

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEVADA

3 WILLIAM A. RICHARDSON,)
4)
5 Plaintiff,)
6 vs.)
7)
8 OPPENHEIMER & CO. INC.;)
9 OPPENHEIMER HOLDINGS INC.;)
10 OPPENHEIMER ASSET MANAGEMENT,)
11 INC.; and MARK WEINBERG; DOE)
12 DEFENDANTS 1-100; ROE CORPORATE)
13 DEFENDANTS 1-100, inclusive,)
14)
15 Defendants.)
16)
17)

Case No.: 2:11-cv-02078-GMN-PAL

ORDER

18 Pending before the Court is the Motion for Limited Reconsideration (ECF No. 74) filed
19 by Plaintiff William A. Richardson (“Plaintiff”). Defendants Oppenheimer & Co. Inc.,
20 Oppenheimer Holdings Inc., and Oppenheimer Asset Management, Inc. filed a Response (ECF
21 No. 77), and Plaintiff filed a Reply (ECF No. 79). For the reasons discussed below, the Motion
22 for Limited Reconsideration (ECF No. 74) is **GRANTED**.

23 **I. BACKGROUND**

24 This is a securities fraud case arising out of the systematic failure of the Auction Rate
25 Securities (“ARS”) market in February 2008. ARS are long-term bonds and preferred stock
with interest rates or dividend yields that are reset through periodic auctions. (ECF No. 43, ¶ 2).
These periodic auctions provide high liquidity for the securities by enabling investors to easily
sell their ARS holdings at regular intervals. (Id.). During an auction, potential purchasers bid
by stating the minimum interest rate at which they are willing to purchase a quantity of ARS.
(Id. at ¶ 33). The bids are then sorted, high to low, and the lowest interest rate required to sell

1 all available ARS—the “clearing rate”—becomes the rate that applies until the next auction.
2 (Id.). Alternatively, if there are an insufficient number of bids to cover all the ARS offered for
3 sale, the auction fails and the investors must retain their ARS until the next auction. (Id.).

4 Because of these periodic auctions, ARS were generally regarded as having the same
5 liquidity as a money market fund but offering higher returns. (Id. at ¶ 2). However, for many
6 years, the success of the auctions was allegedly dependent on ARS underwriters purchasing
7 large quantities of ARS at each auction to ensure that the auction did not fail (support bids),
8 thus preserving the perceived liquidity of the security. (Id. at ¶ 17). Beginning in 2007, the
9 ARS underwriters allegedly began to withdraw their support bids and a few auctions—roughly
10 2-6%—began to fail. (Id. at ¶ 47). This modest withdrawal of support, eventually culminated
11 in a market-wide failure on February 13, 2008, when 87% of auctions failed. (Id. at ¶ 48).

12 As early as 2002, Plaintiff William A. Richardson (“Plaintiff”) began to invest in ARS
13 on the advice of his financial advisor, Defendant Mark W. Weinberg (“Weinberg”), an
14 employee of Defendant Oppenheimer & Co. Inc. (“Oppenheimer”). (Id. at ¶ 4). Plaintiff
15 informed Weinberg that he needed to have immediate access to his funds at all times and was
16 consequently looking for a very liquid investment. (Id. at ¶ 5). Presumably at this time,
17 Weinberg informed Plaintiff about ARS and allegedly represented to Plaintiff that ARS were as
18 liquid and secure as cash, were better than a certificate of deposit or money market account,
19 and that Plaintiff would be able to access his funds when needed. (Id.). Plaintiff alleges that
20 Weinberg continued to make similar representations on telephone calls with Plaintiff from
21 January 29, 2007 through January 31. (Id. at ¶ 41a-yy). Additionally, during this time-span,
22 Oppenheimer sent monthly account statements to Plaintiff that listed his ARS holdings under
23 the category “Cash Equivalents” (Id. at ¶ 41a-m). Relying on these statements, Plaintiff
24 authorized Weinberg to purchase \$6,900,000.00 worth of ARS in the early part of February
25 2008.

1 At the time these statements were made, Plaintiff alleges Oppenheimer knew of, or acted
2 with deliberate indifference toward, the market's impending demise. (Id. at ¶ 186). Plaintiff
3 alleges that Oppenheimer executives sent internal emails recognizing the market's reliance on
4 underwriters' support bids and discussing what would happen in the event of a market failure.
5 (Id. at ¶ 50). Plaintiff also alleges that Oppenheimer executives tracked the inventory capacity
6 and current holdings of underwriters using a computerized spreadsheet (id. at ¶ 107, 109) and
7 monitored the auction failures happening across the market (id. at ¶ 116). Oppenheimer
8 executives allegedly made an affirmative decision to not inform Oppenheimer's financial
9 advisors of the concerning trends developing in the ARS market. (Id. at ¶ 62). At the same
10 time, Oppenheimer executives sold personal holdings of ARS in the days immediately
11 preceding the market collapse. (Id. at ¶¶ 51-57).

12 On February 14, 2008, after the market-wide failure, Weinberg allegedly called Plaintiff
13 and informed him his ARS holdings were frozen. (Id. at ¶ 41zz). Additionally, Plaintiff's
14 March 2008 account statement listed his ARS holdings under the category "Other Securities."
15 (Id. at ¶ 41n). Plaintiff alleges that his ARS holdings lost significant value because of the
16 illiquidity resulting from the market collapse. (Id. at ¶ 159).

17 Plaintiff filed this lawsuit against Defendants alleging violations of §10(b) of the
18 Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), ("Section 10(b)")
19 and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, ("Rule 10b-5"). Plaintiff also
20 alleges that Defendants Oppenheimer Holdings Inc. and Oppenheimer Asset Management, Inc.
21 are liable for Oppenheimer's Actions as control persons under § 20(a) of the Exchange Act, 15
22 U.S. C. § 78t(a) ("Section 20(a)"). The Court granted Defendants' first Motion to Dismiss
23 because Plaintiff had not pled false statements with sufficient particularity to meet the
24 heightened pleadings standards of the Private Securities Litigation Reform Act ("PSLRA") and
25 Fed. R. Civ. P. 9(b). (ECF No. 40). Plaintiff filed his First Amended Complaint (the "FAC")

1 on June 20, 2013, and Defendants again collectively moved to dismiss, arguing that the FAC
2 also fails to plead facts with sufficient particularity to satisfy the heightened pleading standard
3 under the PSLRA.

4 Regarding Defendants' second Motion to Dismiss, the Court dismissed with prejudice
5 all claims against Weinberg. (Order Mot. to Dismiss 19:15–16, ECF No. 73). Additionally,
6 Plaintiff's claims arising under Section 20(a) were dismissed without prejudice. (Id. 19:16–17).
7 Finally, the Motion to Dismiss was denied as to the remaining claims against Oppenheimer. (Id.
8 19:17–18). Shortly thereafter, Plaintiff filed the instant Motion for Limited Reconsideration.
9 (ECF No. 74).

10 **II. LEGAL STANDARD**

11 Under Rule 60(a) a Court may correct any clerical mistakes based on its own oversight
12 or omissions. Additionally, under Rule 60(b), a court may relieve a party from a final
13 judgment, order or proceeding only in the following circumstances: (1) mistake, inadvertence,
14 surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) a void judgment;
15 (5) a satisfied or discharged judgment; or (6) any other reason justifying relief from the
16 judgment. *Backlund v. Barnhart*, 778 F.2d 1386, 1387 (9th Cir. 1985). “Relief under Rule
17 60(b)(6) must be requested within a reasonable time, and is available only under extraordinary
18 circumstances.” *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th
19 Cir. 1981) (internal citations omitted).

20 A motion for reconsideration must set forth the following: (1) some valid reason why the
21 court should revisit its prior order; and (2) facts or law of a “strongly convincing nature” in
22 support of reversing the prior decision. *Frasure v. United States*, 256 F. Supp. 2d 1180, 1183
23 (D. Nev. 2003). However, a motion for reconsideration is not a mechanism for rearguing issues
24 presented in the original filings, *Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th Cir. 1985), or
25 “advancing theories of the case that could have been presented earlier, *Resolution Trust Corp.*

1 v. Holmes, 846 F. Supp. 1310, 1316 (S.D. Tex. 1994) (footnotes omitted). Thus, Rule 59(e)
2 and 60(b) and are not “intended to give an unhappy litigant one additional chance to sway the
3 judge.” Durkin v. Taylor, 444 F. Supp. 879, 889 (E.D. Va. 1977).

4 **III. DISCUSSION**

5 Plaintiff urges the Court to reconsider the following finding regarding statements and
6 omissions being made in connection with the purchase or sale of a security:

7 Plaintiff only specifically alleges one transaction where he
8 purchased ARS. Thus, although Plaintiff references an initial
9 purchase, and vaguely refers to additional purchases, Plaintiff has
10 not alleged that any purchase other than the February 2008 purchase
was made in reliance on the false or misleading statements. Thus,
only the \$6,900,000 February 2008 purchase is actionable.

11 (Order Mot. to Dismiss 15:15–19, ECF No. 73). Plaintiff asserts that “this finding is
12 inconsistent with the other findings issued by the Court in both the May 10, 2013, Order and the
13 March 31, 2014, Order” (Pl.’s Mot. for Limited Recons. 3:22–23, ECF No. 74). Moreover,
14 Plaintiff asserts that he “did in fact plead that all of the purchases from January 2007 forward
15 were made in reliance upon the misstatements and omissions,” and “all of the purchases
16 referenced in the Complaint should be actionable and Plaintiff should not be limited in his
17 pursuit of Oppenheimer on his 10b claims.” (Id. 3:24–28).

18 On the other hand, Defendants assert that, “[w]hile Richardson does identify multiple
19 alleged ARS purchases in footnote 4 of the Amended Complaint, all of them occurred on or
20 before November 28, 2007 except for the \$6.9 million he allegedly purchased in February 2008,
21 which the Court concluded were the only purchases that could potentially support a claim.”
22 (Defs.’ Response 2:2–6, ECF No. 77).

23 Section 10(b) of the Exchange Act and its corresponding Rule 10b-5 prohibit the use of
24 fraud or deceit in connection with the purchase or sale of a security. 15 U.S.C. § 78j(b); 17
25 C.F.R. § 240.10b-5. The elements of a 10b-5 claim are: (1) a material misrepresentation or

1 omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance, (5)
2 economic loss, and (6) loss causation. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005).

3 In its March 31, 2014 Order, the Court found two categories of alleged
4 misrepresentations potentially actionable: (1) the account statements Plaintiff received from
5 Oppenheimer, and (2) the alleged telephone calls from Weinberg. (Order Mot. to Dismiss 8:24–
6 9:3). According to Plaintiff’s First Amended Complaint, Plaintiff received account statements
7 from Oppenheimer as earlier as February 1, 2007, and received telephone calls from Weinberg
8 as early as January 29, 2007. (See Pl.’s First Am. Compl. ¶¶ 41(a)–(zz), ECF No. 43). Thus, the
9 earliest misleading or false statement plead with particularity that could have been made in
10 connection with the purchase or sale of a security is January 29, 2007, the date of the first
11 alleged phone call from Weinberg.

12 In footnote 4 of his First Amended Complaint, Plaintiff specifically alleges 19 individual
13 purchases of ARS. (Id. ¶ 13, n. 4). Two of these purchases occurred before January 29, 2007,
14 and therefore, are not actionable. However, the remaining 17 purchases include:

- 15 • Pimco Municipal Fd Wed \$400,000 purchased on July 18, 2007;
- 16 • Pimco Municipal Fd Tue \$425,000 purchased February 12, 2008;
- 17 • Pimco Municipal Fd Thu \$425,000 purchased June 28, 2007;
- 18 • Pimco Municipal Fd II Tue \$575,000 purchased May 1, 2007;
- 19 • Pimco Municipal Fd II Fri \$575,000 purchased August 10, 2007;
- 20 • Pimco Municipal Fd II Thu \$600,000 purchased July 12, 2007;
- 21 • Pimco Municipal Fd II Wed \$625,000 purchased November 28, 2007;
- 22 • Pimco Municipal Fd II Wed \$650,000 purchased September 26, 2007;
- 23 • Pimco Municipal Fd II Tue \$1,000,000 purchased June 26, 2007;
- 24 • Pimco Municipal Fd II Wed \$1,100,000 purchased October 3, 2007;
- 25 • Pimco Municipal Fd II Mon \$1,600,000 purchased October 5, 2007;

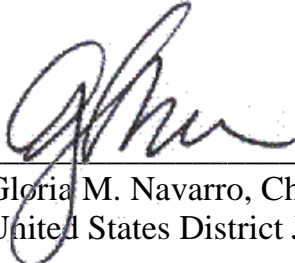
- 1 • Pimco Municipal Fd Mon \$1,675,000 purchased February 11, 2008;
- 2 • Pimco Municipal Fd II Fri \$1,750,000 purchased September 28, 2007;
- 3 • Pimco Municipal Fd II Thu \$2,000,000 purchased September 27, 2007;
- 4 • Pimco Municipal Fd Wed \$2,000,000 purchased October 3, 2007;
- 5 • Pimco Municipal Fd Thu \$2,000,000 purchased September 27, 2007; and
- 6 • Pimco Municipal Fd II Tue \$325,000 purchases April 10, 2007.

7 (Id.). These purchases total \$17,725,000. Additionally, Plaintiff alleges that he purchased
8 \$6,900,000 of ARS in February 2008. (Id. ¶ 14). However, \$2,100,000 of the February 2008
9 purchases is also alleged in the purchases included in footnote 4. Thus, the purchases listed
10 above and the additional \$4,800,000 of February 2008 purchases are actionable, totaling
11 \$22,525,000 of actionable purchases.

12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Limited Reconsideration (ECF
14 No. 74) is **GRANTED**.

15 **DATED** this 8th day of January, 2015.

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Gloria M. Navarro, Chief Judge
United States District Judge