Case No. 06-1312

United States Court of Appeals
for the
Seventh Circuit

STEELWORKERS PENSION TRUST, *et al.*,

Plaintiffs-Appellants

-v.-

BAXTER INTERNATIONAL INC., *et al.*

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
Case No. 04 C 4909
The Honorable Judge William T. Hart

BRIEF AND REQUIRED BRIEF APPENDIX FOR PLAINTIFFS-APPELLANTS

PATRICK V. DAHLSTROM, ESQ.
LEIGH H. SMOLLAR, ESQ.
POMERANTZ HAUDEK BLOCK
GROSSMAN & GROSS, LLP
One N. LaSalle Street, Suite 2225
Chicago, IL 60602-3908
(312) 377-1181
Liaison Counsel for
Plaintiffs-Appellants

SHERRIE R. SAVETT, ESQ.
ARTHUR STOCK, ESQ.
RUSSELL D. PAUL, ESQ.
DOUG M. RISEN, ESQ.
SHOSHANA T. SAVETT, ESQ.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

LIONEL Z. GLANCY, ESQ.
PETER A. BINKOW, ESQ.
GLANCY BINKOW & GOLDBERG LLP
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067
(310) 201-9150
Co-Lead Counsel for Plaintiffs-Appellants

DISCLOSURE STATEMENT

Lead Plaintiff, Steelworkers Pension Trust, is not a corporation. Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, no corporate disclosure is required. Pursuant to Seventh Circuit Rule 26.1, the above-named party hereby states through its undersigned counsel that the following law firms have appeared, or are expected to appear, on its behalf in this matter:

Patrick V. Dahlstrom, Esq.
Leigh H. Smollar, Esq.
POMERANTZ HAUDEK BLOCK GROSSMAN & GROSS, LLP
One North LaSalle Street, Suite 2225
Chicago, IL 60602-3908
(312) 377-1181
Liaison Counsel for Plaintiffs-Appellants

Sherrie R. Savett, Esq.
Arthur Stock, Esq.
Russell D. Paul, Esq.
Doug M. Risen, Esq.
Shoshana T. Savett, Esq.
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Lionel Z. Glancy, Esq.
Peter A. Binkow, Esq.
GLANCY BINKOW & GOLDBERG, LLP
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067
(310) 201-9150
Co-Lead Counsel for Plaintiffs-Appellants

TABLE OF CONTENTS

DISCLOSURE STATEMENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

JURISDICTIONAL STATEMENT 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 7

SUMMARY OF ARGUMENT 16

ARGUMENT 19

I. THE DISTRICT COURT FAILED TO APPLY THE CORRECT PLEADING STANDARDS WHEN IT DISMISSED THE SAC 19

A. Standard of Review 19

B. The District Court Failed To Comply With The Dictates Of The Supreme Court 19

II. THE SAC PLEADS FACTS THAT GIVE RISE TO A STRONG INFERENCE THAT PARKINSON AND ANDERSON ACTED WITH SCIENTER 20

A. The Standards For Pleading Scienter 20

B. The SAC Makes Particularized Allegations Against Parkinson and Anderson 24

1. The Scienter of Parkinson 25

2. The Scienter of Anderson 31

3. The Sale of Baxter Stock by Anderson Further Supports a Strong Inference That He Acted With Scienter 33

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' § 10(b) CLAIMS BASED ON DEFENDANTS' FAILURE TO CORRECT FALSE INFORMATION 38

IV. THE DISTRICT COURT ERRED IN HOLDING THAT GREISCH AND DEL SALTO COULD NOT BE LIABLE UNDER § 10(b) BECAUSE THEY ARE NOT ALLEGED TO HAVE SIGNED THE FORMS 10-K AND 10-Q 41

A. Greisch And del Salto Are Liable Under The Group Pleading Doctrine 41

B. Greisch And del Salto Engaged In A Scheme To Defraud 43

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS BASED ON THE APRIL 22, 2004 CONFERENCE CALL 45

VI. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS AGAINST BAXTER 46

VII. THE DISTRICT COURT ERRED IN DISMISSING THE SECTION 20(a) CONTROL PERSON CLAIMS 49

VIII. THE DISTRICT COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION TO RECONSIDER 49

A. Standard Of Review 49

B. Defendants Did Not Present Any New Evidence In Their Motion To Reconsider 49

C. The District Court Should Not Have Considered Any New Arguments Made By Defendants In Their Motion To Reconsider 52

D. Defendants Already Argued Amendment Futility When Opposing Plaintiffs' Rule 59(e) Motion 53

CONCLUSION 55

TABLE OF AUTHORITIES

CASES

In re 3Com Sec. Litig.,
761 F. Supp. 1411 (N.D. Cal. 1990) 38

Adams v. Kinder-Morgan, Inc.,
340 F.3d 1083 (10th Cir. 2003) 21, 22, 29

Affiliated Ute Citizens v. United States,
406 U.S. 128 (1972) 45

In re American Bank Note Holographics, Inc. Sec. Litig.,
93 F. Supp. 2d 424 (S.D.N.Y. 2000) 25

Bank of Waunakee v. Rochester Cheese Sales, Inc.,
906 F.2d 1185 (7th Cir. 1990) 51

Barnes v. Briley,
420 F.3d 673 (7th Cir. 2005) 19

Basic Inc. v. Levinson,
485 U.S. 224 (1988) 21

In re Bayer AG Sec. Litig.,
Civ. No. 03 Civ. 1546, 2004 WL 2190357 (S.D.N.Y. Sept. 30, 2004) 42

Blau v. Harrison,
Civ. No. 04 C 6592, 2006 WL 2190357 (N.D. Ill. Mar. 24, 2006) 46

In re Bristol-Myers Squibb Sec. Litig.,
312 F. Supp. 2d 549 (S.D.N.Y. 2004) 39

In re CINAR Corp. Sec. Litig.,
186 F. Supp. 2d 279 (E.D.N.Y. 2002) 25

In re Cabletron Sys., Inc.,
311 F.3d 11 (lst Cir. 2002) 20, 21, 22, 24, 28, 38

Caisse Nationale de Credit Agricole v. CBI Indus., Inc.,
90 F.3d 1264 (7th Cir. 1996) 50, 52

Calderon v. Reno,
56 F. Supp. 2d 997 (N.D. Ill. 1999) 51

Caraker v. Sandoz Pharms. Corp.,
172 F. Supp. 2d 1018 (S.D. Ill. 2001) 49, 50

In re Cardinal Health Inc. Sec. Litig.,
426 F. Supp. 2d 688 (S.D. Ohio 2006) 21

Caterpillar v. Great Am. Ins. Co.,
62 F.3d 955 (7th Cir. 1995) 47

In re Cerner Corp. Sec. Litig.,
425 F.3d 1079 (8th Cir. 2005) 23

Coble v. Broadvision Inc.,
Civ. No. 01-01969, 2002 WL 31093589 (N.D. Cal. Sept. 11, 2002) 40

Chill v. GE,
101 F.3d 263 (2d Cir. 1996) 21

Chu v. Sabratek Corp.,
100 F. Supp. 2d 827 (N.D. Ill. 2000) 28, 41

Comprehensive Care Corp. v. RehabCare Corp.,
98 F.3d 1063 (8th Cir. 1996) 48

Conley v. Gibson,
355 U.S. 41 (1957) 19

Corley v. Rosewood Care Ctr., Inc.,
142 F.3d 1041 (7th Cir. 1998) 22

Craftmatic Sec. Litig. v. Kraftsow,
890 F.2d 628 (3d Cir. 1989) 23

Danis v. USN Communs., Inc.,
73 F. Supp. 2d 923 (N.D. Ill. 1999) 28, 41

In re Daou Systems, Inc. Sec. Litig.,
411 F.3d 1006 (9th Cir. 2005) 36

Dardick v. Zimmerman,
149 F. Supp. 2d 986 (N.D. Ill. 2001) 29

DiLeo v. Ernst & Young,
901 F.2d 624 (7th Cir. 1990) 46

DiVittorio v. Equidyne Extractive Indus.,
822 F.2d 1242 (2d Cir. 1987) 43

Emery v. Am. Gen. Fin. Corp.,
134 F.3d 1321 (7th Cir. 1998) 23, 48

In re Enron Corp. Sec. Derivative & ERISA Litig.,
235 F. Supp. 2d 549 (S.D. Tex. 2002) 45

Fitzer v. Security Dynamics Techs.,
119 F. Supp. 2d 12 (D. Mass. 2000) 25

Fla. State Bd. of Admin. v. Green Tree Fin. Corp.,
270 F.3d 645 (8th Cir. 2001) 21, 23, 28, 34

Foss ex rel. Estate of Koth v. Bear, Stearns & Co., Inc.,
Civ. No. 03 C 8338, 2004 WL 2008863 (N.D. Ill. May 14, 2004) 44

Goldin Associates, L.L.C. v. Donaldson, Lufkin & Jenrette Sec.,
Civ. No. 00 C 8688, 2003 WL 22218643 (S.D.N.Y. Sept. 25,2003) 42

Grandon v. Merrill Lynch & Co.,
147 F.3d 184 (2d Cir. 1998) 23

Greebel v. FTP Software, Inc.,
194 F.3d 185 (1st Cir. 1999) 37

In re HealthCare Compare Corp. Sec. Litig.,
75 F.3d 276 (7th Cir. 1996) 21

Helwig v. Vencor, Inc.,
251 F.3d 540 (6th Cir. 2001) 22, 23

Higginbotham, et al. v. Baxter Int' l, Inc., et al.,
Civ. No. 04 C 4909, 2005 WL 127221 (N.D. Ill. May 25, 2005) . . . . passim

Higginbotham, et al. v. Baxter Int' l, Inc., et al.,
Civ. No. 04 C 4909, 2005 WL 2368795 (N.D. Ill. Sept. 23, 2005) . . passim

Higginbotham, et al. v. Baxter Int'l, Inc., et al.,
Civ. No. 04 C 4909, 2005 WL 3542521 (N.D. Ill. Dec. 22, 2005) . . . . passim

Holmes v. Baker,
166 F. Supp. 2d 1362 (S.D. Fla. 2001) 48

Johnson v. Tellabs, Inc.,
262 F. Supp. 2d 937 (N.D. Ill. 2003) 33

In re K-tel Int'l, Inc. Sec. Litig.,
300 F.3d 881 (8th Cir. 2002) 33

Kaplan v. Rose,
49 F.3d 1363 (9th Cir. 1994) 37

Kaufman v. Motorola Inc.,
Civ. No. 95 C 1069, 1999 WL 688780 (N.D. Ill. Apr. 16, 1999) 28

In re Kindred Healthcare, Inc. Sec. Litig.
299 F. Supp. 2d 724 (W.D. Ky. 2004) 35

Kushner v. Beverly Enters.,
317 F.3d 820 (8th Cir. 2003) 22

In re Lattice Semiconductor Corp. Sec. Litig.,
Civ. No. 04-1255-AA, 2006 WL 538756 (D. Or. Jan. 3, 2006) 30

Lee v. City of Chicago,
330 F.3d 456 (7th Cir. 2003) 20

In re Livent, Inc. Sec. Litig.,
78 F. Supp. 2d 194 (S.D.N.Y. 1999) 42

In re MTC Elec. Techs. Shareholders Litig.,
898 F. Supp. 974 (E.D.N.Y. 1995) 38

Makor Issues & Rights, Ltd. v. Tellabs, Inc.,
437 F.3d 588 (7th Cir. 2006) 19, 21, 23, 35, 42

McGann v. Ernst & Young,
102 F.3d 390 (9th Cir. 1996) 34

Nathenson v. Zonagen Inc.,
267 F.3d 400 (5th Cir. 2001) 23

Nelson v. City Colleges of Chicago,
962 F.2d 754 (7th Cir. 1992) 49

In re Nike, Inc. Sec. Litig.,
181 F. Supp. 2d 1160 (D. Or. 2002) 33

No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.,
320 F.3d 920 (9th Cir. 2003) 20, 33, 38

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000) 23, 24, 28

Oran v. Stafford,
226 F.3d 275 (3d Cir. 2000) 34

In re Oxford Health Plans, Inc. Sec. Litig.,
187 F.R.D. 133 (S.D.N.Y. 1999) 38, 43

Pirraglia v. Novell, Inc.,
339 F.3d 1182 (10th Cir. 2003) 20

Polar Int'l Brokerage Corp. v. Reeve,
108 F. Supp. 2d 225 (S.D.N.Y. 2000) 42

Press v. Chemical Inv. Servs. Corp.,
166 F.3d 529 (2d Cir. 1999) 23

Publishers Resource Inc. v. Walker-David Publications, Inc.
762 F.2d 557 (7th Cir. 1985) 50, 51

In re Qwest Communs. Int'l, Inc. Sec. Litig.,
387 F. Supp. 2d 1145 (D. Colo. 2005) 41

