2021 WL 5566168 (C.A.5) (Appellate Brief)
United States Court of Appeals, Fifth Circuit.

OKLAHOMA FIREFIGHTERS PENSION AND RETIREMENT SYSTEM, Plaintiff-Appellant,

v.

SIX FLAGS ENTERTAINMENT CORPORATION; James Reid-Anderson; Marshall Barber, Defendants-Appellees.

No. 21-10865.
November 24, 2021.

On Appeal from the United States District Court for the
Northern District of Texas (Fort Worth) in Case No. 4:20-CV-201,
Honorable Mark Timothy Pittman, U.S. District Judge

Brief for Appellees

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*II STATEMENT REGARDING ORAL ARGUMENT

This case involves a straightforward application of pleading standards for federal securities claims and should be affirmed. The parties have adequately presented the facts and legal arguments in their briefs and in the record. Defendants recognize, however, that oral argument may benefit the Court. In the event the Court schedules oral argument, Defendants respectfully request the opportunity to present their position.

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*1 STATEMENT OF ISSUES PRESENTED

1. Whether the District Court correctly dismissed Plaintiff's suit because the Complaint fails to raise a strong inference of scienter as required by the Private Securities Litigation Reform Act ("PSLRA"), but instead contains (i) deficient incentive compensation allegations that strongly suggest non-fraudulent intent, and (ii) unremarkable circumstantial allegations that boil down to Plaintiff's reliance on the opinions of one confidential witness who is not alleged to have communicated with any Defendant;

2. Whether the District Court correctly dismissed the Complaint for failure to plead an actionable misstatement or omission, where: (i) Plaintiff failed to allege specific facts showing any statement was false when made, especially in light of Defendants' timely disclosures of negative developments in China, (ii) Defendants had no duty to predict the default of their contractual counterparty, Riverside Investment Group ("Riverside"), and (iii) most challenged statements are inactionable forward-looking statements, puffery, or opinions;

3. Whether the District Court correctly dismissed Plaintiff's § 20(a) claim for failure to plead a primary violation of the Securities and Exchange Act of 1934 (the "Exchange Act");

4. Whether the District Court acted within its discretion when denying Plaintiff's successive post-judgment Rule 59(e) motions, where (i) Plaintiff's first ***2** proposed amendments did not raise allegations previously unavailable to Plaintiff, (ii) Plaintiff delayed substantially in seeking leave to amend, (iii) Plaintiff's second post-judgment motion was a second, untimely Rule 59(e) motion, and (iv) each of Plaintiff's proposed amendments was plainly futile.

*3 INTRODUCTION

This Court should affirm. Plaintiff seeks to hold Defendants liable for failing to predict and disclose earlier that their contractual counterparty, Riverside, would default on its obligations under licensing agreements through which Riverside agreed to develop and operate Six Flags-branded parks in China. The federal securities laws do not require such foresight or pessimistic speculation.

The District Court correctly dismissed this case for failure to plead a strong inference of scienter. Plaintiff's motive theory--that Defendants wanted to achieve incentive compensation targets--is categorically insufficient, and weighs heavily against scienter here because Plaintiff alleged that those targets were not achieved ***because*** Defendants disclosed delays in projected park openings in China. Each Defendant also acquired and retained more stock throughout the Class Period, negating any inference

of fraudulent intent. Plaintiff's weak circumstantial scienter allegations--supposed internal reports that are not described in any detail and are not alleged to have reached the Defendants, deficient core operations allegations, and voluntary executive resignations not linked to the alleged fraud--fall ***far*** short of the pleading requirements of the PSLRA.

Judge Pittman also correctly held that Plaintiff failed to allege an actionable misstatement or omission. Plaintiff claims that Defendants concealed that Riverside's financial condition had deteriorated such that it was "impossible" for ***4** Riverside to complete these projects on time. These allegations are conclusory opinions attributed to one former employee, who cannot credibly claim to have personal knowledge of internal affairs at Riverside. Moreover, Plaintiff's allegations are unmoored in time, internally contradictory, and fail to show contemporaneous falsity. Plaintiff also fails to plead an actionable omission because Defendants were not obligated to speculate about Riverside's contractual performance before either party took steps to terminate their relationship. Finally, most challenged statements are inactionable as a matter of law, and Plaintiff waived any argument to the contrary as to many challenged statements.

The District Court acted within its discretion when denying Plaintiff's post-judgment motions. The first Rule 59(e) motion sought to add inconsequential allegations that were available to Plaintiff when the first complaint was filed. And Plaintiff's second Rule 59(e) motion--styled as a motion for leave to file a "supplemental brief"--was properly denied as untimely and futile.

The District Court's thorough and well-reasoned opinion dismissing this action with prejudice should be affirmed.

***5 STATEMENT OF THE CASE**

A. Six Flags' International Development Initiative.

Since opening in 1961, Six Flags has become the largest regional theme park operator in the world, with over 2,400 full-time employees. (Compl. ¶33; ROA.746.) [1] All 26 Six Flags parks are located in North America, and the "vast majority of the Company's revenue--97% in both 2018 and 2019--is derived from parks it owns and operates in North America." (ROA.959; *see also* Compl. ¶244.)

One small component of Six Flags' business--accounting for less than 3% of its revenue--is its international licensing agreements. These agreements provided that Six Flags' contractual counterparties were to develop and operate Six Flags-branded parks, with the Company earning revenue based on licensing payments and performance obligations. (Compl. ¶244.)

In 2014, Six Flags announced its partnership with Riverside, a Chinese real estate developer, to build Six Flags-branded parks in China. (Compl. ¶43.) Six Flags and Riverside announced 11 parks in three cities, each site having different financial arrangements and requiring approval from separate local governments. (Compl. ¶177; ROA.594.)

***6** In January 2016, Six Flags announced that Riverside was breaking ground on a branded theme park, water park, and kid's park in Zhejiang, China, which were part of a larger mixed-use development project undertaken by Riverside. (Compl. ¶¶47-50.) At the beginning of the Class Period, the Zhejiang water park was projected to open "towards the end of 2019," with the remaining parks expected in 2020. (ROA.485.)

In 2017, plans for parks in Chongqing were announced with projected openings in 2020. (Compl. ¶¶52-53.) And on April 24, 2018--the first day of the Class Period--additional parks in Nanjing were announced with projected openings in 2021. (*Id*. ¶¶ 54-56.)

B. Six Flags Warns Of Specific Risks Associated With International Expansion Before And During The Class Period.

While Six Flags was "cautiously optimistic" about international expansion plans, including the licensed parks in China, the Company appropriately cautioned investors. (Compl. ¶133; ROA.648; ROA.664.) Six Flags specifically warned investors that international expansion objectives were subject to unique risks related to the performance of Six Flags' partners, their ability to obtain financing, and economic changes abroad. For example, Six Flags disclosed in its 2017 annual report (filed roughly two months before the Class Period):

[***Difficult economic conditions*** throughout the world could impact ... the ability of third parties to meet their obligations to us, including, ... ***payment by our international licensing partners***. (ROA.467.) ***7** International licensing transactions are also subject to additional risks, including *the* ***performance of our partners and their ability to obtain financing; the impact of economic fluctuations in economies outside of the U.S.; difficulties and costs of staffing*** ... [and] ***changes or uncertainties in economic, legal, regulatory, social and political conditions***. (ROA.472.)

Additional, similar warnings were disclosed throughout the Class Period, and are detailed in a chart in the Appendix to Defendants' motion to dismiss. (ROA.799-810.)

C. Throughout The Class Period, Defendants Consistently Disclosed Issues With, And Warnings Concerning, The China Parks.

At no fault of Six Flags, the very risks disclosed to investors--that the performance of its partner, Riverside, and changing conditions abroad may prevent the Company from realizing all of the anticipated benefits of that partnership--came to pass.

In February 2019, Six Flags announced a negative revenue adjustment of $ 15,000,000 in the fourth quarter of 2018 due to delays in the expected opening dates of certain parks in China. These delays were attributed to macroeconomic issues in China, including lower GDP growth; new government policies making it difficult for real estate developers like Riverside to liquidate assets or obtain loans; and turnover of government officials requiring re-approval of plans for the Chongqing and Nanjing parks. (ROA.594.) Because of these disclosed obstacles, Six Flags announced that the Zhejiang park opening projections were postponed to late 2020 ***8** (instead of 2019); the Chongqing park opening projections were delayed to late 2021 (instead of 2020); and the Nanjing parks were projected to begin opening in late-2022 (instead of 2021). (Compl. ¶¶109-10.) Defendants warned that the economic climate in China "may be [even] ***tougher*** in 2019" and that they could not "predict exactly what's going to happen." (ROA.605; ROA.614.) For that reason, Defendants cautioned that "revenue from [Six Flags'] international agreements may be ***lumpy*** in 2019 and possibly 2020 as [Riverside] works through these macroeconomic issues." (ROA.594.)

At the time, Six Flags had in place an incentive compensation plan--"Project 600"--which entitled Defendants to equity awards if Six Flags' modified EBITDA reached $600 million by the end of 2018. (Compl. ¶36.) Plaintiff alleged that Defendants "would have successfully met the Project 600 target in the fiscal year ended 2018 but for [the February 2018] downward revenue adjustment." (*Id*. ¶269.)

Meanwhile, construction at the parks was underway. According to Plaintiff's confidential witness, FE1, construction in Zhejiang had been ongoing between May 2018 and February 2019. Riverside workers had, based on design drawings, "dug holes," completed installations of "pile foundations" "that would support the rides," and began assembling waterslides for the Zhejiang waterpark (the first ***9** Zhejiang park scheduled to open). (Compl. ¶¶97, 105.) Construction was also ongoing in Chongqing. (*Id*. ¶¶94, 105, 107.)

Defendants continued to disclose issues facing Riverside throughout 2019 as they arose. In April 2019, Defendants disclosed that construction at Chongqing and Nanjing was suspended pending government re-approval, and so those parks were not generating revenue. (ROA.646; ROA.655.) Defendants cautioned that "it does feel like conditions are improving, ***but we'll know as time goes on***." (ROA.655.) Although Defendants hoped Riverside would "successfully navigat[e] the political and regulatory environment," Reid-Anderson made clear he did "***not*** want to ... ***overpromis[e]***," and so did not speculate on the

timing of government re-approvals. (ROA.646; ROA.655.) Reid-Anderson further warned that revenue from these parks may be "***lumpy***" going forward and that "it's just going to take a ***little while longer*** to open the[m]." (Compl. ¶219.)

