

1990

Johnson-Bowles Company INC., and Marlen Vernon Johnson v. The Division of Securities and the Utah Department of Commerce, the State of Utah : Unknown

Utah Court of Appeals

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UTAH COURT OF APPEALS
BRIEF

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FILED

JAN 7 1992

Mary T Noonan
Clerk of the Court
Utah Court of Appeals

January 7, 1992

HAND-DELIVERED

Mary T. Noonan,
Clerk of the Court
UTAH COURT OF APPEALS
230 South 500 East, 4th Floor
Salt Lake City, Utah 84102

Re: Petition for Rehearing in Johnson-Bowles v. Division of
Securities, Case No. 90-00558-CA

Dear Clerk of the Court:

Relative to the above, this letter is submitted to
Judges Orme, Russon, and Jackson in accordance with Rule 24(j),
Utah Rules of Appellate Procedure, entitled "Citation of
Supplemental Authorities."

A new case recently issued out of the federal district
court for the Southern District of New York entitled Jessup,
Josephthal & Co. v. Piguet & Cie, (S.D.N.Y., August 21, 1991)
Fed. Sec. L. Rep. (CCH) ¶96,195 at p. 91,029, a copy of which is
attached hereto, has a direct and favorable bearing on the
Johnsons' December 13, 1991, Petition for Rehearing.

In the Johnsons' December 13, 1991, Petition for
Rehearing, the Johnsons point out that they cannot be held liable
for the mere purchase of non-exempt stock simply because they
were not, as a matter of law, in pari delicto with either their
immediate sellers or those previous matters giving rise (in the
first instance) to the Division's Summary Order of March 1, 1989.
See p. 6, Petition for Rehearing (citing the U.S. Supreme Court's
Pinter v. Dahl decision and Schanaveldt v. Noy-Burn, 347 P.2d
553, 554 (Utah Sup. Ct. 1959)).

Mary T. Noonan, Clerk of the Court
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January 7, 1992

While the Court in its November 29, 1991, decision correctly points out that Judge Greene ruled that Johnson-Bowles (not Mr. Johnson) knew or should have known of the "irregularities" respecting the stock of U.S.A. Medical (175 Utah Adv. Rep. 29 at p. 29, item 4), this is legally insufficient to hold the Johnsons liable under an aiding and abetting or in pari delicto theory -- the only basis upon which the final agency action can withstand analysis.

While the attached decision is factually different, it does unequivocally hold that negligence, imprudence, stupidity or even recklessness (in this case, the mere making-of-a-market in U.S.A. Medical stock) are legally insufficient to trigger in pari delicto or aiding and abetting liability.

Based on the foregoing, including the Johnsons' Petition for Rehearing, no rational basis exists to uphold the Division's final agency action.

Very truly yours,


John Michael Coombs

JMC:ca
Encl.

cc: David N. Sonnenreich, Esq.

[¶ 96,195] *Jesup, Josephthal & Co., Inc., et al. v. Piguet & Cie., et al.*

United States District Court, Southern District of New York. 90 Civ. 6544 (WK). August 21, 1991. Opinion in full text.

1. Exchange Act—Jurisdiction—Minimum Contacts.—A foreign bank charged with securities fraud was subject to jurisdiction in the district in which it maintained brokerage bank accounts. Although the bank had no offices in the United States, and was not authorized to conduct business here, by opening trading accounts it availed itself of the privilege of conducting activities within the forum state and invoked the benefits and protections of its laws.

See ¶ 26,540, "Exchange Act—Insiders; Recordkeeping; Clearance & Transfer" division, Volume 4.

2. Exchange Act—Antifraud—Aiding and Abetting.—Allegations that a foreign bank assisted a trader's price manipulation scheme by representing to a brokerage firm that it would pay for the trader's purchase orders when it knew that he did not have the funds to cover the purchases were sufficient to state an aiding and abetting claim. Limited discovery would be permitted as to whether the representations were known by the bank to be false at the time they were made, and whether the bank's knowledge of the trader's fraudulent scheme could be inferred from its own trading activities in the stock in question.

See ¶ 22,721 and 22,725, "Exchange Act—Manipulations; National Market System" division, Volume 3.

