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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE ROCKET FUEL, INC.
SECURITIES LITIGATION

Case No. 14-cv-3998-PJH

ORDER RE MOTIONS TO DISMISS

United States District Court
Northern District of California

On September 16, 2015, defendants’ motions to dismiss came on for hearing before this court. Lead plaintiffs Oklahoma Firefighters Pension and Retirement System, Browder Capital, LLC, and Patrick Browder (“plaintiffs”) appeared through their counsel, Ramzi Abadou, Laurence King, and Mario Choi. Defendants Rocket Fuel Inc., George H. John, J. Peter Bardwick, Susan L. Bostrom, Ronald E.F. Codd, William Ericson, Richard Frankel, John Gardner, Clark Kokich, and Monte Zweben (collectively, the “Rocket Fuel defendants”) appeared through their counsel, Nina Locker and Rod Strickland. Defendants Credit Suisse Securities, Citigroup Global Markets, Needham & Company, Oppenheimer & Co., Piper Jaffray & Co., BMO Capital Markets, LUMA Securities, and Goldman Sachs (collectively, the “Underwriter defendants”) appeared through their counsel, Robert Varian. Having read the papers filed in conjunction with the motions and carefully considered the arguments and the relevant legal authority, and good cause appearing, the court hereby rules as follows.

BACKGROUND

Defendant Rocket Fuel is a company that offers advertising solutions over web, mobile, video, and social media channels, and claims that its technology is better than

1 its competitors' at detecting "digital ad fraud" – including the viewing of ads by computer
2 programs, such as "bots," rather than by real people. In simple terms, the presence of
3 "bots" can skew the number of actual views (or "impressions") that an ad receives,
4 resulting in advertisers paying for "views" even though the ads are not seen by real
5 people. Rocket Fuel's technology is designed to filter out those "bot views."

6 Plaintiffs allege that Rocket Fuel and its officers made false and misleading
7 statements (and omissions) regarding the technology's effectiveness, which artificially
8 inflated its stock price. Plaintiffs also allege that defendants made a secondary stock
9 offering that was designed to allow company insiders to unload their stock at artificially
10 inflated prices.

11 The nature of those allegedly false/misleading statements is more specifically
12 discussed below, but in general, plaintiffs claim that defendants overstated the
13 effectiveness of their product and failed to disclose that bots were actually causing some
14 Rocket Fuel customers to stop using its service. Plaintiffs also allege that certain
15 false/misleading statements were made in connection with two stock offerings – the initial
16 public offering and the secondary public offering. Despite knowing of the extent of the
17 bot problem, defendants allegedly continued to tout their technology's capabilities, until
18 ultimately being forced to announce poor earnings performances and to admit that
19 customers actually were taking their business elsewhere because of the bot problem.
20 These announcements caused Rocket Fuel's stock price to drop, precipitating this
21 lawsuit.

22 Two cases were filed in this district, and the cases were ultimately related and
23 consolidated, and a lead plaintiff was appointed after various parties filed motions to be
24 appointed as such. An "institutional investor group" was appointed lead plaintiff,
25 consisting of the Oklahoma Firefighters Pension and Retirement System, Browder
26 Capital, and Patrick Browder.

27 Then, a consolidated class action complaint was filed on February 27, 2015. The
28 complaint was brought against four sets of defendants:

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- 1 (1) the “Company defendant” (Rocket Fuel itself),
- 2 (2) the “Insider defendants” (CEO George H. John, President Richard Frankel, and
3 CFO J. Peter Bardwick),
- 4 (3) the “Director defendants” (Susan Bostrom, Ronald Codd, William Ericson, John
5 Gardner, Clark Kokich, and Monte Zweben, all of whom were on Rocket Fuel’s
6 board of directors during the class period), and
- 7 (4) the “Underwriter defendants” (Credit Suisse Securities, Citigroup Global Markets,
8 Needham & Company, Oppenheimer & Co., Piper Jaffray & Co., BMO Capital
9 Markets, LUMA Securities, and Goldman Sachs).

10 The operative consolidated class action complaint asserts seven causes of action
11 (labeled as “counts”):

- 12 (1) violation of section 10(b) of the Exchange Act, asserted against the Company and
13 the Insider defendants,
- 14 (2) violation of section 20(a) of the Exchange Act, asserted against the Insider
15 defendants,
- 16 (3) violation of section 20A of the Exchange Act, asserted against the Insider
17 defendants,
- 18 (4) violation of section 11 of the Securities Act, in connection with the IPO, asserted
19 against all defendants other than Goldman Sachs,
- 20 (5) violation of the Securities Act in connection with the secondary public offering,
21 asserted against all defendants other than LUMA,
- 22 (6) violation of section 12(a)(2) of the Securities Act in connection with the secondary
23 public offering, asserted against the Company and the Underwriter defendants
24 other than LUMA, and
- 25 (7) violation of section 15 of the Securities Act, asserted against the Insider
26 defendants and the Director defendants.

