

**SAP International, SA v UBS Paine Webber Inc.**

2004 NY Slip Op 30035(U)

June 4, 2004

Supreme Court, New York County

Docket Number: 2\_30060/3661

Judge: Karla Moskowitz

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. KARLA MOSKOWITZ  
Justice

PART 03

SAP= INTERNATIONAL, SA,

Plaintiff,

-against-

UBS PAINWEBBER INC., MARC ROUSSO, RANI MERKEL,  
ALBERTO MURO, LEON LIPKIN, SEBASTIAN BARENBOIM  
and ERIC KIRCHGAESSER,

Defendants.

INDEX NO. 603661/2002

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is

ORDERED that the motion is decided in accordance with the accompanying Decision and Order.

FILED

JUN 10 2004

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: June 4, 2004

KARLA MOSKOWITZ

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 3

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SAPHIR INTERNATIONAL, SA,

Index No. 603661/2002

Plaintiff,

-against-

**DECISION and ORDER**

UBS PAINWEBBER INC., MARC ROUSSO,  
RANI MERKEL, ALBERTO MURO, LEON LIPKIN,  
SEBASTIAN BARENBOIM and ERIC  
KIRCHGAESSER,

Defendants.

-----X

**KARLA MOSKOWITZ, J.:**

Motion sequence numbers 001, 002, 004 and 005<sup>1</sup> are consolidated for disposition.

In this action, plaintiff Saphir International, SA ("Saphir") seeks to recover approximately \$5 million in losses it incurred as result of an alleged "pump and dump" stock fraud defendant Marc Rousso ("Rousso") perpetrated. Rousso allegedly worked in concert with certain employees of defendant UBS PaineWebber, Inc. ("PaineWebber"), a securities lawyer, defendant Leon Lipkin ("Lipkin") and others. Defendants Painewebber, Merkel, Muro and Lipkin now move to dismiss on the ground that the statute of limitations (CPLR 213[8]) bars the claims, that the fraud and fraud-related claims fail to state a cause of action (CPLR 32111[a][7]) and that the complaint fails to plead

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<sup>1</sup> By order dated May 19, 2004, the court granted, without opposition, a discontinuance with prejudice against defendant Rousso, the movant in motion sequence no. 003.

fraud with particularity (CPLR 3016{b}). For the reasons set forth below, the motions are granted.

#### The Amended Complaint

The following facts are taken from the Amended Complaint, and plaintiff's affidavit in opposition. Plaintiff Saphir is a Panamanian company that provides investment income to its beneficiary. Between May 1995 and February 1996, Saphir purchased **stocks** in six companies -- Foxwedge, Firenze, Pick Communications, Food Technology Services, Ultimistics and New Century Media -- upon the recommendation of Rousso. Defendant Lipkin prepared corporate documents and made Securities and Exchange Commission filings on behalf of the companies.

During the time that Saphir made these investments, Saphir's sole director and portfolio manager was Jacques Heyer ("Heyer") of Heyer Management, S.A., a consulting business in Geneva, Switzerland. Accordingly, all of Saphir's dealings with Rousso and his alleged co-conspirators took place through Heyer. Heyer has not been associated with Saphir since mid-1997.

#### The Foxwedge Transaction

In March 1995, Heyer called Rousso in New York to discuss potential investments. Rousso, who held himself out at the time as "Marc **Miller**," told Heyer that he was an investment banker who organized private placements of stock in advance of their public offering. Rousso recommended the investment in Foxwedge, **at \$2** per share, asserting that it would trade for more than \$20 per share once a 60-day trading restriction expired. Defendant Rani

Merkel ("Merkel"), a Senior Vice President of PaineWebber, then called Heyer to inform him that he, Merkel, was in charge of the Foxwedge subscription and gave Heyer instructions to wire funds for the purchase.

In late March 1995, Heyer subscribed to one million shares of Foxwedge stock for \$2,000,000 on behalf of several clients. Heyer Management wired the money for the subscription to PaineWebber pursuant to Merkel's directions. Of the one million shares, Heyer transferred 50,000 to Saphir's account for a price of \$131,122.

