22-335

United States Court of Appeals for the Second Circuit

IN RE: RENEWABLE ENERGY GROUP SECURITIES LITIGATION

Steven Rosa,
Plaintiff-Appellant,

David Ramsey, individually and on behalf of all others similarly situated, Chris Olson, individually and on behalf of all others similarly situated,
Plaintiffs,

v.

Renewable Energy Group, Inc., Randolph L. Howard, Cynthia J. Warner, Chad Stone, Todd Robinson,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of New York, No. 21-CV-1832

REPLY BRIEF OF APPELLANT

VELVEL (DEVIN) FREEDMAN
IVY T. NGO
ROCHE FREEDMAN LLP
1 SE 3rd Avenue, Suite 1240
Miami, FL 33131
(786) 924-2900
vel@rochefreedman.com
ingo@rochefreedman.com

Counsel for Plaintiff-Appellant Steven Rosa

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I. INTRODUCTION

Plaintiff's Complaint undisputedly alleges scienter if it alleges actual knowledge of inadequate internal controls and false financials based on REGI's blending problem and improper BTC claims by September 30, 2020. It does so allege. Defendants' Brief argues otherwise only by misstating the Complaint and even REGI's own press releases. If this Court accepts Defendants' construction of the Complaint, Plaintiff should be given leave to amend so that the case may be decided on the merits, not a wordsmithing error. That said, even under Defendants' and the District Court's flawed reading of the Complaint, scienter is adequately alleged because the purported "investigation" – of which Defendants alone have knowledge regarding its length and substance – cannot be deemed reasonable as a matter of law based on the current record.

In addition to actual pre-September 30 knowledge, the Complaint adequately alleges scienter based on recklessness. Defendants focus on each individual suspicious fact and contend that no one fact "alone" is enough. But when read holistically and liberally in Plaintiff's favor, as the allegations must be, the Complaint adequately alleges recklessness. Plaintiff need only show that Defendants had "access" to written or unwritten information revealing the undisputed truth: that REGI's internal controls were inadequate and its previously issued financial statements were wrong. Plaintiff has done just that. It is only because the Defendant

CEOs and CFOs had such access were they able to make specific statements about the Company's BTC revenue, EBITDA, inventory, and guidance every single quarter during the Class Period. Indeed, on August 6, 2019, Defendant Stone assured investors of Defendants' access as they were "monitoring plant by plant" REGI's operations and profit margins. And because management-level employees knew or had access to such pertinent information, corporate scienter has been alleged.[1]

II. THE COMPLAINT RAISES A STRONG INFERENCE OF SCIENTER

A. The Complaint Adequately Alleges Actual Knowledge by September 2020, Affirmative Misrepresentation of the Truth in November 2020, and Concealment of the Truth Until February 2021.

Neither Defendants nor the District Court dispute that if Defendants had actual knowledge of REGI's poor internal controls and inaccurate financials based on the blending problem and improper BTC claims by September 30, 2020, they acted with scienter by affirmatively misrepresenting the truth in November 2020 and concealing it until February 2021. Their position is only that the Complaint does not allege such pre-September 30 knowledge. They are wrong.

[1] The District Court dismissed both the §10(b) and §20(a) claims on one ground – inadequate scienter allegations. Neither the District Court opinion nor the parties' lower court briefs distinguished between the two claims or made separate arguments for each claim. Plaintiff's opening brief thus referred to both generically as "securities fraud" claims and appropriately addressed the sole basis for the decision below. Defendants' contention, Brief at 15 n.2, that plaintiff "waived" his §20(a) claim is therefore baseless.

On February 25, 2021, REGI, Warner and Robinson issued a press release ("Press Release") undisputedly stating that, due to the Company's failure to blend petro-diesel with biodiesel, it was not the "proper claimant for certain BTC payments on biodiesel it sold between January 1, 2017 and September 30, 2020." A-16-A-110 ¶¶10, 199-208. Plaintiff's Complaint quotes this press release, provides a hyperlink to it, and alleges that Defendants acted with actual knowledge. *Id.* at ¶¶30, 214 n.27, 242, 248. Nowhere in the Press Release, during the earnings call held that same day, or since, have Defendants suggested publicly that the blending failure continued to occur after September 30 or that the problem was identified and remediated later.

Indeed, the Press Release itself – entitled "Renewable Energy Group Reports Fourth Quarter and Full Year 2020 Financial Results; Restates Financial Results for 2018, 2019 and First Three Quarters of 2020" – reports extensively on "Fourth Quarter 2020 Highlights" and "Fourth Quarter 2020 Highlights – Non-GAAP," yet nowhere does it mention or imply that the blending problem was discovered, investigated, or remediated during the fourth quarter of 2020.

As such, a plain reading of the Press Release indicates that REGI, Warner and Robinson discovered and remediated the blending failure by September 30. Considered collectively with the rest of the scienter allegations, and construed liberally in Plaintiff's favor, the Complaint alleges that Defendants had actual knowledge of REGI's weak internal controls and incorrect financials based on the

improper BTC claims which had led them to the blending problem by September 30. *Id*. Defendants' proposal to construe September 30 in the Press Release as "merely [referring to] the end of the last quarter impacted by the February 25, 2021 restatement and the IRS settlement," and that the blending issue perhaps continued "for some time into the fourth quarter" before discovery (Brief at 18), is strained at best and in any event, goes beyond the "facts stated in the complaint or in documents attached to the complaint." *See Kramer v. Time Warner Inc*., 937 F.2d 767, 773 (2d Cir. 1991). Since Defendants' construction is not nearly as natural as Plaintiff's (even without the liberal construction to which he is entitled), it should be rejected.

