UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ENDOVASC LTD., Inc., Plaintiff, -against- J.P. TURNER & CO., LLC; KCM GROUP LLC; THE KESHET FUND, L.P.; KESHET, LP; NESHER, LTD; TALBIYA B. INVESTMENTS, LTD; BALMORE FUNDS, S.A.; DAVID GRIN; LH FINANCIAL SERVICES CORP.; LAURUS MASTER FUND, LTD.; LAURUS CAPITAL MANAGEMENT, LLC; CELESTE TRUST REG; PATRICK POWERS; JOHN CLARK; ABRAHAM GRIN; TALBIYA, LTD; and KESHET MANAGEMENT, INC., Defendants.	02 Civ. 7313 (LAP) Memorandum Opinion and Order

LORETTA A. PRESKA, UNITED STATES DISTRICT JUDGE:

Plaintiff, Endovasc Ltd., Inc. (“Endovasc” or “Plaintiff”), brings this action asserting in their Second Amended Complaint (the “Complaint” or “Compl.”) that they were injured by the fraudulent acts of defendants J.P. Turner & Co., LLC (“JP Turner”), KCM Group LLC (“KCM”), The Keshet Fund, L.P. (“Keshet Fund”), Keshet, LP (“Keshet”), Nesher, Ltd. (“Nesher”), Talbiya B. Investments, Ltd. (“Talbiya”), Balmore Funds S.A. (“Balmore”), David Grin (“Grin”), LH Financial Services Corp. (“LH”), Laurus Master Fund, Ltd. (“Laurus Master Fund”), Laurus Capital Management, LLC (“Laurus Capital”), Celeste Trust Reg. (“Celeste”), Patrick Power (“Power”), and John Clark (“Clark”)

(collectively, "Defendants"), in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) ("Section 10(b)") and Rule 10b-5 promulgated thereunder by the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and Section 20(a) of the Securities Exchange Act ("Section 20(a)"), 15 U.S.C. § 78t(a).[1] Endovasc also asserts claims for common law fraud and deceit, civil conspiracy to defraud, breach of contract, and restitution under the Securities Exchange Act of 1934. Defendants move to dismiss the Complaint in its entirety on various grounds and for sanctions under Rule 11 of the Federal Rules of Civil Procedure. For the reasons stated below, Defendants' motions to dismiss are granted, and their motions for sanctions denied.

Procedural History

As set forth more fully in the Court's Order dated August 18, 2003, following service of plaintiff's First Amended Complaint, defendants' counsel forwarded their draft motion to dismiss to plaintiff's counsel so that counsel could decide whether to avail themselves of a final opportunity to amend further or to stand on the First Amended Complaint. Plaintiff's counsel, with the benefit of defendants' views of the deficiencies in the First Amended Complaint, chose to amend

[1] The Complaint also names Abraham Grin, Talbiya, Ltd. and Keshet Management, Inc. There appears to have been no service on these defendants, and they have made no response to the Complaint.

further. By Orders dated November 18, 2002 and December 18, 2002, the Court provided plaintiff with one final opportunity to amend the complaint, with the November 18 Order expressly stating "no additional amendments will be permitted." Plaintiff took approximately three months to file the Second Amended Complaint, dated January 31, 2003.

Pursuant to the Court's instructions, counsel for the various defendants coordinated their briefing to avoid duplicative arguments, and, with respect to certain claims, relied on arguments made in each other's briefs. On April 1, 2003, counsel for KCM, Keshet Fund, Keshet, Nesher, Talbiya, Grin, Laurus Master Fund, and Laurus Capital (collectively, "the KCM defendants") filed their motion to dismiss the Complaint accompanied by a Memorandum of Law in support of that motion ("KCM Mem."). Also on April 1, counsel for JP Turner and Power (collectively, "the JP Turner defendants") filed their motion to dismiss accompanied by a Memorandum of Law in support of that motion ("JP Turner Mem."). On April 3, counsel for LH, Balmore, and Celeste (collectively, "the LH defendants") filed their motion to dismiss accompanied by a Memorandum of Law in support of that motion ("LH Mem.").

On July 16, 2003, approximately two months later, Endovasc filed three separate responsive opposition memoranda (hereinafter, "Opp. to KCM," "Opp. to JP Turner," and "Opp. to

LH"). Along with these opposition memoranda, plaintiff's counsel requested an opportunity to amend the complaint yet again, primarily to include information not specifically relating to defendants herein but to other parties as set forth in an SEC investigation. The Court denied that request by Order dated August 18, 2003. On October 9 and 10, 2003 defense counsel filed their reply memoranda ("LH Reply," "KCM Reply," and "JP Turner Reply"). As stated in the Court's Order of August 18, 2003, and as agreed in a conference held on August 11, 2003, defendant Clark was permitted to join in the other Defendants' motions to dismiss.

Background

The following facts are taken from allegations in the Complaint, except where noted, which are accepted as true for purposes of the motion to dismiss. Endovasc is a "development stage company in the business of market development and licensing of biopharmaceutical products for the health care industry" whose stock is publicly traded on the NASDAQ over-the-counter bulletin board. (Compl. ¶ 27.) Endovasc was in search of capital and was approached by JP Turner. (Compl. ¶ 28.) On or about February 29, 2000, Endovasc signed a "Finders Agreement" with JP Turner to act as a "finder" for all or part

of a private placement offering of equity securities of Endovasc.[2]

In connection with its role as a finder, JP Turner referred Endovasc to KCM as a funding source. (Compl. ¶ 30.) David Grin, identified as "a principal of KCM," (Compl. ¶ 10), "was the person in charge of the Endovasc financing," (Compl. ¶ 30). On or about April 17, 2000, Endovasc signed a term sheet (the "April 17 term sheet") with KCM setting forth preliminary terms for a $4.5 million investment in preferred stock, which would be convertible into Endovasc common stock. (Compl. ¶ 30; Affidavit of Hillary Richard, sworn to Apr. 1, 2003 (the "Richard Aff.") Ex. E.) The investment was to be funded according to the following schedule: $1.5 million at the closing of the agreement, an additional $1.5 million ten days after Endovasc secured an effective registration statement, and the final $1.5 million 120 days after Endovasc secured an effective registration statement. (Richard Aff. Ex. E.)

On or about April 18, 2000, Endovasc signed a second term sheet (the "April 18 term sheet") with KCM proposing a $15

[2] Although Plaintiff refers to this Agreement in the Complaint, it did not attach a copy to the Complaint. Defendants have attached a copy of the Agreement to the Affidavit of Theodore Snyder, sworn to March 31, 2003 ("Snyder Aff."). Because "the complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference," International Audiotext Network, Inc. v. Am. Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (quoting Cortec Indus., Inc. v. Sum Holding L.P., 949 F.2d 42, 47 (2d Cir. 1991), I have considered the Finder's Agreement on Defendants' motion to dismiss. For the same reason, I have considered the other exhibits submitted by all Defendants.

million line of equity financing. (Richard Aff. Ex. F.) According to the Complaint, at an unspecified time and place, David Grin "made verbal promises or covenants to Endovasc that KCM and its agents and/or subsidiaries or other offshore entities would not short sell the stock of Endovasc" and based on this representation, Endovasc signed the April 18 term sheet.

