UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -against- **PAUL FELLER and ICARO MEDIA GROUP, INC.** Defendants.	**Hon. Jesse M. Furman** **Civ. Action No. 1:24-cv-02896-JMF** **ORAL ARGUMENT REQUESTED**

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS THE COMPLAINT UNDER RULE 12(b)(6) and 9(b)

Anna E. Adelstein
Jonathan Uretsky
PULLP
Attorneys for Icaro Media Group, Inc. and Paul Feller
111 Broadway, 8th Floor
New York, NY 10006

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Rules

PRELIMINARY STATEMENTS

The District Court should dismiss the Complaint's allegations of fraud for failure to allege a violation of Section 17(a) of the Securities Act or Section 10(b) and of the Exchange Act and Rule 10(b)-5, for failure to state a claim under 12(b)(6), and failure to comply with the pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure. As set forth below, the Securities and Exchange Commission ("SEC")'s Complaint should be dismissed in its entirety because it: (1) fails to sufficiently plead that Defendants made a misstatement of fact or opinion; and (2) fails to sufficiently plead scienter.

The SEC's Complaint contains allegations that, even if true, do not assert any facts to support a cause of action for securities fraud. While the Complaint contains many references to emails, it does not plead with particularity that any statement was actually false or misleading. The Complaint references myriad emails but does not actually point with specificity to why and how each of the statements they challenge was "false or misleading." The Complaint does not satisfy the requirements of Fed. R. Civ. P. Rule 9(b).

The SEC claims that statements made by Paul Feller, CEO of Icaro Media Group, to prospective investors about potential Icaro partnerships with two telecommunications companies (termed "Telco 1" and "Telco 2" in the Complaint) were "fraudulent" because neither Telco 1 nor Telco 2 launched a product or partnership with Icaro in the relevant period. However, the SEC fails to allege that Feller's statements to investors about the prospective partnerships were false when made. Instead of explaining what aspect of each quoted statement is materially false or misleading and why, plaintiffs reproduce the same conclusory formula, that the deals subsequently fell through due to technical difficulties launching the proposed products, to cover all the allegedly material misrepresentations. Merely because a business deal fails to come to fruition does not, by itself, establish that statements regarding the prospective partnership were fraudulent. The Complaint's boilerplate manner of pleading does not satisfy

the requirements of Rule 9(b) as it does not demonstrate with specificity, why and how each statement was false or misleading.

Finally, the Complaint does not contain any allegations to support that the statements were made with the scienter required to plead a valid cause of action for fraud.

While the SEC's complaint contains myriad specific citations to emails, when each is examined closely, what each lacks is a specific citation to any actual material misrepresentation with either knowledge or intent of its falsity. Indeed, the SEC's own Complaint alleges that when making those statements, Feller believed that the partnerships between Icaro and these companies were imminent. According to the Complaint, Feller and Icaro worked diligently towards those prospects during the relevant period. According to the Complaint, Telco 1 was the largest investor in Icaro and had a past partnership with the company. The Complaint further alleges that Telco 1 engaged in discussions with Feller about a future product launch and agreed that it would enter a partnership with Icaro after a successful launch with Telco 2. The SEC also concedes that Telco 2 and Icaro had an agreement from 2017 through 2020 to develop a product and worked diligently towards launching that product while statements were made to investors. There is no allegation that Feller or anyone at Icaro knew that technology issues, or any issues for that matter, would ultimately thwart Icaro's product launch with Telco 2.

The allegations of fraud all circle around planned launches and future possible projects. To make out a cause of action for securities fraud, based on future potential deals, the SEC would have to allege that Feller and Icaro *knew at the time* that Icaro would never launch such a product, and further intended to defraud *investors*, as opposed to other company insiders. The Complaint, however, fails to do so. In fact, the Complaint shows that Feller and Icaro had a valid basis to form the belief that the launches were in fact imminent at the time those statements were made.

FACTUAL ALLEGATIONS

The background to the SEC's Complaint is that Feller, the CEO of privately held media company Icaro, raised a total of $22 million dollars from 38 investors between 2017 and 2021. SEC Complaint ("Comp.") ¶¶ 1-2.The crux of the Complaint stems from allegations that Feller accomplished this raise by making fraudulent statements regarding two business partnerships with "Telco 1" and "Telco 2". Comp. ¶ 2. However, the Complaint concedes that Feller's statements to potential investors were that "Icaro was either about to launch, or had already launched, digital platforms and mobile phone applications ("smartphone apps") with the Telcos, featuring sports content tailored to the Telcos' regional interests." Comp. ¶ 3.

The Complaint concedes Icaro was legitimately engaged in the business which it purported to be: "Icaro and its predecessor entities worked to develop digital platforms and smartphone apps that aggregate sports news by pulling content from the internet and personalizing that content for individual customers." Comp. ¶ 22. Furthermore, "to generate revenue, Icaro planned to customize its digital platforms to the specific needs of its partners, including the Telcos and other smaller partners, by creating branded websites and smartphone apps that Icaro's partners would market to their subscribers." Comp. ¶ 23.

