APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[DATE STAMP]
FILED
United States Court of Appeals
Tenth Circuit
February 14, 2018
Elisabeth A. Shumaker
Clerk of Court

DAVID ARONSTEIN; LESLEY STROLL, a/k/a Lesley Aronstein,

Plaintiffs - Appellants,

v.

THOMPSON CREEK METALS COMPANY, INC.; KEVIN LOUGHREY; PAMELA SAXTON; PAMELA SOLLY,

Defendants - Appellees,

and

JAMES L. FREER; JAMES P. GEYER; TIMOTHY J. HADDON; CAROL T. BANDUCCI; THOMAS J.

O'NEIL; DENIS C. ARSENAULT; WENDY CASSITY,

Defendants.

No. 17-1178
(D.C. No. 1:15-CV-00204-RM-NYW)
(D. Colo.)

ORDER AND JUDGMENT*

Before TYMKOVICH, Chief Judge, HARTZ and O'BRIEN, Circuit Judges.

Plaintiffs David Aronstein and Lesley Stroll, proceeding pro se, appeal from the district court's judgment in favor of the defendants. Plaintiffs' complaint asserted securities fraud claims based on Conn. Gen. Stat. §§ 36b-4 and 36b-29 and state-law fraudulent and negligent misrepresentation claims against the defendants. The district court granted defendants' motion for summary judgment and denied

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*After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

plaintiffs' motion for partial summary judgment concerning these claims. It also denied as futile plaintiffs' motion to file a third amended complaint.

We review the district court's grant of summary judgment de novo. *Sylvia v. Wisler*, 875 F.3d 1307, 1328 (10th Cir. 2017). "Summary judgment should be granted if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *Id.* (internal quotation marks omitted). "Although we generally review for abuse of discretion a district court's denial of leave to amend a complaint, when this denial is based on a determination that amendment would be futile, our review for abuse of discretion includes de novo review of the legal basis for the finding of futility." *Barnes v. Harris*, 783 F.3d 1185, 1197 (10th Cir. 2015) (internal quotation marks omitted).

Plaintiffs raise the following issues:

1. Whether the district court erred in finding that Thompson Creek Metals Company, Inc. (TCM) met its Item 303 disclosure obligations with regards to the pending budget increases of the Mt. Milligan Project.

2. Whether the district court erred in

distinguishing this action from *SEC v. Curshen*, 372 F. App'x 872 (10th Cir. 2010) with regard to misleading statements made in TCM's Q4 2010 investor conference call.

3. Whether the district court erred in finding that TCM met its Item 303 disclosure obligations with regard to the non-construction capital cost requirements of the Mt. Milligan Project, or whether it erred in finding that TCM's 2011 Q1 and Q2 10-Q forms, along with its investor presentations, were not misleading.

4. Whether the district court erred in finding that TCM's Chief Financial Officer and Investor Relations Director did not make materially false and misleading statements during two telephone conversations with plaintiff David Aronstein on April 25, 2012.

5. Whether the district court erred in imputing knowledge of a negative liquidity covenant to Plaintiffs.

6. Whether the district court erred by denying Plaintiffs' motion to file a third amended complaint, finding that it would be futile to grant them leave to amend.

7. Whether the district court acted as

defendants' advocate.

8. Whether Connecticut law allows for questions of intent to be decided in summary-judgment proceedings.

9. Whether the law-of-the-case doctrine establishes that sales of common shares by TCM, its officers, and its board members, satisfy the primary violator standard of Conn. Gen. Stat. § 36b-29.

10. Whether all of the alleged misrepresentations and omissions satisfy the "in connection with" standard of Conn. Gen. Stat. §36b-4.

11. Whether all of the misrepresentations and omissions that underlie this action were "material."

Having reviewed the record, the briefs, and the applicable law in light of the above-referenced standards of review, we affirm the district court's judgment for substantially the reasons stated in its well-reasoned Order of April 27, 2017, and Opinion and Order of April 28, 2017.

Entered for the Court

Timothy M. Tymkovich
Chief Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Raymond P. Moore

Case No. 15-cv-00204-RM-NYW

DAVID ARONSTEIN, *et al.*,
Plaintiffs,

v.

THOMPSON CREEK METALS COMPANY INC., *et al.*,
Defendants.

OPINION AND ORDER

This matter comes before the Court with the filing of defendants' Thompson Creek Metals Company Inc. ("TCM"), Kevin Loughrey ("Loughrey"), Pamela Saxton ("Saxton"), and Pamela Solly("Solly," and when referred to collectively, "defendants") motion for summary judgment (ECF No. 207) and plaintiffs' David Aronstein ("Aronstein") and Lesley Stroll ("Stroll, with Aronstein, "plaintiffs") partial motion for summary judgment (ECF No. 211). The parties have filed their respective responses in opposition to the

motions for summary judgment (ECF Nos. 219, 221), and their respective replies in support (ECF Nos. 223, 225).

With the motions for summary judgment being fully briefed, the Court makes the following findings.

1. Legal Standard for Summary Judgment

Summary judgment is appropriate "when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). Initially, the movant bears the "responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). If this burden is met, then the non-moving party must set forth specific facts showing that there is a genuine dispute for trial. *Id.* at 324. If the moving party bears the burden of persuasion on a claim at trial, that party must support its motion with evidence that, if uncontroverted, would entitle it to a directed verdict at trial. *Anderson v. Dep't of Health & Human Servs.*, 907 F.2d 936, 947 (10th Cir. 1990) (citing *Celotex Corp.*, 477 U.S. at 331).

A fact is material if it has the potential to affect the outcome of a dispute under applicable law. *Ulissey*

v. Shvartsman, 61 F.3d 805, 808 (10th Cir. 1995). An issue is genuine if a rational trier of fact could find for the non-moving party. *Adams v. Am. Guarantee & Liab. Ins. Co.*, 233 F.3d 1242, 1246 (10th Cir. 2000). In performing this analysis, the factual record and any reasonable inferences therefrom are construed in the light most favorable to the non-moving party. *Adams*, 233 F.3d at 1246. However, a mere "scintilla of evidence" is insufficient to avoid summary judgment. *Turner v. Public Service Co. of Colorado*, 563 F.3d 1136, 1142 (10th Cir. 2009). Instead, a non-movant "must proffer facts such that a reasonable jury could find in her favor." *Id.*

II. Discussion[1]

Before beginning its analysis, the Court makes a few preliminary observations. In the Second Amended Complaint ("the SAC"), plaintiffs' raised claims under the Connecticut Uniform Securities Act ("CUSA"), and for fraudulent and negligent misrepresentation. (ECF No. 163 at ¶¶ 131-137.) Based upon the Court's review of the pleadings, those claims appear to concern several topics of alleged misrepresentation or omission. Those topics appear to be related to: (1) the splitting of costs at the Endako

[1] The Court sets forth the relevant evidence and material facts in its discussion *infra*.

mine[2]; (2) the amount of equipment financing available to TCM; (3) the amount of credit available to TCM pursuant to a December 10, 2010 revolving credit agreement ("the Credit Agreement"); (4) the reporting of money spent on, and capital expenditures for, the Endako mine and the Mt. Milligan Project; (5) the increase in the cost of the Mt. Milligan Project, including statements made during a February 25, 2011 investor conference call; (6) statements made during a November8, 2011 investor conference call and in a subsequent email; and (7) statements made in telephone calls on April 25, 2012. (*See generally* ECF No. 163; *see also* ECF No. 211 at 11-23; ECF No. 207 at 3-15.)[3]

In resolving the pending motions for summary judgment, the Court will address each independently—first, plaintiffs' partial motion for

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[2] The Court assumes the reader's familiarity with certain names used and issues discussed in this Opinion from more developed explanation of those names and issues in other Opinions or recommendations of the Court. (*See generally* ECF Nos. 67, 97, 123, 162.)

[3] The Court notes that in its response to plaintiffs' partial motion for summary judgment, defendants assert that plaintiffs failed to raise any allegations in the SAC with respect to equipment financing. (*See* ECF No. 221 at 15 n.4.) The Court will address that issue *infra*. The Court notes simply that its citation, generally, to the SAC is not meant to suggest that plaintiffs alleged any claim with respect to equipment financing in the SAC.

summary judgment, and then defendants' motion for summary judgment. In doing so, the Court will address each of the topic areas sketched *supra* independently, assessing whether each movant has made a sufficient showing to entitle it to summary judgment with respect to the claims (under the CUSA) and/or for fraudulent and/or negligent misrepresentation) affected by the particular topic area.

A. Plaintiffs' Partial Motion for Summary Judgment

1. Splitting the Costs of the Endako Mine

This claim is premised upon Section 9.8 ("Section 9.8") of an Exploration, Development and Mine Operating Agreement dated June 12, 1997. (*See* ECF No. 211 at 12; ECF No. 224 at ¶ 3.) Section 9.8 provides as follows:

> The Manager shall immediately notify the Management Committee of any material departure from an adopted Program and Budget. If the Manager exceeds an adopted Budget by more than ten percent (10%) in the aggregate, then the excess over ten percent (10%), unless directly caused by an emergency or

> unexpected expenditure made pursuant to Section 9.9 or unless otherwise authorized or ratified by the Management Committee, shall be for the sole account of the Manager and such excess shall not be included in the calculations of the Participating Interests nor deemed a contribution under this Agreement. Budget overruns of ten percent (10%) or less in the aggregate shall be borne by the Participants in proportion to their respective Participating Interests.

(ECF No. 113-2 at 13.)

Plaintiffs allege defendants made false or misleading statements in numerous investor presentations because those presentations stated that TCM's liability for funding the Endako mine was 75%, when, pursuant to Section 9.8, TCM was liable for *all* cost overruns beyond $547.8 million. (ECF No. 211 at 11-12.) Plaintiffs allege this is so because an increase in the Endako mine budget to $550 million triggered Section 9.8, as the increase exceeded the 10% threshold of the provision, and thus, made the Manager (which was TCM) liable for all cost overruns. (*Id.* at 12; ECF No. 224 at ¶ 9.) Plaintiffs' arguments in this regard rely upon the assumptions that not only is plaintiffs' interpretation of Section 9.8 correct—i.e.,

that the Manager was liable for all cost overruns above 10%—but, more importantly, that defendants' interpretation of Section 9.8—i.e., that the Manager was not necessarily liable for all cost overruns above 10%—was either false or misleading. Plaintiffs provide no evidence to support either assumption, other than their own interpretation of the provision. (*See* ECF No. 224 at ¶ 9.) Simply put, plaintiffs' interpretation of the provision is not evidence that their interpretation is correct or that defendants' was false or misleading. In addition, plaintiffs point to no evidence that the Manager (TCM) ever had to cover 100% (i.e., all) of the cost overruns at the Endako mine. The evidence, instead, is to the contrary.

Specifically, when a dispute did arise between TCM and its joint venture partner on the Endako mine (a company that at the time of entering the joint venture was called Nissho Iwai Moly Resources, Inc.), that dispute eventually led to the joint venture partner (now known as "Sojitz") agreeing to pay12.5% of the cost between C$548 million[4] and C$650 million for the

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[4] The Court notes that dollar numbers in the parties' statements of fact are presented at times in U.S. dollars and others in Canadian dollars. The parties also appear to have some dispute as to the materiality of the exchange rate between those numbers. No part of the Court's analysis herein is dependent upon whether a dollar number was stated by defendants in Canadian or U.S. dollars, and thus, to the extent the Court misstates a dollar number as being U.S. dollar when it should be Canadian or vice

Endako mine. (ECF No.113-4 at 4-5.)[5] First, Sojitz paying12.5% of cost overruns is not the same as TCM paying 100% of the same. Second, even though 12.5% is not the same as Sojitz's 25% split of costs, it does not mean that defendants' statements that Sojitz was liable for 25% of costs were false or misleading. At best, the resolution of TCM and Sojitz's dispute shows that they agreed to disagree as to the meaning of Section 9.8. How that makes defendants' interpretation of the provision false or misleading is entirely unexplained.

There is another deficiency in plaintiffs' argument with respect to their CUSA claims involving this topic area; one which plagues their arguments with respect to most if not all of the other topic areas. Plaintiffs make no detailed or reasoned explanation as to how any of defendants' statements are material. Defendants acknowledge that materiality is an element of their CUSA claims (*see* ECF No. 211 at 2, 4-5), and so they should, *see* Conn. Gen. Stat. §§ 36b-4(a)(2), 36b-29(a)(2). Despite that, plaintiffs include just one paragraph in their motion for partial summary judgment dedicated to the concept of

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versa, that should not be treated as effecting the Court's analysis.

[5] The Court uses the page numbers assigned to all documents (other than transcripts) by the CM/ECF system in the top-right hand corner of the document, rather than any other page number(s) appearing thereon.

materiality (*see* ECF No. 211 at 9), and no paragraphs dedicated to explaining why any particular statement is material. Plaintiffs committed a significant error in failing to perform such an analysis because the Court is left with nothing to find that plaintiffs have met their burden as to the materiality element, and thus, plaintiffs cannot be entitled to summary judgment with respect to their CUSA claims.[6]

Looking to the fleeting discussion of materiality in the motion for partial summary judgment does not help plaintiffs either. In that paragraph, plaintiffs attempt to construct a quantitative equation for determining materiality. Cutting a short story shorter, plaintiffs come up with the number $2.5 million as a "reasonable Quantitative Threshold of Materiality," with any number (or statement involving a number) above $2.5 million presumably being material. (*See* ECF No. 211 at 9.) Plaintiffs completely miss the point of the materiality analysis. The purpose of the inquiry

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[6]It is not as if the Court did not place plaintiffs on warning that materiality would be an issue going forward in this case. In the Court's June 20, 2016 Opinion, although plaintiffs' CUSA claims with respect to a different topic area were allowed to proceed, the Court stated that it was "far from certain whether a reasonable investor would have found the total mix of information" altered by the disclosure of certain facts. (ECF No. 123 at 19.) If plaintiffs were not on notice by this statement that materiality would play an important role in addressing their claims, then they have only themselves to blame.

is to assess whether a "reasonable investor" would have considered a fact "significant in making investment decisions." *Lehn v. Dailey*, 825 A.2d 140, 145(Conn. App. Ct. 2003). Entirely missing from plaintiffs' brief discussion of materiality is any explanation as to why the number $2.5 million would be material to a reasonable investor in making an investment decision. This is especially so with respect to the materiality analysis, given that it is a "fact specific inquiry." *Gasner v. Bd. of Supervisors of the Cnty. of Dinwiddie, Va.*, 103 F.3d 351, 362 (4th Cir. 1996). Plaintiffs simply provide no support for the contention that "courts have generally defined a number somewhere between 1 and 10% of earnings for a given quarter," as material. (*See* ECF No. 221 at 9.)

As it pertains to defendants' interpretation of Section 9.8, plaintiffs provide no explanation of (a) how their numbers-based approach to materiality applies, or (b) even if it did, why plaintiffs' different interpretation of the provision would have been significant to a reasonable investor's investment decision. This is especially in light of the undisputed evidence that TCM disclosed to investors (I) that disagreement with its joint venture partner could have a material adverse impact on its profitability, and (ii) when disagreement arose with Sojitz as to the responsibility for cost overruns at the Endako mine.

(*See* ECF No. 226 at ¶¶ 8, 12.)[7] As a result, the Court finds that plaintiffs have failed to present any evidence, let alone undisputed evidence, that defendants' statements with respect to the splitting of costs for the Endako mine were material for purposes of their CUSA claims.

Accordingly, the Court finds that plaintiffs are not entitled to summary judgment with respect to their claims under the CUSA or for fraudulent or negligent misrepresentation as they relate to statements involving the splitting of costs for the Endako mine because defendants' statements in that regard were not false or misleading.[8] In addition, plaintiffs have failed to present any evidence that the statements were material for purposes of their CUSA claims.

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[7] Plaintiffs' response to the factual statements that TCM disclosed the dispute with Sojitz does not dispute the statements. (*See* ECF No. 226 at ¶ 12.)

[8] The Court notes that nowhere in plaintiffs' motion for partial summary judgment do plaintiffs attempt to explain how any of the alleged misrepresentations were negligent under Connecticut law. (*See generally* ECF Nos. 211, 223.) The Court will not act as plaintiffs' advocate, and thus, the Court will not grant them summary judgment with respect to *any* of their claims for negligent misrepresentation.

2. Equipment Financing[9]

Plaintiffs assert that, in various investor presentations, defendants stated that $450 million was available as a source of funding from the Credit Agreement and equipment financing. (ECF No. 211 at 11.) Plaintiffs allege those statements were false because "the maximum amount of equipment financing," when added to the Credit Agreement, was $432 million. (*Id.* at 12.) Plaintiffs rely upon their statement of fact number six, but this factual statement does not establish the falsity of defendants' investor presentations. In essence, plaintiffs assert that the falsity of defendants' presentations was exposed by an investor presentation on May 6, 2011, where it was stated that TCM had equipment financing of $132 million, which when combined with the $300 million available under the Credit Agreement, results in an $18 million overstatement in the prior presentations. (*See* ECF No. 214 at ¶ 6.)

Contrary to plaintiffs' apparent belief, however,

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[9] Although plaintiffs make mention to alleged equipment financing debt in the SAC (ECF No. 163 at ¶¶ 73, 93), nowhere in the SAC do plaintiffs raise any claims related to alleged false statements or omissions pertaining to any equipment financing (*see generally id.*). As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to a non-existent claim. Nonetheless, the Court addresses the substance of the claim for completion purposes.

merely because the May 6, 2011 presentation stated that equipment financing was $132 million (ECF No. 211-3 at 10), did not mean that "the maximum amount of equipment financing" was $132 million. As defendants assert in response, the $132 million number is taken from a March 30, 2011 equipment financing facility, pursuant to which a third party agreed to underwrite up to $132 million in equipment financing for the Mt. Milligan Project. (*See* ECF No. 220 at ¶ 6; *see also* ECF No. 221-5 at 7.) Moreover, defendants disclosed the March 30, 2011 equipment financing facility to investors in a Form 10Q dated May 6, 2011. (ECF No. 221-5.) Plaintiffs have provided no evidence that TCM could not obtain further equipment financing deals to help fund the Mt. Milligan Project, which is what plaintiffs would need to prove in order for the $450 million figure to be arguably false or misleading. (*See* ECF No. 224 at ¶ 6.) As such, it cannot be said that defendants' investor presentations, stating that "up to" $450 million was available from equipment financing and the Credit Agreement, were false or misleading.

In addition, plaintiffs fail to explain, even if the presentations were misleading or false, why a reasonable investor would find the alleged $18 million discrepancy to be significant to an investment decision.

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to

their CUSA and fraudulent and/or negligent misrepresentation claims as those claims relate to the amount of available equipment financing.

3. Credit Available Under the Credit Agreement

This topic area has been addressed once before in this case. Specifically, at the motion to dismiss stage of proceedings, when this Court granted in part and denied in part defendants' motion to dismiss a previous iteration of the SAC. (ECF No. 123 at 9-19.) In that Opinion, the Court, *inter alia*, allowed certain of plaintiffs' CUSA claims with respect to the Credit Agreement to proceed. Specifically, the Court allowed plaintiffs' claims with respect to the Credit Agreement to proceed to the extent they relied upon investor presentations on April 25, 2011, June 6, 2011, November 7, 2011, and February 27, 2012, as well as a November11, 2011 conference call and emails Solly sent to Aronstein after the November 11 conference call. (*Id.* at 19.) The Court allowed those claims to proceed, in part, because, although the operative Complaint was "notably vague" as to when Aronstein first read a Form 10K, construing the Complaint liberally, the Court assumed that Aronstein did not receive the Form 10K until February 28, 2012—after the dates of the events listed *supra*. (*See id.* at 13.) This was important for purposes of defendants' motion to dismiss because, although the Court found that

certain pertinent negative covenants were disclosed in the Form 10K and plaintiffs knew of the negative covenants because they had read the Form 10K, plaintiffs had allegedly not read the Form 10K at the time of the pertinent events. (*See id.* at 13-19.)

The finding with respect to *when* plaintiffs read the Form 10K, though, was made for purposes of defendants' motion to dismiss. In other words, the Court assumed the truth of plaintiffs' allegation that they had not received the Form 10K until February 28, 2012. At the summary judgment stage, things are very different, as plaintiffs must present evidence of when they first read the Form 10K. On that front, plaintiffs assert that they were not aware of the relevant provisions of the Credit Agreement until April 25, 2012. (ECF No. 214 at ¶¶ 5, 38.) As an initial matter, the factual statements to which plaintiffs cite do not support the assertion that plaintiffs were first made aware of the negative covenants on April 25, 2012. All the factual statements allege is that Solly and Saxton told Aronstein on that date that the Credit Agreement contained a liquidity covenant. (*See id.*) Nowhere is there any statement, let alone one supported by evidence, that this was the first time that plaintiffs were made aware of the negative covenants in the Credit Agreement.

Second, it is undisputed that Aronstein read the Form 10K prior to an investment he made in *March*

2011. (*See* ECF No. 113-7 at 62:19-22.) What is disputed is what parts or how much of the Form 10K Aronstein read. (*See id.*; ECF No. 224 at ¶ 5.) As the June 20, 2016 Opinion makes clear, that factual dispute is irrelevant to the Court's analysis. As the Court stated clearly then, plaintiffs cannot read just one thing in the Form 10K and seal their eyes to everything else. (*See* ECF No. 123 at 16.) The absurdity of plaintiffs' position in this regard is indicated in Aronstein's deposition testimony. Notably, Aronstein testified that, when reviewing annual reports like the Form 10K, he "mostly would read the MD&A stuff and then go to specific places if [he] needed a number to plug into. That was [his] general custom, because the rest of it generally didn't give you any information that was of any value." (ECF No. 113-7 at 64:11-17.) Aronstein further testified that, in reviewing quarterly reports, he would "review things that [he] thought might impart some information that was of value, but [he] certainly didn't read them to take a 204-page document and go through line-by-line and take, whatever, 20 hours to do that." (*Id* at 71:22-72:4.)

Aronstein's honesty would be admirable if it was not so damning. In essence, Aronstein concedes that, because he was unwilling to read an entire company report, he would only review parts of those reports that he believed, generally, offered information of value. There is no acceptance that relying upon

general assumptions of company reports might not be the best course of action, or that there might be a reason why spending as much time as required to learn the details of a company's financial reporting is necessary. Moreover, Aronstein's testimony demonstrates that, *in this case*, his general assumptions were not correct because, as he put it, "the rest of it" (being the Form 10K) *did* give the reader information of value; specifically, information on the negative covenants contained in the Credit Agreement.

Plaintiffs assert that this Court should follow *MidAmerica Fed. Sav. & Loan Ass'n v. Shearson/AmericanExpress, Inc.*, 886 F.2d 1249 (10th Cir. 1989). (ECF No. 223 at 12.) However, contrary to plaintiffs' belief, the Court is not ignoring or overturning the Tenth Circuit Court of Appeals' decision in that case. Notably, although the Tenth Circuit explained that actual knowledge was required for claims such as the ones plaintiffs bring under the CUSA, the Circuit premised that holding on that fact that (1) the correct information was not provided to the plaintiff *prior* to its first purchase, even though that information was subsequently provided, and (2) the defendant's oral misrepresentations induced the plaintiff. *MidAmerica*, 886 F.2d at 1254-55. Here, the correct information (i.e., information on the negative covenants) was provided to plaintiffs before Aronstein's first investment in TCM stock in March

2011. (ECF No.113-7 at 62:19-22.) Thus, this Court's finding that plaintiffs' had knowledge of the negative covenants is not contrary to the holding in *MidAmerica*.

The Court also fundamentally disagrees with plaintiffs' policy argument. Plaintiffs believe that finding knowledge of the negative covenants would allow defendants to "lie with impunity" about facts, provided that investors had read some portion of a filed report. (ECF No. 223 at 12.) First, that statement is simply incorrect. A company could not lie with *impunity* about facts that the company had already disclosed because investors would know any statement was a lie, given that they would have read the company's financial reports. Plaintiffs' statement relies upon all investors burying their hands in the sand or being lazy, which the Court does not believe is the case. Second, the opposing policy is much worse, as it would allow an investor to selectively choose which parts of a company's report he or she had read, and then claim that he or she had no knowledge of another more informative part of the report. Such a policy would invite frivolous litigation.

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to their claims under the CUSA as they relate to the reporting of negative covenants contained in the Credit Agreement because plaintiffs had knowledge of those

negative covenants prior to purchasing any of the stock at issue in this case.[10]

In addition, to the extent it could be concluded that plaintiffs did not have such knowledge, the Court finds that the challenged statements about the availability of credit under the Credit Agreement were not false or misleading. Plaintiffs argue that certain investor presentations stated that the entirety of the credit under the Credit Agreement was available to fund the development of the Mt. Milligan Project, and that cash on hand and the Credit Agreement were independent sources of funding for the Mt. Milligan Project. (ECF No. 221 at 11.) Plaintiffs assert that these statements were false or misleading because a negative liquidity covenant in the Credit Agreement forced TCM to keep $100 million in liquid funds, and thus, the investor presentations overstated by $100 million the amount of capital available. (*Id.* at 12-13.)

