UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LEONARD J PANELLA,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. 4:17-CV-02904
	§	
TESCO CORPORATION, *et al*,	§	
	§	
Defendants.	§	

ORDER

Before the Court are Defendants' Tesco Corporation ("Tesco") and Fernando R. Assing, John P. Dielwart, R. Vance Milligan, Douglas R. Ramsay, Rose M. Robeson, Elijio V. Serrano and Michael W. Sutherlin ("Individual Tesco Defendants") Motion to Dismiss Plaintiff's Amended Complaint (Doc. #27), Plaintiff's Response (Doc. #33), and Defendants' Reply (Doc. #39).[1] Also, before the Court is Defendant Nabors Industries Ltd.'s ("Nabors") Motion to Dismiss (Doc. #29), Plaintiff's Response (Doc. #34), and Nabors' Reply (Doc. #38). After reviewing the parties' arguments and the applicable legal authority, the Court grants Tesco and Nabors Defendants' Motions to Dismiss.

I. Background

This case involves a class action brought by Plaintiff on behalf of himself and other former public holders of the common stock of Tesco. Plaintiff alleges Defendants violated Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §§ 78n(a) and 78t(a), and Securities and Exchange Commission ("SEC") Rule 14a-9, 17 C.F.R. 240.14a-9, in connection with the merger between Tesco and Nabors ("Merger").

[1] Plaintiff filed an Unopposed Motion for Leave to File Excess Pages (Doc. #32). That Motion is hereby GRANTED. The Court considered the entirety of the briefing presented by counsel in this case.

On August 13, 2017, Tesco entered into an Arrangement Agreement ("Arrangement") with Nabors. Doc. #26, Ex. 2 at 5. Pursuant to the Arrangement, Nabors would acquire all outstanding shares of Tesco in an all-stock transaction in which Tesco shareholders would receive 0.68 shares of Nabors common stock in exchange for each share of Tesco common stock (the "Merger Consideration"). Based upon the exchange ratio, the Merger Consideration had an implied value of $4.62 per Tesco common share. *Id.* at 43.

The Merger was announced on August 14, 2017. Doc. #26 at 2. On October 26, 2017, the Defendants solicited Tesco shareholders to approve the Merger by filing a 14A Definitive Proxy Statement (the "Proxy") with the SEC and causing the Proxy to be disseminated to the shareholders. *See Id.*, Ex. 2. On December 1, 2017, a majority of Tesco shareholders voted to approve the Merger (33,282,174 shares voted in favor of the Arrangement, 7,133,540 voted against, and 1,405,523 abstained). Doc. #27, Ex. 7. Because Tesco was incorporated under the laws of Alberta, Canada, the Merger was subject to oversight and approval by the Court of Queen's Bench of Alberta, Canada. Doc. #27 at 12.[2] The Merger was approved by the Alberta Court on December 4, 2017, and completed on December 15, 2017.

The Proxy statement that is at issue in this case, was filed on October 25, 2017. The Proxy announced a special shareholders meeting on December 1, 2017, for a vote on the Merger

[2] Plaintiff filed his original complaint on October 10, 2017, seeking to enjoin the Defendants from holding a shareholder vote complaining of incomplete and misleading information (omitted financial projections and valuation analyses performed by J.P. Morgan Securities LLC. The Court notes that securities holders that oppose the Merger Arrangement are given dissent rights in Alberta, Canada, that "allow the dissenting security holders to apply to the Alberta Court to obtain an alternative payment based on a judicial valuation of their shares by the Alberta Court." Doc. #27 at 6–7. Furthermore, the Proxy made shareholders aware of dissenting shareholder rights. Doc. #26, Ex. 2. Plaintiff and his counsel received notice of the Alberta Court's October 18, 2017 interim approval hearing and the December 4, 2017 final approval hearing. Doc. #27 at 7. Neither Plaintiff or any other shareholder appeared before the Alberta Court to contest the Merger Arrangement. *Id.*

and solicited the shareholders' favorable proxies. Doc. #26, Ex. 2 at 5. Plaintiff alleges that "the Proxy omitted several categories of material valuation information that, if disclosed, would have alerted Tesco shareholders that the Merger Consideration undervalued their shares." Doc. #26 at 4 ¶ 11. Plaintiff alleges that the omission of the information "rendered certain sections of the Proxy discussing Tesco's projections, future prospects, and value of Tesco shares, and the analyses performed by Tesco's financial advisor, materially incomplete and misleading." *Id.*

Plaintiff lists four categories of information that were omitted from the Proxy: "1) the unlevered free cash flows[3] that Tesco is expected to generate during fiscal years 2017 through 2022 (the 'Tesco Cash Flow Projections'); 2) Tesco projections (including for Revenue and [Earnings Before Interest, Tax, Depreciation, and Amortization] EBITDA) for years beyond 2018 (the 'Later Year Projections'); 3) implied per share equity value ranges derived by utilizing the significantly higher 'Growth Case' projections prepared by Tesco management (the 'Growth Case Share Value Ranges'); and 4) the analysis (or a summary thereof) J.P. Morgan [the financial advisor] performed whereby it compared the proposed financial terms of the Arrangement with the publicly available financial terms of certain transactions involving companies J.P. Morgan deemed relevant and the consideration received for such companies (the 'Transactions Analysis')." Doc. #26 at 5 ¶ 15, 35 ¶102. Plaintiff argues that "the omission of these categories of information, both individually and collectively, rendered portions of the Proxy that purported to provide shareholders with information regarding the value of their shares, the value of Tesco, and [Tesco's] future prospects incomplete and misleading." Doc. #26 at 19 ¶ 60, 35 ¶ 103.

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[3] "'[U]nlevered cash flows' refers to a calculation of the future cash flows generated by an asset without including in such calculation any debt servicing costs. Specifically, 'unlevered free cash flow' for this purpose represents EBITDA less taxes, capital expenditures, increases in net working capital and certain other one-time cash expenses, as applicable." Doc. #26 at 65.

Plaintiff argues that by "disseminating the materially incomplete and misleading Proxy" Defendants violated Sections 14(a) and 20(a) of the Exchange Act and SEC Rule 14a-9. Doc. #26 at 5 ¶ 14.

The original complaint in this case was filed on September 28, 2017. Doc. #1. Subsequently, on October 18, 2017, related cases *The Vladimir Gusinsky Rev. Trust v. Tesco Corporation et al.*, Civ. No. H-17-02918 (S.D. Tex.) and *Heinze v. Tesco Corporation et al.*, Civ. No. H-17-03029 were consolidated into this case. Doc. #9. Counsel for Plaintiff was appointed as lead counsel (Doc. #24) in this case and the Amended Complaint was filed on April 6, 2018. Doc. #26. Defendants now move to dismiss Plaintiff's Amended Complaint.

II. Legal Standard

A. 12(b)(6) and PSLRA Pleading Standard

To withstand a Rule 12(b)(6) motion to dismiss, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* Although well pleaded factual allegations are taken as true and construed in the light most favorable to the Plaintiff, the Court does not "accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions." *Central Laborers' Pension Fund v. Integrated Elec. Services Inc.*, 497 F.3d 546, 550 (5th Cir. 2007). In considering a Rule 12(b)(6) motion, the Court may examine documents

incorporated into the complaint by reference and matters of which a court may take judicial notice. *Tellabs, Inc. v. Makor Issues & Rights*, Ltd., 551 U.S. 308, 322 (2007).

Additionally, complaints charging false or misleading statements under the federal securities laws are subject to heightened pleading requirements under the Private Securities Litigation Reform Act ("PSLRA"). 15 U.S.C. § 78u–4(b)(1). Under these standards, the complaint in a Section 14(a) action must specify 1) each statement alleged to have been misleading; 2) the reason or reasons why the statement is misleading; and, if an allegation is made on information and belief, 3) all facts supporting the belief, stated with particularity. *See* 15 U.S.C. § 78u–4(b)(1).

Moreover, under the PSLRA, the complaint must set forth a causal connection between the material misrepresentation and an economic loss to the plaintiff. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (holding that "plaintiffs need to prove proximate causation and economic loss"). In the context of a private action under Section 14(a), both loss causation and transaction causation must be proven. *Grace v. Rosenstock*, 228 F.3d 40, 47 (2d Cir. 2000) (citations omitted) (defining loss causation as "the misrepresentations or omissions caused the economic harm," and transaction causation as "the violations in question caused the [plaintiff] to engage in the transaction in question").

B. Section 14(a)

Section 14(a) of the Exchange Act makes it unlawful to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1). The Supreme Court recognized an implied private right of action for injury caused by a violation of Section 14(a), as

implemented by Rule 14a–9,[4] in *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964). Section 14(a) was designed to "prevent management or others from obtaining authorization for corporate action by means of deception or inadequate disclosure in proxy solicitation." *Rosenberg v. Nabors Indus., Inc.*, No. CIV.A. H021942, 2002 WL 1431820, at *2 (S.D. Tex. June 14, 2002) (citations omitted).

The elements of a Section 14(a) claim are 1) defendants misrepresented or omitted a material fact in a proxy statement; 2) defendants acted at least negligently in distributing the proxy statement; and 3) the false or misleading proxy statement was an essential link in causing the corporate actions. *Braun v. Eagle Rock Energy Partners, L.P.*, 223 F. Supp. 3d 644, 649 (S.D. Tex. 2016) (citations omitted). Under element one, "[o]mission of information from a proxy statement will violate Section 14(a) and Rule 14a–9 if either the SEC regulations specifically require disclosure of the omitted information in a proxy statement, or the omission makes other statements in the proxy statement materially false or misleading." *Greenthal v. Joyce*, No. 4:16-CV-41, 2016 WL 362312, at *2 (S.D. Tex. Jan. 29, 2016) (citing *Pedroli ex rel. Microtune, Inc. v. Bartek*, 564 F. Supp. 2d 683, 687 (E.D. Tex. 2008)). An omission is material if "there [is] a substantial likelihood that the disclosure of the omitted fact would have been viewed by a reasonable investor as having significantly altered the 'total mix' of information made available." *TSC Industries, Inc. v. Northway*, 426 U.S. 438, 449 (1976). "However, in a proxy context this definition of materiality assumes that the omitted information would have influenced

[4] Rule 14a–9, promulgated thereunder, provides that "[n]o solicitation subject to this regulation shall be made by means of any proxy statement . . . containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading . . . ." 17 C.F.R. § 240.14a–9(a).

a reasonable shareholder against the proposed transaction for which the proxies were sought." *Minzer v. Keegan*, 218 F.3d 144, 149 (2d Cir. 2000).

C. Safe Harbor Provision

Additionally, claims under Section 14(a) are subject to the PSLRA's safe harbor for "forward-looking statements." 15 U.S.C. § 78u–5(c)(1) (safe harbor applies "in any private action arising under [the Exchange Act] that is based on an untrue statement of a material fact *or omission of a material fact* necessary to make the statement not misleading") (emphasis added).

The definition of a forward-looking statement includes statements containing financial projections (projection of revenues, income, or earnings per share), statements of the plans and objectives of management for future operations, and statements of future economic performance. 15 U.S.C. § 78u–5(i)(1); *see also In re BP P.L.C. Sec. Litig.*, 852 F. Supp. 2d 767, 798–99 (S.D. Tex. 2012) (citations omitted). The PSLRA creates a safe harbor for forward-looking statements that are "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u–5(c)(1)(A). "[A] defendant is not liable 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. *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 766 (2d Cir. 2010) (citing *Southland Secs. Corp. v. INSpire Ins. Solutions, Inc.*, 365 F.3d 353, 371–72 (5th Cir. 2004)).

III. Analysis

In the Fifth Circuit there is "no duty to disclose in the prospectus all information material to the offering, but [there is a duty to disclose] only that material information necessary to make the statements in the prospectus not misleading and that material information specifically

required by the securities laws to be included." *Greenthal*, 2016 WL 362312, at *4 (citing *Kapps v. Torch Offshore, Inc.*, 379 F.3d 207, 212 n.6 (5th Cir. 2004)). Complaints that amount to "'tell me more' pleadings do not state a Section 14(a) claim because if the standard of materiality were so low, not only may the corporation and its management be subjected to liability for insignificant omissions or misstatements, but also management's fear of exposing itself to substantial liability may cause it simply to bury the shareholders in an avalanche of trivial information a result that is hardly conducive to informed decisionmaking." *Goldfinger v. Journal Commc'ns Inc.*, No. 15-C-12, 2015 WL 2189752, at *5 (E.D. Wis. May 8, 2015) (citing *TSC Indus.*, 426 U.S. at 448–49).

Plaintiff's complaint alleges four categories of information that were omitted from the Proxy—Tesco Cash Flow Projections, Later Year Projections, the presumed use of only the Growth Case Share Value Ranges by J.P. Morgan Securities LLC ("J.P. Morgan"), and J.P. Morgan's Transactions Analysis. *See supra* p. 3. However, the "four categories" concern two distinct groups of information: 1) omitted financial projections and 2) issues concerning the valuation analyses performed by J.P. Morgan (the financial advisor that rendered a fairness opinion concerning the Arrangement).

