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28IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIAIN RE CHARLES SCHWAB
CORPORATION
SECURITIES LITIGATION.

No. C 08-01510 WHA

**ORDER DENYING DEFENDANT
DAIFOTIS' MOTION FOR
RECONSIDERATION**

In this securities action, defendant Kimon Daifotis, one of numerous defendants, filed a motion to reconsider a prior order granting in part and denying in part a motion to dismiss filed by all Schwab defendants. Defendant Daifotis argues that the order had applied the now-superseded pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957), rather than the more recent standards of *Ashcroft v. Iqbal*, 2009 WL 1361536 (2009) and *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). The motion is denied. When the order had occasion to consider the sufficiency of the pleadings, rather than purely legal issues, it applied the *Twombly* standard and, although *Iqbal* had yet to be decided, the order was entirely consistent with that decision.

Defendant's motion complains of the order's citation to *In re Westinghouse Securities Litigation*, 90 F.3d 696 (3d Cir. 1996), a pre-*Twombly* decision that had applied the *Conley* pleading standard, in its discussion of the Section 12 claim. *Westinghouse* was cited for the proposition that: "[w]hether or not defendants actually solicited plaintiffs' sales is a factual question which should generally be left to the jury; at this stage plaintiffs need only satisfy Rule 8(a)'s lenient pleading standards." *Id.* at 717. All of that remains true. *Twombly* and *Iqbal* had no occasion to consider whether the Section 12 "solicitation" inquiry is a factual issue for the jury rather than a legal issue for the Court. Nor did they address whether Rule 8 is the


1 appropriate pleading standard (under the circumstances of this action, it is). Granted, the order
2 had previously ruled that “plaintiffs adequately pled solicitation.” It so ruled, however, under
3 the current understanding of Rule 8, not the *Conley* standard. It explained (Order at 15):

4 Plaintiffs alleged more than mere participation. As many courts
5 have found, the registration statement is itself a solicitation
6 document. Although the act of signing a registration statement,
7 alone, may not always suffice, it is at least suggestive of
8 solicitation activity. As stated, the complaint also alleges that
9 defendants “actively solicited the sale of the fund’s shares” and
10 that certain defendants were involved in marketing the fund.

11 The complaint raises plausible allegations of solicitation activity satisfying the
12 *Twombly* (and now *Iqbal*) standards. Defendant’s motion is **DENIED**.

13 **IT IS SO ORDERED.**

14 Dated: August 21, 2009.

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17 WILLIAM ALSUP
18 UNITED STATES DISTRICT JUDGE