In July 2019, Defendants disclosed that, while construction remained suspended in Nanjing (ROA.664-65), construction and revenue recognition at Chongqing resumed (Compl. ¶235; ROA.664-65). Defendants warned, however, that it was "possible that international revenue will remain ***lumpy*** going forward [, e]specially if the timing of park openings changes or broader macroeconomic issues persist." (Compl. ¶232; ROA.665.)

10** Riverside's financial issues continued in late 2019. In August 2019, FE1 resigned, sending a letter to human resources stating his opinion that, by that time, the China projects were "perhaps*** irreversibly off-track." (Compl. ¶254.) In October 2019, Six Flags reported a 26% decrease in international licensing revenues in the third quarter of 2019 and informed investors that "the Chinese market remains ***difficult*** ... [and] continue[s] to be very ***challenging*** for our partner." (ROA.695-96.) Therefore, it was "***unrealistic to think***" that the timeline for the development of parks in China would remain the same. (Compl. ¶138.) Defendants again warned that Six Flags was "likely to continue to recognize ***lumpy*** international agreements revenue," and that construction and revenue recognition was still suspended for Nanjing. (*Id*. ¶¶139, 244.)

On January 10, 2020, Six Flags disclosed that Riverside "continues to face severe challenges due to the macroeconomic environment and declining real estate market in China," causing Riverside to default on payment obligations to the Company. (ROA.731.) The Company disclosed that it had issued formal notices of default to Riverside. (*Id*.) Six Flags further reported that it would not realize revenue from its agreements with Riverside in Q4 2019, that the Company expected a negative $1,000,000 revenue adjustment, and that it was recording aggregate, onetime charges of approximately $10,000,000 "related to the China international agreements and certain unrelated litigation matters." (Compl. ¶¶146-47; ROA.731.) ***11** Six Flags warned that "the eventual outcome [was] unknown and could range from the continuation of one or more projects to the termination of all the Six Flags-branded proj ects in China." (ROA. 731.)

On February 20, 2020--the end of the Class Period--Six Flags announced that it had formally terminated its development agreements with Riverside. (Compl. ¶153.)

D. Procedural History.

On July 2, 2020, Plaintiff filed the Complaint, alleging that Defendants violated § 10(b) and § 20(a) of the Exchange Act by materially misrepresenting (1) Riverside's financial condition, (2) projected openings of the China parks, (3) construction progress, and (4) revenue recognition. Plaintiff claimed that, after the disclosure of Riverside's difficulties and eventual default, Six Flags' stock price declined, allegedly damaging investors.

On August 3, 2020, Defendants moved to dismiss and, on March 3, 2021, the District Court issued a well-reasoned, 60-page opinion dismissing the Complaint with prejudice for failure to plead adequately scienter and falsity. (ROA.958-1017.) The District Court "assessed holistically" Plaintiffs scienter allegations and correctly held that they "fail[ed] to support a strong inference of scienter." (*Id*.) Judge Pittman further found that Plaintiff failed to plead adequately falsity, including because (i) Plaintiff failed to allege that any challenged statement was false when ***12** made or that Defendants made an actionable omission, and (ii) many challenged statements were protected by the PSLRA or were inactionable puffery. (*Id*.)

On March 31, 2021, Plaintiff moved under Rule 59(e) to set aside that judgment and for leave to amend. (ROA.14.) The proposed amended complaint ("PAC") sought to add inconsequential details about FE1, more discussion of his resignation letter, and generic descriptions of Six Flags board meetings. (ROA.1145-46 ¶253, ROA.1148-51 ¶¶258-60.) On June 17, 2021, long after the deadline for post-judgment motions, Plaintiff sought leave to file a "supplemental brief" attaching a revised proposed amended complaint ("RPAC") with new allegations concerning an SEC investigation and retention of defense counsel. (ROA.14.) Judge Pittman denied both post-judgment motions; Plaintiff had unduly delayed and its proposed amendments were futile. (ROA.1490; ROA.1492-93.)

*13 SUMMARY OF ARGUMENT

The District Court decision should be affirmed. The District Court correctly applied Fifth Circuit law concerning confidential witnesses and considered, but generally discounted, the accounts of FE1 and FE2. Judge Pittman also properly applied a significant discount to those allegations where Plaintiff failed to plead facts supporting the inference that the confidential witness would likely possess the information pleaded. (Argument § I.A.)

This Court should affirm because Plaintiff failed to plead adequately a strong inference of scienter--that is, a mental state approximating actual intent to deceive, manipulate, or defraud investors. Plaintiff tried to allege motive based on incentive compensation, but that sort of commonplace motive is insufficient generally and, in this case, Plaintiff alleged that the Individual Defendants did not receive that compensation because they chose to disclose negative developments in China against their own financial interests. In other words, Plaintiff's lone motive allegation contradicts an inference of fraudulent intent. (Argument § I.B.1.)

Plaintiff's circumstantial scienter allegations do not come close to satisfying the PSLRA. Plaintiff failed to allege that Defendants ever reviewed FE1's supposed internal reports, which are not described in sufficient detail to draw any inferences in Plaintiff's favor. On appeal, Plaintiff all but concedes that the core operations theory is inapplicable, and Plaintiff failed entirely to connect allegations of executive ***14** departures to any fraud. Holistically, the Complaint gives rise to one strong (and non-fraudulent) inference: that Defendants were cautiously optimistic that Riverside would work through the issues it was facing, disclosed setbacks as they arose, and were disappointed when Riverside defaulted. (Argument §§ I.B.2-3.)

The District Court also correctly held that Plaintiff failed to allege that any of the challenged statements were false when made. Plaintiff primarily relies on conclusory opinions concerning FE1's dissatisfaction with construction progress, but FE1's account does not specifically contradict any of the challenged statements at the time those statements were made. And the District Court correctly dismissed Plaintiff's revenue recognition claim for failure to plead requisite details concerning the amounts overstated and what required Defendants to report differently. Most challenged statements also are inactionable forward-looking statements, corporate optimism, or opinions--an argument that Plaintiff waived below as to most categories of challenged statements. (Argument § I.C.)

Because Plaintiff failed to plead a primary violation of the Exchange Act, the § 20(a) claim was properly dismissed as well. (Argument § II.)

The District Court did not abuse its discretion when denying Plaintiff's post-judgment motions. The PAC contained no allegations previously unavailable to Plaintiff, and Plaintiff unduly delayed in seeking to amend. In turn, Plaintiff's "supplemental brief" was actually just a second, untimely Rule 59(e) motion. The ***15** supposedly "new" allegations in each of Plaintiff's proposed amendments also would not have changed the result below; denial was proper on the basis of futility. (Argument § III.)

*16 STANDARD OF REVIEW

The Fifth Circuit "review[s] a district court's dismissal of federal securities law claims under Rule 12(b)(6) de novo." *Owens v. Jastrow*, 789 F.3d 529, 535 (5th Cir. 2015). To successfully plead securities fraud under § 10(b), Plaintiff must allege "a material misrepresentation or omission; a defendant with scienter concerning the fraud; reliance; damages; and loss causation." *Ind. Elec. Workers' Pension Tr. Fund IBEW v. Shaw Grp., Inc.*, 537 F.3d 527, 532 (5th Cir. 2008).

As with any claim, Plaintiff "must plead specific facts, not mere conclusory allegations," and this Court should "not accept as true conclusory allegations or unwarranted deductions of fact." *Tuchman v. DSC Commc'ns Corp.*, 14 F.3d 1061, 1067 (5th

Cir. 1994). Rule 9(b) also applies, and requires Plaintiff to plead with particularity the circumstances constituting the alleged fraud. *Id*.

Plaintiff's claim is further subject to the strict pleading standards set forth in the PSLRA, which were enacted "to check 'frivolous, lawyer-driven litigation.' " *Shaw*, 537 F.3d at 532 (quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)). Indeed, "[t]he PSLRA has raised the pleading bar [for securities fraud claims] ***even higher*** and enhances Rule 9(b)'s particularity requirement for pleading fraud in two ways." *Local 731 I.B. of T. Excavators & Pavers Pension Tr. Fund v. Diodes, Inc.*, 810 F.3d 951, 956 (5th Cir. 2016). First, Plaintiff "must specify each statement alleged to have been misleading, and the reason or reasons why the ***17** statement is misleading." *Id*. Second, "for each act or omission alleged to be false or misleading, plaintiffs must state with particularity facts giving rise to a strong inference that the defendant acted with the requisite state of mind." *Id*.

Plaintiff's post-judgment motions are subject to a different, more deferential standard of review. On appeal, this Court reviews the denial of these motions for abuse of discretion. *Schiller v. Phys. Res. Grp. Inc.*, 342 F.3d 563, 566 (5th Cir. 2003). When considering Rule 59(e) motions to set aside judgment and for leave to amend, district courts are afforded broad discretion; such Rule 59(e) motions are properly denied on the basis of undue delay or futility. *Id*.

***18 ARGUMENT**

I. THIS COURT SHOULD AFFIRM DISMISSAL OF THE § 10(b) CLAIM.

A. The District Court Correctly Discounted Plaintiffs Confidential Witness Allegations.

The District Court correctly applied a general discount to Plaintiffs confidential witness allegations. (ROA.989-91.) Under Fifth Circuit law, courts ***"must discount allegations from confidential sources"*** *Mun. Emps.' Ret. Sys. of Mich. v. Pier 1 Imports, Inc.*, 935 F.3d 424, 433 (5th Cir. 2019) (quoting *Shaw*, 537 F.3d at 535). On appeal, Plaintiff cites Fifth Circuit authority predating *Pier 1* and *Shaw* to argue that "Fifth Circuit law does not require a discount of confidential witness allegations," but those cases address whether plaintiffs may rely on anonymous sources under the PSLRA at all, not the weight to be accorded such allegations. (Br. 24-25[2] (citing *ABC Arbitrage Pls. Grp. v. Tchuruk*, 291 F.3d 336, 354 (5th Cir. 2002) (addressing whether PSLRA requires "pleading of the names of confidential sources"), and *Barrie v. Intervoice-Brite, Inc.*, 397 F.3d 249, 259 (5th Cir. 2005) (same).)[3] Plaintiff has the law wrong; the District Court correctly applied a general discount to FE1's and FE2's allegations, and this Court should too.