27 There are now two pending motions to dismiss – one brought by the Company, the
28 Insider defendants, and the Director defendants (collectively referred to as the “Rocket

Fuel defendants”), and one brought by the Underwriter defendants.

DISCUSSION

A. Legal Standard

1. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests for the legal sufficiency of the claims alleged in the complaint. Ileto v. Glock, Inc., 349 F.3d 1191, 1199-1200 (9th Cir. 2003). Review is limited to the contents of the complaint. Allarcom Pay Television, Ltd. v. Gen. Instrument Corp., 69 F.3d 381, 385 (9th Cir. 1995). To survive a motion to dismiss for failure to state a claim, a complaint generally must satisfy only the minimal notice pleading requirements of Federal Rule of Civil Procedure 8, which requires that a complaint include a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).

A complaint may be dismissed under Rule 12(b)(6) for failure to state a claim if the plaintiff fails to state a cognizable legal theory, or has not alleged sufficient facts to support a cognizable legal theory. Balistreri v. Pacifica Police Dep’t, 901 F.2d 696, 699 (9th Cir. 1990). The court is to “accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” Outdoor Media Group, Inc. v. City of Beaumont, 506 F.3d 895, 899-900 (9th Cir. 2007).

However, legally conclusory statements, not supported by actual factual allegations, need not be accepted. Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009). The allegations in the complaint “must be enough to raise a right to relief above the speculative level.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (citations and quotations omitted). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S. at 678 (citation omitted). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not ‘show[n]’ – ‘that the pleader is entitled to relief.’” Id. at 679. In the event dismissal is warranted, it is generally without

1 prejudice, unless it is clear the complaint cannot be saved by any amendment. See
2 Sparling v. Daou, 411 F.3d 1006, 1013 (9th Cir. 2005).

3 In addition, while the court generally may not consider material outside the
4 pleadings when resolving a motion to dismiss for failure to state a claim, the court may
5 consider matters that are properly the subject of judicial notice. Lee v. City of Los
6 Angeles, 250 F.3d 668, 688-89 (9th Cir. 2001); Mack v. South Bay Beer Distributors, Inc.,
7 798 F.2d 1279, 1282 (9th Cir. 1986). Additionally, the court may consider exhibits
8 attached to the complaint, see Hal Roach Studios, Inc. V. Richard Feiner & Co., Inc., 896
9 F.2d 1542, 1555 n.19 (9th Cir. 1989), as well as documents referenced extensively in the
10 complaint and documents that form the basis of a the plaintiff's claims. See No. 84
11 Employer–Teamster Joint Counsel Pension Trust Fund v. America West Holding Corp.,
12 320 F.3d 920, 925 n.2 (9th Cir. 2003).

13 2. Federal Rule of Civil Procedure 9(b)

14 Generally, plaintiffs in federal court are required to give a short, plain statement of
15 the claim sufficient to put the defendants on notice. Fed. R. Civ. P. 8. In actions alleging
16 fraud, however, “the circumstances constituting fraud or mistake shall be stated with
17 particularity.” Fed. R. Civ. P. 9(b). Under Rule 9(b), the complaint must allege specific
18 facts regarding the fraudulent activity, such as the time, date, place, and content of the
19 alleged fraudulent representation, how or why the representation was false or misleading,
20 and in some cases, the identity of the person engaged in the fraud. In re GlenFed Sec.
21 Litig., 42 F.3d 1541, 1547-49 (9th Cir. 1994). Because the plaintiff must set forth what is
22 false or misleading about a particular statement, he must do more than simply allege the
23 neutral facts necessary to identify the transaction; he must also explain why the disputed
24 statement was untrue or misleading at the time it was made. Yourish v. California
25 Amplifier, 191 F.3d 983, 992-93 (9th Cir. 1999).

26 3. Claims under the 1934 Securities Exchange Act

27 Section 10(b) of the Securities Exchange Act of 1934 provides, in part, that it is
28 unlawful “to use or employ in connection with the purchase or sale of any security

1 registered on a national securities exchange or any security not so registered, any
 2 manipulative or deceptive device or contrivance in contravention of such rules and
 3 regulations as the [SEC] may prescribe.” 15 U.S.C. § 78j(b).

