Labourers' Pension Fund of Cent. & E. Can. v CVS Health Corp.
2020 NY Slip Op 31730(U)
June 1, 2020
Supreme Court, New York County
Docket Number: 651700/2019
Judge: Andrea Masley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY PART IAS MOTION 48EFM

Justice

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LABOURERS' PENSION FUND OF CENTRAL AND EASTERN CANADA, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

- v -

CVS HEALTH CORPORATION, LARRY MERLO, DAVID DENTON, and EVA BORATTO,

Defendants.

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INDEX NO. 651700/2019

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 62, 63, 64, 65, 66, 79, 80, 81, 82, 96, 97, 99, 100, 104, 105, 106, 108, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for DISMISSAL.

In motion sequence number 001, defendant CVS Health Corporation (CVS) and defendants Larry J. Merlo, David M. Denton, and Eva C. Boratto (collectively, Individual Defendants) move to dismiss the complaint pursuant to CPLR 3211 (a) (1), (4) and (7), and alternatively, move to stay this action pursuant to CPLR 2201 and 3211(a)(4).

I. Background

The following facts are alleged in the complaint unless noted otherwise, and for purposes of this motion, are accepted as true.

CVS, a Delaware corporation located in Rhode Island, operates retail pharmacies. (NYSCEF Doc. No. [NYSCEF] 1, Complaint ¶ 24.) This case concerns the interplay between CVS's May 2015 acquisition of nonparty Omnicare, which was then the nation's

largest provider of pharmacy services to long-term care facilities (2015 Acquisition) and CVS's acquisition of nonparty Aetna Inc. (Aetna), an insurance company, on November 28, 2018 (Aetna Acquisition). (*Id.* ¶¶ 24, 32, 86.) CVS issued new shares of CVS common stock directly to Aetna shareholders, including plaintiff Labourers' Pension Fund of Central and Eastern Canada (LBF), a pension plan to 99,160 employees. (*Id.* ¶ 23.)

In December 2017, CVS announced its decision to acquire Aetna. (*Id.* ¶ 54.) CVS filed an amended registration statement for the Aetna Acquisition on February 9, 2018, incorporating its annual and quarterly reports. (*Id.* ¶¶ 8, 59–61.) The Individual Defendants allegedly reviewed, contributed to, and signed the registration statement at issue here. (*Id.* ¶¶ 25-27.) Defendant Larry J. Merlo, a resident of Rhode Island, was the Chief Executive Officer and a director on the CVS board of directors. (*Id.* ¶ 25.) Defendant David M. Denton, a resident of New York, served as Executive Vice President and Chief Financial Officer of CVS from January 1, 2010 until November 2018. (*Id.* ¶ 26.) Defendant Eva C. Boratto, a resident of Pennsylvania, served as Chief Accounting Officer and Controller of CVS from July 10, 2013 until November 2018, when she was promoted to Chief Financial Officer. (*Id.* ¶ 27.) The Aetna Acquisition closed on November 28, 2018, nine months after CVS filed its registration statement and 10-K. (*Id.* ¶ 86.)

CVS represented the 2015 Acquisition as a significant expansion of CVS's business into pharmaceutical care for assisted living and long-term care (LTC) facilities. (*Id.* ¶ 32.) Plaintiff alleges that defendants painted a rosy picture of the 2015 Acquisition until the Aetna Acquisition closed, at which point CVS finally disclosed an overhaul of Omnicare's management, new financial projections, and booked an impairment of over $6 billion, or

93% of Omnicare's goodwill value, for issues that existed for years. (*Id.* ¶ 6, 87). CVS's stock price plunged 28%. (*Id.* ¶ 91.)

