

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

CIVIL MINUTES -- GENERAL

Case No. **CV 21-5744-JFW (SHKx)**

Date: July 13, 2022

Title: In Re Stable Road Acquisition Corp. Securities Litigation

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

**Shannon Reilly
Courtroom Deputy**

**None Present
Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS (In Chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS MOMENTUS INC. AND DAWN HARMS' MOTION TO DISMISS AMENDED CONSOLIDATED CLASS ACTION COMPLAINT [filed 2/14/22; Docket No. 122];

ORDER GRANTING IN PART DENYING DEFENDANT FRED KENNEDY'S MOTION TO DISMISS AMENDED CONSOLIDATED COMPLAINT [filed 2/14/22; Docket No. 124]; and

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS STABLE ROAD ACQUISITION CORP., SRC-N1 HOLDINGS, LLC, BRIAN KABOT, JAMES HOFMOCKEL, JAMES NORRIS AND JUAN MANUEL QUIROGA'S MOTION TO DISMISS AMENDED CONSOLIDATED CLASS ACTION COMPLAINT [filed 2/25/22; Docket No. 131]

On February 14, 2022, Defendants Momentus Inc. ("Momentus") and Dawn Harms ("Momentus Defendants") filed a Motion to Dismiss Amended Consolidated Class Action Complaint. On May 26, 2022 Lead Plaintiff Hartmut Haenisch ("Plaintiff") filed an Opposition. On June 20, 2022, the Momentus Defendants filed a Reply. The Momentus Defendants have joined in the Motions to Dismiss filed by Defendant Fred Kennedy (Docket No. 124) and Defendants Stable Road Acquisition Corp. ("Stable Road Corp."), SRC-N1 Holdings, LLC ("SRC-N1"), Brian Kabot, James Hofmockel, James Norris and Juan Manuel Quiroga ("Stable Road Defendants") (Docket No. 131). On February 14, 2022, Defendant Fred Kennedy ("Kennedy") filed a Motion to Dismiss Amended Consolidated Class Action Complaint. On May 26, 2022 Plaintiff filed an Opposition. On

June 20, 2022 Kennedy filed a Reply. Kennedy has joined in the Momentus Defendants' Motion to Dismiss (Docket No. 122). On February 25, 2022, the Stable Road Defendants filed a Motion to Dismiss Amended Consolidated Class Action Complaint. On May 26, 2022, Plaintiff filed an Opposition. On June 20, 2022 the Stable Road Defendants filed a Reply. On February 14, 2022, the Stable Road Defendants filed a joinder in the Motion to Dismiss filed by the Momentus Defendants (Docket No. 122). (Docket No. 127).

Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found the matter appropriate for submission on the papers without oral argument. The matter was, therefore, removed from the Court's July 11, 2022 hearing calendar and the parties were given advance notice. After considering the moving, opposing, and reply papers, and the arguments therein, the Court rules as follows:

I. Factual and Procedural Background¹

In the Amended Consolidated Class Action Complaint, filed on November 12, 2021, Plaintiff alleges the following claims for relief: (1) count one for violation of Section 10(b) of the 1934 Act and Rule 10b-5 against defendants Momentus, Stable Road Corp., Mikhail Kokorich ("Kokorich"), Kennedy, Brian Kabot ("Kabot"), James Norris ("Norris") and James Hofmockel ("Hofmockel"); (2) count two for violation of Section 10(b) of the 1934 Act and Rule 10b-5 against defendants Momentus, Kokorich, Dawn Harms ("Harms") and Kennedy; and (3) count three for violation of Section 20(a) of the 1934 Act against SRAC N-1 Holdings, LLC and the individual defendants, Kokorich, Kennedy, Harms, Kabot, Norris and Hofmockel.²

This action concerns alleged misrepresentations, false statements and material omissions allegedly made by a privately owned space industry startup, Momentus, and Stable Road Corp., a special purpose acquisition company ("SPAC"). Plaintiff purports to represent a class comprised of those individuals or entities that acquired stock in Stable Road Corp. between October 7, 2020 and July 13, 2021 (the "Class Period"). Plaintiff alleges that the decline in Stable Road Corp.'s value at the end of the Class Period resulted from alleged misrepresentations made by Momentus, Stable Road Corp. and their principals regarding: (1) the immigration status of Momentus' Russian CEO, Kokorich and his potential removal from the United States as a national security risk; (2) the success of Momentus' single in-space test of its technology; and (3) misleading revenue projections resulting from the undisclosed concerns raised regarding Kokorich and the problems with Momentus' technology. Plaintiff alleges that investors who purchased Stable Road Corp.

¹ The procedural and factual background is based on the allegations in the Amended Consolidated Class Action Complaint and the documents judicially noticed by the Court. The Defendants' Requests for Judicial Notice are **GRANTED**. (Docket Nos. 123, 132, 151). *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.2d 741, 746 n. 6 (9th Cir. 2006) (matters of public record are proper subjects of judicial notice).

² For some unknown reason, Plaintiff fails to name defendant Juan Manuel Quiroga in any of the three claims for relief. However, for purposes of the Stable Road Defendants' Motion to Dismiss and consistent with the parties' arguments in their pleadings, the Court will rule on the Motion as if Quiroga was named in counts one and three.

stock during the Class Period paid excessive, artificially inflated prices for Stable Road Corp. stock because of defendants' materially false and misleading statements.