On or about May 9, 2000, Endovasc entered into stock purchase agreements (the "May 9 agreements") with several of the defendants: Celeste, Balmore, Keshet Fund, Keshet, Talbiya, and Nesher. Those investors agreed to purchase Endovasc's Series A 8% Cumulative Convertible Preferred Stock in exchange for, in total, $4.5 million in financing, to be paid in separate tranches. (Richard Aff. Ex. G.) The first tranche was a $1.5 million investment to be paid at the closing date of May 9, 2000, and the second tranche, the remaining $3 million, was structured to obligate the investors to purchase additional preferred stock at the request of Endovasc, subject to Endovasc's meeting certain conditions. (Richard Aff. Ex. G ¶¶ 11.1, 11.2.) The deal closed, and these investors purchased $1.5 million of the preferred stock. (Compl. ¶ 32.) Thereafter, registration statements were filed with the SEC, allowing for the issuance of registered common shares upon conversion of the preferred shares. (Compl. ¶ 33.) The second tranche was never paid. (Compl. ¶ 77.) However, from

Endovasc's own SEC filings, it appears that Endovasc reported that although the obligation to pay existed at the option of Endovasc "subject to [Endovasc's] being in compliance with various covenants," Endovasc was "not currently in compliance with these covenants." (Richard Aff. Ex. N at F-6.)

In or about November, 2000, Balmore purchased an additional 1,500 shares of the preferred stock pursuant to the terms of agreements dated November 21, 2000. (Affidavit of Kenneth A. Zitter, sworn to Apr. 1, 2003 (the "Zitter Aff.") Ex. D.)

On or about August 17, 2001, Laurus Master Fund purchased from Endovasc $200,000 in convertible notes, pursuant to the terms of a stock purchase agreement (the "August 17 agreement"). (Richard Aff. Ex. R.) The notes were convertible into Endovasc's common stock under the same formula as the May 9 agreement. (Richard Aff. Ex. S ¶ 2(1)(b).)

Endovasc paid JP Turner a cash fee of approximately $350,000 (10% of the transaction) and 1 million common shares of Endovasc stock. (Compl. ¶ 39.) The terms of the Finder's Agreement required Endovasc to pay JP Turner a fee of 13% of the funds raised from the sale of Endovasc securities as a result of JP Turner's introduction and warrants in Endovasc stock. (Snyder Aff. Ex. A ¶ 3.3.) On or about March 27, 2001, the Finder's Agreement was jointly terminated in consideration of

Endovasc's issuing warrants to purchase 1,000,000 shares of common stock at $.01 per share with some restrictions. (Snyder Aff. Ex. B.) The termination letter expressly stated that "neither party shall have any further obligations or duties to the other in respect of the Finder's Agreement." (Id.)

The Complaint does not refer separately to the agreements. Instead, Endovasc alleges generally that "the Offshore Funds," identified in the Complaint as Keshet Fund, Keshet, Celeste, Balmore, Laurus Master Fund, Laurus Capital, Nesher, and Talbiya (Compl. ¶ 23), paid the $1.5 million investment to Endovasc and received the convertible notes (Compl. ¶ 32). Insofar as these allegations can be interpreted to conflict with the agreements provided by defendants, I decline to accept them as true for purposes of the motion to dismiss. See In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001) ("a court need not feel constrained to accept as truth conflicting pleadings . . . that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely, or by facts of which the court may take judicial notice") (citations omitted).

Generally, Endovasc alleges that based upon the agreements described above, Defendants drove down the price of Endovasc stock in order to profit from the spread. (Compl. ¶ 44.) Defendants did so by "employ[ing] a variety of

manipulative devices and techniques, including, without limitation, stacked trades, washed trades, bulk trades, lock-outs, [and] secret trading between market makers or for their own account." (Compl. ¶ 43.)

Discussion

I. Legal Standards

A. Rule 12(b)(6)

For the purposes of a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations of the complaint are accepted as true and all inferences are drawn in favor of the pleader. See City of Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 493 (1986); Miree v. Dekalb County, 433 U.S. 25, 27 n.2 (1977) (referring to "well-pleaded allegations"); Mills v. Polar Molecular Corp., 12 F.3d 1170, 1174 (2d Cir. 1993). "'The complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.'" International Audiotext Network, Inc. v. American Tel. & Tel. Co., 62 F.3d 69, 72 (2d Cir. 1995) (quoting Cortec Indus., Inc. v. Sum Holding, L.P., 949 F.2d 42, 47 (2d Cir. 1991)). In order to avoid dismissal, plaintiffs must do more than plead mere "conclusory allegations or legal conclusions masquerading as factual conclusions." Gebhardt v. Allspect, Inc., 96 F. Supp. 2d 331, 333 (S.D.N.Y. 2000) (quoting 2 James Wm. Moore, Moore's

Federal Practice P 12.34[a][b] (3d ed. 1997)). Dismissal is proper only when "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1967); accord Cohen v. Koenig, 25 F.3d 1168, 1172 (2d Cir. 1994).

B. Section 10(b) and Rule 10b-5

Section 10(b) of the Exchange Act provides that:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or the mails, or of any facility of any national securities exchange –- (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b).

In order to state a misrepresentation claim under Section 10(b) and Rule 10b-5 promulgated thereunder, a plaintiff must plead that defendants, "'in connection with the purchase or sale of securities, made a materially false statement or omitted a material fact, with scienter, and that the plaintiff's reliance on the defendant[s'] action caused injury to the plaintiff.'" Lawrence v. Cohn, 325 F.3d 141, 147 (2d Cir. 2003) (quoting Ganino v. Citizens Utils. Co., 228 F.3d 154, 161 (2d

Cir. 2000)); see also Grandon v. Merrill Lynch & Co., 147 F.3d 184, 189 2d Cir. 1998).

To state a claim for market manipulation under Section 10(b) of the Exchange Act and Rule 10b-5, a plaintiff must allege: "(1) damage to the plaintiffs, (2) caused by reliance on defendants' misrepresentations or omissions of material facts, or on a scheme by the defendants to defraud, (3) scienter, (4) in connection with the purchase or sale of securities, (5) furthered by the defendants' use of the mails or any facility of a national securities change." Baxter v. A.R. Baron & Co., 94 Civ. 3913, 1995 U.S. Dist. LEXIS 14882, at *18 (S.D.N.Y. Oct. 6, 1995) (citing Cowen & Co v. Merriam, 745 F. Supp. 925, 929 (S.D.N.Y. 1990).

