UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

#78

CIVIL MINUTES - GENERAL

Case No.	CV 18-7469 PSG (PLAx)	Date	March 13, 2020
Title	Adam Vignola v. FAT Brands, Inc., et al.		

Present: The Honorable	Philip S. Gutierrez, United States District Judge

Wendy Hernandez	Not Reported
Deputy Clerk	Court Reporter
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
Not Present	Not Present

Proceedings (In Chambers): The Court DENIES the motion for class certification

Before the Court is Lead Plaintiffs Charles Jordan and David Kovacs's ("Plaintiffs") motion for class certification. *See* Dkts. # 78, 80 ("*Mot.*"). Defendants FAT Brands, Inc. ("FAT Brands"), Andrew A. Wiederhorn, Ron Roe, Edward Rensi, James Neuhauser, Fog Cutter Capital Group, Inc. ("FCCG") and TriPoint Global Equities LLC ("TriPoint") (collectively, "Defendants") oppose, *see* Dkt. # 88 ("*Opp.*"), and Plaintiffs replied, *see* Dkt. # 90 ("*Reply*"). The Court held a hearing on the matter on March 11, 2020. Having considered the moving, opposing, and reply papers and the arguments made at the hearing, the Court **DENIES** the motion for class certification.

I. Background

A. Factual Background

This is a securities class action brought on behalf of "all persons who purchased FAT Brands common stock pursuant to [its] October 23, 2017 initial public stock offering (the "IPO") that seeks remedies under the Securities Act of 1933 ("the Securities Act"). *Second Amended Complaint*, Dkt. # 61 ("*SAC*"), ¶ 1. Lead Plaintiffs Charles Jordan and David Kovacs, who purchased FAT Brands common stock "pursuant to" the IPO, *id.* ¶¶ 15–16, allege that Defendants, who consist of FAT Brands, some of its executive officers and directors, and its underwriter Tripoint, made false and misleading statements and omitted material facts in connection with IPO, *id.* ¶¶ 2–3.

Defendant FAT Brands is an international restaurant franchising company that develops, markets, and acquires "fast casual" restaurant brands. *Id.* ¶ 17. Plaintiffs allege that beginning in August 2017, FAT Brands embarked on a multi-city roadshow to market the company's

common stock in advance of the IPO. *Id.* ¶ 54. FAT Brands' executives Wiederhorn (CEO) and Roe (CFO), as well as TriPoint, the underwriter, participated. *Id.* ¶¶ 18, 25–27, 31, 54. As part of the roadshow, on September 19, 2017, Wiederhorn and the head of TriPoint conducted a live interactive online webinar that included a video presentation. *Id.* ¶ 55.

In October 2017, the Company conducted its IPO under Regulation A. *See id.* ¶¶ 1, 7. Specifically, FAT Brands' IPO was conducted as a Regulation A+ offering. *Id.* ¶ 7. On October 3, 2017, the Company filed with the SEC its final Registration Statement and an Offering Circular (collectively "Offering Documents" or "Prospectus"), which were signed by Defendants Wiederhorn and Roe. *Id.* ¶ 53. Plaintiffs allege that the Company's board members Defendants Neuhauser and Rensi also effectively signed the Offering Documents because Wiederhorn was acting both in his own capacity as CEO of the Company and separately as attorney-in-fact on behalf of Defendants Neuhauser and Rensi. *Id.* ¶¶ 28 n.4, 53. The Company sold two million shares in the IPO at $12 per share, raising $24 million in total. *Id.* ¶¶ 51, 54. Since the IPO, the price of FAT Brands' common stock has plummeted, and currently trades at less than half its IPO price of $12. *Id.* ¶ 10.

