UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

IN RE VALEANT PHARMACEUTICALS INTERNATIONAL, INC. SECURITIES LITIGATION	Master No. 3:15-cv-7658-MAS-LHG
THIS DOCUMENT RELATES TO: ALL ACTIONS	**Motion Day: June 5, 2017**

MEMORANDUM IN SUPPORT OF DEFENDANT DEBORAH JORN'S MOTION FOR RECONSIDERATION OF THE COURT'S APRIL 28, 2017 OPINION

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Defendant Deborah Jorn ("Jorn") respectfully submits this memorandum of law in support of her motion for reconsideration of this Court's April 28, 2017 Memorandum Opinion (ECF No. 216) and accompanying Order (ECF No. 217) (collectively, the "Opinion") with regard to the only count applicable to her.

PRELIMINARY STATEMENT

Reconsideration is rarely granted, but this Court has recognized that some situations warrant it. This is one of those situations. Respectfully, in its Opinion, this Court overlooked controlling law requiring an analysis of Jorn's individual scienter at the motion to dismiss stage.

Jorn is one of a handful of former executives of Valeant Pharmaceuticals International, Inc. ("Valeant") individually named as a defendant in a securities class action Complaint. The Complaint alleges one count of securities fraud against her based on allegedly false and misleading statements made on a single conference call. But Plaintiffs fail to adequately plead with particularity Jorn's scienter in connection with that conference call or any other event in her time at Valeant. Viewed holistically, the Complaint does not sufficiently allege her knowledge of any alleged fraud.

The Court denied Jorn's Motion to Dismiss without analyzing the Complaint's scienter allegations *specific to Jorn*. This analysis is required under Third Circuit law. At this juncture, this clear error can only be corrected through

reconsideration. Accordingly, Jorn respectfully requests that this Court reconsider its Opinion and grant her motion to dismiss.

BACKGROUND

Before this Court is a securities class action including claims stemming from the Securities Exchange Act of 1934 ("Exchange Act") and the Securities Act of 1933 ("Securities Act"). The claims are based on alleged misconduct at Valeant, including Valeant's treatment of, and control over, a network of pharmacies, Philidor Rx Services, LLC ("Philidor").

For the purposes of this motion the relevant facts are as follows. Jorn joined Valeant after the start of the Class Period, in August 2013, when her then-employer, Bausch & Lomb, was acquired by Valeant. (Compl. ¶ 39.) For a portion of the Class Period, Jorn was general manager of Valeant's U.S. dermatology business, Valeant Executive Vice President, and Company Group Chairman. (Compl. ¶ 39.) She left Valeant on March 2, 2016. (Compl. ¶¶ 39; 443.) The Company announced at the time that her departure was due to "personal reasons" and was not the result of any action taken by the Board of Directors. (*See* Ex. 44 to the Declaration of Robert J. Giuffra, Jr. in support of Defendants' Motion to Dismiss the Consolidated Complaint, ECF No. 167, Ex. 9.)

On June 24, 2016, Plaintiffs filed a 282-page consolidated complaint, naming Jorn as one of many defendants. (Compl. ¶¶ 34-53; 558-568.) The

Complaint labels Jorn as one of the "Individual Defendants" and, with Valeant, one of the "Exchange Act Defendants," but Jorn is mentioned in only eight of the 734 paragraphs. (Compl. ¶¶ 52-53.)

Count One of the Complaint, a claim for violation of Section 10(b) of the Exchange Act and Rule 10b-5, is asserted against the Exchange Act Defendants. That is the only count applicable to Jorn. The count is rooted in allegedly false and misleading statements (some of which are snippets of sentences) Jorn allegedly made during a single investor meeting and conference call on May 28, 2014. (*See* Compl. ¶ 162.)

On September 13, 2016, Jorn filed a Motion to Dismiss Count One of the Complaint as to her. (ECF No. 169, the "Opening Br.") Other defendants filed motions to dismiss as well.[1] Plaintiff filed an omnibus opposition to all the motions to dismiss on November 14, 2016. (ECF No. 178.) Jorn filed a reply on December 14, 2016. (ECF No. 191, the "Reply Br.")

This Court heard oral argument on the motions on April 10, 2017. The Opinion was issued on April 28, 2016.

In the Opinion, the Court devotes slightly more than a page to the scienter allegations alleged by Plaintiffs. (Opinion at 16-17.) Of the 70 Complaint

[1] Jorn's briefings in support of her Motion to Dismiss incorporated arguments made in Valeant's Motion to Dismiss briefings, ECF Nos. 167, 196.

paragraphs cited in those pages, only two mention Jorn. (*Id.*; *see also* Compl. ¶¶ 407, 443.) One of those, Paragraph 407, is used in the Complaint not to establish Jorn's scienter, but to show that another individual defendant, J. Michael Pearson, was monitoring Philidor. (*See* Compl. ¶ 407.) The other paragraph cited simply states when Jorn left Valeant. (*See* Compl. ¶ 443.)

Jorn's name is essentially absent from the Opinion's substantive discussion of whether Plaintiffs have sufficiently pled scienter. (Opinion at 19-22.) Nowhere does the Opinion discuss how the Complaint gives rise to a "strong inference" that Jorn specifically "intended to deceive, manipulate, or defraud." *In re Columbia Labs., Inc. Sec. Litig.*, 602 F. App'x 80, 82 (3d Cir. 2015); 15 U.S.C. § 78u-4(b)(2)(A).

The Opinion denied all of the defendant's motions to dismiss with regard to Plaintiffs' claims brought under the Exchange Act.

ARGUMENT

While reconsideration is granted "very sparingly," it should be granted when a movant can show that reconsideration is necessary "to correct a clear error of law. . . or prevent manifest injustice." *Sanofi-Aventis U.S., LLC v. Great American Lines, Inc.*, No. 10-2023, 2016 WL 4472949, at *1 (D.N.J. Aug. 22, 2016) (Shipp, J.) (reconsideration granted as to one motion and order partially vacated) (citation omitted); *Dworjan v. United States*, No. 13-2671, 2016 WL 355074 (D.N.J. Jan.

28, 2016) (Shipp, J.) (reconsideration granted and prior order vacated). Motions for reconsideration are governed by Local Civil Rule 7.1(i), which requires the moving party to "set[ ] forth concisely the matter or controlling decisions which the party believes the Judge or Magistrate Judge has overlooked[.]" L. Civ. R. 7.1(i). As detailed below, the Opinion overlooked controlling Third Circuit precedent requiring the Court to individually analyze Jorn's scienter.

A. The PSLRA and Third Circuit Precedent Require that Plaintiffs Plead Jorn's Scienter Individually

The Court committed a clear error of law by overlooking Third Circuit precedent requiring that a plaintiff must specifically plead that the named defendant is individually associated with the alleged fraud. *See, e.g.*, *In re Alpharma Inc. Sec. Litig.*, 372 F.3d 137, 150-54 (3d Cir. 2004); *Belmont v. MB Inv. Partners, Inc.*, 708 F.3d 470, 493 (3d Cir. 2013).

The Court of Appeals for the Third Circuit has definitively established that Plaintiffs must plead with particularity that Jorn "made a misstatement or an omission of a material fact with scienter." *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 242 (3d Cir. 2013) (citation omitted). Such particularity cannot be presumed, as "a presumption of particularity is inconsistent with the PSLRA's requirement that scienter be pleaded with respect to 'each act or omission' by 'the defendant.'" *Winer Family Trust v. Queen*, 503 F.3d 319, 335 (3d Cir. 2007). And when the

Court of Appeals refers to "the defendant," it means each particular defendant. *See Id*. at 337 n.6.

Accordingly, district courts in this Circuit have required that plaintiffs plead that each defendant is individually associated with the alleged fraud. *See In re Merck & Co. Sec., Derivative & "ERISA" Litig.*, MDL No. 1658 (SRC), Civ. Action Nos. 05-1151 (SRC), 05-2367 (SRC), 2011 WL 344199 at *19, *28 (D.N.J. Aug. 8, 2011) (plaintiffs must specifically plead that the named defendant is "individually associated with the alleged fraud, other than by virtue of their position within" the company, and complaint fails to plead scienter insofar as it relies on allegations "that 'Defendants' as a general group engaged in. . . inappropriate activities"); *In re Par Pharm. Sec. Litig.*, No. 06-cv-3226 (PGS), 2008 WL 2559362, at *10-11 (D.N.J. June 24, 2008) ("Each individual's participation and scienter must be pled separately and with particularity" and a separate section of the brief labeled "Additional Scienter Allegations" just gave "more examples of group pleading and inadequate broad brush statements"); *Bartesch v. Cook*, 941 F. Supp. 2d 501, 510-11 (D. Del. 2013) (it is insufficient when "the allegations generally refer to 'defendants' or 'company executives.' The Third Circuit has explicitly rejected such 'group pleading' as incompatible with the PSLRA's requirement[.]"); *Cf. Li v. Aeterna Zentaris, Inc.*, No. 3:14-7081 (PGS)(TJB), 2016 WL 3583821, at *2 (D.N.J. June 30, 2016) (denying

