FILED
2011 Aug-31 PM 04:23
U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LOCAL 703, I.B. OF T. GROCERY AND FOOD EMPLOYEES WELFARE FUND, DISTRICT NO. 9; I.A. OF M. & A.W. PENSION TRUST, et al.,	
Plaintiffs,	
v.	**Case No. 2:10-cv-02847-IPJ**
REGIONS FINANCIAL CORPORATION, C. DOWD RITTER, IRENE M. ESTEVES, and ALTON E. YOTHER,	**ORAL ARGUMENT REQUESTED**
Defendants.	

DEFENDANTS' NOTICE OF SUPPLEMENTAL AUTHORITY AND RENEWED MOTION TO RECONSIDER AND/OR FOR A CERTIFICATION FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b) AND INCORPORATED MEMORANDUM OF LAW

Defendants Regions Financial Corporation, C. Dowd Ritter, Irene M. Esteves, and Alton E. Yother (collectively, "Defendants") hereby submit the following Notice of Supplemental Authority and Renewed Motion to Reconsider and/or for Certification for Interlocutory Appeal under 28 U.S.C. § 1292(b) and, in support thereof, show as follows:

I. Notice of Supplemental Authority

On August 23, 2011, the same day that this Court denied Defendants' Motion for Reconsideration and/or Certification (Doc. 55), the Second Circuit

released its opinion in the matter of *Fait v. Regions Financial Corp., et al.*, --- F.3d ---, 2011 WL 3667784 (2d Cir. Aug. 23, 2011), and affirmed the district court's dismissal of virtually identical allegations brought against Regions Financial Corporation and its Directors by shareholders for another class of shares represented by counsel for the Plaintiffs at bar. (*See* "Exhibit A," attached). Defendants have already briefed the relevance of the district court's decision in *Fait* (*see, e.g.,* Doc. 39, at pp. 27-28; Doc. 48, at p. 2). *Fait* involved claims against Regions Financial Corporation and its Directors under Sections 11 and 12 of the 1933 Act, which impose a lesser burden of pleading and proof than does Section 10(b) (and the corresponding Rule 10b-5) from the 1934 Act. *See Herman & McClean v. Huddleston*, 459 U.S. 374, 382 (1983) (explaining that "a Section 10(b) plaintiff carries a heavier burden than a Section 11 plaintiff.").[1]

The Second Circuit's August 23rd decision in *Fait* affirmed dismissal of an amended complaint containing 249 numbered paragraphs (*see* "Exhibit B," attached). Many of the allegations in these 249 paragraphs were verbatim identical to the allegations in the 231 numbered paragraphs in Plaintiffs' Amended Complaint (Doc. 28) in the instant case. Specifically, the plaintiff in *Fait*, like

[1] These distinctions were also noted by the Second Circuit in *Fait*, wherein the court explained: "As the parties recognize, in contrast to claims brought pursuant to section 10(b) of the Securities Exchange Act of 1934 . . . claims under sections 11 and 12 do not require allegations of scienter, reliance, or loss causation." (Exhibit A, *slip op.*, at pp. 7-8).

Plaintiffs in the case at bar, questioned the accuracy of statements made by Regions Financial Corporation and its Directors in 2008 regarding the value of the goodwill on Regions' books and the adequacy of Regions' loan loss reserves.

Regarding the allegations as to goodwill, the Second Circuit in *Fait* agreed with the district court judge that "plaintiff's allegations regarding goodwill do not involve misstatements or omissions of fact, but rather a misstatement regarding Regions' opinion." (Exhibit A, *slip op.*, at p. 9). The Second Circuit examined the United States Supreme Court's decision in *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083 (1991), which outlined the requirements for stating an actionable claim for a misstatement of opinion:

> Requiring plaintiffs to allege a speaker's disbelief in, and the falsity of, the opinions or beliefs expressed ensures that their allegations concern the factual components of those statements.
>
> * * *
>
> Applying these principles here, we conclude that Rensin [plaintiff] has not adequately alleged actionable misstatements or opinions regarding goodwill. Plaintiff relies mainly on allegations about adverse market conditions to support the contention that defendants should have reached different conclusions about the amount of and the need to test for goodwill. The complaint does not, however, plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them.

(Exhibit A, *slip op.*, at pp. 12-13). These requirements were not met by the *Fait* plaintiffs and have not been met by the Plaintiffs in case at bar.

Regarding the *Fait* plaintiffs' allegations as to Regions' loan loss reserves, the Second Circuit held:

> These allegations suffer from the same deficiencies as those regarding goodwill. As Judge Kaplan [the district court judge in *Fait*] recognized, determining the adequacy of loan loss reserves is not a matter of objective fact. Instead, loan loss reserves reflect management opinion or judgment about what, if any, portion of amounts due on the loans ultimately might not be collectable.

(*Id.*, *slip op.* at p. 15).

II. Renewed Motion to Reconsider

This Court's June 7, 2011 and August 23, 2011 Opinions (Docs. 52 & 68) on Defendants' Motion to Dismiss do not appear to disagree with *Fait* that Regions' statements regarding goodwill and loans were **statements of opinion, *not* fact**. Rather, this Court attempted to distinguish the district court's holding in *Fait* on other grounds:

> However, in this case, plaintiffs have pled many facts showing that defendants ***had information that did not support defendants' opinions***. For example, ***plaintiffs have brought forth statements of CWs*** showing how defendants improperly handled and classified loans, defendants were aware of the collapsing real estate market in Florida yet continued to push for more growth there, and continued to ignore RAROC reports signaling a negative risk-adjusted bottom line.

(Doc. 52, p. 17; emphasis added). It appears that, in the Court's view, the difference between the 249 paragraphs in the *Fait* pleading and the 231 paragraphs

in the Amended Complaint at bar is simply that the *Fait* pleading did not include "statements of CWs" regarding information that weighed against the opinions apparently reached by Defendants.

Respectfully, the presence of alleged confidential witness ("CW") statements about information indicating that Defendants' opinions were not well founded, or even wrong, cannot reconcile this Court's Opinions (Docs. 52 & 68) with the Second Circuit's holding in *Fait*. As explained by the Second Circuit in *Fait*, simply coming forward with evidence "to support the contention that defendants should have reached different conclusions" about a matter of opinion does ***not*** satisfy the requirement of showing that defendants disbelieved opinions they expressed: "The complaint does not, however, plausibly allege that defendants did not believe the statements regarding goodwill at the time they made them." (Exhibit A, *slip op.*, at pp. 12-13). As such, this Court's statement that "plaintiffs have pled many facts showing that defendants had information that did not support defendants' opinions" does ***not*** differentiate this case from *Fait*. The 249 paragraphs in the amended complaint in *Fait* are replete with allegations about information (much of which was commonly known to anyone reading newspapers in 2007 and 2008) that arguably did ***not*** support the opinions expressed by Regions and its Directors. However, simply showing the speaker's knowledge of information that could have led to a different opinion does not lead to a conclusion

the speaker must have disbelieved his/her opinion at the time -- the very essence of an opinion is that there is information both "pro" and "contra" which the speaker must balance in forming his/her opinion.

Nothing in the alleged CW statements, as pled in Plaintiffs' Amended Complaint (Doc. 28), supports a conclusion that the Defendants in this case ***actually disbelieved*** the opinions they expressed. Rather, at most, the CW statements -- if they are to be credited at all -- simply add to the information available to anyone reading newspapers in 2007 and 2008 and also pled in *Fait* suggesting that Defendants could have reached (but were not required to reach) different opinions. More than this is not apparent on the face of the Amended Complaint (Doc. 28). The Amended Complaint nowhere alleges that Defendants did not truly hold the opinions expressed. Indeed, under the strict pleading standards of the PSLRA, even more specificity would have been required in this case than in *Fait* to properly allege that each Defendant affirmatively disbelieved the opinions expressed. *Compare Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1247 (11th Cir. 2008) ("Because scienter is an essential element of a securities fraud claim, [plaintiff's] allegations must create a strong inference...that the individual defendants knew about the alleged fraud (or were severely reckless in not knowing about it) when they made the purportedly false or misleading statements."), with *Fait*, (Ex. A, slip op., at pp. 12-13, 15) (affirming dismissal of

claims regarding goodwill and loan loss reserves under lesser pleading standard because of failure to "allege that defendants' opinions were both false and not honestly believed when they were made").[2]

Moreover, it appears that this Court has considered more than the pleadings themselves in deciding whether the Plaintiffs at bar satisfied their pleading requirements:

> This Court has taken into account the alleged statements of the CWs, the affidavits of the CWs brought forth by defendants, **and the investigator's notes submitted *in camera***. Having done so, it was not clear error for the court to find that the CW statements satisfied the pleading requirements.

(Doc. 68, p. 8; emphasis added). In other words, in determining that Plaintiffs satisfied their pleading requirements, the Court evidently considered *in camera* notes that Plaintiffs themselves chose not to incorporate into the pleadings (and which Defendants have never seen).

---

[2] The Eleventh Circuit reiterated in *Mizzaro* that under the PSLRA, "the complaint must allege facts supporting a strong inference of scienter 'for each defendant with respect to each violation.'" 544 F.3d at 1238 (citation omitted). Further, the scienter pleading required is not relieved for the corporation itself, where plaintiff still must plead facts with particularity giving rise to a strong inference that someone who signed allegedly fraudulent statements had the requisite scienter, here constituted by an affirmative disbelief of the opinions stated. *Cf. id.*, at 1254 (finding a failure to adequately plead scienter as to the corporate defendant).

Certainly, Plaintiffs have alleged nothing in the Amended Complaint that states with particularity any basis for a strong inference that opinions expressed by each of the Defendants were "not honestly believed when they were made," as required by the Second Circuit in *Fait*. If there is something in the *in camera* notes reviewed and relied upon by this Court that distinguishes this case from *Fait*, the Court's reliance on same would be clear error meriting reconsideration of its June 7, 2011 and August 23, 2011 Opinions, because these *in camera* notes were ***not*** part of Plaintiffs' pleadings. As explained by the Second Circuit even prior to *Fait*, where confidential witnesses are involved, a court can look at matters outside the pleadings only "for the limited purpose of determining whether the confidential witnesses acknowledged the statements attributed to them in the complaint." *Campo v. Sears Holdings Corp.*, 371 Fed. Appx. 212, 216 n.4 (2d Cir. 2010).[3] Beyond this "limited purpose," investigators' notes are not part of the pleadings, *see* FED. R. CIV. P. 7(a) (defining pleadings), and cannot be used to supplement the pleadings.[4] At a minimum, if the Court is relying on the *in camera* notes to

[3] As was done in *Campo*, the way to determine this is by deposing the confidential witnesses. Contrary to sworn deposition testimony (or the sworn affidavits submitted here in support of Defendants' Motion to Dismiss), an investigator's notes do ***not*** constitute sworn testimony and, to the extent relied on to prove the truth of the alleged confidential witness statements, would constitute inadmissible hearsay. *See* FED. R. EVID. 802.

[4] The Supreme Court has explained that a court deciding a Rule 12(b)(6) motion directed at a PSLRA complaint "must consider the complaint in its entirety,

differentiate the allegations at bar from the allegations in *Fait*,[5] as a matter of due process, respectfully, the Court should reveal what the differences are and release the *in camera* notes for review by Defendants' counsel so that Defendants may be apprised of the allegations against them.[6]

III. Motion to Certify Issues for Interlocutory Appeal

As shown above, the law and application of the Second Circuit's decision in *Fait* dictates dismissal of the present Plaintiffs' suit. However, to the degree this Court has any question regarding whether the Eleventh Circuit would apply the same analysis as that employed by the Second Circuit in *Fait*, this is an issue that

---

as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). The investigator's notes -- for which Plaintiffs are claiming work-product protection -- are not incorporated into the Amended Complaint by reference, nor can the Court take "judicial notice" of documents submitted *in camera* and not shared with Defendants.

[5] For example, this Court cites the CW statements as a basis for concluding that Regions "mishandled loans in order to manipulate their financial reporting numbers" and specifically worked to move "non-accrual loans" off the non-accrual lists and delayed reporting loans as "non-accrual" loans "until the following month or quarter." (*See* Doc. 52, at pp. 18-19). However, nothing in the allegations in the Amended Complaint (Doc. 28) suggests that the individual Defendants (or Regions) knew of this alleged practice.

[6] If the Court is relying on documents *in camera* to determine sufficiency of the pleadings, then Defendants are being deprived of due process, as they cannot respond to documents never seen. Although Defendants objected to the proposed *in camera* inspection, the Court overruled the objection. (Doc. 47).

can and should be resolved now, through certification for interlocutory appeal under 28 U.S.C. § 1292(b).

Certification for interlocutory appeal is appropriate where the district court's order involves "[i] a controlling question of law as to which there is [ii] substantial ground for difference of opinion and [iii] that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The holding of *Fait* concerning the requirement that a plaintiff must plead facts sufficient to show that the speaker did not honestly hold his/her opinion is a "controlling question of law." To the degree that this Court is relying on decisions from other circuits -- such as the Sixth Circuit's decision in *Frank v. Dana Corp.*, --- F.3d ---, 2011 WL 2020717 (6th Cir. May 25, 2011) -- to reach a different conclusion, then there appears to be a "substantial ground for difference of opinion."[7] Resolving this question now would substantially hasten the ultimate resolution of this litigation.

As such, Defendants respectfully ask that, if the Court denies reconsideration in light of the Second Circuit's *Fait* opinion, the Court certify the following issue for appeal:

---

[7] For example, this Court's June 7, 2011 Opinion cited *Frank* to hold that pleading the defendants' knowledge of "macroeconomic conditions" could constitute sufficient pleadings of scienter (*see* Doc. 52, at p. 23), whereas *Fait* held that defendants' alleged knowledge of "adverse market conditions" was ***not*** sufficient to show that the defendants did not believe the opinions they expressed.

(i) Must a PSLRA plaintiff plead facts sufficient to show that defendants did not honestly believe the opinions they expressed, or can a plaintiff satisfy his/her pleading burden under Section 10(b) and Rule 10b-5 simply by pleading facts (and defendants knowledge of same) that could have supported opinions contrary to the opinions that the defendants expressed?

IV. Conclusion

WHEREFORE, premises considered, Defendants respectfully request that this Court reconsider its Order in light of the Second Circuit's *Fait* decision and, for the foregoing reasons and for the reasons set forth in Defendants' prior briefing on their Motion to Dismiss Amended Complaint, dismiss with prejudice Plaintiffs' (Corrected) Amended Complaint. Alternatively, Defendants respectfully request that the Court certify this Order under 28 U.S.C. § 1292(b) for an interlocutory appeal.

ORAL ARGUMENT REQUESTED

Respectfully submitted,

/s/ Maibeth J. Porter
Maibeth J. Porter
John N. Bolus
Maynard, Cooper & Gale, P.C.
Suite 2400 Regions/Harbert Plaza
1901 Sixth Avenue North
Birmingham, Alabama 35203
Telephone: 205-254-1000
mporter@maynardcooper.com

Counsel for Regions Financial Corporation

/s/ Kip A. Nesmith
Victor L. Hayslip
Betsy P. Collins
Kip A. Nesmith
BURR & FORMAN LLP
420 North 20th Street, Suite 3400
Birmingham, Alabama 35203
Telephone: (205) 251-3000
vhayslip@burr.com

Counsel for C. Dowd Ritter, Irene M. Esteves, and Alton E. Yother

CERTIFICATE OF SERVICE

I hereby certify that I have filed a copy of the foregoing via the Court's CM/ECF system, which will automatically serve a copy of the foregoing on the following or, if the party served does not participate in the CM/ECF system, that I have a served a copy of the foregoing by U.S. First Class Mail on this the 31st day of August, 2011:

Andrew J. Brown
Robbins, Geller, Rudman, & Dowd, LLP
655 West Broadway, Suite 1900
San Diego, California 92101-3301

James S. Ward
Patrick C. Cooper
Ward & Wilson, LLC
2100 Southbridge Parkway, Suite 580
Birmingham, Alabama 35209

Roger H. Bedford, Jr.
Roger Bedford & Associates, P.C.
P.O. Box 370
303 North Jackson Avenue
Russellville, Alabama 35653

Larry Moore
Moore & Trousdale, P.C.
211 North Court St.
P.O. Box 9
Florence, Alabama 35631

/s/ Kip A. Nesmith
OF COUNSEL