11-2-2022

Troy Welker and Min turner v. MiMedx Group, Inc., et al., Order on Motions to Dismiss

John J. Goger
Superior Court of Fulton County, Metro Atlanta Business Case Division

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA
METRO ATLANTA BUSINESS CASE DIVISION

TROY WELKER and MIN TURNER,	)	
	)	Civil Action
Plaintiffs,	)	File No. 2023CV384144
	)	
v.	)	(f/k/a Fulton State Court
	)	Civil Action File No. 22EV006135)
MIMEDX GROUP, INC., J. TERRY DEWBERRY, CHARLES R. EVANS, PARKER H. PETIT, MICHAEL J. SENKEN, and WILLIAM C. TAYLOR,	)	
Defendants.		

ORDER ON MOTIONS TO DISMISS

This matter comes before the Court on Defendant MiMedx Group, Inc.'s Motion to Dismiss ("MiMedx Motion"), the Motion to Dismiss of Defendants Petit and Taylor ("Petit/Taylor Motion"), Defendant Michael J. Senken's Motion to Dismiss ("Senken Motion"), and Defendants J. Terry Dewberry's and Charles R. Evans' Motion to Dismiss ("Dewberry/Evans Motion"), all filed June 12, 2023. Having considered the record and the arguments of counsel during an October 12, 2023, the Court enters the following order.

1. STATEMENT OF FACTS

In keeping with the standard applicable when considering a motion to dismiss under O.C.G.A. § 9-11-12(b)(6), set forth below, this statement considers the facts in a light most favorable to the Plaintiffs Troy Welker and Min Turner.

1.1 The Parties

Plaintiffs were investors in Defendant MiMedx Group Inc. ("MiMedx" or the "Company"), a biomedical engineering company that experienced exceptional growth starting in 2012. (Compl. ¶¶ 1, 34.) MiMedx acknowledges it is a Florida corporation with a principal place of business in Marietta, Georgia. (Id. ¶ 22; MiMedx Ans. ¶ 22.) By July 2018, Plaintiffs had purchased approximately $4,000,000 in MiMedx call options. (Id. ¶ 4.) As described by the Plaintiffs, a call option is a contract that entitles the buyer to purchase shares in a company at a certain price, called the "strike" price, on or before a certain date, called the "expiration" date. (Id. ¶ 3.) Plaintiffs purchased the majority of their call options in February of 2018 for a strike price of $5.00, and they were set to expire on January 17, 2020. (Id. ¶ 43.)

Defendant Parker H. Petit served as MiMedx's Chairman and Chief Executive Officer from February 2009 until June 30, 2018. (Id. ¶ 26.) Defendant William C. Taylor joined the Company as its President and Chief Operations Officer in September of 2009. (Id. ¶ 28.) He was named as a Director in October of 2011. (Id.) He left those positions on June 30, 2018. (Id.) Defendant Michael J. Senken

served as MiMedx's Chief Financial Officer ("CFO") from 2010 through June 6, 2018 and was terminated from the Company shortly thereafter. (Id. ¶ 27.) Defendant J. Terry Dewberry joined the Company's Board of Directors in September 2009. (Id. ¶ 24.) He began serving as Chairman of the Audit Committee of the Board of Directors (the "Audit Committee") in or around October of 2012. (Id.) Defendant Charles R. Evans served as on the Company's Board of Directors starting in or around September of 2012 and began serving on the Audit Committee the following month. (Id. ¶ 25.) Following Petit's resignation, he became chairman of the Board of Directors.[1] (Id.)

1.2 The Alleged Scheme to Inflate MiMedx's Stock Price

Plaintiffs allege from approximately 2012 through 2018, MiMedx's leadership represented to the investing public that future prospects for MiMedx were bright. (Id. ¶ 5.) The Company's publicly-reported performance indicators supported these representations. (Id.) However, as alleged by Plaintiffs, MiMedx and its leadership were aware, but did not disclose to Plaintiffs or other investors, that the Company's growth had been inflated by questionable sales and improper accounting practices. (Id. ¶ 7.)

Beginning in 2012, Plaintiffs contend that, in order to enhance its stock price, "MiMedx employed a variety of schemes to inflate sales and meet revenue

[1] Collectively, Petit, Taylor, Senken, Dewberry, and Evans are referred to as the "Individual Defendants."

expectations." (Id. ¶ 78.) As part of the scheme, Plaintiff allege MiMedx, Petit, and Taylor, made illicit arrangements with distributors, threatened whistleblowers, and lied to the public. (Id. ¶ 14.) The allegations concerning MiMedx's distributors reflect that MiMedx arranged deals "that allowed MiMedx to prematurely recognize revenue and facilitated a massive channel stuffing scheme." (Id. ¶ 79.) As generally described by Plaintiffs, this particular scheme involved the Company,

> shipping out or otherwise placing significant quantities of merchandise at the end of the quarterly reporting periods in order to record revenue for such shipments, even though they were not true sales and could not be recognized as such under Generally Accepted Accounting Principles ("GAAP").

(Id. ¶ 80.)

More specifically, Plaintiffs allege MiMedx paid bribes to distributors to accept products the distributors had no intention of selling. (Id. ¶¶ 14, 161.) In one instance, Plaintiffs claim Petit orchestrated a loan for one distributor so it "could afford to pay for MiMedx products that [it] did not actually want to purchase." (Id. ¶ 166.) Plaintiffs have also alleged that MiMedx "booked millions of dollars in sales" to another distributor that it was planning to purchase such that the distributor had no intention of paying for the products MiMedx delivered to it. (Id.)

