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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

HENRY CHURCH VI,
Individually and on Behalf of All Others Similarly Situated,

Plaintiff,

v.

GLENCORE PLC, IVAN GLASENBERG, and STEVEN KALMIN,

Defendants.

Case No. 2:18-cv-11477-SDW-CLW

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Motion Day: April 6, 2020

ORAL ARGUMENT REQUESTED

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Defendants Glencore plc, Ivan Glasenberg, and Steven Kalmin respectfully submit this Memorandum of Law in support of their motion to dismiss the Amended Class Action Complaint ("Complaint") pursuant to Fed. R. Civ. P. 9(b), 12(b)(2), and 12(b)(6) and on the basis of *forum non conveniens*.

PRELIMINARY STATEMENT

Plaintiffs allege violations of U.S. securities law by Glencore plc ("Glencore"), a corporation incorporated in an overseas British Crown dependency and headquartered in Switzerland, and its Swiss-domiciled officers Ivan Glasenberg and Steven Kalmin ("Individual Defendants"). According to Plaintiffs, as a result of misstatements and omissions by Glencore concerning alleged bribery and related conduct in the Democratic Republic of the Congo ("DRC"), Venezuela, and Nigeria, Plaintiffs lost money on investments in over-the-counter securities that third parties issued and sold. The Complaint should be dismissed with prejudice for a host of independent reasons.

First, the Court lacks personal jurisdiction because all three Defendants are located overseas and all of the alleged suit-related conduct occurred overseas. The facts that typically support personal jurisdiction over claims under Section 10(b) of the Securities Exchange Act, *e.g.*, transactions in securities that defendants listed on a domestic exchange or alleged misstatements that defendants made in the United States to U.S. investors, are conspicuously absent here.

Second, the claims fail as impermissibly extraterritorial because, under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), Section 10(b) does not apply to Plaintiffs' claims based on overwhelmingly foreign alleged conduct.

Third, Plaintiffs have not pled an actionable misstatement or omission. Plaintiffs allege that Glencore faced undisclosed heightened risk of governmental scrutiny because of alleged bribery and related conduct in three developing countries. But as the Complaint makes clear, these risks were publicly known, including because of Glencore's disclosures, and many of the statements Plaintiffs cite are facially inactionable for other reasons.

Fourth, Plaintiffs have not pled the requisite strong inference of scienter. Plaintiffs do not cite a single internal document, witness account, or other particularized fact showing that anyone at Glencore knew or had reason to believe that the challenged statements were false or misleading. Instead, Plaintiffs rely on conclusions, "must have known" allegations, generic purported motives, and mundane facts (*e.g.*, creation of a committee to oversee an investigation) of the sort that courts have repeatedly rejected as insufficient to support scienter.

Finally, if for any reason Plaintiffs' claims are not dismissed on the above grounds, the Court should exercise its discretion under the doctrine of *forum non conveniens* because Switzerland, not New Jersey, is plainly the more appropriate forum in which this overwhelmingly foreign dispute should be adjudicated.

BACKGROUND

A. Defendants

Glencore is a natural resource holding company incorporated in Jersey, a British Crown dependency, and headquartered in Switzerland. Decl. of John Burton (Feb. 7, 2020) ("Burton Decl.") ¶¶ 4-5. As relevant here, Glencore:

- has no offices anywhere in the United States;
- does not conduct or transact any business in the United States;
- has never had active employees who reside in the U.S.;
- does not maintain any records in the United States;
- has never had a U.S. bank account, mailing address, or phone number;
- has never owned or leased real property in the United States;
- has never paid income or property tax in the United States;
- has never been registered to do business in the United States;
- has never advertised or solicited business, bought or sold goods, or received or rendered services in the United States;
- has never had a registered agent for service in the United States; and
- has never initiated litigation in the United States.

Id. ¶¶ 7-22.

Glencore's common stock is not listed on a U.S. exchange. Burton Decl. ¶ 24. Instead, it is listed on the London Stock Exchange, with a secondary listing on the Johannesburg Stock Exchange. *Id.* ¶ 23. In the United States, investors can purchase over-the-counter securities that unrelated third parties issued, including unsponsored American Depository Receipts ("ADR") under the ticker symbol GLNCY, or "foreign shares," also known as "F shares," under the ticker symbol

GLCNF.[1] Compl. ¶¶ 19-20. Third parties issue these unsponsored ADRs and F shares without Glencore's approval or participation.[2] Burton Decl. ¶ 25.

With regard to the Individual Defendants, Ivan Glasenberg is Glencore's Chief Executive Officer, and Steven Kalmin is its Chief Financial Officer. Compl. ¶¶ 24-25. Neither is domiciled in or is a citizen of the United States. Decl. of Ivan Glasenberg (Feb. 7, 2020) ("Glasenberg Decl.") ¶¶ 2, 4-5; Decl. of Steven Kalmin (Feb. 7, 2020) ("Kalmin Decl.") ¶¶ 2, 4-5.

B. Alleged Misconduct and Government Investigations

The Complaint alleges that Glencore was involved in bribery and related conduct, creating risk to the company, in the DRC, Venezuela, and Nigeria.

In relation to the DRC, Plaintiffs' allegations center on Israeli businessman Dan Gertler. Plaintiffs vaguely assert that Gertler "made a bribe to [DRC] President [Joseph] Kabila, allowing Glencore to obtain the rights to assets in the DRC," as well as helping negotiate mining licenses "in favor of" a company in which Glencore held an ownership interest. Compl. ¶¶ 48-49. Plaintiffs allege

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[1] An ADR is a certificate issued by a U.S. depository bank representing shares in a foreign company's stock. Compl. ¶ 19; *see* ECF No. 16 (describing GLNCY as unsponsored ADRs). F shares are created when a U.S. broker-dealer files with FINRA to create a ticker symbol in order to facilitate reporting trades in the U.S. in a company's security. Compl. ¶ 20.

[2] *See* OTC Markets, "GLNCY," https://www.otcmarkets.com/stock/GLNCY/quote; OTC Markets, "FAQ on F Shares," https://www.otcmarkets.com/files/FAQ-F-Shares.pdf.

that, "in an attempt to distance itself from Gertler," Glencore purchased his stake in two mining companies in which it also had part ownership. *Id.* ¶¶ 51-53. Plaintiffs also allege that Defendants made a loan to Gertler to help him maintain an ownership interest in a mining company, and that Gertler used the loan to obtain a margin loan from a third party, which he then used to bribe President Kabila and repay Glencore. *Id.* ¶¶ 55-56. Plaintiffs further allege that Glencore agreed to satisfy an obligation of a portfolio company to pay royalties to the DRC's state-owned mining company, Gécamines, by helping repay a loan that Gertler made to Gécamines, including after U.S. authorities sanctioned Gertler. *Id.* ¶¶ 57-68. And Plaintiffs allege that Glencore overpaid to resolve a capital deficiency in a mining company it co-owned with Gécamines. *Id.* ¶¶ 71-75. These alleged activities, Plaintiffs contend, exposed Glencore to "heightened risks" and led to "increased costs for Glencore and its investors." *Id.* ¶ 76.

Plaintiffs' allegations related to Venezuela focus on two energy consultants, Francisco Morillo and Leonardo Baquero. Compl. ¶ 78. According to Plaintiffs, Glencore retained Morillo and Baquero to provide market intelligence related to its dealings in oil offtake agreements with the Venezuelan state-owned energy company Petróles de Venezuela, S.A. ("PDVSA"). *Id.* Plaintiffs allege that Morillo and Baquero bribed PDVSA employees to obtain confidential information providing Glencore a competitive advantage. *Id.* ¶¶ 81-83.

As to Nigeria, Plaintiffs offer only the vague allegation that Glencore "participated in a bribery scheme … for the purchase and sale of oil off-take agreements." Compl. ¶ 103.

Plaintiffs derive their allegations from public sources, including information about government investigations by the U.S. Department of Justice ("DOJ"), Ontario Securities Commission ("OSC"), U.S. Commodity Futures Trading Commission ("CFTC"), and U.K. Serious Fraud Office ("SFO"). *See* Compl. ¶¶ 99-101, 116-26, 128, 133-34. As alleged in the Complaint, Glencore publicly disclosed each of these investigations. *See id.* ¶¶ 116-23, 240, 244.

C. Challenged Statements

Plaintiffs challenge various disclosures that Glencore made over a three-year period concerning the alleged misconduct and investigations summarized above.

First, Plaintiffs fault Glencore's disclosures of risks it faced, including corruption- and compliance-related risks described in annual reports, Compl. ¶¶ 147-49, 165-71, 220, 231-34. Plaintiffs concede that these statements "purport to warn investors of bribery risks," *id.* ¶ 148, but assert that such disclosures were materially misleading because they did not affirmatively admit that "Glencore was already engaged in bribery in the DRC, Venezuela, and Nigeria," and did not use Plaintiffs' preferred language to describe the associated risk, namely, that Glencore was subject to "heightened regulatory scrutiny," *see, e.g.*, *id.* ¶¶ 148-49, 168, 233.

Second, Plaintiffs challenge soft, immaterial statements expressing Glencore's commitment to ethics, compliance, and sustainability. *See* Compl. ¶¶ 2, 5, 61, 108-10, 112, 140, 147, 155, 162, 178-79, 212, 237. These include, *e.g.*, statements in two Bloomberg articles, *id*. ¶¶ 140, 162, half-year, annual, and sustainability reports, *id.* ¶¶ 147, 155, 178-79, 237, an August 2018 earnings call, *id.* ¶ 212, and a February 2019 press release, *id.* ¶ 61. These statements generally expressed a commitment to "ethics and compliance," *id.* ¶¶ 108, 140, "the laws and external requirements applicable to [Glencore's] operations and products," *id.* ¶¶ 5, 110, 212, "high standards of corporate governance and transparency," *id.* ¶ 237, the payment of "all relevant taxes, royalties, and levies required by local and national regulation in [its] host countries," *id.* ¶¶ 178, 237, and an "ambition to fully integrate sustainability throughout [its] business," *id.* ¶¶ 5, 109, 155.

Third, Plaintiffs challenge a series of other public statements, contending that these omitted alleged material facts about "bribery schemes." For example, Plaintiffs argue that a September 2016 statement that Glencore was "aware" of and "considering" allegations of bribery implicating Gertler was misleading because Glencore failed to state that it supposedly "already knew it had made illegal bribery payments to the DRC through Gertler" at the time. Compl. ¶¶ 140-41.

None of these allegations suffices to state a claim under the securities laws.

ARGUMENT

I. DEFENDANTS ARE NOT SUBJECT TO PERSONAL JURISDICTION

The Complaint should be dismissed because Plaintiffs have not come close to carrying their burden to plead a basis for this Court's exercise of personal jurisdiction over Defendants. Plaintiffs do not allege that Glencore is incorporated or based in New Jersey or anywhere else in the United States. They do not allege that any of the alleged bribery or other misconduct occurred here. They do not allege that any of the alleged misstatements or omissions occurred here or targeted U.S. investors. They do not allege that the Individual Defendants are domiciled, were served, or engaged in any suit-related conduct here. Plaintiffs allege that they purchased securities in the United States—but not that Glencore had anything to do with issuing or selling those securities. Plaintiffs' allegations show why no basis exists for this Court to exercise personal jurisdiction over any Defendant.

