UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

In re WAYFAIR, INC. Securities Litigation	)
	) Civil Action No. 19-10062-DPW
This Document Relates To: ALL ACTIONS	)

MEMORANDUM AND ORDER
July 8, 2020

After Wayfair, Inc., an online home goods retailer, missed its quarterly financial projection by .002% one quarter, several individuals who say they consequently lost money in the stock market initiated the two lawsuits I have consolidated before me. This putative class action litigation is brought against Wayfair and its three most senior officers, all of whom also serve as directors, to recover those losses. Because I find Plaintiffs have not adequately alleged material misstatements of fact, demonstrated actionable scienter, or shown loss causation, I will grant Defendants' motion to dismiss.

I
BACKGROUND[1]

Wayfair is a huge online home goods store. As online

[1] This background is drawn from the materials available in the motion to dismiss record for review—principally the operative Amended Complaint. It is presented in the light most favorable to the plaintiffs as non-moving parties. *Silverstrand Investments* v. *AMAG Pharm., Inc.*, 707 F.3d 95, 101 (1st Cir. 2013).

retail has grown and Wayfair has faced increasing competition, Wayfair has spent more and more money on advertising — $191 million in 2014, $278 million in 2015, $409 million in 2016, $550 million in 2017, and $774 million in 2018 — to leverage revenue. Revenue correspondingly increased: Wayfair's annual revenue was $1.32 billion in 2014, $2.25 billion in 2015, $3.38 billion in 2016, $4.72 billion in 2017, and $6.78 billion in 2018.

During the alleged class period (August 2, 2018-October 31, 2018), Wayfair's advertising-revenue leverage was worse (deleveraged) than in previous years. Plaintiffs assert that Defendants knew of this problem but concealed it from investors. The defendants, Plaintiffs contend, in fact made false statements to the public about Wayfair's financial position and, in particular, that defendant Niraj Shah, Wayfair CEO and President and Co-Chairman of the Board of Directors, made these false and misleading statements during this time period:

- So ad spend, if you look at it sequentially over the last few years, it continues to drift down . . . . the costs get less and less on the advertising.

- And what you see, no matter which way you cut, you can see systematically that actually as customers increasingly repeat, the effective ad cost to get them [to] come back goes down and those models are kind of self-learning . . . . [W]e're highly confident that we understand what each tranche costs us. And you pretty much clearly see it coming down.

- And we talked about advertising. We talked about the payback cycle and keeping that very tight . . . . But when you take the profit margin we talk about, and you multiply it by a very large top line, you start talking about a very significantly profitable company.

- The U.S. has now been EBITDA[2] profitable, 6 of the last 7 quarters . . . . you can actually see how growing very quickly actually evolves you into the profitable model.

Wayfair's stock price during the class period reached $151.20 per share on September 14, 2018. During that same time period, the individual defendants, Shah, Steven K. Conine, Co-Chair of the Board of Directors, and Michael D. Fleisher, Chief Financial Officer, collectively sold $69 million of their personally held Wayfair shares in dozens of transactions. The record before me does not clearly indicate whether this was unusual transactional activity for those individuals.

Before the stock market opened on November 1, 2018, the day Wayfair would be filing its 3Q 2018 SEC Form 10-Q, Defendants disclosed in a press release and a conference call that their 3Q results were worse than anticipated. In the conference call,

[2] The standard definition of EBITDA is "[a] company's income without deductions for interest expenses, taxes, depreciation expenses, or amortization expenses, used as an indicator of a company's profitability and ability to service its debt." *Earnings before interest, taxes, and depreciation*, BLACK'S LAW DICTIONARY (10th ed. 2014). The parties do not appear to dispute the common definition of this acronym for an earnings and profitability metric.

Defendant Fleisher said that Wayfair's advertising had deleveraged in a year to year comparison between 3Q 2017 and 3Q 2018, from 11.8% in 3Q 2017 to 11.9% in 3Q 2018.[3] According to the amended complaint, however, Defendants had "misleadingly signaled during the Class Period" that they were experiencing positive leverage. Defendant Fleisher explained during the call that the two factors driving the incremental expense which resulted in a loss were advertising spending, which was higher than usual because of paybacks ("we continued to see great opportunities within our paybacks") and headcount hiring.

On November 1, 2018, following that conference call, Wayfair stock suffered a 12.8% loss, closing at $96.16 a share. Wayfair had an EBITDA loss of $76.4 million, a net loss of $151.7 million ($1.69/share), and negative free cash flow of $58.8 million. Plaintiffs characterize these losses as "much worse than Defendants had signaled during the Class Period [August 2, 2018 – October 31, 2018]." On November 2, 2018, the stock price fell an additional 3.3%.

[3] When Wayfair released its second quarter earnings by filing its 10-Q on August 2, 2018, it had forecasted advertising spending as a percentage of net revenue for the third quarter to be above the 10.7% experienced in its second quarter 2018 but below the 11.8% experienced in the third quarter 2017. Instead, Wayfair's advertising expense as a percentage of net revenue for third quarter 2018 was 11.9%, which Wayfair treats in its briefing, apparently through a rounding convention, to be .002% above the high end of its August 2, 2018 forecast.

II
MOTION TO DISMISS STANDARD

As a general proposition, a complaint must assert factual allegations that are more than merely speculative in order to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Isham* v. *Perini Corp.*, 665 F. Supp. 2d 28, 33 (D. Mass. 2009). In evaluating the plaintiffs' allegations in the complaint, I may look only to the "facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the complaint and matters of which judicial notice can be taken." *Id.* at 33 (citing *Nollet* v. *Justices of the Trial Court of Mass.,* 83 F.Supp.2d 204, 208 (D. Mass. 2000) *aff'd,* 248 F.3d 1127 (1st Cir.2000)). In evaluating the complaint, I must accept all factual allegations as true and draw all reasonable inferences in the light most favorable to the plaintiffs. *Isham*, 665 F.Supp.2d at 33 (citing *Langadinos* v. *Am. Airlines, Inc.,* 199 F.3d 68, 69 (1st Cir.2000)).

More specific requirements are in play for securities litigation. The First Circuit has directed that "[t]o state a claim under Section 10(b) of the Securities Exchange Act, plaintiffs must adequately plead '(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.'" *Metzler Asset*

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