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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

SANDRA LIFSCHITZ, On behalf of  
herself and all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NEXTWAVE WIRELESS INC., ALLEN  
SALMASI, and GEORGE C. ALEX,  
  
Defendants.

Civil No. 3:08 cv01697 AJB (WMC)  
(consol. w/3:08cv01934 AJB (WMC))

**ORDER GRANTING MOTION TO  
DISMISS PLAINTIFF'S THIRD  
AMENDED CONSOLIDATED  
COMPLAINT**

ALEX BENJAMIN, Individually and on  
behalf of all others similarly situated,  
  
Plaintiff,  
  
v.  
  
NEXTWAVE WIRELESS INC., ALLEN  
SALMASI, and GEORGE C. ALEX,  
  
Defendants.

[Doc. No. 69]

1 **I.**

2 **INTRODUCTION**

3 Presently before the Court is Defendants’ motion to dismiss Plaintiff’s Third Amended  
4 Consolidated Complaint (“TAC”) for failure to state a claim under Federal Rule of Civil Procedure  
5 12(b)(6). (Doc. 69.) In accordance with Civil Local Rule 7.1.d.1, the Court finds this motion suitable for  
6 determination on the papers and without oral argument. Accordingly, the motion hearing scheduled for  
7 December 9, 2011 is hereby vacated.

8 Plaintiff has had three chances to state a claim against Defendants for violation of § 10(b) of the  
9 Securities Exchange Act of 1934 and Rule 10(b)-5, and for violation of § 20(a) of the same Act. For the  
10 third and final time, Plaintiff has failed to present its allegations in a legally cognizable form in  
11 accordance with the pleading requirements established by the Federal Rules of Civil Procedure, *Dura*  
12 *Pharms. v. Broudo*, 544 U.S. 336 (2005), and the Private Securities Litigation Reform Act (“PSLRA”).  
13 Once again, the claims do not pass muster. Having previously warned Plaintiff that its third chance to  
14 file a complaint would be its last if it did not cure the noted deficiencies (*see* Doc. 62), the Court  
15 **GRANTS** Defendants’ motion to dismiss Plaintiff’s TAC *with prejudice*.

16 **II.**

17 **BACKGROUND**

18 Plaintiff alleges that numerous statements made by Defendants were false and misleading and  
19 expose Defendants to civil liability under the Securities Exchange Act of 1934. The legal standard for  
20 stating a claim under the 1934 Act was expressly given to Plaintiff by this Court in its Order granting  
21 Defendants’ motion to dismiss Plaintiff’s Second Amended Complaint. (Doc. 62, p.1.) To state a claim  
22 under §10(b) of the Securities Exchange Act of 1934, Plaintiff must allege: (1) a material misrepresenta-  
23 tion or omission; (2) made with scienter; (3) in connection with the purchase or sale of a security; (4)  
24 reliance by Plaintiff on the misrepresentation or omission; (5) economic loss; and (6) a causal nexus  
25 between the misrepresentation or omission and the loss. *See Dura*, 544 U.S. at 341-42.

26 The PSLRA fortifies the first and second elements, by requiring Plaintiff to state with particular-  
27 ity both the facts constituting the alleged violation and the facts evidencing scienter. *Tellabs, Inc. v.*  
28 *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007). As to the first, “[T]he complaint shall specify

1 each statement alleged to have been misleading” along with “the reason or reasons why the statement is  
2 misleading.” 15 U.S.C. § 78u-4(b)(1)(B). As to the second, “[T]he complaint shall . . . state with  
3 particularity facts giving rise to a strong inference that the defendant acted with the required state of  
4 mind.” 15 U.S.C. § 78u-4(b)(2)(A). Finally, Federal Rule of Civil Procedure 9(b) imposes its own  
5 heightened pleading standard by requiring a party alleging fraud to state with particularity the circum-  
6 stances constituting fraud.

7 The heightened pleading standard for alleging fraud in securities class action cases serves a  
8 useful purpose of not judging securities fraud cases in hindsight. That is, the plaintiff in securities class  
9 action cases must not masquerade a bad outcome in corporate management as fraud by hindsight, and  
10 must overcome the presumption of mistake in order to plead fraud. *See Klein v. King*, No. C-88-3141,  
11 1990 WL 61950 (N.D. Cal. Mar 26, 1990). The rationale is that punishing mistakes as if they were fraud  
12 undermines the deterrent function of securities regulation. *See Mitu Gulati et al., Fraud by Hindsight*, 98  
13 Nw. U. L. Rev. No. 3 (2004) (citing Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in*  
14 *Hindsight*, 65 U. Chi. L. Rev. 571 (1998)). Here, Plaintiff has not met its heightened burden of pleading  
15 fraud under the Securities Exchange Act because Plaintiff has not made any substantive additions to its  
16 Second Amended Complaint, and has, once again, left the Court to interpret the meaning of its  
17 allegations.