Between 2017 and 2021, Feller, on Icaro's behalf, made projections to potential investors about and representations on the business' strategy going forward. Feller "pitched to prospective investors a revenue strategy in which Icaro's digital platforms and smartphone apps, purportedly pre-loaded onto mobile phones, would drive user traffic translating into millions of advertising dollars and other revenue split between Icaro and the Telcos." Comp. ¶ 25.

The SEC alleges that the revenue forecasts were false and misleading. However, the SEC concedes that in the materials provided, they were based on "imminent launches with the Telcos as the key drivers of Icaro's revenue projections." Comp ¶ 26. The SEC does not allege

the offering materials represented to investors that Icaro currently had active partnerships with the Telcos. The SEC does not allege that the offering memoranda included any misrepresentations of the existing revenue of the company.

A. Alleged Statements Made to Prospective Investors Regarding Telco 1

The SEC alleges that Feller made certain statements to potential investors about a prospective future partnership endeavor with Telco 1 or Telco 1's subsidiary in 2017:

- February 17, 2017, Feller emailed a potential investor a corporate deck which indicated "We expect to launch with [Telco 1's subsidiary] and [its] subsidiary in Q3 and Q4 2017..." Comp. ¶ 37.
- On June 7, 2017, Feller wrote a potential investor stating in "Q3 2017, we will begin to power [Telco 1's subsidiary] apps ..." Comp. ¶ 39.
- On September 20, 2017, Feller wrote a potential investor stating "In Q3 2017, we will begin to power [Telco 1's subsidiary] apps..." Comp. ¶ 40.
- On November 3, 2017, Feller emailed a potential investor "[Telco 1], a NYSE corporation, has invested close to $14 million and owns approximately 13% of Skyy DMG. We expect to begin deployment of the application in partnership with [Telco 1] across Latin America in late 2017 early 2018." Comp. ¶ 41.

Then, beginning in 2020, the SEC alleges Feller made the following representations to investors:

- On February 19, 2020, Feller told an investor who was considering a further investment that Icaro had "many new developments with our contracts with [Telco 1] over the last few weeks...." Feller also said that Icaro currently had "over 500M Cell devises [sic] under contract [with Telco 1's subsidiary] and [Telco 2's subsidiary])…." Comp ¶ 43. The SEC did not allege Feller knew that the existing investor was "considering" a further investment.

- On January 26, 2021, Feller sent a potential investor a January 2021 Investor Presentation containing a "Launch Strategy" with a series of planned launches in 2021 for Telco 2 and Telco 1. A slide titled "Icaro Forecast" included net revenue of $649,193 in 2020. According to its own balance sheet, Icaro earned $3,632 in revenue for 2020. The slide projected nearly $12 million in net revenue for 2021, over $54 million in net revenue in 2022, and over $151 million in net revenue in 2023.
- On March 25, 2021, Feller sent a potential investor a January 2021 Investor Presentation containing a "Launch Strategy" with 2021 launch dates for Telco 1 and projected net revenue numbers based on business with Icaro's Telco partners. Comp. ¶ 49.

B. The SEC Concedes Facts To Support That The Statements Regarding Telco 1 Were Not Misrepresentations

The SEC's action specifically relates to misrepresentations about Icaro having a business relationship or potential partnership with Telco 1 and its subsidiaries. The Complaint contains factual allegations that, if true, support that Icaro and Telco 1 had a business relationship and continued discussions about prospective partnerships. The SEC concedes that Telco 1 invested in Icaro in 2013 and 2014 and became Icaro's largest shareholder. Comp. ¶ 28. The SEC also admits "In 2014 Icaro developed webpages for one of Telco 1's subsidiaries. Those websites were live from 2014 to 2015." Comp. ¶ 29. In 2014 Icaro developed a webpage for a second Telco 1 subsidiary. Comp. ¶ 31. By 2016, both of those webpages had been suspended. Comp. ¶ 32. In 2017 Icaro continued to pitch products to Telco 1. Comp ¶ 34. Icaro represented to Telco 1 that it was poised to launch a product with Telco 2. Comp ¶ 35. In 2021, Icaro and Telco 1 employees were continuing to email. Comp. ¶ 48.

C. Alleged Statements Made to Prospective Investors Regarding Telco 2

The SEC claims that Feller made certain statements to potential investors about a prospective future partnership endeavor with Telco 2 in 2017:

- On February 17, 2017, Feller emailed a corporate deck to a potential investor which included the claim that: "In March we are going live with our partnership with [Telco 2]. Over 70 million [Telco 2's subsidiary] customers will be provided a sport app and website white labeled as [Telco 2's subsidiary] Sports." Comp. ¶ 55.
- 60. On June 7, 2017, Feller wrote to a prospective investor: "... In June 2017, we will be launching with [Telco 2] in Brazil as their sports app and website under their brand [Telco 2's subsidiary]…" Comp. ¶ 60.
- On August 10, 2017, Feller wrote a potential investor that the Telco 2 launch was delayed "one fiscal quarter due to technology issues on their side." He indicated that "we go live to the public with [Telco 2's subsidiary] August 28th. Comp. ¶ 62.
- On September 20, 2017, Feller wrote to a potential investor, "[Telco 2]: In June 2017, we will be launching with [Telco 2] ... We believe we can become the #1 sports app in Brazil within 12 to 18 months." Comp. ¶ 63.
- On November 3, 2017, Feller emailed a potential investor with Icaro's revenue forecast should they launch with Telco 2 in 2018. Comp. ¶ 67.

