Nuveen Winslow Large-Cap Growth ESG Fund v Lu
2021 NY Slip Op 32594(U)
December 7, 2021
Supreme Court, New York County
Docket Number: Index No. 655177/2020
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART**

Justice

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NUVEEN WINSLOW LARGE-CAP GROWTH ESG FUND, NUVEEN WINSLOW SOCIALLY AWARE U.S. LARGE-CAP GROWTH FUND, WINSLOW LARGE-CAP GROWTH FUND, MAINSTAY WINSLOW LARGE CAP GROWTH FUND, MAINSTAY VP WINSLOW LARGE CAP GROWTH PORTFOLIO, ST., I.B.E.W. LOCAL UNION 481 DEFINED CONTRIBUTION PLAN AND TRUST, ST., JUSTIN KELLY REVOCABLE TRUST, JUSTIN AND SUSAN KELLY FAMILY, LLC,THE JUSTIN AND SUSAN KELLY FOUNDATION, JUSTIN KELLY, INDIVIDUALLY AND AS A REPRESENTATIVE OF THE JUSTIN KELLY REVOCABLE TRUST, AMERICAN MEDICAL ASSOCIATION,

Plaintiff,

- v -

CHARLES LU, JENNY QIAN, JIAN LIU, REINOUT SCHAKEL, JINYI GUO, HUI LI, ERHAI LIU, SEAN SHAO, THOMAS MEIER, CREDIT SUISSE SECURITIES (USA) LLC, CHINA INTERNATIONAL CAPITAL CORPORATION HONG KONG SECURITIES LIMITED, HAITONG INTERNATIONAL SECURITIES COMPANY LIMITED, MORGAN STANLEY & CO. LLC, KEYBANC CAPITAL MARKETS INC., NEEDHAM & COMPANY, LLC, LUCKIN COFFEE INC.

Defendant.

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INDEX NO. 655177/2020

MOTION DATE _____

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 43, 51

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 44, 48, 49, 50, 52, 53

were read on this motion to/for DISMISSAL.

Upon the foregoing documents and for the reasons set forth on the record (11.23.21), both Morgan Stanley & Co., LLC (**Morgan Stanley**), KeyBanc Capital Markets Inc. (**KeyBanc**), and Needham & Company, LLC's (**Needham;** Needham, together with Morgan Stanley and KeyBanc, hereinafter, collectively, the **Other Underwriters**) motion (Mtn Seq No 002) and

Credit Suisse Securities (USA) LLC's (the **Lead Underwriter;** the Lead Underwriter, together with the Other Underwriters, hereinafter, collectively, the **Underwriters**) motion (Mtn. Seq. No. 001) to dismiss must be denied. Simply put, the Investors' (hereinafter defined) well plead complaint adequately alleges that the Underwriters violated Section 11 of the Securities and Exchange Act of 1933 (the **1933 Act**) by vouching both for the veracity of the financial statements and the offering documents which included over tens of millions of dollars of fake transactions and that Luckin (hereinafter defined) had internal controls and governance procedures and that the third-party sales had all been confirmed by an outside vendor. Stated differently, the gravamen of the complaint is that the underwriters failed to do what they are required to do under the 1933 Act in underwriting the offering so that the offering documents were not materially misleading in violation of the 1933 Act.

The Underwriters' argument that because the false sales scheme began in the month preceding the IPO (hereinafter defined), it was therefore undiscoverable, fails. This factual inquiry is not properly adjudicated at this stage of the proceeding. Additionally, the claim is not merely predicated on the false sale numbers but also on the representation that there were controls in place to detect against this very problem, which according to the Investors, there were not. Additionally, the court notes that in meeting their due diligence obligations, the Underwriters could not merely rely on the projections of Luckin (hereinafter defined) and had to perform **actual** due diligence on the sales numbers to ensure that they were properly supported in meeting their obligations under the 1933 Act. Nor could the Other Underwriters rely exclusively on the Lead Underwriter as they have their own independent obligations under the 1933 Act.

The Relevant Facts and Circumstances

Luckin Coffee Inc. (**Luckin**), a Chinese coffee company, was founded in October 2017 (Complaint; NYSCEF Doc. No. 2, ¶ 2). In order to expand to the United States securities markets, Luckin went public in the United States on May 17, 2019, selling American Depository Shares (**ADS**) to U.S. investors (*id.*, ¶ 3). At the Initial Public Offering (**IPO**), Luckin sold ADSs at $17 per share, and at the Second Public Offering (**SPO;** the SPO and the IPO, hereinafter, collectively, the **Offerings**), Luckin sold ADSs at $42 per share (*id.*). The investment funds managed by Winslow Capital Management, LP (the **Investors**) allege that no later than April 2019, approximately one month before the IPO, Luckin employees began to engineer fake transactions. (NYSCEF Doc. No. 2, ¶ 10). Specifically, they allege that employees acting at the direction of Luckin CEO Jenny Qian and Luckin COO Jian Liu made purchases on the Luckin app using money from accounts controlled by entities related to Luckin officers and directors (*id.*, ¶ 11). These purchases were then redeemed by fake customers to allow for false recognition of tens of millions of dollars in revenue with no real orders placed or real coupons redeemed (*id.*, ¶¶ 11-12). According to the Investors, Luckin has admitted to the scheme of faking more than $300 million worth of transactions and $190 million worth of expenses (*id.*, ¶ 14).

The Investors allege that the Lead Underwriter vouched for the veracity of Luckin's financial statements and told the Investors that Luckin had effective internal controls and governance procedures and that the third-party sales had all been confirmed by an outside vendor (NYSCEF Doc. No. 2, ¶ 17). The Investors further allege that the Lead Underwriter had a financial

incentive to misrepresent the nature of Luckin's financial position because it had made a $500 million margin loan to Luckin's co-founder Charles Lu that was secured by his stock in Luckin (*id.*, ¶ 19). When the nature of the fabricated sales became public in 2020, Mr. Lu, Mr. Liu, and Ms. Qian were blamed and let go from Luckin (*id.*, ¶ 23) and the Investors brought this lawsuit.

Discussion

On a motion to dismiss, the court must accept the allegations set forth in the complaint as true affording the plaintiff every favorable influence and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]).

To survive a CPLR 3211 motion to dismiss, claims brought under the 1933 Act must satisfy CPLR 3013's notice pleading requirements (*see Feinberg v Marathon Patent Group Inc.*, 193 AD3d 568, 570-571 [1st Dept 2021] ["claims based on the Securities Act should not be seen through the prism of fraud and/or misrepresentation…the heightened pleading standard should not…be applied to plaintiffs' Securities Act claims because they are not premised on common-law fraud"]). They do not need to satisfy CPLR 3016(b). Nor must the Plaintiffs allege scienter. Indeed, as this court has previously discussed, this is a critical distinction between claims brought under the Securities and Exchange Act of 1934 (the **1934 Act**) and the 1933 Act (*In re Netshoes Sec. Litig.* 68 Misc3d 788, 795 [NY County, Sup Ct, 2020] ["[n]either scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims"]). As this court previously held,

> "at their heart, Sections 11 and 12(a)(2) claims are negligence-based claims. And, a heightened pleading standard need not be satisfied because the defendant's state of mind is not relevant because scienter is not an element under Sections 11 and 12(a)(2) (i.e., as opposed to a claim based on fraud or otherwise under the 1934

> Act)…But, where a plaintiff's claims arise under the 1933 Act, the statute (i.e., the 1933 Act) imposes the duty and that duty is to act truthfully in the offering of public securities"

(*In re Uxin Ltd. Sec. Litig.*, 66 Misc3d 1232[A], *7 [NY County, Sup Ct, 2020]).

The Investors allege that they purchased shares in the IPO and the SPO based on the false and misleading registration statements filed by Luckin. The financial statements were premised on certain fabricated transactions and as opposed to what indicated in the offering documents, there were inadequate internal governance or other controls to promptly catch the fraud.

