

LEE, HERNANDEZ, LANDRUM
& GAROFALO
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LAS VEGAS, NV 89128
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1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 MICHAEL KIRSCH; AND SIU YIP,

Supreme Court No. 70854

3
4 Appellants,

District Court Case No. 14-70637-
B Mar 14 2017 04:43 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

5 v.

6 PETER G. TRABER; JAMES C.
7 CZIRR; JACK W. CALLICUTT;
8 GILBERT F. AMELIO; KEVIN D.
9 FREEMAN; ARTHUR R.
10 GREENBERG; ROD D. MARTIN;
11 JOHN F. MAULDIN; STEVEN
12 PRELACK; HERMAN PAUL
13 PRESSLER, III; DR. MARC RUBIN;
14 AND GALECTIN THERAPEUTICS,
INC., A NEVADA CORPORATION,

15 Respondents.

16 **APPENDIX TO APPELLANT'S OPENING BRIEF**
17 **VOLUME VIII**

18 *Submitted by:*

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Nevada Bar No. 6088

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APPELLANT'S APPENDIX

DOCUMENT DESCRIPTION	FILING DATE	BATES NUMBER	VOLUME NUMBER
Order re: Motion to Dismiss Shareholder Derivative Action	4/1/2016	APP000001 – APP000004	I
Notice of Entry of Order Denying Motion to Correct Order re: Motion to Dismiss Shareholder Derivative Action	6/16/2016	APP000005 - APP000010	I
Notice of Appeal	7/15/2016	APP000011 - APP000019	I
Verified Shareholder Derivative Complaint	8/29/2014	APP000020 - APP000045	I
Defendants' Motion to Stay the Case in Deference to Prior-Filed Parallel Derivative Litigation and Supporting Memorandum of Law	11/17/2014	APP000046 - APP000165	I
Court Minutes	12/19/2014	APP000166	I
Defendants' Motion for Reconsideration of Ruling Denying Defendants' Motion to Stay Case and Supporting Memorandum of Points and Authorities	1/8/2015	APP000167 - APP000189	I
Memorandum in Support of Plaintiff's Motion for Leave to file Plaintiff's Second Amended Shareholder Derivative Complaint	3/19/2015	APP000190 - APP000285	II
Plaintiff's Second Amended Shareholder Derivative Complaint	3/27/2015	APP000286 - APP000368	II
Individual Defendants' Motion to Dismiss the Second Amended Shareholder Derivative Complaint and Memorandum of Points and Authorities	4/22/2015	APP000369 - APP000559	III

DOCUMENT DESCRIPTION	FILING DATE	BATES NUMBER	VOLUME NUMBER
Nominal Defendant Galectin Therapeutics, Inc.'s Motion to Dismiss the Second Amended Shareholder Derivative Complaint and Memorandum of Points and Authorities	4/22/2015	APP000560 - APP000759	IV
Plaintiff's Combined Memorandum of Law in Opposition to the Nominal Defendant and Individual Defendants' Motions to Dismiss the Second Amended Shareholder Derivative Complaint	5/20/2015	APP000760 - APP000798	IV
David L. Hasbrouck and Siu Yip's Motion to Intervene	5/29/2015	APP000799 - APP000992	V
Individual Defendants' Reply Memorandum in Support of their Motion to Dismiss the Second Amended Shareholder Derivative Complaint	6/4/2015	APP000993 - APP000999	V
Nominal Defendant Galectin Therapeutic, Inc.'s Reply Memorandum in Support of its Motion to Dismiss the Second Amended Shareholder Derivative Complaint	6/4/2015	APP001000 - APP001043	V
Notice of Entry of Order Re: June 11, 2015 Motions to Dismiss and Motion to Join Additional Plaintiffs	8/10/2015	APP001044 - APP001049	VI
Individual Defendants' and 10X Fund, L.P.'s Motion to Dismiss Shareholder Derivative Action	1/19/2016	APP001050 - APP001054	VI
Nominal Defendant Galectin Therapeutic, Inc.'s Motion to Dismiss Shareholder Derivative Action	1/19/2016	APP001055 - APP001470	VI VII

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DOCUMENT DESCRIPTION	FILING DATE	BATES NUMBER	VOLUME NUMBER
Court Minutes	3/3/2016	APP001471 - APP001472	VII
Transcript of Proceedings on November 3, 2015	11/3/2015	APP001473 - APP001549	VIII
Corrected Transcript of Proceedings on March 3, 2016	3/16/2016	APP001550 - APP001560	VIII

DATED this 14th day of March, 2017.

LEE, HERNANDEZ, LANDRUM &
GAROFALO, A.P.C.

By: _____

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Attorneys for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GALECTIN)	
THERAPEUTICS, INC.)	NO. 1:15-CV-29-SCJ
SECURITIES LITIGATION)	ATLANTA, GEORGIA
<hr/>		
IN RE GALECTIN)	
THERAPEUTICS, INC.)	NO. 1:15-CV-208-SCJ
DERIVATIVE LITIGATION)	
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NOVEMBER 3, 2015

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE

APPEARANCES OF COUNSEL:

FOR SECURITIES PLAINTIFFS:	MICHAEL K. YARNOFF MEREDITH L. LAMBERT ROSS A. ALBERT
FOR DERIVATIVE PLAINTIFFS:	MICHAEL I. FISTEL, JR. JAMES M. FICARO
FOR GALECTIN DEFENDANTS:	MICHAEL R. SMITH BENJAMIN LEE WARREN POPE ALEXANDRA S. PEURACH

DAVID A. RITCHIE
OFFICIAL COURT REPORTER
75 SPRING ST., S.W.
ATLANTA, GEORGIA 30303
(404) 215-1516

UNITED STATES DISTRICT COURT

1 (ATLANTA, FULTON COUNTY, GEORGIA, NOVEMBER 3, 2015,
2 IN OPEN COURT)

3 THE CLERK: THE COURT CALLS CIVIL ACTION NUMBERS
4 1:15-CV-29 AND 1:15-CV-208, IN RE GALECTIN THERAPEUTICS, INC.
5 SECURITIES LITIGATION.

6 THE COURT: I AM GOING TO ASK THE PLAINTIFFS'
7 ATTORNEYS FIRST TO STAND UP AND INTRODUCE YOURSELVES FOR THE
8 RECORD FOLLOWED BY DEFENSE COUNSEL.

9 MR. ALBERT: I AM ROSS ALBERT WITH MORRIS, MANNING &
10 MARTIN HERE IN TOWN. I AM LIAISON COUNSEL HERE TO INTRODUCE
11 LEAD COUNSEL, MR. YARNOFF, WHO HAS BEEN ADMITTED PRO HAC, AND
12 MS. LAMBERT, WHO WE APPLIED FOR PRO HAC ADMISSION LAST WEEK.

13 THE COURT: GOOD MORNING TO YOU ALL.

14 MR. YARNOFF: GOOD MORNING, YOUR HONOR.

15 MS. LAMBERT: GOOD MORNING, YOUR HONOR.

16 THE COURT: GOOD MORNING.

17 MR. YARNOFF: I WILL BE PRESENTING FOR THE SECURITIES
18 PLAINTIFFS.

19 THE COURT: OKAY. AND IN THE BACK?

20 MR. FISTEL: MICHAEL FISTEL WITH JOHNSON & WEAVER. I
21 AM FROM OUR MARIETTA, GEORGIA OFFICE. WITH ME IS JAMES FICARO.
22 MR. FICARO IS ALSO ADMITTED PRO HAC VICE, YOUR HONOR.
23 MR. FICARO WILL HANDLE A PORTION OF THE ARGUMENT FOR THE
24 DERIVATIVE PLAINTIFFS. I WILL ALSO HANDLE A PORTION OF THE
25 ARGUMENT FOR THE DERIVATIVE PLAINTIFFS IF THAT'S ACCEPTABLE TO

UNITED STATES DISTRICT COURT

1 YOUR HONOR.

2 THE COURT: THAT IS FINE WITH THE COURT.

3 THANK YOU ALL.

4 MR. FISTEL: THANK YOU.

5 THE COURT: YES, SIR.

6 MR. SMITH: GOOD MORNING, YOUR HONOR.

7 THE COURT: GOOD MORNING.

8 MR. SMITH: MICHAEL SMITH FROM KING & SPALDING. I AM

9 HERE FOR THE GALECTIN DEFENDANTS.

10 MR. LEE: GOOD MORNING, YOUR HONOR. BENJAMIN LEE,

11 ALSO FOR THE GALECTIN DEFENDANTS.

12 THE COURT: GOOD MORNING.

13 MR. POPE: GOOD MORNING, YOUR HONOR. WARREN POPE

14 FROM KING & SPALDING FOR THE GALECTIN DEFENDANTS. I WILL BE

15 MAKING THE DERIVATIVE MOTIONS IN THIS ARGUMENT THIS MORNING.

16 THE COURT: GOOD MORNING. THANK YOU.

17 MS. PEURACH: ALEXANDRA PEURACH, ALSO FOR THE

18 GALECTIN DEFENDANTS.

19 THE COURT: GOOD MORNING TO ALL OF YOU ALL.

20 I HAVE AN APOLOGY AND A HOUSEKEEPING NOTE I NEED TO

21 TAKE UP WITH YOU ALL.

22 ALL OF YOU ALL KNOW JUDGE O'KELLEY. JUDGE O'KELLEY

23 HAS BEEN A DISTRICT COURT JUDGE FOR 45 YEARS AND TODAY AT

24 LUNCHTIME WE ARE HONORING HIM. AND AS USUAL THE JUDGES -- AS

25 MY WIFE SAID, WE HAVE TO HAVE EVERYBODY DO EVERYTHING FOR US.

UNITED STATES DISTRICT COURT

1 THEY ARE TRANSPORTING US OR TAKING US FROM HERE TO THE CAPITAL
2 CITY CLUB AT 11:30.

3 NOW, I TOLD EACH ONE OF YOU YOU HAVE AN HOUR TO ARGUE
4 AND I PLAN ON FOLLOWING THAT, BUT YOU MIGHT HAVE TO COME BACK
5 AFTER LUNCH, BECAUSE IF SOMEBODY HAS BEEN A JUDGE FOR 45 YEARS,
6 A ROOKIE LIKE ME NEEDS TO BE THERE TO HONOR HIM.

7 MR. SMITH: HE DESERVES IT.

8 THE COURT: EXACTLY, HE DESERVES IT.

9 SO AT 11:25 I WILL PROBABLY STOP SO I CAN GET IN THE
10 VAN AND GO WITH THE OTHER JUDGES. BUT EACH ONE OF YOU IS GOING
11 TO HAVE AN HOUR. IF YOU CANNOT FINISH BY THEN, THEN WE WILL
12 ARRANGE TO COME BACK, BECAUSE I WANT TO HEAR EVERYTHING YOU ALL
13 HAVE TO SAY BECAUSE IT IS A VERY IMPORTANT CASE.

14 WITH THAT STATED, MR. SMITH, YOU ARE THE MOVANT.

15 MR. SMITH: THANK YOU, YOUR HONOR.

16 I AM GOING TO BE -- AND GOOD MORNING, YOUR HONOR, AND
17 MAY IT PLEASE THE COURT.

18 THE COURT: MR. SMITH, LET ME ASK YOU THIS: IT IS MY
19 UNDERSTANDING YOU ALL ARE GOING TO BREAK IT DOWN INTO TWO
20 ARGUMENTS, THE 10B AND THE 20A.

21 MR. SMITH: THAT'S CORRECT, YOUR HONOR. SO I AM
22 GOING TO BE HANDLING THE ARGUMENT ON THE MOTION TO DISMISS THE
23 SECURITIES CASE.

24 THE COURT: OKAY.

25 MR. SMITH: WHICH IS THE CLASS ACTION CASE BROUGHT

UNITED STATES DISTRICT COURT

1 UNDER THE FEDERAL SECURITIES LAWS. MR. POPE IS GOING TO BE
2 HANDLING THE ARGUMENT FOR THE DERIVATIVE SUIT.

3 THE COURT: THANK YOU, SIR.

4 MR. SMITH: SO WE ARE GOING TO ROUGHLY DO 30 MINUTES.
5 I THINK IT WOULD MAKE SENSE TO THEM TO DO THE CASES SEPARATELY,
6 HAVE THE PLAINTIFFS RESPOND.

7 THE COURT: I AGREE.

8 MR. SMITH: AND I WILL REPLY AND THEN WE WILL MOVE TO
9 THE DERIVATIVE.

10 THE COURT: I AGREE TOTALLY.

11 MR. SMITH: IF THAT'S OKAY WITH YOU.

12 THE COURT: YES.

13 MR. SMITH: OKAY. YOUR HONOR, AS PART OF MY ARGUMENT
14 WE HAVE PREPARED A COMPENDIUM OF EXCERPTS FROM THE COMPLAINT
15 FROM DOCUMENTS WE ATTACHED TO OUR MOTION TO DISMISS IN CERTAIN
16 CASES. WE WOULD LIKE TO SHARE THAT WITH YOUR HONOR, YOUR
17 CLERKS AND WITH THE DEFENSE ATTORNEYS.

18 THE COURT: THANK YOU, MR. SMITH.

19 MR. SMITH: I MEAN THE PLAINTIFFS' TABLE.

20 THE COURT: I WILL JUST GET ONE AND YOU ALL HOLD ON
21 TO ONE. THANK YOU.

22 GO AHEAD, MR. SMITH.

23 MR. SMITH: OKAY. GOOD MORNING.

24 SO THIS IS A SECURITIES FRAUD CLASS ACTION CASE
25 BROUGHT BY A SINGLE SHAREHOLDER, MR. HOTZ, ON BEHALF OF A CLASS

UNITED STATES DISTRICT COURT

1 OF PURCHASERS OF GALECTIN STOCK FROM LATE OCTOBER 2013 UNTIL
2 MID JULY 2014.

3 GALECTIN IS A PUBLICLY TRADED BIOPHARMA COMPANY
4 HEADQUARTERED UP IN NORCROSS THAT SPECIALIZES IN DEVELOPING
5 THERAPIES FOR FIBROSIS TYPE DISEASES. ALL OF THE DRUGS THEY
6 HAVE ARE IN THE DEVELOPMENT STAGE. THEY DON'T HAVE ANY YET
7 APPROVED FOR MARKETING AND SALE.

8 THEIR LEAD DRUG UNDER DEVELOPMENT IS CALLED -- IT'S
9 GOT A FORMULA NAME: GR-MD-02. THIS IS A DRUG THAT IS INTENDED
10 FOR TREATMENT OF THE ADVANCED STAGES OF A LIVER DISEASE
11 CALLED -- IT'S CALLED NASH OR, MORE COMMONLY, FATTY LIVER
12 DISEASE.

13 NOW, THIS DISEASE, WHEN IT REACHES ITS ADVANCED
14 STAGES, IT CAUSES LIVER FIBROSIS WHICH CAN LEAD TO LIVER
15 CIRRHOSIS, THE NEED FOR A LIVER TRANSPLANT OR DEATH.

16 THE COMPANY'S DRUG PLAYS A ROLE IN INHIBITING
17 GALECTIN PROTEINS WHICH ARE THOUGHT TO CONTRIBUTE TO THE
18 PROGRESSION OF THIS FIBROSIS TYPE DISEASE. THERE IS NO FDA
19 APPROVED TREATMENT YET FOR THIS, SO THIS IS A VERY IMPORTANT
20 DRUG AND THE COMPANY BELIEVES IT HAS EXCITING PROSPECTS. THE
21 FDA GAVE THE COMPANY FAST TRACK STATUS IN 2013 TO GET MOVING
22 WITH THE DRUG TRIALS, WHICH AS YOU KNOW CAN TAKE SOME TIME TO
23 ACCOMPLISH.

24 THE COMPANY COMPLETED ITS PHASE I DRUG TRIAL IN MID
25 2014 AND ANNOUNCED THE RESULTS, IN FACT, THE LAST DAY OF THE

UNITED STATES DISTRICT COURT

APP001478

1 CLASS PERIOD. PHASE I IS MEANT TO REALLY JUST TEST THE SAFETY
2 OF THE DRUG SO YOU CAN THEN PROCEED TO PHASE II AND III TO SHOW
3 EFFECTIVENESS AND CONTINUED SAFETY MONITORING.

4 THE DRUG WAS FOUND IN PHASE I TRIALS TO BE SAFE AND
5 WELL TOLERATED WITH NO SERIOUS SIDE EFFECTS AND THE COMPANY IS
6 NOW IN THE PHASE II TRIALS, WHICH HAVE BEGUN.

7 THE COMPLAINT CHARGES GALECTIN AND IT'S CEO, CHAIRMAN
8 AND SOME OTHERS WITH SECURITIES FRAUD.

9 THE COURT: RIGHT.

10 MR. SMITH: AND I AM GOING TO INTRODUCE TO YOU HERE,
11 WE HAVE TWO OF THE DEFENDANTS. FIRST, THE CEO OF THE COMPANY,
12 PETER TRABER, DR. PETER TRABER.

13 MR. TRABER IS PRESIDENT EMERITUS OF THE BAYLOR
14 COLLEGE OF MEDICINE WHERE HE WAS CHIEF EXECUTIVE OFFICER FROM
15 2003 TO 2008. BEFORE THAT HE WAS SENIOR VICE PRESIDENT, HEAD
16 OF CLINICAL DEVELOPMENT AND MEDICAL AFFAIRS FOR
17 GLAXOSMITHKLINE, THE BIG DRUG COMPANY. HE HAS ALSO SERVED AS
18 CHIEF EXECUTIVE OFFICER OF THE UNIVERSITY OF PENNSYLVANIA
19 HEALTH SYSTEM.

20 ALSO WITH US TODAY IS THE CHAIRMAN OF THE BOARD,
21 MR. JIM CZIRR.

22 THE COURT: GOOD MORNING, SIR.

23 MR. SMITH: MR. CZIRR IS ONE OF THE FOUNDERS OF THE
24 COMPANY BACK IN 2000 AND HE ALSO FOUNDED 10X FUND, WHICH IS A
25 DEFENDANT. 10X IS AN OWNER OF SOME SHARES OF GALECTIN AND THAT

UNITED STATES DISTRICT COURT

1 COMPANY INVESTS IN BIOTECH COMPANIES.

2 SO THE SECURITIES SUIT, YOUR HONOR, MAKES THE
3 FARFETCHED ALLEGATIONS THAT THESE ACCOMPLISHED DOCTORS AND
4 BUSINESSMEN RISKED THEIR REPUTATIONS AND CAREERS BY CONCOCTING
5 A SCHEME TO DEFRAUD GALECTIN'S SHAREHOLDERS BY ALLEGEDLY
6 FAILING TO DISCLOSE GALECTIN'S ENGAGEMENT OF OUTSIDE PUBLIC
7 RELATIONS FIRMS TO PUBLISH ARTICLES ABOUT GALECTIN AND
8 PUBLICIZE WHERE IT WAS IN ITS PRODUCT DEVELOPMENT, WHERE IT WAS
9 IN ITS TRIALS.

10 YOU NEED TO UNDERSTAND THAT GALECTIN IS VERY SMALL.
11 IT'S GOT SEVEN FULL-TIME EMPLOYEES. SO UNLIKE COMPANIES THAT
12 ARE HUGE AND HAVE REVENUE FROM APPROVED DRUGS AND INTERNAL P.R.
13 DEPARTMENTS AND INVESTOR RELATIONS DEPARTMENTS, GALECTIN HAS TO
14 OUTSOURCE A LOT OF THOSE MARKETING AND PUBLIC RELATIONS
15 FUNCTIONS.

16 THESE FIRMS, THEY HELP GENERATE INTEREST IN THE
17 COMPANY BY PUBLICIZING WHERE THEY ARE, COMMUNICATING TO THE
18 PUBLIC AND THE MARKET WHAT KIND OF ACTIVITY IS GOING ON IN THE
19 DRUG TRIAL PROCESS.

20 SO DURING THE CLASS PERIOD HERE THE PLAINTIFFS ALLEGE
21 THAT THERE WERE FOUR COMPANIES OR INDIVIDUALS THAT PUBLISHED
22 CERTAIN ARTICLES ABOUT GALECTIN. WHAT IS INTERESTING AND
23 IMPORTANT IS ALTHOUGH THE PLAINTIFFS CLAIM THAT THESE ARTICLES
24 WERE EMBELLISHED OR EXAGGERATED HERE AND THERE, THEY ABSOLUTELY
25 DISCLAIM AND ARE NOT CHALLENGING ANY SUBSTANTIVE STATEMENT IN

UNITED STATES DISTRICT COURT

1 THESE ARTICLES.

2 AND I WOULD REFER YOU TO EXHIBIT A IN THE COMPENDIUM,
3 WHICH ARE FOOTNOTES FROM THE PLAINTIFFS' BRIEFING, AND WE HAVE
4 HIGHLIGHTED THERE PLAINTIFF DOES NOT CHALLENGE A SINGLE
5 SUBSTANTIVE STATEMENT IN THE STOCK PROMOTERS' ARTICLES. AND
6 THEN FROM FOOTNOTE 17, THEY DO NOT SEEK TO HOLD THE DEFENDANTS
7 PRIMARILY LIABLE.

8 SO IT'S NOT THE SUBSTANCE OF THE ARTICLES THAT ARE
9 BEING CHALLENGED. THEY ARE NOT SAYING THAT THEY ARE INACCURATE
10 OR MISLEADING. THEY HAVE SAID THEY ARE EXAGGERATED, BUT THAT'S
11 NOT WHERE THEY ARE GOING. WHERE THEY ARE GOING IS GALECTIN'S
12 ALLEGED FAILURE TO DISCLOSE THAT THEY HIRED THESE FIRMS TO
13 WRITE THE ARTICLES.

14 SO I AM GOING TO FIRST, BEFORE WE GET INTO THE
15 ARGUMENT, I WANT TO MAKE THREE POINTS THAT I AM GOING TO KEEP
16 COMING BACK TO DURING THE ARGUMENT.

17 THE COURT: OKAY.

18 MR. SMITH: FIRST, ABSOLUTELY NOTHING IN THE
19 SECURITIES LAWS PROHIBITS COMPANIES FROM HIRING OTHER COMPANIES
20 TO PROMOTE YOUR STOCK, TO PUBLICIZE YOUR STOCK. WE CITED A
21 CASE ON THAT IN OUR BRIEF.

22 SECOND, UNDER THE SECURITIES LAWS THE OBLIGATION TO
23 DISCLOSE PAYMENT FOR PROMOTING A STOCK FALLS ON THE PROMOTING
24 FIRM, NOT ON THE COMPANY WHOSE STOCK IS BEING PUBLICIZED OR
25 PROMOTED. THAT'S SECTION 17 OF THE 33 ACT. SO THE OBLIGATION

UNITED STATES DISTRICT COURT

APP001481

1 IS ON THE PERSON WHO WRITES THE ARTICLE, NOT THE COMPANY.

2 THIRD, THE TWO OUTSIDE FIRMS THAT THE COMPANY DID
3 ENGAGE AND PAY TO WRITE THESE ARTICLES DID DISCLOSE THAT THEY
4 WERE BEING COMPENSATED AND I AM GOING TO DIRECT YOUR ATTENTION,
5 IF I CAN, TO EXHIBIT --

6 THE COURT: TDM AND ALCORN?

7 MR. SMITH: ACORN.

8 THE COURT: ACORN.

9 MR. SMITH: ACORN, EXHIBIT D. THAT IS ONE OF THE --
10 WE ATTACHED THIS AS EXHIBIT D TO OUR BRIEF. THIS IS ONE OF THE
11 ARTICLES THAT'S PUBLISHED BY ACORN. AND IF YOU LOOK BACK AT
12 THE VERY END OF THE ARTICLE, THERE IS A BLUE BOX ON THE LAST
13 PAGE: IMPORTANT NOTICE AND DISCLAIMER. THIS STOCK PROFILE
14 SHOULD BE VIEWED AS A PAID ADVERTISEMENT TO ENHANCE PUBLIC
15 AWARENESS OF GALECTIN, ET CETERA, ET CETERA.

16 AND THEN EXHIBIT C IS ANOTHER ONE OF THE ARTICLES.
17 THIS ONE IS WRITTEN BY A COMPANY BASICALLY CALLED TDM
18 FINANCIAL. AND IF YOU SEE ON WHAT IS THE SECOND PAGE THERE AT
19 THE BOTTOM, IT SAYS: SECFILINGS.COM IS A TDM FINANCIAL
20 PROPERTY. SECFILINGS.COM MAY BE COMPENSATED FOR ITS SERVICES,
21 ET CETERA. FOR A FULL DISCLAIMER CLICK HERE.

22 AND THEN IF YOU GO FURTHER TO THE NEXT FEW PAGES, YOU
23 SEE THE LEGAL DISCLAIMER. YOU SEE ON THE FOURTH PAGE THERE IS
24 DISCUSSION OF COMPENSATION INFORMATION. AND THEN YOU HAVE TO
25 KEEP GOING THROUGH AND IF YOU SEE ON THE BOTTOM OF WHAT IS THE

UNITED STATES DISTRICT COURT

APP001482

1 ONE, TWO, THREE, FOUR, BOTTOM OF THE FIFTH PAGE HERE AT THE
2 VERY BOTTOM, IT LISTS GALECTIN. AND THEN RUNNING ON TO THE
3 NEXT PAGE -- I'M SORRY. AT THE TOP OF THAT PAGE. IT SAYS PAGE
4 NINE OF 12.

5 THE COURT: OKAY.

6 MR. SMITH: YOU'LL SEE THAT. THERE IS A LISTING OF
7 ALL THE PAYMENTS RECEIVED FROM GALECTIN. SO THAT'S ANOTHER
8 THING. THOSE TWO FIRMS CLEARLY DID DISCLOSE THAT THEY WERE
9 BEING COMPENSATED.

10 SO LET'S TURN NOW TO THE SUBSTANCE OF OUR MOTION AND
11 TO GET US ORIENTED JUST REVIEW QUICKLY THE LEGAL STANDARDS.

12 THE COURT: WELL, LISTEN TO THIS.

13 MR. SMITH: ALL RIGHT.

14 THE COURT: STARTING OFF, THE JANUS CASE, THE SUPREME
15 COURT, IS A STRONG CASE FOR YOU.

16 MR. SMITH: SURE.

17 THE COURT: THEIR ARGUMENT IS AGENCY, THAT YOU ALL
18 ARE RESPONSIBLE EVEN THOUGH THE JANUS CASE SAYS THAT PRETTY
19 STRONGLY, AND WE ARE GOING TO TALK TO THE PLAINTIFFS ABOUT THAT
20 A LOT, IS THAT YOU CAN HELP PUT IT TOGETHER, BUT IF YOU DON'T
21 PUT IT OUT THERE, IT'S NOT ON YOU.

