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 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

BRIEF FOR DEFENDANTS-APPELLEES RENEWABLE ENERGY GROUP, INC., RANDOLPH L. HOWARD, CYNTHIA J. WARNER, CHAD STONE, AND TODD ROBINSON

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned Defendants-Appellees make the following disclosures:

Renewable Energy Group, Inc. is a publicly traded corporation. Renewable Energy Group has no parent corporation. No publicly held corporation owns 10% or more of REG's stock, but various mutual funds advised by BlackRock Fund Advisors collectively own more than 10% of REG's stock, and BlackRock Fund Advisors is a subsidiary of BlackRock, Inc., which itself is a publicly traded company.

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INTRODUCTION

When Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA"), a primary goal was to eliminate securities fraud claims based on hindsight allegations that failed to plead specific facts showing a strong inference of scienter. The Amended Complaint in this case offers no witnesses, no contemporaneous documents, and no other particularized facts showing that Defendants possessed the requisite state of mind to commit fraud. Instead, the Amended Complaint relies on speculation, unwarranted inferences, allegations of Defendants' "status," and other theories that courts universally reject as insufficient.

Defendant Renewable Energy Group, Inc. ("REG" or the "Company") is the leading producer of biodiesel fuel, which is made from renewable resources, in the United States, as well as being a wholesaler of blended fuel containing both biodiesel and small amounts of petroleum diesel. Over the course of a 33-month period between 2018 and 2020, REG issued routine financial reports that ended up being incorrect. REG itself disclosed the errors in early 2021, explaining that the Company's quarterly financial statements failed to reflect the impact of a mechanical fuel blending issue at one of the Company's twelve plants, which resulted in the Company improperly claiming certain tax credits. Plaintiff also challenges as fraudulent a forecast for Q2 2020 made during the Company's April

30, 2020 earnings call, which the Company later determined to be inaccurate because the accounting staff was using different tools while working from home during the beginning of the COVID-19 pandemic. Once again, REG itself disclosed the error and corrected its forecast in a press release issued on June 23, 2020.

Plaintiff seeks to use these mistakes—which the Company fully and candidly disclosed, including by restating its financial results and revising its forecasts for certain periods—to support his flawed and implausible argument that Defendants knew or were reckless in not knowing that the earlier statements were false when made. In doing so, Plaintiff fails to come close to pleading a strong inference of scienter, and in any event, any inference in Plaintiff's favor is far less cogent and compelling than the inference that Defendants made mistakes innocently, found them, and timely disclosed them.

The district court correctly dismissed the Complaint and did not abuse its discretion in denying Plaintiff's generic request for leave to amend after Plaintiff failed to amend at the proper time specified in the court's case management order. This Court should affirm.

STATEMENT OF FACTS

I. FACTUAL BACKGROUND

A. REG's Business Model

REG is the country's leading producer of biodiesel fuel—a clean, plant-based fuel made with energy from the sun instead of fossil fuels. A-20 ¶ 2 & n.1. Manufactured utilizing largely biproducts from other industries, biodiesel transforms substances like distillers' corn oil, used cooking oils, inedible animal fats, and soybean and canola oils into usable energy. *Id*. REG is a pioneer in the biodiesel industry with a history of working with competitors for the industry's greater good. A-30 ¶ 31. In recent years, REG has grown quickly, doubling its output between 2014 and 2017. *Id*. ¶ 32. When the Amended Complaint was filed, REG operated twelve biorefineries from which it sold both pure biodiesel fuel (known as "B100") and a mixture of 99.9% biodiesel and .1% petroleum diesel (known as "B99.9"). A-31 ¶ 33.

In addition to generating revenue from selling these products, REG also earns income from its participation in the federal Biodiesel Mixture Excise Tax Credit Program. A-20 ¶ 2; A-32 ¶ 36. Under this program, REG is eligible to receive a Biodiesel Mixture Excise Tax Credit ("BTC") of $1.00 for every gallon of biodiesel fuel that it blends with petroleum diesel to produce a mixture containing at least .1% petroleum diesel fuel. *Id*. To qualify for this credit, REG

must be the first entity in the supply chain to blend the product. A-32 ¶ 36. The credit is claimed through submitting documentation to the federal government. *Id*. ¶ 37. The Company receives BTCs under the program as a tax credit that offsets its tax liability; however, where the amount of BTCs exceeds the Company's tax liability, the federal government pays the overage directly to the Company. A-20 ¶ 2.

Although the BTC program has had longstanding support from Congress since its enactment in 2005, it is not a permanent program that renews automatically. A-32 ¶ 39. Lawmakers must affirmatively reinstate the tax credit, which typically happens every few years, in order for companies like REG to continue to claim it. *Id*. As a result, the BTC program has lapsed multiple times. *Id*. During these lapses, REG continues to blend and sell blended fuel products, but it is not able contemporaneously to claim BTCs earned by the blending. A-20-A-21 ¶ 4. If and when the BTC program is retroactively reinstated, as has happened several times since 2005, companies like REG can then submit claims for the credit—including for all previously unclaimed blending—and those credits are reported as present earnings. *Id*.; A-34 ¶ 43.

Most recently, the BTC program was retroactively reinstated in December 2019 for the five-year period of January 2018-December 2022. A-38 ¶ 51. This

reinstatement allowed the Company retroactively to apply for tax credits on all gallons blended since January 2018 while the BTC program was lapsed. *Id*.

B. 2020 Financial Guidance Revision

Early in the COVID-19 pandemic, during the second quarter of 2020, REG's guidance model contained a calculation error that went undetected by accounting staff as a result of the use of different software tools as employees adapted to working from home. A-92 ¶ 210. Relying on this guidance model, REG announced its forecasted earnings for the second quarter of 2020 as an adjusted EBITDA of $20 million to $35 million on April 30, 2020. A-82 ¶¶ 177, 179. The Amended Complaint nowhere alleges that the Company was aware of the calculation error at the time. To the contrary, the Amended Complaint recounts an analyst's statement that these errors were "missed by accounting staff," indicating a lack of awareness by management when the initial forecast was released. A-92 ¶ 210.

Shortly after forecasted earnings were made public, REG discovered the calculation error, disclosed the mistake, and revised its second quarter forecast. A-91-A-92 ¶ 209. The Company issued a press release on June 23, 2020 stating that "the Company's second quarter 2020 Adjusted EBITDA is expected to be between negative $12 million and negative $2 million." A-165. The press release explained that "[s]everal factors contribute[d] to the Company's revised outlook"

including the calculation error and unanticipated risk management losses. *Id*. It went on to explain that the issues with the guidance model were related to "a manual data entry error resulting from the use of different software tools to accommodate the work-from-home environment during the COVID-19 pandemic." A-167. The Amended Complaint does not contain any allegations contradicting the Company's description of the issue as an inadvertent error that was promptly addressed once it was discovered.

