IN THE SUPERIOR COURT OF THE STATE OF GEORGIA

COUNTY OF FULTON

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

PLAINTIFFS' OMNIBUS BRIEF IN OPPOSITION TO THE ENDOCHOICE DEFENDANTS' AND THE UNDERWRITER DEFENDANTS' RESPECTIVE MOTIONS TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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Plaintiffs respectfully submit this single brief in opposition to the separate motions to dismiss filed by the EndoChoice Defendants and the Underwriter Defendants, respectively.[1]

INTRODUCTION

This case arises out of the initial public offering ("Offering" or "IPO") of the common stock of EndoChoice Holdings, Inc. ("EndoChoice" or the "Company") made pursuant to a registration statement and incorporated materials (collectively, "Offering Materials") that contained inaccurate or misleading statements as well as material omissions concerning the Company's business and flagship FUSE endoscopy product. As a result, Plaintiffs and other investors acquired EndoChoice shares pursuant or traceable to the Offering Materials at inflated prices. Unfortunately for Plaintiffs and the Class, however, the truth concerning the nature and extent of the problems facing EndoChoice did not begin to emerge until after the IPO, when its share price plummeted. By this action, Plaintiffs seek a recovery for their and the Class's losses.

Under §§11 and 12(a)(2) of the Securities Act of 1933 ("1933 Act"), 15 U.S.C. §§77k & 77l(a)(2), a plaintiff "need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolute ***even for innocent misstatements.***" *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983).[2] Moreover, although individuals who sign a registration statement may try to avoid liability by proving that they did not act negligently, it is each defendant's burden to establish his or her "due diligence" as an affirmative defense – and thus Plaintiffs need not even plead negligence to state a *prima facie* claim. *Id*. at 381.

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[1] The EndoChoice Defendants consist of EndoChoice Holdings, Inc. and its officers and directors who signed the Offering Materials for the offering at issue (namely, Michael Gilreath, David Gill, Scott Davis, James Balcom, Jr., Scott Huennekens, Scott Carter, David L. Kaufman, Rurik Vandevenne, and Uri Geiger). The "Underwriter Defendants" that underwrote the IPO are J.P. Morgan Securities LLC; Merrill Lynch, Pierce, Fenner & Smith Inc.; William Blair & Co. L.L.C.; and Stifel, Nicolaus & Co. Inc.

[2] Unless otherwise noted, all emphasis is added and internal citations are omitted. In addition, all citations to "¶__" are to paragraphs of the Consolidated Class Action Complaint filed December 2, 2016.

Plaintiffs easily meet this modest pleading burden, as the Offering Materials contained numerous statements that inaccurately or misleadingly hyped the Company's flagship FUSE product, and falsely claimed that its sales force was "world-class" and "proven," and that the Company was "poised" to start accelerating FUSE sales. Instead (as EndoChoice later admitted, but unbeknownst to investors), as of the IPO its FUSE product was plagued by manufacturing and design defects, and the Company's existing sales force was woefully unprepared to generate significantly improved FUSE sales. Moreover, although having demo units to show potential buyers (and to use to train the Company's sales force) was vital to generating increased FUSE sales, the Offering Materials failed to disclose that EndoChoice would not even *begin* to have "demo" units of its "gen2" FUSE system in the hands of its sales force until well after the IPO. ¶¶6-7. As a result, investors suffered staggering losses as EndoChoice posted a string of disastrous quarterly results after the IPO, with one Wall Street analyst noting in the summer of 2016 that EndoChoice's flagship FUSE product, given its many woes, was only just then – more than a year after the IPO – becoming (perhaps) "ready for prime time" − and that EndoChoice's dismal post-IPO performance of 2015 would continue through *at least* the rest of 2016. ¶¶125, 130. Indeed, with EndoChoice continuing to hemorrhage losses, it announced in September 2016 that it would be acquired by another company – but for only a fraction of the $15.00 per share price at which EndoChoice shares had been offered to the public in the IPO. ¶132.

Defendants' arguments for dismissal are unavailing. First, as the overwhelming weight of authority holds, certain 1998 amendments did ***not*** strip state courts of their previously unquestioned concurrent jurisdiction over class actions that assert 1933 Act claims − provided only that such actions do not also assert pre-empted state law claims (and it is undisputed that no such pre-empted claims are present here). Second, this is not a fraud case, Plaintiffs easily

satisfy the applicable Georgia pleading standards − and Defendants' desperate argument that "heightened" *federal* pleading standards (rather than Georgia pleading rules) fundamentally misreads established law and basic principles of federalism. *See, e.g.*, *Howlett v. Rose*, 496 U.S. 356, 372 (1990) ("The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'"). Defendants' further assertions that certain statements in the Offering Materials were inactionable "puffery" raise, at best, disputed factual issues that are inappropriate for resolution on the pleadings. Similarly, their arguments that certain misleading statements were "forward-looking" and immunized from liability under the "bespeaks caution" and/or "opinion" doctrine are also wrong because, *inter alia*, the key misstatements were misrepresentations of existing fact, or involved omissions of existing material facts and risks that Defendants had a duty to disclose. Finally, Plaintiffs easily allege their standing. Defendants' motions should therefore be denied.

STATEMENT OF FACTS

A. EndoChoice and Its Flagship "FUSE" Technology

EndoChoice, a company that focuses on designing and commercializing products for gastrointestinal ("GI") caregivers in the U.S. and internationally, was founded in 2008. ¶¶2-3, 53. Prior to 2013, the main components of EndoChoice's business consisted of (i) the sale of single-use therapeutic devices and infection control products (such as traps to store and preserve polyps and single-use tools and endoscopy kits); and (ii) GI pathology services. ¶54. In January 2013, however, EndoChoice acquired both Peer Medical Ltd (which was then developing a new endoscope system that EndoChoice subsequently branded as "FUSE") and RMS Endoskopie–Technik (a German developer, manufacturer, and repairer of video endoscopes). These acquisitions heralded a major shift in the focus of EndoChoice's growth plans. ¶¶3, 55-56.

These new growth plans focused on EndoChoice's new flagship product, the FUSE system. FUSE purportedly enables a GI specialist to see more than twice the anatomy of the colon at any one time compared to standard colonoscopes made by established industry leaders such as Olympus, Pentax, and FujiFilm. In particular, FUSE offers a 330º view of the colon during a colonoscopy, compared to the 140º to 170º view offered by competitors, and in one clinical study the FUSE system had detected more pre-cancerous polyps than standard colonoscopes. EndoChoice began limited commercialization of its FUSE system in December 2013 and launched its "second generation" ("Gen2") FUSE product in April 2015. ¶¶3, 59, 115.

B. EndoChoice's June 2015 IPO and the Misleading IPO Offering Materials

EndoChoice's decision to enter the colonoscope/GI imaging business initially produced greatly increased revenue. In particular, revenue from sales of its FUSE system rose 120% from $1.9 million in the 1st quarter of 2014 to $4.2 million in the 1st quarter of 2015 (an increase that accounted for the vast majority of the increase in EndoChoice's gross revenues in the last four full quarters immediately preceding its IPO). Seeking to take advantage of these superficially favorable circumstances, Defendants decided to take EndoChoice public. The IPO occurred on June 5, 2015, with EndoChoice and the Underwriter Defendants offering 6,350,000 EndoChoice common shares to the public, pursuant to the Offering Materials, at $15.00 per share. ¶¶3-5.

The Offering Materials made no secret of the fact that FUSE was critical to the Company. Indeed, they stated that "our success depends in large part on our ability to increase sales of our FUSE system," and that "acceptance of [FUSE] depends on educating GI specialists as to the quality, diagnostic benefits, ease of use and cost-effectiveness of our FUSE system." ¶5.

The Offering Materials, however, also reassured investors as to the FUSE system's purported capabilities and prospects, including by (a) touting FUSE's purportedly "compelling, differentiated clinical efficacy" and "***disruptive FUSE technology***"; and (b) by representing that

the Company had a "***proven sales force***," of "103 experienced sales and marketing professionals" that was "***poised*** to contribute to future sales growth" and was part of a "***highly adaptable sales organization***." ¶¶6, 60-61, 70-73. The Offering Materials also represented that EndoChoice's "significant investments over the past several years in [its] research and development, sales and marketing and manufacturing operations" had resulted in a "***world class organization***" that was already "capable of driving sustainable global growth that can be leveraged to drive increased profitability," and that the Company had the "infrastructure in place to support continued expansion in the growing GI market." ¶¶6, 70-74.

Elsewhere, the Offering Materials touted the FUSE system's purported "relative … ease of use" and stressed how FUSE's "state of the art" cameras provided "crisp, clear imaging," and how its FUSEBox video processor (which is connected to the endoscope's cameras) similarly embodied a "cutting edge graphics processing and computing platform." ¶¶63-64. While noting that *future* "product quality issues or product defects" *might* harm the Company's business, the Offering Materials also characterized such problems as having occurred only in the past, without any mention that its current FUSE products were suffering from any existing design or product quality issues as of the IPO. ¶65.[3] Instead, the Offering Materials assured investors that EndoChoice's "disruptive" FUSE technology "gives us a competitive advantage." ¶68.

However, as alleged in the Complaint, Defendants' statements in the Offering Materials about FUSE's alleged quality and "disruptive" technology were materially false and misleading when made because, *inter alia,* they failed to disclose that, at the time of the IPO, the FUSE system suffered from significant product defects, reliability issues, and basic design flaws. As discussed further below, these undisclosed problems included ***poor quality imaging***; ***defective***

[3] For example, the Offering Materials disclosed only that: "***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." ¶65.

imaging processors that frequently froze in the middle of an endoscopy procedure; a ***defective scope design*** that made it harder for GI physicians (especially women doctors) to maneuver the scope; low-quality component "angulation cables" (that controlled the maneuverability of the scope inside the GI tract) that were ***constantly breaking***; and poorly designed "snares" (used to remove polyps) that regularly got stuck in the GI tract. ¶¶80-90; 115-116, 119-20, 123, 125, 128-129. For the same reasons, the Offering Materials failed to accurately disclose the Company's actual (and limited) ability to accelerate the growth of FUSE sales, and they misrepresented that its R&D and manufacturing operations (together with its sales force) were two of three key elements that somehow constituted a "world-class organization capable of driving sustainable global growth that can be leveraged to drive increased profitability." ¶¶67-69.

Moreover, the Offering Materials' statements that EndoChoice's sales force was "***poised*** to contribute to future sales growth", was of "***world class***" caliber, and was "***highly adaptable***" were also materially untrue, incomplete, and misleading because, as of the IPO (but unbeknownst to investors): (a) EndoChoice's sales force was poorly organized, lacked the skill and experience necessary to legitimize the Company's claims of significant potential for imminent and rapid FUSE sales growth, and was not close to being a "world-class organization"; and (b) EndoChoice had failed (and was continuing to fail) to successfully "adapt" large numbers of its more tenured sales personnel (who had experience selling EndoChoice's non-FUSE products and services) for the very different task of selling expensive capital medical equipment such as the FUSE system. In addition, although having an adequate inventory of "demo" FUSE units was critical to EndoChoice's (and its sales force's) ability to accelerate FUSE sales, the Offering Materials did not disclose that EndoChoice would not even have demo units of the new "Gen2" FUSE system in the field until mid-summer of 2015, making it totally unrealistic (given

FUSE's long sales cycle) for the Company's sales force to materially increase (let alone at an "accelerating" rate) the growth of FUSE sales before late 2015 or the first half of 2016 at the earliest. Nor did the Offering Materials adequately disclose the extent of the turnover and attrition rate in EndoChoice's "proven" sales force. ¶¶74, 78, 91-101, 105-07, 115-19, 122, 127.

C. The Truth Begins to Emerge

Unfortunately for all who purchased EndoChoice shares pursuant or traceable to the IPO, the truth concerning the nature and extent of the Company's problems – and the extent to which the $15.00 per share Offering Price was inflated – did not begin to emerge until after the IPO.

For example, on November 5, 2015, EndoChoice issued its earnings announcement for the 3rd quarter of 2015, which disclosed that FUSE sales had ***declined*** to only 21 units (compared to 26 and 27 units, respectively, in the 1st and 2nd quarters of 2015), and that it was reducing its guidance for total 2015 revenue to $72 million-$74 million (down from its prior guidance of $73 million-$76 million). ¶¶103-04. On a conference call later that morning, Defendant Gilreath then admitted that, contrary to the Offering Material's rosy statements in June (five months earlier) about EndoChoice's "world-class" organization, the Company's sales force and FUSE product offerings were (at best) only just then (in November 2015) "coming together," and that the state of its sales force was such that he did not actually expect the Company's ongoing efforts to upgrade the quality of its sales force to have a "material impact" on FUSE sales ***for another six months*** (*i.e.*, May 2016), if not until the "back half of next year [2016]." ¶¶105-07. In response, EndoChoice shares fell over 22% to $8.01 per share, with J.P. Morgan commenting "a shortfall [in FUSE sales] so soon after the company's June IPO is certainly concerning." ¶110.

On January 8, 2016, EndoChoice announced preliminary results for the 4th quarter and full year 2015, which analysts again promptly termed "disappointing." As JP Morgan reported, "the [FUSE] Imaging business was [again] the source of the shortfall in 4Q, as sales of $5.2M

fell $1.5M shy of our thinking." ¶112. The report further noted that, if one excluded sales of "demo" FUSE units sold to distributors, FUSE sales to *actual end-user customers* in the 4th quarter (19 units) were barely up from either the prior quarter (18 units) or the 4th quarter of the prior year (17 units) – and that EndoChoice was now looking to make changes to FUSE in the wake of unspecified, but presumably adverse, "physician feedback." ¶¶112-13. In response, EndoChoice shares fell a further 14%, from $8.17 to $7.03 per share. ¶114.

On March 3, 2016, Defendants Gilreath and Gill held a call to discuss EndoChoice's 4th quarter and full year 2015 results. On that call, Gilreath tried to assure investors that FUSE's dismal performance would soon turn around, but in doing so admitted as follows:

> Our generation two system was launched in April 2015, bringing major improvements to imaging quality, and the gen two system also provided improvements in scope reliability, significantly reducing repair frequencies . . . .
>
> [The Fuse enhancements we've made] have been really important. [And] although we launched [gen two] in 2015***, remember that it didn't make it into the sales force demo pool until around July.*** Over the second half of the year a better sales rep was demonstrating a better product, more reliable product. And so, that has yielded a better pipeline going into 2016 for the first time. So, we're optimistic on the pipeline.

¶115. These statements effectively conceded that EndoChoice's first generation FUSE system suffered from significant quality and reliability problems, ***and that its sales force had no access to the newer "Gen2" demo units at the time of the IPO*** (and would not even begin to have access to them until mid-summer), thus making it unreasonable to expect any material reversal in the stagnating growth in FUSE sales until sometime in mid-to-late 2016 *at the earliest*. ¶116. With respect to EndoChoice's sales force and product quality, Gilreath also disclosed that:

> ***As of the date of today's call [March 3, 2016], 75% of our territory managers have more than six months of field experience, up from 45% a year ago [March 2015], and 54% of our territory managers have more than one year of experience, up from 35% a year ago***, and 27% of our reps have more than two years of field experience. ***As a reminder, a sales rep takes six months to a year***

> ***to become effective doing Fuse demos and then about six more months transpire before these deals start to close***. So, reps gaining more than one year of tenure in their territory is an important milestone and our financial models are driven by these same assumptions . . . .
>
> ***[W]e've [also] got a significantly enhanced product coming on midstream in the year***. So, we're certainly expecting an updraft in the second half of the year.

¶118. Such statements effectively admitted that, as of the spring 2015 IPO, EndoChoice's sales force was far from "proven" or "world class," and would not in fact be "poised" to materially increase FUSE sales for *at least* another year. Similarly, Gill's reference to "significantly enhanced product coming on midstream in [2016]" confirmed that EndoChoice's then-existing FUSE products as of the IPO suffered from material quality and design issues. ¶119.

On May 4, 2016, EndoChoice again reported dismal FUSE sales results for the 1st quarter of 2016. Moreover, in a further admission that its "Gen2" FUSE system had not cured the quality and design problems that had plagued its "Gen1" system, Defendant Gilreath discussed how EndoChoice was already looking past Gen2 to get a "Gen3" FUSE to market:

> Our latest Fuse system innovations, which we refer to as Generation 3, include improvements to scope ergonomics, drivability and enhanced imaging capability of Lumos . . . . [O]ur new handle, with a much sleeker profile, better fits the hands of most physicians, particularly women. In addition, our [inaudible] DriveWire helps steer the scope with more precision, accuracy and ease. And we have launched the Lumos adaptive Matrix Imaging . . . which provides enhanced imaging capability to support the differentiation of tissue in the esophagus, stomach and colon. We believe that these ongoing enhancements to the Fuse system combined with improved tenure and greater productivity form our territory managers will further accelerate momentum in Fuse placements in the second half of 2016.

¶120. In addition, Gilreath again discussed EndoChoice's seemingly unending efforts to try to "upgrade" its sales force to the levels needed to materially grow its FUSE sales:

> We have several important drivers of upside to our business as we move [forward] . . . . We [are] encourage[d] by the fact that approximately half of our territory managers now have more than a year of experience and the entire team is focused on increasing demo activity, building the pipeline, and closing deals . . . .

> These professionals are the highest quality . . . that we've had in the field since our inception and they are ***poised*** for improved productivity and market share gains.

¶122. Left unsaid in these remarks was the stark contrast between (a) Gilreath's representation that the sales force was finally "poised for improved productivity and market share gains" as of May 2016, versus (b) the Offering Material's false statements a year earlier that, as of the June 2015 IPO, the Company's "proven sales force" was somehow "poised to contribute to future sales growth." In response to the disclosures and related analyst commentary, EndoChoice shares fell another 11%, from $5.46 on May 3, 2016 to only $4.83 per share on May 5, 2016.

On July 13, 2016, as the price of EndoChoice stock continued to languish at around $5.00 per share, J.P. Morgan specifically noted how the FUSE system, which had been so highly touted in the Offering Materials had, in fact, been *far* from "ready for prime time" at the time of IPO:

> Generating sustained Fuse adoption . . . is the key to improving investor sentiment. ***The first generation Fuse [was] originally launched in early 2014 with sub-par image quality, followed by the second generation Fuse that had a poorly designed scope handle***. Now with the third-generation Fuse system that [was] launched . . . in May [2016], EndoChoice ***finally*** has a system ready for prime time. [¶125.]

On August 3, 2016, EndoChoice announced its 2nd quarter 2016 results, and reported that FUSE sales (25 units) were even *less* than they had been in the 2nd quarter of the prior year (27 units). It also announced that, due to FUSE's dismal performance, it was sharply reducing its revenue guidance for the entire 2016 year from $86 million-$93 million to only $80 million-$82 million. Once again, management blamed the decision to rush another "new and improved" generation of the FUSE system to market – and the resulting delay in getting demo units of the "Gen3" FUSE into the field (so that its sales force could demonstrate the product for customers) – as a major factor for the latest bad results. Nonetheless, management apparently preferred to

risk another hurried and botched FUSE launch (of "gen3") rather than continue any longer with its defective "gen2" system. Defendant Gill also disclosed that EndoChoice had ***written-off $12.6 million*** in assets acquired in connection with its 2013 acquisitions of FUSE developer Peer Medical and endoscope maker RMS Endoskopie. As for product quality issues, in response to an analyst question, Defendant Gilreath again effectively conceded that *both* the prior Gen1 and Gen2 FUSE systems had suffered from significant design and reliability problems:

> [The improvement to] Gen3 was more than a new handle. Those ergonomics were applied in ***several*** pieces of the endoscope, and included a number of functional improvements, ***and really significant improvements to the reliability of the scope***. So I think with [improved] Lumos [imaging] it really sets us up further, and we'll experience that as we go further this quarter.

In response, EndoChoice shares fell another 21%, to close at $4.13 per share. ¶¶126-31.

On September 27, 2016, EndoChoice announced that it had agreed to be acquired by Boston Scientific for just $8.00 per share – or barely half the $15.00 per share price at which EndoChoice shares had been offered only 16 months earlier in the June 2015 IPO. ¶133.

ARGUMENT

I. This Court Has Jurisdiction Over Plaintiffs' Claims

The 1933 Act's jurisdictional clause, as amended by the "Conforming Jurisdictional Amendments" of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), provides:

> The district courts of the United States . . . shall have jurisdiction . . . concurrent with State and Territorial courts, ***except as provided in section 77p of this title with respect to covered class actions***, of all suits in equity and actions at law brought to enforce any liability or duly created by this subchapter.

15 U.S.C. §77v(a) (SLUSA-added text in italics).[4] When one turns to the portion of §77p that actually imposes "class action limitations" under SLUSA – namely 15 U.S.C. §77p***(b)*** – it is plain that the only class actions that may no longer be heard in state court are those that assert

[4] The italicized text was added as part of a section, entitled "CONFORMING AMENDMENTS" of the uncodified statute. *See* SLUSA, P.L. 105-353 (105th Cong.), 112 Stat 3227 (1998), at Sec. 101(a)(3).

state law claims. As §77p(b) (the so-called "Preclusion Amendment") provides:

> (b) CLASS ACTION LIMITATIONS − No covered class action ***based upon the statutory or common law of any State*** or subdivision thereof may be maintained in any State or Federal court by any private party alleging - -
>
> (1) an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security; or
>
> (2) that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.

15 U.S.C. §77p(b). Thus, for SLUSA preclusion to apply under §77p – and for a state court to lack jurisdiction – the action must be based (in whole or part) on precluded ***state law*** claims. *See, e.g.*, *Luther v. Countrywide Fin. Corp.*, 195 Cal. App. 4th 789, 795-99 (Cal. Ct. App. 2011). Conversely, where (as here) no impermissible state law claims are brought – and the action includes only federal 1933 Act claims, state courts continue to have concurrent jurisdiction.[5]

Defendants assert that the words added to §77v(a) by the Conforming Jurisdictional Amendment – which reaffirmed concurrent jurisdiction "except as provided in section 77p of this title with respect to covered class actions" − somehow excludes ***all*** covered class actions from state court jurisdiction. In short, they assert that §77v(a)'s reference to §77p refers only to the definition of "covered class action" at §77p(f)(2)(A). However, as the appellate court in *Countrywide* stated, "[we] cannot endorse such a limited reading of . . . §77v" because:

> Section 77v does ***not*** say that there is an exception to concurrent jurisdiction for

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[5] SLUSA also amended the 1933 Act to give defendants the ability to remove to federal court any class action falling within the scope of the Preclusion Amendment, thereby giving defendants the option of having a federal court (rather than a state court) decide whether the case should be dismissed as precluded. *See, e.g.*, *Madden v. Cowen & Co.,* 576 F.3d 957, 964-65 (9th Cir. 2009); *Buelow v. Alibaba Grp. Hld'g Ltd.*, No. 15-cv-05179-BLF, 2016 WL 234159, at *3 (N.D. Cal. Jan. 20, 2016). The "Removal Amendment," codified at 15 U.S.C. §77p(c), provides:

> (c) REMOVAL OF COVERED CLASS ACTIONS − Any covered class action brought in any State court involving a covered security, as set forth in subsection (b) [the Preclusion Amendment], shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b).

> all covered class actions. Nor does it create its exception by referring to the definition of covered class action in section 77p(f)(2). ***Instead, it refers to section 77p without limitation, and creates an exception to concurrent jurisdiction only as provided in section 77p "with respect to covered class actions."***

195 Cal. App. 4th at 795. *Countrywide* also explained why it rejected the contrary result in *Knox v. Agria Corp*., 613 F. Supp. 2d 419 (S.D.N.Y. 2009) and its limited progeny, which Defendants primarily rely on here, because *Knox* "ignored the verb ['as provided'] in the statute, and reached its conclusion by looking only at the noun ['covered class action']":

> Whatever merit *Knox* may have with respect to removal issues, we cannot agree with its reading of . . . section 77v in other respects . . . . Section 77v does not say "except as provided in section 77p(f)(2)," the definition of covered class action. Instead, it refers to ***all*** of . . . section 77p, not just the definitional provision.

Countrywide, 195 Cal. App. 4th at 798; *see also*, *e.g*., *Cervantes v. Dickerson*, No. 15-cv-3825-PJH, 2015 WL 6163573, at *6 (N.D. Cal. Oct. 21, 2015) (rejecting *Knox* "because §77v(a) refers to ***all*** of §77p, and not just to §77p(f)'s definition of 'covered class actions'"); *Niitsoo v. Alpha Nat. Res., Inc.*, 902 F. Supp. 2d 797, 806 n.6 (S.D. W.Va. 2012); *Harper v. Smart Tech. Inc.*, No. C-11-5232 SBA, 2012 WL 12505217, at *5 n.4 (N.D. Cal. Sept. 28, 2012) (same).

On reply, Defendants may try to attack the prevailing "plain meaning" interpretation of §77v(a) by claiming that it somehow renders SLUSA's Conforming Jurisdictional Amendment surplusage. But as many courts have held, any such argument is wrong, because it:

> . . . is based on the mistaken premise that a case cannot both arise under the [1933] Act and be based on state law. As the two leading commentators on federal jurisdiction recognize, a case that includes federal law claims is deemed to arise under federal law for purposes of the general removal statute, 28 U.S.C. §1441, even though it also contains related claims that are based on state law [citing 14C Wright & Miller, Fed. Prac. & Proc. (3d ed. 1998) at §3724, 16 Moore's Fed. Prac. (3d ed. 2003) at §§106.81, 107.14[6], 107.31[9]]. ***The same is true with respect to §77v***. A case that contains one or more [1933] Act claims is deemed to arise under the Act for purposes of §77v even if it also includes state law claims that make the case removable under §77p(c). ***SLUSA's [conforming] amendment to §77v, thus was needed to eliminate any doubt about the removability of cases that include both state law claims and otherwise***

> ***nonremovable claims based on the [1933] Act***. Accordingly, I reject defendants' argument that plaintiffs' interpretation of §77p(c) makes SLUSA's amendment of §77v superfluous.

In re Tyco Int'l, Ltd., 322 F. Supp. 2d 116, 120 (D.N.H. 2004); *accord*, *Fortunato v. Akebia Therapeutics, Inc.*, 183 F. Supp. 3d 326, 330-32 (D. Mass. Apr. 29, 2016); *Desmarais v. Johnson*, No. C 13-03666 WHA, 2013 WL 5735154, at *3-*4 (N.D. Cal. Oct. 22, 2013); *Pipefitters Loc. 522 Pens. Trust Fund v. Salem Commc'ns Corp.*, No. CV 05-2730-RGK, 2005 WL 6963459, at *1-3 (C.D. Cal. June 28, 2005).

Many courts have also found that the "plain meaning" approach is further supported by highly persuasive *dicta* from *Kircher v. Putnam Funds Tr.*, 547 U.S. 633, 642 (2006). In *Kircher*, the Supreme Court considered whether an order to remand a case removed under SLUSA was appealable despite 28 U.S.C. §1447(d)'s general bar on review of such orders. *Id.* at 640. In ruling that such orders are not appealable, the Court analyzed the interplay between SLUSA's jurisdictional, removal and preclusion provisions, and found that the "authorization for the removal in [§77p(c)], on which [federal] jurisdiction depends, [i]s confined to cases 'set forth in subsection (b)'" − *i.e*., is confined to cases asserting precluded state law claims. 547 U.S. at 642. Accordingly, as the Supreme Court stated, "removal ***and jurisdiction to deal with removed cases*** is limited to those precluded by the terms of subsection (b)," and ***"[i]f the action is not precluded [under §77p(b)],*** the federal court likewise has no jurisdiction to touch the case on the merits, and ***the proper course is to remand to the state court that can deal with it***." *Id.* at 643-44. Unsurprisingly, many cases hold that *Kircher* confirms that SLUSA stripped state courts of jurisdiction over 1933 Act class actions ***only*** if they also include precluded state law claims.[6]

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[6] *See also*, *e.g.*, *Elec. Workers Loc. #357 Pens. v. Clovis Oncology, Inc.*, 185 F. Supp. 3d 1172, 1180-81 (N.D. Cal. May 5, 2016) (citing *Kircher* and collecting cases); *Liu v. Xoom Corp*., No. 15-CV-00602-LHK, 2015 WL 3920074, at *4 (N.D. Cal. June 25, 2015); *Plymouth Cty. Ret. Sys. v. Model N, Inc.*, No. 14-cv-04516-WHO, 2015 WL 65110, at *3 (N.D. Cal. Jan. 5, 2015); *Cervantes*, 2015 WL

Any remaining doubt is resolved by two well-settled principles of statutory construction. First, there is a "deeply rooted presumption in favor of concurrent state court jurisdiction" that is rebuttable only if "Congress affirmatively ousts the state courts of jurisdiction over a particular federal claim." *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 378 (2012). Thus, jurisdictional statutes should be "read . . . so long as consistent with their language, to respect the traditional role of state courts in our federal system," *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, 136 S. Ct. 1562, 1567-68 (2016), and the presumption of concurrent state court jurisdiction can only be overcome "by an ***explicit*** statutory directive, by ***unmistakable*** implication from legislative history, or by a ***clear*** incompatibility between state-court jurisdiction and federal interests." *Tafflin v. Levitt*, 493 U.S. 455, 459-60 (1990). The Securities Exchange Act of 1934, for example, *expressly* bars concurrent jurisdiction over Exchange Act claims. *See* 15 U.S.C. §78aa. But nothing close to such an "explicit" statutory directive, "unmistakable implication" or "clear incompatibility" exists here.[7]

6163573, at *5; *Layne v. Countrywide Fin. Corp.*, No. BC 389208, 2010 WL 1637425 (Cal. Super. Ct. Feb. 5, 2010) (citing *Kircher*); *W. Va. Laborers Tr. Fund v. STEC Inc.*, No. SACV 11-01171-JVS, 2011 WL 6156945, at *3 & *5 n.5 (C.D. Cal. Oct 7, 2011) (citing *Kircher* and finding concurrent jurisdiction under §77v for class actions asserting only 1933 Act claims); *Niitsoo*, 902 F. Supp. 2d at 805 ("it is plain to me that concurrent jurisdiction over *federal* securities actions 'under this subchapter' still exists," except as specified in §77p(b), and citing *Kircher*) (emphasis in original); *W. Palm Beach Pol. Pension Fund v. Cardionet, Inc.*, No. 10cv711-L(NLS), 2011 WL 1099815, at *2 (S.D. Cal. Mar. 24, 2011) ("Because Plaintiff's action was brought in State court and asserted claims only under the [1933 Act] rather than under State law, it is neither precluded nor removable") (citing *Kircher*).

[7] The 1933 Act's original (pre-SLUSA) grant of unrestricted state court jurisdiction shows the absence of any inherent "incompatibility" in maintaining such jurisdiction over purely 1933 Act claims. Similarly, SLUSA's legislative history actually supports Plaintiffs' position or (at best for Defendants) is too "murky" from which to derive any "unmistakable implications." *See*, *e.g.*, *Elec. Workers Local #357*, 185 F. Supp. 3d at 1183-84 ("the legislative history supports the Court's conclusion" that the action "was filed in a state court of competent jurisdiction and is therefore not removable") (citing H.R. Rep. No. 105-803, at 1 (1998); H.R. Rep. No. 105-640, at 1, 11 (1998); S. Rep. No. 105-182, at 1, 2, 11, 14, 19 (1998); *Countrywide*, 195 Cal. App. 4th at 798-99 ("'Nothing in SLUSA's text or the legislative history suggests that Congress intended to place roadblocks in the way of federal claims or ***non-precluded*** state law claims; its only discernible intent was to preclude the use of the class-action device to prosecute certain state-law class action claims'") (italics in original) (quoting *Proctor v. Vishay Intertech Inc.*, 584 F.3d 1208, 1228 (9th Cir. 2009); *see also Cervantes*, 2015 WL 6163573, at *6 (same); *Parker v. Nat'l City*

Second, where Congress (as here) designates the disputed statutory words a "conforming amendment," it is evidence of "legislative intent that the amendment should be read as a ***nonsubstantive*** reaction to related legislation." *Springdale Mem'l Hosp. Ass'n, Inc. v. Bowen*, 818 F.2d 1377, 1386 n.9 (8th Cir. 1987) (citing *CBS, Inc. v. FCC*, 453 U.S. 367, 381-82 (1981); *accord Dir. of Revenue of Missouri v. CoBank ACB*, 531 U.S. 316, 324 (2001) (rejecting interpretation of statute that "would mean that Congress made a radical – but entirely implicit – change in the [law] . . . with [an amendment that] was merely one of numerous 'technical and conforming amendments'"). As shown above, SLUSA's Conforming Jurisdictional Amendment ***did*** have a limited, clarifying purpose of eliminating potential conflict with SLUSA's Preclusion and Removal Amendments. But reading that "conforming" amendment to eliminate traditional state court jurisdiction over class actions asserting 1933 Act claims would be exactly the kind of major change in settled law that one would ***not*** expect to find in a "conforming" amendment.

Although there is some contrary (and mostly older) authority, the growing weight of authority holds that state courts continue to have concurrent jurisdiction over class actions alleging solely 1933 Act claims. Indeed, since *Countrywide* was decided in 2011, the number of decisions upholding concurrent state court jurisdiction and/or remanding 1933 Act class actions to state court has *vastly* outnumbered the few cases that have gone the other way.[8]

Corp., No. 1:08 NC 70012, 2009 WL 9152972, at *6-8 (N.D. Ohio Feb. 12, 2009) (same); *see also Rajasekaran v. CytRx Corp.*, No. CV 14-3406-GHK; 2014 WL 4330787, at *7 (C.D. Cal. Aug. 21, 2014) (SLUSA's "murky" legislative history did not justify altering court's plain meaning analysis, as "[b]oth parties can point to statements in the legislative history that support their contentions").

