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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

TONY PLANT,  
Plaintiff,  
v.  
JAGUAR ANIMAL HEALTH, INC, et al.,  
Defendants.

Case No. [17-cv-04102-RS](#)

**ORDER DENYING MOTION TO  
DISMISS**

**I. INTRODUCTION**

Plaintiff Tony Plant’s prior putative class action complaint for alleged securities fraud in connection with a merger between Jaguar Animal Health, Inc. (“Jaguar”) and Napo Pharmaceuticals, Inc. was dismissed, with leave to amend. Defendants’ motion to dismiss the second amended complaint has been submitted without oral argument pursuant to Civil Local Rule 7-1(b) and will be denied.

**II. BACKGROUND**

Jaguar is a publicly traded animal health company focused on developing and commercializing gastrointestinal products for certain animals. Napo was a privately owned pharmaceutical company focused on development and commercialization of proprietary pharmaceuticals for humans. The two companies announced a stock-for-stock merger in March of

1 2017 whereby Jaguar would acquire all of Napo's outstanding stock and Napo would become a  
2 wholly-owned subsidiary of Jaguar. Jaguar would issue new stocks and other securities to fund the  
3 transaction and Jaguar's shareholders would own about 25% of the combined entity. Jaguar and  
4 Napo filed a final joint proxy statement (the "Proxy") with the Securities & Exchange  
5 Commission (the "SEC") in July of 2017. Later that month, Jaguar stockholders approved the  
6 merger and the transaction closed.

7 On behalf of himself and similarly situated shareholders of Jaguar, Plant alleges that  
8 Jaguar, its post-merger entity Jaguar Health, Inc., and individual defendants who were members of  
9 Jaguar's board, violated Section 14(a) and 20(a) of the Securities Exchange Act of 1934 (the  
10 "Exchange Act") by issuing a materially incomplete and misleading joint proxy statement.  
11 Specifically, the second amended complaint alleges three basic categories of omissions.

- 12 • the Proxy purportedly omitted certain financial projections, including Jaguar's  
13 and Napo's projected "unlevered free cash flows" and "pro-forma projections,"
- 14 • Jaguar's financial advisor, Stifel, Nicolaus & Company supposedly utilized  
15 unreasonable discount rate ranges and perpetuity growth rates in connection with  
16 its discounted cash flow analysis described in the Proxy; and
- 17 • the Proxy allegedly misrepresented that Jaguar's potential drug candidate,  
18 Equilevia, would be sold as a prescription product, rather than as a non-prescription  
19 product.

### 20 21 22 **III. LEGAL STANDARD**

23 A complaint must contain "a short and plain statement of the claim showing that the  
24 pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While "detailed factual allegations are not  
25 required," a complaint must have sufficient factual allegations to "state a claim to relief that is  
26 plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic v. Twombly*,  
27 550 U.S. 544, 570 (2007)). A claim is facially plausible "when the pleaded factual content allows  
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1 the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”  
2 *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory  
3 statements, do not suffice.” *Id.*

4 A motion to dismiss a complaint under Federal Rule of Civil Procedure Rule 12(b)(6) tests  
5 the legal sufficiency of the claims alleged in the complaint. *See Parks Sch. of Bus., Inc. v.*  
6 *Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995). Dismissal under Rule 12(b)(6) may be based on  
7 either the “lack of a cognizable legal theory” or on “the absence of sufficient facts alleged under a  
8 cognizable legal theory.” *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006,  
9 1014 (9th Cir. 2013). When evaluating such a motion, the Court must “accept all factual  
10 allegations in the complaint as true and construe the pleadings in the light most favorable to the  
11 nonmoving party.” *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). When a plaintiff has  
12 failed to state a claim upon which relief can be granted, leave to amend should be granted unless  
13 “the complaint could not be saved by any amendment.” *Gompper v. VISX, Inc.*, 298 F.3d 893, 898  
14 (9th Cir. 2002) (citation and internal quotation marks omitted).

#### 15 16 **IV. DISCUSSION**

17 As set out in the prior order of dismissal, Section 14(a) of the Exchange Act makes it  
18 unlawful to solicit shareholder approval using a proxy statement that does not comply with the  
19 rules and regulations of the SEC. 15 U.S.C. §78n. SEC Rule 14a-9 prohibits proxy statements that  
20 are “false or misleading with respect to any material fact.” 17 C.F.R. § 240.14a-9. Collectively,  
21 these provisions “disallow the solicitation of a proxy by a statement that contains either (1) a false  
22 or misleading declaration of material fact, or (2) an omission of material fact that makes any  
23 portion of the statement misleading.” *Desaigoudar v. Meyercord*, 223 F.3d 1020, 1022 (9th Cir.  
24 2000). “An omitted fact or misrepresentation in a proxy statement is material when there is a  
25 substantial likelihood that a reasonable shareholder would consider it important in deciding how to  
26 vote.” *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

27 The prior motion to dismiss was granted in significant part because plaintiff’s opposition to  
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1 dismissal relied on allegations regarding the Equilevia product that were not included in the  
2 complaint. Specifically, plaintiff argued the Proxy stated the Equilevia drug was intended to be  
3 sold as a prescription product—with the attendant delays and costs in obtaining regulatory  
4 approvals—but that within days of the transaction closing the merged entity announced the  
5 product would instead be sold on a non-prescription basis, starting in the near future.

6 The second amended complaint includes the allegations regarding Equilevia that were  
7 missing from the prior complaint. Defendants insist those allegations nevertheless fail to state a  
8 claim because it might be the case that selling Equilevia as a non-prescription product could have  
9 been less profitable than if approval to sell it under prescription had been pursued. While that  
10 could be true, it only underscores the materiality of the issue. Plaintiffs may reasonably argue they  
11 were entitled to weigh the respective costs and benefits of marketing Equilevia with or without a  
12 prescription.

13 Plant’s allegations regarding other supposed deficiencies of the Proxy were previously  
14 dismissed because he had “failed to allege sufficient facts to show that the omissions presently  
15 alleged in the complaint were material.” As explained in the prior order, “at least at this juncture,  
16 the information Plant contends was omitted appears to be details that, if disclosed would not have  
17 substantially altered the “total mix” of information available to the shareholders. *See In re Hot*  
18 *Topic, Inc. Sec. Litig.*, No. CV 13-02939 SJO JCX, 2014 WL 7499375, at \*9 (C.D. Cal. May 2,  
19 2014) (“Plaintiff’s argument chiefly rests on Defendants’ omission of certain accounting details  
20 from the Proxy Statement, including stock based compensation expense, working capital, taxes or  
21 marginal tax rate, net income, and unlevered free cash flows.)

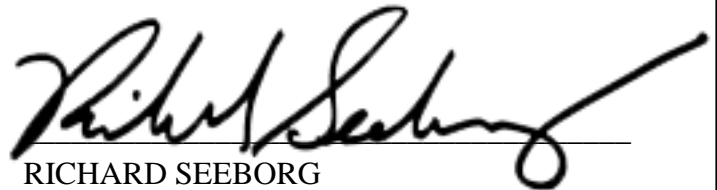
22 The amended complaint includes significant additional detail, although at least some of it  
23 arguably consists of argument rather than fact. Given that Plant has stated a claim based at least on  
24 the allegations regarding Equilevia, however, there is no basis to parse the allegations to decide at  
25 this juncture whether the proxy included other actionable misstatements or was misleading as the  
26 result of any material omissions. The motion to dismiss must be denied.

**V. CONCLUSION**

The motion to dismiss is denied.

**IT IS SO ORDERED.**

Dated: June 28, 2019



RICHARD SEEBORG  
United States District Judge

United States District Court  
Northern District of California

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