First, to the extent plaintiffs argue that the full amount of money under the Credit Agreement was not available, as the Court explained in its June 20, 2016 Opinion, that is not true. (*See* ECF No. 123 at 16-18.) Second, there was nothing false in stating that cash on

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[10]The Court has already dismissed plaintiffs' claims for fraudulent and/or negligent misrepresentation with respect to statements concerning the availability of credit under the Credit Agreement. (*See* ECF No. 123 at 20-21.)

hand and the Credit Agreement were *independent* sources of funding; they were. Plaintiffs dispute, as the Court noted in its June 20, 2016 Opinion, is one of omission—i.e., that, in failing to disclose the negative liquidity covenant, defendants failed to disclose that they were required to maintain either $75 million or $100 million of "Consolidated Liquidity." (*See id.* at 17.) At best, it is arguable whether this omission, to the extent it was an omission in light of the disclosures in the Form 10K, was misleading, and thus, it is not susceptible to resolution at the summary judgment stage of proceedings, at least not in plaintiffs' favor.

In any event, even if the Court were to assume the misleading nature of the omissions was undisputed, the Court would not find that the omission was material, irrespective of its disclosure. As with the other topic areas, plaintiffs fail to explain why knowledge of the negative liquidity covenant—one which the Court has already observed as appearing to be "fairly standard" (ECF No. 123 at 19), and nothing in the summary judgment papers has persuaded the Court to move from this observation—would be significant in making an investment decision. Plaintiffs' theory in this regard relies upon the premise that, without the negative liquidity covenant, TCM would have exhausted *all* of its cash on hand in funding the Mt. Milligan Project. The Court finds that premise to be unmoored from reality.

4. Money Spent and Capital Expenditures for Endako and Mt. Milligan

This topic area relates to various statements pertaining to the reporting of money spent on, and capital expenditures for, the Endako mine and the Mt. Milligan Project. Plaintiffs present the statements as follows. First, various investor presentations stated that the increase in the Endako expansion budget was $82.5 million. (ECF No. 211 at 11.) Second, various investor presentations stated that the amount of money spent on the Mt. Milligan Project from inception through September 30, 2011 was $383.1 million. (*Id.* at 11-12.) Third, various investor presentations stated that the amount of remaining capital expenditures as of September 30, 2011 on the Mt. Milligan Project was $882 million. (*Id.* at 12.) Fourth, various investor presentations stated that the amount of money spent on the Endako mine from inception through September 30, 2011 was $527 million. Fifth, various investor presentations stated that the amount of remaining capital expenditures on the Endako mine as of September 30, 2011 was $105.5 million. (*Id.*)

Plaintiffs assert that these statements were false because (1) it was known that the incremental cost of the Endako mine was $100 million, (2) the total amount of money spent on the Mt. Milligan Project

from inception through September 30, 2011 was $323.9 million, not $383.1 million, (3) the amount of remaining capital expenditures for the Mt. Milligan Project was $59.2 million more than reported, (4) the total amount of money spent on the Endako mine from inception was $484.9 million, not $527 million, and (5) the amount of remaining capital expenditures for the Endako mine was the combination of $42.1 million and $17.5 million more than reported. (*Id.* at 13-14.)

Defendants assert one principal argument in response to these claims: that plaintiffs are comparing inapposite numbers. (ECF No. 221 at 20.) More specifically, that the numbers presented in the investor presentations are accrual basis numbers, while the numbers plaintiffs rely upon to suggest the falsity of the investor presentations are cash basis numbers. (*Id.*) For the uninformed, there is apparently a difference between accrual basis and cash basis. *Compare* Black's Law Dictionary 24 (10thed.2014) (defining "accrual accounting method" as recording "entries of debits and credits when the revenue or liability arises, rather than when the income is received or an expense is paid"), *with id.* (defining "cash-basis accounting method" as considering "only cash actually received as income and cash actually paid out as an expense").

In reply, plaintiffs do not challenge defendants' argument that the numbers in the investor

presentations are not false, but rather state a number that is premised upon a different accounting method than the numbers upon which plaintiffs rely to contend falsity. (*See generally* ECF No. 223.)

The same is true of plaintiffs' reply statement of undisputed facts. (*See generally* ECF No. 224 at ¶¶ 59-63; *see id* at ¶ 63 (agreeing that accrual and cash basis numbers are "fundamentally different")). In any event, given defendants' explanation, the Court finds that none of the numbers stated in the investors presentations with respect to money spent on and capital expenditures for the Endako mine and the Mt. Milligan Project are false. In addition, plaintiffs make no argument that presenting accrual basis numbers in TCM's investor presentations was somehow misleading. Further, plaintiffs make no argument that, even if the investor presentations were misleading, the discrepancy in the accrual basis and cash basis numbers would be material to a reasonable investor.

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to their CUSA and fraudulent and/or negligent misrepresentation claims as they relate to any statements in investor presentations about the money spent on and capital expenditures for the Endako mine and the Mt. Milligan Project.

5. Mt. Milligan Project Cost Increase

Plaintiffs assert that, in TCM's Form 10K filed on February 24, 2011, TCM did not mention that the estimated capital construction cost for the Mt. Milligan Project was "likely to increase" by a minimum of $335 million from the $915 million budget that had previously been communicated to investors. (ECF No. 211 at 15.) Plaintiffs assert this lack of disclosure was misleading because, according to a presentation Terry Owen ("Owen") made to TCM's board of directors on February 23, 2011, the expected budget for the Mt. Milligan Project would be between $1250 million and $1425 million. (*Id.*) Plaintiffs assert that defendants possessed sufficient information to trigger disclosure requirements under regulations of the Securities Exchange Commission ("SEC") because the increase in the Mt. Milligan Project budget was a foreseeable event that would have a material effect on TCM's liquidity. (*Id.* at 16.) Plaintiffs further assert that Loughrey made misleading statements during a February 25, 2011 conference call with respect to the cost of the Mt. Milligan Project. (*Id.* at 16-17.) Plaintiffs also assert that TCM failed to disclose in its regulatory filings from the first quarter of 2011 through the first quarter of 2012 that approximately $100 million of liquidity would be needed to finance the working capital needs for the Mt. Milligan Project, even though TCM was aware of this liquidity need since February 23, 2011. (*Id.* at 15-16.)

Plaintiffs arguments with respect to the cost increase of the Mt. Milligan Project rely upon one document and a presentation at a board meeting on February 23, 2011. (*See* ECF No. 211 at 1516 (citing ECF No. 214 at ¶¶ 19-24)). Because of plaintiffs' reliance on the document, the Court describes it below. The document (the "Ares document") is a "Mt. Milligan Project Risk-Based Cost Estimate Uncertainty Analysis" prepared by Ares Corporation ("Ares"). (ECF No. 212-6 at 2.) The document is not signed or dated, but "February 2011" is placed on the front page. (*Id.* at 2-3.) Also on the front page, in bold, capitalized type at the top of the page is the word "DRAFT," and "draft" in smaller but still capitalized type is placed at the top of every page on the document. (*Id.* at 2-18.)

The document states that Ares has been contracted to conduct a "risk-based cost estimate uncertainty analysis" of the Mt. Milligan Project, with the objectives of the analysis being to identify major cost uncertainties and risks, incorporate those uncertainties and risks into baseline cost estimates, analyze the estimates in terms of confidence levels, and to evaluate the confidence levels to determine appropriate contingencies. (*Id.* at 5.) In performing this analysis, Ares analyzed the uncertainties and risks for two separate entities involved in the Mt. Milligan Project. (*Id.* at 8, 1117.) Ares estimated that the base total for the Mt. Milligan Project would be a combination of $244,780,205 and $959,691,190 (which

was the respective estimated base totals for the two separate entities). (*Id.* at 12-14.) The documents states that there were 35% and 18% probabilities, respectively, that the cost of the Mt. Milligan Project would not exceed the base totals. (*Id.* at 1516.) The document concluded with: "Given the early stages of engineering, the complexity associated with organizational and technical interfaces, and because the analyzed contingency for [the separate entities] includes design development uncertainty, risk mitigation, and general contingency, it is reasonable to select a total cost in the 95% [confidence level] range to reflect appropriate contingency. (*Id.* at 18.) Total cost with a 95% confidence level equated to a combination of $270,062,354 and $1,095,237,116. (*Id.* at 17-18.)

At the board meeting on February 23, 2011, an update was provided on the Mt. Milligan Project. (ECF No. 212-9 at 2.) Among many other topics to do with the Mt. Milligan Project, the board meeting presentation stated that the overall highest value for the project would be $1,415 million, and the probable lowest value would be in the range of $1,250 million. (*Id.* at 15.) "Complete definition" for the overall estimate was expected in "late March/April." The presentation listed as "[o]pportunities" further refinement of direct manhours, further refinement of "EPCM cost," and the opportunity to defer or delay project components. "Other considerations" were listed

as the exchange rate being up 15%, "escalation over 3 years," the rising price of mine plant related components, and the lack of engineering, construction, and management talent. (*Id.*) The presentation further stated that the largest variance to the project's estimate was "manhours to build the plant." (*Id.* at 16.) The presentation ends with priorities to, *inter alia*, integrate a "new EPCM scope," and have a control schedule, control estimate and development plan "for approval by early April." (*Id.* at 17.)

As plaintiffs see it, the information provided during the February 23, 2011 board presentation required defendants to disclose that the cost of the Mt. Milligan Project would increase by a minimum of $350 million. (ECF No. 211 at 15-16.) The Court does not see why. Plaintiffs rely upon a SEC regulation, known as "Item 303," which provides that disclosure of a trend, event, or uncertainty is required unless a company can conclude that it is not reasonably likely to occur or will not have a material effect on the company's capital resources. (*Id.* at 8-9, 16.) The problem for plaintiffs is the lack of conclusiveness to the February 23, 2011 board presentation, as well as the Ares document. Neither the presentation nor the Ares document definitively state what the cost of the Mt. Milligan Project will be. Instead, the presentation provides the board with estimates for the project, with the caveat that "[c]omplete definition" for the estimate might be available in late March or April. (ECF No.

212-9 at 15.) Plaintiffs appear to assert that the cost estimate was not reasonably likely to change, but the presentation provides no such clarity. Contrary to plaintiffs' assertion, the presentation does not state that the scope of the entire Mt. Milligan Project was frozen. (*See* ECF No. 214 at ¶ 24.) Instead, the presentation states that the scope of *engineering* is frozen, while a priority for the project was to integrate a new EPCM scope. (ECF No. 212-9 at 6, 17.) Further doubts are littered throughout the presentation. Notably, manhours to build the plant—the stated "largest variance" to the project estimate—needed "further definition," and EPCM needed "further detailing of costs." (*Id.* at 13, 16.) Moreover, the fact that the status of EPCM and engineering were 16% and 27%, respectively, does not provide support for plaintiffs' contention that costs were in some sense definitively known. (*See* ECF No. 21 4at ¶24.) If anything, the low percentages indicate that there was a long way to go in the project, with all attendant uncertainties that can entail.

The Ares document provides no more certainty. Notably, the document concludes by stating that engineering for the Mt. Milligan Project is still in the "early stages." (ECF No. 212-6 at 18.) As for the numbers in the Ares document, they are undoubtedly higher than the original estimate for the project, which was $915 million. However, the simple fact is that the Ares document is a "DRAFT." Plaintiffs provide no

explanation for why a draft document should have dictated that defendants disclose a possible cost increase for the Mt. Milligan Project. Plaintiffs certainly cite no support for the proposition that Item 303 dictated disclosure. (*See* ECF No.211at 16; ECF No. 223 at 5-6.)

In that regard, as the Tenth Circuit has explained, a duty to disclose under Item 303 arises when an event or uncertainty is "presently known to management," and the event or uncertainty is "reasonably likely to have material effects on the registrant's financial condition or results of operations." *Slater v. A.G. Edwards &Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013). In essence, plaintiffs wish to cast this inquiry as defendants knowing from February 23, 2011 that there was a possibility of an event or uncertainty—the potential cost increase to the Mt. Milligan Project. Assuming arguendo that this framing of the inquiry is accurate, the Court finds that TCM's disclosures in the Form 10K satisfied Item 303's requirements. Notably, the Form 10K reflects that TCM disclosed the following about the cost of the Mt. Milligan Project.

> ... TCM is currently conducting a detailed review of the Mt. Milligan project, including a review of the engineering and design of the equipment and facilities and the amount of capital

> expenditures required to construct and develop the project (which was originally estimated by Terrane to be C$915 million). This review is expected to be completed by the end of the second quarter of 2011.

(ECF No. 211-5 at 4.)

Plaintiffs make no attempt to explain why this disclosure in the Form 10K was inadequate or misleading. (*See* ECF No. 2 11 at 15-16; ECF No. 223 at 5-6.) It is an entirely accurate disclosure of the status of the Mt. Milligan Project. The evidence upon which plaintiffs rely supports that conclusion. The February 23, 2011 board presentation and the Ares document both reflect that a detailed review of the Mt. Milligan Project was ongoing; precisely what is said in the Form 10K. To the extent that plaintiffs believe that defendants should have disclosed estimates from the review mid-stream, there is simply no support that Item 303 requires such interim disclosures, at least not when defendants disclosed that a review was being conducted. In other words, to the extent that an event or uncertainty affecting TCM's liquidity was reasonably likely (i.e., an increase in the cost of Mt. Milligan Project), TCM disclosed that uncertainty by explaining to investors that the cost of the project was under review. Moreover, defendants disclosed that the review of the project would be completed by the end of

the second quarter of 2011. Thus, at least with respect to materiality, to the extent that a reasonable investor would find material information pertaining to the cost of the Mt. Milligan Project, a reasonable investor would have waited until completion of the review when the material information would be disclosed.[11]

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to their CUSA and fraudulent and negligent misrepresentation claims as they relate to statements in the Form 10K about the review of the Mt. Milligan Project.

Plaintiffs further argue that various statements made by Loughrey, and not corrected by Saxton, during a February 25, 2011 conference call with investors were misleading. Plaintiffs challenge the following statements that Loughrey made in response to questions from analysts. First, Loughrey stating that "[u]m, we don't know, of course, what that number [for cost inflation at the Mt. Milligan Project] will turn out to be," and "uh, we will find, whether or not the inflationary impact has a bearing on those numbers as they come out." (ECF No.211 at 16-17.)

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[11]The Court further notes with respect to materiality that plaintiffs provide no explanation of why a reasonable investor would find material the draft information in the Ares document or the information contained in the board presentation, neither of which, as explained, are definitive.

Plaintiffs assert these statements were misleading because they misled investors into believing that it was unknown whether the cost of the Mt. Milligan Project would increase. (*Id.* at 17.) Plaintiffs further assert that Loughrey would have known that a substantial portion of the cost increase to the project was due to inflationary factors. (*Id.* at 19.)

With respect to the latter, the evidence to which plaintiffs cite, deposition testimony from Owen, does not support the contention that a substantial portion of the cost increase was due to inflationary factors. Owen's testimony simply does not say that. (*See* ECF No. 211-9 at 98:22-99:6.) Moreover, the February 23, 2011 board presentation would seem to contradict plaintiffs' contention, given that it states that man hours were the "largest variance" to the Mt. Milligan Project budget. (*See* ECF No. 212-9 at 16.) As for the former argument, plaintiffs provide no support or evidence for the contention that investors were misled by Loughrey's statements. In any event, there is nothing misleading about those statements, given that Loughrey did not know what the number would be for any cost increase to the Mt. Milligan Project, and Loughrey told investors they would find out whether there had been an inflationary impact on the project's cost when TCM's review was complete. Plaintiffs' assertion that defendants knew since July 2010 that the cost of the Mt. Milligan Project would likely increase (ECF No. 211 at 18) is simply not true, given

that the exhibit to which they cite specifically states that the "likely increase in the capital estimate would be refined and discussed at the next meeting." (*See* ECF No. 214 at ¶ 15 (citing ECF No. 212-8 at 2)).

The second response to an analyst question upon which plaintiffs rely is Loughrey's statement that "any revision [to the cost of the Mt. Milligan Project], if one occurs, of the cost element of the project, I think by the time we do this call next quarter or before, we will be done that work. We will announce it as soon as we are done." (ECF No. 211 at 17.) Plaintiffs underline the words "if one occurs," so the Court presumes that it is those words which plaintiffs believe are misleading. (*See id.*) The Court does not understand why, at least not in the sense plaintiffs suggest that an investor would have been misled into believing that the cost of the Mt. Milligan Project would not be increasing. The question Loughrey was asked, and the answer he gave, do not mention whether the cost of the project would be increasing, and thus, the Court cannot discern why a reasonable investor would believe that Loughrey was somehow suggesting that a cost increase would not happen. Loughrey merely hedging his statement that a revision, if there was one at all, would arrive by the time of the next conference call, does not suggest that no revision will take place.

The third response to an analyst question upon which plaintiffs rely is Loughrey's statement that "the

number for 2011 will remain constant." (ECF No. 211 at 17.) Plaintiffs assert that this statement relates to the number for 2011 budgeted capital expenditures, which, apparently, for purposes of the analyst's question, was $350 million. (*See id.* at 17-18.) Plaintiffs assert this statement was false because the capital budget for 2011 increased $87 million and Loughrey knew this at the time of the conference call. (*Id.* at 19.) In support, plaintiffs cite a purported slide from a presentation on March 28, 2011 that shows capital expenditure guidance for Mt. Milligan of $350 million in 2011, and a purported slide from a presentation on July 1, 2011 with capital expenditure guidance for Mt. Milligan of $437 million in 2011—an increase of $87 million. (ECF No. 214 at ¶ 57 (citing ECF No. 211-3 at 7, 14)). The Court agrees that the purported slides show a difference in capital expenditure guidance of $87 million, other than that, though, the Court cannot agree that the evidence cited supports the contention that Loughrey knew his statement to the analyst on February 25, 2011 was false. The purported slides simply have nothing to do with the state of Loughrey's knowledge as to the capital expenditure number for Mt. Milligan in 2011. Even if the Court were to assume that Loughrey knew for a fact on February 25, 2011that the cost of the Mt. Milligan Project was to increase, the purported slides do not show that he knew that the capital expenditure number would increase in 2011.

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to their CUSA and fraudulent and/or negligent misrepresentation claims as they relate to any of Loughrey's statements during the February 25, 2011 conference call with investors.[12]

Plaintiffs also state that defendants failed to disclose that approximately $100 million in liquidity would be needed to finance the working capital startup needs of the Mt. Milligan Project, and TCM knew about this liquidity need since at least February 23, 2011. (ECF No. 211 at 15-16.) Assuming arguendo that the solitary, fleeting reference in an email to the estimated working capital needs of Mt. Milligan (*see* ECF No. 212-5 at 2) put defendants on notice of such a need, plaintiffs still do not explain how defendants' failure to disclose this information was either misleading or material. (*See* ECF No. 211 at 15-16; ECF No. 223 at 6.) In their reply, plaintiffs rely upon Item 303 (ECF No. 223 at 6), but, again, they do not provide any support that Item 303 required disclosure of this liquidity need. As discussed *supra*, in *Slater*, the Tenth Circuit explained that Item 303 required disclosure when, *inter alia*, it was reasonably likely

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[12]Because Saxton had no duty to correct statements from Loughrey that were not misleading, the Court also finds that plaintiffs are not entitled to summary judgment with respect to any claims related to her inaction.

that an event would have a material effect on the registrant's financial condition. *Slater*, 719 at 1197. Here, there is simply no explanation as to why the $100 million need for Mt. Milligan's working capital would have a material effect on TCM's financial condition, at least not when TCM disclosed that it had working capital of $435 million as of December 31, 2010, and $392.7 million as of March 31, 2011. (*See* ECF No. 221-3 at 23; ECF No. 221-5 at 10.) In addition, with respect to materiality, there is no explanation as to why a reasonable investor would find material information about the specific amount of working capital the Mt. Milligan Project needed to startup.

As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to their CUSA and fraudulent and/or negligent misrepresentation claims as they relate to the lack of disclosure of the Mt. Milligan Project's working capital startup needs.

6. The November 8, 2011 Conference Call and Follow-up Email

Because the question and answer at issue with respect to the November 8, 2011 conference call is not particularly amenable to easy summary, the Court includes the entire pertinent question and answer below.

Question (from Aronstein): ... A couple of quick questions. I read the presentation you guys put out yesterday and according to your latest lease, you are looking at about a shortfall of $80 'some odd' million dollars in terms of capital. You also, the sustaining capex for the next two years has been alluded to comes in around $80 million also for a combined $160 million. You also have a forecast for about 60 million pounds of moly for 2012-2013 combined and an average cash cost of 775. So if moly stays in the teens it looks like you make it pretty easy in terms of financing without having to do anymore raise of capital. So, my next question is, as people alluded to, the cost—you've got $311 million off the 25% interest from the gold stream transaction. If you run the numbers today, that looks to be the identical transaction looks well more than $500 million based if you used the same discount rate and I assume it's going to be a little bit better. Because as you said, some of the risk factors are out. You are also a year closer so that amount of interest is gone. My real question is: Your stock is selling at a price where the implied discount rate on the common

shares is somewhere over 20% if you run out the numbers as you project your mind. And it looks you can do financing in the 7 or 8% range because that's about what you did on the gold stream before, so my question is why aren't you doing transactions like this and buying back the common shares?

Loughrey's Answer: Well, I think all in due course. We have, I don't disagree with you about the numbers that you led up to in your question. You know, sort of laying out the sources and uses very quickly. However, given where we stand right now, we need the moly price to move up a little bit. There is, when you talk about those costs, there is some G&A costs that is added on to the mine site cost for the cost of moly production. And the moly market is an uncertain place and so while I agree with you that I think there is a very realistic scenario that says we don't need much if any additional sources of funds, but there is also the opportunity that the moly price won't move as nicely as that and we will need additional funds and while we don't think it will happen, the results of the opportunity for additional costs of the

project, which means that I don't think it's prudent for us to play it too close in terms of the numbers and some additional financing to make sure that we have enough makes sense. If that additional financing is in place, if when that additional financing is in place we make good progress on the projects, and the moly price moves back to better levels for us, then we will be in a completely different financial situation and look at our opportunities at that time. But for now, I think the primary purpose would be to sell that, to sell as much as we can of that and get the financing in place. Then we have a corporate strategic question which you were very correct in pointing out to. Given, if you look at the price and see what happens with the price, once we do that of the shares, then you might want to do something else and buy those back. But I don't think that's where we stand right now. We have first things first in terms of making sure we have enough to get those projects done. And we do think that as we do that our share prices have to move up as we've got a lot of upside potentials reaching to the share price right now.

(ECF No. 113-22 at 5-6.)

Plaintiffs excise from Loughrey's answer two specific comments: (1) Loughrey not disagreeing with Aronstein about the numbers leading up to his question; and (2) Loughrey agreeing that there is a very real scenario TCM would not need much if any additional funding. (ECF No. 211 at 20.) Plaintiffs assert that those comments were false or misleading because Loughrey knew that TCM needed between $250 and $400 million of additional capital to complete its projects, citing a board presentation from September 26, 2011. (*Id.* at 20-21 (citing ECF No. 212 at 3)). The cited board presentation states that TCM's "modeling indicates a need of $250-$400 million (depending on price and capital assumptions)"to fully pay for TCM's projects. (ECF No. 212 at 3.) Defendants assert that Loughrey's comments were not misleading because they were general and noted the uncertainty of projecting TCM's capital needs based on future molybdenum prices. (ECF No. 221 at 17.) Defendants further assert that the September 26, 2011 board presentation also reflected this uncertainty, as thepresentationstatedthattheprojectedfundingneedd ependedonpriceand capital assumptions. (*Id.*) In reply, plaintiffs do not appear to have made any further argument as to this topic area. (*See generally* ECF No. 223.)

The Court agrees with defendants that plaintiffs

are not entitled to summary judgment with respect to their claims involving Loughrey's comments during the November 8, 2011 conference call, especially when the comments are construed in defendants' favor as they must with respect to plaintiffs' motion for partial summary judgment. *See Adams*, 233 F.3d at 1246. At best, plaintiffs have handpicked two superficially misleading comments from Loughrey's long response to Aronstein's long question, and asked this Court to ignore the remainder of Loughrey's response. That the Court will not do. Although Loughrey may have not disagreed with the numbers used in Aronstein's question and stated that there was a very real scenario where TCM did not need additional funding, those comments are surrounded by Loughrey's comments that TCM needs additional funding if the company is to act prudently. In other words, the overarching theme of Loughrey's response, despite the two statements plaintiffs rely upon, is that TCM needs additional funding and will be seeking to acquire it. That theme was confirmed in Loughrey's response to a follow-up question from Aronstein. In that subsequent response, Loughrey stated that: "... We are certainly aware of the fact that the share price is undervalued and we think that the methodology we are going about to secure the financing first is the proper thing and then once that's in hand then we will take whatever the next appropriate step is." (ECF No. 113-22 at 6.)

The only thing left for plaintiffs is that Loughrey should have disclosed that TCM's internal modeling had projected a $250 to $400 million funding need, rather than simply saying that TCM needed an undisclosed amount of additional funding. However, plaintiffs provide no support that Loughrey needed to disclose TCM's internal modeling projections. Moreover, given the context of Aronstein's question, which did not ask Loughrey how much additional funding TCM might need to complete its projects, Loughrey did not speak falsely or mislead when he simply stated that additional funding (without a specific amount) was needed for TCM to act prudently, in light of fluctuating molybdenum prices and the potential for the cost of TCM's projects to increase. Plaintiffs also fail to explain why a reasonable investor would find Loughrey's comments material, when placed in the context of the entire response, given that Loughrey specifically stated that TCM would be seeking to acquire additional financing.

