UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MIRIAM EDWARDS, Individually and On Behalf of All Others Similarly Situated, Plaintiff, v. MCDERMOTT INTERNATIONAL, INC., DAVID DICKSON, and STUART SPENCE, Defendants.	Case No.: 4:18-cv-04330

THE SECTION 14(a) LEAD PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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STATEMENT OF NATURE AND STAGE OF PROCEEDINGS

This is a putative class action brought by Lead Plaintiff, The Public Employees' Retirement System of Mississippi ("Plaintiff"), under Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 ("Exchange Act").[1] Plaintiff opposes Defendants' motion to dismiss Plaintiff's Complaint under Rule 12(b)(6) (the "Motion" or "Mot."; ECF 124).

STATEMENT OF ISSUES

Whether the Complaint adequately alleges violations of Sections 14(a) and 20(a) of the Exchange Act such that Defendants' Motion should be denied in its entirety.

INTRODUCTION AND SUMMARY OF ARGUMENT

This securities class action concerns the May 2018 Merger between Defendants McDermott International, Inc. and Chicago Bridge & Iron Company, N.V. ("CB&I"). The Merger was devised and effectuated by the Individual Defendants: McDermott CEO David Dickson, McDermott CFO Stuart Spence and CB&I CEO Patrick Mullen. In assessing the Merger, McDermott analysts and investors, as well as a McDermott director, expressed serious concerns over the valuation, risks, and liabilities to McDermott resulting from CB&I's four large, long-troubled Focus Projects. In response, Defendants assured investors that McDermott's "extensive" due diligence of the Focus Projects justified the Merger valuation and accounted for all foreseeable negative charges, and that McDermott's due diligence established that the Focus Projects had been "de-risked."

[1] Unless otherwise indicated, all capitalized terms have the same definition as used in the Amended Class Action Complaint for Violation of Sections 14(a) and 20(a) of the Securities Exchange Act of 1934 (ECF Doc. 98) (the "Complaint"). Citations to "¶ _" are to paragraphs in the Complaint. Unless otherwise indicated, all emphasis is added and all internal citations are omitted.

Unbeknownst to McDermott's shareholders voting on the Merger, Defendants' Proxy Solicitations contained materially untrue statements and omissions of material fact in that: (1) CB&I had internally forecast that it would incur at least $1 billion in additional, undisclosed costs associated with these Focus Projects; and (2) the assessment of the fair value of CB&I therein did not accurately value the Focus Projects and violated Generally Accepted Accounting Principles ("GAAP"). Moreover, the McDermott Defendants' repeated assurances, backed by their "extensive" due diligence, that the Focus Projects had been de-risked were materially misleading because any minimal, let alone extensive, due diligence did or would have uncovered the truth. Regardless of whether Dickson and Spence wrongly believed that they could successfully operate the merged company because of their experience, they had an objective obligation in the proxy solicitation process to disclose the true facts concerning the risks, forecasted charges and valuation of the Merger. The McDermott Defendants learned these facts in due diligence—or would have learned of them if not for their negligence—and the facts were in direct conflict with Defendants' public assurances that the Focus Projects had been "de-risked." Meanwhile, Mullen had an active financial motive to avoid disclosing the truth in order to avoid CB&I's bankruptcy and to cause McDermott's shareholders to approve the Merger.

The Defendants' misrepresentations quickly came to light in a disastrous avalanche of bad news. Within six months of the Merger, McDermott disclosed a total negative change in the Focus Projects' value of nearly $1 billion ***as of the date of the Merger***, causing the stock price to plummet to $7.73 per share, down 40% in a single day and down over 62% (from $20.70 per share) from the closing date of the Merger. Throughout 2019, McDermott announced additional hundreds of millions of dollars of charges relating to the Focus Projects, culminating in the temporary halting of trading on September 18, 2019, amid rumors of bankruptcy. By the close of trading on September 19, 2019, McDermott stock traded at just $1.58 per share. Ultimately, on January 21, 2020, McDermott filed for bankruptcy, costing common stock investors everything.

The Complaint's allegations state a violation of Section 14(a), which requires that a company make "full and fair disclosure to shareholders" so that they may make a fully informed vote. *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 381-85 (1970). In response, Defendants filed a Motion that is based on unsound legal theories and improper factual arguments. Three of Defendants' four purported grounds for dismissal are based on legal arguments that have no support within this—or any—Circuit. ***First***, Defendants misstate the pleading and dismissal standards for Section 14(a) claims, seeking to impose an unjustified higher pleading burden on Plaintiff and asking this Court to create a scienter element where there is none. *See* Sections I, III. ***Second***, as Defendants themselves concede, the Supreme Court has already determined that Section 14(a) creates a private cause of action. *See* Section I(A). ***Third***, Defendants' attempt to mischaracterize the direct claims against them brought on behalf of a class of injured shareholders into derivative claims brought on behalf of McDermott is contrary to prevailing case law. *See* Section II.

Defendants' arguments focused on the sufficiency of the Complaint's allegations setting forth a violation of Section 14(a) equally fail. The elements of a Section 14(a) claim are clear and long-established: "(1) defendants misrepresented or omitted a material fact in a proxy statement; (2) defendants acted at least negligently in distributing the proxy statement; and (3) the false or misleading proxy statement was an essential link in causing the corporate actions." *Braun v. Eagle Rock Energy Partners, L.P.*, 223 F. Supp. 3d 644, 649 (S.D. Tex. 2016). Plaintiff sufficiently alleges each of these elements. *See* Sections III(B), IV & V. Specifically, Defendants' attempts to minimize their numerous, positive false and misleading representations concerning the Focus Projects and the risks they posed to McDermott's investors by characterizing them as immaterial, forward looking or mere opinions are all without merit. *See* Section IV.

"Unlike poker where a player must conceal his unexposed cards, the object of a proxy statement is to put all one's cards on the table face-up." *Campbell v. Transgenomic, Inc.*, 916 F.3d 1121, 1125 (8th Cir. 2019). Defendants hid their cards from the Class, which led to disastrous shareholder injury, McDermott's bankruptcy, and SEC and criminal investigations. Plaintiff's allegations clearly state a claim under Section 14(a).

STATEMENT OF FACTS

CB&I's "Focus Projects" Were Subject to Heightened Scrutiny by McDermott

On December 18, 2017, McDermott, a company known for building offshore oil platforms involved in "upstream" oil and gas production, and CB&I, an engineering and construction company focused on the "downstream" oil and gas production industry, announced that the two companies had agreed to merge through an all-stock transaction to be voted on by each company's shareholders. ¶¶29, 33, 72. The terms of the Merger provided that McDermott's shares would be split one-for three and CB&I shareholders would receive 0.82407 shares of McDermott common stock. McDermott's and CB&I's shareholders would receive 53% and 47%, respectively, of the combined company. ¶201.

McDermott's CEO and CFO, Defendants Dickson and Spence would remain in those positions in the merged company.

McDermott investors were initially skeptical of the proposed Merger because, by mid-2017, CB&I faced considerable legal and financial exposure. This required McDermott to perform extensive diligence to examine and fairly value CB&I's ongoing construction projects and potential risks posed to McDermott's financial performance and profitability. ¶¶40-60. CB&I and its executives were alleged to have committed securities fraud through various accounting violations and misrepresentations related to delays and costs in a major nuclear plant construction project. ¶¶41-50; *See In re Chicago Bridge & Iron Co. N.V. Sec. Litig.*, 2018 WL 2382600, at *1 (S.D.N.Y. May 24, 2018).

CB&I's failed nuclear plant construction project was not the only, or greatest, threat to CB&I's financial viability. In 2013 and 2014, CB&I entered into four fixed-price construction projects in the United States: two LNG export facility projects known as Freeport and Cameron, and two gas turbine projects known as IPL and Calpine (the "Focus Projects"). ¶¶52-56. Under accounting principles, once CB&I determined that those projects would incur a loss, CB&I was required to accrue as an accounting charge all *anticipated* losses of those projects. ¶¶89-93. Throughout 2017, CB&I reported declining performance and hundreds of millions of dollars in increasing operating charges due to problems at the Focus Projects. ¶¶57-71. In light of CB&I's increasing charges and costs, between December 3, 2016 and December 18, 2017, CB&I's common stock declined in value by over 43%. ¶73. CB&I acknowledged in its public statements in 2017 that it would seek to sell its technology business to avoid bankruptcy. ¶¶8, 60-71.

McDermott, on the other hand, was financially stable but looking for new areas of growth. Dickson and Spence were motivated to acquire CB&I at a distressed price to diversify McDermott's operations, and make it less dependent on any single customer and fluctuating oil prices. ¶¶5-6, 74. Moreover, as the senior-most executives of a post-merger company twice McDermott's then-current size, Defendants Dickson and Spence would be entitled to stock and cash compensation in a higher tier. ¶¶254-56. Also, that an acquisition of CB&I would make McDermott less desirable to a hostile takeover and enable them to retain the perquisites of their executive offices. *See* ¶¶5, 181-86.

The Proxy Solicitations Emphasize McDermott's "Significant" and "Extensive" Due Diligence of the Focus Projects in Defense of the Merger

Between December 18, 2017 and the date of the Proxy vote on May 2, 2018, the McDermott and CB&I Defendants described the purported benefits of the Merger to McDermott's shareholders. They did so by assuring investors that the long-troubled Focus Projects had been vetted through "extensive" due diligence, that the projects had been "de-risked" (*i.e.*, that CB&I had accrued sufficient charges to account for the risks of those projects), that Dickson and Spence had determined that the Focus Projects posed no material, future threats to McDermott, and that expected negative changes in value were fully accounted for in the exchange ratio for the transaction. ¶¶72-103; 157-96.

Defendants Announce the Merger, Emphasizing McDermott's Due Diligence of the Focus Projects

Defendants Dickson and Spence first acknowledged and addressed investor concerns about the impact of the Focus Projects during the December 18, 2017 conference call that accompanied the Merger announcement. Spence emphasized how, with respect to the Focus Projects, McDermott had "dedicated a significant amount of time performing joint due diligence with CB&I's team." ¶¶11, 76, 140. As a result, Spence explained how that due diligence provided McDermott with "a strong understanding of the key drivers and [we] are comfortable with what needs to be done with these [Focus] [P]rojects." *Id.*

Analysts immediately voiced concerns. A Credit Suisse analyst pressed for more information, asking, among other things: "How much due diligence have you done in terms of really getting your arms around the [Focus Projects] so that you can sort of give us some comfortability factor that you've really sort of priced in the potential risks on these projects?" ¶¶77, 139. Dickson immediately responded that "we have worked extensively with CB&I on due diligence," that "***an extensive amount of work has been done on these projects***," and that the "***significant amount of time and resources [spent] on this***" combined with Defendants' background in the oil and gas business, "***takes out a lot of the risk that you'd expect at the start-up***" of the Focus Projects. Dickson concluded that "we're very happy with the work that we've done and the work to go." ¶¶78-79, 139.

Defendant Mullen similarly stated in a December 19, 2017 press release that a settlement with Cameron had "resolv[ed] all past commercial issues and align[ed] all parties toward the successful completion of the project." Neither Mullen nor CB&I disclosed that CB&I undertook obligations in that agreement that exposed the combined entity (after the Merger) to an additional $1 billion of charges. *See* ¶83.

While analysts expressed surprise and some cautioned about the risks being undertaken by McDermott, they were mollified by Defendants' representations of extensive due diligence of the Focus Projects. For example, a December 19, 2017 Deutsche

Bank report stated that McDermott "[b]egan the due diligence process in the summer (>3 mos)," and "Mgmt feels very comfortable with [the Focus Projects], ran a sensitivity analysis on productivity factors to get more comfortable." ¶81; *see also* ¶82.

Defendants Downplay CB&I's $101 Million Negative Charge Relating to the Focus Projects in February 2018

On February 20, 2018, two months after the Merger announcement, CB&I reported its fourth quarter 2017 operating results, which revealed that CB&I was forced to recognize $101 million of operating charges relating to the Focus Projects. ¶¶87, 94. This news was itself misleading since CB&I and Mullen had under accrued for those charges in its 2017 and first quarter 2018 financial statements in violation of GAAP. The CB&I Defendants failed to "make reasonably dependable estimates" given that its internal analysis showed over one billion dollars of additional charges related to the Focus Projects. ¶¶95-100.

The Defendants sought to mollify investors with respect to the $101 million of charges. ¶¶87-89. The following day, Dickson and Spence spoke directly to investors and analysts, asserting that the "transaction is proceeding on track and on schedule." ¶¶101, 154. Moreover, Dickson affirmatively stated that the $101 million in "overruns on these projects was considered during our due diligence and these charges are well within the potential downside scenarios we contemplated as part of our due diligence." ¶¶11, 101, 154. Further downplaying these substantial charges, Dickson explained that "integration planning [is] now well under way, we're even more confident in our synergy expectations and looking forward to a timely closing." ¶¶101, 154.

Analysts reacted positively. In a February 21, 2018 report, Credit Suisse noted that "[e]ven with the [$101 million in] charges, [McDermott] maintained the company is well within the ranges contemplated as part of due diligence." ¶102. Another analyst from Scotia Howard Weil similarly reported that McDermott's management was not concerned by the charges because "it has been kept apprised of any and all issues encountered by its other half [CB&I] and believes that the numbers it has offered remain in the range of outcomes contemplated by MDR [McDermott] during due diligence and it continues to gather optimism around greater synergy and cost savings figures." *Id.*

The Proxy Statement Affirms That the Focus Project Risks "Could Be Managed" and "Avoided"

The Proxy Statement, the final amendment to which was finalized on March 27, 2018, with various supplemental materials filed afterwards, was mailed to McDermott shareholders of record as of April 4, 2018. ¶160. The Proxy Statement recommended that McDermott and CB&I shareholders vote in favor of the Merger.

McDermott was compelled to reveal in the Proxy Statement that one of its Directors, Stephen Hanks, voted against the Merger. ¶162-66. Based on Mr. Hanks' prior experience in a similar deal that led to a company's bankruptcy, the Proxy Statement communicated that he believed that "the Combination is too risky for McDermott" because the problems already experienced in the Focus Projects "may be difficult for McDermott's management to remedy (at least in the near term)." ¶164. The McDermott Defendants rejected Mr. Hank's warnings, stating forcefully that "based on McDermott's due diligence and the experience and capabilities of McDermott's management team, the risks related to CB&I's

four significant contracts that have negatively impacted CB&I's results of operations in recent periods could be managed and that similar problems could be avoided in the future through improved project management." ¶165.

The Proxy Statement also contained an unaudited pro forma balance sheet. No fair value adjustments, other than intangible assets, were provided in this balance sheet. McDermott noted that "we have assumed that the fair value of all assets and liabilities equal their respective carrying values." ¶170. Given the "extensive" due diligence McDermott represented it had completed on the Focus Projects, any negative adjustments related to the Focus Projects should have been incorporated to be in compliance with SEC purchase accounting rules. ¶¶170-72.

Defendants Report "Excellent Operating Performance" for the Focus Projects Weeks Prior to the Proxy Vote

McDermott and CB&I filed several Proxy Supplements between April 2, 2018 and May 2, 2018, the date of the Proxy vote, in order to convince shareholders to vote in favor of the Merger. On April 12, 2018, CB&I reported that it experienced, as of March 31, 2018, "excellent operating performance across the company's portfolio of projects, including the Cameron and Freeport LNG projects and the Calpine combined-cycle natural gas power project." ¶¶174-75. CB&I did not report a penny of charges to the Focus Projects, in violation of GAAP because, among other things, the CB&I Defendants failed to "make reasonably dependable estimates" given that its own internal analysis showed over one billion dollars of additional charges related to the Focus Projects. *See* ¶¶89-100. This positive news supported the Merger. Credit Suisse wrote that CB&I's results are "a positive surprise and certainly timely given concerns the deal was at risk." ¶178.

On April 23, 2018, just weeks prior to the Merger vote, Subsea 7 S.A. ("Subsea 7") issued a press release confirming that it had made an unsolicited offer to acquire McDermott for $7.00 per share (pre stock-split) in cash or up to 50% in Subsea 7 stock and the balance in cash. ¶181. This offer, valued at $2 billion, was a premium of 16% to McDermott's closing price of $6.05 per share. *Id*. McDermott rejected Subsea 7's offer outright, and in its own April 23, 2018 press release, affirmed that "we remain fully committed to completing the transformational transaction [with CB&I] and our Board has reaffirmed its recommendation." ¶182. On April 23, 2018, an industry publication reported on McDermott's decision to go forward with the CB&I Merger rather than with Subsea 7, noting that the merger with CB&I was "a deal that was widely seen as a defensive merger" because it would guarantee that Defendant Dickson would be in charge of the new combined company, unlike the Subsea 7 proposal. ¶186.

Also on April 23 & 24 2018, CB&I filed a press release and Form 10-Q with the SEC that confirmed its positive first quarter results, and reported a 78 percent increase in net income versus the year-ago quarter. ¶¶187-88. On April 24, 2018, McDermott issued a proxy solicitation press release noting that the parties had identified an additional $100 million of synergies anticipated by the Merger. ¶189. That same day, Defendant Dickson spoke on a conference call with investors as part of the proxy solicitation process. ¶¶190-93. In this last outreach to investors in advance of the Merger vote, Dickson stated: "We have spent a great deal of time with CB&I since we initiated this effort last summer and are more enthusiastic than ever about the opportunities this combination will offer to our customers." ¶191. Dickson commented specifically on the Focus Projects, stating: "[W]e have spent considerable time with CB&I reviewing the project portfolio and feel very comfortable with the progress they've made to de-risk the focus three projects." ¶192.

McDermott Shareholders Approve the Merger

On May 10, 2018, the Company announced that on May 2, 2018, McDermott shareholders overwhelmingly approved the Merger. ¶198.

The Focus Projects Carried Hundreds of Millions of Dollars of Undisclosed Anticipated Costs at the Time of the Merger

Contrary to the CB&I Defendants' representations in press releases and SEC filings, and the McDermott Defendants' representations that "the risks related to the [Focus Projects] . . . could be managed," that the Focus Projects "have been significantly de-risked," and other similar statements, accounts from former senior employees of CB&I and McDermott and internal forecast and risk assessment documents provided to Plaintiff demonstrate that the Proxy Solicitations concealed ***well over $1 billion in undisclosed costs*** directly related to the Focus Projects. ¶¶104-35. These reliable sources make clear that any competent due diligence did or would have uncovered these costs and risks. *Id*.

For example, the former Director of Project Controls at the Cameron Focus Project (FE-1) was tasked with calculating the true costs on Cameron, as well as to account for costs already accrued. ¶195. FE-1 recounted how, when the Merger was announced at the of 2017, anticipated costs had escalated to well over $1 billion above CB&I's current reported costs. FE-1 stated that it was "***as clear as the nose on your face that the [existing]***

forecast [reflected in Defendants' public statements] was not adequate." ¶108. Internal CB&I documents available to Mullen and the McDermott Defendants confirm in stark detail FE-1's account of over $1 billion in undisclosed charges. "Risk Registers" compiled as of December 31, 2017 and March 31, 2018 were drafted by FE-1 and circulated widely throughout CB&I. ¶¶107, 121, 124. FE-1 and others (FE-2 and FE-3) explained that the Risk Registers were key sources of information necessary to any competent due diligence of Cameron, the largest of the four Focus Projects, and clearly document the extent of the known, undisclosed charges to Cameron. *Id*. FE-2, a former Financial Operations Controller for CB&I until November 2017, received these Risk Registers, and provided these and similar documents for McDermott's review. ¶120; *see also* ¶125.

Specifically, the Risk Registers demonstrate that Cameron's Project Controls identified over $1.2 billion of itemized forecasted risks as of December 31, 2017, $468 million of which were ***required*** to have been charged to the project's and CB&I's financial statements prior to the Proxy vote, but were not. ¶110. By March 31, 2018, Cameron's Project Controls identified $1.34 billion of itemized forecasted risks, $513 million of which were ***required*** to have been charged to the project's and CB&I's financial statements for the first quarter of 2018, but were not. ¶111. Rather than report these enormous forecasted costs that had increased from December 31, 2017 to March 31, 2018, CB&I did not charge ***a single penny*** of additional risk to Cameron in its first quarter financials, issued shortly prior to the Proxy vote. ¶115. FE-1 recounted how CB&I's "override of the project financials" was a "***deception to the stakeholders***" of McDermott and CB&I. ¶116. FE-1, who left McDermott on June 12, 2018, shortly after the Merger closed, provided a written exit survey in which he warned—presciently—that "***Cameron is going to lose an additional 700MM to 1.2B before this project is completed***" and complained that "Project Controls is forced ***to report untruthful cost forecasts month after month***." ¶122. FE-1's assessment was entirely accurate. By the end of October 2018, McDermott reported $647 million in additional charges to Cameron (¶123), and that amount increased in 2019.

Other former employees involved with CB&I's finances and risk controls confirmed FE-1's accounts of undisclosed charges, and the McDermott Defendants' awareness or negligent disregard of those charges. ¶¶120-26. FE-3, a Project Controls Manager at CB&I and McDermott who worked with FE-1 at Cameron, explained that Defendant Spence "knew the numbers" prior to the Merger because FE-3 went over the true cost estimates with him, and that emails with the un-doctored forecasts were sent to both Defendants Spence and Dickson. ¶125. FE-4, the Senior Vice President for Construction Operations at CB&I until the Merger, who reported directly to Defendant Mullen until June 2017 and to Mullen's direct report through the Merger, along with FE-4's own direct report (FE-5), each described numerous meetings and reports documenting the delays and costs on the Focus Projects. ¶¶127-35. FE-4 and FE-5 and confirmed that Project Controls documents like the Risk Registers, described above, were known to Mullen and other members of CB&I's management, and provided to McDermott during due diligence. *Id.*

McDermott Reveals $1 Billion of Negative Changes in Value to the Focus Projects

Less than three months following the Merger, McDermott reported $221 million of charges to estimated costs associated with three of the Focus Projects. ¶203. McDermott stated that "the increases are within the bounds of the scenarios ***we contemplated during***

our due diligence." *Id.* Analysts responded cautiously with the expectation that these charges were the end to negative charges on the Focus Projects. For example, UBS reported that "some may see [the charges] as 'kitchen sinking' of the [Focus] Projects for MDR management to clear the deck going forward." ¶208. That was not the case.

Just three months later (six months after the Merger closed), on October 30, 2018, the McDermott Defendants disclosed an additional $744 million in charges to three of the Focus Projects: $482 million on Cameron, $194 million on Freeport and $68 million on Calpine. ¶209. As discussed above, these cost overruns had been forecasted by internal CB&I documents available to CB&I, McDermott, Mullen, Dickson, and Spence prior to the Merger. The July and October charges totaled nearly $1 billion of undisclosed charges that should have been revealed in CB&I's financial disclosures, and in the Proxy Statement and Solicitations, totaling more than half of the $1.75 billion in value paid to CB&I shareholders. While the Company pointedly refused to report any fair value adjustments in the Proxy Statement, in its October 30, 2018 Form 10-Q, the Company now recorded these charges as adjustments to the fair value reflected in the balance sheet. ¶213.

Analysts reacted negatively. UBS wrote that the "additional cost overruns are surprisingly large." ¶217. In a conference call on October 30, 2018, in sharp contrast to the rosy, positive statements made in solicitation of the Proxy vote, Dickson stated with respect to the Cameron project that "the contract was unfavorable to begin with and then moved into lengthy periods in which CB&I underperformed." ¶221. Through their statements on October 30, 2018, in which they characterized the $744 million in charges relating to the Focus Projects as a change in estimate ***as of the Merger Date***, rather than a current third quarter charge, the McDermott Defendants acknowledged that the facts warranting the charges existed at the time of the Merger. ¶225.

As a result of the negative news related to the Focus Projects, analysts downgraded the stock, and the Company's share price fell $5.14 per share, nearly 40%, to close at $7.73 per share on October 31, 2018. ¶229. This was a drop of over 62% from the $20.70 closing price following the Merger, on May 10, 2018. ¶¶16, 201.

On February 13, 2019, McDermott reported an additional $168 million adverse change in the estimates made in the Proxy Statement. ¶234. McDermott's share price fell $2.48 per share, or 26%, from $9.30 to close at $6.82 per share. ¶235. McDermott continued to take charges on the Focus Projects as the Company's ability to operate as a going concern crumbled. ¶¶19-20; 237-49. On the morning of September 18, 2019, news that McDermott had hired a restructuring specialist caused the Company's stock to crater until trading was halted. ¶250. McDermott stock began trading later in the day, and closed at $2.14 per share, falling to a close of $1.58 per share the next day. ¶¶251-52. Moody's downgraded McDermott's corporate family rating, and attributed the downgrade to "the hiring of advisors to evaluate strategic options in light of the higher than expected costs and cash outflow on a few problem projects [i.e., the Focus Projects] and the lower than expected proceeds from asset sales." ¶253.

McDermott Belatedly Reveals an SEC Investigation, Spence Resigns, the Companies Go Bankrupt, and a Criminal Investigation is Launched

On November 4, 2019, after the Complaint was filed, McDermott issued weaker than expected third quarter 2019 results in a Form 8-K and simultaneously filed Form 10-

Q, missing both on earnings and revenue and announcing a $1.9 billion quarterly loss. *See* Insley-Pruitt Decl., Exs. A-B.[2] McDermott also disclosed that it was the target of an SEC investigation over disclosures about projected losses surrounding the Cameron Focus Project, and had received notice of this investigation months earlier, on July 26, 2019. *See* Insley-Pruitt Declaration, Ex. B at 46. In the wake of this negative news, Defendant Spence resigned, effective immediately, on November 5, 2019. *See* Insley-Pruitt Decl., Ex. C.

On January 21, 2020, McDermott and CB&I filed a suggestion of bankruptcy. ECF No. 120. The bankruptcy petition was approved on March 12, 2020, erasing entirely the value of McDermott common stock.[3] On February 28, 2020 McDermott revealed that the office of the United States Attorney for the Southern District of Texas had convened a Federal Grand Jury, which "is conducting a criminal investigation and requested various documents, including cost forecasts and other financial-related information, related to the Cameron LNG project." *See* Insley-Pruitt Decl., Ex. D at 153.

ARGUMENT

I. APPLICABLE LEGAL STANDARDS AND ELEMENTS

A. Section 14(a) of the Exchange Act

Section 14(a) makes it unlawful to solicit proxies "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78n(a)(1); *see also* Rule 240.14a-9.

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[2] The Court may take notice of publicly-available documents filed with the SEC. *See In re Sec. Litig. BMC Software*, 183 F. Supp. 2d 860, 884 (S.D. Tex. 2001).

[3] The corporate defendants sought and received permission from the Bankruptcy Court on January 23, 2020 to modify the automatic stay to allow them to proceed in this litigation. ECF No. 123.

The Supreme Court has held that Section 14(a) "ensur[es] full and fair disclosure to shareholders" so that they can make "an informed choice when they are consulted on corporate transactions." *Mills*, 396 U.S. at 381–85. The elements of a Section 14(a) claim are clear and long-established: "(1) defendants misrepresented or omitted a material fact in a proxy statement; (2) defendants acted at least negligently in distributing the proxy statement; and (3) the false or misleading proxy statement was an essential link in causing the corporate actions." *In re Browning–Ferris Indus. Inc. S'holder Deriv. Litig.*, 830 F. Supp. 361, 365 (S.D. Tex. 1993), *aff'd sub nom. Cohen v. Ruckelshaus*, 20 F.3d 465 (5th Cir. 1994). These elements were more recently reaffirmed in *Braun*, 223 F. Supp. 3d at 649–50. Defendants were legally required to disclose to McDermott's shareholders the true facts concerning the anticipated costs of the Focus Projects in the Proxy Solicitations.

In *J.I. Case Co. v. Borak*, the Supreme Court unanimously held that the Exchange Act implicitly authorizes a private right of action for rescission or damages to stockholders who alleged that they were injured by a merger authorized with a false or misleading proxy statement in violation of Section 14(a). *See* 377 U.S. 426, 428, 435 (1964). The Fifth Circuit explicitly affirmed this private right of action. *KBR v. Chevedden*, 478 F. App'x. 213, 215 (5th Cir. 2012) ("Chevedden's argument that § 14(a) does not create a private right of action is foreclosed by [*Borak*]"). Defendants explicitly "acknowledge that the Supreme Court created a private right of action under § 14(a)" in *Borak*. Mot. at 17.

While Defendants do not ask this Court to contravene prevailing law, and note that their contrary argument is made "solely for preservation purposes," it is worth noting that Defendants' placeholder argument that the Supreme Court "effectively overruled *Borak*" in its 2001 decision in *Alexander v. Sandoval*, 532 U.S. 275, 287-88 (2001), has been explicitly rejected by the Fifth Circuit. *See Chevedden*, 478 F. App'x. at 215, n.1 (discussing *Sandoval* and stating that "the Supreme Court has not overruled *Borak's* holding that § 14(a) creates a private right of action"); *see also Va. Bankshares v. Sandberg*, 501 U.S. 1083, 1104 n.11 (1991) (declining to question the holding of *Borak*).[4]

B. Pleading Standards Relevant to a Rule 12(b)(6) Motion to Dismiss

On a motion to dismiss a securities class action, courts must "accept all factual allegations in the complaint as true." *Id*.[5] Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8. While Rule 8 does not require "detailed factual allegations," a plaintiff must still provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (the complaint "must

[4] Defendants' citation to C.J. Roberts' comment at oral argument in a case brought under Section 14(***e***) (a section of the statute that was not implicated in *Borak*), which was later dismissed as improvidently filed, that "*Borak* may not be decided the same way today" has no import here. Mot. at 18. Indeed, C.J. Roberts gave no indication that he or the Court were inclined to overrule *Borak*. Similarly unavailing are Defendants' reliance upon decades' old law review articles or SEC commentary concerning private rights of action under the separate Section 14(e). *Id.*

[5] Plaintiff notes that Defendants' "Background" section, Mot. at 2-14, cites to only a single paragraph of the Complaint (*id*. at 10, citing ¶181), and otherwise contains Defendants' interpretations of information contained in various documents authored by them not contained in the Complaint. Defendants seek judicial notice of these documents, but their contents "may be considered only for the purpose of determining what statements they contain, and not for proving the truth of their contents." *In re Franklin Bank Corp. Sec. Litig.*, 782 F. Supp. 2d 364, 384-85 (S.D. Tex. 2011). The Court also may not take judicial notice of facts that are "subject to reasonable dispute." Fed. R. Evid. 201; *Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998); *In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 765 n.19 (S.D. Tex. 2012) (purported factual disputes "are more appropriately left for subsequent proceedings."). Factual arguments "are insufficient to support a motion to dismiss." *City of Pontiac Gen. Emps.' Ret. Sys. v. Dell Inc.*, 2016 WL 6075540, at *4 (W.D. Tex. Sept. 16, 2016).

be enough to raise a right to relief above the speculative level" to one that is "plausible on its face"); *see In re Willis Towers Watson plc Proxy Litig.*, -- F. Supp. 3d --, 2020 WL 508861, at *3 (E.D. Va. Jan. 31. 2020) ("*Willis Towers Watson II*") (sustaining Section 14(a) complaint pursuant to Rule 8).

The Private Securities Litigation Reform Act ("PSLRA") imposes only one additional pleading requirement with respect to Section 14(a): when a plaintiff alleges that a defendant "made an untrue statement of a material fact" or "omitted to state a material fact necessary in order to make the statements . . . not misleading," that plaintiff 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). And "if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed." *Id*.

Therefore, Defendants wrongly argue that Plaintiff is required to "state with particularity facts giving rise to a strong inference that the defendant acted with the ***required state of mind***" under another prong of the PSLRA, 15 U.S.C. § 78u-4(b)(2). Mot. at 14, 16-17. Section 14(a) plaintiffs need not plead particularized allegations of a state of mind because Section 14(a) requires only a showing of negligence to recover damages and "negligence is not a state of mind; it is a failure, whether conscious or even unavoidable (by the particular defendant, who may be below average in his ability to exercise due care), to come up to the specified standard of care." *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir. 2009); *see also S.E.C. v. Guardian Oil & Gas, Inc.*, 2014 WL 7330451, at *7 (N.D. Tex. Dec. 23, 2014) ("Defendant also confuses negligence with scienter where negligence is conduct, not a state of mind."); *Willis Towers Watson II*, 2020 WL 508861, at *8 ("[T]he Court concludes that the PSLRA's heightened scienter pleading requirement, relevant only to 'state of minds,' does not require particularized allegations of negligence in Section 14(a) claims."); W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 31, p. 169 (5th ed. 1984) ("negligence is conduct, and not a state of mind").[6]

II. PLAINTIFF'S SECTION 14(a) CLAIM IS DIRECT, NOT DERIVATIVE

Defendants argue that Plaintiff's claims are derivative on behalf of McDermott (rather than direct on behalf of McDermott's shareholders) and must be dismissed under Fed. R. Civ. P. 23.1, absent a pre-suit demand. Mot. at 19-22. Defendants are wrong.

Plaintiff and the Class of McDermott shareholders were entitled to vote on the Merger and were harmed when ***their*** shareholder voting rights—***not*** the Company's—were impaired. This also harmed shareholders' economic interests as a result. This satisfies the test to determine when a claim is direct instead of derivative: "[1] Who suffered the alleged harm—the corporation or the suing stockholder individually—and [2] who would receive the benefit of the recovery or other remedy." *Tooley v. Donaldson, Lufkin, & Jenrette, Inc.*, 845 A.2d 1031, 1035 (Del. 2004) (cited in Mot. at 20 n.5). In other words, "a court should look to the nature of the wrong and to whom the relief should go." *Id.* at 1039.[7] While

[6] Rule 9(b)'s heightened pleading standard is not applicable. Indeed, Defendants, correctly, do not argue that Rule 9(b) applies or that the Complaint's allegations "sound in fraud."

[7] Defendants entirely ignore the second *Tooley* factor, regarding relief sought. *See Tooley*, 845 A.2d at 1038-39 (rejecting the contention, as suggested in the Motion at 20, "that an action cannot be direct if all stockholders are equally affected or unless the stockholder's injury is separate and distinct from that suffered by other stockholders."). Defendants also recognize that Panamanian courts (McDermott is incorporated in Panama, ¶29) look to Delaware law. *Id.* at 21, n.5.

Section 14(a) claims sometimes may be properly plead derivatively on behalf of the corporation, here, Plaintiff alleges direct claims. *See Rudolph v. Cummins*, 2007 WL 1189632, at *2 (S.D. Tex. Apr. 19, 2007) (Section 14(a) claims "may be either direct or derivative") (citing *Borak*, 377 U.S. at 431).

First, Plaintiff alleges that Defendants made misrepresentations in the Proxy in order to influence how McDermott shareholders would "exercise their voting rights." ¶274; *see also* ¶275 (class members "were denied the opportunity to make an informed decision when voting on the Merger"); ¶¶2, 136, 266, 271 (same). The claim that "voting rights have been impaired" through a misleading proxy is direct, not derivative, as it is the "shareholders [who] have been damaged," not the company. *See Rudolph*, 2007 WL 1189632, at *2[8]; *see also Sandberg*, 501 U.S. 1083 (shareholders who voted on a merger transaction could allege a private direct right of action on behalf of the minority shareholders)[9]; *New York City Emps.' Ret. Sys. v. Jobs,* 593 F.3d 1018, 1022-1023 (9th Cir. 2010) (reversing district court's finding that plaintiff's Section 14(a) claim was derivative,

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[8] Defendants omit the above holding from *Rudolph*. In *Rudolph*, the plaintiff asserted five derivative claims and one direct claim, the latter which was brought under Section 14(a). The court observed that the plaintiff had alleged the impairment of voting rights, which the court noted was a direct claim. The court observed a wrinkle, however (which Defendants misconstrue). There, because in its complaint, Plaintiff alleged that "[t]he ***Company*** was damaged as a result of the material misrepresentations and omissions in the Proxy Statements," the Court treated the 14(a) count "as asserting ***both*** a ***direct*** and a derivative claim." *Rudolph*, 2007 WL 1189632, at *2. Contrary to Defendants' suggestion that proxy claims state a "classical derivative action" (Mot. at 22), *Rudolph* held that the plaintiff's cause of action was ***not*** solely derivative, even though the plaintiff had "purport[ed] to bring a claim for damages suffered by the corporation."

[9] The only decision Defendants cite addressing Section 14(a) claims in the context of a merger vote is *Freedman v. magicJack VotalTec. Ltd*., 2018 WL 6110996 (S.D. Fla. Nov. 21, 2018), where the plaintiff did not claim he was misled by the proxy (*id.* at *3) but that the merger consideration was inadequate, which is a derivative claim under the governing Israeli law (*id.* at *6).

as plaintiff had alleged that "shareholders were deprived of the right to a fully informed vote" and "this claimed injury is independent of any injury to the corporation and implicates a duty of disclosure owed to shareholders."); *Smith v. Robbins & Myers*, 969 F. Supp. 2d 850, 864 n.13 (S.D. Ohio 2013) ("the Section 14(a) claim here is based on allegations that Defendants prevented the Company's shareholders from casting an informed vote on a merger and therefore it is the Company's shareholders and their individual, corporate suffrage rights that are implicated and harmed—making it a direct claim."). To conclude otherwise "would be tantamount to removing the private right of action under Section 14(a)" and "contrary to the Congressional purpose of the statute as well as direct Supreme Court precedent." *In re Wells Real Estate Inv. Trust, Inc.*, 2010 U.S. Dist. LEXIS 143057, at *20-21 (N.D. Ga., Aug. 2, 2010). Defendants' brief ignores the Complaint's repeated allegations that voting rights were compromised.

Second, Plaintiff alleges it sustained economic losses when McDermott's stock price decreased after the truth—misrepresented in the Proxy—was revealed. *See, e.g.*, ¶¶28, 278, 279; *see also* ECF No. 16 at 6. Again, this is not a harm suffered by McDermott itself—one of the violators of Section 14(a)—but only those McDermott shareholders who were entitled to vote on the transaction and to whom the Proxy was directed. *See 7547 Corp. v. Parker & Parsley Dev. Partners, L.P.*, 38 F.3d 211, 226–30 (5th Cir. 1994) (holding that Section 14(a) claims—as distinct from state law derivative claims—only provided standing to persons who were eligible to vote). Investors who acquired McDermott common shares after the record date for the vote (April 4, 2018), are not members of the Section 14(a) Class, although they may be part of the Section 10(b) Class, and therefore are not entitled to share in the Section 14(a) Class recovery.

In this regard, *In re Bank of America Corp. Securities, Derivative, & ERISA Litigation*, 757 F. Supp. 2d 260 (S.D.N.Y. 2010), in which Section 14(a) claims were asserted directly ***and*** derivatively is instructive. The plaintiffs asserting direct claims sought "out-of-pocket damages [that] are equal to the diminution in the value of their personally held shares that occurred after corrective disclosures revealed the truth behind the Joint Proxy's representations" while the different plaintiffs asserting derivative claims asserted damages on behalf of the company "arising from BofA's overpayment" for the acquired company, and for "the injury to BofA's reputation and legal fees in defending legal and regulatory proceedings." *Id.* at 291. The court recognized that "[a] single act could [] inflict separate injury on both the corporation and the shareholder" and concluded that both the direct and derivative claims were properly stated because a decrease in the stock price following a corrective disclosure "is not necessarily co-extensive with injury to the corporation." *Id.* at 291-92 (citations omitted).[10] Nowhere in the Complaint is Plaintiff seeking compensation on behalf of McDermott for overpaying for CB&I.

Quoting from *LaSala v. Bordier et Cie*, 519 F.3d 121, 131 (3d Cir. 2008), Defendants insist that "[a]llegations tied to a 'declining stock price' fall within a category of injury that is a 'purely derivative harm.'" Mot. at 21. Defendants mischaracterize

[10] *See also In re Bank of America Corp. Securities, Derivative, & ERISA Litigation*, 281 F.R.D. 134, 141 (S.D.N.Y. 2012) (at class certification, court restated its ruling and cited additional authorities recognizing that shareholders may "bring direct claims under Section 14(a)").

LaSala, which recognized the co-existence of both direct and derivative claims. The Third Circuit noted that individual investors were undoubtedly entitled to bring direct claims for the "value discrepancy" of their stock arising from a "pump and dump" scheme, but also found that the corporation's trustees could assert a derivative claim itself to recover the harm based on it "declining stock price." *Id.*[11]

More fundamentally, the Supreme Court has held that a claim is derivative "only [in] those actions in which the right claimed by the shareholder is one the corporation could itself have enforced in court." *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, 529 (1984). Defendants fail to explain what suit McDermott could have brought arising from its ***own*** misconduct to address its stockholder's losses and to enforce their voting rights.

III. THE COMPLAINT ALLEGES NEGLIGENT CONDUCT IN CONNECTION WITH THE PROXY MISREPRESENTATIONS

A. Scienter is Not an Element of Section 14(a)

Defendants erroneously argue that there is a "debate" over whether Section 14(a) requires allegations of Defendants' negligence or the more demanding element of scienter. Mot. at 14-17. Courts within this Circuit have repeatedly confirmed that scienter is ***not*** an

[11] Defendants' other citations either recognize that Section 14(a) claims may be brought directly ***or*** derivatively, or are plainly inapposite. In *Sweeney v. Harbin Electric Inc.*, the court cited authority suggesting that "an allegation of diminution in the value of stock ***based on a breach of fiduciary duty***" is derivative. 2011 WL 3236114, at *2 (D. Nev. 2011). Defendants place an ellipsis over these crucial emphasized words (Mot. at 21), obscuring this statement. In any event, fiduciary duty claims alleging "diminution in shareholder value" may also be brought directly. *Northstar Fin. Advisors Inc. v. Schwab Invs.*, 779 F.3d 1036, 1058 (9th Cir. 2015). Thus, to the extent *Sweeney* held differently (which it did not), it has been overruled by the Ninth Circuit in *Northstar Financial*. Moreover, in *In re Westinghouse Securities Litigation* (cited in the Mot. at 21), the defendants ***acknowledged*** (and the court agreed) that the plaintiff's Section 14(a) claim ("Count I") was direct, and not derivative. 832 F. Supp. 989 (W.D. Pa. 1993).

element of Section 14(a). *See, e.g.*, *Braun*, 223 F. Supp. 3d at 649-50 (plaintiffs must allege that defendants acted "at least negligently" in distributing the proxy statement); *In re Fossil, Inc.*, 713 F. Supp. 2d 644, 654-55 (N.D. Tex. 2010) (same); *Browning–Ferris Indus.*, 830 F. Supp. at 365 (same). Courts of Appeals across the country have reached the same conclusion. *See In re Willis Towers Watson plc Proxy Litig.*, 937 F.3d 297, 307 (4th Cir. 2019) (applying negligence standard) ("*Willis Towers Watson I*"); *S.E.C. v. Das*, 723 F.3d 943, 953–54 (8th Cir. 2013) (same); *Beck*, 559 F.3d at 682 (same); *Wilson v. Great Am. Indus., Inc*., 855 F.2d 987, 995 (2d Cir. 1988) (same); *Herskowitz v. Nutri/System*, 857 F.2d 179, 190 (3d Cir. 1988) (same).

Simply put, Defendants' discussion of a "debate" is inaccurate, at best, and deceptive, at worst. Defendants' sole support rests with a single 30-year old decision from the Sixth Circuit relating to a class of defendants not at issue here. In *Adams v. Standard Knitting Mills, Inc.*, the Sixth Circuit narrowly required plaintiff to allege scienter for Section 14(a) claims only "***as they apply to outside accountants***." 623 F.2d 422, 428 (6th Cir. 1980). There are no outside accountants in this litigation and, as such, *Adams* has no bearing here. Similarly, Defendants' reliance upon *Bluestone v. Sadove*, 2019 U.S. Dist. LEXIS 62207 (E.D. Tenn. Mar. 14, 2019), is also misplaced. As in *Adams*, the court in *Sadove* addressed claims pursuant to Section 14(a), noting that "[i]n the Sixth Circuit, scienter is required to state a § 14(a) claim ***against outside directors***." *Id*. at *14. Defendants omit the critical words "***against outside directors***" in their recitation of *Sadove*. Mot. at 15. Indeed, unlike *Sadove*, there are no defendants in this case who are outside directors of McDermott or CB&I. ¶¶29–36. Thus, there is no "debate" regarding whether negligence or scienter must be pled for a valid Section 14(a) claim.

Putting aside the absence of an actual Circuit split, the clear statutory language of Section 14(a) dictates application of the element of negligence and not fraud or scienter. To begin with, neither the text of Section 14(a) nor Rule 14a–9 refers to a specific state of mind. *See* 15 U.S.C. § 78n; 17 C.F.R. § 240.14a–9. Importantly, where Congress has intended a scienter requirement, it has used words like "manipulative," "deceptive," "device," or "contrivance" to describe the state of mind required to establish liability, and the rules promulgated pursuant to those statutory provisions have used terms like "scheme" or "artifice to defraud." *See, e.g.*, 15 U.S.C. § 78(j)(b); 17 C.F.R. § 240.10b–5; *see also Aaron v. SEC*, 446 U.S. 680, 696 (1980). This language is in § 10(b) ("Manipulative or deceptive device or contrivance") and also in § 14(e) ("any fraudulent, deceptive, or manipulative acts"), as Defendants' own authority shows. *See, e.g.*, *Flaherty & Crumrine Preferred Income Fund, Inc. v. TXU Corp.*, 565 F.3d 200, 207 (5th Cir. 2009) ("The elements of a claim under Section 14***(e)***, which applies to tender offers, are identical to the Section 10(b)/Rule 10b-5 elements.") (cited in Mot. at 15). By contrast, the plain text in Section 14(a) and Rule 14a–9 conspicuously excludes these words.[12]

[12] Significantly, where Congress has omitted such fraud-like words in other areas of securities law, courts have uniformly applied negligence standards. For example, Section 11 of the Securities Act of 1933, like Section 14(a), "proscribes a type of disclosure or lack of it, i.e., false or misleading statements or omissions of material facts... [and] enumerates specific classes of individuals who bear liability for failure to meet the required standard of disclosure." *Gould v. Am.–Hawaiian S.S. Co.*, 535 F.2d 761, 777 (3d Cir. 1976). It is well-established that Section 11 claims do not require the buyer to prove that the defendant acted with any intent to deceive or defraud. *Omnicare*, 135 S. Ct. at 1323 (*citing Herman & Maclean v. Huddleston*, 459 U.S. 375, 381–82 (1983)). Similarly, §17(a)(2) of the Securities Act prohibits any person from obtaining money or property "by means

Accordingly, Defendants' argument that the Complaint fails to allege a "strong inference" that they acted with scienter (Mot. at 26-28) is misplaced and irrelevant.

B. Plaintiff Adequately Alleges Negligence

Here, Plaintiff has pled only a non-fraud claim under Section 14(a) (and the ancillary Section 20(a) control person claim), has disavowed fraud in the Complaint, and has expressly pled negligence. *See* ¶3. As discussed *supra* at I(B), to establish negligence, "Plaintiff is not required to provide any evidence on mental state but only unreasonable conduct (negligence)." *Guardian Oil & Gas*, 2014 WL 7330451, at *7. Importantly, Defendants do not challenge that their negligence has been adequately alleged.

IV. PLAINTIFF ADEQUATELY ALLEGES MISLEADING STATEMENTS AND MATERIAL OMISSIONS IN THE PROXY SOLICITATIONS

The primary element of a Section 14(a) claim is that the "defendants misrepresented or omitted a material fact in a proxy statement." *Braun*, 223 F. Supp. 3d 644, 649–50. The Complaint alleges both false and misleading statements, and explains ***why*** Defendants' misrepresentations were misleading, as required by the PSLRA. *See Lormand v. US Unwired, Inc.*, 565 F.3d 228, 239 (5th Cir. 2010) (citing 15 U.S.C. § 78u–4(b)(1)).

The Complaint alleges several categories of materially misleading statements and omissions in the Proxy Solicitations and Proxy Statement concerning: (1) the CB&I Defendants' representations of financial information incorporated by reference in the Proxy Statement (*e.g.* ¶¶ 158, 173-79, 188); (2) the risks posed by the Focus Projects (*e.g.*

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of any untrue statement of a material fact or any omission to state a material fact." 15 U.S.C. § 77q(a)(2). And because that section is "devoid of any suggestion whatsoever of a scienter requirement," scienter is not required under § 17(a)(2). *Aaron*, 446 U.S. at 696–97.

¶¶139-153, 165, 179-80, 192-95); (3) McDermott's assessment of the "fair value" of CB&I to the extent that valuation failed to include the internally forecast additional costs to the Focus Projects (*e.g.* ¶¶170-72); and (4) McDermott's repeated assurances that it performed "extensive" due diligence of the Focus Projects sufficient to assess the fair value of CB&I (*e.g.* ¶¶76-79, 86, 101, 139-44, 154, 161, 165, 192-94). The Complaint also alleges in detail why each of the challenged statements and omissions was false and misleading, including by relying on CB&I's and McDermott's own SEC filings detailing the known and knowable charges to the Focus Projects at the time of the Merger, and on detailed information, including clear documentary evidence of falsity, provided by senior-level former employees of CB&I and McDermott. *E.g.* ¶¶141, 152, 155, 167, 172, 179, 194.

Defendants do not challenge that the Complaint adequately specifies each false or misleading statement and omission, and gives its time, place, and content. Importantly, Defendants do not even argue that the vast majority of their statements were not false or misleading. *See* Motion Appendix A. They instead argue that they are insulated from liability either because their statements are (1) "puffery"; (2) insulated by the PSLRA "safe harbor" for certain forward looking statements; or (3) non-actionable opinions.

Moreover, Defendants focus solely on Plaintiff's allegations that McDermott and Dickson and Spence, McDermott's two most senior officers, misrepresented facts. Defendants ignore Plaintiff's separate allegations that Defendants CB&I and Patrick Mullen, CB&I's President and CEO at the time of issue of the Proxy Statement, misrepresented to McDermott shareholders material facts concerning CB&I's financial condition generally, and the Focus Projects specifically, in the Joint Proxy Statement and in CB&I press releases and in quarterly and annual SEC filings. *E.g.*, ¶¶82-84, 165.

A. Defendants' Representations About the Focus Projects and the Extensive Due Diligence of the Focus Projects Were Highly Material

Under the federal securities laws, "[a] fact is 'material' if it is one that a reasonable investor would consider significant in his decision whether to invest and that alters the 'total mix' of information available about the investment." *In re Superior Offshore Int'l, Inc. Sec. Litig.*, 2009 WL 82064, at *2 (S.D. Tex. Jan. 12, 2009). The Supreme Court has noted that the standard for materiality under Section 14(a) is whether a reasonable shareholder would have considered a misstatement or omission "important in deciding how to vote." *TSC Indus. v. Northway Inc.*, 426 U.S. 438, 449 (1976). Plaintiff has adequately pled material misstatements and omissions in connection with the Proxy.

Defendants urge the Court to find as a matter of law that their misstatements and omissions were "immaterial" puffery. Mot. at 28-35. Defendants face a very high burden: "Materiality is a mixed question of fact and law, and a complaint may not be dismissed under Rule 12(b)(6) unless the alleged misstatements and omissions are 'so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance.'" *Kurtzman v. Compaq Computer Corp.*, 2000 WL 34292632, at *39 (S.D. Tex. Dec. 12, 2000); *see also S.E.C. v. Cuban*, 2013 WL 791405, at *12 (N.D. Tex. Mar. 5, 2013) ("The materiality determination is appropriate for the trier of fact because it requires delicate assessments of the inferences a reasonable [investor] would draw from a given set of facts and the significance of those inferences to him."). As explained below, Defendants' challenged misrepresentations and omissions were material.

The Focus Projects were of paramount concern to investors in weighing the risks of the Merger. From the first Proxy Solicitation on December 18, 2017 through the Merger vote, analysts and the Individual Defendants themselves focused on the inherent risks posed by the Focus Projects and the strength of the due diligence process. *E.g.* ¶¶76-79, 81-82, 86, 101-02, 139-153, 154, 161, 165, 178-80, 192-95. Indeed, Defendants recognized the materiality of the Focus Projects by continually speaking about them. *See SEC v. Wyly*, 788 F. Supp. 2d 92, 123 (S.D.N.Y. 2011) ("Given the importance that the [defendants] attached to this information, it is hard for them now to protest at the motion to dismiss stage that no reasonable investor could have found it material."). Moreover, the focus of analysts, journalists, and investors on Defendants' alleged misstatements and omissions regarding the Focus Projects also shows materiality. *See Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 368 (S.D.N.Y. 2012). Analysts wrote reports and specifically focused on Defendants' reassurances that McDermott's due diligence of the Focus Projects was "exhaustive" and left the Company "comfortable with the risks there regarding further charges." ¶82. In addition, investors reacted to the disclosures of the truth regarding the true charges to the Focus Projects, causing the Company's stock price to dramatically decline. ¶¶226-30, 235, 252. This public response further shows the materiality of Defendants' misstatements and omissions. *See, e.g., City of Pontiac Gen. Emps.' Ret. Sys. v. Wal-Mart Stores, Inc.*, 2014 WL 4823876, at *9 (W.D. Ark. Sept. 26, 2014) (materiality supported by a criminal investigation, "the drop in stock price," and "public speculation about the possible financial penalties Walmart could face for allegedly violating the FCPA");[13] *In re Facebook, Inc. IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 520 n.31 (S.D.N.Y. 2013) ("At the motion to dismiss stage, allegation of sharply negative market reaction can be used to support other allegations of materiality.").

1. The Challenged Statements Are Not Inactionable Puffery

Defendants' argument that statements about McDermott's due diligence, de-risking the Focus Projects, and the value of the merged Company are immaterial puffery fails. As an initial matter, the *sine qua non* of puffery is that it is nonspecific. *See Dyson, Inc. v. Oreck Corp.*, 2009 U.S. Dist. LEXIS 19097, at *19 (E.D. La. Mar. 4, 2009) ("[A] statement that makes a claim as to the 'specific or absolute characteristics of a product' is not puffery."); *see also Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (puffery statements are those that are "so vague and such obvious hyperbole that no reasonable investor would rely upon them"). Here, Defendants' statements are not puffery because they convey specific representations of fact, citing particular steps, determinations and actions taken, and even dollar amounts, germane to the Merger.

Defendants attack four categories of statements they claim are puffery: (i) "general statements touting the benefits of the combined company" (citing ¶138), (ii) "general statements about due diligence" (citing ¶¶76-78), (iii) "general statements regarding 'synergies' and creating value for stockholders" (citing ¶¶138-39 and 177), and (iv) "positive statements about improving and 'de-risking' the Focus Projects" (citing ¶165).

[13] The ongoing SEC and criminal investigations into McDermott's representations about the Cameron project also support materiality. *See, e.g.*, *Id.* at *9.

See Mot. at 29-32. Each of these categories of statements, however, made material and specific misrepresentations with respect to the value of the Focus Projects, the amount and quality of the due diligence conducted by the McDermott Defendants and the substantial de-risking of the Focus Projects. *E.g.* ¶¶76-78 (referring to a "great deal of due diligence" and "a significant amount of diligence"); ¶138 ("McDermott and CB&I's combined experience in delivering … fixed price lump-sum contracts will form the basis for the combined company to deliver a consistent approach to executing projects for customers."); ¶165 ("based on McDermott's due diligence and the experience and capabilities of the McDermott management team, the risk related to CB&I's four significant contracts … could be managed and that similar problems could be avoided in the future through improved project management."). These statements are not puffery because they contain specific facts that are alleged to be false and misleading. *Cf. Rougier v. Applied Optoelectronics, Chih-Hsiang Thompson Lin, & Stefan J. Murry*, 2019 U.S. Dist. LEXIS 199050, at *34 (S.D. Tex. Mar. 27, 2019) (not puffery where statements contain an "allegedly false embedded fact").[14]

In addition, specific statements that the "due diligence" conducted by Defendants

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[14] *See also City of Austin Police Ret. Sys. v. Kinross Gold Corp.*, 957 F. Supp. 2d 277, 298 (S.D.N.Y. 2013) ("representations about due diligence anchored in specific factual claims may be actionable"); *In re RAIT Fin. Trust Secs. Litig.*, 2008 WL 5378164, at *6 (E.D. Pa. Dec. 22, 2008) ("We cannot say that a statement claiming that RAIT's 'credit underwriting involves an extensive due diligence process' is mere puffery when Plaintiffs allege that RAIT 'did not conduct any meaningful ongoing credit analysis whatsoever.'"); *S.E.C. v. Quan*, 2013 WL 5566252, at *12 (D. Minn. Oct. 8, 2013), *aff'd sub nom. United States Sec. & Exch. Comm'n v. Quan*, 870 F.3d 754 (8th Cir. 2017) ("Representations here included specific due diligence measures that may have been material to a reasonable investor in making a decision to invest, and thus were not so vague as to constitute 'mere puffery.'").

determined that the Focus Projects had been "de-risked" were not puffery because they related to the highest profile business component of an acquisition that would become 47% of the combined company (*i.e.*, the "four critical projects for CB&I"). *E.g.* ¶¶139, 198; *Bach v. Amedisys, Inc.*, 2016 U.S. Dist. LEXIS 111077, at *37 (M.D. La. Aug. 19, 2016) (statement that a product would "enhance [the Company's] compliance efforts by mandating and standardizing documentation while validating clinical necessity for all care provided" was not puffery, as it referred to a "very specific benefit" that the company claimed was "central to everything we do")); *In re Harman Int'l Indus., Inc. Sec. Litig.*, 791 F.3d 90, 109 (D.C. Cir. 2015) (statement that sales were "very strong" held not puffery when it related to a key product line and "had been the focus of recent public statements").

The Complaint explicitly alleges that the due diligence statements were made to address the concerns of investors. For example, ***the very first question*** from an analyst on the 12/18/17 Conference Call asked about the "level of due diligence" that the Company performed. ¶¶76-78. The Company also presented charts to investors with titles such as "Due Diligence Conducted Over Period of Months." ¶145. Plaintiff alleges plausibly that investors relied on these and similar statements. *See, e.g.*, ¶¶81-82 (noting analysts' reliance on the due diligence efforts to support the transaction); *id.* at ¶¶102-03 (analysts reassured about the then-pending Merger in light of negative news from CB&I because it was within the range of McDermott's due diligence). Defendants' statements, especially in context, are far from the sort of vague corporate cheerleading that constitute puffery, and are therefore actionable. *See Brody v. Zix Corp.*, 2006 U.S. Dist. LEXIS 69302, at *12-13 (N.D. Tex. Sep. 26, 2006) ("Such statements as Plaintiff has plead cannot be considered 'mere puffery' as they are more than vague or optimistic; they contain concrete factual information Defendants could be found to have misrepresented.").

The Fifth Circuit in *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 870 (5th Cir. 2003) (cited in Mot. at 28-30), dismissed allegations with respect to due diligence, but there the statements were generic and unrelated to a specific project, that "[w]e carefully evaluate each project to assess its value. First, we conduct a due diligence review, identifying and quantifying the specific risks of the transaction." *Id.* at 859, n. 4. Here, in contrast, Defendants made repeated statements of extensive due diligence and "de-risking" of the Focus Projects, which were the specific concern of investors. Moreover, in *Azurix*, the only evidence that defendants had not conducted due diligence was a report commissioned after the class period that described problems only in "generalized terms" and that "fail[ed] to identify exactly who supplied the information or when they knew the information." *Id.* at 868. Significantly, the Court in *Azurix* distinguished *Rubinstein v. Collins*, 20 F.3d 160, 168 (5th Cir. 1994), where defendants had made "verifiable" statements with respect to a natural gas well. *See Rosenzweig*, 332 F.3d at 870, *citing* 20 F.3d at 163-64. The McDermott Defendants' statements concerning due diligence and "de-risking," and the CB&I's financial disclosures, in light of the significance of those statements and the focus of investors, are no less "verifiable" than the estimates of natural gas production in *Rubinstein.*

In *Kinross Gold*, (Mot. at 30), the plaintiff failed to allege that specific due diligence statements were false where the contrary evidence was disclosed by the defendant at the time. 957 F. Supp. 2d at 297-98. Here Plaintiff alleges that the due diligence statements were false and misleading based on information that was not disclosed to shareholders. *E.g.*, ¶¶110-15 (detailing over $1.2 billion charges to Cameron, documented in Risk Registers available in due diligence); *see generally* ¶¶75-80; 86-88; 101-10; 136-97.

Similarly, Defendants argue that any discussion of "de-risking" is puffery because the term is vague, relying on *Kelly v. Electronic Arts, Inc.*, 2015 U.S. Dist. LEXIS 57130 (N.D. Cal. Apr. 30, 2015). However, the court in *Kelly* focused on the fact that "de-risking" in the video game development industry did not have a specific or unique meaning, and the evidence presented by that plaintiff related to investors' financial risks in a game development company. *Kelly*, 2015 U.S. Dist. LEXIS 57130, at *21-25. In contrast, "de-risking" the Focus Projects was a specific and material statement. For example, the CB&I Defendants claimed that the settlement of a dispute related to Hurricane Harvey further de-risked the Cameron Project because of the impact of the settlement on a variety of factors. ¶87. The Complaint also provides a lengthy discussion of several Risk Registers, which quantify the risks of the various Projects. The analysts following the Company also focused on the efforts to de-risk the Focus Projects. *See* ¶178. In this context, it is clear that the misleading statements about de-risking were not vague and imprecise puffery.

Plaintiff finally notes that Defendants challenge isolated sentences as puffery that are part of longer, more comprehensive paragraphs in the Complaint that set forth context in which these statements are not puffery. Mot. at 29-30. This is contrary to the Fifth Circuit's instruction that when analyzing a complaint on a motion to dismiss, disclosures "must be considered within the totality" of all other disclosures. *Pub. Emples. Ret. Sys. of Miss. v. Amedisys, Inc.*, 769 F.3d 313, 322 (5th Cir. 2014). For example, Defendants contend that the statement "[t]he combined company will offer customers engineered and constructed facility solutions and fabrication services across the full lifecycle, executed to maximize asset value" is puffery. Mot. at 29 (citing ¶138). Defendants omit the pertinent remainder of ¶138, which also alleges, from the same Press Release, Defendants' statement that "[t]he transaction is expected to be cash accretive, ***excluding one-time costs***, within the first year after closing. It is also ***expected to generate annualized cost synergies of $250 million in 2019. This is in addition to the $100 million cost reduction program that CB&I expects to have fully implemented by the end of 2017 previously implemented*** [sic]." The statement that the combination would "maximize asset value" is material when viewed "within the totality" of these representations touting specific cost synergies and cost reductions in light of the allegation that the combined company was internally forecast to experience $1 billion of charges to the Focus Projects. *See Amedisys*, 769 F.3d at 322; *see also United States v. Skilling*, 554 F.3d 529, 553 (5th Cir. 2009) (a vague and optimistic statement is nevertheless not puffery where it is "so contrary to the verifiable historical facts" that it "mislead[s] about the stated subject matter"). These statements are not the vague and optimistic cheerleading that courts have found to be puffery. *E.g. Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1145 (9th Cir. 1997) (claim that grass required "50% Less Mowing" was not puffery because it was specific and measurable).[15]

[15] *Kurtzman v. Compaq Comput. Corp.*, No. 99-1011, 2002 WL 32442832 (S.D. Tex. Mar. 30, 2002) (cited in Mot. at 28, 30) is distinguishable because, unlike here, the company made no attempt to quantify the purported synergies. *Id.* at *16–18.

2. The Challenged Statements Are Not Protected by the PSLRA Safe Harbor

Defendants argue that nine of the false statements are inactionable because they tailored them to be forward looking and accompanied them with meaningful cautionary language that warned investors of the risk of falsity. Mot. at 32-36. This argument fails.

Forward looking statements, including financial projections, are considered materially false and actionable where they are alleged to have been made "without a reasonable basis." *Rubinstein*, 20 F.3d at 168. Pursuant to the safe harbor, corporations and individual defendants may avoid liability for forward-looking statements that prove false if the statement is "accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement." 15 U.S.C. § 78u-5(c)(1)). However, a "mixed present/future statement is not entitled to the safe harbor with respect to the part of the statement that refers to the present." *Spitzberg v. Houston Am. Energy Corp.*, 758 F.3d 676, 691, 92 (5th Cir. 2014) (noting that "[t]he factual issue of whether . . . tests have already taken place in the past is undoubtedly backward-looking"). Moreover, when "[r]easonable minds could disagree on whether [Defendants'] statements and warnings are misleading [. . .] the Court cannot dismiss this material misstatement based on the safe harbor provision." *Ramirez v. Exxon Mobil Corp.*, 334 F. Supp. 3d 832, 851 (N.D. Tex. 2018). Here, Defendants' statements are all actionable because they contain statements of present fact and/or because any future-oriented components are not accompanied by meaningful cautionary statements.

a. The Due Diligence Statements Are Not Forward Looking

The safe harbor only applies to statements that are actually forward-looking and specifically "identified" as such. *See* 15 U.S.C. § 78u-5(c)(1)(A)(i) . Contrary to Defendants' vague assertions, the majority of the statements at issue here are statements of present and historical fact, not the type of forward-looking statements that, in some instances, the safe harbor will protect. *Houston Am. Energy Corp.*, 758 F.3d at 691. Defendants' misstatements include, either explicitly or by reference, the representation by the CB&I Defendants that CB&I's financial disclosures were accurate, and by the McDermott Defendants that McDermott ***had conducted*** adequate and indeed "thorough" and "extensive" "due diligence" into CB&I, and the Focus Projects in particular, and that, consequently, the risks associated with CB&I were not serious enough to outweigh the benefits of entering into the Merger. *See, e.g.*, ¶142 ("Due diligence supports underlying strength and profitability of CB&I."); ¶143 ("We have performed thorough due diligence and believe we have a strong understanding of the key drivers.").

The Complaint plausibly alleges that Defendants' failure to incorporate CB&I's internal Risk Register and similar cost calculations into their Proxy Solicitations is so contrary to industry norms that it cannot constitute due diligence or, alternatively, Defendants disregarded the findings of their "extensive" due diligence. *E.g.*, ¶¶107, 119, 121, 132; *Aventis Techs. Corp. v. JP Morgan Chase Bank*, 2004 U.S. Dist. LEXIS 8302, at *12 (D. Ariz. Jan. 26, 2004) (statement that a company "performed a due diligence investigation is a statement of fact"); *see also Beavers v. Metro. Life Ins. Co.*, 566 F.3d 436, 440 (5th Cir. 2009) (failure to ask for verifying information in a business transaction "is not due diligence"). Statements containing or relying on the misrepresentation that Defendants' "extensive" due diligence confirmed that the Focus Projects had been de-risked or were otherwise of no real concern are actionable in this context. *E.g.*, *Microcapital Fund LP v. Conn's Inc.*, 2019 U.S. Dist. LEXIS 127748, at *20 n.16 (S.D. Tex. July 24, 2019) ("To the extent Plaintiffs pleaded that [certain] statements [of historical fact] are misleading, the future expectations based thereon are likewise misleading.").

For example, Defendants highlight the statement that the "focus projects ***have been significantly de-risked*** with respect to engineering, quantities and procurement; ***remaining risk is assessed as mostly to labor performance***" as an example of a forward-looking statement regarding future performance. Mot. at 34; ¶144 (emphasis in original). However, this statement discusses the assessment of risk in the Focus Projects at the time the statement was made (the Focus Projects "***ha[ve] 'been*** significantly de-risked' . . .; remaining risk ***is assessed …***") and the chart that follows in the presentation highlights the details of the due diligence efforts to date. *See* ¶145. In a very similar case, the Northern District of California recently held that the safe harbor is inapplicable where the "plaintiff's complaint deals with existing facts pertaining to . . . four projects and their cost overruns." *Police Ret. Sys. of St. Louis v. Granite Constr. Inc.*, 2020 U.S. Dist. LEXIS 88788, at *27 (N.D. Cal. May 20, 2020); *see also In re Tetra Techs., Inc. Sec. Litig.*, 2009 U.S. Dist. LEXIS 126687, at *89 (S.D. Tex. July 9, 2009) (where "costs of goods were understated," then "earnings statements were misrepresentations of the true picture," rendering statement "not forward-looking").[16]

b. To the Extent the Challenged Statements Are Forward-Looking, Any Cautionary Language Was Not Meaningful

In enacting the PSLRA safe harbor provision, "Congress clearly intended that boilerplate cautionary language not constitute 'meaningful cautionary' language for the purpose of the safe harbor analysis." *Lormand*, 565 F.3d at 244. Accordingly,

> [a] cautionary statement must be tailored "to a particular company's status at a particular time." . . . The PSLRA requires a fit between the disclaimer and the challenged forward-looking statement. The disclaimer must warn of what "could cause actual results to differ materially from those in the forward looking statement" . . . to be useful and relevant to an investor weighing the projection with other factors informing purchase decisions.

Carlton v. Cannon, 184 F. Supp. 3d 428, 454-55 (S.D. Tex. 2016); *see also United States v. Causey*, 2005 U.S. Dist. LEXIS 48841, at *29 (S.D. Tex. Oct. 17, 2005) ("Cautionary statements and warnings may render allegedly misleading statements immaterial, but only when they exhaust the misleading statement's capacity to influence the reasonable investor."). "[T]o caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit." *Huddleston v. Herman & MacLean*, 640 F.2d 534, 544 (5th Cir.1981), *aff'd in part, rev'd in part on other grounds*, 459 U.S. 375 (1983).

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[16] Defendants' citation to *Evanston Police Pension Fund v. McKesson Corp.*, 411 F. Supp. 3d 580, 600 (N.D. Cal. 2019)—a case in which the Court denied defendant's motion to dismiss—is, also distinguishable because, in that case, the company stated that it had "derisked" its ***future earnings***. Mot. at 34. Here, Defendants' statements are about existing and ongoing projects having already been de-risked, and are thus not forward-looking.

Here, none of Defendants' supposed cautionary statements are meaningful for the basic reason that, among other things, none of them disclose that there were at least $1 billion in internally-documented and discussed known or knowable additional costs associated with the Focus Projects. *See* Mot. at 33-34. Given the specificity of the promises Defendants made about future cost savings resulting from the Merger, Defendants needed to include a specific warning that such cost savings would be offset by the massive charges the Projects were expected to incur. Defendants did the opposite: describing the extensiveness of their due diligence and their experience to provide them the confidence that the Focus Projects had been sufficiently "de-risked," that the valuation of the Merger anticipated the future cost charges to the Focus Projects, and the Merger with CB&I was highly beneficial to McDermott when the truth was otherwise.[17] ¶¶76-79, 139-145. The opinion in *In re SCANA Corp. Securities Litigation* is informative. In *SCANA*, the Court rejected Defendants' safe harbor argument in a case involving statements about Defendants' "prudent" oversight of and "great progress" made on a nuclear construction project for which CB&I was a supporting contractor, because the "cautionary language

[17] The closest Defendants came to a meaningful cautionary statement was in the Proxy Statement, wherein they stated: "Other than the items listed above, we have assumed that the fair value of all assets and liabilities equal their respective carrying values. Until the Combination is complete, we will not have full access to all relevant information and will not have completed our evaluation. As a result, fair value estimates are preliminary and subject to change." ¶170. This statement cannot qualify as a cautionary statement, however, because it is false: Defendants did, in fact, have sufficient access to the relevant information necessary to accurately calculate fair value at the time of the Merger. *Id.*; *cf.* ¶¶105-35 (statements from confidential witnesses confirming that Defendants had ready access to the information necessary to conclude that the fair value of the projects should have been much lower based on forecasted expenses). This available information showed conclusively that the Focus Projects were much riskier than Defendants advertised.

relied. on by [defendant] fails to convey any substantive warning to investors regarding the specific deficiencies facing the Project," particularly since the defendant "continued to inform [its] investors . . . and the public that great progress was being made on the Project." 2019 U.S Dist. LEXIS 54176, at *27-32 (D.S.C. Mar. 29, 2019).

Defendants summarize the content of the cautionary statements and argue that they were sufficient because they "discussed at length the Focus Projects themselves, the problems that ***had*** beset them, and that ***if*** such problems continued, 'the project[s] would experience further losses.'" Mot. at 35. These cautionary statements are not meaningful because of the multitude of statements Defendants made claiming that the problems with the Projects had already been "de-risked" and because they suggest that the Projects were unlikely to experience further losses, when Defendants had access to information showing that well over one billion dollars of further losses were likely. *Lormand*, 565 F.3d at 246–47 (cautionary language not meaningful where it did not "disclose the specific risks ***and their magnitude***" by offering "specific, concrete explanations that clearly identified and quantified the clearly present financial dangers"); *Tetra Techs.*, 2009 U.S. Dist. LEXIS 126687, at *104–07 (statement not within safe harbor when it referred to future insurance payments without disclosing that those receivables had already been denied); *cf. Carlton*, 184 F. Supp. 3d at 464 (holding cautionary statements meaningful in part because company admitted that it "had no experience in building the facilities necessary" for a key project). Accordingly, Defendants may not avail themselves of the PSLRA's safe harbor for any purported forward-looking statements.

B. Defendants' Challenges to Purported "Opinion" Representations Fail

While the securities laws generally apply to statements of fact, the Supreme Court in *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 575 U.S. 175 (2015), held that opinion statements are actionable in two circumstances: first, if the speaker did not actually hold the given opinion; or second, "if: (i) the speaker 'omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion,' and (ii) 'those facts conflict with what a reasonable investor would take from the statement itself.'" *In re BP P.L.C. Sec. Litig.*, No. 4:10-MD-2185, 2016 U.S. Dist. LEXIS 73721, at *78 (S.D. Tex. May 31, 2016) (*quoting Omnicare*, 575 U.S. at 189). Here, Defendants' challenged opinion statements are actionable because most of them are not opinions, and those that could be construed as opinions are materially misleading.

1. The Challenged Statements Are Not Opinions

Initially, it bears emphasizing that *Omnicare* only applies to statements of opinion, and not to statements of fact (whether forward-looking or otherwise). An opinion is a statement that is predicated by language indicating the ***uncertainty*** of the speaker, classically "I think" or "I believe." *Omnicare*, 575 U.S. at 187; *BP*, 2016 U.S. Dist. LEXIS 73721, at *73 ("'most important' . . . is that 'a statement of fact expresses certainty about a thing, whereas a statement of opinion does not'" (quoting *Omnicare*, 575 U.S. at 183) (internal formatting omitted)). A forward-looking statement is not necessarily an opinion statement (as Defendants imply), especially absent the requisite language of uncertainty couching it as an opinion. *See Firefighters Pension & Relief Fund v. Bulmahn*, 147 F. Supp. 3d 493, 528 (E.D. La. 2015) (*Omnicare* "did not address or modify the PSLRA's safe harbor for forward-looking statements. Accordingly, the Court will not apply the *Omnicare* test to defendants' forward-looking statements of opinion."); *Cutler v. Kirchner*, 696 F. App'x 809, 815 (9th Cir. 2017) (distinguishing between forward-looking statements and opinion statements about then-present circumstances); *In re Aratana Therapeutics Inc. Sec. Litig.*, 315 F. Supp. 3d 737, 758 (S.D.N.Y. 2018) (same).[18]

The statements that Defendants characterize as opinions are no such thing because they do not contain limiting language.[19] Indeed, these statements are not calculated to convey uncertainty, but rather certainty, making such statements misleading. *See* ¶¶139 & 190 ("we're very confident"), 76 ("We feel confident"), 140 ("we're very happy"), 101 ("We remain confident"), 154 ("we're even more confident"), 192 & 194 ("feel very comfortable"). Statements are not opinions when "Plaintiffs plausibly allege that the identified misstatements expressed certainty rather than an uncertain view of a fact." *SCANA*, 2019 U.S. Dist. LEXIS 54176, at *33.

Another recent case is strikingly similar and particularly instructive on this topic. In *Police Ret. Sys. of St. Louis v. Granite Construction*, plaintiffs alleged that defendant construction company "employed fraudulent accounting techniques in preparing financial

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[18] Defendants cite *In re BP*, 2016 U.S. Dist. LEXIS 73721, at *78, for its language that "[e]stimates and projections are classic examples of opinions, especially when cloaked in the context of language such as 'I believe (or I think).'" The specific statements involved in *BP* were made in the context of interview responses in which the speaker characterized certain projections as "highly uncertain" and "difficult to estimate" and specifically used the phrases "we think" and "I don't think," thus plainly labeling them opinions. *See id.* In any event, the opinion statements in *BP* were held actionable pursuant to *Omnicare. See Id.* at *94-110.

[19] *See, e.g.*, ¶¶138, 139, 140, 142, 144-45, 150, 170, 174-75, 177, 182, 187, 188, 189; Motion Appendix A. The four statements that Defendants cite as opinions in their brief (¶¶ 75, 143, 192, 203) are nonetheless actionably misleading under *Omnicare* as discussed below.

reports for . . . four projects," and that "each of the projects experienced significant cost overruns, which defendants either understated or hid in [the defendant's] prepared financial reports." 2020 U.S. Dist. LEXIS 88788, at *3-4. The defendant's failure to abide by GAAP percentage-of-completion rules, as here, resulted in the defendant, in subsequent quarters, "announc[ing] charges of $242 million, driven by the four Projects, which reduced profits and caused its stock price to drop over 40%." *Id.* at *10. The court held that defendants' financial projections were material misrepresentations, and that they were not opinions because "the complaint deals with then-existing facts and does not need to address the relationship between [the defendant's] beliefs and whether those beliefs rate as objectively true." *Id.* at *15-22. Similarly, the Northern District of Texas has squarely rejected the argument that "asset valuation and impairment is an opinion," holding that an "alleged GAAP violation and its failure to recognize the impairment of [an operation] are not opinion statements but create a fact question." *Ramirez*, 334 F. Supp. 3d at 847-48.[20]

Thus, the great majority of Defendants' statements do not even qualify as opinions, including those listed above, and the Court should not accept Defendants' conflation of forward-looking statements with opinion statements, as the two concepts are distinct. To

[20] Defendants' reliance on *In re Deutsche Bank AG Sec. Litig.*, 2016 WL 4083429, at *16 (S.D.N.Y. July 25, 2016), is curious since the court recognized that the proposition for which Defendants cite the decision is no longer good law. The court there explained that "goodwill estimates and loan loss reserves [were] matters of opinion" pursuant to Second Circuit precedent prior to *Omnicare*. *Id.* However, *Omnicare* "altered [this] standard" and held that statements "may nonetheless be actionable if the speaker omits information whose omission makes the statement misleading to a reasonable investor." *Id.* at *18. *Ramirez's* holding that GAAP violations present a fact question is more persuasive because it is more recent, from within this Circuit, and does not rely on pre-*Omnicare* precedent.

the extent Defendants' statements are opinions, for the reasons next discussed, they are nonetheless actionable under *Omnicare's* omissions framework.[21]

2. The Complaint Pleads Actionable Omissions of Fact

To state a claim based on a factual omission in an opinion statement, *Omnicare* requires that "[t]he investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading to a reasonable person reading the statement fairly and in context." *Omnicare*, 575 U.S. at 194. Put differently, "[i]f the underlying facts are not provided and contradict the opinion statement, the statement will be misleading by omission and the speaker can be held liable." *Ramirez*, 334 F. Supp. 3d at 848.

Here, Defendants' statements would cause a reasonable investor to believe that Defendants had, through their "extensive" and "thorough" due diligence, identified no significant issues with the Focus Projects and developed an integration plan to cause the Focus Projects to become profitable in short order, to the tune of "$250 million" in overall "cost synergies" and a "$100 million cost reduction program," balanced out by a "onetime cost of $210 million to realize these synergies." *E.g.* ¶¶138-39, 177. These statements,

[21] Defendants' argument with respect to *Omnicare*'s subjective-disbelief prong (Mot. at 38-47) is irrelevant to this case because Plaintiff's Section 14(a) claims are based on negligence and "Plaintiff specifically disclaims any allegations of fraud, scienter, or recklessness in these non-fraud claims, except that any challenged statements of opinion or belief made in connection with the Merger between McDermott and CB&I are alleged to have been materially untrue statements of opinion or belief when made and at the time of the Merger." ¶3. Accordingly, for purposes of this Section 14(a) case only, Plaintiff is not alleging (but also not conceding) that Defendants' actions were undertaken with any particular state of mind.

taken together, cause a reasonable investor to anticipate overall lower costs as a result of the Merger. *See id.* They are misleading because (a) Defendants omitted any mention of $1 billion of additional forecasted costs, which were known or readily knowable to them at the time; and (b) Defendants' due diligence either included and concealed those forecasted costs, or was minimal and not "thorough" and "extensive," as repeatedly described. Indeed, Defendants' statements about their purported due diligence were especially misleading, considering that CB&I was already under public scrutiny for cost overruns and accounting discrepancies in the form of a class action regarding its Nuclear Projects, among other things.[22] The Complaint confirms the misleading effect that Defendants' statements had on investors and analysts. For example, analysts, while surprised by the Merger announcement, soon reported positively that "***MDR management said on the call that they had done exhaustive due diligence on CBI's backlog and are comfortable with the risks there regarding further charges***." ¶82. Later, just before the Merger vote, Dickson assured investors that "we have spent considerable time with CB&I reviewing the project portfolio and feel very comfortable with the progress they've made to de-risk the focus three projects" and, when questioned, gave assurances that "***Freeport is a good project***." ¶¶192-93; *see also* ¶¶141 (explaining why December 17, 2018 statements were misleading in context), 175, 192, 196 ("[I]t was known or knowable at the time of Defendants' statements

[22] *See* ¶¶40-51; *In re Chicago Bridge & Iron Co. N.V. Sec. Litig.*, 2020 WL 1329354, at *6 (S.D.N.Y. March 23, 2020) (finding, *e.g.*, that CB&I's 2014 10-Q filing was a corrective disclosure where it related to "alleged misrepresentations of the amount of goodwill" on the company's prior balance sheet, and that a CB&I 2014 press release was a corrective disclosure because it related to "alleged misrepresentations about [CB&I]'s liability for delays/cost overruns").

that the Focus Projects had not been de-risked and that CB&I senior personnel internally were anticipating in excess of $1 billion in potential additional charges on Cameron alone . . . . Those true facts were known or knowable to Defendants and conflicted with what a reasonable investor would take from Defendants' statements.").

Courts have consistently found similar situations actionable. *See, e.g.*, *Rougier*, 2019 U.S. Dist. LEXIS 199050, at *35-36 ("The First Amended Complaint alleges that [the] drop in demand was caused by [the defendant's] manufacturing problems, although Defendants omitted these facts from investors. The First Amended Complaint therefore shows that Defendants either did not actually hold the opinion they orally stated or that Defendants omitted material facts that conflicted with what a reasonable investor would take from the statement itself."); *Ramirez*, 334 F. Supp. 3d at 848 ("By allegedly failing to include a proxy cost in its impairment determination, ExxonMobil's purported opinion that [a certain project] was not impaired by year-end 2015 necessarily omitted 'particular facts going to the basis for the defendant's opinion' making the opinion materially misleading." (quoting *Omnicare*, 135 S. Ct. at 1332)).[23] In *In re Advance Auto Parts, Inc.*, the court

[23] *See also Sanchez v. Centene Corp.*, 407 F. Supp. 3d 831, 841-45 (E.D. Mo. 2019) (finding statements that balance sheet had "all been where we expected," and that there was "no unfavorable development" with respect to reserves, were misleading when the company subsequently announced $300 million of additional liabilities, which were known at the time of the previous statements); *Zwick Partners, LP v. Quorum Health Corp.*, 2018 U.S. Dist. LEXIS 97942, at *16-18 (M.D. Tenn. Apr. 19, 2018) (assuming that goodwill impairment was a matter of opinion, finding actionable the allegation that the defendant should have impaired goodwill in 4Q 2015 where the "same financial problems continued and worsened into 1Q 2016" and that based on identified "underlying red flags . . . Plaintiffs have sufficiently alleged that Defendants' assurances (by their failures to test and take additional impairments) did not fairly align with the information in Defendants' possession at the time" (internal quotations omitted)).

ruled in Plaintiff's favor that representations challenged as opinion and/or forward looking statements were actionable in light of the undisclosed fact(s) that the company had missed its operating margin and sales targets and that the defendants "disregarded . . . negative forecasts . . . in favor of numbers based on an unsound methodology." 2020 U.S. Dist. LEXIS 21271, at *20 n.4 (D. Del. Feb. 7, 2020).[24]

Defendants' cases are either unpersuasive or actually supportive of Plaintiff. *Knurr v. Orbital ATK, Inc.*, for example, denied a defendant's motion to dismiss and found a "strong inference of negligence" because, as here, the "Complaint allege[d] that defendants should have looked more closely at [a particular project], but the Complaint also allege[d] that had the defendants done so, they would have discovered the massive losses associated with the [project]." 276 F. Supp. 3d 527, 542 (E.D. Va. 2017). *Frankfurt-Tr. Inv. Luxemburg AG v. United Techs. Corp.*, 336 F. Supp. 3d 196 (S.D.N.Y. 2018) explained that a complaint that was "replete with detail" about the defendants' "meaningful inquiry" weighed against a claim under *Omnicare's* subjective-disbelief theory, not under an omission theory. *Id.* at 228. *In re Plains All Am. Pipeline, L.P.*, 245 F. Supp. 3d 870 (S.D. Tex. 2017) is also inapposite because there "the plaintiffs ma[de] clear that they are

[24] Those challenged statements included: (1) "For 2017, we will deliver positive sales comp growth and a modest increase in operating margin."; (2) For 2017, comparable store sales will grow between "0% to 2%" and adjusted operating income will "improve[]" by "15 to 35 basis points."; (3) "That [FY17 projections] stands as we sit here today," and "we're not going to change guidance [i.e. projections] in fiscal year 17. We're comfortable with the outlook for OI adjusted that we provided."; (4) "[W]e plan to accelerate sales growth to above the industry average, and we're going to close the margin gap versus our competition."; (5) "[W]e remain confident with the progress we're making as we execute our plan and expect sales and customer momentum to continue with more operating leverage as we enter the back half of 2017."; (6) "Everything we look at says that this was a blip, not a trend." *Id.* at *12, *20 n.4.

proceeding under the [theory] that the defendants omitted ***known facts*** that conflict with what a reasonable investor would infer from the statement." *Id.* at 905. Here, Plaintiff does not have to show that Defendants actually knew of the forecasted cost overruns, both because scienter is not required for Plaintiff's Section 14(a) claims, and because Plaintiff may plead an omission based on "facts about the inquiry the issuer did or did not conduct." *Omnicare*, 575 U.S. at 194. Finally, Plaintiff is not improperly asserting a fiduciary breach claim. Mot. at 48-49. Defendants' only post-*Omnicare* case on this point, *Laborers' Local #231 Pension Fund v. PharMerica Corp.*, 2019 U.S. Dist. LEXIS 162763, at *32 (W.D. Ky. Sep. 23, 2019), found no omission because, unlike here, the relevant assumptions behind forecasts had actually been disclosed to shareholders.

Nor is this, as Defendants argue, a case of a "fact cutting the other way" or "internal dissent from management projections." *See* Mot. at 50, 53. In terms of industry norms, the Complaint alleges that pursuant to percentage-of-completion accounting, the $1 billion additional forecasted costs for just one of the four disastrous Focus Projects (or at least a substantial portion thereof—nearly half) should have been reflected on CB&I's books and in the Proxy Solicitations at the time of Defendants' statements. *E.g.* ¶¶93, 97, 99.[25] The failure to disclose that liability not only violated GAAP, but was materially misleading because of the nature and extent of the violation: namely, that it understated the value of the most significant component of the Merger by at least $1 billion. *See* 17 C.F.R. § 210.4-

[25] This relevant industry-specific norm distinguishes this case from *Martin v. Quartermain*, 732 F. App'x 37, 42 (2d Cir. 2018), cited by Defendants, which pertains to the gold mining industry and consequently involves different industry norms.

01(a)(1) ("Financial statements filed with the [SEC] which are not prepared in accordance with generally accepted accounting principles will be presumed to be misleading or inaccurate, despite footnote or other disclosures, unless the [SEC] has otherwise provided."). Indeed, the fact that the combined company later did report these charges as "adjustments to the fair values reflected in the ***acquired balance sheet***" is an acknowledgment that these charges should have been disclosed on the balance sheet at the time of the prior statements. ¶¶206, 213.[26]

For all of these reasons, even to the extent any of Defendants' statements are construed as opinions subject to *Omnicare*, they are all actionably misleading because of the major underlying facts they omit: facts that "conflict with what a reasonable investor would take from" Defendants' statements. *Omnicare*, 575 U.S. at 189.

V. PLAINTIFF HAS SUFFICIENTLY PLED LOSS CAUSATION

Loss causation is the "causal connection between the material misrepresentation and the loss" suffered by Plaintiff and the putative Class. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). Loss causation allegations are subject to Rule 8(a)'s liberal pleading standards and must merely "provide a defendant with some indication of the loss and the

[26] Again, Defendants' cases are distinguishable. *Bulmahn* is a Section 10(b) case with a scienter requirement in which plaintiffs failed to allege specific information showing that executives "knew, or recklessly did not know" that the company had a liquidity problem. 147 F. Supp. 3d at 529 n.151. In *In re EveryWare Glob., Inc. Sec. Litig.*, the court discussed whether management had actual knowledge of the fact that there was employee disagreement about projections, not whether management had access to contradictory information. 175 F. Supp. 3d 837, 853 (S.D. Ohio 2016). And in *Sousa v. Sonus Networks, Inc.*, also proceeding under the inapposite subjective disbelief standard, the court discussed contradictory internal projections that were "without details" unlike the Risk Register forecasts here. 261 F. Supp. 3d 112, 118 (D. Mass. 2017).

causal connection that the plaintiff has in mind." *Amedisys*, 769 F.3d at 321. In the Fifth Circuit, to plead loss causation, Plaintiff must merely "allege the truth that emerged was 'related to' or 'relevant to' the defendants' fraud and earlier misstatements," which "simply means that the truth disclosed must make the existence of the actionable fraud more probable than it would be without that alleged fact, taken as true." *Id*.

The gravamen of Plaintiff's Section 14(a) claim is that Defendants denied McDermott shareholders their right to cast a fully informed vote on the Merger by omitting and misrepresenting material facts concerning the Focus Projects in the Proxy Solicitations, which caused those shareholders economic harm. As discussed *supra*, Section II, this is a direct Section 14(a) claim that seeks redress for the unique harm inflicted upon each shareholder's individual right to "fair corporate suffrage," as well as for economic harm stemming from the misleading statements. *Mills,* 396 U.S. at 381; *Borak,* 377 U.S. at 431.

As numerous courts have held, "the normal measure of recovery [in a direct Section 14(a) action] is out-of-pocket damages." *Goldkrantz v. Griffin*, 1999 WL 191540, at *7, 8 (S.D.N.Y. Apr. 6, 1999), *aff'd*, 201 F.3d 431 (2d Cir. 1999) (looking to "decrease in value" of stock at issue when measuring damages).[27] In turn, out-of-pocket damages are measured by the decline in share price resulting from the misleading statements. *See, e.g., Mills*, 396 U.S. at 388-89 (injured shareholders asserting direct Section 14(a) claim may recover damages based on the "reduction of the earnings or earnings potential of their holdings");

[27] *See also In re DaimlerChrysler AG Sec. Litig.*, 294 F. Supp. 2d 616, 626 (D. Del. 2003) ("[o]ut-of-pocket losses are the standard measure of damages for Rule 10b-5 and Section 14(a) claims"); *In re Real Estate Assocs. Ltd. P'ship Litig.*, 223 F. Supp. 2d 1142, 1152 n.9 (C.D. Cal. 2002) ("[t]he standard measure of recovery under § 14(a) is out-of-pocket damages").

In re AOL Time Warner, Inc. Sec. and ERISA Litig., 381 F. Supp. 2d 192, 231 (S.D.N.Y. 2004) ("a plaintiff satisfies … 14(a)'s loss causation requirement by demonstrating that defendant's misrepresentations induced a disparity between the transaction price and the true 'investment quality' of the securities at the time of the transaction") (quoting *Suez Equity Investors, L.P. v. Toronto-Dominion Bank*, 250 F.3d 87 (2d Cir. 2001)). Consistent with this principle, in cases involving direct Section 14(a) claims brought by shareholders of an acquiring corporation, courts have similarly recognized that "out of pocket losses" are the appropriate measure of damages. *See In re JPMorgan Chase & Co. Sec. Litig.*, 2007 WL 4531794, *9 (N.D. Ill. Dec. 18, 2007); *In re McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1266, 1269 (N.D. Cal. 2000).

The Complaint adequately alleges that McDermott's share price declined through a series of disclosures of information that was misstated or omitted from the Proxy Solicitations in direct violation of Section 14(a), and that Plaintiff and other members of the Class "have suffered damages as a result of the Merger." *See* ¶¶226-30, 235, 252; *see also* ¶¶15-20; 203-52; 278-79. Those allegations satisfy the element of loss causation.

Defendants' challenges to loss causation fail. ***First***, as discussed above, Plaintiff's Section 14(a) claim is direct and not derivative. ***Second***, as also discussed above Plaintiff has adequately pled "economic harm" through out-of-pocket losses measured by the decline in share price resulting from the misleading Proxy Solicitations. Notably, Defendants do not even challenge this parallel loss causation element in the Section 10(b) action. Defendants' cases (Mot. at 25) are all inapposite because none involve allegations of economic loss, as is pled here through the steep decline of McDermott's stock price as Defendants' misrepresentations and omissions were revealed.[28]

VI. PLAINTIFF HAS ALLEGED 20(A) CONTROL PERSON CLAIMS

As Defendants concede, Section 20(a) claims "are derivative of primary claims under Section 14(a)." Mot. at 54. Plaintiff has adequately alleged the Section 14(a) claim, which is sufficient to allege Section 20(a) claims against the Individual Defendants.

CONCLUSION

Defendants' Motion should be denied in its entirety. In the event that the Court grants the Motion to any extent, Plaintiff respectfully requests leave to amend the Complaint to cure any deficiencies identified by the Court, such as to update the complaint to reflect recent developments. *See Hack v. Wright*, 396 F. Supp. 3d 720, 752 (S.D. Tex. 2019) (courts should grant leave to amend under Rule 15(a) in such instances).

Dated: June 15, 2020

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[28] *See N.Y.C. Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1023–24 (9th Cir. 2010) (direct 14(a) claim dismissed because plaintiff failed to plead any economic harm); *Calamore v. Juniper Networks, Inc.*, 364 F. App'x. 370, 371 (9th Cir. 2010) (dismissing direct 14(a) claim because only relief sought was the voiding of a vote that had occurred already); *Rudolph*, 2007 WL 1189632, at *2 (finding on motion to stay, not a motion to dismiss, that plaintiffs pled derivative claim where complaint contained explicit allegation of harm to the company); *Resnik v. Woertz*, 774 F. Supp. 2d 614, 632 (D. Del. 2011) (14(a) claim dismissed because plaintiff sought only injunctive relief and did not plead any economic harm); *Hubner v. Mayer*, 2015 WL 12513581, at *8 (C.D. Cal. June 8, 2015) (same, citing *Resnik*); *Anastasio v. Internap Network Servs. Corp.*, 2010 WL 11459838, at *13 (N.D. Ga. Sept. 15, 2010) (dismissing plaintiffs' 14(a) claim that they overpaid for merger based upon proxy misrepresentations as harm to the company that flowed through to individuals). These cases have no relevance to the alleged economic harm.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served via ECF on all counsel of record on this 15th day of June, 2020.

/s/ Chet B. Waldman
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