22 MR. SMITH: CORRECT.

23 THE COURT: HERE IS THE QUESTION: LET'S SAY
24 HYPOTHETICALLY THERE IS AN AGENCY. I AM NOT SAYING IT IS ONE
25 WAY OR THE OTHER. TWO THINGS: ONE, DO YOU HAVE A

UNITED STATES DISTRICT COURT

1 RESPONSIBILITY IF THIS IS YOUR AGENT PROMOTING SOMETHING THAT
2 IS NOT CORRECT? THAT'S THE FIRST QUESTION. AND THE SECOND
3 QUESTION: THE WHOLE POINT ABOUT AGENCY, IS THAT NOT A FACT
4 QUESTION?

5 MR. SMITH: RIGHT. WELL, THANK YOU FOR RAISING THAT.
6 LET ME ADDRESS THOSE FOR YOU.

7 YOU ARE CORRECT THAT JANUS SAID ONLY THE MAKER OF THE
8 STATEMENT CAN BE LIABLE. THAT'S FROM THE SUPREME COURT.

9 THE COURT: STRONGLY IN YOUR FAVOR.

10 MR. SMITH: AND IF YOU READ JUDGE WHITE'S OPINION IN
11 THAT CASE, HE SAYS WE'VE DONE AWAY WITH AGENCY. THAT'S WHAT
12 THE MAJORITY OPINION DOES AWAY WITH IS AGENCY. SO THE TEST
13 UNDER JANUS IS NOT AGENCY; IT'S WHETHER YOU HAVE THE ULTIMATE
14 AUTHORITY TO CONTROL THE CONTENT, THE METHOD OF DISTRIBUTION
15 AND HOW IT'S GOING TO BE DISTRIBUTED. OKAY?

16 THERE ARE NO ALLEGATIONS WHATSOEVER ABOUT THE
17 ULTIMATE AUTHORITY ISSUE. THERE IS NO ALLEGATION THAT THESE
18 ARTICLES WERE GENERATED BY THE COMPANY AND FED TO THESE GROUPS,
19 THAT THEY WERE EVEN REVIEWED BY THE COMPANY BEFORE OR AFTER
20 THEY WERE DISSEMINATED. THERE IS NO ALLEGATIONS THAT THE
21 COMPANY HAD ANY CONTROL WHATSOEVER OVER THE METHOD AND MANNER
22 IN WHICH THESE ARTICLES WOULD BE DISTRIBUTED.

23 THE COURT: WELL, IF YOU ARE PAYING THEM, YOU ALL
24 HAVE SOME AUTHORITY, THOUGH, IF YOU ARE PAYING THEM.

25 MR. SMITH: PARDON ME?

UNITED STATES DISTRICT COURT

1 THE COURT: IF YOU ARE PAYING SOMEBODY TO DO
2 SOMETHING, YOU SHOULD HAVE SOME AUTHORITY THERE; DON'T YOU
3 THINK?

4 MR. SMITH: YOU MAY WELL HAVE AUTHORITY OVER THEM TO
5 SOME DEGREE, BUT THERE ARE NO ALLEGATIONS THAT THAT AUTHORITY
6 EXTENDED TO THE ULTIMATE AUTHORITY OVER CONTENT AND OVER METHOD
7 AND MANNER OF DISTRIBUTION. THAT'S POINT ONE.

8 POINT TWO IS, WE HAVE ALREADY SEEN, THEY HAVE
9 ACKNOWLEDGED --

10 THE COURT: THAT'S TRUE.

11 MR. SMITH: -- THAT THERE IS NOTHING FALSE IN THE
12 ARTICLES. OKAY. SO WHAT IS THE FALSE STATEMENT?

13 WE HAVE ALREADY SEEN THAT TDM AND ACORN DISCLOSED
14 PAYMENT. SO, YOU KNOW, THERE IS NO, THERE IS NO FALSE OR
15 MISLEADING STATEMENT THERE FOR EITHER OF THOSE.

16 NOW, THEY MAKE ALLEGATIONS ABOUT TWO OTHER COMPANIES:
17 PATRICK COX, WHO PUBLISHED ARTICLES IN MAULDIN ECONOMICS, AND
18 THEN A COMPANY CALLED DREAM TEAM. THEY ALLEGE IN COMPLETELY
19 CONCLUSORY FASHION THAT THEY WERE PAID FOR WRITING THESE
20 ARTICLES. THERE IS NO PARTICULAR FACTUAL SUPPORT FOR THAT
21 ALLEGATION.

22 DREAM TEAM HAS DISCLAIMERS IN THERE WHEN THEY PUBLISH
23 FOR PEOPLE THAT PAY THEM. THEY ACKNOWLEDGE THAT IN THE
24 COMPLAINT. BUT THERE IS NOTHING DISCLOSED THERE THAT GALECTIN
25 PAID THEM AND THERE IS NO PARTICULARIZED SUPPORT THAT EITHER OF

UNITED STATES DISTRICT COURT

1 THOSE GROUPS DID RECEIVE PAYMENT.

2 SO, IN CLOSING ON THAT JANUS POINT, I WOULD SAY THAT
3 GALECTIN DIDN'T MAKE THE STATEMENTS. THAT THE THIRD PARTIES
4 DID. THERE IS NO PARTICULAR ALLEGATIONS. AND, YOU KNOW, I WAS
5 GOING TO LAY THE FOUNDATION. THIS IS A 10B-5 FRAUD CLASS
6 ACTION UNDER THE PRIVATE SECURITIES LITIGATION REFORM ACT. WE
7 ARE NOT IN RULE 8 NOTICE PLEADING LAND. WE ARE IN 9B,
8 PARTICULARITY. WE ARE IN THE PRIVATE SECURITIES LITIGATION
9 REFORM ACT WHICH REQUIRES DETAILED PARTICULAR PLEADING ABOUT
10 WHY A STATEMENT IS FALSE, WHY THE STATEMENT WAS MADE WITH
11 SCIENTER.

12 SO GOING BACK TO THE OTHER FOUNDATIONAL POINTS, THEY
13 HAVE GOT TO SHOW A FALSE STATEMENT TO SUCCEED, THE FOLLOWING
14 ELEMENTS. THIS IS WHAT I AM GOING TO FOCUS ON. WAS THERE A
15 FALSE STATEMENT OR OMISSION? WAS IT MADE WITH SCIENTER, THE
16 INTENT TO DEFRAUD? HAVE THEY PLED LOSS CAUSATION, THAT THERE
17 WAS PROXIMATE CAUSE OF THE LOSS?

18 LET ME TOUCH ON THESE. SO I AM GOING TO FIRST -- WE
19 HAVE KIND OF HIT THE THIRD-PARTY STATEMENTS WITH YOUR QUESTION
20 ABOUT JANUS. LET'S LOOK AT THE STATEMENTS THAT THEY ALLEGE
21 THAT GALECTIN ACTUALLY MADE. THEY ALLEGE TWO STATEMENTS. IT'S
22 REALLY PRETTY STRAIGHTFORWARD.

23 THE FIRST ONE IS A STATEMENT THAT THE COMPANY MADE.
24 IT'S REALLY A CONTRACTUAL TERM THAT THE COMPANY AGREED TO IN A
25 PRIVATE AGREEMENT WITH A BROKER-DEALER WHO WAS GOING TO HELP

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1 THEM SELL SHARES IN A STOCK OFFERING DURING THE CLASS PERIOD,
2 MLV. THEY ALLEGE, AND I'VE GOT THE PART OF THE COMPLAINT ON
3 THAT, THAT THE COMPANY MADE STATEMENTS.

4 LET'S LOOK AT TAB H. THIS IS THE STATEMENT IN THE
5 ATM AGREEMENT. ACTUALLY, NO. I'M SORRY, YOUR HONOR.
6 EXHIBIT I.

7 OKAY. EXHIBIT I. THIS WAS AN 8-K THAT THE COMPANY
8 FILED ANNOUNCING THIS AGREEMENT WITH THE COMPANY MLV. OKAY.
9 YOU SEE THE FIRST PAGE. IT JUST SAYS WE HAVE ENTERED INTO AN
10 AGREEMENT. HERE'S WHAT IT COVERS. THE FULL TERMS OF THE
11 AGREEMENT ARE ATTACHED.

12 SO IF YOU LOOK IN THE AGREEMENT ITSELF, BURIED IN THE
13 AGREEMENT, AND IT'S KIND OF HARD TO FIND BECAUSE IT'S SO BURIED
14 DOWN THERE, LOOK AT THE EXHIBIT. IT'S PAGE 16 OF 50 AT THE TOP
15 OF THE PAGE. IT'S ACTUALLY PAGE 11 OF THE AGREEMENT ITSELF.

16 THE COURT: GOT IT.

17 MR. SMITH: PARAGRAPH U SAYS CERTAIN MARKET
18 ACTIVITIES. AND HERE IT SAYS NEITHER THE COMPANY NOR OTHERS
19 AFFILIATED WITH THE COMPANY HAS TAKEN, DIRECTLY OR INDIRECTLY,
20 ANY ACTION DESIGNED, OR THAT IS CONSTITUTED OR WOULD REASONABLY
21 BE EXPECTED TO CAUSE OR RESULT IN, UNDER THE EXCHANGE ACT OR
22 OTHERWISE, THE STABILIZATION OR MANIPULATION OF THE PRICE OF
23 ANY SECURITY OF THE COMPANY TO FACILITATE THE SALE.

24 OKAY. SO THIS STATEMENT, WHICH IS A REPRESENTATION
25 TO A PRIVATE PARTY IN A PRIVATE AGREEMENT, THEY ARE SAYING,

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1 WELL, THAT STATEMENT IS FALSE AND MISLEADING BECAUSE YOU DON'T
2 DISCLOSE IN THERE THAT YOU WERE ENGAGING PEOPLE TO PUBLICIZE
3 YOUR COMPANY. WELL, THAT IS CLEARLY NOT GOING TO BE ANY KIND
4 OF ACTIONABLE OMISSION.

5 FIRST OF ALL, WE HAVE SEEN THAT THEY ADMIT THAT THE
6 STATEMENTS IN THE ARTICLES WERE CORRECT. WE HAVE SEEN THAT THE
7 ARTICLES FROM THE COMPANIES THEY DID HIRE DID DISCLOSE THAT
8 THERE WAS PAYMENT. OKAY. WE HAVE SEEN THAT THE OBLIGATION TO
9 DISCLOSE PAYMENT IS ON NOT GALECTIN BUT ON THE PEOPLE ISSUING
10 THE STATEMENTS. SO THAT CANNOT BE MANIPULATIVE IN ANY SENSE TO
11 FAIL TO DISCLOSE ACCURATE FACTS ABOUT THE COMPANY OR THINGS
12 THAT ARE ALREADY OUT IN THE PUBLIC DOMAIN BECAUSE THE WRITER OF
13 THE ARTICLE DISCLOSED THEM.

14 SECOND, AND I WANT TO DIRECT YOUR ATTENTION TO TAB E.
15 TAB E IS A QUOTE FROM THE SUPREME COURT CASE OF SANTA FE
16 INDUSTRIES V. GREEN ABOUT THIS TERM "MANIPULATION."

17 SANTA FE AT PAGE 476 SAYS MANIPULATION IS VIRTUALLY A
18 TERM OF ART WHEN USED IN CONNECTION WITH THE SECURITIES
19 MARKETS. THE TERM REFERS GENERALLY TO PRACTICES SUCH AS WASH
20 SALES, MATCHED ORDERS OR RIGGED PRICES THAT ARE INTENDED TO
21 MISLEAD INVESTORS BY ARTIFICIALLY AFFECTING MARKET ACTIVITY.

22 SO WE DON'T HAVE THAT HERE. WE DON'T HAVE ANYTHING
23 LIKE THAT HERE. WE DON'T HAVE A WASH SALE WHERE YOU ARE FAKING
24 A SALE WHEN THE PERSON WHO WAS THE BENEFICIAL OWNER REMAINS THE
25 BENEFICIAL OWNER AFTERWARDS OR A MATCHED ORDER OR RIGGED

UNITED STATES DISTRICT COURT

1 PRICES. THAT'S A TECHNICAL TERM THAT IS IN THE SECURITIES LAWS
2 THAT DOESN'T COVER THE CONDUCT THAT THEY HAVE SAID.

3 SO, FINALLY, ON THIS MANIPULATION STATEMENT WE WANT
4 TO MAKE THE POINT THAT THE STATEMENT WAS NOT MADE TO GALECTIN'S
5 SHAREHOLDERS. IT IS A REPRESENTATION BURIED IN AN 8-K, IN AN
6 AGREEMENT ATTACHED TO AN 8-K THAT WAS MADE TO MLV.

7 IF YOU LOOK AT EXHIBIT I, THE 8-K ITSELF, THE FILING
8 BY THE COMPANY, THE COMPANY DOESN'T SAY ANYTHING IN THERE ABOUT
9 MANIPULATION. IT'S CLEAR THAT THE COMPANY WAS NOT GOING OUT
10 AND TOUTING TO SHAREHOLDERS AND THE MARKET, HEY, WE ARE NOT
11 ENGAGING IN ANY MANIPULATIVE CONDUCT, WE ARE NOT HIRING PEOPLE.
12 IT'S NOT LIKE THAT. IT'S NOT A REPRESENTATION REASONABLY
13 CALCULATED TO REACH THE INVESTING PUBLIC. THERE WAS NO --
14 THERE IS NO INDICIA HERE THAT THIS STATEMENT BURIED IN AN
15 AGREEMENT WITH A BROKER-DEALER WAS IN ANY WAY INTENDED TO
16 INFLUENCE THE INVESTING PUBLIC.

17 AND WE HAVE CITED A CASE AND I'VE GOT THE QUOTE FROM
18 IT ON EXHIBIT F. THIS IS SEC V. TEXAS GULF SULPHUR COMPANY, A
19 WELL-KNOWN SECOND CIRCUIT CASE, THAT SAYS RULE 10B-5 REQUIRES
20 THAT THE COMMUNICATION BE MADE IN A MANNER REASONABLY
21 CALCULATED TO INFLUENCE THE INVESTING PUBLIC, WHICH DID NOT
22 HAPPEN HERE. SO FOR THAT REASON THIS ATM AGREEMENT, THAT'S
23 JUST NOT AN ACTIONABLE STATEMENT BY THE COMPANY.

24 ALL RIGHT. THE SECOND STATEMENT BY THE COMPANY THAT
25 THEY CHALLENGE IS EXHIBIT H. SO IF WE JUST LOOK AT THAT,

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1 THAT'S IN THE COMPLAINT, PARAGRAPH 85. THEY CHALLENGE
2 STATEMENTS THAT THE COMPANY MADE REGARDING THE PROCEEDS THAT
3 THEY RAISED IN THIS OFFERING. OKAY. WELL, THOSE ARE NOT GOING
4 TO BE ACTIONABLE EITHER.

5 FIRST OF ALL, AN OMISSION, THEY SAY IT'S -- WELL, I
6 KNOW YOU ARE LISTING ACCURATE INFORMATION HERE ABOUT HOW MUCH
7 YOU RAISED IN THESE OFFERINGS, BUT YOU DON'T SAY THAT YOU HAD
8 HIRED PUBLIC RELATIONS FIRMS TO PROMOTE YOUR STOCK.

9 WELL, AN OMISSION IS ONLY ACTIONABLE IF IT WAS
10 NECESSARY TO MAKE THE STATEMENTS CHALLENGED NOT MISLEADING.
11 OKAY. THERE IS NOTHING THAT THE HIRING OF P.R. FIRMS HAS TO DO
12 WITH THESE STATEMENTS. THESE STATEMENTS ARE JUST FACTUAL. WE
13 SOLD THIS AMOUNT OF STOCK, WE RAISED THIS AMOUNT OF PROCEEDS,
14 AND THEY STAND ALONE BY THEMSELVES. THEY AREN'T COLORED OR
15 INFLUENCED BY ANY WAY. THEY ARE NOT RENDERED MISLEADING BY THE
16 OMISSION OF INFORMATION THAT THE COMPANY HIRED PROMOTIONAL
17 FIRMS WHICH SAID -- WHICH MADE ACCURATE STATEMENTS ABOUT THE
18 COMPANY'S PROSPECTS AND WHICH DISCLOSED THAT THEY WERE BEING
19 PAID. OKAY. THOSE STATEMENTS WERE NOT NECESSARY TO MAKE THOSE
20 NOT MISLEADING. SO FOR THAT REASON WE THINK THAT THAT
21 STATEMENT IS NOT ACTIONABLE EITHER.

22 SO THAT IS THE TWO STATEMENTS THAT THEY HAVE
23 CHALLENGED THAT GALECTIN MADE. WE HAVE ALREADY BEEN THROUGH
24 THE STATEMENTS MADE BY THE PROMOTIONAL FIRMS THEMSELVES AND WHY
25 UNDER JANUS AND OTHER REASONS THAT IT IS NOT SUFFICIENT.

UNITED STATES DISTRICT COURT

1 I WILL MAKE THE COMMENT YOU ASKED ABOUT THE AGENCY
2 QUESTION. I TOLD YOU JUDGE WHITE PRETTY MUCH SAYS NO AGENCY
3 AFTER JANUS. BUT EVEN THEIR AGENCY ALLEGATIONS ARE COMPLETELY
4 CONCLUSORY. THEY ARE NOT PLED WITH PARTICULARITY. THEY DON'T
5 SHOW ANY KIND OF WHAT THE TYPE OF AGENCY WAS, WAS THERE
6 PAYMENT, WHAT LEVEL OF CONTROL. THEY DON'T ALLEGE ANY OF THAT.

7 THE COURT: IF NOTHING WENT WRONG OR NOTHING WAS DONE
8 WRONG, WHAT CAUSED THE STOCK TO DROP SO?

9 MR. SMITH: WELL, THAT'S INTERESTING. LET'S GO TO
10 LOSS CAUSATION.

11 OKAY. SO UNDER THE SECURITIES LAWS YOU HAVE TO PLEAD
12 LOSS CAUSATION TO STATE A CLAIM AND YOU HAVE TO PLEAD A
13 CORRECTIVE -- THAT YOUR LOSS, THE STOCK DROPPED FOLLOWING A
14 CORRECTIVE DISCLOSURE. A CORRECTIVE DISCLOSURE IS ONE THAT
15 REVEALS TO THE MARKET FOR THE FIRST TIME THAT THERE WAS A PRIOR
16 FALSE AND MISLEADING STATEMENT.

17 THE COURT: TRUE.

18 MR. SMITH: OKAY. SO WHAT DO THEY ALLEGE? THEY
19 ALLEGE -- AND WE'VE GOT THAT EXHIBIT J. LET'S LOOK AT
20 EXHIBIT J.

21 THEY SAY THAT ON JULY 25TH AN INVESTMENT COMMENTATOR
22 INITIALLY ALERTED THE MARKET TO WHAT THEY CALL THE FRAUDULENT
23 PROMOTION SCHEME. OKAY. SO THAT'S ON JULY 25TH.

24 THEN IN THE NEXT PARAGRAPH, 73, THEY SAY ON JULY 28TH
25 ANOTHER FIRM CONFIRMED THAT TWEET AND SAID THAT THERE IS A

UNITED STATES DISTRICT COURT

1 PROMOTIONAL SCHEME GOING ON.

2 OKAY. NOW, WE TALKED ABOUT A CORRECTIVE DISCLOSURE
3 NEEDING TO BE THE FIRST TIME THAT THE MARKET GETS THE
4 INFORMATION. WELL, FIRST OF ALL, WE HAVE SHOWN YOU THE TWO
5 DOCUMENTS IN EXHIBIT C AND D WHERE IT HAD BEEN PUBLIC KNOWLEDGE
6 SINCE MARCH OF 2014 FOR ACORN'S DOCUMENTS, THAT THEY DID, WERE
7 BEING PAID TO PROMOTE.

8 THE COURT: IT'S PUT OUT THERE FOR TWO OF THE
9 COMPANIES.

10 MR. SMITH: IT'S ABSOLUTELY PUT OUT THERE FOR TWO OF
11 THE COMPANIES. OKAY.

12 THE COURT: THE OTHER TWO?

13 MR. SMITH: LET'S TALK ABOUT THE OTHER TWO.

14 AND FOR THE JULY 25TH, OKAY, THEY DON'T ALLEGE ANY
15 MARKET REACTION ON JULY 28TH. THEY ALLEGE THE MARKET REACTION
16 WAS ON JULY 29TH. JULY 29TH IS THE DAY THAT THE COMPANY
17 RELEASED ITS PHASE I TESTING RESULTS.

18 OKAY. JULY 29TH THERE WAS COMMENTARY IN THE MARKET
19 ABOUT, WELL, THOSE RESULTS AREN'T SO GREAT. NOW, THE COMPANY
20 DISPUTES THAT BUT THERE WAS CLEARLY COMMENTARY IN THE MARKET
21 THAT, WELL, THESE RESULTS AND THE DISCUSSION OF, YOU KNOW, YES,
22 IT APPEARED TO BE SAFE, BUT, WHOA, WE WERE EXPECTING TO MAYBE
23 SEE SOMETHING SHOWING THAT THIS WAS A LITTLE MORE EFFECTIVE IN
24 TREATING THE DISEASE EVEN THOUGH THAT'S NOT THE PURPOSE OF
25 PHASE I.

UNITED STATES DISTRICT COURT

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1 SO THERE WAS ALL THAT NOISE IN THE MARKET AND I WOULD
2 SUBMIT TO YOU THAT IT'S THEIR OBLIGATION TO PLEAD TO THE COURT
3 HOW IT COULD BE NOT THAT NOISE BUT THESE OTHER THINGS.

4 SO IF YOU THINK ABOUT IT, AND WE'VE GOT SOME CASE
5 LAW, IF YOU LOOK JUST ON EXHIBIT K HERE, TWO ELEVENTH CIRCUIT
6 CASES I WANT TO DRAW YOUR ATTENTION TO. THE FIRST IS MYER
7 V. GREENE, 2013 ELEVENTH CIRCUIT CASE. THE MERE REPACKAGING OF
8 ALREADY PUBLIC INFORMATION BY AN ANALYST OR SHORT SELLER IS
9 SIMPLY INSUFFICIENT TO CONSTITUTE A CORRECTIVE DISCLOSURE.

10 I WOULD SAY BOTH OF THESE TWEETS, THE TWEET ON THE
11 25TH AND THE REPEAT, THE CONFIRMING TWEET ON THE 29TH, IS JUST
12 REPACKAGING INFORMATION THAT WAS ALREADY OUT THERE IN THE
13 MARKET DOMAIN. THAT'S HOW THESE GUYS FOUND THE INFORMATION TO
14 EVEN TWEET IT IS BECAUSE IT WAS IN THE PUBLIC DOMAIN.

15 THEN, SECOND, YOU LOOK AT THE FINDWHAT INVESTOR
16 ELEVENTH CIRCUIT CASE, 2011 CASE, ALSO TALKS ABOUT THIS WHOLE
17 NOTION OF CONFIRMATORY DISCLOSURES, DISCLOSURES WHICH CONFIRM
18 ALREADY EXISTING INFORMATION CAN'T MOVE THE MARKET PRICE AND
19 CAN'T CONSTITUTE A CORRECTIVE DISCLOSURE.

20 IF YOU LOOK BACK AT TAB J IN THE ALLEGATIONS OF THE
21 COMPLAINT, PARAGRAPH 73, THEY ACTUALLY USED THE WORD CONFIRMING
22 FEUERSTEIN'S TWEET IN THERE. THAT IS A CLASSIC CONFIRMATORY
23 DISCLOSURE AND THE FIRST ONE IS EVEN A CONFIRMATORY DISCLOSURE
24 BECAUSE, AS WE HAVE SEEN AND POINTED TO, THERE WAS ALREADY
25 PUBLIC DISCLOSURE.

UNITED STATES DISTRICT COURT

1 NOW, YOU ASKED ABOUT THE OTHER TWO COMPANIES. OKAY.

2 SO ONE OF THEM IS PATRICK COX. HE IS A PERSON WHO WROTE

3 ARTICLES FOR MAULDIN ECONOMICS.

4 THE COURT: RIGHT.

5 MR. SMITH: MAULDIN ECONOMICS, I MEAN IT'S SAID

6 MAULDIN ECONOMICS. THERE IS NO HIDING THAT FACT. JOHN MAULDIN

7 IS A BOARD MEMBER OF GALECTIN. OKAY. SO THE CONNECTION TO

8 MAULDIN IS FULLY DISCLOSED OUT THERE. ALL RIGHT. THERE IS NO

9 ALLEGATION, AS WE HAVE SAID, THAT WITH PARTICULARITY PROVIDES

10 ANY SUPPORT FOR THE NOTION THAT MR. COX WAS BEING PAID. HE

11 DENIES IT, AT LEAST HE DISCLOSED HE DENIED IT. YOU CAN TAKE

12 NOTICE OF THE FACT THAT HE DENIED IT, BUT THEY HAVE PLED

13 NOTHING TO SHOW THAT HE -- THEY JUST SAID, WELL, IF HE WROTE

14 ARTICLES, ERGO HE MUST HAVE BEEN PAID. AND THAT'S NOT ENOUGH

15 UNDER THE 9B OR THE SECURITIES, PRIVATE SECURITIES LITIGATION

16 REFORM ACT.

17 THE OTHER COMPANY, DREAM TEAM. AGAIN, THERE IS NO

18 ALLEGATIONS. AND IMPORTANTLY, FOR LOSS CAUSATION, REMEMBER I

19 SAID IT HAS TO BE A CORRECTIVE DISCLOSURE.

20 THE COURT: CORRECT.

21 MR. SMITH: IT HAS TO REVEAL TO THE MARKET FOR THE

22 FIRST TIME THAT A PRIOR DISCLOSURE WAS FALSE OR MISLEADING.

23 THERE IS NO, THERE IS NO MENTION OF DREAM TEAM IN THESE

24 SO-CALLED CORRECTIVE DISCLOSURES. THERE IS A VAGUE REFERENCE

25 TO COX THAT SAYS, WELL, HE HAD A CONNECTION TO MAULDIN

UNITED STATES DISTRICT COURT

1 ECONOMICS, BUT MAULDIN ECONOMICS, THAT CONNECTION IS FULLY
2 APPARENT ON THE FACE OF EVERY ONE OF THOSE ARTICLES. SO FOR
3 THAT REASON WE MAINTAIN THAT THERE IS NO LOSS CAUSATION.

4 SO THE LAST THING I WOULD LIKE TO HIT ON, YOUR HONOR,
5 WE TOUCHED ON THERE IS NO FALSE STATEMENT BY THE COMPANY. THE
6 COMPANY CAN'T BE LIABLE FOR THE THIRD-PARTY STATEMENTS. WE
7 TOUCHED ON LOSS CAUSATION. NOW I WANT TO HIT SCIENTER.

