UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
(Alexandria Division)

IN RE K12 INC. SECURITIES LITIGATION	**No. 1:20-cv-01419-LO-TCB**
	CLASS ACTION
THIS DOCUMENT RELATES TO: ALL ACTIONS	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' CONSOLIDATED AMENDED COMPLAINT FOR VIOLATION OF FEDERAL SECURITIES LAWS**

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INTRODUCTION

This is a securities fraud case without a hint of securities fraud. As the COVID-19 pandemic forced brick-and-mortar schools to close their doors and shift to virtual learning, education-technology companies like K12 Inc. ("K12" or the "Company") faced an exploding need for their services. Despite the unprecedented obstacles that the public health crisis created, K12 rose to the challenge. At the start of the first new school year after the pandemic began, K12 enrolled 71,000 more students than it had the year before (a 57% increase). On top of that, K12 offered tens of thousands of people free access to its platform, trainings, and curriculum. And over 1,000 schools and districts nationwide are now educating their students with K12's help.

Ignoring that success, Plaintiffs claim the Company defrauded investors by touting the opportunities presented by—and its ability to serve—the rapidly evolving needs of schools struggling to operate against the pandemic's backdrop. Plaintiffs' primary support for that accusation is the decision by just two of K12's many partner school districts to discontinue their contracts for the 2020-21 school year. But even without those two engagements, K12 reported a ***45.2% revenue increase*** for the first half of its 2021 fiscal year—a figure that is not disputed. The claim that K12 and two of its executives committed securities fraud by generally predicting the Company could help schools during the pandemic is nonsense.

The Consolidated Amended Complaint ("AC") should be dismissed with prejudice for two independent reasons. *First*, Plaintiffs almost exclusively challenge statements that are inactionable as a matter of law. The vast majority are immaterial "puffery"—precisely the sort of "rosy affirmation[s] commonly heard from corporate managers" that "no reasonable investor could [consider] important" to an investment decision. *In re Cable & Wireless, PLC*, 321 F. Supp. 2d 749, 766 (E.D. Va. 2004). Others are subjective opinions, or forward-looking projections strictly insulated from liability under the safe harbor of the Private Securities Litigation Reform Act of

1995 ("PSLRA"). *See Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175, 186-87 (2015); 15 U.S.C. § 78u-5. And even for the few statements that arguably convey current or historical facts, the AC comes nowhere close to pleading specific, contemporaneous facts demonstrating that any such statement was false or misleading when made.

Second, the AC lacks particularized allegations "giving rise to a *strong inference*" that Defendants acted with scienter—that is, "a mental state embracing intent to deceive, manipulate, or defraud." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319, 321 (2007) (citation omitted); 15 U.S.C. § 78u-4(b)(2). For starters, neither Individual Defendant is alleged to have sold stock while K12's share price was purportedly inflated—or to have benefitted in any other way from their supposed scheme. This glaring absence of a cogent reason *why* Defendants would have committed fraud makes Plaintiffs' burden to establish "fraudulent intent" correspondingly greater. *In Re E. Spire Commc'ns, Inc. Sec. Litig.*, 127 F. Supp. 2d 734, 744 (D. Md. 2001). Yet without a theory of motive, Plaintiffs are left to surmise that Defendants *must* have misrepresented *something*—based on nothing more than uninformed, post-hoc criticisms, and an after-the-fact account of "what went wrong" in just two school districts out of K12's massive nationwide operation, during the once-in-a-lifetime experience of COVID-19. The Fourth Circuit has "categorically rejected" such attempts to allege "fraud by hindsight." *In re First Union Corp. Sec. Litig.*, 128 F. Supp. 2d 871, 888 (W.D.N.C. 2001). The AC should be dismissed with prejudice.

BACKGROUND

A. K12's Business

K12 is a technology-based education company headquartered in Herndon, Virginia. Ex. 7, K12 Inc., Annual Report (Form 10-K) (Apr. 27, 2020) at 4, 23. Established over twenty years ago, the Company offers curriculum, online learning systems, and educational services primarily for students in kindergarten through 12th grade. *Id.* at 4, 6. In the Company's most recent fiscal year,

ended June 2020 ("FY20"), K12 partner schools enrolled approximately 134,000 students across the country, and K12 generated just over $1 billion in revenues. *Id.* at 61-63.

Most of K12's FY20 revenues—almost 90%—came from its "Managed Public Schools" segment. *Id.* at 5. Under that business line, K12 contracts with the boards of virtual and blended public schools to provide a full suite of educational products and services—including administrative support, information technology services, academic curriculum, learning systems, instructional services, and academic support. *Id.* K12 also operated a smaller "Institutional" segment, supplying curriculum and other individual products and services on an *à la carte* basis, with customers retaining oversight for school administration. *Id.* at 6. Institutional programming contributed approximately $75 million—or about 7%—to K12's FY20 revenues. *Id.* at 62.

B. COVID-19 Disrupts Traditional Brick-And-Mortar Education

The rapid spread of the coronavirus in early 2020 dramatically changed the educational landscape in the United States. After the World Health Organization ("WHO") declared COVID-19 a worldwide "pandemic" on March 11, 2020, government institutions—including public schools—began implementing policies to address the "ever-changing circumstances and the anticipated increasing threat of community spread of COVID-19." General Order No. 2020-02 at 2, 5, No. 20-mc-007 (E.D. Va. Mar. 13, 2020). In what market analysts described as a "megatrend" of online learning, nearly all elementary and high schools nationwide shifted to virtual operation. AC ¶¶ 4, 38. Consequently, as the AC acknowledges, "[o]nline learning providers, like K12, saw a boom as parents and educators sought an alternative to the traditional classroom setting." *Id.* ¶ 38. Recognizing that virtual learning was new for many families and schools, K12 offered free trial access to its online curriculum, platforms, and training. By April 2020, over 70,000 students, teachers, and families had signed up for K12's complimentary programming. *Id.* ¶ 84.

As the AC observes, the pandemic "presented . . . a unique opportunity" for online

education providers like K12. *Id.* ¶ 38. In an April 2020 update for the third quarter of FY20, K12 cautioned that "[t]he impacts of the global emergence of COVID-19 on the Company's business [were] currently not estimable or determinable." Ex. 4, K12 Inc., Quarterly Report (Form 10-Q) (Apr. 28, 2020) at 29, 36. But K12's CEO, Nate Davis, believed there was reason for optimism. During an April 27 call with investors, he noted that "[w]hen the pandemic first started to impact brick and mortar schools, our phones beg[a]n to ring off the hook and we saw a sharp increase in traffic on our website." AC ¶ 83. K12 was "in the business that helps schools and students in situations exactly like this," and Mr. Davis opined that the Company's "core competency in helping public school districts, private schools, and charter schools operate their online programs position[ed] [K12] well given how the education market [was] likely to change." *Id.* ¶¶ 81, 83. In light of the prospect that many brick-and-mortar schools might "not open" for some time, Mr. Davis predicted "the biggest opportunity" would be "in the institutional business"—with K12 "providing a program that [schools could] run themselves." *Id.* ¶ 85. As an example, he mentioned that "two large cities" had recently asked K12 to bid for such partnership opportunities. *Id.*

Mr. Davis's positive outlook proved well-founded. The start of the 2020-21 school year yielded a 48.6% year-over-year increase in student enrollments at K12's full-service schools. Ex. 11, K12 Inc., Current Report (Form 8-K) (Oct. 26, 2020) at 3.[1] On top of that, K12 partnered with over 150 new schools and districts as part of its Institutional business. Ex. 10, K12 Inc., Q1 2021 Earnings Call (Oct. 26, 2020) at 6. As a result, K12's company-wide revenues increased 44.3% over the same quarter in FY20. Ex. 11 at 3. Even with this surge, customer surveys

[1] Because K12 does not provide enrollment services for schools purchasing only *à la carte* products and services, these enrollment numbers "only include those students in full service public or private programs where K12 provides a combination of curriculum, technology, instructional and support services inclusive of administrative support." Ex. 11 at 3.

indicated that over 75% of parents were satisfied with the enrollment process. Ex. 10 at 5.

