

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  
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 62]**

**I. MOTION PRESENTED**

At docket 62 plaintiffs Jewyl A. Stevens, *et al.* (collectively, “plaintiffs”) move for leave to amend their complaint pursuant to Federal Rule of Civil Procedure 15(a)(2). Defendants Nuverra Environmental Solutions, Inc., *et al.* (collectively, “Nuverra”) oppose at docket 63. Plaintiffs reply at docket 66. 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 (“Complaint”) alleging federal securities law violations. Count I alleges violations of Section 10(b) of the Securities Exchange Act of 1934 (“the Act”) and SEC Rule 10b-5; Count II alleges violations of Section 20(a) of the Act. 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

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

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

---

21 <sup>1</sup>Doc. 43 at 2 ¶ 2.

22 <sup>2</sup>*Id.* at 14 ¶ 46.

23 <sup>3</sup>*Id.* at 2 ¶ 3.

24 <sup>4</sup>*Id.* at 19 ¶ 63.

25 <sup>5</sup>*Id.* at 20 ¶ 67.

26 <sup>6</sup>*Id.*

27 <sup>7</sup>*Id.* at 20 ¶ 65.

1 At docket 61 the court dismissed the Complaint pursuant to Rule 12(b)(6) for  
2 failure to state a claim. The court held that plaintiffs' Count I violations are not pled with  
3 sufficient particularity to comply with Rule 9(b) or the heightened pleading requirements  
4 of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), and that this  
5 deficiency also dooms plaintiffs' Count II allegations. Dismissal was entered without  
6 prejudice to plaintiffs' ability to move to amend the Complaint.

7 Plaintiffs' motion to amend is currently before the court. Their 77-page proposed  
8 Amended Complaint ("PAC") is at docket 62-1, which is accompanied at docket 62-3 by  
9 a 28-page appendix of 49 allegedly false and misleading statements made by Nuverra.

### 10 **III. STANDARD OF REVIEW**

11 Rule 15(a) states that if the period for amending a pleading as a matter of course  
12 has expired "a party may amend its pleading only with the opposing party's written  
13 consent or the court's leave." "The court should freely give leave when justice so  
14 requires."<sup>8</sup> Rule 15 provides for a very liberal amendment policy.<sup>9</sup> The decision to  
15 permit or deny a motion for leave to amend rests within the sound discretion of the trial  
16 court.<sup>10</sup> In deciding whether to grant leave to amend under Rule 15(a), courts generally  
17 consider the following factors: undue delay, bad faith by the moving party, prejudice to  
18 the opposing party, futility of amendment, and whether the party has previously  
19 amended his pleadings.<sup>11</sup> "Generally, this determination should be performed with all  
20 inferences in favor of granting the motion."<sup>12</sup> The party opposing amendment bears the  
21

---

22 <sup>8</sup>Fed. R. Civ. P. 15(a)(2).

23 <sup>9</sup>*Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

24 <sup>10</sup>See *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 185-86 (9th Cir.1987) (citing  
25 *United States v. Webb*, 655 F.2d 977, 979 (9th Cir.1981)).

26 <sup>11</sup>See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Bonin v. Calderon*, 59 F.3d 815, 845  
27 (9th Cir.1995).

28 <sup>12</sup>*Griggs v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir.1999) (citing *DCD*

1 burden of demonstrating a permissible reason for denying the motion to amend.<sup>13</sup>  
2 Motions for leave to amend should be denied, however, where they appear futile or  
3 legally insufficient.<sup>14</sup>

#### 4 **IV. DISCUSSION**

5 The court dismissed the Complaint because it fails to link any of the allegedly  
6 misleading statements with a specific reason or reasons why the statements are  
7 misleading and insufficiently alleges scienter regarding the bill padding scheme.  
8 Plaintiffs argue that the PAC cures these deficiencies in two main ways. First, the  
9 PAC's appendix lists 49 allegedly misleading statements and provides corresponding  
10 reasons why the statements are false and/or misleading. Second, the PAC includes  
11 substantive facts from four confidential witnesses that enhance the specificity with  
12 which scienter is pled.

13 In opposition, Nuverra does not dispute that the PAC now links each misleading  
14 statement with a purported reason why that statement is misleading. Instead, Nuverra  
15 argues that granting plaintiffs leave to file the PAC would be futile because the new  
16 facts from plaintiffs' confidential witnesses are unreliable, the PAC insufficiently pleads  
17 scienter, and none of the 49 allegedly misleading statements are actionable.

