IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

IN RE ENDOCHOICE HOLDINGS, INC. SECURITIES LITIGATION,	)	Civil Action No. 2016-CV-277772
	)	(Consolidated with Civil Action No. 2016-CV-281193)
	)	CLASS ACTION

MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT BY THE ENDOCHOICE DEFENDANTS

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INTRODUCTION

This securities class action should not have been brought in any court, and certainly not in state court. The claims arise under a federal statute that deprives this Court of concurrent jurisdiction. Had the complaint been filed in federal court, where it belongs, its boilerplate allegations of traceability of the shares to the initial public offering would have resulted in dismissal for failure to state a claim. Moreover, it does not sufficiently allege any materially false or misleading statements that would be actionable under the federal securities laws. For all of these reasons, the Court should dismiss the complaint under OCGA § 9-11-12(b)(1) and § 9-11-12(b)(6).

BACKGROUND

As described in the complaint, EndoChoice Holdings, Inc. ("EndoChoice") is a medical-device company headquartered in Alpharetta, Georgia. *See* Compl. ¶¶ 2, 16, 53. Since 2008, EndoChoice has focused on products and services for gastrointestinal caregivers—single-use devices, infection-control products, and the like. *See* Compl. ¶¶ 2, 28, 54. In 2013, EndoChoice began commercialization of its Fuse® endoscopy system, an innovative device capable of revealing twice as much of a patient's anatomy as competing colonoscopes. *See* Compl. ¶¶ 3, 55–56. In a published clinical study, Fuse detected significantly more pre-cancerous polyps than standard colonoscopes. *See* Compl. ¶¶ 3, 56, 60. Fuse is a flagship product that costs more than EndoChoice's other product lines. *See* Compl. ¶¶ 3, 74.

In 2015, EndoChoice sought to raise additional capital through an initial public offering. Toward that end, EndoChoice filed a Registration Statement on

Form S-1 and Form S-1/A with the U.S. Securities and Exchange Commission ("SEC"), which was declared effective on June 4, 2015. *See* Compl. ¶ 1. EndoChoice then filed a Prospectus with the SEC on June 5, 2015, offering 6,350,000 shares of EndoChoice common stock. *See* Compl. ¶ 1. These two filings will be collectively referred to as "the Offering Materials."[1]

Among other aspects of EndoChoice's business, the Offering Materials described the quality and design of Fuse, *see* Compl. ¶¶ 59–66, 68, the development of a "world class" salesforce, *see* Compl. ¶¶ 70–73, and EndoChoice's projected ability to grow revenue by accelerating sales of Fuse, *see* Compl. ¶ 75. The Offering Materials gave a corresponding warning about "defects or bugs" that afflicted Fuse, and noted the launch of a second-generation Fuse system. *See* Compl. ¶¶ 56, 65. They also cautioned that EndoChoice was "still in the process of transitioning our sales force from selling less expensive single use products to nurses and procedure room supervisors to also selling more complex capital equipment (such as our Fuse system) to GI specialists and senior administrators." Compl. ¶ 73.

Pursuant to the Offering Materials, the initial public offering ("IPO") of 6,350,000 EndoChoice shares commenced on June 5, 2015, at an offering price of $15.00 per share. *See* Compl. ¶¶ 1, 4, 44, 57. Serving as underwriters for the IPO were J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, William Blair & Company, L.L.C., and Stifel, Nicolaus & Company, Incorporated (collectively, "the Underwriter Defendants"). *See* Compl. ¶¶ 40–43.

[1] The Offering Materials will be attached to the answer for the Court's review. *See Minnifield v. Wells Fargo Bank, N.A.*, 771 S.E.2d 188, 191 (Ga. Ct. App. 2015).

Following the IPO, EndoChoice shares were traded on the New York Stock Exchange under the ticker symbol "GI." *See* Compl. ¶ 28.

Following the IPO, sales of Fuse were lower than hoped for and the price of EndoChoice shares dropped. *See* Compl. ¶¶ 103–33. That prompted this securities class action by EndoChoice shareholders Jesse L. Bauer and Kenneth T. Raczewski (collectively, "the Shareholders"), who allegedly bought an unspecified number of shares, on unspecified dates, at unspecified prices, from unspecified sellers. *See* Compl. ¶¶ 26–27. The Shareholders assert that the Offering Materials contained materially false or misleading statements about the quality and design of Fuse, the "world class" salesforce, and EndoChoice's ability to accelerate sales of Fuse. *See, e.g.*, Compl. ¶ 58. According to the Shareholders, who interviewed six confidential witnesses formerly employed by EndoChoice, *see* Compl. ¶¶ 85–90, 95–101, the challenged statements should have disclosed various problems with Fuse, including cables that break and computers that freeze, *see* Compl. ¶¶ 67, 69, 80, 86–90, as well as trouble within the salesforce, including attrition and turnover, *see* Compl. ¶¶ 74, 78, 92, 96–101.

