UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF LOUISIANA

LAKE CHARLES DIVISION

WALTER WELCH, Individually and on behalf of all others similarly situated,	*	**CIVIL ACTION NO. 2:19-CV-01260-TAD-KK (Lead)**
v.	*	**CIVIL ACTION NO. No. 2:19-CV-01427-TAD-KK (Member)**
CHRISTOPHER MEAUX, DAVID PRINGLE, JEFF YURECKO, TILMAN J. FERTITTA, RICHARD HANDLER, WAITR HOLDINGS, INC. F/K/A LANDCADIA HOLDINGS, INC., JEFFERIES FINANCIAL GROUP, INC., AND JEFFERIES, LLC,	*	**JUDGE TERRY A. DOUGHTY** **MAGISTRATE JUDGE KATHLEEN KAY**

MEMORANDUM IN SUPPORT OF THE JEFFERIES DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' AMENDED CLASS ACTION COMPLAINT

MAY IT PLEASE THE COURT:

Defendants Jefferies Financial Group, Inc. ("JFG") and Jefferies LLC ("JLLC" and together with JFG, the "Jefferies Defendants") submit this memorandum in support of their motion to dismiss Plaintiffs' Amended Class Action Complaint (the "Amended Complaint" or "AC") pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court should grant the Jefferies Defendants' motion and dismiss Plaintiffs' claims with prejudice at Plaintiffs' cost.

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The Jefferies Defendants, by and through their undersigned counsel, will, and hereby do, move the Court, pursuant to Rules 12(b)(6) and 9(b) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice the Amended Complaint filed on October 16, 2020 (ECF No. 37). The Jefferies Defendants also join, pursuant to Federal Rule of Civil Procedure 10(c) to the extent applicable, the Memorandum in Support of Defendants Christopher Meaux, David Pringle, Jeff Yurecko, Tilman J. Fertitta, Richard Handler, and Waitr Holdings, Inc. f/k/a Landcadia Holdings, Inc.'s Motion to Dismiss (the "Waitr Brief" or "Waitr Br.") concurrently filed in this action.

Plaintiffs allege that the Jefferies Defendants, among other defendants, violated Section 14(a) of the 1934 Exchange Act (the "Exchange Act"), 15 U.S.C. § 78n(a), ("Section 14(a)") and Securities and Exchange Commission ("SEC") Rule 14a-9 promulgated thereunder by allegedly making materially false or misleading statements or omissions in the Schedule 14A Definitive Proxy Statement dated November 1, 2018 (the "Proxy Statement"), and related solicitation materials filed with the SEC in connection with the acquisition of Waitr Incorporated ("Waitr") by Landcadia Holdings, Inc. ("Landcadia") on November 15, 2018 (the "Waitr Acquisition"). AC ¶¶ 1-2.

I. PRELIMINARY STATEMENT

As explained in the Waitr Brief, the Amended Complaint is divided into two separate and distinct sets of claims that are being pursued by separate named plaintiffs on behalf of separate purported classes of investors:

First, certain Plaintiffs assert claims of fraud under Section 10(b) and 20(a) of the Exchange Act against various defendants on behalf of investors who purchased common stock of Waitr on the open market between November 16, 2018, and August 8, 2019. The Jefferies Defendants are *not* named as defendants with respect to these claims.

Second, certain Plaintiffs (Walter Welch and Sean Barnard in particular) assert claims under Section 14(a) of the Exchange Act against various defendants, including the Jefferies Defendants, on behalf of investors who acquired shares between May 17, 2018 (the date Landcadia announced its intention to acquire Waitr), and November 15, 2018 (the date Landcadia's acquisition of Waitr closed, which was also the day before Waitr's shares began to trade publicly). In contrast to Section 10(b) claims, which generally concern claims that open market investors were defrauded into purchasing securities, Section 14(a) claims are more technical and limited, focusing specifically on alleged false and misleading statements made in connection with the solicitation of proxies for a shareholder vote. Here, the Section 14(a) claim is that shareholders of Landcadia—a "SPAC"[1]—were allegedly misled into approving Landcadia's acquisition of Waitr by way of certain purportedly false statements made in connection with the alleged solicitation of their votes (or proxies) in support of the acquisition.