C. Rule 9(b)

Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. Proc. 9(b). A complaint alleging violations of Section 10(b) and Rule 10b-5 must satisfy the particularity requirement set forth in Rule 9(b). See Stevelman v. Alias Research, Inc., 174 F.3d 79, 84 (2d Cir. 1999) (citing Decker v. Massey-Ferguson, Ltd., 681 F2d 111, 114 (2d Cir. 1982). The complaint must "'(1) specify the statements that plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made,

and (4) explain why the statements were fraudulent.'" Novak v. Kasaks, 216 F.3d 300, 306 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) (quoting Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993))).

Rule 9(b) also provides that "malice, intent, knowledge, and other condition of mind may be averred generally." Fed. R. Civ. P. 9(b). The Court of Appeals in Shields noted that:

> Since Rule 9(b) is intended "to provide a defendant with fair notice of a plaintiff's claim, to safeguard a defendant's reputation from improvident charges of wrongdoing, and to protect a defendant against the institution of a strike suit . . ., the relaxation of Rule 9(b)'s specificity requirement for scienter "'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.'"

Shields, 25 F.3d at 1128 (internal citations omitted). Therefore, to give meaning to the overall purpose of Rule 9(b), a fraud plaintiff must "allege facts that give rise to a strong inference of fraudulent intent," which can be accomplished either "(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Id.; see also Wells Fargo Bank Northwest N.A. v. TACA Int'l Airlines, 247 F. Supp. 2d 352, 364-65 (S.D.N.Y. 2002); Stevelman, 174 F.3d at 84. The Private Securities Litigation Reform Act of 1995 ("PSLRA") adopted this

heightened pleading standard for scienter in securities fraud actions. See 15 U.S.C. § 78u-4(b)(1) (setting out the requirements for pleading securities fraud actions, including the requirement that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind"); Levitt v. Bear Sterns & Co., 340 F.3d 94, 104 (2d Cir. 2003) (language of the PSLRA "'echo[s] this Court's [Rule 9(b)] scienter standard'") (quoting Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001).

Rule 9(b) is also applicable to market manipulation claims under Section 10(b) and Rule 10b-5. Baxter v. A.R. Baron & Co., 94 Civ. 3913, 1995 U.S. Dist. LEXIS 14882, at *6 (S.D.N.Y. Oct. 12, 1995). However, the pleading standards are somewhat "relaxed." See SEC v. U.S. Environmental, Inc., 82 F. Supp. 2d 237, 240 (S.D.N.Y. 2000). This is because "[u]nlike most fraud . . . where at least some aspects of the time, place, and other details of a defendant's activity are within the knowledge of plaintiff as a matter of course -– market manipulation claims present circumstances in which the mechanism of the scheme is likely to be unknown to the plaintiffs." In re Blech Sec. Litig., 928 F. Supp. 1279, 1290-91 (S.D.N.Y. 1996). Accordingly, to satisfy Rule 9(b), "a market manipulation claim must specify what manipulative acts were performed, which defendants performed them, when the manipulative acts were

performed, and what effect the scheme had on the market for the securities at issue." U.S. Environmental, 82 F. Supp. 2d at 240 (internal quotations and citations omitted).

II. First Claim: Misrepresentation

Plaintiff's first claim for relief alleges Endovasc was defrauded by various misrepresentations and omissions by Defendants KCM, JP Turner, LH, and "the Offshore Funds" (identified as Keshet Fund, Keshet, Celeste, Balmore, Laurus Master Fund, Laurus Capital, Nesher, and Talbiya) in violation of Section 10(b) and Rule 10b-5.[3] All of these defendants have moved to dismiss this claim on a variety of grounds. For the reasons stated below, as to all defendants named, this claim is dismissed.

A. Particularity

1. KCM, LH, and the Offshore Funds

Endovasc alleges that it was introduced to KCM through JP Turner. Grin, identified "a principal of KCM" (Compl. ¶ 10) was "the person in charge of the Endovasc financing," (Compl. ¶ 30), and allegedly "made verbal promises and covenants to Endovasc that KCM and its agents and/or subsidiaries or other offshore entities would not short sell the stock of Endovasc,"

[3] It is unclear whether Grin is being named as a defendant in this claim. While certain allegations appear to allege Grin was acting "individually," he is not listed in the title as among those that the claim is "against." (Compl. II.). Insofar as the Complaint may be interpreted to include Grin in this claim, it is dismissed for the same reasons as stated in this section.

(Compl. ¶ 31). Additionally, "[d]uring the negotiations" Grin "individually" and on behalf of KCM and the Offshore Funds made a litany of other misrepresentations:

(a) That capital of up to $19.5 million, as needed by Endovasc, would be provided through a $4.5 million convertible preferred stock purchase and a $15 million equity line of credit agreement;
(b) That no one represented by or associated with KCM or the Offshore Funds would sell Endovasc stock for at least a year after any closing, because they were long-term investors;
(c) That they would never manipulate Endovasc stock in order to depress its price;
(d) KCM, by and through its principal agent David Grin, and David Grin, individually, represented that no entity affiliated with KCM, including the Offshore Funds would manipulate Endovasc stock;
(e) That KCM and the Offshore Funds were accredited investors and had sufficient funds to satisfy a $15 million funding commitment;
(f) That Endovasc's stock would be acquired for investment purposes, and not for purposes of distribution or resale;
(g) That other companies funded by entities associated with the defendants experienced increased in their stock price; and
(h) That no active lawsuits were pending against the defendants.

(Compl. ¶ 34.) Further, also "[d]uring the negotiations," KCM and the Offshore Funds, by and through Grin "failed to inform Endovasc or by omission secretly intended":

(i) That the Offshore Funds by and through their affiliates and/or agents would manipulate the stock for vast profits;
(ii) That the Offshore Funds, and each of them, never intended to fully perform their obligations to fund pursuant to the Term Sheet and subsequent agreements;

(iii) That the defendants KCM, Laurus and Keshet never intended to fund the $19.5 million set forth in the Term Sheet;
(iv) That the Offshore Funds, and each of them through their affiliates and/or agents, and by and through their control person or entity, intended to systematically orchestrate a stepdown of the value of the Endovasc stock in order to enrich themselves.

(Compl. ¶ 35.)

These allegations run afoul of Rule 9(b) and the PSLRA in several respects. First, they engage in impermissible group pleading. Second, the misrepresentations and omissions alleged do not begin to sufficiently plead the circumstances comprising the alleged fraud –- the "where" and "when." Third, each allegation individually suffers from other inadequacies.

It is well established that the complaint must "'(1) specify the statements that plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" Novak v. Kasaks, 216 F.3d 300, 306 (quoting Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994) (quoting Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993))). Plaintiff has provided a laundry list of alleged false statements,[4] but fails to do so with the required particularity.

[4] In none of the paragraphs setting forth misrepresentations and omissions does the Complaint allege that LH made any misrepresentations and omissions. For this reason, the claim must fail against LH.

