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**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

IN RE COINBASE GLOBAL, INC.,
SECURITIES LITIGATION

Civil Action No. 2:22-cv-04915-BRM-LDW

Hon. Brian R. Martinotti

Oral Argument Requested

Motion Day: January 16, 2024

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION
TO DISMISS THE SECOND AMENDED CONSOLIDATED CLASS
ACTION COMPLAINT**

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
FACTUAL BACKGROUND.....	4
A. Allegations Relating to Bankruptcy Risk.....	4
B. Allegations Relating to Trading	6
C. Allegations Relating to Regulatory Risks	8
LEGAL STANDARD.....	13
ARGUMENT	14
I. THE SAC FAILS TO PLEAD A SECTION 10(B) CLAIM	14
A. The SAC Fails To Allege Any Material Misstatement Or Omission.....	14
1. The Security Statements Are Not False Or Misleading.....	14
a. None of the Challenged Statements Addressed, Let Alone Concealed, Any Purported “Bankruptcy Risk”	14
b. Plaintiffs Fail To Plead The Allegedly Omitted “Bankruptcy Risk” Ever Existed At All (And Indeed It Did Not).....	16
c. The “Trust” Statements Are Nonactionable	19
2. The Trading Statements Are Not False Or Misleading	20
a. The Article’s Anonymous Allegations Are Insufficient To Plead Falsity.....	21
b. The Article Does Not Contradict The Challenged Statements.....	23
c. The Trading Statements Are Inactionable	24

3.	The Regulatory Risk Statements Are Not False Or Misleading.....	25
a.	Defendants Disclosed Interactions With The SEC Promptly And Had No Duty To Speculate Further	26
b.	Defendants’ Statements Did Not Misleadingly Minimize The Risks Of The SEC Investigation And Are Nonactionable Opinions	29
B.	The SAC Fails To Allege A Strong Inference Of Scienter.....	32
1.	The SAC Fails To Allege Any Motive Based On The Defendants’ Stock Sales or Compensation.....	32
2.	Plaintiffs Allege No Conscious Misbehavior Or Recklessness.....	34
a.	Security Statements	34
b.	Trading Statements	37
c.	Regulatory Risk Statements.....	37
3.	The SAC Fails To Allege The “Core Operations” Inference Or Any Other Circumstantial Evidence Of Fraud	39
C.	The SAC Fails To Allege Loss Causation	40
II.	THE SAC FAILS TO PLEAD A SECURITIES ACT CLAIM.....	42
A.	The SAC Fails To Plead Securities Act Standing.....	43
1.	Plaintiffs Lack Section 11 Standing.....	43
2.	Plaintiffs Lack Section 12 Standing.....	45
B.	The SAC Fails To Plead A Section 11 Claim.....	46
C.	The SAC Fails To Plead A Section 12 Claim.....	47
III.	THE SAC FAILS TO PLEAD CONTROL PERSON LIABILITY	48

CONCLUSION.....48

TABLE OF AUTHORITIES

Page(s)

CASES

In re Amarin Corp. PLC Sec. Litig.,
2021 WL 1171669 (D.N.J. Mar. 29, 2021)*passim*

In re Audible Inc., Sec. Litig.,
2007 WL 1062986 (D.N.J. Apr. 3, 2007).....33

In re Aurora Cannabis, Inc. Sec. Litig.,
2022 WL 4446125 (D.N.J. Sept. 23, 2022).....39

In re Aurora Cannabis Inc. Sec. Litig.,
2023 WL 5508831 (D.N.J. Aug. 24, 2023).....41

Backhaus v. Streamedia Commc’ns, Inc.,
2002 WL 1870272 (S.D.N.Y. Aug. 14, 2002).....45

In Re Blockfi Inc. et al.,
No. 22-bk-19361 (Bankr. D.N.J. May 17, 2023).....18

Brody v. Transitional Hospitals Corp.,
280 F.3d 997 (9th Cir. 2002)15, 28

In re Burlington Coat Factory Sec. Litig.,
114 F.3d 1410 (3d Cir. 1997)14

Cal. Pub. Emp. Ret. Sys. v. Chubb Corp.,
394 F.3d 126 (3d Cir. 2004)46

In re Campbell Soup Co. Sec. Litig.,
2022 WL 6961796 (D.N.J. Oct. 11, 2022)48

In re Celsius Network LLC,
647 B.R. 631 (Bankr. S.D.N.Y. 2023).....19

In re Century Aluminum Co. Sec. Litig.,
729 F.3d 1104 (9th Cir. 2013)43

CFTC v. Zhao,
No. 1:23-cv-01887-MSS (N.D. Ill. Mar. 27, 2023) (ECF No. 1).....30

Chan v. New Oriental Educ. & Tech. Grp. Inc.,
2019 WL 2865452 (D.N.J. July 3, 2019)21, 22

City of Edinburgh Council v. Pfizer, Inc.,
754 F.3d 159 (3d Cir. 2014)13

City of Pontiac Policemen’s and Firemen’s Ret. Sys. v. UBS AG,
752 F.3d 173 (2d Cir. 2014)26

City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.,
70 F.4th 668 (3d Cir. 2023)19, 31

In re Craftmatic Sec. Litig.,
890 F.2d 628 (3d Cir. 1989)48

Curry v. Yelp Inc.,
875 F.3d 1219 (9th Cir. 2017)41

De Vito v. Liquid Hldgs. Grp., Inc.,
2018 WL 6891832 (D.N.J. Dec. 31, 2018).....42, 43, 44

In re Delmarva Sec. Litig.,
794 F. Supp. 1293 (D. Del. 1992).....46

Dura Pharms., Inc. v. Broudo,
544 U.S. 336 (2005).....40

In re Fairway Grp. Hldgs. Corp. Sec. Litig.,
2015 WL 4931357 (S.D.N.Y. Aug. 19, 2015).....46

Fan v. StoneMor Partners LP,
927 F.3d 710 (3d Cir. 2019)39

In re Galena Biopharma, Inc. Sec. Litig.,
2019 WL 5957859 (D.N.J. Nov. 12, 2019)26

Gold v. Ford Motor Co.,
577 F. App’x 120 (3d Cir. 2014)32

GSC Partners CDO Fund v. Washington,
368 F.3d 228 (3d Cir. 2004)34, 37

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995).....45

In re Heartland Payment Sys., Inc. Sec. Litig.,
2009 WL 4798148 (D.N.J. Dec. 7, 2009).....16

In re Hertz Glob. Hldgs., Inc. Sec. Litig.,
2017 WL 1536223 (D.N.J. Apr. 27, 2017).....33

Howard v. Arconic Inc.,
2021 WL 2561895 (W.D. Pa. June 23, 2021)46

Inst. Inv. Grp., v. Avaya, Inc.,
564 F.3d 242 (3d Cir. 2009)25, 32

In re Intelligroup Sec. Litig.,
527 F. Supp. 2d 262 (D.N.J. 2007).....40

Klein v. Gen. Nutrition Cos., Inc.,
186 F.3d 338 (3d Cir. 1999)48

Laasko v. Endo Int’l, PLC,
2022 WL 3444038 (D. N.J. Aug. 17, 2022)33, 39

In re Lantronix, Inc. Sec. Litig.,
2003 WL 23198818 (C.D. Cal. Dec. 31, 2003).....43

Lewakowski v. Aquestive Therapeutics, Inc.,
2023 WL 2496504 (D.N.J. Mar. 14, 2023)34

In re Lions Gate Entm’t. Corp. Sec. Litig.,
165 F. Supp. 3d 1 (S.D.N.Y. 2016)27

In re Lululemon Sec. Litig.,
14 F. Supp. 3d 553 (S.D.N.Y. 2014)17, 24

Matrixx Initiatives, Inc. v. Siracusano,
563 U.S. 27 (2011).....15

McCabe v. Ernst & Young, LLP.,
494 F.3d 418 (3d Cir. 2007)41

Novak v. Kasaks,
 216 F.3d 300 (2d Cir.2000)38

OFI Asset Mgmt. v. Cooper Tire & Rubber,
 834 F.3d 481 (3d Cir. 2016)17

Oklahoma Law Enf't Ret. Sys. v. Papa John's Int'l, Inc.,
 517 F. Supp. 3d 196 (S.D.N.Y. 2021)47

In re Omnicom Group, Inc.,
 541 F. Supp. 2d 546 (S.D.N.Y. 2008)40, 42

In re Optionable Sec. Litig.,
 577 F. Supp. 2d 681 (S.D.N.Y. 2008)22

Oran v. Stafford,
 226 F.3d 275 (3d Cir. 2000)15

In re Party City Sec. Litig.,
 147 F. Supp. 2d 282 (D.N.J. 2001).....33

Pelletier v. Endo Int'l PLC,
 439 F. Supp. 3d 450 (E.D. Pa. 2020).....26

Rahman v. Kid Brands, Inc.,
 736 F.3d 237 (3d Cir. 2013)22

Reilly v. United States Physical Therapy, Inc.,
 2018 WL 3559089 (S.D.N.Y. July 13, 2018).....32, 33

Ret. Sys. of the Gov't of the Virgin Islands v. J.P. Morgan Chase & Co.,
 804 F. Supp. 2d 141 (S.D.N.Y. 2011)48

Richman v. Goldman Sachs Grp., Inc.,
 868 F. Supp. 2d 261 (S.D.N.Y. 2012)38

Risley v. Universal Navigation Inc. et. al.,
 2023 WL 5609200 (S.D.N.Y. Aug. 29, 2023).....30, 48

SEC v. Ripple Labs, Inc.,
 20-cv-10832 (S.D.N.Y. Aug, 18, 2023) (ECF 893)31

SEC v. Ripple Labs, Inc.,
 2023 WL 4507900 (S.D.N.Y. July 13, 2023).....9, 30

SEC v. Terraform Labs Pte. Ltd.,
 2023 WL 4858299 (S.D.N.Y. July 31, 2023).....31

Slack Techs., LLC v. Pirani,
 143 S. Ct. 1433 (2023).....43, 44, 45

SLF Hldgs., LLC v. Uniti Fiber Hldgs., Inc.,
 499 F. Supp. 3d 49 (D. Del. 2020).....15, 19, 41

In re Suprema Specialties, Inc. Sec. Litig.,
 438 F.3d 256 (3d Cir. 2006)43

In re Synchronoss Tech., Inc., Sec. Litig.,
 2019 WL 2849933 (D.N.J. July 2, 2019)33, 39

Tanaskovic v. Realogy Hldgs. Corp.,
 2021 WL 211049 (D.N.J. Jan. 21, 2021).....16, 19, 30

Tellabs, Inc. v. Makor Issues & Rights, Ltd.,
 551 U.S. 308 (2007).....31, 32, 36