3. Exchange Act—Antifraud—Aiding and Abetting—*In Pari Delicto* Defense.—A brokerage firm was not precluded from recovering on an aiding and abetting claim against a bank by its own claimed imprudence and negligence which allegedly caused its financial losses. The *in pari delicto* defense may be invoked only if the plaintiff has been an active, voluntary participant in the unlawful activity that is the subject of the suit. Mere stupidity or recklessness will not trigger this bar.

See ¶ 22,721 and 22,725, "Exchange Act—Manipulations; National Market System" division, Volume 3.

Opinion of KNAPP, District Judge.

By this complaint plaintiffs Jesup, Josephthal & Co., Inc. and Securities Settlement Corporation (hereinafter "plaintiff"), registered securities broker-dealers in the state of New York, allege, *inter alia*, that the defendants violated provisions of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa. On January 16, 1991, plaintiff filed an amended complaint. Pursuant to Fed. R. Civ. P. 12(b)(2) defendant Piguet & Cie, Banquiers (hereinafter, "Piguet") now moves to dismiss that complaint on the ground that this court lacks personal jurisdiction over it. In the alternative, pursuant to Rule 12(b)(6) it moves to dismiss for failure to state a claim upon which relief can be granted. For the reasons that follow, the motions are denied.

Rule 12(b)(2)

Because a determination that we do not have jurisdiction over Piguet would leave us without power to adjudicate any other matter relating to it, we first address this question.

BACKGROUND

Piguet is a private bank organized as a partnership under the laws of Switzerland with its

principal place of business in Switzerland. Plaintiff seeks to recover as against Piguet for its alleged involvement in a fraud perpetrated by defendant Paul Kutik (hereinafter "Kutik"), whom the complaint names as the primary wrongdoer. As discussed in greater detail *infra*, Piguet's alleged participation in this fraud arises from activities it performed in connection with a brokerage bank account it maintains at Morgan Guaranty Trust (hereinafter "Morgan Guaranty") in New York City.

In support of its contention that we lack personal jurisdiction over it, Piguet informs us that it does not maintain offices in the United States and is not authorized to conduct business here. Its sole contacts with the United States are three brokerage bank accounts in New York: the above described Morgan Guaranty account, and one account each with the Philadelphia International Bank and the American Express Bank Limited. Piguet asserts that these accounts exist solely to facilitate international banking transactions, including stock purchase transactions, and that it maintains these accounts primarily as a service to its customers. Def. Mem. p.24.¹ Although it does not dispute plaintiff's allegation that some of the transactions in these

¹ In opposition to the instant motion, plaintiff draws our attention to yet another account that Piguet has with a New York brokerage house, namely the "Cowen & Co account" which is nowhere mentioned in the complaint. Plaintiff asserts that Piguet has engaged in substantial

trading in this account. Piguet contests plaintiff's description of this account as a New York account asserting that this account was serviced by Cowen's office in Geneva, Switzerland. See Def. Reply Mem. p. 13. Since we find that on the facts pleaded in the complaint that we have personal

accounts are performed for the bank's own investment purposes, it contends that since the only alleged connection which these accounts have with the instant suit stems from activities it performed on behalf of its client, Kutik, "it would be unreasonable and unfair to subject [it] to the jurisdiction of this Court." *Id.* We disagree.

DISCUSSION

It is well settled that personal jurisdiction under the Securities Exchange Act of 1934 extends "to the full reach permitted by the due process clause." *Perez-Rubio v. Wyckoff* (S.D.N.Y. 1989) 718 F.Supp. 217, 227. Accordingly jurisdiction can be obtained over any defendant who has "certain minimum contacts with [the forum] such that the maintenance of this suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 227-228 (citing *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 316). The inquiry is necessarily fact specific. Where, as here, jurisdiction is to be asserted over a defendant who is not present in the forum state but has caused an effect in the state by an act done elsewhere, due process requires that the court determine that the defendant's conduct was such that he "should reasonably anticipate being haled into court [in the forum state]" before the exercise of jurisdiction is proper. *See Perez-Rubio*, 718 F.Supp. at 228 (citation omitted).