Plaintiff alleges that the registration statement and prospectus (together, Registration Statement) issued to facilitate the Aetna Acquisition were materially misleading. (*Id.* ¶8). Specifically, plaintiff alleges that the Registration Statement contained four categories of misleading statements and omissions, including: (1) CVS's goodwill; (2) CVS's loss of clients and inability to win new business; (3) solvency of CVS's customers; and (4) integration and success of prior CVS acquisitions. (*Id.* ¶¶ *9-17.*)

On February 25, 2019, Janak Anarkat filed a class action, on behalf of all persons who purchased or otherwise acquired CVS securities between May 21, 2015 and February 20, 2019, against defendants CVS, Merlo, and Denton in the Southern District of New York (Federal Action). (NYSCEF 65, Federal Complaint at 1.) Anarkat alleges that CVS made false and or misleading statements concerning CVS's financial condition and expected earnings when they were deteriorating as a result of rising costs and poor results associated with the 2015 Acquisition. (*Id.* ¶ 6.) Because of these misrepresentations, "the market price of CVS ... securities was artificially inflated", and therefore, the class purchased CVS securities at "artificially inflated prices." (*Id.* ¶¶ 58, 14.) Anarkat alleges in Count I violations of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 and in Count II violations of Section 20(a) of the Securities Exchange Act of 1934. (*Id.* ¶¶ 53, 67.)

On March 22, 2019, nearly a month after the Federal Action was filed, and apparently with actual knowledge of the Federal Action, plaintiff filed this class action[1] against CVS, Merlo, Denton and Boratto in the Commercial Division of Supreme Court, NY County. (*See*

[1] The court uses "plaintiff" since the class has yet to be certified.

NYSCEF 1, Complaint ¶ 21.) Plaintiff alleges violations of Section 11, 12(a)(2) and 15 of the Securities Act of 1933 against the defendants in this action. (*Id.* ¶¶ 98-124.) Plaintiff alleges four categories of materially false or misleading statements or omissions: (1) CVS's goodwill to the extent that the Registration Statement informed investors that there was no reason to believe a write down of the goodwill attributable to Omnicare was necessary when in reality the skilled nursing industry was under siege and CVS' accounts receivable were improperly booked (2) the Registration Statement failed to disclose risks that already materialized to the extent that Omnicare had lost 10 percent to 25 percent of its LTC customers since its acquisition by CVS; (3) the Registration Statement disclosures "failed to disclose that Omnicare had struggled to collect on outstanding accounts receivable or continued to book accounts receivables that should have already been written off;" and (4) CVS warned that it "may be unable to successfully integrate companies" that it acquired such as Omnicare at a time when Omnicare had already underperformed and severely contracted. (*Id.* ¶¶ 10-16.)

On July 22, 2019, Anarkat filed an amended complaint in the Federal Action. (NYSCEF 100, Amended Federal Complaint.) The 137-page Amended Federal Complaint largely expands on the 1934 Act claims alleged in the first complaint and includes Boratto as a defendant in addition to other individuals. (*Id.* at p.1.) It provides more specific allegations that indicate how integral the Aetna Acquisition is to the Federal Action. For instance, the Federal Amended Complaint states that "Defendants knew that the Aetna Acquisition was essential to [CVS'] survival ... Defendants thus embarked on a plan to dribble out incomplete disclosures of the problems in the Omnicare LTC unit so that the acquisition of Aetna could proceed." (*Id.* ¶ 17.) Allegedly, once the Aetna Acquisition was complete, "[CVS] finally told investors that all of the goodwill for the Omnicare LTC business was more or less gone."

(*Id.* ¶ 208.) The Federal Amended Complaint also narrows the class to individuals who purchased CVS securities "between February 9, 2016 and February 20, 2019." (*Id.* ¶ 1.)[2]

Defendants, here, now move to dismiss the complaint on the ground that this case is purportedly duplicative of this litigation pending in the Federal Action or, in the alternative, because plaintiff allegedly fails to state a viable cause of action.

II. Discussion

A. Stay

Defendants' motion to stay this action is denied. A trial court's decision to stay an action under CPLR 2201 is discretionary. (*See GE Oil & Gas, Inc. v Turbine Generation Servs., L.L.C.*, 140 AD3d 582, 583 [1st Dept 2016].) The following factors are relevant to the court's determination as to whether to stay an action: (1) which forum will offer a more complete disposition of the issues; (2) which forum has greater expertise in the type of matter; (3) which action was commenced first and the stage of the litigations; (4) whether "there is substantial overlap between the issues raised" in each court; (5) whether a stay will avert "duplication of effort and waste of judicial resources;" and (6) whether plaintiffs have demonstrated that they would be prejudiced by a stay or that there is a risk of inconsistent rulings. (*Asher v Abbott Labs*, 307 AD2d 211, 211-212 [1st Dept 2003] [Reversing the trial court by staying the state court action brought under the Donnelly Act in favor of federal action which state claims were encompassed by federal anti-trust claims].)

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[2] Subsequent to the submission of this motion, the SDNY transferred the Federal Action to the District of Rhode Island where a stay in favor of this action was denied. (NYSCEF 109, Order at 3.) A motion to dismiss is now pending before that court. (Westlaw Docket, *Anarkat v CVS Health Corporation et al,* 1:19 CV00437/2019).

Defendants make no arguments concerning these factors in connection with their request for a stay. Nevertheless, the court assumes the first factor is neutral in light of defendants' failure to submit arguments on this point. The second factor weighs against granting a stay because this court, sitting in the Commercial Division of New York County, certainly has experience applying various bodies of law including federal law as it pertains to securities cases and defendants provide no information as to the United States District Court in Rhode Island. (*Kirkland v Wideopenwest, Inc.*, 2020 NY Slip Op 31529[U] [Sup Ct, NY County 2020]; *Antipodean Dom. Partners, LP v Clovis Oncology, Inc.*, 2018 NY Slip Op 30809[U] [Sup Ct, NY County 2018]; *Trueblood v Culp*, 2019 NY Slip Op 32091[U] [Sup Ct, NY County 2019]; *Gemmel v Immelt*, 2019 NY Slip Op 32005[U] [Sup Ct, NY County 2019]; *Hoffman v AT&T Inc.*, 2019 NY Slip Op 2578360[U], *2 [Sup Ct, NY County 2019]["The liability issues in a 1933 Act case are, if anything, less complex than issues the Commercial Division resolves every week."].)

The third factor weighs against granting a stay. While the Federal Action was filed almost one month before this case, that factor is less meaningful here because the cases are currently at the same stage: awaiting decisions on motions to dismiss with no apparent discovery.[3] There is no argument that anything prejudicial occurred during that 30 days.[4] Indeed, while this case proceeded to submission of this motion to dismiss, the Federal Action was transferred to the United States District Court in Rhode Island. While significant, the first to file is not dispositive. (*Certain Underwriters at Lloyds, London v Millennium*

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[3] Discovery in the Federal Action was automatically stayed pursuant to PSLRA, 15 USC § 77z-1(b)(1). Defendants' motion to stay discovery was granted pending this decision. (NYSCEF 101, Tr. at 53:16.)

[4] The court must also recognize the impact of the COVID pandemic on this action, the Federal Action and all litigation.

Holdings LLC, 13 Misc 3d 1204[A], 2006 NY Slip Op 51678[U], *7 [Sup Ct, NY County 2006], *affd* 44 AD3d 536 [1st Dept 2007].) Moreover, strict adherence to the "first to file rule creates perverse incentives" such as a race to the courthouse, as defendants repeatedly assert. (*Matter of NYSE Euronext Shareholders/ICE Litig.*, 39 Misc 3d 619, 624 [Sup Ct, NY County 2013].) However, this is not a case of gamesmanship to avoid the consequences in the Federal Action where the first to file rule has been enforced to punish such misbehavior. (*See Gordon v Gridsum Holdings, Inc.*, 2019 WL 1593484, *1 [Sup Ct, NY County 2019][plaintiffs' counsel participated in the federal proceeding but was not selected as lead counsel; state case stayed because it would be "end-run" around federal adjudication]; *Matter of Qudian Sec. Litig.*, 2018 NY Slip Op. 32919[U], *1-3 [Sup Ct, NY County 2018][state case stayed because it was filed after plaintiff's counsel lost its bid to be lead counsel in federal court].) Rather, plaintiff reasonably explains that it brought this action after the Federal Action because the 1933 claims were absent from the Federal Action. Indeed, for this reason, the Federal Action is not the first in time since it was not the first to raise a 1933 Act claim; there is no such claim in the Federal Action. (*See Walsh v Goldman Sachs & Co.*, 185 AD2d 748, 749 [1st Dept 1990] [Both CPLR 2201 and 3211 (a) (4) require same or similar claims].) Therefore, this action and the Federal Action concern different claims under different statutes. (*Id.* ["different statutes are involved; in the Federal court, the ADEA, and in the State court, the Human Rights Law."].)

The fourth factor weighs against granting a stay. Contrary to defendants' claim, both actions are not premised on the same statements or omissions. Here, plaintiff asserts false statements and omissions in four categories, including goodwill, loss of customers, customer solvency, and acquisition integration. (NYSCEF 1, Complaint ¶¶ 67-80). In the Federal Action, Anarkat alleges false statements in a May 2015 press release about the

acquisition of Omnicare regarding the purported benefits of the 2015 Acquisition. (NYSCEF 100, Amended Federal Complaint ¶¶ 85.) The nature of the relief sought in both actions is not substantially the same either. Unlike the Federal Action where the remedy for the claims under the 1934 Act is only damages, under the 1933 Act, "[a] Section 12 action operates much like an 18th century action at equity for rescission." (*Fed. Hous. Finance Agency v Nomura Holding Am., Inc.*, 873 F3d 85, 135 [2d Cir 2017], *cert denied* 138 S Ct 2679 [2018].) Moreover, "[t]he Supreme Court and [the Second Circuit] have recognized that a Section 12 (a) (2) action is the Securities Act equivalent of equitable rescission." (*Id.*)

The fifth factor weighs against granting a stay. Again, defendants offer no argument on this point but a stay will not avert duplication of efforts or waste of judicial resources because the claims are different and both sets of claims will be adjudicated. Duplication of efforts or waste is also not a concern because the parties and courts can cooperate as they do in so many other sophisticated securities cases. (*Matter of NYSE Euronext Shareholders/ICE Litig.*, 39 Misc 3d 619, 626 [Sup Ct, NY County 2013] ["Comity and fairness dictate that the courts, instead, cooperate to ensure efficient coordination by the parties and the courts."].)

The sixth factor weighs against granting a stay. Defendants have not even addressed these factors let alone demonstrated that they will be prejudiced without a stay. Any risk of inconsistent rulings is mitigated by the cooperation between the courts and the parties.

Lastly, defendants' sole argument that courts of concurrent jurisdiction have granted stays in similar situations is not persuasive because granting a stay, as already discussed, is a matter of discretion. It is no surprise that different judges have exercised their discretion differently when considering different factual scenarios and different arguments.

B. Another Pending Action

Likewise, dismissal is denied under CPLR 3211 (a) (4) which provides:

> "[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: there is another action pending between the same parties **for the same cause of action** in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires."

(CPLR 3211 [a] [4] [emphasis added].) The court has "broad discretion in considering whether to dismiss an action." (*Whitney v Whitney*, 57 NY2d 731, 732 [1982].) As discussed above, the two actions concern two different sets of claims pursuant to two different statutes. (*See Walsh v Goldman Sachs & Co.*, 185 AD2d at 749 [citation omitted].) Again, the relief sought in the Federal Action does not include rescission which is permitted under the 1933 Act here. (*Compare id.* ["the relief plaintiff seeks in the Federal action does not include compensatory damages for personal injuries, which are permitted pursuant to the New York Human Rights Law"].) Accordingly, the relief requested is not substantially the same. That Anarkat could have included a 1933 Act claim in the Federal Action, but did not, "'is not a sufficient basis upon which to justify dismissal.'" (*Morgulas v Yudell Realty*, 161 AD2d 211, 213 [1st Dept 1990].)

Furthermore, while defendants are correct that the 1933 Act and the 1934 Act are similar, "[s]ection 11 and Section 10(b) address different types of wrongdoing" and "'[t]he fact that there may well be some overlap is neither unusual nor unfortunate.'" (*Herman & MacLean* v *Huddleston*, 103 S Ct 683, 687-688 [1983] [citation omitted].) Congress saw fit to enact *both* statutes "in the wake of the 1929 stock market crash" and *together* they "create an extensive scheme of civil liability." (*Cent. Bank of Denver v First Interstate Bank of Denver, N.A.*, 114 S Ct 1439, 1445 [1994] [citations omitted].) Accordingly, the court

rejects defendants' position that an earlier filed 1934 Act claim mandates the dismissal of a related 1933 Act claim pursuant to CPLR 3211 (a) (4). On the contrary, "the remedies in each Act were to be supplemented by 'any and all' additional remedies" and "[a] cumulative construction of the securities laws also furthers their broad remedial purposes." (*Herman*, 103 S Ct at 688-689.) The conclusion that defendants promote would ignore the different contours of these statutes and render the 1933 Act meaningless when Congress clearly saw a reason to distinguish the statutes and provide investors with alternate methods of recourse. (*Id.*)

Furthermore, there is good reason to commence separate actions for1933 Act claims as opposed to 1934 Act claims. For instance, "[n]either scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims." (*Panther Partners Inc. v Ikanos Communications, Inc.*, 681 F3d 114, 120 [2d Cir 2012].) Moreover, "Section 11 places a relatively minimal burden on a plaintiff" whereas "Section 10(b) is a 'catchall' antifraud provision, but it requires a plaintiff to carry a heavier burden to establish a cause of action." (*Herman*, 103 S Ct at 687.)

Again, this is not a case of apparent gamesmanship which should result in a dismissal of the state action. (*Syncora Guar. Inc. v JP Morgan Sec. LLC*, 110 AD3d 87, 92 [1st Dept 2013] [subsequent state action dismissed where it was filed alleging same claims that federal court had dismissed as untimely]; *Shah v RBC Capital Mkts. LLC*, 115 AD3d 444, 444 [1st Dept 2014] [2013 case dismissed where plaintiff filed the case to overcome its failure to timely amend the 2011 action].)

Accordingly, this court will not deprive plaintiffs of their right to redress the alleged violations of the 1933 Act because there are 1934 Act claims pending in Rhode Island.

C. Sufficiency Of The Allegations

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) However, factual allegations "that consist of bare legal conclusions, as well as factual claims which are either inherently incredible or flatly contradicted by documentary evidence" cannot survive a motion to dismiss. (*Summit Solomon & Feldesman v Lacher*, 212 AD2d 487, 487 [1st Dept 1995] [citation omitted].)

As a preliminary matter, defendants attack plaintiff's reliance on former employees as sources of information. However, on this motion, the court is "limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious [claim]." (*Major League Soccer, LLC. v. Fed. Ins. Co.*, 2014 WL 5431173, *2 [Sup Ct, NY County 2014]; *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) Of course there are scenarios when plaintiffs may well have to allege facts "in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged." (*Novak v Kasaks*, 216 F3d 300, 314 [2d Cir], *cert denied* 531 US 1012 [2000].) But this is not one of those scenarios. Plaintiff's failure to describe the employees' positions or tenure is not fatal especially because the specific content of the employee statements raises the inference that the employees were high-level with access to relevant confidential internal information. For instance, plaintiff identifies the employees as Omnicare or CVS employees (NYSCEF 1, Complaint ¶¶ 39-43 and p.1) and add that

> "According to a former employee, under CVS's direction, Omnicare did not relieve the bad debt that should have been relieved. The former employee stated that Karen Dailey refused to write-off accounts receivable for several accounts that had supporting documentation showing overstated accounts receivables.
>
> Overall, the former employee believed Omnicare had millions of dollars of overstated accounts receivables. In addition, the former employee stated that Omnicare had another $14 million in questionable receivables which had to be corrected."

(NYSCEF 1, Complaint ¶¶ 44-45.)

Dismissal based on plaintiff's reliance on confidential witnesses is denied.

1. Section 11

To state a cause of action under Section 11 of the Securities Act, plaintiff must allege that "the registration statement ... contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." (15 USC § 77k[a].)

Here, the statements made in the Registration Statement relating to goodwill impairment must be analyzed under the U.S. Supreme Court's decision in *Omnicare, Inc. v Laborers District Council Construction Industry Pension Fund,* 135 S Ct 1318 (2015). (*See Tongue v Sanofi,* 816 F3d 199, 209-210 [2d Cir 2016] [noting that *Omnicare* altered the standard for assessing opinion statements previously articulated by the Second Circuit].) Under *Omnicare*, CVS's statement—"[t]he carrying value of goodwill ... was $38.5 billion ... as of December 31, 2017"—is actionable.

The court rejects defendants' contention that because plaintiff disclaims "scienter or fraudulent intent," the complaint cannot satisfy *Omnicare*. First, *Omnicare* does not conflict with earlier cases because the buyer need not prove (as he must to establish certain other securities offenses) that the defendant acted with any intent to deceive or defraud. (*Herman & MacLean* v *Huddleston*, 103 S Ct 683 [1983].) Rather, courts have consistently held that

a Section 11 claim can disclaim any fraud-based theory while also pleading that opinion statements were disbelieved. (*See Matter of MF Glob. Holdings Ltd. Sec. Litig.*, 982 F Supp 2d 277, 310-311 [SD NY 2013] ["to require proof that an opinion was subjectively disbelieved does not also require proof of fraudulent intent ... [a] complaint can plead that opinions were subjectively disbelieved when made while not also sounding in fraud"].)

Defendants assert that the challenged statements regarding goodwill and the adequacy of loan loss reserves were matters of opinion and are not actionable because plaintiff failed to allege that those opinions were not truly held at the time they were made. However, plaintiff alleges facts that suggest that defendants likely did not believe the opinions expressed in the Registration Statement, because such opinions were based on completely contrary knowledge of which defendants were in possession at the effective date of the Registration Statement (February 9, 2018) (NYSCEF 1, Complaint ¶¶ 10, 11, 12, 13, 14, 15, 16, 17, 18, 39, 40, 41, 42, 43, 44, 45.) Indeed, a reasonable investor would have expected that the goodwill projections fairly aligned with the information in defendant's possession at the time. (*Omnicare,* 135 S Ct 1318.) Further, plaintiff's allegation that defendants' failure to conduct a goodwill impairment test closer in time to the effective date of the Registration Statement rendered the statements about Omnicare's goodwill in the Registration Statement materially false and misleading because the condition of Omnicare that existed at the time of the Registration Statement was falsely portrayed may support a finding that defendants did not believe the opinions in the Registration statement. (NYSCEF 1, Complaint ¶ 70.) For example, the Registration Statement's warning that the "LTC reporting unit could be below our current expectations in the near term and the LTC reporting unit could be deemed to be impaired by a material amount" may be materially

false and misleading because "the near term" and potential impairment had already occurred. (*Id.* ¶ 71.)

Therefore, plaintiff has stated a viable cause of action under Section 11 of the 1933 Act because the goodwill statements made in the Registration Statement allegedly contained embedded statements of untrue facts and the opinions expressed may have not been sincerely held by defendants.

Defendants also seek safe harbor under the PSLRA which immunizes certain forward-looking statements accompanied by meaningful cautionary language. Plaintiff insists the challenged statements cannot be forward-looking because the risks already existed and were known to defendants. The statute defines as forward-looking, "statement[s] containing a projection of revenues, income (including income loss), earnings (including earnings loss) ... or other financial items," "statement[s] of the plans and objectives of management for future operations," "statement[s] of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management," as well as "any statement of the assumptions underlying or relating to" the foregoing. (15 USC § 77z-2 [i] [1].)

Defendants contend that CVS's opinions concerning potential goodwill impairment are classic forward-looking statements because CVS used the terms "projections," "forecasts," and "expectations" about the future performance of the LTC business unit. (NYSCEF 13, MD&A at 22; NYSCEF 14, 10-K, Annual Report.) CVS qualified all of its statements concerning operating performance as forward-looking. For example, statements addressing operating performance began with "that the Company expects or anticipates will occur in the future," including "LTC pharmacy business, sales trends and operations."

(NYSCEF 13, MD&A at 24.) CVS warned that "[i]f we do not achieve our forecasts ... it is reasonably possible that the operational performance of the LTC reporting unit could be deemed to be impaired by a material amount." (*Id.* at 22.)