In re Qwest Communs. Int'l, Inc. Sec. Litig.,
396 F. Supp. 2d 1178 (D. Colo. 2004) 38

In re Rockefeller Ctr. Props., Sec. Litig.,
311 F.3d 198 (3d Cir. 2002) 33

Rolo v. City Investing Co. Liquidating Trust,
155 F.3d 644 (3d Cir. 1998) 22

Rubinstein v. Collins,
20 F.3d 160 (5th Cir. 1994) 38

SEC v. Hopper,
Civ. No. H 04 1054, 2006 WL 778640 (S.D. Tex. Mar. 24, 2006) 39

SEC v. Jakubowski,
150 F.3d 675 (7th Cir. 1998) 23

SEC v. Texas Gulf Sulphur Co.,
401 F.2d 833 (2d Cir. 1968) 34

SEC v. U. S. Envtl, Inc.,
155 F.3d 107 (2d Cir. 1998) 44

SEC v. Zandford,
535 U.S. 813 (2002) 44

Schaffer v. Evolving Sys., Inc.,
29 F. Supp. 2d 1213 (D. Colo. 1998) 41

Scheuer v. Rhodes,
416 U.S. 232 (1974) 19

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001) 22, 23, 28

Schwartz v. Celestial Seasonings, Inc.,
124 F.3d 1246 (10th Cir. 1997) 42, 43

Selbst v McDonald's Corp.,
Civ. No. 04 C 2422, 2005 WL 2319936 (N.D. Ill. Sept. 21, 2005) 34

Sirota v. Solitron Devices, Inc.,
673 F.2d 566 (2d Cir. 1982) 25

In re Solv-Ex Corp. Sec. Litig.,
210 F. Supp. 2d 276 (S.D.N.Y. 2000) 42

In re Sprint Corp. Sec. Litig.,
232 F. Supp. 2d 1193 (D. Kan. 2002) 41

State Bank of India v. Commercial Steel Corp.,
Civ. No. 97 C 1150, 2001 WL 423001 (N.D. Ill. Apr. 24, 2001) 51

Stevelman v. Alias Research Inc.,
174 F.3d 79 (2d Cir. 1999) 25

Stransky v. Cummins Engine Co.,
51 F.3d 1329 (7th Cir. 1995) 39

In re Stratosphere Corp. Sec. Litig.,
1 F. Supp. 2d 1096 (D. Nev. 1998) 30

Swierkiewicz v. Sorema N.A.,
534 U.S. 506 (2002) 19

United States v. Bank of New England N.A.,
821 F.2d 844 (1st Cir. 1987) 47

United States v. Deutsch,
981 F.2d 299 (7th Cir. 1993) 50

United States v. Josleyn,
206 F.3d 144 (lst Cir. 2000) 48

United States v. O'Hagan,
521 U.S. 642 (1997) 45

United States v. One Parcel of Land,
965 F.2d 311 (7th Cir. 1992) 48

Wafra Leasing Corp., 1999-A-1 v. Prime Capital Corp.,
247 F. Supp. 2d 987 (N.D. Ill. 2002) 39

In re Williams Sec. Litig.,
339 F. Supp. 2d 1242 (N.D. Okla. 2003) 41

Williams v. Ramos
71 F.3d 1246 (7th Cir. 1995) 27

Williams v. Seniff,
342 F.3d 774 (7th Cir. 2003) 19

In re WorldCom, Inc., Sec. Litig.,
294 F. Supp. 2d 392 (S.D.N.Y. 2003) 30

In re WorldCom, Inc. Sec. Litig.,
Civ. No. 03 Civ. 1985, 2006 WL 1047130 (S.D.N.Y. Apr. 21, 2006) 40

Worlds v. National RR Passenger Corp.,
Civ. No. 90 C 0643, 1990 WL 84519 (N.D. Ill. May 7, 199) 50

STATUTES

15 U.S.C. §78a 2

15 U.S.C. §78j 44

15 U.S.C. § 78m(a) 39

15 U.S.C. § 78t 1

15 U.S.C. § 78u-4(b)(2) 21

15 U.S.C. § 78u-4(b)(3) 22

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

17 C.F.R. § 230.144(h) 35

17 C.F.R. §240.10b-5 44

17 C.F.R. § 240.12b-20 39

Fed.R.Civ.P. 12(b)(6) 27

Fed. R. Civ. P. 59(e) 5

Fed. R. Civ. P. 60(b) 6

MISCELLANEOUS

2-21 *Knepper & Bailey, Liability of Corporate Officers and Directors*, § 21.02 (7th ed. 2003) 47

JURISDICTIONAL STATEMENT

The District Court's subject matter jurisdiction rested on 28 U.S.C. §§ 1331 and 1337 and Section 27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a. Plaintiffs alleged violations of §§ 10(b) and 20(a) of the Exchange Act, 15 U.S.C. §§ 78j(b) and 78t(a), and Securities and Exchange Commission Rule 10b-5, 17 C.R.F. § 240.10b-5.

On December 22, 2005, the District Court issued a Memorandum Opinion and Order granting in part and denying in part Defendants-Appellees' motion for reconsideration pursuant to Fed R. Civ. Proc. 60(b), and dismissed Plaintiffs-Appellant's cause of action, with prejudice. ("Rule 60(b) Order"). (A14)[1] On December 27, 2005, Judgment was entered pursuant to the District Court's Rule 60(b) Order. (A17) Neither Plaintiffs-Appellants nor Defendants-Appellees has filed any motion for reconsideration or to alter the Judgment that was entered on December 27, 2005.

The May 25, 2005 Memorandum Opinion and Order is reported at *Higginbotham, et al. v. Baxter Int'l, Inc., et al.*, Civ. No. 04 C 4909, 2005 WL 1272271 (N.D. Ill. May 25, 2005) ("*Higginbotham I*"). (A1)

The September 23, 2005 Memorandum Opinion and Order is reported at *Higginbotham, et al. v. Baxter Int'l, Inc., et al.*, Civ. No. 04 C 4909, 2005 WL 2368795 (N.D. Ill. Sept., 23, 2005) ("*Higginbotham II*"). (A10)

---

[1] Citations to "A____" refer to the Required Brief Appendix. Citations to "JA__" refer to the Joint Appendix.

The December 22, 2005 Memorandum Opinion and Order is reported at *Higginbotham, et al. v. Baxter Int'l, Inc., et al.*, Civ. No. 04 C 4909, 2005 WL 3542521 (N.D. Ill. December 22, 2005) ("*Higginbotham III*").

Plaintiffs-Appellants timely filed a Notice of Appeal with the District Court on January 26, 2006. (A18)

This Court's jurisdiction rests on 28 U.S.C. § 1291.

This appeal is from a final order and judgment that disposes of all parties' claims.

QUESTIONS PRESENTED

1. Did the District Court err in dismissing, pursuant to its Rule 60(b) Order, the Second Amended Complaint ("SAC") for failure to plead facts giving rise to a strong inference of scienter of Defendants Parkinson and Anderson, as required by the Private Securities Litigation Reform Act of 1995 (the "PSLRA")?

2. Did the District Court err in finding, pursuant to its Rule 59(e) Order, that Plaintiffs had not adequately alleged Defendants Greisch's and del Salto's participation in the preparation of Baxter's 2003 Form 10-K and 2004 first quarter Form 10-Q?

3. Did the District Court err in dismissing, pursuant to its Rule 60(b) Order, all claims in the SAC based on Defendants' failure to correct publicly-disseminated false information?

4. Did the District Court err in dismissing, pursuant to its Rule 59(e) Order, Plaintiffs' § 10(b) claims based on misstatements and omissions made in Defendants' April 22, 2004 earnings conference call?

5. Did the District Court err in dismissing, pursuant to its Rule 60(b) Order, all claims in the SAC against Defendant Baxter because it found all claims against the Individual Defendants deficient?

6. Given that Plaintiffs-Appellants properly pleaded primary violations of § 10(b) of the Exchange Act, did the District Court err in dismissing, pursuant to its Rule 60(b) Order, claims of control person liability under § 20(a)?

7. Did the District Court err in granting Defendants-Appellees' Rule 60(b) motion to reconsider the District Court's Rule 59(e) Order?

STATEMENT OF THE CASE

This is a securities class action on behalf of persons who purchased the common stock of Baxter International, Inc. ("Baxter" or the "Company") from March 12, 2004 (the date Baxter filed its Form 10-K for the year ended December 31, 2003) through July 21, 2004 (the day prior to the date Baxter announced its plan to restate its financial statements for years 2001-2003 and the first quarter of 2004) (the "Class Period").

Parties and Claims

Lead Plaintiff Steelworkers Pension Trust suffered a loss of over $250,000 as a result of its purchases of Baxter common stock.

Defendants-Appellees are (i) Baxter; (ii) Robert L. Parkinson, Jr. ("Parkinson"), Chairman of the Board, Chief Executive Officer, and President of Baxter from April 26, 2004 through the end of the Class Period; (iii) Carlos del Salto ("del Salto"), Senior Vice President of Baxter Healthcare Corporation from 2003 through August 2004 who managed a diverse geographic region including Latin America and was a member of Baxter's executive management team; (iv) Brian P. Anderson ("Anderson"), Baxter's Senior Vice President and Chief Financial Officer from February 1998 until June 21, 2004; and (v) John J. Greisch ("Greisch"), Corporate Vice President and Chief Financial Officer from June 21, 2004 through the end of the Class Period and Corporate Vice President of Baxter World Trade Corporation and Baxter Healthcare Corporation and President-Bioscience from January to June 2004 (collectively, the "Individual Defendants").[2] (JA6-7; ¶¶16-20)[3]

The SAC asserts claims against all Defendants under § 10(b) of the Exchange Act and Rule 10b-5 and against all Individual Defendants as control persons of Baxter under § 20(a) of the Exchange Act.[4] Plaintiffs alleged in the SAC that Baxter and its senior management became aware of a substantial and ongoing fraud in the Company's Brazilian subsidiary whereby fictitious revenues were being falsely reported and uncollectible receivables were not being properly accounted for.

---

[2] Harry M. Kraemer, Jr. was named as a defendant in the Amended Complaint but was not named as a defendant in the SAC.

[3] Citations to "¶__" are to paragraphs of the Second Amended Complaint ("SAC").

[4] Plaintiffs-Appellants are pursuing the District Court's dismissal of all claims against all Defendants-Appellees in the SAC.

Despite their knowledge of the fraud, Defendants reported overstated corporate revenues and earnings in SEC filings and made statements regarding the Company's internal controls and disclosure controls that were false and misleading.

Procedural History

On July 27, 2004, certain Baxter stock purchasers commenced this litigation. By Order dated November 10, 2004, the District Court appointed Steelworkers Pension Trust and the Michigan Funds[5] lead plaintiffs pursuant to the PSLRA. On January 10, 2005, lead plaintiffs filed the Consolidated Amended Class Action Complaint (the "Amended Complaint"). The Court dismissed the Amended Complaint, with prejudice, by Memorandum and Order dated May 25, 2005 (A1), ruling that lead plaintiffs had not pleaded Defendants' scienter with sufficient specificity, and invited Plaintiffs to file a motion under Rule 59(e) to alter that judgment and to seek leave to file a second amended complaint.

On June 13, 2005, Lead Plaintiff Steelworkers Pension Trust, on behalf of the Class, filed a motion pursuant to Fed. R. Civ. P. 59(e) to alter the May 25, 2005 Memorandum Opinion and Order and grant Plaintiffs-Appellants leave to file the second amended complaint they attached to their motion ("Rule 59(e) Motion"). The District Court issued a Memorandum Opinion and Order dated September 23, 2005 ("Rule 59(e) Order"), granting Plaintiffs-Appellants' Rule 59(e) Motion and granting

[5] Co-lead plaintiff the Michigan Funds was comprised of City of Sterling Heights Police & Fire Retirement System, City of St. Clair Shores Police & Fire Retirement System and City of Roseville Employees Retirement System.

Plaintiffs-Appellants leave to file a second amended complaint. (A10) In that Rule 59(e) Order, the District Court specifically held that Plaintiff adequately alleged that defendants "Anderson, del Salto, and Greisch had knowledge of the Brazilian operations' improprieties prior to the March 12, 2004 filing of the 2003 Form 10-K." (A12; *Higginbotham II* at *3) In addition, the District Court found that "Plaintiff has also adequately alleged Parkinson's knowledge prior to the May 10, 2004 filing of the 2004 first quarter Form 10-Q." (A12; *Higginbotham II* at *3) The District Court specifically stated "Plaintiff has adequately alleged scienter as to all Defendants" and sustained the SAC, requiring Defendants to file an answer and requiring a prompt discovery conference between the parties. (A12; *Higginbotham II* at *3) Thereafter, on September 28, 2005, the SAC was filed.

On October 11, 2005, Defendants-Appellees filed a motion for reconsideration under Fed. R. Civ. P. 60(b) of the District Court's Rule 59(e) Order ("Rule 60(b) Motion" or "Motion To Reconsider"). On December 22, 2005, in a reversal of its own prior decision, the District Court granted in part Defendants' Motion To Reconsider and dismissed Plaintiffs' cause of action with prejudice. (A16; *Higginbotham III* at *3) Based on the same allegations in the same SAC that the District Court considered when it held in its September 23, 2005 Rule 59(e) Order that scienter was adequately alleged as to all of the Defendants, the District Court now held less than three months later in its Rule 60(b) Order that Plaintiffs failed to allege facts sufficient to give rise to a strong inference of scienter on the part of Defendants Parkinson and Anderson. (A15; *Higginbotham III* at *2) In addition, the District

Court dismissed Plaintiffs' remaining claim against Greisch and del Salto based on the failure to correct publicly-disclosed material false and misleading information because it found that Plaintiffs did not provide case law supporting their claim.[6] (A 15; *Higginbotham III* at *1)

Judgment was entered on December 27, 2005. (A17) On January 26, 2006, the Plaintiffs-Appellants filed a timely appeal. (A18)

STATEMENT OF FACTS

The SAC identifies, by description, five persons, all of whom worked for Baxter, with knowledge and information concerning the Company's fraud in its Brazilian subsidiary and Defendants' awareness thereof. These confidential sources included:

- a former Baxter executive employed in the Brazil office throughout the Class Period; (JA12; ¶38)
- a former Baxter-Brazil executive employed through the end of the Class Period; (JA16; ¶55)
- a former Baxter executive who worked in the Company's Deerfield, Illinois headquarters; (JA37; ¶99)
- a consultant retained by Baxter to work on issues related to financial controls; and (JA12-13; ¶40)
- a consultant hired to train Baxter's executives on issues related to financial reporting. (JA25; ¶73)

[6] This was the only remaining claim against Greisch and del Salto because, while the District Court's Rule 59(e) Order found that Plaintiffs had adequately alleged Greisch's and del Salto's scienter with respect to false and misleading statements in Baxter's 2003 Form 10-K and 2004 first quarter Form 10-Q, it also held that Plaintiffs had not adequately alleged Greisch's and del Salto's participation in the preparation of those documents. (A12; *Higginbotham II* at *3)

Three of the five confidential witnesses were directly employed by Baxter, two of whom worked during the Class Period. The remaining two were consultants retained by Baxter. Based on the information provided by Plaintiffs' confidential sources and based on numerous other information sources, including Defendants' own admissions, Plaintiffs alleged in the SAC as follows:

Baxter's International Business

Baxter assists health-care professionals and their patients with the treatment of complex medical conditions, including cancer, hemophilia, immune disorders, kidney disease and trauma. (JA6; ¶16) While Baxter's principal executive offices are located in Deerfield, Illinois, it operates as an international conglomerate. The Company generates approximately 50% of its revenues internationally, with Latin America being one of its principal international markets. *Id.*

The Fraud in Baxter's Brazilian Subsidiary

Throughout the Class Period, Defendants repeatedly assured the accuracy of the Company's reported revenues as well as the sufficiency of the Company's internal controls. (JA17-20, 29-33; ¶¶60-62, 83) However, on July 22, 2004, Baxter announced that it had materially inflated its reported revenues and earnings for the prior three years, including the Class Period, and planned to restate its financial results for the years 2001 through 2003 and for the first quarter of 2004, (JA2; ¶2) which it did on August 6, 2004. (JA3; ¶5) Baxter disclosed in that July 22, 2004 announcement that its Brazilian subsidiary had: (i) recorded fictitious sales to

fictitious customers; (ii) recorded fictitious sales to actual customers; (iii) engaged in improper rebate arrangements; (iv) manipulated bids for the sale of blood byproducts to the Brazilian government; and (v) failed to properly provide for bad debts, in violation of Generally Accepted Accounting Principles (GAAP). (JA2, 12; ¶¶ 3, 37)

According to the combined statements of two confidential sources, three high level managers in Baxter's Brazilian subsidiary - Finance Director Robert Vlasak, President Giancarlo Prestinoni, and Sales Manager Nelson Sanches - pulled legitimate sales from future months into preceding months until late 2003 when there were no more future sales left from which to pull. At that point, they created fictitious sales. (JA12-13; ¶¶38-45) The Individual Defendants also maintained inadequate provisions for bad debt as a result of both fictitious sales and illegal kickbacks. (JA12, 14; ¶¶37, 47)

Baxter Rigs The Bidding Process For Blood Products

On April 29, 2004, Baxter's Brazilian subsidiary was accused by the Brazilian Ministry of Justice of being a member of the "Blood Mafia," a cartel that fixed the bidding process to supply blood byproducts to the Brazilian Ministry of Health since the early 1990s. (JA14; ¶¶48-49) According to the Brazilian Interim Minister of Health, this cartel over-billed the Brazilian Government for the purchase of factors 8 and 9, two blood byproducts essential for the coagulation of blood used in treating hemophiliacs that Brazil did not have the technological resources to produce. (JA15; ¶53) On May 19, 2004, one former Baxter employee

was arrested in connection with these charges. (JA14-15; ¶50) On May 26, 2004, the Secretary of Economic Rights of Brazil ordered that a preliminary investigation be launched against Baxter and several other companies. (JA15; ¶54)

Baxter Executives Demand Kickbacks

According to a former Baxter-Brazil executive and the findings of the preliminary investigation conducted by the Company's internal audit team, at least six members of Baxter's management in Brazil were involved in an illegal scheme that required certain Baxter vendors to pay kickbacks on the purchase of Baxter products. (JA16; ¶¶55-58) According to this same confidential witness, three of these executives were overdue on loans Baxter had made to them and continuously granted themselves unwarranted extensions on the repayment of these loans. (JA16; ¶57) At least two Baxter employees were terminated as a result of this fraud. (JA16; ¶55) According to a Baxter consultant, this kickback scheme was uncovered at the end of the first quarter of 2004. (JA17; ¶59)

Defendants Are Informed Of The Brazil Fraud

According to one confidential witness who was a former Baxter executive employed throughout the Class Period, Greisch, who had oversight of the Brazilian operations prior to being promoted to Chief Financial Officer, was informed of the fictitious contracts on a regular basis. (JA12-13; ¶¶38-46) Del Salto, like Greisch, had oversight responsibilities for Brazil and knew of the Brazil fraud. (JA7; ¶18) Del Salto was a member of Baxter's executive management team, and was responsible for managing international markets, specifically including Latin

America. (JA38; ¶100) The District Court held that Plaintiffs had adequately alleged the scienter of Greisch and del Salto prior to both the March 12, 2004 filing of Baxter's 2003 10-K and the May 10, 2004 filing of Baxter's first quarter 2004 10-Q. *See Higginbotham II* at *3 (A12).

According to the same confidential witness, CFO Anderson became aware of these fictitious contracts no later than May 2004. (JA37; ¶99) Indeed, according to a witness retained by Baxter as a consultant on the issue of financial controls, Baxter senior management in the Deerfield headquarters was able to see these fictitious transactions on a "real-time" basis, since the Brazilian transactions were entered into the J.D. Edwards software system. (JA12-13; ¶40)

Furthermore, on June 22, 2004, the Company held an earnings conference call immediately following its announcement that it planned to restate its financial results for the years 2001 through 2003 and for the first quarter of 2004. During that conference call, CEO Parkinson stated that Defendants were notified of the Brazil fraud by an employee in Brazil who either called or sent an email alerting them to the fraud "sometime in the May time frame." (JA28; ¶81) Parkinson also stated that the Board discussed at the May 4, 2004 Board meeting the Company's cash flow and its ability to continue to pay the same level of dividends as prior years. (JA28; ¶81) The Brazil fraud was one of the major factors effecting cash flow that was discussed at that May 4, 2004 Board meeting. (JA27, 29; ¶¶80, 82)

<u>Defendants Admit The Brazilian Fraud Is A Direct Result Of Inadequate Internal Controls</u>

The fraud in Baxter's Brazilian subsidiary, as Baxter itself admitted after an internal investigation conducted by its Audit Committee, was made possible by Baxter's inadequate and ineffective internal controls.(JA11; ¶35) Specifically, the Audit Committee found, and disclosed in Baxter's Form 10-K/A for the year ended December 31, 2003 filed August 6, 2004: (i) "an ineffective control environment maintained by senior management in Brazil, including intentional overrides by senior management in Brazil of internal controls"; (ii) "inadequate revenue recognition controls in Brazil"; (iii) "inadequate controls in Brazil to ensure adherence to generally accepted accounting principles for loss contingencies, including bad debts"; and (iv) "ineffective financial review by management responsible for the Intercontinental region, which includes Latin America." (JA11; ¶35) These issues caused the Company itself to conclude that collectively, they "constitute a material weakness in the company's internal controls over financial reporting." (JA12; ¶36) According to a confidential witness who was a consultant on issues related to financial controls, Baxter did not even begin implementing Sarbanes-Oxley compliance procedures in its Brazilian subsidiary until September 2004, when it retained Deloitte & Touche to oversee the process. (JA21; ¶63)

<u>Defendants Misrepresent The Effectiveness Of Baxter's Internal Controls And The Accuracy Of Its Financial Statements</u>

Defendants gave the market every assurance that the reported revenues in its Class Period SEC filings were correct and that its internal controls were adequate and effective.

On March 12, 2004, the first day of the Class Period, the Company filed its 2003 Form 10-K with the SEC, which was signed by Defendant Anderson. (JA17; ¶60) Although the 2003 10-K specifically touted the growth in Baxter's Latin American sales and purported to disclose all "significant commitments and contingencies," it did not disclose that a large portion of that growth resulted from the fraud in Brazil and failed to disclose material contingencies surrounding the Brazilian fraud. (JA17, 20-21; ¶¶ 60, 63) As the Brazil fraud ultimately forced Baxter to restate its financial statements presented in the 2003 10-K, those financial statements were materially false and misleading and violated a number of GAAP principles. (JA24-25; ¶72)

The 2003 10-K also included a "Report of Management" signed by Anderson that stated that "[m]anagement is responsible for the integrity and accuracy of the consolidated financial statements of Baxter . . .The financial statements have been prepared in accordance with accounting principles generally accepted in the United States of America," and "[t]he monitoring process includes an annual certification of compliance with Baxter's business practice standards by senior managers and thousands of other employees worldwide. . ." (JA17-18; ¶61) Significantly, the "Report of Management" also discussed the Company's system of internal controls, which was supposedly ". . .monitored by a staff of corporate auditors who recommend changes to the system in response to changes in business conditions and operations." (JA18; ¶61)

The 2003 10-K also included a Sarbanes-Oxley certification specifically stating Anderson's responsibility "for establishing and maintaining disclosure controls and procedures." Anderson also certified that he "designed such disclosure controls and procedures . . .to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities . . ." and had "disclosed, based on our most recent evaluation of internal control over financial reporting . . .all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting; and any fraud, whether or not material . . ." (JA19-20; ¶¶ 61-62)

Both the "Report of Management" and Sarbanes-Oxley certification in the 2003 10-K contained numerous false and misleading statements. Baxter did not have a staff of corporate auditors who monitored Brazil and Sarbanes-Oxley compliance was not implemented in Brazil at that time. In fact, according to one confidential witness, Baxter did not begin implementing Sarbanes-Oxley compliance procedures in Brazil until September 2004. (JA20-21; ¶63) In addition, the Brazil fraud shows that Anderson either had not actually evaluated the Company's controls or did not disclose the deficiencies he uncovered as a result of that investigation. (JA20-21; ¶63)

On May 10, 2004, the Company filed its first quarter 2004 Form 10-Q, signed by Anderson. (JA29-33; ¶83) The misrepresentations in the first quarter 2004 10-Q were similar to those in the 2003 10-K. The Company made false statements regarding its increased penetration of products in the Latin American market and

related to improvements in accounts receivable collections by omitting facts regarding the fraud in its Brazil subsidiary. (JA29-32; ¶83) Both Anderson and Parkinson made Sarbanes-Oxley certifications that, given the existence of the Brazil fraud, were not true. (JA29-33; ¶83)

Defendants Sell Their Baxter Stock Before Disclosing The Fraud

In April 2004, within three days of each other, both Anderson and del Salto sold shares of Baxter stock. Both sales of stock were unusual as neither Defendant had previously sold any Baxter stock. Specifically, on April 26, 2004, Anderson sold 44,902 shares of his Baxter stock for $1,458,865.98. (JA27, 38; ¶¶78, 101) Three days later, on April 29, 2004, del Salto sold almost all of his shares (140,000 shares) of Baxter stock for $4,444,890. (JA27,38; ¶¶79, 101)

The Truth Emerges

On July 22, 2004, the first day after the end of the Class Period, Baxter announced its plan to restate its financial results for the years 2001 through 2003 and for the first quarter of 2004, due to the fraud. (JA2; ¶¶2, 4) Defendants were forced to reveal the fraud at this time because PricewaterhouseCoopers LLP ("PwC"), the Company's independent auditor who assisted Baxter in investigating the fraud and the auditor required to review Baxter's second quarter 2004 Form 10-Q, refused to acquiesce to non-disclosure of the fraud in that 10-Q. PwC refused to agree to the continued concealment of the fraud because of GAAP disclosure rules as well as newly enacted Public Company Accounting Oversight Board guidance and SEC guidance. (JA4-5; ¶9)

Baxter Restates Over Three Years Of Financial Results And Its Share Price Drops

As a result of Baxter's July 22, 2004 announcement, shares of Baxter's common stock dropped from a high of $33.04 per share on July 21, 2004 to a low of $28.20 per share on July 22, 2004 on unusually heavy trading volume. (JA5, 35; ¶¶10, 93) As noted by Baxter's management in the August 6, 2004 Restatement, as a result of the restatement, in aggregate, net sales decreased $37 million and net income decreased $33 million over the three year period ended December 31, 2003. For the first quarter of 2004, net income decreased by $2 million. (JA36; ¶94)

SUMMARY OF ARGUMENT

The District Court found certain statements made by Parkinson and Anderson concerning Baxter to be actionable. Nevertheless, the District Court dismissed, pursuant to its Rule 60(b) Order, Plaintiffs § 10(b) claims as to Parkinson and Anderson for failing to plead facts giving rise to a strong inference of scienter. (A15-16; *Higginbotham III* at*2) The District Court erred by failing to consider the SAC's scienter allegations in their totality, by failing to accept as true all of the well-pleaded factual allegations in the SAC, by failing to draw all reasonable inferences in Plaintiffs' favor, and by improperly requiring Plaintiffs, in effect, to plead evidence at the 12(b)(6) stage. All of this is contrary to well-settled standards for evaluating a complaint on a motion to dismiss. *See* Point I below.

