UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOT FOR PUBLICATION

In re Aceto Corporation Securities Litigation
This Document Relates to: ALL ACTIONS

MEMORANDUM & ORDER

Master File No. 2:18-cv-2425-ERK-AYS

KORMAN, *J.*:

I assume familiarity with the factual and procedural history of this case but briefly summarize the relevant facts here. On August 3, 2020, I dismissed plaintiff Michael Bonine's second amended complaint (the "SAC") in this securities fraud action against certain officers and directors of Aceto Corporation—a developer and distributor of pharmaceutical products—for failure to state a clam under Sections 10(b) and 20(a) of the Securities Exchange Act. Plaintiff, who purchased shares of Aceto on February 2 and 5, 2018—*see* ECF No. 14-2—alleged that defendants' public disclosures in the period between August 25, 2017 and February 19, 2019 ommitted material information about problems Aceto was having with one of its suppliers named Aurobindo.

In December 2016, Aceto acquired certain generic drug products from Citron Pharma LLC and Lucid Pharma LLC. Aceto financed the acquisition through hundreds of millions of dollars in bank loans. Aurobindo supplied those generic

products to Citron and Lucid, so when Aceto acquired the products, it also entered into a long term supply contract with Aurobindo. The SAC alleged that between 2017 and 2018, Aurobindo repeatedly failed to supply Aceto with product, which in turn prevented Aceto from satisfying its supply obligations to its own customers and caused Aceto to owe tens of millions of dollars in failure-to-supply penalties. Aceto filed for bankruptcy in February 2019 and represented to the bankruptcy court that "certain supply chain challenges" forced Aceto to incur "failure to supply penalties" and were among the reasons for its insolvency. Three months later, Aceto sued Aurobindo for fraud and breach of contract, accusing Aurobindo of planning all along to breach the supply agreement in order to sabotage Aceto and steal its customers. The SAC was dismissed because Aceto had made multiple disclosures about its supply chain difficulties and "any duty to disclose the omitted additional information about Aurobindo was not clear" enough to infer scienter. *In re Aceto Corp. Secs. Litig.*, 2020 WL 4452059, at *4 (E.D.N.Y. Aug. 3, 2020) (*Aceto II*).

On September 1, 2020, plaintiff moved under Fed. R. Civ. P. 59(e) that the judgment be vacated on the ground that the Second Circuit's recent decision in *Setzer v. Omega Healthcare Invs. Inc.*, 968 F.3d 204 (2d Cir. 2020), constitutes an intervening change in controlling law. While plaintiff's motion was pending, defendant Douglas Roth pled guilty to criminal insider trading charges, and the parties were ordered to advise me whether the facts underlying Roth's guilty plea

(which will be discussed in more detail below) were relevant to plaintiff's ability to state a claim in this action, even if they did not directly implicate plaintiff's pending reconsideration motion. Plaintiff was also advised that, if he wished to amend the complaint based on those facts, he was to provide the specific allegations he would add and how they would survive a motion to dismiss. Plaintiff subsequently filed a letter pursuant to Fed. R. Civ. P. 60(b) to relieve him from the judgment and permit him to replead under Fed. R. Civ. P. 15(a)(2). ECF No. 67. I address these motions in turn.

I. Rule 59(e) Motion

A court may grant a Rule 59(e) motion to alter or amend judgment if the motion is filed no later than 28 days after the entry of judgment and the movant demonstrates "an intervening change of controlling law." *Metzler Inv. Gmbh v. Chipotle Mexican Grill, Inc.*, 970 F.3d 133, 142 (2d Cir. 2020) (internal quotation omitted). Plaintiff argues that the Second Circuit's recent opinion in *Setzer* constitutes such an intervening change in controlling law. In *Setzer*, a real estate investment trust ("REIT") allegedly failed to disclose a $15 million capital loan that it made to one of its major tenants that was experiencing financial difficulties. 968 F.3d at 207. The complaint in *Setzer* alleged that the REIT had disclosed to investors that the tenant was "facing liquidity pressures," but at the same time represented that the tenant "is currently making partial monthly rent payments." *Id.* at 210.

The Second Circuit held that the representation about the tenant making partial rent payments misleadingly implied that the tenant was making rent payments from its own operating income, when in fact at least part of the rent payments was financed by the undisclosed loan. *Id.* at 214. The Second Circuit also held that the facts alleged created a compelling inference that defendants made a conscious decision not to disclose the loan in order to understate the tenant's financial difficulties. *Id.* at 215. The fact that defendants disclosed the tenant's financial difficulties did not undermine the inference that they sought to use the representations about the tenant's partial rent payments to express optimism and underrepresent the extent of the problem. *Id.* at 216. *Setzer* stands for the unremarkable proposition that defendants in a securities fraud case act with scienter when they make a conscious decision to conceal a fact, the omission of which renders a previously made affirmative statement materially misleading.

