UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LEE P. ROSKY, et al., derivatively, on behalf of WELLCARE HEALTH PLANS, INC.,

Plaintiffs,

v. CASE NO: 8:07-cv-1952-T-26MAP

TODD S. FARHA, REGINA E. HERZLINGER, KEVIN F. HICKEY, ALIF A. HOURANI, RUBEN JOSE KING-SHAW, JR., CHRISTIAN P. MICHALIK, and NEAL MOSZKOWSKI, (Consolidated)

Defendants,

and

WELLCARE HEALTH PLANS, INC.,

Nominal Defendant.
_____/

O R D E R

This cause comes before the Court on Nominal Defendant Wellcare Health Plans, Inc.'s Motion to Dismiss With Prejudice the Verified Second Amended Consolidated Shareholder Derivative Complaint (Dkt. 64), the Individual Defendants'[1] Motion to

[1] Defendants Paul L. Behrens, Thaddeus Bereday, Todd S. Farha, D. Robert Graham, Regina E. Herzlinger, Kevin F. Hickey, Alif A. Hourani, Ruben Jose King-Shaw, Jr., Christian P. Michalik, and Neal Moszkowski are referred to collectively as "the

Dismiss the Verified Second Amended Consolidated Shareholder Derivative Complaint (Dkt. 67), Defendants' supporting declarations with exhibits (Dkts. 65, 68) and request for oral argument (Dkt. 66). Plaintiffs filed an Omnibus Memorandum of Law in Opposition to All Defendants' Motions to Dismiss (Dkt. 71). With the Court's permission, Defendants filed reply memoranda (Dkts. 79, 80). After careful consideration of the allegations of the Verified Second Amended Complaint (Dkt. 62), the parties' submissions, and the applicable law, the Court finds that Defendants' Motions are due to be denied.

Plaintiffs bring this consolidated shareholder derivative action on behalf of nominal defendant Wellcare Health Plans, Inc. ("Wellcare" or "the Company") against certain members of the Company's Board of Directors (the "Board") for an alleged scheme to overstate WellCare's financial results. The seven-count Verified Second Amended Complaint raises claims against all Individual Defendants for violations of § 10(b) and Rule 10b-5 of the Securities and Exchange Act of 1934 ("the Exchange Act") (Count I); violations of § 20(a) of the Exchange Act (Count II); breach of fiduciary duty in connection with improper business practices (Count III); and breach of fiduciary duty in connection with improper accounting and revenue recognition practices (Count IV). It raises claims against Defendants Behrens, Bereday, Farha, Herzlinger, Hickey, Hourani, King-Shaw, Michalik, and Moszkowski for breach of fiduciary duty in connection with

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Individual Defendants."

insider stock sales (Count V); unjust enrichment in connection with insider stock sales (Count VI); and misappropriation of information in connection with insider stock sales (Count VII).

Standards for Dismissal

Defendants seek dismissal of the Verified Second Amended Complaint for failure to state a claim on which relief can be granted pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. Defendants argue that Plaintiffs failed: (1) to make a demand on the board of directors prior to bringing a derivative action; (2) to establish standing; (3) to identify any actionable acts or omissions by the Individual Defendants; (4) to plead with particularity facts establishing scienter for each defendant with respect to each violation; and (5) to plead sufficient allegations with respect to confidential witnesses and the insider trading allegations.

In determining whether to grant a Rule 12(b)(6) motion, the Court shall not dismiss a complaint if it includes "enough facts to state a claim for relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1974 (2007) (dismissing complaint because plaintiffs had not "nudged their claims across the line from conceivable to plausible"); see also Luigino's Int'l, Inc. v. Miller, 2009 WL 330861, at *2 (11th Cir. Feb. 11, 2009) (unpublished) (stating that "[i]n deciding whether a complaint survives a motion to dismiss, the court must assume that 'all the allegations in the complaint are true (even if doubtful in fact).'") (citing and quoting Twombly, 127 S.Ct. 1955, 1965). Furthermore, "[w]hile a complaint attacked by a Rule 12(b)(6) motion to

dismiss does not need detailed factual allegations, (citations omitted), a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, 127 S. Ct. at 1964-65. To survive a motion to dismiss under Twombly, a complaint's factual allegations, if assumed to be true, "must be enough to raise the right to relief above the speculative level." Id. at 1965; see also Watts v. Florida Int'l Univ., 495 F.3d 1289, 1296 (11th Cir. 2007) (analyzing Towmbly's recent formulation for pleading a cause of action).

To prove fraud, a plaintiff must prove: (1) a false statement of material fact; (2) defendant's knowledge that the statement was false; (3) defendant's intent that the statement induced the plaintiff to act; (4) plaintiff's reliance upon the truth of the statement; and (5) plaintiff's damages resulting from reliance on the statement. See Connick v. Suzuki Motor Co., Ltd., 174 Ill. 2d 482, 496, 675 N.E.2d 584, 591 (Ill. 1996); see also Gandy v. Trans World Computer Technology Group, 787 So. 2d 116, 118 (Fla. Dist. Ct. App. 1994). Under long-standing Eleventh Circuit precedent, the particularity pleading requirement imposed by the rule "serves an important purpose in fraud actions by alerting defendants to the precise misconduct with which they are charged and protecting defendants against spurious charges of immoral and fraudulent behavior." Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001). The requirement of pleading fraud with particularity under Rule 9(b) "is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or

what omissions were made and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled plaintiff, and (4) what the defendants obtained as a consequence of the fraud." Id.; see also Anderson v. Transglobe Energy Corp., 35 F. Supp. 2d 1363, 1369-70 (M.D. Fla. 1999) (holding that "a securities-fraud complaint 'need only provide a reasonable delineation of the underlying acts and transactions constituting the fraud.'") When measured against the foregoing standards, the allegations of the Complaint are sufficient to overcome a dismissal at this stage of the proceedings.

Discussion

Defendants argue that the Complaint must be dismissed for Plaintiffs' failure to make a pre-suit demand on the Board. However, when a complaint, such as the one at bar, does not challenge a specific action or decision of the board, demand is excused if the complaint raises a reasonable doubt that a majority of the directors are disinterested or independent. See Rales v. Blasband, 634 A.2d 927, 930 (Del. 1993).[2] Under this test:

> [A] court must determine whether or not the particularized factual allegations of a derivative stockholder complaint create a reasonable doubt that, as of the time the complaint is filed, the board of directors could have properly exercised its independent and disinterested business judgment in responding to a demand. If the derivative plaintiff satisfies this burden, then demand will be excused as futile.

[2] The parties agree that Delaware substantive law is applicable to the demand futility analysis. See Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90, 108-09 (1991).

Id. at 934.

The detailed factual allegations of the Complaint show the absence of an independent and disinterested majority of the Board. (Dkt. 62, ¶¶ 11, 14, 15, 16, 17-18, 30, 41, 89, 95, 97, 136, 150, 161, 171.) The allegations of the Complaint may not be parsed and read in isolation, but must be read as a whole. See In re Cendant Corp. Deriv. Litig., 189 F.R.D. 117, 128 (D.N.J. 1999). Independence "means that a director's decision is based on the corporate merits of the subject before the board rather than extraneous considerations or influences." Aronson v. Lewis, 473 A.2d 805, 813 (Del. 1984). While Defendants dismiss Plaintiffs' allegations as nothing more than structural bias, a lack of independence may be shown, as is the case here, where the particularized facts in the Complaint establish a reasonable doubt whether the director is able to consider impartially a demand when "financial, familial, or other relationships" with the conflicted director are implicated. See, e.g., Haseotes v. Bentas, C.A. No. 19155, 2002 WL 31058540, at *6-7 (Del. Ch. Sept. 3, 2002).

Additionally, and contrary to Defendants' argument, the Court must examine the Board that was in place at the time the action was filed. Rales, 634 A.2d at 934; see also In re Maxim Integrated Prods., 574 F. Supp. 2d 1046, 1059, n.3 (N.D. Cal. 2008) (citing Braddock v. Zimmerman, 906 A.2d 776 (Del. 2006) (holding that a court must examine the independence and disinterestedness of the board as it was constituted at the time the action was first filed, unless the complaint was previously dismissed by the court)). Plaintiffs meet their burden of showing, at a minimum, that there is reasonable doubt

regarding the independence and disinterest of a majority of the Board. Plaintiffs allege that Defendant Farha, CEO and President of Wellcare, as well as Chairman of the Board, received millions of dollars per year in monetary compensation, bonuses, and options from his employment. (Dkt. 62, ¶ 11.) The bonus compensation was allegedly tied to the Company's financial performance. (Id. at ¶ 2.) Plaintiffs also allege that Defendants Hourani and Farha are cousins who previously worked together at another health care company that ran afoul of regulators, and that Hourani was hand-selected by Farha to serve on the Board and the audit committee. (Id. at ¶¶ 41, 80, 161.) In addition, Defendant Hickey allegedly worked alongside Farha at a another health care company, where Farha rose to the level of a division CEO and Hickey served as vice president of operations. (Id.) Defendant King-Shaw was also allegedly retained as a consultant who was responsible for establishing oversight of governmental and regulatory issues for the Company, for which he was paid more than $259,000 in stock and cash -- more than he received as a director. (Id. at ¶ 16.) The Complaint also alleges that Hickey was Chairman and CEO of IntelliClaim, from whom WellCare licensed claims software at a price of over $440,000. (Id. at ¶ 14.) IntelliClaim allegedly made its contract with WellCare, and the WellCare logo, a feature of its own promotional materials, making the Company so successful that it was acquired by McKesson Corporation for over $20 million. (Id. at ¶ 161(l).) These allegations are sufficient to overcome a dismissal of this action at this stage of the proceedings.

Under Delaware law, directors are sufficiently "interested" to render demand

futile where they face a "substantial likelihood" of liability for the wrongful conduct alleged in the complaint. Rales, 634 A.2d at 936. Throughout the Relevant Period,[3] the Audit Committee allegedly consisted of Defendants Hourani, Herzlinger and Michalik. (Dkt. 62, ¶ 161(c).) This committee was specifically charged with "oversight of (i) the integrity of the financial statements of the corporation, (ii) the compliance by the corporation with legal and regulatory requirements. . . ." (Id. at ¶ 30.) Plaintiffs maintain that the Audit Committee members allowed the Company to submit inflated expense reports to governmental agencies to enable WellCare to overstate both its income and net income by nearly 10% throughout the Relevant Period. (Id. at ¶¶ 2, 111.) The Complaint provides sufficient factual details to render demand against the Audit Committee members futile. See In re Lernout & Hauspie Sec. Litig., 286 B.R. 33, 38-39 (D. Mass. 2002) (denying motion to dismiss securities fraud claims against three members of an audit committee because they failed in their "duty to oversee the auditors, that is, to guard the guardians").

To raise a substantial likelihood of liability for insider trading, Plaintiffs must plead that: (1) "the corporate fiduciary possessed material, nonpublic company information," and (2) "the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." In re Oracle Corp., 867 A.2d 904, 934 (Del. Ch. 2004), aff'd, 872 A.2d 960

[3] The Relevant Period is alleged to be February 15, 2005, through the present.

(Del. 2005). Defendants assert that the insider trading claims fail to plead the facts known to Defendants with particularity or that each Defendant acted with "scienter;" however, the claims are sufficient inasmuch as they allege, with particularity, not only the information that was known, or consciously disregarded, by the pertinent Defendants at the time the trades were made, but also the highly suspicious timing and quantity of each of the trades. (Dkt. 62, ¶¶ 48-57.)