The SAC sets forth highly detailed information, including information from five knowledgeable sources, all of whom worked for Baxter as employees or consultants, that gives rise to a strong inference that Parkinson and Anderson (as

well as Greisch and del Salto)[7] knew: that the disclosure controls of Baxter's Brazilian subsidiary were ineffective; that a fraud had occurred at Baxter's Brazilian subsidiary; that the Brazilian subsidiary's sales and revenues were artificially inflated due to that fraud; that certifications filed with Baxter's 2003 10-K and first quarter 2004 form 10-Q regarding the disclosure controls of Baxter's Brazilian subsidiary were false; that Baxter's April 22, 2004 earnings conference call contained material misstatements and omissions; and that Baxter's June 21, 2004 press release stating the Baxter was replacing its CFO omitted material information. In addition, Anderson's sale of Baxter stock was suspicious in both amount and timing and further supports a finding that he acted with scienter. *See* Point II below.

The District Court also erred in dismissing, pursuant to its Rule 60(b) Order, all of Plaintiffs' claims against Defendants based on their failure to correct publicly-disseminated false information. (A15; *Higginbotham III* at *1) Defendants were required to correct publicly-disseminated false information within a reasonable amount of time. Waiting months to disclose the existence of the Company's investigation into the fraud and to correct statements made false by the fraud was an unreasonable amount of time. *See* Point III below.

The District Court held that "Greisch and del Salto cannot be held liable because they are not alleged to have signed the Forms 10-K and 10-Q." (A12;

---

[7] The District Court found that Defendants Greisch and del Salto acted with scienter. (A16; *Higginbotham II* at *3)

Higginbotham II at *3) The District Court further erred. Greisch and del Salto are liable for the false and misleading statements alleged by Plaintiffs under both the group-pleading doctrine and as participants in a fraudulent scheme. *See* Point IV below.

The District Court erred in holding in its Rule 59(e) Order that statements made in an April 22, 2004 earnings conference call would not be considered as a basis for § 10(b) liability. (A11; *Higginbotham II* at *2) Since Plaintiffs alleged the who, what, when, where, and why of the alleged misrepresentations made during this call, claims based on this call should have been sustained. *See* Point V below.

The District Court also erred in holding that Plaintiffs did not sufficiently allege Baxter's scienter (A7-8, 16; *Higginbotham I* at *8-9; *Higginbotham III* at *3) because (1) Plaintiffs did sufficiently allege the scienter of the Individual Defendants and (2) scienter may be found against a corporation even when it is not shown against any one individual. *See* Point VI below.

The District Court committed further error by dismissing Plaintiffs' control person claims (§ 20(a) of the Exchange Act) for failure to plead an underlying violation. (A16; *Higginbotham III* at *3) *See* Point VII below.

The District Court dismissed Plaintiffs' claims pursuant to Defendants' Rule 60(b) Motion. The District Court should not have granted Defendants' Motion To Reconsider because the District Court made no manifest errors of law or fact in granting Plaintiffs' Rule 59(e) Motion. Furthermore, Defendants did not present any newly discovered evidence in making their Motion To Reconsider and any

arguments or evidence presented by Defendants were available during the District Court's original consideration of the Rule 59(e) Motion. *See* Point VIII below.

ARGUMENT

I. THE DISTRICT COURT FAILED TO APPLY THE CORRECT PLEADING STANDARDS WHEN IT DISMISSED THE SAC

A. Standard of Review

The dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) is reviewed *de novo*. *Makor Issues & Rights, Ltd. v. Tellabs, Inc.,* 437 F.3d 588, 594 (7th Cir. 2006) ("We as always review the district court's decision to dismiss under Rule 12(b)(6) *de novo*, as well as its interpretation of the heightened pleading requirements of the PSLRA") (citation omitted); *Barnes v. Briley*, 420 F.3d 673, 677 (7th Cir. 2005) (citing *Williams v. Seniff*, 342 F.3d 774, 781 (7th Cir. 2003) ("We review de novo the district court's grants of summary judgment and motions to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) and draw all favorable inferences in favor of the nonmovant...").

B. The District Court Failed To Comply With The Dictates Of The Supreme Court

A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim [that] would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). On a motion to dismiss, the court must "accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508 n.1 (2002). "[T]he allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416

U.S. 232, 236 (1974); *see also Lee v. City of Chicago*, 330 F.3d 456, 459 (7th Cir. 2003) ("we view the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from those allegations in his or her favor").

These well-settled standards apply with equal force to PSLRA cases. *See No. 84 Employer-Teamster Joint Council Pension Trust Fund v. Am. West Holding Corp.,* 320 F.3d 920, 935 (9th Cir.) ("the District Court failed to accept Plaintiffs' allegations as true and construe them in the light most favorable to Plaintiffs"); *In re Cabletron Sys., Inc.,* 311 F.3d 11, 39 (lst Cir. 2002) ("[defendant] may have done no such thing, but we must take the allegations in the complaint as true"). *See also Pirraglia v. Novell, Inc.,* 339 F.3d 1182, 1188 (10th Cir. 2003):

> Our role at the 12(b)(6) stage is simply to determine whether the plaintiff raises a strong inference of scienter. *We emphasize that this process does not involve a "weighing" of the plaintiff's suggested inference against other inferences*. Faced with two seemingly equally strong inferences, one favoring the plaintiff and one favoring the defendant, it is inappropriate for us to make a determination as to which inference will ultimately prevail, lest we invade the traditional role of the factfinder.

(emphasis added).

II. THE SAC PLEADS FACTS THAT GIVE RISE TO A STRONG INFERENCE THAT PARKINSON AND ANDERSON ACTED WITH SCIENTER

A. The Standards For Pleading Scienter

The PSLRA requires that plaintiffs "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).[8]

In assessing scienter, plaintiffs' allegations must be viewed in their totality. *See Tellabs,* 437 F.3d at 601 ("we conclude that the best approach is for courts to examine all of the allegations in the complaint and then to decide whether collectively they establish such an inference"); *Fla. State Bd. of Admin. v. Green Tree Fin. Corp.,* 270 F.3d 645, 660 (8th Cir. 2001) (securities fraud claim properly stated if allegations collectively add up to a strong inference of the required state of mind); *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1092 (10th Cir. 2003) ("district court must evaluate 'the totality of the pleadings'"). As a recent decision has noted, "the scienter analysis in these types of securities fraud cases is akin to looking at a painting. Though one or two brush strokes may be more powerful up close, to fully appreciate the painting, the viewer must step back to take in the 'big picture.'" *In re Cardinal Health Inc. Sec. Litig.*, 426 F. Supp. 2d 688, 741 (S.D. Ohio 2006).

"The inference of scienter must be reasonable and strong, but need not be irrefutable." *Cabeltron*, 311 F.3d at 38. The Second Circuit, where the "strong

---

[8] A § 10(b) claim requires a showing that the defendant, with scienter, made a representation or omission of material fact in connection with the purchase or sale of a security, and that the plaintiff relied upon the misrepresentation or omission and was damaged thereby. *In re HealthCare Compare Corp. Sec. Litig.*, 75 F.3d 276, 280 (7th Cir. 1996). In this fraud-on-the-market case, reliance is presumed. *See Basic Inc. v. Levinson,* 485 U.S. 224, 245 (1988).

inference" requirement originated, explained that "a plaintiff realistically cannot be expected to plead a defendant's actual state of mind," *Chill v. GE*, 101 F.3d 263, 267 (2d Cir. 1996), and described a strong inference requirement as imposing no more than a "burden of pleading circumstances that provide at least a *minimal* factual basis for their conclusory allegations of scienter." *Id.* (emphasis added).

No particular set of facts is required. *See Kushner v. Beverly Enters.*, 317 F.3d 820, 827 (8th Cir. 2003) ("Congress did not codify any particular methods of satisfying [the scienter]...requirement."); *Helwig v. Vencor, Inc.*, 251 F. 3d 540, 551-52 (6th Cir. 2001) ("we cannot disregard any set of facts as insufficient as a matter of law"). Furthermore, "[s]cienter may be demonstrated by indirect evidence." *Cabletron*, 311 F.3d at 38.

The PSLRA does not require the pleading of evidence. *See, e.g.*, *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 72 (2d Cir. 2001) ("Even with the heightened pleading standard under Rule 9(b) and the Securities Reform Act we do not require the pleading of detailed evidentiary matter in securities litigation."); *Kinder-Morgan*, 340 F.3d at 1101 ("The PSLRA did not...purport to move up the trial to the pleadings stage...if Congress had intended in securities fraud lawsuits to abolish the concept of notice pleading that underlies the Federal Rules...Congress would have done so explicitly.")[9]

---

[9] Because of the automatic stay imposed by the PSLRA, 15 U.S.C. § 78u-4(b)(3), Plaintiffs have had no opportunity to take any discovery. In light of the PSLRA's discovery stay, district courts are cautioned to apply pleading standards flexibly. *See Cabletron*, 311 F.3d at 33 ("the difference in discovery is relevant to a court's evaluation of sufficient

Additionally, reckless disregard for the truth of the matter asserted also suffices to establish scienter under § 10(b). *See SEC v. Jakubowski*, 150 F.3d 675, 681 (7th Cir. 1998) (failure to read a document central to a business transaction was reckless). *Accord, Green Tree*, 270 F.3d at 653-54 ; *Helwig*, 251 F.3d at 548, 550; *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 407-09 (5th Cir. 2001); *Scholastic*, 252 F.3d at 63, 76-77. Such recklessness exists where defendants possessed knowledge of facts or had access to information contradicting their public statements. *See Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

Moreover, a defendant's state of mind is the quintessential question for a jury to answer. *See Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 538 (2d Cir. 1999) (on motion to dismiss securities fraud claim, court stated "'Whether a given intent existed is generally a question of fact' appropriate for resolution by the trier of fact.") *quoting Grandon v. Merrill Lynch & Co.*, 147 F. 3d 184, 194 (2d Cir. 1998); *Tellabs*, 437 F. 3d at 602 ("'Scienter is normally a factual question to be decided by a jury…'") *quoting In re Cerner Corp. Sec. Litig.*, 425 F.3d 1079, 1084-5 (8th Cir. 2005).

---

particularity"). Similarly, courts are cautioned to "apply [Rule 9(b)] with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants." *Rolo v. City Investing Co. Liquidating Trust,* 155 F.3d 644, 658 (3d Cir. 1998). *See also Corley v. Rosewood Care Ctr., Inc.*, 142 F.3d 1041, 1051 (7th Cir. 1998) ("We have noted on a number of occasions that the particularity requirement of Rule 9(b) must be relaxed where the plaintiff lacks access to all facts necessary to detail his claim…."); *Emery v. Am. Gen. Fin. Corp.*, 134 F.3d 1321, 1323 (7th Cir. 1998) ("Rule 9(b) is satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery."); *Craftmatic Sec. Litig. v. Kraftsow*, 890 F.2d 628, 645 (3d Cir. 1989) ("Courts must be sensitive to the fact that application of Rule 9(b) prior to discovery 'may permit sophisticated defrauders to successfully conceal the details of their fraud.'").

