Not for Publication

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

SCHWAB CAPITAL TRUST on behalf of its series SCHWAB TOTAL STOCK MARKET INDEX FUND, SCHWAB HEALTH CARE FUND, SCHWAB DIVIDEND EQUITY FUND, SCHWAB LARGE-CAP GROWTH FUND, SCHWAB S&P 500 INDEX FUND, SCHWAB CORE EQUITY FUND, SCHWAB HEDGED EQUITY FUND, SCHWAB U.S. LARGE-CAP GROWTH INDEX FUND, and SCHWAB FUNDAMENTAL US LARGE COMPANY INDEX FUND; *et al.*; *Plaintiffs*; v. CELGENE CORPORATION; *et al.*; *Defendants*.	Civil Action No. 20-3754 **OPINION**

John Michael Vazquez, U.S.D.J.

Plaintiffs filed this matter after deciding not to participate as a class member in *In re Celgene Corporation Securities Litigation*, Civil Action No. 18-4772 (the "Class Action"), a class action presently pending before this Court. Plaintiffs in both matters allege that Celgene Corporation ("Celgene") and several of its officers and/or employees engaged in fraud under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78a *et seq.*, as to public statements relating to two drugs in Celgene's new product pipeline. Currently pending before the Court is Defendants' motion to dismiss Plaintiffs' Complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u *et seq*. D.E.

6. The Court reviewed the parties' submissions in support and in opposition,[1] and decided the motion without oral argument pursuant to Fed. R. Civ. P. 78(b) and L. Civ. R. 78.1(b). For the reasons stated below, Defendants' motion is **GRANTED in part** and **DENIED in part**.

I. INTRODUCTION

A. Background

Plaintiffs' allegations here mirror those pled in the Class Action. In fact, the vast majority of Plaintiffs' Complaint is copied from the operative Complaint in the Class Action (the "Class Action Complaint"). As a result, the Court incorporates the detailed factual background from its December 19, 2019 Opinion that granted in part and denied in part the motion to dismiss the Class Action Complaint, D.E. 75, into the present Opinion.

Briefly, Celgene manufactures and sells the multiple myeloma drug Revlimid, which between 2014 and 2016, accounted for more than sixty percent of Celgene's total net sales.[2] Compl. ¶ 1. The Revlimid patent expires in 2022. *Id.* Plaintiffs allege that Defendants[3] made

[1] Defendants' moving brief will be referred to as "Defs. Br.," D.E. 6-1; Plaintiffs' opposition will be referred to as "Plfs. Opp," D.E. 10; and Defendants' reply will be referred to as "Defs. Reply," D.E. 17.

[2] The facts are derived from Plaintiffs' Complaint. D.E. 1. When reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded facts in the complaint. *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009). Additionally, a district court may consider "exhibits attached to the complaint and matters of public record," as well as "an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993).

[3] The defendants in this matter are Celgene; Scott A. Smith, Celgene's President and Chief Operating Officer from April 1, 2017 until April 2, 2018, Compl. ¶ 52; Terrie Curran, President of the Global Inflammatory & Immunology ("I&I") franchise during the time frame at issue, *id.* ¶ 53; and Philippe Martin, Managing Director of Receptos and Celgene's Corporate Vice President during the relevant time frame, *id.* ¶ 54.

material misrepresentations and omissions about two drugs, Otezla and Ozanimod, which Celgene touted as products to lessen the anticipated revenue drop following the Revlimid patent expiration.

Otezla is an oral medication used to treat psoriatic arthritis and psoriasis that was approved by the FDA in March 2014. *Id.* ¶¶ 95-96. In a January 12, 2015 press release, Celgene set out its five-year strategic growth plan, in which Celgene maintained that "Otezla net product sales would grow to between $1.5 billion and $2 billion in 2017." *Id.* ¶ 97. Throughout 2015 and 2016, Defendants publicly represented that Celgene was on-track to meet the 2017 sales projection. *Id.* ¶¶ 120-23, 131. Internally, however, Defendants purportedly received explicit warnings that the 2017 projection was unattainable. *See, e.g.*, *id.* ¶¶ 123-28, 146. On October 26, 2017, Celgene "stunned the market by announcing that, in light of the dismal Otezla sales numbers, the Company had slashed the 2017 guidance by more than $250 million" and lowered the 2020 I&I guidance by over $1 billion. *Id.* ¶ 152. After this announcement, the price of Celgene common stock declined more than 16%. *Id.* ¶ 158.