8 OKAY. SCIENTER IS A REQUIRED ELEMENT THEY HAVE TO
9 PLEAD WITH PARTICULARITY.

10 THE COURT: TRUE.

11 MR. SMITH: FACTS WHICH RAISE A STRONG INFERENCE OF
12 SCIENTER, AN INFERENCE, THAT IS, THE SUPREME COURT HAS SAID,
13 HAS GOT TO BE COGENT AND COMPELLING AND AT LEAST AS COMPELLING
14 AS ANY OTHER COMPETING INFERENCE.

15 SO IF YOU LOOK AT -- TABS G ARE THE EXCERPTS FROM THE
16 COMPLAINT REGARDING SCIENTER. AND THESE ARE THE SAME TYPE OF
17 BOILERPLATE GENERIC SCIENTER ALLEGATIONS THAT COURTS HAVE
18 REPEATEDLY, TIME AND TIME AGAIN, FOUND TO BE INSUFFICIENT IN
19 OUR CIRCUIT.

20 YOU KNOW, YOU LOOK FIRST ON PARAGRAPH 101. THE
21 DEFENDANTS, AS EXECUTIVE OFFICERS AND DIRECTORS, CONTROLLED THE
22 CONTENTS OF THE COMPANY'S PUBLIC SEC FILINGS. WELL, THE
23 ELEVENTH CIRCUIT HAS SAID IN PHILLIPS, A 2004 DECISION AND
24 OTHERS WE CITE, THAT TO GO BEYOND THE PLEADING STAGE YOU HAVE
25 GOT TO ALLEGE FACTS THAT SHOW EACH DEFENDANT'S STATE OF MIND

UNITED STATES DISTRICT COURT

1 AND PARTICIPATION IN THIS. SO THESE BOILERPLATE, WELL, THEY
2 WERE DIRECTORS, THEY MUST HAVE KNOWN ARE INSUFFICIENT.

3 ANOTHER ALLEGATION IN PARAGRAPH 103 IS THAT
4 DR. TRABER AND THE CHIEF FINANCIAL OFFICER OF THE COMPANY
5 SIGNED SOX CERTIFICATIONS. THEY ARE REQUIRED TO BE SIGNED WITH
6 ALL THE PUBLIC FILINGS. WELL, THOSE HAVE REPEATEDLY BEEN FOUND
7 TO BE INSUFFICIENT. THE THOMPSON CASE, ELEVENTH CIRCUIT 2010
8 DECISION, FINDS THAT, YOU KNOW, ALLEGATIONS THAT THE DEFENDANTS
9 SIGNED SEC FORMS AND SOX CERTIFICATIONS, WERE INVOLVED IN
10 DRAFTING AND PRODUCING SEC DOCUMENTS WITH MISLEADING STATEMENTS
11 ARE JUST NOT SUFFICIENTLY PARTICULARIZED, NOT SUFFICIENTLY --
12 THEY ARE JUST CONCLUSIONS THAT DON'T BOLSTER THE REQUIRED
13 STRONG INFERENCE OF SCIENTER.

14 FINALLY, THE CORE OPERATIONS DOCTRINE. THEY SAY,
15 WELL, THEY HAD TO HAVE KNOWN BECAUSE THIS IS PART OF THE
16 COMPANY'S CORE OPERATIONS. THE COMPANY'S CORE OPERATIONS ARE
17 DEVELOPING DRUGS. THEY ARE NOT MARKETING. THEY ARE NOT P.R.
18 SO THERE IS JUST SIMPLY NOTHING TO SHOW ANY DEFENDANT'S
19 KNOWLEDGE ABOUT THE ARTICLE, ANY DEFENDANT'S CONTROL OVER THE
20 CONTENTS OF THE ARTICLE. THERE IS NO ALLEGATION THAT THE
21 COMPANY EDITED, REVIEWED, APPROVED, SAID WHAT THEY COULD SAY OR
22 NOT OR EVEN PREVENTED THEM FROM SAYING THINGS.

23 THERE IS A CASE THAT THEY RELY VERY HEAVILY ON. IT'S
24 OUT OF CIRCUIT. IT'S IN OREGON OR SOMEWHERE OUT WEST, THE
25 CYTRX DECISION.

UNITED STATES DISTRICT COURT

1 THE COURT: IT IS GALENA, G-A-L-E-N-A?

2 MR. SMITH: GALENA.

3 THE COURT: GALENA.

4 MR. SMITH: THOSE ARE TWO DECISIONS THAT THEY HAVE
5 CITED. THOSE INVOLVE A VERY, VERY DIFFERENT SET OF FACTS.
6 THERE THE PLAINTIFFS DID PLEAD AND HAD SPECIFIC FACTS.
7 DEFENDANTS REVIEWED THE ARTICLES. DEFENDANTS EDITED THE
8 ARTICLES. DEFENDANTS PREVENTED THE WRITERS OF THE ARTICLES
9 FROM MAKING THE PAYMENT DISCLOSURE.

10 THE COURT: THE KEY THINGS, THE DEFENDANTS. IN THIS
11 CASE, THE PROMOTERS. IN THIS CASE, IT IS THE PROMOTERS. IN
12 THE GALENA CASE THE DEFENDANTS WERE THE PROMOTERS IN A SENSE.

13 MR. SMITH: THEY WERE THE DIRECTORS AND OFFICERS AND
14 THE PROMOTERS WERE DEFENDANTS IN THAT CASE, A VERY, VERY
15 DIFFERENT SET OF CIRCUMSTANCES THAN WHAT WE HAVE HERE.

16 FIRST OF ALL, WE HAVE DISCLOSURE OF THE PAID
17 PROMOTION. THEY DIDN'T THERE AND THEN ALL THOSE OTHER FACTS
18 THAT I HAVE TOLD YOU.

19 SO, IN SHORT, THEY ALSO SAY, WELL, THE DEFENDANTS
20 WERE FINANCIALLY MOTIVATED TO DO THIS, TO NOT DISCLOSE THIS
21 INFORMATION AND HAVE A FRAUDULENT SCHEME BECAUSE THEY NEEDED TO
22 RAISE MONEY TO FUND THE FUTURE RESEARCH AND DEVELOPMENTS.

23 EVERY COMPANY HAS TO RAISE MONEY AND GO OUT THERE
24 AND, YOU KNOW, CONTINUE GOING ON. THAT'S A GENERIC MOTIVE.
25 IT'S NOTHING THAT ADDS TO AN INFERENCE OF SCIENTER UNDER THE

UNITED STATES DISTRICT COURT

1 CASES WE CITE.

2 FINALLY, THERE ARE NO ALLEGATIONS IN THIS SECURITIES
3 SUIT ABOUT INSIDER, SUSPICIOUS INSIDER SALES, THINGS OF THAT
4 NATURE. THE ELEVENTH CIRCUIT IN THE MIZZARO CASE SAID THAT
5 LACK OF ALLEGATIONS OF ANY KIND OF INSIDER PROFIT AND INSIDER
6 TRADING CUT AGAINST AND WEIGH AGAINST AN INFERENCE OF SCIENTER,
7 SO WE WOULD SAY THAT AS WELL.

8 SO IN SUM, YOUR HONOR, I THINK WE HAVE SHOWN HERE
9 THAT THEY HAVEN'T SHOWN A FALSE OR MISLEADING STATEMENT. THEY
10 ADMIT THE CONTENT OF THESE THIRD-PARTY ARTICLES. THEY ARE NOT
11 CHALLENGING THEM. WE HAVE SEEN DISCLOSURE OF PAYMENTS MADE BY
12 TDM AND ACORN. WE HAVE LOOKED AT THE STATEMENTS THAT GALECTIN
13 ACTUALLY MADE, THAT REPRESENTATION IN THE PRIVATE AGREEMENT
14 WITH MLV ABOUT MANIPULATION. IT'S NOT MANIPULATIVE TO -- IT'S
15 CERTAINLY NOT MANIPULATIVE TO HAVE TRUE STATEMENTS ISSUED THAT
16 DISCLOSE PAYMENTS. AND WE HAVE LOOKED AT THE OTHER STATEMENT
17 MADE ABOUT THE PROCEEDS OF THE OFFERING AND EXPLAIN WHY THAT IS
18 NOT A FALSE STATEMENT.

19 WE HAVE SHOWN THAT THEY FAILED TO PLEAD LOSS
20 CAUSATION BECAUSE THE INFORMATION WAS ALREADY IN THE PUBLIC
21 DOMAIN AND THAT CAN'T -- ANY DISCLOSURES RIGHT BEFORE THE DROP
22 WERE JUST CONFIRMING WHAT WAS ALREADY OUT THERE AND THEN
23 SCIENTER.

24 THE COURT: YOU ARE ARGUING THAT THEY DON'T ARGUE
25 THERE WAS ANY FALSE OR MISLEADING STATEMENTS MADE AND YOU POINT

UNITED STATES DISTRICT COURT

1 OUT IN YOUR --

2 MR. SMITH: WHERE THEY HAVE CONCEDED THAT.

3 THE COURT: WHERE THEY HAVE CONCEDED THAT.

4 MR. SMITH: YES.

5 THE COURT: YET DON'T THEY ARGUE THAT -- I THINK THE

6 NAME OF THE COMPANY IS INTELLECT, THAT YOU ALL WERE CLOSE TO

7 DEVELOPING YOUR PRODUCT LIKE THIS OTHER COMPANY.

8 MR. SMITH: OH, INTERCEPT.

9 THE COURT: INTERCEPT, YES.

10 MR. SMITH: INTERCEPT WAS A COMPETITOR.

11 THE COURT: YES.

12 MR. SMITH: YES.

13 THE COURT: DON'T THEY ARGUE THAT IT'S MISLEADING,

14 YOU ALL WERE MISLEADING THE PUBLIC WHEN YOU ARGUE THAT YOU ARE

15 JUST AS CLOSE AS THEY WERE TO THIS?

16 MR. SMITH: I THINK THE SPECIFIC ALLEGATION, YOUR

17 HONOR, AND THANKS FOR RAISING THAT, WAS THAT IN ONE OF THE

18 ARTICLES IT WAS SAID THAT GALECTIN WAS NIPPING AT THE HEELS OF

19 INTERCEPT.

20 INTERCEPT IS A COMPETITOR WHO IS ALSO IN TRIALS TO

21 GET THEIR DRUG APPROVED. I THINK THEY MIGHT BE, MAY BE AHEAD

22 OF US IN SORT OF THE PHASE I, PHASE II, PHASE III PROCESS.

23 THE COURT: I THINK THAT'S THE WAY I READ IT, THAT

24 THEY WERE AHEAD OF YOU ALL BUT YOU ALL WERE RIGHT THERE AT THE

25 HEELS.

UNITED STATES DISTRICT COURT

1 MR. SMITH: SO I THINK THE REASON THEY HAVE ABANDONED
2 ANY ATTEMPT, LIKE THEY ADMIT, TO CHALLENGE THE SUBSTANCE OF THE
3 ARTICLES IS BECAUSE, THINK OF THAT, THAT'S JUST AN OPINION.
4 THAT'S A STATEMENT OF OPINION, WHETHER SOMEBODY IS CLOSE TO
5 THEM OR NIPPING AT THEIR HEELS, AND STATEMENTS OF OPINION UNDER
6 SUPREME COURT AUTHORITY, MOST RECENTLY THE OMNICARE DECISION,
7 YOU HAVE TO SHOW THAT THAT OPINION WAS NOT SUBJECTIVELY HELD BY
8 THE INDIVIDUAL. THAT'S AN IMPOSSIBLE BURDEN FOR THEM.

9 AND I THINK THAT'S WHY THEY -- EVEN THOUGH THEY SAY,
10 WELL, THOSE WERE EXAGGERATIONS AND EMBELLISHED AND
11 OVERPRAISING - THEY USE TERMS LIKE THAT - THAT'S, FIRST OF ALL,
12 NONACTIONABLE OPINIONS AND, SECOND OF ALL, THAT'S WHAT YOU CALL
13 PUFFERY. I MEAN THAT'S JUST MARKETING. AND UNLESS YOU CAN
14 SHOW THAT IT WAS FALSE AND YOU KNEW THE STATEMENT WAS FALSE,
15 IT'S NOT ACTIONABLE AS A FRAUD UNDER THE SECURITIES LAWS. AND
16 THE STATEMENTS IN THESE ARTICLES, I WOULD SUBMIT TO YOU, FALL
17 INTO THAT OPINION AND PUFFERY TYPE BUCKET AND THAT'S WHY THEY
18 HAVE ABANDONED ANY ATTEMPT TO REALLY SAY THE SUBSTANCE WAS
19 FALSE.

20 ONE THING I DO NEED TO ADDRESS BEFORE I SIT DOWN. WE
21 HAVE BEEN THROUGH THE FALSE STATEMENTS. THAT'S THE THRUST OF
22 THEIR CLAIM, RIGHT, THAT YOU MADE FALSE AND MISLEADING
23 STATEMENTS. THEY TRIED TO, I THINK, BECAUSE OF THE JANUS
24 PROBLEM THAT THEY HAVE, BECAUSE OF THE PROBLEM THAT I HAVE
25 POINTED OUT THAT THESE STATEMENTS THAT THE COMPANY MADE AREN'T

UNITED STATES DISTRICT COURT

1 ACTIONABLE, THEY TRIED TO ALLEGE A SCHEME LIABILITY AS WELL.
2 THAT'S COUNT 2 OF THEIR COMPLAINT. SO COUNT 1 IS THE FALSE
3 STATEMENTS. COUNT 2 IS THE SCHEME UNDER RULE 10B-5(A) AND (C).

4 WE CITE AUTHORITY FOR YOUR HONOR THAT YOU CAN'T BASE
5 A SCHEME LIABILITY CLAIM BASED ON A REPACKAGED CLAIM OF YOUR
6 FALSE STATEMENTS AND OMISSIONS. AND WE'VE GOT A CASE FOR YOU
7 HERE THAT WE CITE. IT'S BEHIND TAB L. IT'S A FAIRLY RECENT
8 NINTH CIRCUIT CASE ON SCHEME LIABILITY AND THAT'S THE WPP
9 LUXEMBOURG CASE BEHIND TAB L. AND COURTS HAVE -- AND I AM
10 QUOTING NOW. COURTS HAVE GENERALLY HELD THAT A RULE 10B-5(A)
11 AND/OR (C) CLAIM - THAT'S A SCHEME CLAIM - CANNOT BE PREMISED
12 ON THE ALLEGED MISREPRESENTATIONS OR OMISSIONS THAT FORM THE
13 BASIS OF THE RULE 10B-5(B) CLAIM, WHICH IS THE FALSE OR
14 MISLEADING STATEMENTS.

15 AND THEN LATER IN THE CASE IT SAYS YOU CAN'T JUST
16 REPACKAGE AN OMISSION CLAIM AND SAY, WELL, IT'S ALSO A SCHEME
17 CLAIM TO GET AROUND THE JANUS AND SOME OF THESE OTHER PROBLEMS
18 THAT THEY HAVE. THE DIVIDING LINES HAVE TO BE KEPT BRIGHT.

19 THERE IS NO CONDUCT ALLEGED HERE BEYOND WHAT THE
20 ALLEGED MISSTATEMENTS WERE THAT YOU DIDN'T DISCLOSE, THE
21 ENGAGEMENT OF THESE FIRMS, SO FOR THAT REASON NO SCHEME
22 LIABILITY EITHER.

23 SO I WOULD LIKE TO HAVE A FEW MINUTES IN REBUTTAL
24 AFTER THE PLAINTIFFS ADDRESS IT.

25 THANK YOU, YOUR HONOR.

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1 THE COURT: THANK YOU, MR. SMITH.

2 COUNSEL?

3 MR. YARNOFF: GOOD MORNING, YOUR HONOR.

4 THE COURT: GOOD MORNING, SIR.

5 MR. YARNOFF: MICHAEL YARNOFF. IT WAS INTERESTING --

6 THE COURT: EXCUSE ME? I SAID GOOD MORNING.

7 MR. YARNOFF: MICHAEL YARNOFF.

8 THE COURT: OH, I'M SORRY.

9 MR. YARNOFF: GOOD MORNING, YOUR HONOR. I'M SORRY.

10 I WAS LOOKING DOWN AT MY PAPERS RIGHT HERE.

11 IT'S INTERESTING. MR. SMITH, HIS LAST EXHIBIT THAT
12 HE SHOWED THE COURT WAS TAB L. IT WAS A NINTH CIRCUIT CASE AND
13 IT WAS INTERESTING WHEN HE WAS TALKING ABOUT THE CYTRX CASE,
14 ALSO A NINTH CIRCUIT CASE. HE SAID, OH, THAT'S A NINTH CIRCUIT
15 CASE, YOUR HONOR. YOU KNOW, THAT'S NOT IMPORTANT HERE. BUT,
16 YOU KNOW, WHEN SOMETHING IS IN HIS FAVOR, HE IS GOING TO CITE
17 TO IT, AND IT'S TAB L, WHICH IS A NINTH CIRCUIT CASE, SO --

18 THE COURT: IT'S CALLED LAWYERING.

19 MR. YARNOFF: AND HE DID, AND HE DID THAT MANY TIMES
20 THROUGHOUT, AND I KNOW IT'S ADVOCACY, BUT YOU HAVE TO TAKE THAT
21 AND YOU HAVE TO LOOK AT WHAT HE IS SAYING AND WHERE HE IS
22 TRYING TO LEAD THE COURT. AND I THINK WHERE HE WAS TRYING TO
23 LEAD THE COURT WAS SOMEWHERE WHERE WHAT THE PLAINTIFFS HAVE NOT
24 ALLEGED HERE, BECAUSE WHAT THE PLAINTIFFS HAVE ALLEGED IS A
25 FRAUD SCHEME.

UNITED STATES DISTRICT COURT

1 THEY USED THESE STOCK PROMOTERS IN ORDER TO
2 EMBELLISH, EXAGGERATE HOW THE COMPANY WAS DOING AND THEY DID
3 THAT BY USING THESE STOCK PROMOTERS AT THE SAME TIME WHERE THEY
4 WERE PUTTING OUT THEIR OWN STATEMENTS. SO THEY WERE TIMING A
5 LOT OF THE STATEMENTS. AND YOU COULD SEE IN THE ALLEGATIONS IN
6 THE COMPLAINT WHERE THE COMPANY PUTS OUT A STATEMENT ABOUT WHAT
7 WAS HAPPENING WITH THE COMPANY IMMEDIATELY EITHER BEFORE OR
8 AFTER THERE WAS A STATEMENT FROM ONE OF THESE STOCK PROMOTERS.

9 THE COURT: DO YOU AGREE OR DISAGREE WITH MR. SMITH
10 THAT NONE OF THE STATEMENTS GIVEN BY THESE COMPANIES WERE
11 FALSE?

12 MR. YARNOFF: WELL, I WANT TO TAKE YOU BACK TO --

13 THE COURT: LET'S START OFF WITH THE SIMPLE STUFF
14 FIRST.

15 MR. YARNOFF: OKAY.

16 THE COURT: DO YOU AGREE OR DISAGREE WITH MR. SMITH'S
17 ARGUMENT THAT NONE OF THESE STATEMENTS GIVEN BY THE COMPANIES
18 WERE FALSE?

19 MR. YARNOFF: WHEN YOU SAY GIVEN "BY THE COMPANIES,"
20 BECAUSE THE COMPANY MADE --

21 THE COURT: PROMOTERS, THE PROMOTERS.

22 MR. YARNOFF: THE PROMOTERS. WE ARE NOT CLAIMING
23 HERE THAT THE INFORMATION IS FALSE AND MISLEADING IN THOSE
24 STOCK PROMOTERS' STATEMENTS. THAT'S TRUE, YOUR HONOR.

25 THE COURT: OKAY. ALL RIGHT.

UNITED STATES DISTRICT COURT

1 MR. YARNOFF: WHAT WE ARE CLAIMING IS FALSE IN
2 THERE --

3 THE COURT: WHAT'S FALSE?

4 MR. YARNOFF: WHAT IS FALSE IS THE FAILURE TO
5 DISCLOSE. THESE ARE INVESTORS --

6 THE COURT: DISCLOSE WHAT?

7 MR. YARNOFF: DISCLOSE THAT THE COMPANY IS PAYING
8 THESE ENTITIES TO PUT THESE STATEMENTS OUT THERE.

9 THE COURT: BUT DO THEY HAVE TO DISCLOSE THAT?

10 MR. YARNOFF: WELL, WHAT WE ARE SUGGESTING TO YOUR
11 HONOR IS THAT THESE ARE AGENTS OF THE COMPANY. THEY ARE BEING
12 PAID. NOW, DEFENDANTS WANT TO MAKE A POINT THAT WE DON'T HAVE
13 ENOUGH INFORMATION, WE DON'T HAVE ENOUGH SPECIFICS ABOUT HOW OR
14 WHY THEY WERE GETTING PAID. BUT, YOU KNOW WHAT, THE BOTTOM
15 LINE IS --

16 THE COURT: WELL, I GUESS HERE IS THE QUESTION. HERE
17 IS THE QUESTION, THOUGH. LET'S GO BACK TO THE JANUS CASE. FOR
18 ME THAT IS A HURDLE I NEED YOU TO GET OVER.

19 MR. YARNOFF: OKAY. NOW, THAT'S ONLY FOR SOME OF THE
20 STATEMENTS, YOUR HONOR.

21 THE COURT: I UNDERSTAND.

22 MR. YARNOFF: AND I WILL GET TO THE OTHER STATEMENTS.

23 THE COURT: IN THAT CASE JUSTICE THOMAS -- AND I
24 UNDERLINED IT, BECAUSE WHEN I READ IT THE OTHER NIGHT, I AM
25 LIKE, GOSH, THIS IS STRONG. HE SAYS IN IT, HE SAYS -- HE TALKS

UNITED STATES DISTRICT COURT

APP001504

1 ABOUT THE STONERIDGE CASE, BUT I AM GOING TO READ THE WHOLE
2 PARAGRAPH. HE SAYS: ADOPTING THE GOVERNMENT'S DEFINITION OF
3 "MAKE" WOULD ALSO LEAD TO RESULTS INCONSISTENT WITH OUR
4 PRECEDENT. THE GOVERNMENT'S DEFINITION WOULD PERMIT PRIVATE
5 PLAINTIFFS TO SUE A PERSON WHO PROVIDES THE FALSE OR MISLEADING
6 INFORMATION THAT ANOTHER PERSON THEN PUTS INTO THE STATEMENT.
7 BUT IN STONERIDGE, WE REJECTED A PRIVATE 10B-5 SUIT AGAINST
8 COMPANIES INVOLVED IN DECEPTIVE TRANSACTIONS, EVEN WHEN
9 INFORMATION ABOUT THOSE TRANSACTIONS WAS LATER INCORPORATED
10 INTO FALSE PUBLIC STATEMENTS.

11 HE SAYS RIGHT THERE THEY CAN GIVE THEM FALSE
12 INFORMATION, AND IF THE COMPANY GOES OUT AND PUTS IT IN THERE,
13 YOU STILL CAN'T HOLD THE ONE THAT GAVE THEM THE FALSE
14 INFORMATION RESPONSIBLE, AND EVEN THOUGH HERE WE ARE NOT EVEN
15 CLAIMING FALSE INFORMATION.

16 MR. YARNOFF: NO. WHAT WE ARE CLAIMING IS, AND THIS
17 IS THE KEY AND THIS IS HOW THIS SCHEME WORKS, YOUR HONOR, THIS
18 SCHEME WORKS BECAUSE INVESTORS ARE LOOKING AT WHAT THE COMPANY
19 IS SAYING BUT THEY ARE TAKING IT WITH A GRAIN OF SALT BECAUSE
20 IT'S THE COMPANY. AND OF COURSE THEY ARE GOING TO BE
21 OPTIMISTIC ABOUT WHAT THEY ARE SAYING ABOUT THEIR DRUG. THIS
22 IS THEIR ONLY DRUG. THEY NEED TO GET THIS DRUG APPROVED FOR
23 THIS COMPANY TO GO FORWARD, TO PROSPER. THIS COMPANY IS NOT
24 MAKING ANY MONEY RIGHT NOW.

25 THE COURT: I GUESS MY QUESTION IS: WHAT DID THE

UNITED STATES DISTRICT COURT

1 COMPANY DO WRONG? IN OTHER WORDS, I'VE GOT CASE LAW HERE AND I
2 AM SURE YOU ARE GOING TO TALK ABOUT THE GARVEY CASE. I WAS A
3 LITTLE SURPRISED MR. SMITH DIDN'T TALK MORE ABOUT IT, BUT HE
4 DID TOUCH ON IT, SO I GUESS HE DIDN'T TALK ABOUT IT BECAUSE
5 THIS IS WHAT IT SAYS: ISSUERS OF SECURITIES DID NOT HAVE THE
6 DUTY TO DISCLOSE TO INVESTORS THAT IT PAID ANALYSTS TO PUBLISH
7 THE FAVORABLE INFORMATION ABOUT THE COMPANY.

8 ALL RIGHT. IT'S NOT A FALSE STATEMENT. THEY DON'T
9 HAVE TO TELL IF THEY ARE PAYING THEM. SO WHAT IS IT? GIVE ME
10 A SENSE OF WHAT THEY DID WRONG.

11 NOW I AM GOING TO QUIT INTERRUPTING YOU AND LET YOU
12 TALK.

13 MR. YARNOFF: THAT'S NO PROBLEM.

14 WHAT THEY DID WRONG, WE HAVE TO GO BACK TO THE
15 STATEMENTS THAT I FIRST WANT TO ADDRESS AND THAT'S THE
16 STATEMENTS IN THE ATM OFFERINGS. THAT'S THE DOCUMENTS THEY
17 FILED WITH THE SEC WHERE THEY SAY THEY ARE NOT GOING TO
18 MANIPULATE THE STOCK. IT'S AN SEC FILING.

19 I KNOW MR. SMITH SAID, OH, YOU HAVE TO GO TO PAGE 12
20 OF 16 TO FIND IT. WELL, YOU KNOW WHAT? IT'S IN THERE. IT'S A
21 PUBLIC FILING AND IT SAYS THAT. IT SAYS THE COMPANY IS NOT
22 GOING TO MANIPULATE THE STOCK. BUT THAT'S EXACTLY WHAT THEY
23 ARE DOING HERE. BASED ON THE ALLEGATIONS IN THE COMPLAINT,
24 THAT'S WHAT THEY ARE TRYING TO DO. THEY HIRE STOCK PROMOTERS,
25 DON'T PROPERLY DISCLOSE THAT THEY ARE HIRING THESE STOCK

UNITED STATES DISTRICT COURT

1 PROMOTERS.

2 THE COURT: WELL, THERE ARE TWO OF THEM, TWO OF THEM
3 ARE DISCLOSED.

4 MR. YARNOFF: WELL, I CAN GO THROUGH THOSE TWO
5 DISCLOSURES, AND WHEN I SAY "NOT PROPERLY DISCLOSED," YES, THEY
6 WERE DISCLOSED TO SOME DEGREE AND I CAN RUN THROUGH THOSE.

