UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 17-00118 AG (DFMx)	Date	September 6, 2017
Title	IN RE BANC OF CALIFORNIA SECURITIES LITIGATION		

Present: The Honorable	ANDREW J. GUILFORD	
Lisa Bredahl	Not Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs: Attorneys Present for Defendants:

Proceedings: **[IN CHAMBERS] ORDER DENYING MOTIONS TO DISMISS**

This is a putative securities fraud class action purporting to allege violations of the Securities Exchange Act of 1934 (referred to as the "Exchange Act" for short) and Rule 10b–5 adopted by the Security and Exchange Commission ("SEC") to implement the Exchange Act. The Court recently granted leave for the appointment of a lead plaintiff and the filing of a consolidated complaint. (Dkt. No. 39.) Iron Workers Local No. 25 Pension Fund is the Lead Plaintiff that was appointed. It filed the consolidated complaint (which the Court will simply refer to as "the complaint"). (Dkt. No. 41.)

The complaint initially identified three defendants—individual defendants Steven A. Sugarman and James L. McKinney, and corporate defendant Banc of California (referred to as "Banc"). Each defendant filed a separate motion to dismiss. (Dkt. Nos. 42, 43 & 44.) Defendants also submitted a joint request for judicial notice and for incorporation of documents by reference. (Dkt. No. 47.)

Plaintiffs have since dismissed with prejudice their claims against Defendant James L. McKinney under Federal Rule of Civil Procedure 41(a)(1)(A)(I). (Dkt. No. 59.) Defendant McKinney's motion is therefore MOOT. (Dkt. No. 44.)

The Court now DENIES the remaining motions to dismiss. (Dkt. Nos. 42, 43.)

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1. BRIEF BACKGROUND

The relevant facts will be discussed in more detail in the Court's analysis. The Court's modest goal here is just to provide a bit of context, assuming all the allegations in the complaint are true.

Banc is a financial holding company. Steven A. Sugarman was its CEO until January 23, 2017. Sugarman was also the CEO of COR, the entity that was responsible for the recapitalization of Banc. And Sugarman owned and/or controlled COR-affiliated companies. Here, "COR" will refer to both COR and the COR-affiliated companies.

This lawsuit was born from purported allegations that Banc and Sugarman misled their investors, who because of that lost money. The investors proposed to bring a class action. The putative class would be composed of "all persons who purchased Banc publicly traded securities between October 29, 2015 and January 20, 2017." (Compl., Dkt. No. 41 ¶ 1.)

The most significant drop in Banc share value that Plaintiffs complain of is the 29% decrease "from a close of $15.87 on October 17, 2016, to a close of $11.26 per share on October 18, 2016, on a volume of 17.2 million shares." (*Id.* at ¶ 7.)

On October 18, 2016, the website SEEKINGALPHA published a blog post from an anonymous short seller who goes by the pen name Aurelius. The post purported to reveal not only financial ties between Banc CEO Sugarman and Banc Lead Independent Director Chad Brownstein, but also and more importantly connections between Sugarman, Brownstein, and a man named Jason Galanis.

Here's why suggesting ties to Galanis raises issues. On September 24, 2015, before the beginning of the class period, Jason Galanis was charged with securities fraud crimes because he "orchestrat[ed] multiple schemes to defraud investors of millions of dollars," including from 2009 to 2011 "a scheme to defraud the shareholders of a publicly traded company called Gerova Financial Group, Ltd." (*Id.* at ¶ 31.) Let's refer to this crime as the "Gerova scheme." He pled guilty to those charges in July 2016 and was sentenced to a six-year prison term in February 2017. (*Id.*) While Galanis was still out on bail for the Gerova scheme, he was charged in May 2016 for another crime, which the complaint refers to as the "Tribal

Bond Scheme." (*Id.* at ¶ 32.) This time, Galanis was involved in "orchestrating a Ponzi scheme to defraud investors and a Native American tribal entity of tens of millions of dollars." (*Id.*) Galanis pled guilty to the Tribal Bond Scheme in January 2017. (*Id.*)

2. LEGAL STANDARD

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." With that liberal pleading standard, the purpose of a motion under Rule 12(b)(6) is "to test the formal sufficiency of the statement of the claim for relief." 5B C. Wright & A. Miller, Federal Practice and Procedure § 1356, p. 354 (3d ed. 2004). To survive a motion to dismiss, a complaint must contain sufficient factual material to "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when "the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Securities fraud claims, like those here, require more still. Such claims also "must satisfy the heightened pleading requirements of both Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act." *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012) (citation omitted). Like all fraud claims, securities fraud claims "must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). And "[t]he 1995 Private Securities Litigation Reform Act ('PSLRA') raised the pleading standard for federal securities fraud claims under § 10(b) of the Securities Exchange Act by adding that a plaintiff must plead with particularity both falsity and scienter." *ESG Capital Partners, LP v. Stratos*, 828 F.3d 1023, 1032 (9th Cir. 2016) (citing 15 U.S.C. § 78u–4(b)(1)–(2)). In this context, Rule 9(b) "requires particularized allegations of the circumstances constituting fraud, including identifying the statements at issue and setting forth what is false or misleading . . . about the statement and why the statements were false or misleading at the time they were made." *In re Rigel Pharm*, 697 F.3d at 876. And on top of that, the PSLRA requires "plaintiffs to state with particularity both the facts constituting the alleged violation and the facts evidencing" that the defendants had the required state of mind. *Id.*

Still, in analyzing the complaint's sufficiency, a court must accept as true the facts alleged in a well-pleaded complaint in the light most favorable to non-moving party. *See ESG Capital Partners*, 828 F.3d at 1031; *Reese v. BP Expl. (Alaska) Inc.*, 643 F.3d 681, 690 (9th Cir. 2011).

3. EVIDENTIARY MATTERS

The Court has accordingly accepted all the facts alleged in the complaint as true. For now, the Court's analysis should ordinarily be limited to those allegations, although it may also consider material incorporated by reference into the complaint or evidence that's appropriate for judicial notice. *See United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003); *see also In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d at 876 (holding that a court deciding a motion to dismiss for failure to state a claim is "generally limited to the face of the complaint, materials incorporated into the complaint by reference, and matters of which [the court] may take judicial notice"). Considering excessive extrinsic evidence would end up transforming a motion to dismiss into a motion for summary judgment. *See* Fed. R. Civ. P. 12(d); *United States v. Ritchie*, 342 F.3d at 907.

Defendants have asked the Court to take judicial notice of or incorporate by reference a great volume of documents. To be more precise, Defendants have asked the Court in deciding their motions to look at 19 exhibits, totaling over 1,000 pages, without taking a clear position about the grounds that justify the Court doing so. (Dkt. No. 47 at 1) ("Defendants respectfully request that the Court consider the following documents, pursuant to Federal Rule of Evidence 201 [on judicial notice] or the doctrine of incorporation by reference, on ruling on their Motions.")

This Court has written at length before about the problems of excessive—and often conflated—attempts to use judicial notice and incorporation by reference regarding, among other things, access to justice and the efficient resolution of disputes. *See Hsu v. Puma Biotechnology, Inc.*, 213 F. Supp. 3d 1275, 1279–82, 1284–85 (C.D. Cal. 2016). Here, the parties' dispute over Defendants' request has been minimal. Plaintiffs don't object to the Court considering Defendants' exhibits 1–12 under the incorporation by reference doctrine. (Dkt. No. 56 at 1.) Plaintiffs also don't object to the Court taking judicial notice of the existence of the documents listed as exhibits 13–19, but they object to the Court taking judicial notice of the truth of their contents. (*Id.*) This is consistent with Federal Rule of Evidence 201. *See, e.g.*,

Maiman v. Talbott, No. SACV 09-00012 AG (ANx), 2011 WL 13065750, at *2, (C.D. Cal. Aug. 29, 2011). So even though none of the parties appear to have relied on exhibits 13–19, the Court will take judicial notice of the existence of these documents but not of the truth of their contents.

With that said, the Court would still urge the parties to consider the usefulness of all these requests. Here, the Court's ultimate ruling on Defendants' motions would not have been any different without these evidentiary rulings, given that the Court generally had to take all well-pled factual allegations in the complaint as true. *See also Hsu*, 213 F. Supp. 3d at 1285.

4. ANALYSIS

Lead Plaintiff purportedly asserts a first claim for violation of § 10(b) of the Exchange Act and SEC Rule 10b–5, and a second claim for violation of § 20(a) of the Exchange Act. All parties seem to agree that the second claim's fate will follow the first claim's fate for now. The Court's analysis will therefore focus on the first claim.

Section 10(b) of the Exchange Act forbids "manipulative or deceptive" company practices that violate SEC rules "in connection with the purchase or sale of any security." 15 U.S.C. § 78j(b). One of those SEC rules is Rule 10b–5, which prohibits, among other things, making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b). To plead a violation of § 10(b) of the Exchange Act and SEC Rule 10b–5, a plaintiff must adequately allege (1) a material misrepresentation or omission by the defendant, (2) "scienter," (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance on the misrepresentation or omission, (5) economic loss, and (6) loss causation. *See In re Rigel Pharm.*, 697 F.3d at 876. "Scienter" is a term of art describing "an intent to deceive, manipulate, or defraud." Scienter, Black's Law Dictionary (10th ed. 2014).

Both remaining motions to dismiss argue the Plaintiffs failed to plead with sufficient particularity the first two elements—a material misrepresentation or omission by the defendant, and scienter. Defendant Banc also contends Plaintiff failed to allege the last element, loss causation. The Court will examine these three elements in turn.

4.1 Material Misrepresentation or Omission by Defendants

The PSLRA has exacting requirements for pleading "falsity." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008). A complaint has to "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u–4.

A brief note on terminology. When securities fraud claims are based on a defendant's omissions, there is often a discussion about defendants' duty to disclose the omitted information. This is likely because § 10(b) and Rule 10b–5 don't create an affirmative duty to disclose. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44–45 (2011); *see also Basic Inc. v. Levinson*, 485 U.S. 224, 239 n.17 (1988) ("Silence, absent a duty to disclose, is not misleading under Rule 10b–5."). A duty to disclose only exists when necessary "to make . . . statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b–5(b). But of course, all plaintiffs must "specify each statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading." 15 U.S.C. § 78u–4. So the duty to disclose isn't so much a special requirement for omission claims as it is, at this stage, another way of talking about, or maybe a shorthand for, plaintiffs' pleading requirements. The duty to disclose doesn't change the legal standard for the Court's analysis.

Allegations about omitted information based on the SEEKINGALPHA blog post. Plaintiffs identify alleged revelations in the SEEKINGALPHA blog post as information Defendants purportedly failed to disclose. Plaintiffs specifically focus on (1) the alleged ties between Banc's then-CEO, Defendant Sugarman, and securities fraudster Jason Galanis, (2) the alleged ties between Jason Galanis and Banc's Lead Independent Director and Chaiman of the Nominating and Corporate Governance Committee ("CNCG"), Brownstein, and (3) Brownstein's alleged lack of independence from Defendant Sugarman, because of alleged financial ties between the two.

As will be explained shortly, the Court finds the complaint hasn't sufficiently explained how Defendants' statements about Brownstein could be misleading. The Court therefore won't

go into any more detail about the allegations concerning Brownstein. But the complaint identified certain potentially relevant allegations about Defendant Sugarman's alleged ties to Jason Galanis, which merit some more discussion.

Recall that Jason Galanis was charged for his crimes, and pled guilty to his charges, in both the Gerova scheme and the Tribal Bond Scheme. Galanis was charged for his participation in the Gerova scheme on September 24, 2015. (Compl., Dkt. No. 41 ¶ 31.) He pled guilty to those charges in July 2016 and was sentenced to a six-year prison term in February 2017. (*Id.*) He was charged for his involvement in the Tribal Bond Scheme in May 2016, and pled guilty in January 2017. (*Id.* at ¶ 32.)

The complaint references multiple, complicated ties between on the one hand Defendant Sugarman and companies he owns or controls, and on the other, Galanis and both the Gerova scheme and the Tribal Bond Scheme. What's of primary interest here are the allegations about Defendant Sugarman and COR. Those allegations purportedly tie COR and Sugarman to the Tribal Bond Scheme in several ways, which the Court will now summarize. Sugarman owned COR, the entity that led to the recapitalization of Banc's predecessor, FPB, from 2011 and through the class period. (*Id.* at ¶ 30.) Sugarman was also COR's CEO. (*Id.* at ¶ 68.) But Galanis controlled COR. (*Id.* at ¶ 30.) Galanis installed officers at COR, and during the Tribal Bond Scheme, he represented to his co-conspirators that he controlled COR. (*Id.* at ¶ 35.) Galanis also used COR to demonstrate his financial backing to acquire the investment firms used to perpetrate the Tribal Bond Scheme. (*Id.*) COR and Galanis controlled an offshore insurance company called Valor Group (or "Valor"). (*Id.* at ¶ 33.) Sugarman's brother was chairman and CEO of Valor during the Tribal Bond Scheme. (*Id.*) Dunkerly, a former COR director, incorporated Valor while still at COR, and served as President of Valor while still at COR. (*Id.*) Valor and one of its subsidiaries played a central role in the Tribal Bond Scheme. (*Id.* at ¶ 33–34.) Burnham Securities, also a part of COR, acted as the placement agent during the Tribal Bond Scheme, operating out of the same building as Banc's corporate headquarters during the fraud. (*Id.* at ¶ 34.)

Other allegations about omissions or misstatements. To the extent the complaint purports to allege other omissions or misstatements by Defendants, it hasn't identified that these omissions or misstatements were revealed during the class period. Because Plaintiffs would therefore be

unable to allege loss causation about these alleged omissions or misstatements, the Court won't discuss those here either.

Materiality of the allegedly omitted information. Information is material if "[i]t is substantially likely that a reasonable investor would have viewed this information as having significantly altered the total mix of information made available." *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 47 (2011) (quoting *Basic,* 485 U.S., at 232) (internal quotation marks omitted). Significant changes in stock price following the release of information is "strong evidence of materiality." *No. 84 Employer-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 949 (9th Cir. 2003). Here, Plaintiffs have alleged that the value of Banc shares dropped 29% within one day of the publication of the SEEKINGALPHA blog. The Court finds that a 29% drop is a significant change in price, that it makes it plausible Banc investors found the information material, and therefore that Plaintiffs have met the pleading requirements for materiality. Plaintiffs mention several other reasons why the release of the alleged revelations from SEEKINGALPHA are material. But the Court finds it unnecessary to discuss further allegations of materiality, since unlike falsity, materiality isn't subject to a heightened pleading standard.

But Defendants have another argument. They contend that publicly available information is immaterial as a matter of law. Plaintiffs appear to disagree that there exists such a broad rule. They differentiate between situations where information is readily and easily available to investors, and situations where the information is only discoverable by combing through and analyzing hundreds of legal and agency documents. In the second type of situation, Plaintiffs argue there is a duty to disclose.

Defendants cite *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 577 (S.D.N.Y. 2013), *aff'd*, 566 F. App'x 93 (2d Cir. 2014), and *White v. H&R Block, Inc.*, No. 02 Civ. 8965 (MBM), 2004 WL 1698628 (S.D.N.Y. July 28, 2004). In those cases, the court found that defendants had no duty to disclose information that had previously been made known to the public. But in those cases, the way the information was disclosed is very different from what happened here. Defendant's reliance on *In re Bank of Am.* is particularly confusing because there, the way the information had previously been made known to the public was through articles in the New York Times and other newspapers. 980 F. Supp. 2d at 576–77. Newspaper articles often rely on some degree of in-depth research into public

documents, and the case didn't mention that the New York Times article was based in whole or in part on confidential information. In *White v. H&R Block*, plaintiffs complained that the defendant hadn't disclosed information about a lawsuit, when it had mentioned that very lawsuit in two SEC filings and one of its own press releases. 2004 WL 1698628, at *2. As the court noted, plaintiffs' argument was really that the defendant had only disclosed the "good news" about the litigation. *Id.* at *3.

Meanwhile, Plaintiffs cite authority that undermine Defendants' contention. For example, in *City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 415 (S.D.N.Y. 2011), the court rejected defendants' argument that an omission of certain information could not be material where the information "may have been publicly discoverable, but it cannot be said to be so manifestly well-known that it was, as a matter of law, already part of the total mix of information available to investors." Further, the *In re Amgen Inc. Securities Litigation* court noted that, "[a]s a general rule, the truth-on-the-market defense is intensely fact-specific, so courts rarely dismiss a complaint on this basis." 544 F. Supp. 2d 1009, 1025 (C.D. Cal. 2008) (citation omitted). The Court finds that Plaintiffs have the stronger argument. It isn't appropriate to find the information allegedly revealed in the SEEKINGALPHA blog immaterial as a matter of law at the pleading stage, just because the information was based on public documents.

Defendant Sugarman also argues that the blog revelations were immaterial because Banc had warned investors about "reputational harm from negative publicity based on incorrect facts." (Sugarman Mot., Dkt. No. 42 at 4.) The Court finds this argument unpersuasive. First, the argument is based on the premise that reputational attacks stem from false information. Even though they've argued the information from the blog was false, Defendants don't appear to have established it. Nor would the Court expect them to at this stage, before any discovery and when the Court must accept the facts alleged in the complaint as true. Second, the authorities Defendant Sugarman cites to bolster his argument don't support such a broad rule about warnings outside the context of forward-looking statements. *See In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010); *Kovtun v. VIVUS, Inc.*, No. C 10-4957 PJH, 2012 WL 4477647, at *12 (N.D. Cal. Sept. 27, 2012), *aff'd sub nom. Ingram v. VIVUS, Inc.*, 591 F. App'x 592 (9th Cir. 2015). And finally, as a matter of policy, it seems unwise to adopt such a rule, which would allow companies to engage in questionable activities with immunity. All they would have to do to protect themselves is include a warning that information circulating

about a company's questionable activity may impact stock price—which is something all reasonable investors know anyway. Then, if a lawsuit is ever filed, they could just say the information isn't true at the earliest stage possible, and that would preclude any discovery into the truth of the matter. For all these reasons, the Court refuses to adopt Defendant Sugarman's argument.

Statements allegedly identified as misleading or false. The complaint purports to identify numerous statements by defendants during the class period as false or misleading in light of the SEEKINGALPHA blog post's alleged revelations. But only one deserves some in-depth discussion here, Banc's 2015 Proxy with Sugarman's biography.

A few quick words about the other statements. By and large, the Court agrees with Defendants' arguments regarding those statements. References about "quality" and "talent" of Banc's directors and employees are too subjective to be actionable. The same is true about Banc's self-promotion as a community-oriented institution. As for the claims of its board's strength and independence, assuming such claims would be actionable in a different context, they can't be here. The SEEKINGALPHA blog post's alleged revelations only concern Brownstein. But there were three members of the CNCG. If Plaintiffs' only purported allegation is that one of the three—a minority of the CNCG—was not independent, Banc's claims of independence would not be misleading.

Back, then, to the 2015 Proxy. At the outset, the Court took notice of the error identified by Plaintiffs in Defendants' submission. (Dkt. No. 63.) Plaintiffs' notice of error explained that Defendants mistakenly discussed the relevance of the Proxy Banc *filed* in 2015 instead of the 2015 Proxy filed on April 15, 2016. (*Id.*) Looking at the allegations in the complaint, the Court finds Plaintiffs were correct in their assessment of Defendants' error. Which makes it difficult to understand why Defendants, when notified by Plaintiffs, refused to correct this error themselves.

At any rate, the relevant Proxy was filed to solicit proxies from shareholders for Banc's annual shareholder meeting. (Compl., Dkt. No. 41 ¶ 67.) It was signed by Defendant Sugarman. (*Id.*) Among the items up for vote at the meeting was the re-election of Sugarman as Banc director. (*Id.*) The Proxy included a biography of Sugarman, which states in relevant part:

> Mr. Sugarman is the Chair, President and Chief Executive Officer of the Company . . . . Mr. Sugarman continues as the Chief Executive Officer of COR Securities Holdings, Inc., the parent company of COR Clearing LLC (of which he is Chair of the Board), a national securities clearing firm, and remains the Managing Member of COR Capital LLC, a Southern California-based firm that was lead investor in the November 2010 recapitalization of the Company.

(*Id.* at ¶ 68.) The reasons Plaintiffs purportedly allege this statement was misleading are that it didn't disclose Sugarman's ties to Galanis, Galanis's use of COR and related entities in the Tribal Bond Scheme, or Sugarman's ties to Galanis through other entities besides COR. (*Id.* at ¶ 72(a).) Although not specifically included in Plaintiffs' listed reasons making the Proxy misleading, the complaint also states that, "Sugarman's biography touted his involvement with COR but failed to disclose the ties Sugarman and those companies had to Galanis." (*Id.* at ¶ 68.)

At this point, the Court observes that Plaintiffs have identified a specific statement they allege to be false or misleading. And they have listed reasons why they find these statements to be false or misleading. Although their reasons could be stated more succinctly and effectively, with more impact, the Court finds Plaintiffs' allegations are sufficient to satisfy the pleading standards of Federal Rules of Civil Procedure 8(a)(2) and 9(b), and of the PSLRA.

The Court will therefore only briefly address Defendants' remaining falsity argument, namely that the SEEKINGALPHA blog post cannot establish falsity because Plaintiffs have not sufficiently alleged the author's personal knowledge about the contents in the post. To support this position, Defendants cite a couple of cases about confidential informants and anonymous internet postings. But the Ninth Circuit opinion cited by Defendants talks about reliability as well as personal knowledge. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009), *as amended* (Feb. 10, 2009). And a blog author, even an anonymous one, who relies on publicly filed documents doesn't raise the same concerns about unreliability as a confidential informant. Particularly when, as here, the author later released a list of all the documents that were the sources of the blog post. Therefore, this Court agrees with others in this district that, under these circumstances, "[i]t is permissible for Plaintiffs to

rely on a short seller report . . . to allege falsity at the pleading stage." *See Snellink v. Gulf Res., Inc.*, 870 F. Supp. 2d 930, 939 (C.D. Cal. 2012) (citation omitted).

To conclude this lengthy analysis about Defendants' first argument, the Court finds Plaintiffs have adequately pleaded material misrepresentation or omission.

4.2 Scienter, the Intent to Defraud

To adequately plead scienter under the PSLRA, the complaint must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u–4(b)(2)(A). Courts have described the required state of mind as one that intends to deceive, manipulate, or defraud. *See Metzler*, 540 F.3d at 1070. Courts have also said a complaint "must allege that the defendants made false or misleading statements either intentionally or with deliberate recklessness." *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1180 (9th Cir. 2009) (citation omitted). But in any case, "[t]he inferences that the defendant acted with scienter need not be . . . of the 'smoking-gun' genre." *Tellabs, Inc. v. Makor Issues &Rights, Ltd.*, 551 U.S. 308, 324 (2007). They must, however, be sufficient for a reasonable person to find them "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.*

The parties seem to agree that, "a corporation can only act through its employees and agents and can likewise only have scienter through them." *In re ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 475 (9th Cir. 2015) (citation omitted); *see also Oregon Pub. Employees Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 607 (9th Cir. 2014) ("Where, as here, the Plaintiffs seek to hold individuals and a company liable on a securities fraud theory, we require that the Plaintiffs allege scienter with respect to each of the individual defendants.") In short, whether Plaintiffs have alleged sufficient facts to show Defendant Banc acted with scienter turns on whether Plaintiffs have alleged sufficient facts to show Defendant Sugarman acted with scienter. The Court will therefore focus on Sugarman.

Plaintiffs argue that Defendant Sugarman acted with scienter for three types of reasons. First, if the allegations in the complaint are taken as true, as they must be, "it is hardly plausible that Sugarman was unaware of his own connection to Galanis." (Opp'n, Dkt. No. 55 at 19.) Plaintiffs then go one step further and argue that it is therefore "hardly plausible" that

Sugarman's failure to mention those connections was "simply an oversight." (*Id.*) Part of Plaintiffs' argument is that Sugarman knew about the 2015 Proxy because he signed it. Defendants contend the Court shouldn't rely on Sugarman's signature as any evidence of scienter. (Sugarman Mot., Dkt No. 42 at 8.) They stress that courts have found boilerplate certifications "add nothing substantial to the scienter calculus." *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1004 (9th Cir. 2009), *as amended* (Feb. 10, 2009). They distinguish cases where defendants signed public documents with certifications from cases where defendants prepared and filed proxies. (Sugarman Reply, Dkt. No. 60 at 8–9.)

But what differentiates this case from those the parties cited is that Plaintiffs don't appear to rely on Sugarman's signature as evidence of scienter by itself. Rather, Plaintiffs appear to suggest that his signature shows he knew the documents were filed, and he knew their content. Plaintiffs' allegations that Sugarman's knowledge of the allegedly misleading nature of these statements rest on different facts.

The question is then whether Sugarman approving the contents of the 2015 Proxy, or failing to correct them, raises a strong inference that Sugarman did so with the intent, or at least with deliberate recklessness, to deceive investors. A quick recap of some of the details the Court has already covered makes the answer to that question straightforward. The Court accepts as true, for the sake of these motions to dismiss, Plaintiffs' allegations that there were ties between Sugarman and Galanis and that COR was involved in the Tribal Bond Scheme. It follows from there that it would be "hardly plausible" for Sugarman not to know about those ties. And, as the Court already concluded, Plaintiffs have sufficiently pled that the 2015 Proxy became misleading in light of these facts. The logical conclusion is therefore that Sugarman stayed silent about his and COR's involvement intentionally or at least with deliberate recklessness. The Court therefore finds Plaintiffs' first scienter argument is sufficient to satisfy their burden for now. But Plaintiffs have more arguments.

Plaintiffs's second argument is that "Sugarman's resignation on the same day the Company announced an SEC investigation into Banc's response to the Article, followed by Banc's announcement of remedial and corporate governance changes" also supports a strong inference of scienter. (Opp'n, Dkt. No. 55 at 20.) Defendants argue that evidence of resignation during the class period, without additional facts showing that the resignation occurred under suspicious circumstances cannot "support a strong inference of scienter."

Zucco Partners, LLC v. Digimarc Corp., 552 F.3d 981, 1002 (9th Cir. 2009), *as amended* (Feb. 10, 2009). But in *Zucco*, the proximity in time was not as great as here, because the resignation there occurred a month after the company issued a statement. *Id.* The other cases Defendants rely on are also distinguishable because of the amount of time that passed before executives resigned or were terminated. *See In re Cornerstone Propane Partners, L.P.*, 355 F. Supp. 2d 1069, 1074 (N.D. Cal. 2005); *see also Luna v. Marvell Tech. Grp. Ltd*, CV 15-05447 (RMW), 2016 WL 5930655, at *12–13 (N.D. Cal. Oct. 12, 2016). Here, Sugarman resigned on the very same day that Banc issued a statement announcing an SEC investigation. And Plaintiffs' alleged evidence to support an inference of scienter isn't limited to Sugarman's resignation, as the rest of the discussion in this section makes clear. So the Court need not decide if the timing of Sugarman's resignation is *enough* to support a strong inference of scienter. Rather, the Court finds that this allegation "add[s] one more piece to the scienter puzzle." *In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d 964, 976 (N.D. Cal. 2009) (citation omitted).

Finally, Plaintiffs argue that Banc's later admission about the insufficiency of its internal controls during the class period, when there was an "inadequate tone at the top," also supports a strong inference of scienter. (Opp'n, Dkt. No. 55 at 21.) The parties haven't discussed this argument much, and the Court finds it inappropriate to make their arguments for them. And at any rate, Plaintiffs' first two categories of allegations are enough to raise a strong inference of scienter.

To summarize its analysis of Defendants' second argument for dismissal, the Court finds Plaintiffs have adequately pled scienter and disagree with Defendants' second argument.

4.3 Loss Causation

Defendant Banc also contends Plaintiff failed to allege "particularized facts showing" the last element, loss causation.

A pause to discuss Defendant's Banc purported legal standard. Its motion stated Plaintiffs had not alleged "particularized facts showing [loss causation]." (Banc Mot. Dkt. No. 43 at 19.) Yet it cites no authority supporting that heightened pleading standards apply to loss causation. Neither the text of Federal Rule of Civil Procedure 9(b) nor the text of the PSLRA, 15 U.S.C. § 78u–4, suggest that a heightened pleading standard applies to loss

causation. Judicial precedent appears to support a more lenient pleading standard for loss causation, requiring only that the complaint provide defendants with fair notice of the claims against them and the grounds for those claims. *See Loos v. Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014), *as amended* (Sept. 11, 2014) ("At the pleading stage, however, the plaintiff need only allege that the decline in the defendant's stock price was proximately caused by a revelation of fraudulent activity rather than by changing market conditions, changing investor expectations, or other unrelated factors.") (citing *Metzler Inv. GMBH v. Corinthian Colls., Inc.,* 540 F.3d 1049, 1062 (9th Cir.2008)); *see also Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (assuming without deciding that allegations of loss causation are not subject to heightened pleadings standards); *Apollo Grp. Inc.*, 774 F.3d at 608 ("To prove loss causation, [the Plaintiffs] must demonstrate a causal connection between the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by the [Plaintiffs].") (citation omitted). Given this authority, and given the importance of pleading standards for access to justice, the Court finds it inappropriate to apply a heightened pleading standard for loss causation. This is also why the "Legal Standard" section did not mention heightened pleading standards for loss causation.

Moving on to the substance of the parties' arguments, Defendant Banc purports to argue that Plaintiffs cannot allege loss causation because the SEEKINGALPHA blog post isn't a corrective disclosure. Banc contends that the SEEKINGALPHA blog post cannot be a corrective disclosure because it is based on publicly available information and it stated that it merely reflects the author's opinion. (Banc Mot. 20.) The reasons the Court rejects the argument about the information being publicly available here are the same as they were when the Court analyzed Defendants' similar argument about materiality. And Plaintiffs have cited cases showing that the distinction between different types of public information applies in the context of loss causation, too. *See, e.g.*, *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1058 (9th Cir. 2008); *Scott v. ZST Digital Networks, Inc.*, No. CV 11 03531 GAF (JCx), 2012 WL 538279, at *11 (C.D. Cal. Feb. 14, 2012); *see also In re Apollo Grp., Inc. Sec. Litig.*, No. 08–16971, 2010 WL 5927988, at *1 (9th Cir. June 23, 2010) ("The jury could have reasonably found that the UBS reports following various newspaper articles were 'corrective disclosures' providing additional or more authoritative fraud-related information that deflated the stock price.") (citation omitted). As for Defendant's argument that the Ninth Circuit decided otherwise in *Loos*, the Court finds it unpersuasive. (Banc Reply, Dkt. No. 61 at 13.) In *Loos*, the Ninth Circuit agreed with the Eleventh Circuit's reasoning in *Meyer v. Greene*, 710 F.3d

1189 (11th Cir. 2013). *Loos*, 762 F.3d at 890. But in doing so, the Ninth Circuit didn't focus on the fact that the information in *Meyer* "had been derived entirely from public filings." 762 F.3d at 889. Instead, it focused on the fact that the announcement of an investigation cannot be a corrective disclosure because "at the moment an investigation is announced, the market cannot possibly know what the investigation will ultimately reveal." *Id.* at 890.

Defendant's next argument about the blog post being nothing more than an opinion doesn't make much sense under the specific circumstances alleged here. Of course, the Court is mindful of the risks Defendant identifies, as stated by the Eleventh Circuit.

> If every analyst or short-seller's opinion based on already-public information could form the basis for a corrective disclosure, then every investor who suffers a loss in the financial markets could sue under § 10(b) using an analyst's negative analysis of public filings as a corrective disclosure. That cannot be—nor is it—the law.

Meyer v. Greene, 710 F.3d 1189, 1199 (11th Cir. 2013) (citation omitted). But here, Plaintiffs' complaint isn't only based on the opinion of the blog post's author that Banc was "un-investible." It relies much more on the factual conclusions that led to the author's overall opinion. That appears to be one difference from the facts in *Meyer*. *See id.* at 1193 ("During the presentation, Einhorn suggested that St. Joe's assets were significantly overvalued and therefore 'should be' impaired."). The other reason that makes the Court reluctant to call the SEEKINGALPHA blog post no more than an opinion piece is the author's later revelation of his numerous sources. While the Court has not reviewed those sources for these motions and therefore cannot say if or to what extent they corroborate the blog's alleged revelations, the Court isn't willing to close the courthouse to any investor who was defrauded simply because the fraud was revealed by a short-seller—no matter how thorough the short-seller's research or how compelling the short-seller's conclusions.

What remains is the 29% stock price drop that happened within 1 day of the publication of the SEEKINGALPHA article. This is enough for Plaintiff to "plausibly allege that the defendant's fraud was *revealed* to the market and *caused* the resulting losses." *See Loos*, 762 F.3d at 887 (citation omitted). And so, the Court rejects Defendants' third and final argument for dismissal.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	SACV 17-00118 AG (DFMx)	Date	September 6, 2017
Title	IN RE BANC OF CALIFORNIA SECURITIES LITIGATION		

5. DISPOSITION

The Court now DENIES the remaining motions to dismiss. (Dkt. Nos. 42, 43.)

Defendant McKinney's motion is MOOT. (Dkt. No. 44.)

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