Despite Piguet's recitation of the dearth of contacts it has with this forum, it is undisputed that it purchases and sells stock for its clients on a continuing basis through the above described correspondent bank accounts. It is also undisputed that the cause of action here asserted against it arises out of its alleged activities in one of these accounts, namely the account at Morgan Guaranty. Although Piguet strenuously argues that its activities with respect to the Morgan account here complained of were performed on behalf of its client, and not itself, we find this fact to be of little relevance for by offering the services provided by these accounts to its clients, Piguet acts to inure to its own benefit. *See Securities Exchange Commission v. Gilbert* (1979) 82 F.R.D. 723, 725. By opening these accounts Piguet purposely chose to "[avail] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla* (1957) 357 U.S. 235, 253. Thus, it is only reasonable to conclude that Piguet must "anticipate being haled into court" in New York for alleged illegal conduct it performed through these accounts. *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297 ("When a

corporation 'purposefully avails itself of the privilege of conducting activities within the forum State' it has clear notice that it is subject to suit there"); *see Gilbert*, 82 F.R.D. at 725, 726 (noting that personal jurisdiction was proper over Swiss bank whose only contact with New York was through four accounts maintained with three New York broker-dealers, since the cause of action sued upon arose out of the purchases and sales of stock in New York "which were not only the direct and foreseeable, but the intended 'effects' of the bank's 'acts' in Switzerland). Accordingly we find that in the circumstances before us the exercise of personal jurisdiction over Piguet comports with traditional notions of fair play and substantial justice. *Cf. Perez-Rubio*, 718 F.Supp. at 227 ("On a motion to dismiss pursuant to Rule 12(b)(2) . . . all doubts are to be resolved in the plaintiff's favor . . . a plaintiff need make out only a *prima facie* case of personal jurisdiction").

Rule 12(b)(6)

In support of its motion to dismiss pursuant to 12(b)(6) Piguet makes two contentions. First it asserts that plaintiff has failed to plead fraud with particularity as required by Rule 9. Second, it contends that plaintiff's actions were as egregious as its own, and therefore that the doctrine of *pari delicto* should bar plaintiff from recovering as against it. We shall address each of these contentions in turn.

BACKGROUND

The theory of the complaint is that defendant Paul Kutik (hereinafter "Kutik") schemed to inflate the value of Columbia Laboratories stock (hereinafter "Columbia") in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, promulgated thereunder. *See* 15 U.S.C. § 78j; 17 C.F.R. § 240.10b-5. In particular, the complaint alleges that Kutik placed buy orders for Columbia stock with various brokerage houses with no intention of actually paying for the ordered shares. Plaintiff contends that Kutik's motivation for this fraud stems from the fact that he had secured substantial loans using Columbia shares as collateral, and that, according to the terms of these loan agreements, he would be obligated to put up additional collateral as security should the value of Columbia stock decline to below \$9.00 a share.

The gravamen of the claim against Piguet is that Piguet aided and abetted Kutik's scheme to manipulate the price of Columbia stock. The relevant facts of this claim are as follows.

Plaintiff alleges that on or about August 3, 1990, it was contacted by Kutik to open an

(Footnote Continued)

jurisdiction over Piguet we need not presently address the merits of this dispute.

account on behalf of Dermal Panama, SA (hereinafter, the "Dermal" account)². Kutik informed plaintiff that he had authority to open this account and to direct trading activities therein on Dermal's behalf. In the following week, acting under Kutik's instructions, plaintiff purchased an aggregate of 80,500 shares of Columbia common stock for the Dermal account. Although Kutik represented that payment for said purchases would be prompt, no such payments were ever made. Compl. ¶ 96.

On August 14, at Kutik's request, plaintiff opened a second account, entitled the Farnell Holdings, Ltd. account (hereinafter the "Farnell" account)³. Pursuant to Kutik's instructions, plaintiff purchased an aggregate of 88,300 shares of Columbia common stock for this account over the next week.

After plaintiff made repeated demands for payment for the Dermal purchases, Kutik informed it that payment could be facilitated if it would transfer the stock which it had purchased for the Dermal account to a new account entitled the "Dermal Morgan" account and designate Morgan Guaranty as the receiving agent for stock purchased for this new account. Kutik explained that his bank, Piguet, had an account at Morgan Guaranty, and that it would furnish the funds necessary to pay for the stock on a delivery versus payment basis. He assured plaintiff that at all times there would be sufficient funds on deposit with Morgan Guaranty to pay for all transactions effected for this account. See *id.* at ¶ 102.

