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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In re VAXART, INC. SECURITIES LITIGATION	Case No. 3:20-cv-05949-VC CLASS ACTION **PLAINTIFFS' OPPOSITION TO ARMISTICE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
This Document Relates to: *ALL ACTIONS*	Date: June 26, 2025 Time: 2:00 p.m. Courtroom: 4, 17th Floor Judge: Hon. Vince Chhabria

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TABLE OF DEFINED TERMS

TERM	DEFINITION
PX##	Refers to exhibits to the Melanson Declaration filed herewith
DX##	Refers to exhibits to Defendants' summary judgment motion
Armistice	Refers collectively to Armistice Capital and Armistice Capital Master Fund
Armistice Capital	Defendant Armistice Capital, LLC
Attwill	Attwill Medical Solutions Sterilflow, LP
Attwill Release	The June 25, 2020 Press Release titled "Vaxart, Inc. Signs Memorandum of Understanding with [Attwill] Enabling Production of A Billion or More COVID-19 Vaccine Doses Per Year …"
BARDA	Biomedical Advanced Research and Development Authority
Class Period	June 25, 2020 through July 24, 2020, inclusive
Defendants	Armistice, Boyd, and Maher
HHS	U.S. Department of Health and Human Services
LifeSci	LifeSci Advisors LLC—Vaxart's external PR firm
Master Fund	Defendant Armistice Capital Master Fund Ltd.
MNPI	Material nonpublic information (also sometimes "MNI")
NHP	Non-human primates
NIH	The U.S. National Institute of Health
OWS	Operation Warp Speed
OWS Release	The June 26, 2020 Press Release titled "Vaxart's COVID-19 Vaccine Selected for the U.S. Government's Operation Warp Speed"
Plaintiffs	Langdon Elliott, Wei Huang, and Ani Hovhannisyan
Retail	Individual investors who commit capital for their personal account rather than on behalf of another company.
Robinhood	An electronic trading platform launched to bring "the efficiencies of an institutional trading firm to retail investors who trade on their own."
USG	United States Government
Vaxart	Vaxart, Inc. (settled defendant) (also sometimes the "Company")
Vaxart Securities	Vaxart common stock and options

TABLE OF INDIVIDUAL WITNESSES AND THEIR AFFILIATIONS

NAME	AFFILLIATION(S)	DESCRIPTION
BIEHN, Brant	Vaxart	Chief Commercial Officer, Management
BOYD, Steven	Armistice	Founder; Chief Investment Officer
CAIN, Matthew	Expert	Economist
CAPUTO, Michael	OWS	HHS Spokesperson
CHARLES, Faith	Vaxart	Outside Legal Counsel
DAVIS, Todd	Vaxart	Board Member
ECHERD, Margaret	Vaxart	Controller and Highest Financial Officer
FINNEY, Michael	Vaxart	Board Member
FLOROIU, Andrei	Vaxart Armistice	Vaxart Director and CEO (6/13/2020); Armistice Senior Analyst (2013)
HERKLOTS, Hans	LifeSci	Managing Director
HOUCHENS, Christopher	BARDA	Leader of Pre-OWS USG Countermeasure Task Force; OWS Technical Point of Contact for Moderna COVID-19 Vaccine Contract
JACKSON, Bill	Attwill	Co-Founder and Managing Partner
LATOUR, Wouter	Vaxart	Vaxart CEO (before 6/13/2020)
MAHER, Keith	Armistice	Managing Partner
RADDEN, Dan	Armistice	In-House Legal Counsel
SHIRLEY, Eric (Col.)	OWS	OWS Chief of Staff
SINHA, Tanima	BARDA	Project Officer (for Vaxart NHP Study)
SLAOUI, Moncef	OWS	OWS Head
SMIRIGLIO, Sergio	Armistice	Head Trader
TUCKER, Sean	Vaxart	Chief Science Officer; Management
YEDID, Bob	Vaxart	Board Member

I. ISSUES TO BE DECIDED

1. Could a reasonable jury, drawing all inferences in Plaintiffs' favor, find that Defendants violated Rule 10b-5 where triable evidence shows that, the day Defendants learned Operation Warp Speed had selected at least five of ultimately seven finalists, Defendants moved to capitalize on the public's speculation as to which other vaccines OWS would select by, *inter alia*, (i) orchestrating the appointment of former Armistice employee, Andrei Floroiu, as Vaxart's CEO, (ii) repeatedly discussing with him the need to more aggressively hype the Company, (iii) telling him the day before he published the Attwill Release to issue news "in a way that hit the news wires," (iv) ramming through changes to Vaxart's blackout trading window, knowing they planned to dump tens of millions of Vaxart shares the next day, and (v) within hours of getting that trading window reopened, strong-arming Floroiu into publishing a misleading press release for an NHP study which Vaxart's management ruled was not MNPI and should not be published until monkeys were dosed—all before reaping a quarter billion dollars in insider trading profits?

2. Could a reasonable jury, drawing all inferences in Plaintiffs' favor, find that Defendants violated Section 20A where triable evidence shows that Defendants (i) as insatiable consumers of biopharma news, knew in June 2020 that there was rampant speculation as to which seven vaccines OWS would choose as finalists to receive massive government support, (ii) knew from their daily insider communications with Vaxart that, as of June 26, OWS had not selected Vaxart as one of the remaining finalists, and (iii) thereafter sold tens of millions of Vaxart shares while possessing the material, non-public information that Vaxart had not been selected for OWS?

3. Could a reasonable jury, drawing all inferences in Plaintiffs' favor, find that Defendants' fraud proximately or foreseeably caused the Class's financial losses where (i) triable evidence shows that the relevant truth leaked out as investors digested the misleading press releases, Vaxart refused to respond to media inquiries seeking clarity on its claimed selection for OWS, and market participants learned of Defendants' insider sales, (ii) Defendants' arguments make no mention of leakage theory, and (iii) Defendants fail to address that, prior to *The New York Times's* ("*NYT*") July 25, 2020 exposé (citing USG sources) and HHS's subsequent tweets on Vaxart, the market was still uncertain as to whether Vaxart had been selected for OWS?

II. INTRODUCTION[1]

At trial, a jury will hear compelling evidence showing how Defendants engaged in a stunningly lucrative insider trading scheme ending with getting Vaxart to issue misleading press releases that fraudulently inflated Vaxart's stock price; simultaneously ramming through changes to Vaxart's insider trading policy that allowed Defendants to sell shares; and then cashing out over a quarter of a ***billion*** dollars of Vaxart shares at inflated prices. The jury will see texts and other documents showing how Armistice's Steven Boyd put his plan into action in early June 2020 when rampant speculation swirled as to which companies would be chosen to fill one to two remaining spots to receive massive government support from OWS to develop and produce at scale an effective COVID vaccine. The jury will also learn how, in this frothy environment, Defendants—communicating regularly with their handpicked new Vaxart CEO (former Armistice employee, Andrei Floroiu)—plotted to capitalize on investor speculation regarding OWS's final spots by, *inter alia*, (i) telling Floroiu to issue press releases "in a way that hit the news wires"; (ii) getting Vaxart to change its insider trading window to allow Armistice to sell weeks earlier than it would have otherwise been allowed; (iii) strong-arming Floroiu into ***reversing*** Vaxart's management's decision to ***not*** issue a press release about Vaxart being "one of the few companies selected" for OWS; and then (iv) selling over 27 million shares and reaping over $250 million in profit over two trading days, while knowing that the hype they created was a fraud. PX1.

Rather than squarely address this evidence (or their spoliation of over 600 text messages ***exchanged only between Boyd and Maher*** in the weeks leading up to their stock sales, PX125), Defendants ask the Court to ignore key facts, credit Defendants' cherrypicked documents, deny the intertwined nature of the Attwill and OWS Releases, and accept their self-serving claims of good faith. But Defendants knew of the market's intense interest in which remaining companies would be selected by OWS, knew Vaxart shares would spike on any news suggesting OWS selection, and knew that, *inter alia*, Vaxart had only been invited to participate in a non-human primate ("NHP") study. Moreover, it is beyond dispute that, but-for Defendants' actions, Vaxart

[1] Herein: (i) all internal citations are omitted, and all emphasis is added, unless otherwise noted; (ii) PX## refers to exhibits to the Melanson Decl.; and (iii) all times are in ET.

would not have issued the misleading "selected for" release at ***that critical juncture or with its misleading emphasis***—if at all, certainly not until after every OWS finalist had been identified.

Assuming that terminating sanctions for their spoliation are not granted, Plaintiffs look forward to telling their story to the jury. In the meantime, Defendants' motion must be denied.

III. SUMMARY OF SCHEME EVIDENCE

A. Defendants Halt Their Plan to Transform Vaxart into a RoyaltyCo and Instead Gamble on Getting Massive Government Funding for Vaxart's Oral COVID Vaccine.

