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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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GARY ZAGAMI,

Plaintiff,

v.

15 Civ. 7194 (KPF)

CELLCEUTIX CORPORATION, et al.,

Defendants.

Conference

-----x

New York, N.Y.
December 18, 2015
3:30 p.m.

Before:

HON. KATHERINE POLK FAILLA

District Judge

APPEARANCES

THE ROSEN LAW FIRM P.A.
Attorneys for Plaintiff
BY: PHILLIP C. KIM
JONATHAN STERN

ASHCROFT LAW FIRM PLC/ASHCROFT SULLIVAN
Attorneys for Defendants
BY: MICHAEL J. SULLIVAN

1 (Case called)

2 THE COURT: Good afternoon.

3 This is, as best I can understand, both our initial
4 pretrial conference and a pre-motion conference, and it is also
5 the resolution of pending motions to serve as lead plaintiff
6 and to approve lead counsel. Mr. Sullivan, let me speak to
7 you, sir. I'm not sure you have a horse in this race; am I
8 correct? The issues of lead plaintiff and lead counsel are
9 really for the putative plaintiffs and the actual plaintiffs in
10 this case to deal with, is that correct, sir?

11 MR. SULLIVAN: That's correct, your Honor.

12 THE COURT: Then I'm going to focus on your colleagues
13 at the front table.

14 Mr. Kim and Mr. Stern, I would hear you on your
15 motions. It might be quite short, because it would appear you
16 are the only game in town in terms of those who have applied.
17 Is that correct?

18 MR. KIM: That's right, your Honor. Notice was issued
19 timely. Mr. Zagami has a material interest. He bought 5,000
20 shares, lost over \$6,000. He is an experienced shareholder.
21 About six years ago he served as lead plaintiff in a securities
22 class action in Dallas federal court, and we were successful in
23 that case, recovering a couple of million dollars for share-
24 holders. So he is experienced. He is a good candidate to be
25 lead plaintiff.

1 THE COURT: Is he just unlucky, sir, that he has
2 bought securities that have required him twice to be involved
3 in class action litigation?

4 MR. KIM: Between six, seven years, given the GFC, I
5 think he did okay as to losses. In that sense I think he did
6 okay.

7 With respect to our motion, he is the presumptive lead
8 plaintiff. He is the only movant. We did issue notice. Under
9 the statute, putative class members have an opportunity to
10 object; no one has objected.

11 Given that his motion is unopposed, as to my firm, we
12 have served as lead counsel in a number of actions in this
13 court and in others, as noted in our firm résumé. We have
14 recovered tens of millions of dollars for shareholders in
15 similarly size cases such as this. I would ask that the Court
16 grant the motion so that we may proceed with the merits of the
17 case.

18 THE COURT: May I understand, please, Mr. Zagami is
19 alleged to be the biggest loser, or is that just among those
20 who have put in as plaintiffs in this case?

21 MR. KIM: That's correct: of the people before the
22 Court.

23 THE COURT: There are two people before the Court,
24 correct, Ms. O'Connell and Mr. Zagami? Are there others?

25 MR. KIM: No. Actually, there is only one plaintiff.

1 We substituted in Mr. Zagami during the pendency of the case.

2 THE COURT: Ms. O'Connell still shows up on ECF. I
3 will have to see what I can do so she doesn't show up on ECF.
4 My case as it is staring me in the face is captioned O'Connell
5 v. Cellceutix. But you have no control over that. By saying
6 he is the largest loser in this, he is also the smallest loser
7 of the putative plaintiffs because he is the only one who is in
8 this litigation thus far as the plaintiff, correct?

9 MR. KIM: Yes, he is the only named plaintiff at this
10 juncture.

11 THE COURT: That is a lovely way of saying it. Have a
12 seat for a moment, please.

13 In dealing with these motions, I am going to grant
14 both of them, in large measure because Mr. Zagami and The Rosen
15 Law Firm have demonstrated themselves to qualify for these
16 positions and no one else has asked to be.

