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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

Case No. 2:20-CV-1209 JCM (NJK)

ORDER

IN RE AGS, INC. SECURITIES LITIGATION,

This is a consolidated class action lawsuit alleging various violations of the Securities Exchange Act of 1934 (“Exchange Act”) and the Securities Act of 1933 (“Securities Act”) against twenty-eight defendants. Presently before the court are three motions to dismiss the second amended complaint filed by three separate groups of defendants. (ECF Nos. 69, 70, 71). The plaintiff class, through lead plaintiff Oklahoma Police Pension and Retirement System (“lead plaintiff”), filed responses. (ECF Nos. 78, 79, 80). The groups of defendants replied. (ECF Nos. 83, 84, 85).

I. INTRODUCTION

This matter arises from allegedly fraudulent misrepresentations regarding defendants’ statements regarding PlayAGS, Inc. (“PlayAGS”)’s economic performance. The plaintiff class contends these statements were part of a fraudulent scheme to inflate the price of PlayAGS’s initial public offering (“IPO”) and subsequent secondary public offerings (“SPOs”). Specifically, the alleged harm resulted from statements artificially inflating the share price in advance of two SPOs: one in August 2018 (the “August 2018 SPO”) and another in March 2019 (the “March 2019 SPO”). The plaintiff class consists of any person or entity who purchased PlayAGS stock from January 26, 2018, to March 4, 2020 (the “class period”). During the class period, PlayAGS stock fell from a high of \$32.04 per share in 2018 to a low of \$6.65 per share in

1 2020. Defendants contend this price decrease was due to unforeseen challenges in the market
2 while the plaintiff class asserts it was a result of the falsity of defendants' statements coming to
3 light.

4 Samples of allegations include: PlayAGS and/or other defendants arbitrarily and
5 fraudulently inflating its sales metrics and growth projections by a factor of four when reporting
6 to Wall Street (ECF No. 60 at 8); reporting sales in quarters in which they did not occur (*Id.* at
7 9); and failing to disclose costs and risks of an acquisition (*Id.* at 10). In sum, the plaintiff class
8 asserts unlawful statements concerning "unsupported and unsustainable growth measures, sales
9 manipulation, and problematic [] acquisition" led to inflated IPO and SPO prices and ultimately
10 the downfall of the stock price harming the plaintiff class. (*Id.* at 11).

11 The plaintiff class asserts defendants David Lopez and Kimo Akiona ("executive
12 defendants"), and PlayAGS (collectively "PlayAGS defendants") violated Section 10(b) of the
13 Exchange Act and Rule 10b-5 promulgated thereunder ("claim 1"). Further, the plaintiff class
14 asserts defendants Apollo Global Management, LLC; Apollo Gaming Holdings, LP; Apollo
15 Investment Fund, LP; and AP Gaming VoteCo, LLC ("Apollo defendants"), and the executive
16 defendants, violated Section 20(a) of the Exchange Act ("claim 2").

17 Regarding the Securities Act, the plaintiff class avers Section 11 was violated by the
18 underwriter defendants;¹ PlayAGS; the executive defendants; and David Sambur, Daniel Cohen,
19 Eric Press, Yvette Landau, Adam Chibib, and Geoff Freeman ("director defendants") (together
20 with the executive defendants, the "individual defendants") ("claim 3"). Plaintiff further
21 contends Section 12(a)(2) was violated by all defendants ("claim 4"), and Section 15 was
22 violated by the individual defendants and Apollo defendants ("claim 5").

23 The underwriter defendants move to dismiss the second amended complaint, joined by
24 the AGS defendants and Apollo defendants. (ECF No. 69). The AGS defendants also move to

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26 ¹ The "underwriter defendants" consist of Credit Suisse Securities (USA), LLC; Deutsche
27 Bank Securities, Inc.; Jeffries, LLC; Macquarie Capital (USA), Inc.; Merrill Lynch; Pierce,
28 Fenner, & Smith, Inc.; Citigroup Global Markets, Inc.; Stifel, Nicolaus, & Company, Inc.;
SunTrust Robinson Humphrey, Inc.; Nomura Securities International, Inc.; Rother Capital
Partners, LLC; Union Gaming Securities, LLC; Williams Capital Group, LP; Apollo Global
Securities, LLC; and Morgan Stanley & Co.

1 dismiss the second amended complaint, joined by the underwriter defendants and Apollo
2 defendants.² (ECF No. 70). The Apollo defendants also move to dismiss the second amended
3 complaint. (ECF No. 71).

4 **II. LEGAL STANDARD**

5 A court may dismiss a complaint for “failure to state a claim upon which relief can be
6 granted.” Fed. R. Civ. P. 12(b)(6). A properly pled complaint must provide “[a] short and plain
7 statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *Bell*
8 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While Rule 8 does not require detailed
9 factual allegations, it demands “more than labels and conclusions” or a “formulaic recitation of
10 the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation
11 omitted).

12 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply
13 when considering motions to dismiss. First, the court must accept as true all well-pled factual
14 allegations in the complaint; however, legal conclusions are not entitled to the assumption of
15 truth. *Id.* at 678–79. Mere recitals of the elements of a cause of action, supported only by
16 conclusory statements, do not suffice. *Id.* at 678.

17 Second, the court must consider whether the factual allegations in the complaint allege a
18 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff’s complaint
19 alleges facts that allow the court to draw a reasonable inference that the defendant is liable for
20 the alleged misconduct. *Id.* at 678.

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28 ² The Apollo defendants join the motion in its entirety, and the underwriter defendants
join only §§ III.A–C.

1 The Ninth Circuit addressed post-*Iqbal* pleading standards in *Starr v. Baca*, 652 F.3d
2 1202, 1216 (9th Cir. 2011). The *Starr* court stated, in relevant part:

3 First, to be entitled to the presumption of truth, allegations in a complaint or
4 counterclaim may not simply recite the elements of a cause of action, but must
5 contain sufficient allegations of underlying facts to give fair notice and to enable
6 the opposing party to defend itself effectively. Second, the factual allegations that
are taken as true must plausibly suggest an entitlement to relief, such that it is not
unfair to require the opposing party to be subjected to the expense of discovery
and continued litigation.

7 *Id.*

8 Allegations of fraud, however, are subject to a heightened pleading standard and must be
9 stated with particularity. Fed. R. Civ. P. 9(b). Rule 9(b) provides that “[m]alice, intent,
10 knowledge, and other conditions of a person’s mind may be alleged generally.” *Id.* Rule 9(b)
11 operates “to give defendants notice of the particular misconduct which is alleged,” requiring
12 plaintiffs to identify “the circumstances constituting fraud so that the defendant can prepare an
13 adequate answer from the allegations. . . . The complaint must specify such facts as the times,
14 dates, places, benefits received, and other details of the alleged fraudulent activity.” *Neubronner*
15 *v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993) (citations omitted).

16 Moreover, the Private Securities Litigation Reform Act of 1995 (“PSLRA”) also raises
17 the pleading standard for private securities fraud plaintiffs. “[A] private securities plaintiff
18 proceeding under the PSLRA must plead, in great detail, facts that constitute strong
19 circumstantial evidence of deliberately reckless or conscious misconduct.” *In re Silicon*
20 *Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (superseded by statute on other
21 grounds).

22 **III. DISCUSSION**

23 **a. Heightened Pleading Standard**

24 The plaintiff class’s allegations sound in fraud. (*See* ECF No. 60). The Exchange Act
25 claims are subject to a heightened pleading standard pursuant to the PSLRA. *See* 15 U.S.C. §
26 78u-4(b)(1)(B). Moreover, the entirety of the complaint alleges a “unified course of fraudulent
27 conduct” in which defendants made false statements and misrepresentations to artificially inflate
28 the price of PlayAGS shares prior to SPOs. (*Id.*). Thus, the Securities Act claims are subject to

1 the Rule 9(b) pleading standard. *See Rubke v. Capitol Bancorp Ltd.*, 551 F.3d 1156, 1161 (9th
2 Cir. 2009). Further, the Ninth Circuit specifically requires “an explanation as to why the
3 disputed statement was untrue or misleading *when made*. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d
4 1541, 1549 (9th Cir. 1994) (superseded by statute on other grounds) (emphasis in original).

5 **b. Underwriter Defendants’ Motion to Dismiss**

6 The underwriter defendants move to dismiss claim 3: violation of Section 11 of the
7 Securities Act. (ECF No. 69). The underwriter defendants additionally move to dismiss the
8 plaintiff class’s claim 4: violation of Section 12(a)(2) of the Securities Act. (*Id.*).

9 *i. Standing – March 2019 SPO*

10 As an initial matter, the underwriter defendants assert lead plaintiff—and thus the
11 plaintiff class—lacks standing to bring claims alleging violations of Sections 11 and 12 of the
12 Securities Act regarding the March 2019 SPO. (*Id.*). In support, the underwriter defendants
13 assert lead plaintiff’s last purchase of AGS shares was seven months prior to the March 2019
14 SPO, and further contend a lead plaintiff does not have standing to challenge a public offering in
15 which it did not purchase a security. (*Id.*). Lead plaintiff, alternatively, asserts that even if it did
16 not purchase shares in the March 2019 SPO, it purchased shares in the August 2018 SPO, and
17 both SPOs relied on nearly identical shelf registration statements and resulted in the same type of
18 injury. (ECF No. 79). Thus, lead plaintiff contends it has standing on behalf of other class
19 members who did purchase shares in the March 2019 SPO because of the similarity of the
20 alleged wrongdoing and harm. (*Id.*).

21 The sides present competing case law, but the dispute boils down to what type of
22 standing is at issue here. The underwriter defendants suggest statutory standing is at issue (ECF
23 Nos. 71, 85) while lead plaintiff provides case law concerning Constitutional standing (ECF No.
24 79). The court finds statutory standing is the appropriate standard as the underwriter defendants
25 moved to dismiss claims pursuant to Rule 12(b)(6). *See In re Century Aluminum Co. Sec. Litig.*,

1 729 F.3d 1104, 1109 (“[F]ailure to allege statutory standing results in failure to state a claim on
2 which relief can be granted, not the absence of subject matter jurisdiction.”); (ECF No. 71).³

3 To adequately allege statutory standing, plaintiffs can (1) “prove they purchased their
4 shares directly in the secondary offering itself,” or (2) “prove that [its] shares, although
5 purchased in the aftermarket, can be traced back to the secondary offering.” *Id.* at 1106 (citing
6 *Joseph v. Wiles*, 223 F.3d 1155, 1159 (10th Cir. 2000) (abrogated on other grounds)).

7 Here, lead plaintiff’s last purchase of AGS shares was seven months prior to the March
8 2019 SPO, and the complaint contains no allegations tying any of its shares to the March SPO.
9 (ECF No. 60). Thus, lead plaintiff does not have statutory standing to bring claims of violations
10 of Section 11 or Section 12 of the Securities Act concerning the March 2019 SPO.

11 The underwriter defendants’ motion to dismiss (ECF No. 69)—to which the AGS
12 defendants and Apollo defendants have joined—is GRANTED as to all defendants concerning
13 the March 2019 SPO because lead plaintiff does not have statutory standing.

14 *ii. The underwriter defendants are not statutory sellers*

15 To find liability under Section 12(a)(2) of the securities act, the defendant must be a
16 “statutory seller” defined by 15 U.S.C. § 771(a)(2). (“A person who offers or sells a security...by
17 means of a prospectus or oral communication...shall be liable...to the person purchasing such
18 security from him.”). The term “purchase” is not defined by the Securities Act but has been
19 interpreted to be “a correlative to both ‘sell’ and ‘offer,’ at least to the extent that the latter
20 entails active solicitation of an offer to buy.” *Pinter v. Dahl*, 486 U.S. 622, 645 (1988).

21 Here, each allegation concerning underwriter defendants “selling” or “offering” AGS
22 shares is vague and conclusory. Both parties refer to paragraphs 33, 46–59, 399, and 408 of the
23 complaint as relevant to whether the underwriter defendants actually sold, offered, or solicited
24 purchase of shares to the plaintiffs. (ECF Nos. 69, 79, 85). Notably, all these paragraphs are in
25 the “PARTIES” or “CLAIMS FOR RELIEF UNDER THE SECURITIES ACT” sections of the

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27 ³ In its opposition and argument for Constitutional standing, lead plaintiff suggests standing is, at least in
28 part, a class certification issue. (ECF No. 79). The merits of this contention are irrelevant here as
Constitutional standing is not at issue.

1 complaint. (ECF No. 60). Paragraph 33 simply describes lead plaintiff and alleges it purchased
2 shares from underwriter defendant Deutsche Bank Securities Inc. in the August 2018 SPO. (ECF
3 No. 60). Paragraphs 46–59 merely state who each underwriter defendant is and blanketly assert
4 each “help[ed] to draft and disseminated the Shelf Registration Statement and solicit investors to
5 purchase the PlayAGS stock issued pursuant thereto.” (*Id.*). Paragraphs 399 and 408 are
6 conclusory statements of law. (*See id.*). Such vague and conclusory allegations do not meet the
7 heightened Rule 9(b) pleading standard and thus do not need to be taken as true. Fed. R. Civ. P.
8 9(b); *see Neubronner*, 6 F.3d at 671; *In re Silicon Graphics*, 183 F.3d at 974.

9 Lead plaintiff also points to paragraphs 315–20, which contain allegations regarding the
10 nature of the underwriter defendants’ relationship with PlayAGS and role in the SPOs.⁴ (ECF
11 Nos. 60, 79). None of these, however, allege with specificity any sale or offer to the plaintiff
12 class. (*See* ECF No. 60). Even taking the most specific allegation regarding an underwriter
13 defendant selling shares to lead plaintiff—paragraph 33—and considering it in context with
14 paragraphs 315–320, the complaint falls short of establishing underwriter defendants as statutory
15 sellers. *See In re Violin Memory Sec. Litig.*, 2014 WL 5525946, at *19 (N.D. Cal. Oct. 31, 2014)
16 (holding that without allegations active or direct solicitation, communication, or negotiation
17 between plaintiffs and the alleged statutory seller, the pleadings were insufficient to establish
18 underwriters as statutory sellers).

19 The underwriter defendants’ motion to dismiss (ECF No. 69)—to which the AGS
20 defendants and Apollo defendants have joined—is GRANTED as to the underwriter defendants
21 as the allegations are insufficient to establish them as statutory sellers.

22 **c. AGS Defendants’ Motion to Dismiss**

23 The AGS defendants seek to dismiss the entire complaint. (ECF No. 70). The plaintiff
24 class asserts claims 1 and 4 against the AGS defendants, claim 2 against the executive
25 defendants, and claim 3 against PlayAGS. (ECF No. 60). As an initial matter, the court
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28 ⁴ Specifically, they allege the underwriter defendants’ direct participation in creating and filing
with the SEC the Shelf Registration Statement. (SAC ¶¶ 319–320).

1 reiterates lead plaintiff does not have standing to bring claims 3 or 4 as they pertain to the March
2 2019 SPO.

3 *i. Confidential Witnesses*

4 Many of the allegations in the complaint are derived from confidential witnesses
5 (“CWs”). (See ECF No. 60). The AGS defendants argue that most, if not all, allegations based
6 on CW assertions should not be considered at this stage of pleading. (ECF No. 70).

7 CWs must be “described ‘with sufficient particularity to support the probability that a
8 person in the position occupied by the source would possess the information alleged.’” *Zucco*
9 *Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009) (citing *In re Duao Sys., Inc.*
10 *Sec. Litig.*, 411 F.3d 1006, 1015 (9th Cir. 2005)). Facts must demonstrate that a CW would have
11 been “personally knowledgeable of the information alleged” given their position. *Id.* at 996.
12 When alleging scienter, CW allegations of unreliable hearsay and conclusory assertions of
13 scienter are unreliable. *Id.*

14 The court first addresses whether each CW would have been “personally knowledgeable
15 of the information alleged” given their position. *See id.*

16 CW-1 is a former vice president of game development and worked at PlayAGS from June
17 2015 through January 2018. (ECF No. 60). CW-1’s allegations discuss financial goals of
18 PlayAGS, its success—or lack thereof—in Oklahoma, and post-January 2018-IPO sales goals.
19 (*Id.*). It seems unlikely that someone in game development, albeit in a high-up role, would be
20 “personally knowledgeable” about such specific details of sales. Without more, allegations of
21 CW-1 are insufficiently pled. *See Zucco Partners*, 552 F.3d at 995.

22 CW-2 is a former director of slot products and worked for PlayAGS from September
23 2015 until February 2017. (ECF No. 60). CW-2 “was responsible for product management,
24 placing units, and forecasting earnings.” (*Id.*). CW-2’s allegations concern communication with
25 a former director of sales and unrealistic forecasted growth going into the January 2018 IPO.
26 (*Id.*). The similarity between the allegations and CW-2’s responsibilities demonstrate that CW-2
27 was in a position to be “personally knowledgeable of the information alleged.” *See Zucco*
28 *Partners*, 552 F.3d at 995.

1 CW-3 is a former information systems manager and worked for PlayAGS “prior to the
2 class period” but allegedly bore witness to practices “in late 2017 and early 2018” and was
3 tasked with “creating synergy” between Cadillac Jack and PlayAGS during the 2015 acquisition.
4 (ECF No. 60). CW-3’s allegations concern PlayAGS pressuring salespeople and firing those
5 who “pushed back” as well as Cadillac Jack’s alleged price-inflating practices. (*Id.*). It seems
6 unlikely that someone in information systems management would be “personally
7 knowledgeable” about the culture of the sales team at PlayAGS. *See Zucco Partners*, 552 F.3d
8 at 995. Further, though tasked with “creating synergy,” it seems unlikely that someone in
9 information systems management would be “personally knowledgeable” about executive
10 financial decisions and practices of a target company. *See id.* Without more, CW-3 is
11 insufficiently pled. *See id.*

12 CW-4 is a former PlayAGS employee. (ECF No. 60). CW-4 worked at Cadillac Jack
13 until it was acquired by PlayAGS in 2015, then at PlayAGS until August 2018. (*Id.*). The
14 complaint states CW-4 was “in the reporting line that reported to the Chief Technology Officer,
15 who reported to Defendant Lopez. (*Id.*). “CW-4 participated in meetings with his reporting line
16 throughout the 2017 to 2018 time period where the Oklahoma market was discussed.” (*Id.*).
17 Allegations concern difficulty placing certain games in Oklahoma and lack of certain actions to
18 resolve the issue. (*Id.*). The similarity between the allegations and CW-4’s position and
19 activities within PlayAGS demonstrate that CW-4 was in a position to be “personally
20 knowledgeable of the information alleged.” *See Zucco Partners*, 552 F.3d at 995.

21 CW-5 is a former senior financial analyst who worked for PlayAGS from April 2016 to
22 June 2019. (ECF No. 60). He attended financial meetings regarding sales and cost cutting.
23 (*Id.*). His allegations concern these meetings and general financial and sales practices of
24 PlayAGS. (*Id.*). The similarity between the allegations and CW-5’s position and activities
25 within PlayAGS demonstrate that CW-5 was in a position to be “personally knowledgeable of
26 the information alleged.” *See Zucco Partners*, 552 F.3d at 995.

27 CW-6 is a former member of the finance team who worked for PlayAGS during the class
28 period and was responsible for business analytics, forecasting, and budgeting. (ECF No. 60).

1 CW-6’s allegations concern sales practices with clients and selling pieces of Integrity. (*Id.*). It
2 seems unlikely that a non-executive member of the finance team would be “personally
3 knowledgeable” about negotiations with clients, though CW-6 is likely “personally
4 knowledgeable” about selling pieces of a previously acquired company. *See Zucco Partners*,
5 552 F.3d at 995. CW-6 is insufficiently pled regarding allegations of client negotiations, but
6 sufficiently pled regarding allegations of selling parts of the company. *See id.*

7 CW-7 is a former manager of gaming operations who worked at PlayAGS from May
8 2017 through October 2019. (ECF No. 60). CW-7 conducted market research ahead of the
9 Integrity acquisition. (*Id.*). CW-7’s allegations concern findings pursuant to the market research
10 as well as insider information on a contract negotiation with Chickasaw Nation, where PlayAGS
11 had electronic gaming machines located. (*Id.*). Given that CW-7 personally performed the
12 research giving rise to his allegations, CW-7 was in a position to be “personally knowledgeable
13 of the information alleged” regarding the Integrity acquisition. *See Zucco Partners*, 552 F.3d at
14 995. Further, due to his involvement with other entities generally, CW-7 likely also was
15 “personally knowledgeable” about negotiations with Chickasaw Nation. *See id.*

16 CWs-8 and -9 were never employed at PlayAGS. (ECF No. 60). It is unlikely that non-
17 employees would be knowledgeable about PlayAGS’s business decisions given they would not
18 be in a position to be privy to internal corporate knowledge. *See Zucco Partners*, 552 F.3d at
19 995. Thus, CWs-8 and -9 are insufficiently pled. *See id.*

20 CW-10, like CW-4, previously worked for Cadillac Jack then at PlayAGS “in an
21 engineering capacity” until October 2019 after the acquisition. (ECF No. 60). CW-10’s
22 allegations concern details of revenue models and pricing arrangements with casinos as well as
23 requisite maintenance and upkeep of the gaming machines. (*Id.*). It seems unlikely that an
24 employee who simply worked “in an engineering capacity” would be “personally
25 knowledgeable” about revenue models and pricing arrangements with casinos, though CW-10 is
26 likely “personally knowledgeable” about maintenance and upkeep issues of the gaming machines.
27 *See Zucco Partners*, 552 F.3d at 995. CW-10 is insufficiently pled regarding business dealings,
28 but sufficiently pled regarding maintenance of machines. *See id.*

1 CW-11 is a former senior employee in sales, who was employed with PlayAGS “from
2 before the class period until shortly before August 2019” SPO.⁵ (ECF No. 60). CW-11’s
3 allegations concern pressure on improving revenue and sales, in part from the Apollo defendants.
4 (*Id.*). The court recognizes CW-11’s request and need for anonymity. However, a “senior
5 employee in sales,” without more detail, is insufficient to establish whether CW-11 is
6 “personally knowledgeable” about financial practices and executive-level pressure from third
7 parties. *See Zucco Partners*, 552 F.3d at 995. This is especially so because the specific timing
8 of employment cannot be discerned. *See id.*; (ECF No. 60). Thus, CW-11 is insufficiently pled.
9 *See Zucco Partners*, 552 F.3d at 995.

10 CW-12 was a director of gaming operations for PlayAGS from November 2013 to
11 February 2019. (ECF No. 60). CW-12’s responsibilities including managing large projects and
12 acquisitions in this role. (*Id.*). CW-12 then worked as an account executive until August 2019
13 and reported to senior vice president of slot products, Andrew Burke, who reported to defendant
14 Lopez. (*Id.*). CW-12 was also sent to Oklahoma to assess the Integrity acquisition. (*Id.*). CW-
15 12’s allegations concern misrepresentations of growth to investors and Integrity’s overvaluation.
16 (*Id.*). The similarity between the allegations and CW-12’s position and responsibilities within
17 PlayAGS demonstrate that CW-12 was in a position to be “personally knowledgeable of the
18 information alleged.” *See Zucco Partners*, 552 F.3d at 995.

19 In sum, allegations of CWs-1, -3, -8, -9, and -11 are insufficiently pled. Thus, allegations
20 sourced from these CWs do not have to be accepted by the court as true. *See id.* at 999. CWs-6
21 and -10 are likewise insufficiently pled as to allegations of client negotiations and business
22 dealings, respectively. CWs-2, -4, -5, -7, and -12 are sufficiently pled.

23 *ii. Executive Defendants*

24 The plaintiff class asserts claims 1, 2, and 4 against the executive defendants. To support
25 claims 1 and 2, the pleadings must include materially false or misleading statements and allege
26 scienter with a high degree of particularity. *Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*,

27 _____
28 ⁵ There are two SPOs at issue: August 2018 and March 2019. The court is unclear on which this
refers to.

1 *Inc.*, 552 U.S. 148, 157 (2008). To support claim 4, the pleadings must establish defendants
2 were statutory sellers of the shares at issue and that plaintiff relied on materially false and
3 misleading statements when purchasing the shares. 15 U.S.C. § 771(a)(2). *Omnicare* has
4 clarified that the author of the statements must not believe the contents thereof when published to
5 constitute “false or misleading.” *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus.*
6 *Pension Fund*, 575 U.S. 175, 188–89 (2015). Here, the complaint does not allege the requisite
7 scienter or contemporaneous falsity required nor that the executive defendants were statutory
8 sellers.

9 All supporting factual allegations in the complaint point to already-existing poor market
10 conditions or declining sales in advance of the SPOs when positive statements saying the
11 opposite were published. (ECF No. 60). However, each of these statements were based on
12 record sales in audited financial statements. There is no allegation that shows the executive
13 defendants had any reason to believe otherwise. (*Id.*). Moreover, the executive defendants did
14 not directly sell or solicit purchase of shares of PlayAGS. Indeed, both the executive defendants
15 purchased shares of AGS and did not sell them, further indicating their belief of positive
16 performance of PlayAGS.

17 Thus, because allegations fail to show the executive defendants did not believe
18 statements that turned out to be false or misleading, and because there are no allegations to
19 establish executive defendants as statutory sellers, the AGS defendants’ motion as to claims 1, 2,
20 and 4, against the executive defendants is GRANTED.

21 *iii. PlayAGS*

22 The plaintiff class brings claims 1, 3, and 4 against PlayAGS. Like the executive
23 defendants, there are no allegations establishing PlayAGS ever selling or soliciting purchase of
24 AGS shares. (*See generally* ECF No. 60). Moreover, there are no allegations of scienter to
25 support PlayAGS intentionally publishing misrepresentations or false statements. (*Id.*). Indeed,
26 the complaint lacks factual allegations that demonstrate the statements were false at the time, let
27 alone that defendants did not believe them. (*Id.*). Thus, the complaint does not reach the
28 heightened pleading standards required for claims 1 and 4.

1 Lead plaintiff contends PlayAGS failed to disclose the necessary risks in its SPO
2 materials, but the prospectus supplement before the court directly contradicts this. (*See* ECF
3 Nos. 60, 70). Risks of the Integrity acquisition and moving into the Oklahoma market—which
4 were a significant factor in the downfall of the stock price—were adequately disclosed. (ECF
5 No. 60). Lead plaintiff contends the risks were misidentified as “potential” risks when they had
6 already materialized, but the complaint does not allege sufficient factual allegations to support
7 this assertion. (*Id.*)

8 Thus, the complaint fails as to claims 1, 3, and 4 against PlayAGS and the AGS
9 defendants’ motion to dismiss with respect to these claims is GRANTED.

10 **d. Apollo Defendants’ Motion to Dismiss**

11 *i. The Apollo defendants are not statutory sellers*

12 The parties dispute whether the Apollo defendants are established as statutory sellers
13 pursuant to § 12(a)(2) in the complaint. *Pinter* instructs a defendant that (1) “passed title, or
14 other interest in the security, to the buyer for value,” or (2) successfully solicited the purchase of
15 the security “motivated at least in part by a desire to serve his own financial interests.” 486 U.S.
16 at 642, 647. The Ninth Circuit has clarified that “a plaintiff must allege that the defendants did
17 more than simply urge another to purchase a security.” *In re Daou Sys., Inc.*, 411 F.3d 1006,
18 1029 (9th Cir. 2005). “The plaintiff must show that the defendants solicited purchase of the
19 securities for their own financial gain.” *Id.*

20 The requisite showing is not present here. As an initial matter, the complaint contains no
21 allegations of any Apollo defendants passing title to any member of the plaintiff class. (*See* ECF
22 No. 60). Secondly, there are no allegations that allege any direct communications between the
23 Apollo defendants and any member of the plaintiff class. (*See id.*). Without more, the
24 solicitation prong cannot be satisfied. *See Maine State Ret. Sys. v. Countrywide Fin. Corp.*, 2011
25 WL 4389689, at *10 (C.D. Cal. May 5, 2011) (noting that a complaint “must include very
26 specific allegations of solicitation, including direct communication[s]” to avoid dismissal).
27 Thus, the complaint does not establish the Apollo defendants as statutory sellers.

28 ...

1 The Apollo defendants’ motion to dismiss is thus GRANTED with respect to claim 4.

2 *ii. Primary Liability*

3 The Apollo defendants further move to dismiss claims 2 and 5—alleged violations of §
4 20(a) of the Exchange Act and § 15 of the Securities Act—on the grounds that there is no
5 primary liability and thus there cannot be control person liability. (ECF No. 71). “To establish a
6 cause of action under § 20(a), a plaintiff must first prove a primary violation of underlying
7 federal securities laws.” *In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1052 (9th Cir. 2014).
8 Likewise, “violation of § 15 is predicated upon violation of § 11 or § 12.” *In re Harmonic Inc.*
9 *Sec. Litig.*, 163 F. Supp. 2d 1079, 1085 (N.D. Cal. 2001).

10 Because the Apollo defendants are not established as statutory sellers by the complaint,
11 there is no primary liability to predicate claims 2 and 5. Thus, they must be dismissed with claim
12 3 regarding the Apollo defendants. Lead plaintiff points to paragraphs 269–87, and 414–22 for
13 allegations of the Apollo defendants’ control other defendants in this action. (ECF No. 80).
14 However, even assuming *arguendo* this is true, it does not affect this court’s finding that the
15 complaint fails to establish the Apollo defendants as statutory sellers and thus fails to establish
16 primary liability for claims 2 and 5.

17 **e. Scheme Liability Claim**

18 Defendants dispute whether the plaintiff class brings an independent scheme liability
19 claim. However, this claim is clear from the complaint’s face. Claim 1 is specifically entitled
20 “Violation of Section 10(b) of the Exchange Act *and Rule 10b-5 Promulgated Thereunder*
21 *Against PlayAGS and the Executive Defendants.*” (ECF No. 60 (emphasis added)). No motion
22 presently before the court properly addresses this claim. The AGS defendants’ motion to dismiss
23 contends the complaint does not cite “Rule 10b-5(a) or (c),” which is the legal basis for scheme
24 liability, but this nuance does not indicate there is no claim for scheme liability when Rule 10b-5
25 was specifically mentioned. (*See* ECF No. 60). Nonetheless, they move to dismiss the
26 complaint in its entirety. The AGS defendants’ motion to dismiss as to scheme liability is
27 DENIED.

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f. Leave to Amend

Lead plaintiff requests leave to amend the complaint should any claims be dismissed. Despite the complaint having been amended twice already, the court recognizes this is the first it has been substantively challenged. Thus, leave to amend is GRANTED.


IV. CONCLUSION

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the defendants' motions to dismiss are GRANTED in part and DENIED in part consistent with the foregoing.

IT IS FURTHER ORDERED the plaintiff class is GRANTED leave to file an amended complaint within 30 days of this order.

DATED December 2, 2022.


UNITED STATES DISTRICT JUDGE