In the United States Court of Appeals for the Third Circuit

No. 13–3750

ALAN W. SCHMIDT, on behalf of himself and in a representative capacity on behalf of all others similarly situated and derivatively on behalf of Genaera Corp., appellant

v.

JOHN A. SKOLAS; LEANNE KELLY; JOHN L. ARMSTRONG, JR.; ZOLA B. HOROVITZ, Ph. D.; OSAGIE O. IMASOGIE; MITCHELL D. KAYE; ROBERT F. SHAPIRO; PAUL K. WOTTON; ROBERT DELUCCIA; DAVID LUCI; STEVE ROUHANDEH; JEFFREY DAVIS; MARK ALVINO; GENAERA LIQUIDATING TRUST; BIOTECHNOLOGY VALUE FUND, INC.; LIGAND PHARMACEUTICALS, INC.; XMARK CAPITAL PARTNERS, LLC; ARGYCE LLC; OHR PHARMACEUTICALS; JOHN L. HIGGINS; GENAERA CORP.; SCO FINANCIAL GROUP; DIPEXIUM PHARMACEUTICALS, LLC; MACROCHEM CORP.; ACCESS PHARMACEUTICALS, INC.; MARK N. LAMPERT

On Appeal from the U.S. District Court for the Eastern District of Pennsylvania, No. 12–cv–3265 (Honorable Berle M. Schiller, U.S. District Judge)

ANSWER OF PLAINTIFF/APPELLANT IN OPPOSITION TO THE PETITIONS FOR REHEARING EN BANC

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Court Rules

I. INTRODUCTION

In accordance with this Court's order dated November 13, 2014, plaintiff/appellant Alan W. Schmidt respectfully submits this answer in opposition to the pending petitions for rehearing en banc. Because neither petition has merit, they should both be denied.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff/appellant Alan Schmidt filed an amended complaint in the U.S. District Court for the Eastern District of Pennsylvania asserting a variety of Pennsylvania state law claims against defendants. In response, defendants filed motions to dismiss under Federal Rule of Civil Procedure 12(b)(6) asserting numerous alternative grounds for dismissal.

Defendants argued, among other things, that Schmidt's claims were time–barred under Pennsylvania's two–year statute of limitations. In response, Schmidt argued that this was not an appropriate case in which to dismiss the action at the Rule 12(b)(6) stage, because Schmidt's amended complaint did not clearly establish on its face that his claims were untimely. Moreover, in opposing the defendants' statute

of limitations defense at the Rule 12(b)(6) stage, Schmidt specifically argued that even if the defendants' tortious conduct had occurred slightly more than two years before he filed suit, the discovery rule applicable under Pennsylvania law operated to postpone the accrual of his claims so that they were timely filed. Finally, Schmidt objected to the defendants' improper reliance on, and improper introduction into the record of, a substantial volume of material from outside of the pleadings in support of their motions to dismiss on statute of limitations grounds.

The district court ruled, as to defendant Ohr Pharmaceutical, Inc., that plaintiff had failed to establish Ohr's amenability to personal jurisdiction in Pennsylvania. As a result, as to Ohr alone, the district court dismissed plaintiff's action for lack of personal jurisdiction. Plaintiff did not challenge Ohr's dismissal in his Brief for Appellant, and thereafter, at the urging of counsel for Ohr, plaintiff filed an unopposed motion to dismiss Ohr as an appellee from this appeal.[1]

[1] Consequently, Ohr's petition for rehearing should be denied, because there is absolutely no dispute that this Court's decision does not, and could not have, reinstated any of plaintiff's claims against Ohr. Plaintiff acknowledges this, and plaintiff will not contend on remand that this Court's ruling somehow reinstated plaintiff's claims against Ohr. Were

As to the remaining defendants, the district court dismissed Schmidt's Pennsylvania law claims as time–barred. Following an unsuccessful motion for reconsideration, Schmidt filed a timely appeal to this Court. After briefing and oral argument, a divided three–judge panel reversed the district court's dismissal at the Rule 12(b)(6) stage on statute of limitations grounds.

The majority opinion makes clear that the defendants' numerous remaining grounds for Rule 12(b)(6) dismissal, which the district court has yet to address, should be addressed in the first instance by the district court on remand. Moreover, the majority opinion makes clear that this Court has not determined the merits either of defendants' statute of limitations defenses or of plaintiff's invocation of the discovery rule. Rather, the majority has ruled that the district court acted prematurely in holding at the Rule 12(b)(6) stage that plaintiff's Pennsylvania law claims were time–barred. Consequently, the merits of

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plaintiff to do so — which plaintiff will not — counsel for Ohr could of course seek appropriate sanctions from the district court. As this Court's judgment makes clear — and as Ohr's rehearing petition acknowledges — this Court affirmed in part and reversed in part the district court's judgment. The part that was affirmed was the district court's dismissal of Ohr for lack of personal jurisdiction.

defendants' invocation of a statute of limitations defense and plaintiff's invocation of the discovery rule can be revisited in the district court if necessary on a proper factual record at the summary judgment stage and thereafter by the factfinders at trial.

III. THE PETITIONS FOR REHEARING EN BANC SHOULD BE DENIED

A. The Panel's Ruling Is Not Contrary To *Twombly* Or *Iqbal*, Nor Does The Panel's Ruling Conflict With Any Of This Court's Prior Decisions

Defendants' petition for rehearing en banc asserts that full–Court review is necessary because the panel's decision supposedly conflicts with the U.S. Supreme Court's rulings in *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544 (2007), and *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009). This centerpiece of defendants' rehearing request is demonstrably wrong, as plaintiff will turn to demonstrate momentarily.

To begin with, however, this Court should approach defendants' assertion of a conflict between the panel's decision and the U.S. Supreme Court's rulings in *Twombly* and *Iqbal* with considerable skepticism. Neither the majority opinion nor Judge Rendell's dissenting

opinion cites to or contains any mention whatsoever of either *Twombly* or *Iqbal*.

Moreover, although the predominant focus of plaintiff's appellate briefing was obtaining a reversal of the district court's statute of limitations–based dismissal, none of the defendants' briefs for appellees filed in this Court argued that the *Twombly* or *Iqbal* rulings precluded or were inconsistent with the appellate relief that plaintiff sought. Defendants' briefs for appellees did not even once cite to either ruling. At the rehearing stage, it is simply too late to introduce new grounds for affirmance that appellees have already waived by failing to raise in a timely manner before the panel during the merits briefing of the appeal.

Under Pennsylvania law, the discovery rule postpones the accrual of the statute of limitations to the point at which either the plaintiff discovered her loss and its cause or a reasonably diligent plaintiff would have done so. Here, the panel majority correctly recognized that plaintiff properly invoked the discovery rule in opposing defendants' statute of limitations–based motions to dismiss and that plaintiff's complaint did not contain anything that precluded plaintiff's reliance on the discovery rule to establish the timeliness of his claims.

In so ruling, the panel majority's decision is consistent with Third Circuit precedent and the rulings of other circuits (both precedential and non–precedential) that expressly cite to *Twombly* and/or *Iqbal*. Thus, defendants' contention that the panel majority's ruling somehow conflicts with *Twombly* or *Iqbal* is demonstrably incorrect.

Most importantly, the panel majority's ruling is consistent with existing Third Circuit precedent. Neither the dissenting opinion nor the rehearing petition argues to the contrary. In *Barefoot Architect, Inc.* v. *Bunge*, 632 F.3d 822, 835 (3d Cir. 2011) (McKee, C.J., Fuentes, and Smith), which the panel majority cites (slip op. at page 19 & 21), the plaintiff had moved for a Rule 12(b)(6) dismissal asserting that the defendants' counterclaim was time–barred under Virgin Islands law. The defendants, in response, argued that under the discovery rule their counterclaim was timely. This Court ruled that because "[t]he date of discovery [of the cause of action] is not evident from the face of the counterclaim * * * , the pleading does not reveal when the limitations period began to run, and the statute of limitations cannot justify Rule 12 dismissal." 632 F.3d at 835.

The rehearing petition only discusses this Court's ruling in *Barefoot Architect* in a footnote, *see* Reh'g Pet. at 8 n.6, seeking to minimize that decision because this Court's discussion was supposedly "terse" and confined to "a single paragraph." *See id.* But this Court's holding in *Barefoot Architect*, quoted immediately above and in the majority opinion in this case, represents a squarely on–point ruling and unquestionably was informed by the U.S. Supreme Court's decisions in *Twombly* and *Iqbal*, both of which the *Barefoot Architect* opinion cites in its discussion of the applicable standard of review for a Rule 12 motion. *See* 632 F.3d at 826.

The panel majority's ruling also cited to (slip op. at pages 19–20) and finds support in the Federal Circuit's decision in *USPPS, Ltd.* v. *Avery Dennison Corp.*, 676 F.3d 1341, 1345 (Fed. Cir. 2012), *vacated on other grounds*, 133 S. Ct. 1794 (2013). In that decision, the Federal Circuit noted that, in an earlier appeal to the Fifth Circuit in the same case, *see* 326 Fed. Appx. 842 (5th Cir. 2009) (per curiam), the Fifth Circuit had ruled at the Rule 12(b)(6) stage based on the language of the complaint that "we cannot definitively say that the discovery rule and fraudulent concealment exceptions do not postpone the date of accrual" of the

plaintiff's claims. *See* 326 Fed. Appx. at 851. As a result, the unanimous Fifth Circuit panel, in a decision that cited to *Twombly*, *see* 326 Fed. Appx. at 846, reversed the district court's Rule 12(b)(6) dismissal of plaintiff's complaint as untimely. *See also Goodman* v. *Praxair, Inc.*, 494 F.3d 458, 463–66 (4th Cir. 2007) (en banc) (unanimous en banc court, citing *Twombly*, held that where complaint does not contain the date on which the plaintiff *discovered* the defendants' alleged breach of contract, the complaint could not be dismissed on statute of limitations grounds as untimely at the Rule 12(b)(6) stage).

In yet another unpublished decision citing to *Twombly*, the Fifth Circuit again reached the same result. *See Brandau* v. *Howmedica Osteonics Corp.*, 439 Fed. Appx. 317 (5th Cir. 2011) (per curiam). In *Brandau*, the Fifth Circuit reversed the Rule 12(b)(6) dismissal of plaintiff's claim as time–barred, recognizing that plaintiff's complaint did not preclude her reliance on the discovery rule. *Id.* at 322. The decision recognized that in cases involving a plaintiff's invocation of the discovery rule, adjudication of the statute of limitations issue "typically occurs at the summary judgment phase, after facts added to the record can lead to more fully formed conclusions." *Id.*

To summarize, neither the majority opinion nor Judge Rendell's dissent asserts, suggests, or implies that the majority's holding conflicts with *Twombly*, *Iqbal*, any earlier Third Circuit decision, or any decision from any other federal appellate court. Rather, as plaintiff has demonstrated above, the panel's ruling is consistent with this Court's existing precedent and with the precedent of other circuits contained in opinions that have themselves expressly cited to *Twombly* and/or *Iqbal*.

The lack of any citation to either *Twombly* or *Iqbal* in the majority or dissenting opinion in this case can no doubt be attributed to defendants' failure, in their briefs for appellees, to even once cite to either of those rulings. The centerpiece of plaintiff's appeal was an argument that the district court's statute of limitations dismissal should be reversed because it was both procedurally improper and because plaintiff had invoked the discovery rule to establish the timeliness of his claims. Defendants never once argued in opposition to plaintiff's appeal that a ruling in plaintiff's favor would violate either *Twombly* or *Iqbal*. Plaintiff respectfully submits that defendants have thus already waived the argument that is now the main focus of their rehearing request.

B. The Panel Majority's Ruling Establishes Nothing More Than That The District Court Prematurely Dismissed Plaintiff's State Law Claims As Untimely Before An Adequate Factual Record Exists

Because the statute of limitations is an affirmative defense, a plaintiff is under no obligation to include in the complaint facts establishing the timeliness of a claim, let alone facts sufficient to establish the plaintiff's entitlement to postpone the accrual of the statute of limitations under Pennsylvania's discovery rule. Defendants' rehearing petition is predicated on the supposed entitlement of defendants to dismiss claims as untimely based solely on the plaintiff's complaint, but that has never been an entitlement that federal law has afforded to defendants except in the unusual situation where the complaint clearly shows that the action is time–barred.[2]

[2] It is thus telling that the Third Circuit ruling on which Judge Rendell relies in dissent for her assertion that "[a] plaintiff, faced with a clear 'miss' of the statute of limitations, must come forth with some basis for invoking the discovery rule," *see Mest* v. *Cabot Corp.*, 449 F.3d 502, 511 (3d Cir. 2006) (Roth, Fuentes, Garth), involved a case that arrived at this Court after the district court had rejected the plaintiff's invocation of the discovery rule at the *summary judgment* stage, not at the Rule 12(b)(6) motion to dismiss stage. Defendants' rehearing petition fails even to cite to this Court's ruling in *Mest*, further confirming that *Mest* does not conflict with the panel's ruling here.

Whether the complaint in a given case clearly shows a claim to be time–barred presents a fact–bound inquiry that must be performed on a case–by–case basis. Consequently, it is not the sort of question for which the en banc process exists to resolve. The unsuitability of a case such as this for en banc review is even more apparent where the plaintiff's invocation of the discovery rule overlays the statute of limitations inquiry at the Rule 12(b)(6) stage. In other words, the disagreement between the majority and the dissent does not appear to exist over the formulation of legal principles, but rather over what legal principle should be applied to the unique facts of this case. That type of disagreement, over the application rather than the formulation of a legal principal, is not the sort of disagreement for which en banc review exists to resolve.[3]

The defendants attempt to portray this case as one in which the sky is falling unless they can get a statute of limitations–based dismissal at

[3] Nevertheless, were this Court to disagree and conclude that an issue so fact–bound and thus of such limited relevance to other cases was deserving of this Court's expenditure of its precious en banc resources, counsel for plaintiff would welcome the opportunity to persuade a majority of this Court's non–recused active judges that the panel majority's decision clearly was correct, for the reasons explained in the panel's decision itself, as further expanded on herein.

the Rule 12(b)(6) stage, when in reality the absence of such a dismissal merely transforms this case into the typical case in which the questions of timeliness of suit, and applicability of the discovery rule, are decided on an appropriate factual record developed during discovery either at the summary judgment stage or thereafter by the factfinders at trial.[4]

In this case, the panel's remand authorizes the district court to consider on the merits numerous other grounds for Rule 12(b)(6) dismissal that the defendants have raised but the district court has yet to explicitly address on the merits. Whether this case will proceed past the Rule 12(b)(6) stage on remand thus remains to be seen. What can be said with certainty, however, is that postponing the statute of limitations issue until summary judgment does not make this an exceptional case, notwithstanding defendants' protestations to the contrary.

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[4] Given that the panel majority merely held that the district court's statute of limitations–based dismissal was premature, defendants' assertion that the panel somehow improperly expanded the reach of this Court's suggestion in *In re Mushroom Transp. Co.*, 382 F.3d 325, 343 (3d Cir. 2004) (Scirica, C.J., Fisher, Alarcon), that sometimes a "smoking gun" may be required to put the principal on notice of a fiduciary's wrongdoing is unpersuasive.

Defendants are likewise incorrect to suggest that they would be entitled to some earlier resolution of the statute of limitations issue in state court. On the contrary, Pennsylvania state courts ordinarily postpone resolution of the statute of limitations defense and the discovery rule's applicability until either summary judgment or trial *See Gleason* v. *Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011); *Wilson* v. *El–Daief*, 964 A.2d 354, 361–62 (Pa. 2009); *Fine* v. *Checcio*, 870 A.2d 850, 858–63 (Pa. 2005).

The supposed difference to which defendants' rehearing petition refers between how the statute of limitations defense is considered in Pennsylvania state court practice and in federal court practice under Rule 12(b)(6) is nonexistent. In Pennsylvania state court practice, so–called "preliminary objections" are the equivalent of a Rule 12(b)(6) motion. *See Lindsey* v. *Chase Home Finance L.L.C.*, 2006 WL 2524227, at *2 n.3 (M.D. Pa. 2006) (Vanaskie, C.J.). In state court, however, the only proper way to raise a statute of limitations defense is by means of new matter, not by preliminary objections. *See* Pa. R. Civ. P. 1028(a)(4) (advisory committee note to the rule governing preliminary objections stating that "The defense of the bar of a statute of frauds or statute of

limitations *can be asserted only in a responsive pleading* as new matter under Rule 1030."); Pa. R. Civ. P. 1030 ("all affirmative defenses including * * * statute of limitations * * * *shall* be pleaded in a responsive pleading under the heading 'New Matter.'"). Pennsylvania state court practice thus allows the parties to create an adequate factual record beyond the pleadings concerning the statute of limitations defense and the discovery rule before a state trial court initially considers those issues.

Defendants' suggestion of a difference between how the panel addressed this issue and how a Pennsylvania state court would do so is thus incorrect. In Pennsylvania state court practice, the applicability of the statute of limitations defense and of the discovery rule to postpone accrual are ordinarily decided no earlier than at the summary judgment stage. *See Gleason*, *supra*; *Wilson*, *supra*; *Fine*, *supra*.

C. A Few Words About Judge Rendell's Dissenting Opinion

To a large degree, it appears that the disagreement between the majority and the dissent concerns the significance to be accorded to the procedural posture in which this case finds itself. Judge Rendell, in her

dissent, believes it is appropriate to decide this case as though all of the evidence bearing on applicability of the statute of limitations, including the discovery rule, already exists of record. Yet that is simply an incorrect assumption.

Judge Rendell is inaccurate in stating that the plaintiff argues merely that the district court's dismissal was procedurally improper but refuses to provide the facts demonstrating that the discovery rule will establish the timeliness of his claims. In actuality, it is the procedural posture of this case that precludes plaintiff from providing those outside–the–record facts at this juncture. At the Rule 12(b)(6) stage, all that a court may consider are the pleading and its attachments. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (Greenberg, Alito, Roth) ("As a general matter, a district court ruling on a motion to dismiss may not consider matters extraneous to the pleadings.").

The plaintiff played by the rules and limited his arguments to the facts and information contained in plaintiff's amended complaint. The defendants, by contrast, violated the rules and brought forth a tremendous amount of extraneous evidence from outside the pleadings

that is not properly considered at the Rule 12(b)(6) stage. Nevertheless, Judge Rendell has chosen to chide the plaintiff and his counsel for not being able to demonstrate to Judge Rendell's satisfaction from the Rule 12(b)(6) record, which consists insofar as plaintiff is concerned solely of the amended complaint, exactly how and why the discovery rule applies to make plaintiff's claims timely under Pennsylvania law.

What needs to be understood, and what Judge Rendell's dissenting opinion unfortunately overlooks, is that in plaintiff's appellate briefs and at oral argument, counsel for the plaintiff/appellant repeatedly informed this Court that plaintiff looks forward to demonstrating his entitlement to the benefit of the discovery rule on a proper evidentiary record when this case reaches the next procedural stage, at which point introduction into the district court record of evidence beyond plaintiff's complaint is proper. This is surely not a case, as depicted by Judge Rendell, where the plaintiff admits that his claim is time–barred, claims that the dismissal was procedurally improper, but has no hope or expectation of establishing the discovery rule's applicability to his claims. Rather, the so–called admission on which Judge Rendell's dissent repeatedly relies merely acknowledges that were the discovery

rule to apply, as plaintiff contends it should, plaintiff would only need to postpone the accrual of many of his claims for just several weeks in order to render them timely filed.

The dissent would credit plaintiff with omniscience merely because he happens to be an experienced investor, although experience as an investor does not necessarily entail unlimited knowledge. If in fact it did, very little money would have been lost by experienced investors who sunk their money into Bernard Madoff's undisclosed Ponzi scheme.

In sum, the dissent would decide the merits of defendants' invocation of the statute of limitations defense and plaintiff's invocation of the discovery rule on an incomplete record that unfairly favors defendants, because the defendants are the only parties that improperly introduced extraneous evidence at the Rule 12(b)(6) stage, whereas the evidence currently outside the record that plaintiff needs to demonstrate applicability of the discovery rule is not yet in the record because plaintiff adhered to the rules applicable to a Rule 12(b)(6) motion. The majority has correctly recognized, in accordance with this Court's precedent and the precedent of numerous other circuits, that under the circumstances of this case the statute of limitations defense, and

plaintiff's invocation of the discovery rule, should be adjudicated on a properly developed record created during discovery. Surely that issue is not deserving of en banc review.

IV. CONCLUSION

For the reasons set forth above, plaintiff/appellant respectfully requests that the rehearing petitions be denied.

Respectfully submitted,

Dated: November 24, 2014

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