#### 18 **A. Scienter**

19 With regard to scienter, the PSLRA requires plaintiffs' complaint to state facts  
20 "giving rise to a strong inference" that Nuverra acted with the required state of mind.<sup>15</sup>  
21 In other words, the particular facts in the complaint, when taken as a whole, must raise

22 \_\_\_\_\_  
23 *Programs*, 833 F.2d at 186).

24 <sup>13</sup>*DCD Programs*, 833 F.2d at 187; see *Richardson v. United States*, 841 F.2d 993, 999  
25 (9th Cir. 1988) (stating that leave to amend should be freely given unless the opposing party  
makes "an affirmative showing of either prejudice or bad faith").

26 <sup>14</sup>*Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988); *Steckman v. Hart*  
27 *Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998).

28 <sup>15</sup>15 U.S.C. § 78u-4(b)(2)(A).

1 a strong inference that Nuverra intentionally or with deliberate recklessness made false  
2 or misleading statements to investors.<sup>16</sup> For an inference of scienter to be “strong,” it  
3 must be more than merely reasonable or plausible; a reasonable person must be able  
4 to find that the culpable inference is “cogent and at least as compelling as any opposing  
5 inference of nonfraudulent intent.”<sup>17</sup> “Deliberate recklessness means that the reckless  
6 conduct ‘reflects some degree of intentional or conscious misconduct.’”<sup>18</sup> For plaintiffs  
7 to prove that an individual defendant was deliberately reckless they must show that he  
8 “‘had reasonable grounds to believe material facts existed that were misstated or  
9 omitted, but nonetheless failed to obtain and disclose such facts although he could  
10 have done so without extraordinary effort.’”<sup>19</sup>

11 “In considering whether a strong inference of scienter has been pled, ‘the court  
12 must consider *all* reasonable inferences to be drawn from the allegations, including  
13 inferences unfavorable to the plaintiffs.’” On one hand, “allegations of defendants’  
14 ‘hands-on’ management style, their interaction with other officers and employees, their  
15 attendance at meetings, and their receipt of unspecified weekly or monthly reports” are  
16 generally insufficient.<sup>20</sup> But on the other hand, it may be reasonable “to conclude that  
17 high-ranking corporate officers have knowledge of the critical core operation of their  
18 companies.”<sup>21</sup>

19 Nuverra argues that it would be futile to allow the PAC because plaintiffs have  
20 not pled scienter for two reasons. First, Nuverra argues that the facts from confidential  
21

---

22 <sup>16</sup>*Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001).

23 <sup>17</sup>*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

24 <sup>18</sup>*Reese v. Malone*, 747 F.3d 557, 569 (9th Cir. 2014) (quoting *S. Ferry LP, No.2 v.*  
25 *Killinger*, 542 F.3d 776, 782 (9th Cir. 2008)).

26 <sup>19</sup>*Id.* (quoting *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 390 (9th Cir. 2010)).

27 <sup>20</sup>*In re Daou Sys., Inc.*, 411 F.3d 1006, 1022 (9th Cir. 2005).

28 <sup>21</sup>*Reese*, 747 F.3d at 569.

1 witnesses contained in the PAC are generally unreliable and implausible, and therefore  
2 should be given little or no deference.<sup>22</sup> The flaw with this argument is that Nuverra  
3 only specifically challenges one fact attributed to one of plaintiffs' confidential  
4 witnesses, "CW3." The allegations attributed to CW3 merely corroborate allegations  
5 attributed to plaintiffs' primary confidential witnesses, "CW2."<sup>23</sup> Because Nuverra does  
6 not contend that CW2's evidence is unreliable or implausible, Nuverra's argument fails.

7 Second, Nuverra argues that allowing the PAC would be futile because, even if  
8 evidence from plaintiffs' confidential witnesses is considered, the PAC fails to plead a  
9 strong inference of scienter with regard to both the bill padding scheme and the EOG  
10 deal.

### 11 **1. The bill padding scheme**

12 The court in its previous order found that the Complaint fails to sufficiently allege  
13 that any particular defendant knew about the alleged bill padding scheme or had  
14 access to any specific information about it. Additionally, the court observed that the  
15 Complaint does not plead a strong inference of scienter because it does not identify the  
16 magnitude of the scheme or any other facts from which scienter might be inferred.  
17 Plaintiffs argue that the PAC cures these deficiencies.<sup>24</sup> The court disagrees.