The SAC here made no such plausible allegations. As described in the Memorandum and Order dismissing the SAC, "Aceto did describe to investors Aurobindo's failures to meet its supply needs, the harm Aceto suffered as a consequence, and the risk that the problem would cause additional harm in the future." *Aceto II* at *5. Failing to disclose "the legal issue of whether or not Aurobindo's failures to meet Aceto's supply needs amounted to breaches of the Supply Agreement," *id.* at *4, does not produce a strong enough inference that

defendants made a conscious decision to mislead investors about the problems Aceto was having with Aurobindo—particularly given the extensive disclosures Aceto made about its supply chain difficulties.

Setzer is also distinguishable because the *Setzer* defendants were unquestionably aware of a hidden loan that was intentionally concealed. To the extent plaintiff argues that defendants were required to disclose that Aurobindo intentionally refused to honor the Supply Agreement and was trying to steal Aceto's customers, nothing in the SAC alleged when any of the defendants became aware of Aurobindo's double dealing. As noted in the prior opinion, "Plaintiff does *not* allege that Defendants apprehended during the Class Period that Aurobindo was engaged in a fraudulent scheme to sabotage Aceto." *Aceto II* at *3 n.2.

Plaintiff argues that "Defendants [] knew by early 2017, at the latest . . . that Aurobindo was in material breach of its supply contract with Aceto." ECF No. 64-1 at 7. To support this argument, plaintiff cites an adversary complaint that Aceto filed against Aurobindo in Aceto's Chapter 11 bankruptcy proceedings in May 2019—three months after the end of the class period (the "Adversary Complaint"). But neither the SAC nor the Adversary Complaint alleged that any of the defendants were aware of Aurobindo's intentional misconduct at the time they made disclosures about Aceto's supply chain issues. The Adversary Complaint alleged that, throughout 2017 and 2018, Aurobindo accepted purchase orders and promised to

supply Aceto with product but communicated "capacity constraints" as the reason for failing to supply the product. ECF No. 53-2 ¶ 37. The Adversary Complaint further alleged that it was not until September 2018 that an Aurobindo subsidiary first communicated its intention not to honor the Supply Agreement, and that it was some time after this that Aurobindo stole one of Aceto's customers. *Id.* ¶¶ 45–47. Even after the Aurobindo subsidiary announced its intention to no longer supply product to an Aceto subsidiary in September 2018, and instructed Aceto's subsidiary to secure future deliveries of its drug from Aurobindo directly, Aurobindo "professed ignorance of this development and made clear that no transitionary plans had been made." *Id.* ¶ 45.

Indeed, the Adversary Complaint suggests that Aceto itself was deceived by Aurobindo. For example, the Adversary Complaint alleged:

> Aurolife [the Aurobindo subsidiary] intentionally stalled on providing any notice to Rising Health [an Aceto subsidiary] of its decision to stop supplying product, especially given the rolling forecasts and purchase orders submitted by Rising Health and accepted by Aurolife. At a minimum, Aurobindo knew of this development at least 30 days prior to informing Rising Health (and likely well before that), but remained silent during weekly conference calls with the Rising Health supply chain staff devoted to addressing inventory needs.

Id. ¶ 46.

Thus, even assuming that defendants had a duty to disclose Aurobindo's fraudulent scheme, the SAC alleged no facts suggesting that defendants were aware of Aurobindo's deceit when they spoke about Aceto's supply chain difficulties to

investors. That is fatal to the SAC's scienter allegations. *See In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 386 (E.D.N.Y. 2003) (holding that scienter is not adequately pled when a complaint fails to allege facts suggesting that defendants had contemporaneous knowledge of the negative information they allegedly concealed). Even generously construing the Adversary Complaint and SAC to imply that someone at Aceto's subsidiary was aware in September 2018 that Aurobindo had no intention of honoring the supply contract, these allegations are insufficient to save the SAC from dismissal. Neither Aceto nor its subsidiary are defendants in this action, ECF No. 53 ¶ 17, and there are no allegations in the SAC suggesting when each of the individual defendants in this case became aware of Aurobindo's deceit. *See In re Keyspan*, 383 F. Supp. 2d 358 at 386–87 (scienter not alleged as to individual defendants when complaint "fail[s] to specify how and when defendants became aware of information . . . contradicting their public statements."); *Tamar v. Mind C.T.I., Ltd.*, 723 F. Supp. 2d 546, 557 (S.D.N.Y. 2010) ("[F]ailure to link any particular [d]efendant with the factual background from which [p]laintiff alleges all [d]efendants' scienter can be inferred contravenes Rule 9(b)."). .