In holding that Plaintiffs have not alleged the scienter of Parkinson and Anderson adequately, the District Court erred in failing to accept as true all well-pleaded factual allegations in the SAC; in failing to draw all reasonable inferences in Plaintiffs' favor, instead making factual determination in favor of Defendants (thereby invading the province of the fact finder); in failing to consider Plaintiffs' scienter allegations in their totality; and, in effect, requiring Plaintiffs at the pleading stage to prove their case with evidence.

B. The SAC Makes Particularized Allegations Against Parkinson and Anderson

The SAC particularizes many facts that create a strong inference that Parkinson and Anderson knew or, at a bare minimum, recklessly disregarded the fraud in Baxter's Brazilian subsidiary. First, it must be noted that the five confidential witnesses referred to in the SAC clearly were in positions to know what was known to Defendants. (JA12,13,16,25,37; ¶¶ 38, 40, 55, 73, 99) The sources plainly are "described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." *Novak v. Kasaks*, 216 F.3d 300, 314 (2d Cir. 2000). The sources also corroborate each other and are corroborated by other facts in the SAC. *See also Cabletron*, 311 F.3d at 30 ("In addition, the number of different sources helps the complaint meet the standard. Their consistent accounts reinforce one another and undermine any argument that the complaint relies unduly on the stories of just one or two former employees, possibly disgruntled.") Source

credibility questions -- i.e. "Were such former employees in a position in the company to learn of the facts they claim to know? Are they credible or do they, as former employees, hold a grudge against the company?"-- should not be considered at the pleading stage. *Fitzer v. Security Dynamics Techs.,* 119 F. Supp. 2d 12, 21 (D. Mass. 2000) (where court found statements of 5 unnamed former employees sufficient to sustain plaintiffs' allegations of scienter under Rule 9(b) and the PSLRA at motion to dismiss stage).

Second, courts have repeatedly held that CEO's and CFO's positions and continuous, intimate knowledge of corporate information during the period of the misstatements support a strong inference of scienter. *See, e.g.*, *Stevelman v. Alias Research Inc.*, 174 F.3d 79, 84-85 (2d Cir. 1999) (citing *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 573 (2d Cir. 1982); *In re CINAR Corp. Sec. Litig.*, 186 F. Supp. 2d 279, 316-317 (E.D.N.Y. 2002); *In re American Bank Note Holographics, Inc., Sec. Litig.,* 93 F. Supp. 2d 424, 446-47 (S.D.N.Y. 2000).

1. The Scienter of Parkinson

Parkinson became Chairman of the Board of Directors, Chief Executive Officer, and President of Baxter on April 26, 2004. In that capacity, he signed the Company's May 10, 2004 first quarter Form 10-Q and accompanying Sarbanes-Oxley certification, which stated that he had designed disclosure controls and procedures (or supervised the design); evaluated the effectiveness of such controls and procedures; and disclosed any shortcomings in the procedures and the Company's internal controls. (JA29-33; ¶83) Plaintiffs have alleged that this

statement was false, as there had been no implementation of Sarbanes-Oxley procedures in Baxter-Brazil. (JA33; ¶84)

Parkinson admitted in a July 22, 2004 conference call with stock analysts that he learned of the Brazilian fraud "in the May time frame." (JA28,38; ¶¶ 81, 102) The District Court found, in its Rule 59(e) Order, that Parkinson had "discussed it with the Board at the spring Board meeting, which was on May 4, 2002. Thus, Parkinson would have been aware of the problem prior to his May 10, 2004 certification of the 2004 first quarter Form 10-Q." (A12; *Higginbotham II* at *3) The District Court found that Parkinson had discussed the Brazil fraud at the May 4, 2004 Board meeting by drawing an appropriate inference from Parkinson's statements on the conference call: Parkinson said that he had discussed corporate cash flow with the Board at the Board's May 4, 2004 meeting when considering the Company's dividend policy, and found no reason to alter the Company's dividend policy. (A12; *Higginbotham II* at *3; (JA28-29 ¶¶ 81, 82) Since the fraud necessarily affected corporate cash flow, the Court quite reasonably found that the fraud was reported at the May 4th Board meeting. (A12; *Higginbotham II* at *3)

In the District Court's Rule 60(b) Order of December 22, 2005, the Court inexplicably reversed itself on identical facts, now stating that "[t]he transcript of the public interview does not support the allegation of the SAC and lead plaintiff does not presently contend otherwise."[10] (A15; *Higginbotham III* at *2) The District

[10] The District Court was referring to the July 22, 2004 earnings conference call transcript, which Defendants attached in full to their Rule 60(b) Motion and which is

Court erred for several reasons. First, the District Court improperly decided an issue of fact (whether or not the Brazil fraud was discussed at the May 4, 2004 Board Meeting) and drew inferences in Defendants' favor. The District Court failed to accept Plaintiffs' allegations as true and construe them in the light most favorable to Plaintiffs. *See Williams v. Ramos,* 71 F.3d 1246, 1250 (7th Cir. 1995) (when considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), court must view the complaint in light most favorable to plaintiffs and complaint's well-pleaded factual allegations must be accepted as true). Second, even if new evidence was allowed on a motion to reconsider, there was absolutely no new evidence introduced by Defendants in their Motion To Reconsider regarding this conference call. Indeed, the portion of the call quoted by Defendants in their Rule 60(b) Motion is identical to the portion quoted in the SAC. (Compare Defendants' Rule 60(b) Motion at p. 9 with ¶81, JA28) Third, Plaintiffs did, in fact, "presently contend otherwise," when they argued that the transcript did support the allegations in the SAC. *See* Plaintiffs' Memorandum Of Law In Opposition to Defendants' Motion To Reconsider, pp. 5-6. Thus, there was absolutely no basis for the District Court to reverse its prior decision.

Furthermore, the following additional factual allegations supporting a strong inference of scienter on the part of Parkinson demonstrates clearly that the District Court erred:

---

attached hereto at JA54.

1. Confidential sources who worked at Baxter during the Class Period reported that the financial results of Baxter's Brazilian subsidiary were forwarded to Baxter senior management, which included Defendant Parkinson, on a monthly basis and could be viewed by Defendants on a real-time basis. (JA12-13; ¶¶39, 40)

"One of the classic fact patterns giving rise to a strong inference of scienter is that defendants published statements when they knew facts or *had access to information* suggesting that their public statements were materially inaccurate." *Green Tree*, 270 F.3d at 665 (emphasis added); *see also Novak*, 216 F.3d at 308 (same); *Scholastic*, 252 F. 3d at 76 (defendant "had access to internal corporate documents and reports relating to trade sales and return data, conversed with other officers and employees and attended management and committee meetings"); *Danis v. USN Communs., Inc.*, 73 F. Supp. 2d 923, 939 (N.D. Ill. 1999) ("individual defendants' receipt of [consultant's] report further supports an inference that they had scienter").[11] As the First Circuit observed in *Cabletron* 311 F.3d at 39: "[The complaint] also alleges that many people within the company...received regular information about the SmartSwitch problems which they should have realized contradicted the company's public statements about the rollout of the product." The SAC alleges that Parkinson had access to data regarding Baxter-Brazil (JA38;

---

[11] *See also Chu v. Sabratek Corp.*, 100 F. Supp. 2d 827, 836 (N.D. Ill. 2000) ("based on their positions with the company, the individual defendants had access to inside information that belied the company's public statements"); *Kaufman v. Motorola Inc.*, Civ. No. 95 C 1069, 1999 WL 688780 at *13 (N.D. Ill. Apr. 16, 1999) ("the extensive reporting system [the company] maintained to keep these top officials apprised of company issues...created a genuine issue as to whether these defendants either knew or recklessly disregarded the increased inventory problem").

¶103), data that would have shown a pattern of disproportionately increasing sales and fictitious customers raising red flags. (JA39; ¶103)

2. Baxter was accused on April 29, 2004, by the Brazilian Ministry of Justice, of being a part of a cartel that rigged the bidding of blood byproducts administered by the Brazilian Ministry of Health. (JA14; ¶48) This occurred just after Parkinson assumed his position as CEO, and because of this accusation and the administrative proceeding that soon followed, he knew or recklessly disregarded that Baxter-Brazil's sales and revenues were inflated.

3. The Brazil fraud was discovered by the end of the first quarter of 2004 and, according to a confidential witness, was brought to the attention of Baxter management. (JA17, 25; ¶59, 73) This is prior to or contemporaneous with the March 12 through July 21, 2004 Class Period. Parkinson was the most senior officer at Baxter. The SAC alleges that Parkinson had conversations and connections with other senior officers and attended meetings and received reports through which other Baxter officers, including del Salto and Greisch (with respect to whom the District Court found that Plaintiffs had sufficiently alleged scienter), would have informed him of the Brazilian fraud. (JA38-39, 40; ¶¶103, 104, 108) *See Kinder-Morgan*, 340 F.3d at 1106 ("that [CEO and president] was the most senior executive of the Company is a fact relevant in our weighing of the totality of the [scienter] allegations"); *Dardick v. Zimmerman*,149 F. Supp. 2d 986, 988 (N.D.Ill. 2001) (denying motion to dismiss; noting allegation that, "as the senior officers and

directors of the Company, the Defendants had knowledge of, or recklessly disregarded, the details of the Company's internal affairs").

4. As the SAC particularizes, Parkinson was directly involved in the day-to-day operations of the Company and directly participated in the management of the Company. (JA39-40; ¶106) These allegations of hands-on management support an inference of scienter. *See In re WorldCom, Inc. Sec. Litig.* 294 F. Supp. 2d 392, 416 (S.D.N.Y. 2003) ("hands-on management style" supported strong inference of knowledge); *In re Stratosphere Corp. Sec. Litig.*, 1 F. Supp. 2d 1096, 1118-19 (D. Nev. 1998) (defendant controlled "day to day operations, financing and planning decisions").

5. Parkinson himself stated in the Sarbanes-Oxley certification he signed in the Company's May 10, 2004 first quarter Form 10-Q that he was knowledgeable both of the Company's financial statements and of the Company's internal controls. He further stated that he had personally conducted "our most recent evaluation of internal control over financial reporting," that he disclosed to the audit committee "all significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting" and "any fraud, whether or not material, that involves management or other employees who have a significant role is the registrant's internal control over financial reporting." (JA29-33, 41-42; ¶¶ 83, 110) Thus, Parkinson himself must have known about the Brazilian fraud because he certified the effectiveness of the internal controls under Rule 13a-14 of the Exchange Act and Section 906 of the Sarbanes-Oxley Act of 2002,

which if true would certainly have exposed that fraud. *See In re Lattice Semiconductor Corp. Sec. Litig.,* Civ. No. 04-1255-AA, 2006 WL 538756, at *18 (D. Or. Jan. 3, 2006) ("I conclude that the Sarbanes-Oxley certifications give rise to an inference of *scienter* because they provide evidence either that defendants knew about the improper journal entries and unreported sales credits that led to the over-reporting of revenues (because of the internal controls they said existed) or, alternatively, knew that the controls they attested to were inadequate" because they were overridden.) At the very least, Parkinson was reckless in certifying the effectiveness of Baxter's internal controls without adequate investigation as its Chief Executive Officer making that certification in Baxter's first quarter 2004 Form 10-Q.

2. The Scienter of Anderson

Anderson was Baxter's Chief Financial Officer from February 1998 until June 21, 2004. In that capacity, he signed the Company's March 12, 2004 Form 10-K and its May 10, 2004 first quarter Form 10-Q, both of which contained Sarbanes-Oxley certifications that stated Anderson had designed disclosure controls and procedures (or supervised the design), evaluated the effectiveness of such controls and procedures, and disclosed any shortcomings in those procedures and the Company's internal controls. (JA17-20, 29-33; ¶¶ 61, 62, 83)

The following well-pled factual allegations supporting a strong inference of scienter on the part of Defendant Anderson demonstrate clearly that the District Court erred:

1. Confidential sources who worked at Baxter during the Class Period reported that the financial results of Baxter's Brazilian subsidiary were forwarded to Baxter senior management, which includes Defendant Anderson, on a monthly basis and could be viewed by Defendants on a real-time basis. (JA12-13; ¶¶39, 40) The SAC alleges that Defendant Anderson had access to data regarding Baxter-Brazil (JA38; ¶103), data that would have shown a pattern of sales raising red flags. (JA38; ¶103)

2. Baxter was accused on April 29, 2004 by the Brazilian Ministry of Justice of being a part of a cartel that rigged the bidding of blood byproducts administered by the Brazilian Ministry of Health. (JA14; ¶48) This occurred before Anderson signed and certified Baxter's 2004 10-K and first quarter 2004 Form 10-Q. Thus, he knew or recklessly disregarded that Baxter-Brazil's sales and revenues were not accurate.

3. The Brazil fraud was discovered by the end of the first quarter of 2004 and, according to a confidential witness, brought to the attention of Baxter management. (JA17, 25; ¶¶59, 73) Anderson was Baxter's most senior financial officer and was "responsible for all finance functions, supply chain and information technology." (JA17-18; ¶61) The SAC alleges that Anderson had conversations and connections with other senior officers and attended meetings and received reports through which other Baxter officers, including del Salto and Greisch (with respect to whom the District Court found that Plaintiffs had sufficiently alleged scienter), would have informed him of the Brazilian fraud. (JA38-39, 40; ¶¶103, 104, 108)

4. As the SAC particularizes, Anderson was directly involved in the day-to-day operations of the Company and directly participated in the management of the Company. (JA39-40; ¶106) These allegations of hands-on management support an inference of scienter.

5. In the Company's 2003 10-K and first quarter 2004 Form 10-Q, Anderson himself certified the Company's internal controls. (JA18-20, 29-33, 41-42; ¶¶62, 83, 110) Thus, Anderson himself knew or should have known about the Brazilian fraud because he certified the effectiveness of the internal controls under Rule 13a-14 of the Exchange Act and Section 906 of the Sarbanes-Oxley Act of 2002, which, if true, would certainly have exposed that fraud.

6. One confidential witness who was retained by Baxter as a consultant on financial controls (JA12; ¶39) asserted that Anderson had been informed of the fictitious contracts in Brazil by May 2004. (JA13; ¶46)

3. The Sale of Baxter Stock by Anderson Further Supports a Strong Inference That He Acted With Scienter

Unusual or suspicious stock sales by corporate officers may constitute circumstantial evidence of scienter. *Johnson v. Tellabs, Inc.*, 262 F. Supp. 2d 937, 955 -956 (N.D. Ill. 2003) (same); *see also No. 84 Employer-Teamster Pension Trust Fund*, 320 F.3d at 938 ("'unusual' or 'suspicious' stock sales by corporate insiders may constitute circumstantial evidence of scienter"); *In re Rockefeller Ctr. Props., Sec. Litig.*, 311 F.3d 198, 225 (3d Cir. 2002) ("if the stock sales were unusual in scope or timing, they may support an inference of scienter"); *In re K-tel Int'l, Inc.*

Sec. Litig., 300 F.3d 881, 907 (8th Cir. 2002) (same); *In re Nike, Inc. Sec. Litig*. 181 F. Supp. 2d 1160, 1169 (D. Or. 2002) (same).[12]

To determine whether the insider trading allegations rise to this level of unusual or suspicious, the amount and percentage of overall shares sold, the profit made, the timing of the stock sales and the consistency of the sales with the insider's prior trading history can be considered by the Court. *See Green Tree*, 270 F.3d at 659 ("the insider trades have to be 'unusual,' either in the amount of profit made, the amount of stock traded, the portion of stockholdings sold, or the number of insiders involved"); *Oran v. Stafford,* 226 F.3d 275, 290 (3d Cir. 2000) (same). Under this analysis, Anderson's insider trading is both unusual and suspicious.

a. Anderson's Sale Is Suspicious In Timing

On March 9, 2004, Anderson filed a Form 144 Notice with the SEC that he planned to sell 44,902 shares of Baxter common stock. (JA78) Thus, Anderson decided to sell a significant number of Baxter shares at around the same time Plaintiffs have alleged he learned of the Brazil fraud. (JA25;¶ 73) This makes his sale suspicious in timing. *See Selbst v. McDonald's Corp*., Civ. No. 04 C 2422, 2005

---

[12] There is no requirement of company or insider stock sales to sustain a §10(b) violation. *See SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 860 (2d Cir. 1968) (en banc) ("There is no indication that Congress intended that the corporations or persons responsible for the issuance of a misleading statement would not violate [§ 10(b)] unless they engaged in related securities transactions...indeed, the obvious purposes of the Act to protect the investing public and to secure fair dealing in the securities markets would be seriously undermined by applying such a gloss onto the legislative language."); *see also McGann v. Ernst & Young*, 102 F.3d 390, 396 (9th Cir. 1996) ("a party that introduces fraudulent information into the securities market does no less damage to the public because that party did not trade stocks); *Green Tree,* 270 F.3d at 663 (lack of insider selling does not negate other allegations showing scienter).

WL 2319936, *19 (N.D. Ill. Sept. 21, 2005) (defendants' pleading burden for scienter met by alleging, *inter alia*, that defendants sold the company's stock "at a suspicious time or in an unusual amount") quoting *In re Kindred Healthcare, Inc. Sec. Litig.,* 299 F. Supp. 2d 724, 739-40 (W.D. Ky. 2004).

Furthermore, SEC Rule 144(h), 17 C.F.R. § 230.144(h), states that "[t]he Form 144 shall be signed by the person for whose account the securities are to be sold and shall be transmitted for filing concurrently with either the placing with a broker of an order to execute a sale of securities in reliance upon this rule or the execution directly with a market maker of such a sale." Thus, when Anderson filed his Form 144 on March 9, 2004, at the same time he necessarily placed an order to sell the securities on April 26, 2004, which is the date Anderson actually sold 44,902 shares of Baxter common stock for over $1.45 million. Given that he knew Baxter's first quarter earnings were to be announced mid-April, that those earnings were artificially inflated due to the Brazil fraud, and that Baxter's stock price was likely to drop after that fraud was revealed, Anderson's selection of the April 26, 2004 sale date further casts suspicion on the timing of his sale of Baxter stock and further supports an inference of scienter. Anderson's sale was timed so that he sold at the high Baxter stock price that was artificially inflated as a result of the fraud, and before the fraud was revealed. This is a highly plausible inference based on the facts as alleged. *See Tellabs, Inc.*, 437 F.3d at 602 (although Sixth Circuit found that the "strong inference" requirement creates a situation in which plaintiffs are only entitled to the most plausible of competing inferences when a court evaluates

their scienter allegations, the Seventh Circuit disagreed, stating that it "will allow the complaint to survive if it alleges facts from which, if true, a reasonable person could infer that the defendant acted with the required intent.")

Anderson's sale of Baxter stock was very close in time to the date of del Salto's sale of 140,000 shares of Baxter stock on April 29, 2004. (JA27;¶ 78) Given that the District Court found Plaintiffs had sufficiently alleged del Salto's scienter based, in part, on del Salto's sale of Baxter stock, (A12, *Higginbotham II* at *3), the proximity of Anderson's sale to del Salto's sale further supports a finding that the timing of Anderson's sale was suspicious and coordinated.

In addition, according to the Form 4 filed by Anderson on April 27, 2004 to report his April 26, 2004 sale of Baxter stock (JA80), Anderson immediately sold stock he received upon the exercise of options due to expire June 15, 2004. The timing of the sale in relation to Baxter's first quarter 2004 financial results and the impending expiration date further supports an inference of scienter. Anderson timed his options exercise and corresponding sale to take advantage of Baxter's stock price that was artificially inflated as a result of the Brazil fraud and Baxter's first quarter 2004 financial results containing inflated sales that were released just four days prior to Anderson's exercise and sale.

Furthermore, because the options' expiration date was fast-approaching at the time Plaintiffs have alleged Anderson learned of the fraud, Anderson had the incentive to, and did, withhold the truth regarding the Brazil fraud until after he exercised his options and sold his shares. *See In re Daou Systems, Inc. Sec. Litig.*,

411 F.3d 1006, 1022-23 (9th Cir. 2005) ("At a minimum, however, 'the trading must be in a context where defendants have incentives to withhold material, non-public information, and it must be unusual, well beyond the normal patterns of trading by those defendants.'") quoting *Greebel v. FTP Software, Inc.*, 194 F.3d 185, 1983 (1st Cir. 1999).

Defendants have argued that it may be inferred from the SAC that Anderson exercised his options and sold his Baxter stock because he anticipated, after Baxter CEO Harry M. Kraemer, Jr. announced his resignation on January 26, 2004, that he would be terminated by Mr. Kraemer's successor. *See* Defendants' Memorandum Of Law In Support Of Their Motion For Reconsideration at p. 15. This argument has no merit. First, a terminated employee can still retain his option shares. Second, this highly speculative conjecture is clearly insufficient to defeat a finding that Plaintiffs have sufficiently alleged Anderson's scienter to survive a motion to dismiss given the 7th Circuit's scienter standard. *See* Section II.A above. Third, any argument that Anderson sold his Baxter shares for personal reasons must be rejected. In fact, this argument actually supports a finding that Plaintiffs have adequately alleged Anderson's scienter because it raises the inference that Anderson withheld the truth regarding the Baxter fraud until after he exercised his options and sold his shares. *See Kaplan v. Rose*, 49 F.3d 1363, 1380 (9th Cir. 1994) (CEO's and President's explanations in selling company stock "to reap financial benefits for personal reasons - merely beg the question of whether they acted on the basis of undisclosed inside information in order to reap large returns.")

b. Anderson's Sale Is Suspicious In Amount

The amount of Baxter stock sold by Anderson (44,902 shares sold for proceeds totaling $1,458,865.98) is further evidence that he acted with scienter. *See e.g.*, *Cabletron*, 311 F.3d at 27-40-41 (sales of $474,000, $1,600,000, $797,000 and $218,000 deemed significant); *Rubinstein v. Collins*, 20 F.3d 160, 169 (5th Cir. 1994) (sales of $760,000); *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. 133, 140 (S.D.N.Y. 1999) ($1.7 million profit for one defendant and $621,000 for another); *In re MTC Elec. Techs. Shareholders Litig.*, 898 F. Supp. 974, 980 (E.D.N.Y. 1995) (one defendant sold 8,000 shares for $173,000 profit); *In re 3COM Sec. Litig.*, 761 F. Supp. 1411, 1417 (N.D. Cal. 1990) ($2 million of trades); *In re Qwest Communs. Int'l, Inc. Sec. Litig.*, 396 F. Supp. 2d 1178, 1196 (D. Colo. 2004) ("$410,000 is a substantial sum, and reasonably can be seen as a significant gain from the alleged deception").

In addition, Anderson had not, in preceding years, sold any Baxter stock. (JA 2,7; ¶78) This further supports a finding that Anderson's sale was suspicious in amount and in timing. *See No. 84 Employer-Teamster Joint Council Pension Trust Fund* , 320 F.3d at 938 (9th Cir. 2003) (consistency of the sales with the insider's prior trading history to be considered by the Court).

III. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' § 10(b) CLAIMS BASED ON DEFENDANTS' FAILURE TO CORRECT FALSE INFORMATION

The District Court erred in dismissing, pursuant to its Rule 60(b) Order, all of Plaintiffs' claims against Defendants based on their failure to correct publicly-

disseminated false information. Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 require issuers of registered securities to file with the SEC annual and quarterly reports, and under Rule 12b-20, Defendants had a duty to correct any misstatements or omissions contained in those reports as necessary to ensure that they were not misleading. *See* 15 U.S.C. § 78m(a); 17 C.F.R. §§ 240.12b-20[13], 240.13a-1, 240.13a. The duty to correct "applies when a company makes a historical statement that, at the time made, the company believes to be true, but as revealed by subsequently discovered information, actually was not. The company then must correct the prior statement within a reasonable time." *Wafra Leasing Corp., 1999-A-1 v. Prime Capital Corp.*, 247 F. Supp. 2d 987, 996 (N.D. Ill. 2002) quoting *Stransky v. Cummins Engine Co.,* 51 F.3d 1329, 1332 (7th Cir. 1995). *See also SEC v. Hopper*, Civ. No. H 04 1054, 2006 WL 778640, *15 (S.D. Tex. Mar. 24, 2006) ("under Rule 12b-20, CMS and Reliant had a duty to correct any misstatements or omissions contained in the reports as necessary to ensure that they are not misleading"); *In re Bristol-Myers Squibb Sec. Litig.*, 312 F. Supp. 2d 549, *560 (S.D.N.Y. 2004) ("A duty to correct arises when a party makes a material statement it believes to be true but subsequent events prove otherwise.")

Plaintiffs have alleged that Defendants knew of the Brazil fraud as early as

---

[13]17 C.F.R. § 240.12b-20 (1996) reads as follows:
Additional information.
In addition to the information expressly required to be included in a statement or report, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading.

the beginning of March 2004, prior to the March 12, 2004 filing date of Baxter's 2002 10-K. (JA25;¶73) Defendants did not disclose the fraud until over four months later. According to Baxter's July 22, 2004 press release, Defendants undertook an internal investigation upon learning of the fraud. (Defendants' Rule 60(b) Motion at 11). Although the parties may dispute exactly when Defendants learned of the fraud (a dispute incapable of resolution on a motion to dismiss), Defendants had a duty, upon learning of the fraud, to promptly correct the material misstatements in the Company's 2003 10-K and first quarter 2004 10-Q made false and misleading by the fraud. *See In re WorldCom, Inc. Sec. Litig.*, Civ. No. 03 Civ. 1985, 2006 WL 1047130, *3 -4 (S.D.N.Y. Apr. 21, 2006) (Audit Committee announced a massive restatement of *WorldCom's* financial statements just six days after learning of fraud, and also advised the public at that time of its ongoing investigation). Waiting months to disclose the existence of the Company's investigation into the fraud and to correct statements made false by the fraud was an unreasonable amount of time. *Cf. Coble v. Broadvision Inc.*, Civ. No. 01-01969, 2002 WL 31093589, *7 -8 (N.D. Cal. Sept. 11, 2002) (where plaintiffs alleged that defendants had a duty to correct statements as soon as they learned about erroneously excluded expenses, court found no unreasonable delay in correcting statements when defendants corrected one business day later).