As a result, plaintiffs are not entitled to summary judgment with respect to their CUSA and fraudulent and/or negligent misrepresentation claims as they relate to Loughrey's statements during the November 8, 2011 conference call.

Plaintiffs also assert that an email from Solly, which was sent in response to an email from Aronstein, was false and misleading. (ECF No. 211 at

20.) Aronstein's email is, like his question to Loughrey, long, and contains numerous numbers related to TCM's financial position, including a capital expenditure shortfall of "83 million dollars," interest on a loan, the company's cash needs for the next two years, and molybdenum prices. (*See* ECF No. 211-22 at 2-3.) Aronstein also asks for help in understanding why TCM needs to act with "extreme prudence." (*Id.* at 3.) In response, Solly states that she should not have used the word "extreme" to describe TCM's prudence, but simply"prudence." (*Id.* at 2.) Solly then quoted a passage from Loughrey's response to Aronstein's question during the November 8, 2011 conference call; specifically, Loughrey's statement that, while there was a very realistic scenario in which TCM did not need much if any additional funding, in light of fluctuating molybdenum prices and the opportunity for cost increases at the company's projects, some additional financing made sense. Finally, Solly stated: "At a quick glance your analysis of the numbers appears to be correct, but I will take a closer look and get back with you if there are any discrepancies." (*Id.*) Plaintiffs take issue with this final statement, asserting that it was misleading because it conveyed to Aronstein that his calculations with regards to TCM's need to raise capital were correct. (ECF No. 211 at 20-21.) Defendants do not offer much in response to this specific claim, merely asserting that Solly made a "polite statement" in saying that she would take a closer look at Aronstein's numbers. (*See* ECF No. 221

at 17.)

Solly's email is a closer question than Loughrey's response during the November 8, 2011 conference call. This is because Solly makes a specific commitment to review Aronstein's numbers and get back to him if there are "any discrepancies." Thus, although both Solly and Loughrey stated that Aronstein's numbers appeared correct or do not disagree with them, unlike Loughrey, Solly specifically said that she would review the numbers and get back to Aronstein if there was a discrepancy. According to plaintiffs there was such a discrepancy—a $170 to $250 million discrepancy in TCM's need for additional capital. (*See* ECF No. 211 at 21.) Defendants do not challenge this statement in their response, and in their response statement of undisputed facts assert only that they dispute plaintiffs' "inaccurate characterization" of Solly's email. (*See* ECF No. 221 at 17; ECF No. 222 at ¶ 53.) Defendants also fail to explain why Solly's email is "[n]ot [m]aterial." (*See* ECF No. 222 at ¶ 53.)

That being said, plaintiffs have provided no support for their apparent contention that, as a matter of law, Solly's statement about reviewing Aronstein's numbers for any discrepancy and failing to get back to him was false or misleading. In addition, plaintiffs again fail to explain why Solly's failure to respond or a miscalculation in TCM's funding needs would be

material to a reasonable investor. (*See* ECF No. 211 at 20-21.) As a result, the Court finds that summary judgment in favor of plaintiffs with respect to their CUSA and fraudulent misrepresentation claims is not appropriate at this juncture.[13]

7. Telephone Calls on April 25, 2012

Plaintiffs assert that various statements made during telephone calls with Saxton and Solly on April 25, 2011 were false or misleading. (ECF No. 211 at 21-23.) The statements are as follows. First, Saxton and Solly stating that $200 million in variable costs remain at the Mt. Milligan Project. (*Id.* at 21.) Second, Saxton and Solly stating that TCM's banking group

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[13]As already explained, plaintiffs make no arguments whatsoever with respect to their negligent misrepresentation claim, and thus, the Court would not have granted them summary judgment as to any such claim in the context of Solly's email, irrespective of whether the Court had found them entitled to summary judgment with respect to their fraudulent misrepresentation claim. Defendants also assert that plaintiffs have failed to show, *inter alia*, (1) reliance with respect to the false misrepresentation claims, or (2) that any statements were made in connection with an offer to buy or sell a security with respect to the CUSA claims. (ECF No. 221 at 21.) Because the Court finds that plaintiffs are not entitled to summary judgment on other grounds, the Court does not address those arguments with respect to plaintiffs' motion for partial summary judgment. To the extent the same arguments are relevant and necessary to defendants' motion for summary judgment, the Court will address them at that time.

are being very cooperative and are trying to "renegotiate the liquidity provision." (*Id.*) Third, Saxton and Solly stating that TCM is examining other forms of financing including selling off another piece of the gold stream. (*Id.* at 22.) Fourth, Saxton and Solly conveying that "the funding shortfall was around $100 Million." (*Id.*)

As an initial matter, this topic area is complicated by the nature of the evidence plaintiffs rely upon to support their assertions regarding the content of the conversations on April 25, 2012 with Saxton and Solly. Other than the fourth statement *supra*, the only evidence upon which plaintiffs cite to support the *content* of the conversations on April 25, 2012 is Exhibit 2 to the motion for partial summary judgment. (*See* ECF No. 214 at ¶¶ 35-36, 38-40.) The Court does not know how best to describe Exhibit 2, but it contains what appears to be a timeline of events pertaining to the telephone calls on April 25, 2012, and purported statements made by Saxton and Solly during those calls. (*See* ECF No. 211-2.) What Exhibit 2 is not is signed, dated, or sworn. (*See generally id.*) In fact, it is not abundantly clear to whom the stream of memory contained in the document can be attributed, but, presumably it is Aronstein's memory. In their reply, plaintiffs effectively assert that the Court can ignore the shaky foundation of Exhibit 2 because the same stream of memory is contained in the SAC, which they assert is verified. (*See* ECF No.

223 at 6-7.) The problem for plaintiffs is that they do not cite the SAC in their statement of undisputed facts or their reply statement. (*See* ECF No. 214 at ¶¶ 35-36, 38-40; ECF No. 224 at ¶¶35-36,38-40.) Thus, the Court is unprepared to consider a document that plaintiffs do not cite.

That being said, Fed.R.Civ.P. 56(c)(2) provides that a party may object to a fact if the material cited in support cannot be presented in an admissible form. Although plaintiffs do not make this argument, making the argument for them, and construing Exhibit 2 in the most liberal way possible (which includes that the stream of memory is in fact Aronstein's), arguably, the purported content of the April 25, 2012 telephone conversations that is contained in Exhibit 2 can be presented in an admissible form at trial. Specifically, the Court does not discern why purported content of the telephone conversations can not be presented through Aronstein's own testimony. Defendants assert that Aronstein's recollection of the telephone conversations is inadmissible hearsay(ECF No. 222 at ¶¶ 35, 38-40), but that is certainly not true if plaintiffs use the testimony to show that a statement was made, rather than that the statement was true. For example, Aronstein could testify that Saxton and Solly told him that TCM's banking group were being very cooperative, not for the purpose of establishing that the banking group was, in fact, being very cooperative, but, instead, to establish that the statement itself was

made. This would be entirely permissible.

Thus, assuming for present purposes that Exhibit 2 can be presented in an admissible form at trial, the Court turns to the specific statements challenged by plaintiffs. With respect to the first statement, plaintiffs assert it is misleading because TCM had $310 million of uncommitted work still to do on the Mt. Milligan Project as of the end of April 2012. (ECF No. 211 at 22.) In support, plaintiffs cite two pages from a purported "Royal Gold Report[]". (ECF No. 214 at ¶ 44 (citing ECF No.212-11at 4-5.) On those two pages, someone (presumably plaintiffs) have circled two numbers and then added the numbers together to reach the figure of "310.0". (*See* ECF No. 212-11 at 4-5.) The two circled numbers are in a column titled "Forecast To Go," and a row for the "Project Total," which is presumably referring to the Mt. Milligan Project because that is labeled across the top of the respective pages. (*See id.*) Put simply, plaintiffs make no effort to explain how the numbers circled and the overall figure of "310.0" means that $310 million of uncommitted work remained for the Mt. Milligan Project. Moreover, the Court can discern no connection independently. As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to any of their claims as they relate to Saxton and Solly's purported statement that $200 million in variable costs remained at the Mt. Milligan Project.

Plaintiffs assert that the second statement is misleading for multiple reasons. Plaintiffs assert that the lead banker for the Credit Agreement was also the lead book-runner for "securities about to be sold." (ECF No. 211 at 22.) Next, plaintiffs assert that defendants expected final approval on existing loans from lenders on April 27, 2012. Plaintiffs further assert that, had there been a possibility of renegotiating the liquidity constraint, it would have been "in flight" as the same constraint existed in other loans. Finally, plaintiffs assert that the possibility of freeing up $75 million is not "broached as a possibility" in any of the minutes of TCM's board of directors or audit committee. (*Id.*) For this list of reasons why the second statement was misleading, plaintiffs cite only factual statement number 28. (*See id.*) In that factual statement, plaintiffs assert that the terms of a deal were given to existing lenders on April 11, 2012 in order to get the lenders' approval to amend an existing lending facility. (ECF No. 214 at ¶28.) Plaintiffs further assert that TCM was expecting the lenders' approval by April 27, 2012, and, as a result, all of the material terms of the deal would have been known to TCM and Saxton by that date. (*Id.*)

How these factual statements support the contention that TCM's banking group was not being very cooperative or was not trying to renegotiate a liquidity provision is not clear. Plaintiffs certainly do not attempt to explain the relevance between the

relied upon factual statements and the alleged misleading nature of defendants' statements. In their reply, plaintiffs assert that defendants have offered no evidence that a renegotiation was in progress (ECF No. 223 at 9), but, it is not defendants' responsibility to do so. With respect to plaintiffs' motion for partial summary judgment, plaintiffs have the burden of establishing no genuine issue of material fact. Moreover, at trial, plaintiffs would have the burden of establishing the falsity or misleading nature of defendants' statements. As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to any of their claims as they relate to Saxton and Solly's purported statement that TCM's banking group was being very cooperative and trying to renegotiate a liquidity constraint.

Plaintiffs assert that the third statement is misleading because TCM was "just days away" from a capital raise that had been contemplated since at least March 2012. (ECF No. 211 at 22.) Plaintiffs assert that, had there been any discussions about a gold stream sale, defendants would not have been finalizing another deal. (*Id.*) Plaintiffs further assert that, in a board presentation on April 10, 2012, TCM's management considered a gold stream transaction too expensive. (*Id.* at 22-23.) Plaintiffs only cite support for the latter assertion—that TCM's management considered a gold stream transaction too expensive. (*See id* at 23 (citing ECF No. 214 at ¶ 69)). Therefore,

the Court does not consider the other unsupported ruminations of plaintiffs. As for the latter assertion, though, defendants do not dispute that the evidence shows that TCM's management recommended, at a board meeting on April 10, 2012, that a gold stream transaction would be too expensive and imposed a higher risk for the company's bottom line in future years. (ECF No. 222 at ¶ 69.) Instead, defendants dispute the meaning of that recommendation; specifically, defendants dispute whether it meant that TCM was not discussing alternatives such as a gold stream transaction. (*See id.*)

At this juncture, the Court finds that, although plaintiffs' evidence may be persuasive, it does not establish as *undisputed* that TCM was not examining other forms of financing such as a gold stream sale. This is certainly the case with respect to the falsity of the purported statement. As for whether it was misleading, this depends in no small measure on the construction of the word "examining" in the purported statement. Arguably, as defendants contend, "examining" could mean that TCM had discussed alternative financing arrangements such as a gold stream sale. Arguably, it could be construed as meaning something very different, such as that a gold stream sale was still a viable financing option and had not received a negative recommendation from TCM's management. If the latter is believed, then Saxton and Solly's purported statement could very well be

misleading. But that is a factual dispute, and thus, is not amenable to resolution at this stage of proceedings. As a result, the Court finds that plaintiffs are not entitled to summary judgment with respect to any of their claims as they relate to Saxton and Solly's purported statement that TCM was examining other forms of financing including selling another piece of the gold stream.[14]

With respect to the fourth and final statement, plaintiffs assert that it was false or misleading because defendants knew "for certain" that TCM's funding shortfall was "in the neighborhood of between $400 Million and $450 Million," which plaintiffs assert was proven by a capital raise that occurred shortly thereafter. (ECF No. 211 at 23.) Plaintiffs, though, cite no evidence or factual statement to support this assertion; specifically, the assertion that defendants knew for certain that TCM's funding shortfall was between $400 and $450 million, and this was proven by a capital raise occurring shortly after the telephone

[14]Again, defendants assert that plaintiffs have failed to show reliance with respect to the false misrepresentation claims, or that any statements were made in connection with an offer to buy or sell a security with respect to the CUSA claims. (ECF No. 221 at 21.) Again, because the Court finds that plaintiffs are not entitled to summary judgment on other grounds, the Court does not address those arguments. To the extent the same arguments are relevant and necessary to defendants' motion for summary judgment, the Court will address them at that time.

conversation. (*See id.*) The evidence plaintiffs cite is an email purportedly confirming Aronstein's understanding (from the telephone conversation) that TCM's funding shortfall was $100 million. (*See id.* (citing ECF No. 214 at ¶ 43)). Putting aside for now that defendants very much dispute whether Aronstein's email confirms such an understanding (*see* ECF No. 221 at 18-19; ECF No. 222 at ¶ 43), even if it did, it does not support plaintiffs' assertion that Saxton and Solly knew that TCM's funding shortfall was between $400 and $450 million. As a result, plaintiffs are not entitled to summary judgment with respect to any of their claims as they relate to Saxton and Solly's purported statement that TCM's funding shortfall was around $100 million.