Finally, I decline to grant defendants' request to award costs and fees against plaintiff for defendants' response to the Rule 59(e) motion. The decision to award attorneys' fees is within the district court's discretion, and while plaintiff's motion

is without merit, it is not "wholly frivolous" or made in bad faith. *See Vicuna v. O.P. Schuman & Sons, Inc.*, 298 F. Supp. 3d 419, 450 (E.D.N.Y. 2017).

II. Rule 60(b) Motion

Rule 60(b) "allows relief from a judgment or order when evidence has been newly discovered or for any other reason justifying relief from the operation of the judgment." *Metzler*, 970 F. 3d at 146. Here, plaintiff argues that the facts underlying recent criminal and civil insider trading charges against defendant Roth and Aceto's former controller Edward Kelly (who is not a defendant in the SAC) justify granting relief from the judgment and permitting plaintiff to file a third amended complaint.

The facts relevant to Roth and Kelly's insider trading charges are as follows. As described above, in December 2016, Aceto acquired generic products and related assets of Citron Pharma LLC and Lucid Pharma LLC to expand Aceto's generics business. ECF No. 67-1 ¶ 8. According to the criminal information, Aceto funded the acquisitions through a $225 million credit facility and $150 million term loan (the "Bank Loans"). *Id.* ¶ 8. The Bank Loans required Aceto to meet certain financial covenants, including that Aceto remain below a Total Net Leverage Ratio and above a specified Debt Service Coverage Ratio. *Id.* ¶ 9. If Aceto breached the financial covenants, the lenders could declare Aceto in default and demand full repayment of the Bank Loans. *Id.*

In November 2017, Aceto projected that it risked breaching one of its financial covenants and sought an amendment that would bring it back into compliance. ECF No. 67-2 ¶ 22. On December 13, 2017, Aceto and its lenders agreed to amendments that would ease the financial covenants for the three remaining fiscal quarters ending June 30, 2018. *Id.* Aceto publicly announced the amendment to the financial covenants in a Form 8-K[1] on December 18, 2017. *Id.*

Beginning in January 2018, Roth received nonpublic information that Aceto's financial performance was declining. ECF No. 67-1 ¶ 11. Specifically, Roth learned that Aceto was unlikely to meet its financial projections for the quarters ending in March 31, 2018 and June 30, 2018 because of difficulties with its generics business and that, as a result, Aceto's internal forecasts predicted that it would breach its recently renegotiated financial covenants. *Id.*

On February 1, 2018, Aceto issued a press release, attached to a Form 8-K, in which it reported a decline in profits and profit margins and projected that its generic pharmaceuticals business would continue to face "generic industry headwinds." ECF No. 67-2 ¶ 23. Aceto also projected that overall results for the second half of the fiscal year would be only "modestly better than the first half" and that it would have non-GAAP earnings of between $1 and $1.05 per share. *Id.* The SEC

[1] An 8-K, also known as a "Current Report," is filed by companies to inform the public of events that might be important to shareholders. *In re Liberty Tax, Inc. Secs. Litig.*, 435 F. Supp. 3d 457, 462 n.1 (E.D.N.Y. 2020).

complaint refers to the February 1 earnings projection in the 8-K press release as the February Guidance. *Id.* The February Guidance was a downward revision of a previous earnings forecast that Aceto made in November 2017. ECF No. 39 ¶¶ 38–40.

A day later, on February 2, 2018, Aceto filed its quarterly Form 10-Q with the SEC. ECF Nos. 67-1 ¶ 10, 67-2 ¶ 23. In the 10-Q, Aceto represented that as of December 31, 2017 it was in compliance with all its financial covenants. ECF No. 67-1 ¶ 10. The 10-Q also incorporated by reference risk disclosures from its annual 10-K, which it filed in November 2017 and included the following statement:

> *We have a significant amount of bank loans.*
>
> At June 30, 2017, we have $90,000[,000] of revolving bank loans outstanding and $142,500[,000] outstanding in a bank term loan. If we are unable to generate sufficient cash flow or otherwise obtain funds necessary to make required payments on the credit facility, it will be in default. This current debt arrangement requires us to comply with several financial covenants. Our ability to comply with these covenants may be affected by events beyond our control and could result in a default under our credit facility, which could have a material adverse effect on our business, financial condition, operating results and cash flows.

ECF 46-4 at 35. In neither the February 1 press release nor the February 2 10-Q, did Aceto disclose that its January 2018 internal forecasts predicted that it would breach its debt covenants.