In March 2020, a once-in-a lifetime pandemic shut down the country, prompting Armistice Capital—a hedge fund founded and wholly owned by Defendant Boyd—to put its plans to install a former Armistice employee—Andrei Floroiu—as Vaxart's CEO "on hold" in favor of a more lucrative opportunity. PX2. Armistice hoped Vaxart could convince the Biomedical Advanced Research and Development Authority to give Vaxart much-needed funding to develop its unproven oral vaccine. PX3, PX4. Without outside funding, Vaxart's "hope to come to market" was "nil." PX5. To that end, on March 23, Vaxart, with Armistice's imprimatur, asked BARDA for $50 million. PX6. Thereafter, Boyd peppered Vaxart's Chief Science Officer, Sean Tucker, for updates. PX4. And on April 13, Armistice caused Floroiu to be appointed to Vaxart's Board. PX7.

While Vaxart's BARDA petition languished, *see* PX8, PX9, news began to leak that the federal government was launching a secret, Manhattan-Project-style initiative, Operation Warp Speed, which aimed to spend billions to deliver 300 million doses of a safe, effective COVID vaccine by January 2021. PX9, PX10. Days later, on May 3, 2020, Dr. Christopher Houchens of BARDA—the leader of the USG's pre-OWS taskforce—asked Vaxart if it was available to discuss the status of its COVID vaccine candidate. *See* PX11. After the call, Dr. Houchens ceased communications with Vaxart, referring it to a separate group of BARDA/NIH scientists who were assisting less-developed vaccine manufacturers test their vaccines in preclinical studies. PX12.

B. Defendants Learn OWS Aimed to Narrow 14 Vaccines Down to About 8 Finalists for USG Support but Receive No USG Confirmation That Vaxart Was on Any List.

On May 15, 2020, President Trump formally announced the launch of OWS. PX13. In a release issued the same day, OWS clarified it was already "winnowing down" 14 vaccine candidates to "about 8," which would go through further early clinical trials, some in parallel with

animal models. PX14. Thereafter, considerable public interest arose as to which vaccines OWS would select to provide coordinated government support for development and testing in clinical trials, as part of its goal to deliver 300 million vaccines by early 2021. PX15, PX16.

C. After Learning the Identity of at Least Five OWS Finalists, Defendants Restart Their Plan to Make Floroiu CEO to Capitalize on Speculation on OWS's Remaining Spots.

Two weeks later, on June 3, media outlets identified five "winners" OWS had selected—Moderna, J&J, AstraZeneca, Pfizer, and Merck—creating significant speculation as to the remaining two or three finalists' identities. PX17. Defendants—consuming "anything and everything [they could] that's publicly available" and "constantly doing research on the companies" they invested in, Boyd Tr. 75:16-76:9, 80:19-81:9 (PX113)—understood what being an OWS finalist meant. In an internal chat, Armistice's head trader asked Boyd: "See it, would be nice if VXRT was one of the five. WTF does this even mean. … Like what about the 100 other programs." PX18. Boyd answered, "just means where the gov't will focus …." *Id.* Floroiu also texted the news to Defendants, stating "I think this means no BARDA money, right?" PX19; PX20.

By June 3, Defendants also knew from their communications with Vaxart's managers and Directors that, with OWS's selection nearly complete, Vaxart's lagging vaccine had a near-zero chance of getting the funding needed to bring its vaccine to market, at least from USG. On June 3, Maher spoke with Latour for 13 minutes. PX21. The same day, Defendants informed Floroiu that the plan to appoint him as CEO—forestalled while there was a chance Vaxart could receive USG funding, PX22—was back on the "front burner" and "asked [him] to sketch a 60-day plan." PX23.

The next day, June 4, 2020, the odds Vaxart would be selected grew slimmer when NovaVax—a sixth OWS finalist—announced the U.S. Department of Defense had awarded it a $60M contract for the manufacturing of its vaccine. PX24. Boyd forwarded the NovaVax release to Floroiu, prompting Floroiu to confirm that Vaxart was out of its depth in garnering USG support:

> Very frustrating. … I have no doubt that we should've and could've done a lot better on both government support and corporate partnerships. But this company just can't sell. And the window of opportunity is closing up soon (if it already hasn't on BARDA ...) I mean, given how many programs are out there, how do you think BARDA reacts to an application saying we'll file a BLA in 2022/2023?!?!? Do you think they have time to say ... oh well, maybe it can be sooner, let's help these guys out because the tech is interesting? [PX24.]

D. Defendants Learn That, Weeks Prior to OWS's Recent Selection of Vaccine Finalists, BARDA Had Invited Vaxart to Participate in NHP Studies "Related to OWS."

Three weeks prior to the June 3 *NYT* article, on May 12, 2020, BARDA and NIH scientists followed up with Vaxart regarding its interest in preclinical testing. PX25. This USG team—comprised of line-level USG scientists, not OWS leaders or contract managers, *see* Houchens Tr. 15:10-21:25; 88:8-91:21 (PX116)—informed Vaxart that a non-human-primate ("NHP") challenge study "related to Operation Warp Speed" was available at a government-contracted laboratory, Battelle, if Vaxart was interested. PX12.

On May 13, 2020, Vaxart's management updated the Board on "the status of interactions with Project Warp Speed, CEPI, and other potential sources of funding." PX8; *see also* PX26. The Board also "engaged in a lengthy and detailed discussion regarding the proposed timeline for a coronavirus vaccine, expected funding needs, possible collaborators, and potential obstacles," including how Vaxart "was led to believe it would receive a response from BARDA within weeks of submitting [its March 23] proposal, but … had received [no] responses to date."[2] PX8.

By May 17, 2020, Vaxart had executed a material transfer agreement for the NHP study with BARDA. PX33. Vaxart did not issue a press release at the time. It did not mention the study in a press release issued on May 20 announcing the selection of its lead candidate. PX34. It did not announce the invitation after being told by BARDA on May 29 that it was "good to go to test [its] … vaccine candidate in our non-clinical network." PX35. And it declined to announce the NHP invitation even after *Science* published an interview on June 1 with the CEO of a competing

[2] Though Boyd and Maher did not attend the meeting, they were informed of its discussions through their "plaything," Floroiu, PX27. Prior to the meeting, at 1:54 pm ET, Boyd emailed the Board, noting "Armistice would support an incremental $2-3mm investment in the [coronavirus] program …." PX28. At 2:09 pm ET, Maher added, "echo[ing] Steve's points" and requesting "discipline[] with our capital." At 2:33 pm, Maher texted Floroiu (i) "[p]lease echo points I sent in my email"; (ii) "make sure it [the $2-3 million] comes in stages and we can re-evaluate and cut it off without penalties," (iii) and "[p]lease take the lead, don't be concerned how it looks." PX29. After the Board meeting, Floroiu called Boyd to "chat about the VXRT Board meeting," PX30, speaking for ~7 minutes that night, ~22 minutes the next day, and ~15 minutes on May 18—the day BARDA sent the fully executed MTA. PX31. Floroiu also spoke with Maher for ~8 minutes on May 15, ~20 minutes on May 18, and ~20 minutes on May 19. PX21. Defendants similarly used Floroiu as a proxy at the Board's June 1, 2020 vote on whether to increase Armistice's warrant blocker to "19.9% or higher." PX32.

vaccine manufacturer, NantKwest, who told *Science* that OWS was "assess[ing]" its vaccine "in head-to-head monkey studies." PX36. As such, every member of Vaxart's management at the time—Wouter Latour, Sean Tucker, and Brant Biehn—along with its outside counsel, determined that (i) the NHP invitation was not material, PX37; (ii) Vaxart would give BARDA a "heads up" about an NHP press release once BARDA had committed to a date, PX38; and (iii) Vaxart would ***not*** issue a press release for the NHP study until primates had actually been dosed. PX39; PX40.

E. With the Window for USG Funding Soon Closing, Armistice Installs Floroiu as CEO to Implement an Aggressive PR Campaign to Pump Up Vaxart's Stock Price.

On June 8, 2020, Vaxart held its annual shareholder meeting and a Board meeting. There, the Board again discussed Vaxart's "invitat[ion] to participate in a [NHP] study organized by [OWS]." PX41; PX42. In this context, Defendants began a scheme to raise Vaxart's stock price.

During the June 8 Board meeting, Defendants reactivated their prior plans to install Floroiu as CEO. Minutes into the Board meeting—around the same time Vaxart's legacy CEO briefed the Board on the NHP study—Boyd texted Floroiu "[y]our first news"; the two then discussed the "game plan." PX43; *see also* PX44. Floroiu was formally appointed as CEO on June 13. PX45; PX46. On his first work day, June 15, he began enacting the Armistice-approved plan for Vaxart, which included an aggressive PR campaign. PX44. Boyd affirmed the plan the night before, texting: "focus on the PR plan." PX47. In furtherance of the plan, Defendants spoke with Floroiu and each other—but no other Vaxart managers or Directors—on a near-daily basis. PX122; PX123.

Table Summarizing Total Minutes Defendants Spoke with Floroiu on Phone (PX122 & 123)

June 15	June 16	June 17	June 18	June 19
1 minute	17 minutes	32 minutes	9 minutes	27 minutes
June 22	June 23	June 24	June 25	June 26
4 Mins	7 minutes	35 minutes	76 minutes	0 minutes

F. Noting Significant Short Interest in Vaxart That Would Need to Be Covered, Defendants Patiently Observe the First Stage of Floroiu's Aggressive PR Campaign.

On Monday, June 15, Vaxart, now under Floroiu's control, issued a press release, in which Boyd emphasized his "great confidence" in Floroiu and Vaxart's "multiple potential partnership opportunities." PX48. Less than 24 minutes later, Boyd emailed Floroiu a graph titled "VXRT short interest," showing that, since the June 3, 2020 *NYT* article, the number of investors shorting

(*i.e.*, betting against) Vaxart—who soon would need to buy shares to cover—had doubled. PX49. Boyd told Floroiu: "Pls don't share. … That's a lot of shares to cover!" *Id.*

The next day, Floroiu circulated his edits to a draft OWS Release.[3] PX50. He then turned to preparing a "a new deck [*i.e.*, a corporate PowerPoint presentation] … testing a new way of telling the story [of Vaxart]" at the then-upcoming June 18 Raymond James conference. PX51. He also gave an interview to the *San Francisco Business Times*, which reported on Tuesday, June 18, that Floroiu was "well into unrolling a plan that he hopes will push Vaxart Inc. to the leading edge of a ***second wave*** of potential Covid-19 vaccine developers." PX53. Foreshadowing Armistice's future plans, Floroiu assured the public, "'It's my last worry whether Armistice gets out of the stock or not, because I think people pay too much attention to these things in the short term.'" *Id.*

On Thursday, June 18, at 3:46 pm, Vaxart's highest financial officer, Margaret Echerd, reminded Boyd that, under the insider trading policy that the Board had approved on June 8, the insider trading window would close on June 24. PX54; Echerd Tr. 86:14-87:11 (PX115). At 5:00 pm, Boyd provided "notice to trade for next week" and—despite knowing of the NHP study for weeks—"confirm[ed] that neither [he] nor Keith nor Armistice has MNPI." PX54. Around 8:41 pm, Maher tried calling Floroiu on an "urgent" matter, adding at 9:03 pm, "there is a problem." PX55. At 9:03 pm, they spoke for 5 minutes. PX123. On June 19, they had a 27-minute follow-up call. *Id*. And on Saturday, June 20, they agreed to "talk about retail / Robinhood." PX56.

G. After Discussing Retail Investors with Maher, Floroiu Asks Vaxart Staff to Draft the Attwill Release and to Consider What Vaxart Could Say Now About the NHP Study.

On Monday, June 22, Floroiu and Maher spoke for 7 minutes at 10:29 am. PX123. Later, at 1:54 pm, Floroiu asked Tucker: "if we are to put out a press release before they dose the monkeys, what exactly could we say? Why are we thinking we are actually in OWS? … There has been an article out listing us there, we are not sure how to answer clearly if we're asked. … I'm trying to understand what we could say." PX57. Floroiu then asked Biehn to draft a release for an MOU Vaxart was negotiating with Attwill. PX58. At 5:38 pm, Tucker affirmed his prior position

[3] Also on June 16, HHS released a Fact Sheet clarifying that OWS—previously narrowing vaccines down to "about eight" finalists, PX14, was now narrowing to "about seven." PX93.

on releasing an NHP press release: "Given this administration, I can't guarantee anything. Normal rules do not apply. I see it as a major win for us if BARDA was to announce the winners, the final 14. I see that once the study starts, it's a material thing and we should disclose the study …." PX57.

The next day, June 23, Boyd and Maher held a sequence of calls with Floroiu and Vaxart outside counsel Faith Charles. PX122; PX123. At 11:33 am that morning, Maher called Floroiu and the two spoke for 5 minutes; at 12:15 pm, Maher spoke with Charles for 8 minutes; at 11:37 pm, Boyd spoke with Floroiu for 15 minutes; and at 12:52 pm, Maher spoke with Floroiu for 7 minutes. *Id.* A similar pattern recurred later that day, with Floroiu speaking with Maher for 33 minutes at 3:07 pm, Floroiu missing Maher's 3:47 pm call, Floroiu returning Maher's call to speak for 8 minutes at 4:00 pm, and Maher speaking with Charles for 5 minutes at 8:48 pm. *Id.*

H. Frustrated by Vaxart's Stagnating Stock Price, Defendants Push Floroiu to Create News That Will Break the News Vacuum and Increase Vaxart's Profile.

On June 24, 2020, the last trading day under Vaxart's June 8 insider trading policy, Vaxart's stock price opened at $2.62 and closed at $3.19, peaking at $3.37. At those prices, Armistice could have liquidated its remaining Vaxart holdings to recover between $55.6 million and $76.3 million in net profits, *see* Cain Rpt. ¶ 184 (ECF No. 379-2)—a 327% to 450% return on investment.

Instead, Boyd—frustrated with Vaxart's uninspiring press to date—told Maher that Vaxart "need[ed] to keep up, at minimum" with its competitors, who were "all ripping our face off," adding it was "horrible … absolutely f-ing horrible." PX59. Maher replied, "It's a news vaccum [sic] With this guy Andrei," and proceeded to call Floroiu. *Id.* At 2:01 pm, Maher and Floroiu spoke for about 9 minutes. PX122. One hour later, Floroiu told Vaxart's PR team to have the Attwill Release lead with the "billion or more" doses subtitle to "start with the Big Bang first." PX60. At 7:30 pm, with Vaxart only having the Attwill and OWS Releases on deck, Maher instructed Floroiu to release news before 8 am "in a way that hit the news wires"—even though "all [Vaxart] PR s [sic] [had] came out at 8 am," and the release that day had caused a "+20%" price increase. PX61. On June 24, Defendants exchanged in total 24 now-spoliated texts by the day's end. PX125.

I. Maher Thanks Floroiu for Helping Him After Vaxart Issues the Attwill Press Release, and Internally Notes That Vaxart's Stock Price Will Continue to Rise.

On June 25, after Vaxart's insider trading window had closed, Vaxart issued the Attwill

Release before 8 am. PX62. This Release—focusing on large-scale manufacturing—misleadingly suggested that Vaxart stood at the precipice of pioneering a successful coronavirus vaccine which would soon produce "a billion or more doses," possibly for OWS. *Id.*; *see also* 2022 MTD Order at 8 (ECF No. 182). Vaxart's outside PR firm, LifeSci, suspected that Floroiu might be engaging in "shady over promotion," PX63, and viewed the Attwill MOU by itself to as be immaterial, PX64. On this news, Vaxart's stock price surged by about 96%. Cain Rpt. ¶ 88.

Defendants reacted to the Release immediately. At 8:01 am, Smiriglio said in a group chat "1 Billion doses *said in doctor evil voice*," to which Boyd pithily responded, "reads well." PX65. At 8:51 am, Maher texted Floroiu: "Thank you for helping me. I am so grateful.… Hopefully he [Boyd] leaves you alone now to do your job. I think the stock is at 7-8 by the end of the summer." PX66. But Armistice was not done. Seeing the press release and Floroiu's presentation at the virtual H.C. Wainright Conference, Maher noted that if Vaxart's stock price went higher, "the computers start to buy [VXRT] as a breakout." PX65. Maher added, "we are not over the hump on this and while very overbought the [sic] VXRT is probably going to $5+ just hand out from there." *Id.*

J. Defendants Push Vaxart's Board to Change Its Insider Policy Again to Lift the In-Effect Black-Out Period So That Armistice Could Dump Its Shares the Next Day.

The same day, about an hour before Vaxart issued the Attwill Press Release, Boyd—having not sold Vaxart shares for weeks—emailed Vaxart, requesting preclearance to trade, PX67, even though he knew the insider trading window had closed on June 24. PX54. In that email, Boyd—having known of Vaxart's NHP study since at least June 8—certified for a third time since learning of the NHP study that he was not in possession of any material, nonpublic information. PX67.

Six minutes after the misleading Attwill Release issued, both Boyd and Maher began aggressively calling and texting attorney Charles, totaling nearly 27 calls and 10 texts by day's end. PX122; PX123. By 4:00 pm, Charles circulated a DocuSign for a revised insider trading policy Vaxart had just adopted at the June 8 Board meeting. *See* PX41; PX68. This new version, pushed by Armistice, reopened the blackout period (currently closed until early August) to allow insiders to trade on June 26 and 29 and obtain pre-clearance to trade directly from Floroiu. PX68.

