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8 UNITED STATES DISTRICT COURT
 9
 10 NORTHERN DISTRICT OF CALIFORNIA

11 In re UTSTARCOM, INC. SECURITIES)	Master File No. C-04-4908-JW(PVT)
LITIGATION)	
_____)	<u>CLASS ACTION</u>
This Document Relates To:)	STATEMENT OF RECENT DECISION IN
ALL ACTIONS.)	SUPPORT OF PLAINTIFFS' MOTION FOR
_____)	LEAVE TO FILE SECOND AMENDED
	COMPLAINT

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1 Pursuant to Civ. L.R. 7-3(d), plaintiffs respectfully submit this Statement of Recent Decision
 2 in *Belizan v. Hershon*, No. 04-7187, 2006 U.S. App. LEXIS 1018, at **8-9 (D.C. Cir. Jan. 17, 2006)
 3 (“In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory
 4 motive on the part of the movant, repeated failure to cure deficiencies by amendments previously
 5 allowed, [or] undue prejudice to the opposing party. . . the leave sought should . . . be ‘freely
 6 given.’”) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962) (quotations omitted)), attached hereto
 7 as Exhibit A. Plaintiffs respectfully request that this Court consider this relevant authority in ruling
 8 on plaintiffs’ Motion for Leave to Amend to File Second Amended Complaint.

9 DATED: February 8, 2006

LERACH COUGHLIN STOIA GELLER
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/s/

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DECLARATION OF SERVICE BY FACSIMILE

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the City and County of San Francisco, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 100 Pine Street, Suite 2600, San Francisco, California 94111.

2. That on February 8, 2006, declarant served by facsimile the **STATEMENT OF RECENT DECISION IN SUPPORT OF PLAINTIFFS' MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT** to the parties listed on the attached Service List.

3. That there is a regular communication by facsimile between the place of origin and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of February, 2006, at San Francisco, California.

/s/
CAROLINE A. WILEY

UTSTARCOM 04 (CA) (LEAD)

Service List - 2/8/2006 (04-0558C)

Page 1 of 1

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EXHIBIT A

**MONICA BELIZAN, AND ALL OTHERS SIMILARLY SITUATED, AND
WILLIAM PRATHER, DR., AS TRUSTEE FOR THE AVON MEDICAL GROUP
PC EMPLOYEES PROFIT SHARING PLAN & TRUST, AND AS TRUSTEE FOR
THE JUDITH ANN PRATHER REVOCABLE TRUST, APPELLANTS v. SIMON
HERSHON, ET AL., APPELLEES**

No. 04-7187 Consolidated with 04-7188

**UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

2006 U.S. App. LEXIS 1018

**October 21, 2005, Argued
January 17, 2006, Decided**

PRIOR HISTORY: [*1] Appeals from the United States District Court for the District of Columbia. (No. 02cv01490) (No. 02cv01886). *In re Interbank Funding*

Corp. Secs. Litig., 329 F. Supp. 2d 84, 2004 U.S. Dist. LEXIS 15482 (D.D.C., 2004)

COUNSEL: Donald J. Enright argued the cause for appellants. With him on the briefs were Burton H. Finkelshtein and Tracy D. Rezvani. Adam T. Savett and Steven J. Toll entered appearances.

recognize it. The district court, however, failed adequately to explain, in light of the standard set in *Firestone v. Firestone*, 316 U.S. App. D.C. 152, 76 F.3d 1205, 1209 (D.C. Cir. 1996), why it dismissed Belizan's complaint with prejudice. Accordingly, we vacate the order in part and remand the question of prejudice for clarification.

Michael L. Martinez argued the cause and filed the brief for appellee Radin Glass & Co., LLP.

I. Background

Jeff G. Hammel argued the cause for appellee CIBC World Markets Corporation. With him on the brief were David M. Brodsky, Donna C. Goggin, and DeMaurice F. Smith.

According to Belizan's complaint, between 1997 and 2002 she and other members of an uncertified class of plaintiffs purchased debt securities from InterBank Funding Corp. (IBF) and its subsidiaries. IBF, which was owned by Simon Hershon, had formed several investment funds with the purpose of purchasing and restructuring or rehabilitating under performing loans. Belizan claims IBF's funds were actually part of a "Ponzi scheme," wherein proceeds from successive securities offerings were used to make interest payments to those who had invested in prior offerings. During the relevant period, Radin Glass & Co. served as IBF's independent auditor and CIBC World Markets Corp. sold IBF's debt securities to investors.

JUDGES: Before: GINSBURG, Chief Judge, and ROGERS and GRIFFITH, Circuit Judges. Opinion for the Court filed by Chief Judge GINSBURG.

OPINIONBY: GINSBURG

OPINION:

GINSBURG, *Chief Judge:* Monica Belizan appeals an order of the district court because it dismissed "with prejudice" her claims under the Securities Act of 1933 and the Securities Exchange Act of 1934 against Radin Glass & Co. and CIBC World Markets Corp. She also contends the district court erred in determining she failed to move for leave to amend her complaint.

Because Belizan's oral request for leave was not a proper motion under *Federal Rule of Civil Procedure 15(a) [*2]*, the district court did not err in refusing to

Investors' suits against Hershon, Radin, CIBC, and others [*3] were consolidated and Belizan, designated as lead plaintiff pursuant to the Private Securities Litigation Reform Act of 1995 (PSLRA), 15 U.S.C. § 78u-4 *etseq.*, filed a consolidated complaint. (Belizan and the others then settled their claims against Hershon.) In the complaint, Belizan alleged Radin and CIBC had dissemi-

nated materially false and misleading information about IBF's funds and engaged in a scheme to defraud investors, in violation of § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. In addition, she claimed Radin, by attesting that IBF's financial statements complied with Generally Accepted Accounting Principles when, in fact, the statements were materially false or misleading, had violated § 11 of the Securities Act of 1933, 15 U.S.C. § 77. Finally, she alleged CIBC had violated the prospectus delivery requirements of §§ 12(a)(1) and (2) of the '33 Act, 15 U.S.C. § 77l(a)(1)-(2), when it sold IBF's securities to investors.

Radin and CIBC each moved, pursuant to [*4] *Federal Rule of Civil Procedure 12(b)(6)*, to dismiss the complaint for failure to state a claim upon which relief can be granted. At a hearing on the motions to dismiss, Belizan's counsel defended the complaint but volunteered his "belief that at this point we probably could, if it was required, file [an] amended complaint," and later, referring to an unnamed officer of IBF who was the source of some allegations in the complaint, reiterated that "if the Court requires us to, we can plead that [source] in an amended pleading if the Court would like." Belizan did not, however, follow up with a written motion for leave, much less a proposed amended complaint.

Some weeks after the hearing, the district court granted the defendants' motions to dismiss Belizan's claims. See *In re Interbank Funding Corp. Secs. Litig.*, 329 F. Supp. 2d 84 (D.D.C. 2004). With respect to the alleged violations of § 10 and Rule 10b-5, the court held Belizan had failed adequately to: (1) plead scienter; (2) allege her claims with the specificity required by Rule 9(b) and the PSLRA, 15 U.S.C. § 78u-4; and (3) plead causation. [*5] 329 F. Supp. 2d at 89-94. The district court also held Belizan failed properly to plead a violation of § 11; her claim under § 12(a)(1) was time-barred; and she and her fellow class members lacked standing to bring the claim under § 12(a)(2). *Id.* at 94-96.

The district court also said Belizan would not be allowed to amend her complaint, which was dismissed "with prejudice." The court explained that counsel's references to the possibility of amending the complaint did not "amount to formal motions for leave to amend" and that even if they did, the PSLRA "counsels restraint in granting leave to amend." 329 F. Supp. 2d at 96. As for the dismissal being with prejudice, the court cited *Miller v. Champion Enters., Inc. (In re Champion Enters., Inc. Secs. Litig.)*, 145 F. Supp. 2d 871, 873 (E.D. Mich. 2001), for the proposition "the [PSLRA] . . . sets a high standard of pleading which if not met results in a manda-

tory dismissal. . . with prejudice." 329 F. Supp. 2d at 96.

Belizan filed a motion under *Rule 59(e)* seeking reconsideration insofar as the court had not permitted her leave to amend the complaint and dismissed her claims [*6] with prejudice. With her motion, Belizan submitted an amended complaint in draft form. The district court denied reconsideration and further stated that Belizan's draft amended complaint "shared important failings with [her] earlier effort."

II. Analysis

On appeal Belizan does not take issue with the district court's determination that she failed properly to plead her various claims under the '33 and '34 Acts. Rather, Belizan first argues she made an adequate motion for leave to amend and then contests the district court's decision to dismiss her complaint "with prejudice." Radin and CIBC defend the district court on both counts.

*

* Although Belizan noted her appeal of the order denying her motion for reconsideration, she advances no argument specific to that order.

A. Leave to Amend

Belizan argues the district court erred in determining she never properly moved to amend her complaint because her oral offer to amend was sufficient in view of the instruction in *Rule 15(a)* that "leave shall be freely [*7] given when justice so requires." She also relies upon *Taylor v. Beckas*, 137 U.S. App. D.C. 417, 424 F.2d 905, 908 (D.C. Cir. 1970), in which we implied the now defunct District of Columbia Court of General Sessions could grant an oral motion for leave to amend a complaint under a local rule similar to *Rule 15(a)*. Proceeding from that premise, Belizan goes on to argue the district court would not have been justified in denying leave on the substantive grounds raised by the defendants, had it addressed them.

Radin and CIBC respond that Belizan's request was properly refused because oral "motions" are not acceptable under the local rules of the district court. Specifically, Local Rule 7(a) requires that every "motion shall include or be accompanied by a statement of the specific points of law and authority that support the motion." Furthermore, Local Rule 15.1 provides each "motion for leave . . . shall be accompanied by an original of the proposed pleading as amended." The defendants also note that even if Belizan had requested leave in her brief in

opposition, she would not have satisfied *Rule 15(a)* because "a bare request in an opposition to a motion to dismiss [*8] -- without any indication of the particular grounds on which amendment is sought-- does not constitute a motion within the contemplation of *Rule 15(a)*." *United States ex rel. Williams v. Martin-Baker Aircraft Co.*, 363 U.S. App. D.C. 419, 389 F.3d 1251, 1259 (D.C. Cir. 2004) (internal quotation marks and citations omitted). As for *Taylor v. Beckas*, Radin and CIBC point out that the permissibility of an oral motion for leave was not therein issue and, in any event, the case involved a D.C. rule of procedure, not *Rule 15(a)* or Local Rule 15.1.

When the district court denies a motion for leave to amend under *Rule 15(a)*, we review its decision for abuse of discretion, see *Carribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 331 U.S. App. D.C. 226, 148 F.3d 1080, 1083 (D.C. Cir. 1998), bearing in mind that the rule is to be construed liberally. For in *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962), the Supreme Court instructed:

In the absence of any apparent or declared reason-- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments [*9] previously allowed,[or] undue prejudice to the opposing party . . . the leave sought should . . . be "freely given."

Nevertheless, *Rule 15(a)*-- even as liberally construed -- applies only when the plaintiff actually has moved for leave to amend the complaint; absent a motion, there is nothing to "be freely given."

Contrary to Belizan's suggestion, a request for leave must be submitted in the form of a written motion, as is made clear by the local rules of the district court and implied by our decision *Ex rel. Williams*, 389 F.3d at 1259. The statement of Belizan's counsel at oral argument that he "probably could, if it was required, file another . . . complaint" was not a proper motion for leave to amend under *Rule 15(a)* or Local Rule 15.1. Therefore, as the district court correctly determined, Belizan never moved for leave.

B. Dismissal with Prejudice

Dismissal with prejudice "operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation" of them. *Jaramillo v. Burkhart*,

59 F.3d 78, 79 (8th Cir. 1995). Belizan argues the district court erred as a matter of law in "premiering its [*10] dismissal with prejudice" on the PSLRA.

That Act requires the plaintiff, in a suit for "securities fraud," to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, . . . all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1)(B). In addition, "with respect to each act or omission," the plaintiff must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). Belizan contends that her failure to satisfy these heightened pleading standards did not necessitate the dismissal of her complaint with prejudice because the PSLRA does not supercede the procedure for moving to amend a complaint under *Rule 15(a)*. See *United States v. Microsoft Corp.*, 334 U.S. App. D.C. 165, 165 F.3d 952, 958 (D.C. Cir. 1999) (under Rules Enabling Act, rules of civil procedure are deemed to supercede conflicting statute except insofar as a substantive right is involved).

Relying upon *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048 (9th Cir. 2003), [*11] Belizan also argues the heightened pleading requirements of the PSLRA lead to a conclusion far different from that reached by the district court. In *Eminence Capital* the court explained that because the PSLRA "requires a plaintiff to plead a complaint of securities fraud with an unprecedented degree of specificity and detail," it is important that the district court "consider the relevant factors and articulate why dismissal should be with prejudice instead of without prejudice." *Id.* at 1052.

Radin and CIBC contend the heightened pleading standards of the PSLRA logically limit the application of *Rule 15(a)* and concomitantly imply dismissal with prejudice is indicated in securities fraud cases that do not measure up to those standards. Cf. *Miller v. Champion Enters., Inc.*, 346 F.3d 660, 690-92 (6th Cir. 2003) (affirming dismissal with prejudice on ground PSLRA counsels against repeated amendments to complaint). Therefore, Radin and CIBC urge, "the District Court's dismissal . . . with prejudice was well within its discretion." Furthermore, they argue, although the district court did consider the PSLRA in making its determination, the court did [*12] not "premise dismissal with prejudice" solely upon that Act, as Belizan maintains.

We are uncertain why the district court dismissed the complaint with prejudice, and what role the PSLRA played in its thinking. The standard for dismissing a complaint with prejudice is high: "dismissal with prejudice is warranted only when a trial court determines that

the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." *Firestone*, 76 F.3d at 1209 (internal quotation marks omitted). Therefore, a complaint that omits certain essential facts and thus fails to state a claim warrants dismissal pursuant to *Rule 12(b)(6)* but not dismissal with prejudice.

Although the PSLRA provides that "dismissal for failure to meet pleading requirements" is appropriate, 15 U.S.C. § 78u-4(b)(3)(A), the Act does not say whether such dismissal should be with or without prejudice. If it does not imply dismissal with prejudice, then it does nothing to change the ordinary consequences of a "failure to meet pleading requirements." On the other hand, had the Congress wished to make dismissal with prejudice the norm, and to [*13] that extent supercede the ordinary application of *Rule 15(a)*, we would expect the text of the PSLRA so to provide. Cf. 21 U.S.C. § 1605(e) (under Biomaterials Access Assurance Act of 1998, "an order granting a motion to dismiss" in a suit against a supplier to a manufacturer of medical devices "shall be entered with prejudice"). Unable to derive any guidance from the PSLRA itself, we are governed simply by *Rule 15(a)*, which, as we have observed, allows "maximum opportunity for each claim to be decided on its merits rather than on procedural technicalities." *United States v. Hicks*, 350 U.S. App. D.C. 279, 283 F.3d 380, 387 (2002) (quoting 6 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1471, 505-06 (2d ed. 1990)). We note also that the heightened pleading standard of *Rule 9(b)*, which requires a plaintiff to plead any allegation of fraud with specificity, does not alter the operation of *Rule 15(a)*. See *Bly-Magee v. California*, 236 F.3d 1014, 1019 (9th Cir. 2001) (holding leave to amend should have been "freely given" pursuant to *Rule 15(a)* even though plaintiff failed in first

amended complaint to [*14] plead fraud with specificity required by *Rule 9(b)*). We therefore hold the PSLRA does not mandate dismissal with prejudice.

The next question is whether Belizan could not allege additional facts that would cure the deficiencies in her complaint -- the standard under *Firestone* for dismissal with prejudice, 76 F.3d at 1209. In its order, the district court neither adverted to *Firestone* nor undertook the inquiry required by that decision. Perhaps the district court, because it believed the PSLRA "counsels restraint in granting leave to amend," 329 F. Supp. 2d at 96, deemed that inquiry unnecessary. Regardless of the standard for leave to amend, however, the PSLRA, as we have seen, does not require dismissal with prejudice. The proper course for the district court, therefore, is to exercise its discretion under *Firestone* and determine whether the allegation of other facts consistent with the challenged pleading could not possibly meet the heightened pleading requirements of the PSLRA.

III. Conclusion

In sum, the district court did not err in determining Belizan's oral request to amend her complaint was not a proper motion for leave. The district [*15] court did, however, fail adequately to explain, with reference to the standard we set in *Firestone*, why it dismissed Belizan's complaint with prejudice. We therefore vacate the order of dismissal and remand the case for the district court to enter a new order either dismissing without prejudice or explaining its dismissal with prejudice in a manner consistent with this opinion. See *Confederate Mem'l Ass'n v. Hines*, 301 U.S. App. D.C. 395, 995 F.2d 295, 301 (D.C. Cir. 1993).

So ordered.