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 9

10 **UNITED STATES DISTRICT COURT**  
 11 **NORTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN FRANCISCO DIVISION**

13 EMAL HAIDERI, Individually and On Behalf )  
 of All Others Similarly Situated, )

14 Plaintiff, )

15 v. )

16 JUMEI INTERNATIONAL HOLDING )  
 LIMITED, LEO OU CHEN, ZHENQUAN )  
 17 REN, SEAN SHAO, MANG SU, and ADAM )  
 18 J. ZHAO, )

19 Defendants. )

CASE NO.: 3:20-cv-02751-EMC

**JUMEI INTERNATIONAL HOLDING  
 LIMITED'S NOTICE OF MOTION AND  
 MOTION TO DISMISS NEW, DISCRETE  
 CLAIMS AND ALLEGATIONS IN THE  
 SECOND AMENDED CLASS ACTION  
 COMPLAINT; MEMORANDUM OF  
 POINTS AND AUTHORITIES IN  
 SUPPORT THEREOF**

Hearing: May 20, 2021  
 Time: 1:30 p.m.  
 Courtroom: 5 – 17<sup>th</sup> Floor  
 Judge: The Honorable Edward M. Chen

Complaint Filed: April 21, 2020  
 Am. Complaint Filed: October 19, 2020  
 Second Am. Complaint Filed: March 8, 2021

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**NOTICE OF MOTION AND MOTION**

1  
2 **PLEASE TAKE NOTICE** that on May 20, 2021, at 1:30 p.m., or as soon thereafter as the matter  
3 may be heard, in the courtroom of the Honorable Edward M. Chen, United States District Judge for the  
4 Northern District of California, located at 450 Golden Gate Avenue, San Francisco, CA 94102, Defendant  
5 Jumei International Holding Limited ("Jumei" or "Company") will and hereby does move the Court for  
6 an order dismissing with prejudice the new claims and allegations in Plaintiff Altimeo Asset  
7 Management's ("Plaintiff") Second Amended Class Action Complaint (ECF No. 71 ("SAC")).

8 The Motion to Dismiss New, Discrete Claims and Allegations in the Second Amended Class  
9 Action Complaint (the "Second Motion") is made pursuant Federal Rules of Civil Procedure 9(b) and  
10 12(b)(6), and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4. It is  
11 based on this Notice, the Memorandum of Points and Authorities below, the Request for Judicial Notice,  
12 the Declaration of Zachary Faigen and attached exhibits, the files in this action, the arguments of counsel,  
13 and any other items the Court may consider.<sup>1</sup> Pursuant to Civil Local Rule 7-2(b)(3), Jumei requests that  
14 the Court dismiss the SAC in its entirety with prejudice, and enter judgment in favor of Jumei.<sup>2</sup>

**MEMORANDUM OF POINTS AND AUTHORITIES**

15  
16 **I. PRELIMINARY STATEMENT**

17 On October 19, 2020 Plaintiff filed its Amended Class Action Complaint ("AC"), challenging the  
18 substantive fairness of a take-private transaction in which Defendant Leo Ou Chen, the founder, Chairman,  
19 CEO and controlling shareholder of Jumei, a Cayman Islands corporation, acquired all of the outstanding  
20 shares of Jumei stock he did not already own through a short-form merger under Cayman law ("Merger").  
21 Plaintiff alleged that Chen's \$2 per share tender offer ("Tender Offer"), which represented a near 15%  
22 *premium* over the stock's prior close, "was substantially lower than the Company's true value" (SAC

23 <sup>1</sup> The numbered exhibits referred to herein are attached to the Declaration of Zachary Faigen. All emphases  
24 are added, and all internal citations and quotation marks are omitted, unless otherwise stated.

25 <sup>2</sup> Plaintiff asserts (i) a claim under § 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") and  
26 SEC Rule 10b-5 against Jumei and three Individual Defendants; (ii) a claim under § 14(e) of the Exchange  
27 Act against Jumei and all five Individual Defendants; and (iii) a claim under § 20(a) of the Exchange Act  
28 against all five Individual Defendants. To the undersigned's knowledge, the Individual Defendants have  
not been served with the SAC and are not currently represented by counsel. Thus, this Motion is brought  
solely on Jumei's behalf. However, the claims under §§ 10(b) and 14(e) fail against the Individual  
Defendants for the same reasons they fail against Jumei. Therefore, the Court can dismiss the SAC as to  
all Defendants. Moreover, because the SAC fails to state a claim for primary liability under either § 10(b)  
or § 14(e), the § 20(a) control person claim also necessarily fails. *See, e.g., Paracor Fin., Inc. v. Gen. Elec.*  
*Cap. Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996).

¶ 110), and Plaintiff therefore "suffered damage" measured as "the difference between the price Jumei shareholders received and the true value of their shares." (*Id.* ¶ 310.) On that theory, Plaintiff asserted claims under §§ 10(b), 14(e) and 20(a) of the Exchange Act.

On December 3, 2020, Jumei moved to dismiss the AC (ECF No. 58 ("First Motion")), showing that Plaintiff failed to plead (i) a false or misleading statement; (ii) the required mental state for its claims (scienter for § 10(b) and negligence for § 14(e)); (iii) reliance; and (iv) loss causation. Briefing on the First Motion concluded on February 18, 2021. The hearing on the First Motion is set for May 20, 2021.

Three weeks before briefing on the First Motion concluded, a judge of the Cayman Islands Grand Court—the trial court in the Cayman judicial system—filed its decision in *In the Matter of the Companies Act (2020 Revision) and In the Matter of Changyou.com Limited*, Cause No. FSD 120 of 2020 (ASCJ) ("*Changyou*"). (SAC Ex. B.) In it, the court ruled that shareholders may exercise appraisal rights in short-form mergers even though Cayman law does not provide a procedural mechanism for doing so. The court concluded that "to the extent that by inadvertence the draftsman or legislature . . . overlooked one class of dissenters (namely those dissenting from a short-form merger), appropriate language to give effect to that intention may and should be *read into* those provisions to carry that purpose into effect." (*Id.* ¶ 136.)

The *Changyou* decision is on appeal. Yet, rather than wait for that appellate ruling, Plaintiff rushed back into this Court to assert a new U.S. federal securities claim based on a Cayman Islands trial court decision that lacks precedential authority. In the SAC, Plaintiff alleges that Jumei violated §§ 10(b) and 14(e) of the Exchange Act when it stated in its Merger-related SEC filings that shareholders did not have appraisal rights because the relevant Cayman statute—which Jumei cited as the basis for its statement and attached to its filings so shareholders could read it for themselves—did not provide a mechanism for exercising such rights in a short-form merger.

Plaintiff's new theory does not state a claim. The Court should dismiss the SAC in its entirety. First, the Court should dismiss the claims that were initially pled in the AC, and which remain unchanged in the SAC, for the four independent reasons stated in the First Motion. Then, the Court should dismiss the new claims raised for the first time in the SAC for the four independent reasons outlined below.<sup>3</sup>

---

<sup>3</sup> On March 5, 2021, the Court ordered that the parties' briefing on the SAC "shall be directed only to the new, discrete claims and allegations that are raised for the first time in the" SAC. (ECF No. 70.) Thus, this Second Motion addresses only the 31 new paragraphs in the SAC, and whether those new allegations state

1           *First*, Plaintiff fails to plead a false or misleading statement. Plaintiff takes issue with Jumei's  
 2 statements that shareholders in the short-form Merger did not have appraisal rights under Cayman law.  
 3 (*See* SAC ¶¶ 240-41.) However, Plaintiff fails to allege that these statements were false because (i) Jumei's  
 4 statements accurately reflect the text of the Cayman statute; and (ii) the *Changyou* decision—which was  
 5 decided a year *after* Jumei made its statements—does not show that Jumei's interpretation of Cayman law  
 6 was objectively wrong at the time it was disclosed. To the extent Plaintiff claims Jumei had to disclose  
 7 uncertainty in the law, or that others might conclude appraisal rights were available, the securities laws  
 8 impose no such requirement. *See Rubke v. Capital Bancorp Ltd.*, 551 F.3d 1156, 1163 (9th Cir. 2009) (no  
 9 duty to disclose publicly available information).

10           Plaintiff's claim that Jumei omitted certain information purportedly required by 17 C.F.R.  
 11 § 229.1004 ("Item 1004") also fails. (SAC ¶ 242.) An alleged failure to comply with Item 1004 is not  
 12 independently actionable, *see, e.g., In re NVIDIA Corp. Sec. Litig.*, 768 F.3d 1046, 1056 (9th Cir. 2014),  
 13 and Plaintiff does not allege facts demonstrating that Jumei failed to comply with Item 1004, in any event.

14           *Second*, Plaintiff fails to plead the required mental state for its claims. For its § 10(b) claim, which  
 15 requires scienter—an intent to defraud—Plaintiff does not attempt to plead "specific facts indicating no  
 16 less than a degree of recklessness that strongly suggests actual intent." *Glazer Cap. Mgmt., L.P. v.*  
 17 *Magistri*, 549 F.3d 736, 743 (9th Cir. 2008). Indeed, Plaintiff does not plead any facts regarding the  
 18 knowledge or mental state of any Defendant with respect to the availability of appraisal rights. For its  
 19 § 14(e) claim, which under current law requires particularized facts that give rise to a strong inference of  
 20 negligence, "there are no facts alleging Defendants failed to review certain materials, or were neglecting  
 21 their responsibilities, or designed and oversaw a flawed review process." *In re Ocera Therapeutics, Inc.*  
 22 *Sec. Litig.*, 2018 WL 7019481, at \*10 (N.D. Cal. Oct. 16, 2018), *aff'd*, 806 F. App'x 603 (9th Cir. 2020).

23           *Third*, Plaintiff fails to plead reliance. Plaintiff does not allege that it "actually read" and "relied  
 24 on" Jumei's statements regarding appraisal rights in deciding not to pursue those supposed rights. *In re*  
 25 *Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig.*, 2018 WL 1142884, at \*10 (N.D.  
 26 Cal. Mar. 2, 2018). Further, as explained below, no presumption of reliance applies to Plaintiff's theory.

27 \_\_\_\_\_  
 28 a claim for securities fraud. (SAC ¶¶ 95, 206, 231-257, 264, 281.) The First Motion (ECF No. 58)  
 addresses the claims and allegations in the SAC that were previously pled in the AC. Both the First Motion  
 and Second Motion are set for hearing on May 20, 2021.



1 *Fourth*, Plaintiff fails to plead loss causation. "[T]he loss causation inquiry assesses whether a  
 2 particular misstatement *actually* resulted in loss." *Miller v. Thane Int'l, Inc.*, 615 F.3d 1095, 1102 (9th Cir.  
 3 2010) (emphasis in original). Plaintiff's theory is that Jumei's alleged failure to apprise shareholders of the  
 4 possibility that a Cayman court might—in the future—recognize appraisal rights prevented "sophisticated  
 5 parties" from seeking appraisal, which then somehow affected the market price of Jumei stock before the  
 6 Merger and, in turn, the price Plaintiff received for its shares in the Merger. (SAC ¶ 264.) This theory is  
 7 purely speculative, and, on that basis, fails. *See In re Ocera Therapeutics Inc. Sec. Litig.*, 806 F. App'x  
 8 603 (9th Cir. 2020). Moreover, the SAC concedes that the possibility that a Cayman court might recognize  
 9 appraisal rights (notwithstanding the statutory language) was ascertainable from publicly available  
 10 information. As such, the "sophisticated parties" Plaintiff cites were necessarily already aware of the  
 11 possibility that a court sometime after the distribution of Jumei's disclosures could read appraisal rights  
 12 into the statute. Plaintiff thus fails to allege, as it must, a causal connection between Jumei's alleged  
 13 misstatements and any loss Plaintiff purportedly suffered. *See id.*

14 For these reasons and those below, the Court should dismiss the SAC in its entirety with prejudice.

## 15 **II. FACTUAL BACKGROUND**

### 16 **A. Cayman Law Regarding Short-form Mergers and Appraisal Rights**

17 Two provisions of the Cayman Island Companies Law (2020 Revision) ("Companies Law") are  
 18 relevant here. The first addresses so-called "short-form mergers." Section 233(7) provides that, when a  
 19 "parent company"—one that owns at least 90% of the voting stock of another company (Companies Law  
 20 § 232)—"is seeking to merge with one or more of its subsidiary companies," a vote on the merger "is not  
 21 required if a copy of the plan of merger is given to every member of each subsidiary to be merged." *Id.*  
 22 § 233(7). In other words, in a "short-form merger," a 90% shareholder can effect a merger without a  
 23 shareholder vote, and a minority shareholder has no right or mechanism to vote against or dissent from it.

