AKIN GUMP STRAUSS HAUER & FELD LLP
NEAL R. MARDER (SBN 126879)
JOSHUA A. RUBIN (SBN 308421)
SINA SAFVATI (SBN 313287)
LILLIAN RAND (SBN 341581)
1999 Avenue of the Stars, Suite 600
Los Angeles, California 90067
Email: nmarder@akingump.com
rubinj@akingump.com
ssafvati@akingump.com
lrand@akingump.com

Attorneys for Defendants ARMISTICE CAPITAL, LLC, ARMISTICE MASTER FUND, LTD, STEVEN J. BOYD, and KEITH MAHER, M.D.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re VAXART, INC. SECURITIES LITIGATION	Lead Case No. 3:20-cv-05949-VC
	District Judge: Hon. Vince Chhabria
This Document Relates to: ALL ACTIONS	CLASS ACTION
	ARMISTICE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
	Date: June 26, 2025 Time: 2 p.m. Ctrm: 4, 17th Floor

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on June 26, 2025, at 2:00 p.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Vince Chhabria, located at United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, California 94102, Defendants Armistice Capital, LLC ("Armistice Capital"), Armistice Master Fund LTD ("Armistice Master Fund"), Steven J. Boyd, and Keith Maher, M.D. (collectively, "Armistice") will and hereby do move for summary judgment pursuant to Federal Rule of Civil Procedure 56 and the Northern District of California Civil Local Rules 7-2, 7-4 and 56.

This Motion is based upon this Notice of Motion and Motion, the Declaration of Joshua A. Rubin, the exhibits attached thereto, the Court's files in this action, the arguments of counsel, and any other matter that the Court may consider.

Dated: April 3, 2025

Akin Gump Strauss Hauer & Feld LLP

By: */s/ Neal R. Marder*
Neal R. Marder
Attorney for ARMISTICE CAPITAL, LLC, ARMISTICE CAPITAL MASTER FUND LTD., STEVEN J. BOYD, and KEITH MAHER, M.D.

ISSUES TO BE DECIDED (Civil Local Rule 7-4(a)(3))

1. Whether summary judgment should be granted on Plaintiffs' second cause of action for violations of Section 10(b) of the Exchange Act and Rule 10b-5(a),(c) promulgated thereunder, where there is no genuine dispute as to any material fact and the undisputed evidence establishes that Armistice (a) did not draft or revise either the June 25, 2020 Vaxart press release (the "Attwill Release") or the June 26, 2020 Vaxart press release (the "OWS Release"); (b) did not see or review the Attwill Release or OWS Release before they were issued or have any of their content previewed to them; and (c) did not commit a deceptive act with the principal purpose and effect of creating a false appearance of fact through Andrei Floroiu's appointment to the board or CEO position, through Boyd's June 25, 2020 email to Floroiu regarding trading preclearance, or through the June 25, 2020 amendment of Vaxart's insider trading policy.

2. Whether summary judgment should be granted on Plaintiffs' fourth and fifth causes of action for insider trading in violation of Section 20A of the Exchange Act, where there is no genuine dispute as to any material fact and the undisputed evidence establishes that (a) Armistice possessed no material nonpublic information contradicting the statements in the Attwill Release; (b) Armistice possessed no material nonpublic information contradicting the statements in the OWS Release; (c) Boyd and Maher were informed by Vaxart management that the non-human primate study ("NHP Study") was part of Operation Warp Speed; (d) Armistice and Vaxart both believed that the NHP Study invitation was material news; and (e) Armistice did not believe that the Attwill Release or OWS Release were false or misleading

3. Whether summary judgment should be granted on Plaintiffs' second, fourth, and fifth causes of action (*i.e.*, all remaining claims) for lack of loss causation where there is no genuine dispute as to any material fact and Plaintiffs have failed to adduce evidence that (a) the alleged truth regarding the Attwill Release was ever revealed to the public causing loss to Plaintiffs or the class; or (b) any corrective disclosure caused loss to Plaintiffs or the class.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

Plaintiffs' entire case rests on two Vaxart, Inc. ("Vaxart") press releases that Plaintiffs maintain were false or misleading. Undisputed evidence confirms that these press releases were not drafted, revised, or even seen by Steven Boyd, Dr. Keith Maher, Armistice Capital, LLC, or Armistice Capital Master Fund LTD (collectively, "Armistice") until Vaxart issued them to the public. The evidence likewise confirms that Armistice had no reason to believe that the information Vaxart disclosed in these press releases was inaccurate or misleading.

Vaxart's management team, alone, drafted the two press releases. The releases disclosed: (1) Vaxart's Memorandum of Understanding ("MOU") with Attwill; and (2) the U.S. government's invitation to Vaxart to participate in an Operation Warp Speed ("OWS") non-human primate study ("NHP Study"). As to the first press release (the "Attwill Release"), Vaxart's management performed due diligence into Attwill's regulatory and manufacturing capabilities, without providing the results of this diligence to Armistice. As Vaxart was drafting the Attwill Release, it was Vaxart's PR firm LifeSci, which had no connection to Armistice, who moved the allegedly misleading "billion" doses per year language into the headline. As to the second press release (the "OWS Release"), Vaxart's management, not Armistice, interacted with representatives from the federal government who ***repeatedly*** told Vaxart they were part of OWS, a fact confirmed by the Department of Health and Human Services ("HHS") witness deposed in this case. And it was LifeSci who moved the key "selected for Operation Warp Speed" language into the release's headline. All of these facts are undisputed and mandate summary judgment.

Plaintiffs' twice-corrected Second Amended Complaint ("SAC")[1] alleges that Armistice "schemed" to manipulate Vaxart's stock price. Effectively acknowledging Armistice did not draft either press release or control their content, Plaintiffs' primary argument is that Armistice "caused the dissemination of" both press releases by: (1) appointing Andrei Floroiu as CEO to do Armistice's bidding; and (2) sending an email to Floroiu stating that Armistice "may" disclose the

[1] Plaintiffs had to correct their complaint twice after Armistice sent Rule 11 letters.

NHP Study if Vaxart did not. Dkt. 276 at 14. But at the summary judgment stage, Plaintiffs' spurious allegations are insufficient—the Court must separate the rhetoric from the evidence. And, based on the evidence, Plaintiffs' unsupported market manipulation theory hits a fatal snag: Vaxart's management had completely drafted the OWS Release—including the allegedly misleading "selected for . . . Operation Warp Speed" language—***before Floroiu was appointed CEO or ever saw the draft OWS Release***. Likewise, Floroiu's predecessor CEO and his management team—with no alleged loyalty to Armistice—had already decided to issue the OWS Release before the NHP Study had yielded any results and before the government had promised any additional money. As to the Attwill Release, Armistice had no clue that Vaxart's management was negotiating with Attwill or drafting a press release until Vaxart disclosed it to the public. These undisputed facts refute baseless allegations of a pump-and-dump scheme to manipulate Vaxart's stock price hatched by Floroiu at the behest of Armistice, foreclosing Plaintiffs' 10b-5 claims.

The evidence also debunks Plaintiffs' theory that Armistice's sale of Vaxart stock constitutes "insider trading." Despite taking dozens of depositions and reviewing tens of thousands of documents, Plaintiffs still cannot point to a single piece of nonpublic information possessed by Armistice at the time of its sales indicating that: (1) Attwill lacked sufficient regulatory approvals or manufacturing capabilities, (2) Vaxart was not one of the companies selected for OWS, or (3) the OWS NHP Study was not important news. Instead, the sworn testimony from Vaxart officers and OWS personnel alike ***corroborates*** Vaxart's statement that it was "selected for OWS." Discovery revealed numerous emails from OWS's own employees inviting Vaxart to participate in the "Operation Warp Speed vaccine testing program" and telling Vaxart it was "part of OWS." There is certainly no evidence that Boyd or Maher received any information suggesting that any statement in either press release was false or misleading.

Nor have Plaintiffs uncovered a shred of evidence that Armistice ***knowingly*** traded on material nonpublic information ("MNPI"). Far from Armistice selling stock to exploit allegedly misleading press releases, the undisputed evidence shows that Armistice contemplated selling Vaxart shares ***before Boyd or Maher saw either press release***. But Armistice knew it could not

sell Vaxart shares until Vaxart's invitation to the NHP Study—which it viewed as MNPI—was disclosed. Contrary to the allegations in the FAC, Vaxart's CEOs, operations team, and directors all confirmed the importance of the NHP Study in their depositions, as did the government official who supervised the study. Following Vaxart's disclosure of the NHP Study, Armistice was then free to sell its Vaxart shares. The "insider trading" claim accordingly fails.

In short, the extensive discovery in this case has established that Plaintiffs' scheme liability and insider trading theories are works of fiction. Specifically, discovery has squarely refuted each of Plaintiffs' key allegations, including that Boyd and Maher: (1) participated in drafting the press releases; (2) knew about Attwill's capabilities; (3) were long-time friends and business partners of Floroiu or of independent directors Davis and Yedid; and (4) knew that Vaxart thought the NHP Study was immaterial. What remains is Plaintiffs' "pure speculation," which is "unacceptable" at the summary judgment stage.[2]

II. FACTS

A. Armistice Invests in Vaxart and Recommends Changes to Vaxart's Board.

Armistice is an asset manager that invests in consumer and health care companies. Declaration of Joshua Rubin ("Rubin Decl."), ¶ 5. In September and October 2019, Armistice invested in a small-cap pharmaceutical company, Vaxart. *Id.* ¶¶ 9-10. Armistice invested because Boyd was impressed by Vaxart's oral vaccine technology and relationships with the U.S. government. *Id.* ¶ 11.

After Armistice's investment, Boyd discussed potential changes to the board of directors with Vaxart's then-CEO Wouter Latour. *Id.* ¶ 15. In addition to Boyd and Maher, Armistice proposed two other qualified candidates to join the board as independent directors: Todd Davis and Bob Yedid. *Id.* ¶ 18. Armistice did not direct the board to appoint Davis or Yedid. *Id.* ¶ 19.

[2] *SEC v. Truong*, 98 F. Supp. 2d 1086, 1098 (N.D. Cal. 2000).

Instead, Davis and Yedid were vetted and unanimously approved by the board. *Id.* ¶ 20. Vaxart's outside counsel confirmed they were independent. *Id.* ¶ 21.[3]

By February 2020, members of Vaxart management and board had grown dissatisfied with Latour's performance as CEO. *Id.* ¶ 29. Boyd reached out to Floroiu, a former colleague with extensive experience in the pharmaceutical space, about Vaxart's CEO position. *Id.* ¶ 30. Following Boyd's initial introduction, Floroiu met with every director other than Latour. *Id.* ¶ 34. Every director supported Floroiu's CEO candidacy after these conversations. *Id.* ¶ 36. However, the board determined that it would hold off appointing Floroiu to be CEO in order to maintain continuity while Vaxart's funding application to BARDA was pending. *Id.* ¶ 37. Instead, Floroiu was unanimously voted to join the board of directors during that interim period. *Id.* ¶ 38.

B. Vaxart Begins to Develop a COVID-19 Vaccine and is Selected to Participate in an OWS-funded Non-Human Primate Study.

In January 2020, Vaxart initiated a COVID-19 vaccine program. Rubin Decl., ¶ 41. In February 2020, U.S. government representatives reached out to Vaxart's Chief Science Officer Sean Tucker with interest in Vaxart's COVID-19 candidate. *Id.* ¶¶ 42-43. By early May 2020, the government identified Vaxart as a "priority" vaccine developer whose oral vaccine had the "profiles, characteristics, [and] attributes that [the government] thought would make effective vaccines for SARS CoV-2." *Id.* ¶ 44.

In mid-May 2020, the White House formally announced OWS, the federal government's response to the pandemic. *Id.* ¶ 45. Tanima Sinha—the lead interdisciplinary scientist and project officer at BARDA during the summer of 2020—led OWS's nonclinical program. *Id.* ¶¶ 46-47. The program included government-sponsored animal studies of vaccine candidates which would

[3] Plaintiffs baselessly alleged that Davis was a "long-time business partner" of Armistice (Dkt. 276 at 6) and that Yedid was a "close and longtime personal friend" of Maher (SAC ¶ 54). These allegations are false. Rubin Decl. ¶¶ 31-33. In response to Armistice's interrogatories seeking facts supporting these allegations, Plaintiffs proffered no evidence whatsoever and instead circularly, and improperly, referred back to their own allegations. *Id.*, Exhs. AY, AZ, BA (Interrogatory Responses) Nos. 18, 19.

be used to "support the overall mission of the COVID response." *Id.* ¶ 48. The U.S. government foot the bill for these NHP studies, which would otherwise have cost millions of dollars. *Id.* ¶ 49.

In May 2020, OWS formally "invited [Vaxart] to participate in" the "Operation Warp Speed vaccine [pre-clinical] testing program." *Id.* ¶ 50. Out of hundreds of applicants, Vaxart was one of only fourteen companies invited by OWS "to participate in the COVID response effort," and one of only four companies participating in an OWS non-human primate study. *Id.* ¶¶ 51-52. Throughout May and June 2020, representatives of OWS thanked Vaxart in emails "for participating in OWS" and stated that they were "look[ing] forward to working with [Vaxart] on these studies as part of Operation Warp Speed." *Id.* ¶¶ 53, 55. Indeed, the U.S. government repeatedly confirmed to Vaxart during this time that "Vaxart was a part of OWS." *Id.* ¶¶ 54, 56. The NHP Study commenced in August 2020. *Id.* ¶ 82.

C. Armistice is Told of Vaxart's Selection to the OWS NHP Study and Concludes that the Information is Material.

As outside, non-managing directors, Boyd and Maher were not involved in the discussions with the U.S. government regarding the OWS-funded NHP Study. Rubin Decl., ¶ 60. On June 6, 2020, Boyd and Maher, along with the other directors, received materials for an upcoming board meeting by email, which included a board presentation containing a page entitled "COVID Funding" with a bullet point entry that stated: "BARDA/NIH (OWS) - Funding challenge study in NHP." *Id.* ¶¶ 61-62. At the June 8 board meeting, Vaxart's management informed the board for the first time that Vaxart "was invited to participate in a non-human primate study organized by [OWS]." *Id.* ¶ 63. The reaction to the NHP Study was extremely positive, with Vaxart VP of Commercial Operations Brant Biehn describing a level of "euphoria." *Id.* ¶¶ 64-65.

After learning of Vaxart's OWS invitation, Armistice concluded the information was material. *Id.* ¶¶ 79-81. Armistice therefore placed Vaxart on its "restricted" list, meaning Armistice could not trade Vaxart stock until the NHP Study was disclosed. *Id.* ¶¶ 77-78.

D. Vaxart Drafts and Issues the Two Press Releases at Issue in this Case.

1. The OWS Release.

Around June 1, 2020—approximately one week before the directors were informed of the NHP Study—Vaxart's management began discussing a press release disclosing Vaxart's participation in the study. Rubin Decl., ¶ 84. Biehn wrote the first draft of the OWS Release. *Id.* ¶ 85. Vaxart's management and PR firm LifeSci then revised the draft, including putting the reference to "Operation Warp Speed" in the headline because it would "move the needle." *Id.* ¶¶ 86, 88. By June 11, 2020, Vaxart's management had approved a draft that was essentially identical to the final version. *Id.* ¶ 90. In particular, the draft release bore the headline that Vaxart's COVID-19 vaccine had been "selected for the U.S. Government's Operation Warp Speed." *Id.* ¶ 90.

Armistice never drafted, revised, or even saw any versions of the OWS Release before Vaxart issued it. *Id.* ¶¶ 92-95. No one previewed the OWS Release's contents to Armistice. *Id.* Armistice first saw the OWS Release at the same time as the public—when it was issued. *Id.*

Vaxart's management initially planned to issue the OWS Release after the first monkey was dosed in the NHP Study, to avoid risking upsetting the government by mentioning the study before it started. *Id.* ¶¶ 100-101. On June 25, 2020, Boyd learned that Vaxart would soon disclose the study, and emailed Vaxart to seek clearance to trade after that disclosure. *Id.* ¶¶ 111-115. After being told by Floroiu that Vaxart would not be disclosing this news the next day, Boyd responded: "[i]f the company is not willing to release the information, Armistice may choose to do so." *Id.* ¶¶ 116-118. Floroiu convened a meeting with his management team and outside consultants and was advised that the government would not be upset by Vaxart's announcement. *Id.* ¶¶ 119-120. Based on these assurances, Floroiu decided to issue the OWS Release the next morning. *Id.* ¶ 121. After confirming that the NHP Study was disclosed, Armistice removed Vaxart from its restricted list and sold most of its Vaxart stock over the next two trading days. *Id.* ¶¶ 122-123.

2. The Attwill Release.

In June 2020, Vaxart management began discussions with Attwill—a leading developer of pharmaceutical processes—regarding the provision of lyophilization, *i.e.*, the freeze-drying of tablets to extend their shelf-life. *Id*. ¶¶ 127-130. Vaxart and Attwill negotiated a memorandum of understanding ("MOU") expressing the parties' mutual interest in negotiating a formal agreement. *Id*. ¶ 131. Vaxart management conducted due diligence into Attwill's capabilities and concluded that Attwill had both the technology and manpower to manufacture over a billion vaccine doses per year. *Id*. ¶ 132. At the same time, Vaxart's management and LifeSci drafted the Attwill Release. *Id*. ¶ 133. LifeSci made the decision to put the reference to a "billion" vaccine doses in the headline. *Id*. ¶ 134. Vaxart issued the Attwill Release on June 25, 2020. *Id*. ¶ 133.

Armistice was not involved in, or aware of, the discussions with Attwill, the negotiations of the MOU, or Vaxart's due diligence. *Id*. ¶ 135. Armistice never drafted, revised, or saw any versions of the Attwill Release before Vaxart issued it. *Id*. ¶ 136. No one otherwise previewed the Attwill Release's contents to Armistice. *Id*. In sum, Armistice saw the Attwill Release for the first time at the same time as the public—when it was issued. *Id*.

E. The *New York Times* Publishes an Article About Vaxart and the OWS Release.

On July 25, 2020, the *New York Times* published an article (the "*NYT* Article") discussing Vaxart's OWS Release, among other vaccine-related information. Rubin Decl., ¶ 143; Ex. AU. The article stated that Vaxart was "not among the companies selected to receive significant financial support from Warp Speed to produce hundreds of millions of vaccine doses." *Id*. ¶ 144. The article also quoted Michael Caputo, HHS's assistant secretary for public affairs. *Id*. ¶ 145. Caputo was not involved with the NHP Study and was not deposed in this case. *Id*. ¶¶ 145-146. Indeed, Sinha—the BARDA scientist who actually ran the NHP Study and who testified under oath in this case—had never heard of Caputo. *Id*. ¶ 146. Notwithstanding the *NYT* Article's purported "revelations" (SAC ¶ 247), Vaxart's stock price closed the next trading day nearly 40% higher than the stock price on June 26, the day of the OWS Release. *Id*. ¶ 147.

III. ARMISTICE IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' "SCHEME LIABILITY" CLAIM

Summary judgment is proper where discovery shows that there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted).

Plaintiffs' "scheme liability" claim under Rule 10b-5(a) and (c) fails under this standard. Plaintiffs allege that Armistice and Vaxart "carried out a common plan, scheme, and unlawful course of conduct" to deceive the public and artificially inflate Vaxart's stock price. SAC ¶ 327. To be liable, a defendant must, among other things, have committed a manipulative or deceptive act in furtherance of the scheme. *SEC v. Hui Feng*, 2017 WL 6551107, at *11 (C.D. Cal. Aug. 10, 2017), *aff'd*, 935 F.3d 721 (9th Cir. 2019); *see also In re Nat'l Century Fin. Enters., Inc. Fin. Inv. Litig.*, 553 F. Supp. 2d 902, 909 (S.D. Ohio 2008) (defendant must affirmatively "engage in conduct that is in itself deceptive"). A deceptive act is one with "the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme." *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds by Avis Budget Grp., Inc. v. Cal. State Tchrs.' Ret. Sys.*, 552 U.S. 1162 (2008). Courts must carefully assess "scheme liability" claims so that Rule 10b-5(a) and (c) does not become "a back door into [aiding and abetting] liability." *SEC v. Lucent Techs., Inc.*, 610 F. Supp. 2d 342, 359 (D.N.J. 2009) (citation omitted).

A. Armistice Committed No Deceptive Act Related to the Attwill Release.

The uncontroverted evidence confirms Armistice had nothing to do with the Attwill Release. Armistice was neither part of, nor notified about, Vaxart's due diligence regarding Attwill's certifications and capabilities. Rubin Decl., ¶ 135. Armistice was not even aware that Vaxart's management was negotiating an MOU with Attwill. *Id.* And Armistice did not draft, revise, see, or even know about the Attwill Release before its public issuance. *Id.* ¶ 136. Armistice thus had no ability to control either the content of the press release or Vaxart's decision to issue it.

Despite this clear evidence, Plaintiffs have continued to represent to the Court—in signed filings governed by Rule 11—that Armistice "coerced the issuance of" the Attwill Release. Dkt. 344 at 5.[4] In support of this false assertion, Plaintiffs make two arguments—each of which is squarely refuted by all relevant evidence.

First, Plaintiffs assert that Boyd and Maher "exchanged many texts and had many substantive calls with Andrei Floroiu" throughout June 2020, and that they each spoke with Floroiu on June 23 and 24, 2020. *See* Rubin Decl., Exhs. AY, AZ, BA (Interrogatory Responses Nos. 20, 21). But Floroiu never communicated with Boyd or Maher (by text or otherwise) about Attwill. Rubin Decl., ¶ 138. Plaintiffs have no support for their idle speculation that calls between Armistice and Floroiu related to the Attwill Release. In fact, the testimony from all relevant witnesses refutes this speculation. *Id.* ¶¶ 135, 136, 138; *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010) ("The non-moving party must do more than show there is some 'metaphysical doubt' as to the material facts at issue.").