7 THE COURT: AS YOU RUN THROUGH THEM, TELL ME WHAT
8 EVIDENCE YOU HAVE THAT THE OTHER TWO WERE PAID TO PROMOTE,
9 DREAM TEAM AND COX.

10 MR. YARNOFF: WELL, WE HAVE A COUPLE OF DIFFERENT
11 THINGS IN THE COMPLAINT THAT SAY WHY THEY WERE PAID OR HOW --
12 OR NOT HOW, WHY THEY WERE PAID.

13 FIRST WAS THE ARTICLES AT THE END OF THE CLASS
14 PERIOD. THE TWO DIFFERENT ARTICLES, ONE FROM BLEECKER STREET
15 AND ONE FROM ADAM FEUERSTEIN, BOTH INDICATE THAT THEY WERE
16 BEING PAID.

17 SECONDLY, IF YOU JUST LOOK AT THE ALLEGATIONS,
18 MR. COX PUT OUT 23 ARTICLES BEFORE AND DURING THE CLASS PERIOD
19 ABOUT GALECTIN. THE DREAM TEAM PUT OUT SEVEN ARTICLES. THE
20 ALLEGATIONS AND WHAT THE PLAINTIFFS PRESENT AND SUGGEST HERE IS
21 NOBODY IS DOING THAT FOR FREE. YOU ARE NOT PUTTING OUT 23
22 ARTICLES, YOU ARE NOT PUTTING OUT SEVEN ARTICLES UNLESS YOU ARE
23 BEING TOLD, PAID, OR RETAINED. AND I AM NOT SURE HOW THEY WERE
24 BEING PAID. MAYBE IT WAS THROUGH CASH. MAYBE IT WAS THROUGH
25 STOCK. MAYBE IT WAS THROUGH SOME OTHER MEANS, BUT I --

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1 THE COURT: THIS IS THE LAST TIME I AM GOING TO
2 INTERRUPT YOU, BECAUSE I LIKE FOR LAWYERS TO ARGUE, BUT YOU ARE
3 SPECULATING.

4 MR. YARNOFF: WELL, NO, WE ARE NOT SPECULATING. WHAT
5 IS IN THE COMPLAINT IS THAT THEY WROTE THOSE 23 ARTICLES AND
6 THEY WROTE THESE SEVEN ARTICLES. AND COMBINE THAT WITH THE
7 FACT THAT AT THE END OF THE CLASS PERIOD TWO DIFFERENT SOURCES
8 INDICATE THAT THEY WERE BEING PAID.

9 THIS IS A MOTION TO DISMISS, YOUR HONOR. IT'S NOT
10 SUMMARY JUDGMENT. MR. SMITH MAY WANT THIS TO BE SUMMARY
11 JUDGMENT AND HE HAS GONE THROUGH THIS CASE LIKE IT'S SUMMARY
12 JUDGMENT. THIS IS A SMALL COMPANY. MR. SMITH EVEN MENTIONED
13 IT. IT'S A SMALL COMPANY. AND IT'S DIFFICULT. IN A LOT OF
14 THESE SECURITIES CASES, YOU KNOW, WE CAN FIND CONFIDENTIAL
15 WITNESSES. THIS IS A VERY SMALL COMPANY.

16 THE COURT: YOU MAKE AN EXCELLENT POINT. THIS IS A
17 MOTION TO DISMISS STAGE.

18 MR. YARNOFF: EXACTLY RIGHT. THIS IS A MOTION TO
19 DISMISS STAGE. SO WE SUGGEST AND WHAT WE PRESENT TO THE COURT
20 IS THAT THIS IS A SCHEME TO DEFRAUD USING STOCK PROMOTERS.
21 THAT WAS UPHELD IN TWO CASES. AND I KNOW MR. SMITH MENTIONED
22 IT AT THE VERY END OF HIS ARGUMENT AND I DON'T BLAME HIM
23 BECAUSE THEY ARE VERY IMPORTANT CASES. ONE IS THE CYTRX CASE
24 AND ONE IS THE GALENA CASE.

25 THE FACTS, YES, MAY BE SOMEWHAT DIFFERENT THERE, BUT

UNITED STATES DISTRICT COURT

APP001508

1 THE BOTTOM LINE, IT'S THE SAME TYPE OF SCHEME. IT'S THE SAME
2 STATEMENT THAT WAS FALSE IN THOSE CASES. IT WAS THE STATEMENTS
3 IN THE SEC FILINGS THAT SAID THE COMPANY IS NOT GOING TO
4 MANIPULATE THE STOCK. AND THEN LO AND BEHOLD AT THE END OF THE
5 CLASS PERIOD IT WAS FOUND OUT. YOU KNOW WHAT? THEY WERE
6 MANIPULATING THE STOCK THROUGH THE USE OF STOCK PROMOTERS.

7 THE COURT: PLUS, THE SEC V. SIMMONS CASE IS A STRONG
8 ARGUMENT FOR YOU.

9 MR. YARNOFF: EXACTLY, YOUR HONOR. AND THIS IS WHAT
10 WE ARE SAYING AND YOU TOUCHED ON IT AND YOU ASKED MR. SMITH A
11 VERY IMPORTANT QUESTION. WHY DID THE STOCK GO DOWN SO MUCH AT
12 THE END OF THE CLASS PERIOD IF THERE WASN'T SOMETHING OUT THERE
13 THAT WASN'T DISCLOSED? AND MR. SMITH STARTED TO SUGGEST
14 SOMETHING ABOUT THE 25TH AND SOMETHING ELSE. YOU KNOW WHAT?
15 IF YOU LOOK AT THE ALLEGATIONS IN THE COMPLAINT, THERE ARE TWO
16 ARTICLES --

17 THE COURT: WELL, HE ARGUED THAT --

18 MR. YARNOFF: YES. THE TWO ARTICLES THAT GIVE THE
19 DETAIL OF THIS SCHEME COME OUT ON THE 28TH. WHAT THE
20 ALLEGATIONS SUGGEST OR WHAT THE ALLEGATIONS SAY IS THAT AT THE
21 OPENING OF THE BELL ON THE 29TH. SO THAT MEANS THE INFORMATION
22 IS ON THE 28TH. PEOPLE ARE PROCESSING IT. INVESTORS ARE
23 PROCESSING IT. IT'S AFTER-MARKET TRADING. WHEN THE MARKET
24 OPENS ON THE 29TH BEFORE THE COMPANY COMES OUT WITH, HEY, WE
25 ARE NOT DOING AS WELL AS WE THOUGHT WE WERE DOING AND THINGS

UNITED STATES DISTRICT COURT

APP001509

1 LIKE THAT, THE STOCK GOES DOWN FROM \$15.91 A SHARE TO OPEN AT
2 \$7.10 CENTS ON JULY 29TH. THAT WAS A DROP OF 55 PERCENT. TO
3 ME THAT SAYS THAT INVESTORS WERE NOT AWARE OF WHAT WAS GOING ON
4 WITH THESE STOCK PROMOTERS.

5 AND I KNOW MR. SMITH INDICATES THAT THERE IS SOME
6 INFORMATION IN THE MARKET THAT TWO OF THE PROMOTERS PUT OUT
7 THEIR INFORMATION THAT INVESTORS KNEW THAT THEY WERE BEING
8 RETAINED BY THE COMPANY, BUT IF YOU LOOK AT THEM, THE FIRST ONE
9 IS ACORN.

10 NOW, ACORN, WHAT THE DEFENDANTS SAY ABOUT ACORN IS
11 THAT THEY HAVE LIKE A CONSULTING AGREEMENT WITH ACORN BUT DON'T
12 GIVE ANY OTHER DETAILS ABOUT WHAT THAT CONSULTING AGREEMENT IS
13 ALL ABOUT. THEY WOULD HAVE COME OUT AND SAID HEY, WE HAVE AN
14 AGREEMENT, A CONSULTING AGREEMENT WITH ACORN. THEY ARE WRITING
15 ARTICLES ON OUR BEHALF TO HYPE THE STOCK. AND YOU KNOW WHAT?
16 THEN INVESTORS ARE ON NOTICE. THEN INVESTORS, WHEN THEY ARE
17 LOOKING AT THESE ARTICLES, THEY CAN SAY TO THEMSELVES, HEY, WE
18 ARE GOING TO LOOK AT THIS AND WE ARE GOING TO DECIDE IF WE ARE
19 GOING TO GIVE IT ANY WEIGHT OR CREDIBILITY. BUT THAT'S NOT
20 WHAT WAS HAPPENING HERE. THAT'S THE WHOLE IDEA OF THE SCHEME.

21 THE SCHEME IS THAT THE COMPANY COMES OUT WITH A
22 STATEMENT. INVESTORS LOOK AT THAT STATEMENT, DECIDE WHETHER
23 THEY THINK IT HAS ANY VALIDITY OR ANY WEIGHT. BUT THEN THEY
24 SEE WHAT THEY THINK ARE INDEPENDENT ARTICLES SUGGESTING HEY,
25 THE COMPANY IS NIPPING AT THE HEELS OF INTERCEPT. YOU KNOW

UNITED STATES DISTRICT COURT

1 WHAT INTERCEPT STOCK WAS TRADING AT? \$600 A SHARE, BECAUSE
2 THEY WERE ALREADY IN PHASE III, I BELIEVE, TWO PHASES AHEAD,
3 ONE OR TWO PHASES AHEAD OF WHERE GALECTIN WAS.

4 AND THEN THESE ARTICLES, YOU KNOW, SUGGEST ABOUT THE
5 EFFICACY. AND SO INVESTORS ARE LOOKING AT THIS AND SAYING WOW.
6 OKAY, THE COMPANY IS SAYING ONE THING, BUT NOW WHAT THEY
7 BELIEVE ARE THESE THIRD-PARTY INDEPENDENT ENTITIES SAYING IT
8 ALSO AND AGREEING WITH IT AND EVEN EMBELLISHING AND, WHAT WE
9 SAY IN THE COMPLAINT, EVEN EXAGGERATING THOSE THINGS.

10 BUT NOT KNOWING THAT THESE STOCK PROMOTERS ARE BEING
11 PAID AND BEING RETAINED BY THE COMPANY, INVESTORS ARE LOOKING
12 AT THIS LIKE, HEY, THIS COMPANY, YEAH, THIS IS A GOOD COMPANY.
13 AND THAT'S WHY YOU SEE THROUGHOUT THE CLASS PERIOD THE STOCK IS
14 GOING UP. AND THE REASON THEY WANT THE STOCK TO KEEP GOING UP,
15 FOR A NUMBER OF REASONS, BUT ONE OF THE MAIN REASONS -- AND
16 AGAIN MR. SMITH SORT OF JUST, YOU KNOW, SLOUGHED IT OFF, BUT
17 THEY WERE DOING ATM'S, AT-MARKET OFFERINGS. AND AT-MARKET
18 OFFERINGS, YOU OFFER THE PRICE AT THE MARKET PRICE. AND THEY
19 WANTED TO RAISE \$30 MILLION.

20 THE FIRST AT-MARKET OFFERING WAS IN OCTOBER, START OF
21 THE CLASS PERIOD, AND THEN THE SECOND ONE WAS IN MARCH. THEY
22 WANTED TO RAISE \$30 MILLION IN EACH OF THESE OFFERINGS. AND IN
23 ORDER TO RAISE \$30 MILLION, IF THE STOCK IS LOWER YOU ARE GOING
24 TO HAVE TO ISSUE MORE SHARES. IF THE STOCK IS HIGHER, YOU HAVE
25 TO ISSUE LESS SHARES. BY ISSUING LESS SHARES AT A HIGHER

UNITED STATES DISTRICT COURT

1 PRICE, THE STOCK THAT IS OWNED BY THE DEFENDANTS IN THIS
2 CASE -- AND IT'S A SMALL COMPANY. THERE'S NOT THAT MANY SHARES
3 PUBLICLY TRADED. THEY OWN A GREAT PERCENTAGE OF THE STOCK --
4 IF THERE IS MORE STOCK BEING OFFERED, THEIR POSITIONS IN THE
5 COMPANY ARE BEING DILUTED. SO OF COURSE THEY WANT THE PRICE TO
6 GO UP. SO WHEN THEY ISSUE THESE AT-MARKET OFFERINGS, RAISE THE
7 MONEY, THEIR DILUTION STAYS DOWN. AND THAT'S EXACTLY WHAT
8 HAPPENED HERE AND THAT'S WHAT'S ALLEGED IN THE COMPLAINT.

9 SO, YOU KNOW, WE CAN GO THROUGH EVERY LITTLE ASPECT
10 AND TECHNICAL, YOU KNOW, ARGUMENT THAT CAN BE MADE HERE, BUT IF
11 YOU LOOK AT THIS AS A WHOLE AND IF YOU LOOK AT TELLABS AND
12 WHAT -- IS THIS A PLAUSIBLE INFERENCE ON BEHALF OF THE
13 PLAINTIFFS? IS THIS JUST ENOUGH TO GET US INTO DISCOVERY WHERE
14 WE MAY FIND OUT SOME OF THESE DETAILS MR. SMITH SAYS WE LACK
15 HERE? AND WE SUBMIT THAT IT IS. BECAUSE THIS IS A CASE WHERE
16 THE COMPANY, YOU KNOW, HIRED THE STOCK PROMOTERS, USED THE
17 STOCK PROMOTERS TO MANIPULATE THE STOCK. IT'S THEN FOUND OUT
18 AT THE END OF THE CLASS PERIOD AND ALL THIS MANIPULATION WHERE
19 THE STOCK IS GOING HIGHER THEN DROPS AT THE END OF THE CLASS
20 PERIOD.

21 SO, YOU KNOW, THIS IS A PRETTY SIMPLE CASE, YOUR
22 HONOR. IT REALLY IS. I MEAN, YOU KNOW, THE FACTS ARE NOT --

23 THE COURT: I NEVER HEARD A LAWYER SAY SOMETHING LIKE
24 THAT.

25 MR. YARNOFF: YEAH, I MEAN, AND I'VE BEEN TO A LOT OF

1 THESE HEARINGS AND A LOT OF THESE CASES ARE ACCOUNTING-BASED
2 AND A LOT MORE TECHNICAL. THIS IS LIKE A VERY -- IT'S LIKE
3 SIMPLE FRAUD HERE.

4 THE COURT: WELL, LET ME ASK YOU THIS QUESTION. AND
5 AGAIN I APOLOGIZE FOR INTERRUPTING YOU.

6 MR. YARNOFF: NO. NO PROBLEM, YOUR HONOR.

7 THE COURT: THAT'S A MISTAKE THAT JUDGES DO TOO MANY
8 TIMES.

9 MR. YARNOFF: NO, NO PROBLEM.

10 THE COURT: LET'S SAY AT THE MOTION TO DISMISS STAGE
11 I AM SUPPOSED TO ACCEPT MORE OR LESS WHAT YOU SAY AS PLAINTIFF,
12 AS THE NONMOVANT, AS BASICALLY TRUE ON ITS FACE.

13 MR. YARNOFF: RIGHT.

14 THE COURT: BUT IF I LOOK AT IT ON ITS FACE AND I SAY
15 IF I ACCEPT EVERYTHING THEY HAVE HERE AS TRUE ON ITS FACE AND I
16 STILL DON'T FIND A WRONG, WHERE AM I?

17 MR. YARNOFF: WHERE ARE YOU? ON THE PLAINTIFFS' SIDE
18 OF THINGS?

19 THE COURT: YES.

20 MR. YARNOFF: NOT AT A GOOD PLACE.

21 THE COURT: IN OTHER WORDS, THE MOVANT IN THIS CASE
22 IS THE DEFENDANTS.

23 MR. YARNOFF: NOT IN A GOOD PLACE, YES.

24 THE COURT: SO I HAVE TO ACCEPT WHAT YOU HAVE FILED
25 AS BEING TRUE.

UNITED STATES DISTRICT COURT

1 MR. YARNOFF: THAT'S CORRECT, YOUR HONOR.

2 THE COURT: OKAY. BUT IF I ACCEPT WHAT YOU HAVE
3 FILED AS TRUE, WHICH I AM REQUIRED TO DO AT THE MOTION TO
4 DISMISS STAGE.

5 MR. YARNOFF: RIGHT, RIGHT.

6 THE COURT: AND I LOOK AT IT AND I SAY, WELL, I STILL
7 DON'T FIND A PROBLEM, WHERE AM I?

8 MR. YARNOFF: WHERE ARE YOU? WELL, I MEAN YOU COULD
9 ASK US TO AMEND THE COMPLAINT AND ADD INFORMATION WHERE YOU
10 THINK IT NEEDS TO BE ADDED.

11 THE COURT: TRUE.

12 MR. YARNOFF: BUT AGAIN, YOU KNOW, I SUBMIT THAT
13 THAT'S NOT NECESSARY HERE; THAT IF YOU -- OBVIOUSLY YOUR HONOR
14 IS GOING TO GO BACK AND REVIEW THE COMPLAINT AGAIN AND THE
15 BRIEFING.

16 THE COURT: THAT'S TRUE.

17 MR. YARNOFF: AND IF YOU GO BACK AND LOOK AT THE
18 COMPLAINT, THERE IS ENOUGH IN HERE BASED ON THE DECISIONS OUT
19 IN CALIFORNIA AND OREGON WITH CYTRX AND GALENA WHERE THE SAME
20 TYPE OF FRAUD WAS TAKING PLACE, WHERE IT WAS USE OF STOCK
21 PROMOTERS, WHERE THE COURTS IN BOTH OF THOSE CASES FOUND THAT
22 THE STATEMENTS THAT THE COMPANY WAS NOT GOING TO MANIPULATE THE
23 STOCK WERE FOUND TO BE FALSE, THAT'S WHAT YOU ARE GOING TO FIND
24 HERE AND THAT'S WHAT'S ALLEGED IN THE COMPLAINT.

25 AND OBVIOUSLY DURING THE DISCOVERY PHASE, YOU KNOW,

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1 MORE INFORMATION WILL COME OUT. DEFENDANTS CAN OBVIOUSLY COME
2 BACK SOMETIME DOWN THE ROAD AT SUMMARY JUDGMENT. AND IF WE
3 HAVEN'T GIVEN YOU EVERYTHING THAT YOU NEED, I AM SURE YOU ARE
4 GOING TO BE WILLING AND HAPPY TO, YOU KNOW, DISMISS US AT THE
5 SUMMARY JUDGMENT STAGE, BUT THIS IS THE MOTION TO DISMISS
6 STAGE, NOT SUMMARY JUDGMENT.

7 THE COURT: BEFORE YOU SIT DOWN, LET'S TALK A LITTLE
8 BIT ABOUT AGENCY.

9 MR. YARNOFF: OKAY.

10 THE COURT: A BIG PART OF YOUR ARGUMENT.

11 MR. YARNOFF: OKAY.

12 THE COURT: DO YOU WANT TO ADDRESS THAT AS IT RELATES
13 TO -- YOU KNOW, I THINK WE BOTH AGREE THAT THE JANUS CASE IS
14 NOT FAVORABLE TO YOU.

15 MR. YARNOFF: YOUR HONOR, THE AGENCY IS A DIFFICULT
16 POINT FOR US AND I AM NOT GOING TO SIT HERE AND SAY IT ISN'T.

17 THE COURT: OKAY.

18 MR. YARNOFF: BUT PUTTING THE AGENCY ASIDE, THOSE ARE
19 ONLY CERTAIN STATEMENTS THAT ARE PART OF THE AGENCY ARGUMENTS.

20 THE STATEMENTS ABOUT THE SEC FILINGS THAT I HAVE
21 ALREADY DISCUSSED ABOUT THE MANIPULATION, THOSE ARE SEPARATE
22 AND APART. SO AT THE END OF THE DAY IF YOU FIND THAT WE DON'T
23 HAVE AGENCY AND THOSE ADDITIONAL STATEMENTS, THE ACTUAL
24 RELEASES AND STATEMENTS MADE BY THE COMPANY ARE NOT FALSE, YOU
25 STILL HAVE THE FALSE STATEMENTS MADE BY THE COMPANY IN TERMS OF

UNITED STATES DISTRICT COURT

1 NOT MANIPULATING THE STOCK.

2 THE COURT: THOSE TWO STATEMENTS, MR. SMITH ARGUES
3 THAT THEY DON'T HAVE AN EFFECT. HE SAYS IT DOES NOT AFFECT THE
4 STOCK PRICE. HE SAYS THOSE TWO, YOU HAVE TO BE ABLE TO SHOW IT
5 HAS AN EFFECT.

6 MR. YARNOFF: WE ABSOLUTELY SHOW IT.

7 THE COURT: OKAY.

8 MR. YARNOFF: WE ABSOLUTELY SHOW IT ON THE 28TH AND
9 THAT'S WHAT I TALKED ABOUT BEFORE. YOU KNOW, MR. SMITH KIND OF
10 WANTS TO REWRITE THE PLAINTIFFS' LIKE COMPLAINT HERE.

11 IF YOU LOOK AT WHAT WE SAY, WE SAY ON THE 28TH THE
12 BLEECKER STREET REPORT COMES OUT, THE ADAM FEUERSTEIN SEEKING
13 ALPHA REPORT COMES OUT. BOTH OF THOSE REPORTS SUGGEST, STATE
14 THAT THE COMPANY IS USING STOCK PROMOTERS TO ISSUE INACCURATE
15 AND BOASTFUL STORIES ABOUT THE COMPANY IN ORDER TO ENTICE
16 INVESTORS TO BUY ITS STOCK AT ARTIFICIALLY INFLATED PRICES.

17 WHAT WE THEN GO ON TO SAY IS, THAT HAPPENS ON THE
18 28TH. ON THE OPENING OF THE MARKETS ON THE 29TH, THE DROP FROM
19 WHEN THE STATEMENTS ARE MADE ON THE 28TH GOING THROUGH, YOU
20 KNOW, AFTER-HOURS TRADING TO WHEN THE COMPANY, WHEN THE BELL
21 RINGS ON THE 29TH IN THE MORNING, THE STOCK HAS GONE DOWN 55
22 PERCENT, YOU KNOW, OVER \$7.10 A SHARE. TO ME THAT SUGGESTS
23 THAT SOMETHING WAS NOT DISCLOSED DURING THE CLASS PERIOD
24 BECAUSE INVESTORS ARE REACTING TO IT. YOU DON'T HAVE TO MAKE A
25 GUESS ABOUT THAT. IT'S IN BLACK AND WHITE. I MEAN IT'S THERE.

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1 THESE STORIES COME OUT. THE STOCK GOES DOWN \$7 A SHARE.

2 NOW, JUST GETTING BACK TO THAT AGENCY ARGUMENT, YOU
3 ARE RIGHT, THAT'S A TOUGHER ARGUMENT FOR US, AND ULTIMATELY IF
4 YOU DON'T AGREE THAT THESE STOCK PROMOTERS WERE BEING PAID BY
5 THE COMPANY AND BY BEING PAID MEANING -- AND I THINK YOU EVEN
6 SUGGESTED IT. LIKE WHEN YOU ARE GETTING PAID, YOU ARE
7 DIRECTING THESE PEOPLE WHAT TO DO. YOU ARE TELLING THEM WHAT
8 TO DO BECAUSE YOU ARE PAYING THEM. IF YOU DON'T COME TO THAT
9 CONCLUSION, THEN YEAH, WE ARE GOING TO HAVE SOME DIFFICULTIES
10 ON THOSE STATEMENTS. BUT ULTIMATELY, LIKE I SAID, AT THE END
11 OF THE DAY YOU STILL HAVE OTHER STATEMENTS THAT YOU CAN FIND
12 ARE FALSE AND MISLEADING AND STILL SUSTAIN THIS COMPLAINT.

13 THE COURT: ANYTHING ELSE?

14 MR. YARNOFF: LET ME JUST LOOK THROUGH MY NOTES. I
15 KNOW I TOOK A FEW DIFFERENT NOTES WHEN MR. SMITH WAS SPEAKING.

16 THE COURT: TAKE YOUR TIME.

17 MR. YARNOFF: I APOLOGIZE.

18 THE COURT: NO. TAKE YOUR TIME. LOOK THROUGH THEM.

19 MR. YARNOFF: JUST REAL QUICKLY, TOO, ON THE LOSS
20 CAUSATION, YOU KNOW, AND I THINK WE HAVE GONE WAY ABOVE ON THE
21 LOSS CAUSATION, BUT EVEN ON LOSS CAUSATION AT THIS MOTION TO
22 DISMISS STAGE, IT'S A RULE 8 PLEADING REQUIREMENT AND
23 THEREFORE, YOU KNOW, WE HAVE EASILY MET THAT BURDEN ON THE LOSS
24 CAUSATION. I JUST WANTED TO ADDRESS THAT.

25 THE COURT: THE GALECTIN CASE, THE MAIN PART OF YOUR

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APP001517

1 ARGUMENT, IS IT REALLY EXACTLY THE SAME AS THIS CASE?

2 MR. YARNOFF: I AM NOT SAYING IT'S EXACTLY THE SAME,
3 BUT THOSE CASES TAKE THOSE SAME STATEMENTS ABOUT NOT
4 MANIPULATING THE STOCK.

5 THE COURT: THIS IS A DERIVATIVE SUIT, GALECTIN,
6 CORRECT? THE GALECTIN CASE IS A DERIVATIVE SUIT AND THIS IS A
7 SECURITIES --

8 MR. YARNOFF: THIS IS GALECTIN, THIS IS GALECTIN.
9 YOU MEAN GALENA?

10 THE COURT: GALENA -- EXCUSE ME -- YES.

11 MR. YARNOFF: GALENA?

12 THE COURT: GALENA.

13 MR. YARNOFF: GALENA. RIGHT, RIGHT, RIGHT, RIGHT.

14 THE COURT: GALENA IS A DERIVATIVE SUIT AND THIS IS A
15 SECURITY CLASS ACTION SUIT.

16 MR. YARNOFF: RIGHT, RIGHT, RIGHT. AND THAT'S FINE,
17 YOUR HONOR. YOU KNOW, I STILL THINK THAT CASE HAS PRECEDENTIAL
18 VALUE HERE IN TERMS OF UNDERSTANDING WHAT WAS DONE IN BOTH OF
19 THOSE CASES. THE CYTRX CASE THAT WE CITE IN OUR BRIEFING IS
20 THE ONE THAT'S, YOU KNOW, REALLY ON POINT AND REALLY HITS HOME
21 WITH THIS ARGUMENT ABOUT USING STOCK PROMOTERS AND IT'S A
22 FRAUDULENT SCHEME BASED ON THE FACT THAT THE COMPANY IN THEIR
23 SEC FILINGS WITH REGARD TO THE OFFERINGS ARE SUGGESTING TO
24 INVESTORS THAT THEY ARE NOT GOING TO MANIPULATE THE STOCK.