C. The Miami-Dade Project

The unprecedented opportunities created by the pandemic did not come without challenges. On July 29, 2020, with a statewide debate stirring about whether to open brick-and-mortar schools in Florida, Miami-Dade County Public School District ("Miami-Dade") announced that it had preemptively "spent the past couple months researching the best-in-class content providers and platforms" to provide "a one-stop-shop for interfacing in a distance learning modality." Ex. 13, School Board Minutes (July 29, 2020) at 8. As reflected in public meeting minutes, "it quickly became apparent that K12 would be the best fit given the fact that there [we]re over 1,200 course[] offer[ings]" available, and the School Board thus "intend[ed] to purchase the [K12] platform, along with the [Company's curriculum] content." *Id.* Miami-Dade submitted its school reopening plan to the state Department of Education the next day, outlining the services to be "provided by K12." Ex. 14, Miami-Dade Reopening Plan (July 30, 2020) at 3, 10.

On August 10, K12 signed a one-year contract with Miami-Dade dated August 7, 2020. Ex. 15. The contract was worth $15.3 million—less than 1.5% of K12's FY20 revenues of $1.04 billion. *Id.*; Ex. 7 at 62. Miami-Dade's Superintendent and Assistant School Board Attorney in turn signed the parties' written agreement on August 17. Ex. 15.

By that time, K12 had already started developing a customized learning system for Miami-Dade. With more than 270,000 students in the district and classes starting on August 31, the scope of that undertaking was substantial. Ex. 14 at 5; AC ¶ 43. As Mr. Davis reflected months later, K12 "knew the 6-week timeframe was a challenge" and, "in regular circumstances," it might "have taken . . . six months to implement" the project fully. AC ¶ 58 (quoting Ex. 10 at 6). But in Mr. Davis's view, K12 "owed it to the students, their families, and their teachers to deliver." Ex. 9, Ltr. from N. Davis (Sept. 9, 2020). And the Company "worked around the clock in concert with

the Miami-Dade team" in an effort to be ready for the beginning of the new school year. *Id.*

Mr. Davis mentioned the Miami-Dade engagement during an August 11 investor call. He explained that K12's "primary growth" thus far had stemmed from increased "enrollment in . . . managed schools." Ex. 5, K12 Inc., Q4 2020 Earnings Call (Aug. 11, 2020) at 12. He added, however, that K12 was also "seeing [an] increase . . . in school districts who call us and want to use our content and our curriculum with more of those contracts this year than we've ever had in any one year before." *Id.*; AC ¶ 92. As one example of school district interest, he noted that K12 planned to provide "customized services, including curriculum, assessment tools, teacher training and data management" to Miami-Dade. AC ¶ 91.

Despite the collective efforts of K12 and school district staff, the rollout of the Miami-Dade program fell short of expectations. On August 25, approximately two weeks after K12's August 11 investor call, the Vice Chair of the Miami-Dade School Board reported teacher complaints about insufficient "training" related to the "new system," and acknowledged "that several areas of planning and execution . . . fell below the expectations . . . set [by the] Board." *Id.* ¶ 6. The August 31 rollout was further complicated by "cyberattacks" on Miami-Dade's network, which interrupted the delivery of online services during the first week of classes. *Id.* ¶ 8.

The Miami-Dade School Board met to discuss these issues on September 2 and 9. *Id.* ¶¶ 8, 55. According to one School Board member, Mr. Davis took "full responsibility" for the operational challenges. *Id.* ¶ 55. Mr. Davis expressed "regret" in a public letter "for the series of events that caused Miami-Dade County Public School students, families, teachers, and administrators to have a difficult start to the school year." Ex. 9 at 1. He acknowledged that "while in any complex, highly scaled solution there will be ongoing issues to solve," K12 had "not been able to get to where the Miami-Dade administration want[ed] . . . to be." *Id.* Nonetheless, he

emphasized that K12 would strive "to make changes to resolve issues and make improvements that Miami-Dade wants to see . . . as their partner." *Id.* At the conclusion of the September 9 meeting, the Miami-Dade School Board voted to discontinue its use of K12's program. AC ¶ 55.

D. The Beaufort County Project

The only other district alleged to have cancelled K12's services for the 2020-21 school year is South Carolina's Beaufort County. *Id.* ¶ 56. According to the AC, K12 had a contract with the Beaufort County School District worth $2.75 million—representing less than 0.3% of K12's FY20 revenues. *Id.* ¶ 14; Ex. 7 at 62. Plaintiffs allege that Beaufort County "senior staff . . . lost any confidence" in K12, and the School Board "voted to terminate the K12 contract" on September 17. AC ¶¶ 111, 113. But the AC explains neither the nature of the services K12 had agreed to provide, nor the specific circumstances that prompted the School Board's decision.

E. Stock Analysts Thought K12's Miami-Dade Contract Was Minor

K12's stock price declined around the time that Miami-Dade cancelled its contract, which caused analysts to react with surprise. One William Blair Analyst referred to the loss of the Miami-Dade engagement as "a small incremental negative to the story, but not one . . . that justifies the degree of [stock-price] pullback." Ex. 16, William Blair Report (Sept. 10, 2020). An analyst from BMO similarly reported that "[w]hile it was high profile," the Miami-Dade project "was not part of [K12's] core business and management noted other similar contracts have not seen any similar issues." Ex. 17, BMO Report (Sept. 17, 2020).[2] And there is no allegation that any analyst took notice *at all* when Beaufort County cancelled its small contract on September 17.

F. K12 Grows Substantially In Fiscal Year 2021

Despite having lost the Miami-Dade and Beaufort County projects in September 2020, K12

[2] The AC "quotes selectively" from these reports, *e.g.*, AC ¶ 58, but the Court may consider them in full, *In re Human Genome Sci., Inc. Sec. Litig.*, 933 F. Supp. 2d 751, 758 (D. Md. 2013).

still achieved massive revenue growth during the start of the 2020-21 school year. In its first quarter of FY21, K12's revenues increased 44.3%, year over year. Ex. 11 at 3. And through its second quarter of FY21, ended December 31, 2020, K12 generated over $747 million—a 46% year-over-year increase. Ex. 12, K12 Inc., Current Report (Form 8-K) (Jan. 26, 2021) at 1. K12's enrollment for that six-month period also swelled 59%, to over 192,000 students. *Id.* at 3.

G. Plaintiffs Challenge K12's Generalized Projections

Plaintiffs filed this lawsuit just three weeks after K12 announced blowout growth in revenue and enrollment. The AC does not dispute the accuracy of those reported results. Nonetheless, Plaintiffs claim that Defendants fraudulently misrepresented K12's ability to support the emerging online learning needs prompted by the pandemic—including by describing the Company as being "in the business that helps schools and students in situations exactly like this," AC ¶ 83, characterizing COVID-19's impact as "a positive tailwind" for virtual education, *id.* ¶ 85, and suggesting K12's "learning systems are well-suited for virtual and blended public schools," *id.* ¶ 86. Specifically, Plaintiffs assert that K12, its CEO, and its CFO made false or misleading statements about "(i) the technological wherewithal of the Company's online learning platforms and preparedness for large volumes of students, (ii) cybersecurity protocols and protections, and (iii) the training that K12 would provide to students, parents, and teachers." *Id.* ¶ 3. Defendants' supposed scheme purportedly began on April 27, and continued until two school districts (out of more than 1,000) discontinued their K12 contracts in mid-September 2020. *See id.* ¶ 1 (alleging a "Class Period" of April 27 to September 18, 2020); Ex. 10 at 6 ("over 1,000 school districts").

LEGAL STANDARD

"Speculation by investors and subsequent buyers' remorse cannot support an Exchange Act suit." *Cozzarelli v. Inspire Pharms., Inc.*, 549 F.3d 618, 627 (4th Cir. 2008). Enacted to "protect the integrity of the market," Section 10(b) of the Securities Exchange Act of 1934 and its

implementing regulation, Securities and Exchange Commission ("SEC") Rule 10b-5, "prohibit *fraud* in connection with the purchase or sale of a security." *Id.* at 623 (emphasis added); 15 U.S.C. § 78j(b); 17 C.F.R. § 240.10b-5. In other words, these provisions are meant "to protect investors against manipulation of stock prices" by company insiders, *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988)—"not to provide investors with broad insurance against market losses," *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 345 (2005).

To prevent investors from merely "making post hoc attempts to recoup market losses," Section 10(b) requires a stringent showing. *Xia Bi v. McAuliffe*, 927 F.3d 177, 187 (4th Cir. 2019). A plaintiff must adequately plead: "(1) a material misrepresentation or omission by the defendant; (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." *Maguire Fin. v. PowerSecure Int'l*, 876 F.3d 541, 546 (4th Cir. 2017). Contrary to "the norm in federal civil procedure," moreover, Rule 9(b) and the PSLRA "impose[] heightened pleading requirements for private securities fraud actions." *Pub. Emps.' Ret. Ass'n. of Colo. v. Deloitte & Touche*, 551 F.3d 305, 310-11 (4th Cir. 2009). Under Rule 9(b), plaintiffs must "state with particularity the circumstances constituting fraud," Fed. R. Civ. P. 9(b), by alleging with specificity "the who, what, when, where and how" of the supposed scheme, *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 490 (3d Cir. 2016). And the PSLRA requires Plaintiffs to "specify each statement alleged to have been misleading" and the "reasons why the statement is misleading." 15 U.S.C. § 78u-4(b)(1)(B). In addition, Plaintiffs must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A). This inference of scienter "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent."

Tellabs, 551 U.S. at 309. A complaint that does not "clear the[se] hurdle[s]" cannot "survive a motion to dismiss." *Matrix Cap. Mgmt. Fund v. BearingPoint*, 576 F.3d 172, 181 (4th Cir. 2009).

ARGUMENT

I. PLAINTIFFS FAIL TO ALLEGE AN ACTIONABLE MISSTATEMENT

Plaintiffs' claims stumble right out of the gate. Try as they might, Plaintiffs cannot point to a single false statement of material fact. Most every utterance on which the AC relies is not actionable *as a matter of law* because it is mere puffery, a subjective opinion, a forward-looking projection, or some combination of the three. *See In re K12 Inc. Sec. Litig.*, 66 F. Supp. 3d 711, 718-22 (E.D. Va. 2014). And for the few statements of current or historical fact in dispute, Plaintiffs have not pled—and cannot plead—particularized facts showing that those statements were false or misleading when made.

A. Most Challenged Statements Are Mere "Puffery"

Thirteen of the 23 statements Plaintiffs challenge are textbook examples of nonactionable "puffery"—that is, the sort of boasting, superlatives, and other expressions of enthusiasm frequently uttered in business but not relied upon by reasonable investors. *Longman v. Food Lion, Inc.*, 197 F.3d 675, 685 (4th Cir. 1999); *see* App. A (**Statements 1-6, 9, 13, 14, 16-19**).[3] These include broad statements about K12's (1) general business capabilities and financial strength; (2) effective academic curriculum, teacher training, and online platform; and (3) growth opportunities due to COVID-19 and the resulting nationwide shift to virtual learning. Such "loosely optimistic" statements are immaterial as a matter of law because they "are so vague, so lacking in specificity, or so clearly constituting the opinions of the speaker, that no reasonable investor could find them important to the total mix of information available." *In re Cable &*

[3] For the Court's convenience, attached as Appendix A ("App. A") is a numbered table setting forth each challenged statement and the reasons it cannot sustain a securities fraud claim.

Wireless, 321 F. Supp. 2d at 766-67. They also "cannot be objectively demonstrated to be false or misleading." *In re K12 Inc. Sec. Litig.*, 66 F. Supp. 3d at 719.

First, Plaintiffs assail "indefinite statements of corporate optimism" about K12's general business capabilities. *Johnson v. Pozen Inc.*, 2009 WL 426235, at *22 (M.D.N.C. Feb. 19, 2009). For example, the AC faults Mr. Davis for citing K12's "core competency in helping public school districts, private schools, and charter schools operate their online programs" and the Company's "expertise in this area." AC ¶¶ 81, 83, 84 (**Statements 1, 4, 5**). The AC attacks similar statements in K12's August 12, 2020 Form 10-K. *See id.* ¶¶ 93, 95 (**Statements 16, 18**) ("core competencies" and "effective"). But such "statements touting [K12's] expertise are not actionable" because they are "empty superlative[s]" regarding "the quality of [K12's] products or services." *Twin Master Fund, Ltd. v. Akorn, Inc.*, 2020 WL 564222, at *10 (N.D. Ill. Feb. 5, 2020).[4]

The same is true of Plaintiffs' challenge to Mr. Davis's assertion about the "ongoing strength of [K12's] core business." AC ¶ 82 (**Statement 2**). Claiming that business "has been very strong" is *exactly* the sort of "immaterial puffery" that courts routinely deem inactionable as a matter of law. *Pipefitters Loc. No. 636 Defined Ben Plan v. Tekelec*, 2013 WL 1192004, at *8 (E.D.N.C. Mar. 22, 2013).[5] Indeed, Judge Trenga reached that very conclusion in another case involving K12, rejecting claims based on an indistinguishable assertion that the Company's "core business remain[ed] strong." *See In re K12 Inc. Sec. Litig.*, 66 F. Supp. 3d at 721-22.

Second, the AC disputes vaguely positive appraisals of K12's products and services. These

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[4] *See also In re Ranasinghe*, 341 B.R. 556, 563 (Bankr. E.D. Va. 2006) (finding "a generalized claim of competence to undertake services for a client" is "puffery"); *Porwal v. Ballard Power Sys.*, 2019 WL 1510707, at *8 (S.D.N.Y. Mar. 21, 2019) ("expertise," "strength").

[5] *See also, e.g.*, *In re Constellation Energy Grp., Inc. Sec. Litig.*, 738 F. Supp. 2d 614, 631 (D. Md. 2010) ("strong risk management culture"); *Next Century Commc'ns Corp. v. Ellis*, 318 F.3d 1023, 1028 (11th Cir. 2003) ("strong performance").

include statements that K12's "learning systems are well-suited" for the schools it supports, AC ¶ 86 (**Statement 9**), and that K12 can "meet the varied needs of [its] school customers," *id.* ¶ 93 (**Statement 16**). But a company cannot commit fraud merely by suggesting its offerings are "well suited to the demands of [its] customers." *Longman*, 197 F.3d at 685. Describing a curriculum as "engaging" and an online platform as "flexible," "easy . . . to use," "great," and the "right . . . technology," AC ¶¶ 91-95 (**Statements 13, 14, 16-19**), are likewise the "kind of puffery and generalizations that reasonable investors could not have relied upon when deciding whether to buy stock," *Longman*, 197 F.3d at 685; *see also Phila. Fin. Mgmt. of S.F. v. DJSP Enters.*, 572 F. App'x 713, 716 (11th Cir. 2014) (dismissing boasts about "the 'rigor' of processes, the 'efficiency' and 'accuracy' of its operations, and its 'effective' staff training"). "All public companies praise their products," *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004), and buzzy adjectives like these are simply "too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision," *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005); *see also In re Constellation*, 738 F. Supp. 2d at 631 ("effective" is "mere puffery").