Tellingly, other than September 30, 2020, neither the Press Release nor any of Defendants' briefs specify another date regarding the discovery, investigation, or remediation of the blending problem. The Complaint alleges that these dates were concealed. A-23-A-24 ¶¶10, 13. Defendants know exactly when these events occurred, yet evasively state "the blending issue ***could have*** continued for some time into the fourth quarter" (Brief at 6, 18) (emphasis added), and REGI's disclosure is "consistent" with discovery and remediation in the fourth quarter (A-620).[2]

[2] Defendants incorrectly insist (Brief at 17) that it is "fatal" for the Complaint to not allege an exact date of discovery, even if it alleges pre-September 30 discovery and concealment of the exact date. Plaintiff need not plead dates "with absolute precision, so long as the complaint gives fair and reasonable notice to defendants of the claim and the grounds upon which it is based." *Manavazian v. Atec Grp., Inc.*, 160 F. Supp. 2d 468, 485 (E.D.N.Y. 2001) (both scienter and falsity satisfied where,

Unlike Defendants, the District Court reasoned that the Complaint "does not allege that the problem was discovered at any particular point in time," so its allegations are "consistent with the discovery of the problem during the fourth quarter of 2020." SPA-11. But "consistent with" is not the correct test, which Defendants do not dispute. On a Rule 12(b)(6) motion, under *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322-24 (2007), courts must "construe the complaint liberally, accept[] all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Koncelik v. Savient Pharms., Inc.*, 448 F. App'x 154 (2d Cir. 2012). Defendants are not entitled to dismissal just because the allegations are "consistent with" a construction that favors them. Rather, if the Complaint alleges pre-September 30 discovery when liberally construed with all inferences drawn in Plaintiff's favor, it must be so construed. The only issue is whether the Complaint reasonably **can** be read as alleging discovery by

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as here, "the complaint pleads that 'information contrary to the alleged misrepresentations is alleged to have been known by defendants at the time the misrepresentations were made'"); *see also Ballan v. Wilfred Am. Educ. Corp.*, 720 F. Supp. 241, 254 (E.D.N.Y. 1989) (A plaintiff is not required "to allege exactly what each defendant knew at each moment [when that] information is peculiarly within the knowledge of defendants"). The only case cited by Defendants says nothing about requiring plaintiffs to plead an exact date, only that they have an "obligation to state with particularity facts giving rise to a strong inference of conscious misbehavior or recklessness." *Mucha v. Volkswagen Aktiengesellschaft*, 2021 WL 2006079 (E.D.N.Y. May 20, 2021), *aff'd sub nom. Mucha v. Winterkorn*, 2022 WL 774877 (2d Cir. Mar. 15, 2022). Plaintiff has done just that by pleading actual knowledge by September 30, based on the plain language of the Press Release.

the end of September 2020. It certainly can.

Once the Complaint is liberally construed as including an allegation of pre-September 30 discovery, then, and only then, the issue becomes whether the allegation of pre-September 30 actual knowledge, supported by the Press Release, is as plausible as any inference of innocent behavior. At this point, under *Tellabs,* courts "must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff," 551 U.S. at 324, and any "tie on scienter goes to the plaintiff." *In re Wells Fargo & Co. Sec. Litig.*, 2021 WL 4482102, at *27 (S.D.N.Y. Sept. 30, 2021). But Defendants have offered no innocent explanation for their actions if they had actual knowledge by September 30. Their sole argument, and the sole basis for the District Court's decision, is that the Complaint does not allege pre-September 30 knowledge. Since the Complaint does so allege, and it must be deemed true, the decision below must be reversed.

As shown above, the Complaint, liberally, or even fairly, construed, alleges that REGI, Stone and Warner acquired actual knowledge at least by September 2020. This allegation, supported by REGI's own February 2021 disclosure, is more than adequate to satisfy the PSLRA's requirement of "alleg[ing] facts that, 'taken collectively' and taken as true, give rise to an inference of scienter that is 'cogent and at least as compelling as any opposing inference one could draw from the facts alleged.'" *Moshell v. Sasol Ltd.*, 481 F. Supp. 3d 280, 291 (S.D.N.Y. 2020) (quoting

Slayton v. Am. Exp. Co., 604 F.3d 758, 774 (2d Cir. 2010)), *reconsideration denied*, 2021 WL 3174414 (S.D.N.Y. July 24, 2021).[3]

Defendants do not dispute that a Rule 12(b)(6) motion should not be granted just because a complaint is deemed less than precise. *See Atuahene v. City of Hartford*, 10 F. App'x 33, 34 (2d Cir. 2001) (complaint need not be a "model of clarity"); *Solano v. N.Y.*, 2021 WL 4134793, at *8 (N.D.N.Y. Sept. 10, 2021) ("inartful pleading does not provide a basis for dismissal"). Thus, while the Complaint does allege pre-September 30 knowledge, even if this allegation is considered to be inartful or unclear, the decision below must be reversed.