Seeking money damages on behalf of a putative class of all who purchased EndoChoice shares pursuant or traceable to the Offering Materials, the Shareholders filed a complaint in this Court asserting federal-law claims under the Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 ("the Securities Act"). *See* Compl. ¶¶ 23, 134. They claim that EndoChoice and nine of its directors and officers (collectively, "the EndoChoice Defendants") violated Section 11 and

Section 12(a)(2) of the Securities Act, 15 U.S.C. §§ 77k, 77*l*(a)(2), as did the Underwriter Defendants. *See* Compl. ¶¶ 140–56. The Shareholders also seek to impose control-person liability under Section 15 of the Securities Act, 15 U.S.C. § 77*o*. *See* Compl. ¶¶ 157–59.

ARGUMENT

"Claims under sections 11 and 12(a)(2) are . . . Securities Act siblings with roughly parallel elements . . . ." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 359 (2d Cir. 2010).

> To state a claim under section 11, the plaintiff must allege that: (1) she purchased a registered security, either directly from the issuer or in the aftermarket following the offering; (2) the defendant participated in the offering in a manner sufficient to give rise to liability under section 11; and (3) the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading."

Id. at 358–59 (quoting 15 U.S.C. § 77k). Similarly,

> the elements of a prima facie claim under section 12(a)(2) are: (1) the defendant is a "statutory seller"; (2) the sale was effectuated "by means of a prospectus or oral communication"; and (3) the prospectus or oral communication "include[d] an untrue statement of a material fact or omit[ted] to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading."

Id. at 359 (alterations in original) (quoting 15 U.S.C. § 77*l*(a)(2)). Meanwhile, control-person liability under Section 15 is derivative of claims under Section 11 and Section 12(a)(2). *See id.* at 358.

For several reasons, the Court should dismiss this Securities Act class action. Subject-matter jurisdiction is lacking as a consequence of Section 22(a) of the

Securities Act, which limits concurrent jurisdiction in the state courts. *See* GA. CODE ANN. § 9-11-12(b)(1). And even if the Court had jurisdiction to reach the merits, the Shareholders' complaint fails to state a claim under Section 11 or Section 12(a)(2). *See* GA. CODE ANN. § 9-11-12(b)(6).

I. The Securities Act Strips This Court Of Subject-Matter Jurisdiction

A. The Shareholders Rely On The Jurisdictional Provision In Section 22(a) Of The Securities Act

The Shareholders purport to invoke this Court's subject-matter jurisdiction under Section 22 of the Securities Act, Compl. ¶ 15, which provides for concurrent federal court and state court jurisdiction over Section 11 and Section 12(a)(2) claims "*except* as provided in section 16 with respect to covered class actions." 112 Stat. 3230 (emphasis added). Congress gets to decide whether to make a federal-law claim subject to concurrent jurisdiction in the state courts, as is usually the case, or to provide instead for exclusive jurisdiction in the federal courts. *See Tafflin v. Levitt*, 493 U.S. 455, 458–60 (1990); *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 428–30 (1867). In relying on Section 22(a), the Shareholders overlook the critical "except" clause noted above, which was included among important changes to the Securities Act that negate the presumption of concurrent jurisdiction. *See Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 478 (1981).

Congress amended the Securities Act, along with the Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881, by enacting the Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 ("the PSLRA"). The PSLRA made procedural and substantive changes to the federal securities

laws, "targeted at perceived abuses of the class-action vehicle in litigation involving nationally traded securities." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006). For example, the PSLRA imposed a heightened pleading standard, established a procedure for appointing lead plaintiffs, provided for a stay of discovery while a motion to dismiss is pending, and created a safe harbor for forward-looking statements. *See* 15 U.S.C. §§ 77z-1, 77z-2, 78u-4, 78u-5.

In the immediate aftermath of the PSLRA's passage, the plaintiffs' bar sought to evade the PSLRA's strictures by bringing many of their securities class actions in the state courts, rather than the federal courts, and repackaging their federal-law claims as state-law violations. *See Dabit*, 547 U.S. at 81–82. Congress responded promptly to this shift by enacting the Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 ("the SLUSA"). As its very title makes clear, the SLUSA was meant to promote uniformity in the adjudication of class actions that implicate the Securities Act or the Exchange Act.

Toward that end, the SLUSA amended Section 16 of the Securities Act, among other provisions. As amended, Section 16(f) defines a "covered class action" as a lawsuit seeking damages for more than fifty people, and defines a "covered security" as one that is traded nationally and listed on a regulated national exchange. *See* 15 U.S.C. § 77p(f)(2)–(3); *Dabit*, 547 U.S. at 83. According to the preclusion provision in Section 16(b), a private party cannot bring a covered class action in any court, be it state or federal, to pursue a state-law claim alleging untruth or manipulation in connection with the purchase or sale of a covered

security. *See* 15 U.S.C. § 77p(b); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 636–37 (2006). Section 16(c) provides for removal so that the federal courts can dismiss all cases that are precluded by Section 16(b). *See* 15 U.S.C. § 77p(c); *Kircher*, 547 U.S. at 643–44.

The SLUSA also made conforming amendments to Section 22(a) of the Securities Act. *See* 15 U.S.C. § 77v(a). As amended, Section 22(a) makes clear that the grant of concurrent jurisdiction over Securities Act claims is limited: "except as provided in section 16 with respect to covered class actions." *See* 112 Stat. 3230 (reflecting the SLUSA's addition of the quoted language to Section 22(a) of the Securities Act). In addition, the amended version of Section 22(a) allows for removal to the federal courts "as provided in section 16(c)." *See id.* (same); *cf. Wilko v. Swan*, 346 U.S. 427, 431 (1953) (noting that a pre-SLUSA version of Section 22(a) prohibited removal).

The Shareholders' invocation of Section 22(a) presents a question regarding the jurisdictional exception created by the SLUSA. If their case falls outside the Securities Act's grant of concurrent jurisdiction, and hence within the exclusive jurisdiction of the federal courts, then this Court must dismiss for lack of subject-matter jurisdiction. *See Gold Kist, Inc. v. Alimenta (U.S.A.), Inc.*, 319 S.E.2d 37, 37–38 (Ga. Ct. App. 1984).

B. Section 22(a) Does Not Allow For Concurrent Jurisdiction Over This Covered Class Action

This case is governed by the SLUSA's carve-out from concurrent jurisdiction over Securities Act cases. As originally enacted, Section 22(a) provided that "[t]he

district courts of the United States . . . shall have jurisdiction . . . , concurrent with State and Territorial courts, of all suits in equity and actions at law brought to enforce any liability or duty created by [the Securities Act]." 48 Stat. 86. But, as noted above, the SLUSA inserted a jurisdictional exception into Section 22(a), as reflected in the following italicized language:

> The district courts of the United States . . . shall have jurisdiction . . . , concurrent with State and Territorial courts, *except as provided in section 16 with respect to covered class actions*, of all suits in equity and actions at law brought to enforce any liability or duty created by [the Securities Act].

See 112 Stat. 3230; *see also* 15 U.S.C. § 77v(a). "The exception in the jurisdictional provision of Section 22(a) exempts covered class actions raising [Securities Act] claims from concurrent jurisdiction." *Knox v. Agria Corp.*, 613 F. Supp. 2d 419, 425 (S.D.N.Y. 2009).[2]

This exception to concurrent jurisdiction is a broad one because "covered class action" is defined, for purposes of the cross-referenced Section 16, as any lawsuit seeking damages for more than fifty people—without regard to whether the underlying claims are based on state or federal law. *See* 15 U.S.C. § 77p(f)(2). In telling contrast, the SLUSA employed a narrower cross-reference when it amended Section 22(a) to prohibit removal of Securities Act cases "[e]xcept as provided in *section 16(c)*." 112 Stat. 3230 (emphasis added). Section 16(c) goes on to make a similarly specific cross-reference to Section 16(b), which in turn narrows its own

[2] State and federal courts are admittedly divided on this important jurisdictional question, which is the subject of a certiorari petition currently pending before the Supreme Court of the United States. *See generally Cyan, Inc. v. Beaver Cty. Emps.' Ret. Fund*, No. 15-1439 (U.S.).

reach to certain "covered class action[s] based upon the statutory or common law of any State." *See* 15 U.S.C. § 77p(b)–(c). To account for this textual difference within Section 22(a), the SLUSA's jurisdictional exception must be understood to reach covered class actions sounding in federal law as well as state law:

> Congress expressly eliminated state courts' concurrent jurisdiction over covered class actions arising under the Securities Act when it referred to the *entirety* of Section 16—and *not* just Sections (b) and (c)—in providing an exception to concurrent jurisdiction for covered class actions. . . . [C]oncurrent jurisdiction was eliminated for *all* covered class actions, as they are defined in Section 16(f), rather than only for those based on state law, which are the subject of Section 16(b). If Congress had wanted to refer only to Section 16(b)'s narrower definition of covered class actions *brought under state law*, it could have done so, as it did with respect to Section 16(c) in Section 22(a)'s removal bar.

Iron Workers Dist. Council of New England Pension Fund v. MoneyGram Int'l, Inc., No. 15-cv-402, 2016 WL 4585975, at *5 (D. Del. Sept. 2, 2016) (citations omitted).

This interpretation of the SLUSA's amendments to Section 22(a) makes sense because it avoids the "jurisdictional anomaly . . . of prohibiting state securities fraud claims in state courts, while allowing federal securities fraud class actions to be litigated there." *Knox*, 613 F. Supp. 2d at 423. Moreover, Congress sought to promote uniformity in enacting the PSLRA and the SLUSA. That objective would be frustrated if plaintiffs could avoid the PSLRA's obstacles by simply bringing their Securities Act class actions in the state courts. *Cf. Gulf Offshore*, 453 U.S. at 483–84 ("The factors generally recommending exclusive federal-court jurisdiction over an area of federal law include the desirability of uniform interpretation . . . ." (footnote omitted)).

The SLUSA's amendments to Section 22(a) thus place this case within the exclusive jurisdiction of the federal courts. The Shareholders claim violations of Section 11 and Section 12(a)(2), so this is an "action[ ] at law brought to enforce [a] liability or duty created by [the Securities Act]" within the meaning of Section 22(a). *See* Compl. ¶¶ 140–59. And the Shareholders seek damages on behalf of more than fifty people, so this is a "covered class action" within the meaning of Section 16. *See* Compl. ¶ 135 (alleging "thousands of members of the proposed Class"). Nothing more is needed to implicate Section 22(a)'s exception to concurrent jurisdiction. Accordingly, this Court should dismiss for lack of subject-matter jurisdiction under OCGA § 9-11-12(b)(1).

II. The Complaint Fails To State A Claim For Relief Under Applicable Pleadings Standards

A. The Complaint Fails To Plead Traceability With The Required Specificity

Turning to the merits, Section 11 of the Securities Act narrows its own cause of action to "any person acquiring such security." 15 U.S.C. § 77k(a). This statutory text limits the universe of proper plaintiffs to "anyone who can 'trace' his shares to the challenged registration statement." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 873 (5th Cir. 2003); *see also APA Excelsior III L.P. v. Premiere Techs., Inc.*, 476 F.3d 1261, 1271 (11th Cir. 2007); *In re Friedman's, Inc. Sec. Litig.*, 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2005). As a result, the Shareholders' Section 11 claim must be dismissed unless they adequately allege that all of their EndoChoice shares were issued pursuant to the Offering Materials in the IPO of June 5, 2015. *See Krim v. PcOrder.com, Inc.*, 402 F.3d 489, 494–502 (5th Cir. 2005).

Liability under Section 12(a)(2) of the Securities Act is similarly narrow because it provides that "[a]ny person who . . . offers or sells a security . . . shall be liable . . . to the person purchasing such security from him." 15 U.S.C. § 77*l*(a)(2). This statutory text obliges the Shareholders to plead that they bought their EndoChoice shares in the IPO of June 5, 2015, as opposed to acquiring them in the aftermarket. *See Licht v. Watson*, 567 F. App'x 689, 691–92 (11th Cir. 2014) (per curiam); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 529 F. Supp. 2d 644, 649 n.1 (S.D. Tex. 2006) (citing *Gustafson v. Alloyd Co.*, 513 U.S. 561, 582 (1995)); *In re Cosi, Inc. Sec. Litig.*, 379 F. Supp. 2d 580, 588–89 (S.D.N.Y. 2005).

Section 11 and Section 12(a)(2) thus impose a strict traceability requirement. To plead traceability in any federal court, the Shareholders' complaint would have to go beyond conclusory allegations and provide factual specificity supporting a reasonable inference that their shares can be traced to the Offering Materials. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107–08 (9th Cir. 2013) (applying the pleading standard of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 899–901 (4th Cir. 2014) (same).

But a conclusory allegation is all the Shareholders can muster, with each alleging that he "purchased shares of [EndoChoice's] common stock pursuant and/or traceable to the defective Offering Materials." Compl. ¶¶ 26–27 (repeating this boilerplate assertion for both Bauer and Raczewski). Fatally absent from their complaint are factual allegations making this a plausible conclusion, such as the

dates of the Shareholders' purchases of EndoChoice shares, what prices they paid, or the identities of the sellers.

Federal courts from coast to coast have repeatedly dismissed Section 11 and Section 12(a)(2) claims that use the traceability boilerplate found in the Shareholders' complaint. *See, e.g.*, *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 755–56 (1st Cir. 2016); *Yates*, 744 F.3d at 899–901; *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 141–42 (2d Cir. 2013); *Century Aluminum*, 729 F.3d at 1107–08; *Johnson v. CBD Energy Ltd.*, No. 4:15-cv-1668, 2016 WL 3654657, at *3–*6 (S.D. Tex. July 6, 2016); *Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 94 F. Supp. 3d 1035, 1056–57 (D. Minn. 2015). At least in a federal court, "mere boilerplate allegations of traceability are insufficient." *Scott v. ZST Digital Networks, Inc.*, 896 F. Supp. 2d 877, 883 (C.D. Cal. 2012). Had they sued just a few blocks away in the United States District Court for the Northern District of Georgia, therefore, the Shareholders would have been met with a swift dismissal under the federal-law pleading standard of *Iqbal* and *Twombly*.

The Shareholders cannot get a different outcome by filing their inadequate complaint in a state court instead of a federal court. To be sure, Georgia has not adopted the pleading standard of *Iqbal* and *Twombly* for its own state courts. *See Austin v. Clark*, 755 S.E.2d 796, 798–99 (Ga. 2014) (citing *Anderson v. Flake*, 480 S.E.2d 10 (Ga. 1997)); *id.* at 800 (Nahmias, J., concurring) (citing *Iqbal*); *Bush v. Bank of N.Y. Mellon*, 720 S.E.2d 370, 375 n.13 (Ga. Ct. App. 2011); *Stillwell v. Allstate Ins. Co.*, 663 F.3d 1329, 1334 n.3 (11th Cir. 2011) (per curiam). And the

Shareholders' traceability boilerplate might suffice under a more lenient state-law pleading standard. *Cf. Century Aluminum*, 729 F.3d at 1107. Here, however, decisions from the Supreme Court of the United States compel this Court to use the federal-law pleading standard in adjudicating the Shareholders' federal-law claims.

The controlling case is *Brown v. Western Railway*, 338 U.S. 294 (1949), which reversed the Court of Appeals of Georgia for having applied a state-law pleading standard to a federal-law claim. In *Brown*, the state court dismissed a Federal Employers' Liability Act claim because the plaintiff did not satisfy Georgia's state-law pleading standard, which was stricter than the federal-law pleading standard then in existence. *Id.* at 294–96. Pointing to the need for "desirable uniformity in adjudication of federally created rights," the Supreme Court held that the federal-law claim was subject to the federal-law pleading standard and therefore should not have been dismissed. *Id.* at 299.

