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 14 WageWorks, Inc.

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 OAKLAND DIVISION

18 IN RE WAGeworks, INC.
 19 SECURITIES LITIGATION

) CASE NO.: 4:18-CV-01523-JSW
)
) **DEFENDANTS WAGeworks INC.**
) **AND JOSEPH L. JACKSON'S**
) **JOINT REPLY IN SUPPORT OF**
) **REQUEST FOR JUDICIAL NOTICE**
) **AND NOTICE OF**
) **INCORPORATION IN SUPPORT**
) **OF MOTION TO DISMISS**
) **CONSOLIDATED AMENDED**
) **CLASS ACTION COMPLAINT FOR**
) **VIOLATION OF SECURITIES**
) **LAWS**

) Hearing Date: November 22, 2019
) Hearing Time: 9:00 a.m.
) Courtroom: 5, 2d floor
) Judge: Hon. Jeffrey S. White

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INTRODUCTION

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2 Plaintiffs’ Partial Objection to Defendants’ Request for Judicial Notice (“Obj.”) (Dkt. No.
3 124) seeks to do that which is prohibited by the Ninth Circuit: “select[] only portions of
4 documents that support [Plaintiffs’] claims, while omitting portions of those very documents that
5 weaken – or doom – their claims.” *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1102
6 (9th Cir. 2018). Though titled an “Objection,” Plaintiffs’ submission does not actually oppose
7 judicial consideration of any documents offered in Defendant WageWorks, Inc.’s
8 (“WageWorks” or the “Company”) Request for Judicial Notice and Notice of Incorporation (the
9 “WageWorks RJN”) (Dkt. No. 109) and Defendant Joseph L. Jackson’s Request for Judicial
10 Notice (“Jackson RJN”) (Dkt. No. 112). Of the seven documents discussed in the WageWorks
11 RJN, Plaintiffs do not oppose the Court considering and accepting as true the OPM Contract, the
12 Modification, the Company’s historical stock prices and the FOIA Order. *See* Obj. at 2.
13 Likewise, of the five documents discussed in the Jackson RJN, Plaintiffs do not oppose judicial
14 consideration of Mr. Jackson’s Forms 4 for the truth of their contents. *Id.*

15 With respect to the remaining seven documents, Plaintiffs do not object to judicial
16 consideration of the *existence* of certain statements in the documents – all public documents filed
17 by the Company with the Securities and Exchange Commission. *Id.* Instead, they object to the
18 *truth* of the statements. *Id.* The problem with Plaintiffs’ argument is that Plaintiffs conflate the
19 doctrines of incorporation by reference and judicial notice. Under Ninth Circuit precedent, after
20 a document is incorporated by reference (which Plaintiffs effectively concede they have done
21 with nearly all of these SEC filings), the Court may assume all contents of the document are true.
22 Plaintiffs’ attempt to escape the effect of incorporation by characterizing the referenced
23 statements as “assertions of contrary facts” (Obj. at 6) fails because they identify no well-pleaded
24 fact that is purportedly disputed by these SEC filings. Under Plaintiffs’ view, even though the
25 Consolidated Amended Complaint (“CAC”) relies extensively on, for example, the Company’s
26 2017 Form 10-K for the truth of certain statements made therein, the Court may not consider
27 other statements for their truth – even where the statements appear side by side in the same
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1 paragraph. Plaintiffs are incorrect and to accept their position is to sanction the “artful pleading”
2 denounced by the Ninth Circuit. *See Orexigen*, 899 F.3d at 1003. The Partial Objection should
3 be denied.

4 **I. PLAINTIFFS ERRONEOUSLY CONFLATE THE INCORPORATION BY**
5 **REFERENCE AND JUDICIAL NOTICE DOCTRINES**

6 Plaintiffs intertwine the incorporation by reference and judicial notice doctrines, which
7 permit consideration of documents outside of the complaint for different reasons. Under Rule
8 201, a court may take judicial notice of an adjudicative fact if it is “not subject to reasonable
9 dispute.” Fed. R. Evid. 201(b). The doctrine of incorporation by reference, on the other hand,
10 “is a judicially created doctrine that treats certain documents as though they are part of the
11 complaint itself.” *Orexigen*, 899 F.3d at 1002. WageWorks seeks consideration of the 2017
12 Form 10-K under the doctrine of incorporation only. *See WageWorks RJN* at 4-5. Mr. Jackson
13 seeks consideration of certain SEC filings under the doctrine of incorporation as well as the
14 judicial notice doctrine. *See Jackson RJN* at 1-2.

15 The consequences flowing from the application of each doctrine are different. Unlike
16 under the doctrine of judicial notice, a document that is referred extensively in the complaint or
17 that forms the basis of plaintiffs’ claims is incorporated into the complaint by reference and
18 treated as though it is “part of the complaint itself.” *Orexigen*, 899 F.3d at 1002. Once a
19 document is incorporated by reference, the Court may assume all contents of the document are
20 true for the purposes of a motion to dismiss. *Id.* at 1003 (citing *Marder v. Lopez*, 450 F.3d 445,
21 448 (9th Cir. 2006)); *see In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1057-58 n.10 (9th Cir.
22 2014) (“Once a document is deemed incorporated by reference, the entire document is assumed
23 to be true for purposes of a motion to dismiss, and both parties – and the Court – *are free to refer*
24 *to any of its contents*”) (emphasis added) (citation omitted). And while the truth of an
25 incorporated document may not be considered for the sole purpose of disputing well pleaded
26 facts (*Orexigen*, 899 F.3d at 1003), it is also true that the Court is “not required to accept as true
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1 conclusory allegations which are contradicted by documents referred to in the complaint.”

2 *Steckman v. Hart Brewing Inc.*, 143 F.3d 1293, 1295-96 (9th Cir. 1998).

3 As previously shown, the 2017 Form 10-K and Prospectus Supplement (Rowe Decl. Exs.
4 B & D) not only form the basis for Plaintiffs’ claims but also are referred to extensively in the
5 CAC. *See WageWorks RJN* at 4-5. Likewise, the CAC refers to the Forms 10-Q and Proxy
6 Statements.¹ The doctrine of incorporation therefore applies to these documents.

7 **II. PLAINTIFFS’ OBJECTION TO THE TRUTH OF THE INCORPORATED SEC**
8 **FILINGS IS WITHOUT MERIT (Rowe Decl. Exs. B, D & F and Muck Decl. Exs.**
9 **B-D)**

10 Plaintiffs do not dispute that the CAC incorporates by reference the Company’s 2017
11 Form 10-K, the Prospectus Supplement, the Forms 10-Q and the Proxy Statements. Yet they
12 seek to escape the *effect* of that incorporation, arguing the Court should not take as true certain
13 statements in these incorporated documents because the documents were either issued after this
14 lawsuit was initiated and/or present “contrary fact.” *Obj.* at 6-8. Plaintiffs’ objection is without
15 merit and is a guise for “artful pleading.” *Orexigen*, 899 F.3d at 1003.

16 **A. PLAINTIFFS ENGAGE IN IMPROPER “ARTFUL PLEADING”**

17 As the Ninth Circuit has explained, the incorporation by reference doctrine “is designed
18 to prevent artful pleading by plaintiffs.” *Orexigen*, 899 F.3d at 1003. Here, Plaintiffs cherry-
19 picked portions of the 2017 Form 10-K to support their claims of falsity and scienter. For
20 example, the CAC trumpets the Company’s “admission” in the 2017 Form 10-K that certain
21 OPM revenue “should not have been recognized.”² Yet Plaintiffs seek to keep from the Court’s

22 ¹ The Forms 10-Q for the periods ending June 30, 2016 (Muck Decl. Ex. C) and September
23 30, 2016 (Muck Decl. Ex. D) are incorporated by referenced in the CAC at paragraphs 19, 106,
24 153 and 283. Plaintiffs incorporated the Proxy Statements (Muck Decl. Ex. B) in paragraphs
25 186, 187, and 194 of the CAC by alleging the percentages of shares and vested options sold by
26 Mr. Jackson during the Class Period, which calculation necessarily was based on the information
27 contained in the Proxy Statements (the total number of shares of WageWorks stock and vested
28 options owned by Mr. Jackson on particular dates) together with the information contained in
Mr. Jackson’s Forms 4. Notably, Plaintiffs do not object to the Court accepting the truth of the
information contained in the Forms 4. *See Obj.* at 2.

² CAC ¶¶ 19, 153; *see Plaintiffs’ Opp. to Mot. to Dismiss* at 7, 13 (Dkt. No. 123).

1 consideration the statement *immediately preceding* this alleged admission: “Upon
2 commencement of the [OPM] agreement, the Company performed certain professional services
3 that it believed were within the scope of the agreement[.]”³ This sentence provides context for
4 the purported admission. Under Plaintiffs’ view, the Court may take as true the sentence
5 containing the purported “admission” but not the sentence immediately preceding it – both of
6 which appear in the same paragraph and pertain to the same subject matter. Such tactics are
7 improper. The purpose of the doctrine of incorporation is to “prevent[] plaintiffs from selecting
8 only portions of documents that support their claims, while omitting portions of those very
9 documents that weaken – or doom – their claims.” *Orexigen*, 899 F.3d at 1102. That is precisely
10 what Plaintiffs seek to do. By operation of the incorporation doctrine, the 2017 Form 10-K is
11 treated as though it is “part of the complaint itself” (*id.* at 1002) and therefore, the Court may
12 consider all of it, not just the sentence Plaintiffs select.

13 In short, Plaintiffs cannot have it both ways. They cannot, on the one hand, cite
14 extensively to the 2017 Form 10-K in the CAC and use part of it in response to the motions to
15 dismiss while on the other hand, prevent the Court from considering the full text of the very
16 document Plaintiffs admittedly made a part of their complaint. The doctrine of incorporation by
17 reference, which applies with particular force in securities fraud cases,⁴ permits the Court to
18 consider the 2017 Form 10-K (and the other incorporated SEC filings) in its entirety. *See In re*
19 *SunPower Corp. Sec. Litig.*, 2018 WL 4904904, at *3 n.2 (N.D. Cal. Oct. 9, 2018) (“plaintiffs
20 refer to all the motion to dismiss exhibits . . . explicitly as the ground for SunPower’s false
21 statements and scienter; they are appropriately incorporated by reference.”).⁵

22 ³ Rowe Decl. Ex. B at 68 (referenced in WageWorks Mot. to Dismiss at 2-3).

23 ⁴ *See In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 863 (N.D. Cal. 2004) (“courts
24 are specifically authorized, in connection with a motion to dismiss a securities fraud complaint,
25 to consider documents and filings described in the complaint under the incorporation by
reference doctrine.”).

26 ⁵ *See also In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (holding that
27 district court properly considered SEC filings under incorporation by reference doctrine because
28 their contents were alleged in the complaint) (superseded by statute on other grounds by 15
U.S.C. § 78u-4(b)(2)(A)).

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2 **B. THE COURT MAY PROPERLY CONSIDER DOCUMENTS THAT POST-
3 DATE THE COMMENCEMENT OF THIS LAWSUIT**

4 Plaintiffs cite no legal authority to support their contention that the Court cannot consider
5 a document simply because it post-dates the filing of the lawsuit. To the contrary, Judge
6 Gonzalez Rogers in *In re Violin Memory Sec. Litig.*, 2014 WL 5525946 (N.D. Cal. Oct. 31,
7 2014), granted judicial notice of “[t]he April 2014 10-K, which post-dates the filing of this
8 action.” *Id.* at *6. The Court did so, even though that 10-K “is nowhere referred to in the CAC,
9 but the substance therein relates to Plaintiffs’ allegations that there had been financial chicanery
10 at play[.]” *Id.* This ruling applies even more so here where the CAC *does* refer to and rely on
11 the very SEC filings Plaintiffs seek to prevent the Court from considering.

12 **C. PLAINTIFFS FAIL TO IDENTIFY WELL-PLEADED FACTS THAT THE
13 INCORPORATED DOCUMENTS PURPORTEDLY DISPUTE**

14 Plaintiffs’ blanket objection that the proffered SEC filings “contradict the factual
15 allegations of the Complaint” (Obj. at 6) is insufficient. Critically, Plaintiffs fail to specify well-
16 pleaded facts allegedly disputed by the SEC filings. Such was the case in *Golub v. Gigamon*,
17 2019 WL 4168948 (N.D. Cal. Sept. 3, 2019). There, as here, the plaintiff merely “cites to
18 concerns voiced by the Ninth Circuit that judicial notice and incorporation by reference are
19 sometimes applied improperly in securities cases to resolve disputes of material fact.” *Id.* at *6.
20 In granting judicial consideration of the Form 10-K and Form 10-Q at issue, Judge Orrick
21 explained that the plaintiff “is not actually opposing judicial notice or incorporation by reference
22 of any of the documents here” and that “a party may not avoid dismissal by raising an
23 unreasonable factual dispute.” *Id.* Likewise, Plaintiffs cannot escape dismissal by raising the
24 specter of some unspecified factual dispute. In reality, the proffered SEC filings are submitted
25 for facts that are not subject to reasonable dispute. Those facts include:
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- 1 • The number of outstanding shares of common stock at the time of the Secondary Offering.⁶
- 2 • The total amount of 2016 revenue⁷ and the amount of restated revenues for 2Q and
- 3 3Q 2016,⁸ to provide context for the restated OPM revenue and restated quarterly
- 4 revenue.
- 5 • The existence of the Company's lawsuit against OPM.⁹
- 6 • The fact that WageWorks provided FSAFEDS Administration services and
- 7 performed under the OPM Contract after the Contract was executed.¹⁰
- 8 • The fact that WageWorks disclosed it believed the services it performed under the
- 9 OPM Contract were within the scope of the agreement.¹¹
- 10 • The total number of shares of and vested options for WageWorks stock Mr. Jackson
- 11 held on particular dates.¹²
- 12 • Mr. Jackson's tenures at the Company as CEO and Executive Chairman of the
- 13 Board.¹³

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15 Lastly, although Plaintiffs object to the excerpt of the 2018 Form 10-K (Rowe Decl. Ex.
16 F) for the truth of the Special Committee's findings, the Company requested judicial notice of

17 ⁶ See WageWorks Mot. at 3, 20 (citing the Prospectus Supplement). See *In re Century*
18 *Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1110 (9th Cir. 2013) (affirming judicial consideration
19 of prospectus supplement for the number of shares outstanding at the time of secondary
20 offering.).

21 ⁷ See WageWorks Mot. at 14 (citing the 2017 Form 10-K to support the calculation of the
22 percentage of the reversed OPM revenue relative to the total 2016 revenue).

23 ⁸ See Jackson Mot. at 3 (citing the Forms 10-Q). The Court may properly consider "revenue
24 figures" in an exhibit on a motion to dismiss. See *SunPower*, 2018 WL 4904904, at *3 n.2
25 (taking judicial notice of a portion of exhibit referencing "revenue figures").

26 ⁹ See WageWorks Mot. at 2, 7 (citing the 2017 Form 10-K).

27 ¹⁰ *Id.* at 2 (citing the 2017 Form 10-K).

28 ¹¹ *Id.* at 3 (citing the 2017 Form 10-K).

¹² Jackson Mot. at 8, 9, 11 (citing the Proxy Statements to support the calculation of the
percentage of Mr. Jackson's stock sales and stock retention); see n.1, *supra*.

¹³ See Jackson Mot. at 3 (citing the Form 8-K); see also CAC ¶¶ 34, 148. As an SEC filing
whose authenticity is unchallenged, the Form 8-K is appropriate for judicial notice. See *In re*
Intel Corp. Sec. Litig., 2019 WL 142766, at *7 (N.D. Cal. Mar. 29, 2019) (taking judicial notice
of the 2016 Form 10-K "since SEC filings are routinely subject to judicial notice," even though
"it is not mentioned in the CCAC, nor do plaintiffs' claims necessarily depend on it").

1 that information, “not for its truth,” but for the fact and the substance of the disclosed findings.
2 WageWorks RJN at 7. Under these circumstances, judicial notice of the excerpt is proper. *See*
3 *Wanca v. Super Micro Comp., Inc.*, 2018 WL 3145649, at *4 (N.D. Cal. June 27, 2018) (taking
4 judicial notice of “the fact the [SEC filings] impart particular information”).

5 **CONCLUSION**

6 For the foregoing reasons and for the reasons set forth in their respective Request for
7 Judicial Notice, Defendant WageWorks and Defendant Jackson respectfully request that the
8 Court consider and notice the above-referenced documents in connection with their respective
9 motions to dismiss the CAC.

10 Dated: November 8, 2019

Respectfully Submitted,

11 WILSON SONSINI GOODRICH & ROSATI
12 Professional Corporation

13 /s/ Ignacio E. Salceda
14 Ignacio E. Salceda

15 FENWICK & WEST LLP

16 /s/ Kevin P. Muck
17 Kevin P. Muck

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