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6 and QUARTZVIEW, INC.

7
8 UNITED STATES DISTRICT COURT
9 EASTERN DISTRICT OF CALIFORNIA
10

11 THE ORIGINAL SIXTEEN TO ONE MINE, INC. a
California Corporation, MICHAEL MILLER,
12 HUGH DAN O'NEILL III, ROBERT BESSO,
JONATHAN FERRELL, TOM WOODFIN, and
13 KEITH ROBERTSON,

14 Plaintiffs,

15 v.

16 QUARTZVIEW, INC. a California Corporation,
ROGER HAAS, SIMON P. WESTBROOK,
17 DOUGLAS LOCKIE, DOUGLAS W. CHARLTON,
and CHARLES CROMPTON JR., DOES 1 through
18 100, inclusive,

19 Defendants.
20
21

CASE NO. 2:23-CV-00376-TLN-DB

**DEFENDANTS' NOTICE OF
MOTION AND MOTION AND
PARTIAL MOTION TO DISMISS
PLAINTIFFS' COMPLAINT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

[Fed. R. Civ. P. 12(b)(6)]

The Honorable Troy L. Nunley

Date: August 24, 2023

Time: 2:00 p.m.

Location: Courtroom 2, 15th Floor

Complaint filed: February 28, 2023

22
23 **TO THE HONORABLE COURT AND ALL PARTIES AND THEIR COUNSEL OF**
24 **RECORD:**

25 **PLEASE TAKE NOTICE THAT** on August 24, 2023, at 2:00 p.m., or as soon
26 thereafter as counsel may be heard in Courtroom 2, 15th Floor, District Judge Troy L. Nunley,
27 presiding, at the Robert T. Matsui United States Courthouse, 501 I Street Sacramento, CA
28 95814, defendants ROGER HAAS, SIMON P. WESTBROOK, and QUARTZVIEW, INC.

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1 (“Defendants”), will and hereby do move the Court, pursuant to Federal Rule of Civil Procedure
2 12(b)(6) and 9(b), for an Order dismissing portions of the Complaint by plaintiffs THE
3 ORIGINAL SIXTEEN TO ONE MINE, INC., MICHAEL MILLER, HUGH DAN O’NEILL III,
4 ROBERT BESSO, JONATHAN FERRELL, TOM WOODFIN, and KEITH ROBERTSON
5 (“Plaintiffs”).

6 Defendants’ Motion to Dismiss is based upon the following grounds:

7 1. Plaintiffs’ causes of action for: (1) Manipulation of Securities to Gain Control, (2)
8 False and Misleading Statements in Connection with a Tender Offer, and (3) punitive damages
9 fail to state a claim upon which relief can be granted as to all Defendants. A complaint may be
10 dismissed, in whole or in part, for failure to state a claim upon which relief can be granted. Fed.
11 R Civ. P. 12(b)(6).

12 2. Plaintiffs’ causes of action for (1) False and Misleading Statements in Connection
13 with a Tender Offer, (2) Breach of Contract; and (3) Rescission fail to state a claim as against all
14 Defendants except Haas and Quartzview, Inc.

15 3. Plaintiffs’ causes of action related to fraud including, causes of action one, two,
16 three, six, seven, and eight, are not pled with particularity under Federal Rule of Civil Procedure
17 9(b), and such failure is grounds for dismissal of the claim for failure to state a claim upon which
18 relief can be granted. Fed. R Civ. P. 12(b)(6).

19 The Motion is based on this Notice of Motion, the Memorandum of Points and
20 Authorities attached hereto, the Court’s file, and such additional facts and argument as will be
21 presented at the hearing.

23 Dated: June 23, 2023

GORDON REES SCULLY MANSUKHANI,
LLP

25 By: /s/ Kendra S. Canape
26 Kendra S. Canape
27 *Attorney for Defendants*
28 ROGER HAAS, SIMON P.
WESTBROOK, and QUARTZVIEW,
INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND FACTUAL BACKGROUND**

