

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF
CALIFORNIA**

Nowakowski v. AXT, Inc.

No. 24-cv-02778-MMC (N.D. Cal. May 28, 2025) · No. 24-cv-02778-MMC · Decided May 28, 2025

OPINION

1 2 3 4 IN THE UNITED STATES DISTRICT COURT 5 FOR THE NORTHERN DISTRICT OF
CALIFORNIA 6 7 CRAIG NOWAKOWSKI, et al., Case No. 24-cv-02778-MMC 8 Plaintiffs,
ORDER GRANTING DEFENDANTS' 9 v. MOTION TO DISMISS; DISMISSING AMENDED
COMPLAINT WITH LEAVE 10 AXT INC., et al., TO AMEND 11 Defendants. 12 13 Before the
Court is defendants AXT, Inc. ("AXT"), Morris Young ("Young"), and 14 Gary L Fischer's
("Fischer") Motion, filed November 8, 2024, "to Dismiss Plaintiffs' 15 Amended Class Action
Complaint."

Plaintiffs Craig Nowakowski and Charles Grubb have 16 filed opposition, to which defendants
have replied. Having read and considered the 17 papers filed in support of and in opposition to the
motion,¹ the Court rules as follows.² 18 BACKGROUND 19 In the operative complaint, the
Amended Class Action Complaint ("AC"), plaintiffs, 20 who state they have purchased stock in
defendant AXT (see AC ¶¶ 10-11), allege that 21 AXT, a "materials science company," obtains
"almost all of [its] revenue" from the 22 operations of Tongmei, its "subsidiary based in China"
(see AC ¶¶ 21-22, 24).

According 23 to plaintiffs, AXT announced in November 2020 that it planned "to list Tongmei on
24 China's STAR Market, an exchange established by the Chinese government" (see AC 25 1 In
support of its motion, defendants request the Court take judicial notice of 26 fifteen documents.

As the Court does not find it necessary to consider those documents to address the instant motion,
said request is hereby DENIED. 27 1 ¶ 26), and that it thereafter raised \$49.6 million from
"private equity firms in China" in 2 exchange for "a 7.28% non-controlling interest in Tongmei"
and gave those firms the right 3 to redeem their shares if "Tongmei's IPO application" was
"rejected" or Tongmei 4 "withdrew" it (see AC ¶¶ 29-30).

Plaintiffs also allege that, in December 2021, Tongmei 5 submitted its IPO application to the
Shanghai Stock Exchange, which entity, in August 6 2022, "gave preliminary approval and
forwarded an amended version of [the IPO 7 application] to the CSRC [China Securities
Regulatory Commission]." (See AC ¶ 32.) 8 Plaintiffs further allege that AXT filed reports with
the Securities and Exchange 9 Commission ("SEC") on, respectively, March 23, 2021, January 10,
2022, March 15, 10 2022, August 2, 2022, March 16, 2023, and March 14, 2024, containing,
according to 11 plaintiffs, "materially false and misleading statements."

(See AC at 15:1-2, ¶¶ 59-90.) In 12 that regard, plaintiffs contend, AXT failed to disclose in those reports that "there were 13 specific, known material risks that Tongmei's IPO attempt would fail, requiring AXT to 14 refund the \$49 million investment to the pre-IPO Chinese corporate investors and that 15 AXT's financial condition, and business operations would be adversely impacted."

(See 16 AC ¶¶ 63, 65, 68, 70, 72, 75, 77, 79, 81, 84, 86, 88, 90; see also AC ¶ 61.) 17 Plaintiffs' allegations include an acknowledgment that the above-referenced 18 reports AXT filed with the SEC contained what plaintiffs refer to as "risk disclosures" (see 19 AC ¶¶ 60, 67, 69, 76, 78, 80, 85, 87, 89), for example, that "[t]he proposed Tongmei IPO 20 on the STAR market in China could fail to be completed" (see AC ¶ 67), and that "[t]he 21 terms of the private equity raised by Tongmei in China grant each investor a right of 22 redemption if the IPO fails to pass the audit of the Shanghai Stock Exchange, is not 23 approved by the CSRC or Tongmei cancels the IPO application[,] [which] could result in 24 disgorging the cash [Tongmei] raised from the [i]nvestors" (see AC ¶ 78).

Plaintiffs 25 allege, however, that the risk disclosures were "incomplete and materially false and 26 misleading" (see AC ¶¶ 63, 65, 68, 72, 75, 77, 79, 81, 84, 86, 88, 90; see also AC ¶¶ 61, 27 70) for the asserted reason that AXT did not disclose that "Tongmei had stolen trade 1 in China" (see AC ¶ 3). 2 In light of the above, plaintiffs assert two causes of action on their own behalf and 3 on behalf of a putative class, namely, "Violations of Section 10(b) and Rule 10b-5 4 Promulgated Thereunder" (Count I) and "Violations of Section 20(a) of the Exchange Act" 5 (Count II).

6 DISCUSSION 7 The elements of a private securities fraud action under § 10b, Rule 10b-5, and 8 § 20(a) are "(1) a material misrepresentation or omission of fact, (2) scienter, (3) a 9 connection with the purchase or sale of a security, (4) transaction and loss causation, 10 and (5) economic loss." See *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 11 1049, 1055, 1061 (9th Cir.

2008) (internal quotation and citation omitted). In their motion, 12 defendants argue the AC is subject to dismissal for failure to allege, as is required by the 13 Private Securities Litigation Reform Act ("PSLRA"), sufficient facts to meet what the Ninth 14 Circuit has described as the "formidable pleading requirements" applicable in "private 15 securities fraud class actions," see *id.* at 1054-55, and, in particular, facts sufficient to 16 support a finding of "falsity," see *id.* at 1070.3 17 "To plead falsity adequately under the PSLRA[,] the complaint shall specify each 18 statement alleged to have been misleading, the reason or reasons why the statement is 19 misleading, and, if an allegation regarding the statement or omission is made on 20 information and belief, the complaint shall state with particularity all facts on which that 21 belief is formed."

Glazer Capital Mgmt., L.P. v. Forescout Technologies, Inc., 63 F.4th 22 747, 765 (9th Cir. 2023) (internal quotation and citation omitted; emphasis omitted). "In 23 doing so, the plaintiff must reveal the sources of his information." *Id.* (internal quotation, 24 alteration, and citation omitted).

25 In the instant action, plaintiffs allege that Tongmei, in 2019, hired a former 26 3 In light of the Court's findings stated herein with respect to falsity, the Court has 27 not addressed defendants' additional arguments that the AC fails to sufficiently plead 1 employee of a competitor known as Sinocryst who "brought with him trade secrets" of 2 Sinocryst (see AC ¶ 38), that Tongmei "used" Sinocryst's trade secrets to "quickly 3 develop" products (see id.), that Sinocryst, in 2021, "reported the violation" to the 4 Yucheng City Public Security Bureau, which agency "obtained evidence of Tongmei's IP 5 infringement" and "launched a criminal investigation" (see AC ¶¶ 39-40), and that said 6 agency, in 2023, "completed its investigation and transferred the case records to the 7 People's Procuratorate, or public prosecutor's office, pending criminal prosecution" (see 8 AC ¶ 41).

9 Plaintiffs fail to expressly allege, however, "the sources of [their] information," see 10 Glazer Capital Mgmt., 63 F.4th at 765, and, to the extent plaintiffs implicitly allege the 11 source was a "report" issued in April 2024 by "J Capital Research" (see AC ¶ 93 (alleging 12 J Capital Research report "revealed the criminal investigation against Tongmei due to the 13 IP infringement as stated above [in the AC]")), plaintiffs' reliance is unavailing.

Although 14 courts have found that a plaintiff, to "allege falsity at the pleading stage," can "rely on a 15 short seller report"4 that contains "indicia of reliability," such as where the report "relies on 16 publicly filed documents," see *Hershowe v. Joyy Inc.*, 2021 WL 6536670, at *4 (C.D. Cal. 17 November 5, 2021) (citing cases), here, the AC does not allege the source or sources on 18 which J Capital Research relied, much less a source that is of the type on which a 19 securities fraud claim can be based, see id. at *5 (finding short seller report insufficient to 20 plead falsity, where short seller "did not corroborate its core conclusions" and cited only 21 to "unverified and unverifiable information").

22 Accordingly, the AC will be dismissed for failure to sufficiently allege falsity. As it 23 appears plaintiffs may be able to cure the deficiency identified,5 the Court will afford 24 4 Although not alleged in the AC, the parties agree that J. Capital Research is a 25 "short seller." (See Defs.' Mot. at 1:16-17; Pls.' Opp. at 23:15-16.) 26 5 In support of their opposition, plaintiffs have offered five exhibits, and, although, as defendants note, a plaintiff cannot amend a pleading by citing to information not 27 contained therein, the Court has considered the exhibits in determining whether leave to 1 plaintiffs leave to amend.°® 2 CONCLUSION 3 For the reasons stated above, the motion to dismiss is hereby GRANTED, and the 4 ¶ Amended Class Action Complaint is DISMISSED, with leave to amend.

Any Second 5 ¶ Amended Class Action Complaint shall be filed no later than June 27, 2025. 6 IT IS SO ORDERED. 7 8 ¶ Dated: May 28, 2025 INE M. CHESNEY 9 United States District Judge 10 11 12 13 16 17 18 19 20 21 22 23 24 25 26 27 ° In any further pleading, plaintiffs are not

limited to amending their falsity 2g || allegations, and may choose to amend other allegations as well.

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