***19** Judge Pittman also properly applied a "substantial" discount where Plaintiff's confidential witnesses were not described with sufficient particularity to support the information pleaded. Plaintiff concedes that, for confidential witness allegations to be given *any* weight, Plaintiff must plead with particularity facts establishing that someone in the witness's position "would possess the information pleaded." (Br. 24); *In re Key Energy Servs., Inc. Sec. Litig.*, 166 F. Supp. 3d 822, 839 (S.D. Tex. 2016). Here, the District Court considered Plaintiff's confidential witness allegations and correctly found that Plaintiff had not alleged with particularity facts showing that FE1 and FE2 would possess all of the information pleaded. (ROA.990-91.) Most notably, Plaintiff did not plead facts sufficient to show that FE1 would have personal, insider knowledge of Riverside's financial condition, funding for the parks, or employment issues, because FE1 was never employed by Riverside. Thus, FE1's assertions that, for example, "Riverside received no funding from its partners in the Chinese government for" Zhejiang or "Riverside lacked the funding to make any meaningful progress" (Compl. ¶¶71, 89), carry little to no weight. *In re TETRA Techs., Inc. Sec. Litig.*, 2009 WL 6325540, at *30 (S.D. Tex. July 9, 2009) (disregarding confidential witness allegations where "job duties and position [did ***20** not] suggest that he would have personal knowledge" of company financial issues). With respect to FE2, Plaintiff merely alleges that she was an "Account Manager ... throughout 2018" (Compl. ¶100), pleading nothing about FE2's "job description[], individual responsibilities, [or] specific employment dates" or involvement with the China projects, as required, *Key Energy*, 166 F. Supp. 3d at 839.

The District Court correctly discounted allegations attributed to FE1 and FE2, and this Court should consider those allegations through that same lens.

*21 B. Plaintiff Failed To Plead Adequately Any Inference of Scienter.

Regardless of the weight accorded to Plaintiffs confidential witnesses, this case was properly dismissed for failure to plead scienter. To survive dismissal, Plaintiff needed to allege with particularity facts giving rise to a "strong inference of scienter"--that is, "a mental state which embraces the intent to deceive, manipulate or defraud." *Fin. Acquisition Partners, LP v. Blackwell*, 2004 WL 2203253, at *6 (N.D. Tex. Sept. 29, 2004). To meet this demanding standard, Plaintiff must allege with particularity either knowing misconduct or "severe recklessness." *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 866 (5th Cir. 2003). "[S]imple or even inexcusable negligence" is insufficient; instead, Plaintiff must plead with particularity "highly unreasonable" conduct representing "an extreme departure from the standards of ordinary care." *Id*. And Plaintiffs theory of fraud must be "cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324.

The District Court correctly dismissed this case because Plaintiff "fail[ed] to plead motive and, assessed holistically, Plaintiff['s] allegations fail to support a strong inference of scienter." (ROA.1008.)

1. *Plaintiffs Motive Allegations Contradict Its Theory of Fraud.*

The District Court correctly held that Plaintiff "fail[ed] to plead facts to support a showing that Defendants had a motive to deceive," (ROA.1011), and ***22** Plaintiff's recycled arguments on appeal fail. Here, Plaintiff's "sole theory of motive is that Defendants wanted to hit the Project 600 target. However, such allegations are typically 'not the types of motive that support a strong inference of scienter.' " (ROA.1009.) Indeed, "the law is clear that a defendant's ... [alleged] desire for enhanced incentive compensation" is "insufficient to support an inference of scienter." *Fin. Acquisition*, 2004 WL 2203253, at *16. Plaintiff essentially concedes this point, admitting that "Defendants' desire to increase their compensation" is a "commonplace motive." (Br. 51.)

Worse still, Plaintiff's motive theory strongly cuts ***against*** an inference of scienter. While incentive compensation is generally insufficient, this is all the more true where the incentive targets were not achieved. *E.g.*, *Pier 1*, 935 F.3d at 431 (rejecting motive allegations based on incentive compensation where incentive targets were "out of reach"); *Perrin v. SouthWest Water Co.*, 2011 WL 10756419, at *12 (C.D. Cal. June 30, 2011) (same). Here, for 2018, Plaintiff claims that Six Flags "would have successfully met the Project 600 target" if Defendants had not announced a downward revenue adjustment in February 2019 related to delays in expected park openings in China. (Compl. ¶269.) In other words, Plaintiff alleged the opposite of securities fraud: when presented with an opportunity to mislead investors for their own benefit, Defendants accurately disclosed a downward ***23** revenue adjustment to their own financial detriment.[4] And Plaintiff alleged that Defendants continued misleading investors after February 2019 (Compl. ¶¶214-47), but failed to identify any motive for these alleged misstatements.

Notably, Defendants' stock transactions--the normal way securities plaintiffs try to plead motive--further contradict Plaintiff's theory of fraud. Acquiring and retaining stock through the disclosure of bad news is "inconsistent with the allegation that defendants harbored information that the Company's financial health was in ... jeopardy." *In re Keyspan Corp. Sec. Litig.*, 383 F. Supp. 2d 358, 383 (E.D.N.Y. 2003); *see also Abrams v. Baker Hughes Inc.*, 292 F.3d 424, 435 (5th Cir. 2002) (similar). Here, Reid-Anderson and Barber acquired a net 27,484 and 10,403 shares, respectively, during the Class Period. (ROA.497-505.) And Six Flags repurchased 1,800,000 shares for $111,000,000 in 2018. (ROA.596.) Defendants' acquisition and retention of stock through the disclosure of bad news concerning the Six Flags parks in China contradicts Plaintiff's theory of fraud.[5]

*24 2. *Plaintiff's Circumstantial Scienter Allegations Are Inadequate.*

As the District Court correctly noted, (ROA.1011), "[w]here, as here, the plaintiff [has] not alleged a clear motive for the alleged misstatements or omissions," to plead adequately scienter, "the strength of [the] circumstantial evidence of scienter must be correspondingly greater." *Neiman v. Bulmahn*, 854 F.3d 741, 748 (5th Cir. 2017). [6] Plaintiff's circumstantial allegations fall far short of the demanding bar for pleading scienter under the PSLRA.

a. *The Confidential Witness Allegations Do Not Support An Inference Of Scienter.*

The District Court correctly held that Plaintiff's confidential witness allegations fail to support an inference of scienter, including because Plaintiff "failed to dispute that the 'opinions of confidential witnesses add nothing to scienter analysis,' " and failed to "even allege that FE1 ever had any contact with Defendants." (ROA.1012; *see also Budde v. Glob. Power Equip. Grp., Inc.*, 2017 WL 6621540, at *3 (N.D. Tex. Dec. 27, 2017) ("[O]pinions of confidential witnesses add nothing to scienter analysis."); *Neiman*, 854 F.3d at 752; *Key Energy*, 166 F. Supp. 3d at 862.)

***25** Plaintiff now claims that Judge Pittman erred in finding that Plaintiff had waived the argument that FE1's scienter-related allegations were mere opinions. (Br. 43 n.2.) But below, Plaintiff only offered the circular argument that "facts and analysis provided by FE1 are facts," (ROA.839), while ignoring FE1's statements that Defendants challenged as mere opinions (ROA.886). Below, Defendants argued:

FE1 claims he offered the opinion that Riverside 'should have had 1,500 to 2,000 people onsite' (Compl. ¶250), that 'no meaningful construction' had occurred (while admitting that construction was on going) (*id*. ¶251), that 'McKillips needed to shut down the China projects' (*id*. 400 ¶253), or that the China projects were 'perhaps irreversibly off-track' (*id*. ¶254). These are opinions, not facts, and they do not support an inference of scienter. (ROA.446.)

These are mere opinions that cannot contribute to an inference of scienter, and Plaintiff waived below any argument to the contrary.

These allegations fail at a more fundamental level: neither FE1 nor FE2 is alleged to have had any contact with Defendants. For confidential witness allegations to support an inference of scienter, Plaintiff must make specific allegations that the confidential witness "presented information to [the] Individual Defendant[s] capable of establishing that any of the statements alleged to be false or misleading was, in fact, inaccurate." *Heck v. Orion Grp. Holdings, Inc.*, 468 F. Supp. 3d 828, 858 (S.D. Tex. 2020). FE1 claims to have had contact with members of Six Flags management but, as detailed below, never claims to have had contact ***26** with any Defendant. (Compl. ¶¶250-55.) FE2 claims to have spoken with Brett Petit (SVP, Marketing and Sales) but also does not allege to have had contact with any Defendant. (*Id*. ¶256.) Moreover, neither confidential witness claims to have communicated allegedly contradictory information to Defendants in advance of any specific alleged misstatement or omission, as required for supposedly contradictory information to support an inference of scienter. Instead, as further discussed below, the confidential witness allegations are entirely unmoored in time.

b. *Alleged Internal Reports Do Not Support An Inference Of Scienter.*

The District Court correctly held that FE1's alleged internal reports fail to support a strong inference of scienter. (ROA.1012.) In *Neiman*, this Court held that internal reports contribute to an inference of scienter only if Plaintiff pleads with particularity (1) facts connecting the reports "to the speaking executive in a persuasive way," and (2) "details regarding the contents of allegedly contrary reports, their authors and recipients." *Neiman*, 854 F.3d at 748. [7] Plaintiff does not satisfy either factor.

***27** First, Plaintiff does not connect the alleged reports to any Defendant. Simply making a report "available" to senior management is insufficient. *Neiman*, 854 F.3d at 748; *see also Huang v. EZCorp, Inc.*, 2016 WL 6092717, at *9 (W.D. Tex. Oct. 18, 2016) (allegation that report was "sent to senior management" insufficient because plaintiffs failed to plead defendants "actually saw the report"); *Izadjoo*, 237 F. Supp. 3d at 517 (similar). On appeal, Plaintiff claims the District Court failed to

"draw inferences in the Plaintiff's favor" concerning "presentations and reports that FE1 prepared for Reid-Anderson and the Board." (Br. 45.) But Plaintiff did not allege that FE1's supposed reports were prepared for, or sent to, the Individual Defendants or the Board. Instead, Plaintiff alleged that FE1 prepared "presentations on the construction progress at the Zhejiang and Chongqing sites for Mark Kane ... and David McKillips." (Compl. ¶250.)[8] Plaintiff cannot rewrite the Complaint on appeal; FE1 is not alleged to have had any contact with the Defendants. Instead, as the District Court explained, Plaintiff "simply assume[s] that these reports--created by a confidential witness and submitted to individuals not named as defendants--were presented to Reid-Anderson without stating when the reports were created, ***28** when they were presented to Defendants, or whether Defendants actually saw the reports." (ROA.1013.)

Second, Plaintiff fails to allege the content or dates of any alleged report. (*See* Compl. ¶¶250-52.) The law is clear that alleged internal reports only support an inference of scienter where the contents and dates of the reports are pleaded with specificity. *E.g.*, *Neiman*, 854 F.3d at 748; *Town of Davie Police Pension Plan v. Pier 1 Imports, Inc.*, 273 F. Supp. 3d 650, 673 (N.D. Tex. 2017) (no inference of scienter from alleged internal reports where plaintiffs did "not allege any specific information that was provided to or acknowledged by defendants"); *Huang*, 2016 WL 6092717, at *9 (same). Plaintiff argues that the District Court erroneously failed to draw inferences in the Plaintiff's favor because FE1 allegedly prepared vaguely gloomy reports "regularly." (Br. 45.) But there is no allegation of when specific reports were prepared or what those reports supposedly said. Thus, one cannot draw the inference that, for example, Reid-Anderson spoke falsely and with the requisite intent when he stated on April 24, 2019 that "[t]here's ongoing building" (Compl. ¶219), because Plaintiff does not allege that a specific report contradicted this information, or that this report was received by Reid-Anderson prior to April 24, 2019.

The District Court correctly held that FE1's supposed internal reports do not support an inference of scienter.

***29 c. *The Core Operations Theory Does Not Apply*.**

The District Court correctly held that the core operations theory does not apply. (ROA.1013.) The core operations doctrine is an extremely narrow exception to "the particularized pleading required for scienter," and one that "the Fifth Circuit and other courts have been reluctant to apply." *Dawes v. Imperial Sugar Co.*, 975 F. Supp. 2d 666, 699 (S.D. Tex. 2013); *Plaisance v. Schiller*, 2019 WL 1205628, at *31 (S.D. Tex. Mar. 14, 2019) (same). It has been applied only in limited circumstances not present here--that is, (1) where the company in question is small, (2) the operations at issue are "critical to the company's continued vitality," (3) the supposed omissions would be "readily apparent" to the speaker, and (4) corporate officers made internally inconsistent statements. *Diodes*, 810 F.3d at 959.

Plaintiff does not meet this clearly-articulated standard and, on appeal, fails even to address half of the *Diodes* factors. (Br. 48-49.) First, Six Flags employs over 2,400 full time employees (ROA.746), so is not the sort of "small" company that would permit the core operations inference.[9] Plaintiff does not address this factor on appeal. Second, the planned Six Flags-branded parks in China were not the Company's "core business," nor was their success critical to Six Flags' continued vitality. Indeed, this was just one facet of Six Flags' international licensing program, ***30** which program as a whole accounted for less than 3% of Six Flags' revenue. (ROA.695)[10] Third, Plaintiff cites no "internally inconsistent" statements in the Complaint, nor does Plaintiff allege contradictory facts that would be "readily apparent"; instead, the Complaint is predicated on the opinions of FE1 who, as discussed above, had no contact with the Individual Defendants. The core operations inference does not apply.

d. *Voluntary Executive Departures Do Not Support An Inference Of Scienter*.

The District Court correctly held that Plaintiff failed to plead that the "departures of Reid-Anderson, Barber, and certain other non-parties are indicative of scienter." (ROA.1015.) In the Fifth Circuit, allegations of executive resignations are "unavailing as proof of the commission of fraud." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 383 (5th Cir. 2004). For departures to support an inference of scienter, Plaintiff must allege adequately facts "link[ing] the resignations with purported fraud." *Kurtzman v. Compaq Computer Corp.*, 2002 WL 32442832, at *12 (S.D. Tex. Mar. 30, 2002); *Abrams*, 292 F.3d at 434.

It is not sufficient to allege departures following the disclosure of bad news; instead, specific facts alleged must actually link the executive departure to securities fraud. *See* ***31** *Rosenzweig*, 332 F.3d at 867; *In re Hertz Glob. Holdings Inc.*, 905 F.3d 106, 118 (3d Cir. 2018) (to even support an inference of scienter, plaintiffs must allege particularized facts "suggesting a compelling inference that the resignation was the result of something other than 'the reasonable assumption that the resignation occurred as a result of' the release of bad news...."). Here, Plaintiff did not allege *any* specific facts tying the voluntary resignations of Reid-Anderson and Barber to Plaintiff's theory of fraud. Instead, Plaintiff merely notes that these departures occurred after the release of bad news concerning the Six Flags-branded parks in China (Compl. ¶258), which plainly is insufficient, *e.g.*, *Abrams*, 292 F.3d at 434; *Rosenzweig*, 332 F.3d at 867.

Worse still, the circumstances of Defendants' departures bely any suggestion of impropriety. Reid-Anderson's retirement was announced in March 2019--almost a full year before Riverside's default in January 2020. (Compl. ¶258.) Six Flags explained that it had commenced a search for Reid-Anderson's successor, and that February 28, 2020 was the outside date for Reid-Anderson's retirement. (ROA.632.) Plaintiff insinuates that Reid-Anderson's resignation in November 2019 was related to disclosures on an October 2019 earnings call (Compl. ¶258), but Six Flags made clear all along that Reid-Anderson would retire if the Company "identifie[d] a new [CEO] before February 28, 2020" (ROA.632), which Six Flags did when it announced Michael Spanos would be the next CEO on October 24, 2019 ***32** (ROA.722). Likewise, on February 20, 2020, Six Flags announced that Barber would resign voluntarily, but Barber chose to remain at the Company through August 31, 2020, and there is no allegation that his departure was linked to the alleged fraud. (Compl. ¶259; ROA.754.) The District Court correctly held that Plaintiff's "vague and circumstantial allegations ... fail[ed] to adequately link the departures to the alleged fraud." (ROA.1015-16.) [11]

Plaintiff's allegations of departures of non-party executives also fail. Plaintiff tries to connect McKillips' departure to its strained theory of fraud (Compl. ¶260), but omits that he left Six Flags in January 2020 to become the CEO of CEC Entertainment, Inc. (the corporate parent of Chuck E. Cheese) (ROA.785). Leaving Six Flags to pursue a career opportunity is not indicative of securities fraud. [12]

On appeal, Plaintiff argues that these resignations are "strong indicia of scienter" given the proximity to an "SEC investigation." (Br. 49.) That allegation is not at issue in the de novo review of the Complaint, but instead was raised in an ***33** untimely, second Rule 59(e) motion. As discussed below (Argument § III), however, the mere existence of an SEC investigation does not change the scienter analysis, including because Plaintiff fails to link any executive departure to that investigation.

3. *Considering Plaintiff's Scienter Allegations Holistically, The Only Strong Inference Is Non-Fraudulent.*

Considered together, Plaintiff's allegations give rise to one strong inference: Defendants hoped that Riverside would work through the issues it was facing (and which were disclosed), and were disappointed when Riverside failed to do so. That is not securities fraud. Courts dismiss securities fraud cases that boil down to an allegation that "Defendants knew or should have known that a contractual counterparty would ultimately default." *In re Ferrellgas Partners, L.P., Sec. Litig.*, 764 F. App'x 127, 128 (2d Cir. 2019). Plaintiff's alternative inference requires this Court to conclude as "cogent and compelling," *Tellabs*, 551 U.S. at 324, that Defendants knew that Riverside was certain to default in early 2018, chose not to issue notices of default or terminate until 2020, and hid this from investors for no discernible financial benefit. Plaintiff's theory makes no sense.

On appeal, Plaintiff barely mentions competing inferences, but claims that Judge Pittman supposedly failed to consider the "scienter allegations holistically." (Br. 50.) This is incorrect. The District Court stated, on multiple occasions, that Plaintiff's scienter allegations were considered "holistically." (ROA.1008, ROA.1011.) It also makes little difference whether Plaintiff's deficient scienter ***34** allegations were considered holistically or not; where "each scienter-related allegation added little, if anything, to plaintiff[']s side of the scienter scale," "it does not take much to explain that zero plus zero equals zero." *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 442 F. App'x 672, 675 (3d Cir. 2011).

The District Court properly dismissed this case with prejudice for failure to plead scienter with the requisite particularity; this Court should affirm on this basis.

*35 C. The District Court Properly Ruled That Plaintiff Failed To Plead Sufficiently An Actionable Misstatement Or Omission.

This Court should affirm on falsity grounds as well. *First*, the District Court correctly held that Plaintiff failed to allege sufficiently that any alleged misstatement was false when made. *Second*, the District Court properly held that Plaintiff failed to plead an actionable omission. *Third*, many of the statements Plaintiff challenge are inactionable forward-looking statements, puffery, or opinions, and Plaintiff waived any argument to the contrary as to many challenged statements. (ROA.991-1008.)

1. *Plaintiff Failed To Plead Adequately That Any Of The Alleged Misstatements Were False When Made.*

a. *Riverside's Financial Condition, Quality As A Partner, And Abilities.* [13]

The Complaint fails to plead contemporaneous falsity of any statements regarding Riverside's financial condition, quality as a partner, or capabilities. Plaintiff abandons any argument on appeal that these alleged misstatements were affirmatively false. As the District Court correctly held: Plaintiff "fail[ed] to plead that FE1 had personal knowledge of Riverside's internal finances, access to funding, or relationships with the Chinese government despite his preparation of regular reports from an outsider's view into Riverside." (ROA.994.) Even if this Court credits the confidential witness accounts concerning Riverside--which it should ***36** not--Plaintiff also failed to allege that the statements "were false or misleading ***when made***." *Plaisance*, 2019 WL 1205628, at *24. For example, Plaintiff challenged one statement from February 14, 2019--that Riverside "continue[d] to pay" Six Flags--arguing that this statement was false because Riverside missed certain payments. (Compl. ¶¶207, 213.) But Plaintiff did not plead with specificity when those payments were missed or the amounts that Riverside was supposedly delinquent at the time of the challenged statements, so it is impossible to infer that Defendants' statement on February 14, 2019 was false when made. [14] Challenged statements about Riverside's finances, quality as a partner, or capabilities were properly dismissed.

b. *Construction Progress Statements.* [15]

Plaintiff's allegations regarding statements that construction was "continuing," "progressing," or "ongoing"--made on earnings calls held in February 2019, April 2019, and July 2019--are deficient. As the District Court correctly held, "either construction was 'continuing' or 'ongoing,' or it was not. In ***37** this case, Plaintiff[] concede[s] that it was--even if it was slower than FE1 or Plaintiff[] expected." (ROA.997.) This Court should affirm that holding.