Maher texted Floroiu at 4:03 pm—"Hi we need to get this thing signed and done," at 4:28

pm—"There is a sense of urgency on this," and at 4:37 pm—"Once the policy has been approved we need an email or some waiver letter from you for our purposes." PX66. Boyd also texted Floroiu at 4:24 pm—"Keith mentioned that there is a docusign and waiver that we need to execute tonight. Pls make sure we do so ASAP. Also happy to chat briefly." PX69. Then, from 4:46 to 5:00 pm, Boyd and Maher contacted each of the other Vaxart Directors, urging them to sign the new policy via DocuSign, rather than go through the normal Board meeting process. PX70, PX71, PX72; PX123. In none of these messages did Armistice say it was planning to dump its shares. *Id.*

K. Defendants Threaten Vaxart to Publish the OWS Release, Knowing They Would Dump.

At 5:05 pm, Defendants received confirmation that, per their pressure, the blackout period had been lifted. PX68. Less than two hours later, at 6:48 pm, Boyd asked Maher to certify that he did not possess any MNPI "beyond tomorrow's press release." PX73. Between 6:51 and 6:57 pm, they exchanged seven spoliated texts. PX122. Immediately after, at 6:57 pm, Boyd directed Floroiu to put out a second press release building off Attwill's momentum. PX37. This release falsely declared Vaxart was "one of the ***few*** companies selected by" OWS, even though Vaxart had merely been invited to test its vaccine in an NHP study organized by BARDA to be run in a USG-contracted lab. PX1. Though Floroiu noted that both prior and current management deemed participation in the NHP study to be immaterial, and that Armistice was free to trade, Boyd pressed: "With all due respect, as a Firm, we [Armistice] are unsure if we agree with your assessment. If the Company is not willing to release the information, Armistice may choose to do so." PX37.

Over the next two hours, Boyd and Maher called Floroiu multiple times. PX122, PX123. Maher spoke with Floroiu for 18 total minutes. Maher also called Charles for 11 minutes. At 9:50 pm, Vaxart instructed LifeSci to issue the OWS Release the next morning at 8 am. PX40. At 9:52 pm, Floroiu spoke with Boyd for 6 minutes. Immediately thereafter, Boyd spoke with Maher for 6 minutes. By day's end, Defendants had exchanged 53 spoliated texts. PX124; PX125.

L. Because of Boyd's Email Threat, Vaxart Reverses Course and Publishes a Press Release Misleadingly Stating It Was "One of the Few" Vaccines "Selected" for OWS.

Vaxart issued the OWS Release at 8:00 am on June 26 because of Defendants' actions. PX1. An hour before, LifeSci questioned what had triggered the release, asking if any NHPs had

been dosed, and warning of the attention Vaxart was getting on Robinhood from its June 25 public statements. PX40. Thereafter, media outlets contacted Vaxart and HHS seeking clarity as to what Vaxart's self-proclaimed OWS selection actually entailed, PX74, PX75, PX76, PX77, including whether "it [wa]s ***just*** funding for some animal studies," PX78. In response, OWS's Chief of Staff, Col. Eric P. Shirley, privately told his staff that "VaxArt entered into a contract with BARDA," but were "not, however a part of the OWS Vx effort at this time." PX79.

Neither Vaxart nor Defendants made any efforts to clarify the record or provide an informed answer, letting the misimpression linger. In this environment, Vaxart's stock price jumped from a closing price of $6.26 on June 25 to an unprecedented high of $14.30 on June 26. Cain Rpt. ¶ 139.

M. Defendants Liquidate Their Vaxart Holdings for Exorbitant Insider Profits.

Under the hurriedly approved change to Vaxart's insider trading, "one full trading day must elapse before" any material, nonpublic information in the OWS Release could generally lose its non-public status. PX68. Nevertheless, within minutes of seeing the OWS Release go out on June 26, Armistice began dumping nearly all its of its 27.6 million Vaxart shares and exercised warrants.

At 6:25 am on June 26—hours before that Release issued and Armistice began dumping, Smiriglio asked Boyd if he was having "Dreams/Nightmares of VXRT," adding: "Maybe we don't sell this thing, see if these retail guys can turn it into NVAX without us sending any signals at all to the market." PX80. Likewise, on June 28, after Smiriglio noted CBS news mentioned Vaxart alongside NovaVax and J&J, PX81, Boyd texted: "Fingers crossed but they might run this VXRT up early. Let's just watch early and cross our fingers." PX82. Smiriglio answered: "Hope so man. We are still good to go right?" Boyd replied: "Yes. All day so can be patient." *Id.*

In two trading days (Friday, June 26 and Monday, June 29), Armistice reaped over a quarter billion dollars in pure profit. PX83. They did so even though several misled media outlets were reporting that Vaxart was now in league with OWS finalists like Moderna. PX84, PX85.

IV. APPLICABLE LEGAL STANDARD

Summary judgment is inappropriate unless the evidence, viewed in the light most favorable to the nonmoving party, with all inferences drawn in the light most favorable to the nonmoving party, shows "that there is no genuine issue as to any material fact and that the moving party is

entitled to judgment as a matter of law."[4] "An issue of material fact is genuine 'if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party.'"[5]

This standard imposes a particularly tall order in this case where:

(i) every key allegation cited in this Court's order sustaining Plaintiffs' scheme liability and insider trading claims arose from produced documents, *see* ECF No. 293; and

(ii) at minimum, at trial, the jury will receive a permissive inference instruction regarding Defendants' deletion of texts, *see* ECF No. 484 at 26:16-17.

V. ARGUMENT

A. Genuine Factual Disputes Preclude Summary Judgment on Scheme Liability.

At trial, Plaintiffs will prove Defendants violated Rule 10b-5 by participating in an illegal scheme to pump up the price of Vaxart shares for the purpose of selling them at an artificially inflated price. As noted in this Court's 2023 MTD Order, ECF No. 293, this scheme included four components: (i) appointing Andrei Floroiu—a former Armistice employee and plaything of Armistice with no prior experience developing a vaccine—as a first-time CEO to carry out an aggressive public relations campaign; (ii) changing Vaxart's insider trading blackout window with the specific purpose of letting Armistice capitalize on speculation about OWS; (iii) pushing Vaxart to release news suggesting Vaxart had been selected as a finalist for OWS; (iv) all before liquidating nearly all their remaining Vaxart holdings for over $250 million in pure profit.

Over the past two years, Defendants have produced internal emails and communications showing they knew what OWS selection meant, monitored Floroiu's press campaign, and were frustrated by Vaxart's stagnant stock price. Witness testimony has confirmed that, but for Defendants' actions, Vaxart would not have appointed Floroiu as CEO on June 8, would not have reopened the insider trading window on June 25, and would not have issued the OWS Press Release, if at all, until NHPs were dosed in August 2020—after all OWS finalists had been identified. And third-party productions of Boyd and Maher's phone records confirm, ***despite Defendants' spoliation of ESI***, that Boyd and Maher communicated behind the scenes at critical junctures during the scheme timeline. Given this mounting evidence of fraud, most of which

[4] *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630-31 (9th Cir. 1987).
[5] *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

Defendants' motion fails to even acknowledge, there can be no doubt that Defendants' motion pays mere lip service to Rule 56's requirement of showing no disputes of material fact.

1. Hoping to Exploit Market Uncertainty as to Whether Vaxart Might Be One of the Last Two, Defendants Moved to Appoint Floroiu as CEO the Day *The New York Times* Revealed Five OWS Finalists' Identities.

Ample evidence—including Defendants' texts with Floroiu—demonstrate that, in early June, Defendants reactivated their prior plan to install Floroiu as Vaxart's CEO in furtherance of a pump-and-dump scheme triggered by their conclusion Vaxart would not receive USG funding.[6]

On June 3, 2020, Defendants learned OWS had already selected five finalists for the same multi-million dollar USG funding opportunity that Vaxart had been hoping to receive for nearly three months. Floroiu texted Boyd and Maher a link to the news, followed by the question "means no BARDA money, right?" PX19; PX20. Boyd confirmed a similar understanding in an internal Armistice chat with Head Trader Sergio Smiriglio. When asked "WTF … what about the 100 other programs," PX18, Boyd answered, "just means where the gov't will focus." *Id.*

That evening, Floroiu emailed a friend that "[m]y becoming CEO is again on the front burner, and ***I was asked***"—from context, presumably by Defendants—"to sketch a 60-day plan." PX23. This "60-day CEO Plan" sketched out a three-step process to elevate Vaxart's standing in the eyes of investors: "craft new message" to "create lots of buzz," "spread it" through PR and lobbying, and "use it." *Id.* On June 8, 2020, at 12:59 pm, Floroiu sent Defendants a streamlined version of his PR plan for the "2-3 month window to capitalize on the COVID-19 opportunity."[7] PX44. At 1:00 pm, Vaxart started the Board meeting at which management discussed the NHP study. PX41. In this context, Boyd informed Floroiu that the CEO transition was formally a go, texting during the meeting: "I am visualizing our game plan here and getting very bullish." PX43.

Boyd's subsequent texts corroborate that "game plan" was to pump up Vaxart's stock price.

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[6] PX22 (Floroiu text to friends: "They applied for a BARDA grant for the vaccine, and they don't wanna change the CEO in the middle of it …. But if they don't get it, I'll be back there.").

[7] On June 11, Floroiu elaborated the plan to capitalize on COVID fears. After Boyd texted "[c]an't have stuff down 7,8,9% … VXRT horrible ... Let's fix this fast," Floroiu responded "This 2nd wave, the realization that it's coming and fear of it, is good for Vaxart. ***And I'll make sure we capitalize on it***." Boyd responded with a prayer emoji and "I can't wait!" Floroiu replied, "Tomorrow we're launching a rocket! [rocket emoji] Buckle up!" PX86.

On June 14, 2020—the evening before Floroiu's first day, Boyd reiterated that Floroiu had been appointed to enact a PR game plan to boost Vaxart's stock price, texting: "Let's also focus on the PR plan, in particular for Tuesday AM! ... And when the banks panic and call you, pls tell them we're not interested in raising money at these prices! Maybe $5! Or just never. Whatever is stronger." PX47. The very next morning, Boyd emailed Floroiu a graph showing that, since the June 3 *NYT* article, the number of investors shorting Vaxart—and who would soon need to buy Vaxart shares to cover—had doubled. PX49. Boyd said: "Pls don't share. … That's a lot of shares to cover!" *Id.* And the next day, June 16, Floroiu circulated his edits to a draft press release Vaxart was considering issuing, PX50, once BARDA had signed off and NHPs were dosed, PX37-40.

In the face of this evidence, Defendants construct strawmen to assert their efforts to appoint Floroiu were not for a deceptive end. Most egregiously, they assert that because Armistice originally approached Floroiu in February 2020, before COVID-19, "no reasonable fact finder could conclude that Armistice had the premonition in February 2020" to orchestrate the alleged fraud in June. MSJ at 11. But that is not Plaintiffs' theory. Plaintiffs claim the fraud scheme came into form in June in a completely new opportunistic context—a once-in-a-life-time pandemic—after Armistice had abandoned its initial "royaltyco" plans. It is blackletter law that "[n]ot every perpetrator deliberately plan[s] and devise[s] a well-integrated, long-range, and effective scheme' from the outset"; in reality, "schemes to defraud are often open-ended, opportunistic enterprises. They may evolve over time, contemplate no fixed end date or adapt to changed circumstance."[8]

On this record, a jury could reasonably find Floroiu's appointment "had the effect of creating a false appearance" that Armistice was in full support of Vaxart while, behind the scenes, it was preparing to hype up Vaxart stock before dumping its holdings—an act it could have done anytime between June 8 and June 24, but waited until ***after*** pushing Floroiu to issue misleading press releases to do so—as part of a pump-and-dump scheme that, if not near-fully formed at the outset, evolved and took full form by June 25 when Defendants strong-armed Vaxart to amend its insider trading policy before threatening it into releasing news suggesting Vaxart had a greater role

[8] *United States v. Tanke*, 743 F.3d 1296, 1305 (9th Cir. 2014).

in OWS—news the company deemed immaterial and had no present plans to release. PX37-40.[9]

2. Defendants Instructed Floroiu to Issue News Before 8 am the Night Before the Attwill Release, and Thanked Him After, in Furtherance of Their Scheme.

Triable evidence shows that Defendants' pump-and-dump scheme also evolved to include a misleading press release about Attwill—which achieved Boyd's desired effect of breaking through the news vacuum that had engulfed Vaxart, but not its small, COVID biotech competitors.

As highlighted above, beginning on June 20, 2020, Floroiu and Maher began exploring how to reach retail investors on platforms like Robinhood—presumably to boost Vaxart's stock price. PX56. Following a call with Maher on Monday, June 22, Floroiu approached Tucker to gauge what Vaxart "could say" if it "put out a press release before [BARDA] dose[d] the monkeys." PX57. Seeking further publicity, he also asked Vaxart's CCO hours later to draft a press release for a memorandum of understanding that Vaxart was negotiating with Attwill. PX58.

Defendants' phone calls and texts with Floroiu the next days, *see* Part III.G-H, suggest he discussed Attwill with Defendants. ***In total, Floroiu spoke with Boyd and Maher for over an hour*** the same day that Vaxart's primary concern was finalizing the Attwill MOU and Press Release.[10]

Defendants' internal Bloomberg chats further confirm that Armistice pushed Floroiu to issue the Attwill Release to boost Vaxart's stock price. These logs show that on June 24, Boyd told Maher that Vaxart "need[ed] to keep up, at minimum" with its vaccine competitors, who were "all ripping our face off," adding it was "horrible … absolutely f-ing horrible." PX59. Maher responded, "It's a news vaccum [sic] with this guy Andrei," and he proceeded to call Floroiu. *Id.* Within hours, Floroiu told Vaxart's press team to lead with the "billion or more" doses claim in the Attwill Release's subtitle to "start with the Big Bang first." PX60. And that night, with Vaxart only having the Attwill and OWS Releases on deck, Maher micromanaged Vaxart's press further,

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[9] *See id.* (finding that reasonable jury could have found that event was part of "scheme from the outset or as it evolved over time—just another misrepresentation to facilitate" illegal profits).

[10] Beyond Vaxart's engagement with Attwill, Vaxart only had the following major events on its short-term horizon as potential discussion points—each speaking to Defendants' knowledge, motive, and opportunity to complete the alleged fraud scheme: (i) Vaxart's attempts to find non-OWS funding; (ii) Vaxart's closing insider trading window; (iii) Vaxart's inability to make meaningful news; and (iv) the NHP study and the OWS Release.

instructing Floroiu to release news before 8 am "in a way that hit the news wires," even though, as Floroiu noted, "all [Vaxart] PR s [sic] [to date had] came out at 8am." PX61.

Finally, Defendants' internal chats prove they approved of the Attwill Release's language. At 8:01 am, Smiriglio reacted in a group chat, "1 Billion doses *said in doctor evil voice*," with Boyd adding "reads well." PX65. At 8:51 am, Maher texted Floroiu: "Thank you for helping me. I am so grateful.… Hopefully he [Boyd] leaves you alone now to do your job. I think the stock is at 7-8 by the end of the summer." PX66. Defendants do not seriously engage with these facts.

3. Just Hours After Getting Vaxart's Insider Trading Policy Changed, Defendants Strong-Arm Floroiu to Issue the OWS Press Release, Intending to Further Pump Up Vaxart's Stock Price Before Selling the Next Day.

Ample evidence shows that, on June 25, 2020, Defendants committed multiple deceptive acts that collectively enabled them to dump their remaining Vaxart holdings at maximal profit.

First, the evidence irrefutably proves that Defendants, not Vaxart, were responsible for the mad dash to reopen Vaxart's insider trading window on June 25. Defendants' phone records show that, minutes after the Attwill Release issued, Defendants began aggressively calling and texting ***Vaxart's*** outside counsel, Faith Charles, who circulated a revised policy later that day. PX124.

It defies all credulity to suggest the timing was coincidental. Charles (with the help of Vaxart Controller Margaret Echerd) had just updated Vaxart's insider trading policy in late May/early June, which the Vaxart Board approved after having time to review and discuss at the June 8 Board meeting. PX41. Defendants' texts show it was them—not any other Director—who aggressively campaigned to revise the policy on June 25. Moreso, Defendants pushed through the changes knowing they planned to trade the next day. As just one example: At 2:46 pm, Maher reached out to Floroiu asking to speak. PX66. Maher followed up via text at 4:03 pm—"Hi, we need to get this thing signed and done"; at 4:28 pm—"There is a sense of urgency on this"; and at 4:37 pm—"***Once the policy has been approved we need an email or some waiver letter from you for our purposes***." PX66. Boyd also texted Floroiu: "Keith mentioned that there is a docusign and waiver that ***we need to execute tonight***. Pls make sure we do so ASAP. Also happy to chat briefly." PX69. And, from 4:46 to 5:00 pm, Defendants urged the remaining Vaxart Directors to DocuSign the new policy, rather than go through the normal Board meeting process. PX66, 69-72, 123.

The changes themselves further suggest Armistice masterminded the update. Specifically, the new policy reopened the blackout period, allowing Armistice to trade until June 29. PX68. Moreover, Armistice could obtain pre-clearance directly from Floroiu, rather than Echerd. *Id.* Absent these changes, Armistice—which decided not to sell prior to the old blackout date, June 24—was barred from selling until early August, PX68, Echerd Tr. 97:16-25 (PX115)—after all OWS finalists would be announced. There was no other need to change the policy on June 24. Defendants' claim that no single witness testified to their responsibility, MSJ at 15, ignores the overwhelming circumstantial evidence indicating they orchestrated the revisions for the scheme.

Second, the evidence shows that Boyd waited until ***after*** he had changed the insider trading policy to push Vaxart to issue the OWS Release. Less than two hours after receiving confirmation that the blackout period had been lifted, PX68, Boyd sent his first of two emails pressuring Floroiu to put out the OWS Release, PX37. Though Floroiu noted that management deemed participation in the study to be immaterial, and that Armistice was free to trade, Boyd pressed: "With all due respect, as a Firm, we [Armistice] are unsure if we agree with your assessment. If the Company is not willing to release the information, Armistice may choose to do so." *Id.* Defendants' phone records further show they continued to pressure Floroiu after this email, calling him multiple times, before Vaxart told LifeSci to issue the press release. *See* PX124 (table charting all June 25 events).

Defendants—arguing their own set of disputed inferences—erroneously suggest no jury could find against them because Vaxart began drafting the OWS Release before Floroiu was appointed CEO. Contrary to their suggestions,[11] the fraud was not simply adding "Selected for OWS" to the Release, but rather pushing Vaxart to publish ***at a specific time*** when such misrepresentations could (i) foreseeably mislead investors and (ii) likely boost Vaxart's stock price before Armistice's already planned sales the next day, Boyd Tr. 260:22-261:10 (PX113). As Defendants concede, MSJ at 12-14, before Floroiu's appointment, Vaxart's management agreed to

[11] Defendants blame LifeSci for adding OWS to the title. MSJ at 10. But LifeSci stressed in its draft that Vaxart ***might*** be in "***2nd wave of OWS programs"*** and recommended that Vaxart "add detail/color on timelines/milestones of the NHP study" to avoid confusion. PX39. It was Armistice's desire for an impactful, stock-moving release and its eleventh-hour threat to Vaxart that caused the incomplete and misleading Release to issue despite LifeSci's warnings. PX40.

sit on the draft until after the NHPs were dosed. In other words, "had Boyd not sent his email … Vaxart would have issued the OWS Release in August," MSJ at 14—after the identities of all seven vaccines that were actually selected for Operation Warp Speed were publicly announced.

Because of Boyd's scheme, there is no way of knowing what would have occurred in normal business, including (i) whether Vaxart (under Latour or Floroiu) would have stuck to its plan to reach out to BARDA for edits on the Release, PX38—like it did in 2021 when debating to publish the NHP study's inconclusive results;[12] (ii) what further edits Vaxart may have made to the Release to reflect the August information climate—beyond Tucker refusing to be quoted;[13] (iii) whether Vaxart would have heeded LifeSci's pre-8:00 am advice that publishing the Release, as is, could confuse investors, PX40; (iv) whether Vaxart would have resisted Armistice's pressure; (v) whether Vaxart would have clarified, in response to media inquiries, that it was not an OWS finalist—as Latour later recommended;[14] or (vi) whether Vaxart would have pulled the draft Release entirely, as it did with its draft for the NHP results, *see* PX87. Nevertheless, it is beyond dispute that Vaxart would not have issued the Release on June 26 but-for Defendants' actions.

Likewise, Defendants err in asserting there is no triable evidence showing Boyd propagated a favorable, yet misleading appearance of Vaxart's prospects, prior to dumping stock, with the purpose and scienter necessary for a Plaintiffs' verdict.[15] "[T]he proof of scienter required in fraud cases is often a matter of inference from circumstantial evidence," and here, the circumstantial evidence is compelling.[16] In addition to the conduct highlighted above, between learning of the

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[12] PX87 (instructing Vaxart to drop all references to OWS and instead characterize the NHP study as "funded by BARDA" and "in collaboration with USG partners").

[13] PX88 ("I disagree with the approach but it's your call. Please don't quote me in the PR.").

[14] PX89 ("My two cents: I would make it crystal clear that Vaxart was selected for the NH primate study only, not for the full development program like the other 5 big companies.…").

[15] *See* MSJ at 14 (relying heavily on a vacated decision, *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040 (9th Cir. 2006), *vacated by* 519 F.3d 1041 (9th Cir. 2008)). However, even were *Simpson* to apply, the principal purpose of Boyd's demand—even if he had not read the draft PR—was to force the issuance of some OWS-related news to catalyze a stock pump—a crucial step in his indisputably pre-planned dump. And the effect of this demand was a misleading release hitting the market precisely when Armistice had just re-opened their trading window.

[16] *Herman & MacLean v. Huddleston*, 459 U.S. 375, 390 n.30 (1983); *see also SEC v. Burns*, 816 F.2d 471, 474 (9th Cir. 1987) (insider trading claims are "often based on inferences from circumstantial evidence"); *SEC v. Singer*, 786 F. Supp. 1158, 1164 (S.D.N.Y. 1992) (same).

NHP study and instructing Floroiu to publish the OWS Release, Defendants certified on three occasions that they did not possess material non-public information. PX67; PX54; PX90. In other words, ***they certified three times that Vaxart's mere invitation to a BARDA-administered NHP study was not material***. This was the same conclusion reached by Vaxart's management and outside counsel. PX37. Yet on June 25—after having Vaxart change its insider trading policy and speaking to Floroiu by phone for over 40 minutes—Defendants changed their tune. PX37; PX73.

No evidence suggests that Boyd's email threat was consistent with normal practices. By that time, Floroiu had relayed that, because the NHP study "was not MNI," Armistice was "cleared to trade" without Vaxart having to publish the Release. PX37. If Boyd truly disagreed, he could have asked Vaxart for additional information to aid Armistice's assessment. He could have asked for a copy of the press release (assuming he did not discuss its contents). He could have brought his materiality views to the Board in a simple email. Or he could simply have abstained from trading until the NHPs had been dosed in August (at a price that would still be profitable).

On this record, a reasonable jury could infer that, by this point, Boyd knew publishing the OWS Release on June 26 might suggest something beyond Vaxart's mere participation in an immaterial and ill-fitted NHP study[17]—something that would increase Vaxart's stock price given the market's thirst for OWS news.[18] Moreover, even if Boyd had not seen the Release, a reasonable jury could still find that Boyd—a Vaxart Director—at least acted recklessly in strong-arming Vaxart into issuing a release that Boyd self-servingly claims he never read prior to its publication.[19]

B. Genuine Factual Disputes Preclude Summary Judgment on Insider Trading.

On June 26 and 29, Armistice dumped its Vaxart holdings after pushing Vaxart to issue the

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[17] *See Kirby v. Cullinet Software, Inc.*, 721 F. Supp. 1444, 1455 (D. Mass. 1989) ("This statement may not have been literally false, but it would be permissible for a jury to consider whether it was material and intentionally or recklessly misleading in the context of the [moment].").

[18] Boyd Tr. 260:22-261:10 (PX113) ("From June 8th onward I believed, yes, that the stock would likely go up when the public was made aware that Vaxart was working with the government.").

[19] *Cf. Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp.*, 514 F. Supp. 3d 942, 954 (S.D. Tex. 2021) (sustaining fraud claim where defendants "direct[ed] employees to use outdated, misleading maps that made [the project] seem more commercially viable tha[n] it really was"); *SEC v. Agora, Inc.*, 2007 WL 9725170, at *11 (D. Md. Oct. 3, 2007) ("allowing one person to author, edit, and publish information without editorial or other review to authenticate its claims … evidence[s] a reckless disregard for the truth of the statement").

OWS Release, which misleadingly suggested it was "selected for" OWS. At that time, Defendants knew Vaxart had no realistic OWS prospects. They had implicitly sworn on prior occasions that the NHP study news was immaterial. And rather than (i) selling on June 24 (when the blackout period was open), (ii) abstaining from selling until after NHPs were dosed, or (iii) going long on Vaxart in the hope the NHP study would convert into an OWS partnership, Defendants, knowing what they knew, sold more stock on Friday, June 26 than all their past sales combined before largely liquidating what remained on Monday, June 29. On this record, a reasonable jury could easily find Defendants knowingly used insider information in violation of insider trading laws.[20]

1. Defendants Knew or Recklessly Ignored from Their Vaxart Interactions and Daily News Consumption That Vaxart Had Not Been Selected for OWS.

