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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MEITAV DASH PROVIDENT FUNDS AND PENSION LTD.; GARY SMITH, individually and on behalf of all others similarly situated; CITY OF MIAMI FIRE FIGHTERS' AND POLICE OFFICERS' RETIREMENT TRUST,

Plaintiffs - Appellants,

and

JACOB GOLDMAN, individually and on behalf of all others similarly situated; EMPLOYEES' RETIREMENT SYSTEM OF THE CITY OF PROVIDENCE,

Plaintiffs,

v.

SPIRIT AEROSYSTEMS HOLDINGS, INC.; THOMAS C. GENTILE, III; JOSE GARCIA; JOHN GILSON; SHAWN CAMPBELL,

Defendants - Appellees.

No. 22-5013

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA (D.C. No. 4:20-CV-00054-SPF-JFJ)

Irina Vasilchenko, Labaton Sucharow LLP, New York, New York (Brian Calandra, and Jeremy A. Lieberman, Pomerantz LLP, New York, New York; Patrick V. Dahlstrom, Pomerantz LLP, Chicago, Illinois; James W. Johnson, David J. Schwartz, Geoffrey C. Jarvis, Kessler Topaz Meltzer & Check, LLP, Radnor, Pennsylvania; John W. Dowdell and James M. Reed, Hall Estill Law Firm, Tulsa, Oklahoma; Peretz Bronstein, Bronstein, Gewirtz & Grossman, New York, New Yok, with her on the briefs), for Plaintiffs-Appellants.

John Wander, Vinson & Elkins, LLP, Dallas, Texas (C. Austin Birnie and R. Richard Love, III, Conner & Winters, LLP, Tulsa, Oklahoma; Michael Holmes and Robert Ritchie, Vinson & Elkins, LLP, Dallas, Texas; Mary Quinn Cooper, Jessica L. Dickerson and Spencer F. Smith, McAfee & Taft P.C., Tulsa, Oklahoma; Patrick Smith and Andrew Rodgers, Smith Villazor LLP, New York, New York; John Christopher Davis, Johnson & Jones, Tulsa, Oklahoma; Daniel Gold, Shearman & Sterling LLP, Dallas, Texas, with him on the brief), for Defendants-Appellees.

Before **BACHARACH**, **PHILLIPS**, and **MORITZ**, Circuit Judges.

BACHARACH, Circuit Judge.

This appeal involves claims for securities fraud against Spirit AeroSystems, Inc., and four of its executives. Spirit produced shipsets of components for jetliners, including Boeing's 737 MAX. But Boeing stopped producing the 737 MAX, and Spirit's sales tumbled. At about the same time, Spirit acknowledged an unexpected loss from inadequate accounting controls.

After learning about Spirit's downturn in sales and the inadequacies in accounting controls, some investors sued Spirit and four executives for

securities fraud. *See* 17 C.F.R. § 240.10b–5. The district court dismissed the suit, and the investors appealed.

For claims involving securities fraud, pleaders bear a stiff burden when alleging scienter. In our view, the investors have not satisfied that burden. So we affirm the dismissal.

1. Spirit reassures investors, but Boeing then halts production of the 737 MAX.

When two jetliners crashed, the Federal Aviation Administration grounded flights for the 737 MAX. After the grounding, Boeing reduced production of the 737 MAX from 52 jetliners per month to 42. But Boeing kept purchasing the same monthly number of shipsets (52) from Spirit.

These purchases proved critical to Spirit, which obtained roughly half of its yearly revenue from sales of the shipsets to Boeing. So investors nervously monitored Boeing's continued purchases from Spirit.

Spirit's chief executive officer (Thomas Gentile, III) allegedly reassured investors in a call on October 31, 2019, stating that Spirit would "be at 52 [shipsets of components produced per month] for an extended period of time."[1] Appellants' App'x vol. 2, at 244. On the same day, Mr. Gentile, Spirit's chief financial officer (Jose Garcia), and Spirit's corporate controller (John Gilson) filed documents with the Securities and

[1] The allegedly fraudulent statements are listed in the appendix. *See* pp. 41–45, below.

Exchange Commission, stating that Spirit expected to continue selling Boeing 52 shipsets every month.

On November 24, 2019, a market observer reported on "takeaways" from a meeting with Spirit executives. This report suggested that Spirit would continue monthly sales of 52 shipsets until at least May 2020. On December 16, 2019, Boeing announced that it would soon temporarily stop producing the 737 MAX.

Three days later, Boeing told Spirit to stop delivering shipsets for the 737 MAX. The next day, Spirit disclosed that it would stop producing the shipsets.[2]

[2] The complaint sometimes frames Spirit's economic hardship as a decline in Spirit's production rather than in its sales. *See, e.g.*, Appellants' App'x vol. 1, at 29 (alleging that "Boeing told Spirit to cut production of the 737 MAX in half"). But a decline in Spirit's production led to a decline in sales. We thus refer to the decline in Spirit's production as a decline in Spirit's sales.

More bad news followed, this time about Spirit's method of accounting for contingent liabilities. Spirit had filed documents on October 31, 2019, certifying the adequacy of its accounting controls. Months later, Spirit disclosed that

- material weaknesses had existed in the accounting controls and
- two executives (Jose Garcia and John Gilson) had quit.

At about the same time, Spirit fired another executive (Shawn Campbell).

When investors learned of Boeing's halt in production and the inadequacy of Spirit's accounting controls, Spirit's stock price plummeted.

2. The plaintiffs must plead facts giving rise to a strong inference of scienter.

When considering the district court's grant of the defendants' motion to dismiss, we conduct de novo review. *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1146 (10th Cir. 2015). When conducting that review, we credit the allegations in the complaint and view them in the light most favorable to the plaintiffs. *Moore v. Guthrie*, 438 F.3d 1036, 1039 (10th Cir. 2006).

Though we view the allegations favorably to the plaintiffs, federal law creates a heavy burden on claimants alleging securities fraud. *See In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1333 (10th Cir. 2012) ("A plaintiff suing under Section 10(b) [of the Exchange Act] bears a heavy burden at the pleading stage."). This burden requires the plaintiffs to "state with particularity facts giving rise to a *strong* inference that the

defendant[s] acted with" scienter. *Smallen v. W. Union Co.*, 950 F.3d 1297, 1305 (10th Cir. 2020) (emphasis & alteration in original) (quoting *In re Level 3*, 677 F.3d at 1333); *see* 15 U.S.C. § 78u-4(b)(2)(A) (requiring the pleader to "state with particularity facts giving rise to a strong inference" of scienter).

To assess the strength of this inference, we "consider . . . competing inferences rationally drawn from the facts alleged." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 314 (2007). An inference of scienter is considered "strong" only if proof of the allegations would lead a reasonable factfinder to determine that an inference of fraudulent intent or recklessness is at least as compelling as an innocent inference. *See Smallen*, 950 F.3d at 1305 (fraudulent intent); *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1200–01 (10th Cir. 2015) (recklessness). "Conduct is considered reckless only if the defendants (1) acted in 'an extreme departure from the standards of ordinary care' and (2) presented 'a danger of misleading buyers or sellers' that was [] known to the defendants or [] so obvious that the defendants must have been aware of the danger." *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1237 (10th Cir. 2016) (quoting *In re Level 3*, 667 F.3d at 1343 n.12).

The dissent suggests that a plaintiff can allege fraudulent intent or recklessness through executives' access to information that contradicts their statements. Dissent at 3. For this suggestion, the dissent relies solely

on a Second Circuit opinion: *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000). But some other circuits regard allegations of access to contradictory information as inadequate to plead scienter. *See PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 688 (6th Cir. 2003) (stating that "fraudulent intent cannot be inferred merely from the [two corporate officers'] positions in the Company and alleged access to information"), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308 (2007); *Police Ret. Sys. of St. Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1063 (9th Cir. 2014) ("Mere access to reports containing undisclosed sales data is insufficient to establish a strong inference of scienter."); *see also Anderson*, 827 F.3d at 1246 ("[M]ere attendance at meetings does not contribute to an inference of scienter.").

For the sake of argument, we can assume that access to contradictory information can sometimes contribute to a strong inference of scienter. Even with that assumption, however, the plaintiffs would need particularized allegations that, if proven, would show a speaker's knowledge or reckless disregard of contradictory information. *See City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 620 (9th Cir. 2017) (concluding that the plaintiff failed to adequately allege the speaker's direct knowledge of flawed accounting even though access to the disputed information could contribute to a strong inference of scienter). For example, it's not enough for the plaintiffs to

allege briefings to a speaker on the underlying data or the speaker's access to internal reports. *See Anderson*, 827 F.3d at 1246 (briefings and attendance at meetings); *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1344–45 (10th Cir. 2012) (internal reports).

Through briefings and internal reports, Spirit's top executives presumably had access to a broad swath of information shared among subordinates within Spirit. But an executive's position in the company doesn't show knowledge of specific facts. *See Anderson*, 827 F.3d at 1245 ("We cannot infer scienter based only on a defendant's position in a company."); *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1205 (10th Cir. 2015) (rejecting "the notion that knowledge may be imputed solely from an individual's position within a company" (quoting *Wolfe v. Asphenbio Pharma, Inc.*, 587 F. App'x 493, 497 (10th Cir. 2014))). So it would make little sense to draw a strong inference of scienter from access to information. If access alone were enough, a strong inference of scienter would exist for high-level executives whenever they make a public statement contradicting something in the company's files.

A plaintiff must thus allege facts with particularity showing not only the executive's access to contradictory information but also the executive's fraudulent intent or reckless disregard of accessible information. *See* p. 6, above (discussing recklessness). So we must consider what Spirit's speakers knew when they made the public disclosures, focusing on the

particularity of the plaintiffs' allegations and the strength of the related inferences.

3. The plaintiffs didn't adequately plead scienter for Spirit's statements about continued sales to Boeing.

In these public disclosures, Spirit's executives reassured investors that Boeing would continue buying 52 shipsets each month. According to the plaintiffs, the executives made these statements even though Boeing had privately told Spirit about plans to reduce purchases of the shipsets.

