UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE AOL TIME WARNER, INC. SECURITIES AND "ERISA" LITIGATION

MDL Docket No. 1500
02 Civ. 5575 (SWK)

OPINION AND ORDER

SHIRLEY WOHL KRAM, U.S.D.J.

On May 5, 2004, the Court granted in part and denied in part the defendants' motions to dismiss the Amended Complaint in this securities fraud action.[1] The May 5, 2004 Order and Opinion ("Opinion") provided for the plaintiff to submit a proposed Second Amended Complaint ("SAC") and accompanying memorandum of law indicating how the defects in the Amended Complaint had been cured.

On June 3, 2004, Lead Plaintiff Minnesota State Board of Investment ("MSBI") filed a motion for leave to file a SAC, a proposed SAC and a supporting memorandum of law claiming that the defects identified by the Opinion had been corrected. The defendants opposed the motion. For the reasons set forth below, the motion for leave to file the proposed SAC is granted, subject to the limitations indicated.

I. The eBay Transaction Is Pled With Particularity

[1] See Opinion and Order, In re AOLTW Inc. Sec. and ERISA Litig., MDL Doc. No. 1495, 02 Civ. 5575, 2004 WL 992991 (S.D.N.Y. May 5, 2004).

Allegations relating to AOL's transaction with eBay were initially dismissed because the pleadings made "no mention of when this agreement was consummated or what its terms were." Opinion at 36. By providing particularized details regarding the allegedly fraudulent deal between AOL and eBay (SAC ¶¶ 229-230), the SAC has cured this omission.[2]

II. The Proposed SAC Cures The Defects With Respect To Joseph Ripp And Steven Rindner

In dismissing the claims against Joseph Ripp and Steven Rindner, the Court found that the Amended Complaint did not establish Ripp and Rindner's knowledge of the allegedly fraudulent deals with Homestore, but merely pled that the two of them participated on a telephone call where certain aspects of the deal were discussed. See Opinion at 59-60, 64-65. The SAC cures this defect, and thereby adequately pleads "strong circumstantial evidence of conscious misbehavior or recklessness," Ganino v. Citizens Utils. Co., 228 F.3d 154, 168-69 (2d Cir. 2000), by alleging that Ripp and Rindner were intimately involved in the allegedly fraudulent Homestore transactions.[3] Coupled with the detailed pleadings regarding

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[2] The defendants do not oppose the amended eBay allegations. See Memorandum Of Law In Support Of Defendants' Opposition To Plaintiff's Motion For Leave To File Its Second Amended Consolidated Class Action Complaint ("Def. Opp.") at 3.

[3] The SAC alleges, inter alia, that Ripp and Rindner participated in a call in which the entire structure of the three-way deal with Homestore, including a "written schedule of the

alleged manipulative acts by Ripp and Rindner vis-à-vis their participation in the Homestore deal, the allegations in the SAC are adequate to survive a motion to dismiss. With respect to Defendant Ripp, the SAC's scienter allegations also cure the defects in the control person claims asserted against him.

III. The Proposed SAC Cures The Defects With Respect To Gerald Levin

The Section 10(b) claims against Defendant Gerald Levin in the Amended Complaint were dismissed for failure to plead scienter and failure to plead actionable misstatements or manipulative acts. See Opinion at 56-57. The proposed SAC cures these defects.

According to the proposed SAC, Levin, as CEO of AOLTW, signed numerous AOLTW SEC filings in February 2000, March 2000, April 2000 and May 2000, including the Merger Registration Statement. Reply Memorandum of Lead Plaintiff MSBI In Support Of Its Motion For Leave To File Its Second Amended Consolidated Class Action Complaint ("MSBI Reply") at 8, n.6. Plaintiff alleges that Levin's signature on the Company's SEC filings is sufficient to plead Levin's knowledge, or at least reckless disregard of, AOL's advertising situation. Against the backdrop

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transactions," was discussed. SAC ¶ 614. Additionally, the SAC alleges that Ripp and Rindner requested that Homestore executives provide a list of the third parties involved in the deal and then agreed to accept a list that apparently disguised the actual third parties by including non-parties, or dummy vendors. SAC ¶ 612.

of the aforementioned SEC filings, plaintiff alleges that in October 2000 Levin made a series of statements regarding AOL's advertising, including a statement that concerns related to a decline in AOL's advertising revenue were "a kind of nervous Nellie, manufactured issue." SAC ¶ 600. MSBI contends that at minimum, it has adequately pled that Levin was reckless in making these statements "because he failed to review internal AOL documents which showed the substantial deteriorating condition of AOL advertising revenue." Memorandum of Lead Plaintiff MSBI In Support Of Its Motion For Leave To File Its Second Amended Consolidated Class Action Complaint ("MSBI Memo") at 6, 7-8. The Court agrees.[4] Drawing all reasonable inferences from the SAC in favor of the plaintiff, as it must, the Court concludes that MSBI has alleged "strong circumstantial evidence of conscious misbehavior or recklessness," Ganino, 228 F.3d at 168-69. Accordingly, the Section 10(b) and related control person claims against Levin in the SAC cure the defects of the

[4] Levin's contention that his October 2000 statements could not have been reckless because he "simply was not privy to 'the internal AOL documents' concerning AOL's advertising revenue" in October 2000, See Def. Opp. at 8, appears flatly contrary to the fact that Levin signed AOLTW's SEC filings throughout the year 2000, including the Merger Registration Statement. Further, even if Levin did not have access to any AOL internal documents prior to October 2000, which seems unlikely, MSBI's allegation that Levin acted recklessly in offering an unqualified and uninformed opinion on an issue of critical importance to investors is sufficient to satisfy Section 10(b)'s scienter requirement. See generally In re Carter Wallace, Inc. Sec. Litig., 220 F.3d 36, 39 (2d Cir. 2000).

Amended Complaint and are sufficient to survive a motion to dismiss.

IV. The Proposed SAC Cures The Defects With Respect To Stephen M. Case

The Section 10(b) claim against Case was dismissed, inter alia, for failure to allege that Case "knew that the A&C revenue stream was considerably more imperiled than was being reported to shareholders and the public." Opinion at 71-72. By alleging that in November 1999, "Case began *receiving* internal company reports pointing to a stark reversal of fortune on the horizon," the SAC cures this defect. See SAC ¶¶ 581-582 (pleading with specificity the content of the November 1999 internal company reports)(emphasis added).[5]

The Section 10(b) claim against Case in the Amended Complaint was also dismissed because "none of the statements…attributed to Case in the Complaint [were] sufficient to create…liability." Opinion at 72. The SAC also cures this defect. According to the SAC, on October 17, 2000 Case said, "I do not think people generally are concerned about Internet advertising. Our results show that there's no reason to be concerned when it comes to AOL." SAC ¶ 590. In light of Case's

[5] Challenges to the credibility of the source of some of the allegations in the SAC are not appropriate at the motion to dismiss stage. See In re IPO Sec. Litig., 241 F. Supp. 2d 281, 295 (S.D.N.Y. 2003)("A court must accept as true the factual allegations of a complaint.")

alleged knowledge as early as November 1999 that the advertising revenue was facing a "stark reversal of fortune," the above statement may form the basis of a Section 10(b) claim against Case.

Because the SAC properly pleads scienter with respect to Case, the Sections 10(b) and related control person claims against Case are sufficient to survive a motion to dismiss.

V. The Claims Against Defendants Novack, Parsons, Schuler and Berlow Are Dismissed With Prejudice

MSBI asks that the Court not dismiss with prejudice the Sections 10(b) related control person claims against defendants Novack, Parsons, Schuler and Berlow, despite the fact that MSBI has made no effort to replead securities claims against these individuals. That request is denied.

In enacting the PSLRA, Congress recognized that "[t]he cost of discovery often forces innocent parties to settle frivolous securities class actions", H.R. Conf. Rep. No. 104-359, at 37 (1994), and imposed a mandatory stay of discovery, in part, to protect defendants from the burdens of discovery before a court determines that plaintiffs have put forth a sustainable claim. See In re Vivendi Universal, S.A. Sec. Litig., No. 02 Civ. 5571, 2003 WL 21035383, at *1 (S.D.N.Y. May 6, 2003) (citing S. Rep. No. 104-98, at 14 (1995)). If the Court were to permit MSBI to discover its way into a viable securities claim, the PSLRA stay

provision would become meaningless and the Congressional intent of the statute vitiated. After all, "[d]iscovery is authorized solely for parties to develop the facts in a lawsuit in which a plaintiff has stated a legally cognizable claim, not in order to permit a plaintiff to find out whether he has such a claim, and still less to salvage a lawsuit that has already been dismissed for failure to state a claim." Podany v. Robertson Stephens, Inc., No. 03 Civ. 3961 (GEL), 2004 WL 1161247, at *2 (S.D.N.Y. May 24, 2004).

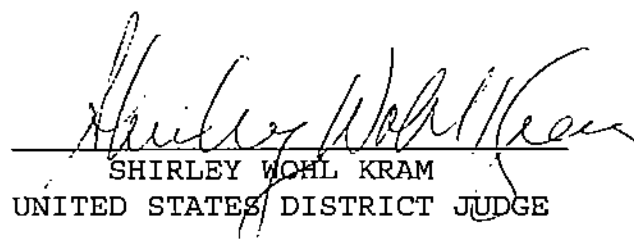
After having the deficiencies in the Amended Complaint explicitly identified, the plaintiff was given an opportunity to cure them. With respect to Novack, Parsons, Schuler and Berlow, it chose not to do so. Accordingly, the claims against those individuals are dismissed with prejudice.

VI. All Claims That Are Dismissed With Prejudice Should Be Removed From The SAC

In light of the Second Circuit's statement in P. Stolz Family P'Ship L.P. v. Daum, 355 F.3d 92, 96 (2d Cir. 2004), that "we will not require a party, in an amended complaint, to replead a dismissed claim in order to preserve the right to appeal…," MSBI has offered, and by this Order is now instructed, to excise the portions of the Amended Complaint that have been dismissed with prejudice.

MSBI's Final Amended Complaint should be filed with the Court and served on opposing counsel no later than fifteen days after entry of this Order. At that time, the defendants, subject to any separate agreement reached by the parties, will have thirty days to answer the allegations.

SO ORDERED.



SHIRLEY WOHL KRAM
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 11, 2004