Although Plaintiffs have included the Jefferies Defendants as Section 14(a) Defendants, they do not, in fact, allege that the Jefferies Defendants themselves made *any* of the purported misstatements at issue. Nor do Plaintiffs adequately allege that the Jefferies Defendants authored or filed the Proxy Statement at issue or undertook any tangible step to solicit shareholder votes or proxies. This is hardly surprising given that the Jefferies Defendants were not parties to the Landcadia-Waitr merger agreement and are not alleged to have controlled either company. Instead, Plaintiffs have misguidedly included the Jefferies Defendants in this action solely because: (i) JFG was one of Landcadia's initial sponsors and investors; and (ii) JLLC was a

[1] "SPAC" stands for Special Purpose Acquisition Company, which is a special type of company (here, Landcadia) formed for the sole purpose of acquiring a yet-to-be-identified target company, which in this case turned out to be Waitr. In recent years, SPACs have become an increasingly common means of raising capital to acquire and take private companies public.

financial advisor to Landcadia. As explained below, neither of these roles gives rise to Section 14(a) liability, and Plaintiffs' conclusory allegations against the Jefferies Defendants utterly fail to state a claim under Section 14(a). For the most part, the Amended Complaint simply lumps the Jefferies Defendants together with other Defendants, employing precisely the sort of "group pleading" tactic that the Fifth Circuit has repeatedly forbidden in Exchange Act cases such as this.

For all of the reasons set forth in the Waitr Brief, which the Jefferies Defendants join to the extent applicable to them, Plaintiffs have failed to state a claim under Section 14(a) as to *any* Defendant. Among other failures, the Amended Complaint fails to identify a statement or omission actionable under Section 14(a), fails to plead that any Defendant acted with the requisite state of mind, and, as noted above, blatantly engages in impermissible group pleading. Accordingly, the Court need not even reach the Jefferies Defendants' separate arguments for dismissal set forth herein in order to dismiss Plaintiffs' Section 14(a) claim as to all Defendants. But even if Plaintiffs properly alleged a Section 14(a) claim against *some* defendants, they certainly have not done so with respect to either of the Jefferies Defendants.

First, and most simply, the Jefferies Defendants neither solicited proxies nor permitted the use of their names in connection with the Waitr Acquisition in a manner that could give rise to Section 14(a) liability. Plaintiffs do not, and cannot, adequately allege otherwise. JFG was an original investor in and sponsor of Landcadia but that investment had nothing to do with the solicitation of proxies and comes nowhere close to the central level of involvement in a proxy solicitation effort that could give rise to Section 14(a) liability. Likewise, the financial advisory services that JLLC provided to Landcadia do not give rise to Section 14(a) liability—financial advisors are expressly carved out of the applicable regulatory definition of "participants" in a

solicitation and the mere use of a financial advisor's name in proxy materials cannot alone give rise to liability.

Second, the Proxy Statement—which Plaintiffs have incorporated in the Amended Complaint and which therefore can be fully considered by the Court in deciding this motion—made crystal clear that the Jefferies Defendants played a very limited role in Landcadia's acquisition of Waitr. The Proxy Statement makes no reference to any involvement by JFG in evaluating or advising Landcadia on the Waitr Acquisition, and the Amended Complaint includes no well-pleaded allegations to the contrary. As for JLLC, the Proxy Statement makes clear that JLLC: (i) made no recommendation whatsoever to investors regarding the Waitr Acquisition; and (ii) did not issue any fairness opinion in connection with the transaction. As a result, the two customary hallmarks of alleged Section 14(a) liability for a financial advisor are wholly absent from this case. Plaintiffs do not, and cannot, allege otherwise. On top of that, the Amended Complaint fails entirely to explain how the Jefferies Defendants "induced" any stockholder to vote in favor of the merger, or that the Jefferies Defendants were connected in any culpable manner to any alleged omission or misstatement. In sum, the Amended Complaint fails to allege *anything* against the Jefferies Defendants that even remotely satisfies the requirements of Section 14(a).

Third, the Complaint should be dismissed as to the Jefferies Defendants because Plaintiffs do not, and cannot, allege that the Jefferies Defendants acted with scienter. While plaintiffs expressly state that their Section 14(a) claims are based in negligence, for third-party advisors like JLLC, or other secondary actors such as JFG, scienter is required. Moreover, even assuming *arguendo* that a negligence standard applies, the Amended Complaint utterly fails adequately to allege negligence on the part of the Jefferies Defendants.