Plaintiff's allegations regarding the statements and omissions concerning goodwill are enough to avoid the safe harbor. Plaintiff alleges they were not forward-looking and were rendered false by then-existing conditions, e.g., the "'exodus' of Vice Presidents because CVS was 'killing the [Omnicare] business,'" the "'significant' loss of '10-25%' of [Omnicare's] customers," and the fact that "'a growing number of [skilled nursing facilities were] approaching insolvency.'" (NYSCEF 1, Complaint ¶¶ 40, 41, 48.) The safe harbor provision, by its own terms, does not apply to misrepresentations and omissions of present and historical facts. (15 U.S.C. § 77z-2 [i] [1].) Plaintiff alleges that these facts were known to defendants based on statements from former employee statements and industry conditions. (NYSCEF 1, Complaint ¶¶ 38-53.) In a 1933 Act case, "actual knowledge" need not be proven now; rather, plaintiff need only plead an "inference" of knowledge. (*See Matter of CPI Card Grp. Inc. Sec. Litig.*, 2017 WL 4941597, *4 [SD NY 2017] ["admitted awareness of the trend so soon after the IPO, while certainly not dispositive, supports a claim of pre-IPO knowledge"].) Likewise, risk warnings or cautionary warnings are not enough for safe-harbor protection where defendants fail "to disclose the risk has already transpired." (*Matter of Van de Moolen N.V. Sec. Litig*, 405 F Supp 2d 388, 400 [SD NY 2005] [citation omitted].)

Finally, defendants insist that their disclosure of known trends is sufficient to satisfy Item 303 and 503. "While it is true that Section 11 claims generally do not require pleading scienter, Item 303's requirement of knowledge requires that a plaintiff plead, with some

specificity, facts establishing that the defendant had actual knowledge of the purported trend." (*Blackmoss Invs. Inc. v Aca Capital Holdings, Inc.*, 2010 WL 148617, *9, 2010 US Dist LEXIS 2899, *24 [SD NY 2010] [citations omitted].) Similarly, "Item 503 requires that certain filings 'provide under the caption Risk Factors a discussion of the most significant factors that make the offering speculative or risky.'" (*Matter of Lions Gate Entmt. Corp. Sec. Litig.*, 165 F Supp 3d 1, 21 [SD NY 2016] [internal quotation marks and citation omitted].)

Defendants argue that CVS explained the basis for its goodwill opinion, which expressly included a recognition of negative trends impacting its long-term care business. CVS cautioned: "If we do not achieve our forecasts, given the small excess of fair value over the related carrying value, as well as the current market conditions in the healthcare industry, it is reasonably possible that the operational performance of the LTC reporting unit could be below our current expectations in the near term and the LTC unit could be deemed to be impaired by a material amount." (NYSCEF 13, MD&A at 22.) Defendants insist that no investor could have been misled as to how CVS formed its goodwill opinion. Rather, defendants assert that plaintiff's claim is nothing more than a hindsight-driven disagreement with CVS's subjective judgments, which the law forbids.

Plaintiff alleges that defendants violated their affirmative obligations under Items 303 and 503 to disclose that the skilled nursing industry was "under siege" with the two largest skilled nursing companies nearing bankruptcy, Omnicare had struggled to collect on outstanding accounts receivables, and Omnicare had already lost 10-25 percent of its LTC customers. (NYSCEF 1, Complaint ¶¶ 69-74, 76, 78, 80.) Because the complaint need only, at most, allege facts to create an inference that the trend or uncertainty was "known" at

the time of the offering, nothing more is required to state a claim under Item 303. (*See CPI Card Grp.*, 2017 WL 4941597 at *4.)

Likewise, in order to state an Item 503 claim, plaintiffs need only allege that the Registration Statement omitted company-specific disclosures regarding existing factors that made the offering speculative or risky. (*City of Roseville,* 814 F Supp 2d 395, 426 [SD NY 2011].)

2. Section 12(a)(2)

Because the court finds that plaintiff states a viable cause of action under Section 11, it follows that the Section 12 cause of action is at least substantively viable. (*See e.g. Matter of Lone Pine Res., Inc.,* 2014 WL 1259653, *6 [SD NY 2014] [Plaintiff's failure to state a cause of action under Section 11 would defeat the Section 12 cause of action].)