3 Plaintiffs’ 24-page Complaint fails to allege sufficient facts to state several causes of
4 action, and fails to identify any alleged wrongdoing by any of the named Defendants, except
5 Roger Haas and Quartzview, Inc. Plaintiffs’ Complaint alleges that the Original Sixteen to One
6 Mine, Inc. (hereinafter “OSTO”) and Defendant Quartzview, Inc., entered into a written License
7 and Service Agreement (“License Agreement”) and Confidentiality Agreement (Confidentiality
8 Agreement”) on or about October 30, 2012, for Quartzview, Inc. to test its developing deep
9 sensing technology at OSTO’s mines. (Dkt. 1, ¶ 20.) Plaintiffs further allege that Defendants
10 engaged in “acts and omissions intended to manipulate through false and misleading statements
11 intended and calculated for the purpose of depressing the value of the securities of OSTO. . . .”
12 (Dkt. 1, ¶ 24.) Plaintiffs also allege that during the exercise of the License Agreement,
13 Defendants investigated information about OSTO, its management and financial condition, and
14 divulged said confidential information, for the purpose to manipulate and gain control of OSTO,
15 and to depress the value of its stock. (Dkt. 1 ¶ 23-25). Plaintiffs further allege that defendants
16 Roger Haas and Quartzview, Inc. issued a tender offer to shareholders of OSTO on or about
17 March 2, 2021 that contained false and misleading statements, and failed to pay for the securities
18 for those who accepted the tender offer. (Dkt. 1, ¶ 30-34.)

19 Plaintiffs allege eight causes of action against all Defendants for: (1) Manipulation of
20 Securities to Gain Control; (2) False and Misleading Statements in Connection with a Tender
21 Offer; (3) Declaratory Relief; (4) Violation of CA Corp. Code Sec. 25400-25304; (5) Breach of
22 Contract; (6) Elder Financial Abuse; (7) Theft, CA Penal Code Sec. 484; (8) Unfair Competition,
23 CA Bus. Prof. Code Sec. 17200.

24 **II. LEGAL ARGUMENT**

25 **A. STANDARD FOR MOTION TO DISMISS**

26 To survive a motion to dismiss pursuant to Rule 12(b)(6), “a complaint must contain
27 sufficient factual matter, accepted as true ‘to state a claim to relief that is plausible on its face.’”
28 *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S.

1 544, 570 (2007)). A claim is facially plausible only “when the plaintiff pleads factual content
2 that allows the court to draw the reasonable inference that the defendant is liable for the
3 misconduct alleged.” *Id.* Determining whether a complaint is facially plausible is a “context-
4 specific task that requires the reviewing court to draw on its judicial experience and common
5 sense.” *Id.* at 1950.

6 While the Court must accept as true all material allegations in the complaint in evaluating
7 a Rule 12(b)(6) motion, the Court need not accept conclusory legal allegations “cast in the form
8 of factual allegations, if those conclusions cannot reasonably be drawn from the facts alleged.”
9 *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-55 (9th Cir. 1994). Similarly, the Court is
10 not bound to accept unreasonable inferences or unwarranted deductions of fact. *Western Mining*
11 *Counsel v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

12 Further, there is a heightened pleading requirement for Plaintiffs’ claims alleging fraud in
13 order to give a defendant notice of the particular misconduct with which he/she is charged.
14 *Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir.1993). An allegation of fraud or mistake must
15 be pled with particularity. Fed. R. Civ. P. 9(b); *Desaigoudar v. Meyercord*, 223 F.3d 1020,
16 1022-1023 (9th Cir. 2000). Specifically, under Rule 9(b), “In alleging fraud or mistake, a party
17 must state with particularity the circumstances constituting fraud or mistake. Malice, intent,
18 knowledge, and other conditions of a person's mind may be alleged generally.” Fed. R. Civ. P.
19 9(b). Allegations that are vague or conclusory are insufficient to satisfy the “particularity”
20 required by Rule 9(b). *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.
21 1989); *Wool v. Tandem Computers Inc.* 818 F.2d 1433, 1439 (9th Cir. 1987). A plaintiff's failure
22 to meet the specific pleading requirements of Rule 9(b) may result in dismissal of the complaint
23 for failure to state a claim upon which relief can be granted. *See Vess v. Ciba-Geigy Corp. USA*,
24 317 F.3d 1097, 1107-1108 (9th Cir. 2003); *United States ex rel. Doe v. Dow Chem. Co.*, 343
25 F.3d 325, 330 (5th Cir. 2003).

26 Under Rule 9(b), each defendant is entitled to be informed of the specific acts or
27 omissions which it must defend. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir.
28 2003). Plaintiff must (1) specify the alleged fraudulent misrepresentations or omissions, (2)

1 allege the representations were false when made, (3) identify the speaker, (4) state when and
2 where the statements were made, and (5) state the manner in which the representations were false
3 and misleading. *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989).

4 **1. Plaintiffs’ First Cause of Action for Manipulation of Securities to Gain**
5 **Control Fails to State a Claim Upon Which Relief Can Be Granted**

6 Plaintiffs’ first cause of action is for “Manipulation of securities to gain control.”
7 However, this is not a legal cause of action. Indeed, plaintiffs fail to identify the statute, code, or
8 common law claim which provides the basis for this cause of action. As such, this cause of
9 cation is vague and uncertain to Defendants as Defendants are entitled know the legal basis for
10 Plaintiffs’ allegations.

11 Furthermore, Plaintiffs failed to allege sufficient facts to indicate how defendants, apart
12 from Quartzview, Inc. and Roger Haas, have any culpability. Indeed, there is not one allegation
13 in the Complaint that identifies how defendants allegedly “manipulated” any security.
14 Accordingly, this cause of action must be dismissed, with prejudice.

15 **2. Plaintiffs’ Second Cause of Action for False and Misleading Statements in**
16 **Connection with a Tender Offer Fails to State a Claim Upon Which Relief**
17 **Can Be Granted**

18 Plaintiffs’ second cause of action is for “false and misleading statements in connection
19 with a tender offer” based upon violation of section 14(e) of the Security and Exchange Act of
20 1934. (Dkt. 1, ¶¶ 40-43.) Under section 14(e), it is “unlawful for any person to make any untrue
21 statement of a material fact or omit to state any material fact necessary in order to make the
22 statements made, in the light of the circumstances under which they are made, not misleading or to
23 engage in any fraudulent, deceptive, or manipulative acts or practices, in connection with any tender
24 offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in
25 favor of any such offer, request, or invitation.” 15 U.S.C. § 78n(e).

26 First, the Complaint alleges that the tender offer was made by Quartzview and Roger
27 Haas. (Dkt. 1, ¶ 30 and Exhibit “C”.) Plaintiffs failed to allege sufficient facts to state a claim as
28 each of the other named defendants, including that they had any connection with the tender or

1 the alleged false and misleading statements in connection therewith. As such, Plaintiffs failed to
2 state a claim under this cause of action as against all defendants besides Quartzview and Roger
3 Haas and this cause of action must be dismissed as to them.

4 Second, as with the first cause of action, it is uncertain whether Plaintiffs rely on any
5 other statute for their cause of action besides section 14(e) of the Security and Exchange Act of
6 1934. Notwithstanding this uncertainty, the Complaint is deficient because it fails to meet the
7 heightened pleading standard for claims based upon fraud.

8 In addition to the general pleading standards of FRCP 8(a), federal securities fraud claims
9 must meet the heightened pleading requirements of FRCP 9(b), which requires the plaintiffs state
10 “the who, what, when, where, and how” of the alleged fraud. *In re Initial Pub. Offering Sec.*
11 *Litig.*, 241 F. Supp. 2d 281, 327 (S.D.N.Y. 2003). Elements of private securities fraud action
12 under Securities and Exchange Commission (SEC) rule prohibiting deceptive devices in
13 connection with purchase or sale of securities are (1) material misrepresentation or omission by
14 defendant, (2) scienter, (3) connection between misrepresentation or omission and purchase or
15 sale of security, (4) reliance upon misrepresentation or omission, (5) economic loss, and (6) loss
16 causation. *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S.Ct. 2296, 564 (2011).

17 Here, Plaintiffs failed to incorporate alleged facts in their cause of action, such that as
18 plead, Defendants must speculate as to the necessary “who, what, when, where, and how”.
19 Plaintiffs generally state, “Defendants omitted to disclose material facts”, yet Plaintiffs do not
20 specify *which* Defendant said exactly *what*, and *when*. It is insufficient for Plaintiffs’ to
21 generally allege all Defendants engaged in fraudulent behavior, absent conformity with the
22 pleading standard for fraud, which requires details as to each Defendant the cause of action is
23 alleged against.

24 In further deficiency, the Complaint failed to allege facts relating to causation, a requisite
25 element for the cause of action. Plaintiffs must establish a causal link between the fraud and
26 some action that resulted in injury. *Basic v. Levinson*, 485 U.S. 224, 243 (1988). Here, Plaintiffs
27 generally plead harm to shareholders in the “diminution of fair market value of the shares
28 through manipulative actions of Defendants.” Plaintiffs failed to plead any sort of causation

1 between the alleged depressed share price, as a result of Defendants’ misleading statements, and
2 shareholder reliance thereto. As such, Plaintiffs’ second cause of action must be dismissed, with
3 prejudice.

4 **3. Plaintiffs’ Cause of Action for Breach of Contract Fails to State a Claim**
5 **Upon Which Relief Can Be Granted**

6 Plaintiffs’ Complaint contains an unnumbered breach of contract claim against
7 Defendants for “breach of the accepted tender offer”. (Dkt. 1, ¶ 52.) However, Plaintiffs failed to
8 allege sufficient facts to indicate that any Defendants, other than Quartzview, Inc. or Roger Haas,
9 had any connection with the tender. As such, Plaintiffs failed to state a claim under this cause of
10 action as against all Defendants other than Quartzview, Inc. and Roger Haas, and this cause of
11 action must be dismissed as to them.

12 **4. Plaintiffs’ Unnumbered Causes of Action for Rescission Fail to State a Claim**
13 **Upon Which Relief Can Be Granted**

14 Plaintiffs’ Complaint contains an unnumbered cause of action for rescission against
15 Defendants for the sale of stock and offers to tender. (Dkt. 1, ¶ 53.) However, Plaintiffs failed to
16 allege sufficient facts to indicate that any Defendants, other than Quartzview, Inc. or Roger Haas,
17 had any connection with the tender. As such, Plaintiffs failed to state a claim under this cause of
18 action as against all Defendants other than Quartzview, Inc. and Roger Haas, and this cause of
19 action must be dismissed as to them.

20 **5. Plaintiffs’ Complaint Fails to State Facts Sufficient to Recover Punitive**
21 **Damages**

22 Plaintiffs’ prayer for punitive damages is subject to dismissal. More than a mere
23 commission of a tort is required for punitive damages. “There must be circumstances of
24 aggravation or outrage, such as spite or malice or a fraudulent or evil motive on the part of the
25 defendant, *or such a conscious and deliberate disregard of the interests of others that his*
26 *conduct may be called willful or wanton. . .” Mock v. Michigan Millers Mut. Ins. Co. 4*
27 *Cal.App.4th 306, 328 (1992), emphasis in original. Moreover, “[A]n award of exemplary*
28 *damages cannot be based on mere speculation; it depends instead on a definite showing of a*

1 willingness to vex, harass, to injure. The wrongful personal intention to injure is the factor that
2 calls forth the penalty of punitive damages.” *Roth v. Shell Oil Co.*, 185 Cal.App.2d 676, 682
3 (1960).

4 Plaintiffs’ Complaint failed to plead any such evil intent or motive on the part of
5 Defendants. Rather, the Complaint uses boilerplate language and merely alleges that Defendants,
6 generally, acted manipulatively to gain control of OTSO. Further, the Complaint failed to
7 differentiate the conduct of each named Defendant, as required for a claim for punitive damages.
8 Therefore, Plaintiffs’ prayer for punitive damages cannot be maintained as a matter of law and
9 should properly be dismissed.

10 **6. Plaintiff’s Causes of Action Related to Fraudulent Conduct, and Each of**
11 **Them, Fail to Plead Fraud With Requisite Particularity**

12 Here, strikingly, Plaintiffs’ Complaint failed to identify *which* Defendant did *what*. As
13 analyzed in section A(2), Plaintiffs failed to differentiate each Defendants’ conduct to
14 demonstrate it rises to the level of fraud. Plaintiffs’ overall attempt to lump all Defendants and
15 their conduct together by alleging they each engaged in intentional conduct falls short of the
16 requisite pleading standard. The heightened pleading requirement, which exists for the very
17 purpose to preclude broad strokes pleading related to fraudulent acts, is at issue for each of
18 Plaintiffs’ causes of action where they allege for simplicity, that all Defendants acted
19 fraudulently. Therefore, where causes of action one, two, three, six, seven, and eight generally
20 allege all Defendants engaged in fraudulent activity, but fails to properly identify the *who*, *what*,
21 *when*, *where*, and *how*, the pleading is deficient. As plead, each Defendant is not informed by the
22 Complaint of the specific acts or omission which it must defend. By failing to identify the
23 speaker or “bad actor”, the specific statements made by each Defendant, when the statements
24 were made, and the source of the fraud, Plaintiffs failed entirely to plead fraud with particularity
25 under the heightened scrutiny of FRCP Rule 9(b).

26 ///

28 //

1 **III. CONCLUSION**

2 For the reasons explained above, Defendants respectfully request that this Court dismiss
3 portions of Plaintiffs' Complaint based upon Plaintiffs' failure to state a claim upon which relief
4 can be granted.

5 Dated: June 23, 2023

GORDON REES SCULLY MANSUKHANI,
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7 By: /s/ Kendra S. Canape
8 Kendra S. Canape
9 *Attorney for Defendants*
10 ROGER HAAS, SIMON P.
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