UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 21-6240 PA (JEMx)	Date	January 22, 2023
Title	Gary Cheng, et al. v. Activision Blizzard, Inc., et al.		

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

Proceedings: IN CHAMBERS – COURT ORDER

Before the Court is a Motion to Dismiss Third Amended Class Action Complaint filed by defendants Activision Blizzard, Inc. ("Activision Blizzard" or "Company"), Robert A. Kotick ("Kotick"), Dennis Durkin ("Durkin"), Armin Zerza ("Zerza"), and Brian Kelly ("Kelly") (collectively, the "Defendants"). (Docket No. 91.) Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds this matter appropriate for decision without oral argument. The hearing calendared for January 9, 2023, was previously vacated, and the matter taken off calendar. (Docket No. 97.)

I. Background

The facts and procedural history of this case are familiar to the Court and parties and will not be recounted here in full. Any critical facts or procedural history are noted in this section and in the Court's analysis below.

This is a private securities fraud, class action case brought by lead plaintiff Jeff Ross and six other named plaintiffs, individually and on behalf of all others similarly situated (collectively, "Plaintiffs"). (Docket No. 90 ¶ 1.) Plaintiffs allege two causes of action: (1) violations of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5, against all Defendants; and (2) control person liability under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t(a), against defendants Kotick, Durkin, Zerza, and Kelly (collectively, "Individual Defendants"). (Id. ¶¶ 487–501.) The crux of Plaintiffs' claims is that Defendants misled the investing public by making material misstatements and omissions concerning rampant sexual harassment and discrimination at the Company, and the existence of investigations initiated in 2018 by the California Department of Fair Employment and Housing ("DFEH") and the United States Equal Employment Opportunity Commission ("EEOC") (collectively, the "Investigations"). (See generally id.) Plaintiffs allege that the material misstatements and omissions were made in the

quarter 2021 Form 10-Q filings (collectively, "SEC filings"). (Id. ¶¶ 390–426.) The SEC filings represented that the Company was only "party to routine claims, suits, investigations . . . arising in[/from] the ordinary course of business" and that "such routine claims and lawsuits are not significant" and "not expect[ed] [] to have a material adverse effect on" the Company's business. (Id.)

The Court previously granted Defendants' motions to dismiss the First and Second Amended Class Action Complaints on the basis that Plaintiffs failed to plead sufficient facts to establish that the SEC filing statements were false or misleading, and failed to plead particularized facts from which the Court could draw the necessary strong inference of scienter. (See Docket Nos. 75, 87.) Plaintiffs then filed a Third Amended Class Action Complaint ("3rd AC"). Notably, the 3rd AC contains references to five new confidential witnesses ("CWs") that worked in various roles in the Company's Human Resources ("HR") departments.[1/] The 3rd AC also contains some new allegations – or expansions upon prior ones – that Plaintiffs use to support their theories of falsity and/or scienter. These include the following allegations.

First, the 3rd AC references two additional news articles – a January 26, 2018 Wall Street Journal article about a pattern of sexual misconduct by the CEO of Wynn Resorts, and a January 21, 2020 Los Angeles Times article about a sexual assault and discrimination lawsuit against Riot Games. (Docket No. 90 ¶¶ 27, 245, 297, 410, 448.) Plaintiffs allege that these articles "show[] the immense danger of public sexual harassment allegations to the value of a company." (Id. ¶ 245.)

Second, Plaintiffs reference the Company's 2018 Proxy statement, which touted that the Company prioritizes and values diversity and inclusion. (Id. ¶ 246.) Plaintiffs allege that this demonstrates how "Activision Blizzard was especially vulnerable to reputational damage from sexual harassment allegations." (Id.)

Third, Plaintiffs allege that CW14 stated that, after the Investigations began, the Company's attorneys told her about the Investigations and "made an 'urgent' request for 'huge' data sets on the Company's employees dating back many years." (Id. ¶ 261.) Plaintiffs also allege that CW14 stated that she was confident that the higher-ups at the Company were worried about the Investigations. (Id.)

[1/] The five new CWs are referred to by the 3rd AC as CW10, CW11, CW12, CW13, and CW14, respectively.

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Fourth, in the Company's Answer to the DFEH's Amended Complaint,[2/] the Company "admitted it opened an internal investigation of practices and policies of its Human Resources department in 2018." (Id. ¶ 262.) Plaintiffs allege that "[t]he fact that Activision Blizzard spent the time and money conducting this parallel investigation shows the significant and non-routine nature of the DFEH and EEOC Investigations and also put Defendants on notice of the endemic misconduct at the Company." (Id. ¶ 265.) Plaintiffs further allege that the Company had tried to negotiate with the DFEH about mediating any claims the DFEH may bring against the Company. Plaintiffs allege that, "it is clear that Activision Blizzard believed that there was significant risk that the DFEH would find cause for one or more of its claims." (Id. ¶ 321.)

Fifth, Plaintiffs cite to the statements of CW10, CW11, and CW16 to allege that the Company's Human Resources ("HR") underwent significant changes – such as the establishment of an Employee Relations Team – at Kotick's direction, in the years after the Investigations commenced. (See, e.g., id. ¶¶ 294, 307–11.) Plaintiffs allege that "it is clear that this significant restructuring of Human Resources was due [to] the ongoing Investigations." (Id. ¶ 294.)

Sixth, Plaintiffs allege that the firing of higher-ups – such as Blizzard's Chief Technology Officer, Ben Kilgore ("Kilgore"), Senior Manager of Global Business Strategy and Operations, Tyler Rosen ("Rosen"), and Senior Creative Director of World of Warcraft, Alex Afrasaibi ("Afrasaibi") – were "dramatic, non-routine, shift[s] of policy" and "could only have been explained by the Investigations . . . ." (Id. ¶¶ 226, 272, 439.) Plaintiffs further allege that Kotick personally approved of the firings of Rosen and Kilgore because Kotick's approval was needed to terminate anyone at the level of Senior Vice President and up. (Id. ¶¶ 219–22.) Plaintiffs base these allegations on CW statements and a news article. (Id.)

Seventh, Plaintiffs allege that multiple employees, including CW3 and CW6, complained to higher-ups at the Company, such as Kotick and Blizzard President Brack ("Brack"), about sexual harassment and discrimination. (Id. ¶¶ 286, 401.) Plaintiffs also cite to a November 16, 2021 Wall Street Journal article to allege that "Kotick was aware of a 2020 email that 30 female employees working in Activision Blizzard's Esports division wrote to their unit's leaders 'saying that female employees had been subject to unwanted touching, demeaning comments, exclusion from important meetings, and unsolicited comments on their appearance.'" (Id. ¶¶ 14, 317.)

[2/] The DFEH filed a public complaint against the Company on July 20, 2021. Plaintiffs' "Exhibit 2 " to the 3rd AC (Docket No. 90-2) is Activision Blizzard's Answer to the DFEH's

In addition to these new allegations, Plaintiffs' 3rd AC recycles allegations from the previous amended complaints to support Plaintiffs' claim that the statements in each SEC filing were allegedly false. (Id. ¶¶ 390–426.)

The 3rd AC also alleges reasons why defendants Kotick, Durkin, Zerza, and Kelly (collectively, "Individual Defendants") acted knowingly or recklessly in signing the SEC filings and/or related Sarbanes-Oxley Act ("SOX") certifications. (Id. ¶¶ 432–45.) Specifically, Plaintiffs allege that Kotick "acted knowingly or recklessly" because he was aware of the pervasive sexual harassment and discrimination at the Company, the Investigations and the details thereof, and the changes to the Company's HR department. (Id. ¶¶ 432–41.) Plaintiffs allege that Durkin and Zerza "acted knowingly or recklessly" because, in their roles as CFO/COO, "a minimal level of due diligence would have informed" them of the Investigations, the firing of employees like Kilgore, Afrasaibi, and Rosen, the changes to the HR department, and the pervasive sexual harassment and discrimination at the Company. (Id. ¶¶ 442–44.) Similarly, Plaintiffs allege that Kelly "acted knowingly or recklessly" because a Wall Street Journal Article stated that the Company's Board of Directors had been "'informed at all times with respect to the status of regulatory matter,' referring to the DFEH and EEOC Investigations.'" (Id. ¶ 445.)

Defendants now move to dismiss Plaintiffs' 3rd AC for failure to state a claim, pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, and the Private Securities Litigation Reform Act, arguing that Plaintiffs fail to plead falsity, scienter, and loss causation. (See generally Docket Nos. 91, 91-1.)

II. Request for Judicial Notice

Defendants request that the Court take judicial notice of six documents, including a press release, SEC filings, a list of historic stock prices, a letter from the Company's CEO referenced in the 3rd AC, and documents maintained on the DFEH's and EEOC's respective websites. (Docket No. 91-10, Exs. A–F.) Plaintiffs do not oppose Defendants' requests. In ruling on a Rule 12(b)(6) motion to dismiss, a court may take judicial notice of matters referred to in the complaint, but not attached, where the document's authenticity is not contested and the complaint necessarily relies on them. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). A court may also judicially notice matters of public record. Id. at 789. Moreover, courts routinely find SEC filings, as well as press releases, and other information made available to the market to be matters of public record, regardless of whether it was referenced in the complaint. See Dreiling v. Am. Express Co., 458 F.3d 942, 946 n.2 (9th Cir. 2006); Heliotrope Gen., Inc. v.

notice of all documents, but not as to the truth of the matters asserted therein. See Asner v. SAG-AFTRA Health Fund, 557 F. Supp. 3d 1018, 1024 (C.D. Cal. 2021).

III. Legal Standard

For purposes of a Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), plaintiffs in federal court are generally required to give only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The purpose of Rule 8(a)(2) is to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). While the Federal Rules allow a court to dismiss a cause of action for "failure to state a claim upon which relief can be granted," they also require all pleadings to be "construed so as to do justice." Fed. R. Civ. P. 12(b)(6), 8(e).

However, in Twombly, the Supreme Court rejected the notion that "a wholly conclusory statement of a claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery." Twombly, 550 U.S. at 561. Instead, the Court adopted a "plausibility standard," in which the complaint must "raise a reasonable expectation that discovery will reveal evidence of [the alleged infraction]." Id. at 556. For a complaint to meet this standard, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." Id. at 555 (citing 5 C. Wright & A. Miller, Federal Practice and Procedure §1216, pp. 235–36 (3d ed. 2004) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action") (alteration in original)); Daniel v. County of Santa Barbara, 288 F.3d 375, 380 (9th Cir. 2002) ("'All allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party.'") (quoting Burgert v. Lokelani Bernice Pauahi Bishop Trust, 200 F.3d 661, 663 (9th Cir. 2000)). "[A] plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 550 U.S. at 555 (internal quotations omitted). In construing the Twombly standard, the Supreme Court has advised that "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009).

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