A. Financial Projections Beyond 2018

i. The alleged omitted financial projections are not material.

Plaintiff complains that "Defendants withheld from Tesco's shareholders these Tesco financial projections for years 2019 and beyond (i.e., the Tesco Cash Flow Projections and the Later Year Projections)." Doc. #26 at 20 ¶ 63. First, Plaintiff's complaint furnishes no basis to plausibly conclude that more financial projections beyond what were already supplied (two years from 2017 to 2018) were substantially likely to have been viewed by reasonable investors as having significantly altered the total mix of information available. The Proxy statement itself cautions:

> **Certain Prospective Financial Information Prepared by TESCO**
> TESCO does not as a matter of course make public forecasts as to future performance, earnings or other results among other reasons because of the unpredictability of the assumptions and estimates underlying such forecasts. However, in connection with Nabors' due diligence review of TESCO, TESCO presented certain prospective, unaudited financial information regarding its business, which is referred to as the "TESCO Business Management Case", to Nabors. The TESCO Business Management Case also was provided to Nabors' financial advisors, Intrepid, for use in connection with its financial analysis. The TESCO Business Management Case contains certain internal financial forecasts regarding TESCO's anticipated future operations for fiscal years 2017-2018. These projections were produced during the middle of the second quarter of 2017, and take into account actual first quarter financial results.

Doc. #26, Ex. 2 at 60–61. The Proxy then goes on to list the "summary of the Tesco Business Management Case" (Revenue and EBITDA Base Case and Growth Case numbers for 2017 and 2018):

	2017E	2018E
	(US dollars in millions)	
Revenue—Base Case	$ 172.7	$ 222.2
EBITDA—Base Case	$ (19.5)	$ 2.5
Revenue—Growth Case[1]	$ 172.1	$ 262.6
EBITDA—Growth Case[1]	$ (19.4)	$ 22.0

* EBITDA is defined as earnings before interest, taxes, depreciation and amortization.
(1) TESCO management provided a growth case scenario for 2017 and 2018. This growth case was contingent upon and assumes favorable market conditions and takes into account other assumptions related to successful entry into several offshore contracts for tubular services and additional product sales.

Id. at 61. Again, the Proxy itself cautions that "in preparing the TESCO Business Management Case, TESCO management made assumptions and estimates regarding, among other things, [c]ommodity price (oil and gas) trends, volatility, and resulting potential activity fluctuations . . . ." *Id.*

Plaintiff's allegations are that Defendants omitted a longer projection horizon than the two years of projections included in the Proxy. Specifically, Plaintiff complains that the Proxy did not include financial projections for the years 2019 through 2022—years Plaintiff claims "oil prices are expected to significantly accelerate." Doc. #26 at 21–23, 36. Plaintiff alleges that including more financial projections beyond 2018 would have informed Tesco shareholders that

Tesco's future prospects were particularly strong starting 2019 and beyond, and that the Merger Consideration undervalued their shares in light of Tesco's future prospects. Doc. #26 at 21–22.

However, in general, "the longer the projection period, the more speculative (and, therefore, the less useful) the projection, suggesting that the materiality of a projection must vary inversely with the length of the projection period." *Trahan v. Interactive Intelligence Grp., Inc.*, 308 F. Supp. 3d 977, 989 (S.D. Ind. 2018) (citing *Himmel v. Bucyrus Int'l, Inc.*, No. 10-C-1104, 2014 WL 1406279, at *16 (E.D. Wis. Apr. 11, 2014). The Proxy itself cautions this very point, that the longer the projection period, the less useful the information becomes. *See* Doc. #26 at 60 ("TESCO Business Management Case covers multiple years and the forecasts contained therein by their nature become less predictive with each succeeding year."). Accordingly, speculative future projections beyond 2018 would not be viewed by a reasonable investor as significantly altering the total mix of information available in the Proxy.

