

Rosenfeld v Kadmon Holdings, LLC
2017 NY Slip Op 30547(U)
March 20, 2017
Supreme Court, New York County
Docket Number: 650360/2014
Judge: Jeffrey K. Oing
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
-----x

DR. STEVEN ROSENFELD,

Plaintiff,

-against-

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KADMON HOLDINGS, LLC, KADMON I,
LLC, KADMON II, LLC, KADMON
CAPITAL, LLC, KADMON CORPORATION,
LLC, JOEL SCHREIBER, and DR. SAMUEL
WAKSAL,

Mtn Seq. Nos. 007 & 008

DECISION AND ORDER

Defendants.
-----x

JEFFREY K. OING, J.:

Defendants Kadmon Holdings, LLC ("Kadmon Holdings"), Kadmon I, LLC ("Kadmon I"), Kadmon II, LLC ("Kadmon II"), Kadmon Capital, LLC ("Kadmon Capital"), Kadmon Corporation, LLC ("Kadmon Corp."), and Dr. Samuel Waksal ("Waksal") (collectively, the Moving Defendants) move for an order, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the third amended complaint.

Preliminary Statement

This action arises from an agreement the parties allegedly entered into in which plaintiff and defendant Joel Schreiber agreed to raise approximately \$50 million in order for defendants Waksal and Kadmon Capital to acquire certain pharmaceutical companies, reorganize them, and take them public. If they successfully raised these funds, plaintiff and Schreiber were to share a six percent "equity package." Plaintiff alleges that he

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and Schreiber introduced defendant Waksal to Colbeck Capital Management, LLC which provided defendants with over \$250 million, and that he never received his six percent equity interest. Plaintiff seeks recovery for breach of contract, and, alternatively, in quantum merit. The Moving Defendants seek dismissal, urging that plaintiff's alleged agreement does not satisfy the statute of frauds because it was never signed by them. They also argue that the third amended complaint fails to state a claim and is insufficient based on documentary evidence that shows Kadmon Capital never accomplished the alleged agreement's stated purpose of acquiring specific pharmaceutical companies.

Factual Background

The following are facts from the third amended complaint (Meissner Affirm., Ex. A [Meissner Affirm.], Third Amended Complaint ["TAC"]), and plaintiff's affidavit on an earlier motion to dismiss (Meissner Affirm., Ex. C, Rosenfeld Aff., dated May 23, 2014 [Rosenfeld Aff.], at 168-172).

In 2009, defendant Waksal was seeking to raise capital for a new venture in which he would acquire pharmaceutical companies, reorganize them, and take them public at a dramatically increased equity value (TAC ¶ 14). Plaintiff and defendant Schreiber agreed to raise the capital for the new venture in exchange for

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an equity interest (Id., ¶ 15). In July 2009, plaintiff and defendant Schreiber entered into a written agreement with Waksal setting forth the terms of their engagement (the "Agreement") (Id., ¶ 18). This agreement was written on Kadmon Capital, LLC letterhead, was undated, and included typed on the signature line: "Dr. Samuel D. Waksal, Managing Partner, Kadmon Capital LLC" (TAC, Ex. A, Agreement). The Agreement specifically provided:

You and your colleagues have agreed to raise approximately US\$50 million for the first special-purpose private equity vehicle which will be used to acquire Sunesis Pharmaceutical Corporation (as well as other companies) with the intent of reorganizing them and taking the new entity public within a two-year time frame.

Your fee will be a 6% equity package to be shared by you and Mr. Joel Schreiber in ratios to be determined by both of you. You will also be paid all expenses associated with the fund-raising for this project.

You will have an exclusive arrangement for this project.

You and your colleague have also been retained to raise up to US\$500 million (and up to US 1B) for the acquisition of Amylin Pharmaceuticals. You will receive a fee of 1% in cash and 4% in an equity package. You will also be reimbursed for all expenses associated with this project.

(Id.). According to plaintiff, Waksal electronically and physically signed the Agreement in July 2009, and sent it to him, but that he was unable to locate the physically signed document

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after a flood in his offices in September 2011 (Meissner Affirm., Ex. C at 169).

