International Union of Operating Engr. Benefit Funds of E. Pa & Del v Camping World Holdings, Inc.
2020 NY Slip Op 31560(U)
April 22, 2020
Supreme Court, New York County
Docket Number: 656308/2018
Judge: Jennifer G. Schecter
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

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INTERNATIONAL UNION OF OPERATING ENGINEERS BENEFIT FUNDS OF EASTERN PENNSYLVANIA AND DELAWARE,

Plaintiff,

- v -

CAMPING WORLD HOLDINGS, INC.,MARCUS LEMONIS, THOMAS WOLFE, STEPHEN ADAMS, CRESTVIEW ADVISORS, L.L.C., CRESTVIEW PARTNERS II GP, L.P., CWGS HOLDING, LLC,CVRV ACQUISITION LLC,CVRV ACQUISITION II LLC,GOLDMAN SACHS & CO. LLC,J.P. MORGAN SECURITIES LLC,MERRILL LYNCH, PIERCE, FENNER & SMITH INC.,CREDIT SUISSE SECURITIES (USA) LLC,ROBERT W. BAIRD & CO. INC.,BMO CAPITAL MARKETS CORP., KEYBANC CAPITAL MARKETS INC.,STEPHENS INC.,WELLS FARGO SECURITIES, LLC,

Defendants.

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INDEX NO. 656308/2018

MOTION DATE

SEQ. NOS. 002 003

DECISION & ORDER ON MOTIONS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 61, 62, 63, 65, 66, 67, 72, 73

were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 54, 68

were read on this motion to DISMISS.

Motion sequence numbers 002 and 003 are consolidated for disposition.

Defendants Camping World Holdings, Inc. (Camping World or the Company), Marcus A. Lemonis, Thomas F. Wolfe, Stephen Adams (collectively, the Individual Defendants), Crestview Partners II GP, L.P. (Crestview Partners), CWGS Holding, LLC (CWGS Holding), CVRV Acquisition LLC (CVRV Acquisition), CVRV Acquisition II LLC (CVRV Acquisition II), and Crestview Advisors, L.L.C. (collectively with CWGS

Holding, CVRV Acquisition, and CVRV Acquisition II, the LLC Defendants) move to dismiss the complaint (Seq. 002). Defendants Goldman Sachs & Co. LLC, J.P. Morgan Securities LLC, Merrill Lynch, Pierce, Fenner & Smith Incorporated, Credit Suisse Securities (USA) LLC, Robert W. Baird & Co. Incorporated, BMO Capital Markets Corp., Keybanc Capital Markets Inc., Stephens Inc., and Wells Fargo Securities, LLC (collectively, the Underwriter Defendants) separately move to dismiss the complaint (Seq. 003). Plaintiff, International Union of Operating Engineers Benefit Funds of Eastern Pennsylvania and Delaware, opposes the motions. The motions are granted in part.

Background

Camping World is an Illinois-based publicly traded corporation that provides products and services to RV enthusiasts. Plaintiff brings this putative class action under sections 11 and 12(a)(2) of the Securities Act of 1933 (the 1933 Act) based on allegedly material misstatements made in the prospectus (Dkt. 34) and registration statement (Dkt. 35) (collectively, the Offering Materials) issued in connection with its purchase of Camping World's Class A common stock in a secondary offering in October 2017 (the Offering).[1] Plaintiff has sued Camping World's underwriters, the selling stockholders, and three individuals allegedly responsible for the misstatements in the Offering Materials.

[1] "Section 11 deals with registration statements, while section 12 covers prospectuses. Section 11 allows purchasers of a registered security to sue certain statutorily-enumerated parties involved in a registered offering when false or misleading information is included in a registration statement. The statutorily-enumerated parties subject to liability include every person who signed the registration statement, the directors of the issuer, and the underwriters of the security. Section 12(a)(2) creates liability for any person who offers or sells a security by means of a prospectus or oral communication that includes a material misrepresentation or omission" (*In re Fuwei Films Sec. Litig.*, 634 F Supp 2d 419, 433-34 [SDNY 2009]).