For these reasons—and those set forth in the Waitr Brief—Plaintiffs' claims against the Jefferies Defendants should be dismissed with prejudice.

II. BACKGROUND

The factual background related to Landcadia, Waitr, the Waitr Acquisition, and certain other relevant facts and allegations are set forth more fully in the Waitr Brief and are incorporated herein by reference.

A. The Jefferies Defendants

JFG is a New York-based financial services company. *See* AC ¶ 13. Though Plaintiffs allege, entirely without any factual support, that "JFG and/or Jefferies" was an "underwriter" of the Waitr Acquisition (*see id.*), that allegation is directly contradicted by the Proxy Statement, filed with the SEC, that Plaintiffs rely upon and incorporate in the Amended Complaint.[2] The Proxy Statement identifies JFG as a sponsor of and investor in Landcadia, nothing more. *See* Proxy Statement at F-5.

JLLC is an affiliate of JFG and a registered broker-dealer. AC ¶ 14. As noted above, Plaintiffs allege that "JFG and/or Jefferies served as Underwriter(s) for the Going Public Transaction," *see id.*, but again, this is directly contradicted by the Proxy Statement and related materials. *See* Proxy Statement at 33, 129. JLLC did not underwrite (which is a term of art under the federal securities laws) Landcadia's acquisition of Waitr; JLLC was an underwriter of

[2] It is well-settled that in a securities action such as this the Court can consider the content of SEC filings in deciding a motion to dismiss. *See Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017–18 (5th Cir. 1996) ("When deciding a motion to dismiss a claim for securities fraud on the pleadings, a court may consider the contents of relevant public disclosure documents which (1) are required to be filed with the SEC, and (2) are actually filed with the SEC."); *Giancarlo v. UBS Fin. Servs., Inc.*, 725 F. App'x 278, 282 (5th Cir.), *cert. denied*, 139 S. Ct. 199, 202 L. Ed. 2d 123 (2018) (same). It is similarly well settled that where, as here, a plaintiff cites and relies upon a public document, such as the Proxy Statement, in its pleading, the Court can consider the full contents of that document in deciding a motion to dismiss. *See Alaska Elec. Pension Fund v. Asar*, 768 F. App'x 175, 180 n.25 (5th Cir. 2019) ("a court *must* consider documents incorporated by reference into a securities fraud complaint.") (emphasis in original).

Landcadia's initial public offering, which is not part of this case. AC ¶ 17. JLLC's role in the Waitr acquisition was solely as financial and capital markets advisor to Landcadia. *See* Proxy Statement at 33, 129.

B. JLLC's Limited Role in the Waitr Acquisition

The Proxy Statement specifically and carefully disclosed that JLLC only played a "Limited Role" as financial advisor to Landcadia. *Id*. at 129. In that limited role, JLLC participated in business and financial diligence and attended a Landcadia board meeting on May 16, 2018, at which it provided a "value assessment of Waitr." *Id.* at 125. The Proxy Statement also expressly cautioned that JLLC's role was more limited than that of a traditional financial advisor for a merger transaction, noting that:

i. JLLC did not prepare or provide any "appraisal, report, or opinion" on the proposed acquisition;

ii. JLLC did not "follow the procedures that it would ordinarily follow in connection with rendering a report, opinion or appraisal;"

iii. JLLC did not conduct an independent appraisal or evaluation of Waitr's assets or liabilities; and

iv. JLLC "did not make . . . a recommendation to [Landcadia's] Board" regarding the proposed acquisition of Waitr "or any other matter."

Id. at 128.

The Proxy Statement went on to emphasize the narrow scope of JLLC's "Limited Role" in its engagement by Landcadia. *Id*. at 129. The Proxy Statement also noted that, while JLLC "conducted a review of the information provided to it by [Landcadia] and Waitr," JLLC performed "no independent verification" of that information. *Id.* The Proxy Statement expressly stated that JLLC assumed, "with the consent" of Landcadia's board, that the information provided by Waitr and Landcadia was complete and correct and did not assess its "accuracy and completeness." *Id.* And it disclosed that JLLC assumed, "at the direction" of Landcadia's

board, that the financial forecasts and estimates provided by Waitr were "reasonably prepared on a basis reflecting the best then-available estimates and judgments of the management of Waitr as to the future financial performance of Waitr." *Id.*

Finally, the Proxy Statement made clear that JLLC had no involvement in determining the consideration that Landcadia paid for Waitr and that, while JLLC advised the Landcadia board with respect to "negotiations with Waitr," that advice was "only one of many factors considered by our Board in its evaluation of the business combination." *Id.*

III. ARGUMENT

A. Legal Standard

To survive a motion to dismiss, the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). A court must "begin by identifying those pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are insufficient to survive dismissal. *Id.* at 678-79. Instead, a complaint "must contain enough factual matter to raise a reasonable expectation that discovery will reveal evidence of each element of the plaintiff's claim." *Bradley v. P N K (Lake Charles), LLC*, No. 2:18-CV-1004, 2018 WL 7107607, at *1 (W.D. La. Dec. 28, 2018) (Kay, J.) *report and recommendation adopted sub nom. Bradley v. Moses*, No. CV 2:18-1004, 2019 WL 299200 (W.D. La. Jan. 22, 2019) (internal citations omitted).

B. The Amended Complaint Fails To Adequately Allege that the Jefferies Defendants Either Solicited Proxies or Permitted the Use of Their Names in a Manner Having a "Substantial Connection" to the Landcadia Stockholder Vote on the Waitr Acquisition

Section 14(a) liability only attaches if a defendant "solicit[s] or….permit[s] the use of his name to solicit any proxy" that is "in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78(n)(a). The Amended Complaint does not, and cannot, adequately allege that the Jefferies Defendants either solicited proxies or permitted their names to be used to do so.

1. The Jefferies Defendants Did Not Solicit Proxies

The Proxy Statement makes clear that votes/proxies in favor of the Waitr Acquisition were solicited by Landcadia and its board—not by the Jefferies Defendants. *See*., *e.g.*, Proxy Statement, cover letter (describing solicitation on behalf of Landcadia). The Proxy Card itself, appended to the Proxy Statement, stated in all-caps that: "THIS PROXY IS SOLICITED ON BEHALF OF THE BOARD OF DIRECTORS." Proxy Card at 1.

Even if the Proxy Statement itself had not made it abundantly clear that the Jefferies Defendants were not soliciting proxies, the federal rules and regulations that govern the solicitation of proxies conclusively establish that neither Jefferies Defendant was a soliciting party. Specifically, Instructions 3(a) and 3(b) of Schedule 14A expressly enumerate who is deemed a "participant in a solicitation" within the meaning of Section 14(a). Instruction 3(a) states plainly that the registrant, its directors, and certain other committees, groups, or persons who organize or finance a proxy solicitation should be counted as "participants," while Instruction 3(b) identifies certain officers, employers, and *advisors* as persons and entities who should *not* be deemed participants in a solicitation.

JFG was an investor in Landcadia, and none of the categories of participants under

Instruction 3(a) apply to it. Plaintiffs do not even attempt to allege otherwise, and instead try to shoehorn JFG into the case by making generic allegations that "JFG and/or Jefferies" engaged in various activities. That is not sufficient to establish Section 14(a) liability. *See, e.g.*, *Fin. Acquisition Partners LP v. Blackwell*, 440 F.3d 278, 286 (5th Cir. 2006) ("the plaintiff must plead specific facts, *not conclusory allegations*, to avoid dismissal.") (emphasis in original); *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th Cir. 1994) (same).

Plaintiffs' allegations fare no better with respect to JLLC. Instruction 3(b) to Section 14(a) expressly states that "participant[s] in a solicitation ***do not include*** . . . [a]ny person employed by a participant in the capacity of attorney, accountant, or advertising, public relations or ***financial adviser*** **[which is exactly what JLLC was engaged to be]**, and whose activities are limited to the duties required to be performed in the course of such employment." 17 C.F.R. § 240.14a–101, Item 4, Instruction 3(b) (emphasis added). As the Proxy Statement makes clear, JLLC served in the sole and limited capacity of a financial advisor to Landcadia in connection with the Waitr Acquisition. *See supra* at II.B.[3]

Courts routinely dismiss Section 14(a) claims against defendants that do not meet the definition of a solicitation "participant" under Schedule 14A and the related instructions. *See, e.g., In re Bank of Am. Corp. Sec., Deriv., and ERISA Litig.*, 757 F. Supp. 2d 260, 293 (S.D.N.Y. 2010) (analyzing definition of persons soliciting proxies in Schedule 14A and dismissing Section

[3] It is of no moment that certain of the solicitation materials state that JLLC "*may*" be deemed a soliciting party. That language was cautionary boilerplate and says nothing about actions taken by JLLC to solicit proxies. To the contrary, the inclusion of this language actually suggests that JLLC was *not* a soliciting party because applicable SEC guidance states that where a party is, in fact, soliciting a proxy, the solicitation materials must say so unequivocally. *See, e.g.*, Computer Horizons Corp., Letter to SEC Regarding Preliminary Schedule 14A filed on August 24, 2005 (Sept. 8, 2005), *available at* https://www.sec.gov/Archives/edgar/data/23019/000110465905043392/filename1.htm.

14(a) claims against entities not deemed to have solicited within the meaning of the Schedule); *Cf. IBS Fin. Corp. v. Seidman & Assocs., L.L.C.*, 954 F. Supp. 980, 989 (D.N.J. 1997), *aff'd in part, rev'd in part on other grounds*, 136 F.3d 940 (3d Cir. 1998) (reviewing "SEC definition of participant" as set forth in "Schedule 14A, Item 4, Instruction 3" to determine whether certain parties were participants in a proxy solicitation); *Lane v. Page*, 649 F. Supp. 2d 1256, 1287 (D.N.M. 2009) (same). The same result should obtain here. The Jefferies Defendants are not participants within the applicable SEC definition and therefore cannot be liable under Section 14(a) on the theory that they solicited proxies.

2. The Jefferies Defendants Did Not Permit the Use of Their Name in a Manner Giving Rise to Any Liability Under Section 14(a)

Courts have long held that that "the simple appearance of one's name in a proxy statement does not trigger liability for any misstatement appearing therein." *SEC v. Falstaff Brewing Corp.*, 629 F.2d 62, 68 (D.C. Cir. 1980) (*quoting Yamamoto v. Omiya*, 564 F.2d 1319, 1323 (9th Cir. 1977)); *see also Lewis v. Byrnes*, 538 F. Supp. 1221, 1224 (S.D.N.Y. 1982) (same). For Section 14(a) liability to attach, "there must have been 'a substantial connection between the use of the person's name and the solicitation effort.'" *Falstaff Brewing*, 629 F.2d at 68 (*quoting Yamamoto*, 564 F.2d at 1323). The type of "substantial connection" that can create liability typically is limited to situations in which the named defendant would be acquiring a directorship or control of the entity whose votes are being solicited. *See, e.g., Falstaff Brewing*, 629 F.2d at 69 (narrowly expanding the universe of potential Section 14(a) liability to an individual "who was seeking the shareholders' votes to approve his taking control" of the soliciting corporation); *Lewis*, 538 F. Supp. at 1224-25 (continued ownership and a future directorship in a merged entity would be retained by the individual sued for permitting the use of

his name).

Plaintiffs do not allege any facts from which any such "substantial connection" could be inferred, because: (i) as a matter of law, mere advisory services, or investment in the soliciting entity, do not create a substantial connection; (ii) there is no allegation that the Jefferies Defendants' roles induced votes in favor of the acquisition; and (iii) the Amended Complaint does not allege that the Jefferies Defendants had any responsibility for the statements challenged as false or misleading. In sum, the references to the Jefferies Defendants in the Proxy Statement come nowhere close to pleading a substantial connection to the proxy solicitation effort.

a. The Jefferies Defendants Are Not Subject to Section 14(a) Liability on Account of Their Roles with Respect to Landcadia

Multiple courts have concluded that financial advisors, such as JLLC, and entities that are not involved in any meaningful way in the proxy solicitation, such as JFG, are not among the group of defendants potentially liable for a violation of Section 14(a) due to the "use" of their name in proxy solicitation materials. Plaintiffs offer no basis to depart from this conclusion here.

As discussed above, federal regulations expressly exclude financial advisors from the definition of "participants" in a solicitation. *See supra* at III.B.1. Courts have thus rejected the notion that merely disclosing a financial advisor's role and related activities is sufficient to constitute "use" of its name such that liability attaches. *See*, *e.g.*, *Mendell v. Greenberg*, 612 F. Supp. 1543, 1551 (S.D.N.Y. 1985). In *Mendell*, the court dismissed as "legally insufficient" Section 14(a) claims against a financial advisor to a company soliciting votes in favor of a merger. *Id.* at 1552. Unlike JLLC here, the advisor in *Mendell* had both issued an allegedly misleading fairness opinion and participated in drafting an allegedly misleading proxy statement. The court nevertheless saw no "basis for finding [the financial advisor] liable under section 14(a) for permitting use of its name to solicit proxies." *Id.* Other courts have come to the same

conclusion. *See, e.g.*, *Gould v. American Hawaiian Steamship Co.*, 351 F. Supp. 853, 865 (D. Del. 1972) ("Section 14(a) imposes liability on individuals soliciting proxies, and not on the attorneys or accountants preparing them"); *see also Madden v. Deloitte & Touche, LLP*, 118 F. App'x 150, 154 (9th Cir. 2004) (financial advisor in merger transaction was not liable "as an underwriter or seller for misstatements in the … proxy" materials).[4] The same result should hold here.

Similarly, JFG, which is referenced in the Proxy Statement as an original sponsor of Landcadia, but is not identified as having been involved in any other substantial capacity in the solicitation effort, cannot be liable under Section 14(a). "In order to hold a person liable for proxy violations, one must show, at the very least, a substantial connection between the use of the person's name and the solicitation effort." *Yamamoto*, 564 F.2d at 1323. Plaintiffs plead no facts suggesting that JFG's name was in any way relevant to the solicitation effort, much less that there was a substantial connection between its name and that effort.

At bottom, there are no well-pleaded factual allegations suggesting that JLLC or JFG solicited proxies or permitted the use of their names in a manner sufficient to support the conclusion that they had a "substantial connection" to the solicitation. The Court should thus dismiss the Jefferies Defendants from this action.

[4] Though a handful of courts have found that financial advisors could be named as defendants in Section 14(a) claims, those cases typically involved instances where the investment bank provided a fairness opinion that was disclosed in the proxy statement and on which shareholders relied. *See, e.g.*, *Herskowitz v. Nutri/System, Inc.*, 857 F.2d 179, 189–90 (3d Cir. 1988) ("Moreover since an investment banker rendering a fairness opinion in connection with a leveraged buyout knows full well that it will be used to solicit shareholder approval, and is well paid for the service it performs, we see no convincing reason for not holding it to the same standard of liability as the management it is assisting."). These cases are inapposite to this litigation because JLLC issued no fairness opinion here, and the Amended Complaint does not allege otherwise.

b. Plaintiffs Do Not and Cannot Allege that the Jefferies Defendants' Limited Roles Induced Votes in Favor of the Acquisition

Another important limitation reflected in the caselaw is the requirement that the use of an organization's name must in some meaningful sense "induce" votes in favor of a transaction. For example, in *Yamamoto*, the court held that "[i]t is hardly conceivable that the mere revelation that Lee was the proposed purchaser could have been an inducing factor in the granting of a shareholder's proxy." 564 F.2d 1319 at 1323; *see also Lewis*, 538 F. Supp. at 1224-25 (complaint survived dismissal only because the identity and future "plans" of named defendant "clearly could have been an inducing factor in a shareholder's grant of his proxy").

Here, Plaintiffs make no allegations whatsoever that JLLC's provision of advice to the Landcadia board induced shareholders to approve the acquisition. Nor is there any non-conclusory allegation that JLLC's involvement, as opposed to another advisory firm in the same role, was a material factor that induced shareholders to vote in favor of the Waitr Acquisition. It is even less plausible—and is nowhere alleged—that JFG's early investment as a sponsor in the formation of Landcadia was a material inducement securing votes in favor of the Waitr Acquisition many months later.

c. The Complaint Does Not Allege that Any Alleged Omissions Were Connected to the Jefferies Defendants