Plaintiff claims that he spent many hours assisting the attorneys who were putting together the operating agreement and the Private Placement Memorandum ("PPM") for the project (Id., at 171; Rosenfeld Aff., ¶ 10). Plaintiff introduced his attorneys, Sichenzia Ross Friedman Ference ("SRFF"), to Waksal, and SRFF was ultimately engaged to draft the PPM (TAC ¶ 25).

In a December 15, 2009 email from Andrew Smith of SRFF to plaintiff and defendant Schreiber, which was carbon copied to Waksal's and Kadmon Capital's counsel, Steve Gordon, Smith assured plaintiff and Schreiber that their interest arising from the Agreement was protected, even if the 6% was not disclosed in the PPM, because there would be subscription documents for their 6% interest. In direct response to that email, Steve Gordon replied "[t]hank you" (Meissner Affirm., Ex. C at 235).

Sometime in late 2009, plaintiff and defendant Schreiber, in furtherance of the Agreement, introduced Colbeck Capital Management LLC ("Colbeck") as a potential funding source for Kadmon Capital (Meissner Affirm., Ex. C at 220; Rosenfeld Aff., ¶ 37). This introduction took place at Colbeck's Manhattan offices at 888 7th Avenue, and was attended by Waksal, Schreiber, plaintiff, and three representatives of Colbeck: Matthew R. Glass

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CFA, Jason Cologne, and David Aho (Id.; see also Meissner Affirm., Ex. C at 236). Defendant Schreiber admitted, in his answer to the third amended complaint, that he introduced Colbeck to the other defendants (Meissner Affirm., Ex. B, Answer ¶ 8). Shortly after the meeting, without plaintiff's knowledge, Colbeck financed or raised over \$250 million in debt and equity for Kadmon I, a separate entity from Kadmon Capital, which funds, plaintiff alleges, upon information and belief, were used to acquire pharmaceutical companies, reorganize them, and take them public (TAC, ¶¶ 37, 42; see Meissner Affirm., Ex. C at 221; Rosenfeld Aff., ¶¶ 38-40). Plaintiff alleges the funds were used to acquire various pharmaceutical companies, which were then combined to form defendant Kadmon Corp., in which he is entitled to a 6% equity interest (TAC ¶ 37; Meissner Affirm., Ex. C at 171; Rosenfeld Aff., ¶ 11). Plaintiff also alleges that the Moving Defendants collectively constitute the special-purpose private equity vehicle contemplated by the Agreement (TAC ¶ 21).

Plaintiff asserts that additional funds were raised for the new venture by "other individuals and entities" during the pendency of the Agreement, that the Agreement vested him and defendant Schreiber with the exclusive right to raise funds, and that they are entitled to credit for any funds raised by any third parties during the period of the Agreement (TAC ¶ 39).

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These other individuals and entities included Colbeck, John Thomas Financial Inc., Anastasios Thomas Belesis, ATB Holding Company, LLC, and/or SRF (Id.). On September 1, 2011, plaintiff had a flood in his home which destroyed many of his documents, including his signed version of the Agreement (TAC ¶ 42).

In 2014, plaintiff commenced this action, asserting two causes of action: breach of the Agreement, and in quantum merit. In June 2015, the Moving Defendants challenged plaintiff's second amended complaint based on the statute of frauds and for failure to state a claim. By decision of this Court so ordered on June 18, 2015, that motion was denied (Rosenfeld v Kadmon Holdings, LLC, Johnson Affirm., dated September 26, 2016 [Johnson Affirm.], Ex. D). Defendants appealed the denial of their motion on the statute of frauds grounds, and the Appellate Division, First Department affirmed (139 AD3d 609 [1st Dept 2016]). In August 2016, plaintiff filed a third amended complaint, adding to the breach of contract claim allegations of breach of the plaintiff's exclusive right to raise funds (TAC ¶ 39).