Grin is identified in the Complaint only as "a principal of KCM" (Compl. ¶ 10) and "the person in charge of Endovasc financing" for KCM (Compl. ¶ 30). No further details are provided as the basis for this allegation, nor is Grin's authority to act on behalf of the Offshore Funds detailed anywhere in the Complaint.[5] Insofar as the Complaint implies that Grin spoke on behalf of KCM and the Offshore Funds (nine defendants in all), either at once or in each negotiation separately repeating the same statements, the reader is left to guess on which entity's or entities' behalf he was speaking at the time of the statement. Further, because a defendant may only be held liable under Section 10(b) for its own misrepresentations, any generalized language found elsewhere in the Complaint alleging a "conspiracy" among the Defendants is unavailing. See Scone Investments, L.P. v. American Third Market Corp., 97 Civ. 3802, 1998 U.S. Dist. LEXIS 5903, at *18 (S.D.N.Y. Apr. 27, 1998) ("'Where the requirements for primary liability [under Section 10(b) and Rule 10b-5] are not independently met, they may not be satisfied based solely on

[5] Indeed, although paragraph 23 alleges that Balmore and Celeste are "partners" of JP Turner and KCM (without any details as to the partnership pleaded), Grin (the only speaker identified) is not alleged to be an officer, director or otherwise a control person of Balmore or Celeste (see Compl. ¶ 10, 71). Nor are any details of agency pleaded. See Kolbeck v. LIT America, Inc., 923 F. Supp. 557, 569 (S.D.N.Y. 1996) ("Broad allegations that several defendants participated in a scheme, or conclusory assertions that one defendant controlled another, or that some defendants are guilty because of their association with others, do not inform each defendant of its role in the fraud and do not satisfy Rule 9(b)."). Therefore none of the alleged misrepresentations may even be properly attributed those defendants.

one's participation in a conspiracy which other parties have committed a primary violation.' Rather, a plaintiff alleging a violation of §10(b) and Rule 10b-5 must make out a claim for primary liability against each defendant individually, including a showing that plaintiff relied one ach defendant's allegedly fraudulent conduct.") (quoting Dinsmore v. Squadron, Ellenoff, Plesent, Sheinfeld & Sorkin, 135 F.3d 837, 843 (2d Cir. 1998). Additionally, with respect to the alleged omissions, it is not specified as to each alleged "secret inten[tion]" whether Grin "and/or the controlling person of each of the Offshore Funds set forth in paragraph 71" made the omission. (Compl. ¶ 35.) This type of "clump[ing] [of] defendants together in vague allegations of fraud" is the very type of inadequate pleading that Rule 9(b) and the PSLRA sought to prevent. In re Blech Sec. Litig., 928 F. Supp. 1279, 1294 (S.D.N.Y. 1996); see also Scone Investments, 1998 U.S. Dist. LEXIS 5903, at *12 ("Courts are especially vigilant in applying Rule 9(b) where a complaint is made against multiple defendants. Each defendant is entitled to be apprised of the circumstances surrounding the fraudulent conduct with which it individually stands charged.") (internal quotations and citations omitted). Even insofar as the Complaint can be construed to mean that Grin spoke each of the misstatements on behalf of all ten defendants at once (a construction accepted in Internet Law Library, Inc. v.

Southridge Capital Mgmt., LLC, 223 F. Supp. 2d 474, 481 (S.D.N.Y. 2002)), it fails to specify adequately where and when the misrepresentations were made.

The Complaint's only reference to a time period is that the misrepresentations occurred "during negotiations." While Plaintiff "need not plead dates, times and places with absolute precision," International Motor Sports Group, Inc. v. Gordon, 98 Civ. 5611, 1999 U.S. Dist. LEXIS 12610 (S.D.N.Y. Aug. 10, 1999), Endovasc fails to give even a general time frame for what it means by "during negotiations." Endovasc mentions not only the Finder's Agreement date of February 29, 2000, but also a May 5, 2000 closing date (Compl. ¶ 32), a May 9, 2000 purchase date and an August 17, 2001 purchase date (Compl. ¶ 40.) It is impossible to determine from the Complaint what "during negotiations" means within a time frame spanning approximately a year and a half. While even a specified two-month time period may be sufficient in certain circumstances to satisfy the heightened pleading requirements (see, e.g., Internet Law, 223 F. Supp. 2d at 481-82; International Motor Sports Group, 1999 U.S. Dist. LEXIS 12610, at *12-14), Endovasc has failed even to do that much. If the requirement that a plaintiff must state when the misstatements were made is to have any meaning, the complaint must do more than state that the misstatements occurred "during negotiations," an undefined period of time that

(cobbled together from the allegations of the Complaint) may span from as early as February, 2000 to August, 2001.

Additionally, Endovasc entirely fails to plead the "where" as required under the PSLRA and Rule 9(b). There is likewise no mention of to whom at Endovasc any of the alleged misrepresentations or omissions were made or by what method they were made. Nor is there any indication of the context in which the defendants made the alleged omissions in paragraph 35. See Baxter v. A.R. Baron & Co., 94 Civ. 3913, 1995 U.S. Dist. LEXIS 14882, at *9 (S.D.N.Y. Oct. 6, 1995) (finding similar failures to constitute "ambiguous and imprecise pleading [that] is plainly inadequate and does not afford the defendants a reasonable opportunity to answer the allegations properly"). Further, the lack of specificity in this regard is compounded by the lumping together of the Defendants and the agreements. The lack of specificity is particularity inexplicable here where Endovasc was a party to these alleged negotiations.

The alleged misrepresentations and omissions alleged in paragraphs 34 and 35 fail for additional reasons. With respect to misstatements alleged in paragraph 34(e), (f), (g), and (h), the Complaint is devoid of an explanation of how the statements were false, other than by labeling them "misrepresentations." For example, the Complaint alleges that KCM and the Offshore Funds misrepresented their accreditation

stats and financial resources. (Compl. ¶ 34(e).) However, the Complaint fails even to allege in a conclusory fashion that the KCM and the Offshore Funds were not accredited investors and lacked the resources to meet funding commitments. Instead, the Complaint simply states that the statements were "false and misleading when made," (Compl. ¶ 42), which is wholly insufficient to meet the specificity standards of Rule 9(b) and the PSLRA. Endovasc argues in response that it is not "incumbent upon [it] to prove the assertion in its pleadings." (Pl's KCM et al. Opp. at 7.) However, this argument misses the point. Endovasc need not have "prove[d]" the assertion in its Complaint. Rather, Endovasc was required to set forth, with particularity, the basis for its allegation that the statement was false. See Nanopierce Techs., Inc. v. Southridge Capital Mgmt. LLC, 02 Civ. 767, 2003 U.S. Dist. LEXIS 11108, at *31 (S.D.N.Y. June 30, 2003) ("If 'explain why' is to have any meaning, it must mean more than merely contradicting a statement, and offering as support a rewording of that statement in the negative.").