1.3 The Audit Committee Performs Three Internal Investigations

MiMedx, through its Audit Committee, performed three internal investigations into allegations that the Company inflated its sales and financial performance. (Id. ¶¶ 9, 86-144.) The first such investigation occurred between late

2015 and early 2016 in response to concerns the Company's controller raised to Senken, its CFO. (Id. ¶¶ 87-103.) The controller identified certain transactions involving four of the Company's largest distributors that the controller determined would not satisfy GAAP standards for the recognition of revenue at the time of shipment. (Id. ¶ 89.) The controller also identified concerns with the Company's internal controls relating to the ability of sales personnel to extend payment terms and other incentives to customers. (Id. ¶ 90.)

The second internal investigation occurred between late 2016 through early 2017 in response to complaints by sales representatives who claimed they were denied the full commission on a $461,000 sale because MiMedx had previously and improperly recognized revenue for those sales. (Id. ¶¶ 104-122.) Legal counsel for these sales representatives sent a demand letter to MiMedx describing misconduct with the Company's distributors which included channel stuffing and improper revenue recognition practices. (Id. ¶ 111.)

Plaintiffs describe the first two Audit Committee investigations as "shams that found no wrongdoing." (Pls.' Resp. 4.) The third investigation launched February 20, 2018. (Compl. ¶¶ 37, 123.) As described by Plaintiffs, it was much longer and substantive than the two prior investigations. At the time MiMedx commenced the third internal investigation, it announced it was postponing the release of its fourth quarter and fiscal year 2017 financial results pending an internal investigation regarding "certain sales and distributions practices" and "the accounting treatment

of certain distributor contracts." (Id. ¶ 37.) Contemporaneous with this announcement, MiMedx offered reassurance to the investing public that this development "should not have a material impact on revenue guidance for 2018." (Id. ¶ 38.)

While this third investigation was ongoing, several other key events occurred. Senken ceased serving as MiMedx's CFO on June 6, 2018. (Compl. ¶ 27.) The following day, June 7, 2018, the Company announced the need to restate its previously-issued financial statements going back several years and stating that its previously issued guidance related to fourth quarter 2017 and for 2018 should no longer be relied upon. (Id. ¶¶ 49-50.) At the same time the Company reassured the investing public that its underlying business remained strong and it was working to restate its public filings. (Id. ¶ 51.) On July 2, 2018, the Company announced that Petit and Taylor were leaving their leadership posts and new oversight measures were being implemented in connection with MiMedx's "accounting, corporate compliance and internal controls practices." (Id. ¶ 52.) Between the June 7, 2018 and July 2, 2018 press releases, MiMedx's stock price dropped by more than fifty percent. (Id. ¶ 54.) On November 7, 2018, based on its inability to comply with listing requirements, MiMedx's stock was delisted by NASDAQ. (Id. ¶ 71.) In early December of 2018, MiMedx announced that its outside auditor, EY, had resigned because EY determined that "internal controls necessary for the [c]ompany to develop reliable financial statements do not exist." (Id. ¶¶ 8, 73, 76.)

The results of the third internal investigation by the Audit Committee were released on May 23, 2019, and they revealed, "MiMedx's most senior officers had for years engaged in serious wrongdoing and had made material misstatements to the investing public, regulators, and outside auditors." (Id. ¶¶ 10-11.)

1.4 The Fallout from the Audit Committee's Third Internal Investigation

On November 25, 2019, Petit and Taylor were indicted by the United States Attorney for the Southern District of New York. (Id. ¶ 13.)

Plaintiffs summarize what transpired as MiMedx's misconduct became public: "MiMedx's stock price plummeted, erasing more than one billion from the [c]ompany's market capitalization." (Id. ¶ 12.) In January of 2020, when their call options expired, Plaintiffs claim they were "nearly worthless." (Id.)

On November 19, 2020, following a four-week trial, a jury convicted Petit of securities fraud and convicted Taylor of conspiracy to commit the same violations of federal securities law. (Id. ¶ 15.) On August 22, 2022, the United States Court of Appeals for the Second Circuit affirmed both convictions. (Id. ¶ 17.)

2. PROCEDURAL POSTURE

Plaintiffs brought this action on November 4, 2022 in the State Court of Fulton County. The Complaint alleges that Defendants violated federal securities laws, mail and wire fraud laws, and Georgia securities laws. (Id. ¶¶ 204-208.)

Plaintiffs further allege Petit and Taylor were able to carry out a years-long fraudulent scheme to inflate the Company's stock price because they were assisted by the Senken in his capacity as CFO, members of the Board of Directors' Audit Committee, including Dewberry and Evans, together with others inside and outside the Company. (Id. ¶ 18.) Plaintiffs lodged a variety of RICO-based claims, a claim for breach of fiduciary duty, and derivative claims for punitive damages and attorney's fees.[2]

On November 30, 2022, MiMedx removed the action to the United States District Court for the Northern District of Georgia. On May 11, 2023, the federal court granted Plaintiffs' Motion to Remand. Upon remand, the parties agreed that Defendants' responsive pleadings were due June 12, 2023. (Jt. Stip. for Ext. 1.) Defendants filed their answers and these motions on that deadline.

On June 30, 2023, Defendants jointly moved for transfer into the Metro Atlanta Business Case Division. That motion was granted, and the order of transfer was entered August 9, 2023. The instant motions to dismiss were heard on October 12, 2023.

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[2] In Count I of their Complaint, Plaintiffs allege a violation of O.C.G.A. § 16-14-4(b) against all Defendants, in Count II they allege a violation of O.C.G.A. § 16-14-4(a) against the Individual Defendants, and in Count III they allege a violation of O.C.G.A. § 16-14-4(c) against the Individual Defendants. In Count IV Plaintiffs allege a breach of fiduciary duty against the Individual Defendants. In Counts V and VI, respectively, Plaintiffs seek punitive damages and attorney's fees against all Defendants.

3. STANDARD OF REVIEW

As outlined in Doe v. Saint Joseph's Catholic Hosp., 313 Ga. 558, 561 (2022),

> [a] motion to dismiss for failure to state a claim cannot be granted unless
>
> (1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and
>
> (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

In considering a motion to dismiss under O.C.G.A. § 9-11-12(b)(6), a trial court should "construe the pleadings in the light most favorable to the plaintiff and resolve all doubts in the plaintiff's favor." Id.

4. ANALYSIS

4.1 MiMedx Motion

Plaintiffs' assert a RICO claim against MiMedx under O.C.G.A. § 16-14-4(b) and derivative claims for punitive damages and attorney's fees. (Compl. ¶¶ 221-232, 290-296.)

MiMedx offers three primary arguments in support of its motion to dismiss Plaintiffs' RICO claim. It contends Plaintiffs have failed to properly allege: (1) MiMedx's federal and state law violations constitute "racketeering activity," (2) MiMedx was engaged in a RICO "enterprise," and (3) MiMedx's misconduct proximately caused Plaintiffs' damages.

4.1.2 Plaintiffs' Allegations Concerning MiMedx's Racketeering Activity

Plaintiffs allege MiMedx engaged in "racketeering activity" by violating federal securities, mail fraud, and wire fraud (the "Federal Law Violations") and Georgia securities laws (the "State Law Violations"). (Compl. ¶¶ 200-217.) MiMedx argues that, under the Georgia RICO Act, these violations do not constitute racketeering activity. (MiMedx Mot. 4-6.)

Federal Law Violations. First, MiMedx attacks the Plaintiffs' alleged Federal Law Violations. The Georgia RICO Act defines "racketeering activity" to include "any conduct defined as 'racketeering activity'" under 18 U.S.C. Section 1961(1)" of the federal RICO Act. O.C.G.A. § 16-14-3(5)(C). In turn, 18 U.S.C. § 1961(1) defines "racketeering activity" to include "any offense involving . . . fraud in the sale of securities . . ."

MiMedx argues that a different provision of the federal RICO Act statutorily bars RICO claims based on alleged violations of federal securities laws. See 18 U.S.C. § 1964(c)(with limited exception, "[n]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish" a federal RICO claim).[3] As explained in Absolute Activist Value Master Fund Ltd. v. Devine, 233 F. Supp. 3d 1297, 1321 (M.D. Fla. 2017), Congress enacted 18 U.S.C. § 1964(c) to carve out securities laws violations from the federal civil

[3] 18 § U.S.C. 1964(c)'s bar against federal RICO claims based on securities fraud, "does not apply to an action against any person that is criminally convicted in connection with the fraud . . ."

RICO statute as part of the Private Securities Litigation Reform Act of 1995 ("PSLRA").

This PSLRA prohibition established in 18 U.S.C. § 1964(c) has been interpreted expansively by federal courts. See Licht v. Watson, 567 F. Appx. 689, 693 (11th Cir. 2014)(PRSLA prohibition "broadly" applies "regardless of whether the plaintiff explicitly relied upon securities fraud as a predicate act . . .") Dusek v. JPMorgan Chase & Co., 832 F.3d 1243, 1249 (11th Cir. 2016) held that 18 § U.S.C. 1964(c)'s bar against federal RICO claims based on securities fraud cannot be avoided "by pleading other offenses as predicate acts . . . if the claim is based on conduct that would have been actionable as securities fraud." Accordingly, in Dusek, plaintiffs' mail and wire fraud claims -- which were clearly related to fraudulent conduct involving securities investments -- were precluded as predicate RICO acts under the PRSLA bar. Id.

Because the alleged Federal Law Violations do not constitute racketeering activity under the federal RICO Act, MiMedx argues they cannot constitute such activity under Georgia's RICO Act. MiMedx urges the Court not to construe the Georgia RICO Act in a "statutory interpretation vacuum," ignoring this body of PRSLA federal law. (MiMedx Reply 2.) However, it does not appear that O.C.G.A. § 16-14-3(5)(A) requires any interpretation. "[W]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." Arby's Rest. Grp., Inc. v. McRae, 292 Ga. 243, 245 (2012) (Citation omitted). Based

on upon the plain and unambiguous language of O.C.G.A. § 16-14-3(5)(C), its reference to 18 U.S.C. § 1961(1), and the plain and unambiguous language of 18 U.S.C. § 1961(1), the Court finds Plaintiffs' alleged violations of federal securities laws constitute racketeering activity under the Georgia RICO Act. See also O.C.G.A. § 16-14-2(b) (directing that the Georgia RICO Act "shall be liberally construed to effectuate the remedial purposes embodied in its operative provisions").