Plaintiff alleges that Camping World's 2016 Form 10-K, filed on March 13, 2017, misstated its fourth quarter basic and diluted earnings per share (EPS),[2] respectively, by 37.5% and 28.6% and that it also overstated its net income for the fourth quarter by 29.8% (*see* Dkt. 36 [the 2016 10-K]). Camping World did not restate these metrics until 2018 – after it repeated these incorrect amounts in the Offering Materials and after the Offering occurred. According to the complaint, the 2016 10-K also falsely claimed that Camping World's financial statements were prepared in accordance with generally accepted accounting principles (GAAP). Furthermore, Camping World allegedly falsely stated in the Offering Materials that it had devoted "significant resources and management attention" to ensure that it had effective internal controls over its financial reporting. In Camping World's Form 10-Qs, filed on May 4, 2017 and August 10, 2017, it repeated the alleged misrepresentations concerning GAAP and internal controls.

On October 25, 2017, Camping World filed the Offering Materials with the SEC. The following day, on October 26, 2017, plaintiff purchased 1,560 shares of Camping World's stock in the Offering at a price of $40.50 per share – nearly $20 per share more than the stock's IPO price from the previous year (*see* Dkt. 63 at 6). Plaintiff claims that Camping World's inflated earnings data made it and other similarly situated investors believe that Camping World was performing better than it really was.

[2] "'Basic' EPS measures the earnings on the total number of common shares outstanding as of the reporting date. 'Diluted' EPS takes into account potential additional shares outstanding, including the exercise of stock options or other convertible shares" (Dkt. 46 at 10 n 4).

Four months later, on February 27, 2018, Camping World released its financial results for 2017, disclosing that it "recently identified material weaknesses in [its] internal control over financial reporting" and that it had identified errors in its prior financial reports that would necessitate a restatement of its financials (*see* Dkt. 39 at 12). On March 13, 2018, Camping World did so (*see, e.g.*, Dkt. 38 at 2 ["the Company's previously issued consolidated financial statements as of and for the year ended December 31, 2016 … should no longer be relied upon"], 2-3 ["the Company's chief executive officer and chief financial officer have concluded that the Company's disclosure controls and procedures were not effective at the reasonable assurance level as of (the period between December 31, 2016 and December 31, 2017) and the Company's management has concluded that its internal control over financial reporting was not effective as of December 31, 2017"]). Specifically, the "Company noted errors involving (i) the lack of deferral of a portion of roadside assistance policies sold with its vehicles; (ii) the application of certain vendor rebates against the related inventory balances; (iii) the elimination of the intercompany allocation of certain revenue from new and used vehicles to consumer services and plans; (iv) the allocation of the intercompany markup applicable to new and used vehicles" (Complaint ¶ 62; *see* Dkt. 39 at 10).

In December 2018,[3] plaintiff commenced this action, alleging: (1) violation of section 11 of the 1933 Act, asserted against Camping World, the Individual Defendants, and the Underwriter Defendants; (2) violation of section 12(a)(2) of the 1933 Act, asserted

[3] On December 17, 2018--the day before the complaint was filed--the Company's stock traded at $14.46, which was well below the $40.50 per share that plaintiff paid in the Offering.

against the LLC Defendants; (3) violation of section 15 of the 1933 Act, based on the alleged violation of section 11, asserted against Lemonis, CWGS Holding, and Crestview Partners; and (4) violation of section 15 of the 1933 Act, based on the alleged violation of section 12(a)(2), asserted against Lemonis, Adams, and Crestview Partners.

Defendants move to dismiss. They argue that (1) the LLC Defendants are not "statutory sellers,"[4] (2) the statements about Camping World's EPS and net income are not material; (3) the statements about Camping World's internal controls and GAAP are non-actionable opinions; (4) plaintiff failed to plead any red flags that would preclude the Underwriter Defendants from relying on Camping World's auditors' expertised statements; (5) plaintiff failed to allege control-person liability under section 15; and (6) alternatively, this action should be dismissed or stayed because a similar action is pending in the United States District Court for the Northern District of Illinois (*Ronge v Camping World Holdings, Inc.*, No. 1:18-cv-7030 [ND Ill] [the Illinois Federal Action]; *see* Dkt. 44).

Discussion

Legal Standard

On a motion to dismiss, the court must accept as true the facts alleged in the complaint and all reasonable inferences that may be gleaned from them (*Amaro v Gani Realty Corp.*, 60 AD3d 491 [1st Dept 2009]). The court is not permitted to assess the merits of the complaint or any of its factual allegations, but may only determine if,

[4] Reserving the right to probe the issue in discovery, defendants withdrew the argument that plaintiff lacks standing on its section 11 claims after plaintiff submitted evidence of its purchase of the Company's stock in the Offering (*see* Dkt. 63 at 6).

assuming the truth of the facts alleged and the inferences that can be drawn from them, the complaint states the elements of a legally cognizable cause of action (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003], citing *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). If the defendant seeks dismissal of the complaint based on documentary evidence, the motion will succeed only if "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Securities Act of 1933

The 1933 Act provides relief to investors who purchased securities after a company issued a prospectus (section 12) or a registration statement (section 11) containing either "an untrue statement of a material fact" or omitting a material fact necessary to make statements that were included in the materials not misleading. Because security issuers have virtually absolute liability under section 11 and negligence otherwise applies to section 11 and violations of section 12, the 1933 Act gives rise to liability much more readily than the Securities Exchange Act of 1934, which governs securities fraud and is subject to exclusive federal jurisdiction (*In re Morgan Stanley Information Fund Secs. Litig.*, 592 F3d 347, 359 [2d Cir 2010]). The 1933 Act, however, applies much more narrowly.

Section 12: Liability Based on the Prospectus

Section 12(a)(2) only imposes liability on one who "offers or sells a security" (15 USC § 77l[a][2]). It requires that a defendant be more than a mere participant in a securities

transaction. A defendant must be a "statutory seller"--one who either actually passes title to the purchaser for value or who successfully solicits the purchase of securities "motivated at least in part by a desire to serve his own financial interests or those of the securities owner" (*Pinter v Dahl*, 486 US 622, 642, 647 [1988]).

In this case, the section 12 claims are asserted only against the LLC Defendants. It is undisputed that the LLC Defendants never passed title of the shares to plaintiff "because the underwriters purchased all 6,700,000 shares before such shares were offered to investors" (Dkt. 31 at 20). Plaintiff's contention that the LLC Defendants "received the majority of the $271 million in proceeds generated by the Offering" does not satisfy the requirement that actual title pass between the parties and value be exchanged between them (*see* Dkt. 61 at 18). Plaintiff contends that the LLC Defendants are nonetheless statutory sellers based on solicitation because they "sold and assisted in the sale of Camping World's stock by means of the prospectus, promoted the sale of Camping World's common stock, and were motivated by a desire to serve their financial interests" (*see id.*). While plaintiff pleads the requisite motive, missing are any facts demonstrating what the LLC Defendants actually did to "solicit" the purchase here.[5] Plaintiff recites solicitous words but they are not tethered to any facts laying out the LLC Defendants' conduct that constitutes selling, assisting or promoting in regard to the plaintiff or the relevant offering (*see In Re Violin*

[5] Plaintiff relies on the allegations in paragraph 101 to show that the LLC Defendants promoted the transactions (*see* Dkt. 61 at 19). There are no facts, however, supporting solicitation, just conclusory allegations (*see* Complaint ¶ 101 [LLC Defendants "were sellers of Camping World Class A common stock within the meaning of § 12(a)(2) . . . and promoted the sale of said securities directly to Plaintiff and the Class, and in so acting, were motivated by a desire to serve their own financial interests"]).

