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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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DAVID S. GROSS,

Plaintiff,

v.

CHEMBIO DIAGNOSTICS, INC., *et al.*,

Defendants.

Case No. 3:23-cv-00093-MMD-CSD

ORDER

I. SUMMARY

Pro se Plaintiff David S. Gross sued Defendants Chembio Diagnostics, Inc. (a company he invested in that makes tests for infectious diseases), along with Defendants Katherine L. Davis, John G. Potthoff, David W.K. Acheson, David W. Bepalko, Richard L. Eberly, Leslie Teso-Lichtman, and Lawrence J. Steenvoorden (Chembio executives and members of Chembio’s board) for allegedly violating federal securities laws in connection with a tender offer and related merger through which Chembio merged into a larger company. (ECF No. 6 (“Complaint”).) Before the Court is Defendants’ motion to dismiss the Complaint. (ECF No. 17 (“Motion”).)¹ Because Plaintiff’s Complaint does not comply with Federal Rule of Civil Procedure 8, and as further explained below, the Court will grant the Motion. But the Court will grant Plaintiff an opportunity to file an amended complaint within 30 days.

II. BACKGROUND

Defendants submitted some documents filed with the Securities and Exchange Commission (“SEC”) on Chembio’s behalf and some documents filed in *Sholom Keller v. Chembio Diagnostics, et al.*, Case No. 1:23-cv-01388-PAC (S.D.N.Y. Filed Feb. 17, 2023) (“*Keller*”) with their Motion—specifically attached to an accompanying declaration. (ECF

¹Plaintiff responded (ECF No. 20), and Defendants replied (ECF No. 21).

1 No. 18.) Defendants argued in their Motion that the Court may consider these documents
2 in ruling on the Motion without converting it to one for summary judgment under the
3 incorporation by reference doctrine. (ECF No. 17 at 9 n.2.) Defendants argue in their reply
4 that the Court may take judicial notice of certain facts not subject to reasonable dispute
5 from these documents. (ECF No. 21 at 3.) The Court takes judicial notice of the facts
6 described below and taken from these documents, as they all come from publicly
7 available sources not subject to reasonable dispute, specifically SEC filings, and filings in
8 the *Keller* case filed in the United States District Court for the Southern District of New
9 York. See *Ferris v. Wynn Resorts Ltd.*, 462 F. Supp. 3d 1101, 1117 (D. Nev. 2020) (taking
10 judicial notice “of SEC filings, [and] matters of public record” including documents filed in
11 other federal courts). Though some facts described below are taken from the Complaint.

12 Chembio decided to sell itself to another company called Biosynex SA, Inc. in
13 2022. (ECF No. 6 at 15.) In early 2023, Chembio announced the sale, “under which
14 Biosynex, through a subsidiary, would acquire Chembio pursuant to a tender offer for the
15 purchase of all issued and outstanding Chembio shares at a price of \$0.45 per share (the
16 “Tender Offer”).” (ECF No. 17 at 9 (citing ECF No. 6 at 2-3, 15).) Shortly after this
17 announcement, Chembio filed a Tender Offer Statement with the SEC, along with a
18 Schedule 14D-9 Solicitation/Recommendation Statement (“Recommendation
19 Statement”), in which it recommended to Chembio stockholders that they tender their
20 shares under the Tender Offer and explained why Chembio’s Board of Directors had
21 decided to go through with the sale. (ECF No. 6 at 3; see also ECF Nos. 18-1 (Tender
22 Offer Statement), 18-2 (Recommendation Statement).)

23 The *Keller* case was filed on February 17, 2023, shortly after Chembio filed the
24 Recommendation Statement with the SEC. (ECF No. 18-4 (*Keller* complaint).) The *Keller*
25 plaintiffs alleged in their complaint that the Recommendation Statement was false and
26 misleading because it was missing key details about financial projections mentioned in it,
27 the financial projections mentioned in it were likely inaccurate, it was missing key details
28 about the makeup and power of something referred to as the Strategic Committee, and

1 the fairness opinion of an outside financial advisor called Craig-Hallum also referenced in
2 the Recommendation Statement was misleading. (*Id.* at 9-16.)

3 On March 1, 2023, Chembio voluntarily amended and supplemented the
4 Recommendation Statement by filing an Amended Recommendation Statement with the
5 SEC. (ECF No. 18-5.)