Stable Road Defendants

Plaintiff alleges that defendant SRC-N1 was one of Stable Road Corp.'s initial investors, and served as the sponsor of Stable Road Corp. during the Class Period. Defendant Kabot served as Chief Executive Officer and Chairman of the Board of Stable Road Corp. during the Class Period. Kabot was also a manager of the Sponsor. Defendant Quiroga served as Chief Investment Officer and Secretary of Stable Road Corp. during the Class Period. Quiroga was also a manager of the Sponsor. Defendant Norris served as Chief Financial Officer and a director of Stable Road Corp. during the Class Period and was also a member of the Sponsor. Defendant Hofmockel served as a Director of Stable Road Corp. during the Class Period, and was also a member of the Sponsor.

Momentum Defendants

Defendant Kokorich served as CEO and a director of Momentum during the Class Period until his resignation on January 25, 2021.³ Defendant Harms served as Chief Revenue Officer of Momentum during the Class Period, and as interim CEO upon Kokorich's resignation. Defendant Kennedy served as President of Momentum during the Class Period.

A. The Merger

Stable Road Corp. is a SPAC that was formed on May 28, 2019 for the sole purpose of acquiring or merging with another company in order to take that company public. Plaintiff alleges that in general, SPACs typically raise capital for the acquisition or merger through an Initial Public Offering ("IPO"), and hold that capital in trust for specific period of time. If the merger or acquisition is successful, the founders and managers of the SPAC profit through their ownership of the SPAC's securities. If the merger or acquisition is not completed, the SPAC is dissolved and the capital is returned to the original investors. As a result, the principals associated with a SPAC are highly motivated to complete an acquisition or merger. Plaintiff alleges that this process is not unlike an acquisition or merger funded through an IPO with one important exception. Because an IPO is underwritten by an investment bank, the banks perform substantial due diligence and help formulate the disclosures to potential investors. In a SPAC transaction there are no underwriters and the due diligence and disclosures are undertaken by those most interested in completing the transaction.

In advance of its IPO, Stable Road Corp. filed a prospectus with the SEC on November 8, 2019. Plaintiff alleges that this prospectus represented that Stable Road Corp.'s focus would be an acquisition in the cannabis industry, and that the prospectus touted the Stable Road Corp.'s executive teams' investment and management experience, contacts and business relationships in the cannabis industry. The prospectus did not mention the space or satellite industry. Stable

³ Defendant Kokorich resigned as CEO on January 25, 2021, and sold all of his Momentum shares to Momentum on June 8, 2021. Kokorich currently resides in Switzerland, and has not appeared in this action.

Road Corp. completed its IPO on November 13, 2019. Plaintiff further alleges that the Stable Road Defendants' deadline to complete the merger or acquisition was May 13, 2021, eighteen months from the closing date of the IPO. Stable Road Corp. raised \$172.5 million, and would have to return that money to investors if it did not meet the deadline. Moreover the individual Stable Road Defendants' shares in the Stable Road Corp. would become worthless. The pressure to complete the acquisition was greatly increased by the amount of time it would take to complete negotiations, finalize the merger documentation and obtain the required shareholder approvals.

In the summer and fall of 2020, Momentus and Stable Road Corp. entered into a series of transactions that, if approved, would result in Momentus going public through a business combination with Stable Road Corp. On October 7, 2020 Momentus and Stable Road Corp. publicly announced their agreement to merge. The joint press release described Momentus as a "commercial space company offering in-space transportation and infrastructure services." Despite having never completed a commercial launch carrying customer cargo, and having never recognized any revenue, the press release claimed Momentus' customers included satellite operators, manufacturers, launch providers, defense contractors such as Lockheed Martin and government agencies such as NASA.

On the same day, Stable Road Corp. entered into agreements with Private Investment in Public Equity ("PIPE") investors and raised \$175 million to be used to fund the merger with Momentus if it was successful. Momentus' business plans and revenue projections, provided to PIPE investors and in Stable Road Corp.'s Form S-4 registration statement were premised on Momentus' development of a commercially viable technology that could be used to provide commercial space services. Specifically, Momentus represented that it would provide satellite-positioning services with in-space propulsion systems powered by Microwave Electrothermal Thruster ("MET") water plasma thrusters.

Plaintiff alleges that because of Momentus' lack of revenue and history of increasing losses, Momentus' management was motivated to conceal the issues relating to the immigration and national security risk status of its founder, defendant Kokorich, and the questionable commercial viability of its technology. Likewise, Stable Road Corp. was motivated to ensure the successful completion of the merger, and thus conducted inadequate due diligence of Momentus and failed to follow up on any of the red flags regarding Defendant Kokorich's national security issues and the commercial viability of Momentus' technology. Plaintiff specifically alleges that the Stable Road Defendants knew that they were relying on key information provided by Momentus, and that they failed to reasonably investigate Momentus' claims regarding its technology and also the issues surrounding defendant Kokorich's national security risks and immigration status. The Stable Road Defendants thus "knew that they had failed to verify key information" and that they were "simply repeating" without conducting adequate due diligence as to Momentus and the information that Momentus provided.

B. The SEC Action⁴

⁴ The SEC's findings are based on defendants Momentus, Stable Road Corp., SRC-N1 and Kabot's offer of settlement in the SEC action, and are not binding on any of the defendants in this action.

On July 13, 2021, the SEC announced that a Cease and Desist Order (“SEC Order”) had been entered against defendants Momentus, Stable Road Corp., SRC-N1, LLC and Brian Kabot. The SEC also filed a civil complaint (“SEC Complaint”) against Defendant Kokorich. According to the SEC Order and Complaint, the named defendants had misled the investing public while promoting the merger by failing to disclose that multiple federal agencies had determined that Kokorich posed an unacceptable security risk, that Momentus had never successfully tested its technology in space as claimed, and as a result, Momentus’ financial projections of revenue growth were highly misleading. The SEC Order and Complaint also stated that Stable Road Corp. had engaged in negligent misconduct and compounded Momentus’ misrepresentations by repeating and disseminating Momentus’ misrepresentations without a reasonable basis, and that Brian Kabot, who signed public filings that included the misrepresentations, was responsible for and caused Stable Road Corp.’s disclosure violations.

In order to resolve the SEC action Stable Road Corp. agreed to pay a civil monetary penalty of \$1,000,000, Kabot agreed to pay a civil monetary penalty of \$40,000 and Momentus agreed to pay a civil monetary penalty of \$7,000,000.

B. The Alleged Misrepresentations

Plaintiff alleges that the defendants made misleading statements in periodic filings, and during earnings calls, investor presentations and media appearances that touted Momentus technology, potential revenues and that discussed specific customers, operations and a launch schedule. The alleged misrepresentations fall into two categories: (1) statements and omissions regarding Kokorich’s immigration and national security risk status that made it unlikely Momentus would be able to obtain the necessary regulatory approvals with Kokorich as CEO or shareholder; and (2) statements and omissions regarding the success and commercial viability of Momentus’ water plasma thruster technology.

1. Allegations Against the Momentus Defendants

a. Kokorich’s Immigration and National Security Issues

Plaintiff alleges that the Momentus Defendants knew that the United States government had determined that Kokorich presented a national security risk, which posed serious problems for Momentus and created a heightened risk that Momentus would not be granted the regulatory approvals it needed for its space operations. Specifically, Plaintiff alleges that the Momentus Defendants were aware that in March 22, 2018, the U.S. Department of Commerce, Bureau of Industry and Security (“BIS”) had sent an Export License Rejection Notice to Momentus,⁵ denying the application to provide Kokorich with the core technology relating to the MET water plasma thrusters.⁶ On June 24, 2018, the US Department of Treasury raised concerns in a letter to Kokorich and his attorney regarding Kokorich’ ownership of stock in another space industry company and ordered Kokorich to divest his interest in that company because he presented “a

⁵ At that time Momentus was doing business as Space Apprentices Enterprise.

⁶ Because Kokorich was a foreign national, he could not access parts of Momentus’ technology without an export license.

threat to the national security of the United States.” In June 2018, the United States Custom and Immigration Services (“USCIS”) revoked Defendant Kokorich’s work visa and denied his application for permanent resident status. Kokorich then applied for asylum, but his application was denied on August 28, 2019. The USCIS informed Kokorich that it had referred his case to an immigration judge to commence removal proceedings. Around that same time, the FBI appeared at Momentus’ offices, questioned several employees, detained Kokorich and transported him to an immigration detention center.⁷

Plaintiff further alleges that on November 12, 2020, Momentus received another letter from BIS informing Momentus that it intended to deny its application to export certain software and technology to Kokorich and stated that its denial would further “the United States policy to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country....and which would prove detrimental to the security of the United States.” Moreover, on January 13, 2021, the U.S. Department of Defense sent a letter to the SEC stating that Momentus posed a national security risk as result of foreign ownership and control by Kokorich and requested that the SEC delay Momentus’ IPO and merger with Stable Road Corp. Plaintiff alleges that any statements regarding Momentus’ business plans and launch schedule were misleading because it was unlikely that Momentus could or would ever get the regulatory approvals necessary for its space technology and operations given Kokorich’s unfavorable history with the BIS, Department of Treasury, Department of Defense and the USCIS.⁸ In other words, the government’s national security related concerns about Kokorich posed a significant--if not fatal--obstacle to Momentus’ ability to generate any meaningful revenue.

b. Momentus’ Water Plasma Technology

With respect to the commercial viability of Momentus’ technology, Plaintiff alleges that the Momentus Defendants knew, but failed to disclose, that Momentus had conducted only one test of its technology in space, that the test was not completed due to an equipment failure, and that even if the test had been successfully completed, it would not have demonstrated the commercial viability of Momentus’ water plasma thruster technology. Specifically, Plaintiff alleges that defendants Harms and Kokorich knew that the July 2019 water plasma based thruster test (called the El Camino Mission) did not meet its pre-launch success criteria based on an email sent by Momentus Chief Technology Officer with the subject line “Need El Camino Real Failure Review Board.” Moreover, Plaintiff alleges that even if the mission had succeeded, the thruster that was tested was too small for commercial use, and that the mission would not have provided a basis for Momentus’ representations that its technology was commercially viable.

2. Allegations Relating to Stable Road Defendants

⁷ Kokorich was still involved in the removal proceedings at the time he left the United States in January 2021.

⁸ Before any space launch, Momentus or its launch partners would have to obtain licenses from various government agencies, including the FAA, which has the authority to deny a license for national security reasons. The FAA has the authority to consult with the Defense Department to determine if a mission presents a national security risk.