D. The SEC Concedes Facts To Support That The Statements Regarding Telco 2 Were Not Misrepresentations

The SEC's factual section entitled "Icaro and Telco 2 Attempted to Launch an App Together, But Were Stymied by Technical Difficulties" is a prelude to their recitation of insufficient facts to plead a cause of action for material misrepresentations and fraud. Icaro and Telco 2 had legitimate business to substantiate all the forward looking projections made by Feller.

"Telco 2 engaged in efforts with Icaro to launch a product." Comp.¶ 6. "In November 2016, Icaro signed a one-year partnership agreement with a subsidiary of Telco 2, a mobile

telecommunications company in Brazil, for Icaro to develop its platform for potential distribution by Telco 2." Comp. ¶ 53. Then, "From November 2016 through mid-2017, Icaro worked on trying to resolve technical issues, such as loading incorrect content and layout errors for the product that had to be addressed before any launch." Comp. ¶ 54. The Complaint concedes Icaro had an agreement with Telco 2, and executed an amendment to that agreement to extend the term of that agreement to address issues. Comp ¶ 61.

From October 24, 2017 to October 31, 2017, Telco 2's subsidiary ran a small simulation for its employees to test Icaro's demonstration version of the android smartphone app it built for Telco 2's subsidiary. During the simulation, Telco 2's subsidiary identified technical issues, such as loading delays and layout errors. Comp ¶ 64. On January 9, 2018, Icaro released a smartphone app for Telco 2 to the Google Play Store. Comp ¶ 68. Telco 2 never approved that version of the smartphone app, and Telco 2 never did a public launch of the smartphone app. Comp. ¶ 68. On January 18, 2018, employees of Telco 2 internally expressed concerns about: (i) Telco 2's subsidiary not being able to test or use the smartphone app in Apple phones because Icaro's iOS app had not been approved by Apple; and (ii) slow loading of content. Comp. ¶ 69. In February 2018, Icaro launched another demonstration for Telco 2's subsidiary. Comp ¶ 70. On June 14, 2018, Telco 2 extended its agreement to June 1, 2020. Comp ¶ 71. At the end of 2018, Telco 2's subsidiary determined that it could not use Icaro's unlicensed content and proposed putting content provided by another Telco 2 subsidiary on Icaro's platform, and Icaro declined this proposal. Comp ¶ 72.

E. **The SEC Alleges Defendants Made Statements Regarding Pending Investors**

The Complaint alleges that in 2016 Feller solicited an investment from "Sportswear CEO," who responded in December 13, 2016 that he was "just not interested...." The rest of the email is conspicuously left out of the Complaint. Feller told a potential investor that a Sportswear CEO was "in process now" of investing. Comp. ¶ 105. Feller sent another email

"listing the Sportswear CEO as a pending investor." Comp. ¶ 106. The Sportswear CEP ultimately never invested. Comp. ¶ 108.

In February of 2020 Feller also reached out to "Personal Finance CEO" about investing in Icaro. Feller listed the Personal Finance CEO as a "pending investor" in an email to Sportswear CEO. Comp. ¶ 112. Personal Finance CEO never invested in Icaro. Comp. ¶ 113.

The Complaint asserts that Feller made misrepresentations to investors about business leaders having invested in the company. However, the SEC concedes that these emails conditioned those investments as "pending." There is no allegation that Feller ever represented that either of these individuals had already invested in Icaro. Furthermore, there is no allegation that either of the individuals who received these statements relied upon them to their detriment. The SEC in fact states that neither Sportswear CEO nor Personal Finance CEO ever made an investment in Icaro.

LEGAL STANDARDS

A. Rule 12(b)(6)

When considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court should accept all facts as true, and construe all reasonable inferences in favor of the plaintiff. However, the asserted claims must "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L.Ed.2d 868 (2009). To survive a motion to dismiss, the court must find that the complaint rests on factual allegations that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007) *citing Iqbal* ("the plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.")

B. Rule 9(b) Pleading Standard for Fraud

Fed. R. Civ. P. 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity," an exception to the generally liberal scope of pleadings allowed by Rule 8, Fed. R. Civ. P." *Luce v. Edelstein,* 802 F.2d 49, 54 (2d Cir. 1986) *citing Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir.1979), *cert. denied,* 446 U.S. 946 (1980).