Accordingly, for all of the reasons discussed *supra*, the Court DENIES plaintiffs' motion for partial summary judgment.[15]

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[15]At the very end of plaintiffs' motion for partial summary judgment, they assert that the evidence supports their "invocation of scheme liability" for purposes of CUSA Section 36b-4(1). (ECF No. 211 at 25-26.) Plaintiffs provide no support for any of their assertions that defendants engaged in a scheme to defraud. (*See id.*) The section discussing Section 36b-4 is missing any citation to evidence or case law support. (*See id.*) The Court is not going to spend its time finding that support, and also then making legal arguments, for plaintiffs. As such, plaintiffs are not entitled to summary judgment with respect to any claims they may have raised under CUSA Section 36b-4.

B. Defendants' Motion for Summary Judgment

1. Splitting the Costs of the Endako Mine

Defendants assert that plaintiffs have failed to prove that their statements with respect to the splitting of costs for the Endako mine were false or misleading because plaintiffs' theory of why those statements were false is baseless. (ECF No. 207 at 3-4.) More specifically, defendants assert that plaintiffs' theory regarding Section 9.8—that Section 9.8 required TCM to pay 100% of cost overruns—does not establish that defendants' statements were false or misleading. (*Id.*)

The Court agrees with defendants. In response, plaintiffs merely assert that, because the Endako mine budget had increased to $550 million, Section 9.8 had been triggered. (ECF No. 219 at 11.) Why the purported triggering of Section 9.8 rendered defendants' statements about the splitting of costs false or misleading is unexplained. (*See id.*) Presumably, it is because of plaintiffs' interpretation of Section 9.8 that when the Endako mine occurred cost overruns, all of those overrun costs were TCM's responsibility. But, as the Court explained *supra*, that it merely plaintiffs' *interpretation* of Section 9.8; it is not a fact or evidence of the falsity or misleading

nature of defendants' statements. Defendants had a different interpretation of Section 9.8, and no evidence has been presented of that interpretation's falsity or misleading nature, especially given that the one documented dispute arising from Section 9.8 did not end in a result matching plaintiffs' interpretation. The result may not have matched defendants' interpretation either, but that does not mean defendants' interpretation was false or misleading.

As a result, because plaintiffs have not set forth any evidence to show that defendants' statements concerning the splitting of costs for the Endako mine were false or misleading,[16] defendants' are entitled to summary judgment with respect to all claims relating to those statements.

2. Equipment Financing

Defendants' motion for summary judgment did not raise an argument as to any purported false or misleading statements with respect to TCM's equipment financing. (*See generally* ECF No.207.) As discussed *supra*, this was presumably because no claim related to equipment financing was raised in the SAC. In plaintiffs' response, they assert simply that

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[16]The Court notes that plaintiffs have also not presented any evidence (or argument) that defendants' statements in this regard were material to a reasonable investor. (*See* ECF No. 219 at 11).

defendants' statements—that $450 million was available from the Credit Agreement and equipment financing—were false because only$432 million was available. (ECF No. 219 at 11.) No further argument or explanation is made as to why defendants' statements were false, or why the statements were material. (*See id.*) The Court is not going to engage in the game of making plaintiffs' arguments for them, or attempting to understand how the factual statement to which they cite indicates the falsity of defendants' statement that $150 million could be available in equipment financing, when the only evidence plaintiffs cite is defendants' subsequent statement that they had $132 million in equipment financing—a factually true statement in light of defendants' explanation that the $132 million number represents an actual equipment financing loan. (*See* ECF No. 220 at ¶ 61; ECF No. 226 at ¶ 61.)

As a result, because plaintiffs did not raise any claims in the SAC related to statements about the availability of capital from equipment financing, and because plaintiffs have not provided any evidence that any such statements were false, misleading, or material, the Court finds that defendants are entitled to summary judgment with respect to any claims in this regard.

3. Credit Available Under the Credit Agreement

In their motion for summary judgment, defendants raise the argument that plaintiffs had actual knowledge of the negative covenants contained in the Credit Agreement, in light of disclosures made in the Form 10K. (ECF No. 207 at 12-14.) Although defendants do not specifically assert in their motion for summary judgment that plaintiffs read the Form 10K prior to making share purchases in March 2011, they do add that assertion in their reply. (*See id*; ECF No. 225 at 10-11.) In their response, plaintiffs assert that they had no due diligence obligation with respect to defendants' statements about the Credit Agreement, citing this Court's June 20, 2016 Opinion. (ECF No. 219 at 8.)

As the plaintiffs' quoted passage from that Opinion indicates, however, that finding was made as of the juncture of a motion to dismiss. In other words, the Court assumed the truth, as it must, of plaintiffs' allegations that they did not read the Form 10K prior to any of the pertinent events. As discussed *supra*, plaintiffs can now no longer rely upon their unsupported allegations, and, instead, must present evidence of their lack of actual knowledge of the Form 10K. In light of Aronstein's deposition testimony that he read the Form 10K prior to March 2011 (ECF No. 113-7 at 62:19-22), and the Court's finding in the June 20, 2016 Opinion that Aronstein cannot shield his eyes from disclosures in a document that he has actually read(*see* ECF No. 123 at 13-16), plaintiffs have failed

to present any evidence rebutting defendants' evidence that plaintiffs had knowledge of the negative covenants that form the basis of their claims with respect to the Credit Agreement. As a result, on that basis alone, the Court finds that defendants are entitled to summary judgment with respect to plaintiffs' CUSA claim relating to credit available under the Credit Agreement.

For the sake of completeness, the Court also finds that plaintiffs have failed to present any evidence of the falsity of defendants' statement that the entirety of the credit under the Credit Agreement was available. As discussed *supra*, the terms of the Credit Agreement, specifically, the definition of "Consolidated Liquidity," demonstrate that the entirety of the credit was available. As for the implied statement that cash on hand and the Credit Agreement were independent sources of funding, even if this statement could be construed as misleading (because the use of some cash and/or some of the Credit Agreement was restricted by the negative liquidity covenant), plaintiffs have provided no evidence that this statement was material to a reasonable investor, especially in light of the disclosures made in the Form 10K. Plaintiffs assert that the statement was material because the negative covenant "forces" defendants to raise additional funding (ECF No. 219 at 12), but plaintiffs provide no evidence that the negative covenant alone or in part forced defendants to raise additional capital. (*See id.*)

4. Money Spent and Capital Expenditures for Endako and Mt. Milligan

In their motion for summary judgment, defendants raise the argument that the numbers plaintiffs rely upon to allege the falsity of statements pertaining to money spent on and capital expenditures for the Endako mine and the Mt. Milligan Project are not false because the numbers used in defendants' investor presentations were accrual basis numbers, while the numbers used by plaintiffs to demonstrate falsity are cash basis numbers. (ECF No. 207 at 11-12.) In response, plaintiffs argue that the investor presentations contain a row labeled "Spent Since Inception," and "Spent" in this context means "cash out the door." (ECF No. 219 at 12-13.) Plaintiffs assert that this means that the numbers in the investor presentations overstate the cash already paid. (*Id.*)

Plaintiffs rely upon the deposition testimony of Owen. (*Id* at 13 (citing ECF No. 220 at ¶¶ 32-33)). Owen's testimony does not support plaintiffs' contentions however. In the portion of testimony to which plaintiffs cite, Owen is asked a very general question about "some of the terms that are used in your charts," specifically the terms "committed and spent ... and actual," and how those terms "relate to one another in terms of the [sic] spent on a project." (*See* ECF No. 211-9 at 224:23-225:7.) In response,

Owen states that "actual and spent are typically the same, as far as I'm concerned from a project perspective." (*Id.* at 225:8-10.) Owen continues with explaining that "[c]ommitted" "is when, say, we give a purchase order to somebody for a piece of equipment or we hire a contractor for a certain amount of money. We've—we've committed a cost. When it's paid, it's spent." (*Id.* at 225:11-15.)

Plaintiffs apparently believe that this testimony indicates that, contrary to defendants' argument, TCM's investor presentations were not done on an accrual basis. The Court does not understand why. First, it is not clear from the question whether Owen is being asked to explain the specific labels plaintiffs contend are misleading or false, i.e, the "Spent Since Inception" label. Rather, the question appears to be asking Owen, generally, about his understanding of certain terms. Second, even if Owen is commenting about specific terms used in specific investor presentations, Owen states that the explanation he gives of the words "accrual," "spent," and "committed" are his meaning of those terms from a "project perspective." (*See id.* at 225:8-10.) Nowhere does Owen testify that the phrase "Spent Since Inception" does not mean the numbers under that column are not calculated on an accrual basis. In other words, merely because, from a project perspective, actual and spent may mean money out of the door, that does not mean, from the perspective of presenting money spent since

inception in an investor presentation, the money presented is not in an accrual basis form. Owen's testimony simply does not go to that issue.

Plaintiffs also assert, in a different factual statement, that it was deceptive for TCM to present a column of numbers based upon accruals side-by-side with a column of cash resources. (ECF No. 220 at ¶ 35.) However, plaintiffs present no evidence to support this assertion (*see id.*), and thus, the Court does not further consider it. Plaintiffs also assert that, on numerous occasions, defendants have taken the position that their numbers are "cash numbers." (*Id.*; ECF No. 219 at 12 n.3.) Plaintiffs assert that defendants"should be held to account for this lie" pursuant to Fed.R.Civ.P. 11. Plaintiffs provide no legal support for this argument, and, except for a citation to a page in one of defendants' other pleadings (a page from which the Court cannot discern any "lie"), no evidence to support it either. (*See* ECF No. 219 at 12 n.3; ECF No. 220 at ¶ 35.) Therefore, the Court does not further consider this argument.

As a result, because plaintiffs have not presented any evidence to refute defendants' assertions that the challenged numbers in the investor presentations were different to numbers in other documents due to the accounting method used to calculate those numbers, defendants are entitled to summary judgment with respect to all of plaintiffs'

claims as they relate to the money spent on and capital expenditures for the Endako mine and the Mt. Milligan Project.

5. Mt. Milligan Project Cost Increase

Defendants assert that their statements with respect to the cost of the Mt. Milligan Project were not false or misleading because, in February 2011, TCM was not required to disclose a "speculative" budget range for the project. (ECF No. 207 at 7-8.) Defendants assert that TCM disclosed to investors that the Mt. Milligan Project was undergoing a detailed review and the review was expected to be completed in the second quarter of 2011. (*Id.* at 8.) Defendants further assert that they never told investors that the Mt. Milligan Project could be completed for C$915 million. (*Id.*) In response, plaintiffs assert that defendants knew in July 2010 that the "likely" increase in the cost of the Mt. Milligan Project would be around $248 million. (ECF No. 219 at 13.) Plaintiffs assert that, in February 2011, Ares presented an estimate of baseline costs for the Mt. Milligan Project, estimating that the cost would be approximately $1365 million—$550 million more than the existing budget. (*Id.* at 14.) Plaintiffs further assert that, at a February23, 2011 board meeting, Owen explained that the likely range of the Mt. Milligan Project would be between $1250 and $1425 million. (*Id.*)

As this claim pertains to TCM's disclosures in its SEC filings, resolution turns on whether TCM had a legal duty to disclose information about an estimated cost increase in the Mt. Milligan Project. As the Court explained *supra*, TCM did not have a legal duty to disclose based upon the Ares document and the February 23, 2011 board presentation. The Ares document was a draft estimate that specifically noted that the Mt. Milligan Project was in the early stages of engineering. (ECF No. 212-6 at 18.) Thus, even construing inferences that can be construed from the Ares document in plaintiffs' favor, the Court does not construe it as imposing a legal duty on TCM to disclose the conclusions of the document.

As for the February 23, 2011 board presentation, that too is surrounded by indefiniteness with respect to its estimate of the project's budget, as it specifically states that a complete definition was expected in late March/April, further refinement was needed to direct man hours and EPCM cost, and there was an opportunity to defer or delay project components. (*See* ECF No. 212-9 at 15.) Although plaintiffs may accurately assert that defendants have presented no evidence that TCM intended to change the scope of the Mt. Milligan Project or do anything else that may change the way the budget was calculated, that still does not mean that TCM was required to disclose an estimated cost increase to the Mt. Milligan Project when review of that budget was

still undoubtedly ongoing, and when TCM disclosed to investors that the review was ongoing and expected to end by the second quarter of 2011. Moreover, relatedly, plaintiffs fail to explain (other than asserting that the potential cost increase was "massive[]" (ECF No. 219 at 16)) why information about the Ares document or the estimated cost in the February 23 2011 board presentation would have been material to a reasonable investor, in light of defendants' disclosures that review of the Mt. Milligan Project would not be complete until the second quarter of 2011. In other words, plaintiffs fail to explain why disclosing the draft, preliminary numbers plaintiffs rely upon would have been material to a reasonable investor when, even if disclosed, such an investor would have known that those numbers were subject to change come disclosure of the final projected budget for the Mt. Milligan Project in the second quarter.

Plaintiffs' claims related to the Mt. Milligan Project's cost increase also pertain to statements made by Loughrey during a February 25, 2011 conference call with investors. (ECF No. 219 at 17-18.) Plaintiffs assert that Loughrey's statements convey to investors that TCM's engineering review of the Mt. Milligan Project had produced "no real information as to cost and whether or not it might increase." (*Id.* at 17.) Plaintiffs rely upon the same evidence they relied upon with respect to their motion for partial summary judgment to support the assertion that Loughrey's

statements during the February 25, 2011 conference call were false or misleading. (*See* ECF No. 219 at 17 (citing ECF No. 220 at ¶¶ 87-90)). Plaintiffs assert that, once Loughrey elected to speak, he was required to speak fully and truthfully. (ECF No. 219 at 18.) The circumstances of the case to which plaintiffs cite, *S.E.C. v. Curshen*, 372 F. App'x 872 (10th Cir. 2010), are not the same as here, given that in *Curshen* the defendant made voluntary postings to the Internet vouching for the management of a company. *Id.* at 880-881. Here, Loughrey was merely answering questions put to him by analysts. (*See* ECF No. 221-4 at 2-3.)

Moreover, none of Loughrey's responses were false or misleading. In the first question plaintiffs rely upon, Loughrey was asked whether the Mt. Milligan Project would see similar inflation costs to the Endako mine, and Loughrey responded that he did not know and TCM would find out when the review was complete. (*Id.* at 2.) In the second question, Loughrey is asked for a timeline of when the Mt. Milligan Project review would be complete, and Loughrey responded that, if a revision to the project's cost occurred, he would expect it in the next quarter. (*Id.* at 2-3.) In the third question, Loughrey is asked whether a number for 2011 is "mostly in the back half of 2011," and Loughrey responded negatively as the number was evenly spread throughout 2011 and the number would remain constant. (*Id.* at 3.) As discussed *supra*, those

responses were neither false or misleading.

Plaintiffs also assert that defendants made other false or misleading statements with respect to the Mt. Milligan Project. First, defendants failed to disclose that TCM would need approximately $100 million to finance the working capital needs of the project. (ECF No. 219 at 17.) Second, defendants failed to disclose that approximately $90 million in capital costs were excluded from the $1265 million Mt. Milligan Project budget. (*Id.*) Plaintiffs, though, provide no explanation for why defendants' disclosures in this regard were false, misleading, or material. (*See id.*) In addition, plaintiffs provide no answer to defendants' assertion that TCM was not required to disclose working capital and capital costs when the company disclosed the increase to the capital expenditure budget for the Mt. Milligan Project. (*See* ECF No. 226 at ¶¶ 64-65.) In the reply statement of undisputed facts connected to plaintiffs' motion for partial judgment, plaintiffs did have an opportunity to respond to the same assertions from defendants. (*See* ECF No.224 at ¶11.) There, plaintiffs replied that a book authored in part by Owen demonstrated the need to include working capital and capital costs in the capital expenditure budget for the Mt. Milligan Project. (*Id.*) However, Owen's "[h]andbook" does not so provide. (*See* ECF No. 224-6.) In the handbook, it states that the "principal elements" of a capital cost estimate are direct cost, indirect cost, owner's cost, and

contingency. (*Id.* at 3.) In other words, not working capital or financing costs. The handbook goes on to say that working capital and financing costs should be "capture[d]" in any "project budget presented to the authorizing body". (*Id.*) Contrary to plaintiffs' belief, that does not mean that working capital and financing costs are part of the capital cost estimate, or that those costs should have been disclosed in defendants' disclosure of the capital expenditure budget for the Mt. Milligan Project. The handbook only states that those costs should be presented to an "authorizing body,"and there is no suggestion that, that is the situation here. As a result, for all of the reasons discussed with respect to this topic area, the Court finds that plaintiffs have failed to present any evidence of genuine issue of material fact with respect to the misleading or material nature of defendants' statements as they relate to the cost of the Mt. Milligan Project, and thus, defendants are entitled to summary judgment as to all CUSA and fraudulent and/or negligent misrepresentation claims in that regard.

6. The November 8, 2011 Conference Call and Follow-up Email

The question and answer from the conference call and the email from Solly that are at issue with respect to this topic area are set forth in detail *supra*, thus the Court does not spend time repeating them

here. In their motion for summary judgment, defendants do not specifically address the question and answer or Solly's email in discussing the November 2011 conference call. (ECF No. 207 at 12-14.) In their reply, defendants spend a total of three lines directed toward the conference call part of this topic area, asserting that Loughrey's response was "polite" and explained Loughrey's different perspective, but did not make any untrue statements. (ECF No. 225 at 10.) In other words, defendants provide no argument or explanation with respect to whether Loughrey's statements were *misleading*. Thus, the Court would have to engage in its own legal argument on defendants' behalf to justify granting summary judgment in their favor on the ground that Loughrey's statements were not misleading.[17]

Defendants also fail to address Solly's email at all. In light of the Court's discussion *supra*, construing the evidence in plaintiffs' favor for purposes of

[17]If the Court were to engage in its own little debate, the issue would be too close to call for purposes of summary judgment. As the Court explained *supra*, the overarching theme of Loughrey's response appears to be that he believes it to be prudent for TCM to obtain additional financing. Plaintiffs selective reliance on a single passage, stating that there is a very real scenario where TCM would not need any additional funding, appears to be precisely that. However, the Court is unprepared to find that there is no genuine issue of material fact as to whether Loughrey's statements *in toto* were misleading. The Court believes that question would best be decided by a jury.

defendants' motion for summary judgment, there is a genuine issue of material fact as to whether Solly's email was misleading; particularly, that part of the email stating Solly will get back to Aronstein if there is any discrepancy in his numbers.

Defendants, though, have backup arguments. First, with respect to plaintiffs' CUSA claims, defendants argue that plaintiffs have failed to present any evidence that these statements were made in connection with an offer to buy or sell a security. (ECF No. 207 at 15-16; ECF No. 225 at 14-15.) Defendants argue that plaintiffs purchased securities on the open stock market from anonymous sellers, and none of plaintiffs' stock purchases or sales "correlate" with the dates of defendants' statements. (ECF No. 207 at 16; ECF No. 225 at 14.) For example, defendants assert that plaintiffs' trading records show that plaintiffs did not purchase TCM shares until November 22, 2011—eleven days after Solly's email to Aronstein on November 11, 2011. (*See* ECF No. 207 at 16.) Plaintiffs' response to this line of attack is meager at best. Plaintiffs assert that the "[l]aw of the [c]ase" establishes that defendants are sellers under the CUSA. (ECF No. 219 at 6.) Plaintiffs explanation of this argument is completely incorrect, though, as, contrary to plaintiffs' apparent belief, this Court has never found that defendants are sellers for purposes of the CUSA. In fact, as plaintiffs appear to be aware (*see id.* at 7 n. 1), in a prior Opinion, this Court specifically

noted that defendants had failed to argue they were not sellers under the CUSA (*see* ECF No. 164 at 3-4 n.3). Thus, it is not law of the case that defendants are sellers for purposes of the CUSA.

Plaintiffs' alternative argument is that defendants are sellers because "the entirety of TCM's Investor Relations department and the conference calls and investor presentations that they produced, were done so in an effort to sell the shares in TCM." (ECF No. 219 at 7-8.) Plaintiffs rely upon the deposition testimony of Solly for this assertion. (*Id.* (citing ECF No. 220 at ¶ 17)). Solly's testimony, though, does not support the assertion, at least not to the extent necessary to show that defendants were sellers for purposes of the CUSA.

Before explaining why though, the Court observes one of the main problems with respect to the issue of whether defendants were sellers for purposes of the CUSA is that the parties have not attempted to explain who or what a "seller" is under the statute. (*See* ECF No. 207 at 15-16; ECF No. 219 at 6-8.) This does not help the Court because the issue is not a simple one—there is no binding precedent on the issue. Nonetheless, as the Court explained in its June 20, 2016 Opinion, the CUSA is modeled upon the 1956 Uniform Securities Act, and the relevant provision of the 1956 Uniform Securities Act is modeled upon § 12(2) of the federal Securities Act of 1933 ("§ 12(2)").

Although the meaning of "seller" under § 12(2) has not been definitively ruled upon, the meaning of the same term in § 12(1) of the Securities Act of 1933 ("12(1)") has been, and courts have applied § 12(1)'s meaning to § 12(2). *See, e.g.*, *Gorga v. Uniroyal Chem. Corp.*, 697 A.2d 731, 734 (Conn. Super. Ct. 1996) (summarizing cases). Notably, in *Pinter v. Dahl*, 486 U.S. 622, 108 S. Ct. 2063 (1988), the U.S. Supreme Court held that a "seller" for purposes of §12(1) is anyone who passes title in a security or anyone who solicits the purchase of a security motivated at least in part by a desire to serve his own financial interests or those of the securities owner. *Id.* at 642, 647. Like at least one Connecticut court, for purposes of this case, the Court will apply that definition of "seller" to plaintiffs' CUSA claims. *See Gorga*, 697 A.2d at 735-736.

Here, there is simply no evidence that defendants either passed title to any security or solicited the purchase of any security with respect to Loughrey's statements during the November 8, 2011 conference call or Solly's November 11, 2011 email. Solly's deposition testimony certainly does not provide any such evidence. Plaintiffs rely upon three passages from Solly's deposition. The first, essentially Solly testifying that she was hired to tell a story in order to try and increase institutional ownership, does not relate to her work at TCM. Instead, Solly is describing her role while working for a different company, "Cirrus Financial". (*See* ECF No. 211-8 at 11:6-14:19.) Thus, it

is irrelevant. The second, Solly testifying that the "objective of investor relations is to have a fully-valued liquid stock," is a response explaining the general purpose of a person working in investor relations and in response to a question asking Solly about her work for Cirrus Financial. (*See id* at 11:6-14:24.) Thus, the Court does not find this testimony relevant either. The third is Solly testifying that she wanted people to be able to buy and sell stock. (*Id.*at15:15-18.) Assuming that Solly is talking about TCM's stock, that is still not evidence that Solly's email or Loughrey's statements during the conference call were attempts to solicit plaintiffs' purchase of TCM securities.. Solly's explanation of one of the general purposes of her work is simply not relevant evidence in that regard. *See In re Westinghouse Sec. Litig.*, 90 F.3d 696, 717 n.19 ("An allegation of direct and active participation in the solicitation of the *immediate sale* is necessary for solicitation liability, i.e., where the section 12(2) defendant is not a direct seller.") (emphasis added).

As a result, the Court finds that, because plaintiffs have presented no evidence to create a genuine issue of material fact as to whether defendants were sellers for purposes of their CUSA claims, defendants are entitled to summary judgment as those claims relate to Loughrey's statements during the November 8, 2011 conference call and Solly's November 11, 2011 email.

That still leaves, however, plaintiffs' fraudulent and negligent misrepresentation claims relating to those statements and email. One of the defendants' arguments with respect to these claims is that plaintiffs have failed to show that they relied on defendants' statements. (ECF No. 207 at 18-19; ECF No. 225 at 15.) More specifically, defendants assert that Aronstein made the decision whether plaintiffs bought or sold TCM shares, and Aronstein's decision was based upon his personal assessment after reviewing his "model," his appetite for risk, and the market. (ECF No. 207 at 18-19.) In addition, defendants assert that Aronstein did not retain the output when he ran his "model," and plaintiffs cannot prove that any factual statement dictated the "model's" output. (*Id.* at 19.)

In response, plaintiffs acknowledge that their fraudulent misrepresentation claims have reliance as an element.[18] (*See* ECF No. 219 at 3 (characterizing the requirement as needing to prove that plaintiffs acted on a statement to their injury)). Despite knowing

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[18]In their response, as in their motion for partial summary judgment, plaintiffs again fail to discuss (in any way) their claims for negligent misrepresentation. (*See generally* ECF No. 219.) In other words, plaintiffs fail to respond to defendants' arguments that summary judgment should be granted in defendants' favor with respect to those claims (*see* ECF No. 207 at 19-20; ECF No. 225 at 15), which is another reason for granting summar judgment in favor of defendants with respect to any such claims.

that, plaintiffs do not address the issue of reliance when discussing Loughrey's statements during the November 8, 2011 conference call or Solly's November 11, 2011 email. (*See generally id.* at 18.) As a result, because defendants have presented undisputed evidence that plaintiffs' investment decisions were based, at times, on a "model" and, at other times, on Aronstein's appetite for risk or the state of the market (ECF No. 220 at ¶¶ 4-7), and plaintiffs have provided no evidence to show that those factors were influenced by any of Loughrey's statements during the November 8, 2011 conference call or Solly's November 11, 2011 email, defendants are entitled to summary judgment with respect to any fraudulent or negligent misrepresentation claims relating to those statements and email.

7. Telephone Calls on April 25, 2012

Although defendants' motion for summary judgment does not address the four statements addressed in dealing with this topic area *supra* (ECF No. 207 at 14-15), in response, plaintiffs raised the same four statements (ECF No. 219 at 18-19), and defendants addressed them in their reply (ECF No. 225 at 11-12). Therefore, the Court confines its analysis to those four statements, which, for ease of reference are: (1) Saxton and Solly stating that $200 million in variable costs remain at the Mt. Milligan Project; (2) Saxton and Solly stating that TCM's

banking group are being very cooperative and are trying to "renegotiate the liquidity provision"; (3) Saxton and Solly stating that TCM is examining other forms of financing, including selling off another piece of the gold stream; and (4) Saxton and Solly conveying that "the funding shortfall was around $100 Million." (ECF No. 219 at 18-19.)

The Court's analysis with respect to the first statement remains unchanged. As discussed *supra*, the evidence upon which plaintiffs rely does not establish that Saxton and Solly's purported statement about the variable costs remaining at the Mt. Milligan Project was false or misleading.[19] As a result, because plaintiffs have failed to present any evidence showing the falsity or misleading nature of Saxton and Solly's statement in this regard, defendants are entitled to summary judgment with respect to all claims relating to the same.

With respect to the second statement, the Court's analysis is mostly unchanged. The only difference is that, unlike in the context of plaintiffs' motion for partial summary judgment, on this occasion, defendants have the burden of demonstrating

[19]The Court further notes that in presenting evidence related to this statement plaintiffs do so in response to a factual statement that has nothing to do with the variable costs remaining at the Mt. Milligan Project. (*See* ECF No. 220 at ¶ 51.) As such, plaintiffs have not properly presented evidence related to this statement.

the absence of a genuine issue of material fact. Here, defendants argue there is no genuine issue of material fact because there is no evidence that Saxton and Solly spoke falsely or misled plaintiffs when they said that TCM's banks were being very cooperative and were trying to renegotiate a liquidity provision. That is all defendants are required to initially assert, given that plaintiffs will hold the burden of showing the falsity or misleading nature of Saxton and Solly's statements at trial. *See Celotex Corp.*,477 U.S. at 322-323. In response, plaintiffs rely upon the same assertions as they did in the motion for partial summary judgment, and, as discussed *supra*, plaintiffs fail to explain how those assertions (many of which are not supported by citation to evidence) show the falsity or misleading nature of Saxton and Solly's statements. (*See* ECF No. 219 at 18-19.) As a result, because plaintiffs have failed to show a genuine issue of material fact with respect to the falsity or misleading nature of Saxton and Solly's statements in this regard, defendants are entitled to summary judgment as to all claims related to the same.

As discussed *supra*, the third statement is a much closer call as it comes to whether the statement was false or misleading. This is because of the April 10, 2012 board presentation where it states that an additional gold stream transaction would be "too expensive" and would impose "higher risk" for the bottom line in future years. (*See* ECF No. 134-9

at39.)[20] Although defendants argue that the evidence does not show that TCM's board had made a "final decision" on whether to pursue an additional gold

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[20]The Court notes, again, that, like the evidence presented with respect to the variable costs at the Mt. Milligan Project, plaintiffs have not properly presented their evidence with respect to the additional gold stream transaction, as they provided this evidence in response to a factual statement that has nothing to do with additional gold stream transactions. (*See* ECF No. 220 at ¶ 51.) On this occasion, given the closeness of the underlying issue, plaintiffs failure to properly present their evidence is important. There is a reason why this Court allows 40 additional statements of material fact in response to another party's motion for summary judgment; it is to keep the record manageable. It is not to have a stated number of 40, and then have a party avoid that upper limit by inserting facts in response to unrelated factual statements. If the latter was the case, the Court might as well allow an unlimited number of additional factual statements. It is even more important here because plaintiffs reached the upper limit of 40 factual statements in presenting their additional statements of fact. (*See id.* at ¶¶ 52-91.) It was plaintiffs' responsibility to marshal the relevant facts appropriately and present only 40 additional facts. That they failed to do. Even more so with respect to the variable costs at Mt. Milligan and the additional gold stream transaction because factual statements related to those two, separate issues are presented in the *same* factual statement—a clear end-run around the Court's limit. All this being said, defendants' reply is at best wishy-washy as to whether they object to plaintiffs' response on this basis. (*See* ECF No. 226 at ¶ 51.) Thus, although the Court believes in enforcing its Practice Standards, and believes that plaintiffs' response to factual statement 51 violates those Practice Standards, the Court will address the substantive merit of claims related to an additional gold stream transaction.

stream transaction, that does not mean Saxton and Solly's purported statement that TCM was "examining" such a transaction was not, at the very least, misleading, in light of management's recommendation to the board. Whether it was misleading may turn on a factfinder's interpretation of the word "examining," and what that word was meant to convey. The Court, thus, does not believe that the issue of whether this particular statement was misleading is amenable to summary judgment in favor of defendants.[21]

As discussed *supra*, though, defendants also argue, with respect to the CUSA claim, that plaintiffs have failed to present evidence that Saxton and Solly's statement was made in connection with an offer to buy

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[21]The Court further notes that plaintiffs make no argument (and present no evidence) that a reasonable investor would have found Saxton and Solly's statement about an additional gold stream transaction to be material. (*See* ECF No. 219 at 19.) However, because defendants do not raise this lack of evidence as a reason to dismiss plaintiffs' claims related to the purported statement (*see* ECF No. 225 at 12), the Court will not grant defendants summary judgment on that basis. This is, thus, different to the Court's analysis of plaintiffs' motion for partial summary judgment, where plaintiffs are required to show that they would be entitled to a directed verdict. *See Celotex Corp.*, 477 U.S. at 331. Plaintiffs failed to do this by failing to present any evidence of the material nature of many (if not all) of the challenged statements, irrespective of defendants' failure to raise any specific objection to this evidentiary deficiency.

or sell a security. (ECF No. 225 at 14-15.) As with plaintiffs' response to the same argument pertaining to the November 2011 statements and email, their response in this regard is noticeable by its absence, and, if present, its lack of specificity. Notably, plaintiffs do not argue, when discussing Saxton and Solly's statement about an additional gold stream transaction, that the statement was made in connection with an offer to buy or sell a security. (ECF No. 219 at 19.) Construing plaintiffs' response liberally, they do assert that Saxton and Solly's statements on April 25, 2012 were made "to get Plaintiffs to hold their shares". (*Id.* at 21.) While this assertion may or may not be relevant to plaintiffs' fraudulent misrepresentation claim, which is addressed immediately *infra*, plaintiffs provide no argument that it is relevant to their CUSA claim. (*See id.* at 9-10.) As a result, because plaintiffs have provided no evidence that Saxton and Solly's statement about an additional gold stream transaction was made in connection with an offer to buy or sell a security, defendants are entitled to summary judgment with respect to plaintiffs' CUSA claim as it relates to the same.

As for the fraudulent misrepresentation claim, as discussed *supra*, plaintiffs must show reliance. On this occasion, plaintiffs assert that they were induced to hold their TCM shares by Saxton and Solly's statements on April 25, 2012. (ECF No. 219 at 21.)

Plaintiffs further assert that, in Connecticut, a plaintiff is entitled to damages for being induced to hold securities by a fraudulent misrepresentation. (*Id.* at 9-10.) Assuming arguendo that plaintiffs accurately describe the state of the law in Connecticut, there is still a problem—they have presented no *evidence* that Saxton and Solly made their statements on April 25, 2012 in order to induce plaintiffs to hold onto their TCM shares. Plaintiffs simply cite no evidence for this assertion. (*See* ECF No. 219 at 21.) As a result, because plaintiffs have failed to present evidence that Saxton and Solly's statement about an additional gold stream transaction was made to induce plaintiffs to hold onto their shares, defendants are entitled to summary judgment with respect to plaintiffs' fraudulent and negligent misrepresentation claims as they relate to the same.[22]

Finally, the fourth purported statement on April 25, 2011—Saxton and Solly telling plaintiff that TCM's funding shortfall was around $100 million. In support of this claim, plaintiffs rely upon an email Aronstein sent Solly, which, plaintiffs assert, "immortalize[s]" Aronstein's understanding that TCM has a $100 million funding shortfall. (ECF No. 219 at 19 (citing ECF No. 220 at ¶ 85)). As mentioned *supra*, defendants do not agree on the import of Aronstein's

[22]As noted repeatedly now, plaintiffs do not present any argument about their negligent misrepresentation claims.

email, disputing whether it does, in fact, "immortalize[]" Aronstein's understanding of a $100 million funding shortfall for TCM. (*See* ECF No. 225 at 12.) Construing Aronstein's email in the light most favorable to plaintiffs, it is not clear precisely what Aronstein's understanding was of TCM's funding shortfall, as the email states both that the "[t]otal need for capital [was] about 420 million," and the "actual shortfall [was] around $100 million." A factfinder could go either wayin interpreting the meaning of Aronstein's email, and thus, resolving the import of that email would be best left to a jury.

That, however, does not mean that claims related to this statement cannot be resolved at summary judgment. Plaintiffs also assert that defendants knew "for certain" that TCM's shortfall was "somewhere in the neighborhood of between $400 million and $450 million as evidenced by the capital raise that would come shortly thereafter." (ECF No. 219 at 19.) As discussed *supra*, plaintiffs again provide no citation to evidence to support this assertion. (*See id.*) Moreover, even if they did, plaintiffs provide no explanation for why Saxton and Solly's alleged knowledge of a subsequent capital raise would have given them "for certain" knowledge of TCM's funding shortfall. As a result, because plaintiffs have failed to properly present sufficient evidence of a genuine issue of material fact with respect to whether Saxton and Solly's purported statement about TCM's funding

shortfall was false or misleading, defendants are entitled to summary judgment with respect to all claims related to the same.[23]

Accordingly, for all of the reasons discussed *supra*, the Court GRANTS defendants' motion for summary judgment in full.

III. Conclusion

For the reasons set forth herein, the Court:

(1) GRANTS defendants' motion for summary judgment (ECF No. 207); and

(2) DENIES plaintiffs' motion for partial summary judgment (ECF No. 211).

The April 5, 2017 Order setting this case for trial (ECF No. 236) is VACATED.

The Clerk is instructed to enter Final Judgment

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[23]The Court further notes that, even if plaintiffs could be found to have properly presented sufficient evidence to create a genuine issue of material fact in this regard, for the same reasons discussed *supra* with respect to the additional gold stream transaction, plaintiffs have failed to present any evidence that (i) Saxton and Solly's statement was made in connection with an offer to buy or sell a security, or (ii) plaintiffs relied on Saxton and Solly's statement to their injury. (*See* ECF No. 219 at 19.)

in favor of defendants, and then CLOSE this case.

SO ORDERED.

DATED this 28th day of April, 2017.

BY THE COURT:

/s/
RAYMOND P. MOORE
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

[DATE STAMP]
FILED
United States Court of Appeals
Tenth Circuit
April 3, 2018
Elisabeth A. Shumaker
Clerk of Court

DAVID ARONSTEIN, et al.,
Plaintiffs - Appellants,

v. No. 17-1178

THOMPSON CREEK METALS COMPANY, INC., et al.,
Defendants - Appellees,

and

JAMES L. FREER, et al.,
Defendants.

ORDER

Before TYMKOVICH, Chief Judge, HARTZ, and O'BRIEN, Circuit Judges.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/
ELISABETH A. SHUMAKER, Clerk

Additional material from this filing is available in the Clerk's Office.