18 The PAC alleges that CW2 is a former Nuverra employee who worked as the  
19 Business Unit Manager for the Eagle Ford site from March 2012 until June 2013, and in  
20 that role oversaw "all aspects of Nuverra's day-to-day operations in Eagle Ford."<sup>25</sup>  
21 Around the time that CW2 was promoted to that position, Nuverra entered into the  
22  
23

---

24 <sup>22</sup>Doc. 63 at 6.

25 <sup>23</sup>Doc. 62-1 at 24 ¶¶ 73.

26 <sup>24</sup>Doc. 62 at 6, 12 (citing the PAC at ¶¶ 71, 93-97); *id.* at 11 (citing the PAC at ¶¶ 42, 71-  
27 75, 78-83).

28 <sup>25</sup>Doc. 62-1 at 14 ¶ 42(b).

1 sweetheart EOG deal<sup>26</sup> and hired dozens more drivers to service that account.<sup>27</sup> Also at  
2 around that time, defendant Charles R. Gordon (“Gordon”) handed a directive down to  
3 CW2 that changed the drivers’ pay from a commission-based program to a flat hourly  
4 wage.<sup>28</sup> The PAC alleges that in the five months before this change the drivers were  
5 inflating their time sheets with help from E&P company employees.<sup>29</sup> “Earning a  
6 commission on every hour billed,” the PAC alleges, “Nuverra’s drivers learned to abuse  
7 the system to pad their hours.”<sup>30</sup>

8 As with the Complaint, the PAC also does not allege direct evidence of  
9 scienter—that any individual defendant knew about the alleged scheme. The PAC also  
10 fails to allege facts giving rise to a strong inference of scienter. The details of the bill  
11 padding scheme remain sketchy. Plaintiffs continue to assert that an unspecified  
12 number of unnamed drivers worked out unspecified agreements with an unspecified  
13 number of unnamed E&P employees to sign off on time sheets that had been artificially  
14 inflated by unspecified amounts, causing Nuverra’s aggregate revenues to be artificially  
15 inflated by an unspecified amount.<sup>31</sup> These allegations fall far-short of sufficiently  
16 alleging that any individual defendant acted with scienter under the PSLRA’s  
17 heightened pleading requirements.

18 **2. The EOG deal**

19 Nuverra argues that it would be futile to allow the PAC because plaintiffs also fail  
20 to plead a strong inference of scienter with respect to the EOG deal. The PAC names  
21

---

22 <sup>26</sup>Doc. 62-1 at 22 ¶ 67.

23 <sup>27</sup>Doc. 62-1 at 23 ¶ 71.

24 <sup>28</sup>Doc. 62-1 at 23 ¶ 71.

25 <sup>29</sup>Doc. 62-1 at 32 ¶ 93-94.

26 <sup>30</sup>Doc. 62-1 at 32 ¶ 95.

27 <sup>31</sup>Doc. 62-1 at 32.

1 five individual defendants: Gordon; W. Christopher Chisholm (“Chisholm”); Mark D.  
2 Johnsrud (“Johnsrud”); Richard J. Heckmann (“Heckmann”); and Jay Parkinson  
3 (“Parkinson”). Nuverra contends that the PAC pleads scienter based only on these  
4 defendants’ participation in quarterly meetings and “involvement in other routine  
5 aspects of Eagle Ford’s operations.” This “theory of scienter,” Nuverra argues, is  
6 inadequate as a matter of law.<sup>32</sup> Nuverra is essentially arguing that regardless whether  
7 the individual defendants omitted material facts about the EOG deal, the PAC fails to  
8 allege that each individual had reasonable grounds to know the omitted facts and  
9 consciously chose not to disclose them.

10 Nuverra’s argument is well-taken with respect to Parkinson, Heckmann, and  
11 Johnsrud. Although the PAC alleges that each of these three defendants regularly  
12 attended Nuverra’s quarterly meetings, it fails to identify any specific meeting that they  
13 attended where Eagle Ford’s unprofitability was discussed. More importantly, the PAC  
14 lacks detailed and specific allegations about what was said at any of these meetings.  
15 Instead, the PAC vaguely states that at some unspecified meeting or meetings CW2  
16 “protested the EOG contract and raised concerns” about costs at Eagle Ford. The PAC  
17 does not specify what CW2 said or to whom he said it. The PAC also alleges that when  
18 Eagle Ford made its presentation at each quarterly meeting “underpricing was always a  
19 topic of conversation.”<sup>33</sup> The PAC specifies neither the substance of any of these  
20 conversations nor the participants.

