

**IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA**

HIGH RIVER LIMITED PARTNERSHIP,	:	
Plaintiff,	:	No. 1:04-cv-02677
	:	
v.	:	Hon. Sylvia H. Rambo
	:	
MYLAN LABORATORIES, INC.,	:	Electronically Filed
ROBERT COURY, PERRY CORP.,	:	
RICHARD C. PERRY, AND DOES 1-100,	:	
Defendants.	:	

**MEMORANDUM OF MYLAN LABORATORIES, INC. AND
ROBERT COURY IN SUPPORT OF THEIR MOTION TO DISMISS**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
INTRODUCTION	1
PROCEDURAL BACKGROUND.....	8
FACTUAL BACKGROUND.....	9
QUESTIONS PRESENTED.....	16
ARGUMENT	16
I. THE §10(B) CLAIM AGAINST MYLAN SHOULD BE DISMISSED	16
A. Plaintiff’s §10(b) Claim Must Satisfy Rule 9(b) And The PSLRA.....	16
B. The Complaint Fails To Allege That Mylan Made A Materially Misleading Statement.....	20
1. No facts are pled to show that Mylan’s SEC filings were misstated when made	20
2. Mylan’s SEC filings were not rendered false or misleading by omitting to disclose the “vote buying scheme”	23
C. The Complaint Fails To Allege Facts Giving Rise To A Strong Inference That Mylan Acted With Scienter.....	26
D. Mylan’s Alleged Failure To Disclose Corporate Mismanagement Is Not Actionable Under §10(b)	31
E. The Complaint Fails To Plead That Mylan’s Alleged Misstatements Caused Plaintiff To Suffer Any Loss.....	34

II. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL
JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIMS.....37

CONCLUSION.....44

TABLE OF AUTHORITIES

Cases

Anderson v. First Security Corp., 249 F. Supp. 2d 1256 (D.Utah 2002)36

Bastian v. Petren Res. Corp., 892 F.2d 680 (7th Cir. 1990).....36

Borough of West Mifflin v. Lancaster, 45 F.3d 780 (3d Cir. 1995).....36

Broudo v. Dura Pharmaceuticals, 339 F.3d 933 (9th Cir. 2003),
cert. granted, 124 S.Ct. 2904 (2004).....36

California Pub. Employees' Ret. Sys., No. 03-3755,
2004 WL 3015578 (3d Cir. Dec. 30, 2004)(Ex. A)* *passim*

Castlerock Management, Ltd. v. Ultralife Batteries, Inc.,
68 F. Supp. 2d 480 (D.N.J. 1999)21, 23

Ciro, Inc. v. Gold, 816 F. Supp. 253 (D. Del. 1993)40

City of Chicago v. International College of Surgeons,
522 U.S. 56 (1997).....38

Coronet Insur. Co. v. Seyfarth, 665 F. Supp. 661 (N.D. Ill. 1987)34

D.E. & J Ltd. Partnership v. Conaway,
284 F. Supp. 2d 719 (E.D. Mich. 2003).....36

De Asencio v. Tyson Foods, Inc., 342 F.3d 301 (3d Cir. 2003)40, 43, 44

*Emergent Capital Investment Management, LLC v. Stonepath
Group, Inc.*, 343 F.3d 189 (2d Cir. 2003).....36

Frank's GMC Truck Center, Inc. v. General Motors Corp., 847
F.2d 100 (3d Cir. 1988).....37

* Pursuant to Local Rule 7.8(a), unreported cases are attached hereto as exhibits.

Gannon v. Continental Insur. Co., 920 F. Supp. 566 (D.N.J. 1996)34

Gettysburg Battlefield Preservation Assoc. v. Gettysburg College,
799 F. Supp. 1571 (M.D. Pa. 1992).....40

GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189 (3d Cir. 2001) 11

Greenfield v. Heublein, Inc., 742 F.2d 751 (3d Cir. 1984).....23

Gross v. Summa Four, Inc., 93 F.3d 987 (1st Cir. 1996)21, 23, 25

Growth Horizons, Inc. v. Delaware County, PA,
983 F.2d 1277 (3d Cir. 1993).....38

GSC Partners CDO Fund v. Washington,
368 F.3d 228 (3d Cir. 2004)..... *passim*

HB General Corp. v. Manchester Partners, L.P.,
95 F.3d 1185 (3d Cir. 1996).....38

Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000)39

Hewlett v. Hewlett-Packard Co., No. Civ.A.19513-NC,
2002 WL 549137, at *4 (Del. Ch. Apr. 8, 2002)(Ex. J)41

In re Adams Golf, Inc. Sec. Litig., 381 F.3d 267 (3d Cir. 2004)36

In re Advanta Corp. Sec. Litig., 180 F.3d 525 (3d Cir. 1999)..... *passim*

In re Alparma Inc. Sec. Litig., 372 F.3d 137 (3d Cir. 2004) *passim*

In re Burlington Coat Factory Sec. Litig., 114 F.3d 1410 (3d Cir. 1997).....12, 17

In re CDNOW, Inc. Sec. Litig., 138 F. Supp. 2d 624 (E.D. Pa. 2001)17, 18

In re Cooper Mountain Sec. Litig., 311 F. Supp. 2d 857 (N.D. Cal. 2004)28

In re Craftmatic Sec. Litig., 890 F.2d 628 (3d Cir. 1990)24, 32

In re Cybershop.Com Sec. Litig., 189 F. Supp. 2d 214 (D.N.J. 2002)23, 30, 26

In Re Digital Island Sec. Litig., 357 F.3d 332 (3d Cir. 2004)29

In re Jack Greenberg, Inc., 240 B.R. 486 (Bankr. E.D. Pa. 1999).....41

In re NAHC, Inc. Sec. Litig., 306 F.3d 1314 (3d Cir. 2002)..... *passim*

In re NAHC, Inc. Sec. Litig., No. Civ. A. 00-4020,
2001 WL 1241007 (E.D. Pa. Oct. 17, 2001)(Ex. C), *aff'd*, 306 F.3d
1314 (3d Cir. 2002)..... *passim*

In re Nice Systems, Ltd. Sec. Litig.,
135 F. Supp. 2d 551 (D.N.J. 2001) *passim*

In re Rockefeller Center Properties, Inc. Sec. Litig.,
311 F.3d 198 (3d Cir. 2002).....17, 18, 19, 20

In re U.S. West, Inc. Sec. Litig., 201 F. Supp. 2d 302 (D. Del.
2002), *aff'd*, 65 Fed. Appx. 856 (3d Cir. 2003).....25

Keeney v. Larkin, 306 F. Supp. 2d 522 (D. Md. 2003).....36

L-3 Communications Corp. v. Clevenger, No. 03-CV-3932,
2004 WL 1941248 (E.D. Pa. Aug. 31, 2004)(Ex. F).....39, 40

Lewis v. Chrysler Corp., 949 F.2d 644 (3d Cir. 1991).....33

Martin v. PNC Financial Services Group, Inc., No. Civ.A.02-7191,
2004 WL 887411 (E.D. Pa. Jan. 16, 2004)(Ex. G).....40

McCreary v. Wilt, 11 F. Supp. 2d 731 (M.D. Pa. 1998).....40

Napier v. PriceWaterhouse Coopers LLP,
227 F. Supp. 2d 263 (D.N.J. 2002) *pasim*

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
259 F.3d 154 (3d Cir. 2001).....35

Novak v. Kasaks, 216 F.3d 300 (2d Cir. 2000).....30

Reifsnnyder v. Pittsburgh Outdoor Advertising Co.,
173 A.2d 319 (Pa. 1961)41

Robbins v. Koger Properties, Inc., 116 F.3d 1441 (11th Cir. 1997)36

S. Kane & Son Profit Sharing Trust v. Marine Midland Bank, No. Civ.A. 95-7058, 1996 WL 325894
(E.D. Pa. June 13, 1996)(Ex. I).....41

Santa Fe Industries, Inc. v. Green, 430 U.S. 462 (1977)31, 32

Schreiber v. Carney, 447 A.2d 17 (Del. Ch. 1982)42

Semerenko v. Cendant Corp., 223 F.3d 165 (3d Cir. 2000)35

Shapiro v. UJB Financial Corp., 964 F.2d 272 (3d Cir. 1992).....25

Spencer Trask Software and Information Services LLC v. RPost Internat'l Ltd., No. 02 Civ. 1276 (PKL), 2003 WL 169801
(S.D.N.Y. Jan. 24, 2003)(Ex. E)36

Staffin v. Greenberg, 672 F.2d 1196 (3d Cir. 1982).....24, 25

Steinhardt Group, Inc. v. Citicorp, No.Civ.A.96-15-SLR, 1996 WL 790097 (D. Del. Dec. 2, 1996)(Ex. H), *aff'd*, 126 F.3d 144 (3d Cir. 1997)40

Troublefield v. City of Harrisburg, 789 F. Supp. 160 (M.D. Pa. 1992).....40

Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.,
963 F. Supp. 395 (D.N.J. 1997), *aff'd*, 140 F.3d 478 (3d Cir. 1998)39, 40

United Mine Workers v. Gibbs, 383 U.S. 715 (1966).....40

United States ex rel. Stauffer v. Bell Atlantic, Civil No. 1:CV-96-1432, 1998 U.S. Dist Lexis 22654 (M.D. Pa. 1998)(Ex. B).....18

Warner Communications, Inc. v. Murdoch,
581 F. Supp. 1482 (D. Del. 1984).....34

Werner v. Werner, 267 F.3d 288 (3d Cir. 2001).....33, 34

Wilson v. Bernstock, 195 F. Supp. 2d 619 (D.N.J. 2002)..... *passim*

Winer Family Trust v. Queen, No. Civ. A. 03-4318,
2004 WL 2203709 (E.D. Pa. Sept. 27, 2004)(Ex. D).....26

Zucker v. Quasha, 891 F. Supp. 1010 (D.N.J. 1995), *aff'd*,
82 F.3d 408 (3d Cir. 1996).....21, 23, 26

Statutes

15 Pa.C.S. §1105.....42, 43

15 Pa.C.S. §1765(3).....42

15 Pa.C.S. §1793.....42

15 Pa.C.S. §1924(b)(1)(i).....10

15 U.S.C. § 78j(b).....15

15 U.S.C. § 78u-4..... *passim*

28 U.S.C. §1367(c)..... *passim*

Rule 9(b), Fed. R. Civ. P..... *passim*

Regulations

17 C.F.R. §240.10b-5.....15

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**MEMORANDUM OF MYLAN LABORATORIES, INC. AND
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Defendants Mylan Laboratories, Inc. (“Mylan”) and Robert Coury (“Coury”)(collectively, the “Mylan Defendants”) submit this memorandum in support of their motion, pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure and the provisions of the Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4, to dismiss the claims asserted against them in the complaint filed by plaintiff High River Limited Partnership.

INTRODUCTION

This action arises from a battle over competing financial strategies being waged between plaintiff -- a private investment vehicle for the “corporate raider” and “greenmailer” Carl Icahn (“Icahn”) -- and defendants Perry Corp., an investment advisor to private “hedge funds,” and its sole stockholder, defendant Richard C. Perry (collectively, the “Perry Defendants”). The centerpiece of that

battle is a proposed merger between Mylan, a publicly-held, Pennsylvania corporation, and King Pharmaceuticals, Inc. (“King”), another public company.

On July 23, 2004, Mylan and King signed a merger agreement -- filed by Mylan with the Securities and Exchange Commission (“SEC”) -- which, if consummated, would result in King merging with a Mylan subsidiary. As set forth in Mylan’s SEC disclosure, the proposed merger does not require the approval of Mylan’s shareholders. The merger, however, is conditioned, among other things, on Mylan’s shareholders approving, by majority vote, the issuance of Mylan stock to be used as the consideration for the merger.

In subsequent SEC filings -- *i.e.*, an interim Form 10-Q, filed August 9, and a joint preliminary registration/proxy statement, dated September 3 -- Mylan repeated its prior disclosures concerning the terms of the proposed Mylan/King merger, including the requirement of a Mylan shareholder vote.

Plaintiff alleges that, after learning of the proposed merger, it decided that the transaction was ill-advised and so (somewhat perversely) began buying Mylan shares with an eye to defeating the merger by voting against Mylan’s stock issuance. At the same time, plaintiff (and other Icahn “affiliates”) also began selling shares of King “short” -- apparently believing that King’s stock price would decline if the merger was defeated. Plaintiff first disclosed its Mylan stock purchases -- and hostility to the Mylan/King merger -- in a Schedule 13D, dated

September 7, 2004, filed with the SEC (although it inexplicably delayed mention of its King “short” sales until an October 14 filing). Thereafter, plaintiff made further Schedule 13D filings reflecting its growing accumulation of Mylan stock and continued opposition to the proposed merger.

Plaintiff contends that its vote opposing Mylan’s stock issuance -- and the votes of other “legitimate” Mylan shareholders -- will be frustrated by the Perry Defendants, who allegedly have engaged in an illegal “vote buying scheme” to help the Mylan/King merger succeed. According to plaintiff, the Perry Defendants began buying King shares by December 2003 and will reap a large profit from the Mylan/King merger. To ensure the merger is effected, the Perry Defendants supposedly engaged in a “scheme” -- accomplished by, among other things, buying and shorting Mylan stock -- to acquire voting rights in Mylan stock with no corresponding “economic” interest (or risk) in those shares. As a result of their “scheme,” the Perry Defendants allegedly hold 9.89% of Mylan’s shares which they will vote in favor of Mylan’s stock issuance.

Plaintiff has asserted federal securities and state law claims against the Perry Defendants, charging that their “vote buying scheme” was inadequately disclosed to the market and that their votes are void under state law.

Caught in the midst of these competing investment stratagems are Mylan and Coury, Mylan’s Chief Executive Officer -- as well as all of Mylan’s

other shareholders. Even though the complaint fails to allege a single fact suggesting that Mylan or Coury had any involvement in -- or knowledge of -- the Perry Defendants' alleged misconduct when Mylan made the SEC filings at issue, plaintiff has sought to tar the Mylan Defendants with the same "vote buying scheme." Plaintiff's motive for pursuing its baseless claims is evident from recent history.

For the past several months, plaintiff -- in furtherance of its campaign against the Mylan/King merger -- has engaged in harsh public attacks on Mylan's management, criticizing its leadership, condemning its decision to pursue the Mylan/King merger, raising the possibility of a proxy fight to replace the current directors and threatening litigation. Apparently, plaintiff has now chosen to expand that publicity campaign by turning its dispute with the Perry Defendants into yet another opportunity to criticize (and cast doubt upon) the integrity of Mylan and its management -- for there is nothing else to explain plaintiff's decision to file a lawsuit that lacks even a colorable claim against Mylan or Coury.

Plaintiff's claims focus on Mylan's 3 SEC filings and their disclosure of the terms of the Mylan/King merger -- particularly, the need for a shareholder vote on Mylan's stock issuance. Although plaintiff does not -- and cannot -- contest the accuracy of these disclosures, it nevertheless contends that they were misleading because Mylan knew, but failed to disclose, that the shareholder vote

would be “rigged” by the Perry Defendants’ “vote buying scheme.” Plaintiff allegedly relied upon those SEC filings in purchasing its Mylan stock and suffered injury because the omission of the “vote buying scheme” was material to the value of Mylan’s shares.

Based on these allegations, the complaint purports to assert a claim against Mylan under §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5 promulgated thereunder. Plaintiff also alleges a raft of claims against Mylan and Coury arising under Pennsylvania statutory and common law which seek to have this Court supervise Mylan’s voting process and prevent the Perry Defendants from exercising their voting rights -- even though no shareholder vote has yet been scheduled and thus there has been no occasion (or reason) to assess the validity of any votes which the Perry Defendants might cast.

As discussed further below, plaintiff’s claims against Mylan and Coury should be dismissed. Plaintiff’s §10(b) claim against Mylan must satisfy the heightened pleading standards of Rule 9(b) and the PSLRA, which abrogated the traditional approach to analyzing claims under which “reasonable” inferences might be indulged based on vague and conclusory assertions. The heightened pleading standards require plaintiff to plead, with particularity, facts demonstrating why Mylan’s statements were false when made. Moreover, plaintiff may not rest its allegations on “information and belief,” but must plead facts sufficient to

support the adequacy of its belief. Furthermore, “reasonable” inferences alone will not support a §10(b) claim -- plaintiff must plead facts raising a “strong” inference that Mylan acted with scienter. Plaintiff’s allegations in support of its §10(b) claim fall woefully short of meeting these heightened pleading standards.

First, plaintiff’s conclusory assertion that Mylan’s SEC filings were misleading is inadequate. The complaint fails to allege a single fact to show that the Perry Defendants had devised, let alone executed, their supposed “vote buying scheme” at the time Mylan made its SEC filings. Because there is no factual basis for believing that Mylan’s SEC filings were misleading when made, plaintiff’s claim must fail. Moreover, Mylan’s accurate summary of the Mylan/King merger terms cannot be transformed by plaintiff into a misleading representation simply because Mylan did not also discuss the entirely separate issue of the possible effect of the Perry Defendants’ “scheme” (assuming it then existed) on Mylan’s voting process.

Second, the complaint’s lack of factual detail raises another flaw in plaintiff’s §10(b) claim -- the failure to allege facts raising a “strong” inference that Mylan, at the time of its SEC filings, knew of the Perry Defendants’ “scheme.” Plaintiff premises its scienter allegation solely on Coury’s boast -- supposedly made in a meeting with Icahn on an unidentified date -- that he “‘had the votes’ to force approval of the King acquisition.” Coury’s alleged remark, however, does

not raise a plausible -- let alone “strong” -- inference that he knew of the Perry Defendants’ supposed misconduct. Indeed, plaintiff’s assertion is nothing but sheer speculation, because no facts are pled to show that Coury, prior to Mylan’s SEC filings, had any connection with the Perry Defendants, let alone knew of their “vote buying scheme.”

Third, putting aside plaintiff’s own characterization, the essence of its §10(b) claim is that Mylan’s management violated their state law duties by allowing a potentially “rigged” corporate vote to proceed and not disclosing that “unfair” process to shareholders. The Supreme Court and the Third Circuit, however, have decisively held that §10(b) does not encompass claims for breach of fiduciary duty and corporate mismanagement and such claims cannot be “bootstrapped” into federal securities actions by pleading them, as plaintiff does here, as a misleading statement.

Fourth, the facts alleged in the complaint fail to show that plaintiff has suffered any injury proximately caused by Mylan’s SEC filings. Although plaintiff asserts that the “omission” of the “vote buying scheme” was material to Mylan’s stock and further alleges that the Perry Defendants’ “scheme” was publicly disclosed in late November and early December 2004, plaintiff does not contend that those disclosures had any adverse impact on Mylan’s stock price. Plaintiff’s

failure to allege a decline in Mylan's stock price due to Mylan's supposedly misleading SEC filings requires that its §10(b) claim be dismissed.

Because plaintiff's §10(b) claim against Mylan should be dismissed and because its state law claims against Mylan and Coury raise novel and complex issues of Pennsylvania law which substantially overshadow the federal securities action, the Court should, pursuant to 28 U.S.C. §1367(c), decline to exercise its supplemental jurisdiction over plaintiff's state law claims. Accordingly, the entire complaint against the Mylan Defendants should be dismissed.

PROCEDURAL BACKGROUND

Plaintiff commenced this action on December 10, 2004. It later moved on December 17, 2004 (a) to advance the hearing of its declaratory judgment claim seeking a determination that, under Pennsylvania corporate law, the Perry Defendants may not exercise any voting rights associated with their Mylan stock and (b) for expedited discovery in support of that claim.

On December 20, 2004, the Perry Defendants moved to transfer this action to the Southern District of New York or alternatively, the Western District of Pennsylvania. The Mylan Defendants acknowledged that venue was proper here, but agreed that a transfer to the Southern District of New York would also be appropriate. By Order dated December 21, 2004, the Court stayed further briefing on plaintiff's motion and directed plaintiff to respond to the transfer motion by

December 30, 2004. Plaintiff moved to lift the Court's stay, which the Court denied by Order dated December 22, 2004.

After plaintiff filed its opposition to the transfer motion, the Court granted permission for the Perry Defendants to file a reply brief and plaintiff to file a sur-reply brief. Both of those briefs have now been filed and the motion is awaiting decision.

None of the defendants has previously responded to the complaint.

FACTUAL BACKGROUND

For the Court's convenience, the allegations of the complaint relevant to the Mylan Defendants' motion are summarized below.

On July 23, 2004, Mylan entered into a merger agreement with King. (Complaint ("Compl.") ¶ 18.) Thereafter, Mylan issued a press release, held an investor conference call and filed a Form 8-K with the SEC announcing the merger. (*Id.* ¶ 55.¹) The merger agreement provides that King shareholders will receive 0.9 shares of Mylan stock for each issued and outstanding share of King

¹ Although the complaint alleges that Mylan disclosed (and filed with the SEC) the Mylan/King merger agreement on the same date as it was signed -- *i.e.*, July 23 -- Mylan's announcement and SEC filing actually took place on July 26. (Mylan's SEC filings can be found on the SEC's website at www.sec.gov/cgi-bin/browse-edgar?company=mylan+laboratories&CIK=&filenum=&State=&SIC=&owner=include&action=getcompany)(the "SEC Mylan Website"). Because plaintiff's error appears inconsequential to this motion, we will employ plaintiff's alleged July 23 disclosure date to avoid confusion.

common stock. (*Id.* ¶ 19.) In its SEC disclosures, Mylan represented that the merger, as presently structured, was conditioned upon Mylan shareholders approving, by majority vote, “the issuance of the Mylan common stock to be paid to King shareholders as compensation.” (*Id.*) The shareholder vote is “not a vote on a plan of [m]erger” with King, but is “rather, a vote on whether to issue Mylan stock in connection with the proposed [m]erger.”² (*Id.* ¶ 112.)

On August 9, 2004, Mylan filed its Form 10-Q for the quarter ending June 30, 2004 with the SEC. (*Id.* ¶ 56.) The Form 10-Q again reported that the Mylan/King merger agreement is conditioned on Mylan shareholders’ vote. (*Id.*)

On September 3, 2004, Mylan filed a Form S-4 with the SEC to register the shares of Mylan stock to be issued in connection with the King merger. (*Id.* ¶ 22.) The preliminary registration statement included a prospectus and proxy statement for the merger. (*Id.* ¶ 56.) The preliminary registration statement and proxy statement, like Mylan’s prior SEC filings relating to the merger, state that “Mylan shareholders must approve the issuance of shares of Mylan common stock to King shareholders pursuant to the merger.” (*Id.*)

² Pursuant to Pennsylvania law, Mylan’s shareholders are not required to vote on the merger because their share holdings in the company will not change due to the merger. *See* 15 Pa.C.S. §1924(b)(1)(i). In contrast, shareholder approval of the issuance of new stock to be used in the merger is required pursuant to Rule 312.03 of the New York Stock Exchange (on which Mylan’s stock trades) due to the amount of stock being issued. (*See* Compl. ¶ 55(b).)

The complaint does not identify any other allegedly actionable statements made by Mylan apart from those contained in its July 23, August 9 and September 3, 2004 SEC filings reporting that the Mylan/King merger agreement was conditioned on Mylan shareholders approving the issuance of additional stock. Moreover, although Mylan has allegedly fixed a “record date” of November 16, 2004 for its shareholder vote (*id.* ¶ 25), the complaint does not allege (a) that Mylan has filed a definitive registration statement; or (b) that the SEC has declared Mylan’s registration statement effective; or (c) that Mylan has set a date for its shareholder vote; or (d) that Mylan has directly contacted its shareholders to solicit their votes.

On September 7, 2004, plaintiff filed a Schedule 13D with the SEC disclosing that it (and other Icahn affiliates) had purchased 6.8% of Mylan’s outstanding shares. (*Id.* ¶ 23.) In that filing, plaintiff announced its intention to oppose the Mylan/King merger. Plaintiff, however, did not disclose -- until a subsequent October 14, 2004 SEC filing -- that it (and other Icahn affiliates) had engaged in short sales³ of King stock.⁴ Plaintiff has conceded that, due to those

³ A short sale involves borrowing a security and selling it, with the obligation to return a similar security to the original owner at some later point. In selling short, investors are “betting that the stock price will decline between the time they sell the borrowed stock and the time they must ‘cover,’ *i.e.*, purchase replacement shares to repay the borrowed stock.” *GFL Advantage Fund, Ltd. v. Colkitt*, 272 F.3d 189, 196 (3d Cir. 2001).

short sales (the details of which have not been fully revealed), it is “in a position to benefit if the proposed [m]erger is not consummated in a way that is different from other Mylan shareholders.”⁵

The complaint alleges that “long before any solicitation of the Mylan shareholders,” Coury met with Icahn, who the complaint obliquely describes as plaintiff’s “beneficial owner.”⁶ (Compl. ¶ 6.) At that meeting, Coury allegedly told Icahn that he “‘had the votes’ to force approval of the King acquisition.” (*Id.*) The complaint does not allege that Coury made any other statements at that meeting. Nor does the complaint allege any other communications between Coury and Icahn. Most importantly, there are no allegations that, prior to any of Mylan’s SEC filings at issue, Coury had any contact or communications with the Perry Defendants in which he learned of the Perry Defendants’ alleged stock purchases.

⁴ See *Preliminary Proxy Statement, Schedule 14A*, High River Limited Partnership, et al., filed Oct. 14, 2004 with the SEC at 5 (Exhibit 1 to Wertheimer Declaration, dated January 13, 2005 (“Wertheimer Dec.”); see also SEC Mylan Website). The Court may consider, on a motion to dismiss, a party’s filings with the SEC. See *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Wilson v. Bernstock*, 195 F. Supp. 2d 619, 623-24 (D.N.J. 2002).

⁵ See *Preliminary Proxy Statement, Schedule 14A*, High River Limited Partnership, et al., filed December 15, 2004 with the SEC at 13 (Wertheimer Dec. Ex. 2; see also SEC Mylan Website).

⁶ Icahn’s status as plaintiff’s beneficial owner is set forth in plaintiff’s Schedule 13Ds attached as Exhibit 1 to the complaint. The Court may consider those exhibits on this motion since they are integral to plaintiff’s pleading. See *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

Plaintiff continued to purchase Mylan shares and to campaign against the Mylan/King merger after the meeting with Coury. (*Id.* ¶ 27.) By October 29, 2004, plaintiff disclosed that it had acquired approximately 9.78% of Mylan's outstanding shares. (*Id.* & Compl. Ex. 1, Schedule 13D Amend. No. 2, at 3.)

Since announcing its opposition to the Mylan/King merger, plaintiff (and Icahn) has engaged in a public campaign to defeat the transaction. In various SEC filings, plaintiff has criticized King and its performance, questioned the benefits of the transaction and challenged the wisdom of the merger.⁷ Plaintiff, however, has not confined its attacks to the merger alone. It has also derided Coury's general performance as Mylan's CEO and the Mylan Board of Directors' oversight of the company; announced the possibility of commencing a proxy fight to unseat the current Board; and threatened Mylan's Board with litigation.⁸

Defendant Perry Corp. is an investment advisor to certain private investment funds and Richard Perry is its sole stockholder. (*Id.* ¶¶ 14-15.) In a Schedule 13F filed February 13, 2004, Perry revealed that, as of December 31,

⁷ See *Preliminary Proxy Statement, Schedule 14A*, High River Limited Partnership, et al., filed Oct. 14, 2004 with the SEC (Wertheimer Dec. Ex. 1); *Letter from Icahn to Coury*, dated October 29, 2004, attached to Schedule 13D, Amend. No. 2 (Compl. Ex. 1).

⁸ See *Letter from Icahn to Mylan Board of Directors*, dated November 19, 2004, attached to Schedule 13D, Amend. No. 3 (Compl. Ex. 1); *Letter from Icahn to Mylan Board of Directors*, dated November 22, 2004, attached to Schedule 13D, Amend. No. 4 (Compl. Ex. 1).

2003, it owned 300,000 shares of King. By June 30, 2004, according to a subsequent Schedule 13F filing, Perry had increased its King holdings to 4.03 million shares. (*Id.* ¶¶ 44, 46.)

On November 12, 2004, Perry filed a Schedule 13F with the SEC reporting that it owned 7 million shares of King stock and 16.9 million shares of Mylan stock as of September 30, 2004. (*Id.* ¶ 29.) The Mylan shares owned by Perry represented over 6% of Mylan's outstanding shares as of September 30, 2004. (*Id.*) The Complaint does not allege that Perry owned any shares of Mylan stock prior to the meeting between Coury and Icahn.

On November 29, 2004, the Perry Defendants filed a joint Schedule 13D with the SEC which disclosed that Perry had increased his ownership position to 9.89% of Mylan's outstanding shares. (*Id.* ¶ 30.) In that filing, the Perry Defendants announced their support for the Mylan/King merger. (*Id.* ¶ 31.)

The complaint alleges that Perry “fully hedged its investment in Mylan to ensure that its only purchase was of Mylan shareholder voting rights.” (*Id.* ¶ 4.) Perry supposedly intends to vote its Mylan shares in favor of the Mylan/King merger “without regard to whether the merger would be in the best interests of Mylan or its shareholders.” (*Id.* ¶ 32.) Moreover, Perry's alleged objective is to influence Mylan's “shareholder vote in favor of obtaining approval of the Merger.” (*Id.* ¶ 39.) The Perry Defendants reportedly will reap millions of

dollars in profit on their King investment if the Mylan/King merger proceeds. (*Id.* ¶¶ 5, 35.) The complaint further asserts that the Schedule 13D filed by Perry does not adequately disclose the nature of his “hedging transactions.” (*Id.* ¶ 48.) The complaint does not allege any connection between Perry and Coury or anyone else affiliated with Mylan.

According to the complaint, Perry’s hedging strategy -- or, to use plaintiff’s term, “vote-buying scheme” -- was reported in *The Daily Deal* on November 23 (*id.* ¶ 33), Perry’s Schedule 13D on November 29 (*id.* ¶ 30) and *The New York Times* on December 2 (*id.* ¶ 5). Plaintiff does not allege that the publication of these articles and filings had any effect on the market price of Mylan’s stock.

Plaintiff purports to assert in Count 1 a claim against Mylan arising under §10(b), 15 U.S.C. §78j(b), and SEC Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5.⁹ The remaining claims against Mylan (Counts 4, 5, 7-10) and all the claims against Coury (Counts 7-10) arise under either Pennsylvania corporate statutes or its common law.

⁹ Although unclear, Count 5, which seeks a declaratory judgment against Mylan and other defendants, may only be based, as against Mylan, on §10(b), whereas it may also be premised on state law claims as against other defendants. (*See Compl.* ¶¶ 86, 88.) Because both the §10(b) and state law claims against Mylan should be dismissed, the declaratory judgment action -- regardless of the particular laws on which it is based -- should also be dismissed.

QUESTIONS PRESENTED

1. Does the complaint properly allege against Mylan the elements of a §10(b) claim -- particularly, a misleading statement, scienter and loss causation -- consistent with Rule 9(b) and the PSLRA?

Suggested answer: no.

2. Should the Court retain supplemental jurisdiction over plaintiff's state law claims against Mylan and Coury absent any affirmative justification of judicial economy, convenience or fairness for doing so?

Suggested answer: no.

ARGUMENT

I. THE §10(b) CLAIM AGAINST MYLAN SHOULD BE DISMISSED

To state a claim under §10(b):

“a plaintiff must plead facts demonstrating that (1) the defendant made a materially false or misleading statement or omitted to state a material fact necessary to make a statement not misleading; (2) the defendant acted with scienter; and (3) the plaintiff's reliance on the defendant's misstatement caused him or her injury.”

California Pub. Employees' Ret. Sys., No. 03-3755, 2004 WL 3015578, at *9 (3d Cir. Dec. 30, 2004)(hereafter “*CALPERS*, 2004 WL 3015578”)(Ex. A). As discussed below, the complaint fails to plead properly these essential elements.

A. Plaintiff's §10(b) Claim Must Satisfy Rule 9(b) And The PSLRA

To withstand dismissal, plaintiff's §10(b) claim must satisfy the heightened pleading requirements of Rule 9(b), Fed. R. Civ. P., and the PSLRA.

Id. Accord In re Alpharma Inc. Sec. Litig., 372 F.3d 137, 147-48 (3d Cir. 2004); *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 237 (3d Cir. 2004). A §10(b) claim that fails to comply with the PSLRA must be dismissed. 15 U.S.C. §78u-4(b)(3)(A); *CALPERS*, 2004 WL 3015578, at *11.

Although Rule 9(b) had been applied, particularly in this Circuit, to reduce the number of frivolous securities actions, *see, e.g., In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997), Congress determined that the Rule was subject to varying interpretations and failed to limit meritless claims. *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 530-34 (3d Cir. 1999)(reviewing legislative history); *In re Rockefeller Center Properties, Inc. Sec. Litig.*, 311 F.3d 198, 217-18 (3d Cir. 2002)(same). It thus enacted the PSLRA to “to adopt a ‘uniform and stringent pleading requirement’” that would eliminate frivolous actions at the pleading stage. *Rockefeller Center*, 311 F.3d at 217-18.¹⁰

Both Rule 9(b) and the PSLRA require that the circumstances of an alleged fraud be pled with “particularity.” *See* Rule 9(b), Fed. R. Civ. P.; 15

¹⁰ *See also In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1332 (3d Cir. 2002) (PSLRA pleading standards adopted “to provide a filter at the earliest stage (the pleading stage) to screen out lawsuits that have no factual basis”)(internal quotations omitted); *Wilson v. Bernstock*, 195 F. Supp. 2d 619, 625 (D.N.J. 2002)(PSLRA designed “to provide added protection against ... a growing number of frivolous ‘strike suits’”); *In re CDNOW, Inc. Sec. Litig.*, 138 F. Supp. 2d 624, 639 (E.D. Pa. 2001) (“[w]hile the PSLRA does not resolve the tension between deterring securities fraud and stymieing meritless suits, it was designed to favor the second consideration”).

U.S.C. §78u-4(b)(1); *Wilson*, 195 F. Supp. 2d at 632 n.15; *CDNOW*, 138 F. Supp. 2d at 640. Courts have interpreted the Rule and statutory standards as complementary, requiring, in essence, that a complaint provide “all of the essential factual background” of the purported securities fraud -- “that is, the ‘who, what, when, where and how’ of the events at issue.” *Rockefeller Center*, 311 F.3d at 217.¹¹

In addition, if allegations are pled on “information and belief” -- as they are here -- the PSLRA directs that plaintiff “shall state with particularity all facts on which that belief is formed.” 15 U.S.C. §78u-4(b)(1); *CALPERS*, 2004 WL 3015578, at *12 (requirement met only if “sufficient facts” are pled with particularity to “provide an adequate basis” for plaintiff’s belief).

The PSLRA also expands upon the requirements of Rule 9(b) for pleading scienter. Whereas Rule 9(b) permits scienter to be “averred generally,” the PSLRA directs (a) that scienter be pled with “particularity” and (b) that the particularized factual allegations raise a “strong” inference of scienter. *See*

¹¹ *Accord Alparma*, 372 F.3d at 148. For a more elaborate explanation of the factual detail required by Rule 9(b), see *id.* (identifying elements that Rule 9(b) requires be pled with particularity); *United States ex rel. Stauffer v. Bell Atlantic*, Civil No. 1:CV-96-1432, 1998 U.S. Dist. Lexis 22654, at *7-8 (M.D. Pa. 1998) (Rambo, C.J.)(Ex. B). Similarly, the PSLRA explicitly sets forth its own requirements for pleading with particularity the circumstances constituting fraud. *See* 15 U.S.C. §78u-4(b)(1); *Alparma*, 372 F.3d at 147.

Advanta, 180 F.3d at 531 n.5, 533-34.¹² Specifically, the PSLRA provides that a complaint asserting a §10(b) claim “shall, with respect to each act or omission ... state with particularity facts giving rise to a strong inference” that the defendant acted with scienter. 15 U.S.C. §78u-4(b)(2).

The Third Circuit has held that, to meet the PSLRA’s “particularity” requirement, the plaintiff must allege the essential factual details -- “the who, what, when, where, and how” -- supporting an inference of scienter. *GSC Partners*, 368 F.3d at 239; *Advanta*, 180 F.3d at 534. Moreover, a complaint may only raise a “strong” inference of scienter “either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.” *Alpharma*, 372 F.3d at 148.¹³

The heightened pleading standards of Rule 9(b) and the PSLRA preclude the traditional approach to evaluating a claim under which “reasonable” inferences might be indulged based on conclusory allegations. Rather, as the Third Circuit has held:

“unless plaintiffs in securities fraud actions allege facts supporting their contentions of fraud with the requisite particularity mandated by

¹² *Accord Alpharma*, 372 F.3d at 147-48; *Napier v. PriceWaterhouse Coopers LLP*, 227 F. Supp. 2d 263, 273-74 (D.N.J. 2002); *Wilson*, 195 F. Supp. 2d at 624-25.

¹³ *Accord GSC Partners*, 368 F.3d at 237; *Advanta*, 180 F.3d at 534-35.

Rule 9(b) and the Reform Act [PSLRA], they may not benefit from inferences flowing from vague or unspecific allegations -- inferences that may arguably have been justified under a traditional Rule 12(b)(6) analysis.”

CALPERS, 2004 WL 3015578, at *11. Moreover, “inferences of scienter do not survive if they are merely reasonable” but instead they must be “both reasonable and ”strong.”” *Alpharma*, 372 F.3d at 150.

B. The Complaint Fails To Allege That Mylan Made A Materially Misleading Statement

Plaintiff’s §10(b) claim is premised on the assertion that Mylan’s 3 SEC filings reporting the terms of the Mylan/King merger (on July 23, August 9 and September 3) were materially misstated because they failed to disclose the Perry Defendants’ “vote buying scheme.” (*See* Compl. ¶¶ 55-57.) Plaintiff’s premise, however, is fundamentally flawed because (a) no facts are pled to show that, as of the dates when Mylan made its 3 SEC filings, the Perry Defendants had even conceived of their alleged “vote buying scheme,” let alone executed it; and (b) the omission of the alleged “vote buying scheme” did not render Mylan’s statements either false or misleading.

1. No facts are pled to show that Mylan’s SEC filings were misstated when made

It is well established that “[t]o be actionable, a statement or omission must have been misleading at the time it was made; liability cannot be imposed on the basis of subsequent events.” *NAHC*, 306 F.3d at 1330; *In re Nice Systems, Ltd.*

Sec. Litig., 135 F. Supp. 2d 551, 578 (D.N.J. 2001). Accordingly, to state a claim, “a plaintiff must show that the omitted information in fact existed at the time that the allegedly misleading statement was made.” *In re NAHC, Inc. Sec. Litig.*, No. Civ. A. 00-4020, 2001 WL 1241007, at *11 (E.D. Pa. Oct. 17, 2001)(Ex. C), *aff’d*, 306 F.3d 1314 (3d Cir. 2002); *Castlerock Management, Ltd. v. Ultralife Batteries, Inc.*, 68 F. Supp. 2d 480, 487-88 (D.N.J. 1999); *Zucker v. Quasha*, 891 F. Supp. 1010, 1017 (D.N.J. 1995), *aff’d*, 82 F.3d 408 (3d Cir. 1996)).

Moreover, consistent with Rule 9(b) and the PSLRA, plaintiff may not rely on “[g]eneric and conclusory allegations based upon rumor or conjecture” to plead falsity, but must allege, with particularity, those facts demonstrating that a statement was false when made. *CALPERS*, 2004 WL 3015578, at *19. For that reason, numerous courts have dismissed §10(b) claims which lack sufficient factual detail to show that a statement was false or misleading when published. *Id.* at *13-23.¹⁴

Plaintiff’s claim suffers from that very flaw. Although plaintiff contends that Mylan’s 3 SEC filing were materially misleading because they failed

¹⁴ *See also Gross v. Summa Four, Inc.*, 93 F.3d 987, 993-94 (1st Cir. 1996)(claim properly dismissed where no facts pled to show that published statements was false when made); *NAHC*, 2001 WL 1241007, at *12-16 (claim dismissed because no facts pled to show that information contradicting published statements existed at time statements were made); *Nice Systems*, 135 F. Supp. 2d at 576-78 (failure to allege when facts supposedly contradicting published statement first existed renders claim inadequate).

to disclose the Perry Defendants' "vote buying scheme," the complaint fails to plead a single fact to show that the Perry Defendants' "scheme" even existed as of the date of any of Mylan's statements.

To the contrary, the only "facts" pled concerning the Perry Defendants' "scheme" relate to periods after Mylan made its statements. For example, the complaint alleges that the Perry Defendants first disclosed in a Schedule 13F filing, dated November 12, 2004, that they had acquired, as of September 30, 2004, approximately 6% of Mylan shares. (Compl. ¶ 29.) Similarly, the complaint alleges that the Perry Defendants disclosed in a Schedule 13D filing, dated November 29, 2004, their purchases and sales of Mylan stock, reflecting the implementation of their "vote buying scheme." (*Id.* ¶¶ 30-31.)

None of those alleged facts, however, support the conclusion that the Perry Defendants had executed (or even envisioned) their supposed "scheme" as of September 3 -- or at the time of Mylan's two prior disclosures.¹⁵ Moreover, plaintiff cannot rely upon the Perry Defendants' post-September 3 disclosures to

¹⁵ Indeed, given the supposed goal of the Perry Defendants' "vote buying scheme" (*i.e.*, to ensure the success of the proposed King/Mylan merger) the Perry Defendants may only have first devised their "scheme" after plaintiff announced its opposition to the merger -- which did not occur until September 7. (Compl. ¶ 26.) Moreover, as a matter of logic, it appears impossible for the Perry Defendants to have conceived their "scheme" prior to Mylan's initial disclosure on July 23 of the proposed Mylan/King transaction, since the Perry Defendants are not alleged to have had inside information concerning the proposed merger and, prior to its disclosure, would have had no reason even to consider the alleged "scheme."

infer that the Perry Defendants' "scheme" existed when Mylan made its SEC filings because such "fraud by hindsight" is impermissible.¹⁶ Accordingly, no facts are pled to show that Mylan's statements were false or misleading when made and thus plaintiff's claim must fail.

2. Mylan's SEC filings were not rendered false or misleading by omitting to disclose the "vote buying scheme"

Even assuming -- contrary to the facts pled -- that Perry's "vote buying scheme" existed at some point prior to Mylan's SEC filings, Mylan's failure to disclose that "scheme" did not render its statements actionable. A statement may only be found false or misleading "if it is factually inaccurate, or additional information is required to clarify it." *In re Cybershop.Com Sec. Litig.*, 189 F. Supp. 2d 214, 224-25 (D.N.J. 2002).¹⁷

¹⁶ See *CALPERS*, 2004 WL 3015578, at *22 ("[w]e have long rejected attempts to plead fraud by hindsight"); *Gross*, 93 F.3d at 994 (company's slowing sales in late spring fail to support inference that sales were slow in early January); *NAHC*, 2001 WL 1241007, at *13 (write off of accounts receivable after financial statements issued does not support inference that statements were false when issued because "[p]laintiffs may not rely on an inference based upon events subsequent to the statements"); *Castlerock*, 68 F. Supp. 2d at 487-88 (disclosure of production delays 40 days after public offering does not support inference that problems existed at time of offering); *Zucker*, 891 F. Supp. at 1017-18 (decline in performance 4 months after public offering does not support inference of poor performance at time of offering).

¹⁷ *Accord Greenfield v. Heublein, Inc.*, 742 F.2d 751, 756 (3d Cir. 1984) ("corporation has a duty to disclose sufficient information so that the statement made is not 'false or misleading or ...so incomplete as to mislead'"); *Nice Systems*, 135 F. Supp. 2d at 573 (same).

Neither of those conditions is met here. First, it is undisputed that Mylan's statements were factually accurate. Each of Mylan's statements which the complaint focuses upon simply summarizes the terms of the Mylan/King merger and reports that the merger is conditioned upon Mylan's shareholders approving the issuance of additional stock to be used as the consideration for the merger. (Compl. ¶¶ 55-56.) Plaintiff does not challenge the accuracy of those statements. To the contrary, the fact that the merger is conditioned on Mylan shareholders' vote is the premise for plaintiff's claim that it will be injured by the Perry Defendants' "scheme." In short, plaintiff has not -- and could not -- assert that Mylan's statements were actionable because "false."

Second, Mylan's statements were not rendered "misleading" for failing to disclose the "vote buying scheme." Although Mylan had a duty, when disclosing the terms of the merger agreement, to be "complete and accurate," that "does not mean that by revealing one fact ... one must reveal all others that, too, would be interesting, market-wise, but means only such others, if any, that are needed so that what was revealed would not be so incomplete as to mislead." *Gross*, 93 F.3d at 992 (citations and quotations omitted).¹⁸

¹⁸ *Accord Staffin v. Greenberg*, 672 F.2d 1196, 1204 (3d Cir. 1982)(corporation not required "to reveal every material corporate fact known to it every time it makes a public statement"); *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 641 n.17 (3d Cir. 1990)(corporation has "duty to disclose additional material facts only to the extent

In this case, the statements in Mylan's SEC filings which plaintiff cite focused on describing the merger and their discussion of the shareholder vote was solely in the context of identifying the conditions to the merger. (Compl. ¶¶ 55-56.) Plaintiff does not contend that Mylan said anything further about the vote. For example, Mylan did not discuss who would vote, the terms under which the vote would occur or the likely outcome of the vote. Moreover, Mylan did not comment upon or otherwise characterize the integrity of the voting process.

Given the limited scope of Mylan's disclosure, it had no obligation to disclose -- and its statements were not rendered misleading for failing to disclose -- that the shareholder vote was "rigged" by the Perry Defendants' "vote buying scheme" (assuming it even then existed). *See In re U.S. West, Inc. Sec. Litig.*, 201 F. Supp. 2d 302, 307 (D. Del. 2002)(proxy statement's accurate description of "no solicitation" clause contained in merger agreement not rendered misleading by failure to disclose intent to breach clause, particularly where proxy did not discuss parties' future intentions), *aff'd*, 65 Fed. Appx. 856 (3d Cir. 2003).¹⁹

that the volunteered disclosure was misleading as to a material fact"); *Zucker*, 891 F. Supp. at 1014 ("defendant is not required to disclose all known information, but only information that is 'necessary to make other statements not misleading.'").

¹⁹ *See also Gross*, 93 F.3d at 994-95 (accurate disclosure of "significant orders" not made misleading for failing to disclose difficulties in completing orders); *Shapiro v. UJB Financial Corp.*, 964 F.2d 272, 281 (3d Cir. 1992)(accurate disclosure of financial data not rendered misleading by failing to adversely characterize performance when no positive comments made); *Staffin*, 672 F.2d at 1204

Moreover, plaintiff's theory fails for two additional reasons. First, Mylan's omission of the "vote buying scheme" could only be actionable under §10(b) if Mylan knew of the scheme when making its statements. The complaint, however, pleads no facts raising a "strong" (or any) inference of scienter. (*See* Point I.C., below.) Second, the thrust of plaintiff's "omission" claim is that Mylan failed to disclose that it would permit its shareholders' vote to be corrupted by the Perry Defendants' "scheme." That charge, however, only accuses Mylan of failing to disclose a possible breach of fiduciary duty, which is not actionable under §10(b) (*see* Point I.D., below).

C. The Complaint Fails To Allege Facts Giving Rise To A Strong Inference That Mylan Acted With Scienter

Given that no facts are pled to show that the Perry Defendants' "scheme" existed at the time of Mylan's SEC filings, it is not surprising that the complaint falls woefully short of pleading the particularized factual allegations necessary to raise a "strong" inference that Mylan acted with scienter in making its SEC filings.

(accurate disclosure of insider's sales to large, outside investor not made misleading by omission of insider's hostility to investor and search for white knight); *Winer Family Trust v. Queen*, No. Civ. A. 03-4318, 2004 WL 2203709, at *6-7 (E.D. Pa. Sept. 27, 2004)(accurate disclosure that investor's equity infusion enabled firm to list stock not rendered misleading by omission of hostility between firm and investor)(Ex. D); *Zucker* 891 F. Supp. at 1016-18 (accurate disclosure of historic revenue not rendered misleading by subsequent decline in revenue where no revenue predictions made).

Notably, the complaint fails to plead any motive by Mylan to commit fraud. Moreover, any argument that Mylan's desire to complete the Mylan/King merger constitutes motive is contradicted by established caselaw holding that such a generic accusation -- common to all companies engaged in merger transactions and tender offers -- would be inadequate.²⁰ Accordingly, because Mylan had no apparent motive to commit fraud, "the strength" of plaintiff's "circumstantial allegations must be correspondingly stronger." *GSC Partners*, 368 F.3d at 238 (citations omitted).

The complaint's sole allegation concerning Mylan's knowledge of the Perry Defendants' "vote buying scheme," however, rests on nothing more than implausible speculation bereft of factual support. Specifically, the complaint attempts to draw an inference of scienter based on a single conversation between Coury and Icahn that supposedly occurred "long before any solicitation of the

²⁰ Motive allegations must be supported by facts showing "a concrete and personal benefit to the individual defendant" from the fraud and thus "[m]otives that are generally possessed by most corporate directors and officers do not suffice." *GSC Partners*, 368 F.3d at 237. For that reason, the desire to complete a merger -- like similar, widely-shared corporate motives, such as the desire to retain a corporate position and benefits, maximize share prices, increase market share and improve stock prices or credit ratings -- have been deemed insufficient to raise a strong inference of scienter. *Id.* (desire to complete a merger fails to show motive). See also *Alpharma*, 372 F.3d at 152-53 (collecting examples of generalized, inadequate motive allegations); *Wilson*, 195 F. Supp. 2d at 634-37 (same); *Nice Systems*, 135 F. Supp. 2d at 583 (same).

Mylan shareholders” and in which Coury allegedly said that he “‘had the votes’ to force approval of the King acquisition.” (Compl. ¶ 6; *see also id.* ¶ 59.)

Coury’s alleged remark, however, does not offer even a plausible -- let alone a “strong” -- inference that he knew anything about the Perry Defendants’ alleged “vote buying scheme.”²¹ On its face, Coury’s statement makes no mention of the Perry Defendants -- and plaintiff cannot, consistent with the PSLRA, assume, *ipse dixit*, some otherwise unstated knowledge informing Coury’s remark. *Nappier*, 227 F. Supp.2d at 280-81 (plaintiff cannot satisfy the PSLRA “simply by defining certain [vague] terms in a way that assumes the required state of mind”).

Moreover, contrary to the inference plaintiff seeks to draw, Coury’s alleged statement could reasonably be understood to reflect simply his confidence

²¹ Plaintiff’s failure to allege the date of the Coury/Icahn meeting also undermines its claim because, even if Coury’s remark raised a “strong” inference of scienter (which it does not), plaintiff has not shown that Coury possessed that knowledge before Mylan made its last relevant SEC filing on September 3. The complaint pleads only that Coury met with Icahn “long before any solicitation of the Mylan shareholders.” (Compl. ¶ 6.) Mylan, however, has still not distributed proxy statements to its shareholders, but has only filed a preliminary proxy statement with the SEC (*id.* ¶ 56). Accordingly, plaintiff’s vague allegation offers no basis to conclude that the Coury/Icahn conversation occurred prior to Mylan’s September 3 SEC filing and thus fails to adequately plead scienter. *See NAHC*, 2001 WL 1241007 at *20 (dismissing claim for failing to allege “particularized facts” supporting scienter “contemporaneous to the issuance of the allegedly misleading statements”); *Nice Systems*, 135 F. Supp. 2d at 576-78 (dismissing claim for failing to plead when defendants supposedly learned of information contradicting their public statements); *In re Cooper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 871 (N.D. Cal. 2004)(dismissing claim which failed to allege dates of conversations supposedly evidencing defendants’ scienter).

that Mylan's shareholders would approve Mylan's proposal given the benefits of the Mylan/King merger. Indeed, Icahn apparently understood Coury's statement in just that manner, as Icahn allegedly continued, after his meeting with Coury, to buy Mylan shares -- and campaign against the proposed merger. Plainly, Coury's statement does not support a "strong" inference of scienter where it permits (if not compels) a reasonable interpretation directly contrary to the inference plaintiff seeks to draw.²²

The inference plaintiff advocates is particularly untenable given that the complaint fails to allege any connection between Coury and the Perry Defendants. The PSLRA precludes plaintiff from resting on conclusory assertions that Coury "knew" or "must have known" the "truth" contradicting Mylan's public statements.²³ Instead, the PSLRA directs that scienter allegations be supported by detailed factual allegations linking a defendant to timely knowledge of facts

²² See *Nappier*, 227 F. Supp. 2d at 278 ("if the facts alleged do not exclude other plausible explanations that would undercut a plaintiff's circumstantial evidence of scienter, then that plaintiff's facts cannot be fairly said to raise a 'strong inference' that the defendant acted with the required state of mind"). *Accord Alpharma*, 372 F.3d at 150 ("inferences of scienter do not survive if they are merely reasonable" but instead they must be "both reasonable and "strong""); *In Re Digital Island Sec. Litig.*, 357 F.3d 332, 330 (3d Cir. 2004)("PSLRA requires a strong -- as opposed to merely reasonable -- inference to survive a motion to dismiss"); *Nice Systems*, 135 F. Supp. at 572 n.15 ("plausible" inference is insufficient).

²³ See *GSC Partners*, 368 F.3d at 239; *Advanta*, 180 F.3d at 539.

rendering his public statements false or misleading.²⁴ Those factual averments, however, are wholly absent from the complaint.

Thus, among other missing facts, the Complaint fails to allege that, prior to the Coury/Icahn meeting, Coury (a) had any association with Perry or members of his hedge fund; (b) was aware of the Perry Defendants' investment strategies generally; or (c) discussed with the Perry Defendants their plans (if any) for purchasing Mylan shares and what investment strategies they intended to pursue. Indeed, as discussed above, the complaint does not even allege whether the Perry Defendants were Mylan shareholders at the time of the Coury/Icahn meeting or had even conceived of the "vote buying scheme" for Mylan shares at that time.²⁵

²⁴ See *Novak v. Kasaks*, 216 F.3d 300, 308-09 (2d Cir. 2000) (setting forth rule and summarizing types of factual allegations which may satisfy it). See also *CALPERS*, 2004 WL 3015578, at *23 (scienter not pled where no particularized facts alleged showing how management learned of facts supposedly contradicting its public statements); *Alpharma*, 372 F.3d at 151 (allegation that adverse information was available at company inadequate because no facts pled that corporate defendant reviewed the information); *NAHC*, 2001 WL 1241007 at *19 (scienter allegation rejected where no facts alleged to show that defendants had access to information supposedly contradicting published statements); *Wilson*, 195 F. Supp. 2d at 640 (same); *Nice Systems*, 135 F. Supp. 2d at 585-86 (same); *Cybershop.Com*, 189 F. Supp. 2d at 235-36 (same).

²⁵ The complaint's factual paucity is not cured by its assertion that Perry's "modus operandi" is to hold "discussions with corporate management to indicate that he will help to secure the shareholder approval of transactions" without disclosing those discussions to the public. (Compl. ¶ 1.) First, that allegation is itself entirely conclusory, failing to reveal any factual details concerning Perry's supposed

The absence of such critical factual averments precludes any conclusion that Coury knew of the Perry Defendants' alleged scheme. Far from raising a "strong" inference of scienter, plaintiff's conclusory, *ipse dixit*, assertion of scienter is neither reasonable nor plausible. Accordingly, plaintiff's §10(b) claim should be dismissed.

D. Mylan's Alleged Failure To Disclose Corporate Mismanagement Is Not Actionable Under §10(b)

Even assuming that (a) the Perry Defendants' "vote buying scheme" existed at the time of Mylan's SEC filings; and (b) Mylan's statements were rendered incomplete by the omission of the scheme; and (c) Mylan knew of the "scheme" -- the non-disclosure of that "scheme" still does not state a claim. That is because the complaint, in essence, asserts nothing more than a failure to disclose possible corporate mismanagement, which is not actionable under §10(b).

In *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462 (1977) -- in which a minority stockholder claimed to have been victimized by a "short-form" merger effected by the majority stockholder at an "unfair" price -- the Supreme Court held

"modus operandi." Second, because the allegation is pled on information and belief, plaintiff should have -- but failed to -- allege "with particularity all facts on which the belief is formed" and thus its pleading is inadequate. *See* 15 U.S.C. §78u-4(b)(1); *CALERS*, 2004 WL 3015578, at *12 (plaintiff must "plead with particularity *sufficient* facts to support" allegations of belief). Third, regardless of Perry's generic "modus operandi," no facts are pled to suggest that he followed that pattern with Mylan. Accordingly, plaintiff's conclusory claim about Perry's "modus operandi" lends no support for finding a "strong" inference of scienter.

that §10(b) did not encompass claims for “breach of fiduciary duty” unaccompanied by deception, misrepresentation or nondisclosure. *Id.* at 476. The Court based its decision as much on statutory construction as policy concerns.

Among other things, the Court found that Congress did not necessarily intend to afford relief under §10(b) when the “cause of action (is) one traditionally relegated to state law.” *Id.* at 478. Moreover, the Court expressed substantial reluctance to “federalize” state corporate law, holding:

“Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”

Id. at 479.

Since *Santa Fe*, courts, including the Third Circuit, have heeded the Supreme Court’s concerns and rejected plaintiffs’ attempts to “bootstrap” a breach of fiduciary duty claim into a §10(b) action by alleging that management failed to disclose a breach of duty. Thus, the Third Circuit has held that “[w]here the incremental value of disclosure is solely to place potential investors on notice that management is culpable of a breach of faith or incompetence, the failure to disclose does not violate the securities acts.” *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 640 (3d Cir. 1990). In short, “[c]laims grounded in breach of fiduciary duty

or improper management are not actionable under Section 10(b).” *Werner v. Werner*, 267 F.3d 288, 299 (3d Cir. 2001).

Plaintiff’s §10(b) claim runs directly afoul of these principles. Plaintiff accuses Mylan of not disclosing that the announced Mylan shareholder vote would proceed despite its being “rigged” by the Perry Defendants’ “vote buying scheme.” The essence of that “omission” claim is that Mylan management had a duty to prevent the “rigged” vote and Mylan failed to disclose both its management’s anticipated breach of duty and the resulting “unfair” process.

Of course, whether Mylan management has a duty to supervise corporate elections is a matter of state law -- in this case, Pennsylvania, the state where Mylan is incorporated. Moreover, if such a duty exists, its breach would also be a matter of state law. Indeed, the numerous state law claims asserted against Mylan are testament to plaintiff’s belief that its claim against Mylan is rooted in state law.

Consistent with *Santa Fe*, plaintiff may not fashion a §10(b) claim based on Mylan’s failure to disclose that the anticipated shareholder vote would be “unfair” because of its management’s supposed breach of corporate duties. As the Third Circuit has held, §10(b) does not impose an obligation on corporate management “to publicly admit the culpability of their actions.” *Lewis v. Chrysler Corp.*, 949 F.2d 644, 652 (3d Cir. 1991)(management’s failure to disclose that its

proposed voting rights plan was part of an entrenchment scheme not actionable under §10(b)).²⁶ To the extent plaintiff believes that Mylan intends to allow shareholders to cast improper votes, plaintiff's remedy (if any) lies under state law -- not §10(b).

E. The Complaint Fails To Plead That Mylan's Alleged Misstatements Caused Plaintiff To Suffer Any Loss

A further, independent reason for dismissing plaintiff's §10(b) claim is that the complaint fails to plead the essential element of "loss causation" -- *i.e.*, that Mylan's alleged misstatements were the cause of any injury plaintiff supposedly suffered.

Loss causation -- and its doctrinal twin, "transaction causation" -- are established concepts in §10(b) jurisprudence and, collectively, reflect the plaintiff's burden to establish that the defendant's alleged misconduct proximately caused plaintiff's injury. Transaction causation -- more commonly known as reliance --

²⁶ See also *Werner*, 267 F.3d at 298-99 (rights plan description which omitted that plan would only benefit management not actionable); *Gannon v. Continental Insur. Co.*, 920 F. Supp. 566, 579-80 (D.N.J. 1996)(failure to disclose that published decision not to accrue reserves was motivated by desire to protect incentive bonuses alleges only non-actionable corporate mismanagement); *Coronet Insur. Co. v. Seyfarth*, 665 F. Supp. 661 (N.D. Ill. 1987)(rejecting claim premised on failure to disclose various management misconduct, including improper director vote, undertaken to further an undisclosed entrenchment scheme that deprived plaintiff of its ability to "vote effectively on proposals affecting corporate actions"); *Warner Communications, Inc. v. Murdoch*, 581 F. Supp. 1482, 1488-95 (D. Del. 1984) (failure to disclose that charter amendments and stock sale were designed to entrench management and unfair to shareholders not actionable).

“establishes that but for the fraudulent misrepresentation, the investor would not have purchased or sold the security.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 172 (3d Cir. 2001). In turn, “[l]oss causation demonstrates that the fraudulent misrepresentation actually caused the loss suffered.” *Id.* at 173.

Congress, in the PSLRA, recognized the critical role played by the element of loss causation. In a provision entitled “Loss Causation,” the PSLRA directs that “[i]n any private action ... the plaintiff shall have the burden of proving that the act or omission of the defendant ... caused the loss for which the plaintiff seeks to recover damages.” 15 U.S.C. §78u-4(b)(4).

To plead loss causation, a plaintiff must do more than simply allege that he purchased a security whose value was affected by a materially misleading statement. That is because such an allegation fails to establish that the plaintiff actually suffered any loss due to the alleged misrepresentation. As the Third Circuit explained, “[w]here the value of the security does not actually decline as a result of an alleged misrepresentation, it cannot be said that there is in fact an economic loss attributable to that misrepresentation.” *Semerenko v. Cendant Corp.*, 223 F.3d 165, 187 (3d Cir. 2000).

Accordingly, to plead loss causation, a plaintiff “must also establish that the alleged misrepresentations proximately caused the decline in the security’s

value.” *Id. Accord In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 277 (3d Cir. 2004)(§10(b) claim “requires that plaintiffs plead loss causation, i.e., allege that the material misstatement or omission caused a drop in the stock price”).²⁷ Consistent with that rule, numerous courts have, at the pleading stage, dismissed complaints which failed to allege that the release of “curative” information (*i.e.*, disclosures correcting prior false statements) caused the price of a security to decline -- because the pleadings failed to show that the allegedly false information caused any injury.²⁸

These decisions illustrate the defect in plaintiff’s §10(b) claim. Plaintiff asserts that Mylan’s alleged misstatements “were material to the value of the Mylan stock” (Compl. ¶ 1) but fails to allege that those misstatements caused any decline in Mylan’s stock price.

²⁷ Although a number of Circuit Courts have reached the same conclusion as the Third Circuit -- *e.g.*, *Emergent Capital Investment Management, LLC v. Stonepath Group, Inc.*, 343 F.3d 189, 196-98 (2d Cir. 2003); *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441, 1448 (11th Cir. 1997); *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685-86 (7th Cir. 1990) -- the Ninth Circuit has articulated the opposite view in a decision now before the Supreme Court. *See Broudo v. Dura Pharmaceuticals*, 339 F.3d 933 (9th Cir. 2003), *cert. granted*, 124 S.Ct. 2904 (2004).

²⁸ *See, e.g.*, *Spencer Trask Software and Information Services LLC v. RPost Internat’l Ltd.*, No. 02 Civ. 1276 (PKL), 2003 WL 169801, at *19-21 (S.D.N.Y. Jan. 24, 2003)(Ex. E); *Keeney v. Larkin*, 306 F. Supp. 2d 522, 541 (D. Md. 2003); *D.E. & J Ltd. Partnership v. Conaway*, 284 F. Supp. 2d 719, 746-49 (E.D. Mich. 2003); *Anderson v. First Security Corp.*, 249 F. Supp. 2d 1256, 1268 (D. Utah 2002). *Cf. Cypershop.Com*, 189 F. Supp. 2d at 233 (loss causation not pled when stock price increased upon disclosure of allegedly curative information).

Indeed, plaintiff identifies three separate occasions on which the Perry Defendants' "vote buying scheme" was publicly disclosed -- on November 23 in an article in *The Daily Deal* (*id.* ¶ 33); on November 29, in the Perry Defendants' Schedule 13D (*id.* ¶ 30) and on December 2 in a *New York Times* article (*id.* ¶ 5). The complaint, however, fails to allege that Mylan's stock price declined as the result of any one (or all) of these disclosures. Accordingly, plaintiff has failed to allege that it suffered a loss due to Mylan's alleged misstatements and its claim should be dismissed.²⁹

II. THE COURT SHOULD DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIMS

Apart from the §10(b) claim, all the remaining claims in the Complaint asserted against Mylan arise under state law (*see* Compl. Counts 4, 5, 7-10).³⁰ Moreover, the Complaint only purports to plead state law claims against

²⁹ Plaintiff cannot avoid its failure to plead loss causation by relying upon its request for injunctive relief because, as discussed above, loss causation, by statute and caselaw, is an essential element of every §10(b) claim. Moreover, to the extent plaintiff did suffer injury by purchasing stock whose value had been affected by material misstatements, there is no reason why money damages could not fully compensate plaintiff for that injury, thereby rendering injunctive relief inappropriate. *See Frank's GMC Truck Center, Inc. v. General Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) ("availability of adequate monetary damages belies a claim of irreparable injury").

³⁰ As noted above, the declaratory judgment claim asserted against Mylan in Count 5 may seek only a determination that Mylan has violated §10(b) and not state law. (*See* Compl. ¶¶ 86, 88.) To the extent Count 5 is so limited, it should be dismissed for the same reasons as plaintiff's primary §10(b) claim against Mylan.

Coury (*id.* Counts 7-10). Plaintiff contends that this Court may hear these state law claims by exercising supplemental jurisdiction over them pursuant to 28 U.S.C. § 1367. (Compl. ¶ 9.) For the reasons discussed below, however, the Court should decline to exercise such supplemental jurisdiction.

Section 1367 affords a district court “supplemental jurisdiction” to hear state law claims that are “so related” to claims over which the court has original jurisdiction “that they form part of the same case or controversy under Article III of the United States Constitution.” 28 U.S.C. §1367(a). In addition, supplemental jurisdiction embraces parties added to such state law claims who were not named in the federal counts. *Id.*; *see also HB General Corp. v. Manchester Partners, L.P.*, 95 F.3d 1185, 1197 (3d Cir. 1996).