The Section 14(a) claims against the Jefferies Defendants should also be dismissed because Plaintiffs do not—and cannot—allege that JFG or JLLC had any involvement in or connection with the statements alleged to have been false or misleading. Plaintiffs allege that misstatements were made during public statements by Landcadia and/or Waitr that were subsequently filed with the SEC (AC ¶¶ 29-38), press releases filed as Form 8-K updates to the solicitation materials (*id.* ¶¶ 39, 43), and an investor presentation (*id.* ¶¶ 41-42). But none of

these supposed misstatements were made by the Jefferies Defendants, or had anything to do with the Jefferies Defendants or the work they performed, and Plaintiffs do not allege otherwise. Indeed, Plaintiffs do not even allege that the Proxy Statement itself—which disclosed JFG's sponsorship and JLLC's advisory role—contained any misrepresentations at all. In other words, Plaintiffs' allegations provide no basis to impose liability for the alleged misstatements on the Jefferies Defendants.

The court's ruling in *In re Bank of America Corp. Securities, Derivative, and ERISA Litigation* is instructive. 757 F. Supp. 2d 260 (S.D.N.Y. 2010). In that case, the District Court for the Southern District of New York dismissed claims against an officer whose name was used in a proxy statement, finding that the officer's name did not "appear[] within the context of a challenged statement." *Id.* at 295. The court concluded that, for this reason, the plaintiff's "allegations do not show a substantial and plausible connection to the solicitation process sufficient to subject [the named officer] to liability under Section 14(a)." *Id.* The same is true here. The role played by JLLC as financial advisor to Landcadia was disclosed to have been highly limited. *See* II.B, *supra*. Nowhere do the solicitation materials even suggest—much less affirm—that JLLC vetted, approved, or had anything to do with the alleged misstatements. This alone provides a basis for dismissal of JLLC. And if there were any room for doubt, the clear cautionary language in the Proxy Statement describing JLLC's "Limited Role"—which disclosed that JLLC did not even recommend acquisition of Waitr to the Landcadia board—should have alerted shareholders that JLLC had no role with respect to the public commentary that Plaintiffs purport to challenge here. Likewise, the role played by JFG in sponsoring the formation of Landcadia bears no relation whatsoever to any of the alleged misstatements or omissions described in the Complaint.

C. Plaintiffs Fail to Allege that the Jefferies Defendants Acted with Scienter, or Even with Negligence

Even assuming *arguendo* that the Jefferies Defendants were properly included in this action as parties potentially liable under Section 14(a), the claims against them still must be dismissed because Plaintiffs have failed to adequately allege that the Jefferies Defendants acted with the required state of mind for a Section 14(a) violation.

1. Scienter is Required, But Not Pled, as to Jefferies Defendants

As explained in the Waitr Brief, the Court should dismiss Plaintiffs' Section 14(a) claims as to all Defendants because Plaintiffs concede that they have not pleaded scienter with respect to their Section 14(a) claims. *See* Waitr Br. at II.B. The Supreme Court and Fifth Circuit have not yet decided the question of whether scienter, as opposed to mere negligence, is required for Section 14(a) claims. *Id*. For all of the reasons set forth in the Waitr Brief, this Court should determine that scienter is required for Section 14(a) claims, consistent with the Fifth Circuit's rationale that scienter is required for other Exchange Act claims, including under Section 14(e). *Id*.

But even if scienter were not required for Section 14(a) claims with respect to the Waitr defendants, scienter clearly should be required as to secondary actors such as the Jefferies Defendants, as has been held by multiple courts. *See, e.g.*, *Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 428–30 (6th Cir. 1980), *cert. denied*, 449 U.S. 1067 (1980) (holding that scienter is required to establish a Section 14(a) claim and is particularly appropriate where the defendant was a non-company defendant providing advisory services); *see also SEC v. Shanahan*, 646 F.3d 536, 546-47 (8th Cir. 2011) (concluding that "scienter is an element [of a Section 14(a) claim], at least for claims against outside directors and accountants."); *Salit v. Stanley Works*, 802 F. Supp. 728, 733-34 (D. Conn. 1992) (scienter required to plead a Section

14(a) claim against outside directors).

As the *Standard Knitting* court observed, given the potentially vast liability that could be imposed under Section 14(a), it would be an unreasonable and unintended outcome for a secondary actor, such as a third-party advisor like JLLC (or its parent and Landcadia shareholder, JFG), to be subject to Section 14(a) liability for mere negligence. 623 F.2d at 428–30. The court also reasoned that, unlike the corporation issuing the proxy in question, secondary actors, such as the Jefferies Defendants, are not in privity with the investors who have standing to bring Section 14(a) claims, and it would be unreasonable for that reason as well to subject a professional firm to the same standard of liability as the issuer itself. *Id.*

Accordingly, the Court should dismiss Plaintiffs' claims against the Jefferies Defendants for failure to plead scienter, which Plaintiffs concede they have not done. AC ¶ 27.

2. Plaintiffs Have Not Adequately Pleaded Negligence on the Part of the Jefferies Defendants

Even if the Court were to conclude that Plaintiffs are not required to plead scienter against the Jefferies Defendants, Plaintiffs' allegations of negligence are wholly conclusory and thus insufficient to state a claim. *Iqbal*, 556 U.S. at 678-79. Moreover, the PSLRA requirement that Section 14(a) claims be pleaded with particularity *as to each defendant* renders Plaintiffs' failure to plead negligence as to the Jefferies Defendants particularly stark. *See Stanley Works*, 802 F. Supp. at 733 ("Where plaintiffs have not pled that the individual defendants knew of the facts allegedly omitted from the proxy statement…. plaintiffs have insufficiently pled a negligence claim."). Generally alleging that "Defendants" were negligent is insufficient as a matter of law. *See In re Ocera Therapeutics, Inc. Sec. Litig.*, No. 17-cv-06687-RS, 2018 WL7019481, at *10 (N.D. Cal. Oct. 16, 2018) ("conclusory averments of Defendants'

negligence *as a group*" held to be a "deficiency") (emphasis in original).

Nor could Plaintiffs properly allege negligence on the part of the Jefferies Defendants even if they seriously tried to do so (which they have not).[5] The Proxy Statement itself, which the Court can and must consider in deciding this motion (*see supra* at fn 2), specifically explained that JLLC acted only as a financial advisor in connection with the acquisition of Waitr and that it did *not* assess the "accuracy and completeness" of the information presented regarding Waitr and "performed no independent verification" of such information, including financial projections provided by Waitr. Proxy Statement at 129. Accordingly, the Proxy Statement forecloses any good faith allegation (and there is none) that JLLC (let alone JFG, which is ascribed no diligence role whatsoever in the Proxy Statement) owed and breached a duty of care actionable under Section 14(a). *Shanahan*, 646 F.3d at 545-46 (in addition to establishing that a defendant "failed to perform" a duty, the "basic framework" of "whether a duty existed" must also be established); *Little Gem Life Skis., LLC v. Orphan Med., Inc.*, 537 F.3d 913, 917 (8th Cir. 2008) (Section 14(a) claims are properly dismissed when a complaint fails to establish that defendants had "a legal duty to search out and disclose [allegedly omitted] information"); *Krieger v. Atheros Commc'ns, Inc.*, No. 11-CV-00640-LHK, 2012 WL 1933559, at *8 (N.D. Cal. May 29, 2012) (dismissing Section 14(a) claim where "Plaintiff has not adequately pled that any specific Defendant breached any duty").

[5] Plaintiffs appear to suggest that the Jefferies Defendants may have owed a special duty in connection with the Waitr Acquisition because they allegedly acted as "underwriters" of the acquisition. *See* AC ¶ 209. But as explained previously (*supra* II.A), this is incorrect and wholly unsupported by any well-pleaded allegation. JFG was not an underwriter at all, and JLLC was not an underwriter of the Waitr Acquisition—no such role existed. JLLC was an underwriter of Landcadia's initial public offering, but that offering is not in issue in this action and pre-dated Waitr even being identified as an acquisition target for Landcadia. *See* Proxy Statement at 233.

IV. CONCLUSION

For the foregoing reasons, and those set forth in the Waitr Brief, the Court should dismiss all claims asserted against the Jefferies Defendants with prejudice.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document has been electronically filed with the Clerk of Court using the CM/ECF system this 30th day of November, 2020. Notice of this filing will be sent to all counsel of record by operation of the court's electronic filing system.

/s/*Claire Elizabeth Juneau*
Claire Elizabeth Juneau