Pursuant to this information, and at Kutik's instruction, plaintiff contacted Piguet and was informed that "both Kutik and Dermal were clients of Piguet and that arrangements were being made to make payment for the 80,500 shares of Columbia stock which [would be] transferred to the Dermal Morgan account."⁴ *Id.* at ¶ 107. Accordingly, on August 21, 1990, plaintiff opened the Dermal Morgan account. Between August 21 and August 27, plaintiff attempted to deliver to Morgan Guaranty the 80,500 shares of Columbia stock now purchased on behalf of the Dermal Morgan account. Morgan Guaranty, however, refused such delivery. *Id.* at ¶¶ 111, 112.

Again pursuant to Kutik's instructions, on August 29, plaintiff opened a separate account entitled the "Farnell Morgan" account, desig-

nated Morgan Guaranty the receiving agent for this account, and transferred to it the stock previously purchased for the Farnell account. The complaint alleges that to confirm that payment arrangements were being made for this transferred stock, plaintiff again contacted Piguet, and was informed that Piguet would make immediate payment for "all of the Columbia shares purchased for the various accounts maintained by Kutik . . . upon delivery of such securities to Morgan [Guaranty]." *Id.* at ¶¶ 126, 127.

At or about this time plaintiff, acting on Kutik's instructions, purchased an additional 66,000 shares of Columbia stock for the Farnell Morgan account and transferred all stock then in the Dermal Morgan account to this Farnell Morgan account. Accordingly, by September 1 plaintiff had purchased a total of 234,800 shares of Columbia stock for Kutik, all of which were held in the Farnell Morgan account.

On several occasions between August 29 and September 7 plaintiff attempted to deliver the 234,800 shares to Morgan Guaranty. However, Morgan Guaranty continued to refuse receipt of this stock. *Id.* at ¶ 132.

The complaint alleges that thereafter Piguet was advised that the 234,800 shares presently held in the Farnell Morgan account would be resold due to nonpayment. In response, on September 7 Piguet represented to plaintiff that:

[it] was in the process of making arrangements for the payment for all of the full purchase price for all 234,000 [234,000] [shares] of Columbia stock held in the Farnell Morgan brokerage account, and that the previous delays preventing Morgan [Guaranty] from accepting delivery of said securities and tendering payment for same was due to problems encountered in transmitting the appropriate instructions to Morgan [Guaranty] for the conversion of Swiss Francs into U.S. Dollars for payment to [plaintiff] for the Columbia shares.

Id. at ¶ 133.

On September 10, Piguet did in fact forward to plaintiff \$922,075.58 to pay for 100,000 of the 234,800 Columbia shares. Plaintiff alleges that in light of the September 7 conversation with Piguet it justifiably relied upon the fact that this was a partial payment and accordingly

² Dermal, a defendant in this action, is a Panama corporation with its principal place of business in Switzerland.

³ Farnell, also a defendant, is a United Kingdom corporation with its principal place of business in Gibraltar.

⁴ Paragraph 107 of the complaint states that "[Piguet] telephoned [plaintiff] prior to August 21, 1990, and confirmed that both Kutik and Dermal were clients of Piguet and that arrangements were being made to make payment

for the 80,500 shares of Columbia stock, which had been transferred to the Dermal Morgan Account, in cash, or by delivery of other negotiable securities, to Morgan." Since the complaint informs that the Dermal Morgan account was not opened until plaintiff had received this information we presume the language cited above was intended to be set forth in conditional terms.

did not liquidate the remaining 134,800 shares. *Id.* at ¶ 191. Thereafter, on September 19, 20, and 21, plaintiff's registered representative Jeffrey Leach introduced Kutik to other broker-dealers, with whom Kutik proceeded to place purchase orders for an additional 56,000 shares of Columbia stock. Piguet made no additional payments to plaintiff, and in the period of September 20 to December 6 plaintiff sold the remaining stock for \$684,743. Plaintiff asserts that it suffered a loss of \$509,958 on this transaction.⁵