A. Legal Standards

Plaintiffs "bear[] the burden of establishing with reasonable particularity sufficient contacts between the defendant and the forum state" to support this Court's exercise of personal jurisdiction over Defendants. *Senju Pharm. Co. v. Metrics, Inc.*, 96 F. Supp. 3d 428, 434 (D.N.J. 2015) (internal quotation marks omitted). Specifically, Plaintiffs must show that each Defendant had "certain minimum contacts with [the forum] such that maintenance of the suit does not

offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotation marks omitted).

Courts have "recognized two types of personal jurisdiction: general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction." *Bristol-Myers Squibb Co. v. Super. Ct. of Cal.*, 137 S. Ct. 1773, 1779-80 (2017) (internal quotation marks omitted). General jurisdiction permits a court to "hear any claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Id.* at 1780. However, "'only a limited set of affiliations with a forum will render a defendant amenable to' general jurisdiction." *Id.* (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014)). For a corporation, general jurisdiction typically attaches only where the corporation is incorporated or has its principal place of business. *See Daimler*, 571 U.S. at 139. For an individual, "the main bases for general jurisdiction are the person's state of domicile or service of process on the individual in the forum state." *Display Works, LLC v. Bartley*, 182 F. Supp. 3d 166, 173 n.2 (D.N.J. 2016).

The specific jurisdiction inquiry "focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 284 (2014) (internal quotation marks omitted). "For a State to exercise [specific] jurisdiction consistent with due process, the defendant's suit-related conduct must create a substantial connection with the forum State." *Id.* "[T]he relationship must

arise out of contacts that the defendant himself creates with the forum State." *Id.* (internal quotation marks omitted). The inquiry "has three parts": (1) "the defendant must have purposefully directed [its] activities at the forum," (2) "the litigation must arise out of or relate to at least one of those activities," and (3) "if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise comports with notions of fair play and substantial justice." *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007).

B. Glencore Is Not Subject to Personal Jurisdiction

1. General Jurisdiction

Plaintiffs have not pleaded facts to support general jurisdiction over Glencore. Plaintiffs allege that "Glencore has had and continues to have continuous and systematic contacts with this forum that render it at home in the United States," Compl. ¶ 10, but that is a legal conclusion, and Plaintiffs allege no such contacts in the Complaint. As the Supreme Court has explained, "[w]ith respect to a corporation, the place of incorporation and principal place of business are paradig[m] ... bases for general jurisdiction," and general personal jurisdiction will otherwise attach only under exceptional circumstances not present here. *Daimler*, 571 U.S. at 137, 139 n.19. Glencore is incorporated in the British Crown dependency of Jersey and headquartered in Baar, Switzerland. Burton Decl. ¶¶ 4-5. Glencore itself has no offices or employees in the United States and conducts

no business here. *Id.* ¶¶ 7-22. Accordingly, Glencore is not "at home" in this forum and there is no basis to exercise general jurisdiction over it here. Indeed, courts commonly decline to exercise general jurisdiction even over defendants with substantial forum presence, whereas Glencore has none. *See Oliver v. Funai Corp.*, 2015 WL 9304541, at *8 (D.N.J. Dec. 21, 2015) (no general jurisdiction over company with employees in New Jersey); *Display Works*, 182 F. Supp. 3d at 173 (same). Addressing similar jurisdictional facts, the Southern of District of New York concluded that it "would be unreasonable" to exercise jurisdiction over Glencore plc because it "lack[ed] even minimal contacts with the United States." *In re Aluminum Warehousing Antitrust Litig.*, 90 F. Supp. 3d 219, 230-32 (S.D.N.Y. 2015). The same result is warranted here.

To the extent Plaintiffs attempt to establish general jurisdiction based on domestic activities of Glencore subsidiaries, the attempt fails. Plaintiffs fail to allege even the most basic facts about any such subsidiary, instead relying on a vague allegation concerning "offices, subsidiaries, or operations located throughout the United States" and the conditional legal conclusion that unnamed subsidiaries operated as "a unitary business and an integrated enterprise … to the extent that they became mere instrumentalities of their parent." Compl. ¶¶ 10, 15. That is not remotely sufficient. Whether jurisdiction exists over a corporation "under the alter-ego theory depends upon the details of the unique relationship

between the parent corporation and its subsidiary." *Horowitz v. AT&T Inc.*, 2018 WL 1942525, at *8 (D.N.J. Apr. 25, 2018) (internal quotation marks omitted). Plaintiffs have not and cannot allege any such details here. *See Aluminum*, 90 F. Supp. 3d at 232 (no jurisdiction based on alleged activities of subsidiaries); *Pathfinder Mgmt., Inc. v. Mayne Pharma PTY*, 2008 WL 3192563, at *6 (D.N.J. Aug. 5, 2008) (same); *see also Seltzer v. I.C. Optics, Ltd.*, 339 F. Supp. 2d 601, 609, 613 (D.N.J. 2004) (describing "New Jersey's strong presumption against attributing a subsidiary's forum contacts to its corporate parent").

2. Specific Jurisdiction

Plaintiffs' attempt to establish specific jurisdiction over Glencore fares no better. The Complaint contains no allegations that Glencore engaged in "suit-related" conduct in, or targeted, New Jersey or any other U.S. location. *See Joao Control & Monitoring Sys., LLC v. Olivo*, 2015 WL 71180, at *5 (D.N.J. Jan. 5, 2015) (Wigenton, J.) ("Specific jurisdiction is established only when plaintiff proffers evidence that a non-resident defendant 'purposefully directed' his activities to the forum state or its residents, and that the cause of action is related to or resulted from those contacts."). Rather, the alleged misconduct attributed to Glencore is described as occurring in the DRC, Venezuela, and Nigeria. *See* Compl. ¶¶ 48-77 (alleging "business dealings in the DRC"); ¶¶ 78-102 (alleging "bribery in Venezuela"); ¶¶ 103-07 (alleging "bribery scheme in Nigeria").

Similarly, nothing in the Complaint connects any alleged misstatement or omission to the United States. Plaintiffs cite press releases, statements, and annual and other periodic reports, but none is alleged to have originated in the United States or targeted U.S. investors. *See Machulsky v. Hall*, 210 F. Supp. 2d 531, 542 (D.N.J. 2002) (no jurisdiction where statements not directed at "New Jersey residents, or … the state"); *see also Gorbaty v. Mitchell Hamline Sch. of Law*, 2019 WL 3297211, at *3 (D.N.J. July 23, 2019) (no jurisdiction where statements appeared on website "accessible to a nationwide (indeed, global) audience"). In fact, these statements originated in Switzerland or the United Kingdom. *See* Burton Decl. ¶¶ 34-39. The Complaint itself reveals that several of the press releases upon which Plaintiffs rely (like all of Glencore's press releases) are datelined "Baar, Switzerland." *See, e.g.*, Compl. ¶¶ 199, 205, 209.

Nor is Glencore connected in any way to the securities or transactions alleged to have caused injury to Plaintiffs. Unsponsored ADRs and F shares can be "established with little or [as in this case] no involvement of the issuer of the underlying security" listed abroad. *Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 367 (3d Cir. 2002); Compl. ¶ 20 (F shares are created by broker-dealers). Neither third parties' independent decisions to issue such securities, nor Plaintiffs' independent decisions to buy them, can subject Glencore (or the Individual Defendants, for that matter) to personal jurisdiction here, because "unilateral

activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417 (1984); *see O'Connor*, 496 F.3d at 317.

Otherwise, Plaintiffs allege entirely irrelevant matters such as, for example, that Glencore "presents its financial statements in U.S. dollars" and purportedly "provides post-retirement healthcare benefits to certain Glencore employees." Compl. ¶ 17. Those facts—even if considered "domestic"—are entirely unrelated to the claims in this case and accordingly cannot support personal jurisdiction.

C. The Individual Defendants Are Not Subject to Personal Jurisdiction

There is similarly no basis for personal jurisdiction over either Individual Defendant. Even if Plaintiffs had alleged facts sufficient to support personal jurisdiction over Glencore, that would not support personal jurisdiction over the Individual Defendants, because "jurisdiction over an employee does not automatically follow from jurisdiction over the corporation which employs him." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984); *Nicholas v. Saul Stone & Co. LLC*, 224 F.3d 179, 184 (3d Cir. 2000) (same). Rather, the Individual Defendants' forum contacts "must be assessed individually." *Keeton*, 465 U.S. at 781 n.13. Here, Plaintiffs allege no meaningful forum contacts for either Individual Defendant.

General jurisdiction over the Individual Defendants plainly does not lie because neither Individual Defendant is domiciled in New Jersey or anywhere else in the United States, and neither was served with process here. *See* Glasenberg Decl. ¶¶ 4-7; Kalmin Decl. ¶¶ 4-7; *Display Works*, 182 F. Supp. 3d at 173. Nor is there any basis to subject either Individual Defendant to specific jurisdiction. The Complaint attributes no domestic conduct to either—much less any domestic conduct relating to Plaintiffs' claims. Plaintiffs' vague allegations that the Individual Defendants were "directly or indirectly involved in drafting, producing, reviewing and/or disseminating" the challenged statements, Compl. ¶ 27, are too conclusory to support jurisdiction. *See In re AstraZeneca Sec. Litig.*, 559 F. Supp. 2d 453, 467 (S.D.N.Y. 2008) (general allegations that defendants caused distribution of statements or had knowledge of falsity too conclusory to support jurisdiction). For example, in *In re Braskem S.A. Securities Litigation*, a securities fraud action concerning alleged failures to disclose bribery, similarly "sweeping and conclusory allegations" that a foreign defendant "had the power to influence and control and did influence and control" alleged misstatements were insufficient to support personal jurisdiction. 246 F. Supp. 3d 731, 769-70 (S.D.N.Y. 2017). Even to the extent that Plaintiffs attribute specific statements to the Individual Defendants, those fail to support jurisdiction because none is alleged to have been made from the United States. *See AstraZeneca*, 559 F. Supp. 2d at 467 (no

jurisdiction based on overseas signing of SEC filing); *Display Works*, 182 F. Supp. 3d at 181 (no jurisdiction based on allegedly defamatory statements made outside forum). Nor, finally, is there any plausible allegation in the Complaint that any of the challenged statements targeted this forum. *See Machulsky*, 210 F. Supp. 2d at 542 (no jurisdiction where allegedly defamatory statements targeted "global audience"); *see also* Glasenberg Decl. ¶¶ 9-14; Kalmin Decl. ¶¶ 9-14.

D. Exercising Personal Jurisdiction Over Defendants Would Not Comport with Fair Play or Substantial Justice

Finally, even if other requirements were satisfied, exercising personal jurisdiction here would not comport with "fair play and substantial justice." *BP Chems. Ltd. v. Formosa Chem. & Fibre Corp.*, 229 F.3d 254, 260 (3d Cir. 2000). Relevant factors include "'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantial social policies.'" *Id*. (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-77 (1985)). Several of these factors cut against exercising personal jurisdiction over Defendants here.