Memory Sec. Litig., 2014 WL 5525946, at *19 [ND Cal Oct. 31, 2014], accord *Baker v Seaworld Entertainment, Inc.*, 2016 WL 2993481, at *17 [SD Cal Mar. 31, 2016]; *see also Greenfield Children's Partnership v FriendFinder Networks, Inc.*, 2014 WL 12205997, at *4 [SD Fla Mar. 18, 2014] ["threadbare assertion" that defendant "'actively solicited the securities' is insufficient to establish seller status under *Pinter*"]).

Because plaintiff fails to allege facts plausibly rendering the LLC Defendants statutory sellers, the section 12(a)(2) claims are dismissed without prejudice to proper amendment based on non-conclusory solicitation allegations.

Section 11: Liability Based on the Registration Statement

Section 11 "imposes liability on issuers and other signatories of a registration statement that, upon becoming effective, contains an untrue statement of a **material** fact" or omits "a **material** fact required to be stated therein or necessary to make the statements therein not misleading" (*Litwin v Blackstone Group, L.P.*, 634 F3d 706, 715 [2d Cir 2011] [emphasis added]; *see* 15 USC § 77k[a]).

Earnings Per Share and Net Income

Materiality is essential to liability in a section 11 case. A statement is only material if there is "a substantial likelihood that the disclosure … would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available" (*Basic Inc. v Levinson*, 485 US 224, 231-32 [1988]; *see Litwin*, 634 F3d at 717). Materiality is often a question of fact, especially when the court cannot discern from the pleadings and without the benefit of expert testimony how important a particular metric was to a reasonable investor (*see Morgan Stanley*, 592 F3d at 359 ["the materiality element

presents 'a mixed question of law and fact" and thus "it will rarely be dispositive in a motion to dismiss"], citing *ECA, Local 134 IBEW Joint Pension Trust of Chicago v JP Morgan Chase Co.*, 553 F3d 187, 197 [2d Cir 2009] ["A complaint may not properly be dismissed ... on the ground that the alleged misstatements or omissions are not material unless they are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance"]).

Defendants contend that the alleged misrepresentations about Camping World's EPS and net income are not material because each metric falls well short of the 5% threshold below which misstatements are considered immaterial absent a qualitative basis to infer otherwise (*ECA*, 553 F3d at 204; *see Litwin*, 634 F3d at 717 ["a court must consider both 'quantitative' and 'qualitative' factors in assessing an item's materiality"]). They are only able to claim that the metrics are below the 5% threshold by focusing on Camping World's annual performance. The complaint, however, is based on Camping World's reported performance in the fourth quarter of 2016, for which it is undisputed that all of the relevant metrics were misstated by a much greater percentage. Net income for that quarter, for example, was misstated by 29.8%.

Plaintiff alleges that fourth-quarter information was material. It asserts that investors "and analysts had been eagerly anticipating [Camping World's] announcement of its fourth quarter 2016, results" because it was the first quarter since Camping World was publicly traded (Complaint ¶ 42). It also pleads that a financial firm observed in March 2018 that the "4Q EPS exceeded the consensus estimate of analysts" (*id.*). Defendants maintain that focusing on fourth-quarter results in isolation is misleading "due to the

seasonal nature of RV sales" as historically there is "lower customer demand in winter" (Dkt. 31 at 23).

That Camping World's fourth-quarter income has been much lower than income in the earlier three quarters alone cannot render any and all misstatements about fourth quarter performance immaterial as a matter of law. Reasonable investors may consider that information, which was misstated by more than 5%, in deciding whether or not to purchase. Without the benefit of a proper factual record and expert analysis about the significance of the disclosure, it is premature to conclude that Camping World's fourth quarter performance is inherently immaterial even if it was materially overreported. At this pleadings stage, the complaint must be construed liberally and be afforded every favorable inference. Because it is not definitively clear that the misreported information would have had no bearing on a reasonable decision to invest, dismissal of the claim is denied.