While the stringent pleading requirements of the Private Securities Law Reform Act of 1995 ("PSLRA") do not apply in an SEC enforcement action, the Court will still evaluate "the complaint in its entirety" to determine "whether all of the facts alleged, taken collectively" meet the scienter standard. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 310, 127 S. Ct. 2499, 2502 (2007). The Court will conduct a fact-specific inquiry that considers the circumstances and allegations of the particular case, rather than relying on a generalized pattern of facts as evidence of motive and opportunity. *Id.*

C. Securities Act Claim Under 17(a)

To state a claim under Section 17(a)(1) of the Securities Act, the SEC must allege that a defendant directly or indirectly used any device, scheme, or artifice to defraud in the offer or sale of securities. 15 U.S.C. § 77(q)(a)(1*); see also SEC v. Yorkville Advisors, LLC*, No. 12 CIV. 7728 GBD, 2013 WL 3989054, at *2 (S.D.N.Y. Aug. 2, 2013). To state a claim under Section 17(a)(2) of the Securities Act, the SEC must allege that Defendants obtained money or property through misstatements or omissions about material facts in the offer or sale of securities. 15 U.S.C. § 77(q)(a)(2); *see also Yorkville Advisors*, 2013 WL 3989054, at *2. The elements of a claim under Section 17(a) of the Securities Act in the offer or sale of a security are "essentially the same" as those required to prove fraud under Section 10(b). *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999). However, the SEC need only prove negligence, rather than scienter, to succeed on a claim under Section 17(a)(2) or 17(a)(3). *SEC*

v. Ginder, 752 F.3d 569, 574 (2d Cir. 2014); *U.S. Securities and Exch. Comm'n v. Wey*, 246 F. Supp. 3d 894, 912 (S.D.N.Y. 2017).

D. Exchange Act Claims under Section 10(b) and 10(b)-5

15 U.S.C. § 78a *et seq.* Section 10(b) makes it unlawful to "use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j(b). SEC Rule 10b–5 states that it "shall be unlawful for any person ... [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b).

Under the law of this Circuit, to state a claim under Rule 10b–5, a plaintiff must allege that, in connection with the purchase or sale of securities, the defendant made material misstatements or omissions of material fact, with scienter, and that the plaintiff's reliance on the defendant's actions caused injury to the plaintiff. *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 765 (2d Cir. 2010); citing *Ganino v. Citizens Utils. Co.*, 228 F.3d 154, 161 (2d Cir.2000). For a statement to be material under Rule 10(b)-5, there must be a "substantial likelihood that, under all the circumstances, [the statement] would have assumed actual significance in the deliberations of the reasonable shareholder." *TSC Indus., Inc. v. Norway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 2132 (1976).

ARGUMENT

A. The Complaint Fails to Meet the Heightened Pleading Standard for Fraud Under Federal Rule 9(b)

Under Federal Rule of Civil Procedure 9(b), whenever a party claims fraud or mistake, "the circumstances constituting fraud or mistake shall be stated with particularity." The Second Circuit has read Rule 9(b) to require that a complaint "(1) specify the statements that the

plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004). "Fraudulent intent may be averred generally, as long as the complaint provides a factual basis that gives rise to a strong inference of intent to defraud, knowledge of the falsity, or a reckless disregard for the truth." *Trs. of Plumbers & Pipefitters Nat. Pension Fund v. De-Con Mech. Contractors, Inc.,* 896 F. Supp. 342, 346–47 (S.D.N.Y. 1995).

The Complaint clearly fails to allege each of these, but certainly (4), as it fails to specifically explain why the statements were fraudulent.

B. The Complaint Should Be Dismissed Because it Fails to Adequately Plead That The Alleged Statements Were False

The falsity element is the basic tenant required of all securities fraud actions. A securities fraud claim under Section 10(b) and Rule 10b-5 requires the defendant to have "made an **untrue statement** of material fact" or "omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading." 15 U.S.C. § 78u-4(b)(1); 17 C.F.R. § 240.10b-5(b)-(c) (emphasis added). Section 17(a)1-3 similarly prohibit "any person from obtaining money or property "by means of any **untrue statement** of a material fact. *Aaron v. Securities and Exch. Comm'n,* 446 U.S. 680, 696 (1980) (emphasis added).

The SEC's Complaint (pgs. 17-18) contains a list of what was allegedly "false or misleading" about the statements by Feller, that do not directly reflect what was actually stated to potential investors according to its own admissions. We address each of the paragraphs herein:

> *91. Regarding the emails Feller sent during the Relevant Period to potential investors concerning the launches or near launches of partnerships with Telco 1 and Telco 2, Defendants knew or recklessly disregarded that no*

such launches were imminent and the statements to potential investors were false and misleading.

The Complaint does not contain a single specific allegation that Feller sent an email to any prospective investor that represented that the launch with either Telco 1 or Telco 2 was "imminent". The allegations that Feller told investors that launches were "imminent" are unsubstantiated by the very emails cited to on which the SEC predicates the Complaint.

The Complaint alleges that Feller emailed potential investors in 2017 that they expected to launch with Telco 1's subsidiary (unidentified) in "Q3", then "late 2017 early 2018". Comp. ¶ 37, 39, 40, 41. Icaro and Telco 1 had suspended its current contracts in 2016 but the Complaint asserts "Icaro continued to pitch products to Telco 1" that were "in the pitch stage" (Comp. ¶ 34). Telco 1 also stated it would "not entertain any future potential partnership until Icaro executed a successful launch with Telco 2" (Comp. ¶ 35). In November 2016, Icaro signed a one-year partnership agreement with a subsidiary of Telco 2 to develop its platform for potential distribution by Telco 2. (Comp ¶ 53). From November 2016 through mid-2017, Icaro worked on trying to resolve technical issues that needed to be addressed before the launch. (Comp. ¶ 54).

