UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ERIC DE FORD, SANDRA BADER and SHAWN R. KEY,

Plaintiffs,

v. **Case No: 6:22-cv-652-PGB-DCI**

JAMES KOUTOULAS, NATIONAL ASSOCIATION FOR STOCK CAR AUTO RACING, LLC, LETSGOBRANDON.COM FOUNDATION, LGBCOIN, LTD and PATRICK BRIAN HORSMAN,

Defendants.
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ORDER

This cause comes before the Court on the following:

1. Defendant James Koutoutlas's ("**Defendant Koutoulas**") Motion for Reconsideration of the Court's Order (Doc. 293 (the "**Motion for Reconsideration**"));
2. Defendants LGBCoin, LTD ("**Defendant LGBCoin**") and Letsgobrandon.com Foundation's (the "**Defendant Foundation**") Motion to Strike the Third Amended Complaint (Doc. 294 (the "**Motion to Strike**")); and
3. Defendant Koutoulas's Motion for Leave to Appeal and to Amend Order (Doc. 297 (the "**Motion for Leave to Appeal**")).

Upon consideration, all three Motions are due to be denied.[1]

I. BACKGROUND

This putative class action stems from the creation, marketing, and sale of the LGBCoin, a cryptocurrency. (Doc. 245). Plaintiffs subsequently filed this action to recover the alleged losses flowing from these events. (Doc. 1). Plaintiffs amended the Complaint once as a matter of course (Doc. 21), again after the Court dismissed the First Amended Complaint as an impermissible shotgun pleading (Doc. 63), and again after the Court granted in part and denied in part several motions to dismiss with respect to the Second Amended Complaint. (Docs. 74, 211, 212, 213, 229, 245). After the permitted repleader, the operative pleading is now the Third Amended Complaint. (Doc. 245). In every iteration of the complaint Plaintiffs asserted a federal securities law claim in addition to various other claims. (*See* Docs. 1, 21, 74, 245).

Almost thirteen months after the case was filed, Defendant Koutoulas requested for the first time that the Third Amended Complaint be stricken for violating procedural requirements of the Private Securities Litigation Reform Act ("**PSLRA**") and relatedly that sanctions be imposed for these violations. (Doc. 271). The Court granted in part and denied in part that request. (Doc. 284 (the "**PSLRA Order**")). The Court explained that while Plaintiff violated the PSLRA,

[1] The Court does not require a response from Plaintiffs to resolve the instant Motions. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (stating that a district court has the inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants").

the PSLRA and controlling persuasive precedent did not clearly provide for the remedy sought, particularly when no party had raised the issue despite numerous opportunities to do so. (Doc. 284, pp. 3–7). As such, the Court fashioned an appropriate remedy and calibrated it to the relative prejudice to the parties. (*Id.*).

Defendant LGBCoin and the Defendant Foundation now move to strike the Third Amended Complaint for Plaintiffs' violation of the PSLRA. (Doc. 294). Defendant Koutoulas also seeks, first, reconsideration of the PSLRA Order (Doc. 293) and, second, leave to file an interlocutory appeal of the PSLRA Order (Doc. 297). The same day Defendant Koutoulas requested leave to appeal, he filed notice of an interlocutory appeal (Doc. 298) to the Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1292(a).

II. DISCUSSION

A. Motion to Strike

At the outset, the Court notes that Defendant LGBCoin and the Defendant Foundation cite to zero controlling authorities providing the Court the grounds to strike the Third Amended Complaint for Plaintiffs' admitted violations of the PSLRA. (*See* Doc. 294). This omission is troubling as Defendant LGBCoin and the Defendant Foundation are represented by the same counsel which represents Defendant Koutoulas, and the Court already noted in denying in part Defendant Koutoulas's Motion to Strike that the PSLRA does not expressly provide for the requested remedy for Plaintiffs' violations. (Doc. 284, pp. 4–7). Indeed, Federal Rule of Civil Procedure 12(f) states only that "[t]he court may strike from a

pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." None of these grounds apply here.

Even if such an avenue for relief was properly available, the remedy Defendant LGBCoin and the Defendant Foundation seek is not warranted. The heart of their Motion to strike is that Plaintiffs obtained information in discovery that should have been stayed under the PSLRA which led to their inclusion in the current pleadings. (Doc. 294, pp. 3–11). Defendant LGBCoin and the Defendant Foundation further point out that, as they were not previously joined, they were not available to seek a protective order from the discovery on these grounds. (*Id.* at p. 3). Defendant LGBCoin and the Defendant Foundation fail to mention, however, that they are not subject to the securities claim which subjects the suit to the PSLRA discovery stay. (*See* Doc. 245). Their right to enforce the PSLRA is thus dubious.

Regardless, the Court has already found that at least some of the non-PSLRA claims would survive a motion to dismiss, and the Court notes such claims would have survived even prior to the inclusion of the allegations obtained through discovery. (*See* Docs. 21, 74, 229). Therefore, discovery would have ensued eventually, and the information that gave rise to the Third Amended Complaint would have been handed over to Plaintiffs, allowing them to join Defendant LGBCoin and the Defendant Foundation.[2] If this were not the case, the Court might

[2] The Court rejects Defendant LGBCoin and the Defendant Foundation's other arguments in support of their Motion to Strike as either entirely irrelevant or wholly unpersuasive.

rule differently. As such, no improper benefits flow to Plaintiffs, and no perverse incentives result for future litigants. The Motion to Strike is accordingly denied.

B. Motion for Reconsideration

Reconsideration is an extraordinary remedy which will only be granted upon a showing of one of the following: (1) an intervening change in law, (2) the discovery of new evidence which was not available at the time the Court rendered its decision, or (3) the need to correct clear error or manifest injustice. *Fla. Coll. of Osteopathic Med., Inc. v. Dean Witter Reynolds, Inc.*, 12 F. Supp. 2d 1306, 1308 (M.D. Fla. 1998). "A motion for reconsideration cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 957 (11th Cir. 2009) (internal quotation marks omitted). It is wholly inappropriate in a motion for reconsideration to relitigate the merits of the case or to "vent dissatisfaction with the Court's reasoning." *Madura v. BAC Home Loans Servicing L.P.*, No. 8:11-cv-2511, 2013 WL 4055851, at *2 (M.D. Fla. Aug. 12, 2013) (citation omitted). Instead, the moving party must set forth "strongly convincing" reasons for the Court to change its prior decision. *Id.* at *1.

As is relevant here, Rule 60(b) provides that a court may relieve a party from an order on the following grounds: "mistake, inadvertence, surprise, or excusable neglect;" or for "for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(1), (6). Although Rule 60(b)(6) acts as a catchall, it "is an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances." *Rice v. Ford*

Motor Co., 88 F.3d 914, 919 (11th Cir. 1996) (quotation and citation omitted). Thus, the movant "must demonstrate a justification so compelling that the district court [is] required to vacate its order." *Galbert v. W. Caribbean Airways*, 715 F.3d 1290, 1294 (11th Cir. 2013) (quotation omitted). Plaintiff appears to proceed under Rule 60(b)(1) or Rule 60(b)(6) by arguing the Court has clearly erred or, alternatively, it should reconsider in order to prevent manifest injustice. (Doc. 293, p. 4). Neither provision is applicable.

First, Defendant Koutoulas insinuates the Court made a mistake when it concluded he had unclean hands due to his own engagement in discovery. (*Id.* at pp. 6–8). Not so. The Court does not imply that Defendant Koutoulas and Plaintiffs' failure to raise the PSLRA or engagement in discovery are equivalent but instead that Defendant Koutoulas has no legs to stand on, specifically with respect to seeking the striking of the Third Amended Complaint, when he also failed to raise this argument upon seeking a stay of discovery. It is nonsensical to say that the Court erred in not considering an argument that was never raised; indeed, some courts might consider this defense waived or forfeited.[3] *See Compania de Elaborados de Café v. Cardinal Cap. Mgmt., Inc.*, 401 F. Supp. 2d 1270, 1283 (S.D.

[3] Defendant Koutoulas states, "The Plaintiffs did not comply with the PSLRA and as such, the Defendant was never on notice that they were bringing PSLRA claims until they were specifically pled in the TAC, especially given Plaintiffs' repeated judicial admissions that LGBcoin is not a security." (Doc. 293, p. 6). This is problematic for multiple reasons. First, Plaintiffs' reference to LGBCoins by various names other than a security has almost no bearing on whether it qualifies as a security under federal securities law. Second, each iteration of the complaint expressly states that it proceeds under the "1933 Securities Act" while citing to specific statutory provisions governing the unregistered sale of securities. (Doc. 1, ¶¶ 173–83; Doc. 21, ¶¶ 277–89; Doc. 74, ¶¶ 275–87; Doc. 245, ¶¶ 369–81).

Fla. 2003) ("In order to demonstrate clear error, the movant must do more than simply restate his or her previous argument, and any arguments the movant *failed to raise in the earlier motion will be deemed waived*." (emphasis added)). In any event, the Court reiterates that even if Plaintiffs had complied with the PSLRA, some claims would have proceeded to discovery, and the case would have yielded the discovery already obtained. The Court sees no reason to stave off the inevitable.

Second, in an apparent attempt to demonstrate the alleged bad faith of Plaintiffs' counsel, Defendant Koutoulas brings up other cases in which both the PSLRA applies and Plaintiffs' counsel represents the plaintiffs there. (Doc. 293, pp. 5–6). Even if this tactic was persuasive, it is insufficient on a motion for reconsideration as it raises an argument that could have been put forward (but was not) in Defendant Koutoulas's previous motion to strike. *Wilchombe*, 555 F.3d at 957. Similarly, Defendant Koutoulas takes umbrage with the Court's conclusion that it was incumbent on the parties to raise the applicability of the PSLRA and its discovery stay provision—he argues instead that the Court should have raised it itself or that the stay should have been automatic, as in the bankruptcy context. (Doc. 293, p. 8). This argument was not previously raised but could have been.[4] Consequently, the Court need not address it.[5]

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[4] In Defendant Koutoulas's initial request to strike the Third Amended Complaint for Plaintiff's PSLRA violations, he simply assumes in a conclusory fashion the stay should have been automatic. (*See* Doc. 271).

[5] Had it been raised, the Court would have no trouble casting it aside. Unlike in the bankruptcy context where the statute at issue, 11 U.S.C. § 362, is titled "Automatic Stay," here there is no clear textual insinuation that the stay applies automatically. *See* 15 U.S.C. §§ 77z-1, 78u-4. The

The rest of Defendant Koutoulas's arguments fare no better. They all inappropriately rehash points made, and rejected, elsewhere. *Wilchombe*, 555 F.3d at 957; (Docs. 271, 284, 293). Therefore, Defendant Koutoulas's Motion for Reconsideration does not set forth the strongly convincing reasons necessary to warrant relief from the Court's Order.

C. Motion for Leave to Appeal

The Court begins by noting that its Order denying Defendant Koutoulas's Motion to Strike (Docs. 271, 284) is a non-final decision, which is ordinary not subject to immediate appellate review. *See CSX Transp., Inc. v. Kissimmee Util. Auth.*, 153 F.3d 1283, 1285 (11th Cir. 1998) (per curiam). However, there are certain limited exceptions to the finality requirement that may permit interlocutory review of a non-final order. One such exception is 28 U.S.C. § 1292(b). This statute allows a district court to certify an interlocutory order for appeal where the order "(1) involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Harris v. Luckey*, 918 F.2d 888, 892 (11th Cir. 1990); (Doc. 297, pp. 4–8). The certification of an interlocutory appeal, however, is an exceptional remedy, and the party moving for

Court agrees the stay should have been put in place; the Court disagrees it is incumbent upon itself to raise the stay without motion or notice of PSLRA applicability from the parties. This would turn the adversarial system on its head. The Court appreciates that Defendant Koutoulas disagrees, but this disagreement simply "vent[s] dissatisfaction with the Court's reasoning," which is wholly inappropriate on a motion for reconsideration. *Madura*, 2013 WL 4055851, at *2.

certification bears a heavy burden of demonstrating that immediate appellate review is appropriate. *See McFarlin v. Conseco Servs., LLC*, 381 F.3d 1251, 1264 (11th Cir. 2004).

The Court finds that certification of an interlocutory appeal—or amendment of the Court's prior order—is inappropriate because an immediate appeal in this case will not materially advance the termination of the litigation. The Eleventh Circuit has explained that this requirement:

> means that resolution of a controlling legal question would serve to avoid a trial or otherwise substantially shorten the litigation. *See generally* 16 Charles Alan Wright, et al., *Federal Practice & Procedure* § 3930 at 432 (2d ed. 1996); *see also In re Virginia Elec. & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976) (§ 1292(b) appeal appropriate where resolution of controlling question could prevent substantial delay); *U.S. Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F. Supp. 1139, 1176 (W.D. Mich. 1988) (§ 1292(b) appeal appropriate where resolution of controlling questions could shorten the time, effort, and expense of the litigation); *Ashmore v. Northeast Petrol. Div.*, 855 F. Supp. 438, 440 (D. Me. 1994) (§ 1292(b) appeal inappropriate where the same parties and issues would remain in district court regardless of resolution of issues on appeal).

McFarlin, 381 F.3d at 1259. Here, appeal is inappropriate because the same parties and almost the same issues would remain before the Court were the Eleventh Circuit to mandate a contrary approach. Even if the federal securities law claim was stricken, the bulk of the suit would remain with the same parties now present in the case. This will not "substantially shorten" the litigation. *Id.* In fact, an

interlocutory appeal is much more likely to delay the proceedings than to advance their resolution.[6]

III. CONCLUSION

For these reasons, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion for Reconsideration (Doc. 293) is **DENIED**;

2. The Motion to Strike (Doc. 294) is **DENIED**; and

3. The Motion for Leave to Appeal (Doc. 297) is **DENIED**.

DONE AND ORDERED in Orlando, Florida on June 23, 2023.

PAUL G. BYRON
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Unrepresented Parties

[6] The Court notes that beyond the discovery stay already in place it will not further stay the proceedings in light of Defendant Koutoulas seeking interlocutory review because the appeal of the Court's non-final order is dilatory in effect. *BancPass, Inc. v. Highway Toll Admin. L.C.C.*, 863 F.3d 391, 399 (5th Cir. 2017) ("district courts may retain jurisdiction despite the filing of an interlocutory appeal, so long as they certify that the appeal is frivolous or dilatory.").