Plaintiff alleges that FE1 reported construction was ongoing throughout the Class Period. With respect to Zhejiang, FE1 claims that in May 2018, "workers hired by Riverside dug holes and installed certain 'pile foundations' that would support the rides." (Compl. ¶97.) FE1 claims that, in his opinion, this construction was based on insufficiently detailed blueprints. (*Id*.) By February 2019, however, FE1 admits that workers completed the pile foundations and were assembling waterslides for the Zhejiang waterpark (*id*. ¶¶104-05), which was the first Zhejiang park scheduled to open (ROA.485). With respect to Chongqing, Plaintiffs only allegation is that, in FE1's opinion, plans were inadequately detailed--*i.e.*, the same issue that did not prevent construction in Zhejiang-- and that Riverside did not have theme park rides in place as of February 2019, although construction was ongoing at the Chongqing waterparks. (Compl. ¶¶94, 105, 107.) With respect to Nanjing, Plaintiff makes no allegations about construction, relying on FE1's conclusory assertion that "material" construction never started. (*Id*. ¶238.) Critically, Defendants also ***told*** to investors that ***construction was suspended*** at various times throughout the Class Period. (Statement of the Case ("SOC") § C.) Plaintiff does not plead adequately that statements concerning construction progress were false ***38** based on FE1's vague allegations that, at unknown times, construction had stalled or was not progressing as fast as he wanted.

On appeal, Plaintiff incorrectly argues that the District Court erred because, according to Plaintiff and FE1, "no ***meaningful*** construction had occurred." (Br. 31.)[16] The PSLRA requires Plaintiff to plead with particularity ***facts*** showing why each challenged statement is misleading; this standard is not satisfied by conclusory assertions that "are subjective" or "based on opinion." *In re Capstead Mortg. Corp. Sec. Litig.*, 258 F. Supp. 2d 533, 550 (N.D. Tex. 2003). That FE1 believed the construction was not "meaningful" is insufficient: that is an opinion and, in any event, none of the challenged statements mention anything about the manner or extent of ongoing construction.

Plaintiff argues that the "context" of the challenged construction statements suggested a specific kind of progress. (Br. 32-33.) But contrary to Plaintiff's uncited assertion that the statements "assured investors that Six Flags' international expansion was proceeding as planned," each of the challenged construction statements was made in the context of disclosing delays and other setbacks (*supra* SOC § C); it is not plausible that Defendants' statements that construction was ***39** "ongoing" at certain parks could be interpreted to convey a specific sort of construction progress that FE1 and Plaintiff would deem "material."[17] FE1's opinions regarding the "meaningfulness" of construction, which was admittedly ongoing at all relevant times, are insufficient to state a securities claim.

c. *Projected Park Opening Dates and Future Parks.*[18]

Plaintiff relatedly fails to plead that Defendants' projected park openings and future park plans were false when made. Because those statements relate to future events that Plaintiff claims were "impossible," Plaintiff needed to plead "specific facts that show how ... problems and difficulties ***necessarily*** precluded" Riverside from hitting projected park opening dates or developing new parks. *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1064 (N.D. Cal. 2012) (quoting *Ronconi v. Larkin*, 253 F.3d 423, 434 (9th Cir. 2001)); *see also Carvelli v. Ocwen Fin. Corp.*, 934 F.3d 1307, 1329 n.13 (11th Cir. 2019) (dismissing securities ***40** claim based on statements concerning compliance progress where plaintiffs "allege[d] at length ... serious problems," but failed to "allege facts strongly supporting the inference that [compliance] was *impossible*"). Here too, the Complaint fails to plead specific facts linking FE1's conclusory opinions that it was "impossible" for the parks to open on the timetables when the challenged statements were made. For example, Plaintiff cites FE1's supposed observations that one local government withdrew Riverside's funding (Compl. ¶71) or that Riverside was firing employees (*id*. ¶103), but "[t]hat a company is incurring a loss, running out of money, or even near bankrupt, does not mean that it necessarily [lacks the] ability to generate revenues or make future payments," *Druskin v. Answerthink, Inc.*, 299 F. Supp. 2d 1307, 1326 (S.D. Fla. 2004).[19] The District Court correctly held that Plaintiff "fail[ed] to plead any specific facts showing how or why the projected park openings were impossible to meet." (ROA.998.)

On appeal, Plaintiff argues that the District Court failed to consider FE1's opinions and conclusory assertions concerning internal Riverside affairs, which ***41** Plaintiff claims directly contradict the challenged statements. (Br. 29-31.) As explained above, however, "[i]t is not sufficient to simply allege certain facts that support a final conclusion, when those 'facts' themselves are conclusory; the PSLRA is satisfied only by facts, not conclusory allegations." *Capstead*, 258 F. Supp. 2d at 550; *Miyahira v. Vitacost.com, Inc.*, 2011 WL 13136262, at *7 (S.D. Fla. Dec. 8, 2011) (disregarding confidential witness opinion that there was "no way" certain goals would be met as "bereft of any facts"). Here, there are no "factual allegations" showing that any specific projected opening date was "impossible" when the projected dates were relayed to investors.[20] Instead, Plaintiff points to the conclusory opinions of one confidential witness, which are generally unmoored in time and must be severely discounted since FE1 never worked for Riverside. Plaintiff also emphasizes FE1's conclusory statements about one-off business difficulties to support challenges to statements related to the timeline for opening the Zhejiang park. (Br. 30-31.) But the Complaint does not plead specific, contemporaneous facts showing that any of the problems Riverside allegedly faced ***42** at the time "***necessarily*** precluded" the parks from opening on the stated timelines when the challenged statements were made. *Juniper*, 880 F. Supp. 2d at 1064. The Complaint does not adequately allege the falsity of those statements.

d. *Revenue Recognition*. [21]

Judge Pittman correctly dismissed the revenue recognition claims for failure to plead falsity. Here, the PSLRA requires Plaintiff to allege specifically the amount of revenue overstated, how the amount was determined, and why Defendants were required to report revenue differently. *Magruder v. Halliburton Co.*, 359 F. Supp. 3d 452, 465-66 (N.D. Tex. 2018); *Capstead*, 258 F. Supp. 2d at 550. [22] As the District Court correctly held, Plaintiff failed to allege with specificity "the amount of revenue ... allege[dly] improperly recognized," "which service periods or performance obligations [we]re not met, and why that would have required different reporting." (ROA.999.)

On appeal, Plaintiff claims to have "allege[d] specific amounts that Six Flags improperly recognized--approximately $15 million in quarterly revenue." (Br. 36.) But Plaintiff cites no allegations in support of this proposition. Plaintiff notes that, on July 15, 2018, Barber stated that $14.7 million in revenue was attributable to the parks in China (*id.*), but that is not an allegation of ***overstated*** revenue, that is ***total*** ***43** revenue that quarter from those parks. Because Plaintiff agrees that revenue is properly recognized based on licensing payments and other progress-related performance obligations (*e.g.*, Br. 35), but fails to allege (1) whether, when, and to what extent Riverside was delinquent on licensing payments in July 2018 (or at any other point during the Class Period, (*supra* Argument § I.C.1.a)) or (2) whether, how, and to what extent alleged delays at that time required negative revisions, [23] Plaintiff has not pleaded adequately an accounting fraud claim. [24]

2. *Plaintiff Failed To Allege Actionable Omissions.*

Plaintiff's argument that the District Court erred in finding no actionable omission fails. As the District Court correctly held, there is no general duty to disclose. (ROA.1000 (citing *Berger v. Beletic*, 248 F. Supp. 2d 597, 603 (N.D. Tex. 2003).) While a duty to disclose may arise "when silence would make other statements misleading," *Berger*, 248 F. Supp. 2d at 603, that duty "does not attach" where "an outcome is merely speculative," *In re Express Scripts Holding Co. Sec. Litig.*, 2017 WL 3278930, at *11 (S.D.N.Y. Aug. 1, 2017). Accordingly, when ***44** "publicly hyp[ing] the importance of [a third-party contractual] relationship," companies must disclose when one party takes steps to terminate the contract, *id.* at *12-13, but there is no obligation to disclose mere "disagreements in the course of a contract's performance," or "fail[ures] to perform," *Nasyrova v. Immunomedics, Inc.*, 2015 WL 382846, at *6-8 (D.N.J. Jan. 28, 2015); *see also Okla. Firefighters Pension & Ret. Sys. v. Xerox Corp.*, 300 F. Supp. 3d 551, 576-77 (S.D.N.Y. 2018) (no duty to disclose "litany of current adverse facts" when making "generally positive statements" concerning contracts absent prior "repudiation of th[ose] contracts"). [25]

Accordingly, Plaintiff's argument that Defendants were required to speculate about Riverside's financial and business difficulties whenever referencing Riverside fails. (Br. 37.) The District Court correctly held that Defendants had no duty to detail every supposed difficulty facing Riverside, or to speculate about default, until either Six Flags or Riverside took steps to terminate their relationship. (ROA.1001.) ***45** On appeal, Plaintiff claims "uncertainty about Six Flags' contractual relationship with Riverside" is different than "negative information about Riverside" (Br. 38), but that is a distinction without a difference: Plaintiff's case theory is that Riverside's difficulties jeopardized Six Flags' licensing agreements. There is no allegation that Riverside or Six Flags took any steps to terminate their relationship prior to January 10, 2020, when Six Flags promptly disclosed that it had issued notices of default to Riverside. (Compl. ¶¶145, 147.)

Finally, Plaintiff's omission theory on appeal is entirely predicated on uncorroborated allegations from FE1 concerning internal affairs at Riverside but, as discussed above (*supra* Argument § I.C.1.a), Plaintiff fails to plead that FE1 had personal knowledge of such matters, and such allegations are too unmoored in time to substantiate an actionable omission.

3. *Many Challenged Statements Are Protected Forward-Looking Statements, Inactionable Expressions of Corporate Optimism or Opinion.*

a. *Plaintiff Waived Arguments Concerning The Inactionability Of Most Challenged Misstatements*.