C. 2021 Financial Restatement Related To The Seneca Plant Mechanical Issue

REG's BTC filings are subject to standard audits by the IRS. A-94-A-95 ¶ 217. While preparing for an audit of the 2018 and 2019 BTC filings made on behalf its Seneca, Illinois plant, REG discovered that a smaller volume of petroleum diesel had been used for blending at the plant than expected. A-94 ¶ 215. REG reported this finding to the IRS. A-171. It also launched an internal investigation that the Audit Committee and the Board of Directors oversaw to determine the root cause. A-24 ¶ 13; A-171-A-172.

The Company's investigation ultimately revealed that the shortage in gallons of petroleum diesel used at the Seneca plant was caused by "failures in the diesel additive system" specific to that plant. A-94 ¶ 215. These "intermittent," "one-off" failures caused by "a design issue" meant that "petroleum diesel was periodically not added to certain loads" of biodiesel that were being mixed to

create B99.9. *Id.*; A-96 at ¶ 220. The blending issue was not immediately detected because it was intermittent, affected only "certain loads," and was not obvious to the blender (because B99.9 includes only .1% petroleum diesel, which amounts to less than a teaspoon per gallon) or the end-user (because B99.9 is functionally equivalent to B100). A-32 ¶ 36. The total petroleum diesel shortfall identified at the Seneca plant during the audit period was only 40,000 gallons—a negligible amount in comparison to the 60-76 *million* gallons that the Seneca plant alone has the capacity to produce every year, A-153, and the 651 *million* gallons of fuel that the Company sold in 2020, A-152.

Before the issue was discovered, REG sold fuel that it thought had been blended into B99.9 but—because the mechanical failure meant that petroleum diesel was not actually added during the fuel blending process—was actually pure biodiesel or B100. A-94 ¶ 215. This meant that the customers who later blended the fuel were actually the first blenders and eligible to receive the tax credit, not REG. *Id*. Unaware at the time that it was not actually the first blender, REG applied for the BTC on these gallons. A-93 ¶ 214.

The Company announced its discovery and investigation of the mechanical issue at the Seneca plant on February 25, 2021. A-94 ¶ 215. On the same day, the Company also announced a restatement of $38.2 million in revenue from January 2018 through September 30, 2020 and explained that it was restating "its financial

statements for the years ended December 31, 2019 and 2018 and the quarters ended March 31, June 30 and September 30, 2019 and 2018." A-93 ¶ 214. Because the Company's public financial statements reflected BTC revenue from gallons that had not been blended, the Company determined that its disclosures for 2018 and 2019 should be restated to reflect the smaller number of BTCs to which the Company was entitled; the Company correspondingly issued corrected numbers for 2020 in its annual filing on March 1, 2021. A-94 ¶ 216; A-97 ¶ 224.

In addition to restating its financials, the Company made public several remedial actions that it had taken in response to the discovery of the mechanical issue at the Seneca plant. It disclosed that it had reached an agreement with the IRS on February 23, 2021 to return certain BTC claims impacted by the issue and to update its BTC tax claims for the Seneca plant. A-93-A-94 ¶ 214; A-172. The IRS agreed to an assessment of $40.5 million[1] and did not assess a penalty. *Id*. The Company also announced that it was "working with its customers on BTC re-filings on these gallons to recover as much as possible." A-172.

[1] This number reflects the total amount of tax credits under the BTC that the IRS determined were improperly claimed. A-172. The reason that this number is larger than the $38.2 million reflected in the Company's restatement is that some of the sales of B99.9 that lacked petroleum diesel were to REG's subsidiaries that later blended the fuel. REG was able to recoup the credits for these sales because the subsidiaries that were in fact the first blenders could claim the tax credits for the Company. *Id*.

Finally, the Company put in place additional measures to prevent a recurrence of the blending issue. A-172; A-95 ¶ 218. Among other things, the Company added calculation and readout tools that "enable[d] the loading operator to validate that the proper number of petroleum diesel gallons were added to each load." *Id*. At the Company-wide level, REG began "[p]erforming additional local reconciliations weekly to validate that the amount of petroleum diesel used matches the amount of petroleum diesel required to be blended" and added an additional review to the process before filing for BTCs that would "re-confirm that the required volume of petroleum diesel has been blended." A-173; A-95 ¶ 218.

Nothing about these disclosures indicates that anyone at the Company, much less management, knew of the fuel blending issue at the time of any challenged statement. The Amended Complaint asserts, without any factual support whatsoever, that "[s]omeone" at the Seneca plant "should have noticed" the discrepancy in the volume of petroleum diesel being consumed. A-41 ¶ 60. It further alleges that unidentified "accountants" "should have detected if diesel was not being consumed." A-43 ¶ 64. But no facts are alleged suggesting that any person, much less a Defendant, "noticed" the fuel blending issue or any discrepancy. Alleging that an unspecified "someone" must have known or seen and unspecified "something" utterly fails to satisfy the PSLRA's requirements for pleading scienter.

Taken as a whole, the Amended Complaint and the documents referenced in it demonstrate that REG identified an isolated, line-level issue, performed a thorough investigation of how it affected the business and past financial statements, disclosed it, and took appropriate remedial action to correct it. Those are not the acts of defendants bent on engaging in securities fraud.

II. PROCEDURAL HISTORY

On March 2, 2021, David Ramsey filed a complaint in the Southern District of New York against REG and individual defendants Randolph L. Howard, Cynthia J. Warner, Chad Stone, and Todd Robinson ("Individual Defendants," and collectively with REG, the "Defendants")—who each served as CEO or CFO during the putative class period, *see* A-27-A-29 ¶¶ 25-28—under Section 10(b) and Rule 10b-5 of the Exchange Act and for control person liability under Section 20(a) of the Exchange Act. *See* A-6; A-19 ¶ 1. Motions for appointment of lead plaintiff followed. On May 19, 2021, the district court appointed Steven Rosa Lead Plaintiff and issued a case management order. ASA-1.

A nearly identical complaint was filed on March 12, 2021, by Chris Olson in the Central District of California. *See* Compl. at 1, *Olson v. Renewable Energy Grp., Inc.*, No. 21-cv-02244 (C.D. Cal. Mar. 12, 2021), ECF No. 1. Plaintiff intervened and moved to transfer this case to the Southern District of New York for consolidation with the first-filed case. Mot. to Transfer, *Olson*, No. 21-cv-

02244 (C.D. Cal. May 5, 2021), ECF No. 27. The court granted the motion to transfer and consolidated the cases. Order at 1, *Olson*, No. 21-cv-02244 (C.D. Cal. June 7, 2021), ECF No. 43; Order at 1, *Olson*, No. 21-cv-05127 (S.D.N.Y. June 24, 2021), ECF No. 45.

On July 9, 2021, Plaintiff filed an Amended Complaint in the consolidated action on behalf of a putative class of REG shareholders who purchased shares between March 8, 2018 and February 25, 2021. A-16-A-110. Defendants filed their motion to dismiss on August 6, 2021. A-111-A-262. The district court's case management order instructed Plaintiff that, in the event a motion to dismiss was filed, Plaintiff "shall file a letter … indicating a desire to further amend its complaint in response to the motion." ASA-3. The order stated that if Plaintiff did not amend at that time, "[i]t is unlikely that … Plaintiff will be granted any further opportunities to amend." ASA-3-ASA-4. Plaintiff did not file a letter and instead opposed the motion to dismiss on September 10, 2021. A-263-A-294.

On January 20, 2022, the district court issued its order dismissing the Amended Complaint. SPA-1-SPA-12. The court held that Plaintiff "fail[ed] to plead the defendants' scienter" because Plaintiff's theory of scienter relied solely on "assertions that the defendants knew facts or had access to information suggesting that their public statements were not accurate and failed to check information that they had a duty to monitor." The court further held that none of

the allegations in the Amended Complaint demonstrated either of these two bases for recklessness. SPA-9-SPA-10. As to the 2020 financial guidance revision, the court held that Plaintiff failed to identify "specific information that a defendant knew or should have known that would have alerted them to the calculation errors made during the early days of the pandemic." SPA-10.

The court held that Plaintiff similarly failed to identify with any precision the information that Defendants allegedly should have known that would have informed them of the mechanical failures at the Seneca plant. SPA-10. To the contrary, the court found that the Seneca plant allegations were "consistent with the discovery of the problem during the fourth quarter of 2020, and the reporting of the problem and the results of its investigation when it issued its Form 10-K for 2020 on March 1, 2021." SPA-11. The court rejected Plaintiff's contention that Defendants should have disclosed the problem immediately upon discovery, holding that they were entitled to a reasonable period to investigate. *Id*. Finally, the district court rejected the effort to plead corporate scienter because Plaintiff "d[id] not plead collective fraudulent conduct." SPA-12. Accordingly, the court granted the Defendants' motion to dismiss with prejudice, dismissed the Amended Complaint, and closed the case.

Plaintiff filed a notice of appeal on February 18, 2022. Dkt. 4.

SUMMARY OF ARGUMENT

Plaintiff does not allege any contemporaneous facts demonstrating that Defendants either knew about the guidance model error or the fuel blending issue at the Seneca plant at the time of any challenged statement or acted recklessly. In the absence of such allegations, Plaintiff makes a host of arguments, some of which Plaintiff did not even raise below. None of these arguments is sound. For example, Plaintiff suggests that the Court draw a baseless inference of actual knowledge of the fuel blending issue; relies on assertions of recklessness founded on nothing more than hindsight, generalized conclusions, and status; improperly seeks to apply notions of corporate scienter and the core operations doctrine; and offers the discredited argument that scienter can be inferred from the size of the errors at issue. None of this meets the exacting standards of the PSLRA and Federal Rule of Civil Procedure 9(b). *See* 15 U.S.C. § 78u-4(b)(2); *Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 194 (2d Cir. 2008) (quoting 15 U.S.C. § 78u-4(b)(2)) (explaining that securities complaints must "state with particularity" facts giving rise to the "strong inference" of scienter).

Moreover, Plaintiff fails to show how any inference of scienter in his favor is at least as cogent and compelling as the obvious nonculpable inference here: that Defendants made innocent mistakes, discovered and corrected them, and

candidly and timely disclosed them to the public. Finally, Plaintiff fails to show how the district court abused its discretion by denying his generic request to amend, especially in light of the district court's warning that further leave likely would not be granted if Plaintiff chose to forego his earlier opportunity for amendment and oppose Defendants' motion to dismiss.

The Court should affirm.

STANDARD OF REVIEW

This Court reviews the district court's dismissal for failure to state a claim *de novo*. *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007). This Court reviews the district court's denial of leave to amend for abuse of discretion. *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009).

ARGUMENT

Section 10(b) of the PSLRA makes it "unlawful for any person, directly or indirectly" to "use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe." 15 U.S.C. § 78j. Rule 10b-5, promulgated under this provision of the PSLRA, prohibits "mak[ing] any untrue statement of a material fact" or the omission of "a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 C.F.R. § 240.10b-5. "To state a

claim under Section 10(b) and Rule 10b-5, a plaintiff must plead: (1) a misstatement or omission of material fact; (2) scienter; (3) a connection with the purchase or sale of securities; (4) reliance; (5) economic loss; and (6) loss causation." *Arkansas Pub. Emps. Ret. Sys. v. Bristol-Myers Squibb Co.*, 28 F.4th 343, 351-352 (2d Cir. 2022). This appeal concerns only the second element, scienter.[2]

Under the heightened pleading requirements of the PSLRA and [Federal Rule of Civil Procedure] 9(b), "a plaintiff's complaint [must] 'state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.'" *Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 194 (2d Cir. 2008) (quoting 15 U.S.C. § 78u-4(b)(2)). When evaluating allegations of scienter for a securities fraud claim, the Court does not draw all reasonable inferences in favor of the non-movant as it would for a typical claim, but instead evaluates whether the inference of scienter is "cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Id*.

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[2] In addition to the claim under Section 10(b), in the district court, Plaintiff alleged a claim under Section 20(a) of the Exchange Act, 15 U.S.C. § 78t. A-106-A-107, ¶¶ 255-260. Because the opening brief makes no mention of this claim, it is waived. *JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant pursued those arguments in the district court or raise[s] them in a reply brief."). Plaintiff's only remaining claim is thus the claim under Section 10(b).

(quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007)). A plaintiff may demonstrate scienter in one of two ways. He may "allege facts showing (1) that defendants had the motive and opportunity to commit fraud, or (2) strong circumstantial evidence of conscious misbehavior or recklessness." *Arkansas Pub. Emps. Ret. Sys.,* 28 F.4th at 355 (quotations omitted). Plaintiff concedes that there is no evidence of motive and opportunity to commit fraud and he is relying solely on the second method of proving scienter. *See* Blue Br. at 29-30 (stating that the scienter allegations are based on actual knowledge and recklessness); SPA-9-SPA-10.

"Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater." *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001) (quotations omitted). This conscious misbehavior must amount to at least recklessness, which is defined as "conduct that is highly unreasonable, representing an extreme departure from the standards of ordinary care, not merely a heightened form of negligence." *In re Advanced Battery Techs., Inc.*, 781 F.3d 638, 644 (2d Cir. 2015) (citations omitted).

III. PLAINTIFF FAILS TO PLEAD A "STRONG INFERENCE" OF SCIENTER FOR ANY INDIVIDUAL DEFENDANT REGARDING FUEL BLENDING AT THE SENECA PLANT

A. Plaintiff Fails To Plead Actual Knowledge

Plaintiff argues that Defendants had actual knowledge of the fuel blending issue no later than September 30, 2020 (before the Company filed its 3Q 2020 financial results on November 6, 2020). However, as the district court correctly observed, the Amended Complaint makes no allegations in this regard. SPA-11 ("The FAC does not allege that the problem was discovered at any particular point in time, including before the filing of [REG's] 3Q20 results."). Moreover, Plaintiff conceded in his opposition to Defendants' motion to dismiss below that he does not know when Defendants discovered the issue. A-281 ("**Although they have concealed exactly when they discovered the issue**, they have confirmed that the blending error occurred repeatedly …." (emphasis added)). This alone is fatal. *See Mucha v. Volkswagen Aktiengesellschaft*, 540 F. Supp. 3d 269, 303 (E.D.N.Y. 2021) *aff'd sub nom. Mucha v. Winterkorn*, 2022 WL 774877 (2d Cir. Mar. 15, 2022) ("[T]he Court cannot relieve Plaintiffs of their obligation to state with particularity facts giving rise to a strong inference of conscious misbehavior or recklessness by assuming facts favorable to Plaintiffs' case.").

Plaintiff does not seriously contest this on appeal. Instead, Plaintiff asks this Court to **infer** that Defendants must have known of the issue no later than

September 30, 2020, because "there were no more improper claims after [that date] and the problem would not likely have gone away on its own." Blue Br. at 31.

This speculation makes no sense. Nothing in the record remotely suggests September 30, 2020 was the date by which the blending issue was remediated. To the contrary, that date is merely the end of the last quarter impacted by the February 25, 2021 restatement and the IRS settlement. Obviously, the blending issue could have continued for some time into the fourth quarter (ended December 31, 2020) before being discovered, and then been corrected before the company reported the results of that quarter on March 1, 2021 and before any BTC claims for that quarter were due on March 31, 2021.[3] *See* SPA-11. Thus, the fact that the

[3] BTCs are claimed on IRS Form 8849, which states that "[t]he claim must be filed by the last day of the first quarter following the earliest quarter of the claimant's income tax year included in the claim." IRS Form 8849, available at https://www.irs.gov/pub/irs-access/f8849s3_accessible.pdf. Claims for biodiesel blended in the fourth quarter of 2020 therefore would not have been due until March 31, 2021. The IRS does not have authorization to collect excess credits paid during a quarter in which it is still receiving claims. *See* 26 U.S.C. § 6206 (providing that the IRS may collect "excessive" BTC claims only after the "last day prescribed for the filing of the claim under section … 6427" for BTCs). As a result, REG's restatement and the IRS settlement both focused only on quarters for which REG had completed its BTC filings and for which an "excess" amount could be determined and recouped. By the same token, any improper claims REG may have filed after September 30, 2020 would not have been subject to review by the IRS until after the due date for those claims had passed, in the event that any improper claims were not resolved in advance of the claim due date.

third quarter ending September 30, 2020 was the last quarter **restated** says nothing about when the company discovered the fuel blending issue.[4]

Equally problematic for Plaintiff, his theory is utterly implausible on its face. According to him, Defendants discovered the fuel blending problem by September 30, 2020, intentionally hid the problem from investors when they released the Q3 2020 results on November 5, but then decided to disclose the problem absent any intervening reason to do so on February 25, 2021. Plaintiff gives no explanation for why this inference is at least 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. *See Tellabs*, 551 U.S. at 324 (inference must be "at least as compelling as any opposing inference one could draw" from facts alleged).

Finally in this regard, Plaintiff asserts that even if the Amended Complaint can plausibly be read as alleging discovery during the fourth quarter of 2020 or not alleging any particular discovery date, the Court still must find scienter because "the Complaint must not be construed in Defendants' favor for Rule 12(b)(6) purposes." Blue Br. at 31. This is not the case in the context of scienter. For

[4] Plaintiff's argument that "no defendant has ever … denied knowledge of [the fuel blending issue] by September 2020" (Blue Br. at 30) misstates the burden of proof at the motion to dismiss stage, where Plaintiff is required to plead facts establishing a strong inference of scienter. *See Tellabs*, 551 U.S. at 324.

scienter, courts "must consider plausible, nonculpable explanations for the defendant's conduct, as well as inferences favoring the plaintiff." *Tellabs*, 551 U.S. at 324. As set out above, Plaintiff fails to meet this standard; his theory is utterly implausible as well as unsupported by any pleaded facts, and there is no reason to credit his inference.[5]

B. That Defendants Investigated The Fuel Blending Issue Before Disclosing It Does Not Show Scienter

Plaintiff makes a secondary argument that, even if the fuel blending issue was discovered later in Q4 2020, an inference of scienter arises from the Company's decision to investigate it rather than immediately disclosing it. Blue Br. at 34. This is contrary to law and the district court appropriately rejected it. SPA-11.

As this Court has held, taking the time to investigate a problem before disclosing it is "a prudent course of action that weakens rather than strengthens an inference of scienter." *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 777 (2d Cir. 2010) (quoting *Horizon Asset Mgmt. Inc. v. H & R Block, Inc.*, 580 F.3d 755, 763 (8th Cir. 2009)); *see also* SPA-11 (company is permitted investigation period). It would have been "irresponsibl[e] (and possibly in violation of the securities laws)" for REG to "ma[ke] a public announcement which was possibly inaccurate because

[5] Plaintiff's further alternative claim that the district court erred in not granting him leave to amend is addressed *infra* at Section VI.

the situation … had not yet been adequately investigated." *New Jersey Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 58 (1st Cir. 2008).

While the amount of time it may take to investigate an issue varies depending on the circumstances, courts have held that an investigation period of a few months does not give rise to an inference of scienter. *See Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 760-761 (7th Cir. 2007) (dismissing for lack of scienter after investigation period of nearly three months); *In re Welspun Litig.*, 2019 WL 2174089, at *3, *16 (S.D.N.Y. May 20, 2019) (eight-month investigation and three-month audit period did not establish scienter); *In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *22 (N.D. Cal. Aug. 10, 2012), *aff'd*, 611 F. App'x 387 (9th Cir. 2015) (five week investigation did not establish scienter). Regardless of when precisely the issue may have been discovered during the fourth quarter, REG's investigation was well within the range that courts have held does not support an inference of scienter.