92. *Regarding the emails Feller sent during the Relevant Period to potential investors concerning Telco 1, Defendants knew or recklessly disregarded that Telco 1 had terminated all product launches prior to the Relevant Period and Icaro never got close to launching another product with Telco 1.*

The Complaint does not contain a single specific allegation that Feller represented to a potential investor that Telco 1 had not terminated its product launches prior to the Relevant Period. The Complaint also does not contain any alleged specific statement made by Feller to a prospective investor that Icaro was "close" to launching another product with Telco 1.

93. *Regarding statements Feller made during the Relevant Period to potential investors about the existence of contracts with Telco 1 and the number of cell phone devices under contract with Telco 1, Defendant*

knew or recklessly disregarded that no contracts existed between Icaro and Telco 1 to launch products during the Relevant Period.

The Complaint does not contain an allegation that Feller made a statement to potential investors about the existence of contracts with Telco 1 to launch products during the relevant period. The Complaint alleges Feller stated "we expect to launch with [Telco 1's subsidiary]" (Comp. ¶ 37), "In Q3, we will begin to power [Telco 1 subsidiary] apps", (Comp. ¶ 40), "we expect to begin deployment of the application in partnership with [Telco 1]" (Comp ¶ 41), "'Launch Strategy' with a series of planned launches for 2021 for Telco 2 and Telco 1" (Comp. ¶ 45), "goal of a potential partnership with [Telco 1]" (Comp. ¶ 46), "assumptions on possible launch by geographic footprint" (Comp. ¶ 47), "'Launch strategy' with 2021 launch dates" (Comp. ¶ 49).

The Complaint does allege Feller emailed "someone" that Icaro had "current" and "signed contracts" with various companies including Telco 1, (Comp ¶ 38), but does not allege that email was sent to a potential investor. The Paragraph contains a quotation marks around "current" and "signed contracts" but conspicuously does not include specificity by way of the full citation to a sentence where Feller made an actual representation that those current or signed contracts were with Telco 1. The Complaint also alleges Feller sent an email to "several of his contacts" that Icaro had "exclusive contracts to launch over 500m cell phone devices with the white label AP [sic]" with Telco 1 and Telco 2. (Comp. ¶ 44). This statement, once again, was not made to potential investors, and also conspicuously does not include Telco 1 in the quote. Had Feller specifically represented that he had a contract with Telco 1, the SEC most certainly would have included it in the quote. The Complaint similarly alleges that Feller told a potential investor in 2021 they had "pending agreements" with Telco 1, without a specific quote from the email. Comp. ¶ 50.

> *94. Regarding Defendants' distribution during the Relevant Period to potential investors of Icaro's revenue projections based on existing business partnerships with Telco 1, Defendants knew or recklessly disregarded that these projections were false and misleading.*

The Complaint does not allege that Feller represented to any potential investor any revenue projections were based on existing business partnerships with Telco 1. The only reference to revenue projections in the Complaint were regarding Icaro's proposed launch strategy. "On January 26, 2021, Feller sent a potential investor a January 2021 Investor Presentation containing a "Launch Strategy" with a series of planned launches in 2021 for Telco 2 and Telco 1." Comp. ¶ 45, and ¶ 49.

The SEC alleges "The Icaro officer sent a copy of DiCaro's revenue projections to a CFO of Telco 1, and indicated that "With the goal of a potential partnership with [Telco 1] we included this opportunity in our forecast model." In response, another executive of Telco 1 asked "Question: Which potential partnership with [Telco 1] are you referring to specifically?" The Icaro officer responded: "A *potential partnership* specific to the telecom market in the region." Comp. ¶ 46 (emphasis added). Alleging that Feller and Icaro had a "goal of a potential partnership" is insufficient under the standards for pleading securities fraud.

> *95. Regarding Defendants' representations during the Relevant Period to potential investors that Telco 1 had invested in Icaro during the Relevant Period, Defendants knew or recklessly disregarded that Telco 1 never invested during the Relevant Period and those statements were false and misleading.*

The Complaint contains an allegation that between 2015 and 2022 Telco 1 did not invest any additional funds in Icaro (Comp ¶ 51) and that on March 25, 2021 Feller told a potential investor that Telco 1 made an additional investment in Icaro's *latest* round. (Comp. ¶ 52). Yet the Complaint does not contain any specific allegations regarding any series funding rounds completed between 2015 and 2021 that would render Feller's statement false.

96. Regarding Defendants' representations during the Relevant Period to potential investors that Icaro was involved in launching a project for Telco 2, Defendants knew or recklessly disregarded that the product never got close to launching during the Relevant Period, and never ultimately launched.

This allegation contradicts itself. First, the allegation that Icaro made statements that "Icaro was involved in launching a product for Telco 2" were not false according to the Complaint. Comp. ¶ 53. Second, there is no allegation that Defendants made any statement representing to potential investors that the product ultimately launched. Finally, the SEC's claim that Defendants "knew or recklessly disregarding that the product never got close to launching" during the Relevant period is unsubstantiated by any concrete facts. The SEC concedes that Telco 2 and Icaro had an active agreement to develop a product and Icaro was endeavoring to work out technical issues to complete said launch.