The District Court correctly held that Plaintiff failed to challenge the inactionability of many statements. (ROA.992.) "[A]rguments not raised before the district court are waived and cannot be raised for the first time on appeal." *LeMaire v. Louisiana Dep't of Transp. & Dev.*, 480 F.3d 383, 387 (5th Cir. 2007). Here, Plaintiff failed to rebut the following arguments: (1) "that forward-looking ***46** statements related to revenue recognition" (Compl. ¶¶184, 232, 244) and "Riverside's future performance" (*id*. ¶¶172, 207-09, 219, 227) "are protected under the PSLRA"; (2) "that statements concerning Riverside's quality as a partner" (*id*. ¶176), "Riverside's ability to work through issues" (*id*.), "Riverside's financial condition and government relationships" (*id*. ¶¶172, 207-09, 219, 227), and "prospects for future parks" (*id*. ¶¶170, 172-73, 175, 177, 179), "are all inactionable puffery"; and (3) "that numerous opinions ... are inactionable" (*id*. ¶¶168, 173, 177, 179, 219, 222, 227, 232, 235-36, 244, 246). The District Court correctly dismissed the majority of the challenged statements on the basis of Plaintiff's waiver.

On appeal, Plaintiff tries to hide this deficiency in a footnote, claiming that "Plaintiff's Opposition squarely addressed these issues." (Br. 43 n.2.) Defendants respectfully submit that the record speaks for itself (*compare* ROA.828-34 *with* ROA.882); this Court should affirm dismissal of these statements in light of Plaintiff's waiver.

b. *Inactionable Forward-Looking Statements*.

The PSLRA safe harbor "has two independent prongs." *Southland*, 365 F.3d at 371. First, a statement is inactionable if it is "identified as a forward-looking" and "accompanied by meaningful cautionary statements." 15 U.S.C. § 78u-5(c)(1)(A). Second, even absent meaningful cautionary language, a forward looking statement is inactionable if Plaintiff fails to plead adequately that it was made with "actual ***47** knowledge" of its falsity. 15 U.S.C. § 78u-5(c)(1)(B). The District Court applied this standard and correctly held that many challenged "statements are protected by the PSLRA's safe harbor provision as forward-looking statements." (ROA.1002.)

First, all challenged statements concerning projected park openings,[26] expectations regarding Riverside's future performance,[27] revenue recognition,[28] and certain construction-related statements[29] concern future operations and so are forward-looking under the PSLRA. 15 U.S.C. § 78u-5(i).[30] These statements are inactionable because Defendants identified them as forward-looking and they were accompanied by meaningful cautionary language. Contrary to Plaintiff's superficial arguments on appeal (Br. 40), investors were directed to Six Flags' annual and quarterly SEC filings containing the specific, meaningful risk disclosures. (*See* ROA.799-810.) Moreover, as the District Court found, Defendants' earnings calls ***48** included specific warnings concerning the market in China and difficulties facing Riverside. (ROA.1005-06.) Specific cautionary language accompanying Defendants' forward-looking statements renders those statements inactionable.

Even if these forward-looking statements were not accompanied by meaningful cautionary language (they were), the PSLRA would still render them inactionable because Plaintiff fails to plead that Defendants had "actual knowledge" of the statements' falsity. (*Supra* Argument § I.B.)

c. *Inactionable Corporate Optimism*.

The District Court correctly held that many challenged statements are inactionable puffery. (ROA.1007-08.) Statements expressing general optimism are inactionable because they are "too general and vague to cause a reasonable investor to rely on them." *Halliburton Co.*, 359 F. Supp. 3d at 461; *see also Southland*, 365 F.3d at 372. Here, Plaintiff challenges statements that are inactionable because they relay general optimism about the parks or Riverside.[31] For example, Plaintiff challenges statements that "our partner Riverside remains very committed to developing Six Flags parks," (Compl. ¶219), that Defendants

were "optimistic that [Riverside] can get through" difficult conditions (*id*. ¶227), and that Defendants ***49** were "pleased with [Riverside's] consistent progress" (*id*. ¶234). These statements are general expressions of optimism that are routinely dismissed.

On appeal, Plaintiff claims that certain of these vague statements of optimism might be actionable when examined in context. (Br. 41-42.) But the "context" surrounding these statements of cautious optimism was repeated disclosure of setbacks Riverside was facing (*supra* SOC § C), not unbridled optimism. [32] If anything, the context here emphasizes why these statements are inactionable.

Plaintiff also argues that certain statements related to Riverside and park progress are not puffery because they were made in response to analyst questions. (Br. 42.) That is not the law; otherwise every conversation with an analyst would be categorically material. Unsurprisingly then, Plaintiff's authority--*Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588 (7th Cir. 2006)--does not support Plaintiff's argument. There, the Seventh Circuit held that the challenged statement was not puffery because the defendant "describe [d] a decline as equivalent to a continued growth rate," *id*. at 597, not because that statement happened to be made during a conversation with an analyst. Here, Defendants' responses to analyst questions expressed general optimism. (Compl. ¶¶169-72.)

***50 d. *Inactionable Opinions*.**

Opinions are actionable only if Plaintiff alleges adequately either that (1) the opinion was not subjectively held by the speaker, or (2) a reasonable investor could understand the opinion to "imply facts about the inquiry [Defendants] conducted or the knowledge [they] had," and "the real facts are otherwise, but not provided." *Plaisance*, 2019 WL 1205628, at *10 (quoting *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 176 (2015)). Here, Plaintiff challenges pure opinions--for example, "I think 20 parks is possible" (Compl. ¶177) or Riverside has "been a very good partner for us" (*id*. ¶179) [33] --but fails to allege that Defendants did not believe these opinions or that Defendants knew material, contradictory facts (Argument § I.B). These opinions are inactionable.

***51 II. PLAINTIFF FAILED TO PLEAD A VIOLATION OF § 20(a).**

Because Plaintiff failed to state a claim for a primary § 10(b) violation, the District Court correctly dismissed the § 20(a) claim. *Owens v. Jastrow*, 789 F.3d 529, 547 (5th Cir. 2015).

***52 III. THE DISTRICT COURT ACTED WELL WITHIN ITS DISCRETION WHEN DENYING PLAINTIFF'S POST-JUDGMENT MOTIONS.**

While a Rule 59(e) motion seeking post-judgment leave to amend is guided by the standards of Rule 15(a), that "standard is tempered by the necessity of a district court to manage a case." *In re Capstead Mortg. Corp. Sec. Litig.*, 2003 WL 22221320, at *3 (N.D. Tex. Sept. 19, 2003) (quoting *Schiller*, 342 F.3d at 566). Among other considerations, denial is warranted for "undue delay" and "futility of the amendment." *Rosenzweig*, 332 F.3d at 864. Rule 59(e) motions are routinely rejected on these grounds alone. *E.g.*, *id*. at 864-65; *Howley v. Bankers Std. Ins. Co.*, 2021 WL 913290, at *23 (N.D. Tex. Mar. 10, 2021); *Capstead*, 2003 WL 22221320, at *3. Rule 59(e) motions "must be filed no later than 28 days after the entry of the judgment," Fed. R. Civ. P. 59(e); district courts do not have discretion to extend that deadline, Fed. R. Civ. P. 6(b)(2).

Here, the District Court did not abuse its discretion when denying Plaintiff's serial post-judgment motions. First, Judge Pittman correctly denied the first Rule 59(e) motion because Plaintiff "unduly delayed in seeking to amend and because the [PAC] is futile." (ROA.1492.) Second, the District Court acted well within its discretion when denying Plaintiff's second Rule 59(e) motion, which was untimely and futile.

***53 A. Plaintiff Unduly Delayed In Seeking Leave To Amend.**

As the District Court explained correctly, Plaintiff "unduly delayed in seeking to amend because the new information they propose was available to Plaintiff[] before they filed their Second Amended Complaint" and, "after filing two amended complaints ..., Plaintiff[] did not seek leave to amend ... either in their Response or in a separate motion during the pendency of Defendants' Motion to Dismiss." (ROA.1492-93.) And Plaintiffs "supplemental brief" and RPAC were procedurally improper because they were filed long after the non-discretionary, 28-day deadline for filing a Rule 59(e) motion.

1. *Every Single "New" Allegation In The PAC Was Available To Plaintiff When The Complaint Was Filed.*

Plaintiffs first Rule 59(e) motion was properly denied because the PAC did not contain allegations that were unavailable when the Complaint was filed. "[I]n cases where a party seeks to amend [the] complaint after entry of judgment, [the Fifth Circuit] ha[s] consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling." *Rosenblatt v. United Way of Greater Houston*, 607 F.3d 413, 420 (5th Cir. 2010). The first Rule 59(e) motion was deficient for precisely this reason. On appeal, Plaintiff abandons any argument that the PAC contained new, previously unavailable allegations, instead arguing without supporting authority that "there is no requirement that an amendment add ***54** only previously unavailable facts." (Br. 57.) To the contrary, Fifth Circuit law is clear on this issue, *Rosenblatt*, 607 F.3d at 420; Plaintiff's failure to show it could not have raised the PAC allegations earlier confirms the District Court had discretion to deny Plaintiff's Rule 59(e) motion.

2. *Plaintiff's Failure To Seek Leave To Amend During The Pendency Of The Motion To Dismiss Further Evinces Undue Delay.*

Plaintiff's undue delay in seeking leave to amend further warrants affirmance. The Fifth Circuit regularly affirms denials of post-judgment motions to amend where the plaintiff does not act for months during the pendency of a motion to dismiss. *DeGruy v. Wade*, 586 F. App'x 652, 656 (5th Cir. 2014); *Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 837 (5th Cir. 1992). Here, Defendants moved to dismiss on August 3, 2020; by that time, Plaintiff was on notice that the Complaint may be deficient. Defendants expressly sought dismissal with prejudice, so Plaintiff also knew that the Complaint may be dismissed with prejudice. (ROA.426, ROA.450.) Plaintiff chose to stand on the allegations in the Complaint. This further justifies the District Court's discretionary denial of the first Rule 59(e) motion.

Plaintiff suggests Judge Pittman did something wrong by denying the first Rule 59(e) motion in part because "the PAC was purportedly a third amended complaint." (Br. 54.) But this is an accurate recitation of the procedural history of this case and, when assessing undue delay, courts reject the argument that complaints ***55** filed after lead plaintiff appointment under the PSLRA constitute the "original complaint." *E.g.*, *Singh v. Schikan*, 2015 WL 4111344, at *2 (S.D.N.Y. June 25, 2015); *Capstead*, 2003 WL 22221320, at *2-3.