B. If the Court Accepts Defendants' Construction of the Complaint, Plaintiff Is Entitled to Amend.

As shown above, Plaintiff's Complaint alleges that REGI, Warner, Stone and Robinson had actual knowledge by September 2020, at least. If this Court finds otherwise, Plaintiff should be granted leave to supplement the Complaint by adding clearer allegations of pre-September 30 knowledge.

[3] Defendants assert that an allegation of pre-September knowledge is not "as cogent and compelling as the simple inference that Defendants discovered the issue during the fourth quarter, investigated it, and then disclosed it when they announced the results of that quarter." Brief at 19. However, the Complaint alleges pre-September 30 knowledge, which must be accepted as true for Rule 12(b)(6) purposes. Thus, Defendants are not entitled to any "inference that [they] discovered the issue during the fourth quarter," as fourth quarter discovery would be contrary to Plaintiff's allegations. Moreover, there are no facts in the record to support any inference, let alone a cogent and compelling inference, of fourth quarter discovery.

There is no merit to Defendants' contention, Brief at 39-40, that leave to amend should be denied because the District Court "warned" Plaintiff that leave would not be granted "in contravention of the district court's appropriate case management order." That order did not set a hard deadline for amendments. Instead, it said that, if an amended complaint is filed, an answer or motion to dismiss must be filed by August 6, and "Lead Plaintiff shall file a letter by August 13 indicating a desire to further amend its complaint in response to the motion. It is ***unlikely*** that Lead Plaintiff will be granted any further opportunities to amend." ASA-3-ASA-4 (emphasis added).

Defendants filed their motion to dismiss on August 6. Neither the motion nor supporting memorandum even remotely asserted that the Complaint failed to allege discovery of the blending problem by September 30, 2020. Thus, Plaintiff had no reason to amend the Complaint by August 13. Indeed, Defendants' memorandum even cited the Complaint as alleging a petro-diesel shortfall "between January 1, 2017 and September 30, 2020." A-122.

Only in their reply brief did Defendants contend that the Complaint did not allege discovery of the error by September 30 – after Plaintiff noted the allegation in his opposition brief. A-619-A-620. And only in their appellate brief to this Court did Defendants contend (for the first time) that September 30 in the Press Release means "merely the end of the last quarter impacted by the February 25, 2021

restatement and the IRS settlement," and that the blending issue perhaps continued "for some time into the fourth quarter before discovery." Brief at 18.

The District Court did not adopt Defendants' reply brief argument that the Complaint failed to allege pre-September 30 discovery. Again, on this point, the District Court only found that the Complaint did not allege discovery at "any particular point in time," and that the allegations were "consistent with the discovery of the problem during the fourth quarter of 2020." SPA-11.

Under these circumstances, there is no basis for denying Plaintiff leave to file a simple, clarifying amendment that raises no new claims or issues and does not delay discovery (which has not even begun) or trial. It would be unjust and unfair for this case to be decided on a wordsmithing technicality. Justice requires leave when there are "at least colorable grounds for relief...." *Abbey v. Skokos*, 303 F. App'x 911, 913 (2d Cir. 2008). The Second Circuit has a "strong preference for resolving disputes on the merits." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 190 (2d Cir. 2015); *see e.g., United States ex rel. Maritime Admin. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.,* 889 F.2d 1248, 1254 (2d Cir. 1989) ("[I]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [they] ought to be afforded an opportunity to test [their] claim on the merits.").

"Although the decision whether to grant leave to amend is within the

discretion of the district court, refusal to grant leave must be based on a valid ground." *Oliver Schs., Inc. v. Foley*, 930 F.2d 248, 253 (2d Cir. 1991) (quoting *Ronzani v. Sanofi S.A.,* 899 F.2d 195, 198 (2d Cir. 1990)). "The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith." *Pasternack v. Shrader*, 863 F.3d 162, 174 (2d Cir. 2017); *see e.g., Anthony v. City of N.Y.*, 339 F.3d 129, 138 n.5 (2d Cir. 2003) (interpreting Rule 15(a) "in favor of allowing the amendment absent a showing by the non-moving party of bad faith or undue prejudice"). Defendants do not argue that Plaintiff acted in bad faith or that an amendment would cause them prejudice.[4]

Rather, Defendants incorrectly suggest that amendment would be futile. Where leave to amend is denied based on futility, this Court reviews the decision de novo. *Lehmann v. Ohr Pharm., Inc*., 830 F. App'x 349, 353 (2d Cir. 2020); *see also, e.g., Azkour v. Bowery Residents' Comm., Inc.,* 646 F. App'x 40 (2d Cir. 2016). An amendment here would not be futile because, as shown above, if Defendants had

[4] Courts have been especially liberal granting leave to amend in securities fraud cases, given the stringent pleading standards applicable to such claims. See *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 312 (S.D.N.Y. 2008) (recognizing importance of liberally allowing amendment in view of complicated pleading rules applied to securities fraud claims, and allowing third amended complaint); *see also Osher v. JNI Corp*., 183 F. App'x 604, 605 (9th Cir. 2006) ("[l]eave to amend is to be granted with extreme liberality…because the heightened pleading requirements imposed by the PSLRA are so difficult to meet.").

discovered the incorrect BTC claims and blending problem by September 30, they clearly acted with scienter and are liable for securities fraud. The District Court did not suggest otherwise.