The defendants deny such private statements from Boeing. So we consider the particularity of the plaintiffs' allegations of knowledge on the part of Spirit's speakers. These speakers include Mr. Gentile, Mr. Garcia, and Mr. Gilson.

A. Mr. Gentile's oral statements

In our view, the plaintiffs haven't adequately alleged Mr. Gentile's awareness of Boeing's plan to reduce purchases of the shipsets.

i. The complaint lacks particularized allegations of Mr. Gentile's scienter.

The plaintiffs complain that Mr. Gentile said on October 31, 2019, that he expected to continue selling shipsets to Boeing at the same rate "for an extended period of time." Appellants' App'x vol. 2, at 244. According to the plaintiffs, Mr. Gentile knew that Boeing was planning to reduce the purchases of shipsets. We thus consider the particularity of the plaintiffs'

allegations and the strength of an inference that Mr. Gentile had known by October 31, 2019, of Boeing's decision to reduce purchases of shipsets.

The plaintiffs argue that the complaint reflects Mr. Gentile's knowledge based on reports from Spirit's former employees and his stock sales. We disagree.

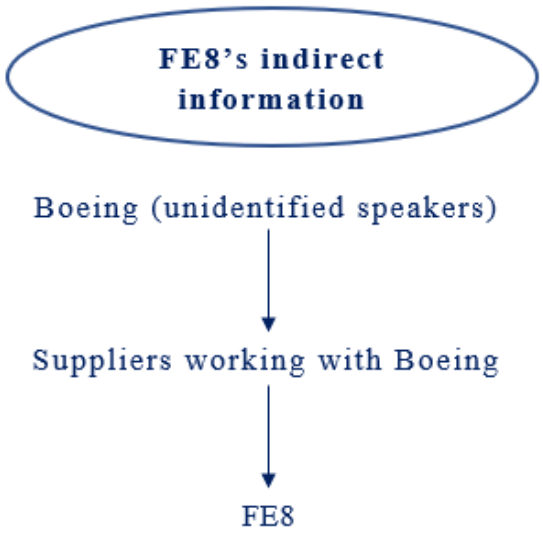
Two former Spirit employees (FE7 and FE8) allegedly reported that

- unidentified employees of Boeing had told suppliers and Spirit executives that Boeing would cut production of the 737 MAX or reduce purchases of shipsets from Spirit and
- Spirit had then projected the number of layoffs when Boeing implemented its plan to reduce production of the 737 MAX and purchases of shipsets.

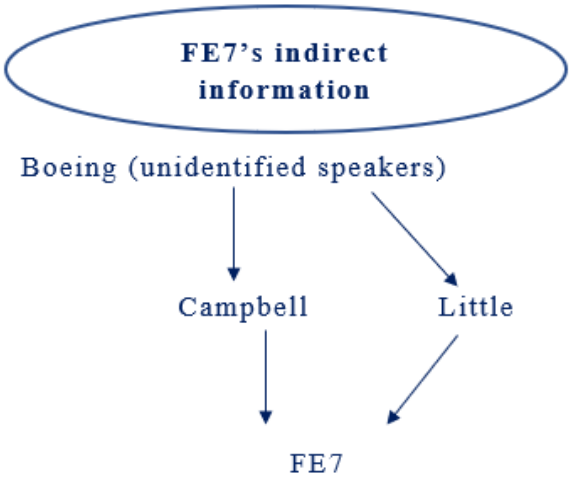
Despite the reliance on the former employees, the complaint doesn't allege that the former employees

- told Mr. Gentile that Boeing had planned to reduce purchases of shipsets or
- knew of other statements to Mr. Gentile about Boeing's plan to reduce purchases.

The two former employees allegedly heard that Boeing had planned to cut production of the 737 MAX and purchases of shipsets. FE8's information came from suppliers who had worked with Boeing.



And FE7's information came from Shawn Campbell and Angela Little, two Spirit executives who in turn had obtained their information from unidentified employees of Boeing.[3]



No matter what FE7 or FE8 had heard, scienter would exist only if Mr. Gentile was aware of what the Boeing employees had said. *See Smallen*

[3] At oral argument, the plaintiffs acknowledged that they didn't know who at Boeing had made the statements.

v. W. Union Co., 950 F.3d 1297, 1313 (10th Cir. 2020) (stating that we consider the state of mind of the corporate officials making the statement, approving it, or furnishing the underlying information); *accord Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) ("[T]he required state of mind must actually exist in the individual making (or being a cause of the making of) the misrepresentation."). But the complaint doesn't allege Mr. Gentile's awareness of the information allegedly reported to FE7, FE8, Mr. Campbell, or Ms. Little. To the contrary, the complaint says only that two former Spirit employees had heard others relay what unidentified Boeing employees had said; the complaint doesn't allege that anyone at Spirit had informed Mr. Gentile about these conversations.

Despite that gap in the complaint, the plaintiffs argue that Mr. Gentile knew about layoff projections that FE7 had helped create. The complaint states that the layoff projections had proceeded in four steps:

1. A supervisor told FE7 and other Spirit employees to provide data about the adjustments that Spirit would need to make.
2. Spirit used the data to create the layoff projections.
3. Spirit provided these layoff projections to FE7's supervisor for his review.
4. If FE7's supervisor agreed with the projections, he would send them to Mr. Gentile.

Appellants' App'x vol. 1, at 71. Through these steps, the plaintiffs contend that the layoff projections show Mr. Gentile's knowledge about Boeing's impending production cuts.

The plaintiffs allege that Mr. Gentile saw the first round of the layoff projections. But this allegation is conclusory, and the plaintiffs elsewhere explain that the projections wouldn't go to Mr. Gentile unless FE7's supervisor had agreed "with the results of the exercise (*i.e.*, the number of layoffs)." *Id.* And in the complaint, the plaintiffs don't identify anyone with personal knowledge of the supervisor's approval of the layoff projections or their delivery to Mr. Gentile. *See Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009) ("[T]he complaint must provide an adequate basis for determining that the witnesses in question have personal knowledge of the events they report."). So the plaintiffs fail to adequately allege that Mr. Gentile saw FE7's input into the layoff projections.

The complaint also lacks particularized allegations about the contents of the final layoff projections. Given the limitations on FE7's role, the allegations address only some of the data incorporated at an early stage of preparation. For example, the plaintiffs allege that

- FE7 had submitted information about what would happen if Boeing reduced purchases of shipsets,
- other individuals submitted additional information, and

- still other individuals then combined the submissions into a set of projections.

If the supervisor were to approve these projections, they would go to Mr. Gentile.

But the complaint contains no information beyond the contribution of FE7's own data: There's nothing about the contributions from other Spirit employees, the content of the final projections, or the supervisor's approval or rejection of the projections.

In light of these omissions, FE7's input resembles the confidential witness's input that we considered insufficient in *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229 (10th Cir. 2016). In *Anderson*, the plaintiffs alleged securities fraud based on public statements that had contradicted reports from confidential witnesses. *Id.* at 1240–41. We concluded that the plaintiffs hadn't adequately alleged the content of the reports or the defendants' receipt of the reports. *Id.* Though one confidential witness had contributed data to the reports, we noted that Spirit had

- combined this data with data collected from other employees and
- revised the reports before they went to the defendants.

Id. at 1241.

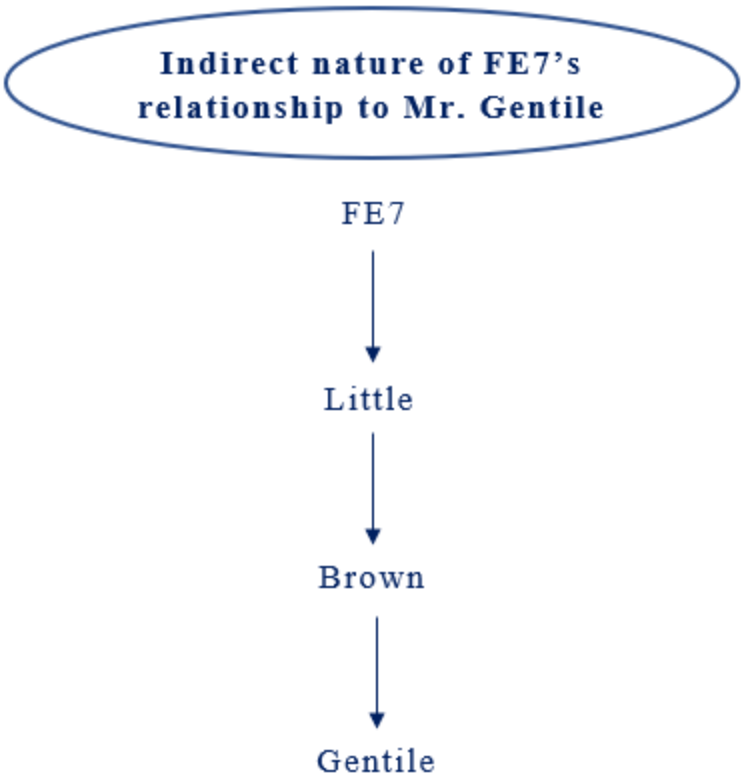
Like the confidential witness in *Anderson*, FE7 allegedly contributed information to larger reports. But like the larger reports in *Anderson*,

Spirit's final layoff projections included additional information from other employees. The complaint thus doesn't tell us what was in the final version of the projections.

The dissent tries to distinguish *Anderson*. According to the dissent, *Anderson* sensibly declined to infer scienter because the witnesses there had lacked a close connection to the defendants. Dissent at 8. For example, the dissent notes that

- one witness "was four levels removed from" executives who made allegedly fraudulent statements and
- other witnesses had no reporting relationship to those executives.

Id. But FE7 also lacked a "reporting relationship" to Mr. Gentile. FE7 instead reported to Ms. Little, who in turn reported to Spirit's Senior Vice President for the Boeing Program (Mr. Bill Brown), who in turn reported to Mr. Gentile. *See* Appellants' App'x vol. 1, at 45–46.



In fact, the complaint acknowledges that FE7 had only "occasional contact with [Mr.] Gentile" at meetings. *Id*. at 46.

Though *Anderson* undercuts the significance of the layoff projections, FE7's alleged knowledge could support an inference that Mr. Gentile had obtained similar information from someone else. *See* Dissent at 8–9 (noting that unlike *Anderson*, the executives in this case could have learned of the information from third parties). But the possibility of that inference isn't enough; the plaintiffs must identify facts with particularity that create a strong inference of Mr. Gentile's fraudulent intent or recklessness. *See* p. 6, above. And the complaint contains no

particularized allegations that anyone told Mr. Gentile of Boeing's plan to reduce purchases.

Without such an allegation, the plaintiffs point to Spirit's layoff projections. But what did those projections say? Spirit characterizes the final version as a compilation of various contingencies, including a drop in Boeing's purchases. And the plaintiffs have not questioned Spirit's characterization of the final version. Given the contingencies in the projections, the plaintiffs' allegations don't create a strong inference of Mr. Gentile's knowledge of Boeing's plan to reduce purchases of the shipsets. *See Smallen v. W. Union Co.*, 950 F.3d 1297, 1310 (10th Cir. 2020) (rejecting an inference of scienter when a complaint had failed to provide "particularized facts tying the [officers]" to facts known by other company executives).

The plaintiffs rely not only on the layoff projections but also on allegations that Mr. Gentile actively participated in the 737 MAX program and served as a hands-on executive with close ties to Boeing. Based on these allegations, the plaintiffs argue that Mr. Gentile would have quickly learned of any decision by Boeing to cut purchases. *See, e.g.*, Appellants' App'x vol. 1, at 162 (alleging in the complaint that Mr. Gentile had "communicated with Boeing *daily* regarding the 737 MAX" (emphasis in original)); *see also id.* at 164 (alleging that Mr. Gentile had "communicated daily with Boeing regarding the 737 MAX"); Appellants'

Opening Br. at 6 ("[T]hroughout the Class Period, Spirit and Boeing employees worked onsite at each other's facilities, and Gentile himself communicated *daily* with Boeing." (emphasis in original)); *id.* at 39–41 (stating that Mr. Gentile was a hands-on executive and that the 737 MAX was "crucial" to Spirit's bottom line); Appellants' Reply Br. at 3 (arguing that Mr. Gentile "had *daily* communications with Boeing" (emphasis added)); *id.* at 9 (arguing that the plaintiffs had pleaded Mr. Gentile's close monitoring of production of the 737 MAX through "*daily* communications with Boeing" (emphasis in original)). The plaintiffs point out that these daily communications led Mr. Gentile to express confidence that he would quickly learn from Boeing about plans to reduce purchases of the shipsets. Appellants' App'x vo1. 1, at 162–63. But to show scienter, the plaintiffs can't rely solely on Mr. Gentile's active involvement in a "particular project" even when the project involves "Spirit's core operations." *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1245–46 (10th Cir. 2016). The plaintiffs allege Mr. Gentile's close involvement with the 737 MAX program, but don't provide any

particularized allegations that would create a strong inference of scienter. *See id.*[4]

In a footnote, the plaintiffs also point to their allegations that Mr. Gentile sold Spirit stock in early February 2020. By then, however, Spirit had already announced that it was no longer selling shipsets for the 737 MAX. How can we infer scienter from Mr. Gentile's sale of stock after the public had all of the same information about Spirit's loss in business?

Other allegations diminish the significance of Mr. Gentile's sale of stock. For example, the complaint points out that Mr. Gentile had actually increased his holdings in late January 2020. According to the complaint, Mr. Gentile had acquired more than 60,000 shares of Spirit stock and then sold fewer than 48,000 shares. Appellants' App'x vol. 1, at 170. So Mr. Gentile's total shares increased despite his sales after the public announcement.

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[4] For example, if a defendant makes a false statement about a data point involving the company's core operations, a claimant might base scienter on the defendant's act of monitoring the data point. *See Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1263–64 (10th Cir. 2022). But no such allegations exist here. For example, the plaintiffs don't allege with particularity that

- anyone told Mr. Gentile about Boeing's plan to cut purchases of the shipsets or
- Mr. Gentile saw data that would have alerted him to Boeing's plan.

On appeal, the plaintiffs attribute the increase in Mr. Gentile's stock to grants and options. But the plaintiffs forfeited this argument by failing to present it in district court. *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127 (10th Cir. 2011). Even if the plaintiffs had preserved the argument, though, it wouldn't support scienter. After all, Mr. Gentile received the new shares after Spirit had already announced that it was no longer selling the shipsets.

* * *

In summary, the complaint doesn't allege facts with particularity that would reflect Mr. Gentile's knowledge or reckless disregard of Boeing's plan to cut purchases of the shipsets. Mr. Gentile presumably knew, as the public did, that Boeing might reduce purchases. But the complaint doesn't contain particularized allegations showing that Mr. Gentile was aware, by October 31, 2019, that Boeing had decided to reduce purchases of shipsets. So the district court properly concluded that scienter was missing for the claims involving Mr. Gentile's reassurance of continued sales to Boeing.

ii. The district court considered the plaintiffs' allegations holistically.

The plaintiffs also criticize the district court for considering the allegations individually rather than holistically. We reject this criticism. The district court said four times that it was viewing the plaintiffs' allegations holistically. *Meitav Dash Provident Funds & Pension Ltd. v.*

Spirit AeroSystems Holdings, Inc., No. 20-cv-00077-SPF-JFJ, 2022 WL 377415, at *18, *21, *23, *25 (N.D. Okla. Jan. 7, 2022). We have no reason to question the district court's statement. *See Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093 (10th Cir. 2003) ("In light of the district court's express statement that it considered the pleadings in their entirety, we have no reason to conclude otherwise."); *accord In re VeriFone Holdings, Inc. Sec. Litig.*, 704 F.3d 694, 702–03 (9th Cir. 2012) (stating that when courts have discussed specific allegations, "a brief statement that the court has also viewed the claims holistically has been sufficient").

Granted, the district court separately discussed each of the plaintiffs' allegations. But "[a] district court may best make sense of scienter allegations by first looking to the contribution of each individual allegation to a strong inference of scienter." *Owens v. Jastrow*, 789 F.3d 529, 537 (5th Cir. 2015). So the court can analyze the allegations separately before considering them as a whole. *See id.* at 536–37. We take the same approach because of the need to consider each of the plaintiffs' allegations before considering them together.

Though individual allegations might not suffice, they can sometimes complement each other. *Yates v. Mun. Mortg. & Equity, LLC*, 744 F.3d 874, 893 (4th Cir. 2014). For example, the dissent argues that six factual allegations complement each other:

1. Mr. Gentile was Spirit's chief executive officer.

2. Spirit obtained most of its revenue from sales to Boeing.

3. Mr. Gentile acknowledged a close relationship with Boeing.

4. Mr. Gentile may have received the layoff projections.

5. Mr. Gentile had access to meetings where production cuts may have been discussed.

6. Mr. Gentile sold stock during the class period.

Dissent at 12–14.

We view many of these allegations differently. For example, the complaint contains no particularized allegations stating what was in the layoff projections that went to Mr. Gentile. *See Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1241 (10th Cir. 2016) (rejecting an inference of scienter because Spirit's reports had undergone multiple revisions before the final versions would have gone to Spirit's chief executive officer or chief financial officer). And the stock sales don't reflect scienter because Mr. Gentile sold the stock months after Boeing had publicly announced that it would stop production of the 737 MAX and Spirit had announced that it would stop selling shipsets to Boeing. *See* p. 19, above.

The other allegations involve Mr. Gentile's position and the significance of Boeing to Spirit's core operations. But Mr. Gentile's position and Spirit's core operations do little to create an inference of

scienter. *See Anderson*, 827 F.3d at 1245–46 (concluding that the plaintiffs didn't adequately allege scienter based on core operations, a defendant's position within a company, or the opportunity to attend meetings); *Smallen v. W. Union Co.*, 950 F.3d 1297, 1307–08 (10th Cir. 2020) (concluding that the plaintiffs didn't adequately allege scienter based on a defendant's position within a company and attendance at meetings); *In re Level 3 Commc'ns., Inc. Sec. Litig.*, 667 F.3d 1331, 1344 (10th Cir. 2012) (concluding that the plaintiff didn't adequately allege scienter based on the defendants' attendance at meetings and a motive to defraud).

Whether we view these factual allegations in isolation or together, they don't create a particularized basis to draw a strong inference of Mr. Gentile's awareness of Boeing's plan to cut purchases of the shipsets. Even in combination, second-hand reports from other Spirit employees don't show that Mr. Gentile knew of or consciously disregarded Boeing's plans when he made the disputed statements.

B. Spirit's regulatory reports on October 31, 2019

On October 31, 2019, Spirit not only made oral statements through Mr. Gentile but also filed documents with the federal government. These reports echoed Mr. Gentile's optimistic projections of continued sales to Boeing. The regulatory statements came from Spirit's chief financial officer (Mr. Garcia) and corporate controller (Mr. Gilson).

In the complaint, the plaintiffs alleged that Mr. Garcia and Mr. Gilson had learned of Boeing's decision to cut purchases of shipsets. In response, Mr. Garcia and Mr. Gilson urged an inference that they hadn't known of Boeing's plan. So the issue of scienter turned on a comparison of the competing inferences. In addressing this issue, the district court concluded that the plaintiffs had not adequately alleged a reason for Mr. Garcia or Mr. Gilson to know about Boeing's plan to cut purchases from Spirit.

On appeal, Mr. Garcia and Mr. Gilson argue that (1) the plaintiffs failed to challenge this ruling and (2) any appellate challenge is thus waived. The plaintiffs do not address this waiver argument in their reply brief. Given this omission, we consider only the possibility of an obvious error in the defendants' assertion of a waiver. *Eaton v. Pacheco*, 931 F.3d 1009, 1031 (10th Cir. 2019).

We see no obvious error in the defendants' assertion of a waiver. For example, the plaintiffs' opening brief refers only three times to Mr. Garcia or Mr. Gilson in connection with their regulatory statements about continued sales to Boeing:

1. a footnote stating that Spirit's chief financial officer and corporate controller would certainly know of Boeing's impending cut in purchases of shipsets based on the importance to Spirit's core operations,

2. a passing reference to the scienter of Mr. Garcia and Mr. Gilson, and

3. a footnote stating that the district court should have considered Mr. Garcia's certifications despite his exposure to contrary information.

