IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE THE CHEMOURS COMPANY SECURITIES LITIGATION	C.A. NO. 1:19-CV-01911-CFC Hon. Colm F. Connolly
This document relates to all actions.	CLASS ACTION

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT

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PRELIMINARY STATEMENT

This case is premised on the mischaracterization of a complaint that The Chemours Company filed against its former parent E. I. du Pont de Nemours & Co. ("DuPont") in Delaware's Court of Chancery. Plaintiff alleges that Chemours "admitted" in that complaint to massive accounting fraud—namely, that the company had understated its environmental liability accruals by $2.46 billion and so has been insolvent every quarter since its July 1, 2015 spin-off from DuPont. ¶ 1.[1] Because those allegations have no basis in Chemours's Delaware complaint, they cannot be credited. Indeed, even Plaintiff does not credit them—just two weeks after the Delaware complaint was unsealed, after Chemours's supposed "admission" of insolvency was made public, Plaintiff expressed its confidence in the company's solvency by paying an above-par price for $75,000 of Chemours debt.

Here's what Chemours actually alleged in its Delaware complaint: In connection with the 2015 spin-off, DuPont allocated environmental liabilities to Chemours and purported to have Chemours indemnify it for those liabilities. DuPont also certified "maximum" exposure for each of those liabilities. The "maximums" were not intended to comply with generally accepted accounting principles (GAAP); instead, they were supposed to reflect Chemours's maximum possible exposure going forward. And the certifications of those "maximums" were not used for any financial filing; they were created for a third-party solvency

[1] Citations in the form "¶ __" refer to Plaintiff's Consolidated Class Action Complaint (the "Complaint"), D.I. 30.

opinion. Chemours alleged that DuPont had understated these "maximums" and that a solvency opinion would not have been possible in connection with the spin-off unless they were given force. Chemours sought a declaration that DuPont thus retained any liability beyond those maximums.

The Delaware complaint, in short, was filed to protect Chemours's stockholders from DuPont's demands for unlimited indemnification above and beyond the "maximums" that it had certified, not to restate Chemours's present exposure to environmental liabilities for purposes of GAAP (or otherwise). And, in fact, Chemours has not restated any of the disclosures that Plaintiff challenges.

Once the Delaware complaint is correctly understood, Plaintiff's claims fall away. The gravamen of Plaintiff's suit is that the Delaware complaint demonstrates Chemours falsified every one of its GAAP-based environmental disclosures over a 30-month class period. It is the "why" Plaintiff alleges in claiming that virtually all of the challenged disclosures were false and misleading. But GAAP does not deal in "maximums," nor does it direct companies to disclose a company's "maximum" possible exposure to contingent liabilities—in fact, the accounting authorities specifically considered and rejected such a requirement a decade ago. Instead, companies must accrue liabilities that are both "probable" and "reasonably estimable," and disclose the existence of material liabilities that are "reasonably possible." These concepts are not equivalent to "maximums."

Plaintiff's claims should thus be dismissed for three independent reasons:

(1) Plaintiff does not allege any false statement with the particularity required under the Private Securities Litigation Reform Act (PSLRA). The

challenges to Chemours's environmental disclosures and sundry other statements also fail under established precedent for additional reasons, including that they were statements of opinion (*see City of Edinburgh Council* v. *Pfizer, Inc.*, 754 F.3d 159 (3d Cir. 2014)) and because they fall within the PSLRA safe harbor for forward-looking statements (*see* 15 U.S.C. § 78u–5(c)(1)).

(2) Plaintiff does not present particularized allegations supporting a strong inference of scienter. It is well-settled that even an admitted accounting error does not support an inference of scienter unless it "equates to a self-evident business nonsensicality which cannot be made by a defendant with a non-culpable state of mind." *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 352 (D.N.J. 2007). Plaintiff cannot make that showing. Here, there is not even a conceded accounting error. And the confidential witness testimony and stock sales on which the Complaint relies only reinforce that Chemours and its executives strictly complied with federal law and GAAP.

(3) Plaintiff does not adequately allege that Chemours's supposed accounting misstatements or other challenged disclosures caused stockholders any economic loss. *See Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336 (2005). Plaintiff points to three corrective disclosures that allegedly "revealed" the supposed true extent of Chemours's environmental liabilities—a May 2019 short-seller's presentation, the June 2019 unsealing of the Delaware complaint, and an August 2019 Chemours earnings press release. ¶ 136. These disclosures shed no light on the alleged misrepresentations. In fact, Plaintiff is mistaken about when two of the supposed disclosures occurred.

This lawsuit takes on the difficult task of challenging complicated accounting judgments as securities fraud. To do so, Plaintiff mischaracterizes an action that Chemours took to protect its stockholders. The Complaint should be dismissed for failure to state a claim.

NATURE AND STAGE OF THE PROCEEDINGS

In October 2019, two individual Chemours stockholders sued Defendants on behalf of a putative class of Chemours stockholders. D.I. 1; *Saw* v. *The Chemours Company*, No. 19-CV-2074-CFC, ECF No. 1. The Court consolidated the cases, D.I. 5, and appointed New York State Teachers' Retirement System as Lead Plaintiff. D.I. 20. On April 3, 2020, Plaintiff filed the Consolidated Class Action Complaint (the "Complaint"), which Defendants now move to dismiss.

SUMMARY OF ARGUMENT

1. Plaintiff fails to plead that Defendants made any materially false or misleading statements or omissions. *See* Point I.

2. Plaintiff fails to plead particularized facts supporting a strong inference of scienter. *See* Point II.

3. Plaintiff fails to plead that the alleged misrepresentations caused Chemours stockholders to suffer any loss. *See* Point III.

4. Plaintiff's claims under Section 20(a) should be dismissed for failure to plead any underlying securities fraud. *See* Point IV.

STATEMENT OF FACTS

A. The Defendants

Chemours is a Delaware corporation that produces industrial and specialty chemical products. ¶ 19. Defendants Mark Vergnano and Mark Newman (collectively "Individual Defendants") are Chemours officers. Vergnano has served as President and Chief Executive Officer since July 2015. ¶ 20. Newman served as Senior Vice President and Chief Financial Officer from July 2015 until June 2019, when he was appointed Chief Operating Officer. ¶ 22.

B. DuPont spins off its Performance Chemicals business as Chemours, which immediately struggles.

Chemours was once a subsidiary of chemical conglomerate DuPont. In 2013, DuPont launched an internal initiative to explore selling off its "Performance Chemicals" unit. After concluding that no one would buy that business because the associated liabilities were too large and volatile, DuPont began exploring a spin-off of what would become Chemours. ¶ 39. DuPont dominated the spin process, and used that control to impose unfavorable terms on Chemours. ¶ 40.

DuPont's board could not approve the spin-off unless it found that Chemours would be solvent post-spin. ¶ 57. It retained a financial adviser to give a solvency opinion and directed that adviser to rely on DuPont management's certifications of "High End (Maximum)" exposure for each of the liabilities allocated to Chemours. ¶ 60. As the Delaware complaint alleges, these maximums were not intended to be GAAP estimates; instead they were supposed to reflect

worst-case scenarios. Del. Compl. ¶¶ 52-55.[2] Assuming the accuracy of the "maximums," DuPont's financial advisor opined that Chemours would be solvent.

The spin-off was completed on July 1, 2015 pursuant to a DuPont-drafted agreement. ¶ 40. That document included provisions that purport to require Chemours to indemnify DuPont for transferred liabilities. *Id.* The terms and background of the spin-off were, of course, public.

Chemours struggled following its spin-off, suffering an 85% decline in share price. ¶ 41. Under the leadership of Individual Defendants Vergnano and Newman, the company worked to reduce its expenses and relieve its debt burden. *Id.* This "Five-Point Transformation Plan" was successful. Chemours's free cash

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[2] On a motion to dismiss, the Court must evaluate "documents incorporated into the complaint by reference and matters of which [it] may take judicial notice," *City of Edinburgh Council* v. *Pfizer, Inc.*, 754 F.3d 159, 136 n.3, 166 (3d Cir. 2014), including SEC filings, newspaper articles, and any "undisputedly authentic document that a defendant attaches as an exhibit to [its motion] if the plaintiff's claims are based on the document." *Pension Ben. Guar. Corp.* v. *White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993). This, of course, includes the Delaware complaint on which Plaintiff bases its claims.

The Delaware complaint is attached as Exhibit 1 to the Declaration of Joel Friedlander in Support of Defendants' Motion to Dismiss ("Friedlander Declaration") and referenced as "Del. Compl." The Friedlander Declaration also includes various other exhibits that are subject to judicial notice, which are referenced as "Ex. __." In addition, an example of Chemours's environmental-related disclosures and related risk statements from the last Form 10-K in the Class Period has been excerpted at Exhibit 2. In the interest of brevity, while Defendants have included as exhibits to the Friedlander Declaration transcripts of earnings calls and other statements that are less freely accessible, Defendants have not included all referenced filings by Chemours with the Securities and Exchange Commission (SEC). Defendants are prepared to provide hard copies of any document cited in Defendant's submission at the request of the Court.

flow from operations rose from negative $337 million in fiscal year 2015 to $642 million in fiscal year 2018, driven by increased revenues and restructured debt agreements. Annual Report (Form 10-K) (Feb. 16, 2018) at 69; Annual Report (Form 10-K) (Feb. 15, 2019) at 58.

C. Chemours discloses contingent environmental remediation and litigation liabilities consistent with GAAP.

The public was well aware of the risks presented by Chemours's inherited environmental liabilities. *See, e.g.*, ¶¶ 2, 37. Chemours provided regular disclosures of its material litigation liabilities and environmental remediation liabilities (*i.e.*, liabilities reflecting the estimate of environmental remediation costs required by regulation or order). ¶ 21. Consistent with GAAP, each of Chemours's periodic filings included accruals of material liabilities that its management believed "probable" (*i.e.*, more likely than not) and "reasonably estimable"—which were recorded as liabilities on the corporate balance sheet—as well as disclosures of liabilities that Chemours believed "reasonably possible" (*i.e.*, with more than slight likelihood). *See, e.g.*, Annual Report (Form 10-K) (Feb. 16, 2018) at 61, 62.[3] Beginning in February 2017, Chemours also voluntarily provided

[3] The relevant accounting standards are cited in the Complaint, ¶¶ 255-67 and attached as exhibits for completeness. Accounting Standards Codification (ASC) Topic 450 (Ex. 3A) covers contingent liabilities generally, including for litigation. ASC Topic 410 (Ex. 3B) applies to environmental remediation liabilities. Key terms are defined in the ASC Master Glossary (Ex. 3C). Plaintiff also cites various Statements of the Conceptual Framework for Financial Reporting, ¶ 268, but these "do[] not establish generally accepted accounting standards." *See* FASB Concepts Statements, available at http://www.fasb.org/jsp/FASB/Page/PreCodSectionPage&cid=1176156317989. Issuers have no duty to supplement their GAAP disclosures to comply with FASB's "conceptual" guidance. *Harris* v. *AmTrust*

even more information about its environmental remediation liability, disclosing each quarter that "under adverse changes in circumstances, although deemed remote" (*i.e.*, per the ASC Master Glossary, with a "slight" likelihood) that liability "may range up to" a higher figure "above the amount accrued." ¶ 169.

Chemours's disclosures of its remediation and litigation liability estimates were comprehensive, including summaries detailing the status of remediation at major sites and significant litigation. *See, e.g.*, Ex. 2 (Annual Report (Form 10-K) (Feb. 15, 2019) at 49-55 (cited at ¶ 235)). The company supplemented these disclosures with cautionary statements emphasizing their subjective nature, the considerable risk they could prove inaccurate, and the potential reasons for inaccuracy. Chemours regularly warned, for example, that "[w]hile [it] establish[ed] accruals in accordance with [GAAP], the ultimate actual costs and liabilities may vary from the accruals because the estimates on which the accruals [were] based depend[ed] on a number of factors (many of which are outside of [the company's] control)." Ex. 2 (Annual Report (Form 10-K) (Feb. 15, 2019) at 12).

Throughout this period, notwithstanding Plaintiff's allegation that Chemours was actually insolvent due to understated accruals of environmental liabilities, Chemours timely filed its periodic reports and received clean audit opinions from its accountants at PricewaterhouseCoopers LLP. *See* Annual Report (Form 10-K) (Feb. 17, 2017) at F-3; Annual Report (Form 10-K) (Feb. 16, 2018) at F-3; Annual

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Fin. Servs., Inc., 135 F. Supp. 3d 155, 172 n.28 (S.D.N.Y. 2015), *aff'd*, 649 F. App'x 7 (2d Cir. 2016).

Report (Form 10-K) (Feb. 15, 2019) at F-3; Annual Report (Form 10-K) (Feb. 14, 2020) at F-3.

D. DuPont's maximums prove hollow and the markets grow concerned that new litigation and shifts in regulatory enforcement will further increase Chemours's environmental exposure.

As the Delaware complaint recounts, DuPont's maximums ultimately proved to be without basis. Del. Compl. ¶¶ 69-98. For example, after a series of trial losses, Chemours announced in early 2017 an agreement with DuPont over responsibility for litigation liabilities arising from historical emissions of perfluorooctanoic acid (PFOA). The amounts at issue were well above DuPont's certified maximum for that risk. ¶ 76. During that same period, state and federal regulators began to focus on the emission of a chemical known as GenX from a Chemours plant in Fayetteville, North Carolina, leading to a public resolution also well above DuPont's maximum for the risk. ¶ 98.

PFOA and GenX belong to a class of chemicals known as per- and polyfluoroalkyl substances (PFAS) that DuPont had historically released from some of its manufacturing facilities. The public has long been aware of allegations that PFAS pose a health hazard. For example, the EPA issued public warnings about PFAS toxicity in 2009. ¶ 37. These concerns provoked thousands of public lawsuits against DuPont and other chemical companies. ¶ 36. In the early 2000s, PFAS litigation against DuPont made public its internal research into the potential health risks posed by the chemicals. ¶ 33.

Over the Class Period, Chemours experienced a marked increase in PFAS lawsuits brought by private litigants and investigations by regulators and state governments, once again putting DuPont's maximums at risk. ¶¶ 78, 80, 109. Chemours regularly updated investors on this increase in litigation. *See, e.g.*, Quarterly Report (Form 10-Q) (May 4, 2018) at 22 (reporting new PFAS "personal-injury cases . . . filed in West Virginia, Ohio, and New York Courts"); Quarterly Report (Form 10-Q) (May 3, 2019) at 21-22 (noting new PFAS litigation brought by Ohio, the city of Dayton, and various water authorities, among others).

Market concern over PFAS liability came to a head on the afternoon of May 6, 2019, when the CEO of a hedge fund gave a presentation at an investors conference—which was rebroadcast on CNBC—where he spoke for approximately one minute about Chemours. ¶ 136 (referencing a presentation available at https://www.cnbc.com/video/2019/05/06/larry-robbins-shares-his-best-ideas-at-the-sohn-investment-conference.html). The executive said that his fund had shorted Chemours and another chemical company because he expected the government to take a more aggressive approach in regulating PFAS in the future. *Id.* He also opined that based on pending litigation, Chemours was facing $4-6 billion in PFAS liability, and advised investors that they should view any suit against DuPont as a suit against Chemours given the spin-off agreement's purported indemnification obligations. The presentation relied on publicly available information. *Id.*

Chemours's share price had already fallen more than 8% in the days preceding the presentation, following a disappointing earnings announcement at

the close of trading on May 2, 2019. *See* Current Report (Form 8-K) (May 2, 2019) at Ex. 99.1 p. 1 (announcing an 18% drop in net sales for the quarter). It fell a further 4.2% on the day of the presentation, and another 8% the next day. Ex. 4.[4] Consistent with these market movements, Plaintiff sold more than 826,000 shares of Chemours stock shortly after the presentation, almost 90% of its stake. D.I. 15-1, Ex. D p. 3.

E. Chemours files suit in Delaware's Court of Chancery to force DuPont to abide by the maximums.

One week after the hedge fund presentation, on May 13, 2019, Chemours sued DuPont in Delaware's Court of Chancery seeking declarations that DuPont is not in fact entitled to indemnification for historical liabilities that exceed the DuPont-certified "maximums" and likewise may not preclude Chemours from seeking contribution. Del. Compl. ¶¶ 100-01 (cited at ¶¶ 140-47). The Delaware complaint stated that if DuPont's "maximums" did not cap Chemours's obligations, then Chemours would have been insolvent at the time of the spin-off, such that both the spin-off and a dividend paid to DuPont would have violated Delaware law. Del. Compl. ¶¶ 10, 101. Chemours did not allege that it is presently insolvent.

Chemours sought judicial relief to protect its stockholders. The public had long known that Chemours believed its indemnification obligations were capped; that had been the basis for the February 2017 PFOA resolution. ¶ 76. As

[4] A chart showing Chemours's stock price during the period covered by the claimed "stock drops" is set out at Exhibit 4.

Chemours explained in the Delaware filing, it was compelled to take action by DuPont's continued repudiation of the DuPont-certified "maximums" and developments since the spin that demonstrated the maximums had not been reasonable. Del. Compl. ¶¶ 9-10.

At DuPont's insistence, the Delaware complaint was filed under seal, accompanied by a public version that was completely redacted. Ex. 5A (Tr. of May 23, 2019 Telephonic Conference) at 7:14-23. The Court of Chancery rejected DuPont's redactions as inconsistent with its rules, *id.* at 19:5-12, and so the complaint was unsealed after the close of trading on Friday, June 28, 2019. Ex. 5B (June 28, 2019 Order) at 1.[5] While the market had already been informed about the growth in PFAS litigation and seen the hedge fund's assessment that Chemours faced up to $6 billion of PFAS liability, ¶ 137, the unsealing disclosed the extent of Chemours's dispute with DuPont, an important counterparty with which it still worked closely. One of Plaintiff's confidential witnesses described that lawsuit as the "nuclear option" in the parties' relationship. ¶ 135. When the markets reopened on Monday, July 1, 2019, Chemours's share price declined 6%. Ex. 4.

F. Chemours's business suffers, prompting shares to decline further.

After market close on August 1, 2019, Chemours issued a press release reporting its results for the prior quarter. Chemours reported a 22% decline in sales and reduced its earnings guidance for fiscal year 2019 by several hundred

[5] The Complaint inaccurately implies that the Delaware complaint was unsealed before market close on June 28, 2019. ¶ 288.

million dollars. Current Report (Form 8-K) (Aug. 1, 2019) at Ex. 99.1 p. 1. The press release also reported a drop in accrued liabilities and a reduction in costs "associated with certain legacy environmental matters." *Id.* at pp. 2, 6. Chemours's share price fell 19% on August 2, 2019. ¶ 13. After market close that day, Chemours filed its quarterly report on Form 10-Q, which disclosed a small increase in environmental remediation liability and a small decrease in its litigation accruals. Quarterly Report (Form 10-Q) (Aug. 2, 2019) at 20-21.[6]

G. Plaintiff files suit.

In October 2019, two individual Chemours stockholders filed complaints naming Chemours, Vergnano, and Newman as defendants. Both suits relied extensively on the allegations in the Delaware complaint. On April 3, 2020, after the consolidation of the litigation, Plaintiff filed the 163-page, 320-paragraph Complaint alleging that between February 15, 2017 and August 1, 2019, Defendants had knowingly understated Chemours's environmental liability, among other related misrepresentations. The Complaint asserts claims for violation of Sections 10(b) and 20(a) of the Securities Exchange Act, as well as Rule 10b-5.

The Complaint again relies almost exclusively on the filings in the Delaware litigation. In particular, Plaintiff repeatedly contends that in the Delaware

[6] Plaintiff alleges that the Form 10-Q was filed on August 1, 2019. ¶ 148. The document itself shows that it was signed and filed on August 2, 2019, *see* Quarterly Report (Form 10-Q) (Aug. 2, 2019), and public SEC records confirm that it was filed at 4:25:56 p.m. on that date. *See* SEC, Filing Detail, available at https://www.sec.gov/Archives/edgar/data/1627223/000156459019028394/0001564590-19-028394-index.htm.

complaint, Chemours admitted it had understated its accruals for environmental liabilities by $2.46 billion and thus has been insolvent since the spin-off. ¶ 1. The Complaint also adds allegations by three purported confidential witnesses, one of whom (CW 1) left Chemours before the Class Period, ¶ 116, another (CW 2) who confirms that Chemours followed the applicable accounting rules, ¶¶ 124-26, and a third (CW 3) who describes his role in preparing a $2 billion estimate of long-term environmental investments that Chemours may undertake as part of its publicly announced Corporate Responsibility Commitment, distinct from any environmental remediation liability. ¶¶ 127-133.[7]

While Plaintiff asserts that the Delaware complaint establishes Chemours's understatement of its liabilities and its insolvency, Plaintiff's own market activity negates that inference. Two weeks after the Delaware complaint was unsealed, Plaintiff purchased $75,000 in Chemours bonds at an above-par price, endorsing the market's belief in Chemours's creditworthiness. D.I. 15-1, Ex. D p. 4.

[7] The Complaint suggests that this $2 billion estimate related to Chemours's GAAP accruals for environmental remediation. ¶ 127. That suggestion is unsupported by the actual statements attributed to CW 3, as confirmed by Chemours's public filings and a declaration from CW 3 himself. *See* Point II.B; Ex. 7 (Decl. of Paul Kirsch).

ARGUMENT

To state a claim for securities fraud under Section 10(b) and Rule 10b-5, a plaintiff must plead facts sufficient to show: "(1) a material misrepresentation or omission, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation or omission, (5) economic loss, and (6) loss causation." *City of Edinburgh Council* v. *Pfizer, Inc.*, 754 F.3d 159, 167 (3d Cir. 2014).

Ordinary notice-pleading standards do not apply. Under Fed. R. Civ. P. 9(b), a complaint must plead fraud "with particularity." And under the PSLRA, it must "specify each statement alleged to have been misleading [and] the reason or reasons why the statement is misleading . . . ." 15 U.S.C. § 78u–4(b)(1) (emphasis added). The PSLRA further requires a plaintiff to plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u–4(b)(2).

The Complaint falls well short of these standards, on three independent grounds. Plaintiff does not adequately allege that Defendants made any material misrepresentations actionable under the securities laws, does not allege particularized facts giving rise to a strong inference of scienter, and does not allege that Defendants' purported misrepresentations caused any loss. For those reasons, Plaintiff's claims should be dismissed.[8]

[8] In addition, a number of the challenged statements were made before October 8, 2017, which is two years before this litigation commenced. D.I. 1. Any claim based on disclosures prior to that date must be dismissed pursuant to the two-year statute of limitations for securities fraud cases. 28 U.S.C § 1658(b)(1). Plaintiff

I. Plaintiff fails to plead any actionably false or misleading statements.

The Complaint attacks scores of supposedly false statements over 58 pages of repetitious pleading, ¶¶ 164-253, 269-84. To facilitate the Court's review, Defendants have collected these statements in a table at Appendix A that sets out the challenged disclosures and the reasons they are not actionable.

Almost all of Plaintiff's allegations reduce to the same theory of misrepresentation: Chemours "admitted" in its Delaware complaint that it should have accrued far greater amounts for environmental remediation and toxic tort litigation. That theory fails because Plaintiff mischaracterizes the Delaware complaint—and so Plaintiff has not pleaded that any of those disclosures were false. *See* Point I.A. The challenged accounting and related disclosures are also non-actionable as protected statements of opinion and forward-looking statements. What remains is non-actionable puffery and an improper attempt to plead alleged corporate mismanagement as securities fraud. *See* Point I.B.[9]

A. Plaintiff's allegations cannot be credited because they are based on a mischaracterization of the Delaware complaint.

Most of the Complaint follows a simple formula. Plaintiff presents a public statement made by Chemours, such as an environmental remediation accrual or

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does not adequately allege that the time period should be tolled. To the contrary, Plaintiff alleges that this period began with Chemours's accrual of $335 million for a PFOA settlement for which there had previously been no accrual. ¶ 79.

[9] Plaintiff also challenges the Individual Defendants' Sarbanes-Oxley Act certifications, which confirmed the accuracy of certain Chemours filings. These statements do not support an independent cause of action; Plaintiff pleads only that they were false due to other allegedly false statements. ¶¶ 252-53. *See Zhengyu He* v. *China Zenix Auto Int'l Ltd.,* 2020 WL 3169506, at *7 (D.N.J. June 12, 2020).

another statement regarding the risk posed by its environmental exposures. Plaintiff then claims that this statement is belied by an "admission" that Chemours made in the Delaware complaint. And the supposed admission Plaintiff points to is Chemours's allegation that one of DuPont's "maximums" for a particular environmental exposure was unreasonable, and that in fact the "maximum" is much higher. *See, e.g.*, ¶¶ 169-70.

This formulaic pleading fails because Plaintiff fundamentally mischaracterizes the Delaware complaint and its discussion of DuPont's "maximums." Contrary to Plaintiff's repeated assertion, the "maximums" were not GAAP equivalents and Chemours's criticisms of them was not an admission that its GAAP-based accruals are wrong. This is fatal to Plaintiff's claims because when "documents referenced in the Complaint . . . . contradict the Complaint's factual allegations, the documents will control." *Goldenberg* v. *Indel, Inc.*, 741 F. Supp. 2d 618, 624 (D.N.J. 2010).

Chemours sued DuPont for misstating figures that were supposed to reflect not Chemours's "probable" exposure to environmental liability (as required for GAAP accrual), nor its "reasonably possible" exposure (as required for GAAP disclosure), nor even its "remote" exposure (also defined under GAAP, and meaning "slight likelihood"), but rather its maximum possible exposure. Del. Compl. ¶¶ 2, 52. Maximum exposure is not an accounting concept. To the contrary, the entity responsible for defining GAAP specifically considered and rejected an amendment to the relevant GAAP codification that would have required companies to disclose their "best estimate of the maximum exposure to

loss." *See* Ex. 6 (FASB Proposed Accounting Standards Update (July 20, 2010)) at 40. GAAP instead imposes higher probability thresholds "to prevent accrual . . . of amounts so uncertain as to impair the integrity of" issuer's financial statements, ASC 450-20-25-4, recognizing that even under the stricter GAAP standards "uncertainties . . . are pervasive, and they often result in wide ranges of reasonably possible losses." ASC 410-30-50-9.

The Delaware complaint is not subtle on this distinction between "maximum" exposure and GAAP. Indeed, Chemours's central criticism of the "maximums" is that DuPont improperly derived them from GAAP environmental remediation accruals. Del. Compl. ¶ 53. Chemours alleged that this approach obviously and necessarily "understated the real maximum liabilities . . . because accounting reserves include only liabilities that are both probable and estimable." *Id.* (emphasis added). As Chemours correctly explained, the GAAP approach excluded liabilities that were merely "possible," no matter how small that possibility, and liabilities that DuPont concluded were not "estimable" because the range of possible outcomes was ill-defined. *Id.*

The "maximum exposure" concept was relevant to the Chemours spin-off only because the courts have made clear that solvency analyses should not be cabined by accounting requirements. *See In re Tronox Inc.*, 503 B.R. 239, 302 (Bankr. S.D.N.Y. 2013) ("[F]inancial statement reserves for environmental liabilities are of no probative value in a solvency analysis because GAAP itself only requires reporting a limited subclass of environmental and tort liabilities"). To address that precedent, DuPont assumed the burden of assessing Chemours's

"maximum" possible exposure—including for claims or regulatory directives not yet asserted, and which might never be successful or come to fruition. The Delaware complaint points to developments since the spin-off that demonstrate DuPont's assessment was unreasonably low. However, that criticism has zero bearing on the adequacy of Chemours's disclosures under GAAP. Rather, Chemours's criticism of the maximums is that they failed to accomplish a goal that is necessary for a solvency opinion but goes beyond what GAAP contemplates.

Plaintiff's mischaracterization of the Delaware complaint is demonstrated most starkly by its claim that Chemours should have accrued at least $2.46 billion in additional environmental-related liabilities. ¶ 111. That allegation is the bedrock of the Complaint; Plaintiff proffers it no less than 90 times as the reason "why" Chemours's various challenged disclosures, GAAP accruals, and other statements regarding its environmental disclosures were misleading. *See, e.g.*, ¶¶ 8, 111, 158. It is baseless for that purpose. The number relies on amounts that are plainly not a basis for accrual or disclosure—such as litigation demands—or that only crystallized later in the Class Period and were then promptly disclosed.

Plaintiff constructed its "$2.46 billion" claim largely by plucking from the Delaware complaint several very large damages claims and judgments that Chemours has faced since the spin, each of which Chemours presented as evidence that DuPont's corresponding "maximum" did not actually reflect Chemours's maximum possible disclosure. ¶ 111. Most of the figure is attributed to a lawsuit against DuPont and Chemours brought by the municipality of Carneys Point, New Jersey. *Id.* Plaintiff claims that Chemours "effectively admitted in the [Delaware

complaint] that the Carneys Point lawsuit was so meritorious that the company was highly likely to actually incur the $1.1 billion cost." ¶ 86. Here's what Chemours actually alleged: "[A] New Jersey municipality has brought suit against DuPont seeking over $1 billion to address alleged clean-up costs." Del. Compl. ¶ 92. Nowhere does Chemours even suggest that New Jersey's claim, which was public, is "so meritorious" that it is "highly likely to actually" pay $1.1 billion in damages. Of course, GAAP does not mandate that companies mechanically accrue or disclose a complaint's prayer for damages. Instead, ASC 450 provides for an analysis of the likelihood and magnitude of any adverse judgment, guided by advice of counsel, among other factors. *See* ASC 450-20-55-12.

The other components of Plaintiff's $2.46 billion accrual are likewise unfounded:

New Jersey remediation. The figure includes DuPont's $620 million "maximum" for Chemours's New Jersey remediation liability, which Plaintiff says Chemours called "implausib[ly] low" and "staggeringly expensive." *See, e.g.*, ¶ 81. But those quotes are from a public suit filed by New Jersey—Chemours specifically noted that it was defending against the claims and that the matter was in its early stages. Del. Compl. ¶ 88.

PFOA litigation. The figure also includes $335 million that Chemours paid for its portion of the settlement that resolved the Ohio PFOA litigation. But even

Plaintiff concedes that this settlement cost was promptly accrued following its announcement "three days prior to the Class Period." ¶¶ 76, 79.[10]

Fayetteville Works remediation. The figure includes $200 million for the "remediation of Fayetteville Works." ¶ 111. As the Complaint itself makes clear, much of that expense actually arose from plant upgrades designed to prevent future pollution—a capital investment that is not subject to accrual or disclosure. ASC 410-30-15-3. And Chemours fully accrued the relevant portion of the remediation liability once it had completed its evaluation of the remediation costs. Annual Report (Form 10-K) (Feb. 14, 2020) at F-51-52.

Benzene litigation. Plaintiff's figure also includes $111 million related to Chemours's inherited benzene liability, based on a "comprehensive study" prepared by a DuPont consultant and given to Chemours in late 2018. ¶ 106. Nothing in the Delaware complaint suggests that this estimate was prepared in compliance with GAAP, or that Chemours actually credited it as anything but evidence that DuPont had understated the "maximum" benzene liability at the time of the spin.

[10] Contrary to Plaintiff's suggestion that Defendants said this ended the company's PFOA risk (¶ 174), Chemours explained to its stockholders at the time of the settlement that it was reasonably possible to incur further "losses related to other PFOA matters" in connection with lawsuits by plaintiffs outside the scope of the settlement. Quarterly Report (Form 10-Q) (May 3, 2017) at 17; *see also* Current Report (Form 8-K) (Feb. 13, 2017) at 2 (announcing the PFOA settlement, but cautioning against risk associated with "the outcome of any pending or future litigation related to PFOA").

PFAS litigation and remediation. The final component of Plaintiff's alleged "$2.46 billion" is a $194 million catchall that DuPont certified as Chemours's "maximum" possible exposure for general litigation. Plaintiff says Chemours should have accrued at least that much to cover "PFAS liability," but instead that Chemours "apparently did not" evaluate its PFAS liability and so accrued "nothing." ¶ 110. Not only does this allegation again conflate DuPont's "maximum" with a GAAP accrual, it has no basis on its face; Chemours did not allege that this $194 million figure was intended to estimate its PFAS liability. And Plaintiff offers no basis for the Court to infer that Chemours failed to undertake a GAAP analysis of unasserted PFAS claims.

Once Plaintiff's mischaracterizations of the Delaware complaint are discarded, its alleged misrepresentations also fall away.[11] The following examples, together with indistinguishable variants, capture nearly every statement challenged in the Complaint:

- Plaintiff claims Chemours's 2016 annual report falsely reported an environmental remediation accrual of $278 million and management's belief that "under adverse changes in circumstances," which it "deemed remote," this liability could "range up to approximately $535 million" more than the accrual. ¶ 169. Why? Because Chemours had "admitted" that its environmental liabilities were "over $2.46 billion, such that they rendered the company insolvent . . . throughout the Class Period." ¶ 170.

[11] Plaintiff's confidential witness allegations cannot and do not compensate for the mischaracterization of the Delaware complaint. *See infra* Point II.B.

See ¶¶ 179-80, 189-90, 195-96, 206-07, 212-13, 219-20, 224-25, 235-36, 243-44, 270-72 (indistinguishably flawed allegations).[12]

- Plaintiff claims that in that filing and eight others, Chemours falsely reported management's belief that "any loss, in excess of the amounts accrued, related to remediation activities at any individual site [would not] have a material impact on the Company's financial position, results of operations or cash flows at any given year, as such obligation can be satisfied or settled over many years." ¶ 169. Why? Because Chemours "admitted" that remediation at New Jersey sites would cost at least $337 million and remediation at the Chambers Works facility would cost $1.1 billion. ¶ 171. *See* ¶¶ 179-81, 189-91, 195-97, 206-08, 219-21, 224-26, 235-37, 243-45 (indistinguishably flawed allegations).[13]
- Plaintiff claims that in all those same filings Chemours falsely reported that while it "believe[d] that a loss [wa]s reasonably possible related to" a number of pending cases alleging benzene-related illnesses, because "evaluation of each benzene matter is highly fact-driven and impacted by disease, exposure, and other factors, a range of such losses [could not] be

[12] Plaintiff occasionally describes these "deemed remote" disclosures using the word "maximum," in an apparent attempt to blur the distinction. *See, e.g.*, ¶ 4. Plaintiff cannot plead securities fraud by blue-penciling Chemours's disclosures: Liability that may arise in circumstances "deemed remote" (*i.e.*, with slight likelihood) is not the same as maximum liability.

[13] Chemours's large remediation accruals have historically translated into much lower annual costs. *See* Annual Report (Form 10-K) (Feb. 14, 2020) at 51. Plaintiff nowhere explains why its imagined accrual would have had an immediate, material impact on Chemours's financial position.

reasonably estimated at th[e] time." ¶ 172. Why? Because Chemours "admitted" that it "knew" that DuPont's $17 million "maximum" for benzene liability was understated. ¶ 173. *See* ¶¶ 182, 192, 209, 215, 222, 229 (indistinguishably flawed allegations).

- Plaintiff claims that on a May 2, 2017 investor conference call, Newman falsely reported that Chemours had achieved "balance sheet flexibility" because it had reduced its ratio of debt-to-earnings. ¶ 178. Why? Because Chemours "admitted" that its environmental liabilities "were so massive, amounting to over $2.46 billion, that they . . . rendered it insolvent," meaning that its "net leverage ratio only increased during the Class Period." ¶ 180. *See* ¶¶ 166-8, 188-90, 194-6, 201-2, 204-07, 211-13, 218-20, 223-25, 231-32, 234-36, 242-44 (indistinguishably flawed allegations).

To be sure, as the Delaware complaint alleges, Chemours had liability risk above and beyond its accruals. But contrary to Plaintiff's telling, Chemours was transparent with its stockholders about that risk. Chemours detailed its significant litigation. It comprehensively described the status of remediation at major sites. Indeed, it disclosed more than it had to by providing, starting in February 2017, higher clean-up costs that might result "under adverse changes in circumstances, although deemed remote." ¶ 169. The disclosure went on for pages and pages, as the attached excerpt from Chemours's 2018 Annual Report demonstrates, all accompanied by extensive warnings that Chemours's environmental exposures could be worse than anticipated. Ex. 2. Stripped of its mischaracterization of the

Delaware complaint and the DuPont "maximums," the Complaint identifies nothing false in any of those statements.

B. All of the alleged misstatements are otherwise inactionable.

1. Chemours's environmental liability disclosures were accurate statements of opinion.

Even if Plaintiff had identified any error in Chemours's environmental liability disclosures, they would nevertheless be inactionable because they were accurate statements of opinion.

GAAP "are far from being a canonical set of rules that will ensure identical accounting treatment of identical transactions. [GAAP], rather, tolerate a range of 'reasonable' treatments, leaving the choice among alternatives to management." *Thor Power Tool Co.* v. *C.I.R.*, 439 U.S. 522, 544 (1979). Because the accounting guidelines thus require "inherently subjective" judgments, courts routinely hold that accrual and disclosure of contingent liabilities are protected statements of opinion. *See In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at *11 (D.N.J. Apr. 27, 2017), *aff'd*, 905 F.3d 106 (3d Cir. 2018) (ASC 450 judgments about the probability and estimation of contingent losses "are not the kind of fixed rules that would qualify as objective standards"); *Hall* v. *Johnson & Johnson*, 2019 WL 7207491, at *19 (D.N.J. Dec. 27, 2019) (statements regarding the likelihood of success in litigation or the viability of defenses "clearly constitute opinions"); *see also In re AmTrust Fin. Servs., Inc. Sec. Litig.*, 2019 WL 4257110, at *14, 18 (S.D.N.Y. Sept. 9, 2019); *Chapman* v. *Mueller Water Prods., Inc.*, 2020 WL 3100243, at *10 (S.D.N.Y. June 11, 2020).

Equivalent logic shields the views of Chemours's management about the risks posed by the company's environmental exposures. Those challenged statements all turn on statements about what Individual Defendants or other management "believe[d]" or "thought" about Chemours's evolving liability profile, *see, e.g.*, ¶¶ 174, 238—statements that plainly reflect individuals' opinions. *See also AmTrust*, 2019 WL 4257110, at *24 (SOX certifications are protected statements of opinion).

As the Supreme Court has observed, a "statement of opinion is not misleading just because external facts show the opinion to be incorrect." *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indust. Pension Fund*, 575 U.S. 175, 188, 194 (2015). Instead, such statements are actionable only if "they are not honestly believed and lack a reasonable basis." *City of Edinburgh Council* v. *Pfizer, Inc.*, 754 F.3d 159, 170 (3d Cir. 2014).[14]

Plaintiff cannot satisfy that standard. Plaintiff points to the "maximums," and Chemours's criticisms of them in the Delaware complaint, and contends the accruals should have been higher. That assessment is wrong, *see supra* Point I.A.

[14] The Third Circuit has declined to decide whether the Supreme Court's decision in *Omnicare* is applicable to Section 10(b) claims, while reaffirming the applicability of *City of Edinburgh*. *In re Amarin Corp. PLC Sec. Litig.*, 689 F. App'x 124, 129, 132 n.12 (3d Cir. 2017). In any event, the challenged statements would nevertheless be protected statements of opinion under *Omnicare*, which permits a claim only where an opinion is (1) both incorrect (*i.e.*, objectively false) and not genuinely believed (*i.e.*, subjectively false) or (2) "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion" and "those facts conflict with what a reasonable investor would take from the statement itself." *Omnicare*, 575 U.S. at 189.

Regardless, Plaintiff nowhere explains how this is anything but a difference of opinion over the result of a complex GAAP analysis of uncertain liabilities. The fact that DuPont's "maximums" may be reached in the future does not mean that the Individual Defendants lacked an "honest" (and reasonable) belief in their opinions as to Chemours's environmental risk profile, let alone that their accounting judgments, as informed by the advice and judgments of the company's accounting experts, fell outside the "range of 'reasonable' treatments" tolerated by GAAP. *Thor Power Tool*, 439 U.S. at 544; *see also infra* Point II.A (explaining that the Complaint does not support any inference that the Individual Defendants disbelieved Chemours's disclosures).

2. The Complaint challenges forward-looking statements that are protected by the statutory safe harbor.

The PSLRA renders inactionable any forward-looking statement that is either identified as such and accompanied by "meaningful cautionary statements identifying important factors that could cause actual results to differ materially" or for which the Plaintiff has failed to show that the statement was made with "actual knowledge" of its falsehood. 15 U.S.C. § 78u–5(c)(1)(A)(i); *see Institutional Invs. Grp.* v. *Avaya, Inc.*, 564 F.3d 242, 254 (3d Cir. 2009) (discussing and interpreting statutory standard). The statute defines "forward-looking statement" broadly to include, among other things, statements "containing . . . financial items," 15 U.S.C. § 78u–5(i)(1)(A), together with "any statement of the assumptions underlying or relating to any [such] statement." 15 U.S.C. § 78u–5(i)(1)(D). This is yet another independent basis to dismiss virtually all of the challenged disclosures.

Chemours's environmental and litigation accruals and related disclosures fall within this safe harbor because they were "financial items" that reflected management's assessment of the probability and likely magnitude of future liability. Courts within and outside this Circuit have held similar reserves against future contingencies to be forward-looking statements entitled to protection under the statutory safe harbor. *See GSC Partners CDO Fund* v. *Washington*, 368 F.3d 228, 242 (3d Cir. 2004) (endorsing the proposition that the amount an issuer "keeps in reserves to cover liability claims is necessarily a prediction about its future claims experience" to which it is "rather beyond argument" that the statutory safe harbor applies); *Se. Pa. Transp. Auth.* v. *Orrstown Fin. Servs., Inc.*, 2015 WL 3833849, at *23 (M.D. Pa. June 22, 2015); *In re Am. Serv. Grp., Inc.*, 2009 WL 1348163, at *37 (M.D. Tenn. Mar. 31, 2009).

Chemours also properly identified such disclosures as forward-looking statements. Specifically, each of the SEC filings referenced by Plaintiff included a section noting the inclusion of "[f]orward-looking statements provid[ing] current expectations of future events based on certain assumptions," which were generally identified by the use of words like "believe" and "estimate." Quarterly Report (Form 10-Q) (May 3, 2017) at 29. This specification extends to nearly all of the disclosures attacked in the Complaint—including Chemours's regular disclosure that in the event of future "adverse changes in circumstances, although deemed remote, [its] potential [environmental remediation] liability may range up to" a higher number than what it had accrued. *Id.* at 18.

Finally, Chemours also included copious cautionary statements warning its stockholders of the risk that actual liability would exceed the amounts accrued or disclosed, rendering the challenged forward-looking statements inactionable under the PSLRA. Among the "risks, uncertainties and other factors that could cause actual results to differ materially from those set forth in the forward-looking statements," Chemours specifically flagged the uncertainty associated with "significant litigation and environmental matters" and "litigation or legal settlement expenses." Annual Report (Form 10-K) (Feb. 15, 2019) at 2. This warning was supplemented by extensive cautionary statements that appeared within the disclosures themselves and that were incorporated by reference into Chemours's earnings releases and investor presentations. *See, e.g.*, Ex. 2.[15]

As the challenged disclosures meet the test for forward-looking statements under the PSLRA, they are not actionable. Moreover, under the plain language of the PSLRA, Chemours's forward-looking statements are also not actionable unless Plaintiff pleads that Defendants made them with "actual knowledge" of their falsity. Again, Plaintiff has not and cannot show that here, because its allegations all rely on a mischaracterization of the DuPont "maximums." *See infra* Point II.A.

Chemours's regular updates to its stockholders about its environmental exposures are precisely the kind of forward-looking information that Congress sought to encourage and immunize through the PSLRA's safe harbor. 15 U.S.C.

[15] Given this extensive cautionary language, Chemours's forward-looking disclosures are also protected under the "bespeaks caution" doctrine. *See EP Medsystems, Inc.* v. *EchoCath, Inc.*, 235 F.3d 865, 873 (3d Cir. 2000).

§ 77z–2(i)(1). Plaintiff's attempt to transform these disclosures into a securities fraud claim cannot be sustained.

3. The remaining challenged statements are non-actionable as veiled attacks on corporate management and puffery.

The arguments above dispatch nearly all of the statements challenged as fraudulent in Plaintiff's rambling complaint. The remaining challenged disclosures should be dismissed because they are criticisms of Chemours's management of its liabilities or non-actionable puffery.

Plaintiff takes issue with several public statements that Chemours made in June 2017 concerning the environmental impact of GenX and the company's overall environmental compliance record. ¶¶ 183-85, 199. Plaintiff claims that these public statements were securities fraud because Chemours "was in possession of numerous studies showing that GenX was 'toxic' and presented serious danger to human health." ¶ 186. Putting aside that these statements, too, are expressions of protected opinion, the Complaint itself makes clear that the "studies" cited by Plaintiff were no secret—they were submitted by DuPont to the EPA in the early 2000s. The EPA concluded GenX "could be 'toxic,'" and then announced that concern in a public order. ¶ 91. At bottom, this is nothing more than a criticism of how Chemours, and presumably DuPont before it, managed its potential exposure from GenX. That is not actionable under the securities laws. *See Santa Fe Indus., Inc.* v. *Green*, 430 U.S. 462, 479 (1977) (allegations of "corporate mismanagement" insufficient to state a claim under Section 10(b)). Moreover, "[t]he federal securities laws do not require a company to accuse itself

of wrongdoing." *In re Galena Biopharma, Inc. Sec. Litig.*, 2019 WL 5957859, at *10 (D.N.J. Nov. 12, 2019). "To hold otherwise would be to eviscerate the obvious purpose of the *Santa Fe* decision, and to permit evasion of that decision by artful legal draftsmanship." *Weill* v. *Dominion Res., Inc.*, 875 F. Supp. 331, 337 (E.D. Va. 1994).

The remaining statements in the Complaint are the type of "general, non-specific statements of optimism or hope that has been found to be inactionable puffery." *Takata* v. *Riot Blockchain, Inc.*, 2020 WL 2079375, at *12 (D.N.J. Apr. 30, 2020). For example, Plaintiff claims that on a February 16, 2017 earnings call, Vergnano falsely attributed Chemours's earnings performance to 2016 being "truly a year of transformation" and falsely observed that "Chemours exited 2016 in a very strong position." ¶ 165. Similarly, Plaintiff claims that in a January 7, 2019 presentation to the Delaware State Chamber of Commerce, Vergnano falsely denied that Chemours was "set up to fail" and falsely characterized Chemours's turnaround as "nothing short of remarkable." ¶¶ 230-31. Both statements offer the type of vague positive portrayal that is routinely dismissed as puffery. *See In re ForceField Energy Inc. Sec. Litig.*, 2017 WL 1319802, at *16 (S.D.N.Y. Mar. 29, 2017) (statement about defendant's "transformation" was inactionable puffery); *Cambridge Ret. Sys.* v. *MEDNAX, Inc.*, 2019 WL 4893029, at *17 (S.D. Fla. Oct. 3, 2019) (statement about defendants' "strong position" was inactionable puffery). Regardless, since the "why" offered up as the reason these statements are false is the supposed need to accrue billions more for environmental exposures, they are also not actionable for the reasons stated in Point I.A, *supra*.

II. Plaintiff has failed to plead scienter.

A plaintiff asserting securities fraud must present particularized facts giving rise to a strong inference of scienter for each defendant, meaning that the defendants acted with an "intent to deceive, manipulate, or defraud," either knowingly or recklessly. *Avaya, Inc.*, 564 F.3d at 252 (citation omitted). This standard is met "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007). Motive, even a desire to keep the stock price high, is not enough to establish scienter. *See Institutional Invs. Grp.* v. *Avaya, Inc.*, 564 F.3d 242, 276 (3d Cir. 2009); *Rahman* v. *Kid Brands, Inc.*, 736 F.3d 237, 245-46 (3d Cir. 2013).

Plaintiff's theory is that Defendants admitted to massive accounting fraud when filing the Delaware suit, prepared by the company's lawyers, seeking to enforce certified "maximum" liabilities as a cap on indemnification obligations with DuPont. However, even where a defendant has publicly admitted to an accounting misstatement, courts still require "more" to sustain a "strong inference of scienter"—meaning facts that "sufficiently indicate that defendants had clear reasons to doubt the validity of the issuer's financials but, nonetheless, kept turning a blind eye to all such factual 'red flags.'" *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 286-87 (D.N.J. 2007). GAAP violations thus merit "additional significance only where the provisions of GAAP so coincide with conclusions obvious to any business person and present recitals of knowledge so common to the business—rather than accounting—community, that a violation . . . equates to a

self-evident business nonsensicality which cannot be made by a defendant with a non-culpable state of mind." *Id.* at 352.

Plaintiff does not satisfy this standard. Here, there is not even a conceded accounting error or restatement. To the contrary, the far more cogent theory is that Chemours made good-faith disclosures concerning its environmental risks as those risks developed and undertook the "nuclear option" of suing DuPont only when mounting litigation threatened certain of the DuPont maximums. ¶¶ 86, 94, 98, 109, 135.[16]

A. The purported GAAP violations do not support an inference of scienter.

As explained above, Plaintiff has not pleaded that any of Defendants' disclosures violated GAAP. But even supposing that Plaintiff had pleaded accounting misstatements, the Complaint certainly does not allege with particularity facts giving rise to a strong inference that Chemours's assessment of its environmental liabilities was a "self-evident business nonsensicality." *Intelligroup*, 527 F. Supp. 2d at 352. As detailed in the Complaint itself, ¶¶ 255-67, GAAP accrual and disclosure requires a complex sequence of accounting judgments about the likelihood of liability and the estimability of contingent liability—judgments that are informed by the subsidiary advice of an army of subject-area experts, including legal counsel and remediation specialists. For

[16] Plaintiff does not attempt to plead that any Chemours employee other than the Individual Defendants acted with scienter. Accordingly, even if the Third Circuit accepted a theory of "corporate scienter"—which it has not—the Complaint likewise fails to plead scienter as to Chemours.

unasserted claims, this analysis is more complex still, requiring an assessment of both the likelihood of assertion and the likelihood of an unfavorable outcome. ASC 450-20-55-14. Environmental remediation presents yet more complexity, so arcane that the Financial Accounting Standards Board has nearly 150 pages of dense guidance on its disclosure and accrual. *See* Ex. 3B (ASC 410). The existence of maximums, or even potential exposures above the certified maximums, does not demonstrate that any of these judgments were plainly wrong.

In any event, any inference of scienter stemming from Chemours's purported violations of GAAP would be negated by the fact that Chemours's independent auditor, PricewaterhouseCoopers, has confirmed the disclosures complied with GAAP every quarter since the July 2015 spin-off, including following the filing of the Delaware complaint. *See, e.g.*, Annual Report (Form 10-K) (Feb. 14, 2020) at F-3; *see Podraza* v. *Whiting*, 790 F.3d 828, 838 (8th Cir. 2015) (holding that the inference of scienter from a GAAP violation was contradicted by an accountant's opinion). The PSLRA requires a GAAP violation so egregious that it "equates to a self-evident business nonsensicality which cannot be made by a defendant with a non-culpable state of mind." *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d at 352. Here, the supposed GAAP violations were apparently so obscure that they eluded the grasp of a Big Four accounting firm for a half-decade and counting.

Finally, even if incorrect "maximums" could have rendered the GAAP figures "nonsensical[]" to the Individual Defendants, Plaintiff nowhere adequately alleges when any Defendant knew that the maximums were inaccurate. That

omission is fatal, because scienter is evaluated at the time of the alleged misstatement. *Winer Family Tr.* v. *Queen*, 503 F.3d 319, 331 (3d Cir. 2007). Plaintiff alleges only that Chemours was "fully apprised and aware of DuPont's scheme" to understate its certified maximums and that "Chemours stated that [Defendant] Newman was so dubious" of the maximums that he refused to endorse them. ¶ 62. But the Delaware complaint upon which Plaintiff relies alleges that the inadequacy of DuPont's "maximums" became clear only after the spin-off, Del. Compl. ¶¶ 1-2, and makes clear that Newman refused to endorse the maximums because he did not understand how they had been derived. Del. Compl. ¶ 49.

B. Plaintiff's confidential witness allegations do not support an inference of scienter.

Plaintiff's purported "confidential witnesses" also provide no evidence of scienter. The PSLRA requires a court to scrutinize the "detail provided by the confidential sources, the sources' basis of knowledge, the reliability of the sources, the corroborative nature of other facts alleged, including from other sources, the coherence and plausibility of the allegations, and similar indicia." *Cal. Pub. Emps. Ret. Sys.* v. *Chubb*, 394 F.3d 126, 146 (3d Cir. 2004). "Where these requirements are not met, courts must ignore the insufficiently described witness' statements for purposes of evaluating the plaintiff's allegations." *In re Synchronoss Techs., Inc. Sec. Litig.*, 2019 WL 2849933, at *9 (D.N.J. July 2, 2019). Further, where a plaintiff seeks to rely upon confidential witness testimony to establish scienter underlying a purported GAAP violation, the confidential witness testimony must demonstrate that the defendant knew of the alleged accounting impropriety or was

reckless in disregarding it. *Id.* Contrary to Plaintiff's suggestion, the allegations attributed to the "confidential witnesses" demonstrate only that Chemours adhered to GAAP in its liability accruals and disclosures:

Confidential Witness 1. Plaintiff represents that CW 1 left her job at Chemours in September 2016, six months before the start of the Class Period. ¶ 116. Her allegations should be heavily discounted for that reason alone. *See Chan* v. *New Oriental Educ. & Tech. Grp. Inc.*, 2019 WL 2865452, at *11 (D.N.J. July 3, 2019). Regardless, beyond the empty hyperbolism that "'there was no honest statement' regarding [Chemours's] environmental liabilities in its public filings" prior to September 2016, ¶ 122, no allegation attributed to CW 1 actually provides any evidence of any GAAP violation. Instead, CW 1 is simply alleged to have said that "Chemours leadership knew exactly the extent of the liabilities they were taking over," ¶¶ 117, 119, an irrelevant claim absent any allegation as to how this knowledge should have translated into different accrual and disclosure of any particular liability.

Moreover, while CW 1 describes Chemours's Disclosure Committee as analyzing whether potential remediation costs could be recorded as "additional investments to improve productivity at the plants" or as proactive steps to "reduc[e] potential risks for the future," ¶ 121, that is precisely the analysis that GAAP requires. ASC 410-30-25-18. While the Complaint certainly suggests that CW 1 disagreed with the GAAP judgments made by the Disclosure Committee, nothing in the allegations attributed to her identifies any actual violation of GAAP, let alone any knowing violation.

Confidential Witness 2. CW 2 actually confirms Chemours's compliance with GAAP. According to CW 2, Chemours had a practice of calculating remediation estimates using the "low end." ¶ 125. That is what GAAP mandates. ASC 450-20-30-1 (requiring "low end" reporting so long as a company does not believe that any other estimate in a range is most reliable). According to CW 2, Chemours excluded "[n]atural [r]esource [d]amages" from its environmental remediation calculations. ¶ 126. That is what GAAP mandates. ASC 410-30-15-3(e). According to CW 2, for a "long time" there was nothing in Chemours's "low end" estimates that "accounted for [PFAS] being spread far and wide" because "it was an unregulated compound whose damaging effects were purportedly unknown." ¶ 126. This is what GAAP mandates for unregulated compounds. ASC 410-30-15-3(c).

Confidential Witness 3. CW 3 is said to be "the former President of the Fluoroproducts business at Chemours from 2016 to October 2019." ¶ 127. Plaintiff asserts that CW 3 "gave an exhaustive presentation in the spring of 2018 . . . showing that remediation across all of Chemours' problematic sites would cost $2 billion." *Id.* According to the Complaint, CW 3 said that Chemours's remediation policy in general was to "observe mandatory limits set by state and federal governments" but "not voluntarily spend money on remediation." ¶ 128. That is what GAAP mandates. ASC 410-30-15-3(c). In early 2018, CW 3 "began an exercise of looking into how much it would cost to 'plug all the holes' at each Chemours worksite and remediate the damage already done to the environment." ¶ 130. CW 3 allegedly concluded that this would cost "approximately $2 billion."

Id. When that figure was presented to Vergnano, he "characterized th[o]se costs as coming from the 'capital budget,' and not environmental remediation accruals." ¶ 132. That is also what GAAP mandates for discretionary clean-up and prospective plant enhancements. ASC 410-30-25-18.

Both the timing of CW 3's "presentation" and its reported contents demonstrate that it was not—as the Complaint implies—an analysis of Chemours's environmental remediation costs in the GAAP sense, but instead a general evaluation of the scope and potential cost of Chemours's publicly announced "Corporate Responsibility Commitment." And this is confirmed by a declaration from CW 3 himself — Paul Kirsch, President of the Fluoroproducts business from 2016 to October 2019. *See* Ex. 7 (Decl. of Paul Kirsch). As part of that voluntary campaign, unveiled several months after CW 3's claimed presentation, Chemours announced its intent to achieve a range of goals that far exceed regulatory requirements, including "[r]educ[ing] greenhouse gas emission intensity by 60%" and "[r]educ[ing] air and water process emissions of fluorinated organic chemicals by 99% or greater." Ex. 8 (September 13, 2018 Press Release). This market-leading effort to "plug all the holes" may ultimately prove to be costly over many years—but because it is not directed to environmental remediation liability, Chemours had no duty to disclose that cost.

C. The Individual Defendants' sales of insider stock pursuant to 10b5-1 plans do not support an inference of scienter.

Plaintiff also relies on the fact that in May 2018, the Individual Defendants exercised stock options and sold shares of Chemours stock. ¶ 134. Plaintiff

suggests that these sales were "highly suspicious in both timing and magnitude" and thus support an inference of scienter. *Id.* Plaintiff is mistaken.

"Insider trading will strengthen an inference of scienter when the sales of company stock by insiders are unusual in scope or timing." *In re Hertz Glob. Holdings Inc.*, 905 F.3d 106, 119 (3d Cir. 2018). But "[c]ourts have regularly concluded that an inference of scienter from insider trading is lessened when . . . the class period is well over a year." *Id.* at 120. There is nothing suspicious about the Individual Defendants' sale of shares over a 30-month class period.

Moreover, as Plaintiff concedes, both sales were conducted pursuant to 10b5-1 plans. ¶ 217 n.7. Trading activity pursuant to 10b5-1 plans is "of minimal value in establishing an inference of scienter." *In re Synchronoss Techs., Inc. Sec. Litig.*, 2020 WL 2786936, at *17 (D.N.J. May 29, 2020). While Plaintiff asserts that the Individual Defendants "abandoned the[ir] trading plans" after the May 2018 sales, ¶ 217 n.7, in fact Vergnano exercised and sold the balance of his expiring options on January 23, 2020—pursuant to his 10b5-1 plan and after the share price decline recited in the Complaint. Statement of Changes in Beneficial Ownership (Form 4) (Jan. 27, 2020) at 1.

In any event, nothing about the transactions was otherwise "unusual." Vergnano and Newman's sales involved 11% and 9% of the shares that each could have sold, respectively. *See* Statement of Changes in Beneficial Ownership (Form 4) (May 10, 2018) at 1 (reporting Vergnano's sale of 200,151 shares); Statement of Changes in Beneficial Ownership (Form 4) (May 10, 2018) (reporting Newman's sale of 43,675 shares); Proxy Statement (Schedule 14A) (Mar. 16, 2018) at 16

(reporting that Vergnano and Newman respectively held or had a right to acquire 1,760,932 and 484,005 shares). This is well below the level that triggers any inference of scienter. *See Avaya*, 564 F.3d at 279 (not inferring scienter when defendants sold 17% or less of their shares).

III. Plaintiff has not pleaded that the alleged misrepresentations caused Chemours stockholders to suffer any loss.

To allege loss causation, a plaintiff must "establish that the alleged misrepresentations proximately caused the decline in the security's value." *Semerenko* v. *Cendant Corp.*, 223 F.3d 165, 185 (3d Cir. 2000); *McCabe* v. *Ernst & Young LLP*, 494 F.3d 418, 426 (3d Cir. 2007) ("[T]he plaintiff must show that the defendant misrepresented or omitted the very facts that were a substantial factor in causing the plaintiff's economic loss."); *see also Dura Pharms., Inc.* v. *Broudo*, 544 U.S. 336 (2005). Plaintiff relies on three "corrective disclosures" to show loss causation:

(1) a May 6, 2019 presentation in which a hedge fund CEO warned that Chemours faced significant future risk due to shifting regulatory enforcement and pending private lawsuits related to PFAS emissions, and concluded based on publicly available information that Chemours might have as much as $6 billion of litigation liability, ¶¶ 136-139;

(2) the June 28, 2019 unsealing of the Delaware Complaint, ¶¶ 140-47; and

(3) an August 1, 2019 Chemours press release that "suddenly lowered its full-year [earnings] guidance . . . from $550 million to only $100 million," ¶ 148.

None of these "disclosures" is probative of loss causation. To make that showing, a plaintiff must allege "specific disclosures of new information." *Hall* v. *Johnson & Johnson*, 2019 WL 7207491, at *28 (D.N.J. Dec. 27, 2019) (emphasis added); *see In re Navient Corp. Sec. Litig.*, 2019 WL 7288881, at *12 (D.N.J. Dec. 30, 2019) (same). Moreover, the disclosure cannot simply relate back to "some other negative information about the company," *Zhengyu He* v. *China Zenix Auto Int'l Ltd.*, 2020 WL 3169506, at *11 (D.N.J. June 12, 2020); it must "expos[e] the falsity of the fraudulent representation" and "reveal[] that the defendant company made false claims." *Hall*, 2019 WL 7207491, at *27.

Neither the hedge fund presentation nor the press release imparted any "new information" related to the alleged fraud. The hedge fund did not claim access to any confidential information about Chemours's exposure—instead, it drew upon public filings from public dockets to produce a pessimistic projection of Chemours's litigation liability. That projection thus revealed no "new information" at all; it simply repackaged public information about PFAS litigation risk into a CNBC segment. *See Nat'l Junior Baseball League* v. *Pharmanet Dev. Grp. Inc.*, 720 F. Supp. 2d 517, 562 n.34 (D.N.J. 2010) ("To the extent [analyst] reports merely provided more details about the public disclosures, they are insufficient to establish loss causation."). Moreover, the purported share price "reaction" to the presentation had started days earlier, after a disappointing earnings release. Ex. 4.

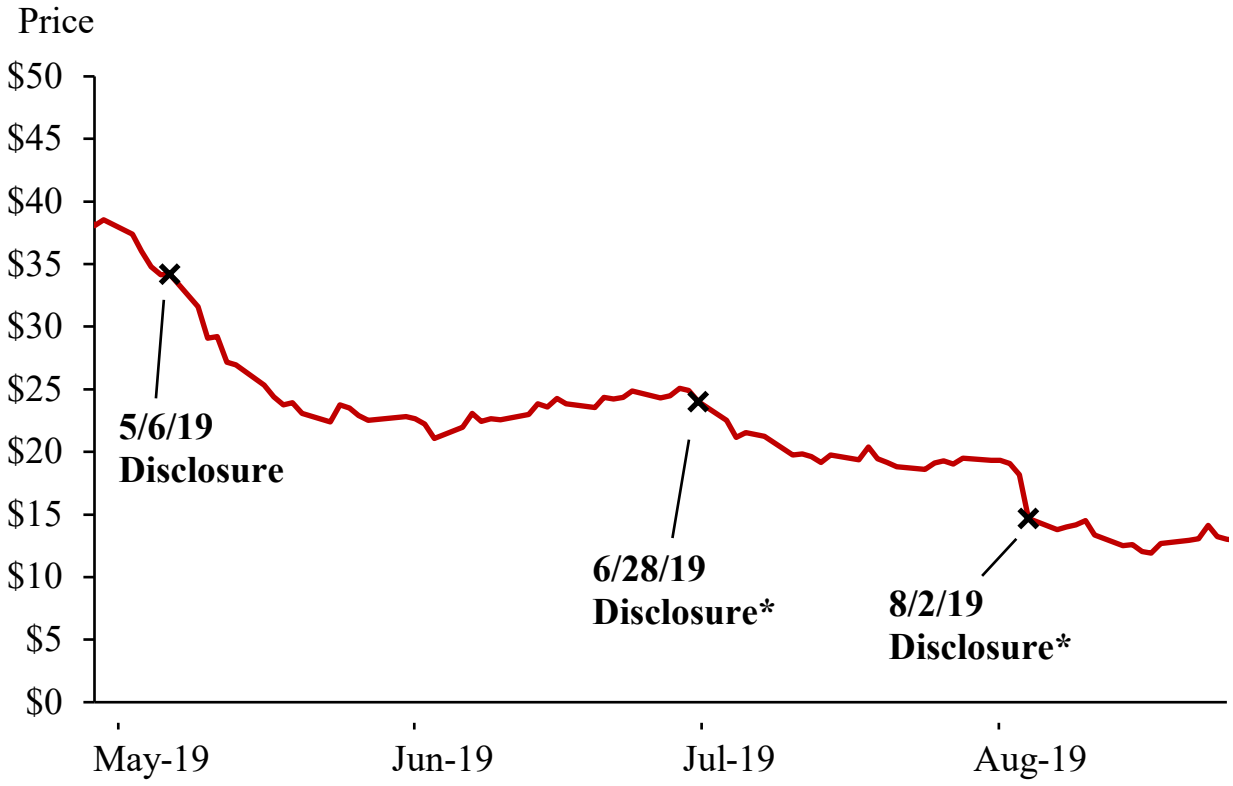
The August 1, 2019 press release, meanwhile, included nothing relevant to the supposed fraud—to the contrary, it reported a drop in accruals and

environmental costs. Current Report (Form 8-K) (Aug. 1, 2019) at Ex. 99.1 p. 1. The report's highlight is a large cut in earnings guidance and a second successive earnings miss. *Id.* As the analyst reports cited in the Complaint state, "[m]ost investors [would] likely focus on the guidance." Ex. 9 (Barclays Research Report (Aug. 1, 2019)) at 1 (cited at ¶ 150). Plaintiff seeks to avoid this fact by pointing to a Form 10-Q that it says was "filed the same day" and which it says "disclosed significant increases in [Chemours's] estimated environmental liabilities." ¶ 148. But (1) Plaintiff's claims are otherwise premised on the allegation that Chemours had fully confessed fraud in the Delaware complaint and (2) that report was not filed until close of market on August 2, 2019—after the 19% drop that Plaintiff cites. Quarterly Report (Form 10-Q) (Aug. 2, 2019).

Nor does the unsealing of the Delaware complaint demonstrate loss causation. As explained above, it did not uncover any misrepresentations by Defendants, *see supra* Point I.A. Rather, the complaint revealed only that the dispute between Chemours and DuPont over the allocation of historical liability had escalated to the point where Chemours had to exercise the "nuclear option" on an important business relationship. ¶ 183. Moreover, a July 8, 2019 analyst report cited in the Complaint indicates that the market did not perceive the Delaware complaint to have uncovered accounting fraud. Instead, the analysts simply explained that "[f]or conservatism and to reflect the market's high sensitivity to PFAS risks," they were updating their financial model to assume "the aggregate of maximum liabilities [Chemours] ha[d] quantified" in the Delaware complaint. Ex. 10 (SunTrust Robinson Humphrey Research Report (July 8, 2019)) at 1-2.

The chart below (also attached as Exhibit 4), shows Chemours's stock performance in the period around the alleged disclosures. It is plain that Chemours's share price declined after disappointing earnings reports on May 2 and August 1, 2019. But, of course, the securities laws exist "not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause." *Dura*, 544 U.S. 345.

The Chemours Company
Share Price during "Corrective Disclosure" Period
April 2019 – August 2019



* The alleged disclosure was made after market close on the indicated date.
Source: *CRSP*

IV. Plaintiff's claims under Section 20(a) should be dismissed for failure to plead any underlying securities fraud.

Plaintiff's Section 20(a) claim against the Individual Defendants also fails. "Section 20(a) of the Exchange Act creates a cause of action against individuals who exercise control over a 'controlled person,' including a corporation, who has committed a [S]ection 10(b) violation." *City of Edinburgh Council* v. *Pfizer, Inc.*, 754 F.3d 159, 177 (3d Cir. 2014). Because Plaintiff has failed to plead an underlying securities fraud claim, its Section 20(a) claim "must be dismissed." *Id.*

CONCLUSION

For the reasons stated above, the Court should dismiss the Complaint.

DATED: August 24, 2020

Respectfully submitted,

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