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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

PETE J. MANGER,
Plaintiff,
v.
LEAPFROG ENTERPRISES, INC., et al.,
Defendants.

Case No. [16-cv-01161-WHO](#)

**ORDER GRANTING MOTON TO
DISMISS**

Re: Dkt. No. 29

In this shareholder derivative lawsuit, plaintiff alleges that defendant Leapfrog Enterprises, Inc. (Leapfrog) and seven of its former Board of Directors members¹ violated three provisions of the Securities and Exchange Act of 1934 by issuing a false and misleading Recommendation Statement, recommending that shareholders of Leapfrog tender their shares pursuant to a Tender Offer from VTech. Defendants move to dismiss, arguing that plaintiff’s Amended Complaint fails to state a claim under Section 14(e) of the Exchange Act because Manger fails to allege with the required specificity which statements in the Recommendation Statement were false or misleading and why, fails to allege facts showing scienter, and fails to allege facts showing loss causation. Defendants also move to dismiss the claim under Section 14(d)(4) because there is no private right of action under that section, and the claim under 20(a) because there is no liability under any other section of the Exchange Act. I agree with defendants. The Section 14(e) and 20(a) claims are **DISMISSED** with leave to amend and the Section 14(d)(4) claim is **DISMISSED** without leave to amend.

¹ The individual defendants are John Barbour (former Chief Executive Officer), William B. Chiasson (former Chairman of the Board), Thomas J. Kalinske (former Vice-Chairman of the Board), E. Stanton Mckee, Jr. (former Chairman of the Audit Committee), Randy O. Rissman (former Chair of the Compensation Committee), Caden Wang (former member of the Audit and Nominating and Corporate Government Committees), and Stephen M. Youngwood (member of the Audit Committee).

BACKGROUND

1
2 In February 2016, Leapfrog, VTech, and VTech’s wholly owned subsidiary Bonita Merger
3 Sub, LLC entered into an agreement and plan of merger (Merger Agreement). Pursuant to the
4 terms of the Merger Agreement, VTech made a Tender Offer on March 3, 2016 (expiring April 1,
5 2016), whereby each LeapFrog share would be cashed out for \$1.00. Amended Complaint (AC) ¶
6 3. In between the announcement of the Merger Agreement and the Tender Offer, LeapFrog
7 disclosed the success of a new product line – the EPIC tablet – and noted in its February 9, 2016
8 10-Q, that EPIC became the “#1 kid’s tablet” in that time period and it accounted for a significant
9 percentage of the company’s sales (between 10% and 18%) during the quarter. AC ¶ 7;
10 Declaration of James M. Wilson, Ex. 1 (3rd Quarter 10-Q) at 23.

11 On March 3, 2016, Leapfrog filed a Schedule 14D-9 Solicitation/Recommendation
12 Statement with the Securities and Exchange Commission and disseminated it to its shareholders.
13 The Recommendation Statement recommended that shareholders agree to the \$1.00 a share
14 Tender Offer. Defendants’ basis and rationale was the company’s “dire” financial straits and
15 impending lack of liquidity. AC ¶¶ 92, 97. Plaintiff alleges that these characterizations of “dire”
16 financial straits and the Statement’s focus on failing products (LeapTV) were misleading because
17 defendants failed to disclose to shareholders in the Recommendation Statement that the EPIC
18 tablet was forecasted to bring in substantial sales and success. AC ¶¶ 7-9. Plaintiff alleges that
19 defendants also failed to conduct “typical valuation analyses” in order to determine whether the
20 Merger Consideration was fair, and failed to secure a proper evaluation of liquidation or asset sale
21 alternatives (other than relying on unqualified evaluations of those options by LeapFrog’s banker
22 Morgan Stanley & Co. LLC). AC ¶¶ 9-11, 101-102. Plaintiff also asserts that shareholders’
23 damages are demonstrated in part by the fact that defendants rejected a competing offer of \$1.10 a
24 share, made by large toy maker MGA, shortly after the Merger Agreement was announced. In
25 sum, plaintiff argues that defendants “affirmatively created an impression of a state of affairs that
26 differed materially from one that actually existed.” Oppo. at 2; AC ¶¶ 70-71.

27 In early April 2016, 56% of outstanding shares were tendered, just enough to effectuate the
28 merger. All Leapfrog shareholders were cashed out of their shares at \$1.00 per share. AC ¶¶ 3,4.

LEGAL STANDARD

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

In deciding whether the plaintiff has stated a claim upon which relief can be granted, the Court accepts the plaintiff’s allegations as true and draws all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). Moreover, in this case, with omissions-based claims asserted under Section 14(e) of the Exchange Act, the heightened pleading requirement of Rule 9(b) applies. *See, e.g., Deutsch v. Flannery*, 823 F.2d 1361, 1362 (9th Cir. 1987) (applying Rule 9(b) to 14(e) claim that tender offer solicitation “failed to disclose” material information).²

If the court dismisses the complaint, it “should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). In making this determination, the court should consider factors such as “the presence or absence of undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies by previous amendments,

² Plaintiff argues that Rule 9(b) does not apply to claims under 14(e), because *Deutsch v. Flannery*, 823 F.2d 1361 (9th Cir. 1987) considered both 10(b) and 14(e) claims and applied the 9(b) standard without separately explaining why it was appropriate with respect to the 14(e) claim. *Oppo.* at 4, n.5. In *Deutsch*, the Ninth Circuit expressly acknowledged the 14(e) claim and nonetheless applied 9(b)’s heightened pleading standard. I will follow suit.

1 undue prejudice to the opposing party and futility of the proposed amendment.” *Moore v. Kayport*
2 *Package Express*, 885 F.2d 531, 538 (9th Cir.1989).

3 **DISCUSSION**

4 **I. SECTION 14(E) CLAIM**

5 Section 14(e) of the Exchange Act prohibits a person from making “any untrue statement
6 of a material fact or omit to state any material fact necessary in order to make the statements
7 made, in the light of the circumstances under which they are made, not misleading, or to engage in
8 any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender offer or
9 request or invitation for tenders, or any solicitation of security holders in opposition to or in favor
10 of any such offer, request, or invitation.” 15 U.S.C. § 78n. In addition to meeting the Rule 9(b)
11 heightened pleadings requirements, under the PSLRA plaintiff must plead particular facts showing
12 falsity and scienter. *See, e.g., Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1167 (9th Cir. 2009)
13 (“the analysis of Rubke’s section 14(e) claims is identical to that of her section 10(b) claims with
14 regard to falsity”).

15 **A. Falsity**

16 Plaintiff’s opposition clarifies that the claim under 14(e) is based on omission of critical
17 internal financial measures and forecasts in general and information regarding the success of the
18 EPIC tablet specifically that made the dire financial predictions contained in the Recommendation
19 Statement misleading. Plaintiff argues that EPIC was a centerpiece of the company’s hopes for a
20 turnaround and it was – as hoped for – successful during the 2015 holiday season. Yet, mention of
21 EPIC and details about its forecasted sales were omitted from the Recommendation Statement.
22 Plaintiff argues that this posture – omission of information that defendants admittedly knew from
23 the merger Recommendation – distinguishes this case from those relied on by defendants that
24 concern insufficient allegations that defendants knew the true state of facts they were alleged to
25 have omitted or “fraud-by-hindsight.” *See, e.g., In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d
26 970, 988 (9th Cir. 1999), *as amended* (Aug. 4, 1999). According to plaintiff, defendants’ own
27 public filings and attempts to enforce its EPIC trademark in at least one lawsuit show how
28 important EPIC was to defendants. Its omission from the Recommendation Statement, when

1 defendants focused on failing products, is the problem here.³

2 Defendants respond that the omission alleged cannot be actionable for the primary reason
3 that the status of the EPIC tablet’s launch and sales were disclosed just three weeks earlier in its
4 10-Q, so it was not hiding anything and investors could make up their minds with full information.
5 Defendants also point out that the Recommendation Statement itself referred investors to the 10-
6 Q, and that 10-Q stated that “declines in the overall table market overshadowed improvements in
7 certain product lines such as the Company’s new Epic tablet.” 3rd Quarter 10-Q at 9; *cf. Rubke v.*
8 *Capitol Bancorp Ltd*, 551 F.3d 1156, 1162–63 (9th Cir. 2009) (affirming dismissal of Section 11
9 claim in connection with a registration statement because allegedly omitted information “was
10 publicly available” and recognizing it is “pointless and costly to compel firms to reprint
11 information already in the public domain.” (internal quotation omitted)).

12 Most critically, defendants point out that plaintiff is required to identify what exactly in the
13 Recommendation Statement was rendered misleading by the failure to discuss the EPIC tablet,
14 which plaintiff fails to do. *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002)
15 (“In order to survive a motion to dismiss under the heightened pleading standards of the Private
16 Securities Litigation Reform Act (‘PSLRA’), the plaintiffs’ complaint must specify the reason or
17 reasons why the statements made by [defendant] were misleading.”)⁴ As the Ninth Circuit
18 explained in *Brody*, “Section 14(e) in terms prohibit[s] only misleading and untrue statements, not
19 statements that are incomplete.” *Id.* at 1006. And “[t]o be actionable under the securities laws, an
20 omission must be misleading; in other words it must affirmatively create an impression of a state
21 of affairs that differs in a material way from the one that actually exists” *Id.*

22 _____
23 ³ Plaintiff argues it is unnecessary to determine whether LeapFrog had a duty to disclose any
24 financial metrics pertaining to EPIC in the Statement, but instead it was the company’s focus on
25 its failing product (LeapTV) that imposed the duty on LeapFrog to discuss the successful product
26 (EPIC).

27 ⁴ Plaintiff makes a half-hearted attempt to argue that because the Ninth Circuit in *Brody* was
28 applying the requirements of a Section 10b-5 claim as well as a Section 14(e) claim with respect to
those provisions’ prohibition against “the making of untrue or misleading statements,” the Ninth
Circuit somehow inadvertently adopted the Section 10b-5 requirements for claims sounding in
fraud to the Section 14(e) claim. The *Brody* court explicitly and repeatedly referred to Section
14(e) and I am bound to follow that court’s conclusion as to what must be pleaded for a Section
14(e) claim based on untrue or misleading statements, like the one alleged here.

1 There are two problems with plaintiff’s Amended Complaint. First, plaintiff does not
2 identify with specificity the statements in the Recommendation that were rendered misleading by
3 the failure to include information regarding the EPIC tablet. At most, in his opposition, he refers
4 to paragraphs 92 and 97 of his Amended Complaint where five general statements are identified,
5 but there is no “connection” showing how each of those statements was made misleading by the
6 failure to disclose the EPIC results. Second, plaintiff fails to allege facts supporting his assertion
7 that the allegedly omitted information regarding the EPIC tablet could have undermined any of
8 those statements: e.g., facts that the success of EPIC in the 2015 holiday season *meant* that the
9 company was not in dire financial straits, or was not facing severe underperformance based on its
10 operating plan, or was not facing a severe liquidity situation. *See Brody*, 280 F.3d at 1006 (“the
11 plaintiffs’ complaint must specify the reason or reasons why the statements made by THC were
12 misleading or untrue, not simply why the statements were incomplete.”). The Amended
13 Complaint does not allege facts showing that any particular statement was rendered materially
14 misleading because the omission of EPIC’s success hid that LeapFrog’s financial condition was
15 not as dire as described in the Recommendation Statement. *See also Police Ret. Sys. of St. Louis*
16 *v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1061 (9th Cir. 2014) (“Nothing about the statements in
17 the 2007 Annual Report would give a reasonable investor the impression that Intuitive’s growth
18 was different than it was in reality. The statements accurately reflect the company’s growth in
19 2007; they do not purport to speak to any trends in Intuitive’s growth or revenues and do not alter
20 the total mix of information available to investors.”).

21 Plaintiff responds that because LeapFrog took it upon itself to discuss failing products in
22 the Recommendation Statement (referring to LeapTV at least six times by name), then it was
23 required to discuss EPIC as a successful product. As support for this position, plaintiff relies on
24 cases where defendants touted the success of a product line, but failed to disclose material
25 information regarding problems with the same. *See, e.g., Schueneman v. Arena Pharm., Inc.*, 840
26 F.3d 698, 701-02, 708 (9th Cir. 2016); *Kyrstek v. Ruby Tuesday, Inc.*, No. 3:14-CV-01119, 2016
27 WL 1274447, *7-8 (M.D. Tenn. Mar. 31, 2016) (by touting success of company’s casual dining
28 outlet, company was required to disclose adverse information regarding same outlet). Those cases

1 are factually inapposite in as much as Manger fails to allege facts showing why omission of
2 information regarding EPIC from its Recommendation conveyed a false reality about LeapFrog's
3 financial condition represented in the Recommendation.⁵

4 **B. 14(e) and Scierter**

5 **1. Scierter Requirement**

6 Plaintiff argues that his 14(e) claim is governed by the lower negligence standard as
7 opposed to the higher scierter standard, and as such allegations regarding scierter are not required.
8 Both sides agree that the Second, Third, and Fifth Circuits expressly require scierter for 14(e)
9 claims. Defendants point out that the Sixth and Eleventh Circuits have also expressly required
10 scierter for 14(e) claims, and the Seventh assumed that standard applied. *See* cases cited in Reply
11 at 7 & n.4. And although the Ninth Circuit has yet to address the issue, at least four judges in *this*
12 District have concluded that scierter is required for claims under Section 14(e). *See Russian Hill*
13 *Capital, LP v. Energy Corp. of Am.*, No. 15-CV-02554-HSG, 2016 WL 1029541, at *8 (N.D. Cal.
14 Mar. 15, 2016); *Biotechnology Value Fund, L.P. v. Celera Corp.*, No. 13-cv-03248-WHA, 12 F.
15 Supp. 3d 1194, 1199 (N.D. Cal. 2013); *Dixon v. Cost Plus*, No. 12-CV-02721-LHK, 2012 WL
16 2499931, at *6 (N.D. Cal. June 27, 2012); *Rubke v. Capitol Bancorp Ltd.*, No. 05-cv-4800-PJH,
17 460 F. Supp. 2d 1124, 1150 (N.D. Cal. 2006), *aff'd sub nom. Rubke v. Capitol Bancorp Ltd.*, 551
18 F.3d 1156 (9th Cir. 2009); *see also Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226, 1233
19 (C.D. Cal. 2016) (requiring scierter and noting that "no federal court has held that § 14(e) requires
20 only a showing of negligence").⁶

21 While plaintiff makes interesting textual and legislative history arguments, he identifies no
22

23 ⁵ Plaintiff's focus on LeapTV misses the point. Plaintiff's claim is not that LeapFrog represented
24 that LeapTV was failing and significantly contributing to the failing finances of LeapFrog when it
25 was not. A different situation would be presented if LeapFrog had undisclosed information that
26 LeapTV was actually performing better than represented. Relatedly, if plaintiff has facts that the
27 success of the EPIC tablets outweighed the failures of LeapTV and the company's otherwise
28 declining market share and prospects, those facts are the type that could show LeapFrog created an
impression that differed in a material way from reality.

⁶ Plaintiff argues I should not rely on *Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226 (C.D.
Cal. 2016) because the case is on appeal to the Ninth Circuit.

1 case applying the negligence standard to Section 14(e) claims. Scierter applies to Manger’s 14(e)
2 claim.

3 **2. Scierter Allegations**

4 Even if scierter is required, plaintiff argues that he has sufficiently alleged it here based on
5 defendants “conscious disregard or recklessness” in failing to disclose the *known* information
6 about the company’s financial prospects in the Recommendation Statement, specifically the
7 forecasts for the EPIC tablet. Presumably, under plaintiff’s theory, those forecasts were
8 contradictory to the dire reports of the company’s financial condition and material to the
9 company’s true financial strength.⁷ However, facts regarding that very issue – that the EPIC
10 financials contradicted the financial predictions contained in the Recommendation Statement – are
11 exactly what *is missing* from the Amendment Complaint.

12 There are no facts currently alleged that support plaintiff’s theory that the forecasts for
13 EPIC were material *because* those forecasts (if disclosed) would have made the dire statements
14 regarding the company’s financial condition misleading and/or false. Unless there are facts to be
15 alleged showing that the omitted EPIC tablet information materially contradicted the disclosed
16 statements or were otherwise “critically adverse” to the disclosed information, plaintiffs cannot
17 adequately alleged scierter. *See, e.g., In re Amgen Inc. Sec. Litig.*, No. CV 07-2536 PSG (PLAx),
18 2014 U.S. Dist. LEXIS 183034, at *30 (C.D. Cal. Aug. 4, 2014) (“Where a strong inference
19 suggests that a defendant was on notice of clinical findings before making contradictory public
20 statements, the defendant's conduct is at least ‘deliberately reckless’ under Section 10(b).”);
21 *Schlagal v. Learning Tree Int’l*, 1998 U.S. Dist. LEXIS 20306, *54 (where plaintiffs alleged that
22 defendants “had knowledge of the critical adverse information” scierter adequately alleged); *see*
23 *also Siemers v. Wells Fargo & Co.*, No. C 05-04518 WHA, 2007 U.S. Dist. LEXIS 31287, at *37
24 (N.D. Cal. Apr. 17, 2007) (strong inference of scierter where “the secret program was not fairly
25 disclosed in the prospectus”).

26 _____
27 ⁷ To satisfy the scierter requirement, plaintiff must state facts with particularity that give rise to a
28 “strong inference” that defendants made false or misleading statements either intentionally or with
deliberate recklessness. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 991 (9th Cir.
2009), *as amended* (Feb. 10, 2009).

1 With respect to the individual defendants, in the Ninth Circuit plaintiffs are required to
2 “allege scienter with respect to each of the individual defendants.” *Oregon Pub. Employees Ret.*
3 *Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 607 (9th Cir. 2014). However, scienter can be imputed to
4 individual defendants where a company’s public statements are “so important” and “so
5 dramatically false” that “they would create a strong inference that at least some corporate officials
6 knew of the falsity upon publication.” *Id.* at 607-08. Here, there are neither scienter allegations
7 with respect to each individual defendant nor facts alleged that the Recommendation Statement
8 was “so dramatically false” concerning the company’s financial situation that scienter can be
9 inferred for the individual defendants.

10 The most plaintiff alleges is that the individual defendants were motivated to consummate
11 the “fire sale” merger because they were “driven in part to preserve equity compensation awards”
12 that would occur in a change-of-control transaction (like the VTech merger) but would not
13 continue if an asset sale or liquidation occurred. AC ¶ 122. Defendants respond that plaintiff’s
14 theory regarding the individual defendants fails to consider that those same defendants had equity
15 shares that would be cashed out for the allegedly deflated Tender Offer. AC ¶ 122. Under
16 plaintiff’s theory, these very shares would be worth more had the individual defendants not pushed
17 the Merger at its allegedly deflated price. *See, e.g., In re Digital Island Sec. Litig.*, 357 F.3d 322,
18 331 (3d Cir. 2004) (“plaintiffs’ theory makes little economic sense because the directors’ own
19 stock options would have been devalued if they tried to sell the company for less than full price.”).
20 There are no facts alleged to suggest that the other allegedly inadequately considered alternatives –
21 asset sale or liquidation – would have resulted in a *higher* per share price for shareholders than the
22 Merger provided. In any event, even if plausible, the change-of-control allegations are insufficient
23 by themselves to make a strong inference of scienter. *See, e.g., Biotechnology Value Fund, L.P.*
24 *v. Celera Corp.*, 12 F. Supp. 3d 1194, 1203 (N.D. Cal. 2013) (allegation that directors stood to
25 benefit from change-of-control provision might support “reasonable inference of intent, they are
26 not sufficient to establish a strong inference of deliberate recklessness.”) (internal quotation
27 omitted)).

28

1 **C. Loss Causation**

2 Defendants also argue plaintiff has failed to adequately allege loss causation. Loss
3 causation requires a showing that the defendant caused the loss for which the plaintiff seeks to
4 recover damage, and plaintiff must prove both economic loss and proximate causation. *N.Y. City*
5 *Employees' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1023 (9th Cir. 2010), *overruled on other grounds by*
6 *Lacey v. Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012).

7 Plaintiff relies on the measurable damages of the Board's rejection of the MGA
8 proposal that would have paid stockholders 10 cents more per share. AC ¶¶ 119-123; Oppo. at 3.
9 Defendants point out that plaintiff fails to allege facts explaining how non-disclosure of the EPIC
10 tablet's performance in the Recommendation Statement led to the rejection of the MGA offer,
11 much less plaintiff's loss of 10 cents a share.

12 Plaintiff's current allegations regarding the falsity of the Recommendation Statement,
13 scienter and loss causation are insufficient, and the Section 14(e) claim is dismissed with leave to
14 amend. Plaintiff's Section 20(a) claim is derivative of his other claims and is also dismissed with
15 leave to amend.

16 **II. 14(D)(4) AND RULE 14D-9**

17 Under 14(d)(4) and Rule 14d-9 (and their implementing regulations) solicitations or
18 recommendations must furnish information "as necessary to make the required statements, in light
19 of the circumstances under which they are made, not misleading." 17 C.F.R. § 229.1011(c).
20 Defendants argue that there is no private right of action under Section 14(d)(4) or the rule, and
21 point out that no federal court case has found otherwise. Plaintiff relies only on three cases from
22 Delaware, two of which assumed a private right of action existed in denying motions for a
23 preliminary injunction, and a third state court decision which did not address 14(d). Oppo. at 16.⁸

24 Three cases from this District *have* addressed the issue on the merits and concluded
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26 ⁸ *Revlon, Inc. v. Pantry Pride, Inc.*, 621 F. Supp. 804 (D. Del. 1985) (denying motion for
27 preliminary injunction); *Gulf Corp. v. Mesa Petroleum Co.*, 582 F. Supp. 1110, 1119 (D. Del.
28 1984) (same); *Weinberger v. Rio Grande Indus., Inc.*, 519 A.2d 116, 125 (Del. Ch. 1986)
(addressing scope of Schedule 14D-9 disclosure required under state law duty of disclosure claim).

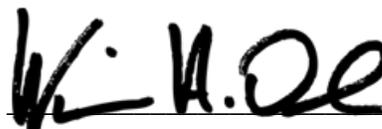
1 Section 14(d) does not provide a private right of action. See *Dixon v. Cost Plus*, No. 12-CV-
2 02721-LHK, 2012 WL 2499931, at *6 n. 2 (N.D. Cal. June 27, 2012); *McCreary v. Celera Corp.*,
3 No. 11-1618 SC, 2011 WL 1399263, at *3 (N.D. Cal. Apr. 13, 2011); *Erickson v. Wheatley*
4 *Ventures*, No. C-96 2934 MHP, 1997 WL 119849, at *5 (N.D. Cal. Mar. 4, 1997). Plaintiff argues
5 that *Dixon* and *McCreary* did not analyze the particular text of 14(d) or its legislative history and
6 instead relied solely on *Erickson*. Plaintiff criticizes the analysis in *Erickson*, arguing that the
7 court misapplied the test for determining whether a private right of action exists as set out by the
8 Supreme Court in *Cort v. Ash*, 422 U.S. 66 (1975). Oppo. at 17-18. But more recently, the district
9 court in *Varjabedian v. Emulex Corp.*, 152 F. Supp. 3d 1226 (C.D. Cal. 2016) conducted that
10 exact analysis under *Cort v. Ash* and agreed with the opinions from this District that no private
11 right of action exists under 14(d). While the *Varjabedian* decision is on appeal to the Ninth
12 Circuit, I find its in-depth analysis persuasive and conclude, consistent with the other decisions
13 from this District, that there is no private right of action under Section 14(d).

14 **CONCLUSION**

15 Plaintiff's Section 14(d) claim is DISMISSED with prejudice. Plaintiff's Section 14(e)
16 and Section 20(a) claims are DISMISSED with leave to amend. If plaintiff believes he can amend
17 to cure the deficiencies identified, he must file his Second Amended Complaint within twenty one
18 (21) days of the date of this Order. If he does not file a Second Amended Complaint by that date,
19 this case will be dismissed with prejudice.

20 **IT IS SO ORDERED.**

21 Dated: January 23, 2017

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23 WILLIAM H. ORRICK
24 United States District Judge

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