

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

MIGUEL HUSSEY, et al.,

Plaintiffs,

v.

RUCKUS WIRELESS, INC., et al.,

Defendants.

Case No. [16-cv-02991-EMC](#)

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS SECOND
AMENDED COMPLAINT**

Docket No. 75

This is a securities fraud class action relating to the acquisition of Ruckus Wireless Inc. (“Ruckus”) by Brocade Communications Systems, Inc. (“Brocade”) in May 2016. Lead Plaintiff is the City of Pontiac General Employees’ Retirement System, one of the shareholders of Ruckus.

Defendants are as follows:

- Ruckus;
- Ruckus’s Board of Directors (consisting of Selina Y. Lo (also President and CEO of Ruckus), Georges Antoun, Barton Burstein, Gaurav Garg, Stewart Grierson, Mohan Gyani, and Richard Lynch);
- Seamus Hennessy (Ruckus’s CFO);
- Brocade;
- Stallion Merger Sub Inc. (“Merger Sub”) (a wholly owned subsidiary of Brocade and the entity set up as the formal purchaser of Ruckus stock); and
- Morgan Stanley & Co. LLC (“Morgan Stanley”) (Ruckus’s financial advisor for the merger).

Previously, the Court granted a motion to dismiss filed by a majority of the defendants named above, but with leave to amend. Lead Plaintiff thus filed a second amended complaint

1 (“SAC”). All Defendants named above now move for dismissal of the SAC.

2 Having considered the parties’ briefs and accompanying submissions, as well as the oral
3 argument of counsel, the Court hereby **GRANTS** Defendants motion.

4 **I. FACTUAL & PROCEDURAL BACKGROUND**

5 In the SAC, Lead Plaintiff alleges as follows.

6 Before the merger with Brocade, “Ruckus was a global supplier of advanced Wi-Fi
7 solutions.” SAC ¶ 43. At the end of December 2015, Ruckus’s financial performance was strong
8 and had exceeded the prior year’s financial performance. *See* SAC ¶ 47. “Despite Ruckus’
9 improving metrics and strong prospects, the Board was concurrently pursuing a sale of the
10 Company.” SAC ¶ 50.

11 Ruckus and Brocade first entered into merger discussions in or about August 2015. *See*
12 SAC ¶ 54. (Prior to that, the companies had worked together with apparent success. *See, e.g.,*
13 SAC ¶ 53.) Discussions continued through March 2016.

14 “On March 9, 2016, Brocade gave Ruckus its best and final offer . . . of \$6.45 in cash and
15 0.75 shares of Brocade common stock (valued at the time of the offer at \$14.06 per Ruckus
16 share).” SAC ¶ 65 (emphasis added). The Ruckus Board accepted the offer on the same day. *See*
17 SAC ¶ 65.

18 On April 6, 2016, the companies announced the merger agreement. The proposed merger
19 would be effected through a tender offer. *See* SAC ¶¶ 2, 68.

20 The Ruckus Board recommended that shareholders tender their shares in a 14D-9 filed
21 with the SEC. *See* SAC ¶ 3. In the 14D-9, Ruckus stated that the implied value of the merger
22 consideration was \$14.43 per Ruckus share “(based on the closing price of [Brocade] Common
23 Stock on . . . the last trading day prior to the approval by the [Ruckus] Board of the Merger
24 Agreement).” Defs.’ RJN, Ex. 1 (14D-9, at 29). The closing price of Brocade stock at that point
25 in time was \$10.64. *See* Defs.’ RJN, Ex. 1 (14D-9, at 34). The \$14.43 merger consideration¹ was
26 “an approximate premium of 44% based on the closing price per [Ruckus] Share of \$10.00 on
27

28 ¹ (0.75 x \$10.64 [Brocade share]) + \$6.45 [cash] = \$14.43.

1 April 1, 2016.” Defs.’ RJN, Ex. 1 (14D-9, at 29); *see also* SAC ¶ 4.

2 The tender offer launched on April 29, 2016, and ended on May 27, 2016. Because
3 enough shares were tendered (a majority),² the merger was completed on May 27, 2016, or shortly
4 thereafter. *See* SAC ¶¶ 2, 69; *see also* RJN, Ex. 1 (14D-9, at 2) (providing that a majority of
5 shares must be tendered).

6 As indicated above, at the time the parties entered into the merger agreement (March 9,
7 2016), the merger consideration for each Ruckus share had an implied value of \$14.06. *See* SAC
8 ¶ 65. In the 14D-9 that Ruckus filed with the SEC, Ruckus stated that the implied value of the
9 merger consideration was \$14.43 per Ruckus share. *See* SAC ¶ 4. However, by the closing date
10 of the tender offer (May 27, 2016), the merger consideration value had declined to \$12.90 per
11 Ruckus share. *See* SAC ¶ 65.

12 In its SAC, Lead Plaintiff has asserted both federal and state claims. With respect to the
13 federal claims, the main claim is a violation of § 14(e) of the 1934 Securities Exchange Act.³
14 Section 14(e) covers an untrue statement of material fact or omission of fact with respect to a
15 tender offer. Section 14(e) provides in relevant part as follows:

16 It shall be unlawful for any person to make any untrue statement of a
17 material fact or omit to state any material fact necessary in order to
18 make the statements made, in the light of the circumstances under
19 which they are made, not misleading or to engage in any fraudulent,
20 deceptive, or manipulative acts or practices, in connection with any
tender offer or request or invitation for tenders, or any solicitation of
security holders in opposition to or in favor of any such offer,
request, or invitation.

21 15 U.S.C. § 78n(e). In addition to the federal claims, Lead Plaintiff also brings a state claim for
22 breach of fiduciary duty (against the individual defendants, Count V) and a related state claim for
23 aiding and abetting (against Brocade and its Merger Sub, Count VI).

24 _____
25 ² Lead Plaintiff admits that, technically, a majority of shares were tendered – 58.3%. But, Lead
26 Plaintiff argues, “[b]ased on the fact that Ruckus insiders held 8.5% of the Company’s outstanding
27 shares, fewer than a majority of independent stockholders supported the Acquisition.” SAC ¶ 70.
(58.3% – 8.5% = 49.8%.)

28 ³ Lead Plaintiff has asserted a § 14(e) claim against Ruckus and the individual defendants (Count
I) as well as Morgan Stanley (Count II). Lead Plaintiff has also asserted derivative § 20(a) claims
against the individual defendants (Count III) and Brocade and its Merger Sub (Count IV).

1 **II. DISCUSSION**

2 A. Legal Standard

3 As the Court has before it a 12(b)(6) motion to dismiss, the *Twombly/Iqbal* standard is
4 applicable. That is, the Court must evaluate the SAC for plausibility. *See Ashcroft v. Iqbal*, 556
5 U.S. 662, 678 (2009) (stating that, “[t]o survive a motion to dismiss, a complaint must contain
6 sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face’”)
7 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

8 A claim has facial plausibility when the plaintiff pleads factual
9 content that allows the court to draw the reasonable inference that
10 the defendant is liable for the misconduct alleged. The plausibility
11 standard is not akin to a “probability requirement,” but it asks for
12 more than a sheer possibility that a defendant has acted unlawfully.
13 Where a complaint pleads facts that are “merely consistent with” a
14 defendant’s liability, it “stops short of the line between possibility
15 and plausibility of ‘entitlement to relief.’”

16 *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556-57).

17 For Plaintiffs’ federal claims, more than just the *Twombly/Iqbal* standard must be met. In
18 particular, the Private Securities Litigation Reform Act (“PSLRA”) provides as follows:

19 In any private action arising under this title [15 U.S.C. §§ 78a *et*
20 *seq.*] in which the plaintiff alleges that the defendant –

- 21 (A) made an untrue statement of a material fact; or
- 22 (B) omitted to state a material fact necessary in order to make the
23 statements made, in the light of the circumstances in which
24 they were made, not misleading;

25 the complaint shall specify each statement alleged to have been
26 misleading, the reason or reasons why the statement is misleading,
27 and, if an allegation regarding the statement or omission is made on
28 information and belief, the complaint shall state with particularity all
facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1); *see also Janas v. McCracken (in Re Silicon Graphics Sec. Litig.)*, 183
F.3d 970, 996 (9th Cir. 1999) (noting that, under the PSLRA, “a securities fraud complaint shall
identify: (1) each statement alleged to have been misleading; (2) the reason or reasons why the
statement is misleading; and (3) all facts on which that belief is formed”“).

Moreover, the PSLRA has an additional requirement:

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

5 15 U.S.C. § 78u-4(b)(2)(A) (emphasis added). In its prior order granting the motion to dismiss the
6 first amended complaint (“FAC”), the Court held that the state of mind required for a § 14(e)
7 claim is scienter – *i.e.*, intent to deceive or deliberate recklessness. *See* Docket No. 62 (Order at
8 1). “Facts showing mere recklessness or a motive to commit fraud and opportunity to do so
9 provide some reasonable inference of intent, but are not sufficient to establish a strong inference of
10 deliberate recklessness.” *In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 701 (9th Cir.
11 2012). In addition, a strong inference of scienter must be “at least as compelling as any opposing
12 inference one could draw from the facts alleged.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*,
13 551 U.S. 308, 324 (2007).

14 B. Defendants’ Arguments

15 In their motion to dismiss, Defendants challenge both the federal and state claims. As to
16 the federal claims, Defendants’ main arguments are that Lead Plaintiff has failed to sufficiently
17 allege falsity, scienter, and loss causation. (There are additional arguments that are applicable to
18 the derivative § 20(a) claims only.) As for the state claims, Defendants assert that the Court
19 should decline supplemental jurisdiction if the federal claims are dismissed. Alternatively,
20 Defendants argue that the state claims should be dismissed based on the doctrine of forum non
21 conveniens. Finally, Defendants raise merits-based arguments in favor of dismissal of the state
22 claims (*e.g.*, based on the business judgment rule).

23 For the reasons discussed below, the Court concludes that Lead Plaintiff has failed to plead
24 a viable § 14(e) claim. Without a viable § 14(e) claim, the derivative § 20(a) claims also fail. And
25 in the absence of a viable federal claim, the Court declines supplemental jurisdiction over the
26 asserted state claims.

27 C. Section 14(e) Falsity

28 Lead Plaintiff’s § 14(e) claim is, in a nutshell, that Defendants included a misleading

1 opinion statement in the 14D-9. *See generally Omnicare, Inc. v. Laborers District Council*
2 *Construction Industrial Pension Fund*, 135 S. Ct. 1318 (2015) (providing the governing standard
3 for falsity with respect to an opinion statement).

4 The allegedly misleading opinion statement was related to a financial analysis performed
5 by Morgan Stanley, Ruckus’s financial adviser. Morgan Stanley conducted a discounted cash
6 flow (“DCF”) analysis to determine what consideration a Ruckus shareholder would get if the
7 Ruckus-Brocade merger were to take place. The DCF analysis “purported to show that the
8 [merger] offered Ruckus stockholders greater value than if the Company remained a standalone
9 enterprise.” SAC ¶ 87.

10 Morgan Stanley opined that the value of the merger consideration was worth \$17.61-
11 \$22.35 (Base Case Scenario – Midrange Forecast). *See* SAC ¶ 87; *see also* RJN, Ex. 1 (14D-9, at
12 38). But, according to Lead Plaintiff, Morgan Stanley – and thereafter the remaining defendants –
13 omitted the fact that the \$17.61-\$22.35 value was based on an assumption that Brocade stock
14 “standalone” (*i.e.*, without a merger) was worth **\$13.58 to \$19.52 per share**.⁴ According to Lead
15 Plaintiff, it was misleading to omit this assumption because the assumption overinflated the value
16 of Brocade stock standalone as evidenced by, *e.g.*, the following:

- 17 • That, from May 27, 2016 (the day the merger was completed) through July 31, 2016,
18 Brocade repurchased its own stock for an average of only **\$9.08 per share**. *See* SAC ¶¶
19 73, 90(a).
- 20 • That, in November 2016 (approximately five months after the merger was completed in
21 May 2016), Broadcom agreed to acquire Brocade for only **\$12.75 per share**. *See* SAC ¶
22 90(b).

23 Lead Plaintiff maintains that, if the \$13.58-\$19.52 value of Brocade stock standalone had been
24 disclosed in (and not omitted from) the 14D-9, then Ruckus stockholders would not have tendered
25 their shares for the merger because Brocade stock standalone was not in fact worth that much.

26
27 _____
28 ⁴ The SAC does not include any reference to the \$13.58-\$19.52 figure. Rather, the SAC makes
reference to a figure of \$14.88-\$21.20. In its opposition, Lead Plaintiff states that this was a
mistake. *See* Opp’n at 9-10.

1 The Court finds that Lead Plaintiff has failed to adequately plead a materially misleading
2 omission for several reasons.

3 First, Lead Plaintiff focuses exclusively on the alleged omission from Morgan Stanley’s
4 Discounted Cash Flow analysis. However, it is important to put the DCF analysis in context. It
5 was one of several models of financial analyses which informed Morgan Stanley’s opinion as to
6 the fairness of the other consideration to Ruckus shareholders. *See* RJN, Ex. 1 (14D-9, at 35-50).⁵
7 Lead Plaintiff has not shown how the standalone share value of Brocade stock, which allegedly
8 was omitted from the DCF analysis, was material to the overall multifaceted financial analysis.

9 Second, even if Morgan Stanley’s DCF analysis were deemed central to its opinion as to
10 the fairness of the merger, and the DCF analysis somehow overinflated the implied value of
11 Brocade stock standalone (a fact not clearly established by Lead Plaintiff), Lead Plaintiff, at the
12 hearing, effectively conceded that there was no problem with Morgan Stanley’s bottom-line DCF
13 valuation – \$17.61-\$22.35 per share for the merger consideration (Base Case Scenario). *See* SAC
14 ¶ 87; *see also* RJN, Ex. 1 (14D-9, at 38). As it stated at the hearing, Lead Plaintiff did *not* take
15 issue with how Morgan Stanley calculated the value of the merger consideration in its DCF
16 analysis. *See generally* RJN, Ex. 1 (14D-9, at 38) (discussing in general terms how Morgan
17 Stanley calculated the value of the merger consideration). Nor did it take issue with the cash flow
18 projections used or the methodology employed by Morgan Stanley in its DCF analysis. If the
19 value of the merger consideration (\$17.61-\$22.35) was correct or reasonable, the Court does not
20 see how the implied value of Brocade stock standalone was material to a Ruckus shareholder in
21

22 ⁵ Although these other models are mentioned on the face of the 14D-9, Lead Plaintiff protests that
23 the Court should not consider them. Lead Plaintiff asserts that a court may only take judicial
24 notice of the existence of the 14D-9 and its contents – not any facts contained therein. Lead
25 Plaintiff further argues that “the propriety of [the models] will be tested through fact discovery”
and that, in any event, the models are “immaterial to the merits” of its claims.” Docket No. 84
(Opp’n to RJN at 3-4).