17 With respect to the motion to serve as lead plaintiff,
18 there was the appropriate notice given, the deadline came and
19 went, and only Mr. Zagami has moved. No opposition has been
20 filed to the application. And the PSLRA still provides a
21 rebuttable presumption that the most adequate plaintiff to
22 serve as lead plaintiff is the one who either filed the
23 complaint, made a motion in response to the notice, in the
24 determination of the court has the largest financial interest
25 in the relief sought, and otherwise satisfies the requirements

1 of rule 23 of the Federal Rules of Civil Procedure.

2 Mr. Zagami filed the instant motion to serve as lead
3 plaintiff, satisfying the first requirement. In the named
4 plaintiffs, he has lost the most. And there is no other
5 potential lead plaintiff with a greater loss who has come
6 forward or been identified.

7 It would appear that he meets at this juncture the
8 other requirements of rule 23. Having satisfied that
9 presumption, it can be rebutted only upon proof by another
10 purported class member that Mr. Zagami would not fairly and
11 adequately protect the interests of the class or is subject to
12 unique defenses that render him incapable of adequately
13 representing the class, and I see neither here.

14 With respect to the motion to approve lead counsel,
15 here, too, the PSLRA gives the lead plaintiff the authority to
16 choose lead counsel subject to my approval. My decision to
17 intervene or to choose someone else to represent the lead
18 plaintiff's interests should occur only when necessary and only
19 to protect the interests of the class. I agree with Mr. Kim
20 that The Rosen Law Firm has extensive experience in this area.
21 There is no indication that they cannot adequately serve the
22 class in this case. They have been active in Mr. Zagami's case
23 thus far. Given that, I will in fact allow them to be
24 appointed as lead counsel.

25 I would like now to talk about the merits of the case.

1 Mr. Kim, let me talk to you first, sir. Unless, of course, Mr.
2 Stern is actually going to be taking the laboring oar. I
3 suppose you will pass off to him as need be.

4 MR. KIM: That's correct, your Honor.

5 THE COURT: Perhaps I was misunderstanding the letter
6 that was filed by your adversaries. In the defendants' letter,
7 what was suggested to me is there is a concern that the time
8 period between the announcement of the drop in the stock price
9 and the filing of the complaints was really quite small, it
10 happened on the same day. I believe the response that you gave
11 was that it was true that these individuals had the opportunity
12 to and reviewed the complaints before they were filed. That's
13 fine.

14 I'm just trying to understand, was everyone expecting
15 this announcement to take place such that there was a complaint
16 that was already ready, or was this a case for which you had
17 prior complaints that could very quickly be turned around to
18 meet the specifics of this? I'm trying to figure out how it
19 came to be so quick that Ms. O'Connell was able to file the
20 lawsuit.

21 MR. KIM: Your Honor, we have no relationship with
22 Mako Research. We had no idea they were going to issue a
23 report. We saw it at the same time everyone else saw it.
24 That's pretty clear. I don't think anyone is suggesting that
25 we did.

1 That being said, as to the case, we do monitor the
2 news, just being a plaintiff securities firm, and we do receive
3 tips from shareholders. I don't recall in this specific
4 instance whether this was something we discovered or a
5 shareholder had tipped us to, but that's when we issued our
6 investigative notice, which is typical in this practice. You
7 can follow other stocks that have similar issues, whether it's
8 a restatement, a short seller report, etc.

9 Then we issued the investigative and clients contacted
10 us, including Ms. O'Connell. She filled out a form with
11 respect to the case. But there was a delay between when we
12 issued the announcement and when we actually filed the case.
13 When we filed the case, Ms. O'Connell had reviewed the
14 complaint and had approved it, same as Mr. Zagami when we
15 amended the complaint.

16 We didn't file the complaint right way. We wanted to
17 check it out. That's part of our obligation. We certainly
18 take the allegations that Mr. Sullivan had made in his letter
19 very seriously.

20 THE COURT: As do I, yes.

21 MR. KIM: We had been looking at this issue prior to
22 us filing the case. We consulted an industry expert who we
23 asked for an initial review -- does this sound right? does this
24 look okay? -- and he concurred. We took a further look at it.
25 Since then, we have consulted an FDA regulatory expert that we

1 have used in other cases and looked at the issues even further.

2 So, in that sense we didn't file the complaint right
3 away. The clients reviewed the complaint. Mr. Zagami had
4 reviewed the complaint when we amended it. That's what we said
5 in our letter. So the case was filed.