[8] *See, e.g.*, *Rivera v. Fitbit, Inc.*, No. 16-cv-02890-SI, 2016 WL 4013504 (N.D. Cal. July 27, 2016); *Pytel v. Sunrun Inc.*, No. C-16-2566-CRB, 2016 U.S. Dist. LEXIS 90417 (N.D. Cal. July 12, 2016); *Elec. Workers Local #357*, 185 F. Supp. 3d 1172, *supra*; *Fortunato*, 2016 WL 1734073, *supra*; *Badri v. TerraForm Global, Inc.*, No. 15-cv-06323, 2016 WL 827372 (N.D. Cal. Mar. 3, 2016); *Iron Workers Mid-South Pension Fund v. TerraForm Global, Inc.*, No. 15-cv-6328-BLF, 2016 WL 827374 (N.D. Cal. Mar. 3, 2016); *Patel v. TerraForm Global, Inc.*, No. 16-cv-00073-BLF, 2016 WL 827375 (N.D. Cal. Mar. 3, 2016); *Carlson v. Ovascience, Inc.*, No. 15-14032-WGY, 2016 WL 2650707 (D. Mass. Feb. 23, 2016); *Buelow*, 2016 WL 234159, *supra*; *Kerley v. MobileIron, Inc.,* No. 15-cv-04416-VC, slip op. (N.D. Cal.

Finally, Defendants cite no contrary authority from within this state – whereas federal courts within the Eleventh Circuit (including Georgia) appear to have uniformly held that class actions that assert only 1933 Act claims ***cannot*** be removed to federal court, and have thus agreed that state courts have subject matter jurisdiction over such actions. *See, e.g.*, *Unschuld v. Tri-S Sec. Corp.*, No. 1:06-CV-02931-JEC, 2007 WL 2729011, at *11 (N.D. Ga. Sept. 14, 2007); (rejecting federal removal jurisdiction and remanding 1933 Act class action to state court); *Williams v. AFC Enterprises, Inc.*, No. 103-CV-2490-TWT, 2003 WL 24100302 (N.D. Ga. Nov. 20, 2003) (same); *Martin v. BellSouth Corp.*, No. 1:03-CV-728, 2003 WL 26476752, at *2 (N.D. Ga. July 3, 2003) (remanding case to state court under "plain meaning" of the statute); *City of Birmingham Ret. and Relief Sys. v. MetLife, Inc.*, No. 2:12-CV-2626, 2015 WL 4385277, at *4 (N.D. Ala. Mar. 31, 2015) ("the state court has concurrent jurisdiction over any class action based [solely] on the [1933] Act"); *Steamfitters Local 449 Pension & Ret. Sec. Funds v. Quality Distr., Inc.*, No. 8:04-cv-961-T-26, 2004 WL 6246913, at *2 (M.D. Fla. June 25, 2004) (even if it were somehow an "anomaly" that class actions filed in state court alleging federal claims cannot be removed, any "anomaly" is due to Congress's "clear" choice of language, and

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Nov. 30, 2015); *Cervantes,* 2015 WL 6163573, *supra*; *City of Warren Pol. and Fire Ret. Sys. v. Revance Therapeutics, Inc*., 125 F. Supp. 3d 917 (N.D. Cal. 2015); *Liu*, 2015 WL 3920074, *supra*; *Pac. Inv. Mgmt. Co. LLC v. Am. Int'l Grp., Inc*., No. SA-CV-15-0687-DOC, 2015 WL 3631833 (C.D. Cal. June 10, 2015); *Rosenberg v. Cliffs Nat. Res., Inc.*, No. 1:14-CV-1531, 2015 WL 1534033 (N.D. Ohio Mar. 25, 2015); *Plymouth Cty. Ret. Sys.*, 2015 WL 65110, *supra*; *Rajasekaran*, 2014 WL 4330787, *supra*; *Desmarais*, 2013 WL 5735154, *supra*; *Toth v. Envivo, Inc.*, No. C-12-5636 CW, 2013 WL 5596965 (N.D. Cal. Oct. 11, 2013); *City of Birmingham Ret. & Relief Sys. v. MetLife, Inc*., No. 2:12-cv-02626-HGD, 2013 WL 5526621 (N.D. Ala. Aug. 23, 2013), *magistrate's report aff'd by* 2015 WL 4385277 (N.D. Ala. Mar. 31, 2015); *Reyes v. Zynga Inc*., No. C-12-05065 JSW, 2013 WL 5529754 (N.D. Cal. Jan. 23, 2013); *Nitsoo*, 902 F. Supp. 2d at 807, *supra*; *Harper*, 2012 WL 12505217, *supra*; *Young v. Pac. Biosciences of Cal., Inc*., No. 5:11-cv-05668 EJD, 2012 WL 851509 (N.D. Cal. Mar. 13, 2012); *see also West Va. Laborers Trust Fund*, 2011 WL 6156945, *supra*; *W. Palm Beach Police Pension Fund*, 2011 WL 1099815, *supra*, at *2; *Layne*, 2010 WL 1637425, *supra*; *Pipefitters Loc. 522*, 2005 WL 6963459, *supra*; *Tyco Int'l*, 322 F. Supp. 2d at 120-21; *In re Waste Mgmt., Inc. Sec. Litig.*, 194 F. Supp. 2d 590, 596 (S.D. Tex. 2002).

judiciary's job is to apply statute, not rewrite it).[9]

II. THE COMPLAINT ADEQUATELY ALLEGES CLAIMS FOR RELIEF UNDER THE APPLICABLE PLEADING STANDARDS

A. Georgia's Procedural Standards, Rather than Federal Standards, Apply Here

On a motion to dismiss, "trial courts must accept as true all well-pled material allegations in the complaint and must resolve any doubts in favor of the plaintiff." *Ramsey v. New Times Moving, Inc.*, 332 Ga. App. 555, 557, 774 S.E. 2d 134, 136 (Ga. Ct. App. 2015), and under O.C.G.A. §9-11-12(b)(6) a complaint need only set forth a "short and plain statement of the claims showing that the pleader is entitled to relief" to avoid dismissal. *Charles H. Wesley Educ. Found., Inc. v. State Election Bd*., 282 Ga. 707, 713, 654 S.E.2d 127 (2007); *accord* O.C.G.A. §9-11-8. Moreover, dismissal should not be granted unless: "(1) the [complaint's] allegations . . . disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Mbigi v. Wells Fargo Home Mortg.*, 336 Ga. App. 316, 316, 785 S.E. 2d 8, 12 (Ga. Ct. App. 2016); *Austin v. Clark*, 294 Ga. 773, 775, 755 S.E. 2d 796 (Ga. 2014) (same). It is thus only the "rare case" where a motion to dismiss, as opposed to one for summary judgment, will be an appropriate device for summary adjudication. *Consol. Gov't of Muscogee Cty. v. Williams*, 184 G. App. 815, 817, 363 S.E. 2d 20, 23 (Ga. Ct. App. 1987).

Defendants apparently recognize that Plaintiffs' allegations easily pass muster under Georgia's pleading standards (*see* EC Br. at 12-13) – and also apparently concede that Georgia has *not* adopted the federal pleading standard articulated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), which replaced the traditional

[9] Defendants also cite the purported intent of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). But the PSLRA did not amend *any* of the 1933 Act's jurisdictional or preclusion provisions.

"no set of facts" pleading standard in favor of a somewhat higher "plausibility" standard. *See* EC Br. at 12; *cf. Weathers v. Dieniahmar Music, LLC*, 337 Ga. App. 816, 823, 788 S.E. 2d 852, 859 (Ga. Ct. App. 2016) (Georgia has ***not*** adopted the *Twombly/Iqbal* "plausibility" standard); *Hughes v. Cornerstone Inspection Grp., Inc.*, 336 Ga. App. 283, 285-86, 784 S.E. 2d 116, 118 (Ga. Ct. App. 2016) (same).

Instead, Defendants make the novel argument that the higher *Twombly/Iqbal* federal pleading standard applies to Plaintiffs' claims here because this case is brought under a federal statute. The U.S. Supreme Court, however, has repeatedly recognized that state court rules of *procedure* continue to apply regardless of whether the *substantive* law at issue is federal. *See, e.g.*, *Howlett*, 496 U.S. at 372 ("The general rule, 'bottomed deeply in belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them.'"); *F.E.R.C. v. Mississippi*, 456 U.S. 742, 773 (1982) (same); *Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (a state's control over its own court procedure is "no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law"); *see also*, David Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OREGON L. REV. 541, 570-88 (2004).

The courts of Georgia – and of states nationwide − similarly recognize the rule that the forum state's procedural rules apply to federal claims when they are brought in state court. *See Simmons Co. v. Deutsche Fin. Servs. Corp.*, 243 Ga. App. 85, 87, 532 S.E. 2d 436, 438 (Ga. Ct. App. 2000) ("[e]ven where a claim is governed by substantive federal law, a state may apply its own procedural rules in its own courts" and finding that where federal rules did not preempt Georgia procedural rules, that Georgia's rules applied); *Shotwell v. Donahoe*, 85 P.3d 1045, 1048 (Ariz. 2004) ("[g]enerally speaking, while federal laws control the substantive aspects of federal

claims adjudicated in state courts, state rules of procedure and evidence apply" unless the state rules would impair a litigant's substantive federal rights); *Edelen v. Bd. of Com'rs of Bryan Cty.*, 266 P.3d 660, 663 (Okla. Ct. App. 2011) (state pleading standard applies to federal constitutional claims and rejecting argument that federal standard should apply); *Chavez v. Keat*, 34 Cal. App. 4th 1406 (1995) (where action under federal statue is brought in state court "the law of the state controls in matters of . . . procedure unless the federal statute provides otherwise.").[10]

None of the cases Defendants cite remotely contradicts the general rule set forth in *Howlett* and countless other cases. For example, Defendants assert that *Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949) requires the application of a higher federal pleading standard here. EC Br. at 13. In *Brown*, however, the circumstances were *opposite* to those presented here, as the state law pleading standard was more rigorous than the federal standard. *Brown*, 338 U.S. at 296. In *those* circumstances, the Supreme Court held that the plaintiff's "federal right cannot be defeated by the forms of local practice" (*e.g.*, where state court procedure was used to stifle a federal substantive right), and in so holding expressly ***reiterated*** the general rule – namely, that state courts ***"are free to follow their own rules of 'practice' and 'procedure'***" in cases brought under federal law, provided only that doing so does not "detract from 'substantive rights' granted by Congress." *Id.*; *see also*, *e.g.*, *Norfolk S. Ry.*, 875 N.E. 2d at 925-26 (distinguishing *Brown* on this ground). Here, Defendants do not − and cannot – show that the exercise of the Plaintiffs' (or

[10] *See also, e.g.*, *Norfolk S. Ry. Co. v. Bogle*, 875 N.E. 2d 919, 924 (Ohio 2007) ("[d]espite the federal claim at issue," the Seventh Amendment did not apply to civil action brought in state court, as "Congress 'clearly contemplate[d] the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the [federal] statute in accordance with the modes of procedure prevailing in such courts'") (citing *Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211, 218 (1916)); *Hughes v. Massey*, 65 S.W. 3d 743, 745 (Tex. Ct. App. 2001) ("[a]bsent federal preemption, a State may apply its own neutral procedural rules to federal claims"); *Italia Foods, Inc. v. Sun Tours, Inc.*, 986 N.E. 2d 55, 62 (Ill. 2011) (same); *Maisonet v. New Jersey Dep't of Human Servs., Div. of Family Development*, 657 A.2d 1209, 1213 (N.J. 1995) (same).

any Defendant's) federal *rights* would be defeated by applying the general rule, under which "federal law takes the state courts as it finds them." *Howlett,* 496 U.S. at 372.

The other cases Defendants cite (EC Br. at 13) are also plainly inapposite. For example, in *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980) and *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330 (1988), the Supreme Court held that the proper measure of damages under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51, *et seq.*, was inseparably connected with the right of the action, "and therefore is ***an issue of substance*** that must be settled according to federal law rather than state law." *Monessen*, 486 U.S. at 330; *see also Norfolk & W. Ry.*, 444 U.S. at 493 ("[i]t has long been settled that questions concerning the measure of damages in a FELA action are federal in character"). *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (1952), is also easily distinguished, as *Dice* involved whether the validity of releases under FELA was an issue of federal or state law. *Id.* at 361. The Supreme Court held that §1 of FELA "granted petitioner a ***right*** to recover against his employer for damages negligently inflicted," and thus "State laws are not controlling in determining what the incidents of this federal ***right*** shall be." *Id.* In other words, the Supreme Court in *Dice* found that the issue was one of substance, not procedure. Here, by contrast, the pleading standard "issue" is a matter of ***procedure***.

Defendants also cite *Felder v. Casey*, 487 U.S. 131 (1988) – another FELA case. EC Br. at 13. Defendants, however, fail to note that *Felder* involved the very rare case where the Supreme Court found that a state procedural rule was preempted by applicable federal law. *Felder*, 487 U.S. 131 (1988). Specifically, *Felder* held that a Wisconsin "notice of claim" statute − which provided for dismissal of claims against a city's police department where the claimant had failed to give the defendant city notice within 120 days of plaintiff's alleged injuries − was preempted by the broad remedial provisions of 42 U.S.C. §1983 which allow citizens to bring

claims based on violations of their civil rights. *Id.* at 134. But nothing in *Felder* (which related to state-law imposed ***preconditions*** for bringing suit, rather than pleading standards) remotely undermines the general rule that state courts apply state procedural rules in adjudicating claims brought under federal substantive law. *See Felder*, 487 U.S. at 138 ("No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts."); *James v. Kentucky*, 466 U.S. 341, 348 (1984). Nor, of course, does anything in *Felder* address whether any 1933 Act provisions somehow "preempt" state pleading rules. Indeed, plaintiffs have had the right to bring such claims in state court since 1933 – ***yet Defendants cite no case where any state court has held that federal, rather than state, pleading rules apply in a 1933 Act case***.[11]

Curiously, Defendants try to argue that federal pleading rules should apply based on some nebulous "intent" that they "infer" from the passage of the PSLRA in 1995 and SLUSA in 1998. But when Congress heightened the federal standard for pleading fraudulent intent for claims brought under the Exchange Act of 1934 (*see* 15 U.S.C. §78u-4(b)(1))when it enacted the PSLRA, tellingly it made ***no*** changes to any pleading standards (federal or state) for claims brought under the 1933 Act. Nor did SLUSA change any pleading standards. And finally, Defendants' argument that SLUSA "must have" been intended to change pleading standards because the Act's title refers to creating "uniform standards" is also a red herring. But if one looks at the ***actual words of the SLUSA statute,*** Congress plainly ***did*** create "national uniform

[11] By contrast, *see, e.g.*, *Robinson v. Audience, Inc.*, No. 1:2-cv-232227, 2013 WL 4736832 (Cal. Super. Sept. 3, 2013) (applying state pleading standards to 1933 Act claims brought in state court). Indeed, to Plaintiffs' counsel's knowledge, despite the numerous 1933 Act class actions where state courts have exercised jurisdiction over such claims (including the many dozens cited in footnote 8 above that federal courts have remanded to state court), Plaintiffs' counsel are unaware of *any* such cases where a state court has held that federal *pleading* rules should somehow apply.

standards" – but it chose to do so by creating uniform ***substantive law*** standards through the elimination of most ***state law*** securities claims (which now cannot be brought in any court).

B. Plaintiffs Adequately Allege Material Misstatements and Omissions

1. Plaintiffs' "Minimal Burden" Under the 1933 Act

To prove a *prima facie* §11 or §12 claim, a plaintiff need only show that he acquired a security pursuant to a registration statement that (1) contained an untrue statement of fact; (2) omitted to state a material fact required to be stated therein; or (3) omitted to state a material fact necessary to make the statements not misleading. *See, e.g.*, *In re Friedman's, Inc. Sec. Litig.*, 385 F. Supp. 2d 1345, 1356-57 (N.D. Ga. 2005); *In re BellSouth Corp. Sec. Litig.*, 355 F. Supp. 2d 1350, 1363-64 (N.D. Ga. 2005). These sections "essentially impose strict liability for material misinformation contained in or omitted from a registration statement or prospectus." *Friedman's*, 385 F. Supp. 2d at 1357; *see also Herman*, 459 U.S. at 382 ("If a plaintiff purchased a security issued pursuant to a registration statement, he need only show a material misstatement or omission to establish his *prima facie* case. Liability against the issuer of a security is virtually absolutely, even for innocent misstatements."). Thus, a plaintiff need not even plead defendants' negligence, let alone scienter. *Friedman's*, 385 F. Supp. 3d at 1357; *BellSouth*, 355 F. Supp. 2d at 1364. This is because §11 and §12 were "designed to assure compliance with the disclosure provisions of the [1933] Act by imposing a ***stringent standard of liability*** on the parties who play a direct role in a registered offering." *Huddleston*, 459 U.S. at 381-82. In sum, §11 and §12 "place[] a ***relatively minimal burden*** on a plaintiff," *id.*; *accord Belmont Holdings Corp. v. Suntrust Banks, Inc.*, No. 1:09-cv-1185-WSD, 2011 WL 13119118, at *10 (N.D. Ga. Sept. 7, 2011), and Plaintiffs easily meet this "minimal burden" here.

A fact is "material" when there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by [a] reasonable investor as having significantly altered

the 'total mix' of information made available." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1318 (2011), quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). However, even in federal cases, it is well-settled that materiality "involve[es] assessments peculiarly within the province of the trier of fact." *S.E.C. v. Talbot*, 530 F.3d 1085, 1097 (9th Cir. 2008), and are thus rarely decided at the motion to dismiss stage. *See, e.g.*, *Fecht v. Price Co.,* 70 F.3d 1078, 1081 (9th Cir. 1995); *see also TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 453 (1976) (adequacy of disclosure can be decided at *summary judgment* only if "so obviously important that reasonable minds could not differ") (applying federal pleading rules).

Nor can Defendants seriously dispute that they had a duty to disclose the truth about the many problems that plagued FUSE as of the IPO, or the truth about the problems facing the Company's FUSE sales operations. It is, for example, hornbook law that "[w]hen a corporation does make a disclosure − whether it be voluntary or required – there is a duty to make it complete and accurate." *See, e.g.*, *Roeder v. Alpha Indus., Inc.,* 814 F. 2d 22, 26 (1st Cir 1987); *In re Morgan Stanley Info Fund Sec. Litig.*, 592 F.3d 347, 366 (2d Cir. 2010). Having put the subject of FUSE's purported quality and game-changing capabilities "in play," Defendants had a duty to ensure that the Offering Materials' disclosures would not be so incomplete as to mislead. *Id*; *see also City of Roseville Empl.' Ret. Sys. v. Energy Solutions, Inc.*, 814 F. Supp. 2d 395, 410 (S.D.N.Y. 2011) ("even an entirely truthful statement may provide a basis for liability if material omissions related to [its content] make it . . . materially misleading").

Moreover, Item 303 of SEC Reg. S-K affirmatively requires disclosure in the Offering Materials of "any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on . . . revenues or income from continuing operations," 17 C.F.R. §229.303(a)(3)(ii), as well as *specific* disclosures of "whether,

and to what extent" a known trend, event, or uncertainty "might reasonably be expected to materially impact [defendant's] future revenues." *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 718-19 (2d Cir. 2011). Because Item 303 claims are brought under §11 and §12, even in federal practice, claims alleging nondisclosure of a "known" event or uncertainty are also governed by basic notice pleading rules. *Id.* (holding that Federal Rule 8 notice pleading rules apply in 1933 Act cases, including to Item 303 claims). Moreover, a defendant's "knowledge" may, in any event, be generally averred under O.C.G.A. §9-11-9(b). *See, e.g.*, *Drug Emporium, Inc. v. Peaks*, 277 Ga. App. 121, 130, 488 S.E. 2d 500, 507-08 (Ga. Ct. App. 1997).

2. Plaintiffs Adequately Allege Material Misstatements and Omissions Concerning the FUSE System

Plaintiffs plainly identify the statements in the Offering Materials that they allege affirmatively misrepresented or misled investors as to the quality and purported design advantages of the FUSE system. For example, Plaintiffs allege how the Offering Materials stated, among other things, that the FUSE represented a "disruptive technology" that delivered "compelling, differentiated clinical efficacy," ¶¶60-61, and would lead to FUSE's "widespread adoption." ¶60. Plaintiffs also allege how Defendants touted FUSE's "quality" and "relative ease of use" of the FUSE system, ¶¶62-63, and the purported "differentiation and advantages of our FUSE system." ¶63. Plaintiffs also cite the Offering Materials' further representations as to the purported quality of the images that the FUSE system provided, stating:

> Each [FUSE] endoscope consists of multiple components, including a distal tip containing multiple, sophisticated cameras and state of the art light emitting diodes, or LEDs, which provide ***crisp, clear imaging and lighting*** and project an expanded view of the GI tract.

¶64. Similarly, the Offering Materials described FUSE's video processor as embodying a "cutting edge graphics processing and computing platform." *Id.*

In addition, while noting that future "product quality issues or product defects" might harm the Company's business or results of operations, the Offering Materials characterized such problems as having occurred ***only in the past,*** without giving any indication that FUSE products were suffering from ***existing*** quality issues as of the IPO. As the Offering Materials stated:

> ***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.

¶65. The Offering Materials also represented that:

> 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 global growth that can be leveraged to drive increased profitability. ¶66.

Plaintiffs also plainly allege how the above statements were each materially false and misleading when made, because (*inter alia*) they failed to disclose that, as of the IPO, the FUSE system suffered from multiple significant product defects, reliability issues, and basic design flaws. These undisclosed problems (*see* ¶¶67, 79-90) included: ***poor quality imaging***; a ***defective scope design*** that made it hard for many GI physicians to maneuver the scope; ***low-quality "angulation cables"*** that were constantly breaking; ***poorly designed "snares"*** that regularly got stuck in the GI tract; and ***defective imaging processors*** that ***frequently froze*** in the middle of endoscopy procedures. For the same reasons, the Offering Materials failed to fully and accurately disclose the Company's actual – *i.e.* very limited – ability to accelerate the growth of FUSE sales, and misrepresented that EndoChoice's R&D and manufacturing operations were two of the three key elements that somehow made the Company a "world-class organization capable of driving sustainable global growth." ¶67.

Indeed, Defendants do not even contest that Plaintiffs adequately allege that the Offering Materials' statements that FUSE provided "crisp, clear imaging and lighting" and a "cutting edge

graphics processing and computing platform" were materially false or misleading. Instead, as Defendants Gill and Gilreath later effectively conceded, *both* of the then-existing Gen1 and Gen2 FUSE systems were suffering from product quality, design and reliability problems as of the IPO (¶¶82, 118-19), which ultimately required EndoChoice to write off $12.6 million in intangible assets related to FUSE. ¶¶82, 128. Blog postings from former employees, as well as information from confidential witnesses, also detail undisclosed but then-existing problems involving lights on the scope that would not turn off or emitted too much heat (¶¶85(b), 88); constantly rupturing angulation cables (¶¶67, 86(a), 89); FUSEPanel screens "constantly" freezing (¶86(c)); and problems with the system's FUSEBox Processor (¶87(c)). And the Court need only look at JP Morgan's July 13, 2016 report to confirm that the Offering Materials misrepresented FUSE's quality, design and purported "ease of use" (and hence FUSE's potential for significant sales growth) -- or at least failed to speak "fully and completely" on these subjects. *Roeder,* 814 F. 2d at 26. As that report stated, as of the IPO (nearly 14 months earlier), FUSE was not close to being a "ready for prime time" product:

> Generating sustained Fuse adoption, particularly in the US, is the key to improving investor sentiment. ***The first generation Fuse [was] originally launched in early 2014 with sub-par image quality, followed by the second generation Fuse that had a poorly designed scope handle.*** Now with the third-generation Fuse system that [was] launched … in May [2016], ***EndoChoice finally has a system ready for prime time. . .***

¶125. For the same reasons, the Offering Materials also failed to adequately disclose that FUSE lacked the ability to deliver "compelling, differentiated clinical efficacy" that would transform the GI market (¶60), and would ***not*** be widely adopted anytime soon.

a. The Offering Materials' Statements Touting FUSE Were Not Immaterial "Puffery"

In response, Defendants first argue that *some* of the Defendants' statements about

EndoChoice's purported ability to "driv[e] sustainable global growth" and FUSE's "disruptive technology," "quality" and "ease of use" are inactionable puffery. (EC Br. at 15-16; UW Br. at 11).[12] However, a statement is inactionable puffery only when it is "so exaggerated" or "vague" that, as a matter of law, no reasonable investor would ever rely on it or consider it to be material. *In re Scientific-Atlanta, Inc. Sec. Litig.*, 239 F. Supp. 2d 1351, 1360 (N.D. Ga. 2002); *In re Splash Tech. Hold'ings Inc., Sec. Litig.*, 160 F. Supp. 2d 1059, 1076 (N.D. Cal. 2001)(same). Dismissals on puffery grounds are thus "increasingly rare." *Brumbaugh v. Wave Sys. Corp.*, 416 F. Supp. 2d, 239, 250 n.11 (D. Mass. 2006). And because the "recent trend is to consider expressions of corporate optimism carefully, . . . claims of puffery now require courts to consider . . . whether the statement was also considered unimportant to the total mix of information by the market as a whole." *In re Boston Sci. Corp. Sec. Litig.*, No. 10-10593-DPW, 2011 WL 4381889, at *11 (D. Mass. Sept. 19, 2011); *Scientific-Atlanta*, 239 F. Supp. 2d at 1360.

Defendants claim that the Offering Materials' affirmative statements touting FUSE's quality, ease of use, and purportedly then-existing ability to "drive sustainable global growth" were somehow "immaterially vague" ignores FUSE's importance to EndoChoice as its flagship product. ¶19. *See, e.g.*, *In re Choicepoint, Inc.*, C.A. No. 1:05-CV-00686-JTC, 2006 U.S. Dist. LEXIS 97903, at *16 (N.D. Ga. Nov. 19, 2006) ("'Only if the lack of importance of the [misstatement or] omission is so plain that reasonable minds cannot differ thereabout is it proper for the court to pronounce the [misstatement or] omission immaterial as a matter of law'") (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1189 (11th Cir. 2002)); *Mulligan v. Impax Labs., Inc.*, 36 F. Supp. 3d 942, 968 (N.D. Cal. 2014) (challenged statements not so "obviously unimportant" to shareholders as to warrant dismissal). And having put these subjects

[12] *E.g.*, Defendants do not contend that statements that FUSE provided "crisp, clear imaging and lighting" and "cutting edge graphics processing" were "puffery" or otherwise immune from liability.

"in play," in any event Defendants still had the duty to "speak fully and completely" so as not to mislead by omitting then-existing, adverse information on such subjects.

Nor is the Offering Material's description of EndoChoice's R&D and manufacturing operations (together with its sales operation, discussed below in §b) as constituting a "***world class*** organization" mere puffery. Rather, in the context of a small company such as EndoChoice, the term "world class" plainly conveyed the very concrete factual concept that, despite its size, it was reasonable ready, as of the IPO, to begin to seriously compete in the marketplace. But this was simply not true – or at best materially misleading when made in light of the Offering Material's omissions of adverse material facts -- given FUSE's undisclosed quality, manufacturing and design problems. ¶¶7, 67. *See also In re Allaire Corp. Sec. Litig.*, 224 F. Supp. 2d 319 (D. Mass. 2002) (challenged statements must be evaluated in light of their overall context); *see also Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1327 (2015) (statements not puffery where speaker had undisclosed contradictory information that materially undermined the statement's purported basis).[13]

Defendants also contend that their statements regarding FUSE as a "disruptive" and "compelling" "quality" product with "relative … ease of use" are immaterial because "all public companies praise their products and their objectives." But this misses the point. The fact here is

[13] Plaintiffs note that to support their puffery argument, Defendants cite federal cases applying the heightened federal pleading standards under Fed. R. Civ. P. 9(b) and the PSLRA to *fraud* claims brought under the Securities Exchange Act of 1934. Plaintiffs, however, do not allege fraud, but rather strict liability and negligence claims under the separate 1933 Act. ¶¶50-52. In any event, Defendants' cited cases involving the term "world class" are readily distinguishable. For example, in *Strougo v. Barclays PLC*, 105 F. Supp. 3d 330, 347 (S.D.N.Y. 2015), the court held that statements regarding Barclays' "world-class compliance function" were immaterial puffery because the complaint failed to adequately allege that conduct with regard to a business segment that comprised just 0.1 percent of Barclays' revenue was "representative of [Barclays' compliance efforts in its other divisions], or material to the company's overall financial condition." Here, by contrast, EndoChoice was describing its overall business operations. Similarly, in *In re Bos. Scientific Corp. Sec. Litig.*, 490 F. Supp. 2d 142, 162 (D. Mass. 2007), the court found a statement touting a single company *facility* as "world class" to be immaterial puffery.

that, as analysts and the Company itself later agreed, EndoChoice's product design was ***so*** poor (and hard to use) that its IPO-era "gen1" and "gen2" FUSE product had to be redesigned – and similarly, its product quality and reliability was not merely short of "compelling," but were so poor that EndoChoice was forced to rush its "gen3" product to market in 2016. ¶¶67, 79-90. Those statements in the Offering Materials' that Defendants actually challenge thus plainly cannot be said to be so "obviously unimportant" to investors as to render them immaterial. *See Stumpf v. Garvey*, No. 03-CV-1352, 2005 WL 2127674, at *8 (D.N.H. Sept. 2, 2005).[14]

Courts within the Eleventh Circuit have recognized that statements similar to challenged here are not mere puffery. For example, *Scientific-Atlanta* rejected the argument that statements about a company's success, its customers' confidence and growing needs for [the company's] products, the success of [its] business strategies, and the good economic success of [its] customers" were puffery, finding that such statements were not so vague that the court could "find as a matter of law" that they were not material. 239 F. Supp. 2d at 1360. Given that "puffery" is a fact-specific defense to materiality, this Court should similarly reject Defendants' efforts to dismiss on such grounds. *See Fecht v. Price Co.*, 70 F.3d 1078, 1080 (9th Cir. 1995).

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[14] While '[a]ll public companies praise their products and their objectives" (*In re Ford Motor Co. Sec. Litig. Class Action*, 381 F.3d 563, 570 (6th Cir. 2004)), "[t]he context of statements is often telling." *City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 672 (6th Cir. 2005) (defendants' statement that data "reinforces our belief that these are high-quality, safe tires" was misleading in the face of evidence that "tended to cut the other way"). Accordingly, "[w]hat might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation." *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989). Like Bridgestone in *City of Monroe*, Defendants' product did not have, *inter alia*, superior quality or ease of use, yet the Offering Materials failed to disclose this information at the time of the IPO, thereby giving reasonable investors the "impression of a state of affairs that differ[ed] in a material way from the one that actually exist[ed]." *Reese v. Malone*, 747 F.3d 557, 570 (9th Cir. 2014). These statements were not so "on the extreme edge of generality and vagueness" that they may be held immaterial at the pleading stage. *S. Ferry LP #2 v. Sillinger*, 399 F. Supp. 2d 1121, 1129 (W.D. Wash. 2005). When considered in context, *Kelly v. Elec. Arts, Inc.*, 71 F. Supp. 3d 1061 (N.D. Cal. 2014) and *In re MCI Worldcom, Inc. Sec. Litig.*, 191 F. Supp. 2d 778 (S.D. Miss. 2002) are also easily distinguished, as the cited statements found to be puffery there simply referred to amorphous "innovation."

b. No Statements Are Protected by the "Bespeaks Caution" Doctrine

Next, Defendants attempt to invoke the bespeaks caution doctrine with respect to certain statements. EC Br. at 17-20; UW Br. at 11-12. The bespeaks caution doctrine, however, applies only to "forward-looking" statements, and does ***not*** apply to material misrepresentations or omissions of then-existing fact. *In re Premiere Tech., Inc. Sec. Litig.*, No. 1:98-CV-1804, 2000 WL 33231639, at *17 (N.D. Ga. Dec. 8, 2000) ("Statements and omissions of past and current circumstances cannot be cured by reference to future difficulties and undetected problems."); s*ee also Scientific-Atlanta*, 239 F. Supp. 2d at 1362; *Gross v. Medaphis Corp.*, 977 F. Supp. 1463, 1473 (N.D. Ga. 1997); *In re Towne Servs., Inc. Sec. Litig.*, 184 F. Supp. 2d 1308, 1320 (N.D. Ga. 2001); *In re Stone & Webster, Inc., Sec. Litig.*, 414 F.3d 187, 213 (1st Cir. 2005) (mere fact that statement contains some reference to future events "cannot sensibly bring [it] within the safe harbor if the allegation of falsehood relates to non-forward-looking aspects of the statement."); *In re Evergreen Ultra Short Opportunities Fund Sec. Litig.*, 705 F. Supp. 2d 86, 93 (D. Mass. 2010). Here, the Offering Materials' statements regarding the product quality and design were representations of then-existing fact, and the Complaint alleges how they omitted material information concerning then-existing product design, defect and reliability problems. *See, e.g.*, ¶¶60-61, 78-79. Similarly, Defendants' statements regarding its *capabilities* (e.g. its ability to generate accelerated FUSE growth based on its "world class" organization) purported to describe *then-existing* conditions.

Moreover, even if certain aspects of Defendants' statements concerning the ability of FUSE to generate future growth were forward-looking (and they are not), they would still not be protected by the bespeaks caution doctrine because they were not accompanied by "cautionary language sufficient to make them not misleading." *In re CV Therapeutics, Inc.*, No. 03-03709,

2004 WL 1753251, at *11 (N.D. Cal. Aug. 5, 2004). As case law makes clear, "[b]oilerplate warnings will not suffice as meaningful cautionary statements . . . . The cautionary statements must convey ***substantive information*** about factors that realistically could cause results to differ materially from those projected in the forward-looking statement." *Scientific-Atlanta*, 239 F. Supp. 2d at 1362 (quoting *In re World Access, Inc. Sec. Litig.*, 119 F. Supp. 2d 1348, 1357 (N.D. Ga. 2000)). At best, Defendants disclosed the existence of "product bugs" in the past, and warned that the Company might experience product quality problems in the future" (*cf.* EC Br. at 19), but such "warnings" did ***nothing*** to inform investors of the multiple, *then-existing* problems with FUSE. Indeed, by warning only of past quality issues associated with the FUSE system, without disclosing the then-existing problems, Defendants' own cited "cautionary language" was itself misleading. *See In re MobileMedia Sec. Litig.*, 28 F. Supp. 2d 901, 925-28 (D.N.J. 1998) (to merely warn of "risk" that has already transpired is misleading); *McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990) ("[T]he disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers.").

Similarly, Defendants cannot rely on general, boilerplate warning that the Company's "quality assurance testing programs may not be adequate to detect all defects" where, as here, the risk of multiple and material defects, including in products that was currently being sold into the market, had already materialized. *In re Nortel Networks Corp. Secs. Litig.*, 238 F. Supp. 2d 613, 629 (S.D.N.Y. 2003) (no safe harbor protection for forward-looking statements when complaint alleges that defendants "had no basis for their optimistic statements and already knew (allegedly) that certain risks had become reality"); *Evergreen*, 705 F. Supp. 2d at 93; *In re Am. Int'l Grp., Inc. 2008 Secs. Litig.*, 741 F. Supp. 2d 511, 531 (S.D.N.Y. 2010) ("[G]eneric risk disclosures are

inadequate to shield defendants from liability for failing to disclose known specific risks").

Finally, whether certain risk disclosures are sufficient is a fact-intensive issue that is rarely decided on the pleadings. *See Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1097 (1991) (purportedly curative disclosure must "discredit the [misleading statement] so obviously that the risk of real deception drops to nil"); *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (dismissal "requires a stringent showing . . . [that the] risk disclosure [was such] that reasonable minds could not disagree"). Dismissal should be denied.

c. The Statements About FUSE's Quality Are Not Immune "Opinions"

Finally, Defendants argue that *some* of their statements are inactionable opinions, but significantly they do not even argue that most of the statements discussed above as to FUSE's purported quality were straightforward statements of fact (rather than opinion or belief). *Cf.* EC Br. at 20-23. Moreover, even the quality-related statements that Defendants claim were "mere opinions" – *i.e.* that the Company had a "world-class" R&D and manufacturing operations, and had a "disruptive" product that gave it a "competitive advantage" capable of supporting accelerating sales growth – were still materially misleading because they failed to disclose the numerous material product quality and design problems with FUSE (as well as the serious problems with its sales operations, which are discussed in §3 below).

In sum, Defendants selectively quote from the Supreme Court's *Omnicare* decision, but ignore its directive that companies do not have "virtual *carte blanche* to assert opinions in registration statements free from worry about § 11." *Omnicare*, 135 S. Ct. at 1331 (adding that "Congress adopted § 11 to ensure that issuers 'tell[] the whole truth' to investors"). Thus, if offering materials omit material facts about the issuer's knowledge concerning a statement of opinion, "and if those facts conflict with what a reasonable investor would take from the

statement itself," then §11's omissions clause creates liability. *In re Genworth Fin. Inc. Sec. Litig.*, No. 3:14-CV- 682, 2015 WL 2061989, at *14 (E.D. Va. May 1, 2015) (quoting *Omnicare*, 151 S. Ct. at 1329); *see also In re Salix Pharms., Ltd.*, No. 14-cv-8925, 2016 WL 1629341, at *12 n.10 (S.D.N.Y. Apr. 22, 2016) (quoting *Omnicare* and rejecting same argument made by defendants here under more rigorous federal pleading standard applied in cases brought under the Securities Exchange Act of 1934); *In re ISO Ray Inc. Sec. Litig.*, 189 F. Supp. 2d 1057, 1071 (E.D. Wash. 2016) (same). *See also* discussion at §3 below.[15]

3. Plaintiffs Adequately Allege Material Misstatements and Omissions Concerning the Company's Sales Operations and Purported Ability to Generate Accelerating FUSE Sales

Plaintiffs also allege that the Offering Materials repeatedly assured investors that the Company had the ability, as of the IPO, to generate significantly increased FUSE sales. For example, Defendants described the Company's sales force as consisting of "103 experienced sales and marketing professionals" (¶71) who were "proven" (¶70). They further represented that the Company's sales force was "***poised*** to contribute to future sales growth" and was part of a "***highly adaptable sales organization***" and "***world-class***" sales operation. ¶¶6, 59-74.

As Defendants later admitted, however, as of the IPO, the sales force lacked the requisite experience and skill necessary to materially accelerate growth of FUSE sales, and the Offering Materials failed to adequately disclose the extent to which the Company had already failed to "adapt" large numbers of its existing sales force (who had previously sold single-use GI products to GI professionals) for the very different task of selling expensive capital medical equipment such as FUSE. ¶74. Indeed, as Defendant Gilreath later conceded during a November 2015

[15] Whether Defendants actually believed their statements is a fact question for trial. *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 257-58 (5th Cir. 2005) (reversing district court for considering fact-based defenses, which are inappropriate at the pleading stage). Although Plaintiffs disavow claims that Defendants acted with *intent to defraud*, that does not mean that Plaintiffs somehow allege that Defendants were not aware of conflicting facts that undermined the basis for their stated opinions.

conference call, the kind of sales person that EndoChoice was hiring after the IPO was "not the sales rep we had two years ago [and] it was a dramatic difference." ¶93. Unfortunately for EndoChoice, the obviously needed upgrade in sales personnel came far too late to allow for any material increase in FUSE sales until well into 2016 at the earliest, as reflected in the Company's flat – and indeed declining − FUSE sales over the 15 months that followed the IPO. *Id*. On the same call, Gilreath also conceded that for FUSE sales to increase, "the sales force has to be in place" – thereby tacitly conceding that EndoChoice was ***not*** "poised" for growth as of the IPO. Indeed, far from being "poised" for growth, as of the IPO the Company had not even *begun* to get demo units of its "gen2" FUSE into the hands of any of its sales personnel, even though this was critical to any ability to start increasing sales. ¶¶78, 115. Instead, it was not until November 2015 (at the *earliest*) that, according to Gilreath, one could finally say "for the first time [] that [the sales force is] now coming together." ¶¶94, 107.

a. The Statements Concerning the Company's Sales Operations and Alleged Capabilities to Increase FUSE Sales Were Not Puffery

Defendants' statements, which directly related to the very mechanism for EndoChoice to grow its business and achieve long-term viability, can hardly be classified as "immaterial." EC Br. at 17. Indeed, the Company's sales force's qualifications, experience and readiness were crucial to generate the increased FUSE sales that investors were counting on. Nothing could have been more material to investors. *See also* §2(a), above.

b. The Bespeaks Caution Doctrine Is Again Inapplicable

Second, Defendants' statements regarding its sales operations' capabilities are not protected by the bespeaks caution doctrine because they are either statements of historical fact (*e.g.*, ¶70, describing sales force as "proven" and "experienced in the medical technology industry") or are not accompanied by meaningful cautionary language. Indeed, the purported

warnings that EndoChoice's sales force was "still in the process of transitioning [its] sales force" and that, if it was unsuccessful in expanding its sales force, it "may not be able to generate anticipated revenue" were not meaningful because those risk warnings were general warnings about "risks" that the Company was ***already experiencing*** at the time of the IPO. Moreover, Plaintiffs' references to "post-IPO developments" (including certain Defendants' own later admissions) are not "irrelevant" (*cf.* EC Br. at 23) because they are used ***not*** to show Defendants' "lack of clairvoyance," but rather to show how relevant adverse facts and conditions (which rendered their statements materially false or misleading) existed ***as of the IPO.***

C. The Challenged Statements of Opinion Are Actionable

First, many of the statements at issue relating to sales operations were not "opinions" at all. For example, the statement "Our proven sales force ***is poised*** to contribute to future sales growth" is not a statement of opinion (and the reference to "is poised" refers to a current, rather than future, condition). And as noted above, the inexperienced sales force was hardly "poised" for any FUSE growth as of the June 5, 2015 IPO, given that, *inter alia*, it would not even *begin* to have vital demo units needed to sell the "gen2" product until after the IPO. ¶¶70, 74.

Moreover, as discussed at Section 2(c), even statements clearly couched as "opinions" are not immune from liability where, as here, the Complaint alleges the Defendants' awareness of material adverse facts that raise serious doubts as to the reasonableness of the opinion expressed. For all the reasons set forth above (and further discussed in Section D below), the existence of such material facts, that were not disclosed to investors, is pled in spades here.

D. Plaintiffs Adequately Allege Material Omissions in Violation of Item 303

Item 303 imposes a series of disclosure obligations upon registrants that are "'intended to give the investor an opportunity to look at the company through the eyes of management,' so that

they may 'assess the financial condition and results of operations of the registrant, with particular emphasis on the registrant's prospects for the future.'" *Silverstrand Invs. v. AMAG Pharms., Inc.*, 707 F.3d 95, 102 (1st Cir. 2013) (citing Mgmt.'s Discussion and Analysis of Fin. Condition and Results of Operations; Certain Inv. Co. Disclosures, SEC Release No. 6835, 1989 WL 1092885 (May 18, 1989)). In that regard, Item 303 requires that a registrant "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. §229.303(a)(3)(ii). Specifically, "[t]he discussion and analysis shall focus specifically on material events and uncertainties known to management that would cause reported financial information ***not to be necessarily indicative of future operating results*** or of future financial condition." 17 C.F.R. §229.303(a), Instruction 3. To adequately plead an Item 303 claim, a plaintiff must therefore simply allege "(1) that a registrant knew about an uncertainty before an offering; (2) that the known uncertainty is 'reasonably likely to have material effects on the registrant's financial condition or results of operation'; and (3) that the offering documents failed to disclose the known uncertainty." *Silverstrand*, 707 F.3d at 103.

Plaintiffs allege that Defendants failed to disclose known events and uncertainties regarding: (i) the capabilities and prospects of its FUSE system in light of FUSE known design and product defect problems; and (ii) the readiness and ability of its sales force to generate materially increased sales growth (particularly when combined FUSE's significant product and design flaws). ¶¶80-90, 91-101. As discussed above (Section 2, *supra*), Plaintiffs adequately allege that this information was known to Defendants as of the June 5, 2015 IPO.

Defendants' argument that these adverse events, trends, and uncertainties were not known at the time of the IPO (EC Br. at 24-26; UW Br. at 11-12) disregards Plaintiffs' well-

pleaded allegations that the FUSE system was long-plagued by shoddy build and design quality, and that the EndoChoice sales force lacked the qualifications or experience to sell FUSE. Specifically, during a March 3, 2016 investor call regarding the Company's 2015 annual results, Defendant Gilreath discussed that the Gen2 FUSE system brought "major improvements to image quality" and "improvements in scope reliability" (¶115), noting that Gen2 "didn't make it into the sales force demo pool until around July [2015]." ¶116. Gilreath's statements effectively admitted that, at the time of the IPO, only Gen1 was available and that Gen1 suffered from significant quality and design issues that would not be remedied until, at the earliest, when Gen2 came out in mid-2015. ¶82. Given FUSE's average nine-month sales cycle (¶96), it would have been unreasonable to expect FUSE's stagnating sales to improve until 2016, at the earliest. *Id.* EndoChoice's reported total FUSE sales in the second quarter 2015 confirmed this. For the second quarter 2015, the Company sold only 27 units as compared to 26 in the first quarter, indicating an already significant slowdown at the time of the IPO. ¶108. Former employees confirmed that FUSE's defect and design problems existed at the time of the IPO. ¶¶82-90.

Defendant Gilreath made similar admissions with respect to the Company's sales force during an earlier November 2015 investor call in which he admitted that the Company had "dramatic[ally]" improved its sales force as compared to "two years ago," noting that "for the first time" the sales force was "coming together." ¶94. Similarly, during the March 6, 2016 investor call, Gilreath conceded that as of March 6, "75% of our territory managers have more than six months of field experience, up from 45% a year ago [March 2015], and 54% of our territory managers have more than one year of experience, up from 35% a year ago." ¶118. According to Gilreath, sales reps take at least "six months to a year to become effective doing FUSE demos and then about six more months transpire before these deals start to close." *Id.*

Thus, at the time of the IPO, EndoChoice's sales force on balance ***lacked*** the requisite experience (let alone "proven" ability) to produce significant increases in FUSE sales.

Moreover, given their own admissions (*e.g.*, ¶¶94, 105, 115-16, 118-19, 122), Defendants cannot credibly deny that the FUSE and sales force problems existed and were known as of the IPO, rendering their statements about being "poised" for accelerating FUSE sales misleading and lacking in reasonable basis. ¶¶70-76. *See also* ¶84 ("forcing to do demos with a device [Gen2] that was released too soon and then wondering why these demos failed is ridiculous."[16]

E. Plaintiffs Adequately Allege Their Standing Under the 1933 Act

"To have standing under [§]11, one must simply be able to trace the purchase of his securities to the registration statement that allegedly violated [§]11." EC Br. at 10, citing *In re*

[16] Defendants' reliance on *J & R Mktg. v. Gen. Motors Corp., SEP*, 549 F.3d 384 (6th Cir. 2008) (EC Br. at 25) is misplaced. There, the complaint alleged only that the undisclosed information at issue "was 'knowable' to GMAC." *Id.* at 391. In contrast, Plaintiffs here adequately allege that "EndoChoice and its management knew or should have known" of the undisclosed product and design defects with the Company's FUSE products, as well as of the circumstances relating to its sales force, which existed as of the IPO, that would likely have a "foreseeable unfavorable impact on net sales or revenues or income from continuing operations" within the meaning of Item 303. For example, even assuming *arguendo* that a plaintiff cannot generally aver a defendants' knowledge under O.C.G.A §9-11-9(b), it defies credulity to believe that EndoChoice management was not aware of significant product design and defect issues in its ***flagship*** product. *See Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 709, 711 (7th Cir. 2008) (in an action brought under §10(b)(5) of the Exchange Act of 1934, finding inference of defendants' knowledge where the alleged false statements related to the defendant company's flagship product).. Here, moreover, the Complaint's allegations that management was aware of problems with the FUSE product are also supported by statements from Plaintiffs' confidential witnesses. *See, e.g.*, ¶89 ("[E]verybody [in the Company] knew the angulation cables were something that needed to be improved, because they weren't durable."). Thus, as in *In re PlyGem Holdings, Inc.*, No. 14-CV-3577 (JPO), 2016 WL 5339541, at *5 (S.D.N.Y. Sept. 23, 2016), "the nature and impact" of the sales drop-off were well within Defendants' knowledge (and finding that plaintiff adequately pled defendants' knowledge for an Item 303 claim). Similarly, it defies credulity to believe that Defendants were not aware that, as of the IPO, there were ***no Gen2 FUSE demo units*** in the hands of its sales force in the field (and would not be any until mid-summer 2015 at best), and that the lack of such demo units would almost certainly prevent the Company from beginning to materially improve its FUSE sales until sometime in 2016 at the earliest. ¶¶74, 78, 104, 116. Further, Defendants' cite to *Lin v. Interactive Brokers Group, Inc.*, 574 F. Supp. 2d 408, 421 (S.D.N.Y. 2008) (EC Br. at 26) is a red herring. Plaintiffs do not allege that Defendants should have been "clairvoyant" as to their future sales. Instead, Plaintiffs' Item 303 allegations are based on the fact that Defendants failed to disclose then-existing adverse facts and related uncertainties that were "reasonably likely" – as of the date of the IPO − to have a material adverse impact on the Company's net sales or revenues. *See Litwin*, 634 F.3d at 716.

Friedman's, Inc. Sec. Litig., 385 F. Supp. 2d 1345, 1371 (N.D. Ga. 2005). Similarly, a plaintiff has standing under §12(a)(2) if they "plead that they bought their EndoChoice shares 'in' [*i.e.*, "pursuant to"] the IPO of June 5, 2015, as opposed to acquiring them in the aftermarket." *See* EC Br. at 11 (citation omitted). Defendants nonetheless assert that Plaintiffs do not allege enough "details" to adequately allege their standing at the pleadings.

Defendants' arguments fail for at least two reasons. First, Defendants do not dispute that Plaintiffs' standing allegations are sufficient if Georgia's pleading standards apply. *See* EC Br. at 12-13. And as shown at §III.A above, Georgia's pleading standards ***do*** apply here.

Second, even under federal law, Plaintiffs' allegation that they bought EndoChoice shares "pursuant and/or traceable to" the Offering Materials, *see* ¶¶26-27, suffices to *allege* their standing under §§11 and 12. *See, e.g., In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 373 (S.D.N.Y. 2011) ("pleading requirement for [§]11 standing is satisfied by general allegations that plaintiff purchased pursuant to or traceable to [a] false registration statement"); *Maine State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP, 2011 WL 4389689, at *11 (C.D. Cal. May 5, 2011) (same); *Northumberland Cty. Ret. Sys. v. Kenworthy*, No. CIV-11-520-D, 2013 WL 5230000, at *6 (W.D. Okla. Sept. 16, 2013) (same, and noting that whether plaintiff can prove its standing allegations "is a matter that involves consideration of the merits … rather than the sufficiency of the pleadings"); *Perry v. Duoyuan Printing, Inc.*, No. 10 Civ. 7235 (GBD), 2013 WL 4505199, at *10 (S.D.N.Y. Aug. 22, 2013) ("general allegations that plaintiff purchased 'pursuant' [or] traceable to [a] false registration statement" suffice); *In re Suprema Spec., Inc. Sec. Litig.*, 438 F.3d 256, 274 n.7 (3d Cir. 2006) (plaintiffs need not "prove" traceability at the pleading, but "must [simply] allege it").[17]

[17] Although the Court need not consider them because they were decided under *federal* pleading rules, it should be noted that Defendants rely on readily distinguishable cases where a defendant company

Finally, the U/W Defendants (Br. at 10) argue that Plaintiffs have failed to adequately allege §12(a)(2) standing against them because a §12(a)(2) plaintiff must purportedly "allege and show that each defendant is a 'seller' with respect to that plaintiff." However, Defendants once again rely on inapplicable federal cases, and also ignore that even under federal law Plaintiffs' pleading is entirely adequate. *See, e.g., Northumberland Cnty. Ret. Sys.,* 2013 WL 5230000, at *7-8. Indeed, the same argument that Defendants make here was rejected just two days ago:

> Plaintiffs here allege that 'the Underwriter Defendants offered [the company's shares] to the Class and solicited the purchase of the [shares] through 'preparation and/or dissemination of the [Offering Materials] and/or the solicitation of the class.' They further allege that the Underwriter Defendants profited from the transaction, confirming that they were motivated by their desire to serve their own financial interests. This is sufficient to justify standing under section 12(a)(2) and to give the underwriters 'fair notice of the basis for the claims against them.' *Plaintiffs are* ***not*** *required to identify the specific defendant from whom they purchased the [shares]*; it is sufficient to ***allege*** that they purchased them in connection with the IPO.

In re iDreamSky Tech. Ltd. Sec. Litig., No. 15-CV-2514 (JPO), 2017 WL 706336, at *4 (S.D.N.Y. Feb 22, 2017). Plaintiffs make the same, sufficient allegations here. ¶¶40-45, 151.

Should the Court nonetheless find that Plaintiffs' standing allegations – or any other aspect of Plaintiffs' claims – are deficient, Plaintiffs respectfully request leave to amend pursuant to O.C.G.A. §9-11-15. *See Deering v. Keever*, 282 Ga. 161, 646 S.E.2d 262 (2007) (noting §9-11-15's liberal policy in favor of allowing amendments).[18]

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had made *multiple offerings* pursuant to *different* registration statements, which in turn raised an issue of whether plaintiffs' shares were traceable to, *e.g*., the company's IPO ***or*** to a later "secondary" offering. *See* EC Br. at 12, citing *In re Ariad Pharm, Inc. Sec. Litig.*, 842 F.3d 744 (1st Cir. 2016), *Freidus v. Barclays Bank PLC*, 734 F.3d 132 (2d Cir. 2013), *In re Century Alum. Co. Sec. Litig.*, 729 F.3d 1104 (9th Cir. 2013), and *Scott v. ZST Digital Networks, Inc.*, 896 F. Supp. 877 (C.D. Cal. 2012). But here Defendants offer no evidence of any later secondary public offerings of EndoChoice stock (and Plaintiffs are aware of none) -- and in any event the prevailing federal rule (*see* cases cited above) remains that tracing issues are "merits" issues that should be decided after discovery, and *not* at the pleadings.

[18] Because Plaintiffs adequately allege claims under §11, their §15 claims for "control person" liability should also be upheld. *See, e.g.*, *Silverstrand Invs. v. AMAG Pharms., Inc.*, 12 F. Supp. 3d 241 (D. Mass. 2014) (§15 claim upheld where plaintiff sufficiently pled underlying violation of §11);

CONCLUSION

For the foregoing reasons, Defendants' motions to dismiss should be denied.

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Friedman's, 385 F. Supp. 2d at 1357 (same); *In re Unicapital Corp. Sec. Litig.*, 149 F. Supp. 2d 1353, 1367-68 (S.D. Fla. 2001) (same).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon counsel for all the parties via e-mail as follows:

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This 24th day of February, 2017.

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