Appellants' Opening Br. at 36 n.17, 38, 42 n.19.

The plaintiffs disavow an argument that core operations alone can establish scienter. And the plaintiffs' three passing references to the scienter of Mr. Garcia and Mr. Gilson don't address any flaws in the district court's reasoning. Without an argument from the plaintiffs, we see no obvious flaw in the defendants' assertion of waiver as to the scienter of Mr. Garcia and Mr. Gilson.

C. The market observer's report on November 24, 2019

A securities analyst, Jefferies LLC, distributed a statement on November 24, 2019, about Spirit's expectations. Jefferies based the statement on a prior meeting with Mr. Gentile (Spirit's chief executive officer) and Mr. Garcia (Spirit's chief financial officer). In the report, Jefferies stated the "takeaways" from the meeting with Spirit's management. One of the "takeaways" was Spirit's expectation that Boeing would continue to buy the same number of shipsets for the next six months. Appellants' App'x vol. 2, at 324. The plaintiffs attribute this statement to Mr. Gentile and Mr. Garcia because the report identifies them as sources.

The district court concluded that the Jefferies report couldn't support a strong inference of scienter. We agree because the complaint doesn't

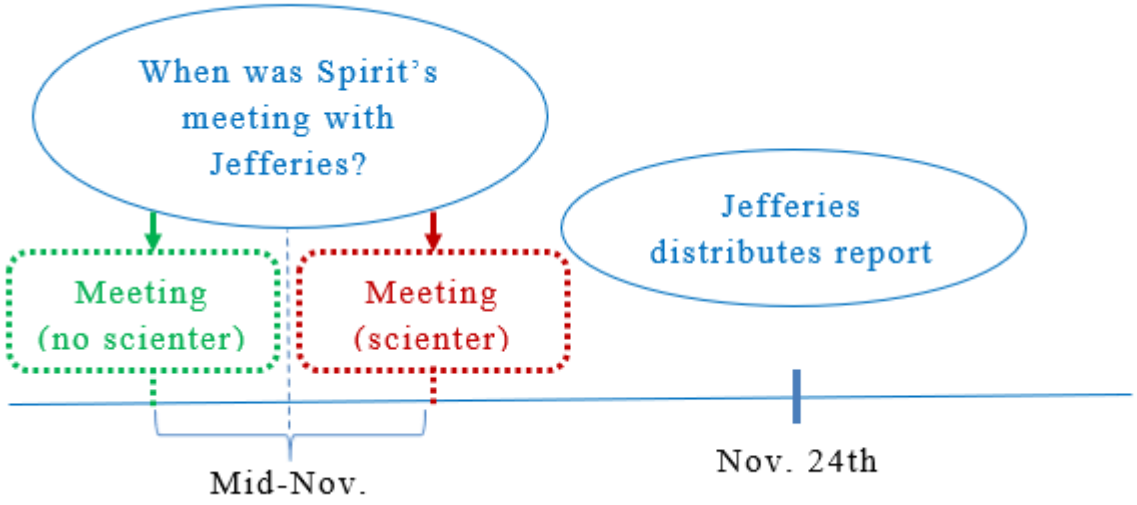
- identify facts showing Spirit's control over the content of the Jefferies report or
- say when Spirit met with Jefferies.

The district court could attribute the Jefferies report to Mr. Gentile and Mr. Garcia only if they had controlled the contents and method of communication. *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 141–42 (2011). Nothing in the complaint or the report suggests that Mr. Gentile or Mr. Garcia had controlled the contents of the report or method of communication.

Even if the contents or method of communication could be attributed to Mr. Gentile or Mr. Garcia, the complaint doesn't create a strong inference of scienter in light of the failure to say when Mr. Gentile and Mr. Garcia met with Jefferies. Although we've concluded earlier that the complaint doesn't adequately allege scienter as of October 31, 2019, the plaintiffs argue that Mr. Gentile or Mr. Garcia would have learned of Boeing's plans at a staff meeting in mid-November 2019.

But did Mr. Gentile or Mr. Garcia talk to Jefferies after this staff meeting? We ordinarily require the plaintiffs to state when the defendants had made the false representation. *Koch v. Koch Indus., Inc.*, 203 F.3d 1202, 1236 (10th Cir. 2000). Here the plaintiffs don't say when Mr. Gentile or Mr. Garcia had met with Jefferies.

This lack of particularity matters because the meeting with Jefferies could have preceded the disclosure of Boeing's plans in mid-November. Jefferies distributed the report on November 24, 2019, so the preparation must have started earlier. But how much earlier? The report spans roughly 30 pages, so the preparation time could have been substantial. Given the uncertainty over the preparation time, the complaint fails to allege with particularity that the November staff meeting had preceded Jefferies' meeting with Mr. Gentile and Mr. Garcia.



So the district court couldn't draw a strong inference of scienter from the general allegations that Jefferies had met with Mr. Gentile and Mr. Garcia at some unspecified date.[5]

[5] The defendants also rely on Boeing's public statements that it was planning to continue buying shipsets from Spirit. We need not address the defendants' reliance on Boeing's public statements.

4. The plaintiffs didn't adequately plead scienter for false statements about Spirit's accounting controls.

The plaintiffs also complain about statements involving the adequacy of Spirit's accounting controls. These complaints stemmed from Mr. Campbell's undervaluation of claims against Spirit. While Mr. Campbell was undervaluing claims, Mr. Garcia and Mr. Gilson were certifying the adequacy of Spirit's accounting controls.[6] Spirit later acknowledged inadequacies in these controls.

For the sake of argument, we can assume that the regulatory filings were false. This assumption triggers an issue involving the scienter of Mr. Garcia and Mr. Gilson: Does the complaint allege with particularity that they knew about the inadequacies in Spirit's accounting controls for estimating contingent liabilities? The plaintiffs urge awareness based on two resignations, a firing, and information from two former employees.

With the public announcement of inadequacies in accounting controls, Spirit fired Mr. Campbell; and Mr. Garcia and Mr. Gilson quit. The plaintiffs also rely on information from two former employees, FE9 and FE10. According to the complaint, FE9 questioned Mr. Campbell's accounting and expressed concern to Mr. Gilson. Mr. Gilson allegedly

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[6] In the complaint, the plaintiffs also allege that Mr. Gentile had made public statements about the adequacy of Spirit's accounting controls. But the plaintiffs' opening brief on appeal doesn't mention Mr. Gentile's alleged scienter regarding the accounting controls. *See* Appellants' Opening Br. at 43–48.

responded by "shut[ting] down" FE9's concerns. Appellants' App'x vol. 1, at 107. The plaintiffs allege that FE10 also questioned Mr. Campbell's accounting of contingent liabilities, but the plaintiffs don't allege that FE10 shared this skepticism with anyone else.

Based on the resignations, firing, and information from FE9 and FE10, the plaintiffs make three arguments:

1. Mr. Gilson knew about the inadequacy in accounting controls because FE9 had expressed concern.

2. Suspicion arises from the firing of Mr. Campbell and the resignations of Mr. Garcia and Mr. Gilson.

3. Mr. Garcia and Mr. Gilson must have known about the inadequacy in accounting controls because Spirit had estimated customer claims on most contracts and had regularly discussed Boeing's claims.

Individually or combined, these allegations don't create a strong inference of scienter.

The plaintiffs' allegations reflect FE9's communication of concerns to Mr. Gilson in early 2019—months before Mr. Gilson had certified Spirit's regulatory reports. These concerns involved Spirit's lack of appropriate training, delegation of too much control to Mr. Campbell, and his manipulation of the accounting. *Id.* at 105–07. The complaint alleges that "FE 9 discussed her concerns with Defendant Gilson and other Finance personnel, but to no avail." *Id.* at 107.

But the complaint doesn't suggest that Mr. Gilson had agreed with FE9. To the contrary, the complaint states that Mr. Gilson and other finance personnel had "shut [FE9] down." *Id.* And the complaint doesn't allege Mr. Gilson's awareness of anyone else who agreed with FE9.[7]

Granted, a factfinder might infer that Mr. Gilson knew from FE9's expression of concern that the accounting controls were inadequate. *See* Dissent at 10–11, 15–16. But an even more plausible inference is that Mr. Gilson disagreed with FE9 and maintained confidence in Spirit's accounting controls.

We've elsewhere rejected an inference of scienter in part because the allegations didn't show that a Spirit executive had doubted his own accounting. *Anderson v. Spirit Aerosystems Holdings, Inc.*, 827 F.3d 1229, 1245 (10th Cir. 2016).[8] Here, too, the plaintiffs' witness accounts don't suggest that Mr. Gilson had questioned Mr. Campbell's accounting. To the contrary, the witness account suggests that Mr. Gilson and other finance

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[7] The complaint does allege that some of FE9's colleagues "shared [FE9's] concerns" about Mr. Campbell's faulty accounting. Appellants' App'x vol. 1, at 108. But the plaintiffs don't allege that these colleagues had told Mr. Gilson about these concerns. So Mr. Gilson had to rely solely on a single conversation with FE9, where Mr. Gilson and other finance personnel had shut down FE9's concerns.

[8] The dissent tries to distinguish *Anderson* on the ground that *Anderson* concerned optimistic statements about "cost projections [that] were future estimates." Dissent at 9–11 & n.5. We don't see the purported distinction. Mr. Campbell was responsible for estimating future liabilities. As in *Anderson*, the estimates were allegedly too optimistic.

personnel did not agree with FE9's concerns. We thus have little basis to infer scienter from FE9's expression of concern.

The complaint does allege that Mr. Gilson "knew of and permitted Defendant Campbell to manipulate the value of the Boeing claims." Appellants' App'x vol. 1, at 107. But the complaint says only that FE9 expressed concern to Mr. Gilson about Mr. Campbell. Because there's no indication that Mr. Gilson believed FE9 or otherwise harbored these concerns, the complaint lacks the required particularity for a strong inference of scienter from FE9's communication with Mr. Gilson. Nor does the complaint say how Mr. Gilson would have learned from someone other than FE9 that Mr. Campbell had been making overly optimistic projections.