Plaintiff submits that no amendment is needed, as the Complaint already alleges actual pre-September 30 knowledge of shoddy internal controls and false financials in light of the improper BTC claims and blending problem, as plainly stated in the Press Release. If the Court disagrees, Plaintiff should be granted leave to allege this more explicitly.

C. Scienter May Be Inferred Even Under Defendants' Incorrect Construction of the Complaint's Allegations.

Even if the Complaint is deemed to only allege discovery of the undisclosed truth during the fourth quarter of 2020, meaning October 1 through December 31, 2020, and even if leave to amend is denied, it still pleads actionable scienter. Defendants appear to contend that, as a matter of law, they were entitled to as much as a five-month delay to disclose REGI's inadequate internal controls and inaccurate financials, regardless of circumstance, simply by alleging an investigation, without any details as to length or substance. This argument should be emphatically rejected.

Defendants are "entitled to investigate for a reasonable time, until they have a full story to reveal." *Slayton*, 604 F.3d at 777 (quoting *Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 761 (7th Cir. 2007)). The issue here is whether the District Court properly concluded as a matter of law that the lengthy delay in disclosure of

the alleged fraud was entirely the result of a "reasonable time" to investigate – even though, aside from the Press Release indicating pre-September 30 resolution, there is no pertinent record regarding the discovery, length or substance of the investigation, remediation of the blending issue, negotiation with the IRS as to the $40.5 million in incorrectly claimed BTC credits, or preparation of REGI's restatement of nearly three years of financials. According to Defendants, even if the blending problem was discovered on October 1 and the investigation of it was completed in one week, Defendants were entitled to delay disclosure from October 8 to February 25. That is ridiculous.

The cases cited by Defendants and the District Court do not suggest any per se rule allowing several months of "investigation" regardless of circumstances. *Slayton* and *Higginbotham* hold only that, defendants are entitled to a "reasonable time" that is "necessary to get things right until they have a full story to reveal." *Id*. In *Higginbotham*, only a few weeks of delay were at issue – plaintiff contended "that Baxter should have disclosed the news in June 2004 or the first half of July, rather than on July 22." 495 F.3d at 760-61.[5] *Slayton* quoted *Higginbotham* and concluded, based on a highly detailed account of the defendant company's two-month investigation from a Wall Street Journal article attached to the complaint, that

[5] Defendants incorrectly assert that Higginbotham involved an "investigation period of nearly three months." Brief at 21.

defendants engaged "in a good-faith process to inform themselves and the public of the risks." 604 F.3d at 777. Defendants also cite *In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *22-*23 (N.D. Cal. Aug. 10, 2012), *aff'd*, 611 F. App'x 387 (9th Cir. 2015), which cited *Slayton* and *Higginbotham* and found that five weeks was "reasonable" based on detailed, undisputed facts regarding the investigation, taken directly from the complaint.[6]

Here, in sharp contrast, Defendants are asking for approval of as much as five months of delay while they were making false and/or misleading statements to investors, including that both REGI's "internal controls and procedures" and "disclosure control over financial reporting" were "effective as of September 30, 2020" on November 5, 2020, without the slightest indication of even the existence of an investigation – much less what it entailed or how long it had lasted or would

[6] Defendants also cite a consumer protection case, *In re Welspun Litig.*, 2019 WL 2174089, at *16 (S.D.N.Y. May 20, 2019), which cites *Slayton* for the proposition that "investigations indicate 'a prudent course of action'" rather than fraud. There was apparently no issue as to the reasonableness of the length or nature of the investigation, just to whether plaintiff had plead "specific facts supporting the conclusory allegation that Walmart buried the results of its investigation." *Id.* In contrast, here, the Complaint pleads with particularity what statements, when they were made, and by whom, which triggered a duty to disclose the truth. *See, e.g.,* A-56-91 ¶¶109-208. Defendants did not dispute the falsity or materiality of those statements below, and this Court should "abstain from entertaining [those] issues that have not been raised and preserved in the court of first instance." *DeValerio v. Olinski*, 673 Fed. Appx. 87, 90 (2d Cir. 2016) (quoting *Wood v. Milyard*, 566 U.S. 463, 473 (2012)).

continue to last. Further, in deciding when to finally tell investors the truth, Defendants were well aware that their recent disclosure of failed controls in preventing the calculation and publication of the wrong guidance had recently caused REGI's stock to fall 20.5% in June 2020. A-24-A-25 ¶¶6-7; A-91-A-92 ¶¶209-11. Unlike in *Slayton*, *Higginbotham*, and *Yahoo!*, nothing in the record even remotely suggests that Defendants needed so much time to "get things right," or that the investigation was concluded within a "reasonable time."

Where, as here, the details and length of an investigation are unclear or disputed, courts have not hesitated to treat the reasonableness of a securities fraud investigation as a fact issue not to be decided on a Rule 12(b)(6) motion. *See, e.g., In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 328 F. Supp. 3d 963, 980 (N.D. Cal. 2018) (reversing earlier ruling and holding that under "the facts alleged now, and drawing all reasonable inferences in Plaintiff's favor, the Court can no longer conclude that Horn's delay was reasonable as a matter of law"); *Maverick Fund, L.D.C. v. Lender Processing Servs. Inc.*, 2015 WL 5559761, at *11 (M.D. Fla. Sept. 21, 2015) (four month delay, scienter adequately alleged: "Without drawing an arbitrary line, surely at some point the prudent manager discussed in *Higginbotham* entitled to investigate before speaking has learned enough to inform shareholders"); *Oaktree Principal Fund V, L.P. v. Warburg Pincus LLC*, 2018 WL 6137169, at *16 (C.D. Cal. Aug. 29, 2018) ("*Yahoo!* And *Higginbotham* did not

purport to create bright line rules for what constitutes a reasonable amount of time for correction; instead, both found reasonableness on the facts of those respective cases"); *Katz v. Image Innovations Holdings, Inc*., 542 F. Supp. 2d 269, 274 (S.D.N.Y. 2008) (rejecting contention that "the Audit Committee's investigation and subsequent actions negates scienter as a matter of law").

Defendants do not dispute that, as shown in the many cases cited in Plaintiff's opening brief, the reasonableness of any action by a defendant is a fact issue in numerous areas of law. Nor do Defendants suggest any reason why reasonableness can or should be treated differently here. The universal rule, in all areas of law, is that reasonableness is a fact issue that may only be resolved as a matter of law where, unlike here, the facts are "uncontroverted" and "there is only one conclusion reasonably possible." *West v. State Farm Fire & Cas. Co*., 868 F.2d 348, 350-51 (9th Cir. 1989); *see SEC v. Dean*, 2018 WL 10715230, at *3 (S.D.N.Y. Oct. 19, 2018) (the "reasonableness" of a party's actions is a fact-specific question).

Perhaps the closest analogy comes from cases construing the Fair Credit Reporting Act, which requires credit agencies to conduct a "reasonable investigation" if an alleged debt is disputed. There, even under the stricter summary judgment standard, reasonableness is treated as a standard factual issue. *See, e.g., Romero v. Monterey Fin. Servs., LLC,* 2021 WL 268635, at *2 (S.D. Cal. Jan. 27, 2021) (denying summary judgment because "the parties genuinely dispute multiple

facts that are material to the reasonableness of Monterey's investigation"); *Daugherty v. Equifax Info. Servs., LLC*, 2015 WL 6456572, at *8 (S.D.W. Va. Oct. 26, 2015) (finding "genuine issue of material fact as to whether Ocwen conducted a reasonable investigation"); *Langley v. Geico Gen. Ins. Co*., 2015 WL 3402895, at *1-*2 (E.D. Wash. May 26, 2015) (denying summary judgment because "the Court cannot say that, as a matter of law, the duration or nature of Defendant's investigation was reasonable"); *Defer v. World Fin. Network Nat. Bank*, 2007 WL 3026091, at *3-*4 (E.D. Mich. Oct. 15, 2007) ("the reasonableness of Defendant's investigation cannot be ascertained as a matter of law under the present record").

The same rule applies here. The pertinent facts regarding REGI's purported investigation are not publicly known or alleged, and certainly not "uncontroverted." In such circumstances, the Court cannot justifiably find that the "only conclusion reasonably possible" is that the duration and nature of REGI's investigation was reasonable as a matter of law. Therefore, even if the Complaint is deemed not to allege actual knowledge by September 30 (it does), and even if leave to amend is denied (leave should be granted), there is no basis for dismissal on "reasonable investigation" grounds – the only one on which the District Court based its decision.

Defendants assert, without any citation of authority, that "in the scienter context, it is Plaintiff's burden to show the time REG took was **not** reasonable." Brief at 22. However, it is Defendants who would assert a "reasonable investigation"

affirmative defense, and thus, "has the burden of proving it," particularly where, as here, "the facts in support of the defense are peculiarly within the knowledge of the party asserting it." *Drexel Burnham Lambert Grp. Inc. v. Galadari*, 777 F.2d 877, 880 (2d Cir. 1985). Plaintiff does not have to prove a negative. *See also, e.g., Est. of Hamilton v. City of New York*, 627 F.3d 50, 57 (2d Cir. 2010) (when a defendant seeks to raise a point that "is not an element which the plaintiff must establish to make out a prima facie showing of liability," it is treated as an affirmative defense); *U.S. Underwriters Ins. Co. v. Tauber*, 604 F. Supp. 2d 521, 531 (E.D.N.Y. 2009) ("insurer carries the burden of showing the reasonableness of its delay").

D. The Complaint Adequately Alleges Recklessness.

The word "holistic" is conspicuously absent from Defendants' Brief even though the Supreme Court has made clear that the "court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically." *Tellabs*, 551 U.S. at 326. Defendants' brief is replete with quotes from cases stating that one suspicious fact or another is "alone" insufficient to create a strong inference of scienter,[7] but does not dispute the caselaw that several such factual allegations may

[7] *See* Brief at 26 ("[I]t is well established that 'the size of the fraud alone does not create an inference of scienter.'") (quoting *In re PXRE Grp. Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 545 (S.D.N.Y. 2010)); *Id.* at 29 ("[A]llegations of GAAP violations or accounting irregularities, standing alone, are insufficient to state a securities fraud claim") (quoting *Novak*, 216 F.3d at 309); *Id.* at 30 (inaccuracy of a forecast alone "is insufficient evidence that defendants acted with intent to defraud") (quoting *In*

together support a strong inference of scienter, when read holistically. *See Novak v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000) (allegations of GAAP violations or accounting irregularities may be sufficient to state a securities fraud claim when coupled with other evidence of "corresponding fraudulent intent"); *New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 F. App'x 10, 14 n.3 (2d Cir. 2011) ("allegations of a company's core operations, GAAP violations, and removal of its executives can provide supplemental support for allegations of scienter, even if they cannot establish scienter independently"); *In re Gen. Elec. Co. Securities Litig.*, 857 F. Supp. 2d 367, 395 (S.D.N.Y. 2012) ("in employing a holistic analysis, surely an inference of knowledge may be appropriate, even if not determinative, where it would be 'absurd to suggest that management was without knowledge of the matter'"); *Norfolk Cnty. Ret. Sys. V. Ustian*, 2009 WL 2386156, at *10 (N.D. Ill. July 28, 2009) (although accounting standards violations are "generally insufficient, standing alone," a strong inference of scienter is created when "the errors were too basic, there were too many of them, and the bottom line discrepancies were too big" to suggest mere incompetence).

The Complaint here alleges a full panoply of activities that, read as a whole,

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re N. Telecom Ltd. Sec. Litig., 116 F. Supp. 2d 446, 464 (S.D.N.Y. 2000)); *Id.* at 37 ("[t]erminations or resignations of corporate executives are insufficient alone to establish an inference of scienter") (quoting *Woolgar v. Kingstone Companies, Inc.*, 477 F. Supp. 3d 193, 240 (S.D.N.Y. 2020)).

establishes a strong inference of at least reckless behavior by Defendants. The Complaint alleges with particularity: (1) specific documents and information to which Defendants had access that revealed the truth (including REGI's guidance model, BTC assumptions, MS exchange sheets, reconciliation procedure, and all other information used by accounting to calculate BTCs); (2) internal control procedures that did not require high-level review and reconciliation of spreadsheets regarding REGI's most critical data, and did not require regular daily, weekly, or even monthly review of the amount of petro-diesel used; (3) huge losses, GAAP violations, and a restatement of nearly three years of financials; (4) extensive, seemingly knowledgeable statements by Defendants about REGI's BTCs, EBITDA, fuel inventory, and its blending strategy and guidelines for biofuel monitoring, tracking, risk management and forecasting; (5) the Individual Defendants' duty under GAAP to familiarize themselves with REGI's core operations and financial reporting of those operations;[8] and (6) demotions and terminations of high-level

[8] Defendants claim that the core operations doctrine applies only if it is "absurd" to think the defendant company's management was not aware of the truth (Brief at 34-35). However, with one exception, Defendants' cited cases do not require "absurdity" for the doctrine to apply. The exception case says that reporting false information is "only" indicative of scienter where it would be "absurd to suggest" that top management was unaware of the truth, *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1001 (9th Cir. 2009), but the cases cited in *Zucco* in support of this proposition say nothing of the sort. *See No. 84 Emp.-Teamster Joint Council Pension Tr. Fund v. America West Holding Corp.*, 320 F.3d 920, 943 (9th Cir. 2003) ("This argument is patently incredible. It is absurd to suggest that the Board of

corporate officers near in time to the events at issue.[9] This is more than enough to create an inference of recklessness that is at least as strong as Defendants' "mere negligence" theory.

In disputing scienter, Defendants do not even accurately describe REGI's own press releases. Most notably, they repeatedly state that the April 2020 guidance error occurred because "the accounting staff was using different tools while working from home during the beginning of the COVID-19 pandemic," Brief at 1-2, 4-6, 25 (citing A-167, REGI's June 2020 press release). However, the cited document clearly states that this was the second of two independent factors. The first was that the error occurred because the Company's guidance model "us[ed] formulas that overestimated REG's BTC revenue." A-167. This had nothing to do with the

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Directors would not discuss [the alleged matters]"); *Berson v. Applied Signal Tech., Inc*., 527 F.3d 982, 989 (9th Cir. 2008) (similar, citing *America West*). There is no basis for imposing any hard and fast "absurdity" requirement; the only issue is whether the alleged facts, read holistically, suggest a strong inference of scienter.

[9] The Complaint alleges the termination of Albin and the demotion of Stone, but these facts were inadvertently not mentioned in Plaintiff's motion to dismiss opposition. As these contentions "involve only questions of law" and require no fact finding, this Court may "may consider the new issues." *Vintero Corp. v. Corporacion Venezolana de Fomento*, 675 F.2d 513, 515 (2d Cir. 1982); *see also Brody v. Chem. Bank*, 482 F.2d 1111, 1114 (2d Cir. 1973) ("While the Delaware point of law was not raised below, there is no reason why this court should not consider it here"). Also, as noted in the case cited by Defendants, this Court has discretion to consider any issue not raised below to avoid "manifest injustice." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006). Plaintiff respectfully asks the Court to exercise its discretion here, as Defendants had full knowledge of Albin's termination and Stone's demotion from the Complaint and would not be prejudiced if those allegations were considered in support of scienter.

pandemic, and as REGI's current or former CEOs or CFOs, the Individual Defendants had direct knowledge of and responsibility for its public guidance. *See* A-29-A-30 ¶¶29-30. Despite providing guidance to investors each quarter during the Class Period, Defendants did not have adequate controls to ensure that the model upon which that guidance was based calculated BTC revenue correctly. From the beginning of the Class Period, the Individual Defendants demonstrated familiarity with and knowledge about the guidance model's inputs, which included BTC revenue. *See, e.g.,* A-48 ¶84 (Howard: "[w]ith the retroactive reinstatement of the BTC for 2018, we are forecasting $60 million to $75 million for adjusted EBITDA"); A-67-A-68 ¶141 (Warner: "This estimate for the third quarter is based on actual performance through last week and takes into account existing forward contracts expected to be fulfilled, and existing spot margin through the end of the quarter."); A-68 ¶142 (Stone: "If we add adjusted EBITDA and expected BTC benefit together in both the guidance and the result, we would have been within the lower end of our guidance range.").

Moreover, in responding to analyst concerns about the April 2020 guidance being revised down from $37-$38 million to $20-$35 million in ***gains*** (that was actually $2 to $12 million in ***losses***), both Stone and Warner assured investors that they knew about and were tracking "the puts and takes" of that guidance:

- Stone: "[A]s we go to forecasting and preparing to provide guidance, we kind of know a little bit of how April started off and through basically the

> end of last week… we know ***we're sitting on a position that we track regularly*** that already reflects some risk management gain and ***that's built into our forecasting and guidance that we provide***." A-82 ¶180.
>
> - Warner: "[W]e expect gallon[s] sold in the range of 155 million to 175 million and adjusted EBITDA in the range of $20 to $35 million." *Id.* at ¶179. [Where REGI will "land" in that range will depend on] "things like well the margin, of course, is one of them. And demand is going to be one, but from a controllable factor standpoint, our underlying performance is a big part." A-82-A-83 ¶181.[10]

Defendants do not dispute the caselaw holding that it is not necessary to allege that a defendant read or was consciously aware of information revealing the truth – "access" to such information is all that is required. *Setzer v. Omega Healthcare Invs., Inc.*, 968 F.3d 204, 215 (2d Cir. 2020); *Novak*, 216 F.3d at 311; *Yannes v. SCWorx Corp.*, 2021 WL 2555437, at *4 (S.D.N.Y. June 21, 2021).[11] And Defendants do not

[10] Defendants incorrectly contend that "Plaintiff does not contest that the challenged forecast is a forward-looking statement that falls within the PLSRA's safe harbor." Brief at 27. Defendants argued this point in their motion to dismiss, and Plaintiff showed how the argument lacks merit in his opposition brief. A-290-A-291. The District Court did not adopt or even mention this argument in its opinion, so Plaintiff had no reason to address it in his opening appeal brief. Plaintiff incorporates his District Court argument here by reference. As shown therein, Plaintiff does not allege that the April 2020 guidance statements were false because of REGI's failure to meet its guidance; rather, they were false because that was not the actual guidance. Moreover, Defendants falsely and repeatedly conveyed that REGI had adequate internal controls – without having a sufficient basis to say so and while withholding material contradictory information. *Id.*

[11] It is also uncontested that "the contradictory facts [need not] be summarized in a single report that explicitly states the direct opposite of the misleading statement. To the contrary, a strong inference of scienter is alleged by specific allegations of various reasonably available facts that should have put the officers on notice that their public statements were false." *In re Dynex Cap., Inc. Sec. Litig.*, 2009 WL 3380621, at *14 (S.D.N.Y. Oct. 19, 2009).

dispute that they had unrestricted "access" to REGI's guidance model, BTC assumptions, MS exchange sheets, reconciliation procedure, internal controls, information in the Company's J.D. Edwards system, and all other information used to calculate the earnings forecast and BTC revenue before they made public statements on those topics at earnings calls, in press releases and in SEC filings. *See* A-27-A-30 ¶¶26-30; A-48 ¶64; A-107 ¶¶256-57. Instead, Defendants contend that access to these documents is not enough because the Individual Defendants were "upper-level executives" with no obligation to have knowledge of "plant-level" or "accounting-level" documents. Brief at 23, 29, 35. They cite no case that so holds, because there is none. In any event, nothing in the Complaint suggests that the subject documents are purely "plant-level" or "accounting-level." Indeed, the Complaint alleges that REGI's "[a]ccounting was handled at the ***corporate*** level in Ames, Iowa through a J.D. Edwards system and rolled up to Chad Stone as the CFO" and that the "***corporate*** accounting team, at the end of each month, reconciled the inventory levels of the plants, as well as the reported sales, to arrive at final figures representing how much fuel had been produced and sold." A-43 ¶64.

Moreover, REGI's senior management was directly responsible for preparing its financial statements and designing and maintaining its guidance models and internal control procedures. *See* A-29-A-30 ¶¶29-30; A-46-A-47 ¶¶77-79 ("management is responsible for the preparation of…financial statements" and

"establishing and maintaining adequate internal control over financial reporting"), A-47-A-48 ¶81 ("Internal control over financial reporting…is a process designed by, or under the supervision of, the CEO and CFO"), A-48 ¶83 (CEO "has ultimate ownership responsibility for the internal control system"). As such, Defendants should not be permitted to escape liability simply because they had different staff reporting to them for different aspects of REGI's business. *See*, *e.g.,* Brief at 25 ("the guidance model error was distinct from the fuel blending issue, as it involved different personnel and resulted from accounting staff using different software tools."). Accordingly, the Complaint adequately pleads a strong inference of reckless-based scienter, and the decision below should be reversed.