Defendants knew from their vigorous consumption of OWS news, including "constant reports of speculation around one company or another," Boyd Tr. 136:11-137:12 (PX113)—that in June 2020, there was considerable public interest in which of 100+ possible vaccines OWS would be selecting as the handful of finalists to further its publicly touted mission of making available hundreds of millions of doses of vaccine by early 2021. Indeed, Boyd himself privately conceded on June 3 the OWS finalists—"mrna, jnj, azn, mrk, [and] pfe"—were where "the gov't will focus." PX18. News sources affirmed this belief in the following days. On June 4, *Science* reported that (i) the selections reported by *NYT* "signaled that Warp Speed had changed its initial plan of doing comparative studies of 14 vaccines" to narrow down candidates, (ii) Vaxart, while on the list of 14, was not reported as a finalist by *NYT*, and that another company in the NHP studies, NantKwest, also "did not make the final cut."[21] PX92. And on June 16, HHS affirmed in a fact sheet that OWS's was narrowing down to "about seven" vaccines, PX93, rather than eight, PX14.

In this information environment, Defendants also knew there was no basis to nakedly claim

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[20] *See Thomas v. Magnachip Semiconductor Corp.*, 167 F. Supp. 3d 1029, 1050 (N.D. Cal. 2016) ("Section 20A requires only that a party know the inside information while making the trade, not that she actually use that information."); *Johnson v. Aljian*, 394 F. Supp. 2d 1184, 1198-99 (C.D. Cal. 2004) ("when an insider trades while in ***possession*** of material, nonpublic information, a strong inference arises that such information was used by the insider").

[21] Floroiu sent the article to Tucker on June 17 at 6:19 pm, PX91, immediately after an 8-minute call with Boyd at 5:45 pm and then a 24-minute call with Maher at 5:56 pm. PX122, PX123.

that Vaxart had been selected by OWS as one of the seven finalists (narrowed down from the round of 14). This is reinforced by their actions. For example, after reading in the *NYT* that OWS had selected at least five finalists, Defendants reactivated the prior plan to appoint Floroiu as Vaxart CEO—a plan Armistice had put on hold so long as there was a chance Vaxart could receive USG funding, PX22—and "asked [Floroiu] to sketch a 60-day [CEO] plan." *Id.* The next day, Boyd forwarded a press release announcing that DoD had awarded NovaVax—another OWS finalist—$60M for its vaccine, causing Floroiu to lament that the window for Vaxart to get BARDA funding had closed. PX24. Defendants' stock sales also constitute strong circumstantial evidence. If Defendants truly believed that the NHP study represented the potential that OWS might explore a partnership with Vaxart (if the results were good), *see* MSJ at 19 (providing no explanation as to how Defendants' reached this purported belief), then why choose to cash out? The decision suggests Defendants knew there would be no higher price and wanted to go out on a bang.[22]

Defendants cite no evidence showing that, at any point, anyone within Vaxart suggested to anyone at Armistice that Vaxart had in fact been selected as one of the remaining one to three yet-to-be-revealed OWS finalists.[23] This includes any conversation with Floroiu—who texted and spoke on the phone with Defendants multiple times per day.[24] Nor could they. Vaxart was never

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[22] As discussed in Part V.C, *infra*, this material non-public information also applies to the Attwill Release which, with the OWS Release, misleadingly suggested Vaxart stood at the precipice of pioneering a successful coronavirus vaccine and would soon make a billion or more doses.

[23] Citing no cases, Defendants assert they cannot be found liable unless they were explicitly told that Vaxart had not been selected as an OWS finalist. MSJ at 17. But the burden rests with them to prove their affirmative defense that they believed Vaxart had been selected. *United States v. Cortez-Rivera*, 454 F.3d 1038, 1041-42 (9th Cir. 2006) ("[F]airness and common sense often counsel against requiring a party to prove a negative fact, and favor, instead, placing the burden of coming forward with evidence on the party with superior access to the affirmative information."). Tellingly, at no point do Defendants state with any specificity when and what they were actually told about the study, or how they reconciled that info with later OWS news.

[24] *SEC v. Horn*, 2010 WL 5370988, at *5 (N.D. Ill. Dec. 16, 2010) (although "the SEC had no direct evidence that [a defendant] was given [MNPI], the circumstances," including the timing of the defendants' meetings and communications, "supported an inference of illegal insider trading sufficient to withstand" summary judgment); *SEC v. Warde*, 151 F.3d 42, 47 (2d Cir. 1998) (defendant's access to insider information, coupled with pattern of phone calls and stock purchases, provided sufficient circumstantial evidence of insider trading). Defendants' reliance on *SEC v. Horn* and *SEC v. Alejandro Duclaud Gonzalez de Castilla* is flawed. MSJ at 18. In *Horn*, there was no evidence showing the defendant spoke with any employees who possessed

told it was selected for OWS. *E.g.*, Tucker Tr. 259:17-260:2 (PX120). And even as late as June 22, Vaxart knew that, ***at best***, the NHP study ***might*** mean Vaxart had been on the list of 14. PX57. But by that point, OWS had already moved on to "narrow[ing] down" the list of 14 to "about seven" finalists, PX93, PX94, and the media had already publicly identified five or six of them.

That Vaxart witnesses self-servingly opined that (i) they saw no difference between "working with" and "being selected by OWS," and (ii) they did not believe the Releases they drafted violated federal securities laws, is of no moment.[25] *See* MSJ at 18. Even if their objected-to, lay-witness opinions were admissible to show what the market understood, they cannot be credibly reconciled with (i) these witnesses' statements,[26] (ii) their conduct; or (iii) the views of OWS's leadership, PX79, in June 2020.[27] A jury must decide which evidence to credit.

2. Defendants Knew an NHP Study without Results Was Immaterial.

After learning that Vaxart had been invited to a BARDA-run NHP study, Boyd asked Vaxart for preclearance to trade three times. PX67; PX54; PX90. Each time, he certified that neither he nor Armistice possessed material nonpublic information. *Id.* In none of his requests did he state that his plans to trade were contingent on Vaxart publishing news about the NHP study invitation.

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inside information. 2010 WL 5370988, at *6-7. And in *Gonzalez*, the alleged tipper had no knowledge of the alleged inside information, 184 F. Supp. 2d 365, 377 (S.D.N.Y. 2002), unlike Floroiu who specifically discussed OWS with Tucker, PX57.

[25] *Manley v. Rowley*, 847 F.3d 705, 711 (9th Cir. 2017) ("a party's own testimony will nearly always be self-serving"). Of course, a jury must resolve credibility issues.

[26] *Compare* MSJ at 18 (citing Latour's testimony opining the OWS Release was not misleading) *with* PX89 (advising Floroiu to "make it crystal clear that Vaxart was selected for the NH primate study only, not for the full development program like the other 5 big companies"). The same is true for Floroiu. Despite his cited attempts to run away from his past statements, MSJ at 18, on June 25 2020, Floroiu specifically told Boyd that the NHP study "***was not MNI***, and therefore [Vaxart did] not need to put out a press release." PX88. Thus, a jury must decide.

[27] Defendants stake much of their defense on the improper lay opinions of Tanima Sinha—a non-managerial BARDA scientist who had no interaction with OWS leaders (like Col. Shirley), no involvement with BARDA's work with the OWS finalists (unlike Houchens), and (for OWS) worked primarily as a technical coordinator for Vaxart's NHP study. Sinha Tr. 71:17-79:16 (PX119). Not only did Sinha testify she never told Vaxart it had been selected for the list of 14 or seven, *id.* 115:18-116:10, she specifically clarified that in providing her lay views on the OWS Release, she was not "opining that the press release could not potentially be misleading to individuals digesting the information about OWS that was publicly available" in June 2020, *id.* 121:14-122:4; she confirmed OWS has selected six "tier 1" vaccines, *id.* 91:8-95:9, and she also sent Vaxart press release edits in 2021 to remove all references to OWS, PX87.

Boyd now claims that despite his certifications, he actually believed "the NHP study was of monumental importance" as it suggested funding "was likely to follow if the results of the study were positive." MSJ at 19. To that end, Boyd testified ***after*** the close of discovery that ***he*** placed Vaxart on Armistice's "restricted list"—a document Defendants produced unredacted the day before they filed their summary judgment motion, despite Plaintiffs' requests 10 months earlier.[28] This unauthenticated, unreliable document with no adequate foundational proffer or opportunity to test should be stricken.[29] DX O. Even if considered, it is of no moment, as it does not disprove Defendants held the additional belief that Vaxart had not been selected for OWS when dumping.

Defendants also contend the NHP study was important for Vaxart, given it could barely afford such a study with its dwindling funds. "But just because a particular analysis was worth considering by [management] does not mean that it is material to a reasonable investor."[30] Vaxart's prior written statements further undermine the study's claimed importance. From the outset, Vaxart believed a "hamster challenge model would have been better." PX39. Because NHPs "can't just take a tablet like a human can … there was a concern there would be a problem there"—which Vaxart "had seen [] previously in nonhuman primate dosing." Biehn Tr. 132:13–133:6 (PX112).