With respect to misstatements alleged in paragraph 34(a) and (b), the allegations are directly contradicted by the terms of the various agreements, and thus, render Endovasc's alleged reliance unjustifiable. To state a misrepresentation claim under Section 10(b), a plaintiff must allege that it

reasonably relied on the misrepresentation to its detriment. See Harsco Corp. v. Segui, 91 F.3d 337, 342 (2d Cir. 1996) ("The general rule is that reasonable reliance must be proved as an element of a securities fraud claim."); Global Intellicom, Inc. v. Thomson Keraghan & Co., 99 Civ. 342, 1999 U.S. Dist. LEXIS 11378, at *31 (S.D.N.Y. Jul. 27, 1999). With respect to the alleged misstatement in paragraph 34(a) "[t]hat capital of up to $19.5 million . . . would be provided through a $4.5 million convertible preferred stock purchase and a $15 million equity line of credit agreement," this claim is contradicted by the terms of the agreements. First, the only "agreement" mentioning a $15 million line of equity financing is the April 18 term sheet, which is not alleged to have given rise to an agreement upon which KCM and Endovasc closed.[6] Second, insofar as the Offshore Funds separately entered into agreements with Endovasc, none mentions a $15 million equity line of credit. Further, the Complaint contends that a $15 million equity line of credit was promised "during negotiations" of these agreements as an inducement. However, that term is conspicuously absent from all of the agreements, and, as such, reliance on the alleged oral misrepresentation is unreasonable as a matter of law. See

[6] Indeed, the only agreements alleged in the Complaint to have "closed" were a May 5 agreement by the Offshore Funds (Compl. ¶ 32), a May 9 agreement (by Keshet, Esher and Talbiya), and an August 17 agreement with Laurus. The Complaint even refers to the Term Sheet as a "preliminary agreement." (Compl. ¶ 39.)

Emergent Capital Inv. Management, LLC v. Stonepath Group, Inc., 343 F.3d 189, 196 (2d Cir. 2003) (plaintiff's failure to insist that a representation be included in stock purchase agreement "precludes as a matter of law a finding of reasonable reliance"). Moreover, as in Emergent Capital, each of the agreements contained a merger clause (see, e.g., Richard Aff. Ex. G ¶ 14(c)) that precludes the parties from arguing that pre-contract representations, particularly concerning matters at the very core of the agreements, somehow survived the reduction of the agreements to writing. See Global Intellicom, 1999 U.S. Dist. LEXIS 11378, at *33-34 (finding plaintiff's reliance on defendant's alleged oral representation regarding short sales to be unreasonable as a matter of law in light of contract terms permitting all legal sales and the contract's merger clause).

The alleged misstatement in paragraph 34(b) fails for similar reasons. In addition to the fact that various provisions found within the agreement require Endovasc's cooperation with investors to facilitate the resale of common stock received upon conversion (see, e.g., Richard Aff. Ex. G ¶ 7(b)), there is no representation included in any the purchase agreements warranting such a restriction. As discussed, supra, Endovasc's failure to insist upon such a term, as well as the existence of merger clauses in the agreements, "precludes as a

matter of law a finding of reasonable reliance." Emergent Capital, 343 F.3d at 196.

The misstatements alleged in paragraph 34(c) and (d) must also fail because they are supported only by sweeping, conclusory allegations that lack particularity as to how the statements were untrue. Endovasc alleges throughout its Complaint that the Defendants manipulated Endovasc's stock, but never identifies even one short sale by any one Defendant or any other instance of any manipulation. Rather, Endovasc simply states in a conclusory fashion that Defendants manipulated Endovasc's stock, the thing that they promised not to do. Plaintiff provides a laundry list of "manipulative devices and techniques" such as "stacked trades," "washed trades," and "bulk trades" but neither explains what these terms mean nor provides any foundation for the pleading "on information and belief," as required under Rule 9(b) and the PSLRA. (Compl. ¶ 43.) Plaintiff also relies on circumstantial allegations that Defendants "are accomplished practitioners of 'death spiral' funding mechanisms and active practitioners of stock manipulation" having "repeatedly" engaged in this sort of scheme in the past. (Compl. 22-25.) While such pleadings may add context to a claim stating at least some particulars of the alleged manipulation, here there are simply no allegations connecting Defendants to the scheme alleged in this action. In

short, the Complaint "is long on innuendo but lacking in factual assertions or specificity" in this regard. Baxter I, 1995 U.S. Dist. LEXIS 14882, at *20. Thus, Endovasc fails to state with particularity how these alleged "misstatements" were false.[7]

Finally, the "omissions" alleged in paragraph 35 of the Complaint are nothing more than conclusory restatements of the misrepresentations alleged in paragraph 34. As such, they are insufficient for the same reasons as the misrepresentations, as discussed supra.

2. JP Turner

As described, supra, on or about February 29, 2000, Endovasc and JP Turner entered into the Finders Agreement, providing that JP Turner would act as a "finder" for all or part of a private placement offering of equity securities of Endovasc. (Compl. ¶ 29; Snyder Aff. Ex. A.) Pursuant to this agreement, JP Turner referred Endovasc to KCM as a funding source. (Compl. ¶ 30.) Endovasc alleges that "during these negotiations" (presumably, but not specified to be, the

[7] I note that a similar case, Internet Law Library v. Southridge Capital Management, LLC, 223 F. Supp. 2d 474 (S.D.N.Y. 2002) found that where pleadings alleged that defendants were "accomplished practitioners of death spiral convertible schemes," described in some detail how such schemes operate, listed several companies which are believed to have been victims of the defendants' scheme, and alleged that the plaintiff there was one such victim, such pleadings were sufficient to plead falsity with respect to the alleged statement by defendants that they would never manipulate the Plaintiff's stock price. Id. at *16-17. However, in Internet Law, plaintiffs had also alleged specific short sales by a defendant, including dates and amounts. Here, there are no such allegations connecting even one defendant specifically to the scheme. Additionally, insofar as Internet Law held that sufficient particularity was alleged even without naming one specific instance, I decline to adopt that conclusion.

negotiations between Endovasc and KCM), JP Turner, "by and through its agent/employee Patrick Power and Patrick Power, individually" made a series of misrepresentations:

(a) That neither KCM nor any of the entities dealing in the Endovasc stock would sell such stock by naked shorting;
(b) That the "investors" would be long-term holders and that these individuals would be sophisticated investors anxious to see the company grow, and thus would not flip stock; and
(c) That KCM were accredited investors and vouched for the integrity of KCM and its funders

(Compl. ¶ 36.) Additionally, "during these negotiations," Tim McAfee, the Chairman of the Board of JP Turner, allegedly made the following misrepresentations:

(a) That JP Turner and/or its affiliates such as KCM, and others through their efforts would enable Endovasc stock to become a NASDAQ stock; and
(b) That if short selling occurred that JP Turner and/or its affiliates such as KCM would cover such short sells or otherwise would prevent any harm to Endovasc stock.

(Compl. ¶ 37.) In reliance on these representations, Endovasc alleges it compensated JP Turner "with a cash fee of 10% resulting in a cash payment of approximately $350,000.00 . . . and one million (1,000,000) common shares of Endovasc stock" and entered into the "Term Sheet" with KCM. (Compl. ¶ 38-9.)

While providing slightly more detail and differentiation than those alleged against KCM and the Offshore Funds, these allegations also fail to meet the standards of

particularity under Rule 9(b) and the PSLRA. Although identifying the speaker, there are insufficient allegations as to the "when" and "where" requirements. With respect to JP Turner, the only reference in to time period is "during these negotiations." (Compl. ¶ 36-7.) "[T]hese" appears to refer to the vague time period discussed, supra, as "during the negotiations." (Compl. ¶ 34-5.) For the same reasons discussed, supra, this amorphous time period fails to satisfy the requisite pleading requirements. Additionally, JP Turner and Endovasc jointly terminated the Finder's Agreement on or about March 27, 2001. (Synder Aff. Ex. B.) This predates one of the funding agreements entered into by Endovasc and Laurus on August 17, 2001. (Compl. ¶ 40.) Further, the Complaint fails to specify where these statements were made, to whom, and by what method.

B. Scienter

Defendants also move to dismiss the misrepresentation claim for failure adequately to plead scienter. To state a claim for securities fraud, the PSLRA requires that plaintiffs "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). As the Court of Appeals has recently reiterated, "[i]n order to satisfy this requirement, 'a complaint may (1) allege facts that constitute strong

circumstantial evidence of conscious misbehavior or recklessness, or (2) allege facts to show that defendants had both motive and opportunity to commit fraud.'" Rombach v. Chang, 355 F.3d 164, 176 (2d Cir. 2004) (quoting Rothman v. Gregor, 220 F.3d 81, 90 (2d Cir. 2000)). With respect to the second prong, motive "entail[s] concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged" while opportunity "entail[s] the means and likely prospect of achieving concrete benefits by the means alleged. Shields v. Citytrust Bancorp., Inc.,25 F.3d 1124, 1130 (2d Cir. 1994).

The Complaint attempts to satisfy the scienter requirement by pleading motive and opportunity. (See Compl. ¶¶ 40-45.) More specifically, the Complaint alleges that the structure of the agreements provided defendants with motive and opportunity to defraud Endovasc:

> The defendants had motive and opportunity to make false and misleading statements, because the terms of the agreement with Endovasc would provide them with an economic incentive to acquire Endovasc stock and manipulate its price.

(Compl. ¶ 42.) The Complaint also alleges that the defendants "are accomplished practitioners of 'death spiral' funding mechanisms and active practitioners of stock manipulation." (Compl. ¶ 22.) Endovasc alleges that defendants have engaged in previous "manipulative schemes" with respect to other companies

(Compl. ¶ 23-24) and generally explains how these schemes operate (Compl. ¶ 25.) While somewhat convoluted and difficult to comprehend, Endovasc alleges that the defendants are able to profit from "manipulating down the market for the stock" by "sell[ing] the shares short . . . and cover[ing] the short with additional shares of stock converted at the lower price," thereby profiting from "the difference between the price at which the stock was sold short and the price at conversion." (Compl. ¶ 25.) The structure of the "investment agreements" allegedly permits such a result. (Compl. ¶ 42.)

Specifically with respect to "motive," the Complaint alleges:

> During the interim time periods between fundings, it is Endovasc's belief that defendants KCM, Keshet, Laraus, LH[], Celeste, and Balmore, through their respective control persons . . . manipulated the stock price downward to realize significant profits from the 'spread,' the difference in stock price between the offer of the seller and bid of the buyer. Additionally, the lower the stock price fell, the more shares E[ndovasc] was required to deliver to these defendants, and the more shares, the greater the profits.

(Compl. ¶ 40.) With respect to opportunity, Endovasc alleges:

> Defendants received large stocks of Endovasc stock at closing of May 9, 2000 funding and August 17, 2001 funding and pursuant to conversion notices demanded by KCM, Keshet and Laurus. Further, if the "shorters" (defendants and their affiliates) could buy their stock price down, further financing would not be available and the company would not longer be viable, and thus, these defendants would not be required to cover the naked short positions. Further, E[ndovasc]

> could seek no other financing due to defendants' manipulations. These defendants took advantage of the manipulated circumstances created by them to their gain and to the detriment of Endovasc.

(Compl. ¶ 41.)[8]

Endovasc contends that other district courts in this circuit have held that similar allegations suffice to plead motive and opportunity where such a scheme exists. See, e.g., Internet Law, 223 F. Supp. at 483-85 (holding that motive and opportunity was satisfied where structure of agreement gave defendants economic incentive to manipulate stock price); Global Intellicom, Inc. v. Thomson Keraghan & Co., 1999 U.S. Dist. LEXIS 11378, at *27-28 (allegations that defendants had an incentive to short-sell stock, without detection, due to a favorable conversion ratio and a long history of orchestrating similar schemes in other companies satisfied pleading burden for scienter). However, these cases are distinguishable. In each,

[8] The Complaint appears to fail to plead any motive pertaining to JP Turner. JP Turner is not alleged to have engaged in any manipulative trading in Endovasc stock or to have received any other concrete benefits. Endovasc responds that it has alleged that JP Turner participated in a conspiracy with the other defendants and "[t]herefore, their motive in committing fraud was the furtherance of the conspiracy." (Opp. to JP Turner, at 11.) Even insofar as this might be interpreted to be found in the Complaint (in which even conclusory allegations of such are absent), it falls far short of the "concrete benefits that could be realized by one or more of the false statements and wrongful non-disclosures" required under the Rule 9(b) and the PSLRA. Shields, 25 F.3d at 1128. Additionally, the only securities that JP Turner held were warrants received pursuant to the Finder's Agreement, which would have lost value with the decline of Endovasc's stock price. Endovasc's vague argument in its opposition (found nowhere in the Complaint) that JP Turner and Power stood to gain even more by participating in the conspiracy to cause a decline in the price of Endovasc stock is wholly unexplained even in general terms. (Opp. to JP Turner, at 11-12.) Therefore, as to JP Turner, motive and opportunity have not been properly pleaded.

