



subsequently denied complainant's motion to vacate the judgment under Fed. R. Civ. P. 60(b), and the court of appeals affirmed that order as well.

Complainant alleges in his judicial complaint that the district judge should have recused himself from the case based on a financial conflict of interest. Complainant alleges that the judge's financial disclosure reports from 2003 to present reflect that the judge "maintains an IRA account in which all of his IRA funds are vested in Fidelity, and in some years, Fidelity Small Cap Aggressive Growth." (Judicial complaint at 1). Complainant asserts that his district court complaint included allegations showing that Fidelity "appeared to have engaged in illegal insider trading" and that the unknown defendants in his complaint therefore clearly included Fidelity. (Judicial Complaint at 1). Complainant further alleges that if the judge "had the Fidelity Small Cap Aggressive Growth fund in 2000 [the time period covered by the complaint], he then held shares of [the defendant biotech company], which connects the financial interests of the judge to . . . the central figure in the complaint." (Judicial Complaint at 2).

A judge must disqualify himself where "[h]e knows that he, individually or as a fiduciary . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially

affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). A legal or equitable interest, however small, is considered a "financial interest." Canon 3C(3)(c), Code of Conduct for United States Judges. However, investment in a mutual fund does not give rise to a financial interest in the securities held by the fund unless the judge participates in management of the fund. Canon 3C(3)(c)(i). Nor does investment in a mutual fund give rise to a financial interest in the investment company that manages the fund. Canon 3C(3)(c)(iii). Such an investment gives rise to a disqualifying interest only if the outcome of the proceeding could substantially affect the value of the interest. Advisory Opinion No. 106 (Comm. on Codes of Conduct March 2011).

Although complainant contends that Fidelity was clearly implicated as a defendant in his lawsuit, the record fails to support this contention. Fidelity is mentioned in paragraph 101 of the amended complaint:

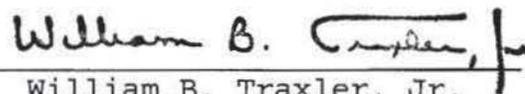
The secondary offering did not materialize because the price of the [defendant biotech company's] stock plummeted. It is believed that when the institutional investors were shown the prospectus, they realized that the information that had been publicly disclosed in the rumors and leaks emanating from [the defendant biotech company] were false and instead of purchasing shares in the private placement, in fact sold their shares. Fidelity through its funds had purchased in excess of 1.3 million shares, all of which were liquidated in 2000. Among other things, the private placement warned that there may not be sufficient capital to complete the human testing of [the defendant biotech company's] products. In the past,

[the defendant biotech company] boasted at annual shareholders' meetings that because it had earnings and was profitable, it had sufficient cash to conduct the human trials without the necessity of a joint venture partner. The private placement memorandum, however, indicated that there may not be sufficient cash. It also indicated that because of the death of . . . , the regulatory process entailed a higher level of scrutiny and potential delays.

(DE 19, amended complaint at 30).<sup>\*</sup> Contrary to complainant's judicial complaint allegations, the references to Fidelity in the amended complaint do not allege illegal insider trading by Fidelity or otherwise suggest that Fidelity was an unnamed defendant. Nor do the references provide any basis for concluding that the value of the judge's financial interests would be substantially affected by the outcome of complainant's litigation.

Accordingly, this judicial complaint is dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i) & (iii) for failure to state a claim of misconduct.

IT IS SO ORDERED.

  
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William B. Traxler, Jr.  
Chief Judge

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<sup>\*</sup> Other references to Fidelity, for example in a subsequent motion to amend the complaint, are to the same effect: that the defendants offered stock to Fidelity in a private placement offering that, because it disclosed various weaknesses, instead caused Fidelity to liquidate its holdings.