Brown is not alone in rejecting the use of state-law procedure to adjudicate a federal-law claim. In *Dice v. Akron, Canton & Youngstown Railroad*, 342 U.S. 359, 362–64 (1952), the Supreme Court held that a state court could not adhere to state law that shifted fact-finding responsibilities from a jury to a judge. In *Norfolk & Western Railway v. Liepelt*, 444 U.S. 490, 492–98 (1980), and again in *Monessen Southwestern Railway v. Morgan*, 486 U.S. 330, 334–42 (1988), the Supreme Court held that a state court could not determine damages according to state law. And in *Felder v. Casey*, 487 U.S. 131, 134 (1988), the Supreme Court held that a state court could not enforce a notice-of-claim requirement imposed by a state statute.

Supreme Court precedent thus forbids this Court's application of any Georgia procedure that would "defeat the objectives of the federal law," as expressed in the Securities Act under which the Shareholders' claims arise. *See Simmons Co. v. Deutsche Fin. Servs. Corp.*, 532 S.E.2d 436, 438 (Ga. Ct. App. 2000). Congress's objective in amending the Securities Act through the PSLRA and the SLUSA was uniformity of application. *See, e.g.*, *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 320–21 (2007); *Rowinski v. Salomon Smith Barney Inc.*, 398 F.3d 294, 300 (3d Cir. 2005); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 107–08 (2d Cir. 2001). Indeed, the *U* stands for *Uniform* in the title of the SLUSA, and the text of that statute provides as follows: "The Congress finds that . . . it is appropriate to enact *national standards* for securities class action lawsuits involving nationally traded securities . . . ." 112 Stat. 3227 (emphasis added).

In short, the "desirable uniformity" that trumped Georgia's incompatible state-law pleading standard in *Brown*, 338 U.S. at 299, is all the more important in this action under the federal securities laws. The Shareholders' cursory attempt to satisfy the traceability requirement of Section 11 and Section 12(a)(2) would fail in any federal court. To ensure uniformity, this Court should apply the same federal-law pleading standard to yield the same prompt dismissal of their federal-law claims. To do otherwise would be to give "outcome-determinative" effect to a state-law pleading standard, in violation of binding Supreme Court precedent. *See Felder*, 487 U.S. at 141.

B. The Offering Materials Were Not Materially False Or Misleading

1. The Complaint Challenges Immaterial Puffery

To state a claim under Section 11 or Section 12(a)(2), the Shareholders must allege that the Offering Materials conveyed "an untrue statement of a *material* fact" or "omit[ted] to state a *material* fact . . . necessary to make the statements . . . not misleading." *See* 15 U.S.C. §§ 77k, 77*l*(a)(2) (emphases added). This materiality requirement cannot be satisfied by challenging statements of corporate puffery, because "[a]nalysts and arbitrageurs rely on facts in determining the value of a security, not mere expressions of optimism from company spokesmen." *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 290 (4th Cir. 1993); *see also In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1378–79 (N.D. Ga. 2005); *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1350 (N.D. Ga. 2001); *cf. Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1028–30 (11th Cir. 2003) (per curiam) (applying Georgia puffery law). A reasonable investor is too sophisticated to rely on vague corporate cheerleading, as opposed to specific and verifiable facts, so such statements are held immaterial as a matter of law. *See Southland Sec. Corp. v. INSpire Ins. Solutions Inc.*, 365 F.3d 353, 372 (5th Cir. 2004).

The Court should therefore dismiss the Shareholders' claims insofar as they challenge various bits of puffery within the Offering Materials. Chief among these is EndoChoice's description of itself as "a world class organization capable of driving sustainable global growth that can be leveraged to drive increased profitability." Compl. ¶ 66. The Shareholders point to this "world class" jargon throughout their prolix complaint, arguing that it conflicts with the alleged problems seen in Fuse

and the salesforce. *See* Compl. ¶¶ 6–7, 66–67, 72, 74, 78, 91, 105, 107, 119. But the phrase "world class" is classic puffery, as numerous courts have held in rejecting claims under the federal securities laws for want of materiality. *See, e.g.*, *Anastasio v. Internap Network Servs. Corp.*, No. 1:08-cv-3462, 2010 WL 11459838, at *11 (N.D. Ga. Sept. 15, 2010) (touting "a world class talent [for] our C-level management team"); *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 347 (S.D.N.Y. 2015) (touting "world-class compliance function"); *In re Bos. Scientific Corp. Sec. Litig.*, 490 F. Supp. 2d 142, 162 (D. Mass. 2007) (touting a "facility [that] is 'world class' "), *rev'd on other grounds*, 523 F.3d 75 (1st Cir. 2008).

Similarly, the Shareholders repeatedly challenge statements in the Offering Materials describing Fuse as a "disruptive," "innovative," and "compelling" product whose "quality, diagnostic benefits, ease of use[,] and cost-effectiveness" would "set a new standard of care" for gastrointestinal caregivers. *See* Compl. ¶¶ 3, 6, 56, 59–64, 68. But "[a]ll public companies praise their products and their objectives." *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004). Such self-interested product testimonials are a common form of puffery, as seen in the many cases finding them immaterial under the federal securities laws. *See, e.g.*, *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 670–71 (6th Cir. 2005) (touting "global consistent quality" of "the best tires in the world"); *Ford*, 381 F.3d at 570–71 (touting "defect-free" vehicles of the "best quality ever"); *Kelly v. Elec. Arts, Inc.*, 71 F. Supp. 3d 1061, 1070–71 (N.D. Cal. 2014) (touting "investment in new innovation for the future"); *In re MCI Worldcom, Inc. Sec. Litig.*, 191 F. Supp.

2d 778, 784–86 (S.D. Miss. 2002) (touting "technological innovations to increase the capacity and reach of our networks").

The same goes for the challenged statements in the Offering Materials that characterize EndoChoice's salesforce as "highly adaptable," "experienced," "proven," and "poised to contribute to future sales growth." *See* Compl. ¶¶ 6, 70, 73–74, 78, 91, 94, 119, 122. These "generalized, positive statements about the company's competitive strengths, experienced management, and future prospects are not actionable because they are immaterial." *Southland*, 365 F.3d at 372. The Shareholders cannot spin a few rosy adjectives into a securities class action, because "statements describing a product in terms of 'quality' or 'best' or benefitting from 'aggressive marketing' are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision." *Bridgestone*, 399 F.3d at 671

2. The Complaint Challenges Statements Protected By The Bespeaks-Caution Doctrine

The materiality requirement further undercuts the Shareholders' Section 11 and Section 12(a)(2) claims through the bespeaks-caution doctrine, which "provides a mechanism by which a court can rule as a matter of law . . . that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1413 (9th Cir. 1994). A reasonable investor reads words in context, so the bespeaks-caution doctrine recognizes that the materiality of a projection can be negated by its accompanying warnings. *See, e.g.*,

Bryant v. Avado Brands, Inc., 187 F.3d 1271, 1276 n.7 (11th Cir. 1999); *Worlds of Wonder*, 35 F.3d at 1413–15; *Rubinstein v. Collins*, 20 F.3d 160, 166–68 (5th Cir. 1994). The Court should dismiss the Shareholders' claims insofar as they challenge statements in the Offering Materials protected by the bespeaks-caution doctrine.

Many of the challenged statements are no more than optimistic projections about how EndoChoice will increase revenue in the future thanks to a combination of its flagship product and its salesforce:

- "We *intend to* leverage our broad product platform, established customer relationships, commercial infrastructure and Fuse technology to set *a new standard of care* for the global GI market." Compl. ¶ 59.
- "We believe that the improved clinical and cost outcomes that Fuse enables *will lead to* its widespread adoption *over time*." Compl. ¶ 60.
- "We *intend to* educate GI specialists, referring physicians, administrators and patients on the compelling, differentiated clinical efficacy of our Fuse system . . . ." Compl. ¶ 61.
- "We believe the combination of a broad and innovative product portfolio spanning the entire GI procedure cycle coupled with our disruptive Fuse technology gives us a competitive advantage that *will enable us to* gain further share of our customers' spend." Compl. ¶ 68.
- "Our proven salesforce is *poised to* contribute to *future* sales growth." Compl. ¶ 70.
- "We *expect* revenue to increase *in the future* as we expand our sales, marketing and distribution capabilities to support growth in the United States and internationally as our Fuse system becomes more widely adopted." Compl. ¶ 75.

(Emphases added.)

These projections are not material because they were accompanied by meaningful cautionary language, found in a section of the Offering Materials entitled "RISK FACTORS." Prospectus, Ex. A, at 13. With respect to Fuse, the

Offering Materials flagged quality-control problems that have hurt sales of that product since the IPO: "In the past, we have had to replace certain components and provide remediation in response to the discovery of defects or bugs in products we had shipped, including initial shipments of our Fuse system." Compl. ¶ 65; *see also* Prospectus, Ex. A, at 27 ("Product quality issues or product defects may harm our business, results of operations[,] and financial condition."). The Shareholders argue that this language—which disclosed actual defects in the *past* and warned of potential defects in the *future*—somehow promised that Fuse was defect-free when the IPO occurred on June 5, 2015. *See* Compl. ¶ 65. In selectively quoting from the Offering Materials, however, the Shareholders omit an important disclaimer about unknown defects in the *present*: "Our quality assurance testing programs may not be adequate to detect all defects . . . ." Prospectus, Ex. A, at 27.

As for the salesforce, the Offering Materials warned that EndoChoice was "still in the process of transitioning our sales force from selling less expensive single use products to nurses and procedure room supervisors to also selling more complex capital equipment (such as our Fuse system) to GI specialists and senior administrators." Compl. ¶ 73; *see also* Prospectus, Ex. A, at 16–17 ("If we are unable to expand, manage[,] and maintain our direct sales and marketing organizations we may not be able to generate anticipated revenue."). The Offering Materials further disclosed, in great detail, the challenges EndoChoice's salesforce would face in trying to sell an expensive new product like Fuse to gastrointestinal specialists unfamiliar with its merits. *See* Prospectus, Ex. A, at 13–17.

Given these explicit warnings about Fuse and EndoChoice's salesforce, a reasonable investor would not assign the requisite importance to the hedged projections in the Offering Materials. Accordingly, the bespeaks-caution doctrine counsels dismissal on materiality grounds.