reconsideration of denial of a motion to dismiss where the Court noted it had in fact "specifically examined each Defendant" and whether each Defendant's "behavior could satisfy the pleading standard for Section 10(b) of the Exchange Act and Rule 10b-5" in its opinion).

In fact, the day before the Opinion was issued, another District of New Jersey court performed just such an analysis when dismissing a securities class action complaint brought against a company and various individual defendants. *See In re Hertz Glob. Holdings, Inc. Sec. Litig.*, No. 13-7050, 2017 WL 1536223, at *15-23 (D.N.J. Apr. 27, 2017) (dismissing a securities litigation with prejudice after analyzing allegations of scienter alleged as to the individual defendants and the corporation).

Respectfully, this Court overlooked this line of precedent in the Opinion. The Opinion features no examination of Jorn's scienter.

B. Plaintiffs Have Failed to Sufficiently Plead Scienter with Regard to Jorn

As detailed in Jorn's prior briefs, the Complaint does not adequately allege that Jorn knew, or recklessly disregarded, the alleged Section 10(b) fraud.[2] One need look no further than the Opinion itself to see this. As set forth *supra*, the

[2] Jorn's Motion to Dismiss also raises additional arguments not addressed in this briefing or relevant to the instant motion. (*See* Opening Br.; Reply Br..)

Opinion cites only two Complaint paragraphs related specifically to Jorn—and these paragraphs cannot sufficiently establish Jorn's scienter.

The first, Paragraph 407, is used to support this sentence in the Opinion: "The Individual Defendants were aware because they were involved in signing the relevant agreements, touting the deceptive programs as legitimate, conducting due diligence related to acquiring the option to purchase Philidor, and otherwise monitoring Philidor." (Opinion at 16.) But the Plaintiffs include Paragraph 407 of the Complaint to show Pearson's personal involvement, not Jorn's: "As further example that **Pearson was personally monitoring Philidor's practices**, on March 9, 2015, Kellen sent an email **to Pearson** updating him on their earlier conversation …." (Compl. ¶ 407, *see also* Reply Br. at 5.) (emphasis added).

That leaves only one other cited paragraph specifically related to Jorn, Paragraph 443, which is cited after the following sentence in the Opinion: "As further indication that the Individual Defendants possessed the requisite scienter, Valeant refused to pursue remedies against wrongdoers for committing the deceptive practices, Pearson and Schiller made key admissions and provided misleading testimony in Congressional hearings, and numerous executives and directors departed Valeant just a few months before the Exchange Act Defendants' scheme became public." (Opinion at 16.)

The only aspect of this sentence related to Jorn is that she was one of the executive departures, as supported by Paragraph 443. But there is no allegation that she was fired, asked to leave, or that her departure was in any way related to the alleged fraud. The Complaint states that she left Valeant – nothing more. "The Third Circuit and other courts have found resignations of key officers to be insufficient to show that they acted with the requisite scienter to commit the alleged fraud." *In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at *20 (D.N.J. Apr. 27, 2017) (citations omitted); *see also* Opening Br. at 8; Reply Br. at 12-13. *In re Hertz Global Holdings* reiterated that sentiment last month in its dismissal of individual defendants.

The rest of the sentence from the Opinion has nothing to do with Jorn. First, the statement that "Valeant refused to pursue remedies against wrongdoers" is about Paragraph 413 of the Complaint, and that paragraph is solely about Pearson, Schiller, and Philidor; it does not mention Jorn. (Compl. ¶ 413.) Second, the Complaint does not have *any* allegation that "remedies" against Jorn were considered (or any discussion regarding what remedies would have been considered). Third, Jorn did not testify before Congress.