IV. THE DISTRICT COURT ERRED IN HOLDING THAT GREISCH AND DEL SALTO COULD NOT BE LIABLE UNDER § 10(b) BECAUSE THEY ARE NOT ALLEGED TO HAVE SIGNED THE FORMS 10-K AND 10-Q

The District Court held that "Greisch and del Salto cannot be held liable because they are not alleged to have signed the Forms 10-K and 10-Q." (A12; *Higginbotham II* at *3) The District Court erred.

A. Greisch And del Salto Are Liable Under The Group Pleading Doctrine

First, the SAC satisfies the requirements of Rule 9(b) particularity since Greisch and del Salto are liable for the statements Defendants made in the 2003 10-K and first quarter 2004 10-Q under the group pleading doctrine. Courts recognize the applicability of the group-published information (or group pleading) doctrine whereby group-published documents such as annual reports, press releases and SEC filings are presumed to involve the collective actions of corporate directors or officers. *See Danis,* 73 F. Supp. 2d at 939 n. 9 (concluding that group pleading continues after the PSLRA); *but cf. Chu,* 100 F. Supp. 2d at 835-37 (concluding that it does not); *see also In re Qwest Communs. Int'l, Inc. Sec. Litig.,* 387 F. Supp. 2d 1145 (D. Colo. 2005) ("However, I conclude that the group publication doctrine was not abrogated by the PSLRA."); *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1242, 1260 (N.D. Okla. 2003) ("the Court finds that the group pleading doctrine survived the enactment of the PSLRA"); *In re Sprint Corp. Sec. Litig.,* 232 F. Supp. 2d 1193 (D. Kan. 2002) (applying group pleading to a statement by a Sprint spokesperson);

Schaffer v. Evolving Sys., Inc., 29 F. Supp. 2d 1213, 1225 (D. Colo. 1998) (finding group-published information doctrine applies to cases governed by the PSLRA).[14]

Under the group pleading doctrine, plaintiffs may rely on a presumption that statements in company documents (prospectuses, registration statements, annual reports, press releases) and other group-published information are the work of the company's officers and directors. *See Schwartz v. Celestial Seasonings, Inc.,* 124 F.3d 1246, 1254 (10th Cir. 1997) ("Identifying the individual sources of statements is unnecessary when the fraud allegations arise from misstatements or omissions in group-published documents such as annual reports, which presumably involve collective actions of corporate directors or officers.") *In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 219 (S.D.N.Y. 1999) (group pleading doctrine permits plaintiffs "to allege that misstatements contained in company documents may be presumed to be the work of the company's officers and directors"); *see also Goldin Associates, L.L.C. v. Donaldson, Lufkin & Jenrette Sec.*, Civ. No. 00 C 8688, 2003 WL 22218643, at *5 (S.D.N.Y. Sept. 25, 2003) ("[t]he group pleading doctrine is limited to individuals, usually officers or directors, of the company furnishing a group-published document.")

Such statements are also presumed to be the collective work of those individuals with direct involvement in the everyday business of the company. *See In re Bayer AG Sec. Litig.*, Civ. No. 03 Civ. 1546, 2004 WL 2190357, at *15

---

[14] Plaintiffs carefully pled the separate scienter of each Individual Defendant. *See Tellabs, Inc.*, 437 F.3d at 602 (finding no group pleading for purposes of alleging scienter).

(S.D.N.Y. Sept. 30, 2004); *In re Solv-Ex Corp. Sec. Litig.*, 210 F. Supp. 2d 276, 283 (S.D.N.Y. 2000); *Polar Int'l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225, 237 (S.D.N.Y. 2000) (quoting *In re Oxford Health Plans, Inc. Sec. Litig.*, 187 F.R.D. at 142.

Thus, the identification of the individual sources of statements is unnecessary when the fraud allegations arise from misstatements or omissions in group-published documents that reflect the collective actions of officers, directors or various individuals directly involved in the day-to-day affairs of the corporation. *See Celestial Seasonings*, 124 F.3d at 1254; *DiVittorio v. Equidyne Extractive Indus.*, 822 F.2d 1242, 1247 (2d Cir. 1987) ("[N]o specific connection between fraudulent representations in [a published company document] is necessary where defendants are insiders or affiliates of the company…") (citations and quotations omitted).

Here, each of the alleged misrepresentations were contained in group published documents. (JA17-25, 29-33, 39; ¶¶60-72; 83-84, 86, 105) Greisch and del Salto were high-level officers of Baxter with direct involvement in the everyday business of the Company, including oversight of Baxter-Brazil. (JA39, 41; ¶¶ 104, 106, 109) As such, they are liable under the group-pleading doctrine for the false and misleading statements in Baxter's SEC filings and press releases.

B. Greisch And del Salto Engaged In A Scheme To Defraud

Second, these Defendants are liable for engaging in and employing an unlawful scheme designed to dupe the investing public into believing that Baxter's

financials were accurate and its internal controls were effective when they were not. (JA42-43;¶¶ 111-113)[15]

In numerous cases, courts have held that a defendant may be liable under § 10(b) for participating in an unlawful and deceptive scheme, course of business, or device in connection with the sale of securities. *See, e.g., SEC v. Zandford*, 535 U.S. 813, 819-820 (2002) (reversing dismissal of a § 10(b) complaint against a stock broker for "fraudulent conduct" in selling his customer's securities, the Court emphasized that "neither the SEC nor this Court has ever held that there must be a misrepresentation about the value of a particular security in order to run afoul of the Act." Instead, liability may be premised on any fraudulent conduct "in connection with the purchase or sale of any security."); *Foss ex rel. Estate of Koth v. Bear, Stearns & Co., Inc.*, Civ. No. 03 C 8338, 2004 WL 2008863, *3 (N.D. Ill. May 14, 2004) (claim of manipulative conduct under Rule 10b-5(c) does not require proof of material misrepresentations or omissions); *SEC v. U.S. Envtl., Inc.*, 155 F.3d 107, 112 (2d Cir. 1998) (SEC successfully pled a primary violation of §10(b) by a secondary actor who "participated in the fraudulent scheme" by committing a "manipulative act," namely, the execution of manipulative stock trades).

---

[15] *See* 15 U.S.C. §78j ("It shall be unlawful for any person, directly or indirectly ... (b) To use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may proscribe ..."); 17 C.F.R. §240.10b-5 ("It shall be unlawful for any person ... (a) to employ any device, scheme or artifice to defraud, ... or (c) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.")

According to settled Supreme Court precedent, "[w]hile subsection (b) of Rule 10b-5 provides a cause of action based on the 'making of an untrue statement of a material fact and the omission to state a material fact,' subsections (a) and (c) 'are not so restricted' and allow suit against defendants who, with scienter, participated in a 'course of business' or a 'device, scheme or artifice that operated as a fraud' on sellers or purchasers of stock even if these defendants did not make a materially false or misleading statement or omission." *In re Enron Corp. Sec. Derivative & ERISA Litig.*, 235 F. Supp. 2d 549, 577 (S.D. Tex. 2002) quoting *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 152-53 (1972); *see also United States v. O'Hagan*, 521 U.S. 642, 664 (1997) (holding that Section 10(b) does not require a defendant to speak). Thus, "[i]f a plaintiff meets the requirements of pleading primary liability as to each defendant, *i.e.*, alleges with factual specificity (1) that each defendant made a material misstatement (or omission) *or committed a manipulative or deceptive act in furtherance of the alleged scheme to defraud*, (2) scienter, and (3) reliance, that plaintiff can plead a scheme to defraud and still satisfy *Central Bank*." *Enron*, 235 F. Supp. 2d at 592 (emphasis added). Here, the SAC sufficiently alleges an unlawful scheme and a systematic fraud at Baxter. (JA42-43, 44-45, 46; ¶¶ 111-113, 118-120, 122) Greisch and del Salto participated in that scheme by making false and misleading statements and by failing to correct false statements made by Defendants.

V. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS BASED ON THE APRIL 22, 2004 CONFERENCE CALL

The District Court held in its Rule 59(e) Order that statements made in the April 22, 2004 conference call would not be considered as a basis for liability because Plaintiffs did not allege in the SAC "who participated in this conference call, nor even any general allegation that the statements were made public" and, thus, failed to meet the specificity requirement of Rule 9(b). (A11; *Higginbotham II* at *2)[16] The District Court erred. A complaint satisfies the standard for pleading securities fraud if it alleges the who, what, when, where, and why of the alleged misrepresentations. *Blau v. Harrison*, Civ. No. 04 C 6592, 2006 WL 850959, *4 (N.D. Ill. Mar. 24, 2006) (same) citing *DiLeo v. Ernst & Young,* 901 F.2d 624, 627 (7th Cir. 1990). Plaintiffs did just that. Plaintiffs alleged: who, by identifying Defendant Anderson as the speaker (JA26;¶75); what, by listing the statements alleged to be false and misleading (JA26; ¶76); when, by alleging the date of the call (JA26; ¶75); where, by alleging a conference call and by giving sufficient facts regarding the subject matter of the call to indicate that it was an earnings conference call with analysts (JA26; ¶76); and why, by stating why those statements were false and misleading (JA26; ¶77) Thus, Plaintiffs sufficiently alleged the April 22, 2004 conference call as a basis for § 10(b) liability in accordance with Rule 9(b).

VI. THE DISTRICT COURT ERRED IN DISMISSING PLAINTIFFS' CLAIMS AGAINST BAXTER

---

[16] Plaintiffs also alleged that the June 21, 2004 Baxter press release was also false and misleading. (JA34; ¶¶87-88) The District Court did not dismiss claims based on that press release for failure to meet the specificity requirement of Rule 9(b).

The District Court also erred in holding that Plaintiffs did not allege Baxter's scienter because they did not sufficiently allege that any Individual Defendant had the requisite scienter. (A7-8;*Higginbotham I* at *8-9; A16; *Higginbotham III* at *3); First, as has been shown above,(and as the District Court found with respect to Defendants Greisch and del Salto) Plaintiffs did sufficiently allege the scienter of each of the Individual Defendants.

Second, there is absolutely nothing in § 10(b), Rule 10b-5, or the PSLRA that supports the District Court's analysis. Scienter may be found against a corporation even when it is not shown against any one individual:

> The general rule is that the knowledge of a director, officer, sole shareholder or controlling person is imputable to the corporation...This direct corporate liability under the securities laws can exist even when directors and officers are not personally liable for the conduct which gave rise to the direct corporate liability....Similarly, the corporation's collective knowledge of various facts, as evidenced by the collective knowledge of all of its directors, officers and employees, may satisfy the scienter requirement under Section 10(b) of the Securities and Exchange Act, whereas the knowledge of any one director, officer or employee would not satisfy that scienter requirement. *A corporation's knowledge need not be possessed by a single officer or agent; the cumulative knowledge of all of its agents will be imputed to the corporation.*

2-21 *Knepper & Bailey, Liability of Corporate Officers and Directors*, § 21.02 (7th ed. 2003). (emphasis added) *See also Caterpillar v. Great Am. Ins. Co.*, 62 F.3d 955, 962 (7th Cir. 1995) ("there are conceivable situations where the individual actors would not be liable but their corporate employer would be, for example where a case

depends on the collective scienter of its employees or where defenses are available to individuals but not the corporation"); *United States v. Bank of New England N.A.*, 821 F.2d 844, 856 (1st Cir. 1987) ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge of a particular operation."). Plaintiffs have certainly alleged the scienter of other Baxter employees in addition to the Individual Defendants. (JA12-13; ¶¶38-45)

Even assuming that an individual must be shown to have culpable knowledge to hold the corporation liable, there is no requirement that the person with such culpable knowledge be a named defendant. It is enough that any director or officer possessed the requisite knowledge.[17] *See, e.g., United States v. One Parcel of Land*, 965 F.2d 311, 316 (7th Cir. 1992) ("a corporation 'knows' through its agents"); *United States v. Josleyn*, 206 F.3d 144, 159 (lst Cir. 2000) ("we clarify that there is no requirement that a person be a 'central figure' at a company in order for that person's knowledge to be imputed to the company")'; *Comprehensive Care Corp. v. RehabCare Corp.*, 98 F.3d 1063, 1066 (8th Cir. 1996) ("Knowledge obtained by a corporation's key employees, officers, and directors, obtained in the course of their duties, is generally imputed to the corporation."); *Holmes v. Baker*, 166 F. Supp. 2d

---

[17] Plaintiffs have sufficiently alleged the scienter of the named Individual Defendants. Other Baxter directors and officers with knowledge can only be identified through discovery. *See Emery*, 134 F.3d at 1323 ("Rule 9(b) is satisfied by a showing that further particulars of the alleged fraud could not have been obtained without discovery.")