25 THE COURT: OKAY.

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1 MR. YARNOFF: NOW, IF I COULD JUST TAKE ONE MINUTE
2 TO --

3 THE COURT: YES, SIR; YES, SIR.

4 MR. YARNOFF: -- TALK TO MY CO-COUNSEL REAL QUICK.

5 (PAUSE IN PROCEEDINGS)

6 YOUR HONOR, YOU CONFUSED ME A LITTLE BIT.

7 THE COURT: I'M SORRY.

8 MR. YARNOFF: THAT'S OKAY. THERE'S TWO GALENA CASES.
9 THERE IS A GALENA SECURITIES CASE NOW AND THAT CASE CAME OUT I
10 THINK LIKE THE DAY THAT WE WERE FILING OUR BRIEFS.

11 THE COURT: OKAY.

12 MR. YARNOFF: AND IT DIDN'T GET INTO THE BRIEF, BUT
13 THEN WHEN THE DEFENDANTS FILED THEIR REPLY BRIEF, THE GALENA
14 SECURITIES CASE WAS IN THEIR BRIEF. THEY TRIED TO DISTINGUISH
15 IT. SO I'M SORRY. YOU GOT ME A LITTLE CONFUSED.

16 THE COURT: I'M SORRY. I DIDN'T MEAN TO DO THAT.

17 MR. YARNOFF: AND SO THERE IS A SECURITIES GALENA
18 CASE. THERE IS OBVIOUSLY THE SECURITIES CYTRX CASE. BOTH OF
19 THOSE CASES WE SUGGEST ARE ON POINT WITH THIS CASE AND IN BOTH
20 OF THOSE CASES THE JUDGE SUSTAINED THE COMPLAINT AND DENIED THE
21 MOTION TO DISMISS.

22 THE COURT: OKAY. THANK YOU.

23 MR. YARNOFF: I REALLY APPRECIATE YOUR TIME.

24 THANK YOU.

25 THE COURT: THANK YOU, SIR.

UNITED STATES DISTRICT COURT

1 MR. SMITH?

2 MR. SMITH: JUST BRIEFLY, YOUR HONOR. A COUPLE OF
3 POINTS AND THEN I'LL SIT DOWN AND IT MAY BE A GOOD TIME FOR YOU
4 TO -- WE'LL COME BACK TO HANDLE THE OTHER.

5 SO, FIRST OF ALL, ON SOME QUESTIONS YOU ASKED MY
6 PLAINTIFFS' COUNSEL HERE, YOU SAID THAT ON A MOTION TO DISMISS
7 YOU HAVE TO ACCEPT WHAT THEY SAY IS TRUE. AND THAT'S A GOOD
8 SHORTHAND, BUT I JUST WANT TO REMIND THE COURT THAT YOU DON'T
9 HAVE TO ACCEPT EVERYTHING AS TRUE. YOU CAN'T UNDER THE PRIVATE
10 SECURITY LITIGATION REFORM ACT ACCEPT A CONCLUSORY PLEADING AS
11 TRUE. IT HAS TO BE PARTICULAR.

12 ON THE AGENCY POINT, IF YOU LOOK AT PARAGRAPHS ABOUT
13 WHAT DO THEY ALLEGE AS AGENT, IN PARAGRAPH 92, DREAM TEAM.
14 DEFENDANTS ACTING THROUGH THEIR AGENT, THE DREAM TEAM. THAT'S
15 IT. I MEAN THAT'S REALLY ALL THEY HAVE. THEY DO THE SAME
16 THING IN PARAGRAPH 94. DEFENDANTS, ACTING THROUGH THEIR AGENT
17 COX, ISSUED THE FOLLOWING STATEMENTS. AND THE SAME WITH THE
18 OTHER TWO. THAT'S NOT PARTICULAR. THAT'S NOT SUFFICIENT TO
19 RAISE AGENCY. AND AS I MENTIONED, EVEN IF IT DID, AGENCY
20 DOESN'T MATTER ANYMORE UNDER JANUS.

21 A COUPLE OF OTHER THINGS ABOUT ACORN. THEY CRITICIZE
22 THE COMPANY'S DISCLOSURE THAT THEY PAID ACORN STOCK UNDER A
23 CONSULTING AGREEMENT. WE SHOWED YOU THERE IN TAB D. ACORN'S
24 ARTICLES COULDN'T BE ANY MORE CLEAR. YOU ARE TO VIEW THIS AS A
25 PAID ADVERTISEMENT. SO THERE IS NOTHING FURTHER THAT NEEDS TO

UNITED STATES DISTRICT COURT

1 BE DISCLOSED.

2 AND ON THAT POINT I THINK IT BEARS KEEPING IN MIND
3 THAT IN PARAGRAPH 112 OF THE COMPLAINT THE PLAINTIFFS MAKE WHAT
4 ARE SO-CALLED EFFICIENT MARKET ALLEGATIONS WHICH THEY NEED TO
5 DO TO EVER HAVE HOPE OF GETTING CLASS ACTION TREATMENT IN THIS
6 CASE.

7 SO IN PARAGRAPH 112 THEY SAY THE MARKET FOR GALECTIN
8 COMMON STOCK PROMPTLY DIGESTED CURRENT INFORMATION REGARDING
9 GALECTIN FROM ALL PUBLICLY AVAILABLE SOURCES AND THE PRICES OF
10 GALECTIN COMMON STOCK REFLECTED SUCH INFORMATION. WELL, THAT
11 MEANS THAT WHEN ACORN, IN ITS VARIOUS ARTICLES, SAID IT'S A
12 PAID ADVERTISEMENT, THE MARKET KNEW THAT, IT ACCEPTED THAT, IT
13 DIGESTED THAT INFORMATION.

14 THE SAME WITH THE TDM ARTICLES. THE MARKET KNEW AND
15 THEY ALLEGE FROM ALL PUBLICLY AVAILABLE SOURCES LIKE THOSE
16 ARTICLES IT ABSORBED THAT INFORMATION. AND I THINK THAT'S
17 IMPORTANT FOR PURPOSES OF THE LOSS CAUSATION ARGUMENT TOO.

18 I DID WANT TO SAY THAT ON THAT POINT THEY DON'T HAVE
19 AN EXPLANATION FOR WHY THE ONE TWEET COMES OUT ON FRIDAY THE
20 25TH BUT THEY DON'T ALLEGE THE STOCK DROPPED UNTIL TUESDAY THE
21 29TH. OKAY. AND I THINK WE HAVE ADDRESSED THAT.

22 THEY FOR THE MOST PART STUDIOUSLY AVOID MENTIONING
23 THAT THE COMPANY CAME OUT WITH ITS PHASE I RESULTS THE MORNING
24 OF THE 29TH. OKAY. THAT WAS THE COMPANY'S "HERE ARE OUR PHASE
25 I RESULTS."

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1 THEY MAKE A REFERENCE IN PARAGRAPH 63 OF THE
2 COMPLAINT THAT THE COMPANY ANNOUNCED IT WAS GOING TO ANNOUNCE
3 THE RESULTS THE MORNING OF THE 29TH, BUT I WOULD SUBMIT TO YOU,
4 YOUR HONOR, THAT IT IS THEIR BURDEN TO PLEAD THAT IT WAS THIS
5 STOCK PROMOTION STUFF AS OPPOSED TO THE RELEASE OF THE RESULTS
6 THAT IMPACTED THE PRICE OF THE STOCK. AND I THINK THEY CAN'T
7 DO IT BECAUSE THE MARKET ALREADY KNEW BECAUSE IT WAS DISCLOSED
8 THAT THERE WAS PAID ARTICLES OUT THERE AND BECAUSE THERE WAS NO
9 REACTION THAT THEY HAVE ALLEGED TO THAT TWEET ON THE 25TH.

10 FINALLY, YOUR HONOR, TWO OTHER POINTS. YOU MENTIONED
11 THE SEC V. SIMMONS CASE. THAT WAS A CASE BY THE SEC AGAINST
12 THE PROMOTER HIMSELF, BECAUSE THE PROMOTER HAS THE OBLIGATION
13 UNDER THE SECURITIES LAWS TO SAY WHETHER OR NOT HE IS BEING
14 PAID. SO THAT'S NOT CONTROVERSIAL. I WOULD SAY THAT'S NOT AT
15 ISSUE HERE.

16 AND THEN I WILL END ON THE TWO CASES THAT THEY POINT
17 TO, CYTRX AND GALENA, AND JUST REMIND THE COURT. VERY, VERY
18 DIFFERENT PLEADINGS HERE. THERE THEY PLED THAT -- FIRST OF
19 ALL, THERE WAS NO DISCLOSURE AT ALL OF PAID PROMOTION. THAT'S
20 A KEY DIFFERENCE. HERE WE DO HAVE A DISCLOSURE IN THE
21 ARTICLES.

22 TWO, THE ALLEGATIONS IN THAT COMPLAINT WERE THAT THE
23 DEFENDANTS NOT ONLY KNEW ABOUT THE ARTICLES, THAT THEY WROTE
24 AND EDITED THE ARTICLES, THAT THEY PREVENTED THE PROMOTIONAL
25 FIRMS FROM SAYING THIS IS A PAID PROMOTION AND THEY ALSO SAY

UNITED STATES DISTRICT COURT

1 THAT IT WAS DONE AS PART OF A PUMP AND DUMP SCHEME. ALL THE
2 DEFENDANTS IN THAT CASE, IN CONTRAST TO OUR CASE, RAN AND
3 DUMPED -- THEY SOLD THEIR STOCK AND THEY ISSUED THEMSELVES
4 OPTIONS WHEN THE STOCK WAS LOW BEFORE THE SCHEME TO PUMP UP THE
5 STOCK HAPPENED AND THEY GOT HUGE STOCK GRANTS AS PART OF THAT.
6 VERY, VERY DIFFERENT CASES, BECAUSE HERE, NO ALLEGATIONS OF
7 DEFENDANT INVOLVEMENT, KNOWLEDGE, CONTROL, EDITING, AND
8 FUNDAMENTALLY YOU HAVE THE PROMOTION WAS DISCLOSED.

9 SO IN CLOSING, YOUR HONOR, I THINK PLAINTIFFS HAVE
10 FAILED TO MEET THEIR BURDEN AND WE WOULD ASK YOU TO DISMISS
11 THIS CASE.

12 THE COURT: THANK YOU.

13 MR. SMITH: THANK YOU.

14 THE COURT: MS. WRIGHT, HOW MUCH TIME DOES THE
15 PLAINTIFF AND DEFENSE HAVE LEFT?

16 THE CLERK: DEFENDANTS HAVE ABOUT 13 MINUTES AND
17 PLAINTIFFS ARE AT ABOUT 24. SO THEY HAVE USED ABOUT 24 AND
18 DEFENDANTS HAVE USED ABOUT -- IT LOOKS LIKE ABOUT 46, 47
19 MINUTES TOTAL.

20 THE COURT: SO WE WILL COME BACK AT 2:00 O'CLOCK.
21 DEFENSE WILL HAVE 13 MINUTES LEFT TO PRESENT ITS DERIVATIVE
22 ARGUMENT AND PLAINTIFFS WILL HAVE WHAT, 24 MINUTES?

23 THE CLERK: ABOUT 36.

24 THE COURT: 36 MINUTES TO PRESENT YOUR DERIVATIVE
25 ARGUMENT.

UNITED STATES DISTRICT COURT

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1 ANY QUESTIONS ABOUT THAT?

2 MR. YARNOFF: YOUR HONOR?

3 THE COURT: YES.

4 MR. YARNOFF: DO YOU NEED THE SECURITIES PLAINTIFFS
5 TO COME BACK AT 2:00 O'CLOCK AS WELL?

6 THE COURT: WELL, I LOVE SEEING YOU GUYS, BUT IF
7 YOU'VE GOT SOMEPLACE YOU NEED TO BE, NO, YOU DON'T HAVE TO COME
8 BACK.

9 MR. YARNOFF: WE ARE FLYING OUT, SO WE WILL HAVE --

10 THE COURT: HAVE A SAFE FLIGHT BACK AND WE WILL BE IN
11 TOUCH. MY LAW CLERKS DON'T LIKE FOR ME TO SAY SOON, SO WE WILL
12 BE IN TOUCH.

13 MR. YARNOFF: THANK YOU, YOUR HONOR.

14 THE COURT: THANK YOU ALL.

15 HAVE A GOOD LUNCH.

16 (LUNCHEON RECESS)

17 LET ME JUST SAY THIS TO THE ATTORNEYS STARTING OFF,
18 AND I SHOULD HAVE DONE THIS BEFORE THE OTHER ATTORNEYS LEFT, I
19 APOLOGIZE. I ASKED TOO MANY QUESTIONS THIS MORNING. I FEEL
20 THAT LAWYERS SHOULD BE GIVEN THE FULL TIME TO ARGUE. SO PLEASE
21 PASS IT ON TO THE OTHER COUNSEL THAT -- WELL, HE IS STILL HERE.
22 JUDGES SHOULD ALLOW PEOPLE TO COME IN AND MAKE THE ARGUMENTS.
23 I ASK TOO MANY QUESTIONS, SO I AM GOING TO RESERVE ASKING A
24 BUNCH OF QUESTIONS THIS AFTERNOON. I ALWAYS HATED THAT WHEN I
25 WAS A LAWYER AND I HAD A PREPARED ARGUMENT AND THE JUDGE TOOK

UNITED STATES DISTRICT COURT

1 UP ALL MY TIME.

2 YOU MAY PROCEED.

3 MR. POPE: THANK YOU, YOUR HONOR.

4 WARREN POPE FROM KING & SPALDING ON BEHALF OF THE
5 DEFENDANTS IN THE DERIVATIVE ACTION.

6 WE ARE HERE TODAY ON TWO PENDING MOTIONS TO DISMISS
7 IN THAT ACTION, A RULE 23.1 MOTION FOR FAILURE TO MAKE DEMAND
8 AND A 12(B)(6) MOTION ON BEHALF OF THE INDIVIDUAL DEFENDANTS.

9 GIVEN MY TIME, I AM GOING TO FOCUS JUST ON THE 23.1
10 MOTION FOR FAILURE TO MAKE DEMAND. I WILL RELY ON THE PAPERS
11 FOR THE 12(B)(6) MOTION.

12 THE COURT: ALL RIGHT.

13 MR. POPE: SO YOUR HONOR ASKED QUESTIONS, SPEAKING OF
14 QUESTIONS, THIS MORNING ABOUT WHAT HAPPENS IF YOU ASSUME THAT
15 EVERYTHING IN THE CLASS ACTION COMPLAINT WAS TRUE AND YOU STILL
16 FIND THERE WAS NO FRAUD. AND THE ANSWER TO THAT, OF COURSE, IS
17 THAT YOU OUGHT TO DISMISS THE COMPLAINT, AND IF YOU DISMISS THE
18 COMPLAINT IN THE 10B-5 ACTION, WHAT DOES THAT DO FOR THE
19 DERIVATIVE ACTION? WE SUBMIT THIS AFTERNOON, YOUR HONOR, THAT
20 YOU OUGHT TO DISMISS THE DERIVATIVE ACTION AS WELL, BECAUSE AS
21 YOU CAN TELL, THE CORE CONDUCT IN THE CLASS ACTION, NAMELY THE
22 ALLEGED FAILURE TO DISCLOSE THE STOCK PROMOTERS, IS THE SAME
23 THAT IS AT ISSUE IN THE DERIVATIVE ACTION. SO IF YOU DISMISS
24 BASED ON FAILURE TO DISCLOSE, ALLEGED FAILURE TO DISCLOSE IN
25 THE CLASS ACTION, THEN YOU OUGHT TO DISMISS IN THE DERIVATIVE

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1 ACTION, AND I WILL EXPLAIN WHY.

2 THE MAIN REASON, YOUR HONOR, IS THAT THE STANDARD FOR
3 SURVIVING A MOTION TO DISMISS IN THE DERIVATIVE ACTION IS
4 ACTUALLY HIGHER THAN IT IS IN THE CLASS ACTION.

5 THE COURT: TRUE.

6 MR. POPE: BECAUSE THEY HAVE TO SHOW A SUBSTANTIAL
7 LIKELIHOOD OF LIABILITY ON THE PART OF THE BOARD OF DIRECTORS
8 OF GALECTIN IN ORDER TO SHOW THAT DEMAND WAS EXCUSED, AND
9 THAT'S A HIGHER STANDARD THAN WHAT THE CLASS PLAINTIFFS ARE
10 FACING IN CONNECTION WITH THE 12(B)(6) MOTION IN THE CLASS
11 ACTION. SO IF YOU CONCLUDE THAT THE CLASS PLAINTIFFS HAVE NOT
12 MET THAT BURDEN, THEN I THINK IT FOLLOWS THAT YOU MUST CONCLUDE
13 THAT THE DERIVATIVE PLAINTIFFS CANNOT MEET THEIR BURDEN TO SHOW
14 SUBSTANTIAL LIKELIHOOD OF LIABILITY.

15 YOUR HONOR HEARD A LOT OF ARGUMENT THIS MORNING ON
16 THE MERITS OF THE CORE CONDUCT.

17 THE COURT: RIGHT.

18 MR. POPE: AND HOW IT DID NOT VIOLATE SECURITIES
19 LAWS. I AM GOING TO TRY NOT TO REPEAT ALL OF THAT THIS
20 AFTERNOON. I AM GOING TO TRY TO BE VERY EFFICIENT. SO I AM
21 JUST GOING TO FOCUS ON THIS AFTERNOON WHAT WE DIDN'T COVER THIS
22 MORNING.

23 THE COURT: OKAY.

24 MR. POPE: AND THAT WOULD INCLUDE -- I WILL TOUCH ON
25 FOUR TOPICS GENERALLY: ONE, THE STANDARDS FOR A DERIVATIVE

UNITED STATES DISTRICT COURT

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1 ACTION, WHICH WOULD INCLUDE NO SUBSTANTIAL LIKELIHOOD OF
2 LIABILITY. I WILL ALSO FOCUS ON THE INSIDER TRADING
3 ALLEGATIONS WHICH ARE IN THE DERIVATIVE CASE, WHICH ARE NOT IN
4 THE CLASS CASE, AND WE WILL TALK ABOUT THAT, AND THEN FINALLY
5 WE WILL TALK ABOUT THE PLAINTIFFS' ARGUMENT IN THIS CASE THAT
6 YOUR HONOR IS BARRED FROM RULING ON THE DERIVATIVE MOTION GIVEN
7 THE RULING IN NEVADA, BECAUSE THERE WAS THEIR ARGUMENT THAT
8 THERE IS ISSUE PRECLUSION IN THIS CASE BECAUSE OF WHAT HAPPENED
9 IN NEVADA AND WE OF COURSE WOULD CONTEND THAT'S NOT TRUE.

10 SO BACKING UP, YOUR HONOR, THIS IS A DERIVATIVE
11 ACTION. IT'S BROUGHT ON BEHALF OF THE COMPANY. THE COMPANY IS
12 THE NOMINAL DEFENDANT AND THERE ARE CLAIMS ALLEGED AGAINST THE
13 COMPANY. IT'S BROUGHT ON THE COMPANY'S PURPORTED BENEFIT. THE
14 STANDARD OF PLEADING IS UNDER 23.1(B)(3), THAT THE SHAREHOLDER
15 PURSUING THE DERIVATIVE SUIT MUST FIRST MAKE A DEMAND OR PLEAD
16 WITH PARTICULARITY THE REASONS WHY A DEMAND WOULD HAVE BEEN
17 FUTILE.

18 WELL, HERE IT IS UNDISPUTED THERE IS NO DEMAND, SO
19 THE FOCUS FOR THE COURT AND FOR THE PARTIES TODAY IS WHETHER OR
20 NOT THE PLAINTIFFS HAVE ADEQUATELY PLED DEMAND FUTILITY. THAT
21 HAS GOT TO BE PLED, AS I MENTIONED, WITH PARTICULARITY.

22 SO GALECTIN IS INCORPORATED UNDER NEVADA LAW, SO
23 NEVADA LAW IS GOING TO GOVERN WHETHER OR NOT DEMAND IS EXCUSED.
24 IN ORDER FOR THEM, PLAINTIFFS, TO SHOW THAT DEMAND IS EXCUSED,
25 WE HAD A TEN-PERSON BOARD OF DIRECTORS HERE, SO THEY ARE GOING

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1 TO HAVE TO SHOW THAT AT LEAST FIVE OF THE DIRECTORS WERE NOT
2 DISINTERESTED AND WERE NOT INDEPENDENT.

3 SO WHAT DOES DISINTEREST AND INDEPENDENCE MEAN AND
4 WHAT CAN YOU PRESUME AT THIS STAGE OF THE PLEADING STAGE? SO
5 DISINTEREST AND INDEPENDENCE. THEY ARE BOTH PRESUMED ON THE
6 PART OF THE DIRECTORS AT THE PLEADING STAGE. IT IS PRESUMED
7 THAT THE DIRECTORS ACTED IN GOOD FAITH. IT IS PRESUMED THAT
8 THEY WERE DISINTERESTED. IT IS PRESUMED THAT THEY WERE
9 INDEPENDENT. AND THAT'S IN OUR BRIEF AT 78.138, SUBSECTION 3
10 OF THE NEVADA REVISED STATUTES.

11 SHOEN IS THE PRINCIPAL CASE IN NEVADA THAT PROVIDES
12 THE RULE OF DECISION HERE COUPLED WITH THE STATUTE I JUST
13 MENTIONED. SO IN ORDER TO SHOW A DISABLING INTEREST, THEY HAVE
14 GOT TO SHOW THAT THE DEFENDANTS' ACTION WERE, QUOTE, SO
15 EGREGIOUS THAT A SUBSTANTIAL LIKELIHOOD OF DIRECTOR LIABILITY
16 EXISTS, AND ACCORDING TO SHOEN, WHICH IS -- THAT QUOTE WAS FROM
17 137 P.3D AT 1184. ACCORDING TO SHOEN, THAT IS, QUOTE, A
18 DIFFICULT THRESHOLD TO MEET.

19 YOU HAVE GOT TO LAYER ON TOP OF THAT, YOUR HONOR, THE
20 EXCULPATION WHICH IS PRESENT FOR THESE DIRECTORS AT EXHIBIT A
21 TO OUR BRIEF, AND THAT'S IN THE ARTICLES OF INCORPORATION THAT
22 THE COMPANY ADOPTED. AND THERE, IN ORDER TO SURVIVE AND
23 OVERCOME THOSE EXCULPATION PROTECTIONS THE DIRECTORS HAVE, THE
24 PLAINTIFFS HAVE TO PLEAD A BREACH OF FIDUCIARY DUTY AND THEY
25 ALSO HAVE TO SHOW THAT -- AND THIS IS IMPORTANT -- THAT THE

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1 BREACHES INVOLVED INTENTIONAL MISCONDUCT, FRAUD, OR A KNOWING
2 VIOLATION OF THE LAW.

3 SO IT'S A VERY HIGH STANDARD WHICH MIRRORS THAT
4 SUBSTANTIAL LIKELIHOOD OF LIABILITY STANDARD. AND THIS IS FROM
5 THE FOSBRE CASE THAT WE SUBMITTED, FOSBRE V. MATTHEWS, WHICH IS
6 A DISTRICT COURT OF NEVADA CASE. IN ORDER TO SHOW DEMAND
7 FUTILITY THROUGH A SUBSTANTIAL LIKELIHOOD OF DIRECTOR
8 LIABILITY, PLAINTIFF MUST PLEAD PARTICULAR FACTS SHOWING THAT
9 THE ACTS, OMISSION -- ACTS OR OMISSIONS OF THE DEFENDANT
10 DIRECTORS INVOLVED INTENTIONAL MISCONDUCT, FRAUD, OR A KNOWING
11 VIOLATION OF THE LAW.

12 SO WHAT DOES THAT MEAN FOR WHAT YOU HEARD THIS
13 MORNING? WELL, WHAT YOU HEARD THIS MORNING AND YOU DEFTLY
14 POINTED OUT BASED ON SOME OF THE CASES IS THAT IT IS VERY
15 DUBIOUS THAT THERE IS ANY CLAIM AT ALL HERE WITH RESPECT TO THE
16 CORE CONDUCT.

17 SO, FOR INSTANCE, THE GARVEY CASE THAT YOU POINTED
18 OUT, THERE IS NO DUTY TO DISCLOSE THE ALLEGED RETENTION OF A
19 PROMOTER BY THE COMPANY.

20 THE JANUS CASE. THERE IS NO LIABILITY UNDER THAT
21 BECAUSE THE COMPANY WASN'T THE MAKER OF THE STATEMENTS.

22 SECTION 17. NO DUTY TO DISCLOSE THERE. AGAIN, THE
23 DUTY IS ON THE PROMOTER, NOT THE COMPANY OR THE BOARD OF
24 DIRECTORS OF THE COMPANY. THERE WAS IN FACT DISCLOSURE OF THE
25 FACT THAT THERE WERE PROMOTERS BEING PAID AND THAT WAS MADE BY

UNITED STATES DISTRICT COURT

1 A COUPLE OF THE PROMOTERS.

2 YOU ALSO HEARD THAT THE COMPANY DID NOT CONTROL THE
3 CONTENTS OF THE STATEMENTS, DIDN'T EDIT THE STATEMENTS, DIDN'T
4 APPROVE THE STATEMENTS UNLIKE, SAY, THE GALENA CASE OR THE
5 CYTRX CASE. YOU ALSO HEARD AND THE PLAINTIFFS IN THE CLASS
6 CASE ADMITTED THAT THE STATEMENTS WEREN'T FALSE OR MISLEADING.
7 AND SO IN LIGHT OF ALL OF THAT, YOU HAVE GOT NO CORE
8 WRONGDOING.

9 THE COURT: LET ME ASK YOU ONE QUESTION.

10 MR. POPE: SURE, YOUR HONOR.

11 THE COURT: THERE IS ONLY ONE QUESTION I AM GOING TO
12 ASK YOU.

13 MR. POPE: ABSOLUTELY.

14 THE COURT: PLAINTIFFS' COUNSEL, AND I HOPE I HEARD
15 HIM CORRECTLY, SORT OF INDICATED, WELL, MAYBE, JUDGE, YOU
16 SHOULD ALLOW, IF YOU CAN'T FIND ANY OF THESE THINGS, ALLOW US
17 TO REPLEAD. WOULD THAT BE -- WHAT IS THE WORD I AM LOOKING
18 FOR? WELL, GIVE ME YOUR OPINION. IN OTHER WORDS, ALL THOSE
19 THINGS YOU JUST SAID, YOU SORT OF INDICATED, HE SAYS, WELL, IF
20 THAT'S THE CASE, JUDGE, MAYBE YOU SHOULD ALLOW US TO REPLEAD.

21 MR. POPE: SURE. THERE IS A CASE --

22 THE COURT: WOULD THAT BE FUTILE?

23 MR. POPE: THAT IS TRUE IN THE ELEVENTH CIRCUIT.
24 THEY HAVE A RIGHT TO REPLEAD. THERE IS A CASE CALLED THE
25 BRYANT CASE.

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1 THE COURT: UNLESS I FIND IT TO BE FUTILE.

2 MR. POPE: UNLESS YOU FIND IT TO BE FUTILE, CORRECT.
3 THAT'S WHAT I WAS GOING TO SAY IS THAT YOU CAN GIVE THEM THE
4 OPPORTUNITY TO REPLEAD WITHIN A CERTAIN PERIOD OF TIME, SAY 20
5 DAYS, AND IF THEY BRING ON AN AMENDMENT, WE WILL HAVE THE
6 OPPORTUNITY TO RESPOND TO THAT, BUT, YES, IN THE ELEVENTH
7 CIRCUIT THEY DO HAVE THE OPPORTUNITY TO REPLEAD, BUT FOR ALL
8 THE REASONS THAT WE ARE GOING TO TALK ABOUT WE THINK HERE THAT
9 IT WOULD BE FUTILE, RIGHT, BECAUSE THEY CAN'T CHANGE THE
10 UNDERLYING FACTS. THE DISCLOSURES WERE THE DISCLOSURES. THE
11 THIRD PARTIES ARE THE ONES WHO WERE PAID. THEY MADE THE
12 DISCLOSURE THEY WERE PAID. THE COMPANY HAD NO UNDERLYING
13 OBLIGATION TO MAKE A DISCLOSURE THAT THEY HAD RETAINED THE
14 THIRD PARTIES. THAT BURDEN IS ON THE PROMOTERS, NOT THE
15 COMPANY.

16 SO WITH THAT, YOUR HONOR, LET ME MOVE QUICKLY AHEAD
17 TO SOME OF THE OTHER POINTS THAT ARE UNIQUE TO OUR CASE THAT
18 ARE A LITTLE DIFFERENT FROM THE CLASS CASE.

19 THE COURT: OKAY.

20 MR. POPE: FIRST, BEFORE I GET THERE, THE OTHER
21 COMPONENT TO A DERIVATIVE ACTION IS THE INDEPENDENCE OF THE
22 BOARD. WE MADE AN ARGUMENT IN OUR PAPERS THAT THEY HAD
23 CONCEDED THAT THE BOARD WAS INDEPENDENT. WE MADE THAT ARGUMENT
24 IN THE INITIAL BRIEFING AT 21 TO 25 AND THEN WE MADE AN
25 ARGUMENT IN THE REPLY BRIEF AT 7 TO 8. IT'S OUR CONTENTION

UNITED STATES DISTRICT COURT

1 THAT THEY HAVE NOT SUFFICIENTLY ALLEGED THAT THE BOARD WAS NOT
2 INDEPENDENT.

3 SO REALLY THE ISSUE FOR THIS COURT IS INTEREST. AN
4 INTEREST IS THAT SUBSTANTIAL LIKELIHOOD OF LIABILITY TEST. AND
5 SO YOU HAVE THAT TEST AS APPLIED TO THE CLAIMS IN THE
6 DERIVATIVE COMPLAINT. WE CONTEND THAT, YOUR HONOR, THEY HAVE
7 NOT ALLEGED A SUBSTANTIAL LIKELIHOOD OF LIABILITY, NOR DID THEY
8 EVEN ARGUE IT IN THEIR OPPOSITION, SO THEY HAVE WAIVED AS TO
9 UNJUST ENRICHMENT, WASTE AND AIDING AND ABETTING.

10 SO WHAT YOU ARE LEFT WITH, AND THIS IS ALL IN OUR
11 REPLY BRIEFING, IS BREACH OF FIDUCIARY DUTY, COUNT 2, AND
12 COUNT 1, PROXY FRAUD, WHETHER OR NOT THEY PLED, ADEQUATELY PLED
13 WITH PARTICULARITY A SUBSTANTIAL LIKELIHOOD OF LIABILITY AS TO
14 THOSE TWO CLAIMS, AND THEN THE INSIDER TRADING CLAIM, WHICH I
15 AM GOING TO COME TO NEXT, BECAUSE THE INSIDER TRADING CLAIM IS
16 IN THIS CASE BUT IT IS NOT IN THE CLASS CASE.

17 THE COURT: OKAY.

18 MR. POPE: ALL RIGHT. SO THE INSIDER TRADING CLAIM.
19 IT'S INTERESTING THAT THE PLAINTIFFS IN THE CLASS CASE WHO HAVE
20 10B-5 CLAIMS WHERE YOU WOULD NORMALLY EXPECT TO SEE AN INSIDER
21 TRADING CLAIM BROUGHT DID NOT BRING THAT CLAIM BUT THE
22 DERIVATIVE PLAINTIFFS DID AND THE REASON I SUBMIT THAT'S THE
23 CASE, YOUR HONOR, IS BECAUSE THE INSIDER TRADING CLAIM IS SO
24 WEAK.

25 THE INSIDER TRADING CLAIM THAT THE DERIVATIVE

UNITED STATES DISTRICT COURT

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1 PLAINTIFFS BROUGHT, THERE IS NOTHING UNUSUAL OR SUSPICIOUS
2 ABOUT THESE TRADES. THEY CRITICIZE THE TRADES OF THE 10X FUND.
3 THE 10X FUND WAS A SELLER. BUT IF YOU LOOK, AND THIS IS IN OUR
4 BRIEFING, YOUR HONOR, THE 10X FUND ACTUALLY BOUGHT TWICE AS
5 MUCH AS IT SOLD. AND IN ADDITION THEY CRITICIZED DIRECTOR
6 PRELACK FOR SELLING SOME SHARES, BUT THAT WAS AN OPTION
7 EXERCISE. SO HE HAD TO SELL SHARES IN ORDER TO BUY MORE
8 SHARES.

9 SO IN BOTH INSTANCES YOU HAVE A SITUATION WHERE
10 PARTIES ARE ESSENTIALLY BUYING MORE THAN THEY ARE SELLING AND
11 THEY ARE RETAINING LARGE PORTIONS OF THEIR HOLDINGS. IN THE
12 CASE OF THE 10X FUND, IT WAS 99 PERCENT THEY RETAINED. IN THE
13 CASE OF PRELACK, IT WAS 84 PERCENT.

14 AND SO IN THOSE INSTANCES THE COURTS, AND THIS IS IN
15 OUR BRIEFING, YOUR HONOR, HAVE FOUND THAT THERE IS NOTHING
16 UNUSUAL OR SUSPICIOUS. THERE IS NO FRAUDULENT INTENT. THERE
17 IS NO WILLFUL VIOLATION OF LAW. SO NOTHING THAT WOULD BE
18 ENOUGH TO SUSTAIN AN INSIDER TRADING CLAIM.

19 THE OTHER THING I NOTE FOR YOUR HONOR IS EVEN IF YOU
20 FIND THAT THERE IS A VIABLE INSIDER TRADING CLAIM OR POTENTIAL
21 LIKELIHOOD OF LIABILITY, THAT ONLY GETS YOU THREE DIRECTORS.
22 THAT GETS YOU DIRECTOR CZIRR, DIRECTOR MARTIN AND PRELACK.
23 YOU'VE GOT TEN TOTAL DIRECTORS SO YOU NEED AT LEAST FIVE OF
24 THEM TO BE CONFLICTED. SO YOU DON'T GET THERE VIA THREE. IT'S
25 JUST A SIMPLE EXERCISE OF COUNTING HEADS. YOU DON'T GET THERE.

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1 SO WHAT YOU SEE OFTEN IN THE DERIVATIVE LITIGATION
2 WORLD IS - FOR INSTANCE, THIS IS IN THE FOSBRE CASE THAT WE
3 CITED - THE COURT DOESN'T EVEN DEAL WITH THE INSIDER TRADING
4 ALLEGATIONS BECAUSE THE COURT SAYS ASSUMING THAT THERE IS A
5 VIABLE CLAIM HERE, IT IS ONLY A MINORITY OF THE BOARD SO I
6 DON'T NEED TO CONSIDER IT. YOU HAVEN'T ALLEGED DEMAND
7 FUTILITY. SO I WOULD SUBMIT, YOUR HONOR, YOU COULD DO THE SAME
8 THING HERE GIVEN THAT IT IS ONLY THREE OF A POSSIBLE TEN AND
9 THERE ARE NO ALLEGATIONS AS TO THE SEVEN.

10 SO WITH THE LITTLE TIME I HAVE LEFT, YOUR HONOR, I
11 WANT TO BRIEFLY SUGGEST WHY THE NEVADA RULINGS DON'T BAR YOU,
12 YOUR HONOR, FROM CONSIDERING THIS MOTION.

13 FIRST, THERE IS NO ISSUE PRECLUSION. IN ORDER TO
14 HAVE ISSUE PRECLUSION, IT IS A FAMILIAR TEST. THERE ARE FOUR
15 PRONGS. I AM NOT GOING TO GO THROUGH ALL OF THEM. THEY
16 CLEARLY CAN'T MEET TWO OF THEM, WHICH IS, ONE, THERE IS NO
17 FINAL DECISION ON THE MERITS IN NEVADA, RIGHT, BECAUSE IT WAS A
18 DENIAL OF A MOTION TO DISMISS. THAT'S NOT A FINAL DECISION ON
19 THE MERITS. THAT'S BY ITS DEFINITION AN INTERLOCUTORY ORDER.

20 ALL OF THE CASES THEY CITE GRANTED MOTIONS TO
21 DISMISS. THOSE ARE FINAL, FINAL DECISIONS THAT CAN BE DEEMED
22 TO HAVE PRECLUDED THE ISSUE. HERE WE HAVE A DENIAL OF A MOTION
23 TO DISMISS SO IT'S NOT A FINAL JUDGMENT ON THE MERITS. WE
24 CITED CASES ON THAT IN OUR BRIEF.

25 MOREOVER, THERE WAS NO RULING ON FUTILITY, AS IT

UNITED STATES DISTRICT COURT

1 WERE, IN NEVADA. YOU'VE GOT WHAT WAS RULED IN NEVADA. OUR
2 VIEW OF THAT IS THAT IT WAS A PROCEDURAL RULING, ESSENTIALLY A
3 DENIAL BASED ON MOOTNESS GROUNDS BECAUSE THEY HAD TO AMEND
4 THEIR COMPLAINT IN NEVADA. AND THE COURT IN NEVADA STAYED IN
5 DEFERENCE TO WHAT THIS COURT WAS GOING TO DO.

6 SO THE OTHER PRONG OF ISSUE PRECLUSION THEY CAN'T
7 MEET IS THAT THE FUTILITY ISSUE WAS ACTUALLY AND NECESSARILY
8 LITIGATED AND DECIDED IN NEVADA. SO THEY CAN'T MEET THE SECOND
9 PRONG OF THAT EITHER.

10 WE CITED A CASE, YOUR HONOR, IN OUR BRIEF, THE HART
11 CASE, WHICH GOES THROUGH THIS VERY ISSUE EXCEPT THERE IT'S THE
12 OPPOSITE. THERE DERIVATIVE SUIT NUMBER TWO WAS TRYING TO ARGUE
13 THAT IT WAS NOT BARRED BY DERIVATIVE SUIT NUMBER ONE AND THE
14 JUDGE'S RULING THERE, THE SAME JUDGE WHO HAD SAID THE
15 DERIVATIVE SUIT WAS DISMISSED FOR FAILURE TO MAKE DEMAND, AND
16 THEN DIFFERENT PLAINTIFFS TRIED TO SAY NO, IT'S NOT BARRED,
17 THERE THERE IS ISSUE PRECLUSION, BECAUSE IT'S A DECISION ON THE
18 MERITS. IT'S FINAL. THE COURT ISSUED A VERY DETAILED RULING
19 ON FAILURE TO MAKE DEMAND IN THE SUIT NUMBER ONE AND IT WAS
20 ACTUALLY AND NECESSARILY LITIGATED. HERE YOU DIDN'T GET ANY OF
21 THAT. AND JUST AS A PRACTICAL MATTER, WHY WOULD THE COURT IN
22 NEVADA STAY THEIR CASE FOR SIX MONTHS PENDING WHAT YOU WERE
23 GOING TO DO IF THE COURT HAD ALREADY TAKEN UP THE MERITS OF THE
24 MOTION?

25 SO WITH THAT I WILL SIT DOWN, YOUR HONOR, AND RESERVE

UNITED STATES DISTRICT COURT

1 WHATEVER TIME I HAVE LEFT FOR REBUTTAL.

2 THANK YOU.

3 THE COURT: THANK YOU, SIR.

4 MR. FICARO: GOOD AFTERNOON, YOUR HONOR.

5 THE COURT: GOOD AFTERNOON.

6 MR. FICARO: JAMES FICARO FROM THE WEISER LAW FIRM.

7 I BROUGHT MY CO-COUNSEL WITH ME TODAY, WHO IS DRESSED
8 UP WITH NO PLACE TO GO. HE WAS PREPARED TO HANDLE ANYTHING
9 REGARDING THE CLAIMS TODAY BROUGHT BY THE 10X FUND AND THE
10 INDIVIDUAL DEFENDANTS. AND IF THERE IS SOME TIME, WE WILL LET
11 MR. FISTEL SPEAK, BUT I THOUGHT IT BEST IF WE FIRST FOCUS ON
12 THE DEMAND FUTILITY QUESTION AND SEE WHERE WE GO FROM THERE.

13 THE COURT: I AGREE.

14 MR. FICARO: I WOULD LIKE TO HANDLE MR. POPE'S
15 COMMENTS KIND OF IN REVERSE ORDER. I WOULD LIKE TO START WITH
16 THE NEVADA ACTION IF WE COULD.

17 THE COURT: OKAY.

18 MR. FICARO: AND I WOULD LIKE TO TALK ABOUT WHY THESE
19 ISSUES ARE PRECLUDED HERE AND PARTICULARLY THE DEMAND FUTILITY
20 QUESTION.

21 FIRST AND FOREMOST, AS YOUR HONOR IS AWARE, THERE WAS
22 THE SAME ULTIMATE ISSUE IN QUESTION IN THE NEVADA ACTION IN THE
23 STATE COURT. THE OTHER SHAREHOLDER BRIEFED A VERY SIMILAR
24 COMPLAINT WITH SIMILAR ALLEGATIONS. I WOULD SUGGEST IT IS NOT
25 NEARLY AS FULSOME AS THE COMPLAINT BEFORE YOUR HONOR TODAY, BUT

UNITED STATES DISTRICT COURT

1 NONETHELESS THE SAME ULTIMATE ISSUE WAS IN QUESTION.

2 IT WAS FULLY HEARD. IT WAS FULLY BRIEFED IN NEVADA
3 AND FULLY ARGUED AND THEREFORE THE DECISION BY JUDGE GONZALEZ
4 TO DENY THE MOTION TO DISMISS BOTH ON FUTILITY GROUNDS AND FOR
5 FAILURE TO STATE A CLAIM SHOULD HAVE PRECLUSIVE EFFECT HERE.

6 NOW, MR. POPE STANDS UP AND HE SAYS, LOOK, IT WASN'T
7 A DECISION ON THE MERITS. IT WASN'T A FINAL DECISION. BUT
8 UNFORTUNATELY HE IS WRONG. WHEN IT COMES TO DEMAND FUTILITY,
9 THE QUESTION BEFORE THE COURT IS A PLEADING QUESTION. ONCE
10 DEMAND FUTILITY IS DECIDED ON A PLEADING MOTION IT'S DONE.
11 IT'S OVER. YOUR HONOR WON'T HEAR FROM IT AGAIN. PLAINTIFF IS
12 UNDER NO OBLIGATION TO PROVE AT TRIAL THAT DEMAND WAS FUTILE.
13 SO, THEREFORE, A DECISION IN ANY DIRECTION ON DEMAND FUTILITY
14 IS A FINAL DECISION AND THEREFORE THAT IS THE PRIMARY OBSTACLE
15 WE HAVE AND WE HAVE BEATEN IT EASILY.

16 FURTHER, I WOULD SUGGEST THAT YOUR HONOR COULD GO
17 THROUGH THE ENTIRE TRANSCRIPT FROM THE MOTIONS TO DISMISS IN
18 NEVADA AND NEVER FIND THE WORD "MOOTNESS" ANYWHERE. THE ORDER
19 COULD NOT BE MORE CLEAR. JUST LIKE HERE, THE NOMINAL DEFENDANT
20 GALECTIN MOVED SOLELY ON 23.1 DEMAND FUTILITY GROUNDS. THE
21 INDIVIDUAL DEFENDANTS MOVED SOLELY ON FAILURE TO STATE A CLAIM.
22 THE ORDER SAYS THE MOTION FROM THE COMPANY IS DENIED. THE
23 MOTION FROM THE INDIVIDUAL DEFENDANTS IS DENIED. IT AS SIMPLE
24 AS THAT AND THEREFORE THE ANALYSIS REALLY ENDS THERE FOR YOUR
25 HONOR AND SPECIFICALLY REGARDING DEMAND FUTILITY.

UNITED STATES DISTRICT COURT

1 AND, YOU KNOW, WE ADDRESSED BOTH THAT THE NINTH
2 CIRCUIT HAS MADE IT VERY CLEAR IN THE ARDUINI V. HART CASE
3 ABOUT HOW NEVADA LAW APPLIES, PARTICULARLY THIS IDEA OF DEMAND
4 FUTILITY BEING PRECLUDED IN LATER-FILED ACTIONS. AND MR. POPE
5 IS RIGHT. IN THE VAST MAJORITY OF THE CASES THAT ARE PUBLISHED
6 THE SITUATION HAPPENED THE OTHER WAY AROUND. PLAINTIFFS LOST
7 THE DEMAND FUTILITY ANALYSIS. ANOTHER PLAINTIFF SOUGHT TO TAKE
8 UP THAT MANTLE AND WAS DISMISSED FOR PRECLUSIVE. I WOULD
9 SUGGEST WHAT IS GOOD FOR THE GOOSE IS GOOD FOR THE GANDER AS
10 WELL, PARTICULARLY IN LIGHT OF THE FACT THAT IT IS A FINAL
11 PART.

12 BUT EVEN IF YOUR HONOR WERE TO WANT TO HEAR THE FULL
13 ANALYSIS REGARDING DEMAND FUTILITY, WE WOULD SUGGEST THAT THERE
14 IS NO REASON FOR YOUR HONOR TO RULE ANY DIFFERENTLY THAN JUDGE
15 GONZALEZ, AND THAT IS BECAUSE WE BELIEVE THERE IS A SUBSTANTIAL
16 LIKELIHOOD OF LIABILITY ON BEHALF OF ALL THE DEFENDANTS AND THE
17 BOARD MEMBERS AND THEREFORE DEMAND WOULD BE FUTILE.

18 SPECIFICALLY, I WOULD LIKE TO TAKE A MOMENT TO
19 DISCUSS THE GALENA CASE WHICH HAS GOTTEN SO MUCH ATTENTION
20 TODAY.

21 THE COURT: YES. I READ THE SECOND ONE THAT CAME OUT
22 THIS YEAR OVER LUNCH.

23 MR. FICARO: THE SECURITIES DEFENDANT. WELL, YOU
24 WERE MORE PRODUCTIVE THAN I WAS DURING LUNCH. THAT'S FOR SURE.

25 I WOULD SUGGEST TO YOUR HONOR THAT THERE ARE A COUPLE

UNITED STATES DISTRICT COURT

1 OF ISSUES THAT REALLY MAKE THOSE CASES MORE INTERTWINED THAN
2 DEFENDANTS WOULD HAVE YOU BELIEVE. THE FIRST AND FOREMOST,
3 OBVIOUSLY, IS THE OVERLAPPING OF THE PARTICULAR STOCK PROMOTER,
4 THE DREAM TEAM.

5 NOW, THE FACTS THAT WE KNEW IN GALENA THAT WE DON'T
6 KNOW HERE FOR SURE ARE AS FOLLOWS: IN GALENA ONE OF THE STOCK
7 PROMOTER AUTHORS THAT WAS CONTACTED WAS ALSO A WRITER FOR A
8 WEBSITE CALLED SEEKING ALPHA. SO HE KIND OF WENT UNDERCOVER
9 AND TRIED TO PLAY ALONG, BECAUSE HE RECEIVED AN EMAIL THAT HE
10 SAYS IN PUBLISHED DOCUMENTS THAT HE WAS SOLICITED TO BE A HIRED
11 PROMOTER FOR BOTH CYTRX AND/OR GALENA.

12 SO HE TOOK THE JOB AND HE WAS ABLE TO FIGURE OUT THAT
13 THEY WERE SENDING ARTICLES TO THE MANAGEMENT AND THAT THERE WAS
14 COMPENSATION INVOLVED. NOW, WE ARE NOT -- WE DO NOT
15 SPECIFICALLY HAVE THAT CLAIM HERE. I OPENLY ADMIT THAT, THAT
16 WE DO NOT KNOW FOR SURE, BUT THAT'S WHAT THE DREAM TEAM DOES.
17 THAT'S THE BUSINESS MODEL. AND AS A RESULT, WE SHOULD BE
18 GRANTED THAT INFERENCE AT THE MOTION TO DISMISS STAGE THAT
19 THERE WAS COMPENSATION BEING EXCHANGED, WHICH BRINGS US TO THE
20 INTERESTING DISCLOSURE OR LACK THEREOF BEING DONE WITH TDM AND
21 SOME OF THE OTHER STOCK PROMOTERS.

22 MR. SMITH, DURING THE SECURITIES ACTION, GAVE YOUR
23 HONOR A LITTLE INDEX. I DON'T KNOW IF YOU STILL HAVE IT IN
24 FRONT OF YOU.

25 THE COURT: I HAVE IT.

UNITED STATES DISTRICT COURT

1 MR. FICARO: IT IS TAB C THAT I WOULD LIKE TO TALK
2 ABOUT BRIEFLY.

3 UNDER TAB C WE GET THE FULL ARTICLE, TALKING ABOUT
4 GALECTIN AND INTERCEPT, OTHERS VYING FOR LEAD DRUGS IN NASH
5 EPIDEMIC, AND WE HAVE THE ENTIRE ARTICLE THAT IS LISTED ON THIS
6 FIRST AND SECOND PAGE. NOWHERE HERE ON THIS PAGE IS THERE A
7 DISCLAIMER ANYWHERE TO SUGGEST THAT THIS ARTICLE IS PAID FOR.

8 SO ONLY IF YOUR RADAR IS UP AND YOU THINK THIS
9 ARTICLE IS A LITTLE OFF WOULD YOU VENTURE DOWN TO THE SIX-POINT
10 FONT BELOW AND CLICK ON THE WORD "DISCLAIMER." ONLY THEN DO
11 YOU GET SENT TO A DIFFERENT WEBSITE, NOT IMMEDIATELY FOLLOWING
12 THE ARTICLE AS DEFENDANTS WOULD HAVE YOU BELIEVE. IT IS NOT ON
13 THIS WEBSITE. YOU GET SENT TO A NEW ARTICLE AND NOW WE ARE ON
14 THE NEXT PAGE.

15 AND NOW WE SCROLL DOWN AND DOWN AND DOWN AND DOWN AND
16 WE FIND THE TERM THAT SAYS COMPENSATION. AND THERE WE LEARN
17 THAT EMERGING GROWTH, QUOTE, MAY BE PAID FOR SOME ARTICLES, AND
18 THERE IS A LIST OF CURRENT CLIENTS BELOW. AND YOU SCROLL DOWN
19 AND DOWN AND DOWN UNTIL FINALLY YOU GET TO GALECTIN. AND THEN
20 ONCE YOU REALIZE THAT THE WORD "GALECTIN" IS IN ITSELF A LINK
21 DO YOU CLICK ON THAT LINK AND YOU SEE THE COMPENSATION.

22 OUR POSITION, YOUR HONOR, IS, ONE, THAT THAT IS NOT
23 ADEQUATE DISCLOSURE. IT'S SIMPLY NOT. OUR OTHER POSITION,
24 YOUR HONOR, IS THAT THE QUESTION BEFORE THIS COURT IS WHETHER
25 OR NOT THE INDIVIDUAL DEFENDANTS, GALECTIN, BREACHED ITS

UNITED STATES DISTRICT COURT

1 FIDUCIARY DUTY TO THE COMPANY AND TO THE SHAREHOLDERS. KEEPING
2 THAT INFORMATION OUT OF GALECTIN'S SEC FILINGS IS THAT BREACH.
3 THAT'S THE BREACH OF FIDUCIARY DUTY AND THAT IS A LOWER
4 STANDARD THAN MY COLLEAGUES REPRESENTING THE CLASS HAD. WE
5 JUST NEED TO SHOW THAT THAT WAS A BREACH. THEY DIDN'T DO IT.
6 THEY ADMIT THAT THEY DIDN'T DO IT.

7 HOW DOES THAT DIFFER FROM GALENA? AT FIRST GALENA
8 HAD THE SAME TYPE OF DISCLOSURE THAT YOU SEE HERE. NOT LONG
9 AFTER THE INFORMATION CAME OUT IN GALENA THAT THEY WERE PAID
10 STOCK PROMOTERS DID IT ALL OF A SUDDEN DISAPPEAR FROM THE
11 INTERNET AND ALL OF THOSE ARTICLES WERE TAKEN DOWN FROM THE
12 RESPECTIVE WEBSITES. SO AT A TIME THAT SAME DISCLOSURE WAS
13 MADE BUT THEN IT WAS BROUGHT BACK. THAT'S A SIMILARITY AS FAR
14 AS WE ARE CONCERNED, BECAUSE DEFENDANTS WOULD HAVE STOOD UP
15 HERE AND TOLD YOU THAT IF IT WAS DISCLOSED ONCE, IT WAS
16 DISCLOSED INDEFINITELY, SO WE THINK THAT IS ANOTHER COMPARISON.

17 PUT SIMPLY, YOUR HONOR, IN MY REMAINING MINUTES, I
18 THINK THAT THE SUBSTANTIAL LIKELIHOOD OF LIABILITY PRONG IS
19 EASILY MET HERE. AND I WOULD LIKE TO TAKE A FEW MOMENTS TO
20 TALK ABOUT THE INSIDER TRADING AND SOME OF THE OTHER FUTILITY
21 CLAIMS THAT WE HAVE BROUGHT UP.

22 MR. POPE IS RIGHT INSOFAR AS THERE WERE PURCHASES
23 THAT WENT ALONG WITH SOME OF THOSE INSIDER SALES FROM THE 10X
24 FUND AND MR. PRELACK. I DO THINK WHAT HE IS OMITTING, HOWEVER,
25 IS THAT SOME OF THOSE WARRANT EXERCISES BY THE 10X FUND WERE

UNITED STATES DISTRICT COURT

1 DONE AT \$3 A SHARE.

2 SO WHAT HAPPENED IS THEY WOULD EXERCISE 100,000
3 WARRANTS WHICH TURNED INTO 500,000 SHARES AT \$15 RATHER THAN
4 HAVING THE 100,000 WARRANTS AT \$3. SO, YES, THERE WERE
5 EXERCISES TO PURCHASE BUT THEY STILL COME OUT AHEAD. SO YOU
6 STILL MAKE A MILLION DOLLARS. EVEN IT'S ON PAPER, THEN YOU ARE
7 IN A GOOD SPOT AND I WOULD HAPPILY TRADE PLACES.