as described by the district court, specific sales by defendants along with the corresponding figures, explained in detail how the defendants' alleged scheme enabled defendants to profit from the structure of the agreement. For example, in Internet Law, the Complaint alleged multiple sales by a defendant along with figures relating to the corresponding daily trading volume and decline in stock value. Internet Law, 223 F. Supp. 2d at 479-80. Similarly, in Global Intellicom, the Complaint alleged figures relating to the daily trading volume, short sales, and stock price decline along with detailed pleading as to the structure of the agreements. Global Intellicom, 1999 U.S. Dist. LEXIS 11378, at *3-18. In comparison, specificity of any kind is wholly lacking from the Endovasc Complaint. Not only does the Complaint fail to specify the terms of the agreements that might provide a basis for alleging that the structure of the agreements gave defendants a motive to manipulate down Endovasc's stock price, it jumbles together all of the agreements, entered into by separate defendants. Furthermore, the Complaint fails to identify even one specific conversion request, and fails to specify even one instance on which any preferred shares or notes were converted, the number of shares or notes converted, or the price at which any shares or notes were converted. The Complaint similarly fails to specify any trade made by any of the defendants in Endovasc stock, the date

on which any trades were made, the number of shares traded, whether those trades were long or short, or the price at which any shares were bought or sold. Insofar as the Complaint alleges the market prices at which Endovasc stock was trading and the daily trading volume, these figures are simply wrong.[9] Indeed, the Complaint does little more than make the bald, conclusory assertions in this regard without naming a single specific instance. As a result, the complete lack of specificity with which Endovasc alleges that the structure of the agreements provided defendants with motive and opportunity fails to meet the pleading standards for scienter required by this Circuit under the PSLRA, which requires a showing of a concrete benefit to each defendant. See Shields v. Citytrust Bancorp., 25 F.3d 1124, 1129 (2d Cir. 1994) ("frequent conclusory allegations. . . do not satisfy the requirements o Rule 9(b)" because "such allegations are 'so broad and conclusory as to be meaningless") (internal quotations omitted).

[9] Pursuant to Ganino v. Citizens Utilities Co., 228 F.3d 154, 167 n.8 (2d Cir. 2000) (holding that it is permissible to take judicial notice of stock prices), I have taken judicial notice of the prices and volumes on the days alleged in the Complaint. It appears that the figures in the Endovasc Complaint were mistakenly "borrowed" from the Complaint filed in a separate case (Internet Law Library, Inc. v. Southridge Capital Mgmt., 01 Civ. 6600) by the same Plaintiff's firm. Despite this error by counsel for Plaintiff, the general "trend" alleged by Plaintiff is accurate. However, without reference to any specific acts (viz., trades or conversions), even the correct figures are unhelpful to Endovasc in demonstrating the requisite showing.

III. Second claim: Market Manipulation

Plaintiff's second claim for relief alleges against JP Turner, KCM, Keshet Fund, Keshet, Nesher, Talbiya B. Investments, Balmore, Grin, LH, Laurus Capital, Celeste, and Power that "[e]ach defendant participated in a scheme to defraud Endovasc by manipulating the price of Endovasc stock." (Compl. ¶ 59-60.)

All named defendants also move to dismiss the market manipulation claim for, inter alia, lack of standing, failure to satisfy the pleading standards of Rule 9(b), and failure to adequately plead scienter. For the reasons stated below, the claim must be dismissed.

A. Standing

It is well established that a private right of action for market manipulation is available under Section 10(b) only to purchasers and sellers of securities allegedly defrauded by the manipulation. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730-31 (1975). KCM and Grin claim that under this rule, Endovasc does not have standing to bring a market manipulation claim because the Complaint is devoid of any allegations that Endovasc was either the purchaser or seller of any allegedly manipulated stock. (KCM Mem. at 28-29.) Endovasc counters, in reliance on Frankel v. Slotkin, 984 F.2d 1328, 1332-33 (2d Cir. 1993), that a Company's issuance of treasury stock constitutes a

"sale" of securities for purposes of Section 10(b) and that it "was an active market participant during the time when the activities of these defendants and others were alleged to have affected the price of Endovasc stock." (Opp. To KCM at 13-14.) However, as the KCM defendants point out, the Complaint is likewise devoid of any allegation that Endovasc relied on the market in honoring conversion notices, and it fails to identify any conversion notice honored by Endovasc. Furthermore, the Complaint contains no allegation that Endovasc was an "active market participant." Endovasc's attempt to cite to exhibits attached to affidavits submitted by defendants is an impermissible attempt to amend its Complaint in its briefs. See O'Brien v. National Property Analysts Partners, 719 F. Supp. 222, 229 (S.D.N.Y. 1989) ("It is axiomatic that the Complaint cannot be amended by the briefs in opposition to a motion to dismiss."). Even so, with respect to the exhibit cited, Endovasc was obligated by contract to honor the conversion demands that defendants made. The honoring of conversion notices does not constitute a sale or purchase of a security and thus does not does not confer standing to assert a market manipulation claim. See Global Intellicom, 1999 U.S. Dist. LEXIS 11378, at *26; Log On America, Inc. v. Promethean Asset Management LLC, 223 F. Supp. 2d 435, 446 (S.D.N.Y. 2001) (rejecting plaintiff's argument that the conversion feature of a

convertible security qualifies as a contract for the purchase or sale of a security for purposes of standing). Accordingly, because Plaintiff did not allege in the Complaint that it was a purchaser or seller of securities, it does not have standing to bring the market manipulation claim and it must be dismissed.

B. Rule 9(b)

Even if Plaintiff did have standing to bring the claim, the Complaint fails to meet the pleading requirements of Rule 9(b) even under the "relaxed" standards applied to market manipulation claims. Simply put, the Complaint's section dedicated to stating the market manipulation claim is incomprehensible. The Complaint appears to predicate its claim on allegations that Endovasc was defrauded into "purchasing KCM common stock and warrants" and that "defendants manipulated the price of Endovasc stock thereby causing Endovasc to purchase KCM's stock at an artificially inflated price." (Compl. ¶ 60-61 (emphasis added).) It further asserts that "defendants . . . manipulate[d] the price of KCM's stock" and "induce[d] investors, including Endovasc, to invest in KCM, which included making false and misleading financial projections for KCM." (Compl. ¶ 62.) With respect to scienter, it alleges that "Defendants' omission of material fact and other manipulative conduct were intentional and/or reckless and done for the purpose of enriching themselves at the expense of Endovasc and

other investors and to conceal the true facts about KCM's financial condition and prospects. (Compl. ¶ 63.) Endovasc argues in its opposition that although "the complaint does inadvertently become garbled at one point," the alleged scheme is somehow still "apparent" from the "context of the complaint." (Opp. To KCM at 12 & n.2.) However, these allegations comprise a substantial portion of the allegations supporting the manipulation claim and do not begin to place a defendant on notice of the conduct with which it is being charged given the contradictory and bizarre allegations. See In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001) (a court is required only to accept as true well-pleaded allegations and may reject "conflicting pleadings that make no sense, or that would render a claim incoherent"). Additionally, most of the remaining allegations do little more than track the statutory language of Section 10(b), thereby rendering them deficient as a matter of law. See Ross v. A.H. Robins Co., Inc. 607 F.2d 545, 557-58 (2d Cir. 1979) ("It will not do merely to track the language of Rule 10b-5 and rely on such meaningless phrases as 'scheme and conspiracy' or 'plan and scheme and course of conduct to deceive.'"). Even insofar as the Court can "interpret" the Complaint to mean what Plaintiff alleges was intended, Endovasc has failed to plead any specifics with respect to the nature of the scheme. While manipulation claims

may be subject to a slightly less rigorous pleading standard, the Complaint must still identify "what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue." In re Blech Sec. Litig., 928 F. Supp. 1279, 1291 (S.D.N.Y. 1996). The Complaint provides nothing more than generalized conclusory allegations of a scheme, with a laundry list of terms purporting to identify what manipulative acts were performed, all of which lump together the defendants. At no point in the Complaint is a specific instance of trading by any defendant identified with specificity. Such vague, conclusory allegations are insufficient. See Baxter I, 1995 U.S. Dist. LEXIS 14882, at *21-26 ("broad strokes with which the plaintiffs have alleged market manipulation do not pass muster" where claims contain only "generalized allegations"); Connolly v. Havens, 763 F. Supp. 6, 13 (S.D.N.Y. 1991) (complaint deficient given absence of details of manipulative acts, time performed, shares traded, injuries suffered and what manipulator allegedly gained). Cf. Internet Law, 223 F. Supp. 2d at 486 (adequate detail where complaint describes how defendants manipulated the price of the stock and list specific short sales by a defendant, providing dates and the number of shares sold for each trade); U.S. Environmental, 82 F. Supp. 2d at 240 (complaint contained

"detailed descriptions" of sample trades and broader allegations"); Cowen & Co. v. Merriam, 745 F. Supp. 925, 929-30 (S.D.N.Y. 1990) (complaint adequately pled where details of date, quantity and price of purchases are alleged). Accordingly, for these additional reasons, as well as the reasons discussed in Part II.B., supra, with respect to scienter (which apply with equal force to this claim), Plaintiff's market manipulation claim is dismissed.

IV. Claim Three: Control Person Liability

Section 20(a) provides in relevant part:

> Every person who, directly or indirectly, controls any person liable under any provision of this title or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.

15 U.S.C. § 78t(a). As discussed above, Plaintiff has failed to state a primary violation of the securities laws under section 10(b). Without a primary violation, there can be no secondary, or derivative, violation under Section 20(a). See Shields, 25 F.3d at 1132; Brown v. Hutton Group, 795 F. Supp. 1317, 1324 (S.D.N.Y. 1992). Accordingly, Plaintiff's Section 20(a) claim is also dismissed.

V. Claim Four: Common Law Fraud

The requirements of common law fraud are (1) false representation of a material fact; (2) intent to defraud; (3) reasonable reliance on the representation; and (4) damage caused by such reliance. May Dep't Stores Co. v. Int'l Leasing Corp., 1 F.3d 138, 140 (2d Cir. 1993). Thus, "the elements of common law fraud are essentially the same as those which must be pleaded to establish a claim under § 10(b) and Rule 10b-5." Scone Investments, L.P. v. American Third Market Corp., 97 Civ. 3802, 1998 U.S. Dist. LEXIS 5903, at *28 (citing Pits, Ltd. v. American Express Bank, Int'l, 911 F. Supp. 710, 719 (S.D.N.Y. 1996). For the same reasons discussed in dismissing Endovasc's misrepresentation and market manipulation claims, the claim for common law fraud must also be dismissed.

VI. Claim Five: Civil Conspiracy to Defraud

There is no cognizable claim for the tort of civil conspiracy in New York or Georgia. See Internet Law, 223 F. Supp. 2d at 490 ("It is well-settled that New York law does not recognize an independent cause of action for civil conspiracy); U.S. Anchor Mfg., Inc. Rule Indus., 264 Ga. 295, 297 (Ga. 1994) ("there is no such thing as a civil action for conspiracy") (citations omitted) (emphasis in original). Endovasc responds by noting that New York law recognizes a derivative cause of action for civil conspiracy based upon another tort, and claims

that its conspiracy action is derivative of its cause of action for fraud. See Dimon Inc. v. Folium, Inc., 48 F. Supp. 29 359, 374 (S.D.N.Y. 1999). However, assuming that New York law applies, because the fraud action has been dismissed, there can be no derivative conspiracy action. Accordingly, the claim for civil conspiracy is dismissed.

VII. Claim Six: Breach of Contract

To state a claim under New York law, the complaint must allege: (a) the existence of a valid agreement; (b) adequate performance of the contract by plaintiff; (c) breach of the contract by defendant; and (d) damages. Harsco v. Segui, 91 F.3d 337, 348 (2d Cir. 1996). Putting aside the issue of whether there was a valid agreement pled, Endovasc makes no allegation that it performed under the contract, even in a conclusory fashion. Accordingly, this claim must be dismissed. Rueben H. Donnelly Corp. v. Mark I Marketing Corp., 893 F. Supp. 285, 291 (S.D.N.Y. 1995) (holding that when pleading breach of an express contract, "the complaint must contain some allegations that the plaintiff actually performed their obligations under the contract"); Zaro Licensing, Inc. v. Cinmar, Inc., 779 F. Supp. 276, 286 (S.D.N.Y. 1991) (dismissing breach of contract claim in part due to plaintiff's failure to plead performance with the contract).

VIII. Claim Seven: Restitution

Endovasc's seventh claim for relief in the Complaint seeks "restitution" under the Securities Act of 1934. However, restitution is a remedy, not a specifically cognizable claim. Because Endovasc has not properly pled claims for securities fraud violations, the demand for the remedy of restitution must necessarily be denied.

IX. Plaintiff's Request to Amend its Complaint

For the reasons stated in the Court's Order dated August 18, 2003, Plaintiff's request to amend its Complaint is denied.

X. Rule 11 sanctions

As the Court of Appeals recently stated in Rombach v. Chang, 355 F.3d 164 (2d Cir. 2004):

> The PSLRA mandates that, at the end of any private securities action, the district court must "include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b)." 15 U.S.C. § 78u-4(c)(1); see also Simon DeBartolo Group, L.P. v. Richard E. Jacobs Group, Inc., 186 F.3d 157, 167 (2d Cir. 1999) (noting that the PSLRA "functions . . . to reduce courts' discretion in choosing whether to conduct the Rule 11 inquiry at all"). And, if the court finds that any party or lawyer violated Rule 11(b), the PSLRA mandates the imposition of sanctions. See 15 U.S.C. § 78u-4(c)(2).

Id. at 178. I cannot find on this record that the Complaint was filed for an improper purpose, that it presented a frivolous

legal position or completely lacked evidentiary support. Accordingly, the Defendants' motions for sanctions are denied.

CONCLUSION

Defendants' motions to dimiss the Complaint in its entirety are granted with prejudice. Defendants' motions for sanctions are denied. The Clerk of the Court shall mark this action closed and all pending motions denied as moot.

SO ORDERED

March ___, 2004

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LORETTA A. PRESKA, U.S.D.J.