Plaintiff's argument that "the reasonableness of any action is a fact issue that must not be resolved on a motion to dismiss" is contrary to the precedent discussed above. Plaintiff's cases do not hold otherwise; they all deal with other reasonableness inquiries, not with the question of whether investigating an issue before disclosing it shows scienter. *See In re Lavender*, 399 F. App'x 649, 652-654 (2d Cir. 2010) (reasonableness of reliance on bankruptcy debtor's financial

statement to extend credit); *King v. Crossland Sav. Bank*, 111 F.3d 251, 259 (2d Cir. 1997) (negligence claim); *Kaminsky v. Rosenblum*, 929 F.2d 922, 927 (2d Cir. 1991) (qualified immunity); *Rekor Sys., Inc. v. Loughlin*, 2020 WL 6898271, at *6 (S.D.N.Y. Nov. 23, 2020) (rescission of a contract); *Ion Audio, LLC v. Bed, Bath & Beyond, Inc.*, 2019 WL 1494398, at *9 (S.D.N.Y. Apr. 2, 2019) (reasonable time for performance of a contract); *Gamoran v. Neuberger Berman, LLC*, 2012 WL 2148217, at *5 (S.D.N.Y. June 12, 2012) (whether company board was acting in good faith for purposes of Delaware's demand requirement in derivative actions). Indeed, in the scienter context, it is Plaintiff's burden to show the time REG took was **not** reasonable, and other than intoning incorrectly that the issue is inherently one of fact, Plaintiff cites no facts to meet that burden.

C. Plaintiff Fails To Plead Recklessness

Plaintiff argues in the alternative that Defendants were reckless in failing to identify the fuel blending issue because they had access to information that would have alerted them to the unexpectedly high levels of petroleum diesel remaining at the Seneca plant. This is no more than impermissible "fraud by hindsight." "Corporate officials need not be clairvoyant; they are only responsible for revealing those material facts reasonably available to them." *Novak*, *v. Kasaks*, 216 F.3d 300, 309 (2d Cir. 2000). Therefore, in order to prevail on a recklessness claim based on access to information, the Second Circuit has repeatedly held that

plaintiffs must "specifically identify the reports or statements containing this information." *Id.*; *accord Dynex Cap. Inc.*, 531 F.3d at 196; *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 270 (2d Cir. 1996). The Amended Complaint contains no facts identifying the materials "reasonably available" to Defendants that would have revealed this issue. Plaintiff hypothesizes in the Amended Complaint that "[i]f someone was simply keeping track of and examining 'receipts of loads of petro-diesel' being delivered to the Seneca plant, there would have been 'a stark difference' between receipts from when Renewable Energy had been correctly mixing the B99.9 blend and after the diesel additive system failures." A-41 ¶ 60. This allegation, however, falls short of saying that receipts actually showing this discrepancy existed, and it is unreasonable in any case to suggest that upper-level executives were reckless for not reviewing plant-level receipts. *Compare In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 268 (S.D.N.Y. 2010) (finding recklessness based on access to "memo detailing" relevant information "sent to … Credit Risk Committee" and email to defendant questioning relevant company policies); *Nursing Home Pension Fund, Loc. 144 v. Oracle Corp.*, 380 F.3d 1226, 1231 (9th Cir. 2004) (finding scienter where plaintiffs had "hard numbers and ma[de] specific allegations regarding large portions of Oracle's sales data" contained in a particular database that defendants admitted to monitoring).

Plaintiff also argues that Defendants were reckless in failing to identify the fuel blending issue earlier because they had access to unspecified "internal controls" and therefore should have known that these internal controls were inadequate. Blue Br. at 39. However, even assuming the fuel blending issue could have been avoided by some additional internal control, this does not establish recklessness on the part of the Defendants. *See In re Magnum Hunter Res. Corp. Sec. Litig.*, 616 F. App'x 442, 446 (2d Cir. 2015) (allegations suggested "at most" that company, which reported multiple weaknesses in internal controls, had inadequate internal controls and did "not imply that any defendant made specific disclosures with fraudulent scienter"); *Woolgar v. Kingstone Companies, Inc.*, 477 F. Supp. 3d 193, 239 (S.D.N.Y. 2020) ("The mere fact that [the Company] identified a material weakness in its internal controls … does not lead to the inference that the Individual Defendants were aware of that weakness—or any similar weakness—during the Class Period."). Nor does the Company's decision to add internal controls after the blending issue was resolved support an inference of recklessness. *In re Magnum Hunter*, 616 F. App'x at 446. In the end, Plaintiff's argument is circular: the error happened, therefore there was scienter.

Plaintiff's related contention that Defendants "admittedly were aware of information indicating deficient internal controls by June 2020" when the Company disclosed the guidance model error—and therefore Defendants were

reckless in failing more quickly to identify the fuel blending issue—is equally meritless. Blue Br. at 39. As explained previously, 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 when working at home. *See supra* at 5-6. The two issues cannot be shoehorned into a single global conclusion that internal controls were inadequate. *See Rombach v. Chang*, 355 F.3d 164, 176 (2d Cir. 2004) (plaintiff cannot prevail by "coupl[ing] a factual statement with a conclusory allegation of fraudulent intent").

Plaintiff also attempts to argue recklessness based on the fact that the Company did not identify the error until after it issued its initial financial statements, the magnitude of the restatement, and the Individual Defendants' positions within the Company. First, the "mere fact of a restatement of earnings does not support a strong, or even a weak, inference of scienter." *City of Brockton Ret. Sys. v. Shaw Grp. Inc.*, 540 F. Supp. 2d 464, 472 (S.D.N.Y. 2008). This is true even when a company must restate "several prior periods' financial results." *Plumbers & Pipefitters Loc. Union No. 719 Pension Tr. Fund v. Conseco Inc.*, 2011 WL 1198712, at *22 (S.D.N.Y. Mar. 30, 2011). Second, alleging the "sheer size" or "duration" of the alleged fraud adds nothing to the analysis. *In re OSG Sec. Litig.*, 971 F. Supp. 2d 387, 409-410 (S.D.N.Y. 2013); *see also Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 596-597 (S.D.N.Y. 2011) ("[A]bsent facts

indicating that defendants knew of the falsity of their statements, that an eventual write-off was large does not support the required strong inference of misbehavior."); *In re PXRE Grp. Ltd., Sec. Litig.*, 600 F. Supp. 2d 510, 545 (S.D.N.Y. 2010) ("[I]t is well established that 'the size of the fraud alone does not create an inference of scienter.'").

Similarly, the mere fact that the Individual Defendants "occupied high-ranking positions" and "monitored" relevant aspects of the business does not establish scienter in the absence of "any particularized facts suggesting that defendants actually possessed information contradicting their public statements." *Cox v. Blackberry Ltd.*, 660 F. App'x 23, 25 (2d Cir. 2016); *see also Maldonado v. Dominguez*, 137 F.3d 1, 10 (1st Cir. 1998) ("[G]eneral inferences that [an individual] 'must have known' [based on his position] … are precisely the types of inferences which this court, on numerous occasions, has determined to be inadequate."). Plaintiff's argument is again circular and would lead to the conclusion that individuals who review financial statements must have acted recklessly every time there is an error in one of those statements.

In short, none of the facts on which Plaintiff attempts to rely supports the inference that Defendants recklessly failed to discover the fuel blending issue at the time of the challenged financial statements.

IV. PLAINTIFF FAILS TO PLEAD A "STRONG INFERENCE" OF SCIENTER FOR ANY INDIVIDUAL DEFENDANT REGARDING THE 2020 FINANCIAL GUIDANCE REVISION

Plaintiff fails to establish scienter as to the 2020 guidance model error. This claim hinges on the allegedly false statement that, in the second quarter, REG "expect[ed] … adjusted EBITDA in the range of $20 to $35 million." A-82 ¶ 179. The district court correctly rejected this claim because the Amended Complaint "does not reference any specific information that a defendant knew or should have known that would have alerted them to the calculation errors" and similarly "fails to identify any reports or statements that a defendant had a duty to monitor which would have alerted the defendant to the errors." SPA-10.

As an initial matter, Plaintiff does not contest that the challenged forecast is a forward-looking statement that falls within the PLSRA's safe harbor. *See* 15 U.S.C. § 78u-5(i)(1)(A) (defining a forward-looking statement as "a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items"). As such, the statement is only actionable if Plaintiff sufficiently alleges "that the forward-looking statement … was … made or approved by an executive officer with *actual knowledge* by that officer that the statement was false or misleading." *Slayton*, 604 F.3d at 762 (emphasis added, alterations omitted, ellipsis in original) (citing 15 U.S.C. § 78u-5(c)).

None of Plaintiff's allegations regarding the guidance model error speaks to actual knowledge. Rather, his discussion of actual knowledge is limited to the fuel blending issue, *see* Blue Br. at 29-30. As discussed *supra*, these were distinct issues. The fuel blending issue at the Seneca plant was a mechanical error resulting in an overstatement of BTC claims for gallons of fuel sold from that plant. *See supra* at 6-8. In contrast, the guidance model error related to the corporate accounting staff's preparation of financial forecasts, which included BTC claims from all of REG's 12 plants for the quarter at issue. *See supra* at 5-6. Plaintiff does not even attempt to explain how actual knowledge of the fuel blending issue (which, as explained above, is not even pleaded in the Amended Complaint) could support an inference that any Defendant had actual knowledge of the guidance model issue when giving the 2020 Q2 projection. This is fatal to his claim under the safe harbor.

Moreover, Plaintiff does not adequately allege recklessness. Plaintiff argues that Defendants were reckless in making the original forecast because they "had access to various forms of specific information, written and unwritten, that demonstrated the truth." Blue Br. at 37. Plaintiff also contends that because the error was allegedly "basic" and because of the "financial magnitude of the misstatements," (Blue Br. at 41) an inference of scienter arises out of the very existence of the mistake. Neither of these is sufficient.

As previously explained, general allegations of access to contrary information are insufficient; Plaintiff must "specifically identify the reports or statements containing this information." *Novak*, 216 F.3d at 309; *Dynex*, 531 F.3d at 196; *Chill*, 101 F.3d at 270. Plaintiff offers no such reports concerning the guidance model. Plaintiff speculates **in the brief** that Defendants "must have known of, or at least had unrestricted access to … the MS exchange sheets, the reconciliation procedure, the guidance model, and all other information used by the accounting staff." Blue Br. at 38. But this theory appears nowhere in the Amended Complaint. In any case, there is no sound reason to think the Individual Defendants should have reviewed these accounting-level documents, or that they would have discovered an error the accounting staff itself had missed. *Compare In re Ambac*, 693 F. Supp. 2d at 268.

Plaintiff's attempt to establish scienter based on accounting irregularities and GAAP violations is just another spin on the same allegations, and equally deficient. "[A]llegations of GAAP violations or accounting irregularities, standing alone, are insufficient to state a securities fraud claim." *Novak*, 216 F.3d at 309. Nor, as discussed *supra* at 25-26, does the size of the guidance error give rise to an inference of scienter. This rationale applies equally to errors in forecasting. *See City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 304 (S.D.N.Y. 2013) ("bad forecasting alone is not actionable" (quoting *ABF Capital*

Mgmt. LP v. Askin Capital Mgmt., 957 F.Supp. 1308, 1324 (S.D.N.Y.1997)); *In re N. Telecom Ltd. Sec. Litig.*, 116 F. Supp. 2d 446, 464 (S.D.N.Y. 2000) (inaccuracy of a forecast alone "is insufficient evidence that defendants acted with intent to defraud").

Finally, even assuming that Plaintiff's sparse allegations concerning the guidance model error raise some inference of scienter, the district court was correct that the culpable inference proposed by Plaintiff is not "at least as compelling" as the nonculpable inference of negligence. *Tellabs, Inc.*, 551 U.S. at 323-324; *see, e.g.*, *Dynex*, 531 F.3d at 197 (finding culpable inference less compelling than competing inference that allegedly misleading statements "were the result of merely careless mistakes at the management level based on false information" provided by others); SPA-11-SPA-12 ("misstatements here were, at worst, a result of negligence"). The guidance model error was "missed by accounting staff review," A-92 ¶ 210, and the far more compelling inference is that upper management reasonably relied on accounting staff, not that it was somehow reckless because it did not catch the mistake. Moreover, Defendants' prompt disclosure and remediation, A-91 ¶ 209, taken together with the absence of any allegations concerning motive or personal benefit, point strongly to negligence and against any inference of fraud.

V. PLAINTIFF'S ALTERNATIVE BASES FOR SCIENTER FAIL

A. Plaintiff Cannot Show Corporate Scienter Based On A Theory Of General, Unattributed Recklessness

Plaintiff argues that, even in the absence of scienter on the part of any Individual Defendant, the Court should find corporate scienter because "someone at a reasonably high level surely knew of or at least recklessly disregarded the truth." Blue Br. at 51. The district court correctly rejected this theory because nothing in the Amended Complaint alleges the "collective fraudulent conduct" required for this type of claim. SPA-11-SPA-12.

Plaintiff has not articulated a basis for collective scienter for either of the relevant events. As to the fuel blending issue, Plaintiff contends that an unidentified "manager of the Seneca plant must have known" about the intermittent failure to blend based on Plaintiff's conjecture about how quickly petroleum diesel was being used at the plant. Blue Br. at 51; A-41 ¶ 60 (alleging that "[s]omeone at the Seneca plant should have noticed" the discrepancy in the volume of petroleum diesel being consumed). And Plaintiff asserts that "someone" in "management" must have known of the guidance model error because of how inaccurate the projection turned out to be. Blue Br. at 52. Neither of these is enough for collective scienter under Second Circuit law.

Allegations of knowledge by "unidentified senior executives" are "not sufficiently particularized to raise a strong inference of scienter against any

individual, much less one whose knowledge may be imputed to the Corporate Defendant[].” *Jackson v. Abernathy*, 960 F.3d 94, 99 (2d Cir. 2020); *Mucha*, 540 F. Supp. 3d at 301 (potential knowledge “at some point, [by] individuals of unknown seniority” does not raise cogent inference that individual “whose intent could be imputed to [the company] was engaged in conscious misbehavior or recklessness”).

Moreover, the proposition that corporate scienter can be pleaded without reference to the state of mind of a specific individual is limited to extreme cases. The *Dynex* court held that such an inference might be appropriate only in a rare extreme case, such as if “General Motors announced that it had sold one million SUVs in 2006, and the actual number was zero.” 531 F.3d at 195 (quoting *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 710 (7th Cir. 2008)). Absent such extreme circumstances, *Dynex* held that the suggested inference that “someone whose scienter is imputable to the corporate defendant[] and who was responsible for the statements made was at least reckless toward the alleged falsity of those statements” is not as cogent as the competing inference that those statements “were the result of merely careless mistakes at the management level based on” inaccurate information from below. *Id*. at 197. Obviously, REG’s statements concerning its BTC claims and its second quarter 2020 financial guidance do not come close to the extreme example in *Dynex*. Moreover, there are no facts

suggesting the Seneca plant manager was sufficiently senior that his or her knowledge could be imputed to REG, *see Jackson*, 960 F.3d at 99; *Mucha*, 540 F. Supp. 3d at 301, or that he or she had any involvement with the statements at issue. *See Dynex,* 531 F.3d at 197.

B. The Second Circuit Has Not Recognized The "Core Operations" Doctrine Since The PSLRA, And In Any Event It Does Not Supply Scienter Here

Relatedly, Plaintiff attempts to rely on the "core operations" doctrine to plead scienter in the absence of particularized allegations that would support his claims. Blue Br. at 46-48. According to Plaintiff, Defendants identified the tax credit as "a really big deal" for the Company, and the Seneca plant as its "crown jewel," A-43 ¶ 65; A-44 ¶ 68, and therefore any false or misleading statement about BTC claims was necessarily made with knowledge of the contrary facts or recklessness. But even assuming that filing BTC claims was a core part of REG's business, the core operations doctrine fails to supply the missing link for scienter here.

Whether this doctrine is even "a viable theory of scienter" in the Second Circuit is in doubt, and this Court has not expressly adopted it following the enactment of the PSLRA. *See Frederick v. Mechel OAO*, 475 F. App'x 353, 356 (2d Cir. 2012) (questioning viability of core operations doctrine following enactment of the PSLRA); *see also Hensley v. IEC Elecs. Corp.*, 2014 WL

4473373, at *5 (S.D.N.Y. Sept. 11, 2014) (similar). Moreover, the Court has rejected the use of allegations such as this as a basis for scienter. *Jackson*, 960 F.3d at 99 ("naked assertion" that particular segment of the Company's business "was of such core importance to the Corporate defendants that their senior officers must have known" challenged statements were false is insufficient).

Even where courts in this Circuit have applied the doctrine, they have held that it "does not independently establish scienter," but instead is "at most … supplemental support for alleging scienter." *Woolgar,* 477 F. Supp. 3d at 239 (alterations and quotations omitted); *Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 799, 816 (S.D.N.Y. 2018); *Glaser,* 772 F. Supp. 2d at 596. As set out above, Plaintiff has not alleged any specific facts showing scienter, and thus cannot invoke the core operations doctrine.

Beyond that, courts have typically found that the core operations doctrine contributes to an inference of scienter only where it would be "absurd" to think that the Company's management was not aware of facts indicating that their statements were false. *See In re Avon Sec. Litig.*, 2019 WL 6115349, at *20 (S.D.N.Y. Nov. 18, 2019) (finding scienter where problem was so important to company's business that it would have been "absurd to suggest that … senior management was unaware" of it); *In re Gen. Elec. Co. Sec. Litig.*, 857 F. Supp. 2d 367, 395 (S.D.N.Y. 2012) (inference may be appropriate where "it would be

'absurd to suggest that management'" did not know of the falsity); *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 1000 (9th Cir. 2009) (where "relevant fact [was] of such prominence that it would be 'absurd' to suggest that management was without knowledge of the matter" this could give rise to scienter).

While, as a general matter, BTC claims may have been important or even vital to the Company's profitability, it clearly was not "absurd" for the Individual Defendants not to know the details of the particular mechanical issue at the Seneca plant that resulted in the erroneous filings at issue. After all, the Seneca plant was one of 12 such plants across the country, *see* A-31 ¶ 33, the mechanical blending issues at that one plant were intermittent, and the errors involved tiny amounts of petroleum diesel that were not obvious from the final product, *see* A-32 ¶ 36 (B99.9 contains only .1% diesel, which is less than a teaspoon per gallon). Indeed, Plaintiff himself suggests that the issue could have been discovered by reviewing plant-level receipts, hardly something one would expect of management. For all these reasons, Plaintiff cannot establish scienter via the core operations doctrine.[6]

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[6] Plaintiff also makes the related argument that because Defendants "spoke knowledgeably" about BTCs and REG's EBITDA, they must have known "the pertinent facts on the topics on which they were speaking, or at least acted recklessly by speaking without conducting due diligence" on these topics. Blue Br. at 44-46. This is yet again circular—it would establish scienter nearly every time a corporate officer made a false statement. Not surprisingly, Plaintiff's cases do not support this argument. In *Hawaii Structural Ironworkers Pension Tr. Fund v. AMC Ent. Holdings, Inc.*, for example, the high level of detail of the challenged statements themselves supported scienter because they showed the defendant's

C. Changes In Senior Management Do Not Establish Scienter

Plaintiff's final argument is that Mr. Stone's December 2020 move from Chief Financial Officer to Senior Vice President of Commercial Performance and the May 2021 departure of Mr. Albin, Vice President of Manufacturing, are "additional" evidence of scienter. Blue Br. at 48-49.

As a threshold matter, Plaintiff waived this argument by failing to raise it before the district court. *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (brackets in original) (quoting

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intimate knowledge and personal involvement with the issue. 422 F. Supp. 3d 821, 850 (S.D.N.Y. 2019) (statement that defendant had "identified that there are an easy 50 to 100 Carmike theaters that are capable of supporting an AMC-style renovation" and that it had made decisions to renovate these theaters "one at a time, theater by theater" indicated that defendant "was aware of Carmike's underinvestment in its theaters or had access to this information" at the time of the statements). By contrast, where defendants in that same case made "much more general" statements like the ones at issue here, the court held that these did "little to support the more specific inference" of scienter as to particular facts. *Id*. Plaintiff's other cases are easily distinguishable because the court did not come close to finding scienter on this basis alone. In *Alexion*, the court found that the individual defendants had scienter with respect to unethical business practices because the defendants "were in the top senior management roles at Alexion at the time the confidential report [detailing such practices] was submitted by outside counsel." *Bos. Ret. Sys. v. Alexion Pharms., Inc.*, 556 F. Supp. 3d 100, 134 (D. Conn. 2021). And in *Gauquie*, the finding of scienter was based in large part on a confidential witness who "detail[ed] AMRI's awareness of the mold problem prior to AMRI's allegedly material misstatements." *Gauquie v. Albany Molecular Rsch., Inc.*, 2016 WL 4007591, at *2 (E.D.N.Y. July 26, 2016).

Greene v. United States, 13 F.3d 577, 586 (2d Cir. 1994))). That ends the discussion.

But even if the Court were to consider the point, as Plaintiff acknowledges, *see* Blue Br. at 49, "[t]erminations or resignations of corporate executives are insufficient alone to establish an inference of scienter." *Woolgar* 477 F. Supp. 3d at 240; *accord Das,* 332 F. Supp. 3d at 815. Rather, there must be "highly unusual or suspicious circumstances" for courts to find that personnel changes contributed to a cogent inference of scienter. *See Glaser*, 772 F. Supp. 2d at 598 (collecting cases); *KBC Asset Mgmt. NV v. MetLife, Inc.*, 2022 WL 480213, at *3 (2d Cir. Feb. 17, 2022) ("We have suggested that employees' 'suspicious' resignations may be suggestive of scienter, but we have done so only in the context of other compelling circumstantial allegations supporting scienter"). Where, as here, a complaint "does not recite facts linking the [move] to the alleged fraud, this dimension of the pleadings does not justify inferring scienter." *In re Hebron Tech. Co., Ltd. Sec. Litig.*, 2021 WL 4341500, at *23 (S.D.N.Y. Sept. 22, 2021); *see also Glaser*, 772 F. Supp. 2d at 598 (even if resignations were "actually tied" to alleged "inadequate internal controls over financial reporting … plaintiffs still have not come close to connecting those resignations to the fraud alleged").

Here, the facts surrounding Mr. Albin's departure and Mr. Stone's change in position are not close to being highly suspicious, or even connected to the alleged

fraudulent conduct. Mr. Albin's termination without cause in May 2021, months after the Company disclosed the fuel blending issue and restated its earnings, does not create any adverse inference. Plaintiff glosses over the more probative fact that before his departure, Mr. Albin was promoted to Senior Vice President as a result of his role in "le[ading] the substantial development and growth of the company's production fleet and engineering function" in the fourth quarter of 2020 when the Company discovered and was investigating the fuel blending issue. A-97 ¶ 225 (quoting Business Wire, *Renewable Energy Group Announces Changes to Organization* (December 3, 2020), https://www.businesswire.com/news/home/20201203005632/en/). And when Mr. Albin left the Company, he did so explicitly "without cause." ASA-6; *see also* A-97 ¶ 225.

As to Mr. Stone, Plaintiff alleges that "On December 3, 2020, Renewable Energy announced that Chad Stone had 'ceased to serve as the Company's principal financial officer' and was instead the 'Senior Vice President, Commercial Performance of the Company.'" AC ¶ 207. The Amended Complaint does not indicate that this change was even a demotion, much less that it was related to the fuel blending issue. The Company's decision to keep Mr. Stone on its senior management team leads to the opposite inference.

VI. THE DISTRICT COURT DID NOT ERR IN DISMISSING WITH PREJUDICE

Plaintiff argues that the district court erred in not allowing him to amend. Blue Br. at 32-33. Appellate courts apply "a deferential, 'abuse of discretion' standard of review to the district court's informed discretion" as to whether to grant leave to amend. *Iqbal*, 574 F.3d at 822.

Plaintiff contends that he should have been allowed to amend to add allegations that Defendants "had knowledge of the blending problem and underlying deficient internal controls by September 2020." Blue Br. at 33. However, the district court warned Plaintiff that if he chose to oppose Defendants' motion to dismiss rather than filing a letter indicating a desire to further amend the complaint, absent unforeseen circumstances, he would not "be granted any further opportunities to amend." ASA-3-ASA-4. Plaintiff declined the opportunity. Plaintiff cannot now argue that he should be granted leave to amend in contravention of the district court's appropriate case management order.

Even aside from this fundamental problem, Plaintiff's opposition to the motion to dismiss merely included the perfunctory language that the court should deny Defendants' motion to dismiss "or grant leave to amend if the Court grants the Motion." A-292-A-293. Plaintiff did not say that he could more clearly allege actual knowledge of the fuel blending issue by September 2020, much less identify what facts he would allege in that regard. He cannot raise this issue for the first

time in this Court. *See Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." (brackets in original) (quoting *Greene,* 13 F.3d at 586)). Although the Court has discretion to consider waived arguments "to avoid a manifest injustice," there is no reason to do so here, where this argument was "available to the parties below" and Plaintiff has "proffer[ed] no reason for [his] failure to raise" the argument. *Id*.

Finally in this regard, amendment would be futile and there is no reason to prolong this case through another round of briefing. Plaintiff still offers nothing but speculation and illogical reasoning in support of the argument that Defendants had actual knowledge of the fuel blending issue by September 30, 2020. *See supra* at 17-20. That is fatal to his effort to amend. *See Lucente v. Int'l Bus. Machines Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) ("An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6)."); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007) ("naked assertion[s]" of circumstantial evidence may "get[] the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief'" (second alteration in original)). The Court should affirm the dismissal with prejudice.

CONCLUSION

For all of the reasons set forth above, this Court should affirm the district Court's dismissal of the Amended Complaint in its entirety.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 9,738 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

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