Those projections involved estimates about how much Spirit would eventually need to pay on outside claims. According to the plaintiffs, these claims were subject to negotiation. As a hypothetical example, FE9 described a situation in which Spirit could get Boeing to cut its customer claims from $10 million to $5 million. Appellants' App'x vol. 1, at 105. The eventual loss wouldn't be known until Spirit had completed its negotiations with Boeing. Given the need for negotiation, Mr. Gilson could not have learned that the controls were inadequate until the negotiations were complete.

In fact, the complaint suggests that Mr. Gilson might not have recognized the inadequacy in accounting controls even after Boeing had

completed its negotiations. After all, the plaintiffs allege that Mr. Gilson didn't monitor Mr. Campbell's projections. For example, FE9 allegedly said that Spirit hadn't adequately discussed "discrepancies between the actual value of Boeing Claims based on Spirit's contracts with Boeing, and the value that Campbell accounted for in the [estimates] he submitted." *Id.* at 110 (emphasis omitted). FE9 attributed the lack of discussion to Spirit's delegation of final authority to Mr. Campbell for estimates on the claims. *Id.*

Given the uncertainty, the need for negotiation, and the delegation of final authority to Mr. Campbell, the complaint lacks a particularized reason to infer that Mr. Gilson would have recognized an inadequacy in accounting controls as early as October 2019. The nature of Mr. Campbell's projections entailed uncertainty; according to the complaint, Mr. Gilson was ill equipped to recognize an inadequacy in accounting controls because he wasn't monitoring Mr. Campbell's estimates.[9]

The plaintiffs rely not only on FE9's expression of concern but also on the firing of Mr. Campbell and the resignations of Mr. Garcia and

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[9] Given the allegations, Spirit might have used poor judgment or acted negligently in failing to exercise greater oversight over Mr. Campbell. But we cannot base scienter on either negligence or poor business judgment. *See Smallen v. W. Union Co.*, 950 F.3d 1297, 1312 (10th Cir. 2020) (negligence); *Rothman v. Gregor*, 220 F.3d 81, 90 (2d Cir. 2000) ("poor business judgment").

Mr. Gilson. Different inferences are possible. One is that Spirit forced Mr. Garcia and Mr. Gilson to resign because they had been complicit in Mr. Campbell's understatements of contingent liabilities. Another inference is that Mr. Garcia and Mr. Gilson quit because their inattention had allowed Mr. Campbell to undervalue claims. The inference of inattention is justifiable, and the plaintiffs didn't make particularized allegations of scienter based on the later resignations. *See In re Zagg, Inc., Sec. Litig.*, 797 F.3d 1194, 1205 (10th Cir. 2015) (stating that a "forced resignation [was] at most an acknowledgment that the company identified a better way of doing things moving forward, not an indicator that fraudulent intent existed at the time the alleged omissions occurred"); *see also In re Hertz Global Holdings Inc.*, 905 F.3d 106, 118 (3d Cir. 2018) ("[F]or corporate departures to strengthen an inference of scienter, there must be particularized allegations connecting the departures to the alleged fraud.").

Apart from these personnel moves, the plaintiffs point out that Spirit used the same accounting process for most of its sales contracts. But we see little reason to attribute complicity in the misconduct. After all, the plaintiffs allege that Spirit delegated virtually unchecked authority to Mr. Campbell. Ultimately, Mr. Campbell failed to record an unpredicted loss of about $8 million in the third quarter of 2019. Appellants' App'x vol. 1, at 172, 201. This loss was minor compared to Spirit's revenue that quarter, which amounted to almost $1.92 billion. *See* Appellants' App'x

vol. 2, at 356 (noting that Spirit had a revenue approximating $1,919,900,000 in the quarter ending September 26, 2019); *see also Smallen v. W. Union Co.*, 950 F.3d 1297, 1306–07 (10th Cir. 2020) (rejecting an inference of scienter, even though the fraudulent transactions involved over $632 million during a 12-year period, in part because the transactions had constituted a relatively small amount of the defendant's business).

Given these allegations, the district court properly regarded the plaintiffs' collective allegations of scienter as weak rather than strong. Mr. Campbell's alleged misuse of the accounting processes may reflect inadequate oversight. But the plaintiffs don't identify a cogent reason to infer the defendants' awareness of the inadequacy in Spirit's accounting controls.

5. The complaint lacks particularized allegations to impute Mr. Campbell's scienter to Spirit.

The plaintiffs seek to impute liability to Spirit based on the alleged scienter of its executives. We have already concluded that the complaint doesn't adequately allege scienter on the part of Mr. Gentile, Mr. Garcia, and Mr. Gilson. But the plaintiffs also point to Mr. Campbell.

The plaintiffs don't allege fraudulent or reckless statements by Mr. Campbell. Instead, the plaintiffs attribute liability to Spirit because its

other executives had misled the public based on false information from Mr. Campbell.

The court can impute scienter to a corporation if an official intentionally or recklessly

- makes a false statement or
- furnishes false information for inclusion in a statement.

Smallen v. W. Union Co., 950 F.3d 1297, 1313 (10th Cir. 2020). The plaintiffs thus try to pin liability on Spirit for its false statements based on information that Mr. Campbell had furnished.

The plaintiffs allege that when Spirit was reassuring investors, Mr. Campbell knew about Boeing's plan to cut purchases of the shipsets. But the plaintiffs don't allege that Mr. Campbell reported his information to anyone making the public disclosures or preparing a public statement. To the contrary, the plaintiffs allege only that Mr. Campbell had a chance to report what he knew. The chance to disclose information doesn't imply an actual disclosure.

Nor do the plaintiffs allege a basis to infer that Mr. Campbell disclosed Spirit's inadequate accounting controls. The plaintiffs allege that Mr. Campbell fudged the numbers to make himself look better.[10] But the

[10] When others learned of the flaws in Mr. Campbell's accounting, he was fired. This firing doesn't create a strong inference of complicity. To the contrary, the firing suggests that others at Spirit had not known what

plaintiffs don't allege that Mr. Campbell told others about his improper accounting techniques.

The plaintiffs instead allege that Mr. Campbell provided overly optimistic estimates to other executives. But those estimates didn't appear in any of the alleged statements by Mr. Gentile, Mr. Garcia, or Mr. Gilson. Those statements involved the adequacy of Spirit's accounting controls—not the accuracy of Mr. Campbell's projections. And the complaint contains no allegations that Mr. Campbell provided information about the adequacy of Spirit's accounting controls to the other defendants or to anyone preparing a public statement.[11] The complaint thus fails to tie the certifications to information from Mr. Campbell. *See Smallen v. W. Union Co.*, 950 F.3d 1297, 1313 (10th Cir. 2020).[12]

Mr. Campbell was doing. *See* pp. 32–34, above. So the complaint doesn't imply scienter for Spirit itself.

[11] Because the complaint lacks particularized allegations showing that Mr. Campbell furnished false information for inclusion in a public statement, we need not consider his potential scienter.

[12] In their opening brief, the plaintiffs argue that the "Complaint . . . adequately alleged that Campbell . . . furnished false information for inclusion in Defendants' misstatements regarding Spirit's compliance with [generally accepted accounting principles]." Appellants' Opening Br. at 50. This argument misstates the allegations in the complaint. The complaint contains no allegations that Mr. Campbell provided information about the accounting controls to the other executives making the false statements.

The plaintiffs also attribute Mr. Campbell's scienter to Spirit because he was a senior officer. The Court may be able to impute scienter to a corporation when a senior officer recklessly or intentionally approves a false statement to the public. *See Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1106 (10th Cir. 2003) (imputing scienter to a corporation when executives had signed fraudulent financial statements with an intent to deceive investors). But the complaint doesn't allege Mr. Campbell's approval of a public statement.

The plaintiffs try to fill the gap by arguing that any senior officer's scienter can be imputed to a corporation. We have not gone that far. Some circuits have allowed plaintiffs to plead scienter through a senior official's knowledge of a misrepresentation. For example, the Second Circuit recognizes corporate scienter when a plaintiff alleges that statements "'would have been approved by corporate officials sufficiently knowledgeable about the company to know' that those statements were misleading." *Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC*, 797 F.3d 160, 177 (2d Cir. 2015) (quoting *Teamsters Loc. 445 Freight Div. Pension Fund v. Dynex Cap. Inc.*, 531 F.3d 190, 195–96 (2d Cir. 2008)). And the Sixth Circuit allows courts to impute scienter to a corporation if a "high managerial agent or member of the board of directors . . . ratified, recklessly disregarded, or tolerated the misrepresentation after its

utterance." *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 476 (6th Cir. 2014).

But even if we were to follow the approach in the Second or Sixth Circuit, the plaintiffs don't allege Mr. Campbell's knowledge of a false statement. In the complaint, the plaintiffs allege that Mr. Campbell had provided inaccurate estimates to others. But these allegations didn't encompass Mr. Campbell's knowledge of regulatory filings on the adequacy of Spirit's accounting controls. So the plaintiffs have not shown how a court could impute Mr. Campbell's scienter to Spirit.

6. The lack of direct liability prevents liability as a controlling person.

When direct liability exists, an individual can incur joint and several liability for control over someone who has committed securities fraud. 15 U.S.C. § 78t(a). But we have upheld the dismissal of each individual defendant. Without direct liability, no basis exists for joint and several liability as a controlling person.

7. The district court did not abuse its discretion by denying leave to amend the complaint.

The district court dismissed the action with prejudice. The plaintiffs challenge the dismissal, arguing that the court should have allowed them to amend.

But the plaintiffs didn't seek leave to amend the complaint. They instead opposed dismissal, adding a request to amend if the court were to

regard the complaint as inadequate. We've held that a request like this is inadequate to preserve a request for leave to amend the complaint. *Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1187 (10th Cir. 1999); *see also Garman v. Campbell Cnty. Sch. Dist. No. 1*, 630 F.3d 977, 986 (10th Cir. 2010) (stating that it's insufficient for a claimant to request a chance to amend if the court concludes that "her pleadings were infirm").

Once the district court dismissed the complaint, the plaintiffs needed to "move to reopen the case under Federal Rule of Civil Procedure 59(e) or 60(b) and then move for leave to amend under Rule 15." *Brooks v. Mentor Worldwide LLC*, 985 F.3d 1272, 1283 (10th Cir. 2021). With no motion to reopen or amend the complaint, the district court didn't abuse its discretion in disallowing amendment. *Id.*

Affirmed.

APPENDIX[13]

Date	Speaker(s)	Allegedly fraudulent statement
10/31/19	Garcia, Gilson	"To improve quality and cost efficiencies, we slowed down production temporarily in June 2019, and, as a result, we delivered fewer shipsets per month during the month of June. We expect that the annualized average monthly shipset deliveries over the course of the year to be at rate 52 subject to any reductions that Boeing may decide to implement."
10/31/19	Garcia, Gilson	"The B737 MAX fleet has now been grounded for over six months. For so long as the grounding of the B737 MAX fleet continues, there may be further reductions in the production rate, including a temporary shutdown in production. To the extent that the grounding of the B737 MAX fleet continues for an extended period of time and Spirit is required to further reduce its production rate on the B737 MAX aircraft, Spirit's business, financial condition, results of operations and cash flows could be materially adversely impacted."
10/31/19	Garcia	"Spirit continues to produce at a rate of 52 aircraft per month in accordance with its agreement with Boeing."
10/31/19	Gentile	"We are continuing to produce at a rate of 52 aircraft per month as we agreed with Boeing, and currently have about 65 shipsets in storage at our facilities. We communicate with Boeing regularly and we'll coordinate our production rates with them based on the timing of the MAX returning to service."
10/31/19	Gentile	"Our current expectations are that we will continue to produce at rate 52 in order to burn off the excess stored inventory after Boeing eventually transitions to rate 57. Given current production and storage levels, our expectation is that we will not produce at a higher rate than 52 through 2020, [20]21 and possibly into 2022."

[13] The information in this list comes from a summary that the plaintiffs submitted in district court. Appellants' App'x vol. 2, at 243–48 (modifications in original).

10/31/19	Gentile	"If Boeing goes down more, we would sit down and talk with them about what's the appropriate production level for us. That's why we didn't give guidance for the rest of this year. We still don't know when the MAX is going to go back into service. And we'll work closely with Boeing to determine what the right production level is. Now what I would say though is that this period of time where we're at 52, gives us a chance to achieve some stability that we haven't had for a while. So going back to 2016, we were shifting from the NG to the MAX. We were hiring lots of new people. We were going up 10% a year in terms of our rate from 42 to 47 then 52 then getting ready for 57. So as you can imagine, a lot of disruption, a lot of extra costs as we were going through those learning curves. Now we're going to be at 52 for an extended period of time, which will allow us to get more stable, and allow our supply chain to get healthy. And that will mean not only more stability, but also opportunities to improve quality, which is so important now in the industry, probably more important than it's ever been."
11/24/19	Jefferies LLC	"[Spirit] targets 16.5% segment margins, despite stable 737 MAX rates and lower 787. The two moving targets for 2020 are MAX and 777 production. The MAX is set to stay at a rate of 52/mo. until May 2020 w/ a potential rate decision at that time."
10/31/19	Garcia, Gilson	"Our President and Chief Executive Officer and Senior Vice President and Chief Financial Officer have evaluated the effectiveness of our disclosure controls and procedures as of September 26, 2019 and have concluded that these disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) of the Securities Exchange Act of 1934) are effective to provide reasonable assurance that information required to be disclosed by us in the reports that we file or submit under the Securities Exchange Act of 1934, as amended, is recorded, processed, summarized and reported within the time period specified in the SEC rules and forms.

		These disclosure controls and procedures include, without limitation, controls and procedures designed to provide reasonable assurance that information required to be disclosed by us in the reports we file or submit is accumulated and communicated to management of the Company, including our principal executive and principal financial officers, as appropriate to allow timely decisions regarding required disclosure."
8/9/18	Gentile, Garcia, Gilson	"Our management is responsible for establishing and maintaining adequate internal control over financial reporting as such term is defined in Rules 13a-15(f) and 15d-15(f) of the Securities Exchange Act of 1934. Internal control over financial reporting is a process designed by, or under the supervision of, our principal executive and principal financial officers and effected by the Company's board of directors, management and other personnel . . . Management conducted an evaluation of the effectiveness of our internal control over financial reporting as of December 31, 2018. In making this evaluation, we used the criteria set forth by the Committee of Sponsoring Organizations of the Treadway Commission (COSO) in Internal Control-Integrated Framework (2013 Framework). Based on this evaluation, our management concluded that our internal control over financial reporting was effective as of December 31, 2018."
10/31/19	Gentile, Garcia	"2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report; 3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations, and cash flows of the registrant as of, and for, the periods presented in this report;"

10/31/19	Gentile, Garcia	"[To the best of my knowledge] . . . [t]he information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company."
10/31/19	Gentile, Garcia	"4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have: (a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared; (b) Designed such internal controls over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;"
10/31/19	Gentile, Garcia	"5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's Board of Directors (or persons performing the equivalent functions): (a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely

		affect the registrant's ability to record, process, summarize, and report financial information; and (b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting."
10/31/19	Garcia, Gilson	"The accompanying unaudited interim condensed consolidated financial statements include the Company's financial statements and the financial statements of its majority-owned or controlled subsidiaries and have been prepared in accordance with accounting principles generally accepted in the United States of America ("GAAP") and the instructions to Form 10-Q and Article 10 of Regulation S-X."
10/31/19	Garcia, Gilson	"In the opinion of management, the accompanying unaudited interim condensed consolidated financial statements contain all adjustments (consisting of normal recurring adjustments and elimination of intercompany balances and transactions) considered necessary to fairly present the results of operations for the interim period."
10/31/19	Garcia, Gilson	"There were no changes in our internal control over financial reporting during the quarter ended September 26, 2019, that have materially affected, or are reasonably likely to materially affect, our internal control over financial reporting."

22-5013, *Meitav Dash Provident Funds & Pension Ltd. v. Spirit AeroSystems Holdings, Inc.*
Phillips, J., dissenting.

I disagree with the majority's scienter analysis. In my view, the majority errs by affirming the dismissal of this case based on its conclusion that the complaint does not allege with particularity that either Chief Executive Officer Thomas C. Gentile III or Vice President and Corporate Controller John Gilson knew that their statements to investors were materially false.

First, the majority requires Plaintiffs to make this showing against CEO Gentile by alleging that someone told him about Boeing's upcoming jetliner production cuts. Second, even though a former employee told VP Gilson about Spirit's accounting misconduct, the majority requires Plaintiffs to allege more facts to bolster the former employee's credibility. Third, for both CEO Gentile and VP Gilson, the majority uncritically accepts Spirit's post-hoc assertions that the pair could not have known about Boeing's production cuts and Spirit's accounting failures. In other words, the majority reads Plaintiffs' complaint as alleging that CEO Gentile and VP Gilson did not know about two seismic problems bubbling at the company but that several low-level employees did. I would conclude that Plaintiffs' complaint pleads a strong inference of scienter for CEO Gentile and VP Gilson.

I

I disagree with the majority's view that the complaint fails to allege facts giving rise to a strong inference of CEO Gentile's scienter. According to the

majority, "scienter would exist only if Mr. Gentile was aware of what the Boeing employees had said," meaning someone at Boeing or Spirit had to have told him about the jetliner production cuts. Maj. Op. 11–12.[1] But we've ruled that to "assess[] the sufficiency of a plaintiff's allegations under the PSLRA, a court 'must consider the complaint in its entirety' and decide 'whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.'" *Ind. Pub. Ret. Sys. v. Pluralsight, Inc.*, 45 F.4th 1236, 1259 (10th Cir. 2022) (quoting *Smallen*, 950 F.3d at 1305). No single fact is dispositive in a scienter analysis because we assess all the facts alleged, not individual allegations. The majority simply elevates the complaint's failure to allege a particular fact to a dispositive status not warranted by precedent.

Further, requiring allegations that someone told CEO Gentile about the production cuts, the majority does not sufficiently consider that in our circuit, plaintiffs can proceed by pleading reckless conduct. Recklessness is "conduct

[1] As support, the majority relies on *Smallen v. Western Union Co.*, 950 F.3d 1297, 1313 (10th Cir. 2020), and *Southland Securities Corp. v. INSpire Insurance Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004). Neither case holds that individual securities defendants must have direct knowledge of their fraudulent statements. For instance, in *Smallen*, we said that "Plaintiff does not plead any particularized facts either tying the Individual Defendants to the consumer complaints or the agent arrests, or otherwise demonstrating the Individual Defendants were aware Western Union's compliance program had failed to redress these issues." 950 F.3d at 1307. We thus recognized that individual defendants' awareness of their fraudulent statements is one way—but not the exclusive way—to show scienter under the securities laws.

that is an extreme departure from the standards of ordinary care, and 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." *In re Zagg, Inc. Sec. Litig.*, 797 F.3d 1194, 1201 (10th Cir. 2015) (citation omitted). It requires proof of a "defendant's knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *City of Philadelphia v. Fleming Cos.*, 264 F.3d 1245, 1261 (10th Cir. 2001). "In the securities-fraud context, recklessness is akin to conscious disregard . . . ." *Smallen*, 950 F.3d at 1305. So securities plaintiffs need not always plead that defendants actually knew their statements were false when made. Plaintiffs can survive dismissal by pleading, for instance, that defendants made reckless misstatements when they have "knowledge of facts or access to information contradicting their public statements" such that they "should have known that they were misrepresenting material facts related to the corporation." *Novak v. Kasaks*, 216 F.3d 300, 308 (2d Cir. 2000).

Nor does the PSLRA require allegations of a defendant's direct knowledge. As several courts have noted, the PSLRA permits securities plaintiffs to prove scienter through circumstantial evidence of a defendant's state of mind and motive. *E.g.*, *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1347 (10th Cir. 2012) ("[A] plaintiff may adequately plead scienter by identifying circumstances that indicate conscious behavior on the part of the

defendant, though the strength of the circumstantial allegations must be correspondingly greater." (citation omitted)); *Nathenson v. Zonagen Inc.*, 267 F.3d 400, 410 (5th Cir. 2001) ("There does not appear to be any question that under the PSLRA circumstantial evidence can support a strong inference of scienter."); *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 276 (3d Cir. 2006) ("The requisite strong inference of fraud may be established . . . by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." (cleaned up) (citation omitted)). The majority imposes too high a pleading burden at the dismissal stage by mandating allegations of direct evidence of CEO Gentile's knowledge.

