UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-1479 PA (MRWx)	Date	January 8, 2018
Title	M & M Hart Living Trust, et al. v. Global Eagle Entertainment, Inc., et al.		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE	
Kamilla Sali-Suleyman	Not Reported	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:	
None	None	

Proceedings: IN CHAMBERS - COURT ORDER

Before the Court is a Motion to Amend Judgment and for Leave to File an Amended Complaint filed by lead plaintiff M & M Hart Living Trust ("M & M Hart") and Randi Williams (collectively "Plaintiffs"). (Docket No. 90.) Defendants Global Eagle Entertainment, Inc. ("Global Eagle"), David M. Davis, and Thomas E. Severson, Jr. (collectively "Defendants") have filed an Opposition (Docket No. 93) and a Motion to Strike Plaintiffs' Motion to Amend (Docket No.92, 93). Plaintiffs have filed an Opposition to Defendants' Motion to Strike. (Docket No. 96.) Plaintiffs and Defendants have each filed a Reply in support of their respective motions.[1/] (Respectively, Docket Nos. 95, 97.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds these matters appropriate for decision without oral argument. The hearings calendared for January 8, 2018, and January 22, 2018, are vacated, and the matters taken off calendar.

I. BACKGROUND

This action, alleging claims for securities fraud in violation of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and Securities and Exchange Commission (SEC) Rule 10b-5 promulgated thereunder, was originally filed on February 23, 2017. Plaintiffs filed a First Amended Complaint as a matter of right in response to Defendants' first motion to dismiss. Defendants again moved to dismiss, and the Court found that Plaintiffs had not adequately alleged falsity of the statements at the time they were made, and had not adequately alleged that Defendants acted with scienter. The Court dismissed the First Amended Complaint with leave to amend. (Docket No. 76.) Plaintiffs then filed a Second Amended Complaint, which Defendants moved to dismiss. The Court dismissed Plaintiffs' Second Amended Complaint for the same reasons as it had dismissed the First Amended Complaint. This time, the Could dismissed the complaint without leave to amend because Plaintiffs had identified no meaningful way in which a third amended complaint could fair any better than the First or Second Amended Complaints; Plaintiffs merely argued that Global Eagle's belated 2016 annual report ("2016 Form 10-K") could contain information to supplement the complaint. (See Docket No. 88, p.13

1/ Unless otherwise specified, the terms "Motion," "Opposition," and "Reply" refer to those filings for Plaintiffs' Motion to Amend Judgment.

& n.8.) On November 2, 2017, the Court entered final judgment dismissing Plaintiffs' Second Amended Complaint without leave to amend. (See Docket No. 89.)

On November 17, 2017, Global Eagle released the anticipated 2016 Form 10-K. (Pls.' Mot., Apton Decl. ISO Pls.' Mot., Ex. B (Form 10-K).) Then, on November 28, 2017, Global Eagle released its annual proxy statement. (Apton Decl., Ex. C (Proxy Statement).) On November 30, Plaintiffs filed the instant Motion to Amend Judgment accompanied by, inter alia, a proposed third amended complaint (PTAC). (See Apton Decl., Ex. A (PTAC).) Plaintiffs request that the Court amend judgment to render the dismissal of Plaintiffs' Second Amended Complaint without prejudice, and to give Plaintiffs leave to file a third amended complaint. Defendants counter that Plaintiffs' PTAC is not based on previously unavailable evidence, that any new evidence does not remedy the deficiencies of the Second Amended Complaint, and that the Motion was filed in violation of Local Rule 7-3.

