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 BRIEF IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED COMPLAINT BY THE ENDOCHOICE DEFENDANTS

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

The Shareholders ask this Court to ignore the statutory language that negates concurrent jurisdiction over their claims, and to focus instead on a lower-court split that the EndoChoice Defendants already acknowledged in footnote 2 of the motion to dismiss. *See* Opp'n 16 (invoking "the number of decisions" on either side of the split). The cited opinions from sister courts are not binding here and have only the power to persuade. *See, e.g.*, *Deen v. Stevens*, 698 S.E.2d 321, 324–25 (Ga. 2010). The opinions on the Shareholders' side of the split are unpersuasive, so they should have no power at all when this Court conducts its own analysis of the jurisdictional exception that the SLUSA added to Section 22(a) of the Securities Act.

The SLUSA used different cross-references when it simultaneously amended both the jurisdictional provision and the removal provision of Section 22(a). *See* 112 Stat. 3230 (using "section 16" in the jurisdictional provision but "section 16(c)" in the removal provision). In their motion to dismiss, the EndoChoice Defendants challenged the Shareholders to explain away Congress's conscious choice of divergent language. *See* MTD 8–9 (quoting persuasive analysis from *Iron Workers Dist. Council of New England Pension Fund v. MoneyGram Int'l, Inc.*, No. 15-cv-402, 2016 WL 4585975, at *5 (D. Del. Sept. 2, 2016)). The Shareholders have not met that challenge, despite having numerous opinions from which to borrow. *See* Opp'n 11–18 (neglecting to cite *MoneyGram*).

If anything, the Shareholders actually prove the EndoChoice Defendants' point by invoking the narrower language of Section 16(b) to conclude "that the only

class actions that may no longer be heard in state court are those that assert *state law* claims." Opp'n 11–12. Congress knew how to cross-reference a specific subsection of Section 16, as seen in the SLUSA's amendment to the removal provision of Section 22(a). Yet it chose a broader cross-reference—to the entirety of Section 16, rather than the Shareholders' preferred subsection—when it amended the jurisdictional provision of Section 22(a). The Court should honor Congress's choice of statutory text, even if the Shareholders cannot bring themselves to do so.

The Shareholders cannot avoid the jurisdictional implications of the SLUSA's text by labeling it a *conforming amendment*. *See* Opp'n 16. That argument "places more weight on the 'Conforming Amendments' caption than it can bear." *Burgess v. United States*, 553 U.S. 124, 135 (2008). The changes to Section 22(a) were indeed included as "CONFORMING AMENDMENTS" in the SLUSA, 112 Stat. 3230, "[b]ut a statute is a statute, whatever its label," *United States v. R.L.C.*, 503 U.S. 291, 305 n.5 (1992) (plurality opinion). According to the Supreme Court, conforming amendments in a federal statute cannot be "[t]reat[ed] as nonsubstantive" unless the text "disavow[s] any intent to make substantive changes." *Burgess*, 553 U.S. at 135. The Shareholders have identified no such statutory text, because none exists.

Nor do the Shareholders find support in dicta from *Kircher v. Putnam Funds Trust*, 547 U.S. 633 (2006), an opinion that does not so much as cite Section 22(a). *See* Opp'n 14. To the contrary, *Kircher* undercuts the Shareholders' jurisdictional argument by demanding closer attention to statutory cross-references than they care to give: Recall that the Supreme Court reversed an interpretation of the

SLUSA because it gave "no apparent function" to Section 16(c)'s cross-reference to the cases "set forth in subsection (b)." *See Kircher*, 547 U.S. at 642–43 (citing 15 U.S.C. § 77p(c)). Once again, it is telling that Congress used a narrow cross-reference to "subsection (b)" in Section 16(c), but chose a different and broader cross-reference for Section 22(a)'s jurisdictional provision.

In light of Section 22(a)'s exception to concurrent jurisdiction, this Court should dismiss for lack of subject-matter jurisdiction under OCGA § 9-11-12(b)(1).

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

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

The Shareholders have no persuasive authority for the proposition that the traceability boilerplate in their complaint, Compl. ¶¶ 26–27, is enough to satisfy the federal-law pleading standard of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). *See* Opp'n 40. Of the cases they cite, one of them is no longer good law in the circuit from which it came;[1] one of them predates *Iqbal* and *Twombly*;[2] and the remaining three rely on pre-*Twombly* law without addressing the impact of *Iqbal* and *Twombly*.[3] As the EndoChoice Defendants have explained, federal courts that actually apply the pleading

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[1] *See Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-cv-302, 2011 WL 4389689, at *11 (C.D. Cal. May 5, 2011), *overruled by In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1107–08 (9th Cir. 2013).

[2] *See In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256 (3d Cir. 2006).

[3] *See In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 373 (S.D.N.Y. 2011); *Northumberland Cty. Ret. Sys. v. Kenworthy*, No. 11-cv-520, 2013 WL 5230000, at *6 (W.D. Okla. Sept. 16, 2013); *Perry v. Duoyuan Printing, Inc.*, No. 10-cv-7235, 2013 WL 4505199, at *10 (S.D.N.Y. Aug. 22, 2013).

standard of *Iqbal* and *Twombly* have invariably dismissed the Shareholders' traceability boilerplate. *See* MTD 11–12 (citing *In re Ariad Pharm., Inc. Sec. Litig.*, 842 F.3d 744, 755–56 (1st Cir. 2016); *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 899–901 (4th Cir. 2014); *Freidus v. Barclays Bank PLC*, 734 F.3d 132, 141–42 (2d Cir. 2013); *Century Aluminum*, 729 F.3d at 1107–08; *Johnson v. CBD Energy Ltd.*, No. 4:15-cv-1668, 2016 WL 3654657, at *3–*6 (S.D. Tex. July 6, 2016); *Beaver Cty. Emps.' Ret. Fund v. Tile Shop Holdings, Inc.*, 94 F. Supp. 3d 1035, 1056–57 (D. Minn. 2015)). Judge Watford's cogent opinion for the Ninth Circuit is especially persuasive on this point. *See Century Aluminum*, 729 F.3d at 1107–08.

Realizing that their traceability boilerplate will not suffice under the federal-law pleading standard of *Iqbal* and *Twombly*, the Shareholders urge this Court to apply a state-law pleading standard instead. *See* Opp'n 18–23, 40. But they attack a straw man in doing so, because nobody is arguing "that the higher *Twombly/Iqbal* federal pleading standard applies . . . because this case is brought under a federal statute." Opp'n 19. The EndoChoice Defendants are making the much narrower argument, based on cases like *Brown v. Western Railway*, 338 U.S. 294 (1949), that Congress's desire for uniform adjudication of claims governed by the PSLRA and the SLUSA has trumped the state-law pleading standard that would otherwise apply in this Court. *See* MTD 13–14.

This narrower argument is entirely consistent with *Howlett v. Rose*, 496 U.S. 356, 372 (1990), upon which the Shareholders selectively rely for their "basic principles of federalism." *See* Opp'n 3, 19–21. The Supreme Court noted there that

"States may apply their own neutral procedural rules to federal claims, *unless those rules are pre-empted by federal law*." *Howlett*, 496 U.S. at 372 (emphasis added). The Shareholders simply ignore the italicized qualification—as though the two dissenting Justices in *Brown* had commanded a majority. *See Brown*, 338 U.S. at 299–303 (Frankfurter, J., dissenting) (arguing unsuccessfully that, to promote "the working of our federalism without needless friction," the state court should be allowed to apply Georgia's state-law pleading standard to a federal-law claim).

The Shareholders also note that *Brown* reached a plaintiff-friendly result in "circumstances [that] were *opposite* to those presented here, as the state law pleading standard was more rigorous than the federal standard." Opp'n 20. Unlike this case, however, *Brown* involved a notoriously plaintiff-friendly statute. *See, e.g.*, *Kossman v. Ne. Ill. Reg'l Commuter R.R.*, 211 F.3d 1031, 1036 (7th Cir. 2000) (noting "the plaintiff friendly nature of [the Federal Employers' Liability Act]"). The PSLRA and the SLUSA point in the opposite direction by giving defendants the protection of uniformity in class actions under the federal securities laws. *See, e.g.*, 112 Stat. 3227 ("The Congress finds that . . . it is appropriate to enact national standards for securities class action lawsuits involving nationally traded securities . . . ."). This Court should therefore apply the same federal-law pleading standard as any federal court would use to dismiss the Shareholders' traceability boilerplate.

B. The Offering Materials Were Not Materially False Or Misleading

In response to the EndoChoice Defendants' argument of immateriality for the allegedly misleading statements, *see* MTD 14–17, the Shareholders wrongly contend that even the most vaguely optimistic statements will be deemed material if they so

much as mention a flagship product like Fuse or the salesforce that sells it, *see* Opp'n 27–30, 35. The materiality requirement of Section 11 and Section 12(a)(2) demands "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (internal quotation marks omitted). A reasonable investor will not rely on a content-free statement that merely lists an important topic next to a string of self-congratulatory jargon, such as "world class."[4]

The Shareholders also incorrectly characterize this defense as too fact-specific to be decided on a motion to dismiss, relying on the Northern District of Georgia's opinion in *In re Scientific-Atlanta, Inc. Securities Litigation*, 239 F. Supp. 2d 1351, 1360 (N.D. Ga. 2002). *See* Opp'n 30. Of course, the Northern District of Georgia has also granted many motions to dismiss based on a so-called "puffery" defense. *See, e.g.*, *In re Airgate PCS, Inc. Sec. Litig.*, 389 F. Supp. 2d 1360, 1378–79 (N.D. Ga. 2005); *In re S1 Corp. Sec. Litig.*, 173 F. Supp. 2d 1334, 1355–56 (N.D. Ga. 2001); *Amalgamated Bank v. Coca-Cola Co.*, No. 1:05-cv-1226, 2006 WL 2818973, at *7 (N.D. Ga. Sept. 29, 2006). A puffery dismissal was likewise granted in part in the Sixth Circuit case upon which the Shareholders rely. *Compare* Opp'n 30 n.14, *with City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 670–71 (6th

[4] The Shareholders are mistaken in asserting that the EndoChoice 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." Opp'n 28 n.12. As the motion to dismiss explained, "[s]uch self-interested product testimonials are a common form of puffery." MTD 16.

Cir. 2005). In any event, *Scientific-Atlanta* is distinguishable because the defendants in that case allegedly "knew that the statements were false at the time they were made," 239 F. Supp. 2d at 1360, whereas the Shareholders here have "expressly exclude[d] any allegation that could be construed as alleging fraud," Compl. ¶ 52.

As the EndoChoice Defendants explained in their motion to dismiss, moreover, the Offering Materials warned of Fuse's quality-control problems and the salesforce's challenges in transitioning to a relatively expensive product. *See* MTD 18–19. The Shareholders are therefore incorrect in describing these problems as "unbeknownst to investors." Opp'n 2, 6. They were certainly beknownst to any investor who bothered to read the "RISK FACTORS" section of the Offering Materials. *See* Compl. ¶¶ 65, 73; Prospectus, Ex. A, at 13–17, 27, 41. Under the bespeaks-caution doctrine, the optimistic projections that were accompanied by meaningful cautionary language are immaterial as a matter of law. *See* MTD 17–20. And under *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318 (2015), the challenged opinion statements are not actionable because the Shareholders do not allege that the EndoChoice Defendants did not believe the opinions, and because the optimistic beliefs were hedged by explicit warnings in the Offering Materials. *See* MTD 20–23.

The Supreme Court has put the Shareholders on notice of their burden to "identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or

did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Omnicare*, 135 S. Ct. at 1332. With respect to *Omnicare*, however, the Shareholders merely argue that "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 [Section 11's] omissions clause creates liability." Opp'n 33–34 (internal quotation marks omitted). Having thus failed to perform the particularized identification that *Omnicare* requires, the Shareholders cannot proceed with their challenge to the opinion statements.

Finally, the Shareholders fail to salvage their Item 303 argument. *See* Opp'n 36–39. According to the Shareholders, the EndoChoice Defendants knew at the time of the IPO "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." Opp'n 38. But investors knew the same thing at the same time, thanks to the "RISK FACTORS" section of the Offering Materials. *See* Compl. ¶¶ 65, 73; Prospectus, Ex. A, at 13–17, 27, 41. At the risk of stating the obvious, "there can be no omission where the allegedly omitted facts are disclosed." *In re Progress Energy, Inc.*, 371 F. Supp. 2d 548, 552 (S.D.N.Y. 2005). And while the EndoChoice Defendants subsequently acquired (and then disclosed) additional knowledge about Fuse's defects and difficulties in transitioning the salesforce, *see* Opp'n 38–39, Item 303 did not oblige them to operate a crystal ball in preparing the Offering Materials, *see* MTD 24–26.

CONCLUSION

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

March 24, 2017

Respectfully submitted.

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I further certify that I have delivered a courtesy copy of the foregoing to the Fulton County Business Court Program Director at businesscourt@fultoncountyga.gov.

This 24th day of March, 2017.

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