Plaintiff alleges that Stable Road Corp.'s representations regarding Momentus' business plans and revenue projections were false and misleading because the Stable Road Defendants knew that they had failed to conduct adequate due diligence and had failed to follow up on known red flags regarding defendant Kokorich and the commercial viability of Momentus' technology. Plaintiff alleges that the Stable Road Defendants admitted at the end of the Class Period and afterwards that they failed to reasonably investigate Momentus' claims regarding the commercial viability of its technology or that it had successfully tested the water plasma technology in space. Specifically, Stable Road Corp. did not ask its expert, who was hired to assist with its due diligence, to evaluate the results of the El Camino Real Mission. Plaintiff also alleges that Kabot knew that Kokorich had been forced to divest his holdings in another space technology company because Stable Road Corp. had received a copy of the United States Department of Treasury's ("Dept. of Treasury") final order requiring divestiture, and that Stable Road Corp. repeatedly asked Momentus for, but never received, any correspondence or other information from Momentus explaining the reasons for the Dept. of Treasury's action. As a result, Stable Road Corp. never determined the basis for the final order. Plaintiff thus alleges that any statements Stable Road Corp. made regarding Momentus' technology, planned launch schedule or revenue projections were materially false and misleading because of Stable Road Corp.'s lack of due diligence. Moreover, Plaintiff alleges that the registration statement filed by Stable Road Corp. and Kabot's statements to the public on October 7, 2020 touting Stable Road Corp.'s extensive due diligence of Momentus were materially false and misleading because the Stable Road Defendants knew that Stable Road Corp. had failed to conduct adequate due diligence.

3. The Alleged Misrepresentations or Material Omissions

Plaintiff alleges that defendants made misleading statements regarding Momentus' prospects, launch schedule and potential revenue to investors, including the following:

1. Press release issued by Stable Road Corp. and Momentus, investor presentation, Kabot's television interview and SEC Form 8-K filed by Stable Road Corp on October 7, 2020.⁹
2. Form S-4 Registration Statement on November 2, 2020 (signed by Kabot, Norris and board members, including Hofmockel) and the amendments to this Registration Statement dated December 14, 2020, March 8, 2021, June 29, 2021 and July 12, 2021.
3. Kennedy's interview with IPO Edge¹⁰ and Press Release on January 4, 2021.
4. Momentus press release announcing Harms as interim CEO and the resignation of Kokorich, and Form 8-K signed by Kabot on January 24, 2021 .

⁹ Defendants filed updated versions of the October 7, 2020 investor presentation with the SEC on October 13, 2020, November 17, 2020, December 14, 2020, April 7, 2021 and May 5, 2021. These filings were all signed by Kabot.

¹⁰ IPO Edge is a website that publishes articles dedicated to new and upcoming initial public offerings.

5. Kabot and Harms' interview with IPO Edge on May 4, 2021.

Plaintiff also alleges that defendants made "partial corrective disclosures" beginning in January 4, 2021 and ending on July 13, 2021 (the date that the SEC issued its Cease and Desist Order). As a result of those disclosures, the price of Stable Road Corp. stock declined from a high of \$29.18 on February 10, 2021 to \$10.38 per share on July 15, 2021. These "partial corrective disclosures included the following:

1. Disclosure regarding a launch delay for its January 2021 Mission due to lack of FAA approval because of an "interagency review" on January 4, 2021 .
2. Disclosure regarding Kokorich's resignation purportedly in an effort to expedite the Momentus' resolution with the US government regarding national security and foreign ownership concerns on January 25, 2021.
3. Disclosures regarding government investigations on March 8, 2021—US Department of Defense's statement that Momentus posed a risk to national security as a result of Kokorich's ownership and control and the FAA's decision refusing to grant approval for the Momentus' participation in the SpaceX January 2021 launch due to national security and foreign ownership concerns.
4. Disclosures regarding Momentus' loss of customers due to launch delays on May 4, 2021.
5. Disclosures regarding further launch delays due to Momentus' inability to secure US government approvals because of Kokorich's continued ownership interest in Momentus on May 24, 2021.
6. Disclosure on June 29, 2021 regarding the failed test of its MET water plasma technology and the government's national security concerns surrounding Kokorich, an announcement that Momentus had acquired all of Kokorich's shares, and had agreed to outside monitoring of its security operations, that the FAA had recently denied Momentus' application due to its finding that the launch would jeopardize US national security and also confirming a loss of customers due the delayed launches and lower revenue projections. The disclosure also included information regarding the ongoing SEC investigation, and ongoing settlement discussions.¹¹
7. July 13, 2021 publication of SEC Order and Complaint.

II. Legal Standard

¹¹ Interestingly, Stable Road Corp.'s stock closed at \$13.97 on June 30, 2021, 4.7% *higher* than the day before. Plaintiff alleges that this increase in price was due to defendants' disclosure on June 29, 2021 that it was revising the terms of the merger and that as a result, public investors stood to gain a larger interest in Momentus (19.4% versus 12.5%) following the proposed merger.

Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act (“PSLRA”) govern the pleading requirements for claims under 15 U.S.C. § 78j(b) and 17 C.F.R. § 240.10b-5. See *Yourish v. California Amplifier*, 191 F.3d 983, 993 (9th Cir. 1999); *Cooper v. Pickett*, 137 F.3d 616, 628 n. 2 (9th Cir. 1997); see also William W. Schwarzer, A. Wallace Tashima, & James M. Wagstaffe, California Practice Guide, *Federal Civil Procedure Before Trial* § 8:45.10.

Rule 9(b) provides: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). The heightened pleading requirements of Rule 9(b) are designed “to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993). In order to provide this required notice, “the complaint must specify such facts as the times, dates, places, and benefits received, and other details of the alleged fraudulent activity.” *Id.* at 672. Further, “a pleader must identify the individual who made the alleged representation and the content of the alleged representation.” *Glen Holly Entertainment, Inc. v. Tektronix, Inc.*, 100 F. Supp. 2d 1086, 1094 (C.D. Cal. 1999).

The PSLRA requires a heightened pleading standard for allegations regarding misleading statements and omissions that is similar to the heightened pleading standard required by Rule 9(b). “The purpose of this heightened pleading requirement was . . . to put an end to the practice of pleading ‘fraud by hindsight.’” *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1084-85 (9th Cir. 2002) quoting *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 988 (9th Cir. 1999). The PSLRA specifically provides:

[T]he complaint shall 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(b)(1).

In addition, the PSLRA requires a heightened pleading standard for state of mind: “the complaint shall, with respect to each act or omission alleged to violate this chapter, 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); see also *Silicon Graphics*, 183 F.3d at 974 (“We hold that a private securities plaintiff proceeding under the PSLRA must plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct”). “To allege a ‘strong inference of deliberate recklessness,’ [the plaintiff] ‘must state facts that come closer to demonstrating intent, as opposed to mere motive and opportunity.’” *DSAM Global Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 388 (9th Cir. 2002) quoting *Silicon Graphics*, 183 F.3d at 974. “[R]ecklessness only satisfies scienter under § 10(b) to the extent it reflects some degree of intentional or knowing misconduct.” *Silicon Graphics*, 183 F.3d at 976-77.

III. Discussion

A. Violation of Section 10(b) and Rule 10b-5

Section 10(b) makes it unlawful:

[t]o use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b-5 makes it unlawful for any person to use interstate commerce:

- (a) To employ any device, scheme, or artifice to defraud,
- (b) To make 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, or
- (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. In a typical section 10(b) or Rule 10b-5 private action, a plaintiff must prove: (1) a material misrepresentation or omission, (2) scienter, (3) a connection with the purchase or sale of a security, (4) reliance, (5) economic loss, and (6) loss causation. *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005); *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008).

B. The Momentus Defendants' Motion to Dismiss¹²

The Momentus Defendants move to dismiss count one as to defendants Momentus, count two as to defendants Momentus and Harms, and count three as to defendant Harms. The Momentus Defendants argue that Plaintiff fails to allege that: (1) the Momentus Defendants made any material misstatements or omissions because many of the alleged statements are protected by the PSLRA safe harbor provisions for inactionable assertions of corporate puffery and opinion; (2) the Momentus Defendants fully disclosed information relating to the El Camino Mission and Defendant Kokorich's national security issues and there was no affirmative duty to disclose any additional information; (3) the Momentus Defendants fully disclosed all material facts relating to their revenue projections; (4) that the Stable Road Defendants did not have any duty to disclose any information relating to the nature and scope of their due diligence; and (5) Plaintiff fails to adequately allege scienter of the individual defendants.

1. Plaintiff Adequately Alleges that the Momentus Defendants Made False or Misleading Statements or Omissions of Material Fact.

¹² Although Kennedy filed a separate Motion to Dismiss, because his arguments raise similar issues, the Court will address Kennedy's Motion along with defendants Momentus and Harms' Motion.

In order to be actionable under Section 10(b) of the Exchange Act, and Rule 10b-5, the alleged misstatements or omissions must be false or misleading. A statement or omission is misleading if it “affirmatively creates an impression of a state of affairs that differs in a material way from the one that actually exists.” *Brody v. Transitional Hospitals. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002). A statement, although literally true, can be misleading. See *In re Convergent Technologies Securities Litigation*, 948 F.2d 507, 512 (9th Cir. 1991) (quotations and citation omitted) (“[T]he disclosure required by the securities laws is measured not by literal truth, but by the ability of the material to accurately inform rather than mislead prospective buyers”).

In addition, in order to be actionable, the statement or omission must be material. “It is not enough that a statement is false or incomplete, if the misrepresented fact is otherwise insignificant.” *Basic Inc. v. Levinson*, 485 U.S. 224, 238 (1988). A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making an investment decision. See *id.* at 231-32. Further, “to fulfill the materiality requirement ‘there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.’” See *id.* (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

Both the materiality and misleading nature of a misstatement or omission are usually questions for the trier of fact. See *Fecht v. Price Co.*, 70 F.3d 1078, 1081 (9th Cir. 1995) (“[W]hether a public statement is misleading, or whether adverse facts were adequately disclosed is a mixed question to be decided by the trier of fact.”); *id.* (quoting *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)) (“Whether an omission is ‘material’ is a determination that ‘requires delicate assessments of the inferences a ‘reasonable shareholder’ would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact.’”); *Siracusano v. Matrixx Initiatives, Inc.*, 585 F.3d 1167, 1178 (9th Cir. 2009) (quotations and citations omitted) (“Questions of materiality . . . involv[e] assessments peculiarly within the province of the trier of fact.”). “Therefore, only if the adequacy of the disclosure or the materiality of the statement is so obvious that reasonable minds could not differ are these issues appropriately resolved as a matter of law.” *Fecht*, 70 F.3d at 1081 (quotations and citations omitted); *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687, 700 (9th Cir. 2021).

The Momentus Defendants argue that the majority of the alleged misstatements and omissions were not material or misleading as a matter of law because they were either forward looking statements of opinion or the disclosures Momentus made regarding Kokorich, the risk of not obtaining regulatory approvals and that Momentus’ technology was still in the development stage and had not been completely tested were adequate. However, the materiality and misleading nature of a misstatement or omission is usually a question for the trier of fact, and such an argument is rarely successful on a motion for summary judgment, and even more rarely successful on a motion to dismiss. See *SEC v. Phan*, 500 F.3d 895, 908 (9th Cir. 2007) (“Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor’s reaction to the alleged misstatement.”).

Indeed, after carefully reviewing the Momentus Defendants’ disclosures and statements, especially when viewed together with the information Plaintiff alleges that the Momentus Defendants knew and did not disclose, the Court cannot conclude as a matter of law that the

alleged omissions or misstatements were not material or misleading. Risk disclosures that “speak[] entirely of as-yet-unrealized risks and contingencies” and do not “alert[] the reader that some of these risks may already have come to fruition” can mislead reasonable investors. *Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 985–87 (9th Cir. 2008). In *Berson*, the Ninth Circuit held that the company’s statement of anticipated revenues from its large backlog of work was misleading because it failed to disclose that a significant portion of the “backlogged” work was “substantially delayed and at serious risk of being cancelled altogether.” *Id.* at 986. Similarly, in *Siracusano v. Matrixx Initiatives, Inc.*, a 10-Q statement that warned of the risks of product liability claims in the abstract was misleading because it failed to disclose that the risk had already come to fruition. 585 F.3d 1167, 1181 (9th Cir. 2009). Similarly here, Plaintiff plausibly alleges that the Momentus Defendants’ warnings of risks that might occur is misleading to a reasonable investor because the Momentus Defendants knew that many of those risks had already materialized or very likely would materialize. *In re Alphabet, Inc. Securities Litigation*, 1 F.4th at 703-04. *Cf. Macomb County Employees’ Retirement System v. Align Technology, Inc.*, 2022 WL 2525306 at *5 (9th Cir. July 7, 2022) (affirming dismissal of 10(b) claims where defendant’s statements did not affirmatively create an impression that materially differed from the facts that actually existed).

Accordingly, the Court concludes that Plaintiff has adequately alleged that the Momentus Defendants made false or misleading statements or omissions of material fact.¹³

2. Plaintiff Adequately Alleges Scienter as to the Individual Momentus Defendants.

To adequately plead scienter under the PSLRA, Plaintiff 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). The “required state of mind” is “scienter,” i.e., “a mental state embracing intent to deceive, manipulate, or defraud.” *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n.12 (1976); *In re Silicon Graphics*, 183 F.3d 970, 975 (9th Cir. 1999). Plaintiff must plead “at a minimum, particular facts giving rise to a strong inference of deliberate or conscious recklessness.” *In re Silicon Graphics*, 183 F.3d at 979. To satisfy this pleading requirement, “the complaint must contain allegations of specific ‘contemporaneous statements or conditions’ that demonstrate the intentional or the deliberately reckless[,] false or misleading nature of the statements when made.” *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001). In addition, the Supreme Court recently described the appropriate method for determining if the “strong inference” requirement for alleging scienter had been met:

It does not suffice that a reasonable factfinder plausibly could infer from the complaint’s allegations the requisite state of mind. Rather, to determine whether a complaint’s scienter allegations can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff, . . . but also competing inferences rationally drawn from the facts alleged. An inference of fraudulent intent may be plausible, yet

¹³Although the Court has not discussed every alleged statement or omission in detail, the Court is unable to conclude as a matter of law at the pleading stage that any of the alleged statements or omissions were not material or misleading.

less cogent than other, nonculpable explanations for the defendant's conduct. To qualify as “strong” within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 314-15 (2007). In deciding if scienter has been adequately pled, “[t]he inquiry . . . is whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.” *Id.* at 322-23 (citations omitted); see also, *Zucco Partners, LLC v. Digimarc Corp.*, 2009 WL 311070, *1 (Feb. 10, 2009) (holding that the Supreme Court’s “decision in *Tellabs* does not materially alter the particularity requirements for scienter claims established in our previous decisions, but instead only adds an additional ‘holistic’ component to those requirements”).

In this case, Plaintiff’s allegations, when considered collectively, give rise to a strong inference of scienter. The Court concludes that the factual allegations taken as a whole permit a strong inference that the individual defendants knew that their representations with respect to Momentus’ prospective revenues were misleading due to the failure to disclose all material information regarding Momentus’ inability to obtain regulatory approval because of Kokorich’s national security issues and their knowledge that the only test of Momentus’ core technology had failed. Moreover, the allegations satisfy the specificity requirements of Rule 9(b) and the PSLRA. The specific allegations of the roles each individual defendant played in the alleged fraud give rise to a strong inference of scienter on the part of each individual defendant.