Most obviously, exercising personal jurisdiction would burden Defendants, a foreign company and its Swiss-domiciled officers with defending themselves in a U.S. court in relation to statements made in Switzerland and the United Kingdom

about events in Africa and South America. New Jersey courts have declined to exercise jurisdiction in similar circumstances. *See, e.g.*, *Fisher v. Teva PFC SRL*, 212 F. App'x 72, 77 (3d Cir. 2006); *Seltzer*, 339 F. Supp. 2d at 601. As important, New Jersey has little interest in this dispute between Plaintiffs, who do not even claim to reside in New Jersey, and Defendants, all of whom are located overseas, concerning alleged conduct with no connection to this forum. *See Eaton Corp. v. Maslym Holding Co.*, 929 F. Supp. 792, 798-99 (D.N.J. 1996) (forum's interest "minimal to nonexistent" where no party was a citizen of New Jersey). Far from promoting "efficient resolution of controversies" and "fundamental substantial social policies," adjudicating this dispute here would threaten international comity. *See Daimler*, 571 U.S. at 141-42. Finally, nothing prevents Plaintiffs from seeking relief in a forum where Defendants are subject to jurisdiction. *See Grainer v. Smallboard, Inc.*, 2017 WL 736718, at *3 (E.D. Pa. Feb. 24, 2017).

II. PLAINTIFFS' CLAIMS ARE IMPERMISSIBLY EXTRATERRITORIAL

Plaintiffs' claims are also impermissibly extraterritorial under *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), requiring dismissal under Rule 12(b)(6). Under *Morrison*, Plaintiffs asserting a claim under Section 10(b) must plead that they either (1) purchased or sold a security listed on a U.S. national exchange or (2) otherwise engaged in a "domestic" transaction. 561 U.S. at 273; *accord United States v. Georgiou*, 777 F.3d 125, 133-34 (3d Cir. 2015). While "a

domestic transaction or listing is necessary," it is "not alone sufficient" to state a claim under Section 10(b). *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 215-16 (2d Cir. 2014). Conduct may still be "so predominantly foreign" as to render federal securities claims impermissibly extraterritorial. *See id.* Plaintiffs fail this test because (1) the securities Plaintiffs allegedly purchased are not listed on a U.S. exchange; (2) Plaintiffs have not adequately alleged a domestic transaction; and (3) the conduct at issue is predominantly foreign.

First, Plaintiffs did not purchase or sell a security listed on a U.S. national exchange. Plaintiffs' claims arise from alleged trading of unsponsored ADRs and F shares on an over-the-counter market operated by OTC Markets Group. *See* Compl. ¶¶ 18-20. In *Georgiou*, the Third Circuit held that such over-the-counter markets are not "securities exchanges" for purposes of the Exchange Act. 777 F.3d at 134-35; *see Stoyas v. Toshiba Corp.*, 896 F.3d 933, 945 (9th Cir. 2018) ("No over-the-counter market is a 'national security exchange.'"). Plaintiffs thus cannot meet the first prong of *Morrison*. *See Georgiou*, 777 F.3d at 134.

Second, Plaintiffs' conclusory allegations lack the "detailed facts" "necessary in order to plead a U.S. domestic transaction" under the second prong of *Morrison*. *Banco Safra S.A.-Cayman Islands Branch v. Samarco Mineracao S.A.*, 2019 WL 2514056, at *5 (S.D.N.Y. June 18, 2019). Plaintiffs attempt to plead domestic transactions by generally alleging that the parties to relevant

transactions were in the United States. *See* Compl. ¶¶ 13-14. But "a party's residency or citizenship is irrelevant to the location of a given transaction." *Absolute Activist Value Master Fund Ltd. v. Ficeto*, 677 F.3d 60, 70 (2d Cir. 2012). The Complaint falls short of alleging a "meeting of the minds" in the United States, *id.* at 68, and how the trades were effectuated, *see In re Petrobras Sec.*, 862 F.3d 250, 263, 273 (2d Cir. 2017), as required to establish a U.S. transaction.

Third, even if Plaintiffs could plead a domestic transaction, they still could not satisfy *Morrison*, because the conduct at issue here is overwhelmingly foreign. In *Parkcentral*, the Second Circuit held that despite allegations technically establishing domestic transactions, plaintiffs' securities claims were "so predominantly foreign as to be impermissibly extraterritorial" because they arose from "statements made primarily in Germany with respect to stock in a German company traded only on exchanges in Europe." 763 F.3d at 216. The court cautioned that applying Section 10(b) "to wholly foreign activity clearly subject to regulation by foreign authorities solely because a plaintiff in the United States made a domestic transaction, even if the foreign defendants were completely unaware of it" would "conflict with the regulatory laws of other nations" and "seriously undermine *Morrison*'s insistence that § 10(b) has no extraterritorial application." *Id.* at 215. Thus, subjecting foreign defendants with "no alleged

involvement in plaintiffs' transactions" to U.S. securities laws "would constitute an impermissibly extraterritorial extension of [Section 10(b)]." *Id.* at 201.[3]

Here, as in *Parkcentral*, Plaintiffs seek an "impermissibly extraterritorial application" of Section 10(b). Glencore had no involvement in offering the securities at issue in the U.S. Plaintiffs do not allege that Glencore sponsored ADRs or participated in any way in establishing F shares in the United States. While a *sponsored* ADR is "established with the active participation of the issuer of the underlying security," an *unsponsored* ADR, such as GLNCY, is "established with little or no involvement of the issuer of the underlying security." *Pinker*, 292 F.3d at 367.[4] Likewise, an F share such as GLCNF is also established without the

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[3] *See also Prime Int'l Trading, Ltd. v. BP P.L.C.*, 937 F.3d 94, 106 (2d Cir. 2019) ("Plaintiffs' claims must not be so predominately foreign as to be impermissibly extraterritorial.") (internal quotation marks omitted); *In re London Silver Fixing, Ltd., Antitrust Litig.*, 332 F. Supp. 3d 885, 918 (S.D.N.Y. 2018) ("[A] technically 'domestic' transaction can be so rooted in foreign conduct that the claim itself is an extra-territorial application of the statute."). The question whether conduct is predominantly foreign did not arise in *Georgiou*, where the defendant manipulated the market for stocks in U.S. companies, conducted manipulative trades through U.S. market makers, and directed U.S. individuals to carry out a fraudulent scheme. *See* 777 F.3d at 131, 135, 136. In *Stoyas*, the Ninth Circuit declined to follow *Parkcentral*'s "predominantly foreign" standard, instead holding that to satisfy Section 10(b)'s requirement of "a connection between the misrepresentation or omission and the purchase or sale of a security," plaintiffs must plead that the defendant was "involved" in establishing ADRs. 896 F.3d at 950-51. There is no such allegation here. *See Stoyas v. Toshiba Corp.*, 2020 WL 466629, at *2-4 (C.D. Cal. Jan. 28, 2020) (finding domestic transaction where plaintiff pleaded numerous details of purchase).

[4] A "sponsored ADR is where the company has a formal agreement with the depositary bank issuing the shares of the ADR. Conversely, no agreement is in

foreign issuer's involvement. *See* Compl. ¶ 20. Plaintiffs seek to hold liable a Swiss-based company with stock listed overseas based on statements made in Switzerland or the United Kingdom concerning activities in Africa and South America. Against this backdrop, Plaintiffs cannot show that Defendants "sufficiently subjected themselves to [Section 10(b)]." *Parkcentral*, 763 F.3d at 217. The result should be dismissal.

III. PLAINTIFFS FAIL TO PLEAD AN ACTIONABLE MISSTATEMENT OR OMISSION

Even if the Complaint satisfied *Morrison*'s requirements, it should still be dismissed because Plaintiffs fail to allege an actionable misstatement or omission.

To state a claim under Section 10(b) and Rule 10b-5, Plaintiffs must allege "(1) a material misrepresentation (or omission); (2) scienter, i.e., a wrongful state of mind; (3) a connection with the purchase or sale of a security; (4) reliance; (5) economic loss; and (6) loss causation." *City of Cambridge Ret. Sys. v. Altisource Asset Mgmt. Corp.*, 908 F.3d 872, 879 (3d Cir. 2018). "In general, an omission is only fraudulent in the presence of a duty to disclose," and "an affirmative statement will only create a duty to disclose additional facts if additional disclosures are required to make the affirmative statement not misleading." *In re*

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place for an unsponsored ADR. For unsponsored ADRs, the depositary bank establishes the ADR with or without the consent of the company." OTC Markets, FAQs, https://www.otcmarkets.com/learn/faqs.

Heartland Payment Sys., Inc. Sec. Litig., 2009 WL 4798148, at *6 (D.N.J. Dec. 7, 2009). Such allegations must "satisfy the particularity requirements of both [Fed. R. Civ. P.] 9(b) and the Private Securities Litigation Reform Act (PSLRA)." *City of Cambridge*, 908 F.3d at 879. The PSLRA requires plaintiffs to identify "with particularity" all allegedly false or misleading statements and set forth specific facts showing why each statement was false or misleading. *See id.*; 15 U.S.C. § 78u-4(b)(1). Rule 9(b) likewise "imposes a heightened pleading requirement of factual particularity with respect to allegations of fraud," a rule "rigorously applied in securities fraud cases." *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 216 (3d Cir. 2002). This "high-specificity pleading standard" precludes courts from "giving credence to allegations" that do not "'plead the who, what, when, where and how' of a supposed misrepresentation." *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 490, 495-96 (3d Cir. 2016).

The Complaint falls at the first hurdle. It alleges that Defendants made false or misleading statements related to corruption- and compliance-related risk factors in Glencore's Annual Reports; ethics and legal compliance; and anti-corruption investigations, or actions that became the subject of investigations. But as a matter of law, all of these challenged statements are inactionable.

A. Glencore Fully Disclosed the Relevant Risks

The Complaint alleges that certain risk-disclosure statements in Glencore's Annual Reports were materially false or misleading. *See* Compl. ¶¶ 147-49 (2016 Annual Report); ¶¶ 165-71 (2017); ¶¶ 220, 231-34 (2018). Plaintiffs offer two theories of actionability for these statements, neither of which states a claim.

First, the Complaint asserts that the risk-disclosure statements were misleading by omission because Defendants did not disclose that Glencore's business in the DRC, Venezuela, and Nigeria subjected Glencore to "heightened scrutiny by U.S. and foreign government bodies," which might investigate "Glencore's compliance with money laundering and bribery laws, as well as the FCPA." Compl. ¶ 149; *see also id.* ¶¶ 169, 236.[5]

The problem with Plaintiffs' theory is that, as the Complaint itself makes clear, each of Glencore's Annual Reports during the class period *did* specifically disclose the risks that the Complaint alleges should have been disclosed. *See* Compl. ¶ 147 ("Bribery and corruption risks remain highly relevant for businesses operating in emerging markets as shown by recent regulatory enforcement actions both inside and outside the resources sector.") (quoting 2016 Annual Report);

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[5] Plaintiffs do not rest their theories of falsity on a failure to disclose any actual criminal or regulatory violation, but rather on Glencore's supposed failure to disclose a risk of "heightened scrutiny" from regulators. *E.g.*, Compl. ¶¶ 5, 47, 113, 115, 138-39, 149, 151, 157, 159, 169, 175, 181, 185, 190, 197, 200, 210, 215, 224, 229, 239, 241, 248, 251, 296, 300, 306, 310, 314.

¶ 166 (2017); ¶ 232 (2018); *see also In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 656 (S.D.N.Y. 2017) (risk-disclosure statements not false or misleading where company disclosed in general terms its exposure to risks associated with anti-corruption investigations); *In re PTC Therapeutics, Inc. Sec. Litig.*, 2017 WL 3705801, at *9-11 (D.N.J. Aug. 28, 2017) (statements that allegedly understated future risk inactionable where plaintiffs did not sufficiently allege that risk was obvious when statements were made). The Annual Reports warned investors of the risk that Glencore, if implicated in bribery or corruption, might face "regulatory enforcement actions," Compl. ¶¶ 147, 166, 232, or "sanctions," *id.* ¶¶ 166, 232 (stating "some of [Glencore Group's] industrial activities are located in countries … where corruption is generally understood to exist"). A reasonable investor, reading those disclosures, "would not conclude that [Glencore] faced no legal or compliance risks, or that the risk management and compliance programs [Glencore] had adopted were completely adequate to prevent all such risks." *Howard v. Arconic Inc.*, 395 F. Supp. 3d 516, 552 (W.D. Pa. 2019).[6]

[6] *See also In re Donald J. Trump Casino Sec. Litig.-Taj Mahal Litig.*, 7 F.3d 357, 374-75 (3d Cir. 1993) (disclosure of risk-related data point "would have been superfluous" to reasonable investor in light of "cautionary explanations" about investment's "substantial risks"); *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 579 (S.D.N.Y. 2013) ("[W]here there is disclosure that is broad enough to cover a specific risk, the disclosure is not misleading simply because it

Plaintiffs' theory that Glencore's statements misled investors as to the risk of government investigations is also implausible given that news of inquiries into Glencore and its business partners was publicly available throughout the class period. The Complaint itself alleges that from the *beginning* of the class period in September 2016, the public was aware of allegations by U.S. authorities and in U.S. court proceedings that Glencore's associate, Gertler, was engaged in bribery on behalf of another entity. *See* Compl. ¶¶ 56, 140. The Complaint also acknowledges that Glencore advised the marketplace of government investigations into Glencore and affiliated companies, including in relation to potential bribery. *See id.* ¶ 117 (OSC investigation); ¶ 122 (DOJ subpoena); ¶ 133 (CFTC investigation); ¶ 128 (SFO investigation). Glencore timely disclosed each of these investigations. *See, e.g.*, *id.* ¶¶ 116-21 (disclosing details of OSC investigation); ¶¶ 122-23 (disclosing DOJ investigation one day after subpoena); ¶ 240 (disclosing nature and scope of CFTC investigation); ¶ 244 (disclosing SFO investigation on same day Glencore received notice). There can be no materially misleading and fraudulent statements under these circumstances, where "the allegedly undisclosed

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fails to discuss the specific risk. This is particularly so when there is ample disclosure of the broader risk."), *aff'd*, 566 F. App'x 93 (2d Cir. 2014).

facts … already entered the market." *Winer Family Tr. v. Queen*, 2004 WL 2203709, at *4 (E.D. Pa. Sept. 27, 2004), *aff'd*, 503 F.3d 319 (3d Cir. 2007).[7]

Plaintiffs' theory that the Annual Report misled the public by omitting the risks of heightened regulatory scrutiny also fails because the Complaint does not allege that, at the time the statements were made, Glencore had experienced any losses or consequences that it concealed from the public. Analyzing a similar issue in *Williams v. Globus Medical, Inc.*, 869 F.3d 235 (3d Cir. 2017), the Third Circuit held that the plaintiffs failed to plead actionable omissions from risk disclosures. *See id.* at 241-43. The *Williams* plaintiffs alleged that the defendant misleadingly warned investors "that the loss of an independent distributor could have a negative impact on sales," *id.* at 241, while omitting the recent termination of one distributor relationship. As here, however, there was no particularized allegation that the omitted event had adversely affected the company; the company had not "describe[d] as hypothetical a risk that has already come to fruition." *Id.* at 242. Glencore likewise was under no duty to engage in gloomy speculation about

[7] *See also Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 38 (2011) (omitted facts are material only if there is "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988))); *Brady v. Top Ships Inc.*, 2019 WL 3553999, at *10 (E.D.N.Y. Aug. 5, 2019) (plaintiffs' "lack of awareness" of transactions' effect on stock value could not "be attributed to defendants," because plaintiffs "were not in the dark" about information in annual report).

whether disclosed risks might come to fruition at some unknown future time, or to characterize the risks in Plaintiffs' preferred terms (*e.g.*, "heightened"). *See OFI Asset Mgmt.*, 834 F.3d at 504 (disclosure that did not describe merger as "imperiled" or "in danger" was not actionably misleading because company "was under no obligation to use any adjective, let alone a pejorative one, to describe the state of the deal"); *Donald J. Trump Casino*, 7 F.3d at 375 ("[T]he plaintiffs cannot successfully contend that the prospectus is actionable because it failed to describe its debt-equity ratio as either 'unwarranted' or 'excessive.'").

Second, the Complaint alleges that Glencore's statements were misleading by omission because they "failed to disclose the fact that [Glencore] was already engaged in bribery in the DRC, Venezuela, and Nigeria." Compl. ¶¶ 148, 168, 233. But the Complaint does not support its speculative claim that Glencore was "engaged in bribery" with well-pleaded facts. *See Roofer's Pension Fund v. Papa*, 2018 WL 3601229, at *11 (D.N.J. July 27, 2018) (complaint that "rests on … failure to disclose uncharged illegal conduct … must state a plausible claim that the underlying conduct occurred.").[8] The Complaint alleges that regulators have opened "investigations into Glencore's compliance with money laundering and bribery laws, as well as the FCPA." Compl. ¶ 5. It does not, however, specify any

[8] *See also Das v. Rio Tinto PLC*, 332 F. Supp. 3d 786, 804-05 (S.D.N.Y. 2018) (complaint failed to allege FCPA violation and, "[s]ince the payment was not unlawful, failure to disclose it cannot violate the Exchange Act").

"money laundering or bribery laws" that Glencore supposedly violated—much less explain with particularity how Glencore's alleged misconduct violated any such laws. To the extent that Plaintiffs intend to assert that Glencore misled investors because it had violated the FCPA, the only specific law or regulation mentioned in the Complaint, they do not plausibly allege anything of the sort. In particular, none of the Complaint's three "bribery schemes," *see* Compl. ¶¶ 47-107, includes any particularized allegation that Glencore—or any of its employees or agents—made a payment to any "foreign official," as would be required to state an FCPA violation. *Rio Tinto*, 332 F. Supp. 3d at 803; *see* 15 U.S.C. § 78dd-2(a). The Complaint also does not plead that Glencore satisfied the FCPA's *mens rea* element—that is, that it "knowing[ly]" made an unlawful payment or caused an unlawful payment to be made. *Rio Tinto*, 332 F. Supp. 3d at 804-05.

More specifically, the vague allegation that Gertler made a "bribe" to President Kabila "[a]t the request of Glencore" is unsupported by any facts, such as the date or amount of any "bribe." *See* Compl. ¶¶ 3, 48, 56, 254. Plaintiffs' other allegations concerning supposed bribery in the DRC describe payments to Gertler, who is not alleged to be a foreign official. *See, e.g.*, *id.* ¶¶ 48, 51, 59, 63, 67-68, 77. As to Venezuela, Plaintiffs focus on alleged payments to companies owned by Morillo and Baquero, also not alleged to be foreign officials. *See id.* ¶¶ 78-97. Plaintiffs do not allege other than in conclusory and speculative fashion that

Glencore expected or instructed Morillo and Baquero to direct payments to any official. As to Nigeria, Plaintiffs allege no specific payments to a "foreign official" or anyone else. *See id.* ¶¶ 103-07; *see Cal. Pub. Emps.' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 155 (3d Cir. 2004) ("[g]eneric and conclusory allegations based upon rumor or conjecture are undisputedly insufficient" under PSLRA).

Because Plaintiffs have not specifically alleged any underlying violation of law, their claims "premised on the nondisclosure of the alleged scheme are fatally flawed." *In re AXIS Capital Holdings Ltd. Sec. Litig.*, 456 F. Supp. 2d 576, 585-86 (S.D.N.Y. 2006); *see Roofer's Pension Fund*, 2018 WL 3601229, at *11; *Rio Tinto*, 332 F. Supp. 3d at 803. Just as Glencore has no duty to speculate about how regulators might address its conduct, it likewise had no "preemptive duty to 'confess' as soon as a regulatory agency [began] an investigation." *Menaldi v. Och-Ziff Capital Mgmt. Grp. LLC*, 164 F. Supp. 3d 568, 582 (S.D.N.Y. 2016); *see City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014) ("[D]isclosure is not a rite of confession, and companies do not have a duty to disclose uncharged, unadjudicated wrongdoing." (internal quotation marks omitted)). Indeed, "[e]ven *if* a corporation is engaging in illegal practices, predictions of future events such as criminal indictments are too speculative to be material." *Galati v. Commerce Bancorp, Inc.*, 2005 WL 3797764, at *6 (D.N.J. Nov. 7, 2005) (emphasis added), *aff'd*, 220 F. App'x 97 (3d Cir. 2007).

B. Glencore's Statements Concerning Ethics and Compliance Were Immaterial

Also inactionable are the challenged statements that simply describe, in generic terms, Glencore's organizational commitment to ethics, compliance, or sustainability. *See* Compl. ¶¶ 140, 147, 155, 162, 178, 212, 223, 237. The Complaint challenges generic assertions that Glencore is "committed" to high standards of corporate governance and compliance, and announcements highlighting Glencore's code of conduct and Ethics, Compliance, and Culture Committee. *See, e.g.*, *id.* ¶¶ 2, 147 (stating Glencore is "committed to complying with or exceeding the laws and external requirements applicable to our operations and products," and citing code of conduct and anti-corruption policy).[9] The Complaint also challenges generalized statements that Glencore pays "all relevant taxes, royalties, and levies required by local and national regulation in [its] host countries," *id.* ¶¶ 178, 237, has an "ambition to fully integrate sustainability throughout our business" and has a "commitment to operate transparently and responsibly," *id.* ¶¶ 5, 109, 155. All of these soft statements are inactionable.

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[9] *See also, e.g.*, Compl. ¶¶ 5, 110, 212 (promising to "operate in a responsible, lawful and sustainable manner"), ¶¶ 61, 112, 162 (stating Glencore would follow "correct procedures"), ¶¶ 108, 140 ("Glencore takes ethics and compliance very seriously."), ¶ 179 (stating Glencore was "committed to high standards of corporate governance and transparency and welcome[d] increased transparency around the redistribution and reinvestment of such payments"), ¶ 237 (reiterating "commit[ment] to high standards of corporate governance and transparency").

First, the statements at issue consist of "boilerplate rhetoric" and therefore are immaterial as a matter of law.[10] *Galati*, 2005 WL 3797764, at *4.[11] Courts have consistently found comparable ethics and compliance statements to be inactionable—including in cases involving similar FCPA- or bribery-related allegations. *See Schiro v. Cemex, S.A.B. de C.V.*, 396 F. Supp. 3d 283, 298 (S.D.N.Y. 2019) (dismissing as "classic puffery" statements that company "rejects all forms of corruption," "is committed to conducting its business with

[10] The Third Circuit has contrasted actionable material statements "with statements of subjective analysis or extrapolations, such as opinions, motives and intentions, or general statements of optimism, which constitute no more than "puffery" and are understood by reasonable investors as such." *EP Medsystems, Inc. v. EchoCath, Inc.*, 235 F.3d 865, 872 (3d Cir. 2000); *see also Fan v. StoneMor Partners LP*, 927 F.3d 710, 716 (3d Cir. 2019) ("vague and general statements of optimism" not actionable). Similarly, "[o]pinions are only actionable under the securities laws if they are not honestly believed and lack a reasonable basis." *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 170 (3d Cir. 2014).

