IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

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

REPLY MEMORANDUM IN SUPPORT OF UNDERWRITER DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

The Underwriter Defendants[1] respectfully submit this reply memorandum in support of their motion to dismiss the Complaint. Plaintiffs do not demonstrate why this Court can exercise jurisdiction over a purely federal securities law matter such as this, and they fail to overcome the fatal deficiencies in the Complaint. Accordingly, the Underwriter Defendants' motion to dismiss should be granted.

A. This Court Lacks Subject Matter Jurisdiction

Plaintiffs make no real effort to explain how it could possibly make sense, given SLUSA's broad mandate against federal securities class actions in state courts, that a class action asserting a mixture of federal and state claims cannot be brought in state court but a class action asserting *only federal claims* can be maintained in state court. Yet that is exactly the result they urge here. Plaintiffs rely on a crabbed reading of SLUSA, and on inapplicable dicta from the U.S. Supreme Court's decision in *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 642, 126 S. Ct. 2145 (2006), which does not even address the particular statutory provision at issue (Section 22(a) of the Securities Act). See Endochoice Defs. Reply Br. at 2-3. Plaintiffs also point out, as

[1] Defined terms used herein have the same meaning as they do in the Underwriter Defendants' opening brief. References to Plaintiffs' response brief are cited as "Response at __."

the defendants did in their opening briefs, that some courts have ruled in favor of Section 11 and 12 plaintiffs on the jurisdictional question presented here.

This Court is, of course, not bound to follow the flawed reasoning of the decisions concluding that SLUSA permits state court jurisdiction over purely federal securities class actions brought under the Securities Act. Until the U.S. Supreme Court rules on the issue, it is up to the Georgia courts to make their own independent assessment as to whether they have jurisdiction over a case of this nature. The better reasoned position is that, in light of SLUSA, state courts lack jurisdiction to hear federal securities class actions. Though it is true that a few federal courts in Georgia have held to the contrary, this does not leave a plaintiff without a forum, for those decisions addressed only whether SLUSA allowed removal of the suits involved, not whether the type of suit was maintainable in a federal court.[2] Section 22(a)'s jurisdictional provision enables a Securities Act plaintiff to file a class action in federal court, or to file an individual action in state court. Plaintiffs here simply made a strategic decision not to do so.

B. Plaintiffs Have Not Traced Their Purchases To The IPO Or Established That Any Underwriter Defendant Was A Seller

The likely motivation for Plaintiffs' strategic decision to file this class action in state rather than federal court is apparent from how they discuss various pleading requirements throughout their Response. Plaintiffs readily note that they are relying on unique federal statutory causes of action (that have no analogue in Georgia law) that do not require them to

[2] The Northern District judges who so held expressed considerable reluctance, finding that they were compelled to do so by dicta from the Eleventh Circuit and the U.S. Supreme Court. See *Williams v. AFC Enterprises, Inc*., 2003 WL 24100302, *3 (N.D. Ga. Nov. 20, 2003) (Thrash, J.) ("Given the intent of SLUSA, it just makes no sense to prohibit the removal of federal securities class actions to federal court. Such a prohibition would permit the sort of end run around the PSLRA that [SLUSA] attempted to stop. It is inconceivable to me that the drafters of the Act intended such an outcome."); *Unschuld v. Tri-S Security Corp*., 2007 WL 2729011, *9 (N.D. Ga. Sept. 14, 2007) (Carnes, J.) (quoting and agreeing with the same statement).

plead fraudulent intent or even negligence to state a claim. See, e.g, Response at 1 ("Plaintiffs need not even plead negligence…"); id. at 2 (describing the "modest pleading burden" of Section 11 and 12 claims); id. at 23 (stating that Sections 11 and 12 "place a relatively minimal burden on a plaintiff"). But they balk at the notion that federal pleading standards should be applied to those elements of Section 11 and 12 claims that are more onerous towards a plaintiff, namely, the requirements that they be able to trace their purchases to the IPO and that they identify which of the several Underwriter Defendants sold them their shares. See id. at 18-23, 39-41. As to those elements, Plaintiffs argue that the Georgia courts' more liberal "notice pleading" rules should apply. In essence, Plaintiffs seek to have the best of both worlds.