97. Regarding Defendants' representations during the Relevant Period to potential investors that Icaro was about to go live with its product for Telco 2, Defendants knew or recklessly disregarded that those statements were false and misleading.

The SEC alleges "On August 10, 2017, Feller wrote a potential investor that the Telco 2 launch was delayed "one fiscal quarter due to technology issues on their side." He indicated that "we go live to the public with [Telco 2's subsidiary] August 28th..." (Comp. ¶ 62), but fails to allege any facts to show this statement was false at the time it was made. The other email that references "going live" was not sent to a potential investor. Comp. ¶ 57. In fact, the SEC admits "On January 9, 2018, Icaro released a smartphone app for Telco 2 to the Google Play Store," (Comp. ¶ 68), and in February 2018, Icaro launched another employee demonstration for Telco's subsidiary. Comp. ¶ 70.

98. Regarding Defendants' statements during the Relevant Period to potential investors in which they predicted the revenues Icaro would receive from its partnership with Telco 2, Defendants knew or recklessly disregarded that those predictions had no basis in fact and their statements to potential investors were false and misleading.

The SEC alleges "on November 3, 2017, Feller emailed a potential investor, stating that Icaro's 'forecast model projects that by the end of 2018 this partnership [with Telco 2] will generate over $16 million USD in net revenue...'" Comp. ¶ 67. However, the SEC does not allege any facts to support that this projection had no basis in fact. Furthermore, this email was not sent to a potential investor.

99. *Regarding Defendants' statement during the Relevant Period to investors in which they blamed the launch delays on Telco 2, Defendants knew or recklessly disregarded that the launches were delayed because of Icaro: Icaro had not obtained the necessary licenses for the content, and had not ironed out the technical issues with the product. Feller knew or recklessly disregarded that his statement to potential investors blaming Telco 2 was false and misleading.*

The Complaint alleges that "On August 10, 2017, Feller wrote a potential investor that the Telco 2 launch was delayed 'one fiscal quarter due to technology issues on their side.'" Comp. ¶ 62. However, the SEC fails to allege with specificity how this statement was false or materially misleading. Feller's statement that the issues were on Telco 2's side was not materially misleading so as to constitute fraud. The characterization of the issue as on "their side" is a general statement, which could be interpreted to mean that Telco 2 had delayed the launch because they identified technical issues. For example, the SEC alleges "During [Icaro's demonstration], Telco 2's subsidiary identified technical issues, such as loading delays and layout errors." Comp. ¶ 64. This statement, while confusingly worded, certainly does not supply a sufficient factual basis to support "falsity" and sustain a cause of action for fraud.

100. *Regarding Defendants' statement during the Relevant Period to potential investors that Icaro's product for Telco 2 had already gone live, Defendants knew or recklessly disregarded that statement was false and misleading.*

The Complaint does *not* allege Defendants made statements to potential investors that Icaro's product had already gone live. The Complaint alleges "October 26, 2017, Feller emailed the Recruiter that Icaro 'has gone live this week with the [Telco 2] APP.'" Comp. ¶ 65. That

statement was made to a "recruiter." That same day, according to the SEC, Feller informed the same recruiter "that there were launch delays due to technology issues." Comp. ¶ 66. The Complaint fails to allege that this statement ever reached a potential investor. In addition, given that the statement was immediately qualified, it does not clearly indicate falsity.

> *101. Regarding Defendants' statements during the Relevant Period to potential investors claiming that Telco 2 wanted one of Icaro's predecessor companies, VOS, to take over SKYY, Defendants knew or recklessly disregarded those statements were false and misleading; Telco 2 did not opine on Icaro's corporate structure nor have a position on whether SKYY and VOS merged.*

The SEC fails to allege how this statement was false or materially misleading or in any event, made to secure an investment from prospective investors. If anything, the statement indicates there is disharmony from Telco 2 and is cautionary.

> *102. Regarding Defendants' statements during the Relevant Period to potential investors, after Telco 2 informed Icaro that it was going to terminate its contract, that a contract still existed or that it was preparing to launch a smartphone app with Telco 2, Defendants knew or recklessly disregarded those statements were false and misleading.*

The SEC alleges Telco 2's subsidiary informed Icaro it *intended* to terminate the agreement with Icaro. Comp. ¶ 85. However, Telco 2 did not terminate its contract until July 9, 2020. Comp. ¶ 89. That termination purported to be "retroactive" to June of 2020. The Complaint alleges "on February 19, 2020, Feller told an investor who was considering a further investment that Icaro had "many new developments with our contracts with [Telco 2] over the last few weeks and we are preparing for launch of our first 40m cell phone devices with [Telco 2] now" (Comp. ¶ 86) but fails to allege facts to support this was false at the time it was made. The only communication made thereafter regarding Telco 2 contained a "Launch Strategy" with a prospective launch for 2021 with Telco 2. Comp. ¶ 9. There is no allegation that after the cancellation, Defendants told any prospective investor that it had an active contract with Telco 2.

All of the statements made to prospective investors upon which the SEC's Complaint relies were statements made by Feller, the company's CEO, about the future prospects of Icaro. Supreme Court emphasized the need to examine the context of an allegedly misleading opinion. *Tongue v. Sanofi,* 816 F.3d 199, 211 (2d Cir. 2016); citing *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund,* 575 U.S. 175, 190 (2015). The SEC fails to show any evidence to substantiate that Feller did not believe or expect that outcome. Courts have held that "Defendants' statements about what they 'think,' 'believe,' and 'expect' to occur in the future are inactionable statements of opinion or belief." *In re Adient plc Securities Litig.,* No. 18-CV-9116 (RA), 2020 WL 1644018, at *17 (S.D.N.Y. Apr. 2, 2020) ((The SAC thus fails to adequately allege that any of Defendants' statements—of fact or opinion—were false or misleading at the time they were made, or that Defendants omitted any material facts that made them so), *See, also,*, *Steamfitters Local 449 Pension Plan v. Sketchers U.S.A., Inc.*, No. 17 Civ. 8107 (AT), 2019 WL 4640217, at *5-6 (S.D.N.Y. Sept. 23, 2019).

There is no allegation to support that any statement made about the prospective partnerships with Telco 1 or Telco 2 were based on false or misleading information at the time they were made. Telco 1 was Icaro's largest investor. The SEC admits Telco 2 had a signed agreement with Icaro to launch a product during the time that Icaro was touting the potential imminent launch of said product between 2017 and 2020. The fact that the product had technical issues is not fraud. The SEC's complaint in detail addresses the fact that the parties were actively engaged in developing the product. Other Courts have held that just because "such a dialogue was ongoing did not prevent Defendants from expressing optimism, even exceptional optimism," about the likelihood they would successfully launch a product. *Tongue v. Sanofi,* 816 F.3d 199, 211 (2d Cir. 2016) (regarding drug approval and an ongoing dialogue with the FDA).

In re Sanofi Sec. Litig., 87 F. Supp. 3d 510, 533 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016), this Court granted a motion to dismiss a fraud action where defendant made opinion statements regarding when their product, (a drug) would be approved by the FDA and put on the market. The Court in *Sanofi* analyzed opinion statements made by Defendants, i.e. expectations for the future, rather than presently existing objective facts. *See, e.g., In re Bank of Am. Corp. Sec., Derivative, & Employee Ret. Income Sec. Act (ERISA) Litig.*, No. 09 MD 2058(PKC), 2013 WL 6504801, at *16 (S.D.N.Y. Dec. 11, 2013) (prediction of a company's future performance is a statement of opinion). The Court opined that statements are "actionable only if the 'defendant's opinions were both false and not honestly believed when they were made.' " *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 531 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016); citing *Kleinman*, 706 F.3d at 153.

The *Sanofi* Court held that there was no basis to conclude that defendants did not genuinely believe what they were saying at the time they said it. *Id.* at 531. The plaintiffs' complaint contained no facts to indicate that defendants did not expect FDA approval within the timeframe their statements articulated. Absent "concretely pled facts" to this effect, the inference that plaintiffs asked the Court to draw (that defendants believed that the drug launch was unlikely, impossible, or achievable only on a delinquent time table), was "implausible and conjectural*." In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 531 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016) (internal citation omitted).

The SEC in the instant action similarly has failed to set forth facts to clearly indicate that the product launch with Telcos 1 or 2 was unlikely or impossible. In fact, given Icaro's efforts to launch the product as described in the SEC's Complaint, to infer Defendants thought the launch was impossible or unlikely would be implausible and conjectural, and contradicted within the Complaint itself. In *Sanofi*, plaintiffs argued that the defendant was on notice that

the product might fail, because the FDA expressed concerns about the clinical trial. Similarly, in the instant action, the SEC alleges that Telco 2 expressed concerns about the technology. The Court held in *Sanofi* that "viewed in context, the FDA's statements to the company could readily be squared with the company's publicly anticipated timetable for approval. As pled, in expressing misgivings ... the FDA did not state that it would refuse to approve..." *In re Sanofi Sec. Litig.*, 87 F. Supp. 3d 510, 533 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016). In the instant case, Telco 2 expressed concerns with the technology but continued to extend its contract with Icaro twice while Icaro continued to work towards the anticipated product launch.

The instant case can be distinguished from a case the SEC will likely cite to, involving representations made by a telecommunications company: in *S.E.C. v. StratoComm Corp.*, 2 F. Supp. 3d 240, 253 (N.D.N.Y. 2014), *aff'd sub nom. Securities and Exch. Comm'n v. StratoComm Corp.*, 652 Fed. Appx. 35 (2d Cir. 2016) (unpublished), the Defendant made statements regarding its product development that the Court found to be materially misleading. However, unlike in the instant case, the Court made this conclusion based on the fact that while the defendant possessed the "proprietary technology to build a TTS system, it was undisputed that it (1) never actually built a TTS, (2) never tested an operational prototype, and (3) never had funds or parts to construct a TTS." In this case, the SEC concedes that Defendants had developed the technology as purported, tested more than one iteration of an operational prototype to Telco subsidiaries (Comp. ¶ 70), and launched an app on Google Play store. Comp ¶ 68.

For all of the foregoing reasons, the SEC has failed to allege that the defendant's statements were false. As such the Complaint should be dismissed.

