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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
FTR CONSULTING GROUP, INC., derivatively :
on behalf of CEL-SCI CORPORATION, :
:

Plaintiff, :
:

-against- :
:

02 Civ. 8608 (RMB)

ORDER

ADVANTAGE FUND II LTD., GENESEE :
INTERNATIONAL, INC., DONALD R. :
MORKEN, KOCH INVESTMENT GROUP :
LIMITED, AND CEL-SCI CORPORATION, :
:

Defendants. :
:
-----X

I. Introduction

On March 8, 2005, the Court granted Defendants' joint motion for summary judgment under Fed. R. Civ. P. 56, finding, among other things, that Plaintiff's counsel acknowledged at oral argument that a ruling in Defendants' favor on the Reset Warrant issue would "dispose of" this case (see Transcript of Hearing, dated February 23, 2005 ("Hearing"), at 11-12), and holding that "because the [Defendants'] Reset Warrant's exercise price is deemed fixed, for § 16(b) matching purposes the underlying stock was acquired at the time of the Warrant's (original) acquisition, rather than at the time of the Warrant's vesting or exercise" (see Order, dated March 8, 2005 ("Order"), at 9 n.8, 17).¹

By letter, dated March 23, 2005, Plaintiff requests reconsideration of the Order on the grounds that: (1) "the Court committed plain error in determining that [the Reset Warrants] were

¹The Court assumes familiarity with the factual and procedural history described in the Order, and employs the same definitions of terms contained therein.

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derivative instruments"; and (2) Plaintiffs "Exchange Agreement claim . . . is distinct and independent of the analysis of the [Reset] Warrants."² (Plaintiff's Letter to the Court, dated March 23, 2005; see also Plaintiffs Memorandum of Law in Support of Motion to Vacate Judgment, dated March 22, 2005 ("Pl. Recon. Mem.")). Defendants counter that, among other things: (1) Plaintiff's argument as to the Reset Warrants was already "before the Court . . . and the Court explicitly rejected it"; and (2) Plaintiff should be held to its counsel's "express concession" at the Hearing that resolution of the Reset Warrant issue disposed of the entire case. (Defendants' Letter to the Court, dated March 30, 2005.)

For the foregoing reasons, Plaintiff's motion for reconsideration is granted in part and denied in part, as set forth below.³

II. Background

On May 7, 2001, Cel-Sci requested that Defendants, among other things, agree to modify their investment in Cel-Sci securities. (Def. 56.1 ¶ 81-82; Pl. Opp. 56.1 ¶ 81-82; Pl. 56.1 ¶¶ 9-10; Ex. J.) Lengthy negotiations ensued and resulted in the Exchange Agreement, dated August 15, 2001 ("Exchange Agreement"), under which Advantage, Koch, and Mooring "tendered to Cel-Sci . . . 3,589,289 shares of common stock and 2,212,192 shares issuable pursuant to unexercised Series D Warrants," and received in return 6,288 shares of non-voting Series E preferred stock. (Def. 56.1 ¶ 91; Pl. Opp. 56.1 ¶ 91.) Defendants also exchanged their 746,351 unexercised Series A and C Warrants for newly-issued Series E Warrants. (Def. 56.1 ¶ 95; Pl.

²In the interest of judicial economy, the Court is treating Plaintiff's (and Defendants') correspondence as an application for reconsideration.

³The Court is not here ruling upon the ultimate merits of Plaintiff's remaining claims.

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Opp. 56.1 ¶ 95.) "After the August 2001 exchange transaction, Defendants converted their preferred stock shares into common stock and sold the converted [common] stock" intermittently through January 2003. (Def. Mem. at 2; Def. 56.1 ¶ 102; Pl. Opp. 56.1 ¶ 102.)

III. Legal Standard

Motions for reconsideration are governed by Rule 59(e) of the Federal Rules of Civil Procedure and Local Civil Rule 6.3. See Schaffer v. Soros, No. 92 Civ. 1233, 1994 WL 592891, at *1 (S.D.N.Y. Oct. 31, 1994). "[R]econsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked--matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995); accord Weissman v. Fruchtman, 658 F. Supp. 547, 548 (1987).

IV. Analysis

A. Reset Warrants

As to the Reset Warrant issue, Plaintiff substantially repeats arguments that the Court resolved in the Order. (Pl. Recon. Mem. at 2-10.) Plaintiff's new arguments, if any, explaining how the Reset Warrants could have "presented an opportunity for speculative abuse," should have been raised either in Plaintiff's opposition papers, dated June 25, 2004 (wherein Plaintiff did discuss speculative abuse) or at the Hearing, where the issue of speculative abuse was raised (again). (See Hearing at 2, 5, 8-11.) "The purpose of a motion [for reconsideration] is not to start a new round of arguments in which a party can simply make new arguments which should have been made originally or repeat arguments rejected by the Court in its original decision." Forsyth v. Federation Employment and Guidance Service, No. 97 Civ. 3399, 2003 WL 943855,

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at *1 (S.D.N.Y. Mar. 6, 2003).

B. Exchange Agreement

Because it relied upon counsel's representations that resolution of the Reset Warrant issue in Defendants' favor disposes of the case, the Order did not address Plaintiff's "Exchange Agreement claim." (Plaintiff's Letter to the Court, dated March 23, 2005.) In the interest of justice, the Court grants reconsideration and amends the Order to allow Plaintiff's Exchange Agreement claim to go forward. See, e.g., Edsall v. Penn Central Trans. Co., 479 F.2d 33, 35 (6th Cir. 1973) ("Rightfully, courts are reluctant to punish a client for the behavior of his lawyer.").

Defendants assert, among other things, that: (1) the "August 2001 Exchange was not a 'purchase' or a 'sale' under Section 16(b) because it was an exchange of economic equivalents"; and (2) "Defendants' conversions of their Preferred Stock after the August 2001 Exchange" were not "purchases . . . because the Preferred Stock itself had been acquired in an economically equivalent exchange" and "[t]hus, the actual conversion was not a separate transaction under Section 16." (Def. Mem. at 13-14.)

Plaintiff counters that, among other things: (1) "the exemption for exchange transactions is fact-based and requires defendants to establish the economic equivalence of the two types of stock as well as 'an unchanged investment position in the issuer after the exchange'; and (2) the conversion of the preferred stock was "a purchase for purposes of § 16(b)" because the "preferred stock had both fixed and floating conversions features." (Pl. Mem. at 24.)

The Court finds, upon reconsideration, that factual issues remain warranting a trial, including, among other things: (1) whether Defendants entered into the Exchange Agreement

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voluntarily; and (2) whether the Exchange Agreement and subsequent conversion of Defendants' preferred stock "presented the potential for speculative abuse of inside information." See Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 593-95, 600 (1973); Peter J. Romeo & Alan L. Dye, Section 16 Treatise and Reporting Guide, §10.07[7] (2d ed. 2004) (whether or not the "exchange was voluntary, rather than mandatory," is "highly relevant" in determining whether an exchange agreement involved a purchase and sale under Section 16(b)).

V. Conclusion and Order

For the foregoing reasons, the Court grants in part and denies in part Plaintiff's motion [64], dated March 22, 2005, for reconsideration of the Order, and amends the Order so that Defendants' motion [49] for summary judgment is granted in part and denied in part, as indicated above.

Counsel are requested to appear at a status/scheduling/settlement conference with the Court on Wednesday April 13, 2005, at 11:30 a.m., in Courtroom 706 of the Thurgood Marshall Courthouse, 40 Centre Street, New York, New York. The Court directs the parties to engage in good faith settlement negotiations prior to the conference with the Court.

Dated: New York, New York
April 1, 2005



RICHARD M. BERMAN, U.S.D.J.