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; WILLIAM W. LOVETTE, individually; FABIO SANDRI, individually,
Defendants - Appellees.

GEORGE JAMES FULLER,
Movant - Appellant.

On Appeal from the United States District Court for the District of Colorado, No. 1:16-cv-02611-RBJ, Honorable R. Brooke Jackson, Presiding

BRIEF OF APPELLEES

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Defendant–Appellee Pilgrim's Pride Corporation submits this corporate disclosure statement pursuant to Federal Rule of Appellate Procedure 26.1(a). JBS S.A., through its indirect wholly-owned subsidiaries, beneficially owns more than 10% of the common stock of Pilgrim's Pride Corporation.

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY

Term	Definition
Br.	Opening Brief of Plaintiff–Appellant, filed February 23, 2022
Class Period	The putative class period of February 21, 2014, to November 17, 2016, as alleged in the First Amended Complaint and the Second Amended Complaint
Defendants	Defendants–Appellees Pilgrim's Pride Corporation, William W. Lovette, and Fabio Sandri
FAC	First Amended Complaint
Plaintiff	Lead Plaintiff–Appellant George James Fuller
PPC	Pilgrim's Pride Corporation
PSLRA	Private Securities Litigation Reform Act of 1995
SAC	Second Amended Complaint

PRELIMINARY STATEMENT

For almost five years, across two distinct complaints and four district court opinions, Plaintiff has endeavored to cobble together a cognizable claim for securities fraud by copying from various civil and criminal proceedings involving an alleged antitrust conspiracy in the broiler chicken industry. With almost every filing, Plaintiff's theory of the case has shifted, but one thing has remained constant: Time after time, the trial court found his claims insufficient, untimely, or both.

In his First Amended Complaint ("FAC"), Plaintiff alleged that Pilgrim's Pride Corporation ("PPC") made statements regarding its financial results and competition with other producers that were false or misleading because of its alleged participation in a conspiracy to fix broiler chicken prices. Plaintiff lifted allegations from a private antitrust complaint filed in the Northern District of Illinois and claimed that those allegations, held sufficient under Rule 8, also were sufficient to support securities fraud claims against PPC and its senior officers. The District Court saw this for what it was—an impermissible attempt to piggyback on mere allegations from the antitrust case—and held that Plaintiff's securities fraud claims failed to meet the more exacting standards for

pleading falsity imposed by the Private Securities Litigation Reform Act ("PSLRA") and Rule 9(b). In his brief, Plaintiff pays lip service to the requirements that his allegations be pleaded with particularity, but then repeatedly—and erroneously—insists that a decision from another court holding antitrust allegations sufficient to state a Sherman Act claim under Rule 8(a) automatically renders those allegations sufficient under Rule 9(b) and the PSLRA. Plaintiff cannot simply ride the coattails of the antitrust plaintiffs in another action to state a securities claim.

The District Court correctly dismissed the FAC in its entirety, but subsequently granted Plaintiff leave to amend if he could offer "new facts that [were] materially different tha[n] those that the Court has already found to be insufficient." App.Vol.V at 1294.[1] Inexplicably, after having his case fully disposed of by the District Court, Plaintiff waited approximately nineteen months—576 days—to file his Second Amended Complaint ("SAC"). This inaction bore consequences: by the time he filed the SAC in June 2020, the majority of his Section 10(b) claims were time-barred under the Securities Exchange Act's unqualified five-year statute of repose, and he lacked standing to pursue the claims that remained. On appeal, Plaintiff

[1] Citations to "App.Vol.__ at __" refer to the Joint Appendix.

offers a slew of arguments as to why this Court should excuse his conscious decision to sit on the sidelines for nineteen months before bringing this action anew. None of them passes muster as each stands at odds with the fundamental purpose of the five-year repose period: protecting defendants from an indefinite threat of liability.

Finally, in a last-ditch effort to salvage his case after years of adverse rulings, Plaintiff claims that the District Court ignored his supposedly separate "scheme liability" claim when it dismissed the FAC and SAC in full. Of course, if Plaintiff *actually* believed that Defendants had overlooked an entirely separate basis for liability when they moved to dismiss, one would expect Plaintiff to have raised it with the District Court at the first opportunity—in his opposition briefing on Defendants' motion to dismiss the FAC *in its entirety*. Yet Plaintiff did not do so. Nor did Plaintiff raise this contention in his first motion for reconsideration or in his opposition to Defendants' motion to dismiss the SAC *in its entirety*. Rather, Plaintiff waited four years and raised the issue for the first time in his *second motion for reconsideration* in 2021. He now blames the District Court and Defendants for not stepping in to save his claim for him. This argument is a last-minute Hail Mary that does not warrant reversal.

The District Court's opinions should be affirmed.

STATEMENT OF THE ISSUES

I. Whether the District Court, in accordance with every other court that has considered a securities class action involving this particular alleged antitrust conspiracy, correctly held that the PSLRA's heightened pleading standard applied to Plaintiff's allegations of falsity, and that Plaintiff's allegations fell short of meeting that exacting standard.

II. Whether the District Court, after dismissing the First Amended Complaint in its entirety and thereby ending the original proceeding, correctly held that the Second Amended Complaint was barred by the statute of repose because Plaintiff waited 576 days to amend his complaint after receiving leave to do so.

III. Whether the District Court abused its discretion by rejecting Plaintiff's novel argument that he adequately alleged a free-standing "scheme liability" claim when Plaintiff never mentioned "scheme liability" in any of his briefs during the previous four years of litigation and raised the argument for the first time in his second motion for reconsideration.

STATEMENT OF THE CASE

A. Plaintiff Files the First Amended Complaint, Alleging an Antitrust Conspiracy Based on Production Cuts

Plaintiff filed the FAC in May 2017, bringing claims against PPC and two of its executives, then-CEO William Lovette and CFO Fabio Sandri. App.Vol.I at 53. In his first version of events, Plaintiff claimed that PPC, a broiler chicken producer, was involved in an antitrust conspiracy with its competitors to reduce the output of broiler chickens and maintain inflated prices, and thus, Defendants' public statements about PPC's financial results were false or misleading because they failed to disclose the company's involvement in this conspiracy. *Id.* at 57-58.

The FAC alleged that the broiler chicken industry was plagued by a "volatile 'boom and bust' pattern," such that when supply declined, prices would rise. *Id.* at 57, 68. The goal of the alleged antitrust conspiracy, according to Plaintiff, was to avoid the detrimental effects of this cycle by both suppressing output and increasing prices. *Id.* at 57. According to Plaintiff, PPC and other chicken producers carried out chicken "production cuts" in 2008-2009 and 2011-2012. *Id.* at 88. The production cuts allegedly "took a number of different forms," such as "breaking eggs," "[r]educing the size of broiler breeder flocks," closing chicken facilities, and "[e]xporting

hatching eggs or chicks" to other countries. *Id.* These steps purportedly caused "artificial stabilization" in a historically unpredictable industry. *Id.* at 89. Notably, Plaintiff did not allege any production cuts during the Class Period. *See id.* at 17, 88. In order to know when to implement these production cuts, PPC and other chicken producers allegedly used Agri Stats, a broiler chicken data service, to somehow "monitor their co-conspirators' conduct." *Id.* at 58-59. Plaintiff also claimed that "[p]articipants in the scheme … manipulat[ed] the Georgia Dock chicken pricing index," which supposedly impacted broiler chicken prices. *Id.* at 60. However, the FAC did not allege any particular instance in which *PPC* submitted false information to the Georgia Dock.

Plaintiff claimed that PPC's public statements during the Class Period were false or misleading because PPC "did not credit the industry supply collusion and price manipulation" as the "cause" of its success. *Id.* at 61. Plaintiff alleged that instead, PPC falsely attributed its performance to factors such as its diverse portfolio model and pricing strategy, and claimed that the chicken industry was highly competitive. *Id.* at 61, 109. Plaintiff attempted to support his claims by lifting allegations from a private antitrust class action brought in the Northern District of Illinois. *Id.* at 62-

63.[2] He cryptically asserted that the mere *allegations* in the *Broiler Chicken* complaint provided "strong support" for his claim that Defendants' public statements were false or misleading. *Id.* at 78.

The FAC contained three causes of action. The first broadly asserted that Defendants violated Section 10(b) of the Exchange Act and Rule 10b-5 by "disseminat[ing] or approv[ing] … statements … which they knew or recklessly disregarded were materially false and misleading" because they were "engaged in a price-fixing scheme while failing to disclose it." *Id.* at 107, 194. The second claim alleged that Defendants violated Section 10(b) and Rule 10b-5(a) and (c) by making "untrue statements of material facts or omitt[ing] to state material facts necessary in order to make the statements … not misleading." *Id.* at 195-96. In other words, all of Plaintiff's Section 10(b) claims were, according to Plaintiff himself, premised on the same conduct—making false statements. Finally, Plaintiff brought a control person claim under Section 20(a). *Id.* at 196.

[2] *Maplevale Farms, Inc v. Koch Foods, Inc.*, No. 1:16-cv-08637 (N.D. Ill. Sept. 2, 2016) ("*Broiler Chicken*").

B. The District Court Rules that Plaintiff Failed to Plead Falsity with Particularity

Defendants moved to dismiss the FAC "in its entirety with prejudice," arguing that the FAC failed to adequately allege that PPC's statements were false or misleading because it did not plead the existence of an underlying antitrust conspiracy with the requisite particularly. *Id.* at 201. Defendants also argued that the FAC failed to plead scienter and loss causation with particularity. *Id.* at 201-02. Plaintiff opposed the motion and made no distinction between his two causes of action under Section 10(b), thereby conceding that both were grounded in Defendants' alleged misstatements (consistent with the FAC). App.Vol.III at 751-70.

On March 14, 2018, the District Court granted Defendants' motion to dismiss all of Plaintiff's claims, holding that Plaintiff had failed to plead the falsity element of a Section 10(b) claim with the particularity required by the PSLRA and Rule 9(b). App.Vol.IV at 995-1013. The Court dismissed the complaint in its entirety, entered final judgment in Defendants' favor, awarded costs to Defendants, and "terminated" the case. App.Vol.I at 7; App.Vol.IV at 1014-15. Shortly thereafter, Plaintiff moved for reconsideration under Rule 59(e). App.Vol.IV at 1016. Once again, Plaintiff did not argue that Defendants had failed to move to dismiss his "scheme

liability" claim, much less raise arguments as to why that claim should proceed. *Id.* at 1019-28. The District Court denied this motion on November 9, 2018, holding that Plaintiff "simply rehash[ed] arguments that were previously raised" and rejected. App.Vol.V at 1292-93. The District Court nevertheless granted Plaintiff leave to amend. *Id.* at 1294.

C. Plaintiff Waits Nineteen Months to File the Second Amended Complaint Based on a Different Antitrust Theory

After the District Court granted leave to amend, Plaintiff took no action to preserve his claims. He did not contact the District Court seeking a schedule for amending his complaint. He did not ask Defendants for a stipulation preserving his right to file an amended complaint notwithstanding applicable time bars. Plaintiff did nothing, allowing 576 days to lapse before filing the SAC. App.Vol.I at 13. Plaintiff does not mention this nineteen-month gap in his brief. *See* Br. 43.

When he eventually filed the SAC on June 8, 2020, Plaintiff apparently did little but copy and paste additional allegations from other actions in a futile effort to cure the pleading deficiencies in the FAC. This included references to recent developments in the *Broiler Chicken* antitrust litigation and selected portions of a June 3, 2020 federal indictment against

four chicken industry executives, none of whom were defendants in this case. App.Vol.VI at 1314, 1454-59. The new allegations that Plaintiff borrowed from the other actions diverged from his initial theory of an antitrust conspiracy. Instead of focusing on claims that chicken producers reduced chicken output and passively monitored each other's prices, the new allegations piggybacked on the federal indictment's allegations of a "continuing network" of poultry producers that directly communicated with one another to rig bids for specific contracts with customers, including by "coordinating price submissions to a buyer's cooperative." *Id.* at 1454-59.

Once again, Plaintiff's first cause of action for violations of "Section 10(b)" and "Rule 10b-5" alleged that Defendants "disseminated or approved … statements … which they knew or recklessly disregarded were materially false and misleading" because they "failed to disclose" that they were "engaged in a price-fixing scheme." *Id.* at 1362, 1466.

The second claim in the SAC for violations of "Rule 10b-5(a) & (c)" "repeat[ed] and realleg[ed] each and every allegation contained" in all preceding paragraphs, making no effort to carve out this claim from Plaintiff's "first" Rule 10b-5 count. *Id.* at 1466-67. Moreover, Plaintiff repeated word-for-word the allegation in his first cause of action that

Defendants "disseminated or approved the false statements specified above, which they knew or recklessly disregarded were materially false and misleading." *Id.* at 1467. Leaving little doubt as to the centrality of the supposed misrepresentations to this claim, Plaintiff added paragraphs alleging that "Defendants made untrue statements of material facts" and had "actual knowledge of the misrepresentations and omissions." *Id.*

In sum, Plaintiff's two Section 10(b) causes of action were once again premised on the same conduct as one another.

D. The District Court Dismisses the Second Amended Complaint in Its Entirety

Defendants moved to dismiss the SAC "in its entirety with prejudice"—arguing that (1) most of Plaintiff' claims were barred by the statute of repose, (2) he lacked standing to pursue the claims that remained, and (3) his new cherry-picked allegations from other proceedings did not establish the elements of a Section 10(b) claim. App.Vol.VII at 1705-06, 1719. Plaintiff opposed the motion. *Id.* at 1744-58. In doing so, Plaintiff acknowledged that the Court "had correctly assessed that the crux of [his] complaint is that defendants made untrue or misleading public statements," without attributing any importance to the alleged "scheme" independent of the alleged misstatements. *Id.* at 1749 (citation omitted).

Indeed, the words "scheme liability" and "Rule 10b-5(a) & (c)" appear nowhere in his opposition brief. *See id.* at 1744-58. Rather, Plaintiff continued treating the "two" Section 10(b) counts identically.

Weeks after the motion was fully briefed, Plaintiff filed a letter attempting to supplement his allegations yet again with a superseding indictment in the federal prosecution, which added Lovette as a defendant. App.Vol.VIII at 1791. Then four months later, while the District Court was still considering the motion to dismiss, Plaintiff filed another letter noting that PPC had recently entered into a plea agreement with the federal government for "participating in a conspiracy to suppress and eliminate competition by rigging bids and fixing prices." *Id.* at 1836. Plaintiff did not seek leave to amend the SAC to reflect either of these developments.

The District Court granted Defendants' motion to dismiss, holding that Plaintiff's nineteen-month sojourn made most of his claims untimely under the Exchange Act's five-year statute of repose. *Id.* at 1875-82. Additionally, the Court held that all claims that were not time-barred were based on statements Defendants allegedly made after Plaintiff purchased his PPC shares, and he therefore did not rely on them and lacked standing

to bring claims based on them. *Id.* at 1882-85.[3] The trial court dismissed all of Plaintiff's claims and entered final judgment for the second time. *Id.* at 1886-87.

E. Plaintiff Tries to Re-litigate the Motion to Dismiss, Raising an Alternative Theory of Liability for the First Time in Four Years

Dissatisfied with the District Court's third ruling against him, Plaintiff again sought amended judgment under Rule 59(e) and tried to move the goalposts yet again. *Id.* at 1888. For the first time, Plaintiff distinguished between the two Section 10(b) counts in his complaint. *Id.* at 1891. Ignoring Defendants' clear statement that they moved to dismiss the SAC "in its entirety," Plaintiff contended that Defendants had not "expressly or impliedly" moved to dismiss his "fraudulent scheme claims," which he now argued were subject to a different repose period. *Id.* Plaintiff made this argument despite having never invoked the phrase "scheme liability" across any of his briefs. Plaintiff also repeated his previously rejected argument that the relation-back doctrine could save his claims from the absolute bar of the statute of repose. *Id.* at 1893-97.

[3] The District Court explicitly noted Plaintiff's failure to respond to Defendants' standing argument. *Id.* at 1882.

On November 29, 2021, the District Court denied Plaintiff's motion. *Id.* at 1929. The Court rejected Plaintiff's argument that it had ignored the second claim for relief, noting that the claims as pleaded "were substantively the same other than their headings." *Id.* at 1934. As the Court observed, even though Defendants had argued the entire case should be dismissed, Plaintiff's response "did not mention the scheme claims or suggest that a different statute of repose applied to his second claim. The Court ruled on what the parties presented." *Id.* at 1934-35. The Court also held that Plaintiff's scheme liability claim was time-barred because the statute of repose for that claim ran from the date he purchased his stock. *Id.* at 1935-36. Finally, the Court once again rejected Plaintiff's argument regarding relation back, noting that this was "essentially a rehashing of points that he made or could have made in his opposition to the motion to dismiss." *Id.* at 1933.

This appeal followed. In his opening brief, Plaintiff repeatedly discusses events occurring after he filed his complaints—even occurring *one day* before he filed his brief in this appeal—as though those events would confirm that his pleadings were sufficient when filed. *See* Br. 18-20. But the allegations in his complaints must stand on their own.

SUMMARY OF ARGUMENT

I.A. The District Court properly concluded that the FAC failed to allege with the requisite particularity that Defendants' statements were false or misleading. On appeal, Plaintiff pivots to arguing that certain statements were false regardless of whether there were underlying violations of the antitrust laws. Plaintiff never made this argument in the District Court and cannot raise it for the first time here, and in any event, it fails because Plaintiff has not adequately alleged falsity.

B. The District Court properly held that, when a plaintiff alleges that statements were rendered false through the non-disclosure of an antitrust conspiracy, the plaintiff must allege the facts of the underlying antitrust conspiracy with particularity under the PSLRA and Rule 9(b). Virtually every other court that has ruled on this issue has reached the same conclusion.

C. Plaintiff's conclusory and contradictory allegations of an antitrust conspiracy did not satisfy this heightened pleading requirement. Indeed, Plaintiff has failed to allege parallel conduct because even though the FAC's entire premise is that chicken producers sought to drive up prices by engaging in coordinated production cuts, the

FAC fails to allege that *any* production cuts even occurred within the Class Period. Nor has Plaintiff alleged with particularity any additional circumstances indicating that there was an antitrust conspiracy during the Class Period.

II.A. The District Court correctly held that, when Plaintiff finally amended his complaint nineteen months after the Court granted him leave, most of Plaintiff's claims were barred by the five-year statute of repose, and he lacked standing to pursue those that remained. At that point, the original action had ended. The District Court had dismissed the FAC in its entirety, and there were no live claims pending against any party. Thus, Defendants were entitled to complete repose for most of the alleged violations.

B. The District Court properly rejected Plaintiff's argument that the statute of repose only ran from the last alleged "violation" of Section 10(b). A majority of courts to address the issue have held that each alleged misstatement constitutes a separate "violation" of Section 10(b) that independently triggers the statute.

C. Relation back cannot save Plaintiff's time-barred claims. Allowing the SAC to relate back to the FAC would violate Defendants'

substantive rights to be free from liability after the congressionally mandated time and thus violate the Rules Enabling Act. Indeed, the only court of appeals to consider this question expressly indicated that a defendant's substantive right to repose is implicated when a court dismisses all claims against all parties, as the District Court did here when it dismissed the FAC.

D. Plaintiff does not dispute that he lacks standing to pursue the claims that were not barred by the statute of repose.

III. The District Court properly rejected Plaintiff's last-minute effort to convert his misstatements claims into a brand-new "scheme liability" claim. It was Plaintiff's burden to explain why his claims should survive Defendants' motions to dismiss. He failed to do so in three separate rounds of briefing and did not raise the scheme liability issue until his second Rule 59(e) motion. He cannot blame Defendants or the District Court for his own failure to defend his scheme liability claim. Moreover, Plaintiff's scheme liability is indistinguishable from his misstatements claims because, by his own assessment, it is rooted in the same alleged misstatements, not independent anticompetitive behavior.

STANDARD OF REVIEW

This Court reviews the decision to dismiss a complaint under Rule 12(b)(6) de novo. *See Smallen v. W. Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020). While the Court accepts "the complaint's well-pleaded factual allegations as true," *id.*, it need not credit "conclusory allegations without supporting factual averments." *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1159 (10th Cir. 2021). A motion for amended judgment under Rule 59(e), however, is reviewed for abuse of discretion. *See Castanon v. Cathey*, 976 F.3d 1136, 1140 (10th Cir. 2020). A district court abuses its discretion only if it makes "clear error of judgment or exceed[s] the bounds of permissible choice in the circumstances." *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1228 (10th Cir. 2016).

ARGUMENT

I. Plaintiff Failed to Plead with Particularity that PPC Engaged in an Antitrust Conspiracy that Rendered Defendants' Statements False or Misleading

To state a claim under Section 10(b), a plaintiff must show that the defendant (1) made a material misrepresentation or omission (2) with scienter (3) in connection with the purchase or sale of a security (4) upon which the plaintiff justifiably relied and (5) that caused its damages. *See Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, Inc.*, 552 U.S. 148, 157

(2008). The District Court properly held that the FAC's allegations did not satisfy the first of these elements—falsity—because Plaintiff "did not plead the underlying antitrust conspiracy with sufficient particularity." App.Vol.IV at 1012.

A. Plaintiff Cannot Pivot to a New Theory of Liability for the First Time on Appeal

Throughout this litigation, the entire premise of Plaintiff's claims—in both the FAC and extensive motion practice that followed—has been that "[PPC] and other industry participants … created a chicken cartel to illegally fix, raise, and maintain high prices on Broilers," and that the challenged statements were false because PPC engaged in this "price-fixing scheme while failing to disclose it." App.Vol.I at 61, 107-08, 116. Even when Plaintiff moved for reconsideration of the FAC's dismissal, his primary argument was "that the collusive conduct alleged in Plaintiff's complaint … does, in fact, plausibly allege violations of antitrust laws." App.Vol.IV at 1020 (emphasis omitted).

Now, for the first time on appeal, Plaintiff argues that the falsity of certain of Defendants' statements is "not tethered to actual antitrust violations." Br. 29. Plaintiff made no such argument below. Critically, both of the "examples" he now cites in his brief as "false and misleading

notwithstanding whether Pilgrim actually committed an antitrust violation" were previously—and repeatedly—described as false based solely on alleged anticompetitive behavior. Br. 30; *see also* App.Vol.III at 759-61 (Plaintiff's brief asserting that statements were false because of underlying antitrust violations).

First, as to the statements describing "[t]he chicken industry [as] highly competitive," Plaintiff's theory of falsity has always been grounded in the alleged antitrust conspiracy. Indeed, he repeatedly contended that such statements were false because PPC and other chicken producers were allegedly participating in a "massive collusive effort … to artificially fix, raise and maintain high prices on broiler chicken" by reducing the "supply of Broiler chicken." App.Vol.I at 57; *see also, e.g.*, App.Vol.III at 755. Similarly, his allegations surrounding Agri Stats were linked to the conspiracy: The producers allegedly used the data service "to monitor and enforce their co-conspirators' compliance with their [alleged] supply reduction agreement." App.Vol.III at 755. Plaintiff never claimed these allegations were anything but "tethered to actual antitrust violations."

Second, with respect to the Georgia Dock index, Plaintiff repeatedly argued that conduct relating to the index was part of an antitrust

conspiracy. *See, e.g.*, App.Vol.III at 760-61 (discussing Georgia Dock allegations in section of brief entitled "Plaintiff's Theory of Antitrust Liability" and arguing that "[p]rice index manipulation allegations have consistently supported allegations of collusion"); App.Vol.I at 60 (stating that "[p]articipants in the scheme, including Defendants, also took the extraordinary step of systematically manipulating the Georgia Dock chicken pricing index"); App.Vol.I at 138 ("Pilgrim and other companies were collaborating to fix Broiler prices at an artificial prices [sic] through reductions of supply and by manipulating the Georgia Dock index.").[4]

Having failed to raise this theory previously, Plaintiff has forfeited the ability to switch gears and now contend that these statements do not depend on the antitrust conspiracy. "[A] federal appellate court does not

[4] Plaintiff's cases on this point are inapt. In *Evanston Police Pension Fund v. McKesson Corp.*, the defendant did "not appear to contest" that the plaintiff "ha[d] adequately plead[ed] the existence of" unlawful agreements among manufacturers, but rather, whether plaintiff had sufficiently pleaded whether defendants were aware of that conspiracy. 411 F. Supp. 3d 580, 598 (N.D. Cal. 2019). Moreover, the fact that plaintiffs in other cases were able to state claims in the absence of properly pleaded antitrust conspiracies—as in *Pelletier v. Endo Int'l PLC*, 439 F. Supp. 3d 450, 466 (E.D. Pa. 2020), and *Peace Officers' Annuity & Benefit Fund of Ga. v. DaVita Inc.*, 372 F. Supp. 3d 1139, 1151-52 (D. Colo. 2019)—does not aid Plaintiff, whose falsity claims are dependent on a finding that he has pleaded the underlying anticompetitive conduct with particularity.

consider an issue not passed upon below." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019) (citation omitted). "Ordinarily, a party may not lose in the district court on one theory of the case, and then prevail on appeal on a different theory." *Lone Star Steel Co. v. United Mine Workers of Am.*, 851 F.2d 1239, 1243 (10th Cir. 1988).[5]

B. The District Court Correctly Employed the PSLRA's Heightened Pleading Standard for Falsity

Plaintiff's arguments that the FAC states a claim for relief all suffer from a fundamental and fatal flaw: He is not asserting antirust claims, but rather securities fraud claims, which are governed by an entirely different—and far more stringent—pleading standard. This misconception permeates Plaintiff's brief. *See, e.g.*, Br. 34 ("a securities complaint that pleads sufficient facts to state a claim under antitrust law would adequately plead the underlying antitrust conduct"); *id.* at 31.

Whereas a complaint in an antitrust case need only contain a "short and plain statement of the claim," a "plaintiff suing under Section 10(b)" "must do more" and "bears a heavy burden at the pleading stage."

[5] The Court should not exercise its discretion to consider these forfeited arguments under the plain-error standard because Plaintiff "has not asked" it to do so. *Ave. Cap. Mgmt. II, L.P. v. Schaden*, 843 F.3d 876, 884-85 (10th Cir. 2016).

App.Vol.IV at 1000, 1006 n.4 (quoting *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1333 (10th Cir. 2012)). Under the PSLRA, a plaintiff is required to "specify" the "reason or reasons why the statement is misleading," and where, as here, allegations "regarding the statement or omission" are "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)(1); *see* App.Vol.I at 190. In addition, Rule 9(b) requires a plaintiff bringing a fraud claim to "state with particularity the circumstances constituting [the] fraud." The "circumstances" of an alleged fraud are not just the particular statement the plaintiff contends is fraudulent, but "why [each] statement or omission complained of was false or misleading" when made. *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1124 (10th Cir. 1997).

That Plaintiff's claims are grounded in an antitrust conspiracy does not exempt his complaint from the PSLRA and Rule 9(b). To the contrary, as the Second Circuit held in *Gamm v. Sanderson Farms, Inc.*, "[t]he clear language of the statute, the existing case-law, and the stated intent of the securities laws all lead us to recognize that, when a complaint claims that statements were rendered false or misleading through the non-

disclosure of illegal activity, the facts of the underlying illegal acts must also be pleaded with particularity, in accordance with the heightened pleading requirement of Rule 9(b) and the PSLRA." 944 F.3d 455, 465 (2d Cir. 2019). Given that it is "a serious matter to charge a person with fraud … no one is permitted to do so unless he is in a position and is willing to put himself on record as to what the alleged fraud consists of specifically." *Id.* at 464 (citation omitted). Thus, a company like PPC "cannot be required, whenever accused of illegal activity, to simultaneously defend itself in an accompanying securities fraud suit based on facts not alleged with the level of particularity required by the statute." *Id.* at 464-65. "Such a reality would harm the company's stock and contravene the purpose of the securities laws—to protect shareholders' interests." *Id.* at 465.

Virtually every court that has considered this issue has reached the same conclusion. *See, e.g.*, *In re Tyson Foods, Inc. Sec. Litig.* (*Tyson I*), 275 F. Supp. 3d, 970, 984-85 (W.D. Ark. 2017); *Shoemaker v. Cardiovascular Sys., Inc.*, 2017 WL 1180444, at *8 (D. Minn. Mar. 29, 2017); *In re Immucor, Inc. Sec. Litig.*, 2011 WL 2619092, at *4 (N.D. Ga. June 30, 2011); *In re Mirant Corp. Sec. Litig.*, 2009 WL 48188, at *17

(N.D. Ga. Jan. 7, 2009); *In re FBR Inc. Sec. Litig.*, 544 F. Supp. 2d 346, 354 (S.D.N.Y. 2008); *In re Axis Cap. Holdings, Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 585 (S.D.N.Y. 2006); *In re JP Morgan Chase Sec. Litig.*, 363 F. Supp. 2d 595, 632 (S.D.N.Y. 2005). In fact, just recently, the Second Circuit reaffirmed the holding of *Gamm*, concluding that a complaint must plead with particularity "*what* law or standard the defendant violated and *how* the alleged violation occurred" and provide "sufficient … facts describing the essential elements of that underlying conduct." *Mucha v. Winterkorn*, 2022 WL 774877, at *2-3 (2d Cir. Mar. 15, 2022) (citation omitted). Accordingly, the District Court properly held that Plaintiff was required to "plead with particularity the facts that establish the existence of the antitrust conspiracy." App.Vol.IV at 1003.

In the face of the clear statutory text, as well as the overwhelming case law supporting the District Court's decision, Plaintiff offers four arguments in an effort to show that the District Court somehow applied an incorrect pleading standard. All lack merit.

First, Plaintiff claims, without citation, that the District Court "overstated Plaintiff's burden" by requiring him to plead "evidence to prove alleged conduct." Br. 32; *see also id.* at 1, 21, 23. The District Court

imposed no such requirement. In fact, the District Court expressly recognized that Plaintiff "need not supply evidence proving [his] allegation in the initial complaint." *See* App.Vol.IV at 1002 (citation omitted). Nothing in the District Court's decision suggests otherwise.

Second, contrary to Plaintiff's assertions, the District Court did not demand that Plaintiff plead "additional collusive conduct." Br. 33. Rather, the Court correctly recognized the universally accepted distinction between pleading an antitrust claim (which, under Rule 8, requires merely a "short and plain statement of the claim showing that the pleader is entitled to relief") and a securities claim (which requires pleading fraud with *particularity*). With that distinction in mind, the District Court then applied the "six-factor test" from *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083 (10th Cir. 2003), "to assess whether the complaint *stated with particularity* specific facts" to support Plaintiff's claim, and found the FAC's allegations of an antitrust conspiracy lacking under that standard. App.Vol.IV at 1004-12 (emphasis added). At no point did the District Court demand that Plaintiff plead more than what the law requires of a Section 10(b) plaintiff who stakes his claim of falsity on allegations of underlying illegality. The District Court merely required

that the underlying illegality be pleaded with the factual particularity the PSLRA and Rule 9(b) require.

Third, Plaintiff misreads *Tyson I*, claiming that it construed the PSLRA requirement as focused on the "quantum" of facts alleged to support the allegations of an antitrust conspiracy. Br. 32-33; *see also id.* at 37 (the FAC "alleged at least as many facts" as in the antitrust action). But Plaintiff ignores that *Tyson I* made clear that a plaintiff must do more than offer a random litany of facts; a pleading satisfies the particularity requirement only by "setting forth the who, what, when, where and how of the statement itself," all of which "must [then] be supported by particularized facts." 275 F. Supp. 3d at 985.[6] Contrary to Plaintiff's suggestion, the Court's job is not to count the number of facts alleged, but rather, determine whether those facts are stated with sufficient particularity to plead the underlying wrongful conduct.

[6] Plaintiff attempts a similar sleight-of-hand with *Gamm*, claiming that the court there held that the PSLRA "merely requires" a plaintiff to "have alleged the basic elements of an underlying antitrust conspiracy." Br. 34 (quoting *Gamm*, 944 F.3d at 465). However, he ignores that the Second Circuit held that "the facts of the underlying illegal acts must also be pleaded with particularity, in accordance with the heightened pleading requirement of Rule 9(b) and the PSLRA." *Gamm*, 944 F.3d at 465.

Finally, Plaintiff contends that he did not need to plead an antitrust conspiracy with particularity because the District Court stated that "plaintiff has sufficiently satisfied the first PSLRA requirement for pleading false or misleading statements." Br. 4, 21 (quoting App.Vol.IV at 1005). In doing so, Plaintiff elides two distinct portions of his substantive burden. In the opinion below, the District Court merely noted that Plaintiff had "specif[ied] each statement alleged to have been misleading." App.Vol.IV at 1000, 1005 (quoting 15 U.S.C. § 78u-4(b)(1)). But this non-controversial conclusion did not relieve Plaintiff from his burden of pleading "the reason or reasons why the statement is misleading" and "stat[ing] with particularity all facts on which that belief is formed." *Id.* Indeed, that logic is clearly reflected in the Court's conclusion that "[b]ecause plaintiff *did not plead the underlying antitrust conspiracy with sufficient particularity* according to the PSLRA's requirements, his claims for § 10 violations fail to satisfy the falsity elements." App.Vol.IV at 1012 (emphasis added).

C. The District Court Correctly Held that the First Amended Complaint Did Not Satisfy the PSLRA's Heightened Standard for Pleading Falsity

To plead an antitrust conspiracy based on circumstantial evidence, a plaintiff must allege both (1) parallel conduct by competitors and (2) additional circumstances or "plus factors" that allow a fact-finder to infer a conspiracy, which may include "a common motive to conspire, evidence that shows that the parallel acts were against the apparent individual economic self-interest of the alleged conspirators, and evidence of a high level of interfirm communications." *Mayor v. Citigroup, Inc.*, 709 F.3d 129, 136 (2d Cir. 2013) (citations omitted).

The District Court properly concluded that Plaintiff had failed to plead these elements "with sufficient particularity according to the PSLRA's requirements." App.Vol.IV at 1012. All of Plaintiff's arguments further underscore his flawed view of the standard by which his securities law claims are to be tested at the pleading stage.

1. *The* Broiler Chicken *Decision on Antitrust Claims Does Not Establish that Plaintiff Adequately Pleaded Securities Fraud*

Plaintiff spills much ink contending that the District Court should have adopted the holding of *In re Broiler Chicken Antitrust Litigation,* 290 F. Supp. 3d 772 (N.D. Ill. 2017). In that *antitrust* action, the court

found sufficient the plaintiff's allegations of an antitrust violation involving the same alleged conspiracy under the more liberal Rule 8 pleading standard. Br. 36-37. But as the District Court properly held, a securities plaintiff "must do more than piggyback on allegations in [an] antitrust case if he wishes to prosecute a securities suit." App.Vol.IV at 1006 n.4. The *Broiler Chicken* decision simply has no bearing on whether Plaintiff has satisfied his pleading obligations here.[7]

Plaintiff's claim is subject to the heightened pleading requirements of the PSLRA and Rule 9(b); the antitrust claims in *Broiler Chicken* were not. *See Broiler Chicken*, 290 F. Supp. 3d at 779. As the District Court recognized, a securities plaintiff does not plead a Section 10(b) claim simply because the FAC "alleged at least as many facts" as were alleged in a separate action governed by an entirely different pleading standard. *See* Br. 37. The pleading must independently satisfy the PSLRA and Rule

[7] *Broiler Chicken* was issued before the District Court's order granting Defendants' motion to dismiss the FAC. Indeed, Plaintiff sent the decision to the Court while Defendants' motion to dismiss was pending. App.Vol.IV at 1006 n.4. Thus, Plaintiff's repeated suggestion that the *Broiler Chicken* court "rejected" the District Court's conclusions (Br. 35-37) ignores that the two complaints are different and that *Broiler Chicken* self-evidently did not analyze whether Plaintiff's specific allegations here were sufficient.

9(b). Indeed, the Second Circuit recognized this distinction in rejecting a similar effort to "piggyback" off *Broiler Chicken*.

In *Gamm*, the Southern District of New York dismissed a securities fraud complaint alleging the same conspiracy alleged in the FAC nearly two months after *Broiler Chicken* was issued. *Gamm v. Sanderson Farms, Inc.*, 2018 WL 1319157, at *6 (S.D.N.Y. Jan. 19, 2018). On appeal, the *Gamm* plaintiff repeatedly emphasized that the district court had failed to consider the implications of the *Broiler Chicken* ruling. *See* Brief for Appellants at *12, *18, *23-25, *30, *Gamm*, 2018 WL 1468487 (2d Cir. Mar. 23, 2018). The Second Circuit nevertheless affirmed the dismissal, holding that the complaint's allegations of an antitrust conspiracy failed to meet the exacting standards of the PSLRA. *See Gamm*, 944 F.3d at 466-67.[8] Notably, the Second Circuit's opinion in *Gamm* does not even

[8] Plaintiff attempts to sidestep the Second Circuit's ruling in *Gamm* by seeking to draw a distinction between the FAC and the *Gamm* complaint. *See* Br. 34 n.3. But the two complaints contain allegations regarding coordinated supply cuts and manipulation of price indices that are substantively the same, and the *Gamm* complaint contains forty-five paragraphs about collusive conduct—the same number of paragraphs Plaintiff says are in the FAC. *See* Second Amended Complaint, *Gamm*, No. 16-cv-8420, ECF No. 43.

mention the *Broiler Chicken* decision, underscoring its irrelevance to these securities fraud cases.[9]

2. *Plaintiff's Allegations of Parallel Conduct Were Insufficient*

Plaintiff also argues that the District Court erred in concluding that he failed to adequately allege the first element of an antitrust claim, parallel conduct, claiming that the Court "ignored numerous allegations in the FAC and viewed others in the light most favorable to Defendants." Br. 38. Not so.

First, even though Plaintiff's claim of parallel conduct is premised on an underlying conspiracy to cut production, the FAC does not contain *any* allegations of reductions in broiler chicken supply during the Class

[9] The court in *Tyson I*—also facing a Section 10(b) complaint premised on the same alleged anticompetitive conduct—arrived at the same result. After applying the PSLRA's "heightened pleading standard," the court determined that the complaint "fail[ed] to plausibly allege that Tyson entered into an agreement with its industry competitors to suppress the domestic supply of chicken, in order to increase prices." 275 F. Supp. 3d at 996. When the *Tyson* plaintiff moved to amend his complaint, citing the *Broiler Chicken* decision, the court rejected his effort as futile, noting that *Broiler Chicken* had "little relevance to the precise issues before this Court" because "unlike the present case, [*Broiler Chicken*] is a prototypical antitrust case not scrutinized under the more exacting standards of the PSLRA." *In re Tyson Foods, Inc. Sec. Litig.*, 2018 WL 1598670, at *13 (W.D. Ark. Mar. 31, 2018).

Period—either industry-wide or by PPC specifically. Instead, the FAC alleges that chicken producers "conducted two large coordinated production cuts" in "2008 to early 2009" and "in 2011 through 2012"—years before the Class Period began on February 21, 2014. App.Vol.I at 88. The reason for this omission is obvious: publicly available U.S. Department of Agriculture data show that broiler output actually *increased by 7%* during the Class Period. *Id.* at 226. Given that Plaintiff fails to allege the most basic component of the primary conspiracy he alleges—a coordinated reduction in the supply of broiler chickens across the industry—he cannot plead a supply reduction among producers *in parallel—i.e.*, at approximately the same times and by the same amounts. *See, e.g., In re Beef Indus. Antitrust Litig.*, 907 F.2d 510, 514 (5th Cir. 1990) (a plaintiff bringing a circumstantial case "must first demonstrate that the defendants' actions were parallel"). This pleading deficiency alone is fatal to his claims. *Abbott Lab'ys v. Adelphia Supply USA*, 2017 WL 5992355, at *10 (E.D.N.Y. Aug. 10, 2017) ("A court need not reach the question of the sufficiency of the alleged plus factors where

plaintiffs have in the first instance failed to adequately allege parallel conduct.").[10]

Second, Plaintiff's argument that the FAC contains "detailed facts" on industry participants' production cuts rings hollow. Br. 38. The FAC is devoid of any details on the overall levels of production of each industry participant or their respective market shares, which are essential to a finding of parallel conduct. As the District Court properly concluded, the failure to offer this baseline information undercuts any claim that the actions taken by industry participants were in parallel. *See* App.Vol.IV at 1008 (citing *Gamm* and *Burtch v. Milbert Factors, Inc.*, 662 F.3d 212, 228 (3d Cir. 2011)).

[10] For similar reasons, even if Plaintiff had sufficiently alleged an anticompetitive scheme—he hasn't—the FAC still fails to adequately plead that *any* of the challenged statements were contemporaneously false when made. First, because the FAC contains no particularized allegations that the conspiracy actually continued during the Class Period, it does not establish that Defendants' statements were untrue at the time. *See UFCW Int'l Union Loc. 464A v. Pilgrim's Pride Corp.*, 2022 WL 684169, at *3 (D. Colo. Mar. 8, 2022). Second, Plaintiff does not even attempt to plead—much less with particularity—how, or by how much, the anticompetitive conduct impacted PPC's business or financial results, "such that its statements attributing its success to other factors were materially false or misleading." *See id.* at *3.

Third, Plaintiff contends that the District Court ignored the facts alleged in the FAC demonstrating the "impact such reductions had on broiler production levels." Br. 38. But, as the District Court held, even though these allegations were "somewhat more particularized," the "disparate effects" of the various actions chicken producers allegedly "took to cut production" were too great and too diverse to plead parallel conduct. App.Vol.IV at 1008-09. For instance, the FAC alleged that, in 2011, one company (of indeterminate market share) imposed a 20% reduction at a deboning operation, another delayed production of a plant, and yet another "began pulling eggs from incubators." App.Vol.I at 180-81. These wildly varied methods of cutting production, at various times across multi-year periods, by some—but not all—industry participants, are simply not parallel. *See Burtch*, 662 F.3d at 228 (holding plaintiffs had not alleged parallel conduct when defendants acted differently and "at different time periods"); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 884 (9th Cir. 1982) (similar).

Finally, Plaintiff's claim that the District Court "mischaracterized Plaintiff's allegations regarding Agri Stats and the Georgia Dock" is unfounded. Br. 38-39. As the District Court explained, the FAC fails to

allege that PPC ever used Agri Stats unlawfully, but rather relies on confidential witness accounts suggesting that, at most, the company *may* have been able to discern individual competitors' statistics from the Agri Stats data. App.Vol.I at 80-86. However, none reported that PPC actually engaged in any such reverse engineering. Rather, Plaintiff merely claims that PPC received data from Agri Stats and reviewed that data closely (*Id.* at 78-87)—none of which, without more, is even suggestive of an antitrust conspiracy centered around reducing chicken supply. *See Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 583 (1925) (mere allegations of information sharing not suggestive of conspiracy even if sharing might "tend to diminish production").[11]

Similarly, with respect to the Georgia Dock index, the District Court correctly noted that there are "no particularized facts about Pilgrim's sending false or misleading information to the index on any particular occasion and no facts indicating that if it did, its conduct was

[11] Indeed, Plaintiff ignores Supreme Court precedent recognizing information-sharing by competitors as a means to "increase economic efficiency and render markets more, rather than less, competitive." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

in parallel to that of its co-conspirators." App.Vol.IV at 1009-10.[12] The absence of any such allegations is fatal to any claim that PPC actually manipulated the index or that any of its public statements about it were false. *See Gamm*, 944 F.3d at 466 (rejecting similar allegations).

3. *Plaintiff's Allegations of Circumstantial Evidence of a Conspiracy Were Insufficient*

In addition to parallel conduct, a plaintiff alleging an anticompetitive agreement through circumstantial evidence must plead "the existence of additional circumstances, often referred to as 'plus' factors, which, when viewed in conjunction with the parallel acts, can serve to allow a fact-finder to infer a conspiracy." *Mayor*, 709 F.3d at 136. Here, the District Court correctly held that, even assuming Plaintiff's allegations of parallel conduct were sufficient, the FAC did not plead particularized facts to establish the requisite "circumstantial evidence of an agreement." App.Vol.IV at 1010.

[12] Plaintiff's reference to former PPC CEO Jayson Penn serving on the Georgia Department of Agriculture Advisory Board (Br. 39), with no particularized allegations that Mr. Penn was involved in, or had any knowledge of, purported manipulation of the index is tantamount to the unavailing assertion that Defendants—through Mr. Penn—"must have known" that the index was false, which courts have routinely rejected as a basis to plead scienter (or falsity) under the PSLRA. *See City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1264-65 (10th Cir. 2001).

None of the "plus factors" offered in Plaintiff's opening brief support a finding of an illegal anticompetitive agreement. Indeed, Plaintiff ignores that, as the District Court stated below, *Tyson I* held allegations that largely mirrored those contained in the FAC insufficient for meeting this prong of the antitrust conspiracy test. *See* App.Vol.IV at 1010 (noting that *Tyson I* "under a very similar set of facts . . . found insufficient evidence of an agreement"). And Plaintiff once again relies heavily on the irrelevant *Broiler Chicken* decision (Br. 40) that, as discussed above, lends no support to his Section 10(b) claim. These glaring deficiencies aside, we now address each of the "plus factors" Plaintiff identified.

First, Plaintiff's allegation as to Defendants' "unusual use of Agri Stats" (Br. 37) is, as discussed above, insufficient given that Plaintiff failed to allege that PPC actually used the data service to ascertain competitors' supply reductions. *See Gamm*, 944 F.3d at 466 (declining to credit Agri Stats information-sharing as "plus factor" where plaintiff "[did] not allege when and how Sanderson Farms used Agri Stats to know of their peers' supply reductions," but rather, alleged that "Sanderson Farms 'could' determine whether or not its peers were reducing supply"). Second, his reference to "membership in trade associations and social

interactions with other industry members" (Br. 36) is insufficient. These activities, which are common throughout the business world, cannot satisfactorily plead the existence of a conspiracy "without significantly more in a Rule 10b-5 case." *Tyson I*, 275 F. Supp. 3d at 995. Finally, his reference to "public statements calling for production cuts" (Br. 37) is unavailing. Nowhere in his opposition to the motion to dismiss did Plaintiff even mention Defendants' alleged public statements about production cuts, much less argue that they demonstrated collusion. *See* App.Vol.III at 760-61. Plaintiff forfeited that argument and is precluded from raising it now. *See Schaden*, 843 F.3d at 884-85.

II. Plaintiff Forfeited His Rights by Waiting 576 Days to File the Second Amended Complaint

The District Court properly held that, when Plaintiff finally filed the SAC nineteen months after the District Court granted him leave to amend, most of his claims were barred by the statute of repose, and he lacked Article III standing to pursue those that remained. App.Vol.VIII at 1874-85.

A. Plaintiff Cannot Avoid the Statute of Repose Merely Because the First Amended Complaint Was Timely

Section 10(b) claims are subject to the statute of repose in 28 U.S.C. § 1658(b)(2), mandating that "a private right of action" must be "brought"

within "5 years after such violation." Applying this "unqualified" five-year bar,[13] the District Court correctly held that, because Plaintiff filed the SAC on June 8, 2020, all claims predicated on alleged misstatements made before June 8, 2015, were time-barred. *See, e.g.*, *Colbert v. Rio Tinto PLC*, 392 F. Supp. 3d 329, 336-37 (S.D.N.Y. 2019) (dismissing "all claims predicated on misrepresentations or omissions that occurred" over five years before complaint was filed); *Althaus v. Broderick*, 2016 WL 3976639, at *2-4 (D. Utah July 22, 2016) (same).

In his opening brief, Plaintiff argues that the District Court erred because the statute only bars completely "new 'actions' that are 'brought' after five years, not amendments." Br. 41. Plaintiff also contends that because the FAC was timely, so too was the SAC, which supposedly merely alleged "additional facts, not new claims, in an existing case." *Id.* Plaintiff misreads the statute. As the Supreme Court has explained, "an 'action' is 'brought' … when a particular complaint is filed in a particular court," not "when substantive claims are presented to any court." *Cal. Pub. Emps.' Ret. Sys. v. ANZ Sec., Inc.* (*CalPERS*), 137 S. Ct. 2042, 2054

[13] *Merck & Co. v. Reynolds*, 559 U.S. 633, 650 (2010).

(2017). Indeed, "[t]he term 'action' … refers to a judicial 'proceeding,' or perhaps to a 'suit'—not to the general content of claims." *Id.*

Here, the original proceeding ended when the District Court dismissed the case and denied Plaintiff's motion for reconsideration. *See* App.Vol.IV at 995-1015; App.Vol.V at 1292-94. The District Court "[t]erminated" the case as of March 14, 2018, dismissing the FAC in its entirety, disposing of all claims and all parties, entering final judgment in Defendants' favor, and awarding costs to Defendants. App.Vol.I at 7; App.Vol.IV at 1013-15. As a result, no live claims remained against any Defendant, and thus, there was no longer any action, suit, or proceeding—the District Court's decision had "ended the action." *Se. Pa. Transp. Auth. v. Orrstown Fin. Servs. Inc.* (*SEPTA*), 12 F.4th 337, 348 (3d Cir. 2021) (discussing *Hogan v. Pilgrim's Pride Corp.*, 2021 WL 1534602, at *7-8 (D. Colo. Apr. 16, 2021)). Accordingly, when Plaintiff subsequently filed the SAC many months later, the original action was no longer "still pending." *Id.*

Plaintiff nevertheless contends "the dismissal order … kept the action open" because "the District Court granted leave to amend" and "a dismissal without prejudice is not a final decision." Br. 41-44. In other

words, he "believe[s] that when a case is dismissed without prejudice one is free to refile it any time, any statutes of limitation or statutes of repose notwithstanding. This is dead wrong." *In re Aguilar*, 470 B.R. 606, 617 (Bankr. D.N.M. 2012). The principle offered by Plaintiff is inapplicable once a statutory time limit has run. *Ciralsky v. CIA*, 355 F.3d 661, 672 & nn.11-12 (D.C. Cir. 2004) (cataloguing cases from numerous courts of appeals). "[I]f a plaintiff mistakes his remedy, in the absence of any statutory provision saving his rights, or where, from any cause, a plaintiff becomes nonsuit, or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred." *Willard v. Wood*, 164 U.S. 502, 523 (1896).

Indeed, "[t]he filing of a complaint that is dismissed without prejudice does not toll the statutory filing period." *McIntosh v. Boatman's First Nat'l Bank of Okla.*, 103 F.3d 144 (10th Cir. 1996) (unpublished). In these circumstances, "a suit dismissed without prejudice is treated … as if it had never been filed," and thus does not toll any time bar. *Elmore v. Henderson*, 227 F.3d 1009, 1011 (7th Cir. 2000); *see also Janis v. Reno*, 98 F.3d 1349 (10th Cir. 1996) (non-binding) (noting that "dismissal of suit without prejudice does not authorize later suit brought outside otherwise

binding limitation period"); *Brown v. Hartshorne Pub. Sch. Dist. No. 1,* 926 F.2d 959, 961 (10th Cir. 1991) (similar).[14] "[D]ismissal of the original suit, even though labeled as without prejudice … may sound the death knell for the plaintiff's underlying cause of action if the sheer passage of time precludes the prosecution of a new action." *Chico-Velez v. Roche Prod., Inc.*, 139 F.3d 56, 59 (1st Cir. 1998). That is precisely what happened here.[15]

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[14] While Plaintiff seeks to distinguish *Brown v. Hartshorne Public School District No. 1* as concerning a "voluntary dismissal," Br. 42-43, that case "addressed the tolling effect of dismissals without limiting itself to voluntary dismissals." *Jones v. Frank*, 819 F. Supp. 923, 926 (D. Colo. 1993), *aff'd sub nom. Jones v. Runyon*, 32 F.3d 1454 (10th Cir. 1994). Indeed, *Brown* remains consistent with the great weight of authority cited herein indicating that "there is no difference in the tolling effect of an action dismissed with or without prejudice." *Id.* Furthermore, that these cases may arise in the statute of limitations context is of no moment; none rests on any feature unique to a statute of limitations, and their underlying logic applies with equal force. *See SEPTA*, 12 F.4th at 348 (acknowledging "general rule" that "complaint that is subsequently dismissed without prejudice is treated" for statute of repose purposes "as if it never existed"); *In re Aguilar*, 470 B.R. at 617 (same).

[15] The definition of "dismissal without prejudice" contained in *Black's Law Dictionary* is likewise consistent with the well-accepted rule that such a dismissal—whether styled as a dismissal of the lawsuit or the complaint itself—"does not bar the plaintiff from refiling the lawsuit *within the limitations period*." *Dismissal*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added).

Plaintiff's argument that the statute of repose does not apply to amendments, like the SAC, fares no better. Br. 41-44. Plaintiff's rule, if adopted, would eviscerate the "full protection" that Section 1658(b)(2) provides "from an interminable threat of liability." *CalPERS*, 137 S. Ct. 2050, 2053. Under Plaintiff's view, he was free to file his amended pleading anytime he pleased—whether it was nineteen days, nineteen months, or nineteen years after the District Court granted leave to amend—without regard to any applicable time bar. This view is wholly at odds with the fundamental purpose of provisions such as Section 1658(b)(2), which are designed to provide defendants "explicit and certain protection," and "a fresh start or freedom from liability" after the requisite period has passed—even if "this period ends before the plaintiff has suffered a resulting injury." *CTS Corp. v. Waldburger*, 573 U.S. 1, 8-9 (2014); *accord CalPERS*, 137 S. Ct. at 2049, 2052-53 (discussing similar statute and noting that "the text, purpose, structure, and history of the statute all disclose the congressional purpose to offer defendants full and final security after three years"). Given this clear rationale, numerous courts have soundly rejected Plaintiff's position that the statute of repose does not apply to amendments. *See, e.g.*, *FDIC v.*

First Horizon Asset Sec., Inc., 291 F. Supp. 3d 364, 372 (S.D.N.Y. 2018); *Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d 232, 264 (S.D.N.Y. 2019); *De Vito v. Liquid Holdings Grp., Inc.*, 2018 WL 6891832, at *22-23 (D.N.J. Dec. 31, 2018).

Finally, Plaintiff suggests that the District Court could have prevented him from waiting nineteen months to amend his complaint "by simply placing a deadline on the amended pleading." Br. 43. But there was already a deadline: the statute of repose. The mere fact that the District Court granted Plaintiff leave to amend did not give him a free pass to amend his pleading at any point in the future irrespective of all statutory time limits. That is not the rule Congress established when it passed Section 1658(b)(2). It was incumbent upon Plaintiff, not the Court, to take the requisite steps to ensure he preserved his claims.

B. Plaintiff Cannot Avoid the Statute of Repose by Conflating His Claims into a Single Violation

Section 1658(b)(2) states that "a private right of action" must be "brought" within "5 years" after each alleged "violation" of Section 10(b). "The word 'violation' is singular in the statute" and refers to an act constituting "fraud, deceit, manipulation, or contrivance in contravention of … the securities laws." *Althaus*, 2016 WL 3976639, at *2-3 (quoting 28

U.S.C. § 1658(b)). Where, as here, a plaintiff alleges that defendants made multiple misstatements, each one "may constitute a separate violation of § 10(b)," and "the five-year period begins to run with respect to each violation when it occurs." *In re Juniper Networks, Inc. Sec. Litig.*, 542 F. Supp. 2d 1037, 1051 (N.D. Cal. 2008). The District Court, applying these well-settled principles, dismissed all of Plaintiff's claims relating to misrepresentations made before June 8, 2015. App.Vol.VIII at 1867-82.

Ignoring the statutory text, Plaintiff contends that the repose period did not begin to run until the "last alleged misrepresentation or omission took place on October 27, 2016." Br. 44-46. This reading cannot be squared with Section 10(b). "[A] plaintiff can establish that a defendant has 'violated' Section 10(b) by alleging just a single misstatement or omission," and each statement "can constitute an independent 'violation' of Section 10(b)." *In re Teva Sec. Litig.*, 512 F. Supp. 3d 321, 335 (D. Conn.), *reh'g denied*, 2021 WL 1197805 (D. Conn. Mar. 30, 2021). As Section 1658(b) speaks in terms of a "violation," not violations, the repose clock starts ticking each time a company issues a false statement. *Id.* Accordingly, a "majority of courts across circuits" have rejected the notion that the statute "runs from the date of the last

alleged misrepresentation" in a Section 10(b) case as an impermissible form of equitable tolling. *Howe v. Shchekin*, 238 F. Supp. 3d 1046, 1050-51 (N.D. Ill. 2017); *accord Abu Dhabi Inv. Auth. v. Mylan NV*, 2021 WL 516310, at *2 (S.D.N.Y. Feb. 10, 2021); *Teva*, 512 F. Supp. 3d, at 333-40; *Kuwait Inv. Office v. Am. Int'l Grp., Inc.*, 128 F. Supp. 3d 792, 807-09 (S.D.N.Y. 2015).[16]

To adopt Plaintiff's position would be to read into the statute the very equitable tolling the Supreme Court has expressly foreclosed. As the Supreme Court held in *CalPERS*, "a statute of repose implements a legislative decisio[n] that as a matter of policy there should be a specific time beyond which a defendant should no longer be subjected to protracted liability." 137 S. Ct. at 2051 (cleaned up). "The unqualified

[16] Plaintiff relies heavily on *Equity Tr. Co. v. Kopacka*, 2018 WL 3708078 (E.D. Mich. Aug. 3, 2018). Br. 46. However, the defendant there did not argue that the statute began to run from each alleged misrepresentation, but rather that the statute ran from "the final sale date" of "a purchase or sale of securities." *Kopacka*, 2018 WL 370878, at *3. The court rejected the defendant's position, concluding that it was "more consonant with the traditional understanding of how a statute of repose functions for the repose period to begin from the date of the alleged misrepresentation." *Id.* at *5 (cleaned up). Likewise, in *Goldberg v. Rome McGuigan, PC*, the court did not address the issue presented here—whether the statute runs from each violation of Section 10(b)—in rejecting an argument that the statute ran "from the date of the purchase or sale of the security." 2021 WL 1570858, at *7 (C.D. Cal. Mar. 4, 2021).

nature of that determination supersedes the courts' residual authority and forecloses the extension of the statutory period based on equitable principles." *Id.* For this reason, "the Court repeatedly has stated in broad terms that statutes of repose are not subject to equitable tolling" (unlike statutes of limitations). *Id.* Plaintiff has no answer for this bedrock authority that is fatal to his argument.

Moreover, contrary to Plaintiff's contention, Br. 44-45, the rule that the statute of repose runs from each alleged violation is entirely consistent with the Supreme Court's admonition that "statutes of repose begin to run on 'the date of the last culpable act or omission of the defendant.'" *CalPERS*, 137 S. Ct. at 2049 (quoting *CTS*, 573 U.S. at 8). In *CalPERS* and *CTS*, "the Court was simply emphasizing that a repose period begins to run at the conclusion of a Defendant's culpable behavior" in connection with a particular "violation" of the securities laws, and nowhere did the Court suggest that the statute of repose is not triggered upon each misstatement. *Teva*, 512 F. Supp. 3d at 335 (emphasis omitted). Indeed, "[t]here is no indication in the statutory language that

Congress intended the statute of repose to run from the *last* violation." *Abu Dhabi*, 2021 WL 516310, at *2.[17]

Plaintiff next contends that, in denying his second motion for amended judgment, the District Court erroneously calculated the statute of repose from the date Plaintiff purchased his stock, rather than from the dates of the alleged misstatements. Br. 45. But the result is the same no matter whether the repose period is measured from Plaintiff's last stock purchases (February 19, 2015) or from the alleged misstatements he supposedly relied upon in purchasing his stock[18]—all of those events occurred more than five years before Plaintiff filed the SAC on June 8,

[17] Plaintiff criticizes the District Court for relying on *Carlucci v. Han*, 886 F. Supp. 2d 497 (E.D. Va. 2012), which "predates the Supreme Court's rulings" in *CTS* and *CalPERS* that "repose runs from defendants' 'last culpable act.'" Br. 45-46 (citation omitted). But at least two courts have specifically rejected Plaintiff's interpretation of the "last culpable act" language from *CTS* and *CalPERS*. *See Abu Dhabi*, 2021 WL 516310, at *2; *Teva*, 512 F. Supp. 3d at 335. And the rule followed in *Carlucci* that equitable tolling does not apply to repose periods has consistently been reaffirmed since *CTS* first discussed the "last culpable act" in 2014. *See, e.g.*, *Wu v. Colo. Reg'l Ctr. Project Solaris LLLP*, 2021 WL 795831, at *11 (D. Colo. Mar. 2, 2021); *Freihofer v. Vt. Country Foods, Inc.*, 2019 WL 2995949, at *3 (D. Vt. July 9, 2019); *Althaus*, 2016 WL 3976639, at *3-4; *Kuwait*, 128 F. Supp. 3d at 808.

[18] The statements predating Plaintiff's purchases were made from February 20, 2014, to February 12, 2015. App.Vol.VI at 1363-87.

2020. App.Vol.VIII at 1884-85; *see also Stan Lee Media, Inc. v. Walt Disney Co.*, 774 F.3d 1292, 1296 (10th Cir. 2014) ("We can affirm on any grounds supported by the record."). In any event, the District Court's order dismissing the SAC correctly calculated the repose period from "the date of defendants' [alleged] misstatement or violation." App.Vol.VIII at 1878-80, 1882.

Finally, Plaintiff's argument that the District Court should have applied a different repose period to his scheme liability claim ignores the fact that all of his claims, including his scheme liability claim, entailed the same type of allegedly wrongful conduct (making misstatements). Br. 47-48. In his own briefing below, Plaintiff emphasized that "[t]he crux of [his] complaint is that … defendants made untrue or misleading public statements." App.Vol.VII at 1749. Moreover, his "Second Claim" under Rule 10b-5(a) and (c) was based on allegations that "Defendants made untrue statements of material facts." App.Vol.VI at 1466-67. Where, as here, the crux of Plaintiff's complaint is alleged misstatements, he cannot evade the date of each statement as the trigger for the repose period simply by claiming that Defendants also engaged in an anticompetitive scheme purportedly covered up by those same statements. *See Teva*, 512

F. Supp. 3d at 337 (rejecting effort to extend the five-year repose period by transforming misrepresentation claims into a scheme claim "for purposes of the relevant statute of repose").[19]

C. Plaintiff Cannot Avoid the Statute of Repose by Relying on Relation Back

Plaintiff contends that the District Court erred in declining to apply relation back to save his untimely SAC. Br. 48-52. However, a statute of repose "creates a *substantive right* in those protected to be free from liability after a legislatively-determined period of time." *Amoco Prod. Co. v. Newton Sheep Co.*, 85 F.3d 1464, 1472 (10th Cir. 1996) (emphasis added) (citation omitted). Relation back "is in tension with the principle that a statute of repose is a rigid and essential limitation on the scope of the cause of action itself." *De Vito*, 2018 WL 6891832, at *24. Thus, "allow[ing] a plaintiff to utilize Rule 15(c) to avoid the statute of repose would significantly abridge the substantive, statutory rights of Defendants in violation of the Rules Enabling Act." *Barilli*, 389 F. Supp.

[19] Plaintiff attempts to distinguish *Teva* by asserting that the plaintiffs there waited until oral argument to advance their scheme claim. Br. 48 n.9. That is a distinction without a difference. Here, Plaintiff never protested that his scheme liability claim was distinct from his misrepresentation claims until *after* the District Court granted Defendants' *second* motion to dismiss. *See infra* Section III.A.

3d at 263-64; *see also* 28 U.S.C. § 2072(b); *In re Cmty. Bank of N. Va.*, 467 F. Supp. 2d 466, 481-82 (W.D. Pa. 2006).

Plaintiff asserts that courts "have consistently upheld the Federal Rules of Procedure against Rules Enabling Act challenges," Br. 49 n.10, but the cases he cites in support say nothing about statutes of repose and thus do not address the "substantive right" to repose at issue here, *See Amoco Prod.*, 85 F.3d at 1472. And although Plaintiff notes that courts take a "liberal approach" to relation back when an amended complaint contains no new causes of action, Br. 48-52 (citation omitted), this rule—which derives from the principle that the original complaint provides "adequate notice of the matters raised in the amended pleading[]"—is "inapplicable to statutes of repose" because "it is irrelevant whether parties have notice of a claim" in this context. *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 939 F. Supp. 2d 360, 379-80 (S.D.N.Y. 2013) (cleaned up).[20]

[20] *McClelland v. Deluxe Fin. Servs., Inc.,* 431 F. App'x. 718 (10th Cir. 2011), and *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538 (2010), are not to the contrary. Both involved statutes of limitations, and neither addressed whether relation back applies to statues of repose.

Relying on the Third Circuit's decision in *SEPTA*, Plaintiff nonetheless argues that "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." Br. 50 (citation omitted). However, this case was not pending when the SAC was filed. In fact, the *SEPTA* court distinguished this very action from its own, emphasizing that the *Hogan* action was *no longer pending* when Plaintiff filed the SAC because the District Court "had previously dismissed the timely filed complaint in its entirety." 12 F.4th at 348. Remarkably, Plaintiff's brief fails to mention that *SEPTA* specifically discussed and distinguished *Hogan*.

In contrast to this case, relation back was available in *SEPTA* despite the statute of repose because the "action" was "still pending" when the plaintiff sought to amend. *Id.* at 348-52. The district court had "dismissed only *some* claims and *some* parties." *Id.* Moreover, the Third Circuit acknowledged that the defendants would have had a "vested right to repose"—and the Rules Enabling Act would have barred relation back—if the action had "ended before the repose deadline, thus requiring SEPTA to bring a new action after the deadline expired." *Id.* at 351.

However, because the District Court's decision there, unlike here, "did not decide all claims [against] all parties," the "Rules Enabling Act's protections for substantive rights d[id] not apply." *Id.* at 351.[21] Accordingly, contrary to Plaintiff's assertions, this Court would not create a circuit split by holding—consistent with *SEPTA* and the "unqualified bar" Congress established when it enacted the statute—that a plaintiff cannot use relation back to circumvent the statute of repose after his original action has been dismissed in its entirety.

For these same reasons, the parade of horribles that Plaintiff foresees will not come to pass if the District Court's ruling is affirmed. In both of the "anomalous" situations Plaintiff discusses, the statute of repose would not bar the amended complaint because the timely action would still be pending. *See* Br. 51-52 (citation omitted). Indeed, a plaintiff can "make *any* changes … to its complaint"—big or small—"after

[21] In an effort to undercut the District Court's reliance on *De Vito* and *First Horizon Asset Sec. Inc.*, 291 F. Supp. 3d 364, 371 (S.D.N.Y. 2018), Plaintiff notes that *SEPTA* characterized these cases as involving "*new* causes of action or *new* parties." Br. 50. But *SEPTA* merely indicated that those were examples of cases where an untimely complaint would violate a defendant's substantive rights. 12 F.4th at 352. The Third Circuit also discussed another example where amendment is improper: cases, like this one, where all claims against all parties have been dismissed. *Id.* at 348.

expiration of the repose period" so long as the timely action is "still pending" when the plaintiff seeks to amend. *SEPTA*, 12 F.4th at 346, 348. And in *In re LexinFintech Holdings Ltd. Securities Litigation*, the statute of repose did not bar the amended complaint because the original, timely action remained pending throughout the lead plaintiff selection process (as is commonplace in securities class actions) and was still pending when the selected lead plaintiff filed the amended complaint. 2021 WL 5530949, at *17-18 (D. Or. Nov. 24, 2021). Accordingly, this Court can affirm the District Court's decision that relation back did not save Plaintiff's claims from the statute of repose after the original action was fully dismissed without opening the door to any supposed "enormous practical difficulties." Br. 51 (citation omitted).

D. Plaintiff Lacks Standing for the Claims that Are Not Time Barred

The District Court properly held that Plaintiff lacks Article III standing to pursue claims based on statements made since June 2015 because he was a mere holder of PPC stock at the time, not a purchaser. App.Vol.VIII at 1884-85. Plaintiff does not challenge this holding in his opening brief, thus waiving the point. In any event, given that "§ 10(b) limits private causes of action to purchasers and sellers," claims by "mere

holders" of securities "should be dismissed." *In re Smith Barney Transfer Agent Litig.*, 765 F. Supp. 2d 391, 400 (S.D.N.Y. 2011); *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 754-55 (1975). Plaintiff purchased his PPC stock in January and February 2015, and thus, he was a mere holder of stock with respect to the statements made since February 2015. App.Vol.VIII at 1882-85; ECF No. 8-1. He has no standing to pursue any claims that survive the five-year statute of repose. *See Winer Family Tr. v. Queen*, 503 F.3d 319, 323-26 (3d Cir. 2007).[22]

III. The District Court Properly Rejected Plaintiff's Untimely Bait-and-Switch of His Scheme Liability Claims

Plaintiff contends that the District Court erred in rejecting his belated argument that his scheme liability claim was subject to a different repose period than his other Section 10(b) claims. Br. 52-56. However, because Plaintiff raised this argument for the first time in a Rule 59(e) motion for amended judgment, the District Court's decision rejecting it is subject to the "abuse of discretion" standard. *Etherton v. Owners Ins. Co.*, 829 F.3d 1209, 1228 (10th Cir. 2016). Plaintiff has not

[22] In any event, all of the claims in the SAC are now barred by the statute of repose, irrespective of whether Plaintiff had standing to pursue them, because the last alleged misstatements were made on October 27, 2016, more than five years ago. *See* App.Vol.VI at 1415-17.

shown that the District Court was wrong, let alone that the Court abused its discretion.

Defendants' motion to dismiss the SAC argued that the statute of repose barred his claims. App.Vol.VII at 1707-08. While Plaintiff now claims that a different repose period applies to his scheme liability claim, he did not raise this argument in his opposition. *See id.* at 1755-58. In fact, he failed to even mention "scheme liability" in any of his briefing until *after* the District Court had issued *three separate decisions* dismissing *all* of his claims. *See* App.Vol.VIII at 1888-89. Rule 59(e) motions "cannot be used to expand a judgment to encompass new issues which could have been raised prior to issuance of the judgment." *Steele v. Young*, 11 F.3d 1518, 1520 n.1 (10th Cir. 1993) (citation omitted). Therefore, the District Court did not abuse its discretion when it rejected Plaintiff's belated raising of this issue for the first time in his Rule 59(e) motion. App.Vol.VIII at 1933-35. None of Plaintiff's arguments to the contrary withstands scrutiny.

First, Plaintiff's contention that "Defendants never moved to dismiss Plaintiff's scheme liability claims" can be summarily rejected. *See* Br. 52-56. In their first motion to dismiss, Defendants expressly moved

to dismiss the FAC "*in its entirety with prejudice,*" arguing that Plaintiff's "theory fails to sustain a Section 10(b) claim." App.Vol.I at 219, 201 (emphasis added). In so doing, Defendants put Plaintiff on notice that they were moving to dismiss *all* of his claims, including his scheme liability claim under Rule 10b-5(a) and (c). And everyone understood that was the case. Indeed, in dismissing the FAC, the District Court noted that Defendants had "move[d] to dismiss all three claims." App.Vol.IV at 999. Thus, by the time he filed his first reconsideration motion, Plaintiff was plainly on notice that his scheme liability claim was in play. When Defendants filed their second motion to dismiss, they again asked the District Court to dismiss the SAC "*in its entirety with prejudice*." App.Vol.VII at 1719 (emphasis added). Given all the proceedings up to this point, there was no way Plaintiff could have misunderstood that his scheme liability claim remained in jeopardy. Yet he stayed silent and never argued that the scheme liability claim was subject to a different repose period than his other claims. *See id.* at 1755-58. Plaintiff's failures on this score are his own.

Second, *In re Alphabet, Inc. Sec. Litig.*, 1 F.4th 687 (9th Cir. 2021), does not save Plaintiff's scheme liability claim. There, the Ninth Circuit

held that the district court erred by dismissing the plaintiff's securities claims because the motion to dismiss did not address its scheme claims and the plaintiff had no obligation to address arguments not made. *Id.* at 709. But contrary to Plaintiff's contentions, *Alphabet* does not entail "nearly identical circumstances." Br. 54. The plaintiff in *Alphabet* had nowhere near the amount of notice that Plaintiff had in this case, given the Court's dismissal of the FAC, which should have served as a clarion call that he had better defend his scheme claim or it would be dismissed again. In addition, unlike here, plaintiffs in *Alphabet* could argue on appeal that the defendants' motion to dismiss did not challenge "the majority of the alleged scheme." Appellant's Opening Brief at *10, *Alphabet*, 2020 WL 4354497 (9th Cir. July 20, 2020). But here, Defendants' motion to dismiss the SAC was not so limited, directly attacking the entire antitrust conspiracy and all of the misstatements alleged in the SAC. App.Vol.VII at 1707-19.

Third, the District Court did not abuse its discretion by rejecting Plaintiff's argument that his "scheme liability claims" were "not predicated on misstatements." Br. 53. As Plaintiff himself conceded in opposing Defendants' motion to dismiss the SAC, the District Court

"*correctly* assessed" that "[t]he crux of plaintiff's complaint is that … defendants made untrue or misleading public statements by failing to disclose the price-fixing conspiracy and instead touting legitimate causes for Pilgrim's success." App.Vol.VII at 1749 (emphasis added). In other words, by the clear text of his pleadings and his own representations to the Court below, all of Plaintiff's claims were grounded in alleged misstatements and omissions about the underlying anticompetitive conduct that constituted the "scheme."

For this reason, Plaintiff's reliance on *Lorenzo v. SEC*, 139 S. Ct. 1094 (2019), is misplaced. That "*Lorenzo* rejected the premise that scheme liability claims are violated only when conduct other than misstatements is involved" (Br. 55) is beside the point. Defendants do not contest that scheme liability claims can have "considerable overlap" with Rule 10b-5(b) claims. *Id.* The problem for Plaintiff is that, according to his *own formulation* of his claims, all of his Section 10(b) claims concern the *same conduct*—public statements that did not disclose the alleged antitrust conspiracy. *See* App.Vol.VII at 1749.[23]

[23] Even if preserved, Plaintiff's scheme liability claim would still fail. By artificially divorcing his scheme claim from the alleged misstatements, Plaintiff abandons the only link his claim might have to his decision to

In sum, Plaintiff's arguments amount to little more than an effort to shift the blame for his own failure to defend his scheme liability claim. To the extent Defendants "lump[ed]" the Section 10(b) claims together (Br. 56) and the District Court treated them as one and the same, it was Plaintiff's responsibility, not Defendants' or the District Court's, to raise that issue and explain why his scheme liability claim should survive separate from his misstatement claims. *See Canfield v. Douglas County*, 619 F. App'x 774, 778 (10th Cir. 2015) ("It was not the job of the district court to rescue [the] claim by making her legal arguments and factual allegations for her"); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 672 (10th Cir. 1998) (similar).

CONCLUSION

For these reasons, the Court should affirm the District Court's decisions dismissing Plaintiff's case in its entirety.

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purchase PPC stock. Without those misstatements, Plaintiff cannot establish reliance because the anticompetitive acts alleged here relate to sales of goods and services, not the "investment sphere" where Plaintiff purchased his stock. *See Stoneridge*, 552 U.S. at 158-59, 166-67.

Dated: March 25, 2022

Respectfully submitted,

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ORAL ARGUMENT STATEMENT

This appeal arises out of nearly five years of litigation across two distinct complaints and four district court opinions. Plaintiff's claim that Defendants made several alleged misstatements over a multi-year period suffers from both substantive and procedural defects. Oral argument will be beneficial for the Court because of the nature of the issues, the extensive procedural history, and the volume of the record. Defendants–Appellees therefore request oral argument.

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 12,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word Version 16.0.5290.1000 in Century Schoolbook font size 14.

Respectfully submitted,

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ELECTRONIC SUBMISSION CERTIFICATE

Counsel for Appellees Pilgrim's Pride Corporation and Fabio Sandri hereby certifies that with respect to the foregoing: (1) all required privacy redactions have been made per 10th Cir. R. 25.5; (2) the hard copies submitted to the Court are exact copies of this ECF submission; and (3) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program, Sophos Central with Intercept X, and according to the program is free of viruses.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2022, I electronically filed the foregoing Brief for Appellees with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Respectfully submitted,

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