C. The Complaint Should be Dismissed Where the Complaint Fails to Plead Facts Which Raise a Strong Inference of Scienter

"To state a cause of action under section 10(b) and Rule 10b–5, a plaintiff must plead that the defendant made a false statement or omitted a material fact, with scienter, and that plaintiff's reliance on defendant's action caused plaintiff injury." *San Leandro Emergency Med. Group Profit Sharing Plan v. Philip Morris Cos*., 75 F.3d 801, 808 (2d Cir.1996) (citing *In re Time Warner Inc. Secs. Litig*., 9 F.3d 259, 264 (2d Cir.1993)). The requisite state of mind, or scienter, in an action under section 10(b) and Rule 10b–5, that the plaintiff must allege is " 'an intent to deceive, manipulate or defraud.' " *Kalnit v. Eichler*, 264 F.3d 131, 138 (C.A.2 (N.Y.), 2001) (quoting *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 n. 12, 96 S. Ct. 1375, 47 L.Ed.2d 668 (1976)).

To establish liability under Section 10(b) and Rule 10b–5, a plaintiff must prove that the defendant acted with scienter, *i.e.* "a mental state embracing intent to deceive, manipulate, or defraud*." Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 319, 127 S. Ct. 2499, 2507, 168 L. Ed. 2d 179 (2007); *Ernst & Ernst*, 425 U.S., at 193–194, and n. 12, 96 S. Ct. 1375; *and see U.S. S.E.C. v. Power*, 525 F. Supp. 2d 415, 419 (S.D.N.Y. 2007). To make a case under Section 10(b), the plaintiff must plead facts giving rise to a "strong" inference of scienter. *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 2509, 168 L. Ed. 2d 179 (2007). In determining whether the pleaded facts give rise to a "strong" inference of scienter, the court must consider plausible opposing inferences. *Id.*, 551 U.S. at 322. A Court must consider plausible, nonculpable explanations for the defendant's alleged conduct, as well as inferences favoring the plaintiff. *Id. Id.*, 551 U.S. at 323–24. Defendants cannot be liable for a violation of Rule 10b, where the Commission has not plead any fact so support scienter. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 199, 96 S. Ct. 1375, 1384, 47 L. Ed. 2d 668 (1976); *see Aaron v. Sec. & Exch. Comm'n*, 446 U.S. 680, 100 S. Ct. 1945, 64 L. Ed. 2d 611 (1980) (scienter is an element of a violation of section 10(b) of the Securities Exchange Act of 1934 and of Rule 10b–5). With regard to the showing of

scienter required to proceed on the Section 17(a)(1), Section 10(b), and Rule 10b–5 claims, in the Second Circuit, the pleading standard for scienter is satisfied " '(a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.' " *Ganino v. Citizens Utilities Co.,* 228 F.3d 154, 168–69 (2d Cir.2000) (quoting *Shields v. Citytrust Bancorp, Inc.,* 25 F.3d 1124, 1128 (2d Cir.1994)). *U.S. S.E.C. v. Power,* 525 F. Supp. 2d 415, 421 (S.D.N.Y. 2007).

As a practical note, Section 17(a)(1) also requires scienter. *Aaron v. Sec. & Exch. Comm'n,* 446 U.S. 680, 697, 100 S. Ct. 1945, 1956, 64 L. Ed. 2d 611 (1980). Plaintiff's cause of action for violation of 17(a) can only be described as seeking liability for fraud. There is no allegation that Feller's statements were "mistakes." The 17(a) claims are duplicative of the 10-b and 10b-5 claims. As such, the 17(a) claim should also be dismissed for failure to plead scienter with particularity.

Where plaintiffs allege a false statement of opinion, "the falsity and scienter requirements are essentially identical" because "a material misstatement of *opinion* is by its nature a false statement, not about the objective world, but about the defendant's own belief*."* *In re Sanofi Sec. Litig.*, at 534 (S.D.N.Y. 2015), *aff'd sub nom. Tongue v. Sanofi*, 816 F.3d 199 (2d Cir. 2016). While the Complaint alleges certain statements were made to investors regarding prospective launches (which lack the requisite falsity, as detailed above", there are no allegations that Feller knew, at the time the statements were made, that Icaro would not launch products with the Telco entities. There is no basis to conclude that Defendants did not genuinely believe those statements at the time they were saying them. Similarly, the Complaint fails to assert that Feller knew, at the time he made the statements about pending future investments, that those statements were incorrect.

The only plausible inference from the facts alleged is that Feller believed at the time he made statements to potential investors, that Icaro would launch products with Telcos 1 and 2 during the Relevant Period. The SEC Complaint details the business relationships with these two entities, and the efforts made within Icaro to complete those launches as outlined above. The circumstantial evidence, set forth by the SEC's own detailed description of the legitimate business dealings between Icaro and Telcos 1 and 2, support a finding that these statements, even if untrue, were not made with the requisite scienter to support a cause of action for fraud.

CONCLUSION

For all of the foregoing reasons, the Court should grant Defendants' motion to dismiss the Complaint.

PULLP

By: /s/Anna Adelstein

Anna Adelstein
Jonathan Uretsky
111 Broadway, 8th Floor
New York, New York 10006
(212) 571-1164
uretsky@pullp.com
adelstein@pullp.com
Attorneys for Defendants