IN THE SUPERIOR COURT FOR THE STATE OF DELAWARE

MATTHEW B. MOONEY,	:	
	:	C.A. No. K20C-04-025 WLW
Plaintiff,	:	
	:	
v.	:	
	:	
THE BOEING COMPANY,	:	
	:	
Defendant.	:	

Submitted: March 8, 2021
Decided: May 4, 2021

OPINION MEMORANDUM AND ORDER

Defendant's Motion to Dismiss
Granted

Matthew B. Mooney, Esquire, Pro Se Plaintiff

Blake Rohrbacher, Esquire, Kelly E. Farnan, Esquire, Matthew D. Perri, Esquire, and Ryan D. Konstanzer, Esquire, of Richards Layton & Finger, P.A., Wilmington, Delaware, Counsel for Defendant.

WITHAM, R.J.

Before the Court is Defendant The Boeing Company's (hereafter "Boeing") Motion to Dismiss pursuant to Superior Court Civil Rule 12(b)(6) for failure to state a claim for which relief can be granted. The complaint brought against Boeing by Plaintiff Matthew B. Mooney, Esquire (hereafter "Mooney") alleges fraudulent misrepresentation, fraudulent concealment, and fraud by omission on the part of Boeing. Boeing has moved to dismiss Mooney's complaint on the grounds that Mooney's claim of fraud fails to meet the Superior Court Civil Rule 9(b) standard of sufficient particularity and should be dismissed for failure to state a claim for which relief may be granted under Superior Court Civil Rule 12(b)(6). After review of all the documents filed by the parties and hearing oral arguments from the parties, this Court **GRANTS** Boeing's Motion to Dismiss for the following reasons:

Facts and Procedural Background

Mooney filed his claim with this Court on April 23, 2020 and seeks relief for alleged fraud carried out by senior executives and employees of various levels of Boeing. On March 11, 2019, Mooney began conducting complex trading schemes involving Boeing stock. These types of trades continued until March 16, 2020. These trades involved the buying and selling of "puts" and "strike puts" involving Boeing stock.[1] These purchases began after two crashes of a new commercial air

1 Invstopedia defines a "put option" as "a contract giving the owner the right, but not the obligation, to sell–or sell short–a specified amount of an underlying security at a pre-determined price within a specified time frame. This pre-determined price that buyer of the put option can sell at is called the strike price." https://www.investopedia.com/terms/p/putoption.asp. NOTE:

platform that Boeing was in the process of delivering to market commonly known as the 737 MAX.

On October 29, 2018, Lion Air Flight 610 crashed in the waters off Malaysia. On November 13, 2018, then Chief Executive Officer Dennis Muilenburg stated during an interview provided to Fox Business News that the 737 MAX was "safe."[2] Between the date of the Flight 610 crash and March 11, 2019, when Mooney made his first trade, Mooney "began researching and considering an investment in Boeing predicated on Boeing's repeated statements that its 737 MAX was safe and that proper certification procedures were followed."[3] During this time frame, Mooney points to two dates where statements regarding the 737 MAX's safety were made by Boeing, November 13, 2018, and November 28, 2018.

On March 10, 2019, the second 737 MAX crash occurred in Ethiopia, and "Boeing's stock plummeted."[4] Mooney's trading in Boeing stock began on March 11, 2019 and commenced with regular frequency from that date until March 16, 2020. Mooney's strategy was a "continuous" one of "bullish exposure."[5] During

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Given the nature of Mooney's trading and timing, the Court must view his trading as representative of a sophisticated investor, with an investment strategy.

2 Plaintiff's Compl. at ¶ 271.

3 Plaintiff's Resp. at 3.

4 *Id.*

5 *Id.*; See also Plaintiff's Compl. at 70 to 84. The transactions show a continuous flow of activity by Mooney with no two transactions occurring more than ten (10) days apart except

this time, Mooney points to statements made by various Boeing personnel on March 27, 2019, April 24, 2019, April 29, 2019, June 3, 2019, and October 29, 2019, as being factors in his continued trading of Boeing stock. On March 6, 2020, the U.S. House of Representatives, Committee on Transportation and Infrastructure published a report allegedly detailing how Boeing misrepresented the true nature of the safety of its 737 MAX.[6] On March 16, 2020, Mooney "fully divested" his Boeing stock.[7]

Mooney filed his complaint against Boeing on April 23, 2020. Boeing first requested that this case be transferred to the Complex Commercial Litigation Division within the Superior Court, chambered in New Castle County, Delaware. On June 30, 2020, Boeing's request was denied. On July 2, 2020, Boeing then filed a Motion to Stay and for a Protective Order, which was heard by this Court on July 23, 2020, and granted on September 1, 2020. Boeing filed a Motion to Dismiss on July 31, 2020. An oral argument on Boeing's Motion to Dismiss via ZOOM was conducted on December 15, 2020. Shortly after, on January 5, 2021, Mooney filed an amended complaint. Boeing's response to this amended

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for the transaction occurring on September 26, 2019 and the one occurring on October 21, 2019.

6 Plaintiff's Compl. at 5.

7 *Id.*

complaint was to simply direct the Court to its arguments in its July 31, 2020 Motion to Dismiss.[8]

Boeing's Argument

Boeing argues that Mooney fails to satisfy all the elements of common law fraud by not providing adequate particularity in his claim of fraud. First, Boeing argues that Mooney's claim of false statements and misrepresentations fails because he fails to allege, beyond making conclusive claims of lies and misrepresentations, that the statements Mooney points to in his complaint are false. Second, Boeing asserts that Mooney's claims about the statements being misrepresentations are nothing more than forward looking statements and opinions made by senior Boeing personnel.

Second, Boeing claims that Mooney does not allege those making the statements in Mooney's complaint knew those statements were false or recklessly indifferent to the truth. Additionally, Boeing says that Mooney does not make a pleading that could lead to an inference of those statements being knowingly false. Boeing's contention is that Mooney is attempting to take the false statements of some employees and impute knowledge of those falsehoods onto other employees.

Third, Mooney did not plea direct interaction between himself and those making the allegedly false statements. Many of the statements to which Mooney

8 During the interim of Boeing's Motion to Dismiss Plaintiff's Amended Complaint and this Opinion, the Court also decided Mooney's Motion to Dissolve Stay Against Discovery. That Order was entered on March 25, 2021 and DENIED Mooney's request.

asserts were the impetus behind his investments were statements made during television interviews, during shareholder meetings, and general audiences. Furthermore, many of the statements Mooney points to as being relied on were made years in advance of his initial investment purchase.

Finally, and closely related to Boeing's third point, is that Mooney did not sufficiently plea reliance on the statements made by Boeing personnel when deciding to make his investments. Boeing's argument is that Mooney only allegedly relied on those statements in a general sense because he failed to link trades to (1) any statement of fact or (2) his reliance on any statements. Lastly, Boeing stipulates that the only statement to which Mooney can point where any sense of reliance could be found was the November 13, 2018 interview given to Fox Business News, which was made approximately four months prior to Mooney's first trade.

Boeing also argues that Mooney's claims of fraudulent concealment and fraud by omission fail for the same reasons stated above.

Mooney's Response

Mooney's response to Boeing's argument points to the numerous statements that were made by Boeing executives which he specifically detailed in his complaint. He then argues that these statements were made for the purpose of inducing individuals, in a general sense, to invest in Boeing or to maintain investments in Boeing. He then states that he acted in reliance on those statements.

First, Mooney specifies when each statement was made, where those statements were made, and the contents of those statements. He also argues that the fact that they were statements made to general audiences does not negate his claim that those statements induced him to invest in Boeing.

Second, Mooney's argument is that his continuous investment activity was the result of continuous fraudulent statements made by Boeing personnel. These statements were made, as has been indicated above, during television interviews, shareholder meetings, press conferences, and quarterly investment calls. Mooney argues that "Boeing lied directly to investors, including Mooney."[9]

Finally, Mooney states that he "assumed continuous volatility exposure that was completely reliant upon Boeing's statements."[10] Mooney's investment strategy was entirely reliant on Boeing's truthfulness about the safety of its 737 MAX. He further argues that reliance is a question of fact that should not be taken out of the hands of a jury by a 12(b)(6) motion.

Standard of Review

When considering motions to dismiss under Superior Court Civil Rule 12(b)(6), this Court will accept all well pleaded factual allegations as true, accept even vague allegations as well-pleaded if they put the opposing party on notice, draw only reasonable inferences in favor of the non-moving party, and only

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9 Plaintiff's Response at 11.

10 *Id.* at 7.

dismiss where there is not a reasonable set of circumstances where the plaintiff could be entitled to recover.[11]

In cases of fraud, Superior Court Civil Rule 9(b) increases the pleading standard to require particularity; "however, 'malice, intent, knowledge, and other condition of mind of a person may be averred generally.'"[12] Although "knowledge" may be asserted in a general sense, when pleading fraud, the element of knowledge must infer that what the defendant knew was knowable and that the defendant was in a position to know it.[13] Finally, the particularity pertains to "time, place, and contents of the false representations; the facts misrepresented; the identity of the person making the misrepresentation; and what the person gained from making the misrepresentation."[14]

Discussion

There are five elements to establish fraudulent misrepresentation: (1) a false representation, usually one of fact, made by defendant; (2) the defendant's knowledge or belief that the representation was false, or was made with reckless indifference to the truth; (3) an intent to induce the plaintiff to act or

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11 *Mooney v. Pioneer Natural Resources Company*, 2017 WL 4857133 at *4, (Del. Super. Oct. 24, 2017).

12 *Id.* Also, see *Eastern Com. Realty Corp. v. Fasco*, 654 A.2d 833 (del. 1995) which specifies that fraud must be plead with sufficient particularity.

13 *Id.*

14 *Id.*

refrain from acting; (4) the plaintiff's action or inaction taken in justifiable reliance upon the misrepresentation; and (5) damage to the plaintiff as a result of such reliance.[15]

For a plaintiff to show with particularity that the defendant "knew something, there must, at least be sufficient well-pled facts from which it can reasonably be inferred that this 'something' was knowable, and that the defendant was in a position to know it."[16] Mooney presents many facts in his amended complaint that indicate that Boeing employees at multiple levels knew something was amiss pertaining to the 737 MAX. Findings by the U.S. House of Representatives, Committee on Transportation & Infrastructure noted several failures on the part of Boeing to be completely transparent about what Boeing knew of the 737 MAX. However, the allegation of fraud requires that Boeing personally targeted Mooney with inducement to invest in the company despite its knowledge of the problems with the 737 MAX and that Mooney relied on Boeing's misleading statements when deciding to invest during the continued investment scheme.

Mooney's final transaction of Boeing stock was on March 16, 2020, and yet, Mooney points to a statement made about a deadly assumption Boeing allegedly knew to be false on November 5, 2019. Either Mooney knew of that statement and

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15 *LCT Capital, LLC v. NGL Energy Partners LP*, 2021 WL 282645 at *6 (Del. 2021).

16 *Mooney v. Pioneer Natural Resources Co.*, 2017 WL 4857133 at *4 (Del. Super. Oct. 24, 2017).

continued to trade Boeing stock for another four months, or Mooney did not know of that statement while Mooney continued his trading strategy based on "Boeing's statements about its 737 MAX."[17] If Mooney knew of the statement and continued trading for four more months, then he cannot credibly make the argument that he suffered from fraudulent misrepresentations by Boeing. On the other hand, if Mooney did not know of the statement, continued to trade in Boeing stock, and then learned of the statement only after he ceased his trading scheme, then Mooney did not rely on the statement in calculating whether to continue trading Boeing stock.

In essence, the timing of the statements and the actions of Mooney are key in determining whether he showed reliance on those statements when trading Boeing stock. "Conclusory allegations that plaintiffs were in fact deceived by the acts, omissions, and conduct described in this complaint and relied thereon to their detriment is glaringly insufficient to meet the particularity requirement of Rule 9(b)."[18] Mooney states that pleading the exact statements demonstrates that he relied on them in pursuing his investment strategy.[19] There is no dispute that the statements pled by Mooney were made and there is no dispute that Mooney made investments in Boeing; however, the bounds of reality would have to be stretched

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17 Plaintiff's Response at 7.

18 *Mooney*, 2017 WL 4857133 at *8; quoting *Anglo American Sec. Fund, LP v. S.R. Global Int'l Fund, L.P.*, 829 A.2d 143 at 159 (Del. Ch. 2003).

19 Pl.'s Response at 6 to 7.

to a "bridge too far" limits to reach the conclusion that Mooney desires, that he justifiably relied on those statements when deciding to begin his investment scheme.

The frequency with which Mooney conducted his trade regimen does not comport with the sparsity of the statements included in his complaint which he asserts were part of his determination to continue investing. The statements that he specifies in his complaint and in his response were made on March 27, April 24 and 29, June 3, and October 29 all in 2019. His trading activity was a continuous string of trades between March 11, 2019, and March 16, 2020. As detailed in Mooney's complaint, the one period where his trading frequency stopped was between September 26, 2019, and October 21, 2019, and the one statement specified by Mooney to be fraudulent within that period of time was made after he began trading again. There is no correlation between when he made trades and when those statements were made, so it stands to reason that there could not be reliance.

Additionally, Mooney cannot credibly make the claim that he relied on the statements because many of the statements were not available for public consumption until after investigatory revelations, made years in advance of Mooney becoming interested in trading in Boeing stock, or were made to the general public through cable news networks. None of the statements were made directly to Mooney or with intent that he specifically act based on those statements. "[A] party...is accountable 'if the misrepresentation, although not made directly to

the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction.'"[20]

Mooney's allegations of fraudulent concealment and fraud by omission also fail. Fraudulent concealment requires a plaintiff to "prove that the defendant 'knowingly acted to prevent the plaintiff from learning facts or otherwise made misrepresentations intended to put the plaintiff off the trail of inquiry.'"[21] The fraudulent behavior must be personal to the plaintiff and not general statements for public consumption that also happen to be misrepresentations or even outright fraud. Mooney urges the Court to impute onto Boeing fraudulent concealment based on comments made by Boeing executives on cable news networks. Doing so would open the door for any individual who saw those statements and either began investing or continued investing in Boeing to bring suit against Boeing for fraudulent concealment.

Fraud by omission requires similar elements as does a showing of fraudulent misrepresentation with the exception that the particularity standard is not quite as rigid as that of fraudulent misrepresentation because "[n]o rational pleading standard can require a plaintiff to plead specific facts that he has no means to

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20 *Prairie Capital III, L.P. v. Double E Holding Corp.*, 132 A.3d 35 at *59 (Del. Ch. Nov. 24, 2015); quoting Restatement (Second) of Torts §533. See also *Nye Odorless Incinerator Corp. v. Felton, 5 W.W. Harr.* 236 at *253 (Del. 1931).

21 *Krahmer v. Christie's Inc.*, 911 A.2d 399 at *407 (Del. 2006); quoting *State ex rel. Brady v. Pettinaro Enters.*, 870 A.2d 513 at 531 (Del. Ch. 2005).

know."[22] However, in Mooney's amended complaint under the section titled "Defendant's Specific Misstatements and Omissions Made to Investors," Mooney either points to statements made through the business news media or statements made between employees of Boeing that were never intended to reach the public. He attempts to ascribe to Boeing acts of omission by alluding to statements made for internal consumption among personnel by those employees. Lastly, there is nothing to suggest that Mooney's lack of knowledge of these internal statements by Boeing employees played any role in his investment scheme.

Mooney appears to be asking this Court to create a scenario where day traders may recoup their losses over a period of time based on statements of corporate officers collected by the investor and presented after the fact as fraud. This Court should not engage in such a dangerous precedent. Mooney's "argument is a mere conclusory allegation that, as a shareholder, he is entitled to recovery because Defendant's stock did not perform well. This cannot survive a motion to dismiss."[23]

Conclusion

Mooney's failure to show that the many public statements made by Boeing executives prior to Mooney initiating a complex investment scheme were relied

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22 *Elburn on behalf of Investors Bancorp, Inc. v. Albanese*, 2020 WL 1929169 at *8 (Del. Ch. Apr. 21, 2020).

23 *Mooney*, 2017 WL 4857133 at *10.

upon requires a dismissal on Rule 9(b) grounds. There is no indication based on the pattern of the trades that any of the statements Mooney alleges were the impetus of his continued trading in Boeing stock actually induced Mooney as a sophisticated investor to act. Reliance is an element of fraud that is personal to the plaintiff and cannot be established by pointing to statements of puffery made during interviews on cable news networks.

WHEREFORE, for the reasons explained above, this Court **GRANTS** Defendant The Boeing Company's Motion to Dismiss pursuant to Rules 12(b)(6) and 9(b).

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh