UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

IN RE FRONTIER COMMUNICATIONS, CORP. STOCKHOLDERS LITIGATION	No. 3:17-cv-1617 (VAB) CLASS ACTION **ECF CASE**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION FOR LEAVE TO AMEND THE CONSOLIDATED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY 4

III. LEGAL STANDARD 5

IV. ARGUMENT 5

A. Plaintiffs Have Not Previously Been Granted Leave to Amend 5

B. Amendment Would Not Be Futile 6

1. Plaintiffs' Claims Are Timely 6

2. The Amended Complaint Pleads False and Misleading Statements 8

3. The Amended Complaint Pleads Scienter 17

4. The Amended Complaint Pleads Loss Causation 21

C. Defendants Will Not Suffer Undue Prejudice If Leave To Amend Is Granted 26

D. Plaintiffs' Proposed Amendment Is Timely and Not Made In Bad Faith 27

V. CONCLUSION 27

TABLE OF AUTHORITIES

Page(s)

Cases

A. V. by Versace, Inc. v. Gianni Versace S.p.A.,
87 F. Supp. 2d 281 (S.D.N.Y. 2000)....26, 27

Acticon AG v. China North East Petroleum Holdings, Ltd.,
692 F.3d 34 (2d Cir. 2012)....25

In re Advanced Battery Techs., Inc. Sec. Litig.,
No. 11 CIV. 2279 CM, 2012 WL 3758085 (S.D.N.Y. Aug. 29, 2012)....22

Anthony v. City of New York,
339 F.3d 129 (2d Cir. 2003)....26

Arkansas Teachers Ret. Sys. v. Goldman Sachs Group, Inc.,
879 F.3d 474 (2d Cir. 2018)....24

Bertini v. Smith & Nephew, Inc.,
2013 WL 6332684 (E.D.N.Y. July 15, 2013)....6

Block v. First Blood Assocs.,
988 F.2d 344 (2d Cir. 1993).... *passim*

Boudinot v. Shrader,
2012 WL 489215 (S.D.N.Y. Feb. 15, 2012)....6

Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC,
750 F.3d 227 (2d Cir. 2014).... *passim*

United States ex rel. Chorches for Bankruptcy Estate of Fabula v. American Medical Response, Inc.,
865 F.3d 71 (2d Cir. 2017)....2

City of Birmingham Ret. and Relief Sys. v. Credit Suisse Group AG,
2019 WL 719751 (S.D.N.Y. Feb. 19, 2019)....22, 23

Cohen v. Kitov Pharm. Holdings, Ltd.,
2018 WL 1406619 (S.D.N.Y. Mar. 20, 2018)....22

Cohen v. Kitov Pharm. Holdings, Ltd.,
No. 17....22

Emergent Capital Inv. Mgmt. v. Stonepath Grp.,
343 F.3d 189 (2d Cir. 2003)....25

Excelsior Fund, Inc. v. JP Morgan Chase Bank, NA.,
2007 WL 950134 (S.D.N.Y. Mar. 28, 2007) 26

Financial Guaranty Insurance Company v. The Putman Advisory Co.,
783 F. 3d 395 (2d Cir. 2015)....................23

Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC,
376 F.Supp.2d 385 (S.D.N.Y. 2005)....................21

Fresno Cnty. Emps.' Ret. Ass'n v. comScore, Inc.,
268 F. Supp. 3d 526, 549-550 (S.D.N.Y. 2017....................15

In Re Frontier Communications Corp Stockholders Litigation,
2019 WL 1099075 (D. Conn. Mar. 8, 2019) .... *passim*

In re Goldman Sachs Group, Inc. Sec. Litig.,
868 F. Supp. 2d 261 (S.D.N.Y. 2012)....................25

Hull v. Glob. Digital Sols., Inc.,
2017 WL 6493148 (D.N.J. Dec. 19, 2017)....................7

Indiana Public Retirement System v. SAIC, Inc.,
818 F.3d 85 (2d Cir. 2016)....................20

Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC,
797 F.3d 160 (2d Cir. 2015)....................5, 21, 25

Merck & Co. v. Reynolds,
559 U.S. 633 (2010)....................7

Meyer v. JinkoSolar Holdings Co., Ltd.,
761 F.3d 245 (2d Cir. 2014)....................11

In re Mylan N.V. Sec. Litig.,
2018 WL 1595985 (S.D.N.Y. Mar. 28, 2018) 20

New Orleans Emps. Ret. Sys. v. Celestica, Inc.,
455 Fed. App'x. 10 (2d Cir. 2011)....................17, 19

Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.,
153 F. Supp. 3d 628 (S.D.N.Y. 2015)....................5

In re Petrobras Sec. Litig.,
116 F. Supp. 3d 368 (S.D.N.Y. 2015)....................25

In re Rhodia S.A. Securities Litigation,
531 F. Supp. 2d 527 (S.D.N.Y. 2007)....................25, 26

Ronzani v. Sanofi S.A.,
899 F.2d 195 (2d Cir. 1990)..5

S.E.C. v. Lee,
720 F.Supp.2d 305 (S.D.N.Y. 2010)..21

Sheet Metal Workers Local 32 Pension Fund v. Terex Corp.,
2018 WL 1587457 (D. Conn. Mar. 31, 2018) 17

In re Take-Two Interactive Sec. Litig.,
551 F. Supp. 2d 247 (S.D.N.Y. 2008)..5, 27

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
551 U.S. 308 (2007)...4, 17

Three Crown Ltd. P'ship v. Caxton Corp.,
817 F. Supp. 1033 (S.D.N.Y. 1993)..6

Virginia Bankshares, Inc. v. Sandberg,
501 U.S. 1083 (1991)...3, 10

In re Vivendi, S.A. Sec. Litig.,
838 F.3d 223 (2d. Cir. 2016)...24

In re Wilmington Trust Sec. Litig.,
29 F. Supp. 3d 432 (D. Del. 2014)...25

Statutes

Fed. R. Civ. P. 15(a) 5

Other Authorities

Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1489 (3d ed.) 6

Pursuant to Rule 15 of the Federal Rules of Civil Procedure and this Court's Ruling and Order on Motions to Dismiss, 2019 WL 1099075 (D. Conn. Mar. 8, 2019) (the "Order"), Lead Plaintiffs Arkansas Teacher Retirement System ("ATRS") and Carlos Lagomarsino ("Mr. Lagomarsino," and together with ATRS, "Plaintiffs"), by and through their undersigned counsel, respectfully submit this memorandum of law in support of their Motion for Leave to Amend the Complaint (the "Motion").[1]

Pursuant to Rule 7(f) of the Local Rules of Civil Procedure for the United States District Court for the District of Connecticut, Plaintiffs state that they have inquired with Defendants, and Defendants object to the Motion.

I. INTRODUCTION

As the Court is aware, this case concerns Plaintiffs' allegations that Defendants made false and misleading statements about Frontier's $10.5 billion acquisition of Verizon's wireline operations in California, Texas, and Florida (the "CTF Acquisition"), ultimately causing hundreds of millions of dollars in investor losses. In the Order, the Court dismissed in their entirety Plaintiffs' claims under both the Securities Act of 1933 (the "Securities Act") and the Securities Exchange Act of 1934 (the "Exchange Act"), but permitted Plaintiffs to seek leave to amend to address certain deficiencies identified by the Court. 2019 WL 1099075, at *1.

Plaintiffs now seek leave to amend only as to Exchange Act claims for a narrower Class Period, beginning after the close of the CTF Acquisition: from April 25, 2016 to October 31, 2017

---

[1] A copy of Plaintiffs' Proposed Amended Class Action Complaint (the "PAC") is attached as Exhibit A to the Motion. A redlined copy of the PAC, which compares the amended allegations to the Class Action Complaint ("CAC") (ECF No. 134), is attached as Exhibit B to the Motion. Unless otherwise noted herein: (i) all references to "¶__" are to paragraphs in the PAC; (ii) all internal citations, quotation marks, and brackets are omitted; (iii) all emphasis is added; and (iv) unless otherwise defined, all terms have the definitions provided in the PAC.

(the "Class Period"). During this time Defendants made specific assertions that fewer than 1% of acquired CTF customers experienced service disruptions; that non-paying CTF accounts acquired from Verizon led to over $50 million in revenue loss; that Defendants complied with GAAP; and other ascertainable and verifiable claims about the status of the CTF Acquisition.[2] The PAC contains new allegations that resolve the deficiencies identified by the Court as to these statements, many of which the Court already found to be "closer calls," and also otherwise streamlines the proposed pleading in light of the Court's Order. 2019 WL 1099075, at *20. As discussed further below, the PAC is not futile and the Motion should be granted.

First, as a threshold matter, the claims asserted in the PAC are timely. (*Infra* Section IV.B.1)

Second, the PAC includes new allegations that confirm the falsity of these alleged misstatements and omissions. (*Infra* Section IV.B.2.) For example, with respect to Defendants' claims that less than 1% of CTF Acquisition customers experienced service interruptions, the PAC alleges multiple fronts on which these "1%" statements were materially false and misleading to investors. While Defendants conspired to inflate the "denominator" (the number of CTF customers acquired) to downplay as much as possible the materiality of the numerous public reports of service issues, the PAC provides information demonstrating that ***hundreds of thousands*** of customers lost service—a number wildly greater than 1% of any conceivable measure of Frontier's acquired

[2] Plaintiffs do not seek to amend claims concerning any of the other statements alleged in the CAC (ECF No. 134 at ¶¶171-218). For the avoidance of doubt, Plaintiffs explicitly stand on their prior allegations in the CAC and preserve their right to appeal those dismissed claims, Defendants, and statements. *See, e.g.*, *United States ex rel. Chorches for Bankruptcy Estate of Fabula v. American Medical Response, Inc.*, 865 F.3d 71, 95 (2d Cir. 2017) (party who believes claim "was adequately pled" in dismissed pleading "was fully entitled to stand on the allegations of the [dismissed pleading], and to appeal the dismissal of that claim (when a final judgment was entered in the case), rather than attempt to replead his retaliation claim to the district court"). For ease of comprehension and readability, Plaintiffs have excised the allegations relating to the dismissed claims and placed them in an Appendix B attached to the PAC.

customers. This sufficiently establishes falsity. *See* 2019 WL 1099075, at *21. ("If untrue, the Frontier Defendants' 1% statements would fall into . . . material misrepresentations of existing facts."). Moreover, the Complaint further demonstrates the falsity of Defendants' 1% statements through specific allegations showing that Defendants did not have a reasonable basis to make these statements. *See, e.g.*, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991) (When statements "are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading.").

Third, the PAC includes new allegations detailing Defendants' scienter in making these false and misleading statements. (*Infra* Section IV.B.3.) For example, with respect to Defendants' statements attributing revenue decline to supposed "non-paying accounts" that Frontier inherited from Verizon, the Court had found insufficiently particular the information provided by "Plaintiffs' single confidential informant." 2019 WL 1099075, at *26 (citing FE-3). The PAC not only includes additional detail from FE-3, but ***also*** includes the additional account of FE-26, a former Frontier Senior Vice President, who had access to and was personally involved in the creation of CTF (and, later, Company-wide) aggregated data of non-paying accounts, reports of which were provided to the Company's C-suite and which FE-26 relied on for her responsibilities in sales, marketing, and product development. Because these reports should have revealed the hidden time-bomb of non-paying accounts that Defendants blamed for the disappointing revenue, FE-26 "thought it was incredibly odd" that "Dan [McCarthy] said we had all these never-pays that we flushed through the system and that's why our churn was so bad." Confused, and concerned that she had the wrong numbers—and therefore could not properly prepare her budget and marketing plans—FE-26 asked her supervisor, then-Executive Vice President Kenneth Arndt, about the discrepancy, but did not receive an explanation: instead, Frontier took away FE-26's

analytics responsibility after Mr. Arndt responded that he needed to "start being careful" because "***I don't want to go to jail***."

Similarly, the inference of Defendants' scienter throughout is strengthened by the damning findings of one of Frontier's regulators that for years—including at least part of the Class Period—the Company had violated dozens of laws and rules due to "***broad, systemic problems*** with Frontier's service quality, recordkeeping, and business operations." The conclusions specifically corroborate Plaintiffs' allegations, including that Frontier "masked its poor service" through "under-recording and under-reporting of telephone outages" and by inaccurately closing trouble tickets. Considering all allegations holistically, the PAC gives rise to an inference of conscious misbehavior or recklessness that is "***at least*** as compelling as any opposing inference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

Fourth, the PAC includes additional allegations that clarify the specific connection between the statistically significant stock declines following the alleged corrective events and Defendants' false and misleading statements and omissions. (*Infra* Section IV.B.4.) These allegations address the causal concerns articulated by the Court, and more than satisfy the Second Circuit's requirements for pleading loss causation at this early stage in the litigation.

Accordingly, Plaintiffs respectfully request that the Court grant leave to file the PAC.

II. PROCEDURAL HISTORY

Plaintiff Chris Bray ("Bray") filed the initial complaint in this action on September 26, 2017. ECF No. 1. After the Court appointed ATRS and Mr. Lagomarsino as Lead Plaintiffs on January 18, 2018, Plaintiffs timely filed the CAC on April 30, 2018. ECF Nos. 99, 134. Defendants filed their motions to dismiss the CAC on June 29, 2018. ECF Nos. 143-46. On August 28, 2018, Plaintiffs opposed Defendants' motions to dismiss (ECF No. 151), and Defendants replied in further support of their motions on October 12, 2018 (ECF No. 155). Oral argument took place on

Defendants' motions on February 7, 2019. By Order dated March 8, 2019, the Court granted Defendants' motions to dismiss in their entirety but afforded Plaintiffs the opportunity to move for leave to amend the CAC. 2019 WL 1099075, at *31. This Motion and Plaintiffs' submission of the PAC follows.

III. LEGAL STANDARD

In permitting Plaintiffs to seek leave to amend, the Court noted the liberal standards of Fed. R. Civ. P. 15(a), which advise that this Court "should freely give leave when justice so requires." 2019 WL 1099075, at *30. The Second Circuit favors granting leave to amend because "the permissive standard of Rule 15 is consistent with our strong preference for resolving disputes on the merits." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 189-90 (2d Cir. 2015) (reversing denial of leave to amend as abuse of discretion). Courts have noted that this liberal approach is particularly important in securities fraud actions like here, given the strict pleading standards that the PSLRA imposes. *See, e.g.*, *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 312 (S.D.N.Y. 2008) (noting the "importance of adherence to liberal amendment standards in context of complicated pleading rules of PSLRA").

IV. ARGUMENT

A. Plaintiffs Have Not Previously Been Granted Leave to Amend

Leave to amend is warranted because Plaintiffs have not previously been granted such leave following dismissal. *See Ronzani v. Sanofi S.A.*, 899 F.2d 195, 198 (2d Cir. 1990); *Pehlivanian v. China Gerui Advanced Materials Grp., Ltd.*, 153 F. Supp. 3d 628, 657 (S.D.N.Y. 2015) (granting leave to amend a securities class action complaint even though "Plaintiff has amended once as a matter of right," because "Plaintiff has not been granted leave to amend").

B. Amendment Would Not Be Futile

Leave to amend should be granted because the PAC cures the purported deficiencies that the Court identified in the Order. However, even if the Court has doubts about whether all deficiencies have been cured, the Court still has discretion to grant leave to amend under Rule 15's liberal standard, and the Court should grant the Motion on that basis alone. *See, e.g.*, *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F. Supp. 1033, 1051 (S.D.N.Y. 1993) ("Since plaintiffs have demonstrated a likelihood that they will be able to cure ***some*** of the deficiencies in their Securities Exchange Act [and other] claims . . . plaintiffs are given [leave] to further amend their complaint as to those claims." (emphasis added)); *Bertini v. Smith & Nephew, Inc.*, No. 13 Civ. 0079, 2013 WL 6332684, at *6 (E.D.N.Y. July 15, 2013) (granting leave to amend where, even though plaintiffs already had a chance to amend their complaint, it was possible for them to "refine their allegations" such that they could cure "at least ***some*** of the many deficiencies in their complaint"); Wright & Miller, 6 Fed. Prac. & Proc. Civ. § 1489 (3d ed.) ("Rule 15(a)(2) vests the district judge with virtually unlimited discretion to allow amendments by stating that leave to amend may be granted when 'justice so requires.'").

1. Plaintiffs' Claims Are Timely

Section 10(b) of the Exchange Act requires that claims be brought "no later than the earlier of (1) [two] years after the discovery of the facts constituting the violation; or [five] years after such violation" has occurred. It is axiomatic that no claim can accrue until the alleged violation of the securities laws has occurred. *See, e.g.*, *Boudinot v. Shrader*, No. 09-civ-10163, 2012 WL 489215, at *4 (S.D.N.Y. Feb. 15, 2012) (noting that clock "begins to run from the time that the

allegedly fraudulent representations were made").[3] Bray filed his initial complaint in this Action on September 26, 2017. Thus, the statute of limitations in this case simply cannot have expired on statements that Defendants made after September 2015.

In the Order, the Court *sua sponte* dismissed Plaintiffs' Section 10(b) claims in their entirety, including alleged misstatements that occurred after the close of the CTF Acquisition on April 1, 2016. 2019 WL 1099075, at *27. Defendants themselves conceded the timeliness of those claims. In their motions to dismiss, Defendants argued ***only*** that statements made before the close of the CTF Acquisition—between February 5, 2015 and February 29, 2016—were untimely. *See* Defs. Mem. Supp. Mot. Dismiss (ECF No. 144), at 38 ("Plaintiffs' Statements Before The Offerings [In June 2015] Are Not Actionable Due To The Statutes of Limitations"); Defs. Mot. Dismiss Reply (ECF No. 155), at 23 ("The Pre-Offering Statements Are Not Actionable Under The Statutes of Limitation"). Defendants did not seek dismissal of statements made after the close of the CTF Acquisition on timeliness grounds.

Nonetheless, the Court dismissed Plaintiffs' entire Section 10(b) claim on statute of limitations grounds, noting that "a number of key events occurred before September 26, 2015." 2019 WL 1099075, at *27. The relevant "key events," however—including all of Defendants' false and misleading statements alleged in the PAC—occurred well after September 26, 2015 and within the two-year window set forth in Section 10(b). Plaintiffs could not reasonably have brought

---

[3] At the date on which a claim for securities fraud accrues—*i.e.*, when a defendant utters his allegedly false or misleading statement—plaintiff may still not be able to plead other critical elements of a 10(b) claim, notably scienter or loss causation. The Supreme Court has made clear that the two-year "discovery period" does not begin to run until a plaintiff could have successfully pled all elements of a claim for securities fraud. *Merck & Co. v. Reynolds*, 559 U.S. 633, 646-47 (2010). Therefore, under *Merck*, the statute of limitations does not begin until the date of the first corrective disclosure demonstrating loss causation, "when a reasonably diligent plaintiff should have discovered facts permitting it to successfully plead a claim, including all elements." *Hull v. Glob. Digital Sols., Inc.*, No. 16-5153, 2017 WL 6493148, at *8 (D.N.J. Dec. 19, 2017). Thus, Plaintiffs could not have pled any claim—and started the two-year discovery clock—until November 1, 2016, the date of the first alleged corrective disclosure.

a claim based on these statements until after the alleged false statements were made. Defendants made the first of these statements on April 25, 2016, within the two-year period preceding the filing of Bray's complaint. Thus, Plaintiffs' claims arising from this and subsequent statements are timely under any measure.

2. The Amended Complaint Pleads False and Misleading Statements

The PAC includes new allegations that address the Court's rulings concerning the falsity of several of Defendants' statements made after the close of the CTF Acquisition, including those that the Court previously found to be "closer calls." 2019 WL 1099075, at *20.

a. Defendants Falsely Claim That Only 1% Of CTF Customers Suffered Service Issues

The Court previously ruled that, "if untrue, the Frontier Defendants' 1% statements would [be] material misrepresentations of existing facts," and "would not be afforded the safe harbor given to optimistic forecasts about the future." 2019 WL 1099075, at *20. Nonetheless, while confirming that "precise mathematical data" is not necessary, the Court ruled that Plaintiffs had not pled the falsity of the 1% statements without allegations of both "estimates of the number of accounts acquired through the CTF acquisition (i.e., more specific than 'millions'[])" and "the number of customers experiencing issues following the flash cut." 2019 WL 1099075, at *21. The PAC alleges both.

The PAC establishes through reports from former employees and Frontier's own SEC filings that Defendants misstated and manipulated both the ***denominator*** (that is, the total number of acquired CTF customers) and the ***numerator*** (that is, the total number of acquired CTF customers that experienced service issues). With respect to the denominator, the PAC demonstrates that Defendants asserted that only 1% of ***3.7 million CTF customers*** acquired in the CTF transaction were affected by service issues (*see* ¶¶128). However, the Company's own later

SEC filings directly contradict this figure – in a footnote to a schedule of consolidated financial statements, the Company indicated that there were "2,586,000 total customers" acquired in the CTF Flash Cut. ¶41. The major discrepancy between these two figures supports the PAC's allegations that Frontier senior executives sought to "inflate the denominator . . . in order to decrease the percentage of affected customers." *Id*.

Moreover, even using Defendants' denominator based on "funny math" (3.7 million), the PAC more than adequately alleges the falsity of Defendants' 1% statements by describing with particularity service impacts that exceed 37,000 customers (1% of 3.7 million) by a staggering margin. The PAC does so in several independent ways. First, the PAC refers to information provided by several former employees concerning one particular issue that plagued hundreds of thousands of acquired FiOS customers and of which Defendants were aware. ¶¶40-45. These allegations include new information provided by the Field Operations Manager for much of the acquired Texas territory, including Houston, Austin, and Corpus Christie (FE-27), who recalled seeing reports of 80,000 unique customers who suffered multi-day service outages service relating specifically just to this one issue, which FE-27 described as causing a "total loss of internet and/or television activity." ¶45. In total, based on the number of trouble tickets FE-27 viewed in the ticket management system along with the spreadsheets exported from this database for circulation, FE-27 estimated that this problem impacted approximately 75% of all acquired customers in Texas—not just customers in her territory alone—and ultimately afflicted the CTF systems for months before Frontier developed a solution. *Id*. FE-27 recounted that the nature of the system problems meant that her technicians were unable to help restore service—they were, as FE-27's director relayed to her, "held hostage to the people in Connecticut," Frontier's headquarters. *Id*. Thus,

allegations from FE-27 ***alone*** "describe[] with sufficiently particularity . . . access to company data" (2019 WL 1099075, at *20) showing the material falsity of Defendants' 1% statements.

The widespread disruption caused by this issue is further corroborated with additional information from FE-4 concerning its impact in Florida. FE-4 explained that, during the first two to four weeks after the CTF Flash Cut, this issue knocked waves of 30,000-50,000 customers out of service for more than 72 hours at a time—***multiple*** times—with problems affecting ***all*** of the customers in the metropolitan Tampa market. ¶44. Again, these allegations—both independently and read in corroboration with the other information provided by FE-27 and other former employees—shows the falsity of Defendants' claims that less than 1% of acquired customers impacted.

Even beyond this one issue, the PAC also demonstrates that Defendants' 1% claims were false because former employees have revealed that service disruptions affected "every video customer" on the over 1.1 million video lines that Frontier acquired in the CTF Acquisition. ¶¶46-49.

Finally, in addition to sufficiently establishing the actual falsity of the 1% statements, the PAC also alleges that the 1% statements are independently actionable as misleading because the statements are based on information that Defendants knew or should have known was unreliable. *See, e.g.*, *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1093 (1991) (When statements "are reasonably understood to rest on a factual basis that justifies them as accurate, the absence of which renders them misleading."). New allegations corroborate the account of FE-3 that senior management had deliberately ordered the misclassification of Frontier's own internal records of customer problems, called "trouble tickets," including: 1) that FE-26 also personally heard Frontier Southeast Region Senior Vice President Melanie Williams give the same instruction (¶61); and 2)

the determination by the Minnesota Department of Commerce that Frontier had "significantly overstated its performance for a period of years" in part through improperly closing customer trouble tickets, and that as a result "regulatory agencies cannot rely upon the Company's records to assess Frontier's service quality" (¶119).

The PAC further alleges Defendants' lack of a factual basis in making the 1% statements through additional information provided by FE-17 concerning the "war rooms" set up to manage the CTF Acquisition. FE-17 explained that the "war rooms" tracked and reported on all of the inbound trouble tickets, which FE-17 recalled was tens of thousands of tickets involving customers that were either totally out of service or experiencing major service issues (further showing the falsity of Defendants' 1% claims). ¶56. However, FE-17 stated that the "war rooms" learned that there were ***thousands of additional customers*** experiencing issues that were never logged because Frontier's third-party vendor call centers had not been creating trouble tickets. ¶59. As a result, Frontier senior management (including Defendants) knew or should have known that their own records of complaints were inaccurate and thus Defendants did not have a factual basis on which to justify the accuracy of Defendants' 1% statements.

Thus, in several respects, the PAC alleges that the 1% statements were actionably false and misleading. While the Court found that "the former employees do not allege that they shared contradictory aggregate data with Frontier Defendants that called into question Frontier's estimates for the total number of affected customers across the acquired territories" (2019 WL 1099075, at *21), that is not the law. Instead, "[o]nce [Defendants] chose to discuss" the number of CTF customers suffering service issues, they "had a duty to be both accurate and complete." *Meyer v. JinkoSolar Holdings Co., Ltd.,* 761 F.3d 245, 250 (2d Cir. 2014) (quoting *Caiola v. Citibank, N.A.*, 295 F.3d 312 (331 (2d Cir. 2002)). The PAC establishes that Defendants were neither.

b. Defendants Falsely Blame "Non-Paying Accounts" Acquired From Verizon For Serious Revenue Decline

Another of Plaintiff's "closer calls" (2019 WL 1099075, at *20) concerns Defendants' statements that tens of millions of dollars in revenue loss were due to the "cleanup" of "non-paying accounts" acquired in the CTF Acquisition because Verizon had "stopped treatment of overdue accounts on February 1, 2016"—two months before the close of the CTF Acquisition. The PAC alleges that these statements were, in the words of FE-3, a "provable lie"—these non-paying customers did not exist.

In response to the Court's ruling that former employees' "access to company-wide data is not described with sufficient particularity" (2019 WL 1099075, at *23), the PAC alleges new information provided by FE-26, Frontier's former Senior Vice President. ¶100. After joining Frontier as a Senior Vice President in August 2016, FE-26 had access to and was personally involved in the creation of analytics reports that aggregated CTF (and, no later than January 2017, Company-wide) churn data concerning the payment status of customer accounts, including aggregate data on "never pay" accounts. *Id*. "Never pay" accounts are the equivalent of the "non-paying" accounts Defendant McCarthy later referenced. *Id*. FE-26 stated that these reports were provided to the Company's c-suite executives, and FE-26 would personally discuss these reports with, among others, Kenneth Arndt. *Id*. Mr. Arndt was promoted in December 2016 to Executive Vice President, Commercial Sales Operations, from his prior position as President for Frontier's East Region. *Id*. Mr. Arndt reported directly to Defendant McCarthy, and FE-26 understood that Mr. Arndt discussed these reports with McCarthy. *Id*. According to FE-26, these reports should have indicated the existence of the massive number of non-paying Verizon accounts that Defendants described, but instead the "never-pay" numbers were consistent with industry standards—and nowhere near the level required to account for the unexpected $45 million in

revenue loss that Defendants described in February 2017. *Id*. As a result, FE-26 "thought it was incredibly odd" that "[i]n earnings reports Dan [McCarthy] said we had all these never-pays that we flushed through the system and that's why our churn was so bad." *Id*. FE-26 even brought in another team member to confirm that FE-26's numbers were correct. *Id*. Confused, FE-26 asked Mr. Arndt about the discrepancy at a meeting in March 2017. In response, Mr. Arndt refused to explain the discrepancy. *Id*. Instead, referring to his recent promotion, Mr. Arndt stated that he needed to "start being careful" now that he was an officer, because "***I don't want to go to jail***." *Id*. FE-26 never got an explanation—and after raising these questions, Mr. Arndt told her to just stop working on anything related to churn, and Frontier took away FE-26's analytics responsibility. *Id*.

The PAC includes also includes additional information from FE-3. Specifically, as Verizon's Florida Director of Operations prior to the close of the CTF Acquisition, FE-3 had been responsible for Florida customer data analytics. (¶101.) In connection with that role, FE-3 looked at daily analyses of the "Net Adds to Bill" ("NATB") for the entire Florida region. *Id*. FE-3 explained that these reports tracked sales, cancellations, and disconnects, and were reported weekly to senior leadership including both real numbers and future forecasting. *Id*. FE-3 explained that her daily review of the NATB reports would have revealed to her immediately if—as Defendants claimed—Verizon had "stopped treatment of overdue accounts," because there would have immediately been a decline in the number of disconnects. *Id*. However, FE-3 stated specifically that she viewed these daily NATB reports in her official capacity at Verizon up until March 31, 2016—the eve of the CTF Flash Cut—yet saw zero fluctuations in the number of disconnects. *Id*. Plaintiffs respectfully submit that the Court's concerns regarding FE-3's information are misplaced. *See* 2019 WL 1099075, at *23. First, it is unnecessary for FE-3 to have reviewed "aggregate [CTF] data" because Defendants did not state that the non-paying accounts

were a regional issue, but instead the result of Verizon's CTF-wide decision to "stop[] treatment of overdue accounts" months in advance of the CTF Acquisition close. Yet FE-3 was neither aware of such a directive nor did she see any evidence of such a directive. To the contrary, FE-3 explained that in fact Verizon had actually "made a significant point to start cleaning" such accounts for the year before the close. ¶101. Second, the Court's finding that FE-3 did not "share[] contradictory aggregate data with Frontier" (2019 WL 1099075, at *23) turns Defendants' obligation to be truthful on its head: Defendants—not FE-3—chose to state that Verizon had stopped its non-paying account cleanup, and thus Defendants were obligated to have a reasonable basis for their statements. It was not FE-3's obligation to correct Defendants by sharing reports that she personally saw in her capacity as a Verizon employee nearly a year prior.

Thus, the accounts of both FE-26 and FE-3 demonstrate falsity of the non-paying accounts statements and sufficiently address the Court's request for information concerning "the number of non-paying accounts acquired through the CTF acquisition." 2019 WL 1099075, at *22.[4]

c. Defendants Falsely Claim To Have Complied With GAAP

The PAC also includes information as to another of the Court's "closer calls" (2019 WL 1099075, at *20): Defendants' false certifications that they complied with GAAP despite failing to disclose a change in accounting policy to account for the cost of maintenance activities (such as repairing or replacing broken devices) as capital expenditures, rather than operating expenses. In response to the Court's criticism that "the former employees only indirectly learned about the

[4] With respect to the Court's request for "estimates of . . . the typical cost to clean up a non-paying account" (2019 WL 1099075, at *22), it is not the unexpected cost per-account that was the subject of Defendants' misstatements, but rather that the ***number*** of non-paying accounts (100,000 accounts) purportedly exceeded expectations. Indeed, Defendants concede as much: in their motion to dismiss reply brief, Defendants describe the non-pay statements as referring to the Company's discovery "that it was inheriting a larger number of non-paying customers from Verizon than it had anticipated." Defs. Mot. Dismiss Reply (ECF No. 155), at 15 n. 13.

alleged new policy" and "did not provide dates for the adoption or implementation of the new policy or for when they learned about the new policy" (2019 WL 1099075, at *22), the PAC includes new information from FE-17, stating the new corporate guidance came out in the third or fourth quarter of 2016 and that he personally had conversations about the instructions with Frontier Senior Vice President John Lass, Frontier Vice President of Financial Planning & Analysis Brett Lafferty, and Frontier Senior Vice President Melanie Williams. Further, FE-17 stated that Lafferty agreed with FE-17 that the instruction was wrong, but ordered FE-17 to comply regardless. FE-17 also provided additional information relevant to the Court's ruling that it could not "fully evaluate" the import of "KPMG's partial audit of Frontier's finances." 2019 WL 1099075, at *22.[5] Specifically, FE-17 described that, while at Verizon, he had numerous interactions with Verizon's auditor, including spot checks and deeper dives for the classifications of repairs versus capital expenditures. Yet, in the same role at Frontier, FE-17 never once had any interaction with KPMG. *See* ¶91.

Finally, the Court's request for "relevant data, such as estimates of [] the impact of" the nonpublic accounting policy change is unwarranted. 2019 WL 1099075, at *22. Without discovery, only Defendants have access to the quantitative impact of this change: however, the PAC makes clear that its qualitative impact is undoubtedly material through, among other things, reference to the importance of Defendants' EBITDA to analysts covering the Company. *See, e.g.*, *Fresno Cnty. Emps.' Ret. Ass'n v. comScore, Inc.*, 268 F. Supp. 3d 526, 549-550 (S.D.N.Y. 2017) (qualitative analysis of materiality includes whether a known misstatement may result in a significant negative market reaction; whether the misstatement plausibly "mask[ed] a change in

[5] In fact, the Court not only cannot "fully evaluate" KPMG's role—it ***should*** not: Defendants' wholly factual arguments have no basis in Plaintiffs' allegations.

earnings or other trends"; and whether the misstatement "hid[] a failure to meet analysts' consensus expectations for the enterprise").

d. Defendants' Falsely Described The Status And Progress Of Integration Of The CTF Acquisition.

Finally, the PAC also includes new allegations that further confirm the falsity of certain of Defendants' other statements after the close of the CTF Acquisition. Though the Court had previously dismissed these and numerous other statements as mere "boast[s] of success" (2019 WL 1099075, at *20), Plaintiffs have removed the "success" statements and only seek to amend to address Defendants' specific statements about the status and progress of integration on the CTF Acquisition after the close, which are the assertions of "ascertainable or verifiable" facts that the Court found to be "closer calls." 2019 WL 1099075, at *20.

For example, on May 3, 2016, Defendant McCarthy stated that, while there had been "some issues at the outset . . . [that] resulted in some negative publicity in the market," including "a number of issues with imperfect data extracts and network complexities," Defendants "now have these issues ***resolved and behind us*** . . . . ***All service issues related to the conversion have been substantially resolved***[.]" ¶131. Allegations in the PAC confirm that this statement—and the other similar claims made by Defendants—were false, because Defendants had not "substantially resolved" the issues but instead continued to be plagued by them for months. ¶133. For example, the PAC includes new information provided by FE-17, including a text message in which Frontier Chief Technology Officer Steve Gable confirmed Frontier senior management's awareness that the widespread video-on-demand issues affecting hundreds of thousands of customers would not be resolved until at least June 6, 2016. ¶75. Ultimately, these and other disruptions were not resolved until well after McCarthy claimed on August 1, 2016 that integration of the CTF

Acquisition was "essentially done," and Frontier did not stop "drowning" in complaints and issues from the CTF Flash Cut until April 2017. ¶81.

3. The Amended Complaint Pleads Scienter

The PAC contains well-pled allegations establishing that: 1) Defendants "knew facts or had access to non-public information contradicting their public statements" (2019 WL 1099075, at *25 (quoting *Scholastic*, 252 F.3d at 76)); and 2) the information misrepresented was a "key to measuring . . . performance and . . . a subject about which investors and analysts often inquired" (*New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 Fed. App'x. 10, 14 & n. 3 (2d Cir. 2011)).[6] Considered holistically—as the Court must—these allegations both address the issues identified by the Court and sufficiently raise an inference of conscious misbehavior or recklessness that is "***at least*** as compelling as any opposing inference." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 324 (2007).

First, as to Defendants' 1% statements, the Court ruled that scienter was "a closer call" but nonetheless found that "Plaintiffs suggest but do not adequately plead having had access to data on the total number of customers gained through the CTF Acquisition and the number who faced problems." 2019 WL 1099075, at *26. For the reasons described more fully above, the PAC addresses the Court's concern: in sum, the PAC readily establishes that "the number who faced problems" far exceeded 1% of the total CTF customers acquired, whether using Defendants'

[6] While the Court had referred to "the size of the CTF project" in analyzing motive (2019 WL 1099075, at *26), such allegations are traditionally analyzed in considering an inference of recklessness because the "importance . . . to the company's business" makes it "'exceedingly unlikely' that the executives were not aware of the falsity of their statements." *Sheet Metal Workers Local 32 Pension Fund v. Terex Corp.*, No. 09-cv-2083, 2018 WL 1587457, at *11 (D. Conn. Mar. 31, 2018) (quoting *Makor Issues & Rights, Ltd. v. Tellabs Inc.* ("Tellabs II"), 513 F.3d 702, 710 (7th Cir. 2008)). As the *Terex* court summarized, "[i]n some circumstances, . . . scienter may be established based solely on the magnitude of the company's problems," such as—like here—where former employee accounts revealed that executives "had overstated" its "flagship" efforts. *Terex*, 2018 WL 1587457, at *11.

artificially inflated with "funny math" number of 3.7 million, or their later disclosed true number of 2.5 million. Thus, because the "one percent figure was wildly incorrect," the PAC alleges "an inference of mathematical manipulation or reckless disregard for the truth 'at least as likely as any plausible opposing inference.'" 2019 WL 1099075, at *26 (quoting *In re Scholastic*, 252 F.3d 63, 76 (2d Cir. 2001)).

Defendants' scienter on this point is also demonstrated by FE-16's account that the 1% statements were based on "funny math" designed deliberately to mislead. Specifically, FE-16 explained that she personally participated in meetings with Frontier senior management (including CTO Steve Gable and West Region President Melinda White) in which they discussed how to inflate the denominator in order to decrease the percentage of affected customers. ¶41. In fact, Defendants' later disclosures bear this out: as noted above, while making the 1% statements, Defendants claimed that Frontier had acquired 3.7 million accounts in the CTF Acquisition, but Frontier's later SEC filings disclosed that the Company only acquired 2.5 million customers. ¶41.

Finally, the PAC further establishes scienter by demonstrating Defendants' personal awareness of the false and misleading nature of their statements, including through new allegations concerning Frontier's CTF "war room" reporting to Defendant McCarthy and other senior executives: as described by FE-17, prior to the 1% statements, the war rooms were reporting trouble tickets upwards of 50,000 to 100,000 in Florida alone, with Texas reporting similar levels and California being even worse. These and other allegations in the PAC sufficiently demonstrate that Defendants "knew facts or had access to non-public information contradicting their public statements," and thus—as the Court acknowledged—"recklessness is adequately pled for defendants who knew or should have known they were misrepresenting material facts with respect

to the corporate business." 2019 WL 1099075, at *25 (quoting *In re Scholastic Corp. Sec. Litig.*, 252 F.3d 63, 76 (2d Cir. 2001)).

Second, with respect to Defendants' non-paying accounts statements, the Court's reasoning relied on its falsity rulings that "Plaintiffs' single confidential informant did not describe company-wide data with sufficient particularity to support an inference of wrongdoing" and "that employee does not allege that she shared contradictory aggregate data with Frontier." 2019 WL 1099075, at *26. As discussed above, the PAC addresses the Court's rulings through additional allegations about FE-3 and FE-26, both of whom provided information indicating that Defendants' statements were knowing falsehoods. Among other things, the new information provided by FE-26 provides particularly strong circumstantial evidence of conscious misbehavior: after confronting Frontier Executive Vice President Arndt about discrepancies between Defendants' public non-paying accounts statements and Frontier's internal records, Mr. Arndt refused to explain, stating that he had to be "careful" because he "didn't want to go to jail." ¶100.

Third, concerning Defendants' GAAP violation, the Court likewise relied entirely on its falsity rulings. 2019 WL 1099075, at *26. With respect to the Court's ruling that "Plaintiffs have not alleged when new accounting policies were adopted or implemented," the PAC specifically alleges that the new accounting policies were adopted in the third or fourth quarter of 2016, and further includes additional information on the connection of senior executives to these directives: specifically, FE-17 discussed (and challenged) the accounting policy change with his supervisor, Senior Vice President John Lass, who reported directly to Defendant McCarthy. ¶91. In addition, the inference of scienter from these allegations is heightened because the metrics affected were "key to measuring [the Company's] financial performance and was a subject about which investors and analysts often inquired." *New Orleans Emps. Ret. Sys. v. Celestica, Inc.*, 455 F. Appx. 10, 14

(2d Cir. 2011) (reversing dismissal on scienter after noting that "allegations of a company's core operations, GAAP violations, and removal of its executives can provide supplemental support for allegations of scienter").

Finally, it is inappropriate to speculate at this stage as to whether "KPMG's partial audit . . . would have supported a reasonable belief that no GAAP violations existed." 2019 WL 1099075, at *26. As noted, scienter is sufficiently alleged when it is "at least as likely as any plausible opposing inference," and the extraneous material prepared and submitted by Defendants themselves[7] does not make "implausible" the well-pled allegations that Defendants implemented (yet improperly failed to disclose) an accounting policy change that softened the impact to one of their key metrics. *See, e.g.*, *Indiana Public Retirement System v. SAIC, Inc.*, 818 F.3d 85, 97 (2d Cir. 2016) (reversing refusal to grant leave to amend where scienter theory is not "implausible").

Fourth, having dismissed the claims on falsity, the Court did not address the scienter allegations as to Defendants' statements about the status and progress of the CTF Acquisition integration. The PAC establishes Defendants' scienter for these statements through allegations that "plausibly allege[] with particularity that Defendants were at least reckless with respect to their . . . [s]tatements because 'the danger was either known to the defendant[s] or so obvious that the defendant[s] must have been aware of it.'" *In re Mylan N.V. Sec. Litig.*, 2018 WL 1595985, at *12 (S.D.N.Y. Mar. 28, 2018) (quoting *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38, 47 (2d Cir. 1978), *amended sub nom. Rolf v. Blyth Eastman Dillon & Co.*, No. 77-7104, 1978 WL 4098 (2d Cir. May 22, 1978)). Among other things, these allegations now include the damning conclusions of the Minnesota Commerce Department that Frontier had "significantly overstated its

---

[7] The Court did not consider any of KPMG's actual audit work (nor would it have been proper to do so), but instead Defendants directed the Court to a few (at best) ambiguous and/or ad-hoc statements made by ***Defendants*** that Defendants claim prove a negative—i.e., that no policy change occurred.

performance for a period of years"—including at least part of the Class Period—because of "***broad, systemic problems*** with Frontier's service quality, recordkeeping, and business operations." These findings—made after an extensive investigation and review of Frontier's internal documents, which are not available to Plaintiffs here—are consistent with Plaintiffs' allegations concerning Frontier's business practices and even corroborate particular details, such as that Frontier "masked its poor service" through "under-recording and under-reporting of telephone outages" and through inaccurately closing trouble tickets. Considered holistically with the other allegations in the PAC, these conclusions and others contribute further to the inference that Defendants were at least reckless in claiming to have resolved all service issues. *See, e.g.*, *S.E.C. v. Lee*, 720 F.Supp.2d 305, 341 (S.D.N.Y. 2010) ("private plaintiff . . . reliance on the SEC and CFTC allegations does not demonstrate that it lacks evidentiary support, but rather ***provides*** it with the necessary evidentiary support"); *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC*, 376 F.Supp.2d 385, 395 (S.D.N.Y. 2005) (crediting allegations based on liquidator's report and SEC complaint as "adequate for Rule 9(b) and PSLRA purposes").

4. The Amended Complaint Pleads Loss Causation

The PAC addresses both loss causation issues identified by the Court, and readily satisfies the light pleading requirements of the Second Circuit. *See Loreley Financing (Jersey) No. 3 Ltd. v. Wells Fargo Securities LLC*, 797 F.3d 160, 187 (2d Cir. 2015) (reversing refusal to grant leave to amend after noting that "Plaintiffs' burden is not a heavy one" in pleading loss causation).[8]

First, after making the determination that "each of the five alleged corrective events revealed both company-wide losses and negative information about the CTF integration," the Court ruled that "Plaintiffs' loss causation argument requires the Court to assume that Frontier

[8] In light of the Court's Order, the PAC does not alleges loss causation with respect to the February 27, 2018 disclosure. The Class Period as alleged in the PAC accordingly ends on October 31, 2017.

investors sold their stocks due to revelations regarding CTF integration issues rather than the company's broader financial losses, which were announced simultaneously." 2019 WL 1099075, at *24. In response, the PAC alleges new facts—including additional commentary by Defendants and analysts—and establishes, for each corrective event: 1) the specific connection between the new information and Defendants' CTF misrepresentations; and 2) that the resulting stock price decline related to the new CTF-related information. These allegations "support an inference that 'an ascertainable portion' of this complex, nationwide company's stock loss can be traced to disclosures regarding the CTF integration" (2019 WL 1099075, at *24), and sufficiently allege that "'the available public information regarding the company's financial condition [was] corrected,' and that the market reacted negatively." *Carpenters Pension Tr. Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 232-33 (2d Cir. 2014) (quoting *In re Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 511 (2d Cir. 2010)). Nothing further is required: "'Plaintiffs need not demonstrate on a motion to dismiss that the corrective disclosure was the ***only*** possible cause for decline in the stock price.' . . . In other words, a complaint can sufficiently plead loss causation without alleging facts that disaggregate losses or that rule out other causes." *City of Birmingham Ret. and Relief Sys. v. Credit Suisse Group AG*, 2019 WL 719751, at *8 (S.D.N.Y. Feb. 19, 2019) (quoting *Carpenter's Pension*); *see also Cohen v. Kitov Pharm. Holdings, Ltd.*, No. 17 civ. 0917, 2018 WL 1406619, at *6 (S.D.N.Y. Mar. 20, 2018) (same); *In re Advanced Battery Techs., Inc. Sec. Litig.*, No. 11 CIV. 2279 CM, 2012 WL 3758085, at *13 (S.D.N.Y. Aug. 29, 2012) ("There is no requirement at the pleading stage that Plaintiffs disaggregate potential confounding factors that they allege do not exist.").

For example, with respect to the Company's first quarter 2017 earnings disclosures on May 2, 2017, the Court determined that there were "three pieces of information: (1) a $53 million

revenue decline, (2) a 62 percent cut to Frontier's dividend, and (3) a $11 million revenue decline related to non-paying account cleanup," and ruled that "Plaintiffs have not plausibly alleged that investors ignored the first two pieces of information and sold their stocks on the basis of the third piece of information, which accounted for less than 20 percent of that quarter's revenue decline." 2019 WL 1099075, at *24. In fact, as the PAC makes clearer, ***all three*** of these disclosures related to the CTF Acquisition: during Frontier's earnings call, Defendant McCarthy stated that the majority of the $53 million revenue decline "was ***primarily driven*** by residential voice and video customer losses on ***the CTF properties***," and further that the Company "decided to move forward and reduce the dividend" in response to Defendants' consequentially reduced EBITDA expectations. ¶¶104,105. Further, the PAC includes analyst commentary that specifically links the market's negative reaction to these CTF-related disclosures: for example, Cowen and Company's May 3, 2017 analyst report stated that the Company "reported downside results . . . clearly having trouble shaking off [Verizon] integration issues (this time delinquent customers inherited from [Verizon])," and as a result, Cowen concluded, the Company had "little choice" but to "commit[] all of its div[idend cut] savings to pay down debt. ¶108. Cowen continued, "We believed the issues were behind the company, . . . but elevated CTF churn (>3%) remains an issue that could jeopardize the revenue stability story," and downgraded the stock from "Outperform" to "Market Perform." *Id.*[9]

[9] Even if the disclosures that day had been as the Court characterized them, to the extent the Court held that Plaintiffs need to "allege[] that investors ignored the first two pieces of information"—and thus that the "third piece of information" exclusively caused the stock decline—that is not the law. 2019 WL 1099075, at *24. As discussed above, there is no requirement that Plaintiffs "alleging facts that disaggregate losses or that rule out other causes." *Birmingham*, 2019 WL 719751, at *8. For example, in *Financial Guaranty Insurance Company* (cited in the Order), the Second Circuit ruled that district court had "misapplied the standard on a motion to dismiss" because, "[a]t this stage of the proceedings, [plaintiff] is not required to establish . . . the ***exclusive cause*** of its losses," but only that the misrepresentations "caused ***at least some*** of its losses." 783 F.3d at 404-405. *See also, e.g.*, *Carpenters*, 750 F.3d at 233 (no requirement to allege "the *only* possible cause for decline in the stock price" (emphasis in original)).

***Second*¸** the PAC addresses the Court's ruling that "the causal connection between the corrective events and Frontier's stock declines is too tenuous" through new allegations that firmly establish the causal relationship between the corrective events and the stock price declines. Specifically, for each decline in Frontier's stock price after a corrective event, the PAC alleges: 1) that the decline dramatically outpaced comparative performance by both the S&P 500 and of Frontier's peers specifically; and 2) that, based on an event study,[10] the statistical significance of the decline is at the 95% confidence level or greater—a determination that, in far more demanding contexts than Rule 8 notice pleading standards, courts routinely accept to prove a cause-and-effect relationship. *See, e.g.*, *In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223, 253 (2d. Cir. 2016) (sustaining judgment against defendant company after ruling reliable expert's opinion based on an event study, noting that event studies "ha[ve] now become 'standard operating procedure in federal securities litigation' . . . [to] help an expert determine whether, and the extent to which, the release of certain information caused a stock price to fall").

Thus, the PAC incontestably establishes a "causal connection between the corrective events and Frontier's stock declines" (2019 WL 1099075, at *23). *See, e.g.*, *Carpenters*, 750 F.3d at 233-34 (sustaining loss causation concerning a 12% stock price decline in the day after a corrective event; citing in support a district court ruling that a 7.5% stock price drop in the day after a corrective event "created a sufficient causal connection to plead loss causation" (citing *In re Take-Two Interactive Sec. Litig.*, 551 F. Supp. 2d 247, 287-88 (S.D.N.Y. 2008)).

[10] As the Second Circuit has explained, "An event study isolates the stock price movement attributable to a company (as opposed to market-wide or industry-wide movements) and then examines whether the price movement on a given date is outside the range of typical random stock price fluctuations observed for that stock. If the isolated stock price movement falls outside the range of typical random stock price fluctuations, it is statistically significant. If the stock price movement is indistinguishable from random price fluctuations, it cannot be attributed to company-specific information announced on the event date." *Arkansas Teachers Ret. Sys. v. Goldman Sachs Group, Inc.*, 879 F.3d 474, 481 n. 3 (2d Cir. 2018).

To the extent the Court ruled that Plaintiffs need to further "[]explain" the decline in Frontier's stock price prior to the first corrective disclosure, or "[]account" for fluctuations in Frontier's stock price between the corrective events, that is not the law. *See, e.g.*, *Loreley*, 797 F.3d at 189 ("While Plaintiffs did not plead that the alleged fraud caused their losses independently of the larger financial events of 2007 and 2008, they were not required to do so under our precedents. The requirement, if any, to plead a causal link does not place on Plaintiffs a further pleading obligation to rule out other contributing factors or alternative causal explanations."); *Acticon AG v. China North East Petroleum Holdings, Ltd.*, 692 F.3d 34, 39 (2d Cir. 2012) (ruling that, on a motion to dismiss, "it is improper" to infer that price increases meant "that the market was unfazed by the alleged corrective disclosures"). Indeed, courts routinely sustain securities fraud claims concerning similar circumstances. *See, e.g.*, *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368 (S.D.N.Y. 2015) (sustaining claims where stock price declined nearly 50% prior to the first corrective disclosure); *In re Goldman Sachs Group, Inc. Sec. Litig.*, 868 F. Supp. 2d 261 (S.D.N.Y. 2012) (same); *In re Wilmington Trust Sec. Litig.*, 29 F. Supp. 3d 432 (D. Del. 2014) (same).

Finally, the Court's factual determination that "negative public events seem to render Plaintiffs' causation arguments too tenuous" does not make the PAC futile. 2019 WL 1099075, at *25. Not only does the Court's finding rely on information from beyond the Complaint—even to events "***after*** the class period" (*id.*)—the Second Circuit routinely rejects such reasoning, which is "a matter of law and without discovery," as improper on a motion to dismiss. *Carpenters*, 750 F.3d at 234; *see also, e.g.*, *Emergent Capital Inv. Mgmt. v. Stonepath Grp. Inc.*, 343 F.3d 189, 196 (2d Cir. 2003) (reversing dismissal on loss causation based on purported "intervening event, like a general fall in the price of Internet stocks," as "a matter of proof at trial and not to be decided on a Rule 12(b)(6) motion to dismiss"). The district court decision relied on by the Court, *In re Rhodia*

S.A. Securities Litigation—which predates *Carpenters* by seven years—does not hold otherwise: there, the court rejected loss causation from a "slow steady decline." 531 F. Supp. 2d 527, 546 (S.D.N.Y. 2007). That is a far cry from the statistically significant, one-day declines alleged for loss causation in the PAC.

C. Defendants Will Not Suffer Undue Prejudice If Leave To Amend Is Granted

Plaintiff's proposed amendments will cause no prejudice to Defendants. Any party opposing leave to amend bears the burden of establishing that it would be prejudiced by the proposed amendment. *See Anthony v. City of New York*, 339 F.3d 129, 138 n.5 (2d Cir. 2003) (interpreting Rule 15(a) "in favor of allowing the amendment absent a showing by the non-moving party of bad faith or undue prejudice"). Defendants cannot satisfy this burden here.

"In determining what constitutes 'prejudice,' courts should 'consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; [or] (ii) significantly delay the resolution of the dispute.'" *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). Plaintiff's addition of new factual allegations to address the purported merits deficiencies do not impose on Defendants any "undue prejudice." *See A. V. by Versace, Inc. v. Gianni Versace S.p.A.*, 87 F. Supp. 2d 281, 299 (S.D.N.Y. 2000) ("that an amendment will require the expenditure of additional time, effort, or money do[es] not constitute 'undue prejudice.'").

Any delay in the resolution of the litigation will be immaterial, adding less than two months of additional briefing to a case that has already been pending for over a year. Because discovery has not yet commenced, any delay caused by the filing of the PAC would be minimal. Courts in this district have granted leave to amend at a similar, or later, procedural stage. *See, e.g.*, *Excelsior Fund, Inc. v. JP Morgan Chase Bank, NA.*, No. 06-civ-5246, 2007 WL 950134, at *5 (S.D.N.Y.

Mar. 28, 2007) (granting leave to amend prior to discovery); *Versace*, 87 F. Supp. 2d at 299 (granting leave to amend during discovery).

D. Plaintiffs' Proposed Amendment Is Timely and Not Made In Bad Faith

Defendants cannot show that amendment at this time reflects undue "delay" or "bad faith." *Block*, 988 F.2d at 350. The Court's Order granting Defendants' motions to dismiss extended to Plaintiffs the opportunity to move for leave to amend by May 10, 2019 (2019 WL 1099075 at *31), and Plaintiffs have acted expeditiously—continuing their investigation, drafting the PAC, and making this motion—in order to comply with the Court's deadline. Accordingly, the Court has "no reason to deviate from the general policy that leave to amend should be granted liberally in cases alleging securities fraud." *In re Take-Two*, 551 F. Supp. 2d at 313.

V. CONCLUSION

Plaintiffs respectfully request that the Court enter an Order granting leave to file the proposed Amended Class Action Complaint for Violations of the Federal Securities Laws.

DATED: May 10, 2019

Respectfully submitted,

/s/ Katherine M. Sinderson

BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP

Katherine M. Sinderson (admitted *pro hac vice*)
Jesse L. Jensen (admitted *pro hac vice*)
Kate W. Aufses (admitted *pro hac vice*)
1251 Avenue of the Americas
New York, NY 10020
Telephone: (212) 554-1400
Facsimile: (212) 554-1444
KatieM@blbglaw.com
Jesse.Jensen@blbglaw.com
Kate.Aufses@blbglaw.com

Counsel for Lead Plaintiffs Arkansas Teacher Retirement System and Carlos Lagomarsino and

Lead Counsel for the Class

MOTLEY RICE LLC

William H. Narwold (ct 00133)
Mathew P. Jasinski (ct 27520)
One Corporate Center, 17th Floor
20 Church Street
Hartford, Connecticut 06103
Tel.: (860) 882-1675
Fax: (860) 882-1682
bnarwold@motleyrice.com
mjasinski@motleyrice.com

Liaison Counsel for Lead Plaintiffs Arkansas Teacher Retirement System and Carlos Lagomarsino

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2019, a copy of the foregoing Plaintiffs' Memorandum of Law in Support of the Motion for Leave to Amend the Consolidated Class Action Complaint was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/ Katherine M. Sinderson
Katherine M. Sinderson (phv09412)
BERNSTEIN LITOWITZ BERGER & GROSSMANN LLP
1251 Avenue of the Americas, 44th Floor
New York, NY 10020
Tel.: (212) 554-1392
Fax: (212) 554-1444
katiem@blbglaw.com