Furthermore, Plaintiff does not point to any securities law, nor does the Court find one, that requires the Proxy to include five years of financial projections as opposed to two years. The omissions concerning financial projections that Plaintiff complains of are not "half-truths" (where some information about 2019-2022 was included and other information was excluded).[5]

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[5] Plaintiff filed a notice of supplemental authority (Doc. #47) concerning the Eighth Circuit case, *Campbell v. Transgenomic, Inc.*, 916 F.3d 1121 (8th Cir. 2019). However, the Eighth Circuit case dealt with "half-truths"—it involved a proxy that included post-merger financial projections for the company but did not include any pre-merger financial projections. *Campbell* was not a case concerning "pure omissions" of future financial projections beyond the dates provided in the proxy. *Id.* at 1125 The Eighth Circuit found that it was materially misleading to include only the financial information for the post-merger company while excluding the pre-merger information for the same company. *Id.* That is not the issue in this case. Here, pre-merger financial information was included concerning Tesco. What was omitted were financial projections beyond 2018. And, with no law requiring more financial projections beyond the two years already included in the Proxy, this "pure omission" does not render the information included in the Proxy false and misleading, nor does it alter the total mix of information that was available to the Tesco shareholders.

Rather, it was a "pure omission" of financial projection information beyond the year 2018. Therefore, with no requirement to include a longer projection period by law, Defendant's pure omission of financial projections beyond the two years already included in the Proxy is not actionable. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 239 (2d Cir. 2016) (quoting *Litwin v. Blackstone Grp., L.P.*, 634 F.3d 706, 719 (2d Cir. 2011) ("a complete failure to make a statement—in other words, a pure omission—is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts.").

In a case alleging similar omissions from a proxy, "full financial forecasts, particularly the estimates of free cash flow" and "the underlying inputs and assumptions used to generate" the values in the arrangement analysis, the district court granted dismissal of the claims alleged under Section 14(a) and Rule 14a–9 as the plaintiff failed to identify a precise statement in the proxy that was "either affirmatively misleading or that is rendered misleading by the operation of a materially omitted fact," finding the statements alleged to be vague and conclusory assertions. *Louisiana Mun. Police Employees Ret. Sys. v. Cooper Indus. plc*, No. 12 CV 1750, 2012 WL 4958561, at *8 (N.D. Ohio Oct. 16, 2012). Similarly, in this case there is no factual support for Plaintiff's argument that omitting the projections beyond two years renders any of the other statements in the Proxy materially false or misleading or that disclosure of projection periods beyond the two years was required by law. *See Greenthal*, 2016 WL 362312, at *5 (citing *Pedroli ex rel. Microtune, Inc. v. Bartek*, 564 F. Supp. 2d 683, 687 (E.D. Tex. 2008)). Accordingly, the Court finds that Plaintiff did not plead a plausible Section 14(a) claim based upon the omissions alleged in the complaint.

ii. Future projections are covered by the PSLRA safe harbor provision.

Furthermore, the future projections that Plaintiff complains were omitted from the Proxy would be covered by the PLSRA safe harbor for "forward-looking statements." A forward-looking statement includes statements containing financial projections (projection of revenues, income, or earnings per share), statements of the plans and objectives of management for future operations, and statements of future economic performance. 15 U.S.C. § 78u–5(i)(1); *see also In re BP P.L.C. Sec. Litig.*, 852 F. Supp. 2d 767, 798–99 (S.D. Tex. 2012) (citations omitted). "The safe harbor provision protects individuals and corporations from liability for forward-looking statements that are accompanied by meaningful cautionary statements." *In re BP P.L.C. Sec. Litig.*, 852 F. Supp. 2d at 789 (quoting 15 U.S.C. § 78u–5(c)(1)(A)(i)-(ii)). The Tesco Cash Flow Projections and Later Year Projections are forward looking statements. They are financial projections from 2019-2022 and statements of future economic performance. Therefore, Defendants are not liable for omitting speculative projections for years beyond 2018. Furthermore, the sections of the Proxy omitting these forward-looking projections contain detailed cautionary language. *See In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 247 (2d Cir. 2016) (citations omitted) ("To avail themselves of safe harbor protection under the meaningful cautionary language prong, defendants must demonstrate that their cautionary language was not boilerplate and conveyed substantive information."). The Proxy includes cautionary language concerning the forward-looking statements for the years 2017-2018, including detailed risk factors. Doc. #26 at 30–37. Furthermore, the cautionary language is detailed and substantive. *See e.g.,* Doc. #26, Ex. 2 at 61–62 ("in preparing the TESCO Business Management Case, TESCO's management made assumptions and estimates regarding, among other things, commodity price (oil and gas) . . . market trends . . . competitive landscape . . . use of cash . . . organic and inorganic growth

potential; and execution risks. . . ." Tesco's management's "assumptions may not prove to be accurate and the projected results may not be realized, and actual results may differ from those reflected in the TESCO Business Management Case."). Additionally, the Proxy cautions "[t]his summary of the TESCO Business Management Case is not included in this proxy statement to induce any Securityholder to vote in favor of approval of the Arrangement and should not be relied upon for such purpose." *Id.* at 62.

What Plaintiff construes as material misstatements are Plaintiff's preference to see longer financial projections than what was already provided by Defendants. Defendants' pure omission of more forward-looking statements for the years beyond 2018 does not make other statements in the Proxy false or misleading and furthermore and the information is covered by the PSLRA safe-harbor provision. Therefore, the omissions are not actionable Section 14(a) and Rule 14a–9 claims.

B. The allegations concerning J.P. Morgan are not actionable.

Additionally, Plaintiff argues the Proxy violated Section 14(a) due to information he alleges was not included in J.P. Morgan's Transaction Analysis. First, the Court notes that Plaintiff's complaint concerning whether J.P. Morgan used the "Growth Case" or "Base Case" to calculate the "implied per share equity ranges" is pure speculation. Plaintiff alleges that J.P. Morgan "presumably calculated from the significant lower Base Case projections." Doc. #26 at 8. However, both Growth Case and Base Case numbers are included in the Proxy. *Id.* at 61. Furthermore, the "implied per share equity value" ranges listed in the Proxy subject to J.P. Morgan's Transaction Analysis (low $3.50-4.00 and high $5.50-5.75) and the Merger Consideration are commensurate with the actual public stock prices for Tesco during the time of the Merger (Doc. #27, Ex. 9). Doc. #26 at 65. Plaintiff's conclusory allegation concerning what

projection J.P. Morgan calculated from does not amount to a plausible claim for relief, nor does it meet the heightened pleading standard of particularity under PSLRA.

Plaintiff's final allegation concerns the inadequacy of J.P. Morgan's opinion summary that was included in the Proxy. Doc. #26 at 228–229, Annex F. However, Plaintiff's allegation has no basis in the law. Plaintiff complains that "it is inherently misleading to summarize a valuation analyses that makes a merger look favorable and fair, while withholding analysis that makes a merger look unfavorable and unfair." Doc. #26 at 35. Plaintiff alleges that Defendants omitted information concerning the transactions J.P. Morgan analyzed in comparison to the financial terms of the Arrangement because the Transaction Analysis "likely indicated that the Merger Consideration and premium obtained for Tesco shareholders were insufficient." Doc. #26 at 31. Plaintiff pleads no particularized facts to support this allegation. Furthermore, J.P. Morgan provided a fairness opinion and a summary thereof in the Proxy. Doc. #26, Ex. 2 at 62–66, 228–229. The Proxy states that J.P. Morgan found the Merger Consideration to be paid shareholders as proposed in the Arrangement to be fair. Doc. #26 at 21. "Under the law, shareholders are merely entitled to "a fair summary of the substantive work performed by the investment bankers." *Greenthal*, 2016 WL 362312, at *6. The full summary of J.P. Morgan was included in the Proxy and information concerning the fairness recommendation. Simply because Plaintiff prefers more information beyond the summary provided by J.P. Morgan does not render the information provided false or misleading. Accordingly, Plaintiff has not pleaded a plausible claim based upon the Transaction Analysis of J.P. Morgan.

Fore the aforementioned reasons, the Court finds that Plaintiff has not plead a plausible claim for violations of Section 14(a) and Rule 14a–9 against any of the Defendants (Tesco, Individual Tesco Defendants, and Nabors Defendants).

C. Section 20(a)

Plaintiff also seeks to impose control person liability under Section 20(a) against Defendants. Because Plaintiff failed to plead a primary violation under Section 14(a), the Section 20(a) claims are dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Alaska Elec. Pension Fund v. Flotek Indus., Inc.*, 915 F.3d 975, 986 (5th Cir. 2019) (citing *Southland Sec. Corp.*, 365 F.3d at 383) (stating "[c]ontrol person liability is secondary only and cannot exist in the absence of a primary violation"). Because Plaintiff has not established a primary violation under Section 14(a), his Section 20(a) claims fail. *Id.*

IV. Conclusion

For the foregoing reasons, Plaintiff failed to plead plausible Section 14(a) and 20(a) claims against Tesco and Nabors Defendants based upon the information Plaintiff alleged was omitted from the Proxy. Accordingly, Defendants' Motions to Dismiss (Doc. #27 & 29) are hereby GRANTED. Plaintiff's claims are hereby DISMISSED.

It is so ORDERED.

MAR 29 2019
Date

The Honorable Alfred H. Bennett
United States District Judge