4 Rule 10b-5 makes it unlawful for any person to use interstate commerce:

5 (a) To employ any device, scheme, or artifice to defraud,

6 (b) To make any untrue statement of a material fact or to omit to state a
 7 material fact necessary in order to make the statements made, in the light
 8 of the circumstances under which they were made, not misleading, or

9 (c) To engage in any act, practice, or course of business which operates or
 10 would operate as a fraud or deceit upon any person, in connection with the
 purchase or sale of any security.

11 17 C.F.R. § 240.10b-5.

12 In order to state a claim under § 10(b) of the 1934 Act and Rule 10b-5, a plaintiff
 13 must allege: (1) the use or employment of a manipulative or deceptive device or
 14 contrivance; (2) scienter, *i.e.*, wrongful state of mind; (3) a connection with the purchase
 15 or sale of a security; (4) reliance, often referred to as “transaction causation;” (5)
 16 economic loss; and (6) loss causation, *i.e.*, a causal connection between the manipulative
 17 or deceptive device or contrivance and the loss. Simpson v. AOL Time Warner, 452 F.3d
 18 1040, 1047 (9th Cir. 2006); see also Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336,
 19 341-42 (2005). The misstatement or omission complained of must have been
 20 misleading; in the case of an omission, “[s]ilence, absent a duty to disclose, is not
 21 misleading under Rule 10b-5.” Basic, Inc. v. Levinson, 485 U.S. 224, 239 n.17 (1988).

22 4. The Private Securities Litigation Reform Act

23 It has long been established that claims brought under Rule 10b-5 and § 10(b)
 24 must meet the particularity requirements of Rule 9(b). See In re Daou Sys. Inc. Sec.
 25 Litig., 411 F.3d 1006, 1014 (9th Cir. 2005). In addition, the enactment of the Private
 26 Securities Litigation Reform Act (“PSLRA”) in 1995 altered pleading requirements for
 27 actions brought under the 1934 Exchange Act. Id.

28 The PSLRA was enacted to establish uniform and stringent pleading requirements

1 for securities fraud actions, and “to put an end to the practice of pleading ‘fraud by
2 hindsight.’” In re Silicon Graphics, 183 F.3d at 958. The PSLRA heightened the pleading
3 requirements in private securities fraud litigation by requiring that the complaint plead
4 both falsity and scienter with particularity. In re Vantive Corp. Sec. Litig., 283 F.3d 1079,
5 1084 (9th Cir. 2002). If the complaint does not satisfy these pleading requirements, the
6 court, upon motion of the defendant, must dismiss the complaint. 15 U.S.C. § 78u-
7 4(b)(3)(A).

8 Under the PSLRA – whether alleging that a defendant “made an untrue statement
9 of a material fact” or alleging that a defendant “omitted to state a material fact necessary
10 in order to make the statements made, in the light of the circumstances in which they
11 were made, not misleading” – the complaint must specify each statement alleged to have
12 been false or misleading, specify the reason or reasons why each such statement is
13 misleading, and, if an allegation regarding the statement or omission is made on
14 information and belief, state with particularity all facts on which that belief is formed. 15
15 U.S.C. § 78u-4(b)(1). If the challenged statement is not false or misleading, it does not
16 become actionable merely because it is incomplete. In re Vantive, 283 F.3d at 1085;
17 Brody v. Transitional Hosp. Corp., 280 F.3d 997, 1006 (9th Cir. 2002).

18 In addition – whether alleging that a defendant “made an untrue statement of
19 material fact” or alleging that a defendant “omitted to state a material fact” – the complaint
20 must, with respect to each alleged act or omission, “state with particularity facts giving
21 rise to a strong inference that the defendant acted with the required state of mind.” 15
22 U.S.C. § 78u-4(b)(2). In the Ninth Circuit, the required state of mind is “deliberate or
23 conscious recklessness.” In re Silicon Graphics, 183 F.3d at 979.

24 Because falsity and scienter in securities fraud cases are generally strongly
25 inferred from the same set of facts, the Ninth Circuit has incorporated the falsity and
26 scienter requirements into a single inquiry. No. 84 Employer-Teamster Joint Council
27 Pension Trust Fund v. America West Holding Co., 320 F.3d 920, 932 (9th Cir. 2003). In
28 addition, when considering whether plaintiffs have shown a strong inference of scienter,

1 “the district court must consider all reasonable inferences to be drawn from the
 2 allegations, including inferences unfavorable to the plaintiffs.” Gompper v. VISX, Inc.,
 3 298 F.3d 893, 897 (9th Cir. 2002) (noting the “inevitable tension . . . between the
 4 customary latitude granted the plaintiff on a [12(b)(6)] motion to dismiss . . . and the
 5 heightened pleading standard set forth under the PSLRA). In other words, the court must
 6 consider all the allegations in their entirety in concluding whether, on balance, the
 7 complaint gives rise to the requisite inference of scienter. Id.

8 B. Legal Analysis

9 The court will start by discussing the alleged false/misleading statements, which
 10 the Rocket Fuel defendants¹ have divided into four categories: (1) “factual statements
 11 regarding Rocket Fuel’s efforts to combat bot fraud,” (2) “positive statements regarding
 12 Rocket Fuel’s technology,” (3) “Rocket Fuel’s forward-looking financial guidance,” and (4)
 13 “product marketing statements made towards Rocket Fuel’s customers.” Dkt. 99 at 11.
 14 The court notes that plaintiffs have conceded that category (3) is no longer actionable, so
 15 only categories (1), (2), and (4) will be addressed in this order. See Dkt. 108 at 8, n. 5.

16 Plaintiffs appear to categorize the statements as follows: (1) “Rocket Fuel’s
 17 statements regarding its unequivocal ability to combat bot fraud and fraudulent websites,”
 18 (2) “risk factor statements,” and (3) “Rocket Fuel’s statements regarding its proprietary
 19 technology.”

20 Both parties attempt some sleight of hand through their use of categories, so
 21 rather than adopting either party’s categorization, the court will address the alleged
 22 false/misleading statements in chronological order, as they are presented in the
 23 complaint. The court also notes that a number of the allegations made in the complaint
 24 were not mentioned by plaintiffs in their papers.

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 26
 27 ¹ Because the Rocket Fuel defendants’ motion addresses all of the alleged
 28 false/misleading statements, whereas the Underwriter defendants’ motion is limited to
 statements made in registration statements, the court will use the Rocket Fuel
 defendants’ framework for assessing the false/misleading statements.

1 1. IPO materials

2 The first set of actionable statements presented in the complaint comes from the
3 IPO materials. Specifically, plaintiffs identify as false/misleading the statement that “if we
4 fail to detect fraud . . . our reputation will suffer,” the statement that the company used
5 “proprietary technology to detect click fraud and block inventory that we know or suspect
6 to be fraudulent,” and the statement that the company delivers ad campaigns that are
7 “effective and efficient” and “enables advertisers to efficiently connect with large
8 audiences.” Consolidated Complaint, ¶¶ 123-125.

9 Plaintiffs do not allege that any of these statements are false or misleading on
10 their face, but instead argue that the first statement (the “if . . . then” statement) is
11 misleading because the supposed hypothetical situation was already occurring, and that
12 the latter two statements were misleading because they did not acknowledge that bot
13 fraud was already negatively impacting the company.

14 Taking the latter two statements first, the court finds that no level of success is
15 stated or implied by the statement that Rocket Fuel uses “proprietary technology to detect
16 click fraud,” or that its technology is “effective and efficient” and “enables advertisers to
17 efficiently connect with large audiences.” Saying that a company’s technology is used to
18 “detect click fraud” does not imply that it blocks all fraud, and saying that it delivers an
19 “effective and efficient” service does not imply that there will never be any instances of
20 fraud. Overall, the court finds that these statements are not actionable.

21 With respect to the statement that “if we fail to detect fraud . . . our reputation will
22 suffer” (referred to in this order as “the ‘if . . . then’ statement”), the court finds that this
23 statement similarly makes no implication of any specific level of success, and in fact does
24 the opposite, warning readers that the technology may sometimes fail to detect fraud.
25 The court finds that this statement is not actionable.

26 2. Third quarter 2013

27 Plaintiffs allege as false/misleading two statements made in the third quarter of
28 2013: (1) a website post on November 6, 2013, stating that Rocket Fuel “uses real-time

1 data points to recognize these bad actors and block them at the source,” that it
2 “undermines fraudulent practices and makes sure con artists always leave empty-
3 handed” and is “able to identify and eliminate all threats before serving a single ad,” and
4 (2) a press release from November 7, 2013 discussing Rocket Fuel’s strong growth
5 (citing revenue figures for support) and repeating the risk disclosures from the IPO
6 materials (i.e., the “if . . . then” statement discussed in the previous section of this order).
7 Consolidated Complaint, ¶¶ 127-128.

8 Starting with the statements from the November 7 press release, the court has
9 already addressed the “if . . . then” statement, and found that it is not actionable.
10 Regarding the statements about Rocket Fuel’s “strong growth,” plaintiffs do not allege
11 that the cited revenue figures were false, but rather claim that the figures were misleading
12 in light of the actual threat of bot fraud. Plaintiffs cannot use the threat of bot fraud to
13 cast every positive statement of Rocket Fuel’s as misleading, so without more, the court
14 finds that the statements contained within the November 7, 2013 press release are not
15 actionable.