1362, 1376 (S.D. Fla. 2001) ("The scienter of a corporation's officers may be imputed to the corporation itself under general agency and corporate law principles.").

VII. THE DISTRICT COURT ERRED IN DISMISSING THE SECTION 20(a) CONTROL PERSON CLAIMS

The District Court dismissed the claims for control person liability under § 20(a) of the Exchange Act against the Individual Defendants solely on the basis that Plaintiffs failed to allege properly an underlying securities violation by the controlled person, Baxter. (A16; *Higginbotham III* at *3) Yet, as demonstrated above, Plaintiffs have stated actionable underlying claims against Baxter as a primary violator of § 10(b) and Rule 10b-5. Thus, the control person claims against the Individual Defendants should not have been dismissed.

VIII. THE DISTRICT COURT ERRED WHEN IT GRANTED DEFENDANTS' MOTION TO RECONSIDER

A. Standard Of Review

The standard of review of a district court's ruling on a motion to reconsider is whether the district court abused its discretion. *Caraker v. Sandoz Pharms. Corp.*, 172 F. Supp. 2d 1018, 1024 (S.D. Ill. 2001). An appellate court will find an abuse of discretion if it determines that "no reasonable person could agree with the district court." *Nelson v. City Colleges of Chicago*, 962 F.2d 754, 755 (7th Cir. 1992).

B. Defendants Did Not Present Any New Evidence In Their Motion To Reconsider

The District Court abused its discretion when it granted Defendants' Rule 60(b) motion to reconsider the District Court's September 23, 2005 Rule 59(e) Order.[18]

In *Caraker,* 172 F. Supp. 2d at 1044, the court stated:

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence...Belated factual or legal attacks are viewed with great suspicion, and intentionally withholding essential facts for later use on reconsideration is flatly prohibited. Reconsideration is not an appropriate forum for rehashing previously rejected arguments or arguing matters that could have been heard during the pendency of the previous motion. *Id.* at 1269-70 (citations and internal quotations and brackets omitted).

Id. at 1024 (reconsideration of a decision that denied a motion for summary judgment was not warranted based on claims of new law or new facts) (citation omitted); *see also Caisse Nationale de Credit Agricole v. CBI Indus., Inc.*, 90 F.3d 1264 (7th Cir. 1996) (district court's denial of motion for reconsideration upheld where corporation sought on motion to reconsider to introduce new evidence that could have been adduced earlier and previously omitted evidence); *Worlds v. Nat'l RR Passenger Corp.*, Civ. No. 90 C 0643, 1990 WL 84519, at *1 (N.D. Ill. May 7,

[18] Defendants' Motion To Reconsider was brought pursuant to Fed. R. Civ. Proc. 60(b). While Defendants did not specifically cite to Rule 60(b) in their Motion To Reconsider, "the fact that... [the motion to reconsider] challenges the merits of the district court's decision means that it must fall under either Rule 59(e) or Rule 60(b)." *United States v. Deutsch,* 981 F.2d 299, 300 (7th Cir. 1993). If a motion to reconsider is served within ten days of the judgment, it is considered to have been filed pursuant to Rule 59(e); however, if the motion is served after ten days, it is considered a Rule 60(b) motion. *Id.* at 300. Here, the Court entered its Order on Plaintiffs' Rule 59(e) Motion on September 23, 2005. Defendants did not serve their Motion To Reconsider until October 25, 2005, more than thirty days later. Thus, it is considered to have been filed pursuant to Rule 60(b).

1990) ("A motion to reconsider is available to correct manifest errors of law and fact or to present newly discovered evidence.") (citing *Publishers Resource Inc. v. Walker-David Publications, Inc.*, 762 F.2d 557, 561 (7th Cir. 1985)); *State Bank of India v. Commercial Steel Corp.*, Civ. No. 97 C 1150, 2001 WL 423001, at *2 (N.D. Ill. Apr. 24, 2001) (motion to reconsider available where there is a controlling or significant change in the law or facts since the submission of the issue to the court).

A motion to reconsider is not be used to introduce evidence that was available during consideration of the original motion, nor to introduce new legal theories. *See Calderon v. Reno*, 56 F. Supp. 2d 997, 998 (N.D. Ill. 1999) (citing *Publishers Resource*, 762 F.2d at 561) ("The motion [to reconsider] is proper where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension.") quoting *Bank of Waunakee v. Rochester Cheese Sales, Inc.* 906 F.2d 1185, 1191 (7th Cir. 1990).

Here, Defendants did not present any newly discovered evidence in making their Rule 60(b) Motion. Indeed, any evidence presented by Defendants on their Rule 60(b) Motion was available during the original consideration of the Rule 59(e) Motion. For example, Defendants submitted with their Motion To Reconsider a copy of the transcript of Defendants' July 22, 2004 earnings conference call, in support of their argument that Plaintiffs did not sufficiently allege the scienter of Defendant Parkinson. This argument and the document used to support it should not have been considered by the District Court in the context of the Motion To

Reconsider because this transcript was not newly discovered evidence. This transcript clearly was a matter of public record that was accessible when Defendants submitted their opposition to Plaintiffs' Rule 59(e) Motion. *See, e.g.*, *Caisse Nationale*, 90 F.3d at 1269 (on motion for reconsideration, movant must show "not only that this evidence was newly discovered or unknown to it until after the hearing, but also that it could not with reasonable diligence have discovered and produced such evidence [during the pendency of the motion]") (internal quotations and citations omitted). In fact, Defendants had previously attacked Plaintiffs' scienter argument based on this same transcript and even quoted from that transcript. *See* Defendants' Memorandum Of Law In Opposition To Plaintiffs' Rule 59(e) Motion, p. 14. Defendants had every opportunity at that time to make all of their arguments regarding that transcript but failed to do so. The District Court should not have allowed Defendants a second bite at the apple merely because the first bite they took wasn't big enough.

C. The District Court Should Not Have Considered Any New Arguments Made By Defendants In Their Motion To Reconsider

The District Court also reconsidered in its Rule 60(b) Order its prior ruling that Plaintiffs had sufficiently pled the scienter of Anderson, and reversed itself. (A 16; *Higginbotham III* at *3) In doing so, the District Court improperly considered new arguments regarding the timing of Anderson's stock sales in relation to Baxter's filing its 2003 Form 10-K and the expiration date of Anderson's stock options. These arguments were not based on any new evidence and most certainly

could have and should have been made by Defendants in responding to Plaintiffs' Rule 59(e) Motion. (A15; *Higginbotham III* at *2)

In addition, in their Rule 60(b) Motion, Defendants raised a new argument that Plaintiffs' allegations regarding Defendants failure to correct false information disseminated by others at Baxter were insufficient. Defendants presented no newly discovered evidence or facts in making this argument. In fact, they had all the same facts and evidence at their disposal when opposing Plaintiffs' Rule 59(e) Motion and were required to have made their argument at that time. As such, their argument regarding Plaintiffs' 10(b) claim for failure to correct should not have been considered on a motion to reconsider. The District Court itself stated that Defendants' arguments "could have and should have been presented when opposing the Rule 59(e) motion." (A14; *Higginbotham III* at *1)

D. Defendants Already Argued Amendment Futility When Opposing Plaintiffs' Rule 59(e) Motion

Defendants argued their opposition to Plaintiffs' Rule 59(e) Motion in a 15 page brief that included five pages under the heading "...It Is Apparent that Amendment Would Be Futile. " There, Defendants specifically argued that any amendment to the Amended Complaint would be futile and also argued that each of the Individual Defendants did not act with the requisite scienter. *See* Defendants' Memorandum Of Law In Opposition to Plaintiffs' Rule 59(e) Motion at pp. 12-15. Defendants later argued in their Rule 60(b) Motion that they believed the threshold, dispositive issue on the Rule 59(e) Motion was whether there had been valid

grounds under Rule 59(e) to reopen the judgment and that - despite presenting their cogent arguments in their Rule 59(e) opposition papers that amendment would be futile - they were unaware that the District Court would be evaluating Plaintiffs' 59(e) Motion under the Rule 15(a) futility of amendment standard. *See* Defendants' Memorandum of Law in Support of Their Motion for Reconsideration, p. 3, n.1. This argument was, and still is, meritless. Defendants did indeed proffer arguments concerning the futility of amending the Amended Complaint - arguments that, after losing on the issue, they found inadequate. As the District Court in *Higginbotham II* explained, when a plaintiff moves to amend, "the motion will be granted unless defendant successfully argues that the amendment would be futile because the proposed amendment also fails to state a viable cause of action. (A10; *Id.* at *1) In fact, *Higginbotham I* specifically required any Rule 59(e) Motion to be filed to include a copy of the proposed amended complaint. (A8; *Id.* at *10) Plaintiffs included a copy of the proposed SAC, and Defendants had ample opportunity to review it and challenge it. If Defendants had any question regarding the procedure the District Court would follow in addressing Plaintiffs' Rule 59(e) Motion, they should have filed full and complete arguments. Nothing prohibited them from doing this. Indeed, the District Court specifically found that "Defendants were provided with an opportunity to oppose lead plaintiff's Rule 59(e) motion." (A14; *Higginbotham III* at *1)

CONCLUSION

For all the reasons stated, the District Court's dismissal of the SAC should be reversed.

Dated: July 25, 2006

Respectfully submitted,

By____

Patrick V. Dahlstrom
Leigh H. Smollar
POMERANTZ HAUDECK BLOCK
GROSSMAN & GROSS, LLP
One North LaSalle Street, Suite 2225
Chicago, IL 60602-3908
(312) 377-1181

PLAINTIFFS-APPELLANTS'
LIAISON COUNSEL

Sherrie R. Savett
Arthur Stock
Russell D. Paul
Doug M. Risen
Shoshana T. Savett
BERGER & MONTAGUE, P.C.
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

Lionel Z. Glancy
Peter A. Binkow
GLANCY BINKOW & GOLDBERG LLP
1801 Avenue of the Stars, Suite 311
Los Angeles, CA 90067
(310) 201-9150

PLAINTIFFS-APPELLANTS' CO-LEAD
COUNSEL

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,262 lines, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. R. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Wordperfect 12 in 12-Point Century.

Dated: July 25, 2006

____

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 30(d)

Pursuant to Rule 30(d) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, the undersigned, an attorney associated with the firm of Berger & Montague, P.C. hereby certifies that the Brief Appendix following this statement contains all of the documents required to be included by Circuit Rule 30(a) and that the Joint Appendix, which is separately bound and is being filed concurrently with the foregoing brief, contains all of the documents required by Circuit Rule 30(b).

Dated: July 25, 2006 ______________________________

Attorney for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE WITH
CIRCUIT RULE 31(e)

Pursuant to Rule 31(e) of the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, the undersigned, an attorney associated with the firm of Berger & Montague, hereby certifies that the Disclosure Statement Brief, Table of Contents, Table of Authorities, Brief, Certificates of Compliance, Brief Appendix and Joint Appendix have been provided in electronic format.

Dated: July 25, 2006

____
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

The undersigned, counsel for the Plaintiff-Appellant Steelworkers Pension Trust, hereby certifies that on July 25, 2006, two copies of the Brief and Required Brief Appendix of Appellant and the Joint Appendix, as well as a digital version containing these documents were delivered by overnight mail to the below-listed counsel for the Defendants-Appellees Baxter International, Inc., Brian P. Anderson, John J. Greisch, Carlos del Salto and Robert L. Parkinson.

Matthew R. Kipp, Esquire
Donna L. McDevitt, Esquire
Dhananjai Shivakumar, Esquire
Lanelle K. Meidan, Esquire
Skadden, Arps, Slate, Meagher & Flom LLP
333 West Wacker Drive, Suite 2100
Chicago, IL 60606-1285

BERGER & MONTAGUE, P.C.

Dated: July 25, 2006

By_________________________________
Russell D. Paul
Attorney for Plaintiffs-Appellants

REQUIRED BRIEF APPENDIX

Table of Contents

Page

Table of Contents...i

Higginbotham, et al. v. Baxter Int'l, Inc., et al., Civ. No. O4 C 4909,
2005 WL 1272271 (N.D. Ill. May 25, 2005) 1

Higginbotham, et al. v. Baxter Int'l, Inc., et al., Civ. No. O4 C 4909,
2005 WL 2368795 (N.D. Ill. Sept., 23, 2005) 10

Higginbotham, et al. v. Baxter Int'l, Inc., et al., Civ. No. O4 C 4909,
2005 WL 3542521 (N.D. Ill. December 22, 2005) 14

Judgment, dated December 22, 2005..17

Notice of Appeal, filed January 26, 2006...18