ADVANCE SHEET HEADNOTE
November 21, 2022

2022 CO 54

No. 21SC334, *Jagged Peak Energy Inc. v. Okla. Police Pension & Ret. Sys.*—Securities Regulation—Failure to State a Claim—Materiality.

In this case, the supreme court considers whether a division of the court of appeals erred when it concluded that plaintiff plausibly pleaded viable claims for relief under sections 11, 12(a)(2), and 15 of the Securities Act of 1933, 15 U.S.C. §§ 77k, 77*l*(a)(2), 77*o*, notwithstanding defendants' assertions that the alleged misrepresentations at issue were not actionable under federal law because (1) the statements constituted immaterial "puffery" and (2) plaintiff's claims were based on improper hindsight pleading.

The court now concludes that, on the specific facts presented in the case, plaintiff stated a plausible claim for relief because its allegations regarding the misrepresentations at issue were, as a matter of law, more than mere puffery and not based on hindsight pleading.

Accordingly, the court affirms the division's judgment.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2022 CO 54

Supreme Court Case No. 21SC334
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 19CA1718

Petitioners:

Jagged Peak Energy Inc.; Joseph N. Jaggers; Robert W. Howard; Shonn D. Stahlecker; Charles D. Davison; S. Wil Vanloh, Jr.; Blake A. Webster; Citigroup Global Markets Inc.; Credit Suisse Securities (USA) LLC; J.P. Morgan Securities LLC; Goldman, Sachs & Co.; RBC Capital Markets, LLC; Wells Fargo Securities, LLC; UBS Securities LLC; Keybanc Capital Markets, Inc.; ABN AMRO Securities (USA) LLC; Fifth Third Securities, Inc.; Petrie Partners Securities, LLC; Tudor, Pickering, Holt & Co. Securities, Inc.; BMO Capital Markets Corp.; Deutsche Bank Securities Inc.; Evercore Group L.L.C.; and Scotia Capital (USA) Inc.,

v.

Respondent:

Oklahoma Police Pension and Retirement System, individually and on behalf of all others similarly situated.

Judgment Affirmed
en banc
November 21, 2022

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JUSTICE GABRIEL delivered the Opinion of the Court, in which **JUSTICE HOOD**, **JUSTICE HART**, **JUSTICE SAMOUR**, and **JUSTICE BERKENKOTTER** joined.
JUSTICE MÁRQUEZ, joined by **CHIEF JUSTICE BOATRIGHT**, dissented.

JUSTICE GABRIEL delivered the Opinion of the Court.

¶1 In this case, we consider whether a division of the court of appeals misapplied federal case law when it concluded that respondent Oklahoma Police Pension and Retirement System ("Oklahoma") stated a plausible claim for relief under sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77k, 77*l*(a)(2), 77*o*, notwithstanding petitioners' assertions that the alleged misrepresentations at issue constituted immaterial "puffery" and amounted to claims based on hindsight, which are not actionable under federal law.[1] We conclude that the division's conclusion was consistent with applicable federal precedent, and we therefore affirm the division's judgment.

I. Facts and Procedural History

¶2 Because this case comes to us in the context of a C.R.C.P. 12(b)(5) motion to dismiss, we take the facts primarily from the allegations in Oklahoma's amended complaint.

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[1] Specifically, we granted certiorari to review the following issues:

1. Whether the court of appeals departed from federal caselaw on the Securities Act of 1933 when it (a) held that immaterial "puffery" statements may become material due to nearby historical or measurable information, and (b) allowed plaintiff to plead claims based on hindsight.
2. Whether the court of appeals erred by reversing the district court based on a theory plaintiff never raised.

¶3 Jagged Peak Energy Inc. ("Jagged") is a Denver-based company that specializes in the exploration, development, and production of crude oil and natural gas. Jagged's development drilling plan is composed exclusively of horizontal, as opposed to vertical, drilling. Although a horizontal well can cost up to 300% more to drill and complete for production than a vertical well directed to the same target horizon, the additional cost is expected to be recovered from increased production.

¶4 Creating horizontal wells is a complicated process. Thus, oil and gas exploration and production companies like Jagged typically contract with third-party drilling companies to drill and service wells for them. These contract drilling service companies are generally compensated based on the amount of time that they work for the exploration and production companies and the costs that they incur during the engagement.

¶5 In January 2017, Jagged conducted an initial public offering ("IPO"), during which it sold over 31 million shares at a price to the public of $15.00 per share. In connection with this IPO, Jagged filed a registration statement and incorporated offering materials (collectively, the "offering documents") with the Securities and Exchange Commission ("SEC"). The Jagged officers and directors named individually as defendants in this case (the "individual defendants") each either signed or authorized the signing of the offering documents. Further, a number of

investment banking houses that specialize in underwriting public offerings of securities (the "underwriter defendants") underwrote, served as financial advisors for, and assisted in the preparation and dissemination of Jagged's offering documents.

¶6 Oklahoma, a governmental pension system that provides pension and disability benefits for municipal police officers in the state of Oklahoma, purchased Jagged shares "pursuant to and/or traceable to the [IPO]." According to Oklahoma, within a short time after its investment, facts came to light indicating that Jagged, the individual defendants, and the underwriter defendants (collectively, "defendants") had negligently overstated Jagged's ability to increase its oil and gas production. As a result, the price of Jagged shares saw several notable declines, and except for a brief surge, Jagged's stock has traded well below its IPO price.

¶7 In light of the foregoing, Oklahoma filed a class action lawsuit in Denver District Court, alleging that defendants had made materially untrue statements and omissions in their offering documents in violation of sections 11, 12(a)(2), and 15 of the Securities Act. After the removal of this case to federal court and the case's subsequent remand back to the state district court, Oklahoma filed an amended complaint that added more than forty paragraphs of details to support its claim that Jagged had "negligently overstated [its] ability to increase its oil and

gas production" by representing that it (1) "owned prime territory in the core oil producing window" of the area to be developed and (2) "had a highly experienced professional workforce capable of developing Jagged's property in an efficient and aggressive manner."

¶8 Although the amended complaint identifies as materially misleading multiple statements, sometimes paragraphs at a time, from Jagged's offering documents, the issues before us require us to take a closer look at just two.

¶9 The first statement, which the parties now refer to as "Statement 4," provided that Jagged's primary business objective was to "increase stockholder value through the execution of the following strateg[y]":

> ***Maximize returns by optimizing drilling and completion techniques through the experience and expertise of our management and technical teams.*** Our experienced management and technical teams have a proven track record of optimizing drilling and completion techniques to drive well and field-level returns. We have experienced a significant decrease in our drilling and completion costs since 2014.

¶10 The second statement, which the parties now refer to as "Statement 2," provided that Jagged's "development drilling plan is comprised exclusively of horizontal drilling with an ongoing focus on reducing drilling times, optimizing completions and reducing costs."

¶11 Oklahoma alleged that both of these statements were materially untrue and misleading and omitted material information because Jagged had failed to disclose that (1) it had "hired inexperienced and wasteful employees and contractors to

oversee and operate its drilling operations" in the development area at issue; (2) "the contractors had favorable provisions in their contracts with Jagged that gave them more money for increased costs"; and (3) as a result of such inefficient and unfavorable contract terms, Jagged had "incurred substantial and ongoing additional drilling and production costs." Oklahoma further alleged that Jagged violated Item 303 of Regulation S-K, 17 C.F.R. § 229.303(b)(2)(ii) (2021) (requiring, among other things, a securities registrant to "[d]escribe any known trends or uncertainties that have had or that are reasonably likely to have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations"), by failing to disclose "uncertainties about the quality of its workforce, the Company's practice of hiring inexperienced and wasteful contractors and employees, and how those employee inadequacies were reasonably likely to (and did) adversely impact Jagged's operating results."

¶12 Oklahoma contended that interviews with employees of Jagged and its contractors who worked for those entities "during the relevant period," as well as public records, provided further corroboration that the offering documents were false and misleading. Specifically, according to Oklahoma, the former employees who were interviewed observed that (1) Jagged's "two in-house geologists were inexperienced and incompetent," with one being deemed "not qualified" by a Jagged executive "due to his lack of relevant experience and this being his first job

out of college"; (2) Jagged's CEO was aware of myriad problems and mistakes at the drilling sites; (3) Jagged was heavily dependent on a de facto "chief drilling contractor" who used his position "to award [contracts to] contractors he controlled," notwithstanding that their bids were "consistently lower" than all other bids; (4) the "chief drilling contractor" then overbilled Jagged; (5) another Jagged executive "continuously steered drilling and operational work" to AEP, a contractor that was run by a long-standing business associate of his, Jagged gave AEP "a contract heavily skewed in [its] favor," and AEP then "deliberately ran up costs at Jagged"; and (6) "in the immediate wake of the IPO," AEP more than doubled its daily field invoices "without any apparent basis," other than perhaps its understanding from Jagged that "it had the greenlight to be more profligate," given that Jagged was using "investors' money."

¶13 Jagged moved to dismiss the amended complaint under C.R.C.P. 12(b)(5). In its motion, Jagged argued, as pertinent here, that Oklahoma did not sufficiently plead that the offering documents contained materially false misstatements or omissions, as required to state a claim under sections 11, 12(a)(2), and 15 of the Securities Act. Oklahoma responded that the above-noted portions of the offering documents provided sufficient grounds for relief, but the district court subsequently granted Jagged's motion to dismiss in part, concluding that although

Oklahoma had failed to state a claim under section 11, its remaining allegations stated viable claims for relief under sections 12(a)(2) and 15.

¶14 Jagged then filed a motion for "clarification" of the court's order, requesting that the district court "clarify" its order by ruling that its dismissal of Oklahoma's section 11 claim was dispositive of Oklahoma's remaining claims, thus requiring dismissal of the amended complaint in its entirety. The district court agreed and issued a supplemental order dismissing with prejudice all of Oklahoma's claims. In so ruling, the court found and concluded that "[s]ection 12(a)(2) and 15 are dependent on the findings of [s]ection 11."

¶15 Oklahoma appealed, and in its opening brief, it changed course somewhat. Rather than continuing to rely on the full excerpted statements from Jagged's offering documents, it narrowed its focus to two general categories of alleged misrepresentations and omissions, only one of which is at issue before us, namely, the alleged material misrepresentations regarding the competence and expertise of Jagged's management and workforce. Within this category, Oklahoma centered its argument on (1) the heading from Jagged's plan to "[m]aximize returns by optimizing drilling and completion techniques through the experience and expertise of our management and technical teams" and (2) the standalone statement regarding Jagged's "ongoing focus on reducing drilling times, optimizing completions and reducing costs."

¶16 Jagged responded by reiterating its view that none of the statements on which Oklahoma was relying were actionable. In particular, as pertinent here, Jagged contended that the statements at issue amounted to (1) vague statements of corporate optimism that are immaterial as a matter of law under the so-called "puffery" doctrine and (2) assertions regarding post-IPO events that did not support plausible claims for relief (because Oklahoma was required to allege that Jagged's representations or omissions were misleading *at the time of the IPO*).

¶17 In a unanimous, unpublished opinion, a division of the court of appeals reversed the district court's judgment in part, concluding that as to both Statements 4 and 2, Oklahoma had pleaded actionable claims under sections 11, 12(a)(2), and 15 of the Securities Act (the division affirmed the district court's judgment in other respects that are not before us). *Okla. Police Pension & Ret. Sys. v. Jagged Peak Energy Inc.*, No. 19CA1718, ¶¶ 81, 88, 95 (Apr. 1, 2021).

¶18 With respect to Statement 4, the division concluded that Oklahoma had plausibly pleaded that the statement was materially misleading or omitted material information because, at the time Jagged made the representation regarding its plan to maximize returns through the experience and expertise of its management and technical teams, its "management knew, but did not disclose, that Jagged's technical team was incompetent or unqualified and Jagged had

awarded contracts that enriched its chief drilling contractor or were otherwise disadvantageous to Jagged." *Id.* at ¶ 77.

¶19 In so concluding, the division rejected Jagged's argument that Statement 4 comprised only immaterial puffery. *Id.* at ¶ 78. On this point, the division acknowledged that Jagged had represented generally that it had a proven track record of optimizing drilling and completion techniques, but Jagged also represented, in support of its more general point, that it had experienced a significant decrease in its drilling and completion costs from 2014 through November 2016, citing "very specific numerical data" showing this decline in costs. *Id.* Oklahoma alleged, however, that at the time of the IPO, Jagged had known workforce inadequacies that caused "substantial and ongoing additional drilling and production costs." *Id.* The division thus concluded that Jagged's representations were not mere "puffery" but rather had "specific meaning" when read in context. *Id.*

¶20 The division reached a similar conclusion with respect to Statement 2 (regarding Jagged's representation as to its "ongoing focus"). *Id.* at ¶¶ 86–87. Specifically, the division concluded that this representation was contrary to the alleged facts "that, at the time of the IPO, Jagged was not focused on reducing its drilling times or its costs" but rather was "knowingly allowing inexperienced or incompetent employees to target well locations" and "had awarded costly

contracts to its contractors that motivated them to extend drilling times, and those contracts were allegedly awarded to benefit individual managers, not to save money and time." *Id.* at ¶ 87. The division thus concluded that, for the same reasons that Oklahoma had plausibly pleaded viable claims as to Statement 4, it had plausibly pleaded viable claims as to Statement 2. *Id.* at ¶ 88.

¶21 Finally, the division observed that because Oklahoma had alleged that Jagged's "managerial mistakes had already resulted in cost overruns and had decreased production at the time of the [IPO]," which the division deemed "an uncertainty that was likely to materially impact revenues," Item 303 obligated Jagged to disclose the existing problems with its workforce. *Id.* at ¶ 93. The division thus reversed the district court's judgment to the extent that it had dismissed the portion of Oklahoma's Item 303 claim that was based on Jagged's failure to disclose the above-referenced uncertainties. *Id.* at ¶ 94.

¶22 Jagged then petitioned this court for certiorari review, and we granted its petition.

II. Analysis

¶23 We begin by setting forth the applicable standard of review. Next, we discuss the legal framework governing claims brought under sections 11, 12(a)(2), and 15 of the Securities Act. We then consider Jagged's contentions that

Oklahoma's claims are based on non-actionable puffery statements pleaded with the benefit of hindsight.

A. Standard of Review

¶24 We review de novo a district court's dismissal of a complaint for failure to state a claim under C.R.C.P. 12(b)(5). *N.M. by and through Lopez v. Trujillo*, 2017 CO 79, ¶ 18, 397 P.3d 370, 373. Applying the same standard as the district court, we accept all factual allegations in the complaint as true and view them in the light most favorable to the non-moving party. *Id.* "Dismissal under C.R.C.P. 12(b)(5) is proper only when the facts alleged in the complaint cannot, as a matter of law, support the claim for relief." *Id.*

¶25 Under the "plausibility" standard for assessing C.R.C.P. 12(b)(5) motions that we adopted in *Warne v. Hall*, 2016 CO 50, ¶¶ 9, 24, 373 P.3d 588, 591, 595, to survive a motion to dismiss for failure to state a claim on which relief can be granted, a plaintiff must allege sufficient facts that, if taken as true, show plausible grounds to support a claim for relief.

B. The Securities Act

¶26 Sections 11, 12(a)(2), and 15 of the Securities Act impose liability on certain participants in a registered securities offering when "the publicly filed documents used during the offering contain material misstatements or omissions." *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 358 (2d Cir. 2010).

¶27 Specifically, section 11 prohibits materially misleading statements or omissions in registration statements filed with the SEC. *See* 15 U.S.C. § 77k(a). To state a claim under section 11, plaintiffs must plausibly allege that (1) they purchased a registered security from the issuer or in the aftermarket following the IPO; (2) the defendant participated in the offering in such a way as to give rise to liability under the statute; and (3) the registration statement "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." *Morgan Stanley*, 592 F.3d at 358–59 (quoting 15 U.S.C. § 77k(a)).

¶28 Section 12(a)(2) provides for liability when a prospectus or oral communication, rather than a registration statement, contains a material misstatement or omission. *See* 15 U.S.C. § 77*l*(a)(2). The Supreme Court, however, has interpreted section 12 as imposing liability only on "statutory sellers," which are defined as individuals who (1) "passed title, or other interest in the security, to the buyer for value" or (2) "successfully solicit[ed] the purchase [of a security], motivated at least in part by a desire to serve [their] own financial interests or those of the securities owner." *Pinter v. Dahl*, 486 U.S. 622, 642, 647 (1988). Thus, to state a viable claim for relief under section 12(a)(2), a plaintiff must plausibly allege that:

> (1) the defendant is a "statutory seller"; (2) the sale was effectuated "by means of a prospectus or oral communication"; and (3) the prospectus or oral communication "include[d] an untrue statement of a material fact or omit[ted] to state a material fact necessary in order

> to make the statements, in the light of the circumstances under which they were made, not misleading."

Morgan Stanley, 592 F.3d at 359 (alterations in original) (quoting 15 U.S.C. § 77*l*(a)(2)).

¶29 Section 15 extends liability, jointly and severally, to any person who, "by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person" who is liable under sections 11 and 12, "unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist." 15 U.S.C. § 77*o*(a). Therefore, if a court dismisses a plaintiff's claims under both sections 11 and 12(a)(2), then it must likewise dismiss any derivative section 15 claims. *See In re Alcatel Sec. Litig.*, 382 F. Supp. 2d 513, 533 (S.D.N.Y. 2005).

¶30 Finally, according to an SEC interpretive release regarding Item 303 of SEC Regulation S-K, Item 303 establishes a duty of disclosure when a "trend, demand, commitment, event or uncertainty is both presently known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation." *In re Facebook, Inc., IPO Sec. & Derivative Litig.*, 986 F. Supp. 2d 487, 506 (S.D.N.Y. 2013) (quoting Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment

Company Disclosures, Securities Act Release No. 6835, Exchange Act Release No. 26,831, Investment Company Act Release No. 16,961, 43 SEC Docket 1330, 54 Fed. Reg. 22,427, 22,429 (May 24, 1989)). And because sections 11 and 12(a)(2) of the Securities Act prohibit "omission[s] in contravention of an affirmative legal disclosure obligation[,]" *Morgan Stanley*, 592 F.3d at 360, a defendant may be liable under either provision if it violates Item 303's disclosure obligation, *see Facebook*, 986 F. Supp. 2d at 506–14 (denying the defendants' motion to dismiss the plaintiffs' claims under sections 11 and 12(a)(2), and, in turn, section 15, of the Securities Act, after concluding, among other things, that the plaintiffs had sufficiently pleaded that the defendants had omitted material information in violation of Item 303).

C. Claims at Issue

¶31 Turning then to the case before us, we note that Jagged contends that the division below erroneously concluded that Statements 4 and 2 stated plausible claims for relief because, in Jagged's view, (1) those statements amounted to no more than immaterial puffery and were not rendered material by the presence of nearby allegations of historical or measurable information; and (2) in concluding that Oklahoma had plausibly pleaded claims that Statements 4 and 2 were misleading when made, the division inappropriately relied on Oklahoma's

allegations regarding post-IPO events, which, as a matter of law, could not support Oklahoma's claims here.

¶32 We address and reject each contention in turn.

1. Puffery

¶33 Jagged first argues that the division adopted a theory of "couching" generally rejected by federal courts when the division concluded that the allegedly immaterial puffery statements that Oklahoma had identified as misleading were "transformed into material and therefore actionable statements simply by the presence in the offering materials of other, nearby, truthful, historical information." Jagged asserts that the division got it doubly wrong because, in Jagged's view, Oklahoma had not raised the argument on which the division relied, nor did Oklahoma identify the contextual statements on which the division ultimately rested its conclusion (this is the second issue on which we granted certiorari). We are unpersuaded.

¶34 As an initial matter, Jagged misapprehends the division's analysis. The division did not rely on a theory of couching, nor did it rule on a basis not properly before it. Jagged principally argued that Oklahoma's assertions constituted immaterial puffery as a matter of law. Responding directly to this argument, the division concluded that Statements 4 and 2 were not overly vague statements of corporate optimism that were incapable of objective verification. To the contrary,

the division concluded that when read in context, the statements had "specific meaning," and Oklahoma had alleged that such statements were misleading when they were made. *Okla. Police Pension*, ¶¶ 75, 78. Thus, the division observed that Oklahoma had alleged that Jagged's "historical claims were partially inaccurate, making the predictive claims that they support misleading by omission." *Id.* at ¶ 75.

¶35 Accordingly, rather than looking to accurate historical statements "couched" around allegedly misleading (and therefore non-actionable) puffing statements, the division simply considered the allegedly misleading statements in context, which, under established precedent, it could properly do.

¶36 Specifically, in reviewing a district court's dismissal of a complaint for failure to state a claim, appellate courts must examine the complaint to determine its facial plausibility, and in doing so, the courts may "consider any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, *legally required public disclosure documents filed with the SEC*, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (emphasis added).

¶37 Accordingly, in determining whether Oklahoma plausibly pleaded the element of materiality, the division did not err in considering all of the allegations

in Oklahoma's amended complaint, which identified the "partially misleading" historical statements on which the division relied, documents incorporated by reference in the amended complaint, and representations made in the offering documents filed with the SEC (including any tables, graphs, and statements set forth therein).

¶38 We thus turn to the merits of Jagged's contention that, as a matter of law, Statements 4 and 2 comprised immaterial, non-actionable puffery.

¶39 In cases like the one before us, "two issues are central to claims under sections 11 and 12(a)(2): (1) the existence of either a misstatement or an unlawful omission; and (2) materiality." *Morgan Stanley*, 592 F.3d at 360. Materiality for purposes of sections 11 and 12(a)(2), in turn, is defined as follows: "[W]hether the defendants' representations, taken together and in context, would have misled a reasonable investor." *Id.* (alteration in original) (quoting *Rombach v. Chang*, 355 F.3d 164, 172 n.7 (2d Cir. 2004)).

¶40 Materiality is an inherently fact-specific inquiry. *Facebook*, 986 F. Supp. 2d at 508. Thus, a complaint may not properly be dismissed on materiality grounds unless the alleged misstatements or omissions "are so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance." *ECA, Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 197 (2d Cir. 2009) (quoting *Ganino v. Citizens Utils. Co.*, 228 F.3d 154,

162 (2d Cir. 2000)). As a result, the materiality element "will rarely be dispositive in a motion to dismiss." *Morgan Stanley*, 592 F.3d at 360.

¶41 Statements that are classified as "puffery" are "generalized statements of optimism that are not capable of objective verification." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997). Such "[v]ague, optimistic statements are not actionable because reasonable investors do not rely on them in making investment decisions." *Id.* And because reasonable investors would not rely on such vague, broad, and non-specific statements, those statements are immaterial as a matter of law. *See Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d 232, 250 (S.D.N.Y. 2019).

¶42 Like all statements in the materiality analysis, puffery must be considered in context. *See Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989). Context, however, can take many forms and, depending on the facts, may well impact the significance, if any, that a reasonable investor would place on the withheld or misrepresented information.

¶43 For example, in *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651, 669–71 (6th Cir. 2005), the Sixth Circuit considered a tire manufacturer's and its subsidiary's public statements affirming the safety and quality of its tires, as well as allegedly false representations in the manufacturer's financial statements accompanying its annual reports. The court concluded that all but one of eight specifically challenged representations were "best

characterized as loosely optimistic statements insufficiently specific for a reasonable investor to 'find them important to the total mix of information available.'" *Id.* at 671 (quoting *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 571 (6th Cir. 2004)). As to the one statement that the court viewed differently (the subsidiary's statement that "the objective data" reinforced its belief that its tires were "high-quality, safe tires"), the court found this statement to be actionable, given the context in which it was made. *Id.* at 674. Specifically, the court observed that because consumers had filed multiple lawsuits against the subsidiary prior to the time that the subsidiary made the statement regarding the tires' safety, "[a] reasonable juror could infer that the 'objective data' representation was a direct response to the lawsuits, or to the public challenges to the safety of [the subsidiary's] tires, or to both." *Id.* at 672. The court further disagreed that the representation at issue was merely a statement of general optimism or pure opinion because, in the court's view, "the statement was an assertion of a relationship between data and a conclusion," which a fact-finder "could test against record evidence." *Id.* at 674. And even if the statement could be classified as opinion, the court deemed it "specific enough to form the basis of an actionable securities fraud claim." *Id.*

¶44 Industry-specific context may likewise impact the materiality of a given statement. For example, in *Bricklayers & Masons Local Union No. 5 Ohio Pension*

Fund v. Transocean Ltd., 866 F. Supp. 2d 223, 243 (S.D.N.Y. 2012), the court considered whether an offshore oil contractor's representation that it had "conducted 'extensive' training and safety programs" was, among other things, non-actionable puffery. The court concluded that the representation was actionable because the court could not say, as a matter of law, that the representation regarding the contractor's training efforts was so obviously unimportant to a reasonable investor that reasonable minds could not differ as to the importance of the representation. *Id.* at 244. In support of this conclusion, the court looked to the industry-specific context, stating, "In an industry as dangerous as deepwater drilling, it is to be expected that investors will be greatly concerned about an operator's safety and training efforts." *Id*.

¶45 Lastly, a defendant's own, separate representations may be telling. *See Casella,* 883 F.2d at 808. Thus, a defendant's statements "'cannot be considered in isolation,' but must be viewed 'in the context of the total presentation.'" *Id.* (quoting *Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156, 176 (9th Cir. 1976)). "What might be innocuous 'puffery' or mere statement of opinion standing alone may be actionable as an integral part of a representation of material fact when used to emphasize and induce reliance upon such a representation." *Id.*

¶46 Even when considering the pertinent context in which statements were made, however, federal courts have concluded that "general positive statements"

about, for example, a chief executive officer's "professional history and management abilities" and about a company's "proven track record" can still, in appropriate circumstances, amount to non-actionable puffery. *Barilli*, 389 F. Supp. 3d at 252–53; *see also In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1340 (10th Cir. 2012) (concluding that a defendant's representations as to its "proven integration experience" and its intended "focus" in the upcoming year on integration were "vague (if not meaningless) management-speak upon which no reasonable investor would base a trading decision").

¶47 In light of the foregoing precedent, Jagged argues that Statements 4 and 2 constituted immaterial puffery because Statement 4 "was a vague opinion about the company's perceived strengths" and Statement 2 was a "generic statement[] of corporate objectives." For several reasons, we disagree.

¶48 First, regarding Statement 4, as the division below suggested, touting a strategy of maximizing returns "by optimizing drilling and completion techniques through the experience and expertise of [Jagged's] management and technical teams" and lauding a company's "proven track record" may, standing alone, be too general to support a viable claim. But that is not all that Oklahoma alleged. As noted above, Oklahoma also alleged that known historical and objectively verifiable facts and data could plausibly show that these general allegations were misleading at the time of the IPO and that defendants knew that they were,

thereby undermining any claim of mere puffery. For example, Oklahoma alleged that contrary to Jagged's representations, former Jagged and contractor employees "during the relevant period" observed that (1) Jagged's in-house geologists were, in fact, *in*experienced and *in*competent, with one being deemed "not qualified" by a Jagged executive due to his lack of relevant experience; (2) incompetence at Jagged's drilling sites resulted in myriad problems and mistakes of which Jagged's CEO was himself aware; and (3) Jagged's "chief drilling contractor" and a Jagged executive steered contracts to companies that they controlled or that were controlled by business associates (sometimes based on bids that were lower than other bids that Jagged had received), and these companies then signed favorable contracts and proceeded to overbill Jagged, rendering the representations regarding Jagged's history of decreasing costs at best misleading (and verifiably so). This is particularly true given Item 303's requirement that an SEC registrant disclose trends, demands, events, or uncertainties that are known to management and reasonably likely to have material effects on the registrant's financial condition or results of operation. *Facebook*, 986 F. Supp 2d at 506. Thus, even if the historical information regarding Jagged's declining costs in the stated time period was accurate, the trend was allegedly in the opposite direction, and, if true, defendants had a duty to disclose that trend and its resulting uncertainty.

¶49 Second, regarding Statement 2, in which Jagged represented that its development plan was "comprised exclusively of horizontal drilling with an ongoing focus on reducing drilling times, optimizing completions, and reducing costs," we again acknowledge that, standing alone, this statement might not be actionable. But when viewed in the context of the historical and objectively verifiable facts set forth above, we conclude that Oklahoma has pleaded sufficient facts to support plausible claims for relief. Specifically, the facts set forth above in connection with our analysis of Statement 4, if true, can plausibly establish that Jagged, in fact, was not focused on optimizing completions and reducing costs. Indeed, the alleged facts, which are verifiable (and thus, by definition, not mere puffery), suggest the opposite.

¶50 Third, as noted above, industry-specific context may likewise impact the materiality of a given statement. *See Bricklayers & Masons Local Union No. 5*, 866 F. Supp. 2d at 243–44. Here, accepting the allegations in Oklahoma's amended complaint as true, in the oil and gas industry, a horizontal well can cost up to 300% more to drill and complete for production than a vertical well directed to the same target horizon, but the extra costs associated with this process are expected to be recovered through increased production from the well. Thus, just as an investor in an industry as dangerous as deepwater drilling would be expected to be concerned about an operator's safety and training efforts, *id.* at 244, an investor in

a company like Jagged, which exclusively engaged in horizontal drilling and relied heavily on contract drilling services companies, would be expected to be concerned with the company's experience with horizontal drilling, its relationships with its contractors, and its ability to control costs.

¶51 Fourth, were we to adopt Jagged's rigid position regarding the representations that it alleges to be puffery here, we fear that we would effectively create a form of "magic words" exception to the materiality element that is inconsistent with what, as noted above, is an inherently fact-specific analysis. *See Facebook*, 986 F. Supp. 2d at 508. Under Jagged's apparent interpretation, virtually any statement containing the words "experience," "expertise," "track record," or "focus" would be immaterial as a matter of law, regardless of anything else alleged in a complaint. Were we to embrace such a position, however, securities registrants could use words like these to hide behind, or between, their own misrepresentations. Thus, we agree with the observation of one federal district court that "a company's statements that it is 'premier,' 'dominant,' or 'leading' must not be assessed in a vacuum (*i.e.*, by plucking the statements out of their context to determine whether the words, taken *per se*, are sufficiently 'vague' so as to constitute puffery)." *Scritchfield v. Paolo*, 274 F. Supp. 2d 163, 175–76 (D.R.I. 2003). Rather, such statements "are properly interpreted only by reference to the relevant circumstances that underlie their meaning." *Id.* at 176.

¶52 For these reasons, on the specific facts presented here, we cannot say that the statements at issue were nothing more than generalized statements of corporate optimism that cannot be objectively verified. Nor, when we consider the context in which the statements were made, can we conclude that they would have been so obviously unimportant to a reasonable investor that reasonable minds could not differ on the question of their importance, thereby rendering them immaterial as a matter of law. *See ECA*, 553 F.3d at 197; *Grossman*, 120 F.3d at 1119. Accordingly, we conclude that the division below properly rejected Jagged's contentions that Statements 4 and 2 were, as a matter of law, mere puffery.

¶53 In so concluding, we are not persuaded by Jagged's assertion that the representations at issue were not capable of objective verification. During oral argument, Jagged contended that because no standard exists for determining when an unspecified amount of experience can constitute "having experience" or when a company's business activities become a "focus," its representations that it had (1) management and technical teams experienced in "optimizing drilling and completion techniques" and (2) "an ongoing focus on reducing drilling times, optimizing completions and reducing costs" are inherently unverifiable. In our view, however, "verifiable" is not necessarily synonymous with "quantifiable" or "measurable." Thus, rather than examining just how much experience Jagged's

management and technical teams had and how much of Jagged's business activity centered around reducing drilling times, we believe that the relevant question is whether a fact-finder could test Jagged's statements against the record evidence. *See City of Monroe*, 399 F.3d at 674. Here, evidence that one of Jagged's two in-house geologists was right out of college (coupled with a Jagged executive's statement that this lack of experience rendered the geologist "not qualified") is one form of record evidence on which a fact-finder could reasonably rely to test Jagged's assertions regarding its experience and expertise. Incompetence on the job leading to inappropriate drilling site selection, collapsed wells, and dramatically increased costs, if proven, would likewise constitute objective evidence on which a fact-finder could rely to test Jagged's representations.

¶54 We likewise are unpersuaded by the case law on which Jagged relies because we view the statements at issue here as distinguishable from the kinds of statements that other courts have found to be too vague to be actionable. To be sure, courts have deemed to be non-actionable puffery bald representations touting a company's "[e]xperienced management team" with a "track record of executing effective strategies and achieving profitable growth," *City of Omaha Police & Fire Ret. Sys. v. Evoqua Water Techs. Corp.*, 450 F. Supp. 3d 379, 400 (S.D.N.Y. 2020), and statements extolling a company's "successful businessman" chief executive officer and the company's "proven track record . . . operating

under local conditions," *Barilli*, 389 F. Supp. 3d at 252. For the reasons set forth above, however, in this case, Oklahoma did not rely solely on bald statements of corporate optimism. Rather, it alleged sufficient objectively verifiable facts to allow a fact-finder to test Jagged's more general representations.

¶55 Accordingly, we conclude that Oklahoma's allegations regarding Statements 4 and 2 were sufficient to survive Jagged's motion to dismiss on puffery grounds.

2. Hindsight Pleading

¶56 Jagged next argues that the division committed reversible error when it allowed Oklahoma to base its claims on "hindsight pleading." Specifically, in Jagged's view, the division improperly relied on Oklahoma's allegations regarding post-IPO well collapses, cost increases, disadvantageous contracts, and employee departures to infer that Jagged had misrepresented or omitted information regarding its team's experience or its finances at the time of the IPO. Jagged asserts that the division was required to assess any alleged misrepresentations or omissions at the time the disclosures were made or should have been made. Although we view this issue as somewhat close, we ultimately are unpersuaded.

¶57 As noted above, to plead a claim under sections 11, 12(a)(2), or 15 of the Securities Act, a plaintiff must allege that the purported misrepresentations or

omissions were made at the time of the IPO. *See* 15 U.S.C. § 77k(a) (providing for liability when "any part of the registration statement, *when such part became effective*, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading") (emphasis added); 15 U.S.C. § 77*l*(a)(2) (providing for liability when a person offers or sells a security by means of a prospectus or oral communication that includes an untrue statement of material fact or omits a material fact); 15 U.S.C. § 77*o*(a) (providing for derivative liability of "controlling persons"). At a minimum then, a plaintiff must plead facts to demonstrate that the allegedly misrepresented or omitted facts existed and were either known or knowable at the time of the offering. *See In re HEXO Corp. Sec. Litig.*, 524 F. Supp. 3d 283, 300 (S.D.N.Y. 2021).

¶58 We recognize that Oklahoma's amended complaint includes many allegations recounting actions and events that occurred *after* the IPO, and we agree that these events cannot alone support an inference that trouble was brewing at Jagged prior to the IPO.

¶59 But in addition to these claims, the amended complaint makes the factual allegation that "during the relevant period," former employees of Jagged and its contractors observed that (1) Jagged's two in-house geologists were inexperienced and incompetent; (2) one Jagged executive regarded one of the two geologists as

"not qualified" as a result of "his lack of relevant experience and this being his first job out of college"; (3) the collapsing of many wellbores was indicative of the geologists' incompetence in selecting well sites; (4) the well collapses, as well as Jagged's entering into disadvantageous contracts, led to "dramatically increased costs"; and (5) Jagged's CEO was aware of myriad problems and mistakes at the drilling sites. Similarly, the amended complaint alleges that "*at the time of the Offering,* [Jagged] failed to disclose that it did not have qualified workers in sufficient numbers to achieve its production and well completion goals" and further failed to disclose the various facts set forth above. (Emphasis added.)

¶60 Although the amended complaint could (and perhaps should) have better clarified exactly when "the relevant period" was, when we read "the relevant period" together with "at the time of the Offering," we are satisfied that Oklahoma sufficiently alleged that Jagged's representations were misleading at the time of the IPO and not solely in hindsight. This is particularly true given that, at this stage of the proceedings, we must accept the amended complaint's well-pleaded allegations as true and view those allegations in the light most favorable to Oklahoma. *See N.M.*, ¶ 18, 397 P.3d at 373.

¶61 Accordingly, we conclude that Oklahoma plausibly alleged facts indicating that Jagged's statements about its workforce experience and focus on decreasing

costs, and its decision to omit information about disadvantageous contracts, were misleading at the time of the IPO.

¶62 Finally, we note Jagged's contention that even if some of Oklahoma's allegations are not based on hindsight pleading, those that remain are still insufficient to state a claim under the standard for opinion statements established in *Omnicare, Inc. v. Laborers District Council Construction Industry Pension Fund*, 575 U.S. 175, 194 (2015) (concluding that an investor "must identify particular (and material) facts going to the basis for the issuer's opinion").

¶63 Although the division below indicated that its conclusion "that Oklahoma has stated a plausible claim that Jagged misled investors" was "[p]ursuant to *Omnicare*," *Okla. Police Pension*, ¶ 77, Jagged did not cite to *Omnicare* in its certiorari petition, nor did it request that this court grant certiorari to consider the division's decision regarding opinion statements. Accordingly, that question is not properly before us, and we will not consider it. *See Colo. Permanente Med. Grp., P.C. v. Evans*, 926 P.2d 1218, 1228–29 (Colo. 1996).

¶64 In concluding that Oklahoma has plausibly pleaded its claims on the specific facts before us, we emphasize the limited nature of our opinion today. This case comes before us in the context of a motion to dismiss for failure to state a claim. Accordingly, the only question before us is whether Oklahoma plausibly alleged facts that, if proven, can support liability. In this context, we have assumed the

truth of Oklahoma's well-pleaded factual allegations, and we have afforded Oklahoma the reasonable inferences to be drawn from those allegations, as we are required to do. We conclude only that the division correctly determined that it could not dismiss the claims at issue as a matter of law at this early stage of the proceedings. We, of course, express no opinion on the ultimate merits of the claims asserted in this case.

III. Conclusion

¶65 For the foregoing reasons, we conclude that the division below properly (1) applied federal law in concluding that Oklahoma plausibly pleaded viable claims for relief under sections 11, 12(a)(2), and 15 of the Securities Act; and (2) rejected Jagged's assertions that, as a matter of law, the alleged misrepresentations at issue comprised immaterial puffery and amounted to improper hindsight pleading.

¶66 Accordingly, we affirm the judgment of the division below.

JUSTICE MÁRQUEZ, joined by **CHIEF JUSTICE BOATRIGHT**, dissented.

JUSTICE MÁRQUEZ, joined by CHIEF JUSTICE BOATRIGHT, dissenting.

¶67 The majority holds that Oklahoma Police Pension and Retirement System ("Oklahoma") has stated plausible claims for relief against Jagged Peak Energy Inc. ("Jagged") under sections 11, 12(a)(2), and 15 of the Securities Act of 1933, even though federal courts have consistently reached the opposite conclusion in cases raising similar allegations. Federal courts deem statements like Jagged's about its "proven track record" and "ongoing focus" to be non-actionable, immaterial puffery because no reasonable investor would base a trading decision on such "vague (if not meaningless) management-speak." *In re Level 3 Commc'ns, Inc. Sec. Litig.*, 667 F.3d 1331, 1340 (10th Cir. 2012).

¶68 The majority admits that the challenged statements, standing alone, are too general to be actionable. *See* Maj. op. ¶¶ 48-49. But the majority nevertheless affirms the division's conclusion that Statements 4 and 2 support a viable claim under the Securities Act by reading the statements in conjunction with Oklahoma's other allegations in the amended complaint. Although I agree with the majority that a court may look to context to decide whether an allegedly misleading statement is material for purposes of a claim under the Securities Act, I disagree that a court may lean on nearby historical statements and data to concretize an otherwise vague puffing statement, which is what the division did below, and which federal case law explicitly prohibits. *See Freeland v. Iridium*

World Commc'ns, Ltd., 545 F. Supp. 2d 59, 76 (D.D.C. 2008) ("Combining puffery with accurate historical statements does not render the puffery material.") (quoting *In re XM Satellite Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 177 (D.D.C. 2007)). I further disagree that in determining whether a statement is *material*, a court may rely on other allegations in the complaint that the statement was *misleading*, which is what the majority has done here.

¶69 Not only does the majority fail to disavow the approach taken by the division below, it also compounds the division's error by conflating the plaintiff's burden to show that the statement was *material* with the separate burden to show that the statement was misleading. In so doing, the majority departs from federal precedent.

¶70 Statements about a company's "proven track record" and "ongoing focus" will not be puffery in every case. But in this case, a reasonable investor would not rely on such vague representations. Because I disagree with the majority's analytical approach and because Statements 4 and 2 are immaterial puffery and therefore non-actionable, I respectfully dissent.

I. Factual Background

¶71 This case has been a moving target. Initially, Oklahoma claimed that Jagged misled investors about the location of its acreage, the quality and value of that acreage, its capital expenditures, and the experience and expertise of its staff.

Oklahoma's amended complaint highlighted about a dozen excerpts, some paragraphs long, from Jagged's offering documents in support of its claims under sections 11, 12(a)(2), and 15 of the Securities Act.

¶72 On appeal, Oklahoma abandoned all allegations related to the location of Jagged's acreage. Oklahoma's remaining allegations were distilled into eight discrete statements. A division of the court of appeals found six of those statements to be non-actionable. *Okla. Police Pension & Ret. Sys. v. Jagged Peak Energy Inc.*, No. 19CA1718, ¶¶ 59, 73, 81, 84, 88. All of this means that at this point in the litigation, of the thousands of statements made in Jagged's 200-plus pages of offering materials, only two statements remain at issue.

¶73 The first statement ("Statement 4") appears in a section of the prospectus about Jagged's business strategies. Jagged said it would:

> ***Maximize returns by optimizing drilling and completion techniques through the experience and expertise of our management and technical teams.*** Our experienced management and technical teams have a proven track record of optimizing drilling and completion techniques to drive well and field-level returns. We have experienced a significant decrease in our drilling and completion costs since 2014.[1]

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[1] The bold font appears in the original prospectus. Notably, at the court of appeals, Oklahoma focused solely on the bolded sentence about "maximiz[ing] returns" through the "experience and expertise" of its staff. In its opinion, however, the division emphasized a different part of Statement 4 that did not appear in Oklahoma's brief: that Jagged's teams "have a proven track record" of optimizing drilling. *Okla. Police Pension*, ¶ 78.

¶74 The second statement ("Statement 2") describes Jagged's operations: "Our development drilling plan is comprised exclusively of horizontal drilling with an ongoing focus on reducing drilling times, optimizing completions and reducing costs."

II. Overview of Federal Securities Law

¶75 Liability arises under section 11 of the Securities Act when a registration statement contains "an untrue statement of a material fact" or "omit[s] to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k(a). Similarly, under section 12(a)(2), liability arises when a prospectus or oral communication includes "an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements . . . not misleading." 15 U.S.C. § 77*l*(a)(2). Thus, to state a claim under sections 11 and 12(a)(2), a plaintiff must show that a challenged statement or omission is both material and misleading. *See In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 360 (2d Cir. 2010) ("[T]wo issues are central to claims under sections 11 and 12(a)(2): (1) the existence of either a misstatement or an unlawful omission; and (2) materiality."). "Material" and "misleading" are separate elements of a Securities Act claim, each a "distinct hurdle[]" that the complaint must clear. *In re ProShares Tr. Sec. Litig.*, 728 F.3d 96, 101 (2d Cir. 2013); *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1280 (E.D. Wash. 2007).

¶76 This case concerns materiality. For purposes of a Securities Act claim, a statement is "material only if 'a reasonable investor would consider it important in determining whether to buy or sell stock.'" *Slater v. A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir. 2013) (quoting *McDonald v. Kinder-Morgan, Inc.*, 287 F.3d 992, 998 (10th Cir. 2002)). Generalized statements of corporate optimism that are incapable of objective verification—which courts label as "puffery"—are not material because "reasonable investors do not rely on them in making investment decisions." *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997). Puffery includes "rosy affirmation[s] heard from corporate managers" and "loosely optimistic statements that are so vague, [and] so lacking in specificity" that no reasonable investor would find them important. *In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570–71 (6th Cir. 2004) (quoting *Shaw v. Digit. Equip. Corp.*, 82 F.3d 1194, 1217 (1st Cir. 1996)). In contrast, statements that are capable of objective verification are material. *Grossman*, 120 F.3d at 1119. A court evaluating materiality is thus tasked with deciding whether a challenged statement has "cross[ed] the line from corporate optimism and puffery to objectively verifiable matters of fact." *In re Level 3*, 667 F.3d at 1340. Although materiality is a mixed question of law and fact often reserved for the trier of fact, a court should "not hesitate to dismiss securities claims [for failure to state a claim] where the alleged

misstatements or omissions are plainly immaterial." *Slater*, 719 F.3d at 1197 (quoting *McDonald*, 287 F.3d at 997).

¶77 As the majority notes, a court looks at a challenged statement in context to determine whether it is material. *See* Maj. op. ¶ 42. But both the division and the majority have stretched "context" beyond the bounds of federal case law.

¶78 True, a court viewing a challenged statement in context may consider the general circumstances under which the statement was made: by whom, in response to what, in what form, in what industry, and so on. Take, for example, *City of Monroe Employees Retirement System v. Bridgestone Corp.*, 399 F.3d 651 (6th Cir. 2005). There, the relevant context was the fact that consumers had filed multiple lawsuits against the defendant company. *Id.* at 672. The Sixth Circuit reasoned that against this factual backdrop, a statement in the company's subsequent press release could lead a reasonable juror to infer that the statement was a "direct response to the lawsuits." *Id.* In other words, the lawsuits imbued the challenged statement with significance, which is what made the statement material.

¶79 Similarly, in *Hughes v. Dempsey-Tegeler & Co.*, 534 F.2d 156, 176 (9th Cir. 1976), the Ninth Circuit considered the circumstances in which the challenged statement was made, observing that the alleged misrepresentations occurred in

conversations spanning three meetings and that the plaintiff was a sophisticated businessman with an extensive business background. *Id.* at 164, 176, 177.

¶80 In *Bricklayers & Masons Local Union No. 5 Ohio Pension Fund v. Transocean Ltd.*, 866 F. Supp. 2d 223, 243 (S.D.N.Y. 2012), the federal district court considered industry-specific context in assessing the materiality of a statement. There, the court concluded that the defendants' representation about conducting "'extensive' training and safety programs" was not puffery because "[i]n an industry as dangerous as deepwater drilling, it is to be expected that investors will be greatly concerned about an operator's safety and training efforts." *Id.* at 233, 244.

¶81 Other federal securities cases reinforce the notion that "context" refers to the general circumstances under which the statement was made. *See, e.g.*, *Grossman*, 120 F.3d at 1121 (considering as context that the challenged statements were all "contained in press releases or interview statements"); *In re Petrobras Sec. Litig.*, 116 F. Supp. 3d 368, 381 (S.D.N.Y. 2015) (considering as context that the challenged statements "were made repeatedly"). Ultimately, when a court views a challenged statement in context, it considers whether the statement "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *In re Campbell Soup Co. Sec. Litig.*, 145 F. Supp. 2d 574, 584 (D.N.J. 2001) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

¶82 But the consideration of such general circumstances is a different endeavor than using historical statements and data near a challenged statement in a prospectus to concretize an otherwise vague statement of puffery. Federal case law expressly holds that courts cannot use neighboring statements and data to make an otherwise vague statement somehow material. *See Freeland*, 545 F. Supp. 2d at 76 ("Combining puffery with accurate historical statements does not render the puffery material.") (quoting *XM Satellite*, 479 F. Supp. 2d at 177)); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1122 (W.D. Mich. 1996) (same). Under federal case law, puffery does not become actionable when it is "couched between statements of fact and offered for context." *In re Diebold Nixdorf, Inc., Sec. Litig.*, No. 19-CV-6180, 2021 WL 1226627, at *10 (S.D.N.Y. Mar. 30, 2021). The puffery remains general, "which is what prevents [it] from rising to the level of materiality required to form the basis for assessing a potential investment." *Id.* (quoting *Ind. Pub. Ret. Sys. v. SAIC, Inc.*, 818 F.3d 85, 97–98 (2d Cir. 2016)).

¶83 Accordingly, when vague statements of corporate optimism and historical statements of fact appear together, a court evaluating materiality should assess such statements separately. *See Abramson v. Newlink Genetics Corp.*, 965 F.3d 165, 173 (2d Cir. 2020) (concluding that defendants' general descriptions of its pharmaceutical trial results were not puffery); *In re DXC Tech. Co. Sec. Litig.*,

No. 1:18-cv01599, 2020 WL 3456129, at *8 (E.D. Va. June 2, 2020), *aff'd sub nom. KBC Asset Mgmt. NV v. DXC Tech. Co.*, 19 F.4th 601 (4th Cir. 2021) (holding that plaintiffs failed to allege facts that took defendant's general statements accompanying revenue projections out of the category of non-actionable puffery). A court should not, however, use the historical statements of fact to render an otherwise vague statement of corporate optimism material.

¶84 Examining the general context of a statement to evaluate its materiality is also distinct from relying on a plaintiff's allegations that the challenged statement was *misleading* when made; such allegations do not make non-actionable puffery material. Rather, whether a statement is material is a separate analysis from whether a statement is misleading. *See In re Metro Sec. Litig.*, 532 F. Supp. 2d at 1280 ("A [s]ection 11 claim has two elements": (1) the plaintiff must prove that the registration statement contains a misstatement, and (2) the plaintiff must prove the misstatement was material). Federal courts reject attempts to conflate these two elements. For example, in *Indiana Public Retirement System*, 818 F.3d at 97, the Second Circuit rejected the plaintiffs' contention that general statements about the defendants' commitment to ethics and integrity were material. Recognizing that such general statements typically constitute puffery, the plaintiffs argued that the challenged statements were nonetheless actionable because the defendants were "aware of facts undermining [its] positive statements." *Id.* Notably, the Second

Circuit rejected plaintiffs' attempt to rely on allegations that the statements were misleading to prove that the statements were material: "Plaintiffs' claim that these statements were knowingly and verifiably false when made does not cure their generality, which is what prevents them from rising to the level of materiality required to form the basis for assessing a potential investment." *Id.* at 97–98 (quoting *City of Pontiac Policemen's & Firemen's Ret. Sys. v. UBS AG*, 752 F.3d 173, 183 (2d Cir. 2014)).

III. Analysis

¶85 In concluding that Statements 4 and 2 are material, both the division and the majority departed from federal precedent.

¶86 First, as discussed above, a court evaluating materiality must decide when a challenged statement "cross[es] the line from corporate optimism and puffery to objectively verifiable matters of fact." *See In re Level 3*, 667 F.3d at 1340. Here, the division used the surrounding historical statements and data to nudge Statement 4 across the line. In its arguments before the division, Oklahoma claimed that Jagged's statement about "[m]aximiz[ing] returns by optimizing drilling and completion techniques through the experience and expertise of [its] management and technical teams" was misleading. But in assessing the materiality of that statement, the division reasoned that sentence was "buttressed" by neighboring statements that Jagged's teams have a "proven track record" of optimizing drilling

and completion techniques. *Okla. Police Pension*, ¶ 75. In turn, the division reasoned, Jagged's "proven track record" statement was not puffery because it was "followed by the specific claim that Jagged 'experienced a significant decrease in [its] drilling and completion costs since 2014.'" *Id.* at ¶ 78. And this claim, in turn, was "made just after Jagged set[] forth very specific numerical data showing a decline in average drilling and completion costs from 2014 to November 30, 2016." *Id.* Through this chain of reasoning, the division concluded that a general statement of corporate optimism was rendered material when tethered to nearby data and historical statements. The division acknowledged that it relied on neighboring data in its materiality analysis when it observed that Jagged's use of the phrase "proven track record" in its prospectus (a phrase deemed in federal court cases to be immaterial puffery) "was made in connection with measurable results." *Id.* at ¶ 78 n.8.

¶87 The division's reliance on neighboring statements and data departed from federal precedent. *See Freeland*, 545 F. Supp. 2d at 76 ("Combining puffery with accurate historical statements does not render the puffery material.") (quoting *XM Satellite*, 479 F. Supp. 2d at 177). If the historical data surrounding Statement 4 were false—and the majority acknowledges it is not, *see* Maj. op. ¶ 35—the division could have held that the historical data itself was material and misleading.

Instead, the division relied on nearby historical data to concretize an otherwise vague puffing statement about Jagged's "expertise and experience."

¶88 The majority does not disavow the division's approach. Instead, it compounds the division's error by looking to Oklahoma's other allegations suggesting that Statement 4 was *misleading*. *See* Maj. op. at ¶ 48 ("But that is not all that Oklahoma alleged. . . . Oklahoma also alleged that known historical and objectively verifiable facts and data *could plausibly show that these general allegations were misleading* at the time of the IPO and that defendants knew that they were.") (emphasis added). The majority adopts the same approach to Statement 2, again relying solely on allegations that Statement 2 was *not true*—not that Statement 2 was *material*. *See id.* at ¶ 49 ("Specifically, the facts set forth above in connection with our analysis of Statement 4, if true, can plausibly establish that Jagged, in fact, was *not* focused on optimizing completions and reducing costs. *Indeed, the alleged facts, which are verifiable . . . , suggest the opposite.*") (emphases added). Notably, the majority does not rely on the statements Oklahoma actually challenged. Indeed, the majority acknowledges that those challenged statements, standing alone, are not actionable. It instead looks to Oklahoma's allegations concerning the *misleading* nature of those allegations to conclude that the statements were *material*. But as discussed above, those are separate hurdles.

¶89 Both the division's approach and the majority's approach deviate from federal securities case law at a time when uniformity is increasingly important. In 2018, the United States Supreme Court confirmed that state courts have concurrent jurisdiction over Securities Act claims. *See Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 (2018). Since that decision, the volume of section 11 cases filed in state courts has increased. *See* Michael Klausner et al., *State Section 11 Litigation in the Post*-Cyan *Environment (Despite* Sciabacucchi*)*, 75 Bus. Law. 1769, 1774 (2020). I am concerned that today's decision lowers the bar and invites plaintiffs alleging Securities Act violations to forum shop in Colorado state courts.

¶90 As a practical matter, the majority's ruling today forces this particular litigation forward. As the majority observes, materiality "will rarely be dispositive in a motion to dismiss." Maj. op ¶ 40 (quoting *Morgan Stanley*, 592 F.3d at 360). But federal courts routinely dismiss cases at the motion to dismiss stage on materiality grounds. *See, e.g.*, *Grossman,* 120 F.3d at 1121–22; *In re Level 3*, 667 F.3d at 1340; *Barilli v. Sky Solar Holdings, Ltd.*, 389 F. Supp. 3d 232, 252–53 (S.D.N.Y. 2019). Such dismissals reflect a careful balance between protecting plaintiffs' access to courts and protecting defendants from expensive yet meritless litigation.

¶91 Consistent with federal securities case law, I would hold that Statements 4 and 2 are non-actionable. Federal courts have routinely held that statements about

"experience and expertise" or "proven track record" are immaterial puffery. *See, e.g.*, *In re Level 3*, 667 F.3d at 1340 (concluding defendants' statement that it had "proven integration experience" was puffery); *City of Omaha Police & Fire Ret. Sys. v. Evoqua Water Techs. Corp.*, 450 F. Supp. 3d 379, 400 (S.D.N.Y. 2020) (concluding defendant's statement that it has an "[e]xperienced management team with proven operational capabilities" was puffery); *Barilli*, 389 F. Supp. 3d at 252–53 (concluding defendant's statements about its chief executive officer's "professional history and management abilities" and the company's "proven track record" were puffery).

¶92 Similarly, federal courts have found assertions about a company's ongoing "focus" to be puffery. *See, e.g.*, *In re Level 3*, 667 F.3d at 1340 (concluding defendant's statement that "this year is really focused on integration" was puffery); *ECA, Loc. 134 IBEW Joint Pension Tr. of Chi. v. JP Morgan Chase Co.*, 553 F.3d 187, 206 (2d Cir. 2009) (concluding defendant's representation that it would "focus on financial discipline" was puffery). Indeed, statements regarding "focus" "are typical of the kind of 'self directed corporate puffery' and sales talk that courts . . . have shielded from liability." *In re Stone & Webster, Inc., Sec. Litig.*, 253 F. Supp. 2d 102, 117 (D. Mass. 2003) (quoting *Carney v. Cambridge Tech. Partners, Inc.*, 135 F. Supp. 2d 235, 245 (D. Mass. 2001)).

¶93 In sum, I agree with the district court in this case and would hold that Statements 4 and 2 are non-actionable, immaterial puffery. As a result, I would not reach Jagged's hindsight pleading argument.

IV. Conclusion

¶94 I acknowledge this is a close case. To prevail on a claim under the Securities Act, a complaint must sufficiently plead that a challenged statement is both material and misleading. These are separate hurdles. Vague statements of corporate optimism cannot be propped up by nearby historical statements and data, and such puffery cannot be rendered material by looking to a plaintiff's separate allegations that the statements are misleading. Because the majority opinion adopts a method of analyzing materiality that departs from federal precedent, I respectfully dissent.

¶95 I am authorized to state that CHIEF JUSTICE BOATRIGHT joins in this dissent.