### 18 III.

### 19 DISCUSSION

20 Defendants assert that the TAC fails to allege a valid claim for securities fraud because it (1)  
21 seeks to impose liability for forward-looking statements that, pursuant to the PSLRA Safe Harbor  
22 provision, are not actionable; (2) fails to adequately allege scienter; and (3) fails to adequately allege  
23 loss causation. The Court analyzes Plaintiff’s two causes of action below.

#### 24 1. Section 10(b) Violation

25 Plaintiff has failed to plead a § 10(b) violation because seventeen out of the twenty-four  
26 misleading statements attributed to Defendants are forward-looking statements protected by the PSLRA  
27 “Safe Harbor” provision. (*See* TAC, Doc. 68, ¶¶ 15, 20, 38(b), 42, 51, 52, and 80.2.) The PSLRA “Safe  
28 Harbor” provision immunizes optimistic statements concerning future financial results, plans and

1 objectives for future operations, and future economic performance. 15 U.S.C. § 78u-5(c)(1), (2). Thus,  
2 Defendants cannot be held liable for projections regarding its future operations, potential sources of  
3 income, and product/technological success.

4 With regard to the last seven of Defendants’ allegedly misleading statements, Plaintiff has failed  
5 to show *scienter*—that is, actual knowledge of falsity or deliberate recklessness in finding out that the  
6 statements are false—on Defendants’ part. Plaintiff’s use of confidential witnesses (“CWs”) does not  
7 help Plaintiff establish *scienter*. Plaintiff must show specific facts relating to the CWs’ positions within  
8 the company and their access to the company’s records to demonstrate Defendants’ actual knowledge or  
9 deliberate recklessness in not knowing that these statements were false. *In re Wet Seal, Inc.*, 518 F.  
10 Supp. 2d 1148, 1170 (C.D. Cal. 2007). Plaintiff has failed to do so with regard to the CWs’ alleged  
11 knowledge of Defendants’ liquidity problems and acquisition strategy. In addition, courts are generally  
12 skeptical of using CWs’ opinions to prove *scienter*. *Higginbotham v. Baxter Intern., Inc.*, 495 F.3d 757  
13 (7th Cir. 2007).

14 Since Plaintiff has failed to plead sufficient facts establishing the first two elements of its first  
15 cause of action, the Court need not inquire whether Plaintiff has adequately pled “loss causation,” which  
16 is also necessary for a valid cause of action under §10(b).

17 Accordingly, Defendants’ motion to dismiss Plaintiff’s first cause of action is **GRANTED** with  
18 prejudice.<sup>1</sup>

## 19 **2. Section 20(a) Violation**

20 Plaintiff’s claim for violation of § 20(a) of the Securities Exchange Act depends upon Plaintiff  
21 establishing a valid §10(b) claim. *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 990 (9th Cir.  
22 2009). For the reasons discussed above, the §10(b) claim fails, which consequently bars the § 20(a)  
23 claim. Accordingly, Defendants’ motion to dismiss Plaintiff’s second cause of action is **GRANTED**  
24 with prejudice.

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25  
26 <sup>1</sup> In support of its motion to dismiss, Defendants request judicial notice of various Securities and  
27 Exchange Commission (“SEC”) filings and press releases. (Doc. 69-2.) Pursuant to Rule 201, a court  
28 may take judicial notice of adjudicative facts “not subject to reasonable dispute.” Fed. R. Evid. 201(b).  
Facts are indisputable, and thus subject to judicial notice, only if they are either “generally known”  
under Rule 201(b)(1) or “capable of accurate and ready determination by resort to sources whose  
accuracy cannot be reasonably questioned” under Rule 201(b)(2). The Court finds that these documents  
are judicially noticeable and grants Defendants’ request.


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**IV.**  
**CONCLUSION**

For the foregoing reasons, the Court **GRANTS** Defendants' motion to dismiss Plaintiff's TAC with prejudice. The Court directs the Clerk to enter judgment accordingly.

**IT IS SO ORDERED.**

DATED: November 21, 2011

  
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Hon. Anthony J. Battaglia  
U.S. District Judge