UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re ALPHABET, INC. SECURITIES LITIGATION

Master Case No. 18-cv-06245-JSW

ORDER GRANTING MOTION TO DISMISS

Re: Dkt. No. 71

Now before the Court is the motion to dismiss filed by Defendants Alphabet, Inc., Google LLC, Lawrence E. Page, Sundar Pichai, Keith P. Enright, and John Kent Walker, Jr. (collectively "Alphabet"). The Court has considered the parties' papers, relevant legal authority, and the record in this case, and for the reasons set forth below, the Court HEREBY GRANTS Alphabet's motion to dismiss, with leave to amend.

BACKGROUND

Plaintiffs originally filed their complaint in this matter on October 11, 2018. Alphabet then moved to dismiss. After consolidation of related cases and appointment of lead plaintiff and lead counsel, Plaintiffs filed a consolidated amended complaint on April 26, 2019. On May 31, 2019, Alphabet again moved to dismiss for failure to state a claim under Federal Rules of Civil Procedure 9(b) and 12(b)(6).

Plaintiffs allege that Alphabet made false or misleading statements and that those statements violated (i) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78j(b) and Securities Exchange Commission Rule 10b-5, 17 C.F.R. § 240.10b-5; and (ii) Section 20(a) of the Exchange Act, 15 U.S.C. § 78t.

ANALYSIS

A. Applicable Legal Standard.

A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) where the pleadings fail to state a claim upon which relief can be granted. The Court's "inquiry is limited to the allegations in the complaint, which are accepted as true and construed in the light most favorable to the plaintiff." *Lazy Y Ranch LTD v. Behrens*, 546 F.3d 580, 588 (9th Cir. 2008). Even under the liberal pleading standard of Federal Rule of Civil Procedure 8(a)(2), "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Pursuant to *Twombly*, a plaintiff must not merely allege conduct that is conceivable but must instead allege "enough facts to state a claim to relief that is plausible on its face." *Id*. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (overruled on other grounds by *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002) (citation omitted)). However, documents subject to judicial notice may be considered on a motion to dismiss. In doing so, the Court does not convert a motion to dismiss to one for summary judgment. *See Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1282 (9th Cir. 1986) (overruled on other grounds by *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104 (1991)).

Federal Rule of Civil Procedure 8 requires plaintiffs to "plead a short and plain statement of the elements of his or her claim." *Bautista v. Los Angeles County*, 216 F.3d 837, 840 (9th Cir.

2000). Rule 8 requires each allegation to be "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). Where the allegations in a complaint are "argumentative, prolix, replete with redundancy and largely irrelevant," the complaint is properly dismissed for failure to comply with Rule 8(a). *McHenry v. Renne*, 84 F.3d 1172, 1177, 1178-79 (9th Cir. 1996); *see also Nevijel v. North Coast Life Ins. Co.*, 651 F.2d 671, 673-74 (9th Cir. 1981) (affirming dismissal of complaint that was "'verbose, confusing and almost entirely conclusory'").

Where a plaintiff alleges fraud, however, Rule 9(b) requires the plaintiff to state with particularity the circumstances constituting fraud. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547-49 (9th Cir. 1994) (en banc) (superseded by the Private Securities Litigation Reform Act ("PSLRA") on other grounds). A plaintiff averring fraud must plead with particularity the circumstances constituting fraud. *See* Fed. R. Civ. P. 9(b). Particularity under Rule 9(b) requires the plaintiff to plead the "who, what, when, where, and how" of the misconduct alleged. *See Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir. 2009). In the securities context, the pleading requirements are even more stringent and require that "the particular circumstances indicating falseness of the defendant's statements to be pled, specifically, 'an explanation as to why the statement or omission complained of was false or misleading.'" *In re Intuitive Surgical Sec. Litig*, 65 F. Supp. 3d 821, 830 (N.D. Cal. Aug. 21, 2014) (citing *In re GlenFed*, 42 F.3d at 1548).

The Rule 9(b) requirement "has long been applied to securities complaints." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009). "At the pleading stage, a complaint stating claims under section 10(b) and Rule 10b-5 must satisfy the dual pleading requirements of . . . Rule 9(b) and the PSLRA." *Id.* The PSLRA requires that "a complaint 'plead with particularity both falsity and scienter.'" *Id.* (quoting *Gompper v. VISX*, 298 F.3d 893, 895 (9th Cir. 2002)).

