UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BOSTON RETIREMENT SYSTEM, et al.,[1]

Plaintiffs,

v.

UBER TECHNOLOGIES, INC., et al.,

Defendants.

Case No. 19-cv-06361-RS

ORDER DENYING MOTION TO DISMISS

I. INTRODUCTION

Lead plaintiff Boston Retirement System ("BRS") brings this putative class action against defendants Uber Technologies, Inc. ("Uber"), several of its current and former executives, and the underwriters of its initial public offering ("IPO"). BRS alleges defendants made false or misleading statements and omissions in connection with Uber's IPO in violation of Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"). Defendants now move to dismiss the complaint under Rule 12(b)(6). Pursuant to Civil Local Rule 7-1(b), the motion is suitable for disposition without oral argument, and the hearing set for August 13, 2020 is vacated. For the reasons set forth below, the motion is denied.

II. BACKGROUND[2]

[1] This case was originally filed as *Benjamin Stirratt v. Uber Technologies, Inc.* Boston Retirement System was subsequently appointed lead plaintiff. The Clerk shall change the caption of the case on ECF.

[2] The factual background is based on the allegations in the complaint (which must be taken as true

Uber is a transportation company which provides on demand rides and food delivery. The company was founded in San Francisco in 2009 and has since expanded globally. On May 10, 2019, Uber conducted its IPO, in which it sold 180,000,000 shares of common share stock to the public. The IPO was priced at $45 per share and generated nearly $8 billion in proceeds for Uber. The IPO was conducted pursuant to several documents filed by defendants with the U.S. Securities and Exchange Commission ("SEC"), including an April 11, 2019 Registration Statement on Form S-1, which, after amendment, was declared effective by the SEC on May 5, 2019. *See* ECF No. 86-1 ("RS").

BRS purchased Uber's common stock in the IPO, and from an underwriter of the IPO, pursuant to the offering documents, including the RS. At the time BRS purchased this stock, only Uber shares offered in the IPO were available in the market. Uber's share price subsequently declined from $45 to an all-time low of $25.99 on November 14, 2019. This action was brought, alleging violations of Sections 11, 12(a)(2), and 15 of the Securities Act. In January 2020, BRS was appointed lead plaintiff. The named defendants are Uber, several of its past and present executives, and the underwriters of its IPO.[3]

III. INCORPORATION BY REFERENCE AND JUDICIAL NOTICE

A. Legal Standard

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judicial notice may be taken. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see generally* Part III, *infra*.

[3] The full list of defendants is: Uber, Dara Khosrowshahi, Nelson Chai, Glen Ceremony, Ronald Sugar, Ursula Burns, Garrett Camp, Matt Cohler, Ryan Graves, Arianna Huffington, Travis Kalanick, Wan Ling Martello, H.E. Yasir Al- Rumayyan, John Thain, David Trujillo, Morgan Stanley & Co. LLC, Goldman Sachs & Co. LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Barclays Capital Inc., Citigroup Global Markets, Inc., Allen & Company LLC, RBC Capital Markets, LLC, SunTrust Robinson Humphrey, Inc., Deutsche Bank Securities Inc., HSBC Securities (USA) Inc., SMBC Nikko Securities America, Inc., Mizuho Securities USA LLC, Needham & Company, LLC, Loop Capital Markets LLC, Siebert Cisneros Shank & Co., L.L.C., Academy Securities, Inc., BTIG, LLC, Canaccord Genuity LLC, CastleOak Securities, L.P., Cowen and Company, LLC, Evercore Group L.L.C., JMP Securities LLC, Macquarie Capital (USA) Inc., Mischler Financial Group, Inc., Oppenheimer & Co. Inc., Raymond James & Associates, Inc., William Blair & Company, L.L.C., The Williams Capital Group, L.P., and TPG Capital BD, LLC. Defendants bring the present motion to dismiss jointly.

Generally, district courts may not consider material outside the pleadings when assessing the sufficiency of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). However, "[t]here are two exceptions to this rule: the incorporation-by-reference doctrine, and judicial notice under Federal Rule of Evidence 201." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (noting documents incorporated by reference and "matters of which a court may take judicial notice" are properly considered when ruling on a motion to dismiss).

"Incorporation-by-reference is a judicially created doctrine that treats certain documents as though they are part of the complaint itself." *Khoja*, 899 F.3d at 1002. A defendant may seek to incorporate a document into the complaint "if the plaintiff refers *extensively* to the document or the document forms the basis of the plaintiff's claim." *Ritchie*, 342 F.3d at 907 (emphasis added). "The doctrine prevents plaintiffs from selecting only portions of documents that support their claims, while omitting portions of those very documents that weaken—or doom—their claims." *Khoja*, 899 F.3d at 1002. In general, "a court may assume an incorporated document's contents are true for purposes of a motion to dismiss under Rule 12(b)(6) . . . [but] it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint." *Id.* at 1003 (internal quotations and citations omitted).

"Judicial notice under Rule 201 permits a court to notice an adjudicative fact if it is 'not subject to reasonable dispute.'" *Id.* at 999 (citing Fed. R. Evid. 201(b)). "A fact is 'not subject to reasonable dispute' if it is 'generally known,' or 'can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'" *Id.* (quoting Fed. R. Evid. 201(b)(1)–(2)). "Accordingly, a court may take judicial notice of matters of public record without converting a motion to dismiss into a motion for summary judgment . . . [b]ut a court cannot take judicial notice of disputed facts contained in such public records." *Id.* (internal quotations and citation omitted). If either party requests judicial notice and "supplie[s] the necessary information," judicial notice "must" be taken. Fed. R. Evid. 201(c)(2).

B. Discussion

In support of their motion to dismiss, defendants seek incorporation by reference and/or judicial notice of 29 documents, termed "exhibits" for ease of reference. Exhibit A is the amended RS for Uber's IPO, as filed with the SEC on Form S-1/A on April 26, 2019. BRS agrees that the complaint refers extensively to, and in fact depends on, the amended RS; thus, incorporation by reference of the RS is appropriate.

Exhibits B and C are Uber's press releases announcing its financial results for the first and second quarters of 2019. These were filed with the SEC on May 30 and August 8, 2019, respectively. BRS argues incorporation by reference is inappropriate because the complaint "barely mentions" Uber's financial results; the company's earnings results, it points out, are mentioned in fewer than ten of the hundreds of paragraphs of the complaint. That argument, however, would allow BRS to do precisely what incorporation by reference attempts to avoid: selective use of documents. The complaint refers to Uber's financial results "extensively" in that one of its three main theories is that the company misrepresented its financial position to investors in violation of the Securities Act. Put differently, that theory "depends on" Uber's 2019 financial results, which BRS alleges paint a very different financial picture than the RS. Notably, BRS does not dispute the accuracy of the contents of Exhibits B and C; on the contrary, their contents, i.e., Uber's Q1 and Q2 2019 financial results, bolster BRS's claims. Incorporation by reference of Exhibits B and C is thus appropriate.[4]

The remaining 26 exhibits are news articles written in various publications about Uber between 2014 and 2019. BRS argues they should not be incorporated by reference because they are referenced nowhere in the complaint, and judicial notice should not be taken because they are offered for the sole purpose of raising a "truth-on-the-market" defense, which is inappropriate at

[4] Alternatively, because "SEC filings are publicly-filed documents whose accuracy cannot reasonably be questioned," judicial notice may be taken at least in order to "determin[e] what representations [Uber] made to the market." *In re Pivotal Sec. Litig.*, No. 19-cv-03589, 2020 WL 4193384, at *5 (N.D. Cal. July 21, 2020).

the motion to dismiss stage. However, both arguments miss the mark. Defendants do not propose incorporation by reference, and whether they may offer a "truth-on-the-market" defense in a motion to dismiss, or whether the defense would succeed, goes to the substance of the motion, *see* section IV.B.2, *infra*, not the admissibility of evidence. Defendants have "supplied the necessary information"—notably, BRS does not dispute that the articles were published on the dates and in the publications that defendants represent they were—and judicial notice *must* therefore be taken. However, "[j]ust because [a] document itself is susceptible to judicial notice does not mean that every assertion of fact within that document is judicially noticeable for its truth." *Khoja*, 899 F.3d at 999. Thus "judicial notice of these documents" will be taken "not for the truth of the matter asserted, but 'for the purpose of showing that particular information was available to the stock market.'" *In re Apple Inc. Sec. Litig.*, No. 19-cv-02033, 2020 WL 2857397, at *6 (N.D. Cal. June 2, 2020) (quoting *Helitrope Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999)).

IV. MOTION TO DISMISS

A. Legal Standard

A complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not required," a complaint must include sufficient facts to "state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

A motion to dismiss a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus. v. Symington*, 51 F.3d 1480, 1484 (9th Cir.1995). Dismissal under Rule 12(b)(6) may be based either on the "lack of a cognizable legal theory" or on "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir.1988). When evaluating such a motion, the court must accept all material allegations in the complaint as true, even if doubtful, and construe them in the light most favorable to the non-

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