Third, the AC challenges generalized statements about COVID-19's potential impact on K12's business outlook. For example, Plaintiffs claim it was fraudulent to suggest that increased demand for online education "positions [K12] well given how the education market is likely to change," and that K12 has "the right experience and technology to take advantage of [this] large addressable market." AC ¶¶ 81, 92 (**Statements 1, 14**). Setting aside the fact that those broad projections are forward-looking and protected by the PSLRA's safe harbor, *see infra* § I.C, the "market price of a share is not inflated by vague statements predicting growth," *Raab v. Gen. Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993), or by a company's asserted "confidence in its

position in the market," *In re Neustar Sec. Litig.*, 83 F. Supp. 3d 671, 680 (E.D. Va. 2015). The same is true of predictions that the pandemic would be a "positive tailwind" for K12. AC ¶ 85 (**Statement 6**); *see Phillips v. Triad Guar. Inc.*, 2015 WL 1457980, at *11 (M.D.N.C. Mar. 30, 2015) ("a lot of wind at our back" was "puffery").[6]

So too with other "soft forecasting" about the pandemic's expected effect, *In re Cable & Wireless*, 321 F. Supp. 2d at 767—such as unremarkable statements describing K12 as being "in the business that helps schools and students in situations exactly like this" and "stand[ing] ready to support schools . . . during this critical time," AC ¶¶ 83, 91 (**Statements 4, 13**). Even with challenges on the horizon, "people in charge of an enterprise are not required to take a gloomy, fearful or defeatist view of the future." *Rombach v. Chang*, 355 F.3d 164, 174 (2d Cir. 2004); *In re Neustar*, 83 F. Supp. 3d at 680-81 (same). Such platitudes simply do "not give rise to securities violations." *Rombach*, 355 F.3d at 174. Nor does obvious "hyperbole," *Phillips v. LCI Int'l*, 190 F.3d 609, 615 (4th Cir. 1999)—*e.g.*, indicating that the "academic experience" for K12 programs as of April 2020 was "essentially school as usual," despite the forced closure of brick-and-mortar schools around that time, AC ¶ 82 (**Statement 3**).

B. Plaintiffs Mischaracterize Defendants' Opinions

Under the Supreme Court's decision in *Omnicare*, statements of "opinion" are "inherently subjective and uncertain assessments" and therefore generally inactionable. 575 U.S. at 186. Specifically, an expression of opinion can support a securities fraud claim only in rare circumstances, such as where the plaintiff alleges particularized facts demonstrating the statement was subjectively false—*i.e.*, that "the speaker did not hold the belief she professed." *Id.* Plaintiffs

[6] *See also City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F. Supp. 2d 1045, 1064 (N.D. Cal. 2012) (claim of "good momentum" was puffery); *Schultz v. Tomotherapy Inc.*, 2009 WL 2032372, at *22 (W.D. Wisc. July 9, 2009) ("we have a lot of growth momentum").

do not even try to satisfy *Omnicare*'s heightened pleading standard here. Instead, they distort **Statements 6, 16, 19, and 23**, altering each to obscure language reflecting the speaker's clear expression of opinion. But Plaintiffs cannot cook up viable claims by "tak[ing] statements out of their proper context." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 222 (3d Cir. 2002); *see also Phillips*, 190 F.3d at 615.

For example, Plaintiffs brazenly mischaracterize **Statement 23**. On August 19, 2020, an analyst asked Mr. Davis if he "*feel[s]* as though there will be a great disadvantage for [students] in underserved, underprivileged communities" as a result of the pandemic. Ex. 8, Yahoo! Finance Interview (Aug. 19, 2020) at 1-2 (emphasis added).[7] In response to that question, which plainly solicited his personal views, Mr. Davis said, "*I think* we can keep th[e] [achievement] gap minimized," and pointed to Miami-Dade teachers "using online tools to reach their students" as an example of how he believed schools could "minimize[] . . . the gap." *Id.* at 2. Omitting this critical context, the AC casts Mr. Davis's opinion as a concrete representation about the effectiveness of K12's platform. *See* AC ¶ 99 ("Davis stated: 'I'll use Miami-Dade as an example . . . and they chose an approach that I think is innovative and allows all of their students to keep up. . . . ***Teachers [in the Miami-Dade County Public Schools] are using online tools to reach their students*** and that minimizes you know the gap'").

Plaintiffs employ the same tactic with **Statement 19**. K12's August 12, 2020 Form 10-K said, "*We believe* students learn better not just with great curriculum, but also great teachers and technology that allows them to access the content and teachers in a way that makes learning more engaging and effective." Ex. 7 at 13 (emphasis added). The AC does not assert that this

[7] Because this interview is "relied [up]on" in the AC, this Court may consider the complete transcript. *Knurr v. Orbital ATK Inc.*, 272 F. Supp. 3d 784, 789 (E.D. Va. 2017).

"subjective and uncertain assessment[]" about student learning could support a claim for securities fraud—it obviously cannot. *Omnicare*, 575 U.S. at 186. Instead, the AC challenges a strawman by deleting "We believe" and portraying what remains as a guarantee about K12's technology. *See* AC ¶ 95 (**Statement 19**) ("K12's 'Educational Philosophy' confirms that 'students learn better not just with great curriculum, but also great teachers and ***technology that allows them to access the content and teachers*** in a way that makes learning more engaging and effective.'").

Plaintiffs mischaracterize **Statements 6 and 16** in an almost identical manner, artfully omitting the prefaces "I think" and "We believe." *Compare* Ex. 3, K12 Inc., Q3 2020 Earnings Call (Apr. 27, 2020) at 10, *and* Ex. 7 at 4, *with* AC ¶¶ 85, 93 **(Statements 6, 16)**. But Plaintiffs cannot plead around *Omnicare's* stringent requirements using "mischaracterizations" of Defendants' clear opinion statements. *Phillips*, 190 F.3d at 615. And the AC is devoid even of conclusory assertions that any speaker's subjective views were not sincerely held under *Omnicare*.

C. The Safe Harbor Shields Defendants' Forward-Looking Statements

The crux of Plaintiffs' fraud theory is that, before the start of the 2020-21 school year, Defendants misrepresented K12's expected preparedness to "accommodate and service the massive surge of students, parents, and teachers who were turning to online education" because of the pandemic. AC ¶ 3. As explained above, nearly all of the statements Plaintiffs challenge on that score are paradigmatic puffery. *See supra* § I.A. But those projections are also independently immunized from liability by the PSLRA's statutory safe harbor. Under that provision, a forward-looking statement is not actionable as a matter of law if (1) it is couched in "meaningful cautionary" terms *or* (2) the plaintiff fails to plead particularized facts demonstrating that it was made with "actual knowledge" of falsity. 15 U.S.C. § 78u-5(c); *Slayton v. Am. Express Co.*, 604 F.3d 758, 766 (2d Cir. 2010) (noting the "safe harbor is written in the disjunctive"). Consistent with that framework, "[p]rojections of future performance are generally not actionable under the

federal securities laws as long as they are not worded as guarantees." *Paradise Wire & Cable Defined Benefit Pension Plan v. Weil*, 918 F.3d 312, 321 (4th Cir. 2019) (citation omitted).

The AC challenges predictive statements that "fall[] into the heartland of" the statutory safe harbor. *Ash v. PowerSecure Int'l, Inc.*, 2015 WL 5444741, at *8 (E.D.N.C. Sept. 15, 2015). For example, Plaintiffs dispute K12's projection that its "core competency in helping public school districts, private schools, and charter schools operate their online programs positions us well given how the education market is likely to change." AC ¶ 81 (**Statement 1**). The AC similarly contests Mr. Davis's beliefs that, going forward, the changing educational landscape would be "a positive tailwind" for K12, *id.* ¶ 85 (**Statement 6**), and that K12 could "take advantage of a large addressable market," *id.* ¶ 92 (**Statement 14**). These and other "statement[s] of future economic performance" and "plans and objectives of management for future operations" are plainly forward-looking. 15 U.S.C. § 78u-5(i)(1); *see, e.g.*, *Raab*, 4 F.3d at 289.[8] And because the AC does not allege facts showing either that these projections were presented as "guarantees," *Ash*, 2015 WL 5444741, at *8, or that Defendants *knew* their predictive statements were false when made, **Statements 1, 6, 8, 10, 14, and 21** are protected under both inlets of the safe harbor.

1. Defendants Cautioned Investors

Under the safe harbor's first prong, forward-looking statements are not actionable when defendants "remind[] investors" that expected and actual results "might materially differ." *In re Triangle Cap. Corp. Sec. Litig.*, 2019 WL 1083777, at *10 (E.D.N.C. Mar. 7, 2019). Defendants did just that. Their forward-looking statements were made in "cautionary" terms, 15 U.S.C. § 78u-5(c)(1), "not worded as guarantees," *Paradise Wire*, 918 F.3d at 321. K12's SEC filings clearly

[8] *See also In re Trex Co., Inc. Sec. Litig.*, 454 F. Supp. 2d 560, 577 (W.D. Va. 2006) (CEO "'expect[ed]' 20-25% revenue and earnings growth"); *Hillson Partners Ltd. P'Ship v. Adage, Inc.*, 42 F.3d 204,212 (4th Cir. 1994) (similar).

identified statements about what K12 "anticipates," "believes," and "projects"—and any statement about an "opportunity" or "potential"—to be forward-looking. Ex. 7 at 3. And K12 expressly cautioned that such predictive statements were "not guarantees of future performance," and were "[b]y their nature . . . subject to risks and uncertainties." *Id.* at 4.

More than that, K12's "extensive, specific and tailored" warnings—including in public SEC filings—explicitly "address[ed] the very complaints [that Plaintiffs] make about" K12's ability to meet increased demand amidst an ongoing global health crisis. *Paradise Wire*, 918 F.3d at 319. The AC claims that Defendants' expectations about K12's business prospects were false given alleged problems that arose with K12's "technological capabilities," "cybersecurity protocols," and "training [for] teachers, students, and parents"—albeit in just *two* of the many school districts K12 served nationwide. AC ¶ 89; *see also, e.g.*, *id.* ¶¶ 100-113. Yet K12 warned of just those risks, including possible (i) "harm to our reputation resulting from poor performance" of the Company "in any school in which we operate," (ii) "termination of our contracts, or a reduction in the scope of services, with schools," (iii) "inadequate recruiting, training and retention of effective teachers," and (iv) "disruptions to our Internet-based learning and delivery systems . . . resulting from cybersecurity attacks." Ex. 7 at 3-4.[9]

K12's warnings regarding technological risks and the pandemic's unprecedented nature were especially thorough. At the outset of the public health crisis, K12 cautioned that "[t]he impacts of the global emergence of COVID-19 on [its] business" were "not estimable or

[9] K12's 2019 10-K contained similar warnings. *See* Ex. 1, K12 Inc., Annual Report (Form 10-K) (Aug. 7, 2019) at 3-4, 37-42. And Defendants elsewhere incorporated such warnings by reference. *See* Ex. 3, K12 Inc., Q3 2020 Earnings Call (Apr. 27, 2020) at 4; Ex. 5 at 2; Ex. 2, K12 Inc., Current Report, Ex. 99.1 (Form 8-K) (Apr. 27, 2020) at 6. "Cautionary statements disclosed in SEC filings may be incorporated by reference; they do not have to be in the same document as the forward-looking statements." *Elec. Workers Pension Tr. Fund of IBEW Loc. Union No. 58 v. CommScope, Inc.*, 2013 WL 4014978, at *13 (W.D.N.C. Aug. 6, 2013) (citation omitted).

determinable," and noted the possibility of pandemic-related business disruptions. Ex. 4 at 29, 36; *see also* Ex. 3 at 5; Ex. 5 at 9. The Company also explained that it "rel[ies] on third-party service providers" that it "do[es] not control," which could be "vulnerable" to threats like "computer viruses, sabotage, intentional acts of vandalism and other misconduct." Ex. 7 at 39. Other named risks included "customers' inability to access the Internet, the failure of our network or software systems due to human or other error, security breaches or the ability of our infrastructure to handle spikes in customer usage." *Id.* at 40. The Company also noted that increased "traffic" might render K12's systems unable to meet "increased demand" given the difficulty of "accurately project[ing]" rapidly changing capacity needs for "processing systems and network hardware and software." *Id.* at 43-44. And K12 explicitly warned that its cybersecurity "measures cannot provide an absolute guarantee as hackers continue to become more sophisticated."[10] *Id.* at 41.

Those are *exactly* the sorts of "technical problems" that the AC alleges later arose. AC ¶ 104. So even though K12 did not specifically foresee that Miami-Dade would suffer a cyberattack "committed by a 16-year-old high school junior" against "the school's network" (*not* K12's), *id.* ¶ 106, these disclosures—and others indexed in Appendix B—put an investor "sufficiently on notice of the danger of the investment to make an intelligent decision about it according to her own preferences for risk and reward," *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 103 (D.C. Cir. 2015); *accord Ash*, 2015 WL 5444741, at *8. Requiring anything more would impose a duty of clairvoyance that has no foundation in securities law. *Keeney v. Larkin*, 306 F. Supp. 2d 522, 534 (D. Md. 2003) ("Corporate officials need not be clairvoyant.").

[10] Plaintiffs again mischaracterize Defendants' statements, asserting that this sentence effectively guaranteed K12 was invulnerable to cyberattacks committed by anyone except "'more sophisticated' hackers." AC ¶ 97 **(Statement 21)**. Not so. *See* Ex. 7 at 41.

2. No Defendant Had Actual Knowledge Of Falsity

Nor have Plaintiffs alleged particularized facts showing any Defendant had "*actual knowledge*" that a forward-looking statement was false when made—as they must to overcome the safe harbor's protections. 15 U.S.C. § 78u-5(c)(1)(B) (emphasis added). Even so-called "deliberate recklessness" cannot satisfy this heavy pleading burden. *See Inst. Invs. Grp. v. Avaya, Inc.*, 564 F.3d 242, 274 (3d Cir. 2009).

The AC is silent as to what either Individual Defendant knew at the time of their April and August 2020 statements. As discussed *infra* § II.A, the AC purports to rely on inside information from seven "confidential witnesses" described as former K12 employees. But only two of those individuals are alleged to have worked at K12 during the Class Period. *See* AC ¶¶ 69-75 (CW-3); *id.* ¶ 77 (CW-5). And neither of those witnesses is alleged to have spoken with Mr. Davis or Mr. Medina *at all*—let alone about the facts at issue. Given that "[n]one of these witnesses" is "alleged to have had any direct contact with the Defendants," their accounts cannot show "what the Defendants knew or recklessly disregarded." *In re Coventry Healthcare, Inc. Sec. Litig.*, 2011 WL 1230998, at *6 (D. Md. Mar. 30, 2011).

Any possible knowledge-of-falsity inference is also undercut by the fact that Defendants' projections proved largely accurate. As described above in Background Section F, the uncontested numbers bear out K12's optimism about the impact of the nationwide shift to remote learning. Plaintiffs do not dispute that K12's revenue shot up to $371 million for the first quarter of FY21, representing a 44.3% year-over-year increase compared to the first quarter of FY20. Ex. 10 at 5.[11]

[11] The Court may consider the call transcripts, the Miami-Dade contract, and Mr. Davis's public letter, Exs. 3, 5, 9, 10, 15, because they are "integral to or explicitly referenced in the complaint." *Knurr*, 272 F. Supp. 3d at 789; *e.g.*, AC ¶¶ 8, 39-40, 55, 58, 91, 108. The same is true of K12's SEC filings, Exs. 1, 2, 4, 6, 7, 11, 12, which are publicly available and, in most cases, "relied [up]on" in the AC. *Knurr*, 272 F. Supp. 3d at 789; *e.g.*, AC ¶¶ 81, 86, 93.

D. Defendants' Factual Statements Were True And Accurate

The AC is short on bona fide "*factual* statement[s]" capably "demonstrable as being true or false." *Ottmann v. Hanger Orthopedic Grp., Inc.*, 353 F.3d 338, 342-43 (4th Cir. 2003) (quoting *Longman*, 197 F.3d at 682). But to the extent any representations of current or historical fact can be gleaned from the statements Plaintiffs challenge, the AC fails to plead particularized facts demonstrating those statements were false when made.[12]

First, while it assails obvious (and nonactionable) puffing statements about the "ongoing strength" of K12's business, the AC nowhere disputes the factual representations about K12's earnings and the demand for its services. *See* AC ¶ 82 (**Statement 2**) (K12 "beat [its] estimates" for "revenue, adjusted operating income and capital expenditures."); *id.* ¶ 83 (**Statement 4**) (K12's phones began "to ring off the hook" and its website "saw a sharp increase in traffic").

Second, the AC asserts that K12 mislead investors about the *quality* of its teacher training. *See, e.g.*, AC ¶ 108 (alleging "insufficient training"). But the challenged statements themselves say nothing specific or measureable about training quality—only that K12 "provides teacher training, teaching services, and other academic and technology supports services." AC ¶ 86 (**Statement 9**); *see also id.* ¶¶ 84-85, 94 (**Statements 5, 8, 17**) (similar). And "at no point in the [AC] do Plaintiffs actually contradict" that K12 offered such training. *Plymouth Cty. Ret. Ass'n v. Primo Water Corp.*, 966 F. Supp. 2d 525, 545 (M.D.N.C. 2013). Instead, Plaintiffs' allegations—including the critical CW statements on which they rely—amount to no more than a subjective "disagreement as to the quality and execution of the effort[s]" that those statements

[12] While Plaintiffs generally "make it clear what portion of each quotation [allegedly] constitutes a false representation" using bold emphasis, most arguable statements of current or historical fact appear in surrounding (non-bolded) text. *In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 513, 534 (S.D.N.Y. 2005). Neither Defendants nor this Court should bear the "burden" of "sort[ing] out" the exact portions of such lengthy excerpts that Plaintiffs are challenging. *Id.*

described. *Id.* Those are nonactionable "criticisms" from a Monday-morning quarterback, not particularized falsity allegations. *Id.*; *see also Hillson Partners*, 42 F.3d at 209 ("Mere allegations of 'fraud by hindsight' will not satisfy the requirements of Rule 9(b)."). And even if K12 had said anything specific or measurable about the quality of its teacher training (which it did not), isolated accounts from CWs criticizing unspecified professional training that K12 provided, *id.* ¶ 78; *see also id.* ¶¶ 52, 75-76, are "unremarkable" for a company that operates "nationwide," *Rombach*, 355 F.3d at 173. In fact, CW-3 and CW-4 criticize only K12's training for its own staff, *not* teachers in the public schools that K12 serves. AC ¶¶ 75-76; *see also infra* § II.A.

Third, what K12 actually said about its cybersecurity protocols goes similarly unchallenged. The AC cites representations that K12 "protect[s] sensitive information through policy and control governance that is validated on a semi-annual basis, and maintain[s] a layered security architecture," and has "engaged [third-party firms] to test [its] networks, servers and applications for vulnerabilities." AC ¶¶ 96-97 (**Statements 20, 21**). But the AC does not dispute that K12 had such protocols in place. Instead, Plaintiffs complain that those measures failed to prevent a cyberattack committed weeks after these statement were made—against *Miami-Dade's* system, not K12's. *See id.* ¶ 106. Even if a vulnerability in "*the school's network system*" could somehow be attributed to K12, *id.* (emphasis in original),—and Plaintiffs fail to allege how it could be—the AC (again) merely "disagree[s] as to the quality" of K12's measures, without disputing the truth of the Company's factual assertions, *Plymouth*, 966 F. Supp. 2d at 545.[13]

Fourth, while the AC challenges Mr. Davis's August 11, 2020 assertion that "[t]he schools [K12] support[s] did not experience disruption" as a result of the pandemic, AC ¶ 90 (**Statement**

[13] And as explained, K12 never guaranteed that its systems were impenetrable—on the contrary, it expressly warned that cyberattacks were an ongoing threat. *See supra* § I.C.1.

12), it does not plead particularized facts describing any such disruptions, or otherwise establishing that the statement was untrue when made.

Finally, the AC contends that Miami-Dade "Superintendent Alberto Carvalho never signed [a] $15.3 million no-bid contract with K12, and the school district never paid K12 for the provision of its services and products." AC ¶ 104; *see also id.* ¶¶ 8, 51, 53, 100. But nowhere does the AC allege a statement from Defendants asserting otherwise—*i.e.*, representing that Mr. Carvalho *had* signed or that the district *had* paid. To the contrary, all the AC alleges is that, during the August 11, 2020 earnings call, Mr. Davis said K12 would "provide customized services" to Miami-Dade and "serve" the district's teachers and students, and that the arrangement was among the many "contracts" K12 was "working on." *Id.* ¶¶ 91, 92 (**Statements 13, 15**); *see also id.* ¶ 85 (**Statement 7**) (similar). Miami-Dade had publicly acknowledged as much two weeks earlier, saying that it "intend[ed] to purchase [K12's institutional] platform." Ex. 13 at 8; Ex. 14 at 3.[14] In any event, the AC is simply wrong: Mr. Carvalho did sign the K12 contract within a week of Mr. Davis's statements, and then subsequently voided it. *See* Ex. 15 at 1.

Plaintiffs' failure to plead an actionable misstatement, by itself, mandates dismissal.[15]

II. PLAINTIFFS FAIL TO ALLEGE PARTICULARIZED FACTS SUPPORTING A STRONG INFERENCE OF SCIENTER

The AC also fails because it lacks particularized facts supporting a "strong inference" of scienter that is "at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs*, 551 U.S. at 314. To meet that standard, Plaintiffs must adequately plead that each Defendant not

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[14] These sources, and Exs. 18, 19, are noticeable to show "what the market knew." *In re Human Genome Sci. Inc. Sec. Litig.*, 933 F. Supp. 2d 751, 758 (D. Md. 2013) (citation omitted); *Locklear v. Town of Pembrok, N.C.*, 2012 WL 6701784, at *2 (E.D.N.C. Dec. 26, 2012) (taking judicial notice of minutes), *aff'd,* 531 F. App'x 379 (4th Cir. 2013).

[15] Because the AC points to no misstatement of material fact, K12's certifications to that effect were accurate as well. *See* AC ¶¶ 88, 98 (**Statements 11, 22**).

only made a false statement of material fact, but did so with "a mental state embracing intent to deceive, manipulate, or defraud." *In re Triangle Cap. Corp. Sec. Litig.*, 988 F.3d 743, 751 (4th Cir. 2021) (citation omitted). "[M]ere negligence" will not suffice. *In re PEC Sols., Inc. Sec. Litig.*, 418 F.3d 379, 387 (4th Cir. 2005). Instead, Defendants' alleged conduct must reflect at least "severe recklessness," which is "so highly unreasonable and such an extreme departure from the standard of ordinary care as to present a danger of misleading [investors] to the extent that the danger was either known to [Defendants] or so obvious that [they] must have been aware of it." *In re DXC Tech. Co. Sec. Litig.*, 2020 WL 3456129, at *12 (E.D. Va. June 2, 2020).