Discussion

On a motion to dismiss, pursuant to CLR 3211 (a)(7), for failure to state a cause of action, the court must accept all factual allegations as truthful, construe the complaint in a light most favorable to the plaintiff, and give the plaintiff the

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benefit of all reasonable inferences (Allianz Underwriters Ins. Co. v Landmark Ins. Co., 13 AD3d 172, 174 [1st Dept 2004]). It must "determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88 [1994]). On a CPLR 3211(a)(1) motion, based on documentary evidence, however, the principle "is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence ... are not presumed to be true on a motion to dismiss for legal insufficiency" (O'Donnell, Fox & Gartner v R-2000 Corp., 198 AD2d 154, 154 [1st Dept 1993]). Where the moving party "offers matter extrinsic to the pleadings, the court need not assume the truthfulness of the pleaded allegations, but rather is required to determine whether the opposing party actually has a cause of action or defense, not whether he has properly stated one" (Id. [citation omitted]). The court is not required to accept factual allegations that are contradicted by documentary evidence or legal conclusions that are unsupported in the face of undisputed facts (see Zanett Lombardier, Ltd. v Maslow, 29 AD3d 495, 495 [1st Dept 2006]). Dismissal based on documentary evidence may be granted "where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Goshen v Mutual Life Ins. Co. of

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N.Y., 98 NY2d 314, 326 [2002]; see Leon v Martinez, 84 NY2d at 88).

As an initial matter, this Court will address plaintiff's argument that the doctrine of law of the case bars the Moving Defendants from moving to dismiss on statute of frauds grounds. The doctrine of law of the case determines the preclusive effect of judicial determinations made in the course of a litigation prior to the final judgment of the case (see People v Evans, 94 NY2d 499, 503 [2000]). It is a discretionary doctrine "regulating pre-judgment rulings made by courts of coordinate jurisdiction in a single litigation" (Id. at 503-504 [citations omitted]). When applied, it precludes parties or their privies from relitigating an issue that has already been decided (Chanice v Federal Express Corp., 118 AD3d 634, 635 [1st Dept 2014]; Carmona v Mathisson, 92 AD3d 492, 493 [1st Dept 2012]). In deciding if it applies, the procedural posture and evidentiary burdens of the parties must be considered (Feinberg v Boros, 99 AD3d 219, 224 [1st Dept 2012]). The doctrine contemplates that the parties had a full and fair opportunity to litigate when the initial determination was made (see People v Evans, 94 NY2d at 502; Chanice v Federal Exp. Corp., 118 AD3d at 635).

Here, the prior motion to dismiss addressed the second amended complaint, whereas this motion challenges the third

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amended complaint, which contains additional factual allegations. Accordingly, the doctrine does not bar this motion (see Cobalt Partners, L.P. v GSC Capital Corp., 97 AD3d 35, 39 [1st Dept 2012] [law of case did not require dismissal where motion addressed second amended complaint, which differed from amended complaint]; see also Peters v Peters, 118 AD3d 593, 594 [1st Dept 2014] [original complaint is superseded by amended complaint so sufficiency of original pleadings is rendered academic]). Further, this Court did not consider defendants Kadmon Holdings', Kadmon I's and Kadmon II's position with regard to the motion to dismiss the second amended complaint because they were not parties to the case at the time, and, thus, they are not precluded by law of the case from seeking dismissal of the claims (see Chanice v Fed. Exp. Corp., 118 AD3d at 635). As such, the doctrine also does not bar these defendants from seeking dismissal of the third amended complaint.

Turning to that branch of the motion to dismiss on statute of frauds grounds, this Court finds, as it did with regard to the second amended complaint, that plaintiff's allegations are sufficient to satisfy the statute, and the documentary evidence submitted does not conclusively establish that no agreement existed (see Rosenfeld v Schreiber, 139 AD3d 609, 610 [1st Dept 2016]).