26 The Court does not find Lead Plaintiff’s arguments persuasive. First, for the reasons stated
27 above, the other models are material to falsity; they provide context for Lead Plaintiff’s challenge
28 to the DCF analysis. Lead Plaintiff cannot rely centrally on one section of a document in his
complaint and ignore adjacent pages which are directly related. To do so would violate the rule of
completeness. Moreover, Lead Plaintiff cannot claim any prejudice. It does not challenge the
accuracy or completeness of the other models.

1 deciding whether or not to tender her shares in exchange for that consideration.

2 Third, even if Lead Plaintiff did assert that the \$17.61-\$22.35 valuation for the merger
3 consideration was in fact too high, there is nothing in the record to attribute that valuation to
4 Brocade stock standalone being overvalued. Although Lead Plaintiff assumes that Morgan
5 Stanley did a Brocade stock standalone valuation as part of its overall valuation of the merger
6 consideration, there is no factual basis for that assumption. All that the 14D-9 states is as follows:

7 Morgan Stanley . . . compared these per Share values [for Ruckus
8 standalone] with the discounted cash flow value per Share value of
9 the Offer Consideration as of April 1, 2016 that each shareholder of
10 [Ruckus] would receive in the Offer and the Merger in exchange for
11 a Share [*i.e.*, if the Ruckus-Brocade merger were to go through].
12 The value that would be received for each [Ruckus] Share was
13 defined as the discounted cash flow value per share of the [Brocade]
14 Common Stock, *after giving effect to the Merger and incorporating*
15 *the value of certain synergy forecasts . . .*, multiplied by the 0.75
16 transaction exchange ratio, plus \$6.45 of cash consideration per
17 [Ruckus] Share.

18 RJN, Ex. 1 (14-D9, at 38) (emphasis added). As indicated by the italicized language above,
19 Morgan Stanley did not do a Brocade standalone stock valuation. Rather, Morgan Stanley
20 compared the value of Ruckus standalone stock to the value of stock for a *merged* Ruckus-
21 Brocade company. The standalone value of Brocade stock does not appear to be an input into the
22 DCF analysis. Instead, the DCF analysis was based on cash flow projections for 2016 through
23 2025 to which varying discount rates were applied. *See, e.g.*, RJN, Ex. 1 (14D-9, at 40-42).

24 Notably, Lead Plaintiff does not argue that Morgan Stanley should have performed a
25 Brocade stock standalone valuation. While Lead Plaintiff did suggest at the hearing that Morgan
26 Stanley must have performed a Brocade stock standalone valuation, it points to no evidence of
27 that. Indeed, as Defendants pointed out at the hearing, it would make little sense for Morgan
28 Stanley to do a Brocade stock standalone valuation because the point of the DCF analysis was to
compare the value of Ruckus stock standalone to the value of a Ruckus-Brocade merged company.
In other words, there was no need to do a Brocade stock standalone valuation because that was
never a contemplated option for a Ruckus shareholder.

29 D. Section 14(e) Scienter

30 For the reasons stated above, Lead Plaintiff has failed to adequately plead a materially

1 misleading omission, and therefore all Defendants are entitled to dismissal of the federal claims.
2 However, even if Lead Plaintiff had adequately pled falsity, the Court would still grant
3 Defendants’ motion to dismiss on an independent ground – *i.e.*, Lead Plaintiff has failed to
4 adequately plead scienter.

5 As to all Defendants other than Morgan Stanley, Lead Plaintiff has failed to adequately
6 allege that these defendants knew or should have known that the implied Brocade stock standalone
7 value was \$13.58 to \$19.52 per share (*i.e.*, overinflated). Notably, both in its papers and at the
8 hearing, Lead Plaintiff admitted that it had to do a complex calculation to figure out that, based on
9 the \$17.61-\$22.35 merger consideration value determined by Morgan Stanley, Brocade stock
10 standalone had to be worth \$13.58-\$19.52. *See, e.g.*, Opp’n at 10 (stating that to get to the \$13.58-
11 \$19.52 figure required “a complex DCF analysis on the post-tax cash synergies,” *i.e.*, to isolate the
12 Brocade stock standalone value). Nowhere in the SAC has Lead Plaintiff has alleged that any
13 defendant did such a calculation, was shown such a calculation, or was equipped to engage in such
14 a complex calculation. Nor is there anything in the 14D-9 suggesting such. At the hearing, Lead
15 Plaintiff argued that these defendants must have been told of the Brocade stock standalone value
16 when Morgan Stanley informed them of its DCF analysis. But, as noted above, that assumes that
17 Morgan Stanley did a Brocade stock standalone valuation in the first place, and that assumption
18 cannot reasonably be inferred based on the allegations in the SAC and the statements in the 14D-9.
19 Furthermore, as discussed above, it is not implied in the methodology employed by Morgan
20 Stanley in deriving the DCF analysis.

21 As for Morgan Stanley, while it may well have had the ability to do the complex
22 calculation performed by Lead Plaintiff, there is still a problem with scienter – Lead Plaintiff
23 assumes that Morgan Stanley did in fact do a Brocade stock standalone valuation. As noted,
24 nothing in the SAC or 14D-9 indicates that Morgan Stanley considered Brocade standalone as an
25 input (or even an output) in conducting its DCF analysis. Indeed, the 14D-9 indicates that the
26 driving force in Morgan Stanley’s DCF analysis was not current stock price of Brocade but rather
27 Brocade’s future income. *See, e.g.*, RJN, Ex. 1 (14D-9, at 37) (“Morgan Stanley performed a
28 discounted cash flow analysis, which is designed to provide an implied value of a company by

1 calculating the present value of *the estimated future cash flows* and terminal value of such
2 company.”) (emphasis added); *id.* (14D-9, at 38) (“Morgan Stanley utilized estimates from the
3 [Brocade] *Forecasts* . . . and the Synergies for purposes of its discounted cash flow analysis of the
4 combined [Brocade and Ruckus] discounted cash flow analysis. . . . The [Brocade] Forecasts
5 through 2018 were based on projections prepared by [Brocade] for fiscal years 2016 and 2017 and
6 a financial model prepared by [Brocade] for fiscal year 2018 . . . and the estimates for calendar
7 years 2019 through 2025 represented an extrapolation of 2018 estimates.”) (emphasis added).
8 Absent a showing that a standalone valuation of Brocade was performed by Morgan Stanley, no
9 showing of scienter adequate to satisfy PSLRA has been made.

10 E. Supplemental Jurisdiction

11 Based on Lead Plaintiff’s failure to plead falsity and scienter, the Court dismisses the §
12 14(e) claims as well as the § 20(a) claims which flow therefrom. The only remaining claims are
13 state claims (related to breaches of fiduciary duty) over which the Court has supplemental
14 jurisdiction. Having dismissed the federal claims, the Court, in the exercise of its discretion,
15 declines supplemental jurisdiction over the state claims. *See* 28 U.S.C. § 1367(c)(3) (providing
16 that a court “may decline to exercise supplemental jurisdiction” if “the district court has dismissed
17 all claims over which it has original jurisdiction”).

18 **III. CONCLUSION**

19 Defendants’ motion to dismiss the federal claims is granted. The dismissal is with
20 prejudice. Lead Plaintiff has already been given one opportunity to cure with respect to both
21 falsity and scienter and, in any event, Lead Plaintiff has failed to show that it could plead
22 allegations to cure any of the deficiencies identified above. The Court declines to exercise
23 supplemental jurisdiction over the state claims.

24 ///
25 ///
26 ///
27 ///
28 ///

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

The Clerk of the Court is directed to enter judgment in accordance with the above and close the file in this case.

This order disposes of Docket No. 75.

IT IS SO ORDERED.

Dated: June 29, 2017



EDWARD M. CHEN
United States District Judge