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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

IN RE SVB FINANCIAL GROUP SECURITIES LITIGATION	Master File No. 5:23-cv-01097-NW Consolidated Case Nos. 5:23-cv-01173-JD; 5:23-cv-01228-JD; 5:23-cv-01697-JD; 5:23-cv-01962-JD **PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR LEAVE TO AMEND** CLASS ACTION Date: July 27, 2026 Time: 1:30 P.M. Courtroom: 3, 5th Floor Judge: Hon. Noël Wise

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I. INTRODUCTION

In its Opposition, KPMG tellingly fails even to mention the Supreme Court's seminal decision in *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010), which establishes the governing statute-of-limitations standard for Exchange Act claims and wholly undermines KPMG's timeliness challenge. Rather than address the controlling legal standard, KPMG rests its statute-of-limitations defense on a fundamental distortion of the PSLRA framework and procedural history of this case. The record reflects the following:

- The *Hialeah* Complaint—an initial, 34-page complaint filed by plaintiffs represented by BLB&G before the appointment of Lead Plaintiffs—was not filed by the Court-appointed Lead Plaintiffs and expressly stated that "[p]laintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery." Complaint at 1, *City of Hialeah Emps.' Ret. Sys. v. Becker*, No. 3:23-cv-1697 (N.D. Cal. April 7, 2023) ("*Hialeah* Complaint"), Dkt. No. 1;
- Upon their appointment, Lead Plaintiffs and Lead Counsel conducted a thorough investigation and assessment, determining that the *Hialeah* Complaint's allegations and the facts known at the time were insufficient to plead KPMG's scienter with the particularity required by the PSLRA—a determination with which KPMG itself agrees;
- Having determined that they could not viably allege KPMG's scienter with the required PSLRA particularity at the time, Lead Plaintiffs filed a 290-page consolidated amended complaint that asserted only a Securities Act claim against KPMG and repeatedly reserved their right to amend their allegations after discovery; and
- Lead Plaintiffs' motion to amend now, based on internal documents Defendants recently produced, to assert a scienter-based claim against KPMG is entirely consistent with *Merck*, which holds that the operative statute-of-limitations question is when Lead Plaintiffs obtained the facts necessary to plead KPMG's scienter with PSLRA particularity—regardless of any prior complaints.

In not pursuing the fraud claims alleged in the *Hialeah* Complaint, Lead Plaintiffs made the determination that without further discovery, those claims were not feasible. The PSLRA vests such prudent and deliberate decision-making authority in court-appointed Lead Plaintiffs, and *Merck* reflects the Supreme Court's view that the Exchange Act's statute of limitations provision encourages, and does not penalize, a lead plaintiff's further investigation into claims.

Unable to grapple with *Merck*'s legal standard, the actual PSLRA-mandated framework, and the procedural history in this case, KPMG resorts to baseless assertions that Lead Plaintiffs somehow extinguished the rights of the Class to assert a §10(b) claim against KPMG by "abandoning" that claim. This argument fails at every level. For starters, Lead Plaintiffs never previously asserted a §10(b) claim against KPMG—and therefore could not have "abandoned" it. And there is nothing remotely improper about reasserting a claim following discovery of facts that justify doing so. The Ninth Circuit is clear on this point: it has "never held … that a plaintiff who omits previously dismissed claims from an amended complaint waives his right to reallege these claims in further amendments at the district court level." *New York City Emps.' Ret. Sys. v. Jobs*, 593 F.3d 1018, 1025 (9th Cir. 2010) ("*Jobs*").[1]

KPMG's remaining arguments fare no better. Its claim of undue delay is baseless: "undue delay cannot exist where, as in this case, discovery has not ended." *James ex rel. James Ambrose Johnson, Jr., 1999 Tr. v. UMG Recordings, Inc.*, 2012 WL 4859069, at *2 (N.D. Cal. Oct. 11, 2012). Discovery in this case is ongoing; no depositions have been taken of KPMG or any other Defendants; only 15% of the parties' allotted depositions have been taken; and Lead Plaintiffs promptly amended the complaint following their expedited review of over 34 million pages of produced documents. KPMG's claims of "undue prejudice" are equally meritless. A potential need to re-depose witnesses and serve additional discovery are the ordinary burdens of litigation—not the kind of undue prejudice that warrants the drastic measure of denying leave to amend. *See Garcia v. Stemilt AG Servs., LLC*, 2021 WL 9527247, at *2 (E.D. Wash. July 1, 2021).

The Ninth Circuit has long instructed that leave to amend should be liberally granted and disputes resolved on the merits. This case—involving the third largest bank failure in U.S. history and KPMG's dereliction of duties, with scienter now identified through discovery—is no exception. The Court should reject KPMG's attempt to avoid the SAC's merits.

II. RELEVANT BACKGROUND

On March 10, 2023, SVB collapsed, leaving investors with billions of dollars of losses. Between March 13 and April 24, 2023, five sets of plaintiffs each filed initial class action complaints in this District. One of the initial complaints, filed on April 7, 2023, named KPMG as an Exchange Act defendant (the "*Hialeah* Complaint"). Neither Lead Plaintiff was a party to it.

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[1] Unless otherwise noted, all emphases have been added, and all internal quotation marks, alterations, and citations have been omitted. "Opp." refers to KPMG's opposition to Plaintiffs' Motion for Leave to Amend (Dkt. No. 330).

The 34-page *Hialeah* Complaint was filed less than one month after SVB's collapse, based on limited publicly available information. It alleged fraud-based Exchange Act claims against all of SVB's directors and KPMG, but did not allege a Securities Act claim against KPMG. Nor did the *Hialeah* Complaint include the particularized allegations of KPMG's scienter included in the SAC, instead stating those plaintiffs' belief that "substantial additional evidentiary support will exist" for the allegations "after … discovery." *Hialeah* Complaint at 1.

On November 30, 2023, the Court appointed Norges and AP7 as Lead Plaintiffs, appointed Lead Counsel, and ordered Lead Plaintiffs to file a consolidated amended complaint within 45 days. Dkt. No. 44 at 4-5. Lead Counsel conducted an extensive investigation but had no access to KPMG's internal documents and workpapers. Based on their investigation, Lead Plaintiffs and Lead Counsel concluded that, without such information, they could not allege KPMG's scienter with the particularity required by the PSLRA.

On January 16, 2024, Lead Plaintiffs filed a 290-page consolidated amended complaint ("AC") that superseded all prior complaints (including the *Hialeah* Complaint) and alleged only strict-liability Securities Act claims against KPMG, with Exchange Act fraud claims asserted against only two individual Defendants. Dkt. No. 88 ¶¶340-68; 647-723. The AC included Asbestos Workers and Local 12 (who had filed the *Hialeah* Complaint) as additional plaintiffs for only the Securities Act claims. *Id.* ¶¶377-78. Discovery was stayed under the PSLRA until June 13, 2025, when this Court denied Defendants' motions to dismiss.

On August 26, 2025, the parties submitted a joint case management statement, which noted that Plaintiffs had not yet received 4 million documents from SVB. Dkt. No. 217 at 9. In that and each later such statement, Lead Plaintiffs expressly reserved their right to amend the AC. *See* Dkt. Nos. 217, 221, 238. Meanwhile, KPMG never proposed a deadline for Lead Plaintiffs to seek leave to amend, and the Court's scheduling orders imposed no such deadline. Dkt. Nos. 198, 250.[2]

[2] KPMG erroneously claims that the deadline to amend was January 16, 2024, and thus Rule 16's good cause showing is required. *See* Opp. at 6 (citing Dkt. No. 82). But KPMG cites to the Court's initial consolidation order giving the Lead Plaintiffs until that date to file the consolidated amended complaint. *See* Dkt. No. 82 at 5. That order was not a Rule 16 scheduling order, and the Court's Rule 16 scheduling orders never imposed any deadlines to amend.

On September 19, 2025, the Senate Permanent Subcommittee on Investigations released a detailed report following its access to KPMG internal documents (the "Senate Report"), which concluded that "KPMG had years-long awareness of the problems at [SVB] that precipitated [SVB]'s … failure, but either ignored or justified these concerns." *See* Dkt. No. 319 ¶985.

During document discovery, KPMG produced over 1.3 million pages of documents—with approximately 30% produced after the January 9, 2026 substantial completion deadline. On April 3, 2026, Defendants produced 500,000 additional documents from SVB, of the 4 million total.

On April 15, 2026, less than two weeks after receiving Defendants' final production of 500,000 SVB documents and before the class certification hearing, Lead Plaintiffs notified KPMG that they intended to seek leave to amend the AC to add a §10(b) claim against KPMG. Dkt. No. 303 at 2. On May 4, 2026, Lead Plaintiffs filed their motion for leave to amend, attaching the proposed SAC. *See* Dkt. No. 319. The SAC's scienter allegations rely almost entirely on KPMG's non-public audit workpapers and Defendants' internal documents—materials Lead Plaintiffs had no access to until discovery. KPMG acknowledges this by seeking to seal 64% of the 85 pages detailing KPMG's scienter because they disclose "confidential audit information…reflected in workpapers and other audit documents." Dkt. No. 323 at 3, 6-7.

III. ARGUMENT

A. The Proposed SAC Is Not Futile

1. The Proposed SAC Is Not Time-Barred

Since *Merck* overruled the "inquiry notice" standard, the statute of limitations ("SOL") for Exchange Act claims begins only after "a reasonably diligent plaintiff would have discovered the facts constituting the violation, including scienter." 559 U.S. at 653. The Ninth Circuit has emphasized that the "fact" of scienter is "discovered" only when a plaintiff can plead scienter with sufficient "particularity to survive a 12(b)(6) motion to dismiss." *York Cnty. v. HP, Inc.*, 65 F.4th 459, 465 (9th Cir. 2023). Until a plaintiff can plead scienter with the particularity that the PSLRA demands, "the statute of limitations [] does not begin to run." *Merck*, 559 U.S. at 648.

Courts in this District have stressed that "[t]he Supreme Court [in *Merck*] set a high bar for establishing [a SOL defense] as a matter of law in securities cases." *Rafton v. Rydex Series Funds*, 2011 WL 31114, at *9 (N.D. Cal. 2011). The determination "is fact intensive and is usually not appropriate at the pleading stage." *Id.* at *9. At the pleading stage, a SOL defense is only appropriate when there is an "obvious bar to securing relief on the face of the complaint." *York Cnty.*, 65 F.4th at 466. "Whether plaintiffs should have discovered the requisite facts may be decided as a matter of law only when 'uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the fraudulent conduct.'" *Borteanu v. Nikola Corp.*, 2023 WL 11017679, at *5 (D. Ariz. Dec. 8, 2023); *see also Booth v. Strategic Realty Tr.*, 2014 WL 3749759, at *5 (N.D. Cal. Jul. 29, 2014) (*Merck* made "defendants' burdens even more onerous"). "[T]he law of the Ninth Circuit strongly favors any legitimate factual disputes over the timeliness of a securities claim being determined by the fact-finder" and, to defeat a SOL challenge at the pleading stage, plaintiffs need only show it "is plausible" they lacked the necessary facts to plead Defendants' scienter with the requisite particularity two years earlier. *See id.* *5. KPMG cannot establish a SOL defense—let alone carry its heavy burden as a matter of law at the pleading stage.

First, contrary to KPMG's assertions, the *Hialeah* Complaint did not start the SOL clock. Under *Merck*, a complaint triggers the SOL only if it contains the necessary particularity to survive a Rule 12(b)(6) motion to dismiss. *See, e.g.*, *Eton Park Fund, L.P. v. Am. Realty Cap. Props.*, 2017 WL 4898226, at *4 (S.D.N.Y. Aug. 14, 2017) (initial complaint filed by a non-lead plaintiff did not start the SOL clock, which was triggered only once lead plaintiffs obtained "critical information allowing [them] to properly plead scienter and to survive a motion to dismiss").

The initial, 34-page *Hialeah* Complaint did not include the particularized allegations of KPMG's scienter in the SAC. Unlike the SAC, the *Hialeah* Complaint did not allege facts establishing KPMG's knowledge of SVB's severe risk control and liquidity deficiencies, including SVB's internal liquidity stress test results that "demonstrate[d] a sustained liquidity shortfall" at SVB. SAC ¶881 (quoting internal KPMG workpapers). Nor did it allege KPMG's awareness that SVB "plann[ed] to reclass[ify] securities out of HTM to AFS," reflecting SVB's lack of intent and ability to hold those HTM securities to maturity. SAC ¶898 (quoting internal email from KPMG Audit Partner Jack Pohlman). And the *Hialeah* Complaint likewise did not plead facts establishing KPMG's knowledge that throughout 2021, SVB was in breach of its Economic Value of Equity limits and "out of compliance" with respect to interest rate risk. SAC ¶850 (quoting internal KPMG notes of SVB Asset/Liability Committee meeting). Lead Plaintiffs neither knew nor could have known any of these critical scienter facts until discovery in this action.

Courts repeatedly reject KPMG's contention that a complaint without particularized scienter facts starts the SOL clock under *Merck*. *See, e.g.*, *Venkataraman v. Kandi Techs. Grp., Inc.*, 2022 WL 4225562, at *8 (S.D.N.Y. Sept. 13, 2022) (finding that an "initial complaint [that] did not include *any* specific allegations of scienter" did not trigger SOL); *Cosby v. KPMG, LLP*, 2018 WL 3723712, at *7-8 (E.D. Tenn. Aug. 2, 2018) (rejecting KPMG's argument that "based on the allegations … in the initial complaint, plaintiffs knew of or should have discovered the alleged wrongdoing"); *La. Mun. Police Emp. Ret. Sys. v. KPMG LLP*, 822 F. Supp. 2d 711, 717 (N.D. Ohio 2011) ("prior lawsuit do[es] not reveal facts of … scienter … Plaintiff's claims are not time barred"); *Eton Park*, 2017 WL 4898226, at *2-4.

Facts developed through discovery—now detailed in the SAC—substantiate Plaintiffs' allegations and provide necessary support for the PSLRA's scienter requirement. For example, in a securities action against Valeant, the court dismissed a complaint against PwC that alleged, prior to discovery, that the auditor "would have concluded that Valeant was violating GAAP." *Lord Abbett Inv. Tr.-Lord Abbett Short Duration Income Fund v. Valeant Pharms. Int'l, Inc.*, 2018 WL 3637514, at *3 (D.N.J. July 31, 2018). Following discovery, however, the plaintiffs amended to add a §10(b) claim against PwC, because they could now "allege[] what PwC learned as documented in its workpapers." *In re Valeant Pharms. Int'l. Inc. Sec. Litig.*, 2022 WL 17480933, at *17 (D.N.J. Nov. 30, 2022). With the workpapers, those plaintiffs could—and did—successfully allege PwC's scienter. The same is true here.

Second, KPMG undermines its own SOL argument by simultaneously asserting in moving to dismiss the proposed SAC that, even now, Lead Plaintiffs fail to allege facts necessary to plead KPMG's scienter with the particularity the PSLRA mandates. *See* Dkt. No. 331 at 6-21. As courts have explained, under *Merck*, KPMG's SOL defense is "at cross purposes," "significantly undercut," and "trivial at best" where, as here, defendant argues plaintiff's complaint still lacks necessary scienter allegations. *See Orbis Glob. Equity Fund Ltd. v. NortonLifelock Inc.*, 2023 WL

1800963, at *6 (D. Ariz. Feb. 7, 2023) ("at cross purposes with"); *Fed. Hous. Fin. Agency v. UBS Americas, Inc.*, 858 F. Supp. 2d 306, 320 (S.D.N.Y. 2012) ("significantly undercut"); *In re Ambac Fin. Grp., Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 276-77 (S.D.N.Y. 2010) ("trivial at best").

Third, KPMG asserts that "Plaintiffs," having filed the initial *Hialeah* Complaint, forever "admitted" that they had the necessary particularized facts to satisfy the PSLRA's scienter requirement at that early time—and cannot state otherwise now. Putting aside that neither of the Lead Plaintiffs filed the *Hialeah* Complaint (*see infra* at 9-10), KPMG's argument ignores that the *Hialeah* Complaint was superseded, rendering it a legal nullity. *See Habelt v. iRhythm Techs.*, 83 F.4th 1162, 1166 (9th Cir. 2023) ("While it is true that [plaintiff] filed the initial complaint in this matter, that complaint has now been extinguished [because] an amended complaint supersedes the original"); *Ramirez v. Cnty. of San Bernardino*, 806 F.3d 1002, 1008 (9th Cir. 2015) ("It is well-established in our circuit that an amended complaint supersedes the original, the latter being treated thereafter as non-existent"); *McCrary v. Elations Co.*, 2014 WL 1779243, at *4 (C.D. Cal. 2014) ("Defendant appears to contend that the Court should deny amendment because the allegations in the 4AC explicitly or implicitly admit that prior allegations in the TAC were false .... However, an amended pleading supersedes earlier pleadings."); *see also Nat. Rural Elec. Co-op. Assoc. v. Breen Cap. Servs. Corp.*, 2001 WL 294086, at *4 (D.N.J. Mar. 28, 2001) (defendants could not rely on "allegations made in the original complaint" to assert SOL defense).

Indeed, there is "nothing in the Federal Rules of Civil Procedure to prevent a party from filing successive pleadings that make inconsistent or even contradictory allegations." *PAE Gov't. Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 860 (9th Cir. 2007). As the Ninth Circuit has explained, "over the passage of time and through diligent work," plaintiffs often "learn[] more about the available evidence and viable legal theories, and wish to shape their allegations to conform to these newly discovered realities. We do not call this process sham pleading; we call it litigation." *Id.*

Moreover, courts have long held that—even absent an amendment—the mere assertion of a legal claim in a complaint, such as the *Hialeah* Complaint's §10(b) claim against KPMG and its single paragraph alleging scienter, cannot constitute a judicial admission. *See A.F. v. Evans*, 2022 WL 1541463, at *4 (D. Or. May 16, 2022) (statements asserting "causes of action against [a defendant] state only legal conclusions that the Court does not consider to be judicial admissions"); *Five Points Hotel P'ship v. Pinsonneault*, 2014 WL 4771769, at *2 (D. Ariz. Sept. 24, 2014) ("[s]tatements of legal theories or legal conclusions are not admissions and are not binding"); *Pierson v. Ford Motor Co.*, 2008 WL 7074289, at *2 (N.D. Cal. Oct. 3, 2008) ("legal conclusion or opinion" not a judicial admission); *Saticoy Bay LLC v. U.S. Bank Nat'l Ass'n*, 2022 WL 17061223, at *3 (D. Nev. Nov. 17, 2022) ("the scope of judicial admissions is restricted … and does not include counsel's statement of his conception of the legal theory of a case").

Fourth, while KPMG seeks to minimize the significance of its audit workpapers here, it told the Court just weeks ago that they are the "<u>written record of the basis for [its] conclusions</u>." Dkt. No. 323 at 3. Lead Plaintiffs could not plead the detailed scienter facts contained in the SAC before receiving the workpapers and other internal KPMG discovery. *See In re Silver Wheaton Corp. Sec. Litig.*, 2018 WL 1517130, at *4 (C.D. Cal. 2018) ("reasonable" for plaintiffs "to have waited to amend their complaint until after [the auditor] produced additional documents and their audit work papers," as "[a]n earlier attempt at amendment could very well have resulted in dismissal under the PSLRA"); *Valeant*, 2022 WL 17480933, at *17 (following discovery and amendment of complaint, plaintiff could "allege[] what PwC learned as documented in its workpapers"); *Antell v. Arthur Andersen LLP*, 1998 WL 245878, at *4-5 (N.D. Ill. May 4, 1998) (rejecting SOL argument, as plaintiff "could not have known that Arthur Andersen may have joined in the alleged fraud … until Arthur Andersen produced its work papers").

Finally, KPMG's "relation back" arguments are irrelevant. Because "Defendants have failed to establish that a reasonably diligent plaintiff would have discovered facts constituting scienter" more than two years before the SAC was filed, "this Court need not address Defendants' arguments concerning whether the" SAC "relates back to the [earlier] complaints." *See In re Smith Barney Transfer Agent Litig.*, 765 F. Supp. 2d 391, 401 (S.D.N.Y. 2011). KPMG's arguments are also wrong: the SAC relates back to the AC under Rule 15(c)(1)(B), as both relate to the "same conduct, transaction, <u>or</u> occurrence"—i.e., KPMG's deficient audits of SVB. That the AC alleged only Securities Act claims against KPMG is of no moment. Consistent with Rule 15, the Ninth Circuit has long held that "later-filed claims may relate back, <u>even if they rest on a different legal</u>

theory than that of the first claim." *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730 (9th Cir. 1988) (fraud claim related back to non-fraud claim). The Ninth Circuit has further held that Rule 15's relation back doctrine "liberally applies," even when the amended complaint includes "allegations that were expressly disclaimed in the original pleading." *ASARCO, LLC v. Union Pac. R.R. Co.*, 765 F.3d 999, 1005 (9th Cir. 2014); *see also In re Dynegy, Inc. Sec. Litig.*, 339 F. Supp. 2d 804, 887 (S.D. Tex. 2004) (Exchange Act claims relate back to Securities Act claims).

2. The §10(b) Claim Against KPMG Has Not Been Waived

KPMG also mistakenly contends that Lead Plaintiffs have somehow "waived the Section 10(b) claims against KPMG." Dkt. No. 330 at 11. The law squarely holds to the contrary. As the Supreme Court has emphasized, "waiver" requires an affirmative demonstration of the "intentional relinquishment or abandonment of a known right." *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417 (2022). To amount to a "waiver," the litigant's act "must be clear, decisive and unequivocal of a purpose to waive the legal rights involved." *Plaskett v. McCarthy*, 2019 WL 4278945, at *8 (N.D. Cal. Sept. 10, 2019). KPMG cannot demonstrate any such "waiver" here.

First, KPMG's waiver argument rests on the fiction that Lead Plaintiffs filed the *Hialeah* Complaint. They did not—and one party cannot waive another party's rights. *See Morgan*, 596 U.S. at 417 ("To decide whether a waiver has occurred, the court focuses on the actions of the person who held the right"); *Olympic Pipe Line Co. v. City of Seattle*, 437 F.3d 872, 883 (9th Cir. 2006) ("[Plaintiff] could not, therefore, waive a right that it did not possess"); *Oracle Am., Inc. v. Or. Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018, 1043-44 (D. Or. 2015) ("one may not waive a right that one does not possess") (collecting cases).

Second, even if Lead Plaintiffs had previously asserted §10(b) claims against KPMG, they would be entitled to reassert them. The Ninth Circuit has made this clear. In *Jobs*, the "original complaint [filed by a non-lead plaintiff] contained a § 10(b) claim, but [the lead plaintiff] did not include that claim in the consolidated complaint," before eventually "[seeking] leave to amend the consolidated complaint to reallege the § 10(b) claim." 593 F.3d at 1024. Reversing the district court's denial of leave to amend, the Ninth Circuit explained that "[w]e have never held … that a plaintiff who omits previously dismissed claims from an amended complaint waives his right to reallege these claims in further amendments at the district court level." *Id.* at 1025.

This principle has particular force in the PSLRA context, where a "lead plaintiff has the autonomy and authority to direct the course and strategy of the litigation"—not the initial filers of complaints that are subsequently superseded. *In re Synergy Pharms. Inc. Sec. Litig.*, 2019 WL 6150713, at *2 (E.D.N.Y. Nov. 20, 2019); *see also In re Facebook, Inc., IPO Sec. & Deriv. Litig.*, 2013 WL 4399215, at *3 (S.D.N.Y. Aug. 13, 2013) ("a lead plaintiff has the sole authority to determine what claims to pursue on behalf of the class"). Lead Plaintiffs' purported failure to "reassert" a claim they never previously asserted cannot constitute the "clear, decisive and unequivocal" conduct necessary to forever relinquish their (and the Class's) legal rights.