8 AND I THINK THE SAME CAN BE SAID OF MR. PRELACK.
9 WHAT WE NEED TO SHOW HERE IS NOT THEY SOLD 100 PERCENT OF THEIR
10 HOLDINGS. WHAT WE NEED TO SHOW IS THAT THEY WERE SELLING
11 NOTHING PRIOR TO 2009. THERE WERE NO INSIDER SALES WHATSOEVER.
12 BUT NOW, ALL OF A SUDDEN, ONCE THEY HAVE HIRED FOUR STOCK
13 PROMOTERS AND PUBLISHED OVER 40 ARTICLES THAT THE COMPLAINT
14 PUTS IN A PERFECT TIMELINE FOR THIS COURT, COMPANY DISCLOSURE,
15 PROMOTION ARTICLE, PRICE INCREASE; COMPANY PRESS RELEASE, STOCK
16 PROMOTION ARTICLE, STOCK PRICE INCREASE. WE SEE IT TIME AND
17 AGAIN. IT'S NOT AN ACCIDENT. IT'S NOT SOME RANDOM
18 COINCIDENCE. IT IS COORDINATION BETWEEN THE COMPANY, THE
19 INDIVIDUAL DEFENDANTS AND THE STOCK PROMOTERS THAT ALLOWED
20 THOSE SALES TO ULTIMATELY HAPPEN.

21 FINALLY, YOUR HONOR, WE DO LIST A COUPLE OF
22 ALLEGATIONS REGARDING FUTILITY TO BOTH ISSUES REGARDING THE
23 AUDIT COMMITTEE AND THE GOVERNANCE COMMITTEE, MR. TRABER
24 SPECIFICALLY, NOT ONLY AS HIS ROLE AS A DEFENDANT IN A
25 SECURITIES CASE BUT THE PROXY ITSELF LISTS HIM AS NOT

UNITED STATES DISTRICT COURT

1 INDEPENDENT BECAUSE OF HIS PRIMARY ROLE, HIS PRIMARY OCCUPATION
2 AS AN EMPLOYEE OF THE COMPANY.

3 AND THE SAME, EXCUSE ME, IS TRUE OF MR. CZIRR. AND,
4 OF COURSE, MR. MAULDIN. WE DISCUSSED THAT HIS RELATIONSHIP
5 WITH COX AS A PROMOTER CLEARLY PUTS HIM AT A POSITION WHERE HE
6 COULD NOT PROPERLY EVALUATE A DEMAND.

7 AND THEN SO THAT'S REALLY THE ISSUES BEFORE THE
8 COURT, YOUR HONOR, AND I THINK IT'S PRETTY CUT AND DRIED. ONE,
9 SAVE YOURSELF THE TIME. YOU DON'T EVEN HAVE TO GO DOWN THAT
10 ROAD.

11 THE COURT: LET'S DO THE RULING.

12 MR. FICARO: JUDGE GONZALEZ HELPED OUT. AND IT'S
13 NOT -- JUDGE GONZALEZ'S RATIONALE IS CLEAR. IT'S EASY TO
14 UNDERSTAND WHY SHE WOULD HAVE REACHED THAT CONCLUSION. THERE
15 IS A SERIOUS SUBSTANTIAL LIKELIHOOD OF LIABILITY ON THE CLAIM
16 OF A BREACH OF FIDUCIARY DUTY, WHICH AT THIS STAGE, ESPECIALLY
17 AT THE MOTION TO DISMISS STAGE, IS NOT A HIGH HURDLE.

18 AND THEN FINALLY THE OTHER ALLEGATIONS REGARDING THE
19 INSIDER SELLING. ALL OF THOSE INFERENCES SHOULD GO TO THE
20 PLAINTIFF AND AS A RESULT, YOUR HONOR, I WILL YIELD WHATEVER
21 REMAINDER OF MY TIME TO MY COLLEAGUE, BUT I THINK WE ARE NEAR
22 THE END HERE, SO I THANK YOU FOR YOUR TIME, YOUR HONOR.

23 THE COURT: THANK YOU, SIR.

24 MR. FISTEL: GOOD AFTERNOON, YOUR HONOR.

25 THE COURT: GOOD AFTERNOON, SIR.

UNITED STATES DISTRICT COURT

1 MR. FISTEL: I THINK WE HAVE HEARD A LOT OF THIS
2 STUFF TODAY. I ACTUALLY COME UP HERE HAVING THE CLAIMS
3 ARGUMENT. THEY REST ON THEIR PAPERS. WE BELIEVE OUR PAPERS
4 ARE VERY DETAILED AS TO WHY THE CLAIMS ARE ADEQUATELY PLED. IF
5 YOUR HONOR HAS ANY QUESTIONS REGARDING ANY OF OUR CLAIMS, I AM
6 HAPPY TO ANSWER THOSE FOR YOU TODAY.

7 YOU KNOW, I DO WANT TO NOTE THERE WAS TALK EARLIER OF
8 THIS CONTROL ISSUE WITH DO YOU CONTROL THE STOCK PROMOTERS.

9 THE COURT: YES.

10 MR. FISTEL: AND OUR COMPLAINT, YOU KNOW, I HAVEN'T
11 GONE THROUGH THE SECURITIES CASE WITH A FINE-TOOTH COMB, BUT
12 OUR COMPLAINT, A 160-PAGE COMPLAINT IN PAINSTAKING DETAIL HAS
13 ALL 55 OF THE GALENA -- I'M SORRY -- GALECTIN PRESS RELEASES
14 FROM AUGUST OF 2012 THROUGH JULY OF 2014.

15 THE COURT: I LIKE THE WAY YOU PUT THAT PAINSTAKING
16 IN THIS, BECAUSE I HAVE TO READ IT ALL.

17 MR. FISTEL: IT IS PAINSTAKING. I UNDERSTAND. AND
18 THEN WE HAVE 40 OF THE STOCK PROMOTER ARTICLES IN THERE. THEY
19 ARE ALL DOVETAILED OFF OF EACH OTHER. TO SAY THEY DIDN'T
20 CONTROL THEM IS -- WE ARE CERTAINLY ENTITLED TO THAT INFERENCE.
21 THERE IS NO COMPETING INFERENCE OUT THERE THAT I HAVE HEARD.
22 AS YOUR HONOR IDENTIFIED EARLIER, THEY ARE ALSO BEING PAID
23 MONEY. THERE IS A SEMBLANCE OF CONTROL THERE. I KNOW IF I
24 WERE PAYING FOR A PRESS RELEASE ABOUT MY COMPANY PROMOTING IT,
25 I WOULD WANT TO SEE IT BEFORE IT WAS RELEASED. THAT JUST MAKES

UNITED STATES DISTRICT COURT

1 SENSE, RIGHT? SO JUST BECAUSE WE DON'T HAVE AN INTERNAL EMAIL
2 BETWEEN DIRECTORS, OR WHATEVER, SHOWING THAT THEY SAW IT AND
3 EDITED IT AND WHATNOT, WE WILL GET THAT IN DISCOVERY. I AM
4 SURE IT EXISTS, THAT THERE ARE EMAILS BACK AND FORTH BETWEEN
5 TDM. ALL WE HAVE TO ALLEGE IS THE INFERENCE THAT THERE WAS A
6 CONTROL THERE. MR. TRABER IS QUOTED IN SOME OF THOSE ARTICLES.
7 LINKS TO THE WEBSITE, YOU KNOW, GO BACK AND FORTH FROM THE TDM
8 ARTICLES AND OVER EVERY WHICH WAY, SO I JUST WANT TO SHORE UP
9 THAT KIND OF CONTROL ISSUE HERE.

10 BUT UNLESS YOUR HONOR HAS ANY QUESTIONS, WE WILL JUST
11 RELY ON OUR PAPERS.

12 THE COURT: THANK YOU.

13 MR. FISTEL: THANK YOU.

14 THE COURT: HOW MUCH TIME DOES MR. POPE HAVE LEFT?

15 THE CLERK: I BELIEVE IT HAS EXPIRED.

16 THE COURT: YOUR TIME HAS EXPIRED, MR. POPE.

17 MR. POPE: THANK YOU.

18 THE COURT: WELL, DO YOU HAVE TWO MINUTES? DO YOU
19 WANT TO TELL ME WHAT YOU WANT TO SAY IN TWO MINUTES?

20 MR. POPE: SURE.

21 THE COURT: AND I WILL ALLOW YOU ALL TO START.

22 MR. POPE: DID MY TIME EVER START?

23 THE COURT: YES, IT STARTED, I ASSURE YOU.

24 MR. POPE: I THINK IT IS PROBABLY FAIR TO CONCLUDE I
25 WAS OUT AT 15 MINUTES.

UNITED STATES DISTRICT COURT

1 TWO MINUTES VERY FAST ON THE QUESTION ABOUT
2 AMENDMENT. THEY ACTUALLY HAVE. EACH PLAINTIFF IN EACH CASE
3 HAS ALREADY AMENDED ONCE, SO I THINK UNDER THE BRYANT RULE YOU
4 ARE OKAY IF YOU WANTED TO NOT ALLOW THEM AN OPPORTUNITY. SO
5 THEY HAVE ALREADY AMENDED.

6 WITH RESPECT TO THE NEVADA RULING, YOUR HONOR, THERE
7 IS NOTHING ANYWHERE IN THOSE PAPERS, AND YOU'VE GOT THEM ALL
8 BEFORE YOU, THAT SAYS ANYTHING ABOUT SUBSTANTIAL LIKELIHOOD OF
9 LIABILITY OR ANY OF THE ANALYSIS AROUND DEMAND FUTILITY. IT'S
10 JUST NOT IN THERE. YOU CAN READ IT JUST THE WAY WE READ IT,
11 WHICH IS THAT IT'S SIMPLY A DENIAL BASED ON MOOTNESS BECAUSE
12 SHE KNOWS ANOTHER COMPLAINT IS COMING AND BECAUSE SHE DOESN'T
13 HAVE TO TAKE UP THE MERITS AND BECAUSE SHE WANTS TO DEFER TO
14 YOUR HONOR, WHO HAS THE SAME CASE IN FRONT OF HIM WHICH WAS
15 FIRST FILED, AND SHE KNOWS SHE IS BEING BRIEFED, WHICH
16 MR. SMITH TOLD HER IN NEVADA. SO SHE KNOWS THAT SHE CAN DEFER
17 TO YOU. THERE IS NOTHING LIKE WHAT MR. FICARO SAID PRESENT IN
18 THAT RULING. THERE IS NO RULING ON THE MERITS WITH RESPECT TO
19 DEMAND FUTILITY.

20 FINALLY ON THE COMMITTEE POINT, YOUR HONOR, MERE
21 MEMBERSHIP ON BOARD COMMITTEES, AUDIT COMMITTEE, GOVERNANCE
22 COMMITTEE, THAT ALONE IS NOT ENOUGH TO ESTABLISH A SUBSTANTIAL
23 LIKELIHOOD OF LIABILITY. THERE HAS TO BE PARTICULAR FACTS THAT
24 SHOWED THAT THE BOARD WAS CONSCIOUSLY NOT DOING ITS JOB. AND
25 IF YOU READ THE FOSBRE CASE, YOUR HONOR, THAT I REFERRED TO,

UNITED STATES DISTRICT COURT

1 THEY ACTUALLY RELY ON AN INTERESTING QUOTE FROM JUDGE THRASH OF
2 THIS DISTRICT, CHIEF JUDGE THRASH, IN THE COCA-COLA ENTERPRISES
3 CASE, WHO SAYS THAT IN ORDER TO SHOW A SUBSTANTIAL LIKELIHOOD
4 OF LIABILITY BASED ON THESE COMMITTEE-TYPE ALLEGATIONS, YOU
5 HAVE TO CONSCIOUS -- YOU HAVE TO SHOW THAT THE DIRECTORS WERE
6 CONSCIOUS OF THE FACT THAT THEY WERE NOT DOING THEIR JOB, WHICH
7 IS A VERY DIFFICULT STANDARD TO MEET AND OUR CONTENTION IS THEY
8 HAVE NOT DONE SO.

9 THANK YOU, YOUR HONOR.

10 THE COURT: THANK YOU.

11 TO BE FAIR, TWO MINUTES FOR YOU ALL TO SAY ANYTHING.

12 MR. FISTEL: ON THE COCA-COLA ENTERPRISES CASE, YOU
13 ARE TALKING ABOUT COCA-COLA ENTERPRISES, YOUR HONOR, A HUGE
14 COMPANY. THIS IS A SEVEN-EMPLOYEE COMPANY WITH MORE DIRECTORS
15 THAN EMPLOYEES WITH ESSENTIALLY ONE, A PROMISE OF ONE, NOT
16 EVEN -- TO CALL IT PROMISING WOULD BE GENEROUS -- DRUG
17 CANDIDATE TO PUT OUT THERE. THE VIABILITY OF THE COMPANY, THE
18 VERY EXISTENCE RESTED IN INFLATING THE PRICE OF THE STOCK,
19 ISSUING MORE STOCK AT THAT INFLATED LEVEL TO BRING MONEY INTO
20 THE COMPANY TO GET TO TOMORROW. AND THAT'S WHAT THE GOAL WAS
21 HERE. THAT'S WHAT HAPPENED BEHIND THE SCENES HERE. IT'S
22 DEFINITELY A REASONABLE INFERENCE, A COMPELLING STORY OF FRAUD,
23 FRANKLY.

24 THANK YOU, YOUR HONOR.

25 THE COURT: THANK YOU.

UNITED STATES DISTRICT COURT

1 WELL, THANK ALL OF YOU ALL. YOU ALL ARGUED VERY WELL
2 AND MADE IT DIFFICULT FOR THE COURT. COURTS LIKES IT WHEN ONE
3 SIDE JUST -- I AM SAYING THAT ALL OF YOU ARGUED EXCELLENT.

4 I WAS COMPLIMENTING YOU ALL AT LUNCH TODAY. I SAID I
5 HAVE SOME VERY GOOD PROFESSIONAL LAWYERS IN FRONT OF ME. SO IF
6 YOU ALL RUN INTO ANY OF MY OTHER NINE COLLEAGUES AND THEY PAT
7 YOU ON THE BACK, YOU WILL KNOW WHY.

8 THANK YOU ALL. AGAIN, I AM GOING TO TRY TO GET AN
9 ANSWER ON THIS AS QUICKLY AS POSSIBLE, BUT I THANK YOU ALL FOR
10 BEING HERE AND HAVE A GREAT DAY.

11 (PROCEEDINGS CONCLUDED)

12

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25

UNITED STATES DISTRICT COURT

APP001548

1 C E R T I F I C A T E

2

3 UNITED STATES OF AMERICA

4 NORTHERN DISTRICT OF GEORGIA

5 I, DAVID A. RITCHIE, OFFICIAL COURT REPORTER OF THE

6 UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF

7 GEORGIA, DO HEREBY CERTIFY THAT THE FOREGOING 76 PAGES

8 CONSTITUTE A TRUE TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE SAID

9 COURT, HELD IN THE CITY OF ATLANTA, GEORGIA, IN THE MATTER

10 THEREIN STATED.

11 IN TESTIMONY WHEREOF, I HEREUNTO SET MY HAND ON THIS,

12 THE 2ND DAY OF DECEMBER, 2015.

13

14

15

16 DAVID A. RITCHIE
17 OFFICIAL COURT REPORTER
18 NORTHERN DISTRICT OF GEORGIA

19

20

21

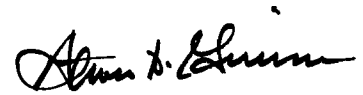
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UNITED STATES DISTRICT COURT



CLERK OF THE COURT

TRAN

DISTRICT COURT
CLARK COUNTY, NEVADA
* * * * *

MICHAEL KIRSCH

Plaintiff

vs.

PETER TRABER, et al.

Defendants
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CASE NO. A-706397

DEPT. NO. XI

**Corrected
Transcript of
Proceedings**

BEFORE THE HONORABLE ELIZABETH GONZALEZ, DISTRICT COURT JUDGE

HEARING ON MOTIONS TO DISMISS

THURSDAY, MARCH 3, 2016

APPEARANCES:

FOR THE PLAINTIFF:

DAVID S. DAVIS, ESQ.
EDWARD J. MILLER, ESQ.

FOR THE DEFENDANTS:

MICHAEL R. SMITH, ESQ.
RYAN DANIELS, ESQ.
JOHN P. ALDRICH, ESQ.
LANDON LERNER, ESQ.

COURT RECORDER:

JILL HAWKINS
District Court

TRANSCRIPTION BY:

FLORENCE HOYT
Las Vegas, Nevada 89146

Proceedings recorded by audio-visual recording, transcript
produced by transcription service.

APP001550

1 LAS VEGAS, NEVADA, THURSDAY, MARCH 3, 2016, 9:05 A.M.

2 (Court was called to order)

3 THE COURT: If I could go to Kirsch versus Traber.

4 Can I have everyone identify themselves for purposes
5 of my record.

6 MR. SMITH: Good morning, Your Honor. Michael Smith
7 for the defendants.

8 MR. DANIELS: Good morning, Your Honor. Ryan
9 Daniels on behalf of the defendants.

10 MR. MILLER: Good morning, Your Honor. Edward
11 Miller for plaintiffs.

12 MR. DAVIS: Good morning. David Davis for
13 plaintiffs.

14 MR. LERNER: 'Morning, Your Honor. Landon Lerner on
15 behalf of intervenor plaintiffs.

16 THE COURT: Okay. Let me just be clear so all of
17 you know. A denial of a motion to dismiss is not a final
18 order in Nevada. Anything else you want to say?

19 MR. SMITH: Your Honor, only that we have submitted
20 to you the final orders from Georgia.

21 THE COURT: Well, I understand. But those are in
22 Georgia. And I understand the potential impact of those.

23 MR. SMITH: Yes.

24 THE COURT: But I'm pretty clear from the Nevada
25 Supreme Court and a history of being a lawyer in Nevada that a

1 denial of a motion to dismiss is never a final order in
2 Nevada. Never.

3 MR. SMITH: That is correct. But -- your order
4 which denied the motions to dismiss, you're correct, those
5 were not final. The Georgia orders granted the motions to
6 dismiss.

7 THE COURT: I understand. That's a different issue.
8 I'm talking about my order.

9 MR. SMITH: That's correct.

10 THE COURT: Because some people have tried to say
11 that my order is a final order first. And my order can't be
12 final, because it's a denial of a motion to dismiss.

13 MR. SMITH: That's why the plaintiffs' position is
14 not well taken, and we pointed that out.

15 So we are seeking dismissal of this case based on
16 the claims -- issue preclusion and claims preclusion from the
17 Georgia orders denying the motions -- or granting the motion
18 to dismiss the derivative suit in Georgia.

19 Because the Georgia order is a final order which
20 dismissed a functionally identical derivative suit, it has
21 preclusive effect in this court. Under the Nevada Supreme
22 Court authority that we cited in the Bower case the plaintiffs
23 here, both the original complaint that Kirsch filed and the
24 complaints -- the complaint in intervention that was filed
25 pursuant to Your Honor's order in June, both of those

1 plaintiffs are now precluded from arguing demand futility.
2 It's undisputed they did not make a demand. The issue of
3 demand futility has been ruled on in Georgia in a final
4 judgment on the merits, and therefore the plaintiffs here can
5 no longer raise that issue.

6 THE COURT: The issue of demand futility under
7 Nevada law has been addressed by a federal judge in Georgia,
8 and your position is that is a final judgment that precludes a
9 Nevada judge from acting further?

10 MR. SMITH: Absolutely.

11 THE COURT: Just making sure your record is clear on
12 what you're saying.

13 MR. SMITH: Yes.

14 THE COURT: Okay.

15 MR. SMITH: That is absolutely correct. And for
16 that reason these cases should be dismissed.

17 We cited to you the Bower case, which says that --
18 it's a Nevada Supreme Court case. It says that Nevada courts
19 -- when you have a Federal Court which has issued a final
20 judgment on the merits, that Nevada courts must pay deference
21 to that. And the requirements for issue preclusion are met
22 here, and therefore the plaintiffs in this court can no longer
23 raise the demand futility as an excuse for having failed to
24 make demand, and the cases must be dismissed.

25 THE COURT: Thank you.

1 MR. SMITH: Thank you, Your Honor.

2 MR. MILLER: Good morning, Your Honor.

3 THE COURT: Good morning.

4 MR. MILLER: The preclusive effect of a ruling
5 depends on the identity of the issues. And defendants have
6 quoted that law and recognize it. So even had the federal
7 judgment come down first or if indeed it has preclusive effect
8 as the grant of a motion to dismiss, it's only if this case is
9 identical and the issue presented is identical.

10 Now, in Georgia defendants had two arguments. One
11 argument was that this Court had never issued a substantive
12 ruling. But their second argument is very, very important for
13 this Court today. Their second argument was that the Nevada
14 court, your judgment --

15 THE COURT: I didn't issue a judgment, Counsel. I
16 issued an order denying a motion to dismiss.

17 MR. MILLER: That order, they argued, was not
18 preclusive because it was a different case, it was a different
19 complaint. And they presented that argument in the Federal
20 Court in Georgia and told the judge that, because the amended
21 complaint there was different, this Nevada State Court order
22 had no preclusive effect. That's -- I'm just repeating what
23 the defendants said, I'm not saying it.

24 Having taken that position, the defendants are under
25 Nevada law as stated in Marcuse versus Del Webb, 123 Nev. 278,

1 judicially estopped from taking the opposite position here.
2 Defendants just said, no, now the cases are identical, the
3 complaints are identical. But the Supreme Court does not
4 permit that type of opposite argumentation in different
5 courts.

6 I want to quote Marcuse. "The same party may not
7 take two totally inconsistent positions in two different
8 judicial proceedings where the party was successful in
9 asserting the first position and the first position was not
10 taken as a result of ignorance."

11 And I just want to go through those factors one by
12 one. It is opposite to say in Georgia that the cases are
13 different and to say here today that they're identical. They
14 were successful in Georgia, they got the case dismissed, and
15 their position was not taken as a result of ignorance. In
16 Georgia it served their purposes for the cases to be
17 different, and today it serves their purposes for the cases to
18 be identical. And the position that they've taken today is
19 therefore on all fours judicially estopped. They cannot argue
20 it.

21 Now, I don't want to rest on that. I want to
22 address the issue of whether or not in fact the decisions --
23 I'm sorry, the complaints are identical or not. What happened
24 in Georgia is that a class action was dismissed because of a
25 failure to reach Janus level of proof. And court in the oral

1 hearing and its decision treated the complaint in that case,
2 as the class action plaintiffs admitted on the record, to lack
3 any allegation of any false statements. Now, if we give the
4 federal judge the credit that a federal judge in Georgia
5 deserves and assume that he's correct about that, we are in
6 fact dealing with two very different complaints. Because here
7 in this court plaintiff Kirsch's complaint, an entire demand
8 futility argument, was based upon false statements by a
9 publication published by a director of the company which
10 there's plenty of facts to -- from which a reasonable
11 inference can be drawn the board of directors of this six-
12 employee company was fully aware of when they added a ninth
13 directorship to bring on the publisher who then published that
14 this company had discovered a cure to cancer two dozen times
15 as the stock steadily shot up. And then the stock fell from
16 \$30 to \$2 not for nothing. It fell because the company had
17 lied to the investing public, and that was the basis upon
18 which plaintiff came here last summer and argued that these
19 directors are in trouble and they should be put in a position
20 to answer a few questions because they do face a substantial
21 chance of liability in this case and are therefore not in a
22 position to dispassionately make a decision about whether or
23 not to pursue this litigation.

24 There are a few other points I would like to make if
25 I have time, Your Honor. But that is really --

1 THE COURT: You have four minutes.

2 MR. MILLER: -- the essential point.

3 THE COURT: You have four minutes left.

4 MR. MILLER: The cases that defendants cite for
5 their proposition that a motion -- a denial of a motion to
6 dismiss is not a final ruling on the merits for purposes of
7 preclusion, I'd just like to point out their cases don't say
8 it. Now, the Court has done its own research, and I can't
9 dispute the Court's research. But the cases, not one of the
10 cases cited by defendants says that a denial of a motion to
11 dismiss lack preclusive effect. And I just want to show --
12 give one example. The very first case, Arduini, which they
13 cite saying it says that the denial of a motion to dismiss was
14 not a final order -- I'm sorry, that denying a motion to
15 dismiss, as opposed to granting such motion is not a final
16 judgment on the merits. They cite Arduini. Well, here's
17 Arduini, page 632. It doesn't say that. None of the cases
18 they cite say that. Arduini says that the denial of a motion
19 to dismiss is not a final order establishing liability.
20 Totally different subject.

21 The other cases they cite deal with whether or not a
22 denial of a motion to dismiss is final for purposes of filing
23 an appeal, not even dealing with preclusion law. What the
24 Nevada cases do say is that the Nevada Supreme Court adopts
25 the Restatement. And what the Restatement says is that the

1 definition of a final judgment for purposes of preclusion is
2 very different than the definition of a final judgment for
3 purposes of appeal. The Ohio Supreme Court in University of
4 Nevada versus Tarkanian, 110 Nev. 581, adopts the Restatement
5 definition that for preclusion of final judgment is any prior
6 adjudication of an issue in another action that is determined
7 to be sufficiently firm to be accorded conclusive effect.
8 And, yes, there are some courts in other states that say that
9 could or could not mean that a denial of a motion to dismiss
10 has preclusive effect depending on the facts of the case.
11 Nevada has not ruled upon it, and this Court does not have to
12 reach that question, because, according to defendants in
13 Georgia, these are two different cases. And that's the one
14 thing that they did get right. Thank you.

15 THE COURT: Thank you.

16 The motion is granted. Here the parties are
17 identical, the issue of demand futility is identical. While
18 I'm very concerned that the representations that were made to
19 me by Mr. Smith at the last time we argued this motion in June
20 of 2015 were that the issues being raised in Georgia related
21 to class certification issues, I stayed the case based on
22 those representations.

23 I must give preclusive effect to the Georgia Federal
24 Court's final order. For that reason the motion is granted.

25 MR. SMITH: Thank you, Your Honor. Should we

1 prepare an order?

2 THE COURT: Please.

3 THE PROCEEDINGS CONCLUDED AT 9:19 A.M.

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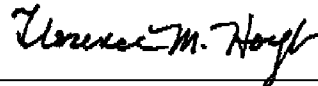
CERTIFICATION

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE AUDIO-VISUAL RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

AFFIRMATION

I AFFIRM THAT THIS TRANSCRIPT DOES NOT CONTAIN THE SOCIAL SECURITY OR TAX IDENTIFICATION NUMBER OF ANY PERSON OR ENTITY.