Turnofsky v. electroCore, Inc.,
 2021 WL 3579057 (D.N.J. Aug. 13, 2021).....42, 47

In re UBS AG Sec. Litig.,
 2012 WL 4471265 (S.D.N.Y. Sept. 28, 2012)27

Ulbricht v. Ternium S.A.,
 2020 WL 5517313 (E.D.N.Y. Sept. 14, 2020)26

In re Vale S.A. Sec. Litig.,
 2017 WL 1102666 (S.D.N.Y. Mar. 23, 2017).....21

In re Voyager Dig. Hldgs., Inc.,
 2022 WL 3146796 (Bankr. S.D.N.Y. Aug. 5, 2022).....18

Weston Family P’ship LLLP v. Twitter, Inc.,
 29 F.4th 611 (9th Cir. 2022)13

In re Wilmington Tr. Sec. Litig.,
852 F. Supp. 2d 477 (D. Del. 2012).....46

Winer Fam. Tr. v. Queen,
503 F.3d 319 (3d Cir. 2007)15, 23

Wu v. GSX Techedu Inc.,
2023 WL 2207422 (D.N.J. Feb. 24, 2023)39

STATUTES

15 U.S.C. § 77k(a)42

15 U.S.C. § 77l(a)(2).....42, 45

15 U.S.C. § 78u-4(b)(1)-(2)13, 14

15 U.S.C. § 78u-4(b)(2)31

15 U.S.C. § 78u-5(i)(1)(A)-(C).....25

15 U.S.C. § 78u-5(c)25

REGULATIONS

17 C.F.R. § 240.10b-5(b)13, 15

Pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6), Defendants respectfully submit this Memorandum of Law in Support of their Motion to Dismiss Plaintiffs' Second Amended Consolidated Class Action Complaint.¹

PRELIMINARY STATEMENT

This case is a transparent attempt to manufacture a securities fraud lawsuit out of stock price drops during a tumultuous period for tech firms. Although stock drops often arise after the disclosed and obvious risks of running a new public company in a new industry materialize, that does not automatically create a claim for securities fraud, and Plaintiffs have failed to plausibly state one here. Instead, Plaintiffs' Second Amended Complaint ("SAC") launches scattershot attacks based on three distinct and very limited topics:

- a newly-added risk factor in Coinbase's May 10, 2022 10-Q about crypto assets in bankruptcy, added solely at the recommendation of the SEC itself, not a change in any actual bankruptcy risk;
- a mischaracterization of a single, anonymously-sourced news article about purported proprietary trading on September 22, 2022; and
- news concerning the SEC's investigation and potential enforcement action, even though that was properly and fully disclosed.

None of these allegations can support any of the claims brought under the Securities Exchange Act of 1934, the Securities Act of 1933, or related SEC rules because they

¹ Unless otherwise indicated, all internal citations and quotation marks are omitted, emphasis is added, citations to "¶ _" refer to the SAC, and citations to "Ex. _" refer to exhibits attached to the Declaration of Kevin M. McDonough, submitted herewith.

do not render false or misleading any of the challenged statements.

The **bankruptcy risk** claim fails because Plaintiffs do not, and cannot, allege a single fact suggesting that the purportedly omitted bankruptcy risk even existed (and indeed, it does not). None of the challenged statements so much as mentioned bankruptcy. They described *physical* security risks to crypto assets such as loss of a private key, and they set the terms of Coinbase’s staking and Wallet services. Indeed, there were no bankruptcy-related risks to disclose when Defendants made the challenged statements (nor today). Plaintiffs entirely ignore the strength of Coinbase’s balance sheet throughout the relevant time period, which was publicly disclosed and continues through today. And Plaintiffs turn a blind eye to *why* Coinbase added the risk factor in its May 2022 10-Q filing—a March 31, 2022 memo by SEC staff (“SAB 121”) *recommending* that every company holding crypto assets for its customers do so, regardless of any actual bankruptcy risk or change with respect to Coinbase itself.

The **trading** claim fails because it is plucked entirely from a *Wall Street Journal* article reporting that anonymous sources “described” Coinbase as “flirt[ing]” with a plan to trade crypto with its own money. The Third Circuit does not allow a claim for securities fraud on the word of an undescribed anonymous source. The claim separately fails because it has the anonymous allegations wrong. The article actually reported that Coinbase hired traders in July 2021 “to trade crypto

for clients,” i.e., not for Coinbase; then Coinbase “soured” on the whole idea of proprietary trading. Ex. 1 (WSJ Article) at 2-4. None of these allegations contradict Coinbase’s statements that it does not engage in proprietary trading.

Finally, the **regulatory risk** claim fails because Defendants fully and repeatedly disclosed the SEC’s investigation, including disclosing within hours the SEC’s Wells notice in an 8-K last spring. Coinbase also disclosed repeatedly the steps the SEC was taking over time that were at odds with the regulator’s own prior positions, underscoring the risk of an enforcement action despite Coinbase’s good faith compliance and the SEC’s own review process of Coinbase’s S-1. Plaintiffs’ suggestion that Coinbase’s well-known, fully disclosed, and heavily reported SEC investigation somehow led investors into believing the SEC would not take any regulatory action defies common sense. The fact that the SEC ultimately brought an action based on the overly expansive view of the securities law to which Coinbase had publicly and repeatedly objected—a view that has also now been rejected by at least one federal court—certainly does not create a securities fraud claim.

All three Exchange Act claims also fail for the independent reason that Plaintiffs fail to allege any inference of scienter. There are no plausible allegations that any Defendant had any motive to commit fraud. To the contrary, since their sales in Coinbase’s direct listing, all of the Executive Defendants’ stock sales have been made pursuant to trading plans. Nor do Plaintiffs plead a single fact suggesting

that any Defendant made any statement with an intent to deceive investors. Coinbase's proactive addition of an SEC Staff-guided risk factor before it was obligated to do so is *the opposite* of concealing a risk. And Coinbase could not have been more transparent in professing its genuinely held belief—shared at one time by the SEC itself—that the SEC's current approach to crypto regulation was unfounded or inscrutable at best. Coinbase has further reinforced those views in briefing in the SEC enforcement action, including its pending motion for judgment on the pleadings.

Finally, Plaintiffs cannot save the SAC with the newly-added Securities Act claims for the bankruptcy risk and trading statements. Just like the Exchange Act claims, the Securities Act claims fail because none of the challenged statements were false or misleading. The Securities Act claims also fail for the independent reason that Plaintiffs do not (and cannot) plead standing.

The SAC should be dismissed in its entirety.

FACTUAL BACKGROUND

Plaintiffs seek to represent a class of investors who bought Coinbase stock from the date of Coinbase's direct listing, April 14, 2021, through June 5, 2023, and bring claims based on three entirely distinct sets of factual allegations.

A. Allegations Relating to Bankruptcy Risk

The first category of challenged statements relates to a risk factor disclosure

that Coinbase added in its May 10, 2022 10-Q filing. In that filing, Coinbase reported an earnings miss in its May 10, 2022 10-Q, and after that filing, its stock price dropped. ¶ 234. Coinbase had no risk of bankruptcy then or now—at the time, the Company reported net income of \$3.6 billion for 2021 and had \$7.1 billion in cash and cash equivalents at the end of 2021. Ex. 2 (2021 10-K) at 117-18. But separately, six weeks prior, the SEC accounting staff had published a memo called SAB 121, which discussed the possibility of certain legal risks associated with investing in crypto, including whether under certain circumstances customers’ crypto assets could become property of a bankruptcy estate under certain crypto companies’ user agreements, and recommended that public companies address such a risk in public filings. Coinbase proactively added a responsive risk disclosure to its next 10-Q filing on May 10, 2022 (a quarter earlier than the SEC recommended), even though nothing about Coinbase or its customers’ ownership of their assets had changed at all. ¶ 395. Later that day, Coinbase’s CEO, Brian Armstrong, confirmed that the SAB 121 memo was the reason for the new disclosure, expressed his belief that Coinbase’s user agreement protected customers’ crypto in the event of a bankruptcy, and reassured customers that Coinbase was not at risk of bankruptcy. Ex. 3 (May 10, 2022 Armstrong tweets).

Plaintiffs now challenge any statement they can find prior to the May 2022 10-Q that relates to the “security” of crypto assets. *See* Appendix A, Statements 1-

17. But none concerns bankruptcy or any legal risks to customer assets.

B. Allegations Relating to Trading

The second category of challenged statements is based entirely on a *Wall Street Journal* article published on September 22, 2022. The article relied exclusively on anonymous sources who suggested that Coinbase was “flirt[ing]” with proprietary trading. Ex. 1 (Sept 22, 2022 WSJ Article) at 1. Those sources claimed that Coinbase started a Risk Solutions group in July 2021 “to trade crypto for clients,” but that the group subsequently “made plans to being making trades with Coinbase’s cash,” and made one supposed “test trade” at some point “earlier [in 2022],”² before “sour[ing]” on the idea. *Id.* at 1-4. The article described the anonymous sources as “people at the company” but did not identify their names or positions or even whether they worked in the Risk Solutions group at all. *Id.* Nor did the article provide any details about the test trade, including whether it was done away from Coinbase’s platform or whether it was a long-term investment. The article admits that the test trade was done with money from a client, but nonetheless suggests it was proprietary trading because the transaction was structured as a loan. *Id.* at 3. While the article claims (again based on anonymous sources) that Coinbase’s CFO was “involved in creation of the unit” to trade crypto for clients, the article

² Plaintiffs allege in ¶ 329 that the test trade was completed in “early 2022,” but the *Wall Street Journal* article simply reported that the trade was completed “earlier this year,” *i.e.*, at some time in 2022 before the article was published September 22, 2022.

does not in any way suggest that she knew of or was involved in the 2022 “test trade” or any supposed consideration of proprietary trading. *Id.* at 2. As also reported, a Coinbase spokeswoman told the *Wall Street Journal* that the Risk Solutions group “was established to facilitate client-driven crypto transactions,” and that “Coinbase does not, and has never, had a proprietary trading business.” *Id.*

As a public company, Coinbase has always been open about the kinds of trading it does. Throughout the putative class period, Coinbase fully disclosed the very limited kinds of trading it conducts using its own funds to trade crypto for both its customers and itself by fulfilling customer transactions as accommodations during system disruptions, *e.g.* ¶¶ 295, 299; making long-term investments in crypto with its own money, *e.g.* Ex. 4 (August 19, 2021 blog post disclosing that Coinbase had “committed to invest \$500 million of [its] cash and cash equivalents into a diverse portfolio of crypto assets”); and hedging those long term investments by taking short positions on crypto assets, Ex. 5 (May 10, 2022 10-Q) at 29; *see also* Ex. 24 (Nov. 10, 2021 10-Q) at 62 (“We have purchased, and intend in the future to continue to purchase, digital assets for investment and operational purposes.”). But Coinbase (rightly) does not view those “time to time” transactions as proprietary trading because their “purpose is not for Coinbase to benefit from short-term increases in value of the cryptocurrency being traded.” Ex. 6 (Sept. 22, 2022 blog post).

Plaintiffs apparently agree—they do not allege that any of these disclosed trading activities constitute *proprietary* trading. ¶ 17. Yet Plaintiffs challenge 33 statements made between April 14, 2021 and August 9, 2022, including statements that Coinbase does not engage in proprietary trading, as well as statements regarding Coinbase’s customer accommodation transactions and long-term crypto investments (though not the hedging statements). *See* Appendix A, Statements 18-50. Other than the *Wall Street Journal* article’s anonymously-sourced allegations, however, there is not a single fact alleged in the SAC that Coinbase engaged in anything other than the non-proprietary and disclosed trading activities.

C. Allegations Relating to Regulatory Risks

The final category of statements arises out of the SEC enforcement action filed on June 6, 2023, which alleges that 12 of the more than 240 assets listed on Coinbase’s platform are securities. Plaintiffs claim that Defendants downplayed the risk that the SEC would bring such an action and concealed that the SEC was taking steps to do so. *E.g.*, ¶¶ 342, 345, 357.

Coinbase takes substantial efforts to ensure that none of its products or services contravene the securities laws, and before its direct listing the Company described both its pre-listing process for new crypto assets and its staking services at length in publicly filed correspondence with the SEC’s Division of Corporation Finance. Ex. 25 (Dec. 21, 2020 Ltr.) at 2-9; Ex. 26 (Feb. 12, 2021 Ltr.) at 1-4. Also

before the direct listing, Coinbase specifically explained that “[t]he SEC and its staff have taken the position that certain crypto assets fall within the definition of a ‘security’ under the U.S. federal securities laws,” and even more importantly that the SEC’s “views in this area have evolved over time” and are “difficult to predict.” Ex. 7 (Registration Statement “RS”) at 29. Indeed, Coinbase specifically warned that “[i]t is also possible that a change in the governing administration or the appointment of new SEC commissioners could substantially impact the views of the SEC and its staff.” *Id.* Coinbase reminded investors about the SEC’s action against Ripple Labs, in which the SEC was alleging that Ripple’s sales of its crypto token were unregistered securities offerings, *id.* at 29-30—allegations which have now been substantially rejected by a U.S. District Court. *See Sec. & Exch. Comm’n v. Ripple Labs, Inc.*, 2023 WL 4507900, at *11-13 (S.D.N.Y. July 13, 2023).

Coinbase disclosed steps it had taken in response to this regulatory uncertainty, including “policies and procedures to analyze whether each crypto asset” it considered listing “could be deemed to be a ‘security’ under applicable laws.” Ex. 7 (RS) at 29-30. But Coinbase also warned that its conclusions were necessarily “risk-based assessment[s],” especially when it came to the risk of regulatory enforcement actions. *Id.* Specifically, it warned that, “[r]egardless of our conclusions, we could be subject to legal or regulatory action in the event the SEC . . . were to determine that a supported crypto asset currently offered, sold, or traded

on our platform is a ‘security’ under applicable laws.” *Id.* at 29. And that is exactly what has come to pass.

In the year leading up to the enforcement action, Coinbase also repeatedly disclosed interactions with the SEC, including on July 21, 2022, that the SEC had filed charges against a former Coinbase employee alleging that he used information stolen from Coinbase to front-run trading on seven assets listed on Coinbase’s platform, *e.g.* Ex. 8 (July 21, 2022 blog post) at 1-2; and on August 9, 2022, that the SEC had requested information “in May” about Coinbase’s listing process and its staking program, Ex. 9 (Aug. 9, 2022 Shareholder Ltr.) at 20; Ex. 10 (Aug. 9, 2022 Q2 2022 Call Tr.) at 3; Ex. 11 (Aug. 9, 2022 10-Q) at 46.

Throughout that time, Coinbase executives—including its CEO and its Chief Legal Officer—regularly disclosed to investors in plain English and in near-real-time the SEC’s position (*i.e.*, that it might pursue legal action alleging certain Coinbase-listed crypto assets were securities), as well as Coinbase’s robust and good faith disagreement with the SEC’s position. For example, *the same day* that the SEC filed the front-running charges, Coinbase executives responded: “Coinbase does not list securities. End of story,” and they explained that the SEC chose “regulation by enforcement” instead of developing a regulatory framework or even having “a dialogue” with Coinbase “about the seven assets on [its] platform” that the SEC claimed were securities in the case. Ex. 8 (July 21, 2022 blog post) at 1-2. Coinbase

executives also publicly commented on the SEC’s targeting of other crypto firms’ staking programs and again expressed their disagreement with the SEC’s position, including when the SEC brought an enforcement action against Kraken on February 10, 2023. Ex. 12 (Feb. 10, 2023 blog post explaining Coinbase’s view that “[s]taking is not a security.”) at 1; *see also* Exs. 13-14 (Feb. 8-12, 2023 tweets cited at ¶¶ 354-62, including Armstrong tweeting that Coinbase “will happily defend [its view that staking services are not securities] in court if needed.”).

Then on March 22, 2023, when the SEC staff issued a “Wells notice” advising that the staff had “made a ‘preliminary determination’ to recommend that the SEC file an enforcement action against the Company,” Coinbase filed an 8-K and published a blog post *that very day*. ¶ 372; Ex. 29 (Mar. 22, 2023 8-K) at 4. In its blog post, Coinbase explained that the SEC had at first been “interested in discussing a potential resolution that would include registering some portion of [Coinbase’s] business with the SEC,” but there had been “disagreement within the Commission itself on how to proceed with a registration path.” Ex. 15 (Mar. 22, 2023 blog post) at 2. Then, “in January 2023,” the SEC told Coinbase “they would be shifting back to an enforcement investigation.” *Id.* The post reiterated the Company’s belief that “Coinbase does not list securities or offer products to [its] customers that are securities,” and its efforts to convey to the SEC that the regulator’s positions were not grounded in existing law. *Id.* at 5.

On June 6, 2023, the SEC sued Coinbase in the Southern District of New York without giving Coinbase the customary notice, just hours before Coinbase’s Chief Legal Officer was scheduled to testify to Congress on the need for legal clarity for the crypto industry. Ex. 27 (June 6, 2023 Armstrong tweet); Ex. 28 (June 5, 2023 blog post). On August 4, 2023, Coinbase filed a motion for judgment on the pleadings disputing the SEC’s allegations on multiple independent grounds, including that the crypto transactions and services on the Coinbase exchange are not “investment contracts,” and therefore not securities, Coinbase is not a “broker” of investment contracts, and “staking” services are not securities transactions because customers do not actually make an investment by using Coinbase’s software to stake. Ex. 16 (Aug. 4, 2023 Memo. iso MJP) at 6-21, 25-29. That motion is pending.

Despite all of Coinbase’s disclosures, in particular about the SEC’s changing views, increasing enforcement efforts, and the unprecedented uncertainty the SEC’s actions were creating for the crypto industry as a whole, Plaintiffs nevertheless contend the Company (i) should have disclosed *even more* information about the SEC’s investigation, including the supposed certainty of an SEC enforcement action, and (ii) should have withheld its view that “Coinbase does not list securities” and “staking is not a security”—even before the SEC gave the Company a Wells notice or filed its complaint, and even before a court has had the opportunity to speak on these issues at all. *See* Appendix A, Statements 51-67.

LEGAL STANDARD

To state a claim for securities fraud under Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, Plaintiffs must adequately plead facts showing “(1) a material misrepresentation or omission, (2) scienter, (3) a connection between the misrepresentation or omission and the purchase or sale of a security, (4) reliance upon the misrepresentation or omission, (5) economic loss, and (6) loss causation.” *In re Amarin Corp. PLC Sec. Litig.*, 2021 WL 1171669, at *11 (D.N.J. Mar. 29, 2021) (Martinotti, J.) (quoting *City of Edinburgh Council v. Pfizer, Inc.*, 754 F.3d 159, 167 (3d Cir. 2014)), *aff’d*, 2022 WL 2128560 (3d Cir. June 14, 2022).

Section 10(b) and Rule 10b-5 “do not require real-time business updates or complete disclosure of all material information whenever a company speaks on a particular topic.” *Weston Fam. P’ship LLLP v. Twitter, Inc.*, 29 F.4th 611, 615 (9th Cir. 2022). Rather, those provisions require a plaintiff to plead an “untrue statement of a material fact” or an “omi[ssion of] a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” 17 C.F.R. § 240.10b-5(b). To plead a claim, Plaintiffs must satisfy the heightened pleading requirements of both Rule 9(b) and the Private Securities Litigation Reform Act (“PSLRA”), *see Amarin*, 2021 WL 1171669, at *11, including (i) “specify[ing] each statement alleged to have been misleading” and “the reasons why” (*i.e.*, falsity), 15 U.S.C. § 78u-4(b)(1)-(2), and “stat[ing] with

particularity facts giving rise to a strong inference” of scienter, *id.* See also *Williams v. Globus Med., Inc.*, 869 F.3d 235, 240-41 (3d Cir. 2017). Rule 9(b)’s particularity requirement is “rigorously applied in securities fraud cases.” *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1417 (3d Cir. 1997).

ARGUMENT

I. THE SAC FAILS TO PLEAD A SECTION 10(B) CLAIM

A. The SAC Fails To Allege Any Material Misstatement Or Omission

1. The Security Statements Are Not False Or Misleading

Plaintiffs have not pled the threshold element of falsity. Plaintiffs challenge 17 statements that allegedly misled investors about a purported legal risk that assets held in Coinbase’s custody might not be safe in the event Coinbase filed for bankruptcy. See Appendix A, Statements 1-17. But Plaintiffs’ challenge fails on falsity grounds alone for multiple independent reasons. First, none of the challenged statements even mentioned bankruptcy, and therefore could not have misled investors about a supposedly concealed bankruptcy-related risk. Second, Plaintiffs fail to allege contemporaneous falsity altogether, *i.e.*, that the supposedly concealed risk even existed at the time of the challenged statements. Finally, statements that customers “trust” Coinbase are nonactionable puffery and opinions.

a. None of the Challenged Statements Addressed, Let Alone Concealed, Any Purported “Bankruptcy Risk”

Plaintiffs’ claims based on the purported bankruptcy risk can only survive this

motion if the challenged statements related to a possible bankruptcy risk—but none of them did. ¶¶ 261-62; *see also* ¶¶ 265, 280. Disclosure is required under § 10(b) and Rule 10b-5 only when “necessary ‘to make ... statements made, in light of the circumstances under which they were made, not misleading.’” *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 44 (2011) (quoting 17 C.F.R. § 240.10b-5(b)). “Liability may exist under Rule 10b-5 for misleading or untrue statements, *but not for statements that are simply incomplete.*” *Winer Fam. Tr. v. Queen*, 503 F.3d 319, 330 (3d Cir. 2007) (citing *Brody v. Transitional Hospitals Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002) (a statement is only misleading if it “affirmatively create[s] an impression of a state of affairs that differs in a material way from the one that actually exists”). In other words, Rule 10b-5 requires disclosure of information only when an affirmative statement puts that information “in play” by “characteriz[ing] or ma[king] affirmative claims about” it. *Pfizer*, 754 F.3d at 174-75.³

None of the 17 statements characterizes or makes affirmative claims about, or

³ Plaintiffs allege that Coinbase had an independent duty to disclose the purported “bankruptcy risk” under Item 303 of Regulation S-K. ¶ 263. Plaintiffs are wrong. In the Third Circuit, Item 303 does not create an “affirmative duty of disclosure” that, if violated, would “automatically give rise to a material omission under Rule 10b-5.” *Oran v. Stafford*, 226 F.3d 275, 288 (3d Cir. 2000). “[R]ather, a plaintiff must plead an actionable misrepresentation or omission under the specific standards applicable to Rule 10b-5,” which Plaintiffs have failed to do. *See SLF Holdings, LLC v. Uniti Fiber Holdings, Inc.*, 499 F. Supp. 3d 49, 64 n.4 (D. Del. 2020), *aff’d*, 2022 WL 3442353 (3d Cir. Aug. 17, 2022).

“put[s] ... in play,” the treatment of customer assets in the event of bankruptcy. *Id.* (affirming dismissal of securities claim where statement about third drug trial phase did not put “in play” prior phase results). Simply put, Coinbase’s warnings about *physical* risks such as hacks, theft, or data loss (Statements 1-3, 6-11, 14-15) did not create some obligation to speculate about every legal risk like bankruptcy. Nor did describing the terms of certain products and services (Statements 4, 16) or making observations about customers’ trust in Coinbase (Statements 5, 12-13, 17). Courts routinely dismiss complaints where there is such a disconnect between the challenged statement and alleged omission, as the Court should do here.⁴

b. Plaintiffs Fail To Plead The Allegedly Omitted “Bankruptcy Risk” Ever Existed At All (And Indeed It Did Not)

Plaintiffs’ claim independently fails because the SAC fails to allege a single fact suggesting any bankruptcy risk, let alone a risk to customer assets in a

⁴ See, e.g., *In re Amarin Corp. PLC Sec. Litig. (“Amarin II”)*, 2022 WL 2128560, at *3 (3d Cir. June 14, 2022) (affirming dismissal of securities claim where announcement of topline trial results “did not put into play” the undisclosed full trial data or additional information regarding the trial placebo); *Tanaskovic v. Realogy Holdings Corp.*, 2021 WL 211049, at *8 (D.N.J. Jan. 21, 2021) (dismissing securities claim where statements did not give “the impression that [an] initiative would ‘have only a near term negative effect’” because “not once did Defendants say that the negative impact of this initiative would be limited to the near-term”); *In re Heartland Payment Sys., Inc. Sec. Litig.*, 2009 WL 4798148, at *6 (D.N.J. Dec. 7, 2009) (dismissing securities claim where description of security system “did not imply that [company] had never experienced any security problems,” so “the failure to disclose [a security] attack was not misleading”).

bankruptcy, existed at the time the challenged statements were made (or ever at all). *See, e.g., Williams*, 869 F.3d at 244 (“[A]llegations cannot rely exclusively on hindsight, but must be sufficient to show that the challenged statements were ‘actionably unsound when made.’”) (citation omitted). “[W]ithout contemporaneous falsity, there can be no fraud.” *In re Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 571 (S.D.N.Y. 2014), *aff’d*, 604 F. App’x 62 (2d Cir. 2015). Yet Plaintiffs base their allegations on SAB 121, ¶ 131, which was issued *after* all of the challenged statements. Coinbase subsequently added a risk factor warning based on that guidance alone, not based on any pre-existing or new bankruptcy risk for the company. Ex. 5 (May 10, 2022 10-Q) at 83. Plaintiffs’ claim is simple fraud by hindsight, which the Third Circuit “has long rejected.” *OFI Asset Mgmt. v. Cooper Tire & Rubber*, 834 F.3d 481, 497 (3d Cir. 2016). Indeed, Plaintiffs’ theory would deter companies from responding proactively to SEC guidance on new risk factors for fear of inviting liability for filings that pre-date that guidance.

Coinbase’s financial disclosures, which Plaintiffs do not challenge, also irrefutably demonstrate the lack of any contemporaneous bankruptcy risk. Coinbase had an ample balance sheet without any risk of bankruptcy at the time of the challenged statements, let alone a material one—for example, Coinbase reported net income of \$3.6 billion for 2021 and \$7.1 billion in cash and cash equivalents at the end of 2021. Ex. 2 (2021 10-K) at 117-18. And while Plaintiffs speculate about what

a hypothetical bankruptcy court could consider, ¶ 109, it is nothing more than speculation untied to any contemporaneous allegations of fact.

Not surprisingly, to this day no bankruptcy court has ever adopted Plaintiffs’ position. Since the challenged statements were made and SAB 121 itself issued, bankruptcy courts (in cases that have nothing to do with Coinbase) have held that crypto asset ownership turns on *contract law*—and specifically user agreements—rather than constructive trust or bailment principles, the position Coinbase has consistently held. *See, e.g., In re Voyager Digit. Holdings, Inc.*, 2022 WL 3146796, at *3 (Bankr. S.D.N.Y. Aug. 5, 2022) (terms of Customer Agreement did not give “Debtors ... either legal title or equitable interests”). In *In re Blockfi Inc.*, the bankruptcy court in this District recently held that ownership remains *with customers* (*i.e.*, custodially-held crypto assets do *not* become property of the estate) under terms of service with ownership provisions similar to Coinbase’s user agreements.⁵ *See In re Blockfi Inc.*, No. 22-19361 (Bankr. D.N.J. May 17, 2023), Order ¶ 2, ECF No. 923; *see also In re Blockfi Inc.*, No. 22-19361 (Dec. 19, 2022), Mot. re Entry of an Order ¶ 1, ECF No. 121 (BlockFi Terms of Service provided that “title to the cryptocurrency held in your BlockFi Wallet shall at all times remain with you and

⁵ ¶ 115 (correctly noting that Coinbase’s Retail User Agreement stated that assets “held in your Digital Wallet are custodial assets held by Coinbase for your benefit,” “[t]itle in Digital Assets shall at all times remain with you and shall not transfer to Coinbase,” and “[y]ou control the Digital Assets held in your Digital Asset Wallet.”)

shall not transfer to BlockFi”). By contrast, only where the terms of use unambiguously granted “all right and title.... including ownership rights” to the debtor have courts found assets could become part of a bankruptcy estate, which is not possible for a company like Coinbase. *Cf. In re Celsius Network LLC*, 647 B.R. 631, 637 (Bankr. S.D.N.Y. 2023).

At bottom, Plaintiffs’ claim fails because they rely on an unpled and non-existent bankruptcy risk. A company does not have to speculate, let alone predict, future regulator-requested guidance, especially when nothing about that guidance itself identifies or creates a new risk.

c. The “Trust” Statements Are Nonactionable

Claims based on several statements (Statements 5, 12-13, 17) fail for the additional reason that they are non-actionable puffery and opinion. Statements touting customers’ “trust” and “preference[s]” (Statements 5 and 12), Coinbase’s “world-class security” (Statement 13), and “a great, safe place” (Statement 17), are “[v]ague and general statements of optimism” that “constitute nonactionable ‘puffery.’” *Uniti Fiber*, 499 F. Supp. 3d at 65 (“iron-clad” dividend and “stable” lease payments were puffery); *Tanaskovic*, 2021 WL 211049, at *20 (D.N.J. Jan. 21, 2021) (“great progress” and “compelling” products were puffery).

They are also subjective opinions subject to a higher falsity standard, which

Plaintiffs do not satisfy. *Id.* at 19-20.⁶ There are no allegations that Defendants did not sincerely believe that “customers choose [Coinbase] because they trust us to keep their assets safe” (*e.g.*, Statement 5), and that Coinbase is “a great, safe place to buy your first Bitcoin to trade to safely store” (*e.g.*, Statement 17); *see infra* Section I.B.2.a. Nor does the SAC adequately allege the opinions lacked a reasonable basis.

2. The Trading Statements Are Not False Or Misleading

Plaintiffs next challenge 33 statements made between April 14, 2021 and August 9, 2022, that purportedly misrepresented or concealed that Coinbase had always “intended to engage in proprietary trading.” *See* Appendix A, Statements 18-50. These statements fall into two categories: (i) disclosures in SEC filings throughout the class period that Coinbase made crypto purchases as “long-term” investments and also to “fulfill customer transactions” but did “not plan to engage in regular trading of crypto assets” (Statements 19-22, 24-31, 33-36, 39-50); and (ii) statements by Coinbase executives in 2021 that the Company “do[es] not proprietary trade against [its] clients,” and also that Coinbase will buy crypto for its long term investment portfolio “via our over the counter desk or away from [Coinbase’s] exchange” (Statements 18, 23, 32, 37, 38).

⁶ In the Third Circuit, an opinion statement can be misleading only if it: “(i) was not sincerely believed when made; (ii) contains an expressly embedded, untrue factual assertion; or (iii) reasonably implies untrue facts and omits appropriate qualifying language.” *City of Warren Police & Fire Ret. Sys. v. Prudential Fin., Inc.*, 70 F.4th 668, 686 (3d Cir. 2023); *see also Pfizer*, 754 F.3d at 170.

All of these statements are true. But as a matter of law, Plaintiffs' claim fails. First, it is based entirely on an anonymously-sourced news article whose allegations are not sufficiently reliable "facts."⁷ Second, even accepting those allegations, the article does not contradict any challenged statement. Third, Plaintiffs' claim is inactionable altogether because of timing and the PSLRA safe harbor.

a. The Article's Anonymous Allegations Are Insufficient To Plead Falsity

When allegations are sourced from a news article, the relevant statements in the article must be properly attributed and also meet Rule 9(b)'s particularity requirement. That is why Courts routinely reject similar claims based on anonymous sources alone. *See, e.g., In re Vale S.A. Sec. Litig.*, 2017 WL 1102666, at *27-28 (S.D.N.Y. Mar. 23, 2017) (dismissing securities fraud claim based on two *Wall Street Journal* articles because they relied on anonymous employees of the defendant company without corroborating information); *Chan v. New Oriental Educ. & Tech. Grp. Inc.*, 2019 WL 2865452, at *7 (D.N.J. July 3, 2019) (*Reuters*

⁷ Plaintiffs also cite a copycat post on a website called beincrypto.com, implying the website corroborates the *Journal* article, and alleging that "numerous sources [] spoke with beincrypto.com." ¶ 147. But, as even its title makes clear, the beincrypto.com post merely parrots the WSJ's article: "Coinbase Used Company Cash to Trade Crypto Assets, *Claims Report*. Ex. 18 (Sept. 22, 2022 beincrypto.com article) (emphasis added). It repeatedly cites (and links to) the WSJ article and includes a disclaimer at the end that says, "BeInCrypto has reached out to company or individual involved in the story to get an official statement about the recent developments, but it has yet to hear back." *Id.* at 5.

article quoting both named and anonymous sources did “not meet the heightened particularity required of claims under Section 10(b) and Rule 10b-5” because it was “devoid” of relevant information and lacked “specifics” as to the allegations supporting the claims). “Conclusory allegations of wrongdoing are no more sufficient if they come from a newspaper article than from plaintiff’s counsel,” which is why “[n]ewspaper articles should be credited only to the extent that other factual allegations would be—if they are sufficiently particular and detailed to indicate their reliability.” *In re Optionable Sec. Litig.*, 577 F. Supp. 2d 681, 690 (S.D.N.Y. 2008). If “the ‘detail provided by the confidential sources, the sources’ basis of knowledge, the reliability of the sources, the corroborative nature of other facts alleged, including from other sources, the coherence and plausibility of the allegations, and similar indicia,’” is “found wanting,” then “courts must discount them steeply.” *Rahman v. Kid Brands, Inc.*, 736 F.3d 237, 244 (3d Cir. 2013) (citation omitted).

In this case, Plaintiffs have *no idea* whether the *Wall Street Journal*’s anonymous sources pass muster—they just copied and pasted allegations from the single article that they liked. The article does not provide any details about the confidential sources beyond asserting that they were “close to the matter” while working for Coinbase. Ex. 1 (Sept. 22, 2022 WSJ Article) at 1. It does not provide their names, titles, or job functions, let alone the basis for their supposed knowledge about any proprietary trading plan. Nor does it provide any corroborative sources.

Another Court in this District dismissed securities claims cribbed from significantly better-sourced news articles than this one. *See New Oriental*, 2019 WL 2865452, at *3, *7 (dismissing complaint relying on Reuters article quoting eight sources, including three who were named).

b. The Article Does Not Contradict The Challenged Statements

In any event, nothing in the article contradicts any of Defendants' statements because the anonymous sources did not actually suggest Coinbase engaged in any regular trading on its own behalf against its clients on its exchange. *See Winer*, 503 F.3d at 330 (holding that "duty to disclose" extends only to information necessary to make the challenged statements "not be so 'incomplete as to mislead'").

To the contrary, the article's anonymous sources admitted that the "Risk Solutions" group began in July 2021, in order "to trade crypto *for clients*," *i.e.*, not for itself. Ex. 1 (Sept. 22, 2022 WSJ article) at 2. The article claimed that at some unspecified time, the group "made plans to begin trading with Coinbase's cash," but the anonymous sources identified just one "test trade" sometime in 2022. *Id.* at 1-2. It did not in any way suggest that Coinbase was actively trading its investment portfolio, regularly engaging in proprietary trading, or even making any trades against its clients on its platform. Plaintiffs try to seize on the test trade, but the article alleges almost no details about it at all, except that the money came from a *client* (*i.e.*, not Coinbase), which itself refutes Plaintiffs' proprietary trading

allegations. The article does not report the timing of the purported trade or whether it took place on Coinbase’s exchange (and thus if it could be considered a trade against a client). At most the SAC suggests the test trade might be proprietary trading because it was structured as a loan. ¶ 147. But even if that were possible, none of those details are adequately pled, and certainly are not alleged to have been known to any Defendant. Plaintiffs cannot state a claim based on such vague and speculative allegations—particularly from anonymous sources with no first-hand knowledge or corroboration.

c. The Trading Statements Are Inactionable

Independently, nearly all of the trading statements are inactionable.

To begin with, Plaintiffs’ claim has several timing problems. Most fundamentally, Plaintiffs do not allege any facts about *when* purported plans for proprietary trading were supposedly made, so those “plans” cannot show contemporaneous falsity for any statements. More specifically, a test trade made at some point in 2022 cannot show contemporaneous falsity for any statements that came before it including all of the 2021 statements (Statements 18-38),⁸ and the CFO’s purported admission that Coinbase was making monthly purchases on its

⁸ All of Defendants’ statements that Coinbase does not “proprietary trade against [its] clients” or “engage in proprietary trading on [its] platform” were made before Coinbase allegedly made the so-called “test trade” and cannot be rendered misleading by something new that happened months later. *Lululemon*, 14 F. Supp. 3d at 571.

exchange for its long-term investment portfolio cannot show contemporaneous falsity for a statement made *four months earlier* (Statement 38; ¶ 311).

In addition, identified forward-looking statements about plans, potential or actual, are immune under PSLRA’s safe harbor. The statement repeated in 2022—*i.e.*, “we do not plan to engage in regular trading of crypto assets” (Statements 39, 43, 47)—was a quintessential forward-looking statement, *i.e.*, “a statement of the plans and objectives of management for future operations,” 15 U.S.C. § 78u-5(i)(1)(A)-(C); *see, e.g.* Ex. 5 (May 10, 2022 10-Q) at 2 (noting that the word “plan” is “intended to identify forward-looking statements”), and made without particularized allegations of “actual knowledge” of falsity. *See* 15 U.S.C. § 78u-5(c); *see also Inst. Inv. Grp., v. Avaya, Inc.*, 564 F.3d 242, 259 (3d Cir. 2009). And because the “actual knowledge” standard is “more demanding” than the scienter standard, *id.* n.29, Plaintiffs fail to meet it for the same reasons, *see infra* Section I.B.1.b.

3. The Regulatory Risk Statements Are Not False Or Misleading

Finally, Plaintiffs challenge 17 statements made between May 10, 2022 and March 22, 2023, that purportedly failed to disclose the scope of the SEC’s investigation and purported certainty of an enforcement action, and also allegedly downplayed the regulatory enforcement risk. Plaintiffs’ claim fails at every turn. Coinbase had no duty to disclose details of the SEC’s investigation any sooner than

it did or to speculate about what the SEC might do. Yet despite having no disclosure obligation to do so, Coinbase nevertheless repeatedly responded publicly to positions the SEC was newly taking after Coinbase became a public company, and fully disclosed the SEC's investigation and Wells notice. Not a single one of Coinbase's statements purported to minimize the risk of SEC action—indeed, Coinbase was *highlighting* the new positions the SEC was taking that *amplified* that very risk despite Coinbase's disagreement with the SEC's changing positions, which it also disclosed. But Plaintiffs cannot state a claim based on Coinbase's well-founded disagreement alone.

a. Defendants Disclosed Interactions With The SEC Promptly And Had No Duty To Speculate Further

Plaintiffs claim that certain statements in the May 10, 2022 10-Q (Statements 51-52) and the February 23, 2023 10-K (Statement 64) were misleading because they did not disclose that the SEC had turned its “focus” to Coinbase's asset listing determinations (¶ 342)—and further, by the time of the February 2023 10-K, that the SEC was supposedly “not uncertain” in its intent to bring an enforcement action (¶ 369). That argument is dead on arrival because none of the challenged statements “made affirmative claims” downplaying the risk that the SEC could bring an enforcement action, and Coinbase had no standalone duty to disclose the SEC's purported focus on Coinbase even if it had existed at the time of the May 10, 2022 filing, which Plaintiffs do not and cannot allege. *See Pfizer*, 754 F.3d at 174-75.

It is black-letter law that a company has no duty to “disclose uncharged, unadjudicated wrongdoing.” *Pelletier v. Endo Int’l PLC*, 439 F. Supp. 3d 450, 465 (E.D. Pa. 2020) (quoting *City of Pontiac Policemen’s and Firemen’s Ret. Sys. v. UBS AG*, 752 F.3d 173, 184 (2d Cir. 2014)); see, e.g., *In re Galena Biopharma, Inc. Sec. Litig.*, 2019 WL 5957859, at *10-11 (D.N.J. Nov. 12, 2019); *Ulbricht v. Ternium S.A.*, 2020 WL 5517313, at *7, 10 (E.D.N.Y. Sept. 14, 2020). Even when the SEC sends a Wells notice, which indicates the Enforcement Division staff’s preliminary decision “to recommend charges” at the end of an investigation, *In re Lions Gate Entm’t. Corp. Sec. Litig.*, 165 F. Supp. 3d 1, 12 (S.D.N.Y. 2016) (citation omitted), a company has no obligation to disclose it because there is no standalone duty to disclose a government investigation. See *In re UBS AG Sec. Litig.*, 2012 WL 4471265, at *31 (S.D.N.Y. Sept. 28, 2012), *aff’d sub nom.*, *City of Pontiac*, 752 F.3d at 184 (“absent an express prior disclosure, a corporation has no affirmative duty to speculate or disclose uncharged, unadjudicated wrongdoings....”).

Plaintiffs therefore cannot complain about Coinbase’s fulsome disclosure of the SEC’s investigative subpoenas and requests for information it had received as of its February 23, 2023 10-K, simply by pointing to Coinbase’s refusal to make predictions about the SEC’s next steps (Statement 64, SAC ¶ 369). See *Lions Gate*, 165 F. Supp. 3d at 12 (“[T]he securities laws do not impose an obligation on a company to predict the outcome of investigations.”). Nevertheless, Coinbase

repeatedly warned of the regulatory uncertainty and disclosed information promptly. And, Coinbase promptly disclosed those next steps—the issuance of a Wells notice—as they occurred, even before the SEC actually brought its enforcement action. Ex. 29 (Mar. 22, 2023 8-K) at 4.

Plaintiffs also cannot complain about Coinbase’s earlier statements in the May 10, 2022 10-Q (Statements 51-52; ¶ 342) because they do not allege even a single fact supporting their allegation that the SEC had in fact turned its focus to Coinbase by that time. The SAC also provides no basis to conclude that the statements “affirmatively create an impression of a state of affairs that differ[ed] in a material way from the one that actually exists.” *Brody*, 280 F.3d at 1006. Neither statement “put into play” or downplayed the SEC’s position with respect to Coinbase’s asset listing determinations. *Amarin II*, 2022 WL 2128560, at *3. If anything they suggest the opposite.

Plaintiffs also entirely ignore the context of the challenged statements, where Coinbase fully and repeatedly disclosed the risk that the SEC could disagree with Coinbase’s listing determinations, that the SEC’s view of how the securities laws applies to crypto assets is “subject to change,” and that it “could be subject to judicial or administrative sanctions for failing to offer or sell the crypto asset in compliance with the registration requirements.” Ex. 5 (May 10, 2022 10-Q) at 79; Ex. 22 (Feb 21, 2023 10-K) at 41-42; *see also supra* Background Section C. Coinbase fully

disclosed the risk, and Coinbase had no duty to predict the exact course of the SEC’s regulatory uncertainty or the ultimate steps the SEC would take.

b. Defendants’ Statements Did Not Misleadingly Minimize The Risks Of The SEC Investigation And Are Nonactionable Opinions

Plaintiffs separately challenge numerous social media and blog posts, as well as other statements, because they express Coinbase’s disagreement with the steps the SEC was taking (Statements 53-63, 65-67), alleging that Defendants somehow gave investors the “impression that the regulatory risks related to Coinbase’s listing[s]” were “minimal.” *E.g.*, ¶¶ 344-45, 356-57.

As just discussed, that argument simply cannot stand in the face of Coinbase’s repeated and substantial disclosures of the risk that the SEC could take “legal or regulatory action” if it determines that an asset on Coinbase’s platform is a security, Ex. 7 (RS) at 29, as well as Coinbase’s accurate descriptions of the SEC investigation once it commenced, Ex. 11 (Aug. 9, 2022 10-Q) at 46. And, in addition to Coinbase’s disclosures, public statements by the SEC and speculation in the press further alerted investors to the risk of SEC enforcement. *E.g.* ¶ 238 (discussing Bloomberg article reporting that Coinbase “faces SEC Probe”); Ex. 19 (May 18, 2022 WSJ article) at 3 (quoting SEC Chairman Gensler’s statement to reporters that exchanges like Coinbase “should move towards getting registered, or ... we’re going to be the cop on the beat. and we’re going to bring the enforcement actions”).

Coinbase's statements disagreeing with the SEC's positions only confirmed the regulatory risk Coinbase was facing. *E.g.* ¶ 362 (Armstrong tweet raising the possibility that Coinbase will go to court to show that its staking services are not securities). Statements that disagree with the *basis* for the SEC's investigation do not mislead investors about the risks of such an investigation, they simply explain why and how the company will defend itself if that risk arises. *Pfizer*, 754 F.3d at 174-75; *Tanaskovic*, 2021 WL 211049, at *8.

In any event, these challenged statements are also inactionable opinions. Defendants stated repeatedly that Coinbase does not list securities on its platform, that its review process is effective at screening out securities before listing new assets, and that "staking" is not a security (Statements 53-63, 65-67). These accurate statements of the securities laws reflect Coinbase's views that "are only actionable under the securities laws if they are not honestly believed and lack a reasonable basis." *Pfizer*, 754 F.3d at 170.

Coinbase's honest belief that it does not list securities and that the SEC's crypto enforcement actions stretch beyond existing securities law is held by others as well. Commodities regulators have characterized crypto assets as commodities (not securities),⁹ and recently Judge Torres of the Southern District of New York

⁹ See *Commodity Futures Trading Comm'n v. Zhao*, No. 1:23-cv-01887-MSS, (N.D. Ill. Mar. 27, 2023) Compl. ¶¶ 2, 24, ECF No. 1 (claiming that Bitcoin, Ether,

held that certain crypto sales on crypto exchanges like Coinbase were not securities transactions.¹⁰ *Ripple*, 2023 WL 4507900, at *11-13. The SEC itself has disclaimed in cases the view that crypto assets themselves, rather than transactions involving those assets, are securities. *See Ripple*, 20-cv-10832 (S.D.N.Y. Aug. 18, 2023), SEC Mot. for Interlocutory Appeal at 22, ECF 893; *see also Sec. & Exch. Comm'n v. Terraform Labs Pte. Ltd.*, 2023 WL 4858299, at *12 (S.D.N.Y. July 31, 2023) (acknowledging crypto-assets were not necessarily all investment contracts under federal securities laws).

The securities laws do not penalize companies for expressing their sincerely held opinions about whether a particular regulatory regime applies to their business. And the securities laws certainly do not require a company to espouse a position contrary to their sincerely held beliefs, as Plaintiffs are suggesting Coinbase should have done here. As a matter of law, Coinbase's statements are not misleading—they were “sincerely believed when made,” and Plaintiffs do not allege facts that could show otherwise. *City of Warren*, 70 F. 4th at 686.

Litecoin, Tether, and some “other virtual currencies” are “commodities”).

¹⁰ In another recent decision, another judge on the same court held that Section 12 of the Securities Act does not apply to a decentralized crypto exchange because the court could not “stretch the federal securities laws to cover the conduct alleged” and that “Plaintiffs’ concerns are better addressed to Congress.” *Risley v. Universal Navigation Inc.*, 2023 WL 5609200, at *11 (S.D.N.Y. Aug. 29, 2023).

B. The SAC Fails To Allege A Strong Inference Of Scienter

Plaintiffs face a high bar to satisfy the pleading requirements for scienter, and fall far short here. Plaintiffs must “state with *particularity* facts giving rise to a *strong inference* that the defendant acted with the required state of mind,” 15 U.S.C. § 78u-4(b)(2) (emphases added), *i.e.*, with an “intent to deceive, manipulate, or defraud.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007).

In the Third Circuit, “motive and opportunity may no longer serve as an independent route to scienter” because defendants “often forbear” even when they “have both strong motive and ample opportunity to commit bad acts.” *Avaya*, 564 F.3d at 277; *see also Gold v. Ford Motor Co.*, 577 F. App’x 120, 123 (3d Cir. 2014). Therefore, Plaintiffs must plead a “strong inference” of recklessness or “conscious misbehavior.” *Id.* This is such a demanding standard that “omissions and ambiguities count *against* inferring scienter.” *Tellabs*, 551 U.S. at 326 (emphasis added).

1. The SAC Fails To Allege Any Motive Based On The Defendants’ Stock Sales or Compensation

Insider sales can only give rise to a strong inference of scienter where they “were unusual or suspicious in timing or amount,” which is not possible here. *Reilly v. U.S. Physical Therapy, Inc.*, 2018 WL 3559089, at *13 (S.D.N.Y. July 13, 2018). In a direct listing, insider sales are inherently usual and unsuspecting. In fact, they are necessary for the direct listing to proceed at all, and Coinbase became a public company through a direct listing. ¶ 73. In contrast to a traditional IPO, where a

company's newly issued shares are sold first to a syndicate of underwriters and then resold to the public, Coinbase's existing shareholders could sell their shares immediately in the open market. Indeed, Coinbase disclosed (including on the cover of its registration statement) that the entire point of its direct listing was to create a "public market" (which had previously not existed) for its stock. Ex. 7 (RS). That alone precludes Plaintiffs' attempt to rely on direct listing sales.

Plaintiffs also have a timing and amount problem. There are no particularized allegations that the direct listing was somehow planned and executed to permit Defendants to sell their stock because they anticipated an alleged corrective disclosure *more than a year later*. This "temporal distance" necessarily "defeats any inference of scienter." *In re Hertz Glob. Holdings, Inc. Sec. Litig.*, 2017 WL 1536223, at *22 (D.N.J. Apr. 27, 2017), *aff'd sub nom. In re Hertz Glob. Holdings Inc.*, 905 F.3d 106 (3d Cir. 2018) (no scienter where sales took place "several months before the first negative news"). Courts also "routinely find that raw sales numbers alone are insufficient to establish scienter" where the fraction of holdings sold is low. *Reilly*, 2018 WL 3559089, at *15. Here, Mr. Armstrong sold less than 2% of his holdings in the direct listing, Exs. 7 (RS) at 187, 20 (Apr. 16, 2021 Form 4) at 1, and Mr. Grewal sold *nothing*.

Lastly, apart from their direct listing sales, all of the Executive Defendants sold stock only pursuant to Rule 10b5-1 trading plans. Ex. 21 (Form 4s). "Courts

have consistently held that trades made under automatic trading plans are of minimal value in establishing an inference of scienter.” *In re Synchronoss Tech., Inc., Sec. Litig.*, 2019 WL 2849933, at *16 & n.11 (D.N.J. July 2, 2019); *see also In re Audible Inc., Sec. Litig.*, 2007 WL 1062986, at *12 (D.N.J. Apr. 3, 2007).¹¹

2. Plaintiffs Allege No Conscious Misbehavior Or Recklessness

Where (as here) the motive allegations fall far short, allegations of recklessness or conscious misbehavior must be “correspondingly greater.” *GSC Partners CDO Fund v. Washington*, 368 F.3d 228, 238 (3d Cir. 2004). Plaintiffs do not come close to meeting this standard for any of the challenged statements.

a. Security Statements

There are no factual allegations that Defendants were intending to mislead investors about the legal risks to customers’ crypto assets when they made the challenged security statements between April 14, 2021, and March 9, 2022. Indeed, Plaintiffs do not and cannot allege Defendants even knew about, let alone ignored, the SEC accounting staff’s guidance on the issue—most notably because the SAB

¹¹ Mr. Armstrong’s receipt of stock options through a performance-based compensation plan likewise does not support an inference that he was, as Plaintiffs contend, “highly” or “uniquely motivated” to inflate Coinbase’s stock price, ¶ 386. *Laasko v. Endo Int’l, PLC*, 2022 WL 3444038, at *8 (D. N.J. Aug. 17, 2022) (“[I]ncentive compensation, including performance-based bonuses, does not, by itself, establish [the] motive’ necessary to establish scienter.”); *In re Party City Sec. Litig.*, 147 F. Supp. 2d 282, 312, 314 (D.N.J. 2001) (“[C]ausing temporary inflations of price through the dissemination of false information hurts the long-term stock price of the company and thereby presumably hurts managerial compensation.”).

121 memo was not released until March 31, 2022 and even then only recommended adding a risk factor in earnings reports for the second quarter of 2022. Ex. 23 (SAB 121) at 4. Nor do they or can they allege Defendants knew or should have known that Coinbase faced a material risk of bankruptcy during that timeframe—because it didn't. Plaintiffs' inability to plead any such allegations warrants dismissal on scienter grounds. *See Lewakowski v. Aquestive Therapeutics, Inc.*, 2023 WL 2496504, at *12 (D.N.J. Mar. 14, 2023) (dismissing because “the Amended Complaint is devoid of any particularized facts—no internal reports, memoranda, or communications—suggesting Defendants were aware” of the fraud).

Plaintiffs offer three allegations regarding Defendants' supposed knowledge. First, they say Armstrong “admitted on Twitter that Coinbase had failed to appropriately communicate this risk to investors” the day it was announced on May 10, 2022. ¶ 232, *see also* ¶ 377. But what Armstrong actually said was that Coinbase should have “communicate[d] proactively *when this risk disclosure was added.*” ¶ 232. Nor did Armstrong ever say that the Company knew of or believed there to be any bankruptcy risk. To the contrary, he said that Coinbase had “no risk of bankruptcy” but nevertheless “included a new risk factor based on an SEC requirement called SAB 121.” Ex. 3 (May 10, 2022 Armstrong tweets) at 1.

Second, Plaintiffs point to a comment letter Coinbase submitted to the SEC in 2019 explaining that institutional clients' assets would not be segregated from

Coinbase’s assets or the assets of other customers. ¶¶ 107-08, 377. But the excerpts cited do not even mention bankruptcy, let alone suggest that a bankruptcy risk related in any way to the reasoning in the letter itself. ¶¶ 107-08.

Third, Plaintiffs note certain modest differences in the user agreements for retail customers and institutional customers. ¶¶ 113-121, 377. But Plaintiffs don’t allege any link between Coinbase’s decision to include different asset security features in its agreements with institutional and retail customers, on the one hand, and Defendants’ knowledge of any bankruptcy risk related to customers’ assets on the other hand. ¶¶ 109, 113-121. And most tellingly, there are no allegations at all suggesting that the Uniform Commercial Code (“UCC”) would *not* apply just because Coinbase did not cite it in the retail user agreement, ¶¶ 119-120—as the law review article Plaintiffs rely on acknowledges. ¶ 110 (quoting Ex. 17 (March 2023 Texas Law Review article)). That is because the UCC has always and continues to apply today.

Finally, all three of Plaintiffs’ scienter allegations fail simply and easily because they are not “at least as compelling as any opposing inference one could draw from the facts alleged,” *Tellabs*, 551 U.S. at 324, which is that Coinbase disclosed the risks relating to custodial assets that were known at the time of the challenged statements (*e.g.*, hacking, lost keys, and other asset security risks) and separately, proactively implemented the SAB 121 memo’s guidance as soon as it

came out. This is thoughtful disclosure. This is over-disclosure. This is not fraud.

b. Trading Statements

Plaintiffs also fail to plead that Defendants acted with “conscious misbehavior or recklessness” with respect to the alleged proprietary trading statements. *See* ¶¶ 377-79. Defendants made ample and repeated disclosures about Coinbase’s trading activities, and the SAC contains no allegations that Defendants believed those trading activities—or any others—constituted “proprietary trading” or that it was “so obvious that the [Defendants] must have been aware of” “a danger of misleading.” *GSC Partners*, 368 F.3d at 239 (citation omitted). The *Wall Street Journal*’s anonymous sources claim that Ms. Haas was “specifically involved in the creation of the proprietary trading unit,” ¶ 380, but that allegation does not support scienter because the only “unit” in question was formed “to trade crypto *for clients*” not for Coinbase itself, Ex. 1 (Sept. 22, 2022 WSJ article) at 2. There are no allegations that any Individual Defendants knew about any purported plans to engage in proprietary trading or about where trades for Coinbase’s own investment portfolio were made, let alone that they were intending to mislead investors about it.

c. Regulatory Risk Statements

Plaintiffs’ scienter theory for the regulatory risk statements requires them to plead a strong inference that Defendants intended to mislead investors about the SEC’s next steps and the risk the SEC would ultimately bring an enforcement action.

There are three fatal problems with Plaintiffs’ theory: first, Coinbase repeatedly disclosed that very risk; second, to this day, it hasn’t been established that *any* of the assets listed on Coinbase’s platform are “securities”; and third, there are no allegations suggesting that Coinbase *knew* the SEC would file an enforcement action based on such uncertain legal claims—in fact, Coinbase has explicitly raised defenses in the SEC action that it did not and could not have. Ex. 30 (June 28, 2023 Answer) at 173-75.

While it’s true that the SEC has brought cases alleging that a small number of crypto assets are securities, those cases are proceeding slowly in district courts, and the federal appellate courts have yet to address the issue. And as discussed *supra*, the SEC itself has disclaimed in court the view that it is now pressing in its enforcement action against Coinbase, namely, that certain crypto assets themselves, rather than transactions involving those assets, are securities. *Supra* Section I.A.3.b.

Plaintiffs ultimately fail to plead scienter for the regulatory risk statements because they cannot allege that Coinbase “‘knew facts or had access to information suggesting that their public statements were not accurate’; or [] ‘failed to check information they had a duty to monitor.’” *Novak v. Kasaks*, 216 F.3d 300, 311 (2d Cir. 2000). Plaintiffs allege that a Coinbase blog post on March 22, 2023 in which Coinbase disclosed the Wells notice within hours of receiving it somehow “‘revealed” that “‘the SEC canceled [a meeting] and told us they would be shifting

back to an enforcement investigation” and noting that Mr. Armstrong believed the SEC’s “‘tone’ shifted” sometime in 2022. ¶ 378. But not disclosing a canceled meeting or an impression that the SEC was “shifting back to an [existing and disclosed] enforcement investigation” and changing its “tone” is a far cry from conscious misbehavior or recklessness, and simply meant the posture shifted back to exactly what Coinbase disclosed in August 2022. *See Richman v. Goldman Sachs Grp., Inc.*, 868 F. Supp. 2d 261, 276 (S.D.N.Y. 2012). The exact risks now complained about by Plaintiffs were at most the “risk inherent in [the company’s] business strategy” and had already long been disclosed. *See Fan v. StoneMor Partners LP*, 927 F.3d 710, 718 (3d Cir. 2019).

3. The SAC Fails To Allege The “Core Operations” Inference Or Any Other Circumstantial Evidence Of Fraud

The SAC’s remaining “circumstantial evidence” allegations, ¶¶ 380-85—which do not include any confidential witnesses or whistleblowers—are the type of boilerplate allegations that courts consistently reject when the pleading contains no “additional allegation of specific information that was conveyed to management and related to the fraud.” *E.g., Laasko*, 2022 WL 3444038, at *9; *Synchronoss*, 2019 WL 2849933, at *15.

Similarly, conclusory unsupported allegations about Defendants’ “detailed knowledge of, or access to,” concealed information, ¶¶ 381-84, and Defendants’ “high-level positions and involvement with Coinbase’s core operation,” ¶ 385, fail

to support a strong inference of scienter. *See In re Aurora Cannabis, Inc. Sec. Litig.*, 2022 WL 4446125, at *8 (D.N.J. Sept. 23, 2022) (rejecting argument “that knowledge can be imputed to a company’s key corporate officers for issues critical to a company’s core business”); *see also Wu v. GSX Techedu Inc.*, 2023 WL 2207422, at *14 (D.N.J. Feb. 24, 2023) (defendants’ “positions as CEO and CFO not strong enough” to plead scienter).

Finally, Plaintiffs’ “temporal proximity” arguments, ¶¶ 388-90, fail because for each of the three theories, the final corrective disclosure was approximately *a year* after the challenged statements were initially made, and the statements at issue do not materially change over time. It is well-settled that “a temporal proximity of events is insufficient circumstantial evidence” of scienter where, as here, there are no particularized allegations of conscious misbehavior or recklessness. *In re Intelligroup Sec. Litig.*, 527 F. Supp. 2d 262, 285 (D.N.J. 2007).

C. The SAC Fails To Allege Loss Causation

The SAC independently fails to allege the requisite element of loss causation because Plaintiffs do not allege any “corrective” disclosure of a previously concealed “truth” that caused Coinbase’s stock price to decline. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 342-43, 347 (2005).

Bankruptcy Risk. Plaintiffs cannot recover for the stock drop following the disclosure in Coinbase’s May 10, 2022 10-Q “that crypto assets the Company held

in custody on behalf of customers could be treated as the Company's assets in the event of bankruptcy" ¶ 395, for the simple reason that the very same risk had already been disclosed on March 31, 2022, in the form of the SAB 121 memo. ¶ 131; *see also* Ex. 23 (SAB 121). It is well-established that "the disclosed fact must be new to the market" because "[a] recharacterization of previously disclosed facts cannot qualify as a corrective disclosure." *In re Omnicom Grp., Inc.*, 541 F. Supp. 2d 546, 551-52 (S.D.N.Y. 2008); *see also Unifi Fiber*, 499 F. Supp. 3d at 71 (same).

Trading. Plaintiffs also cannot recover for the stock drop following the *Wall Street Journal* article on September 22, 2022. A news article that is based only on anonymous allegations that are disputed and uncorroborated does not reveal to the market the falsity of any prior statements. *Curry v. Yelp Inc.*, 875 F.3d 1219, 1225 (9th Cir. 2017) (holding that "loss causation cannot be adequately made out merely by resting on a number of customer complaints and asserting that where there is smoke, there must be fire"). And to the extent Plaintiffs allege that Coinbase misdescribed purchases for its long-term investment portfolio as away from the exchange, the article did not report any information correcting it. *See In re Aurora Cannabis Inc. Sec. Litig.*, 2023 WL 5508831, at *4 (D.N.J. Aug. 24, 2023).

Regulatory Risk. Lastly, Plaintiffs cannot recover for stock drops following the July 25, 2022 *Bloomberg* article reporting that the SEC was investigating Coinbase, ¶ 398, Coinbase's March 22, 2023, announcement that it had received a

Wells notice, ¶ 402, and the June 6, 2023, SEC complaint against Coinbase in New York federal court, ¶ 405. That “materialization of risk” approach to loss causation requires plaintiffs to plead “that the materialization of an *undisclosed* risk caused the alleged loss.” *McCabe v. Ernst & Young, LLP.*, 494 F.3d 418, 429 (3d Cir. 2007) (emphasis added). In this case, the risk was amply disclosed—indeed, Defendants spoke about it as often as they could. *See supra* Section I.A.3. And independently, the later stock drop cannot plausibly have disclosed something “new,” given Coinbase’s disclosure of the Wells notice. *Omnicom*, 541 F. Supp. 2d at 551-52.

II. THE SAC FAILS TO PLEAD A SECURITIES ACT CLAIM

The first two iterations of the complaint alleged only Exchange Act claims. *See* ECF Nos. 1, 62. Consistent with the SAC’s kitchen-sink approach, Plaintiffs now claim that certain of the security and proprietary trading (but not the regulatory risk) statements also violate Sections 11 and 12 of the Securities Act because they were made in the registration statement or prospectus for Coinbase’s direct listing. *See* ¶¶ 437-41, 477-91; Appendix A, Statements 69-81.¹² Plaintiffs’ claims fail because Plaintiffs—including the two new plaintiffs added without leave of

¹² Section 11 provides a private right of action for purchasers if the registration statement (1) “contained an untrue statement of a material fact,” (2) “omitted to state a material fact required [by law] to be stated therein,” or (3) “omitted to state a material fact ... necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(a); *see also Turnofsky v. electroCore, Inc.*, 2021 WL 3579057, at *4 (D.N.J. Aug. 13, 2021). Section 12(a)(2) overlaps but is more limited. *Id.* at *10 (quoting 15 U.S.C. §77l(a)(2)). The seller is only liable to “the person purchasing from him.”

court¹³—lack standing, and regardless, Plaintiffs again fail to plead any misstatement or omission.

A. The SAC Fails To Plead Securities Act Standing

1. Plaintiffs Lack Section 11 Standing

Plaintiffs’ Section 11 claim should be dismissed at the outset for lack of standing because Plaintiffs do not adequately plead that they purchased Coinbase shares that are traceable to the registration statement, as required by the Supreme Court’s recent decision in *Slack Techs., LLC v. Pirani*, 143 S. Ct. 1433, 1435 (2023).

Statutory standing under Section 11 is available *only* to purchasers “who acquired securities issued ‘pursuant to’ or ‘traceable to’ the specific offering documents that are alleged to be false or misleading.” *De Vito*, 2018 WL 6891832, at *15 (citing *In re Suprema Specialties, Inc. Sec. Litig.*, 438 F.3d 256, 274 n.7 (3d Cir. 2006)). Adopting the Ninth Circuit’s Section 11 tracing analysis in *Century Aluminum*, the *De Vito* court found that while this tracing requirement is easily met

¹³ Lead Plaintiff AP7, conceding that it was an aftermarket purchaser (¶ 40), “will not be able to plausibly allege that [its] shares trace back” to the Registration Statement. *De Vito v. Liquid Hldgs. Grp., Inc.*, 2018 WL 6891832, at *16 (D.N.J. Dec. 31, 2018). Plaintiffs attempt to patch this fatal deficiency by adding two new plaintiffs without leave of court who purportedly purchased Coinbase shares on the day of the direct listing. ¶¶41-42. But Plaintiffs cannot end-run the lead-plaintiff process—which was vigorously contested—by “adding” new plaintiffs in their Complaint. *See In re Lantronix, Inc. Sec. Litig.*, 2003 WL 23198818, at *11 (C.D. Cal. Dec. 31, 2003) (adding new plaintiff “without notice to the Court or Defendants . . . runs the risk of subverting the PSLRA’s lead plaintiff appointment process”).

in a traditional IPO case, where “all of a company’s shares have been issued in a single offering under the same registration statement,” it is not so when the market also contains shares that were not issued under the challenged registration statement. *De Vito*, 2018 WL 6891832, at *15 (citing *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1106 (9th Cir. 2013)). Such is the case in direct listings, when a company makes both registered and unregistered shares available for sale.

In *Slack*, as here, both registered and unregistered shares were available for sale when the company went public via direct listing. In a June 2023 decision, the Supreme Court unanimously sided with the Slack defendants’ reading of Section 11—that the statute required “plaintiffs to plead and prove that [plaintiff] purchased shares traceable to the allegedly defective registration statement.” *Slack*, 143 S. Ct. at 1435. The Supreme Court vacated the Ninth Circuit’s decision and remanded for the Ninth Circuit to consider whether the *Slack* plaintiff’s pleading can satisfy Section 11. *Id.* at 1442.

Here, Plaintiffs do not “plead and prove” traceability. They allege only that “approximately 74%” of the entire pool of Coinbase’s common stock were registered when Lead Plaintiff purchased Coinbase shares, and “approximately 88%” were registered when the new plaintiffs purchased, and say nothing about whether Plaintiffs purchased registered (rather than unregistered) shares that could be traced to the registration statement. ¶¶ 40-42. Nor do their unsupported

conclusions that they purchased shares “pursuant and/or traceable to the Offering Materials” (¶¶ 40-42) suffice because they “do[] not satisfy the standard of factual plausibility as to the essential issue of traceability.” *De Vito*, 2018 WL 6891832, at *17. Because Plaintiffs cannot plead and prove that they purchased registered Coinbase shares, their Section 11 claim should be dismissed for lack of standing.

2. Plaintiffs Lack Section 12 Standing

Plaintiffs’ Section 12 claim should also be dismissed for failing to plead standing. First, the same tracing requirement applies to Section 12 because Section 12 liability “cannot attach unless there is an obligation to distribute the prospectus in the first place,” and there is no obligation to distribute a prospectus for transactions in unregistered shares. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 571 (1995).

Second, as an aftermarket purchaser, Lead Plaintiff lacks standing because it did not purchase registered shares from a person who sold “by means of” the prospectus. 15 U.S.C. § 77l(a)(2). Apparently conceding this fact, Plaintiffs only assert their Section 12(a)(2) claims on behalf of the new plaintiffs. But they too cannot show that they purchased registered shares because both registered and unregistered shares were available for sale as part of Coinbase’s direct listing and there is no way to identify which kind Plaintiffs bought. Plaintiffs necessarily fail to plead Section 12(a)(2) standing when they fail to plead Section 11 standing.¹⁴ *See*

¹⁴ The Supreme Court vacated the Ninth Circuit’s judgment on the Section 12 claim

Backhaus v. Streamedia Commc'ns, Inc., 2002 WL 1870272, at *5 (S.D.N.Y. Aug. 14, 2002); *In re Delmarva Sec. Litig.*, 794 F. Supp. 1293, 1309 (D. Del. 1992).

B. The SAC Fails To Plead A Section 11 Claim

In the Third Circuit, Securities Act claims “sound in fraud” and are subject to Rule 9(b)’s heightened pleading standard when “a core theory of fraud permeate[s] the entire” complaint. *Cal. Pub. Emp. Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 160 (3d Cir. 2004). Here, the conduct pled for the Securities Act claims is so similar to the core theory of fraud pled for the Exchange Act claims that it is virtually impossible to distinguish between the two.¹⁵

Regardless, Plaintiffs fail to plead the requisite element of material falsity under any standard. Plaintiffs’ allegations fail to show that Defendants made any material false statements, *see supra* Section I.A., and therefore should be dismissed for the same reasons as the Exchange Act claims. *See, e.g., In re Wilmington Tr. Sec. Litig.*, 852 F. Supp. 2d 477, 492 (D. Del. 2012); *In re Fairway Grp. Holdings Corp. Sec. Litig.*, 2015 WL 4931357, *27 (S.D.N.Y. Aug. 19, 2015) (same).

Plaintiffs also fail in their attempt to recast their bankruptcy and trading claims

“for reconsideration in light of our holding today about the meaning of § 11,” noting that “[i]n doing so, we express no views about the proper interpretation of § 12 or its application to this case.” *Slack*, 143 S. Ct. at 1442 n.3. Defendants respectfully request leave to submit additional briefing on the Section 11 and Section 12 issues in the event the Ninth Circuit rules on them prior to this Court’s decision.

¹⁵ Compare ¶¶ 96-97, with ¶¶ 458-460 (bankruptcy risk), and ¶¶ 133-140, 144-45, 147-48 with ¶¶ 467-76 (trading):

as undisclosed material risks or trends under Item 105 or Item 303 of SEC Regulation S-K. *See* ¶¶ 492-99. The Third Circuit requires plaintiffs to plead knowledge under both Items. *See Howard v. Arconic Inc.*, 2021 WL 2561895, at *27 (W.D. Pa. June 23, 2021). But Plaintiffs fail to plead that either the bankruptcy risk or any purported proprietary trading was a *known* risk or a *known* trend reasonably expected to impact Coinbase’s financial results when the challenged statements were made in the *April 2021* registration statement. Indeed, Plaintiffs fail to allege either *ever* had any material adverse financial impact, *see Okla. Law Enf’t Ret. Sys. v. Papa John’s Int’l, Inc.*, 517 F. Supp. 3d 196, 213 (S.D.N.Y. 2021), or was ever considered to be a material risk, *see electroCore*, 2021 WL 3579057 at *9.

C. The SAC Fails To Plead A Section 12 Claim

Plaintiffs’ Section 12 claim is based on the same misstatements as their Section 11 claim and should be dismissed for that reason alone. In addition, it should be dismissed because Plaintiffs fail to allege that either Coinbase or any of the Securities Act Defendants are “statutory sellers” under the Supreme Court’s holding in *Pinter v. Dahl*—*i.e.*, that Defendants either (i) “passed title, or other interest in the security, to the buyer for value,” or (ii) “successfully solicit[ed] the purchase [of a security], motivated at least in part by a desire to serve [its] own financial interests or those of the securities owner.” 486 U.S. 622, 642, 647 (1988).

Plaintiffs do not allege that any of the Defendants sold directly to Plaintiffs.

Indeed, the Complaint contains no allegations that Coinbase or Individual Defendants Ms. Kramer and Mr. Rajaram sold *any* shares in the direct listing. ¶¶ 432-33. Nor do Plaintiffs allege that Defendants “successfully solicit[ed] the purchase [of a security]” from Plaintiffs. Threadbare allegation that “Defendants’ acts of solicitation included participating in the preparation of the false and misleading Offering Materials,” ¶ 525, are insufficient, *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 636 (3d Cir. 1989), and conclusory assertions that “Defendants solicited Plaintiffs” (¶ 525) likewise fail. *Emps.’ Ret. Sys. of the Gov’t of the Virgin Islands v. J.P. Morgan Chase & Co.*, 804 F. Supp. 2d 141, 151 (S.D.N.Y. 2011). Plaintiffs also fail to allege that the alleged solicitation was successful, *i.e.*, that Defendants “directly contacted” Plaintiffs or that Plaintiffs “purchased securities as a result of” Defendants’ solicitations.” *Risley*, 2023 WL 5609200 at *18.

III. THE SAC FAILS TO PLEAD CONTROL PERSON LIABILITY

Plaintiffs’ control person claims under Section 20(a) of the Exchange Act and Section 15 of the Securities Act should also be dismissed because they fail to state a predicate claim under Section 10(b) and Section 11, respectively. *See Klein v. Gen. Nutrition Cos., Inc.*, 186 F.3d 338, 344 (3d Cir. 1999); *In re Campbell Soup Co. Sec. Litig.*, 2022 WL 6961796, at *12 (D.N.J. Oct. 11, 2022).

CONCLUSION

For the foregoing reasons, the Court should dismiss the SAC with prejudice.

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Respectfully submitted,

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