I also disagree with the majority's view that the complaint fails to allege facts giving rise to a strong inference of VP Gilson's scienter. Here, the majority acknowledges that the complaint alleges that VP Gilson knew of the accounting misconduct after learning of it from a concerned employee, FE 9. Maj. Op. 29. But rather than find its self-made necessary condition of direct knowledge satisfied, the majority creates more pleading conditions for securities plaintiffs: they must allege "that Mr. Gilson had agreed with FE9" and must allege "Mr. Gilson's awareness of anyone else who agreed with FE9." Maj. Op. 30. The majority cites no law to support such stringent pleading requirements. Absent discovery, I am unsure how Plaintiffs could faithfully plead whether VP Gilson, a named Defendant, agreed with FE 9's concerns. Or whether VP Gilson was aware of communications to and from other

employees.[2] We do not require this level of evidentiary pleading under the PSLRA. *See Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1101 (10th Cir. 2003) ("The PSLRA did not . . . purport to move up the trial to the pleadings stage. While the PSLRA certainly heightened pleading standards for securities fraud lawsuits, we believe that if Congress had intended in securities fraud lawsuits to abolish the concept of notice pleading that underlies the Federal Rules of Civil Procedure, Congress would have done so explicitly.").

The majority suggests that VP Gilson didn't find FE 9 credible, noting that the complaint alleges that he and others "shut [FE9] down." Maj. Op. 30 (alteration in original). That approach runs counter to our standard of review for Rule 12(b)(6) dismissals. *Level 3 Commc'ns Sec. Litig.*, 667 F.3d at 1339 ("We review de novo the district court's dismissal under Rule 12(b)(6) . . . , accepting all well-pleaded factual allegations in the complaint as true and construing them in the light most favorable to the plaintiff." (cleaned up) (citations omitted)). But more importantly, "a court cannot dismiss a complaint by assessing the credibility of an informant." *Nakkhumpun v. Taylor*, 782 F.3d 1142, 1152 (10th Cir. 2015) (citing *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)). We instead assess whether Plaintiffs have alleged that FE 9 provided sufficiently reliable information. *See Adams*, 340 F.3d at

[2] Notably, the complaint tries to meet the majority's prohibitive standard. It alleges, for example, that several of FE 9's colleagues "shared her concerns about the inappropriate handling" of the company's accounting. App. vol. 1, at 108 (¶ 179).

1102–03; *Makor Issues & Rts., Ltd. v. Tellabs, Inc.*, 513 F.3d 702, 712 (7th Cir. 2008) (Posner, J.) ("The information that the confidential informants are reported to have obtained is set forth in convincing detail, with some of the information, moreover, corroborated by multiple sources."). And here, taking all inferences in Plaintiffs' favor, the complaint provides us with several indicia of the reliability of FE 9's information, including that she oversaw a team working on the 737 MAX program, that she worked closely with VP Campbell, and that she was familiar with Spirit's accounting-control processes. *E.g.*, app. vol. 1, at 47–48 (¶ 54), 97–100 (¶¶ 158–62), 100–03 (¶¶ 164–68).

Finally, in my view, the majority at times misconstrues the relevant inference-balancing analysis we undertake in securities litigation. Under that analysis, we assess whether "a reasonable person would deem the inference of scienter cogent and *at least as compelling as* any opposing inference one could draw from the facts alleged." *Tellabs*, 551 U.S. at 324 (emphasis added). We conduct this analysis after holistically considering plaintiffs' allegations of scienter. *See Pluralsight*, 45 F.4th at 1267–68; *Smallen*, 950 F.3d at 1311–12; *Nakkhumpun*, 782 F.3d at 1153. But the majority instead isolates the individual allegations of scienter and fashions competing inferences to defeat those allegations.[3] *But see Tellabs*, 551 U.S. at 323 (noting that the standard of

[3] For example, when discussing the layoff analyses, the majority notes that "the plaintiffs have not questioned Spirit's characterization" that the final layoff analyses were mere contingency plans. Maj. Op. 17.

review is "not whether any individual allegation, scrutinized in isolation," gives rise to a strong inference of scienter). The majority should assess all the allegations together *and then* assess whether the competing inferences are stronger than the complaint's allegations of scienter.

II

In the majority's quest to reject the common-sense inference of scienter for CEO Gentile and VP Gilson, it misapplies our decision in *Anderson v. Spirit AeroSystems Holdings, Inc.*, 827 F.3d 1229 (10th Cir. 2016). There, the plaintiffs accused four Spirit executives of bilking investors by concealing several cost overruns and project delays on Spirit's core projects. *Id.* at 1239. The plaintiffs tried to establish scienter by alleging accounts from ten low-level employees—all of whom attested to the overruns and delays. *Id.* at 1239–40. And the plaintiffs pointed to an internal cost-study report and internal quarterly reports that purported to document these problems. *Id.* at 1240.

We refused to impute these employees' accounts to the Spirit executives. We reasoned that "[t]he witnesses' accounts do not allege that the four Spirit executives actually received the internal business group's cost-study report," that "[t]he witness accounts do not adequately describe the contents of the quarterly reports allegedly sent to the Spirit executives," and that "[g]eneral accounts of mismanagement and delay do not imply that the four Spirit executives knew that the projects would fall short of long-term cost forecasts." *Id.* Motivating our reasoning was that the "witnesses were too far removed from

the four Spirit executives and did not provide sufficiently particularized accounts of what the Spirit executives must have known." *Id.* at 1244. Indeed, we were wise to reject these employees' accounts because, otherwise, "[g]eneralized claims about corporate knowledge" from far-removed employees could morph into a strong inference of scienter. *Id.* (quoting *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d 981, 998 (9th Cir. 2009)).

Anderson made sense because the plaintiffs asked us to accept the untenable inference of scienter that a constellation of internal complaints from low-level employees about problems on specific projects bubbled up to the Spirit executives. In that situation, as we said, the plaintiffs must describe with particularity what information the executives saw and how that information made its way to the executives. *Id.* at 1240–44. And the plaintiffs failed to do so—for instance, one employee was four levels removed from Spirit's executives, and many other employees "had no alleged reporting relationship to the defendants." *Id.* at 1242–43. So we declined to impute these internal complaints of overruns and project delays to Spirit's executives without a showing that the executives would have concerned themselves with the day-to-day minutiae of project costs and timelines.

This case is different. For CEO Gentile, Plaintiffs' inference of scienter does not depend solely on whether he saw and knew about internal reports or a patchwork of employee accounts. That's because, unlike the information the executives allegedly should have pieced together in *Anderson*, the key

information here is a *single*, *critical*, *external* data point: Boeing's decision to cut production of (and eventually stop producing) the 737 MAX. So what matters is whether Plaintiffs have alleged with particularity an inference of scienter that CEO Gentile had access to this 737 MAX information from Boeing and should have known from Boeing that the company was cutting production of the 737 MAX. That several employees at Spirit knew about Boeing's production cuts thus *supports* an inference that CEO Gentile should have also known about Boeing's intentions.[4]

Anderson also does not help resolve the question of VP Gilson's scienter. In *Anderson*, we assessed whether one of Spirit's vice presidents (Terry George) knowingly misrepresented the projected future costs on Spirit's 787 project with Boeing. *Id.* at 1244. The plaintiffs alleged that, in an undated meeting, George told an employee that "the cost projections were too high" and "threatened to find managers who 'could achieve [lower] forecasts.'" *Id.* We ruled that these allegations did not give rise to actionable scienter because, at best, they showed that "George was too optimistic about Spirit's ability to reduce costs on the Boeing 787 project." *Id.* at 1245. That conclusion made sense because these cost projections were future estimates. *Cf. In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 930 (9th Cir. 1996) (finding that a corporate

[4] Indeed, the majority focuses on the form of the final version of the layoff analyses, *see* Maj. Op. 13–17, while sidestepping the common-sense inference those analyses create. Why were employees at Spirit preparing layoff analyses in the first place?

statement that the FDA would approve the company's drug by 1993 was nonactionable because it was "forecasting a future event" and "the company could have known of problems in the testing procedures, planned to remedy those deficiencies, and still thought it would achieve FDA approval by the estimated date"). Thus, the plaintiffs hadn't defeated the innocuous and more compelling explanation that George had been hopeful that the cost overruns would abate in the future. *See Anderson*, 827 F.3d at 1245 ("[The employee's] account does not suggest that Mr. George believed his cost-control efforts were unrealistic or that he wished to intentionally mislead investors.").

Here, the complaint alleges that VP Gilson recklessly disregarded FE 9's account of past accounting misconduct and thus misrepresented the efficacy of Spirit's "estimate at completion" (or EAC) process. *E.g.*, app. vol. 1, at 107 (¶ 178), 137–38 (¶ 241) (alleging that statement that Spirit's financial statements complied with generally accepted accounting principles was false "because in order to comply with GAAP, a company must implement adequate internal controls for financial reporting"). The complaint alleges neither forward-looking vagaries nor doubts about what VP Gilson knew.[5] FE 9 raised

[5] The majority sees this case as no different from *Anderson* because VP Gilson didn't doubt VP Campbell's accounting of contingent liabilities. Maj. Op. 30–32. But in *Anderson*, we assessed whether an executive's statements about cost controls rendered future-looking cost projections false or misleading. So, it made sense for us to assess whether the executive doubted his own cost-control measures. Here, we are assessing whether VP Gilson's public statements about the effectiveness of Spirit's accounting controls are

(*footnote continued*)

concerns about past "failures in the EAC process" to VP Gilson—including the "impossib[ility] to even come close to the numbers [VP Campbell] had put into the EAC for Boeing Claims." App. vol. 1, at 106–07 (¶¶ 176, 178). I see no lurking innocent explanation here: If VP Gilson believed FE 9's account, then he knew Spirit's statements about the EAC process were false. If he discounted FE 9's account, then he consciously disregarded a known failure of Spirit's EAC process.

All to say that *Anderson* did not create a prohibitive evidence-pleading standard; it simply ruled that the plaintiffs hadn't come close to alleging the specifics of what Spirit's executives knew.

III

Under de novo review, I would conclude that Plaintiffs have sufficiently alleged that both CEO Gentile and VP Gilson made recklessly misleading statements. In doing so, I would of course "accept the well-pleaded allegations of the complaint and construe them in the light most favorable to the plaintiff." *Nakkhumpun*, 782 F.3d at 1146. I would conclude that the complaint "state[s] with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Level 3 Commc'ns Sec. Litig.*, 667 F.3d at

misleading because he recklessly omitted *past* accounting misconduct. App. vol. 1, at 137–38 (¶ 241), 142 (¶ 250). In my view, the complaint doesn't need to allege that VP Gilson knew VP Campbell's contingencies to be false so long as it alleges that he recklessly ignored information about past failures in Spirit's EAC process.

1333. On that point, I would further conclude that the complaint alleges a strong inference of recklessness, which, as mentioned, requires proof of a "defendant's knowledge of a fact that was so obviously material that the defendant must have been aware both of its materiality and that its non-disclosure would likely mislead investors." *Fleming Cos.*, 264 F.3d at 1261. And then unlike the majority, I would "consider the complaint in its entirety" and consider "*all* of the facts alleged, taken collectively." *Pluralsight*, 45 F.4th at 1259 (citation omitted).

For CEO Gentile, the complaint contains six categories of allegations that give rise to a strong inference that he consciously disregarded information about the production cuts:

1. Gentile was the CEO of Spirit. App. vol. 1, at 40–41 (¶ 37). Though his role is not dispositive to a scienter analysis, it is a "relevant fact" because he had motive to learn about any of Boeing's production cuts as CEO. *See Zagg Sec. Litig.*, 797 F.3d at 1205 ("*A defendant's position is a relevant fact*, but we have previously rejected the notion that knowledge may be imputed *solely* from an individual's position within a company." (emphases added) (citation and internal quotation marks omitted)).

2. The complaint alleges that "sales to Boeing accounted for roughly 79% of Spirit's net revenues" and the 737 MAX program "accounted for more than 50% of Spirit's annual revenue during the Class Period." App. vol. 1, at 53–54 (¶ 70) (emphases omitted). These facts alone furnish strong evidence that CEO Gentile was likely aware of all things Boeing. *See Berson v. Applied Signal Tech., Inc.*, 527 F.3d 982, 988 n.5 (9th Cir. 2008) ("The size of the contract and the prominence of the client raise a strong inference that defendants would be aware of this order."); *Adams*, 340 F.3d at 1106 (reasoning that fraud pertaining to "more than one quarter of the $22.4 million in net income" in the first quarter of 1998 "[s]trengthen[ed] the inference" that the CEO knew the falsity of

his statements); *Anderson*, 827 F.3d at 1255 (Lucero, J., concurring and dissenting in part) (noting as relevant to the scienter analysis that "Spirit's cost overruns on the 787 project resulted in forward-losses of $184 million, approximately one quarter of reported earnings across 2010-2011").

3. The complaint alleges that CEO Gentile made several public statements about Spirit and Boeing's close working relationship. For example, in June 2019, CEO Gentile told analysts and investors, "So, we're going to work very closely with Boeing to understand when does the MAX go back into service, what is their production plan and what's the right number of aircraft to split between producing this year and next year." App. vol. 1, at 61 (¶ 85) (emphasis omitted); *see also, e.g.*, *id.* at 57 (¶ 75) (alleging that, in May 2019, CEO Gentile told investors, "We work very closely with Boeing every day" (emphasis omitted)); *id.* at 70 n.11 ("According to another former Spirit employee, FE 5, Defendant Gentile had daily communications with Boeing . . . ."). CEO Gentile's own words tell us that he would be monitoring Boeing's production of the 737 MAX. *See Pluralsight*, 45 F.4th at 1263–64 (finding Chief Financial Officer's prior statements to investors and analysts touting his careful attention to sales data relevant to the scienter analysis).

4. The complaint alleges that CEO Gentile saw layoff analyses based on the production cuts. App. vol. 1, at 71–72 (¶ 105); *see Level 3 Commc'ns Sec. Litig.*, 667 F.3d at 1345 ("'[D]ivergence between internal reports and external statements on the same subject' and 'disregard of the most current factual information before making statements' can be factors supporting scienter." (quoting *Frank v. Dana Corp.*, 646 F.3d 954, 959 n.2 (6th Cir. 2011))).[6]

[6] The majority misreads the complaint's allegations about CEO Gentile's direct knowledge of the layoff analyses. According to the majority, the allegation that CEO Gentile saw the first round of layoff analyses is "conclusory" and conflicts with other allegations in the complaint. Maj. Op. 13. But taking all inferences in favor of Plaintiffs and reading the complaint holistically, we can deduce much about what CEO Gentile saw. Plaintiffs allege that FE 7 was tasked to "provide necessary data so that others could analyze the appropriate level of workers needed to continue production at the new lower [shipset] rate." App. vo1. 1, at 71 (¶ 104). And, undercutting the majority's

(*footnote continued*)

5. The complaint alleges that CEO Gentile had access to meetings where the production cuts would have been discussed. App. vol. 1, at 67–68 (¶ 98), 70–71 (¶ 103), 110–11 (¶ 183). The complaint alleges that FE 7, a Business Operations Specialist that often reported to CEO Gentile about "data on the performance of Spirit's 737 MAX program," attended a "regular production meeting" in late September or early October 2019 about Boeing's jetliner production cuts. *Id.* at 67 (¶ 98).

6. The complaint alleges that CEO Gentile sold securities during the class period. *Id.* at 170–71 (¶¶ 317–20); *see Pluralsight*, 45 F.4th at 1264–65 (observing that suspicious trades in the class period support a strong inference of scienter).

Viewed holistically, these allegations raise a strong inference that the CEO—who touted Spirit's close relationship with Boeing, the company's most important customer—knew about Boeing's 737 MAX production cuts by early October 2019. Though independently nonactionable, as a whole, these categories of allegations lead to a strong inference of scienter. They allege with particularity that CEO Gentile likely knew about, or was reckless in not

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assertion that the complaint alleges "nothing about the contributions from other Spirit employees," Maj. Op. 14, Plaintiffs allege that "planning personnel examined staffing levels and costs and considered the financial impact of staffing reductions, such as the impact on earnings per share, in order to come up with the number of layoffs with which the executive leadership and Spirit's Board of Directors would be comfortable," app. vol. 1, at 71 (¶ 104). The complaint then alleges that FE 7 presented the layoff analyses to Senior Vice President Bill Brown and VP Campbell. *Id.* And then that the analyses were "presented to Spirit's executive leadership, including Defendant Gentile." *Id.* (¶ 105). I see nothing conclusory or conflicting in these allegations. It is a reasonable inference that SVP Brown and VP Campbell approved the layoff analyses and sent them to CEO Gentile for review. And Plaintiffs tell us that CEO Gentile received the layoff analyses, which I infer he read based on the analyses' financial and earnings-per-share implications.

knowing about, the production cuts before he told investors about them. *See Pluralsight*, 45 F.4th at 1267–69; *Southland Sec. Corp.*, 365 F.3d at 380.

This strong inference of recklessness is at least as plausible as any competing inference that CEO Gentile did not know about the production cuts. The competing inference depends on CEO Gentile's being inattentive in his duty as head of Spirit—that he didn't talk to Boeing about its jetliner cuts, that he didn't attend meetings where his employees discussed the impact of those cuts, and that he never viewed layoff analyses that his direct reports worked closely on (or that he viewed these layoff analyses as mere contingency plans). And all this concerning Boeing, Spirit's biggest customer, which accounted for almost 80% of Spirit's net revenue. *See Makor Issues & Rts.*, 513 F.3d at 711 ("Is it conceivable that [the CEO] was unaware of the problems of his company's two major products and merely repeating lies fed to him by other executives of the company? It is conceivable, yes, but it is exceedingly unlikely.").

As for VP Gilson's scienter, the complaint alleges that he "knew of and permitted Defendant Campbell to manipulate the value of the Boeing Claims in the 737 EAC." App. vol. 1, at 107 (¶ 178). As mentioned, the complaint alleges with particularity that FE 9 discussed VP Campbell's accounting misconduct with VP Gilson and that VP Gilson "did not take any appropriate actions to remedy the problems." *Id.*; *see also id.* at 104 (¶ 173) ("Campbell's manipulation was simple and out in the open for everyone at Spirit to

see . . . .").[7] In addition, the complaint alleges that VP Gilson had ready access to meetings where Spirit's accounting controls were discussed, that he signed the company's third-quarter Form 10-Q (which contained assurances that Spirit's financial statements were GAAP-compliant), and that he soon after resigned. App. vol. 1, at 109–11 (¶¶ 182–83), 111–12 (¶ 186), 137–38 (¶¶ 240–43), 153–54 (¶ 277). Taken together, these allegations create a strong inference that VP Gilson likely knew about and ignored Spirit's accounting failures. Any competing inference pales in comparison, especially given the complaint's detailed allegations of FE 9's description of the accounting failures to VP Gilson.

Because I would find actionable scienter for both CEO Gentile and VP Gilson, I would also impute that scienter to Spirit. "The scienter of the senior controlling officers of a corporation may be attributed to the corporation itself to establish liability as a primary violator of § 10(b) and Rule 10b-5 when those senior officials were acting within the scope of their apparent authority." *Adams*, 340 F.3d at 1106–07 (citations omitted). I would impute to Spirit CEO Gentile's scienter for the statements on the production cuts and VP Gilson's scienter for the statements on Spirit's accounting controls.

[7] The majority asserts that VP Gilson couldn't have learned of Spirit's accounting failures until negotiations over what VP Campbell projected were complete. Maj. Op. 31–32. But that inference for Defendants skirts that the complaint alleges that VP Gilson ignored FE 9's concerns about the accounting failures in the first place.

I respectfully dissent.