Throughout February 2018, the dates of which were not alleged in the SEC complaint nor the the criminal information, Roth continued to receive nonpublic

information about Aceto's declining financial performance, which showed Aceto's financial situation worsening as compared to the financial statements it made at the beginning of the same month. ECF Nos. 67-1 ¶ 12, 67-2 ¶¶ 24–25. Specifically, Roth received information that Aceto expected it would breach at least one of the Bank Loans' financial covenants and might need to record an impairment of its goodwill assets. ECF No. 67-1 ¶ 12.

Given this information, Roth presented a forecast to Aceto's board of directors, which showed that if Aceto were to hit the mid-point of its February Guidance, it would breach one of its recently-revised covenants in each of the two quarters remaining in its fiscal year ending June 30, 2018. ECF No. 67-2 ¶ 24. Roth's forecast also projected that Aceto could avoid the breach by outperforming the forecast underpinning the February Guidance, repatriating cash held abroad to pay down debt, or obtaining a further amendment of the financial covenants. *Id.* Also in February 2018, Roth initiated discussions with Aceto's lenders to further amend or waive the financial covenants. *Id.* ¶ 25.

Aceto's financial situation continued to deteriorate in March 2018. ECF Nos. 67-1 ¶ 13, 67-2 ¶¶ 24–28. *Id.* By early March 2018—the start of the final month in Aceto's third fiscal quarter—Roth received updated internal forecasts projecting that Aceto would fall materially short of the February Guidance and breach two of the financial covenants in the current quarter, as well as in several subsequent quarters,

even if it repatriated its cash held overseas. ECF No. 67-2 at ¶ 24. Roth prepared a presentation, which he sent to Aceto's senior management, proposing the discontinuation of its dividend as a way to mitigate Aceto's violation of its financial covenants. *Id.* ¶ 25.

By early March, Aceto also began to test the intangible assets on its balance sheet to determine if the decline in earnings would require the company to take an impairment charge, which would write down part of their value. ECF No. 67-3 ¶ 23. During March 2018, Aceto's testing revealed that, at the low end, Aceto would be required to write down the value of its intangible assets by at least $135 million and that, at the high end, the approximately $235 million of goodwill on Aceto's balance sheet might be fully impaired—that is, its value would be reduced to zero. *Id.* At either the high or low end of the impairment testing results, the write down would comprise a significant portion of Aceto's total assets. *Id.* Roth received the internal modeling predicting that Aceto would need to record an impairment of its goodwill assets. ECF No. 67-2 ¶¶ 27–28. Roth was also directly involved in the impairment assessment and testing process and received email updates containing possible impairment charges. *Id.* ¶ 28.

On March 31, 2018, Roth retired as Aceto's CFO, a decision he first announced to the company in October 2017, and entered into a consulting relationship with the company in which he would deliver financial reporting and

advisory services for the upcoming financial reporting periods. ECF Nos. 67-1 ¶ 14, 67-2 ¶¶ 12, 26. On April 3–4, days after his retirement, Roth sold shares of Aceto stock while knowing the nonpublic information that Aceto would breach its financial covenants unless it received a waiver or further amendment from its lenders, which had not yet occurred. ECF Nos. 67-1 ¶¶ 15–16, 67-2 ¶ 32. Kelly similarly retired in March 2018 and became an Aceto consultant on April 3, 2018. ECF No. 67-3 ¶¶ 24–26. In his role as a consultant, Kelly also learned material nonpublic information about Aceto's deteriorating financial condition and sold Aceto stock between April 5 and 18 while in possession of that information. *Id.* ¶¶ 28–29.

On April 18, 2018, Aceto publicly announced in a Form 8-K that (a) it anticipated recording an impairment of its goodwill assets; (b) it was negotiating a waiver of its financial covenants; (c) it anticipated a significant reduction of its dividend to fortify its balance sheet; (d) its February Guidance should no longer be relied upon, and it was suspending providing further financial guidance; (e) its board had initiated a process to identify and evaluate a range of strategic alternatives; and (f) Roth's successor as CFO had resigned two months after being hired. ECF Nos. 67-1 ¶ 18, 67-2 ¶ 36. Aceto's stock price fell approximately 64% after this announcement. ECF No. 67-2 ¶ 37. When it released its financial results for its fiscal third quarter on May 7, 2018, Aceto reported an impairment of more than $256

million and a loss of more than $202 million for the nine-month period ending March 31, 2018. *Id.*

The SEC complaint alleges that by selling his shares on April 3–4, 2018, before the material nonpublic information he possessed became public, Roth avoided losses of more than $305,000. *Id.* ¶ 38. Kelly avoided losses and made a profit that totaled more than $85,000. ECF No. 67-3 ¶ 37.

A. *Aurobindo Allegations*

Plaintiff makes several arguments about how the facts underlying Roth and Kelly's illegal trades will allow him to state securities fraud claims against defendants if he is given an opportunity to replead. First, plaintiff argues that the insider trading allegations will cure the deficiencies in his scienter pleading related to the Aurobindo allegations in the SAC. Specifically, plaintiff asserts that "[t]he illegal insider sales show, with particularity, that the adverse information about Aurobindo's refusal to supply product . . . caused Aceto to renegotiate debt covenants and accept new financial metrics that Defendants knew or recklessly disregarded Aceto could not achieve," and that the material nonpublic information on which Roth and Kelly traded "is inextricably linked with the information about Aurobindo that Defendants omitted." ECF No. 67 at 3; ECF No. 73 at 4. But neither the SEC complaints nor the criminal information make any allegations with respect to Roth or Kelly's knowledge about Aurobindo's intentional breach of the agreement

to supply Aceto with product. Indeed, Aurobindo is not mentioned at all in the civil and criminal charging documents.

Aceto disclosed numerous problems in its public statements at the end of 2017 and beginning of 2018 that could have led to its deteriorating financial position and resulted in its attempt to renegotiate its financial covenants with its lenders. These problems included increased competition in the generic pharmaceuticals market, customer consolidations, pricing pressures on certain products, softer than expected contributions from new product launches, and problems with the timing of product launches due to constraints on active pharmaceutical ingredients. *See, e.g.*, ECF No. 53 ¶¶ 55, 69, 74, 90, 97, 106, 110, 121, 125, 131–32. Based on these headwinds, Aceto lowered its projections of increased total revenues from "approximately 20% to 25%" in August 2017, to 15% to 20% in November 2017, and again to 10% to 15% in February 2018. ECF No. 39 ¶¶ 38–40. The inference that Roth and Kelly were aware of Aurobindo's deceit is not "at least as compelling as any opposing inference one could draw from the facts alleged," *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007), namely that the problems Aceto disclosed were worsening over time and eventually forced the company into bankruptcy. Plaintiff's attempt to tie Roth and Kelly's insider trading to their knowledge about Aurobindo's double dealing—when none of the documents charging them with insider trading even mention Aurobindo—is thus "too speculative and conclusory to

support scienter." *Kalnit v. Eichler*, 264 F.3d 131, 140 (2d Cir. 2001). The facts underlying Roth and Kelly's insider trading would therefore not cure the deficiencies in plaintiff's scienter pleadings with respect to the Aurobindo allegations, especially when considered in light of the abundant disclosures that Aceto made about its supply chain difficulties. *See Aceto II*, at *3–4.

B. *February Statements*

Plaintiff argues that the insider trading allegations against Roth and Kelly will allow him to demonstrate that Aceto's February Guidance forecasting diluted non-GAAP earnings per share between $1.00 and $1.05 for the fiscal year ending on June 30, 2018 was knowingly false when made. ECF No. 67 at 6. I rejected this claim when I dismissed plaintiff's first amended complaint in 2019, holding that the February Guidance was a forward-looking statement protected by the PSLRA's safe harbor and that plaintiff's arguments for why it was false amounted to "fraud by hindsight." *In re Aceto Corp. Secs. Litig.*, 2019 WL 3606745, at *6–7 (E.D.N.Y. Aug. 6, 2019) (*Aceto I*).

Plaintiff argues that the insider trading allegations provide new information demonstrating that the February Guidance was false when made because they suggest that "[b]y January 2018 Roth *knew*" (1) "that Aceto's financial situation was rapidly deteriorating due to Aurobindo's refusal to supply," (2) "Aceto would not meet its guidance for the quarters ending March 31, 2018 and June 30, 2018," and

(3) "Aceto would breach the debt covenants renegotiated a month earlier." ECF No. 67 at 6. As described above, the SEC complaints and criminal information do not allege that Roth had any reason to believe that Aceto's deteriorating financial situation was connected to undisclosed problems with Aurobindo. Moreover, although the criminal information alleges that "[b]eginning in or about January 2018 . . . Roth learned that Aceto was unlikely to meet its financial projections for the quarters ending March 31, 2018 and June 30, 2018, because of difficulties with the Generic Business," these allegations do not suggest that the forecast in the February Guidance was false when made. ECF No. 67-1 ¶ 11. Indeed, as mentioned above, the February Guidance itself was a downward revision of a previous forecast Aceto made in November 2017, ECF No. 39 ¶¶ 38–40. Aceto's CEO explained why the company was downwardly revising its forecast in the February Guidance press release:

> As we look to the second half of fiscal 2018, our operating assumption is the generic industry headwinds will not ease in the near term and we now have greater clarity on the impact of harmonization from customer consolidations. Adverse market conditions are impacting the sales, profitability and market share of certain Rising products to a greater degree than anticipated and a number of API projects which were scheduled to be monetized in the second half of the year have been discontinued. As a result of these factors, although we remain on track to launch 15-20 generic products this year, we are reducing our outlook for fiscal year sales and profitability and now expect our overall results for the second half of the year to be only modestly better than the first half.