To be sure, the Complaint has many allegations related to the scienter of the groups it brands the "Individual Defendants" or "Exchange Act Defendants," but that is not sufficient to survive a motion to dismiss under the heightened pleading

standards of the PSLRA. (*See* Opening Br. at 5-7; Reply Br. at 9-11; *supra* p. 5-7.) The Complaint does not allege with particularity that Jorn, the head of dermatology for only a small portion of the class period, knew about, or recklessly disregarded, any alleged fraud.

Courts in this Circuit dismiss claims against individual defendants—while allowing a complaint against a company and other individual defendants to proceed—when Plaintiffs have not pled scienter with regard to certain individual defendants. *See, e.g.*, *In re Merck & Co., Sec., Derivative & "ERISA" Litig.*, 2011 WL 344199, at * 38 (D.N.J. Aug. 8, 2011) (dismissing a 10(b) charge against many of a company's senior executives, including its CEO and a person in charge of the division that developed the product at the center of the litigation, because of plaintiffs' failure to plead scienter with regard to those defendants, while allowing plaintiffs' claims against two other individuals and the company to survive); *Se. Pennsylvania Transp. Auth. v. Orrstown Fin. Servs., Inc.*, No. 1:12-CV-00993, 2016 WL 7117455, at *22 (M.D. Pa. Dec. 7, 2016) (granting a motion to dismiss as to four individual defendants "absent any allegation as to how they would have known the challenged representations were false and/or misleading at the time they were made," but denying the motion as to three other defendants and the company).

Examining paragraphs in the Complaint that the Opinion did not cite leads to the same conclusion: Plaintiffs' Complaint against Jorn should be dismissed. Plaintiffs' scienter allegations against Jorn boil down to nothing more than the following: Jorn was an executive; Jorn received a raise during the class period; and Jorn knew that dermatology products were sold through Philidor. That is not enough. "[C]obbling together a litany of inadequate allegations does not render those allegations particularized in accordance with . . . the PSLRA." *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 713 F. Supp. 2d 378, 386 (D. Del. 2010) (quoting *Cal. Pub. Emps' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 155 (3d Cir. 2004)), *aff'd*, 442 F. App'x 672 (3d Cir. 2011).

Indeed, "[A]llegations that a securities-fraud defendant, because of his position within the company, 'must have known' a statement was false or misleading are 'precisely the types of inferences which [courts], on numerous occasions, have determined to be inadequate to withstand Rule 9(b) scrutiny'." *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 539 (3d Cir. 1999) (citation omitted).

Also, scienter cannot be established through a salary increase, even if that increase is tied to company performance. *See Institutional Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 279 (3d Cir. 2009) ("Corporate officers always have an incentive to improve the lot of their companies."); *In re Merck & Co., Sec.,*

Derivative & "ERISA" Litig., 2011 WL 344199, at * 26 (D.N.J. 2011) (citation omitted) ("*Avaya* stresses the insufficiency of motives 'generally possessed by most corporate directors and officers,' such as improving company's performance, even when that individual's compensation is tied to the success of a transaction or an increase in sales."); *Sapir v. Verback*, No. 14-7331 (JLL)(JAD), 2016 WL 554581, at *13 (D.N.J. Feb. 10, 2016) ("[G]eneralized motivations, such as maintaining a high stock price in order to fund operations, are insufficient to establish scienter.").

Further, Jorn's attendance at a meeting where Philidor was discussed is not enough to "establish that [she] had knowledge of illegal activities." *See Rahman*, 736 F.3d at 245 (stating that a CEO visiting a subsidiary and meeting with the subsidiary's president is not enough to establish the CEO's knowledge with regard to allegedly illegal conduct at that subsidiary).[3] The existence of Philidor *per se* is not where Plaintiffs' allegations of fraud lie. Plaintiffs' allegations are based on a knowledge of the relationship between Valeant and Philidor that they do not sufficiently plead Jorn possessed.

The Court is correct that the Complaint must be considered "holistically considering the entirety of the Complaint[.]" (Opinion at 21.) However, that

[3] Jorn's scienter arguments are more fully detailed in the Opening Br. at 4-8 and Reply Br. at 2-13.

holistic examination must take place with regard to each defendant under the controlling law of this Circuit. That analysis with regard to Jorn makes it clear that Plaintiffs have not pled scienter with the required particularity.

CONCLUSION

For all of the foregoing reasons, Jorn respectfully requests the Court grant her Motion For Reconsideration and, upon such reconsideration, enter an order dismissing the Complaint as to Jorn with prejudice.

Dated: New York, New York
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