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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

MEMORANDUM OF POINTS AND AUTHORITIES 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)

Date: February 2, 2023
Time: 2:00 p.m.
Dept: 4A
Judge: Hon. Anthony Battaglia

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statute

Secondary Source

I. INTRODUCTION

Defendant George Sharp ("Sharp" or "Defendant Sharp") hereby moves to dismiss the First Amended Class Action Complaint ("FAC"), and all Causes of Action therein, of Plaintiffs Matt Pasquinelli and Bryan Payson, individually and on behalf of all others similarly situated (collectively "Plaintiffs"). The FAC fails to adequately plead any of its claims against Defendant Sharp.

The FAC's First, Second, and Third Causes of Action for violations of the Exchange Act are not plead with the requisite particularity as to Defendant Sharp. Lacking are any detailed allegations of any material misrepresentations or omissions by Defendant Sharp, or allegations showing that Defendant Sharp is a "controlling person" of Defendant HUMBL, LLC ("HUMBL"). Pursuant to the Private Securities Litigation Reform Act ("PSLRA"), and FRCP 9(b), these claims are subject to heightened pleading requirements – which have not been satisfied here.

Further, the Fourth Cause of Action for violation of Section 12(a) of the Securities Act also fails. The FAC does not allege that Defendant Sharp was an "immediate seller" of the securities at issue, nor are there sufficient allegations to state a claim based on "solicitation". Accordingly, Defendant Sharp respectfully requests that this Court grant the instant motion in its entirety, and dismiss the FAC as against Defendant Sharp.

II. FACTUAL ALLEGATIONS

The FAC generally alleges a scheme by HUMBL and the Individual Defendants to artificially inflate the price of HUMBL's stock through a series of misrepresentations relating to partnerships, product development, mergers, etc. However, as against Defendant Sharp, the allegation are very limited. Below are all of the allegations in the FAC that identify any alleged conduct of Defendant Sharp:

> 32. The scheme begins with the merger between Tesoro Enterprises, Inc. ("Tesoro") and HUMBL, which was facilitated by Defendant Sharp – a known player in the OTC market with a history of brokering

reverse mergers and a penchant for thoroughbred horses (including one named "Front-Run the Fed"10).

33. In this instance, Sharp connected Defendant Foote with Tesoro's near death CEO Henry Boucher ("Boucher") and orchestrated a lightening-speed merger that instantly turned a worthless company into one worth billions of dollars – despite having no products on the market.

36. The Company simultaneously announced that Foote was installed as President, Hinshaw as Secretary, Rivera as a director and Vice President, Global Partnerships, and Garcia as Vice President, Major Accounts.11 Sharp remained on as an advisor to HUMBL, while also working with HUMBL in his capacity as President of Forwardly, LLC ("Forwardly"). 12

42. On November 23, 2020, Forwardly – controlled by Sharp – invested an undisclosed amount in Tesoro in exchange for warrants to purchase 500 million common shares within two years of the HUMBL/Tesoro merger. In a December 10, 2020 press release issued by Forwardly, Sharp stated that the investment in HUMBL was immediately beneficial due, in part, to "the fortuitous timing of the execution of the purchase agreement."16

123. Defendant Sharp – who routinely promoted himself as an "'advocate for shareholder rights and honesty in the OTC'"66 – used his well-branded identity to pump Tesoro's share price just before the merger completed. In one Tweet, Sharp wrote: "I didn't really realize what a big deal $TSNP & HUMBL CEO, Brian Foote, is until this weekend. I believe that he may be the Elon Musk of blockchain. He is so highly regarded that he is a keynote speaker at BC conventions around the world."67 At the December 9, 2020 investor call, Sharp said: "'I'm not easily impressed, but I was blown apart. . . . This deal is going to bring credibility finally to the OTC.'"68

124. In addition to pumping the share prices, Sharp deliberately withheld material information from shareholders to delay adverse reactions from the public. During the February 26, 2021 investor call, Sharp said: "'I made the conscious decision that we were not going to

tell you and I'll tell you why: it would have created mass panic . . . I don't want to sound like I'm your mother, but we saved a lot of you from yourselves here.'" Id

125. In saying this, Sharp acknowledged that telegraphing the split would have had an adverse effect on the share price. Between the time Sharp knew that a split would occur (November 12, 2020) and the date of the actual split (February 26, 2021), HUMBL shares skyrocketed from $0.014 to $5.15.

126. Then when the public learned that HUMBL had quietly issued Series B Preferred shares convertible into 5.54 billion common shares to insiders and family members – thereby setting shareholders up for total annihilation once those shares unlocked and became available to sell – Sharp repeatedly gaslit investors. On February 26, 2021, Sharp said: "'If you're worried about dilution, don't be. This is not your typical OTC stock. We believe these people are investors, not profit takers.'" Id.

127. Again, on April 18, 2021, Sharp tweeted: "If you think that 6 billion new $HMBL shares are going to suddenly appear in the O/S, then please . . . sell your shares."69 Sharp's Tweet was classic gaslighting, given that 3 billion shares could suddenly appear for sale in December if insiders converted their Series B into common shares.

128. Sharp's portrayal of HUMBL as full of diehard believers who would never sell their shares was an important part of the scheme to keep investors engaged in the Company despite its utter failure to bring a successful product to market. Foote carried this mission out flawlessly.

167. Sharp or his family benefited from the sale of Forwardly's common shares (previously converted from Series B). For example, the Company reported that Forwardly planned to sell 125,000,000 shares in its July 20, 2022 S-1 filing.

175. The reverse merger closed on December 3, 2020. The reverse merger was shepherded by OTC investor Defendant George Sharp, who described himself during HUMBL's debut webcast as "an

advocate for shareholder rights and honesty in the OTC."87

181. Thereafter Defendant Sharp attempted to downplay the concern shareholders expressed about the corporate action and assuage those who were concerned about potential dilution, stating: "If you're worried about dilution, don't be."94 Sharp also told investors that he was doing them a favor by being opaque about the Company's actions, such as the surprise reverse stock split, stating, "I made the conscious decision that we were not going to tell you."95

182. The price of HUMBL stock declined following the announcement of the reverse split, but the downplaying of the potential dilution by the Company and Defendant Sharp, coupled with a continued string of announcements about HUMBL's international partnerships and growth prospects, kept the stock price artificially inflated for the rest of the Class Period.

273. Then, after markets closed on February 26, 2021, HUMBL held its third investor conference call. During that February 26, 2021 investor call, Defendant Sharp assured investors that: "If you're worried about dilution, don't be."148

299. The Individual Defendants had actual knowledge of HUMBL's strategy for the reverse merger with Tesoro and structuring of the different classes of shares at the time they were occurring. Their own public statements indicated their personal involvement and knowledge:

> • December 9, 2020: "The HUMBL team and the Tesoro public vehicle were a perfect match, and we laid out a plan to bring the two together and everybody followed the plan to a tee which is a credit to Brian [Foote] and his group. (Sharp)
>
> December 9, 2020: "It goes without saying that George [Sharp] was incredible at getting us into the OTC markets. …We knew it takes an average of five to seven years to get onto the NASDAQ and we saw tech starting to run through the same five venture capital firms, same five mega techs, same five investment backs in New York, and I said 'Okay, well, what can we do here to do something really fresh and not only for the brand … but also do something from a capital markets prospective that was super

> disruptive and got back to the basic so early stage technology being available for anybody to invest in.' We appreciate that opportunity. Thank you George." (Foote)160
>
> February 26, 2021: "A lot of people that would have taken over the TSNP vehicle would have done a 1 for 10,000, a 1 for 100,000, wiping out the existing shareholders. We did a very small reverse split …We picked the number one for four as our personally said because we wanted to appease the shareholders." (Sharp)161

300. Defendant Sharp's own statements further demonstrated his knowledge of what HUMBL shareholders consider material and indeed, his admission that he withheld information in order to manage the Company's stock price. Specifically, during the February 26, 2021call with investors, Defendant Sharp stated: We received a number of comments about how some certain people would have wished that we had announced that we were doing to do this reverse split sooner. In other words, we should have told you a week ago or two weeks ago. I made the conscious decision that we were not going to tell you. I'll tell you why. It would've created mass panic. Some of you would've sold your stock, which is fine, but the problem is, with a mass panic, instead of selling your stock at a dollar, 90 cents, 80 cents, 70 cents, you probably would've ended up selling, a lot of you, selling it for 40 cents. I don't want to sound like I'm your mother, but we saved a lot of you from yourselves here.

302. Lastly, the Individual Defendants closely followed HUMBL's stock price, see, e.g., February 26, 2021 investor call (Sharp: "[Y]ou in fact had a tremendous increase in the value of your stock today ... We closed at 85 cents yesterday, and opened at $3.40."), and relied on the value of its stock in order to conduct acquisitions, see, e.g., July 7, 2021 Press Release (Foote's "retired shares are sufficient to cover the shares that have been or will be issued in connection with the completed Tickeri and Monster LA acquisitions, HUMBL Brand Ambassadors, HUMBL Strategic Advisors and HUMBL Strategic Collaborations such as Athletes First, Glushon Sports Management and Pilgrimage Festival").

> 326. During the Class Period, Defendants Foote, Sharp, and Hinshaw participated in the operation and management of HUMBL and conducted and participated, directly and indirectly, in the conduct of HUMBL's business affairs. Because of their senior positions, the Individual Defendants knew the adverse nonpublic information about HUMBL's current financial position and future business prospects
>
> 330. By reason of the above conduct, Defendants Foote, Sharp, and Hinshaw are liable pursuant to §20(a) of the Exchange Act for the violations committed by HUMBL.

In sum, the FAC alleges that Sharp: introduced Defendant Foote to the CEO of Tesoro (FAC ¶¶ 32-33), remained on as an "advisor" of HUMBL after its merger with Tesoro (FAC ¶ 36), indirectly through an entity he controlled invested in Tesoro within two (2) years of the aforementioned merger (FAC ¶ 42), issued a "Tweet" praising Defendant Foote (FAC ¶ 123), advised shareholders that he intentionally did not tell them about the "reverse split" out of a fear of creating a panic (FAC ¶¶ 124-25), and told investors to not worry about dilution of their shares, and, if they were worried, to sell their shares (FAC ¶¶ 126-27).

The remainder of allegations in the FAC either relate to the conduct of other individuals, or are alleged against the "Defendants" generally.

III. LAW AND ARGUMENT

A. Legal Standard

"A motion to dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint." *In re Ferrero Litig.*, 794 F. Supp. 2d 1107, 1111 (S.D. Cal. 2011). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of

'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "All allegations of material fact are taken as true and construed in the light most favorable to plaintiff. However, conclusory allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss for failure to state a claim." *Epstein v. Wash. Energy Co*., 83 F.3d 1136, 1140 (9th Cir. 1996).

B. Pleading Requirements for Securities Fraud Claims

A Complaint alleging a violation of section 10(b) and Rule-10b(5) of the Exchange Act must satisfy the pleading requirements of both the PSLRA and FRCP 9(b). *Mueller v. San Diego Entm't Partners, LLC*, 260 F. Supp. 3d 1283, 1291 (S.D.Cal. 2017). The PSLRA provides that:

> In any private action arising under this title [15 USCS §§ 78a et seq.] in which the plaintiff alleges that the defendant—
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading; the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1). Further:

> [I]n any private action arising under this title [15 USCS §§ 78a et seq.] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate this title [15 USCS §§ 78a et seq.], state with particularity facts giving rise to a strong inference that the defendant acted with the required state of

mind.

15 U.S.C. § 78u-4(b)(2).

"The PSLRA requires plaintiffs to state with particularity both the facts constituting the alleged violation, and the facts evidencing scienter, i.e., the defendant's intention 'to deceive, manipulate, or defraud.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

> ***It does not suffice that a reasonable factfinder plausibly could infer from the complaint's allegations the requisite state of mind.*** Rather, to determine whether a complaint's scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, as the Seventh Circuit did, but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet less cogent than other, nonculpable explanations for the defendant's conduct. ***To qualify as "strong" within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable--it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent***.

Id. at 314 (emphasis added). Indeed, the heightened pleading requirements of the PSLRA "are an unusual deviation from the usually lenient requirements of federal rule pleadings." *Ronconi v. Larkin*, 253 F.3d 423, 437 (9th Cir. 2001).

Rule 9(b) provides that "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." To satisfy the heightened pleading requirements, the plaintiff must set forth "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Odom v. Microsoft Corp.*, 486 F.3d 541, 553 (9th Cir. 2007) (internal citations omitted). In addition, the complaint must indicate "what is false or misleading about a statement, and why it is false" and "be specific

enough to give defendants notice of the particular misconduct that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106-07 (9th Cir. 2003) (internal citations omitted) ("[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.").

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

"Section 10(b) of the Exchange Act forbids: (1) the use or employment of any deceptive device, (2) in connection with the purchase or sale of any security, and (3) in contravention of Securities and Exchange Commission rules and regulations." *In re Acadia Pharms. Inc. Secs. Litig*. (S.D.Cal. Jan. 3, 2022, No. 18-cv-01647-AJB-BGS) 2022 U.S.Dist.LEXIS 724, at *21. Additionally, Rule 10b-5, promulgated by the SEC under Section 10(b), forbids the making of any "untrue statement of a material fact" or the omission of any material fact "necessary in order to make the statements made not misleading." *Id*. The basic elements of a Section 10(b) claim are: (1) a material misrepresentation or omission; (2) made with scienter; (3) in connection with the purchase or sale of a security; (4) reliance by plaintiffs; (5) economic loss; and (6) a causal nexus between the misrepresentation or omission and the loss. *Id*.

1. The FAC Does Not Identify Any Material Misrepresentation or Omission by Defendant Sharp

None of the statements attributed to Sharp in the FAC constitute material misrepresentations. "To be actionable, of course, a statement must also be misleading." *Basic Inc. v. Levinson*, 485 U.S. 224, 239, fn. 17 (1988). "[A]n allegedly misleading statement must be 'capable of objective verification.' For example, "puffing"—expressing an opinion rather than a knowingly false statement of fact—is not misleading." *Weston Family P'ship LLLP v. Twitter, Inc*., 29 F.4th

611, 619-620 (9th Cir. 2022).

The FAC discloses only three statements made by Sharp relevant to Plaintiffs' section 10(b) and Rule 10(b)-5 claim. First, a statement allegedly made in a February 26, 2021 investor call that:

> *We received a number of comments about how some certain people would have wished that we had announced that we were doing to do this reverse split sooner. In other words, we should have told you a week ago or two weeks ago. I made the conscious decision that we were not going to tell you. I'll tell you why. It would've created mass panic. Some of you would've sold your stock, which is fine, but the problem is, with a mass panic, instead of selling your stock at a dollar, 90 cents, 80 cents, 70 cents, you probably would've ended up selling, a lot of you, selling it for 40 cents. I don't want to sound like I'm your mother, but we saved a lot of you from yourselves here.*

(FAC ¶ 300). Second, and additional statement allegedly made on the February 26, 2021 investor call that:

> *If you're worried about dilution, don't be. This is not your typical OTC stock. We believe these people are investors, not profit takers.*

(FAC ¶ 126). Third, a tweet dated April 18, 2021 stating:

> *If you think that 6 billion new $HMBL shares are going to suddenly appear in the O/S, then please . . . sell your shares.*

(FAC ¶ 127).

The First of the above statements cannot be construed as misleading. Sharp is doing nothing more than advising investors that he did not tell them about the alleged "reverse-split" and providing his opinion on what would have happened if he did disclose that information. Indeed, the FAC does not allege that this statement was misleading either.

The Second and Third statements identified above are also not misleading. Both statements are statements of opinion – not fact. Defendant Sharp is identifying that he didn't believe that certain investors were profit takers or that there would be

dilution of shares. Defendant Sharp even qualified these statements by advising investors to "sell [their] shares" if they believed otherwise. Accordingly, none of the statements attributable to Defendant Sharp constitute a material misrepresentation.

Further, the FAC does not adequately allege any material omission by Sharp. "To be actionable under the securities laws, an omission must be misleading." *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). "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). "A company must disclose a negative internal development only if its omission would make other statements materially misleading." *Weston Family P'ship LLLP v. Twitter, Inc.* 29 F.4th 611, 620 (9th Cir. 2022).

> Moreover, it bears emphasis that § 10(b) and Rule 10b-5(b) do not create an affirmative duty to disclose any and all material information. ***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***. 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.

(*Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44-45 (2011) (internal citations omitted) (emphasis added).

The only omission that the FAC attributes to Defendant Sharp is his failure to inform investors of the Merger with Tesoro and the "reverse-split". However, the FAC does not allege that Defendant Sharp had a duty to disclose this information. Further, there are no statements allegedly made by Sharp in the FAC that would have given rise to a duty to disclose on his part. Accordingly, the FAC fails to allege a material misrepresentation or omission on the part of Defendant Sharp, and the First and Third Causes of Action for violations of Section 10(b) and Rule 10(b)-5 of the Exchange Act fail.

While there are numerous other allegations in the FAC concerning other

statements made by HUMBL and its principals, the FAC does not attribute any of those statements to Sharp. The FAC's allegations that simply reference "Defendants" or the "Individual Defendants" lack the requisite particularity to find a violation of 10(b) and 10(b)-5 against Defendant Sharp as an individual. *See Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106-07 (9th Cir. 2003) ("[a]verments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged.").

Finally, Defendant Sharp cannot be held liable for a violation of Section 10(b) and Rule 10(b)-5 simply by his involvement in the "scheme" alleged or general allegations of his providing assistant to other actors. "[A] private plaintiff may not maintain an aiding and abetting suit under § 10(b)." *Cent. Bank, N.A. v. First Interstate Bank, N.A.* (1994) (finding Defendant who did not commit a "manipulative or deceptive act within the meaning of § 10(b)" could not be held liable); see also *SEC v. City of Victorville* (C.D.Cal. June 2, 2017, No. ED CV13-00776 JAK (DTBx)) 2017 U.S.Dist.LEXIS 209607, at *132-133 ("The Court rejected an interpretation of Section 10(b) or Rule 10b-5 that would "permit private plaintiffs to sue a person who 'provides the false or misleading information that another person then puts into the statement."). For liability to attach under Section 10(b) and Rule 10(b)-5, the defendant must have committed a primary violation, i.e. a material misrepresentation or omission. *See Howard v. Everex Sys.*, 228 F.3d 1057, 1061-1062 (9th Cir. 2000).

Here, the FAC does not allege any material misrepresentation or omission against Defendant Sharp. Therefore, he cannot be liable under Section 10(b) or Rule 10(b)-5. His involvement in the overall "scheme" or rendering of assistance to primary violators is insufficient to confer individual liability. Accordingly, the First and Third Causes of Action must be dismissed.

2. The FAC Does not Adequately Plead Scienter as to Defendant

Sharp

"To plead scienter in accordance with the PSLRA, a plaintiff must 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind' with respect to each act or omission." *3226701 Can. v. Qualcomm, Inc*. (S.D.Cal. Oct. 20, 2017, No. 15cv2678-MMA (WVG)) 2017 U.S.Dist.LEXIS 174367, at *73. "To act with the required state of mind means to make false or misleading statements 'either intentionally or with deliberate recklessness.'" *Id*.

"A defendant acts with deliberate recklessness where he has "reasonable grounds to believe material facts existed that were misstated or omitted, but nonetheless failed to obtain and disclose such facts although he could have done so without extraordinary effort'" *Id*. at *73-*74. "To plead a strong inference of deliberate recklessness, a plaintiff must allege "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*. at *74.

"[F]acts showing mere recklessness or a motive to commit fraud and opportunity to do so" are insufficient to plead a strong inference of deliberate recklessness." *Id*. "In determining whether a plaintiff has alleged facts giving rise to a strong inference of scienter, "a court must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Id*.

Here, the FAC utterly fails to plead scienter with the requisite particularity against Defendant Sharp. The only scienter allegations against Sharp are that he (1) personally benefitted from the sale of stock owned by a company called "Forward" that was allegedly under his control (FAC ¶ 167); and (2) told shareholders that he intentionally did not advise them of the "reverse-split" because he feared creating a

panic. These allegations fall far short of establishing the intentional conduct or deliberate recklessness required to support a claim under Section 10(b) and Rule 10(b)-5. Accordingly, the First and Third Causes of action must be dismissed.

Further, Sharp is entitled to even greater protection because two of his statements referenced above were "forward-looking." "[E]ven if a statement is objectively false or misleading, the PSLRA provides a "safe harbor" for forward-looking statements if such statements are either identified as forward-looking and accompanied by a meaningful cautionary statement, or if the plaintiff fails to show that the statement was made with actual knowledge that it was false or misleading." *Weston Family P'ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 620 (9th Cir. 2022). "Under the PSLRA, if the alleged misstatement or omission is a "forward-looking statement," the required level of scienter is "actual knowledge." *Matrixx Initiatives, Inc. v. Siracusano* 563 U.S. 27, 48, fn. 14 (2011).

There is absolutely nothing alleged in the FAC that shows "actual knowledge" of falsity in the statements allegedly made by Defendant Sharp. Accordingly, the First and Third Causes of Action must be dismissed.

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

"[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).

"Congress intended for control person liability under Section 20(a) "to prevent evasion of the law by organizing dummies who will undertake the actual things forbidden. In other words, § 20(a) was intended to impose liability on controlling persons, such as controlling shareholders and corporate officers, who would not be liable under respondeat superior because they were not the actual employers." *In re*

BofI Holding, Inc. Sec. Litig., No. 3:15-CV-02324-GPC-KSC, 2017 U.S. Dist. LEXIS 79062, at *61 (S.D. Cal. May 23, 2017).

"The SEC's regulations define "control" as 'the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.'" *Id* at *65 (S.D. Cal. May 23, 2017). "[T]he status or position of an alleged controlling person, by itself is insufficient to presume or warrant a finding of power to control or influence." *Id*.

The FAC is devoid of allegations indicating that Defendant Sharp was a "control person" of HUMBL. The FAC identifies that Sharp previously served as an "advisor" to HUMBL and currently serves as its "Capital Markets Advisor". (FAC ¶ 16). The FAC does not allege that Defendant Sharp is an officer, director, or controlling shareholder of HUMBL. Further, it does not allege that Sharp had the authority to make business decisions on HUMBL's behalf, or that he exercised actual authority over HUMBL's day to day operations. Indeed, Defendant Sharp is the only Defendant that is not alleged to be an officer or director (or both) of HUMBL. (*See* FAC ¶¶ 13-18).

Based on the foregoing, the FAC fails to state a claim for control person liability under Section 20(a) of the Exchange Act. Accordingly, the Second Cause of Action must be dismissed.

E. The FAC Fails to State a Claim for Violations of Sections 5 and 12(a)(1) of the Securities Act Against Defendant Sharp

"Any person who… offers or sells a security in violation of section 5 [15 USCS § 77e]… shall be liable, subject to subsection (b), to the person purchasing such security from him…" 15 U.S.C.S. § 77l(a)(1). "The wording of this section indicates that there must be privity between plaintiff and defendant, that a plaintiff may recover only against his immediate seller." *Winter v. D. J. & M. Inv. & Constr.*

Corp., 185 F. Supp. 943, 946 (S.D. Cal. 1960).

The FAC does not allege that any Plaintiffs purchased securities directly from Defendant Sharp. Because there are no allegations that Sharp was an immediately seller, or in privity with the Plaintiffs, the Fourth Cause of Action should be dismissed.

The FAC attempts to escape the privity requirement by alleging that Defendant Sharp "actively solicited" the sale of the securities at issue. FAC ¶ 349. However, the FAC does not sufficiently plead liability by reason of solicitation.

"To establish liability under section 12(a)(2), a plaintiff must allege that the defendants did more than simply urge another to purchase a security; rather, the plaintiff must show that the defendants solicited purchase of the securities for their own financial gain." *Sparling v. Daou (In re Daou Sys.)*, 411 F.3d 1006, 1029 (9th Cir. 2005).

> The person who gratuitously urges another to make a particular investment decision is not, in any meaningful sense, requesting value in exchange for his suggestion or seeking the value the titleholder will obtain in exchange for the ultimate sale. The language and purpose of § 12(1) suggest that liability extends only to the person who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner. If he had such a motivation, it is fair to say that the buyer "purchased" the security from him . . . .

Pinter v. Dahl, 486 U.S. 622, 647, 100 L. Ed. 2d 658, 108 S. Ct. 2063 (1988).

To "sustain a Section 12(a)(2) claim against the Issuer Defendants under the second prong of the Pinter test, seller by solicitation, Plaintiffs would have to plead active participation in the solicitation of the immediate sale, a direct relationship between the purchaser and the defendant." *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, No. 2:10-CV-0302 MRP (MANx), 2011 U.S. Dist. LEXIS 125203, at *36 (C.D. Cal. May 5, 2011) ("The allegation that the Issuer Defendants "promoted" the

sale of securities is not sufficient."); *Pinter*, 486 U.S. at 654 ("Being merely a "substantial factor" in causing the sale of unregistered securities is not sufficient in itself to render a defendant liable under § 12(1)"); *see also Baker v. Seaworld Entm't, Inc.*, No. 14cv2129-MMA (KSC), 2016 U.S. Dist. LEXIS 72409, at *53-55 (S.D. Cal. Mar. 31, 2016) ("barebones allegations that SeaWorld Entertainment and Blackstone are "seller[s], offeror[s], and/or solicitor[s] of sales of the common stock," are insufficient to properly allege solicitation."); *Mallen v. Alphatec Holdings, Inc.*, 861 F. Supp. 2d 1111, 1132 (S.D. Cal. 2012) (dismissing Section 12(a) claims based on a failure to adequately plead solicitation).

The Fourth Cause of Action does not allege Defendant Sharp's "solicitation" with any detail whatsoever. *See* FAC ¶¶ 343-351. Further, the preliminary allegations in the FAC do not sufficiently allege solicitation either. As is identified in greater detail above, the FAC only alleges that Defendant Sharp: (1) told investors that he did not disclose the "reverse-split" to them, and (2) told investors not to worry about dilution of their shares. Thus, the allegations of the FAC fail to allege a violation of Section 12(a) of the Securities Act against Defendant Sharp, and the Fourth Cause of Action must be dismissed.

IV. CONCLUSION

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

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