

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

LIFELINE LEGACY HOLDINGS, LLC,
Plaintiff,
v.
OZY MEDIA, INC., SAMIR RAO, and
CARLOS WATSON,
Defendants.

Case No. 21-cv-07751-BLF

**ORDER GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT WITH LEAVE TO
AMEND IN PART AND WITHOUT
LEAVE TO AMEND IN PART**

[Re: ECF 31]

Plaintiff LifeLine Legacy Holdings, LLC sues Defendants OZY Media, Inc., Samir Rao, and Carlos Watson for securities fraud under federal and state laws. OZY Media has filed a motion to dismiss the first amended complaint (“FAC”) under Federal Rule of Civil Procedure 12(b)(6), which is joined by Rao and Watson.

The motion to dismiss is GRANTED WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART.

I. BACKGROUND¹

OZY Media is a digital media company specializing in news, podcasts, television, and film. FAC ¶ 13, ECF 18. The company was founded by Rao and Watson in 2013. *Id.* Rao is the Chief Operating Officer, Watson is the Chief Executive Officer, and both serve on the company’s Board of Directors. *Id.* ¶¶ 11-13.

Rao and Watson solicited LifeLine to invest in OZY Media. FAC ¶ 14. In February 2021, they reached out to LifeLine via telephone and electronic correspondence, touting OZY Media’s

¹ LifeLine’s well-pled factual allegations are accepted as true for purposes of the motion to dismiss. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

1 financial performance and claiming interest from large institutional investors such as Goldman
2 Sachs. *Id.* On February 15, 2021, Watson informed LifeLine that Goldman Sachs had declined to
3 invest, but stated that other institutional investors were interested. *Id.* LifeLine entered into a
4 Stock Purchase Agreement (“SPA”) with OZY Media on February 24, 2021, for the purchase of
5 approximately \$2 million of Series C Preferred Shares. *Id.* ¶ 15. In April and May 2021, Rao and
6 Watson solicited further investments from LifeLine, making oral and written representations that a
7 Google affiliate was leading the Series D financing by investing approximately \$30 million in
8 OZY Media. *Id.* ¶ 18. LifeLine entered into a second SPA with OZY Media on May 13, 2021, for
9 the purchase of approximately \$250,000 of Series D Preferred Shares. *Id.* ¶¶ 15-19.

10 LifeLine claims that Defendants failed to disclose material information regarding OZY
11 Media prior to execution of the SPAs. FAC ¶¶ 6, 22-26. Specifically, LifeLine alleges that, “At
12 no time prior to LifeLine’s execution of the Series C and Series D SPAs did Defendants disclose
13 to LifeLine that Rao attempted to impersonate an executive of YouTube in an effort to obtain a
14 substantial investment from Goldman Sachs, or that, as a result of Rao’s fraudulent conduct,
15 Goldman Sachs declined to invest in Ozy Media and that Ozy Media was under investigation by
16 government agencies.” *Id.* ¶ 24. Rao’s actions became publicly known in September 2021. *Id.* ¶
17 26. OZY Media’s Board of Directors initially decided to wind down the company’s affairs, but
18 Watson subsequently announced that the company would continue operations. *Id.*

19 LifeLine filed this suit against Ozy Media and Rao on October 4, 2021, and thereafter
20 amended as of right to add Watson as a defendant. *See* Compl., ECF 1; FAC, ECF 18. The FAC
21 asserts the following claims: (1) violations of § 10(b) of the Securities Exchange Act of 1934
22 (“Exchange Act”) and Rule 10b-5 against OZY Media; (2) violations of § 10(b) of the Exchange
23 Act and Rule 10b-5 against Rao; (3) violations of § 10(b) of the Exchange Act and Rule 10b-5
24 against Watson; (4) violations of California Corporations Code § 25401 against OZY Media; (5)
25 violations of California Corporations Code § 25401 against Rao; (6) violations of California
26 Corporations Code § 25401 against Watson; and (7) fraud by concealment against all Defendants.
27 LifeLine seeks rescission of the SPAs and damages. FAC ¶¶ 8, 32, 49.

28

1 **II. LEGAL STANDARD**

2 “A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a
3 claim upon which relief can be granted tests the legal sufficiency of a claim.” *Conservation Force*
4 *v. Salazar*, 646 F.3d 1240, 1241-42 (9th Cir. 2011) (internal quotation marks and citation omitted).
5 While a complaint need not contain detailed factual allegations, it “must contain sufficient factual
6 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
7 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A
8 claim is facially plausible when it “allows the court to draw the reasonable inference that the
9 defendant is liable for the misconduct alleged.” *Id.*

10 When evaluating a Rule 12(b)(6) motion, the district court is limited to consideration of the
11 allegations of the complaint, documents incorporated into the complaint by reference, and matters
12 which are subject to judicial notice. *See Louisiana Mun. Police Employees’ Ret. Sys. v. Wynn*, 829
13 F.3d 1048, 1063 (9th Cir. 2016).

14 **III. DISCUSSION**

15 Defendants assert that LifeLine’s federal securities claims are not adequately pled, and that
16 because the federal securities claims fail, so too do the state law claims based on the same
17 allegations. In opposition, LifeLine contends that its claims are adequately pled. The Court first
18 discusses the federal securities claims, and then it takes up the state law claims.

19 **A. Federal Claims**

20 Claims 1, 2, and 3 are asserted under § 10(b) of the Exchange Act and Rule 10b-5. Claim
21 1 is asserted against OZY Media, Claim 2 is asserted against Rao, and Claim 3 is asserted against
22 Watson. The elements of a claim under § 10(b) and Rule 10b-5 are: “(1) a material
23 misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the
24 misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the
25 misrepresentation or omission; (5) economic loss; and (6) loss causation.” *In re Volkswagen*
26 *“Clean Diesel” Mktg., Sales Pracs., & Prod. Liab. Litig.*, 2 F.4th 1199, 1203 (9th Cir. 2021)
27 (internal quotation marks and citation omitted). “If one of these elements is missing, the claim
28 fails.” *Id.*

1 Defendants contend that LifeLine has not alleged a material misrepresentation or omission,
2 scienter, reliance, economic loss, or loss causation. LifeLine asserts that these elements are
3 adequately alleged.

4 **1. Material Misrepresentation or Omission**

5 The FAC alleges that Rao and Watson made several oral representations to LifeLine
6 regarding OZY Media, and the § 10(b) claims appear to be based at least in part on those oral
7 representations. FAC ¶¶ 14, 18, 30, 36, 42. However, LifeLine’s counsel clarified at the hearing
8 that the § 10(b) claims are not based on any oral representations, but instead are based on alleged
9 material omissions. *See* Hrg. Tr. 17:8-18, ECF 55.

10 Section 10(b) and Rule 10b-5 “do not create an affirmative duty to disclose any and all
11 material information.” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011). “The
12 person who omitted the material information must have had a duty to disclose it to the person
13 supposedly harmed by the omission.” *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 939 (9th
14 Cir. 2009). “Such a duty may arise from a relationship of trust and confidence between parties to
15 a transaction.” *Id.* (internal quotation marks and citation omitted). Alternatively, disclosure is
16 required “when necessary to make . . . statements made, in the light of the circumstances under
17 which they were made, not misleading.” *Matrixx*, 563 U.S. at 44 (internal quotation marks and
18 citation omitted).

19 Claim 7 of the FAC, for fraud by concealment under state law, alleges that “a fiduciary and
20 confidential relationship existed between Defendants, and each of them, and Plaintiff.” FAC ¶ 61.
21 That allegation does not appear in Claims 1-3 for federal securities fraud. LifeLine’s counsel
22 stated at the hearing that its claims are not premised on an alleged fiduciary relationship, and that
23 the allegations of breach of fiduciary duty “will be withdrawn.” Hrg. Tr. 17:8-18. Counsel stated
24 that “this is a case about the failure to disclose the conduct that rendered representations in the
25 actual document itself[,] the Stock Purchase Agreements, misleading or false.” *Id.* The Court
26 therefore focuses on the representations and warranties of the SPAs in evaluating the adequacy of
27 LifeLine’s claims. The Court understands LifeLine to be withdrawing its fiduciary duty theory as
28 to all claims, including Claim 7 for fraud by concealment.

1 The FAC identifies only one representation and warranty that is set forth in the SPAs: “to
2 the Company’s knowledge, the Company is not in violation of any federal or state statute, rule or
3 regulation applicable to the Company.” FAC ¶¶ 16, 20. LifeLine does not explain how this
4 statement was rendered false or misleading by Defendants’ failure to disclose the Rao
5 impersonation and resulting government investigations. LifeLine does not identify any statute,
6 rule, or regulation that was violated by Rao’s impersonation of a YouTube executive. Nor has
7 LifeLine tied the alleged failure to disclose government investigations to the alleged representation
8 and warranty. LifeLine must clearly connect the alleged nondisclosure of investigations to the
9 specific statement allegedly rendered false or misleading by that nondisclosure. *See Metzler Inv.*
10 *GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1071 (9th Cir. 2008) (falsity not sufficiently
11 pled where “the TAC’s connection between the falsity of these statements and the regulatory
12 investigations is extraordinarily vague”).

13 In its opposition to the motion, LifeLine identifies *other* representations and warranties in
14 the SPAs that LifeLine contends were rendered false or misleading by Defendants’ failure to
15 disclose. When evaluating a Rule 12(b)(6) motion, the Court cannot consider representations and
16 warranties that are not alleged in the FAC.

17 As currently framed, Claims 1, 2, and 3 are subject to dismissal for failure to allege an
18 actionable omission.

19 **2. Scienter**

20 “[T]o adequately plead scienter, a complaint must state with particularity facts giving rise
21 to a strong inference that the defendant acted with the required state of mind.” *Prodanova v. H.C.*
22 *Wainwright & Co., LLC*, 993 F.3d 1097, 1106 (9th Cir. 2021) (internal quotation marks and
23 citation omitted). Where the plaintiff claims that the defendant omitted material facts necessary to
24 make a statement not misleading, the court “must first determine who was the maker of the
25 statement for purposes of Section 10(b) and Rule 10b-5(b) and whether the complaint adequately
26 alleged that the maker omitted material information knowingly, intentionally, or with deliberate
27 recklessness.” *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687, 705 (9th Cir. 2021).

28 LifeLine’s theory is that Defendants failed to disclose material facts – the Rao

1 impersonation and government investigations – that were necessary to make certain
2 representations of the SPAs not misleading. The FAC refers to only one such representation: “to
3 the Company’s knowledge, the Company is not in violation of any federal or state statute, rule or
4 regulation applicable to the Company.” FAC ¶¶ 16, 20. Thus, the Court’s scienter inquiry is
5 limited to identifying the maker of that statement and determining whether the FAC adequately
6 alleges that the maker “omitted material information knowingly, intentionally, or with deliberate
7 recklessness.” *In re Alphabet*, 1 F.4th at 705.

8 LifeLine has not alleged who signed the SPAs, and has not attached them to the FAC.
9 Defendants have submitted the SPAs, however, and the Court may consider them under the
10 incorporation by reference doctrine. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).
11 The SPAs were signed by Watson as CEO of OZY Media. *See Eidelman Decl. Exhs. B, C, ECF*
12 33. Accordingly, both Watson and OZY Media may be considered makers of the statement at
13 issue. *See In re Alphabet*, 1 F.4th at 705.

14 The FAC alleges that Watson knew about the Rao impersonation as of February 2, 2021 –
15 a date prior to execution of the SPAs – but the FAC does not allege that Watson knew Rao’s
16 conduct violated a statute, rule, or regulation applicable to the company. FAC ¶ 22. In fact, as
17 discussed above in section III.A.1., the FAC does not even allege that Rao’s conduct *did* violate a
18 statute, rule, or regulation. Moreover, while the FAC alleges that Watson knew “that government
19 agency investigations of the company’s and Rao’s actions had been initiated,” the FAC does not
20 say when Watson became aware those investigations. *Id.* Finally, knowledge of investigations
21 does not equate to knowledge that a statute, rule, or regulation has been violated. Consequently,
22 LifeLine’s allegations are insufficient to show that Watson acted with the requisite scienter.

23 As to OZY Media, the scienter of its senior controlling officers may be attributed to it. *See*
24 *In re Alphabet*, 1 F.4th at 705. Scienter is not adequately alleged as to Watson for the reasons
25 discussed above. Nor is scienter adequately alleged as to Rao. While Rao clearly knew about his
26 own impersonation of a YouTube executive, the FAC does not allege facts showing that Rao knew
27 that his conduct violated a statute, rule or regulation. Accordingly, LifeLine’s allegations are
28 insufficient to show the requisite scienter as to OZY Media.

1 LifeLine argues that scienter is established by the FAC’s allegations that Watson and Rao
2 had actual knowledge of Rao impersonation. The flaw in LifeLine’s argument is that it is not
3 tethered to the specific representation of the SPAs that LifeLine claims gave rise to a duty to
4 disclose. See *In re Alphabet*, 1 F.4th at 705 (scienter inquiry must focus on the statement that was
5 made and allegedly rendered false or misleading by omissions).