However, defendants argue that the alleged misstatements could not have caused plaintiff's Section 12 losses because CVS disclosed new information between March and November 2018. Section 12 (a) (2) requires "an untrue statement of a material fact or omi[ssion] 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." (5 USC § 77l [a] [2].) Such claims accrue from the date of sale, or when "the parties obligate ... themselves to perform what they have agreed to perform even if the formal performance of their agreement is to be after a lapse of time." (*Footbridge Ltd. Tr. v Countrywide Fin. Corp.,* 770 F Supp 2d 618, 623 [SD NY 2011] [internal quotation marks and citation omitted].) Defendants insist that November 28, 2018—the date the Aetna Acquisition closed—is the "date of sale" for purposes of the Section 12 (a) (2) claim. That date is the day on which former Aetna shareholders received CVS common stock pursuant to the Registration

Statement. Plaintiff focuses on when the parties "committed" to the Aetna Acquisition. According to plaintiff, the Aetna shareholders committed to the Aetna Acquisition more than eight months earlier on March 13, 2018, when they voted to approve the Aetna Acquisition. (NYSCEF 1, Complaint ¶ 81.) But "plaintiffs bringing claims under sections 11 and 12(a)(2) need not allege ... loss causation." (*N.J. Carpenters Health Fund* v Royal Bank of Scotland Group, PLC, 709 F3d 109, 120 [2d Cir 2013] [internal quotation marks and citation omitted].) "Rather, defendants bear the burden of 'negating' causation, an affirmative defense sometimes referred to as "negative causation.'" (*Matter of Fuwei Films Sec. Litig.*, 634 F Supp 2d 419, 444 [SD NY 2009].) The court agrees with plaintiff that any question about that "commitment" is a question of fact not appropriately resolved at this early stage. Rather, the affirmative defense of negative causation "is more properly considered [at] summary judgment." (*Id.*)

Finally, the Individual Defendants challenge whether they are "statutory sellers." Plaintiff alleges that each Individual Defendant "reviewed, contributed to, and signed the Registration Statement." (NYSCEF 1, Complaint ¶¶ 25-27.) Such allegations are "particularly 'significant for purposes of finding that a [person] is a seller.'" (*Matter of Vivendi Universal, S.A. Sec. Litig.*, 381 F Supp 2d 158, 187 [SD NY 2003] [citation omitted].) In addition, plaintiff pleads that the Individual Defendants promoted, offered, and sold CVS common stock to plaintiff and other class members for the benefit of themselves and their associates. (NYSCEF 1, Complaint ¶ 113). Here too, "'whether an individual is a seller under section 12 is a question of fact, not properly decided on a motion to dismiss.'" (*Primo v Pac. Biosciences of Cal., Inc.*, 940 F Supp 2d 1105, 1126 [ND Cal 2013] [internal quotation marks and citation omitted].)

3. Section 15

Defendants do not contest that each of the Individual Defendants was an officer or director of CVS who signed the Registration Statement. (*See City of Westland Police & Fire Ret. Sys. v. Metlife, Inc.*, 928 F Supp 2d 705, 721 [SD NY 2013] ["Directors and officers who sign registration statements ... are presumed" to be control persons].) Thus, the Section 15 claim must survive dismissal because plaintiff sufficiently alleges CVS's primary violation of Sections 11 and 12(a)(2). (*Id.* at 720.)

The court has considered the balance of plaintiff's arguments and they do not demand a different result.

Accordingly, it is

ORDERED that the motion of defendants CVS Health Corporation, Larry J. Merlo, David M. Denton, and Eva C. Boratto to dismiss the complaint is denied; and it is further

ORDERED that defendants are directed to answer the complaint within 20 days of this decision and order's entry onto NYSCEF by the court; and it is further

ORDERED that that the parties shall meet and confer and submit a proposed preliminary conference order to the court via email (SFC-Part48@nycourts.gov) 20 days after defendants' answer is filed.

6/1/2020
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL		
APPLICATION:	☐	GRANTED	☒ DENIED	☐	GRANTED IN PART	☐	OTHER
CHECK IF	☐	SETTLE		☐	SUBMIT ORDER		
	☐	INCLUDES		☐	FIDUCIARY	☐	REFERENCE