The exercise of supplemental jurisdiction, however, is not mandatory. Rather, supplemental jurisdiction “is a doctrine of discretion, not of plaintiff’s right.” *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 172 (1997). Section 1367(c) codifies that principle, directing that a district court “may decline to exercise supplemental jurisdiction” based on any one of four separately enumerated conditions. *See id.* at 173 (listing statutory conditions); *Growth Horizons, Inc. v. Delaware County, PA*, 983 F.2d 1277, 1284 (3d Cir. 1993) (supplemental jurisdiction may be declined “if any of four conditions are met”). In

evaluating these conditions, the court should “take into account generally accepted principles of ‘judicial economy, convenience, and fairness to the litigants.’” *Id.*

In this case, the §1367(c) conditions point clearly towards declining jurisdiction over plaintiff’s state law claims. First, if the Court dismisses plaintiff’s federal securities claims, then one of the conditions for declining jurisdiction -- *i.e.*, §1367(c)(3) -- would be met. Indeed, the Third Circuit has held that where a court has dismissed all federal claims, it “*must* decline to decide the pendent state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so.” *Hedges v. Musco*, 204 F.3d 109, 123 (3d Cir. 2000)(emphasis original). *Accord Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir. 1995).

Plaintiff, however, can point to no “affirmative justification” for maintaining jurisdiction. To the contrary, courts have held that where, as here, federal claims are dismissed at the pleading stage, judicial economy, convenience and fairness do not weigh in favor of retaining jurisdiction because neither the court nor the parties have invested sufficient time or resources in the action.³¹

³¹ See *L-3 Communications Corp. v. Clevenger*, No. 03-CV-3932, 2004 WL 1941248, at *6 (E.D. Pa. Aug. 31, 2004)(jurisdiction declined because federal claims dismissed at pleading stage before entry of scheduling order)(Ex. F); *Trump Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc.*, 963 F. Supp. 395, 408 (D.N.J. 1997)(because federal claims dismissed on pleadings motion, no discovery had occurred and no trial date set, jurisdiction not compelled by consideration of

Indeed, in other cases, this Court has declined to exercise supplemental jurisdiction where it dismissed all federal claims at the pleading stage.³² Similarly, in other actions predicated on alleged federal securities violations, courts have dismissed pendent state law claims after dismissing the securities claims on pleading motions.³³

Another condition weighing heavily against retaining supplemental jurisdiction is the presence of novel or complex issues of state law. *See* 28 U.S.C. §1367(c)(1). As the Supreme Court has directed, “[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties.” *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966). *Accord De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003)(despite presence of federal claim, trial court should have declined supplemental jurisdiction because state claims raised novel and complex issues under Pennsylvania law).

fairness and judicial economy), *aff'd*, 140 F.3d 478, 487 (3d Cir. 1998); *Ciro, Inc. v. Gold*, 816 F. Supp. 253, 271 (D. Del. 1993)(same).

³² *See Gettysburg Battlefield Preservation Assoc. v. Gettysburg College*, 799 F. Supp. 1571, 1585 (M.D. Pa. 1992)(Rambo, J.); *Troublefield v. City of Harrisburg*, 789 F. Supp. 160, 167 (M.D. Pa. 1992)(Rambo, J.). *Cf. McCreary v. Wilt*, 11 F. Supp. 2d 731, 733 (M.D. Pa. 1998)(Rambo, C.J.)(state law claims may be dismissed if federal claims dismissed on pleadings motion).

³³ *See, e.g., L-3 Communications Corp.*, 2004 WL 1941248, at *6; *Martin v. PNC Financial Services Group, Inc.*, No. Civ.A.02-7191, 2004 WL 887411, at *2 (E.D. Pa. Jan. 16, 2004)(Ex. G); *Trump Hotels*, 963 F. Supp. at 408; *Steinhardt Group, Inc. v. Citicorp*, No.Civ.A.96-15-SLR, 1996 WL 790097, at *10 (D. Del. Dec. 2, 1996)(Ex. H), *aff'd*, 126 F.3d 144 (3d Cir. 1997); *Ciro, Inc.*, 816 F. Supp. at 271.

Plaintiff's state law claims against Mylan and Coury raise a number of novel and complex (although far from meritorious) issues.³⁴ One such issue -- which underpins all of plaintiff's state law claims -- is whether the Perry Defendants' actions constitute "vote buying" and, if so, whether that conduct invalidates the Perry Defendants' voting rights. These issues plainly implicate core principles of Pennsylvania corporate law, since the "right to vote is often considered a shareholder's most fundamental right." *Reifsnyder v. Pittsburgh Outdoor Advertising Co.*, 173 A.2d 319, 322 n.8 (Pa. 1961). Nevertheless, the issue raised here has not been directly addressed by the Pennsylvania courts.³⁵

³⁴ At the same time, those claims implicate other, established legal principles that warrant dismissal of the claims. For example, Count 9 purports to assert a claim against Mylan and Coury for "aiding and abetting" fraud and conspiracy, but Pennsylvania does not recognize such a tort. *See In re Jack Greenberg, Inc.*, 240 B.R. 486, 523-24 (Bankr. E.D. Pa. 1999); *S. Kane & Son Profit Sharing Trust v. Marine Midland Bank*, No. Civ.A. 95-7058, 1996 WL 325894, at *9 (E.D. Pa. June 13, 1996)(Ex. I). Moreover, because the state law claims sound in fraud -- since they not only make explicit averments of fraudulent conduct but each claim incorporates by reference all the allegations of fraud in the complaint -- they must all satisfy Rule 9(b). *See CALPERS*, 2004 WL 3015578, at *24-25 (applying Rule 9(b) to negligence and strict liability claim where allegations sound in fraud). For the reasons discussed above, the complaint fails to satisfy Rule 9(b) and thus the state law claims should be dismissed. If the Court decides to exercise supplemental jurisdiction, Mylan and Coury respectfully request an opportunity to submit further briefing identifying the defects in plaintiff's state law claims.

³⁵ Notably, courts applying other states' laws have suggested that there is nothing improper about "vote buying" when effected in transactions between individual shareholders that do not involve the use of corporate assets. As one Delaware court noted, "[s]hareholders are free to do whatever they want with their votes, including selling them to the highest bidder." *Hewlett v. Hewlett-Packard Co.*, No.

Plaintiff's state law claims raise numerous other unresolved issues. For example, in Count 4, plaintiff purports to seek relief (including equitable relief) under 15 Pa.C.S. §1793. It appears to be a novel issue, however, whether plaintiff has standing under §1793, since that statute requires, as a predicate to relief, that a person be "aggrieved by any corporate action" and the "corporate action" at issue here -- the Mylan shareholder vote -- has not even been scheduled, let alone occurred.³⁶

Moreover, plaintiff's claim raises new and difficult issues of causation and injury. That is because any votes cast by Mylan shareholders -- the "corporate action" at the heart of plaintiff's §1793 claim -- are subject to scrutiny by the "judges of election" who, under 15 Pa.C.S. §1765(3), are authorized to "determine...all challenges and questions in any way arising in connection with the right to vote." There is no reason to believe -- and the complaint offers no facts to suggest -- that these judges, if presented with an appropriate application, would fail

Civ.A.19513-NC, 2002 WL 549137, at *4 (Del. Ch. Apr. 8, 2002)(Ex. J). *See also Schreiber v. Carney*, 447 A.2d 17 (Del. Ch. 1982)(discussing policy issues implicated by vote buying).

³⁶ Similarly, it is undecided whether 15 Pa.C.S. §1105 -- which plaintiff contends in Count 10 applies here -- precludes all of plaintiff's statutory and common law claims for equitable relief, since §1105 appears to set forth the exclusive conditions for obtaining an injunction against a merger.

to properly evaluate the validity of any votes cast by the Perry Defendants, thereby averting any “corruption” of the voting process.

Plaintiff’s claim for “prospective breach of duty to hold fair election” alleged in Count 10 raises similar novel issues. Particularly, although plaintiff asserts a right to injunctive relief under 15 Pa.C.S. §1105, that statute is limited to “an injunction against any proposed [merger] plan.” No Pennsylvania court appears to have addressed whether the statute would apply here, where, as plaintiff concedes, Mylan shareholders are not being asked to approve a merger but instead, approve only the issuance of stock. (Compl. ¶ 112.) Moreover, plaintiff’s claim raises similar, complex issues of causality and injury as Count 4, since any alleged harm may be averted by the judges of election in the exercise of their statutorily assigned roles.³⁷

As the above examples illustrate, because plaintiff’s claims raise novel and complex issues of state law, they “are better left to the Pennsylvania state courts” and thus supplemental jurisdiction should be declined. *De Asencio, Inc.*, 342 F.3d at 311.

³⁷ As for the remaining state law claims, those asserted in Counts 7 and 8 appear to be tort claims paralleling plaintiff’s statutory claims. Not only is it uncertain whether Pennsylvania recognizes such torts (and what the elements of the claims might be) but the claims raise the same complex issues of causality and injury as the statutory actions. Plaintiff’s declaratory judgment action against Mylan, to the extent it is even premised on state law, necessarily raises the same novel and complex issues as the underlying state law claims.

Further counseling against the exercise of supplemental jurisdiction is that plaintiff's state law claims will "substantially predominate" over its federal securities action. *See* 28 U.S.C. §1367(c)(2). The basic issue raised by plaintiff's state law claims is the "fairness" of Mylan's expected shareholder vote and the relief requested is the supervision of that corporate voting process by this Court. That issue (and related remedy) stand in marked contrast to what should be the concerns of a properly pled securities action -- *i.e.*, whether a defendant knowingly made a material misstatement or omission on which plaintiff relied and thereby suffered harm.

Because the issues raised by the state law claims -- in terms of proof, the scope of relevant inquiry and the comprehensiveness of the remedy sought -- far exceed the narrower federal securities claim, the Court should decline to exercise supplemental jurisdiction. *See De Asencio, Inc.*, 342 F.3d at 309-10.

CONCLUSION

For the reasons set forth above, defendants Mylan and Coury respectfully request that the Court enter an Order dismissing with prejudice the §10(b) claim asserted against Mylan and dismissing all other remaining claims asserted against Mylan and Coury in the complaint.

Respectfully submitted,

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