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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BRAD MAUSS, individually and on behalf of all other persons similarly situated,

Plaintiff,

vs.

NUVASIVE, INC.; ALEXIS V. LUKIANOV; KEVIN C. O'BOYLE; and MICHAEL J. LAMBERT; ,

Defendants.

CASE NO. 13-cv-2005 JM (JLB)

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND

[Dkt. No. 24]

This is a purported securities fraud class action on behalf of persons who purchased NuVasive, Inc. securities between October 22, 2008, and July 30, 2013. Plaintiff alleges Defendants violated federal securities laws and pursues remedies under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 and the regulations promulgated thereunder, including Rule 10b-5. Defendant NuVasive, Inc. ("NuVasive") and several of its officers, Defendants Alexis V. Lukianov, Kevin C. O'Boyle, and Michael J. Lambert (collectively, "Individual Defendants") have filed a motion to dismiss Plaintiff Mauss's amended complaint (the "FAC") under Federal Rule of Civil Procedure ("Rule") 12(b)(6) for failure to state a claim. (Dkt. No. 24). Plaintiff has filed an opposition to Defendants' motion, (Dkt. No. 26), and Defendants have filed their reply. Having carefully considered the parties' briefing, the court finds this matter suitable for resolution on the papers without oral argument pursuant to Civil Local Rule 7.1.d.1. The motion to dismiss is GRANTED WITH LEAVE TO AMEND for the reasons set forth below.

1 **BACKGROUND**¹

2 NuVasive designs, develops, and markets a range of products relating to the
3 surgical treatment of spine disorders. In order to sustain and grow its business, the
4 Plaintiff alleges NuVasive faces constant pressure to innovate, promote and market its
5 products, establish relationships with surgeons and hospitals, and convince spine
6 surgeons to choose its products over those of its competitors. NuVasive and other
7 medical device companies are subject to an extensive regulatory framework intended
8 to protect patients and government-funded health care programs, such as Medicare and
9 Medicaid, from fraud and abuse. Thus, sales and marketing practices and other conduct
10 that can be commonplace in other industries may be unacceptable or illegal when
11 soliciting business that ultimately is paid for, in whole or in part, by governmental
12 healthcare programs. Failure to adhere to these laws and regulations can result in civil
13 and criminal penalties, or even exclusion from participation in governmental health
14 care programs.

15 Because NuVasive and its customers – mainly hospitals and surgeons
16 – rely primarily on third-party reimbursement for the earned surgical and monitoring
17 fees, Plaintiff alleges exclusion from participation in programs, such as Medicare and
18 Medicaid, can be fatal to its business. Consequently, if hospitals and physicians cannot
19 recover adequate payments from programs like Medicare and Medicaid, either because
20 NuVasive is ineligible to participate or because there is a disagreement about
21 reimbursement, it is unlikely that they will continue to use NuVasive’s products and
22 services.

23 Plaintiff alleges that despite NuVasive’s recognition that “[h]ealthcare fraud and
24 abuse laws apply to our business,” “Defendants determined to sustain [NuVasive’s]
25 revenues and expand its customer base by employing numerous, aggressive and
26 questionably-ethical sales and marketing practices that constitute violations of federal
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28 ¹ The background consists of Plaintiff’s allegations and, to the extent they are well-pled, are taken as true for purposes of this motion.

1 and state laws, including but not limited to, the Anti-Kickback Statute, the False
2 Claims Act, and other applicable healthcare fraud and abuse laws.” (FAC ¶ 6).
3 Generally, Plaintiff alleges Defendants engaged in three specific practices in violation
4 of applicable healthcare fraud and abuse laws.²