ECF No. 46-8 at 6. Plaintiff does not point to any facts suggesting that this downward revision of Aceto's forecasted earnings was made in bad faith or that defendants did not think that Aceto could meet its lowered earnings projection when it issued its February Guidance. Indeed, the SEC complaint states that Roth continued to receive nonpublic information about Aceto's worsening financial condition in the two months after it issued the February Guidance and that it was only "[b]y early March 2018—the start of the final month in Aceto's third fiscal quarter" that "Roth received updated internal forecasts projecting that Aceto would fall materially short of the February Guidance." ECF No. 67-2 at ¶ 24. Thus, plaintiff has failed to demonstrate how he can state a claim based on a theory that the February Guidance was false when made.

Although the insider trading allegations do not suggest that the forward-looking earnings forecast in the February Guidance was false when made, whether Aceto's representations about compliance with its financial covenants were materially misleading presents a closer question. According to the criminal information, Roth received nonpublic information in January 2018 that "Aceto's internal forecasts predicted that Aceto would breach" the financial covenants in the Bank Loans. ECF 67-1 ¶ 11. But in its February 2, 2018 10-Q, Aceto represented that "at December 31, 2017," it was in compliance with all of its financial covenants. ECF No. 59-5 at 19. While literally true, one might argue that this statement left the

impression that Aceto was not expected to breach its financial covenants in the near future, while, in reality, Aceto's internal forecasts suggested that a breach of the covenants was imminent. A complaint may state a claim under § 10(b) "by alleging a 'half-truth,' that is, a 'literally true statement[] that create[s] a materially misleading impression,' by omitting certain information." *Moshell v. Sasol Ltd.*, 481 F. Supp. 3d 280, 292(S.D.N.Y. 2020) (quoting *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 240 (2d Cir. 2016)). Nevertheless, plaintiff's Rule 60(b) motion cannot be granted on this ground.

As an initial matter, although plaintiff argues that the February Guidance was materially misleading because Aceto failed to disclose that it was projected to breach its debt covenant, ECF No. 67 at 6, he does not argue that the representation in Aceto's February 10-Q about its historical compliance with its financial covenants was materially misleading. Consequently, plaintiff arguably waives this argument on its reconsideration motion. *See Mexico Infrastructure Fin., LLC v. Corp. of Hamilton*, 2020 WL 5646107, at *3 (S.D.N.Y. Sept. 21, 2020) (holding that argument not raised in opening brief is waived on reconsideration motion).

Regardless of waiver, the representation about Aceto's historical compliance with its financial covenants is not the type of actionable "half-truth" that supports a securities fraud claim. Courts have rejected the notion that accurate statements of historical fact "create[] an implicit promise" that such a state of affairs at a company

will continue. *See In re Coty Inc. Secs. Litig.*, 2016 WL 1271065, at *6 (S.D.N.Y. Mar. 29, 2016). "Accurate statements about past performance are self evidently not actionable under the securities laws." *Nadoff v. Duane Reade, Inc.*, 107 F. App'x. 250, 252 (2d Cir. 2004). "The disclosure of accurate historical data does not become misleading even if less favorable results might be predictable by the company in the future." *River Birch Cap., LLC v. Jack Cooper Holdings Corp.*, 2019 WL 1099943, at *4 (S.D.N.Y. Mar. 8, 2019) (quoting *In re Initial Pub. Offering Sec. Litig.*, 358 F. Supp. 2d 189, 210 (S.D.N.Y. 2004)).

Aceto's situation is similar to that in *River Birch*. There, the company had a similar covenant in a contract with one of its largest customers, which required the company, as of December 2016, to have an EBITDA/debt ratio below a certain level. *Id.* at *2. Otherwise, the customer could renegotiate the contract and send a large portion of its business elsewhere. *Id.* In November 2016, the company announced in an 8-K that as of June 30, 2016, its EBITDA/debt ratio was over 3 times higher than what was required under the covenant and that its customer had informed the company that it was going to enforce the covenant and move a large portion of its business elsewhere unless the company brought its debt under the required level. *Id.* The court found that the company did not have a duty to disclose this contractual provision or its likely breach before it did so in November 2016, despite the fact that its debt ratio had been so high for the prior six months. The court held that plaintiff's

theory of liability relied on a chain of speculative inferences including: (1) the company would not be able to reduce its EBIDTA/debt ratio prior to December 2016 and (2) even if it was unable to reduce its EBITDA/debt ratio, the customer would ignore countervailing pressures to remain with the company and would take its business elsewhere. *Id.* at *7–8.

One is required to make the same type of speculative inferences here. Even given Aceto's January 2018 forecast of breach, in order for Aceto's lenders to demand full repayment of the Bank Loans, one has to assume that Aceto could not take the steps to avoid breach that Roth identified in his February 2018 presentation to the board, such as (1) outperforming its earnings forecast, (2) repatriating cash held overseas to pay down debt, or (3) renegotiating its financial covenants. And even if Aceto could not avoid breach, one then has to assume that its lenders would enforce the acceleration provisions of the loan agreements and demand full repayment of the loans, despite countervailing pressures not to, such as putting a financial strain on Aceto that could jeopardize its ability to pay back the loans at all. As the court held in *River Birch*, "that is a far cry from the 'foregone conclusion' that would imply a prior duty to disclose." *Id.* at *8 (citing *Acito v. IMCERA Grp., Inc.*, 47 F.3d 47, 53 (2d Cir. 1995)).

Ultimately, a finding that defendants had a duty to disclose their internal forecasts predicting a technical breach of Aceto's debt covenants would rely on

assumptions that defendants were not required to make. "The law does not require public disclosure of mere *risks* of failure. No prediction—even a prediction that the sun will rise tomorrow—has a 100 percent probability of being correct." *City of Livonia Emps.' Retirement Sys. & Loc. 851 v. Boeing Co.*, 711 F.3d 754, 758 (7th Cir. 2013). Technical breaches of debt covenants, like Aceto's internal forecasts predicted here, are common in credit agreements, but they often do not result in lenders deciding to accelerate a loan. *See, e.g.*, *Braun v. Eagle Rock Energy Partners, L.P.*, 223 F. Supp. 3d 644, 651 (S.D. Tex. 2016) (holding that despite projections that a company would breach its debt covenants, defendants did not need to assume a "looming debt problem" because plaintiff did not allege that further amendments were impossible and the covenants had already been amended several times before). Indeed, Aceto had already renegotiated amendment of its debt covenants in December 2017 and was eventually able to successfully negotiate a waiver of its financial covenants for the third fiscal quarter of 2018, an announcement it made in an 8-K dated May 3, 2018. ECF No. 59-11 at 8. On September 11, 2018, Aceto entered into another waiver of the covenents with its lenders for the quarters ending June 30, 2018, September 30, 2018, December 31, 2018, March 31, 2019 and June 30, 2019. ECF 59-8 at 16.

The insider trading allegations thus do not support the argument that any of the defendants (except Roth) had a duty to disclose that Aceto was at risk of

breaching its financial covenants before it announced that it was renegotiating the covenants in the April 18, 2018 8-K. As will be explained below, while most of the defendants had no duty to make the disclosures in the April 18, 2018 8-K earlier than they did, Roth had a duty to disclose all material nonpublic information before he traded. Because plaintiff purchased his shares of Aceto before Roth traded on the material nonpublic information in his possession, however, plaintiff lacks standing to state a securities fraud claim against Roth.

C. *Duty To Update*

Plaintiff further argues that the insider trading allegations demonstrate that defendants knew the February Guidance was false after they issued it and had a duty to update the forecast before they ultimately did on April 18, 2018. ECF No. 67 at 6. The Second Circuit has held that "a duty to update opinions and projections may arise if the original opinions or projections have become misleading as the result of intervening events." *In re Time Warner Inc. Secs. Litig.*, 9 F.3d 259, 267 (2d Cir. 1993). There is, however, "no duty to update vague statements of optimism or expressions of opinion," or "when the original statement was not forward looking and does not contain some factual representation that remains 'alive' in the minds of investors as a continuing representation" or "if the original statements are not material." *In re Int'l Bus. Machs. Corp. Secs. Litig.*, 163 F.3d 102, 110 (2d Cir. 1998).

As then-Judge Alito explained in *Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1432–33 (3d Cir. 1997), there is generally no duty to update run-of-the-mill earnings forecasts like the February Guidance. "Under existing law, the market knows that companies have neither a specific obligation to disclose internal forecasts nor a general obligation to disclose all material information," and thus ordinary earnings projections do not "contain[] an implicit representation on the part of the company that it will update the investing public with all material information that relates to the forecast." *Id.* at 1433. "Just as the accurate disclosure of a line of past successes has been ruled not to contain the implication that the current period is going just as well, . . . disclosure of a specific earnings forecast does not contain the implication that the forecast will continue to hold good even as circumstances change." *Id.* Thus, earnings forecasts contain "no more than the implicit representation that the forecasts were made reasonably and in good faith." *Id.* Finding a continuous duty to update earnings projections every time a forecast is disclosed "would likely result in a drastic reduction in the number of such projections made by companies," projections which "are the most useful to investors in deciding whether to invest in the firm's securities." *Id.*; *see also Hillson Partners Ltd. P'ship v. Adage, Inc.*, 42 F.3d 204, 219 (4th Cir. 1994) (requiring a company to "continually [] correct and modify its projections would inevitably discourage the types of disclosures the securities laws seek to encourage").

The facts underlying the insider trading allegations against Roth and Kelly do not suggest that the forecast in the February Guidance was unreasonable when made or was made in bad faith. As described above, the February Guidance itself was a downward revision of a prior forecast, and Aceto simultaneously described problems that led to its revised earnings expectations. That the company's financial position continued to worsen over the next two months does not indicate that defendants made the forecast in bad faith. To hold otherwise would permit plaintiff to plead fraud by hindsight, a theory that courts have long rejected and that I rejected when plaintiff sought to invoke it in the past. *See Aceto I* at *7.

While defendants were under no obligation to update the February Guidance as Aceto's financial condition worsened over time, Roth did have a duty to disclose material nonpublic information to investors before he sold his shares on April 3–4, 2018. "[A]n omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted material facts," and such "a duty may arise when there is a corporate insider trad[ing] on confidential information." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 101 (2d Cir. 2015) (internal quotation omitted). The information that Aceto disclosed in its April 18, 2018 8-K, which caused its stock price to drop 64%, is the type of material information that Roth had a duty to disclose before he sold his shares. Investors who purchased Aceto stock in the period between when Roth sold his shares and Aceto's

April 18, 2018 disclosure might well have a viable securities fraud claim against Roth.

Plaintiff, however, does not argue that Roth is liable on this basis, perhaps because plaintiff purchased shares in Aceto in February 2018—*see* ECF No. 14-2—two months before Roth made his sales. "[A]lthough the liability of one who trades on inside information may extend to all those who trade between the date of the defendant's sales and the date of public disclosure of the inside information . . . liability does not extend to those who traded prior to the defendant's breach of his duty to 'disclose or abstain'—that is, prior to the date of the defendant's trades." *O'Connor & Assocs. v. Dean Witter Reynolds, Inc.*, 559 F. Supp. 800, 804 (S.D.N.Y. 1983) (internal citations omitted)*; In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 311 n.51 (S.D.N.Y. 2008). Plaintiff therefore lacks standing to serve as lead plaintiff in a class action lawsuit against Roth based on his insider trading.

D. *Impairment Charge*

A class of Aceto shareholders may also have a securities fraud claim against certain Aceto officers and directors based on the company's failure to disclose that it would need to take an impairment charge before that information was disclosed on April 18, 2018. While "silence, absent a duty to disclose, is not misleading under Rule 10b-5," such a duty may arise if there exists "a statute or regulation requiring disclosure." *Stratte-McClure*, 776 F.3d at 100–01. Based on the rules governing

when a company must file a Form 8-K—specifically, Item 2.06—Aceto may have had a duty to disclose its estimated impairment of its goodwill assets no later than some time in March 2018, when Aceto's testing revealed that it would be required to write down the value of its intangible assets by between $135–$235 million. This potential claim need not be discussed further, however, because plaintiff purchased his shares of Aceto in February 2018 and thus lacks standing. *See Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737–38 (1975); *First Equity Corp. v. Standard & Poor's Corp.*, 869 F.2d 175, 180 n.2 (2d Cir.1989) (10b-5 plaintiffs "may recover only for losses that result from decisions to buy or sell, not from decisions to hold or refrain from trading."); *Druck Corp. v. Macro Fund Ltd.*, 290 F. App'x. 441, 445 (2d Cir. 2008) (Plaintiff "alleges only that it relied on Defendants–Appellees' misrepresentations in deciding to *hold* its shares. As a mere holder, [plaintiff] lacks standing.") (emphasis in original).

CONCLUSION

Plaintiff's motions under Rules 59(e) and 60(b) are denied.

SO ORDERED.

Edward R. Korman

Brooklyn, New York
March 16, 2021

Edward R. Korman
United States District Judge