In support of its claim that Piguet aided and abetted Kutik's alleged illegal conduct, the complaint specifically pleads "upon information and belief" that Piguet knew of the existence and purpose of Kutik's scheme to violate the securities laws, and that it rendered substantial assistance to this scheme. *See id.* at ¶¶ 188, 190. The complaint asserts that Piguet's knowledge of the underlying securities fraud perpetrated by Kutik can be inferred from the fact that Piguet, as Kutik's bank, "[knew] of Kutik's financial resources and concomitant inability to make payment" for the amount of shares he ordered. *See id.* at ¶ 189. The complaint does not, however, specifically state that at the time Piguet represented to plaintiff that it would pay for all shares, *see id.* at ¶ 133, it knew that its client would not be forwarding to it funds necessary to pay for said shares; nor does it allege that when Piguet asserted that it had had difficulty transferring Swiss francs into U.S. currency, *see id.*, it knew this statement to be false.

In its brief in opposition plaintiff offers an additional fact from which Piguet's knowledge of the alleged securities fraud might be inferred, namely that it itself owned a substantial number of shares of Columbia stock in August 1990, and that it engaged in substantial trading activity in this stock during the period of Kutik's alleged fraudulent scheme. *See Pl. Mem.* at 20 n.2; *supra* at 2, n.1. Plaintiff concedes, however, that this information is not pleaded in its complaint.

DISCUSSION

Rule 9

To state a claim for aider and abettor liability under Section 10(b) of the Securities and Exchange Act of 1934 a plaintiff must allege sufficient facts to demonstrate: (1) the existence of a securities law violation by the primary party; (2) knowledge of the violation by the

aider and abettor; and (3) substantial assistance by the aider and abettor in achievement of the primary violation. *Armstrong v. McAlpin* (2d Cir. 1983) 699 F.2d 79, 91. In support of this motion to dismiss, Piguet contends that the allegations of the complaint are insufficient to properly plead factors (2) and (3).⁶

With respect to factor (3) Piguet contends that as a matter of law its three conversations with plaintiff do not constitute "substantial assistance". *Def. Mem.* at 20. We disagree. The success of Kutik's alleged scheme artificially to inflate the price of Columbia stock was dependent on his ability to induce plaintiff to purchase shares on his behalf, over a period of time. We can not say as a matter of law that no reasonable juror could conclude that Piguet's affirmative statement to plaintiff that it would pay for all shares ordered by Kutik did not substantially assist Kutik in this task. Accordingly, we turn to the question of whether or not plaintiff has pleaded facts sufficient to establish that Piguet knew that Kutik was engaged in a scheme to violate the securities laws.

Citing Rule 9⁷, Piguet contends that even if we were to assume that it knew that its client Kutik did not have the funds at hand to pay for the stock he was instructing plaintiff to purchase, it by no means follows that it would have known—or even should necessarily have suspected—that Kutik was entering orders which he did not hope to be able to cover. Rather, it contends that it is only logical to infer that it assumed Kutik would in due course provide the necessary funds for his purchases. In support of this argument, Piguet draws our attention to the absence of any allegation by plaintiff that any statements it made to plaintiff were "knowingly false" when made. *See 5/30/91 Tr.* at 24.

At first glance we found these arguments persuasive. However, at oral argument plaintiff informed us that it did not affirmatively plead that Piguet made false statements precisely because the information necessary to plead such an allegation is exclusively within Piguet's possession. In particular, plaintiff argued that whether or not Piguet had in fact had difficulty transferring Swiss francs to U.S. dollars, or had made any efforts whatsoever prior to September 10 to pay for any of the stock ordered by Kutik, were facts known only to Piguet and could be substantiated only through discovery. *See id.* at 23-28.

⁵ \$509,958 represents the difference between the price plaintiff originally paid for the shares namely 2,116,777 and the price it received from this delayed sale.

⁶ For purposes of this motion, Piguet assumes that the allegations in the Amended Complaint are sufficient to allege securities laws violations by Kutik. *See Def. Mem.* at 14 n.7.

⁷ Rule 9 provides:

In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, or other conditions of a mind of a person may be averred generally.

Although Rule 9 requires that allegations of fraud be pleaded with particularity, it specifically provides that "[m]alice, intent, knowledge, or other conditions of a mind of a person may be averred generally". In *Hospital Bldg. Co. v. Rex Hospital Trustees* (1975) 425 U.S. 738, 746, the Supreme Court observed that:

'[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the 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 (1957) . . . And in . . . cases, where 'the proof is largely in the hands of the alleged conspirators,' *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.

Having reviewed all of the allegations of the complaint, as well as the briefs submitted in relation to the instant motions, we can not say that plaintiff can not prove any set of facts in support of its claim that Piguet knew of Kutik's scheme to violate the securities laws and, accordingly, that it aided and abetted him in this task. Cf. *Ouaknine v. MacFarlane* (2d Cir. 1990) 897 F.2d 75, 80-81 ("[p]lausible allegations that defendants made specific promises to induce a securities transaction while secretly intending not to carry them out or knowing they could not be carried out, and that they were not carried out, are sufficient . . . to state a claim for relief under Section 10(b)" (citations omitted)). Accordingly, pursuant to the teaching of *Hospital Bldg. Co.*, we presently deny Piguet's motion to dismiss for failure to plead fraud with particularity, and grant plaintiff limited discovery on the following two issues: (1) whether or not statements which Piguet made to plaintiff during any of the three above discussed conversations were known by Piguet to be false at the time they were made, and (2) whether—or to what extent—Piguet's knowledge of Kutik's fraudulent scheme can be inferred from its own trading activities in the shares of Columbia stock it owned. Piguet may, of course, renew this motion to dismiss at the close of discovery on these issues. Plaintiff, if so advised, may in the interim file a second amended complaint.

In pari delicto

As an alternative ground for dismissing the complaint, Piguet asserts that even if the plaintiff could allege a valid aiding and abetting claim, the doctrine of *in pari delicto* should preclude it from recovering on this claim

because it was plaintiff's own imprudence and negligence which caused it to suffer the financial loss here asserted. See 5/30/91 Tr. at 28. In support of this claim, Piguet cites the facts that plaintiff, a sophisticated broker-dealer, proceeded to permit Kutik to order an aggregate of 234,800 shares of Columbia stock over a period of less than six weeks without ever having paid one cent for said purchases, and it even "aided" Kutik in his purchase of an additional 56,000 Columbia shares by introducing him to other broker-dealers even though it, itself, had never been paid for any of the stock Kutik ordered purchased.

The common law defense of *in pari delicto* prohibits a plaintiff from recovering only if he "is as guilty of wrongdoing as the party he accuses." *Ross v. Bolton*, (S.D.N.Y. 1986) 639 F.Supp. 323, 328 citing *Mallis v. Bankers Trust*, (2d Cir. 1980) 615 F.2d 68, 76 cert. denied, (1981) 449 U.S. 1123, 101 S. Ct. 938, 67 L.Ed.2d 109. Mere stupidity, or even recklessness, will not suffice to trigger this bar. As the Court in *Pinter v. Dahl* (1988) 486 U.S. 622, 636 stated:

The plaintiff must be an active, voluntary participant in the unlawful activity that is the subject of the suit. 'Plaintiffs who are truly *in pari delicto* are those who have themselves violated the law in cooperation with the defendant'. Unless the degrees of fault are essentially indistinguishable or the plaintiff's responsibility is clearly greater, the *in pari delicto* defense should not be allowed, and the plaintiff should be compensated. (citations omitted).

On the facts presently before us, we can not conclude that this affirmative defense will inevitably bar plaintiff from recovering against Piguet. Piguet does not claim that plaintiff knew of Kutik's fraudulent scheme nor does it assert that plaintiff's actions to accommodate Kutik's requests to purchase stock were in any way unlawful. Accordingly, the motion to dismiss on this ground is denied.

CONCLUSION

Piguet's motions to dismiss are denied. It is granted leave to renew that portion of its Rule 12(b)(6) motion specified above after discovery on the issues outlined is completed or after a reasonable period of time has passed. Plaintiff is granted leave to file a second amended complaint, if it be so advised.

SO ORDERED.