16 Regarding the November 6, 2013 website post, the Rocket Fuel defendants first
17 address the “bad actors” statement, arguing that the statement is an accurate description
18 of how the Rocket Fuel service works, and that plaintiffs offer no facts to contradict it.
19 The court finds that the statement does not imply anything about the effectiveness of the
20 approach, and merely describes the approach at a high level. Thus, the “bad actors”
21 statement is not actionable.

22 However, the statements that Rocket Fuel is “able to identify and eliminate all
23 threats before serving a single ad” and that it “undermines fraudulent practices and
24 makes sure con artists always leave empty-handed” do indeed describe a specific level
25 of effectiveness. The words “all” and “always” serve to distinguish these statements from
26 the remainder of the allegedly false/misleading statements contained in the complaint.

27 The Rocket Fuel defendants do not appear to defend the truth of these
28 statements, as their only response is to express skepticism that “a reasonable investor

1 would have found and relied upon this marketing statement as a guarantee that Rocket
2 Fuel's technology prevented literally every single instance of ad fraud in the billions of
3 impressions Rocket Fuel considered per day." Dkt. 99 at 19-20 (emphasis in original). In
4 other words, the Rocket Fuel defendants suggest the statements were so over-the-top
5 that no reasonable investor would have believed them. The court knows of no authority
6 for the proposition that a statement can be so clearly false that it should not be
7 considered false or misleading. The court also notes that the Rocket Fuel defendants
8 attempt to characterize these statements as mere "product marketing statements," when
9 they are more properly characterized as "factual statements regarding Rocket Fuel's
10 efforts to combat bot fraud."

11 While the Rocket Fuel defendants make arguments regarding scienter and loss
12 causation, as well as the identity of the speaker of these statements, those arguments
13 will be addressed below. For now, the court finds that plaintiffs have adequately alleged
14 that the "identify and eliminate all threats" statement and the "con artists always leave
15 empty-handed" statements contained in the November 6, 2013 website posting are false
16 or misleading.

17 3. December 4, 2013 investor conference

18 The complaint alleges as false/misleading certain statements made by defendant
19 Bardwick at a NASDAQ OMX Investor Program held on December 4, 2013. Specifically,
20 Bardwick stated that Rocket Fuel had "proprietary technology for filtering for bots," that it
21 "filtered for quality," and that "the advertisers and then certain players like us will continue
22 to stay ahead of the people who are trying to make a quick buck." Consolidated
23 Complaint, ¶¶ 130-131. It appears undisputed that Rocket Fuel does indeed have
24 "proprietary technology for filtering for bots" and that it "filtered for quality," as those
25 statements make no mention of the technology's effectiveness. Similarly, the statement
26 that Rocket Fuel "will continue to stay ahead of the people who are trying to make a quick
27 buck" makes no guarantee of any specific level of success, nor does it, as plaintiffs claim,
28 "affirmatively create an impression of a state of affairs that differs in a material way from

1 the one that actually exists.” Thus, the court finds that these statements are not
2 actionable.

3 4. Fourth quarter 2013 and fiscal year 2013

4 The complaint alleges as false/misleading statements made in a press release
5 issued on January 22, 2014, statements made on a conference call on February 20,
6 2014, and statements made in its annual report filed on February 28, 2014. Consolidated
7 Complaint, ¶¶ 133-135.

8 The allegations regarding the January 22, 2014 press release appear to be based
9 on the now-abandoned allegations that Rocket Fuel’s financial guidance was false or
10 misleading.

11 Regarding the conference call, plaintiffs point to defendant John’s statement that
12 “AI and big data is a competitive advantage enabling us to transform advertising and gain
13 market share.” *Id.*, ¶ 134. Plaintiffs’ papers do not present any argument as to why this
14 statement is false/misleading, nor does the court have any basis for finding the statement
15 to be false or misleading.

16 Finally, regarding the annual report, plaintiffs point to the same risk disclosure (the
17 “if . . . then” statement) discussed in the context of the IPO materials. For the same
18 reasons discussed above, the court finds that this statement is not actionable.

19 5. Secondary offering materials

20 The statements identified in this section of the complaint overlap with the
21 statements contained in the IPO materials. Specifically, plaintiffs point to the same risk
22 disclosure (i.e., the “if . . . then” statement) and the same discussion of Rocket Fuel’s
23 “solution” being “effective and efficient.” For the same reasons discussed above, the
24 court finds that these statements are not actionable.

25 6. March 11, 2014 conference

26 The complaint alleges as false/misleading statements made during a March 11,
27 2014 conference, where defendant Bardwick stated that the company had “a lot of
28 proprietary technology” and filtered “about a third of the 40 billion impressions a day that

1 we see. Some of it is bot, some of it is brand-related.” ¶ 140. Plaintiffs do not dispute
2 that Rocket Fuel has “a lot of proprietary technology,” and the statement that Rocket Fuel
3 filters “about a third of the 40 billion impressions a day” says nothing, express or implied,
4 regarding the effectiveness of filtering out bot traffic. Thus, the court finds that these
5 statements are not actionable.

6 7. First quarter 2014

7 This category of alleged false/misleading statements includes the now-abandoned
8 allegations regarding financial guidance, and also includes the same risk disclosure (the
9 “if . . . then” statement) mentioned numerous times above. Consolidated Complaint,
10 ¶¶ 142-143. For the same reasons discussed above, the court finds that these
11 statements are not actionable.

12 8. May 14, 2014 conference

13 The complaint alleges as false/misleading statements made at a May 14, 2014
14 conference, where defendant Bardwick stated that “we’ve got some proprietary things we
15 do that we don’t detail in public, that we do in order to make sure that we’re delivering
16 quality results to the advertisers,” and that “we have said publicly that of the 40 billion
17 impressions that we see per day . . . we filter about a third of them off the top for quality
18 reasons, which would include potentially fraud-related reasons.” Consolidated
19 Complaint, ¶ 145. These statements are similar to the other statements made by
20 Bardwick (especially the statements made at the March 11, 2014 conference), and
21 similarly make no express or implied claims about the success of their anti-bot efforts.
22 Thus, the court finds that these statements are not actionable.

23 The court also notes that the complaint alleges one additional false/misleading
24 statement without providing a specific date on which it was made. Specifically, the
25 complaint alleges that “before quieting [sic] revising its representation on or about June
26 25, 2014, the Company assured investors that the Company could ‘block bad sites and
27 pages before we ever serve a single ad on them.’” Consolidated Complaint, ¶ 124. The
28 Rocket Fuel defendants claim that this statement was made in a website post on August

1 9, 2011 (more than two years before the start of the class period), and plaintiffs do not
2 directly address this argument, though they do attempt some sleight of hand by grouping
3 the “block bad sites and pages” statement with the “identify and eliminate all fraud”
4 statement and making the blanket argument that “Rocket Fuel made these absolute and
5 unequivocal assurances to investors during the class period.” Dkt. 108 at 14. The court
6 finds no basis for concluding that the “block bad sites and pages” statement was made
7 during the class period; and moreover, the statement does not relate to bot views, and
8 instead, claims that Rocket Fuel’s clients’ ads will not be served on “bad sites and
9 pages,” such as pornographic or hate-speech pages. In other words, the statement
10 relates to the process for selecting pages on which ads are served, rather than the
11 process for blocking bot views.

12 The complaint also contains a separate section alleging that the Securities Act
13 claims are actionable, but a number of the statements identified in that section are a
14 subset of the statements discussed above – namely, the statements made in the IPO
15 materials and the secondary offering materials. To the extent that the court has already
16 addressed the allegedly false/misleading statements made in the registration statements
17 (i.e., the “if . . . then” statement, the “effective and efficient” statement, and the “efficiently
18 connect with large audiences” statement), the court finds that they are not actionable for
19 the reasons discussed above.

20 The two previously-unaddressed statements are (1) a risk disclosure that Rocket
21 Fuel “may not be able to retain advertisers or attract new advertisers that provide us with
22 revenue that is comparable to the revenue generated by any advertisers we may lose,”
23 and (2) a list of “challenges faced by digital advertisers.” Consolidated Complaint,
24 ¶¶ 153, 155.

25 Plaintiffs allege that (1), while technically true, is misleading because “Rocket Fuel
26 omitted to disclose that its customers (and prospective customers) were already opting
27 out of using Rocket Fuel’s services and bringing similar services in-house.” However,
28 while plaintiffs allege that certain customers were already “opting out” of Rocket Fuel’s

1 services, the Underwriter defendants' motion pointed out the absence of any allegation
2 that Rocket Fuel was losing more customers than it was gaining, and plaintiffs failed to
3 respond to the argument in their opposition. Thus, the court finds that this statement is
4 not actionable.

5 With respect to (2), plaintiffs allege that the list of challenges was "materially
6 misleading because defendants failed to disclose the challenges faced or the true risks
7 and negative trends posed by the impact of digital fraud and bot traffic on the company's
8 operations and financial performance." However, the list was presented as a list of
9 challenges facing the digital advertising industry as a whole, not just Rocket Fuel, and
10 made no representations regarding Rocket Fuel at all, let alone its ability to combat
11 advertising fraud and bot traffic. Thus, the court finds that this statement is not
12 actionable.

13 In its opposition to the Underwriter defendants' motion to dismiss, plaintiffs attempt
14 to use a recent Supreme Court opinion to expand the scope of what can be considered
15 part of the registration statement, arguing that the representations need to be considered
16 in a "broader frame." See Omnicare, Inc. v. Laborers District Council Construction
17 Industry Pension Fund, 135 S.Ct. 1318, 1330 (2015).

18 Plaintiffs stretch Omnicare too far, in an apparent attempt to shoehorn their
19 strongest allegation ("identify and eliminate all threats") into all asserted claims. To the
20 contrary, Omnicare holds only that "an investor reads each statement within such a
21 document, whether of fact or opinion, in light of all its surrounding text, including hedges,
22 disclaimers, and apparently conflicting information." Id. Nothing in Omnicare endorses
23 plaintiffs' approach of importing statements into registration materials in order to state a
24 Securities Act claim.

25 Finally, to the extent that plaintiffs allege that the registration statements were
26 false or misleading due to the failure to include information required by Item 303 of
27 Regulation S-K, they have failed to adequately allege any failure to disclose "known
28 trends or uncertainties that have had or that the registrant reasonably expects will have a

1 material favorable or unfavorable impact on net sales or revenues or income from
2 continuing operations.” Plaintiffs appear to allege that the “known trend or uncertainty”
3 was “ad fraud and the effect of ad fraud,” but as the above discussion shows, the
4 prospect of ad fraud was extensively discussed in the registration statements.

5 Accordingly, because the complaint does not adequately allege that any
6 statements contained in registration statements were false or misleading, the court finds
7 that all Securities Act claims must be DISMISSED. Because only Securities Act claims
8 are asserted against the Underwriter defendants, their motion to dismiss is GRANTED in
9 full, without leave to amend. The court need not, and does not, reach any of the other
10 arguments presented in connection with the Underwriter defendants’ motion. With regard
11 to the Rocket Fuel defendants’ motion to dismiss, it is GRANTED with respect to the
12 Securities Act claims. Because only Securities Act claims are asserted against the
13 Director defendants, no claims remain asserted against them, and their motion to dismiss
14 is GRANTED without leave to amend.

15 With regard to the remaining Exchange Act claims asserted against Rocket Fuel
16 and the Insider defendants, all that remains are the statements made in the November 6,
17 2013 website posting – namely, that Rocket Fuel “undermines fraudulent practices and
18 makes sure con artists always leave empty-handed” and is “able to identify and eliminate
19 all threats before serving a single ad.”

20 As briefly mentioned above, the Rocket Fuel defendants argue that the statements
21 made in the November 6, 2013 website post cannot be attributed to the Insider
22 defendants, as plaintiffs do not allege that defendants John, Frankel, or Bardwick
23 “authored, reviewed, or approved any portion” of the statement. Defendants cite a
24 portion of a Supreme Court opinion holding that “one ‘makes’ a statement by stating it,”
25 but omits the portion of the Court’s order holding that “the maker of a statement is the
26 person or entity with ultimate authority over the statement, including its content and
27 whether and how to communicate it.” Janus Capital Group, Inc. v. First Derivative
28 Traders, 131 S.Ct. 2296, 2302 (2011). And the complaint does indeed allege that the

1 three Insider defendants “possessed the power and authority to control the contents of
2 the Company’s press releases [and] investor and media presentations.” Consolidated
3 Complaint, ¶¶ 31-33. Thus, for purposes of this motion to dismiss, the court finds that
4 plaintiffs have adequately alleged that the Insider defendants had “ultimate authority”
5 over the statements contained within the November 6, 2013 website posting. Moreover,
6 plaintiffs may also attribute the statement to the company itself, which is also named as a
7 defendant on the Exchange Act claims.

8 Turning to the issue of scienter, while the parties make a number of arguments
9 regarding defendants’ stock sales, the court finds that the issue can be resolved rather
10 simply given the fact that only the November 6, 2013 website statements are actionable.
11 As mentioned above, in their motion, the Rocket Fuel defendants appear to express
12 skepticism that “a reasonable investor would have found and relied upon this marketing
13 statement as a guarantee that Rocket Fuel’s technology prevents literally every single
14 instance of ad fraud in the billions of impressions Rocket Fuel considered per day.” Dkt.
15 99 at 19-20 (emphasis in original). To the extent that defendants imply that a reasonable
16 investor would know that the statement was not literally true, that implication also
17 supports a finding that the statements were made with scienter. Moreover, the “core
18 operations” theory, which allows a court to “infer[] that the facts critical to a business’s
19 core operations or important transactions are known to a company’s key officers,” further
20 supports the court’s finding that plaintiffs have adequately alleged scienter as to the
21 Insider defendants.

22 Regarding the company defendant, plaintiffs rely on the “corporate scienter”
23 doctrine. While the Rocket Fuel defendants argue that such a theory is accepted only in
24 “unusual” cases, the Ninth Circuit has held only that corporate scienter is unlikely in
25 cases where no individual officer or director is alleged to have had the required intent to
26 defraud. Glazer Capital Management v. Magistri, 549 F.3d 736, 745 (9th Cir. 2008). The
27 court left open the possibility of alleging corporate scienter where the directors and
28 officers were also implicated. Because the court has already found that plaintiffs have

1 adequately alleged scienter as to the three Insider defendants, it also finds that plaintiffs
2 have adequately alleged corporate scienter.

3 Turning to loss causation, the Rocket Fuel defendants are correct that plaintiffs'
4 theory of loss causation is difficult to follow, but defendants have also mischaracterized
5 plaintiffs' theory in a number of ways. The complaint identifies only two loss-causing
6 events: (1) a partial corrective disclosure on May 8, 2014, where Rocket Fuel announced
7 disappointing financial results leading to a 21.5% drop in stock price the next day, and (2)
8 an August 5, 2014 corrective disclosure where the company again announced
9 disappointing financial results and also lowered its revenue guidance, leading to a 30%
10 drop in stock price. The first disclosure is referred to as "partial" because plaintiffs allege
11 that it did not reveal the full extent of the company's problems with bot traffic, and
12 because the stock price continued to be inflated by defendants' allegedly false/misleading
13 statements. The second disclosure more fully explained that bot traffic was affecting their
14 financial results.

15 Defendants seize on two other events – the May 26, 2014 Financial Times article
16 and July 23, 2014 Digiday article – and argue that the supposed truth was "revealed" by
17 those articles, and because there was no corresponding drop in stock price, plaintiffs'
18 loss causation theory must fail. However, in making this argument, defendants appear to
19 re-write the allegations of the complaint in order to make them easier to dismiss.
20 Nowhere do plaintiffs allege that the two articles were loss-causing events. Moreover,
21 the Ninth Circuit has cited, with approval, cases from other circuits holding that loss
22 causation is "not to be decided on a Rule 12(b)(6) motion to dismiss," and that "loss
23 causation becomes most critical at the proof stage." In re Gilead Sciences Securities
24 Litigation, 536 F.3d 1049, 1057 (9th Cir. 2008). In accordance with Gilead, the court
25 finds that the complaint "alleges facts that, if taken as true, plausibly establish loss
26 causation."

27 Accordingly, with respect to the Exchange Act claims based on statements made
28 in the November 6, 2013 website post (i.e., the "identify and eliminate all threats"

1 statement and the “con artists always leave empty-handed” statements), the Rocket Fuel
2 defendants’ motion to dismiss is DENIED.

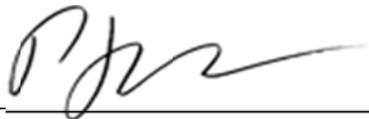
3 **CONCLUSION**

4 For the foregoing reasons, the Underwriter defendants’ motion to dismiss is
5 GRANTED, and the Rocket Fuel defendants’ motion is GRANTED in part and DENIED in
6 part. Specifically, the Rocket Fuel defendants’ motion is GRANTED to the extent that it
7 seeks dismissal of all claims asserted against the Director defendants, and to the extent
8 that it seeks dismissal of the Securities Act claims asserted against the Insider
9 defendants and the Company defendant. To the extent that the Rocket Fuel defendants’
10 motion seeks dismissal of the Exchange Act claims asserted against the Insider
11 defendants and the Company defendant, the motion is DENIED.

12 Finally, the court notes that a related case (Veloso v. John, 15-4625) was filed
13 during the pendency of the present motions, and stayed pending the outcome of the
14 motions. The Veloso parties have stipulated to meet and confer and submit a proposed
15 schedule within 30 days of this order, and the court also directs the parties in this case to
16 meet and confer with the Veloso parties, and to submit a joint stipulation as to a date for
17 a case management conference to include all parties in both cases. The parties may find
18 available dates for a case management conference on the court’s website.

19 **IT IS SO ORDERED.**

20 Dated: December 23, 2015

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23 PHYLLIS J. HAMILTON
24 United States District Judge
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