DOCKET NO. X08 CV 18 6038160 S	:	SUPERIOR COURT
CITY OF LIVONIA RETIREE HEALTH AND DISABILITY BENEFITS PLAN, et al.	:	COMPLEX LITIGATION DOCKET
v.	:	AT STAMFORD
PITNEY BOWES, INC., et al.	:	OCTOBER 24, 2019

MEMORANDUM OF DECISION RE:

DEFENDANTS' MOTION TO STRIKE (#146)

The plaintiff, City of Livonia Retiree Health & Disability Benefits Plan, brings a putative class action against the defendants, Pitney Bowes Inc. (Pitney Bowes), several individual officers and directors of Pitney Bowes (individual defendants),[1] and several investment banking firms (underwriter defendants), alleging violations of the Securities Act of 1933, 15 U.S.C. §§ 77a, et seq. The plaintiff's claims arise out of disclosures in connection with an initial public offering (IPO) by Pitney Bowes of debt securities (notes) and the underwriting of the IPO by the underwriter defendants. On February 1, 2019, Pitney Bowes and the individual defendants[2] moved to strike the plaintiff's claims against them in their entirety, arguing that the plaintiff's allegations

[1] Specifically: Marc B. Lautenbach (Pitney Bowes' president, chief executive officer, and a director), Stanley J. Sutula III (executive vice president and chief financial officer), Steven J. Green (vice president and chief accounting officer at the time of the securities offering presently at issue), Michael I. Roth (non-executive chairman of the board of directors), Linda G. Alvarado (director), Anne M. Busquet (director), Roger Fradin (director), Anne Sutherland Fuchs (director), S. Douglas Hutcheson (director), Eduardo R. Menascé (director), Linda S. Sanford (director), David L. Shedlarz (director), and David B. Snow, Jr. (director).

[2] Because the present motion to strike is brought only by the defendant Pitney Bowes Inc. and the individual defendants, any collective references to "the defendants" herein refer only to those defendants.

do not state violations of the Securities Act as a matter of law. Docket No. 146. For the reasons explained below, the defendants' motion to strike is granted.

Allegations of the Complaint

The plaintiff filed a three-count complaint against the present defendants and the underwriter defendants on September 18, 2018, claiming that the defendants had violated the Securities Act by failing to disclose in connection with the IPO various third quarter 2017 declines in the Small and Medium Business Solutions segment and their corresponding effects on Pitney Bowes' financial performance. Specifically, the plaintiff claimed: 1) violation of § 11 of the Securities Act, 15 U.S.C. § 77k, based on purported inaccuracies in the registration statement (against all defendants); 2) violation of § 12 (a) (2) of the Securities Act, 15 U.S.C. § 77l (a) (2), based on purported inaccuracies in the prospectus (against Pitney Bowes, the individual defendants who serve as officers of Pitney Bowes, and the underwriter defendants), and 3) violation of § 15 of the Securities Act, 15 U.S.C. § 77o, based on "controlling person" liability for the claimed violations of §§ 11 and 12 (a) (2) (against Pitney Bowes and the individual defendants). The following relevant facts are alleged in the complaint as supplemented by certain of Pitney Bowes' filings with the Securities and Exchange Commission (SEC), which have been submitted as exhibits to the present motion to strike.[3]

The complaint alleges the following facts: Pitney Bowes is a publicly traded corporation with its corporate headquarters in Stamford, Connecticut. As set forth in the complaint, Pitney Bowes provides "mail processing equipment and integrated mail solutions"; compl., ¶ 14; and its

[3] The parties have stipulated that the court may consider these filings in deciding the defendants' motions to strike. Docket No. 144.

business is composed of three major segments. The largest of these segments in terms of earnings, "Small and Medium Business Solutions," generated fifty-one percent of Pitney Bowes' revenue in the year 2016; Docket No. 147, Ex. A, p. 22; and seventy-six percent of the company's earnings before interest and taxes (EBIT) that year. Id., p. 23. The second-highest source of Pitney Bowes' overall revenues irrespective of segment in 2016 was equipment sales, which accounted for nineteen percent of Pitney Bowes' 2016 revenue. Id., p. 18.

The plaintiff alleges that, on or about March 16, 2017, Pitney Bowes filed a Form S-3 registration statement with the SEC, intending in the future to offer securities through a shelf registration process.[4] As part of this shelf registration process, Pitney Bowes would be permitted to incorporate by reference various of its periodic filings with the SEC, with those filings being considered part of the registration statement for any future securities offerings and satisfying the pertinent disclosure obligations under federal securities law.[5]

The plaintiff alleges that, on September 13, 2017, Pitney Bowes filed a prospectus with the SEC in connection with the sale on that date of a total of $700 million in notes in an IPO. The prospectus is alleged to have incorporated by reference four additional documents: 1) Pitney Bowes' annual report on Form 10-K for the year ending December 31, 2016, which was originally filed with the SEC on February 22, 2017; 2) Pitney Bowes' quarterly report on Form 10-Q for the first quarter ended March 31, 2017, which was originally filed with the SEC on May 3, 2017; 3)

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[4] "The shelf registration process enables qualified issuers to offer securities on a continuous basis by first filing a shelf registration statement and then subsequently filing separate prospectus supplements for each offering." *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 150 (2d Cir. 2012), cert. denied, 568 U.S. 1228, 133 S. Ct. 1624, 185 L. Ed. 2d 576 (2013).

[5] See generally 17 C.F.R. § 230.415 (establishing parameters for the shelf registration process); 17 C.F.R. § 239.13 (denoting the types of issuers and transactions that qualify for registration using Form S-3).

Pitney Bowes' quarterly report on Form 10-Q for the second quarter ended June 30, 2017, which was originally filed with the SEC on August 2, 2017; and 4) current reports on Form 8-K filed on May 5, May 9, May 10, July 14, and September 9, 2017. Together, these documents (the Form S-3 registration statement, the prospectus, and the incorporated documents) are alleged to have composed the full registration statement for the offering. Ultimately, the plaintiff alleges, Pitney Bowes completed the IPO, and the plaintiff purchased securities pursuant to and/or traceable to it.

The plaintiff claims that four statements in Pitney Bowes' registration statement were misleading absent further disclosure regarding Pitney Bowes' third quarter performance, which ended on September 30, 2017, after the date of the IPO. The challenged statements, with portions of the statements as quoted in the plaintiff's complaint italicized, are:

1) "*[Small and Medium Business Solutions] is characterized by a high level of recurring revenue driven by rental, lease and loan arrangements, contract support services and supplies sales.*" Compl. ¶ 22; Docket No. 147, Ex. A, p. 4 (2016 10-K).

2) "[Small and Medium Business Solutions] revenue declined 3% as reported and 2% on a constant currency basis. North America Mailing revenue declined 1% driven by continued declines in recurring revenue streams, partially offset by *growth in equipment sales. The growth in equipment sales reflects new product offerings, including the initial SendPro products launched last year and digital offerings.* Equipment sales growth also benefited from a favorable comparison to the prior year, which was impacted by the enterprise business platform implementation in the second quarter of 2016." Compl. ¶ 23; Docket No. 147, Ex. B, p. 29 (2017 Second Quarter 10-Q).

3) "*Equipment sales revenue increased 4% in the [second quarter of 2017].* On a constant currency basis, equipment sales increased 5%, *primarily due to: 12% from higher equipment sales in North America Mailing due to increased sales in Mail Finishing, which*

includes the initial SendPro products launched last year and, in part, reflecting a favorable comparison to [the] prior year, which was affected by the enterprise business platform implementation in the second quarter of 2016 . . . ." Compl. ¶ 24, Docket No. 147, Ex. B, p. 32 (Id.).

4) *"Cost of equipment sales as a percentage of equipment sales decreased to 48.7% in the [second quarter of 2017], primarily due to improved equipment sales margins in International Mailing.*" Compl. ¶ 25; Docket No. 147, Ex. B, p. 32 (Id.).

The plaintiff alleges that Pitney Bowes' third financial quarter ended on September 30, 2017, and that performance within the Small and Medium Business Solutions segment had declined during that quarter, leading to overall declines in company net income and EBIT. Specifically, the plaintiff alleges the following:

1) Revenues for the Small and Medium Business Solutions segment for the interim period ending September 30, 2017 ("3Q17") declined seven percent as subsequently reported, reflecting a decline in revenue of nine percent in the segment's North America Mailing sub-segment largely attributable to lower equipment sales.
2) 3Q17 equipment sales within the Small and Medium Business Solutions segment declined, largely due to an eight percent decline in equipment sales in the North America Mailing sub-segment and a one percent decline in equipment sales in the Production Mail sub-segment.
3) For 3Q17, the Small and Medium Business Solutions segment's cost of equipment sales as a percentage of equipment sales increased to 54.3 percent, primarily due to lower margins in North America.

4) Due to the preceding factors, company-wide EBIT (earnings before interest and taxes) declined eighteen percent as compared to the prior year, while North America Mailing EBIT declined twenty-four percent and Small and Medium Business Solutions segment EBIT declined twenty-three percent.
5) Also due to these factors, company-wide net income declined eighteen percent, driven largely by declining gross margins, particularly those in the Small and Medium Business Solutions segment.

As an additional basis for liability, the plaintiff further claims that the declines in equipment sales and margins in the Small and Medium Business Solutions segment during the third quarter of 2017 were "trends" or "uncertainties" that triggered an affirmative disclosure obligation under Item 303 of SEC Regulation S-K, 17 C.F.R. § 229.303. Finally, the plaintiff alleges that the defendants were aware of the aforementioned declines at the time of the IPO, and that the securities issued through the offering were trading below their initial prices at the time this litigation was commenced.

Contentions of the Parties

The defendants filed the present motion to strike on February 1, 2019, arguing that the plaintiff's complaint failed to state a claim upon which this court may grant relief. In their accompanying memorandum (Docket No. 147), the defendants argued 1) that Item 303 did not require disclosure of Pitney Bowes' third quarter performance because the various declines in performance during that quarter were not "trends" or "uncertainties" as defined therein, and, further, that it was not objectively unreasonable for the defendants to conclude that these declines would have no material adverse impact on Pitney Bowes' ongoing results; 2) that the statements about recurring revenues and equipment sales were truthful statements of historical fact that did

not imply any future performance and thus did not trigger a duty to disclose additional information; and 3) that, in any event, none of the alleged omissions were material. With their memorandum, the defendants submitted as exhibits Pitney Bowes' Form 10-K for the year 2016, Pitney Bowes' Form 10-Q for the second quarter of 2017, and the prospectus supplement issued in connection with the IPO.

The plaintiff filed an opposition and memorandum on April 3, 2019 (Docket Nos. 154 and 155), arguing 1) that it had adequately pleaded the existence of trends and uncertainties that Item 303 required be disclosed, 2) that Pitney Bowes' registration statement suggested a "transformative turnaround story" of improving company results in 2017, as well as growing revenues and profits in the Small and Medium Business Solutions segment, which the declines experienced in the third quarter of that year rendered misleading (Docket No. 154, p.2); and 3) that questions of materiality were not properly decided at the motion to strike stage, but, in any event, that the plaintiff had adequately pleaded materiality.

The defendants filed a reply on May 6, 2019 (Docket No. 159), and the court heard oral argument on June 27, 2019.

Standard of Review

Practice Book § 10-39 (a) provides in relevant part: "A motion to strike shall be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted . . . ." "[A] motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court . . . . [The court] construe[s] the complaint in the manner most favorable to sustaining its legal sufficiency. . . . Thus, [i]f facts provable in the complaint would support a cause of action, the motion to strike must be denied." (Internal quotation marks omitted.) *Geysen v. Securitas Security*

Services USA, Inc., 322 Conn. 385, 398 (2016). Nevertheless, while "[a] motion to strike admits all facts well pleaded; it does not admit legal conclusions or the truth or accuracy of opinions stated in the pleadings." (Emphasis omitted; internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588 (1997). Further, although decisions of federal district courts and courts of appeal do not bind Connecticut state courts; see *Szewczyk v. Dept. of Social Services*, 275 Conn. 464, 475 n.11 (2005); "it is well settled that [t]he decisions of the Second Circuit Court of Appeals carry particularly persuasive weight in the interpretation of federal statutes by Connecticut state courts." (Internal quotation marks omitted.) Id., 475.

Discussion

The plaintiff's claims against the defendants arise under §§ 11, 12 (a) (2), and 15 of the Securities Act. "Section 11 of the Securities Act imposes liability on issuers and other signatories of a registration statement that, upon becoming effective, contain[s] an untrue statement of a material fact or omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading. . . . Section 12 (a) (2) imposes liability under similar circumstances on issuers or sellers of securities by means of a prospectus." (Citation omitted; internal quotation marks omitted.) *Litwin v. Blackstone Group, L.P.*, 634 F.3d 706, 715 (2d Cir. 2011), cert. denied, 565 U.S. 878, 132 S. Ct. 242, 181 L. Ed. 2d 138 (2011). Section 15, meanwhile, imposes joint and several liability on various "controlling persons" affiliated with an issuer that is derivative of violations of §§ 11 and 12. 15 U.S.C. § 77o (a). "Claims under sections 11 and 12 (a) (2) are . . . notable both for the limitations on their scope as well as the *in terrorem* nature of the liability they create. . . . Issuers are subject to virtually absolute liability under section 11, while the remaining potential defendants under sections 11 and 12 (a) (2) may be held liable for mere negligence." (Citations omitted; internal quotation marks omitted.) *In re Morgan Stanley*

Information Fund Securities Litigation, 592 F.3d 347, 359 (2d Cir. 2010). "Collectively, the language of sections 11 and 12 (a) (2) creates three potential bases for liability based on registration statements and prospectuses filed with the SEC: (1) a misrepresentation; (2) an omission in contravention of an affirmative legal disclosure obligation; and (3) an omission of information that is necessary to prevent existing disclosures from being misleading."[6] Id., 360.

A. Omission in Contravention of an Affirmative Disclosure Obligation

The plaintiff alleges that the defendants violated an affirmative disclosure obligation by failing to disclose that lower equipment sales and margins in Pitney Bowes' Small and Medium Business Solutions segment would reduce Pitney Bowes' net income and EBIT in the third quarter of 2017. Although the Securities Act is intended to "[protect] investors by ensuring that companies issuing securities (known as 'issuers') make a full and fair disclosure of information relevant to a public offering"; (internal quotation marks omitted) *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 135 S. Ct. 1318, 1323, 191 L. Ed. 2d 253 (2015); it does not require issuers to disclose all information that a potential investor may possibly find material to an investment decision. Rather, the "[registration] statement must contain *specified* information about both the company itself and the security for sale. . . . Beyond those required disclosures, the issuer may include additional representations of either fact or opinion." (Citations omitted; emphasis added.) Id. Put another way, "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable

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[6] Neither the complaint nor any of the plaintiff's subsequent arguments suggest that the challenged statements were affirmative misrepresentations. Additionally, plaintiff's counsel stated at oral argument that none of the statements at issue were false per se, but rather that the defendants were obligated to disclose additional information beyond the statements contained in their registration statement to avoid deception. Accordingly, the court reviews the plaintiff's claims only under the latter two bases for liability.

under the securities laws only when the corporation is subject to a duty to disclose the omitted facts." *In re Time Warner Inc. Securities Litigation*, 9 F.3d 259, 267 (2d Cir. 1993), cert. denied, 511 U.S. 1017, 114 S. Ct. 1397, 128 L. Ed. 2d 70 (1994).

The plaintiff contends that the defendants' affirmative duty to disclose arose out of Item 303, which requires, inter alia, that an issuer "[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 C.F.R. § 229.303 (a) (3) (ii). As explained further in interpretive guidance issued by the SEC, "the Regulation imposes a disclosure duty 'where a trend, demand, commitment, event or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operations.'" *Litwin v. Blackstone Group, L.P.*, supra, 634 F.3d 716 (quoting Securities Act Release No. 6835, Management's Discussion & Analysis of Financial Condition & Results of Operations; Certain Investment Company Disclosures (May 18, 1989) (1989 WL 1092885)). Failure to disclose information that is subject to Item 303's disclosure requirement provides a basis for liability under §§ 11 and 12 (a) (2). See, e.g., *Panther Partners Inc. v. Ikanos Communications, Inc.*, 681 F.3d 114, 120 (2d Cir. 2012).

The SEC's interpretive guidance offers insight into what constitutes a "trend" or "uncertainty" under Item 303, providing as examples: "[a] reduction in the registrant's product prices; erosion in the [registrant's] market share; changes in insurance coverage; or the likely non-renewal of a material contract." Release No. 6835. With respect to "uncertainties" in particular, the SEC suggested that these arise as consequences of discrete events or series of events affecting an issuer: "[e]vents that have already occurred or are anticipated often give rise to known uncertainties. For example, a registrant may know that a material government contract is about to

expire. The registrant may be uncertain as to whether the contract will be renewed, but nevertheless would be able to assess facts relating to whether it will be renewed." Id. See also *Silverstrand Investments v. AMAG Pharmaceuticals, Inc.*, 707 F.3d 95, 104 (1st Cir. 2013) (effect that numerous "serious adverse event" reports associated with new prescription drug would have on demand for the drug within the medical community constituted an uncertainty), cert. denied, 571 U.S. 941, 134 S. Ct. 174, 187 L. Ed. 2d 256 (2013); *McKenna v. SMART Technologies Inc.*, United States District Court, Docket No. 11 Civ. 7673 (KBF), 2012 WL 3589655 (S.D.N.Y. August 21, 2012) (potential decline in government stimulus funds created uncertainty over future demand for issuer's products where issuer was a "substantial beneficiary" of stimulus funds).

The plaintiff has not alleged that any uncertainties existed with respect to Pitney Bowes' financial performance in the third quarter of 2017. On the contrary, the plaintiff has alleged that the defendants were fully aware of the impact of declining equipment sales and margins in the company's Small and Medium Business Solutions segment had on its overall business: "Pitney Bowes was required to disclose at the time of the IPO that decreases in equipment sales in the North America Mailing division in 3Q17, which had already reduced sales revenues in the [Small and Medium Business Solutions] segment, coupled with decreased margins in the [Small and Medium Business Solutions] segment had *already reduced* Pitney Bowes's 3Q17 net income and EBIT." (Emphasis added.) Compl. ¶ 27. Accordingly, because the plaintiff's complaint does not allege any uncertainties arising out of the purported declines in Pitney Bowes' Small and Medium Business Solutions segment, any duty to disclose under Item 303 would require that these declines constitute a "trend," as the term is used therein.

The United States Court of Appeals for the Eleventh Circuit has explained that determining the existence of a trend under Item 303 "require[s] an assessment of whether an observed pattern

accurately reflects persistent conditions of the particular registrant's business environment. It may be that a particular pattern is, for example, of such short duration that it will not support any conclusions about the registrant's business environment." *Oxford Asset Management, Ltd. v. Jaharis*, 297 F.3d 1182, 1191 (11th Cir. 2002), cert. denied, 540 U.S. 872, 124 S. Ct. 205, 157 L. Ed. 2d 132 (2003). In the context of a different disclosure requirement,[7] the United States Court of Appeals for the Second Circuit suggested that a pattern was not a trend unless it spanned multiple quarters. *Stadnick v. Vivint Solar, Inc.*, 861 F.3d 31, 39 (2d Cir. 2017) ("prior to the third quarter of 2014, neither [income available to shareholders nor earnings per share] fluctuated in the same direction for two successive quarters; in other words there was never a trend of the shareholders' income increasing or decreasing").

Several lower courts in the Second Circuit also have looked to the duration of a particular pattern when assessing whether, as a matter of law, it constituted a trend. See, e.g., *Nguyen v. MaxPoint Interactive, Inc.*, 234 F. Supp. 3d 540, 546 (S.D.N.Y. 2017) ("events occurring within a two month period of time do not establish a 'trend' for purposes of the disclosures required by Item 303"); *Pearlstein v. Blackberry Ltd.*, 93 F. Supp. 3d 233, 245 (S.D.N.Y. 2015) ("[t]he two- and five-month periods preceding defendants' public filings were insufficient to establish a reportable trend in device performance given the pleaded volatility of the smartphone market"); *In re Noah Educational Holdings, Ltd. Securities Litigation*, United States District Court, Docket No. 08 Civ. 9203 (RJS), 2010 WL 1372709 (S.D.N.Y. March 31, 2010) ("Item 303 does not require companies to disclose isolated occurrences that affect their financial performance"); *Blackmoss Investments Inc. v. ACA Capital Holdings, Inc.*, United States District Court, Docket No. 07 Civ.

[7] Specifically, the requirement that issuers disclose any additional information required to make information already disclosed not misleading, as discussed in Section B, below.

10528, 2010 WL 148617 (S.D.N.Y. January 14, 2010) ("[a]s a matter of law, a two-month period of time does not establish a 'trend' for purposes of the disclosures required by Item 303"). See also *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) (implying that a "regular . . . quarter slowdown" would not be a trend under Item 303). [8]

Courts have been notably reluctant to impose disclosure obligations on mid-quarter company financial results absent allegations of broader factors driving these fluctuations. Compare *In re Noah Educational Holdings, Ltd. Securities Litigation*, supra, United States District Court, Docket No. 08 Civ. 9203 (RJS) ("[t]he Court's conclusion [that a two-month spike in raw materials costs was not a trend] is further bolstered by the SEC's financial reporting regulations, which . . . do not require publicly traded companies to disclose interim financial data") with *In re Facebook, Inc., IPO Securities & Derivative Litigation*, 986 F. Supp. 2d 524, 541 (S.D.N.Y. 2014) (recognizing a duty to disclose where "Plaintiffs allege omission of a material trend, *not financial data*, and the extent of an impact such a trend would have" [emphasis added]). This line of analysis comports with the implicit distinction in Item 303 between trends themselves and their financial impact. See Release No. 6835 ("[a] disclosure duty exists where a trend . . . is *both* presently known

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[8] This court acknowledges the plaintiff's reference to *In re CPI Card Group Inc. Securities Litigation*, United States District Court, Docket No. 16-cv-4531 (LAK), 2017 WL 4941597 (S.D.N.Y. October 30, 2017), where the court, in deciding a motion to dismiss for failure to state a claim brought pursuant to rule 12 (b) (6) of the Federal Rules of Civil Procedure, stated "whether a pattern or occurrence is sufficiently lengthy to constitute a trend is a question that should not be resolved at the motion to dismiss stage." Notwithstanding the court's holding in that case, the weight of the authority in the Second Circuit, as cited above, suggests that this question may be determined at the motion to dismiss stage in federal court and thus, by extension, through a motion to strike in Connecticut court. See generally *DeLaurentis v. New Haven*, 220 Conn. 225, 239-40 (1991) (a motion to dismiss under rule 12 (b) (6) of the Federal Rules of Civil Procedure "is similar to our motion to strike").

to management *and* reasonably likely to have material effects on the registrant's financial condition or results of operation" [emphasis added]).

Here, the declines in overall equipment sales and equipment sales margins are alleged to have taken place only during the third quarter of 2017, during which the IPO occurred. Notwithstanding the plaintiff's assertions, precedent from the Second Circuit and elsewhere supports the notion that "trends," as the term is used in the disclosure context, take place over a longer period of time than merely one quarter. Moreover, while the plaintiff has cited cases in support of the proposition that Item 303 can require immediate disclosure of a trend discovered prior to a quarter's completion, these cases all involved occurrences whose effects would logically be expected to span multiple quarters. See *Panther Partners Inc. v. Ikanos Communications, Inc.*, supra, 681 F.3d 120 (trend or uncertainty existed where issuer had provided defective computer chips to key customers and had potentially jeopardized its relationship with these customers going forward); *Litwin v. Blackstone Group, L.P.*, supra, 634 F.3d 716 (ongoing decline in the real estate market constituted a trend or uncertainty); *In re Facebook, Inc., IPO Securities & Derivative Litigation*, supra, 986 F. Supp. 2d 512 (identified shift in user preferences toward social media company's mobile application and away from its traditional website was a trend).

Here, by contrast, the plaintiff simply has alleged that equipment sales and margins in an important business segment declined in the third quarter of 2017 as compared to the prior quarter.[9]

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[9] Finding that these changes in financial metrics, without more, triggered a disclosure obligation would also seemingly contradict the SEC's disclosure regime, which relies on periodic, rather than continuous, disclosure of financial information. See, e.g., *In re Noah Educational Holdings, Ltd. Securities Litigation*, supra, United States District Court, Docket No. 08 Civ. 9203 (RJS) ("[t]he court's conclusion is further bolstered by the SEC's financial reporting regulations, which . . . do not require publicly traded companies to disclose interim financial data. . . . The cost of raw materials is only one step removed from Noah's reported cost of revenue, a prominent financial metric. . . . Thus, Plaintiff's theory of liability would appear to be little more than an end-run

Nothing in the plaintiff's complaint suggests that this decline was part of an ongoing pattern, nor that it was caused by a persistent condition affecting Pitney Bowes' business rather than ordinary, quarter-to-quarter business fluctuations. Accordingly, because neither the duration nor the substance of the alleged declines at issue meet the criteria of a "trend" under Item 303, Pitney Bowes was under no independent duty to disclose the alleged declines in equipment sales and margins during a quarter which had not yet closed, nor their overall impact on company financial performance, prior to or at the time of, the IPO.[10]

B. Omission of Necessary Information in Light of Existing Disclosures

The plaintiff also alleges that the defendants violated the Securities Act by failing to disclose additional information required to make the disclosures in Pitney Bowes' registration statement not misleading. "When a corporation does make a disclosure—whether it be voluntary or required—there is a duty to make it complete and accurate." (Internal quotation marks omitted.) *In re Marsh & McLennan Cos. Securities Litigation*, 501 F. Supp. 2d 452, 469 (S.D.N.Y. 2006). Failure to disclose information that is necessary to make the publicly available information in a registration statement not misleading provides a basis for liability under §§ 11 and 12 (a) (2). See *In re Morgan Stanley Information Fund Securities Litigation*, supra, 592 F.3d 360.

The Second Circuit follows the test set forth in *DeMaria v. Andersen*, 318 F.3d 170 (2d Cir. 2003), to determine whether the omission of information from a registration statement renders

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around the carefully delineated SEC regulations that specify what financial data must be disclosed in offering documents.").

[10] Because the court finds that these purported declines were neither trends nor uncertainties, it does not address whether the remaining elements of Item 303's disclosure requirement were satisfied, i.e., that the "trend . . . or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operations"; Litwin *v. Blackstone Group, L.P.*, supra, 634 F.3d 716.

any information disclosed therein materially misleading. *Stadnick v. Vivint Solar, Inc.*, supra, 861 F.3d 37. Under *DeMaria*, a court analyzing omitted information in light of information already disclosed to investors "engage[s] in the familiar inquiry of whether there is 'a substantial likelihood that the disclosure of the omitted [information] would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'" *DeMaria v. Andersen*, supra, 180 (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976)). The court's inquiry focuses on the entirety of disclosures made within the registration statement, asking "whether defendants' representations, taken together and in context, would have misled a reasonable investor about the nature of the [securities]." (Internal quotation marks omitted.) *DeMaria v. Andersen*, supra, 180.[11]

It is well established that accurate statements of historical performance do not, by themselves, imply that such performance will continue and are not rendered misleading merely because future performance differs. See, e.g., *IBEW Local Union No. 58 Pension Trust Fund & Annuity Fund v. Royal Bank of Scotland Group, PLC*, 783 F.3d 383, 390 (2d Cir. 2015) ("[b]ecause

[11] The plaintiff urges the court to adopt the "extreme departure" test as set forth by the First Circuit in *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1210 (1st Cir 1996), which would require disclosure when "the issuer is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available information . . . ." This test was unequivocally rejected by the Second Circuit in *Stadnick v. Vivint Solar, Inc.*, supra, 861 F.3d 37 ("[w]e conclude that the 'extreme departure' test of *Shaw* is not the law of the Circuit . . . ."), and this court finds no reason to depart from the Second Circuit's reasoning in that case. Moreover, even the extreme departure test does not require an issuer to disclose intra-quarter results merely because they are likely to disappoint in relation to earlier ones. *Shaw v. Digital Equipment Corp.*, supra. Particularly in light of ongoing year-over-year declines in revenue and EBIT in Pitney Bowes' Small and Medium Business Solutions segment, as well as declines in equipment sales more broadly; Docket No. 147, Ex. A, pp. 18, 22-23 (2016 10-K); the alleged third quarter underperformance in these categories hardly seems to constitute the sort of "unexpectedly disastrous" performance that would trigger a duty to disclose under the extreme departure test. See *Shaw v. Digital Equipment Corp.*, supra, 1210.

the statements referred only to past events or conditions and did not imply anything about future circumstances, there was no duty to update"); *DoubleLine Capital LP v. Odebrecht Finance, Ltd.*, 323 F. Supp. 3d 393, 448 (S.D.N.Y. 2018) ("[t]he disclosure of accurate historical data does not become misleading even if less favorable results might be predictable by the company in the future" [internal quotation marks omitted]). "[A]n accurate report of past successes does not contain an implicit representation that the trend is going to continue, and hence does not, in and of itself, obligate the company to update the public as to the state of the quarter in progress." *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1432 (3d Cir. 1997) (Alito, J.). Therefore, for the plaintiff's claims to succeed, they must allege that the statements at issue communicated some information beyond mere historical fact.

The plaintiff first claims that Pitney Bowes' declaration that the Small and Medium Business Solutions segment was "characterized by a high level of recurring revenue" was misleading absent additional disclosure concerning the purported third quarter decline in segment revenue. Specifically, the plaintiff contends that this statement implied that the Small and Medium Business Solutions segment would generate continuously high revenue going forward, and that it became misleading once segment revenue dropped during the third quarter. Notwithstanding these arguments, a plain reading of this statement makes clear that it did not carry with it the promise that the Small and Medium Business Solutions segment would generate consistently high levels of overall revenue in the future. Rather, the statement indicates that, irrespective of the total amount of revenue earned within the segment, much of it was derived from recurring sources. One need only look to the full context of the second allegedly misleading statement cited in the plaintiff's complaint to reinforce the notion that "recurring revenue" is a specific type of revenue, rather than an assertion as to the overall amount of revenue. See Docket No. 147, Ex. B, p. 30 (2017 Second

Quarter 10-Q) ("North America Mailing revenue declined 3% driven by *continued declines in recurring revenue streams*"). Accordingly, the alleged declines in Small and Medium Business Solutions segment revenue during the third quarter of 2017 did not render the statement that the segment was "characterized by a high level of recurring revenue" misleading.

Finally, the plaintiff contends that three statements concerning improvements in equipment sales and margins within the Small and Medium Business Solutions segment during the second quarter of 2017 were misleading without additional disclosure concerning declines in these metrics during the third quarter. However, a review of these statements demonstrates that they are unequivocally in the past tense and do nothing besides offer further explanation as to various aspects of the Small and Medium Business Solutions segment's second quarter performance. While the plaintiff contends that these statements gave the impression of a "transformative turnaround story" promising continued success within the Small and Medium Business Solutions segment, this interpretation relies on a reading of the statements that is completely divorced from the context in which they appear.

In contrast to the plaintiff's allegation that "the Registration Statement . . . stated that [Pitney Bowes] was then experiencing 'growth in equipment sales'"; compl. ¶ 23; the full context of this statement shows that it was actually an explanation of year-over-year variances in segment revenue: "[Small and Medium Business Solutions segment] revenue declined 3% as reported and 2% on a constant currency basis. North America Mailing revenue declined 1% driven by continued declines in recurring revenue streams, *partially offset by growth in equipment sales*." (Emphasis added.) Entry No. 147, Ex. B, p. 29 (2017 Second Quarter 10-Q). The third statement, meanwhile, is found under the heading "Revenue and Cost of Revenues – 2017 compared to 2016"; id., p. 32; and is part of a bulleted list of factors provided to explain why equipment sales revenue had

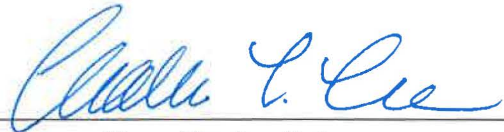
increased in the second quarter of 2017. The fourth statement is found under this same heading and explains why the cost of equipment sales as a percentage of equipment sales had decreased year-over-year. Nothing in any of these statements suggests, explicitly or implicitly, that any of this performance would continue into the future.

Furthermore, Pitney Bowes made clear that at least some of this performance was *unlikely* to continue going forward, explaining that some of the increase in equipment sales was driven by a favorable comparison to the prior year, where equipment sales had been depressed due to a non-recurring event. Thus, because accurate statements of historical fact cannot form the basis of a securities claim and because the statements at issue did not contain any assertions about future performance, they were not misleading in light of Pitney Bowes' failure to disclose information about the purported declines in equipment sales and margins in the Small and Medium Business Solutions segment during the third quarter of 2017. Pitney Bowes was accordingly under no obligation to disclose these alleged declines or prior to, or contemporaneously with, the IPO.[12]

CONCLUSION

For the foregoing reasons, the court grants the defendants' motion to strike the plaintiff's complaint in its entirety.

Decision entered in accordance with the foregoing 10/24/2019. [illegible] All Counsel notified.



Hon. Charles T. Lee

[12] Because of the above conclusions, the court need not reach the defendants' third argument concerning the issue of materiality. Regardless of the materiality of the purported declines in Pitney Bowes' third quarter performance, the defendants had no duty to disclose this information in the offering documents, and "an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts." *In re Time Warner Inc. Securities Litigation*, supra, 9 F.3d 267.