UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 20-963-MWF (AFMx) **Date: October 8, 2020**
Title: Larry Tran v. Beyond Meat, Inc. et al

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER RE: MOTION TO DISMISS AMENDED CLASS ACTION COMPLAINT [55]; PLAINTIFF'S MOTION TO STRIKE PORTIONS OF REQUEST FOR JUDICIAL NOTICE [64]

Before the Court are two motions:

The first is Defendants Beyond Meat, Inc. ("Beyond Meat"), Ethan Brown, and Mark J. Nelson's Motion to Dismiss Amended Class Action Complaint for Violation of the Federal Securities Laws, (the "Motion"), filed on July 31, 2020. (Docket No. 55). Lead Plaintiff Block Investments Corporation and named Plaintiffs Jie Ling Guo and Neeraj Tulsian filed an opposition on August 31, 2020. (Docket No. 59). Defendants filed a reply on September 15, 2020. (Docket No. 62).

The second is Plaintiffs' Motion to Strike Portions of Defendants' Request for Judicial Notice (the "MTS"), filed on September 24, 2020. (Docket No. 64). Defendants filed an opposition on September 28, 2020. (Docket No. 66).

The Court has read and considered the papers filed in connection with the motions and held a telephonic hearing on **October 6, 2020**, pursuant to General Order 20-09 arising from the COVID-19 pandemic.

The Motion is **GRANTED *with leave to amend***. The FAC does not sufficiently allege the falsity of material statements or omissions.

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I. BACKGROUND

On January 30, 2020, Plaintiff Larry Tran initiated this action with his complaint against Beyond Meat, Inc. ("Beyond Meat"), Ethan Brown, and Mark J. Nelson (the "Tran Action"). (Docket No. 1). Generally, the Tran Action concerns allegations arising from a lawsuit brought by a former supplier of Beyond Meat, Don Lee Farms in Los Angeles Superior Court, along with a lawsuit brought by one of Beyond Meat's new manufacturing partners, ProPortion Foods, LLC ("ProPortion"), captioned *Don Lee Farms v. Savage River, Inc.*, Case No. BC662838 (Cal. Super. Ct.) ("Don Lee Farms"). (*Id.*). *Don Lee Farms* included allegations that Beyond Meat had employed lax food safety practices, that Don Lee Farms found plastics, cardboard and a metal nozzle in ingredients that Beyond Meat supplied, and that a Beyond Meat truck had arrived at a Don Lee Farms processing facility with a load contaminated with an unidentified white powder. (*Id.*).

Subsequent to the *Tran Action*, two related actions were filed against Beyond Meat concerning the same allegations, captioned *Eric Weiner v. Ethan Brown et al.*, CV 20-2524-MWF and *Kimberly Brink et al. v. Ethan Brown et al.*, CV 20- 2574-MWF. On April 1, 2020, the Court consolidated the actions and ordered the various parties to "meet and confer regarding the potential need for the appointment of a lead plaintiff, along with lead counsel." (Docket No. 32 at 3). The Court ordered that if the parties were unable to reach an agreement, "counsel must submit short (no more than five pages) applications for lead counsel and/or lead plaintiff." (*Id.*).

On May 18, 2020, the Court granted the Block Investments Motion, appointing Block Investments as Lead Plaintiff, Bernstein Liebhard LLP as Lead Counsel, and Kaplan Fox & Kilsheimer LLP as Liaison Counsel. (Docket No. 41). Plaintiffs filed the First Amended Complaint ("FAC") on July 1, 2020. (Docket No. 54).

The following facts are based on the FAC, which the Court assumes are true and construes any inferences arising from those facts in the light most favorable to Plaintiff. *See, e.g.*, *Schueneman v. Arena Pharm., Inc.*, 840 F.3d 698, 704 (9th Cir. 2016) (restating generally-accepted principle that "[o]rdinarily, when we review a

motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), we accept a plaintiff's allegations as true 'and construe them in the light most favorable' to the plaintiff") (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 989 (9th Cir. 2009)).

Plaintiffs assert a federal securities class action brought on behalf of all other persons and entities that purchased or otherwise acquired the securities of Defendant Beyond Meat, Inc. ("Beyond Meat" or the "Company"), between May 2, 2019 and January 27, 2020 (the "Class Period"). (FAC ¶ 1).

Beyond Meat is a food company that manufactures and sells plant-based meat products using protein from peas referred to as "extrudate." (*Id*. ¶ 5). Beyond Meat does not perform all of the steps in the manufacturing process for its products. (*Id*.). Rather, the Company produces the extrudate and other pea protein-based raw ingredients and contracts with a co-manufacturer who processes the ingredients into finished products and packages them for distribution and sale by the Company. (*Id*.).

Defendant Ethan Brown served as Beyond Meat's Chief Executive Officer and President during the Class Period, and served on the Company's Board of Directors. (*Id*. ¶ 38). Defendant Mark J. Nelson served as Beyond Meat's Chief Financial Officer, Treasurer, and Secretary during the Class Period. (*Id*. ¶ 39).

From the moment Beyond Meat went public in May 2019, Defendants materially misrepresented to investors that a pending lawsuit against the Company brought by its former co-manufacturer, Don Lee Farms ("DLF"), lacked validity, and that its risks from the lawsuit were not extraordinary. (*Id*. ¶ 3). This lawsuit was filed in the California Superior Court, County of Los Angeles, *Don Lee Farms v. Savage River, Inc. d/b/a Beyond Meat*, Case No. BC662838 (the "DLF Litigation"). (*Id*.). Defendants knew or recklessly disregarded that their risk of liability was a near certainty. Defendants' fraudulent actions ensured that Beyond Meat's May 2019 Initial Public Offering ("IPO") went off without a hitch, becoming the largest popping U.S. IPO in nearly two decades, and artificially inflated Beyond Meat's stock price throughout the Class Period. (*Id*.).

Unbeknownst to investors, however, years before the IPO, Defendants executed a scheme to get out of an exclusive supply agreement it had with DLF before the end of the contract term — a scheme that would ultimately form the basis of DLF's legal claims against the Company. (*Id.* ¶ 4). In 2014, Beyond Meat and DLF entered into a contract whereby, DLF became Beyond Meat's exclusive co-manufacturer. (*Id.* ¶ 6). In its role as exclusive co-manufacturer, DLF significantly contributed to Beyond Meat's rise. (*Id.*). Prior to entering its relationship with DLF, Beyond Meat did not know how to mass-produce its product and had essentially been making the products by hand. (*Id.*). DLF was responsible for engineering the process to scale production of Beyond Meat's plant-based meat products, allowing the Company to grow. (*Id.*).

DLF also developed the "Batch Making Protocols" for producing several of the Company's products, including the "Beyond Burger" — Beyond Meat's most popular product. (*Id.* ¶ 7). DLF's Batch Making Protocols detailed the method and process for mass-producing the Beyond Burger, including critical components like ingredient amounts, mixing times, and equipment layouts. (*Id.*). However, in late January 2016, prior to DLF completing development of the Beyond Burger, Beyond Meat's relationship with DLF was deteriorating, in part, because DLF had lost confidence in Beyond Meat's food safety protocols after discovering foreign objects in the raw materials provided by Beyond Meat on multiple occasions. (*Id.* ¶ 8).

At that time, maintaining the Company's relationship with DLF was critical, as DLF was still perfecting the Beyond Burger. (*Id.* ¶ 9). Accordingly, Beyond Meat conducted an independent food safety audit of the Company's facility in an attempt to address DLF's concerns. (*Id.*). Thereafter, Beyond Meat provided DLF with an independent safety audit report that identified no food safety concerns. (*Id.* ¶ 10). DLF has since alleged that Beyond Meat executives deleted significant portions of the safety audit report, concealing the consultant's findings of contamination. (*Id.*).

Satisfied by the purported clean audit, on April 11, 2016, DLF agreed to amend the exclusive supply agreement, extending the contract with Beyond Meat through April 11, 2019. (*Id.* ¶ 11). The amendment also more than doubled Beyond Meat's minimum required purchases under the agreement to 4,000,000 pounds of product in

the first year, escalating to 6,000,000 pounds in the third year. (*Id.*). One month later, in May 2016, Beyond Meat launched the Beyond Burger, which sold out almost immediately and became the Company's flagship product. (*Id.* ¶ 12). Since its launch, the Beyond Burger has been the Company's most successful product, accounting for approximately 60% of the Company's revenue leading up to its IPO. (*Id.*).

With the Beyond Burger launched and DLF's Batch Making Protocol for its new core product in hand, Defendants no longer had to rely on DLF and began to shop for a less costly replacement co-manufacturer. (*Id.* ¶ 13). To that end, Defendants secretly arranged a test with CLW Foods, LLC ("CLW") to potentially replace DLF as the Company's co-manufacturer. The test was scheduled for February 3, 2017. (*Id.* ¶ 14). Before the test could take place, DLF was alerted to Defendants' plans when a Beyond Meat employee accidently copied DLF on an email chain discussing CLW. (*Id.*).

Defendant Brown attempted to address the accidental email by representing to DLF that the Company would pull the test at CLW in the hope that the two companies could put the matter behind them. (*Id.* ¶ 15). However, despite Brown's assurances to the contrary, Beyond Meat continued to covertly negotiate with CLW. (*Id.*). Beyond Meat's former Vice President of Operations and Supply Chain testified that by late March 2017, he had been negotiating with CLW for a while, including discussing price, capabilities and quantities, and had taken a tour of CLW's facility. (*Id.* ¶ 16).

Beyond Meat was looking for an alternative to DLF, in part because Beyond Meat executives believed that the excessive minimum purchases required under the parties' agreement were too costly. (*Id.* ¶ 17). Rather than attempt to renegotiate the terms with DLF, Beyond Meat decided to find a way out of the contract. (*Id.*). After ensuring that CLW was ready to take over as co-manufacturer, Beyond Meat set in motion its plan to change its co-manufacturer, in violation of the Company's exclusive supply agreement with DLF. (*Id.* ¶ 18).

On April 12, 2017, Beyond Meat sent DLF a Notice of Breach alleging multiple material breaches of the exclusive supply agreement related to purported food safety concerns, including discovering Salmonella at DLF's facility, allegations DLF claims

were just a pretext to end the relationship. (*Id.*). On May 23, 2017, Beyond Meat sent a Notice of Termination to DLF stating that, due to DLF's failure to cure the alleged breaches, the Company was terminating the exclusive supply agreement. (*Id.* ¶ 19). On May 25, 2017, DLF filed a lawsuit against the Company alleging breach of contract, misappropriation of trade secrets, and fraud, among other claims. (*Id.* ¶ 20).

In November 2018, Beyond Meat announced that the Company planned to go public. (*Id.* ¶ 21). In the weeks leading up to the Company's IPO on May 2, 2019, there was significant excitement about the Company. Despite never having turned a profit, Beyond Meat was dubbed a "unicorn" startup, as a private company with a valuation of over $1 billion. (*Id.*). Not wanting to damage the positivity in the market surrounding the Company heading into the IPO, Beyond Meat concealed the truth about the DLF Litigation from investors in the Registration Statement dated May 1, 2019, filed with the SEC in connection with the Company's IPO (the "Registration Statement"). (*Id.* ¶ 22). In the Registration Statement, Beyond Meat affirmatively denied each of the claims made against the Company by DLF and provided only general risk disclosures related to the DLF Litigation. (*Id.*). These representations served to assuage investors' concerns that DLF was likely to be awarded damages in the DLF Litigation or be able to lay claim to any portion of Beyond Meat's intellectual property, including the Beyond Burger. (*Id.*).

On May 2, 2019, the Company completed its Initial Public Offering, issuing 11,068,750 shares of common stock at an offering price of $25.00 per share, generating approximately $276,718,750 in gross proceeds. (*Id.* ¶ 23). By the close of the market, Beyond Meat shares had soared to $65.75, for a gain of 163%, and it had become the biggest-popping U.S. IPO in nearly two decades. (*Id.*).

Throughout the Class Period, Defendants continued to deny the merits of DLF's claims and conceal from investors that Beyond Meat's risk of being held liable in the DLF Litigation was closer to a near certainty rather than the mere possibility represented by the Company. (*Id.* ¶ 24). Because of the Company's forceful denials of liability, the market was unable to decipher the Company's true risks of liability. (*Id.*).

Nevertheless, it was only a matter of time before the market discovered DLF's claims were valid and the risks materialized. (*Id.*).

On January 27, 2020, after the close of the markets, DLF issued a press release announcing that the judge in the DLF Litigation issued a Right to Attach Order, and by doing so, ruled that DLF "proved the probable validity of its claim that Beyond Meat breached its manufacturing agreement with Don Lee Farms." (*Id.* ¶ 25). DLF's press release also revealed that based on discovery produced in the DLF Litigation, the court granted its motion to amend its complaint to name Defendant Nelson and Beyond Meat's Senior Quality Assurance Manager Jessica Quetsch and Director of Operations Anthony Miller in connection with its fraud claim, alleging that these individuals coordinated to intentionally doctor and omit material information from the 2016 safety audit report that Beyond Meat provided to DLF — the very report that induced DLF to extend its contract with Beyond Meat. (*Id.* ¶ 26).

Following these revelations, for the first time, the market appreciated that DLF's claims were legitimate and that Defendants had no basis for their blanket denial of culpability for the actions alleged in the DLF Litigation. (*Id.* ¶ 27). The market also appreciated that Beyond Meat's warnings did not reflect the true level of risk the Company faced with respect to the DLF Litigation and it was likely to be subjected to significant penalties. (*Id.*). Indeed, even analysts at J.P. Morgan noted that this news "surely is an additional risk to the stock price." (*Id.*).

On this news, Beyond Meat's stock price dropped $4.63, or over 3.7%, to close at $120.12 per share on January 28, 2020. (*Id.* ¶ 28). As a direct and proximate result of Defendants' fraud, Beyond Meat investors lost hundreds of millions of dollars. (*Id.* ¶ 29).

Based on the above allegations, the FAC asserts two claims for relief: (1) violations of § 10(b) of the Securities Exchange Act of 1934 ("Section 10(b)") and the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5 promulgated thereunder ("Rule 10b-5"); and (2) violations of § 20(a) of the Exchange Act ("Section 20(a)"). (*Id.* ¶¶ 172-188).

II. REQUEST FOR JUDICIAL NOTICE

Defendants make two requests for judicial notice.

In the first request (the "RJN 1"), Defendants asked the Court to take judicial notice of several documents, including: (1) documents filed in the DLF Litigation; (2) Beyond Meat's SEC Form 424B4, 10-Q Filings, and 10-K Filing; and (3) DLF's January 27, 2020 press release. (Docket No. 56)). Plaintiffs do not oppose RJN 1.

In the second request (the "RJN 2"), Defendants asked the Court to take judicial notice of several additional documents filed in the DLF Litigation, including: (1) A May 17, 2019 Minute Order; (2) Beyond Meat's FAC in the DLF Litigation; (3) Beyond Meat's Motion for Sanctions in DLF Litigation; (4) Beyond Meat's Response to DLF's Opposition to Proportion Summary Judgment Motion; (5) the Sahni Declaration; and (6) Beyond Meat's Objection to Right to Attach Order in DLF Litigation. (Docket No. 64).

As a general rule, "a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). An exception to this general rule exists for (1) materials that are attached to or necessarily relied upon in the complaint, and (2) matters of public record that are not "subject to reasonable dispute." *Id.* at 688-89. This exception does ***not*** apply to "disputed facts stated in public records." *Id*. at 690.

On September 24, 2020, Plaintiffs filed the Motion to Strike Portions of RJN 2 (the "RJN Motion"). (Docket No. 64). Defendants filed the Opposition on September 28, 2020 (the "RJN Opp."). (Docket No. 66).

Plaintiffs principally argue that Exhibits 2 through 5 of the RJN 2 should be stricken because they are not cited in or necessarily relied upon in the FAC. (RJN Motion at 1). Plaintiffs also argue that although the RJN 2 documents were filed publicly, judicial notice is not appropriate because the content of the documents are disputed. (*Id*. at 3-6). Defendants argue that they include these public documents not

to prove the truth of the matter asserted, but rather to show that no facts have been established as "true" in the DLF Litigation. (RJN Opp. at 2-6). Defendants also argue that the documents are judicially noticeable under the incorporation by reference doctrine. (*Id*. at 7-10).

The Court agrees with Plaintiffs that matters of public record are not judicially noticeable when their content is in dispute. The Court is also dubious of Defendants' arguments that these documents are not being offered for the truth of their content and that they have been incorporated by reference. However, the Court would reach the same conclusion here regardless of whether it considered these documents.

Accordingly, the RJN 2 and the RJN Motion are both **DENIED *as moot***. The unopposed RJN 1 is **GRANTED**, as these documents are matters of public record not subject to reasonable dispute.

III. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013)

In ruling on the Motion under Rule 12(b)(6), the Court follows *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id*. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between

possibility and plausibility.'" *Id*. at 995 (quoting *Twombly*, 550 U.S. at 556–57) (internal citations omitted).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the Complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, No. 13-56644, 2016 WL 5389307, at *2 (9th Cir. Sept. 27, 2016) (as amended) (quoting *Iqbal*, 556 U.S. at 679). Where the facts as pleaded in the Complaint indicate that there are two alternative explanations, only one of which would result in liability, "plaintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible." *Eclectic Properties*, 751 F.3d at 996–97; *see also Somers*, 729 F.3d at 960.

Allegations of fraud must meet a higher pleading standard. Fed. R. Civ. P. 9(b) (requiring the pleading party to "state with particularity the circumstances constituting fraud or mistake"). It is well-established that, "[a]t the pleading stage, a complaint alleging claims under Section 10(b) and Rule 10b-5 must not only meet the requirements of Rule 8, but must satisfy the heightened pleading requirements of both Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act ('PSLRA')." *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 876 (9th Cir. 2012).

IV. DISCUSSION

The "elements that must be pleaded to state a claim for securities fraud are strenuous but well established." *Curry v. Yelp Inc.*, 875 F.3d 1219, 1224 (9th Cir. 2017). "To state a claim for violation of Rule 10b-5, a plaintiff must allege a material misrepresentation or omission of fact, scienter, a connection with the purchase or sale of a security, transaction and loss causation, and economic loss." *Id*.

Defendants raise four arguments as to why the FAC should be dismissed: (1) Plaintiffs failed to plead falsity of any Beyond Meat statements; (2) Plaintiffs failed to plead scienter adequately; (3) Plaintiffs failed to plead loss causation; and (4) Plaintiffs' § 20(a) claim should be dismissed because it is based on Plaintiffs' Rule 10b-5 claim. (Motion at 10-25).

A. Falsity

"[A] plaintiff must plead falsity with particularity: a plaintiff must '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.'" *Rubke v. Capitol Bancorp Ltd*, 551 F.3d 1156, 1164 (9th Cir. 2009) (quoting 15 U.S.C. § 78u-4(b)(1)).

Plaintiffs point to two allegedly false statements made in Beyond Meat's Registration Statement and 10-Q filings:

1. "We deny all of [DLF's] claims[.]" (FAC ¶¶ 119, 123, 128).

2. "We believe we were justified in terminating the supply agreement with Don Lee Farms, that we did not misappropriate their alleged trade secrets, [and] that we are not liable for the fraud or negligent misrepresentation alleged in the proposed second amended complaint[.]" (*Id*. ¶¶ 115, 119, 123, 128).

Plaintiffs proceed under an omissions theory. The thrust of their argument is that these statements created a false impression that the DLF Litigation was meritless, when in fact, Defendants were aware of and failed to disclose specific facts showing that the risk of liability was "substantial." (Opposition at 8). Defendants argue that these statements express an opinion, and that Plaintiffs failed to allege any facts calling into question the basis of the opinion which would render the statements objectively false or misleading. (Motion at 11-17).

As Plaintiffs correctly point out, "a statement that is literally true can be misleading and thus actionable under the securities laws." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). There is no rule, however, that "once a disclosure is made, there is a duty to make it complete and accurate." *Id*. An incomplete statement is not necessarily a misleading statement, and a completeness rule would sweep too broadly, as "[n]o matter how detailed and accurate disclosure statements are, there are likely to be additional details that could have been disclosed but were not." *Id*.

Statements expressing an opinion or belief can also be actionable under Section 10(b). As the Supreme Court explained in the seminal case *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund*, 575 U.S. 175, 179 (2015), "an investor cannot state a claim by alleging only that an opinion was wrong; the complaint must as well call into question the issuer's basis for offering the opinion. And to do so, the investor cannot just say that the issuer failed to reveal its basis." *Id.* at 194. Rather, the investor must identify specific, material facts "in the issuer's possession at the time" of the statement "whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Id*. at 189, 194. "That is no small task for an investor." *Id*. at 189.

The Court agrees with Defendants that Plaintiffs have not made this showing.

First, Plaintiffs failed to allege with particularity any omitted facts in Defendants' possession that plausibly demonstrate how the opinion statements were misleading.

To support their claim that Beyond Meat manufactured a reason to terminate the agreement with DLF, Plaintiffs merely regurgitate DLF's unproven allegations in the DLF Litigation. (FAC ¶ 84 ("DLF alleges that Beyond Meat invented false food safety concerns . . . as a pretext for terminating" the agreement)). They provide no facts showing, for example, that Defendants were aware of any information that Salmonella was not actually present in the new DLF facility when Beyond Meat terminated its agreement with DLF.

Plaintiffs also claim Beyond Meat misappropriated DLF's trade secrets in violation of the agreement, but they do not provide the agreement, or plead its contents with any specificity. Instead, Plaintiffs again regurgitate DLF's unproven allegations. (*Id*. ¶ 88). Though Plaintiffs do allege that "DLF discovered its Batch Making Protocol for the Beyond Burger in the [new manufacturer's] files that were produced in discovery," *id*. ¶ 89, without access to the agreement's provisions, the Court has no ability to ascertain whether DLF's Batch Making Protocol was a trade secret belonging to DLF. The agreement could, for example, grant Beyond Meat the intellectual property rights over DLF's Batch Making Protocol.

Finally, in support of its claim that Beyond Meat altered the 2016 audit report to induce DLF into entering into the agreement, Plaintiffs point only to DLF's second amended complaint making this allegation. (*Id*. ¶ 95).

At the hearing, Plaintiffs argued that DLF's allegations ***are*** based on underlying evidence; Plaintiffs just lack access to that evidence because many of the documents in the DLF Litigation are not public. But the Court cannot just accept at face value DLF's characterization of the underlying evidence supposedly implicating Beyond Meat. "Without a particularized description" of the evidence supporting DLF's allegations (and Plaintiffs' allegations in turn), the Court cannot determine whether Defendants' opinion statements about Beyond Meat's liability in the DLF litigation would have been materially misleading to a reasonable investor. *See In re Regulus Therapeutics Inc. Sec. Litig.*, 406 F. Supp. 3d 845, 857 (S.D. Cal. 2019) (holding plaintiffs did not sufficiently allege falsity under omissions theory where plaintiffs "failed to provide specifics as to how and to what extent" information in the company's possession showed that one of its products was potentially dangerous).

In sum, because Plaintiffs have failed to point to specific, factual details about the alleged scheme to manufacture food safety concerns to justify terminating DLF, the specific terms of the agreement, *i.e.* the agreement's termination and intellectual property provisions, and details about the allegedly fraudulent altering of a report in 2016, Plaintiffs' allegations "are insufficient to meet the heightened pleading requirements of the PSLRA." *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1036 (9th

Cir. 2002) (holding that plaintiffs' allegations relying upon negative characterizations of reports, without specific reference to the contents of those reports, were insufficient to meet pleading PSLRA standard to show scienter).

But even if the FAC's allegations had a sufficient factual basis, they fail for an additional reason. To successfully plead falsity under an omission theory, Plaintiffs must point to information "***in the issuer's possession at the time***" of the statement "whose omission makes the opinion statement at issue misleading[.]" *Omnicare*, 575 U.S. at 189, 194. Alhough the parties did not brief the issue, it appears that the issuers of the 10-Q statements are the individual defendants. (*See*, *e.g.*, RJN, Ex. 6 at 72 (10-Q signed by Defendants Brown and Nelson)). The FAC states that Beyond Meat surreptitiously obtained a replacement manufacturer and executed a scheme to justify terminating DLF, but fails to allege that Defendants Brown and Nelson were involved in or even aware of these events. (FAC ¶¶ 80-89). Instead, the FAC merely states that Defendant Nelson briefly left the company in March 2017 and that Defendant Brown tried to ameliorate Beyond Meat's relationship with DLF before the termination. (*Id.* ¶¶ 79, 83). Perhaps Plaintiffs can point to case law that imputes all employees' knowledge to the issuer of a 10-Q. But at present, Plaintiffs offer no legal or factual connection between the "ulterior motive" allegations and the individual defendants.

Second, it is far from clear that a more-detailed disclosure of the risks posed by the DLF Litigation was required.

The Ninth Circuit's opinion in *Brody* is instructive. In *Brody*, the plaintiffs alleged that the company's two press releases were materially misleading because they failed to include information about the possible sale, *i.e.* that the company had received three actual offers, not just "expressions of interest," as the press release stated. *Brody*, 280 F.3d at 1006. The court explained that "to survive a motion to dismiss under the heightened pleading standards of the PSLRA, the plaintiffs' complaint must specify the reason or reasons why the statements made by the [company] were misleading or untrue, not simply why the statements were incomplete." *Id.* Applying this rule, the Ninth Circuit held that the district court properly dismissed plaintiffs' complaint, which failed to allege facts indicating that the press release was misleading. *Id.* at

1007. Although the company's complained-of statements did not provide all of the information that the company possessed regarding a possible sale, they were entirely consistent with the true state of affairs, *i.e.* that the company had received actual proposals as part of a takeover contest. *Id*. The press releases gave the plaintiffs sufficient notice of the possibility that the value of the company's shares would increase in the near future due to a takeover contest, and thus were not misleading. *Id.*

Similarly, Beyond Meat disclosed the existence of the DLF Litigation, DLF's specific claims against it, the types of relief DLF sought, and the stage of the proceedings, including the upcoming trial date. (RJN, Ex. 1, SEC Form 424B4, at 34-35; Ex. 6, June 12, 2019 10-Q Filing, at 44; Ex. 7, July 29, 2019 10-Q Filing, at 45; Ex. 8, November 12, 2019 10-Q Filing, at 48). While Beyond Meat stated that it did not believe it was liable for DLF's claims, it also offered no assurances that it would ***not*** be found liable by the court: "We cannot assure you that Don Lee Farms or ProPortion will not prevail in all or some of their claims against us." (Ex. 8 at 48). It also disclosed the potential consequences of being found liable: "If [DLF] succeeds in the lawsuit, we could be required to pay damages, including but not limited to contract damages . . . [DLF] could also claim some ownership in the intellectual property associated with the production of certain of our products[.]" (*Id*.). These statements gave investors sufficient notice of the potential risks of the DLF Litigation, and Plaintiffs failed to plead any facts indicating that they were inconsistent with the true state of affairs.

The circumstances here are materially distinguishable from those in *In re Apollo Grp., Inc. Sec. Litig.*, 395 F. Supp. 2d 906, 910 (D. Ariz. 2005), a case cited by Plaintiffs. (Opposition at 12). In that case, the company made a literally true statement that the government decided not to intervene in the qui tam action against its employees, and that the court granted its motion to dismiss. *Id*. However, the company's "portrayal of that dismissal" created a false impression that the action had been dismissed on the merits, when in actuality, the government had launched a separate investigation — which the company did not disclose — and the lawsuit was dismissed only because the alleged conduct was not actionable as a qui tam suit. *Id*.

While a reasonable investor would likely interpret a company's touting of its successful motion to dismiss as evidence of its innocence on the merits, a reasonable investor would not assume that a lawsuit was "meritless" just because the company stated it was defending against the suit, had filed an answer to the complaint, stated its belief that it was not liable, but also stated that it could not assure investors that it would not be found liable by the court. Unlike the company's statement in *In re Apollo*, Beyond Meat's "disclosures never created the impression that the [DLF Litigation] did ***not*** put its business [] at risk; they simply did not explain the risk in the manner or level of detail that Plaintiff[s] would have preferred." *Lefter v. Yirendai Ltd.*, CV 16-06437-MWF (AGRx), 2017 WL 2857535, at *7 (C.D. Cal. June 20, 2017). Indeed, "the overall impression created by [Beyond Meat's] discussion of the [DLF Litigation] was not one of optimism, but rather one of cautious concern." *Id*.

At the hearing, Plaintiffs pointed to *Lloyd v. CVB Fin. Corp.*, 811 F.3d 1200, 1208 (9th Cir. 2016) in support of its position. In *Lloyd*, a lending company issued a statement that it was "not aware" of loans "for which known credit problems of the borrower would cause serious doubts as to the ability of such borrowers to comply with their loan repayment terms, or any known events that would result in the loan being designated as non-performing at some future date." *Id*. at 1203. The Ninth Circuit held that the plaintiffs sufficiently alleged the falsity of this statement because they pointed to facts showing that at the time of the statement, the company knew – but failed to disclose – that its largest borrower was making layoffs, reducing salaries, and had fallen delinquent on its loans. *Id*. at 1209.

Plaintiffs' reliance on *Lloyd* is misplaced. The Court agrees that Plaintiffs need not allege that Defendants actually believed Beyond Meat was liable in the DLF Litigation, only that Defendants were "on notice of facts that would reasonably" cast doubt on the basis of their belief that they were not liable. *Id*. at 1208. The problem is that Plaintiffs failed to allege facts sufficient to make that showing. Plaintiffs pointed to no facts showing that Defendants had knowledge of Beyond Meat employees executing a scheme to justify terminating DLF, employees stealing trade secrets, or employees falsifying the 2016 report. And the "facts" to which Plaintiffs do point are mere recitations of DLF's allegations and simply do not suffice.

At the hearing, Plaintiffs also pointed to *Hoffman v. Avant! Corp.*, No. CV-97-20698-RMW, 1997 U.S. Dist. LEXIS 21823, at *6 (N.D. Cal. Dec. 18, 1997). The court in *Hoffman* denied the defendants' motion to dismiss because the plaintiffs had alleged sufficient facts showing that the defendants knew of and participated in trade secrets misappropriation, despite their statements that the trade secrets lawsuit against them was "without merit," "baseless," and would "not have a material adverse effect" on the company's financial position. *Id*. *Hoffman* is thus distinguishable for two reasons. First, as discussed, Plaintiffs failed to point to evidence showing Defendants knew of any facts to suggest that Beyond Meat would be found liable in the DLF Litigation. And second, Beyond Meat made no statements that the DLF Litigation was meritless or that it could not affect the company financially; indeed, Beyond Meat stated the opposite.

Accordingly, Plaintiffs failed sufficiently to allege that Beyond Meat's statements affirmatively created an impression of its state of affairs regarding the DLF Litigation that differed in a material way from the one that actually existed.

Having concluded that the First Amended Complaint fails to allege any false statements, the Court necessarily cannot find that the allegations suffice to show scienter. Separately, the Court notes that Plaintiffs' loss causation analysis is less than persuasive. It is unclear how, if the Superior Court's unfavorable rulings were already publicly available days prior to the loss, Plaintiffs will be able to prove their corrective disclosure theory.

Finally, Plaintiffs' claim under § 20(a) of the Exchange Act requires an underlying § 10(b) violation. Because the allegations are insufficient to support a claim under § 10(b), the § 20(a) claim is also dismissed.

III. CONCLUSION

For the foregoing reasons, the Motion is **GRANTED *with leave to amend*** as to Plaintiff's Section 10(b) claim.

Although the Court is uncertain what further factual allegations could rescue the claim, perhaps an amendment could cure the deficiencies raised above. Accordingly, Plaintiff shall have one further opportunity to amend the First Amended Complaint. *See Carolina Cas. Ins. Co. v. Team Equip., Inc.*, 741 F.3d 1082, 1086 (9th Cir. 2014) ("A complaint should not be dismissed without leave to amend unless amendment would be futile."). But Plaintiffs are warned that the next attempt will be their final opportunity; while there may be a Second Amended Complaint, there will be no Third.

Plaintiffs shall file their Second Amended Complaint, if any, on or before **October 22, 2020**. Defendants shall file a response to the SAC by no later than **November 5, 2020**. The case will be dismissed with prejudice if Plaintiff fails to file the SAC by October 22, 2020.

IT IS SO ORDERED.