21 Plaintiffs make two additional, insufficient attempts to tie Parkinson, Heckmann,  
22 and Johnsrud to the omitted information about the EOG deal. First, the PAC states that  
23 Johnsrud (along with Gordon) met with EOG management in early 2013.<sup>34</sup> This  
24 allegation is unavailing because the PAC does not specify anything that was discussed

---

25  
26 <sup>32</sup>Doc. 63 at 11.

27 <sup>33</sup>*Id.* at ¶ 82.

28 <sup>34</sup>*Id.* at ¶ 83.

1 at this meeting. Second, the PAC alleges that CW2 “believed that” Heckmann and  
2 Johnsrud received monthly reports on Eagle Ford’s financial affairs from Chisholm and  
3 Gordon,<sup>35</sup> but the PAC does not provide any basis for CW2’s belief. Taken as a whole,  
4 these allegations are insufficient to give rise to a strong inference that Parkinson,  
5 Heckmann, or Johnsrud acted with the required state of mind.

6 The same is not true about the PAC’s allegations against Gordon and Chisholm.  
7 The PAC alleges that CW2 “immediately and repeatedly” told Gordon and Chisholm  
8 that the “lagging revenues resulting from [the EOG deal’s] below-market transport  
9 pricing (and even free frac tank rentals) could not sustain the operation’s cost  
10 structure,” and in response Gordon told CW2 to “keep quiet.”<sup>36</sup> Plaintiffs also allege  
11 that CW2, Gordon, and Chisholm spoke over the telephone two or three times per week  
12 on average; that “month after month” CW2 complained to Gordon and Chisholm about  
13 the Eagle Ford site’s “underpricing issues and mounting financial losses”; and that  
14 Gordon and Chisholm each admitted on “one particular call” that the EOG’s “below-  
15 cost” contract was a mistake.<sup>37</sup> This sufficiently pleads facts supporting Gordon’s and  
16 Chisholm’s knowledge of the allegedly material omitted facts.

17 In sum, leave to amend is granted with regard to plaintiffs’ claims against Gordon  
18 and Chisholm. With regard to plaintiffs’ claims against any other defendant, leave to  
19 amend is denied with prejudice.

## 20 **B. Whether the PAC Alleges Actionable Statements**

21 Defendants argue that none of the 49 statements listed in plaintiffs’ Appendix C  
22 is actionable because each is either a statement of accurate historical data, a protected  
23 forward-looking statement, or non-actionable puffery. The flaw with this argument is  
24 that Nuverra only specifically identifies three statements that it contends are non-

---

25  
26 <sup>35</sup>*Id.* ¶ 79.

27 <sup>36</sup>Doc. 62-1 at 26 ¶ 78.

28 <sup>37</sup>Doc. 62-1 at 26 ¶¶ 78-79.

1 actionable historical statements, three that are protected forward-looking statements,  
2 and three that are puffery—and none of these statements is attributed to either of the  
3 two remaining defendants. Thus, even if the statements attributed to Gordon and  
4 Chisholm are not actionable, Nuverra has not met its burden of proving as much.

5 **V. CONCLUSION**

6 Based on the preceding discussion, plaintiffs’ motion for leave to amend their  
7 complaint at docket 62 is **GRANTED IN PART AND DENIED IN PART** as follows:  
8 Plaintiffs may file an amended complaint that includes claims against Charles R.  
9 Gordon and W. Christopher Chisholm that are related to Nuverra’s contract with EOG  
10 Resources, Inc. In all other respects, plaintiffs’ motion is denied with prejudice. Within  
11 seven (7) days from the date of this order, plaintiffs shall file a version of the Proposed  
12 Amended Complaint that omits all claims against any defendant other than Charles R.  
13 Gordon and W. Christopher Chisholm and all claims based on the alleged bill padding  
14 scheme. Defendants shall respond to the amended complaint within seven (7) days  
15 from the date it is filed and served.

16 DATED this 12th day of March 2015.

17  
18 /s/ JOHN W. SEDWICK  
19 SENIOR UNITED STATES DISTRICT JUDGE  
20  
21  
22  
23  
24  
25  
26  
27  
28