Plaintiffs attempt to support their scienter theory with a mishmash of allegations, including: (i) secondhand, post-hoc descriptions of the Miami-Dade engagement; (ii) broad-brushed criticisms from seven anonymous former employees; (iii) Mr. Davis's after-the-fact reflections on the Miami-Dade relationship; (iv) the breach of a non-K12 server in 2015 and an unspecified "data breach" in 2019; (v) a purported connection to K12's "core" business; and (vi) Defendants' general monitoring of K12 information. None comes remotely close to supporting the requisite strong inference of fraudulent intent.

To begin, the Complaint is devoid of facts suggesting a plausible—much less compelling—*reason* for any Defendant to commit fraud. Neither Individual Defendant is alleged to have "sold any of his personally held [K12] stock at inflated prices," nor to have benefited in any other way from the supposed scheme. *In re Acterna Corp. Sec. Litig.*, 378 F. Supp. 2d 561, 576 (D. Md. 2005). This glaring "absence of any allegations establishing a motive for the individual Defendants to engage in securities fraud cuts against Plaintiffs' argument," *id.* at 577, and "diminish[es] the strength of any scienter inference that can be drawn from the allegation[s]," *In re Triangle*, 988 F.3d at 752. Indeed, the lack of any alleged motive to defraud investors makes

Plaintiffs' burden to establish Defendants' deliberate recklessness "correspondingly greater." *ECA & Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 199 (2d Cir. 2009) (quoting *Kalnit v. Eichler*, 264 F.3d 131, 142 (2d Cir. 2001)); *see also In Re E. Spire Commc'ns, Inc. Sec. Litig.*, 127 F. Supp. 2d at 744 ("[W]hen a defendant's motive to commit securities fraud is not readily apparent from a complaint, the plaintiff faces a more stringent standard for establishing fraudulent intent."). Moreover, any possible inference of fraudulent intent is negated by (i) the illogical nature of the scheme alleged; (ii) the cost-free access K12 granted to its platform; and (iii) Mr. Davis's class-period disclosures.

A. Plaintiffs' Scienter Allegations Fail

1. Secondhand, Post-Hoc Statements Are Not Evidence Of Scienter

The AC does not allege any facts evidencing—even circumstantially, let alone with particularity—what any Defendant knew about the Miami-Dade engagement as of August 11 and 19, 2020. None of Plaintiffs' seven "confidential witnesses" purports to have first-hand knowledge of K12's negotiation, development, or implementation of the Miami-Dade program. In fact, it appears only one witness—CW-5—still worked at K12 when Miami-Dade's school year began. But CW-5 does not say anything about Miami-Dade. *See* AC ¶ 77. And CW-3, who allegedly left the Company at some unspecified point in August 2020, was based in Philadelphia and similarly had no involvement in K12's Miami-Dade relationship. *Id.* ¶ 69. The remainder of the CWs left K12 as much as a year or more before the Miami-Dade project began,[16] and held (mostly low-level) positions having nothing to do with Miami-Dade.[17] None of the information allegedly provided by these former employees can establish any Defendant's state of mind with respect to

[16] AC ¶¶ 59 (CW-1 left Feb. 2019); 67 (CW-2 left "early 2019"); 127 (CW-7 left June 2019).

[17] *See, e.g.*, *id.* ¶ 76 (CW-4 left in February 2020 and worked as an "academic advisor" in Alabama); *id.* ¶ 78 (CW-6 left in January 2020 and worked as a math teacher in Arizona).

any statement challenged in the AC.[18]

Lacking any witness with relevant first-hand knowledge, Plaintiffs apparently asked the CWs to guess what *might* have happened with the Miami-Dade rollout—based solely on what those individuals learned from public sources or heard through the grapevine. CW-2, for example, merely "read about the issues K12 faced in Miami-Dade County," AC ¶ 68, and CW-1 purports to relay what other employees "told her," *id.* ¶ 60. But "confidential witness[es] must have personal knowledge," and their "testimony cannot be based on hearsay." *In re Trex Co., Inc. Sec. Litig.*, 454 F. Supp. 2d 560, 573 (W.D. Va. 2006); *see also Tekelec*, 2013 WL 1192004, at *12 ("Absent CW6's personal knowledge, the court declines to credit this inference in support of scienter.").

Further, even if these witnesses could credibly offer reliable information about K12's Miami-Dade project (and none even purports to do so), not one of them—nor the doubly anonymized secondhand sources they mention—is "alleged to have had any direct contact with the Defendants, and accordingly, it defies logic to conclude that these witnesses knew what the Defendants knew or recklessly disregarded." *In re Coventry*, 2011 WL 1230998, at *6; *see also Carlucci v. Han*, 886 F. Supp. 2d 497, 519-20 (E.D. Va. 2012) (similar). Instead, the allegations attributed to those individuals amount to mere after-the-fact speculation and criticism—the very essence of impermissible fraud-by-hindsight pleading. *See In re Triangle*, 988 F.3d at 753.

2. Isolated Criticisms Do Not Establish "Widespread" Problems

To the extent Plaintiffs' CWs do provide first-hand accounts, the subject matter of their statements is irrelevant. For example, the AC quotes three CWs that had negative views about unspecified aspects of K12's "training for staff," AC ¶¶ 75-76, 78, and cites generalized criticisms

[18] *See Teachers' Ret. Sys. of La. v. Hunter*, 477 F.3d 162, 174 (4th Cir. 2007) ("When the complaint chooses to rely on facts provided by confidential sources, it must describe the sources 'with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged.'" (citation omitted)).

from other witnesses concerning mostly undefined elements of K12's technology "systems," including one of the Company's many software programs, *id.* ¶¶ 67, 70, 76-77, 79. But such vague and isolated complaints from a few ex-employees fall well short of substantiating Plaintiffs' contention that K12 had "widespread technology problems" and "failed to provide proper support and training." *Id.* ¶ 59; *see Steiner v. MedQuist Inc.*, 2006 WL 2827740, at *23 (D.N.J. Sept. 29, 2006) (finding "a handful of customer complaints" among "thousands" of customers is "insignificant as a matter of law"); *Longman*, 197 F.3d at 686 (three examples from 1,000 stores is not "widespread"). In any event, the AC "contains no particularized factual allegations that connect the red flags" these witnesses purport to describe "with a specific problem " relating to the Miami-Dade rollout or any challenged statement. *Knurr*, 272 F. Supp. 3d at 804. And more fundamentally, "[e]ven if someone at [K12] believed" the Company's training and technology was inadequate in some respect, "no fact alleged suggests that [any Defendant] was this person," or that Mr. Davis or Mr. Medina even knew of the CWs' views. *Maguire Fin.*, 876 F.3d at 550. In short, the sporadic criticisms Plaintiffs rely on cannot substitute for "particularized facts showing that [D]efendants had contemporaneous information indicating" any specific challenged statement was false or misleading. *Knurr*, 272 F. Supp. 3d at 804.

3. Mr. Davis's Reflections Are Not "Admissions"

Given their lack of particularized factual allegations demonstrating Defendants' contemporaneous knowledge, Plaintiffs attempt to salvage their position by suggesting that Mr. Davis *subsequently* "admitted"—during an October 26, 2020 investor call—that "the Miami-Dade implementation was doomed from the start." AC ¶ 121. Of course, Mr. Davis said no such thing. Instead, he merely reflected, after-the-fact, as follows:

> [W]e faced a very large custom implementation with numerous systems interfaces and evolving requirements. Because we believe in the vision of [Miami-Dade] Superintendent Carvalho, we committed to delivering that solution in 6 weeks,

> something that should have taken us 6 months to implement in regular circumstances. Unfortunately, this just wasn't enough time to iron out all the kinks in the interfaces and systems in a short time frame.

Ex. 10 at 6. This retrospection gives no hint that Mr. Davis knew or believed *at the time of any challenged statement* that K12 could not deliver for Miami-Dade. It merely acknowledges that the end-result was not what K12 intended. But being "ultimately wrong is not enough to support an inference of scienter." *Yates v. Mun, Mortg. & Equity, LLC*, 744 F.3d 874, 887 (4th Cir. 2014). Instead, Plaintiffs' reliance on this statement "amounts to little more than pleading fraud by hindsight," which "is precisely what Congress intended for the PSLRA to eliminate." *In re Triangle*, 988 F.3d at 753.

4. Unrelated "Data Breaches" Are Irrelevant

The allegation that K12 or one of its partner schools experienced two vaguely described "data breaches" in a span of six years suffers the same defects as the AC's claim of "widespread" problems. AC ¶ 64. The AC says nothing about any Defendant's knowledge of those prior breaches, nor does it explain how they relate to any challenged statement. And the only well-pled fact—that the "system" accessed in 2015 "**was external** to K12's own systems"—makes the breaches irrelevant on their face to representations that the Company *itself* "maintain[s] a layered security architecture," *id.* ¶ 96 (**Statement 20**) and "dedicate[s] personnel and resources to maintain multiple levels of protection," *id.* ¶ 97 (**Statement 21**). In any event, that investors learned of those breaches years ago "substantially waters down any inference of scienter." *Knurr*, 272 F. Supp. 3d at 802. [19]

[19] *See* Ex. 18, CAVA Notice of Data Breach (Jan. 13, 2016); Ex. 19, Alyson Klein, *K12 Inc. Data Breach Opens Doors to Students' Personal Information*, edweek.org (July 10, 2019). Both of these public sources are judicially noticeable to show "what the market knew." *In re Human Genome*, 933 F. Supp. 2d at 758.

5. Bald "Core Operations" Allegations Carry No Weight

In a single paragraph, the AC baldly alleges that the "Individual Defendants, in their roles as top-level executives, would have been aware of all relevant issues impacting the very core of their business." AC ¶ 120. As an initial matter, analysts cited in the AC contradict that sweeping assertion, emphasizing that the Miami-Dade program "was not part of [K12's] core business." Ex. 17 at 1. Further, the Fourth Circuit has roundly rejected contentions that "defendants must have acted intentionally or recklessly . . . merely because . . . they were senior executives" and spoke about "a core business of the Company." *Yates*, 744 F.3d at 890. Because the AC lacks "detailed allegations establishing [D]efendants' actual exposure to" information contradicting their statements, it "falls short of the PSLRA's particularity requirements." *Id.*

6. Generic "Access" To Company Information Is Insufficient

In the same vein, Plaintiffs repackage their CW allegations to assert that the Individual Defendants "regularly attended . . . meetings" and oversaw K12's operations. AC ¶ 124. But if anything, allegations that Mr. Davis was "hands-on," AC ¶ 124-27, "expected people to solve things," *id.* ¶ 125, and held meetings "regarding policy recommendations that would make sense for students," *id.* ¶ 127, reflect laudable "diligence rather than evidence of a nefarious purpose." *Yates*, 744 F.3d at 889. "Monitoring company operations, discussing company business on conference calls, and signing off on financial statements are all part and parcel of the role of a senior executive and do not, without more, support an inference of actual exposure to a problem as required to establish scienter." *Knurr*, 272 F. Supp. 3d at 800.[20] None of this general oversight

[20] The AC's one-sentence, conclusory allegation that "[a]s officers of the Company, the Individual Defendants had an opportunity to commit securities fraud," AC ¶ 119, fails for the same reason. Corporate position alone cannot give rise to an inference of scienter, *Yates*, 744 F.3d at 890, and "opportunity" without motive is irrelevant, *In re Acterna*, 378 F. Supp. 2d at 576-77.

shows Defendants' knowledge that any particular challenged statement was false. *See id.* at 801.

B. Opposing Inferences Outweigh Any Suggestion Of Scienter

The scienter inquiry requires this Court to "compare the malicious and innocent inferences cognizable from the facts pled." *Yates*, 744 F.3d at 885. Plaintiffs' claims can be sustained only if the malicious inference is "as compelling as any opposing innocent inference." *Id.* (citation omitted). The innocent—and far more compelling—narrative here is that, in March and April 2020, at the outset of a rapid, pandemic-driven move to virtual education in the United States, K12 brought to bear two decades of experience as one of the nation's leading providers of online learning services. Guided by a justified belief in its ability to help students and families navigate these unprecedented challenges, the Company stepped up to deliver customized solutions for more than a hundred new partner schools and school districts across the country. And it did so to record financial success. It is true that two of those engagements—including an ambitious project for one of the nation's largest school districts—presented challenges that K12 ultimately was unable to overcome. But those facts suggest "an inference that [K12] was simply in over its head" with respect to the Miami-Dade project. *Id.* at 893. That is not securities fraud. *Id.*

1. Plaintiffs' Theory Defies Common Sense

Courts should afford scienter allegations only "the inferential weight warranted by context and common sense." *In re Triangle*, 988 F.3d at 751 (quoting *Yates*, 744 F.3d at 885). Here, Plaintiffs' theory of fraud makes no sense at all. According to the AC, K12 publicly promoted its Miami-Dade relationship as late as August 19 in order to attract new customers, despite knowing that its rollout of that program *just 11 days later* was "doomed" to fail. AC ¶ 121. But it "defies common sense to suppose" that K12 "withheld bad news to entice investment, while knowing it soon would release even worse news and thereby drive away all of the investment it had just garnered." *In re BearingPoint Sec. Litig.*, 525 F. Supp. 2d 759, 771 (E.D. Va. Sept. 12, 2007),

aff'd in relevant part, *Matrix*, 576 F.3d at 183, 190.

2. K12 Gave Away Its Products And Services For Free

Plaintiffs acknowledge that K12 responded to the pandemic by "offering free online curriculum, platforms, training and technical assistance to students, their families and to school districts." AC ¶ 84. And that concession underscores the implausibility of Plaintiffs' fraud narrative. If Defendants knew their products and services were critically flawed, it would be illogical for them to grant "nearly 70,000 students, teachers, and families" access to those offerings free of charge. *Id.* Doing so would only invite K12's supposed victims to discover the very "fraud" that Defendants were allegedly hiding from investors—all without financial upside for the Company. That is "not even plausible, much less convincing." *Cozzarelli*, 549 F.3d at 627.

3. Mr. Davis Was Forthcoming To Investors

As discussed, the AC tries to twist after-the-fact acknowledgements by Mr. Davis of shortcomings in K12's Miami-Dade rollout as an admission that Defendants were lying to the market all along. *See, e.g.*, AC ¶ 55; Ex. 9. But accepting responsibility for operational issues more than a full week before the end of the alleged Class Period—*i.e.*, while the purported scheme was still supposedly ongoing—*cuts against* an inference of fraud. Such disclosures "support[] a strong inference that defendants were not acting with scienter but rather were endeavoring in good faith to inform" investors. *Yates*, 744 F.3d at 888 (internal quotation marks omitted).

CONCLUSION

Defendants respectfully request that the Court dismiss the AC with prejudice.[21]

[21] Because Plaintiffs have not established a primary Section 10(b) violation, their derivative Section 20(a) claim for control-person liability also fails. *See Yates*, 744 F.3d at 894 n.8.

Date: May 20, 2021

Respectfully Submitted,

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