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General Obligations Law § 5-701(a)(10) requires that the parties' agreement contain the material terms, and that it be subscribed by the party to be charged (see Saivest Empreendimentos Imobiliarios E. Participacoes, Ltd v Elman Invs., Inc., 117 AD3d 447, 448 [1st Dept 2014]). To satisfy the requirements of the statute of frauds, "a memorandum must contain expressly or by reasonable implication all the material terms of the agreement, including the rate of compensation if there has been agreement on that matter" (Davis & Mamber v Adrienne Vittadini, Inc., 212 AD2d 424, 425 [1st Dept 1995] [internal quotation marks and citation omitted]). The relied-on writings may include emails between the parties (Chapman, Spira & Carson, LLC v Helix BioPharma Corp., 115 AD3d 526, 528 [1st Dept 2014]; Newmark & Co. Real Estate Inc. v 2615 E. 17 St. Realty LLC, 80 AD3d 476, 477 [1st Dept 2011] [an email can constitute a writing to satisfy statute of frauds]).

In the instant case, the parties' various writings, particularly the December 15, 2009 emails and the Agreement, taken together, as this Court previously found with regard to the second amended complaint, contain the material terms, and constitute a writing to satisfy the statute of frauds for a finder's fee agreement (see Saivest Empreendimentos Imobiliarios E. Participacoes, Ltda v Elman Invs., Inc., 117 AD3d at 449; see

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also Chapman, Spira & Carson, LLC v Helix BioPharma Corp., 115 AD3d at 528). For instance, in an email on December 15, 2009, from plaintiff's counsel, Andrew Smith of SRFF, to his clients, plaintiff and Schreiber, which was carbon copied to Steve Gordon, general counsel of Kadmon Capital and Waksal's counsel, Smith referred to the 6% compensation to plaintiff and Schreiber, which is specifically referable to the unsigned Agreement indicating compensation of a 6% equity interest (Meissner Affirm., Ex. C at 235). Gordon responded directly to this email, on that same day, stating "[t]hank you" (Id.). These, along with the Agreement, are sufficient writings, which included a reference to the compensation, to satisfy the statute of frauds (see Chapman, Spira & Carson, LLC v Helix BioPharma Corp., 115 AD3d at 528).

Contrary to the Moving Defendants' contention, the fact that discovery has not revealed a signed copy of the Agreement, does not warrant dismissal of this action. There is nothing in the emails or in the Agreement indicating that either party reserved the right not to be bound prior to execution of the Agreement (see Kolchins v Evolution Mkts., Inc., 128 AD3d 47, 60 [1st Dept 2015]). Thus, plaintiff's claim for breach of contract is not barred by the statute of frauds.

Plaintiff's quantum merit claim also withstands dismissal under the statute of frauds. The writing requirement

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establishing a quantum merit claim is less exacting than that for a claim for breach of contract, and requires only that the writing evidence the fact of plaintiff's employment by defendants to render the alleged services (see Chapman, Spira & Carson, LLC v Helix BioPharma Corp., 115 AD3d at 528; Davis & Mamber v Adrienne Vittadini, Inc., 212 AD2d at 426). As with the contract claim, the Agreement and emails sufficiently show that defendants employed plaintiff, and, therefore, are enough to satisfy the statute of frauds on this claim as well. Notwithstanding this determination with respect to the statute of frauds defense, the Moving Defendants also argue that documentary evidence compels dismissal of the third amended complaint.

To begin, the breach of contract claim asserted against defendants Kadmon Holdings, Kadmon I, Kadmon II, and Kadmon Corp. is dismissed. Not only are these defendants not parties to the contract, almost all of them were not even formed until long after the contract was entered into (see Randall's Is. Aquatic Leisure, LLC v City of New York, 92 AD3d 463, 463-464 [1st Dept 2012] [no breach of contract, or quasi-contract, claim against non-signatory to contract]). For instance, Kadmon II was incorporated on October 5, 2010, Kadmon Holdings, Inc. was incorporated on September 15, 2010, and even Kadmon Capital was not incorporated until January 25, 2012, more than two years

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after the Agreement was entered into (Meissner Affirm., Ex. D). Kadmon Pharmaceuticals, LLC was renamed Kadmon Corporation, LLC in 2011 (Meissner Affirm., Ex. F at 9). While Kadmon I was formed in August 2009, it was not a party to the Agreement. Plaintiff fails to allege a basis for holding them contractually liable under any other theory.