Moreover, Plaintiff argues that a strong inference of scienter can be shown by the individual defendants’ high-level positions within Momentus, and the facts alleged relating to their roles in the fraudulent activity. *In re Alphabet, Inc. Securities Litigation*, 1 F.4th 687, 706 (9th Cir. 2021). See, e.g., *In re Zoran Corp. Deriv. Litig.*, 2007 WL 1650948, at *20 (N.D.Cal. June 5, 2007) (pleading specific facts about each individual defendants’ role in the options granting process, including statements from confidential witnesses). For example, Plaintiff alleges that Harms had direct knowledge that the El Camino Mission failed based on an internal email she received in 2019 and also as Momentus’ Chief Revenue Officer (and later interim CEO) she had a direct role in matters relating to Momentus’ revenue projections, including a due diligence call with Stable Road Corp. on September 25, 2020 and an interview with IPO Edge in May, 2021. Plaintiff further alleges that based on Harms’ position as part of the leadership team, Harms should have known of Kokorich’s national security and immigration issues. See *South Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008) (“Allegations regarding management’s role in a corporate structure and the importance of the corporate information about which management made false or misleading statements may also create a strong interference of scienter when made in conjunction with detailed and specific allegations”).

The specific allegations against Kennedy combined with the inference of his knowledge based on his position as Momentus’ President are also sufficient to allege scienter. Plaintiff alleges that Kennedy made material misstatements and omissions in an interview discussing revenue projections and downplaying Kokorich’s national security issues

and the adverse impact they had in the FAA's failure to approve Momentus' launch. Plaintiff argues that as President, and a key member of the Momentus management team, it would be "absurd" to assume that nobody at Momentus informed Kennedy of key operational details, such as the government's November 12, 2020 rejection of Momentus' application to provide its technology to Kokorich, especially given Kennedy's background and experience working in high level positions at the Defense Department, White House and Air Force. In response, Kennedy argues that there are no allegations that he had access to information that would have put him on notice that his statements were false or misleading. Plaintiff, however, specifically alleges that matters relating to Kokorich's national security issues and Momentus' regulatory approvals were an integral part of Momentus' core operations and that the Momentus Individual Defendants had strong financial motives to obtain those approvals and complete the merger with Stable Road Corp. Defendants' argument also ignores the specific and detailed information Kennedy disclosed in his interview regarding Kokorich's immigration status, the regulatory issues and significance of successfully completing the licensing process. It is implausible that Kennedy would only be aware of the facts he disclosed in his interview and none of the other directly relevant and material information that would have made his statements not misleading. The Court declines to make this assumption on a Motion to Dismiss, and concludes that Plaintiff has sufficiently alleged that Kennedy had the requisite scienter.¹⁴

The Momentus Defendants also argue that Plaintiff fails to allege scienter with respect to Kokorich. The Court disagrees. Plaintiff's allegations regarding Kokorich are more than sufficient. The Court thus concludes that considering the allegations in the Complaint in a holistic and collective manner, Plaintiff has adequately alleged that the Individual Momentus Defendants had the requisite knowledge both due to their positions and Plaintiff's specific allegations.¹⁵

Accordingly, the Momentus Defendants' Motions to Dismiss counts one and two are denied.

C. The Stable Road Defendants' Motion to Dismiss¹⁶

¹⁴ The Court also finds persuasive Plaintiff's argument that at a minimum, Kennedy made his statements with deliberate ignorance or recklessness as to Kokorich's national security issues and their impact on the viability of Momentus' business operations.

¹⁵ A strong inference of scienter can be negated when there is an absence of stock sales or where such sales are minimal. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989). Here, however Plaintiff specifically alleges that the fact that the Momentus Individual Defendants did not appear to sell any stock does not negate the inference of scienter because they did not own Stable Road Corp. securities during the Class Period.

¹⁶ The Court also concludes that Plaintiff's allegations that the Stable Road Defendants made material misrepresentations and misleading statements are adequate for the reasons set forth in the discussion of the Momentus Defendants' Motion to Dismiss.

The Stable Road Defendants move to dismiss count one as to defendants Stable Road Corp., Kabot, Norris, Quiroga and Hofmockel and count three as to defendants SRC-N1, Kabot, Norris, Quiroga and Hofmockel. The Stable Road Defendants argue that Plaintiff fails to plead particularized facts giving rise to a strong inference of scienter. They contend that Plaintiff alleges only that the Stable Road Defendants engaged in negligent misconduct by repeating and disseminating Momentus' misrepresentations without having conducted adequate due diligence. The Stable Road Defendants also argue that Plaintiff's allegations that the Momentus Defendants concealed certain information, combined with the lack of specific allegations that the Stable Road Defendants knew that Kokorich had been declared a national security risk or that there were issues with Momentus' technology are fatal to their claim under *Tellabs* because the inference of scienter is less compelling than the other plausible inferences. 551 U.S. at 310.

In response to Stable Road Corp. Defendant's scienter argument, Plaintiff argues that the defendants were wilfully blind to material problems at Momentus, and were thus reckless in its own dissemination of Momentus' misleading and incomplete statements. Plaintiff also argues that the Stable Road Corp. Defendants were deliberately reckless in failing to disclose Stable Road Corp.'s limited due diligence, and the fact that Momentus had failed to provide key information relating to Kokorich and Momentus' technology, especially in light of the fact that Stable Road Corp.: (1) promoted the merger to investors by emphasizing its extensive due diligence; (2) never followed up with Momentus regarding its attempts to learn why Kokorich had been forced to divest his interest in another space technology company in 2018; (3) did not request that its expert consultant review Momentus' only space test mission or investigate why the expert's report did not include any information relating to that mission; and (4) had a financial and business incentive to complete the merger.

The Court has reviewed the complaint and all of the allegations against Stable Road Corp. The Court agrees with the Plaintiff and concludes that considered holistically and in its entirety, the pleaded facts give rise to a "strong" inference of scienter-based deliberate recklessness or wilful blindness--that is at least as strong as any opposing inference. See *Tellabs*, 551 U.S. at 324.

With respect to the individual defendants, the Court concludes the allegations are sufficient to plead a strong inference of scienter as to Kabot, who was allegedly responsible for making statements regarding Kokorich and Momentus' technology while at the same time failing to further investigate Kokorich's national security issues, and the absence of information regarding Momentus' only test of its technology, and also for touting Stable Road Corps.' extensive due diligence.¹⁷ Accordingly, the Court concludes that Plaintiff's allegations

¹⁷ In promoting the merger on October 7, 2020, Kabot specifically stated:

[W]hat I think is great for the investor is we did four months of due diligence. We spent a lot of money with some of the top service providers out here...we did four months of due diligence, which in a traditional IPO you would never have the opportunity to do.

that Kabot made statements and representations with deliberate recklessness and wilful blindness are sufficient to establish a strong inference of scienter.

The Court reaches the opposite conclusion with respect to the other individual defendants—Quiroga, Norris and Hofmockel. Plaintiff's allegations regarding these three defendants are limited to the fact that they participated in due diligence at Momentus' offices and on conference calls, and generally that they held high level positions and had access to documents and information. Unlike the allegations against Kabot, there are no specific allegations that they were aware of any red flags to which they turned a blind eye, or that they made any statements that were deliberately reckless because of the failure to investigate those red flags.

Accordingly, defendants Stable Road Corp. and Kabot's Motion to Dismiss count one is denied, and defendants Quiroga, Norris and Hofmockel's Motion to Dismiss count one is granted.

D. Violation of Section 20(a)

Count three alleges a violation of Section 20(a) of the Exchange Act against SRC-N1 and the individual Momentus and Stable Road Corp. defendants Kennedy, Harms, Kabot, Norris, Quiroga and Hofmockel. To state a claim under Section 20(a), a plaintiff must allege (1) a primary violation of federal securities laws; and (2) that the defendant exercised actual power or control over the primary violator. *Howard v. Everex Systems, Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000).

The Court concludes that Plaintiff has failed to plead that Momentus individual defendants Kennedy and Harms, and Stable Road individual defendants Quiroga, Norris and Hofmockel exercised the requisite control for a Section 20(a) claim. Plaintiff has failed to allege any particularized facts that these individual defendants exercised control over Momentus or Stable Road Corp. in an effort to induce them to engage in acts that violated the securities laws, or the times, dates, and places that such violations allegedly occurred. Instead, Plaintiff merely alleges that the individual defendants, by reason of their positions in Momentus and Stable Road Corp., had access to press releases and public filings, and as owners of Momentus stock, had the power to cause Momentus and Stable Road Corp. to engage in the alleged conduct. *See In re Middlesex Retirement System v. Quest Software Inc.*, 527 F. Supp. 2d 1164, 1194 (C.D. Cal. 2007) (“[F]or Plaintiff to establish Garn's control person liability, Plaintiff must provide factual support that Garn was in a position to control a primary violator.”).

Accordingly, defendants Kennedy and Harms' Motion to Dismiss count three is granted, defendants Quiroga, Norris and Hofmockel's Motion to Dismiss counts three is granted. Because the Court finds the allegations sufficient to state a section 20(a) claim against defendants SRC-N1 and Kabot, their Motion to Dismiss count three is denied.

IV. Conclusion

For all the foregoing reasons, defendants Momentus and Harms' Motion to Dismiss is **DENIED** as to counts one and two. Defendant Kennedy's Motion to Dismiss is also **DENIED**

as to counts one and two. Defendant Harms' Motion to Dismiss count three is **GRANTED WITHOUT LEAVE TO AMEND**. Defendant Kennedy's Motion to Dismiss count three is also **GRANTED WITHOUT LEAVE TO AMEND**. The Court **DENIES** defendants Stable Road Corp. and Kabot's Motion to Dismiss count one. The Court also **DENIES** defendants SRC-N1 and Kabot's Motion to Dismiss count three. The Court **GRANTS** the Stable Road Defendants' Motion to Dismiss counts one and three as to defendants Quiroga, Norris and Hofmockel **WITHOUT LEAVE TO AMEND**. Although the Court recognizes that this Circuit has a liberal policy favoring amendments and that leave to amend should be freely granted, the Court is not required to grant leave to amend if the Court determines that permitting a plaintiff to amend would be an exercise in futility. *See, e.g., Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987) ("Denial of leave to amend is not an abuse of discretion where the pleadings before the court demonstrate that further amendment would be futile."). Plaintiff has already had an opportunity to amend his complaint and fails to indicate in its Opposition that he can allege any additional facts in support of its claims for relief. Accordingly, because the Court concludes that amendment would be futile, the Court denies Plaintiff leave to amend. Defendants shall file an answer to the Amended Consolidated Class Complaint within twenty days of this order.

IT IS SO ORDERED.