosed the Second Shareholder Amendment and the Share Purchase Agreement on Forms 8-K. Also on July 24, 2000, IBC issued a press release, after the close of trading, announcing the stock buyback and describing certain aspects of the July 2000 Amendment. On July 25, 2000, Ralston announced that it was exercising its option to redeem the SAILS for cash.

On April 9, 2001, plaintiff filed a six-count complaint alleging that both defendants violated § 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. § 78j(b) (1994), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 (2000), that Ralston violated § 20(a) of the Exchange Act, 15 U.S.C. § 78t(a) (1994), that the conduct of both defendants constituted negligent misrepresentation and common law fraud, that both defendants are barred promissory estoppel from denying their promise to redeem SAILS in IBC stock, and that Ralston breached its contract with plaintiff.

III. DISCUSSION

Defendant moves, pursuant to FED. R. CIV. P. 9(b), FED. R. CIV. P. 12(b)(6), and 15 U.S.C. § 78u-4(b)(3)(A) to dismiss the claims against IBC, which include violation of section 10(b) and 10b-5, negligent misrepresentation, common law fraud and promissory estoppel..

A. Standard

A motion to dismiss is properly granted when “it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” *In re Scholastic Corp. Sec.*

Litig., 252 F.3d 63, 69 (2d Cir. 2001) (internal quotation marks omitted). A motion to dismiss must be decided on the facts as alleged in the complaint. *Merritt v. Shuttle, Inc.*, 245 F.3d 182, 186 (2d Cir. 2001). All facts in the complaint are assumed to be true and are considered in the light most favorable to the non-movant. *Manning v. Utils. Mut. Ins. Co.*, 254 F.3d 387, 390 n.1 (2d Cir. 2001).

B. Pleading of Fraud

FED. R. CIV. P. 9(b) requires a plaintiff alleging a violation of 10(b) and 10b-5 to plead fraud with particularity. *Suez Equity Investors v. Toronto-Dominion Bank*, 250 F.3d 87, 95 (2d Cir. 2001). A complaint is sufficiently particular in its allegations of fraud when it includes “the who, what, when, where, and how: the first paragraph of any newspaper story,” *Hemenway v. Peabody Coal Co.*, 159 F.3d 255, 261 (7th Cir. 1998) (internal quotation marks omitted). Plaintiff is thus obliged to specify the statements claimed to be false or misleading, provide particulars as to how the statements were fraudulent, identify when and where the statements were made, and identify those responsible for the statements. *See Suez Equity Investors*, 250 F.3d at 95.

Plaintiff identifies two separate bases on which to base its claims of fraud against defendants with respect to the manner of redemption of SAILS. The first allegation of fraud is that, prior to embarking on its investment strategy, plaintiff sought and received assurances from an unidentified agent of Ralston that SAILS would be redeemed for IBC stock rather than cash. The second allegation of fraud is that defendants, through press releases and SEC filings related to the First Shareholder Amendment in place at the time it embarked on its investment strategy, assured the public that the SAILS would be redeemed for IBC stock rather than cash. The third allegation of fraud pertains to a

press release by IBC summarizing the First Shareholder Amendment. The fourth allegation of fraud is that defendants failed to disclose material information to shareholders at the time they determined that the First Shareholder Amendment would be amended. Each allegation will be addressed in turn.

1. Assurances by the Ralston Agent

Plaintiff's allegation that it received, on three separate occasions, assurances from Ralston as to how SAILS would be redeemed prior to embarking on its arbitrage scheme fails to satisfy the pleading requirements of FED. R. CIV. P. 9(b). "[A]t a minimum, [FED. R. CIV. P. 9(b) requires] that the plaintiff identify the speaker of the allegedly fraudulent statements." *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 265 (2d Cir. 1993). "No[] . . . cases sanction[] the pleading of fraud through completely unattributed statements, even when the plaintiff alleges . . . that the unattributed statement was made by an agent of the defendant." *Id.* This allegation is therefore dismissed.

2. First Shareholder Amendment, SEC Filings

Plaintiff's allegations of fraud through SEC filings and the First Shareholder Amendment are deficient for failure to explain how the statements are fraudulent. The SAILS by their terms permitted redemption in either cash or IBC stock. The First Shareholders Amendment limited the form of redemption to IBC stock conditional upon Ralston's divestiture of its ownership interest in IBC. The Second Shareholder Amendment marked, in essence, a return to the original terms of the SAILS. Plaintiff fails to identify how the language of the amendment or the SEC filings, in light of the condition precedent, constitute a fraudulent misstatement. Furthermore, it is not apparent that the result produced by Second Shareholder Amendment differed from the expectation established by the conditional language of the First Shareholder Amendment, thus supporting a claim that there was some

misstatement. These allegations of fraud are therefore deficient and dismissed.

3. IBC Press Release

The IBC press release discussing the First Shareholder Amendment does not suffer from the same deficiencies as the other allegations. It omits the stated condition from its summary of the First Shareholders Amendment, indicating only that Ralston “has . . . agreed to use IBC common stock to satisfy its SAILS obligation .” Although the author of this statement is not identified, it purports to be an official press release of IBC for which identification of the speaker is not a necessity. *See id.* This allegation thus satisfies the requirements of FED. R. CIV. P. 9(b).

4. Omissions by Defendants

Plaintiff alleges that defendants failure to disclose their intention to amend the First Shareholder Amendment immediately was an omission that rendered their previous public filings, press releases and telephone calls misleading. Defendants respond that the allegations are inadequate.

As with the misstatements, plaintiff fails to allege how defendants’ failure to disclose how their intention to amend the First Shareholder Amendment at an earlier date constitutes fraud. The First Shareholder Amendment, under which plaintiff purchased the SAILS, was a conditional promise to redeem the SAILS for IBC stock. The Second Shareholder Amendment permitted redemption in either cash or IBC stock. Furthermore, defendants announced in the First Shareholder Amendment that it could be modified at a later date. Although omissions may provide some pleading challenges when compared to affirmative misstatements, *see Alevizopoulos & Assocs. v. Comcast Int’l Holdings, Inc.*, 100 F. Supp. 2d 178, 184 (S.D.N.Y. 2000), this does not relieve plaintiff of its obligation to allege how the misstatements constituted a fraudulent omission as required by FED. R. CIV.

P. 9(b). The allegations of omissions, with the exception of the omission alleged following the IBC press release, therefore fail FED. R. CIV. P. 9(b)'s requirement of pleading with particularity and are dismissed.²

C. Section 10(b) and 10b-5 Claims

Defendant IBC argues that plaintiff has failed to allege reliance on the statement by IBC in the press release in pursuing its investment strategy, contending that Ralston's oral assurances are plead as the basis for its purchases. Plaintiff responds that its pleadings are adequate in this regard.

A sufficient pleading for a claimed violation of 10(b) or Rule 10b-5 requires allegations that the defendant (1) misstated or omitted a material³ fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury. *In re IBM Corp. Sec. Litig.*, 163 F.3d 102, 106 (2d Cir.1998). "In connection with a claim that the defendant has affirmatively made false statements, plaintiff must demonstrate that he or she relied on the misrepresentation when entering the transaction that caused him or her economic harm." *Burke v. Jacoby*, 981 F.2d 1372, 1378 (2d Cir.1992). A motion to dismiss is properly granted for failure to allege reliance when an investor, "through minimal diligence, . . . should

² "A claim under § 10(b) must allege a defendant has made a material misstatement or omission indicating an intent to deceive or defraud in connection with the purchase or sale of a security." *Shapiro v. Cantor*, 123 F.3d 717, 720-21 (2d Cir. 1997). As no misstatement is sufficiently alleged Count I is dismissed as to Ralston.

³ Plaintiff would also appear to face a formidable obstacle in alleging that the misstatement in the IBC press release was material. "At the pleading stage, a plaintiff satisfies the materiality requirement of Rule 10b-5 by alleging a statement or omission that a reasonable investor would have considered significant in making investment decisions." *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir. 2000). The notion that a sophisticated plaintiff would rely on a summary of a shareholder agreement appearing within a press release without referring to the document to which it refers is a dubious proposition.

have discovered the truth.” *Hunt v. Alliance N. Am. Gov’t Income Trust, Inc.*, 159 F.3d 723, 729 (2d Cir. 1998).

In *Hunt*, allegations of the plaintiff’s reliance on misrepresentations were not adequate when the plaintiff cited a misrepresentation in a brochure but failed to consult the prospectus to which the prospectus directly referred. *Id.* In affirming the district court’s dismissal of the claim, the *Hunt* court concluded “[m]inimal diligence in this case would have included consulting the prospectuses, for the challenged brochures direct[ed] the potential investor to the Prospectus, the single most important document and perhaps the primary resource an investor should consult in seeking . . . information [about the Fund’s risks].” *Id.* (internal quotation marks omitted). As in *Hunt*, the misrepresentation to which plaintiff points, specifically the press release, is a summary that refers to the First Shareholder Amendment. Plaintiff therefore may not plead justifiable reliance on the statement in the press release, and its claim is dismissed as to defendant IBC.

D. Section 20(a) of the Securities Exchange Act

The dismissal of the alleged violations of § 10(b) mandates dismissal of the alleged § 20(a) violation. A prima facie case for a § 20(a) violation requires (1) a primary violation by a controlled person; (2) defendant’s control of the primary violator; and (3) participation, in a meaningful sense, in the primary violation by the controlling person. *Boguslavsky v. Kaplan*, 159 F.3d 715, 720 (2d Cir. 1998). A failure to establish a predicate violation under § 10b-5 or § 10(b) by the controlling person precludes allegation of a § 20 violation. *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir.1983). Plaintiff’s claim of a violation of § 20 is therefore dismissed for failure to establish a claim under § 10b-5 or § 10(b) against either defendant.

E. Plaintiff's State Law Claims

Plaintiff concedes that there is no basis for supplemental jurisdiction over the state law claims in the absence of the alleged federal law violations. *See* 28 U.S.C. § 1367(c)(3) (“[t]he district courts may decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction”). Plaintiff does not plead diversity as a possible basis for jurisdiction over the claims. *See K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 131 (2d Cir. 1995). The state law claims are therefore dismissed.

IV. CONCLUSION

Defendants’ motions to dismiss all claims against Interstate Bakeries Corp. and Ralston Purina Co. (Docs. 24 & 29) are **granted**. Plaintiff is granted leave to file an amended complaint within thirty days.

SO ORDERED.

Dated at New Haven, Connecticut, January __, 2002.

Peter C. Dorsey
United States District Judge