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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MATT PASQUINELLI and BRYAN PAYSEN, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

v.

HUMBL, LLC, BRIAN FOOTE, JEFFREY HINSHAW, GEORGE SHARP, KAREN GARCIA, and MICHELE RIVERA,

Defendants.

Case No.: 3:22-cv-00723-AJB-BLM

REPLY BRIEF IN SUPPORT OF DEFENDANT GEORGE SHARP'S MOTION TO DISMISS THE FIRST AMENDED CLASS ACTION COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)

Judge: Hon. Anthony Battaglia
Dept: 4A

Complaint Filed: May 19, 2022
Trial: Not Yet Set

I. INTRODUCTION AND RELEVANT FACTS

Plaintiffs' Opposition only underscores why the instant motion should be granted. Plaintiff argues that Defendant Sharp – an individual who is not, and never has been, an employee, officer or director of HUMBL, and who did not trade directly with any of the Plaintiffs in this action should be found liable for violations of Rule 10(b) and 10(b)-5 of the Exchange Act. Plaintiffs are wrong.

The PSLRA imposes heightened pleading requirements on the type of investment fraud claims at issue here, as well as protections for forward looking statements. Plaintiffs have failed to meet these pleading requirements because: (1) they do not allege any actionable misrepresentations by Sharp other than forward looking opinions; (2) they do not allege any actionable omissions by Sharp because Sharp did not owe Plaintiffs a duty to disclose; and (3) they fail to allege scienter against Sharp because, at best, the allegations in the FAC infer only a motive to commit fraud and not "actual knowledge" or deliberate recklessness as required by the PSLRA. For those reasons, Plaintiffs' First and Third Causes of Action must be dismissed.

Further, Plaintiff's Second Cause of Action for violation of section 20(a) of the Exchange Act must be dismissed for two reasons. First, the 20(a) claim fails because Plaintiffs have not established that Sharp violated rules 10(b) and 10(b)-5. Second, the FAC does not contain sufficient allegations that Sharp "controlled" the actions of HUMBL – a corporation of which he was not an officer, director, or majority shareholder.

Finally, Plaintiffs' Opposition apparently concedes that the Fourth Cause of Action lacks merit against Sharp by failing to argue against dismissal. Accordingly, Defendant Sharp respectfully requests that his Motion to Dismiss be granted in its entirety.

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II. LAW AND ARGUMENT

A. The FAC Fails to State a Claim Under Section 10(b) and Rule 10(b)-5 of the Exchange Act against Defendant Sharp

1. None of Sharp's Statements Were Material Misrepresentations

The FAC only identifies three statements made by Sharp including those made in: (1) the February 26, 2021 investor call, (2) Sharp's February 26, 2021 tweet, and (3) Sharp's April 18, 2021 tweet. Regarding the first of these statements, it cannot be considered false or misleading because all that Sharp did was tell investors that he previously did not notify them of the reverse split. The FAC does not allege that this statement was misleading, and does not appear to contest the truth of said statement. Accordingly, it cannot be a material misrepresentation.

The statements contained in Sharp's two "tweets" are also not false or misleading because they are statements of opinion about future events. "[I]t is a general rule that 'predictions as to future events, or statements as to future action by some third party, are deemed opinions, and not actionable fraud.'" *Mueller v. San Diego Entm't Partners, Ltd. Liab. Co.*, 260 F. Supp. 3d 1283, 1296 (S.D. Cal. 2017) quoting 5 Witkin, Summary of Cal. Law, Torts, § 678, pp. 779-80 (9th ed. 1988).

Sharp's February 26, 2021 tweet advised investors not to be worried about dilution. Nowhere in this statement was there any representation of existing fact, false or otherwise. The February 26 tweet went on to identify itself as an opinion by Sharp's statement that "***we believe*** these people are investors, not profit takers." (FAC ¶ 126) (emphasis added). The inclusion of the words "we believe" makes clear that this was a statement of opinion – not fact. Further, because the statement was forward-looking (i.e. identifying that there wouldn't be dilution of shares in the future) it cannot be a material misrepresentation. Accordingly, Sharp's February 26 tweet is non-actionable opinion.

Sharp's April 18, 2021 tweet is also not actionable as a material misrepresentation. The April 18 tweet simply told investors that if they thought 6,000,000,000 new shares were going to appear that they should sell their stock in HUMBL. (FAC ¶ 127). This, like the February 26 tweet, is clearly a statement of opinion because Sharp is telling investors that if they have a certain belief, they "***should***" sell their shares. Further, like the February 26 tweet, the April 18 tweet references a hypothetical future event. Accordingly, it is a forward-looking statement of opinion, not a statement of material fact. Therefore, it is also non-actionable.

2. Sharp Did Not Have a Duty to Disclose

Sharp cannot be held liable for omissions of material fact because he did not have a duty to disclose. "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Basic, Inc. v. Levinson*, 485 U.S. 224, 239 n. 17 (1988). "§ 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44, 131 S. Ct. 1309, 1321 (2011). "Disclosure is required under these provisions only when necessary 'to make . . . statements made, in the light of the circumstances under which they were made, not misleading.'" *Id*. "Even with respect to information that a reasonable investor might consider material, ***companies can control what they have to disclose under these provisions by controlling what they say to the market***." *Id*. (emphasis added).

The foregoing "is particularly true for Defendants' statements that are more appropriately classified as opinions." *In re Regulus Therapeutics Inc. Sec. Litig*., 406 F. Supp. 3d 845, 857 (S.D. Cal. 2019). "An opinion statement, however, is not necessarily misleading when an issuer knows, but fails to disclose, some fact cutting the other way." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 189-90, 135 S. Ct. 1318, 1329 (2015). "Reasonable investors understand that opinions sometimes rest on a weighing of competing

facts; indeed, the presence of such facts is one reason why an issuer may frame a statement as an opinion, thus conveying uncertainty." *Id*.

Sharp did not have a duty to disclose any information about the Tesoro Merger or the "reverse split" because the FAC does not allege that he made any statements prior to those events giving rise to a duty to disclose. Because the FAC does not plead that Sharp made prior representations about those items, no duty to disclose arose.

Plaintiffs argue that Sharp had a duty to disclose because he was privy to material, nonpublic information that the Plaintiffs were not. Opposition at p. 15, lines 13-18. This is not the standard for omission claims under the Exchange Act. Plaintiffs cite *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir. 1988) (Jett) in support of their argument that Sharp had a duty to disclose. However, the *Jett* case supports Defendant Sharp's position, not Plaintiffs.

In *Jett*, the 9th Circuit Court of Appeals affirmed the District Court's granting of a Defendant's motion for summary judgment on the grounds that the Defendant did not have a duty to disclose under the Exchange Act. *Id*. at *1493. In doing so, the 9th Circuit stated:

> The Supreme Court has held that the parties to an impersonal market transaction owe no duty of disclosure to one another absent a fiduciary or agency relationship, prior dealings, or circumstances such that one party has placed trust and confidence in the other. The reasoning is equally appropriate in this situation. If Jett and Union Bank had no prior dealings or pre-existing relationship and the circumstances of the transaction were not such as to create a relationship of trust and confidence, then the threshold requirement of a duty to disclose has not been met.

Id. The Court went on to state that "Jett offered no evidence of any relationship or prior dealings from which the duty to disclose might arise. Consequently, he failed to raise genuine issues of fact concerning Union Bank's duty to disclose, and the district court was correct in concluding that there was no duty." *Id*.

Here, as in *Jett*, there are no allegations that Sharp had any previous relationship with investors, that a fiduciary relationship existed, or that Sharp made representations giving rise to a duty to disclose the details of the Tesoro merger or reverse split to investors. Accordingly, based on the allegations of the FAC Sharp did not have a duty to disclose.

The other cases cited in Plaintiffs' Opposition do not warrant a different result either. First, the case of *McCormick v. Fund Am. Cos*., 26 F.3d 869, 876 (9th Cir. 1994) (McCormick) addressed the issue of whether a corporation has a duty to disclose information to its shareholders when it is repurchasing stock directly from them. Unlike in *McCormick*, Sharp is not a corporation, and there are no allegations that he traded directly with the Plaintiffs. *See id*. at 876 ("the corporate issuer in possession of material nonpublic information, must, like other insiders in the same situation, disclose that information to its shareholders ***or refrain from trading with them***.") (emphasis added). Further, the cases cited in *McCormick* also relate to situations where a ***corporation*** is ***repurchasing shares or trading directly with its shareholders***. *See id*. In short, *McCormick* does not address the situation present here, i.e. where an individual third party, who is not an officer or director of a corporation, does not disclose information to that corporation's shareholders.

The case of *In re Volkswagen "Clean Diesel" Mktg*., 328 F. Supp. 3d 963, 983 (N.D. Cal. 2018) (Volkswagen) conducts the same analysis as *McCormick*. There, the Court also addressed whether a duty to disclose existed between corporations and their shareholders when the corporation was trading directly with them. *See id*. at 983-984. Further, the *Volkswagen* Court made clear that a "traditional corporate insider" is "someone in senior management or a member of the board of directors", and that a duty to disclose arises ***only*** when this insider is trading directly with shareholders. *Id* at 983. Unlike in *Volkswagen*, the FAC here does not allege that Sharp is a member of management or of HUMBL's board of directors. Nor does it allege that he traded directly with any of the Plaintiffs.

Accordingly, no duty to disclose arose, and Plaintiffs omission based claims must fail.

3. The FAC Fails to Adequately Plead Scienter

The FAC does not adequately plead Scienter as to Sharp. "In a securities fraud action like this one, there is no dispute as to the required state of mind: the plaintiffs must show that defendants engaged in 'knowing' or 'intentional' conduct." *S. Ferry LP v. Killinger*, 542 F.3d 776, 782 (9th Cir. 2008). "[R]eckless conduct can also meet this standard 'to the extent that it reflects some degree of intentional or conscious misconduct,' or what we have called 'deliberate recklessness.'" *Id*. (Internal citation omitted).

"[F]acts showing mere recklessness or a motive to commit fraud and opportunity to do so may provide some reasonable inference of intent, they are not sufficient to establish a strong inference of deliberate recklessness." *Zucco Partners, LLC v. Digimarc Corp*., 552 F.3d 981, 991 (9th Cir. 2009) (emphasis added). "Rather, the plaintiff must plead "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id*. *quoting Hollinger v. Titan Capital Corp*., 914 F.2d 1564, 1569 (9th Cir. 1990).

> To determine whether the plaintiff has alleged facts giving rise to the requisite "strong inference," a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff. The inference that the defendant acted with scienter need not be irrefutable, but it must be more than merely "reasonable" or "permissible"--it must be cogent and compelling, thus strong in light of other explanations. A complaint will survive only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any plausible opposing inference one could draw from the facts alleged.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 313, 127 S. Ct. 2499, 2504 (2007).

Plaintiffs' Opposition argues that the FAC "indicate[s]" that Sharp acted recklessly. Opposition p. 21, lines 26-27. Specifically, the Opposition argues that scienter should be inferred because Sharp allegedly had a financial interest in the Tesoro merger, and did not disclose the merger or reverse split to HUMBL investors. This falls far short of the requirements for pleading scienter under the PLSRA and Federal Rule 9 for several reasons.

First, the FAC is devoid of any allegations that Sharp engaged in an "extreme departure" from the standard of care. The FAC's allegations, at best, infer that Sharp had a motive to commit fraud. This, however, is insufficient to satisfy the scienter requirement. *Zucco Partners*, 552 F.3d at 991.

Second, when weighed against plausible other explanations, the FAC's allegations fail. In the February 26 investor call, Sharp specifically advised that his failure to disclose the reverse split was because he did not want to create panic selling a drop in the price of HUMBL stock. This reason is far more compelling that the deliberately opaque argument made by Plaintiffs that Sharp – an outside advisor and not an officer or director in HUMBL who was not trading directly with the shareholders – was deliberately withholding information for financial gain.

Finally, the FAC's allegations fail because the only statements made by Sharp were forward looking, and Plaintiffs have not adequately plead actual knowledge. A defendant "shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that… the plaintiff fails to prove that the forward-looking statement… was made with actual knowledge by that person that the statement was false or misleading." 15 U.S.C. § 78u-5(c)(1)(B)(i).

Because Sharp's statements about dilution were forward looking, the FAC must allege specific facts showing that he had actual knowledge that such

statements were false. The FAC fails to do so, and the argument advanced by the Opposition – that recklessness should be inferred – is insufficient. Accordingly, Plaitniffs' First and Third Causes of Action must be dismissed.

B. The FAC Fails to State a Claim Under Section 20(a) of the Exchange Act Against Defendant Sharp.

Plaintiffs' Section 20(a) claim fails because the FAC does not establish a primary violation of the Exchange Act on the part of Sharp as explained above. "[U]nder Section 20(a), plaintiff must prove: (1) a primary violation of federal securities laws[]; and (2) that the defendant exercised actual power or control over the primary violator." *Howard v. Everex Systems, Inc*., 228 F.3d 1057, 1065 (9th Cir. 2000).

As explained in greater detail above, the FAC fails to provide sufficient allegations that Sharp violated rule 10(b) and 10(b)-5 of the Exchange Act. For that reason alone, Plaintiff's Scheme Liability claim must fail.

Additionally, Plaintiffs' opposition fails to show how the FAC establishes that Sharp had "actual power or control" over HUMBL. The FAC does not allege that Sharp was an officer or director of HUMBL, or that he had authority to make decisions on behalf of the company. Further, the FAC does not allege that Sharp could directly or indirectly cause the direction of HUMBL management or policies by reason of his virtue as a shareholder, by contract, or otherwise. *In re BofI Holding, Inc. Sec. Litig*., No. 3:15-CV-02324-GPC-KSC, 2017 U.S. Dist. LEXIS 79062, at *65 (S.D. Cal. May 23, 2017). Accordingly, the FAC's "control" allegations are insufficient, and Plaintiffs' Second Cause of Action must be dismissed.

C. The FAC Does Not Allege a Violation of the Securities Act on the Part of Sharp.

The Opposition does not contest Sharp's position that the FAC does not allege a violation of the Securities Act by Sharp. Accordingly, the Fourth Cause of

Action must be dismissed. *Brown v. DIRECTV, LLC*, No. CV 13-1170-DMG (Ex), 2019 U.S. Dist. LEXIS 211854, at *28 (C.D. Cal. Aug. 5, 2019) ("Typically, a non-movant's failure to raise an issue in an opposition to a motion constitutes a waiver thereof.").

III. CONCLUSION

Defendant George Sharp respectfully requests that this Court dismiss the FAC in its entirety as against Defendant Sharp.

BROWN & CHARBONNEAU, LLP

Dated: December 1, 2022

By: /s/ Joseph Dankert
Gregory G. Brown
Mark M. Higuchi
Joseph M. Dankert

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on December 1, 2022, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which sent notification of such filing to counsel of record.

s/Joseph Dankert

Joseph Dankert