5 First, Plaintiff alleges Defendants “lured surgeons to utilize NuVasive products
6 and services and encourage other surgeons to do the same by devising so-called
7 educational and training programs and clinical studies, which included, among other
8 things, all-expense paid trips to New York, San Diego, Puerto Rico, and other
9 locations, first-class flights on private jets, tickets to Broadway shows and NFL games,
10 expensive cocktail receptions and dinners, luxury hotel stays, and gift cards.” (Id. at
11 ¶ 7). Plaintiff further asserts Defendants “created a network of prominent physicians,”
12 known within NuVasive as high-end rollers, “who received rewards and special
13 treatment, such as all-expense paid travel, concierge services, and speaking
14 engagements, based upon the number of patients they referred to [NuVasive] and their
15 promotion and publication of peer-reviewed papers touting the benefits of NuVasive
16 products and services. Certain physicians were also paid exorbitant consulting fees and
17 commissions, often in excess of \$1 million per year per doctor, for participating in
18 clinical trials and utilizing NuVasive products in surgeries.” (Id. at ¶¶ 8-9). Plaintiff
19 alleges Defendants engaged in this wrongful and illegal conduct, knowing that the
20 resulting increases in sales and revenues would be paid, in part, by governmental
21 healthcare programs, including Medicare and Medicaid.

22 Second, Plaintiff alleges Defendants violated applicable health care and abuse
23 laws following losses in revenue in its monitoring business due to changes in rules for
24 billing and coding its Intra-Operative Monitoring (“IOM”) services.³ Specifically,
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26 ² Plaintiff provides statements from confidential witnesses in support of these
27 allegations, which will be discussed further below.

28 ³ In October 2011, NuVasive expanded its products and services by
acquiring Impulse Monitoring, Inc. (“Impulse Monitoring”), which operates as a
wholly-owned subsidiary of NuVasive, for \$80 million. Impulse Monitoring

1 Plaintiff alleges, “[Defendants] responded by, among other things, (1) having sales
2 representatives place monitoring equipment in operating rooms, when the equipment
3 was redundant and not medically necessary; (2) allowing doctors to remotely monitor
4 several patients simultaneously, and then generating separate invoices for the same
5 time billed; (3) developing marketing materials to instruct customers on coding
6 monitoring services so as to take advantage of loopholes in coding procedures; and (4)
7 improperly coding monitoring services in claims submissions to Medicare and
8 Medicaid.” (Id. at ¶ 11).

9 Third, Plaintiff alleges that Defendants took aggressive action when coding
10 disputes threatened to impact revenues for NuVasive’s eXtreme Lateral
11 Interbody Fusion® (“XLIF procedure”),⁴ which was NuVasive’s most lucrative and
12 well-known line of business. In doing so, Defendants “waged a very heated battle with
13 third-party payers, insisting that those payers, including Medicare and Medicaid, accept
14 the coding designation assigned by NuVasive.” (Id. at ¶ 12). Ultimately, NuVasive
15 decided to continue to utilize the coding that resulted in the highest reimbursement for
16 the XLIF procedure.

17 In various public filings, Plaintiff alleges Defendants indicated that the
18 Anti-Kickback Statute “prohibits the knowing and willful solicitation, offer, payment
19 or receipt of any remuneration, direct or indirect, in cash or in kind, in return for or to
20 induce the referral of patients for items or services covered by Medicare, Medicaid and
21 certain other governmental health programs.” Despite knowing their conduct violated
22 the law, Defendants nevertheless claimed in these filings that they “believe[d] that

23 _____
24 provides Intra-Operative Monitoring (“IOM”) services, which allow doctors to
25 detect neural structures and potential neural compromise during surgical
26 procedures. The IOM model employs two doctors, a neurophysiologist, who
27 oversees the use of monitoring equipment during surgery, and a physician, who
28 monitors and interprets neurological data transmitted from sensors attached to the
patient by the neurophysiologist, usually from a remote location outside the hospital.

⁴ The XLIF® procedure is a minimally disruptive procedure that allows spine surgeons to have direct access to the intervertebral disc space (the "joint" of the spine) from the side of the body, as opposed to the front or back.

1 [their] operations materially compl[ied] with the antikickback statutes....” Likewise,
2 Plaintiff alleges Defendants knew that by compromising the independent judgment of
3 physicians, promoting the use of equipment that was not medically necessary, and
4 manipulating and exploiting loopholes in the billing coding system and encouraging
5 customers to do the same, improper claims would be submitted for payment to
6 Medicare and Medicaid in violation of the False Claims Act.

7 Ultimately, Plaintiff alleges the Defendants’ thinly-veiled kickback scheme and
8 deceptive billing practices caught the attention of regulators. On July 30, 2013,
9 NuVasive disclosed in its Form 10-Q for its second quarter in 2013 that it had
10 “received a federal administrative subpoena from the Office of the Inspector General
11 of the U.S. Department of Health and Human Services (OIG) in connection with an
12 investigation into possible false or otherwise improper claims submitted to Medicare
13 and Medicaid. The subpoena seeks discovery of documents for the period January
14 2007 through April 2013.” After releasing this news, NuVasive securities declined
15 \$3.28 per share or over 12%, to close at \$22.84 per share on July 31, 2013.

16 Throughout the applicable class period from October 22, 2008 through July 30,
17 2013, the FAC alleges Defendants violated federal securities laws and seeks remedies
18 under Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the “Exchange
19 Act”) and Rule 10b-5 against Nuvasive and the Individual Defendants. In particular,
20 Plaintiff alleges Defendants made false and/or misleading statements during conference
21 calls with investors and in NuVasive’s quarterly and annual reports. Plaintiff also
22 alleges Defendants failed to disclose material adverse facts about NuVasive’s business,
23 operations, and prospects. Specifically, Defendants made false and/or misleading
24 statements and/or failed to disclose that: (1) Defendants’ education and training
25 programs and expenses related thereto were a contrivance to disguise improper and
26 illegal gifts, payments, and other remuneration to doctors in exchange for referrals of
27 business; (2) Defendants utilized kickbacks, in the form of gifts, entertainment,
28 improper commissions and consulting fees, and other remuneration, in order to induce

1 doctors, including certain prominent physicians referred to by NuVasive insiders as
2 high-end rollers, to utilize its products and services and to encourage other doctors to
3 do the same; (3) Defendants employed improper sales and billing practices to sustain
4 revenues, including submitting false claims to Medicare and Medicaid with knowledge
5 that its customers ultimately would submit claims for reimbursement to governmental
6 healthcare programs, including Medicare and Medicaid; (4) Defendants provided
7 guidance to its customers as to how to code NuVasive products and procedures in order
8 to take advantage of loopholes and maximize reimbursement by third party payers,
9 including Medicare and Medicaid; (5) Defendants did not employ adequate internal
10 controls to detect and prevent fraudulent and abusive marketing, sales, and billing
11 practices so as to maintain compliance with applicable laws; (6) a substantial portion
12 of NuVasive's earnings and revenues were thereby earned as a result of violations of
13 the Anti-Kickback Statute, the False Claims Act, and other healthcare fraud statutes;
14 and (7) as a result of Defendants' practices, there was a substantial risk that NuVasive
15 would encounter regulatory scrutiny.

16 As a result of Defendants' misleading statements and omissions, and the
17 precipitous decline in the market value of NuVasive's securities, the FAC alleges
18 Plaintiff and other class members have suffered significant losses and damages. Based
19 on these general allegations and more specific allegations provided in the FAC,
20 Plaintiff asserts two causes of action: (1) Violations of Section 10(b) and Rule 10b-5
21 promulgated thereunder against all Defendants; and (2) Violations of Section 20(a) of
22 the Securities Exchange Act against the individual Defendants.

23 On August 28, 2013, Danny Popov filed this class action against Defendants.
24 On October 28, 2013, Movant Mauss brought a motion to appoint lead counsel and
25 lead plaintiff pursuant to § 21D(a)(3)(B) of the Securities Exchange Act, as amended
26 by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C.
27 § 78u-4(a)(3)(B). On December 27, 2013, the court granted the motion to name
28 Pomerantz Grossman Huffman Dahlstrom & Gross LLP as lead counsel with Glancy

1 Binkow and Goldberg acting as liaison counsel and to appoint Mauss as lead plaintiff.
2 Plaintiff Mauss filed the operative FAC on February 13, 2014.

3 LEGAL STANDARD

4 **A. Federal Rule of Civil Procedure 12(b)(6)**

5 A Rule 12(b)(6) motion to dismiss challenges the legal sufficiency of the
6 pleadings. Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). When considering a
7 Rule 12(b)(6) motion to dismiss, the court must construe the pleadings in the light most
8 favorable to the non-moving party, accepting as true all material allegations in the
9 complaint and any reasonable inferences drawn therefrom. See, e.g., Broam v. Bogan,
10 320 F.3d 1023, 1028 (9th Cir. 2003). While dismissal is proper only in “extraordinary”
11 cases, United States v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981), the
12 complaint’s “[f]actual allegations must be enough to raise a right to relief above the
13 speculative level.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). The court
14 should grant relief under Rule 12(b)(6) only if the complaint lacks either a “cognizable
15 legal theory” or facts sufficient to support a cognizable legal theory. Balistreri v.
16 Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990).

17 **B. Federal Rule of Civil Procedure 9(b) and the PSLRA**

18 Because Plaintiff has alleged securities fraud claims governed by the Private
19 Securities Litigation Reform Act of 1995 (“PSLRA”), Plaintiff must also satisfy the
20 heightened pleading standards set forth by Rule 9(b) of the Federal Rules of Civil
21 Procedure and by the PSLRA, the latter of which has imposed “formidable pleading
22 requirements to properly state a claim and avoid dismissal under Fed. R. Civ. P.
23 12(b)(6).” Metzler Inv. GMBH v. Corinthian Colls., Inc., 540 F.3d 1049, 1055 (9th
24 Cir. 2008); see Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 990 (9th Cir.
25 2009). (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)).

26 Section 10(b) of the Exchange Act makes it unlawful “[t]o use or employ, in
27 connection with the purchase or sale of any security ... any manipulative or deceptive
28 device or contrivance in contravention of such rules and regulations as the [Securities

1 and Exchange (“SEC”)] Commission may prescribe” 15 U.S.C. § 78j(b).
2 Pursuant to that section, the SEC promulgated Rule 10b-5, which makes it unlawful,
3 among other things, “[t]o make any untrue statement of a material fact or to omit to
4 state a material fact necessary in order to make the statements made, in the light of the
5 circumstances under which they were made, not misleading[]” in connection with the
6 purchase or sale of any security. 17 C.F.R. § 240.10b-5(b). Thus, to state a claim for
7 private securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must allege:
8 “(1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with
9 the purchase or sale of a security, (4) transaction and loss causation, and (5) economic
10 loss.” In re Daou Sys., Inc., 411 F.3d 1006, 1014 (9th Cir. 2005) (citing Dura Pharms.,
11 Inc. v. Broudo, 544 U.S. 336, 341-42 (2005)).

12 Rule 9(b) requires a plaintiff alleging fraud or mistake to “state with particularity
13 the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b); see Nursing
14 Home Pension Fund, Local 144 v. Oracle Corp., 380 F.3d 1226, 1230 (9th Cir. 2004).
15 The Ninth Circuit has explained that “[a]llegations of fraud must be accompanied by
16 ‘the who, what, when, where, and how’ of the misconduct charged.” Vess v.
17 Ciba–Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003)

18 In addition to Rule 9(b)’s heightened pleading requirements for allegations of
19 fraud, the PSLRA requires a plaintiff alleging securities fraud to “plead with
20 particularity both falsity and scienter.” Zucco Partners, 552 F.3d at 990 (citation
21 omitted); accord Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314
22 (2007). The complaint must “specify each statement alleged to have been misleading
23 [and] the reason or reasons why the statement is misleading,” and “state with
24 particularity facts giving rise to a strong inference that the defendant acted with the
25 required state of mind.” 15 U.S.C. § 78u4(b)(1)-(2); see also Tellabs, 551 U.S. at 321.
26 To satisfy the rigorous pleading standards of the PSLRA, the complaint's scienter
27 allegations must give rise not simply to a plausible inference of scienter, but rather to
28 an inference of scienter that is “cogent and at least as compelling as any opposing

1 inference of nonfraudulent intent.” Tellabs, 551 U.S. at 314, 324. “If a plaintiff fails
2 to plead the alleged misleading statements or omissions or the defendant’s scienter with
3 particularity, the complaint must be dismissed.” Nursing Home Pension Fund, Local
4 144 v. Oracle Corp., 380 F.3d 1226, 1230 (9th Cir. 2004) (citing 15 U.S.C.
5 § 78u-4(b)(3)(A)).

6 DISCUSSION

7 Defendants seek dismissal of Plaintiff’s Section 10(b) claim on the basis that
8 (1) Plaintiff has failed to plead falsity with regard to Defendants’ alleged material
9 misrepresentations and omissions as the FAC does not specify with particularity what
10 statements are false and the reasons why they are, and (2) Plaintiff has failed to plead
11 sufficient facts to establish scienter. Defendants also seek dismissal of Plaintiff’s
12 Section 20(A) claim for failure to establish an underlying securities violation through
13 Section 10(b).

14 **A. Plaintiff’s Section 10(b) Claim**

15 **1. Falsity of the Alleged Misrepresentations or Omissions**

16 Defendants argue Plaintiff has failed to sufficiently allege falsity by identifying
17 specific statements as misleading and then offering a specific reason why the
18 statements are misleading. See Desaigoudar v. Meyercord, 223 F.3d 1020, 1023 (9th
19 Cir. 2000). The FAC is 93 pages long and contains 226 paragraphs. In 91 paragraphs
20 of the FAC entitled “Materially False and Misleading Statements During the Class
21 Period,” Plaintiff provides summaries and direct quotes, many of which are in the form
22 of lengthy block-quotes, from various quarterly reports, annual reports, and investor
23 conference calls occurring from late 2008 through the 2012 annual report. (FAC
24 ¶¶ 103-94). Rather than specifically stating why each statement was false, the FAC
25 summarizes the numerous reasons why all of the Defendants’ statements in the various
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1 documents and conference calls were false in just two paragraphs.⁵ (FAC ¶¶ 112; 194).
2 Defendants argue this style of “puzzle pleading” has been roundly rejected by courts
3 and fails to satisfy the PSLRA’s requirement that the complaint identify the allegedly
4 false statements with particularity.

5 “In the context of securities fraud, the term ‘puzzle pleading’ refers to a pleading
6 that requires a defendant and the court to ‘match up’ the statements that form the basis
7 of the plaintiff’s claims with the reasons why those statements are misleading.”
8 Neborksy v. Valley Forge Composite Tech., Inc., 2014 WL 1705522, at *5 (S.D. Cal.
9 Apr. 28, 2014)(citing In re Splash Tech. Holdings, Inc. Sec. Litig., 160 F. Supp. 2d
10 1059, 1073–75 (N.D. Cal. 2001); In re Cisco Sys. Inc. Sec. Litig., 2013 WL 1402788
11 (N.D. Cal. Mar. 29, 2013)). It is Plaintiff’s burden to identify the misleading statement
12 and link each one to the facts that establish that the statement was false or misleading
13 when made. In re Glenfed, Inc. Sec. Litig., 42 F.3d 1541, 1553–54 (9th Cir.1995) (“A
14 complaint is not a puzzle ... and we are loathe to allow plaintiffs to tax defendants,
15 against whom they have leveled very serious charges, with the burden of solving
16 puzzles in addition to the burden of formulating an answer to their complaint.”). While
17 the FAC contains a great deal of back-drop relative to Plaintiff’s claims and the

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19 ⁵ As noted above, Plaintiff alleges these statements were false and/or misleading
20 because: “(1) Defendants’ education and training programs and expenses related
21 thereto were a contrivance to disguise improper and illegal gifts, payments, and other
22 remuneration to doctors in exchange for referrals of business; (2) Defendants utilized
23 kickbacks, in the form of gifts, entertainment, improper commissions and consulting
24 fees, and other remuneration, in order to induce doctors, including certain prominent
25 physicians referred to by NuVasive insiders as “high end rollers,” to utilize its products
26 and services and to encourage other doctors to do the same; (3) Defendants employed
27 improper sales and billing practices to sustain revenues, including by submitting false
28 claims to Medicare and Medicaid and with knowledge that its customers ultimately
would submit claims for reimbursement to governmental healthcare programs,
including Medicare and Medicaid; (4) Defendants provided guidance to its customers
as to how to code NuVasive products and procedures in order to take advantage of
loopholes and maximize reimbursement by third party payers, including Medicare and
Medicaid; (5) Defendants did not employ adequate internal controls to detect and
prevent fraudulent and abusive marketing, sales, and billing practices so as to maintain
compliance with applicable laws; (6) a substantial portion of the Company’s earnings
and revenues were thereby earned as a result of violations of the Anti-Kickback
Statute, the False Claims Act, and other healthcare fraud statutes; and (7) as a result of
Defendants’ practices, there was a substantial risk that NuVasive would encounter
regulatory scrutiny.” (FAC ¶ 194).

1 Defendants' alleged violations of applicable healthcare laws, the court nevertheless
2 agrees with Defendants' assessment. The FAC simply does not sufficiently link the
3 many statements at issue to the reasons why Plaintiff believes they were impermissible
4 misrepresentations and omissions. As pled, the FAC's format, a version of
5 impermissible "puzzle pleading" rejected by other courts, does not provide the clarity
6 required to evaluate the falsity of the individual statements.

7 Moreover, Defendants argue it is unclear from the structure of the FAC whether
8 Plaintiff challenges every aspect of the referenced documents as false or simply
9 challenges certain statements made in those documents. This is largely because many
10 of the statements quoted by Plaintiff do not appear false on their face. For example, the
11 FAC quotes the following statement from NuVasive's SEC filings: "Healthcare fraud
12 and abuse laws apply to our business if a customer submits a claim for an item or
13 service that is reimbursed under Medicare, Medicaid or most other federally-funded
14 health care programs." (FAC ¶¶111, 126). Without further explanation, it is unclear
15 whether Plaintiff considers this statement to be false or why, particularly because
16 Plaintiff's claims are entirely predicated upon the applicability of various healthcare
17 fraud and abuse laws to NuVasive. Perhaps this statement was included in the FAC as
18 a basis for establishing Defendants' scienter rather than as a false statement by
19 Defendants. However, its inclusion in the "Materially False and Misleading Statements
20 During the Class Period" creates confusion of the type often associated with "puzzle
21 pleading." Because the FAC does not specifically link the individually challenged
22 statements to the asserted reasons for their falsity, it is not immediately clear which
23 Defendants are involved and how they are involved. As a result, the FAC's allegations
24 regarding false misrepresentations and fraudulent omissions are insufficient under the
25 PSLRA.

26 Plaintiff argues the FAC is sufficient because it sets forth four categories of false
27 and misleading statements in addition to containing three separately-labeled and
28 clearly-identifiable sections explaining the reasons why each category of statements is

1 false and misleading. Plaintiff's argument, however, suggests a clarity that is not
2 reflected in the FAC. In the FAC, Defendants' actual statements and the respective
3 reasons for their falsity are not included within the same section of the 93-page FAC.
4 Plaintiff describes the factual background suggesting Defendants' statements were false
5 and misleading in paragraphs 50 through 102. Thereafter, Plaintiff details the actual
6 statements made by Defendants in paragraphs 103-193, along with brief summaries of
7 the many reasons the statements are allegedly false and misleading in paragraphs 112
8 and 194. By separating the statements from the alleged reasons for their falsity,
9 Plaintiff has placed the burden on Defendants and the court to "match up" the lengthy
10 allegations in order to consider the merits of Plaintiff's claims. Over a 93-page FAC,
11 this would prove to be quite an onerous and speculative task, particularly given the
12 possibility that individual statements may or may not implicate more than one of
13 Plaintiff's many allegations regarding falsity.

14 With regard to the Individual Defendants, the FAC poses an additional problem.
15 While Defendant Lukianov has served as NuVasive's Chief Executive Officer
16 throughout the time period at issue in the FAC, Defendants O'Boyle and Lambert have
17 not. (FAC ¶¶ 25-27). Rather, Defendant O'Boyle served as Executive Vice President
18 and Chief Financial Officer for NuVasive up until November 2009 at which point
19 Defendant Lambert took over as Chief Financial Officer on November 9, 2009. (Id.)
20 As currently pled, the FAC suggests the Individual Defendants are equally liable for
21 all of the allegedly misleading statements made from 2008 through 2012, without
22 offering any basis for holding Defendant O'Boyle liable for statements made after his
23 departure from NuVasive or for holding Defendant Lambert liable for statements made
24 prior to his arrival.

25 Additionally, Plaintiff offers factual allegations from confidential witnesses to
26 demonstrate the falsity of Defendants' statements as well as provide an inference of
27 their scienter at the time the statements were made. However, the FAC rarely provides
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1 any dates associated with their factual allegations.⁶ Generally, the sole context
2 regarding the timing of the confidential witnesses' factual allegations comes from their
3 period of employment at NuVasive.⁷ Of the fifteen confidential witnesses, six did not
4 begin working at NuVasive until after Defendant O'Boyle's tenure had ended, and it
5 is unclear from the complaint when two of the witnesses were employed at NuVasive.⁸
6 As a result, it is unclear how the factual allegations of these eight confidential
7 witnesses pertain to Defendant O'Boyle. Moreover, while Defendants Lambert and
8 Lukianov are specifically named in statements from several confidential witnesses,⁹
9 Defendant O'Boyle is never mentioned individually. Considering the differing tenures
10 of Defendants O'Boyle and Lambert as well as the confidential witnesses, the FAC's
11 failure to allege which statements are attributable to the Individual Defendants is
12 insufficient under the PSLRA and Rule 9(b).

13 For these reasons, the FAC fails to allege false or misleading statements by the
14 Defendants. However, as it may be possible for Plaintiff to resolve these deficiencies,
15 the Court grants Plaintiff leave to amend the FAC. Should Plaintiff choose to do so,
16 a further amended complaint should specifically identify the allegedly misleading

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18 ⁶ This statement appears to be the exception: "For example, CW15 explained that
19 during 2010, NuVasive fought with insurance companies concerning the proper coding
20 for the XLIF procedure. Ultimately the dispute was resolved, with NuVasive adopting
the coding for XLIF that it demanded, which also allowed the Company to charge more
for the procedure." (FAC ¶ 101).

21 ⁷ The FAC provides the following periods of employment for the confidential
22 witnesses: Confidential Witness 1 ("CW1"): Dec. 2009 - Sept. 2012; CW2: Aug. 2008-
23 Oct. 2013; CW3: June 2012-Feb. 2013; CW4: Jan. 2011-May 2013; CW5: June 2010-
24 Feb. 2011; CW6: June 2010-Apr. 2012; CW7: 2011-2012; CW8: Dec. 2009-Mar.
2012; CW9: 2006-Aug. 2013; CW10: 2006-July 2013; CW11: Feb. 2011-Jan. 2013;
CW12 and CW13: unknown; CW14: Jan. 2005-May 2010; and CW15: June 2009-Jan.
2013. (FAC ¶¶ 54, 59, 59, 63, 64, 65, 81, 63, 78, 85, 93, 86, 100, and 101,
respectively).

25 ⁸ Of the fifteen confidential witnesses, CW1, CW3, CW4, CW5, CW6, CW7,
26 CW8, and CW11 began their employment after November 2009. Additionally, it is
27 unclear from the FAC when CW 12 and CW13 began working at NuVasive as their
periods of employment are not provided.

28 ⁹ (FAC ¶¶ 50-75, 95, 115-116, 137 (confidential witness statements regarding
Defendant Lukianov); *Id.* at ¶¶ 72-74 (confidential witness statements regarding
Defendant Lambert)).

1 statements and link each one to the facts that establish that the statement was false or
2 misleading when made by the particular defendant.

3 **2. Scienter**

4 In addition to alleging material misrepresentations or omissions of fact, Plaintiff
5 must also allege scienter, a mental state embracing intent to deceive, manipulate, or
6 defraud. Tellabs, 551 U.S. at 319. The PSLRA requires that a securities fraud
7 complaint “state with particularity facts giving rise to a strong inference that the
8 defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). A
9 complaint must allege that the defendants made false or misleading statements either
10 knowing they were false or with deliberate recklessness as to their falsity. Zucco
11 Partners, LLC v. Digimarc Corp., 552 F.3d 981, 992 (9th Cir. 2009). It is not enough
12 for a plaintiff merely to allege facts “from which an inference of scienter rationally
13 could be drawn.” Tellabs, 551 U.S. at 323. Instead, the plaintiff must “plead with
14 particularity facts that give rise to a ‘strong’—i.e., a powerful or cogent—inference.”
15 Id. (emphasis added). In determining whether a plaintiff has met this heightened
16 pleading burden, the Court must examine whether all of the facts alleged, taken
17 collectively, give rise to a strong inference of scienter. Id. at 324. In Matrixx
18 Initiatives, Inc. v. Siracusano, the Supreme Court reiterated that courts must “review
19 ‘all the allegations holistically’” when determining whether scienter has been
20 sufficiently pled. 131 S. Ct. 1309, 1324 (quoting Tellabs, 551 U.S. at 326).

21 Despite the lengthy factual background provided in the FAC as supported by
22 statements from numerous confidential witnesses, Plaintiff has failed to allege falsity
23 of Defendants’ statements with particularity because it is unclear from the FAC which
24 statements are at issue, which factual allegations support a finding of falsity for each
25 specific statement, and which Defendant allegedly made each statement. Plaintiff’s
26 allegations regarding Defendants’ scienter at the time of making the statements suffer
27 from the same deficiencies. “Where plaintiffs fail to plead falsity, *a fortiori* they have
28 not established that defendants knew those statements were false.” Karacand v.

1 Edwards, 53 F. Supp. 2d 1236, 1252 (D. Utah 1999); In re Cisco Sys. Inc. Sec. Litig.,
2 2013 WL 1402788 (N.D. Cal. Mar. 29, 2013). In particular, the court has no way to
3 evaluate Defendants' scienter at the time of making the allegedly misleading statement
4 when it remains unclear which statements are at issue and why. Additionally, it is
5 concerning that Plaintiff's allegations of scienter refer to all Defendants equally
6 without addressing the impact of the Individual Defendants' and the confidential
7 witnesses' differing periods of employment at NuVasive. For these reasons, the FAC
8 also fails to allege scienter sufficient with particularity.

9 **B. Plaintiff's Section 20(A) Claim**


10 Finally, Defendants challenge Plaintiff's second cause of action under section
11 20(a) of the Exchange Act, which provides that joint and several liability may be
12 imposed on persons who directly or indirectly control a violator of the securities laws.
13 15 U.S.C. § 78t(a). To establish "control person" liability under section 20(a) of the
14 Exchange Act, a plaintiff must show that a primary violation of section 10(b) was
15 committed and that each individual defendant "directly or indirectly" controlled the
16 violator. Paracor Fin., Inc. v. Gen. Elec. Capital, 96 F.3d 1151, 1161 (9th Cir. 1996).
17 Since Plaintiff has failed to state a viable section 10(b) claim, Plaintiff's claim under
18 section 20(a) of the Exchange Act fails as well.

19 **CONCLUSION**

20 For the reasons set forth above, Defendants motion to dismiss is GRANTED
21 WITH LEAVE TO AMEND. Should Plaintiff wish to file a second amended
22 complaint, he must do so within twenty days of this order.

23 IT IS SO ORDERED.

24 DATED: August 19, 2014

25 
26 Hon. Jeffrey T. Miller
27 United States District Judge
28