Plaintiffs do not attempt to show in their Response that they actually can trace their purchases to the IPO nor do they identify from whom they purchased their shares. Instead, Plaintiffs cite the general rule that Georgia's notice pleading standards apply to federal causes of action asserted in Georgia courts. See id. at 19. The defendants have not argued otherwise. Instead, the defendants have shown that an exception to this general rule applies where, as here, applying state law pleading rules would eviscerate a federal policy in favor of uniformity in adjudication of federal rights. See Endochoice Defs. Opening Br. at 12-14; Endochoice Defs. Reply Br. at 4-5. This is such a case. The PSLRA and SLUSA reflect a clear expression of Congress's policy in favor of uniform national standards for federal securities class actions and against having fifty states administer such cases according to their own rules and procedures. It bears noting that the drafters of the PSLRA and SLUSA were especially concerned about abuses occurring at the pleadings stage of litigation, and that many of their most significant reforms (such as the automatic discovery stay and heightened pleading standards) specifically address this stage of the proceedings. *See Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S.

71, 81-82, 126 S. Ct. 1503 (2006). A plaintiff in a Securities Act class action brought in federal court cannot satisfy the traceability requirement with boilerplate, conclusory allegations. Given the strong federal policy favoring uniform treatment of federal securities class actions, the result should be the same in this Court.[3]

C. Plaintiffs Do Not Identify Any Material Misstatement Or Omission

Finally, Plaintiffs fail to show how their claims are based on any objectively false statement or any material omission of fact in the Offering Materials, as they must in order to state a claim under the Securities Act. The Response confirms that Plaintiffs' entire case is based on non-actionable puffery, forward-looking statements, and opinion statements that are no different from the sorts of optimistic comments found in every offering document relating to an IPO. Two points raised in Plaintiffs' Response stand out in particular.

First, Plaintiffs go to great lengths to argue that the disclosures in the Offering Materials portrayed defects and operational issues concerning the FUSE system to be only a thing of the past. See, e.g., Response at 26 ("[T]he Offering Materials characterized such problems as having occurred ***only in the past***.") (emphasis in original). The statement Plaintiffs are referring to is in the section of the Prospectus titled "**RISK FACTORS**," under the subheading "***Product quality issues or product defects may harm our business, results of operations and financial condition.***" Prospectus at 27 (emphasis in original).[4] No reasonable investor would understand a

[3] With regard to the separate requirement under Section 12(a)(2) that a plaintiff identify the particular seller who passed title in the security to the plaintiff or who successfully solicited the plaintiff's purchase, Plaintiffs ignore the cases cited on pages 10-11 of the Underwriter Defendants' opening brief and instead cite decisions that seemingly disregard the plausibility requirements for federal pleadings by permitting Section 12(a)(2) claims to proceed against defendants in the absence of allegations of any contact between the plaintiff and the particular defendant. Response at 41. The cases previously cited by the Underwriter Defendants take the better reasoned approach, and should be followed here.

[4] The full disclosure reads: "Certain of our medical device products are highly complex and incorporate sophisticated technology, including hardware and software. Software typically

description of past defects incorporated into a discussion of risks to be intended to convey the impression that there is no risk going forward. To the contrary, the only possible purpose for including a discussion of past defects in this context would be to convey to the reader that similar problems could occur again. Plaintiffs have adopted a nonsensical construction of this disclosure because the viability of their claims depends on it. When the disclosure is read in its proper context, it is clear that Endochoice warned investors of the exact types of risks that Plaintiffs now contend caused the company's stock price to fall.

Second, the Complaint and Response repeatedly rely on statements that are *incapable* of independent, objective verification. See Response at 4 (citing statements that FUSE had "compelling, differentiated clinical efficacy" and was "disruptive"); id. at 5 (citing statements that the Company had a "proven sales force," that its sales staff was "poised to contribute to future sales growth," and that it had a "world class organization"). A statement that is "too generalized to be susceptible to verification" is not actionable under the federal securities laws. *See Mogensen v. Body Cent. Corp.*, 15 F. Supp. 3d 1191, 1213 (M.D. Fla. 2014). A contrary rule would place underwriters in an impossible situation. As Plaintiffs note, an underwriter has a complete defense to a Section 11 or 12 claim if it demonstrates that it conducted due diligence and had, after reasonable investigation, reason to believe that a registration statement contained no materially false statement or omission of material fact. Response at 1; *see also In re Software*

---

contains, particularly in the periods subsequent to the initial launch, bugs that can unexpectedly interfere with the device's operation. Our quality assurance testing programs may not be adequate to detect all defects, which might interfere with customer satisfaction, reduce sales opportunities, harm our marketplace reputation, increase warranty repairs or reduce gross margins. In the past, we have had to replace certain components and provide remediation in response to the discovery of defects or bugs in products that we had shipped, including initial shipments of our Fuse ® system. An inability to cure a product defect could result in the financial failure of products, a product recall, temporary or permanent withdrawal of a product from a market, damage to our reputation or our brand, inventory costs or product reengineering expenses, any of which could have a material impact on our business, results of operations and financial condition." Prospectus at 27.

Toolworks, Inc., 50 F.3d 615, 621 (9th Cir. 1994). But how can one conduct due diligence into whether a sales staff is "world class" or whether a product is going to be "disruptive" to the market? The way the securities laws deal with that problem is to treat generalized statements of optimism as not actionable.

Moreover, the sorts of subsequent problems identified in the Complaint and the Response are issues that beset every company, particularly in high-tech businesses. The product has unforeseen design defects and needs to be repaired or replaced. Design flaws are revealed as the product begins to be used in the field. Employees leave, or their responsibilities change. The same allegations that form the basis for the Complaint could be made about any emerging company, and the risk that results may not meet expectations is plainly apparent for such companies. If these kinds of problems could form the basis for liability under the Securities Act simply because the IPO optimistically predicted that the company would succeed, then the Securities Act would essentially turn issuers and underwriters into insurers, and no rational actor would underwrite an IPO. The reason that Sections 11 and 12 of the Securities Act do not operate as an investment insurance policy is (in addition to the traceability and standing requirements discussed earlier) that they provide for liability only for incorrect statements of material and objective fact, not for touting that an issuer's employees are world class or predicting that its product will disrupt the market. Requiring underwriters to somehow vet such puffery through a diligence process would put them in an impossible position. Because Plaintiffs have not identified any actionable misrepresentation of a material fact, their claims fail as a matter of law.

CONCLUSION

For these reasons, and the reasons given in the Underwriter Defendants' opening brief and in the Endochoice Defendants' briefs, the Court should dismiss the Complaint in its entirety as to the Underwriter Defendants.

Date: March 24, 2017

BRYAN CAVE, LLP

/s/ John R. Bielema
John R. Bielema
Georgia Bar No. 056832
Michael P. Carey
Georgia Bar No. 109364
1201 West Peachtree Street N.W.
One Atlantic Center, Fourteenth Floor
Atlanta, GA 30309
Telephone: 404-572-6600
Facsimile: 404-572-6999
john.bielema@bryancave.com

Counsel for the Underwriter Defendants

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 by electronic filing and via e-mail as follows:

William C. Fredericks
Thomas L. Laughlin
Scott+Scott, Attorneys at Law, LLP
The Helmsley Building
230 Park Avenue, 17th Floor
New York, NY 10174
wfredericks@scott-scott.com
tlaughlin@scott-scott.com

David R. Scott
Stephen J. Teti
Scott+Scott, Attorneys at Law, LLP
156 South Main Street
PO Box 192
Colchester, CT 06415
david.scott@scott-scott.com
steti@scott-scott.com

Jesse Strauss
Strauss Law PLLC
305 Broadway, 9th Floor
New York, NY 10007
jesse@strausslawpllc.com

Co-Lead Counsel for
Co-Lead Plaintiff Jesse L. Bauer
and the Proposed Class

Shannon L. Hopkins
Sebastiano Tornatore
Levi & Korsinsky LLP
733 Summer Street, Suite 304
Stamford, CT 06901
shopkins@zlk.com
stornatore@zlk.com

Co-Lead Counsel for
Co-Lead Plaintiff Kenneth T. Raczewski
and the Proposed Class

Robert W. Killorin
Law Offices of Robert W. Killorin
5587 Benton Woods Drive
Atlanta, GA 30342-1308
rwk@bellsouth.net

Co-Liaison Counsel for
Co-Lead Plaintiff Jesse L. Bauer
and the Proposed Class

David A. Bain
Law Offices of David A. Bain, LLC
1050 Promenade II
1230 Peachtree Street, NE
Atlanta, GA 30309
dbain@bain-law.com

Co-Liaison Counsel for
Co-Lead Plaintiff Kenneth T. Raczewski
and the Proposed Class

Michael R. Smith
Georgia Bar No. 661689
Benjamin Lee
KING & SPALDING LLP
Georgia Bar No. 443082
1180 Peachtree Street, NE
Atlanta, GA 30309-3521
mrsmith@kslaw.com

blee@kslaw.com
Tel: (404) 572-4824
Fax: (404) 572-5100

James P. Sullivan (pro hac vice)
Srimath S. Subasinghe (pro hac vice)
KING & SPALDING LLP
401 Congress Avenue, Suite 3200
Austin, Texas 78701
jsullivan@kslaw.com
ssubasinghe@kslaw.com
Tel.: (512) 457-2000
Fax: (512) 457-2100

Counsel for the EndoChoice Defendants

Date: March 24, 2017

/s/ Michael P. Carey
Michael P. Carey
Georgia Bar No. 109364