Case No. 21-1445

In the United States Court of Appeals for the Tenth Circuit

PATRICK HOGAN, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

PILGRIM'S PRIDE CORPORATION,
and
WILLIAM W. LOVETTE, Individually,
and
FABIO SANDRI, Individually,

Defendants-Appellees.

GEORGE JAMES FULLER,

Movant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR COLORADO
HONORABLE R. BROOKE JACKSON, DISTRICT JUDGE
1:16-cv-02611-RBJ

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

DATED: February 23, 2022

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GLOSSARY

Antitrust Court	Hon. Thomas M. Durkin, United States District Court Judge for the Northern District of Illinois, *In re Broiler Chicken Antitrust Litigation*, No. 16-C-8637
Broiler(s)	Broiler chickens
CEO	Chief Executive Officer
CFO	Chief Financial Officer
Defendants	Pilgrim's Pride Corporation, William W. Lovette, and Fabio Sandri
District Court	Hon. R. Brooke Jackson, United States District Court Judge for the District of Colorado
Exchange Act	Securities and Exchange Act of 1934
DOJ	Department of Justice
FAC	First Amended Complaint
FTC	Federal Trade Commission
GDA	Georgia Department of Agriculture
Georgia Dock	The Georgia Dock chicken price index
Indictment	June 3, 2020 grand jury indictment in *USA v. Penn, et al.*, 1:20cr152 (D. Colo)
Pilgrim	Pilgrim's Pride Corporation
Plaintiff	Lead Plaintiff George James Fuller, on behalf of himself and all others similarly situated
PSLRA	Private Securities Litigation Reform Act
SAC	Second Amended Complaint
SEC	Securities and Exchange Commission
Superseding Indictment	October 6, 2020 superseding grand jury indictment in *USA v. Penn, et al.*, 1:20cr152 (D. Colo)
USDA	United States Department of Agriculture

STATEMENT OF PRIOR AND RELATED CASES

There are no prior or related cases, and no prior or related appeals.

STATEMENT OF JURISDICTION

The United States District Court for the District of Colorado ("District Court") has subject matter jurisdiction over this securities class action pursuant to 28 U.S.C. §§1331 and 1337, and §27 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. §78aa. The District Court entered final judgment on April 19, 2021, dismissing Plaintiff's claims with prejudice. (App.Vol.VIII, at 1886-87).[1] The District Court denied Plaintiff's motion to alter or amend the judgment on November 29, 2021. (App.Vol.VIII, at 1936). On December 28, 2021, Plaintiff filed a timely notice of appeal. (App.Vol.VIII, at 1937). This Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed reversible error by dismissing the First Amended Complaint ("FAC") for failure to adequately allege material falsity based on an analysis that: (a) erroneously characterized the basis for all Plaintiff's alleged misrepresentations as predicated on Defendants' participation in an antitrust conspiracy; (b) misapplied controlling law regarding allegations "upon information and belief," erroneously requiring Plaintiff to plead "evidence" and

[1] Citations herein to particular volumes and pages in the Joint Appendix are referred to as "App.Vol._, at __." All citations and quotation marks are omitted unless otherwise noted.

"prove" underlying antitrust conduct; and (c) failed to draw reasonable inferences in Plaintiff's favor while drawing unreasonable inferences in Defendants' favor.

2. Whether the District Court committed reversible error by dismissing the Second Amended Complaint ("SAC") for violating the Exchange Act's five-year statute of repose, and specifically, whether the District Court erroneously: (a) held that Plaintiff brought a new "cause of action" by filing the SAC, which merely added factual detail, in the same open case; (b) calculated the repose period as running from either each alleged misrepresentation or the date of Plaintiff's stock purchases when controlling Supreme Court precedent holds that the repose period runs from Defendants' "last culpable act"; and (c) held that the "relation-back" doctrine of amending through Fed. R. Civ. P. 15 violates the Rules Enabling Act.

3. Whether the District Court committed reversible error by dismissing Plaintiff's SEC Rule 10b-5(a) and (c) scheme liability claims alleged in both the FAC and the SAC, despite Defendants never targeting those claims in any motion to dismiss, and despite those claims having a different repose period.

STATEMENT OF THE CASE AND PROCEEDINGS BELOW

A. Nature of the Case

This is a putative securities class action alleging violations of Sections 10(b) and 20(a) of the Exchange Act, and Rules 10b-5(a), (b), and (c) promulgated thereunder, brought by Plaintiff-Appellant George James Fuller on behalf of himself

and all others similarly situated ("Plaintiff") who purchased or otherwise acquired Pilgrim's Pride Corporation ("Pilgrim" or the "Company") stock between February 21, 2014 and November 17, 2016) (the "Class Period"). App.Vol.I, at 57; Vol.VI, at 1305.

Plaintiff alleges that, during the Class Period, Pilgrim, one of the largest poultry producers in the country, CEO William W. Lovette, and CFO Fabio Sandri (collectively, "Defendants"), artificially inflated Pilgrim's stock price through a fraudulent course of conduct, and through materially misleading statements and omissions, which, among other things, misrepresented the source of Pilgrim's record earnings and profits during the relevant time period, misrepresented the nature of the poultry industry, and concealed industry-wide cooperative efforts to maintain high chicken prices in the United States. *Id*. Pilgrim has since pled guilty to violating antitrust laws for this collusion and paid a fine of over $100 million. App.Vol.VIII, at 1838-65. Defendant Lovette and other Pilgrim executives have been indicted on criminal antitrust charges. App.Vol.VIII, at 1793-41.

Through a series of revelations, the true, previously undisclosed collusive conduct was revealed, and the artificial inflation eroded from Pilgrim's stock price, causing substantial harm to Plaintiff. App.Vol.I at 62-64; App.Vol.VI, at 1312-14.

B. Procedural History and Rulings Presented for Review

On May 11, 2017, Plaintiff filed the FAC. In 351 paragraphs of allegations supported by over a dozen well-positioned confidential witnesses, the FAC details the way Defendants artificially inflated Pilgrim's stock price through collusion, manipulation of chicken prices, and misrepresentations attributing its success to other factors. App.Vol.I, at 53-197. Defendants moved to dismiss Plaintiff's 10b-5(b) misrepresentation claims on June 12, 2017, arguing the FAC failed to adequately allege falsity, scienter, and loss causation. App.Vol.I, at 200-19.

On March 14, 2018, the District Court granted Defendants' motion to dismiss without prejudice. App.Vol.IV, at 995-1013. While the District Court held that "plaintiff has sufficiently satisfied the PSLRA requirement for pleading false or misleading statements," it nevertheless held that Plaintiff failed to adequately plead the underlying antitrust violations with PSLRA particularity to support falsity. App.Vol.IV at 1005. The District Court did not reach scienter or loss causation.

Plaintiff moved for reconsideration on April 11, 2018, arguing that the FAC met the PSLRA pleading requirements for falsity as the District Court itself acknowledged, and also that the FAC plausibly alleged an antitrust violation, because Judge Durkin in the Northern District of Illinois (the "Antitrust Court") held the same antitrust allegations that formed the bulk of the FAC plausibly alleged antitrust violations on the same facts. App.Vol.IV, at 1016-30. On November 8,

2018, the District Court issued an Order rejecting these arguments, but, upon Plaintiff's request, granted leave to amend. App.Vol.V, at 1292-94.

On June 8, 2020, Plaintiff filed his amended pleading, the SAC. Among other things, the SAC includes direct evidence of collusion between Pilgrim and another poultry producer, gathered from the grand jury indictment of Pilgrim executives for Sherman Act violations. App.Vol.VI, at 1301-1494. Defendants again moved to dismiss Plaintiff's 10b-5(b) misrepresentation claims on the grounds they failed to meet the PSLRA pleading standard, and that Lead Plaintiff had no standing to assert claims alleged in the SAC, because the only actionable misstatements – those that took place before his Pilgrim stock purchases – were barred by the Exchange Act's five-year statute of repose. App.Vol.VII, at 1705-19.

On April 15, 2021, the District Court granted Defendants' motion to dismiss with prejudice on repose grounds, and entered final judgment on April 19, 2021. App.Vol.VIII, at 1876-86. Specifically, the District Court held that: (i) the SAC is subject to the five-year statute of repose, which runs from the date of each alleged misrepresentation, and thus any claims predicated on misstatements occurring prior to June 8, 2015 are time-barred; (ii) the SAC does not relate back under Rule 15 because the relation back doctrine violates the Rules Enabling Act; and (iii) Lead Plaintiff lacks standing to bring the SAC because his purchases predated June 8, 2015. *Id*.

On May 17, 2012, Plaintiff moved for reconsideration and amended judgment, arguing that: (i) Defendants did not move to dismiss Plaintiff's scheme liability claims under Rule 10b-5(a) and (c), the repose period for which cannot run from the date of misrepresentations, because those claims do not require misrepresentations; and (ii) the District Court's holding that the SAC does not relate back under Rule 15 rested on inapposite cases in which the plaintiff added new causes of action or new parties affecting a defendant's substantive rights, not mere specificity and factual detail. App.Vol.VIII, at 1888-98.

The District Court denied Plaintiff's motion for reconsideration on November 29, 2021. App.Vol.VIII, at 1929-36.

Plaintiff timely filed a notice of appeal on December 28, 2021, seeking appellate review of the District Court's (i) March 14, 2018 Order dismissing the FAC, (ii) November 8, 2018 Order denying reconsideration of the FAC dismissal Order, (iii) April 15, 2021 Order dismissing the SAC, and (iv) November 29, 2021 Order denying reconsideration of the SAC dismissal Order. App.Vol.VIII, at 1937.

C. Relevant Factual Background

1. Overview of Pilgrim and the Poultry Industry

Pilgrim is one of the largest poultry producers in the United States. App.Vol.I, at 67. Together with Tyson and Sanderson Farms, the three companies account for nearly half the chicken sold in the country. *Id.*

Pilgrim's business focuses on the production and sale of Broilers, which make up 98% or more of the chicken sold in the United States. App.Vol.I, at 67-68. With little or nothing to distinguish a Broiler sold by Pilgrim from one by Tyson or by Sanderson Farms, Broilers are considered a commodity. App.Vol.I, at 68. As such, the market for Broilers is characterized as one of "inelastic demand." *Id.* In other words, the demand for Broilers does not meaningfully increase or decrease with changes in price; however, a decrease in supply will increase prices. *Id.* Thus, from the business standpoint of Pilgrim's and other producers, keeping Broiler supply low keeps prices high, which works to the benefit of all. *Id.*

When poultry companies compete naturally, the market for Broilers follows a vicious "boom and bust" cycle for industry participants. *Id.* If chicken prices rise, producers ramp up production to capture more revenue. *Id.* The resulting oversaturation causes prices to fall, in turn causing production to decline as it becomes less profitable to produce more chicken, and the cycle starts anew. *Id.* In a competitive environment, the financial health of poultry producers matches this cycle and follows a pattern of volatility. *Id.*

2. Poultry Industry Collusion

a) Poultry Producers' Coordinated Production Cuts.

In 2007 and into 2008, the poultry market suffered a particularly difficult trough in the boom and bust cycle, where the market was oversupplied with chicken

and feed prices were unusually high. App.Vol.I, at 172. Pilgrim openly bemoaned the oversupply of chicken, and explained that if Pilgrim cut its production and "let the other producers capitalize on that," it will lead to "the demise of our company, which we are not willing to accept." *Id*.

But instead of a viciously competitive poultry market claiming Pilgrim as its next victim, in 2008, the industry worked together to break the "boom and bust" cycle. App.Vol.I, at 173. Rather than fill the gaps in production as they would in a natural competitive environment, the poultry producers acted in concert, all cutting production by approximately the same percentage in the first two weeks of April 2008. *Id*. Coordinated production cuts continued into 2009, typically on the heels of a major industry function or conference where all the major poultry executives would congregate and socialize. App.Vol.I, at 174-76. The 2008-2009 production cuts led to unprecedented reductions in Broiler breeder flocks and all-time highs in Broiler prices. App.Vol.I, at 176-79.

When an uptick in supply began to occur in 2010, the industry swiftly responded with a second round of coordinated production cuts in 2011 and 2012, which inflated the price of chicken. App.Vol.I, at 179-84. Just like the production cuts of 2008-2009, the 2011-2012 production cuts greatly reduced the number of breeders, meaning that companies were content to handcuff their ability to ramp up production despite the high chicken prices with confidence that the rest of the

industry was doing the same. App.Vol.I, at 184-85. Despite high feed prices, which ordinarily would stunt earnings for poultry companies, the coordinated production cuts of 2011-2012 led to record profits during the Class Period for Pilgrim and other producers. App.Vol.I, at 185-87.

b) Poultry Companies Improperly Shared Information.

The main reason that poultry companies were willing to restrict Broiler production was that they knew the exact details of other companies' operations, engendering confidence that their "competitors" would not take advantage of them. First, the poultry industry is highly concentrated and familial. App.Vol.I, at 72-75. Only a few companies dominate the market, and executives often jump from company to company, and remain in close contact with one another through friendships, industry organizations and conferences. *Id*. As CW7, Pilgrim's Executive Vice President of National Accounts, explained, the COO of Tyson was one of Defendant Lovette's best friends, and they modeled their respective businesses off one another. App.Vol.I, at 72. CW7 also recalled that Pilgrim employees would regularly contact colleagues at other companies regarding business, and in one situation, a high-ranking executive of Pilgrim called the CEO of another company during a Company meeting, which CW7 found so unethical it caused CW7 to walk out of the room. App.Vol.I, at 73.

Second, the poultry industry used Agri Stats data to monitor other companies' operations and to discipline them if they increased production. App.Vol.I, at 78-87. Agri Stats is a private service that gathers volumes of detailed data from poultry processors, produces "confidential" weekly and monthly reports, and disseminates them back to companies, like Pilgrim, that pay enormous sums for subscriptions. App.Vol.I, at 79. The vast scope and granular nature of this information, described in detail by former employees of Pilgrim, Agri Stats, and Tyson, provide subscribers with near-real time visibility into their competitors' operations, projections, and financials. App.Vol.I, at 79-81. Under normal, competitive circumstances, companies would tightly guard such highly confidential and proprietary information, and such information sharing would run afoul of antitrust laws, as outlined in the Federal Trade Commission ("FTC") and Department of Justice ("DOJ")'s joint "Antitrust Guidelines for Collaborations Among Competitors." App.Vol.I, at 81-82, 86.

While Agri Stats and the poultry industry have always maintained that the anonymous presentation of the data skirts any antitrust violations, former employees explained that this purported anonymity is a fiction, because it was easy to ascertain the identities of the companies with the information provided. App.Vol.I, at 81-87. For example, producers could identify the different companies and their complexes by production size alone, which they need only do once, because the identification

number would never change. App.Vol.I, at 82. Further, Pilgrim employed a former Agri Stats employee, Larry Higdem, who knew all the identifying numbers for companies in the industry. App.Vol.I, at 83. Finally, former employees also describe situations in which Agri Stats employees would meet with Broiler producers and simply tell them the identities of companies when asked. App.Vol.I, at 84.

The widespread use and transparency of this data enabled companies to monitor every aspect of their competitors' businesses and ensure no company was "cheating" on their agreement. App.Vol.I, at 85. Senior executives of poultry companies, including Defendant Lovette, created stability by publicly conveying their familiarity with competitors' operations using Agri Stats data. App.Vol.I, at 131-32, 180-81. Thus, Agri Stats gave Pilgrim and other poultry companies the ability to monitor one another and be assured that no company would surge ahead with production while prices were inflated.

c) Poultry Producers Rigged the Georgia Dock

The poultry industry also kept Broiler prices artificially high by manipulating the Georgia Dock pricing index, which was considered the most influential of all Broiler pricing indices. App.Vol.I, at 93-105. Unlike other price indices, the Georgia dock did not have a system of verification for reported prices. App.Vol.I, at 93-94. Rather, the Georgia Dock was compiled through weekly telephone calls from the Georgia Department of Agriculture ("GDA") to the top Broiler producers

in the state, during which the Broiler producers would report the price offered to customers with whom they have contracts. App.Vol.I, at 94. That price would be accepted by the GDA without any verification from the purchasers or from invoices. *Id*. Then, to calculate the index price, the GDA would take the price quotation from each of the producers participating in the survey and "smooth" the results by eliminating outliers. App.Vol.I, at 101. During the relevant time period of cooperation, and particularly during the Class Period, the Georgia Dock price was consistently higher than the other two primary indices, which required verification. App.Vol.I, at 95.

A pair of articles by THE NEW YORK TIMES and THE WASHINGTON POST revealed that Arty Schronce, the director of the Georgia Dock, "question[ed] the validity" and accuracy of the index and the propriety and independence of its "Advisory Board," made up of poultry executives including Pilgrim's Jayson Penn, whose approval was needed for any change to the index. App.Vol.I, at 96-100. After a request from the USDA for information to verify the submitted prices, Schronce faced resistance to the change from the poultry companies. App.Vol.I, at 100. According to Schronce, the companies also were gaming the "One Cent Rule" that eliminated outlying prices by having one company "deliberately submit a low bid that they know will be kicked out," so that "they can claim that they are

submitting something lower," and "can take advantage of a high whole bird price while maintaining that they want it to be lower." App.Vol.I, at 100-01.

Inquiries by the USDA led to antitrust concerns by GDA officials, and eventually, the GDA agreed that more verification and transparency was needed. App.Vol.I, at 101-05. The USDA later stopped publishing the Georgia Dock price, and the GDA itself would later cease publication of the Georgia Dock because of antitrust concerns. App.Vol.I, at 103-05.

3. Price-Fixing of Chicken Manipulated Pilgrim's Stock Price During the Class Period

Chicken is Pilgrim's entire business. App.Vol.I, at 170. Revenue from chicken operations is the only driver of the Company's performance and the value of its stock. *Id*. Defendant Lovette stated that for Pilgrim, "revenue is a function of price," and therefore, manipulation of chicken prices had a direct, correlative, and manipulative effect on Pilgrim's stock price. App.Vol.I, at 186. Stock analysts drew this connection as well, because when the collusive conduct was revealed to the market, analysts correlated sustained high stock prices to "the perfect harmony that the industry has operated in since 2009," facilitated by "the invisible hand of Agri Stats." App.Vol.I, at 163-64. Accordingly, by virtue of Defendants' participation in collusive activities to manipulate chicken prices, Defendants perpetrated a scheme to manipulate the price of Pilgrim's stock, in violation of Rules 10b-5(a) and (c). App.Vol.I, at 195-96.

4. Misrepresentations and Omissions During Class Period

In addition to artificially inflating Pilgrim's stock price through the price-fixing scheme itself, Defendants also artificially inflated the Company's stock price through a series of materially false and misleading statements and omissions throughout the Class Period.

a) Misrepresentations and Omissions Regarding Financial Results and How They Were Achieved

Over the course of the Class Period, Defendants touted the Company's strong financial results and attributed them to a variety of factors, such as their "relentless pursuit of operational excellence," their creation of a "spread business," their "pricing strategy," "portfolio brand," and "mix and operational improvements." App.Vol.I, at 108-14, 16-17.[2] In reality, however, the cause of Pilgrim's financial success during the Class Period was the artificially high price of chicken. *Id*.

b) Misrepresentations and Omissions Regarding the Competitive Nature of the Poultry Industry

Because poultry producers had historically drawn scrutiny from regulators over antitrust concerns, Defendants repeatedly emphasized the "highly competitive" nature of the chicken industry, and "price" as the predominant "competitive factor." App.Vol.I, at 109, 129-30, 148-49. Contrary to these repeated assertions, the poultry industry had not been "highly competitive" dating back to 2008, particularly on

[2] *See also* App.Vol.I, at 117-30, 132-34, 136-37, 141-43, 145-47, 149-57, 159-60, 162.

price. *Id*. Poultry companies worked together to: keep supply constrained, openly share proprietary information through Agri Stats, maintain the high Georgia Dock price, and openly discuss business strategy with their competitors. *Id.*, *see also supra* pp. 8-13. These activities violated Pilgrim's own Code of Conduct, which prohibited employees from "discussing with competitors any matter directly involved in competition between us and the competitor…." App.Vol.I, at 107.

c) Misrepresentations and Omissions Regarding Poultry Industry Economics

Defendants also misleadingly discussed poultry economics and their impact on industry profitability while omitting how that landscape had changed with industry cooperation. For example, Defendants misleadingly stated that chicken prices were determined by "supply and demand factors" creating "cyclical earnings fluctuations," when, in fact, the poultry industry was working together to break that cycle by manipulating supply and the prices set by the Georgia Dock. App.Vol.I, at 109-10, 130-32, 138-40, 143-44, 159. When Defendants discussed "constrained supply," noting that they "believe the industry does not currently possess the physical capability to rapidly increase production," they omitted the material fact that the industry was intentionally constraining that supply, and that there was no ability to rapidly increase production because they had taken steps to reduce Broiler breeders. App.Vol.I, at 114-15, 118-19, 123-26, 149-51, 154-55. To that end, Defendants misleadingly stated that they could not anticipate "what the demand and

supply for chickens are and, therefore, what prices are going to be," and also how "feed ingredient prices" affected profitability, when, in fact, the industry was working together to lower supply and create sustainably high prices that offset such economic impacts. App.Vol.I, at 121, 134-38, 142, 153-54, 157-58, 160-61.

Furthermore, Defendants discussed that "Pilgrim's results don't just follow the full peaks and troughs of pricing trends," while concealing that the reason why the Company broke the "boom and "bust" cycle was because of industry efforts to reduce Broiler supply. App.Vol.I, at 120-21.

d) Misrepresentations and Omissions Regarding the Georgia Dock

Defendants also repeatedly emphasized the high Georgia Dock price's impact on the Company's strong financial results, when the Georgia Dock price index was, in fact, inaccurate, unverified, and manipulated by its Advisory Board that included Jayson Penn. App.Vol.I, at 115-16, 120-21, 128-29, 135-36, 148-49. Indeed, when an analyst specifically questioned Defendants about how the Georgia Dock inexplicably sustained high prices even as other prices had dropped, Defendant Lovette misleadingly assured the analyst that the Georgia Dock price was accurately "reflective of whole birds." App.Vol.I, at 140. *See also* App.Vol.I, at 144, 152.

5. The Truth Is Revealed to Investors

Investors learned the truth through a series of revelations. First, the *Maplevale* antitrust class action was filed on September 2, 2016, revealing facts connecting

sustained high chicken prices to collusive activity by Pilgrim and numerous other Broiler producers. App.Vol.I, at 162-63. Approximately a month later, on October 7, 2016, a veteran industry analyst with Pivotal Research Group, issued a report downgrading Tyson's stock from "Hold" to "Sell," on the basis that the allegations in the *Maplevale* complaint were "powerfully convincing," and that the "invisible hand of Agri Stats," helped explain the sustained success of the industry, which had historically been marred by volatility. App.Vol.I, at 163.

The inaccuracy and conflicts of the Georgia Dock price index were then revealed through the publication of two articles published by THE NEW YORK TIMES and THE WASHINGTON POST on November 3, 2016, and November 17, 2016, respectively. App.Vol.I, at 164-65. The articles, citing documents obtained through FOIA requests, revealed the lack of verification of the Georgia Dock, and the concerns of Schronce, as to its accuracy, and the independence of the previously undisclosed Advisory Committee. App.Vol.I, at 164-66. In response to each of these revelations, Pilgrim's stock fell, removing the artificial inflation caused by Defendants' scheme and materially false misrepresentations and omissions. App.Vol.I, at 162-67.

6. Post Class-Period Events Confirm Industry Collusion

Shortly after the Class Period, between February and May 2017, government agencies opened investigations into poultry companies, including Pilgrim, Tyson,

and Sanderson Farms, for anti-competitive conduct. App.Vol.I, at 166-67. Then, in June 2019, the DOJ intervened in the *Maplevale* civil antitrust action, which had survived motion to dismiss, and requested a stay of discovery to protect its investigation. App.Vol.VI, at 1314-15.

On June 3, 2020, a grand jury indicted four poultry executives, including then-CEO and Defendant Lovette's "right hand man" Jayson Penn and Roger Austin from Pilgrim, as well as two executives from Claxton Poultry (the "Indictment"). App.Vol.VI, at 1454. According to the Indictment, "from at least as early as 2012 until at least as early as 2017," a time period encompassing the entirety of the Class Period, the four executives "conspired to fix prices and rig bids for broiler chickens across the United States." *Id*. The Indictment, replete with evidence in the form of text messages and telephone records between Penn, Defendant Lovette, and others, outlines coordination between Pilgrim, Claxton, and at least four other poultry suppliers in submitting pricing and other bids. App.Vol.VI, at 1454-58.

On June 10, 2020, one week after the grand jury returned the Indictment, Tyson issued a public statement confirming that it was a co-conspirator and had been cooperating in the criminal investigation pursuant to its application for leniency with the DOJ, the terms of which required Tyson to "confess participation in an antitrust crime." App.Vol.VII, at 1776.

In a Superseding Indictment filed on October 6, 2020, a grand jury charged six additional executives, including Defendant Lovette, with criminal conspiracy, implicated at least four additional poultry suppliers, and expanded the time period of the Sherman Act violations through "at least 2019." App.Vol.VIII, at 1793-95.

On February 16, 2021, Pilgrim pled guilty to antitrust violations. App.Vol.VIII, at 1838-62. Pilgrim admitted to knowingly "participating in a conspiracy to suppress and eliminate competition by rigging bids and fixing prices and other price-related terms for broiler chicken products sold in the United States, in violation of the Sherman Antitrust Act," during a period "[f]rom at least as early as 2012 and continuing through at least early 2017," which envelops the entire Class Period. *Id*. In connection with the guilty plea, Pilgrim was ordered to pay a $107,923,572.00 fine. App.Vol.VIII, at 1864-65.

Trial began in the government's case against Defendant Lovette, Jayson Penn, and other poultry executives on October 25, 2021. *See United States v. Penn*, No. 20-cr-152, 2022 U.S. Dist. LEXIS 7009, at *4 (D. Colo. Jan. 13, 2022). During trial, Robbie Bryant, a Pilgrim employee, "testified that he 'received competitor pricing and used that pricing to submit bids to customers and asked others to retrieve competitor pricing," during the Class Period, and further "stated that the purpose of obtaining competitor pricing information 'was either to increase prices or limit a decrease in price.'" *Id.* at *10. The government presented evidence in the form of

text messages and emails that supported a finding that the indicted poultry executives, including Defendant Lovette and Mr. Penn, "knowingly joined the alleged conspiracy." *Id.* at *13-15, *31-34. For example, "in August 2012 Mr. Penn forwarded an email to Mr. McGuire at Pilgrim's from a subordinate, Brenda Ray, indicating that she had received a call from a friendly competitor that it was 'all over the market that Pilgrim's is taking contract pricing up,'" in which Penn "states, 'FYI. Do not fwd. [N]ot exactly a legal conversation.'" *Id.* at *13. Other emails demonstrate that Defendant Lovette reviewed and discussed competitor price submissions with Penn and other Pilgrim employees and supported the reasonable inference that "Mr. Lovette was directing [a Pilgrim employee's] price negotiations and was doing so pursuant to an agreement to fix prices." *Id.* at *32-34.

On December 16, 2021, the court declared a mistrial for failure to reach a unanimous verdict. *Id.* at *5. After the trial, the court denied the defendants' motions for acquittal, "find[ing] that the evidence [presented at trial] is sufficient for a reasonable jury to find that the charged conspiracy existed and that each defendant knowingly joined the conspiracy, knowing of its goal and intending to help accomplish it." *Id.* at *39-40.

The court scheduled a new trial that commenced on February 22, 2022.

SUMMARY OF THE ARGUMENT

Plaintiff's FAC, filed in 2017, adequately alleges that Defendants made materially misleading statements and omissions. Defendants repeatedly stated that pricing in the "[t]he chicken industry is highly competitive," and attributed their sustained success and record earnings over the Class Period to better "product mix" and operational improvements; yet, in reality, as set forth in the FAC's 300-plus paragraphs of detailed allegations supported by over a dozen confidential witnesses, the poultry industry was cooperating to maintain high chicken prices, which was the true cause of Pilgrim's sustained success and record results during the Class Period. The District Court readily acknowledged that with these allegations, "plaintiff has sufficiently satisfied the first PSLRA requirement for pleading false or misleading statements" because "[t]he complaint contains a detailed accounting of each allegedly misleading statement made during the Class Period….and the complaint explains why each statement is alleged to have been misleading at the time it was made." App.Vol.IV, at 1005.

But because the District Court held that Plaintiff's reasons for falsity touched on anticompetitive conduct, the District Court erroneously concluded that Plaintiff must plead "evidence" that "establish[ed] the existence of a conspiracy," in order to comply with the Tenth Circuit's requirements for the sufficiency of Plaintiff's falsity allegations made on information and belief. App.Vol.IV, at 1005-12. The District Court also explained that Plaintiff needed to plead "significantly more in a Rule 10b-

5 case" than what antitrust law requires. App.Vol.IV, at 1012. The District Court's holdings are erroneous for several different reasons.

As an initial matter, requiring Plaintiff to prove, much less even adequately plead, that Pilgrim committed antitrust violations constitutes reversible error, because Plaintiff's allegations of falsity are not dependent on whether Pilgrim violated the Sherman Act as a matter of law. For example, as the GDA acknowledged, the high Georgia Dock chicken prices that Defendants emphasized throughout the Class Period to support the Company's results were unverified and inaccurate. App.Vol.I, at 96-105. Similarly, regardless of whether Pilgrim or the poultry industry collectively were violating antitrust laws, Defendants' attribution of Pilgrim's financial success to operational improvements was false. Likewise, Defendants' statements that the poultry industry was "highly competitive" would still be misleading even if the industry conduct did not legally amount to an antitrust violation.

Nevertheless, the District Court's interpretation of applicable pleading standards is erroneous. The PSLRA does not create a heightened plausibility threshold for falsity; it simply heightens the particularity of the facts alleged to support a plausible claim that the alleged statements or omissions were misleading. 15 U.S.C. § 78u-4(b)(1). The Tenth Circuit's opinion in *Adams* addresses the type of specificity required, such as the level of detail and sources of facts alleged. *Adams*

v. Kinder-Morgan, Inc., 340 F.3d 1083, 1059 (10th Cir. 2003). In fact, the Tenth Circuit in *Adams* roundly rejected a requirement for plaintiffs to plead the type of evidence the District Court required. In the FAC, Plaintiff met the *Adams* requirements, explaining in detail the sources of Plaintiff's alleged facts, including, investigative reports, the backgrounds of confidential witnesses, and the company announcements of production cuts. Because these allegations met the PSLRA's particularity requirements, and these allegations sufficiently met the elements under antitrust law to plausibly allege Sherman Act violations as held by the "Antitrust Court, Plaintiff adequately alleged the underlying conduct to support his allegations of falsity.

In its analysis, the District Court, following the lead of the court in *In re Tyson Foods, Inc. Secs. Litig.*, 275 F. Supp. 3d 970 (W.D. Ark. 2017), also erroneously ignored allegations and weighed competing inferences, rejecting Plaintiff's allegations if the District Court determined there was "a plausible alternative" or "possible explanation" for Defendants' conduct. *See, e.g.*, App.Vol.IV, at 1011. Scienter, not falsity, requires the weighing of competing inferences, and even with scienter, Plaintiff's allegations prevail if both inferences are equally compelling. *Tellabs, Inc. v. Makor Issues & Rights, Ltd., 55*1 U.S. 308, 314 (2007). The District Court and the *Tyson* court both erroneously injected their own subjective beliefs as to what the evidence would ultimately bear, and both reached the objectively

incorrect conclusion that it was "implausible" that these two companies violated Sherman Act, because Pilgrim and Tyson both admitted guilt. *See Bell Atl. v. Twombly*, 550 U.S. 544, 556 (2007) ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable.").

While the District Court erred in dismissing the FAC, the District Court also erred in dismissing the SAC on repose grounds. Because the SAC was filed in the same ongoing case, and did not allege any new causes of action or any new parties, the filing of the SAC did not implicate the statute of repose, which, by its plain language, only requires that the "action" be "brought" within the five-year repose period.

First, the District Court erred by relying on BLACK'S LAW DICTIONARY's definition of "dismissal without prejudice," and the Tenth Circuit's decision in *Brown v. Hartshorne Pub. Sch. Dist. No. 1*, 926 F.2d 959 (10th Cir. 1991), to hold that Plaintiff was required to amend his complaint within the repose period, because, unlike here, neither involved an order granting leave to amend. *Brown* involved a voluntary dismissal, and the BLACK'S definition cited by the District Court discusses "*refiling the lawsuit* within the limitations period." Plaintiff did not "refile the lawsuit," but rather, with the District Court's permission, amended the complaint in the same action.

Second, the District Court erred by not calculating the repose period from the Defendants' "last culpable act," as the Supreme Court requires. Instead, in its April 16, 2021 dismissal Order, the District Court calculated the repose first from each alleged misrepresentation, and then in the November 29, 2021 reconsideration Order, calculated the repose period from Plaintiff's stock purchases. These inconsistent holdings are both legally incorrect.

Third, the District Court erred in holding that the SAC cannot relate back to a previously filed complaint under Fed. R. Civ. P. 15(c) because it would violate the Rules Enabling Act. In *SEPTA v. Orrstown Fin. Servs.*, 12 F.4th 337 (3d Cir. 2021), however, the Third Circuit, the only circuit court that has addressed this specific issue, directly rejected the District Court's holding. Like here, the Third Circuit in *SEPTA* held that where the amended complaint "reasserts no more than the same claims, against the same parties, as the timely filed" complaint, relation back does not violate affect any "substantive right" protected by the Rules Enabling Act. Further, just as Plaintiff urged the District Court to do on reconsideration, the *SEPTA* court distinguished the very cases relied upon by the District Court as "involv[ing] entirely new claims or parties that were added after the repose period expired." *Id.* at 352. Accordingly, affirming the District Court's holding would not only create a circuit split, but would do so on the basis of inapposite authority.

Finally, the District Court erred by dismissing Plaintiff's scheme liability claims alleged under SEC Rules 10b-5(a) and (c), when Defendants never moved to dismiss those claims. While the District Court acknowledged that "Defendants' motion to dismiss did not single out any of plaintiff's three claims," the District Court held that Plaintiff was responsible for raising and rebutting arguments specific to scheme liability that Defendants never addressed. App.Vol.VIII, at 1935. The District Court's holding again directly contradicts the only circuit-level authority on this issue. In *In re Alphabet, Inc. Securities Litigation*, the Ninth Circuit reversed a district court's dismissal of scheme liability claims because the defendants did not "target" those claims in their motion to dismiss. 1 F.4th 687, 709 (9th Cir. 2021). Thus, affirming the District Court's holding would create yet another circuit split.

For the foregoing reasons, the District Court's opinions regarding falsity, repose, and scheme liability should be reversed.

STANDARD OF REVIEW

In reviewing a district court's decision to dismiss a complaint under Rule 12(b)(6), the appropriate standard of review is *de novo*. *See, e.g., Nakkhumpun v. Taylor,* 782 F.3d 1142, 1152-53 (10th Cir. 2015).

To survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only plead sufficient factual allegations to "state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 579. "When there are well-pleaded factual allegations, a court

should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). In the Tenth Circuit, the court "must liberally construe the pleadings and make all reasonable inferences in favor of the nonmoving party." *Doe v. Woodard*, 912 F.3d 1278 (10th Cir. 2019).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING THE FAC ON FALSITY GROUNDS

Despite properly holding that "[P]laintiff has sufficiently satisfied the first PSLRA requirement for pleading false or misleading statements," the District Court erred in dismissing the FAC for failing to establish an underlying antitrust conspiracy. App.Vol.IV, at 1005. First, contrary to the District Court's opinion, violations of antitrust law are not a predicate to finding the alleged misstatements are false and misleading. Second, the District Court misapplied the PSLRA pleading standard. Third, even if Plaintiff were required to plead underlying anticompetitive conduct, Plaintiff's allegations plausibly alleged such conduct when viewed in the light most favorable to Plaintiff and with inferences drawn in Plaintiff's favor.

A. Pleading Standard for Falsity

Under Rule 10b-5(b), it is unlawful "[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17

C.F.R. §240.10b-5. In determining whether a statement was misleading, courts look to whether "a reasonable person would have understood it to be 'inconsistent with the facts on the ground.'" *Nakkumpun*, 782 F.3d at 1148 (quoting *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1343 (10th Cir. 2012)).

In order to adequately plead falsity, a complaint must "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." 15 U.S.C. §78u-4(b)(2)(A). In evaluating whether the alleged facts, "taken as a whole, [] support a reasonable belief that the defendant's statements identified by the plaintiff were false or misleading," the Tenth Circuit looks at several factors:

> (1) the level of detail provided by the facts stated in a complaint; (2) the number of facts provided; (3) the coherence and plausibility of the facts when considered together; (4) whether the source of the plaintiff's knowledge about a stated fact is disclosed; (5) the reliability of the sources from which the facts were obtained; and (6) any other indicia of how strongly the facts support the conclusion that a reasonable person would believe that the defendant's statements were misleading.

Adams, 340 F.3d at 1059.

B. The District Court Erred in Requiring Plaintiff to Establish Antitrust Violations as a Predicate to Alleging Falsity

The District Court's analysis that Plaintiff must establish that Pilgrim committed an underlying antitrust violation is erroneous because the misleading nature of the alleged misstatements is not tethered to actual antitrust violations.

Courts across the country – including in this Circuit – have declined to predicate findings of falsity on the illegality of underlying conduct when the misrepresentations are not so dependent. For example, in *Peace Officers' Annuity & Ben. Fund of Ga. v. DaVita Inc.*, the district court rejected "Defendants' claim that Plaintiffs' entire theory of liability depends on the illegality or impropriety" of the underlying alleged conduct, because "as a factual matter, not all of Plaintiffs' claims rest on the purported illegality of the underlying scheme," and therefore "can be construed as potentially false or misleading independent of the illegality of the underlying scheme." 372 F. Supp. 3d 1139, 1151 (D. Colo. 2019).

In recent, factually similar securities cases involving price-fixing allegations where plaintiffs alleged misrepresentations regarding the competitive environment or the drivers of their financial results, courts have held that whether those statements are misleading is not dependent on whether the defendant violated antitrust laws. In *Pelletier v. Endo Int'l PLC*, even though the court "concluded that Lead Plaintiff has not adequately alleged that defendants participated in a price-fixing conspiracy," it nonetheless held that "Defendants' statements about market conditions, sources of

revenue and pricing decisions were misleading even in the absence of a price-fixing conspiracy." 439 F. Supp. 3d 450, 466 (E.D. Pa. 2020). In *Evanston Police Pension Fund v. McKesson Corp.*, the court acknowledged that "even if [defendants] did not participate in an antitrust conspiracy, its statements would still be false and misleading if it knew [other companies] were engaged in a price-fixing conspiracy." 411 F. Supp. 3d 580, 598 (N.D. Cal. 2019).

Here, the FAC adequately alleges numerous statements were false and misleading notwithstanding whether Pilgrim actually committed an antitrust violation. For example, Defendants repeatedly emphasized the Company's financial results and outlook by underscoring high Georgia Dock index prices, even after analysts specifically questioned the accuracy of the index. *See supra* at pp. 16-17. The FAC adequately alleges, with support from an internal GDA memorandum, that the Georgia Dock pricing index was inaccurate and unverified, and was manipulated by poultry companies sitting on its Advisory Board, including Pilgrim. *See supra* at pp. 11-13. Likewise, Pilgrim's repeated statements that "[t]he chicken industry is highly competitive," were materially false and misleading given the willingness of Pilgrim and other companies to share proprietary information through Agri Stats, consult with one another on business matters, and collectively embrace a "disciplined" approach to Broiler supply, even if such conduct is not an antitrust violation. *See supra* at pp. 9-11; *Pelletier*, 439 F. Supp. 3d at 466 (holding

statements regarding "the competitive environment" misleading despite failure to allege defendants committed an antitrust violation).

Because the District Court required Plaintiff to establish an antitrust violation when the falsity of these statements is not reliant on such a finding, the District Court committed reversible error.

C. The District Court Applied an Improper Pleading Standard for the Underlying Antitrust Allegations

While Plaintiff need not even plead underlying antitrust conduct to support a finding of falsity, the District Court nevertheless erred in misapplying both the PSLRA pleading standard and antitrust pleading standards with respect to Plaintiff's allegations of underlying antitrust conduct.

1. The District Court Misapplied the PSLRA Pleading Framework as Interpreted by the Tenth Circuit

In attempting to "apply the *Adams* framework to assess the sufficiency of the facts pled in support of plaintiff's allegation of an underlying conspiracy," the District Court erroneously overstated Plaintiff's burden under the PSLRA, requiring Plaintiff to plead something "significantly more" than the "plus factors" sufficient to plead a Sherman Act violation. App.Vol.IV, at 1012.

With respect to allegations of falsity made on information and belief, the PSLRA only requires Plaintiff to "state with particularity all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). The Tenth Circuit's opinion in *Adams*

discusses the type of specificity required to meet this standard, including the level of detail, the number of facts, and the sources of alleged facts. *Adams*, 340 F.3d at 1059. Notably, the Tenth Circuit in *Adams* directly rejected the District Court's view that the PSLRA's particularity requirement ever requires plaintiff to plead evidence to prove alleged conduct. *Id.* at 1101 ("The PSLRA did not, however, purport to move up the trial to the pleadings stage, and 'does not require pleading all of the evidence and proof thereunder supporting a plaintiff's claim.'") (citation omitted). As even the *Tyson* court acknowledged, "[a] heightened 'particularity' requirement does not alter the requirement that the pleaded facts plausibly allege a cognizable claim," but rather the "quantum" of facts supporting Plaintiff's information and belief." *Tyson*, 275 F. Supp. 3d at 985 n.7 (emphasis in original). In other words, the conduct alleged in a PSLRA case need not be *more* plausibly conspiratorial than in an antitrust case, the PSLRA just requires Plaintiff to plead the basis for his information and belief.

In *Tyson*, the court explained with an example how the PSLRA's particularity requirement would apply to an alleged fact here:

> When the Court accepts as true the fact that Wayne Farms announced the closure of a plant and a layoff of 600 employees, it can credit as plausible Lead Plaintiffs' allegation that Wayne Farms cut production in 2008. Importantly, this is true even though the conclusion that Wayne Farms *actually* cut production still rests on information and belief. Lead Plaintiffs are not required to supply evidence proving the ultimate fact at this early stage of the proceedings; rather, "the allegations on information and belief," i.e., that Wayne Farms cut production, "should

> be accompanied by a statement of the grounds on which the pleader's belief rests," i.e., that it announced the closing of a plant and layoff of 600 workers.

Tyson, 275 F. Supp. 3d 985. Thus, where an antitrust complaint could merely allege that "Wayne Farms cut production in 2008," a securities complaint must allege the facts that form the basis of that belief: the announcement by Wayne Farms of a plant closure and layoff of 600 workers. Similarly, the PSLRA requires Plaintiff to explain the basis for his belief that the Georgia Dock pricing index was inaccurate and manipulated by poultry industry insiders: the statements of GDA director Arty Schronce. Here, Plaintiff supplied such information. App.Vol.I, at 173-75, 179-184 (describing "announced" production cuts, layoffs, etc.); 93-105 (explaining basis for Georgia Dock allegations). The District Court was required to accept those well-pled allegations as true. *In re Molycorp, Inc. Sec. Litig.*, 157 F. Supp. 3d 987, 1001 (D. Colo. 2016).

The District Court's erroneous interpretation of *Adams* that Plaintiff was required to plead additional collusive conduct, rather than specificity, irreparably poisoned his analysis of Plaintiff's antitrust allegations.

2. <u>The District Court Misapplied Antitrust Pleading Standards, Resulting in Conflicting Analysis with the Antitrust Court</u>

Assuming arguendo that Plaintiff was required to adequately plead underlying antitrust conduct, the proper pleading standard for such allegations would be whether

the alleged facts under antitrust, not securities, law plausibly met the legal elements of an antitrust violation.

As discussed in *Gamm v. Sanderson Farms, Inc.*, 944 F.3d 455, 465 (2d Cir. 2019), another securities case with misrepresentations involving poultry industry collusion, the PSLRA merely "require[s] appellants to have alleged the basic elements of an underlying antitrust conspiracy…." (citation omitted).[3] *See also Speakes v. Taro Pharm. Indus.*, No. 16-cv-8318, 2018 U.S. Dist. LEXIS 163281, at *12 (S.D.N.Y. Sept. 24, 2018) (explaining that "a securities fraud action based upon the nondisclosure of uncharged illegal conduct" need only "plausibly articulate 'that the underlying conduct occurred.'") (citation omitted). Thus, a securities complaint that pleads sufficient facts to state a claim under antitrust law would adequately plead the underlying antitrust conduct.

To state a claim under § 1 of the Sherman Antitrust Act, a complaint must present "enough factual matter (taken as true) to suggest that an agreement was made…[and] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. at 556. "An agreement, however, need not

[3] Unlike here, however, the complaint in *Gamm* contained "virtually no explanation as to how th[e] collusive conduct occurred, and whether and how it affected trade." *Gamm*, 944 F.3d at 465. Indeed, in comparison to the FAC's forty-five paragraphs of coordinated conduct, plaintiff's complaint in *Gamm* contained just a single paragraph alleging such collusion. App.Vol.IV, at 1024; *see also* App.Vol.V, at 1217.

be in writing or be explicit, and may be established by either direct or circumstantial evidence." *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1073 (D. Colo. 2016). Indeed, "because direct evidence of concreted action is 'so rare,' the antitrust law has 'granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances.'" *Id.* at 1072.

First, without citing any legal authority, the District Court erroneously held that the "disparate effects" of the alleged various supply-reducing actions – allegations the District Court acknowledged were "particularized" – could "not represent a parallel course of conduct" as a matter of law. App.Vol.IV, at 1008-09. Yet, that same position that the "alleged production cuts are too varied in methods and amounts," was roundly rejected by the Antitrust Court, which explained that courts across the country "have not required such uniformity to allege parallel conduct." *In re Broiler Chicken Antitrust Litig.,* 290 F. Supp. 3d 772, 791-92 (N.D. Ill. 2017) (citing cases). The Antitrust Court reasoned that "[i]t is more than plausible that conspirators would leave the precise means of cutting production up to each conspirator, where multiple options would accomplish the intended goal. Permitting flexibility, where possible, in the means of effectuating price increases, would enable a greater number of producers to participate in the conspiracy, and might help to conceal the collusive nature of their conduct." *Id*. at 792 (citing *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F. 3d 412, 428 (4th Cir. 2015)).

Similarly, where the District Court agreed with the Defendants' argument (again, without citing caselaw), that "it is facially implausible to assert an antitrust claim based on an allegation that a producer give up 10% of its sales, while its rivals gave up only 1%," App.Vol.IV, at 1009, the Antitrust Court rejected this exact same argument once again. The Antitrust Court explained that "[c]ertainly, companies with a larger market share have more room to cut[,] [a]nd if the resulting price increase is large enough, convincing smaller companies to cut production, even in smaller amounts, could still benefit the bottom line of the larger companies, despite a potentially greater loss of market share." *In re Broiler*, 290 F. Supp. 3d at 795 (citing *United States v. Foley*, 598 F.2d 1323, 1333-34 (4th Cir. 1979)).

Second, the District Court erroneously concluded that the FAC failed to allege facts that provide circumstantial support, or "plus factors," for the existence of a conspiracy. App.Vol.IV, at 1011-12. For example, the District Court held that "defendants' membership in trade associations and social interactions with other industry members is insufficient 'without significantly more in a Rule 10b-5 case' to establish the existence of a conspiracy." App.Vol.IV, at 1012 (citing *Tyson*, 275 F. Supp. 3d at 995).[4] Putting aside that the PSLRA does not require Plaintiff to plead

[4] The court's rationale in *Tyson*, the only authority cited by the District Court, relied heavily on Tyson's "buy-versus-grow" strategy that the *Tyson* court found undercut the company's motive to keep prices high. 275 F. Supp. 3d at 993. As the District Court acknowledged, this did not apply to Pilgrim, but nevertheless, the *Tyson* court

additional *conduct* beyond what is required in an antitrust action, the Antitrust Court yet again rejected the District Court's legal basis on this score. Specifically, the Antitrust Court concluded, after a lengthy legal analysis, that attendance at industry or trade association meetings (especially given the "suspicious timing" of the meetings before alleged production cuts), the companies' public statements calling for production cuts, and "unusual" use of Agri Stats as a means of communication and monitoring provide circumstantial support to "plausibly infer formation and communication" of a conspiracy. *In re Broiler*, 290 F. Supp. 3d at 787-88, 797-802.

Because, as the District Court recognized, Plaintiff's FAC alleged at least as many facts (indeed, many more, especially as pertaining to Pilgrim) supporting parallel conduct and circumstantial evidence of a conspiracy as plaintiffs in the antitrust action,[5] and the Antitrust Court held the antitrust plaintiffs plausibly alleged Sherman Act violations against Pilgrim and others, Plaintiff here too plausibly alleged the underlying conduct sufficient to support his securities fraud claims.

D. Accepting Plaintiff's Allegations as True and Viewing Them in the Light Most Favorable to Plaintiff, the FAC Plausibly Alleged the Underlying Antitrust Misconduct

Lastly, in reaching the erroneous conclusion that Plaintiff failed to adequately plead parallel conduct and circumstantial evidence of a conspiracy, the District Court

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still missed the mark given that Tyson later admitted to the DOJ that it colluded with its competitors. App.Vol.IV, at 1012.

[5] *See* App.Vol.IV, at 1006, n.4.

erroneously ignored numerous allegations in the FAC and viewed others in the light most favorable to Defendants.

First, the District Court mischaracterized the allegations of the FAC and improperly drew inferences in Defendants' favor to reach the erroneous conclusion that Plaintiff failed to plead parallel conduct. For example, the District Court erroneously concluded that the FAC "lacks facts about the means and amounts by which the alleged conspirators cut production or when those particular cuts occurred," App.Vol.IV, at 1007, when the FAC specifically lays out those detailed facts. *See* App.Vol.I, at 173-76, 179-184 (discussing dates, means and amounts of production cuts). Similarly, while the District Court found that Plaintiff did not explain "what impact such reductions had on broiler production levels," App.Vol.IV, at 1008, the FAC specifically describes those impacts, complete with charts depicting the changes in Broiler breeder flocks at the relevant times. *See* App.Vol.I, at 176-78, 184-85.

The District Court similarly mischaracterized Plaintiff's allegations regarding Agri Stats and the Georgia Dock, and improperly drew all inferences in Defendants' favor. With regard to Agri Stats, Plaintiff alleges that the information sharing service was a means of communication that facilitated the conspiracy because poultry companies used the propriety information contained therein to "monitor and discipline competitors' supply restraining conduct." App.Vol.I, at 78-87. Seizing on

a single allegation where Plaintiff noted that a former Agri Stats employee "may have even taken the master list [of company identification numbers] with him over to Pilgrim," the District Court characterized all Plaintiff's Agri Stats allegations as hypothetical, and improperly credited Defendants' inference (over Plaintiff's) that, while poultry companies had the ability to identify their competitors and facilities from the detailed data in the reports, they did not.[6] App.Vol.IV, at 1009-10. Similarly, with regard to the Georgia Dock, while readily acknowledging that the FAC is "replete with allegations about the index's inaccuracy and lack of verification," the District Court nonetheless found that Plaintiff did not sufficiently plead that Pilgrim's "conduct was in parallel to that of its co-conspirators." *Id*. But, among other things, the FAC alleges, based on an internal report of the GDA director and other documents, that the manipulation of the Georgia Dock was steered through its poultry company-led Advisory Committee, which Pilgrim (and specifically, Jayson Penn) was a member. App.Vol.I, at 96-100.

Second, the District Court ignored allegations and drew inferences in Defendants' favor in holding that Plaintiff did "not provid[e] circumstantial evidence of a conscious commitment to a common unlawful scheme." App.Vol.IV, at 1010. For example, one of the "plus factors" that the Antitrust Court found most important

[6] The District Court also ignored the allegations that Agri Stats employees revealed the identities of competitors in the reports directly to the companies when asked. ¶¶64-65.

– allegations of "unusual public statements" regarding intent to cut production and anticipating production cuts from other companies – is thoroughly alleged in the FAC, yet ignored in the District Court's opinion. *In re Broiler*, 290 F. Supp. 3d at 788, 799. Furthermore, the District Court only credited Defendants' inference that production cuts following Pilgrim's bankruptcy were "made in an effort to avert [its financial] crisis rather than to comply with a price-fixing conspiracy." App.Vol.IV, at 1011. The Antitrust Court, however, acknowledged plaintiffs' alternative inference that "producers facing such economic conditions have an even greater incentive to conspire to fix prices." *In re Broiler*, 290 F. Supp. 3d at 802. Accordingly, the Antitrust Court held, as the District Court here should have, that "[b]y asking the Court to choose its innocent explanations over Plaintiffs' claims, Defendants are asking the Court to undertake a weighing of evidence that is not appropriate at the pleading stage, and must be rejected." *Id.*

Because the FAC plausibly alleged materially misleading statements and omissions, and plausibly alleged underlying antitrust conduct, the District Court erred in dismissing the FAC.

II. THE DISTRICT COURT ERRED IN DISMISSING THE SAC ON REPOSE GROUNDS

Plaintiff's SAC, filed pursuant to the District Court's order granting leave to amend with no deadline, and which added only factual detail, not new claims or parties, did not implicate the Exchange Act's five-year statute of repose, much less

violate it. Each aspect of the District Court's repose holding – that (a) the SAC brought a new action; (b) the repose period runs from the time of each misrepresentation, or conversely, from the time of Plaintiff's stock purchases; and (c) relation back under Rule 15 does not apply and violates the Rules Enabling Act – constitutes reversible error.

A. The District Court Erred by Applying the Exchange Act's Statute of Repose to the SAC, Because Repose Only Applies to Actions "Brought" Outside the Repose Period

Because Plaintiff amended his complaint with additional facts, not new claims, in an existing case, the filing of the SAC does not implicate repose. The Exchange Act's statute of repose reads as follows:

> [A] private ***right of action*** that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws… may ***be brought*** not later than the earlier of…5 years after such violation.

28 U.S.C. § 1658. By its plain language, the statute only bars new "actions" that are "brought" after five years, not amendments. The Supreme Court has interpreted the language of the statute the same way, noting that "[t]he term 'action['] refers to a judicial 'proceeding,' or perhaps to a 'suit'…." *Cal. Pub. Emps' Ret. Sys. v. ANZ Sec., Inc.,* 137 S. Ct. 2042, 2049 (2017).

Thus, whether the SAC was filed in the same "action" as the timely filed FAC[7] is a threshold question to whether the filing of the SAC implicates the statute of repose. As the District Court acknowledged, "a dismissal without prejudice is not a final decision," under Tenth Circuit Law. App.Vol.VIII, at 1876; *see also Amazon, Inc. v. Dirt Camp, Inc.*, 273 F.3d 1271, 1275 (10th Cir. 2001). Accordingly, whether the action is still live for repose purposes after a dismissal order depends on "whether the district court's order evidences an intent to extinguish the plaintiff's cause of action." *Moya v. Schollenbarger*, 465 F.3d 444, 450 (10th Cir. 2006). If "the dismissal order expressly grants the plaintiff leave to amend, that conclusively shows that the district court intended only to dismiss the complaint," not the "entire action," and that the dismissal is "not a final decision." *Id.* at 451. This is the case regardless of whether the clerk enters a final judgment. *See Bramhall v. Salt Lake DA's Off.*, 804 F. App'x 935, 937 (10th Cir. 2020). Because the District Court granted Plaintiff leave to amend, the District Court did not dismiss Plaintiff's lawsuit. As a result, the SAC was filed in the same timely brought action.

The District Court erroneously relied on *Brown v. Hartshorne Pub. Sch. Dist.* and *Black's Law Dictionary*'s definition of "a dismissal without prejudice," for treating its order as the end of Plaintiff's lawsuit, such that the SAC brought a new

[7] Because the FAC brought new causes of action under Rule 10b-5(a) and (c), the relevant date for purposes of when the "action" was "brought" is the date of filing the FAC.

action, inappropriately "tolling" the statute of repose. App.Vol.VIII, at 1876-77. The *Brown* case, however, dealt with a *voluntary* dismissal, and the court there recognized that a complaint filed after a voluntary dismissal constitutes a newly brought action. 926 F.2d at 961 ("It is hornbook law that, as a general rule, a *voluntary* dismissal without prejudice leaves the parties as though the action had never been brought.") (emphasis added). Consequently, the District Court's worry that plaintiffs could game the repose statute by "fil[ing] a case, have it dismissed without prejudice, and then file an amended complaint at any time irrespective of any repose period," was rooted in error, because such a voluntary dismissal would have erased the existence of the lawsuit, and therefore *would* have repose implications. *See* App.Vol.VIII, at 1878. Moreover, when courts grant leave to amend following 12(b)(6) dismissals, they can (and typically do) prevent the scenario contemplated by District Court by simply placing a deadline on the amended pleading, after which if plaintiff fails to amend, the court dismisses with prejudice.

Second, the language of the *Black's Law Dictionary* definition cited by the District Court does not address the critical distinction under Tenth Circuit law of whether a court intends to dismiss the action or just the complaint. The definition – "[a] dismissal that does not bar the plaintiff from refiling the lawsuit within the limitations period" – simply addresses the former situation, when a "lawsuit" is

dismissed and refiled. App.Vol.VIII, at 1876 (quoting DISMISSAL, Black's Law Dictionary (11th ed. 2019). Here, because the District Court granted leave to amend, the dismissal order was not final and kept the action open, such that Plaintiff's SAC was filed in the same action brought in 2016, indisputably within the repose period.

Because filing an amended complaint that adds no new parties or claims in an open case does not "bring" a new "action," the filing of the SAC did not implicate repose.

B. The District Court Erred by Miscalculating the Repose Period

1. The Proper Repose Trigger for 10b-5(b) Claims is the Last Alleged Misstatement or Omission

Even if Exchange Act's repose period applies to the SAC, the District Court nonetheless erred, because Plaintiff timely filed the SAC's 10b-5(b) claims under controlling law. The Supreme Court has made crystal clear that "statutes of repose begin to run on the *last* culpable act or omission of the defendant." *ANZ*, 137 S. Ct. at 2049 (emphasis added). Because the last alleged misrepresentation or omission took place on October 27, 2016, the SAC, filed on June 8, 2020, timely brought claims before the expiration of the five-year repose period. *See* SAC at 263-69.

In the Second Dismissal Order, the District Court erroneously held, contrary to controlling law, "that *each* alleged misrepresentation independently triggers the five-year statute of repose." App.Vol.VIII, at 1878. The District Court reasoned that calculating the repose period from the last alleged misrepresentation or omission

"urges this court to find that the continuing fraud exception applies," which would improperly "toll the repose period." *Id.* The District Court then inconsistently explained in its Reconsideration Order that the repose period was calculated five years from "Mr. Fuller's purchases of Pilgrim stock in January and February 2015." App.Vol.VIII, at 1932. Neither of these conflicting rationales square with the direction from the Supreme Court to look to the "*last*" action of the *defendant*, which contemplates a series of misrepresentations or omissions. Had the Supreme Court meant to run repose from "each" act of the defendants, it would have used the word "each" rather than "last."

None of the cases cited by the District Court address this issue in the context of current controlling law. The court in neither *Wu v. Colo. Reg'l Ctr. Project Solaris LLLP*, No. 19-cv-2443, 2021 U.S. Dist. LEXIS 38484, at *28-29 (D. Colo. Mar. 2, 2021) nor *Althaus v. Broderick*, No. 1:15-CV-164, 2016 U.S. Dist. LEXIS 96243, at *5 (D. Utah July 22, 2016), discusses what constituted defendants' "last culpable act," for purposes of calculating the statute of repose. *Id.* at *28-29. These cases, as well as the District Court here, relied heavily on *Carlucci v. Han*, 886 F. Supp. 2d 497 (E.D. Va. 2012) for the premise that repose is not subject to "any continuing fraud exception," but *Carlucci* notably predates the Supreme Court's

rulings in *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014) and *ANZ,* which establish that repose runs from defendants' "last culpable act."[8]

In contrast, the court in *Equity Tr. Co. v. Kopacka*, No. 17-12275, 2018 U.S. Dist. LEXIS 130259 (E.D. Mich. Aug. 3, 2018), citing cases from around the country (including *Waldburger*), directly rejected the District Court's calculation of repose. There, defendants took the District Court's position that the repose period runs from each misrepresentation preceding a purchase or sale of securities. *Id*. at *8. Plaintiffs, citing numerous cases, argued that the repose period runs from the date of the last fraudulent misrepresentation. *Id*. at *12. The court found plaintiffs' position, "generally supported throughout the First, Second, and Third Circuits," was "more persuasive," and held that "the statute of repose to run from the date of Kopacka's last fraudulent misrepresentation. *Id*. at *12-13 (citing cases). Plaintiff's position is now endorsed within the Ninth Circuit, as well. *See Goldberg v. Rome McGuigan P.C.*, No. CV-20-9958, 2021 U.S. Dist. LEXIS 80984, at *19 (C.D. Cal. Mar. 4, 2021) ("[T]he Court concludes that the Rome Defendants' last alleged misrepresentation occurred in November 2014" which "constitutes the Rome Defendants' last culpable act or omission alleged in the Complaint.").

[8] *Wolfe v. Bellos*, No. 3:11-CV-2015, 2012 U.S. Dist. LEXIS 26452 (N.D. Tex. Feb. 28, 2012), cited by the District Court and relied upon by the court in *Carlucci*, also predated *Waldburger* and *ANZ.*

2. The Proper Repose Trigger for 10b-5(a) and (c) Claims is When Defendants Stopped Their Fraudulent Scheme

With respect to Plaintiff's scheme liability claims, the District Court similarly erred in holding "that the statute of repose began to run on the date Mr. Fuller purchased his stock because the scheme claim as alleged in this case was, in reality, a concealment claim." App.Vol.VIII, at 1935. As mentioned above, the Supreme Court has plainly established that repose runs from the conduct of the *defendant*, not the plaintiff. *ANZ*, 137 S. Ct. at 2049. As discussed in *Waldburger*, "[s]tatutes of *limitations* are designed to promote justice by encouraging plaintiffs to pursue claims diligently and begin to run when a claim accrues." 573 U.S. at 2 (emphasis added). "A statute of repose, on the other hand, puts an outer limit on the right to bring a civil action. That limit is measured not from the date on which the claim accrues but instead from the date of the last culpable act or omission of the defendant." *Id*. at 8.

Because scheme liability claims involve a "course of business" or "practice," 17 C.F.R. §240.10b-5(a) and (c), and that the alleged scheme here involved Defendants' manipulation Pilgrim's stock price through their manipulation of chicken prices, the proper trigger for starting the repose clock is Defendants' last culpable act in furtherance of their scheme. Here, that course of business continued, at the very least, until the market learned truth of defendants' conduct at the end of the Class Period. However, because Pilgrim pled guilty to collusion and price-fixing

"continuing through at least early 2017," the trigger for repose may begin even later. App.Vol.VIII, at 1841. Plaintiff's position is not "arbitrary," as the District Court held (App.Vol.VIII, at 1936)[9]; it closely adheres to controlling Supreme Court law.

Accordingly, Plaintiff's Rule 10b-5(a), (b) and (c) claims were still timely even if repose applied.

C. The District Court Erred in Holding that the SAC Does Not Relate-Back Under Rule 15

Even if the District Court did not err in applying repose to the SAC, and even if the District Court did not err in calculating the repose period from each misrepresentation or Plaintiff's purchases, the District Court still committed reversible error by failing to apply the relation back doctrine on the basis that it violated the Rules Enabling Act.

Courts in this Circuit and others have long-recognized the "liberal" approach to amending under Rule 15. *See Vigil v. Tweed*, No. 18-829, 2020 U.S. Dist. LEXIS 104866, at *13 (D.N.M. June 16, 2020); *Arthur v. Maersk, Inc.*, 434 F.3d 196, 202 (3d Cir. 2006) ("Federal Rule of Civil Procedure 15 embodies a liberal approach to

[9] The District Court's reliance on *In re Teva Secs. Litig.*, No. 3:17-cv-558, 2021 U.S. Dist. LEXIS 60195, at *12 (D. Conn. Mar. 30, 2021) is misplaced. Unlike here, the *Teva* plaintiffs "[n]ever 'mention[ed] Rule 10b-5(a) and (c) or 'scheme liability,'" the court emphasized that "courts 'rightly insist that a plaintiff who intends to bring a Rule 10b-5 claim based on both misstatement and scheme liability must do so clearly and specifically,' and that 'such plaintiffs routinely proceed by alleging Rule 10b-5 claims in two separately counts.'" *Id.*, at *14. The SAC does just that (and mentions the word "scheme" 119 times). ¶¶393-403.

pleading."). Under Rule 15(c), an amended pleading "relates back to the date" of an earlier pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). "Though a potential defendant has a 'strong interest in repose,' repose should not be a 'windfall' for a defendant who possesses sufficient notice of impending claims." *McClelland v. Deluxe Fin. Servs.*, 431 F. App'x. 718, 724 (10th Cir. 2011) (quoting *Krupski v. Costa Crociere S. p.A.*, 130 S. Ct. 2485, 2494 (2010)). Accordingly, relation back serves the clear "preference expressed in the Federal Rules of Civil Procedure in general, and Rule 15 in particular, for resolving disputes on their merits." *Krupski*, 130 S. Ct. at 2494.

The District Court, relying on inapposite cases, erroneously held that applying relation back to the SAC would violate the Rules Enabling Act. That Act generally prohibits an interpretation of the Federal Rules of Procedure that would "abridge, enlarge[,] or modify any substantive right." 28 U.S.C. § 2072(b). But "the bar for finding an Enabling Act problem is a high one." *Shady Grove Orthopedic Assocs., P.A., v. Allstate Ins. Co.*, 559 U.S. 393, 432 (2010) (Stevens, J., concurring).[10]

[10] Courts of Appeal have consistently upheld the Federal Rules of Procedure against Rules Enabling Act challenges, explaining that "'[t]he Federal Rules are presumptively valid,' and 'the Supreme Court has rejected every challenge to the Federal Rules that it has considered under the Rules Enabling Act.'" *Nessel ex rel. Mich. v. Amerigas Partners, L.P.*, 954 F.3d 831, 840 (6th Cir. 2020) (citations omitted); *see also Stender v. Archstone-Smith Operating Tr.*, 958 F.3d 938 (10th Cir. 2020).

Despite that high bar, the District Court held that "because a statute of repose creates a substantive right in defendants' freedom from liability, Rule 15(c) cannot be interpreted in a way to expand or abridge that right." App.Vol.VIII, at 1881.

In *SEPTA v. Orrstown Fin. Servs.*, the Third Circuit became the first Circuit Court to address this precise issue, and rejected the reasoning of the District Court. 12 F.4th 337, 350-52. The Third Circuit held that because, like here, the amended pleading in *SEPTA* "reasserts no more than the same claims, against the same parties, as the timely filed First Amended Complaint….the Rules Enabling Act's protections for substantive rights do not apply here." *Id*. at 351. Also like here, plaintiffs' "*action* had not ended," under applicable Federal Rules. "Because statutes of repose create a deadline for *filing* actions, rather than *resolving* them…. a defendant does not have a vested right for repose as against a plaintiff who sues before the deadline as long as the plaintiff's action is pending when the deadline expires." *Id*. (emphasis in original).

The *SEPTA* court also explained – just as Plaintiffs did in their motion for reconsideration – that the cases relied upon by the District Court were situations where plaintiff amended with *new* causes of action or *new* parties. *Id*. at 352; ECF 76 at 8 (distinguishing, for example, *De Vito v. Liquid Holdings Grp., Inc.*, No. 15-6969, 2018 U.S. Dist. LEXIS 217963 (D.N.J. Dec. 31, 2018) (adding new plaintiff to cure standing problems), *First Horizon Asset Secs. Inc.*, 291 F. Supp. 3d 364, 371-

72 (S.D.N.Y. 2018) (adding new causes of action under different statutes)). Consistent with *SEPTA*, courts have permitted relation back of a post-repose amended complaint that simply adds additional factual detail. *See In re Direxion Shares ETF Tr.*, No. 09-cv-8011, 2012 U.S. Dist. LEXIS 29709, at *17-20 (S.D.N.Y. Mar. 6, 2012), and *United States ex rel. Carter v. Halliburton Co.,* 315 F.R.D. 56, 64-65 (E.D. Va. 2016). Indeed, Moore Federal Practice Manual endorses this approach. *See* 3 Moore's Federal Practice § 15.19 (2021) (noting that "[t]here is nothing in the language of the Rule allowing relation back when a statute of limitations is involved and barring it when a statute of repose is involved," and that barring "an amendment only adding specificity to a complaint…serves no one involved in the litigation.").

Finally, the District Court's approach to relation back creates procedural problems for all types of actions, not just securities cases. As the Third Circuit explained in *SEPTA*, a rule barring relation back in all circumstances after the expiration of the repose period "would present enormous practical difficulties," because "[i]t would mean that a plaintiff could not make any changes—no matter how small—to its complaint after expiration of the repose period." *Id*. at 346. And as Moore's Practice Manual points out, such "a strict rule forbidding relation back

could lead to anomalous results."[11] Coincidentally, the "anomalous" situation Plaintiff raised to the District Court on reconsideration – that the repose period could expire during the statutorily mandated lead plaintiff selection process, preventing the appointed lead plaintiff from amending (*see* App.VIII, at 1897 n.12) – recently occurred in *In re LexinFintech Holdings Ltd. Sec. Litig.,* 3:20-cv-1562, 2021 U.S. Dist. LEXIS 226732, at *51-55 (D. Or. Nov. 24, 2021), and the court, over defendants' objection, applied relation-back to the amended complaint.

Accordingly, to avoid a Circuit split and the practical difficulties that would result, this Court should respectfully reverse the District Court's opinion that a statute of repose bars relation back in these and any other circumstances.

III. THE DISTRICT COURT ERRED BY DISMISSING PLAINTIFF'S SCHEME LIABILITY CLAIMS WHEN DEFENDANTS FAILED TO MOVE AGAINST THOSE CLAIMS

In both the FAC and the SAC, Plaintiff clearly pled claims under Rule 10b-5(a) and (c), commonly referred to as "scheme liability claims," in addition to claims arising under Rule 10b-5(b). App.Vol.I, at 194-95; App.Vol.VI, at 1466-68. Because Defendants never moved to dismiss these scheme liability claims, and also because

[11] Take, for example, a situation where a district court dismisses a case with prejudice but erroneously denies leave to amend. If the repose period expires during plaintiffs' successful appeal, even if the appellate court vacates the district court's erroneous order, plaintiffs could still not amend.

these claims could not have the repose period outlined by the District Court, these claims were erroneously dismissed.

Rule 10b-5 states as follows:

> It shall be unlawful for any person … (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. §240.10b-5. In *Affiliated Ute Citizens v. United States*, the Supreme Court recognized Rule 10b-5(a) and (c) claims do not require an alleged misstatement: "To be sure, the second subparagraph of the rule specifies the making of an untrue statement of a material fact… The first and third subparagraphs are not so restricted." 406 U.S. 128, 152-53 (1972). The District Court recognized this distinction. App.Vol.VIII, at 1934 ("Generally speaking, 'scheme liability' claims under Rule 10b-5(a) or (c) are distinct from Rule 10b-5(b) claims….").

In moving for reconsideration of the District Court's second dismissal Order, Plaintiff noted that Defendants never moved to dismiss Plaintiff's scheme liability claims, which could not have the same repose period articulated by the District Court, because scheme liability claims are not predicated on misstatements. App.Vol.VIII, at 1891. Denying Plaintiff's motion for reconsideration, the District Court erroneously sided with Defendants, holding that the claims "were

substantively the same," and that "Plaintiff could and should have argued at the time that a 'scheme claim' is governed by a different statute of repose." App.Vol.VIII, at 1934-35. To affirm the District Court in this regard would create yet another Circuit split, as the Ninth Circuit recently overturned a district court's dismissal of scheme liability claims under nearly identical circumstances.

In *Alphabet Sec. Litig., R.I. v. Alphabet, Inc.*, plaintiff "argue[d] on appeal that the district court erred in dismissing its claims under Rule 10b-5(a) and (c) (referred to in the complaint as a 'scheme liability claim') when it dismissed the complaint in its entirety without addressing those claims." 1 F.4th 687, 709 (9th Cir. 2021). There, defendants argued, just like the District Court held here, "that [plaintiff] waived these claims because it failed to raise them to the district court in opposition to Alphabet's motion to dismiss" and "that the complaint's claims under 10b-5(a) and (c) are duplicative of the claims under Rule 10b5-(b) seeking to hold the defendants liable for misleading statements." *Id*. The Ninth Circuit rejected both these arguments.

First, the Ninth Circuit held that because, like here, "Alphabet's motion to dismiss did not ***target*** [plaintiff's] Rule 10b-5(a) and (c) claims, [plaintiff] did not waive those claims by failing to address them in opposition to the motion to dismiss," and "[a] party's failure to oppose an argument that was not made does not constitute a waiver." *Id*. (emphasis added). There is no question Defendants failed to target

these claims, as even the District Court acknowledged that "Defendants' motion to dismiss did not single out any of plaintiff's three claims." App.Vol.VIII, at 1934. Tenth Circuit law supports this basic concept of fairness in not requiring that parties to defend against arguments the other side has not made. *See Cahill v. Am. Family Mut. Ins. Co.*, 610 F.3d 1235, 1238-39 (10th Cir. 2010) ("[W]e must not be unfair to the opposing party, who should not be required to guess at what issues are being raised and must be addressed or, alternatively, to devote its brief to every argument that is possibly being raised.").

Second, the Ninth Circuit rejected the argument that the discussion of misstatements in plaintiffs' scheme liability claims makes them duplicative of the Rule 10b-5(b) claims, explaining that argument is "foreclosed" by the Supreme Court's holding in *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019). *Id*. at *46. The Ninth Circuit correctly noted that *Lorenzo* rejected the premise that scheme liability claims "are violated only when conduct other than misstatements is involved," as "*Lorenzo* explained that 'considerable overlap' exists among the subsections of Rule 10b-5 and held that disseminating false statements 'ran afoul of subsections (a) and (c).'" *Id*. (quoting *Lorenzo*, 139 S. Ct. at 1101-02. Thus, the District Court's holding here that the "crux" of Plaintiff's 10b-5(a) and (c) claims relate to misstatements, not scheme liability, is likewise foreclosed by *Lorenzo*. App.Vol.VIII, at 1934.

Because Defendants improperly "lump[ed] plaintiff's fraudulent scheme claims together with their fraudulent misstatement claims," *In re Glob. Crossing, Ltd. Sec. Litig.*, 322 F. Supp. 2d 319, 336 (S.D.N.Y. 2004), "the district court erred in sua sponte dismissing [plaintiff's] claims under Rule 10b-5(a) and (c) when [defendant] had not targeted those claims in its motion to dismiss…." *Alphabet*, 1 F.4th at 709.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the District Courts' Opinions and Judgment be reversed, and this matter be remanded for further proceedings.

DATED: February 23, 2022

Respectfully submitted,

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ORAL ARGUMENT STATEMENT

Plaintiff-Appellant requests oral argument because it will likely assist the Court in this complex securities class action with nuanced issues of law and fact.

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CERTIFICATE OF COMPLIANCE

This brief complies with Fed. R. App. P. 32(a)(7)(B), which requires that the principal brief contain no more than 13,000 words, because it contains 12,985 words, exclusive of the sections that do not count towards the limitation pursuant to 10th Cir. R. 32(B). This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font.

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