II. REQUEST FOR JUDICIAL NOTICE

Defendants request that the Court take judicial notice of several Global Eagle SEC filings, press releases, earnings calls, and Global Eagle's historic stock prices. (See Docket No. 94 (RJN).) "The court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201. Courts routinely find SEC filings, as well as press releases, earnings calls, and other information made available to the market to be matters of public record. See Dreiling v. Am. Express Co., 458 F.3d 942, 946 n.2 (9th Cir. 2006); Heliotrope Gen., Inc. v. Ford Motor Co., 189 F.3d 971, 981 n.18 (9th Cir. 1999); In re Hansen Nat. Corp. Sec. Litig., 527 F. Supp. 2d 1142, 1149 (C.D. Cal. 2007). Courts also may take judicial notice of historic stock prices, as such information is readily ascertainable and not subject to reasonable dispute. See, e.g., Metzler Inv. GMBHv. Corinthian Colls., Inc., 540 F.3d 1049, 1064 n.7 (9th Cir. 2008). Plaintiffs have not objected to the Court taking judicial notice of these documents. The Court grants the requested judicial notice of these documents, but not as to the truth of the matters asserted therein. See In re Wet Seal, Inc. Sec. Litig., 518 F. Supp. 2d 1148, 1158 (C.D. Cal. 2007).

III. LEGAL STANDARD

"Under Federal Rule of Civil Procedure 59(e), a party may move to have the court amend its judgment within twenty-eight days after entry of the judgment. 'Since specific grounds for a motion to amend or alter are not listed in the rule, the district court enjoys considerable discretion in granting or denying the motion.'" Allstate Ins. Co. v. Herron, 634 F.3d 1101, 1111 (9th Cir. 2011) (quoting McDowell v. Calderon, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999) (en banc) (per curiam)).

> In general, there are four basic grounds upon which a Rule 59(e) motion may be granted: (1) if such motion is necessary to correct manifest errors of law or fact upon which the judgment rests; (2) if such motion is necessary to present newly discovered or previously unavailable evidence;

> (3) if such motion is necessary to prevent manifest injustice; or (4) if the amendment is justified by an intervening change in controlling law.

Id. (citing McDowell, 197 F.3d at 1255 n.1). The Ninth Circuit has "held that altering or amending a judgment under Rule 59(e) is an 'extraordinary remedy.'" Rishor v. Ferguson, 822 F.3d 482, 491–92 (quoting Allstate, 634 F.3d at 1111). Amendment of judgment is "to be used sparingly in the interests of finality and conservation of judicial resources." Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 890 (9th Cir. 2000); Allstate, 634 F.3d at 1111. To establish that evidence first offered after entry of judgment warrants amendment of judgment, a movant must show that:

> (1) the evidence was discovered after [the judgment was entered], (2) the exercise of due diligence would not have resulted in the evidence being discovered at an earlier stage and (3) the newly discovered evidence is of such magnitude that production of it earlier would likely have changed the outcome of the case.

Far Out Prods. v. Oskar, 247 F.3d 986, 992–93 (9th Cir. 2001); Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd., No. 10-01172, 2013 WL 12174146, at *3 (C.D. Cal. Sept. 9, 2013). A Rule 59(e) motion cannot be used to raise arguments that were, or could have been, raised earlier in the litigation. See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471, 485 n.5, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008).

IV. ANALYSIS

Plaintiffs contend that Global Eagle's 2016 Form 10-K and annual proxy statement disclosed the following for the first time: (1) revisions of Global Eagle's purchase price allocation (PPA) dated November 9, 2016,[2/] (2) impairment to goodwill of approximately $64 million in 2016 and projected impairment of $75–80 million in the first quarter of 2017, (3) certain internal control weaknesses, (4) the resignation of Global Eagle's auditor, and (5) the cost of the auditor's services. (See Mot. 2–3.) Plaintiffs contend that this evidence justifies allowing Plaintiffs to file a third amended complaint.

As an initial matter, Plaintiffs argue that leave to amend should be freely granted and that Defendants' Opposition, which attacks the strength of Plaintiff's allegations, is inappropriate at this stage. (Reply 5–6.) However, as Plaintiffs admit, futility may be grounds to deny leave to amend. (Id.); see Leadsinger, Inc. v. BMG Music Publ'g, 512 F.3d 522, 532 (9th Cir. 2008). Moreover, as judgment has been entered, Plaintiffs must satisfy the requirements of amending judgment. See 3-24 Moore's

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[2/] In the Motion and PTAC, Plaintiffs describe this as a revision of a financial statement, though in their Reply, they concede that the statement was of purchase price allocation (PPA). (See Reply 1.) Plaintiffs do not dispute that "[a] PPA allocates the purchase price a buyer pays for a business into various classes of assets and liabilities, including, inter alia, tangible assets, identifiable intangible assets and goodwill." (See Opp'n 11 n.1.)

Manual, Federal Practice and Procedure § 24.80 (2017); see, e.g., Shaker v. Nature's Path Foods, Inc., No. EDCV 13-1138-GW(OPx), 2014 U.S. Dist. LEXIS 190409 (C.D. Cal. Feb. 7, 2014); see also Diersen v. Chi. Car Exch., 110 F.3d 481, 489 (7th Cir. 1997). Thus, this Motion turns on whether the new evidence was discovered after entry of judgment, could not have been discovered with due diligence earlier, and is of such magnitude that it would likely have changed the outcome of the case, i.e., that it would have justified leave to amend. See Far Out Prods., 247 F.3d at 992–93.

A claim under Rule 10b-5 must allege six elements: (1) a material misrepresentation or omission; (2) scienter; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation. See Dura Pharm., Inc. v. Broudo, 544 U.S. 336, 341, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005). As further elaborated in the Court's prior orders, those allegations must satisfy heightened pleading requirements. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 321, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

As in their prior complaints, Plaintiffs again allege that Defendants made false statements involving Global Eagle's acquisition of EMC. In particular, these statements include (1) the value of EMC at the time of the acquisition, (2) the success of the acquisition, (3) Global Eagle's expected synergies and earnings, and (4) the state of Global Eagle's internal controls. (See Mot. 7–8; see also PTAC ¶ 50.) The only alleged misrepresentation based on new evidence involves the preliminary PPA, which Plaintiffs frame as the "value of EMC at the time of the acquisition"; the other categories of statements alleged to be false were alleged in the First and Second Amended Complaints, and thus were further addressed in the Court's prior orders. Plaintiffs argue that the PPA released in the third quarter of 2016 was false because it was later revised. (Mot. 6.) However, the preliminary PPA constituted an opinion, as Plaintiffs admit (Reply 7), and later adjustments do not inherently make the earlier statement false under Rule 10(b). See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc., 856 F.3d 605, 613 (9th Cir. 2017); Fait v. Regions Fin. Corp., 655 F.3d 105, 110 (2d Cir. 2011). The Ninth Circuit has adopted the following test to determine whether an opinion statement is false for purposes of section 10(b) and Rule 10b-5:

> First, when a plaintiff relies on a theory of material misrepresentation, the plaintiff must allege both that "the speaker did not hold the belief she professed" and that the belief is objectively untrue. Second, when a plaintiff relies on a theory that a statement of fact contained within an opinion statement is materially misleading, the plaintiff must allege that "the supporting fact [the speaker] supplied [is] untrue." Third, when a plaintiff relies on a theory of omission, the plaintiff must allege "facts going to the basis for the issuer's opinion . . . whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context."

City of Dearborn Heights Act 345 Police & Fire Ret. Sys., 856 F.3d at 615–16 (quoting Omnicare, Inc. v. Laborers Dist. Council Constr. Ind. Pension Fund, 135 S. Ct. 1318, 1327, 1332, 191 L. Ed. 2d 253 (2015)).

Here, Plaintiffs offer only a post hoc assessment that "[t]hese values were grossly incorrect and, as stated in the Annual Report, the bases for the discrepancies 'existed as of the acquisition date.'" (Reply 6 (quoting 2016 Form 10-K at 158 n.2).) This is insufficient to allege falsity under the Ninth Circuit's standard. Neither the PTAC nor the Motion allege that the preliminary PPA was not actually believed by Defendants or that Defendants were aware of undisclosed facts that tended to seriously undermine the preliminary PPA's accuracy at the time the statement was made. Nor do Plaintiffs identify facts going to the basis of the preliminary PPA that rendered it misleading to a reasonable person. In fact, when issuing the preliminary PPA, Global Eagle identified it as "a summary of the preliminary purchase price to the estimated fair values of the identifiable assets acquired and the liabilities at the EMC Acquisition date." (RJN, Ex. E, 23.) Global Eagle warned investors that a final PPA would be issued later and "may change materially based on the receipt of more detailed information, including information pertaining to equity method investments, vendor agreements and income taxes." (Id.) Global Eagle observed that the final PPA would "depend on a number of factors, which [could not] be predicted with certainty at [that] time." (Id.) On these facts, Plaintiffs cannot adequately allege that the preliminary PPA was false. In addition, Plaintiffs' moving papers do not explain how the new evidence resolves the deficiencies in Plaintiffs' prior efforts to plead falsity of the other statements. Accordingly, Plaintiffs have not demonstrated that the new evidence would satisfy PSLRA's standards to plead falsity, and leave to file a third amended complaint based on this evidence would not have been granted, as it would have been futile.

Even if new evidence enabled Plaintiffs to adequately allege falsity of Defendants' statements, Plaintiffs would further need to demonstrate that Plaintiffs can now, based on new evidence, adequately allege scienter despite their previous inability to do so. Plaintiffs have identified little new evidence to support an inference of scienter. Plaintiffs point to the 2016 Form 10-K's disclosure that, at the time of the EMC acquisition, further internal control weaknesses existed than previously identified, and the facts and circumstances causing adjustment of the PPA also existed. Such allegations are insufficient to suggest that Defendants knew of those facts or circumstances and acted with reckless disregard in making the allegedly false statements. Plaintiffs also assert that the size of the goodwill impairment supports their scienter allegations. However, this goodwill impairment was revealed prior to the entry of judgment, and thus does not justify amending judgment based on new evidence. (See RJN, Ex. F (Oct. 18, 2017 8-K) at 2.) Moreover, Plaintiffs' briefing does not explain how this impairment relates to the earlier statements or demonstrates that Defendants acted with reckless disregard in making those statements. This is particularly notable given that the bases for the impairment occurred after the acquisition. (See Mot. 2 (quoting 2016 Form 10-K 5–6).) Plaintiffs have failed to establish that, taken as a whole, the previously asserted scienter allegations and the new evidence would give rise to a strong

inference that Defendants acted with scienter.[3] See Tellabs, Inc., 551 U.S. at 325, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (requiring courts to consider scienter allegations holistically); (Docket No. 88, 10–13). Thus, even if Plaintiffs could allege falsity, leave to file a third amended complaint would not have been granted based on the new evidence, as Plaintiffs have not demonstrated an ability to allege scienter, and such leave would be futile.

In sum, Plaintiffs have failed to demonstrate that new evidence is "of such magnitude that production of it earlier would likely have changed the outcome of the case."[4]

Conclusion

For the foregoing reasons, Plaintiffs' Motion to Amend Judgment and for Leave to File an Amended Complaint is denied. Defendants' Motion to Strike is denied as moot.

IT IS SO ORDERED.

[3] The PTAC also alleges that an August 2016 settlement incentivized Defendants to artificially inflate the value of Global Eagle's stock. (See PTAC ¶ 148.) However, as Defendants correctly argue, this settlement was not raised in the instant Motion as grounds for relief and was disclosed to the public prior to entry of judgment. (See RJN Ex. M (Aug. 12, 2016 8-K) at 2.) Moreover, the allegations based on the settlement are speculative, and do not support an inference of scienter.

[4] The Court need not reach Defendants' argument involving loss causation. (See Opp'n 24.)