3. *Plaintiff's Proposed "Supplemental Brief" Constituted A Second, Untimely Rule 59(e) Motion.*

Plaintiff's motion for leave to file a "supplemental brief" with yet more proposed amendments was filed three months after entry of judgment, long past the 28-day deadline set forth in Rule 59(e). (ROA.14; Fed. R. Civ. P. 59(e).)[34] When, as here, a motion for leave to file a supplemental brief in support of a Rule 59(e) motion contains new allegations, that motion is considered a new, separate Rule 59(e) motion that must be made within 28 days of judgment. *Collier v. Cty. of Los Angeles*, 2008 WL 11420057, at *2 (C.D. Cal. Feb. 8, 2008), *aff'd*, 331 F. App'x 468 (9th Cir. 2009) (supplemental brief asserting newly-discovered allegations in support of Rule 59(e) motion, but filed more than 28 days after judgment, construed as separate, untimely Rule 59(e) motion); *Reese v. McGraw-Hill Cos., Inc.*, 293 F.R.D. 617, 625 (S.D.N.Y. 2013), *aff'd*, 574 F. App'x 21 (2d Cir. 2014) (similar, concerning

Rule 60(b)(2) motion). Here too, Plaintiff's motion to file a "supplemental brief" more than 28 days after entry of judgment was a new, plainly ***56** untimely, Rule 59(e) motion. The District Court's order denying that motion should be affirmed.

B. Denial Of The Post-Judgment Motions Should Also Be Affirmed Because Plaintiffs Proposed Amendments Were Futile.

The District Court correctly held that the proposed allegations in the PAC and Plaintiffs untimely, second Rule 59(e) motion, were futile. The amendment rules "do not require that courts indulge in futile gestures. Where a complaint, as amended, would be subject to dismissal, leave to amend need not be granted." *U.S. ex rel. Jackson v. Univ. of N. Texas*, 673 F. App'x 384, 388 (5th Cir. 2016). And it is Plaintiffs burden to show amendment would not be futile as adjudged against the stringent pleading standards of the PSLRA. *See, e.g., Neiman*, 854 F.3d at 746; *see also* 15 U.S.C. § 78u-4(b)(1). The District Court was well within its discretion to deny Plaintiffs post-judgment motions on futility grounds.

First, the new allegations proposed in the PAC were futile. On appeal, Plaintiff argues that "the District Court abused its discretion when it rejected the PAC's new allegations that FE1 was informed that his presentations and reports 'were to be presented to the Six Flags Board of Directors, including Reid-Anderson' " (Br. 56.) But that proposed tweak is just semantics: FE1 still does not claim to have presented the internal reports to any Defendant, nor were any dates or contents of these supposed reports provided. The District Court was well within its discretion to find that Plaintiffs proposed amendments confirmed that this "case ***57** rests primarily on opinions of a midlevel employee who never presented his opinions to Defendants." (ROA.1493.) Plaintiff's PAC also spent more time discussing FE1's resignation letter, which was already cited in the Complaint that was dismissed. In that August 2019 letter--sent shortly before Six Flags disclosed it had issued Riverside notices of default--FE1 opined that the "projects in China [we]re ***perhaps*** irreversibly off-track" (Br. 52), belying Plaintiff's conclusory claim that, throughout the Class Period, the project park openings were "impossible." The "new" allegations in the PAC were more of the same, inadequate allegations that the District Court correctly rejected when granting Defendants' motion to dismiss.

Plaintiff next claims that the District Court's denial of the first Rule 59(e) motion, "unaccompanied by reasons ... may constitute an abuse of discretion." (Br. 56.) But the District Court ***did*** explain its rationale for denying the PAC, Plaintiff just ignores this part of the Court's decision. The District Court explained that the motion was denied because Plaintiff "unduly delayed in seeking to amend and because the [PAC] is futile," and then elaborated on this rationale, as described above. (ROA.1492-93.) The District Court's order, which "considered and applied the factors" relevant to Plaintiff's Rule 59(e) motion, clearly is sufficient even under ***58** Plaintiff's lone authority. *Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 819 (5th Cir. 2004). [35]

Second, the proposed new allegations in Plaintiff's untimely motion for leave to file a "supplemental brief" also were plainly futile. Plaintiff argues that the SEC investigation "contributes to the scienter analysis." (Br. 55.) But the mere existence of an SEC investigation "is too speculative to add much, if anything, to an inference of scienter." *Cozzarelli v. Inspire Pharms. Inc.*, 549 F.3d 618, 628 n.2 (4th Cir. 2008); *see also Konkol v. Diebold, Inc.*, 590 F.3d 390, 402 (6th Cir. 2009) ("Government investigations can result from any number of causes, and [plaintiffs] have not pointed to any facts suggesting that the SEC investigation was the result of knowing or reckless behavior by the Defendants."); *In re Ceridian Corp. Sec. Litig.*, 542 F.3d 240, 248-49 (8th Cir. 2008) (similar). Here too, Plaintiff's untimely, second Rule 59(e) motion does not propose allegations that the SEC investigation even resulted in an enforcement action, never mind a finding of wrongdoing. The proposed SEC investigation amendments were futile.

Plaintiff claims that certain executive resignations occurred close in time to the SEC investigation, and that this "proximity" is "strong indicia" of scienter. (Br. ***59** 49-50.) But Plaintiff's authority, *In re UTStarcom, Inc. Sec. Litig.*, 617 F. Supp. 2d 964 (N.D. Cal. 2009) (Br. 49-50), emphasizes what is missing here. In *UTStarcom*, a defendant's resignation was announced in the same press release where it was "revealed that SEC staff had recommended that the SEC file a civil injunctive action" against that defendant for securities fraud. 617 F. Supp. 2d at 976. Here, Plaintiff's RPAC fails to allege either that the executives' departures were linked to the SEC investigation, or the outcome of the SEC investigation.

The second Rule 59(e) motion also proposed amendments concerning choice of defense counsel, but Plaintiff never explains how this is relevant to whether Defendants made any misrepresentation with the requisite intent. For example, Plaintiff asserts that the decision to retain separate counsel for Reid-Anderson and Barber "adds to Plaintiff's scienter allegations," but cites no authority for that dubious proposition. (Br. 55.) Choice of defense counsel after the alleged wrongdoing adds nothing. *Cf. Neiman*, 854 F.3d at 751 (no inference of scienter from defendants' decision to engage bankruptcy counsel *prior* to alleged misstatements concerning liquidity). [36]

The District Court did not abuse its discretion in denying Plaintiff's untimely ***60** and futile post-judgment motions.

CONCLUSION

For these reasons, Defendants respectfully submit that this Court should affirm.

***61** Dated: November 24, 2021

Respectfully submitted,

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Footnotes

1 "Complaint" or "Compl." refers to ROA.300-418. Defendants cite certain SEC filings and materials incorporated by reference in Plaintiffs complaint (all included in the record on appeal), which may be considered at this stage. *Giancarlo v. UBS Fin. Servs., Inc.*, 725 F. App'x 278, 282 (5th Cir. 2018). Unless otherwise noted, alterations, citations, quotations, and subsequent history are omitted, and emphasis is added.

2 "Br." refers to the Brief for Plaintiff-Appellant, Doc. 00516068231.

3 The same is true for Plaintiff's district level and out-of-circuit authority. (Br. 25-27 (citing, *e.g., Higginbotham v. Baxter Int'l, Inc.*, 495 F.3d 753, 757 (7th Cir. 2007) ("[Allegations from 'confidential witnesses' must be 'discounted' rather than ignored. Usually that discount will be steep."); *Makor Issues & Rts., Ltd. v. Tellabs Inc.*, 513 F.3d 702, 712 (7th Cir. 2008) (anonymity did not "invalidate" confidential witness allegations); *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1239 (11th Cir. 2008) (rejecting "*per se* rule that always requires a securities-fraud complaint to name the confidential source"); *Rougier v. Applied Optoelectronics, Inc.*, 2019 WL 6111516, at *11 (S.D. Tex. Mar. 27, 2019) (plaintiffs pleaded sufficient facts to permit *some* consideration of the anonymous statements).)

4 Plaintiff claims *Pier 1* "is inapposite because the incentive compensation there was 'well out of reach.' " (Br. 47.) Plaintiff misses the point: the alleged motive here is not just insufficient like in *Pier 1*; it strongly weighs ***against*** scienter.

5 Plaintiff argued below that the Individual Defendants did not acquire stock through open-market purchases, but it is "[t]he fact that ... defendants did not ***sell*** the[] shares" they acquired that "undermines plaintiffs' claim of scienter." *Izadjoo v. Helix Energy Sols. Grp., Inc.*, 237 F. Supp. 3d 492, 517 (S.D. Tex. 2017).

6 Plaintiff cites out-of-circuit authority for the proposition that "[t]here is a distinction between alleging literally no motive to commit fraud" and "alleging arguably commonplace motives." (Br. 51.) The Fifth Circuit does not recognize this distinction. *Neiman*, 854 F.3d at 748 (requiring "correspondingly greater" circumstantial allegations because alleged motive-- "[t]he desire to raise capital"--is one "virtually all corporate insiders share").

7 Defendants respectfully submit that, while the District Court reached the correct result on this issue, *Neiman* was improperly distinguished. Judge Pittman held that the *Neiman* factors control where the only allegations of scienter are alleged internal reports. (ROA.1012.) But in *Neiman*, there were other scienter allegations, including "(1) [defendant's] purported motive to deceive investors, (2) allegations made by certain confidential witnesses, and (3) [defendant's] high rank in the company." 854 F.3d at 747. The *Neiman* court's reference to "allegations concerning internal corporate reports ***alone***," *id.* at 748, concerns the first step of scienter analysis, where courts "consider[] each allegation individually," *In re KBR, Inc. Sec. Litig.*, 2018 WL 4208681, at *8 (S.D. Tex. Aug. 31, 2018). During the holistic analysis, if each

allegation is separately insufficient--as is the case here--"the combined effect of the allegations [cannot] form a strong inference of scienter." *Malin v. XL Capital, Ltd.*, 312 F. App'x 400, 402 (2d Cir. 2009); (*infra* Argument § I.B.3).

8 FE1 also claims his resignation letter, sent at the end of the Class Period, reached Kathy Aslin (SVP, Human Resources) (Compl. ¶254); again, no Individual Defendant is implicated.

