22-0355-cv

United States Court of Appeals

for the

Second Circuit

MASO CAPITAL INVESTMENTS LIMITED, ALTIMEO ASSET MANAGEMENT, BLACKWELL PARTNERS LLC SERIES A, CROWN MANAGED ACCOUNTS SPC for and on behalf of Crown/Maso Segregated Portfolio, individually and on behalf of all others similarly situated,

Plaintiffs-Appellants,

– v. –

E-HOUSE (CHINA) HOLDINGS LIMITED, XIN ZHOU, NEIL NANPENG SHEN, E-HOUSE HOLDINGS LTD., BING XIANG, HONGCHAO ZHU, JEFFREY ZENG, WINSTON LI, DAVID JIAN SUN, CANHAO HUANG, SINA CORPORATION, KANRICH HOLDINGS LIMITED, ON CHANCE, INC., SMART CREATE GROUP LIMITED, SMART MASTER INTERNATIONAL LIMITED, JUN HENG INVESTMENT LIMITED, CHARLES CHAO,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Plaintiff-Appellant Maso Capital Investments Limited, Blackwell Partners LLC – Series A, Crown Managed Accounts SPC for and on behalf of Crown/Maso Segregated Portfolio (together, the "Maso Entities,") state that they do not have any parent corporation and that no publicly held corporation owns 10% or more of their respective stock.

JURISDICTIONAL STATEMENT

This class action case against E-House (China) Holdings Limited ("E-House" or the "Company") and certain of its executives arises under (1) Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78j(b), and SEC Rule 10b-5 promulgated thereunder, 17 C.F.R. §240.10b-5 (together "§10(b)"); (2) Section 20(a) of the Exchange Act, 15 U.S.C. §78t(a) ("20(a)"); (3) Section 20A of the Exchange Act, 15 U.S.C. §78t–1 ("20A"); and (4) Section 13(e) of the Exchange Act, 15 U.S.C. §78m(e), and SEC Rule 13e–3 promulgated thereunder, 17 C.F.R. §240.13e–3 (together "§13(e)").

The District Court had jurisdiction of this Action under §27 of the Exchange Act, 15 U.S.C. §78aa, and 28 U.S.C. §1331. The District Court dismissed Plaintiffs' Amended Complaint ("Complaint") in its September 29, 2021 Opinion and Order ("Opinion"), *see* SPA:1-33,[1] and judgment was entered on February 8, 2021, SPA:34. Plaintiffs filed a Notice of Appeal on February 23, 2022. A:335. This Court has jurisdiction under 28 U.S.C. §1291.

[1] References to "SPA:__" refer to the Special Appendix attached hereto, and references to "A:__," refer to pages of the Joint Appendix submitted herewith. Terms not otherwise defined herein have the meaning stated in the Complaint.

ISSUES PRESENTED FOR REVIEW

1. Whether Plaintiffs adequately alleged materially false and misleading statements, omissions, or actionable fraudulent conduct.

2. Whether Plaintiffs adequately alleged loss causation.

STATEMENT OF THE CASE

E-House was a China-based, Cayman-incorporated, real estate services company that listed stock-like securities ("ADS") on the New York Stock Exchange ("NYSE"). Defendants defrauded investors in E-House's ADS, in a scheme to reap hundreds of millions of dollars in wrongful gains by buying the Company on the cheap, in a management buyout (the "Merger").

To pitch the Merger, Defendants filed proxy statements with the Securities Exchange Commission ("SEC"), which: (a) claimed to include a summary of the "best currently available" projections for the Company; (b) represented that there were not "any present plans or proposals" for major post-Merger transactions and that Defendants' reason for buying E-House was a plain vanilla desire to operate it privately to maximize its profitibility; and (c) assured investors the deal was fair.

The assurances regarding the projections and fairness of the deal were obviously important to investors evaluating the deal. As were the assurances regarding Defendants' reasons for the Merger and plans for the Company, which provided important context for the disclosures (*e.g.*, by informing investors of the Buyers' motivations), provided insight into the management-lead Buyers' view of the Company (*e.g.*, whether it was worth more than the deal price, and could be resold at a profit), and were relevant to assessing the alternatives to the Merger.

Federal law recognizes the importance of these disclosures, especially in the context of going-private transactions where risks from information asymmetries between acquirers and shareholders are particularly serious, and ***requires*** disclosure of the "reasons" for the Merger, "benefits" of the Merger for the buyer, and post-Merger "plans" or "proposals" for the Company. Additionally, insider trading law required Defendants to disclose all material nonpublic information prior to purchasing the ADS through the Merger. Similarly, the Cayman Islands—like many U.S. states—require similar pre-merger disclosures.

In reliance on Defendants' disclosures, investors approved the Merger. After the deal closed, a shareholder sought appraisal of its shares in the Cayman Islands (the "Appraisal"). In the Appraisal trial, it was revealed, based on evidence produced in that proceeding, that Defendants' assurances were false and misleading.

Specifically, it was revealed that, ***before*** the Final Proxy was published, Defendants had approved updated projections (the "Updated Projections"), which forecasted ***400% faster profit growth*** than the projections touted as the "best currently available" in the Final Proxy (the "Published Projections"). In part, the Updated Projections reflected the fact that E-House had already dramatically outperformed the Published Projections, generating net income growth for its core business of 37% in the first half of 2016, compared to assumed growth of less than 2% for the entirety of the year in the Published Projections.

Incredibly, ***before*** the Merger even closed, the Updated Projections were used to privately pitch new investors in the post-Merger Company and the corresponding "Investor Presentation," stated that E-House's core business was worth about $1.2 billion, whereas the Merger valued the entire Company at $1.06 billion. The Merger documents valued that core business as only 40% of E-House's overall valuation, indicating that E-House's true valuation dwarfed even that $1.2 billion figure.

Private sales began closing as soon as August 2016, the same month as the Merger, and Defendants were so confident in the higher Updated Projections that the private investors were given a contractual ***financial guarantee*** that E-House's core business would perform within 95% of the Updated Projections.

Given these undisclosed facts, reasonable investors would find the published claims that the Merger was "fair" and the Published Projections were the "best available" materially misleading. Furthermore, the failure to disclose the Updated Projections was an astounding omission in the face of the affirmative duties requiring their disclosure. The only plausible explanation for omitting the Updated Projections is unfettered greed. Defendants knew they were underpaying public investors and pushed the deal forward without disclosing this critical information.

Defendants ultimately relisted E-House's core business on the Hong Kong stock exchange. Upon this relisting of just part of the Company, E-House had a

market capitalization of $2.651 billion, roughly ***2.5 times*** more than the valuation for the entirety of E-House offered through the Merger.

The relisting took about two years to complete, but the related dealmaking began before the Merger even closed (together, the planned "Subsequent Transactions"). The presentation used to pitch post-Merger investors included a section titled "Valuation and Exit," showing a plan to relist E-House in Asia. Stock sales to private investors began closing the same month as the Merger. Thus, Defendants defrauded public investors by hiding their plans while denying any "plans or proposals" for post-Merger transactions.

Finally, Defendants failed to disclose the real reasons for the Merger or to "quantify" the benefits to the Buyers as required by SEC regulations, and instead claimed the reasons for the Merger were plain vanilla "benefits from being privat[e]," which benefits were specifically identified as "greater flexibility to focus on addressing . . . long-term profitability without the constraints [of] the public . . . market's . . . emphasis on short-term . . . performance." In reality, they sought to complete the Subsequent Transactions and would reap enormous benefits from buying the Company for less than fair value. Indeed, in regulatory filings during the relisting, Defendants ***admitted*** the privatization was initiated because E-House was undervalued and because they wanted to pursue the Subsequent Transactions.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

E-House operates real estate businesses in China and has both a "core business," and owns interests in other companies. A:33-34¶49-55.

On June 9, 2015, E-House announced a proposed buyout, offering $7.38 per ADS, made by Defendants Zhou (E-House's CEO, Founder, and Chairman), Shen (an E-House Director), and their affiliated entities. A:35¶56. Shortly thereafter, E-House formed a transaction committee and Defendant Sina, a publicly traded business represented on E-House's Board by Defendant Chao, joined the acquirors (the "Buyer Group"). A:30-31¶¶35-40; A:32¶48; A:40¶77.

The Buyer Group eventually negotiated the price down to $6.85 (valuing E-House at $1.06 billion), and on April 15, 2016, the Company entered into the Merger Agreement. A:35-36¶¶59-60. However, the deal was conditioned on securing the approval of minority shareholders. A:36¶63.

E-House filed an SEC Rule 13e-3 transaction statement, that also served as a preliminary proxy, which was signed by E-House and the Buyers, on April 25, 2016. E-House filed several amendments to the initial transaction statement in the months leading up to the shareholders' approval of the Merger. On July 1, 2016, Defendants issued the third amendment to the transaction statement (the "Final Proxy"), soliciting shareholders to approve the Merger. A:35-36¶¶59, 61; A:42-45¶¶87-93.

The Final Proxy contained assurances that the Merger was fair to investors. A:38-39¶72. It also included the Published Projections and claimed that these projections were "the best currently available" estimates of E-House's prospects. A:39¶73. The transaction statement also stated that the Buyers Group was conducting the Merger for ordinary benefits of operating privately and did not have any "plans or proposals" for post-Merger transactions. A:54-59¶¶129-39.

On August 5, 2016, shareholders voted to approve the Merger. A:45¶¶96. The Merger closed on August 12, 2016, and E-House's ADS were delisted from the NYSE. A:46¶97. Upon closing, the Buyers' ownership in E-House increased substantially, functionally "buying" the publicly traded shares to become the owners of the equity interests that public investors previously owned.

A. Defendants Secretly Valued E-House As Far More Valuable Than the Merger Price

On October 14, 2016, Senrigan Master Fund (the "Dissenter") filed an Appraisal action in the Cayman Islands. A:46¶99. During the April 10-11, 2018, Appraisal trial, the existence of the Updated Projections was extensively discussed. A:47¶102-03. The trial revealed that these internal projections superseded the Published Projections and reflected the Company's improved performance in 2016. A:47-48¶104. The Updated Projections were comparable in form to the Published Projections, except that they reflected E-House management's current assessment when they were prepared. The Updated Projections were so authoritative that they

were approved by Defendant Zhou and the accounting and auditing firm PriceWaterhouseCoopers. A:47-48¶104.

The Updated Projections reflected 37% net income growth for E-House's core business in the first half of 2016, compared to less than 2% net income growth for all of 2016, estimated in the Published Projections. A:48¶106.

B. Defendants Planned Subsequent Transactions to Capitalize on E-House's Higher Valuation

At trial, the Dissenter's counsel also raised the existence of the Company and the Buyer's plans to take future action with the Company after the Merger. A:49¶108. Investors were pitched on July 16, 2016 – ***before the Merger closed*** – and the Investor Presentation document, showed that E-House's core business was valued at $1.2 billion, compared to the $332 million touted publicly. A:40¶77; 49¶108, 111. This investor pitch was based on the higher Updated Projections. A: 49¶108. Moreover, the presentation contained a section titled "Valuation and Exit," which showed a plan to engineer a future stock listing in Asia. A:49¶109.

E-House closed equity sales to private investors beginning in August 2016, the same month as the Merger. The Buyers evidenced their total confidence in the Updated Projections by providing these investors with a financial guarantee that E-House would perform within 95% of the Updated Projections. A:50¶113. Defendants also brought in additional strategic investors in furtherance of the relisting as early as December 2016, just four months after the Merger. A:51¶116.

On July 1, 2018, E-House relisted just its core business, on the Hong Kong stock exchange. A:51¶114. During the relisting, in Chinese government filings, E-House (with Zhou still as CEO) admitted that the Merger "was initiated because [E-House] was undervalued" and because the Merger would enable the Buyers to pursue their "capital market strategies," *i.e.*, the Subsequent Transactions. A:51-52¶117.

On the day of the relisting, just the part of E-House that was relisted had a market capitalization of $2.651 billion, a far higher value than that of the $1.06 billion Merger valuation for the entire Company. A:53¶120. This discrepancy serves to further reveal that E-House was substantially undervalued at the time shareholders voted to approve the Merger. A:53¶120. As a result, Defendants reaped hundreds of millions of dollars in illicit profits. A:54¶121.

II. PROCEDURAL HISTORY AND RULING BELOW

This Action was filed on April 9, 2020. A:7. On August 12, 2020, Plaintiffs Maso and Altimeo Asset Management ("Altimeo") were appointed Lead Plaintiffs pursuant to the Private Securities Litigation Reform Act of 1995 ("PSLRA"). A:12. Plaintiffs filed the amended complaint on October 13, 2020. A:12, 17. On January 19, 2021, Defendants filed a motion to dismiss. A:13-14. On September 29, 2021, the District Court issued an opinion dismissing the action. A:15. On February 8, 2021, the dismissal judgment was entered. A:16. On February 23, 2021, Plaintiffs filed a notice of appeal. A:335.

SUMMARY OF THE ARGUMENT

Defendants engaged in a scheme to defraud investors into selling their E-House ADS for less than fair value. Through this scheme Defendants reaped hundreds of millions of dollars in profit at the expense of public investors.

Defendants made false and misleading statements and omitted to make required disclosures concerning three topics.

First, Defendants deceived investors regarding E-House's projected performance by touting stale projections, and omitting to disclose the more current and more favorable Updated Projections. **Second**, Defendants deceived investors regarding their plans for E-House following the Merger by denying and failing to disclose their planned Subsequent Transactions. **Third**, Defendants represented that the Merger was fair to investors, despite not believing this and knowing, but not disclosing, facts that rendered this statement misleading.

The Opinion dismissed the entirety of the Complaint. In doing so, the District Court erred in disregarding well-pled facts, and interpreting facts and drawing inferences in the light most favorable to Defendants, contrary to the standard that applies when analyzing a motion to dismiss. The Opinion also misapplied legal principles in Defendants' favor, such as by applying the PSLRA safe harbor for forward-looking statements to statements that were adequately alleged to be misleading when properly viewed as representations of then-present facts.

The Complaint detailed legal duties (SEC regulations, insider trading law, and Cayman law), which required Defendants to disclose the omitted information. Despite this, the Opinion dismissed the omission claims with a terse cross-reference to its analysis of the misstatements. This was erroneous, not only because the misstatement claims were adequately pled, but also because the omission claims require different analysis than the misstatement claims.

Plaintiffs also alleged that Defendants' course of conduct amounted to an actionable scheme to defraud. The Opinion improperly rejected this claim with another cross-reference to its analysis of the misrepresentation claims, even though the scheme claim does not depend on the alleged misrepresentations.

The Opinion also briefly commented, in a footnote, that Plaintiffs had not adequately pled "loss causation." The Court stated that because the ADS price increased on the completion of the Merger, Plaintiffs could not have suffered losses. This conclusion is factually incorrect, and more importantly ignores the controlling law holding that when a plaintiff is defrauded into selling, the correct measure of damage is based on the difference between the fair value of that which plaintiff received upon selling and the fair value of the securities plaintiffs sold.

Each alleged claim should be reinstated and the matter should be remanded for resolution of issues not reached by the District Court.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss de novo. *See City of Providence v. BATS Glob. Mkts., Inc.*, 878 F.3d 36, 48 (2d Cir. 2017).

ARGUMENT

I. THE ISSUES REACHED BY THE DISTRICT COURT

A. Plaintiffs Adequately Pled Falsity, Omissions, and a Fraudulent Scheme

While falsity allegations are subject to heightened pleading standards, those standards do not alter the basic rule that courts must "accept all factual allegations" as "true" when reviewing a motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). While competing inferences of *scienter* may be weighed, when reviewing *falsity*, courts must draw "all reasonable inferences in the plaintiffs' favor." *Giunta v. Dingman*, 893 F.3d 73, 78-79 (2d Cir. 2018).

Under Rule 9(b), allegations of falsity must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." *Mills v. Polar Molecular Corp.,* 12 F.3d 1170, 1175 (2d Cir. 1993). The PSLRA similarly requires Plaintiffs to "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading." *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir. 2004). There is no genuine dispute as to whether Plaintiffs have specifically identified the information required under these standards. Rather, the dispute regarding falsity turns entirely on whether the identified statements, omissions, and conduct, was misleading.

"The veracity of a statement or omission is measured not by its literal truth, but by its ability to accurately inform rather than mislead." *Operating Loc. 649 Annuity Tr. Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 92 (2d Cir. 2010) (citation omitted). Literally accurate statements can, "through their context and manner of presentation, . . . mislead investors." *Id.* (quoting *McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990)).

Materiality is established where there is "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." *Id.* (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988)).

"Materiality is a mixed question of law and fact." *Ganino v. Citizens Utilities Co.*, 228 F.3d 154, 162 (2d Cir. 2000) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976)). "[A] complaint may not properly be dismissed" on materiality grounds, unless the misrepresentations or omissions are "so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question." *Id.* (quoting *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

A legal duty to disclose may arise because a defendant has chosen to speak on a topic, where their statement would be rendered misleading by not providing relevant additional information. *Meyer v. Jinkosolar Holdings Co., Ltd.*, 761 F.3d

245, 250 (2d Cir. 2014) ("once a company speaks on an issue or topic, there is a duty to tell the whole truth") (citation omitted).

Additionally, a duty to disclose can arise where one has a freestanding legal obligation to disclose information ("pure omissions"). The Complaint alleges three duties giving rise to pure omissions (insider trading law, SEC regulation, and Cayman Islands law) as discussed in Sections I(A)(2) and (4) below.

1. The Projection Statements Were Materially Misleading

a. Falsity Regarding the Projection Statements

First, the Final Proxy[2] included the stale Published Projections without disclosing the better Updated Projections. A:59¶141. This statement was misleading given the omission of the Updated Projections, as disclosure of the existence of the Updated Projections was necessary to put the Published Projections in context, and without them, left investors with the false impression that the Published Projections were still worthwhile predictions, and were not supplanted by newer projections. A:59¶142.

[2] All statements in the Final Proxy were "made" by E-House, because it issued that document. A:54¶122; *City of Roseville Employees' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y. 2011) (SEC filings issued by entity and attributed to it, are "made" by that entity). The statements were also "made" by Defendants Zhou, Shen, and Chao, since each signed the Final Proxy. A:54¶122; *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 163-64 (S.D.N.Y. 2012) ("signatories of misleading documents 'made' the statements" therein).

