

**United States Court of Appeals**  
**FOR THE EIGHTH CIRCUIT**

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NORFOLK COUNTY RETIREMENT SYSTEM, STATE-BOSTON  
RETIREMENT SYSTEM, PUBLIC PENSION FUND GROUP,

*Plaintiffs-Appellants,*

JOSEPH MAS, HERMAN UNVERICHT,

*Consolidated Appellants,*

— v. —

KV PHARMACEUTICAL COMPANY, MARC S. HERMELIN,  
DAVID A. VAN VLIET, RITA E. BLESER,

*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI (ST. LOUIS)

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**BRIEF OF DEFENDANT-APPELLEE RITA E. BLESER**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Defendant Rita Bleser is an individual for whom disclosures are not required.

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## **STATEMENT OF JOINDER**

Pursuant to Federal Rule of Appellate Procedure 28(i), Defendant-Appellee Rita E. Bleser hereby joins in the brief filed by Defendants-Appellees KV Pharmaceutical Company and David A. Van Vliet, with additional brief argument specific to Rita E. Bleser below.

## ARGUMENT

### **I. The District Court Did Not Err in Dismissing Plaintiffs' Complaint Against Rita E. Bleser Because Plaintiffs Failed To State a Claim Under Rules 10b-5(a) and (c)**

Rule 10b-5(a) prohibits “any device, scheme or artifice to defraud.” 17 C.F.R. § 240.10b-5(a). Similarly, Rule 10b-5(c) prohibits “any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” 17 C.F.R. § 240.10b-5(c). With respect to fraud, Federal Rule of Civil Procedure 9(b) requires Plaintiffs to “state with particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). With respect to securities fraud claims, the Private Securities Litigation Reform Act of 1995 (“PSLRA”) contains heightened pleading rules by requiring plaintiffs to specify each misleading statement or omission and why the statement or omission was misleading. *Kushner v. Beverly Enters., Inc.*, 317 F.3d 820, 824, 826 (8th Cir. 2003), citing 15 U.S.C. § 78u-4(b)(1)). The complaint must also state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind. 15 U.S.C. § 78-4(b)(2).

Plaintiffs assert the Complaint met the requirements of this “scheme liability” under Rules 10b-5(a) and (c) because: (1) Bleser was a defendant in the Complaint filed by the FDA, and (2) she was President of the Manufacturing Division. Br. at 52-53. Plaintiffs argue that since Bleser was named in the FDA

Complaint, Bleser is responsible for the Company's violations and regulatory noncompliance. Br. at 52-54. Yet Plaintiffs allege no specific actions taken by Bleser, as an individual, to support their claims.

Plaintiffs claim that "specific factual allegations, which explain that Defendants, plural, all participated in the scheme violating FDA regulations" were pled in the Complaint. Br. at 55 (citing A-76-84). However, Plaintiffs never describe any specific actions committed by Bleser as an individual that constitute a fraudulent scheme. Lumping Bleser with "all Defendants" without alleging what Bleser specifically did as an individual is insufficient to plead fraud under the heightened requirements of both Federal Rule of Civil Procedure 9(b) and the PSLRA. Federal Rule of Civil Procedure 9(b) requires a plaintiff to specifically plead "what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed and what effect the scheme had on the securities." *In re Able Labs. Sec. Inc.*, Civil Action No. 05-2681 (JAG), 2008 WL 1967509, 19 (D.N.J. Mar. 24, 2008). Indeed, the PSLRA requires the Court to disregard blanket assertions that fall short of the particularity requirements of the statute, which is exactly the nature of these conclusory allegations. *In re: AMDOCS Ltd. Securities Litig.*, 390 F.3d 542, 547 (8<sup>th</sup> Cir. 2004), citing *Florida State Bd. Of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 660 (8<sup>th</sup> Cir. 2001).

The second allegation Plaintiffs use in support of their claim against Bleser is her officer status as President of the Manufacturing Division. Plaintiffs assert that since Bleser was the President of Manufacturing, she participated in a scheme to defraud through systemic and continued violations of FDA regulations. Br. at 54. The Complaint alleges that “Defendants knew, since at least *early 2003*, that KV was in violation of numerous FDA regulations.” Compl. ¶ 35 (emphasis added).

Again, neither Plaintiffs’ Complaint nor the FDA Complaint described any actions taken by Bleser individually in furtherance of a fraudulent scheme. On the contrary, Bleser did not start with the Company until April 2007, approximately five years after Plaintiffs allege the Company knew it was in violation of FDA regulations. Such vague pleading is insufficient to survive a motion to dismiss with respect to the Rule 10b-5(a) and (c) claim against Bleser. *See, e.g., City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 690 (6th Cir. 2005) (holding that a complaint that alleged only that the defendant was a high-ranking corporate officer, but did not allege that he “played any role” in the alleged fraud was insufficient).

Finally, Plaintiffs concede in their brief that in order to state a primary liability claim under Rules 10b-5(a) and (c), they must also establish the other elements of Section 10(b) - scienter and reliance. *In re Alstom Sec. Litig.*, 406 F.



Supp. 2d 433, 474 (S.D.N.Y. 2005). Yet, Plaintiffs' brief is glaringly silent regarding these other requirements. Plaintiffs offer no allegations specific to Bleser because, simply put, there are none. The District Court correctly dismissed the claim.

## **II. The District Court Properly Denied Plaintiffs' Motion to Alter or Amend the Judgment**

The District Court properly denied Plaintiffs' Motion to Alter or Amend the Judgment. The proposed amended complaint offers no new allegations against Bleser. Plaintiffs have no basis to reopen the case against Bleser because Plaintiffs have offered no new facts or allegations with which to do so.

### **CONCLUSION**

For the foregoing reasons, the judgments of the District Court should be affirmed.

DATED: March 9, 2011

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), I hereby certify that the foregoing Brief for Defendant-Appellee Rita E. Bleser complies with Fed. R. App. P.32(a)(7)(B)(i) because it contains 1,351 words. I also certify that this Brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared using Microsoft Word with a proportionally spaced 14-point font in Times New Roman.

DATED: March 9, 2011

/s/ Kurtis B. Reeg  
Kurtis B. Reeg

**CERTIFICATE OF SERVICE (CM/ECF)**

The undersigned certifies that on March 9, 2011, the foregoing Brief for Defendant-Appellee Rita E. Bleser was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the appellate CM/ECF filing system. The brief was scanned for viruses using Trend Micro Security Agent and no viruses were detected.

/s/ Kurtis B. Reeg