Plaintiff contends that even though Kadmon Holdings, Kadmon I and II, and Kadmon Corp. did not sign the Agreement, it was drafted with the intent that "these entities would be formed and bound by the Agreement and Waksal's promise of a 6% equity interest" (Plaintiff's Memo. in Opp. at 19). He further asserts that Kadmon I was the special purpose vehicle for which the funds were being raised, and that "Kadmon I via Waksal adopted, ratified and/or accepted the parties' Agreement, and that both Kadmon I and its affiliated Kadmon entities who benefitted from and accepted the funds that were raised, are bound by it" (Id.). By these arguments, plaintiff appears to be seeking to pierce the corporate veil between these various related entities without pleading or demonstrating the basis for such relief. By merely raising these arguments in his memorandum, he seeks to circumvent the pleading requirements. In that regard, he fails to allege, and meet the required heavy burden of showing, the requisite domination and control with respect to the transaction attacked,

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or that such domination was used to commit a fraud on him or otherwise resulted in inequitable consequences (see TNS Holdings v MKI Sec. Corp., 92 NY2d 335, 339 [1998]; Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 141 [1993]).

The fact that these other entities share the Kadmon name, and are affiliated with Kadmon Capital, alone, does not impose contractual liability on them (see Sheridan Broadcasting Corp. v Small, 19 AD3d 331, 332 [1st Dept 2005] [parent and subsidiary or affiliated companies treated separately, not liable for contract obligations of the other without showing complete domination and control]). Plaintiff's claims that the other Kadmon entities ratified the Agreement are conclusory and unsupported.

As against defendants Waksal and Kadmon Capital, the breach of contract claim is dismissed based on the language of the Agreement, and the documentary evidence submitted. The Moving Defendants urge that plaintiff failed to allege satisfaction of the purposes of the Agreement. They contend that the Agreement provides for two rounds of financing to capitalize Kadmon Capital for two specific, stated purposes: (1) to raise \$50 million in funds for an entity which would be used to acquire Sunesis Pharmaceutical Corporation ("Sunesis"), with the intent of reorganizing it, and taking the new entity public within a two-year time frame; and (2) to raise up to \$500 million for the

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acquisition of Amylin Pharmaceuticals ("Amylin") (Meissner Affirm., Ex. A, Agreement). They assert that plaintiff never achieved these purposes, which were conditions precedent to Kadmon Capital's obligations. They submit documents that show that Sunesis is an independent company, and Amylin is owned by AstraZeneca, and not by any Kadmon entity (Johnson Affirm., Ex. F-H).

Plaintiff contends, however, that he introduced Colbeck to Waksal, and that he did not have control over which companies were acquired because that decision was under Waksal's and Kadmon Capital's control. His contention is unavailing. The clear terms of the Agreement indicate that it required plaintiff to raise \$50 million for the "first special-purpose private equity vehicle which was to use the money for acquiring Sunesis Pharmaceutical Corporation (as well as other companies)" to take the new entity public within two years, and for that fundraising, plaintiff and Schreiber together would be paid a 6% equity package, which they would share (Id.). It also provided for plaintiff and Schreiber to raise another round of financing, capitalizing Kadmon Capital to acquire Amylin Pharmaceuticals, for which they would receive a fee of 1% in cash and 4% in an equity package (Meissner Affirm., Ex. A, Agreement).

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Plaintiff does not dispute that the second funding involving Amylin Pharmaceuticals was not achieved, and the Moving Defendants submit documentary proof that Amylin was acquired by AstraZeneca, not by any of the defendants. Plaintiff, however, contends that while Sunesis Pharmaceutical Corporation was not acquired, other companies, such as Three Rivers Pharmaceuticals, were acquired with funding from Colbeck. He argues that he was only required to raise the funding for the special purpose vehicle, and had no control over how Waksal and the Kadmon entities used that funding, and which particular companies they acquired. The language of the Agreement, however, requires that the \$50 million be used to acquire Sunesis, and the words "as well as other companies" refers to other companies in addition to, not instead of, Sunesis. If the parties intended to mean Sunesis "or any other companies," they could have so provided, but they did not, and this Court will not change the meaning of the contract in the guise of interpreting it. Further, the Moving Defendants' submission of Sunesis' SEC Form 8-K demonstrates that it is an independent company, and was not acquired by any special-purpose private equity vehicle with funding raised by plaintiff, as contemplated in the Agreement (Johnson Affirm., Ex. F). Therefore, plaintiff fails to allege a

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basis to entitle him to recovery under the Agreement (see Stanwich Consulting v Etkin, 47 AD3d 403, 403 [1st Dept 2008]).

Plaintiff's allegations that defendants' breached the exclusivity clause fail to save this cause of action. In his complaint, plaintiff alleges that he performed the Agreement by participating in introducing Waksal to Colbeck, and that, pursuant to that introduction, Kadmon Capital received over \$250 million "in debt and equity" (TAC, ¶¶ 36-37). He further alleges that because he and Schreiber had an "exclusive right" to raise capital for Kadmon Capital he is entitled to credit for any funds raised by any third parties during the period of the Agreement" (Id., ¶¶ 38-40).

Again, the documentary evidence demonstrates that neither Sunesis nor Amylin were acquired, reorganized, and then taken public within two years as required by the Agreement. Thus, even if plaintiff had an exclusive right, the transaction, that is, the acquisition specified in the Agreement, did not occur. Additionally, plaintiff never alleges what "the period of the Agreement" was, and how the alleged efforts of others fell within that period. Further, contrary to plaintiff's contentions, the Agreement does not provide for an exclusive right to sell. Rather, at best, it provides for an exclusive agency, which merely precludes an owner from retaining another broker, but does

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not restrict the owner's inherent right to sell its own property (see Morpheus Capital Advisors LLC v UBS AG, 23 NY3d 528, 534-535 [2014]). The language in the Agreement "[y]ou will have an exclusive arrangement for this project" (Meissner Affirm., Ex. A, Agreement) is not the "affirmative and unequivocal" statement required to establish that only plaintiff and Schreiber could raise capital for Kadmon Capital, or that plaintiff and Schreiber would be entitled to a commission for funds raised by it, and does not prohibit Kadmon Capital from securing funds from third parties (see Morpheus Capital Advisors LLC v UBS AG, 23 NY3d at 535). As discussed, supra, the purposes of the Agreement were not achieved, and, thus, plaintiff failed to perform, and cannot seek recovery for breach of the Agreement.

Plaintiff's quantum merit claim, a quasi contract claim, is dismissed as duplicative of the insufficient breach of contract claim (see Miron Props., LLC v Eberli, 126 AD3d 479, 479 [1st Dept 2015] [quantum merit as well as other claims dismissed as duplicative of deficient breach of contract claim]).

In light of the above determination regarding the motion to dismiss, that branch of the motion for a stay or for a protective order is denied as moot.

Accordingly, it is

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ORDERED that the motion of defendants Kadmon Holdings, LLC, Kadmon I, LLC, Kadmon II, LLC, Kadmon Capital, LLC, Kadmon Corporation, LLC, and Dr. Samuel Waksal to dismiss the third amended complaint (mtn seq. no. 007) is granted, and the complaint is dismissed in its entirety as against these defendants, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of these defendants; and it is further

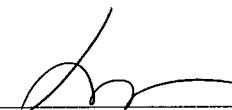
ORDERED that the same defendants' motion for a stay or for a protective order (mtn seq. no. 008) is denied as moot; and it is further

ORDERED that the action is severed and continued against the remaining defendant Joel Schreiber; and it is further

ORDERED that counsel appear in Part 48 on April 11, 2017 at 11 a.m. for a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/20/17


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.