IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

ANCHORBANK, FSB, and
PLUMB TRUST COMPANY,
on behalf of all AnchorBank Unitized Fund Participants,

Plaintiffs,

v.

CLARK HOFER,

Defendant.

OPINION and ORDER

09-cv-610-slc

In this securities fraud case, defendant Clark Hofer prevailed on its motion to dismiss the federal claims asserted against him by plaintiffs Anchorbank, fsb and Plumb Trust Company.[1] Following dismissal of the case, defendant moved to alter or amend the judgment to include Rule 11 findings in the judgment, sought additional discovery to support his position on Rule 11 violations and moved for attorney's fees under 15 U.S.C. §§ 78u-4(c)(3) and 78i(e). In an order entered November 23, 2010, I denied the motion to alter or amend the judgment and conduct additional discovery and found that there was no Rule 11 violation. Because there must be a Rule 11 violation to warrant awarding attorney's fees under § 78u-4(c)(3), I also denied defendant's request for attorney's fees under that section. However, I declined to rule on the request for attorney's fees under § 78i(e) because, unlike § 78u-4(c)(3), the standard for determining whether to award attorney's fees under § 78i(e) is not explicitly tied to Rule 11. I ordered the parties to submit additional briefing on the question and the matter has now been fully briefed. I am denying defendant's motion for attorney's fees. Defendant's sole argument in support of fees under § 78i(e) is that I erred in finding no Rule 11 violation and concluding

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[1] Plaintiffs also asserted state law claims, but I declined to exercise supplemental jurisdiction over those claims after concluding that the federal claims must be dismissed.

that no additional discovery should be had on the matter. I am not persuaded that either decision was in error.

I set the § 78i(e) motion up for additional briefing because the standard for assigning fees seemed less restrictive than that of § 78u-4(c)(3), which hinges on finding a Rule 11 violation. Plaintiff contends that this view of the law is mistaken, in the sense that the standard for awarding fees under § 78i(e) is at least as restrictive as the standard set out in § 78u-4(c)(3). Defendant does not challenge that argument, but instead contends that I should reconsider my finding that plaintiffs did not violate Rule 11 and my finding that no additional discovery is warranted on the question.

I am denying defendant's request for reconsideration of my conclusions. Defendant makes two arguments in support of reconsideration, neither of which is persuasive. First, defendant argues that his averments challenging plaintiffs' evidentiary support are at least sufficient to allow him to conduct additional discovery to determine whether plaintiffs' claims lacked factual support. However, the "challenge" he makes is not of the right sort. Defendant argues that a possible lack of factual support can be seen in his "categorical" denials of plaintiffs' allegations, but the averments he identifies fail to show a lack of factual support. He denies "conspiring" with anyone, denies having an "agreement" with his co-workers "regarding attempting to affect the price of ABCW stock on the Exchange by trading in the AUF," Hofer Decl., ¶ 8, asserts that he "made his own trading decisions" and denied "directing or instructing" others to trade. He also "expressly challenged" plaintiff's use of his emails.

Defendant's carefully worded statements do not establish that plaintiffs' allegations in their complaint were baseless. First, as I explained in the previous order, many of defendant's

averments are legal, not factual. Defendant's assertions that he did not "conspire," "direct" or "instruct" others to trade and did not have an "agreement" to affect the price of stock do not contradict what plaintiffs alleged, which is that defendant told the alleged co-conspirators when he intended to trade and "encourage[d] them to do the same" and forwarded them electronic copies of his confirmations. Likewise, defendant's equivocal statement that he "can recall no emails" of the sort plaintiffs relied on for their claim does not seriously put in question the existence of those emails. If plaintiff had submitted an affidavit averring that he never had sent any such emails, then perhaps this might be a closer question. Defendant's statement that he does not "believe" that any emails he sent "support the allegations made" is merely his opinion, impervious to objective verification or impeachment, and therefore virtually irrelevant to the analysis. The question is not whether plaintiffs were correct or incorrect, it is whether there was no factual basis for their allegations. Plaintiffs submitted enough evidence to establish the required factual basis. Defendant's contrary opinion and cabined denials are inadequate to undermine this evidence.

Defendant's second argument is that an exhibit plaintiffs filed demonstrates that plaintiffs had made false and misleading statements in their first two complaints. In particular, defendant contends that Exhibit B to the second amended complaint reveals the falsity of plaintiffs' allegations that the trustee for the Fund had been "forced" to trade on the market as a result of defendants' and others employees' trades. According to defendant, this is because Exhibit B "documents the discretion" the trustee possessed and showed dates in which the trustee's trade volume was greater than the employees' and dates in which the trustee engaged in a trade opposite to that of the employees.

Exhibit B is not the smoking gun defendant makes it out to be. It shows that the trustee had discretion, undermining any inference that defendant *must* have caused the loss alleged; Exhibit B does not show as false plaintiffs' allegation that the trustee was "forced" to trade. Plaintiffs never alleged that every trade of the employees "forced" a trade on the market. Instead, they alleged that the trustee was required to buy or sell on the open market when its balance exceeded a certain cash-to-stock ratio and they suggested that defendant was responsible for causing that ratio to be exceeded at least once. Also, plaintiffs avoided alleging that when they were "forced" to trade, it had to occur immediately or that they had no discretion at all. Instead, they alleged only that the trustee would have to trade in "the next trading day(s)" following imbalance.

Exhibit B does not undermine the evidence that *some* of the Fund's trades were forced, which is all that plaintiffs ever alleged. The sheer number of trades by defendant and his alleged cohorts supports this contention, as did the fact that more often than not, the Fund followed the employees' moves (bought after they bought, for example.) In dismissing the case, I explained that the problem with defendant's allegations was that they failed to support an inference "that one or more of the Fund's forced trades occurred in the wake of a previous forced trade that affected the market," not that trades were never forced. Dkt. 60, at 5.

In sum, neither defendant's averments nor Exhibit B are adequate to support this court finding a Rule 11 violation or allowing defendant to conduct a fishing expedition on this topic. Defendant's sole argument for attorney's fees under § 78i(e) hinges on showing Rule 11 violations and I already have found no such violation on plaintiffs' part.

ORDER

IT IS ORDERED that defendant Clark Hofer's motion for attorney fees under 15 U.S.C. § 78i(e), dkt. 62, is DENIED.

Entered this 19th day of May, 2011.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge