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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

NELDA ZAMIR, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

v.

BRIDGEPOINT EDUCATION, INC., et
al.,

Defendants.

Case No.: 15-CV-408 JLS (DHB)

**ORDER GRANTING DEFENDANTS’
MOTION TO DISMISS**

(ECF No. 58)

Presently before the Court is Defendants Bridgepoint Education, Inc., Andrew S. Clark, and Daniel J. Devine’s (collectively, “Defendants”) Motion to Dismiss Plaintiffs’ Second Amended Class Action Complaint (“MTD,” ECF No. 58). Also before the Court are Lead Plaintiffs’ Response in Opposition to, (“Opp’n,” ECF No. 61), and Defendants’ Reply in Support of, (“Reply,” ECF No. 63), Defendants’ MTD. The Court vacated the hearing and took this matter under submission without oral argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 62.) Having considered the parties’ arguments and the law, the Court **GRANTS** Defendants’ MTD.

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BACKGROUND

I. The Defendants

Defendant Bridgepoint provides for-profit higher education through two wholly-owned subsidiaries, Ashford University and the University of the Rockies. (Second Am. Class Action Compl. (“SAC”) ¶¶ 3, 24, ECF No. 57.) Its common stock is publicly traded on the New York Stock Exchange. (*Id.* ¶ 24.)

Defendant Clark is a co-founder of Defendant Bridgepoint, as well as its Chief Executive Officer, President, and a director. (*Id.* ¶ 25.) Defendant Devine served as Defendant Bridgepoint’s Chief Financial Officer since January 2004 and its Executive Vice President since January 2011, resigning both positions on October 1, 2015. (*Id.* ¶ 27.)

II. Factual Background

Defendant Bridgepoint’s primary source of revenue is tuition and related fees. (*Id.* ¶ 3.) Without federal financial aid, many of Defendant Bridgepoint’s students would not choose to attend Bridgepoint’s institutions, nor could they pay the tuition these institutions charge. (*Id.* ¶ 35.)

In mid-2012, Defendant Bridgepoint experienced technical issues during an annual upgrade of its student management system. (*Id.* ¶ 62.) These technical issues resulted in delays in packaging students for financial aid qualification in between financial aid award years. (*Id.* ¶ 63.) As a result, a significant number of students were not packaged prior to leaving Defendant Bridgepoint’s institutions and were consequently not eligible for financial aid funding. (*Id.* ¶ 64.) These students were therefore required to pay outstanding balances without the assistance of financial aid. (*Id.*)

On March 12, 2013, Defendant Bridgepoint reported an increase in its bad debt expense for the fourth quarter of 2012 and the 2012 fiscal year. (*Id.* ¶ 97.) Defendant Devine explained to investors and analysts on an earnings conference call that Defendant Bridgepoint’s technical issues were to blame, but that he did not expect the issue to repeat in 2013. (*Id.* ¶¶ 63, 97.) On May 17, 2013, Defendant Bridgepoint issued an amended Form 10-K for the 2012 fiscal year to reissue its financial statements. (*Id.* ¶ 67.)

1 Despite Defendant Bridgepoint’s assurances to the contrary, the 2012 technical
2 issues caused a backlog in packaging financial aid throughout 2013. (*Id.* ¶¶ 63, 97.)
3 Consequently, Defendant Bridgepoint continued to report higher than normal bad debt
4 expenses as a percentage of revenues. (*Id.* ¶¶ 11, 98.)

5 On December 11, 2013, the United States Securities and Exchange Commission
6 (SEC) contacted Defendant Devine with comments and questions regarding Defendant
7 Bridgepoint’s declining enrollments but increased revenue for the 2012 fiscal year. (*Id.*
8 ¶¶ 47, 65.) The SEC also asked Defendant Devine how Defendant Bridgepoint’s internal
9 processing issues with financial aid packages had affected its bad debt percentage. (*Id.*
10 ¶ 65.) Defendant Devine’s January 10, 2014 response detailed Defendant Bridgepoint’s
11 2012 technical issues and the backlog affecting financial aid packaging through 2013. (*Id.*
12 ¶ 65.) In response to the SEC’s inquiry regarding Defendant Bridgepoint’s determination
13 that collectability is reasonably assured, Defendant Devine noted that Defendant
14 Bridgepoint “conclude[s its] collectability assessment based on the government’s ability to
15 pay as opposed to a student’s ability to pay.” (*Id.* ¶ 45 (emphasis omitted).) Defendant
16 Devine’s response prompted the SEC to ask for additional information on February 12,
17 2014, including “why it is appropriate to base your collectability assessment on the
18 government’s ability to pay.” (*Id.* ¶ 48.)

19 On March 11, 2014, Defendant Bridgepoint preliminarily announced its fourth
20 quarter and 2013 fiscal year financial results in a press release. (*Id.* ¶ 120.) Later that day,
21 Defendants held an earnings call, during which Defendants Clark and Devine fielded
22 questions relating to Defendant Bridgepoint’s increased bad debt percentage for the
23 quarter. (*Id.* ¶ 121.) Following this news, the price of Defendant Bridgepoint’s stock fell
24 15.73%, or \$2.99 per share, closing at \$16.02 per share following unusually heavy trading
25 volume. (*Id.* ¶ 122.)

26 On May 12, 2014, Defendants announced in a press release attached to a Form 8-K
27 that Defendant Bridgepoint would be unable to timely file its Form 10-Q for the first
28 quarter of 2014 because “[t]he Company is working to quantify the impact of an

1 outstanding comment the Company received from the [SEC].” (*Id.* ¶¶ 36, 124.) Defendants
2 also explained that Defendant Bridgepoint was evaluating whether to restate its financial
3 results for the periods from January 1, 2011 through December 31, 2013. (*Id.*) Defendants
4 Clark and Devine held an earnings conference call later that day, during which Defendant
5 Devine admitted that Defendant Bridgepoint’s prior revenue recognition policy was
6 incorrect. (*Id.* ¶ 125.) Specifically, Defendant Devine explained that

7 [u]nder previous revenue recognition, revenues recognized subsequent to a
8 student losing financial aid eligibility, and ultimately not collected, were
9 included in our bad debt expense. Going forward, our policy will exclude
10 these revenues and will result in a corresponding decrease in our bad debt
expense that will be realized over subsequent quarters.

11 (*Id.* ¶ 37.) Consequently, the price of Defendant Bridgepoint’s shares declined nearly 9%,
12 closing at \$14.51 per share after unusually heavy trading volume. (*Id.* ¶ 127.)

13 The following day, Defendant Devine filed a notification of late filing for the first
14 quarter of 2014 on Form 12b-25 with the SEC. (*Id.* ¶ 126.) This resulted in an additional
15 decline of 3.17% in Defendant Bridgepoint’s share price, which closed at \$14.05 per share.
16 (*Id.* ¶ 127.)

17 On May 30, 2014, Defendants announced that they were restating Defendant
18 Bridgepoint’s financial results for the fiscal year ending December 31, 2013 and each of
19 the three quarterly financial results during the year, as well as revising the financial
20 statements for the fiscal years ending in December 31, 2012 and 2011. (*Id.* ¶¶ 13, 128–29.)

21 On June 2, 2014, the first trading day following the press release, the price of Defendant
22 Bridgepoint’s shares declined by 1.31%, or \$0.17 per share, closing at \$12.82. (*Id.* ¶¶ 14,
23 130.) Defendant Bridgepoint issued its restated 2013 financials on August 4, 2014. (*Id.*
24 ¶¶ 4, 38.)

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1 As a result of the restatement, Defendant Bridgepoint saw a decrease in revenues,
 2 but a corresponding increase in net income and decrease in its bad debt expense:

Financial Period	Original Revenue (millions)	Restated Revenue (millions)	Difference in Revenue	Original Bad Debt Expense (millions)	Restated Bad Debt Expense (millions)	Original Bad Debt/ Revenue	Restated Bad Debt/ Revenue	Original Net Income (millions)	Restated Net Income/ Loss (millions)	Difference in Net Income/ Loss
FY 2012	\$968.2	\$943.4	(2.6%)	\$73.7	\$52.8	7.6%	5.6%	\$123.4	\$121.1	(1.9%)
1Q 2013	\$222.0	\$213.0	(4.1%)	\$18.3	\$13.0	8.2%	6.1%	\$27.0	\$24.7	(8.5%)
2Q 2013	\$197.6	\$193.4	(2.1%)	\$18.6	\$11.4	9.4%	5.9%	\$10.4	\$12.1	16.3%
3Q 2013	\$185.6	\$182.8	(1.5%)	\$16.8	\$7.3	9.0%	4.0%	\$10.1	\$14.2	40.6%
4Q 2013	\$163.5	\$162.2	(0.8%)	\$18.7	\$15.4	11.4%	9.5%	(\$6.5)	(\$5.1)	(21.5%)
FY 2013	\$768.6	\$751.4	(2.2%)	\$72.3	\$47.1	9.4%	6.3%	\$41.0	\$45.9	12.0%

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 10 (*Id.* ¶ 43; MTD Mem. 6, ECF No. 58-1; Manolova Decl. Ex. E at 32–33, ECF No. 28-2 at
 11 39–40.)¹

12 On July 25, 2014, Defendant Bridgepoint disclosed that the SEC was investigating
 13 its accounting practices, including revenue recognition and receivables. (*Id.* ¶ 134.) The
 14 SEC also issued a subpoena for the revised and restated time periods, and documents and
 15 information dating back to July 1, 2009 to the present. (*Id.*) On July 12, 2016, via a Form
 16 8-K filed with the SEC, Defendant Bridgepoint announced that the Department of
 17 Education would commence a review of Ashford’s administration of federal student
 18 financial aid programs for certain students identified in the 2009–2012 calendar year. (*Id.*
 19 ¶ 136.) In this same Form 8-K, Defendant Bridgepoint also announced that the U.S.
 20 Department of Justice was conducting an “investigation concerning allegations that the
 21 Company may have misstated Title IV refund revenue or overstated revenue associated
 22 with private secondary loan programs and thereby misrepresented its compliance with the
 23 90/10 rule of the Higher Education Act.” (*Id.* ¶ 137.)

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27 ¹ This table is based on Plaintiffs’ allegations in addition to documents submitted as Exhibits to the
 28 Manolova Declaration in Defendants’ first Motion to Dismiss and Request for Judicial Notice, (ECF No. 28), which the Court granted in its entirety, (*see* ECF No. 53).

1 **III. Procedural Background**

2 Lead Plaintiff Zamir filed an initial complaint on February 24, 2015, alleging two
3 causes of action for violation of Section 10(b) of the Exchange Act and Rule 10b-5 and
4 violation of Section 20(a) of the Exchange Act. (*See generally* ECF No. 1.) Lead Plaintiffs
5 moved for appointment as lead plaintiffs and approval of choice of counsel on April 27,
6 2015. (*See* ECF No. 3.) Because the motion was unopposed, (*see* ECF No. 13), the Court
7 granted Lead Plaintiffs’ motion, (*see* ECF No. 14).

8 On September 18, 2015, Lead Plaintiffs filed the AC, asserting the same causes of
9 action as in the original complaint. (*See* ECF No. 17.) Several Defendants filed motions to
10 dismiss on November 24, 2015, (*see* ECF Nos. 28, 30), and on January 11, 2016, Lead
11 Plaintiffs filed a Motion to Strike, (*see* ECF No. 37). The Court granted Defendants’
12 motions to dismiss, and denied Lead Plaintiffs’ Motion to Strike. (“First MTD Order,” ECF
13 No. 53.) Thereafter Lead Plaintiffs dismissed several named Defendants. (ECF Nos. 56,
14 59.) Lead Plaintiffs filed their SAC on September 9, 2016. (ECF No. 57.) Defendants filed
15 the instant Motion to Dismiss on October 24, 2016.

16 **MOTION TO DISMISS**

17 **I. Legal Standard**

18 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the
19 defense that the complaint “fail[s] to state a claim upon which relief can be granted,”
20 generally referred to as a motion to dismiss. The Court evaluates whether a complaint states
21 a cognizable legal theory and sufficient facts in light of Federal Rule of Civil Procedure
22 8(a), which requires a “short and plain statement of the claim showing that the pleader is
23 entitled to relief.” Although Rule 8 “does not require ‘detailed factual allegations,’ . . . it
24 [does] demand more than an unadorned, the-defendant-unlawfully-harmed-me
25 accusation.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*
26 *Twombly*, 550 U.S. 544, 555 (2007)). In other words, “a plaintiff’s obligation to provide
27 the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and
28 a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S.

1 at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). A complaint will not suffice
2 “if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’” *Iqbal*, 556 U.S.
3 at 677 (citing *Twombly*, 550 U.S. at 557).

4 In order to survive a motion to dismiss, “a complaint must contain sufficient factual
5 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Id.* (quoting
6 *Twombly*, 550 U.S. at 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible
7 when the facts pled “allow the court to draw the reasonable inference that the defendant is
8 liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 677 (citing *Twombly*, 550 U.S. at
9 556). That is not to say that the claim must be probable, but there must be “more than a
10 sheer possibility that a defendant has acted unlawfully.” *Id.* Facts “‘merely consistent with’
11 a defendant’s liability” fall short of a plausible entitlement to relief. *Id.* (quoting *Twombly*,
12 550 U.S. at 557). Further, the Court need not accept as true “legal conclusions” contained
13 in the complaint. *Id.* This review requires context-specific analysis involving the Court’s
14 “judicial experience and common sense.” *Id.* at 678 (citation omitted). “[W]here the well-
15 pleaded facts do not permit the court to infer more than the mere possibility of misconduct,
16 the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’”
17 *Id.*

18 Where a complaint does not survive 12(b)(6) analysis, the Court will grant leave to
19 amend unless it determines that no modified contention “consistent with the challenged
20 pleading . . . [will] cure the deficiency.” *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655,
21 658 (9th Cir. 1992) (quoting *Schriber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d
22 1393, 1401 (9th Cir. 1986)).

23 “Claims brought under Rule 10b-5 . . . must meet Federal Rule of Civil Procedure
24 9(b)’s particularity requirement that ‘[i]n all averments of fraud or mistake, the
25 circumstances constituting fraud or mistake shall be stated with particularity.’” *In re Dura*
26 *Pharm., Inc. Sec. Litig.*, 452 F. Supp. 2d 1005, 1016 (S.D. Cal. 2006) (alteration in original)
27 (quoting Fed. R. Civ. P. 9(b)) (citing *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1014
28 (9th Cir. 2005), *cert. denied*, 546 U.S. 1172 (2006); *Yourish v. Cal. Amplifier*, 191 F.3d

1 983, 993 (9th Cir. 1999)). “In addition, in 1995, Congress enacted the Private Securities
2 Litigation Record Act of 1995 (PSLRA) and altered the pleading requirements in private
3 securities fraud litigation by requiring a complaint plead with particularity both falsity and
4 scienter.” *Id.* at 1016–17 (quoting *Daou Sys.*, 411 F.3d at 1014) (internal quotation marks
5 omitted).

6 **II. Analysis**

7 As before, Lead Plaintiffs assert two causes of action: (1) violation of Section 10(b)
8 of the Exchange Act and Rule 10b-5 against all Defendants, and (2) violation of Section
9 20(a) of the Exchange Act against Defendants Clark and Devine (collectively, the
10 “Individual Defendants”). (*See generally* SAC, ECF No. 57.) Defendants ask the Court to
11 dismiss Lead Plaintiffs’ SAC with prejudice. (*See* MTD Mem. 18, ECF No. 58-1.)

12 **A. Section 10(b) and Rule 10b-5**

13 “Section 10(b) of the Securities Exchange Act of 1934 forbids (1) the ‘use or
14 employ[ment] . . . of any . . . deceptive device,’ (2) ‘in connection with the purchase or sale
15 of any security,’ and (3) ‘in contravention of’ Securities and Exchange Commission ‘rules
16 and regulations.’” *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341 (2005) (quoting 15
17 U.S.C. § 78j(b)). “Commission Rule 10b-5 forbids, among other things, the making of any
18 ‘untrue statement of a material fact’ or the omission of any material fact ‘necessary in order
19 to make the statements made . . . not misleading.’” *Id.* (quoting 17 CFR § 240.10b-5
20 (2004)). “The basic elements of a Rule 10b-5 claim, therefore, are: (1) a material
21 misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or
22 sale of a security, (4) transaction and loss causation, and (5) economic loss.” *Daou Sys.*,
23 411 F.3d at 1014 (citing *Dura Pharms.*, 544 U.S. at 341–42). Defendants challenge the
24 adequacy of Lead Plaintiffs’ allegations concerning only the second and fourth elements.
25 (*See generally* MTD Mem., ECF No. 58-1; *see also* Opp’n 1, ECF No. 61; Reply 4–9, ECF
26 No. 63.)

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1 1. *Scienter*

2 A private securities plaintiff must “state with particularity facts giving rise to a strong
3 inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2).
4 The “required state of mind” is “scienter,” i.e., “a mental state embracing intent to deceive,
5 manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *In*
6 *re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 975 (9th Cir. 1999), *abrogated on other*
7 *grounds by S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776 (9th Cir. 2008); *In re Peerless*
8 *Sys., Corp. Sec. Litig.*, 182 F. Supp. 2d 982, 987–88 (S.D. Cal. 2002). “[T]he PSLRA
9 requires plaintiffs to plead, at a minimum, particular facts giving rise to a strong inference
10 of deliberate or conscious recklessness.” *Silicon Graphics*, 183 F.3d at 979; *In re Wet Seal,*
11 *Inc. Sec. Litig.*, 518 F. Supp. 2d 1148, 1157 (C.D. Cal. 2007). Recklessness amounts to
12 ““an extreme departure from the standards of ordinary care, and . . . presents a danger of
13 misleading buyers and sellers that is either known to the defendant or is so obvious that the
14 actor must have been aware of it.”” *DSAM Global Value Fund v. Altris Software, Inc.*, 288
15 F.3d 385, 389 (9th Cir. 2002) (quoting *Hollinger v. Titan Cap. Corp.*, 914 F.2d 1564, 1569
16 (9th Cir. 1990)). To satisfy this pleading requirement, “the complaint must contain
17 allegations of specific ‘contemporaneous statements or conditions’ that demonstrate the
18 intentional or the deliberately reckless false or misleading nature of the statements when
19 made.” *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001); *In re Levi Strauss & Co. Sec.*
20 *Litig.*, 527 F. Supp. 2d 965, 988 (N.D. Cal. 2007). The Court must consider competing
21 inferences that could be drawn in favor of plaintiffs or defendants and determine whether
22 plaintiffs have pled a “strong inference” of scienter which is “cogent and at least as
23 compelling as any opposing inference of nonfraudulent intent.” *Tellabs, Inc. v. Makor*
24 *Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2007).

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1 Defendants argue that Lead Plaintiffs once again fail to adequately plead scienter.
2 (MTD Mem. 4–13, ECF No. 58-1.) The Court agrees.²

3 a. GAAP³ Violations

4 Lead Plaintiffs structure their opposition by responding to the directive of the
5 Court’s First MTD Order. (*See generally* Opp’n, ECF No. 61.) Specifically, the Court
6 concluded that

7 [a]t the very least, the plaintiff must present facts demonstrating that the
8 defendant was aware of the relevant GAAP principle and that this defendant
9 knew how that princip[le] was being interpreted. The plaintiff must then plead
10 facts explaining how the defendant’s incorrect interpretation was so
11 unreasonable or obviously wrong that it should give rise to an inference of
deliberate wrongdoing.

12 (First MTD Order 13–14 (quoting *In re Medicis Pharm. Corp. Sec. Litig.*, No. CV-08-
13 1821-PHX-GMS, 2010 WL 3154863, at *5 (D. Ariz. Aug. 9, 2010) (citing *Medicis*, 689 F.
14 Supp. 2d at 1204)).) Lead Plaintiffs argue that their allegations in the SAC are sufficient to
15 demonstrate that Defendants were deliberately reckless. (Opp’n 7, ECF No. 61.)
16 Specifically, Lead Plaintiffs argue that at least three different events “necessitated
17 Defendants’ review, and thus, awareness of Defendant Bridgepoint’s collectability
18 assurance assessment. Based on the facts alleged in the SAC, Defendants’ failure to review
19 this policy during or after any of these three events amounts to deliberate recklessness.”
20 (*Id.*)

21 First, Lead Plaintiffs argue that

22 Defendants Devine and Clark were made aware that: (1) under GAAP and
23 SEC guidance, revenue cannot be recognized until collectibility is reasonably

24 ² Although the Court addresses a number of Lead Plaintiffs’ allegations individually, “it is cognizant of
25 the duty to conduct a holistic analysis of Plaintiffs’ scienter allegations. The flaws of the various
26 allegations must be exposed as part of the Court’s holistic analysis.” *Westley v. Oclaro, Inc.*, No. C-11-
2448 EMC, 2013 WL 2384244, at *5 (N.D. Cal. May 30, 2013).

27 ³ Generally Accepted Accounting Principles (“GAAP”). *See, e.g., Metzler Inv. GMBH v. Corinthian*
28 *Colls., Inc.*, 540 F.3d 1049, 1056 (9th Cir. 2008).

1 assured (*see* ¶41); (2) Bridgepoint undertook an assessment of whether the
2 collectibility of its revenue was reasonably assured (¶45) and (3)
3 Bridgepoint’s collectibility assurance assessment did not take into
4 consideration a student’s ability to pay (*see* ¶45) by, at the latest, January 10,
2014, when Defendant Devine responded to an earlier SEC comment.

5 (*Id.* at 7.) Thus, “Defendants Clark and Devine were put on notice when the SEC raised
6 the issue.” (*Id.* at 7–8.)

7 Second, Lead Plaintiffs argue that on an earnings call on March 12, 2013,
8 Defendants Clark and Devine, by “assuring investors and analysts that they knew why the
9 Bad Debt Percentage increased, [they] implicitly admitted that they knew how Bridgepoint
10 accounted for both revenues and bad debt expenses . . . [which] in turn necessitated an
11 understanding of Bridgepoint’s revenue recognition policy and the Company’s
12 collectability assurance as part of that policy.” (*Id.* at 8.)

13 Third, Lead Plaintiffs similarly argue that Defendant Devine’s announcement
14 accompanying their amended Form 10-K that Defendant Bridgepoint would, among other
15 things, focus on “improvements in the accounting process” would have “necessitated a
16 review of Bridgepoint’s revenue recognition policy and the Company’s collectability
17 assurance assessment.” (*Id.* at 9.)

18 As to the first “event,” the Court agrees with Defendants that “being ‘put on notice’
19 in this context simply means an awareness that there was an issue, with the January 10,
20 2014 letter to the SEC articulating Bridgepoint’s position on that issue.” (Reply 5, ECF
21 No. 63.) This does not establish the requisite scienter.