6 Defendants contend that there is an additional deficiency in LifeLine’s scienter allegations,
7 namely, the failure to plead a plausible motive for the alleged material omissions. In the Ninth
8 Circuit, allegation of a plausible motive generally is required to plead scienter. See *Prodanova v.*
9 *H.C. Wainwright & Co., LLC*, 993 F.3d 1097, 1106-08 (9th Cir. 2021). “[A] complaint lacking a
10 plausible motive allegation may still meet its burden of pleading a strong inference of scienter.”
11 *Id.* at 1108. “But the lack of a plausible motive certainly makes it much less likely that a plaintiff
12 can show a strong inference of scienter.” *Id.* The Ninth Circuit has stated that “[o]nly where a
13 complaint otherwise asserts compelling and particularized facts showing fraudulent intent or
14 deliberate recklessness will we overlook the failure to allege a plausible motive.” *Id.* The FAC
15 does not use the word “motive.” In their opposition, LifeLine argues that the FAC discloses a
16 pecuniary motive for not disclosing Rao’s misconduct, that is, the desire to obtain financing from
17 LifeLine. See Opp. at 13, ECF 37. “[A]llegations of routine corporate objectives such as the
18 desire to obtain good financing and expand are not, without more, sufficient to allege scienter; to
19 hold otherwise would support a finding of scienter for any company that seeks to enhance its
20 business prospects.” *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 884 (9th Cir. 2012).
21 LifeLine’s failure to allege a plausible motive under Ninth Circuit standards is an additional basis
22 for finding the scienter allegations to be inadequate.

23 Claims 1, 2, and 3 are subject to dismissal for failure to allege scienter with adequate
24 particularity.

25 **3. Reliance**

26 “Reliance establishes the causal connection between the alleged fraud and the securities
27 transaction.” *Desai*, 573 F.3d at 939. “To say that a plaintiff relied on a defendant’s bad act is to
28 say that the defendant’s actions played a substantial part in the plaintiff’s investment decision.”

1 *Id.* (internal quotation marks and citation omitted). Reliance may be presumed in certain limited
2 circumstances. *See In re Volkswagen*, 2 F.4th at 1203-04. Pursuant to the Supreme Court’s
3 decision in *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), the Ninth Circuit has
4 “recognized the presumption of reliance is generally available to plaintiffs alleging violations of
5 section 10(b) based on omissions of material fact.” *In re Volkswagen*, 2 F.4th at 1204. However,
6 “the *Affiliated Ute* presumption is limited to cases that primarily allege omissions and present
7 plaintiffs with the difficult task of proving a speculative negative.” *Id.* (internal quotation marks
8 and citation omitted). Such “pure omissions” cases are distinguishable from “mixed” cases
9 involving both omissions and affirmative misrepresentations. *See id.* The district court must
10 “analytically characterize” the case before it “as either primarily a nondisclosure case (which
11 would make the presumption applicable), or a positive misrepresentation case (where the
12 presumption would be unavailable).” *Id.* at 1204-05 (internal quotation marks and citation
13 omitted).

14 LifeLine asserts that this is an omissions case, and therefore that it is entitled to a
15 presumption of reliance. Defendants contend that this is a mixed case, involving both alleged
16 omissions and misrepresentations, and therefore that the presumption does not apply. The Court
17 agrees with Defendants. LifeLine’s theory is that certain representations and warranties in the
18 SPAs were false or misleading because Defendants failed to disclose the Rao impersonation and
19 the government investigations. Based on LifeLine’s framing of its claims, the Court finds that
20 LifeLine must allege facts showing that it relied on the false or misleading representations in the
21 SPAs when making its investment decision. LifeLine has not alleged facts showing that it relied
22 on the sole representation of the SPAs identified in the complaint – that the Company was not in
23 violation of any statute, rule or regulation – in deciding to invest in OZY Media.

24 Claims 1, 2, and 3 are subject to dismissal for failure to allege reliance.

25 **4. Economic Loss / Loss Causation**

26 “The causation requirement for Rule 10b-5 actions includes both transaction causation, that
27 the violations in question caused the plaintiff to engage in the transaction, and loss causation, that
28 the misrepresentation or omissions caused the harm.” *Livid Holdings Ltd. v. Salomon Smith*

1 *Barney, Inc.*, 416 F.3d 940, 949 (9th Cir. 2005) (internal quotation marks and citation omitted).

2 In the present case, LifeLine alleges that had it known about the Rao impersonation, “it
3 would never have invested in Ozy Media and LifeLine is now, therefore, entitled to rescission of
4 its investments and/or damages all as provided under applicable law.” FAC ¶ 8. With respect to
5 damages, LifeLine alleges that “Rao’s fraudulent conduct, once disclosed resulted in damage to
6 the value of Ozy Media and, as a result, Plaintiff has incurred damage in an amount according to
7 proof at trial, but not less than the difference between the amount paid by Plaintiff for the shares in
8 Ozy Media and the value of the shares following the disclosure of Rao’s fraudulent conduct, plus
9 interest thereon.” FAC ¶ 38.

10 Defendants argue that these allegations are insufficient to show that LifeLine suffered
11 economic loss caused by Defendants’ conduct. LifeLine argues that its allegations are sufficient,
12 relying on *Livid Holdings*, in which the plaintiff alleged that it would not have purchased stock in
13 a privately held company but for the concealment of the company’s dire financial situation. *See*
14 *Livid Holdings*, 416 F.3d at 949. The company eventually went bankrupt, causing the plaintiff to
15 lose the entire value of its investment. *See id.* The Ninth Circuit found the plaintiffs’ allegations
16 sufficient to withstand a Rule 12(b)(6) motion. *See id.* *Livid Holdings* is distinguishable from the
17 present case, because the plaintiff in *Livid Holdings* identified specific economic loss caused by
18 the defendants’ conduct – loss of the plaintiff’s investment. Here, LifeLine has not alleged facts
19 showing similar loss or even that the value of its shares has decreased.

20 Lifeline also relies on *WPP Lux*, in which the plaintiff alleged that it bought shares in a
21 privately held company while the company’s founders secretly were selling their own shares. *See*
22 *WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, 655 F.3d 1039, 1054 (9th Cir. 2011),
23 *abrogated by Lorenzo v. Sec. & Exch. Comm’n*, 139 S. Ct. 1094 (2019). The plaintiff alleged that
24 when the company revealed that its founders had engaged in this “pump and dump” scheme, the
25 plaintiff’s shares in the company immediately became worthless, as no investor would buy them
26 under those circumstances. *See id.* The Ninth Circuit found these allegations to be adequate,
27 holding that “[a]lthough these allegations do not provide detailed share prices, the number of
28 shares currently held, or whether attempts to sell the Spot Runner shares were made, the amended

1 complaint includes a statement of loss causation sufficient to provide some assurance that the
2 theory has a basis in fact.” *Id.* In contrast, LifeLine has not alleged facts showing that its
3 conclusory allegation of economic loss has a basis in fact.

4 While LifeLine need not allege a great amount of factual detail, it must allege facts
5 sufficient to provide some assurance that it suffered economic loss as a result of Defendants’
6 alleged material omissions.

7 Claims 1, 2, and 3 are subject to dismissal for failure to allege economic loss and loss
8 causation.

9 **5. Conclusion Re Federal Claims**

10 For the reasons discussed above, Defendants’ motion to dismiss is GRANTED as to
11 Claims 1-3, WITH LEAVE TO AMEND to the extent the claims are based on the theory that the
12 alleged omissions rendered false and misleading representations and warranties in the SPAs, and
13 WITHOUT LEAVE TO AMEND to the extent the claims are based on oral representations or an
14 alleged fiduciary duty.

15 **B. State Law Claims**

16 Claims 4, 5, and 6 are asserted under California Corporations Code § 25401, and Claim 7
17 is for fraud by concealment under California common law. Defendants argue that because these
18 state law claims merely repackage LifeLine’s federal securities claims, dismissal of the federal
19 securities claims warrants dismissal of the state law claims as well. Defendants’ argument is
20 supported by decisions from district courts within the Ninth Circuit. *See, e.g., Mohebbi v. Khazen*,
21 50 F. Supp. 3d 1234, 1252 (N.D. Cal. 2014) (“The Court agrees with Defendants that Plaintiff’s
22 inability to state a claim for fraud under Section 10b-5 is also fatal to his § 25401 claims.”);
23 *Wallack v. Idexx Lab’ys, Inc.*, No. 11CV2996-GPC KSC, 2013 WL 5206190, at *12 (S.D. Cal.
24 Sept. 12, 2013) (finding dismissal of state securities claims and fraud claims warranted following
25 dismissal of federal securities claims).

26 Accordingly, Defendants’ motion to dismiss is GRANTED as to Claims 4-7, WITH
27 LEAVE TO AMEND to the extent the claims are based on the theory that the alleged omissions
28 rendered false and misleading representations and warranties in the SPAs, and WITHOUT


1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LEAVE TO AMEND to the extent the claims are based on oral representations or an alleged fiduciary duty.

IV. ORDER

- (1) The motion to dismiss is GRANTED, WITH LEAVE TO AMEND IN PART AND WITHOUT LEAVE TO AMEND IN PART, as stated herein;
- (2) Any amended pleading shall be filed by July 29, 2022. Leave to amend is limited to the defects identified in this order. LifeLine may not add new claims or parties absent express leave of the Court.
- (3) This order terminates ECF 31.

Dated: June 13, 2022


BETH LABSON FREEMAN
United States District Judge