Further, the Court is not convinced that the exculpatory provision in WellCare's Certificate of Incorporation exempts any Defendant from liability at this juncture. Pursuant to § 102(b)(7) of the Delaware General Corporation Law, a corporation may exempt its directors from liability for violations of the duty of due care, but not for violations of the duties of loyalty and good faith. 8 Del. C. § 102(b)(7); Pereira v. Cogan, 294 B.R. 449, 534 (S.D.N.Y. 2003); Emerald Partners v. Berlin, 726 A.2d 1215, 1223 (Del. 1999). Although Defendants' misconduct may implicate the duty of due care, many of Plaintiffs' allegations relate to violations of the duties of loyalty and good faith, such that the duty of care is not the sole basis of liability under Plaintiffs' well-pleaded allegations. See In re Abbott Labs. Derivative S'Holders Litig., 325 F.3d 795, 808 (7th Cir. 2003) (holding that the failure to monitor implicates "the duty of care, the duty of loyalty, and the duty of good faith."); see also Malone v. Brincat, 722 A.2d 5 10-11 (Del. 1998) (holding that the directors' dissemination of inaccurate information implicates duties of loyalty and good faith). Consequently, the Court agrees with Plaintiffs that §102(b)(7) provides no basis for dismissal at this stage of the proceedings.

Defendants argue that Plaintiffs do not have standing to pursue their Exchange Act claims on behalf of Wellcare. Notwithstanding, courts have held that an individual shareholder, although not a purchaser or seller of stock, has standing to bring a derivative claim on behalf of a corporation which has been fraudulently induced to issue its stock. See Sargent v. Genesco, Inc., 492 F.2d 750, 765 (5th Cir. 1974). Defendants assert that there was no bargained-for exchange that resulted in an investment decision. Plaintiffs assert, however, that WellCare's 2006 and 2007 Proxy Statements filed with the SEC, reveal that certain of the Defendants in 2005 and early 2006 were issued stock options by WellCare. Throughout the Complaint, Plaintiffs describe the misrepresentations contained within the financial statements issued during the Relevant Period. (Dkt. 62, ¶¶ 48-63, 136-141, 147-157.) The Complaint also clearly states that in the five months prior to October 24, 2007, the date federal agents raided WellCare's headquarters and the trust status of the Company began emerging, Defendants Farha, Herzlinger, Hickey, Hourani, King-Shaw, Michalik, and Moszkowski sold 283,000 shares of WellCare common stock for proceeds of approximately $27,711,000. (Id. at ¶ 149.) Plaintiffs allege that Defendants were at all times relevant agents of each other and of WellCare, and at all times relevant owed fiduciary duties toward WellCare. (Id. at ¶¶ 25, 27.) Plaintiffs assert that when Defendants failed to disclose the non-public information while selling their own shares at grossly inflated prices, they consummated the Section 10(b) violations and WellCare was harmed as a result thereby. Therefore, the Court finds that Plaintiffs have standing to bring the Exchange Act claims.

Plaintiffs also adequately plead their Exchange Act claims. The Complaint identifies each of the false and misleading statements made by the Individual Defendants during the Relevant Period (Dkt. 62, ¶¶ 103-135), states where and when they were made (id.), and explains why the statements were false and misleading. (Id. at ¶¶ 136-137). Taken as a whole, the Complaint alleges the Individual Defendants' fraudulent misstatements about the nature of WellCare's business which ultimately led to multiple government investigations of Defendants' illegal activities, (id. at ¶¶ 64-102), the resignations of several high-ranking executives (id. at ¶ 86), a workforce reduction costing the Company more than $3.1 million (id. at ¶ 92), a restatement of WellCare's historical consolidated financial statements for the 2004-2006 fiscal years (id. at ¶¶ 95-98), and a payment of $35.2 million to the Financial Litigation Unit of the United States Attorney's Office for Medicaid behavioral health capitation refunds that the Company owed to the Florida Agency for Health Care Administration (id. at ¶ 100).

As Plaintiffs argue in their Omnibus Memorandum, the Complaint describes in detail a scheme whereby the Individual Defendants caused the Company to enter into non-standardized contracts with medical providers promising substantial premiums above established Medicare and Medicaid fee schedules. (Id. at ¶¶ 48-51). The Complaint also specifically alleges that Individual Defendants acted with scienter in that they either had actual knowledge of the fraud, or acted with reckless disregard for the truth in failing to ascertain and disclose the true facts even though such facts were available to them. (Id. at ¶ 168). In addition, the Complaint consistently draws a nexus between the Individual

Defendants' false and misleading statements and their motive to grossly inflate the Company's financial position while falsely assuring the SEC and the investing public that the Company was being operated in a lawful and proper manner, in order to boost the Company's stock price. (Id. at ¶¶ 48-63, 103-135). The Complaint then supports these allegations through various first-hand accounts by former employees of the Company. (Id. at ¶¶ 48-63.)

Plaintiffs' allegations raise a strong inference of scienter on the part of each of the Defendants, at least at this stage of the proceedings, despite Defendants' urging to the contrary. As the Supreme Court has stated, under the "strong inference" of scienter standard set forth in the PSLRA, scienter allegations of a Section 10(b) claim will survive a motion to dismiss "if a reasonable person would deem the inference cogent and at least as compelling as any opposing inference one could draw from the facts alleged." Tellabs v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499, 2510 (2007) ("Tellabs I"). The Complaint alleges that Defendants knew or recklessly disregarded that WellCare was engaging in unsound business practices by entering into non-standardized contracts with medical providers promising substantial premiums above established Medicare and Medicaid fee schedules and that their actions created an inadequate system of internal controls which fostered complete disregard for regulatory compliance. (Dkt. 62, ¶¶ 2, 48-63.) The Individual Defendants are also alleged to have orchestrated a scheme to artificially increase the revenue WellCare received from the government for Medicare and Medicaid services, which in turn enabled the Company to post dramatic profits that

far outpaced the financial results of its competitors and facilitated massive insider selling by the Company's officers and directors. (Id. at ¶ 47.) The Complaint specifically alleges that "nothing within the Company" occurred without the knowledge of executive management, that Individual Defendants "knew and controlled everything that was going on," and that WellCare's senior management, including Farha, were "well aware of and encouraged" the unsound business practices which form the basis of Plaintiffs' allegations. (Id. at ¶¶ 52-53.)

The confidential witness information is also more than adequate for this stage of the proceedings. The Eleventh Circuit Court of Appeals has held that:

> [T]he weight to be afforded to allegations based on statements proffered by a confidential source depends on the particularity of the allegations made in each case, and confidentiality is one factor that courts may consider. Confidentiality, however, should not eviscerate the weight given if the complaint otherwise fully describes the foundation or basis of the confidential witness's knowledge, including the position(s) held, the proximity to the offending conduct, and the relevant time frame.

Mizzaro v. Home Depot, Inc., 544 F.3d 1230, 1240 (11th Cir. 2008). The Complaint includes sufficiently detailed confidential witness accounts that substantiate Plaintiffs' allegations regarding Individual Defendants' direct involvement in, control over and knowledge of, the WellCare fraudulent scheme. (Id. at ¶¶ 48-63.)

Plaintiffs' allegations against non-management directors support a strong inference of scienter as well. Plaintiffs allege that the outside directors "were able to and did, directly and/or indirectly, exercise control over . . . the contents of the various public statements issued by the Company," that they "had access to adverse, non-public

information about the financial condition, operations, and improper representations of WellCare," and that at all relevant times, Defendants were agents of each other and of the Company. (Dkt. 62, ¶¶ 24-25.) Some of the Individual Defendants, including Defendants Herzlinger, Hourani, and Michalik, allegedly served on the Audit Committee and were responsible for compliance with legal and regulatory requirements, maintaining and establishing adequate internal accounting controls for the Company and ensuring that the Company's financial statements were based on accurate financial information. (Dkt. 62, ¶ 30.) These outside directors and Audit Committee members are alleged to have failed to correct the false and misleading statements in the financial reports even though they were under a duty to do so. See Barrie v. Intervoice-Brit, Inc., 409 F.3d 653, 656 (5th Cir. 2005) (holding that "[w]here it is pled that one defendant knowingly uttered a false statement and the other defendant knowingly failed to correct it, even if it is not alleged which defendant made the statement and which defendant did not correct it, the fraud is sufficiently pled as to each defendant").

Defendants' false Sarbanes-Oxley certifications also support a strong inference of scienter. Sarbanes-Oxley certifications are "probative of scienter" where, as here, "the person[s] signing the certification were severely reckless in certifying the accuracy of the financial statements." Garfield v. NDC Health Corp., 466 F.3d 1255, 1266 (11th Cir. 2006). This "severely reckless" requirement is satisfied "if the person signing the certification had reason to know, or should have suspected, due to the presence of glaring accounting irregularities or other 'red flags,' that the financial statements contained

material misstatements or omissions." Id. The Complaint alleges that Defendants Farha and Behrens knew and controlled everything that occurred at WellCare during the Relevant Period. (Dkt. 62, ¶ 53.) Defendants Farha and Behrens certified that "[t]he Form 10-K fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934" and that "[t]he information contained in the Form 10-K fairly presents, in all material respects, the financial condition and results of operations of the Company." (Dkt. 62, ¶¶ 105, 108, 113, 115, 117, 120, 125, 127, 129, 132, 134.) On July 21, 2008, WellCare announced in a press release and a Form 8-K that based upon the results of the Special Committee's investigation to date, WellCare restated its historical consolidated financial statements for 2004, 2005, and 2006, and unaudited condensed consolidated financial statements for the first half of 2007. (Id. at ¶ 95.) When a corporation's own internal investigation leads to the announcement of a restatement of historical financial results, this "establish[es] a strong inference that the company itself believes that fraud" occurred. In re Sipex Corp. Sec. Litig., No. C 05-00392 WHA, 2005 U.S. Dist. LEXIS 30854, at **3-4 (N.D. Cal. Nov. 17, 2005).

Additionally, the investigations into WellCare by various government agencies only serve to bolster the inference of scienter at this stage of this action. The Complaint alleges that investigations are being conducted by no less than four state governments and three agencies of the federal government. (Dkt. 62, ¶¶ 64-102.) Courts commonly hold that pending government investigations are relevant and provide notice of a possible fraud, *i.e.*, that the pendency of an investigation serves to suggest that a fraud may have

occurred and may not be ignored. See In re Hamilton Bancorp, Inc. Sec. Litig., 194 F. Supp. 2d 1353, 1359 n.4 (S.D. Fla. 2002); see also In re Lernout & Hauspie Sec. Litig., 230 F. Supp. 2d 152, 165, 168 (D. Mass. 2002) (finding that an ongoing SEC inquiry was a red flag indicative of misconduct); In re Oxford Health Plans, Inc. Sec. Litig., 51 F. Supp. 2d 290, 295 (S.D.N.Y. 1999) (finding that an active investigation by New York Attorney General was a relevant "red flag" to put auditor on notice of misconduct); In re Health Mgmt. Inc. Sec. Litig., 970 F. Supp. 192, 203 (E.D.N.Y. 1997) (finding that an SEC inquiry into company accounting practices was a "red flag" to put auditor on notice of suspicious activity).

Furthermore, Plaintiffs' allegations of insider stock sales support a strong inference of scienter. Defendants, and other Company insiders, allegedly sold approximately 1.6 million shares of WellCare common stock for proceeds of over $100 million during the Relevant Period. (Dkt. 62, ¶ 149.) This amount includes 283,000 shares sold for proceeds of approximately $27,711,000 in the five months prior to the federal raid on WellCare's headquarters on October 24, 2007. (Id.) A complaint need not allege insider trading or pecuniary motive to plead a securities fraud claim successfully. Tellabs I, 127 S. Ct. at 2511. Nevertheless, allegations of personal financial motive "may weigh heavily in favor of a scienter inference." Id.

Despite Defendants' assertions to the contrary, Plaintiffs adequately plead loss causation. The Complaint alleges that, as a result of Defendants' misrepresentations and omissions which concealed WellCare's true financial condition, the Company's stock was

artificially inflated during the Relevant Period until the truth about WellCare was revealed. (Dkt. 62, ¶¶ 142, 147.) Plaintiffs allege that when the truth about WellCare was revealed, beginning with the raid on October 24, 2007, by federal agents, the stock price plunged from $115.17 to close at $42.67, a drop of $72.50 in a single day. (Id. at ¶¶ 145, 149.) More important, however, loss causation is a fact-based inquiry that is generally not proper to resolve on a motion to dismiss. See In re PSS World Medical, Inc. Sec. Litig., 250 F. Supp. 2d 1335, 1351 (M.D. Fla. 2002).

Defendants assert that Plaintiffs' Exchange Act claims are impermissibly disguised state law breach of fiduciary duty claims, arising from acts of corporate mismanagement. However, the allegations of the Complaint satisfy each of the elements of a securities fraud claim under Section 10(b) and Rule 10b-5. (See Dkt. 62, ¶¶ 47, 136-37.) Defendants also argue that Plaintiffs fail to state a controlling person claim. Notwithstanding, the matter of whether a defendant is a control person is a fact-intensive inquiry that is not appropriate for a motion to dismiss. See In re Unicapital Corp. Sec. Litig., 149 F. Supp. 2d 1353, 1368 n.23 (S.D. Fla. 2001).

Finally, Defendants argue that Plaintiffs' state law claims are not adequately alleged. However, the Complaint sets out with specific allegations how Individual Defendants' breached their fiduciary duties by engaging in improper business practices, improper accounting practices, and failing to maintain the Company's internal financial controls, as well as their knowledge thereof. (Dkt. 62, ¶¶ 22-27, 30-33, 34-36, 48-49, 57, 58, 175). Plaintiffs also adequately allege insider stock sales in violation of Delaware

law. Delaware law has long provided that "directors who misuse company information to profit at the expense of innocent buyers of their stock should disgorge their profits." Guttman v. Huang, 823 A.2d 492, 505 (Del. Ch. 2003) (citing Brophy v. Cities Serv., Inc., 70 A.2d 5, 8 (Del. Ch. 1949)). A breach of fiduciary duty claim premised on insider trading, which is referred to as a Brophy claim, arises where "(1) the corporate fiduciary possessed material, nonpublic company information; and (2) the corporate fiduciary used that information improperly by making trades because she was motivated, in whole or in part, by the substance of that information." In re American Intern. Group, Inc., 2009 WL 366613, at *24 (Del. Ch. Feb. 10, 2009) (citation omitted). The Complaint alleges that while the Company's stock price increased, Defendants Behrens, Bereday, Farha, Herzlinger, Hickey, Hourani, King-Shaw, Michalik, and Moszkowski, with the knowledge that the Company's financial statements were false and materially misstated, sold more than $100 million worth of Company stock while unsuspecting investors purchased WellCare stock. (Dkt. 62, ¶ 148.) At the time the stock sales were made, these Defendants allegedly knew that the Company's financial statements were false and materially overstated, and that the Company's stock price was materially inflated as a result thereof. (Id. at ¶ 150.) The Complaint adds that just five months prior to the raid on the Company's officers, Defendants Farha, Herzlinger, Hickey, Hourani, King-Shaw, Michalik, and Moszkowski sold more than $27 million in shares. (Id. at ¶ 149.) In 2006, TowerBrook Investors, an entity with which Moszkowski, the Company's then-Chairman, is directly affiliated, and TowerBrook Investors' affiliates, allegedly liquidated

its approximately 12.8% interest in WellCare. (Id. at ¶ 152.) Other Defendants are also alleged to have sold shares within close proximity to the Search. (Id. at ¶ 151.)

ACCORDINGLY, it is **ORDERED AND ADJUDGED**:

1. Nominal Defendant Wellcare Health Plans, Inc.'s Motion to Dismiss With Prejudice the Verified Second Amended Consolidated Shareholder Derivative Complaint (Dkt. 64) is denied.

2. The Individual Defendants' Motion to Dismiss the Verified Second Amended Consolidated Shareholder Derivative Complaint (Dkt. 67) is denied.

3. Defendants' request for oral argument (Dkt. 66) is denied as unnecessary.

4. Defendants shall file their answer and defenses to the Verified Second Amended Complaint (Dkt. 62) within thirty (30) days of this Order.

5. The Court will conduct a preliminary pretrial conference on **Thursday, May 14, 2009, at 9:30 a.m.**, in Courtroom 15B, United States Courthouse, 801 North Florida Avenue, Tampa, Florida.

DONE AND ORDERED at Tampa, Florida, on March 30, 2009.

s/*Richard A. Lazzara*
RICHARD A. LAZZARA
UNITED STATES DISTRICT JUDGE

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Counsel of Record