3. The Complaint Fails To Plead Any Actionable Opinion Statements

The Shareholders challenge numerous statements of opinion in the Offering Materials, which calls for application of *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015). The statements communicated opinions, as opposed to facts, because the EndoChoice Defendants did not "express[ ] certainty about a thing," *id.* at 1325, with the following language:

- "*We believe* our commitment to continuing innovation and focus on GI specialists provides us with the unique capability to meet their evolving needs." Compl. ¶ 59.
- "*We believe* that the improved clinical and cost outcomes that Fuse enables will lead to its widespread adoption over time." Compl. ¶ 60.
- "We have made significant investments over the past several years in our research and development, sales and marketing and manufacturing operations to build what *we believe* is a world class organization capable of driving sustainable growth that can be leveraged to drive increased profitability." Compl. ¶ 66.
- "*We believe* the combination of a broad and innovative product portfolio spanning the entire GI procedure cycle coupled with our disruptive Fuse technology gives us a competitive advantage that will enable us to gain further share of our customers' spend." Compl. ¶ 68.
- "Our proven salesforce is poised to contribute to future sales growth. *We believe* we have the infrastructure in place to support continued expansion in the growing GI market." Compl. ¶ 70.
- "With these organizational and infrastructure investments already in place, *we believe* we have the resources to support accelerated growth. As

> a result, *we believe* we can increase revenue and ultimately achieve and improve profitability through operating leverage." Compl. ¶ 72.

(Emphases added.) *Cf. Omnicare*, 135 S. Ct. at 1327 ("The two sentences to which the [plaintiffs] object are pure statements of opinion: To simplify their content only a bit, [the defendants] said in each that '*we believe* we are obeying the law.' " (emphasis added)).

To determine whether these opinion statements are actionable, the Court must proceed in "two steps" by separately analyzing "when an opinion itself constitutes a factual misstatement," and "when an opinion may be rendered misleading by the omission of discrete factual representations." *Omnicare*, 135 S. Ct. at 1324–25. As to the former, each opinion statement conveyed only one fact with the requisite certainty: "that the speaker actually holds the stated belief." *Id.* at 1325–27. Yet the Shareholders do not allege disbelief on the part of the EndoChoice Defendants. To the contrary, their complaint "expressly exclude[s] any allegation that could be construed as alleging fraud." Compl. ¶ 52. Accordingly, none of the opinion statements was an "untrue statement of a material fact" within the meaning of Section 11 and Section 12(a)(2). *See* 15 U.S.C. §§ 77k, 77*l*(a)(2); *see also Omnicare*, 135 S. Ct. at 1327 (holding as much for a similar disclaimer).

The Shareholders' only hope, then, is to show that the Offering Materials violated Section 11 and Section 12(a)(2) by "omit[ting] to state a material fact . . . necessary to make the statements . . . not misleading." *See* 15 U.S.C. §§ 77k, 77*l*(a)(2). To do so, they must plead that each challenged opinion statement would mislead a reasonable investor by implying to her some factual basis for the opinion

that does not actually exist. *See Omnicare*, 135 S. Ct. at 1328–29. Satisfying this pleading burden will be "no small task" for the Shareholders, who "must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id.* at 1332. It will not suffice to show that the opinion turned out to be wrong, *id.* at 1328, to allege that the speaker failed to disclose "some fact cutting the other way," *id.* at 1329, or to offer a "conclusory allegation that [the EndoChoice Defendants] lacked 'reasonable grounds for the belief,' " *id.* at 1333.

With respect to the opinion statements, the Shareholders fail to state a claim under the post-*Omnicare* omissions clause of Section 11 and Section 12(a)(2). "[W]hether an omission makes an expression of opinion misleading always depends on context," and a reasonable investor would understand each statement "in light of all its surrounding text, including hedges, disclaimers, and apparently conflicting information." *Omnicare*, 135 S. Ct. at 1330. As explained in Part II.B.2, *supra*, the Offering Materials explicitly warned that the EndoChoice Defendants' optimistic beliefs might be dashed by Fuse's defects or a failure to transition the salesforce, among other risk factors. *See* Compl. ¶¶ 65, 73; Prospectus, Ex. A, at 13–17, 27, 41. The EndoChoice Defendants thus "avoid[ed] exposure for omissions" by "mak[ing] clear the real tentativeness of [their] belief," such that no reasonable investor could have been misled by the hedged opinions that the Shareholders challenge.

Omnicare, 135 S. Ct. at 1332. Any investor who bothered to read the warnings in the Offering Materials could reach her own conclusion as to whether it was "reasonable to believe that the FUSE system could or would accelerate through the remainder of 2015." Compl. ¶ 76.

The Shareholders' allegations about post-IPO developments are irrelevant to whether the opinion statements were misleading by omission. *Cf. In re Keegan Mgmt. Co. Sec. Litig.*, 794 F. Supp. 939, 942 (N.D. Cal. 1992) ("[E]vidence of information available *after* [the effective date of the prospectus] is irrelevant to the determination of what should have been stated in the prospectus."). A reasonable investor does not expect clairvoyance, but only that an opinion "fairly aligns with the information in the issuer's possession at the time" the statement is made. *Omnicare*, 135 S. Ct. at 1329. So in evaluating the challenged opinion statements, the Court should not consider analyst reports, analyst calls, or internet posts that came months after the IPO of June 5, 2015. *See, e.g.*, Compl. ¶¶ 81–82, 84, 103–08, 110–13, 115–23, 125–30, 132–33.

The Shareholders flunk *Omnicare*'s two-step standard for identifying false or misleading opinion statements. The Court should dismiss all Section 11 and Section 12(a)(2) claims that challenge opinion statements in the Offering Materials.

4. The Complaint Fails To Plead A Violation Of Item 303

The Shareholders engage in Monday-morning quarterbacking by pointing to problems with Fuse and the salesforce that emerged after the IPO of June 5, 2015, as noted in Part II.B.3, *supra*. *See, e.g.*, Compl. ¶¶ 81–82, 84, 103–08, 110–13, 115–23, 125–30, 132–33. But these post-IPO developments fail to state a claim under

Section 11 and Section 12(a)(2), which oblige a plaintiff to "plead facts establishing that the Prospectus contained a material misrepresentation or omission *on the date it was issued*." *Rudd v. Suburban Lodges of Am., Inc.*, 67 F. Supp. 2d 1366, 1370 (N.D. Ga. 1999) (internal quotation marks omitted); *see also Kaplan v. Rose*, 49 F.3d 1363, 1373 (9th Cir. 1994); *In re Mirant Corp. Sec. Litig.*, No. 1:02-cv-1467, 2009 WL 48188, at *20 (N.D. Ga. Jan. 7, 2009); *Nelson v. Paramount Commc'ns, Inc.*, 872 F. Supp. 1242, 1246 (S.D.N.Y. 1994). The Shareholders are not entitled to dictate the contents of the Offering Materials "from the privileged position of hindsight." *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 518 (7th Cir. 1989).

The Shareholders cannot overcome this temporal limitation with Item 303 of SEC Regulation S-K. *See* Compl. ¶ 5. Under Item 303, the Offering Materials were supposed to "[d]escribe any known trends or uncertainties that . . . [EndoChoice] reasonably expects will have a material . . . unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303(a)(3)(ii). To leave out such a known trend would be to violate Section 11 by "omit[ting] to state a material fact required to be stated." *See* 15 U.S.C. § 77k; *see also Panther Partners Inc. v. Ikanos Commc'ns, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012). For this reason, the Shareholders assert that the Offering Materials should have disclosed a trend "concerning the demand for EndoChoice's FUSE products." Compl. ¶ 51.

This Item 303 argument fails because the Shareholders do not adequately allege that the EndoChoice Defendants had "actual knowledge of the relevant trend" when they issued the Offering Materials. *Ind. Pub. Ret. Sys. v. SAIC, Inc.*,

818 F.3d 85, 95 (2d Cir. 2016). By its plain text, Item 303 requires disclosure of *known* trends, but not of *knowable* trends. *See J&R Mktg. v. Gen. Motors Corp.*, 549 F.3d 384, 391–92 (6th Cir. 2008). As the SEC has explained, Item 303 only covers trends "presently known to management." *See* Management's Discussion and Analysis of Financial Condition and Results of Operations, SEC Release No. 6835, 1989 WL 1092885, at *4 (May 18, 1989). Accordingly, the Shareholders have not pleaded an Item 303 violation with their conclusory assertion that "EndoChoice and its management knew or *should have known*[that] the sharp upward trajectory and growth trend in the Company's pre-IPO FUSE system sales was already flattening out (and trending downward) as of the date of the Company's June 2015 IPO." Compl. ¶ 78 (emphasis added).

In any event, the Shareholders fail to account for the timeline of events. They allege that "the sharp upward trajectory and growth trend in the Company's pre-IPO FUSE system sales was already flattening out (and trending downward) as of the date of the Company's June 2015 IPO." Compl. ¶ 78. But on June 5, 2015, EndoChoice was still in the middle of a second quarter in which Fuse sales were relatively high, with an upward trajectory from twenty-six Fuse systems sold in the first quarter to twenty-seven Fuse systems sold in the second quarter. *See* Compl. ¶¶ 8, 104. It was not until after the IPO of June 5, 2015 that EndoChoice saw sales dip to twenty-one Fuse systems in the third quarter. *See* Compl. ¶¶ 8, 104. Even under Item 303, the EndoChoice Defendants had no duty to predict a future in which demand would be slowed by Fuse defects and an unprepared salesforce. *See*

Lin v. Interactive Brokers Group, Inc., 574 F. Supp. 2d 408, 421 (S.D.N.Y. 2008) ("Not only is it not plausible to suggest that Defendants could have known that they would lose money during the Second Quarter before that quarter was half over; it is absurd. The securities laws do not require clairvoyance in the preparation of offering documents." (internal quotation marks omitted)).

CONCLUSION

The Court should dismiss this Securities Act class action for lack of subject-matter jurisdiction. *See* GA. CODE ANN. § 9-11-12(b)(1). Alternatively, the Court should dismiss the complaint for failure to state a claim upon which relief can be granted. *See* GA. CODE ANN. § 9-11-12(b)(6).

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This 17th day of January, 2017.

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