[11] *See also, e.g.*, *In re Toronto-Dominion Bank Sec. Litig.*, 2018 WL 6381882, at *11 (D.N.J. Dec. 6, 2018) (statements that company was "committed to conducting its affairs to the highest standard of ethics, integrity, honest, fairness and professionalism—in every respect, without exception, and at all times" were "general statements and immaterial puffery that are inactionable as a matter of law"); *In re Cognizant Tech. Sols. Corp. Sec. Litig.*, 2018 WL 3772675, at *17 (D.N.J. Aug. 8, 2018) (general statements in code of conduct and anti-corruption policy were inactionable); *In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at *11 (D.N.J. Apr. 27, 2017) (optimistic rhetoric about "strong" and "record" financial results was inactionable puffery, as "[s]uch statements of optimism are commonly heard from corporate managers and are too imprecise to alter the total mix of available information"), *aff'd*, 905 F.3d 106 (3d Cir. 2018).

transparency and integrity," and "does not tolerate bribery in any form" in case involving FCPA investigation and alleged undisclosed bribery scheme).[12]

The Second Circuit recently rejected a theory strikingly similar to the one that Plaintiffs advance here. In *Singh v. Cigna Corp.*, 918 F.3d 57 (2d Cir. 2019), the plaintiffs alleged that Cigna's statements concerning ethics in its 10-K disclosures and in its "Code of Ethics" were materially misleading in light of later-disclosed regulatory violations related to Cigna's Medicare operations. *See id.* at 60-61, 63. Affirming dismissal, the Second Circuit rejected Plaintiffs' "creative attempt to recast" the regulatory violations at issue as securities fraud:

> The attempt relies on a simple equation: first, point to banal and vague corporate statements affirming the importance of regulatory compliance; next, point to significant regulatory violations; and *voila*, you have alleged a prima facie case of securities fraud! The problem with this equation, however, is that such generic statements do not invite reasonable reliance. They are not, therefore, materially misleading, and so cannot form the basis of a fraud case.

Id. at 59-60. The same reasoning fully applies here.

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[12] *See also, e.g.*, *Rio Tinto*, 332 F. Supp. 3d at 806 (holding that "it is well-established that general statements about reputation, integrity, and compliance with ethical norms are inactionable 'puffery', meaning that they are 'too general to cause a reasonable investor to rely on them'"); *Emps. Ret. Sys. of Providence v. Embraer S.A.*, 2018 WL 1725574, at *8 (S.D.N.Y. Mar. 30, 2018) ("aspirational statements" about ethics and anti-corruption were inactionable); *Braskem*, 246 F. Supp. 3d at 755 (statements touting "commitment to integrity," "compliance with the laws," and "commitment to transparency and good corporate governance practices" were inactionable puffery).

Second, the Complaint's contention that these statements were misleading because Glencore was involved in the purported schemes alleged in the Complaint, *see* Compl. ¶¶ 156, 180-81, 238, fails for the same reasons it failed as to risk-disclosure statements. The Complaint does not plead particularized facts establishing that Glencore committed any underlying violation that might render its ethics or compliance statements false or misleading. Moreover, even if the statements were not immaterial on their face, no reasonable investor in context would have concluded from these statements that Glencore was free from potential risks related to government investigations. As explained above, Glencore's Annual Reports consistently and clearly disclosed that Glencore was subject to a risk of investigations from regulators probing allegations of bribery or corruption. *See id.* ¶¶ 147, 166, 232. The Complaint itself identifies a host of information from Glencore and non-party sources informing the market of the very events that Plaintiffs claim subjected Glencore to scrutiny. By definition, there is no securities fraud in these circumstances. *See Winer Family Tr.*, 2004 WL 2203709, at *4; *see also Top Ships*, 2019 WL 3553999, at *10; *In re Progress Energy, Inc. Sec. Litig.*, 371 F. Supp. 2d 548, 552 (S.D.N.Y. 2005).

C. Other Statements Were Not Misleading by Virtue of Nondisclosure of Wrongful Conduct

Finally, Plaintiffs allege that a series of other statements omitted material facts about (1) purported wrongful conduct in the DRC, Venezuela, and Nigeria,

and (2) heightened risk of regulatory scrutiny. *See* Compl. ¶¶ 140, 143, 162, 166-67, 179, 182-83, 192, 199, 213, 235. None of these challenged statements can support a claim for securities fraud.

Plaintiffs challenge Glencore's statement in September 2016 that it was "aware" of and "considering" allegations that Gertler was implicated in a Congolese bribery scheme involving a different entity. Compl. ¶ 140. Plaintiffs baldly allege that Glencore "already knew it had made illegal bribery payments to the DRC through Gertler," *id.* ¶ 141, and misled investors by omitting that fact from its statement. Leaving aside the absence of any well-pleaded factual predicate, Plaintiffs do not claim the statements above were inaccurate, and they were not misleading because they did not imply anything about Glencore's own relationship with Gertler. The securities laws do not impose an "affirmative duty to disclose any and all material information," but require disclosure "only when necessary 'to make … statements made, in the light of the circumstances under which they were made, not misleading.'" *Matrixx*, 563 U.S. at 44-45 (quoting Rule 10b-5 and *Basic*, 485 U.S. at 239 n.17); *see also Sec. Police & Fire Prof's of Am. Ret. Fund v. Pfizer, Inc.*, 2012 WL 458431, at *6 (D.N.J. Feb. 10, 2012)

(Wigenton, J.) (omissions of "efficacy and safety concerns" were immaterial absent duty to disclose).[13]

Plaintiffs also challenge statements related to Glencore's (1) review of its contractual obligations to Gertler after sanctions were imposed on him, and (2) business decision to balance legal and regulatory risks by honoring its contractual obligations to Gertler. *See, e.g.*, Compl. ¶ 162 (stating that Glencore would "follow the correct procedures and … come to the right conclusions").[14] These statements, too, are inactionable for multiple reasons.

First, to the extent that the statements concerned what Glencore "believe[d]" about its legal obligations, they are actionable only "if they [were] not honestly believed and lack[ed] a reasonable basis." *City of Edinburgh*, 754 F.3d at 170. Plaintiffs allege no facts suggesting that Glencore did not believe its statements or lacked a reasonable basis to do so. *See Omnicare, Inc. v. Laborers Dist. Council*

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[13] *See also, e.g.*, *In re Galena Biopharma, Inc. Sec. Litig.*, 2019 WL 5957859, at *10-11 (D.N.J. Nov. 12, 2019) (disclosures not rendered actionably misleading by failure to "make a complete *mea culpa* when disclosing the investigation and its potential legal implications"); *In re Anadigics, Inc., Sec. Litig.*, 2011 WL 4594845, at *20 (D.N.J. Sept. 30, 2011) (alleged failure to disclose customers' "dual sourcing" did not render misleading statement that company was "working to build further market share"), *aff'd*, 484 F. App'x 742 (3d Cir. 2012).

[14] *See also, e.g.*, Compl. ¶¶ 166-67 (Glencore "considering how best to mitigate its risks"); ¶¶ 199, 203 (Glencore planned to make payments, which it believed would not violate sanctions); ¶ 213 (Glencore believed "way forward" with Gertler was consistent with sanctions); ¶ 235 (Glencore believed strategy "appropriately addresse[d] all applicable sanctions regulations").

Constr. Indus. Pension Fund, 575 U.S. 175, 194 (2015) ("The investor must identify particular (and material) facts going to the basis for the issuer's opinion—facts about the inquiry the issuer did or did not conduct or the knowledge it did or did not have—whose omission makes the opinion statement at issue misleading.").[15]

Second, to the extent that the statements are alleged to have omitted material facts related to Glencore's business relationship with Gertler, *e.g.*, Compl. ¶¶ 148, 156, 168, 180, 233, 238, they are all inactionable for the same reason described above: The investing public already possessed a wealth of information on Gertler, Gertler's activities in the DRC, and the relationship between Glencore and Gertler (including Glencore's contractual obligations to Gertler or entities he controlled). At least as early as September 2016 (*i.e.*, the beginning of the class period), the public was aware that Gertler was tied to investigations of misconduct in the DRC through media reports and court documents. *See id.* ¶¶ 56, 140-42.

Finally, with respect to Plaintiffs' assertion that Glencore falsely assured investors after U.S. sanctions were imposed, the Complaint acknowledges that Glencore announced that it was reviewing its contractual obligations in February

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[15] *See also, e.g.*, *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 616-19 (9th Cir. 2017) (no support for inference issuer lacked basis for statements of opinion and belief); *Tongue v. Sanofi*, 816 F.3d 199, 210-14 (2d Cir. 2016) (same); *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1159-60 (10th Cir. 2015) (same).

2018, and thereafter that it would continue making payments to Gertler. *See* Compl. ¶¶ 61, 63. Plaintiffs may disagree with the merits of that decision, but their own allegations demonstrate that there was no misstatement or omission. On Plaintiffs' own version of the facts, far from being reassured by this decision, the market and analysts were "shocked." *Id.* ¶¶ 64-69.[16] Nor does the Complaint plead that any U.S. authority determined that the payments violated sanctions.

IV. PLAINTIFFS FAIL TO PLEAD SCIENTER

Plaintiffs' failure to plead an actionable statement dooms any attempt to plead scienter. *See DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1232 (S.D. Cal. 2001) (absent actionable statements or omissions, scienter analysis "entails the illogical inquiry into whether the defendant intended to deceive when,

[16] In addition, many of the challenged statements are factual reports that do not give rise to an affirmative duty to disclose. For example, Plaintiffs challenge a statement during an earnings call that "[t]he whole approach [regarding payments to Gertler], that's as is from the announcement that was made in June." Compl. ¶ 213. There is nothing misleading about a factual statement that Glencore intended to continue its then-current course of action; nor does such a statement give rise to a duty to disclose regulatory risks that Glencore had already warned about and that were known to the marketplace. *See Winer Family Tr.*, 2004 WL 2203709, at *4 ("As a general matter, such an affirmative duty [to disclose] arises only when there is insider trading, a statute requiring disclosure, or an inaccurate, incomplete or misleading prior disclosure."); *Sec. Police & Fire Prof'ls of Am. Ret. Fund v. Pfizer, Inc.*, 2013 WL 1750010, at *6 (D.N.J. Apr. 22, 2013) (Wigenton, J.) (no duty to disclose problems in clinical studies absent allegations of insider trading, statute requiring disclosure, or misleading prior disclosure), *aff'd sub nom. City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159 (3d Cir. 2014).

in fact, there was no deception"). Even if it were otherwise, Plaintiffs' scienter allegations are deficient in any event, further supporting dismissal.

Scienter is a "mental state embracing intent to deceive, manipulate, or defraud." *Tellabs v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007) (citation omitted). Congress "established heightened pleading requirements" for scienter through the PSLRA, which requires a complaint to "state with particularity facts giving rise to a *strong inference* that the defendant acted with the required state of mind." *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 242 (3d Cir. 2013) (emphasis in original); *see* 15 U.S.C. § 78u-4(b)(2)(A).[17] The "required state of mind" is "one embracing [an] intent to deceive, manipulate, or defraud, either knowingly or recklessly." *In re Hertz Glob. Holdings Inc.*, 905 F.3d 106, 114 (3d Cir. 2018) (internal quotation marks omitted). Recklessness involves "not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care … which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Institutional Inv'rs Grp. v. Avaya, Inc.*, 564 F.3d 242, 267 n.42 (3d Cir. 2009) (internal quotation marks omitted). Further, the required

[17] Private securities fraud claims against corporate officers and directors "must be pleaded with the specificity required by the PSLRA with respect to each defendant." *Winer Family Tr.*, 503 F.3d at 337 (holding that "plaintiffs must create [a strong inference of scienter] with respect to each individual defendant").

strong inference "must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Rahman*, 736 F.3d at 242. Allegations that a defendant had "motive and opportunity" to commit fraud "may be useful indicators," but "are not entitled to a special, independent status" and must "be considered along with all the other allegations in the complaint." *Nat'l Junior Baseball League v. Pharmanet Dev. Grp. Inc.*, 720 F. Supp. 2d 517, 548-49 (D.N.J. 2010) (quoting *Avaya*, 564 F.3d at 277).[18] Plaintiffs must plead scienter as to each defendant and may not rely on "corporate" scienter, a doctrine that the Third Circuit has not adopted. *City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc.*, 713 F. Supp. 2d 378, 403 (D. Del. 2010), *aff'd*, 442 F. App'x 672 (3d Cir. 2011); *see also Hertz*, 905 F.3d at 121 n.6.

Plaintiffs theorize that Defendants acted with scienter when making false statements about ethics and legal compliance, risk factors, and business decisions during the class period because they allegedly knew, or were reckless in not knowing, that Glencore had engaged in undisclosed misconduct that placed it at heightened risk of regulatory scrutiny.[19] Plaintiffs do not, however, support this contention with any particularized allegations, as required.

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[18] The Third Circuit does not recognize "motive and opportunity" as a separate means of pleading scienter. *Avaya*, 564 F.3d at 276-77.

[19] Many of the statements Plaintiffs challenge were in Annual Reports or Sustainability Reports allegedly signed by one or both Individual Defendants. Compl. ¶¶ 147-49, 154-55, 165-67, 178-79. Plaintiffs also challenge statements

A. Plaintiffs Do Not Plead Scienter on the Part of the Individual Defendants

The Complaint attempts to establish Mr. Glasenberg's scienter by virtue of his and Glencore's business relationship with Gertler. Plaintiffs allege that "Defendant Glasenberg had actual knowledge of the bribery payments made by Gertler" because "Glencore was Gertler's biggest partner," "Gertler says he managed his relationship with Glencore directly with Defendant Glasenberg," and "the pair participated in more than a dozen transactions involving Congolese assets." Compl. ¶¶ 33, 254. Plaintiffs further allege that knowledge of bribes can be inferred because Mr. Glasenberg "decided to do business with Gertler" despite Gertler being "well known as a controversial figure in the DRC." *Id.* ¶ 259.

Plaintiffs do not, however, identify any facts they contend alerted Mr. Glasenberg that Gertler was engaged in bribery on behalf of Glencore. The Complaint does not identify a single document, conversation, or witness statement explaining with particularity how *any* individual Glencore employee, let alone Mr. Glasenberg specifically, was aware (or recklessly disregarded) that Gertler had engaged in bribery. Plaintiffs instead rely on conclusory "must have known" assertions, which the PSLRA does not permit. *See In re Elecs. for Imaging, Inc.*

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made during an August 8, 2018 earnings call, *id.* ¶ 212, and in a February 22, 2018 Bloomberg article quoting Mr. Glasenberg, *id.* ¶¶ 61, 112, 162.

Sec. Litig., 2019 WL 397981, at *8 (D.N.J. Jan. 31, 2019) (Third Circuit has disfavored "they-must-have-known" scienter theories).[20]

The Complaint offers even fewer details bearing on Mr. Kalmin's alleged scienter, alleging only that he was "responsible for attending all meetings of the Audit Committee," which allegedly oversaw the "business ethics committee." Compl. ¶ 285. But the Complaint does not allege that the Audit Committee approved any of the challenged statements, much less supply particulars of anything that transpired at any meeting that would have alerted Mr. Kalmin that Glencore's statements were false or misleading. Thus, Plaintiffs are merely pleading scienter based on Mr. Kalmin's position at Glencore. Such scienter-by-status allegations lack the particularity that the PSLRA demands. *See Fain v. USA*

[20] The Complaint's vague allegations concerning information available to the Individual Defendants in "confidential board minutes" *see* Compl. ¶¶ 49, 137(c), 148, 156, 168, 180, 233, 238, 255, fail to explain when the meetings occurred, who was involved, or (most importantly) what information was available. *See Key Equity Inv'rs, Inc. v. Sel-Leb Mktg. Inc.*, 246 F. App'x 780, 786 (3d Cir. 2007) (lack of "facts or details" supporting allegation that company knowingly "falsified its earnings to maintain its credit line" forced court to "speculate about what particular information was hidden, what financial figures were manipulated, and when any of the defendants knew of or implemented such fraudulent devices"); *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 239 (3d Cir. 2004) (scienter allegations must be supported by "the essential factual background that would accompany the first paragraph of any newspaper story—that is, the who, what, when, where and how of the events at issue" (internal quotation marks omitted)). Similarly, Plaintiffs' bare allegation that "emails evidencing … bribery were sent to Glencore domain email addresses," Compl. ¶ 256, lacks any facts concerning the dates, senders, recipients, or contents of those emails.

Techs., Inc., 707 F. App'x 91, 96 (3d Cir. 2017) ("That Defendants were in top positions …, alone, is not enough.").[21]

Lacking particularized allegations to show the Individual Defendants' scienter, the Complaint falls back on a very narrow exception to the "no scienter by status" rule: the so-called "core operations" doctrine. *See Martin v. GNC Holdings, Inc.*, 757 F. App'x 151, 155 (3d Cir. 2018) (plaintiff may plead strong inference of scienter by alleging "that a defendant made misstatements concerning 'core matters' of central importance to a company"). Plaintiffs claim that the Court can infer scienter on the part of the Individual Defendants because DRC-based mining of cobalt and copper was "such an important and integral part of Glencore's operations that it would be absurd to suggest that Defendants were unaware" of Glencore's supposed involvement in DRC-based corruption scandals. Compl. ¶ 276; *see also id.* ¶¶ 277-83. (Plaintiffs do not attempt to invoke the core operations doctrine with respect to operations in Venezuela or Nigeria.) Plaintiffs' reliance on the core operations doctrine is misplaced.

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[21] *See also, e.g.*, *Nat'l Junior Baseball League*, 720 F. Supp. 2d at 556 (imputing knowledge to individual executives "by virtue of their employment has been rejected as a basis for an inference of scienter"); *In re Exxon Mobil Corp. Sec. Litig.*, 387 F. Supp. 2d 407, 430 (D.N.J. 2005) (rejecting allegations that defendant, by virtue of his position, must have known about alleged fraud), *aff'd*, 500 F.3d 189 (3d Cir. 2007); *In re PetroChina Co. Ltd. Sec. Litig.*, 120 F. Supp. 3d 340, 366 (S.D.N.Y. 2015) (allegations that executives "had or should have had knowledge of certain facts contrary to their public statements simply by virtue of their high-level positions" were "entitled to no weight").

First, the core operations doctrine, to the extent that it is even viable, is inapplicable unless plaintiff also has alleged "specific information conveyed to management and related to fraud," which Plaintiffs have not done. *Rahman*, 736 F.3d at 247. Plaintiffs' conclusory allegations "that a corporate officer is familiar with certain facts just because these facts are important to the company's business" do not suffice. *Nat'l Junior Baseball League*, 720 F. Supp. 2d at 556; *see also Rahman v. Kid Brands, Inc.*, 2012 WL 762311, at *14 (D.N.J Mar. 8, 2012) (same), *aff'd*, 736 F.3d 237. Instead, "there must be other, individualized allegations that further suggest that the officer had knowledge of the fact in question." *Nat'l Junior Baseball League*, 720 F. Supp. 2d at 556.[22]

Second, the Complaint does not plausibly establish that DRC-based copper and cobalt mining constituted such an overwhelming proportion of Glencore's overall business that it would be "absurd" to suggest that the Individual Defendants did not know the details of Glencore's business there. "Courts applying the core operations doctrine generally 'require[] that the operation in question constitute nearly all of a company's business before finding scienter,'" *Thomas v. Shiloh Indus., Inc.*, 2017 WL 1102664, at *4 (S.D.N.Y. Mar. 23, 2017), and Plaintiffs

[22] *See Martin*, 757 F. App'x at 155 (requiring "additional allegation of specific information conveyed to management and related to the fraud" (internal quotation marks omitted)); *Elecs. for Imaging*, 2019 WL 397981, at *9 (similar); *In re Amarin Corp. PLC*, 2015 WL 3954190, at *12 (D.N.J. June 29, 2015) (similar).

make no such allegation. Instead, the Complaint describes Glencore as "the world's biggest commodity trader," producing and marketing more than 90 commodities. Compl. ¶¶ 4-5, 36, 140. Plaintiffs allege that copper and cobalt assets represented 58-59% of Glencore's metals and minerals revenue in 2017 and 2018, *see id.* ¶¶ 280-81, but not what portion of those revenues the DRC represents, or what portion of Glencore's revenue comes from metals and minerals. Meanwhile, the Annual Reports list other business segments, including an energy products segment that consistently produces greater revenue than the metals and minerals segment, as well as other geographic regions that drive revenue. *See* Decl. of David Lesser (Feb. 7, 2020) ("Lesser Decl."), Ex. A, at 10-11; *id.* Ex. B, at 2-3 (reporting revenues of $128.3 billion from energy products and $80.5 billion from metals and minerals); *id.* Ex. C, at 2-3 (reporting revenues of $139.0 billion from energy products and $83.4 billion from metals and minerals). Thus, Plaintiffs do not allege that the metals and minerals segment is the "flagship" of Glencore's business, much less that the DRC is so crucial as to invoke "core operations." *See Toronto-Dominion Bank*, 2018 WL 6381882, at *17 (doctrine applied where plaintiffs alleged that 95% of customers used locations where alleged misconduct occurred).

B. Plaintiffs' Circumstantial Evidence Does Not Raise Any Inference of Corporate Scienter, Much Less a "Strong Inference"

Plaintiffs further attempt—but fail—to plead "corporate scienter" through a series of circumstantial allegations unconnected to any Individual Defendant, including (1) Glencore's purported institutional motives to commit fraud, (2) the establishment of a Board Investigations Committee to oversee the DOJ subpoena, and (3) the departure of directors at one of Glencore's subsidiaries in the wake of an OSC investigation. *See* Compl. ¶¶ 260-61, 272-75, 284-88.

As an initial matter, Plaintiffs' invocation of "corporate scienter" separate and apart from the scienter of the Individual Defendants is unavailing. *See City of Roseville*, 442 F. App'x at 676. The Third Circuit has not adopted the "corporate scienter" doctrine. *Hertz*, 905 F.3d at 121 n.6 ("We have neither accepted nor rejected [the corporate scienter] doctrine and decline to do so here."). In any event, Plaintiffs' circumstantial allegations as to Glencore itself fail to clear the PSLRA's high bar. *See Chubb*, 394 F.3d at 155 ("Cobbling together a litany of inadequate allegations does not render those allegations particularized in accordance with Rule 9(b) or the PSLRA."). To the contrary, Glencore's regular and specific risk disclosures throughout the class period negate any inference of scienter. *See Hill v. Gozani*, 638 F.3d 40, 67 (1st Cir. 2011) (disclosures providing "more information about the [] landscape than do the company's earlier statements" negate a finding of fraud); *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1425 (9th Cir. 1994)

("detailed risk disclosure … negates an inference of scienter"). Moreover, each of Plaintiffs' specific theories of corporate scienter misses the mark, for the reasons set forth below.

Corporate Motive. The Complaint makes a token effort to plead corporate motive, alleging that Glencore was incentivized to mislead investors about payments to Gertler, and Glencore's compliance with U.S. sanctions, so as to "[m]aximize [p]rofits" and so as not to "risk losing [Glencore's] assets in the DRC." Compl. ¶¶ 272-75.[23] As an initial matter, and as stated above, the Third Circuit recognizes "motive and opportunity" only as a factor to be considered alongside other scienter allegations in a complaint—not as an independent basis for an inference of scienter. *See Avaya*, 564 F.3d at 276-77. In any event, Plaintiffs' motive allegations contribute nothing to an inference of scienter. The relevant question is not whether Glencore had a motive to "orchestrate[] the bribery schemes and illegal payments," Compl. ¶ 272, but whether the Individual Defendants (or anyone else who made the statements at issue and whose state of

[23] Plaintiffs do not allege that the Individual Defendants stood to profit from a scheme to inflate share prices. Among other things, they allege no stock sales by Individual Defendants during the class period. *See In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 540 (3d Cir. 1999) (fact that individual defendants "sold no stock at all during the class period[,] rais[ed] doubt whether the sales were motivated by an intent to profit from inflated stock prices"); *In re Glenayre Techs. Inc. Sec. Litig.*, 1998 WL 915907, at *4 (S.D.N.Y. Dec. 30, 1998) ("the inference of scienter is undermined by the fact that … [executives] did not sell any stock"), *aff'd sub nom. Kwalbrun v. Glenayre Techs., Inc.*, 201 F.3d 431 (2d Cir. 1999).

mind can be imputed to Glencore) had a motive to make false or misleading statements.[24] As to that question, the Complaint describes only generic motives that all corporate officers and directors possess, rather than any "concrete and personal benefit to the individual defendants resulting from [the] fraud." *Avaya*, 564 F.3d at 278. Maximizing profits and building relationships are "generalized motive[s]" shared by every "publicly-owned, for-profit endeavor," and thus are not sufficiently concrete and individualized for scienter purposes. *In re Cendant Corp. Sec. Litig.*, 76 F. Supp. 2d 539, 548 (D.N.J. 1999) (quoting *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996)).[25] Nothing more is alleged here.

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[24] The Third Circuit has not decided whether the knowledge of persons not involved in statements at issue can be imputed to a corporation for purposes of establishing corporate scienter. *See Cognizant Tech.*, 2018 WL 3772675, at *31-34. But it has indicated that "if such a theory were viable, it would be in an instance of pervasive corporate misconduct, or blatantly false statements." *Id.* at *32; *see MTB Inv. Partners, LP v. Siemens Hearing Instruments, Inc.*, 2013 WL 12149253, at *7 (D.N.J. Feb. 19, 2013) (Wigenton, J.) (rejecting attempt to plead corporate scienter absent "extraordinary facts"). The Complaint pleads neither.

[25] *See also Avaya*, 564 F.3d at 278 ("Motives that are generally possessed by most corporate directors and officers do not suffice; instead, plaintiffs must assert a concrete and personal benefit to the individual defendants resulting from this fraud."); *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 341 (D.N.J. 2007) ("[I]t is well established that the fact of a defendant having certain goals or aspirations common to the law-abiding business community cannot amount to a valid motive for the purposes of showing scienter."); *Wilson v. Bernstock*, 195 F. Supp. 2d 619, 634 (D.N.J. 2002) ("[I]f scienter could be pleaded on [such bases] alone, virtually every company in the United States that experiences a downturn in stock price could be forced to defend securities fraud actions.").

Board Investigations Committee. The Complaint's allegations relating to Glencore's creation of a Board Investigations Committee in July 2018 to oversee Glencore's response to the DOJ subpoena also do not contribute to an inference of "corporate scienter." Compl. ¶¶ 285-86; *see id.* ¶ 100.[26] As an initial matter, there is no allegation that the committee made or approved any of the challenged statements. Even if any committee member's knowledge nonetheless could be imputed to Glencore, Plaintiffs allege no facts suggesting that committee members learned facts that should have led them to believe that Glencore's later statements were false. By the Complaint's own allegations, the committee was formed "to assess the implications of the investigation and to oversee the Company's response to the DOJ's investigation," and engaged external independent legal counsel and forensic accountants to assist in the investigation. *Id.* ¶¶ 100-01. The most plausible inference from the facts Plaintiffs allege is an innocent one: Glencore responsibly formed the committee "to investigate, to gather more information, and to confer with [the DOJ and other government authorities] before taking any action." *City of Brockton Ret. Sys. v. Avon Prod., Inc.*, 2014 WL 4832321, at *24 (S.D.N.Y. Sept. 29, 2014).[27] Under the federal securities laws, Defendants are

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[26] There is no allegation that either Individual Defendant was a member of the committee. Rather, the Complaint specifies that the committee included other individuals. Compl. ¶ 285.

[27] *See also, e.g.*, *Doshi v. Gen. Cable Corp.*, 823 F.3d 1032, 1042 (6th Cir. 2016) (corporate scienter insufficiently alleged where any inference of recklessness

"entitled to investigate for a reasonable time, until they have a full story to reveal." *Higginbotham v. Baxter Int'l Inc.*, 495 F.3d 753, 761 (7th Cir. 2007). If the law were otherwise, corporations would be disincentivized to form investigative committees, lest that somehow establish scienter.

Departure of Directors. The Complaint also attempts to plead Glencore's knowledge of "risks associated with Gertler" based on departures of and penalties imposed upon directors of a Canadian corporation in which Glencore allegedly has an ownership interest in the wake of a settlement agreement with the OSC. Compl. ¶¶ 38, 265-71. But "the Third Circuit, and other courts have found" that even "resignations of key officers [are] insufficient to show that they acted with the requisite scienter to commit the alleged fraud." *In re Interpool, Inc. Sec. Litig.*, 2005 WL 2000237, at *17 (D.N.J. Aug. 17, 2005). The Complaint does not allege what any of the directors knew, what (if any) involvement they had in the events at issue, what they conveyed to Mr. Glasenberg (to whom they allegedly reported), or for that matter (beyond mere speculation) why they left the company. *See Hertz*, 905 F.3d at 118-19 (no inference of scienter from allegations that executives

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was far less plausible than inference that "local managers overrode accounting procedures" without knowledge of corporation); *Rahman*, 736 F.3d at 246 (corporate scienter insufficiently alleged where there was "no credible evidence to suggest that [company] covered up the customs violations at its subsidiaries"); *In re New Oriental Educ. & Tech. Grp. Sec. Litig.*, 988 F. Supp. 2d 406, 427 (S.D.N.Y. 2013) ("[F]ormation of an independent committee to investigate potential defects … provide[s] some evidence of non-fraudulent intent.").

"resigned in close proximity to the public release of 'bad news,'" even accepting premise that resignations were "causally related to the bad news," because allegations did not "cogently suggest that the resignations resulted from the relevant executives' knowing or reckless involvement in a fraud").[28]

Other Allegations. None of Plaintiffs' remaining allegations contributes to an inference of scienter. For example, Plaintiffs' allegation that Glencore's "initial[] deci[sion] not to make payments to Gertler" somehow showed that it knew "doing so would be in violation of the U.S. sanctions," *id.* ¶ 261, lacks any supporting factual allegations. Plaintiffs plead no concrete facts—no confidential witness allegations, no documents, nothing—suggesting that anyone at Glencore knew that the payments to Gertler would violate U.S. sanctions. Plaintiffs do not allege that any authority determined that the payments violated sanctions, and instead fall back on a plainly deficient allegation that Glencore did not comply with a nonexistent requirement to pre-clear the payments with U.S. authorities. *E.g.*, *id.* ¶ 272. The allegation that Glencore did not initially make payments does not, as Plaintiffs claim, make "evident" that Glencore knew that such payments violated sanctions. *Id.* Instead, this allegation more plausibly raises the opposite

[28] *See City of Roseville*, 442 F. App'x at 679; *De Vito v. Liquid Holdings Grp., Inc.*, 2018 WL 6891832, at *35 (D.N.J. Dec. 31, 2018) ("alleged firings" were "too speculative to tip the scienter analysis," where complaint alleged "nothing solid connecting the employees' departures to the particular wrongdoing alleged").

inference: that Glencore carefully considered how to balance the sanctions and its obligations to Gertler—just as its disclosures said it would do. *See id.* ¶¶ 162, 166, 186, 235. Finally, Plaintiffs fare no better by invoking the alleged "severity and duration" of alleged bribery payments, particularly in light of Plaintiffs' failure to plead the particulars of any alleged bribe. *See, e.g.*, *id.* ¶ 253.

V. PLAINTIFFS FAIL TO PLEAD CONTROL PERSON LIABILITY

Plaintiffs' claim against the Individual Defendants under Section 20(a) of the Exchange Act, *see* Compl. ¶¶ 340-45, is derivative of their Section 10(b) claim. *See Rockefeller Ctr.*, 311 F.3d at 211-12 ("[I]it is well-settled that controlling person liability is premised on an independent violation of the federal securities laws."); *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 285 (3d Cir. 2006). Because the Complaint does not plead a viable Section 10(b) claim, the Section 20(a) claim must be dismissed. *See Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 279 (3d Cir. 1992) (finding it "impossible to hold … individual defendants liable under § 20(a)" in light of "dismissal of the § 10(b) claims"), *as amended* (May 28, 1992).

VI. THE COURT SHOULD EXERCISE ITS DISCRETION TO DISMISS THE CASE IN FAVOR OF SWITZERLAND ON *FORUM NON CONVENIENS* GROUNDS

To the extent that the Court finds that any claim may proceed, the case should nonetheless be dismissed in favor of litigation in Switzerland as the far

more convenient and appropriate forum. Plaintiffs allege that Glencore, based in Switzerland, issued misleading statements in relation to events in Africa and South America. None of the events relevant to Plaintiffs' claim occurred in the United States, let alone New Jersey. All three Defendants are domiciled in Switzerland, and witnesses and documents related to the challenged statements are located in Switzerland, as well. Under these circumstances, the well-settled considerations comprising the doctrine of *forum non conveniens* militate in favor of dismissal.

A. The *Forum Non Conveniens* Doctrine

A court may exercise its broad discretion to dismiss a case on the ground of *forum non conveniens* when, as here, "trial in the plaintiff's chosen forum would establish … oppressiveness and vexation to a defendant … out of all proportion to plaintiff's convenience." *Kisano Trade & Invest Ltd. v. Lemster*, 737 F.3d 869, 873 (3d Cir. 2013) (internal quotation marks omitted). Courts consider three factors in analyzing this issue: (1) "whether an alternative forum can entertain the case"; (2) "the appropriate amount of deference to be given the plaintiff's choice of forum"; and (3) the "balance [of] the relevant public and private interest factors." *Windt v. Qwest Commc'ns Int'l, Inc.*, 529 F.3d 183, 189-90 (3d Cir. 2008). Each factor favors dismissal in favor of a Swiss forum here.

B. Plaintiffs' Choice of a New Jersey Forum Merits Little Deference

Plaintiffs' choice of a New Jersey forum warrants little or no deference. Less deference is due where, as here, plaintiffs sue in a representative capacity. *See Gilstrap v. Radianze Ltd.*, 443 F. Supp. 2d 474, 479 (S.D.N.Y. 2006), *aff'd*, 233 F. App'x 83 (2d Cir. 2007). That is because such plaintiffs "have only a small direct interest in a large controversy in which there are many potential plaintiffs, usually in many potential jurisdictions." *Id.* (internal quotation marks omitted).

Furthermore, considerations of convenience—the "touchstone inquiry" for determining the level of deference owed a plaintiff's choice of forum—do not favor litigation in New Jersey. *Wilmot v. Marriott Hurghada Mgmt., Inc.*, 712 F. App'x 200, 203 (3d Cir. 2017). To assess convenience, courts in the Third Circuit examine "where the parties are from, where the evidence is concentrated, and where the relevant conduct occurred." *Steward Int'l Enhanced Index Fund v. Carr*, 2010 WL 336276, at *6 (D.N.J. Jan. 22, 2010). None of those factors favors Plaintiffs and all point to Switzerland as the appropriate forum.

First, the Complaint does not suggest that Plaintiffs have any connection to New Jersey. Plaintiffs allege that they are located in the United States but not that they reside in any particular state. *See* Compl. ¶¶ 13-14. Plaintiffs' lack of connection to this forum significantly reduces the deference due. *See Windt*, 529 F.3d at 191; *Steward Int'l Enhanced Index Fund*, 2010 WL 336276, at *7 (finding

"the Plaintiffs' lack of connection to New Jersey significant in determining how much deference to give their choice of forum").

Second, neither Defendants nor their alleged conduct is connected to New Jersey. Glencore and the Individual Defendants are all based in Switzerland. Burton Decl. ¶ 5; Glasenberg Decl. ¶ 4; Kalmin Decl. ¶ 4. Virtually all of the allegedly misleading statements and omissions occurred in Switzerland. *See Archut v. Ross Univ. Sch. of Veterinary Med.*, 2013 WL 5913675, at *7 (D.N.J. Oct. 31, 2013) ("[I]f the operative facts giving rise to the complaint occurred outside of the chosen forum, then deference owed to a plaintiff's choice of forum is reduced."). For example, all of the allegedly misleading press releases were released from Glencore's Swiss headquarters. *See* Compl. ¶ 199; Lesser Decl. Exs. D, E, F. The underlying events addressed in the challenged statements occurred in the DRC, Venezuela, and Nigeria—not New Jersey.

The Third Circuit's decision in *Windt* is instructive. In *Windt*, Dutch attorneys appointed as trustees for a Dutch company sued an American corporation and its executives in the District of New Jersey. *See* 529 F.3d at 186-87. Plaintiffs had no connection to New Jersey, New Jersey was not the home forum of defendants, and there was no indication that the evidence was concentrated in New Jersey or that a substantial amount of relevant conduct occurred in New Jersey. Accordingly, the Third Circuit afforded plaintiff's choice of forum a low degree of

deference and granted defendants' motion to dismiss on *forum non conveniens* grounds. *See id.* at 191. The same result is warranted here.

Finally, when there are indications that a plaintiff's choice was motivated by "forum-shopping for a … litigation advantage," *Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 71 (2d Cir. 2003), less deference is due. That is true here, where no material connection exists between the case and the U.S. forum. *See, e.g., Allen v. Bongiovi*, 2008 WL 9488939, at *4 (D.N.J. Mar. 18, 2008) ("[T]he case law is [] replete with plaintiffs seeking to bring claims in courts of the United States because of the perceived advantages of litigation here.").

C. Switzerland Is an Adequate Alternative Forum

"Ordinarily, [the alternative forum] requirement will be satisfied when the defendant is amenable to process in the other jurisdiction." *Path to Riches, LLC on behalf of M.M.T. Diagnostics (2014), Ltd. v. CardioLync, Inc.*, 290 F. Supp. 3d 280, 286 (D. Del. 2018) (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 n.22 (1981)). Glencore is headquartered in Switzerland, the Individual Defendants reside in Switzerland, and all are amenable to process there. Decl. of Lorenz Droese (Feb. 7, 2020) ("Droese Decl.") at ¶¶ 9-17. If the Court dismisses this action on *forum non conveniens* grounds, each Defendant will consent to the jurisdiction of the courts of Switzerland to adjudicate claims grounded in the facts alleged here. Lesser Decl. ¶ 3. That alone satisfies the applicable requirement.

Once defendants' amenability to process in an alternative forum is established, that forum is adequate except in "rare circumstances … where the remedy offered by the other forum is clearly unsatisfactory," such as when it "does not permit litigation of the subject matter of the dispute." *Piper Aircraft*, 454 U.S. at 255 n.22. Here, Swiss courts recognize a civil claim for damages. Droese Decl. ¶¶ 22-27. Courts have consistently found that the courts of Switzerland provide an adequate alternative forum for adjudicating similar subject matter. *See, e.g.*, *Knopick v. UBS AG*, 137 F. Supp. 3d 728, 736 (M.D. Pa. 2015); *Erausquin v. Notz, Stucki Mgmt. (Berm.) Ltd.*, 806 F. Supp. 2d 712, 726 (S.D.N.Y. 2011).

At least one federal court has recognized that Switzerland permits parties to litigate the issues underlying Section 10(b) claims. In *In re Optimal U.S. Litigation*, the court determined that Switzerland was an adequate alternative forum in a case involving common law fraud and Section 10(b) claims, which the court concluded were "substantially identical." 837 F. Supp. 2d 244, 252, 257 (S.D.N.Y. 2011) (noting that Switzerland "permit[s] litigation on the subject matter of the dispute and offer[s] remedies for the wrong the plaintiff alleges" (internal citations and quotation marks omitted)). This Court should do the same.

D. Relevant Private Factors Support Dismissal

"Private" factors relevant to the *forum non conveniens* analysis include: (1) "the relative ease of access to sources of proof"; (2) "availability of compulsory

process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses"; (3) "all other practical problems that make trial of a case easy, expeditious and inexpensive"; and (4) "the enforceability of a judgment if one is obtained." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947). Each such factor supports dismissal in favor of a Swiss forum here.

A U.S. trial would complicate "access to sources of proof." *Id.* Critical witnesses, including both Individual Defendants, reside in Switzerland. *See Windt*, 529 F.3d at 194. Documentary evidence is also likely located in Switzerland because the majority of Glencore's public statements and disclosures originate there. Burton Decl. ¶¶ 34–40. Meanwhile, neither Plaintiffs, Defendants, nor any of the "relevant non-parties" listed in the Complaint are alleged to live in New Jersey. Courts have determined that the difficulties presented by overseas fact discovery counsel in favor of dismissal in favor of more convenient fora. *See e.g.*, *Warner Tech. & Inv. Corp. v. Hou*, 2014 WL 7409978, at *8 (D.N.J. Dec. 31, 2014) (dismissing where key witnesses and evidence appeared to be in China).

Swiss law limiting foreign discovery could further complicate access to proof in this case, if it goes forward in this forum. Evidence located in foreign countries generally must be compelled through letters of request made pursuant to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters. Droese Decl. ¶¶ 20-21. This process is time-consuming, expensive, and

not guaranteed to yield the requested discovery requests. *See In re Alcon S'holder Litig.*, 719 F. Supp. 2d 263, 276 (S.D.N.Y. 2010) (presence of witnesses in Switzerland implicated the Hague Convention "caus[ing] not only greater financial hardships, but additional litigation and attendant significant delays"). Swiss law prohibits collecting and producing evidence on behalf of a foreign state on Swiss territory without lawful authority, and thus evidence located in Switzerland will be available in the New Jersey forum only if gathered under the supervision of the Swiss courts. Droese Decl. ¶ 21; *see S.E.C. v. Stanford Int'l Bank, Ltd.*, 776 F. Supp. 2d 323, 333 (N.D. Tex. 2011). In light of these problems, litigation in the U.S. will not be "easy, expeditious and inexpensive." *Gulf Oil*, 330 U.S. at 508. In contrast, Swiss courts have adequate procedural means to take and compel evidence located in Switzerland, *see* Droese Decl. ¶¶ 18-19, where the vast majority of the evidence in this case is likely to be found.

Finally, whether a judgment or settlement reached in a U.S. action would be given *res judicata* effect in Switzerland is unclear. It is doubtful that a Swiss court would give preclusive effect to a judgment in a U.S. class action against absent class members, because of the "opt-out" nature of the U.S. class action mechanism. Consequently, Glencore might have no protection against an attempt by absent class members who are dissatisfied with any U.S. judgment (or settlement) to seek a second bite at the apple in a Swiss court.

E. Relevant Public Factors Support Dismissal

"Public" factors relevant to the *forum non conveniens* analysis include: (1) administrative difficulties from court congestion; (2) the "local interests in having the case tried at home;" (3) a "desire to have the forum match the law that is to govern the case to avoid conflict of laws problems or difficulty in the application of foreign law;" and (4) the unfairness of "burdening citizens in an unrelated forum with jury duty." *Kisano*, 737 F.3d at 873. In evaluating the public interest factors "the court must consider the locus of the alleged culpable conduct … and the connection of that conduct to plaintiffs' chosen forum." *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 48 (3d Cir. 1988) (internal quotation marks omitted). Those factors point to Switzerland as the proper forum for this case.

Switzerland has a substantial interest in this dispute. Glencore's principal place of business is in Switzerland and both Individual Defendants reside and work there. Courts recognize that countries have a significant interest in resolving disputes concerning their own domestic companies and their executives. *See, e.g.*, *Windt*, 529 F.3d at 193 (Netherlands had "substantial interest" in resolving dispute related to alleged mismanagement by Dutch executives). New Jersey, by contrast, has little at stake. The Complaint contains not a single allegation concerning any person or event in New Jersey. *See Warner Tech. & Inv. Corp.*, 2014 WL 7409978, at *8 ("[T]here is no local interest in having this case decided in New

Jersey because the acts and omissions that give rise to the Plaintiff's claims occurred largely in China."). Plaintiffs do not even claim to reside in New Jersey. *See Steward Int'l Enhanced Index Fund*, 2010 WL 336276, at *10 (finding it "especially significant that neither of the named plaintiffs are from New Jersey").

Finally, recent statistics indicate that the District of New Jersey suffers from severe court congestion and is one of the busiest districts in the country. The Administrative Office of U.S. Courts reported that, during the 12-month period ending September 2019, parties filed 26,131 cases in the District of New Jersey, amounting to about 1,537 actions per judge.[29] Absent any connection between the forum and the alleged conduct, maintaining the suit here would drain limited resources without commensurate public benefit.

Because the *forum non conveniens* factors demonstrate that Switzerland is a more suitable forum, this case should be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully submit that the Court should grant Defendants' motion to dismiss the Complaint with prejudice.

[29] *See* September 30, 2019 Federal Court Management Statistics, https://www.uscourts.gov/statistics/table/na/federal-court-management-statistics/2019/09/30-1.

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