Under the PSLRA, actions based on allegations of material misstatements or omissions must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is

formed." 15 U.S.C. § 78u-4(b)(1). In order adequately to plead scienter, the PSLRA requires that the plaintiff "'state with particularity facts giving rise to a *strong* inference that the defendant acted with the required state of mind.'" *Zucco Partners*, 522 F.3d at at 991 (quoting 15 U.S.C. § 78u-4(b)(2)). If the allegations are insufficient to state a claim, a court should grant leave to amend, "unless it is clear that the complaint could not be saved by any amendment." *Id*. at 989 (quoting *Livid Holdings Ltd. v. Solomon Smith Barney, Inc*., 416 F.3d 940, 946 (9th Cir. 2005)).

B. Section 10(b).

Under Section 10(b) of the Exchange Act it is unlawful "to use or employ in connection with the purchase or sale of any security registered on a national securities exchange . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe." 15 U.S.C. § 78j(b). Rule 10b-5, promulgated under the authority of Section 10(b), makes it unlawful for any person, engaged in interstate commerce, to: (i) employ any scheme to defraud; (ii) make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (iii) engage in any act which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security. 17 C.F.R. § 240.10b-5.

To state a claim under Section 10(b) and Rule 10b-5, a plaintiff must allege: (i) a misrepresentation or omission; (ii) of material fact; (iii) made with scienter; (iv) on which the plaintiff justifiably relied; (v) that proximately caused the allege loss. *See Binder v. Gillespie*, 184 F.3d 1059, 1063 (9th Cir. 1999).

1. Material Misrepresentations or Omissions.

Under Rule 9(b) and the PSLRA, a plaintiff must "identify[] the statements at issue and set[] forth what is false or misleading about the statement and why the statements were false or misleading at the time they were made." *In re Rigel Pharm., Inc. Sec. Litig*., 697 F.3d 869, 876 (9th Cir. 2012). Notably, this requirement applies to each challenged representation or omission. *See, e.g., Doll v. Stars Holding Co*., No. 05-cv-01132-MMC, 2005 WL 2811767, at *3 (N.D. Cal. Oct. 27, 2005) (noting plaintiffs must "specify the reasons why each such statement or omission is

false or misleading"). For purposes of Rule 10b-5, a statement is misleading "if it would give a reasonable investor the impression of a state of affairs that differs in a material way from the one that actually exists." *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1109 (9th Cir. 2010) (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985 (9th Cir. 2008)). While a statement is not misleading simply because it is incomplete, it is also the case that a "statement that is literally true can be misleading and thus actionable under the securities laws." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

Here, Plaintiffs challenge the statements and representations made in the Form 10-Qs filed by Alphabet on April 23, 2018 and July 23, 2018, which incorporated the risk factors in Alphabet's Form 10-K for 2017 and stated that there were no material changes to those risk factors. Plaintiffs allege that Alphabet's failure to disclose information about the Google+ bug rendered these statements misleading. (Complaint at ¶¶ 43-44, 49, 55.) Alphabet contends that the statements in its Form 10-Qs were not misleading because the software glitch had been remedied prior to the time the statements were made. The software bug had been identified as a problem in March 2018, and Google soon thereafter implemented a fix. (*See WSJ* Article, Ex. 1 at 1, 2; Complaint at ¶ 73.) Because a statement of future risk does not necessarily have to warn about past problems, Alphabet contends, the representations it made in April and July of 2018 were truthful and not misleading. There is no support for the position that a remediated technological problem which is no longer extant must be disclosed in the company's future-looking disclosures.

Second, Alphabet argues that the security measures that were included in their warnings were sufficiently specific to ensure that reasonable investors would be warned about inherent security risks in software that requires the sharing of data. Alphabet contends that its warnings were sufficient, that "security measures may also be breached due to employee error, [] system errors or vulnerabilities . . .," and that "[p]rivacy concerns relating to our technology could damage out reputation and deter current and potential users or customers from using our products and services." (Complaint at ¶ 27(a), (b).) Alphabet argues that these provisional warnings were sufficient to alert a reasonable investor that the technology involved privacy concerns which could

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