

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	Amy J. St. Eve	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	02 C 4356	DATE	1/12/2009
CASE TITLE	Johnson et al vs. Tellabs, Inc. Et al.		

DOCKET ENTRY TEXT

Defendants' Motion for Partial Judgment On the Pleadings [200] is denied.

■ [For further details see text below.]

Notices mailed by Judicial staff.

STATEMENT

Defendants Tellabs, Inc., Michael J. Birck, Richard C. Notebaert, Brian Jackman and Joan Ryan have moved for partial judgment on the pleadings. For the reasons discussed in detail below, Defendants' motion is denied.

Background

This is a securities fraud action against Tellabs, Incorporated ("Tellabs"), Richard Notebaert, Michael J. Brick, Brian Jackman, and Joan Ryan. In their Second Amended Complaint ("SAC"), Plaintiffs bring claims pursuant to Section 10(b) of the Securities and Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5; Section 20(a) of the Exchange Act; and Section 20A of the Exchange Act. Plaintiffs have filed a motion for class certification, which the parties are currently briefing.

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The Court will briefly review the extensive history of this litigation, but assumes the parties' familiarity with it. In June 2002, Plaintiffs filed a putative class action lawsuit on behalf of various individuals and persons who purchased common stock of Defendant Tellabs between December 11, 2000 and June 19, 2001. The Court granted Defendants' motion to dismiss Plaintiffs' complaint in its entirety, but permitted Plaintiffs to amend. *See Johnson v. Tellabs, Inc.*, 262 F. Supp. 2d 937, 939 (N.D. Ill. 2003). Shortly thereafter, Plaintiffs filed their SAC. (See R. 63-1); *see also Johnson v. Tellabs, Inc.*, 303 F. Supp. 2d 941, 945 (N.D. Ill. 2004). After determining that the SAC failed to properly plead an underlying 10b-5 violation pursuant to the mandates of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(b) (the "PSLRA"), and reasoning that the remaining allegations were dependent on an underlying 10b-5 violation, the Court granted Defendants' motion to dismiss each count of the SAC, with prejudice. *Johnson*, 303 F. Supp. 2d at 971. On appeal, the Seventh Circuit affirmed in part and reversed in part, holding that Plaintiffs sufficiently had plead claims under Section 10(b) against Defendants Tellabs and Notebaert and properly had plead control person liability claims under Section 20(a) against both Notebaert and Birck. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 437 F.3d 588, 603-05 (7th Cir. 2006). The Supreme Court reversed the Seventh Circuit's interpretation of the *scienter* requirement of a Section 10(b) claim under the PSLRA, and remanded the case for further review consistent with the Supreme Court's holding. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007). On remand from the Supreme Court, the Seventh Circuit held that Plaintiffs had sufficiently pled *scienter* under the Supreme Court's articulation of the requirement. *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir. 2008).

The parties agree that following this extensive procedural history, four categories of alleged misrepresentations remain at issue in this lawsuit: 1) statements regarding Tellabs' financial results for the fourth quarter of 2000, 2) statements regarding the TITAN 5500, 3) statements regarding the TITAN 6500 system, and 4) Tellabs' projections of earnings and revenues during 2001. (R. 149-1, Joint Status Report at 2-4.) Defendants now seek to dismiss a portion of these claims in the SAC.

Analysis

Defendants have moved for judgment on the pleadings, arguing that Plaintiffs' SAC fails to allege loss causation with respect to certain fraudulent statements that form the basis of their securities fraud claim. They seek to dismiss portions of the lawsuit based on this alleged fatal defect.

I. Standard of Review

Defendants have filed a motion for judgment on the pleadings, pursuant to Federal Rule of Civil Procedure 12(c). The Court evaluates a Rule 12(c) motion under the same standard as a Rule 12(b)(6) motion to dismiss. *Pisciotta v. Old Nat'l Bancorp.*, 499 F.3d 629, 633 (7th Cir. 2007). In assessing the motion, the Court must accept the facts alleged in the complaint as true and draw all reasonable inferences in favor of Plaintiffs. *Id.*, citing *Thomas v. Guardsmark, Inc.*, 381 F.3d 701, 704 (7th Cir. 2004). "A court will grant a Rule 12(c) motion only when it appears beyond a doubt that the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no material issues of fact to be resolved." *Brunt v. Serv. Employees Int'l Union*, 284 F.3d 715, 718-19 (7th Cir. 2002). In determining a motion for judgment on the pleadings, courts may only consider the pleadings, which consist of the complaint, the answer, and documents attached as exhibits. *Housing Auth. Risk Retention Group, Inc. v. Chicago Hous. Auth.*, 378 F.3d 596, 600 (7th Cir. 2004).

II. Loss Causation

The Supreme Court has set forth the elements of a Section 10(b) securities fraud case "involving publicly traded securities and purchases or sales in public securities markets:"

- (1) *a material misrepresentation (or omission)*; (2) *scienter, i.e., a wrongful state of mind*; (3) *a connection with the purchase or sale of a security*; (4) *reliance*, often referred to in cases involving public securities markets (fraud-on-the-market cases) as "transaction causation;" (5) *economic loss*; and (6) *loss*

causation.

Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 341-342, 125 S.Ct. 1627, 1631 (2005) (citations and quotations omitted; emphasis in original). This motion pertains to the last element – loss causation. The Supreme Court has defined loss causation in this context as “a causal connection between the material misrepresentation and the loss.” *Id.* In order to succeed on a Section 10(b) claim, Plaintiffs must allege and prove that Defendants’ alleged misrepresentations proximately caused Plaintiffs’ losses. See *Ray v. Citigroup Global Mkts., Inc.*, 482 F.3d 991, 994 (7th Cir. 2007). Indeed, “[t]o plead loss causation, the plaintiff must allege that it was the very facts about which the defendant lied which caused its injuries.” *Tricontinental Indus. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 842 (7th Cir. 2007).

The Seventh Circuit teaches that the loss causation requirement “ought not place unrealistic burdens on the plaintiff at the initial pleading stage.” *Caremark, Inc. v. Coram Healthcare Corp.*, 113 F.3d 645, 649 (7th Cir. 1997). Indeed, as the Supreme Court expressly noted in *Dura*:

We concede that the Federal Rules of Civil Procedure require only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. Rule Civ. Proc. 8(a)(2). And we assume, at least for argument’s sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the short and plain statement must provide the defendant with fair notice of what the plaintiff’s claim is and the grounds upon which it rests. *Id.* at 346 (citations omitted).

The Seventh Circuit has recognized “several ways in which a plaintiff might go about proving loss causation.” *Ray*, 482 F.3d at 995. “The first is sometimes called the materialization of risk standard. *Caremark* takes that approach, requiring the plaintiff to prove that it was the very facts about which the defendant lied which caused its injuries. The second approach is the “fraud-on-the-market” scenario, which the Supreme Court discussed in *Dura*. Under that theory, plaintiffs must show both that the defendants’ alleged misrepresentations artificially inflated the price of the stock and that the value of the stock declined once the market learned of the deception.” *Id.* (quotations omitted).

Defendants argue that Plaintiffs have not sufficiently pled loss causation in their SAC because they have not alleged that a corrective disclosure took place in the June 19, 2001 press release which corrected each of the alleged misrepresentations. Specifically, they argue that the July 19, 2001 press release which resulted in the decline in stock price did not correct alleged misrepresentations regarding 1) the TITAN 6500, 2) Tellabs’ financials for the fourth quarter of 2000, and 3) Tellabs’ projections of earnings and revenues during 2001.

Another court in this district recently addressed loss causation in a similar case. In *Silverman v. Motorola, Inc.*, 07 C 4507, 2008 WL 4360648 (N.D. Ill. Sept. 23, 2008), the defendants argued that the plaintiffs had failed to allege loss causation because the press release that preceded the drop in stock price did not specifically say anything about the alleged material misrepresentations by the defendants regarding the delay in bringing Motorola’s 3G cell phones to market. In rejecting the defendants’ argument, the court held as follows:

We believe that the defendants read the loss causation requirement too narrowly. The possibility that other forces can contribute to a decline in value of the plaintiff’s securities always exists. There is no requirement at the pleading stage that a plaintiff affirmatively rule out those other factors in its complaint; rather the burden arises at trial. At this early stage, we find that plaintiffs have met their burden. The price of the stock dropped after the earnings warning issued on January 4, 2007. Although this warning did not single out the delay in marketing the 3G phones as the cause, it did indicate that below forecasted sales and earnings were a problem primarily in the Mobile Devices division. It is not unreasonable to assume that the market was aware of the absence of 3G phones in retail outlets during the all-important holiday season which had just ended, and attributed some or all of the weak sales to the 3G phones, particularly in light of the importance Motorola had placed on the 3G phones in earlier phone calls.

Id. at *15 (citations and quotations omitted). *See also In re Motorola Sec. Litig.*, 505 F.Supp.2d 501, 542-43 (N.D. Ill. 2007) (a securities fraud plaintiff must allege that “it suffered a loss when the truth became generally known”) (citations omitted).

The Court agrees with this reasoning at this stage of the litigation. Plaintiffs have alleged enough in their SAC to satisfy their pleading requirements under Rule 8 regarding loss causation. The SAC provides Defendants with fair notice of Plaintiffs’ claims and the grounds upon which they rest. The factual issues raised by Defendants are more appropriate for summary judgment. Accordingly, Defendants’ motion for judgment on the pleadings is denied.