Floroiu told Boyd on June 25 that the NHP study was not material. PX37. LifeSci believed that neither the Attwill nor OWS Releases were material. PX64. And LifeSci had warned Floroiu before the OWS Release issued that publishing immaterial news of an invitation to a future NHP study could deceive investors, PX40. A jury must decide credibility.

3. Defendants' Kitchen Sink Arguments Do Not Rebut the Inference of Scienter.

Unable to show they lacked MNPI, Defendants muster a patchwork of facts and self-serving testimony in a feeble attempt to show they lacked scienter. Their arguments lack merit.

First, Defendants argue they had no idea the OWS Release (which concerned a six-week-

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[28] *See also* Exhibit A to the Motion to Strike filed contemporaneously with this opposition.

[29] *See SEC v. King Chuen Tang*, 2012 WL 10522, at *24 (N.D. Cal. Jan. 3, 2012); Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information … as required by Rule 26(a) or (e), the party is not allowed to use that information … to supply evidence on a motion … or at a trial, unless the failure was substantially justified or is harmless.").

[30] *Masters v. Avanir Pharms., Inc.*, 996 F. Supp. 2d 872, 884 (C.D. Cal. 2014).

old NHP invite) misleadingly overrepresented Vaxart's role in OWS when they traded. MSJ at 21. Knowledge of a press release's veracity is not a required element under Section 20A, 15 U.S.C. § 78t-1. But even if it was, triable evidence suggests Defendants did know the Release's contents on June 25, *see* PX37, PX73, PX124, or at the very least, before the markets opened at 9:30 am on June 26. Boyd Tr. 260:9-17 (PX113); 12/9/24 Hr'g Tr. 97:2-17 (PX121). Moreover, the June 25 insider trading policy Defendants campaigned to implement specifically warned them that "one full trading day must elapse before" any material, nonpublic information in the OWS Release lost its MNPI status. PX68. Finally, as Defendants dumped stock on June 26, several media outlets reported, based on the Release, that Vaxart had joined the leagues of Moderna and AstraZeneca. PX84. Defendants, who vociferously consumed news and knew where the government was focusing, likely saw these stories when published. Strong circumstantial evidence suggests they knew or recklessly disregarded the Release's obvious connotations when selling. *See also* PX80.

Second, Defendants oddly contend their pre-Class Period trading history exonerates them, as before they learned that OWS had selected finalists and Vaxart no longer had any real chance at getting USG funding, they sold 18.2 million shares over the course of nearly a month. During this time, Armistice never sold more than 1.5 million shares in a single day (excluding one outlier) and needed to sell those shares to be able to start exercising warrants. PX95. By comparison, on June 26, 2020, Defendants sold ***18.2 million shares*** in a single day when Vaxart's stock price reached its historic peak. A reasonable jury would easily find such trades suspicious.[31]

Finally, Defendants contend Boyd's request for preclearance belies any intent to insider trade. As discussed throughout, Defendants' orchestrated conduct in the days leading up to Boyd's preclearance-request-turned-threat demonstrates the request simply constituted lip service in furtherance of a pump-and-dump scheme. *See* Part II.H-M. Indeed, Boyd received preclearance to trade without the NHP news. PX37. Yet he still pushed Vaxart to publish the release.

C. Defendants Have Waived Summary Judgment on Loss Causation.

As shown by Dr. Cain, following the OWS Release, the relevant truth "leaked out" in the

[31] *See No. 84 Emp.-Teamster Joint Council Pension Tr. Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 940 (9th Cir. 2003) (finding outside shareholder sales suspicious); *Warde*, 151 F.3d at 47.

face of "intense scrutiny from investors, analysts, and the media into Vaxart's self-proclaimed selection for OWS[,] … [t]he lack of any confirmation from official government source[s], Vaxart's decision to ignore media inquiries in the days following the allegedly false and misleading press releases, … subsequent reports about [USG] support for other COVID-19 vaccines[,]" and Armistice's stock sales. Cain Rpt. ¶ 21. These events "contributed to increased skepticism" about the Attwill ***and*** OWS Releases' "misleading impression that Vaxart stood at the precipice of pioneering a successful coronavirus vaccine" that had been selected as an OWS finalist and would soon manufacture a billion or more doses. *Id.*; *see also id.* ¶¶ 88-97 (collecting market commentary). After this leakage period, the remaining inflation dissipated on July 25, 2020, when *NYT* and HHS definitively clarified that Vaxart was far from this precipice—it was "not among the companies selected to receive significant financial support from [OWS] to produce hundreds of millions of vaccine doses," PX96, and had only been invited to "participate in preliminary US government studies to determine potential areas for possible [OWS] partnership." PX97.

Defendants' motion makes no mention of leakage. Their loss causation challenge thus fails from the start.[32] And even putting leakage aside, Defendants' remaining arguments fall short.

First, with respect to Attwill, Defendants never engage with Plaintiffs' full theory as to why the Release was misleading. Not only did it misrepresent Vaxart's large-scale manufacturing abilities, it also misleadingly suggested Vaxart had a near-term need to produce "a billion or more doses" of its vaccine—presumably for OWS. Cain Reply ¶¶ 66-67 (ECF No. 398-2) (noting how analysts discussed Attwill alongside Vaxart's purported OWS selection). As explained by Vaxart's CSO, because the USG had seized and restricted access to resources in the early days of COVID, government support was crucial "to get access to materials that you would need to manufacture." Tucker Tr. 33:4–19 (PX120). As such, publishing a release about large-scale manufacturing ability, when Vaxart already had the ability to manufacture 100,000 doses, Biehn Tr. 154:3-10 (PX112), suggested an increased probability to investors that Vaxart had meaningful OWS support. The leakage events and the *NYT*'s July 25 article confirmed that was not so. Cain Reply ¶¶ 66-67.

[32] *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) (unraised arguments are waived).

Second, Defendants contend Armistice's sales could not have revealed why they were selling (*i.e.*, fraud) and instead suggest that supply-and-demand forces caused any price declines. MSJ at 24. As both Armistice's head trader and Dr. Cain confirmed, hyper sophisticated firms could see the trades and react accordingly. Cain Reply ¶¶ 59-63; Smiriglio Tr. 131:10-132:13 (PX118). Defendants also submit no evidence at all to support this new alternative loss causation theory. Nor can this new theory be reconciled with how Vaxart's stock price actually reacted.

Finally, Defendants recycle their class certification argument that the July 25 *NYT* article revealed no new information despite the statistically significant price drop that followed. Cain Rpt. ¶ 144. To that end, they claim a risk disclosure buried in a July 8, 2020 Registration Statement and RA Capital's July 13, 2020 investment in Vaxart put to bed any argument that, after the leakage period, a reasonable investor could believe Vaxart had been selected by OWS. MSJ at 25.

A single sophisticated investor receiving confidential, non-public information and then trading does not demonstrate that the public market was disabused of the misimpression created by Defendants' statements. Nor did the generic risk disclosure at issue sufficiently inform reasonable investors with the clarity provided by the *NYT* article, which quoted USG sources and stated matters plainly.[33] Indeed, on July 7, in connection with Vaxart raising funding, Latour and LifeSci advised Floroiu of Vaxart's "'faux' transparency" and lack of clarity regarding the OWS Release. PX64, PX89. On this record, a reasonable jury could find that the truth was not fully revealed until the *NYT* reported, through HHS sources, that Vaxart was not selected for OWS.[34]

VI. CONCLUSION

For the above-stated reasons, Defendants' summary judgment motion should be denied.

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[33] *See Arkansas Tchr. Ret. Sys. v. Goldman Sachs Grp., Inc.*, 77 F.4th 74, 92 (2d Cir. 2023) (finding that a federal agency's "name lends a certain amount of credibility or gravitas" that make a corrective disclosure "a different kind of event than" prior speculative news reports).

[34] Defendants' footnote arguments, MSJ at 25, fail to explain why "market noise" would not be captured by Cain's regression, which netted out industry and market effects, Cain Reply ¶¶ 52-54. They offer only conclusory speculation that there ***may*** have been confounding information. *See, e.g.*, *In re Tesla, Inc. Sec. Litig.*, 2022 WL 7374936, at *12 (N.D. Cal. Oct. 13, 2022) (noting disaggregation debates "go to the weight," not whether there is triable evidence); Cain Reply ¶¶ 33-56 (finding no confounding information). And they cite no evidence showing the price drop after the July 25 *NYT* article was a ***temporary*** reaction to negative news. (The rest of the year, the stock never returned to its pre-July 25 level, *see* Ex. 1 to ECF No. 318-2.)

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Respectfully submitted,

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