6 If the Court permits us to amend or at least gives us
7 that period of time to prepare the amended complaint and allow
8 us to further consult these experts that we have consulted so
9 far, if we determine what Mr. Sullivan says is true, perhaps we
10 won't amend. But at this point it looks like we want to amend.
11 Certainly we are asking for that time.

12 Typically in a case like this, where there is a lead
13 plaintiff, and I understand the named plaintiff is the lead
14 plaintiff --

15 THE COURT: Yes.

16 MR. KIM: Ordinarily, you would want a lead plaintiff
17 to file a complaint so that it can represent the putative
18 class, so to speak. If you look to rule 15 and of course the
19 recent decision from the Second Circuit *Loreley v. Wells Fargo*,
20 the standard for granting leave to replead is very liberal. In
21 this case if you look at the factor of undue delay, when Mr.
22 Sullivan wrote his letter, immediately we said we want to
23 address this by trying to amend the complaint, let's figure
24 this out. It took about 30 days for all the defendants to get
25 back to us, and ultimately this issue was before the Court.

1 Bad faith, there is no bad faith. We want to amend.
2 We want to address these issues. We are not working with the
3 short sellers. There is no such conspiracy. Even if you look
4 at the rule 11 letter, they specifically say we are not
5 suggesting that you have any impropriety with these short
6 sellers, because there isn't.

7 The other thing is undue prejudice. We cited the
8 Second Circuit case. The fact that you need to litigate is not
9 undue prejudice for rule 15 purposes. In any event, nothing
10 has really been done in the case. Discovery has been stayed.

11 THE COURT: Sir, I want to stop you for a moment
12 because I think you are putting the cart before the horse. I
13 do appreciate the rule 15 factors and I understand how they
14 play out in this case. The issue that I thought you identified
15 in your letter, which is where I wanted to begin, is on some
16 level Mr. Sullivan's letter was premature because at the time I
17 wasn't even aware of an amended complaint that you wished to
18 file. It was not until your letter of the 24th that I became
19 aware or at least there was a hint that you did wish to file an
20 amended complaint.

21 I am also aware that it frequently happens in cases of
22 this type that after the appointment of a lead plaintiff, there
23 is permission given to amend the complaint. I would note that
24 I think in that last regard Mr. Sullivan has the better of the
25 argument, because it really can't be said that there is much to

1 change here inasmuch as this is not a situation where there are
2 multiple competing plaintiffs and you are trying to get
3 together different complaints and consolidate them or things of
4 that nature or trying to speak to a number of individuals.
5 Your client, Mr. Zagami, is I think the only person we know
6 about in this case.

7 I wanted to talk first with you about what you
8 contemplated as an amendment before we go to whether I would
9 allow you to amend. I believe what you said in your letter,
10 and I'm looking at the second page of that letter, was that you
11 believed that Mr. Sullivan's letter should be stricken as
12 procedurally improper. Once again, I wanted to know what the
13 complaint was before you started talking about whether you
14 could do it. What, sir, do you intend to amend your complaint
15 to include?

16 MR. KIM: I'll defer at the appropriate time to Mr.
17 Stern, who is working on that. We intend to add facts
18 particularly with the regulatory process and the clinical
19 trials. I think one of the allegations in the report was that
20 the clinical trial was not set up properly. There were some
21 allegations in rebuttal about the company, about Mr. Menon's
22 background at Harvard.

23 We want to add some additional information related to
24 that, that it is a material misstatement, particularly when you
25 are dealing with a company here where you are trying to have

1 investors believe that this particular product has a likelihood
2 of success. Our view is I think it is relevant that you know
3 the chief research officer was allegedly claiming that he
4 received a Ph.D from Harvard when he didn't.

5 THE COURT: Did he or did he not?

6 MR. KIM: He did not.

7 THE COURT: Did he show up? Did he audit a class?
8 Was he in the vicinity of Cambridge at some period of time?

9 MR. KIM: It's just a false statement, your Honor,
10 that is our contention. They claim it was a mistake. I guess
11 it's a question of fact we would say. We think that is
12 relevant because the investors are trying to assess whether or
13 not the people behind this product and this technology have a
14 likelihood of success. Certainly you would like to know the
15 background relating to this individual.