Compliance with GAAP and Sufficiency of Internal Controls

Misstatements of opinion are actionable under section 11, assuming materiality,[6] if one stating an opinion does not actually hold the opinion professed or if facts accompanying the opinion are untrue (*Omnicare, Inc. v Laborers District Council Constr. Indus. Pension Fund* (135 S Ct 1318, 1327 [2015]). Here, the parties dispute whether statements that Camping World's financial statements were "prepared and presented in

[6] Defendants do not dispute the materiality of a statement related to GAAP compliance here. Whether financials are prepared strictly in accordance with GAAP or use non-GAAP measures could be important to a reasonable investor under the circumstances because Camping World was newly publicly traded and compliance with GAAP criteria could lend credibility to the information reported.

accordance" with GAAP and statements about the sufficiency of Camping World's internal controls constitute factual matters or opinions.

Defendants urge that statements about GAAP compliance are "quintessential opinion statements" because GAAP is necessarily a collection of broad standards (Dkt. 65 at 12). Certain GAAP rules, however, "have objective application such that compliance would be a statement of fact" and defendants have not ruled that out here (*In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at *11-12 [D NJ Apr. 27, 2017], *affd* 905 F3d 106 [3d Cir 2018]). Plaintiff alleges that the 2016 10-K, which the registration statement incorporated, wrongly attests to Camping World's financial statements being prepared in accordance with GAAP when they actually were not (*compare* Dkt. 36 at 84 [representing that Camping World's financial statements are prepared in accordance with GAAP], *with* Complaint ¶ 65 [net income included non-GAAP measures]). While the 2016 10-K also disclosed that Camping World separately relied on non-GAAP metrics (*see, e.g.*, Dkt. 36 at 84 ["We believe that these Non-GAAP Financial Measures, when used in conjunction with GAAP financial measures, provide useful information about operating results, enhance the overall understanding of past financial performance and future prospects, and allow for greater transparency with respect to the key metrics we use in our financial and operational decision making"]), it unequivocally represented that the financial statements themselves were prepared in accordance with GAAP. The issue here is not which metrics best reflect Camping World's financial condition. Rather, what matters is that Camping World expressly represented which of its financial reporting used GAAP measures and which did not.

Plaintiff alleges that the disclosed errors in the financial statements--namely, "(i) the lack of a deferral of a portion of roadside assistance policies sold with [Camping World's] vehicles; (ii) the application of certain vendor rebates against the related inventory balances; (iii) the elimination of the intercompany allocation of certain revenue from new and used vehicles to consumer services and plans; and (iv) the allocation of the intercompany markup applicable to new and used vehicles"--are objectively inconsistent with GAAP not simply bad judgment calls (*see* Dkt. 61 at 25 ["the failures in GAAP . . . did not involve subjective elements . . . they were objective"]). Defendants do not meaningfully counter. Though they have the burden on this motion, they do not explain how despite these acknowledged mistakes, the financial statements could have nonetheless been prepared in accordance with GAAP. Thus, dismissal of the GAAP-related claim is denied.

By contrast, the statements about internal controls are opinions and plaintiff has not pleaded circumstances that would make them actionable. Review of the Offering Materials--the total mix of available information--reveals that Camping World did not make representations about the sufficiency of its internal controls (*see* Dkt. 36 at 55-56; *see also id.* at 107 ["We were not engaged to perform an audit of the Company's internal control over financial reporting. Our audits included consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the Company's internal control over financial reporting. Accordingly, we express no such

opinion"]). A reasonable shareholder could not read these clearly caveated remarks about Camping World's controls and believe that Camping World was assuring their quality.