Unknown to Heyer, PaineWebber was not actually underwriting the subscription to Foxwedge. Instead, Rousso owned and controlled the PaineWebber account in the name of a nominee and the monies went to him rather than Foxwedge. Rousso, who was not an investment banker as he claimed, used the money to drive up the price of Foxwedge's shares so that he could sell his own undisclosed holding in the company at a profit and at the expense of the other investors. By July 1995 the price of Foxwedge had fallen to less than \$1.00. Contrary to Rousso's representation, the stock never **became** free trading and Saphir lost the entire value of its investment.

#### The Firenze Transaction

Sometime after the Foxwedge transaction closed, Merkel invited Heyer to meet with him and Rousso in New York. Philippe Habib ("Habib"), an associate of Rousso, brought Heyer to Merkel's office at PaineWebber. Heyer then met with Rousso, who

occupied an office next to Merkel's. During lunch, Rousso promoted a stock subscription in Firenze, making various misrepresentations about the company's acquisition plans and other prospects. On October 19, 1995, Rousso and Merkel sold 200,000 shares of Firenze to Saphir for a price of \$500,000 (\$2.50 per share). Merkel again held himself out as the person in charge of the subscription at PaineWebber **and** directed that the funds be wired to a PaineWebber account. On February 6, 1996, based on Rousso's continuing recommendations, Saphir acquired 600,000 additional shares for \$1,075,000. A little over one year later, in May 1997, Saphir sold all of this stock for \$31,250 for a loss of \$1,543,750.

#### The Pick Transaction

In October 1995, after the Firenze s bscription was complete, Rousso persuaded Heyer to invest over \$2 million of another client's funds in **Pick** by making a series of misrepresentations about its business and prospects. Merkel again mislead Heyer about PaineWebber's participation as underwriter. When Heyer attempted to sell the shares, Rousso falsely told him that a French investment company was going to take over Pick within 60 days for a price of \$20 and guaranteed that the price would rise by at least 10% within that period. On November 29, 1995, Saphir purchased the stock in Pick from Heyer's original client for \$2,861,964. Thereafter, Pick's price fell dramatically, and between September and November 1996, Heyer requested that Rousso honor the guarantee he made. After he

failed to do so, in May 1997 Saphir sold its holding in Pick for \$155,520, sustaining a loss of over \$2,700,000.

#### Other Transactions

Based upon Rousso's other misrepresentations, Heyer made additional purchases of stock on behalf of Saphir between August and November, 1995. Saphir purchased (1) 40,000 shares of Food Technology Services (that Rousso claimed a French company would soon acquire) for \$184,146 on August 22, 1995 and later exchanged for 52,000 shares of XO Corp.; (2) 67,000 shares of Ultimistics for \$545,176 on October 31, 1995; and (3) 20,000 shares of New Century Media for \$103,064. The XO Corp. shares lost all their value, and, in May 1997, Saphir sold the Ultimistics stock for \$2,538 (a loss of \$542,638) and the New Century stock for \$200 (a loss of \$102,864).

Between 1999 and 2002, Rousso and all of the other individual defendants pled guilty to criminal charges arising from the various stock sales. Plaintiff commenced this action on October 7, 2002 and served the Amended Complaint in December 2002. Plaintiff asserts causes of action sounding in fraud and aiding and abetting fraud, and seeks to hold PaineWebber accountable for the conduct of Merkel and **Muro** under theories of vicarious liability and agency.

#### The Tamisier Declaration

In opposition to the motions to dismiss, plaintiff submitted a declaration from a Swiss Attorney, Christian Tamisier, which recasts some of the allegations of the complaint. Specifically,

Tamisier asserts that Saphir's sole beneficiary, Paule Constant, retained him in early 1997 to participate in a criminal investigation of Mr. Heyer. Tamisier alleges that, in April 1997, Constant became aware of "devastating losses" in Saphir's accounts and that the company filed a criminal complaint against Heyer for embezzlement in June 1997. In the course of the investigation, Heyer allegedly conceded that he knew that Rousso was not "whiter than white" and in 1998 the presiding criminal judge sought testimony from Rousso and Merkel. Additionally, in April 1998, Tamisier commenced a civil lawsuit on behalf of Saphir against Credit Suisse, asserting that Credit Suisse should have stopped Heyer Management from making the investments resulting in the losses.

#### Discussion

The court dismisses plaintiff's claims against the moving defendants as time-barred. The statute of limitations for fraud is either six years from the time of the fraud or two years from when it could have been discovered with reasonable diligence, whichever is longer (CPLR 213 [8], 203[g]; Yatter v William Morris Agency, Inc., 268 AD2d 335; Ghandour v Shearson Lehman Bros. Inc., 213 AD2d 304, lv denied 86 NY2d 710; Prestandrea v Stein, 262 AD2d 621). Plaintiff alleges that it made the last of its investments in reliance upon the fraud in February 1996, more than six years prior to the filing of the original complaint in October 2002.

In addition, plaintiff, through Heyer, was on notice of the fraud by 1997. "An inquiry as to the time that a plaintiff could, with reasonable diligence, have discovered the fraud is a mixed question of law and fact . . . and turns upon whether a person of ordinary intelligence possessed knowledge of facts from which the fraud could be reasonably inferred" (Ghandour, *supra* at 305-06) (internal citations omitted).

In the investment context, a party's awareness of substantial losses or of facts that indicate the falsity of a material representation constitutes constructive **or** inquiry notice of the fraud (see Ghandour, *supra* at 306 ["the **IAS** Court correctly concluded that the substantial losses sustained by the accounts under the circumstances herein was sufficient to place plaintiffs on notice of the potential fraud"]; Prestandrea, *supra* at 622 [plaintiff on notice of fraud because of receipt of documents and statements advising of losses or poor returns on investments]; Ballhaus v Morgan Guar. Trust Co. of New York, 232 AD2d 320 [bankruptcy of company in which plaintiffs invested gave notice that defendants' alleged promises to pay corporate creditors had not been kept]; Weisl v Polaris Holding Co., 226 AD2d 286 ["prospectuses given to plaintiff at the time of purchase or several days later clearly indicated the speculative nature of the investments and risks involved, and thereby put plaintiffs on 'inquiry notice' of their potential claims against defendants for misrepresenting the profitability and safety of the investments"]). The burden of proving that plaintiff could

not have timely discovered the fraud falls upon the plaintiff (Julian v Carroll, 270 AD2d 457).

There is no dispute that, by 1997, Saphir knew that it had lost over \$5.2 million of the \$5.4 million it had invested in the companies Roussso promoted. Moreover, by that time, Saphir necessarily had knowledge of the falsity of many of Roussso's specific statements regarding the investments, including the representations that: (1) the trading restriction on Foxwedge would expire in 60 days; (2) Foxwedge would trade for more than \$20; (3) Pick would be acquired for approximately \$20 per share, (4) Pick's price would appreciate by 10%; (5) Roussso would guarantee Pick's profitability; and (6) Food Technology would be acquired. Although the Amended Complaint indicates that plaintiff first discovered the fraud scheme in January 2002 "and could not, with reasonable diligence, have discovered it any sooner," this conclusory assertion cannot overcome the specific facts establishing Saphir's prior inquiry notice (Commerce and Industry Ins. Co. v Imrex Co., Inc., 270 AD2d 147).

Relying primarily upon the Tamisier Declaration, plaintiff seeks to avoid this result by arguing that the court should not impute Heyer's knowledge of the fraud to Saphir. **Apart** from the concession that Saphir's sole beneficiary, Paule Constant, was also aware of the company's "devastating losses" in 1997, this contention fails for several reasons.

First, under general principles of agency there is a presumption that "knowledge acquired by an agent acting **within**

the scope of his agency is imputed to his principal and the latter is bound by such knowledge although the information is never actually communicated to it" (Center v Hampton Affiliates, Inc., 66 NY2d 782, 784). Although there is an "adverse interest" exception to this rule that renders the presumption inapplicable where the agent engages in a scheme to defraud the principal and thus would not presumably share the knowledge, the exception is of limited scope. To apply, "the agent must have totally abandoned his principal's interests and **be** acting entirely for his own or another's purposes . . . [i]t cannot be invoked merely because he has a conflict of interest or because he is not entirely acting primarily for his principal" (Id., at 784-85).

Neither the pleadings nor the Tamisier declaration meet the burden of demonstrating that Heyer "totally abandoned" Saphir's interests. To the contrary, the Amended Complaint assumes that Heyer was acting squarely in his capacity as Saphir's portfolio manager and director to procure profitable investments for his principal. Heyer is alleged to have believed and relied upon Rousso's representations in purchasing stock for Saphir's account and for its benefit. The conclusory allegations of the Tamisier declaration that Heyer embezzled funds or profited from some of the transactions do not demonstrate a complete abandonment of his corporate principal's interests. At best, the allegations demonstrate a potential conflict of interest.

Second, the adverse interest exception does not apply where the disloyal agent is the "sole actor" for the principal. "The

sole actor rule applies where the corporate principal and its agent are indistinguishable, such as . . . where the corporation bestows upon its agent unfettered control and allows the agent to operate without meaningful supervision with respect to a particular type of transaction" (Breeden v Kirkpatrick & Lockhart, LLP, 268 BR 704, 709 [SDNY 2001]). The rule "imputes the agent's knowledge to the principal notwithstanding the agent's self-dealing because the party that should have been informed was the agent itself albeit in its capacity as principal" (In re Mediators, Inc., 105 F3d 822, 827 [2d Cir 1997]). As noted, the Amended Complaint alleges that Heyer was Saphir's sole director and portfolio manager. Likewise, the Tamisier declaration confirms that Heyer received the "authority to make and implement investment decisions on behalf of Saphir without input from any other person" and was "the only person who managed that business on a day-to-day, month-to-month and year-to-year basis."

Third, and most significantly, plaintiff cannot assert claims based upon its agent's knowledge of and reliance upon specific allegations, while simultaneously disavowing that knowledge for statute of limitations purposes. "An action for fraud requires that the plaintiff demonstrate the making of a material misrepresentation, known to be false, made with the intention of inducing reliance on the part of the victim, on which the victim does in fact rely and, as a result of which, he sustains damages" (Ippolito v Lennon, 150 AD2d 300). Saphir

cannot assert that defendants made representations about the value of and conditions attached to the stock investments and that it reasonably relied upon those representations, unless Heyer's knowledge and reliance are imputed to it. If plaintiff denies that knowledge then it has failed to state any of the elements of fraud. Insofar as plaintiff must concede the imputation of Heyer's knowledge to sustain any causes of action at all, the claims are time-barred because defendant obtained that knowledge more than six years prior to *the filing of the* complaint.

Plaintiff's argument that defendants are equitably estopped from asserting the statute of limitations is without merit. A claim of estoppel applies only where the plaintiff shows that, by fraud, misrepresentation or deception, the defendant has induced it to refrain from filing a timely action (Green v Albert, 199 AD2d 465). However, estoppel does not apply where, as here, the plaintiff is on inquiry notice of the wrongdoing (see Weisl v Polaris Holding Co., 226 AD2d 286).

With respect to the branch of defendants' motion that challenges the legal sufficiency of the fraud claims, it is unnecessary to explore this issue given the complete bar of the statute of limitations.

Accordingly, it is

ORDERED, that the motions **of** defendants UBS PaineWebber Inc., Rani Merkel, Alberto Muro and Leon Lipkin are granted, and the *claims* against *those* defendants are severed and dismissed,

with costs and disbursements to defendants as taxed by the Clerk of the Court, and it is further

ORDERED, that the Clerk shall enter judgment accordingly, and it is further

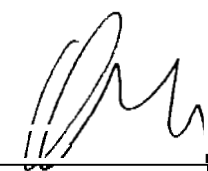
ORDERED, that the remainder of the action shall continue against defendant Sebastian Barenboim.

While these motions were pending, the plaintiff discontinued the action against defendants Marc Rousao and Eric Kirchgasser with prejudice on May 19, 2004.

The remaining parties are directed to appear for a preliminary conference on June 24, 2004 at 10:00 a.m. in the courtroom, room 248, 60 Centre Street, New York, N.Y.

Dated: June 4, 2004

ENTER :

  
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J.S.C.

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JUN 10 2004  
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