E. The Complaint Adequately Alleges Corporate Scienter.

Defendants do not dispute that, if this Court agrees that Plaintiff has adequately alleged scienter as to any of the Individual Defendants, then the same is true as to REGI's scienter. *See Jackson v. Abernathy*, 960 F.3d 94, 98 (2d Cir. 2020) (the "most straightforward" way to raise a strong inference of corporate scienter is to "impute it from an individual defendant"). Nor do Defendants contest that, even if this Court finds scienter insufficiently plead as to every Individual Defendant, corporate scienter may be found if Plaintiff has alleged "facts sufficient to create a strong inference either (1) that someone whose intent could be imputed to the corporation acted with the requisite scienter or (2) that the statements would have

been approved by corporate officials sufficiently knowledgeable about the company to know that those statements were misleading." *In re VEON Ltd. Sec. Litig.*, 2017 WL 4162342, at *10 (S.D.N.Y. Sept. 19, 2017) (quoting *Loreley*, 797 F.3d at 177). There is also no question that "[t]he person whose state of mind is imputed to the corporate defendant need not also be the person who made the material misstatements," and there is "no formulaic method or seniority prerequisite for employee scienter to be imputed to the corporation, but scienter by management-level employees is generally sufficient to attribute scienter to corporate defendants." *In re Henry Schein, Inc. Sec. Litig.,* 2019 WL 8638851, at *22, *23 n.5 (E.D.N.Y. Sept. 27, 2019).

Defendants instead argue that "the proposition that corporate scienter can be pleaded without reference to the state of mind of a specific individual is limited to extreme cases." Brief at 32. Purportedly, the "*Dynex* court held that such an inference might be appropriate only in a rare extreme case." But the *Dynex* court said no such thing. Rather, it quoted a hypothetical from a Seventh Circuit case of "General Motors announc[ing] that it had sold one million SUVs in 2006, and the actual number was zero." *Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 195 (2d Cir. 2008) (quoting *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008)). Neither *Dynex* nor *Tellabs* say anything about limiting corporate scienter to "extreme" cases, simply that "it is

possible to draw a strong inference of corporate scienter without being able to name the individuals who concocted and disseminated the fraud." *Id*. The issue is, as always, whether the allegations, construed holistically with all reasonable inferences drawn in plaintiff's favor, give rise to a strong inference of corporate scienter.

Defendants' only other contention regarding corporate scienter is that "no facts suggest[] the Seneca plant manager was sufficiently senior that his or her knowledge could be imputed to REG, … or that he or she had any involvement with the statements at issue." Brief at 32-33. However, a plant ***manager*** is, by definition, a "management-level employee" whose scienter "is generally sufficient to attribute scienter to corporate defendants." *Henry Schein,* 2019 WL 8638851, at *22, *23 n.5. And the manager at REGI's "crown jewel" plant undoubtedly had direct involvement with reporting its output, which rolled up to corporate and ultimately the CFO. *See* A-43 ¶64. Thus, Defendants' baseless argument should be rejected.

III. CONCLUSION

It is rather incredible that Defendants claim such broad immunity despite making undisputedly false statements that caused Plaintiff and putative class members significant losses when the truth became known. For the reasons stated above and in the opening brief, Defendants' position should be firmly rejected, the decision below reversed, and the case remanded for further proceedings.

Dated: June 23, 2022 Respectfully submitted,

ROCHE FREEDMAN LLP

/*s/ Velvel (Devin) Freedman*
Velvel (Devin) Freedman
Ivy T. Ngo
1 SE 3rd Ave., Suite 1250
Miami, Florida 33131
Telephone: (786) 924-2900
Fax: (646) 392-8842
Email: vel@rochefreedman.com
Email: ingo@rochefreedman.com

Edward Normand
99 Park Avenue, Suite 1910
New York, NY 10016
Telephone: (917) 743-7608
Email: tnormand@rochefreedman.com

Counsel for Lead Plaintiff and Lead Counsel for the Class

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29 and 32 and Circuit Rule 29.1, I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 29.1(c) because this brief contains 6,994 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated June 23, 2022

/s/ Velvel (Devin) Freedman

VELVEL (DEVIN) FREEDMAN
ROCHE FREEDMAN LLP
1 SE 3rd Ave., Suite 1250
Miami, Florida 33131
Telephone: (786) 924-2900
Email: vel@rochefreedman.com

CERTIFICATE OF SERVICE

I certify that on June 23, 2022, the foregoing document was filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system, and served on all parties or their counsel of record through the CM/ECF system.

Dated June 23, 2022

/s/ Velvel (Devin) Freedman

VELVEL (DEVIN) FREEDMAN
ROCHE FREEDMAN LLP
1 SE 3rd Ave., Suite 1250
Miami, Florida 33131
Telephone: (786) 924-2900
Email: vel@rochefreedman.com