Second, Plaintiffs assert that, on June 24, 2020, Maher texted Floroiu requesting that Vaxart issue *all* press releases before 8 a.m. so that they "hit the news wires." SAC ¶ 173. But Plaintiffs have offered no evidence that this request related to the Attwill Release specifically, as opposed to press releases generally, of which there had been many during this time period. To the contrary, Maher testified that he had no advanced knowledge of the Attwill Release. Rubin Decl., ¶¶ 135, 136. Indeed, Floroiu understood Maher's text message to be a general request concerning all press releases that they be issued early. *Id.* ¶ 139.

B. Armistice Committed No Deceptive Act Related to the OWS Release.

1. Armistice Did Not Draft, Revise, or See the OWS Release.

Throughout this litigation, Plaintiffs have asserted that Armistice played a role in drafting the OWS Release. But discovery has confirmed the exact opposite. Armistice did not write or

[4] This representation is particularly egregious given that Plaintiffs filed it *after* the depositions of Biehn and Tucker, who both confirmed that Boyd and Maher had nothing to do with Attwill. Rubin Decl., ¶¶ 135, 136.

edit a single word of the OWS Release and had nothing to do with its content. Rubin Decl., ¶¶ 92-95. While Armistice was briefed on the NHP Study at the June 8, 2020 board meeting, and later learned that Vaxart had drafted a press release, Armistice never saw the draft before it was issued to the public. *Id*. ¶¶ 63, 92, 93.[5]

Instead, discovery shows that the OWS Release was drafted by a few members of Vaxart's management, its longtime CEO Latour, and Vaxart's PR firm LifeSci, none of whom Plaintiffs allege were controlled by Armistice. *Id*. ¶¶ 84-99. Biehn wrote the first draft of the press release and emailed it to Tucker on June 4, 2020. *Id*. ¶ 86. This first draft bore the headline "BARDA's WARP SPEED to Include Vaxart COVID-19 Vaccine" and stated that Vaxart "has been selected to participate in Operation Warp Speed." *Id*. ¶ 86; Ex. AB. On June 10, 2020, LifeSci's Hans Herklots returned another draft with several comments, including "add[ing] OWS to title of release, since that will move the needle." *Id*. ¶ 88. As edited by Herklots, the draft press release's headline read "Vaxart's Vaccine Selected for the U.S. Government's Operation Warp Speed." *Id*. Ex. AC.

On June 11, 2020, Biehn sent a revised version of the press release to the management team and Herklots with no changes to the headline and noted that "I think we are close to a final draft." *Id*. ¶ 90; Ex. AM. Armistice was not involved in this editing process and never reviewed any of these draft releases. *Id*. ¶¶ 92-99. Nor did Armistice review any subsequent draft of the OWS Release before it was issued. *Id*.

[5] In opposing Armistice's motion to dismiss, Plaintiffs relied on an early draft of a spreadsheet which, according to Plaintiffs, stated that Boyd and Maher "participated in 'many revisions'" of the press release on June 25, 2020. Dkt. 276 at 5 n.4. As clarified by the document's author, Brant Biehn, the reference to Boyd and Maher on the June 25, 2020 row indicated Biehn's understanding that Boyd and Maher ***knew about*** a press release on that date, ***not*** that they participated in revising it. Rubin Decl., ¶ 96. In any event, Vaxart's corporate representative testified that the version of the spreadsheet later submitted to FINRA omitted any reference to Boyd or Maher seeing or revising the press release and accurately represented those who did. *Id*. ¶¶ 94-95.

2. Armistice Did Not Commit a Deceptive Act by Recommending Floroiu to the Board or Supporting Him as CEO.

Next, Plaintiffs have argued that Armistice committed a deceptive act by "install[ing] Floroiu . . . as Vaxart's CEO" to "implement[] a new aggressive PR campaign game plan." Dkt. 276 at 7. This theory fails for two principal reasons.

First, there is no evidence "to suggest that the purpose of [Floroiu's installation] was to create a false appearance of fact." *Borteanu v. Nikola Corp.*, 2023 WL 1472852, at *23 (D. Ariz. Feb. 2, 2023). Boyd reached out to Floroiu—a former colleague and casual acquaintance—about becoming CEO in ***February 2020***, less than a month after Vaxart launched its COVID-19 vaccine program, three months before the federal government announced OWS, and four months before the alleged misrepresentations at issue. Rubin Decl., ¶¶ 30-32, 41, 45. No reasonable fact finder could conclude that Armistice had the premonition in February 2020 to arrange for Floroiu to become CEO for the purpose of orchestrating a fraud based on a government initiative and NHP Study that did not yet exist. To the contrary, the evidence shows that Boyd believed Floroiu's background made him a good fit to replace Vaxart's current CEO Latour, whom the board and Chief Science Officer Tucker had "lost confidence in." *Id.* ¶¶ 29-30; Ex. F at 80:3-84:16. Floroiu interviewed with every director other than Latour. *Id.* ¶ 34. Each director was informed of Armistice's limited relationship with Floroiu—who had worked for approximately six months as an analyst at Armistice in 2013. *Id.* ¶¶ 31-35. All the directors supported Floroiu as CEO in March 2020 and ultimately voted for him to join the board. *Id.* ¶ 36. Floroiu understood that his fiduciary duties ran solely to Vaxart. *Id.* ¶ 39.

Second, Plaintiffs cannot prove that Floroiu's appointment as CEO "had *the effect* of creating a false appearance of fact in furtherance of the scheme." *Borteanu*, 2023 WL 1472852, at *25; *see also Simpson*, 452 F.3d at 1048. As described above, the OWS Release was already fully drafted and ready to be issued by June 11, 2020, ***before Floroiu became CEO and even saw the OWS Release***. Rubin Decl., ¶¶ 97-99. Floroiu was not a party to the rounds of drafting between Vaxart management and LifeSci, in which the key language of the press release ("Selected for OWS") was crafted and moved to the headline. *Id.* ¶¶ 88-91; Ex. AC. When Floroiu reported

to work on his first day as CEO, his predecessor's management team had already drafted the OWS Release and had come up with a plan to issue it to the public as soon as the trials began. *Id.* ¶¶ 98, 99, 106. Plaintiffs' "Floroiu-as-Armistice-puppet" theory does not work when the fictitious "fraudulent scheme" was hatched and put into action before the "puppet" entered the picture, by individuals who are not even alleged to be beholden to Armistice.

3. Armistice Did Not Commit a Deceptive Act Through Boyd's June 25, 2020 Email.

In alleging that Armistice caused the dissemination of the OWS Release, Plaintiffs rely on the June 25, 2020 email exchange in which Boyd said that Armistice might disclose the NHP Study if Vaxart did not. However, given Vaxart's management had already drafted the OWS Release and determined to release it upon the first dosed monkey, without any input from Armistice, the exchange does not constitute a deceptive act under Rule 10b-5(a) or (c) as a matter of law.

On June 1, 2020, Tucker proposed to other members of the management team that Vaxart "disclose [its] participation" in the NHP Study because it "seem[ed] like important information." Rubin Decl., Ex. AE at 2. When Biehn wrote the first draft of the OWS Release a few days later, he phrased the press release such that it would be issued before the study had actually commenced. *Id*. ¶ 87. Subsequently, Vaxart management decided to wait to issue the press release until the trials began out of concern the government may back out of the study and make Vaxart look foolish. *Id*. ¶ 101. Vaxart's management also had concerns that issuing the OWS Release before the study commenced could risk upsetting the government. *Id*. Despite these shifting views on timing, there was never any doubt among the Vaxart management team that Vaxart would issue the press release, at latest, on the first day of the study. *Id*. ¶ 102.

After becoming CEO on June 12, 2020, and learning that management had drafted a press release, Floroiu leaned towards releasing the news earlier, because it was "material information that investors would want to know" as well as "a very favorable, meaningful development." *Id*. ¶¶ 40, 107. However, Tucker explained to Floroiu that the study might not go forward if Vaxart could not secure an endoscope, a key medical device necessary to dose monkeys with an oral

vaccine. *Id.* ¶ 109. Floroiu accepted the recommendation to wait. When Floroiu learned from Tucker on the evening of June 22, 2020 that Vaxart had resolved the endoscope issue, Floroiu thought this was a "big deal" because the endoscope "was the only thing that was holding this thing back." *Id.* ¶ 110; Ex. G at 205:8-206:8. By the morning of June 25, 2020—before Boyd's email—Floroiu believed the time was ripe to issue the press release. *Id.* ¶ 111. Nonetheless, other members of his team continued to voice concerns about the government's reaction. *Id.* ¶¶ 112-113.

At some point that same day, Boyd learned that Vaxart had decided to publicly disclose the NHP Study. *Id.* ¶ 115. Pursuant to Vaxart's insider trading policy, Boyd then emailed Floroiu requesting preclearance to trade after the news was disclosed. *Id.* Floroiu responded that Vaxart would not be disclosing the press release the following day and that management had concluded the NHP Study was "not MN[P]I." *Id.* ¶ 116. Boyd replied that Armistice disagreed with that MNPI assessment and "may" disclose the news itself. *Id.* ¶ 118. Following this exchange, Floroiu reached out to Vaxart's government consultants to determine if his management team's concerns about upsetting the government were valid. *Id.* ¶ 119. Vaxart's government consultant John Clerici opined that the government was not likely to be upset by the press release. *Id.* ¶ 120. Based on this insight and further discussions with management, Floroiu, as CEO, made the decision to issue the OWS Release the following morning. *Id.* ¶ 121.

In light of these undisputed facts, no reasonable fact finder could conclude that Boyd's email had the "effect" of creating a false appearance of fact. *Simpson*, 452 F.3d at 1048. The allegedly misleading press release stating that Vaxart had been "selected for" OWS had been drafted by Biehn, Tucker, Latour, and LifeSci weeks before. Rubin Decl., ¶¶ 84-95; Ex. AV. These same individuals had made the decision weeks prior (before Floroiu even became CEO) to issue the press release when the first monkey was dosed, well before any results from the study had been obtained and before OWS would commit to any additional funding beyond the study's costs. *Id.* ¶¶ 40, 100, 101, 103. In other words, the key elements of the alleged fraud—the OWS Release itself and the decision to issue it—were already cemented before Boyd sent his email, based on

management discussions to which Boyd was not a party. Even if Boyd's email encouraged Floroiu to issue the OWS Release the next morning, Boyd's email did not *bring about* the issuance of the release, as that decision was already made. At worst, the email hastened the issuance of the OWS Release by some marginal time. Indeed, had Boyd not sent his email and Floroiu not otherwise spoken to Clerici or convinced his management team that prompt public disclosure served Vaxart's best interest, Vaxart would have issued the OWS Release in August, when the NHP Study commenced. *Id*. ¶¶ 82, 100-102. This release still would have been at a time when, according to Plaintiffs, Vaxart had not been "selected for OWS."

There is likewise no triable issue of fact supporting Plaintiffs' theory that Boyd sent his email to Floroiu with the "purpose" of creating a false statement of fact. *Simpson*, 452 F.3d at 1048; *Borteanu v. Nikola Corp.*, 2023 WL 11017679, at *18 (D. Ariz. Dec. 8, 2023) (defendants' acts of encouraging CEO to make statements which turned out to be false was not deemed to violate Rule 10b-5(a) and (c) because "the Court cannot assume that this was done for a malicious purpose").[6] This is confirmed by the fact that, at the time he sent his June 25, 2020 email, ***Boyd did not know what the press release said***. Rubin Decl., ¶¶ 113-114. Although Boyd understood at that time that the press release would disclose the NHP Study, the undisputed evidence is that Armistice never saw a draft of the press release. *Id*. ¶ 92. Boyd thus would have had no way of knowing that the press release stated that Vaxart was "one of the few companies" that had been "selected for" OWS—the aspect of the OWS Release Plaintiffs argue was misleading. Because Boyd did not know what the OWS Release said, the fraud was, at worst, an "accidental effect" of Boyd's email, as opposed to its "intended purpose." *Simpson*, 452 F.3d at 1048 & n.5. In sum, Plaintiffs cannot show that "the deceptive nature of the transaction or scheme was[] an intended result . . . of the defendant's own conduct" as a matter of law. *Id*.[7]

[6] For the same reason, there is no triable issue of fact that Armistice acted with scienter, another element of Plaintiffs' Rule 10b-5(a) and (c) claim.

[7] Nor can Plaintiffs support their assertion that Armistice worked to change Vaxart's insider trading policy to capitalize on speculation about Operation Warp Speed. Despite Plaintiffs'

IV. ARMISTICE IS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' INSIDER TRADING CLAIM

To prove their insider trading claim, Plaintiffs must establish: (1) that Armistice "possessed material and nonpublic information at the time" Armistice sold stock; (2) that Armistice was "aware that the information [it] possessed was material and nonpublic" and had the "intent to deceive, manipulate, or defraud"; and (3) "that the material nonpublic information played a causal role" in Armistice's decision to sell Vaxart stock. *In re Novatel Wireless Sec. Litig.*, 830 F. Supp. 2d 996, 1022 (S.D. Cal. 2011). The undisputed evidence demonstrates that Plaintiffs cannot prove these elements.

A. Armistice Did Not Possess MNPI When Armistice Sold Stock.

1. Armistice Did Not Possess MNPI About Attwill.

Plaintiffs' insider trading claims relating to the Attwill Release rely on Armistice's purported knowledge that Attwill lacked the regulatory or logistical ability to manufacture a billion or more vaccine doses. However, undisputed evidence confirms that Armistice received no information on Attwill's manufacturing capabilities or its purported deficiencies. Rubin Decl., ¶¶ 135-138. Without the Vaxart board or Armistice's input, Vaxart's management identified Attwill as a potential partner, conducted due diligence into Attwill's capabilities, negotiated an MOU, and drafted the Attwill Release. *Id.* ¶¶ 130-135. While members of Vaxart's *management* may have, through due diligence, obtained MNPI about Attwill's capabilities, the undisputed evidence is that this information was never conveyed to Armistice. *Id.* ¶¶ 135, 136, 138.[8]

---

speculation, not a single witness testified that Armistice was responsible for the changes made to that policy. Rubin Decl., ¶¶ 140-141.

[8] In response to interrogatories served at the close of discovery seeking all facts supporting Plaintiffs' belief that Armistice knew the Attwill Release was false or misleading, Plaintiffs responded only that Armistice "had every opportunity . . . to do due diligence as Board members and to discuss with Vaxart's management or counsel." *See* Rubin Decl., Exhs. AY, AZ, BA at Resp. to Rogs. 22, 23. This is insufficient to support Plaintiffs' claim. As Vaxart board members, Boyd and Maher reasonably relied upon Vaxart's management to conduct diligence into a prospective contracting partner and convey accurate information to the investing public.

