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

In re: ISOLAGEN INC., SECURITIES & DERIVATIVE LITIGATION	:	
This Document Relates to:	:	MDL NO. 1741
RICHARD KEENE, Derivatively and on Behalf of Isolagen, Inc.	:	
	:	CIVIL ACTION NO. 06-1302
Plaintiff,	:	
v.	:	
FRANK M. DELAPE, ROBERT J. BITTERMAN, MICHAEL MACALUSO, JEFFREY W. TOMZ, OLGA MARKO, WILLIAM K. BOSS, JR., MICHAEL AVIGNON, STEVEN MORRELL, HENRY Y.L. TOH, RALPH DE MARTINO, MARSHALL G. WEBB.	:	
Defendants,	:	
and	:	
ISOLAGEN, INC.	:	
Nominal Defendant.	:	

MEMORANDUM

BUCKWALTER, S.J. April 10, 2007

Presently before the Court are Defendants' Motion to Dismiss Plaintiff's Amended Derivative Complaint, Plaintiff's Response, and Defendants' Reply.[1] For the reasons explained below, this case will be **DISMISSED** without prejudice as premature.

1. Defendant Tomz is represented separately, but has joined in the motion to dismiss.

I. BACKGROUND

Nominal Defendant, Isolagen, Inc. ("Isolagen") and all former and current officers and/or directors named in this suit ("Defendants") have joined in a motion to dismiss the Plaintiff, Richard Keene's ("Plaintiff"), Amended Shareholders' Derivative Complaint ("Complaint"). Also, currently pending before this Court is a related securities class action suit which arises out of the same conduct that is alleged in this Complaint.

Isolagen is a company that engages in the development and commercialization of autologous cellular therapies[2] for soft and hard tissue regeneration. Isolagen has two lead products which are currently in development stages. The first product is in Phase III of its clinical development and has applications in cosmetic dermatology to correct and reduce the normal effects of aging, such as wrinkles and nasolabial folds. The second product is in Phase II of clinical trials and is being developed to treat periodontal disease.[3]

Plaintiff's Complaint brings claims for breach of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, unjust enrichment, and misappropriation of information.[4] The Plaintiff alleges that there were material and misleading statements made by certain Defendants throughout the clinical trial phases for Isolagen's lead products as well as improper reporting of Isolagen's financials which certain Defendants knew or

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2. Autologous cellular therapy utilizes a process whereby a patient's own collagen producing cells (dermal fibroblasts) are extracted, allowed to multiply and then injected in the patient. Pl's Response at 4.

3. Isolagen information found in Pl's Response at 3-4.

4. The cause of action of Misappropriation of Information is only alleged against Defendants DeLape, Boss, Marko, Macaluso, and Tomz.

should have known. The Plaintiff alleges that as a result of these material and misleading statements and improper reporting, Isolagen and its shareholders suffered damages.

Defendants have moved the Court to dismiss Plaintiff's Complaint on the following bases: (1) the Complaint does not allege facts sufficient to excuse pre-suit demand; (2) the Complaint does not allege sufficient facts to establish Defendants' breached fiduciary duties owed to Isolagen; and (3) Plaintiff's attempts to recover for any losses Isolagen may sustain as a result of being named in the related securities class action are premature. At this time, the Court has determined that the Complaint is premature and therefore, it will be dismissed without prejudice. Furthermore, should this claim ripen, the Court expects that Defendants will renew arguments 1 and 2 for dismissal at which time the Court will determine the merits of those arguments. Below the Court addresses its reasoning for dismissing the Complaint as premature.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Rule 12(b)(6) is granted where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In a 12(b)(6) motion, the defendant bears the burden of persuading the Court that no claim has been stated. Gould Elecs., Inc. v. United States, 220 F.3d 169, 178 (3d Cir. 2000). A motion to dismiss "may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief." Maio v. Aetna, Inc., 221 F.3d 472, 482 (3d Cir. 2000). While the Court must accept all factual allegations in the complaint as true, it "need not accept as true 'unsupported conclusions and unwarranted inferences.'" Doug Grant, Inc. v. Greate Bay Casino Corp., 232 F.3d 173, 183-84 (3d Cir. 2000) (citing City of Pittsburgh v. West Penn Power Co., 147 F.3d 256, 263 n.13 (3d Cir. 1998)).

Generally, Courts consider the allegations contained in the complaint, exhibits attached to the complaint, and public records of which the court may take judicial notice. Pension Benefit Guar. Corp. v. White Consol. Indus., 998 F.2d 1992, 1196 (3d Cir. 1993).

Derivative shareholder suits are consistently "foreclosed when they merely allege damages based on the potential costs of investigating, defending, or satisfying a judgment or settlement for what might be unlawful conduct." In re Cray Inc. Derivative Litg., 431 F.Supp. 2d 1114, 1134 (W.D. Wash. 2006). Moreover, "Courts routinely dismiss claims as premature if the alleged injury is contingent upon the outcome of a separate, pending lawsuit . . ." In re United Telecommunications, Inc. Securities Litg., 1993 WL 100202 *3 (D. Kan.1993); In re Symbol Technologies Securities Litg. v. Swartz, 762 F.Supp. 510, 516 (E.D.N.Y. 1991) ("[D]efendants cannot be held liable for the costs of defending a potentially baseless suit. [Additionally, where] no judgment has been rendered, nor a settlement reached; therefore, no injury has been sustained for which plaintiff may sue to recover."). Furthermore, if a plaintiff claims damages arising out of injury to a company's creditability and ability to conduct business, defendants are entitled to know "the basis for the damages claimed" and "the extent of those damages." United at *2.

III. DISCUSSION

As explained, Defendants have moved the Court to dismiss Plaintiff's Complaint on three grounds. However, at this time, the Plaintiff's Complaint will be dismissed on one ground only, as being premature.

The Plaintiff's Complaint asserts claims against the Individual and Director Defendants for breaches of fiduciary duties; and claims as a result of breaches of fiduciary duties, Isolagen and its shareholders have suffered damages. Specifically, the Plaintiff argues that

> [T]he Defendants misconduct has caused the Company to incur the costs of internal investigations, including accounting fees and legal fees, and the costs and legal fees for defending the related securities class action lawsuits. [internal citation omitted] In addition, Plaintiff has alleged that Isolagen has been exposed to millions of dollars of liability for securities fraud, has suffered damage to its goodwill and reputation, the loss of creditability, the impairment of its ability to obtain debt or equity financing and losses from the Company's buy back of inflated shares. [internal citation omitted].

Pl's Response at 43-44.

The majority of the damages the Plaintiff is claiming are contingent upon the outcome of the related securities class action which is still pending before this Court. The damages the Plaintiff is claiming are clearly contingent on the related securities class action lawsuit because the Plaintiff states as much in his Response to the Defendants' Motion to Dismiss. Pl's Response at 43-44. Therefore, the damages claimed are premature and the Complaint is dismissed without prejudice. Cray, at 1134.

The Plaintiff also argues that some of the damages[5] Isolagen and its shareholders are suffering are "real and present - - not contingent." Pl's Response at 44. In order to support his premise, the Plaintiff cites two cases, Mehlenbacher v. Jitaru and McSparran v. Larson. For the reasons below, the Court does not find either case persuasive.

First, the Mehlenbacher decision is dissimilar to the instant action because in the Mehlenbacher case the related class action was voluntarily dismissed without payment of settlement, where in this case the related securities class action has not been dismissed, settled, or

5. Damages to good will, reputation, creditability, and impairment to debt or equity financing. Pl's Response at 44.

a judgment entered. Mehlenbacher v. Jitaru, No. 04-CV-1118, slip op. at 5 (M.D. Fla. June 6, 2005). Additionally, the Court agrees with the Cray decision's sentiments that the Mehlenbacher decision is not "instructive due to its lack of analysis or support." Cray at 1134.

Second, the McSparran[6] decision is irrelevant to the Plaintiff's argument that damages are "real and present - - not contingent" because McSparran merely states that damages have been pled. McSparran v. Larson, 2006 WL 250698 *6 (N.D. Ill. 2006). The fact that damages have been pled does not mean that the McSparran Court found that the damages were "real and present - - not contingent" as the Plaintiff suggests. Rather, it means that damages were pled and thus, the complaint was able to survive a motion to dismiss. The Court has found nothing within the McSparran decision that equates to the Plaintiff's premise that the damages were "real and present - - not contingent" and therefore, does not find any basis for establishing that the damages are real and present.

Additionally, with respect to the Plaintiff's allegations that Isolagen has suffered damages to its goodwill and reputation as well as impairment to its ability to obtain debt or equity financing, the Court finds these allegations to be conclusory. The Plaintiff has not explained the basis for the damages claimed or the extent of the damages Isolagen has suffered and therefore, the damages allegation is insufficient to withstand a motion to dismiss. United at *2 ("This sort of conclusory allegation, as the *Symbol* court observed, does not adequately apprise the defendants of the basis for the damages claimed or the extent of those damages."). Further, the Plaintiff has failed to identify any instance where Isolagen needed and/or sought debt

6. McSparran was overruled on a motion for reconsideration and the complaint was dismissed. McSparran v. Larson, No. 04-CV-0041, slip op. (N.D. Ill. May 3, 2006).

or equity financing and failed to obtain it. Therefore, it is the Court's conclusion that Plaintiff's Complaint is premature and dismisses it without prejudice.

IV. CONCLUSION

For all the forgoing reasons, the Court is dismissing this case as premature without prejudice. An appropriate order follows.

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and	:	
ISOLAGEN, INC. Nominal Defendant.	:	

ORDER

AND NOW, this 10th day of April, 2007, upon consideration of Defendants' Motion to Dismiss Plaintiff's Amended Complaint (Docket No. 12), Defendant Tomz's Joinder in the Motion to Dismiss (Docket No. 13), Plaintiff's response thereto (Docket No.17), and Defendants' Reply (Docket No. 22), it is hereby **ORDERED** that said Motion is **GRANTED,** and Plaintiff's Amended Complaint is **DISMISSED**, without prejudice.

BY THE COURT:

RONALD L. BUCKWALTER, S.J.