9 *Compare Nathenson v. Zonagen, Inc.*, 267 F.3d 400, 425 (5th Cir. 2001) (core operations inference where company had 35 employees), *with Izadjoo*, 237 F. Supp. 3d at 515 (rejecting core operations inference for company of "approximately 1,400 employees").

10 Plaintiff claims that Riverside's behavior caused tension with unidentified ride vendors. (Compl. ¶¶262-64.) But Plaintiff does not allege that any vendor took action that impacted Six Flags' North American operations or communicated with anyone on Six Flags' North American teams. (*Id.*) Similarly, merely alleging that Defendants spoke about the parks in China (*id.* ¶257) is insufficient, *e.g.*, *Pier 1*, 273 F. Supp. 3d at 670-71.

11 Plaintiff relies on the same cases raised below (*compare* Br. 49, *with* ROA.836-37), none of which help its cause. In *North Port Firefighters' Pension-Local Option Plan v. Temple-Inland, Inc.*, 936 F. Supp. 2d 722 (N.D. Tex. 2013), allegations of executive resignations *did not* support an inference of scienter. *Id.* at 754. In *Hall v. Rent-A-Ctr., Inc.*, 2017 WL 6398742 (E.D. Tex. Oct. 19, 2017), the company disclosed that it *terminated* the executives *because* the subject of the fraud was "exacerbated under ... previous management," *id.* at *34, emphasizing the requisite link between executive departures and the alleged fraud that is lacking here.

12 Plaintiff cites the departure of Six Flags' former General Counsel Lance Balk in the Complaint (Compl. ¶260), but does not allege facts linking Balk to the alleged fraud, omits that he remained Of Counsel Advisor to Six Flags (ROA.727), and has abandoned this argument on appeal.

13 (*See* Compl. ¶¶172, 207-209, 219, 227.)

14 FE2 alleges only that Riverside missed payments sometime between August 2018 and the "beginning of 2019," when FE2 left Six Flags. (Compl. ¶100.) Similarly, FE1 alleges that, "during his time in China, Riverside failed to make licensing payments," while conceding that Riverside also did make licensing payments during the Class Period. (*Id.* ¶101.) These allegations are "unmoored in time," and so cannot sufficiently plead falsity. *Gregory v. ProNAi Therapeutics Inc.*, 297 F. Supp. 3d 372, 409 (S.D.N.Y. 2018).

15 (*See* Compl. ¶¶205-06, 219, 222, 234-36.)

16 Plaintiff does not dispute that the "meaningful construction" allegation is an opinion, instead citing supposed "facts [FE1] observed on the ground," such as missed vendor payments, ride order cancellations, or lack of certain construction plans. (Br. 34.) None of those allegations render false statements that construction was ongoing at certain work sites.

17 Plaintiff's authorities are distinguishable because in each, specific factual allegations directly contradicted defendants' statements. (Br. 32 (citing *Tellabs*, 513 F.3d at 709-712 (defendants misrepresented consumer demand for " 'flagship' product" in light of specific allegations of weak demand); *Stransky v. Cummins Engine Co.*, 51 F.3d 1329, 1335 & n.10 (7th Cir. 1995) (pre-PSLRA case where specific factual allegations that warranty costs for products already exceeded company's targets contradicted statements that products were "making progress toward their targets"); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 757-58 (S.D. Tex. 2012) (representation that company was "making good progress in addressing the recommendations of the Baker Panel" adequately alleged to be false because defendants were not making progress toward that specific set of recommendations); *In re Venator Materials PLC Sec. Litig.*, 2021 WL 2980581, at *19-20 (S.D. Tex. July 7, 2021) (plaintiffs alleged specific facts contradicting defendants' representations on rebuilding progress where rebuild never began).

18 (*See* Compl. ¶¶168, 172, 187, 196 197, 205, 220-21, 235-37, 246 (projected park openings); *id*. ¶¶170, 172-73, 177, 179 (future park plans).)

19 Plaintiff compares the Six Flags Zhejiang parks to Disney and Universal Studios resorts, and further compares Six Flags' contemplated rides to hypothetical rollercoaster construction timelines, to argue that it was "impossible" to open Six Flags Zhejiang on time. (Br. 10; Compl. ¶¶64-67.) But the Six Flags Zhejiang parks were one component of the Zhejiang Riverside Themed Town, a "mixed-use real-estate development," (Compl. ¶47), so the Disney and Universal resorts are incomparable to the Zhejiang parks (as opposed to the overall Zhejiang resort). This is especially so considering the Disney and Universal properties were run by different companies. Similarly, with respect to Plaintiff's 5-years-to-construct rollercoasters, there is no basis in the Complaint to attribute that hypothetical timeline to the *Six Flags*-branded parks.

20 Plaintiff's authorities are inapposite. (Br. 29 (citing *Venator*, 2021 WL 2980581, at *19-20 (rebuild progress statements false where plaintiffs alleged adequately rebuild never began); *Hall*, 2017 WL 6398742, at *25 (sustaining claims concerning meaning of "operational," not timeline); *Carlton v. Cannon*, 184 F. Supp. 3d 428, 472 (S.D. Tex. 2016) (specific factual allegations from former employees, including former CTO and board member, showed at-issue technology "could not be replicated at a commercial scale production plant"); *Fitzpatrick v. Uni-Pixel, Inc.*, 35 F. Supp. 3d 813, 828 (S.D. Tex. 2014) (falsity adequately pleaded as to production forecast of "45,000 to 60,000 units" when company actually produced only 50; plaintiffs cited contemporaneous internal statements that forecasts were "too tight").) These allegations stand in stark contrast to the speculative opinions of FE1 here.

21 (Compl. ¶¶163-66, 181-84, 190-93, 200-01, 203, 214-17, 229-32, 241-44.)

22 Claims fail for this reason even when supported with allegations from an accounting controller claiming direct knowledge of fraud. *Orion*, 468 F. Supp. 3d at 850-51.

23 On construction progress, Plaintiff fails to allege specific contemporaneous facts to support the conclusory opinions of FE1. (*Supra* Argument § I.C.1.b.) Even assuming FE1's opinion is credited, Plaintiff does not connect the dots between the supposed lack of "material" construction progress and how (and in what amounts) that rendered any revenue recognition statement false.

24 Plaintiff cites the disclosed $15 million revenue write-down for Q4 2018 as well, but concedes that there is no revenue recognition claim for that quarter. (Br. 36-37.) Because Six Flags' revenue recognition depends on the then-current status of, among other performance obligations, Riverside's licensing payments, progress, and expected park openings, that write-down is not indicative of appropriate revenue recognition at any time other than Q4 2018.

25 Plaintiff's reliance on *Lormand v. US Unwired Inc.*, 565 F.3d 228 (5th Cir. 2009) and *Georgia Firefighters' Pension Fund v. Anadarko Petroleum Corp.*, 514 F. Supp. 3d 942, 948 (S.D. Tex. 2021) (Br. 37-38) is misplaced. Neither case arose in the context of an alleged duty to disclose issues facing a contractual counterparty. In *Lormand*, there were specific allegations that defendants themselves had "internal discussions regarding the ***inevitable failure*** of" the program. 565 F.3d at 250. Nothing similar is alleged here. In *Anadarko*, defendants "continued to provide glowing reports [of their own wells] quarter-after-quarter" despite possessing data indicating that the wells were "dry" or "garbage," evidenced by one defendant personally instructing a named witness to manipulate data "to maintain their exaggerated narrative." *Anadarko*, 514 F. Supp. 3d at 948. As the District Court found below, *Anadarko* is "neither persuasive nor analogous." (ROA.993.)

26 (Compl. ¶¶168, 172, 187, 196-97, 205, 220-21, 235-37, 246.)

27 (Compl. ¶¶172, 207-09, 219.)

28 (Compl. ¶¶184, 232, 244.)

29 (Compl. ¶¶219, 222.)

30 Plaintiff also challenges statements concerning hopes to develop future parks. (Compl. ¶¶170, 173, 177, 179.) In addition to being inactionable puffery and opinions, these are inactionable forward looking statements because Plaintiff fails to plead adequately that such statements were made with "actual knowledge" of their falsity, 15 U.S.C. § 78u-5(c)(1)(B).

On appeal, Plaintiff cherry-picks a few statements (some of which Defendants did not argue were forward looking, *e.g.*, Compl. ¶¶206-08, 219-20), that it claims concern mixed present/future statements (Br. 38-39). Even assuming that is so, as discussed, Plaintiff fails to plead adequately that the supposedly "present" components of those statements were false when made.

31 (*See* Compl. ¶¶172, 207-09, 219 (puffery concerning Riverside), *id*. ¶¶170, 173, 177, 179 (puffery concerning future parks), and *id*. ¶¶205-06, 219, 222, 234-236 (puffery concerning construction progress).)

32 In contrast, in *Plotkin v. IP Axess Inc.*, 407 F.3d 690 (5th Cir. 2005) (Br. 42), the at-issue statements were made in the context of announcing "signed, allegedly lucrative contracts," and were "designed to create an impression that a substantial payoff would soon flow from the contracts." *Plotkin*, 407 F.3d at 698. Here, Defendants made cautiously optimistic statements in the context of disclosing setbacks Riverside was facing.

33 (*See* Complaint ¶¶168, 172-73, 177, 179, 184, 187, 196-97, 205, 219-22, 227, 232, 234-37, 244, 246.)

34 Rule 6(b) prohibits extending the time to act under Rule 59(e). *See* Fed. R. Civ. P. 6(b)(2); *Huskey v. Jones*, 860 F. App'x 322, 325 (5th Cir. 2021).

35 Plaintiff does not make the same argument concerning the Court's denial of the second post-judgment motion (Br. 55-56), presumably because that motion was untimely under Rule 59(e), *Mayeaux v. Louisiana Health Serv. & Indem. Co.*, 376 F.3d 420, 426 (5th Cir. 2004) (affirmance of unexplained orders permitted when "reason[ing] for the denial is readily apparent").

36 Plaintiff also fail to explain how Six Flags' retention of McKillips's counsel in connection with the SEC investigation serves as supposed "documentary evidence" supporting FE1's credibility. (Br. 55-56.) In Plaintiff's authority, *ABC Arbitrage*, an internal report prepared by the company's audit department constituted documentary evidence supporting allegations of falsity because the report described "improperly understated" costs and "overstated inventory." 291 F.3d at 344, 354-55. Nothing similar is presented by the choice of counsel allegations here.

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