

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE:	:	18-CV-7143 (JMF)
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NIELSEN HOLDINGS PLC SECURITIES	:	<u>OPINION AND ORDER</u>
LITIGATION	:	
	:	
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JESSE M. FURMAN, United States District Judge:

Plaintiffs in this putative securities-fraud class action — brought pursuant to Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. §§ 78j(b), 78t(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5 — are investors in Nielsen Holdings plc (“Nielsen”), a publicly traded data analytics company most famous for its television ratings service. Plaintiffs allege that Nielsen and several of its officers, Dwight Mitchell Barns, Jamere Jackson, and Kelly Abcarian (the “Individual Defendants” and, together with Nielsen, “Defendants”) made various false and misleading statements overstating the strength of Nielsen’s business segments. Defendants now move, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, to dismiss Plaintiffs’ claims. ECF No. 75 (“Motion”). For the reasons that follow, the motion is granted in part and denied in part.

BACKGROUND

The following facts, drawn from the Second Amended Complaint (the “Complaint”), ECF No. 72 (“SAC”), documents incorporated by reference therein, and mandatory public disclosure documents filed with the SEC, are assumed to be true for purposes of this motion. *See DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 110-11 (2d Cir. 2010); *see also Bd. of Trs. of Ft. Lauderdale Gen. Emps.’ Ret. Sys. v. Mechel OAO*, 811 F. Supp. 2d 853, 865 (S.D.N.Y. 2011), *aff’d sub nom. Frederick v. Mechel OAO*, 475 F. App’x 353 (2d Cir. 2012) (summary order).

Nielsen is a data analytics company that provides clients detailed information about consumer preferences. SAC ¶ 61. Nielsen relies on data obtained from third parties such as Facebook and Twitter for many of its products and services. *Id.* ¶ 2. At all relevant times, Nielsen’s business was broadly divisible into two segments of roughly equivalent size: (1) “Buy,” focused on consumer purchasing measurement and analytics in the Consumer Packaged Goods (“CPG”) space; and (2) “Watch,” focused on media audience measurement and analytics. *Id.* ¶ 61. The Buy Segment was further subdivided into Developed Markets, consisting of the United States, Canada, Western Europe, Japan, South Korea, and Australia; and Emerging Markets, consisting of Africa, Latin America, Eastern Europe, Russia, China, India, and Southeast Asia. *Id.* ¶ 69. By contrast, the Watch segment was subdivided by major product offerings: Marketing Effectiveness, Audio, Audience Measurement, and a general corporate sub-segment. *Id.* ¶ 70. At all relevant times, the Individual Defendants served in key leadership roles at Nielsen: Barns served as Chief Executive Officer and Board Chairman until his resignation at the end of 2018, *id.* ¶¶ 34, 36, 229; Jackson served as Chief Financial Officer until his resignation in August 2018, *id.* ¶¶ 37, 268; and Abcarian served as Senior Vice President of Product Leadership, *id.* ¶ 40.

Plaintiffs allege that Defendants made false or misleading statements in SEC filings and during earnings calls and industry conferences over a Class Period spanning from February 11, 2016, to July 25, 2018. *See id.* ¶ 283. The alleged false or misleading statements can be broadly grouped into two categories: statements concerning the Buy Segment and statements concerning the effect of the European Union’s General Data Protection Regulation (“GDPR”) on Nielsen’s Watch Segment:

A. Buy Segment Statements

Plaintiffs allege that, beginning in 2016, Defendants repeatedly made three kinds of misstatements about Nielsen's Buy Segment.

First, in a February 11, 2016 press release reporting results for the fourth quarter of 2015, Nielsen projected that its Buy Developed Market ("BDM") segment would report 1.5% to 3.5% growth in BDM revenue. *Id.* ¶ 81. During an earnings call for the same quarter, Barns told investors that the "buy business continued to strengthen and expand." *Id.* ¶ 82. He further noted that Nielsen felt "great about [its] progress and confident about the year ahead." *Id.* In the same call, Jackson assured investors that Nielsen's CPG clients were "pivoting to growth" and that Nielsen viewed the environment as stable and saw its "clients investing in analytics and innovation." *Id.* ¶ 83 (emphasis omitted). In Nielsen's 2016 Form 10-K filed on February 19, 2016, however, Barns and Jackson hedged a little, representing that Nielsen's Buy Segment clients "may" reduce discretionary advertising spending and "may" be less likely to purchase Nielsen's analytical services, which "would" naturally have an adverse effect on revenue. *Id.* ¶ 368. But from then through September 2016, Barns and Jackson frequently reaffirmed that they "remain[ed] confident in [their] plan to deliver on all of the operational elements that [they] laid out on [the] fourth quarter call." *Id.* ¶ 289; *see id.* ¶¶ 85, 90-91, 293. Contrary to these assertions and projections, however, discretionary spending was actually declining throughout 2016. Indeed, on October 25, 2016, Barns and Jackson admitted during an earnings call that they knew discretionary spending had been declining throughout the year, that the decline was permanent, and that it caused BDM revenues to fall 2.5% in the third quarter of 2016. *Id.* ¶¶ 133-48, 413-16; *see also id.* ¶¶ 136-37, 414 (Barns later admitting that Nielsen had

implemented initiatives to address the decline throughout 2016). When this news broke, Nielsen's stock plummeted nearly 17%. *Id.* ¶ 367.

Second, Barns and Jackson misrepresented the value of Buy Segment goodwill in Nielsen's Forms 10-K for the years ending December 31, 2016, and December 31, 2017, by making unreasonable and baseless cash flow assumptions that caused Nielsen to report inflated earnings, assets, and capital. *Id.* ¶¶ 157-58, 187-89, 278-80, 372-411, 456-60. In addition to concealing their model's faulty assumptions, Barns and Jackson represented to investors that impairment was just a risk that "could" materially affect Nielsen's financial performance and that the fair value of the Buy Segment's goodwill exceeded its carrying value "by at least 20%." *Id.* ¶¶ 157-58, 373-74, 386, 457. In reality, after the Class Period and after Barns and Jackson left Nielsen, Nielsen recorded a \$1.4 billion impairment charge that reduced the value of the Buy Segment's goodwill by 54%. *Id.* ¶¶ 279, 460.

Third, in 2017 and 2018, Barns and Jackson represented that Nielsen's Buy Emerging Market ("BEM") revenue would increase by 8% to 10% in 2018, that business was "exceptionally strong" and "robust," and that Nielsen "continue[d] to see solid growth from both local clients and multinationals across the emerging markets." *Id.* ¶¶ 14, 174-75, 183, 322-23. Barns and Jackson also represented that any revenue execution issues in China that had contributed to lower revenue than projected for the fourth quarter of 2017 had been resolved and that the Chinese Buy market was "very healthy," with "tremendous growth opportunities." *Id.* ¶¶ 333-34, 348. In actuality, Nielsen's BEM clients were significantly reducing spending throughout 2018, particularly in China and Southeast Asia, and the revenue execution issues were ongoing. *Id.* ¶ 184, 238, 274.

B. GDPR-Related Statements

Plaintiffs also allege false or misleading statements about the effect of GDPR on Nielsen's ability to acquire data from providers such as Facebook. GDPR, a sweeping data privacy regulation adopted in April 2016, and effective on May 25, 2018, created a system of rules restricting the use of personal data. *Id.* ¶¶ 16, 202, 204, 206. Among other things, it requires “the consent of those whose data is being used” and “the anonymization of certain collected data to protect privacy prior to the processing of that data.” *Id.* ¶ 202. It also includes “provisions regarding data breach notifications[] and rules regarding establishing policies for ensuring the safe handling of data across borders.” *Id.* Prior to its enactment, the legislation was heavily scrutinized for its likely adverse effect on the data collecting industry. *See id.* ¶¶ 204-05. Nevertheless, leading up to its enactment, Nielsen's senior officials repeatedly assured the public that Nielsen was ready for the regulation and that it would be a “non-event.” *Id.* ¶ 18. Barns and Abcarian continued to make these assurances even after GDPR went into effect, further representing that Nielsen had access to all of the data it would need for its products. *Id.* ¶¶ 16, 214-19. On September 12, 2018, however, Megan Clarcken, then the President of Product Leadership, revealed that, on the day GDPR was enacted, Nielsen's clients cut the company's access to their data, shutting off 120 of Nielsen's campaigns and raising doubts with respect to the truth of Nielsen's past assurances. *Id.* ¶ 270.

LEGAL STANDARDS

In reviewing a motion to dismiss pursuant to Rule 12(b)(6), a court must accept the factual allegations set forth in the complaint as true and draw all reasonable inferences in favor of the plaintiff. *See, e.g., Cohen v. Avana, Inc.*, 874 F. Supp. 2d 315, 319 (S.D.N.Y. 2012). The Court will not dismiss claims unless Plaintiffs have failed to plead sufficient facts to state a

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