Jobs arose in the same PSLRA context as this case and reiterated the Ninth Circuit's longstanding "standard practice." *See Pack v. McCausland*, 300 F. App'x 541, 543 & n.2 (9th Cir. 2008) (finding denial of leave to amend where plaintiff alleged claims "in earlier iterations of his complaint but had omitted them from the most recent version" "a clearly erroneous application of the law and thus an abuse of discretion"). District courts in this Circuit have repeatedly adhered to this "standard practice," rejecting KPMG's "waiver" argument, including just <u>two weeks ago</u>. *See, e.g.*, *Baskerville v. Skechers, USA, Inc.*, 2026 WL 1670859, at *10 (C.D. Cal. June 4, 2026) (rejecting waiver argument and permitting repleading of voluntarily omitted claims); *Philips v. Ford Motor Co.*, 2016 WL 1745948, at *9-11 (N.D. Cal. May 3, 2016) (Koh, J.); *Coppola v. Smith*, 2015 WL 2127965, at *6 (E.D. Cal. May 6, 2015) (same); *McCart-Pollak v. On Demand Direct Response LLC*, 2023 WL 8481354, at *4 (D. Nev. Dec. 6, 2023) (same); *United States ex rel. Dunlap v. Alaska Radiology Assocs.*, 2017 WL 11684935, at *1 n.12-13 (D. Alaska Mar. 28, 2017) (same); *OEM-Tech v. Video Gaming Techs., Inc.*, 2011 WL 13153640, at *2-3 (N.D. Cal. Dec. 21, 2011) (same); *Google, Inc. v. Affinity Engines, Inc.*, 2005 WL 2007888, at *7 (N.D. Cal. Aug. 12, 2005) (same). These courts have all adhered to the "rule" that "a party may seek leave to amend a complaint to reassert a prior voluntarily omitted claim." *Coppola*, 2015 WL 2127965, at *6.

KPMG's "waiver" argument rests on an inaccurate characterization of the law. Ignoring *Jobs* and progeny directly on point, KPMG argues that *Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012), precludes plaintiffs from reasserting claims if withdrawn in an earlier amendment.

This misconstrues *Lacey*, which addressed preservation of issues "for appeal"—not reassertion of claims in the district court. *Id.* at 928. As Judge Koh has explained, "*Lacey* [addressed] whether an argument is waived for purposes of appeal—not whether … a party may re-assert a previously dismissed claim in an amended complaint." *Philips*, 2016 WL 1745948, at *10. Other courts have read *Lacey* the same way and cited *Jobs* for the governing standard, including after *Lacey*. *See Baskerville*, 2026 WL 1670859, at *10 (finding *Lacey* "only applied to deciding whether an issue is waived on appeal and did not apply to anything else within [*Jobs*] regarding amending complaints at the district court level"); *McCart-Pollak*, 2023 WL 8481354, at *4 ("*Lacey* [] concerned whether the plaintiffs had preserved an issue for appeal," citing *Jobs* approvingly); *Alaska Radiology*, 2017 WL 11684935, at *1 ("[*Lacey*] did not hold [] that the plaintiff would have been barred from re-asserting the omitted claims at the district court level").

Moreover, KPMG's interpretation of *Lacey* cannot be squared with the Ninth Circuit's holdings in *Jobs* or *Pack*—both of which recognize that refusing to allow a plaintiff to amend to reassert a voluntarily omitted claim would be "an erroneous application of the law and, thus, an abuse of discretion." *Jobs*, 593 F.3d at 1025; *Pack*, 300 F. App'x at 543. If KPMG's interpretation of *Lacey* were correct, the *Lacey* court would have explicitly stated that it was overruling prior Ninth Circuit precedent. Of course, *Lacey* does no such thing—because it addressed an entirely different question. The obvious and natural reading is that *Lacey* "only applied to deciding whether an issue is waived on appeal," not waiver of the right to reassert a claim in a subsequently amended complaint at the district court level. *Baskerville*, 2026 WL 1670859, at *10.[3]

Third, even if KPMG's interpretation of *Lacey* were correct, Lead Plaintiffs have still not waived the §10(b) claim because of the new facts developed during discovery. As Judge Koh explained in *Philips*, finding a "waiver" where there is an "intervening change in [] fact" would be "unfair, inefficient, and overly harsh to [plaintiffs]." 2016 WL 1745948, at *11. Indeed, Judge Koh distinguished the very cases KPMG relies upon here, holding that in "none of these cases did the

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[3] If *Heath v. Google* or KPMG's other cited authorities read *Lacey* otherwise, those readings are clear error and constitute "an abuse of discretion." *Jobs*, 593 F.3d at 1025; *Alaska Radiology*, 2017 WL 11684935, at *1 n.13 ("declin[ing] to follow those courts").

Ninth Circuit or the district court consider whether a party could replead a claim in light of an intervening change in law or fact." *Id.* (distinguishing *Chubb Custom* and *Westley v. Oclaro*).

The particularized facts of scienter uncovered during discovery constitute an intervening change in facts. Holding that Lead Plaintiffs' decision to exercise restraint and not bring a §10(b) claim against KPMG forever foreclosed that claim—even after new facts came to light—would be "unfair, inefficient," and inconsistent with Ninth Circuit law. *Id.* at *11. As the Ninth Circuit has stressed, "[p]arties should <u>not</u> be discouraged from limiting their initial pleadings to claims and defenses that have evidentiary support. Nor should they fear that doing so will foreclose them from amending their pleadings if new facts come to light after further investigation and discovery." *ASARCO*, 765 F.3d at 1006. Such a prohibition would also be inconsistent with the lead plaintiff framework established by Congress. *See, e.g.*, *Eton Park*, 2017 WL 4898226, at *4. Lead Plaintiffs never waived—and are not precluded now from bringing—a §10(b) claim against KPMG.

3. The §10(b) Claim Is Not Otherwise Futile

KPMG also argues (Opp. at 12) that the §10(b) claim is supposedly "futile [and] subject to dismissal" on scienter and loss causation grounds. This argument not only fails for the reasons set forth in Plaintiffs' Opposition to KPMG's Motion to Dismiss, but it also ignores that "denial of a motion for leave to amend on [such grounds] is rare and courts generally defer consideration of challenges to the merits of a proposed amended pleading until after leave to amend is granted." *Cress v. Nexo Cap. Inc.*, 2025 WL 3034067, at *8 (N.D. Cal. Oct. 30, 2025).

B. There Was No Undue Delay

Lead Plaintiffs have not delayed, let alone "unduly delayed," in bringing a §10(b) claim against KPMG. The particularized facts of KPMG's scienter alleged in the SAC were not revealed until KPMG completed its production of more than 1.5 million pages of internal documents in March 2026. Even the Senate Report—which did not become public until September 2025—released only a handful of KPMG documents. Lead Plaintiffs correctly "waited until they had sufficient evidence of conduct upon which they could base claims" under §10(b) against KPMG, which the Ninth Circuit has recognized is a "satisfactory explanation" for waiting to amend. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). Lead Plaintiffs expeditiously reviewed the four million produced documents, assessed whether a viable §10(b) claim existed, and drafted the proposed SAC—all in just a few months. That is the definition of diligence.

KPMG's contrary arguments fail. ***First***, even accepting KPMG's mischaracterizations, "delay alone is not sufficient to justify the denial of a motion requesting leave to amend." *Id*.

Second, KPMG wrongly points to 2023 (i.e., the *Hialeah* Complaint) as the time when Lead Plaintiffs supposedly "knew [] the facts" that allowed for amendment. Opp. at 13. But Lead Plaintiffs did not know the facts alleged in the SAC in 2023—and could not have known them before Defendants produced their internal documents. *See Pack*, 300 F. App'x at 544 (reversing denial of leave to amend where "[d]iscovery taken shortly before summary judgment motions were filed uncovered the basis for [] 'specific factual allegations'" of scienter).

Third, KPMG's reliance on class certification briefing, depositions, and expert work as evidence of delay (Opp. at 15) ignores that amendments at such stages of litigation are routinely permitted. *See, e.g., Gray v. Cnty. of Riverside*, 2014 WL 12597907, at *3 (C.D. Cal. July 18, 2014) (granting leave to amend after class certification motion filed); *M.H. v. Cnty. of Alameda*, 2012 WL 5835732, at *3 (N.D. Cal. Nov. 16, 2012) (granting leave to amend after depositions).

KPMG's claim that "Plaintiffs have had the key documents … since September 2025" (Opp. at 15) is also factually wrong. KPMG did not produce most documents referenced in the SAC until 2026—after the parties had begun briefing class certification and depositions. This includes productions of over 700,000 pages at the substantial completion deadline in January 2026 and more than 500,000 pages in February and March 2026. SVB then produced over 500,000 documents requiring review for KPMG-related material in April 2026, less than three weeks before Plaintiffs filed for leave to amend. *See Cress*, 2025 WL 3034067, at *5 (rejecting delay arguments where defendant produced only some of the relevant documents earlier in the litigation).

KPMG also ignores that courts routinely recognize that litigants need time to review voluminous document productions. *See, e.g.*, *Sharp Mem'l Hosp. v. Medi-Excel, S.A. de C.V.*, 2026 WL 684655, at *4 (S.D. Cal. Mar. 10, 2026) (no "lack of diligence" in the nearly nine-month gap between the document production and the motion for leave to amend where "voluminous number of documents" required "time-intensive review"); *James*, 2012 WL 4859069, at *2 ("Five months to complete a review of [25,000 documents] … is not *undue* delay"); *Storz Mgmt. Co. v. Carey*, 2021 WL 848768, at *1-3 (E.D. Cal. Mar. 5, 2021) (no undue delay where plaintiff moved five months after receiving metadata for "170,000 pages of documents").

Finally, KPMG ignores that discovery remains ongoing—and is, in fact, currently stayed. "[C]ourts have found that undue delay <u>cannot exist</u> where discovery has not ended." *Dauth v. Convenience Retailers, LLC*, 2013 WL 12440997, at *3 (N.D. Cal. July 31, 2013).

C. KPMG Has Not Been Unduly Prejudiced

There is no "substantial" or "undue" prejudice here that warrants overcoming the "liberal policy with respect to" amendment. *LeGrand v. Abbott Lab'ys*, 2024 WL 4969127, at *5 (N.D. Cal. Dec. 3, 2024). Lead Plaintiffs informed KPMG of the amendment before the class certification hearing and months before the close of fact discovery; neither KPMG nor any of its co-defendants has been deposed; the parties have taken only 15% of their allotted depositions; and the Court stayed the class certification hearing, discovery, and all other deadlines. The parties' stipulated schedule further provides an additional four months after the Court's order to complete discovery.

KPMG's undue prejudice arguments fail. ***First***, KPMG cannot avoid amendment by equivocally asserting that it will "likely" need "to attempt to reopen" certain fact depositions. Two of those depositions are of Lead Plaintiffs, who remain available. Two others are the Additional Plaintiffs, who are not plaintiffs for the §10(b) claim but are likewise available, if necessary. As for the six former SVB employees KPMG may seek to re-depose, half of them already testified that they never spoke with KPMG employees during the Class Period. In any event, "depos[ing] numerous witnesses across the country who have been previously questioned" does "<u>not</u> constitute undue prejudice." *Genentech, Inc. v. Abbott Lab'ys*, 127 F.R.D. 529, 531 (N.D. Cal. 1989); *see also N. Venture Partners, LLC v. Vocus, Inc.*, 2015 WL 7180553, at *3 (N.D. Cal. Nov. 16, 2015) (defendant could "request additional depositions and discovery at that time"); *Carrillo v. Schneider Logistics, Inc.*, 2013 WL 140214, at *4 (C.D. Cal. Jan. 7, 2013) ("that some witnesses have been deposed does not bar [defendant] from seeking to re-depose" them).

KPMG's cited authorities are inapposite. In several of those cases, the plaintiffs moved to amend <u>after</u> fact discovery closed—some during summary judgment. Here, by contrast, Plaintiffs seek to amend months before the close of discovery, which is now stayed. The need "to conduct additional discovery does not constitute undue prejudice" where "discovery has not yet closed." *Carranza v. City of San Pablo*, 2022 WL 110647, at *6 (N.D. Cal. Jan. 12, 2022).

Second, KPMG's written discovery argument fares no better. *See Genentech*, 127 F.R.D. at 531 (need for "additional document searches and written discovery" does not constitute undue prejudice). The cases KPMG cites (Opp. at 16) involved drastic changes that necessitated significant additional discovery. Here, by contrast, the SAC adds no new parties, does not change the Class Period, and does not meaningfully alter the scope of discovery. This case already includes Exchange Act claims and alleged misstatements in SVB's FY 2022 Form 10-K, and the parties have already produced documents covering the entire Class Period.

Third, KPMG argues that the amendment should be denied because it would "prejudice KPMG's expert preparation" by requiring it to "address a new fraud-based claim" in "only five months." Opp. at 17. But KPMG stipulated to that timeline (Dkt. No. 309) and, if the schedule proves unworkable for KPMG, it may seek additional time for expert reports.

Fourth, KPMG argues it will need to "redo class certification" because it did not ask Lead Plaintiffs' expert, Dr. Cain, questions about market efficiency and damages. Opp. at 18. But counsel for the Exchange Act Defendants questioned Dr. Cain on these topics. Moreover, Dr. Cain is available for an additional deposition if necessary, and the parties' schedule gives KPMG ample time for any additional class certification work. *See Pizana v. SanMedica Int'l LLC*, 345 F.R.D. 469, 484 (E.D. Cal. 2022) (need for "additional class certification discovery" may be necessary does not warrant denial of leave to amend).

Finally, KPMG contends the Motion should be denied due to unspecified "prejudice" to other Defendants from "engag[ing] in the new discovery." Opp. at 18. This generic argument could be made in any multi-party case and is inapplicable; no other Defendant has claimed prejudice. There is no undue prejudice warranting departure from the "extreme liberality" afforded amendment. *Brown v. Stored Value Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020).

IV. CONCLUSION

Plaintiffs' Motion for Leave to Amend should be granted.

Dated: September 9, 2026

Respectfully submitted,

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[4] In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other Signatories.