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 an order entered August 31, 2010, I granted defendant Clark Hofer's motion to dismiss plaintiffs' complaint, which included claims under §§ 9(a) and 10(b) of the Securities Exchange Act of 1934 and state law claims. I dismissed the securities claims with prejudice for plaintiffs' failure to state a claim upon which relief may be granted and declined to exercise jurisdiction over the remaining state law claims. Judgment was entered in defendant's favor on September 1, 2010. After judgment was entered, defendant moved for attorney fees and plaintiffs moved to alter or amend the judgment and stay briefing in the motion for attorney fees pending resolution of the motion to alter or amend the judgment, asking that specific Rule 11 findings be included as part of the judgment. I granted the motion to stay briefing. In this opinion, I address the motion to alter or amend the judgment.

For the reasons provided below, I am denying that motion. I also find that no Rule 11 violation occurred; as a result, I am denying defendant's motion for attorney fees under 15 U.S.C. § 78u-4. This, however, does not completely resolve defendant's motion for attorney fees because he also requests fees under 15 U.S.C. § 78i(e). Thus, I am lifting the stay on briefing for defendant's motion for attorney fees.

Under 15 U.S.C. § 78u-4(c), for federal securities cases governed by the Private Securities Litigation Reform Act of 1995,

> upon final adjudication of the action, the court shall include in the record specific findings regarding compliance by each party and each attorney representing any party with each requirement of Rule 11(b) of the Federal Rules of Civil Procedure as to any complaint, responsive pleading, or dispositive motion.

In this case, no such findings were included in the order dismissing the case, which is why plaintiff has moved to alter or amend the judgment. As plaintiffs point out, other courts have made Rule 11 findings as part of the final adjudication. *In re Nokia Oyj (Nokia Corp.) Securities Litigation*, 423 F. Supp. 2d 364, 411 (S.D.N.Y. 2006); *In re Mirant Corp. Securities Litigation*, 2009 WL 48188, at *28 (N.D. Ga. 2009). Defendant acknowledges that a court may include its Rule 11 findings in a final judgment to satisfy § 78u-4(c), but contends that it may also decide to resolve the question after entering judgment. Defendant did not identify any case interpreting § 78u-4(c) that way, but my own research uncovered one: *In re Charter Communications, Inc., Securities Litigation*, 519 F.3d 730, 731 (8th Cir. 2008), in which the court held that § 78u-4(c) "does not state that the required findings must be part of the judgment."

The statute says that Rule 11 findings are to be recorded "upon final adjudication." This language is ambiguous; "upon" could mean "as it happens" or it could mean "once it happens." Of the two possible interpretations, "as it happens" is more restrictive, and unnecessarily so. A court required to include specific Rule 11 findings as part of the final judgment in every case might feel obliged to make the parties raise any Rule 11 concerns they might have in their dispositive briefs, which would be a waste of time if the dispositive motion was denied. If a court is allowed to wait until after final judgment is entered, then the court can request

additional briefing on the matter at that time, a more efficient approach. In addition, there appears to be no advantage to including Rule 11 findings as part of the judgment and plaintiff does not suggest otherwise. Moreover, the statute requires only that the Rule 11 findings be included "in the record," not "in the judgment." In context, "upon" is best interpreted to mean "once it happens." Thus, it is unnecessary to alter or amend the judgment to make Rule 11 findings; I will deny plaintiff's motion.

That said, the parties' positions about Rule 11 are before the court, so there is no reason to delay making the findings required under § 78u-4(c). The next question, therefore, is determining what exactly § 78u-4(c) requires of the court. According to defendant, for the court to make the required Rule 11 findings requires the court to consider facts not present in the record at the time of dismissal, especially with respect to whether plaintiffs had sufficient factual basis for the statements made in their pleadings. Thus, defendant argues, he is entitled to discovery. He hopes to obtain: (a) plaintiffs' documentation of emails and other communications between defendant and alleged co-conspirators; (b) plaintiffs' investigative files of the alleged co-conspirators; (c) the rules governing the Fund that was central to the alleged market manipulation scheme; (d) copies of the documents the Fund provided to defendant and other participants; and (e) documentation related to the Fund administrators' rationales for investing on days during the period of the alleged fraud.

If defendant is correct, and § 78u-4(c) is taken at face value, then the process required under the statute mandates a trial-within-a-trial in every case, one that would threaten to dwarf any other aspect of the case. The language of § 78u-4(c) is extremely broad, requiring "specific findings" to be recorded with respect to each party and attorney that addresses "each

requirement of Rule 11(b) . . . as to any complaint, responsive pleading, or dispositive motion." *See also Ledford v. Peeples*, 605 F.3d 871, 925 (11th Cir. 2010) (district court erred in bunching claims together when considering Rule 11(b) compliance). Combining the broad language of § 78u-4(c) with defendant's position that fact-finding and discovery is necessary for any Rule 11 determination would require courts to conduct an investigation into each statement made by any party or attorney in every version of the complaint, answer, counterclaim or other pleading, as well as in briefs related to each dispositive motion.

There is no question that a court must do more than simply rattle off the requirements of Rule 11. *Thompson v. RelationServe Media, Inc.*, 610 F.3d 628, 637 (11th Cir. 2010) (court's conclusory statement that plaintiff's claims are not frivolous or devoid of evidentiary support and were not filed for improper reasons did not satisfy requirements of PSLRA); *Gurary v. Winehouse*, 235 F.3d 792, 798 n.6 (2d Cir. 2000) (same). However, § 78u-4(c) should not be read to impose a crippling burden on courts to scrutinize each and every statement the parties make in their pleadings and briefs. Defendant cites no case supporting his position that discovery or a separate fact finding proceeding is required as a matter of course under § 78u-4(c).

A fair reading of § 78u-4(c) is that it requires the court to determine whether the record indicates any Rule 11(b) violation has occurred, and, if the parties identify any other potential Rule 11(b) violation, to assess that as well. The four requirements of Rule 11(b) are: (1) pleadings and motions must not be "presented for any improper purpose"; (2) legal contentions must be "warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law"; (3) factual contentions must have evidentiary support or be identified as likely having such support after further investigation; and (4) denials

of factual contentions must be "warranted on the evidence" or identified as being "reasonably based on a belief or a lack of information." Although the court can determine readily whether a claim is legally frivolous, questions about the parties' intent in filing or a lack of factual basis for statements made is usually within the parties' grasp. There may be instances in which the circumstances suggest that additional discovery is warranted, or at least additional submissions from the potential Rule 11 violator. This is not such a case.

Consider the documents defendant requests in this case. Most of them relate to information defendant already should have, such as his communications with others and the documentation he received from the fund. Other requested documents would be either extremely burdensome to produce (documentation about the Fund's motives for each stock transaction it undertook) or would require attorneys to give up their work product (plaintiffs' investigative files related to the co-conspirators). More important, however, for all of the requested documentation, defendant fails to identify any reason to suppose that this discovery likely will uncover a Rule 11 violation, as explained below.

I turn to consider whether the record suggests any Rule 11 violation. As for the first requirement, nothing in the record suggests that any pleading or motion was "presented for any improper purpose," and neither party suggests otherwise. There is no evidence that any party or attorney violated the second requirement, that legal contentions be "warranted by existing law or by a nonfrivolous argument for extending, modifying or reversing existing law or for establishing new law." As I explained previously, plaintiffs' theory for liability under federal securities laws was novel, but it was not a frivolous attempt to expand the law. Defendant's alleged market manipulation would be a textbook case of a violation of §§ 9(a) and 10(b) of the

Securities Exchange Act of 1934 (15 U.S.C. §§ 78i(a) and 78j(b)) if it weren't for the fact that he used another entity to buy and sell the stock for him. The reason plaintiffs' claims failed was because they could not show that defendant truly caused the Fund to buy and sell, not because the claims were frivolous.

This leaves the third and fourth requirements, that the factual contentions and denials have evidentiary support. Again, the record does not raise any suspicion that any party or attorney lacked evidentiary support for his/her assertions. Defendant suggests otherwise, which is why he requests discovery, but he fails to identify any reason to think plaintiffs did not have evidentiary support for their allegations. As mentioned before, most of the documents defendant requests relate to allegations about what defendant did. If those allegations are false, defendant should be able to say so, in which case plaintiffs can explain whether their factual contentions are supported by evidence.

Defendant does claim that certain allegations are false, but most of these relate to the legal conclusions alleged, not facts: defendant denies that he "conspired" or engaged in a "scheme" or was a "leader." With respect to the *factual* allegations, defendant says only that he "does not believe that any emails that [he] sent to [his] co-workers or other documents which are in Anchor's possession support the allegations made by AnchorBank." Hofer Aff., dkt. 74, at 5. Okay, duly noted. We will never know whether the evidence would have established that defendant was the "leader" of a "scheme" who "conspired" with co-workers because of the gap in causation farther downstream in plaintiffs' narrative. More pertinent to the instant analysis is that defendant does not attempt to show that the central allegations about what he did are false. For instance, defendant does not challenge plaintiffs' allegations that he told the alleged

co-conspirators when he intended to trade and "encourage[d] them to do the same," or that he forwarded electronic copies of his confirmations to alleged co-conspirators.[1]

More important, however, plaintiffs explain that their allegations were drawn from interviews with the alleged co-conspirators, who described how defendant communicated with them and directed them to make purchases. Therefore, even if plaintiffs' allegations against defendant were to be false, plaintiffs had more than enough evidentiary support for these allegations to surpass Rule 11's threshold.

The only allegations about which defendant lacks background information would be the Fund's motivations for buying and selling stock, related to whether it was "forced" to buy and sell stock as alleged. There is no reason to probe this point, however, because this is where plaintiffs' complaint fell short, by *failing* to allege sufficient detail about when the Fund was forced into transactions and when it was not. Moreover, the record describes the evidentiary support for the statement that the Fund was *at times* forced to buy and trade. Plaintiffs alleged that the Fund was bound by a required cash-to-stock ratio, and that defendant and his alleged co-conspirators bought and sold extremely large quantities of stock on several occasions, which popped the ratio outside it required values, thus forcing corrective action by the Fund. Defendant seems to suggest that the alleged ratio requirement may not actually exist, but he does not explain why he thinks this is so, or why plaintiff would lie about this but then not take one more step and lie about specific instances in which the Fund was "forced" to buy or sell under the fictitious ratio.

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[1] Defendant *does* contends that he did not "instruct" others to trade, as plaintiffs alleged. Defendant seems to be quibbling over semantics rather than asserting that his acts could not be viewed by others as the equivalent of instructing.

No other potential Rule 11 violations appear in the record and the parties identify none. In light of the present record, I am satisfied that no party or attorney violated Rule 11(b) with respect to any pleading or dispositive motion. In particular, no party or attorney submitted any pleading or motion for "any improper purpose," made any unwarranted legal contentions, or made any factual contentions or denials that lacked evidentiary support.

One final matter requires attention: defendant has moved for attorney fees under 15 U.S.C. § 78u-4(c)(3). In light of my conclusion that there was no Rule 11 violation, defendant is not entitled to fees under § 78u-4(c)(3), which allows an award of fees only in instances in which a Rule 11 violation is found. However, plaintiffs are wrong to contend that my conclusion means that defendant's motion for attorney fees should be denied in full. Although attorney fees are not available under § 78u-4(c)(3), defendant is also seeking fees under 15 U.S.C. § 78i(e), which provides that a "court may, in its discretion, require an undertaking for the payments of costs . . . and assess reasonable costs, including reasonable attorney fees" in cases brought under § 9(a) of the Securities Exchange Act. Plaintiffs do not suggest that § 78i(e) limits attorney fees to Rule 11 violations and there is no reason to think it would.

Therefore, the parties should continue briefing defendant's motion for attorney fees under § 78i(e). Plaintiffs may have until December 8, 2010 in which to file a brief in opposition to defendant's motion for attorney fees and defendant may have until December 20, 2010 in which to file a reply.

ORDER

IT IS ORDERED that:

(1) The motion for reconsideration filed by plaintiffs AnchorBank, FSB and Plumb Trust Company, dkt. 66, is DENIED. The findings required under 15 U.S.C. § 78u-4(c) are included in this opinion.

(2) The stay on briefing defendant's motion for attorney's fees filed by defendant Clark Hofer, dkt. 62, is LIFTED. Defendant's request for attorney's fees under 15 U.S.C. § 78u-4(c)(3) is DENIED. A decision on defendant's request for attorney's fees under 15 U.S.C. § 78i(e) is STAYED pending briefing on the matter.

(3) Plaintiffs may have until December 10, 2010 in which to file a brief in opposition to defendant's motion for attorney fees and defendant may have until December 20, 2010 in which to file a reply.

Entered this 23rd day of November, 2010.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge