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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**In re Nuverra Environmental
Solutions Securities Litigation**

This Document Relates to:
All Actions.

Lead Case No. 2:13-cv-01800-JWS

ORDER AND OPINION

[Re: Motion at Docket 49]

I. MOTION PRESENTED

At docket 49, defendants Nuverra Environmental Solutions, Inc., Richard J. Heckmann, Mark D. Johnsrud, Jay Parkinson, W. Christopher Chisholm, and Charles R. Gordon move pursuant to Federal Rule of Civil Procedure 12(b)(6) for an order dismissing plaintiffs’ complaint. Plaintiffs respond at docket 54. Defendants filed a reply at docket 56. Oral argument was requested but would not assist the court.

II. BACKGROUND

At docket 43 plaintiffs filed an 83-page, two-count Consolidated Class Action Complaint alleging federal securities law violations. According to the complaint, Nuverra “is an environmental solutions company focused on serving the needs of exploration and production (‘E&P’) companies in their pursuit of shale oil and gas

1 hydraulic fracturing drilling (also known as ‘fracking’).”¹ Fracking is a drilling procedure
2 whereby oil and natural gas is harvested from shale rock formations up to thousands of
3 feet underground by pumping large quantities of fluids at high pressure into the targeted
4 rock.² Nuverra “handles the logistics of delivering—and then removing and disposing
5 of—the millions of gallons of water needed to operate each fracking well.”³

6 Plaintiffs’ complaint centers around two alleged events. First, plaintiffs allege
7 that Nuverra’s truck drivers engaged in an illicit bill padding scheme that artificially
8 boosted Nuverra’s earnings.⁴ Second, plaintiffs allege that Nuverra entered into an
9 unprofitable business deal in early 2012 under which it provided its services at a below-
10 market rate to E&P driller EOG Resources, Inc. at the Eagle Ford basin in Texas.⁵
11 Nuverra hoped that this deal would allow it to “build a book of south Texas E&P
12 customers”⁶ but, instead, Nuverra’s “profitability immediately tanked.”⁷ As discussed in
13 more detail below, plaintiffs allege that defendants misled the investing public by
14 making positive statements about the company without disclosing that Nuverra’s profits
15 were being unsustainably propped up by the bill padding scheme and because the
16 EOG Resources deal was actually causing it to lose substantial sums of money at the
17 Eagle Ford site. Plaintiffs allege that these false statements and misleading omissions
18 artificially inflated the price of Nuverra’s publicly traded securities in violation of federal
19 law.

21 ¹Doc. 43 at 2 ¶ 2.

22 ²*Id.* at 14 ¶ 46.

23 ³*Id.* at 2 ¶ 3.

24 ⁴*Id.* at 19 ¶ 63.

25 ⁵*Id.* at 20 ¶ 67.

26 ⁶*Id.*

27 ⁷*Id.* at 20 ¶ 65.

1 Defendants now move for dismissal of the complaint in its entirety. Plaintiffs
2 maintain that the complaint is sufficient, but request leave to amend if the court holds
3 otherwise.⁸

4 III. STANDARD OF REVIEW

5 Rule 12(b)(6), tests the legal sufficiency of a plaintiff's claims. In reviewing such
6 a motion, "[a]ll allegations of material fact in the complaint are taken as true and
7 construed in the light most favorable to the nonmoving party."⁹ To be assumed true,
8 the allegations "may not simply recite the elements of a cause of action, but must
9 contain sufficient allegations of underlying facts to give fair notice and to enable the
10 opposing party to defend itself effectively."¹⁰ Dismissal for failure to state a claim can
11 be based on either "the lack of a cognizable legal theory or the absence of sufficient
12 facts alleged under a cognizable legal theory."¹¹ "Conclusory allegations of law . . . are
13 insufficient to defeat a motion to dismiss."¹²

14 To avoid dismissal, a plaintiff must plead facts sufficient to "state a claim to relief
15 that is plausible on its face."¹³ "A claim has facial plausibility when the plaintiff pleads
16 factual content that allows the court to draw the reasonable inference that the
17 defendant is liable for the misconduct alleged."¹⁴ "The plausibility standard is not akin
18 to a 'probability requirement,' but it asks for more than a sheer possibility that a
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21 ⁸Doc. 54 at 22.