22 That said, the Court is convinced that the other two events plausibly demonstrate
23 that Defendant Devine was “aware of the relevant GAAP principle and that this defendant
24 knew how that princip[le] was being interpreted.” *In re Medicis Pharm. Corp. Sec. Litig.*,
25 2010 WL 3154863, at *5. Specifically, these events strongly suggest that Defendant
26 Devine’s admissions and remediation plan demonstrated an understanding of the
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1 underlying GAAP principle and how it was applied by Defendant Bridgepoint.⁴ *See, e.g.,*
2 *id.* at *6 (“Plaintiffs allege that Medicis executives, in particular Peterson and Prygocki,
3 emphasized the importance of the Company’s return methodology and stated that the
4 Company was not ‘booking revenue in advance of future quarters.’”); *cf. Reese v. Malone,*
5 747 F.3d 557, 571 (9th Cir. 2014) (“In the wake of a crisis that has the potential to repeat
6 itself, Johnson had every reason to review the results of BP-Alaska’s corrosion monitoring
7 to understand what happened, as well as to assess the possibility of future leaks in similar
8 pipelines. Evidence of high levels of corrosion would be central to this inquiry.”).
9 However, the Court agrees with Defendants that Lead Plaintiffs do not identify any specific
10 allegations against Defendant Clark. (*See* Reply 6 n.7, ECF No. 63.)

11 But awareness is not enough. Even if these three “events” adequately demonstrated
12 that Defendants were aware of a particular GAAP principle and how it was being
13 interpreted, Lead Plaintiffs must also plead facts explaining how Defendants’ “incorrect
14 interpretation was so unreasonable or obviously wrong that it should give rise to an
15 inference of deliberate wrongdoing.” *In re Medicis Pharm. Corp. Sec. Litig.*, 2010 WL
16 3154863, at *5. Lead Plaintiffs fail to do so.

17 Lead Plaintiffs argue that (1) “Bridgepoint’s collectibility assurance assessment was
18 unreasonable and obviously wrong on its face” and “something that a non-accountant, like
19 Defendant Clark, could understand,” (Opp’n 10, ECF No. 61); (2) Defendants knew that
20 independent paying students were less likely to pay tuition, (*id.* at 11); (3) anyone working
21 in the for-profit education sector would have known that these students would have trouble
22 paying tuition without financial aid, (*id.*); (4) Defendants were put on notice that the
23 government would not be paying tuition for a significant number of students, (*id.* at 12);
24 and (5) Defendants knew that a significant number of students left Bridgepoint mid-course,
25 including new allegations of a confidential witness explaining, among other things, that the
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28 ⁴ Defendants appear to concede as much. *See, e.g.,* (Reply 6, ECF No. 63 (“While obviously at least (CFO) Devine knew Bridgepoint’s revenue recognition policy as it pertained to the independent students”).

1 Individual Defendants looked at numbers used to assess when a student was likely to leave
2 Bridgepoint, (*id.* at 12).

3 As before, the Court concludes that these allegations fail to give rise to an
4 inference—much less a strong inference—of deliberate wrongdoing. The “GAAP is not
5 the lucid or encyclopedic set of pre-existing rules that [Lead Plaintiffs] might perceive it
6 to be.” *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 101 (1995). “There are 19 different
7 GAAP sources, any number of which might present conflicting treatments of a particular
8 accounting question.” *Id.* (citing Robert S. Kay & D. Gerald Searfoss, Handbook of
9 Accounting and Auditing: 1994 Update With Cumulative Index, ch. 5, at 6–7 (2d ed.
10 1993)). Consequently, GAAP “tolerate a range of ‘reasonable’ treatments, leaving the
11 choice among alternatives to management.” *Thor Power Tool Co. v. Comm’r of Internal*
12 *Revenue*, 439 U.S. 522, 544 (1979). The Ninth Circuit therefore recognizes that “the mere
13 publication of inaccurate accounting figures, or a failure to follow GAAP, without more,
14 does not establish scienter.” *DSAM*, 288 F.3d at 390 (quoting *In re Software Toolworks,*
15 *Inc.*, 50 F.3d 615, 627 (9th Cir. 1994)). Violations of GAAP, “even significant ones or ones
16 requiring large or multiple restatements, must be augmented by other specific allegations
17 that defendants possessed the requisite mental state.” *In re Int’l Rectifier Corp. Sec. Litig.*,
18 No. CV07-02544-JFWVBKX, 2008 WL 4555794, at *13 (C.D. Cal. May 23, 2008)
19 (collecting cases).

20 Lead Plaintiffs’ identified allegations⁵ do not alter the Court’s previous analysis. In
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22 ⁵ This includes Lead Plaintiffs’ reliance on a confidential witness (“CW1”) who stated, for example, that
23 Bridgepoint was tracking student retention and that these data were available to Defendants Clark and
24 Devine. (*See, e.g.*, SAC ¶ 60, ECF No. 57.) CW1 also “commented that it felt kind of cool to know that
25 the CEO and CFO were looking at the numbers [he/she] provided.” (*Id.*) But “corporate management’s
26 general awareness of the day-to-day workings of the company’s business does not establish scienter—at
27 least absent some additional allegation of specific information conveyed to management *and related to*
28 *fraud.*” *Metzler*, 540 F.3d at 1068 (emphasis added). *See also In re Maxwell Techs., Inc. Sec. Litig.*, 18 F.
Supp. 3d 1023, 1041 (S.D. Cal. 2014) (holding that “[a]lthough Plaintiff has alleged that the individual
defendants attended sales-related meetings and *had access to* sales reports, this does not support the
inference that the individual defendants *must have known about the accounting misconduct*” (emphases
added)). Lead Plaintiffs fail to provide these additional allegations.

1 fact, the crux of Lead Plaintiffs’ GAAP identified allegations remains the same from the
2 AC: Defendants “knew or recklessly disregarded the necessity to reassess whether
3 collectability was reasonably assured on a student-by-student basis when recognizing
4 revenue subsequent to a student’s initial enrollment with Bridgepoint’s institutions upon a
5 change in facts or circumstances that would affect a student’s ability to pay, in violation of
6 GAAP.” (AC ¶ 90, ECF No. 17; *see also* SAC ¶ 5, ECF No. 57 (“Defendants knew or
7 recklessly disregarded that the collectibility of this revenue was not reasonably assured.”).)

8 As before, “[t]he [S]AC does not allege that [Bridgepoint]’s external auditors
9 counseled against the practice or that [any of the Individual Defendants] admitted or was
10 aware it was improper.” *Metzler*, 540 F.3d at 1069.⁶ Instead, Lead Plaintiffs again
11 emphasize the obviousness of the violations. (*Compare* Opp’n 10, ECF No. 61, *with* MTD
12 Opp’n 20–21, ECF No. 36.) Specifically, Lead Plaintiffs allege that

13 Defendants were at a minimum deliberately reckless in basing the assurance
14 of collectibility of its revenues on the government, military, or corporations
15 when Bridgepoint did not ultimately derive 100% of its revenue from these
16 parties. Additionally, during the Class Period, when Defendants knew key
17 facts indicating that significant amount of revenue due from students was not
18 reasonably assured to be collectible, it was at minimum, extremely reckless
for Defendants to continue to base their revenue recognition collectibility
assurance off of the government’s ability to pay.

19 (SAC ¶ 75, ECF No. 57.)

20 This is again insufficient. “A plaintiff . . . cannot merely point at a GAAP principle
21 and contend that a correct interpretation was simple or obvious.” *Medicis Pharm.*, 2010
22 WL 3154863, at *5. And, as in *Metzler*, “[a]lthough the [S]AC does draw its own legal
23 conclusion that the practice was improper, . . . the [S]AC’s factual allegations point only
24

25 ⁶ The Court does not, as Lead Plaintiffs caution, “adopt a rule that in all accounting cases where a clean
26 audit opinion is issued, the plaintiff must allege that the defendants withheld information from the auditor
27 or that the auditor committed fraud or serious error.” (Opp’n 16, ECF No. 61.) And the Court agrees with
28 Lead Plaintiffs that an audit opinion “does not, *standing alone*, negate any otherwise compelling inference
of scienter plaintiffs’ pleading raises.” *Okla. Firefighters Pension & Ret. Sys. v. IXIA*, 50 F. Supp. 3d
1328, 1365 n.183 (C.D. Cal. 2014) (emphasis added).

1 to disagreement and questioning . . . about the practice.” *See* 540 F.3d at 1069. Furthermore,
2 Defendants again persuasively argue that Lead Plaintiffs fail to plausibly allege that Mr.
3 Clark “had any knowledge of, or involvement with, the accounting for the independent
4 paying students,” (MTD Mem. 8, ECF No. 58-1), much less that Mr. Clark, a non-
5 accountant, “would have an informed opinion as to whether treating the independent
6 paying students as presenting a revenue recognition issue, versus a bad debt issue, was the
7 only correct decision under GAAP,” (*id.*). Lead Plaintiffs’ allegations against Mr. Devine
8 fare no better, since, as before, the SAC details a back-and-forth over the appropriate
9 accounting treatment between Mr. Devine and the SEC, (*See* SAC ¶¶ 45–48, 63–65, ECF
10 No. 57), plausibly “suggesting that there was room for reasonable people to disagree over
11 this issue,” (MTD Mem. 9, ECF No. 58-1).⁷ *See In re Nuko Info. Sys. Sec. Litig.*, 199 F.R.D.
12 338, 344 (N.D. Cal. 2000) (“[I]t is well established that GAAP violations, without more,
13 do not establish scienter, even if those GAAP violations were deliberate.” (citing *In re*
14 *Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1426 (9th Cir.1994))); *In re REMEC Inc. Sec.*
15 *Litig.*, 702 F. Supp. 2d 1202, 1243 (S.D. Cal. 2010) (“[E]ven deliberate GAAP violations
16 do not by themselves establish scienter.” (internal citation omitted)). As before, Lead
17 Plaintiffs’ allegations concerning the GAAP violations do not lead to an inference of
18 scienter as compelling as the inference raised by Defendants. (*See* MTD Mem. 10, ECF
19 No. 58-1 (“It is not as though Bridgepoint completely ignored the fact that the independent
20 paying students were less likely to fulfill their contractual obligations to Bridgepoint—
21 Bridgepoint just dealt with that issue by raising its levels of bad debt. Although a
22 restatement involves an admission that the accounting treatment was incorrect, in the
23 abstract treating the independent paying students as presenting a bad debt issue does not
24 seem so odd or ignorant that the only plausible answer is fraud.”).)

25
26
27 ⁷ The Court agrees with Lead Plaintiffs that, compared to the AC, the SAC compresses the dialogue
28 between the SEC and Defendant Devine. But the SAC still alleges a conversation between the SEC and
Defendant Devine regarding Devine’s explanation as to “how the financial aid processing issue affected
the Bad Debt Percentage.” (SAC ¶ 65, ECF No. 57.)

1 With regard to restatements, “[i]n general, the mere publication of a restatement is
2 not enough to create a strong inference of scienter.” *Zucco Partners, LLC v. Digimarc*
3 *Corp.*, 552 F.3d 981, 1000 (9th Cir. 2009), *as amended* (Feb. 10, 2009). The Ninth Circuit
4 does recognize two “narrow” exceptions to this general rule, however. *Id.* (citing *S. Ferry*,
5 542 F.3d at 785).

6 The first exception permits general allegations about
7 “management’s role in a corporate structure and the importance
8 of the corporate information about which management made
9 false or misleading statements” to create a strong inference of
10 scienter when these allegations are buttressed with “detailed and
11 specific allegations about management’s exposure to factual
information within the company.”

12 *Id.* (quoting *S. Ferry*, 542 F.3d at 785). “The second exception . . . permits an inference of
13 scienter where the information misrepresented is readily apparent to the defendant
14 corporation’s senior management,” i.e., “where the falsity is patently obvious—where the
15 facts [are] prominent enough that it would be absurd to suggest that top management was
16 unaware of them.” *Id.* at 1001 (quoting *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982,
17 989 (9th Cir. 2008)) (internal quotation marks omitted).

18 Lead Plaintiffs’ allegations satisfy neither of these exceptions for many of the same
19 reasons discussed above. Moreover, the restated revenue for fiscal year 2013 differed by
20 only 2.2%. (*See* SAC ¶ 43, ECF No. 17; *see also* MTD Mem. 7, ECF No. 58-1.) “When
21 restatements have been considered evidence of scienter, the restatements were of
22 considerably greater magnitude than those here.” *See In re Aspeon, Inc. Sec. Litig.*, 168 F.
23 App’x 836, 839 (9th Cir. 2006) (affirming district court’s dismissal of § 10(b) claim where
24 restatement “only demonstrated a revenue reduction of 1.57%” and therefore failed to “give
25 rise to a strong inference the original statements were issued with deliberate or conscious
26 recklessness”).

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1 Accordingly, Lead Plaintiffs’ allegations concerning Defendants’ GAAP violations
2 and restatement of Defendant Bridgepoint’s financials fail to establish a strong inference
3 of scienter.

4 b. Sarbanes-Oxley Certifications and Internal Control Deficiencies

5 Defendants argue that Lead Plaintiffs’ allegations with respect to the contents of the
6 Individual Defendants’ Sarbanes-Oxley certifications in the SAC are largely identical to
7 those alleged in the AC, (MTD Mem. 11, ECF No. 58-1 (comparing SAC ¶¶ 113–15, with
8 AC ¶¶ 109–111)), which the Court found insufficient in its previous Order. (First MTD
9 Order 19, ECF No. 53.) Lead Plaintiffs concede that these certifications alone do not add
10 to the inference of scienter, but “may provide additional evidence of scienter if the
11 certifications were false and misleading and the defendant knew that, or was deliberately
12 reckless in issuing the certifications.” (Opp’n 13, ECF No. 61 (citing *Stocke v. Shuffle*
13 *Master, Inc.*, 615 F. Supp. 2d 1180, 1190 (D. Nev. 2009)).)

14 With respect to the false Sarbanes-Oxley certifications, “Sarbanes-Oxley
15 certifications are not sufficient, without more, to raise a strong inference of scienter.” *Zucco*
16 *Partners*, 552 F.3d at 1004 (quoting *Glazer Capital Mgmt., LP v. Magistri*, 549 F.3d 736,
17 747–48 (9th Cir. 2008)). Moreover, “required certifications under Sarbanes-Oxley . . . add
18 nothing substantial to the scienter calculus . . . and do not make . . . otherwise insufficient
19 allegations more compelling by their presence in the same complaint.” *Id.* at 1003–04. As
20 before, the Court gives no weight to Lead Plaintiffs’ allegations concerning Defendants’
21 false Sarbanes-Oxley certifications either individually or in the Court’s holistic analysis.
22 *See infra* Part II.A.1.e.

23 c. Government Investigations

24 Lead Plaintiffs argue that the “investigations being conducted by the SEC,
25 Department of Education, and Department of Justice all further support an inference of
26 scienter.” (Opp’n 14, ECF No. 61.) The Court therefore considers Lead Plaintiffs’
27 allegations concerning these government investigations as part of the Court’s holistic
28 analysis. *See infra* Part II.A.1.e.

1 d. Holistic Analysis

2 Although none of Lead Plaintiffs’ individual allegations concerning Defendants’
3 scienter is availing, the Court must also “review ‘all the allegations holistically.’” *See*
4 *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 48 (2011) (citing *Tellabs*, 551 U.S. at
5 326). “The inquiry . . . is whether *all* of the facts alleged, taken collectively, give rise to a
6 strong inference of scienter.” *Tellabs*, 551 U.S. at 322–23 (emphasis in original).

7 Even viewed holistically, however, Lead Plaintiffs’ allegations again do not give rise
8 to a strong inference of scienter that is at least as compelling as an inference of
9 nonfraudulent conduct. And the Court notes that it conducts its holistic analysis this time
10 around without Lead Plaintiffs’ allegations of insider trading, (*see* First MTD Order 16–
11 19, ECF No. 53), which Lead Plaintiffs removed from their SAC, (*see generally* SAC, ECF
12 No. 57). As before, the SAC does not support an inference of scienter “that is greater than
13 the sum of its parts.” *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1165 (9th Cir. 2009)
14 (citing *S. Ferry*, 542 F.3d at 784; *Metzler*, 540 F.3d at 1049). The Court therefore
15 **GRANTS** Defendants’ MTD (ECF No. 58) and **DISMISSES WITHOUT PREJUDICE**
16 Lead Plaintiffs’ first cause of action.

17 2. Loss Causation

18 To demonstrate loss causation, a plaintiff must allege “a causal connection between
19 the material misrepresentation and the loss.” 15 U.S.C. § 78u-4(b)(4); *Dura Pharm., Inc.*
20 *v. Broudo*, 544 U.S. 336, 342 (2005). In other words, “the complaint must allege that the
21 practices that the plaintiff contends are fraudulent were revealed to the market and caused
22 the resulting losses.” *Metzler*, 540 F.3d at 1061. A corrective disclosure must reveal some
23 aspect of the alleged fraud to the market. *See Lentell v. Merrill Lynch & Co.*, 396 F.3d 161,
24 175 (2d Cir. 2005). Additionally, a plaintiff’s allegations must reveal that “the defendant’s
25 ‘share price fell significantly after the truth became known.’” *Metzler*, 540 F.3d at 1062
26 (quoting *Dura Pharm.*, 544 U.S. at 347). The Ninth Circuit has recently clarified that the
27 plaintiff must only allege “facts that, if taken as true, plausibly establish loss causation,” *In*
28 *re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1057 (9th Cir. 2008), “suggesting that loss

1 causation is a fact-intensive inquiry better suited for determination at trial than at the
2 pleading stage,” *Rudolph v. UTStarcom*, No. C 07-04578 SI, 2008 WL 4002855, at *4
3 (N.D. Cal. Aug. 21, 2008) (citing *McCabe v. Ernst & Young, LLP*, 494 F.3d 418, 427 n.4
4 (3rd Cir. 2007); *Emergent Capital Inv. Mgmt., LLC v. Stonepath Grp., Inc.*, 343 F.3d 189,
5 197 (2d Cir. 2003)). Rule 9(b)’s heightened pleading standard applies to allegations of loss
6 causation. *Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014).

7 As before, Lead Plaintiffs point to the following partial corrective disclosures to
8 argue that the alleged fraud was revealed to the market: (1) the March 11, 2014 press
9 release preliminarily announcing Defendant Bridgepoint’s fourth quarter and 2013 fiscal
10 year results and subsequent earnings call, (SAC ¶¶ 12, 120, 123, ECF No. 57); (2) the May
11 12, 2014 press release disclosing, among other things, the SEC’s inquiry and Defendant
12 Bridgepoint’s evaluation of whether a restatement of its 2011 through 2013 financial
13 results was necessary, as well as the earnings conference call held that same day, (*id.*
14 ¶¶ 124–127); and (3) the May 30, 2014 8-K revealing Defendant Bridgepoint’s conclusion
15 that there were material misstatements of revenue and bad debt expense as well as material
16 weaknesses over financial reporting, and also providing an estimate of the restated revenue
17 and expenses for the 2013 fiscal year, (*id.* ¶¶ 128–29). (*See* Opp’n 18–19, ECF No. 61.)
18 Defendants “are cognizant of the Court’s Order finding Plaintiffs’ prior loss causation
19 allegations to be sufficient,” but argue that these three partial disclosure dates fail to
20 adequately plead loss causation. (Reply 9, ECF No. 63.)

21 The Court again concludes that Lead Plaintiffs’ allegations could plausibly establish
22 loss causation. *See Gilead Scis.*, 536 F.3d at 1057; *see also Lloyd v. CVB Fin. Corp.*, 811
23 F.3d 1200, 1210 (9th Cir. 2016) (reversing district court’s holding that plaintiff had not
24 adequately pled loss causation where defendant’s stock price dropped over 20% following
25 announcement of SEC subpoena but “the market reacted hardly at all” to later disclosure
26 revealing falsity of previous representations). Accordingly, the Court declines to grant
27 Defendants’ MTD on this alternative ground at this time.

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1 **B. Section 20(a)**

2 “Section 20(a) of the Act makes certain ‘controlling’ individuals also liable for
3 violations of section 10(b) and its underlying regulations.” *Zucco Partners*, 552 F.3d at
4 990. Specifically, Section 20(a) provides:

5 Every person who, directly or indirectly, controls any person
6 liable under any provision of this chapter or of any rule or
7 regulation thereunder shall also be liable jointly and severally
8 with and to the same extent as such controlled person to any
9 person to whom such controlled person is liable (including to the
10 Commission in any action brought under paragraph (1) or (3) of
11 section 78u(d) of this title), unless the controlling person acted in
12 good faith and did not directly or indirectly induce the act or acts
13 constituting the violation or cause of action.

14 15 U.S.C. § 78t(a). “Thus, a defendant employee of a corporation who has violated the
15 securities laws will be jointly and severally liable to the plaintiff, as long as the plaintiff
16 demonstrates ‘a primary violation of federal securities law’ and that ‘the defendant
17 exercised actual power or control over the primary violator.’” *Zucco Partners*, 552 F.3d at
18 990 (quoting *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W.*
19 *Holding Corp.*, 320 F.3d 920, 945 (9th Cir. 2003)) (citing *Paracor Fin., Inc. v. Gen. Elec.*
20 *Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996)). “Section 20(a) claims may be
21 dismissed summarily . . . if a plaintiff fails to adequately plead a primary violation of
22 section 10(b).” *Id.* (citing *In re VeriFone Sec. Litig.*, 11 F.3d 865, 872 (9th Cir. 1993); *In*
23 *re Metawave Commc’ns Corp. Sec. Litig.*, 298 F. Supp. 2d 1056, 1087 (W.D. Wash. 2003)).

24 Because the Court has dismissed Lead Plaintiffs’ cause of action predicated upon
25 violations of Section 10(b), *see supra* Part II.A, the Court **GRANTS** Defendants’ MTD
26 and **DISMISSES WITHOUT PREJUDICE** Lead Plaintiffs’ second cause of action
27 against the Individual Defendants for violations of Section 20(a).

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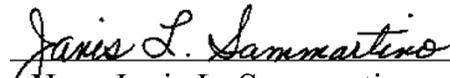
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1 **CONCLUSION**

2 In light of the foregoing, the Court **GRANTS** Defendants' MTD (ECF No. 58).
3 While the Court entertains doubts concerning Lead Plaintiffs' ability to adequately re-plead
4 scienter, the Court will grant Lead Plaintiffs another opportunity to amend. Accordingly,
5 the Court **DISMISSES WITHOUT PREJUDICE** Lead Plaintiffs' SAC. (ECF No. 57.)
6 Lead Plaintiffs **MAY FILE** a third amended complaint (TAC) within fourteen (14) days
7 of the date on which this Order is electronically docketed. *Failure to file a TAC by this date*
8 *may result in dismissal of this action with prejudice.*

9 **IT IS SO ORDERED.**

10 Dated: April 5, 2017

11 
12 Hon. Janis L. Sammartino
13 United States District Judge
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