24 The second relevant provision addresses so-called "appraisal rights." Section 238(1) provides that  
 25 shareholders "shall be entitled to payment of the fair value" of their shares "*upon dissenting from a*  
 26 *merger*." Section 238 then lays out the procedure for what a shareholder "who desires to exercise his  
 27 entitlement under subsection 1" "*shall*" do. *Id.* § 238(2). In setting out the procedure, the key triggering  
 28 event is the "vote on the merger." Among other things, the merger vote triggers (i) the deadline for a

1 shareholder to file a written objection stating that he "proposes to demand payment for [his] shares if the  
2 merger . . . is authorised by the vote," and (ii) the deadline for the company to provide the shareholder  
3 "written notice of the authorisation." *Id.* § 238(1)-(4). Section 238(9) permits a shareholder who has  
4 followed this required procedure to petition the Cayman courts to determine the "fair value" of its shares.

5 The Companies Law does not provide any mechanism for shareholders to exercise appraisal rights  
6 when there is no vote on a merger, as with a short-form merger. Plaintiff concedes as much. (SAC ¶ 245.)

7 **B. Jumei Makes Disclosures Consistent With The Companies Law**

8 On February 26, 2020, Jumei filed a Schedule 14D-9 Recommendation Statement and a Schedule  
9 13E-3 Transaction Statement. The Recommendation Statement explained that if enough shareholders  
10 tendered their shares so that Chen controlled at least 90% of Jumei's voting power, Chen would conduct  
11 a short-form merger, which would not require a shareholder vote. (SAC ¶ 94.)

12 The Recommendation Statement stated that "appraisal rights are not available in connection with  
13 the [Tender] Offer." (*Id.* ¶¶ 94, 241.) It then explained the basis for that statement: "no shareholder vote  
14 on the Merger will be held," and Section 238 provides a mechanism to seek appraisal rights only for  
15 mergers "in which a shareholder vote is held." (*Id.* ¶¶ 94, 241; *see also id.* ¶ 240 (same).) The  
16 Recommendation Statement then attached Section 238 of the Companies Law as an exhibit so that  
17 shareholders could read the law for themselves and reach their own conclusion. (*Id.* ¶ 241.)

18 The Recommendation Statement and Transaction Statement also attached as an exhibit Chen's  
19 Offer to Purchase. (SAC ¶ 233.) The Offer to Purchase stated: "[a]ppraisal rights are not available in  
20 connection with the [Tender] Offer," and "[i]n the Merger, the [shareholders] will not have appraisal  
21 rights." (SAC ¶¶ 234, 235.) It explained that Section 238 "provides a procedure for exercising dissenters'  
22 rights in the case of a 'long form' merger," but "because the Merger is a 'short-form' merger, the terms of  
23 Section 238 . . . do not apply." (*Id.*) It repeated similar statements several times. (*See id.* ¶¶ 236, 238, 239.)

24 Jumei's disclosures regarding appraisal rights were consistent with the disclosures made by  
25 numerous other Cayman companies that have conducted short-form mergers. (*See, e.g.,* Exs. 1-3.) In  
26 contrast, the SAC identifies only one Cayman company that has ever stated that shareholders have  
27 appraisal rights in a short-form merger. (SAC ¶ 250.)

1           **C.     The Grand Court Issues Its Ruling In *Changyou***

2           On January 28, 2021—almost a year *after* Jumei filed its Recommendation Statement and  
 3 Transaction Statement—a Cayman Islands trial court filed its decision in *Changyou*, concluding for the  
 4 first time that minority shareholders in short-form mergers have appraisal rights under Cayman law. The  
 5 court agreed with the plaintiffs "[t]hat while the procedure prescribed by section 238 for assessment of  
 6 fair value by the Court stipulates a prerequisite notice of dissent . . . , the absence of any qualification upon  
 7 that requirement exempting short-form mergers from it, should be regarded as an *accidental oversight in*  
 8 *the drafting of the Act.*" (SAC Ex. B ¶ 27.) As a result, after recognizing that the Companies Law lacks  
 9 "any provision which specifically references a right of the minority to dissent or to have appraisal rights  
 10 in respect of their shares in a short-form merger," the court "read into" Section 238 a procedure for  
 11 exercising appraisal rights where no shareholder vote takes place. (*Id.* ¶ 32; *see also id.* ¶¶ 133-35, 159  
 12 ("[T]he words '*if any*' could be read into subsection 238(2)" . . . "the words '*or other step*' could be read  
 13 into subsection 238(4)" . . . "Reading these few words into the legislation . . . would enable the procedural  
 14 mechanism, set out in subsections 238(2) to (16), to operate in relation to short-form mergers in the same  
 15 way as long-form mergers under subsection 233(6)" . . . "Instead of reading the procedural provisions of  
 16 section 238 as excluding short-form mergers, they should be construed or read down, so as to allow for  
 17 access to the protection of section 238.") (emphasis in original).) The *Changyou* decision is on appeal. *See*  
 18 C.I.C.A. No. 006 of 2021.

19           **III.     PLAINTIFF FAILS TO STATE A CLAIM UNDER SECTION 10(b) OR 14(e)**

20           Plaintiff brings claims for violation of §§ 10(b) and 14(e) of the Exchange Act. To state a claim  
 21 under § 10(b), Plaintiff must plead, among other things: (i) a material misrepresentation or omission;  
 22 (ii) scienter; (iii) reliance; and (iv) loss causation. *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552  
 23 U.S. 148, 157 (2008). "Section 14(e) is generally the same as § 10(b) and Rule 10b-5, but is applicable  
 24 specifically to tender offers rather than other purchases or sales of securities." *Vaughn v. Teledyne, Inc.*,  
 25 628 F.2d 1214, 1219 (9th Cir. 1980). In the Ninth Circuit, § 14(e) requires a showing of negligence, rather  
 26 than scienter. *Varjabedian v. Emulex Corp.*, 888 F.3d 399, 408 (9th Cir. 2018).<sup>4</sup> Claims under §§ 10(b)

27 \_\_\_\_\_  
 28 <sup>4</sup> As Jumei argued in its First Motion, which it incorporates by reference here, no implied right of action  
 exists under § 14(e). (*See* ECF No. 58 at 10 n.5.) To the extent a private right of action exists under § 14(e),  
 Jumei again maintains that scienter should be the required state of mind. (*See id.* at 10 n.6.)

1 and 14(e) are subject to the heightened pleading standards of the PSLRA. *See Rubke*, 551 F.3d at 1164,  
2 1167. Here, Plaintiff fails to adequately plead (i) a false or misleading statement; (ii) negligence or  
3 scienter; (iii) reliance; and (iv) loss causation.

4 **A. Plaintiff Fails To Plead a False or Misleading Statement**

5 "The PSLRA has exacting requirements for pleading 'falsity.'" *Metzler Inv. GMBH v. Corinthian*  
6 *Colls., Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008). Plaintiff must "allege a misrepresentation or a misleading  
7 omission with particularity and explain why it is misleading." *Retail Wholesale & Dep't Store Union Loc.*  
8 *338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1274 (9th Cir. 2017). The SAC fails this standard.

9 **1. Plaintiff Fails To Plead A Material Misrepresentation**

10 Plaintiff fails to allege particularized facts showing that Jumei's statements were false. To meet  
11 this standard, Plaintiff must identify "specific contemporaneous statement or conditions" that show the  
12 "misleading nature of the statements *when made*." *Ronconi v. Larkin*, 253 F.3d 423, 432 (9th Cir. 2001).  
13 Plaintiff must "set forth facts explaining why the difference between two statements is not merely the  
14 difference between two permissible judgments, but rather the results of a falsehood." *In re Rigel Pharm.,*  
15 *Inc. Sec. Litig.*, 697 F.3d 869, 877 (9th Cir. 2012). Jumei stated, in various forms, that "[a]ppraisal rights  
16 are not available in connection with the Offer" because "no shareholder vote on the Merger will be held,"  
17 and Section 238 applies only to mergers "in which a shareholder vote is held." (SAC ¶ 241.) Plaintiff does  
18 not dispute that, under Section 233(7), Jumei did not have to hold, and did not hold, a shareholder vote on  
19 the Merger. Nor does Plaintiff dispute that Section 238 is the source of any appraisal rights under Cayman  
20 Law. Thus, to show contemporaneous falsity, Plaintiff must allege particularized facts showing that, when  
21 Jumei made the statements at issue, Section 238 provided appraisal rights for shareholders who did not  
22 vote on a merger. Plaintiff fails to do so.

23 To begin, Jumei's statements accurately describe the provisions of Section 238. As shown above,  
24 Part II.A, Section 238 is premised on the ability of a shareholder to "dissent" from, *i.e.*, vote against, a  
25 merger. It then sets up a mandatory procedure for any dissenting shareholder who wishes to exercise its  
26 appraisal rights. That mandatory procedure is triggered by a shareholder objecting to the merger before  
27 the vote, and the merger thereafter being approved by a vote. Companies Law § 238(2)-(4). Plainly, a  
28 shareholder cannot comply with the required procedure if no vote takes place. Based on this same reading

1 of the statutory scheme, numerous companies conducting short-form mergers under Cayman law have  
2 stated in their SEC disclosures that Section 238 does not provide appraisal rights. (*See* Exs. 1-3.)

3 Plaintiff identifies no case, statute, rule, or other Cayman legal authority that recognized appraisal  
4 rights in the absence of a shareholder vote, or for a "short-form" merger, at the time Jumei made its  
5 statements. In fact, Plaintiff acknowledges that no such authority existed. (SAC ¶ 257.) While Plaintiff  
6 offers its own interpretation of Section 238 (SAC ¶¶ 243-46), Plaintiff's bespoke legal analyses are not  
7 "facts" the Court need credit in considering a motion to dismiss. *See Rigel*, 697 F.3d at 879 (dismissing  
8 claim when plaintiffs merely alleged their disagreement with how defendant interpreted the results of  
9 clinical study); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (court is "not bound to accept as true a legal  
10 conclusion couched as a factual allegation").

11 Nor does the *Changyou* decision call into question the accuracy of Jumei's description of Cayman  
12 law. (SAC ¶ 247.) As a matter of law, Plaintiff cannot plead falsity based on circumstances that developed  
13 *after* Jumei made the relevant statements because that would not show the statements were false "at the  
14 time [they were] made." *In re Vantive Corp. Sec. Litig.* 283 F.3d 1079, 1084-85, 1097 (9th Cir. 2002)  
15 (noting the PSLRA was intended "to put an end to the practice of pleading 'fraud by hindsight'"); *see also*  
16 *Ronconi*, 253 F.3d at 432 (requiring plaintiff to allege "*contemporaneous* statements or conditions").  
17 *Changyou* was decided January 28, 2021, nearly a year after Jumei made the relevant statements in  
18 February 2020.

19 Moreover, the *Changyou* court did not contradict Jumei's reading of Section 238. The court  
20 recognized that the Companies Law lacks "any provision which specifically references a right of the  
21 minority to dissent or to have appraisal rights in respect of their shares in a short-form merger." (SAC Ex.  
22 B ¶ 32.) It also acknowledged that Section 238 requires a procedure dependent on a shareholder vote and  
23 provides no mechanism for a shareholder to seek appraisal in the absence of a vote. (*Id.* ¶ 44.) These are  
24 the precise points Jumei relied on in its disclosures regarding the implications of a short-form merger.

25 Notwithstanding this plain language, the court opined that it would be "absurd" *as a policy matter*  
26 not to recognize appraisal rights in connection with short-form mergers (*id.* ¶ 132), and "very surprising  
27 if Parliament had intended" a shareholder in a short-form merger not to have appraisal rights, given that  
28 such rights are available (albeit expressly) in other jurisdictions. (*Id.* ¶ 96; *see also id.* ¶¶ 88, 92, 93.) The

1 court concluded that Section 238's failure to provide a procedure for exercising appraisal rights in a  
 2 short-form merger must have been "inadvert[ent]." (*Id.* ¶ 136.) On that basis, the court "read into" Section  
 3 238 a procedure to permit such an exercise. (*See id.* ¶¶ 133-35, 159.) Far from showing that Jumei falsely  
 4 described Section 238, the *Changyou* court had to read new terms into Section 238 to reach its result.

5 What is more, *Changyou* is a non-binding trial court decision that is currently on appeal. *See*  
 6 *Litigation and Enforcement in the Cayman Islands: Overview, Practical Law Country Q&A 2-633-8594*  
 7 (explaining Grand Court's position in Cayman judiciary). Thus, it has not even been finally determined  
 8 that appraisal rights are available in short-form mergers under Cayman law. Plaintiff's attempt to hold  
 9 Jumei liable based on a Cayman trial court's re-interpretation of a statute long after the fact finds no support  
 10 in the law.<sup>5</sup>

## 11 2. Plaintiff Fails To Allege An Actionable Omission

12 Plaintiff also alleges that Jumei's statements were somehow misleading because they failed to  
 13 disclose alternate interpretations of the law. (*See* SAC ¶¶ 241, 248, 251, 281.) Plaintiff claims Jumei was  
 14 required to "disclose the likely possibility that shareholders *do* have appraisal rights," and lay out those  
 15 "*potential* appraisal rights, even while describing the position(s) of the parties to the transaction regarding  
 16 those potential rights, but identifying who asserts those positions, and fully describing the basis for those  
 17 positions in each instance." (*Id.* ¶ 251 (first emphasis in original).) This theory fails to state a claim.

18 *First*, to the extent there was a "possibility that shareholders *do* have appraisal rights"—which the  
 19 Cayman court found only after reading terms into the statute—that "possibility" was readily discernable  
 20 from publicly available information, not from any special information Jumei had. (*Id.*) Any shareholder  
 21 was free to read Section 238—or any other relevant sources of Cayman law—and reach his or her own  
 22 conclusion about the validity of Jumei's interpretation of Section 238. Indeed, in *Changyou*, where, as  
 23 here, the Transaction Statement "made a number of statements in respect of the non-availability of  
 24 dissenter's rights" (SAC Ex. B ¶ 14), the plaintiffs reviewed Section 238, retained counsel, wrote letters

25 \_\_\_\_\_  
 26 <sup>5</sup> Jumei's interpretation of Section 238 is properly characterized as an opinion statement, rather than a pure  
 27 statement of fact. Plaintiff concedes as much. (SAC ¶ 281.) An opinion statement can give rise to liability  
 28 "only if the complaint alleges with particularity that the statements were both objectively and subjectively  
 false." *Rubke*, 551 F.3d at 1162. Plaintiff does not plead any facts showing that any Defendant subjectively  
 believed that Cayman law provided appraisal rights in short-form mergers. While the Court need not reach  
 the issue of subjective falsity because Jumei's statements were plainly not objectively false, this provides  
 yet another basis for the Court to dismiss the SAC.

1 to the company disputing that "shareholders are not entitled to" rights under Section 238, and eventually  
2 filed suit. (*Id.* ¶¶ 16, 23.) Plaintiff here had access to the same information about Cayman law the  
3 *Changyou* plaintiffs had, and could have followed the same course of action. The federal securities laws  
4 do not impose on Jumei the duty that Plaintiff urges. *See, e.g., Rubke*, 551 F.3d at 1162-63 (concluding  
5 that company had no duty to describe information in the public domain); *Heliotrope Gen., Inc. v. Ford*  
6 *Motor Co.*, 189 F.3d 971, 976-77 (9th Cir. 1999) (affirming dismissal of claim based on alleged  
7 nondisclosure of publicly available tax code information); *In re Textainer P'ship Sec. Litig.*, 2005 WL  
8 3801596, at \*6 (N.D. Cal. Dec. 12, 2005) ("[T]he securities laws do not require disclosure of information  
9 that is readily available in the public domain.").

10 While Plaintiff claims that shareholders would not understand the law (SAC ¶ 257), and thus Jumei  
11 was required to explain all possible interpretations of it, a company need not "attribute to investors a child-  
12 like simplicity" and assume they are unable to evaluate the mix of information available to them. *Basic*,  
13 *Inc. v. Levinson*, 485 U.S. 224, 234 (1988). The *Changyou* plaintiffs were certainly able to reach their own  
14 conclusions, as should the "sophisticated parties" considering appraisal rights that Plaintiff references.  
15 (SAC ¶ 264.) Jumei simply had no duty to provide shareholders the treatise on Cayman law that Plaintiff  
16 demands. *See In re Progress Energy, Inc. Sec. Litig.*, 371 F. Supp. 2d 548, 552-53 (S.D.N.Y. 2005) ("[T]he  
17 securities laws do not require disclosure of information that is publicly known . . . or which constitutes  
18 generally applicable laws and regulations . . . . The federal securities laws simply do not require the  
19 excruciatingly lengthy and complicated disclosure that would result if every indicia of the modern  
20 regulatory state needed to be compiled, catalogued, and explained to potential investors.").

21 *Second*, Plaintiff's assertion that Jumei breached a duty to specify "who" at Jumei "assert[ed] [its]  
22 positions [regarding appraisal rights], and fully describ[e] the basis for those positions," also fails. (SAC  
23 ¶ 251.) As an initial matter, Jumei fully explained the basis for its statements and its reading of Section  
24 238. Jumei's statements were not misleading just because they could have been more detailed. The  
25 securities laws "prohibit *only* misleading and untrue statements, not statements that are incomplete." *Brody*  
26 *v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (emphasis in original).

27 Rather, a statement is misleading only if it "affirmatively create[s] an impression of a state of  
28 affairs that differs in a material way from the one that actually exists." *Brody* 280 F.3d at 1006. Jumei's

1 statements did not purport to provide a complete exposition of Cayman law on appraisal rights, and, given  
 2 their brevity, no reasonable shareholder would understand them as such. *See In re Qudian, Inc. Sec. Litig.*,  
 3 2019 WL 4735376, at \*7 (S.D.N.Y. Sept. 27, 2019) ("The fact that Qudian summarized the applicable  
 4 regulations at a high level of generality rather than providing a detailed accounting of each provision (or  
 5 quoting it verbatim) does not make the Registration Statement misleading."). While Plaintiff claims that  
 6 Jumei "disregarded" that its statements "did not constitute a definitive holding by any Cayman Island court  
 7 or express statement under any Cayman Island statute or rule," Jumei never suggested that its statements  
 8 were based on anything more than its own reading of Section 238. (SAC ¶ 281.) Nor did Jumei suggest  
 9 there was no room for debate. *See Rigel*, 697 F.3d at 880 (statements not misleading for omitting certain  
 10 safety results from drug trial when statements did not claim to report all safety results). Jumei did not have  
 11 to argue against its own legal position to keep its statements from being misleading. *See Epstein v.*  
 12 *Washington Energy Co.*, 83 F.3d 1136, 1141 (9th Cir. 1996) (company not required to disclose publicly  
 13 available information about regulatory proceeding undermining its position that it should receive a rate  
 14 increase).

15 Having failed to identify any material facts Jumei was required, but failed, to disclose, Plaintiff is  
 16 left with the allegation that Jumei did not use enough qualifiers. (SAC ¶¶ 239, 241, 248, 251, 281.)  
 17 However, a plaintiff cannot state a claim merely by nitpicking the language or phrasing the company  
 18 selected. *See, e.g., Rubke*, 551 F.3d at 1163 (rejecting "squabble[]" about the adverbs used"); *Kennecott*  
 19 *Copper Corp. v. Curtiss-Wright Corp.*, 584 F.2d 1195, 1200 (2d Cir. 1978) ("There is no requirement that  
 20 a [disclosure] be expressed in certain words or in a certain form of language."); *In re Harmonic, Inc. Sec.*  
 21 *Litig.*, 163 F. Supp. 2d 1079, 1093-94 & n.12 (N.D. Cal. 2001) (rejecting argument that statements were  
 22 misleading because they "created the gloss" or "spin").

### 23 3. Plaintiff Cannot State A Claim Based On Item 1004

24 Plaintiff also cannot state a claim based on its allegation that Jumei violated Item 1004(d). (SAC  
 25 ¶¶ 242, 281.) Item 1004(d) instructs companies to:

26 State whether or not dissenting security holders are entitled to any appraisal  
 27 rights. If so, summarize the appraisal rights. If there are no appraisal rights  
 28 available under state law for security holders who object to the transaction,  
 briefly outline any other rights that may be available to security holders  
 under the law.



1 17 C.F.R. § 229.1004(d); *see also* 17 C.F.R. § 229.1016(f) (requiring a "detailed statement describing  
2 security holders' appraisal rights and the procedures for exercising those appraisal rights referred to in  
3 response to Item 1004(d)"); 17 C.F.R. § 240.13e-3(e)(1)(iv) (Schedule 13E-3 Transaction Statement must  
4 comply with Item 1016(f)).

5 Plaintiff's claim fails at the outset because a violation of Item 1004(d) is not independently  
6 actionable. *NVIDIA* is instructive. In that case, the Ninth Circuit considered whether a failure to comply  
7 with Item 303 of SEC Regulation S-K, which requires companies to disclose certain "trends or  
8 uncertainties," gives rise to a § 10(b) claim. The court held that it did not. The court reasoned that "for  
9 purposes of Section 10(b) and Rule 10b-5, material information need not be disclosed unless omission of  
10 that information would cause other information that is disclosed to be misleading." *NVIDIA*, 798 F.3d at  
11 1056; *see also Brody*, 280 F.3d at 1006 (holding § 14(e) proscribes only misleading, not incomplete,  
12 statements). In other words, omitting information required to be disclosed by Item 303 is not actionable  
13 under § 10(b), unless it renders some other affirmative statement misleading. *NVIDIA*, 768 F.3d at 1056.

14 Courts have extended the reasoning of *NVIDIA* to other, similar SEC rules. *See, e.g., In re Newell*  
15 *Brands, Inc. Sec. Litig.*, 2019 WL 6715055, at \*13 (D.N.J. Dec. 10, 2019), *aff'd*, 837 F. App'x 869 (3d  
16 Cir. 2020) (extending *NVIDIA* to Items 503 and 307 of Regulation S-K); *Nardy v. Chipotle Mexican Grill,*  
17 *Inc.*, 2019 WL 3297467, at \*9 (D. Colo. Mar. 29, 2019) (applying *NVIDIA* to Item 503 of Regulation  
18 S-K); *Stephens v. Uranium Energy Corp.*, 2016 WL 3855860, at \*21 (S.D. Tex. July 15, 2016) (concluding  
19 that "Item 404 [of Regulation S-K] does not create an implied cause of action" and that "case law is clear  
20 as to the absence of an express private right of action under Regulation S-K, and courts may not imply a  
21 private right of action under Regulation S-K where Congress has not established one"). That same  
22 reasoning should also apply here given that Item 1004(d), like Item 303, is an SEC rule that requires  
23 certain disclosures. Because Plaintiff does not allege that any purportedly omitted information under Item  
24 1004 rendered any affirmative statements misleading, Plaintiff's Item 1004 theory fails as a matter of law.

25 Separately, even if a private right of action were assumed to exist, Plaintiff does not sufficiently  
26 allege that Jumei violated Item 1004(d) in the first place. Contrary to Plaintiff's suggestion, Item 1004(d)  
27 does not require a discourse on the arguments for and against appraisal rights. (*See* SAC ¶¶ 251, 281.) It  
28 merely requires a company to state "whether" shareholders are entitled to appraisal rights. 17 C.F.R.

1 § 229.1004(d). If no appraisal rights are available, Item 1004(d) requires no further disclosure regarding  
 2 appraisal rights. The regulations require a "summary" or "detailed statement" only if appraisal rights and  
 3 "procedures for exercising those appraisal rights" exist. *See id.*; 17 C.F.R. § 229.1016(f); 17 C.F.R.  
 4 § 240.13e-3(e)(1)(iv).<sup>6</sup>

5 Plaintiff's argument that Jumei was required to list "any other rights that may be available to  
 6 security holders" also fails, for two reasons. (SAC ¶ 281.) First, Item 1004 requires outlining other rights  
 7 that "may be available" only where "there are no appraisal rights available under *state* law." 17 C.F.R.  
 8 § 229.1004(d). No *state* law even applies here—only foreign law. Thus, the requirement under Item 1004  
 9 to outline "other rights" does not pertain. Second, Plaintiff does not adequately plead that there were "any  
 10 other rights that may be available to security holders." (SAC ¶ 281.) Plaintiff mentions remedies, such as  
 11 a "challenge to the merger . . . on the grounds that it is void or unlawful," a petition for "winding up by  
 12 the court," or "an action for fraud on the minority," which under certain circumstances exist under Cayman  
 13 law. (SAC ¶¶ 255-56.) But Plaintiff alleges no facts to show that those remedies were available to Jumei  
 14 shareholders here. (*Id.*) Plaintiff does not explain, for example, any basis on which shareholders could  
 15 have challenged the Merger as "void or unlawful," much less any facts showing that Jumei believed such  
 16 a challenge was plausible. Plaintiff appears to interpret Item 1004(d) to require Jumei to provide a  
 17 comprehensive list of shareholder claims under Cayman law, regardless of their applicability, as though  
 18 Jumei's SEC filings were some kind of legal practice guide. The Court should dismiss this claim.

19 **B. Plaintiff Fails To Plead That Any Defendant Acted With the Required Mental State**

20 **1. Plaintiff Fails to Plead Scienter for Its Section 10(b) Claim**

21 Plaintiff's Section 10(b) claim also fails because the SAC does not allege that any Defendant acted  
 22 with scienter—a "mental state embracing intent to deceive, manipulate, or defraud." *Nguyen v. Endologix,*  
 23 *Inc.*, 962 F.3d 405, 414 (9th Cir. 2020). To allege scienter, a plaintiff must "state with particularity facts  
 24 giving rise to a strong inference that the defendant acted with . . . no less than a degree of recklessness that  
 25 strongly suggests actual intent." *Glazer*, 549 F.3d at 742-43. In "determining whether the pleaded facts  
 26 give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences."  
 27 *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 323 (2007). The SAC can survive a motion to

28 <sup>6</sup> Even though it was not required to, Jumei did explain why it concluded that no appraisal rights were available based on the plain text of Section 238 and even provided shareholders with a copy of the statute.

1 dismiss "only if a reasonable person would deem the inference of scienter cogent and at least as compelling  
2 as any opposing inference one could draw from the facts alleged." *Id.* at 324. To impute scienter to Jumei,  
3 Plaintiff must first plead the scienter of the Individual Defendants who acted on Jumei's behalf. *See In re*  
4 *ChinaCast Educ. Corp. Sec. Litig.*, 809 F.3d 471, 476 (9th Cir. 2015).

5 To demonstrate that any Individual Defendant knew or with deliberate recklessness disregarded  
6 that Jumei's statements were false or misleading, Plaintiff must allege "specific information conveyed to  
7 [the Individual Defendants] and related to the fraud" that contradicted the disclosures concerning appraisal  
8 rights. *Metzler*, 540 F.3d at 1068; *see also Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1000  
9 (9th Cir. 2009) (stating that a plaintiff must include "detailed and specific allegations about management's  
10 exposure to factual information within the company"). Plaintiff must cite, for example, "specific  
11 report[s]," including their dates, contents, and the sources of such reports. *Metzler*, 540 F.3d at 1068; *see*  
12 *also Vantive*, 283 F.3d at 1087-88 (plaintiff must plead reports, dates, and contents).

13 Plaintiff does not even attempt to meet this standard. Rather, Plaintiff alleges the bare conclusion  
14 that "Defendants"—collectively, without any differentiation among them—"knew or recklessly  
15 disregarded" that (i) Jumei's interpretation of Section 238 was disputed; and (ii) Jumei had violated Item  
16 1004(d). (SAC ¶ 281.) Plaintiff alleges no facts showing what any Individual Defendant knew about  
17 Cayman law, let alone facts showing that any Individual Defendant was aware of any potential appraisal  
18 rights. Plaintiff does not point to a single report, meeting, or other fact that would have made the Individual  
19 Defendants aware that Plaintiff's interpretation of Section 238 should be credited (SAC ¶¶ 243-246), or a  
20 decision like the *Changyou* matter would be forthcoming. (*Id.* ¶¶ 247-249.)

21 Moreover, Plaintiff fails to plead a motive for fraud, which further undermines scienter. *See In re*  
22 *Tibco Software, Inc.*, 2006 WL 1469654, at \*21 (N.D. Cal. May 25, 2006) (no scienter where plaintiff did  
23 not "show[] that [d]efendants were *motivated* to commit fraud" (emphasis in original)). The SAC is silent  
24 about *why* Jumei would allegedly misstate the law, while at the same time providing to shareholders a  
25 copy of the very statute it was supposedly misrepresenting. Moreover, Plaintiff acknowledges that Jumei's  
26 disclosures characterized the lack of appraisal rights as a *negative* aspect of the Merger. (SAC ¶¶ 236,  
27 240.) Plaintiff does not explain why the Individual Defendants would go out of their way to fabricate a  
28 "countervailing factor" against the very Tender Offer and Merger they were recommending. (SAC ¶ 240.)

1 Viewed holistically, Plaintiff's allegations do not establish an inference of scienter that is "cogent  
2 and at least as compelling as any opposing inference." *Tellabs*, 551 U.S. at 314. Plaintiffs' theory is that  
3 non-lawyer Defendants from China somehow acquired an in-depth knowledge of Cayman appraisal rights  
4 law and yet chose to misrepresent that law, without any reason for doing so and while providing the statute  
5 at issue for shareholders to read. The more plausible inference is the Individual Defendants believed their  
6 statements were correct and consistent with the plain language of Section 238—not to mention a number  
7 of other Cayman companies to make a disclosure on this point—and had no basis to think that, almost a  
8 full year later, a Cayman court would read new terms into the statute to provide rights that did not  
9 previously exist.

## 10 **2. Plaintiff Fails to Plead Negligence for Its Section 14(e) Claim**

11 Plaintiff also fails to plead negligence for its § 14(e) claim. Under the PSLRA, Plaintiff "must state  
12 with particularity facts giving rise to a 'strong inference' that the Defendants acted with negligence."  
13 *Ocera*, 2018 WL 7019481, at \*10. The SAC must therefore allege "specific facts regarding *how each*  
14 Defendant was negligent in carrying out his or her duties." *Id.* (emphasis in original). The SAC does not  
15 plead any facts as to each Defendant, much less with respect to Plaintiff's new appraisal rights claim. In  
16 fact, Plaintiff alleges nothing beyond its conclusory and insufficient allegations of scienter. Dispositively,  
17 Plaintiff does not plead that any "Defendants failed to review certain materials, or were neglecting their  
18 responsibilities, or designed and oversaw a flawed review process" with regards to the appraisal rights  
19 statements. *Id.* The SAC simply ignores its obligation to plead negligence under § 14(e).

## 20 **C. Plaintiff Fails To Plead Reliance**

21 A plaintiff can satisfy the reliance element of its claim by pleading that it "actually read" the  
22 documents containing the alleged misstatements and "relied on the statements therein that are at issue."  
23 *Volkswagen*, 2018 WL 1142884, at \*10. Here, the SAC does not allege that Plaintiff "actually read" and  
24 "relied on" Jumei's statements about appraisal rights. Nor does Plaintiff allege that it would have exercised  
25 its appraisal rights had it been apprised of them.

26 It does not appear that Plaintiff is pursuing any other theory of reliance for its new appraisal rights  
27 claim. Plaintiff did not allege any new facts regarding reliance or a presumption of reliance in the SAC.  
28 Thus, Plaintiff simply fails to plead any facts supporting one of the required elements of its new claims.

1 To the extent Plaintiff seeks to rely on the presumptions of reliance it pled elsewhere in the AC,  
2 no such presumption is available for its SAC claims. First, the fraud-on-the-market presumption of  
3 reliance is not available because, as explained in the First Motion, this case does not involve a purchase  
4 or sale of securities in an efficient market at the market price; it involves a tender offer, and such "private  
5 transaction[s] are generally treated as inefficient." *In re Shanda Games Ltd. Sec. Litig.*, 2019 WL  
6 11027710, at \*9 (S.D.N.Y. Sept. 30, 2019); (*see* ECF No. 58 at 22-23.) Moreover, the new SAC claims  
7 concern, not the terms of a purchase or sale on the open market (or any market), but whether Jumei made  
8 a material misstatement regarding the availability of appraisal rights under Cayman law and whether  
9 Plaintiff relied on those misstatements in deciding whether to institute a separate appraisal action in the  
10 Cayman Islands.

11 Plaintiff also cannot invoke the so-called *Affiliated Ute* presumption. In *Affiliated Ute Citizens v.*  
12 *United States*, 406 U.S. 128 (1972), the Court held that, when a claim is based on omissions of material  
13 fact, reliance can be presumed because of the difficulty of proving that the plaintiff relied on what was not  
14 said. *Id.* at 153-54. However, that "presumption should not be applied to cases that allege both  
15 misstatements and omissions unless the case can be characterized as one that primarily alleges omissions."  
16 *Binder v. Gillespie*, 184 F.3d 1059, 1064 (9th Cir. 1999). In the SAC, Plaintiff alleges Jumei's statements  
17 were both affirmative misstatements and misleading by omission. Thus, this is a case alleging "both  
18 misstatements and omissions," not one that "primarily alleges omissions." *Binder*, 184 F.3d at 1064; *see*  
19 *also Waggoner v. Barclays PLC*, 875 F.3d 79, 96 (2d Cir. 2017) (holding that *Affiliated Ute* does not apply  
20 to "misstatements whose only omission is the truth that the statement misrepresents"). Plaintiff cannot  
21 invoke the *Affiliated Ute* (or any) presumption.

22 **D. Plaintiff Fails To Plead Loss Causation**

23 Plaintiff also fails to plead loss causation, *i.e.*, a "causal connection between the deceptive acts that  
24 form the basis for the claim of securities fraud and the injury suffered." *Or. Pub. Emps. Ret. Fund v. Apollo*  
25 *Grp. Inc.*, 774 F.3d 598, 608 (9th Cir. 2014). The "loss causation inquiry assesses whether a particular  
26 misstatement *actually* resulted in loss." *Miller*, 615 F.3d at 1102 (emphasis in original). Plaintiff must  
27 plead loss causation with particularity. *Apollo Grp.*, 774 F.3d at 605.

28 Plaintiff theorizes that "[i]f appraisal rights had been known to have existed, the share price could