Second, Defendants stated that the Published Projections were "the best currently available estimates and judgments, and presents, to the best of management's knowledge and belief, the expected course of action and the expected future financial performance of the Company." A:59¶143. This was not true. The Updated Projections were obviously more accurate, reflecting E-House's far greater performance in the first half of 2016 and replaced the Published Projections, which had become out of date. A:47-48¶104. These Updated Projections reflected management's current assessment when they were prepared. *Id.*

b. The Dismissal of the Projection Statements Should Be Reversed

(i) The Opinion Improperly Rejected Well-Pled Allegations

Plaintiffs learned of the Updated Projections through evidence disclosed during the public Appraisal trial. Prior to the trial, the parties to that action exchanged discovery and produced voluminous expert reports. A:46¶100. Lead Plaintiff Maso instructed lawyers[3] from Walkers—a reputable international law firm—to attend that hearing and take contemporaneous notes. Co-Lead Counsel reviewed those notes when drafting the Complaint. A:47¶102. Based on that

[3] Specifically, the lawyers were "Articled Clerks"—a term that is roughly analogous to the concept of a "law clerk" in the United States. A:47¶102, n.4.

review, the Complaint alleged that, the following facts were disclosed in the Appraisal (A:47-49¶¶104-07):

- The Updated Projections were presented to the Appraisal court as part of the "bundle" of trial documents.
- The Judge was directed to the Updated Projections as a trial exhibit.
- For internal purposes, the Updated Projections replaced the Published Projections, which had become out of date and were superseded by the Updated Projections due to the Company's improved performance.
- The Updated Projections reflected management's current assessment when they were prepared.
- The Updated Projections were approved by Defendant Zhou.
- The accounting and auditing firm PriceWaterhouseCoopers performed diligence on the Updated Projections to confirm their reliability.
- The Updated Projections were comparable in form to the Published Projections.
- The Updated Projections were made in June 2016.
- The experts for both the Dissenters and E-House used the Updated Projections in their valuations of the Company.
- The Updated Projections showed 37% growth in net income for E-House's core business in the first 6 months of 2016.
- The Updated Projections showed higher profit, higher sales figures, and significantly higher EBIT than the Published Projections.
- The Updated Projections ran until 2019, and showed a consolidated annual growth rate in net income of 19%, compared to the meager 4.65% in the Published Projections.

The Opinion rejected these allegations as insufficiently detailed, commenting that Plaintiffs did not allege "who created" the Updated Projections and citing *Long Miao v. Fanhua, Inc.*, for the proposition that Plaintiffs are required to cite the "detail as to the who, what, when, where, and how" of the Updated Projections. SPA:25 (citing 442 F. Supp. 3d 774, 803-04 (S.D.N.Y. 2020)).[4] Far from imposing such a requirement—in contravention of the rule that "allegations must be accepted as true" (*Tellabs*, 551 U.S. at 322)—*Fanhau* merely analyzed a "***conclusory allegation***," from an ***anonymous source,*** and held that it need not be accepted in the absence of "***any detail.***" *Fanhua,* 442 F. Supp. 3d at 803-04 (emphasis added).

The allegations here are not from anonymous sources. Rather, they recite information recounted by Jeremy Goldring, Esq., in open court, based on information provided in discovery by Defendant E-House. A:46¶¶100-101. Furthermore, Plaintiffs pled an abundance of contextualizing detail, such as who approved the projections (Zhou), when they were made (June 2016), how they were used (as a replacement that superseded the Published Projections), who performed diligence on them (PriceWaterhouseCoopers), that they were used in Defendants' investor pitches, and many details about their content. A:47-49¶¶104–07.

[4] In the Opinion, *Fanhua* was incorrectly cited as a Second Circuit decision.

This Court's recent decision in *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co. Ltd.*, 19 F.4th 145 (2d Cir. 2021) ("*Qihoo Appeal*") is illustrative. There, just as in this Action, plaintiffs alleged that defendants had a plan to relist the company after a take-private merger. A core piece of evidence supporting plaintiffs' claims was a news article describing the actual relisting plan. The district court disregarded this article finding that it did not recount "terms, participants, profitability, or mechanics" of the relisting plan. *Id.* at 150. The Second Circuit reversed, crediting the article and cautioning that, "[a]lthough pleading standards are heightened for securities fraud claims, '***we must be careful not to mistake heightened pleading standards for impossible ones***.'" *Id.* (citation omitted; emphasis added).

The Opinion also rejected the well-pled facts, holding that "[the] Court need not credit arguments of a third party's counsel in a totally separate proceeding." SPA:25. Plaintiffs' allegations are derived from factual statements ***based on discovery produced by E-House***, made by a reputable attorney—not mere "argument." A:47-49¶¶104–07.

The Opinion cited *Caiafa v. Sea Containers Ltd.*, 525 F. Supp. 2d 398, 411 (S.D.N.Y. 2007), where the court declined to accept allegations from ***pleadings*** in an unrelated suit as true. However, there is an immense difference between allegations in pleadings and statements of fact in open court after discovery. Furthermore, many cases find even allegations based pleadings to be permissible

when they are sufficiently detailed. *See Hirsch v. Complex Media, Inc.*, 2018 WL 6985227, at *10 (S.D.N.Y. Dec. 10, 2018) ("Courts in this District have made clear that there is no 'bright-line rule prohibiting citations to allegations from other proceedings.'") (citaiton omitted). "It makes little sense to say that information . . . which [Plaintiff] could unquestionably rely on if it were mentioned in a news clipping or public testimony—is immaterial simply because it is conveyed in an unadjudicated complaint." *In re Bear Stearns Mortg. Pass-Through Certificates Litig.*, 851 F. Supp. 2d 746, 768 (S.D.N.Y. 2012)).

(ii) The Opinion Overlooked or Misinterpreted Critical Allegations

First, the Court stated that "projections adopted by the Buyer Group . . . cannot necessarily be attributed to Board, the Committee, or E-House." SPA:25-26. But Plaintiffs alleged that "for internal purposes" the Updated Projections "***replaced***" the earlier ***management*** projections (*i.e.*, the Published Projections). A:47-48¶104; *id.* (the Updated Projections were "comparable in form to the publicly disclosed [Updated Projections]."). Indeed, E-House CEO and Buyer Group member, Defendant Zhou, "approved," the projections. *Id.*

Second, the Opinion stated that "the mere fact that the Buyer Group made projections in the June/July timeframe does not render the [Published Projections] misleading." SPA:26. This continues the error from the prior point; it is not alleged that the Buyer Group made the projections, and it is alleged that they were used

internally by E-House and replaced the ***management*** projections, "which had become out of date and were superseded by the [Updated Projections] due to the Company's improved performance." A:47-48¶104. Additionally, the Complaint does not allege the Updated Projections were made "in the June/July timeframe" (SPA:26); it alleges they were made "in June," ***before*** the Final Proxy was published in July. A:47-48¶104.

Third, the Opinion overlooked Plaintiffs' allegation that in the Appraisal trial an Investment Agreement was submitted as a trial exhibit, showing the ***financial guarantee*** of the Updated Projections given to private investors in sales that began closing the same month as the Merger, which supports the significance of the Updated Projections. A:50¶113. The Opinion concluded that the "Buyer Group's" confidence in the Updated Projections was "irrelevant" to the "Committee's view" of the projections. SPA:26. This analysis misconstrues the allegations. The relevant false statement does not refer to the "Committee;" it refers to "management." A:59¶143. Defendant Zhou who approved the Updated Projections was a member of the Buyer Group ***and*** E-House's management.

(iii) The Opinion Drew Incorrect Conclusions Regarding the Actionability of the Projection Statements

The Opinion applied the PSLRA safe harbor, overlooking that (1) Plaintiffs challenge present tense statements about the projections and (2) even under the safe harbor analysis the Projection Statements were actionable. SPA:20-21.

Where "a statement contains both forward and backward-looking aspects, the two must be . . . analyzed separately." *Abuhamdan v. Blyth, Inc.*, 9 F. Supp. 3d 175, 192 (D. Conn. 2014); *In re Bear Stearns Co., Inc. Sec., Deriv., & ERISA Litig.*, 763 F. Supp. 2d 423, 493 (S.D.N.Y. 2011); *cf. In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 569 (S.D.N.Y. 2011) ("statements about present or historical facts, whose accuracy can be determined at the time they were made, are not forward-looking statements").

One of the Projection Statements literally speaks of a present tense fact—"the best ***currently*** available . . ." A:59¶143. The other Projection Statement is misleading because it omits fact, the existence of the Updated Projections, and therefore cannot be forward-looking. *See Galestan v. OneMain Holdings, Inc.*, 348 F. Supp. 3d 282, 304 (S.D.N.Y. 2018) ("Since these allegations relate to omissions of material information, the PSLRA safe harbor provision cannot insulate [them]."); *In re Salix Pharms., Ltd.*, 2016 WL 1629341, at *10 (S.D.N.Y. Apr. 22, 2016)

(failure to disclose present information about the business that undermined the reliability of forward looking statements was actionable).

The publication of misleading projections and related statements are routinely found to be actionable. *See City of Providence v. Aeropostale, Inc.*, 2013 WL 1197755, at *13 (S.D.N.Y. Mar. 25, 2013) (finding guidance statements actionable due to undisclosed facts); *In re Symbol Techs., Inc. Sec. Litig.*, 2013 WL 6330665, at *6 (E.D.N.Y. Dec. 5, 2013) (finding "revenue projection statements" actionable); *In re APAC Teleservice, Inc. Sec. Litig.*, 1999 WL 1052004, at *8 (S.D.N.Y. Nov. 19, 1999) ("[L]iability may follow where management intentionally fosters a mistaken belief concerning . . . earnings prospects.") (citation omitted); *NECA-IBEW Pen. Tr. Fund v. Precision Castparts Corp.*, 2017 WL 4453561, at *11 (D. Or. Oct. 3, 2017) (statement that projections "reflected management's most up-to-date and accurate forecasts" was actionable), *adopted*, 2018 WL 533912 (Jan. 24, 2018).

Furthermore, even under the safe harbor analysis, Defendants are not absolved of liability. The Opinion erroneously held the statements were inactionable due to the supposed existence of cautionary language. A:20.

The supposed cautionary statement accepted by the Court conveyed that (1) the Published Projections did not take into account events after they were prepared; (2) the projections are not a guarantee of performance; and (3) the ***alleged false statement*** the Published Projections were the "best currently available." SPA:22.

None of these statements "convey substantive information about factors that realistically could cause results to differ materially from projections," as is required for them to act as "cautionary" under the PSLRA. *Slayton v. Am. Express Co.*, 604 F.3d 758, 768-73 (2d Cir. 2010). Rather, the first two are mere boilerplate facts, true of all projections, and the third is merely a false statement.

2. The Pure Omissions Regarding the Projections Were Actionable

Insider trading law creates an affirmative duty to disclose all material nonpublic information ("MNPI") before an insider trades securities. A:63-64¶¶156-58; *Chiarella v. United States*, 445 U.S. 222, 227 (1980). This duty arises "from the existence of a fiduciary relationship." *Dirks v. S.E.C.*, 463 U.S. 646, 654 (1983). The disclosure duty is owed to "investors trading contemporaneously with the insider." *Wilson v. Comtech Telecom. Corp.*, 648 F.2d 88, 94-95 (2d Cir. 1981). Defendants purchased shares from Plaintiffs through the Merger and therefore, contemporaneity is satisfied.

The immediate point of the Merger was for the Buyer Group to purchase all public E-House securities. A:63-64¶¶158-60. While the purchase was accomplished through the Merger, the form of the trading has no bearing on the duty to disclose all MNPI. *See In re Shanda Games Ltd. Sec. Litig.*, 2022 WL 992794,

at *7-9 (S.D.N.Y. Mar. 31, 2022);[5] *cf. Basile v. Valeant Pharm. Int'l*, 2015 WL 7352005, at *6-7 (C.D. Cal. Nov. 9, 2015) (one cannot "avoid [insider trading] liability" by trading through "third parties"); *Vine v. Beneficial Fin. Co.*, 374 F.2d 627, 634-35 (2d Cir. 1967) (holding that the exchange of sales in a merger constitutes a sale for purposes of the Exchange Act); *Green v. Hamilton Int'l Corp.*, 437 F. Supp. 723, 727-29 (S.D.N.Y. 1977) (redemption of bonds while in possession of nonpublic information constitutes insider trading).

Insider trading law required the disclosure of the Updated Projections because this information was known to Defendants and undeniably material to investors' assessment of the Company and the Merger. A:63-64¶158.

SEC regulations created an affirmative duty to disclose specific information in the Final Proxy. A:61-63¶¶147-155. The Second Circuit and its "sister circuits have long recognized that a duty to disclose under Section 10(b) can derive from

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[5] *Shanda* found that the CEO of a corporation that led a group of buyers to acquire that corporation engaged in insider trading through the Merger. *Shanda,* 2022 WL 992794, at *7-9. *Shanda* took a narrow view of whether other Merger participants—including the entities used in the Merger—could also be liable, where those entities acted as agents for or under the control of the company's insiders. *Id.* Plaintiffs in the *Shanda* action have sought entry of a final judgment to appeal that holding. 1:18-CV-2463-ALC, (S.D.N.Y. May 11, 2022), ECF No. 107. Each of the buyer Defendants—and the entities they transacted through—owed duties to disclose prior to the Merger. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 686–87 (1949) ("an agent is liable for his own torts") (citations omitted).

statutes or regulations that obligate a party to speak." *Stratte-McClure v. Morgan Stanley*, 776 F.3d 94, 102 (2d Cir. 2015) (collecting cases).

Item 7 of Schedule 13E-3 requires the disclosure of the "purposes" for the transaction, the "reasons" for undertaking the transaction, and the "effect" of the transaction on the Buyer Group. *See* 17 C.F.R. §229.1013; A:62¶151. The instructions to Schedule 13E-3 further clarify that "[c]onclusory statements will not be considered sufficient" and that the requirement to disclose the "effects" should include a "reasonably detailed discussion" of the "benefits" of the "transaction" for the Buyer Group which must be "quantified to the extent practicable." *Id.*

Defendants' omission of the Updated Projections violated the disclosure duties imposed by Item 7 because the benefits of the Merger to the Buyer Group included the benefits of owning E-House, and those benefits could only be "quantified" upon disclosure of the Updated Projections—or a similar disclosure that demonstrated the real then-current value of the Company.

Rule 13e-3(d)(2) requires prompt amendment upon "any material changes in the information set forth in the schedule." *See* 17 C.F.R. §240.13e-3(d)(2); A:62¶153. The Updated Projections were material to any review of the Published Projections included in the proxies and to Defendants' statements that those Published Projections were the "best currently available estimates and judgments." A:39¶73.

Cayman Islands law, requires directors—including Defendants Zhou, Shen, and Chao—to disclose "sufficient information" to investors, to allow them to fairly understand matters they are called upon to vote on. *Davis v. Scottish Re Grp. Ltd.*, 159 A.D.3d 528, 529 (N.Y. App. Div. 2018) (citing *Sharp v. Blank*, [2015] EWHC 3220 [Ch], ¶5). This obligation mirrors duties imposed by U.S. states. *E.g.*, *Malone v. Brincat*, 722 A.2d 5, 10 (Del. 1998) (Delaware law imposes a "duty" requiring "directors to provide the stockholders with accurate and complete information material to a transaction").[6] Cayman Islands law required disclosure of the Updated Projections because this information was necessary in order to provide investors with "sufficient information" to understand the the Merger.

It is well established that omissions that violate disclosure obligations imposed by fiduciary duties can give rise to Exchange Act claims. *See In re Mindbody, Inc. Sec. Litig.*, 489 F. Supp. 3d 188, 209-10 n.13 (S.D.N.Y. 2020) (finding actionable omission under §10(b) where defendant allegedly violated Delaware law fiduciary duty to disclose all material information prior to merger);

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[6] The Opinion incorrectly stated that *In re Shanda Ltd. Sec. Litig.*, 2020 WL 5813769, at *4-5 (S.D.N.Y. Sept. 30, 2020) held that *Davis* did not support a duty to disclose sufficient information. A:29-30. In fact, *Shanda* merely held that the duty under *Davis* was not a "pure omission" that would support the *Affiliated Ute* presumption of reliance (*see* Section II(B)). Additionally, *Shanda* misreads *Davis*, which clarifies the disclosure duty arises from fiduciary duties, not from beginning to speak, and its violation is thus a pure omission. 159 A.D.3d 528, 529.

Levitt v. J.P. Morgan Sec., Inc., 710 F.3d 454, 467 n.9 (2d Cir. 2013) (describing §10(b) omissions claims and holding "courts have found that '[f]iduciary relationships and their concomitant duty to disclose may be established by state or federal law'") (citation omitted).

<u>The Opinion did not address these omissions</u>, except by cross-referencing its analysis of the misstatements. SPA:30. Thus, if dismissal of the Projection Statements is reversed, dismissal of the omission claims should also be reversed.

However, many of the arguments raised in the analysis of the Projection Statements are facially inapplicable to the omission claims. For example, the omissions do not need to render any affirmative statements misleading, and are actionable as long as they concern material information that Defendants had a duty to disclose. In addition, the omissions cannot be subject to the PSLRA Safe Harbor. *See Galestan* 348 F. Supp. 3d at 304 ("Since these allegations relate to omissions of material information, the PSLRA safe harbor provision cannot insulate the challenged statements."). Any cautionary language regarding the disclosures, cannot cure Defendants' omissions of then-present fact. *Id.*

3. The Subsequent Transaction Statements Were Materially Misleading

a. Falsity Regarding the Subsequent Transaction Statements

First, the Final Proxy stated that the Buyer Group did "not have any present plans or proposals that relate to or would result in" any corporate restructuring, asset sales, or "any other material changes in the Company's business." A:56¶130. This was false and misleading because the plans for the Subsequent Transactions were just such "plans or proposals."

Second, the Proxy Statement stated E-House would "cease to be a publicly traded company," after the Merger. A:58¶136. This statement was misleadingly incomplete because it omitted to disclose the plans to subsequently relist the Company on an Asian exchange. A:58¶137.

Third, the Final Proxy stated the Buyers Group would "continue to evaluate the Company's entire business and operations from time to time, and may propose or develop plans and proposals." A:58¶138. This statement was misleading because it conveyed that a plan for Subsequent Transactions merely could occur upon later assessment, when those plans already existed.