6 On May 18, 2023, the *Keller* plaintiffs voluntarily dismissed their lawsuit. (ECF No.
7 18-6.)

8 Meanwhile, Plaintiff filed this case on March 8, 2023. (ECF No. 1-1.) As further
9 explained below, Plaintiff copied many of the allegations from the *Keller* complaint into
10 his Complaint, but also included other allegations that appear to primarily consist of
11 questions he would have liked Chembio to answer before he decided whether to agree
12 to the Tender Offer as an individual shareholder. (ECF No. 6.)

13 Chembio did not pause the merger because of this lawsuit. Biosynex completed
14 its acquisition of Chembio on April 27, 2023. (ECF No. 18-3 at 2.) “At the effective time of
15 the Merger, each share of Common Stock (except for shares that were validly tendered
16 and irrevocably accepted for purchase pursuant to the Offer or held by the Company as
17 treasury shares, owned by a wholly-owned Company subsidiary or held by Biosynex or
18 its subsidiaries) was converted into the right to receive \$0.45 per share, net to the holder
19 in cash, without interest but subject to any applicable tax withholding.” (*Id.* at 7.)

20 Defendants filed the pending Motion in November 2023. (ECF No. 17.)

21 **III. DISCUSSION**

22 A properly pled complaint must provide “a short and plain statement of the claim
23 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2); *see also Bell Atlantic*
24 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Rule 8(a) notice pleading standard
25 requires Plaintiff to “give the defendant fair notice of what the . . . claim is and the grounds
26 upon which it rests.” *Id.* at 555. (internal quotation marks and citation omitted). Moreover,
27 the notice pleading requirements of Rule 8(a) can be violated not only “when a pleading
28 says too little,” but also “when a pleading says too much.” *Knapp v. Hogan*, 738 F.3d

1 1106, 1109 (9th Cir. 2013) (first citing *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys.,*
2 *Inc.*, 637 F.3d 1047, 1058 (9th Cir. 2011) (“[W]e have never held—and we know of no
3 authority supporting the proposition—that a pleading may be of unlimited length and
4 opacity. Our cases instruct otherwise.”) (citations omitted), then citing *McHenry v. Renne*,
5 84 F.3d 1172, 1179-80 (9th Cir. 1996) (affirming a dismissal under Rule 8, and stating
6 that “[p]rolix, confusing complaints such as the ones plaintiffs filed in this case impose
7 unfair burdens on litigants and judges”). And although a *pro se* complaint is subject to a
8 liberal construction, “even a *pro se* complaint is subject to dismissal if the pleading fails
9 to reasonably inform the adverse party of the basis for the cause of action[.]” See *In re*
10 *“Santa Barbara Like It Is Today” Copyright Infringement Litig.*, 94 F.R.D. 105, 108 (D.
11 Nev. 1982) (citations omitted).

12 Plaintiff’s Complaint fails to provide “a short and plain statement of the claim
13 showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a). As Defendants argue
14 in their Motion (ECF No. 17 at 19-21), it is overlong and hard to follow, consisting largely
15 of block quotes from what appear to be the transcripts of earnings conference calls, lists
16 of rhetorical questions, and sections copied-and-pasted from the *Keller* complaint.
17 Plaintiff’s Complaint is a good example of a “pleading that says too much.” *Knapp*, 738
18 F.3d at 1109. It does not reasonably inform Defendants of the bases for the causes of
19 action asserted in it. See *Santa Barbara*, 94 F.R.D. at 108. And as Defendants also point
20 out (ECF No. 17 at 20), rhetorical questions are not “short, plain, and direct factual
21 allegation[s].” *Herndon v. Byers*, Case No. 622CV06031SOHMEF, 2023 WL 2940243, at
22 *3 (W.D. Ark. Mar. 22, 2023), *report and recommendation adopted*, Case No. 6:22-CV-
23 6031, 2023 WL 2934963 (W.D. Ark. Apr. 13, 2023). In sum, the Court must dismiss the
24 Complaint because it does not satisfy Rule 8.

25 In addition, and alternatively, Defendants’ other arguments in their Motion are well
26 taken. First, to the extent that Plaintiff’s allegations regarding omissions from the
27 Recommendation Statement are copied from the *Keller* complaint, those allegations
28 appear moot because Chembio filed the Amended Recommendation Statement in

1 response to the *Keller* complaint, and then the *Keller* plaintiffs voluntarily dismissed their
2 complaint. (ECF No. 17 at 17-19.) While Plaintiff argues that the *Keller* plaintiffs' voluntary
3 dismissal does not render his case moot because the notice of voluntary dismissal does
4 not specify any reasons for the dismissal (ECF No. 20 at 5), the Court agrees with
5 Defendants that the sequence of events described above renders the inference
6 Defendants ask the Court to draw plausible. And supplemental documents filed with the
7 SEC can moot pending lawsuits filed to challenge statements made in the initial versions
8 of those documents. *See, e.g., Scott v. DST Sys., Inc.*, Case No. 1:18-CV-00286-RGA,
9 2019 WL 3997097, at *1 (D. Del. Aug. 23, 2019). Plaintiff should be mindful of this to the
10 extent he seeks to include allegations from *Keller* in any amended complaint he files.

11 The Court also agrees with Defendants that Plaintiff's request for an injunction
12 enjoining the merger is moot because the merger already happened. (ECF No. 17 at 22
13 (making the argument).) *See also Sawyer v. Pioneer Mill Co.*, 300 F.2d 200, 202 (9th Cir.
14 1962) (finding in part that an action to prevent the use of certain documents at a meeting
15 where a merger could be approved was moot because the merger had already
16 happened). And it is also true that rescission of a merger that has already happened is
17 an "extraordinary equitable remedy" that cannot be earned by showing mere technical
18 violations of federal securities laws. *W. Dist. Council of Lumber Prod. & Indus. Workers*
19 *v. Louisiana Pac. Corp.*, 892 F.2d 1412, 1418 (9th Cir. 1989). Thus, it seems unlikely to
20 the Court that Plaintiff can successfully amend his claims.

21 But the Court will give Plaintiff an opportunity to amend. To start, Plaintiff's claims
22 appear somewhat distinct from those in *Keller*. He appears to basically allege that he did
23 not have enough time, and was not given enough information, to decide whether to accept
24 the Tender Offer made as part of Chembio's acquisition—particularly given the fact that
25 Chembio's business is dependent on approvals from regulatory agencies. (*See, e.g.,* ECF
26 No. 6 at 25-26, 33 (asking questions about why Chembio made business decisions given
27 responses from regulatory agencies).) These sorts of allegations are not present in the
28 *Keller* complaint. (ECF No. 18-4 at 9-16.) And he seeks damages stemming from the

1 merger, not just to block or rescind the merger. (ECF No. 6 at 87-88.) Thus, the Court
2 cannot say amendment would be futile because these aspects of his claims may not be
3 moot. Further, at least in his response to the Motion, Plaintiff argues that he suffered
4 monetary losses because of the merger. (ECF No. 20 at 3.) Facts raised for the first time
5 in a plaintiff's opposition papers should be considered by the Court in determining whether
6 to grant leave to amend or to dismiss the complaint with or without prejudice. *See Orion*
7 *Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1137-38 (9th Cir. 2001). And
8 Plaintiff has not previously amended his Complaint. For all these reasons, the Court will
9 grant Plaintiff the opportunity to file an amended complaint within 30 days.

10 That said, the Court cautions Plaintiff that Plaintiff did not properly serve his
11 Complaint for the reasons Defendants articulate in their Motion. (ECF No. 17 at 26-28.)
12 Thus, if he chooses to file an amended complaint, he must properly serve copies of the
13 amended complaint and summons on all Defendants in compliance with Fed. R. Civ. P.
14 4.

15 **IV. CONCLUSION**

16 The Court notes that the parties made several arguments and cited several cases
17 not discussed above. The Court has reviewed these arguments and cases and
18 determines that they do not warrant discussion as they do not affect the outcome of the
19 motion before the Court.

20 It is therefore ordered that Defendants' motion to dismiss (ECF No. 17) is granted.

21 It is further ordered that Plaintiff's Complaint (ECF No. 6) is dismissed, in its
22 entirety, as specified herein.

23 It is further ordered that Plaintiff must file any amended complaint consistent with
24 this order by July 8, 2024.

25 It is further ordered that Plaintiff must properly serve any amended complaint on
26 all Defendants in compliance with Fed. R. Civ. P. 4.

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It is further ordered that, if Plaintiff does not timely file an amended complaint consistent with this order, the Court may dismiss this case with prejudice and without further advance notice to Plaintiff.

DATED THIS 5th Day of June 2024.



MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE