UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PENN WEST PETROLEUM LTD. SECURITIES LITIGATION	No. 14-cv-6046-JGK ECF Case

LEAD PLAINTIFFS' OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

PRELIMINARY STATEMENT 1

STATEMENT OF FACTS 6

A. Minimizing Operating Expenses Was Critical to Penn West's Financial Performance and the Value of Its Stock 6

B. Defendants' Accounting Fraud 8

C. In Response to Challenging Economic Conditions, Penn West Increases the Magnitude of the Fraud 10

D. Under New Leadership, Penn West and Roberts Train a "Laser Focus" on Reducing Penn West's "Problem" Operating Costs 13

E. Takeyasu Abruptly Departs, and a New CFO Quickly Discovers Defendants' Fraud, Resulting in the Restatement 15

ARGUMENT 17

I. Plaintiffs Adequately Plead a Strong Inference of Scienter for All Defendants 17

A. Plaintiffs Allege Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness 18

1. Penn West's Admission that the Fraud Was Perpetrated by "Senior Accounting Management" Supports An Inference of Scienter 18

2. The Nature of the Accounting Violations Supports an Inference of Scienter 22

3. Widespread Knowledge of the Fraud Supports an Inference of Scienter 26

4. The Importance of the Financial Metrics Defendants Misstated, As Well As the Defendants' Focus on the Company's Operating Costs, Support an Inference of Scienter 27

5. The Duration, Magnitude, and Timing of the Fraud Support an Inference of Scienter 30

6. The Suspicious Circumstances Surrounding Takeyasu's and Curran's Departures Further Support and Inference of Scienter as to Them 32

7. Defendants' False Statements In Their Regulatory Certifications Lend Additional Support to the Inference of Scienter 33

B. Plaintiffs' Motive Allegations Bolster the Scienter Inference 35

C. The Complaint Adequately Pleads Penn West's Corporate Scienter 37

II. Defendants' Arguments Do Not Defeat a Strong Inference of Scienter 38

A. The Company's Admissions Support a Strong Inference of Scienter 38

B. The Timing of Takeyasu's and Curran's Departures, and the Ease with Which Dyck Discovered the Fraud, Support an Inference of Scienter 40

C. Defendants' Unsupported and Fact-Intensive Argument that the Fraud Supposedly "Went Undetected" Provides No Basis for Dismissal 42

D. The Accounting Violations Were Neither a Matter of "Judgment" Nor Innocent Mistake 43

E. KPMG's Certifications of Penn West's Financial Statements Do Not Absolve Defendants 46

F. That Plaintiffs Have Not Obtained an Internal Penn West Report or Witness Statement Does Not Defeat an Inference of Scienter 47

G. The Magnitude of Penn West's Restatement Supports an Inference of Scienter 49

H. Penn West Perpetrated the Fraud to Hide Financial Difficulties 51

I. Plaintiffs' Motive Allegations Support an Inference of Scienter 52

J. Defendants' Remaining Miscellaneous Arguments Fail 53

III. Defendants' Challenges to a Handful of Their Statements are Without Merit 55

A. The Statements Contested by Penn West are Materially Misleading Statements of Fact 55

B. Andrew's and Nunns' Challenges to Their Materially Misleading Statements and Omissions Fail 58

C. Pleading the Falsity of Andrew's and Nunns' Sarbanes-Oxley Certifications Does Not Require Alleging Subjective Disbelief 62

D. Andrew and Nunns are Liable for Failing to Correct Material Misstatements Made During Conference Calls in Which They Participated 65

IV. Plaintiffs Adequately Plead Loss Causation 67

V. Plaintiffs Adequately Plead Control Person Liability 71

CONCLUSION 72

TABLE OF AUTHORITIES

Page(s)

Cases

Aldridge v. A.T. Cross Corp.,
284 F.3d 72 (1st Cir. 2002) 37

In re Alstom SA Sec. Litig.,
406 F. Supp. 2d 433 (S.D.N.Y. 2005)....................22, 27, 30, 71

In re Alstom SA Sec. Litig.,
454 F. Supp. 2d 187 (S.D.N.Y. 2006)....................32

In re Am. Bank Note Holographics, Inc. Sec. Litig.,
93 F. Supp. 2d 424 (S.D.N.Y. 2000)....................20, 30, 57

In re Am. Int'l Grp., Inc. 2008 Sec. Litig.,
741 F. Supp. 2d 511 (S.D.N.Y. 2010)....................48, 71

In re Am. Italian Pasta Co. Sec. Litig.,
2006 WL 1715168 (W.D. Mo. June 19, 2006) 26

In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.,
381 F. Supp. 2d 192 (S.D.N.Y. 2004)....................21

Apogee Enters., Inc. v. State St. Bank & Trust Co.,
2010 WL 3632697 (S.D.N.Y. Sept. 17, 2010)....................30

In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.,
324 F. Supp. 2d 474 (S.D.N.Y. 2004)....................22, 47, 56, 58

Barrie v. Intervoice-Brite, Inc.,
409 F.3d 653 (5th Cir. 2005) 67

In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.,
763 F. Supp. 2d 423 (S.D.N.Y. 2011)....................70

In re BISYS Sec. Litig.,
397 F. Supp. 2d 430 (S.D.N.Y. 2005)....................6, 47, 59

Bd. of Trustees of City of Ft. Lauderdale Gen. Emps.' Ret. Sys. v. Mechel OAO,
811 F. Supp. 2d 853 (S.D.N.Y. 2011)....................49

In re BP p.l.c. Sec. Litig.,
843 F. Supp. 2d 712 (S.D. Tex. 2012) 29

Chalverus v. Pegasystems, Inc.,
59 F. Supp. 2d 226 (D. Mass. 1999) 32

Chill v. Gen. Elec. Co.,
101 F.3d 263 (2d Cir. 1996)..52

In re China Ne. Petroleum Holdings Ltd. Sec. Litig.,
2015 WL 223779, (S.D.N.Y. Jan. 15, 2015) 64

Citiline Holdings, Inc. v. iStar Fin. Inc.,
701 F. Supp. 2d 506 (S.D.N.Y. 2010)..30

City of Brockton Ret. Sys. v. Shaw Grp. Inc.,
540 F. Supp. 2d 464 (S.D.N.Y. 2008)..40, 48

City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.,
875 F. Supp. 2d 359 (S.D.N.Y. 2012)..66

City of Providence v. Aeropostale, Inc.,
2013 WL 1197755 (S.D.N.Y. Mar. 25, 2013) 57

City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.,
814 F. Supp. 2d 395(S.D.N.Y. 2011)...59, 66

In re Complete Mgmt. Inc. Sec. Litig.,
153 F. Supp. 2d 314 (S.D.N.Y. 2001)..28

Cornwell v. Credit Suisse Grp.,
689 F. Supp. 2d 629 (S.D.N.Y. 2010)..27

In re Diamond Foods, Inc., Sec. Litig.,
2012 WL 6000923 (N.D. Cal. Nov. 30, 2012) 47

Dobina v. Weatherford Int'l Ltd.,
909 F. Supp. 2d 228 (S.D.N.Y. 2012)..34, 35, 64

Doré Energy Corp. v. Prospective Inv. & Trading Co.,
2010 WL 4068802 (W.D. La. Oct. 14, 2010) 43

In re DRDGOLD Ltd. Sec. Litig.,
472 F. Supp. 2d 562 (S.D.N.Y. 2007)..50

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005)..68, 70

ECA, Local 134 IBEW Joint Pension Fund of Chi. v. JP Morgan Chase Co.,
553 F.3d 187 (2d Cir. 2009)...18

Fait v. Regions Fin. Corp.,
655 F.3d 105 (2d Cir. 2011)....58, 63

In re Fannie Mae 2008 Sec. Litig.,
891 F. Supp. 2d 458 (S.D.N.Y. 2012),
aff'd, 525 F. App'x 16 (2d Cir. 2013)....67

*Freudenberg v. E*Trade Fin. Corp.*,
712 F. Supp. 2d 171 (S.D.N.Y. 2010)....20, 60, 69

In re Gentiva Sec. Litig.,
932 F. Supp. 2d 352 (E.D.N.Y. 2013)....60, 70

George v. China Auto. Sys., Inc.,
2012 WL 3205062 (S.D.N.Y. Aug. 8, 2012)....22

Glaser v. The9, Ltd.,
772 F. Supp. 2d 573 (S.D.N.Y. 2011)....49

H & H Acquisition Corp. v. Fin. Intranet Holdings,
669 F. Supp. 2d 351 (S.D.N.Y. 2009)....72

Hall v. The Children's Place Retail Stores, Inc.,
580 F. Supp. 2d 212 (S.D.N.Y.2008)....35, 62, 63

In re Hi-Crush Partners L.P. Sec. Litig.,
2013 WL 6233561 (S.D.N.Y. Dec. 2, 2013)....28

Hirsch v. Arthur Andersen & Co.,
72 F.3d 1085 (2d Cir. 1995)....52

Ho v. Duoyuan Global Water, Inc.,
887 F. Supp. 2d 547 (S.D.N.Y. 2012)....66

In re IMAX Sec. Litig.,
587 F. Supp. 2d 471 (S.D.N.Y. 2008)....28

Janus Capital Grp., Inc. v. First Derivative Traders,
131 S. Ct. 2296 (2010).... *passim*

Johnson v. NYFIX, Inc.,
399 F. Supp. 2d 105 (D. Conn. 2005)....50

King Cnty., Wash. v. IKB Deutsche Industriebank AG,
708 F. Supp. 2d 334 (S.D.N.Y. 2010)....67

Kleinman v. Elan Corp., plc,
706 F.3d 145 (2d Cir. 2013)....61

Lapin v. Goldman Sachs Grp., Inc.,
506 F. Supp. 2d 221 (S.D.N.Y. 2006)..60

Lentell v. Merrill Lynch & Co.,
396 F.3d 161 (2d Cir. 2005)...68

In re Livent, Inc. Sec. Litig.,
78 F. Supp. 2d 194 (S.D.N.Y. 1999)..23, 30, 42

In re Longwei Petroleum Inv. Holding Ltd. Sec. Litig.,
2014 WL 285103 (S.D.N.Y. Jan. 27, 2014) 72

In re Magnum Hunter Res. Corp. Sec. Litig.,
26 F. Supp. 3d 278 (S.D.N.Y. 2014)..41, 49, 65

In re Marsh & Mclennan Cos., Inc. Sec. Litig.,
501 F. Supp. 2d 452 (S.D.N.Y. 2006)..37, 38, 60

Matrixx Initiatives, Inc. v. Siracusano,
131 S. Ct. 1309 (2011)...17

In re MBIA, Inc. Sec. Litig.,
700 F. Supp. 2d 566 (S.D.N.Y. 2010)..38

McMahan & Co. v. Wherehouse Entm't, Inc.,
900 F.2d 576 (2d Cir. 1990)...59

In re Mercator Software, Inc. Sec. Litig.,
161 F. Supp. 2d 143 (D. Conn. 2001)..21, 32, 33

In re Merck & Co., Inc. Sec., Derivative, & ERISA Litig.,
2011 WL 3444199 (D.N.J. Aug. 8, 2011) 66

Meridian Horizon Fund, L.P. v. Tremont Grp. Holdings, Inc.,
2012 WL 4049953 (S.D.N.Y. Sept. 14, 2012)..29

Metz v. U.S. Life Ins. Co. in City of New York,
662 F.3d 600 (2d Cir. 2011)...17

In re MicroStrategy, Inc. Sec. Litig.,
115 F. Supp. 2d 620 (E.D. Va. 2000) 24, 31

Monroe Cnty. Emps.' Ret. Sys. v. YPF Sociedad Anonima,
15 F. Supp. 3d 336 (S.D.N.Y. 2014)..62

In re Moody's Corp. Sec. Litig.,
599 F. Supp. 2d 493 (S.D.N.Y. 2009)..38

In re New Century,
588 F. Supp. 2d 1206 (C.D. Cal. 2008) 22

In re New Oriental Educ. & Tech. Grp. Sec. Litig.,
988 F. Supp. 2d 406 (S.D.N.Y. 2013)....................46, 47

New Orleans Emps. Ret. Sys. v. Celestica, Inc.,
455 F. App'x 10 (2d Cir. 2011) 27, 62

Novak v. Kasaks,
216 F.3d 300 (2d Cir. 2000)....................18, 25, 43

Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund,
135 S. Ct. 1318 (2015)....................58, 64, 65

Oneida Sav. Bank v. Uni-Ter Underwriting Mgmt. Corp.,
2014 WL 4678046 (N.D.N.Y. Sept. 18, 2014)....................66

In re Openwave Sys. Sec. Litig.,
528 F. Supp. 2d 236 (S.D.N.Y. 2007)....................41

In re OSG Sec. Litig.,
971 F. Supp. 2d 387 (S.D.N.Y. 2013)....................52

In re OSG Sec. Litig.,
12 F. Supp. 3d 622, 631 (S.D.N.Y. 2014) 21

In re Pfizer Inc. Sec. Litig.,
2012 WL 983548 (S.D.N.Y. Mar. 22, 2012) 67

In re Philip Servs. Corp. Sec. Litig.,
383 F. Supp. 2d 463 (S.D.N.Y. 2004)....................47

Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.,
874 F. Supp. 2d 341 (S.D.N.Y. 2012)....................37

Pirraglia v. Novell, Inc.,
339 F.3d 1182 (10th Cir. 2003) 37

Plumbers & Pipefitters Local Union No. 719 Pension Trust Fund v. Conseco Inc.,
2011 WL 1198712 (S.D.N.Y. Mar. 30, 2011) 40, 49

Plumbers & Pipefitters Nat'l Pension Fund v. Orthofix Int'l N.V.,
2015 WL 981518 (S.D.N.Y. Mar. 6, 2015) .... *passim*

Police & Fire Ret. Sys. of City of Detroit v. SafeNet, Inc.,
645 F. Supp. 2d 210 (S.D.N.Y. 2009)....................70

In re Puda Coal Sec. Inc., Litig.,
30 F. Supp. 3d 261 (S.D.N.Y. 2014)........66

Pugh v. Tribune Co.,
521 F.3d 686 (7th Cir. 2008)........65

In re Refco, Inc. Sec. Litig.,
503 F. Supp. 2d 611 (S.D.N.Y. 2007)........32

Richman v. Goldman Sach Grp., Inc.,
868 F. Supp. 2d 261 (S.D.N.Y. 2012)........30, 61

S.E.C. v. Egan,
994 F. Supp. 2d 558 (S.D.N.Y. 2014)........31

S.E.C. v. Espuelas,
579 F. Supp. 2d 461 (S.D.N.Y. 2008)........55

S.E.C. v. Geswein,
2011 WL 4541308 (N.D. Ohio Aug. 2, 2011)........26

In re Sadia, S.A. Sec. Litig.,
643 F. Supp. 2d 521 (S.D.N.Y. 2009)........25

In re Sanofi-Aventis Sec. Litig.,
774 F. Supp. 2d 549 (S.D.N.Y. 2011)........60

In re Satyam Computer Servs. Ltd. Sec. Litig.,
915 F. Supp. 2d 450 (S.D.N.Y. 2013)........71

In re Scholastic Corp. Sec. Litig.,
252 F.3d 63 (2d Cir. 2001)........52

In re Scottish Re Grp. Sec. Litig.,
524 F. Supp. 2d 370 (S.D.N.Y. 2007)........22, 27, 32

Sgalambo v. McKenzie,
739 F. Supp. 2d 453 (S.D.N.Y. 2010)........38, 48

Shenk v. Karmazin,
867 F. Supp. 2d 379 (S.D.N.Y. 2011)........43

In re SmarTalk Teleservices, Inc. Sec. Litig.,
124 F. Supp. 2d 527 (S.D. Ohio 2000)........26, 67

In re Smith Barney Transfer Agent Litig.,
884 F. Supp. 2d 152 (S.D.N.Y. 2012)........71, 72

In re Sotheby's Holdings, Inc.,
2000 WL 1234601 (S.D.N.Y. Aug. 31, 2000)....................60

Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.,
531 F.3d 190 (2d Cir. 2008)....................37, 38, 48

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007)....................18

In re Turquoise Hill Res. Ltd. Sec. Litig.,
2014 WL 7176187 (S.D.N.Y. Dec. 16, 2014)....................50

In re UBS AG Sec. Litig.,
2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012)....................65

In re Van der Moolen Holding N.V. Sec. Litig.,
405 F. Supp. 2d 388 (S.D.N.Y. 2005).................... *passim*

Vanleeuwen v. Keyuan Petrochemicals, Inc.,
2014 WL 3891351 (S.D.N.Y. Aug. 8, 2014)....................72

In re Veeco Instruments, Inc. Sec. Litig.,
235 F.R.D. 220 (S.D.N.Y. 2006)....................35

In re Vivendi Universal, S.A. Sec. Litig.,
605 F. Supp. 2d 586 (S.D.N.Y. 2009)....................5, 68, 69, 70

In re Wachovia Equity Sec. Litig.,
753 F. Supp. 2d 326 (S.D.N.Y. 2011)....................43, 44

In re Williams Sec. Litig.
339 F. Supp. 2d 1206 (N.D. Okla. 2003)....................37

In re WorldCom, Inc. Sec. Litig.,
294 F. Supp. 2d 392 (S.D.N.Y. 2003)....................26

Other Authorities

17 C.F.R. § 270.30a-3....................63

Lead Plaintiffs The City of Miami Fire Fighters' and Police Officers' Retirement Trust and Avi Rojany ("Plaintiffs") respectfully submit this Omnibus Memorandum of Law in opposition to motions to dismiss filed by Defendants Penn West Petroleum Ltd. ("Penn West" or the "Company"), Todd H. Takeyasu, Jeffery Curran, and David E. Roberts ("PW Br."), Defendant William E. Andrew ("WA Br."), and Defendant Murray R. Nunns ("MN Br.").

PRELIMINARY STATEMENT

This action arises from an admitted accounting fraud perpetrated by the senior executives of Penn West. The Consolidated Amended Class Action Complaint (the "Complaint") alleges that for approximately seven years, Defendants materially misstated Penn West's most important financial metrics in an effort to make the Company's business appear more efficient and healthy than it was. ¶¶28-120.[1] Since its inception as a public company, Penn West struggled to control its operating costs—so severely, in fact, that its CEO, Defendant David Roberts, called the problem an "embarrassment." ¶¶40-42. Unable to legitimately bring its costs down, by no later than 2007, Penn West's senior management began to fraudulently conceal at least $625 million worth of operating expenses by "reclassifying" them—*i.e.*, improperly shifting them into other categories in the Company's financial statements. The bulk of the operating costs were hidden by reclassifying them as capital expenditures, a maneuver that understated operating expenses, artificially inflated assets, and created the false impression that Penn West was investing greater sums in future oil production.

Penn West's own admissions show that these accounting improprieties were authorized by its senior executives and flagrantly violated applicable accounting rules. The Company has admitted that its "senior accounting management" was "responsible" for "the adoption and use of

[1] All references to "¶" are to the Complaint (ECF No. 71), unless otherwise noted.

[the] accounting practices" that comprised the fraud and ultimately led to a significant restatement of its financial results. ¶¶11, 122. It has further admitted that the reclassifications were deliberately "made to reduce operating costs" and "increas[e] the reported capital assets of the Company"; that "little if any analysis was performed" to determine if the reclassifications were merited; that "[i]n some cases, there appeared to be no contemporaneous support" for the reclassifications; and that when the Company's internal accounting systems generated appropriate accounting treatments, "senior accounting management overrode the outcomes." ¶¶118, 123. Through this fraud, the Individual Defendants understated Penn West's operating expenses by as much as 26%, inflated its reported capital assets by as much as 64%, and overstated several of its other core metrics by material amounts. ¶¶7, 218.

In March 2014, the Company's CFO, Defendant Todd Takeyasu, abruptly left Penn West without any explanation, after serving 20 years with the Company in senior accounting positions and the last nine years as CFO. ¶97. Takeyasu's successor, David Dyck, discovered the fraud within weeks of assuming Takeyasu's position, when members of Penn West's accounting team approached him and "expressed concerns about accounting practices going back several years," triggering a Board investigation into the Company's long-running misconduct. ¶98. In the midst of the Board's investigation, Defendant Jeffrey Curran, who had served for nine years as the Company's Vice President of Accounting and Reporting (*i.e.*, Penn West's second most senior accounting official and Takeyasu's deputy) suddenly separated from the Company, also without explanation. ¶99.

Then on July 29, 2014, the Company shocked the market by announcing that it was required to restate its financial results for at least 2012 and 2013 due to the accounting improprieties summarized above, which it admitted also "existed in prior years." ¶101. Penn

West further disclosed that the "senior finance and accounting personnel believed responsible for the adoption and use of these practices have ceased to be employed by the Company." ¶100.

The market was stunned. Following these disclosures, analysts reported that Penn West's restatement "affects most of the cash-based metrics that oil and gas investors care about," was "disconcerting to say the least," had "the appearance of a concerted effort to 'make the numbers,'" and showed that senior management "was basically fudging with its numbers, lowering operating costs and increasing capital expenditures [which] has the net effect of improperly boosting key metrics . . . while hiding cost overruns." ¶¶104, 109-10, 119. Penn West's stock price immediately plummeted. On July 30, 2014, the first trading day after the Company's announcement, its stock price fell 14% on the year's highest trading volume, from USD $9.15 to USD $7.85 per share, destroying hundreds of millions of dollars of shareholder value. ¶107.

The Complaint's allegations state a claim for violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934. Through its restatement, the Company has admitted that its Class Period financial statements were materially false and misleading at the time they were issued, and it does not argue otherwise on this motion. Nor does any Defendant challenge that Plaintiffs have adequately pled loss causation for the July 29, 2014 announcement.

Defendants' main argument is that the Complaint fails to plead a strong inference of scienter. PW Br. at 16-32; MN Br. at 8-15; WA Br. at 11-14. The core of Defendants' argument is that ***none*** of them knew or should have known that Penn West was materially misstating its most important financial metrics for the better part of a decade—not Defendant Takeyasu, who was CFO for the duration for the fraud; not Defendant Curran, who was head of accounting and reporting during the duration of the fraud; not Defendant Roberts, who assured investors that he

kept a "laser focus" on Penn West's operating costs and practiced "relentless cost control"; not Defendant Murray Nunns, who was either the Company's President or CEO for almost the entire duration of the fraud; and not former CEO Defendant William Andrew, who led Penn West when it dramatically increased the magnitude of the fraud in response the 2008 oil market crash and issued some of the largest misstatements made during the Class Period. Individual Defendants assert that ***none*** of them had ***any*** way of knowing about the fraud for seven years—even though Dyck was informed of it almost immediately after joining the Company. This argument defies credulity and cannot be accepted as a matter of law.

The Complaint alleges numerous facts that give rise to a strong inference of severe recklessness at a minimum, including:

- The fraud was perpetrated by "senior accounting management," raising an inference of knowledge as to Takeyasu and Curran, the Company's two most senior accounting managers. Moreover, this admission demonstrates that the remaining Individual Defendants, each of whom served as Penn West's CEO, were, at a minimum, severely reckless in disregarding a pervasive fraud carried out by senior management. ¶¶22-26, 44, 49, 52, 116, 122.
- The Company has admitted that the accounting violations were intentional in nature and constituted clear violations of straightforward accounting rules. ¶¶114, 281-89.
- Knowledge of the fraud was widespread among senior management, and evidence of its existence was readily available to all of the Defendants, as demonstrated in part by the swiftness and ease with which Dyck discovered the fraud. ¶¶97-98, 128.
- The fraud involved the improper reclassification of at least ***$625 million*** worth of operating expenses over a ***seven-year period***, all of which were made pursuant to "practices" that were "adopted" by Penn West's senior executives. ¶¶5, 44.
- The misstatements concerned what Defendants themselves characterized as Penn West's "most important . . . core metrics" and the "key drivers of [Penn West's] shareholder value," subjects about which they undoubtedly knew or should have known. ¶¶124, 126.
- Indeed, Defendants repeatedly represented that they were specifically "focus[e]d" on the very financial metrics that the Company misstated, and understood that the market was intently focused on them as well, acknowledging that showing improvement in these metrics was "critically important" to the market's valuation of the Company. ¶¶84, 124-25.

- The magnitude of the fraud increased when Penn West faced financial adversity, indicating conscious misbehavior at the Company's highest levels. ¶¶65, 95, 127.

All of these allegations, considered collectively, give rise to a strong inference that all Defendants knew or, at least, recklessly disregarded the accounting fraud.

Defendants' remaining arguments are also unavailing. While the Complaint alleges Defendants made dozens of false and misleading statements, Penn West, Takeyasu, Curran, and Roberts challenge only seven, arguing, with the aid of cleverly placed ellipses, that those statements are inactionable opinions. PW Br. at 33. They are wrong. The seven challenged statements are statements of historical fact, many of which concern the drivers of the Company's historical operating results, and are misleading because they omit that accounting fraud was also a material driver of the Company's performance. *See, e.g.*, *In re Van der Moolen Holding N.V. Sec. Litig.*, 405 F. Supp. 2d 388, 400-01 (S.D.N.Y. 2005).

The Company also argues that Plaintiffs fail to plead loss causation for one of the two disclosure events identified in the Complaint, occurring on November 6, 2013, when Penn West announced poor quarterly results driven by unexpectedly higher operating costs, and a "turnaround plan" requiring drastic measures to bring those costs into line. PW Br. at 34-35. Contrary to what Defendants contend, the Complaint adequately pleads loss causation for the November 6, 2013 partial disclosure by alleging that the Company was forced to disclose that its cost structure was worse than previously believed—which was one of the risks concealed by Defendants' fraud. *See, e.g.*, *In re Vivendi Universal, S.A. Sec. Litig.*, 605 F. Supp. 2d 586, 598-601 (S.D.N.Y. 2009).

Andrew and Nunns principally argue that they made no actionable misstatements (MN Br. at 15-20; WA Br. at 7-11), but ignore that each signed the Company's SEC filings containing misstated financial results and discussed those misstated results during investor conference calls.

See, e.g., *In re BISYS Sec. Litig.*, 397 F. Supp. 2d 430, 437 (S.D.N.Y. 2005). Moreover, Andrew and Nunns repeatedly made statements that put at issue the drivers of Penn West's reported financial results, but misleadingly failed to disclose that those results were also driven by fraud. *See, e.g.*, *Van der Moolen*, 405 F. Supp. 2d at 400-01.

For these reasons, and those set forth further herein, Defendants' motions to dismiss should be denied.

STATEMENT OF FACTS

A. Minimizing Operating Expenses Was Critical to Penn West's Financial Performance and the Value of Its Stock

Penn West is one of Canada's largest oil and natural gas producers. ¶¶3, 21. Because the price of oil was set by the commodities market, one of the only ways that a company in Penn West's business could differentiate itself from its competitors and increase its profit margin was by lowering costs. ¶3. The two most important categories of Penn West's costs were operating expenses ("OpEx") and capital expenditures ("CapEx"). ¶¶3, 28-31, 39. OpEx were incurred during the production of oil from established wells and charged against the Company's revenues during the period in which they are incurred. ¶30. CapEx were incurred to obtain or develop new revenue-generating assets, such as oil wells, and recorded on the balance sheet as assets and depreciated over time. ¶¶29-30. Whereas investors viewed CapEx positively as an investment in future production, investors viewed OpEx as costs that should be minimized because they reduced profits and cash without advancing future production. ¶¶31, 33.

Higher OpEx also negatively affected two of Penn West's other key financial metrics: (1) "funds flow" or "cash flow," the cash flow from operating activities; and (2) "netback," the revenue realized per barrel of oil less the costs associated with bringing that barrel of oil to the market. ¶¶34-35, 37. Funds flow was a strong indicator of the Company's ability to invest in

future oil production, pay dividends to its shareholders, and meet and retire its debt obligations. ¶34. Netback measured the efficiency of Penn West's oil production operations. ¶36. Penn West repeatedly stressed the importance of these metrics in assessing its performance, and highlighted growth in funds flow and netback as "***key drivers of shareholder value***." *E.g.*, ¶¶4, 32, 38, 80, 83, 91, 124, 145, 171, 195, 219, 233, 254, 259. Analysts considered these metrics to be extremely important in evaluating Penn West's performance. *E.g.*, ¶¶4, 12, 28, 38-39, 57, 62, 64, 70, 77, 82, 84, 87-89, 92, 94, 104-10.

Unfortunately, both before and during the Class Period, Penn West continually struggled to keep its operating costs under control, which in turn negatively impacted Penn West's funds flow and netback. ¶3. Penn West's operating costs were uniquely bad in comparison to competitors, prompting Roberts to admit (after the Class Period) that Penn West was "literally not in the same postal code with the []leaders in terms of drilling and completion costs and operating costs," which was "***almost a source of embarrassment***" for the Company. ¶42. Analysts repeatedly challenged Penn West to improve along these metrics, describing Penn West as a "'show-me' story" and stating that they "would like to see several quarters of sustained cost reduction" before recommending Penn West's stock. ¶¶70, 90.

To assuage investors, Defendants repeatedly stated throughout the Class Period that they were reducing the Company's operating costs. For example, Andrew, Nunns, and Roberts each assured investors that reducing operating costs was his principal focus, and each of them demonstrated his close familiarity with Penn West's OpEx, CapEx, and the factors influencing those figures.[2] Roberts assured investors that he had a "laser focus" on reducing operating costs,

[2] *See, e.g.*, ¶¶4, 32, 42, 56, 60-61, 63, 83, 85-86, 89, 91, 125, 135, 143, 145, 171, 178, 181, 195, 210, 215, 225, 227, 230, 237, 239, 256, 275.

was practicing "relentless cost control," and centered a turnaround plan on reducing costs. ¶83. And the Company itself represented that it was "critically important" to bring these costs down. ¶91. Unable to legitimately cut its operating costs, however, beginning no later than 2007, Penn West engaged in a fraudulent accounting scheme to create the illusion of increased operating efficiency and financial health. ¶¶55-56.

B. Defendants' Accounting Fraud

As was ultimately revealed in July 2014, "senior accounting management" directed a fraud from 2007-2014 through which the Company systematically underreported its operating costs and artificially inflated its capital expenditures, cash flow, and netback. During this period, Penn West improperly reclassified at least $625 million of OpEx, shifting costs from OpEx to elsewhere in the financial statements and causing the Company to misstate its quarterly and annual financial results on dozens of occasions. ¶126.

Penn West acknowledged that its accounting violations were committed at the direction of the Company's senior management. As noted above, the Company admitted that its "senior accounting management" were "responsible" for "the adoption and use of [] accounting practices" that comprised the fraud. ¶122. Further, all of the fraudulent reclassifications were made "at the corporate level," where the Individual Defendants exercised direct oversight, as opposed to a subsidiary. *Id*. Defendants' fraudulent scheme consisted of three main categories of accounting violations:

Reclassifying OpEx as CapEx: Penn West improperly reclassified at least $405 million of OpEx as CapEx—specifically, property, plant, and equipment—between the beginning of 2007 and the first quarter of 2014. That is, after Penn West accounting staff had correctly classified these expenses in the Company's books as OpEx, senior executives intentionally (and wrongly) changed these entries to reclassify them as CapEx. The Company admitted that the

reclassifications were deliberately "made to reduce operating costs and increase the Company's reported capital expenditures," and to "increas[e] the reported capital assets of the Company." It further admitted that "little if any analysis was performed" to determine if the reclassifications were merited and that "[i]n some cases, there appeared to be no contemporaneous support" for the reclassifications. These fraudulent reclassifications not only decreased the Company's reported OpEx, but also inflated its reported assets, funds flow, and netback. ¶¶44-47.

Reclassifying OpEx as Royalties: Penn West also improperly reclassified hundreds of millions of additional OpEx as royalties. In both 2012 and 2013, Penn West fraudulently reclassified $101 million each year from OpEx to royalties. ¶¶48-50. Penn West paid royalties to property holders in return for the right to drill for oil or gas on the property. In direct contradiction of the applicable accounting guidance, which provide that royalties are "free of cost," Penn West's senior accounting management unilaterally adopted a "practice" of misclassifying the costs associated with the royalty-holder's share of production as a royalty expense. ¶¶48-49, 284. Again, these reclassifications occurred ***after*** accounting staff properly booked these costs as OpEx. Market commentators were particularly concerned by this accounting manipulation, deeming it "***bizarre***[]" because, with respect to royalties, "Generally, it's pretty clear what the amount is and what it's for." ¶¶104, 109.

Over-Accruing Capital Expenditures: Penn West also over-accrued CapEx on its balance sheet by recording its entire capital budget as CapEx each year, irrespective of how much of the budgeted amount was actually spent. ¶¶51-51, 280, 288-89. At the end of the year, the Company was required to reverse any CapEx that had been budgeted and booked but not actually spent. Instead, the Company kept the phantom CapEx on its books. *Id*. Penn West admitted that this failure was intentional as well. *Id*. For instance, during 2013 and 2014, when

the Company's accounting systems correctly determined the amount of CapEx charges that were required to be reversed at year-end, Penn West's "***senior accounting management overrode the outcomes***" in order to artificially inflate the Company's publicly-reported CapEx. ¶¶51-52.

These accounting violations significantly impacted Penn West's key financial metrics during the Class Period. Although Penn West has not publicly issued a detailed restatement of its reported financial results for 2007 through 2011,[3] the restated results that have been publicly disclosed show that the impact of the accounting violations was material. The Company's fraudulent accounting scheme artificially reduced its OpEx by as much as 26% and artificially inflated its funds flow as much as 12%, its netback by as much as 8%, and its CapEx by as much as 64%. ¶¶7, 187, 218. As one analyst would state after the fraud was revealed, the fact that Penn West consistently falsified its most important metrics demonstrated that senior management engaged in "***a concerted effort to 'make the numbers,'*** rather than just poor procedure." ¶119.

C. In Response to Challenging Economic Conditions, Penn West Increases the Magnitude of the Fraud

While engaged in the accounting improprieties described above, Defendants repeatedly made statements to investors stressing the importance of reducing Penn West's operating costs and emphasizing the supposedly legitimate steps Penn West was taking to bring its costs into line. Notably, Penn West's senior management increased the fraud at times when the Company was facing difficult operating conditions—precisely when investor concern was greatest and it was most important to provide investors with an accurate picture of Penn West's performance.

[3] The applicable financial reporting and accounting rules do not require Penn West to issue a full restatement for reporting periods prior to 2012. ¶¶114, 130. For years 2007 through 2011, the Company was required to restate its opening balances for assets, liabilities, and equity but not its OpEx, royalty payments, or CapEx. ¶114.

For instance, in the wake of the 2008 financial crisis, oil prices plunged from USD $101.18 per barrel on September 12, 2008 to a low of $33.87 on December 19, 2008, a decline of nearly 67%. ¶59; *see also* Ex. 1.[4] During roughly the same time period, Penn West's unit price dropped nearly 73%. *Id*. In a time of declining commodities prices, Penn West needed to strictly control its costs in order to maintain its margins and bring its unit price up, and Penn West represented to investors that it was doing just that. ¶60. In its November 5, 2009 Form 6-K reporting its third quarter results, Penn West represented that "[o]perating costs per boe in the third quarter of 2009 remained relatively flat . . . reflecting continued and ongoing efforts by Penn West to manage our cost structure." ¶61. Analysts reacted positively. For example, UBS Investment Research wrote, "[W]e . . . have reduced our operating cost outlook by 4%, leading to stronger cash flow going forward." ¶62.

By the start of the Class Period on February 18, 2010, Penn West was presenting a false "recovery story." On that day, the Company reported its results for the fourth quarter and fiscal year 2009, and Nunns declared supposedly strong funds flow and netback that "exceed[ed] expectations." ¶63. Nunns further highlighted Penn West's ability not only to control costs, but to bring them down, stating that as Penn West "ramp[ed] up" its production, it would reap "an efficiency gain of between 30% to 40% in terms of cost reduction." ¶135.

As the restatement would reveal, however, Penn West's 2009 "recovery story" was a deception. In reality, in 2009, Penn West reclassified at least $118 million of OpEx as CapEx, thereby understating OpEx by 12%, and overstating CapEx by 37%, funds flow by 8%, netback by 7%, and net income by 82%. ¶¶64-65, 134. Significantly, this represented a more than 100%

---

[4] All references to "Ex." are to Exhibits to the Declaration of John Rizio-Hamilton in Support of Lead Plaintiffs' Opposition to Defendants' Motions to Dismiss the Complaint.

increase in the size of the fraud in prior years, giving Penn West's reported financial results an added "boost" just when the Company needed it most. ¶¶58, 65.

By the second quarter of 2011, however, the price of oil began to decline, and Penn West faced a host of operational problems that led to higher costs, which Defendant Nunns highlighted in a May 4, 2012 conference call: "Forest fires, significant flooding, CAD[$]75 oil, a euro debt crisis, sub CAD[$]2 natural gas, and now CAD[$]30 differentials on oil for a short time during the quarter." ¶67. Penn West acknowledged that these problems "led to operational delays and higher costs," but stressed to investors that the issues were merely temporary. ¶¶68-69. Defendant Nunns assured investors on August 10, 2011 that the Company was implementing changes in response "that'll be a long-term positive on our operating costs" (¶69), and Chief Operating Officer Foulkes stated, "While weakness in the commodity prices is outside our control, we've been very active in addressing our costs, both capital expenditures and operating expenses." ¶71. Analysts specifically called on Penn West to demonstrate improving costs before recommending the stock, reporting on November 4, 2011 that "[o]perational setbacks in Q2/11 led PWT to becoming somewhat of a 'show-me' story." ¶70.

As 2012 progressed, Defendants continued to back up their assurances that Penn West was taking meaningful action to control its cost structure with quarterly results purportedly showing improved operating costs. ¶73. On November 2, 2012, in a press release reiterating the Company's commitment to "optimizing capital and operational efficiencies," Penn West reported better than expected operating costs, which offset lower than expect pricing due to the softening oil market. *Id*. In response, Macquarie Equity Research remarked that Penn West's reported OpEx was "its best result since 1Q11," and viewed this improvement as "encouraging." *Id*.

Again, however, in response to challenging market conditions, Penn West had simply increased the magnitude of its fraud. ¶75. In 2012, $94 million of OpEx were reclassified as CapEx, and another $101 million of OpEx were reclassified as royalties. Together, these fraudulent accounting "adjustments" artificially reduced the Company's OpEx by 16%. *Id.*

D. Under New Leadership, Penn West and Roberts Train a "Laser Focus" on Reducing Penn West's "Problem" Operating Costs

On January 9, 2013, Penn West announced that its 2013 capital budget would be $900 million, significantly less than its 2012 capital budget of $1.3 billion. ¶76. This announcement caused investor anxiety, and analysts reported that "Lower Capex [Would] Drive[] Lower Production and Cash Flow." ¶76. In response, Penn West took a number of steps designed to communicate to the market that the Company was doing everything possible to reduce costs and improve performance. For instance, in June 2013, Penn West announced significant management changes, including new Directors—a "Board renewal"—and a new CEO, Defendant Roberts. ¶¶78-81. In announcing Roberts' appointment as CEO, Penn West stated, "The Company, under a new Board and a new CEO, ***will focus on*** operating the business in a more efficient manner, ***significantly reducing . . . field operating costs***." ¶80.

On August 8, 2013, Penn West announced its financial results for the 2013 second quarter, the first reporting period under its new CEO, that purportedly demonstrated Roberts' success in decreasing operating costs. ¶83. In a press release issued that day, the Company touted that "***[o]ur operating costs have decreased*** from the comparative periods in 2012," and promised to "***continue to focus on cost saving initiatives*** and take further steps to allow us to achieve our goal to deliver best in class operating performance and shareholder returns." *Id.* On an August 8, 2013 conference call to discuss these results, Defendant Roberts continued to emphasize that reducing operating costs was his focus and a central part of the Company's turn-around strategy,

stating that "I clearly recognize ***we've got a problem*** [with operating costs] and clearly I have got a ***laser focus*** on that." *Id*. Analysts reacted positively to Penn West's release of its 2013 second quarter results, heralding the results as evidence of "Green Shoots of Cost Control," and reporting that "The Ship is Turning Towards the Correct Course." ¶84.

Penn West's third quarter of 2013, however, was a setback. On November 6, 2013, Penn West reported disappointing financial results that were driven by unexpectedly higher operating costs. ¶85. To assuage market concern, Roberts unveiled a detailed turnaround plan purporting to show that Penn West's "cost structure is in control and moving downward." ¶89. Roberts' turnaround plan required cost cuts so steep that they would cause production to drop by 25% through 2014, which would now have to be a "transition year." ¶86.

Analysts reported that "it is clear that management has executed an in-depth review of its operating costs," but considered the news of Penn West's lengthy turnaround strategy "disappointing," noting that "the timeline is longer than anticipated." ¶¶87, 90. J.P. Morgan underscored the need for Penn West to deliver in the near-term on Roberts' cost reduction strategies before it could recommend the stock to investors, reporting that "we would like to see several quarters of sustained cost reduction before becoming more constructive on" Penn West. ¶90. In response to this news, Penn West's stock dropped more than 15% on extremely high trading volume, falling from USD $11.09 per share to USD $9.35 per share. ¶274.

In response to this negative market reaction, during the last two quarters of the Class Period, Penn West seemingly delivered on Roberts' promise. On March 7, 2014, Penn West released its financial results for the full year and fourth quarter of 2013, and reported that—supposedly as a result of "relentless cost control"—it had reduced OpEx by 25% in the past year. ¶91. Analysts responded favorably, noting that "[c]ost improvement[s] [were] starting to shine

through." ¶92. On May 1, 2014, Penn West released positive financial results for the first quarter of 2014, highlighting a further 14% reduction in OpEx versus the prior quarter, and touting its "lower operating . . . costs" as "a clear step forward." ¶93. Analysts again reacted positively, observing, "Costs Are Improving—A Positive Sign." ¶94.

Penn West's apparent progress in improving its operating costs was, in fact, a product of the decision to increase the magnitude of the fraud. ¶95. While Defendants had understated operating costs in the third quarter of 2013 by 10%, in the fourth quarter of 2013 and first quarter of 2014 they ramped up the fraud, understating operating expenses by 20% and 16% in those quarters, respectively—thus achieving the purported reductions that Roberts told investors he was setting out to achieve through supposedly legitimate and "relentless cost control." ¶95.

E. Takeyasu Abruptly Departs, and a New CFO Quickly Discovers Defendants' Fraud, Resulting in the Restatement

On March 24, 2014, Penn West unexpectedly announced that its longtime CFO, Defendant Takeyasu, was stepping down as CFO effective immediately, after serving twenty years with Penn West in senior finance and accounting positions, including the last nine years as CFO. ¶97. No reason was given for his abrupt departure. *Id.* The Company also announced that Dyck, an outsider, would become CFO starting on May 1, 2014, and that Defendant Curran, who had been the Company's Senior Vice President of Accounting and Reporting for the past nine years, would serve as acting CFO in the interim. *Id.*

Dyck discovered the fraud within weeks of joining Penn West. ¶98. Soon after Dyck joined the Company, members of the finance and accounting team "express[ed] concerns about accounting practices going back several years." *Id*. This information led the Company's Audit Committee to launch an internal investigation into the Company's widespread accounting violations. *Id*. In June 2014, Curran abruptly separated from Penn West without explanation,

even though he had served as interim CFO just months prior. ¶99. All told, while the Audit Committee's investigation was ongoing, at least sixteen accounting and finance personnel, many of them in senior and managerial roles, were terminated by or left the Company. *Id*.

Then, on July 29, 2014, after market-close, Penn West surprised investors by announcing that its Audit Committee concluded that the Company "must" restate its financial statements for at least the full years 2012 and 2013, and the first quarters of 2013 and 2014. ¶100. As the Company explained, its investigation to date had uncovered a total of approximately $400 million worth of improper reclassifications made during 2012 and 2013, "which appear to have been made to reduce operating costs and increase the Company's reported capital expenditures and royalty expense, and that appear to have been made without adequate supporting documentation." *Id*. Penn West also disclosed that "senior finance and accounting personnel [were] believed responsible for the adoption and use of these practices," and that those senior executives "have ceased to be employed by the Company." *Id*. Penn West further stated that the improper practices "appear to have existed in prior years, with the amounts varying from year to year." ¶101.

Analysts were stunned, reporting that Penn West's restatement "affects most of the cash-based metrics that oil and gas investors care about." ¶104. They further observed that the restatement bore the hallmarks of a deliberate fraud, was "disconcerting" and "very troubling," had "the appearance of a concerted effort to 'make the numbers,'" and showed that senior management "was basically fudging with its numbers." ¶¶104, 109-10, 119. Market commentators, including a former Chief Accountant of the SEC, said that "Penn West's accounting 'is like what happened at both WorldCom and Health South,'" two historic accounting frauds that also involved the reclassification of OpEx as CapEx. ¶108.

In response to these revelations, Penn West's stock price swiftly declined. On July 30, 2014, the trading day immediately after the Company's announcement, Penn West's stock price fell 14% on the year's highest trading volume, from USD $9.15 to USD $7.85 per share, erasing hundreds of millions of dollars in market capitalization. ¶107.

On September 18, 2014, the Company issued its restatement, echoing its July 29, 2014 press release. ¶¶111-14. While applicable accounting rules required the Company to fully restate only its annual financial statements for 2012 and 2013 and quarterly results for 2013 and first quarter 2014, the Company was forced to correct certain financial information from prior periods, thus making clear the fraud was ongoing since 2007. ¶114. The Company's stock price has never recovered from the fraud alleged herein, and currently trades at approximately $2.40 per share.

ARGUMENT

On a Rule 12(b)(6) motion, the Court must "accept all factual allegations as true and draw all reasonable inferences in favor of the plaintiff." *Metz v. U.S. Life Ins. Co. in City of New York*, 662 F.3d 600, 602 (2d Cir. 2011) (citation omitted). To state a claim under Section 10(b), a plaintiff must allege: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1317 (2011) (internal quotations omitted).

I. Plaintiffs Adequately Plead a Strong Inference of Scienter for All Defendants

A strong inference of scienter exists where a complaint alleges that the defendants: (1) "knew facts or had access to information suggesting that their public statements were not accurate"; (2) "failed to check information they had a duty to monitor"; or (3) "benefitted in a

concrete and personal way from the purported fraud." *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000). In determining whether a strong inference of scienter exists, the Court must view the Complaint's allegations holistically, rather than piecemeal. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007). The inference of "scienter need not be irrefutable, *i.e.*, of the 'smoking gun' genre, or even the 'most plausible of competing inferences.'" *Id.* at 324 (citation omitted). Instead, a scienter inference is "strong" when it is *as likely as* any other inference. *Id.*

A. Plaintiffs Allege Strong Circumstantial Evidence of Conscious Misbehavior or Recklessness

When viewed holistically, the numerous facts alleged in the Complaint give rise to a strong inference that Defendants "knew facts or had access to information suggesting that their public statements were not accurate" or "failed to check information they had a duty to monitor." *ECA, Local 134 IBEW Joint Pension Fund of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 199 (2d Cir. 2009) (citation omitted).

1. *Penn West's Admission that the Fraud Was Perpetrated by "Senior Accounting Management" Supports An Inference of Scienter*

Penn West admitted that "senior accounting management," along with "senior finance and accounting personnel," were "responsible for the adoption and use" of the "improper" accounting "practices" that comprised the fraud. *See, e.g.*, ¶¶44, 96, 111. Moreover, Penn West admitted that the accounting improprieties "occurred at the corporate level," where, as market commentators with accounting expertise explained, members of corporate "senior management" "would likely have had more direct oversight." ¶¶44, 96, 113, 119. These admissions support an inference of scienter as to all Individual Defendants.

First, there is a strong inference that Defendants Takeyasu and Curran designed the fraud or, at minimum, had direct knowledge of the improper accounting practices at issue. These two

Defendants were quintessential members of "senior accounting management" the Company has blamed for the fraud. *See, e.g.*, *Plumbers & Pipefitters Nat'l Pension Fund v. Orthofix Int'l N.V.*, 2015 WL 981518, at *12, *14 (S.D.N.Y. Mar. 6, 2015) (Koeltl, J.) (noting that an inference of scienter may be "based on individual defendant's position as 'the executive most responsible for the Company's accounting'") (citation omitted). According to the Company, Takeyasu was a certified accountant and internal auditor who held "various senior roles [at Penn West] since 1994"—a period of 20 years. ¶25. He served as Vice President, Senior Vice President, and Executive Vice President, Finance; Treasurer from 2001 to 2005; and CFO from 2005 through March 2014, which included the duration of the fraud. *Id*. Given his central role in overseeing the finance and accounting departments, the Company characterized Takeyasu as "an integral member of Penn West's senior management." *Id*.

Curran, also a certified accountant, was the Company's second most senior accounting and finance officer throughout the Class Period. He served as Takeyasu's top deputy for the duration of the fraud. ¶¶26, 145. He assumed the position of Vice President of Accounting and Reporting in 2005 and held it for nearly a decade, until March 2014, when he succeeded Takeyasu as the Company's interim CFO. ¶26.

As the Company's two most senior accounting and finance officers, Takeyasu and Curran had direct authority over, and were intimately involved with, the Company's finance, accounting and public reporting functions throughout the Class Period. *See, e.g.*, ¶¶26, 137, 149. Of anyone at Penn West, Takeyasu and Curran were undoubtedly able to "adopt" and approve the accounting "practices" that comprised the fraud. At bottom, it is simply implausible that Penn West's two most senior accounting and finance officers lacked knowledge of the fraud alleged in this case. The gravamen of the Complaint is that Penn West's senior accounting executives

improperly reclassified at least $625 million worth of operating expenses over seven years through "practices" that the Company had "adopted"; these reclassifications were deliberately made to misstate the Company's most critical financial metrics; these very metrics were the subject of intense investor concern during the Class Period and the subject of Defendants' repeated public statements; and the size of the fraud increased when Penn West faced significant challenges. *See, e.g.*, ¶¶3-5, 7. Such a deliberate and long-lasting fraud could not be carried out without the knowledge and approval of the Company's most senior accounting executives, *i.e.*, Takeyasu and Curran. The inference that Takeyasu and Curran were among those who perpetrated the fraud is strengthened by the fact that the Company stated that the members of senior accounting management responsible for carrying out the fraud ceased to be employed by Penn West earlier in 2014—a group that included Takeyasu and Curran. ¶¶96-97, 99.

Given these facts, there is a strong inference of scienter as to Takeyasu and Curran. Indeed, the fact that the fraud came to Dyck's attention *in his capacity as CFO* soon after joining Penn West supports the inference that Defendants Takeyasu and Curran, both of whom previously occupied Dyck's office (in Takeyasu's case, for *years*), knew of the fraud. *See, e.g.*, *Orthofix*, 2015 WL 981518, at *12, *14; *In re Am. Bank Note Holographics, Inc. Sec. Litig.*, 93 F. Supp. 2d 424, 448 (S.D.N.Y. 2000) (finding scienter allegation sufficient as to CFO and Comptroller where the defendants were "uniquely situated" to control the revenue recognition procedures); *see also Freudenberg v. E*Trade Fin. Corp.*, 712 F. Supp. 2d 171, 199 (S.D.N.Y. 2010) (defendant's "responsibilities as E*TRADE's chief financial and accounting officer, further evidence his scienter"); *In re AOL Time Warner, Inc. Sec. & "ERISA" Litig.*, 381 F.

Supp. 2d 192, 221–22 (S.D.N.Y. 2004) (same).[5]

Second, the Company's admission that a fraud of this scope was carried out by senior accounting management supports a strong inference of severe recklessness, at a minimum, as to all Individual Defendants. All of the Individual Defendants were high level executives with unlimited access to Company information. They were "directly privy to and in control of the fraudulent financial statements,"[6] had considerable experience in the oil and gas industry, and routinely represented to investors that they had investigated with "reasonable diligence" the accuracy and completeness of the Company's misstated financial statements. ¶¶22-26, 137, 169, 309-14. The Individual Defendants understood that the misstated financial metrics were among the "key drivers of shareholder value," and that investors were extremely concerned about Penn West's operating costs. *See, e.g.*, ¶¶38, 42-43, 57, 60, 62, 69-70, 77, 82, 109, 124. The Individual Defendants each repeatedly issued public statements on this very subject over the course of seven years. *See, e.g.*, ¶¶4, 32, 80, 83, 91, 145, 171, 195, 219, 233, 254, 259.

Accordingly, it was incumbent upon the Individual Defendants to ascertain the true facts concerning the subjects of which they repeatedly spoke. Even assuming that they somehow remained completely ignorant of a fraud perpetrated by "senior accounting management" at the "corporate level" to materially distort the Company's key metrics for the better part of a decade, such ignorance would epitomize severe recklessness. Indeed, their recklessness is demonstrated

[5] Moreover, the knowledge of Takeyasu, who directly reported to the CEO, supports the inference that Andrew, Nunns and Roberts knew as well. *See In re OSG Sec. Litig.*, 12 F. Supp. 3d 622, 631 (S.D.N.Y. 2014) ("Because the Former Treasurer reported directly to Itkin, it is likely that Itkin possessed the same understanding[.]").

[6] *In re Mercator Software, Inc. Sec. Litig.*, 161 F. Supp. 2d 143, 149 (D. Conn. 2001).

by the fact that Dyck came into the Company as a complete outsider and quickly learned of the fraud. ¶¶9-10, 98. *See In re New Century*, 588 F. Supp. 2d 1206, 1231 (C.D. Cal. 2008) ("[T]he fact that the new CEO . . . discovered the accounting violations within months of taking the position is a strong indication that these accounting violations were obvious enough that a new officer found them quickly."); *see also George v. China Auto. Sys., Inc.*, 2012 WL 3205062, at *14 (S.D.N.Y. Aug. 8, 2012) ("[Q]uick discovery of an alleged error in the defendant-company's financial statements" "support[s] an inference of recklessness.").

Each and every Individual Defendant had access to the same information that Dyck did for multiple years, and would have discovered the fraud with ease, just as Dyck did, had they only inquired—***as they were required to do***. Any purported failure to discharge this duty was severely reckless at minimum. *See In re Scottish Re Grp. Sec. Litig.*, 524 F. Supp. 2d 370, 392, 395 (S.D.N.Y. 2007) (allegations that "management was aware" that internal controls were inadequate "sufficiently support the inference that [issuer and certification signatories] were reckless in their failure to discover and disclose these weaknesses"); *In re Alstom SA Sec. Litig.*, 406 F. Supp. 2d 433, 496 (S.D.N.Y. 2005) (CFO "signed Alstom's SEC filings and thus had a duty to familiarize himself with Alstom's core operations"); *In re Atlas Air Worldwide Holdings, Inc. Sec. Litig.*, 324 F. Supp. 2d 474, 491 (S.D.N.Y. 2004) ("As signatories to the SEC filings that contained the company's financials, each individual defendant who served as a high-level officer had a duty to familiarize himself with the facts relevant to the core operations of the company and the financial reporting of those operations.").

2. *The Nature of the Accounting Violations Supports an Inference of Scienter*

A deliberate manipulation of accounting entries to materially understate expenses is strong circumstantial evidence of conscious misbehavior. *See In re Livent, Inc. Sec. Litig.*, 78 F. Supp. 2d 194, 206-208, 215 (S.D.N.Y. 1999). Here, for numerous reasons, the nature of the

accounting violations alleged in the Complaint—violations Penn West itself characterized as "***improper***" (¶111) —strongly support an inference of scienter.

First, the vast majority of the fraudulent accounting entries here are reclassifications. In other words, Penn West's senior management personally went into (or instructed others to go into) Penn West's books and changed entries that had been made correctly in the first instance—conduct that is intentionally misleading by definition. ¶¶44-52. ***Second***, the Company has admitted that the reclassifications were deliberately "made to reduce operating costs and increase the Company's reported capital expenditures." ¶46. ***Third***, the Company has admitted that, in many instances, there was "no contemporaneous support for the decision to reclassify operating expenses," and that "little if any analysis was performed at the time of the entries to determine which items ought to be capitalized." *See, e.g.*, ¶47.

Fourth, another aspect of Defendants' fraud involved booking phantom assets reflecting contemplated capital investments that were never made. ¶¶52, 118, 280, 288-89. As explained above, at the end of the year, senior accounting management simply refused to deduct those capital expenditures that they knew had not in fact been made—conduct that was also clearly knowing. *Id*. ***Fifth***, Penn West has admitted that as part of the fraud, when the Company's internal accounting processes correctly tabulated capital expenditures at year-end, "senior accounting management overrode the outcomes" of the Company's accounting processes in order to falsify the financial statements. *Id*.

Sixth, the accounting improprieties in this case were clear-cut violations of GAAP mandates. ¶¶279-89. "Allegations that the accounting rules are straightforward and the company's accounting treatment was obviously wrong may create an inference of scienter." *Orthofix*, 2015 WL 981518, at *13 (quoting *S.E.C. v. Egan*, 994 F. Supp. 2d 558, 565 (S.D.N.Y.

2014)); *see also In re MicroStrategy, Inc. Sec. Litig.*, 115 F. Supp. 2d 620, 638 (E.D. Va. 2000) ("[I]f the GAAP rules and [the Company's] accounting policies Defendants are alleged to have violated are relatively simple, it is more likely that the Defendants were aware of the violations and consciously or intentionally implemented or supported them, or were reckless in this regard.").

Here, for instance, before Penn West was permitted to capitalize an expenditure, applicable accounting standards required Penn West to determine, based on the evidence available to it, that it was "probable that future economic benefits associated with [the] item [would] flow to" Penn West and "the cost [of the item could] be reliably measured." ¶¶281-82. By admitting that "little if any analysis was performed at the time of the entries to determine which items ought to be capitalized," that "there appeared to be no contemporaneous support for the decision to reclassify operating expenses" in many instances, and that documentation supporting the reclassifications was either entirely absent or wholly "inadequate" (¶¶11, 100, 123), Penn West has admitted that it made essentially no effort to make the determinations required by accounting rules, and had no basis for its reclassifications.

The reclassification of booked operating expenses as royalties presents another case of flagrant GAAP violations. The Company represented that its reported royalties represented amounts actually "payable" to the government, and clear industry guidance explicitly required the ***exclusion*** of "costs" from reported royalties. ¶284. Directly contrary to this mandate, the Company reclassified at least $220 million of operating costs as royalties during the period from January 1, 2012 to the first quarter of 2014 (and additional amounts in prior years). ¶¶280, 286. Because royalties consist of fixed amounts actually paid to the government, there is no room for subjective judgment in accounting for such entries, and, thus, little chance of inadvertent error.

¶285. Thus, after Defendants' fraud was finally revealed, analysts were "***particularly disturbed***" by this practice "because it would seem to be difficult to make inadvertent errors in that accounting," and concluded it was "bizarre" to think Penn West could innocently mistake a royalty payment as a cost expense. ¶¶109, 123.

Seventh, that the fraud involved violations of internal Penn West policy further supports an inference of scienter. *See, e.g.*, *Novak*, 216 F.3d at 311 (inferring scienter from allegation that "defendants knowingly sanctioned procedures that violated the Company's own markdown policy"); *In re Sadia, S.A. Sec. Litig.*, 643 F. Supp. 2d 521, 532 (S.D.N.Y. 2009) ("[T]here is considerable authority for the proposition that a company's failure to follow an internal policy can form the basis for an inference of recklessness."). Here, Defendants' fraudulent accounting practices not only violated GAAP, but the Company's own accounting policies in three ways: (i) the practice of reclassifying operating expenses with "no contemporaneous support" and "little if any analysis" violated the Company's own "journal entry" policy, which specifically required adequate supporting documentation for each reclassification (¶117); (ii) senior management "overrode" the Company's own accounting systems on multiple occasions to produce false results (¶118); and (iii) by definition, the Company's improper ***re***classification of entries that were correct in the first instance constituted a departure from the proper application of Penn West's accounting policies.

Eighth, the type of accounting fraud at issue here is not novel or arcane, but is well-known. In two highly publicized cases of fraud, both WorldCom and HealthSouth understated their operating costs by improperly capitalizing them, allowing the companies to spread those costs over time and transform them into assets on the Company's balance sheet—precisely the same misconduct in which Penn West engaged here. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*,

294 F. Supp. 2d 392, 400-01, 405 (S.D.N.Y. 2003). Market commentators specifically pointed out that Penn West's accounting malfeasance mirrored the improprieties in those two cases. ¶¶12, 108. And improper capitalization of operating expenses has been the subject of numerous other private securities and agency enforcement actions.[7] The fact that improper capitalization of operating expenses has figured prominently in several frauds supports a strong inference not only that Penn West's accounting violations were deliberate, but that the Individual Defendants were at the very least reckless in failing, for several years, to detect that the same misconduct was causing the Company to understate its operating expenses by hundreds of millions of dollars.

In sum, the nature of the accounting improprieties demonstrates that the Company's senior management engaged in a deliberate and sustained fraud, and strongly supports an inference of scienter as to all the Individual Defendants.

3. *Widespread Knowledge of the Fraud Supports an Inference of Scienter*

Where internal knowledge of improper accounting practices is widespread, it "would simply be implausible" to conclude that senior officers "did not know of and in some sense culpably participate in" the fraud. *Alstom*, 406 F. Supp. 2d at 505 (citation omitted); *see also Cornwell v. Credit Suisse Grp.*, 689 F. Supp. 2d 629, 637 (S.D.N.Y. 2010) (inferring officers'

---

[7] *See, e.g.*, *S.E.C. v. Geswein*, 2011 WL 4541308, at *21 (N.D. Ohio Aug. 2, 2011); *In re Am. Italian Pasta Co. Sec. Litig.*, 2006 WL 1715168, at *1-2 (W.D. Mo. June 19, 2006); *In re SmarTalk Teleservices, Inc. Sec. Litig.*, 124 F. Supp. 2d 527, 540 (S.D. Ohio 2000); *S.E.C. v. Sport-Haley, Inc.*, Release No. 1877, 2009 WL 2129037 (Sept. 29, 2003); *In the Matter of Valley Sys. Inc.,* Release No. 707, 1995 WL 547801 (Sept. 14, 1995) (SEC's imposition of sanctions appropriate where, as here, violator understated operating expenses by capitalizing costs and "[t]here was no supporting documentation or analysis to justify the amounts capitalized").

and issuer's scienter from allegations of "widespread knowledge at CSG of the company's problems with valuation, risk management and internal controls"); *Scottish Re*, 524 F. Supp. 2d at 392 (allegations that facts underlying the fraud were "common knowledge" support an inference of recklessness).

Penn West has acknowledged that the fraud was not the work of a few rogue employees and did not concern merely a handful of isolated transactions, but represented "improper" "practices" that were "adopted" "at the corporate level" and sustained over seven years. In other words, the fraudulent accounting practices were institutionalized at Penn West. The Company has further acknowledged that a deficient "culture of compliance" pervaded its accounting and finance departments, and that numerous members of senior management participated in implementing the Company's fraudulent accounting practices, requiring the Board to usher in "a new era of enhanced corporate governance and ethics to address our past." ¶¶113, 116. Indeed, the swiftness with which Dyck discovered the fraud indicates that it was no secret, and that information concerning the fraud was readily available to any executive that cared to inquire.

4. *The Importance of the Financial Metrics Defendants Misstated, As Well As the Defendants' Focus on the Company's Operating Costs, Support an Inference of Scienter*

When misstatements affect metrics and factors that are "key to measuring [a company's] financial performance and [were] a subject about which investors and analysts often inquired" this further "reinforces the inference of scienter." *New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 F. App'x 10, 14 (2d Cir. 2011). The Complaint alleges that Defendants misstated Penn West's most critical financial metrics. The Company characterized its operating costs, funds flow, and netback as among the "key drivers of shareholder value" and the Company's "most important . . . core metrics," and acknowledged that showing improvement in these metrics was "critically important" to investors. *See, e.g.*, ¶¶4, 38, 91. Indeed, analysts and investors

consistently focused on these metrics as key measures of Penn West's financial condition, and these metrics were particularly important to the Company's investors because the Company struggled mightily to control its operating costs. *See* ¶¶28-39. Analysts repeatedly reported that the Company needed to show improvement in these key metrics before they would recommend the stock, calling Penn West a "show-me story" for precisely this reason. *See, e.g.*, ¶¶70, 77, 87, 89. Unsurprisingly, when Penn West's fraud was finally revealed, analysts concluded that "***[a]ll the irregularities that have been identified [] served to inflate key metrics that investors use to evaluate the performance of an energy company . . . . That is very troubling***." ¶109. The fact that Penn West materially misstated its most critical metrics lends strength to the inference that the Company's most senior executives were aware of the fraud or recklessly disregarded it. *See In re IMAX Sec. Litig.*, 587 F. Supp. 2d 471, 481 (S.D.N.Y. 2008) (fact that "defendants undoubtedly appreciated that theater system revenue was of singular importance to the financial well-being and market perception of the Company" supported inference of scienter); *see also In re Hi-Crush Partners L.P. Sec. Litig.*, 2013 WL 6233561, at *26 (S.D.N.Y. Dec. 2, 2013) ("[S]enior members of [issuer's] senior management team . . . can be presumed to have knowledge of the company's core operations."); *In re Complete Mgmt. Inc. Sec. Litig.*, 153 F. Supp. 2d 314, 325 (S.D.N.Y. 2001) ("[O]n a motion to dismiss, making all reasonable assumptions in favor of the plaintiff includes assuming that principal managers of a corporation are aware of matters central to that business's operation.").

Moreover, a defendant's representations to investors that he or she is focused on the subject of their false statements supports an inference of scienter. *See, e.g.*, *Meridian Horizon Fund, L.P. v. Tremont Grp. Holdings, Inc.*, 2012 WL 4049953, at *2-3 (S.D.N.Y. Sept. 14, 2012) (scienter adequately pled where defendants represented "they closely monitored" the subject of

their false statements because they either "failed to perform the monitoring they claimed to have performed or they uncovered [the truth and] knowingly or recklessly misrepresented the circumstances to plaintiffs"). Recognizing the importance of Penn West's cost structure to investors, the Individual Defendants repeatedly assured investors throughout the Class Period that management was "focus[ed] on cost saving initiatives" and "very active in addressing our costs." *See, e.g.*, ¶¶4, 32, 80, 83, 91, 145, 171, 195, 219, 233, 254, 259. Roberts, who took over Penn West at a time when investors were particularly concerned about the Company's operating costs, told investors that he "recognize[d] we've got a problem," and that he had "a laser focus on that" problem. *See, e.g.*, ¶¶4, 38, 91. Indeed, Roberts made reducing operating costs one of the centerpieces of the "turnaround plan" he announced in November 2013, and represented that, in devising the plan, he was intimately familiar with the Company's reported expense figures. ¶¶80-82, 85. Similarly, Andrew told investors that Takeyasu and Curran were combing through the Company's operating costs to find even marginal cost reductions that, because of the importance of operating costs to the Company's profitability, would impact the Company's bottom line. ¶145. Either Defendants actually did pay special attention to the Company's costs, in which case they knew about the fraud, or they lied about paying close attention to this critical issue, in which case their conduct was extremely reckless at minimum. *See In re BP p.l.c. Sec. Litig.*, 843 F. Supp. 2d 712, 783 (S.D. Tex. 2012) (Defendants' repeated statements "weigh strongly in favor of the inference that" they "paid special attention" to the subject of the fraud "or, at the least, [were] reckless in not doing so while continuing to publicly tout improvements").[8]

[8] *See also Richman v. Goldman Sachs Grp. Inc.*, 868 F. Supp. 2d 261, 283 (S.D.N.Y. 2012) (scienter where defendant "monitored the status of Goldman's subprime assets"); *Citiline*

5. *The Duration, Magnitude, and Timing of the Fraud Support an Inference of Scienter*

The substantial size and duration of a fraud also supports a strong inference of scienter as to an issuer's CEO and CFO. As courts have recognized, "[c]ommon sense suggests that, all other things being equal, more opportunities should exist to discover a larger fraud than a smaller fraud, especially where, as here, the magnitude of the fraud was not accomplished by one fraudulent transaction of enormous monetary significance, but by countless small adjustments to the accounting entries." *Livent*, 78 F. Supp. 2d at 217.

As noted above, the fraud lasted approximately seven years. *See Am. Bank Note*, 93 F. Supp. 2d at 447-48 (scienter sufficiently alleged as to CEO, CFO, and Comptroller where revenues had been overstated for a period of two years in repeated SEC filings and defendants had "access to [issuer's] actual sales and revenue information [misstated by the fraud] by virtue of their positions"); *Alstom*, 406 F. Supp. 2d at 460 ("significant length of time [four years] during which the arrangements were not disclosed" supported scienter).

Moreover, the Company's senior executives improperly reclassified at least $625 million worth of operating expenses. *See, e.g.*, ¶5. These senior executives misstated the Company's financial results in dozens of quarterly and annual reports, artificially reducing the Company's operating costs by as much as 26%, and inflating capital expenditures by as much as 64%, net income by as much as 82%, funds flow by as much as 12%, and netback by as much as 8%. *See, e.g.*, ¶¶129-271. This Court has previously held that misstatements of comparable magnitude,

---

Holdings, Inc. v. iStar Fin. Inc., 701 F. Supp. 2d 506, 516 (S.D.N.Y. 2010) (scienter where defendants "told the investing public that they monitored the value of their portfolio"); *Apogee Enters., Inc. v. State St. Bank & Trust Co.*, 2010 WL 3632697, at *5 (S.D.N.Y. Sept. 17, 2010) (scienter where defendant "closely monitored, and enjoyed extensive access to information").

22% and 17%, "render less credible the defendants' arguments that they had no notice of any of the accounting improprieties that led to the Restatement." *Orthofix*, 2015 WL 981518, at *13; *see also MicroStrategy*, 115 F. Supp. 2d at 620 (overstatement of revenues by $66 million over three years supported an inference of scienter).

Again, Plaintiffs' allegations concerning the magnitude and duration of the fraud support a particularly compelling inference with respect to Defendants Takeyasu and Curran, both of whom were responsible for Penn West's accounting policies throughout the duration of the fraud. *See Egan*, 994 F. Supp. 2d at 566-67 ("[A] complaint alleging that a defendant is responsible for revenue recognition policies during a time of large-scale, long-term GAAP violations sufficiently alleges circumstantial evidence of actual knowledge . . . . The Complaint alleges a year-long pattern of activity contributing to the fraud. Egan not only possessed accounting expertise, but as Volt's CFO was responsible for revenue recognition policies.") (internal quotations omitted).

Moreover, Defendants accelerated their accounting fraud when the Company faced downward financial pressures, further strengthening the inference of scienter here. ¶¶7, 127. As detailed in the Complaint, after the price of oil plummeted as a result of the economic collapse in late 2008, Defendants dramatically increased the size of the fraud in 2009. ¶¶7, 127. Likewise, when Penn West faced a series of operational difficulties and adverse market conditions that accumulated over 2011, leading to analyst pessimism and a sharply declining stock price late in the year, Defendants once again responded by increasing the size of Penn West's fraud over prior periods. ¶¶7, 66-75, 127. The fact that Penn West's senior management increased the scope of the fraud in response to adverse conditions is highly indicative of fraudulent intent on the part of the Individual Defendants. After all, it would be implausible to conclude that anyone but those

senior executives were attuned to the complex market and operational forces the Company as a whole faced, and were motivated to adjust the fraud in response to them. *See In re Refco, Inc. Sec. Litig.*, 503 F. Supp. 2d 611, 658-60 (S.D.N.Y. 2007) ("suspicious timing" of large transactions "near the end of financial reporting periods" supported "a strong inference of scienter on [auditor's] part"); *Chalverus v. Pegasystems, Inc.*, 59 F. Supp. 2d 226, 234 (D. Mass. 1999) (accounting irregularities "are particularly suspect when the transaction occurs at a suspicious time").

6. *The Suspicious Circumstances Surrounding Takeyasu's and Curran's Departures Further Support and Inference of Scienter as to Them*

The suspicious circumstances and timing of high-level employee departures contribute to a strong inference of scienter. *See Orthofix*, 2015 WL 981518, at *14 (holding that resignations occurring in the months "lead[ing]-up to [an issuer's] announcement [] that it would delay filing its quarterly report," which "ultimately led to issuance of the Restatement" lent "further weight to an inference of scienter"); *In re Alstom SA Sec. Litig.*, 454 F. Supp. 2d 187, 208 (S.D.N.Y. 2006) (finding that the terminations of two senior executives contributed to an inference of scienter); *Scottish Re*, 524 F. Supp. 2d at 394 n.176 (same); *Mercator Software*, 161 F. Supp. 2d at 150 (same).

The fraud detailed in the Complaint goes as far back as 2007, not long after Takeyasu became CFO. ¶114. After 20 years with Penn West, Takeyasu abruptly departed the Company in March 2014, the last quarter that the Company misstated its results and just months before the revelation of the fraud. ¶97. It is no accident that the fraud began soon after Takeyasu was promoted to CFO and ended just as he left Penn West. The Complaint's allegations also indicate that Takeyasu's departure was not voluntary: (1) the Company's installation of an interim CFO because Dyck was not yet ready to assume the office indicates that Takeysu's departure was

hastily arranged, rather than part of a well-thought out succession plan; and (2) Takeyasu did not leave to pursue another position, indicating he was abruptly forced out of Penn West. *Id*. Market commentators specifically remarked upon the suspicious timing of Takeyasu's departure after the fraud was revealed. ¶108. Curran, who had been Penn West's second most senior accounting executive going back to 2005 and was appointed interim CFO after Takeyasu suddenly departed, was removed less than two months later while the Board's investigation was ongoing, without any explanation. ¶¶26, 99. As soon as Takeyasu was gone and Curran ceased to be interim CFO, their former team members, no longer answerable to either Individual Defendant, "express[ed] concern" about the long-running accounting improprieties to Dyck, their new CFO. ¶98. In sum, the highly suspicious circumstances surrounding the departures of Takeyasu and Curran provide additional support for the inference of scienter.

7. *Defendants' False Statements In Their Regulatory Certifications Lend Additional Support to the Inference of Scienter*

False statements made by each of the Individual Defendants, including Andrew, Nunns, and Roberts, in their regulatory certifications further support an inference of scienter. The Individual Defendants represented, in no less than 18 signed certifications filed with securities regulators, that they had investigated the accuracy and completeness of the Company's financial statements with "reasonable diligence," and determined that (i) the financial statements were accurate and complete; and (ii) the Company's public filings disclosed "[a]ny fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal control over financial reporting." *See* ¶¶137, 169, 309-14.[9] In other words, each

[9] Takeyasu signed 17 such certifications (¶310); Andrew signed six such certifications (¶311); Nunns signed eight such certifications (¶312); Roberts signed four such certifications (¶313); and Curran signed one such certification (¶314).

of the Individual Defendants undertook the duty to conduct a diligent investigation into whether the Company's senior finance and accounting personnel were involved in any fraud. Dyck's discovery of the fraud by simply talking to those ***same*** employees leaves little question that such diligence would have revealed (or, in fact, did reveal) Penn West's accounting improprieties. Either the Individual Defendants conducted such diligence, in which case they clearly knew about the fraud, or they did not conduct the diligence they assured investors they were undertaking, in which case their conduct was severely reckless. *See* authorities cited *supra* at 28-29.

Moreover, in their regulatory certifications, the Individual Defendants repeatedly assured investors that they had "designed" and "evaluated" the Company's internal controls, and that such controls were free of material weaknesses; accordingly, they "presumably had extensive knowledge about precisely these matters." *Dobina v. Weatherford Int'l Ltd.*, 909 F. Supp. 2d 228, 246 (S.D.N.Y. 2012). Yet senior management was responsible for creating three material weaknesses in Penn West's internal controls, each of which facilitated the fraud: (1) a culture that discouraged those with knowledge of the fraud from publicly exposing it; (2) $625 million of reclassifications entered without supporting documentation or analysis, over seven years, for the specific purpose of manipulating the Company's publicly reported financial results; and (3) intentional overrides of the Company's accounting systems to produce false, but desired, results. ¶¶116-18. Given the intimate knowledge of Penn West's internal controls the Individual Defendants must have acquired in the course of "designing" and routinely "evaluating" them, they must have known, or were reckless in failing to know, that Penn West's internal controls

were riddled with multiple severe deficiencies.[10] *See Dobina*, 909 F. Supp. 2d at 246 (holding that scienter with respect to misstatements concerning internal controls could be inferred on the part of signatories to regulatory certifications representing those signatories had "designed" and "evaluated" the issuer's internal controls).

B. Plaintiffs' Motive Allegations Bolster the Scienter Inference

Further supporting a strong inference of scienter, Plaintiffs allege that Defendants possessed a unique motive to engage in this fraud. As explained above, investors viewed operating costs, along with funds flow and netback, as critical measures of Penn West's financial condition, and were intensely focused on those metrics throughout the Class Period. Investors' focus on operating costs and related metrics was particularly problematic for Penn West because the Company had historically struggled relative to its peers to keep operating costs under control. ¶¶3, 40-42. Defendant Roberts acknowledged after the end of the Class Period that "[i]t was almost a source of embarrassment" that Penn West was "not even in the same postal code" with its competitors in terms of costs. ¶42. Penn West therefore stated that showing improvement in its operating costs and related metrics was "critically important" to investors. ¶¶4, 91. Moreover, the Company faced severe challenges at several points during the Class Period that made it even more "critical" for the Company to show it was controlling costs, including after the price of oil

[10] Penn West's lack of adequate internal controls also supports an inference of scienter with respect to the Company's false financial statements. *See Hall v. The Children's Place Retail Stores, Inc.*, 580 F. Supp. 2d 212, 233 (S.D.N.Y.2008) ("[T]he Company admitted that it had material weaknesses in its internal controls—weaknesses probative of scienter."); *In re Veeco Instruments, Inc. Sec. Litig.*, 235 F.R.D. 220, 232 (S.D.N.Y. 2006) ("[A] failure to maintain sufficient internal controls to avoid fraud is sufficiently indicative of scienter.").

collapsed in the wake of the 2008 financial crisis and after it experienced significant operational disruptions in 2011. ¶¶59, 66-75. Thus, when Defendant Roberts took over as CEO, he told investors that he "recognize[d] we've got a problem," had a "laser focus" on the Company's operating costs, and made reducing operating costs the centerpiece of his turnaround plan. ¶83.

Given the unique importance of operating costs to Penn West, analysts repeatedly challenged the Company to improve those costs before recommending the stock. For example, when Penn West faced operational challenges that strained its cost structure and assured investors that its costs would improve, analysts specifically called the Company a "show me story" that they would not endorse until cost improvements were actually achieved. ¶70. And after Penn West disclosed in November 2013 that it was implementing a turn-around plan centered on cost control, analysts took a "wait-and-see approach" and stated they wanted to "see several quarters of sustained cost reduction before becoming more constructive." ¶90. Indeed, after the fraud was revealed, market commentators specifically explained that "Penn West was ***under intense pressure***" during the Class Period "***to show that it was slashing its operating costs and improving its operations***." ¶104.

The Individual Defendants, well aware that the market was keenly focused on Penn West's operating expenses, understood that their jobs were in danger unless they could show that Penn West was improving in this critical area. In the quarter just before Nunns succumbed to pressure to resign as CEO, the magnitude of Defendants' fraud increased compared to prior periods. *Compare* ¶187 *with* ¶203. In other words, the fraud deepened at the time when Nunns' position with Penn West was most in jeopardy. Likewise, by making operating cost reductions a centerpiece in his turnaround plan, Roberts demonstrated that he was acutely aware that the

market would judge his performance as CEO based on his ability to implement meaningful cost improvements.

All of these detailed facts demonstrate Defendants' motive to fraudulently understate Penn West's operating expenses, and provide further support for an inference of scienter. *See, e.g.*, *Pirraglia v. Novell, Inc.*, 339 F.3d 1182, 1191 (10th Cir. 2003) (allegations that defendants desired to protect their positions pled motive because "defendants in the instant case had special cause to think that they would lose their jobs if they failed to produce results"); *Aldridge v. A.T. Cross Corp.*, 284 F.3d 72, 83 (1st Cir. 2002) (motive pled where complaint alleged that subject matter of false statements was "important to [the individual defendants'] own survival and that of the company"); *In re Williams Sec. Litig.*, 339 F. Supp. 2d 1206, 1234 (N.D. Okla. 2003) (motive alleged where issuer's "continued viability was dependent upon certain measures of [its] financial performance").

In sum, for all the reasons set forth above, the Complaint pleads a strong inference of scienter for all Defendants.

C. The Complaint Adequately Pleads Penn West's Corporate Scienter

Even if the Court were to conclude that the Complaint failed to allege scienter for every one of the Individual Defendants, which it should not, a plaintiff may plead an issuer's scienter without alleging the scienter of any named defendant. *See Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc.*, 531 F.3d 190, 195 (2d Cir. 2008).[11] Plaintiffs have

[11] "[T]here is no requirement that the same individual who made an alleged misstatement on behalf of a corporation personally possessed the required scienter." *Marsh*, 501 F. Supp. 2d at 481 (internal quotations omitted); *see also Pa. Pub. Sch. Emps.' Ret. Sys. v. Bank of Am. Corp.*, 874 F. Supp. 2d 341, 372 (S.D.N.Y. 2012) ("[C]ourts in this jurisdiction consistently interpret

sufficiently pled Penn West's scienter here. Standing alone, the Company's admissions that its "senior finance and accounting personnel" and "senior accounting management" perpetrated the fraud give rise to a strong inference of scienter with respect to Penn West. *See, e.g.*, *Sgalambo v. McKenzie*, 739 F. Supp. 2d 453, 486 (S.D.N.Y. 2010) (scienter alleged with respect to issuer because "it is utterly implausible that senior corporate officers . . . would not have been aware of" facts suggesting public statements were inaccurate); *In re MBIA, Inc. Sec. Litig.*, 700 F. Supp. 2d 566, 591 (S.D.N.Y. 2010) (scienter adequately pled based on allegations that corporate officers "had knowledge of and access to non-public information . . . that contradicted their public statements," even though scienter not established with respect to individual defendants); *In re Marsh & Mclennan Cos., Inc. Sec. Litig.*, 501 F. Supp. 2d 452, 481 (S.D.N.Y. 2006) ("[C]ourts have readily attributed the scienter of management-level employees to corporate defendants"). When the totality of Plaintiffs' allegations, summarized above, are considered collectively, that inference of corporate scienter becomes overwhelming.

II. Defendants' Arguments Do Not Defeat a Strong Inference of Scienter

In response to the Complaint's detailed allegations, Defendants make numerous arguments that misstate the law, ignore or contradict the Complaint, and, at best, raise fact issues that cannot be resolved at this stage. These arguments should be rejected.

A. The Company's Admissions Support a Strong Inference of Scienter

Defendants argue that the Court must conclude, as a matter of law, that Penn West's admissions that the fraud was perpetrated by "senior accounting management" and "senior

---

Dynex" as holding that "an individual whose knowledge is imputed to the corporation [need not] also 'make' the material misstatement."); *In re Moody's Corp. Sec. Litig.*, 599 F. Supp. 2d 493, 516 (S.D.N.Y. 2009) (same).

finance and accounting personnel" do not support an inference of scienter. PW Br. at 19-21; MN Br. at 9. According to Defendants, the terms "senior accounting management" and "senior finance and accounting personnel" "do[] not mean the CEO or CFO." PW Br. at 19. This argument fails.

First, Defendants do not even attempt to argue that Defendant Curran is not among the "senior accounting management" or "senior finance and accounting personnel" to blame for the fraud, nor could they seriously make that contention. ***Second***, for all the reasons set forth above at 18-20, it is implausible that the admission does not refer to CFO Takeyasu, who had direct authority over the accounting and finance departments throughout the duration of the fraud, (¶25), who held multiple senior finance and accounting positions during his 20-year tenure with Penn West, (*id.*), who suspiciously left the company just before the fraud was disclosed, (¶97), and whose reports immediately disclosed the fraud to Dyck when he assumed Takeyasu's position, (*id.*). ***Third***, for all the reasons set forth above at 21-22, even assuming that the Individual Defendants had no inkling of this seven-year fraud through which "senior accounting management" misstated Penn West's most important financial metrics, their ignorance would amount to severe recklessness at a minimum. If the Individual Defendants had bothered to check with their own "senior accounting management," they would have discovered the same thing that Dyck discovered within weeks of taking the helm as CFO: Penn West was involved in a wide-ranging, years-long fraud. ¶98.

Fourth, while Defendants contend—with no support—that the Court must hold that "senior accounting management" does not include the CEO and CFO as a matter of law, Defendants fail to identify who ***is*** included in that group, insisting that the culpable parties shall remain nameless. Defendants cannot have it both ways.

The cases on which Defendants rely involved conclusory statements from confidential witnesses and are completely inapposite. For instance, in *City of Brockton Retirement System v. Shaw Group Inc.*, plaintiffs relied upon vague rumors from confidential witnesses such as, "[I]t was a running joke [in the Company] that our accounting department sucks," and comments about the general management style of the CEO and CFO. 540 F. Supp. 2d 464, 474 (S.D.N.Y. 2008). The allegations in *Plumbers & Pipefitters Local Union No. 719 Pension Trust Fund v. Conseco Inc.*, were similarly weak, based merely upon conclusory confidential witness statements that unspecified executives knew of the fraud. 2011 WL 1198712, at *23 (S.D.N.Y. Mar. 30, 2011). Such vague and generic statements from unknown confidential witnesses bear no resemblance to Penn West's detailed admissions concerning the fraud here.

B. The Timing of Takeyasu's and Curran's Departures, and the Ease with Which Dyck Discovered the Fraud, Support an Inference of Scienter

Defendants argue that Takeyasu and Curran's abrupt departures were "simply part of Penn West's broader restructuring" and completely unrelated to the fraud. PW Br. at 22. There are, however, numerous allegations in the Complaint demonstrating that Takeyasu and Curran's abrupt departures were related to the fraud. The duration of the fraud coincides with Takeyasu and Curran's tenures as the Company's two most senior accounting and finance officers. ¶¶25-26, 114. Takeyasu left suddenly after 20 years with the Company in the months before the fraud was revealed, with no explanation, without a replacement, and without another position, and he remained unemployed as of the filing of the Complaint. ¶97. Curran also suddenly stepped down in June 2014, only months after he was asked to serve as interim CFO, weeks before the revelation of the fraud, and while the Board's investigation was ongoing. ¶99. And Penn West has admitted that the fraud was perpetrated by "senior accounting management" who left the Company in 2014. ¶¶96-97, 99. These allegations strongly indicate that Takeyasu's and Curran's

departures were connected to fraud.[12]

Defendants also attempt to undermine the inference of scienter by quibbling that it took Dyck "nearly three months" to uncover the fraud. PW Br. at 22; MN Br. at 13 n.5. This argument contradicts the Complaint, which alleges that weeks after Dyck became CFO, members of his team "expressed concerns about accounting practices going back several years." ¶98. It also incorrectly assumes that Penn West announced that it was restating its financial statements on the very day that Dyck realized there was a problem. And it ignores that Defendants provided comprehensive preliminary information regarding the size, nature, and duration of the fraud on July 29, 2014, (¶¶100-102), demonstrating that they had been investigating for some time before announcing the need to restate. Even if the Court were to accept Defendants' incorrect factual argument, three months is a trifling amount of time in comparison to the seven-year duration of the fraud. [13]

---

[12] Defendants' citation to *In re Openwave Systems Securities Litigation*, 528 F. Supp. 2d 236 (S.D.N.Y. 2007), is inapposite. PW Br. at 22-23. In *Openwave*, unlike here, plaintiffs did little to support the inference that the defendant CEO's departure was related to the fraud beyond "[p]utting the word 'resigned' in quotation marks." 528 F. Supp. 2d at 251. Defendants' citation to *In re Magnum Hunter Resource Corporation Securities Litigation*, 26 F. Supp. 3d 278 (S.D.N.Y. 2014), is likewise unavailing. There, plaintiffs alleged merely that the defendants committed fraud by failing to disclose that the corporate controller was "inexperienced" and "in over his head." *Id.* at 297.

[13] Nunns asserts that a nonculpable inference arises from the fact that the fraud began in the year before his arrival at Penn West and was revealed in the year after he left the Company. MN Br. at 13-14. This conclusion is not supported by his cited authority or by common sense. The longer

C. Defendants' Unsupported and Fact-Intensive Argument that the Fraud Supposedly "Went Undetected" Provides No Basis for Dismissal

Based on a single word in Penn West's press release, Defendants argue that the Court should conclude as a matter of law that the improper "accounting practices . . . went undetected" due to alleged weaknesses in internal controls, including the purported failure of employees to use the independently-administered whistleblower hotline. PW Br. at 19. This argument fails for numerous reasons. ***First***, the notion that Defendants had "no clue" about this fraud over the course of seven years is implausible for all the reasons set forth above. ***Second***, the suggestion that no one within Penn West reported the fraud internally is highly fact-intensive, not supported by any independent facts, and cannot be accepted as a matter of law. ***Third***, this argument is inconsistent with the fact that Penn West employees immediately "expressed concerns about accounting practices going back several years" to Dyck. ¶98. It is implausible to conclude that employees somehow hid the fraud from all of the Individual Defendants for seven years, only to immediately report the fraud to Dyck, who had just joined the Company as an outsider. The fact that employees quickly informed Dyck demonstrates that they ***were*** speaking up about the fraud internally. ***Fourth***, even if the Court were to credit the self-serving factual assertion that the fraud went "undetected," it does not provide a basis for a finding as a matter of law that the Individual Defendants were unaware of the fraud. The press release does not state ***by whom*** the fraud went undetected, and this language could refer to Penn West's Board or its outside auditors. *See* Giuffra Decl., Ex. 2 at 4. The investigation notably did not find any deficiencies in the Company's internal reporting to senior executives—which was not surprising given that ***it has admitted its senior executives adopted the improper practices at issue***—and thus this

---

that his tenure coincided with the fraud—and they overlapped for over five years—the stronger the inference that he was aware of and tacitly approved it. *See Livent*, 78 F. Supp. 2d at 217.

assertion provides no basis for finding that the Individual Defendants were unaware of this pervasive fraud. *See id*.

Finally, even if the Court could find on this motion that no one told any of the Individual Defendants that they were misstating Penn West's key financial metrics, it would not require dismissal. Having repeatedly represented that they were knowledgeable about the Company's operating costs, the Individual Defendants were obligated to ensure that the Company's key metrics were accurately stated. They were not free to shirk their duties and then take refuge behind the unsupported claim that no one specifically told them their own statements were false. *See Novak*, 216 F.3d at 311 (scienter established where defendants "failed to check information they had a duty to monitor"); *Shenk v. Karmazin*, 867 F. Supp. 2d 379, 387 (S.D.N.Y. 2011) (scienter pled where defendants made "statements that contradicted reasonably available data and that concerned major transactions or touched upon the heart of their companies' business[]").

D. The Accounting Violations Were Neither a Matter of "Judgment" Nor Innocent Mistake

Defendants argue that their improper accounting practices were the result of mere mistaken exercise of judgment, rather than fraud. PW Br. at 23-24; MN Br. at 10. This argument not only strains credulity, but also completely contradicts what the Company has admitted actually occurred.[14] The Court should reject this argument for the reasons summarized above at

[14] Defendants' reliance on *Doré Energy Corp. v. Prospective Investment & Trading Company*, 2010 WL 4068802 (W.D. La. Oct. 14, 2010), is misplaced. PW Br. at 23. *Doré* was a breach of contract case, and the court did not conduct any scienter analysis. Nunns' reliance on *In re Wachovia Equity Securities Litigation*, 753 F. Supp. 2d 326 (S.D.N.Y. 2011) (MN Br. at 10), is also misplaced. There was no restatement in that case and the company did not make the admissions that Penn West has made here. *Wachovia*, 753 F. Supp. 2d at 361-62, 364-65.

pages 22-26, including:

- Penn West admitted that its accounting "practices" were "improper," were made to purposefully "reduce operating expenses and increase the Company's reported capital expenditure and royalties," were made with "little if any analysis," and had "no contemporaneous support." ¶¶111-12, 117.[15]

- Penn West fraudulently reclassified its operating expenses as royalties, even though the applicable accounting guidance provides that royalties are "free of cost"—an accounting manipulation that falls far outside the realm of judgment (¶¶284-87) and which market commentators described as "bizarre[]." ¶¶104, 109.

- Penn West admitted that senior management refused to reverse capital expenses that were never actually made, and that senior management repeatedly "overrode" the Company's accounting system to produce false results. ¶¶51-51, 280, 288-89.

- Contemporaneous market commentators concluded that the reclassifications were the result of fraud, describing the misconduct at issue here as "disconcerting, to say the least," "not merely an earnings misstatement," "very troubling," and "a concerted effort to make the numbers." ¶¶104, 109-10.

Defendants make additional fact-intensive arguments to support their contention that the fraud was the result of a good faith mistake. For instance, Defendants repeatedly—and incorrectly—refer to their restatement as "voluntary." PW Br. at 2, 9, 16-17. The restatement was anything but voluntary. Disclosing a fraud after seven years of manipulation can hardly be characterized as forthcoming. Further, after numerous employees came forward to Dyck to report the improper accounting practices, Dyck had little choice but to investigate. ¶98. And pursuant to Canadian GAAP, Section 1506 ¶.42, "[a]n entity ***shall correct*** prior period errors" when it becomes aware of them. Ex. 2 (Canadian GAAP, Section 1506); *See also* ¶114; Ex. 3 ¶42 (International Accounting Standards ("IAS") 8). Thus, once employees alerted Dyck to the fraud,

[15] The Company's disclosure asserting that its employees should have utilized the Company's "whistle blower hotline"—a mechanism for reporting malfeasance, not for resolving reasonable disagreement in the application of accounting principles—essentially acknowledges that the misstatements in this case were not the product of good faith exercises of judgment.

Penn West was required to restate.

In a further attempt to argue that the fraud was an innocent mistake, Defendants also argue that the fraud supposedly "made no sense"—notwithstanding the fact that Defendants' reclassification scheme followed a classic pattern of fraud. In particular, Defendants argue that the fraud did not make sense because it did not result in uniform overstatements of net income. PW Br. at 31. This argument ignores the allegations in the Complaint, which state that the fraud was not aimed at increasing Penn West's apparent net income, but was targeted at reducing operating costs and increasing funds flow and netback—precisely "the cash-based metrics that oil and gas investors care about." ¶104. Defendants' argument also disregards that Penn West had unique problems with these metrics, and, in fact, centered an entire turnaround plan on decreasing operating costs. ¶83. Such a fraud therefore made perfect sense for Penn West. Courts have recognized that financial frauds come in many different varieties, and can make a company's finances appear rosier than they are even if they do not consistently increase the company's net income. *See Orthofix*, 2015 WL 981518, at *13. Finally, the fraud indeed caused Penn West to materially overstate its net income (or understate its net loss) in numerous periods, by as much as 82%. *See, e.g.*, ¶¶134, 159, 175, 187, 203, 218.

Defendants also argue that the fraud "makes no sense" because, in the course of investigating the fraudulent reclassifications, the Company also discovered that certain capital expenses had been originally misclassified as operating expenses. PW Br. at 31. This is a red herring. These original classifications are not at issue in this case. This action concerns fraudulent ***re***classifications, not mere mistakes that were made in the original classification process. These "incorrectly classified" capital expenditures were made by lower level employees, *see* Giuffra Decl., Ex. 16 at 27, whereas the ***reclassification*** of operating expenses as

capital expenses were fraudulently made "at the corporate level" by or at the direction of "senior accounting management" and "senior finance and accounting personnel," ¶44. Further, these classification errors only came to light upon "[f]urther investigation"—*i.e.*, ***after*** Penn West employees brought the fraud to Dyck's attention. *See* Giuffra Decl., Ex. 16 at 27. In short, the fact that the Company discovered some potentially inadvertent errors in classification while investigating a separate and obvious fraud concerning ***re***classification means nothing.

Defendants also argue that the fraud "makes no sense" because it had the effect of making Penn West's capital efficiency appear worse. PW Br. at 31. This argument again ignores and contradicts the Complaint, which alleges that the fraud makes complete sense because (1) it was geared toward artificially reducing operating expenses and inflating other key metrics, and (2) investors understood that capital expenditures were vital investments in the Company's future, and thus, grew anxious when capital expenditures fell too low. ¶¶28-39.

E. KPMG's Certifications of Penn West's Financial Statements Do Not Absolve Defendants

Defendants also improperly assert that they are immune from liability under the securities laws because KPMG signed off on Penn West's financial statements. PW Br. at 30; MN Br. at 12. However, this Court rejected an identical contention in *In re New Oriental Education & Technology Group Securities Litigation*, 988 F. Supp. 2d 406 (S.D.N.Y. 2013). There, this Court held that reliance on an auditor's opinion does not defeat an inference of scienter because: (1) management has an independent duty to verify the accuracy of financial statements; and (2) this argument depends on a series of fact-intensive assumptions that cannot be accepted at this stage, including whether the auditor inquired into the subject of the fraud, whether the company provided full and accurate information to the auditor, and whether the auditor diligently investigated the facts and certified the financial statements in good faith. *Id*. at 426. As the Court

explained:

> While the defendants assert that no inference of scienter is warranted because their independent auditors continued to certify New Oriental's financials, ***reliance on an independent accountant cannot completely absolve the defendants of their obligation to ensure the*** [accuracy of its financial statements] . . . . ***At this stage in the litigation, there is no way to determine what disclosures were made to the auditors and what considerations led the auditors to certify the financial statements***.

Id.; *see also In re Diamond Foods, Inc., Sec. Litig.*, 2012 WL 6000923, at *8 (N.D. Cal. Nov. 30, 2012) ("[W]hat communications passed between the company and the auditor as well as what, if anything, was hidden from the auditor" are key issues that cannot be decided at this stage, especially given that "senior management . . . ha[s] an independent duty to ensure compliance with GAAP and maintain effective internal controls.").

Moreover, if Defendants' argument were correct, then an issuer and its senior executives would be impervious to Section 10(b) liability, no matter how fraudulent their conduct, simply because they got an auditor to sign off on the financial statements. That is not the law. Courts routinely sustain Section 10(b) claims in restatement cases where the auditor signed off on the financials. *See, e.g.*, *Orthofix*, 2015 WL 981518; *BISYS*, 397 F. Supp. 2d at 430; *Atlas*, 324 F. Supp. 2d at 487-96.

F. That Plaintiffs Have Not Obtained an Internal Penn West Report or Witness Statement Does Not Defeat an Inference of Scienter

Despite their repeated public assurances that they were "focus[ed]" on and knowledgeable about Penn West's operating costs, Defendants now contend that there can be no inference of scienter because the Complaint does not identify a specific internal report that would have made the Individual Defendants aware of the fraud. PW Br. at 18; MN Br. at 10; WA Br. at 12-13. Defendants also argue that the Complaint fails because it cites no witness statements. PW Br. at 18. However, the law does not require Plaintiffs to allege such evidence at the pleading

stage, and it would be illogical to expect them to do so in light of the PSLRA discovery stay. *See, e.g.*, *Orthofix*, 2015 WL 981518, at *12 ("[T]he plaintiff does not need a smoking gun to allege sufficient facts to support a strong inference of scienter."); *In re Philip Servs. Corp. Sec. Litig.*, 383 F. Supp. 2d 463, 478 (S.D.N.Y. 2004) ("Had the Second Circuit chosen to interpret the PSLRA as importing an evidentiary requirement into securities fraud complaints, it would have done so more explicitly.").[16] Thus, where the surrounding facts demonstrate that defendants had access to information contradicting their public statements, scienter is adequately pled regardless of whether plaintiffs have obtained internal company reports at the pleading stage. *See, e.g.*, *In re Am. Int'l Grp., Inc. 2008 Sec. Litig.*, 741 F. Supp. 2d 511, 532-33 (S.D.N.Y. 2010) (finding that defendants had access to information contradicting their financial statements dating back to 2005 even though plaintiffs did not make allegations concerning specific reports); *Sgalambo*, 739 F. Supp. 2d at 482 (concluding that defendants "surely relied on some sort of document or report" based solely on the content of their public statements).

Here, the information that contradicted Defendants' public statements was contained in Penn West's own books and records, the very instrumentalities of the fraud, to which all Defendants had access. Penn West admitted that its senior management had reclassified certain operating expenses as capital expenses in many cases "with little if any analysis [] performed" and in others with "no contemporaneous support" for the reclassifications. ¶47. Moreover,

[16] Nunns' and Andrew's cited cases (MN Br. at 10; WA Br. at 12-13) are inapplicable. *See Shaw*, 540 F. Supp. 2d at 473 (declining to infer knowledge where the company and its auditors attributed financial misstatements to a one-time calculation error and a single misapplication of an obscure accounting rule relating to minority interests); *Dynex*, 531 F.3d at 196 (declining to infer knowledge based on conclusory allegation of access to raw loan data).

Dyck's quick and easy discovery of the fraud after joining Penn West demonstrates that information revealing the fraud was widely known and readily available to the Individual Defendants.[17] ¶128. Finally, under applicable accounting rules, the very fact that Penn West restated means that Defendants "fail[ed] to use or misuse[d]" "reliable information" which was available to them at the time the financial statements were issued. *See* ¶111; *see also* Ex. 2 at ¶.05(c); Ex. 3 at ¶5.

G. The Magnitude of Penn West's Restatement Supports an Inference of Scienter

Defendants contend that the magnitude of the restatement does not support an inference of scienter. PW Br. at 25-26; MN Br. at 12. Defendants are wrong for numerous reasons. ***First***, the fraud included improperly reclassifying at least $625 million in operating expenses, lasted approximately seven years, and resulted in understatements of operating expenses by as much as 26%. ¶¶124, 126. As stated above, numerous courts have held that misstatements of this magnitude support an inference of scienter. *See, e.g.*, *Orthofix*, 2015 WL 981518, at *13.[18]

---

[17] In *Board of Trustees of City of Ft. Lauderdale General Employees' Retirement System v. Mechel OAO*, plaintiff relied upon conclusory allegations that defendants had "extensive experience" in the industry or "knowledge of" the subject matter of the fraud, which is a far cry from the fraud alleged here. 811 F. Supp. 2d 853, 873 (S.D.N.Y. 2011); *cf.* PW Br. at 24-25.

[18] Nunns' cited authority provides no support for his claim that the restatement was "modest," MN Br. at 13. *See Magnum Hunter*, 26 F. Supp. 3d at 286 (restatement of a single quarter's results); *Conseco*, 2011 WL 1198712, at *17 ("the restatement showed that income was *understated* or losses *overstated* in five of the eight periods" at issue); *Glaser v. The9, Ltd.*, 772 F. Supp. 2d 573, 583 (S.D.N.Y. 2011) (restatement resulted from write-downs related to a single contract).

Second, as analysts specifically reported, the affected metrics constituted "most of the cash-based metrics that oil and gas investors care about." ¶104. ***Third***, the misstated metrics were especially important to Penn West because Penn West struggled with its operating costs, analysts repeatedly challenged the Company to improve its operating costs, and Penn West unveiled a turnaround plan with reduction of operating costs as its centerpiece. ¶125. ***Fourth***, Defendants increased the magnitude of the fraud when the Company faced challenges, thus accelerating the fraud when investor concern was greatest. ¶127. All of these facts more than adequately allege that the scope and import of the fraud were particularly significant, and thus, support an inference of scienter.

Defendants attempt to undercut the inference of scienter to which these allegations give rise by citing cases where courts found that a restatement does not ***alone*** give rise to an inference of scienter. PW Br. at 25-27; MN Br. 9-10. As Plaintiffs do not rely solely on the existence of accounting violations to establish scienter, none of these cases are relevant. For example, in *In re Turquoise Hill Resources Ltd. Securities Litigation*, 2014 WL 7176187 (S.D.N.Y. Dec. 16, 2014), the court concluded that there was no reason to believe that officers at the defendant corporation's Canadian headquarters were aware of financial fraud at a Mongolian subsidiary where plaintiffs based the scienter inference solely on the magnitude of the restatement. *Id.* at *6.[19] Such facts bear no resemblance to the facts at issue here.

---

[19] The court in *Johnson v. NYFIX, Inc.*, 399 F. Supp. 2d 105 (D. Conn. 2005), suggested that "plaintiffs' only [] scienter allegations consist of a list of GAAPs that defendants violated and the existence of corresponding misstatements in the financial reports and press releases." *Id.* at 116. Similarly, *In re DRDGOLD Ltd. Securities Litigation*, 472 F. Supp. 2d 562 (S.D.N.Y. 2007), involved relatively small restatement of the defendant corporation's quarterly results, but not its

H. Penn West Perpetrated the Fraud to Hide Financial Difficulties

Defendants argue that the Complaint's allegations that they increased the magnitude of the fraud during times of financial struggle are "speculative," again by asking the Court to resolve factual disputes in their favor. First, Defendants argue that there was no need to commit fraud in 2009 because the price of oil rebounded from its low of approximately $33 per barrel in late December 2008 to reach $75 per barrel in December 2009. PW Br. at 28. However, Defendants ignore inconvenient facts. They disregard that the price of oil plummeted from approximately $101 per barrel at the start of September 2008 to $33 per barrel in December 2008; remained below $75 per barrel until mid-October 2009; and that even at $75 per barrel in December 2009, the price of oil remained significantly below its pre-financial crisis price of as much as $148 per barrel. ¶59; Ex. 1. These substantial price declines from 2008 to 2009 gave Penn West significant incentive to increase the fraud, which is precisely what it did.

Second, Defendants argue that there was no need to increase the fraud in 2012 because Penn West experienced operational difficulties only in the second quarter of 2011. PW Br. at 28. Again, Defendants ignore inconvenient facts. While Penn West began to struggle with operational difficulties in the second quarter of 2011, these difficulties persisted thereafter, such that by October 3, 2011, after steadily declining, Penn West stock traded at its lowest since late 2009. Thus, analysts reported in November 2011 that "operational setbacks in Q2/11 led [Penn West] to becoming somewhat of a 'show-me' story." ¶70. Soon thereafter, Defendants began to

---

full year results, stemming from its foreign operations during a period of major restructuring. *Id.* at 573. The court found that these relatively minor misstatements did not support an inference of fraud, as opposed to simple error. As explained above, this case is entirely different.

increase the magnitude of the fraud.[20]

I. Plaintiffs' Motive Allegations Support an Inference of Scienter

Defendants inaccurately assert that "Plaintiffs' only theory of motive" is nothing but a "generalized corporate motive" to show "the appearance of profitability." PW Br. at 1, 17; *see also* MN Br. at 8; WA Br. at 12. This argument fails for multiple reasons. First, as Defendants themselves acknowledge, Plaintiffs are not required to show motive in order to establish scienter. *See* PW Br. at 16; *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 74 (2d Cir. 2001). For all the reasons summarized above, Plaintiffs have more than adequately alleged scienter based on recklessness at minimum. Second, this argument ignores Plaintiffs' detailed allegations regarding Defendants' motive to embark upon the accounting fraud at issue in this case, which are summarized above at 35-37. These detailed allegations—which center on unique challenges that Penn West was facing during the Class Period, as well as the paramount importance of the misstated metrics to this company—demonstrate a particularized motive to commit the precise fraud alleged here, unlike the generic profit motives in the cases Defendants cite.[21]

---

[20] Plaintiffs' concrete allegations are a far cry from the sort of conclusory allegations that the Second Circuit disregarded in *Hirsch v. Arthur Andersen & Company*, 72 F.3d 1085, 1095 (2d Cir. 1995) (disregarding conclusory allegations in a bankruptcy case that one party "controlled" another).

[21] *Chill v. General Electric Co.*, 101 F.3d 263 (2d Cir. 1996) involved only a generalized desire by a parent to have its corporate subsidiary appear profitable. *Id.* at 268. Similarly, *In re OSG Securities Litigation*, 971 F. Supp. 2d 387 (S.D.N.Y. 2013), involved generalized allegations that the corporation was in financial distress, without allegations concerning why the defendants would commit the particular fraud. *Id.* at 406-07.

J. Defendants' Remaining Miscellaneous Arguments Fail

Defendants' remaining arguments can be summarily dispatched. ***First***, Defendants argue that they had no knowledge of the weaknesses in Penn West's internal controls. PW Br. at 19. As explained above, the allegations in the complaint give rise to a strong inference that Defendants, who routinely certified that they had reviewed Penn West's internal controls, were not only aware of the weaknesses in its internal controls, but that senior management was exploiting these very weaknesses to perpetrate the fraud, including by "overriding" the Company's own accounting systems, and reclassifying $625 million of operating expenses over several years with no supporting analysis or documentation. *See Orthofix*, 2015 WL 981518, at *13 (holding that signing false SOX certifications gives rise to an inference of scienter where defendants "had reasons to know that their statements in the SOX certifications were false or misleading").

Second, Nunns argues that "[c]ourts routinely reject efforts to infer knowledge of accounting improprieties . . . based solely on a defendant's status as an officer." MN Br. at 11; *see also* WA Br. at 14. As the foregoing sections demonstrate, however, Plaintiffs rely on far more than Nunns' and Andrew's positions to establish their scienter.

Third, Defendants' portrayal of Penn West's upper management as a "revolving door" mischaracterizes the allegations in the Complaint. PW Br. at 31-32. Virtually all the Individual Defendants had extremely long tenures with the Company in highly-placed positions. Takeyasu was employed by Penn West for 20 years, held numerous senior accounting and finance positions, and was CFO from 2005 to March 2014, for the duration of the fraud. Curran was the Company's second-most senior finance and accounting executive from 2005 to June 2014, for the duration of the fraud. Andrew was Penn West's CEO from 2005 until his retirement in 2011, and was President from 1995 until 2008. ¶22. Nunns was Andrew's second-in-command prior to being promoted to CEO, holding the position of Chief Operating Officer and President from

2008 until 2011, and then President and CEO from 2011 to 2013. ¶23. While Roberts joined the Company in 2013, he repeatedly represented to investors that he had familiarized himself with the details of the Company's operating costs, was keeping a "laser focus" on operating expenses, and was practicing "relentless cost control," which he made the centerpiece of his turnaround plan. ¶¶24, 83. Regardless of how long he was employed at Penn West, he had a duty to inform himself of the true facts before he spoke on a matter of critical importance to the Company and its investors. For all the reasons set forth above at 27-29, any failure to do so was highly reckless at a minimum.

Fourth, both Nunns and Andrew incorrectly argue that the timing of their tenures negates an inference of scienter. Nunns claims that statements about Penn West's focus on certain metrics occurred only after he left the Company. MN Br. at 14. In reality, he was focused on netback, funds flow, and operating costs during his tenure. *See, e.g.*, ¶63 (stating that funds flow and netback "exceed[ed] expectations."); ¶135 (stating that as the Company "ramp[ed] up" its production, it would reap "an efficiency gain of between 30% to 40% in terms of cost reduction"). Andrew claims that the restatement shows that he "was not involved in or aware of any wrongdoing" because Penn West did not restate financial results for any period prior to 1Q 2012, when he was CEO. WA Br. at 2, 14. However, while applicable accounting rules did not require Penn West to issue a full restatement for periods prior to 2012, Penn West indeed corrected financial results reported during Andrew's tenure, showing that Penn West fraudulently capitalized its operating expenses while he was CEO. For instance, under Andrew's leadership, the Company understated its operating costs by at least $118 million in 2009 alone. ¶¶114, 134.

Fifth, Defendants argue that the more compelling inference is that "Defendants could

have more diligently supervised Penn West's accounting staff," but did not act recklessly. PW Br. at 30. Defendants are free to make this highly fact-intensive argument to the jury. But for the reasons set forth above, Plaintiffs' allegations powerfully give rise to the inference that Defendants were involved in a deliberate, top-down fraud. The notion that Penn West's low-level employees engaged in a massive, seven-year long fraud that just happened to make Penn West's performance along key financial metrics appear better than it was—and that these same employees ramped up the fraud at times when Penn West was struggling—all without Defendants' knowledge, defies belief. At best, this argument requires the Court to resolve a host of disputed factual issues in Defendants' favor, which it cannot do at this stage.

Finally, Nunns and Andrew argue that because they were just a geologist and engineer, respectively, who were never involved in the Company's finance or accounting, they are immunized from Section 10(b) liability. MN Br. at 9; WA Br. at 12-13. The mere fact that Nunns was a geologist and Andrew was an engineer does not absolve either of them of their obligations under the federal securities laws to ensure the accuracy of the Company's financial statements. *See S.E.C. v. Espuelas*, 579 F. Supp. 2d 461, 478 (S.D.N.Y. 2008) (even where defendants "are not accounting professionals, a strong inference of recklessness might be drawn from allegations that the accounting rules are straightforward and the company's accounting treatment was obviously wrong"). Moreover, Nunns and Andrew ignore that technical accounting expertise was not necessary to uncover the fraud; rather, as Dyck's swift discovery makes clear, all that was required was a conversation with the Company's senior accounting staff.

III. Defendants' Challenges to a Handful of Their Statements are Without Merit

A. The Statements Contested by Penn West Are Materially Misleading Statements of Fact

While the Complaint alleges dozens of false and misleading statements and omissions

(¶¶129-271), the Company contests only seven.[22] PW Br. at 33 & App'x A. The Company does not challenge the falsity of the restated financial results in its quarterly and annual SEC filings and press releases or the statements discussing restated financial results during investor conference calls. Nor could they. *See Atlas*, 324 F. Supp. 2d at 486 ("[T]he mere fact that financial results were restated is sufficient basis for pleading that those statements were false when made."). As to the seven contested statements, the Company incorrectly argues that they are inactionable because the Complaint does not "allege with particularity why any of these statements of belief and goals for Penn West's future performance was not an honestly held opinion at the time it was made." PW Br. at 33 (citing *Fait v. Regions Fin. Corp*., 655 F.3d 105, 113 (2d Cir. 2011)). This argument is misplaced because the challenged statements are not opinions, but statements of fact.

The Company attempts to cast the seven challenged statements as opinions by selectively quoting them, taking them out of context, ignoring their factual content, and inaccurately summarizing Plaintiffs' allegations setting forth the reasons they are false and misleading. *See* PW Br. at 33 & App'x A. For instance, Defendants' inaccurate reproduction of the statement set forth at paragraph 250 of the Complaint omits that Penn West stated that "[t]he 2013 increase in netback compared to 2012 was primarily due to higher commodity prices." It is ***this*** statement

[22] The Company challenges nine statements in paragraphs 143, 164, 160, 178, 215, 219, 231, 242, and 250 of the Complaint. However, Plaintiffs do not allege that the statements in paragraphs 215 and 231 are actionable. Plaintiffs cited these statements to provide context for the Complaint's subsequent discussion of the market's reaction to the turnaround plan, the Company's disclosure that its operating costs were worse than the market believed, and Penn West and the market were focused on the Company's cost structure.

of historical fact that the Complaint alleges is actionable because it failed to disclose that Defendants' fraud was a material driver of the increase in netback in 2013. In this and many other of these misstatements, Defendants purported to discuss the drivers of Penn West's misstated financial results; these statements are misleading because they omit that Defendants' accounting fraud was also a material driver of those results. As explained in greater detail below at 59-61, courts widely hold that such misstatements are actionable misstatements of fact, not opinion. *See, e.g.*, *Van der Moolen*, 405 F. Supp. 2d at 400-01 (statements "concerning the sources" of revenue generated by a broker-dealer subsidiary, including attributing revenues to "trading volumes and price volatility," triggered an obligation to disclose the subsidiary's revenue was also generated in part by trading practices that violated NYSE rules); and additional authorities *infra at* 59-61.

Similarly, Defendants ignore the portion of Nunns' statement set forth at paragraph 178 that Penn West ***is*** "committed to optimizing capital and operational efficiencies"—a statement about the Company's presently-existing business posture and its current efforts to reduce costs. ¶178. *See Am. Bank Note*, 93 F. Supp. 2d at 443 (rejecting argument that "we intend to de-leverage and are taking the necessary steps to insure the success of this program" was a "generalized, optimistic" statement of "opinion"). Further, Defendants failed to quote the remainder of Nunns' statement, in which he claims, as a matter of fact, that "***[o]ver the last three years***, we ***have*** taken appropriate measures to ensure [the Company's] balance sheet integrity." ¶178. This omitted portion of the statement was misleading because it failed to disclose that among the "measures" Penn West had implemented since 2009, its accounting fraud had a material effect on Penn West's reported balance sheet, making its costs appear lower, and its assets more valuable, than they really were. *See, e.g.*, *City of Providence v. Aeropostale, Inc.*,

2013 WL 1197755, at *13 (S.D.N.Y. Mar. 25, 2013) (statements that issuer "had 'taken the necessary steps to give the customers what they want'" were statements "about present or historical fact, whose 'accuracy can be determined at the time they were made.'" (internal citations omitted)). A more detailed explanation of Defendants' mischaracterizations as to all the challenged statements is set forth in Appendix A hereto.

Even if the Court finds that some of the seven challenged statements express opinion, Defendants are wrong that Plaintiffs must allege they subjectively disbelieved those opinions in order to state a claim. The Supreme Court recently held that an opinion is actionable, regardless of the speaker's subjective belief, if the statement "omits material facts about the issuer's inquiry into or knowledge concerning a statement of opinion" and the omitted facts show the speaker "lacked the basis for making those statements that a reasonable investor would expect." *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1329, 1333 (2015). Accordingly, *Omnicare* abrogates *Fait*. Under *Omnicare*, Plaintiffs need only allege facts showing that Defendants lacked a reasonable basis for opinions, which they have done. As explained above, a reasonable investigation designed to verify the substance of these statements—for example, the drivers of Penn West's operating costs (*see, e.g.*, ¶¶143, 219, 250)—would have uncovered numerous facts seriously impugning their accuracy and completeness, rendering any purported "opinions" actionable.

B. Andrew's and Nunns' Challenges to Their Materially Misleading Statements and Omissions Fail

Andrew and Nunns both argue that they made no actionable misstatements or omissions. They are wrong. First, Andrew and Nunns ignore that they both signed publicly reported financial statements the Company has now admitted were false. *Atlas*, 324 F. Supp. 2d at 486; *City of Roseville Emps.' Ret. Sys. v. EnergySolutions, Inc.*, 814 F. Supp. 2d 395, 417 (S.D.N.Y.

2011) ("no dispute" that signatories to public filings "made" the statements contained in the filings under *Janus*). Second, both Nunns and Andrew routinely made false and misleading statements during investor conference calls reciting those same misstated financial results. *BISYS*, 397 F. Supp. 2d at 437 (allegations that financial results discussed on conference calls were restated sufficiently pleads falsity).[23] Moreover, Andrew and Nunns each made other materially misleading statements addressing the drivers of Penn West's misstated financial results, primarily operating costs, while failing to disclose that its accounting fraud was a material driver of those results. Both Defendants argue that these latter statements are inactionable because they did not trigger a duty to disclose the Company's improper accounting practices. WA Br. at 7-8; MN Br. at 18.[24] They are wrong.

Andrew and Nunns ignore that when a speaker broaches a topic and omits facts concerning that topic, a "plaintiff need only demonstrate the materiality of the omitted facts because '[i]f a reasonable investor would so regard the omitted fact [as material], it is difficult to imagine a circumstance where the prior statement would not be rendered misleading in the absence of the disclosure.'" *In re Sanofi-Aventis Sec. Litig.*, 774 F. Supp. 2d 549, 564 (S.D.N.Y.

---

[23] Although Nunns apparently disputes the falsity of such statements, (MN Br. at 17 (challenging statements recited in paragraphs 208 and 210)), he offers no basis for that challenge.

[24] Andrew further contends that his statements were technically true. WA Br. at 7-8 (stating that there is no allegation that "Messrs. Takeyasu and Curran were not 'look[ing] around' for 'little bits of efficiencies'" or that "[Penn West's] buying power did not help it balance its costs"). It is axiomatic that a literally true statement is actionable, where, as here, it omits material information required to make the statement not misleading. *See, e.g.*, *McMahan & Co. v. Wherehouse Entm't, Inc.*, 900 F.2d 576, 579 (2d Cir. 1990).

2011) (quoting *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259, 267-68 (2d Cir. 1993)). Omissions must be "sufficiently connected to Defendants' existing disclosures to make those public statements misleading." *Marsh*, 501 F. Supp. 2d at 469. Applying these principles, courts widely hold that where an issuer or its officers "put the topic of the causes of [the issuer's] financial success at issue," it materially misleads investors if they fail to disclose that a driver of those results is the use of improper or illegal business practices, such as a fraudulent accounting scheme. *Van der Moolen*, 405 F. Supp. 2d at 400-01; *see also In re Gentiva Sec. Litig.*, 932 F. Supp. 2d 352, 368-69 (E.D.N.Y. 2013) (attribution of Medicare revenue to "increased patient admissions and revenue per episode," triggered duty to disclose that its revenue was created in part by allegedly fraudulent business practices); *Freudenberg*, 712 F. Supp. 2d at 181 (statements concerning drivers of financial results triggered duty to disclose that drivers included accounting violations that concealed risky business practices).[25]

Here, Andrew's and Nunns' statements put at issue the causes of Penn West's financial results, including its "cost reductions," "cost savings," "efficiencies," and "cost structure" (¶¶143, 145, 147), and repeatedly attributed them to legitimate drivers, including the implementation of non-fraudulent business initiatives and operational reforms. Therefore, as in the authorities cited above, it was materially misleading to omit that the Company's improper accounting practices were a material driver of those results. For instance, in response to an

---

[25] *See also Lapin v. Goldman Sachs Grp., Inc.*, 506 F. Supp. 2d 221, 240 (S.D.N.Y. 2006) (statements attributing issuer's success to its "integrity . . . obligated [the issuer] to disclose information concerning the source of its success," including improper business practices); *In re Sotheby's Holdings, Inc.*, 2000 WL 1234601, at *4 (S.D.N.Y. Aug. 31, 2000) (statements regarding industry competition misleading where they failed to disclose price fixing scheme).

analyst question about whether Penn West will face the same "uptick in costs" that the Company's competitors were experiencing, Nunns stated that the Company was "seeing the opposite trend," and he misleadingly attributed its avoidance of those cost pressures to the "ramp up" of its programs, and "the ability to go to a manufacturing model and execute continuously." ¶135. Similarly, Andrew misleadingly attributed the Company's cost savings to Takeyasu's and Curran's painstaking review of the Company's operations, making incremental, but collectively meaningful cuts, by "look[ing] around to where there's some cost savings . . . . looking at little bits of efficiencies." ¶145. The same reasoning applies to the other statements at issue. *See, e.g.*, ¶¶147, 162, 195, 198.[26]

The cases Nunns cites in support of his argument (MN Br. at 18) are inapposite. *See Kleinman v. Elan Corp., plc*, 706 F.3d 145, 153-54 (2d Cir. 2013) (none of the statements concerned the drivers of the issuer's financial results—the court simply rejected a duty to disclose a drug's failure to show a "dose response" in a clinical trial where the plaintiffs failed to establish that dose response was a meaningful subject of that trial); *Richman*, 868 F. Supp. 2d at 273, 278-79 (rejecting contention that Goldman's *past* statements about government investigations triggered a duty to disclose when the firm *subsequently* received a Wells notice; *Richman* actually adopted *Van der Moolen*, holding an issuer's statements that its "success depends upon unswerving" legal compliance actionable for failing to disclose fraudulent drivers of its success); *Monroe Cnty. Emps.' Ret. Sys. v. YPF Sociedad Anonima*, 15 F. Supp. 3d 336,

---

[26] Andrew incorrectly argues that the drivers of Penn West's costs are not a topic of the statement alleged at paragraph 147. WA Br. at 8. That statement describes the effect Penn West's "buying power" had on its reported costs (*i.e.*, insulating those costs from pressure experienced by peers) and specifically references that it was "driving the overall cost structure."

355-56 (S.D.N.Y. 2014) (none of the statements concerned the drivers of reported financial results).[27]

C. Pleading the Falsity of Andrew's and Nunns' Sarbanes-Oxley Certifications Does Not Require Alleging Subjective Disbelief

Andrew and Nunns signed SOX certifications attesting that they "diligen[tly]" investigated the accuracy of the Company's financial statements, and the filings "fairly present[ed] . . . the financial condition and results of operations of" the Company and disclosed "[a]ny fraud . . . that involves management or other employees who have a significant role in the issuer's internal control over financial reporting." *E.g.*, ¶¶137, 149. These certifications were materially false when made because, as explained above, Andrew and Nunns knew of or recklessly disregarded Penn West's accounting fraud. *Supra* at 18-37; *see, e.g.*, *Orthofix*, 2015 WL 981518, at *12-13 (SOX certifications were actionable where plaintiffs alleged the signatory "knew or had access to information" indicating accounting fraud); *Hall*, 580 F. Supp. 2d at 232 (same).[28]

Andrew's and Nunns' SOX certifications also attested that they "designed" and "evaluated" Penn West's internal controls over financial reporting to "ensure that material information" is brought to their attention, that they were "responsible" for those controls, that those controls were "effective" and designed to provide "reasonable assurance regarding the reliability of financial reporting." *E.g.*, ¶¶138, 149. These statements, too, were false at the time they were made because, as explained above, Andrew and Nunns knew or recklessly disregarded

[27] Nunns also argues that he cannot be held liable for failing to disclose information of which he had no knowledge (MN Br. at 18-19), but that is merely rehashing his scienter argument.

[28] While Takeyasu, Curran, and Roberts also signed SOX certifications, they do not challenge the falsity of those certifications.

Penn West's internal controls suffered from several material weaknesses. *Supra* at 33-35. Additionally, Andrew and Nunns represented that Penn West's filings disclosed "any change in the issuer's internal control over financial reporting," which was false because senior executives overrode the Company's own accounting policies and systems.

Relying on *Fait*, Andrew and Nunns argue that their SOX certifications were merely opinions, and Plaintiffs must therefore allege they were not honestly believed at the time they were made. WA Br. at 11; MN Br. at 16. But, this Court has held, in accord with other courts in this Circuit, that SOX certifications are not statements of opinion, and subjective disbelief need not be alleged to plead their falsity. *Orthofix*, 2015 WL 981518, at *12-13; *Hall*, 580 F. Supp. 2d at 232. Instead, these courts have analyzed the actionability of SOX certifications using the scienter analysis applicable to misstatements of fact. Further, *Fait* applies only to matters that are not "objectively determinable." *Fait*, 655 F.3d at 108-09.

Here, Andrew's and Nunns' SOX certifications concern matters of objective fact. Both Defendants' certifications made factual representations, including that they had conducted a diligent inquiry; Penn West's filings disclosed "any change in the issuer's internal control over financial reporting"; and they designed Penn West's internal controls to provide "reasonable assurance regarding the reliability of financial reporting." Andrew and Nunns argue that this last assertion is an opinion expressing their subjective view about the "reasonableness" of the assurance provided by Penn West's internal controls. But the language of this certification is drawn verbatim from the applicable SEC regulation, which commanded them to design internal control processes "to provide reasonable assurance regarding the reliability of financial reporting." 17 C.F.R. § 270.30a-3. Andrew and Nunns did not say, "We *believe* we have designed internal controls that provide the requisite reasonable assurance"; each represented that

he had done so. *See Omnicare*, 135 S. Ct. at 1325 (explaining the statement "we believe we are following the law" is opinion, whereas the statement "we in fact are following the law" is not).[29]

Even the authority cited by Andrew and Nunns does not subject certifications to the subjective falsity requirement. *See, e.g.*, *In re China Ne. Petroleum Holdings Ltd. Sec. Litig.*, 2015 WL 223779, at *3 (S.D.N.Y. Jan. 15, 2015), (concluding that the plaintiff failed to "provide any evidence that defendants knew, *or should have known*, about internal control problems . . . prior to certifying the 2008 Form 10-K") (emphasis added). In *Dobina*, while the court noted that "certifications involve a certain amount of subjectivity," it went on to apply a traditional scienter analysis, stating that "[t]he inference that his certifications were made with *reckless disregard for the truth* is at least as compelling as any opposing, nonculpable inference." 909 F. Supp. 2d at 246-48 (emphasis added). Defendants' other cited cases are factually

---

[29] Andrew argues that disclaimers that the Company's internal controls might not "prevent all errors and fraud" means he did not make any "affirmative guarantees regarding the company's ***compliance*** with" applicable regulations. WA Br. at 10 (emphasis added). A boilerplate disclaimer that Penn West's internal controls *might* not prevent *all* fraud, when they *affirmatively were not* preventing fraud cannot insulate Andrew from liability. *See Van der Moolen*, 405 F. Supp. 2d at 400 ("[T]o warn that the untoward may occur when the event is contingent is prudent; to caution that it is only possible for the unfavorable events to happen when they have already occurred is deceit."). Nunns is also incorrect that the phrase "based on my knowledge" transforms his statements into opinions. MN Br. at 4-5. All assertions, objective or otherwise, cannot *but* proceed from the knowledge of the person issuing them.

distinguishable.[30]

Finally, to the extent that any part of Andrew's and Nunns' misstatements in their SOX certifications are deemed opinion, as explained above, *Omnicare* makes clear Plaintiffs need not allege their subjective disbelief. Instead, Plaintiffs may allege that Andrew and Nunns lacked a reasonable basis for any opinion expressed, which they have done.[31]

D. Andrew and Nunns are Liable for Failing to Correct Material Misstatements Made During Conference Calls in Which They Participated

Relying on *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296 (2010), Andrew and Nunns contend that corporate officers can never be held liable for failing to correct misrepresentations made by other officers during conference calls in which they are participating. WA Br. at 9; MN Br. at 19. This argument misconstrues *Janus*, which held that "the maker of a statement is the person or entity with ultimate authority over the statement," and that attribution of a statement can be "implicit from surrounding circumstances." 131 S. Ct. at 2302.

Andrew and Nunns cite only two post-*Janus* cases holding that subjecting officers to liability for failing to correct misstatements made in their presence "would be in tension with"

[30] *See Magnum Hunter*, 26 F. Supp. 3d at 295 (concluding that the certifications were not false because the company had already disclosed internal control deficiencies); *see also Pugh v. Tribune Co.*, 521 F.3d 686, 695 (7th Cir. 2008) (noting that no certification was at issue and that the plaintiffs failed to cite a single control deficiency); *In re UBS AG Sec. Litig.*, 2012 WL 4471265, at *35-36 (S.D.N.Y. Sept. 28, 2012) (case did not concern SOX certifications).

[31] Andrew also argues that the Complaint does not make any "particularized allegation that any internal control was deficient." WA Br. at 11. However, Plaintiffs allege three material weaknesses in the Company's internal controls that the Company has admitted existed.

Janus because "each party is only liable for their own misstatements" and omissions. *See Oneida Sav. Bank v. Uni-Ter Underwriting Mgmt. Corp.*, 2014 WL 4678046, at *12 (N.D.N.Y. Sept. 18, 2014); *Ho v. Duoyuan Global Water, Inc.*, 887 F. Supp. 2d 547, 572 n.13 (S.D.N.Y. 2012). The very brief analyses in these cases appear to ignore the possibility of implicit attribution and assume that a statement can have only one maker.

As this Court has recognized, however, "[*Janus*] does not imply that there can be only one 'maker' of a statement in the case of express or implicit attribution." *EnergySolutions*, 814 F. Supp. 2d at 417 n.9; *see also id.* at 418 ("Although the Registration Statements did speak in the voice of ES and were signed by . . . directors or officers of ES, these explicit attributions do not preclude attribution to ENV as well."); *In re Puda Coal Sec. Inc., Litig.*, 30 F. Supp. 3d 261, 267 (S.D.N.Y. 2014) (issuer and the underwriter can jointly make the statements in a prospectus, even if the statements are not in the underwriter's "voice").[32]

Although *EnergySolutions* and *Puda* addressed written statements, they apply with equal force to oral statements made during investor conference calls. During such calls, officers of the same company are speaking at the same time on the same topics, presenting a united front, and

[32] Courts have also recognized that *Janus*' reasoning does not apply to the question of corporate officers' liability and have refused to extend the decision's holding in such cases. *See, e.g.*, *City of Pontiac Gen. Emps.' Ret. Sys. v. Lockheed Martin Corp.*, 875 F. Supp. 2d 359, 374 (S.D.N.Y. 2012) ("[*Janus*] addressed only whether *third parties* can be held liable for statements made by their clients. Its logic rested on the distinction between secondary liability and primary liability, and has no bearing on how corporate officers who work together in the same entity can be held jointly responsible on a theory of primary liability.") (citation omitted); *see also In re Merck & Co., Inc. Sec., Derivative, & ERISA Litig.*, 2011 WL 3444199, at *25 (D.N.J. Aug. 8, 2011).

such calls are known to be heavily scripted and planned. It is entirely reasonable for investors to conclude that CEOs, when they participate in these calls, approve the statements made by other company representatives and have ultimate authority over those statements. Based on these surrounding circumstances, the statements made by other Penn West representatives during conference calls that Andrew and Nunns joined are implicitly attributable to them. *See SmarTalk*, 124 F. Supp. 2d at 543 ("[A] high ranking company official cannot sit quietly at a conference with analysts, knowing that another official is making false statements and hope to escape liability for those statements."); *Barrie v. Intervoice-Brite, Inc.*, 409 F.3d 653, 656 (5th Cir. 2005) (same).

The logic of *Janus* is fully consistent with this conclusion. There, the Supreme Court relied on the analogy of the speechwriter versus the speaker, with only the latter having ultimate authority over the content of the speech. 131 S. Ct. at 2302. Officers participating in a conference call is analogous to having two speakers on stage at once delivering a joint speech or presentation. Under such circumstances, each speaker is reasonably viewed as having "approved or ratified" the other's statements unless disagreement is expressed. *Cf. In re Pfizer Inc. Sec. Litig.*, 2012 WL 983548, at *4 (S.D.N.Y. Mar. 22, 2012) ("Given the allegations that the Individual Defendants 'approved or ratified' any statements issued by Pfizer, the [complaint] adequately pleads that such statements were attributed to and ultimately controlled by the Individual Defendants."); *see also In re Fannie Mae 2008 Sec. Litig.*, 891 F. Supp. 2d 458, 473 (S.D.N.Y. 2012), *aff'd*, 525 F. App'x 16 (2d Cir. 2013).

IV. Plaintiffs Adequately Plead Loss Causation

Loss causation is subject to the notice pleading requirements of Fed. R. Civ. P. 8(a)(2). *See King Cnty., Wash. v. IKB Deutsche Industriebank AG*, 708 F. Supp. 2d 334, 339 (S.D.N.Y. 2010). A "short and plain statement" that provides notice of a "causal connection" between the

material misrepresentation and the loss is sufficient. *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005). Here, the Complaint alleges two corrective disclosure dates: November 6, 2013, and July 29, 2014. Acknowledging that loss causation is established on July 29, when Penn West announced the need to issue a restatement, the Company challenges only November 6. PW Br. at 34-35. The Company argues that there can be no loss causation as a matter of law for the November 6 disclosure because it did not "correct[] or reveal[] anything about the improper classification of expenses that Plaintiffs contend made Defendants' statements prior to July 29, 2014 misleading." PW Br. at 35. In essence, Defendants contend Plaintiffs must allege that the November 6 disclosure was a "mirror image" of the alleged fraud. This argument is wrong.

To plead loss causation, a plaintiff must allege that "the misstatement or omission concealed something from the market that, when disclosed, negatively affected the value of the security." *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005) (internal quotations omitted). To do so, a plaintiff need only allege the "materialization" of an event or condition, the risk of which was concealed or understated by the defendant's fraudulent misstatements or omissions. *Vivendi*, 605 F. Supp. 2d at 598; *Lentell*, 396 F.3d at 173.[33] Importantly, "these events ***do not identify specific company statements as false or misleading***." *Vivendi*, 605 F. Supp. 2d at 598 (emphasis added). Indeed, contrary to what Defendants contend, it is well-settled that "neither the Supreme Court in *Dura*, nor any other court addressing the loss causation pleading standard require a corrective disclosure to be a 'mirror image' tantamount to a confession of fraud." *Freudenberg*, 712 F. Supp. 2d at 202. Moreover, the materialized risks "need only

---

[33] For example, "if a company misrepresents fact A (we have plenty of free cash flow), which conceals risk X (liquidity), the risk can still materialize by revelation of fact B (a ratings downgrade), an indication of risk X (liquidity)." *Vivendi*, 605 F. Supp. 2d at 602.

disclose part of the truth that was previously concealed by the fraud." *Vivendi*, 605 F. Supp. 2d at 598.

Plaintiffs allege that Defendants concealed the truth about the magnitude of the problem Penn West was facing with respect to its cost structure by fraudulently understating Penn West's operating costs. On November 6, 2013, part of that concealed truth was revealed when Penn West announced (1) disappointing third quarter results driven in part by higher-than-expected operating costs; and (2) the results of its "strategic review," which included a "'focus[ed],' detailed review of the Company's operating costs," and concluded that severe negative actions would be required to bring the Company's costs into line. ¶¶85, 273. Prior to November 6, 2013, Defendants' accounting violations and other fraudulent statements had led investors to believe that Penn West was making progress in improving its operating efficiency. On November 6, however, investors learned that Penn West would have to take dramatic actions over ***an entire year*** to bring its operating costs in line. ¶¶85, 273. These actions included selling $1.5-$2.0 billion of the Company's most cost-demanding resource assets, halting production at other resource plays, and executing several other cost-cutting measures, all of which would lower production 25% in 2014, now a "transition year." ¶¶85-86.

As alleged in the Complaint, investors were surprised and disappointed to learn that the magnitude of Penn West's cost control problem was so large that cost-cutting measures to date had been insufficient, and that far more dramatic measures were needed that would significantly reduce production and profitability in 2014. ¶¶87-88. In response, Penn West's stock fell more than 15% on the year's highest trading volume. *Id.* The November 6 disclosures thus partially revealed that the Company's cost structure was worse than understood—precisely one of the risks concealed by the fraud, though investors would not learn the truth about the fraud until July

29. These allegations provide Defendants with ample notice of "a causal connection between the material misrepresentation and the loss." *Dura*, 544 U.S. at 342.

Similarly, in *Vivendi*, the court recognized that misstatements relating to debt, income stream, and ability to convert assets to cash concealed the risk of the issuer's illiquidity, and that risk materialized over eleven days through credit ratings downgrades and unexpected asset sales, even though "[n]one of the eleven events include[d] an announcement identifying specific Vivendi statements as false or misleading." 605 F. Supp. 2d at 600-01. The same logic applies here.[34]

At a bare minimum, Plaintiffs have raised an issue of fact as to whether the November 6, 2013 announcements revealed some risk concealed by Defendants' fraud. Courts have recognized that loss causation is a highly fact-intensive issue, and so long as the plaintiff has provided "some indication" of "the causal connection [he or she] has in mind," *Dura*, 544 U.S. at 346–47, loss causation "is an issue to be determined by the trier of fact on a fully developed record." *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 507 (S.D.N.Y. 2011). Here, the factually intricate issue of loss causation cannot be resolved as a

[34] The cases Defendants cite are inapposite. In *Police & Fire Retirement System of City of Detroit v. SafeNet, Inc.*, 645 F. Supp. 2d 210 (S.D.N.Y. 2009), plaintiffs alleged defendants had understated compensation expenses due to options backdating. The two rejected disclosures concerned a review of *revenue* recognition policies and the CFO's departure—neither of which disclosed that the company's compensation expenses were greater than previously believed. *Id.* *Gentiva* is also inapplicable because the two alleged corrective disclosures were merely announcements that the company "earned less than expected," with no connection to the risk concealed by the fraud. *See* 932 F. Supp. 2d at 388-89.

matter of law in Defendants' favor because the Complaint makes specific and detailed allegations demonstrating that (1) the substance of Defendants' November 6 announcements relates to the risk concealed by Defendants' fraud and (2) the market's reaction, including analyst commentary and a substantial drop in Penn West's stock price, shows it understood the disclosures and reacted negatively to them.

V. Plaintiffs Adequately Plead Control Person Liability

To plead a control person liability claim under Section 20(a), a plaintiff must allege: "(1) a primary violation by a controlled person; (2) control of the primary violator by the defendant; and (3) that the controlling person was in some meaningful sense a culpable participant in the primary violation." *Am. Int'l Grp.*, 741 F. Supp. 2d at 535 (quotation marks omitted). These elements are subject to the notice pleading requirements of Fed. R. Civ. P. 8(a)(2). *In re Smith Barney Transfer Agent Litig.*, 884 F. Supp. 2d 152, 166 (S.D.N.Y. 2012). As shown in the preceding sections herein, Plaintiffs have adequately pleaded a primary violation of Section 10(b), satisfying the first element. Plaintiffs have also alleged control, in that each Defendant signed materially misstated financial statements, spoke about them on conference calls, and/or exercised direct control over the Company's accounting department. Finally, contrary to what Defendants contend, Plaintiffs have alleged culpable participation by alleging scienter. *See, e.g.*, *Vanleeuwen v. Keyuan Petrochemicals, Inc.*, 2014 WL 3891351, at *5 (S.D.N.Y. Aug. 8, 2014); *In re Longwei Petroleum Inv. Holding Ltd. Sec. Litig.*, 2014 WL 285103, at *6 (S.D.N.Y. Jan. 27, 2014).

Andrew points out that the Complaint must allege that he had control over the "transaction in question," but erroneously interprets this element to mean that he must have had control over the "accounting decisions at issue," as opposed to the public filings at issue. WA Br. at 15. In *Alstom*, the court, after stating that actual control over the transaction was required,

clarified that if an "officer or director has signed financial statements containing materially false or misleading statements, . . . control as to the financial statements is sufficiently pled." 406 F. Supp. 2d at 487; *see also In re Satyam Computer Servs. Ltd. Sec. Litig.*, 915 F. Supp. 2d 450, 482 (S.D.N.Y. 2013) (holding that "signing a financial statement filed by the company is enough to establish control over . . . the content of the statement").[35] Andrew signed several SEC filings that contained misstatements. ¶¶137, 141, 149, 150, 155.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motions to dismiss in their entirety.

Dated: April 24, 2015

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

/s/ John Rizio-Hamilton
John Rizio-Hamilton
Abe Alexander
Catherine McCaw
1285 Avenue of the Americas
New York, NY 10019
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
Email: johnr@blbglaw.com
Email: abe.alexander@blbglaw.com
Email: catherine.mccaw@blbglaw.com

Counsel for The City of Miami Fire Fighters' and Police Officers' Retirement Trust and Co-Lead Counsel for the Class

GLANCY BINKOW & GOLDBERG LLP

/s/ Peter A Binkow
Peter A. Binkow (*admitted pro hac vice*)
Joshua L. Crowell
Leanne E. Heine (*admitted pro hac vice*)
1925 Century Park East, Suite 2100
Los Angeles, California 90067
Telephone: (310) 201-9150
Facsimile: (310) 201-9160
Email: pbinkow@glancylaw.com
Email: jcrowell@glancylaw.com
Email: lheine@glancylaw.com

Counsel for Avi Rojany and Co-Lead Counsel for the Class

[35] Andrew's cited authority is inapposite, as neither case involved an alleged control person who signed false public filings. *See Smith Barney*, 884 F. Supp. 2d at 167; *H & H Acquisition Corp. v. Fin. Intranet Holdings*, 669 F. Supp. 2d 351, 362 (S.D.N.Y. 2009).

APPENDIX A

Statements Challenged by Defendants Penn West, Takeyasu, Curran, and Roberts

	False and Misleading Statements (Passages Omitted from Defendants' Brief are Underlined)	**The Factual Nature of the Statement and Allegations Support Its Falsity**
¶250	"One of the key strategies in our long-term plan is cost reduction to realize improvements in our netbacks which, in turn drives higher funds flow. The 2013 increase in netbacks compared to 2012 was primarily due to higher commodity prices while the decrease between 2012 and 2011 was attributed to lower commodity prices."	Defendants' reproduction of this statement omits Penn West's statement that "[t]he 2013 increase in netbacks compared to 2012 was primarily due to higher commodity prices." This statement is misleading because it fails to disclose that Defendants' fraud was a material driver of the increase in the Company's netbacks in 2013.
¶242	In a discussion of Penn West's recently-implemented turnaround plan, the Company reiterated its "new vision for Penn West," which included "application of best-in-class operating practices" and "relentless cost control," and stated that a "cornerstone of our business plan is to operate in a continuous and deliberate manner to drive cost efficiencies."	Penn West's statement – again made in connection with reports of reduced operating costs – is a description of the turnaround plan, including its drivers, the Company had supposedly successfully implemented over the previous quarter to improve its cost structure. The statements are misleading because they omit that Defendants' accounting fraud was a material component of Penn West's plan to report reduced operating costs.
¶219	"We are actively streamlining and focusing our management and operating structure. To date in 2013, we have reduced our workforce by over 10 percent of full time equivalents including a realignment of responsibilities and significant reduction of personnel, including at the executive and management level. We will continue to focus on cost saving initiatives and take further steps to allow us to achieve our goal to deliver best in class operating performance and shareholder	Defendants omit Penn West's statement that "***[w]e are actively*** streamlining and focusing our management and operating structure" and describing the way the Company had achieved the streamlining. Penn West's statements touting the Company's success in reducing operating costs misleadingly attributed that success to legitimate means, while failing to disclose the fact that Defendants' fraud contributed materially to the reported improvements in cost structure.

<table>
<tr><td></td><td>returns."</td><td></td></tr>
<tr><td>¶164</td><td>Throughout the Class Period, the market sought assurances that Penn West would continue to make sufficient capital expenditures to support the Company's growth and revenue. On one earnings call, an analyst, expressing this concern, asked Penn West's management, "are you going to actually have to look at asset sales in order to meet your CapEx guidance?" Defendants omit Nunns unequivocal response: "<u>To meet our CapEx guidance, no</u>. We believe we have the capacity internally to do that."</td><td>Nunns' statement was misleading because it failed to disclose that the Company was artificially inflating that metric and booking fictitious assets on its balance sheet through its fraudulent scheme.</td></tr>
<tr><td>¶143</td><td>"The general pattern in anticipation as we scale up to a manufacturing model on these plays is fundamentally that we generally tend to see a 30% to 40% cost reduction from initial tests of the plays, and we believe we can achieve that. On some of them, we believe we have got some of that in the bag. On others, we will add that as we scale up our projects."</td><td>Defendants ignore Nunns' statement that Penn West had historically achieved a substantial "30% to 40% cost reduction from initial tests of the plays." This statement of fact was misleading because Nunns failed to disclose that Penn West had achieved the "30% to 40%" historical cost reductions, in part, by committing accounting fraud.</td></tr>
<tr><td>¶178</td><td>"[w]e are committed to optimizing capital and operational efficiencies while providing dividend income for our shareholders . . . . <u>We have indicated to our shareholders - shareholder base - before that in the softer portions of the commodity price cycle, we aim to ensure consistency in the dividend. </u>Over the last three years, we have taken appropriate measures to ensure that balance sheet integrity to support our endeavors."</td><td>• Nunns' statement that Penn West is "committed to optimizing capital and operational efficiencies" was a statement about the Company's presently existing business posture and its current efforts to reduce costs, and was misleading because it failed to disclose that the Company's fraud was a material component thereof.
• Nunns statement of historical fact that "[o]ver the last three years, we have taken appropriate measures to ensure [the Company's] balance sheet integrity" was misleading because it failed to disclose that since 2009, its accounting fraud had a material effect on Penn West's reported balance sheet integrity.</td></tr>
</table>

¶160	Takeyasu told investors, “our aim is to provide the Company with funds flow certainty to fund our growth and dividend.”	Takeyasu’s statement is an objective description of part of Penn West’s then-existing business strategy: to maintain its funds flow in order to fund the dividend and grow the business. This statement was misleading because Takeyasu omitted to disclose that at the time the statement was made, the Company was committing accounting fraud to generate “funds flow certainty.”