State Law Violations. MiMedx claims the alleged State Law Violations do not constitute "racketeering activity" as defined by Georgia's RICO Act because they are not "chargeable by indictment." O.C.G.A. § 16-14-3(5)(A). (MiMedx Mot. 5-6.) Specifically, MiMedx claims any prosecution for these predicate offenses would be time-barred by the four-year statute of limitations for felony prosecutions outlined in O.C.G.A. § 17-3-1(c) because the last alleged State Law Violation occurred on April 26, 2018, and this lawsuit was filed on November 4, 2022.[4] (Compl. ¶¶ 204(xii), 205(xii), 206(xii), 207(xii), 208(xii).)

However, Plaintiffs argue Georgia's RICO Act specifically establishes its own time parameters for filing a cause of action. O.C.G.A.§ 16-4-8 states, "**[n]otwithstanding any other provision of law setting forth a statute of limitations** a . . . civil action brought pursuant to Code Section 16-4-6 shall be commenced up to **five years** after the conduct in violation of a provision of this

[4] MiMedx contends the four-year statute of limitations expired on August 26, 2022 which calculation includes the 122-day tolling period associated with the COVID-19 pandemic. (MiMedx Mot. n. 1) See First Merit Credit Servs. v. Fairway Aviation, LLC, 359 Ga. App. 829, 835, n. 8 (2021).

chapter terminates (Emphasis supplied)." Accordingly, Plaintiffs assert their State Law Violations of the Georgia RICO Act are not time-barred. See e.g. Glock, Inc. v. Harper, 340 Ga. App. 65, 66 (2017)("OCGA § 16-14-8 provides a five-year statute of limitations for a civil action brought for RICO violations"); Autonation Fin. Servs. Corp. v. Arain, 264 Ga. App. 755, 758 (2003)(physical precedent only)("The limitations period for claims under the Georgia RICO statute is five years . . . ")

MiMedx argues it is not disputing the statute of limitations established by Georgia's RICO Act. (MiMedx Reply 5.) Rather, it claims it is simply arguing that the individual statute of limitations applicable to fraud is part of the definition of "racketeering activity" which must be "chargeable by indictment." (Id.) The Court finds it difficult to square this interpretation with the broad language of O.C.G.A. § 16-4-8 which commands it should control "notwithstanding any other provision of law setting forth a statute of limitations . . ." See generally State v. Hillsman, 368 Ga. App. 873, 877 (2023)("[W]e must construe statutes to give sensible and intelligent effect to all their provisions and to refrain from any interpretation which renders any part of the statutes meaningless.")[5] Similarly, the Court finds this

[5] The Court finds MiMedx overstates the import of the sole case cited in support of its position, Overlook Gardens Prop., LLC v. Orix, USA, LP, 366 Ga. App. 820, 833, 835 (2023). (MiMedx Mot. 6.) In pertinent part, the case involved claims that borrowers lodged against lenders concerning a number of different commercial loans transactions. The appellate court affirmed the trial court's grant of summary judgment on the borrowers' contract and fraud claims against the lenders. The fraud claims were disposed of on the merits – the lack of the lenders' duty to disclose information allegedly concealed, the lack of the borrowers' reasonable reliance due to a merger clause in applicable contracts, and the absence of an affirmative fraudulent misrepresentation by the lenders. Id. at 828-833. As to the fraud claim of one particular entity, Greystone, the borrowers further argued the trial court incorrectly determined the claim was barred by the statute of limitations. Id. at 833. This ruling was also affirmed by the appellate court. Id. In analyzing the RICO claim, the appellate court reasoned, all of the alleged predicate acts including theft by deception, false swearing, and wire fraud were encompassed by the breach of contract and standalone fraud claims

interpretation runs contrary to the mandate of O.C.G.A. § 16-14-2(b) to liberally construe the Georgia RICO Act in a manner that will give rise to its remedial intent.

Additionally, the Court finds Plaintiffs make a strong argument in support of interpretation that O.C.G.A. § 16-4-8 should uniformly govern whether a civil RICO claim has been timely pursued. Plaintiffs correctly note RICO claims involve numerous types of predicate acts -- some serious felonies and other misdemeanors which can have widely varying statutes of limitation. Compare O.C.G.A. § 16-14-3(5)(a)(i) –(xliii). Accordingly, Plaintiffs contend a uniform statute of limitation for civil RICO claims is desirable purposes of consistency. (Pls.' Resp. 11-13.)

In light of all the foregoing, the Court finds O.C.G.A. § 16-14-3(5)(A)'s requirement that "racketing activity" must be "chargeable by indictment" only indicates that the activity constitutes a crime and does not import any other statute of limitations that might apply if that activity were being criminally prosecuted. Accordingly, the Court rejects the assertion that Plaintiffs' alleged State Law Violations do not constitute "racketeering activity" under the Georgia RICO Act.

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for which summary judgment had been granted, and, thus, the RICO claim likewise failed. Id. at 834-835 citing J. Kinson Cook of Georgia, Inc. v. Heery/Mitchell, 284 Ga. App. 552, 560 (2007) ("Under Georgia law, when the underlying actions upon which a RICO claim is premised fail, the RICO claim likewise fails as a matter of law.")

MiMedx cites Overlook as "holding that a Georgia RICO Act claim must necessarily fail if it is based on the same allegations underlying a fraud claim that is time-barred by the four-year statute of limitations (Punctuation omitted)." (MiMedx Mot. 6.) MiMedx's distillation of Overlook ignores that the statute of limitations was only one of the reasons why one of the borrowers' standalone fraud claims failed. Because of the alternate rulings offered for the failure of these claims, the corresponding summary judgment granted on the RICO count cannot be directly tied to the ruling on the statute of limitations. Moreover, the Court of Appeals in Overlook was not interpreting or applying O.C.G.A. § 16-14-8 nor was it offering any analysis of the "chargeable by indictment" argument MiMedx is raising here. For all these reasons, the Court finds Overlook does not speak to the precise issue the Court is being asked to address.

4.1.2 Plaintiffs' Allegations that MiMedx Participated in an "Enterprise"

The Complaint alleges MiMedx violated O.C.G.A. § 16-14-4(b) of the Georgia RICO Act which makes it unlawful for any person "associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity." (Compl. ¶¶ 221-232.)

MiMedx argues Plaintiffs have failed to properly plead that it engaged in a RICO enterprise because (1) a corporation cannot engage in a RICO "enterprise" solely with its employees and directors and (2) MiMedx did not share a common purpose with its distributors which is a necessary to establish an enterprise. (MiMedx Mot. 11.)

As to the first prong of this argument, Plaintiffs acknowledge MiMedx is correct in asserting a corporation cannot engage in a RICO enterprise with its own employees and directors. (Pls.' Resp. 22-25.) As the Eleventh Circuit outlined in Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1357 (11th Cir. 2016) which interpreted 18 U.S.C. § 1962(2), the Federal RICO Act's counterpart to O.C.G.A. § 16-14-4(b),[6]

> plaintiffs may not plead the existence of a RICO enterprise between a corporate defendant and its agents or employees acting within the scope of their roles for the corporation because a corporation necessarily acts through its agents and employees. For [RICO] purposes, there is no distinction between the corporate person and the alleged enterprise . . . . a corporation cannot act except through its officers, agents, and employees. Thus, a corporate defendant acting through its officers,

[6] Kimbrough v. State, 300 Ga. 878 n. 13 (2017) ("The Georgia RICO Act is modeled after the federal RICO statute, and in light of their similarities, we properly may look to decisions of the federal courts construing and applying the federal RICO statute when we consider the meaning and application of the Georgia RICO Act. ")

> agents, and employees is simply a corporation. Labeling it as an enterprise as well would only amount to referring to the corporate "person" by a different name. (Citations and punctuation omitted).[7]

However, Plaintiff have alleged certain third party distributors participated in the enterprise together with the Company's officers, agents, and employees, thus leading to the second prong of MiMedx's enterprise argument, the lack of a common purpose. United States v. Turkette, 452 U.S. 576, 583 (1981)(a RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct.")

MiMedx argues Ray illuminates why the Company and the distributors alleged to have participated in the enterprise shared no common purpose. (MiMedx Mot. 10-11.) In Ray, plaintiffs alleged an airline and its software vendors engaged in deceptive practices and formed a RICO enterprise to disguise the nature of a "usage fee" that consumers paid to the airline as some sort of tax or government-sanctioned fee. Id. at 1345. Plaintiffs alleged the software vendors designed the airline's ticketing and reservation system that was used to collect these disguised fees. Id. at 1352-1353. The complaint did not reflect these vendors "were in any

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[7] In support of the Ray decision, the Eleventh Circuit offered some policy-based reasoning:

> while RICO was intended to be interpreted broadly, permitting plaintiffs to plead an enterprise consisting of a defendant corporation and its officers, agents, and employees acting within the scope of their employment would broaden RICO beyond any reasonable constraints. Because every corporation acts through its own employees as a matter of course, allowing such pleadings to go forward would turn every claim of corporate fraud into a RICO violation. No matter how broadly RICO is interpreted, there is no reason to think that Congress intended the law to provide treble damages in every conceivable case of corporate fraud.

Id. at 1357.

way involved in the actual decisions of how to portray the [usage fee], knew the true nature of the fee, or worked intentionally to misrepresent the fee." Id. at 1353. The Eleventh Circuit determined the allegations of the complaint indicated the software vendors did not share a common purpose with the airline sufficient to create RICO liability.

The present situation differs from Ray in two key respects. First, unlike the software vendors in Ray, Plaintiffs have alleged the distributors were intentional participants in MiMedx's wrongdoing, by, among other things, accepting bribes and receiving inventory they did not intend to sell. (Compl. ¶¶ 14, 79, 82, 161, 166, 222.) These are not like the defendants in Ray that were engaged in "wholly innocent activity undertaken as a course of regular business." Ray at 1353. Second, Ray was decided under federal law which applies a different and stricter standard of review in evaluating whether a plaintiff has stated a claim upon which relief may be granted. As described in Ray, under federal law, "[t]o survive a Rule 12(b)(6) motion to dismiss, a complaint must plead enough facts to state a claim to relief ***that is plausible on its face***." Id. at 1347-1348 (Emphasis added). By contrast, as outlined above, the standard of review under Georgia law is more lenient. A motion to dismiss for failure to state a claim may only be granted when, a plaintiff's allegations "disclose with certainty" that the plaintiff is not entitled to relief "under any state of provable facts . . ." Mayorga v. Benton, 364 Ga. App. 665, 666 (2022). Under Georgia's "minimal requirements of notice pleading, broad and conclusory

allegations are not fatal to a plaintiff's claim at the motion-to-dismiss stage." Id. Here, the pleadings, allege MiMedx bribed and made otherwise inappropriate arrangements with certain distributors that allowed the Company to recognize revenue in violation of GAAP. (See e.g. Compl. ¶¶ 14, 79-82, 111, 121, 161, 166, 222.)

