

**Convery v Jumia Tech. AG**

2020 NY Slip Op 32639(U)

August 7, 2020

Supreme Court, New York County

Docket Number: 656021/2019

Judge: Andrea Masley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: COMMERCIAL PART 48

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MARK CONVERY, Individually and on Behalf  
of All Others Similarly Situated,  
  
Plaintiff,

Index No. 656021/2019

v.

Motion Seq. No. 001

JUMIA TECHNOLOGIES AG, JEREMY HODARA,  
SACHA POIGNONNEC, ANTOINE MAILLET-  
MEZERAY, DONALD J. PUGLISI, GILLES BOGAERT,  
ANDRE T. IGUODALA, BLAISE JUDJA-SATO,  
JONATHAN D. KLEIN, ANGELA KAYA MWANZA,  
ALIOUNE NDIAYE, MATTHEW ODGERS, JOHN H.  
RITTENHOUSE, MORGAN STANLEY & CO. LLC,  
CITIGROUP GLOBAL MARKETS INC., BERENBERG  
CAPITAL MARKETS, LLC, RBC CAPITAL  
MARKETS, LLC, STIFEL, NICOLAUS & COMPANY,  
INCORPORATED, RAYMOND JAMES & ASSOCIATES,  
INC., WILLIAM BLAIR & COMPANY, L.L.C., and  
ERNST & YOUNG, SOCIETE ANONYME,  
  
Defendants.

DECISION & ORDER

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ANDREA MASLEY, J.:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 34, 35, 36, 37, 38 and 48 were read on this motion for a stay.

This is a putative securities class action under the Securities Act of 1933 (the 1933 Act), brought on behalf of the purchasers of American Depository Shares (ADSs) of Jumia Technologies AG (Jumia) pursuant or traceable the Registration Statement issued in connection with Jumia's April 2019 initial public offering (IPO) of 15.525 million ADSs (including exercise of over-allotment option) at \$14.50 per share. In motion sequence 001, all defendants move, pursuant to CPLR 2201, to stay all proceedings pending adjudication of the federal action titled *In re Jumia Technologies AG Securities Litigation*, No. 19-cv-4397 (SD NY) (Castel, J.), currently pending in the United States District Court for the Southern District of New York.

Jumia is an e-commerce company that provides goods and services to consumers in Africa (NYSCEF Doc. No. [NYSCEF] 32, Amended Complaint ¶3). In the state and federal actions, plaintiffs seek recovery on behalf of securities purchasers allegedly defrauded by statements and omissions made in connection with Jumia’s April 2019 IPO regarding the company’s orders, order cancellations, undelivered orders, returned orders, active consumers, active merchants and related party transactions. This state court action was filed on October 15, 2019 (NYSCEF 1) and amended on January 27, 2020 (NYSCEF 32). The federal court action was filed on May 14, 2010 (NYSCEF 23) and amended twice, on December 30, 2019 (NYSCEF 24) and March 13, 2020 (SDNY Pacer Docket No. 87).

A. The May 14, 2019 Federal Complaint

In the original federal complaint, proposed class representative Steven Strugala asserted claims under sections 10(b), 10b-5 & 20(a) of Exchange Act of 1934 (the 1934 Act) (NYSCEF 23, ¶5). Strugala alleged that Jumia’s stock price fell 28% on May 10, 2019, from \$33.11 per ADS to \$24.50 per ADS, the day after Citron Research issued a report (the Citr/on Report) asserting that “Jumia is a Fraud” that “deserves immediate SEC attention” (*id.*, ¶¶ 29). In addition to Jumia, Struglia named as defendants Jeremy Hodara and Sacha Poignonnec, Jumia’s Co-Chief Executive Officers, and Antoine Maillet-Mezeray, Jumia’s Chief Financial Officer (the Management Board Defendants).

B. The October 15, 2019 State Court Complaint

In the original state court complaint (NYSCEF 1), plaintiff asserted claims under sections 11 & 15 of the 1933 Act. Like the original federal complaint, this complaint was brought against Jumia and the Management Board Defendants and relies on the Citron

Report for the allegations of fraud (*id.*, ¶¶ 35, 37). However, besides naming a different class representative, plaintiff adds the seven underwriters participating in the IPO: Morgan Stanley & Co. LLC, Citigroup Global Markets Inc., Berenberg Capital Markets, LLC, RBC Capital Markets, LLC, Stifel, Nicolaus & Company, Inc., Raymond James & Associates, Inc. and William Blair Company, LLC (the Underwriter Defendants). By stipulations dated October 31, 2010 and December 12, 2019 (NYSCEF 13, 16), the parties to this action vacated the deadline for defendants to respond to the complaint and agreed that plaintiff would file an amended complaint on or before January 27, 2020.

C. The December 30, 2019 Amended Federal Complaint

The federal complaint was amended following consolidation and contested motions for appointment of lead plaintiffs and lead counsel. The amended complaint (NYSCEF 24), brought by putative class representatives Hexuan Cai, Kalyan Venkataraman, Kalyanasundaram Venkataraman, Matthew Sacks and Yifeng Zhu, sets forth the same 1934 Act claims contained in the initial federal complaint with the class period enlarged to between April 12, 2019 and September 20, 2019. However, like the original state court complaint, new claims under sections 11 and 15 of the 1933 Act were asserted, and the same Underwriter Defendants were added as parties (*id.*). Furthermore, the eight members of Jumia's supervisory board were named as defendants -- Gilles Bogaert, Andre T. Iguodala, Blaise Judja-Sato, Jonathan D. Klein, Angela Kaya Mwanza, Alioune Ndiaye, Matthew Odgers and John H. Rittenhouse (the Supervisory Board Defendants) (*id.*).

D. The January 27, 2020 Amended State Court Complaint

Despite the parties' earlier stipulations establishing the January 27, 2020 filing date

for plaintiff's amended complaint in this action, defendants filed this motion for a stay on January 22, 2020. Plaintiff nevertheless filed the amended complaint (NYSCEF 32) as scheduled. Plaintiff adds a claim under section 12(a)(2) of the 1933 Act, adds the eight Supervisory Board Defendants as well as Donald J. Puglisi, Jumia's U.S. representative who signed the company's allegedly false and misleading Registration Statement (id.). Additionally, plaintiff names the accounting firm of Ernst & Young as a defendant and alleges that firm's audit report regarding Jumia was materially misleading in violation of international accounting standards, without relying on the Citron Report.

E. March 13, 2020 Second Amended Federal Complaint

The second amended federal complaint (SDNY Pacer Dkt. 87), filed after this motion was briefed and argued, sets forth the same allegations and claims as the the first amended federal complaint, but adds Puglisi as a defendant.

F. Subsequent Developments

On April 3, 2020, the defendants in the federal action filed a pre-motion letter (NYSCEF 48) explaining the grounds for their proposed motion to dismiss the second amended complaint. Pursuant to an April 10, 2020 scheduling order (SDNY Pacer Dkt. 97), the district court judge permitted defendants to file the motion on June 1, 2020, with the briefing to be completed on August 21, 2020 and discovery stayed pending further order of the court.

**I. Discussion**

Defendants' motion to stay this action is denied. A trial court's decision to stay an action constitutes an exercise of discretion (*Dietz v Linde Gas N. Am., LLC*, 178 AD3d 469,

470 [1<sup>st</sup> Dept 2019]). The factors relevant to the determination to stay include (1) which forum will offer a more complete disposition of the issues; (2) which forum has greater expertise in the type of matter; (3) which action was commenced first and the stage of the litigations; (4) whether there is substantial overlap between the issues raised in each court; (5) whether a stay will avert duplication of effort and waste of judicial resources; and (6) whether plaintiffs have demonstrated that they would be prejudiced by a stay or that there is a risk of inconsistent rulings (*Asher v Abbott Labs*, 307 AD2d 211, 211-212 [1<sup>st</sup> Dept], *iv. dismissed* 98 NY2d 728 [2002]).

The first and fourth factors weigh in favor of the plaintiffs. Although there is substantial overlap between the claims and the defendants, neither action will completely dispose of all of the issues relating to the IPO. While both courts have jurisdiction over the 1933 Act claims, the federal court has exclusive jurisdiction over the claim brought under the 1934 Act, so it can only be disposed of there (see *Cyan, Inc. v Beaver Cty. Employees' Ret. Fund*, 138 SCt 1061, 1078 [2018]). However, only the state action includes claims against the accounting firm, and a claim under section 12(a)(2) of the 1933 Act for which rescission is available (see *Labourers' Pension Fund*, 2020 WL 2857654, \*8). Additionally, as plaintiff argues, the fraud claims in the federal action may be subject to heightened scrutiny. Under the circumstances, the difference in the relief sought militates against a stay (see *Uni-Rty Corp. v New York Guangdong Fin., Inc.*, 117 AD3d 427, 429 [1<sup>st</sup> Dept 2014]).

The second factor also weighs against a stay. The federal court does not have superior expertise in adjudicating the claims asserted here because "this court, sitting in the Commercial Division of New York County, certainly has experience applying various bodies

of law including federal law as it pertains to securities cases" (*Labourers' Pension Fund*, 2020 WL 2857654, \*6; see *In re PPDAL Group Sec. Litig.*, 2019 WL 2751278, \*5 [Sup Ct., NY Co 2019] ["the Commercial Division is a longstanding, specialized business court which deals exclusively with complex commercial litigation"]; *Hoffman v AT&T Inc.*, 2019 WL 2578360, \*2 [Sup Ct, NY Co 2019] ["(t)he liability issues in a 1933 Act case are, if anything, less complex than issues the Commercial Division resolves every week).

The third factor does not favor a stay. Although the federal action was commenced first, it was not "first in time" with respect to claims under the 1933 Act, which were first interposed in this action -- over two months before being added to the federal complaint by way of amendment. Indeed, it appears that at the time federal action was filed, plaintiff could not have sought 1933 Act damages because the ADSs price was still above the IPO offering price (NYSCEF 32, Amended Complaint, ¶¶ 84, 85). And even if the federal action was technically filed first, that factor is not dispositive (*Labourers' Pension Fund*, 2020 WL 2857654, \*7) and not particularly meaningful in this case because discovery has been stayed in both actions (*id.*, \*6). Moreover, nothing of significance happened in the five months between the original filing of the federal action and this one, because the parties in the federal action were litigating over the appointment of lead plaintiffs and lead counsel. And although the federal action has progressed slightly further with the partial briefing of a motion to dismiss, this action would likely have been at a more advanced stage had defendants not disrupted the previously stipulated litigation schedule by filing this stay motion.

The fifth factor weighs against a stay. Where the actions involve differing claims, “[t]he possibility or actuality of two trials is of no importance” (*Mt. McKinley Ins. Co. v Corning, Inc.*, 33 AD3d 51, 59 [1st Dep’t 2006]; see *PPDAI*, 2019 WL 2751278, \*6 (“The possibility that at some point there might be two trials is not an appropriate basis for granting a stay”)). Furthermore, “[d]uplication of efforts or waste is also not a concern because the parties and courts can cooperate as they do in so many other sophisticated securities cases” (*Labourers’ Pension Fund*, 2020 WL 2857654, \*3 [citation omitted]). Finally, the court concurs with plaintiff that due to the differences between the parties named, remedies sought and standards of review, the plaintiff and the class might be prejudiced by a stay in pursuing this action.

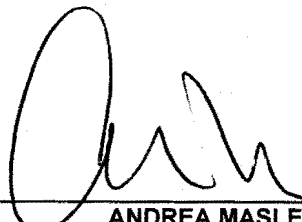
Accordingly, it is

ORDERED that the motion to stay this action is denied; and it is further

ORDERED that defendants are directed to answer or move with respect to the

Amended Complaint within 30 days of this decision and order’s entry onto NYSCEF by the court.

Motion Seq. No. 01  
8/7/2020  
 DATE

  
 ANDREA MASLEY, J.S.C.

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER  FIDUCIARY APPOINTMENT

INCLUDES TRANSFER/REASSIGN  REFERENCE