Ozanimod is the second drug at issue in this matter. On July 14, 2015, Celgene purchased Receptos, a company that initially developed Ozanimod, for $7.2 billion. *Id.* ¶ 159-60. Clinical studies indicated that Ozanimod could be useful in treating ulcerative colitis and relapsing multiple sclerosis. In announcing the acquisition, Celgene "projected annual Ozanimod sales of up to $6 billion." *Id.* ¶ 160. Ozanimod was not approved by the U.S. Food and Drug Administration ("FDA") when Celgene acquired Receptos, but Celgene anticipated filing a New Drug Application ("NDA") for Ozanimod with the FDA in 2017. *Id.* ¶¶ 164, 69.

Through a Phase I trial that Celgene started in October 2016, Celgene identified a metabolite named CC112273 (the "Metabolite"), "which triggered the need for the additional testing described in the FDA guidance," before FDA approval. *Id.* ¶ 186. Despite the need for

additional testing after discovery of the Metabolite, Defendants continued to represent that Celgene was on track to submit the NDA before the end of 2017 and failed to disclose information about the Metabolite. *See, e.g.*, *id.* ¶¶ 190, 195-96, 201. Even after the FDA expressly informed Celgene that it needed to include the Metabolite testing results with its NDA submission, Celgene continued to move forward with its plan to submit the NDA in December 2017 without the Metabolite study results. *Id.* ¶¶ 210-12.

As planned, Celgene submitted the NDA in December 2017. *Id.* ¶ 213. But on February 27, 2018, Celgene disclosed that it received a refuse to file ("RTF") letter from the FDA in response to its NDA submission. An RFT letter indicates that the FDA "identifie[d] clear and obvious deficiencies" in the NDA. *Id.* ¶¶ 217-18. As a result of the RFT announcement, Celgene's common stock fell from $95.78 per share on February 27, 2018 to $87.12 per share on February 28, 2018. *Id.* ¶ 224. Then on April 29, 2017, Plaintiffs allege that the market learned through a Morgan Stanley report that additional testing on the Metabolite was required, which could delay the refiling of the Ozanimod NDA by up to three years. *Id.* ¶ 226. Celgene's common stock fell again, from $95.78 per share on April 27, 2018 to $87.10 per share on April 30, 2018. *Id.*

B. Procedural History

Plaintiff the City of Warren General Employees' Retirement System filed the initial complaint in the Class Action on March 29, 2018. Civ. No. 18-4772, D.E. 1 (D.N.J. Mar. 29, 2018). On May 3, 2018, Plaintiff Charles H. Witchcoff filed a class action complaint asserting similar securities fraud claims against Celgene and certain Celgene executives. By May 29, 2018, ten parties had filed motions to consolidate the cases and appoint a lead plaintiff. On September 26, 2018, this Court consolidated the two cases; appointed AMF Pensionsforsakring AB ("AMF") as the lead plaintiff; and appointed class counsel. Civ. No. 18-4772, D.E. 36 (D.N.J. Sept. 26,

2018). AMF filed the Class Action Complaint on February 27, 2019, alleging violations of Section 10(b) and Rule 10b-5, and Section 20(a) of the Exchange Act. Civ. No. 18-4772, D.E. 57 (D.N.J. Feb. 27, 2019).

Defendants filed a motion on February 8, 2019 seeking to dismiss the Class Action Complaint, in its entirety, pursuant to Rule 12(b)(6) and the PSLRA. Civ. No. 18-4772, D.E. 52 (D.N.J. Feb. 8, 2019). On December 19, 2019, the Court granted in part and denied in part Defendants' motion to dismiss (the "MTD Opinion"). The Court dismissed AMF's Section 20(a) claim and narrowed the Section 10(b) and Rule 10b-5 claim, as the Court determined that many of the alleged misrepresentations and omissions were not actionable. Civ. No. 18-4772, D.E. 75, 76 (D.N.J. Dec. 19, 2019).

Shortly after, on May 7, 2020, Plaintiffs filed this action. D.E. 1. Plaintiffs would have been class members in the Class Action. Plaintiffs' Complaint asserts claims against four Defendants from the Class Action, pursuant to Section 10(b) and Rule 10b-5 of the Exchange Act, based on alleged misrepresentations regarding Otezla and Ozanimod. With respect to Otezla, the alleged misstatements involve Celgene's ability to meet its 2017 sales projections. All but one of the alleged Otezla misrepresentations are asserted in the Class Action Complaint. As for Ozanimod, Plaintiffs allege that Defendants' statements about the plan to submit an NDA for Ozanimod by the end of 2017 were false or misleading because they failed to disclose Celgene's discovery of the Metabolite and need for additional Phase I testing. All the alleged misstatements involving Ozanimod in Plaintiffs' Complaint also appear in the Class Action Complaint.

Defendants responded with the instant motion to dismiss. D.E. 6. Defendants seek to dismiss the Complaint in its entirety and largely rely on the MTD Opinion as the basis for dismissal. Because this matter is virtually identical to the Class Action, Defendants are correct

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