In light of the foregoing, the Court finds Plaintiffs have adequately pled MiMedx engaged in a RICO enterprise.

4.1.3 Plaintiffs' Allegations that MiMedx's Misconduct Proximately Caused their Damages

MiMedx argues Plaintiffs' RICO claims fail as Plaintiffs will be able to demonstrate, as a matter of law that MiMedx's alleged racketeering activity proximately caused their damages. (MiMedx Mot. 12-15.) As established in Najarian Cap., LLC v. Clark, 357 Ga. App. 685, 694 (2020),

> [t]o satisfy the proximate cause element of RICO, a plaintiff must show that his injury flowed directly from at least one of the predicate acts. This burden is not met where a plaintiff shows merely that his injury was an eventual consequence of the predicate act or that he would not have been injured but for the predicate act.

See also Wylie v. Denton, 323 Ga. App. 161, 166 (2013)(a RICO plaintiff "must show that her injury was the direct result of a predicate act targeted towards her, such that she was the intended victim")(physical precedent only).

MiMedx contends Plaintiffs' injuries were the indirect result of MiMedx's alleged RICO violations. It argues, "the only persons who could potentially claim

that they were directly harmed by MiMedx's alleged Georgia RICO Act violations are persons who purchased shares of MiMedx's common stock at an artificially inflated price and owned those shares when the stock price 'plummeted.'" (MiMedx Mot. 13.) MiMedx argues that it did not sell call options to Plaintiffs, and Plaintiffs alone selected the "strike price" and "expiration date" for their call options. (MiMedx 2, 13-14.) In sum, MiMedx claims Plaintiffs made decisions that rendered their call options "worthless," and any misconduct by MiMedx was too far removed to be the proximate cause of their damages.

All of the Georgia authority cited by MiMedx about indirect causation is factually dissimilar, with none arising in an investment context. (MiMedx Mot. 12-13.) See e.g. Najarian (RICO claim stemmed from an alleged wrongful foreclosure); Wylie (bank teller plaintiffs fired for unwittingly participating in embezzlement scheme they allege their former employer was attempting to conceal failed to demonstrate the racketeering activity directly caused their loss of employment); Nicholson v. Windham, 257 Ga. App. 429 (2002)(temporary law firm staffer fired for refusing to participate in the firm's alleged racketeering scheme was not directly injured by the racketeering activity); Maddox v. S. Eng'g Co., 231 Ga. App. 802 (1998)(alleged misrepresentation made to government authority to obtain permit for dam and reservoir did not directly cause upstream property owner's claimed injury of diminished property value related to the permit's approval.)

While MiMedx claims any of the alleged misrepresentations were only targeted directly towards the purchasers of its common stock, Plaintiffs argue MiMedx's misrepresentations were directed to the investing public, including Plaintiffs, who relied upon these misrepresentations in making investment decisions. (Compl. ¶ 42.) They expressly allege that, "the value of their call options . . . was wholly tied to the price of MiMedx common stock." (Id. ¶ 288.) Plaintiffs have cited law from other jurisdictions which finds investors in call options are directly affected by misinformation disseminated by a company attempting to induce investors to purchase their stock. See e.g. Tolan v. Computervision Corp., 696 F. Supp. 771, 775 (D. Mass. 1988)(". . . call option trading on an underlying security is directly affected by the prospecti, representations and omissions of the issuer of the underlying security."); Margolis v. Caterpillar, Inc., 815 F.Supp. 1150, 1156 (C.D. Ill. 1991)(when intentional misrepresentations are alleged, there is "no basis" for treating option investors differently than shareholders). While these cases interpret whether a call option trader has standing under Section 10(b) of the Securities Exchange Act of 1934, the Court finds them persuasive on this causation issue.

In light of the foregoing, the Court finds Plaintiffs have stated a claim against MiMedx for RICO upon which relief can be granted. O.C.G.A. § 9-11-12(b)(6).

4.2 The Individual Defendants' Motions

4.2.1 The Individual Defendants' Motions Regarding Plaintiffs' RICO Claims

Plaintiffs have alleged the Individual Defendants committed RICO violations under O.C.G.A. § 16-14-4(a), (b), and (c). (Compl. ¶¶ 221-266.) The Individual Defendants have either expressly adopted or similarly stated many of MiMedx's arguments for dismissal of these RICO claims.[8] For the same reasons outlined above, the Court rejects these arguments.

Additionally, Dewberry and Evans, the two Audit Committee members, seek dismissal of the RICO claims asserted against them, arguing, "Plaintiffs fail to allege any well-pled predicate acts by Dewberry or Evans specifically, or any conspiracy involving them – much less with the particularity required under Georgia law." (Dewberry/Evans Mot. 16.) O.C.G.A. § 9-11-9(b) requires that when pleadings allege fraud, "the circumstance constituting fraud . . . shall be stated with particularity." This pleading requirement has been applied in the civil RICO context. See Z-Space, Inc. v. Dantanna's CNN Center, LLC, 349 Ga. App. 248, 254 (2019).

Dewberry and Evans suggest the lack of particularity in Plaintiffs' fraud allegations merits dismissal. (Id.) Dewberry and Evans fail to acknowledge that

[8] For the same reasons as MiMedx, Senken argues that the Federal Law Violations and State Law Violation do not constitute "racketeering activity" under Georgia's RICO Act and Plaintiffs have failed to adequately plead causation. (Senken Mot. 6-8.) Petit/Taylor expressly adopt the RICO arguments of MiMedx and Senken in their brief dismissal motion. (Petit/Taylor Mot. 2.) Dewberry and Evans offer the same arguments as MiMedx, that Plaintiffs have failed to properly allege: their Federal Law Violations and State Law Violations constitute "racketeering activity," they were engaged in a RICO "enterprise," and their misconduct proximately caused Plaintiffs' damages. (Dewberry/Evans Mot. 11-15.)

body of law indicating the remedy for a failure to allege fraud with particularity is not dismissal. Bazemore v. U.S. Bank Nat.'l Ass'n, 363 Ga. App. 723, 730 (2022). As outlined in Z-Space, Inc.,

> [a]lthough fraud must be pled with particularity under O.C.G.A. § 9-11-9(b), a complaint alleging fraud should not be dismissed for failure to state a claim unless it appears beyond a doubt that the pleader can prove no set of facts in support of his claim which would entitle him to relief. Rather than move to dismiss, a defendant seeking greater particularity may either move for a more definite statement or wait for the outcome of discovery.

Id. at 636.

Dewberry and Evans have been named as Defendants based on their role in the first two Audit Committee investigations, which Dewberry led and which Plaintiffs have labeled as "shams." (Pls.' Resp. 4.) Specifically, Plaintiffs have alleged that Audit Committee performed only a cursory investigation before rejecting serious concerns raised by MiMedx's controller about the way the Company was recognizing revenue and the effectiveness of its internal controls. (Compl. ¶¶ 96-101). Plaintiffs allege approximately one year later, the Audit Committee again performed a cursory investigation into the allegations of two whistleblowers who were also questioning the Company's revenue recognition practices and internal controls. (Id. ¶¶ 119-120.) These allegations of token or superficial investigations that followed in close succession must be considered against the backdrop of Plaintiffs' other allegations that an outside auditor concluded

the "internal controls necessary for [MiMedx] to develop reliable financial statements" simply did not exist. (Id. ¶¶ 8, 73, 76.)[9]

Plaintiffs also allege that during the time period between the first and third Audit Committee investigations, Dewberry and Evans had either made or facilitated knowing and false representations or omissions about MiMedx in numerous public financial statements which Plaintiffs have specifically identified. (Id. ¶¶ 144, 172, 207-208.)

The Court finds Plaintiffs could offer evidence within the framework of their complaint entitling them to relief. Z-Space, Inc. at 636. Accordingly, dismissal of the claims against Dewberry and Evans is not appropriate. Id. Moreover, the Court finds Plaintiffs have sufficiently alleged, "the circumstance . . . constituting fraud" so as to comply with O.C.G.A. § 9-11-9(b) by informing Dewberry and Evans of the nature of the conduct they are called upon to defend.

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[9] Dewberry and Evans note certain exhibits which Plaintiffs have attached to their Complaint reflect the Audit Committee was duped by MiMedx's officers. (Dewberry/Evans Mot. 17-18.) For example, the results of the Audit Committee's third investigation, indicate Petit, Taylor, and Senken misled or failed to disclosure material facts to the Audit Committee. (Compl. Ex. U at 3-4, 6.) Similarly, an SEC Complaint against those three officers specifically alleged that they, "repeatedly lied to and withheld critical information from the Audit Committee . . ." (Id. Ex. N ¶ 8.) Indeed, Plaintiffs themselves expressly alleged Petit, Taylor, and Senken lied to and concealed information from the Audit Committee. (Id. ¶ 179.) The fact that the Company's officers may not have been forthright with the Audit Committee is not necessarily inconsistent with the notion that the Audit Committee or some of its members knew of of the duplicity. Considering the pleadings in the light most favorable to Plaintiffs, during its first two investigations, the Audit Committee turned a blind eye to the serious concerns it was charged with investigating which is sufficient to raise the inference of complicity in the alleged fraudulent conduct.

4.2.2 Plaintiffs' Breach of Fiduciary Duty Claims

All of the Individual Defendants seek to dismiss Plaintiffs' breach of fiduciary duty claims, arguing no such duty existed. (Senken Mot. 9; Petit/Taylor Mot. 3; Dewberry/Evans Mot. 19-21.) The Court agrees.

Because MiMedx is a Florida corporation, the Individual Defendants contend Florida's substantive law applies to determine whether a fiduciary duty exists. See Mukamal v. Bakes, 378 Fed. Appx. 890, 896-897 (11th Cir. 2020)(Generally, the internal affairs of corporation are governed by the laws of the state of incorporation.) (Senken Mot. n. 2; Dewberry/Evans Mot. n. 4.) Plaintiffs cite both Florida and Georgia law without discussing which state's law they contend is applicable. (Pls.' Resp. 40.)

No party has supplied any Georgia or Florida authority either establishing or discussing whether a corporate insider owes a fiduciary duty to call option investors. However, the Individual Defendants have provided some persuasive authority that no such duty exists. One such case, BHC Interim Funding, L.P. v. Finantra Cap., 283 F.Supp.2d 968, 989 (S.D.N.Y. 2003), involved a plaintiff who claimed a corporate officer breached a fiduciary duty. The plaintiff held warrants to purchase stock in the corporate defendants which the court expressly likened to being an option holder. Id. at 989. The court's opinion then surveys the law regarding the fiduciary duty owed to option holders in New York, California and Delaware, finding none of these jurisdictions recognize such a duty:

> [u]nder either California or New York law, an option holder, unlike a shareholder, is not owed a fiduciary duty by a corporation's officers. See, e.g., Bell v. Leakas, 1993 WL 77320, at *6 (S.D.N.Y. March 13, 1993) (McKenna, J.) ("corporate officers owe no fiduciary duty to stock optionees"); O'Connor & Associates v. Dean Witter Reynolds, Inc., 529 F.Supp. 1179, 1185 (S.D.N.Y.1981) (Lasker, J.) (option holder, unlike shareholder, is owed no fiduciary duties by corporate insiders); Pittelman v. Pearce, 6 Cal.App.4th 1436, 8 Cal.Rptr.2d 359, 362–63 (1992) (debt holder who holds stock options is not owed any fiduciary duty under California law), cited in Traverso v. Clear Channel Comm., Inc., 52 Fed.Appx. 878, 880 (9th Cir.2002). Since [plaintiff] is a Delaware partnership, I would also mention that Delaware law is the same. See [Benjamin v. Kim, 1999 WL 249706 (S.D.N.Y April 28, 1999) at *13 (McKenna, J.)] (convertible debenture holder is owed no fiduciary duty under Delaware law); Powers v. British Vita, P.L.C., 969 F.Supp. 4, 5–6 (S.D.N.Y.1997) (Pollack, J.) (no fiduciary duties are owed to option holders under Delaware law).

Id. As reflected in BHC Interim Funding, Delaware law does not impose a fiduciary duty flowing from corporate insiders to option holders. This was recently reiterated in Bocock v. INNOVATE Corp., No. 2021-0224-PAF, 2022 WL 15800273, at * 27, n. 171 (Del Ch. Oct. 28, 2022) which stated, "[t]he Option Holder Plaintiffs cannot assert fiduciary duty claims because they are not owed fiduciary duties.")[10]

Plaintiffs attempt to factually distinguish the authority the Individual Defendants have offered from other jurisdictions. (Pls.' Resp. 40-41.) Notably, Plaintiffs offer no persuasive authority where another jurisdiction ***has*** determined that a corporate insider owed a fiduciary duty to an option holder.

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[10] Florida courts looks to Delaware corporate law as establishing persuasive authority. See e.g. International Ins. Co. v. Johns, 874 F2d 1447, n.22 (2001)(11th Cir.)(Florida courts rely "upon Delaware corporate law to establish their own corporate doctrines.")

Even if the law does not impose a fiduciary duty flowing from corporate insiders to call options holders, Plaintiffs argue one may have arisen based on these particular facts. See generally Wright v. Apartment Inv. & Mgmt. Co., 315 Ga. App. 587, 592 (2012)(Georgia law recognizes fiduciary duty "may be created by law, contract, or the facts of a particular case."); Susan Fixel, Inc. v. Rosenthal & Rosenthal, Inc., 842 So. 2d 204, 208 (Fla. Dist. Ct. App. 2003)(Florida law recognizes fiduciary duties may be "premised upon the specific factual situation surrounding the transaction and the relationship of the parties.") (Pls.' Resp. 40.)

Plaintiffs contend they sufficiently pled facts that would give rise to a such a fiduciary duty, alleging they "were early and enthusiastic investors" in MiMedx who relied upon public statements and representations of it and its leadership. (Pls.' Resp. 40; Compl. ¶ 1.) The existence of a fact-based fiduciary duty, Plaintiffs assert, is not capable of adjudication on a motion to dismiss. (Id.)

Considering the facts Plaintiffs have alleged, the Court disagrees. Absent allegations reflecting a more direct connection between a corporation's officers and directors and plaintiffs who invest in these types of derivative securities, the Court finds allowing a jury to determine whether a fiduciary duty exists would impermissibly expand the fiduciary liability of corporate officers and directors.[11]

[11] Having found no fiduciary duty exists, the Court will not address the other issues the Individual Defendants have raised, including whether this claim is barred by the statute of limitations or whether it has been stated with the requisite level of particularity. (Senken Mot. 10-14; Petit/Taylor Mot. 3; Dewberry/Evans Mot. 19-22.)

4.3 Plaintiffs' Derivative Claims

Because substantive claims remain pending against each of the Defendants, the Court finds Plaintiff's derivative claims for punitive damages and attorney's fees remain viable as to all Defendants. Sparra v. Deutsche Bank Nat. Trust Co., 336 Ga. App. 418, 422-423 (2016).

5. CONCLUSION

In light of all the foregoing, the Court **ORDERS**:

a. Defendant MiMedx Group, Inc.'s Motion to Dismiss is **DENIED** in full;

b. the Motions to Dismiss filed by Defendants Michael J. Senken, Parker H. Petit, William C. Taylor, J. Terry Dewberry, and Charles R. Evans are **GRANTED** only as to Count IV-Breach of Fiduciary Duty and **DENIED** as to all of Plaintiffs' other claims.

So ordered this 2 day of ~~October~~ November, 2022.

JOHN J. GOGER, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit
Metro Atlanta Business Case Division

Filed and Served upon registered contacts via Odyssey eFileGA

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