UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No. SA CV 15-00865-DOC-SHK Date: June 11, 2021

Title: HSINGCHING HSU v. PUMA BIOTECHNOLOGY, INC. et al

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Deborah Lewman for Kelly Davis	Not Present
Courtroom Clerk	Court Reporter
ATTORNEYS PRESENT FOR PLAINTIFF: None Present	ATTORNEYS PRESENT FOR DEFENDANT: None Present

PROCEEDINGS (IN CHAMBERS): ORDER DENYING DEFENDANTS' MOTION FOR LEAVE TO AMEND THE FINAL PRETRIAL ORDER [818]

Before the Court is a Motion for Leave to Amend the Final Pretrial Order (Dkt. 818) ("Motion" or "Mot.") brought by Defendants Puma Biotechnology, Inc. ("Puma") and Alan H. Auerbach ("Auerbach") ("Defendants"). The Court finds the matter appropriate for resolution without oral argument. Fed. R. Civ. P. 78; C.D. Cal. R. 715. Having reviewed the moving papers submitted by the parties, the Court **DENIES** the Defendants' Motion.

I. Background

A. Facts

In this securities class action, Plaintiffs alleged that Defendants violated Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5 by making certain misrepresentations about the breast-cancer drug neratinib. Complaint ("Compl.") at 1. In the Complaint, Plaintiffs indicated that they would rely, in part, on the

fraud-on-the-market presumption of class member reliance at trial. *Id*. at 27. Leading up to trial, the parties recognized that the reliance element could not be conclusively resolved until after trial, so the parties and court agreed that individual issues as to absent class members would be dealt with after trial. Proposed Final Pretrial Conf. Order (Dkt. 585-1) ¶ 14. In the pretrial order, Defendants stated that they "reserved the right to challenge the individual reliance of absent class members following any determination of liability [by the jury]." *Id*. The pretrial order had also stated that "[a]ll discovery is complete." *Id*. ¶ 9.

The jury found that Defendants failed to rebut the presumption as to the lead plaintiff, Norfolk Pension Fund. *See* Jury Verdict (Dkt. 718) at § 5.1. However, the verdict did not settle the question of whether Defendants may rebut the presumption as to absent class members. *Id*. On November 27, 2020, this Court issued an Order adopting Plaintiffs' schedule and process for challenging validated claims made by class members. *See* Dkt. 817 at 1. The Order stated that "Defendants may file a motion for leave to amend the Final Pretrial Order" pursuant to Rule 16 to seek discovery but that any such motion "must identify the specific discovery, on a claim-by-claim basis, that Defendants seek leave to serve." *Id*.

B. Procedural History

On June 3, 2015, Plaintiffs filed the Complaint against Defendants, alleging violations of Sections 10(b) and 20(a) of the Securities and Exchange Act of 1934 and SEC Rule 10b-5. Compl. at 1. The parties negotiated, agreed on, and signed the Final Pretrial Order in October 2018. Proposed Final Pretrial Conf. Order ¶ 14. The jury trial for this case began on January 15, 2019 and commenced on February 4, 2019. *See* Dkt. 689; Jury Verdict at § 5.1. On February 4, 2019, the jury in this case returned a verdict finding Auerbach and Puma knowingly violated the federal securities laws and defrauded investors. Jury Verdict at § 5.1.

On March 29, 2021, Defendants submitted the instant Motion for Leave to Amend the Final Pretrial Order ("Mot.") (Dkt. 818) and Memorandum of Law in Support of the Motion ("Mot. Mem.") (Dkt. 818-1). Plaintiffs filed the Opposition ("Opp'n") (Dkt. 825) on April 26, 2021. On May 10, 2021, Defendants filed the Reply ("Reply") (Dkt. 829) in support of its Motion for Leave to Amend the Final Pretrial Order.

II. Legal Standard

Once a scheduling order is filed, the "good cause" standard under Federal Rule of Civil Procedure 16 governs any modification of the scheduling order. Fed. R. Civ. P.

16(b) (a district judge must enter a scheduling order and that the "schedule may be modified only for good cause and with the judge's consent."); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). However, after a pretrial conference and a pretrial order has been filed, the court "may modify the order issued after a final pretrial conference only to prevent manifest injustice." Fed. R. Civ. P. 16(e); *see Galdamez v. Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005) (plaintiff failed to demonstrate manifest injustice by filing a motion to add a retaliation claim at trial after the close of evidence where plaintiff had all the evidence well before the pretrial order and the defendant would be deprived of any opportunity to present additional evidence or examine witnesses on this issue); *see also Johnson*, 975 F.2d at 608.

Courts consider four factors to assess whether a movant has established the requisite manifest injustice: "(1) the degree of prejudice or surprise to the [non-movant] if the order is modified; (2) the ability of the [non-movant] to cure the prejudice; (3) any impact of modification on the orderly and efficient conduct of the trial; and (4) any willfulness or bad faith by the [movant]." *Galdamez v. Potter*, 415 F.3d 1015, 1020 (9th Cir. 2005).

III. Discussion

Defendants contend that the final pretrial order should be amended to allow for individual-reliance discovery. Mot. at 1. Defendants support this contention by arguing that they have a right to obtain reasonable discovery to challenge the reliance element of the class action suit, that targeted discovery on individual reliance is necessary to prevent manifest injustice, and that defendants' discovery requests are reasonable and proportionate. Mot. Mem. at 1-19. This Court addresses each argument in turn.

Defendants incorrectly assert that they have a right to obtain reasonable post-trial discovery to challenge the reliance element of the class action suit. Mot. Mem. at 9-13. *Basic* and *Halliburton II* establish that, in class action lawsuits, Defendants have the right to challenge each class member's reliance by rebutting the fraud-on-the-market presumption on an individual basis. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248 (1988); *Halliburton Co. v. Erica P. John Fund, Inc. (Halliburton II)*, 573 U.S. 258, 269-70 (2014). However, these cases did not hold that such a right to challenge reliance through reasonable discovery persisted post-trial. While Defendants also cite *Household* and *In re Vivendi*, which held that defendants in class action lawsuits were allowed post-trial discovery, the circumstances in those cases were significantly different from those in the instant case. *Lawrence E. Jaffe Pension Plan v. Household Int'l, Inc.*, 2005 WL 3801463 (N.D. Ill. Apr. 18, 2005); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512

(S.D.N.Y. 2011). Indeed, the defendants in those cases sought discovery on individual reliance issues during the pre-trial fact discovery period, the discovery was expressly stayed until after trial, and the final pretrial orders specifically provided for post-trial discovery. *See* Opposition to Motion for Order for Adopting Defendants' Proposal Regarding the Claims Challenge Process (Dkt. 812) at 4-5. The final pretrial orders in this case did permit an opportunity for post-trial discovery, but Defendants fail to acknowledge that this was only an opportunity and not a right to post-trial discovery. The November 27, 2020 Order only permitted Defendants to bring a Rule 16 motion to seek specific information on the condition that the motion "must identify the specific discovery, on a claim-by-claim basis, that Defendants seek leave to serve." Dkt. 817 at 1. The discovery that Defendants now propose to conduct does not meet these requirements. Instead, Defendants intend to apply the same discovery on every one of the 4,455 claimants and do not identify a single claimant for which there is reason to believe that the proposed discovery would be necessary to assess the claim. Mot. Mem. at 16-19. Therefore, Defendants do not have a right in this case to obtain reasonable post-trial discovery to challenge the reliance element of the class action suit.

Additionally, an amendment of the final pretrial order is not necessary to prevent manifest injustice since Defendants cannot satisfy any of the *Galdamez* factors. *See Galdamez*, 415 F.3d at 1020. As an initial matter, Defendants are incorrect in their argument that the "manifest injustice" standard for Rule 16(e) should not apply here since the standard and *Galdamez* factors are "not well suited to this case's post-trial procedural posture." Mot. Mem. at 13. This argument is unfounded, and Defendants do not cite binding authority to support its conclusion, therefore the Court rejects it.

In addressing the first prong of the *Galdamez* test, Defendants argue that, if the order is modified, any prejudice or surprise to Plaintiffs is nonexistent since being forced to continue litigating "does not constitute" a legal form of prejudice that weighs against amending a final pretrial order." *Mechmetals Corp. v. Telex Computer Prods., Inc.*, 709 F.2d 1287, 1294 (9th Cir. 1983). However, Defendants fail to recognize that *Mechmetals* is distinguished from this case since the plaintiff in that case did not cite any "prejudice other than the threat of state court litigation" and did not claim "that it expended significant effort in an attempt to defend the fraud or failure of consideration issues in district court." *Id*. at 1294-1995. Here, Plaintiffs have cited additional prejudice other than the threat of continued litigation by alleging that Puma's company losses, outstanding debt, and languished stock price indicate that Defendants will be increasingly unable to satisfy judgment. *See Angoss II P'ship v. Trifox, Inc.*, 2000 WL 288435, at *3 (N.D. Cal. Mar. 13, 2000) (because of "defendant's financial instability" there was "considerable merit in the plaintiffs' contention that any further delay in judgment might

impair their ability to collect" and there "would be considerable prejudice to plaintiffs if entry of judgment were denied"); *see also Constr. Laborers Tr. Fund for S. Cal. Admin. Co. v. Black Diamond Contracting Grp., Inc.*, 2017 WL 6496434, at *5 (C.D. Cal. Dec. 18, 2017) ("there is no just reason for delay in entering final judgment as to Defendant," as "Plaintiff has shown that it would be prejudiced absent entry of judgment . . . in the delay of collection of funds"). Further, Plaintiffs here have claimed that they expended significant effort in attempting to defend their claims by alleging that they have spent five years litigating the claims and two years litigating since a jury verdict has been heard. Opp'n at 8-11.

The other prongs of the *Galdamez* test are also in Plaintiffs' favor. Defendants' argument regarding the second *Galdamez* factor fails since the proposed discovery will set up another obstacle and delay in entering judgment and Plaintiffs will be unable to cure such prejudice on their own. On the third *Galdamez* factor, Defendants' proposed discovery will certainly not improve the orderly and efficient conduct of the trial but will instead diminish the trial's efficiency. As discussed, it has been two years since the jury verdict has been heard and judgment continues to be delayed by Defendants. Finally, the fourth prong of the *Galdamez* test weighs in favor of Plaintiffs since Defendants could have taken discovery on the issue of reliance during the fact discovery period but chose to wait until years after the verdict to bring this Rule 16 motion. Opp'n. at 12-14. Defendants claim that their delay could not have been in bad faith because they did not know who the potential claimants were, and the parties had repeatedly acknowledged that individual reliance issues would be adjudicated post-trial. Mot. Mem. at 15; Reply at 14-16. However, this argument fails to recognize that Defendants had already subjected the largest claimants to discovery and had acknowledged at trial that they were aware of the 232 sophisticated investors that were investors in Puma during the class period. *See* Dkt. 812 at 6-7; Dkt. 766 at 76:21-77:4. Therefore, Defendants' claims of ignorance are meritless, and Defendants fail on all prongs of the *Galdamez* test.

Finally, Defendants are unsuccessful in arguing that their discovery requests are reasonable and proportionate. Mot. Mem. at 16-18; Reply at 16-25. When rebutting the presumption of reliance under the fraud-on-the-market theory, the only question to be asked of the representative plaintiff is whether the plaintiff would have bought stock at the same price, had it known of the alleged fraud. *See Basic Inc. v. Levinson*, 485 U.S. 224, 248-249 (1988). This question is exactly what the jury has already answered regarding the representative plaintiff. *See* Jury Verdict 718, § 5.1. To the extent that Defendants argue that other claimants in the class may have been "privy to the truth" or known of the alleged fraud, this argument is foreclosed since Defendants have already identified every person who has access to the truth of the efficacy of Puma's drug and did

not list a single claimant. *See* Dkt. 812 at 10. Defendants' other reasons for why the discovery requests are justified are similarly meritless. *See* Opp'n at 17-18. As described previously, the November 27, 2020 Order did leave open the possibility for Defendants to move for necessary discovery, but Defendants have not complied with this Order by tailoring the requested discovery on a claim-by-claim basis. *See* Dkt. 817 at 1. Instead, Defendants intend to replicate the same discovery on every one of the 4,455 claimants.

IV. Disposition

For the reasons explained above, the Court DENIES Defendant's Motion under Rule 16(e) for Leave to Amend the Final Pretrial Order.

The Clerk shall serve this minute order on the parties.