Plaintiffs likewise cannot dispute that, before Vaxart issued the Attwill Release, Boyd and Maher had never even heard of Attwill, much less had reason to know about its purported deficiencies. *Id.* ¶ 135. After the Attwill Release was issued, the securities laws did not impose an obligation on Armistice to independently investigate and corroborate the statements in the Attwill Release before trading Vaxart stock. *See In re Facebook, Inc. Sec. Litig.*, 87 F.4th 934, 953 (9th Cir. 2023) (allegation that defendant "should have known" about misrepresentations cannot support a claim). That is especially true where, as here, no evidence suggests that Armistice had any information that would even raise a red flag about Attwill's capabilities. No fact finder could "reasonably infer that [Armistice] received inside information . . . [w]ithout relying on impermissible speculation." *SEC v. Garcia*, 2011 WL 6812680, at *14 (N.D. Ill. Dec. 28, 2011). In sum, Plaintiffs cannot sustain a claim for insider trading regarding the Attwill Release.

2. Armistice Did Not Possess MNPI About the OWS Release.

Plaintiffs advance two equally deficient theories of insider trading regarding the OWS Release. First, Plaintiffs assert that Armistice knew that Vaxart "had not, in any sense of the word [sic], been 'selected for' Operation Warp Speed." *See, e.g.*, SAC ¶ 24. Second, Plaintiffs assert that Armistice knew that the invitation to participate in the NHP Study was "immaterial news" and "not a big deal." *Id.*; *see also* Dkt. 291 at 6-7. While these allegations were deemed sufficient to survive the pleadings, discovery has since eviscerated both theories.

a. Armistice Did Not Possess Knowledge that the NHP Study Did Not Constitute OWS "Selection."

The undisputed evidence shows that Armistice lacked any information reflecting the inaccuracy of the statement that Vaxart had been "selected" for OWS. Rubin Decl., ¶ 126. With "no evidence" that Armistice "knew that any information contained in the Press Release was untrue or misleading," summary judgment must be granted based on lack of MNPI. *Sawant v. Ramsey*, 742 F. Supp. 2d 219, 232 (D. Conn. 2010).

Armistice's exposure to the facts underlying the OWS Release was minimal; everything they knew about the NHP Study came through Vaxart's management. Rubin Decl., ¶¶ 58-60, 63.

Vaxart's management (primarily Tucker and Biehn) participated in the ongoing discussions with the government about the NHP Study and negotiated the relevant documentation, all without Armistice's involvement or knowledge. *Id.* ¶ 59. It was likewise Vaxart's management who reached out to Vaxart's government contact for permission to publicly disclose the NHP Study and who obtained specific confirmation that the study was part of OWS. *Id.* ¶¶ 74, 103. Boyd and Maher learned from Vaxart's management at a June 8, 2020 board meeting that Vaxart had been invited to participate in an NHP Study organized and funded by OWS. *Id.* ¶ 63. The only information provided to the directors about this study came from (1) a slide deck circulated to the directors on June 6, 2020 that contained a reference to a "BARDA/NIH (OWS) . . . funding challenge study" and (2) the board meeting itself, in which Dr. Latour informed the board that Vaxart had been invited to participate in an NHP Study "organized by Operation Warp Speed." *Id.* ¶¶ 62-63.

In the face of Armistice's limited exposure to Vaxart's COVID-19 program generally and the NHP Study specifically, Plaintiffs have not adduced a single piece of nonpublic information given to Armistice that would have notified Armistice that Vaxart was ***not*** "selected for" OWS or that the NHP Study was not part of OWS. *See SEC v. King Chuen Tang*, 2012 WL 10522, at *24 (N.D. Cal. Jan. 3, 2012) (no evidence of MNPI based on board meeting where "single line of notes" from meeting "d[id] not provide sufficient evidence from which a jury could reasonably infer that [defendant] learned [MNPI]"). Plaintiffs' interrogatory response states only that Armistice had the "opportunity to conduct due diligence and discuss with Vaxart management, directors, and counsel," not that it had any such information. Rubin Decl., Exhs. AY, AZ, BA at Resp. to Rog. 25. While Plaintiffs may point to Armistice's general contact with Vaxart's management, mere "access" to information is insufficient to show "what specific information was in [Armistice's] possession," *SEC v. Horn*, 2010 WL 5370988, at *6 (N.D. Ill. Dec. 16, 2010), and

"it is speculative to infer from this contact that [Armistice] acquired inside information," *SEC v. Gonzalez de Castilla*, 184 F. Supp. 2d 365, 377 (S.D.N.Y. 2002).[9]

What is more—the evidence establishes that any "discuss[ions] with Vaxart management, directors, and counsel" would have ***confirmed*** the view that Vaxart was "selected for" OWS. Every Vaxart witness involved in the discussions with the government about the NHP Study uniformly testified that, based on those discussions, they understood that the NHP Study was part of OWS. Rubin Decl. ¶ 74. Dr. Latour, Vaxart's CEO at the time of Vaxart's OWS invitation, believed that there was no difference between "[w]orking with Operation Warp Speed" and "being selected by Operation Warp Speed" because Vaxart was in fact "one of the very few that were selected to work with them." *Id.* ¶ 75. This uniform view held by Vaxart personnel is not surprising, given that representatives from OWS repeatedly told Vaxart's management, both on calls and in emails, that the NHP Study was part of OWS and that Vaxart was "participating in Operation Warp Speed." *Id.* ¶¶ 53-56. As explained by Sinha—an OWS government employee who testified under oath in this case—Vaxart was one of only fourteen companies, out of hundreds of applicants, invited by OWS "to participate in the COVID response effort," and one of only four companies participating in an OWS NHP Study. *Id.* ¶¶ 51-52. For that reason, Sinha—the most knowledgeable witness here on the nature of the NHP Study—had no concerns about the accuracy of the OWS Release and still to this day does not believe it is misleading. *Id.* ¶¶ 103-105.

While Defendants are not moving for summary judgment on whether the OWS Release was ***actually*** misleading, the fact that all players involved in the NHP Study—Vaxart and the government alike—believed in the accuracy of the OWS Release's statement that Vaxart had been "selected for OWS" extinguishes Plaintiffs' assertion that Boyd and Maher possessed MNPI that the statement was false. *Sawant*, 742 F. Supp. 2d at 230 (granting summary judgment when press release's language "confirm[ed]" defendant's understanding). With the government telling Vaxart

[9] Plaintiffs cannot rely on Boyd and Maher's status as directors to assume possession of MNPI; allegations that it was "obvious the Board was updated" cannot survive even a motion to dismiss, much less summary judgment. *In re Silver Lake Grp., LLC Sec. Litig.*, 108 F.4th 1178, 1192 (9th Cir. 2024).

that the NHP Study was part of OWS, and Vaxart telling the board the same, Plaintiffs' theory of insider trading "amounts to no more than conjecture." *SEC v. Goldinger*, 1997 WL 21221, at *3 (9th Cir. Jan. 14, 1997). There is simply no basis to find that non-experts Boyd and Maher lacked "a reasonable basis" to believe that Vaxart not had been selected for OWS. *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1117 (9th Cir. 1989).

b. Armistice Did Not Possess MNPI that the NHP Study Was "Not a Big Deal."

Plaintiffs' second theory—that Armistice was aware that the NHP Study was immaterial and "not a big deal"—fares no better. The undisputed evidence is that Armistice itself viewed Vaxart's invitation to the NHP Study as material. Boyd believed that OWS's decision to fund Vaxart's participation in the NHP Study was of monumental importance because it confirmed that the government believed in Vaxart's science, and that it suggested funding (either from the U.S. government or from some other source) was likely to follow if the results of the study were positive. *Id.* ¶¶ 79-80.[10] The day that Boyd and Maher learned of Vaxart's invitation to the NHP Study, Armistice placed Vaxart on its "restricted list." *Id.* ¶ 77. When Armistice receives MNPI regarding a company, that company must be manually placed on Armistice's "restricted list," which prohibits trading in that company's stock until the company is removed from the list. *Id.* ¶ 78. In other words, Armistice viewed the NHP invitation as so material that Armistice prohibited itself, under its own policies, from trading Vaxart stock until the study was publicly disclosed.

Plaintiffs' theory that Armistice possessed MNPI in the knowledge that *Vaxart* did not view the NHP Study as material was likewise debunked during discovery. Vaxart's corporate representative unambiguously testified that Vaxart never concluded that the NHP Study was immaterial. *Id.* ¶ 66. To the contrary, every Vaxart witness who testified uniformly viewed the invitation as extremely important, which is why Vaxart drafted a press release on the subject in early June 2020. *Id.* ¶¶ 67-72, 74, 84, 85. Even Sinha agreed that she was "not surprised" that

[10] This hypothesis proved prescient, as Vaxart ultimately was awarded over $400 million in government funding. Rubin Decl., ¶ 83.

Vaxart concluded that its participation in the NHP Study was material because "being a part of [OWS] would further [Vaxart's] science." *Id.* ¶ 57.

Floroiu's June 25, 2020 email stating that Vaxart's management had "concluded that what was discussed at the last meeting was not MN[P]I" does not alter this conclusion. *Id.* ¶ 116. Floroiu was always certain that the information "should be disclosed to investors and was material." *Id.* ¶ 70. While his email makes reference to MNPI, Floroiu testified at deposition that his management team "never discussed whether the press release was [MNPI], but instead discussed only "whether *the time ha[d] come* for [Vaxart] to put out the press release about [OWS]." *Id.*, ¶ 117; Ex. G at 51:2-7 (emphasis added). Under oath, Floroiu clarified that his statement that the NHP Study was "not MN[P]I" was not meant to comment on the importance of the study, but rather to convey the issue of *when* to put out a press release, *i.e.*, whether to wait until the first monkey was dosed. *Id.* ¶¶ 69, 70, 111, 112, 117. Testimony from other members of management confirm that the debate amongst Vaxart officers was always about *when* to issue the release, never about *whether*. *Id.* ¶ 102.

Moreover, Floroiu ultimately sought guidance from Vaxart's consultants and reconsidered his decision to wait, concluding that the NHP Study "needed to be disclosed to the public." *Id.* ¶¶ 70, 119, 120; Ex. G at 211:4-14. The temporary disagreement between two non-lawyers (Boyd and Floroiu) about Armistice's legal ability to trade does not create a triable issue of fact as to whether Armistice's subsequent sales constituted insider trading, especially given the uniform and unwavering view among all Vaxart personnel that the NHP Study was an important achievement.

B. Armistice Did Not Act with Scienter.

A plaintiff opposing summary judgment "must present significant probative evidence" of scienter, a "mental state embracing an intent to deceive, manipulate, or defraud." *Provenz v. Miller*, 102 F.3d 1478, 1489-90 (9th Cir. 1996) (citations omitted); *In re REMEC Inc. Sec. Litig.*, 702 F. Supp. 2d 1202, 1236 (S.D. Cal. 2010). In an insider trading case, a plaintiff must prove not only that the insider had knowledge of MNPI, but that the defendant "*intentionally* trade[d] on that

information without disclosing it to the public." *Johnson v. Aljian*, 394 F. Supp. 2d 1184, 1197 (C.D. Cal. 2004) (emphasis added). A defendant "intentionally trades" on information where he or she "*actually use[s]*. . . the inside information in deciding to make the trade." *In re Countrywide Fin. Corp. Sec. Litig.*, 588 F. Supp. 2d 1132, 1203 (C.D. Cal. 2008) (emphasis original).[11] Plaintiffs cannot approach these standards.

1. Plaintiffs Have Adduced No Evidence That Armistice Believed Either Press Release Was False or Misleading.

No reasonable fact finder could conclude that Armistice "intentionally trade[d]" on MNPI because there is not a scintilla of evidence that Armistice knew that either press release was misleading. As explained above, Armistice was not involved in the due diligence into Attwill, was not a party to any discussions with the U.S. government about OWS, and did not draft or see either press release before they were issued. *REMEC*, 702 F. Supp. 2d at 1237 (no scienter where plaintiffs failed to adduce any evidence to substantiate the complaint's allegations regarding the executives' knowledge or personal involvement). Vaxart's representative testified that Armistice was provided no information that contradicted any statement in either press release. Rubin Decl., ¶ 126.

Plaintiffs may argue that Armistice knew that Vaxart was not one of the six or seven companies presently receiving a massive infusion of government cash. Even if this could be proven, it is not sufficient to show that Armistice "intentionally" traded on MNPI. Instead, Boyd would have had to, at a minimum, trade on the knowledge that the OWS Release misleadingly suggested the opposite. *United States v. Teicher*, 987 F.2d 112, 121 (2d Cir. 1993); *Novatel*, 830 F. Supp. 2d at 1022 (defendant must be "aware that the information he possessed was material and nonpublic"). Absent evidence that Armistice received any facts contradicting the press release's

[11] While the Ninth Circuit has never addressed whether a plaintiff must show that the traders "used" MNPI in private securities class actions, district courts have reasoned that proving actual use is necessary to satisfy "the Ninth Circuit's demanding deliberate recklessness or actual knowledge or intent standards." *Countrywide*, 588 F. Supp. 2d at 1203 n.82. Even those courts that do not recognize an "actual use" requirement demand a plaintiff create a "strong inference . . . that such information was used by the insider in trading." *Johnson*, 394 F. Supp. 2d at 1198-99.

statement that Vaxart was "selected for OWS," Plaintiffs' theory of insider trading would impose an obligation on Armistice to surmise how a reasonable investor might interpret the press release before trading. No law supports such a theory.

2. Substantial Undisputed Evidence Rebuts Any Inference of Scienter.

Even if Plaintiffs were given the benefit of an "inference" that Armistice intentionally traded on MNPI, Defendants "have rebutted [that inference] with substantial evidence that [Armistice] lacked the intent to defraud investors." *REMEC*, 702 F. Supp. 2d at 1239.

Boyd and Maher have testified they did not believe either press release was false or misleading at the time they traded. Rubin Decl., ¶ 125, 137. Plaintiffs have failed to "offer[] any concrete evidence" to the contrary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Moreover, the fact that Armistice "relied on [management] to prepare accurate" press releases, and that every member of management testified uniformly that they believed the press releases to be true, further rebuts any inference of scienter. *REMEC*, 702 F. Supp. 2d at 1251.

Armistice's trading pattern constitutes additional evidence of lack of scienter, as it was clearly not "calculated to maximize the personal benefit from undisclosed inside information." *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999). In April 2020, Armistice began consistently selling Vaxart stock to realize gains from the rising market price and to rebalance its portfolio. Rubin Decl., ¶ 124. By early June 2020, Armistice owned less than 10% of Vaxart after owning over 60% of the company in November 2019. *Id.* ¶ 13. Armistice's sales stopped in early June 2020, right around the time Boyd and Maher learned of Vaxart's NHP Study invitation and placed Vaxart on its restricted list. *Id.* ¶ 14.

Boyd testified that, between June 8 and June 25, 2020, he "didn't know when [Vaxart] was going to release that they were working with the government." *Id.* ¶ 113. He further testified that he was concerned that Armistice's inability to trade Vaxart's stock would be "carried forward essentially indefinitely" until the news was publicly disseminated. *Id.* And on June 25, 2020, Boyd sought preclearance from Vaxart to trade once the information about the NHP Study was released. *Id.* ¶ 115. Thus, Armistice knew that it was highly likely to start selling once the NHP

Study was disclosed and Vaxart was taken off the restricted list. The fact that Armistice sought preclearance to sell Vaxart shares, and did so ***before ever seeing the OWS Release and before knowing its headline or particular wording***, rebuts any "inference that [Armistice] actually used [the alleged MNPI] in deciding to make their trades." *Countrywide*, 588 F. Supp. 2d at 1203.[12]

V. ARMISTICE IS ENTITLED TO SUMMARY JUDGMENT BASED ON LACK OF LOSS CAUSATION

Armistice is also entitled to summary judgment because (1) Plaintiffs cannot show loss caused by the Attwill Release, and (2) Plaintiffs have adduced no evidence demonstrating loss causation associated with any of their alleged corrective disclosures.

A. Plaintiffs Cannot Show Any Loss Caused by the Attwill Release.

At summary judgment, a plaintiff must prove that "a later corrective disclosure revealed the relevant truth underlying defendants' earlier allegedly misleading statements." *In re Retek Inc. Sec. Litig.*, 621 F. Supp. 2d 690, 698 (D. Minn. 2009); *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). A plaintiff must show a connection between "the allegedly false statements and the subsequent release." *Alaska Elec. Pension Fund v. Flowserve Corp.*, 572 F.3d 221, 230 (5th Cir. 2009); *Greenberg v. Cooper Cos., Inc.*, 2013 WL 2403648, at *14 (N.D. Cal. May 31, 2013). To do so, he must show "that the practices that the plaintiff contends are fraudulent were revealed to the market. . . ." *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1063 (9th Cir. 2008).

Plaintiffs cannot make this showing with respect to the Attwill Release. Plaintiffs allege that the Attwill Release was misleading because Attwill "lacked the required certifications from" the FDA and "lacked the necessary personnel or operational capabilities to even begin to contemplate the production of 'a billion or more'" vaccine doses. SAC ¶ 20. Plaintiffs have

[12] The rise in Vaxart's stock price following issuance of the OWS Release would not have raised any red flags for Boyd, who had always expected "that the stock would likely go up when the public was made aware that Vaxart was working with the government." Rubin Decl., ¶ 81.

adduced no evidence that Attwill's lack of certifications and capabilities was publicly disclosed so to cause investor loss. *See, e.g.*, *Lormand v. US Unwired, Inc.*, 565 F.3d 228, 260 (5th Cir. 2009).[13]

B. Plaintiffs Cannot Prove a Corrective Disclosure.

A corrective disclosure must "reveal[] the truth behind the alleged misrepresentation to the market." *Retek*, 621 F. Supp. 2d at 704. Plaintiffs identify two alleged corrective disclosures: (1) Armistice's sales of Vaxart stock (and related SEC filings disclosing those sales) and (2) the July 25 *NYT* Article. Plaintiffs cannot establish that either of these disclosures caused their losses.

Armistice's Sales of Vaxart's Stock: There has been no evidence adduced that Armistice's sales were "corrective of" either the Attwill Release or OWS Release. *In re Intuitive Surgical Sec. Litig.*, 2016 WL 7425926, at *16 (N.D. Cal. Dec. 22, 2016). Other than rampant speculation, investors would have no way to know *why* Armistice was selling, *e.g.*, whether they were doing so on the basis of inside information and, if so, whether that information even related to the Attwill or OWS Releases. *Greenberg v. Crossroads Sys., Inc.*, 364 F.3d 657, 667 (5th Cir. 2004). Plaintiffs have thus put forth no evidence "that the price collapse following [Armistice's] exit [wa]s the result of the 'truth' about [the alleged misrepresentations] finally surfacing." *Bratya SPRL v. Bed Bath & Beyond Corp.*, 752 F. Supp. 3d 34, 65 (D.D.C. 2024). As the *Bratya* court recently observed, it is more likely that the price decline was caused by supply and demand forces accompanying a shareholder selling off its assets. *Id.* Because there is no evidence that the sales "expressly []or implicitly revealed the alleged impropriety of" Vaxart's statements to the market, *Brown v. Ambow Educ. Holding Ltd.*, 2014 WL 523166, at *9 (C.D. Cal. Feb. 6, 2014), or that the public understood Armistice's shares to be "connected to the alleged fraud," loss causation cannot be shown. *In re Omnicom Grp., Inc. Sec. Litig.*, 541 F. Supp. 2d 546, 553 (S.D.N.Y. 2008). "[T]o

[13] Nor have Plaintiffs adduced any evidence that the market recognized a relationship between the event disclosed and the fraud. *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1266 (N.D. Okla. 2007). Indeed, Plaintiffs attempt to allege falsity of the Attwill Release by quoting *confidential witnesses*, undercutting the notion that the alleged misrepresentations were ever made public and caused loss. SAC ¶ 175; *see also Oracle*, 627 F.3d at 392 (defendant "is only liable to a relying purchaser for the loss the purchaser sustains when the facts become generally known").

proceed on such a theory would effectively resurrect what *Dura* discredited—that loss causation is established through an allegation that a stock was purchased at an inflated price." *Metzler*, 540 F.3d at 1064 (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

The *New York Times* Article: Plaintiffs have failed to raise a triable issue that the *NYT* Article caused their loss. As of July 25, 2020, the fact that Vaxart had not been awarded hundreds of millions of dollars in government cash was unquestionably already "known to the market." *See* Dkt. 318-2 at ¶¶ 112; *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010). At the latest, the public was aware on July 8, 2020—through a Vaxart Form S-3 registration statement—that Vaxart was merely "selected to participate in a non-human primate challenge study, organized and funded by Operation Warp Speed," and that Vaxart was unable to assure investors that OWS "w[ould] have a positive impact on [its] financial results." Rubin Decl., ¶ 148. Notably, on July 13, 2020, investment fund RA Capital invested $90 million in Vaxart at Vaxart's market price in connection with this registration statement after being brought under a confidentiality agreement and being informed that Vaxart "hadn't received any direct funding." *Id*. ¶ 149-150. That a sophisticated investor like RA Capital invested at the market price while knowing that Vaxart had not received hundreds of millions from OWS conclusively rebuts any notion that the public was not generally aware of this fact by mid-July.[14]

VI. CONCLUSION

Armistice respectfully requests the Court grant its motion for summary judgment.

[14] Plaintiffs also have adduced no evidence that it was "the corrective disclosure in particular" that caused their loss. *In re Sci. Atlanta, Inc. Sec. Litig.*, 754 F. Supp. 2d 1339, 1374 (N.D. Ga. 2010). At summary judgment, a plaintiff must sufficiently "disaggregate the effects of the challenged statements or omissions from the background noise of market information." *In re Mylan N.V. Sec. Litig.*, 666 F. Supp. 3d 266, 288 (S.D.N.Y. 2023); *REMEC*, 702 F. Supp. 2d at 1273-74. Here, Plaintiffs have assumed that the *entire* stock price drop following the *NYT* Article was caused by the revelation of fraud, rather than "the kind of negative news story about a company in a major publication that will often cause a temporary stock drop." Dkt. 374 at 10.

Dated: April 3, 2025

AKIN GUMP STRAUSS HAUER & FELD LLP

By: */s/ Neal R. Marder*
Near R. Marder
Attorney for ARMISTICE CAPITAL, LLC, ARMISTICE CAPITAL MASTER FUND, LTD., STEVEN J. BOYD, and KEITH MAHER, M.D.