22 ⁹*Vignolo v. Miller*, 120 F.3d 1075, 1077 (9th Cir. 1997).

23 ¹⁰*Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011).

24 ¹¹*Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

25 ¹²*Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001).

26 ¹³*Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*,
27 550 U.S. 544, 570 (2007)).

28 ¹⁴*Id.*

1 defendant has acted unlawfully.”¹⁵ “Where a complaint pleads facts that are ‘merely
2 consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and
3 plausibility of entitlement to relief.’”¹⁶ “In sum, for a complaint to survive a motion to
4 dismiss, the non-conclusory ‘factual content,’ and reasonable inferences from that
5 content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”¹⁷

6 **IV. DISCUSSION**

7 **A. The Alleged Section 10(b) and Rule 10b-5 Violation**

8 Count I of plaintiffs’ complaint alleges a violation of Section 10(b) of the
9 Securities Exchange Act of 1934. Section 10(b) “forbids (1) the ‘use or employ[ment]
10 . . . of any . . . deceptive device,’ (2) ‘in connection with the purchase or sale of any
11 security,’ and (3) ‘in contravention of’ Securities and Exchange Commission ‘rules and
12 regulations.’”¹⁸ SEC Rule 10b-5, promulgated under the authority of Section 10(b),
13 specifically forbids, among other things, making untrue statements of material facts or
14 omitting material facts “necessary in order to make the statements made . . . not
15 misleading.”¹⁹ In order to state a claim under Section 10(b) and Rule 10b-5, a plaintiff
16 must allege the following five elements: (1) a material misrepresentation (or omission);
17 (2) scienter; (3) “a connection with the purchase or sale of a security;” (4) transaction
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23 ¹⁵*Id.* (citing *Twombly*, 550 U.S. at 556).

24 ¹⁶*Id.* (quoting *Twombly*, 550 U.S. at 557).

25 ¹⁷*Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009); *see also Starr*, 652 F.3d
26 at 1216.

27 ¹⁸*Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (quoting 15 U.S.C. § 78j(b)).

28 ¹⁹17 C.F.R. § 240.10b-5(b) (2014).

1 and loss causation; and (5) economic loss.²⁰ Defendants' motion to dismiss challenges
2 the first two elements, which must be pled with particularity.²¹

3 Federal Rule of Civil Procedure 9(b) states that all allegations of fraud or mistake
4 must "state with particularity the circumstances constituting fraud or mistake." Further,
5 the Private Securities Litigation Reform Act of 1995 ("PSLRA"), which Congress
6 enacted "[a]s a check against abusive litigation by private parties,"²² contains pleading
7 requirements that are more exacting than Rule 9's.²³ They require plaintiffs to state with
8 particularity not only the allegedly misleading statements and omissions, but also
9 scienter.²⁴ With regard to misleading statements, the PSLRA requires the plaintiff's
10 complaint to "specify each statement alleged to have been misleading, [and] the reason
11 or reasons why the statement is misleading."²⁵ With regard to scienter, the PSLRA
12 requires the plaintiff to state "facts giving rise to a strong inference that the defendant
13 acted with the required state of mind."²⁶ The Ninth Circuit has combined the PSLRA's
14 dual pleading requirements into a single inquiry whereby courts determine whether the
15 particular facts in the complaint, taken as a whole, raise a strong inference that the
16 defendants intentionally or with deliberate recklessness made false or misleading
17 statements to investors.²⁷

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20 ²⁰*Broudo*, 544 U.S. at 341–42 (citations omitted); *In re Daou Sys., Inc.*, 411 F.3d 1006,
1014 (9th Cir. 2005).

21 ²¹*In re Daou Sys., Inc.*, 411 at 1014.

22 ²²*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

23 ²³*Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir. 2009).

24 ²⁴15 U.S.C. § 78u–4(b)(1), (2). See also *Tellabs*, 551 U.S. at 313.

25 ²⁵15 U.S.C. § 78u–4(b)(1)(B).

26 ²⁶*Id.* § 78u–4(b)(2)(A).

27 ²⁷*Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001).

1 Turning to the allegations in plaintiffs' complaint, defendants argue that the
2 complaint fails to state a claim for three reasons: (1) the alleged misrepresentations are
3 not pled with sufficient particularity because plaintiffs do not connect each purported
4 misstatement to a specific reason why the statement was misleading; (2) none of the
5 alleged statements is actionable; and (3) plaintiffs' allegations fail to give rise to a
6 compelling inference of scienter.²⁸ Pursuant to the Ninth Circuit's guidance, the court
7 will analyze defendants' first and third arguments together.

8 **1. Plaintiffs' allegations do not satisfy Rule 9(b)'s or the PSLRA's**
9 **heightened pleading requirements.**

10 Count I of the complaint contains boilerplate conclusions that defendants made
11 unspecified misleading statements and/or omitted material facts "as specified herein."²⁹
12 Section V of the complaint is captioned "Defendants' False and Misleading Statements"
13 and contains 29 pages of allegations sorted into seven subsections that correspond
14 with the seven consecutive financial calendar quarters to which the statements pertain,
15 starting with the Third Quarter ("Q3") of 2011. Each subsection concludes with a
16 paragraph that purports to list all of the reasons why the statements referenced in the
17 subsection were false and misleading when made. These reasons can be boiled down
18 to two: (1) defendants failed to disclose that Eagle Ford's explosive growth in revenue
19 and profitability was unsustainable because it was largely the result of the illicit bill
20 padding scheme;³⁰ and (2) Nuverra's "sweetheart deal" with EOG caused Nuverra to
21 operate at a loss.³¹

24 ²⁸Doc. 49 at 9–21.

25 ²⁹Doc. 43 at 78 ¶ 217.

26 ³⁰Doc. 43 at 31 ¶ 96(a); 35 ¶ 109(a) (verbatim same).

27 ³¹Doc. 43 at 35 ¶ 109(b); 40 ¶ 118(a) (verbatim same); 45 ¶ 133(a) (same); 48 ¶ 144(a)
28 (same); 52 ¶ 153(a) (same); 55 ¶ 161(a) (same).

1 **a. Plaintiffs fail to adequately plead a claim regarding**
2 **defendants' failure to disclose the alleged bill padding**
3 **scheme.**

4 Plaintiffs highlight the complaint's allegations regarding Q3 2011 as an example
5 of how the complaint satisfies the PSLRA's particularity requirements. They explain
6 that paragraphs 84-88 and 92-95 of the complaint "group together Defendants' similar
7 false and misleading statements" related to Q3 2011, each of which involve Nuverra
8 "bragging about Nuverra's significant growth in its core water solutions." Plaintiffs then
9 explain that paragraph 96 of the complaint identifies the reason why each of these
10 statements is false and misleading: Nuverra failed to disclose that its growth was
11 unsustainable because it was based on the "illicit and widespread bill padding
12 scheme"³² involving employees at E&P companies who colluded with Nuverra drivers to
13 sign the drivers' falsified time sheets.³³ Further, plaintiffs argue that they adequately
14 pleaded the required scienter at various other locations in the complaint.³⁴

14 Paragraphs 84-88 and 92-95 of the complaint allege:

- 15 • Statements made by an unidentified author of a Nuverra press release
16 regarding Nuverra's "strong organic growth," its efforts to expand its
17 geographic reach and market share by acquiring permits and wells in
18 additional shale areas, and its addition of cost-saving natural-gas-
19 powered vehicles.
- 20 • Defendant Heckmann's statements during the 3Q 2011 conference call
21 that Nuverra had added 50 trucks to its fleet, increased its frac tank
22 inventory by 200 units, and added a disposal well at the Eagle Ford site.
23 Heckmann also stated that Nuverra planned to add two additional

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26 ³²Doc. 54 at 6-7.

27 ³³Doc. 43 at 20 ¶ 63.

28 ³⁴Doc. 54 at 16-20.

1 disposal wells at the Eagle Ford site by year-end and that Nuverra's "core
2 asset" is its disposal wells.

- 3 • Statements made by an unidentified author of Nuverra's 3Q 2011 Form
4 10-Q that Nuverra's strategy was to continue to build its business "through
5 organic growth and acquisitions," that Nuverra had 450 trucks, 1,100 frac
6 tanks, and 23 disposal wells in the Haynesville and Eagle Ford shale
7 areas, and that Nuverra was in the process of acquiring additional
8 disposal wells.
- 9 • Heckmann's Sarbanes-Oxley certification that he had reviewed Nuverra's
10 3Q 2011 Form 10-Q and it did not contain any untrue statements or
11 omissions of material facts and it fairly presented the financial condition
12 and operating results of the company.
- 13 • Heckmann's statements at a November 16, 2011 investment conference
14 that Nuverra had expanded into the Eagle Ford basin and had "70 trucks
15 or so down there." Heckmann also stated that Nuverra expected to add a
16 pipeline at Eagle Ford in the future.
- 17 • A statement made by an unidentified speaker at an unidentified date at an
18 unidentified location that Nuverra was investing in a water treatment plant
19 in Eagle Ford and that Nuverra hoped to pipe treated water out to
20 producers to use for fracking purposes.
- 21 • Heckmann's statements at a November 30, 2011 energy conference
22 regarding Nuverra's expansion in the Eagle Ford site, including adding
23 wells and a potential pipeline and water treatment facility in the future.

24 In sum, plaintiffs allege that because defendants did not disclose the unsustainable
25 nature of Nuverra's profits, any discussion of Nuverra's operations at the Eagle Ford
26 site or its plans for future growth necessarily misled investors.

27 These allegations fail to state a claim with sufficient particularity because
28 plaintiffs do not link each allegedly misleading statement with a specific reason or

1 reasons why it is misleading. Instead, plaintiffs list numerous statements, list the
2 omitted information (the bill padding scheme), and then provide the blanket conclusion
3 that the omission rendered all of the statements false or misleading without explaining
4 why. This is insufficient.³⁵ For each allegedly misleading statement, plaintiffs must
5 plead with particularity the circumstances that made disclosure of the omitted fact
6 necessary in order to make the statement not misleading.³⁶ Here, plaintiffs do not
7 explicitly state how the omitted information even relates to each alleged statement, let
8 alone why it renders each statement misleading.

9 Plaintiffs also fail to plead scienter with particularity. Although plaintiffs argue
10 that they have “provided particularized allegations regarding what Defendants knew and
11 when,”³⁷ they do not allege that any particular defendant knew about the alleged bill
12 padding scheme, or had access to any specific information about it. Alternatively,
13 plaintiffs appear to argue that the individual defendants must have been aware of the
14 bill padding scheme because the Eagle Ford site was so important to the company and
15 the defendants attended regular meetings where that site was discussed. While it is
16 true that in some circumstances knowledge of a material fact may be inferred where the
17 gravity of the fact renders it so obvious that the defendant “must have been aware of
18 it,”³⁸ plaintiffs have failed to state such circumstances.

19 Plaintiffs fail to identify who participated in the alleged bill padding scheme, who
20 knew about it, when it began, how long it lasted, to what extent any particular bill was

22 ³⁵15 U.S.C. § 78u-4(b)(1)(B); 17 C.F.R. § 240.10b-5(b). See also *May v. Borick*, No.
23 CV 95-8407 LGB, 1997 WL 314166, at *8 (C.D. Cal. Mar. 3, 1997) (“Plaintiff . . . fails to specify,
24 for any individual statement, how and why it was fraudulent or misleading at the time it was
made, leaving Defendants and the Court to piece together Plaintiff’s claims with regard to
particular statements.”).

25 ³⁶17 C.F.R. § 240.10b-5(b).

26 ³⁷Doc. 54 at 21.

27 ³⁸*Zucco Partners*, 552 F.3d at 991; *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d
28 702, 704 (7th Cir. 2008) (“[K]nowledge is inferable from gravity.”).

1 falsified, or to what extent Nuverra’s revenues as a whole were enhanced by this
2 practice. The mere allegation that the individual defendants attended meetings where
3 the status of Eagle Ford was discussed, standing alone, does not create a compelling
4 inference that the bill padding scheme was discussed at those meetings or would have
5 been obvious to those in attendance. Similarly, the mere fact that the Eagle Ford
6 project was critically important to the company does not, standing alone, create a
7 compelling inference that a bill padding scheme of unknown magnitude would have
8 been readily apparent to management. Further, when viewed as a whole, the alleged
9 facts do not combine to create a strong inference that defendants knew about the bill
10 padding scheme. Without stating that defendants knew about the scheme or providing
11 any plausible reasons why defendants must have known about it, the only plausible
12 inference is that defendants were unaware of the scheme when the statements were
13 made.³⁹ Count I of plaintiffs’ complaint is dismissed to the extent it relies on
14 defendants’ failure to disclose the alleged bill padding scheme.

15 **b. Plaintiffs fail to adequately plead a claim regarding Nuverra’s**
16 **“sweetheart deal” with EOG that caused Nuverra to operate at**
17 **a loss.**

18 Plaintiffs also allege that a combined 50 paragraphs of defendants’ statements,⁴⁰
19 which related to six financial quarters (Q4 2011 through Q1 2013), were rendered false
20 and misleading because “EOG’s sweetheart deal, which accounted for more than half
21 of Nuverra’s business at the Eagle Ford site,” caused Eagle Ford to operate at a loss
22 each month.⁴¹ As with plaintiffs’ allegations regarding the bill padding scheme, these
23 claims fail because they do not link each allegedly misleading statement with a specific
24 reason or reasons why it is false or misleading. Instead, the complaint rattles off one
25 allegedly false-and-misleading statement after another (including, apparently, “We have

26 ³⁹*Zucco Partners*, 552 F.3d at 991.

27 ⁴⁰Doc. 43 at ¶¶ 97-105, 107-08, 110-16, 119-30, 134-40, 143, 145-49, 152, and 154-59.

28 ⁴¹*Id.* at ¶¶ 109(a), 118(a), 133(a), 144(a), 153(a), and 161(a).

1 two permits,⁴² “We hired 175 truck drivers,”⁴³ and “The Company now has 5 disposal
2 wells”⁴⁴), alleges that Eagle Ford was operating at a loss, and then provides the blanket
3 conclusion that each statement was false and misleading because of that fact without
4 providing an individualized explanation of how or why. This is insufficient.⁴⁵ Plaintiffs
5 cannot merely conclude that Eagle Ford’s unprofitability rendered every statement false
6 and misleading. For each statement alleged, plaintiffs must specifically state whether
7 Eagle Ford’s alleged unprofitability makes that statement false, or whether the omission
8 of that fact makes the statement misleading, and why. For example, if Heckmann’s
9 August 6, 2012 statement that “Eagle Ford revenues were up 57% over last quarter”⁴⁶
10 was not true, plaintiffs must say so and state what the truth was. Or, if plaintiffs are
11 alleging that his August 6 statement was misleading by omission, plaintiffs must say so
12 and state why the omitted fact rendered the statement misleading. But plaintiffs cannot
13 do as they have done: group voluminous statements together, state a fact, and then
14 conclude that the fact renders all of the preceding statements false and misleading
15 without explaining why on an individualized basis. Complaints such as these fail to
16 satisfy either Rule 9(b) or the PSLRA’s heightened pleading requirements. The
17 remainder of Count I is dismissed.

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21 ⁴²*Id.* at ¶ 100.

22 ⁴³*Id.* at ¶ 111.

23 ⁴⁴*Id.* at ¶ 134.

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25 ⁴⁵15 U.S.C. § 78u-4(b)(1)(B); 17 C.F.R. § 240.10b-5(b). See also *May v. Borick*, No.
26 CV 95-8407 LGB, 1997 WL 314166, at *8 (C.D. Cal. Mar. 3, 1997) (“Plaintiff . . . fails to specify,
27 for any individual statement, how and why it was fraudulent or misleading at the time it was
made, leaving Defendants and the Court to piece together Plaintiff’s claims with regard to
particular statements.”).

28 ⁴⁶*Id.* at ¶ 120.

1 the date of this order. If a timely motion to amend is not filed, this case will be closed.
2 However, failure to file a timely motion to amend shall not preclude plaintiffs from filing
3 a new action based on a sufficient complaint more than 21 days from the date of this
4 order.

5 DATED this 17th day of November, 2014.

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7 /s/ JOHN W. SEDWICK
8 SENIOR UNITED STATES DISTRICT JUDGE
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