Fourth, the Final Proxy stated the Buyer Group's reasons for the Merger were "to take advantage of the benefits of the Company being a privately held company," and specifically identified those benefits as "greater flexibility to focus on

addressing the challenges to the Company's long-term profitability without the constraints caused by the public [market]." A:56-57¶132, 134. This was false and misleading because it misstated Defendants' reasons for the Merger. A:57¶133. They were not planning for E-House to operate as a private company—but ultimately planned to relist. *Id.* Furthermore, regulatory filings in connection with the relisting revealed these were *not* the reasons for the Merger—which was actually conducted because the Buyers believed E-House was "undervalued" and because they wanted to pursue the planned Subsequent Transactions. *Id.*

b. The Opinion's Dismissal of the Subsequent Transaction Statements Should Be Reversed

The Opinion first dismissed the false and misleading statement regarding the Buyer Group's reasons for the Merger. A:26. The entirety of its analysis was to quote the following portion of the false statement: "the Buyer Group did not consider alternative transaction structures, because the Buyer Group believed the Merger was the most direct and effective way . . . to acquire ownership." A-26 (quoting ¶132). The Opinion did not explain why this quote supported dismissal. *Id.*

If the Opinion's quotation suggests that the disclosure was not misleading, because it was literally true that the Buyer Group intended to acquire ownership, this would merely disregard that the *reasons given* as to why the Buyer Group wanted to acquire ownership were misleadingly stated and the true reasons were omitted. A:56-57¶133, 135. The stated reasons were "greater flexibility" to address E-

Houses' "long-term profitability;" the true omitted reasons were to conduct the Subsequent Transactions and because the Buyer Group believed E-House was undervalued. A:57¶134-35; *see Mendell v. Greenberg*, 927 F.2d 667, 675 (2d Cir. 1990) (material omissions regarding motivation for acquiring control are actionable), *amended*, 938 F.2d 1528 (2d Cir. 1990).

As to the statements denying Defendants' plans for any post-merger transactions, the Opinion relied on the three arguments to dismiss these statements. As explained below, this analysis was erroneous.

First, the Opinion misapplied one narrow aspect of *Basic's* holding in determining whether the statements at issue were material, commenting that *Basic* recognized that materiality is a case-by-case determination and treating this truism as an instruction for the Court to make a factual finding to assess materiality. A:26-27 (citing *Basic*, at 485 U.S. 238-39).

Basic does not invite the District Court to make factual determinations on a motion to dismiss. It holds that materiality is satisfied where there is 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." *Basic*, at 485 U.S. 231-32. Subsequent cases clarify that ***at the pleading stage*** a factual determination that this standard has not been met, can only be reached where

undisclosed information was "so obviously unimportant to a reasonable investor that reasonable minds could not differ." *Ganino*, 228 F.3d at 162.

Under the proper standard, Plaintiffs have sufficiently alleged material misstatements. The existence of planned Subsequent Transactions would certainly be material to a reasonable shareholder considering whether to approve the Merger. Indeed, this Court recently addressed nearly this ***exact question***, finding that an alleged plan to relist a Chinese-based, U.S.-listed company—in Asia after a management buyout was not so "obviously unimportant to a reasonable investor" that dismissal on materiality would be appropriate. *Qihoo Appeal*, 19 F.4th at 151.

Second, relying on the subsequently-reversed lower court holding in *Qihoo*, the Opinion held that Plaintiffs needed to alleged a "concrete plan." SPA:27, 29 (citing *Altimeo Asset Mgmt. v. Qihoo 360 Tech. Co. Ltd.*, 2020 WL 4734989, at *9, 16 (S.D.N.Y. Aug. 14, 2020)) (the "*Reversed Qihoo Decision*"). In the *Reversed Qihoo Decision*, the district court used the term "concrete plan" to require plaintiffs to allege the "terms, participants, profitability, or mechanics" of the plan. On appeal, this Court held that a sufficiently material plan had been alleged without requiring these details because "information concerning merger negotiations" can be material even "when 'negotiations had not [yet] jelled to the point where a merger was probable.'" *Qihoo Appeal*, 19 F.4th at 151 (quoting *SEC v. Shapiro*, 494 F.2d 1301,

1306-07 (2d Cir. 1974)). That negotiations in furtherance of the relisting "were ongoing—or had already happened—at the time" was sufficient. *Id*.

The allegations regarding the planned Subsequent Transactions are ***at least*** as strong as in *Qihoo*—as Plaintiffs allege and provide substantial detail about specific documents created in furtherance of those plans, that investors were actually pitched in furtherance of those plans prior to the Merger closing and already started to execute them contemporaneously with its closing, and that Defendants' later ***admitted*** that pursuing their "capital markets strategies" (*i.e.*, the Subsequent Transactions) were the true reasons for the Merger. A:51-52¶¶116-17.

Imposing a special bright-line requirement to plead a "concrete plan," (SPA:27) with specific requirements as to what constitutes such a pleading would be directly contrary to the legions of controlling authorities cautioning against such rules in evaluating materiality in the merger context.[7] In *Basic*, the Supreme Court expressly rejected such bright-line rules, finding that the Sixth Circuit's requirement that denials of a proposed merger could only be material if there was an "agreement

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[7] *Joseph v. Mobileye, N.V.*, 225 F. Supp. 3d 210, 214, 219-20 (S.D.N.Y. 2016) (holding whether complaint adequately alleged that defendants misrepresented "that there was no then-existing plans for an IPO" was an issue for the trier of fact, where the company brought in "stakeholders who can help the company move toward an IPO" that was "expected . . . in perhaps a year and a half"); *In re Merrill Lynch Auction Rate Sec. Litig*., 2011 WL 1330847, at *2, 8 (S.D.N.Y. Mar. 29, 2011) (holding statements touting ARS market were false in light of the fact that defendants "contemplated ending their [market] intervention").

in principle," to be impermissibly restrictive, given the highly factual nature of the materiality inquiry. *Basic*, 485 U.S. at 233. The Opinion's requirement of a "concrete plan" (complete with alleged deal terms) goes *farther* than the firmly rejected "agreement in principle" test and is plainly erroneous.

4. The Pure Omissions Regarding Defendants' Plans and Reasons for the Merger Were Actionable

Insider trading law required the disclosure of the planned Subsequent Transactions and reasons for the Merger because this information was known to Defendants and material. The information would "alter[ ] the 'total mix'" of information available to investors' assessing the Merger, the alternatives to the Merger, and Defendants' motivations regarding the Merger and related disclosures. *See Basic*, 485 U.S. at 231-32 (defining materiality); *Ganino,* 228 F.3d at 162 ("[m]ateriality is mixed question of law and fact.").

Cayman Islands law required disclosure of the planned Subsequent Transactions and reasons for the Merger because this information was necessary in order to provide investors with "sufficient information" to understand the merits of the Merger. *Davis,* 159 A.D.3d at 529.

SEC regulations required disclosure of planned Subsequent Transactions and reasons for the Merger.

The omission of information regarding the planned Subsequent Transactions directly violated **Item 6 of Schedule 13e-3**, which required the Proxy to "[d]escribe

any plans, proposals or negotiations that relate to or would result in . . . [a]ny other material change in the subject company's corporate structure or business" or "the acquisition by any person of any additional securities of the subject company, or the disposition of securities of the subject company." A:50¶149. The plans and proposals for the Subsequent Transactions triggered each of these points, as it would result in stock sales and major changes to E-House's capital structure and business. Solicitations to investors in furtherance of the Subsequent Transactions began before the Merger closed, and thus Defendants violated the duty imposed by SEC Rule 13e-3(d)(2) to promptly amend the Final Proxy upon any material change to the information therein.

The omission of information regarding the planned Subsequent Transactions and Defendants' purposes for the Merger also directly violated **Item 7 of Schedule 13e-3**, which requires disclosure of the "purposes" for the transaction, the "reasons" for undertaking the transaction, and the "effect" of the transaction on the Buyer Group. A:62¶151; 17 C.F.R. §229.1013. Defendants did not state their true reasons for the Merger, which was their belief that E-House was undervalued and their intention to pursue the Subsequent Transactions. This omission is particularly egregious given that Item 7 expressly requires the discussion to be "reasonably detailed" and states that "conclusory statements will not be considered sufficient." *Id.* Additionally, Item 7 requires the benefits of the Merger be "quantified to the

extent practicable" and yet Defendants did not disclose the financial benefits they would receive from the Subsequent Transactions.

The Opinion did not address these omissions, except by cross-referencing its analysis of the misstatement claims. SPA:30. Thus, if dismissal of the Subsequent Transaction Statements is reversed, dismissal of these omission claims should also be reversed.

However, even if the Subsequent Transaction Statements are dismissed, these omission claims remain independently actionable. The duties to disclose this information turns on its materiality and the language of the relevant SEC regulations. The question is whether the information was material and whether the SEC regulations required its disclosure.

5. The "Fairness Statements" Were Materially Misleading

a. False Statements and Omissions

The Final Proxy stated that: (1) "each member of the Buyer Group believes that the Merger is substantively and procedurally fair to the security holders who are not affiliated to the Company;" and (2) that the Board determined the Merger was "fair" and "in the best interests of the Company and its security holders, including security holders unaffiliated to the Company, and declared it advisable, to enter into the Merger Agreement." A:54-55¶125, 127.

Defendants made these assurances despite the fact that the Updated Projections (which included and were based on E-House's actual performance in the first half of 2016) showed the Company to be far more valuable than the Merger price, and despite the fact that the Merger was part of a scheme to deprive investors of fair value—which scheme included the preparation of an Investor Presentation to pitch Subsequent Transactions, showing that just E-House's core business was worth far more than the Merger price. *See* Section I(B)(3) (discussing fair value). Additionally, Defendants later admitted they conducted the Merger because E-House was "undervalued," indicating they always knew the Merger price (which was just a slight premium to the unaffected market price) was unfair. A:51-52¶117.

It was materially misleading for Defendants to assert their belief that the Merger was fair without disclosing this significant information that would substantially undermine that view. A:54-55¶126. These statements were also misleading because Defendants could not have believed the Merger was fair, as (1) Defendants knew of the much higher Updated Projections, which cannot be squared with any plausible belief that the Merger was fair and (2) Defendants knew the Merger was part of a multi-step plan to deprive investors of E-House's much higher value—that Defendants were planning to secure for themselves. *Id.*

The Fairness Statements are subject to the *Omnicare* framework, which holds that opinions may be misleading if (1) "the speaker d[oes] not hold the belief . . .

professed"; (2) the "fact[s] [ ] supplied" in support of the belief professed are "untrue"; or (3) the speaker 'omits information' that 'makes the statement misleading to a reasonable investor.'" *Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018) (quoting *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016)).

Here, Defendants were aware of four key pieces of contradictory information: (i) E-House's higher valuation; (ii) Updated Projections supporting that higher valuation; (iii) the Company's recent financial performance supporting that higher valuation; and (iv) the planned Subsequent Transactions whose purpose was to capitalize on that higher valuation. A:47,49¶¶104, 108-09. With this information, Defendants could not have believed that the Merger, at a significantly lower valuation, was fair. *See Martin,* 732 F. App'x at 40. Additionally, this information was omitted and made the Fairness Statements misleading to investors. *Id.*

Myriad cases confirm that statements regarding a transaction's fairness are actionable where defendants did not believe those statements or they were rendered misleading by undisclosed facts. *ODS Cap. LLC v. JA Solar Holdings Co. Ltd.*, 2020 WL 7028639, at *11 (S.D.N.Y. Nov. 30, 2020) ("*JA Solar District Court Opinion*") (fairness statements actionable because of "understated and misrepresented" figures); *Koppel v. 4987 Corp.*, 167 F.3d 125, 133 (2d Cir. 1999) (holding a merger recommendation is actionable when based on analysis that fails to account for known financial situation); *Bricklayers & Masons Local Union No. 5*

Ohio Pension Fund v. Transocean Ltd., 866 F. Supp. 2d 223, 244 (S.D.N.Y. 2012) (fairness statement relied on false and misleading information); *see also In re Hot Topic, Inc. Sec. Litig.*, 2014 WL 7499375, at *2, *6 (C.D. Cal. May 2, 2014) (worse projections relied on "flawed and inaccurate assumptions"); *Brown v. Papa Murphy's Hold.*, 2021 WL 1574446, at *2 (W.D. Wash. Apr. 22, 2021) (holding statements "endorsing" unreasonably prepared projections and "fairness of the Merger" price were actionable).

b. The Opinion's Analysis of the Fairness Statements Was Erroneous

The Opinion's analysis can be summarized as follows: (1) the entirety of Plaintiffs' position regarding the Fairness Statements hinges on the allegation that Updated Projections were more meaningful than the Published Projections; and (2) that allegation is not sufficiently supported. SPA:29.

First, this analysis ignores Plaintiffs' allegation that Defendants did not believe the Merger was fair because it was part of a scheme to deprive investors of fair value. A:55¶126. That allegation did not turn entirely on the projections. Rather, it incorporates the entirety of Defendants' scheme – *i.e.*, the failure to disclose the Updated Projections, the failure to disclose the planned Subsequent Transactions, and the failure to disclose the Investor Presentation in furtherance of those Subsequent Transactions, which included a far higher valuation for E-House

than the Merger price, which cannot be squared with the assertion that the Merger was fair. The Court ignored this aspect of Plaintiffs' allegations.

Second, the Opinion's conclusion that Plaintiffs did not adequately allege the Updated Projections were more meaningful than the Published Projections was erroneous.[8] As detailed in Section I(A)(1)(b), Plaintiffs' allegation that the Updated Projections were more meaningful should be credited – the Complaint adequately alleged sufficient information regarding the preparation of the Updated Projections, and adequately alleged that they were: (a) a more recent update to the older projections, a fact which standing alone suggests their greater significance at the time the Final Proxy was published; (b) approved by Defendant Zhou and PriceWaterhouseCoopers; (c) based on E-House's actual performance during the first half of 2016; (d) used to pitch subsequent private investors during the relevant time period; and (e) so trusted by the Buyers that the Buyers provided a financial guarantee to private investors that the Updated Projections would be met. These allegations sufficiently support the conclusion that Defendants knew that assertions of the Merger's fairness based on the Published Projections were misleading.

[8] For the avoidance of doubt, this issue is not properly analyzed merely by cross-referencing the conclusion as to whether the Projection Statements are actionable. Several the District Court's conclusions on that topic are facially irrelevant to the question of whether the Updated Projections were more meaningful, such as the applicability of the PSLRA Safe Harbor, and the presence of cautionary language.

Additionally, the far higher valuation included in the Investor Presentation directly supports the conclusion that Defendants trusted the Updated Projections (which were used to justify that higher valuation) over the stale Published Projections.

6. Defendants Engaged in a Fraudulent Scheme

Plaintiffs alleged that the totality of Defendants' conduct with respect to the Merger constituted an actionable scheme to defraud investors out of the fair value for their shares, actionable under SEC Rule 10b-5(a)/(c). A:73-74¶¶190-95. The Opinion dismissed these claims by cross-reference to its analysis of the alleged false statements. SPA:31. Thus, because the dismissal of those claims should be reversed, the dismissal of the scheme claims should also be reversed.

However, the scheme claims are also independently actionable. Scheme liability is "expansive" and "capture[s] a wide range of conduct." *Lorenzo v. S.E.C.*, 139 S. Ct. 1094, 1101 (2019).); *see also In re Eletrobras Sec. Litig.*, 245 F. Supp. 3d 450, 470 (S.D.N.Y. 2017) (scheme liability is based on defendant's "inherently deceptive act[s]"). The proper analysis of scheme claims should consider the totality of the conduct, as opposed to narrowly considering false statements or omissions. Here, the Buyer Group plotted to underpay for E-House so that the Buyer Group could resell and relist the Company at a much higher price. A:73-74¶¶190-95.

B. Plaintiffs Adequately Pled Loss Causation

It is unclear whether the District Court ruled on loss causation. The Opinion states: "Because Plaintiffs have failed to allege actionable misrepresentations or omissions, the Court need only address Defendants' [falsity] argument." SPA:18. However, in a later footnote, the Opinion stated that "Plaintiffs are unable to allege loss causation," and referred to this as "an independent reason for the failure of their claims." SPA:30, at n.11. Either way, this conclusion was erroneous.

1. The "Fair Value Measure" of Out-of-Pocket Loss Is a Correct Approach to Demonstrating Loss Causation

It is hornbook law that plaintiffs defrauded into selling[9] are entitled to "out of pocket" loss equal to "the fair value of the security [] sold minus the fair value of the consideration [] received." Jacobs, Disclosure and Remedies Under the Securities Laws, §20:53 (Mar. 2020) (the "Fair Value Measure" of out-of-pocket loss).

First, the Fair Value Measure was endorsed by the Supreme Court in the seminal *Mills* case, which stated relief may be "predicated on a determination of the fairness of the terms of the merger at the time it was approved." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 389 (1970). *Mills* further clarified that monetary relief would be appropriate "if the merger resulted in a reduction of the earnings or

[9] The separate element of a §10(b) claim known either as "transaction causation" or "reliance," inquires into whether a plaintiff's sale was induced by or causally connected to the alleged misrepresentations or omissions. The District Court did not analyze this element, but a discussion of reliance is set out in Section II(B).

earnings potential of [plaintiff's] holdings." *Id.* The most prominent method used to assess fair value—the Discounted Cash Flow[10] method—assesses the fair value of a security by analyzing its "earning potential," and thus *Mills* is describing ordinary valuation principles.

Second, whereas *Mills* endorsed the Fair Value Measure in the context of a merger, the Supreme Court endorsed the same method more broadly in *Affiliated Ute Citizens of Utah v. United States*, holding that when investors are defrauded into selling, "the correct measure of damages . . . is the difference between the fair value of all that the . . . seller received and the fair value of what he would have received had there been no fraudulent conduct." 406 U.S. 128, 155 (1972).[11]

Third, the Second Circuit has repeatedly endorsed the Fair Value Measure. *E.g., Pierre J. LeLandais & Co., Inc. v. MDS-Atron, Inc.*, 543 F.2d 421, 424-25 (2d Cir. 1976) (defrauded sellers may prove damages by establishing the "'fair cash value,' *i.e.*, the appraisal value, of their holdings" as of the date of the sale, and endorsing the use of "valuation experts" to make such showing at the merits stage); *Mendell v. Greenberg*, 938 F.2d 1528, 1529 (2d Cir. 1991) (permitting trial on "the

[10] Samuel C. Thompson, Jr., *A Lawyer's Guide to Modern Valuation Techniques in Mergers and Acquisitions*, 21 J. Corp. L. 457, 460 (1996).

[11] Here, Plaintiffs alleged the fraud caused them to sell their securities, and therefore in the absence of the fraud, Plaintiffs would have "received" (to use the language from *Affiliated Ute*) continued ownership of those valuable securities. A:67¶170.

issue of fair value" where plaintiff argued under-valuation principles that fair value was "higher" than deal price); *Wilson v. Great Am. Indus., Inc.*, 855 F.2d 987, 996 (2d Cir. 1988) ("*Wilson 1*") ("determination of damages should include a valuation of [the issuer's] future earning power, viewed prospectively from the date of the merger"); *Wilson v. Great Am. Indus, Inc.*, 979 F.2d 924, 931-33 (2d Cir. 1992) ("*Wilson 2*") (holding that loss causation may be established where proxy materials prompt shareholders to accept an "unfair" exchange).

This issue was recently addressed in *Gray v. Wesco Aircraft Holdings, Inc.*, 454 F. Supp. 3d 366 (S.D.N.Y. 2020) ("*Gray*"), *aff'd*, 847 F. App'x 35 (2d Cir. Feb. 26, 2021) ("*Gray Appeal*"). There, plaintiff alleged that a merger proxy included a second set of projections that were intended to make the company look worse. *Id*. at 376-77. The courts did not find any misrepresentations, concluding that plaintiff did not have any basis to doubt the legitimacy of the later projections. *Id.* at 397.

Gray also held that plaintiff had not alleged loss causation, because the allegations of loss were not predicated on the illegitimacy of the revised projections. *Id*. at 403-07. The *Gray* opinion clearly recognized that this holding was fact-dependent, and that "the decision to be acquired could [in another circumstance] cause a loss compared to the decision to remain independent." *Id.* at 407. In other words, the holding endorsed the view that if the deal undervalued the shares compared to fair value, that would cause losses. The Second Circuit affirmed,

finding that plaintiff had not alleged facts to support his claims or his losses, but did not disparage the theory of loss plaintiffs articulated, *i.e.,* that "loss is based on the difference between the . . . merger share price and . . . the true value of [the] shares prior to the Merger." *Gray Appeal*, at 37. Thus consistent with its many prior holdings, the Second Circuit tacitly accepted that, when supported by the facts alleged, the Fair Value Measure is a viable theory of loss.

As a District Court recently explained, the reasoning in *Gray* implies that a claim is adequately alleged where the alternative, more positive projections that defendants ignored in the proxy materials "*are* 'sufficiently likely'" to be realized. *Baum v. Harman Inter. Indus., Inc.*, 2021 WL 5908929, at *4, 7-8 (D. Conn. Dec. 14, 2021). The Updated Projections clearly meet this standard, given that Defendants were so confident in them that they provided a ***financial guarantee*** that they would be realized within 95% of what they projected. A:50¶113.

<u>Fourth</u>, District Court opinions routinely credit allegations of loss causation based on the Fair Value Measure. *E.g., Baum v. Harman Int'l Indus., Inc.*, 408 F. Supp. 3d 70, 92 (D. Conn. 2019) (recognizing that when "plaintiff asserts that shareholders were misled into approving an acquisition that undervalued the company, loss causation is adequately alleged," and crediting allegations based on that theory); *Lewis v. Termeer*, 445 F. Supp. 2d 366, 371 (S.D.N.Y. 2006) (finding loss causation based on allegation that transaction consideration "did not reflect the

true value"); *Lichtenberg v. Besicorp Grp. Inc.,* 43 F. Supp. 2d 376, 389-90 (S.D.N.Y. 1999) ("[L]oss causation is established when a proxy solicitation would result or has resulted in merger on terms that are unfair to the shareholders.").

Out-of-circuit cases endorsing this measure of loss causation are voluminous. *E.g., Hot Topic*, 2014 WL 7499375, at *10; *Azar v. Blount Int'l, Inc.*, 2017 WL 1055966, at *11 (D. Or. Mar. 20, 2017); *In re Envision Healthcare Corp*., 2019 WL 3494407, at *8 (D. Del. Aug. 1, 2019); *Papa Murphy's.*, 2021 WL 1574446, at *4; *Brown v. Brewer*, 2010 WL 2472182, *25, *32 (C.D. Cal. Jun. 17, 2010) ; *Levie v. Sears, Roebuck & Co.*, 496 F. Supp. 2d 944, 949 (N.D. Ill. 2007); *cf.*, *Wilson 2*, 979 F.2d at 932-33 (recognizing the "the forfeiture of appraisal rights" supports a claim.

2. The Pleading Burden Applicable to Loss Causation

The Second Circuit has not stated whether pleadings of loss causation must meet the standards set by Federal Rule of Civil Procedure 8 or 9. *See Gray Appeal*, at *1 n.3. However, "the vast majority of courts in this [Circuit] have required that [pleading] loss causation only meet the notice requirements of Rule 8." *Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities, LLC,* 797 F.3d 160, 183 (2d Cir. 2015) (citation omitted). Regardless of the label, this Court and the Supreme Court have clarified the pleading requirement as follows.

The burden of pleading loss causation "is not a heavy one." *Loreley,* 797 F.3d at 187 (citation omitted). Because "pleading rules are not meant to impose a great

burden upon a plaintiff," all that is required at this stage, even in PSLRA cases, is for plaintiff to provide "some indication of the loss and the causal connection that the plaintiff has in mind." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005). The pleading stage is not the time to test the strength of the allegations of loss causation, meaning that Plaintiffs "need only allege sufficient facts to raise a reasonable inference" in support of its loss causation theory. *Fin. Guar. Ins. Co. v. Putnam Advisory Co., LLC*, 783 F.3d 395, 404 (2d Cir. 2015).

3. The Allegations of Higher Fair Value Are Compelling

Plaintiffs will be able to precisely demonstrate the fair value of their ADS only after discovery and with the assistance of a valuation expert. However, Plaintiffs easily meet their pleading burden at this stage by strongly—and plausibly—alleging that fair value exceeded the prices received.

The Merger consideration was $6.85 and all Class Period sales were below that price. A:35¶60; A:334-35. Plaintiffs allege that the fair value of E-House ADS exceeded $6.85 based on the following well-pled facts.

First, the presentation used by Defendants to pitch new investors in the Subsequent Transactions included a slide titled "Valuation and Exit" that stated that just E-House's core business was worth $1.2 billion (A:49¶110), whereas the entire business was valued at $1.06 billion in the Merger. This means that just this portion of E-House's business was worth at least $7.78 per ADS. A:49¶111. Using that

$1.2 billion valuation for E-House's core business, and the mid-point of the valuation used in the "Fairness Opinion" for E-House's other assets, yields a valuation of $1.9 billion, or $12.60 per ADS, which would mean that the $6.85 paid in the Merger was 48% lower the ADS' fair value. A:50¶112.

Notably, this $1.2 billion valuation was used prior to the close of the Merger to pitch new, private investors, and sales based on that valuation closed in August 2016, the very same month as the Merger.

Second, the Updated Projections—which were created before the Final Proxy and formed the basis for the $1.2 billion valuation noted above—showed that E-House's actual performance during the first half of 2016 (before the Merger) greatly exceeded the "projections" used in the Fairness Opinion. The Fairness Opinion assumed net income for E-House's core business would grow at less than 2% during the entirety of 2016, when in fact it grew by a tremendous 37% in just the first six months (A:48¶106), showing E-House was worth far more than disclosed.

Third, the Updated Projections showed a consolidated annual growth rate ("CAGR") in the net income of E-House's core business, through 2019, of 19%, compared to the meager 4.65% growth shown in the Published Projections. A:48-49¶107. Using this up-to-date figure would dramatically increase E-House's valuation.

Defendants were so confident in these Updated Projections that they provided private investors in the Subsequent Transactions a contractual guarantee to compensate those new investors if E-House did not perform within 95% of the figures in the Updated Projections.

Fourth, the fact of the planned relisting and other Subsequent Transactions itself strongly (and certainly plausibly) supports the conclusion that the Merger's fair valuation was greater than the deal price, as it indicates that the Buyers believed, based on information that existed at the time of the Merger, they could turn around and sell the business, or even just parts thereof, at a profit.

Fifth, during the relisting, Defendants represented that the Merger was initiated because E-House was undervalued at the time of the Merger. A:51-52¶117. The buyout was conducted at a modest 9.08% premium to E-House's unaffected stock price (A:22¶5), which price did not reflect the positive information Defendants kept from the market, including the Updated Projections and E-House's strong performance in the first half of 2016). Thus, the fact that Defendants' believed E-House was undervalued strongly (and certainly plausibly) supports the conclusion that its fair valuation was greater than the deal price.

Sixth, just a portion of E-House's business, which the "Fairness Opinion" concluded was worth only 40% of E-House's overall valuation, was relisted on the Hong Kong exchange at a far higher valuation than paid in the Merger for the entire

company. A:51¶115. On the day of the relisting, this portion of E-House had a market capitalization of $2.651 billion, roughly 2.5 times the valuation of the entire business in the Merger of $1.06 billion. A:53¶120.

The critical point here is not the precise numbers—since some variation in valuation could be expected through the passage of time—but the fact that this tremendously higher valuation strongly supports the conclusion that E-House's fair valuation was greater than the deal price. If just 40% of E-House was worth 2.5 times the deal price just two years later, it is overwhelmingly likely that the entire business was worth more than the deal price at the time of the Merger.

4. The Opinion's Loss Causation Analysis Was Erroneous

The Opinion did not address whether Plaintiffs had adequately alleged that the fair value of their shares was higher than the price they received upon selling. The Opinion also did not offer any conclusion as to why Plaintiffs' alleged theory of loss causation—the Fair Value Measure—is not a proper approach.

Instead, in a single footnote, the Opinion found Plaintiffs' allegations of loss causation to be impermissible based on analysis not tethered to the legal standard. SPA:30, n.11. Specifically, the Opinion stated that "The price of the ADS—and the fact that the prices rose upon completion of the Merger—show that Plaintiffs are unable to allege loss causation." *Id.*

As an initial matter, the above-quoted holding misstates the facts. The ADS price did not rise on the "completion" of the Merger, the ADS stopped publicly trading A:46¶97. The price increased upon the announcement of the proposed Merger, but this could not possibly matter, given that the allegations of fraud begin months later when the Final Proxy was published. On that date, the stock rose just 8 cents or 1.2% (A:334) — and even that minor change is not contextualized on this record with analysis of how it compared to peers or the market's performance.

More importantly, the movement of E-House's ADS price has no bearing on whether the price that investors received upon selling was fair. Simply put, a security price can increase and still be trading at less than fair value. Indeed, none of the many cases cited in Section I(B)(1), which establish that the Fair Value Measure is an appropriate theory of loss causation in sellers' cases, required any showing of stock price decline to establish damages. *See Tracinda Corp. v. DaimlerChrysler AG*, 197 F. Supp. 2d 42, 68 (D. Del. 2002) (rejecting defendant's argument that plaintiffs got a 34% premium and "price actually rose" after the announcement); *San Antonio Fire & Police Pension Fund v. Dole Food Co., Inc.*, 177 F. Supp. 3d 838, 840 (D. Del. 2016) ("The fact that Dole Institutional Investor Group did not suffer a loss in the traditional sense is not dispositive, given that the underlying basis for recovery is the sale of shares at an artificially depressed price.").

The two cases cited by the Opinion do not support its conclusion that loss causation cannot be proven due to the stock price increase.

The Opinion cited *Dura*, for the ordinary proposition that loss causation "is the 'causal connection' between the material misrepresentation and the loss." A:30 (quoting 544 U.S. at 342). As the many cases cited in Section I(B)(1) establish, this standard is met where one is defrauded into selling for less than fair value.

Dura does nothing to undermine the Fair Value Measure of loss causation in the case of a defrauded seller. It held that, if one purchases at artificially inflated levels and then sells before the truth comes to light, they likely suffer no injury. *See* 544 U.S. at 347. In contrast, if one is induced to sell securities for less than fair value, they immediately suffer an injury upon that sale; no later event is necessary for a selling investor to suffer loss.

Second, the Opinion cited *the JA Solar District Court Opinion,* which dismissed claims related to another fraudulent going-private transaction, in which a China-based, Cayman-incorporated firm mislead investors by denying plans to relist. A:30; *see* 2020 WL 7028639, at *14. That decision was appealed to this Court based on its loss causation holding. *See ODS Cap. LLC v. JA Solar Holdings Co., Ltd.,* Appeal No. 20-4268 (2d Cir. Oct. 21, 2021) ("*JA Solar Appeal*"). While the appeal was pending, new evidence arose further demonstrating defendants' fraud and the *JA Solar* District Court issued an "indicative ruling" that the new evidence

may change its decision. Order, *JA Solar District Court Opinion*, ECF No. 96. As a result, the case was remanded for further proceedings. Order, *JA Solar Appeal*, Dkt. No. 94 (2d Cir. Oct. 21, 2021). However, during oral argument, the Second Circuit commented on the viability of the allegations, recognizing that in defrauded purchaser cases, one typically shows loss by demonstrating a stock price reaction to the revelation of the truth, and then stating:

> The problem here means you're never going to get that because there's a buyout by virtue of the tender offer and so on that theory, if that's what you're looking for, there's no way a plaintiff in this situation, even if lied to like crazy, . . . is going to be able to have a claim. ***That seems like an overreach***.[12]

During the hearing, defendants argued against remand on the basis that the new evidence could never justify a different disposition, because the District Court's loss causation holding would preclude recovery.[13] By remanding, the panel implicitly recognized—albeit not in a precedential holding—that loss causation was not an insurmountable obstacle, even where the stock price increased.

Finally, the Opinion's loss causation analysis should also be rejected because it embeds implicit factual conclusions that should not be resolved at this stage. It is

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[12] Oral Argument at 14:09, *JA Solar Appeal* (2d Cir. Oct. 21, 2021), https://www.ca2.uscourts.gov/decisions/isysquery/c1020d56-d869-4006-8b08-dfafa20c8bef/131-140/list (emphasis added).

[13] *E.g.*, *id.* at 11:47, 22:27.

unclear exactly why the Opinion concluded that the stock price was relevant to the issue of damages, given Plaintiffs' allegations are premised on fair value, not the stock price. Any analysis, in favor of Defendants,' that places significance on the stock price should be developed through expert analysis and evidence, as will only be possible after the pleading stage.

II. THE ISSUES NOT REACHED BY THE DISTRICT COURT

The Opinion did not address Defendants' arguments that Plaintiffs did not adequately plead reliance or scienter. Plaintiffs submit that this Court should remand these issues for the District Court to consider in the first instance. *See Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 71 (2d Cir. 2012) (remanding arguments that "the district court did not consider"). The District Court should find that the Complaint adequately pleads these elements for the following reasons, and for the reasons articulated in the briefing before the District Court.[14]

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[14] Defendants also argued that §13(e) does not provide a cause of action, which the Opinion also did not reach. The District Court should find in Plaintiffs' favor on that issue, as the weight of authority demonstrates such a cause of action exist. *E.g., In re Initial Pub. Offering Sec. Litig.,* 241 F. Supp. 2d 281 (S.D.N.Y. 2003) (recognizing 13(e) cause of action); *Fisher v. Plessey Co.,* 1983 WL 1328 (S.D.N.Y. 1983) (same); SEC Release No. 5884, 1977 WL 187732 (1977) (endorsing §13(e) as providing cause of action). Note that whether 13(e) provides a cause of action is distinct from the issue of whether it gives rise to disclosure duties. *See* Sections I(A)(2) and (4). For example, it is settled law "Item 303's affirmative duty to disclose in Form 10–Qs can serve as the basis for a securities fraud claim under Section 10(b)," though Item 303 itself does not provide a cause of action. *Stratte-McClure*, 776 F.3d at 101.

A. Scienter Is Adequately Pled

Plaintiffs must allege a "strong inference" of scienter (*i.e.*, fraudulent intent), but this does not require "smoking-gun" proof. *Tellabs*, 551 U.S. at 313-14, 323-24. Circumstantial evidence is sufficient. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007). The Complaint must be considered "in its entirety" to determine if Plaintiffs' inferences are "at least as compelling as any opposing inference." *Tellabs*, 551 U.S. at 322-24.

Scienter may be pled by alleging (1) defendants' "motive and opportunity" to defraud ***or*** (2) "strong circumstantial evidence of conscious misbehavior or recklessness." *Novak v. Kasaks*, 216 F.3d 300, 307-08 (2d Cir. 2000).

The Complaint Adequately Alleges Motive and Opportunity. "Motive and opportunity" is a sufficient basis to plead a defendant's scienter. *See Ganino*, 228 F.3d at 170. Each of the Buyer Group Defendants had the motive and opportunity to defraud shareholders, due to the profit they would reap by underpaying for the Company. *Buxbaum v. Deutsche Bank, A.G.*, 2000 WL 33912712, at *14 (S.D.N.Y. Mar. 7, 2000) (holding a buyer who "thinks he can save money by lying[,] has all the motive and the opportunity" to defraud); *In re MCI Worldcom Sec. Litig.*, 93 F. Supp. 2d 276, 283-85 (E.D.N.Y. 2000) (similar).

In highly similar scenarios, *Shanda* and *JA Solar* found that scienter was adequately pled against senior managers, directors, and acquirors, as well as the

corporate defendants, based on motive and opportunity in privatization mergers. *Shanda*, 2019 WL 11027710, at *7; *JA Solar*, 2020 WL 7028639, at *12.

Defendants' Conscious Misbehavior & Recklessness. Defendants did not dispute below that each member of the Buyer Group was aware of the Updated Projections, the July 2016 Presentation that contained them, or the Buyer Group's own plans for Subsequent Transactions. Indeed, Defendant Zhou specifically approved of the Updated Projections. A:47-48¶104.

Instead, Defendants argued only that the Complaint does not allege "contemporaneous information contradicting the Proxy's disclosures." *See* Memorandum of Law in Support of Defendants' Motion to Dismiss, *In re E-House Sec. Litig.,* No. 1:20-cv-02943-ER (S.D.N.Y. Jan. 19, 2021), ECF No. 63 ("MtD"), at 19. That is wrong because evidence from the appraisal action shows that the Updated Projections were made in June 2016, before the Final Proxy was issued on July 1. A:45¶93; A:47-48¶104. Furthermore, the plan to conduct Subsequent Transactions was documented in the July 2016 Presentation and the Buyer Group started completing these sales in August, when the Merger closed. A:49-50¶¶108-10, 113; *see also* A:51-53¶¶114-20; *In re Qudian Inc. Sec. Litig*., 2019 WL 4735376, at *4, 9 n.6 (S.D.N.Y. Sept. 27, 2019) ("The timeline of events is overwhelmingly persuasive."). Zhao also admitted in E-House's subsequent IPO that the Buyer Group took E-House private in the Merger to conduct "capital market strategies"

because E-House "was undervalued." A:51-52¶117. *See In re Refco, Inc. Securities Litigation*, 503 F. Supp. 2d 611 at 658-59 (S.D.N.Y. 2007) (holding "suspicious" circumstances support scienter).

Plaintiffs Adequately Allege E-House's Scienter. Defendants Zhou, Shen, and Chao's scienter are all imputed to E-House because they were its Co-Chairmen and Director when E-House's Board approved the Merger. A:30-¶¶33-35; A:35¶¶56-67; A:55¶127. Zhou also signed the Final Proxy as E-House's Chairman. A:110, 115. Moreover, it does not matter whether the Buyer Group Defendants "made" misstatements on behalf of E-House, because "the person whose state of mind is imputed to the [company] need not also be the person who made the material misstatements." *Patel v. L-3 Commc'ns*, 2016 WL 1629325, at *15 n.38 (S.D.N.Y. Apr. 21, 2016); *see Shanda*, 2019 WL 11027710, at *7; *JA Solar*, 2020 WL 7028639, at *13.

Defendants challenged scienter in the District Court by trying to invoke the adverse-interest exception. *See* MtD 21 n.7. This factually intensive affirmative defense is a "most narrow" exception, applied to "outright theft or looting or embezzlement." *Allied Irish Banks, P.L.C. v. Citibank, N.A.*, 2015 WL 4104703, at *8 (S.D.N.Y. June 30, 2015). It applies only if the insider "totally abandoned" the company so that the corporation did not "benefit[] to any extent" from the fraud. *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 382-83 (S.D.N.Y. 2015). While the

Buyer Group's fraud harmed E-House's minority shareholders, it benefited E-House by burdening the Company with less debt, and clearly served the Buyer Group, which owned 44.9% of the Company before the Merger. ¶¶60, 63, 98; *Shanda*, 2019 WL 11027710, at *8 (rejecting adverse-interest exception on highly similar facts).

E-House's scienter is also alleged based on the scienter of the transaction Committee, which had access to all of the Company's information, including its performance in the first half of 2016 that supported the Updated Projections. A:35¶¶56-59; A:39¶75; A:43¶89. In addition, E-House's financial performance and the Buyer Group's plans to sell the Company dealt with such central parts of E-House that a management-level employee would have known that information. *See Speakes v. Taro Pharm. Indus., Ltd.*, 2018 WL 4572987, at *9 (S.D.N.Y. 2018).

B. Transaction Causation Is Adequately Pled

Transaction causation (*i.e.*, reliance), refers to the "causal connection" between Defendants' conduct and the transaction (here, the sale of ADS) which resulted in Plaintiffs' injury. *See Basic*, 485 U.S. at 243.[15]

The Complaint brings claims on behalf of shareholders that (1) sold ADS during the Class Period but before the Merger closed and (2) tendered shares in the

[15] The statutory cause of action provided by §20A does not have a reliance element. Matthew Bender, INSIDER TRADING § 4.07 (2013). Such claims require a predicate insider trading violation of the Exchange Act, but this preedicate claim requirement does not introduce a reliance element into §20A because, while reliance is an element of a §10(b) ***claim***, it is not an element of a §10(b) ***violation***.

Merger. A:28¶¶26-27; A:71¶180. The Motion to Dismiss did not dispute transaction causation as to the first group, and therefore concedes it is adequately pled. MtD at 22. Defendants disputed transaction causation as to the tendering shareholders (*id.*), but this challenge is meritless.

First, transaction causation is satisfied under controlling law holding that the requisite causal connection is established when investors are solicited to vote on a merger utilizing a proxy that contains material misrepresentations or omissions, so long as the vote required some public shareholders to vote in favor of the Merger in order for it to proceed. *Mills*, 396 U.S. at 385 (proof of reliance is not required where a "proxy solicitation itself, rather than the particular defect in the solicitation materials," served as "an essential link in the . . . transaction."); *Grace v. Rosenstock*, 228 F.3d 40, 47-49 (2d Cir. 2000) (holding *Mills* applies to Section 10(b)); *Basic*, 485 U.S. at 243 (endorsing *Mills*). The Buyers only held 44.9% of shares; they needed to solicit shareholder votes. A:36¶63. No further showing of transaction causation is required under *Mills*.

Second, while not required, given the controlling rule established by *Mills*, the tendering shareholders also properly invoke the fraud on the market presumption of reliance. Under *Basic,* there is a presumption that both "[1] the price of stock traded in an efficient market reflects all public, material information—including misrepresentations—and [2] that investors rely on the integrity of the market price

when they choose to buy or sell stock." *Ark. Tchrs. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 879 F.3d 474, 478 (2d Cir. 2018).

Defendants tacitly conceded that Plaintiffs adequately alleged that E-House traded in an efficient market, because they did not dispute the applicability of the *Basic* to those selling prior to the close of the Merger. They instead seem to argue that this presumption is not available to the tendering shareholders because they did not sell on the stock exchange. MtD at 22-23. In support of this proposition, Defendants cited *Shanda,* 2019 WL 110027710, at *9 (MtD at 22-23), but that opinion has been superseded by a newer decision following an additional amended pleading, and in that new opinion, the court found reliance under *Basic* and clarified that its earlier holding was based on a view that market efficiency was inadequately pled, not that tendering shareholders cannot invoke *Basic*.

Defendants' argument is *directly* at odds with the rule that *Basic* recognized a *presumption* that "investors rely on the integrity of the market price when they choose to buy or sell stock." *Goldman*, 879 F.3d at 483. That rule does not depend on where one trades. Defendants' argument also cannot be squared with this Court's holding in *Black v. Finantra Cap., Inc.*, which held that a plaintiff who participated

in a negotiated, private, and off-exchange transaction could invoke the fraud on the market presumption.[16] 418 F.3d 203, 205-06, 209 10 (2d Cir. 2005).

Third, market efficiency is only an "indirect proxy for price impact," which is the fundamental basis for the *Basic* presumption. *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 281 (2014) ("*Halliburton II*") Ordinarily, "plaintiffs need not directly prove price impact." *Goldman Sachs Grp., Inc. v. Arkansas Tchr. Ret. Sys.*, 141 S. Ct. 1951, 1955 (2021). But *Basic* also applies if plaintiffs show price impact directly because "an indirect proxy should not preclude direct evidence." *Halliburton II*, 573 U.S. at 281. Defendants acknowledged that E-House's market price reacted to news about the Merger. MtD at 5. Defendants falsely promoted the Merger price as fair and if Defendants had disclosed the truth, they would have been forced to raise the Merger price to prevent shareholders from voting against the Merger or seeking appraisal. *See* A:66-67¶¶169. Defendants' misrepresentations directly impacted the price at which the Tenderers exchanged their securities in the Merger. At a minimum, the question of price impact raises factual issues that require expert evidence at class certification. *See Goldman Sachs*, 141 S. Ct. at 1960-61; *Halliburton II*, 573 U.S. at 272.

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[16] In *Finantra,* the court found that the presumption was rebutted, based on deposition testimony, but this has no bearing on its relevant legal conclusion.

Fourth, Plaintiffs can proceed under the *Affiliated Ute* presumption of reliance, as they allege pure omissions. A:67¶173; *see* Sections I(A)(2) and (4) (recounting duties and omissions); *see Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) (holding *Affiliated Ute* presumption may be invoked where pure omissions alleged).

CONCLUSION

Plaintiffs-Appellants respectfully request that this Court reverse the Judgment of the District Court and remand for further proceedings. To the extent this Court finds the claims defective in a manner curable by amendment, Plaintiffs respectfully request the Action be remanded with leave to amend. *See Loreley*, 797 F.3d at 190.

Dated June 7, 2022

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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Dated: June 7, 2022

/s/ Carol C. Villegas
Carol C. Villegas

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re E-HOUSE SECURITIES LITIGATION

OPINION & ORDER

20 Civ. 2943 (ER)

RAMOS, D.J.:

In this putative class action, lead plaintiffs Altimeo Asset Management ("Altimeo")[1] and Maso Capital Investments, Blackwell Partners LLC-Series A, Crown Managed Accounts SPC for and on behalf of Crown/Maso Segregated Portfolio (the "Maso entities," and together with Altimeo, "Plaintiffs") allege that leading Chinese real estate company E-House (China) Holdings Limited ("E-House") and its corporate officers schemed to depress the price of E-House's American depositary shares ("ADS")[2] in advance of a go-private merger. Defendants move to dismiss Plaintiffs' First Amended Complaint ("FAC"), for failure to state a claim under Fed. R. Civ. P. 8(a), 9(b), 12(b)(6), and Section 101(b) of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). For the reasons set forth below, Defendants' motion is GRANTED.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following facts, taken as true and drawing all reasonable inferences in Plaintiffs' favor, are based on Plaintiffs' FAC, Doc. 50, the proxy materials incorporated by reference in the FAC, and stock price information of which judicial notice may be taken.

[1] Altimeo is an institutional asset manager managing investment assets through separate funds and is authorized to bring legal action on behalf of its funds. ¶ 27. (Unless otherwise noted, citations to "¶ _" refer to the FAC, Doc. 50.) On May 23, 2020, Altimeo Optimum, which sold E-House securities during the relevant time period, assigned all rights, title, and interest in any causes of action in connection with its purchase or sale of securities of E-House to Altimeo Asset Management. ¶ 27; *see also* Doc. 28-1.

[2] Each ADS represents one share of common stock. ¶ 5. The instrument that trades across the NYSE is the receipt—referred to as an American Depository Receipt ("ADR")—evidencing the ADS. ¶ 29. The ADS program was sponsored by E-House, and the Company registered the ADS with the SEC. The ADS program was administered by JPMorgan Chase Bank N.A. (the "Depository") based in New York, New York. ¶ 30.

A. The Parties

Plaintiffs bring this action on behalf of themselves and all others similarly situated—former owners of E-House ADS who sold their ADS between July 1, 2016 and August 31, 2016 (the "Class Period")—alleging that Defendants deceived them into accepting a management buyout at an unfairly low price, in order to transact a merger taking E-House private. ¶¶ 1-2. Plaintiffs allege violations of §§ 10(b), 13(e), 20A, and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act") and the corresponding rules of the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5 ("Rule 10b-5") and 17 C.F.R. § 240.13e-3 ("Rule 13e-3").

From August 8, 2007, until the Merger closed on August 12, 2016, E-House listed ADS on the New York Stock Exchange ("NYSE"), trading under the ticker EJ. Each ADS represented one share of common stock. ¶¶ 5, 29, 97. Both Altimeo and the Maso entities purchased E-House ADS on the NYSE and sold E-House ADS during the Class Period. ¶¶ 26-27. Between April 15, 2016 and August 17, 2016, Altimeo purchased 213,270 ADS and sold 470,700 ADS. *See* Docs. 28-2, 28-4. During the same time period, the Maso entities purchased 324,929 ADS and sold or tendered 4,173,190 ADS. *See* Doc. 29-1 at 4.

Defendants are E-House, E-House Holdings Ltd., Neil Nanpeng Shen, Charles Chao, Bing Xiang, Hongchao Zhu, Jeffrey Zeng, Xin Zhou, Winston Li, David Jian Sun, Canhao Huang, SINA Corporation ("Sina"), Kanrich Holdings Limited ("Kanrich"), On Chance Inc. ("On Chance"), Jun Heng Investment Limited ("Jun Heng"), Smart Create Group Limited ("Smart Create"), and Smart Master International Limited ("Smart Master"). ¶ 1. E-House is a "leading real estate services company based in China" with a network of real estate businesses covering more than 260 cities in China; at all relevant times it was "an exempted company with limited liability incorporated under the laws of the Cayman Islands." ¶¶ 28, 49. E-House operated several businesses through ownership stakes in several publicly traded corporations, including Leju Holdings, Ld. (real estate e-commerce and online advertising), Jupai Holdings Limited (wealth management services for wealthy individuals in China), Shanghai Weidian

Information Technology Co., Ltd. (which operates a business called Shi Hui, an app that provides promotions for businesses near the app user). ¶¶ 50-53. The rest of E-House's businesses—real estate brokerage services, real estate information and consulting services, real estate advertising and promotional event services, and headquarter functions—constitute "EJ Core." ¶ 54.

Defendant E-House Holdings Ltd. was at all relevant times an exempted company incorporated under Cayman Islands Law, formed for the purpose of entering into the Merger agreement as the parent. ¶ 31. E-House Merger Sub Ltd. was an exempted company incorporated under Cayman Islands Law, formed for the purpose of entering into the Merger agreement and consummating that transaction. ¶ 32. As a result of the Merger, E-House Merger Sub Ltd. no longer exists separately from E-House and thus Plaintiffs do not name it as a defendant in this action. *Id.*

The individual defendants are Zhou, Shen, Chao, Xiang, Zhu, Zeng, Li, Sun, and Huang. ¶¶ 33-41. Zhou[3] is a co-founder of E-House and was at all relevant times co-chair of E-House's Board of Directors. ¶ 33. He was also the Company's CEO from April 2012 through the end of the Class Period. *Id.* Shen, Chao, Xiang, Zhu, Zeng, Li, Sun, and Huang were members of the Board of Directors. ¶¶ 34-41. In approximately June 2015, Zhou, Shen, and E-House's business partner Sina, whose director and CEO was Chao, formed a Buyer Group and proposed a buyout of the Company. ¶¶ 3, 48, 56-57.

In addition to Zhou, Shen, Chao, and Sina, defendant companies Kanrich, On Chance, Jun Heng, Smart Create, and Smart Master, along with E-House Holdings Ltd. (Parent) and E-House Merger Sub Ltd. (Merger Sub), formed the Buyer Group. ¶¶ 47, 48. Chao was director and CEO of Sina; Zhou controlled Kanrich, On Chance, and Jun Heng; and Shen controlled Smart Create and Smart Master. ¶¶ 35, 42-48.

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[3] The Complaint twice refers to a Defendant Zhao, alleging that Zhao was director of E-House Holdings Ltd. and Merger Sub and signed the Merger Agreement on their behalf. ¶¶ 31-32. There is no other reference to Zhao in either the FAC or the parties' papers. The Court assumes that Plaintiffs meant Defendant Zhou.

After receipt of the proposed buyout offer, E-House formed a transaction committee (the "Committee") to evaluate it. ¶ 56. Xiang, Zhu, Zeng, Li, and, briefly, Sun, [4] were members of the Committee that evaluated and negotiated the Merger. ¶¶ 36-40, 48.

Before the Merger, Zhou and the entities he controlled owned 22.8% of E-House; after, they owned 51.6%. Shen and the entities he controlled owned 2.4% of E-House before the Merger; after, 5.4%. Sina owned 19% of E-House before the Merger; after, 43%. ¶ 98.

B. The E-House Merger and Relisting on the Hong Kong Stock Exchange

1. The Merger

On June 9, 2015, E-House announced that it had received a proposed buyout offer made by Zhou and Shen, at an offer price of $7.38 per ADS. ¶ 56. The same day, E-House formed the Committee, composed of Li, Xiang, Zhu, Zeng, and Sun to evaluate and negotiate the offer. *Id.* On June 19, 2015, the Committee was informed that Sina, whose CEO was Chao, had joined Zhou and Shen as a potential buyer. ¶ 57. As noted above, the remaining Buyer Group constituents were companies owned by Zhou or Shen. *Id.*

On June 25, 2015, the Committee retained Davis Polk & Wardwell LLP as its legal counsel and Duff & Phelps, LLC as financial advisors. The Buyer Group retained Skadden, Arps, Slate, Meagher & Flom LLP. ¶ 58.

Between November 2, 2015 and March 6, 2016, the Buyer Group and the Committee negotiated the terms of a potential transaction. ¶ 59. In November 2015, Duff & Phelps, at the direction of the Committee, conducted a market check in which it contacted twenty-nine potential buyers, none of whom expressed interest in a buy-out. Doc. 64-1, Final Proxy at 20-21. On March 4, 2016, after months of negotiations and multiple requests by the Committee that the Buyer Group increase its offer price, the Committee and the Buyer Group "preliminarily agreed on an offer price of $6.85 per ADS, subject to the Buyer Group providing the [Committee] with

[4] Sun resigned from the Committee on June 12, 2015 over a potential perceived conflict of interest. ¶ 56; Doc. 64-1, Final Proxy at 17.

satisfactory evidence of the availability of sufficient financing or satisfactory financing arrangements for the Proposed Transaction[.]" Final Proxy at 21-23. On April 14, 2016, the Committee held a meeting with Duff & Phelps, Davis Polk, and the Committee's Cayman counsel, Walkers, at which Duff & Phelps presented the Committee with its financial analyses of the proposed transaction, including its opinion that the transaction was financially fair to shareholders. ¶ 59; Final Proxy at 24. That same day, the Committee unanimously recommended that the Board adopt resolutions that it would be fair, advisable, and in the best interests of the Company and its security holders to enter into the Merger. Final Proxy at 24. The Committee and the Board approved the Buyer Group's offer, and on April 15, 2016, E-House and the Buyer Group executed a merger agreement. ¶¶ 59-60; Final Proxy at 25. E-House thereafter issued a press release that it had agreed to be taken private by the Buyer Group at a price of $6.85 per ADS, subject to a shareholder vote. ¶ 60.

Between April 25, 2016, and July 1, 2016, E-House filed its SEC Rule 13e-3 Transaction statements (the proxy materials), which included information about the Merger subject to disclosure requirements under § 13(e) of the Exchange Act and SEC Rule 13e-3. ¶¶ 61, 87-93. The proxy materials were signed and filed by E-House and by the Buyer Group. ¶ 61. E-House filed its First Amended Proxy on May 27, 2016, its Second Amended Proxy on June 16, 2016, and its Final Proxy on July 1, 2016. ¶¶ 87-93. In the proxy materials, E-House explained the purposes and reasons for the Merger, the Merger structure and voting process, shareholders' appraisal and dissenter rights, and fairness opinions and projections. E-House stated in its proxy materials that its reasons for going private included the benefits of being a privately held company—the "greater flexibility" to target long term financial performance "without the pressures caused by the public equity market's valuation of the Company and emphasis on short-term period-to-period performance"—and did not discuss plans for any subsequent transactions. ¶¶ 78, 83-84; *see also* Final Proxy at 25.

The proxy materials described the structure of the Merger, and the process by which voting would take place. The Merger would be conducted as a reverse triangular merger: E-

House would merge with Merger Sub, which was owned by parent company E-House Holdings, Ltd., which itself was owned by the Buyer Group. E-House would be the surviving entity. ¶¶ 63-64.

The Merger could only be closed upon approval of two thirds of the shares voting on the transaction. ¶ 63. Because the Buyer Group controlled less than half of the shares—44.9%—public or non-Company affiliated shareholders could block the Merger if they voted against it. *Id.* The Final Proxy set the extraordinary general meeting of shareholders for August 5, 2016. ¶ 94. ADS holders could vote by giving voting instructions to the Depositary by July 11, 2016. *Id.* ADS holders wishing to vote as shareholders would have to redeem their American deposit receipts (ADR) for common stock by July 18, 2016, in order to become direct shareholders in time for the July 22, 2016 record date, as only shareholders as of that date would be able to vote. *Id.*

Before the voting date, shareholders could exercise appraisal rights or dissenter rights. ¶¶ 69-71. However, in order to exercise these rights, ADS holders would first have to redeem their ADS with the Depositary in exchange for common stock, thereby becoming shareholders. ¶ 70. Shareholders intending to dissent would then have to deliver to E-House their written objection to the Merger before the vote and would have to comply with the requirements of Section 238 of Cayman Islands Companies Law. ¶ 69. Thus, in order to exercise dissenter rights, ADS holders would have to

> surrender their ADS to the ADS depositary, pay the . . . fees required for such surrender and any applicable taxes, provide instructions for the registration of the corresponding Shares, . . . certify that they have not given, and will not give, voting instructions as to the ADSs . . . before 12:00 p.m. New York City on August 1, 2016, and become registered holders of Shares by the close of business in the Cayman Islands before August 4, 2016. Thereafter, such former ADS holders must also comply with the procedures and requirements for exercising dissenter rights . . . under Section 238 of the Cayman Islands Companies Law.

Final Proxy at 15. The proxy materials explained that dissenters would be entitled to "receive payment of the fair value of their Shares if the Merger is completed," but that "[t]he fair value of

their Shares as determined under that statute could be more than, the same as, or less than the merger consideration they would receive pursuant to the Merger Agreement." ¶¶ 69, 71. Plaintiffs point out that, if an appraisal determined that shares were worth more than the Merger price, E-House would have to pay dissenting shareholders additional consideration for the Merger, and thus the Buyer Group had an incentive to dissuade shareholders from seeking appraisal. ¶ 71.

To that end, according to Plaintiffs, the proxy materials contained several assurances that the Committee, the Board, the Buyer Group, and Duff & Phelps all believed that the Merger was fair to investors and security holders. ¶ 72. The proxy materials also contained final projections prepared by management and stated that the projections represented "the best currently available estimates and judgments, and presents, to the best of management's knowledge and belief the expected course of action and the expected future financial performance of the Company." ¶ 73 (citing the Initial Proxy). The proxy included a fairness opinion from Duff & Phelps, which concluded that the entire company, with all its components, had a value of $6.26 to $7.27 per share. ¶¶ 75, 77. Thus, Duff & Phelps determined that the Merger consideration of $6.85 per ADS and per share was fair. ¶ 77.

The Final Proxy included projections prepared in January 2016 (the "2016 Management Projections"), which predicted performance from 2016 to 2020 for both Leju and EJ Core. ¶¶ 88, 93; *see also* Final Proxy at 41-43. The 2016 Management Projections replaced earlier projections included in the Initial Proxy, which had been prepared in November 2015. ¶ 88. According to the proxy materials, the 2016 Management Projections were amended to reflect the depreciation of the Chinese renminbi against the U.S. dollar as well as "certain factors relevant to Leju." ¶ 91.

On August 5, 2016, the Merger was approved with 89.79% of votes cast in favor. ¶ 96. Plaintiffs contend that, despite the high approval rate, the outcome "shows little about the overall support of the deal, since the vote total only reflects votes cast, rather than all shareholders." *Id.*

On August 12, 2016, the Merger closed, Merger Sub was merged into E-House, and E-House was delisted from the NYSE. ¶ 97.

2. Cayman Islands Appraisal Action

Following the closing of the Merger, on October 14, 2016, a former shareholder, Senrigan Master Fund ("Senrigan") filed a petition in the Grand Court of the Cayman Islands requesting appraisal of its shares. ¶ 99. The Grand Court of the Cayman Islands Financial Services Division held a trial on the appraisal action, beginning on April 10, 2018. ¶ 102. Although scheduled to last until April 24, 2018, the trial settled after two days. *Id.*

During the trial, E-House and Senrigan discussed certain alternative projections that were not disclosed in the proxy materials, and which Senrigan referred to as the "parallel transaction projections" (henceforth "parallel projections"). ¶ 103. The FAC is silent as to who created the parallel projections, whether the Buyer Group, E-House, or another entity, but states that the Buyer Group used them to "pitch[] investors in post-Merger Subsequent Transactions, in parallel with the proposed public Merger." ¶ 14; *see also* Doc. 63 at 11. Senrigan argued that the parallel projections—which were more recent projections, made in June 2016[5]—replaced the 2016 Management Projections, which were out of date by and superseded by the parallel projections. ¶ 104. Both parties' experts cited the parallel projections in their attempt to value the Company, and Senrigan explained that the parallel projections showed 37% growth in net income for EJ Core in the first six months of 2016, compared with the 2016 Management projections that had "estimated EJ Core's net income growth for the entirety of 2016 at only 1.9%." ¶¶ 105-06. Senrigan argued that the parallel projections showed higher profit, higher sales figures, and higher earnings before interest and taxes than previously disclosed, and that they showed a consolidated annual growth rate in net income of 19%, as opposed to the 4.65% in the 2016 Management projections. ¶ 107. Senrigan also stated that in July 2016, before the Merger, the Buyer Group and the Company had presented a proposal to create a new business out of

[5] Defendants dispute this timing and assert that Senrigan's counsel argued in the Cayman Island's action that "the parallel projections were made by the end of July 2016," that is, possibly at some point after the proxy materials were issued. Doc. 69 at 3.

components of EJ Core to potential investors and had cited the parallel projections as supporting a much higher valuation than previously disclosed.[6] ¶ 108. The trial exhibits included a copy of the July 2016 presentation. *Id.* The same presentation, according to Senrigan, included a slide titled "Valuation" that described relevant portions of EJ Core as worth $1.2 billion as of July 2016, based on the parallel projections, and a section on "Valuation and Exit" that showed a "plan to engineer a future stock listing in Asia." ¶¶ 109-10. Therefore, Plaintiffs contend that E-House and the Buyer Group already had, while the Merger was pending, "a plan to immediately engage in major capital transactions, with an ultimate plan of relisting the shares publicly." ¶ 109.

By contrast, Duff & Phelps' fairness opinion included with the proxy materials had found that the entirety of EJ Core was worth at most $332 million. ¶ 111. Using the parallel projections, Plaintiffs contend that shares in EJ Core alone were in fact worth over $0.50 more per ADS than the $6.85 that Duff & Phelps had found to be fair. *Id.* According to Plaintiffs, the price per ADS for the entirety of E-House should have been $12.60, and the Merger consideration was only 54% of the Company's fair value. ¶¶ 111-12.

Senrigan also submitted at trial an investment agreement to sell equity in the new proposed business to investors, based on the $1.2 billion valuation figure for EJ Core. ¶¶ 108, 113. Those sales closed in August and September 2016. ¶ 113. The investment agreement included a contractual term promising compensation to investors if net profits for 2016-2017 fell under 95% of the parallel projections' projected profits. *Id.*

Two days into the trial, in April 2018, the parties settled the matter for an undisclosed amount. ¶ 102.

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[6] Plaintiffs do not specify in the FAC which individuals gave the presentation, where, or to whom. Plaintiffs state that "[t]he Company and the Buyer Group provided a presentation to potential investors in July 2016," and "Defendants made one such presentation on July 26, 2016." ¶ 108.

3. Relisting on the Hong Kong Stock Exchange

On July 1, 2018, nearly two years after the Merger, E-House registered its shares on the Hong Kong stock exchange and relisted through an initial public offering (IPO) on the Hong Kong stock exchange. ¶ 114. E-House's IPO documents explained that the relisted entity was formed out of constituent parts of the previously privatized E-House, but the relisted entity did not have any ownership interests in Leju or Jupai. ¶ 115. Therefore, Plaintiffs allege, "the relisted entity was . . . supposedly comprised of businesses worth only 40% of the overall value" of E-House at the time of its privatization. *Id.*

Plaintiffs allege that E-House had begun to prepare for the Hong Kong IPO "immediately after going private," and they cite a January 4, 2018 article in *Beijing Commercial Daily* in which "an individual close to the Company explained that after the completion of the delisting, E-House introduced a number of new investors and made other changes in order to start the relisting." ¶ 116. The IPO documents included information about E-House's privatization, including a statement that

> [t]he privatisation was initiated because, among other reasons, it was considered that the Group was undervalued in the U.S. and that the privatisation would allow the then management of E-House (China) Holdings greater flexibility to develop the long-term strategy and restructure different business units to improve the valuation . . . and profitability of their relevant business segments[.]

¶ 117.

On July 20, 2018, E-House went public on the Hong Kong stock exchange. ¶ 120. At that time, E-House had a market capitalization of $2.651 billion, about 2.5 times greater than its valuation of $1.06 billion at the time of the Merger. *Id.* Plaintiffs point out that this higher market capitalization for the relisted business did not include E-House's prior interest in Leju and Jupai. *Id.* The Merger valuation for E-House, less Leju and Jupai, was about $500 million—four times less than E-House's Hong Kong IPO market capitalization ($2.081 billion, subtracting the proceeds of the IPO). *Id.* Therefore, Plaintiffs argue that the results of the IPO show that EJ

Core was drastically undervalued in the Merger, considering that E-House maintained an average market capitalization of over $2.5 billion from the IPO to February 2019. *Id.*

C. Alleged Misrepresentations and Omissions

Based on the Cayman Islands appraisal action and E-House's 2018 relisting on the Hong Kong stock exchange, Plaintiffs allege that the Final Proxy contained several false and misleading statements and omissions attributable to E-House, members of the Buyer Group, and individual Defendants Zhou, Shen, and Chao, who belonged to the Company's management. ¶ 122. Plaintiffs allege three categories of false or misleading statements based on what they assert was Defendants' undisclosed plan to relist E-House at a higher value on the Hong Kong stock exchange: statements portraying the merger as fair; statements concerning an intention not to relist or engage in subsequent transactions; and statements about the future projections. ¶¶ 124, 129, 140. Finally, Plaintiffs assert that Defendants omitted information that they had affirmative duties to disclose under Cayman Islands Law and SEC regulations. ¶ 145.

1. Statements Concerning Fairness

Plaintiffs allege that statements in the proxy materials describing the merger as fair were materially false because Defendants knew that the parallel projections projected higher growth than the Management Projections that Duff & Phelps used to prepare the fairness opinion and they did not include the parallel projections in the proxy materials. ¶¶ 126, 128. Thus, Defendants could not have believed the Merger was fair in that it would deprive investors of a higher value for E-House shares. *Id.* These fairness statements include: "Each member of the Buyer Group believes that the Merger is substantively and procedurally fair to the security holders who are not affiliated to the Company," ¶ 125; and "The Board, acting upon the unanimous recommendation of the [Committee] . . . determined that it was fair (both substantively and procedurally) and in the best interests of the Company and its security holders . . . to enter into the Merger Agreement[.] " ¶ 127.

2. Statements Concerning Subsequent Transactions

Plaintiffs allege that the proxy materials contained statements that the Buyer Group had no plans or proposals to change the Company's corporate structure or enter into any subsequent transactions. ¶¶ 78-79, 84.[7] Plaintiffs contend that these were false or misleading because, as of the date of the July 2016 presentation, E-House in fact had plans for subsequent transactions after closing the Merger and had an ultimate plan to relist on a stock exchange in Asia. ¶ 114.

These statements included the representations that E-House decided to go private in order to have greater flexibility and the benefits of private ownership; that after the Merger E-House would cease to be publicly traded; and that the Buyer Group would continue to evaluate the Company's prospects and "may propose or develop plans and proposals . . . including the possibility of relisting the Company or a substantial part of its business on another stock exchange." ¶¶ 130, 132, 134, 136, 138. Plaintiffs allege these statements are false or misleading because E-House did not "cease" to be a publicly traded company, and that the use of "may" was false because Defendants intended to relist all along. ¶¶ 131, 133, 135.

3. Statements Regarding Future Projections

Plaintiffs allege that the 2016 Management Projections included in the Final Proxy, and Defendants' statement that those projections "reflect[] the best currently available estimates and judgments," were false and misleading because the Final Proxy included outdated projections "without disclosing the fact that management had created more recent far higher projections (the [parallel projections])." ¶ 142. Therefore, Defendants' inclusion of the 2016 Management Projections, and statements that these were the best available, were false and misleading since the projections undervalued E-House. ¶¶ 142, 144.

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[7] The proxy materials did not include any information about any subsequent transaction, ¶¶ 78-79, and in a section titled "Plans for the Company after the Merger," represented that the Buyer Group "does not have any present plans or proposals" relating to "[1] an extraordinary corporate transaction involving the Company's corporate structure, business, or management, such as a merger, reorganization, liquidation, relocation of any material operations; [2] sale or transfer of a material amount of assets; or [3] any other material changes in the Company's business." ¶ 84 (citing proxy materials).

4. Alleged Omissions Violating Defendants' Duties to Disclose

Finally, Plaintiffs allege that Defendants omitted information that they had affirmative duties to disclose under both Cayman Islands and U.S. federal securities laws. ¶¶ 145-60. Plaintiffs claim that Zhou, Shen, and Chao, as directors of E-House, violated their Cayman Islands duty to disclose "sufficient information" to investors by providing outdated projections and valuation and by not disclosing planned subsequent transactions. ¶ 146. Plaintiffs also allege that Defendants' Schedule 13e-3 statements failed to comply with the requirements for Rule 13e-3 transactions because the schedule did not list plans or proposals for future transactions or changes in the capitalization of the Company, and because Defendants' purported reasons for the Merger were not their "true reasons" for going private. ¶¶ 147-55.

Plaintiffs further allege that Defendants violated their duties to disclose by engaging in insider trading, in that the Buyer Group possessed material non-public information, including the parallel projections and their "true reasons for the Merger," at the time the Merger closed and E-House purchased outstanding shares of stock. ¶¶ 156-58. Plaintiffs assert that the members of the Buyer Group, with the exception of Defendant Chao, are properly deemed purchasers of the outstanding shares through the Merger, and they possessed material non-public information at the time of the Merger. ¶¶ 159-60.

D. Scienter and Loss Causation

Plaintiffs allege that Defendants acted with scienter in that Zhou, Shen, and Chao had actual knowledge that the statements made in the proxy materials were false or misleading, or they acted with reckless disregard for the truth or falsity of those statements, and the other entities—E-House, Sina, Kanrich Holdings, On Chance, Jun Heng, HoldCo, and Merger Sub—had the scienter of their management-level employees. ¶¶ 161-62. Plaintiffs allege that the members of the Buyer Group had the motive and opportunity to defraud, because by publishing false, misleading, and incomplete information, they stood to profit from undervaluing E-House in advance of the Merger. ¶ 163. Furthermore, as signatories of the Final Proxy and members of E-House management, members of the Buyer Group were able to exercise control over the

substance of the Final Proxy, and thereby had the opportunity to act on their motive to defraud. ¶ 164. Plaintiffs further allege that Defendants had actual knowledge that the statements in the proxy materials were false—or else they acted with reckless disregard for the truth—because they were aware of the parallel projections. Specifically, Zhou approved of the figures in the parallel projections, and individual members of the Buyer Group, who were also E-House management, were aware of them. ¶¶ 165-67. Because both the Merger and the projections, including the parallel projections, were matters of core importance to E-House, scienter on the part of management, and therefore corporate scienter, may be presumed. ¶ 168.

As to loss causation, Plaintiffs allege that Defendants' scheme to deprive investors of material information artificially depressed the price of E-House ADS, and Plaintiffs were induced to sell shares at less than fair value, resulting in economic loss "equal to the fair value of the shares minus the price that . . . Plaintiffs and members of the Class received when they sold their E-House ADS during the Class Period." ¶ 170. Plaintiffs allege that the fair value of the ADS exceeded the $6.85 price paid to investors at the time of the Merger, because the more recent parallel projections implied a higher valuation. ¶ 171. Plaintiffs allege that, based on the valuation of EJ Core at $1.2 billion, the per share value per ADS should have been between $12.30 and $12.90. *Id.*

E. Procedural Background

On April 9, 2020, Plaintiffs commenced this action. Doc. 1. On August 12, 2020, the Court so ordered a stipulation appointing Altimeo and the Maso entities as Co-Lead Plaintiffs and their counsel as Lead Counsel for the putative class. Doc. 47. On October 13, 2020, Plaintiffs filed the FAC, and on January 19, 2021, Defendants moved to dismiss. Docs. 50, 62.

II. LEGAL STANDARD

A. Rule 12(b)(6)

Under Rule 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept all factual allegations in the complaint as true

and draw all reasonable inferences in the plaintiff's favor. *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 145 (2d Cir. 2012). However, the Court is not required to credit "mere conclusory statements" or "[t]hreadbare recitals of the elements of a cause of action." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* at 678 (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556). If the plaintiff has not "nudged [his] claims across the line from conceivable to plausible, [the] complaint must be dismissed." *Twombly*, 550 U.S. at 570.

In determining the motion to dismiss, the Court may "consider documents that are referenced in the complaint, documents that the plaintiffs relied on in bringing suit and that are either in the plaintiffs' possession or that the plaintiffs knew of when bringing suit, or matters of which judicial notice may be taken." *Silsby v. Icahn*, 17 F. Supp. 3d 348, 354 (S.D.N.Y. 2014), *aff'd sub nom. Lucas v. Icahn*, 616 F. App'x 448 (2d Cir. 2015) (summary order) (citing *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)). The Court may "take judicial notice of public disclosure documents that must be filed with the [SEC] and documents that both 'bear on the adequacy' of SEC disclosures and are 'public disclosure documents required by law.'" *Silsby*, 17 F. Supp. 3d at 354 (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773–74 (2d Cir. 1991)).

B. Heightened Pleading Standard Under Rule 9(b) and the PSLRA

"Securities fraud claims are subject to heightened pleading requirements that the plaintiff must meet to survive a motion to dismiss." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007); *see also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321-23 (2007).

A complaint alleging securities fraud must satisfy the heightened pleading requirements of Federal Rule of Civil Procedure 9(b) and the Private Securities Litigation Reform Act

("PSLRA") by stating the circumstances constituting fraud with particularity. *See, e.g.*, *ECA & Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 196 (2d Cir. 2009) (citing *Tellabs*, 551 U.S. at 320–21). These requirements apply whenever a plaintiff alleges fraudulent conduct, regardless of whether fraudulent intent is an element of a claim. *Rombach v. Chang*, 355 F.3d 164, 170–71 (2d Cir. 2004) (quoting Fed. R. Civ. P. 9(b)) ("By its terms, Rule 9(b) applies to 'all averments of fraud.'").

Specifically, Rule 9(b) requires that a securities fraud claim based on misstatements must identify: (1) the allegedly fraudulent statements, (2) the speaker, (3) where and when the statements were made, and (4) why the statements were fraudulent. *See, e.g.*, *Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 108 (2d Cir. 2012) (citing *Rombach*, 355 F.3d at 170). Conditions of a person's mind—such as malice, intent or knowledge—may be alleged generally, however. *Kalnit v. Eichler*, 264 F.3d 131, 138 (2d Cir. 2001) (citing Fed. R. Civ. P. 9(b)). Like Rule 9(b), the PSLRA requires that securities fraud complaints "'specify' each misleading statement," set forth the reasons or factual basis for the plaintiff's belief that the statement is misleading, and "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 345 (2005) (quoting 15 U.S.C. §§ 78u–4(b)(1), (2)); *see also Slayton v. Am. Express, Co.*, 604 F.3d 758, 766 (2d Cir. 2010). Thus, to plead a claim of securities fraud, plaintiffs "must do more than say that the statements . . . were false and misleading; they must demonstrate with specificity why and how that is so." *Rombach*, 355 F.3d at 174. In addition, the plaintiff "shall, with respect to each act or omission . . . 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).

These heightened pleading standards, when viewed together with the more general standards applicable to Rule 12(b)(6) motions to dismiss under *Twombly* and *Iqbal*, make clear that "plaintiffs must provide sufficient particularity in their allegations to support a plausible inference that it is more likely than not that a securities law violation has been committed." *In re*

Lululemon Sec. Litig., 14 F. Supp. 3d 553, 570 (S.D.N.Y. 2014), *aff'd*, 604 F. App'x 62 (2d Cir. 2015) (citing *ECA*, 553 F.3d at 196).

III. DISCUSSION

A. Plaintiffs' Section 10(b) Claims

Section 10(b) of the Securities Exchange Act of 1934 prohibits using or employing, "in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance," while SEC Rule 10b-5, promulgated thereunder, creates liability for a person who makes "any untrue statement of a material fact or to omit[s] to state a material fact ... in connection with the purchase or sale of any security." *In re OSG Sec. Litig.*, 971 F. Supp. 2d 387, 397 (S.D.N.Y. 2013). "A statement may give rise to liability under § 10(b) if it is '(1) a material misrepresentation; (2) a material omission in contravention of an affirmative legal disclosure obligation; or (3) a material omission of information that is necessary to prevent existing disclosures from being misleading.'" *Altimeo Asset Mgmt. v. WuXi PharmaTech (Cayman) Inc.*, No. 19 Civ. 1654 (AJN), 2020 WL 6063539, at *5 (S.D.N.Y. Oct. 14, 2020) (citing *Police & Fire Ret. Sys. of the City of Detroit v. La Quinta Holdings Inc.*, No. 16 Civ. 3068 (AJN), 2017 WL 4082482, at *5 (S.D.N.Y. Aug. 24, 2017), *aff'd*, 735 F. App'x 11 (2d Cir. 2018)).

Rule 10b–5, promulgated to implement Section 10(b), "more specifically delineates what constitutes a manipulative or deceptive device or contrivance." *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 534 (2d Cir. 1999). Under Rule 10b–5, it is unlawful for any person, directly or indirectly, by the use of any means specified in Section 10(b):

> (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.

To state a claim under Section 10(b) and Rule 10b-5, a plaintiff must plead that: (1) the defendant made a material misrepresentation or omission, (2) with scienter, *i.e.* a wrongful state of mind, (3) in connection with the purchase or sale of a security, and (4) that the plaintiff relied on the misrepresentation or omission, thereby (5) causing economic loss. *In re Express Scripts Holding Co. Sec. Litig.*, No. 16 CIV. 3338 (ER), 2017 WL 3278930, at *10 (S.D.N.Y. Aug. 1, 2017) (citations omitted); *see also Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232 (2d Cir. 2014). Moreover, the plaintiff must meet the PSLRA requirements. *ECA*, 553 F.3d at 196. Therefore, while the Court normally draws reasonable inferences in favor of a non-movant on a motion to dismiss, the PSLRA "'establishes a more stringent rule for inferences involving scienter' because the PSLRA requires particular allegations giving rise to a strong inference of scienter." *Id.* (citing *Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.,* 531 F.3d 190, 194 (2d Cir. 2008)).

As the *WuXi* court explained, "the 'fundamental purpose' of the [Exchange] Act [is to] implement[ ] a 'philosophy of full disclosure'; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute." *WuXi*, 2020 WL 6063539, at *5 (citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-78 (1977); *Affiliated Ute Citizens v. United States*, 406 U.S. 128, 151 (1972)). "Consistent with that purpose, '[a] complaint fails to state a § 10(b) claim when the alleged omission has actually been disclosed.'" *Id.* (citing *Debora v. WPP Grp. PLC*, No. 91 Civ. 1775 (KTD), 1994 WL 177291, at *5 (S.D.N.Y. May 5, 1994)).

Defendants argue that Plaintiffs have not sufficiently alleged (1) actionable material misrepresentations or omissions; (2) an adequate inference of scienter; (3) economic loss causation; or (4) reliance for the tendering shareholders. Because Plaintiffs have failed to allege actionable misrepresentations or omissions, the Court need only address Defendants' first argument.

1. Material Misrepresentations or Omissions

Plaintiffs allege material misrepresentations or omissions in connection with three categories of statements in the proxy materials: (1) Defendants' use of the 2016 Management Projections and omission of the parallel projections; (2) statements pertaining to plans (or lack thereof) for subsequent transactions; (3) and statements that the Merger was fundamentally fair. ¶¶ 122-44. The Court addresses each category of alleged misrepresentation in turn.

a. The Projection Statements

Plaintiffs allege that Defendants' use of the 2016 Management Projections, included in the Final Proxy, and Duff & Phelps' use of these in drafting its April 2016 fairness opinion, was false and misleading, both because these projections were outdated and because Defendants did not disclose the existence of the more favorable parallel projections. ¶¶ 142-44. Defendants argue that the Proxy Materials were not outdated and included adequate cautionary language, that the existence of the parallel projections did not render the 2016 descriptions false or misleading, and that Plaintiffs have not alleged with the requisite particularity that the parallel projections properly superseded the 2016 Management Projections. Doc. 63 at 8-12. The Court agrees with Defendants that the projections included in the proxy materials—and the omission of the parallel projections—are not actionable.

The Second Circuit has held that "statements about a 'company's projections [are treated as] opinions rather than guarantees.'" *ODS Cap. LLC v. JA Solar Holdings Co.,* No. 18 Civ. 12083 (ALC), 2020 WL 7028639, at *11 (S.D.N.Y. Nov. 30, 2020) (citing *In re SunEdison, Inc. Sec. Litig.*, 300 F. Supp. 3d 444, 480 (S.D.N.Y. 2018)). To be actionable, "the representation must be one of existing fact, and not merely an expression of opinion, expectation or declaration of intention." *Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 647-48 (S.D.N.Y. 2015) (citations omitted); *see also Greenberg v. Chrust*, 282 F. Supp. 2d 112, 121 (S.D.N.Y. 2003). "An opinion statement is not actionable unless the speaker disbelieved the statement at the time it was made, the opinion contained one or more embedded factual statements that can be proven false, or the opinion implied facts that can be proven false." *In re*

Mindbody, Inc. Sec. Litig., 489 F. Supp. 3d 188, 202 (S.D.N.Y. 2020) (internal quotation marks and citations omitted). However, "[s]tatements regarding projections of future performance may be actionable under Section 10(b) or Rule 10b-5 if they are worded as guarantees or are supported by specific statements of fact, or if the speaker does not genuinely or reasonably believe them." *Pehlivanian*, 153 F. Supp. 3d at 648 (S.D.N.Y. 2015) (citations omitted); *see also Gissin v. Endres*, 739 F. Supp. 2d 488, 502 (S.D.N.Y. 2010) ("[S]tatements are not protected where defendants had no basis for their optimistic statements and already knew (allegedly) that certain risks had become reality[.]").

Because forward-looking statements are appropriately analyzed as opinions, the framework from *Omnicare, Inc. v. Laborers Dist. Council Const. Industry Pension Fund*, 575 U.S. 175 (2015), applies to the question of whether Plaintiffs have sufficiently pleaded actionable misstatements and omissions concerning the Management Projections. In *Omnicare*, the Supreme Court established that opinions may be misleading if "(1) 'the speaker d[oes] not hold the belief . . . professed'; (2) the 'fact[s] [ ] supplied' in support of the belief professed are 'untrue'; or (3) the speaker 'omits information' that 'makes the statement misleading to a reasonable investor.'" *Martin v. Quartermain*, 732 F. App'x 37, 40 (2d Cir. 2018) (quoting *Tongue v. Sanofi*, 816 F.3d 199, 210 (2d Cir. 2016)).

Furthermore, forward-looking statements are sheltered by the PSLRA's safe harbor provision. "Pursuant to the safe harbor, 'a defendant is not liable [for a forward-looking statement] if the forward-looking statement is identified and accompanied by meaningful cautionary language or is immaterial or the plaintiff fails to prove that it was made with actual knowledge that it was false or misleading.'" *Fresno Cty. Employees' Ret. Ass'n v. comScore, Inc.*, 268 F. Supp. 3d 526, 547-48 (S.D.N.Y. 2017) (quoting *Slayton*, 604 F.3d at 766).[8]

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[8] Plaintiffs contend, without citation, that the PSLRA safe harbor does not apply to going-private transactions. ¶¶ 178-79. However, numerous courts in this district have applied the safe harbor to cases concerning go-private transactions that are on all fours with the case at bar. *See Qihoo*, 2020 WL 4734989, at *7; *ODS Capital LLC v. JA Solar Holdings Co. Ltd.*, No. 18 Civ. 12083 (ALC), 2020 WL 7028639, at *11 (S.D.N.Y. Nov. 30, 2020); *In re Shanda Games Limited Securities Litigation*, No. 18 Civ. 2463 (ALC), 2019 WL 11027710, at * 5 (S.D.N.Y. Sep. 30, 2019).

Statements are protected under the safe harbor if they satisfy any one of these three categories, since the statute is written in the disjunctive. *Altimeo Asset Management v. Qihoo 360 Technology Co. Ltd.*, No. 19 Civ. 10067 (PAE), 2020 WL 4734989, at *7 (S.D.N.Y. Aug. 14, 2020). While "meaningful cautionary language" concerning forward-looking statements shields a defendant from liability in a private action under federal securities laws, the language must not be mere "boilerplate" and must include "important factors that could realistically cause results to differ materially." *Gray v. Wesco Aircraft Holdings, Inc.*, 454 F. Supp. 3d 366, 392 (S.D.N.Y. 2020), *aff'd*, 847 F. App'x 35 (2d Cir. 2021) (citing *Slayton*, 604 F.3d at 771, 773; *In re Philip Morris Int'l Sec. Litig.*, 437 F. Supp. 3d 329, 356–57 (S.D.N.Y. Feb. 4, 2020)). However, "[t]he safe harbor . . . does not protect material omissions." *In re Salix Pharms., Ltd.*, No. 14 Civ. 8925 (KMW), 2016 WL 1629341, at *9 (S.D.N.Y. Apr. 22, 2016).

Reading the FAC in the light most favorable to Plaintiffs, with more concrete information, the omission of the parallel projections might establish that E-House management—which included three individual members of the Buyer Group—did not believe that the 2016 Management Projections were the most accurate projections, or may constitute the omission of information that would be misleading to a reasonable investor. *See JA Solar*, 2020 WL 7028639, at *11 (finding that plaintiff had adequately pleaded that defendant company's 2015 and 2016 operating incoming reporting was "understated and misrepresented in the [p]roxy [m]aterials," where company's "projections for the fourth quarter were vastly different than what was provided," and "that the restructuring report JA Solar and Tonglian issued in connection with its relisting provided operating income for 2015 through 2017 that far exceeded what was reported in the Proxy Materials and SEC filings."). However, Plaintiffs have not overcome the safe harbor provisions in that the Management Projections were accompanied by meaningful cautionary language. Furthermore, Plaintiffs have not alleged with the requisite particularity

required by Rule 9(b) and the PSLRA that Defendants knew the Management Projections were false or misleading.

Plaintiffs' claim that the Management Projections were outdated fails because the Final Proxy included adequate cautionary language explaining the timing of when the projections were prepared and the purpose for which they were included. Specifically, the Final Proxy disclosed that the projection prepared in January 2016 "do not take into account any circumstances or events occurring after the date they were prepared," including "any changes to our operations or strategy that may be implemented after the time the projections were prepared," Final Proxy at 38, and that the "financial projections are not a guarantee of performance," *id.* The Final Proxy disclaimed that the Management Projections were included to deter investors from seeking an appraisal, stating that "[t]he financial projections included in this proxy statement are included solely to give shareholders access to certain information that was made available to the Committee's financial advisor and are not included for the purpose of influencing any shareholder to make any investment decision with respect to the Merger, including whether to seek appraisal" for their shares under Cayman Islands Companies law. *Id.* The Final Proxy also stated that the projections "in the view of the Company's management, [were] prepared on a reasonable basis, reflect[] the best currently available estimates and judgments, and present[], to the best of management's knowledge and belief, the expected course of action and the expected future financial performance of the Company." *Id.*[9] Such cautionary language is adequate under the first prong of the safe harbor. *See In re Bemis Co. Sec. Litig.*, 512 F. Supp. 3d 518, 533-34 (S.D.N.Y. 2021) (finding similar cautionary language, including "that the [projections] were not factual and should not be relied upon as being necessarily predictive of actual future results," that they were "not included to induce any shareholder to vote for the [t]ransaction but rather were

[9] In their opposition, Plaintiffs argue that Defendants' argument that they had disclaimed their duty to update fails because the Final Proxy represents that the 2016 Management Projections are the "best **currently** available." Doc. 68 at 8. However, Defendants counter that the statement that the Projections are the best currently available must be read in context, including the fact that the Final Proxy made clear that the projections were made in January 2016. Final Proxy at 38.

disclosed because the [b]oard considered them in assessing the [t]ransaction, and that "if shareholders were to consider them at all, they should be careful to do so in conjunction with the other information in the [p]roxy," to be "ample, specific cautionary language insulat[ing] [d]efendants from liability under Section 14(a).") (citations omitted).

Plaintiffs further contend that the omission of the parallel projections in the proxy materials is actionable because "[t]he law is clear that projections are actionable in the merger context when the buyers privately used a better set of projections to value the company higher than what was disclosed in the proxy materials." Doc. 68 at 7. None of the cases that Plaintiffs cite is directly on point, and none are binding on this Court. Plaintiffs cite *Baum v. Harman Int'l Indus., Inc.* for the proposition that the proxy materials' omission of the parallel projections is actionable, analogizing to the *Baum* defendants' provision of better projections to potential buyers, and use of more pessimistic projections in connection with its fairness opinions. 408 F. Supp. 3d 70, 88-89 (D. Conn. 2019) ("Taken together, the facts alleged support a strong inference that defendants did not truly believe that the Management Projections contained more downside risk than upside potential.") However, plaintiff's claims in that action concerned defendants' opinion statements about the projections included in the proxy materials, rather than the projections themselves. Plaintiffs also cite to two district court cases from the Ninth Circuit, *Azar v. Blount Int'l, Inc.*, No. 3:16-CV-483-SI, 2017 WL 1055966 (D. Or. Mar. 20, 2017) and *In re Hot Topic, Inc. Sec. Litig.*, No. CV 13-02939 SJO (JCx), 2014 WL 7499375 (C.D. Cal. May 2, 2014). In both cases, plaintiffs alleged that defendants "worked with financial advisors to create more pessimistic financial projections to present to shareholders to justify a merger, while themselves relying on an older but allegedly more optimistic and more accurate set of projections." *Azar*, 2017 WL 1055966, at *8; *see also Hot Topic*, 2014 WL 7499375, at *10. However, both *Azar* and *Hot Topic* differ in a key way from Plaintiffs' allegations here: in those cases, plaintiffs alleged that defendants deliberately had created misleading forecasts *after* the original, more correct forecasts, in order to "affirmatively create[] an impression of a state of affairs that differs in a material way from the one that actually exist[s]." *Hot Topic*, 2014 WL

7499375, at *10 (citation omitted). Finally, all the cases Plaintiffs cite addressed claims brought under Exchange Act § 14(a), rather than, as here, § 10(b).

Defendants argue that the existence of a later set of projections yielding different results does not necessarily render the earlier set of projections false or misleading, citing two cases—one from this district and one from the District of Delaware. Doc. 63 at 10. However, the cases that Defendants cite are also distinguishable. Defendants rely on *Pehlivanian,* wherein the court stated, in an analysis of scienter, that "the recklessness inquiry as to forward-looking projections focuses on whether the defendants knew at the time they made these projections that they were unrealistic or unlikely to come true." 153 F. Supp. 3d at 653-54. However, here Plaintiffs' allegation is that Defendants *did* know at the time they signed the Final Proxy that the 2016 Management Projections were unrealistic, since they had access to the much more optimistic parallel projections based on the Company's performance in the first half of 2016. The second case, *In re Keryx Biopharmaceuticals, Inc.*, 454 F. Supp. 3d 407, 415 (D. Del. 2020) is distinguishable because, in that case, plaintiffs had alleged that defendants' projections were outdated based on information they learned two weeks later that "rendered the Projections overstated and obsolete." 454 F. Supp. 3d at 414, *appeal dismissed*, No. 20-2019, 2020 WL 6737436 (3d Cir. Aug. 5, 2020) (internal quotation marks omitted). Here, Plaintiffs allege the opposite: that Defendants were aware of the parallel projections as early as June 2016, but still published the Final Proxy, dated July 1, 2016, with the outdated 2016 Management Projections.

However, it is true that "the existence of some additional, intermediary projection—if one even existed—does not automatically constitute a material fact, the omission of which makes a Proxy misleading." *Bemis*, 512 F. Supp. 3d at 542 (citing *Resnik v. Swartz*, 303 F.3d 147, 154 (2d Cir. 2002) ("Disclosure of an item of information is not required . . . simply because it may be relevant or of interest to a reasonable investor."). Instead, the key question is whether "[w]hat was disclosed in the Proxy, however, was sufficient to give shareholders the information necessary to making an informed vote on the [t]ransaction." *Id.* at 543 (citation omitted).

Defendants also make an argument that the Management Projections are not actionable because they were included solely to give shareholders access to information available to the Committee, rather than for the purposes of influencing investment decisions. Doc. 63 at 9 (citing *Laborers Loc. No. 231 Pension Fund v. Cowan*, No. 20-1844, 2020 WL 7056070, at *4 (3d Cir. Dec. 2, 2020) (projections that are "disclaimed as being disclosed solely" to make information available are distinct from projections estimating future performance). However, the Court need not decide the question of whether the *purpose*, rather than the content, of the Management Projections controls, because Plaintiffs' allegations—either that Defendants knew the Management Projections were misleading because they omitted the parallel projections, or that the omission of the parallel projections itself was material—are not pleaded with the particularity required by the PSLRA.

The FAC does not contain the requisite "detail as to the who, what, when, where, and how" of the parallel projections, *Long Miao v. Fanhua, Inc.*, 442 F. Supp. 3d 774, 803–04 (2d Cir. 2000), instead relying on arguments by Senrigan and notes from the articled clerks[10] in the Cayman Islands proceedings. Notably, the FAC does not allege *who* created the parallel projections, and on what basis—only that Zhou approved them, and that the accounting firm Price WaterhouseCoopers performed diligence on the parallel projections. ¶ 104. Furthermore, because the case settled after two days, there was no conclusion in that case as to the accuracy of the parallel projections. ¶ 102. The Court need not credit arguments of a third party's counsel in a totally separate proceeding. *Caiafa v. Sea Containers Ltd.,* 525 F. Supp. 2d 398, 411 (S.D.N.Y.2007) ("[A]llegations about [defendant] contained in pleadings from an unrelated lawsuit . . . are inadmissible.")); *see also In re UBS AG Sec. Litig.*, No. 07 Civ. 11225 (RJS), 2012 WL 4471265, at *17 n.17 (S.D.N.Y. Sept. 28, 2012), *aff'd sub nom. City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173 (2d Cir. 2014). Furthermore, the

[10] At the trial, the Maso entities instructed two "articled clerks" from Walkers to attend and take notes. In the Cayman Islands, articled clerks are attorneys-in-training who have completed their academic legal education and are completing the practical stages of their legal training. ¶ 102 n.4.

Buyer Group was separate from the Company, and any later projections adopted by the Buyer Group or presentations made on the basis of those projections cannot necessarily be attributed to Board, the Committee, or E-House. As Defendants note in their reply brief, "the mere fact that the Buyer Group made projections in the June/July timeframe does not render the Committee's January projections (or the accompanying disclosures in the Proxy) false or misleading," and "the Buyer Group's alleged confidence in the parallel projections, including any supposed 'guarantees' based on them, is irrelevant" to the "Committee's view of the 2016 Management Projections at the time of the Proxy. . ." Doc. 69 at 3, 3 n.4.

Thus, Plaintiffs' have not adequately pleaded that the Management Projections, and the omission of the parallel projections, were false or misleading.

b. Subsequent Transaction Statements

Second, Plaintiffs allege that Defendants' statements in the proxy materials that the purpose of the Merger was to obtain the benefits of a privately held Company and that the Buyer Group did not consider alternative transaction structures and did not have any present plans or to change the Company's structure were materially false and misleading. ¶¶ 130, 132, 136. Plaintiffs further allege that the statement that the Buyer Group *may* propose future plans or proposals to change the Company's structure, including relisting the Company or components of it on another stock exchange, was false and misleading because the Buyer Group in fact intended to do that from the outset. ¶¶ 138-39.

Plaintiffs' argument fails. As Defendants point out, Doc. 63 at 12-13, the statement about alternative transaction structures in context makes clear that the Buyer Group did not consider alternative transactions to the Merger, "because the Buyer Group believed the Merger was the most direct and effective way to enable the Buyer Group to acquire ownership and control of the Company." Final Proxy at 61.

As for the statements about future plans for E-House, Plaintiffs state that "[t]he law is clear that it is false for defendants to deny the existence of plans for corporate transactions when such plans already existed," Doc. 68 at 9, citing *Basic Inc. v. Levinson*, 485 U.S. 224 (1988) and

Buxbaum v. Deutsche Bank, A.G., 2000 WL 33912712, at *3 (S.D.N.Y. Mar. 7, 2000). However, Plaintiffs' reliance on *Basic* overstates the Supreme Court's discussion on materiality in the context of merger negotiations. Instead, *Basic* instructs that "materiality is something to be determined on the basis of the particular facts of each case." 485 U.S. at 238–39 (1988) (citing *SEC v. Geon Industries, Inc.*, 531 F.2d 39, 47-48 (2d Cir. 1976)).

Furthermore, Plaintiffs' allegations that the statements explaining the reasons for the Merger and the statements about the Buyer Group's plans (or lack thereof) to relist the Company are an all fours with at least two similar cases brought by Altimeo in this district, both of which involved companies incorporated in the Cayman Islands that went private and then relisted on Asian stock exchanges: *Qihoo*, 2020 WL 4734989, and *WuXi*, 2020 WL 6063539.

The *Qihoo* and *WuXi* courts determined that, because the defendant companies had disclosed "'the possibility of relisting the Surviving Company or a substantial part of its business on another internationally recognized stock exchange,'" the complaints could survive motions to dismiss only if they plausibly alleged "'that defendants, at the time of the Merger, had already adopted—but did not disclose to the public—an actual, concrete plan to relist in China.'" *WuXi*, 2020 WL 6063539, at *5 (citing *Qihoo*, 2020 WL 4734989, at *9). Here, as in those earlier cases, the FAC on its face states that the proxy materials did in fact disclose the possibility of relisting the Company or a component thereof on another stock exchange. ¶ 138.

Thus, as in those cases, the question is whether Plaintiffs have alleged, with the specificity required by Rule 9(b) and the PSLRA, that Defendants had an actual, concrete plan to relist on the Hong Kong stock exchange as of the date of the Proxy Materials. Plaintiffs have not met that standard, and in fact marshal less evidence than in *Qihoo* and *Wuxi*. Notably, in both of those cases, plaintiffs had cited multiple news reports and confidential witnesses, which the courts found insufficient to support a claim that the statements about not relisting were false or misleading. Here, Plaintiffs have not alleged the existence of any confidential witnesses. The lone news article Plaintiffs cite is a January 4, 2018 article in the *Beijing Commercial Daily*, reporting that "an individual close to the Company explained that after the completion of the

delisting, E-House introduced a number of new investors and made other changes in order to start the relisting." ¶ 116. For the same reasons stated in *Qihoo* and *WuXi*, this allegation is insufficient to support Plaintiffs' claims. As the *Qihoo* court explained,

> where a complaint's allegations of a false or misleading statement rely on a news article, the relevant statements in the article must be properly attributed to meet Rule 9(b)'s particularity requirement. *See, e.g.*, *In re Vale S.A. Sec. Litig.*, No. 15 Civ. 9539 (GHW), 2017 WL 1102666, at *27–28 (S.D.N.Y. Mar. 23, 2017) (two *Wall Street Journal* articles did not satisfy Rule 9(b) where "[t]he statements in th[e] article[s] ... are attributed to 'Vale,' but no further information as to the source of the statements is provided in the article, and no further information about the source is alleged in the complaint"). Similarly, media reports that consist of generalized forecasting or factually unsourced speculation do not, without more, satisfy the PSLRA. *See Plumbers & Steamfitters Local 773 Pension Fund v. Canadian Imperial Bank of Com.*, 694 F. Supp. 2d 287, 300–01 (S.D.N.Y. 2010).

2020 WL 4734989, at *13. Plaintiffs' citation to an article in the *Beijing Commercial Daily*, which was published about six months before the July 2018 relisting and describes only "an individual close to the Company," does not meet these standards. Furthermore, "the allegations in [the] article[] . . . are far too conclusory, insufficiently particular, and devoid of details" to be equal to "the task required of plaintiffs to establish that defendants made false or misleading statements." *Id.* at *16 (citing *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008) ("[N]ewspaper articles should be credited only to the extent that other factual allegations would be.")). An article published a year and a half after the Merger took place, and which provides no details about the supposed plan to relist, is insufficient to support the existence of a "concrete" plan to relist as would be required to render Defendants' statements about subsequent transactions false or misleading.

Finally, Plaintiffs contend that the July 2016 Presentation—cited in the Cayman Islands proceedings—reveals that the Buyer Group had pitched sales of stakes in EJ Core before shareholders voted on the Merger. Doc. 68 at 10. This is relevant, they argue, because the Buyer Group's relisting plan "was discussed in [the July 2016] presentation Defendants used to pitch new investors while the Merger was pending." Doc. 68 at 11 (citing ¶ 109). As

Defendants point out, this allegation also fails satisfy the requirements to state with particularity a "concrete and definite" plan to relist that existed before the publication of the Final Proxy, on July 1, 2016. Doc. 69 at 4. As the *WuXi* courts stated, such allegations "support[] only an inference that [the company] was considering" further transactions at the time of issuing the proxy materials and therefore fall "short of establishing that the proxy materials, which disclosed the possibility of relisting, were misleading." *WuXi*, 2020 WL 6063539, at *5 (citing *Qihoo*, 2020 WL 4734989 at *16).

c. Fairness Statements

Plaintiffs' allegations about the fairness statements also fail. Specifically, Plaintiffs allege that two statements are false: that each member of the Buyer Group believed the Merger to be substantively and procedurally fair, and that the Board, acting upon the recommendation of the Committee, had determined it was fair and in the best interests of the Company and the shareholders for the Company to enter into the Merger agreement. ¶¶ 125-28. The bases for Plaintiffs' contention that the Merger was not fair, and that Defendants could not have believed it to be fair, are repetitive of, and hinge on, whether the Management Projections were false or misleading. ¶¶ 126, 128. The Court has already determined that Plaintiffs have not sufficiently alleged that the Management Projections were materially false or misleading.

As noted above, the *Omnicare* framework applies to opinion statements, and thus statements about fairness are only actionable if Plaintiffs can allege that the speaker does not believe them, that the facts in support were untrue, or if the speaker omits information, making the statement misleading to a reasonable investor. Plaintiffs have not alleged that parties to the proxy materials did not believe the fairness statements, that the facts in support of these statements were untrue, or that they omitted information to make the fairness statements misleading. *See In re Shanda Games Ltd. Sec. Litigation*, No. 18 Civ. 02463 (ALC), 2019 WL 11027710, at *6 (S.D.N.Y. Sept. 30, 2019), *adhered to on reconsideration sub nom. In re Shanda Ltd. Sec. Litig.*, No. 18 Civ. 02463 (ALC), 2020 WL 5813769 (S.D.N.Y. Sept. 30, 2020)

("Without more detail the Court cannot conclude that Shanda did not believe the figures were accurate or were unreasonable in believing the figures were accurate.")

"Under § 10(b), the perceived unfairness of a transaction is actionable only insofar as that unfairness stems from a failure of disclosure." *WuXi,* 2020 WL 6063539, at *6. As in *WuXi,* here Plaintiffs have not stated any actionable failures to disclose.

Moreover, although Plaintiffs cite *Mindbody* for the proposition that fairness statements may be misleading where defendants' statements misleadingly "implied [that they] had no non-public information that would materially affect [the] share price," *Mindbody*, 2020 WL 5751173, at *11-13, Doc. 68 at 14, here the share prices in fact increased upon the announcement of the Merger—from $6.28 to $6.55—and again upon issuances of the Final Proxy—from $6.47 to $6.55. Doc. 64-2.[11]

d. Duty to Disclose

For the same reasons, Plaintiffs have not alleged that Defendants have breached any duty to disclose under either Cayman law or federal insider trading law. *See In re Shanda Ltd. Sec. Litig. (Shanda II)*, No. 18 Civ. 02463, 2020 WL 5813769, at *4-5 (S.D.N.Y. Sept. 30, 2020) (finding that plaintiff's reliance on *Davis v. Scottish Re Grp. Ltd.*, 74 N.Y.S.3d 10, 12 (2018), the same case Plaintiffs cite in ¶ 146, did not support a duty under Cayman Islands law for Cayman Islands corporations to provide shareholders with "sufficient information" to understand the merger they are voting on, including a "meaningful valuation" of their shares.)

[11] The price of the ADS—and the fact that the prices rose upon completion of the Merger—show that Plaintiffs are unable to allege loss causation, an independent reason for the failure of their claims. "Loss causation is the "causal connection between the material misrepresentation and the loss." *Dura Pharms.,* 544 U.S. at 342 (2005). To plead loss causation, Plaintiffs must "link the defendant's purported material misstatements or omissions with the harm ultimately suffered." *JA Solar*, 2020 WL 7028639, at *14 (quoting *In re Bristol Myers Squibb Co. Sec. Litig.*, 586 F. Supp. 2d 148, 163 (S.D.N.Y. 2008)). If the relationship between the loss and the information concealed or misstated by the defendant is "sufficiently direct, loss causation is established, but if the connection is attenuated, or if the plaintiff fails to demonstrate a causal connection between the content of the alleged misstatements or omissions and the harm actually suffered, a fraud claim will not lie." *Id.* (quoting *Bristol Myers*, 586 F. Supp. 2d at 163)). Here, as in *JA Solar*, Plaintiffs fail to allege loss causation, because the share prices increased fairly consistently between April 15, 2016, and the date when the Merger was consummated. *Id.* at *15 ("JA Solar's ADS price rose when the Merger was announced; rose once the Preliminary Proxy Materials were released; remained roughly the same when the Amended Proxy Materials were released; and rose again when the Final Proxy Materials were released.")

e. Scheme Liability

Because Plaintiffs have not pled actionable misstatements or omissions, their arguments for scheme liability under Rule 10b-5(a) and (c) also fail.

B. Section 13(e)and Rule 13e-3 Claims

Defendants urge that Plaintiffs' § 13(e) claims fail for the same reasons, because they are based on the same alleged misrepresentations or omissions. Doc. 63 at 23. Defendants also argue that § 13(e) claims do not expressly provide a private right of action. *Berg v. First Am. Bankshares, Inc.*, No. 83-3887, 1985 WL 2232, at *8 (D.D.C. Apr. 17, 1985), *aff'd*, 796 F.2d 489 (D.C. Cir. 1986) ("The Court determines that Congress did not intend to provide a private right of action for money damages under this section."). Plaintiffs argue, on the contrary, that many courts, including in this district, have recognized causes of action under § 13(e). *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 299 n.13 (S.D.N.Y. 2003) (recognizing § 13(e)(1), which prohibits fraud in connection with issuer's repurchase of its shares, as providing an implied right of action under the Exchange Act.)

As courts in this district have previously recognized, whether § 13(e) authorizes private suits remains an unsettled issue. *Polar Int'l Brokerage Corp. v. Reeve*, 108 F. Supp. 2d 225, 246 n.35 (S.D.N.Y. 2000) (comparing *Fisher v. Plessey Co. Ltd.,* 82 Civ. 1183, 1983 WL 1328 (S.D.N.Y. June 22, 1983) (private right of action under § 13(e)) *with Berg v. First Am. Bankshares, Inc.,* 83 Civ. 3887, 1985 WL 2232 (D.D.C. Apr.17, 1985) (no private right of action under § 13(e)). However, the Court need not decide at this juncture decide the issue of whether a private right of action applies. Because Plaintiffs have not adequately alleged actionable misrepresentations, their § 13(e) claims fail as well.

C. Section 20A Insider Trading Claims

Plaintiffs bring claims under § 10(b), Rule 10b-5, and § 20A against Defendant E-House and all members of the Buyer Group, with the exception of Defendant Chao, regarding insider trading. As noted above, the Court has already determined that Plaintiffs have failed to allege any actionable misrepresentations or omissions. Therefore, Plaintiffs' insider trading claims fail.

"Section 20A provides a cause of action against 'Any person who violates any provision of this chapter or the rules or regulations thereunder by . . . selling a security while in possession of material, nonpublic information[.]'" *Jackson Nat. Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994) (quoting 15 U.S.C. § 78t-1(a)). Thus, Section 20A claims require an independent underlying violation of the Exchange Act. *Id.* at 703–04. Because Plaintiffs have not established an underlying violation, their insider trading claims fail.

D. Section 20(a) Control Person Claims

Plaintiffs assert a claim for control person liability against the corporate officer defendants Shen, Chao, Xiang, Zhu, Zeng, Zhou, Li, and Jian, under § 20(a) of the Exchange Act. "Any claim for 'control person' liability under § 20(a) of the Exchange Act must be predicated on a primary violation of securities law." *Pacific Inv. Mgmt. Co. LLC v. Mayer Brown LLP,* 603 F.3d 144, 160 (2d Cir.2010). Because Plaintiffs have not stated a claim for any primary violation, their claims for control person liability also fail.

E. Leave to Amend

Defendants request that the Court dismiss the FAC with prejudice. Doc. 63 at 25. In their opposition, Plaintiffs request leave to amend in the alternative. Doc. 67 at 25. Rule 15 of the Federal Rules of Civil Procedure instructs courts to "freely give leave" to replead "when justice so requires." Fed. R. Civ. P. 15(a)(2); *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). The "usual practice" in this Circuit upon granting a motion to dismiss is to permit amendment of the complaint. *Special Situations Fund III QP, L.P. v. Deloitte Touche Tohmatsu CPA, Ltd.*, 33 F. Supp. 3d 401, 446–47 (S.D.N.Y. 2014) (citing *Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990)). Because it is possible that Plaintiffs can plead additional facts to remedy some of the deficiencies identified in this opinion without prejudice to Defendants, Plaintiffs are granted leave to amend. *See Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 189–90 (2d Cir. 2015) (finding the "district court exceeded the bounds of its discretion in denying Plaintiffs leave to amend their complaint" because an amended complaint "may cure the remaining defects" identified by the court). Plaintiffs will not be given unlimited

opportunities to amend, however, as they are now on notice of the deficiencies in their pleadings. *See, e.g.*, *Dietrich v. Bauer*, 76 F. Supp. 2d 312, 351 (S.D.N.Y. 1999) ("[W]here a plaintiff is on notice of deficiencies in an initial pleading and has had the opportunity to cure them by a first amendment, dismissal with prejudice is proper when a complaint previously has been amended.") (internal quotation marks and citations omitted).

IV. CONCLUSION

For the reasons stated above, Defendants' motion to dismiss is GRANTED. Defendants' letter motion for oral argument is DENIED as moot. Plaintiffs may file their Second Amended Complaint by October 20, 2021.

The Clerk of Court is respectfully directed to terminate the motions, Docs. 62 and 70.

It is SO ORDERED.

Dated: September 29, 2021
New York, New York

EDGARDO RAMOS, U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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In re E-HOUSE SECURITIES LITIGATION

20 **CIVIL** 2943 (ER)

JUDGMENT

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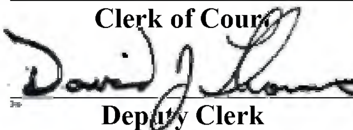
It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons stated in the Court's Opinion and Order dated September 29, 2021 and Memo-Endorsed Order dated February 7, 2022, Defendants' motion to dismiss is granted; Defendants' letter motion for oral argument is denied as moot; Judgment is hereby entered and the case is closed.

Dated: New York, New York
February 8, 2022

RUBY J. KRAJICK
Clerk of Court

BY: 
Deputy Clerk