B. Procedural Background

On June 7, 2018, each Defendant in this case, along with certain FAT Brands director nominees, were named as defendants in a putative securities class action entitled *Rojany v. FAT Brands Inc.*, No. BC708539, in Los Angeles Superior Court. *See* Dkt. # 60 ("*June 14 Order*"). In August 2018, a second putative class action suit, *Alden v. FAT Brands, Inc.*, No. BC716017, was filed in the same court naming the same defendants, but was subsequently consolidated with the *Rojany* case. *Id.* The plaintiffs in the consolidated action then filed an amended complaint, which removed the director nominees as defendants, and as a result, the defendants in *Rojany* are now the same as Defendants in this case. *Id.*

On August 24, 2018, Plaintiff Adam Vignola filed this putative class action against Defendants in this Court. *See Complaint*, Dkt. # 1. On November 16, 2018, this Court appointed Charles Jordan and David Kovacs as Lead Plaintiffs pursuant to 15 U.S.C. § 77z-1(a)(3)(A)(i). *See* Dkt. # 48. Plaintiffs subsequently filed a First Amended Complaint. *See* Dkt. # 52.

In March 2019, Defendants moved to dismiss the First Amended Complaint or, in the alternative, to stay the action until the identical state court lawsuit in *Rojany* resolved. *See* Dkt. # 55. On June 14, 2019, the Court denied Defendants' motion to stay, and granted Defendants'

motion to dismiss the First Amended Complaint with leave to amend. *See generally June 14 Order*.

On August 5, 2019, Plaintiffs filed the Second Amended Complaint ("SAC"), the operative complaint, substantially reducing the number of alleged misleading omissions. Plaintiffs brought the following causes of action:

> First Cause of Action: Violation of § 12(a)(2) of the Securities Act of 1933 ("the Securities Act"), against Defendants FAT Brands, FCCG, Wiederhorn, Roe, and Tripoint. *See SAC* ¶¶ 79–84.
>
> Second Cause of Action: Violation of § 15 of the Securities Act, against Defendants FAT Brands, FCCG, Wiederhorn, Roe, Neuhauser, and Rensi. *See id.* ¶¶ 85–92.

On December 17, 2019, the Court granted in part and denied in part Defendants' motion to dismiss the SAC. *See* Dkt. # 76 ("*December 17 Order*"). The Court determined that the SAC failed to allege that FCCG and Roe were statutory sellers under Section 12(a)(2), for the first cause of action. *See id.* at 18. It also dismissed the first cause of action to the extent that it was premised on the alleged omission of FCCG's 2004 NASDAQ delisting. *See id.* It denied the motion to dismiss to the extent that the first cause of action was premised on the 2009 bankruptcies and subsequent delisting. *See id.* The Court "agree[d] with Plaintiffs that the statement, '[w]e believe that our management team has the track record and vision to leverage the FAT Brands platform to achieve significant future growth,' combined with the disclosure of some bankruptcies, absent the omitted information regarding the 2009 bankruptcies and delisting, are adequately pled as misleading." *Id.* at 14.

Lead Plaintiffs now seek to certify a class under Federal Rule of Civil Procedure 23(b)(3). *See generally Mot*. The proposed class is defined as follows:

> All persons and entities who purchased the publicly traded securities of FAT Brands, Inc. ("FAT Brands") pursuant and/or traceable to FAT Brands' October 23, 2017 initial public stock offering (the "Class").
>
> Excluded from the Class are Defendants, all present and former officers and directors of FAT Brands and any subsidiary thereof, members of such excluded persons' families and their legal representatives, heirs, successors or assigns and any entity which such excluded persons controlled or in which they have or had a controlling interest.

Dkt. # 78 at 1.[1] Plaintiffs also request that the Court appoint Lead Plaintiffs Charles Jordan and David Kovacs as Class Representatives and appoint the Rosen Law Firm, P.A. and Kaskela Law LLC as co-Class Counsel. *See id.*

II. Legal Standard

"The class action is an 'exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348–49 (2011) (citing *Califano v. Yamasaki*, 442 U.S. 682, 700–701 (1979)). In a motion for class certification, the burden is on the plaintiffs to make a prima facie showing that class certification is appropriate, *see In re Northern Dist. of Cal. Dalkon Shield IUD Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982), and the Court must conduct a "rigorous analysis" to determine the merit of plaintiffs' arguments, *see Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). A plaintiff cannot merely allege the class certification requirements, instead a plaintiff bears the burden to "affirmatively demonstrate his compliance with the Rule." *Dukes*, 564 U.S. at 350. Plaintiffs must be prepared to "prove" that there are "*in fact*" sufficiently numerous parties or that common questions exist, and frequently this will require some "overlap with the merits of the plaintiff's underlying claim." *Id.* at 350–51. Rule 23 does not, however, grant the court license to "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 466 (2013). "Merits questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *See id.* (citing *Dukes*, 564 U.S. at 351 n.6).

Federal Rule of Civil Procedure 23(a) provides that a class action may proceed only where "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Additionally, plaintiffs must satisfy Rule 23(b)(1), (2), or (3). Here, Plaintiffs contend the proposed class satisfies Rule 23(b)(3), which authorizes certification if "questions of law or fact common to

[1] Defendants argue, and Plaintiffs agree, that the class definition is invalid to the extent it seeks to include in it persons or entities who purchased FAT Brands common stock "traceable to" the IPO, and Plaintiffs "concede that the class definition should be modified to exclude persons or entities who purchased FAT Brands common stock 'traceable to' the IPO." *Opp.* 28:12–25; *Reply* 12 n.9.

class members predominate over any questions affecting only individual members," and "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Courts routinely refer to the Rule 23(b)(3) requirements as "predominance" and "superiority."

III. Judicial Notice

Under Federal Rule of Evidence 201, a court may take judicial notice of facts not subject to reasonable dispute because they (1) are generally known within the court's territorial jurisdiction, or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b).

Defendants have filed a request for judicial notice with respect to SEC filings. *See* Dkt. # 89 ("*RJN*"). Specifically, Defendants request that the Court take judicial notice of the following documents: (1) FCCG's Form 8-K, filed with the Securities and Exchange Commission on April 8, 2009 ("8-K"), *see id.*, Ex. A.; and (2) excerpts of FAT Brands' final Registration Statement filed with the SEC, dated October 23, 2017, *see id.*, Ex. B. SEC filings are proper subjects of judicial notice, because they are "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Fed. R. Evid. 201(b). Courts have held SEC filings to be matters of public record and properly subject to judicial notice. *See Dreiling v. Am. Exp. Co.*, 458 F.3d 942, 946 (9th Cir. 2006) (courts "may consider . . . any matter subject to judicial notice, such as SEC filings"); *Baker v. SeaWorld Entm't, Inc.*, No. 14CV2129-MMA (AGS), 2017 WL 5885542, at *5 (S.D. Cal. Nov. 29, 2017) (taking judicial notice of SEC filings on a motion for class certification). Plaintiffs have not objected to this Court taking judicial notice of these documents. Accordingly, the Court **GRANTS** Defendants' request for judicial notice.

IV. Discussion

Plaintiffs have moved for class certification pursuant to Rule 12(b)(3). *See generally Mot.* In opposition, Defendants argue that Plaintiffs have not met the class certification requirements of Rule 23(b)(3) because they fail to demonstrate that the predominance and superiority requirements are satisfied. *See Opp.* 14.

The Court turns to the predominance requirement of Rule 23(b)(3), and then to superiority and manageability. Because the motion can be conclusively resolved after this analysis, it does not reach the other requirements of Rule 23.

A. Predominance

Rule 23(b)(3) requires that "the questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). The "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623 (1997). "This calls upon courts to give careful scrutiny to the relation between common and individual questions in a case. An individual question is one where members of a proposed class will need to present evidence that varies from member to member, while a common question is one where the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) (citation and internal quotation marks omitted). The predominance inquiry "asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id*.

"Considering whether 'questions of law or fact common to class members predominate' begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). To prove a prima facie Section 12(a)(2) claim, plaintiffs must establish: a prospectus or oral communication that "includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission)." 15 U.S.C.A. § 77*l*(a)(2); 17 C.F.R. § 230.159(c); *see also Miller*, 519 F.3d at 885. To establish a claim under Section 12(a)(2), a plaintiff need not show scienter, reliance, or loss causation. *Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009). The purchaser must not know the omitted fact at the time of the sale, however, this is an "actual knowledge" standard; "[c]onstructive knowledge cannot bar a purchaser's recovery." *Casella v. Webb*, 883 F.2d 805, 809 (9th Cir. 1989) ("[P]urchasers may recover unless they have actual knowledge of the untruth or omission."); *see also Miller*, 519 F.3d at 887 ("[I]nvestors are not generally required to look beyond a given document to discover what is true and what is not.").

Plaintiffs argue that common questions predominate here, specifically, that common questions of law and fact exist with respect to whether the Offering Documents contain misleading statements and/or material omissions. *See Mot.* 14–15. Defendants do not contest that these common issues exist, but argue that predominance is not satisfied here because of individual knowledge issues. *See Opp.* 16–23. Defendants argue that the allegedly omitted information regarding FCCG's Fatburger subsidiaries' 2009 bankruptcy filings, FCCG's

subsequent delisting, and FCCG's ownership and Wiederhorn's role in managing the subsidiaries at the time, was widely reported in print and online media throughout the eight-year period leading up to FAT Brands' IPO, rendering knowledge an individualized issue. *See id*. In support, Defendants attach an expert declaration of Filipe Lacerda of Cornerstone Research, which identifies articles discussing the bankruptcy filings and linking Wiederhorn to those filings in major publications including *Forbes.com*, *Bloomberg Businessweek*, *Entrepreneur.com*, the *Los Angeles Times*, the *Seattle Times*, the *Las Vegas Sun*, and the *Oregonian*. *See Declaration of Filipe Lacerda*, Dkt. # 88-2 ("*Lacerda Decl.*"), Exs. 3, 4. Defendants also argue that the delisting of FCCG's stock from an over-the-counter exchange was a visible and public event. *See Opp.* 18 n.6. Defendants argue that these news articles, over a span of eight years preceding the IPO, from sources with varying readership and reputation and containing varying information, demonstrate that an element of liability is not susceptible to class-wide, generalized proof. *See id.* 18–19.[2]

In many cases, the knowledge of individual class members is not a major hurdle to certification *because* the information allegedly misstated or omitted concerns an IPO issuer's internal financial data or other internal non-public information that would suggest general lack of knowledge. *See, e.g.*, *In re China Intelligent*, 2013 WL 5789237, at *6 (internal financial condition including revenue and profit data). By contrast, here, the allegedly omitted information that rendered the Offering Documents allegedly misleading was public information, reported prior to the IPO. This evidence shows that it is likely that, before investing, some purchasers came upon, or discovered or were exposed to this allegedly omitted information regarding the bankruptcies, requiring individualized inquiries into each class members' alleged lack of knowledge. *See Opp.* 18. Other courts have concluded that in some circumstances individualized issues regarding knowledge can be sufficient to defeat class certification in Section 11 and 12(a)(2) cases. *See, e.g.*, *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 169–70 (S.D.N.Y. 2011) aff'd *New Jersey Carpenters Health Fund v. Rali Series 2006-QO1 Trust*, 477 Fed. App'x. 809, 813 (2d Cir. 2012); *In re Kosmos Energy Ltd. Sec. Litig.*, 299 F.R.D. 133, 151 (N.D. Tex. 2014) (finding predominance defeated where evidence of public information about the alleged production problems showed "individual knowledge inquiries might be necessary").

[2] Plaintiffs object to Defendants' expert report on a few evidentiary grounds. *See* Dkt. # 91. The Court does not find these objections persuasive, and accordingly **OVERRULES** these objections, and will consider the expert report and attached articles.

Plaintiffs respond by arguing that Defendants have not proffered any evidence of actual knowledge of any putative class members, and cite to cases concluding that arguments regarding individualized knowledge absent a showing of actual knowledge of class members are insufficient to defeat certification in Section 11 and 12(a)(2) cases. *See Reply* 4–6. However, many of these cases are distinguishable in that they involve misstatements and omissions relating to information that is internal, not widely publicly available. *See, e.g.*, *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co. Inc.*, 277 F.R.D. 97, 119 (S.D.N.Y. 2011) (action regarding sale of mortgage pass-through certificates, alleging untrue statements and omissions regarding the defendants' underwriting standards, maximum loan-to-value ratios used by defendants to qualify borrowers, appraisals of properties underlying the mortgages, debt-to-income ratios permitted on the loans, and ratings of the certificates); *New Jersey Carpenters Health Fund v. Royal Bank of Scotland Grp.*, PLC, No. 08-CV-5310 (DAB), 2016 WL 7409840, at *8 (S.D.N.Y. Nov. 4, 2016) (action regarding sale of mortgage backed securities, alleged misstatements and omissions regarding defendants' abandonment of its underwriting guidelines); *Tsereteli v. Residential Asset Securitization Tr. 2006-A8*, 283 F.R.D. 199, 214 (S.D.N.Y. 2012) (action regarding sale of mortgage backed securities, alleged misleading statements and omissions relating to underwriting standards). Unlike those cases, Defendants' evidence here convincingly suggests that knowledge issues as to this publicly available and widely known omitted information would require individualized inquiries.

Moreover, Plaintiffs have not proffered a viable method by which to test knowledge on a class-wide basis with common proof. In their briefing and at the hearing, Plaintiffs argued that knowledge issues are subject to common proof because the Court "could use a representative sample of class members, basic interrogatories," "a simple box to check to inquire as to individual class members' knowledge," surveys, or sampling. *See Reply* 11–12. But the Court is not convinced that these methods would adequately address the potential individualized knowledge of class members, given that Defendants may need to depose or cross-examine purchasers. Plaintiffs have not proffered any other viable way to handle the potential for numerous individualized inquiries regarding knowledge.

Ultimately, it is Plaintiffs' burden to demonstrate the predominance requirement is satisfied. Plaintiffs must "affirmatively demonstrate [their] compliance with the Rule," and the Court must conduct a "rigorous analysis" to determine the merits of Plaintiffs' arguments. *See Dukes*, 564 U.S. at 350; *Gen. Tel. Co. of Sw.*, 457 U.S. at 147. Although Plaintiffs have pointed to common issues that exist by virtue of the fact that this is a Section 12(a)(2) action, Plaintiffs have not provided sufficient evidence to carry their burden to affirmatively demonstrate that common issues predominate over individualized lack of knowledge issues. The Court cannot

conclude that the "common, aggregation-enabling issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Tyson Foods, Inc.*, 136 S. Ct. at 1045.

Accordingly, the Court concludes that based on the evidence presented, the predominance requirement is not satisfied.

B. Superiority: Difficulties in Managing a Class Action

Under the superiority requirement of Rule 23(b)(3), a plaintiff must show that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). As part of this analysis, the Court must consider "the likely difficulties in managing a class action." *Id.* "[W]hen the complexities of class action treatment outweigh the benefits of considering common issues in one trial, class action treatment is not the 'superior' method of adjudication." *Zinser v. Accuflix Research Inst., Inc.*, 253 F.3d 1180, 1193 (9th Cir. 2001).

Defendants argue that burdensome, individualized mini-trials are necessary to resolve the "lack-of-knowledge" issue and would pose serious manageability problems. *See Opp.* 27–28. Plaintiffs respond that to the extent any individualized issues regarding knowledge are necessary, they can be resolved through basic interrogatories, and other methods described above. *See Reply* 12. As discussed, the Court is not convinced that Plaintiffs' suggestion of interrogatories adequately solves manageability concerns. Resolving liability here will require the resolution of investor-specific factual issues. It is thus unclear that aggregation of claims would result in reducing litigation costs or promoting efficiencies, given the potential difficulties of the knowledge inquiry required for establishing liability. The Court concludes that this factor, too, weighs against certification.

V. Conclusion

For the foregoing reasons, the Court **DENIES** Plaintiffs' motion for class certification.

IT IS SO ORDERED.