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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARVIN PEARLSTEIN, Individually And On Behalf of All Others Similarly Situated,

Plaintiff,

-against-

BLACKBERRY LIMITED (formerly known as RESEARCH IN MOTION LIMITED), THORSTEN HEINS, BRIAN BIDULKA, and STEVE ZIPPERSTEIN,

Defendants.

No. 13-cv-7060 (CM)

DECISION AND ORDER DENYING DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT AND REQUEST FOR ORAL ARGUMENT ON THE MOTION

McMahon, C.J.:

On September 29, 2017, lead Plaintiffs Todd Cox and Mary Dinzik, and additional Plaintiffs Yong M. Cho and Batuhan Ulug (collectively, "Plaintiffs") filed their second amended complaint against Defendants Blackberry Limited, Thorsten Heins, Brian Bidulka, and Steve Zipperstein (collectively, "Defendants") pursuant to Federal Rule of Civil Procedure 23(a) and 23(b)(3), on behalf of the purchasers of Blackberry Limited ("Blackberry") common stock between March 28, 2013 and September 20, 2013 (the "Class Period") for violations of the Securities Exchange Act of 1934 (the "Exchange Act"). Plaintiffs allege violations of Section 10(b) of the Exchange Act and Rule 10b-5 against all Defendants, and violations of Section 20(a) of the Exchange Act against Defendants Heins and Bidulka.

On November 20, 2017, Defendants moved to dismiss the second amended complaint as to Blackberry Limited, Thorsten Heins, and Brian Bidulka. On December 1, 2017, Defendants

moved to dismiss the second amended complaint as to Defendant Zipperstein, as well. Defendants requested oral argument on the motion on January 25, 2018. For the reasons set forth below, Defendants' motion to dismiss is DENIED. Oral argument is not needed, so that motion is DENIED, as well.

I. Background

A. Factual Background

This putative class action stems from statements made by Defendants in connection with the sales and returns of the Blackberry Z10 smartphone ("Z10"). Plaintiffs allege that, during the Class Period, Defendants made material misrepresentations or omissions to conceal the poor performance of the newly launched Z10. (Compl. ¶ 1.)

Plaintiffs allege that Defendants made these misleading statements on four occasions: 1) Defendant Blackberry's reporting of its fiscal year 2013 results on March 28, 2013, 2) Blackberry's issuance of an April 12, 2013 press release in response to a report by Detwiler Fenton (the "Detwiler Report") that the Z10 was experiencing high return rates, 3) Blackberry's reporting of its first quarter earnings for fiscal year 2014 on June 28, 2013; and 4) Blackberry's issuing of its press release on September 20, 2013 announcing that its Board of Directors was exploring alternative strategies. (*Id.* ¶ 75-146.) Plaintiffs' second amended complaint ("SAC") relies on two significant developments since the dismissal of the first amended complaint ("FAC") to support its allegations.

First, after the filing of the FAC, new information relevant to this action came to light during the criminal prosecution of James Dunham, Jr. (the "Dunham Action"), a former executive at wireless retailer Wireless Zone. (*Id.* ¶ 9.) Wireless Zone was one of six exclusive national Verizon retailers that sold the Z10 smartphone. (*Id.* ¶ 11.) On April 11, 2013, the research and

investment firm Detwiler Fenton issued a negative research report (the "Detwiler Report") on the Z10. (*Id.*) The Detwiler Report stated, in relevant part, "[W]e believe key retail partners have seen a significant increase in Z10 returns to the point where, in several cases, returns are now exceeding sales, a phenomenon we have never seen before." (*Id.* ¶ 24.) On April 12, 2013, Defendants issued a denial of the claims in the Detwiler Report and challenged the accuracy of the data contained therein. (*Id.* ¶ 7.) The Dunham Action revealed that the Detwiler Report was based on accurate, real-time data from Wireless Zone's approximately 400 stores. (*Id.* ¶ 9-26.) In his plea and sentencing, Dunham admitted that he was the one who had sold the data to Detwiler Fenton. (*Id.*)

Dunham's role as an executive at Wireless Zone had provided him with confidential information, including specific sales and return information. (*Id.*) Plaintiffs allege that Defendants were in possession of the same data that Dunham had unlawfully sold to Detwiler Fenton. (*Id.*) Therefore, Plaintiffs contend, Blackberry's press release on April 12, denying the Detwiler Report, was a material misrepresentation or omission. (*Id.*)

Second, after Judge Griesa dismissed the FAC, the Supreme Court decided *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S.Ct. 1318 (2015), which altered the standard that was previously applied in the Second Circuit under *Fait v. Regions Fin. Corp.*, 655 F.3d 105 (2d Cir. 2011), for determining whether a statement of opinion is misleading. (*Id.* ¶ 3-8.)

Plaintiffs allege that, under the *Omnicare* standard, and in conjunction with the new information from the Dunham Action, the complaint should now survive a motion to dismiss. The Court agrees.

B. Procedural Background

On March 13, 2015, Judge Griesa granted Defendants' motion to dismiss the FAC. (Dkt. No. 54.) On March 31, 2015, Plaintiffs moved for reconsideration. (Dkt. No 56.) During briefing on the motion for reconsideration and in reply to Defendants' opposition to the motion, Plaintiffs sought leave to amend the complaint based on newly discovered information that allegedly supported Plaintiffs claims. (Dkt. No. 59.) The motion for reconsideration was denied and Plaintiffs appealed. (Dkt. No. 62-63.)

On August 24, 2016, the Second Circuit affirmed the dismissal of the complaint, but remanded the case to Judge Griesa on the issue of leave to amend. (Dkt. No. 64.) The Circuit acknowledged that the Supreme Court's decision in *Omnicare* and the newly discovered evidence from the Dunham Action might support Plaintiffs claims, but took no position on whether leave to amend should be granted. (Dkt. No. 64.) The Circuit explained that Judge Griesa's one-page order denying leave to amend did not state whether the denial was based on futility, undue delay, undue prejudice, or for some other reason, and, therefore, directed the district court to explain its rationale. (*Id.*)

On September 13, 2017, Judge Greisa granted Plaintiffs' motion to amend the complaint, finding that amendment would not be futile based on the newly discovered evidence and pleading standard. (Dkt. No. 81.) Moreover, the order held that the proposed complaint would now survive a motion to dismiss. (*Id.*)

Plaintiffs' filed the SAC in this action on September 29, 2017. (Dkt. No. 84.) On November 20, 2017, Defendants filed a motion to dismiss the SAC as to Defendants Blackberry,

Heins, and Bidulka. (Dkt. No. 96.) Defendants filed a motion to dismiss as to Defendant Zipperstein on December 1, 2017. (Dkt. No. 100.)

II. Legal Standard

To survive a motion to dismiss, a complaint must "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint must contain facts stating a claim to relief that is not only conceivable, but plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Twombly* 500 U.S. at 570. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. The Court accepts all well-pleaded allegations as true and draws all reasonable inferences in favor of the plaintiff. *Twombly*, 550 U.S. at 555-56.

In a securities fraud case, "a party must state with particularity the circumstances constituting the fraud or mistake." Fed. R. Civ. P. 9(b). Further, the complaint must satisfy the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737, 747 (1995). The PSLRA provides that, "the complaint shall . . . state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2)(A). "[The Second Circuit] has read Rule 9(b) to require that a complaint '(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent.'" *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004) (quoting *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1175 (2d Cir. 1993)).

III. Discussion

The SAC alleges the same set of misrepresentations and omissions as the FAC, but adds allegations of newly discovered evidence from the Dunham Action. Furthermore, the claims are governed by a new standard under *Omnicare*.

Prior to *Omnicare*, the standard in the Second Circuit for determining whether a statement of opinion is misleading was governed by *Fait v. Regions Fin. Corp.*, 655 F. 3d 105 (2d Cir. 2011). Under the *Fait* standard, a statement of opinion could only be misleading when it was "both objectively false and disbelieved by the defendant at the time it was expressed." *Fait*, 655 F.3d at 110.

Omnicare altered the *Fait* standard, finding that statements of opinion can be misleading even when a defendant believes a statement at the time it was made. *Omnicare*, 135 S. Ct. at 1328. If a statement of opinion "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion, and if those facts conflict with what a reasonable investor would take from the statement itself," it may be misleading for purposes of Section 10(b) and Rule 10b-5 claims. *Id.* at 1329. The Second Circuit expressly acknowledged this change in standard, and quoted the same language in its order remanding this case to Judge Griesa. *Cox v. Blackberry Ltd.*, 660 F. App'x 23, 26 (Aug. 24, 2016).

With the information from the Dunham Action now incorporated into the SAC, and with the benefit of the *Omnicare* pleading standard, Plaintiffs have made a plausible showing that Defendants public statements in response to the Detwiler Report were in contradiction to the data they allegedly had from Wireless Zone. As the Court stated in its order granting leave to amend, failing to disclose the adverse sales and return data could plausibly be misleading to a reasonable investor. (Dkt. No. 81.) It is plausible from the evidence in the Dunham Action that the Detwiler Report was accurate, and could support the allegation that Defendants had access to this data.

Furthermore, this same newly discovered evidence speaks to the issue of scienter. The requisite state of mind for a Section 10(b) and Rule 10b-5 action is intent to "deceive, manipulate, or defraud." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 (1976)). An inference of scienter can be established by showing that a defendant either had the motive to commit fraud or that a defendant acted with a reckless disregard for the truth. *S. Cherry St., LLC v. Hennessee Grp. LLC*, 573 F.3d 98, 108-09 (2d. Cir. 2009). To make a showing of recklessness, a plaintiff must allege that a defendant had "knowledge of facts or access to information contradicting their public statements" or that they "failed to review or check information that they had a duty to monitor." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

Plaintiffs' new allegations incorporate the evidence from the Dunham Action, and allege that Defendants were in possession of the Wireless Zone data. Thus, it is plausible that Defendants had knowledge of facts that contradicted their public statements, or alternatively, Defendants failed to monitor the relevant information. Plaintiffs have therefore made a sufficient inference of scienter.

In light of the *Omnicare* standard and the information from the Dunham Action, the Court finds that Plaintiffs have made out a plausible claim to relief. Defendants have advanced numerous arguments and put forth evidence outside of the SAC in an attempt to prove they were not in possession of the relevant data, and that therefore their statements were not misleading. These are arguments better left for summary judgment, and the Court does not address their merits at the motion to dismiss stage.

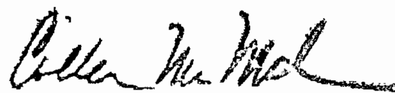
The case will be conferenced under Rule 16 on April 6, 2018 at 10:15 a.m.

CONCLUSION

For the reasons stated above, Defendants' motion to dismiss and request for oral argument are DENIED.

The Clerk of Court is respectfully directed to terminate the motions at Docket Numbers 96, 100, and 114.

Dated: March 19, 2018



Chief Judge

BY ECF TO ALL COUNSEL