16 Apparently, according to news reports in India, he had
17 run a for-profit medical school that was unaccredited, being
18 sued for fraud. Apparently there were some people within the
19 management of the corporation that were affiliated with known
20 or reputed boiler rooms or stock promoters.

21 Those additional details, some may be repetitive.
22 However, I think in a PSLRA case, when the court has to
23 consider the totality of the circumstances, particularly with
24 respect to scienter, when you have additional facts all sort of
25 pointing in one direction that leads to the inference, it is up

1 to the Court whether it is a strong inference or not, which is
2 the standard, whether certain statements were made with
3 scienter or not. There are facts relating to that.

4 We also want to add additional information with
5 respect to scientific experts. There is a dispute as to the
6 science here. And of course, this additional time as well will
7 let us determine if it turns out, based upon our experience
8 after consulting with these scientific experts, that perhaps a
9 particular false statement may not be actionable but some
10 others may, and it may give us time to narrow this as well.

11 THE COURT: I understood everything you said until
12 this last point. I understand that you do not know until you
13 know, and I haven't made the decision yet, that you are going
14 to be given leave to amend. I can understand that you were
15 preparing and trying to get things squared away. I don't
16 understand the last thing you were saying. It may just be my
17 inability to comprehend.

18 What I think you are saying is that you need 45 days
19 from now to figure out whether certain things are material or
20 not material, certain claims should or shouldn't be made. I
21 guess I'm trying to understand why that couldn't be done, for
22 example, back at or about the time of your letter of November
23 21st. November 24th, excuse me.

24 MR. KIM: We have been continuing to look at it. The
25 defendants have put us on notice. If you look at rule 15 in

1 the context of leave to amend, within rule 15 is a built-in
2 mechanism where if defendants make a motion to dismiss, there
3 is a procedure where, rather than answering, one could amend as
4 a matter of right.

5 THE COURT: Yes, sir.

6 MR. KIM: I think our conduct thus far in that regard
7 is reasonable.

8 THE COURT: Sir, let me try and ask the question more
9 pointedly. I'm sorry. We are talking past each other. Why do
10 you need 45 days to do everything you just outlined?

11 MR. KIM: We don't need 45 days.

12 THE COURT: That's correct. Good.

13 MR. KIM: I apologize. It's Friday at 3:30. I'm
14 sorry.

15 THE COURT: That's okay.

16 MR. KIM: We don't need 45 days from today. I think
17 given the holidays, we could get something done by the middle
18 of January. If you exclude Christmas and New Year's, that
19 gives us a few weeks. Certainly, whatever the Court is
20 inclined to grant, we will work hard to meet that schedule.
21 I'm sorry.

22 THE COURT: Thank you. I need to ask more precise
23 questions at 3:30 on a Friday. Now we both understand.

24 I do understand your rule 15 analysis. If there is
25 anything you think I'm missing, I will hear from you. Then I

1 want to hear from Mr. Sullivan as to why I should not permit
2 you to do this.

3 MR. KIM: Thank you.

4 THE COURT: That's it. Mr. Sullivan, I will hear from
5 you, sir.

6 MR. SULLIVAN: Thank you, your Honor. I'm sure you
7 will shut me off at some point in time if I am giving you
8 redundant facts that you are already familiar with.

9 Your Honor, I thought the chronology of this matter is
10 important to restate.

11 THE COURT: Okay.

12 MR. SULLIVAN: It was an anonymous posted article on
13 August 6th of this year that made wild accusations against this
14 company Cellceutix. Within hours that article was tagged by
15 The Rosen Law Firm, and within hours there was a certification
16 by the first named plaintiff that she had reviewed the
17 complaint and found the complaint to be factually accurate.
18 Hours after that, the now lead plaintiff, Mr. Zagami, certified
19 that he reviewed the complaint.

20 So I sit here wondering, your Honor, the same
21 questions that you were asking at the outset. How does a
22 plaintiff's law firm, regardless of whether it is a PSLRA case
23 or any type of litigation that is being filed, how are they
24 able to do the proper due diligence, make the proper inquiries,
25 do the type of investigation that is expected before a

1 complaint is filed, within hours have a complaint that can be
2 certified by not one but by two, and the only two plaintiffs,
3 your Honor, that been identified in this matter?

4 Mr. Kim says he has no relationship with Mako
5 Research. I don't know if he does or doesn't, your Honor.

6 THE COURT: Sir, he made that representation to me as
7 an officer of the court. Bad things will happen to him if that
8 turns out to be false. Let's not go impugning his integrity
9 just yet.

10 MR. SULLIVAN: I am not, your Honor. Our
11 investigation indicated he was the sixth follower of Mako
12 Research. I never heard of Mako Research until they published
13 this particular article. I don't know how somebody becomes the
14 sixth follower of an entity they have no relationship with,
15 your Honor.

16 THE COURT: It may be part of his line of work, sir,
17 to keep up with stuff like this.

18 MR. SULLIVAN: It could be, your Honor. Within hours,
19 essentially two plaintiffs claimed that they reviewed and filed
20 a certification that the complaint was factually accurate.
21 Within a month, your Honor, I guess within five weeks, The
22 Rosen Law Firm filed the first complaint. Several weeks after
23 that, they amended it with Mr. Zagami. That was their first
24 amended complaint.

25 We took, I thought, an extraordinary step, your Honor,

1 and put them on notice under rule 11 and outlined all the
2 deficiencies in their complaint. I should point out, your
3 Honor, their complaint mirrors that anonymous article that was
4 posted online. All the factual information that is in that
5 complaint, including what Mr. Kim is now representing as new
6 evidence that they want to explore, is also in that Mako
7 Research article, your Honor. The issue concerning Dr. Menon's
8 degree --

9 THE COURT: Did he go for Harvard, sir?

10 MR. SULLIVAN: He did not.

11 THE COURT: Why did he say he did?

12 MR. SULLIVAN: He did, your Honor, years ago, and he
13 claimed it was a mistake.

14 THE COURT: Hold on, Mr. Kim. Stop. You do have to
15 have a poker face here. Thank you.

16 Go ahead, Mr. Sullivan.

17 MR. SULLIVAN: He made that claim years ago, your
18 Honor, and claimed it was a mistake. Then all the public
19 filings, your Honor, were corrected concerning Dr. Menon, where
20 he earned his degrees, long before this class period, well
21 before either of these two plaintiffs purchased stock. In all
22 the public documents that had been available during this class
23 period, Dr. Menon's actual qualifications are listed
24 accurately. So the issue about Harvard predates the purported
25 class period.

1 We went through the extraordinary steps of outlining
2 all the deficiencies in the complaint, your Honor. In addition
3 to that, some level of due diligence even after filing would
4 have pointed out a Boston Business Journal article that refuted
5 many of the facts in the Mako Research anonymous article. In
6 fact, the author of the Boston Business Journal identified who
7 he was, did an investigation, went up and checked out the
8 company, and posted an article in the Boston Business Journal.

9 THE COURT: Sir, when you say the Boston Business
10 Journal identified who he was, is he the anonymous poster?

11 MR. SULLIVAN: I'm sorry, your Honor. No.

12 THE COURT: There are a couple of individuals here. I
13 want to make sure I understand what the pronoun refers to.

14 MR. SULLIVAN: The anonymous post, your Honor, is
15 anonymous under the pseudonym Mako Research.

16 THE COURT: Have we identified who Mako Research is?

17 MR. SULLIVAN: We have not, your Honor. He continues
18 to be undisclosed notwithstanding the efforts of trying to
19 identify who he is.

20 Secondly, after the Mako Research article was posted,
21 you can imagine the impact of not just the article, but then
22 the announcement by The Rosen Law Firm that they were pursuing
23 a class action suit, the impact on the valuation of the company
24 plummeted. They lost about 50 percent valuation when the Rosen
25 law firm announced that they were seeking a potential class

1 action lawsuit against the company.

2 The Boston Business Journal, because the company is
3 headquartered in Massachusetts, went out and conducted their
4 own investigation. There is an author of a Boston Business
5 Journal article that refutes many of these outrageous
6 allegations that were included in the Mako Research article.
7 That's been available to The Rosen Law Firm.

8 THE COURT: Sir, I don't think they are under an
9 obligation to accept that. Are they? It may well be that
10 their still additional independent research may show that there
11 are areas of dispute between the Mako Research article, the
12 Boston Business Journal article, and the truth as we will come
13 to know it.

14 I just want to confirm this. You are not saying that
15 they had an obligation to withdraw their complaint upon seeing
16 the Boston Business article; what you are saying instead, sir,
17 is they are on notice that they had some research to be doing
18 when the Boston Business Journal was released?

19 MR. SULLIVAN: Correct.

20 THE COURT: Thank you. Please continue, sir.

21 MR. SULLIVAN: Beyond that, your Honor, our argument
22 is their due diligence, their investigation, should have taken
23 place in advance of racing to the courthouse with a complaint,
24 and they failed to do that. They are now asking the Court to
25 essentially give them some additional time to file a third

1 amended complaint --

2 THE COURT: Second amended complaint.

3 MR. SULLIVAN: I'm sorry, second amended complaint, a
4 third complaint.

5 -- second amended complaint with, as the Court pointed
6 out, a plaintiff that has been a plaintiff of this firm, who
7 Mr. Kim represented has been a plaintiff of this firm
8 previously, Mr. Zagami, and who has certified back on August
9 7th of this year that he had read the complaint and the
10 complaint was accurate. They are now saying we need even more
11 time to essentially determine whether or not there are merits
12 to these claims. That was never the intent in terms of the
13 PSLRA.

14 THE COURT: I understand that, although I thought Mr.
15 Kim was saying that he had merit in his initial complaint and
16 he wanted to augment and perhaps give a little bit more detail
17 to demonstrate that the merit he thought he had when he filed
18 initially he still thinks he has or thinks he has even more so.
19 But I'll let him speak for himself. But I understand. Your
20 point, sir, is he has had enough time to file an appropriate
21 complaint.

22 MR. SULLIVAN: Absolutely, your Honor.

23 THE COURT: And he should not be permitted to file
24 another complaint.

25 MR. SULLIVAN: Absolutely, your Honor.

1 THE COURT: I understand that. Now, sir, you have not
2 responded to said complaint, right, because we are having this
3 motion instead?

4 MR. SULLIVAN: Exactly, your Honor.

5 THE COURT: If it turns out, and I'm still exploring
6 the issue, that I permit him a brief period of time to file a
7 second amended complaint with the understanding that there is
8 highly unlikely to be a third, is it your contemplation that
9 there will be a motion to dismiss?

10 MR. SULLIVAN: Based on the claims that he has
11 represented thus far, your Honor, and based on what he has
12 represented in this courtroom, absolutely. The claims are
13 completely frivolous, your Honor. We will implore the court
14 not to give him any additional time.

15 He is saying his complaint still has merit. He can
16 essentially explain to the Court in response to a motion to
17 dismiss why his claim has merit. To me, your Honor, PSLRA's
18 heightened pleading standard was putting plaintiffs' firms in
19 particular and plaintiffs on notice, get it right at the
20 outset. It's completely unfair to essentially put companies
21 through frivolous claims at great capital cost and the
22 inability to raise capital, the inability to pursue some of
23 their life-changing and potentially life-saving drug therapies.

24 All we are asking your Honor is to let the first
25 amended complaint stand, give us an opportunity to file a

1 motion to dismiss, and hear us on the merits whether or not the
2 claim is sufficient. We believe it won't survive. I suspect
3 Mr. Kim knows that. That's the reason why he is asking for a
4 further amendment to the complaint.

5 He was on notice before he filed it, your Honor. He
6 was on notice with the motion under rule 11. He has ignored
7 both of those. And here we are well in excess of four months
8 into this matter, your Honor. He has had ample time to cure
9 any deficiencies, if there are deficiencies, or to supplement,
10 and he has failed to do that, your Honor. We would ask the
11 Court not to allow any further amendments and give us an
12 opportunity to file a motion to dismiss.

13 THE COURT: Mr. Sullivan, while you are standing, can
14 I understand -- and I realize, sir, that all you can speak to
15 is the operative complaint that we have before us -- what would
16 your motion to dismiss look like?

17 MR. SULLIVAN: Thank you, your Honor. We would lay
18 out all the factual inaccuracies with regard to the
19 representation as it relates to the drug therapies.

20 THE COURT: Let me stop you right there. You will
21 excuse me if I'm misremembering things. It would be in the
22 context of a 12(b)(6) motion, correct, sir?

23 MR. SULLIVAN: Yes, your Honor, correct.

24 THE COURT: So I will have to accept all well-pleaded
25 allegations as true?

1 MR. SULLIVAN: Scierter I think is going to be a
2 tremendous challenge, your Honor.

3 THE COURT: I understand. That's where I thought you
4 were headed. But when you are saying you want to show the
5 factual inaccuracies, are these things where it is simply
6 demonstrably false and material that I may appropriately
7 consider in a 12(b)(6)?

8 MR. SULLIVAN: Yes, your Honor.

9 THE COURT: Good. Please continue, sir.

10 MR. SULLIVAN: Principally scierter, your Honor, the
11 factual inaccuracies, the failure to do the proper due
12 diligence with regard to the pleading itself, the fact that
13 they didn't timely respond to a motion under rule 11, which we
14 think still has merit to pursue.

15 THE COURT: I'm sorry, sir. I want to make sure I
16 understand that. Are you saying that I should dismiss the
17 complaint based on their failure to respond to the rule 11
18 motion?

19 MR. SULLIVAN: No, I am not, your Honor.

20 THE COURT: Thank you. I was misunderstanding. Go
21 ahead.

22 MR. SULLIVAN: We could be asking, I think, your
23 Honor --

24 THE COURT: At some later date I understand you may be
25 asking me for something. This I understand. But I'm really

1 focused on trying to get in my head what the 12(b)(6) motion is
2 going to look like. It's going to be basically a challenge to
3 the factual allegations and, more fundamentally, whether the
4 factual allegations as alleged or as revealed by your contrary
5 materials you submit to me in connection with your motion,
6 whether that amounts to scienter. It is your view that it just
7 can't?

8 MR. SULLIVAN: Correct, your Honor.

9 THE COURT: Anything else you would like to bring up?

10 MR. SULLIVAN: Nothing else at this point, your Honor.

11 THE COURT: Thank you very much, sir.

12 Mr. Kim, may I hear from you, please.

13 MR. KIM: Just a quick couple of points. To this idea
14 that we did not respond to their rule 11 letter, we did
15 respond. We said we wanted to amend the complaint.
16 Immediately we said would you like to agree to a briefing
17 schedule. Certainly 30 days had elapsed. Certainly if he had
18 agreed to that, we would have stuck by that; perhaps by now we
19 would have had an amended complaint. We weren't dragging our
20 feet or trying to have protracted motion practice here. I
21 would like to clear that up.

22 The other point about being a follower of Mako
23 Research. As part of my job, I monitor the news of investment
24 sites. To the fact on seeking out where you can bookmark
25 various authors, again, I have no relationship with Mako

1 Research. We did not know about the article when it was coming
2 out. I learned about it the first time I read it on the
3 Internet.

4 THE COURT: Sir, while we are here, have you read the
5 Boston Business Journal article?

6 MR. KIM: The Boston Business Journal article I
7 believe was an article prompted when the company had reached
8 out to them. This was after the fact. If I remember
9 correctly, they showed some people in the office. That's after
10 the fact. If I remember correctly, there was a line in there
11 that said the company seemed less suspicious. So it is not
12 this watershed sort of exculpation that the defendant suggests.
13 Multiple syllabic words. It is not this watershed disclosure
14 as the company suggests.

15 And there is case law out there sort of in a different
16 context where a company does an initial investigation and there
17 are findings to that investigation, and on a motion to dismiss
18 courts have said even the internal investigation's findings
19 that we find no wrongdoing is a question of fact. It is not
20 something that you could use at the motion to dismiss stage.

21 I sort of use that as an analogy here. It is not even
22 as strong as that. This is just an article saying they
23 interviewed some people, and when they went to the office,
24 there were some people there. The article was made, and the
25 article was post-mortem.

1 THE COURT: My question was, again, so much simpler
2 than that, sir.

3 MR. KIM: Sure.

4 THE COURT: Did you read the article?

5 MR. KIM: Yes, I read the article.

6 THE COURT: Having read the article, you still believe
7 there is merit to the lawsuit you wish to file?

8 MR. KIM: I believe there is merit to file a lawsuit,
9 to proceed.

10 THE COURT: I am going to ask you to remain here for a
11 moment and be patient. I'm going to look at some things and
12 talk to you in a moment. I will stay on the bench.

13 (Pause)

14 Thank you very much for your patience. I am going to
15 permit this amendment of the complaint. Mr. Sullivan, you
16 heard Mr. Kim mention the Wells Fargo case. You don't need to
17 stand. Thank you. The Wells Fargo case is a very interesting
18 one that came up over the summer. It's a Judge Calabresi
19 decision that gently rebuked a colleague of mine, Richard
20 Sullivan, who engaged in a practice that I engage in, which is
21 this pre-motion conference practice.

22 The case itself speaks largely to the issue of
23 pre-motion conferences, but arguably it can speak more broadly
24 to the issue of the propriety of allowing or being especially
25 liberal in the allowing of amendments to complaints at this

1 stage in the litigation. I had Wells Fargo on the brain. But
2 more than that, I had rule 15 on the brain.

3 I think it is appropriate to allow amendment here, or
4 at least it is not inappropriate to allow amendment here. But
5 in no way is 45 days necessary. What I am going to do is the
6 following. I'm going to ask for the complaint, the amended
7 complaint, to be filed on or before the 6th of January. That
8 is enough time. Then, Mr. Sullivan, I think you are quite
9 ready to do your motion to dismiss.

10 What I would like to do is right now set a schedule
11 for that motion to dismiss rather than have you engage in what
12 I think would be unnecessary pre-motion discovery and conduct.
13 Let's do this. Rather than having a case management plan, the
14 complaint will be in on the 6th of January. Your motion will
15 be due, opening brief, on the 5th of February. The responsive
16 brief will be due on the 7th of March. And the reply brief, if
17 one is desired, would be due on the 21st of March.

18 Mr. Sullivan, earlier you heard me talk to you about
19 what documents may and may not be considered. I'm sure you
20 know what is appropriate. I'm only saying this because in the
21 very recent past I have had two motions to dismiss where the
22 parties, understandably but improperly, tried to get other
23 documents before me. They were very interesting documents and
24 one might say dispositive of certain issues; I just couldn't
25 consider them. I'm asking you to learn from your predecessors'

1 mistakes.

2 We'll set a scheduling order that will come out, if
3 not today, then on Monday, that has this schedule. I don't
4 anticipate there will be a need for a third amended complaint.
5 Again, I know Wells Fargo. The parties may ask for leave to
6 amend in the course of responding to his, Mr. Sullivan's,
7 motion to dismiss. We'll see. It seems to me we have had a
8 very thoughtful discussion about what the various issues are.
9 We'll see if any is needed.

10 I believe that's all I have. I wanted to get the
11 motions resolved that existed and to deal with this issue. I
12 note, and I just note, the parties have views about each other.
13 They are embodied in the rule 11 letter. They are embodied in
14 the discussions that each side has had regarding the other in
15 this case. I have allowed it to go on for today. At some
16 point, if it crosses a threshold where I think it goes into ad
17 hominem attacks, I will stop it.

18 You both are allowed to be passionate about your
19 clients and about your positions. You will just have to trust
20 in my ability to resolve these issues without the need to turn
21 it up to 11 each time. And excuse me for the Spinal Tap
22 reference if you are not getting it. I don't need you to
23 attack each other. I can figure this out without that.

24 What I am going to ask is that the parties get a copy
25 of this transcript because we have actually had substantive

1 discussions about the issues and I find them useful. If you
2 order it, I will receive it automatically, you don't need to
3 send it to me.

4 Let me ask, Mr. Kim, is there anything else we should
5 talk about today, sir?

6 MR. KIM: Nothing, your Honor. Thank you.

7 THE COURT: Thank you very much.

8 Mr. Sullivan, anything else today, sir?

9 MR. SULLIVAN: No, your Honor. Thank you very much.

10 THE COURT: Thank you all very much. Mr. Stern, next
11 time we let you speak. Happy holidays to all of you.

12 (Adjourned)

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