**FLORENCE HOYT
Las Vegas, Nevada 89146**



FLORENCE M. HOYT, TRANSCRIBER

3/16/16

DATE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE GALECTIN
THERAPEUTICS, INC.
DERIVATIVE LITIGATION

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CIVIL ACTION NO.
1:15-CV-208-SCJ

ORDER

This matter appears before the Court on Galectin Therapeutics, Inc.'s ("Galectin") Motion to Dismiss (Doc. No. [79]) and Peter Traber, Jack W. Callicutt, James C. Czirr, Gilbert F. Amelio, Kevin D. Freeman, Arthur R. Greenberg, Rod D. Martin, John F. Mauldin, Steven Prelack, Herman Paul Pressler, III, Mark Rubin (the "Individual Defendants"), and 10X Fund L.P.'s ("10X Fund") Motion to Dismiss (Doc. No. [80]).¹ Defendants move to dismiss with prejudice the Verified First Consolidated Amended Shareholder Derivative Complaint ("Verified Amended Complaint") for failure to make pre-suit demand on Galectin's board of directors or plead facts excusing demand as required by Federal Rule of Civil Procedure 23.1 and the law of the State of Nevada, and for

¹ Individual Defendants and 10X Fund "join in, adopt, and incorporate the arguments set forth in [Galectin's] Motion to Dismiss the Verified Consolidated Amended Shareholder Derivative Complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 23.1 and Nevada law as if fully set forth [therein]." Doc. No. [80], p. 2.

failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 9(b).

I. PROCEDURAL BACKGROUND AND SUMMARY OF ALLEGATIONS²

On August 1, 2014, David L. Hasbrouck, derivatively on behalf of Galectin, filed a Complaint in the United States District Court for the District of Nevada against the Individual Defendants and Galectin alleging breach of fiduciary duties, unjust enrichment, waste of corporate assets, and aiding and abetting fiduciary violations. Doc. No. [1]. On September 3, 2014, Galectin, Czirr, Traber, and Callicutt filed an unopposed motion in a related securities class action with the United States District Court for the District of Nevada to transfer venue to the United States District Court for the Northern District of Georgia. On September 29, 2014, Galectin, Traber, Czirr, Callicutt, Martin, Mauldin, Amelio, Freeman, Greenberg, Prelack, Pressler, and Rubin, defendants in the derivative action, filed

² “In ruling on a 12(b)(6) motion, the Court accepts the factual allegations in the complaint as true and construes them in the light most favorable to the plaintiff.” Speaker v. U.S. Dep’t of Health and Human Servs. Ctrs. for Disease Control and Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010). While the Court accepts the factual allegations as true and construes them in the light most favorable to Plaintiff, securities fraud claims are subject to heightened pleadings standards that must be met to survive a motion to dismiss. In re AIG Advisor Group Securities Litigation, 309 F. App’x 495, 497 (2nd Cir. 2009). Plaintiff must plead with particularity the circumstances constituting fraud. Id.

a second unopposed motion to transfer venue to the United States District Court for the Northern District of Georgia. Doc. No. [38]. The United States District Court for the District of Nevada granted the motions and transferred venue to the United States District Court for the Northern District of Georgia on January 5, 2015. Doc. No. [44]. On February 27, 2015, Hasbrouck and Sui Yip, derivatively on behalf of Galectin, filed a Verified Consolidated Shareholder Derivative Complaint against certain current and former officers and directors of the company. Doc. No. [58]. On May 26, 2015, Hasbrouck and Yip filed the Verified Amended Complaint alleging violations of the Securities Exchange Act of 1934 (“Exchange Act”) and laws of the State of Nevada. Doc. No. [74].

Hasbrouck is a current shareholder of Galectin and has continuously held Galectin stock since 2003, when the company was known as Pro-Pharmaceuticals. Doc. No. [74], p. 11, ¶ 18. Yip is a current shareholder of Galectin and has continuously held Galectin stock since February 2007, when the company was known as Pro-Pharmaceuticals. Doc. No. [74], p. 11, ¶ 19. Incorporated in the State of Nevada and headquartered in Norcross, Georgia, Galectin is a biotechnology company engaged in the research of galectin proteins to develop therapies for cancer and non-alcoholic steatohepatitis (“NASH”), or

fatty liver disease with advanced fibrosis. Doc. No. [74], p. 3, ¶¶ 2-3; Doc. No. [74], p. 11, ¶ 20; Doc. No. [74], pp. 19-20, ¶ 39. The Individual Defendants comprise the management team of Galectin – *e.g.*, Chief Executive Officer, Chief Medical Officer, and Chief Financial Officer – and members of Galectin’s board of directors. Doc. No. [74], pp. 12-17, ¶¶ 21-31. 10X Fund and its general partner, 10X Capital Management, LLC, were co-founded by Czirr and Martin in 2008 as a technology-focused hedge fund headquartered in Niceville, Florida. Doc. No. [74], p. 17, ¶ 32. As of March 20, 2015, 10X Fund owned all of the issued and outstanding shares of Galectin Series B preferred stock, as well as warrants exercisable to purchase additional common stock. Doc. No. [74], p. 17, ¶ 32. Czirr was a managing partner of 10X Fund and served as Executive Chairman of Galectin’s Board of Directors during the class period. Doc. No. [74], pp. 12-13, ¶ 22. Martin was also a managing partner of 10X Fund and served as Vice Chairman of Galectin’s Board of Directors during the time period pertinent to this matter. Doc. No. [74], p. 15, ¶ 27.

Plaintiffs include six substantive counts in the Verified Amended Complaint.³ In Count I, Plaintiffs allege that Individual Defendants violated

³ The Verified Amended Complaint is a quintessential shotgun pleading. The United States Court of Appeals for the Eleventh Circuit defines shotgun pleadings as “those that

Section 14(a) of the Exchange Act and Rule 14a-9 promulgated thereunder by failing to disclose in Galectin's 2013 and 2014 Proxy Statements that they had caused the company to enter into a secret stock promotion scheme. Doc. No. [74], pp. 150-52, ¶¶ 311-18. In Count II, Plaintiffs allege that Individual Defendants breached their fiduciary duties by failing to disclose material information concerning Galectin, namely the secret stock promotion scheme. Doc. No. [74], pp. 152-54, ¶¶ 320-27. In Count III, Plaintiffs allege that Czirr, Martin, and Prelack breached their fiduciary duties by selling Galectin stock while in possession of material non-public information. Doc. No. [74], pp. 154-56, ¶¶ 328-34. In Count IV, Plaintiffs allege that Individual Defendants were unjustly enriched due to the compensation they received while in breach of their fiduciary duties. Doc. No. [74], pp. 156-57, ¶¶ 335-40. In Count V, Plaintiffs allege that Individual Defendants wasted corporate assets through improper payments to officers of Galectin, awarding stock options to officers and directors of Galectin, paying third party stock promoters, and potentially incurring substantial legal liability and legal costs. Doc. No. [74], pp. 157-58,

incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense.” Wagner v. First Horizon Pharm. Corp., 464 F.3d 1273, 1279 (11th Cir. 2006). “[S]hotgun pleadings wreak havoc on the judicial system.” Id.

¶¶ 341–45. In Count VI, Plaintiffs allege that Individual Defendants and 10X Fund aided and abetted in the alleged breaches of fiduciary duties. Doc. No. [74], pp. 158–59, ¶¶ 346–52.

On July 8, 2015, Galectin filed a Motion to Dismiss (Doc. No. [79]) and Individual Defendants and 10X Fund filed a Motion to Dismiss (Doc. No. [80]). The parties have briefed the motions and the Court heard oral argument with respect to the motions on November 3, 2015 (Doc. No. [88]). The motions are now ripe for consideration by the Court.

II. LEGAL STANDARD

Under the law of the State of Nevada, “a corporation’s ‘board of directors has full control over the affairs of the corporation.’” Schoen v. SAC Holding Corp., 137 P.3d 1171, 1178 (Nev. 2006). The power conferred upon the board of directors to act on behalf of the corporation “is governed by the directors’ fiduciary relationship with the corporation and its shareholders, which imparts upon the directors duties of care and loyalty.” Id. “In essence, the duty of care consists of an obligation to act on an informed basis; the duty of loyalty requires the board and its directors to maintain, in good faith, the corporation’s and its shareholders’ best interests over anyone else’s interests.” Id. Directors of a

corporation are protected by the business judgment rule, which is “a ‘presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.’” Id. at 1178–79. While the board of directors generally decides whether to pursue legal action on behalf of the corporation, shareholders, through what is known as a derivative suit, may file a lawsuit to enforce the corporation’s rights. Id. at 1179. To be permitted to file a derivative suit, a shareholder must set forth particularized factual statements that are essential to the claim that demand has been made on the corporation that it pursue the claim that the shareholder seeks to pursue, or, alternatively, that making a demand on the corporation would be futile. Id. at 1179–80; see also Fed. R. Civ. P. 23.1. “A shareholder’s failure to sufficiently plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted.” Schoen, 137 P.3d at 1180.

The Supreme Court of Nevada has adopted a two-prong analysis to determine whether demand would be futile.

[W]hen a shareholder’s demand would be made to the same board that voted to take (or reject) an action, so

that the allegedly improper action constitutes a business decision by the board, a shareholder asserting demand futility must allege, with particularity, facts that raise a reasonable doubt as to the directors' independence or their entitlement to protection under the business judgment rule. However, when a board does not affirmatively make a business decision or agree to the subject action, the demand requirement will be excused as futile only when particularized pleadings show that at least fifty percent of the directors considering the demand for corrective action would be unable to act impartially.

Id. at 1175. The first prong concerns business decisions by the board of directors.

With respect to the first prong,

a plaintiff challenging a business decision and asserting demand futility must sufficiently show that either the board is incapable of invoking the business judgment rule's protections (*e.g.*, because the directors are financially or otherwise interested in the challenged transaction) or, if the board is capable of invoking the business judgment rule's protections, that that rule is not likely to in fact protect the decision (*i.e.*, because there exists a possibility of overcoming the business judgment rule's presumptions that the requisite due care was taken when the business decision was made).

Id. at 1181. The second prong concerns actions by the corporation to which the business judgment rule does not apply, "for example, when the board members who decided the challenged act have since changed or when the challenged act

does not constitute a decision by the board.” Id. at 1182. With respect to the second prong, “‘the demand futility analysis considers only whether a majority of the directors had a disqualifying interest in the [demand] matter or were otherwise unable to act independently’ at the time the complaint was filed.” Id. at 1183. “To show interestedness, a shareholder must allege that a majority of the board members would be ‘materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.’” Id. The Supreme Court of Nevada noted, “[a]llegations of mere threats of liability through approval of the wrongdoing or other participation, however, do not show sufficient interestedness to excuse the demand requirement.” Id.

III. DISCUSSION

A. Issue Preclusion

In cases governed by the law of the State of Nevada, “issue preclusion ‘applies to prevent relitigation of [] a specific issue that was decided in a previous suit between the parties, even if the second suit is based on different causes of

action and different circumstances.” Arduini v. Hart, 774 F.3d 622, 629 (9th Cir. 2014). For issue preclusion to apply,

“(1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; . . . (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation”; and (4) the issue was actually and necessarily litigated.

Id. Plaintiffs argue that issue preclusion applies in this matter with respect to demand futility. Specifically, Plaintiffs argue that Judge Elizabeth Gonzalez of the District Court of Clark County, Nevada, denied a substantially similar motion to dismiss filed by Galectin in a parallel, later-filed derivative action before Judge Gonzalez, thereby warranting a finding of issue preclusion. However, based on the Court’s review of the state court action, there is not a sufficient basis for the Court to find that Judge Gonzalez issued a final ruling on the merits with respect to the identical issue of demand futility presently before the Court.

In the state court action, with respect to a motion to dismiss filed by Galectin on the basis of demand futility, Judge Gonzalez stated the following:

The motion to dismiss is denied. The allegations related to the conflicted directors who may face personal liability are not the best I’ve ever seen, but

they are not enough to merit dismissal at this point. Given the fact I'm already going to deal with some pleading issues in a different fashion in a minute, is there anything else?

Doc. No. [79-4], p. 25. While Judge Gonzalez denied the motion to dismiss, she then directed the plaintiffs to file a motion to amend the complaint, and advised the plaintiffs, "you may want to beef up your factual allegations." Doc. No. [79-4], p. 25. Judge Gonzalez also stayed the case for 180 days pending action by the Court in this matter. Doc. No. [79-4], p. 26; Doc. No. [81-1]. Review of the transcript (Doc. No. [79-4]) and subsequent order prepared by the parties (Doc. No. [81-1]) does not indicate whether Judge Gonzalez denied the motion to dismiss based on the merits of the case or mootness. Neither does the state court's journal entry following the hearing resolve the uncertainty regarding the basis for denying the motion to dismiss. See Doc. No. [81-2]. The Court cannot conclude whether Judge Gonzalez issued a final ruling on the merits with respect to the issue of demand futility. Because it is unclear whether issue preclusion applies, the Court is not precluded from considering demand futility.

B. Demand Futility

Plaintiffs contend that they have adequately alleged that demand is excused because each board member faces a substantial likelihood of liability for failing to disclose a secret stock promotion scheme. Doc. No. [74], pp. 138-42,

¶¶ 373–81; Doc. No. [81], pp. 31–36. Specifically, Plaintiffs state, “The entire Board is . . . interested because each director faces a substantial likelihood of liability for failing to disclose that Galectin engaged the Stock Promoters and was paying the Stock Promoters to author and publish ‘articles’ promoting Galectin’s financial prospects.” Doc. No. [81], p. 32. Plaintiffs rely on the second prong of the demand futility analysis by claiming that a majority of the board members are interested through potential liability. As noted above, the Supreme Court of Nevada has held that it is difficult to establish interestedness through potential liability. Schoen, 137 P.3d at 1183–84.

[T]o show interestedness, a shareholder must allege that a majority of the board members would be “materially affected, either to [their] benefit or detriment, by a decision of the board, in a manner not shared by the corporation and the stockholders.” Allegations of mere threats of liability through approval of the wrongdoing or other participation, however, do now show sufficient interestedness to excuse the demand requirement. Instead, as the Delaware courts have indicated, interestedness because of potential liability can be shown in those “rare case[s] . . . where defendants’ actions were so egregious that a substantial likelihood of director liability exists.”

With regard to the duty of care, the business judgment rule does not protect the gross negligence of uninformed directors and officers. And directors and officers may only be found personally liable for

breaching their fiduciary duty of loyalty if that breach involves intentional misconduct, fraud, or a knowing violation of the law. Accordingly, interestedness through potential liability is a difficult threshold to meet.

Id. In this case, Plaintiffs have not set forth allegations that establish interestedness through a substantial likelihood of director liability.

The Court ruled in a related securities class action that Galectin and members of its board of directors did not engage in illegal or impermissible conduct through the use of third party stock promoters. See In re Galectin Therapeutics, Inc. Securities Litigation, Case No. 1:15-CV-29-SCJ, Doc. No. [130] (N.D. Ga. Dec. 30, 2015). The Court held that the third party stock promoters were required to disclose that they received compensation for the articles they disseminated, not the company and its board of directors. Id. While Plaintiffs rely on In re Galena Biopharma, Inc. Derivative Litigation, 83 F. Supp. 3d 1047 (D. Ore. 2015) to distinguish this derivative suit from the related securities class action, that reliance is misplaced. In Re Galena is not binding authority and this Court does not find the district court's reasoning persuasive. In the present matter, Plaintiffs have not identified any failure to disclose by the board of directors that constitutes a breach of a fiduciary duty. In addition, other than noting a relationship between Mauldin and one of the stock promoters, Plaintiffs

have not set forth particularized factual allegations regarding the specific conduct of each of the individual members of the board of directors. Therefore, the Court concludes that Plaintiffs have not set forth particularized allegations that each member of Gaelectin's board of directors faces a substantial likelihood of liability for failing to disclose a stock promotion scheme.

Plaintiffs also contend that they have adequately alleged that demand is excused because a majority of the members of the board of directors face a substantial likelihood of liability for insider selling. Doc. No. [74], p. 138, ¶¶ 271–72; Doc. No. [81], pp. 36–39. The board is comprised of ten members, including both inside and outside directors. However, Plaintiffs allege insider selling against only three members of the board of directors – Czirr, Martin, and Prelack. Even assuming that Czirr, Martin, and Prelack face a substantial likelihood of liability for insider selling, Plaintiffs are able to establish that only a minority of the board is interested, which is not sufficient under the law of the State of Nevada. Therefore, the Court concludes that Plaintiffs have not set forth particularized allegations that a majority of the board of directors face a substantial likelihood of liability for insider selling.

“A shareholder's failure to sufficiently plead compliance with the demand requirement deprives the shareholder of standing and justifies dismissal of the complaint for failure to state a claim upon which relief may be granted.” Schoen, 137 P.3d at 1180. Because Plaintiffs have failed to plead demand futility, they

have not pleaded compliance with the demand requirement to pursue a derivative lawsuit on behalf of Gaelectin. The Court concludes that dismissal of this action is justified.

C. Leave to Amend

Federal Rule of Civil Procedure 15(a)(1) provides that a party may amend its pleading once as a matter of course within either twenty-one days after serving it, or twenty-one days after service of a required responsive pleading or motion filed under Rule 12(b), (e), or (f), whichever is earlier. Fed. R. Civ. P. 15(a)(1). After this twenty-one-day period has passed, a party may amend its pleading only with the opposing party's written consent or the court's leave, which the court "should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2). The United States Court of Appeals for the Eleventh Circuit has held:

The thrust of Rule 15(a) is to allow parties to have their claims heard on the merits, and accordingly, district courts should liberally grant leave to amend when "the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief." Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962). Nevertheless, a motion for leave to amend may appropriately be denied "(1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendments would cause undue prejudice to the opposing party; or (3) where amendment would be futile." Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001).

In re Engle Cases, 767 F.3d 1082, 1108-09 (11th Cir. 2014).

It has been held that “[l]eave to amend a complaint is futile when the complaint as amended would still be properly dismissed or be immediately subject to summary judgment for the defendant.” Cockrell v. Sparks, 510 F.3d 1307, 1310 (11th Cir. 2007); see also Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1263 (11th Cir. 2004) (“This court has found that denial of leave to amend is justified by futility when the complaint as amended is still subject to dismissal.”) The Eleventh Circuit has also held, “‘Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly.’” Rosenberg, 554 F.3d 962, 967 (2009). In this case, Plaintiffs have not raised the issue of amendment in the pleadings. Plaintiffs only raised the issue of amendment during oral argument, and not specifically with respect to the derivative lawsuit. Further, even if Plaintiffs properly raised a request for leave to amend, the Court finds that leave to amend the complaint is futile. The operative complaint is an amended complaint filed by Plaintiffs upon transfer of this matter to this Court.

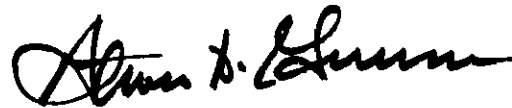
IV. CONCLUSION

Galectin’s Motion to Dismiss (Doc. No. [79]) is **GRANTED**, and the Individual Defendants and 10X Fund’s Motion to Dismiss (Doc. No. [80]) is

GRANTED. This matter is hereby **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED, this 30TH day of December, 2015.

s/Steve C. Jones
HONORABLE STEVE C. JONES
UNITED STATES DISTRICT JUDGE



CLERK OF THE COURT

NODP
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DISTRICT COURT
CLARK COUNTY, NEVADA

MICHAEL KIRSCH, derivatively on behalf of
GALECTIN THERAPEUTICS, INC.,

Plaintiff,

vs.

PETER G. TRABER; JAMES C. CZIRR;
JACK W. CALLICUTT; GILBERT F.
AMELIO; KEVIN D. FREEMAN; ARTHUR
R. GREENBERG; ROD D. MARTIN; JOHN
F. MAULDIN; STEVEN PRELACK;
HERMAN PAUL PRESSLER, III; and DR.
MARC RUBIN,

Defendants,

-and-

GALECTIN THERAPEUTICS, INC., a
Nevada Corporation,

Nominal Defendant.

Case No. A-14-706397-B

Dept. No. XI

**NOTICE OF ENTRY OF ORDER
DISMISSING ACTION WITH
PREJUDICE**

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that an Order Dismissing
this Action with Prejudice was entered in the above entitled matter on the 1st day of April, 2016.
A copy of said Order is attached hereto.

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DATED this 21st day of June, 2016.

KAEMPFER CROWELL

BY: /s/ Lyssa S. Anderson
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 21, 2016, I forwarded copies of the foregoing **NOTICE OF**
3 **ENTRY ORDER REGARDING DISMISSING ACTION WITH PREJUDICE** by ECF
4 and/or U.S. Mail to the following attorneys of record:

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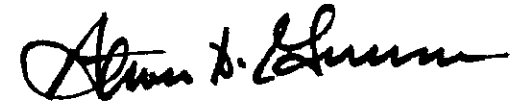
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24 /s/ Becky Hildebrand
an employee of Kaempfer Crowell

1 **ORDR**



CLERK OF THE COURT

2 **DISTRICT COURT**

3 **CLARK COUNTY, NEVADA**

4 MICHAEL KIRSCH, derivatively on behalf
5 of GALECTIN THERAPEUTICS, INC.,

6 Plaintiff,

7 -vs-

8 PETER G. TRABER; JAMES C. CZIRR;
9 JACK W. CALLICUTT; GILBERT F.
10 AMELIO; KEVIN D. FREEMAN; ARTHUR
11 R. GREENBERG; ROD D. MARTIN; JOHN
12 F. MAULDIN; STEVEN PRELACK;
13 HERMAN PAUL PRESSLER, III; and DR.
14 MARC RUBIN,

15 Defendants,

16 -and-

17 GALECTIN THERAPEUTICS, INC., a
18 Nevada corporation,

19 Nominal Defendant.

CASE NO. A-14-706397-B

DEPT. NO. XI

**ORDER RE: MOTIONS TO DISMISS
SHAREHOLDER DERIVATIVE ACTION**

Date of Hearing: March 3, 2016
Time of Hearing: 8:30 a.m.

1 DAVID L. HASBROUCK and SIU YIP,
2 derivatively on behalf of GALECTIN
3 THERAPEUTICS, INC.,

4 Plaintiffs-Intervenors,

5 -vs-

6 PETER G. TRABER; JAMES C. CZIRR;
7 JACK W. CALLICUTT; GILBERT F.
8 AMELIO; KEVIN D. FREEMAN; ARTHUR
9 R. GREENBERG; ROD D. MARTIN; JOHN
10 F. MAULDIN; STEVEN PRELACK;
11 HERMAN PAUL PRESSLER, III; DR.
12 MARC RUBIN; and 10X FUND, L.P.,

13 Defendants,

14 -and-

15 GALECTIN THERAPEUTICS, INC., a
16 Nevada corporation,

17 Nominal Defendant.

18 **ORDER RE: MOTIONS TO DISMISS SHAREHOLDER DERIVATIVE ACTION**

19 This matter having come before the Court on March 3, 2016 at 8:30 a.m. on Nominal
20 Defendant Galectin Therapeutics Inc.'s Motion to Dismiss Shareholder Action and the Individual
21 Defendants' and 10X Fund L.P.'s Motion to Dismiss Shareholder Action (the "Motions"), the
22 Court having reviewed the Motions, all briefing thereon and supporting exhibits, having heard
23 oral argument, and other good cause appearing, the Court holds that the Motions are GRANTED.

24 As grounds for its ruling, the Court finds:

25 1. This is a shareholder derivative action brought by Plaintiff Michael Kirsch and
26 Intervenor Plaintiffs David L. Hasbrouck and Siu Yip (collectively, "Plaintiffs") who allege that
27 they are shareholders of Nominal Defendant Galectin Therapeutics Inc. ("Galectin"), a Nevada
28 corporation.

2. A shareholder seeking to assert claims derivatively on behalf of a Nevada
corporation must, among other things, either (i) make a pre-suit demand on the company's board

1 of directors or (ii) plead particularized facts establishing legal excuse for the failure to do so.

2 3. Plaintiffs did not make a pre-suit demand upon Galectin's board of directors, but
3 instead asserted in their complaints that such a demand was excused under Nevada law.

4 4. On June 11, 2015, the Court held a hearing on various motions filed by the parties
5 and proposed Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;¹ (ii) denying
6 Intervenor Plaintiffs Hasbrouck's and Yip's motion to intervene in this case;¹ (ii) denying
7 Defendants' motion to dismiss Mr. Kirsch's Second Amended Shareholder Derivative
8 Complaint; (iii) staying this action for 180 days pending *In re Galectin Therapeutics, Inc.*
9 *Derivative Litigation*, Lead Case No.: 1:15-CV-00208-SCJ in the United States District Court
10 for the Northern District of Georgia (the "Georgia Action"); and (iv) ordering the parties to file
11 a status report by December 11, 2015 addressing the status of the Georgia Action.
12

13 5. This Court's August 10, 2015 order staying the case for 180 days was based upon
14 representations made to the Court by Mr. Smith at the June 11, 2015 hearing that issues raised in
15 Georgia relate to class representations issues.
16

17 6. Although the Court's August 10, 2015 order was a substantive ruling on the issue
18 of demand futility, which was reached following briefing and oral argument regarding that issue,
19 it was not a final order under Nevada law.

20 7. On December 30, 2015, United States District Court Judge Steven C. Jones of the
21 United States District Court for the Northern District of Georgia, entered a final order and
22 judgment (the "Prior Final Judgment") (i) holding that under Nevada law, Intervenor Plaintiffs
23 David L. Hasbrouck and Siu Yip failed to adequately plead the futility of a pre-suit demand on
24 Galectin's board of directors in their prior-filed and substantively identical Georgia Action and
25 (ii) dismissing the Georgia Action with prejudice.
26

27 ¹ Intervenor Plaintiffs Hasbrouck and Yip filed their Verified Shareholder Complaint-in-
28 Intervention (the "Complaint-in-Intervention") on July 9, 2015.

8. A prior final judgment by a United States District Court has preclusive effect in Nevada as to an issue that: (1) is “identical to the one alleged in the prior litigation;” (2) was “actually litigated in the prior litigation,” and (3) was “a critical and necessary part of the earlier judgment,” provided that the person against whom preclusion is sought to be applied was either a party to the prior final judgment or a nonparty who was “adequately represented by someone with the same interest who [wa]s a party to the suit.” *Bower v. Harrah’s Laughlin, Inc.*, 125 Nev. 470, 480, 215 P.3d 709, 717 (Nev. 2009).

9. The Court finds that each of the above requirements for application of issue preclusion is satisfied with respect to the issue of whether Plaintiffs have adequately pled demand futility in their complaints in this action. Based on this finding and the standards set forth above, this Court determines that it must give preclusive effect to the Prior Final Judgment's ruling on demand futility and grant Defendants' motions to dismiss, the Complaint-in-Intervention and this entire action.

IT IS HEREBY ORDERED AND ADJUDGED that this action is dismissed with prejudice.

Dated this 1 day of ~~March~~ ^{April}, 2016.

~~DISTRICT COURT JUDGE~~