Representations in the 2016 10-K that Camping World had devoted "significant resources and management attention" to its internal controls (*see* Dkt. 36 at 55), moreover, are not actionable because plaintiff has not alleged any facts indicating that this was not true. While Camping World's corrective disclosures admitted that its internal controls were inadequate, it never admitted, nor has plaintiff alleged any facts suggesting that Camping World did not actually devote "significant resources and management attention" to this area (*see* Dkt. 38 at 2 ["management has determined that certain material weaknesses existed in the Company's internal control over financial reporting"]). Just because a company's internal controls turn out to be inadequate does not mean the company did not seriously devote attention and resources to them. Identifying a failure does not permit a reasonable inference that the company did not try (*see In re SunEdison, Inc. Secs. Litig.*, 300 F Supp 3d 444, 469 [SDNY 2018] ["To be actionable, a defendant's certification about the adequacy of internal controls must have been knowingly false at the time that it was made"]).

Likewise, the statement that "our Chief Executive Officer and Chief Financial Officer concluded that our disclosure controls and procedures were effective at the reasonable assurance level as of December 31, 2016" (Dkt. 36 at 157), is also an opinion. It is not actionable because plaintiff has not pleaded that the officers did not believe the controls were effective (*see Tongue v Sanofi*, 816 F3d 199, 210 [2d Cir 2016]). The existence of problems with internal controls and that the officers' conclusions were

ultimately wrong and "turned out to be false" does not alter the analysis (*see Oklahoma Firefighters Pension & Ret. Sys. v Xerox Corp.*, 300 F Supp 3d 551, 566 [SDNY 2018] [insufficient "to allege that an opinion was unreasonable, irrational, excessively optimistic, (or) not borne out by subsequent events"], *affd sub nom. Arkansas Pub. Employees Ret. Sys. v Xerox Corp.*, 771 F Appx 51 [2d Cir 2019]). Claims related to Camping World's internal controls are dismissed without prejudice to proper amendment and satisfaction of the requirements of *Omnicare*.

Section 15: Control Person Liability

"Section 15 imposes joint and several liability on "[e]very person who, by or through stock ownership, agency, or otherwise . . . controls any person liable under" sections 11 or 12 of the 1933 Act (*Hutchison v Deutsche Bank Secs. Inc.*, 647 F3d 479, 490 [2d Cir 2011], quoting 15 USC § 77o[a]). "Control" is "the power to direct or cause the direction of the management and policies of [the primary violators], whether through the ownership of voting securities, by contract, or otherwise" (*In re Lehman Bros. Mtge.-Backed Sec. Litig.*, 650 F3d 167, 185 [2d Cir 2011]). "To establish § 15 liability, a plaintiff must show a 'primary violation' . . . and control of the primary violator by defendants" (*id.*). The only remaining potentially viable section 15 claims are those pleaded in the third cause of action against Lemonis, CWGS Holding, and Crestview Partners.[7]

[7] The section 12(a)(2) cause of action is dismissed; thus, the fourth cause of action fails and there is no reason to analyze whether Crestview Partners controlled the LLC Defendants (*see Hutchison*, 647 F3d at 490).

Defendants argue that Crestview Partners cannot be held liable under section 15 because plaintiff has not pleaded any facts showing its control over Camping World. They observe that "Crestview (Partners) held only a minority voting interest of 15% in the Company, and had nominated just three of the eight members of Camping World's board" (Dkt. 31 at 27). In opposition, plaintiff does not explain how Crestview Partners used or could have used its minority stake to control Camping World. For control-person liability to inhere, there must be an ability to direct the company's action; having a voice in management is not enough. The claim is dismissed without prejudice to amendment upon a showing of actual control.

The section 15 claim also is dismissed without prejudice against CWGS Holding, which had a 47% voting interest in Camping World. Plaintiff does not explain how CWGS Holding could or did use this interest to control Camping World. While plaintiff correctly contends that it need not prove control at the pleading stage, it must do more then simply point to a large minority stake without explaining how that stake was or even could possibly have been used to control Camping World.

Lemonis, by contrast, plausibly controlled Camping World because plaintiff alleges that he "served as Camping World's CEO and Chairman of the Board at the time of the Offering" (Complaint ¶ 12). The section 15 claims against him survive.

Claims Against the Underwriter Defendants

The Underwriter Defendants move for partial dismissal based on 15 USC § 77k(b)(3)(c),[8] which only applies to a non-issuer, and establishes that one may not be held liable under section 11 when a misrepresentation was "made on the authority of an expert" and the defendant

> had no reasonable ground to believe and did not believe, at the time such part of the registration statement became effective, that the statements therein were untrue or that there was an omission to state a material fact required to be stated therein or necessary to make the statements therein not misleading, or that such part of the registration statement did not fairly represent the statement of the expert or was not a fair copy of or extract from the report or valuation of the expert.

Some courts have held that this defense may never be raised on a motion to dismiss (*see Griffin v PaineWebber Inc.*, 84 F Supp 2d 508, 513 [SDNY 2000]). Others have reasoned that, in certain circumstances, a motion to dismiss based on the defense may be granted if the plaintiff does not plead that the underwriter had some reason to believe that there was a misrepresentation, whether it be knowledge or the existence of any red flags that could have served as an alert (*see Feyko v Yuhe Intl., Inc.*, 2013 WL 816409, at *9 [CD Cal Mar. 5, 2013] [complaint was essentially silent about the underwriters other than identifying them]; *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F Supp 2d 1132, 1174-75 [CD Cal 2008] [defense applied to accounting-related allegations because "underwriters

[8] The Underwriter Defendants clarified at oral argument that their reliance-on-expertised-statements defense is limited to claims based on representations in the Company's audited financials (Dkt. 75 [9/6/19 Tr. at 31-32]; *see* Dkt. 46 at 10 n 5).

may reasonably rely on auditors' statements, absent red flags that the underwriters were in a position to see"]).

The Underwriter Defendants argue that here, as in *Feyko*, plaintiff's complaint "is essentially silent about the underwriters, other than identifying them" (*see id.* at *9). Plaintiff does not disagree. It resists dismissal, urging only that a defense based on expertised statements (§ 77k[b][3][c]) is never subject to dismissal at the pleadings stage.

In enacting the defense, Congress determined that, absent a reason to the contrary, non-issuers should be able to rely on the veracity of audited financial statements. The Underwriter Defendants are not corporate directors with broad access to information who can reasonably be expected to know more about the issuer. Nor has plaintiff alleged or even asserted any basis for the Underwriter Defendants to question the audited statements. Categorically denying dismissal would subject non-issuer defendants relying on audited statements to the heavy burden of discovery without even any minimal justification. The claims against the Underwriter Defendants based on Camping World's 2016 audited financials are therefore dismissed without prejudice to proper amendment if appropriate.

Illinois Federal Action

A stay or dismissal of this action in favor of the earlier-filed Illinois Federal Action is denied in the exercise of discretion (*see Aon Risk Servs. v Cusack*, 102 AD3d 461, 462 [1st Dept 2013]). The theory of the Illinois Federal Action, which initially involved 1934 Act claims, was different and only changed to match this case, after this case was filed (*see id.*). This case, moreover, is now discovery ready. The putative class is best served by immediately proceeding with this straightforward action now rather than waiting for the

PSLRA stay to be lifted in Illinois and proceeding in a much more complicated lengthy litigation there.

Accordingly, it is

ORDERED that defendants' motions to dismiss are granted in part to the extent that the following claims are dismissed without prejudice: (1) the second and fourth causes of action; (2) all claims against CWGS Holding and Crestview Partners; and (3) the claims against the Underwriter Defendants based on Camping World's 2016 audited financials; the motions are otherwise denied; and it is further

ORDERED that a preliminary conference will be held telephonically on June 2, 2020 at 3:00 p.m., and the parties shall submit their joint letter at least one week before.

4/22/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☐ GRANTED ☐ DENIED ☒ NON-FINAL DISPOSITION ☒ GRANTED IN PART ☐ OTHER