As the Investors allege, the Underwriters "assisted Luckin and the Luckin Defendants in planning the Offerings, and had access to confidential corporate information concerning Luckin's operations and financial prospects" (NYSCEF Doc. No. 8, ¶ 333). The Investors further allege that, during meetings between the Underwriters and Luckin's lawyers, management, and executives, agreements were reached as to "(i) the strategy to best accomplish the Offerings; (ii) the terms of the Offerings, including the price at which Luckin ADSs would be sold; (iii) the language to be used in the Registration Statements; (iv) what disclosures would be made in the Registration Statements; and (v) what responses would be made to the SEC in connection with its review of the Registration Statements" (*id.*, ¶ 335). Specifically, in alleging a cause of action under Section 11 of the 1933 Act, the Investors assert that the IPO Registration statement and the documents incorporated therein, and the Secondary Registration Statement and the documents incorporated therein "contained false statements of material fact and/or omitted material facts that were required to be disclosed or necessary to make the statements therein not misleading (*id.*, ¶¶ 341-342). The Investors "did not know, or in the exercise of reasonable

diligence could they have known, of the untrue statements of material fact or omission of material facts in the Registration Statements when they purchased or acquired Luckin ADSs" (*id.*, ¶ 350).

In asserting a cause of action under Section 12(a)(2) of the 1933 Act against the Lead Underwriter, the Investors allege that the Lead Underwriter "did not make a reasonable investigation or possess reasonable grounds for belief that the statements contained in the Secondary Registration Statement…were true and did not omit to state material facts necessary to be stated in order to make the statements made therein not false or misleading. The Lead Underwriter should have known in the exercise of reasonable care of the misstatements and omissions…" (*id.*, ¶ 361). In short, as alleged, "the Underwriters knew of, or in the exercise of reasonable care should have known of, the existing yet undisclosed conditions and material risks detailed herein, which were either misrepresented in or omitted from the Registration Statements" (*id.*, ¶ 336). The Underwriters argument that they could not have known of the fraud at the time they reviewed the relevant statements is simply unavailing at this stage of the proceeding. They had access to the information and the duty to uncover the fraud. This they did not do and as alleged could have done. This is sufficient to state a claim under the 1933 Act.

Additionally, the Underwriters' argument that the Plaintiffs lack standing is equally unavailing. The Plaintiffs have standing to bring their claims under Section 12(a)(2) because they allege that they purchased shares directly from the IPO from the Underwriters (*see In re PPDAI Group Sec. Litig.*, 66 Misc3d 1226[A], *5 [Sup Ct, NY County 2020] ["for Section 12(a)(2) standing, it is sufficient to allege that Plaintiffs purchased ADSs in connection with the IPO and Plaintiffs need

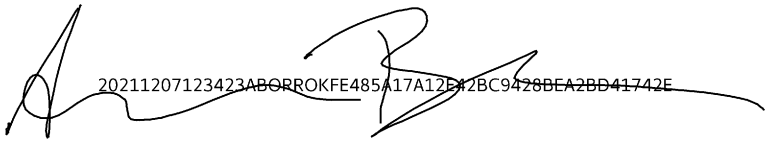
not identify the specific defendant from who they purchased the ADSs"] [internal quotation marks and citation omitted]). The Underwriters' motion to dismiss accordingly must be denied.

For the avoidance of doubt, the Investors have also separately alleged a cause of action for fraud and negligent misrepresentation because as the Complaint alleges "a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff[s], and damages" (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). The Leader Underwriter was the lead underwriter for both the IPO and the SPO. The Investors allege that the Lead Underwriter "assured Plaintiffs that the Company's purported meteoric rise was legitimate and they personally vouched for Luckin's reported financial statements" (NYSCEF Doc. No. 8, ¶ 17). They also allege that Credit Suisse "told Plaintiffs that the Company had effective and robust internal controls and corporate governance procedures in place to prevent fraud, and represented that all of Luckin's third-party sales had been reviewed and confirmed by an outside vendor" (*id.*). The Investors allege that these representations "put any remaining concerns Plaintiffs had about the reliability of Luckin's reported financial information to rest" (*id.*, ¶ 153). This is sufficient to a cause of action under CPLR 3016(b). Thus, the Lead Underwriters motion to dismiss must be denied. For the avoidance of doubt, these claims are not duplicative of the Section 11 claims because the Section 11 claims are premised based on violation of the statute.

The court has considered the Underwriters remaining arguments and finds them unavailing.

It is accordingly hereby ORDERED that the motions to dismiss are denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference on January 24, 2022 at 11:30 AM.



12/7/2021
DATE

ANDREW BORROK, JSC

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE