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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

IN RE WAGeworks, INC.,
SECURITIES LITIGATION

CASE NO. 4:18-CV-01523-JSW

LEAD PLAINTIFFS' PARTIAL OBJECTION
TO DEFENDANT WAGeworks, INC.'S
REQUEST FOR JUDICIAL NOTICE AND
NOTICE OF INCORPORATION BY
REFERENCE, AND DEFENDANT JOSEPH
L. JACKSON'S REQUEST FOR JUDICIAL
NOTICE

Hearing Date: November 22, 2019
Time: 9:00 a.m.
Courtroom: CTRM 5, 2nd Floor
Judge: Honorable Jeffrey S. White

I. INTRODUCTION

In an attempt to contradict the allegations in Lead Plaintiffs' Consolidated Amended Class Action Complaint for Violation of the Federal Securities Laws ("Complaint") and create a competing statement of facts for the case, defendants WageWorks, Inc. ("WageWorks") and Joseph L. Jackson ("Jackson") ask the Court to take judicial notice of eight exhibits and WageWorks further seeks to utilize for its motion to dismiss, under the incorporation-by-reference doctrine, four documents identified in the Complaint.¹

In examining similar types of requests, the Ninth Circuit Court of Appeals in a seminal recent decision, *Khoja v. Orexigen Therapeutics, Inc.* 899 F.3d 988 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 2615 (2019), stated: "we note a concerning pattern in securities cases like this one: exploiting these procedures improperly to defeat what would otherwise constitute adequately stated claims at the pleading stage," adding that the effort to "expand courts' consideration of extrinsic evidence at the motion to dismiss stage" is "particularly troubling in the common situation of asymmetry, where a defendant starts off with sole possession of the information about the alleged wrongdoing." *Id.* at 998-99. The Ninth Circuit made clear that "[s]uch undermining of the usual pleading burdens is not the purpose of judicial notice or the incorporation-by-reference doctrine," stating that the doctrine "is not a tool for defendants to short-circuit the resolution of a well-pleaded claim." *Id.* at 999, 1003. And, reiterating well-established law, the Court stated: "[I]t is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well-pleaded complaint. This admonition is, of course, consistent with the prohibition against resolving factual disputes at the pleading stage." *Id.* at 1003, citing *In re Tracht Gut, LLC*, 836 F.3d 1146, 1150 (9th Cir. 2016) and *Sgro v. Danone Waters of N. Am., Inc.*, 532 F.3d 940, 942 n.1 (9th Cir. 2008).

A. Defendants' Requests

Here, WageWorks asks the Court to consider the "**full text**" of four documents it claims have been incorporated-by-reference into the Complaint, as follows: the OPM Contract and its

¹ Defendant WageWorks' request for judicial notice is ECF No. 109. The related exhibits are docketed at ECF No. 108. Jackson's request is ECF No. 112 and the related exhibits are docketed at ECF No. 110. In this submission, all internal citations are omitted and emphasis added unless otherwise noted. ECF citations refer to the electronic case file numbers, and PIN cites are to the CM/ECF System-generated page numbers.

modification, MOD00001 (Rowe Decl. Exs. A and C, respectively); WageWorks' 2017 Form 10-K filed March 18, 2019 (Rowe Decl. Ex. B); and a WageWorks Form 424B5 Prospectus Supplement for its Secondary Offering filed with the SEC on June 20, 2017 (Rowe Decl. Ex. D). With regard to these documents, WageWorks contends that the Court "may assume [the incorporated documents'] contents are true for purposes of a motion to dismiss." WageWorks RJN at 2. The belatedly filed 2017 Form 10-K (Rowe Decl. Ex. B) was created after the filing of this case on March 12, 2018.

WageWorks also seeks judicial notice of a chart reflecting the trading prices of WageWorks stock (Rowe Decl. Ex. E); an excerpt from WageWorks' 2018 Form 10-K, filed on May 30, 2019 pursuant to its March 19, 2019 Restatement and related Special Committee findings (Rowe Decl. Ex. F); and an Order of Proceeding dated March 22, 2019 (Rowe Decl. Ex. G). The latter two documents were also created or issued after the filing of this case.

Finally, defendant Jackson seeks judicial notice of his Form 4s reporting his WageWorks' stock transactions from August 4, 2011 to June 23, 2017 (Muck Decl. Ex. A); excerpts from WageWorks' Definitive Proxy Statements on Schedule 14A, from March 1, 2013 to March 17, 2017 (Muck Decl. Ex. B); excerpts from WageWorks' amended Quarterly Report on Form 10-Q/A for the period ending June 30, 2016 and Quarterly Report on Form 10-Q/A for the quarterly period ending September 30, 2016, both of which were filed with the SEC on March 18, 2019 (Muck Decl. Exs. C and D, respectively); and a Form 8-K filed with the SEC on September 12, 2018 (Muck Decl. Ex. E). The latter three exhibits were also created after the filing of this case.

B. Summary of Lead Plaintiffs' Positions

Lead Plaintiffs do not object to this Court accepting as true the OPM Contract and its Modification 0001 (Rowe Decl. Exs. A and C), WageWorks' historic stock prices (Rowe Decl., Ex. E) or defendant Jackson's stock trading history (Muck Decl. Ex. A), given their historical nature. Lead Plaintiffs further do not object to the Court taking judicial notice of the Order of Proceeding (Rowe Decl. Ex. G) for the limited purpose set forth in WageWorks' RJN (Dkt. No. 190 at 4 n.3).

Further, while Lead Plaintiffs do not object to the Court recognizing the *existence* of certain statements that were made in the seven remaining documents (Rowe Decl. Exs. B, D and F, and Muck Decl. Exs. B-E), for the reasons discussed below, Lead Plaintiffs object to the Court accepting *as true*

any of the statements or information contained in these documents for which Defendants, without limiting the purposes for which the documents could be interpreted, seek judicial notice or to have them incorporated-by-reference into this proceeding.²

II. LEGAL STANDARDS

"As a general rule, [courts] 'may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) Motion.'" *United States Ex Rel Lee v. Corinthian Colleges*, 655 F.3d 984, 998 (9th Cir. 2011) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). Under Rule 12(b)(6), "[t]he Court must accept as true all factual allegations in the complaint and must draw all reasonable inferences from those allegations, construing the Complaint in the light most favorable to the Plaintiff." *Maiman v. Tablot*, SACV 09-0012 AG (ANx), 2010 U.S. Dist. LEXIS 142712, at *5-6 (C.D. Cal. Aug. 9, 2010). Thus, courts should not make factual determinations on a motion to dismiss. *See, e.g., Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 950 (9th Cir. 2005) ("a factual determination by the Court is inappropriate in a Rule 12(b)(6) dismissal").

The decision in *Corinthian* illustrates the manner in which these principles must be applied. In *Corinthian*, plaintiffs alleged that defendant Ernst & Young ("E&Y") submitted "false statements" concerning Corinthian's compliance with federal regulations via compliance and financial statement reports. E&Y contended that it did not perform the compliance reporting that certified Corinthian's compliance with the federal regulation, and sought judicial notice of documentation that allegedly supported its contention. E&Y requested that the court take judicial notice of the "fact" that the financial statements reports referred to in the complaint did not state any opinion or give any indication

² If this Court were inclined to take judicial notice or incorporate-by-reference the remaining documents for the truth of the matters asserted in them, Lead Plaintiffs respectfully submit that Defendants' motions to dismiss should be converted into motions for summary judgment, which in fairness and pursuant to the Fed. R. Civ. P. 56 would require permitting Lead Plaintiffs the opportunity to take and complete meaningful discovery before being required to respond to such summary judgment motions. As the Supreme Court stated in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986), Rule 56 prevents a party from being "'railroaded' by a premature motion for summary judgment." Thus, before summary judgment may be granted, the non-moving party must have an opportunity to take discovery of information that is essential to its opposition to the motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986) (noting summary judgment will be entered against a plaintiff "as long as the plaintiff has had a full opportunity to conduct discovery").

as to Corinthian's compliance with the regulation, thus supporting E&Y's position. The Ninth Circuit found that because the E&Y reports were relied upon in the complaint, their "existence" could be considered on a motion to dismiss but they could *not* be considered *for the truth of what they said or to establish disputed facts or to draw inferences against the plaintiff*. Rather, the Ninth Circuit held that because the facts were subject to "reasonable dispute," at the motion to dismiss stage the district court was required to "focus only ... on the sufficiency of the allegations and *not the disputed factual matters*." 655 F.3d at 999.

In *Khoja*, the Ninth Circuit similarly refused to allow the doctrine of "incorporation-by-reference" to be used as a cudgel to challenge well-pleaded allegations of a complaint. *See Khoja*, 899 F.3d 988 at 1003 ("the doctrine is not a tool for defendants to short-circuit the resolution of a well-pleaded claim," adding that courts must act "consistent with the prohibition against resolving factual disputes at the pleading stage" and that "it is improper to assume the truth of an incorporated document if such assumptions only serve to dispute facts stated in a well pleaded complaint"). As a result, the Court of Appeals found that the district court had abused its discretion where "in seeking incorporation of these documents, [defendant] improperly asked the District Court to engage in fact-finding in the course of deciding the sufficiency of the Complaint." *Id.* at 1006. As the Court of Appeals stated: "the incorporation-by-reference doctrine *does not override the fundamental rule that courts must interpret the allegations and factual disputes in favor of the plaintiff at the pleading stage*." *Id.* at 1014. *See also SEC v. Mercury Interactive, LLC*, No. 5:07-cv-02822-JF/PVT, 2010 U.S. Dist. LEXIS 106019, at *19 (N.D. Cal. Sept. 27, 2010) ("[Defendant] asks the Court to engage in fact-finding based upon those documents – for example, to find that she did not choose a particular grant date even though the [complaint] alleges expressly that she did so. This type of analysis is inappropriate in the context of a motion to dismiss."); *In re ECOTality, Inc. Sec. Litig.*, No. 13-03791-SC, 2014 U.S. Dist. LEXIS 130499, at *12 n.2 (N.D. Cal. Sept. 16, 2014) ("[W]ere the Court to assume the truth of all documents incorporated by reference into the [complaint], that would mean assuming the truth of all of Defendants' allegedly false or misleading statements. *That cannot be the intended result of the cases Defendants cite, or it would be impossible ever to successfully plead a fraud claim.*"); *Clark v. Hershey Co.*, No. C 18-06113WHA, 2019 U.S. Dist. LEXIS 29700, at *22-*24 (N.D. Cal. 2019)

(following *Khoja* in denying requests for judicial notice).³ Thus, "facts" set forth in documents, including in SEC filings, prepared and filed by a defendant – here, WageWorks – may not properly be judicially noticed as fact or embraced under the incorporation-by-reference doctrine where they are disputed.

III. RESPONSE AND PARTIAL OBJECTIONS

A. Stock Price (Rowe Decl. Ex. E) and Trading History (Muck Decl. Ex. A)

Lead Plaintiffs do not oppose the Court taking judicial notice of the trading prices of WageWorks' common stock or defendant Jackson's trading history.⁴

B. The OPM Contract and Modification 0001 (Rowe Decl. Exs. A and C)

Lead Plaintiffs have no objection to the Court considering the content of the OPM Contract and Modification 0001. However, consistent with the foregoing case law, Lead Plaintiffs object both to Defendants' proposed interpretation of the OPM Contract and Modification and to their proposed inference that they honestly interpreted or believed that the OPM Contract entitled WageWorks to recognize revenue contrary to the facts alleged in the Complaint. *See* Lead Plaintiffs' Opposition to Defendants' Motions to Dismiss at 17-20. Defendants' factual arguments seeking to require the Court to interpret the OPM Contract and Modification 0001 in order to contradict the allegations of the

³ Even documents incorporated by reference cannot be considered for the truth of matters over which there is a factual dispute. *Sgro v. Danone Waters of North Am., Inc.*, 532 F.3d 940, 942 n.1 (9th Cir. 2008); *accord In re Silver Wheaton Corp. Sec. Litig.*, No. 215CP5146 CAS (JEMX), 2019 WL 1512269, at *8 (C.D. Cal. Mar. 25, 2019) (denying defendants' request for judicial notice to the extent defendants sought to have the district court rely on documents to adopt defendants' version of facts at the pleading stage); *Hammonds v. Aurora Loans Servs. LLC*, No. EDCV 10-1025 AG (OPx), 2010 WL 3859069, at *1 (C.D. Cal. Sept. 27, 2010) ("Courts may take judicial notice of '*undisputed* matters of public record,' but generally may not take judicial notice of '*disputed* facts stated in public records.'"); *Maraldo v. Life Ins. Co. of the Sw.*, No. 11-CV-4972-YGR, 2012 WL 1094462, at *6 (N.D. Cal. Mar. 30, 2012) ("The Ninth Circuit has indicated that judicial notice should only be taken sparingly, with caution, and after demonstration of a 'high degree of indisputability.'").

⁴ This is without prejudice to Lead Plaintiffs' contention that ex-CEO Jackson's trading during a 2013 WageWorks Offering is not within a relevant "pre-class period" time frame to use as a trading history comparison to his 664-day Class Period trading history. *See* Lead Plaintiffs' Opposition to Defendants' Motions to Dismiss at 28-32.

Complaint are the essence of "disputed factual matters" that the Ninth Circuit has held to be improperly considered on a Rule 12(b) motion. *E.g., Corinthian*, 655 F.3d at 999.

C. The SEC Filings

As noted above, the contents of SEC filings may be a proper subject of judicial notice or incorporation-by-reference in limited instances. One purpose is to assess whether a complaint accurately recites what was misrepresented or said to the market; another is to determine if and when the truth was disclosed. Lead Plaintiffs do not object to such purposes here. However, there is no basis to accept as true self-serving "facts" set forth in SEC filings – especially those filed after this case was brought – prepared and filed by WageWorks and/or the Executive Defendants in order to enable the Defendants to build their factual contentions or contradict the factual allegations of the Complaint. *See, e.g., In re Silver Wheaton*, 2019 WL 1512269, at *8 (pertaining to request for judicial notice); *Sgro*, 532 F.3d at 942 n.1 (pertaining to use of documents under incorporation-by-reference doctrine). This is especially true where Defendants are asking the Court to take judicial notice of "facts" that are *not* indisputable or incontrovertible.

1. 2017 Form 10-K (Rowe Decl. Ex. B)

WageWorks relies on the incorporation-by-reference doctrine so that it may use its 2017 Form 10-K filed March 18, 2019 – after this suit was initiated – to assert a contrary set of facts relating to: (a) when it began providing FSAFEDS Administration Services (Dkt. No. 108 at 2); (b) the status of its dispute with OPM over its false February 15, 2017 invoice (*id.*); (c) that WageWorks believed the items invoiced in February 2017 were within the scope of the OPM Contract (*id.* at 3); (d) that the ongoing legal dispute with OPM evidences this belief (*id.* at 7); and (e) regarding the materiality of the WageWorks Restatement (*id.* at 14). Lead Plaintiffs object to such usage. Each of these assertions of contrary fact and inferences to be drawn from them is improper at the motion to dismiss stage based on the case law cited above. Indeed, the fact that the 2017 Form 10-K was issued after this lawsuit was initiated – hence, clearly prepared in light of claims that had already been asserted in this litigation – should, by itself, render any and all of Defendants' statements or alleged factual contentions in this and all other post-litigation SEC filings inappropriate for consideration at this stage.

2. 2018 Form 10-K (Rowe Decl. Ex. F)

WageWorks asks the Court to take judicial notice of its 2018 Form 10-K (Rowe Decl. Ex. F) "not for its truth, but for the fact that WageWorks disclosed the Special Committee investigation findings and the substance of the disclosed findings" (WageWorks RJN at 7). Although WageWorks appears to concede that it can only offer the 2018 Form 10-K "not for the truth" of its contents, its motion to dismiss nevertheless relies on the 2018 Form 10-K to support a "factual" contention that, contrary to the well-pleaded allegations of the Complaint, the investigation undertaken by the WageWorks' Audit Committee was adequate and that none of the Audit Committee members had withheld information regarding the OPM Contract from KPMG. (Dkt. No. 108 at 16). Consistent with the case law cited above, WageWorks' counter-statement of these facts – based on an SEC filing made after the filing of this lawsuit – is improper. Stated simply, the contents of the 2018 Form 10-K may not be embraced as true, especially to the extent that they have been used by Defendants to create a universe of self-serving facts contrary to the allegations in Lead Plaintiffs' Complaint.

3. Excerpts from Definitive Proxy Statements and Amended Quarterly Reports on Form 10-Q for the Second and Third Quarters of 2016 (Muck Decl. Exs. B, C, and D)

Defendant Jackson seeks judicial notice of WageWorks' amended quarterly reports on Form 10-Q for the periods ending June 30, 2016 (Muck Decl. Ex. C) and September 30, 2016 (Muck Decl. Ex. D), both of which were filed with the SEC on March 18, 2019, and a series of excerpts from the Company's Definitive Proxy Statements from March 1, 2013 to March 17, 2017 (Muck Decl. Ex. B). While the dates of the filings and what they say or disclose may be appropriate subjects for judicial notice under Rule 201, it is not appropriate under Rule 201 to take judicial notice of their contents for the alleged truth of the matters stated therein based on the case law cited above. This is especially the case for the Form 10-Qs that were belatedly filed after claims had already been asserted against Defendants in this litigation.

4. September 6, 2018 Form 8-K (Muck Decl. Ex. E)

Defendant Jackson seeks judicial notice of a Report on Form 8-K filed by WageWorks on September 12, 2018 ("Form 8-K"). Similar to the amended 10-Qs and 10-K filed March 18, 2019, the Form 8-K was rendered after the commencement of this action and, therefore, was fashioned in anticipation of claims that had been and that might be asserted in this very litigation. Moreover, none of the "facts" upon which Defendants rely from the Form 8-K are either irrefutable or incontrovertible. Finally, the particular Form 8-K respecting Jackson's resignation was not cited or quoted in the Complaint. For these reasons, and consistent with the case law cited above, the contents of the Form 8-K may not be considered for purposes of deciding Defendants' motions to dismiss.

D. The Order of Proceeding (Rowe Decl. Ex. G)

As noted above, Lead Plaintiffs do not object to the Court taking judicial notice of the Order of Proceeding (Rowe Decl. Ex. G) for the limited purpose set forth in footnote 3 of WageWorks' RJN. (Dkt. No. 190 at 4 n.3).

IV. CONCLUSION

For the foregoing reasons, except with the limited exceptions noted above, this Court should deny WageWorks' request for incorporation-by-reference and deny Defendants' requests for judicial notice to the extent that Defendants seek to rely on them for the truth of the matters stated and to recast the facts of the well-pleaded Complaint.

DATED: September 30, 2019

Respectfully submitted,

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